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TEST FOR ECHO: COMPETITION LAW AND THE
MUSIC INDUSTRIES FROM A BUSINESS MODEL
PERSPECTIVE



THE UNIVERSITY
of EDINBURGH

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Doctor of Philosophy

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DECLARATION

I declare that this thesis was composed by myself and that the work contained herein is my own except where explicitly stated otherwise in the text. This thesis contains parts of work submitted to the University of Glasgow for the award of the LLM in International Commercial Law (academic year 2010/2011).

Signed

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ABSTRACT

The thesis asks whether there is a role for competition law and policy in the music industries. It is argued that there is a need for updated competition policy in order to safeguard both end consumer welfare and the competitive process in these markets, characterised by fast-paced developments and business model innovation. Indeed, the past two decades saw the music industries undergo seismic changes, as even the term ‘music industries’ was not in use as such before the advent of the internet era and the decline in sales of recordings in physical format. Soon it became obvious that the traditional music industry’s end consumers had chosen to migrate to alternative methods of consumption, complementing and substituting between several products for music, such as the digital format, the live concert ticket, and the overall ‘music experience’. End consumers chose to completely by-pass the product on offer, meaning the recording of popular music in physical format, as provided top-down by a few multinational record companies, which the thesis identifies as an oligonomy. As alternative business models emerged in the music industries, the members of the oligonomy became followers of end consumer demand, remaining stuck in their notion that the end consumer remains the passive, mass market. Addressing this era as an era of market failure helps to identify the role of the end consumer within the business model of the music industry and to understand emerging trends and patterns in the music industries. Indeed, technological and copyright developments in the late nineteenth century enabled the hardware industries to morph into the recorded music industry, operating under the same business model of copyright exploitation. It follows that the market deriving from this business model is a market prone to monopolisation, resulting in a homogeneous product, designed and delivered top-down to the mass market. The resulting product was not only foreclosed by the few members of the oligonomy, but the operating business model made it impossible for the competition authorities to justify concerns. When the technology allowed for it, the creeping market failure came to the limelight and the end consumer started by-passing the oligonomy to gain access to the foreclosed content, generating consumer demand-driven business models. This translated into business model innovation. To illustrate, the thesis investigates the trial-and-error relationship between the competition authorities of the US, the EU, the UK and the old business model, addressing the failure to appreciate the bottleneck around the creative output that was being created, and the need to safeguard consumer welfare. To compare, the thesis also examines cases in

the new business model era, observing the stance of competition authorities towards consumer demand generated business models. The thesis concludes with the affirmation of the need to design welfare enhancing competition policy, which places the end consumer in the forefront. To achieve this, the thesis proposes the consultation of the relevant business model literature.

LAYSUMMARY

An overview of the music industries from the beginning of recorded sound until the most recent developments in the music world, which offers a detailed evaluation of antitrust investigations and merger cases in the US, in Europe, and in the UK. The aim of the research is to ask whether the end consumer of music has been best served by the music industry, by taking into account the way the industry has always been operating. Then, the thesis asks whether recent changes in consumer consumption have affected the way the industry operates, and if so, whether consumers are having their needs met by the current products on offer.

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Moving to Manchester half way through the PhD journey did not mean distancing myself from my beloved academic community: the 'Edinburgh PhD spirit' lived on in the face of David Rossati's desk (from which he was expelled whenever I wanted to write) and Paolo Sandro's invitations to Rudy's pizza. A big 'thank you' goes to Nicolas Kang-Riou for his (not always voluntary) comments. I would also like to thank Mitch Tedesco for his US-based support, which 'saved the day' more often than not. Additional thanks are extended to Antonios Tzanakopoulos for lending an extra pair of eyes, when needed.

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The main title and the titles of the chapters are kindly borrowed from the band 'Rush'.

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Unauthorized Duplication of Their Phonograms 1971

Paris Convention of the Protection of Industrial Property 1883

Revised Berne Convention for the Protection of Literary and Artistic Works, signed
at Berlin 1908

Glossary

Barriers to entry: obstacles preventing competitors from entering a given market in a timely, efficient, and effective way. The thesis addresses the extent to which a business model can restrict market entry in the context of the music industries.

Complementarity (in products): a good demand for which increases with the decrease in price of another good. The thesis examines patterns of consumption for music from the end consumers' (listeners) perspective, investigating the relationship between recordings in digital format and other products, traditionally thought of as ancillary e.g. a concert ticket or merchandise.

Consolidation: the aggregation of industrial activities under one bigger industrial 'umbrella'. The thesis examines tendencies of consolidation in the music industries (see below) from smaller, independent activities to an era of stronger corporate presence, following changes in business modelling.

Content Foreclosure: the alienation of the musical product from the ultimate end consumer (listener), as lying at the core of the music industry's business model. Here the concept of 'market foreclosure' is taken at a liberty and extended upon, in order for the end consumer to be accommodated in the debate.

Direct customer: in the cases and investigations examined, retailers and wholesalers are recognised as direct customers in the supply chain for the recorded product, leaving the end consumer by-passed. A 'business model' narrative allows for the inclusion of the end consumer, measuring content foreclosure instead.

Effective competition: non-objectionable competition in law. The thesis reflects on the ability to describe competition in a market as legally effective, when the end consumer is placed outside the authorities' direct consideration.

End consumer: the listener/purchaser of the recording product and its complements and substitutes, seeking access to music *per se*.

Gatekeeper: the role assumed by the major record companies in the consolidated music industry, a catalyst in the alienation of the end consumer from the musical product. The thesis examines the relationship between the industry's business model, and the consolidated industrial landscape that invites strong gatekeepers.

Heterogeneity and homogeneity (in products): in the context of the music industries arguments are raised regarding the similar or dissimilar characteristics of several recordings that affect their interchangeability from the point of view of the end consumer. Even though a certain recording or a certain artist can be thought of as unique ('a little monopoly'), the way the industrial business model is organised around the provision of popular or hit music irrespective of content, suggests a homogeneous approach to music top-down.

Interchangeable: products considered substitutable by the consumers. In the given context, the interchangeability of several products for music is considered in light of the products' heterogeneity or homogeneity (see above).

Market (in a business reality sense): the thesis seeks to depart from the concept of the 'relevant product market' as defined in law, and seeks to identify supply and demand patterns for music from the point of view of the end consumer. Any discrepancies between the so-defined 'business reality' market and the notion of the 'relevant product market' can raise consumer access issues.

Market disruption: a factor affecting the standardised operation of a firm or industry. The term is often affiliated with technological advancements, carrying negative connotations. Here, disruption is measured against the industry's standardised business model and is seen as an opportunity to account for end consumers' preferences.

Market failure: the term is taken to describe a situation whereby consumer demand is not met by the offerings of the industry's business model. Taking the induction in the digital era as an example, it appeared that end consumers preferred the consumption of a product (digital format), by-passing the official industrial channels. The inability of the industry to provide the consumers with their product of choice is taken at a liberty in the present in order to describe an era of market failure, acting as a tipping point for the future of the industry's business model.

Music Industries: the term relates to the existence of a plethora of music-related business activities not necessarily secondary to the industrial activity of dealing in

recorded music. It coincides with the unconsolidated phases of industrial activity and signals the existence of multiple business models.

Music Industry: refers to the consolidated industrial landscape, characterised by few major multinational companies, operating under a similar business model.

Niche: represents a variety of sounds and artists ‘awaiting discovery’. Upon entering the business model, the ‘niche’ is marketed and sold as the mainstream, reconfiguring the homogeneity that describes the product on offer by the traditional music industry.

Offer (offering): the thesis employs the term provided by the American Marketing Association to encompass both products and services, according their perceived value as attached by various stakeholders (*“marketing is the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large”*).

Oligonomy: this term is borrowed by the Harvard Business Review to refer to a situation where a firm or a group of firms acts as an oligopoly to one group and as an oligopoly to another, signalling a simultaneous buyers’ and sellers’ market. This alternative to vertical integration is chosen in order to represent the position of the major record companies and their business model vis-à-vis artists and end consumers, rather than vis-à-vis retailers and other intermediaries.

Oligopoly: a market structure with many buyers and fewer sellers (sellers’ market). Here, the position of the major record companies vis-à-vis the end consumers in the traditional business model.

Oligopsony: a market structure with many sellers and fewer buyers (buyers’ market). Here, the position of artists vis-à-vis the major record companies in the traditional business model.

Price: in an EU context, ‘increase of prices’ is used in the Horizontal Merger Guidelines, as a shorthand for any competitive harm that may result from a proposed merger, which includes price increases, reduced output, choice or quality of goods and services and the reduction of innovation. Here, it can be taken to encompass content foreclosure and consumer access issues.

Substitutability (in products): demand substitutability is used to define relevant product markets, as a first step to competition assessment. The thesis examines how product substitutability as per the end consumer is not taken into consideration as such by the competition authorities.

Welfare (consumer): viewed as the ultimate aim of competition policy, consumer welfare is to be satisfied by the products of effective competition. The thesis examines the merits of this in an industrial landscape prone to consolidation, by taking business model innovation as a proxy.

PART ONE

CHAPTER I

1 *'Overture': Business Models for the Music Industries*

*"Competition telling us to follow those guidelines,
and to stay right handed
but music comes from the heart,
lyrics from my head to my hand,
and I 'm left handed"
Raised Fist, 2009*

The thesis asks whether there is a role for competition law and policy in the music industries. It is argued that there is a need for updated competition policy in order to safeguard both end consumer welfare and the competitive process in these markets, characterised by fast-paced developments and business model innovation. To this aim, the thesis suggests the employment of business model literature, which brings the end consumer to the centre of attention.

1.1 *Introduction*

The inspiration behind the present thesis stems from the merger between two key players of the music industries in 2010: Live Nation Inc. and Ticketmaster Inc. The two companies entered into a merger agreement in order to form Live Nation Entertainment Inc., the world's first fully vertically integrated provider of live music entertainment.¹ At first instance, the thesis argues that drawing distinct lines between several products of the music industries (e.g. ticketing, management, touring agency, merchandising and even recorded music) can be misleading in terms of assessing competition and no longer corresponds to the shape the industries are

¹ Preface of Live Nation Entertainment's Annual Report 2010, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTE1NjB8Q2hpbGRJRDotMXxUeXBIPtM=&t=1>.

The merger was notified in the US and the UK, but did not have an EU dimension. This merger is analysed in the fifth chapter of the present thesis.

taking: from the end consumer's point of view the product for music has been subsidised by a bundle covering 'all things music', the overall music experience, or products that the traditional music industry did not have on offer. This realisation came to the limelight in the early days of the digital era, when the recorded music industry underwent *seismic* changes.²

In the beginning of the past decade, thanks to Peer2Peer file-sharing technologies (such as Napster), the music industries and digital consumption dominated the discussion in the media, in politics, in academic literature, and at courts. While focus lied mainly on the perils of 'disruptive technologies' the main driver behind the seismic changes, the end consumer, was not evaluated as much. In lieu, the few major players of the recorded music industry concentrated on combatting file-sharing by turning against their own consumer base and by arguing for stronger intellectual property protection. Yet, the question remained: what about the end consumer?

End consumers were expressing the need to access products not offered by the traditional record companies, firstly through the sharing experience the internet had to offer and later by substituting and complementing between several music products, such as the live concert ticket and the recording. With regard to the recording *per se*, initially faced with no legal alternative on the one hand and with lawsuits against sharing platforms (and themselves) on the other, end consumers experienced a time of crisis, or in other words, a market failure. Moreover, few (if any) in-depth studies had been conducted with respect to the consumption of music from the consumers' point of view. Thus, this era of market failure is further characterised by a lack of knowledge about the consumers of music, who have been traditionally treated as the *mass market*. Ultimately, assessing the role of the end consumer in a failed market opens the door for competition law: is there a need for intervention in the music industries in terms of competition policy making, and if so, how is this intervention justified?

Thus, even though the thesis was triggered by a single merger case between two non-traditional players of the music industries, there was an apparent need to evaluate

² A J Meese and B D Richman, "A careful examination of the Live Nation-Ticketmaster merger" (2009) Research Paper No 09-41 William & Mary Law School 16.

the competitive landscape of the music industries as a whole. This evaluation of the music industry would place the end consumer in the supply chain for music³ and hence, help understand *how* and *why* the tale of the music industry became the tale of a disenfranchised consumer.

Further, one of the recurrent themes that emerged during the thesis' research was the inconsistent definition and competitive assessment of the relevant market, where the music industry's major players operate, compete, and merge. This led to an examination of the reasons behind the divergent approaches to the recorded music industry throughout the years and across jurisdictions, especially since the recorded music industry has traditionally been marked by the presence of the same few multi-national companies operating under the same business model:

Designed to deliver a homogeneous product to the mass market top-down, the recorded music industry was not ready to cope with the ability of the end consumer to disrupt the traditional business model, for instance by blurring the lines of complementarity and substitutability between several products for music or requesting access to artists as such, irrespective of product offered. Indeed, the fact that many innovative business models are currently in operation in a *music industries* context, is partly attributed to those consumer-led changes in consumption. This vibrant 'dialogue' between end consumer and business model innovation translates into diversified views as to what the dominant product for music is. Thus, since a relevant product market for competition law purposes is defined based on substitutability of demand, it should be the case that such a definition can accommodate consumer-led changes in consumption.

The need to evaluate the above becomes evident in the relevant mergers, antitrust cases, and market investigations conducted in the music industries from the late 1950s until today. It appears that the *Live Nation/Ticketmaster* merger was just the tip of the iceberg. What lied beneath was a patch-work of (mostly) failed efforts to

³ As the research identifies, the end consumer is mostly absent from the supply chain for music in a competition law context. The supply chain in the cases examined mostly ends with the customers of the record companies e.g. retailers, wholesalers, and recently on-line streaming and downloading platforms. The thesis attempts to accommodate and include the end consumer in the supply chain for music as such, rather than examine relationships upstream in the supply chain, in order to assess foreclosure.

assess competition and define a market for both the traditional and the recent business models operating in the music industries, in both the US and the EU (as well the UK jurisdiction also examined herein).

Ultimately, the purpose of the thesis became clear: in order to assess the need for intervention in the music industries with respect to competition policy making, there needs to be a clear evaluation of the previous ex post and ex ante interventions in the market. Firstly, this would allow the thesis to pinpoint exactly where the previous attempts had failed, leading to the market failures of the past decade. Secondly, it would allow the thesis to evaluate the assessment of emerging music markets, as resulting from new and innovative business models. To achieve this, whilst acknowledging the herculean task in hand, the thesis asks: Is it the case that the music industries need an updated competition approach that will incorporate their ever-changing nature and their evolving business models?

In light of the above, this introductory chapter unfolds as follows: the main research question of the thesis is presented directly below, as justified by the creative and music industries discourse of the post-industrial economies. Then, the thesis proceeds with the presentation of the ‘tool’ employed throughout its course, business modelling. The distinct characteristics and features of a business model are explained and business modelling is evaluated in both its industrial and in its music dimensions. As such, it becomes relevant to the overall aims of the thesis. Ultimately, the introductory chapter presents the structure of the overall thesis, under the section entitled ‘Grand Designs’ and concludes with a brief look at the jurisdictions examined throughout the course of the present thesis, as well as with a brief justification of its unorthodox choice of language and academic literature.

1.2 Main research question

Is there a role for competition law and policy in the music industries?

Addressing the main question above requires examining the approach that the competition authorities have taken and need to take, when assessing competition in the markets for music.

To take an example from the jurisdictions examined herein, the US Horizontal Merger Guidelines of 2010 are construed around the hypothetical monopolist test; this focuses on demand substitution for defining product markets.⁴ However, according to the guidelines the “*analysis need not start with market definition*” and other analytical tools can be used by the authorities instead.⁵ Nevertheless, the guidelines discourage a broad product and geographical market definition for fear that such an approach would lead to miscalculated market shares.⁶ This rationale reflects the general standpoint that it is always in the competition authorities’ best interest to provide a narrow definition contrary to the parties or the defendants e.g. in a merger case.⁷

However, the following issue can be raised: even if the authorities are discouraged from taking the broader picture of a specific industry into account, how much *narrow-er* should their approach be in lieu? Is there a way for the relevant authorities to appreciate the industry holistically? To address this, the thesis examines the music industries in the cases brought before the competition authorities and the courts so far, following a historical approach, starting from the late 1950s. The purpose of the analysis is to re-define the markets for music, as they result from both the traditional and the recent, innovative business models operating in the *music industries*.

The backbone of the present thesis is provided by the hypothesis that the traditional business model of the music industry as built around copyright exploitation, results in a specific product for music, designed and marketed top-down to the mass market. New business models operating in the music industries lead to the creation of different products and thus, to different relevant product markets for music. Even

⁴ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) 8-13. The product market definitions toolkits employed by the authorities are referred to throughout the present. Also see R Whish and D Bailey, *Competition Law*, 7th edn, (2012), 27-42, for market definition and the SSNIP test in EU competition law. In brief, the hypothetical monopolist test supposes that the producer of a product introduces a Small but Significant Non-transitory Increase in Price (SSNIP) and asks to what extent this increase is sustainable. Should the customers migrate to other products as a result of the increase, these are considered substitutes to the hypothetical monopolist’s product and thus, are included in the relevant product market. The demand-driven nature of the SSNIP test is therefore attested.

⁵ Horizontal Merger Guidelines 7.

⁶ Ibid 8.

⁷ Ibid 7. Also see M Furse, *Competition Law of the EC and the UK* (2008) 281.

when new products for music corresponding to specific markets are not easily identifiable, the thesis argues that the music industries can benefit from differentiated treatment and policy design by the competition authorities. This need for intervention is further evidenced by the market failures in the traditional music industry in the past decade. Ultimately, both evidence that the sector is prone to market failures and more recent evidence of business model innovation and growth, can be employed to justify competition policy intervention.

This argument stems from the debate on the ‘creative industries’ as promoted in the late 1990s. In the post-industrial developed economies, government interest (e.g. Tony Blair Labour Government’s *Creative Industries Mapping Documents*)⁸ turned to the production of cultural products namely publishing, literature, performing arts, music, film and broadcasting among others, as main contributors to wealth creation and sustainability.⁹ The EU confirmed the ever growing financial and entrepreneurial importance of the sector across its member states,¹⁰ whereas academic thinking evolved to encompass Schumpeterian notions of innovation and entrepreneurship in the form of producing new business models across the creative industries’ sectors (alongside new products and employment opportunities).¹¹

The recognition of the financial importance of the creative industries and the subsequent study of the cultural economy raises cultural policy issues: namely, the need to formulate new policies for the cultural industries, and the need for these policies to accommodate the sectors’ particularities and their economic value.¹²

The thesis takes the view that the music industries have provided ample examples of this need, should attention be paid to their historical development. Further, the study of the relevant competition law cases and investigations highlights that the

⁸ Creative Industries Mapping Documents, April 9 2001, available at <https://www.gov.uk/government/publications/creative-industries-mapping-documents-2001>.

⁹ F Terry and S Cunningham, “Creative industries after the first decade of debate” (2010) 26 *The information society* 113-123.

¹⁰ *Ibid.*

¹¹ S Cunningham and P Higgs, “Creative industries mapping: where have we come from and where are we going?” (2008) 1 *Creative Industries J* 7-30, and S Cunningham, J Banks and J Potts, “Cultural economy: the shape of the field,” in *Cultural Economy* H Anheier and Y R Isar 2008 at 15-26.

¹² J Potts and S Cunningham, “Four models of the creative industries” (2008) 14(3) *International Journal of Cultural Policy* 233-247.

lack of policies can even result in misleading competitive assessments of the markets active within the music industries. However, it is not the aim of the thesis to examine new policy theories for the creative industries. Rather, the thesis aims to present and analyse the music industries as a key component of the creative industries, able to demonstrate the necessity of this approach on their own merit. The example of the music industries could then serve towards the re-evaluation of adjacent intellectual property industries, which share similar characteristics with respect to business model innovation, including of course, the creative sector. This point is subsequently raised in the concluding part of the thesis.

Indeed, in the past decade a category of intellectual property markets stood in the competition authorities' spotlight: the study and the debate over the markets defined as *Innovation Markets*¹³ raised a series of issues for the competition authorities to examine. Glader examines how the need to promote and protect innovation, the fast-paced nature of the markets, the inability to predict and define the resulting products, the role of intellectual property rights, and the design of hi-tech and pharmaceutical industries with their network effects and costs structures, altered or at least 'broadened' the traditional competition assessment. As he argues:

*“negative effects on competition have been predicted where the analysis was not restricted to competition between current products but also considered the parties' unique position and highly concentrated capabilities in R&D... the innovation perspective allows for a comprehensive analysis of competitive effects and appropriate remedies.”*¹⁴

It could be argued that the creative industries as a whole and the music industries in particular, share some similar characteristics. The examination of the business models of the music industries can help clarify this point. Nevertheless, the thesis does not aim to engage in an in-depth comparison between the creative and the innovation markets. Nevertheless, a lot can be learned from the authorities' choice to engage with these markets differently, a choice that can be applied to the creative sector.

¹³ As developed in US Antitrust Policy in the 1990's. See M Glader, *Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law* (2006) 3.

¹⁴ Glader, *Innovation Markets* 313.

Hartley et al. could not have been clearer in that regard when they argued that “*the purpose of competition in the creative industries is to set up institutions that incentivise producers to do best by consumers, which typically means developing new ideas.*”¹⁵ They see a role for competition policy aimed at promoting effective entry for the ultimate benefit of consumers, of whom competition law is the ultimate guardian.¹⁶ They acknowledge the need for *maximising innovation and competition policy*, based on evolutionary growth arguments.¹⁷

On a related note, it has been debated whether there exists a need to accommodate cultural expression and diversity concerns in competition law and policy, especially in a creative (and a music industry) context.¹⁸ Indeed, cultural diversity and expression concerns found their way into EU competition law and policy, assuming the role of one of competition’s stated aims.¹⁹ It is argued in the present that consumer welfare can be promoted without a need to accommodate such concerns, by simply broadening the perception of the industry’s operational dimensions. This way, business model innovation becomes innovation enough to justify bespoke policy making, able to place the end consumer within the supply chain for music and able to best serve consumer welfare.

In practice, the need for such differentiated treatment and more precise relevant product market definition should have been taken into consideration when assessing competition in most recent cases such the *Live Nation/Ticketmaster* merger and the merger cases following the break-up of *EMI*,²⁰ meaning cases that follow the emergence of multiple business models. By considering the broader picture of the music industries as a market driven by innovative business models and innovatory

¹⁵ J Hartley, J Potts, S Cunningham, T Flew, M Keane and J Banks, *Key concepts in the Creative Industries* (2013) 27.

¹⁶ Ibid 24-28.

¹⁷ Ibid 28. For more on economics, innovation and competition in this context, see Glader, *Innovation Markets* 20-58. More recent work by Hartley and Potts argues that culture, as “*the population-wide source of newness and innovation it faces the future, not the past.*” The authors utilise evolutionary science (e.g. M Pagel and H Gintis), semiotics (Y Lotman), economic theory (from Schumpeter to McCloskey); and system theory. J Hartley and J Potts, *Cultural science: A natural history of stories, demes, knowledge and innovation* (2014).

¹⁸ This is discussed in relation to the EU jurisdiction in the merger control part of the thesis. A broader debate on cultural policy can found in Hartley et al., *Key concepts* 69-73.

¹⁹ As presented in the merger control part of the thesis, in the fifth chapter.

²⁰ To be examined in the fifth chapter of the present.

product propositions, the role of the consumer and the key players becomes clearer and their conduct gets easier to examine under a competition law light.

To this aim, the present thesis proposes the employment of a tool stemming from business studies literature, which has almost become a catch-phrase in the broader digital and creative economy discourse: business modelling.

1.3 Employing business models to examine the creation of relevant markets for the music industries and raise the thesis' hypothesis

Business model literature has been employed in academia to describe business trends and practices in the digital era and has also attempted to provide answers about the music industries. Therefore, before raising the relevant research questions of the thesis, an introduction to the literature on business modelling is provided. Emphasis is given to Alexander Osterwalder's 9 Building Blocks of the *Business Model Generation*,²¹ as this specific author has addressed the issue of the music industries quite extensively.

Further, Osterwalder's work has been heavily employed in the study of the business model concept, providing common conceptual ground among scholars and professionals.²² The 9 Building Blocks have been employed in literature in order to identify what a business model actually is, why the study of the concept is important, and how business models affect the way a market operates. In other words, does the choice or the evolution of a certain business model have real life consequences in the affected market?

²¹ A Osterwalder and Y Pigneur, *Business Model Generation: a Handbook for Visionaries, Game Changers, and Challengers* (2010).

²² To provide a brief indication, according to Google Scholar the *Business Model Generation* handbook has been cited more than 5000 times at the time of writing (10/03/2017).

1.3.1 Business models: studying and defining a concept²³

Even though the term ‘business model’ reflects a concept more or less familiar to most entrepreneurs and scholars, it had not gained popularity or even proper recognition as a research area among business academics until recently, and more specifically until the late 1990s.²⁴ Literature review on the topic suggests that the concept of a business model has no theoretical grounding in either economics or in business studies.²⁵ Nevertheless, its study has been constantly flourishing, especially in relation to the global economy,²⁶ the emergence of e-commerce, and ancillary internet-based entrepreneurial activities.²⁷

There have been numerous attempts to provide a solid and precise definition of the term in the past few years;²⁸ confusion stems from the fact that authors use the term to address matters that do not necessarily coincide with what a business model actually is, but rather imply components or types of business models.²⁹ However, a more careful examination of these various attempts allows us to detect some common ‘conceptual’ ground in the use of the term.

According to David J Teece “*a business model is a conceptual, rather than financial, model of a business.*”³⁰ He goes on to describe it as “*more generic than a business strategy,*”³¹ reflecting the general tendency in a considerable part of the relevant

²³ The most recent attempt to map, define, and study the concept can be found at D Andreini and C Bettinelli, *Business Model Innovation: From Systematic Literature Review to Future Research Directions* (2017).

²⁴ B Demil and X Lecocq, “Business model evolution: in search of dynamic consistency” (2010) 43.2 Long Range Planning 227.

²⁵ D J Teece, 2010, “Business models, business strategy and innovation” (2010) 43 Long Range Planning 172.

²⁶ Ibid.

²⁷ A Ghaziani and M J Ventresca, “Keywords and cultural change: frame analysis of business model public talk, 1975-2000” (2005) 20(4) Sociological Forum 523-559.

²⁸ A detailed taxonomy of which has been compiled by C Zott, R Amit and L Massa, “The business model: theoretical roots, recent developments, and future research” (2010) WP-862 IESE Business School University of Navarra.

²⁹ A Osterwalder, Y Pigneur and C L Tucci, “Clarifying business models: origins, present, and future of the concept” (2005) 16 (1) Communications of the association for Information Systems 5 “*in the literature, the expression stands for various things, such as parts of a business model (e.g. auction model), types of business models (e.g. direct-to-customer-model), concrete real world instances of business models (e.g. the Dell model), or concepts (elements and relationships of a model).*”

³⁰ Teece (n 25) 173.

³¹ Ibid 179

literature to attempt a placement of the business model concept within a firm, and compare it with other terms such as process models³² and business strategy.³³

Osterwalder, Pigneur and Tucci suggest a 'direction' in which reflection on the concept should go:

*"a business model is a conceptual tool containing a set of objects, concepts and their relationships with the objective to express the business logic of a specific firm. Therefore, we must consider which concepts and relationships allow a simplified description and representation of what value is provided to customers, how this is done and with which financial consequences."*³⁴

This model of 'reflection' attempts to depart from the simplified point of view, which describes a business model either as the way a company does business, as advocated by Galper,³⁵ Gebauer and Ginsburg,³⁶ or as the generic concept of "*telling an enterprise's story*."³⁷

Moving towards a more unified perspective and locating some consensus in the relevant literature, at the core lie some shared concepts, such as value creation for the customers,³⁸ value sustainability as a goal,³⁹ and business architecture,⁴⁰ among

³²J Gordijn and J M Akkermans, "Business modelling is not process modelling" (2000) Proceedings of ECOMO Salt Lake City USA 40-51.

³³A Osterwalder et al. (n 29) 7. The authors refer to J Linder and S Cantrell "Changing business models: surveying the landscape" (2000) Accenture Institute for Strategic Change, M E Porter, "Strategy and the Internet" (2001) Harvard Business Review, P Stähler, "Business models as a unit of analysis for strategizing" (2002) Proceedings of the 1st International Workshop on Business Models *inter alia*.

³⁴ Ibid 3.

³⁵J Galper, "Three business models for the stock exchange industry" (2001) 10(1) Journal of Investing 70-78.

³⁶ J Gebauer and M Ginsburg, "The US wine industry and the internet: an analysis of success factors for online business models" (2003) 13(1) Electronic Markets 59-66.

³⁷ J Magretta, "Why business models matter" (2002) R0205 Harvard Business Review.

³⁸ See e.g. A Afuah and C L Tucci, *Internet Business Models and Strategies* 2nd edn (2003), R Amit and C Zott, "Value creation in e-business" (2001) 22 Strategic Management Journal 493-520.

³⁹ D W Steward and Q Zhao, "Internet marketing, business models, and public policy" (2000) 19 (Fall) J Public Policy Mark 287-96, referring to "*how a firm will make money and sustain its profit stream over time.*"

⁴⁰ See e.g. M Morris, M Schindehutte and J Allen, "The entrepreneur's business model: toward a unified perspective" (2005) 58 Journal of Business Research 727, P Timmers, "Business models for electronic markets" (1998) 8 (2) Electronic Markets 3-8, J Hedman and T Kalling, "The business model concept: theoretical underpinnings and empirical illustrations" (2003) 12 European Journal of Information Systems 49-59. For a more recent review of the concept see M Morris, M Schindehutte, J Richardson and J Allen "Is the

others. According to J Magretta, a good business model addresses Peter Drucker's questions: what does the customer value, how does the business generate income, and who is the customer?⁴¹

Admittedly, the pronouns *who*, *what* and *how* lead to the description of an architecture (*how*) that will create something of value for the customer (*what* and *who*). Hence, despite the apparent multitude of interpretations found in the relevant literature, it would be possible to reach a conceptual consensus on the nature of the subject. Capturing and creating value and designing a way to reach the customer, appear to be the key components of the business model *idea*.

Recently, academic work has attempted to group pre-existing business model literature and map its future directions. Georg Strampfl in the *Process of Business Model Innovation*,⁴² moves beyond the taxonomy of the business model concept and proceeds with the exploration of innovation *in* business modelling within the corporate environment.⁴³ As he summarises:

*“the issue of business model innovation has gained significant prominence in various research streams especially in recent years. It has overcome initial critics and is now recognized as a distinct type of innovation.”*⁴⁴

Ultimately, even though the term has been associated with entrepreneurship and examined on individual firm level, Johnson and Suskewicz refer to the broader picture by applying the term on industry level.⁴⁵ These authors in particular examine new technology industries and analyse a business model that encompasses technological progress, developments, market strategies, ultimately arguing for favourable government policy.⁴⁶

business model a useful strategic concept? Conceptual, theoretical, and empirical insights” (2015) 17 (1) *Journal of Small Business Strategy* 27-50.

⁴¹J Magretta (n 37), V L Vaccaro, D Y Cohn, “The evolution of business models and marketing strategies in the music industry” (2004) 6 (1-2) *International Journal on Media Management* 46-58.

⁴²G Strampfl, *The Process of Business Model Innovation* (2016).

⁴³Ibid 4, the author asks: “*why and how do incumbent companies re-configure their existing business model and /or why and how do they develop new business models?*”

⁴⁴Ibid 49.

⁴⁵M W Johnson and J Suskewicz, “How to jump-start the clean tech economy” (2009) 87 (11) *Harvard Business Review* 52-60.

⁴⁶Ibid.

1.3.2 *The music industries as a field of study for the Business Model Generation*

It is exactly this discussion of business models on industry level and the subsequent departure from single firm treatment that brings us closer to the music industries.

It appears that a broad understanding of the business model concept has been employed with respect to the music industries in both business and in music studies. Teece for example, acknowledges the problem that the recorded music industry was facing in the past decade as a 'business model' problem and calls for its complete reconsideration.⁴⁷ Other authors representing the music industries' point of view 'backed-up' by a plethora of industry professionals,⁴⁸ also refer to the need to formulate innovative business models.⁴⁹ Consequently, various alternative business models have been proposed in the relevant literature,⁵⁰ either as the main subject of a book or as a designated chapter in one. Relevant literature in music studies however, does not include a solid definition of the term; the term is either used generically (e.g. Passman, Gordon, Weissman and Jermance) or borrowed from business studies' literature, albeit rather haphazardly.⁵¹

Amidst these 'voices' raised, Alexander Osterwalder of the *Business Model Generation* 'stretches' the traditional music business model on his 'business model canvas' and analyses its weaknesses by referring to his 9 Building Blocks: *key partners, key activities, key resources, offer, cost structure, customer relationships, customer segments, channels and revenue streams*.⁵²

Applying this business model 'toolkit', the market failure that characterised the recorded music industry at the wake of the 21st century can be viewed as such: loss of value (decline in sales of physical recordings), inability to deliver a product that the

⁴⁷ Teece (n 25) 174.

⁴⁸ See e.g. D Passman, *All you need to know about the Music Business*, 7ed edn (2011), D Weissman and F Jermance, *Navigating the Music Industry Current Issues and Business Models* (2003), S Gordon, *The Future of the Music Business* (2005).

⁴⁹ V L Vaccaro and D Y Cohn (n 41) 46-58.

⁵⁰ Ibid.

⁵¹ Vaccaro and Cohn 'borrow' the definition provided by Afuah and Tucci (n 38), and Magretta (n 37).

⁵² Osterwalder et al., *Business Model Generation* (n 21). Also see A Osterwalder, "The music industry - what's broken (excerpt of a keynote)" (2010), available at <http://www.slideshare.net/Alex.Osterwalder/the-music-industry-whats-broken-excerpt-of-a-keynote>.

consumer values (digital files), and inability to maintain a healthy level of consumer relationships. Further, still in the context of Osterwalder's 9 Building Blocks, we can picture the failure of the old (recorded) music industry model in the following manner: as technological advancements influenced or eliminated the *key resource* of the 'old' business model (copyright exploitation's value leaning to zero), the main *revenue stream* (album sales) became obsolete, the *channels* (retailing, distribution) collapsed, whereas the *cost structure* (marketing, promotion and operational costs, royalties payments) remained unchanged, and the *customer relationships* neglected, as consumers were 'mistreated'.

1.3.3 *The 9 Building Blocks of the Business Model Generation in detail*

Thus, this part applies Alexander Osterwalder's 9 Building Blocks⁵³ to the old business model of the recorded music industry, whereas a similar application to the new players of the music industries (record companies, concert promoters or other recently emerging intermediaries) is being attempted in the forthcoming chapters of the thesis.

In the pre-digital evolution era, the business model of the recorded music industry was 'undisputed', given that the industry was profitable enough not have its patterns and practices questioned.⁵⁴ It is also undisputed that these patterns faced an urgent need to reform following the induction in the digital era or, most importantly, following the fact that record companies started losing 'wallet share' post-1996, meaning the "*proportion of disposable income that people devoted to buying music recordings.*"⁵⁵

At this point, many issues came to the limelight, including questions about the nature of the music business, the impact of illegal downloading, and the replacement of recorded music by live music performance as a main source of income for the artists.⁵⁶ The above led to the production of a vast amount of relevant literature and

⁵³ Osterwalder et al., *Business Model Generation* (n 21).

⁵⁴ See f.i M Cloonan and J Williamson, "Rethinking the music industry" (2007) 26 (2) *Popular Music*, commenting on the 'homogeneity' of the music industries.

⁵⁵ W Page, "Economics: time to face the music" (2007) 178 October 18 *The Report*.

⁵⁶ M Connolly and A Krueger, "Rockonomics: the economics of popular music" (2005) 499 *Working Papers* (Princeton University Industrial Relations Section) Princeton University, available at <http://arks.princeton.edu/ark:/88435/dsp01xs55mc05g>. See M F Schultz, "Live

are being thoroughly addressed in the third chapter of the present. As Dr Nicola Searle points out in her 2011 Intellectual Property Office (IPO) commissioned report, “*the music industry has been at the forefront in dealing with the changes arising from the shift from analogue to digital.*”⁵⁷

Consequently, as the internet-based approach to conducting business expedited the study of business models,⁵⁸ a thorough examination of the dominant business model of the recorded music industry becomes relevant. Such a study could be used to address the market failure of the past, and potentially help prevent similar issues in the future. It was seen how Osterwalder employed his 9 Building Blocks to address the failures of the recorded music industry⁵⁹ and that Nicola Searle employed the same literature in her case studies (Heist Records and Clash Music).⁶⁰ Thus, business model literature and the Building Blocks in particular can be related to the music industries and have been employed in this context in the past.

To summarise again briefly, the 9 Building Blocks consist of *customer segments, value propositions, channels, customer relationships, revenue streams, key resources, key activities, key partnerships* and *cost structure*.⁶¹ These are applied to the old business model of the recorded music industry along with a brief analysis, aiming to investigate the creation and the competitive assessment of markets deriving from business models. It is argued that adopting a business model point of view in a competition law context can provide a holistic and thus, a better understanding of the music industries. This approach can accommodate anticompetitive concerns and appreciate the role of the end consumer in a market for music, without the need to compartmentalise a firm’s activities for market definition and competitive assessment purposes.

performance, copyright, and the future of the music business” (2008-2009) 43 URichLRev, G Tarleton, *Wired Shut: Copyright and the Shape of Digital Culture* (2007), I Pitt, *Economic Analysis of Music Copyright: Income, Media and Performances*, 1st edn (2010), S Knopper, *Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age* (2009), *inter alia*.

⁵⁷ N Searle, “Changing business models in the creative industries” (2011) Independent Report commissioned by the Intellectual Property Office, available at <http://www.ipo.gov.uk/ipresearch-creativeind-full-201110.pdf>.

⁵⁸ A Ghaziani and M J Ventresca, “Keywords and cultural change: frame analysis of business model public talk, 1975-2000” (2005) 20 (4) Sociological Forum 523-559.

⁵⁹ E.g. Osterwalder’s presentation (n 52).

⁶⁰ N Searle (n 57).

⁶¹ Osterwalder et al., *Business Model Generation* (n 21).

Customer segments

The authors of the *Business Model Generation* handbook distinguish between several *customer segments* depending on whether the market has a mass, niche, segmented, diversified or multi-sided character. They discern different segments according to customers' needs, willingness to pay for different aspects of an offer, relationships, and distribution channels through which customers are reached.⁶²

In the old business model of the recorded music industry, the market was treated as a mass market for music consumption,⁶³ meaning that firms treated their customers as one single large group with similar needs.

Value propositions

A value proposition is related to the customer segment it serves; firms provide what the specific segment values and cater for its needs. Osterwalder describes it as a bundle of products and services that make customers prefer one firm over the other.⁶⁴

With regard to the music industry, what was actually on offer during the pre-digital era was the provision of homogeneous hit music or wannabe hit music⁶⁵ or a bundled product containing multiple songs (the album), according to Nicola Searle.⁶⁶ The issue arising here is whether customers' needs are being satisfied by this specific value proposition. Should we envision a mass market, consisting of customers with homogeneous music needs, then the answer can be yes. This forms the basis for the recorded music industry's inability to foresee and respond to consumer consumption changes in a timely and successful manner.

⁶² Osterwalder et al., *Business Model Generation* (n 21) 21. In the *Business Model Generation*, and in the relevant business literature, the terms 'customer' and 'consumer' are used interchangeably. The distinction becomes evident in the fourth and the fifth chapter of the present, where the relevant legal material is analysed. Until such time, and for as long as the thesis follows a business narrative, the two concepts remain aligned.

⁶³ Osterwalder's presentation (n 52).

⁶⁴ Osterwalder et al., *Business Model Generation* (n 21) 22-23.

⁶⁵ Osterwalder's presentation.

⁶⁶ N Searle (n 57) 27.

Channels

This Building Block describes the way in which each value proposition reaches each customer segment.⁶⁷ The authors discern five consequent phases as part of this Building Block: raising awareness about a firm's products and services, helping customers evaluate the firm's value proposition, providing the customers with purchasing solutions, delivering the value proposition, and providing post-purchase support.⁶⁸

Applied to the music industry, delivery channels refer to the sales of the tangible object (CD, cassette, vinyl record) through a network of wholesalers and retailers, or to the TV and the radio as promotional tools.⁶⁹ As posited later in the present, creating *key partnerships* with the *channels* in question, translates to strong synergies for profit maximisation. It comes as no surprise that firms operating as *key partners* of the music industry amassed strong leveraging powers vis-à-vis the traditional record companies, ultimately to become gatekeepers of the music product in a broader music industries discourse.

Customer relationships

The Building Block of customer relationships is described as three-fold: acquisition, retention and boosting sales (or upselling).⁷⁰ In the music industry this has mutated to an Achilles' heel. Customer relationships were completely neglected in the old business model, where it was undisputed that the mass market would generate an interest for the heavily marketed and promoted *hit* music through extended airplay.⁷¹ Upon entering the digital era, the major players in the industry accused customers of switching to alternative value propositions, including but not limited to

⁶⁷ A Osterwalder et al., *Business Model Generation* (n 21) 26-27.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid 28-31.

⁷¹ The 'payola' scandals in the US suggest that record labels were focused more on building strong relationships with intermediaries rather than with their customers. More information on the topic follows in the third and in the fourth chapter of the present. Also see K L Repyneck, "The ghost of Alan Freed: an analysis of the merit and purpose of anti-payola laws in today's music industry" (2006) 51 Villanova Law Review 695.

illegal downloading, at a time which marks the decline in sales of recordings in physical format.⁷²

Instead of building stronger relationships with their customers, record companies turned against them initiating legal action, whilst lobbying for stronger legislative protection, such as copyright extension. Indeed, the third part of the thesis addresses these issues quite extensively.

Osterwalder's presentation however, leaves this point blank and rather suggests that customer relationships are being built by the customer directly through social networking.⁷³

Revenue streams

Revenue streams are also related to each specific customer segment and represent income earned post cost deduction.⁷⁴ According to the *Business Model Generation*, the important question to ask is “*for what value are customers really willing to pay*” as opposed to what it is they are actually paying for (desired versus actual value proposition).⁷⁵

In a music industry context, loss of revenues due to the decline in sales of recordings in physical format led to questioning the old business model. In a mass market, such as the market for hit music, the record companies' main source of revenue relied on massive sales of a few hit albums and on licensing hit music.⁷⁶ Nevertheless, the bundled product (album) has been disfavoured and has been replaced by unbundled singles to be purchased or listened to separately, the price of which was tending towards zero,⁷⁷ following consumer consumption changes.

Further, ancillary revenue streams, such as touring and merchandising income,⁷⁸ started entering the new business model propositions in the form of exclusive rights

⁷² See e.g. F Oberlhozer-Gee and K Strumpf, “The effect of file sharing on record sales: an empirical analysis” (2007) 115 (1) *Journal of Political Economy* 1-42.

⁷³ Osterwalder's presentation (n 52).

⁷⁴ A Osterwalder et al., *Business Model Generation* 30-33.

⁷⁵ *Ibid.*

⁷⁶ Osterwalder's presentation (n 52).

⁷⁷ As per Osterwalder's presentation (n 52). This is further addressed in the third chapter.

⁷⁸ M Brennan, “Constructing a Rough account of british concert promotion history” (2010) 1 *Journal of the International Association for the Study of Popular Music*.

with artists (e.g. 360 degree deals),⁷⁹ alongside services generating income through subscription fees or advertising (e.g. Spotify). The fact that these, formerly views as ancillary, revenue streams are marked by the presence of strong *key partnerships*, controlling the *key channels* of exposure and distribution through exclusive licensing and strong contractual relations, raises further concerns for end consumer access, and thus, consumer welfare.

Key resources

Key resources create and offer specific value propositions to customers. They can either be physical assets or intellectual assets, including intellectual property rights, human resources, and financial resources and guarantees.⁸⁰

Copyright has played a pivotal part in the music industry, constituting its most important *key resource*. A portfolio of artists would assign copyright on musical works to the record companies (often through their publishers), which would build and expand their business model around it.⁸¹ The second chapter of the present thesis is in fact dedicated to the role of copyright in the business model of the music industry, depicting how copyright exploitation gave birth to the industry's business model. Naturally, an industry built around an intellectual property right is and has always been prone to monopolisation, an issue that also characterises more recent business models. The old business model, as built around copyright exploitation, is being presented as doubly oligopolistic: towards both the mass market and towards the artists themselves. This is in fact addressed in the third chapter, which describes the old business model as 'oligonomic'. Finally, since the very nature of the industry is prone to gatekeepers, the role of competition law and policy becomes crucial.

Key activities

Key activities are described as actions undertaken by firms in order to make their business models work. Even though the authors leave room for interpretation when it comes to this term,⁸² they do provide the *key activities* of production (mainly in manufacturing firms), problem solving (providing new solutions to individual

⁷⁹ Passman, *All you need to know about the Music Business* (n 48) 102.

⁸⁰ *Business Model Generation* (n21) 4-35.

⁸¹ Osterwalder's presentation (n 52).

⁸² *Business Model Generation* (n 21) 36-37.

customer problems), and networking (for business models designed with a platform).⁸³

When it comes to the music industry, Osterwalder speaks of marketing and promotion and detecting and building new talent, also known as A&R (Artist and Repertoire).⁸⁴ Promotion and discovery of new talent has been employed by the music business lobbyists as a rationale behind attempts to legislate for copyright extension,⁸⁵ as presented in the second and the third chapters of the thesis. This approach neglects the importance of social networking (or word-of-mouth) to the discovery and promotion of new talent. In other words, it neglects the consumer as such.

Key partnerships

This Building Block refers to the “*network of suppliers and partners that make the business model work.*”⁸⁶ The authors distinguish between three motivations for creating partnerships: optimisation and economy of scale (aimed to cost reduction through vertical relationships), reduction of risk and uncertainty (partnerships in competitive environments), and acquisition of resources and related activities (e.g. licensing).⁸⁷

The old business model relied either on vertical partnerships with manufacturers and wholesalers,⁸⁸ or on partnerships with channels such as radio stations. The importance of the radio for the promotion of new music in the analogue world is highlighted by the payola scandals that mark the relationship between the record companies and the radio stations. Further, radio magnets such as Clear Channel Communications, evolved to bottleneck the music product on their own, introducing an additional layer of gatekeepers in more recent business models. Indeed, Live Nation span out of Clear Channel, following antitrust concerns. This is of utmost importance for the present thesis, as it is only through the business model approach

⁸³ Ibid 37.

⁸⁴ Osterwalder’s presentation (n 52).

⁸⁵ See B Farrand, “Too much is never enough? The 2011 Copyright in Sound Recordings Extension Directive” (2012) 34 (5) EIPR 297-304.

⁸⁶ *Business Model Generation* (n 21) 38-39.

⁸⁷ Ibid.

⁸⁸ Osterwalder’s presentation (n 52).

that these anticompetitive concerns can be viewed as concerns belonging to the same business model. Indeed, an evaluation of these cases alongside the competition authorities' intervention into the deregulated radio industry in the US follow in the fourth and fifth chapters.

Cost Structure

This block refers to the cost occurring during the operation of a business model. Depending on the importance of *cost structure* the authors discern between cost-driven and value-driven business models (e.g. low-cost airlines and luxury products).⁸⁹ *Cost structures* can bear the following characteristics: fixed costs, variable costs, economies of scale or economies of scope.⁹⁰

Osterwalder recognises marketing and promotion, subsidising less successful artists, and paying royalties as the main costs of the old business model.⁹¹ This point figures more prominently in the UK investigation into the prices of CDs that followed in 1994⁹² and invites price uniformity in the traditional business model.

Moreover, these *cost structures* remained unchanged, even when *key resources* and *key activities* were in decline, resulting in the crisis or the failure of the traditional music industry.

1.3.4 *Taking the Building Blocks further*

i. Business model innovation and innovation in the creative industries: what does a business model reveal?

As stated previously, Potts and Cunningham have attempted to define the relationship between the creative industries and the economy as a whole, initially by suggesting innovation and growth model scenarios.⁹³ According to the innovation model, the creative industries have crucial policy significance (similar to science and technology), thanks to their ability to promote and foster innovation in ideas and

⁸⁹ *Business Model Generation* (n 21).

⁹⁰ *Ibid.*

⁹¹ Osterwalder's presentation (n 52).

⁹² To be examined in the fourth chapter.

⁹³ Potts and Cunningham (n 12) 233-247.

technologies.⁹⁴ Potts and Cunningham observe that evidence for the innovation model scenario stems from the new shapes that the traditional creative industries acquire, facilitating and generating new activities, and consequently new products.⁹⁵ With respect to the growth model, this implies a positive relation between the creative industries and the aggregate economy,⁹⁶ where the creative industries are seen as a *growth driver* with the ability to influence growth in adjacent sectors.⁹⁷ Other factors that imply the validity of the growth model would be the creation of new jobs and new commodities, affecting the broader economy.

Whereas the innovation model works *on* the current economy or parallel to it (similarly to science and education) by fostering and promoting ideas or otherwise influencing the economy indirectly, in the growth model the creative industries are seen as “*growth mechanisms for the ‘generic’ adjustment and adaptation of the knowledge-base of the economy. In this case, policy has a distinctly less substantive role: to minimize distortionary interference.*”⁹⁸ Thus, in terms of policy, the growth model requires the creative industries to be treated as a ‘special sector’ with subsequent special sectorial requirements, whereas the innovation model requires a “*substantial and significant role for public support based on innovation policy.*”⁹⁹

Research conducted by the authors in the same paper tended to support the two theories almost equally: the creative industries are responsible for both product innovation and for business innovation through the presence of diverse business models in each creative sub-sector. Whether they act *on* the economy or as its principal drivers, there seem to be general policy implications that require adequate and relevant policy making: innovation (in terms of product or business design), the promotion of cultural goods, the development and diffusion of new knowledge, the creation of wealth for the creative industries and for the aggregate economy, constitute factors that necessitate appropriate policy making.¹⁰⁰

⁹⁴ Ibid 238.

⁹⁵ Ibid 239.

⁹⁶ Ibid 237.

⁹⁷ Ibid 238.

⁹⁸ Ibid 243.

⁹⁹ Ibid 239.

¹⁰⁰ J Potts, in his book *Creative Industries and Economic Evolution: New Horizons in Institutional and Evolutionary Economics series* (2011) did indeed take the evolutionary,

In 2013, Hartley et al. explained that the creative industries are in fact transitioning from cultural and industry policy, as construed around welfare promoting arguments, to competition and innovation policy, evolving from an *industry* to an *innovation* narrative.¹⁰¹ The former justifies intervention based on market-failure arguments, whereas in the latter intervention is justified in order to foster the innovative process. The thesis sheds light into both sides of the spectrum and configures this perspective. Thus, these theories stemming from cultural economics can provide the background for the need for intervention in theory and the studied cases can provide the evidence.

In this sense, the study of the business models operating in music industries is vital: either as a form of innovation themselves or as a factor resulting to product innovation, business models influence heavily the production process. A business model ‘describes’ the process that leads to a product from its inception to its production and beyond. It reveals what is valued in an industry and how it reaches the end consumer, proving the existence of this double innovation (process and product) for the creative and subsequently the music industries.

1.3.4.1 *Business models and copyright*

During the brief presentation of the Building Blocks, copyright was presented as the *key resource* of the music industry’s business model, since revenue streams and value propositions were built around copyright exploitation. Therefore, the first the relationship to be examined is the one between business models and copyright.

With the decline in sales of recordings in physical format, the question that needs to be answered is whether a business model narrative can adequately explain market failure in the traditional music industry. An examination of the history of copyright in relation to the recorded music industry can shed light to this question. Hence, the thesis examines the relationship between copyright laws and the birth of the recorded music industry, following legislative reforms and evaluating the way they affected the industry, enabling the key players (the major record companies) to emerge.

innovation-based approach, departing from the traditional market failure justification for intervention.

¹⁰¹ Hartley et al., *Key concepts* (n 15) 114.

To achieve this, the second chapter of thesis looks at the US (home of the first big record companies Columbia, Capitol and RCA Victor) and the UK (originally home of Decca), passing by other European countries when needed. For instance, the US 1909 Copyright Act introduced compulsory licensing for musical compositions, allowing for multiple covers of the same song to be released across labels,¹⁰² suggesting an early need to intervene in an industry prone to consolidation. On this side of the Atlantic, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961, suggests the presence of a strong industry advocating its interests through lobbying (IFPI). Hence, the connection between copyright and the music industries in this context is multifaceted: the law seems to influence the industry and vice versa.

Additionally, evaluating the relationship between business models and copyright passes through competition's welfare enhancing aims. To illustrate, and going back to Potts and Cunningham's models for the creative industries and the aggregate economy,¹⁰³ the authors have argued that the innovation model views the creative industries as a complex innovation system that can originate and coordinate change in knowledge, rather than an industry *per se*. Thus, the innovation model is justified by changes in business modelling. In the growth model on the other hand, the creative industries both transfer novel ideas to other sectors and absorb novelty in ideas and technology from adjacent industries.

It follows that the implications of this categorisation lie in the way public policy is designed. As seen earlier, if the creative industries have the ability to influence substantially the aggregate economy through their own growth, then public policy should be designed to minimise distortionary interference and promote investment. Against this background, the need to look at competition law as it relates to the music industries becomes even more important: can competition policy be designed in order to accommodate these models? Speaking of innovation and welfare policy making establishes the relevance of competition policy to this concept.¹⁰⁴

¹⁰² §115 Copyright Act 1909. More on this follows in the second chapter of the thesis.

¹⁰³ Potts and Cunningham (n 12).

¹⁰⁴ Further see K Coates, *Competition Law and Regulation of Technology Markets* (2011).

Indeed, ‘notoriously’ established as antitrust’s only articulated goal, the role of consumer welfare in competition policy has been disputed in academia ever since the *Antitrust Paradox*.¹⁰⁵ It has been argued that Bork ‘confused’ consumer surplus as consumer welfare, a concept well established in economic literature.¹⁰⁶ Consumer welfare in economics takes into consideration the overall benefit of the consumption of goods and services in a *relevant market*.¹⁰⁷ Competition methodology focuses on consumer surplus, which according to the Chicago School, is equal to allocative efficiency and overall prosperity.¹⁰⁸

Ever since, the Chicago School has been contradicted and many of its theories have been reconsidered, including the antitrust goal. It has been argued that antitrust may even harm consumer welfare in the “*pursuit of innovation in durables and fashion goods*.”¹⁰⁹ It is wrong therefore to ignore the dynamic nature of the creative and the innovation industries, as also argued by Potts and Cunningham.¹¹⁰ In this sense, antitrust laws have the same goal as intellectual property, as evidenced by the 1995 Antitrust Guidelines for the licensing of intellectual property, namely “*to promote innovation and enhance consumer welfare*.”¹¹¹ In this context, innovation and consumer welfare go hand-in-hand in terms of the supply of “*new and useful products, more efficient processes and original works of expression*.”¹¹² It is argued that in IP-centred industries, competition law and policy have an even greater role to play with regard to consumer welfare, exactly because these industries are *de lege* prone to monopolisation.

With the roles of intellectual property and competition policy tied together towards the provision of creativity and innovation, it is crucial for these two fields to work closely to achieve their common goal. This requires agreement on a conceptual

¹⁰⁵ R H Bork, *The Antitrust Paradox: A policy at war with itself* (1978).

¹⁰⁶ B Y Orbach, “The antitrust consumer welfare paradox” (2010) 7 (1) *Journal of Competition Law and Economics*.

¹⁰⁷ Based on the Marshallian equilibrium, A Marshall, *Principles of Economics* (1890).

¹⁰⁸ R H Bork and W S Bowman, “The crisis in antitrust” (1965) first appeared in *Fortune Magazine* and was re-printed in the *Columbia Law Review*, as B Y Orbach reports (n 106).

¹⁰⁹ *Ibid* 151.

¹¹⁰ Potts and Cunningham (n 12) 239 “*culture is indeed a public good but for dynamic not static reasons*.”

¹¹¹ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995).

¹¹² *Ibid* para 1.

basis: what intellectual property laws create should be understood as such by competition policy. This could not be more relevant for the purposes of the present. It is crucial for competition law to operate on the same conceptual level as intellectual property, when dealing with intellectual property (copyright in the present case) generated business models.

To this aim, the third chapter of the present thesis is dedicated to the linkage between the copyright-led business models and the creation of relevant markets for music, in both a business reality and a competition law context. Is there common ground to be found?

1.3.4.2 Business models and markets for music

Indeed, the examination of the relationship between business models and copyright exploitation inevitably leads to the examination of the markets for music, where the key record companies operate.

The underlying question about the relationship between a business model and markets for music is: to what extent does a specific business model influence the creation of products and markets for music from a consumer's point of view? In other words, how has the business model of the recorded music industry shaped the demand for recorded music?

This question is of great importance when assessing relevant cases in the music industry, as the research aims to identify the markets for music in a legal context. After analysing the recorded music industry as built around copyright exploitation, the relationship between the consumer and the provider comes next.

Is there a single market for music from a consumer's point of view based on the predominant business model? Is this market different from the market the authorities define when assessing competition in the markets for music? To answer this question, the research focuses on the relevant market definitions provided by the authorities in the relevant cases. How have the authorities treated the market for recorded music until now? How does the treatment relate to relevant policy making and what aspects are being promoting (welfare or multiple aims)?

According to the relevant literature on the history of the music industries and the *Business Model Generation's* Building Blocks, the market for music has been treated

as homogeneous throughout its history. This idea of the homogeneous market goes as far back as the 1940s, when the four dominant firms at the time presented the market with a homogeneous product. This product was aimed to appeal to a target audience, which was also treated as the homogeneous market for big-bang, swing, and predominantly “*white non-offensive*” music.¹¹³ The perception of the homogeneous market has been following the recorded music industry ever since and it is important to examine how niche markets have been treated over the years. The examination shows that hit music is created by ‘absorbing’ niche genres and re-marketing them for mass consumption.¹¹⁴

This realisation shows the ‘flexibility’ that characterises the music industries in creating strong value propositions and gaining control over the markets where they operate, leading to the re-shaping of the relevant question: how has the specific business model that revolves around copyright exploitation influenced the market for music on the supply side?

1.3.4.3 *Business Models for music and competition law*

Moving a step forward, after having analysed the triadic relationship between business models, copyright and markets for music, the research focuses on the competition authorities’ point of view, when defining and assessing competition in the markets for music. Thus, a chain is created between the business model of an industry, the subsequent creation of markets where the relevant firms operate, and the way competition is assessed.

Returning to the assumption of a homogeneous market for music, the research seeks to evaluate the relevant market definitions that the competition authorities have employed, when dealing with cases and investigations in the music industries until now. How have the competition authorities ‘complied’ with the dominant business model in terms of accepting or employing a relevant market definition based on its structure? Additionally, are the competition law regimes tied to the idea of a homogeneous market deriving from a specific business model? To this aim, the

¹¹³ R Peterson, “Why 1955? Explaining the advent of rock music” (1990) 9 (1) *Popular Music* 97-116.

¹¹⁴ See. the case of Columbia Records and its relationship with rock’n’roll music as presented in G Marmorstein, *The Label: The Story of Columbia Records* (2007) 229.

research focuses on the relevant cases and market investigations aiming first and foremost to evaluate the differentiated relevant markets defined across jurisdictions, with respect to the same few firms operating under the same business model. Subsequently, the research delves into the competitive assessment in order to learn lessons from the substantive tests the jurisdictions employ, as well as from the several theories of harm examined. These are measured against the stated aims the competition authorities attempt to achieve with respect to intervention.

Thus, the research is able to move towards the evaluation of recent business models and the alternative shapes that the music industries have taken after the ‘digital revolution’. The relevant part re-examines the same points raised, only this time under a new prism: the new business models proposed by and for the music industries following the induction in the digital era. The research does not focus much on the issues of file-sharing and illegal downloading and their effect on the recorded music industry, as these issues have been over-analysed in the past decade.¹¹⁵ Rather, the aim of the research is to examine a post-market failure world, evaluating the business models operating in the music industries and aiming to support business model innovation instead. Additionally, after the era characterised by market failures, the role of the neglected end consumer changed to a powerful participant in the market for music and this should be accounted for in a relevant competition law scenario.

To this goal, the current business practices and trends provide the basis for the subsequent parts. As already mentioned, recent developments have witnessed the emergence of new corporate players such as music promoters, ticket agents, as well as downloading and streaming services, employing new business models. To what extent are these products considered substitutes from the consumers’ point of view? Do they also form part of the same relevant market from a competition law perspective? To illustrate, some empirical research has already been conducted asking whether concerts are complementary products to recordings and therefore

¹¹⁵ Empirical studies are presented and assessed in the third chapter of the thesis.

whether a decline in the artists' income from recordings (royalties) justifies or accelerates an increase in ticket prices.¹¹⁶

Based on this, the thesis examines how new and innovative business models affect the product on offer. To what relevant market(s) do these products relate? And finally, are the competition law regimes under examination fit for assessing competition in the respective markets? In other words: do the competition authorities need to adjust their point of view to accommodate the changing landscape of the music industries and is there a need for specific competition policy making?

By answering the last question, the thesis broadens the relevant market definition attempted by the competition authorities. This helps connect the thesis to the overall issues of policy making in the creative sectors e.g. art, publishing, or other markets that have had to reconsider their business models in the last years. Even though this is only indirectly presented in the thesis, a broader way of thinking regarding the potential effect of an affirmative answer to these questions is accommodated in the concluding chapter. The findings leave room for future comparative research.

1.4 'Grand Designs'

Ultimately, the thesis addresses the issues raised by employing the following methodology: in the *second chapter*, the birth of industry is attested, as built around copyright exploitation. This helps present an industry prone to monopolisation by gatekeepers with little if any room for end consumer involvement. Thus, the characteristics of the music industry's business model are traced to its inception. The second chapter introduces the building model and the Building Blocks relating to copyright explicitly and sets the scene for all developments in the music industries that follow.

¹¹⁶ Among others, M F Schultz (n 56), A Krueger, "The economics of real superstars: the market of concerts in the material world" (2004) 23 (1) *Journal of Labour Economics* 1-30, Connolly and Krueger (n 56).

Subsequently, the *third* chapter is dedicated to supply and demand patterns operating under the business model of the *music industry* and the business model of the *music industries*. This chapter presents the business or commercial reality of the music industries, explaining the business models in action, whilst showcasing both instances of market failures and business model innovation. The third chapter illustrates the establishment and the stabilisation of the business model and follows a narrative closer to competition law this time, as it explains patterns of supply and demand. Thus, its narrative switches from an intellectual property narrative to one closer to competition law.

By the end of the third chapter the theories advocating policy making with respect to growth (market failure) and innovation (competition and innovation maximisation) become justified, as the reader becomes familiarised with the operating business models of the music industries past and present, as well as with the role of the end consumer. Adopting a consumer-focused approach, highlights the need for any advocated policy to ensure consumer welfare either as a safeguard against failures or as a guarantee of innovation, which benefits consumers indirectly.

To address the above, the thesis consults business studies, marketing, popular music, and economics literature, alongside the relevant primary and secondary legal sources. Ultimately, the business reality narrative that the thesis attempts is generated through literature employed by the fields that study business models and the music industries *per se*.

Against this background, the two subsequent chapters provide the necessary evidence. Hence, the thesis' *fourth* and *fifth* chapters (the second part) are dedicated to the thorough examination of the competition authorities' point of view. Case law, interventions, and investigations into the business models (old and recent) are presented and analysed. Specifically, the *fourth* chapter deals with the examination of the business models *ex post*, aiming to assess whether the competition law regimes under examination could address anticompetitive concerns within the music industries; concerns that ultimately led to market failures. The *fifth* chapter evaluates the business model *ex ante*, aiming to assess whether the competition authorities could prevent anticompetitive concerns in relevant merger cases. An evolutionary approach is followed within each chapter, with the relevant cases

examined in chronological order within each jurisdiction. This enables the reader to follow the business model evolution more closely.

The concluding *sixth* chapter groups the key findings together. These key findings are connected to the overall aim of justifying intervention into the industries, as both a result of the market failures of the past and the consumer-led business model innovation that followed. Recommendations for further comparative research within the aggregate creative sector conclude, marking the end of thesis.

1.5 Jurisdiction

Briefly, with respect to jurisdiction the research focuses on the US, the EU and to a lesser extent, the UK. Thus, the world's most mature antitrust jurisdictions, the US and the EU, are presented substantially, whereas the UK features as a country with a prominent creative and, most importantly, music sector. Further, the choice of jurisdiction is justified by the nature of the business model of the music industry and popular music, as historically tied firstly to the US and then to the UK. However, the choice of jurisdiction is justified throughout the present, as related to each case and to each era examined.

1.6 'Language'

The thesis acknowledges the unorthodox choice of academic 'language' and terminology, and the potential 'surprise' this might impose upon the reader. The chosen language and its accompanying literature are employed with a view to 'disentangling' academic knowledge on competition law and business studies. Aiming to offer novel approaches to these fields of study, traditional terminologies are taken at a liberty, not always aligning with their normative confines (e.g. economics in competition law). The thesis provides a dedicated Glossary at its very beginning, where the relevant terms are presented in their given context.

CHAPTER II

2 *'Permanent Waves': The Copyright Story of a Business Model*

*"A lot of a, sharks out there,
try'na take a bite of somethin'
what's hot
lot of chameleons out there, try'na change up
anytime somethin' new comes along, everybody wants a bite
don't happen overnight"
Cypress Hill, 2000*

2.1 *Introduction*

The present thesis proceeds with the examination of the traditional model of the music industry, which posits copyright exploitation in the heart of the industry's activities. The aim of the present chapter is to place copyright exploitation at the core of the business model of the recorded music industry since its inception. Consequently, the present chapter examines the history of the music industry from a copyright perspective. The chapter places copyright within the business model from the very first stages of the industry following legal and technological advancements. The historical approach is drafted with the view to addressing the specific issue: how has the role of copyright evolved alongside the creation and evolution of an industry? How has this legal concept evolved to become a business asset and a business model's *key resource*?

Following the presentation of the *Business Model Generation's* Building Blocks in introduction, the current chapter attempts a business model review of both the music industry and of copyright legislation. To this aim, key issues are addressed through the business model lens. The alternative reading of the music industry enables a first insight into the forthcoming issues to be analysed, including the creation (or the perception) of a homogeneous market for music, the treatment of the niche, and the identification of the key players of the music industry.

The present chapter concludes with an evaluation of the role of copyright throughout the course of the music industry's history. Furthermore, the chapter also attempts to

define the relationship between the music industries, as characterised by a copyright-driven business model and the law. This provides the conceptual link between the second and the third chapter of the present thesis, dedicated to the significance of the music industry's business model for the creation of markets for music.

Initially, it is necessary to identify the Building Blocks of the business model that relate to copyright. Copyright is found to relate to three separate Building Blocks: *key resources*, *key activities*, and *value propositions*.¹¹⁷ Therefore, the sub-sections of the present chapter expand on these Building Blocks, aiming to present how the business model was formed in relation to the copyright regimes in place.

The analysis begins with an overview of the recorded music industry until the Second World War. The era following the Second World War is addressed in the third chapter, as distinct in its 'music industry' dimensions. Indeed, following World War II the recorded music industry grew rapidly (following an increase in consumers' disposable income)¹¹⁸ and its business model became sustainably profitable. However, it was only midway through the 1950s that the music industry fully 'realised' its commercial potential, with industrial interest turning to markets previously considered as niche. As shown in the third chapter, the incorporation of niche genres in the record industry's mainstream rota (jazz, blues, rock'n'roll), served the business model of the industry by enabling the exploitation of these genres under the mainstream 'popular music' umbrella.¹¹⁹ In brief, without popular music the recorded music industry would not have been able to evolve into its corporate stage and sustain its business model.

However, the beginning and the initial industrial organisation of the recorded music industry highlights the way in which the initial market segments were formed through record labelling,¹²⁰ an initiative that came to acquire a specific meaning in

¹¹⁷ It will be later analysed that thanks to vertical integration and conglomerate activities, the recorded music industry has been attracting funds from various and variant sources that can be identified as *key resources* (including other intellectual property rights).

¹¹⁸ G Bakker, "Adopting the rights-based model: music multinationals and local music industries since 1945" (2011) 6 (3) *Popular Music History* 307-343.

¹¹⁹ M Eliot, *Rockonomics, They Money Behind the Music*, (1993) ch 14.

¹²⁰ As labels on records were introduced to separate the several music genres that would appeal to specific customer segments.

terms of segregating the market and creating the relevant supply and, to a certain extent, demand for music. It is shown that even though the market was technically segregated by labels, the purpose behind this was to ‘catch’ the popular sound and incorporate it into the dominant, top-down business model. Thus, popular music is tied to the business model examined, as the driving force of the music industry and its *raison d'être*. This came to place gradually, as the historical analysis unveils.

However, for the time being the analysis begins with the creation of the music industry as an industrial concept, shedding light to the role of copyright legislation. As the historical analysis continues, the formation of the business model becomes clearer. The specific business model examined herein evolved around the creation, marketing and provision of hit music, as the main revenue generator for the industry. The aim is to illustrate how copyright legislation helped the industry evolve and acquire its commercial power. Thus, the explicit presentation of the birth of an industry, its business model, and its relationship with copyright merits its own chapter within the thesis.

The first part of this chapter deals with the recording industry, which originally did not cater for the provision of music. The role of intellectual property for that industry is presented in the form of analysing its *key resource*, the patent. It is established that a change in *key resource* made the recording industry relevant not only to music, but also to copyright law. Secondly, the initial form of the music business is also analysed alongside its primary *key resources* and *key activities*. The closer relationship between two separate activities (recording and publishing) signals the entry into the era of the ‘music industry’. The thesis will continue with the *value propositions* of this ‘single’ music industry in the third chapter. Again, recorded popular music will be identified as the main *value proposition* of the industry, providing its major *revenue stream*.

Thus, the present chapter focuses on the initial stages of the industry, aiming to introduce the business model since its inception, by examining how the law influenced the creation of the business model and vice versa. It is argued that this occurred early on in history and that this business model did not change until the induction in the digital era. Ultimately, by the end of this chapter the business model of the music industries will have been presented as resulting from the *key resource* of copyright, translating into the relevant *key activities*.

As such, the chapter begins by introducing the early days of the music industry and discussing the several technologies relating to patent law. Subsequently, advancements in copyright law are presented to explain the transition from a patent-centred to a copyright-centred music industry. To achieve this, the chapter focuses on the law and on the commercial activities as related to recording, publishing, and performing, concluding with the protection of sound recordings, as lobbied for by the emerging recorded music industry.

Value propositions and the supply of music are being analysed in the third chapter of the present, dealing with the creation of markets resulting from the business model under examination.

2.2 *The early days of the music industry: key resources and key activities*

The *Business Model Generation* has identified *key resources* as the Building Block that relates to the most important assets required to make a business model work. *Key resources* can therefore be identified as physical (including facilities, buildings, and distribution networks), intellectual (including intellectual property rights), human (a portfolio of artists), and financial (including guarantees and lines of credit). These are of a *de facto* tangible nature, as they can be leased, rented, and sold. The same characteristics are also borne by intellectual property rights thanks to their monopolistic nature. Indeed, the economic right can be owned, leased, and acquired by others. It is therefore evident that intellectual property rights belong to this Building Block.

Further, the analysis expands into *key activities*, as a direct result of the *key resources* in question. *Key activities* were described in the previous chapter as “*the most important things a company must do to make its business model work.*”¹²¹ These can include problem solving, production, and networking endeavours. The following analysis investigates several *key activities* to the extent that they relate to the *key resources* under examination. For the music industries, these two Building

¹²¹ *The Business Model Generation* (n 21) 7.

Blocks are interrelated, as *key activities* result from reforms in copyright legislation directly.

2.2.1 *The patent as key resource*

Traditionally, the recorded music company is seen as relying solely on the exploitation of copyright. However, the initial recording industry was far from evolving around copyright exploitation. Originally, the manufacturers of records paid less attention to what was being recorded and more attention to what it was being recorded on; the art to be showcased was the art of recording with precision rather than the art of music.¹²² Hence, the most significant asset of the recording industry until the early twentieth century was the tangible machine itself, rather than the rights incorporated in the music.

As a matter of fact, the record and the sound reproduction hardware in the nineteenth century were seen as innovative technological inventions. The idea of the record as a treated good was not realised until 1889, when the first commercially manufactured discs were produced for Emile Berliner, the inventor of the gramophone.¹²³ Even though music was recorded on them, the three companies dominating the industry in the early years of the twentieth century¹²⁴ were not interested in marketing the music, focusing on showcasing sound reproduction techniques instead. To this end, the labels appearing on the discs contained little information about the music and were rather focused on the awards each company had won in various industrial exhibitions, as well as on patents owned by the manufacturing company.¹²⁵ Almost of equal importance, and thus occupying a large part of the record label, was the trademark of the company. The famous terrier listening to ‘His Master’s Voice’ was used in 1909 for the first time, as the trademark appearing on the Gramophone Company’s discs.¹²⁶ Moreover, record reviews in the

¹²² R Osborne, “The record and its label: identifying, marketing, dividing, collecting” (2007) 2 (3) *Popular Music History* 263-284.

¹²³ *Ibid.*

¹²⁴ Thomas Edison’s “National Phonograph Company”, Emile Berliner’s “National Gramophone Company” or “Gramophone Company” in the UK, and the “Columbia Phonograph Co” originally created to exploit the patented invention of the graphophone (an Alexander Bell invention), in B Southall, *The rise and fall of Emi Records* (2012) 12.

¹²⁵ A R Sutton, *American Record Labels and Companies: An Encyclopaedia (1891-1943)* (2000) 217, B Rust, *The American Record Label Book* (1978) 305.

¹²⁶ R Osborne (n 122).

press were categorised by record company rather than by artist, a practice that stayed with the music press up until the 1940s in some cases.¹²⁷ This practice was held in accordance with each record company's manufacturing process, utilising either the phonograph or the gramophone 'talking machine'.¹²⁸

Initially, the record companies were unaware of the commercial potential of their inventions. The head of the US company Victor, Eldridge Johnson, acknowledged this fact as early as in 1900, when he wrote to the manager of the UK Gramophone company: "...one of our greatest difficulties has been the proper marking of these records. We never tried before to mark them properly, as if we were making them to sell."¹²⁹ Again, the importance of recorded music was not fully realised and the labels appearing on the records were focused on providing information on the product itself.

This is rather obvious in the case of Thomas Edison's National Phonograph Company, as no artist information was to appear on his company's discs. The only figure 'decorating' the disc was the figure of Edison himself.¹³⁰ As a matter of fact, Edison endeavoured his machine to become a vessel for reproducing speech for educational purposes.¹³¹ A similar practice was followed by Columbia records that refused to provide any artist information until 1904.¹³² Pursuant to that year, the composer was given more credit than the recording artist.¹³³ It was Eldridge Johnson (Berliner's business partner in Vector) who first introduced the idea of signing exclusive recording contracts with the most famous performers of his era; nevertheless, the aim was to enhance the popularity of the 'talking machine'.¹³⁴ This

¹²⁷ Sound Wave magazine used this format until 1941 and The Gramophone until 1949, Ibid.

¹²⁸ Ibid.

¹²⁹ R Edge and L Petts, "The first ten-inch records, Part 1" (1987) 156 (June) Hillandale News 201.

¹³⁰ R Osborne (n 122).

¹³¹ M Huygens, C Baden-Fuller, F A J Van Den Bosch and H W Volberda, "Co-evolution of firm capabilities and industry competition: investigating the music industry 1877-1997" (2001) 22 (6) Organization Studies 971-1011.

¹³² R Osborne (n 122).

¹³³ Ibid.

¹³⁴ "Much has been done to enhance the reputation of the talking machine by including artistes of celebrity to sing and play into it," states the British journal "Talking Machine News" in 1905, in R Osborne (n 122). Indeed, the signing of these exclusive contracts is key here, as the practice never left the music industry and its business model. This becomes rather evident later in the fourth chapter, when the George Michael's case against Sony is

practice however, shows the importance of securing long-term exclusive contracts with artists, as they enter the business model themselves. This discussion resurfaces later in the present, during the UK investigation into the prices of recordings. At that stage, the thesis points to the longevity of the practice, referring to its inception by Johnson himself.

Back to the ‘patent wars’ of the time, Edison and Berliner held patents for the phonograph and the gramophone respectively.¹³⁵ Their aspirations regarding their inventions differed as well. Edison’s company provided licences for the manufacturing of dictating machines and it was only under the Columbia phonograph licence that the invention became linked to the entertainment sector, since the machine’s appeal to crowds at fairs and amusements parks got noticed.¹³⁶ This led Berliner to develop a system for manufacturing duplicates of recordings, using a zinc plate as the master, with the purpose of bringing entertainment to people’s homes.¹³⁷ What Berliner actually achieved was the separation of the recording from the reproduction process, guaranteeing cost reduction, as well as easier storage and distribution for the resulting product.¹³⁸ Berliner’s gramophone entered the home entertainment market in 1895.¹³⁹ Edison’s response was to further innovation in his invention, and to sign a deal with Columbia to also enter the home entertainment market.¹⁴⁰ The subsequent post-1895 period is characterised by ‘patent wars’ and minor technological improvements on the pre-existing technologies.¹⁴¹ It appears that in such a competitive environment, where rivalry in innovation thrived, patents and trademarks were the weapons in a company’s arsenal, since companies were competing in the market for sound reproduction and not in the market for recorded music. The dust settled around 1907, with the prevalence of the disc over Edison’s cylinder.¹⁴² Nevertheless, the so called ‘patent

presented. This practice is so embedded in the industry that the competition authorities take it for granted.

¹³⁵ Ft 16.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ K Negus, *Producing pop: Culture and Conflict in the Popular Music Industry* (1992).

¹⁴² R Osborne (n 122). This is evidenced throughout the present and especially in the third chapter, when the standardisation of the vinyl is discussed.

wars' did not end there, as recording music companies would later compete on the standardisation of the record's format.

Victor's (Berliner's and Johnson's company) patent expired in 1914 and more competitors entered the market for the supply of machines, as well as the market for record manufacturing, either for self-supply or for further exploitation.¹⁴³ The distinction between hardware manufacturing and the manufacturing and distribution of records (software), started to become apparent. Independent record companies specialising in a variety of genres started to appear, as it became clearer that profit via the sale of records was easier to achieve than via the sale of machines.¹⁴⁴ However, research shows that success for these companies failed to materialise, as sales of a few recordings per title were typical, disabling economies of scale.¹⁴⁵ As regards the US hardware sector, home entertainment market penetration reached 50 percent by 1929, leading to the introduction of segmentation policies by furthering innovation in the machines once again.¹⁴⁶

The 'preoccupation' with enhancing sound reproduction technology appeared to have an adverse or rather a 'stalling' effect on the materialisation of the record's full commercial potential. Engineers and sound technicians dominated the recording companies and all music-related decisions were left to them, including talent acquisition or A&R (Artists and Repertoire). This resulted in imitative policies, such as the competition for a small number of established theatre and opera names, releasing different version of the same songs.¹⁴⁷ A cheaper alternative was to record live performances of popular music by 'anonymous' artists.¹⁴⁸ It is noted once again that these 'imitation games' never left the business model, resulting in the treatment of the product as 'homogeneous' and of the market as 'mass', as attested later in the following chapters.

¹⁴³ Ibid.

¹⁴⁴ Huygens et al. (n 131).

¹⁴⁵ P Gronow, "The record industry: the growth of a mass medium" (1983) 3 (1) *Popular Music* 53-75.

¹⁴⁶ E.g. a gramophone model with an electric motor guaranteed higher quality and was marketed at a higher price, whereas portable gramophones were marketed to a wider consumer segment in low prices and in higher volumes, in *ibid.*

¹⁴⁷ S Frith, "The industrialization of popular music" in J Lull, *Popular Music and Communication* 2nd edn (1992).

¹⁴⁸ Ibid.

In order to fully apprehend the practices of the time, it is crucial to look into the intellectual property rights affiliated with the industry. The legal framework at the time confirms that copyright was not able to provide the sought-after return on investment. After all, the key participants in the industry were the inventor and the company created to market the invention. This comes to prove the relevance of patents for financial success on both single firm and on industrial level. The industry created around this technology amassed a substantial amount of funding that was subsequently channelled into the music part of the business, as further explained in the third chapter.

Turning to the US patent regime at the time, it becomes evident that a favourable patent regime, combined with the absence of any legislative framework regarding music, can explain why primary focus lied on the invention rather than the music. Investigating the relevant patent and the copyright laws, as well as their progressive changes, is also crucial for addressing any commercial opportunities that these intellectual property rights provided. The change of the industry from hardware to software-oriented is linked to the laws of the era. It becomes clear that the *key resource* of the industry switched from the exploitation of patents to the exploitation of copyrights; a change that shaped the industry throughout the twentieth century.

In the US, patents have been granted on federal level since 1790,¹⁴⁹ three years after the Constitution called for monopolies to be granted to authors and inventors under the Copyright Clause.¹⁵⁰ In the UK, the patent office was established in 1852, and the process of obtaining a patent was characterised by a lack of vigorous examination.¹⁵¹ In both countries, patents were granted for a 14-year period. Another major development in the history of patent and trademark law was the signing of the Paris

¹⁴⁹ Patent Act of 1790, Ch. 7, 1 Stat. 109-112 (April 10, 1790), An Act to promote the progress of useful Arts.

¹⁵⁰ “*The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*” U.S. Const. art. I, §8.

¹⁵¹ Patent Law Amendment Act 1852.

Convention for the Protection of Industrial Property in March 1883.¹⁵² The UK adhered to the Paris convention in 1884 and the US in 1887.¹⁵³

With regard to the US, the importance of patents for the American economy during and after the Industrial Revolution cannot be underestimated. The US posited itself as the innovation hub of its time and that is in great part a consequence of its favourable patent regime. The US patent regime was focused on promoting technological and commercial development through strong proprietary rights, based on lower application fees than in the UK, efficient enforcement mechanisms, and specific requirements for each new invention to advance the ‘state of the art’.¹⁵⁴ It should be noted that post-Industrial Revolution Britain was less favourable towards the patent system, with many viewing it synonymous to ‘royal favouritism’, and with few inventors relying on it for the award of a monopoly.¹⁵⁵ In general, patent abolitionism movements were popular around Europe until the late nineteenth century.¹⁵⁶ On the other hand, the patent regime of the US provided a favourable environment for the exploitation of new technologies to thrive and international commerce to expand, especially after the adherence to the Paris convention, which also contained provisions enabling the acquisition of nationally registered rights on a multinational level.¹⁵⁷

Throughout the nineteenth century, individual innovation flourished across the US, seeing an increase in the number of inventors who were awarded multiple patents

¹⁵² Paris Convention of the Protection of Industrial Property, 1883.

¹⁵³ WIPO-Administered Treaties Contracting Parties, Paris Convention (Total Contracting Parties 177), available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2. The convention signals the ‘birth’ of an era of globalisation in technology and in commerce, even though it is not the present thesis’ purpose to delve into this in more detail.

¹⁵⁴ B Z Khan and K L Sokoloff, “History lessons, the early developments of intellectual property institutions in the United States” (2001) 15 *The Journal of Economic Perspectives* 233-246.

¹⁵⁵ C McLeod, “Patents for invention: setting the stage for the British industrial revolution?” (2009) 18 *Empiria, Revista de Metodologia de Ciencias Sociales* 37-58.

¹⁵⁶ *Ibid.* The Netherlands returned to the Patent System in 1910 and Switzerland enacted its first patent laws in 1887.

¹⁵⁷ G B Dinwoodie, “The architecture of the international intellectual property system” (2002) 77 *Chi-KentLRev* 993.

throughout their careers, Edison being one of them.¹⁵⁸ These inventors were more likely to succeed financially, as they were more likely to assign or license their rights to third parties, either firms or individual entrepreneurs. Individual inventors having received more than twenty patents were likely to sell off 60 percent of their patents for further commercialisation.¹⁵⁹ The ‘golden age of the inventor’ as it has been called,¹⁶⁰ is also characterised by an increasing interest in the market for technology. This is further attested by the publicly available information held at the US patent office¹⁶¹ and by the role that patent agents and lawyers played at the time.¹⁶² It appears that the role of those agents and lawyers did not remain the static role of a legal consultant, but it grew to encompass marketing and commercial advice to patent holders:¹⁶³ there was some sort of patent marketing know-how at the time, and investing in an invention was an almost risk-free entrepreneurial choice.

After the turn of the century, commercial interest in technology had advanced to the point of attracting more interest from intermediaries. This trend led to long-term contractual attachments between inventors and assignees willing to provide the capital necessary for the commercial exploitation of the patent,¹⁶⁴ like in the case of the partnership between Berliner and Johnson. From a commercial point of view, it seemed that an industry for the manufacturing and marketing of technology had been established. Thus, it comes as no surprise that the promotion of the machines and the award of multiple patents was the norm. The late nineteenth century further sees the emergence of international technology licensing agreements, since the forefathers of what was to become EMI entrepreneurs Owen and Williams, acquired Berliner’s patents for Britain. They set up the British Gramophone Company, importing machines from Johnson’s US factory (hardware) and discs from Berliner’s

¹⁵⁸ T A Edison’s Phonograph or Speaking Machine Application No 200, 51, Patented Feb.19, 1878, United States Patent Office. Edison received 199 patents in total for his invention, available at <http://edison.rutgers.edu/phonopats.htm>.

¹⁵⁹ N R Lamoreaux and K L Sokoloff, “The geography of the market for technology in the late-nineteenth and early-twentieth century United States” in G D Libecap, *Advances in the Study of Entrepreneurship, Innovation and Economic Growth* (1999).

¹⁶⁰ Khan and Sokoloff (n 154) 241.

¹⁶¹ Ibid 242.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

native German company, Deutsche Grammophon.¹⁶⁵ The British Gramophone Company integrated vertically following the acquisition of the controlling interest of the German company, securing an unlimited supply of discs, and thus achieving economies of scale. By the time that the First World War broke out, a third of all British households owned some sort of gramophone, and The Gramophone Company had supplied them with more than three million discs.¹⁶⁶

The sound carrier machines and their variations started out as ‘generic’ inventions, without a specific commercial purpose attached to them by their inventors. The post-Industrial Revolution era, along with a favourable patent regime in the US, helped the new technology become known to the public and attract the interest of entrepreneurial intermediaries, who saw the machines as a business opportunity to sell music. However, it was only after being tied to music that the invention reached its full potential and became a standard electrical appliance for the average American and British household. Full market penetration however, meant that the sole supply of hardware would not continue to be as profitable as the supply of the accompanying software, the record. Apart from a switch in market conditions, the legal framework governing the supply of music itself helped the industry acquire the business model researched in the present thesis.

2.2.2 *How the hardware business became the music business and role of copyright: a change in key resource and the standardisation of the industry’s key activities*

2.2.2.1 *Recording*

Turning to the initial ‘music business’, this was the business of publishing sheet music as required for the performance of musical pieces by musicians or members of the public. Printed copies of the works to be performed were subject to copyright as any other printed work published by a publishing house. By the end of the eighteenth century, the piano was present in many affluent households in America

¹⁶⁵ B Southall, *The rise and fall of EMI Records* (n 124) 13.

¹⁶⁶ *Ibid* 17.

and in Europe, and demand for sheet music grew. Composers were therefore able to benefit from the printing and selling of their music.¹⁶⁷

Protection was initiated in the US by the 1831 Copyright Act that added printed music to the protected subject matter under federal law.¹⁶⁸ In the UK, music was protected through case law until the enactment of the 1911 Copyright Act, since the original provisions in the Statute of Anne catered only for printed books, whereas the first case to bring forward the issue of the protection of music was the 1777 case of *Bach v Longman*, when printed music became protected as a form of 'writing'.¹⁶⁹

From the composers' point of view, one could speak of a *key activity* of publishing sheet music with copyright exploitation as a *key resource*, even though it would be incorrect to speak of a music industry at this stage (in terms of comparing individual commercial practices to the commodification of business and the creation of an industry). Specifically, music before the recording era was not seen as a commodity. Before the advent of technology, a piece of sheet music was a product to be sold to individual purchasers, but it was not seen as part of an exchange system seeking to generate surplus value in a market. The actual commodification of music resulted from the commodification of technology, which gave birth to a new market and a new industry for the exploitation of music.¹⁷⁰

As seen previously, 'talking machines' were not initially affiliated with music. However, a different invention was linked to the music business and played an important part in the industry's legislative advancements. Apart from the 'talking machines', the first music commodification attempts followed the invention of the player piano, a mechanism attached to the piano (either to the exterior or to the interior of the instrument's cabinet) that helped the aspiring musician 'read' music instructions as encoded on a paper roll.¹⁷¹ The technology of the player piano evolved to encompass a mechanism that would fully reproduce the music pre-recorded on it,

¹⁶⁷ R Garofalo, "From music publishing to MP3: music and industry in the twentieth century" (1999) 17 (3) *American Music* 318-354.

¹⁶⁸ Copyright Act, Washington D.C. (1831).

¹⁶⁹ *Bach v Longman*, London [1777]. For the copyright history at the time, see (n 170) below. For more information on the sources of copyright, see

<http://www.copyrighthistory.org/cam/index.php>.

¹⁷⁰ T D Taylor, "The commodification of music at the dawn of the era of 'mechanical music'" (2007) 51 (2) *Ethnomusicology* 281-305.

¹⁷¹ *Ibid* 286.

thus eliminating the personal element of pro-active participation and establishing the passive pass-time of listening to music.¹⁷²

By the turn of the twentieth century the player piano industry had entered the business of marketing the music rather than the music reproducing technology, similar to the ‘change of heart’ witnessed in the recording industry.¹⁷³ Consumers were buying the player piano for the music and not as an ornament, as was the case in the nineteenth century.¹⁷⁴ The success the player piano and the advancement of sound reproduction techniques in the recording industry, signalled an era of transition into a new industry built around the music itself. The reason why the player pianos deserve special mentioning herein is that the role of the player piano was akin, if not more important, to the role of the record in terms of influencing the introduction of mechanical royalties in copyright law.

The mechanical reproduction of the music ‘encoded’ in player pianos and recordings was met with dismay from the part of composers, who were being excluded from the profit made by the manufacturers and the sellers of the machines. As regards the US, the first case to address the matter was *Kennedy v. McTammany* in 1888,¹⁷⁵ where the plaintiff argued that the ‘transformation’ of his music into piano rolls amounted to copyright infringement. *Stern v. Rosey*¹⁷⁶ addressed the issue from the perspective of the recording industry: does the record manufacturer infringe upon the copyright in the music? In both cases, the answer was negative and no copyright infringement was found to subsist upon the composition.

The issue of what became known as ‘mechanical reproduction’, reached the Supreme Court in 1908, in *White -Smith Music Publishing Co. v Apollo Co.*¹⁷⁷ Confronted with the dilemma of whether this kind of reproduction amounts to copying as per the status quo, the Supreme Court held that the mechanical reproduction of

¹⁷² Ibid 293.

¹⁷³ Ibid. “*Good music must be sold. The reproducing piano, by eliminating the distraction of a personality, is training the music lover to listen,*” as per Marian Reed, manager of the Ampico Library player piano manufacturers, in 1924.

¹⁷⁴ Ibid. “*The Pianola’s self is not the question. The music it makes possible is the consideration, and every new selection renews again the novelty and freshness of the instrument,*” reads a Pianola advertisement from 1902.

¹⁷⁵ 33 Fed. 584 (C.C. Mass 1888).

¹⁷⁶ 17 App. D.C. 562 (C.A. D.C. 1901).

¹⁷⁷ 209 U.S. 1 (1908).

compositions was not copying as per the meaning of the Copyright Act of 1870, and subsequently composers were denied the exclusive right of the mechanical reproduction of their compositions for piano rolls and recordings.¹⁷⁸ The Copyright revision of 1870 had preceded the invention of the phonograph and the commercial success of the player pianos, resulting in the composers' demands to remain unregulated for a few more years. However, the Supreme Court's decision in *White-Smith* proved unpopular and it was subsequently followed by complaints to Congress from composers claiming that the "*manufacturers of music rolls and talking-machine records were reproducing part of their brain and genius without paying a cent for such use of their compositions*".¹⁷⁹

The matter was resolved with the enactment of the 1909 Copyright Act and the introduction of mechanical licensing.¹⁸⁰ Concerned with the issue of exclusivity and the monopolisation of music by a few recording or player piano companies, the US Congress introduced a licensing mechanism, whereby any person could make a 'similar use' of the work "*whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work.*"¹⁸¹

¹⁷⁸ S L Bach, "Music recording, publishing, and compulsory licenses: toward a consistent copyright law" (1986) 14 Hofstra LRev 379.

¹⁷⁹ Ibid 89. Also see H Henn, "The compulsory license provisions of The US Copyright Law 3 (General Revision of the Copyright Law, Study No 5, Senate Subcomm On the Judiciary)" as reprinted in G Grossman, *Copyright Revision Legislative History* (1976) Omnibus.

¹⁸⁰ §1(e) of the 1909 Act.

¹⁸¹ Ibid: "(a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyrighted control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof."

The compulsory licensing scheme was introduced following Aeolian's (the Pianola manufacturer's) attempts to sign long-term exclusivity contracts with music publishers in order to control the reproduction of all the music they represented.¹⁸²

In the UK, the case *Boosey v Whight*¹⁸³ (the British equivalent to *White-Smith*) was decided in 1899, prior to the American case. The UK decision was similar to the Supreme Court's point of view and composers were denied compensation. It was further established in subsequent English cases in 1907 and in 1912 that mechanical reproduction did not infringe upon the composers' copyright.¹⁸⁴ The UK did not introduce any regulation regarding the mechanical reproduction of music compositions until the Copyright Act of 1911. The 1911 Copyright Act implemented Article 13 of the revision of the Berne Convention, signed in Berlin in 1908, when composers were granted the exclusive right to control the mechanical reproduction of their compositions.¹⁸⁵ Even though the text of the Berne Convention as it stands to the day allows for the introduction of a compulsory licensing system for mechanical reproduction, this was not implemented in the UK.¹⁸⁶

The introduction of mechanical royalties (or *mechanicals* as referred to in the industry) signalled a change in the music landscape by bringing music publishing and record producing closer together. Copyright law became relevant to the production of records. Even though it appeared a small victory for the composers and the publishers at the time, this was a big step for the shaping of the music

¹⁸² Bach (n 178) 389. Note how the compulsory licensing scheme gets introduced to 'break' the monopoly of music, because of exclusive contractual relationships. It was previously seen that no similar intervention was attempted vis-à-vis the artists, not only at the time but also later, as the UK MMC Report into the supply of recording music illustrates in the fourth chapter. This shows that indeed, the business model has always been focused around the recorded product and its copyright exploitation. It also illustrates how the business model transcends and crosses jurisdictions thanks to these established industrial practices.

¹⁸³ *Boosey v Whight*, 15 LTR 322 [1899]; 1 Ch 836 [1899]; 80 LTR (NS) 561.

¹⁸⁴ *Newmark v National Phonograph Co* [1907] 23 TLR 439, 51 Sol J 412, *Monckton v Gramophone Co* [1912] 106 LT 84, 28 LTR 205, 56 Sol J 270, WN 32.

¹⁸⁵ Art 13, Revised Berne Convention for the Protection of Literary and Artistic Works, signed at Berlin, 13 November 1908.

¹⁸⁶ Berne Convention art 13 "(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act," as revised. See PRS for music website for the issuing of licenses in the UK <https://www.prsformusic.com/licences/releasing-music-products/retail-audio-products>.

industry, especially with the establishment of the rights-based multinational record companies later in the 1960s. The integration of the publishing business into the recording business helped reduce transaction costs. At the same time, bridging these *key activities* was the driving force behind the formation of the unified ‘music industry’, as it went on to be known.¹⁸⁷

2.2.2.2 Publishing and performing

Before going forward in time, it is important to take a closer look at the *key activity* of the publishing industry separately. Music publishing is the part of the music industry that deals with the music composition itself, exploiting the copyright in music and lyrics. The publishing industry represents the initial part of the music industry, as evidenced by the publishers’ lobbying efforts to introduce mechanical rights.

The publishers of music however, lobbied and pushed for the introduction of another right that provides a substantial part of the musician’s and the industry’s income to the day: the introduction of the public performance right. The history of this specific right is tied to the history of the music industry *per se*, as its subject matter signalled further changes on industrial organisation level. Indeed, the public performance right introduces a further *key activity* based on copyright exploitation. The foundations of the music business were set and the industry was ready to be born and expand once publishers, record producers, and authors of music were being recognised as the first relevant stakeholders, with the prominent absence of performers and the public, at this initial stage.

The public performance right when it was first introduced, covered live performances of music compositions, since the recording industry was nascent at the time of its debate. Indeed, the protection of the public performance of recordings followed significantly later, when the music industry started acquiring its corporate format. In the US, the public performance right for music compositions was introduced for the first time in 1897.¹⁸⁸ Its enactment was preceded by a series of unlicensed public performances of musical compositions (mostly comic operas at

¹⁸⁷ R Garofalo (n 167) 327.

¹⁸⁸ Act of Mar. 3, 1897, ch.392, 29 Stat. 694 (1897). Note that the public performance right for dramatic works was introduced in 1856.

the time) that resulted in a series of lawsuits brought by composers against the producers of ‘pirated’ versions of their work. Perhaps the most famous relevant case was that of the famous duo Gilbert and Sullivan, composers of the famous operettas “*The Pirates of Penzance*” and “*The Mikado*”.¹⁸⁹ Through the Gilbert and Sullivan litigation series it became clear that common law was unable to protect public performances.¹⁹⁰ What followed, was a series of proposed bills to Congress backed by the music publishing industry.¹⁹¹ The road for establishing a public performance right would pass by Congress rather than by courts.

In a nutshell, before 1897 there was no statutory right in the US granting exclusive public performance rights. Fixated versions of works however, manuscripts in this case, enjoyed proprietary status,¹⁹² thus justifying the extension of the protection into the public performance right.¹⁹³ Nevertheless, once a work had been published it became public property and all rights were lost, as no statutory provisions existed stating otherwise. This caused a particular problem regarding the publication of musical and dramatic works.¹⁹⁴ The general apprehension at the time was that works could be transcribed by ear without the occurrence of any infringement, which led to many performances being ‘pirated’.¹⁹⁵ No direct copying of the work having occurred, the composers’ and publishers’ cases were hard to argue.

During the years that preceded the 1897 Act, music publishers had begun to grow in numbers and strength, and had already started lobbying for copyright revisions that would favour their business, the public performance right being one of them.¹⁹⁶ It is not a coincidence that the Music Publishers Association of the United States was formed in June 1895, only two years prior to the Act, since their mission was the “*revision and improvement of the administration of the present copyright system,*

¹⁸⁹ Z S Rosen, “The twilight of the opera pirates: a prehistory of the exclusive right of public performance for musical compositions” (2007) 24 (3) *Cardozo Arts & EntLJ* 1157-1218.

¹⁹⁰ *Ibid* 1168.

¹⁹¹ *Ibid* see e.g. the Treloar Copyright Bill and the Cummings Copyright Bill (above).

¹⁹² “*That a man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property*” *Wheaton v. Peters*, 33 U.S. 591, 658, (1834).

¹⁹³ Z S Rosen (n 189) 1168.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid* footnote 72, “Authors’ rights before publication- The representation of manuscript plays” (1875) 9 *AmLRev* 236.

¹⁹⁶ *Ibid*.

with the view of making it an adjunct of greater value to the publishing interests of this country."¹⁹⁷ Music publishing gradually became a profitable business, eventually leading to its association.

In Europe, the idea of a public performance right for music was conceived in 1664, when a German composer included on the printed edition of his work his disapproval of any unauthorised public performance of his music.¹⁹⁸ In France, a performance royalty system was introduced during the seventeenth century,¹⁹⁹ followed by a primary form of a collecting society for dramatic works, all in accordance with spirit of the French revolution. Indeed, prevailing schools of thought called for artistic and creative freedom, a traditional that was later translated into the *droit d'auteur*.²⁰⁰ In the UK, performing rights were first recognised in 1842 and royalty arrangements became a common practice between publishers and authors, as a risk spreading mechanism.²⁰¹ In the UK as in the US, the introduction of performance royalties was justified as in the best interests of publishers and composers alike.²⁰²

Finally, both in the US and the UK, the publishers' associations lobbied for the creation and introduction of collecting societies.²⁰³ The British Performing Rights Society (PRS) was formed in 1911²⁰⁴ and the American Society of Composers, Authors and Publishers (ASCAP) was formed in 1914.²⁰⁵ After the public performance of music had been established in the status quo, it soon became apparent that an efficient enforcement mechanism was required in order to secure

¹⁹⁷ Ibid footnote 297, "The Music Publishers' Association of the United States" (June 22, 1895) AmArtJ 171, noting that one of the purposes of the new organization was "[t]he necessary action looking toward a revision and improvement of the administration of the present copyright system, with the view of making it an adjunct of greater value to the publishing interests of this country than it now is."

¹⁹⁸ M Kretschmer, "Intellectual property in music: a historical analysis of rhetoric and institutional practices" (2000) 6 (2) Studies in Cultures, Organizations and Societies (2000) 197-223.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² W Boosey "Many instances occurred of the purchase of valuable copyrights, particularly operas, at the price of a mere song, which works often resulted in a very big profit for the publisher. On the other hand, the publisher would pay a heavy price for subsequent works the purchase of which would result in a dead loss. The results were obviously unsatisfactory both to composer and publisher," in 211.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Z S Rosen (n 189) 1216.

the sufficient remuneration of authors and subsequently, publishers. A few years later, even background music in restaurants was found to be protected by copyright, as the Supreme Court held in *Herbert v. Shanley*.²⁰⁶ The public performance right became one the most profitable *key resources* of the music industry and of composers in particular.

The publishing business, apart from pushing for the aforementioned copyright reforms, was vital for the provision of music in the years that followed: the famous Tin Pan Alley that housed most of New York's publishing houses, which represented the most famous composers until the 1940s, served as a prominent example of the business's success.²⁰⁷ The original music publisher represented the composers of music and acted as a link between the authors, the record companies, and the collecting societies. The publishers were, and still are, the first point of entry of a composer into the music business, as the latter assigns the administration of all music related copyrights to the former (also known as 'administration rights' in the industry).²⁰⁸

Before the 1940s and until the 1960s, it was rare for performers to compose and record their own music material. It was the publishers' task to match the music they represented with the right performer, who would subsequently record or perform the music in public. The publishers' power in this decision-making process grew to the point of making it impossible for a songwriter to exploit the music without the collaboration with a major publisher.²⁰⁹ From a business model perspective, it can be argued that the publishers acted like a hub of *human resources* for the industry by managing the relationships between the human capital of the business, a function that follows the business model to the day.

Additionally, the introduction of mechanical licensing meant that it was impossible for record companies to use a music composition for the first time without the publisher's permission. It has already been stated that the compulsory licensing scheme would be in effect only after the first use of the music had been made. Those

²⁰⁶ *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

²⁰⁷ Indicatively see T E Scheurer, *American Popular Music: The nineteenth century and Tin Pan Alley* (1990).

²⁰⁸ D Passman, *All you need to know about the Music Business* (n 48).

²⁰⁹ *Ibid* 232.

charged with the decision regarding a composition's first use were the publishers, who also acted as the music's sole representatives. The publishers profited, and still do, from the mechanical royalties paid to them by the record companies.²¹⁰ The importance of mechanical royalties to the industry can also be asserted by the subsequent inclusion of monies paid not only for each record manufactured, but also for each digital copy of music downloaded.²¹¹

With respect to the public performance royalties, they constitute an additional *key resource* for the publishing industry to the day. It is not only individual composers who affiliate with collecting societies, but also publishers.²¹² Collecting societies distribute monies collected through blanket licenses issued to music venues and to the media. The royalties are allocated according to the number of plays on the radio, the television, through digital streaming and to a lesser extent, at live events. For instance, in the US only the top 200 grossing tours as reported in Pollstar magazine are considered,²¹³ whereas in the UK promoters of large-scale events submit relevant playlists to PRS for this purpose.²¹⁴

Finally, the role of publishers and collecting societies does not end here. *Inter alia*, their role gets highlighted in the payola scandals explored in the third chapter. The discussion turns once again to publishing in the merger control part of the thesis, where the European Commission discusses the combined market position of a major record company in both the recording and the publishing sector. Nevertheless, this part of the chapter introduced publishing, and of course copyright law, to illustrate the emergence of a pronounced business and industrial interest in music. This is subsequently 'picked up' by the recording business and embedded as a *key resource* in the dominant business model, as the thesis reveals in due course.

²¹⁰ Ibid 235.

²¹¹ Ibid 235.

²¹² Ibid 251.

²¹³ Ibid 253.

²¹⁴ Ibid.

2.2.2.3 The protection of sound recordings

“...on the whole the record [of copyright owners] in having lobbies translate into legislation has been impressive”²¹⁵

It would be impossible to present the *key resources* of the music industry and the importance of copyright legislation without including the protection of sound recordings. This was not previously addressed, as the protection of sound recordings was not introduced until the recorded music industry had already matured and acquired its dominant shape; that is until the record had become the most famous form of supply of music. As already stated, by the end of the 1920s the phonogram had become a standard appliance for the average US and British household. Without a doubt, this meant that the role of the publisher becomes steadily less powerful than the role of the record producer. It was a matter of time until the publishing business lost its status as the sole key player in the music industry. In the 1950s, some record companies integrated into the publishing business, eliminating exogenous costs.²¹⁶ By the beginning of the 1970s, the handful of multinational companies representing the music industry would have merged the *key activities* of distribution, A&R, and music publishing,²¹⁷ thus enabling the notion of a single ‘music industry’ to become established.

For the time being, the analysis separates between the recording and the publishing business and their impact is assessed based on who set the corresponding legislative reforms in motion. The lobbying efforts prove the existence of an industry with activities worth protecting by law.²¹⁸ Hence, it is fair to treat the music publishing industry as the initial key player in a music industries context, with copyright exploitation as the corresponding *key activity*. However, the recorded music industry’s growth in commercial value had a direct effect on the introduction of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations in 1961 (albeit, not in the US). Hence, as this part deals

²¹⁵ H L McQueen, “Copyright, competition and industrial design” (1995) 3 (2) Edinburgh *Hume Papers on Public Policy*.

²¹⁶ E.g. EMI Music entered the publishing business in 1958, in B Southall, *The rise and fall of EMI Records* (n 124).

²¹⁷ G Bakker (n 118) 324. The current state of things however, is evaluated in the merger control part of the thesis, when the ‘break-up’ cases of EMI are discussed.

²¹⁸ M Kretschmer (n 198).

with the main *key resources* of the industry, it is important to mention the targeted efforts towards the separate protection of sound recordings.

The International Federation of Phonograms Producers (IFPI) was formed in Rome in 1933 with the explicit objective of promoting new legislation for the interests of its members.²¹⁹ International cooperation between the record companies was important, as the international environment by the 1930s lacked the necessary framework that would enable trans-border commercial activities: official exports were limited, there was no incentive to set up foreign subsidiaries, and ‘parallel imports’ undermined the domestic product.²²⁰ Additionally, unlicensed versions of records were the norm, a practice that would become more popular with the invention of the cassette.²²¹

The organised efforts of IFPI resulted in the introduction of the Rome Convention. The Convention included provisions conferring protection to the recording of performances, including provisions for distributing, renting and duplicating recordings.²²² However, it failed to attract the sought-after membership, partly due to its efforts to introduce property rights for artists and producers in the field of public performance, something that would be difficult to enforce, as Burke explains.²²³ Ultimately, the UK became a signatory to the Rome Convention in 1963, whereas the US did not implement the convention.

Nevertheless, the industry agreed on the importance of a regime regulating the reproduction of recordings, leading to the introduction of the (Geneva) Phonograms Convention in October 1971. The WIPO-administered Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms was met with success and by 1983 it represented 95 percent of the world’s record

²¹⁹ A E Burke, “How effective are international copyright conventions in the music industry?”(1996) 20 *Journal of Cultural Economics* 51-66.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² Art 3, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

²²³ Burke (n 219) 54.

production.²²⁴ In the US, the Convention was implemented in 1971,²²⁵ amending Section 101 of the 1976 Copyright Act:

“material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

The anomaly lies in the fact that no performance right was recognised in sound recordings, due to broadcasters’ lobbying efforts to avoid having to pay royalties for the use of records over the radio.²²⁶

However, the public performance right in sound recordings was present in the rest of the world, the UK included. The debate dates back to the Berlin Revision of 1908, which first highlighted the exclusive right to the public performance of recordings alongside the introduction of mechanical royalties. However, the implementation of the Berlin Revision was left to the signatory parties.²²⁷ As the US remained outside the Berne Convention until 1988, this issue was not addressed until the Digital Millennium Copyright Act that was called to implement the WIPO treaties on US soil.

2.3 Conclusion

This brings the present chapter to its concluding remarks: the debate over the protection of sound recordings and the public performance right illustrates the importance of the lobbying efforts of the recording industry, compared with similar efforts put forward by the publishers. It follows that the industry pushing for effective reforms is the industry that can be named the dominant player in the music sector at a given period. The lobbying efforts of publishers prevailed until the Rome Convention. However, the economic significance of the recorded music industry

²²⁴ Ibid 56.

²²⁵ Public Law 92-140, 85 Stat. 391

²²⁶ W H O’Dowd, “The need for a public performance right in sounds recordings” (1994) 31 HarvJ on Legis 249. The power of broadcasters and the importance of the radio are presented in the third chapter.

²²⁷ Art 13, Part 1 “*Authors of musical works have the exclusive right to authorise the adaptation of these works to instruments serving to reproduce them mechanically and the public performance of the same works by means of these instruments.*”

post-World War II alongside its association, come to prove that the music industry gradually became synonymous to the recorded music industry, as lobbying suggests. Moreover, the fact that publishing activities became part of the record company's *key activities*, enables the 'music industry' to come forward as a unified concept. As the *key activities* 'merge', so do the *key resources* they represent in terms of copyright exploitation (mechanical royalties, public performances, and later the protection of sound recordings).²²⁸

Ultimately, in terms of addressing the relationship between copyright laws and the birth of the music industry, it was established that the need to afford copyright protection to the various nascent economic interests in music, led to the creation of the new concept of dealing in music. The music industry's first stakeholders were identified as the publishers, the authors, and the record producers, with the notable absence of performers, who were subject to exclusive contractual relationships instead. Thanks to copyright law, the activities of these stakeholders become linked in the face of a commodified music 'product' that enters an exchange system seeking to generate surplus value in its own market.

In consequence, when it comes to addressing the issue of whether the law influenced the industry or vice versa, the following can be observed: it was showcased that even though individual transactions in music had always been in place thanks to copyright protection (e.g. sheet music), it was through copyright law reforms that an industry came into existence. This is especially important for the recording part of the business that emerged as the predominant 'music industry'.

Of course, from an intellectual property perspective there can be no commodification of music without copyright exploitation. In practice, this means that there can be no industrial interest in music as a product outside the realm of copyright protection from the initial composition of music to the supply of a recording, passing through the publishers' activities. Hence, it becomes clear that the law transformed the individual commercial activities into industries through commodification. From that moment onwards, it was a matter of time before the

²²⁸ The present thesis agrees with Williamson and Cloonan that the 'mainstream' use of the term the 'music industry' is not entirely representative of the various stakeholders and business chapters of the music business. J Williamson and M Cloonan, "Rethinking the music industry" (2007) 26 (2) *Popular Music History*.

separate industries merged, responding to various externalities. This way, the law is seen a platform that fosters innovation in business modelling, entrepreneurship, and overall industrial organisation.

As this chapter has shown, the music industry absorbed ideas and expanded on the technological innovations of the nineteenth century. This comes to satisfy the growth model requirements put forth by Potts and Cunningham.²²⁹ The recording industry grew by adopting novel ideas that occurred in the fields of engineering and by introducing into the aggregate economy the idea of ‘dealing in music’. Additionally, ‘dealing in music’ expanded into dealing in recordings thanks to copyright law. Simultaneously, the supply of hardware (talking machines and similar inventions) got stabilised thanks to the economic interest in music, proving the link between music and adjacent industries. The role of copyright law in this sense has been two-fold: copyright reforms were introduced to promote investment and to facilitate the design of an innovative way of doing business (the business model).

Thus far, Potts and Cunningham’s growth model criteria seem to be satisfied. It appears that this has been the case of the music industries since their inception, justifying the adoption and the call for investment-oriented copyright laws. Accretion of subject matter meant accretion of *key resources* and *key activities*, which translated into a stabilised and sustainable business model. A stabilised and sustainable business model translated into a need for further investment through law. The innovation model enters the picture later, following developments and changes in the business model. It is therefore examined in the forthcoming chapters in order to support the current need for maximisation of competition and innovation in the music industries.

It has been established this far that legal intervention in music-related commercial activities both created and helped expand investment opportunities. However, it has also been shown that the music product as protected by intellectual property, becomes prone to monopolisation by publishers and record producers, culminating in the merging of two to form a single music industry. Further, it was shown that this music industry is designed top-down from the very beginning, with little

²²⁹ Ibid 9.

consumer involvement. In lieu, the recurrent theme of long and exclusive contractual relationships becomes noticed early on.

These patterns followed the industry in the years to come and assisted in the establishment of a dominant business model, which was not ‘questioned’ until the digital era. It follows that the discussion on ‘the birth of an industry’ is neither the time nor the place to address and examine market failures, even though their foundations had been laid (monopolisation, exclusivity, absence of interest for the consumer and the artist). Nevertheless, this does not mean that competition policy design is not justified. Even at this early stage the creation of an intellectual property industry experiencing growth, could have invited relevant policy making, aiming to safeguard the role of the end consumer and to potentially prevent market failures. A ‘hint’ of this was observed with the establishment of the compulsory licensing scheme, designed to ‘break’ monopolies in the product of ‘potentially’ hit music. Noble as this might have been, the industry responded by focusing on the ‘making and breaking’ of superstar artists instead, since these were tied to exclusive contracts. This however, becomes obvious later in history and is addressed in the forthcoming third and fourth chapters.

Additionally, the forthcoming examination of consumer-generated business model change, signalling the need for updated policy making, highlights the relationship between the music industries and their operating business model. In this light, the role of the third chapter is two-fold: the third chapter addresses the business model in-depth and the role of the end consumer therein and evaluates the creation of business model-specific markets for music from the end consumer’s perspective. As supply and demand are addressed in a business model context, the thesis can open the door to the evaluation of the same topics, only this time from the competition authorities’ perspective. Ultimately, parts of this second chapter are being highlighted throughout the development of the thesis, whenever there is a need to understand why and how the competition authorities erred in the assessment of music industry’s practices. Perhaps it would not be out of place to borrow George Santayana’s famous quote “*those who cannot remember the past are condemned to repeat it,*” and apply it to the case of an industry prone to consolidation.

2.4 A timeline of events

1664 German composer includes on the printed edition of his work his disapproval of any unauthorised public performance of his music

1777 UK, in *Bach v Longman* printed music becomes protected by copyright as a form of 'writing'

1790 US, Patents are awarded on federal level

1831 US, Copyright Act 1831 adds printed music to the protected subject matter under federal law

1852 UK, Establishment of the UK Patent Office

1879 US, Gilbert and Sullivan litigation series against unauthorised public performance in *Sullivan v. White* and *Sullivan v. Goulland*

1883 Paris Convention for the Protection of Industrial Property

1884 UK signs the Paris Convention

1886 Switzerland, Berne Convention for the Protection of Literary and Artistic Works

1887 US signs the Paris Convention

1888 US, in *Kennedy v. McTammany* the 'transformation' of his music into piano rolls does not amount to copyright infringement

1889 The first commercially manufactured discs are produced for Emile Berliner, the inventor of the gramophone

1895 Berliner's gramophone enters the home entertainment market

1895 US, Formation of the Music Publishers Association of the United States

1897 US, January 6, Music is protected against unauthorised public performance

1898 Owen and Williams acquire Berliner's patents for Britain and set up the British Gramophone Company, importing machines from Johnson's US factory and discs from Berliner's native German company, Deutsche Grammophon

1899 UK, in *Boosey v Whight* mechanical reproduction does not amount to copyright infringement (also *Newmark v National Phonograph Co* [1907] and *Monckton v Gramophone Co* [1912])

1900 Eldridge Johnson writes to the manager of the UK Gramophone company: "...one of our greatest difficulties has been the proper marking of these records. We never tried before to mark them properly, as if we were making them to sell"

1901 US, in *Stern v. Rosey* the record industry is not found to infringe upon copyright by “transforming” a composition into a record

1904 Columbia records starts providing artist information on its discs

1905 Eldridge Johnson introduces the idea of signing exclusive recording contracts with famous performers of his era “to enhance the reputation of the talking machine by including artistes of celebrity to sing and play into it” (according to the British journal “Talking Machine News”)

1907 Berliner’s disc prevails over Edison’s cylinder as the standard format for the “talking machine”

1908 Berlin Revision of the Berne Convention. Composers are awarded the exclusive right to control the mechanical reproduction of their compositions (Article 13)

1908 US, the mechanical reproduction issue reaches the Supreme Court in *White - Smith Music Publishing Co. v Apollo Co*, and composers are denied exclusive rights in mechanical reproduction

1909 ‘His Master’s Voice’ is used for the first time, as the trademark on the Gramophone Company’s discs

1909 US, Copyright Act 1909 introduces mechanical licensing

1911 UK, Copyright Act 1911 adds music to the protected subject matter

1911 UK, Formation of the British Performing Rights Society (PRS)

1914 US, Formation the American Society of Composers, Authors and Publishers (ASCAP)

1914 Victor’s (Berliner’s and Johnson’s company) patent expires and more competitors enter the market for the supply of machines

1917 Background music in restaurants is found to be protected by copyright, as per the Supreme Court in *Herbert v. Shanley*

1924 The player piano industry enters the business of marketing the music rather than the music reproducing technology

1929 The phonogram becomes a standard appliance for the average US and British household by the end of the 1920s

1933 Rome, Formation of the International Federation of Phonograms Producers (IFPI)

1949 The Gramophone is the last publication to start categorising record reviews by artist rather than by record company (Sound Wave magazine started using this format in 1941)

1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations

1963 UK signs the Rome Convention

1971 (Geneva) Phonograms Convention in October 1971

1971 US implements the (Geneva) Phonograms Convention

1988 US becomes a signatory to the Berne Convention

CHAPTER III

3 *'Moving Pictures': Examining Old and New Business Models, and the role of the End Consumer in the Music Industries*

*"Now that ain't workin' that's the way you do it
you play the guitar on the MTV
that ain't workin' that's the way you do it
money for nothin' and your chicks for free"
Dire Straits, 1985*

3.1 *Introduction*

The previous chapter presented how copyright laws in the US and on international level, led innovation in the face of turning an exchange system for music into an industrial activity. It was posited that without advancements in copyright, the music business would not have been able to turn into a music industry evolving around the supply of an intellectual property product for music. The purpose of the present chapter is to further the argument and shed light into the creation of the market for music where this business model operates, firstly from a *business reality* perspective. Therefore, the present chapter considers the establishment of the 'old' or dominant business model of the music industry and the business model evolution that followed.

As such, the chapter aims to explain the relationship between a business model and the creation of product markets for music. Are there new markets for music being created following the changes in business models and if so, what is the role of the consumer therein? By answering this research question the thesis advances with the evaluation of what constitutes a product market for music, both in business or commercial reality and in competition law terms. The research acknowledges that relevant product market definition as conducted in competition analysis is a distinct concept from the market as defined in a business and economics context.²³⁰ Moreover, even in the context of competition analysis, a relevant product can derive

²³⁰ P Massey, "Market definition and market power in competition analysis: some practical issues" (2000) 31 (4) *The Economic and Social Review* 309-328.

among several candidate markets argued by the parties or it can be by-passed altogether in case of differentiated products.²³¹

The extent to which such a distinction alienates the concept of the competition law market from commercial and business reality even further, is subsequently investigated and presented in the forthcoming chapters of the thesis: to what extent can competition law overlook this reality and at what cost (e.g. reduced welfare)? This question assists in the evaluation of the markets formed in the music industries following the consumer-led changes of the past fifteen years (file-sharing scenarios and beyond). It is posited that consumer-led business model changes are associated with demand responsiveness and demand elasticities; thus, they are relevant in a competition law scenario.²³²

To examine the above, this chapter follows directly on the narrative style of the previous one. However, its focus is no longer the intellectual property law presentation of the birth of an industry.²³³ Rather, focus lies with attesting the establishment and the stabilisation of the dominant business model, which translates into a specific market in a business reality sense.

While doing so, the present chapter adopts the following methodology: pursuant to the theme and the structure of the overall thesis, this chapter consults business model, marketing, and broader business studies literature, in order to provide an accurate picture of the music industry, as studied in academic research. This part of the chapter examines how academic areas that study the industry *per se* appreciate its dominant traits and characteristics and how they evaluate the roles of consumers and producers. Borrowing from marketing research, the thesis estimates how the

²³¹ G Niels, H Jenkins, and J Kavanagh, *Economics for Competition Lawyers* (2011) 47.

²³² Cross-price elasticity of demand for defining a relevant market was introduced for the first time in the US in *Times-Picayune Publishing Co. v. United States*, 345 US 549 (1952).

²³³ Referring to the creation of an industry (and of a business model) as ‘innovation through the law’ helps justify the policy-making arguments further, as per the examination of the creative industries and their role in the aggregate economy, in J Hartley et al., *Key Concepts* (n 15).

offering called to reach a consumer is identified and what channels the producers utilise.²³⁴

The examination is enhanced by an evolutionary approach vis-à-vis the music industry that places business literature into perspective. Hence, from a historical point of view, the presentation of the industry continues with the era pursuant to the Second World War, as the aim is to present the expansion and the globalisation of an industry organised around a successful business model, responsible for the supply of a homogeneous product. Indeed, the industry's dominant model was able to internalise consumer demand in niche genres and re-configure them as 'popular' or 'hit' music via the relevant distribution and marketing channels.

As justified by the narrative of this chapter, focus lies with the US competition authorities, due to the lack of material from the UK and, naturally the EU (an analysis from an EU perspective is incorporated later in the thesis). Furthermore, market definition following the widely used hypothetical monopolist test as an intermediary step in competition analysis, had not been introduced at the time investigated (when the dominant business model was established).²³⁵ As such, the analysis develops on a conceptual level attempting to compare the business practices of each given time examined against more current notions of market definition.²³⁶

In broader terms, the thesis acknowledges the constraint placed by the limited amount of primary material available in competition law in the first years of the music industry. This is a direct result of the lack of a priori regulation and a posteriori intervention into the industry, perceived as a branch of either the

²³⁴ According to the American Marketing Association "*marketing is the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large*" (Approved July 2013), available at <https://www.ama.org/AboutAMA/Pages/Definition-of-Marketing.aspx>. It is of interest to note how Marketing research distinguishes between products and services, and opts for the broader term 'offering' when it comes to official definitions. It is also of interest to note how what constitutes an offering results from the perceived value attached to it by various stakeholders (not restricted to consumers).

²³⁵ The hypothetical monopolist test was introduced by the US Department of Justice 1982 Merger Guidelines and has subsequently served as the basis for market definition in other jurisdictions, including the EU.

²³⁶ This analysis will not be jurisdictionally tied, but will try to evaluate the economic principles behind the legal framework as in G Niels et al., *Economics* (n 231).

communication or the feature film industries in the US, but for the few instances addressed in the present. At this stage of the analysis, these instances include the payola scandals and the impact the authorisation of new radio stations by the US Federal Communications Commission in 1947 had on the industry. Indeed, the only significant antitrust investigation into the matters of the record companies initiated in late 1950s,²³⁷ is thoroughly analysed in the fourth chapter.

It should also be noted that the majority of the sources on the history of the industry remain US and UK focused.²³⁸ Nevertheless, this does not pose a major constraint on the present thesis, as its focus lies with the investigation of the ‘majors’ of the music industry that have been expanding on a global level since its establishment.²³⁹ Currently only ‘Big Three’ players remain in the music industry,²⁴⁰ two of which are American corporations and the third one is American-French (Universal). In any event, the primary material investigated in the subsequent chapters derive from the US, the UK, and the EU jurisdictions, which therefore provide the appropriate geographical ‘boundaries’ for the thesis (whilst the German background of BMG is acknowledged, emphasis is placed on these jurisdictions for competition maturity and industrial development reasons).²⁴¹

Subsequently, as the historical timeline evolves, this chapter proceeds with the investigation of consumer-led changes in the business model of the music industry, following the induction in the digital era. The aim is to identify the new-found role for the end consumer of music and assess new patterns of consumption, based on product substitution on the demand side. As this chapter reveals, the relevant literature until the digital era focused mainly on the supply side and demand appears to be of lesser importance.²⁴² Most of the material consulted analyses industrial behaviour and organisation supply-side, whereas the end consumer of

²³⁷ Columbia Broadcasting System, Inc., and Columbia Record club, Inc., Petitioners, v. Federal Trade Commission, Respondent, 414 F.2d 974 (7th Cir. 1969). Again, this investigation was undertaken before the hypothetical monopolist test.

²³⁸ See e.g. B Southall, *EMI Records* (n 124).

²³⁹ Namely, Sony BMG, Columbia Record Club, Universal, EMI, Warner, as well as Live Nation Entertainment, a new and emerging yet different type of ‘major’.

²⁴⁰ Universal Music Group, Sony Music Entertainment, and Warner Music Group at the time of writing.

²⁴¹ Case No COMP/M3333 *Sony/BMG* OJ 2005 L62/30.

²⁴² See R Burnett, *The Global Jukebox, The International Music Industry* (1996).

music appears neglected. This constitutes a very interesting observation as in market definition for competition law purposes, it is the demand side that leads the relevant analysis.²⁴³

The research conducted identified relevant literature on the consumer demand side for music only after the dominant business model was challenged. An example of this is consumer migration from the recording to the live music product, which is addressed explicitly towards the end of the chapter. Additionally, another instance of new-found interest in researching the consumer *per se*, is the introduction of ‘consumer value co-creation’ in the field of marketing. This concept relates to the Building Block of value proposition, as it allows for “*customised products and services, while still taking advantage of economies of scale.*”²⁴⁴ Indeed, this concept has been investigated in relation to the music industries post file-sharing.²⁴⁵ Even though not part of the present thesis, it is mentioned to highlight that the consumer becomes indeed relevant in *business reality* terms.

A question that stems from such observations would be: to what extent can the consumer assign value to differentiated products for music? And subsequently, what consequences can such behaviour have on the way product markets are perceived and shaped, if any?

In light of the above, the structure of the present chapter evolves as follows: following the historical timeline established in the previous chapter, the current chapter proceeds with the examination and the presentation of the music industries following the Second World War. As such, the establishment of a dominant business model is presented alongside an examination of the product market for music as perceived in a *business reality* context. In the forthcoming chapters, this context will

²⁴³ As demand-side substitution is the most immediate constraint producers face “*Customers are generally quicker to vote with their feet if they are unhappy,*” as per Niels et al. (n 231) 31.

²⁴⁴ *Business Model Generation* (n 21) 23. Indeed, *value proposition* refers to what Alexander Osterwalder describes as the *offer* to consumers on the canvas of his presentation (n 52).

²⁴⁵ See H Choi and B Burnes, “The internet and value co-creation: the case of the popular music industry” (2013) 31 (3) *Prometheus* 35-53.

be compared with the concept of the relevant product market as introduced by the competition authorities, on which the thesis focuses.²⁴⁶

The aim is to establish the theoretical framework applied to the subsequent chapters of case analysis: does the existence of a specific business model signify the existence of a specific product market? And if it does, is this specific product market a market that would and could be identified by the relevant competition authorities, were they called to assess competition in it?

In addressing the above, the present chapter reconfigures the validity of the business model as presented by Alexander Osterwalder. It is posited that indeed, the music industry appears centred around the provision of the product defined as ‘hits or wannabe hits’ or ‘hit music’. Further, this chapter examines how this business model sustains an omnipresent and powerful oligonomy that creates a bottleneck around the product’s distribution, acting as its gatekeeper. The chapter proceeds with emerging business models initiated by consumer demand patterns and ends with an assessment of business model creativity and innovation. By the end of the chapter the reader becomes familiar with the established *oligonomic* business model and with the issues brought forward by alternative consumption patterns following the digital era; issues that need to be addressed in a competition scenario, as the two subsequent chapters demonstrate. Overall, this chapter acts like a canvas for the substantive legal chapters to follow in the second part of the thesis.

3.2 *The old business model of the music industry*

3.2.1 *The record company and its dominant business model: towards the creation of an oligonomy for the supply of music*

As stated earlier, according to the business model theory, *revenue streams* are tied to specific *customer segments*, which are presented with specific *value propositions*. *Revenue streams* represent the way that customers are paying for what is being

²⁴⁶ Even though in the present chapter the employment of competition law literature focuses on the underlying economic principles, jurisdictional differences of relevance are flagged along the way.

provided. The provision of music was in the hands of record companies and publishing houses, whose activities got closer thanks to a series of legislative reforms, as examined in the second chapter. Hence, the supply of recorded music becomes more relevant, as record players become omnipresent in households, surpassing player pianos by the 1930s and leading to an increase in demand for recordings rather than for sheet music. As the market for records grew, the power of the record companies grew alongside it, making these companies the most important players in the market for music.

The present sub-chapter deals with the establishment of a successful business model for this industry. It is shown how this business model results in an *oligonomy* of a few major players, who act as the gatekeepers of the music product, by remaining able to absorb disruptive forces threatening to affect their market share. As these forces get internalised, they guarantee the oligonomy's longevity. It is posited that the dominant business model sustains the *oligonomic* model of the industry and vice versa.

The term *oligonomy* was coined relatively recently by Steve Hannaford to describe an industry where “*companies act as an oligopoly to one group and an oligopsony to another*,”²⁴⁷ which translates into a simultaneous buyers' and sellers' market. Hence, this concept is subsequently employed to refer to the gatekeeping function of the major firms in the music industry, since they operate as an oligopoly to the mass audience, the end consumers of the homogeneous product that is popular or hit music and as oligopsony to the artists seeking exposure. The existence of this market phenomenon is a direct result of the industrial organisation identified in the previous chapter and it becomes intensified by the merger between publishing and recording activities under the same corporate umbrella. Indeed, copyrighted content appears on Osterwalder's canvas as the major *key resource* of the majors' business model, whereas the end consumer is being referred to as the mass market, bringing the business model canvas in line with Hannaford's oligonomy.²⁴⁸

²⁴⁷ S Hannaford, “Both sides now” (2005) March Issue Harvard Business Review, available at <https://hbr.org/2005/03/both-sides-now>.

²⁴⁸ Osterwalder's presentation (n 52).

The industrial ecology surrounding this oligonomy and the impact it has on the provision of music in the aggregate, is subsequently presented herein; in order to identify its size and impact, it is important to take a closer look at the structure of its key players (the gatekeepers themselves) and their ability to develop and sustain their oligonomic position. For this reason, disruptive forces in the market for music are presented alongside the oligonomy's business model evolution.

The examination focuses on the 1950s as a period in history when the major record companies were 'forced' to deal with the emergence of a new sound and a new demographic and target audience (rock'n'roll music and teenagers). This era is significant, since it boosted the majors' ability to establish their dominant business model in a manner flexible enough to accommodate trends, foresee them, and market them through linear top-down marketing channels. Moreover, this exploration enables the characterisation of the music industry as an oligonomy, the sole purpose of which is the continuation of its dominance.

Prior to the 1950s, the popular music industry in the United States was dominated by four big record companies (RCA Victor, Columbia, Decca and Capitol).²⁴⁹ Subsequently, the market for recorded music can be characterised as highly concentrated supply-side, with the 'Big Four' firms releasing 81 percent of all records appearing in the weekly top-ten hit list from 1948 to 1949.²⁵⁰

The high levels of concentration in the recorded music market were sustained thanks to vertical integration, and more specifically, thanks to the control of distribution and retail channels and thanks to the establishment of strong affiliations with the dominant national radio stations, as well as with the Broadway theatrical scene and the Hollywood film industry.²⁵¹ As seen in the second chapter, the story of vertical integration dates back to the very beginning of the record industry and is apparent throughout its history and evolution: for instance, EMI (Electric and Musical Industries) was the result of a merger between recorded sound and electrical goods companies, Warner Music was formed when Warner Brothers Pictures purchased the Brunswick record label, and Universal was a by-product of

²⁴⁹ P Lopes, "Innovation and diversity in the popular music industry, 1969 to 1990" (1992) 57 *American Sociological Review* 56 -71.

²⁵⁰ R Peterson (n 113).

²⁵¹ *Ibid.*

Universal Pictures.²⁵² Once again, the role of technology behind the recorded music industry is clear, as is the need of firms operating in adjacent industries to internalise costs. As a result, these four dominant firms in the late 1940s presented the market with a homogeneous product, aimed at appealing to a target audience, which was treated as the homogeneous market for big-band, swing, and “*white non-offensive*” music,²⁵³ as presented at the beginning of the thesis.

Peterson explains that this dominance was easy to maintain for a number of era-specific reasons. These include the existence of long-term contractual relationships with composers and lyricists of hit music (even since the time of the player piano, as Aeolian had also engaged in the practice), the distribution of 78 shellac records, which were costly to manufacture and distribute nationally and thus, automatically excluded independents from successfully entering the distribution market; and the nature of the recorded material itself that fitted the national radio broadcasting requirements of the time. Indeed, there is no documentation of phonograph records being played on air prior to the 1950s and hit music was performed on air by the studio’s live band instead. This raised and sustained the demand for music that could be easily reproduced in the studio and performed during the designated music shows, such as the early morning ‘breakfast’ shows and the lunch time ‘homemaker’ shows.²⁵⁴

These characteristics suggest not only that the oligopolistic nature of the recorded music industry sustained its dominance on the supply side, but also that nothing was foreseen to replace this standardised conventional and studio-friendly product. In that regard, it becomes apparent that high concentration in the supply of recordings promoted and sustained a homogeneous outcome, with little room for sound diversity.

Peterson and Berger have argued that homogeneity and standardisation are characteristics of high market concentration and that the drastic changes in the market for popular music in the late 1950s (and later in the early 1960s) were a consequence of the entry of new players (suppliers) and the subsequent low

²⁵²K Negus, *Music Genres and Corporate Cultures* (2006) 37-45.

²⁵³ R Peterson (n 113).

²⁵⁴ Ibid.

concentration of the market.²⁵⁵ Even though their results have been questioned, as a number of alternative reasons that led to the lower concentration of the market have been taken into account,²⁵⁶ it remains undisputed that the market was indeed highly concentrated and that there has been a tendency towards high concentration ever since.²⁵⁷

Thus, despite the fact that the music scene at the time appeared more or less standardised and targeted towards the continuous consumption of a homogeneous product, a series of technological, legislative and industrial changes influenced the demand for alternative musical genres, laying the path for the introduction of niche sounds into the ‘mainstream’.

In other words, according to the 9 Building Blocks, the business model of the recorded music industry at that stage appears as follows: *key partnerships* were formed via vertical integration and thanks to the control of distribution and other promotional channels (radio, Broadway, Hollywood). *Key activities* relied on the supply of recorded music in 78 shellac format. Costs were controlled and sustained thanks to the establishment of solid partnerships and were easily calculated thanks to the prevalence of specific recording formats. The above led to the *offer-ing* of a standardised product to a non-segmented market and enabled the last Building Block of customer relationships to be left unattended or even neglected altogether.

Consequently, this dominant oligopoly for recorded music did not cater for the needs of niche markets that consisted of teenagers, young adults or African-American buyers. Several of these categories were satisfied by labels (branches) of the majors, dedicated to jazz or country music like the Columbia-owned Okeh label.²⁵⁸ The existence of different labels catering for different needs within the same company, has always been in line with the prioritisation of the homogeneous market, consuming the homogeneous product, as promoted through a network

²⁵⁵ R Peterson and D Berger, “Entrepreneurship in organisations: evidence from the popular music industry” (1971) 10 (1) *Administrative Science Quarterly* 97-107, and same authors, “Cycles in symbolic production: the case of popular music” (1975) 40 (1) *American Sociological Review* 58-73.

²⁵⁶ P Lopes (n 249).

²⁵⁷ Note how the number of the major record companies throughout the history of the recorded music industry has remained relatively stables, always moving in cycles of consolidation.

²⁵⁸G Marmorstein, *The Label, The Story of Columbia Records* (2007) 75

oligopoly of homogeneous channels (e.g. the radio). As a matter of fact, when patents and awards were removed from the labels of recordings and information about the composer and the music started being provided instead, record companies introduced colour-coded labels to explain the genre of music recorded on the disk (classical, country etc.).²⁵⁹ The second chapter presented, however briefly, that this market segmentation enables the oligonomy to foresee and internalise the popular sound. This however, comes as a result of the changes presented in the present chapter.

Indeed, a series of events shifted the balance in favour of the thought-to-be ‘niche markets’, also considered as ‘outsiders’ by the major record companies.²⁶⁰ It should be born in mind however, that these markets had always existed, even though the major record companies refused to openly satisfy them and include them in their top-down marketing strategies for the provision of popular or hit music.²⁶¹ As a result, these markets received little centralised attention. More specifically, Columbia’s Mitch Miller, the company’s ‘gatekeeper’ and notorious rock’n’roll opponent, refused to permit “*any three-chord nonsense from slipping through.*”²⁶² During a CBS stockholders’ meeting in 1957, stockholder and songwriter Gloria Parker demanded the network’s divestiture of its BMI interests as it promoted “*this rock’n’roll junk which is creating juvenile delinquency.*”²⁶³

In any case, the demand for a different music genre (rock’n’roll) grew bigger in the mid-1950s, and therefore greater diversity was apparent in the mainstream music charts. Even though Columbia did not succumb to rock’n’roll until Bob Dylan was signed to Columbia’s CBS label,²⁶⁴ DECCA was behind the hit singles by Bill Haley and His Comets “*Rock around the clock*” and “*Shake Rattle and Roll.*”²⁶⁵ Smaller independents entered the market for the new genre since its very beginning. Atlantic Records for instance, which had been present in the niche markets for rhythm and

²⁵⁹ P Lopes (n 249)

²⁶⁰ In Marmorstein (n 114) “*through the summer of 1954 Columbia’s top selling records belonged to Clooney... Doris Day... and Liberace.*”

²⁶¹ R Peterson (n 113).

²⁶² Marmorstein *The Label* (n 114) 229.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ See Allmusic archives entry for Rock Around The Clock

<http://www.allmusic.com/song/were-gonna-rock-around-the-clock-mt0011724585>.

blues and jazz since the late 1940s,²⁶⁶ was the first record company to produce the charting rock'n'roll single "*Shake Rattle and Roll*" in 1954 (in its original version as recorded by Big Joe Turner).²⁶⁷ Another prominent example was Sam Phillip's famous Sun Records, formed in the early 1950s, which was responsible for the success of most major rock'n'roll recording artists, including Elvis Presley and Johnny Cash.²⁶⁸

These examples come to show that it was not the presence of numerous suppliers that created the demand for a new genre and promoted diversity, as Peterson and Berger have argued among others.²⁶⁹ The major record companies at the time, described as 'deaf' to the demands of music fans (demand-side), took advantage of the nascent interest in 'new' music only around the mid-1950s. It also appears that for a number of coincidental reasons, the market itself was ready to expand on both the supply and the demand side.

These reasons relate to several distinct characteristics of the era and can be summarised as legislative, technological, industrial, organisational as well as occupational career and market facets.²⁷⁰ Richard Peterson analyses several factors and compares the years 1948 and 1958, in order to justify the advent of rock music. Serge Denisoff and William Romanowski 'de-romanticise' the birth of rock'n'roll, traditionally seen as the revolution of a generation.²⁷¹ In summary, it is worth analysing these factors to examine the birth of new demand for music, as this can help understand current industrial practices through a historical lens. In a nutshell, as demand showed evidence of diversification, the industrial response was to internalise and market the sound in demand through the already established lines,

²⁶⁶ See Allmusic entry for Atlantic's founder A Ertegun <http://www.allmusic.com/song/were-gonna-rock-around-the-clock-mt0011724585>.

²⁶⁷ For Big Joe Turner <http://www.allmusic.com/artist/big-joe-turner-mn0000060726>.

²⁶⁸ For Sam Phillips "*not just one of the most important producers in rock history*" <http://www.allmusic.com/artist/sam-phillips-mn0001197138>.

²⁶⁹ R Peterson and D Berger (n 255) 1975 and E Rothenbuhler and J Dimmick, "Popular music: concentration and diversity in the industry, 1974-1980" (1982) 32 *Journal of Communication* 143-47.

²⁷⁰ R Peterson (n 113), M Percival, "Music radio and the record industry: songs, sounds, and power" *Popular Music and Society* (2011) 34 (4) 455-473.

²⁷¹ S Denisoff and W Romanowski, "Katzman's 'Rock Around the Clock': a pseudo-event?" (1990) 24 (1) *The Journal of Popular Culture* 65-78.

thus reinforcing the notion of the homogeneous product. Even though musically diverse, the product remains the same: the hit record.²⁷²

Peterson in his comparison starts by referring to the copyright and patent regimes at the time. In copyright territory, ASCAP had been responsible for the collection of public performance royalties since its formation in 1914.²⁷³ By the 1930s only music licensed by ASCAP could be heard, performed, and played on the radio, in films, and in Broadway productions.²⁷⁴ As a result, until the 1950s all music reaching the public ear was controlled by an oligopoly of just eighteen publishers.²⁷⁵ Eventually, ASCAP's reign proved short-lived as the rival collecting society BMI (formed in 1939) recruited publishers and artists that represented music genres belonging to the niche markets of rhythm and blues and country.²⁷⁶ This transition from monopoly to duopoly in the field of collecting societies enabled the exposure of a series of artists representing the sounds on which rock'n'roll was based.²⁷⁷

The importance of patent law lies in the inability of Columbia and RCA to reach a consensus for the establishment of an industry standard for a high-fidelity long playing record made out of a resistant material.²⁷⁸ Only through government mediation did the majors agree to pool their patents in order to reach an agreement, allowing them to manufacture both long playing (LP) and 45-rpm records.²⁷⁹ In other words, what was on 'offer' was beginning to change both externally (design and material) and in context (popular music, rhythm and blues, country, or a mixture thereof). The fact that the new recording format was more resistant, ironically called the 'unbreakable',²⁸⁰ and easier to store and ship than the previously

²⁷² Osterwalder's presentation (n 52).

²⁷³ More on the early days of ASCAP and BMI at J Ryan, *The production of Culture in the Music Industry: the ASCAP-BMI Controversy* (1985).

²⁷⁴ More in R Sanjek, *American Popular Music and its Business, Volume 3, From 1900 to 1984* (1988).

²⁷⁵ R Peterson (n 113) 99.

²⁷⁶ Ibid.

²⁷⁷ For-profit SESAC was formed in 1930 and it originally represented the interests of European composers in the US, hence the name "Society of European Stage Authors and Composers". It started expanding its approach in 1960 and as such, it is excluded from the narrative at this point. More at <https://www.sesac.com>.

²⁷⁸ R Peterson (n 113) 100-101, more at G Marmorstein, *The Label* (n 258), R Metz, *CBS: Reflections in a Bloodshot Eye* (1975).

²⁷⁹ R Peterson (n 113) 100.

²⁸⁰ Ibid.

dominant shellac, enabled the market to expand, since more independent distributors entered on national level, meaning more distribution channels were available for the new products.²⁸¹

The last pivotal legislative factor mentioned by Peterson is the increase in the number of licensed radio stations in the US. In 1947, the US Federal Communications Commission (hereafter FCC) authorised a number of applications for new radio stations, leading to an increase of even 100 percent in certain geographical markets within the US; it should be noted that the number of radio stations per geographical market prior to 1947 was limited to three or five large corporate networks, with very few independent radio stations in operation.²⁸² As stated previously, the daily programme of these radio stations relied solely on live studio performances of hit music. Apparently, the smaller newcomers were incapable of hiring big bands for their daily programme, leading them to air pre-recorded music for the first time in radio history. Coincidentally, distribution of recorded music had just become cheaper and easier. From that moment, the relationship between the radio and the recorded music industry changed dramatically. It was only a few years prior to these developments that the radio was considered a competitor to the record, based on the assumption that the radio enabled the free consumption of music.²⁸³

Ironically enough, this interrelation between technology and the entertainment industries does not appear to have changed much, as technology gets ‘accepted’ by content providers only once its value has been consolidated. Prominent examples of this include the rivalry between television broadcasters and the VCR and more recently, the rivalry between the oligonomy and the internet.

For instance, Liebowitz wrote in 2004:

“it is common in literature, particularly in the popular press, to encounter the claim that copyright owners always cry wolf when a new technology approaches to threaten the old, only later to discover that the new technology was nothing short of a bonanza. This claim implies that foolish copyright owners

²⁸¹ Ibid.

²⁸² R Peterson (n 113) 103. More information at C Sterling and T Haight, *The Mass Media: Aspen Institute Guide to Communication Industry Trends* (1978). The deregulation following the 1996 Telecommunications Act follows in the next chapters.

²⁸³ M Percival (n 270).

misunderstood the new technology and were fortunate enough to have been thwarted in their attempts to restrict the new technology.”

The commercialisation of the VCR was met with heavy criticism by television broadcasters, as they feared that it would have a negative impact on their ability to sell advertisement.²⁸⁴ Similar reactions to technology are evident in the 1980s and the 1990s, following the introduction of the digital audio tape (DAT), the MiniDisc, and the digital compact cassette (DCC) that appeared to threaten the industry’s preferred format (CD).²⁸⁵

In the present case, apart from the introduction of the new recording formats to the market, another technological development ‘pushed’ the market in the mid-1950s: the lightweight, cheap and portable transistor that enabled young adults and teenagers (*customer segments*) to keep in touch with their favourite music everywhere they went.²⁸⁶

As far as the radio and the record companies are concerned, symbiosis is not the ideal word to describe their relationship, as they do not appear to belong to the same level of the supply chain for music. This can be concluded by examining the 9 Building Blocks: the record is what a record company has on offer (the product), whereas the radio falls under *channels*, with which *key partnerships* should be created.²⁸⁷ As already explained, establishing close relationships or even controlling *channels* and *partnerships*, is vital for the sustainability of a business model. As such, a close relationship with the radio was vital for the viability of the oligonomy.

At first, an increase in the number of radio stations dedicated to the repetition of the trending rock’n’roll sound as favoured by teenagers and produced by independent record companies, was not taken light-heartedly. Having lost three-quarters of their market share by the late 1950s, the majors were aware that in order to regain control of the market, they had to control what was played on the radio, as well as adjust (or

²⁸⁴ S Liebowitz, “The elusive symbiosis: the impact of radio on the record industry” (2004) 1 (1) Review of Economic Research on Copyright Issues 93-118.

²⁸⁵ This matter is addressed further on in the present chapter introducing the industry’s reaction to such disruptive forces (in comparison with the digital era).

²⁸⁶ R Peterson (n 113) 102, E Eisenberg, *The Recording Angel: The Experience of Music from Aristotle to Zappa* (1986).

²⁸⁷ *Business Model Generation* 26-27.

succumb) to the demands of this new market and offer new music genres in their catalogues.²⁸⁸

As far as the relationship with the radio is concerned, it naturally follows that whoever controls what is played on the radio, can foresee a subsequent rise in market share. This became evident during the notorious payola scandals that brought the relationship between record companies and the radio under investigation by the House Legislative Oversight subcommittee of the Commerce Committee in 1960.²⁸⁹ As regards the accumulation of music genres formerly considered niche but growing in popular demand nonetheless, the majors either acquired the recording contracts of popular rock artists such as Elvis Presley, or invested in their own A&R activities in search for the next rock'n'roll superstars.²⁹⁰

These activities resulted in the majors re-acquiring their dominance and by the beginning of the 1970s the scene was set for the multinational conglomerates to emerge: at the beginning of the 1960s, record companies became “*professional in their management style*” and even more “*dominated by lawyers and accountants.*”²⁹¹ This comes as a direct result of a combination of factors such as the promotion of music via the radio and the juke box, the dominance of the LP format, the popularity of rock'n'roll and other formerly considered as niche sounds, changes in demographics, as well as promotional support from live music performances.²⁹² As mentioned previously, the majors' ability to absorb sounds and artists originating from independent labels and niche genres, highlights not only the existence of powerful players in the supply of music, but also the existence of a business model that supports them. This trend continued all the way up to the 1970s and the 1980s, as disco, funk, heavy metal, and punk musicians entered the majors' rota and reached the market via the established corporate route. At the same time, companies

²⁸⁸ R Peterson (n 113) 108, S Chapple and R Garofalo, *Rock'n'Roll is here to Pay: The History and Politics of the Music Industry* (1977) ch 2.

²⁸⁹ More in Chapple and Garofalo (n 288) ch 2 60-64 (Payola Week). More on payola follows in the fourth chapter.

²⁹⁰ C Anderton, A Dubber and M James, *Understanding the Music Industries* (2013) 27.

²⁹¹ *Ibid* 28.

²⁹² *Ibid*.

dedicated to their own sounds, such as Motown or Atlantic, merged with the majors or were acquired by these few corporate entities.²⁹³

The concentration of power and market share by the majors is evident throughout the history of the music industry. Even though the era following the Second World War was examined in order to showcase disruptive forces in the majors' paths that coincide with consumer choice, it was also posited that disruption can get easily internalised and absorbed by the dominant firms.

According to the ecological theory of competition in the music industry, the smaller independent *specialist* or *peripheral* labels concentrate on the production of niche products, such as the sounds described earlier.²⁹⁴ The opportunities for niche products to be produced and supplied to narrower market segments grow, as concentration increases among the so-called *generalist* firms (coinciding with the major record companies). The outcome is that as the *specialists* gain market share, they become absorbed by the *generalists*, which results in a circle of perpetual innovation and absorption of niche products, or sounds in the present case.²⁹⁵

This ecology points to an industry whereby a dualistic system flourishes, to the ultimate benefit of the few major multinational or generalist firms. Even though there exists space for the establishment of middle-size or middle-tier companies, their existence on single firm level proves short-lived, as their purpose is to supply the majors with sounds, artists, and ideas. This comes as no surprise since the majors possess unprecedented power, evident in their ability to internalise disruptive forces and turn them to profit. The thesis expands on these in the forthcoming chapters, when the perspective of the competition authorities is introduced. It is reminded that the present chapter acts as the background against which the authorities' point of view will be compared and evaluated.

²⁹³ The Sex Pistols joined EMI in 1976, Deep Purple also singed with EMI after the success of their debut album, Atlantic became a subsidiary of Warner in 1967, and Motown 'lost' its independence to MCA in 1988. More at S Frith, "The industrialization of popular music", in J Lull, *Popular Music and Communication* (1992) at 49-74.

²⁹⁴ G Carroll, "Concentration and specialization: dynamics of niche width in populations of organizations" (1985) 90 (12) *American Journal of Sociology* 62-1283.

²⁹⁵ R Burnett, *The Global Jukebox, The International Music Industry* (1996) 79.

3.2.2 *The oligonomy gets established*

This ability to internalise disruption and generate profit appears to be mainly due to the organisation of the industry, to horizontal and vertical integration on firm level, and to the business model built and sustained around the provision of copyrighted material. It is worth repeating that an oligopolistic tendency has always been apparent in the industry, ever since the patent days of the machine manufacturers, highlighting the importance of intellectual property for the expansion and establishment of success, as according to Jack Bishop commenting on the history of the industry, “*property equals power.*”²⁹⁶

Oligopoly aside, the major firms also operate as an oligopsony towards musicians and songwriters seeking recording deals, signalling a market of buyers.²⁹⁷ This double-sided concentration of power seems to favour the prolongation of this favourable to their interests situation and it stems directly from the merger of commercial activities *in* music, as per the previous chapter. In other words, it stems directly from the established business model that called for all commercial activities concentrated under the same corporate umbrella.

It would not be possible but to agree with literature characterising the major firms as “*gatekeepers to the industrialisation process through which music must pass in order to be entered into the global market.*”²⁹⁸ In the aggregate, this oligonomy can tip the scales to its advantage and influence not only the creative output that reaches the market, but also the law that protects its *key resource*: copyright. As per Osterwalder’s canvas, concentrating on copyright as a sole resource has steered the collective efforts of the industry towards its protection by all means, even though competition on firm level for the ‘lion’s share’ can be fierce.²⁹⁹

Indeed, as per the previous chapter, IFPI was created in 1933 as a non-profit organisation registered in Zurich,³⁰⁰ and its US counterpart, the Recording Industry

²⁹⁶ J Bishop, “Building international empires of sound: concentrations of power and property in the ‘Global’ music market” (2005) 28 (4) *Popular Music and Society* 443-471.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ IFPI official website <http://ifpi.org/>, RIAA official website <https://www.riaa.com/>.

Association of America (RIAA) was established in 1951, also as a non-profit organisation.³⁰¹ IFPI's, and most importantly, RIAA's lobbying and litigating efforts have been remarkable, showcasing the existence of an industry with immense power. According to RIAA's website their mission is *"to protect artists and all music creators from the damaging impact of music theft. It's up to all of us to safeguard the creative value of artists' work."*³⁰² Additionally, IFPI is *"campaigning for the rights of record producers: we work to make sure that the rights of our members, who create, produce and invest in music, are properly protected and enforced."*³⁰³

Naturally, both mission statements translate to co-ordinated lobbying efforts aimed at influencing law-making in the US and in Europe respectively. More evidently, as regards the US, RIAA can be seen influencing copyright indirectly through litigation or directly by lobbying Congress.³⁰⁴

There is no need to repeat that lobbying to such an extent signifies impermeable industrial organisation. The argument to be furthered here is actually the existence of a nexus of interests so powerful that justifies the apparent neglect of the Building Block dedicated to *customer segments*. It has already been established that any changes in demand for music from the part of the audience will be encapsulated one way or another by the dominant corporate shape, either through the acquisition of the independent label, or through the acquisition of the famous artist, or even through investment in A&R pursuing a similar sound. If anything, the oligonomy of the major record companies ascertained that this trend would continue in perpetuity.

Thus far, this can be observed not only on the business model canvas, but also in the relevant literature on the production (supply) of popular music investigated directly below. As Robert Burnett explained in 1996, the connections and ties within the *"highly complex systems for the production of (musical) culture - the firms, roles,*

³⁰¹ Other associations include the BPI in the UK (1989), the RIAJ in Japan (1942), and the SNEP in France (1922).

³⁰² RIAA website (n 300).

³⁰³ IFPI official website (n 300).

³⁰⁴ RIAA's members filed numerous lawsuits to combat 'piracy' (including the case against Napster), and RIAA can be found successfully lobbying for the Digital Millennium Copyright Act 1998. Moreover, J Bishop (n 296) accounts for lobbying expenses of up to \$28,861,668 and \$13,373,366 going directly to Congress in 2004, amidst the 'piracy' height.

*structures and processes - are analytically, if not factually, distinct from the system of cultural consumption... The relationships among record producers, artists, marketing, and promotion specialists, trade press and so on, are stronger than the relationships between producers and consumers.”*³⁰⁵

Again, this comes as no surprise given the gatekeeping nature of the majors and the fact that, even on the business model canvas, *customer segments* under this business model appear as the mass market. One of the major changes brought forward in the digital era, is the enhanced and participatory role of the end consumer, a role that had not been investigated during the era presented above.

3.2.3 *The behaviour of the oligonomy: supply and distribution of a product for music to the mass market*

3.2.3.1 *The oligonomy as gatekeepers*

Up until this point, it has been observed that the industrial ecology is built to support the oligonomic model of the few major record companies that are responsible for the production of a homogeneous product, aimed at satisfying the mass market. Furthermore, this homogeneity owes its longevity to the constant absorption of the niche, signalling consolidation. It is worth investigating the oligonomic model further, as this record-company-centred simultaneous buyers' and sellers' market emerges again in the forthcoming chapters on competition analysis and relevant product market definition. It also plays a pivotal part in understanding the 'journey' of the musical composition to the end consumer through the majors' marketing functions, as it is exactly thanks to this process that music becomes a 'product', as per the term used by the labels themselves.³⁰⁶

Adopting a holistic view, Hull has identified three general income streams surrounding music in its broader sense: the recording stream, the publishing stream, and the live stream.³⁰⁷ At the peak of the major record companies examined below, the multinationals integrated the recording and the publishing leg in order to internalise costs, meaning royalties paid to the publishers, who dominated the music

³⁰⁵ R Burnett, *Global Jukebox* (n 242) 69-70.

³⁰⁶ G Hull, *The Recording Industry*, 2nd edn, (2004) 170.

³⁰⁷ *Ibid* 21.

business in its initial formation.³⁰⁸ Live appearances and performances of songs (the live music stream) perform an ancillary function, promoting records and marketing new or established acts. This also supports the argument that the music industry was indeed the recording industry, ever since the merging of publishing and recording activities:

*“while one might argue that the song is the thing because it is included in all three streams, it is really the recording that provides most of the drive for the cash flows in all three streams.”*³⁰⁹

Therefore, for the majority of the music industry’s history, industry and literature focus on the provision of recordings of hit music to the audience, a product so profitable that can guarantee the creation and sustainability of an oligonomy for decades.

Robert Burnett discusses the aesthetic and the material production of the music product (also referring to the recording), highlighting the strong links between several professions involved with the recording directly (artists, studio engineers, song writers, musicians) or indirectly (independent producers, the majors, wholesaler distributors, promotion, concert production, retail sales).³¹⁰ On the antipode, the consumption of music by the end consumer is provided as the weakest link in this figure, encompassing media exposure, concert attendance, peer opinion leadership, listening habits, and gratification.³¹¹ This is of relevance later in the thesis, when consumers declare their presence and their ability to affect these links in a material manner. At this stage however, it becomes evident that the production and the consumption of music are being treated as two distinct areas of interest. Whereas the production of recordings focuses on the industrial and organisational principles encountered in business, the consumption is being treated as a cultural or psychological phenomenon.

The top-down organisation of the music industry, here the majors, allowed for minimal consumer involvement; a pattern that has led to the characterisation of the

³⁰⁸ As explained in the second chapter of the present. Also see Chapple and Garofalo (n 288) ch 1.

³⁰⁹ G Hull, Recording Industry (n 306) 21.

³¹⁰ R Burnett (n 242) 71.

³¹¹ Ibid.

music industry as a *mass medium*, since recordings are produced and distributed symbolically to wide audiences that, albeit representing diverse tastes in music, are treated as the mass market. The existence of multiple technologies and methods of dissemination, the low degree of regulation (as well as the haphazard effect that regulation has had on the music industry), the high levels of internalisation, the diversity of reception possibilities, and the existence of gatekeepers, have all contributed to these mass communication attributes, according to McQuail.³¹²

As with traditional mass media (broadcasting and the press), the music industry as represented by the majors, is dedicated to fierce market share competition for audience.³¹³ This of course translates into fierce competition for the production of hit records. Despite the co-ordination for lobbying (e.g. the establishment of IFPI and RIAA), the existence of well-tuned industrial practices (e.g. marketing strategies), and the almost identical firm-level organisational structure among the majors (part of the industry's business model), the members of the oligonomy have faced limited, compared to their power, interest by the competition authorities, and most importantly, by the US antitrust investigators that have failed to reduce the majors' influence over the years. The forthcoming chapters will show that the go-to justification for this, is exactly the mass medium attribute of competition for the lion's share. Nevertheless, this tells us nothing about the role of the end consumer and the promotion of welfare.

However, at this point it is important to note the existence of one ex ante and one ex post attempt to legal intervention, aimed at fostering competition in the market for hit music; the compulsory licensing system introduced with the 1909 US Copyright Act (also in the previous chapter) and the extensive payola investigations in late 1950s. These two examples of legal intervention in the music industry deal with the oligonomic nature of the majors and highlight the gatekeeping function of both the

³¹² D McQuail, *Mass Communication Theory*, 3d edn, (1994) 20. McQuail discusses gatekeeper theory in relation to both the radio and the record companies themselves, since they control the 'gates' the songwriter/artist must pass to reach the audience.

³¹³ The omnipresent 'lion's share'. This form of competition is repeated throughout the investigations presented in the forthcoming chapters, as the justification of the pro-competitive environment the music industry enjoys. The thesis questions the welfare enhancing effects of this type of competition.

majors and the radio stations as per McQuail, as well as the existence of a market for the provision of hit music.

Indeed, the need to legislate for (potentially) hit music to be ‘shared’ equally through copyright law, proves the existence of a single product that can be subjected to monopolisation directly. Bringing this analysis closer to its legal dimensions, it should be noted that in a competition law context, a market is indeed something worth monopolising,³¹⁴ a premise that forms the basis of the introduction of the hypothetical monopolist test in market definition.

Nevertheless, the compulsory licencing system instead of hindering the majors’ route to dominance, enabled them to re-brand niche genres on the verge of popularity, and market them to the mass market, a practice evident in the 1950s with rhythm and blues and country music:

*“the thinking of both the Victor and Columbia heads... is that if is this was what the kids wanted, this was what they were going to get.”*³¹⁵

This quote further supports the view that the major record companies acted as gatekeepers of music, as it was in the songwriters’ best interests to profit from the majors’ distribution system and general exposure techniques, such as the notorious payola scandals. What this outcome further highlights, is the inability of such legal intervention through copyright law to regulate a gatekeeping oligonomy efficiently. A more targeted and dedicated approach appears to be necessary, should the aim be to target concentration in the industry, as attempted by the payola investigations that follow.

Interestingly enough, payola did not constitute an offence at the beginning of the industry. Rather, it was a well-established way of seeking exposure and strengthening ties with the stronger gatekeepers of the relevant dominant industry: Gilbert and Sullivan were also paying money to get their hits played as far back as the 1880s, according to Chapple and Garofalo.³¹⁶ According to the same authors, in the publisher-dominated days of Tin Pan Alley, payola was paid to bandleaders and

³¹⁴ *“In other words, so the logic of this methodology goes, a market is something worth monopolizing”* in Niels et al., *Economics* (n 231) 38.

³¹⁵ As reported in *Billboard* magazine in 1955, in Chapple and Garofalo (n 288) 35.

³¹⁶ *Ibid* 66.

lead singers in order for musical compositions to attract the interest of the audience/purchasers of sheet music.³¹⁷

In the era coinciding with the dominant recorded music industry however, the most important exposure was the one the radio had to offer. It is not a coincidence that payola investigations were initiated as a result of ongoing legal battles between collecting societies ASCAP and BMI, namely the antitrust lawsuit brought against BMI alleging a conspiracy to “*dominate the market for the use and exploitation of music composition.*”³¹⁸ ASCAP used the legal route to ensure the longevity of a business that had tuned its focus upon music recordings, a model that BMI was familiar with and had sought to embrace since its incorporation in 1940.³¹⁹ The congressional payola investigations of 1959-1960 resulted in scandals surrounding famous rock’n’roll DJs taking the ultimate blame for commercial habit of over 50 years. Further, it signalled a new era in commercial radio programming through the role of the station’s program director, who would handle all the ‘transparent’ communications with the record companies’ personally and who would be ultimately responsible for the ‘sound’ of the radio station (rock, country, rhythm and blues), a format that still prevails in commercial radio to some extent.³²⁰

From a legal standpoint, payola became a federal criminal offence in 1960, described as an unfair and deceptive practice,³²¹ which points to the relevance of antitrust legislation and commercial bribery. Indeed, attempts to introduce a code outlawing payola with the support of the Federal Trade Commission, were discussed as far back as the 1930s by a group of publishers.³²² Under Section 15 of the Federal Trade Commission Act “*unfair or deceptive acts or practices in or affecting commerce*” are prohibited, a provision upon which payola was construed as a breach. Hence, the payola scandals of the late 1950s provide a vital insight into the dominance of the

³¹⁷ Ibid.

³¹⁸ Ibid 65-66.

³¹⁹ BMI was formed as Broadcast Music Inc. by the National Association of Broadcasters, who were caught in a deadlock over royalties against ASCAP for almost ten years. Despite the ties with the broadcasters however, BMI-affiliated music was not favoured on the radio as opposed to ASCAP music, since all radio stations carried blanket licenses from both organisations, in Chapple and Garofalo (n 288) 66.

³²⁰ Ibid 68.

³²¹ Reported in S Shemel and M W Krasilovsky, *This Business of Music*, 3rd printing (1974) 98.

³²² Ibid.

oligonomy. The attempts from the part of the law to restrict unfair and anticompetitive behaviour, signal the existence of such behaviour in the music industry, which appears to favour a situation where the phonograph record market is susceptible to unfair and anticompetitive practices by a few dominant players.

The involvement of the FTC in the music industry becomes more evident in the early 1960s, with the Trade Practice Rules for the phonograph record industry promulgated in October 1964 and adopted in November 1964, following a trade practice hearing in Washington DC, where the industry's proposals were heard.³²³ These Trade Practice Rules constituted one of the most extensive attempts of the FTC to codify the requirements of the Robinson-Patman Act³²⁴ for an entire industry,³²⁵ and as such attempted to introduce a price-discrimination prevention mechanism.³²⁶ Rules targeted discriminatory price differential practices, advertising or promotional allowances, price-fixing, sales, and deceptive practices, including competitor defamation.³²⁷

The Robinson-Patman Act itself was introduced as an amendment to the Clayton Act to prevent unfair price discrimination against consumers, which are business for the

³²³ Ibid 103. Federal Register: 29 Fed. Reg. 13925 (Oct. 9, 1964), p 13946 *"These rules promulgated by the Commission are designed to foster and promote the maintenance of fair competitive conditions in the interest of protecting industry, trade, and the **public**"* (emphasis added).

³²⁴ 15 U.S.C. § 13.

³²⁵ The FTC defines the industry as *"composed of persons, firms, corporations, and organizations engaged in the manufacture, processing, sale or distribution of phonograph records, magnetic tapes, and similar devices upon which sound has been recorded."* In Fed. Reg. 13925, p 13946.

³²⁶ 16 C.F.R. 67 (1964). As per the FTC *"In practice, Robinson-Patman claims must meet several specific legal tests: The Act applies to commodities, but not to services, and to purchases, but not to leases. The goods must be of "like grade and quality." There must be likely injury to competition (that is, a private plaintiff must also show actual harm to his or her business)."* <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman>.

³²⁷ Shemel and Krasilovsky, *Music Business* (n 321) 105. The promulgation of the rules coincides with a rather pro-active FTC era, at least with regard to the music business. However, it is not surprising to discover the these rules' traces get 'lost' in time, especially since they had attracted criticism since the very beginning *"... copyright revision, it is submitted, will not necessarily simplify the business of music, nor will the trade practice rules promulgated by the Federal Trade Commission in 1964 for the phonograph record industry mean that a new day has arrived in the business of music,"* as J Teubman argues in his review of Shemel and Krasilovsky's 1st edition, in 50 Cornell LQ 570 1964-1965. The inability of the FTC to interfere efficiently is highlighted in the Columbia investigation to follow.

purposes of the Act. As per the FTC's guide, the Act applies to commodities (not services) of "like grade and quality" and there must be likely injury to competition for a claim under the Act to succeed.³²⁸ The above relate to the music industry as indeed, the recordings (commodities) of music are perceived as being of "like grade and quality," which in turn implies the interchangeability of the recordings as products.³²⁹

Indeed, during the extensive and exhaustive investigation into Columbia Record Club, the debate on relevant market focused on whether there was a relevant product market for all records.³³⁰ However, as far as the specific investigation is concerned, it was deemed necessary to further delineate a sub-market for record clubs,³³¹ pursuant to *Brown Shoe Co. v. United States*.³³² A thorough evaluation of the Columbia Record Club investigation follows in the forthcoming chapter,³³³ aiming to showcase the inability of the FTC to address the issues of the oligonomy successfully, despite its efforts; a pattern repeated through the years.

3.2.3.2 Gatekeeper function: controlling supply and distribution

The final piece of the puzzle introduced in the production and supply of music during the rise of the dominant majors, is the issue of controlling the channels of distribution. Pursuant to the Building Block of *key partnerships*, controlling *key channels* (e.g. supply) is favoured in order to achieve optimisation and economies

³²⁸ (n 326).

³²⁹ The FTC also *alluded* a possible violation of the Robinson-Patman Act in the investigation into the Columbia Record Club. However, merger law was applied instead, as presented in the forthcoming chapter.

³³⁰ "The area of effective competition depends on the degree of substitutability which may be measured by the cross-elasticity of demand. CBS argues that since all records are the same whether distributed through retail dealers or mail order sellers because artists record the same material on both LPs and singles, there is complete interchangeability and, therefore, the relevant market is the entire record market." Columbia Broadcasting System, Inc., and Columbia Recordclub, Inc., Petitioners, v. Federal Trade Commission, Respondent, 414 F.2d 974 (7th Cir. 1969) at 12.

³³¹ "The Commission found that the record club market had 'sufficient peculiar characteristics,' *United States v. E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957), to make it a submarket. The Commission based its finding of a separate submarket on three factors: 1) Columbia by its own acts treated the club market as being separate; 2) differences in demand; and 3) differences in cost." Ibid at 14.

³³² *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 1523, 8 L. Ed. 2d 510 (1962).

³³³ A more thorough analysis of payola from an antitrust perspective follows in the fourth chapter.

of scale in a business model and as such, buyer-supplier relationships are pertinent to a business model's success.³³⁴ This sub-section therefore, investigates these *key partnerships* in the oligonomy's business model.³³⁵

Up until now, the industry's focus was presented as lying with the production of the hit record and its supply to the audience and it was also noted that the model of vertical integration favoured by the majors, includes control of the distribution channels. A closer look highlights the importance of vertical integration for the industry's dominant business model and identifies how control of the distribution channels lies at the core of the industry's activity from the early 1970s onwards, a reliance that will cause sufficient problems once the internet eliminates the need for the supply of physical copies. The relationship between the record companies and the radio was examined under *channels*, aiming to prove the 'change of heart' and the realisation of the radio's potential as a promotional tool as supported by the payola scandals. Juke boxes were also mentioned as another promotional outlet that offered sampling of music to the potential buyers.

Traditionally, there were two ways of reaching the consumer: either directly, bypassing the retail level or vertically, through a hierarchically aligned supply chain. This way, the recording would reach the market through middlemen or directly through the company's own record clubs,³³⁶ a practice that triggered the antitrust investigation into Columbia Record club to follow.

Passing through the distribution channel, the recording would reach the market through wholesalers, supplying dedicated sections of department stores and supermarkets (rack jobbers), traditional retailers, or even 'one-stops', supplying juke boxes and radio stations.³³⁷ It is important to emphasise the role of the distributor in this indirect supply chain, as it is the distributor's "*role to convince retailers that*

³³⁴ *Business Model Generation*, 38-39.

³³⁵ It should be further noted that *key partnerships* Building Block is very close to the Building Block of *channels*, since the oligonomy seeks to internalise or create favourable partnerships with them.

³³⁶ Shamal and Krasilovsky (1964), in R A Mittelstaedt and E Stassen, "Structural changes in the phonograph record industry and its channels of distribution, 1946-1966" (1994) 14 (1) *Journal of Macromarketing* 31-44.

³³⁷ *Ibid.*

they should stock their products, and to ensure that those products are supplied and replenished in a timely fashion."³³⁸

A pivotal part of this distribution chain is the retailers' ability to return unsold products to the record companies, a quite unique characteristic of the music industry.³³⁹ This norm showcases the bargaining power retailers possessed, especially large chain stores such as Tesco or Walmart, where the majors turned their main attention in the 1980s for their retailing needs, once their hold on distribution channels had been consolidated.³⁴⁰ Of course, other retail channels continued to operate, even though they attracted less strategic attention. These retailers include independent specialised retailers (focusing on niche sounds) and second-hand retailers or bazaars.³⁴¹

Overall, this retail system does not only coincide with the consolidation of the distribution channels, but also showcases a change in marketing strategies, as the existence of smaller specialised stores with knowledgeable staff is no longer as favoured as the stocking of few large 'mega' record stores is.³⁴² In more recent years, the focus changed onto either distribution of physical copies via electronic commerce means such as Amazon, or onto the distribution of digital copies e.g. iTunes.

In the days of old business model of the oligonomy, focus lies with the control of the supply system that signals not only the existence of vertical integration in the industry, as most majors own their own distribution networks, but also the importance of the majors as gatekeepers for smaller independent labels wishing to enter into distribution agreements with them in order to profit from the majors' global networks.³⁴³ As stated previously, Alexander Osterwalder places distribution channels under *key partnerships* on the canvas of the old business model and includes retailers (as well as the radio and the television) under *channels*.³⁴⁴ It

³³⁸ C Anderton et al., *Understanding the Music Industries* (n 290) 86.

³³⁹ B Ostertag, *Creative Life: Music, Politics, People, and Machines*, 1st ed (2009) 167.

³⁴⁰ R Burnett (n 242) 75.

³⁴¹ C Anderton et al. (n 290) 84.

³⁴² Ibid.

³⁴³ Ibid 86.

³⁴⁴ Osterwalder's presentation (n 52).

naturally follows that it is in a firm's best interest to internalise costs associated with these Building Blocks, a strategy omnipresent in the globalised, vertically, horizontally, and laterally aligned music industry.³⁴⁵

Going back to the importance of the majors' role as gatekeepers with regard to the independent labels, owning and controlling distribution and supply channels also enables the majors to profit from the success of a potentially successful artist signed at an independent label, whereas there is little risk in the case of less successful acts, since marketing and promotion activities remain with the artist's label. This structure enables the creation of a web (or nexus) of minors and majors, whereby truly independent labels without any ties with the majors are hard to come by.³⁴⁶ Agreements between the oligonomy and the independents include manufacturing and distribution deals on a global scale and highlight the trend appearing in the early 1970s, whereby the strategic focus of the majors falls on the creation and sustainment of these major-minor webs via globalisation networks.

By the end of the 1970s, the majors (by then the 'Big Six') controlled 85 percent of the total record sales through a nexus of many major-owned and major-distributed labels. As such, distribution and promotion became key in the majors' domination of the recorded music market³⁴⁷ and potentially cause of their demise. The majors restricted the minors' potential to affect their market share, while offering them exposure through financial arrangements and distribution deals at the same time. Independent or pseudo-independent labels in this nexus oversee finding, fostering and delivering new talent without hindering the majors' path to dominance.

Concluding where this discussion started, the gatekeeping oligonomy of the music world had positioned itself strategically in the centre of the nexus, profiting from its status from the side of the artist-songwriter, from the side of the minor-independent, and from the side of the end consumer; a dominance so strong, nothing appeared to be able to question it.

³⁴⁵ Indeed, HMV was a part of the EMI group until it was sold off in 1998, more in Hull (n 306) 221.

³⁴⁶ K Negus, *Producing Pop: Culture and Conflict in the Popular Music Industry*, 1st edn, (1992) 17-18.

³⁴⁷ R Burnett (n 242) 61.

3.2.4 *The oligonomic 'empire' of music: a brief look into mergers, acquisitions, and integration*

In order to conclude the discussion on the creation of a dominant oligonomy, another piece of the puzzle needs to be addressed: the long journey of mergers and integration (horizontal, vertical, conglomerate).

It has become apparent so far that the respective companies and music labels form a “*shifting piece in the wealthy mosaic of communications and entertainment conglomerates*”³⁴⁸ and the forthcoming chapters offer a more thorough investigation into the treatment of mergers and antitrust investigations in the music industry. However, for the time being, a brief commentary on the magnitude of the merging activities is provided, to the extent that the ‘making’ of the global music company is supported.

It was presented in the previous chapter that the talking machine industry, even during its patent days, was prone to the creation and sustainment of few dominant key players-oligopolies. As the ownership of owning patents yielded to the ownership of copyright and the (recorded) music industry was created, the oligopolistic tendency remained through a series of mergers and acquisitions, the motto being “*control as much of many things as you possibly can,*” according to industry executive Ted Cohen.³⁴⁹ Keeping track of the series of mergers and acquisitions throughout the years is quite an exhaustive task of limited importance at the present stage; the cases analysed in the subsequent chapters are chosen in order to reflect the points in history where the industry faces either disruptive forces or undeniable dominance, in order for the comparison to be effective.

In any event, consolidation of power in the music industry appears to be in-line with the aggregate extent of consolidation in the broader media sector, which has not mistakenly been characterised as a “*cartel of a magnitude and power the world has never seen.*”³⁵⁰ Nevertheless, either as part of the broader media industries

³⁴⁸ In Bishop (n 296) referring to J Alderman, *Sonic Boom: Napster, MP3, and the New Pioneers of Music* (2001).

³⁴⁹ Ibid.

³⁵⁰ Quote by Ben Bagdikian, in Bishop (n 296).

discourse, or as a stand-alone industry, competition enforcement in the area has been limited if it has not failed altogether.³⁵¹

A closer look at the history of the majors will find them referred to as the “Big Six” in their hiatus, or the ‘Big Four’, following a series of mergers and diversifications, depending on the existence of external disruptive factors. Following the break-up of EMI in 2012,³⁵² the majors reached their lowest number ever, with only three major firms active at the time of writing.

It was presented that this pattern existed since the patent days of the ‘talking machines’ and that it was the same firms that shifted their attention to the supply of the software, the record, capitalising on opportunities created via changes in copyright law, channelling in essence the parent company’s funds into the music business. A prime example was seen in the case of EMI that benefitted from the corporate ‘feeding’ hand of Thorn Electrical Industries from 1979 until 2006, the year where its financial woes came to the limelight.³⁵³ Similarly, the electronics colossus Sony, through its American subsidiary, can be found behind one the remaining majors (Sony Music Entertainment) and the same pattern is observed behind every major company throughout history. Additionally, many major film production companies chose to integrate into the music industry, in a strategic decision to control ownership of their original soundtracks, as was the case of Universal. A similar pattern of conglomeration and integration can be encountered in the live music sector in more recent years, starting with the creation of Live Nation in 2005 as a spin-off of Clear Channel Communications, a mogul of the mass

³⁵¹ *“This oligopoly would never have passed legal muster if the regulators at the Federal Communications Commission and in the antitrust division of the Justice Department were doing their jobs, or if the Telecommunications Act of 1996, were not railroaded through Congress.”* R W McChesney, “Oligopoly: the big media game has fewer and fewer players” (1999) 63 *Progressive-Madison* 20-24. Another unique characteristic of the music industry is that it bears characteristics of both the media and the creative industries, further comprising of innovative markets. A more thorough look into this, justifies the design of competition policy, as the thesis argues.

³⁵² To be investigated in fourth chapter of the present.

³⁵³ More at B Southall *EMI Records* (n 124).

communications sector.³⁵⁴ Clear Channel's power and this power's channelling into products for music, is being addressed in the fifth chapter.

Consolidation is also evidenced in the face of minor firms being "*co-opted, coerced, swallowed-up, recycled and shoved down the throat of the American public by major record companies.*"³⁵⁵ Smaller and niche firms from a variety of countries were ultimately brought under the corporate umbrella, as the majors sought to establish regional branches in order to benefit from emerging markets, as "*a handful of singular firms managed to adapt their strategies and organisational structures to the new environment,*"³⁵⁶ strengthening the business model through globalisation.

To put things into perspective, mergers and acquisitions are an inherent part of the history of the music business and it does come as a surprise that there is not much antitrust and competition law evidence to consult on the matter. One of the reasons why little attention had been paid was the fact that these mergers were either of vertical character (distribution channels) or of horizontal dimensions, albeit with smaller and niche firms. As such, they managed to pass below the radar of the relevant competition authorities. These points are put to the test in the forthcoming chapters, when the primary legal material is analysed.

To illustrate, one of the instances when such a proposed merger triggered governmental intervention in the US, was MCA's attempt to merge with Decca Records (owner of Universal Pictures Inc.). The Robert Kennedy-led Department of Justice interfered and forced MCA to divest Universal Picture's talent agency and focus on feature-film production.³⁵⁷ This investigation however, did not concern music industry matters, as it would appear that the predominant entertainment industry at the time was feature-film production and, as mentioned above, the music

³⁵⁴ "Clear channel to spin off Its entertainment division" (2005) April 30 The New York Times, available at http://www.nytimes.com/2005/04/30/business/media/clear-channel-to-spin-off-its-entertainment-division.html?_r=0.

³⁵⁵ D Reese, "Few survive heady days of independent record labels" (1987) Sept Memphis Business Journal 7-11.

³⁵⁶ G Bakker, "The making of a music multinational: PolyGram's international businesses, 1945-1998" (2006) 80 (01) Business History Review 81-123.

³⁵⁷ MCA Inc. entry in Harvard Business School Baker Library Historical Collections, available at http://www.library.hbs.edu/hc/lehman/company.html?company=mca_inc.

industry did not possess powers of similar dimension at that stage. Indeed, for those Hollywood mega studios, music production was another instance of vertical integration aiming to capture elusive downstream profits (a strategy evident in the music industry itself).

Overall, the music oligonomy's path to dominance has passed (and is still passing) through strategic horizontal and vertical integration. It can be said that the music industry is in itself a 'child' of the hardware sector's and the film industry's vertical integration. Further, vertical integration has been at the core of its business model calling for the control of distribution, manufacturing, production, promotion, and even retailing channels. With respect to horizontal integration, this has become easier to 'monitor' in the past two decades. However, as the following chapters will show, in a world undergoing seismic changes for the first time since its industrial establishment, patterns, markets, and consumers are harder to adequately discern.

Finally, from a horizontal perspective, the more recent occurrence of only three majors (Sony Music Entertainment, Universal Music Group, and Warner Music Group) succeeded an era of 'Big Four' (Vivendi/Universal, Sony BMG, AOL-Time Warner, EMI), which succeeded in its turn an era of 'Big Six' in the 1980s (MCA, CBS, Warner, RCA, Capitol/EMI, PolyGram). It is important to examine how this consolidation was sustained, despite the existence of antitrust regimes in place.

To resume, the corporate overview of the music industry highlights the existence of a model of extreme concentration of power, an infinite line of integration, mergers and acquisitions on industrial level, and a trend to consolidation. This model is sustained by a well-established business model on single firm level; a model that calls for strategic alignment around the copyrighted product, the homogeneous hit record. Ultimate control equals ultimate power in the case of the majors. This power is used to influence legal change and to avoid intervention and regulation, passing below the radar of the relevant authorities.

Further reasons of why this might be the case have been identified above: either the majors, as smaller fish in their parent companies' respective tanks, were divested and traded as assets of bigger conglomerates, or more recently, they were treated as part of the larger deregulated (in the US) mass communication and media discourse that has historically triggered massive concentration of power on its own merit. It

follows that no antitrust or competition regime was equipped with the ‘language’ to read into these industrial trends either, as the forthcoming chapters show.

3.2.5 *The Business model of the oligonomy and the product for music: assessment*

Attempting a competition evaluation of the oligonomy’s business model incorporates considerable constraints, as the industry remained both unregulated and under-investigated at the time examined above. A further limitation is encountered in the fact that relevant product market definition as perceived nowadays, is a result of the 1982 US Merger Guidelines, whereas the earliest reference to the concept of a relevant market for merger purposes appears in the 1948 US Supreme Court Decision *United States v. Columbia Steel Co.*³⁵⁸ As Werden comments:

*“although the Court used the term ‘relevant market,’ it ‘recognize[d] the difficulty of laying down a rule as to what areas or products are competitive, one with another’ and made no attempt to lay down such rules.”*³⁵⁹

From this 1948 decision until the introduction of the hypothetical monopolist test in 1982, the US courts as well as some US academics,³⁶⁰ have passed through various attempts to define a relevant market in competition law. This is relevant to the present thesis when the sub-market test of *Brown Shoe* is utilised to define the sub-market of records clubs in the Columbia record club investigation. A further interesting point to be highlighted is that, even though demand leads the market definition investigation in a competition law context, any investigation into the product market of the music industries should correctly identify the supply chain for music from a vertical perspective, and investigate the consumer separately.

As stated previously, demand for music has not been addressed as part of the broader music industries discourse. This comes as no surprise, as it aligns with the rationale that the end consumer for music is the mass market that consumes a homogeneous product in a homogeneous manner. This point was further illustrated by Burnett when end consumer demand for music was presented as a matter of

³⁵⁸ 334 U.S. 495, 508 (1948).

³⁵⁹ G J Werden, “The history of antitrust market delineation” (1992), 76 MarqLRev 123.

³⁶⁰ Ibid.

aesthetics and cultural habits.³⁶¹ Furthermore, this realisation justifies the lack of relevant sources on demand substitution from an end consumer perspective. Hence, bringing the investigation closer to a demand-substitution-led competition law scenario becomes a broadly theoretical task.³⁶²

In any event, this part of the present chapter sought to establish the relationship between the existence of a business model for the music industry and a specific product for music, attempting a historical overview of the music industry. Indeed, it has been identified that the music industry, in the face of the major record companies, was organised around a single business model that prolonged the success of a powerful oligonomy performing a gatekeeper function. In this business model, the resulting product was identified as the recording of *hit* or *popular* music, a term that does not necessarily imply a single music genre, but signals the existence of a unified process of producing and delivering the product to the mass audience through various channels, also controlled by the oligonomy.

Thus, this oligonomic model is manifested as such: creators of music face an oligopsony in the face of a few major record companies, which possess the necessary control over the marketing and the distribution channels of the finalised product, acting as an oligopoly to the mass audience. This reaffirms their gatekeeper function, implying a sellers' market. Naturally, this chain also represents the copyright journey from the creation of music to its embodiment and its commodification into a tangible object, the control of which remains in the hands of the same oligonomy.

Hence, the *business reality* of the market as presented in the relevant literature, coincides with the picture provided by Alexander Osterwalder's canvas. It was reaffirmed that the dominant business model of the oligonomy views *hits and wannabe hits* as the *value proposition* or *offer* to the customers (offer being the term closer to the marketers' notion of *offering* presented above)³⁶³ and posits the

³⁶¹ R Burnett (n 242) 83-84.

³⁶² As the subsequent chapters illustrate, the competition authorities perceive the relevant market for music in a vertically aligned order, where copyright dictates the supply chain from the creator to the publisher, and from there to the record company. The discussion on the differences between the *customer* and the *consumer*, follows later in the present.

³⁶³ Osterwalder's presentation (n 52), *Business Model Generation* (n 21) 20-41.

mass market under *customer segments*,³⁶⁴ which enables the Building Block of *customer relationships* to be left unattended.³⁶⁵ This finding is in line with the absence of the customer from the literature consulted on the business structure of the industry and mirrors the competition authorities' perception of the market, as presented in the next chapter (the supply chain mostly ends with the retailer, purchaser of the embodiment of music).

This part of the chapter also dealt with *distribution channels* and *key partnerships* in order to highlight the long history of mergers and acquisitions in the industry. As such, it focused on patterns of ownership and control of the distribution channels, which 'engulfed' the smaller independent firms in a nexus of bigger and smaller players, suggesting that the oligonomy of the few is pertinent to the survival of the many.³⁶⁶

Since the literature on the industry agrees with the business model as described by Alexander Osterwalder's canvas and points to the existence of one mass market and one product for music, the research can now turn to the changes brought forward by the induction in the digital era. The end consumer of music becomes a vehicle for industrial and business model change, and thus becomes relevant to the music industry for the first time in history: consumers are no longer passive. Rather, they are armed with power to re-allocate disposable income and affect the business model status quo in an unprecedented manner. This ability to demand and affect changes catches the music industry off guard and forces it to re-invest and re-configure itself.

The forthcoming part also focuses on the extent to which the consumer affects change in the market for music by adding and removing products from the chain of substitution. For example, according to the old business model, live music performance was one of the revenue streams of the music industry, supporting the marketing of the recording. However, live music as a product has recently been re-evaluated. Hence, a question that requires attention arises: what is the relationship between the concert ticket and the recording (complements or substitutes)? What is

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ As Burnett (n 242) and Bishop (n 296) presented.

the music product in demand from the point of view of the end consumer if not the recording of hit music in physical format?

3.3 *Innovation beyond the oligonomy*

3.3.1 *Dawn of the digital era: gatekeepers in peril*

The impact of the internet (and file-sharing in particular) on the music industry has provided industry and academia alike with an unprecedented production of relevant research and literature.³⁶⁷ The music industry, despite its expensive and exhaustive efforts to battle and address the matter of online copyright infringement, found itself unable to deal with the technological developments for the first time in history. Even though disruptive forces on the majors' path were observed before (e.g. the cassette as the first carrier of music that can be duplicated domestically), the advent of the internet and the induction in the digital era forced the music, as well the broader creative, industry to re-invent and re-configure itself or, in other words, reconsider its business model.

As it was examined in the first chapter of the present, the terms 'business model' and 'business model innovation' were also introduced very recently in academic circles. Nevertheless, they have been attracting interest from affiliated areas and disciplines, aiming primarily at filling a gap in the understanding of organisational business structures, by addressing developments through a 'digital versus physical world' perspective.

It was established that business model literature has become a vehicle for the music industries, providing an analysis of the old 'way of doing business' and highlighting the gaps and mishaps that led to market failure. Alexander Osterwalder provides a

³⁶⁷ For a comprehensive literature review of academic studies researching the effect of file-sharing on the recorded music industry up until 2010, see V Grassmuck's, "Academic studies on the effect of file-sharing on the recorded music industry: a literature review" (2010), available at <http://dx.doi.org/10.2139/ssrn.1749579>. Additionally, see S J Watson, D J Zizzo and P Fleming, "Determinants and Welfare Implications of Unlawful File Sharing: A Scoping Review" (2014) 14/5 CREATE Working Paper, available at <http://www.create.ac.uk/publications/determinants-and-welfare-implications-of-unlawful-file-sharing-a-scoping-review/>.

comprehensive ‘reading’ of the old business model and makes suggestions for ‘new’ business models in the music industries, which correspond to the overall business innovation ‘boom’ of the digital era. The struggles of the oligonomy to safeguard its gatekeeper function seem to reaffirm the preface of Osterwalder’s book that “*entirely new industries are forming as old ones crumble. Upstarts are challenging the old guard, some of whom are struggling feverishly to reinvent themselves.*”³⁶⁸ In the case of recorded music more specifically, it has been highlighted how the few dominant gatekeepers managed to identify not only with a specific business model, but also with the whole notion of an *industry* evolving around them. It could be argued that the term ‘industry’ became appropriated by the oligonomy, as this narrative seems to best serve the gatekeepers’ interests, when they argued that it was the whole ‘music industry’ that suffered due to online copyright infringement.

As the music industry discourse meets the business model narrative, the formerly neglected Building Block of *customer segments* enters the picture for the first time. Indeed, the *Business Model Generation* recognises that customers “*comprise the heart of the business model*” and that once *customer segments* have been specified, “*a business model can be carefully designed around a strong understanding of specific customer needs.*”³⁶⁹ It was presented that the oligonomy catered for the mass market with little interest in providing a more customer-oriented product for music. It will be later shown however, that consumer-led changes in consumption make the end consumer of music ‘relevant’ in a business context. For this reason, and to align with the purpose of this chapter which focuses on supply and demand patterns, the remaining of the music industry’s historical overview continues from the demand side. By the end of the present section both supply and demand for music will have been presented, allowing the investigation into the creation of markets for music to conclude.

It comes as no surprise that limited literature has been encountered on the matter of consumer demand for music prior to the digital era, apart from aesthetic and cultural trends and patterns: this stems directly from the industry’s oligonomic and gatekeeper nature and, as it becomes evident from the cases consulted in the

³⁶⁸ *Business Model Generation* (n 21) preface.

³⁶⁹ *Ibid* 20.

forthcoming chapters, it also mirrors the competition authorities' interpretation of the supply chain for music. In the event of 'disruptions', as the ones encountered in the 1950s, the industry was able to expand by absorbing the niche into its core business model, a move that expedited the era of globalisation in the music industry. In the case of digital age however, the change was broader than a change in demographics or tastes in music, leading to an 'adopt or perish' dilemma for the gatekeepers collectively.

Heated debates and reactions followed the advent of file-sharing and downloading music files in MP3 format, which made the availability of music instantaneous notwithstanding geographical location. The internet proved itself foe to the oligonomy, even though restricting and 'gagging' technology had always been in the industry's lobbying agenda.³⁷⁰ By comparison, the oligonomy's reaction to the popularity of the audio cassette was the infamous "Home Taping is Killing Music" BPI-led campaign of 1980. Across the Atlantic, the Audio Home Recording Act of 1992 amended title 17 of the United States Code, introducing the chapter "*Digital Audio Recording Devices and Media*,"³⁷¹ which constituted the industry's first organised attempt to address the making of digital copies of recordings with precision. None of the previous technologies however gained as much popularity as the Mp3 did in the beginning of 1997, thanks to the wild fire that was Napster.³⁷²

Sharing music files is simply another facet of the culture that emerged among the first generation of internet users, who envisioned free sharing of knowledge and ideas, as best addressed by Lawrence Lessig in *Free Culture*.³⁷³ Free knowledge, free ideas, and naturally, free music was not something that the oligonomy was ready to grasp, even though recorded music had already started losing 'wallet share' since 1996, according to Will Page (former Chief Economist of PRS for music).³⁷⁴ Other factors notwithstanding, the oligonomy chose to put the blame of the decline

³⁷⁰ As the industry had always been able to enforce its technology of choice either in the form of the vinyl, or later of the CD.

³⁷¹ 17 U.S.C. ch. 10 § 1001 et seq.

³⁷² It worth noting that the industry thought itself 'MP3-proof' thanks to the 'anti-circumvention' provisions introduced in the industry lobbied Digital Millennium Copyright Act of 1998. Its European counterpart was Directive 2001/29/EC.

³⁷³ L Lessig, *Free culture: How big media uses technology and the law to lock down culture and control creativity* (2004).

³⁷⁴ W Page, "Economics: time to face the music" (2007) Music Ally 7-8. Also above (n 55).

of record sales exclusively on file-sharing, as it had done before in the past when faced with the threat of ‘piracy’. According to Cary Sherman President of the RIAA:

*“there’s no minimizing the impact of illegal file-sharing. It robs songwriters and recording artists of their livelihoods, and it ultimately undermines the future of music itself, not to mention threatening the jobs of tens of thousands.”*³⁷⁵

A comprehensive literature review conducted by Volker Grassmuck in 2010, provides a thorough overview of no less than 80 empirical studies on the impact of file-sharing on record sales, categorized by methodology. The studies include empirical observations of file-sharing, empirical modelling based on industry and macroeconomic data, and representative and non-representative surveys.³⁷⁶ In an attempt to tackle the issue, the only conclusive result reached by Grassmuck with regard to whether P2P file-sharing is responsible for the ‘slump in recorded sales’ or a generator of demand, is that *“the empirical research literature is inconclusive.”*³⁷⁷ This point is more recently reaffirmed by Chong Hyun Christie Byun, who also argued that establishing causation between online ‘piracy’ and the decline in sales of the tangible product is impossible.³⁷⁸

Hence, one tends to agree with the point made above that focusing on the impact file-sharing on record sales is quite futile. Additionally, Grassmuck’s claim that basing policy decisions, such as stronger copyright enforcement, on such contested academic evidence and diverging studies is not (and should not be) permitted, seems to hold merit.³⁷⁹

Furthermore, a point that should be explicitly noted is that most of the empirical studies featuring in the review, tend to be biased towards IFPI’s interests, as for *“piracy rates researchers and government agencies often work with data provided by the same industry associations.”*³⁸⁰ Indeed, the IFPI itself finds support, and frequently quotes, the research conducted by Stan Liebowitz, who claimed in 2008

³⁷⁵ From USA Today, 18 September 2003, in F Oberholzer- Gee and K Strumpf, "The effect of file sharing on record sales: an empirical analysis" (2007) 115 (1) Journal of Political Economy 1-42.

³⁷⁶ V Grassmuck (n 367).

³⁷⁷ Ibid.

³⁷⁸ C H C Byun, *The Economics of the Popular Music Industry* (2016) 31.

³⁷⁹ V Grassmuck (n 367).

³⁸⁰ V Grassmuck and I Png, “On the reliability of software piracy statistics” (2008), available at http://www.rufuspollock.org/economics/papers/optimal_copyright_term.pdf.

that “file-sharing appears to have caused the entire decline in record sales and appears to have vitiated what otherwise would have been growth in the industry.”³⁸¹ On the antipode, the study conducted by Oberholzer-Gee and Strumpf in 2007, which Liebowitz sets to refute, concluded that “downloads have an effect on sales that is statistically indistinguishable from zero. Our estimates are inconsistent with claims that file sharing is the primary reason for the decline in music sales during our study period.”³⁸²

Among an array of inconclusive studies, it appears that the works of Liebowitz and Oberholzer-Gee and Strumpf remained among the most cited, as the IFPI turned to Liebowitz’s work for quotes and support, whereas Oberholzer-Gee’s and Strumpf’s work points to the opposite direction.³⁸³

Nevertheless, the purpose of the present is not to provide an elaboration of the studies conducted, especially since their inconclusive nature appears to be the only proven result. Indeed, the US Government Accounting Office (GAO) further acknowledged that “no one knows what the impact of ‘piracy’ on the economy is.”³⁸⁴ Grassmuck’s literature review is presented to support the argument of inconclusiveness regarding file-sharing’s impact and to lead to two further points: highlight the rigorousness with which the industry, as represented by the oligonomy, focused on the impact of file-sharing, missing the opportunity to engage in alternative business model innovation and digital opportunities and further highlight the attempts to influence policy based on inconclusive and often

³⁸¹ S Liebowitz, “Testing file-sharing’s impact on music album sales in cities” (2008) 54 (4) *Management Science*, S Liebowitz, “File-sharing: creative destruction or just plain destruction” (2006) 49 (1) *The Journal of Law and Economics* 1-28.

³⁸² F Oberholzer- Gee and K Strumpf (n 375).

³⁸³ Grassmuck remains highly critical of Liebowitz in his review “Liebowitz, whose 2006 paper IFPI (2010) quotes in their support, has published the largest number of papers on the issue. For only one of them (2008) he has conducted original empirical research. All the others are based on common sense, informed guesswork, deduction and selective reading of his colleagues’ empirical work,” (n 367) 17.

³⁸⁴ Ibid 12. “They interviewed representatives from U.S. government agencies, industry associations, nongovernmental organizations, academic institutions and a multilateral organization (OECD) and conducted a literature search on studies published since 1999. The result: we determined that the U.S. government did not systematically collect data and perform analysis on the impacts of counterfeiting and piracy on the U.S. economy and, based on our review of literature and interviews with experts, we concluded that it was not feasible to develop our own estimates or attempt to quantify the economic impact of counterfeiting and piracy on the U.S. economy.”

contradictory evidence, instead of introducing what Grassmuck envisions as “*facts-based, social-welfare-oriented policy*,” which coincides with that Potts, Cunningham, and Hartley et al. had argued.

According to Grassmuck’s concluding remarks:

“...the alarmist rhetoric of the IFPI and other industry associations does not hold up to scientific scrutiny. Public policy makers should be cautious not to take their claims at face value and pass the panic-driven, extremist legislation they are demanding... Public policy makers are tasked by society with improving the welfare of all citizens. Policy needs to be based on facts and solid knowledge and directed at organizing an inclusive public negotiation about the future course of the digital revolution.”³⁸⁵

As the issue of welfare enters the picture, the debate seems to be approaching the overall aim of the thesis calling for a competition law evaluation of the industry with respect to welfare and the promotion of innovation.

Grassmuck remains highly dismissive of IFPI’s claims that empirical studies suggest the necessity for stronger protection for the creative content in the face of copyright reforms and the public’s ‘re-education’. IFPI also recycles intellectual property’s justification as a driver of creativity without which not only artists, but also creativity *per se*, and by extension society, will suffer.³⁸⁶

It is argued herein that it was not piracy *per se* that the gatekeepers were faced with. Rather, it was consumer *choice* lying at the heart of the matter. It would further appear that the consumer, who remains actively engaged in the digital environment, opted to move away from the mass consumption of a homogeneous recorded product and into a more personalised way of accessing and consuming music.

³⁸⁵ Ibid 44.

³⁸⁶ Among numerous sources and policy making reports see e.g. USPTO Green paper, “Copyright policy, creativity, and innovation in the digital economy” July 2013 “*Copyright law in the United States is founded on the Constitutional goal of ‘promot[ing] the Progress of Science and useful Arts’ by providing exclusive rights to creators. Protection by copyright law gives creators incentives to produce new works and distribute them to the public.*” On the justification of IP among others, E C Hettinger “Justifying intellectual property” (1989) *Philosophy & Public Affairs* 31-52, M A Lemley “Ex ante versus ex post justifications for intellectual property” (2004) *The University of Chicago Law Review* 129-149. It is worth contemplating at this point on the contribution of alternative and innovatory business models that have emerged thanks, and pursuant, to the technologies the oligonomy attempted so hard to tackle.

Taking a closer look at the three hypotheses brought forward by the aggregation of studies in Grassmuck, it has been argued that direct copying harms and completely substitutes sales, that copying intensifies network or sampling effects, and that sharing might represent a completely differentiated cultural activity with no effect on sales at all.³⁸⁷

Even though the three hypotheses remain to some extent conceptual, they all point to the direction of differentiated consumer habits outside the reach of the majors. Direct copying was not controlled by the industry (file-sharing sites and platforms are independent of the majors' organisations) and the cultural habits of the mass audience with regard to file-sharing did not attract quantifiable interest by the majors as such. Furthermore, it was pointed out in the previous part of this chapter that sampling or network effects were associated with the radio, a medium the industry remained in close connection with, even via the employment of illegal means such as payola. Another promotional medium or ally was later found in the face of television via the MTV.³⁸⁸ Hence, the *choice* of engaging in sharing activities online remained outside the control of a 'crumbling' industry, as per Osterwalder.

Thus, the pre-emptive and threatening measures of past encounters with disruptive technologies, did not seem adequate enough to address a full scale 'disappearance' of consumer base. The oligonomy's reaction this time was representative of its dominant (or even arrogant) nature, with lawsuits filed against individual users,³⁸⁹ legal battles against the file-sharing sites that emerged,³⁹⁰ expensive and extensive re-education campaigns, and even more lobbying.³⁹¹ It could be argued that none of

³⁸⁷ Grassmuck draws evidence from RIAA v. Napster, 1999, and A&M Records, Inc. v. Napster, Inc., 2000.

³⁸⁸ See e.g. R Burnett "The implications of ownership changes on concentration and diversity in the phonogram industry" (1992) 19 (6) Communication Research 749-769.

³⁸⁹ Grassmuck referring to the IFPI "Since 2003, the industry has taken more than 100,000 civil and criminal legal actions against individual illegal high volume file-sharers in 22 countries," (n 367) 43.

³⁹⁰ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2001), MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), Sweden v Neij et al., being the most famous.

³⁹¹ Grassmuck (n 367) as above "Consumer education campaigns which include video-clips insulting to every reasonable viewer but also mass-criminalization (IFPI actually lists under 'Consumer Education', and law making like the 'Three Strikes' legislation as a 'social deterrent', depicted as creating 'a perception of risk' which is 'comparable to speeding fines'. The massive interventions into the digital shared space by DRM and the exclusion of

the above aimed to fully comprehend consumer behavior, even though the industry was indeed faced with a serious decline in sales of recordings in physical format in the past decade.

It became evident that consumers had migrated to other practices and that re-capturing them would necessitate more than legal threats and traditional lobbying activities for rigid copyright protection and enforcement in Europe, in the US, or at the WTO.³⁹² The end consumers of music had ‘voted with their feet’ and ‘shunned’ an industry offering them a homogeneous product through top-down exposure means. It soon followed that other *industries* and markets associated with the provision and production of ‘music’ in the broader sense, were now ripe for investigation and academic and industrial attention. The first sector to attract such interest was the live music industry.³⁹³

It has been established so far, and it is worth emphasising, that the oligonomy as supported by its business model, became almost synonymous to the notion of the ‘music industry’, excluding ancillary industries (e.g. live music promotion) from this narrative. As we enter the digital era, and following the changes in the consumption of music, we encounter not only a nascent interest in the investigation of these industries, but also new and innovative entrepreneurial activities in music, characterised by new and innovative business models. Hence, the music industry unbundles into the ‘music industries’ as per Cloonan,³⁹⁴ in order to encompass ancillary ways of generating profit related to the provision of music, including alternative business models and by-passing the nexus of the majors, to the extent possible.

citizens from the Internet for up to one year are down-played as ‘speed bumps’ and ‘speeding fines’: IFPI treats the global society like a teenager learning to drive.”

³⁹² Note e.g. the imposing of TRIPS upon developing members of the WTO, tying intellectual property rights with trade and development opportunities. Further, see e.g. G Dutfield and U Suthersanen, *Global Intellectual Property Law* (2008).

³⁹³ J H Mortimer, C Nosko, and A Sorensen, "Supply responses to digital distribution: recorded music and live performances" (2012) 24 (1) *Information Economics and Policy* 3-14, Huygen et al., "Ups and downs. Economic and cultural effects of file sharing on music, film and games" (2009), available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350451, D Bahanovich and D Collopy, "Music experience and behaviour in young people" (2009) University of Hertfordshire, available at <http://i.content-review.com/s/ebf223550adb6d7c64fa176200d66ec8.pdf>, for UK Music.

³⁹⁴ M Cloonan (n 54).

Referring to the music industries in plural, enables the ‘music industry’ discourse to *de facto* accommodate the business models that these ancillary industries incorporate. Therefore, accepting and broadening the perception of what the industry consists of, signals the introduction of ‘alternative’ (to the oligonomic) business models into the debate. Hence, the business model of live music promotion now becomes a business model relevant to the music industries discourse, similarly to online streaming and distribution models. Consequently, unbundling the music industry means accepting other business models as business models *of* the music industries. This is further supported by the fact that Alexander Osterwalder’s canvas presents the business model of Spotify as a juxtaposition to the old business model of the record company.³⁹⁵ It can be deduced that what has actually changed, is the very definition of the music industry, which now enables more business models to be accommodated, including both innovative (e.g. Spotify) and more standardised (live music) ones.

Therefore, in order to bridge the gap between business model innovation and consumer demand and identify product markets for music in a competition law context, the remainder of this chapter is dedicated to understanding consumer choices in consumption. By following this methodology, the subsequent part comes closer to the product market in competition law as measured by demand substitutability.³⁹⁶

Since the oligonomic music industry was concentrated around one business model and one product, does it follow that the music *industries* are characterised by many business models and by many products, following changes in consumer demand? To address this question, the live music industry, as well as online distribution and streaming models are examined below. These represent alternative consumer consumption patterns, corresponding to new and innovative business models in a *music industries* context.

³⁹⁵ Osterwalder’s presentation (n 52). Again, the thesis examines to what extent models such as Spotify’s operate within the ‘boundaries’ of the traditional, oligonomic one, leading to further end consumer foreclosure.

³⁹⁶ Starting with demand substitution and considering product differentiation.

3.3.2 Live Music Industry: where is the consumer going?

The first ancillary music industry to be investigated is the live music industry, as it has been proposed that the ‘disappearing’ customer of recorded music is migrating to the attendance of live music events.³⁹⁷ Live music promotion hardly qualifies as a new industry, as concerts have been promoted long before the invention of recorded music. However, and as explained previously, it is the unbundling of the *music industry* into the *music industries* that allows for the exploration of the live music sector and its business model.

The reason why live music promotion features herein, is the need to examine its relationship with the consumer of recorded music. This relationship is vital in a competition law context in terms of researching substitutability. For instance, this substitutability could enable the placement of the recording and the concert ticket in the same relevant product market, which should be taken into consideration at competition assessment stage. Further, the examination of live music promotion leads to the observation that live music has been acquiring corporate interest and has been experimenting with business models (pointing to business model innovation), making live music promotion a music industry prone to the establishment of more gatekeepers. Ultimately, the merger between Live Nation and Ticketmaster is addressed in the fifth chapter and illustrates how these music industries and their business models are perceived by the competition authorities. Attention is paid to the perception of a market for music based on demand substitutability, building on the relationship between the recording and the live music ticket. The studies below help address this exact point.

The year 1996 was mentioned as the year when the record industry started losing ‘wallet share’, earlier in the present. Additionally, the year 1996 signals the establishment of the first concert ticket internet sales by Ticketmaster. It is also the year when concert ticket prices started growing faster than inflation.³⁹⁸ Moreover, the live music sector (or industry) starts attracting corporate attention in terms of

³⁹⁷ Even though the IFPI considers it a myth that “*growing live music revenues can compensate for the fall-off in recorded music sales*” IFPI, Digital Music Report 2010, available at <http://www.ifpi.org/content/library/DMR2010.pdf>

³⁹⁸ M Connolly and A B Krueger (n 56).

ownership. Live concert promotion starts demonstrating the first signs of high consolidation in the face of SFX Entertainment, a company spun off SFX Broadcasting Inc. In 2000, SFX became a wholly owned subsidiary of Clear Channel Communications, Inc.³⁹⁹ In 2005, Clear Channel spun off its live entertainment sector into what was to become Live Nation, creating the world's largest music company, second, at the time, only to Universal.⁴⁰⁰

Comparing a live music promoter to a record company in terms of size comes to highlight the nascent importance of the sector, an unprecedented occurrence in the history of the industry. With the creation of Live Nation, the live music industry enters a phase of significant corporate presence. This presence, combined with the decline in sales of recordings in physical format, left room for new dynamics to be shaped in the relationship between the recorded music industry and the live music industry, or otherwise, between the business model of the *music industry* and the business models of the *music industries*.

Another indicator of power consolidation in the live music industry is that tour promoters start expanding vertically, yet another similarity with the traditional oligonomy. Live Nation stated in its 2010 Annual Report⁴⁰¹ that its mission was:

*“to maximize the live concert experience. Our core business is producing, marketing and selling live concerts via our global concert pipe. Live Nation is...annually producing over 22,000 concerts for 1,500 artists in 57 countries. Live Nation is transforming the concert business by expanding its concert platform into ticketing and building the industry’s first artist-to-fan vertically integrated concert platform.”*⁴⁰²

This quote reveals Live Nation Entertainment's unprecedented (for the live music industry) business model. Live Nation, even before the merger with Ticketmaster, did showcase innovation in its business model by creating a multi-sided platform

³⁹⁹ In 1996, SFX Broadcasting bought concert promoter Delsener/Slater. In 1998, SFX Entertainment, Inc. is spun off, and an exclusive deal with Ticketmaster is signed. In 2000 Clear Channel Communications agrees to buy company, available at <http://www.fundinguniverse.com/company-histories/sfx-entertainment-inc-history/>.

⁴⁰⁰ M Brennan, “Constructing a rough account of British concert promotion history” (2010) 1 (1) IASPM Journal 4-13.

⁴⁰¹ The first annual report produced after the merger with Ticketmaster.

⁴⁰² Live Nation Annual Report 2010, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTE1NjB8Q2hpbGRJRDotMXxUeXBIPtM=&t=1>.

combining all revenue generating activities around an artist's name: concert promotion, ticketing (post-merger), sponsorship and advertising, and artists' management (including selling merchandise).⁴⁰³ Engaging in all of these activities simultaneously and requesting a part of both the artists' and the consumers' income signals the existence of a multi-sided platform. In business model terms, this is characterised by multiple *customer segments*, each with its corresponding *value proposition* and *revenue stream*.⁴⁰⁴ As such, Live Nation Entertainment (hereafter LNE) offers fans to artists, artists to fans, and target audience to advertisers, whilst generating income from various revenue streams including both copyright-related and trademark related profits e.g. merchandise.

It appears that the live music industry is facing innovation in terms of business modelling, almost reminiscent of the first days of the recorded industry, which created a business model sustainable of gatekeepers. However, it would be interesting to consider and question whether the existence of LNE, with its unprecedented portfolio of artists and activities, managed to monopolise the market for the 'all around artist experience' before the creation of an oligonomy was possible. This point is furthered when the Live Nation/Ticketmaster merger case is reviewed, as the author argues that the definition of an accurate relevant product market for the activities of LNE was not possible, given that the market for its product was nascent at the time of the merger.⁴⁰⁵ However, in order to reach this point, it is crucial to investigate the financial importance of the live music industry in terms of consumer demand.

As this section aims to identify whether there exists a product market whereby music related products are interchangeable from the consumers' point of view, the issue of consumer choice comes again to the limelight. For instance, in 2014 Nielsen reports

⁴⁰³ Live Nation Annual Reports, <http://investors.livenationentertainment.com/investor-relations/>. Live Nation first tested the 360 degree deals waters with Korn in 2005 "*Live Nation paid Korn \$3m, plus a share of concessions and parking fees at Live Nation venues, in return for a 6 percent share of Korn's income from touring, licensing, publishing, merchandising and record sales*" in L Marshall, "The 360 deal and the 'new' music industry" (2013) 16 (1) *European Journal of Cultural Studies* 77-99.

⁴⁰⁴ *Business Model Generation* (n 21) 87. The digital economy seems to favour multi-sided platforms such as iTunes and Spotify.

⁴⁰⁵ Which raises the issue of whether the creative industries bear similarities with the technological innovation sector, where competition takes place *for* the market rather than *in* the market. In Glader, *Innovation Markets* (n 13).

indicated that consumers allocate 35 percent of their total music related spending in live concerts, whereas twelve percent are purchasing CDs, and fifteen percent are purchasing digital tracks and albums (combined), with music subscriptions following at nine percent.⁴⁰⁶

A logical question follows suit: is the consumer leaving the record store to attend a concert? Has the consumption of music changed to such a degree that a concert ticket obtains the record's lost 'wallet share'? What is the relationship between the record and the concert ticket, or more pointedly, between recorded music consumed in any format and the concert ticket?

From the point of view of the artist, a loss of income in recording royalties would signal the need to supplement any income lost through touring activities, corroborating the complementarity of the record and the concert ticket and justifying the existence of 360 degree deals.

Creatively enough, the theory on complementarity was named after a quote by the late David Bowie:

*"I'm fully confident that copyright will no longer exist in 10 years, and authorship and intellectual property is in for such a bashing. Music is going to become like running water or electricity.... You'd better be prepared for doing a lot of touring because that's really the only unique situation that's going to be left."*⁴⁰⁷

Alan Krueger coined the 'Bowie Theory' in 2005, arguing that concerts are complementary products to records and therefore a decline in the artists' income from recordings accelerates an increase in ticket prices. Connolly and Krueger see the acceleration of ticket prices as "*the problem of a firm with two complementary outputs, concert seats and record albums and monopoly power in both markets.*"⁴⁰⁸ If greater concert attendance has a positive effect on the income generated by record royalties, the artist will retain ticket prices below the single monopoly price.

⁴⁰⁶ C H C Byun (n 378) 41.

⁴⁰⁷ J Pareles, "David Bowie, 21st-Century Entrepreneur" (2002) June 9 The New York Times, available at <http://www.nytimes.com/2002/06/09/arts/david-bowie-21st-century-entrepreneur.html>.

⁴⁰⁸ Connolly and Krueger (n 56).

Complementarity between concerts and recorded music has been further supported by the sampling effect listening to music has on gaining familiarity with an artist before attending their live performance. Further, it has been supported by the existence of 360 degrees and other multiple right deals that allow music industry companies a share of an artist's all potential revenue streams.⁴⁰⁹ The existence of such deals generates substantial room for thought on the complementary between several music products and on the unpredictability in consumption. Since consumers allocate their wallet share differently than in the past, the music industries should be in position to capture it through expanding their offers across a spectrum of products consumers can switch to. Indeed, recent studies conclude that an integrated business model combining several revenue streams is preferred, should legal alternatives to file-sharing become sufficiently unimportant, indicating positive indirect network effects from the record to the concert and vice versa.⁴¹⁰

More recent studies and economic theory consider the perfect substitution between digital files and physical copies of music and reaffirm that concerts, merchandise, specialty box sets, and vinyl editions of recordings, constitute perfect complements generating the majority of the artists' income.⁴¹¹ However, it is important to note that substitution effects towards live music from the consumers' point of view have also been observed within a household production level, an observation that further attests the rationale towards a single firm controlling both outputs.⁴¹²

Moreover, substitution effects from a consumer's perspective will be more evident when several products for music compete for an individual's wallet share; researchers have observed that for more frequent consumers of music, or 'music lovers', the need for music is in effect a need for information, which can be satisfied by various means, whether by listening to music as a leisure activity or by attending a concert.⁴¹³ In the case of illegal file-sharing, whereby the consumption of recorded

⁴⁰⁹ Byun (n 378) 84.

⁴¹⁰ R Dewenter, J Haucap, and T Wenzel, "On file sharing with indirect network effects between concert ticket sales and music recordings" (2012) 25 (3) *Journal of Media Economics* 168-178.

⁴¹¹ S Cameron, "Past, present and future: music economics at the crossroads" (2016) 40 *J Cult Econ* 1-12.

⁴¹² *Ibid.*

⁴¹³ J D Montoro-Pons, M Cuadrado-Garcia, "Live and prerecorded music consumption" (2011) 35 *J Cult Econ* 19-48.

music does not require an allocation of the consumer's income, an increase of average live concert attendance can be estimated, albeit to a limited extent and only for average consumers of music (exposition effect).⁴¹⁴

In terms of empirical research, the live music industry appeared in studies as early as 2003, with Liebowitz finding a real increase in concert revenues in the US between 2000 and 2001.⁴¹⁵ Additionally, one of the first studies to explicitly deal with the impact of file-sharing on the live music industry was conducted by Mortimer and Sorensen in 2005, who concluded that *“for artists, the decline in revenues from recorded music after 1998 is striking, but appears to have been more than offset by a concomitant increase in concert revenues.”*⁴¹⁶

Furthermore, in 2011 Montoro-Pons and Cuadrado-Garcia noted the existence of complementarities between the two markets, however only from pre-recorded music towards live concert attendance, since the latter does not seem to influence the former in their research.⁴¹⁷ Their research segments frequent and averages users (consumers) of music and the results in the two groups present differentiations, especially with regard to the inclination towards recorded music consumption. A more frequent ‘music lover’s’ needs will be satisfied by both pre-recorded and live music, whereas an average user will opt for either the one or the other, depending on additional variables such as social motivation.⁴¹⁸

Overall, these researchers reaffirm the Bowie theory and conclude by providing an economic rationale for the live music sector to subsidise the recorded music one, an observation that is also supported by the existence of multiple rights or 360 degrees

⁴¹⁴ Ibid.

⁴¹⁵ S Liebowitz, “Will MP3 downloads annihilate the record Industry? The evidence so far” (2003) School of Management, University of Texas at Dallas, available at <http://www.utdallas.edu/~liebowit/intprop/records.pdf>.

⁴¹⁶ The 2005 NBMER working paper of J H Mortimer and A Sorensen (n 393) can be found at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.61.3981&rep=rep1&type=pdf>. Among the studies aggregated by Grassmuck (n 367) the live music industry is also included in Liebowitz (2006 and 2008), Huygen et al.(2009), Bahanovich and Collopy (2009), as above.

⁴¹⁷ Montoro-Pons and Cuadrado-Garcia (n 413).

⁴¹⁸ Dewenter et al. (n 410) also differentiate between music lovers and the average consumption of music.

deals⁴¹⁹ and by the plethora of streaming services and similar business models currently on offer. The complementary between live and recorded music consumption highlights a relationship between the sectors that was not researched during the ‘old business model’ days of the oligonomy, at least not to an extent that would justify subsidisation or would suggest the existence of network effects.

However, further research should be conducted as regards the substitution effect that views music as a need to be satisfied, or as a unified concept. In a “*world that loves their artists more than it loves buying their records*”⁴²⁰ offering an ‘experience’ the way that Live Nation described in its annual statement, can be viewed as offering a new product in the consumption of music:

It was explained earlier in the present that the oligonomy operated a successful business model around the provision of a homogeneous product to a mass audience and that success was established through integration and consolidation. Now that new business models appear to be operating in the music *industries*, offering new opportunities for integration and consolidation among a series of substitute and complementary products, it is worth considering if the resulting product of these business models is ‘the music experience’, the value of which gets encapsulated through patterns like the 360 degree deals or similar industrial practices of subsidisation.

Similar observations have been made by Leyshon et al. at the beginning of the so-defined ‘crisis’ of the recorded music industry. The authors argued that music has infiltrated the capitalistic paradigm, which demands and fosters alternative patterns of consumption, similar to the emergence of the club culture in the early 1990s. Traits and characteristics of this are the provision of a musical experience that cannot be duplicated in private, the cross-selling of music on adjacent media

⁴¹⁹ Indeed, Curien and Moreau in 2005 recommended the diffusion of free copyrighted content by the record companies to a large scale and the participation in ancillary revenue generating activities instead, as a proof that it was the recording that advertised the concert at the time of writing. In N Curien and F Moreau, “The Music industry in the digital era: towards new business frontiers?” (2005) Laboratoire d’Econométrie, Conservatoire National des Arts et Métiers, available at https://perso.univ-rennes1.fr/eric.darmon/workcommed/papers/curien_moreau_1_nice.pdf.

⁴²⁰ R Sandall, “The day the music industry died” (2003) February 16 Sunday Times Magazine, 24-30.

platforms often belonging to the same conglomerate at the expense of content, and the competition listening to music faces in the face of other leisure activities (e.g. leisure time spent on the internet).⁴²¹ Even though the specific research focuses on the survival of the industry's old business model, these observations with regard to the consumption of music also provide an insight into changes in consumer perception and choice: consumer mobility is evidenced towards seeking a music 'experience', like in the case of the dance club, the festival, or as a spin-off of leisure time spent on the internet.

In emerging business models, as the ones seeking to internalise the external effects described above, consumer demand appears to drive and affect change, making it financially viable for a single firm to control multiple outputs. Competition law can 'get involved' depending on the end consumer's appreciation of this evolving market. If consumers have the ability to substitute between products in order to consume the musical experience 'no matter how', then substitution effects prevail. If, on the other hand, consumers need to be exposed to the recording prior to attending a concert, or allocate their income to collectors' items, box sets, and other memorabilia, then complementarity is supported. Both scenarios appear to hold merit and further empirical research is recommended in both fields, despite the limitations previous studies seem to have faced.

Nevertheless, for single firms in the music industries controlling the consumers' music-related budget is an issue of priority. Since it was consumer behaviour that drove physical copies' prices close to zero (either directly as a result of file-sharing or as a consequence of alternative consumption patterns), being able to offer diverse music products and 'listen' to consumer demands, is the way forward. Thus, being in position to provide a music *offering* to the consumer, requires an all-inclusive industrial activity, able to accommodate alternating patterns of *value creation, delivery, and capture*, or in other words, alternating *business models*.⁴²²

⁴²¹ A Leyshon, P Webb, S French, N Thrift, and L Crewe, "On the reproduction of the music economy after the internet" (2005) 27 (2) *Media, Culture, and Society* 177-209.

⁴²² "A business model describes the rationale of how an organisation creates, delivers, and captures value" *Business Model Generation* (n 21) 14.

It is hereby posited that these effects and patterns merit further attention, as we move towards a competition law narrative and an investigation into a demand-side chain of substitutability in competition law-defined relevant product markets. In any event, the existence of network effects, complementarity, and substitution effects, as well as the unpredictability of the shape the market for music can take following business models such as LNE's, should already act as a red flag for competition authorities, wishing to investigate anticompetitive practices or mergers in the music industries.

Indeed, from a competition law perspective, we are moving past the market where the product is considered homogeneous, to an industry where differentiated products can be considered interchangeable from the point of view of the end consumer. Moreover, in the past fifteen years the oligonomy managed to reduce its size considerably, following yet another series of mergers and divestiture, whereas other important players arose through mergers and acquisitions and via the hardware sector (e.g. Live Nation, Apple's iTunes). However, for the first time this series of changes in the music world is met with the maturity of competition regimes in both the US and the EU. Hence, the change in consumption patterns presented above is key in understanding and investigating the cases that follow in the next chapters, where the relevant authorities seek to describe immense industrial and business model change, while making use of the pre-existing product market definition and competitive assessment toolkits.

Thus, before proceeding with an overall estimation of creativity and innovation in the music industries, it is worth repeating that this overview of consumption identified more business models that are relevant to the music industries discourse and signaled a departure from the homogeneous product of *hit* music towards a more holistic music experience. The market for music is therefore characterised by dynamic consumption patterns, permitting the investigation of the music industries from a competition law perspective in a manner similar to other dynamic industries, where the market worth monopolising is a product of innovation. Indeed, the existence of multiple business models means that the old music business model of the oligonomy as tied to the provision of one product, is set to change.

By extension, this realisation should feature in the competitive analysis of the music industries of today. It follows that the absence of such an analysis means that a change in competition policy is required.

3.4 *Conclusions on business models in the music industries: an assessment of creativity and innovation*

To summarise, it is important to identify and highlight once more the existence and importance of alternative business models in the field of the music industries, as per the first chapter of the thesis. The emergence and existence of various business models seeking to capture and deliver value to *consumer segments* is vital in identifying creativity and innovation in a business context.

As such, it was deemed important to identify first and foremost, how the music industry switched to a music industries narrative, which further signals the existence of multiple business models associated with music in industrial terms. The live music industry was presented as an industry that gained substantial academic and corporate interest and displayed innovative business modelling e.g. in the face of Live Nation Entertainment. Moreover, the existence of 360 degree deals was mentioned as an example of the need to capture the consumer's wallet share by re-shaping the relevant business models. This example also pointed to the interchangeability between various products of the music industries as perceived by the end consumer. Nevertheless, these deals were included in the research as an example of industrial response to demand change, in other words as evidence of business model innovation.⁴²³

360 degree deals aside, business model innovation is more often than not associated with the emergence of new players in content delivery, such as iTunes and Spotify,⁴²⁴

⁴²³ See M Bacache-Beauvallet, M Bourreau, and F Moreau, "Cheating and 360-degree contracts in the recorded music industry" (2015), available at <http://dx.doi.org/10.2139/ssrn.2553999>. It is not the aim of thesis to justify these deals or not. However, their emergence corresponded with the disruption the old industry faced and it further proves the existence of business model innovation in the music industries.

⁴²⁴ It is presented later in the fifth chapter of merger control that new *channels* such as Spotify or iTunes, mostly operate within the traditional business model.

as also presented by the *Business Model Generation* authors.⁴²⁵ Both Apple, through iTunes, and Spotify were able to capture the consumer of music by appreciating the *choice* of listening to music online, and more recently ‘accessing content online’; a practice which, according to Keith Negus, characterises the new consumer of music. According to the author:

*“the new music consumer is ambivalent about the plight of musicians and seeks access to their recordings rather than wishing to own them.”*⁴²⁶

Even though Keith Negus’ perception of the modern consumer appears paradoxical compared to the consumer who *“loves the artists more than their records,”* one thing remains clear: the end consumer has devaluated the purchase of the CD and has turned to alternative methods of consumption. Keith Negus describes content access to some extent, commenting on the unbundling of albums into singles, the practice of skipping through songs that do not attract immediate attention, and the enlarged consumer involvement through user-generated content (parodies, mash-ups etc.).⁴²⁷ All of the above correspond with the digital culture of participation, signalling that consuming a product as in the analogue age is no longer preferred and that the firms to survive are the ones tailoring their business model around this realisation. The internet, as the largest bottom-up tool in history, came to highlight the role of the end consumer of various creative and media industries, either by exemplifying pre-existing patterns, or by providing new and de-centralised ways of participation in the creative process.

The traditional oligonomy with its immense power and influence, controlled the cultural output for music unilaterally, demonstrating a corporate top-down approach to the production and distribution of music. Traditionally, there was limited if any communication between end consumer and industry, since *“audiences have historically been separated or disclosed from most of the sites of musical production.”*⁴²⁸ Only the 1950s were discussed as an era when consumer choices did not align directly with the majors’ product on offer. However, the majors’ ability to

⁴²⁵ Osterwalder’s presentation (n 52).

⁴²⁶ K Negus, “Digital divisions and the changing cultures of the music industries (or, the ironies of the artefact and invisibility)” (2015) 4 (1) JBA 151-157.

⁴²⁷ Ibid.

⁴²⁸ K Negus, “Where the mystical meets the market: creativity and commerce in the production of popular music” (1995) 43 (2) The Sociological Review 316-41.

internalise and satisfy demand led to the reinforcement of their corporate structures. This meant that they continued being delineated from their customer base, offering their homogeneous and generic product top-down.

Direct interaction between consumers and producers of music remains absent until the digital era, which offers unprecedented opportunities for communication between fans, artists, and the music industries. Firstly, with the widespread popularity of file-sharing and the alternative patterns of consumption, consumers indicated that the desired method of consuming a product for music was no longer the purchase of physical recordings. Even though this led to aggressive reactions from the part of the oligonomy, others saw an early opportunity to capture several *customer segments* and offer them *value propositions*.⁴²⁹

It is important to note how Osterwalder in his keynote speech, presents “*young connected music fans*” as one of Spotify’s *customer segments*.⁴³⁰ ‘Connected’ is employed to point to the overall behaviour of the consumer online (since the days of the first P2P networks) and to the digital culture of direct participation and sharing. Hence, no longer a homogeneous mass-marketed product, music is being re-evaluated as a holistic experience the value of which depends on consumer perception and involvement, implying network effects. In the aggregate, social network effects have been observed in the broader creative industries by Potts, Cunningham et al., since 2008.⁴³¹

Thus, a pattern can be observed in the face of consumer-generated changes in business models. Consumers either demand an enhanced musical ‘experience’ and blur the lines between product substitutability and complementarity. It appears that the most neglected segment of a traditional top-down industry has been equipped with the unprecedented power to demand and generate value, or demand and generate new and alternative business models. Indeed, in the creative industries discourse it has been acknowledged that such value co-creation in the broader digital

⁴²⁹ See H Choi and B Burnes (n 245). Also, Osterwalder (n 52) focuses on the two-sided platforms of the digital era, namely iTunes and Spotify. He suggests that multiple customer segments, offers, and revenue streams require connections through the platform.

⁴³⁰ Ibid (n 52). Advertisers constitute a customer segment as well.

⁴³¹ J Potts, S Cunningham, J Hartley, and P Ormerod, “Social network markets: a new definition of the creative industries” (2008) 32 (3) *Journal of Cultural Economics* 167-85.

environment and in online social network platforms, blurs production and consumption relationships, since consumers are reconfigured as:

“drivers of wealth production and innovative creativity. No longer at the end of the value chain, consuming what is offered up by professionals, consumers now generate value with their activities actively pursued and harnessed” by corporate interests.⁴³²

As the broader creative sector has been found to operate with the experimental use of technology, the development of new content, and the creation of new business models, the active role of the consumer therein asserts what Hartley et al. call ‘public investment in innovation’ approach, which they juxtapose against the old business model, designed top-down.⁴³³ They argue that ‘public investment in innovation’ marks a shift from a traditional cultural and industrial perspective, towards an innovation and competition policy, based on an evolutionary growth rhetoric. *“An innovation is not an innovation,”* they argue, unless it is *“widely adopted into a social order, such as it changes the underlying market and even industrial order.”*⁴³⁴

As the present chapter attempted to address this point, it was shown that the music industry moved from a traditional old model and industrial order to an era of consumer-led change, innovation, and evolution, which demands the design of new policies. Until now, the change in the underlying market structure was presented alongside the theoretical need to re-address innovation and competition in the music industries, as part of the broader creative sector.

Nevertheless, in order to provide an insightful and analytical overview of the changes in the music sector and attest the role competition law is called to play, the thesis examines the appreciation of the music industries by the competition authorities called to assess both the old business model and the emerging ones. Thus, having established the need for competition policy in theory through the relevant literature, the thesis turns to the view of the authorities called to implement competition law *per se*. This way, the gap between the business reality and the legal reality gets noticed and the main question of the thesis can get answered: is there a

⁴³² J Hartley et al., *Key Concepts* (n 15) 21.

⁴³³ *Ibid* 114.

⁴³⁴ *Ibid*.

role for competition law and policy in the music industries? The answer is affirmative, as confirmed by both the preceding and the two forthcoming chapters.

In practice, the next two chapters examine the way that the industry has been perceived by the relevant competition authorities and ask whether this perception has changed in the new business environment. In other words: do legislation and policy align with industrial organisation and business model development?

PART TWO

PREFACE⁴³⁵

Pursuant to the presentation of business model evolution in the music industries and the signalling of potential competition law concerns that may arise, the second part proceeds with the examination of the business model(s) from the point of view of the competition authorities in the relevant cases and investigations. In this sense, the third chapter of the thesis acted as the background against which the authorities' appreciation of the industries can be measured.

It was presented in the previous chapter that the recorded music industry acted as an oligonomy with strong gatekeepers, who controlled the provision and the distribution of the musical product to the mass audience, the consumer. This in turn reflected a business model that remained unchanged and only started to alter at its core following the emergence of stronger consumer choice in consumption in the digital era. The consumer patterns identified in the previous chapter signalled the existence of various business models in the *music industries*, as per the narrative employed in the relevant research of the music sector. Furthermore, they signalled the existence of blurred lines of substitutability and complementarity from the point of view of the end consumer, whose role is being re-configured in the digital era, moving past the impression of the *mass audience*, meaning past the perception of a passive recipient of a cultural product designed top-down.

It is therefore suggested that these patterns of complementarity and substitutability in consumption are relevant in a competition law discussion of the music industries, as they signal product markets for music distinct from those traditionally defined under the old business model. As per the rationale of the thesis, a change from a *business model* narrative to *business models* one, translates into a change in the product offered. This product should be taken into consideration by the relevant competition authorities and policy makers.

⁴³⁵ The thesis chooses to introduce these two substantive chapters together, to provide a more coherent flow.

Since the previous chapter was designed to examine and analyse the *business reality* of the music industries past and present, the proceeding ones continue with the examination and the analysis of both the *ex post* (Chapter 4) and the *ex ante* (Chapter 5) attempts of competition and regulatory authorities to define markets and assess competition in the music industries. Consequently, this part of the research aims to examine how the dominant business model of the music industry has been perceived by the competition authorities and the courts (US and EU) in the relevant market investigations (UK) and merger cases (EU and US). It is shown that the authorities have failed to identify the bottleneck created around the provision of the music product, which has left the end consumer disenfranchised, even though this issue only became apparent rather recently, namely after the induction in the digital era; an era marked by market failure.

Firstly, as stated in the third chapter of the thesis, the recorded music industry received little *ex post* attention by the competition authorities compared to its consolidated power and oligonomic nature. This chapter turns to the few occurrences, when the nature of the oligonomy was scrutinised by the authorities of the US and the UK, with the EU following in the fifth chapter.⁴³⁶

In this vein, the fourth chapter commences with a closer look at the infamous payola scandals, a topic introduced in terms of its antitrust dimensions. The fourth chapter addresses the issue of payola on the radio, as this offers a regulatory perspective *into* the business model itself: the history of the radio is tied to the history of the recorded music industry, since the licensing of new stations in 1947⁴³⁷ was found to provide the oligonomy with a strong *key channel and partnership*, as per Osterlwader. The existence of payola sheds further light into this *key channel* and assesses the dynamics of this established practice. Therefore, examining instances of regulation and deregulation in the US radio, means assessing regulation *in* the business model, where the radio strongly features. As such, the analysis reveals how

⁴³⁶ As stated in the first chapter of the present, the jurisdictions are chosen as representative of the most mature antitrust jurisdictions (US, EU) and as home to the major players of the oligonomy (US, UK). The aim is not to provide a comparative legal analysis, but to follow the evolution of the oligonomy's business model across the jurisdictions where the majors have significant presence. It is important to observe how the oligonomy's business model transcends jurisdictions.

⁴³⁷ R Peterson (n 113).

the radio reconfigures the importance of reaching and addressing the mass audience and justifies the business model that Osterwalder presents. It appears that the world's most mature antitrust jurisdiction (the US) through its policy reconfigures the dominant traits and characteristics of the old business model as designed top-down for the mass audience and as subject to '*oligonomisation*' by few key players. Hence, any regulatory or deregulatory intervention in the radio has consequences in consumption of music, as established in the third chapter.

Furthermore, focusing on the power of the deregulated radio in the US following the Telecommunications Act of 1996, enables the emergence of an additional key player in the music industries: the former parent of Live Nation Entertainment, Clear Channel Communications.⁴³⁸ This way, the live music industry is presented as an industry also subject to gatekeepers and prone to vertical integration. Thus, examining the regulation/deregulation and the American radio, addresses the way the authorities reconfigure the business model directly (*channels*) and helps identify the bottleneck created around the music product and explain further trends to consolidation. Hence, this examination offers a vital introduction into the competitive assessment of the business model, by considering its most (or only) regulated part.

Leaving the payola investigations, the fourth chapter proceeds with the evaluation of the recorded industry *per se*. It was concluded in the previous chapter that, *inter alia*, the structure of the market for recorded music and the supply of the tangible product (the recording) is designed top-down towards mass consumption and that the product is identified as homogeneous. Naturally, the business model built around the provision of this homogeneous product, as well the power of the firms supplying it, did not go completely 'unnoticed' by the competition authorities, as the cases and investigations analysed attest.

Chapter four looks at the first full-length investigation into the provision of recorded music by the FTC that lasted from 1962 until 1969, when Columbia's appeal was

⁴³⁸ It is repeated that Live Nation was spun off Clear Channel Communications, a stronghold of the deregulated US radio. The alleged anticompetitive practices of Clear Channel have been explored *inter alia* by R M Stilwell in "Which Public? Whose interest? How the FCC's deregulation of radio station ownership has harmed the public, and how we can escape from the swamp" (2005-2006) 26 (369) Loy LA EntLRev 2005-2006.

heard.⁴³⁹ This investigation coincides with a point in history when the business model of the recorded music industry entered a phase of growth and establishment *per se*. It is therefore crucial for the present thesis to evaluate how the business model is perceived, by focusing on the way that the relevant product market is defined in this first occurrence.⁴⁴⁰

Leaving the US, the thesis proceeds with the investigation carried out by the UK Monopolies and Mergers Commission (hereafter MMC) in 1994.⁴⁴¹ The investigation produced a report into the anticompetitive behaviour of the oligonomy with respect to the provision of pre-recorded music. This report can be compared against the findings of the MMC's American counterparts, in order to analyse the understanding of the business model and the resulting product in both jurisdictions.⁴⁴² This investigation enables the evaluation of both sides of the oligonomy, as it addresses not only the supply of the recordings to the mass market, but also the oligopsony towards artists (exclusivity in artists' contracts is also part of the investigation). Therefore, MMC's attempts to appreciate the business model around the supply of the recorded music, allow for a thorough examination of the UK competition framework's ability to deal with the oligonomy at that time. As such, it answers the question of whether the competition authorities have been able to 'read' through the industry and identify the bottleneck around the music product from a UK perspective.

To conclude, the assessment of the anticompetitive investigation in the recorded music industry (and the radio) sheds light into the intervention attempts of the US

⁴³⁹ Columbia Broadcasting System, Inc., and Columbia Recordclub, Inc., Petitioners, v. Federal Trade Commission, Respondent, 414 F.2d 974 (7th Cir. 1969).

⁴⁴⁰ The petitioners appealed on the basis of relevant product market definition *inter alia*, as it will be further presented.

⁴⁴¹ Monopolies and Mergers Commission The supply of recorded music London HMSO (Cm 2599: 1994)

⁴⁴² The FTC has more recently (2000) investigated price-fixing in CDs, FTC Press release, "Record companies settle FTC charges of restraining competition in the CD music market" May 2000. Investigations followed in 2001 (into Warner and Universal regarding the price of a series of albums), in 2002, and later in 2003 (when majors and retailers were accused of collusion). These were however, settled out of court. See Statement of Chairman Robert Pitofsky et al., "In the Matter of Time Warner; Sony Music Entertainment; Capitol Records; d.b.a EMI Music Distribution; Universal Music & Video Distribution Corp. and UMG Recordings; and BMG Music, d.b.a BMG Entertainment." File No.971-0070, and FTC Press release, "FTC charges Warner Music and Universal Music" July 31 2001.

and the UK authorities. The ex post investigations into these anticompetitive practices reconfigure the oligonomic nature of the recorded music industry, as both a seller's (*oligonomy*) and a buyer's (*oligopsony*)⁴⁴³ market is observed. Thus, the aim is to identify and support the creation of a bottleneck around the supply of the music product, which leads to a market failure significant enough to justify intervention, as per the aim of the thesis. The ex post chapter tries to assess exactly this: did the authorities realise and highlight this arising problem as such?

A further point that this chapter aims to highlight, is the stated aim behind competition policy that each investigation reveals. Thus, it is important to assess not only *how* the competition authorities have intervened in the past but also *why*. Since the purpose of the thesis is to assess the need for apt competition policy, this chapter attempts to look for the intentions behind the intervention in conjunction with the prevailing rationale for competition policy each time (and in each jurisdiction).

Lastly, when it comes to the ex post investigations, the thesis further attempts a slight leap forward in time, in order to offer a holistic appreciation of the topic, as IP licensing is discussed with regard to the Columbia investigation. Further, anticompetitive concerns with respect to artists' contracts that are still relevant today, are being introduced to illustrate how these compelling issues were by-passed when the investigations took place.

Moving forward from the ex post investigations, the fifth chapter is dedicated to the evaluation of the major merger cases examined by the competition authorities in the US and the EU. The merger cases are being treated separately in order to highlight their predictive ex ante nature⁴⁴⁴ and in order to focus on relevant product market definition in more detail. Emphasis is placed on both merger cases that follow business model innovation, allowing for the assessment of new relevant product markets, and on mergers addressing the traditional business model operating top-

⁴⁴³ Investigated in both Columbia (FTC) and in the MMC (UK) Report, and further highlighted by the case of George Michael in *Panayiotou and Others v Sony Music Entertainment (UK) Ltd.*

⁴⁴⁴ As famously stated in Case C-12/03 P *Commission v Tetra Laval BV* (2005) ECR I-987, (2005) 4 CMLR 573 at 42 "A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events... or of current events, but rather a prediction of events which are more or likely to occur in future."

down. Pursuant to the third chapter of the thesis, where consumer behaviour identified substitution and complementarity patterns, it becomes crucial to investigate and assess how the relevant product market has been defined in the merger case of the music industries in the past (under the dominant business model), as well as more recently.

When examining the merger cases, the fifth chapter adopts the following structure: firstly, the rationale behind merger control is introduced and is subsequently applied to the case in hand, secondly, the nature of the merger is identified with a focus on the affected market; and thirdly, the analysis proceeds with the evaluation of the competitive assessment. The competitive assessment is examined in line with the purpose of the overall thesis, which is to appreciate the business model investigated each time and, subsequently, to assess how the competition authorities envision a competitive market for music. In other words, the aim is to highlight what makes a competitive music industry according to the authorities and evaluate if the end consumers' interests are served.

Thus, the forthcoming chapters address the following: to what extent have the competition authorities in the jurisdictions under investigation managed to assess changes in business models accurately? It is argued that if the competition authorities have not been accurate in their appreciation of the business model and consequently, of the resulting relevant product market, then inevitable errors in competition assessment can follow.

At this point, the thesis evaluates this hypothesis consulting primary and secondary material from the jurisdictions identified above and aims to shed light into the following points by the end of the fifth chapter: the regulatory attempts into the *key channel* of the music industries, the radio, and the outcomes of the payola scandals for both the radio and the music industries, the previous ex post attempts to intervene in the music industries, their rationale and their outcomes, the markets for music as identified in the relevant cases, the alignment of product markets to business models in the historical timeline; and lastly, the accuracy of competition, regulatory authorities and lawmakers in their attempts to evaluate the business models of the music industries.

The purpose of these chapters is to provide the evidence needed for the thesis to reach its conclusion and addresses the main research question asking whether a need for intervention does actually exist, by evaluating the relationship between competition law, business models, and the music industries. Have the intervention attempts been 'fit' for an industry of such an oligonomic nature? Has the absence or the failure of interference been consistent with the industry's growth and its innovation patterns? And, after all, what is the 'music industry' and what is the role of the consumer from the competition authorities' point of view?

CHAPTER IV

4 *'The Spirit of Radio': Assessing the Business Models of the Music Industries from the Perspective of the Competition Authorities ex post*

*"One likes to believe in the freedom of music, but glittering prizes
and endless compromises
shatter the illusion
of integrity"*
Rush, 1980

4.1 *Oligonomy and the radio: intervention by proxy?*

4.1.1 *'Pay me my money down'*

Examining payola enables the present chapter to commence with the evaluation of the old business model from the authorities' and the lawmakers' perspective, starting with the radio that Alexander Osterwalder places under *channels* on his canvas. The relationship between the recorded music industry and the radio was introduced in the previous chapter; however, this section offers an insight into this relationship from a legal perspective, expanding on the payola scandals. A brief introduction to payola was offered in the previous chapters in anticipation of its 'unfolding' in a competition law context. Thus, the discussion is now ready to delve into the more substantial issues surrounding payola.

As per the previous chapter, payola had been a well-established practice in the music industries since the days of Gilbert and Sullivan and later of Tin Pan Alley. Various big bands and other artists would perform songwriters' music live in exchange for money, which in turn would boost the sales of sheet music. Hence, it appears that pay-for-play has been accepted as a promotional tool since the days

when the publishers controlled the music business,⁴⁴⁵ inevitably acting as a significant barrier to entry.

With the advent of the radio came the realisation that this mass medium can offer unprecedented exposure opportunities not only to the publishers of sheet music, but also to the recorded music industry as a direct result of the first wave of radio deregulation.⁴⁴⁶ Adding to this key relationship, the role of the disc jockey (the DJ) was highlighted as a worth-bribing gatekeeper, who could control the musical output towards the audience. Of equal importance was the introduction of the predominant airplay format in the 1950s, namely the playlist consisting of the Top 40 most popular hits.⁴⁴⁷

The economic rationale behind pay-for-play or, more commonly payola,⁴⁴⁸ has been accurately summarised by Patryk Galuzska and can be easily deduced from the above: reasons include the scarcity of radio time as further intensified by practices such as the Top 40 format, the risk assumed in breaking and promoting new hits that the listeners were unfamiliar with, and the win-win situation for both the record company and the radio station, when audience and costumers get attracted thanks to the repetition of popular music.⁴⁴⁹ It becomes clear that the record company needs the radio in order to break and promote hit songs, since music, as a cultural product, is an experience good that requires sampling by the prospective customer. All of these reasons made payola not only a popular but also a sustainable practice in the recorded music industry, necessary for the survival of both the radio station and the record company.

As Ronald Coase explained in 1979, payola practices were initially more popular among smaller labels, who found a more direct way to compete with the majors in the 1950s.⁴⁵⁰ It was presented in the previous chapter that the majors in the years that followed the Second World War, refused to cater for the fans of niche genres such as rhythm and blues and rock'n'roll and that consequently, the market was

⁴⁴⁵ P Galuzska, "Undisclosed payments to promote records on the radio: an economic analysis of anti-payola legislation" (2011-2012) 11 Va Sports & Ent LJ 38.

⁴⁴⁶ Petereson (n 113).

⁴⁴⁷ P Galuzska (n 445) 45.

⁴⁴⁸ The term was coined in 1938 by the magazine *Variety*, *ibid* 48.

⁴⁴⁹ *Ibid*.

⁴⁵⁰ R H Coase "Payola in radio and television broadcasting" (1979) 22 JL & Econ 269-273.

ready for the emergence of smaller labels dedicated to the promotion of the new sounds. The latter often followed practices guaranteed to generate radio exposure, such as payola.⁴⁵¹ Coase suggests that the investigations into payola practices were partly triggered by the majors, who in an attempt to re-gain their market shares, complained against these ‘immoral’ business practices from the part of labels affiliated with the ‘vile’ rock’n’roll sound.⁴⁵² Coupled with the respective ‘war’ between the collecting societies at the time,⁴⁵³ the matter led to an official series of investigations in the late 1950s, as introduced in the previous chapter.

The scandals of the bribed DJs in the 1950s were revealed pursuant to investigations by the US Congress and the FCC. As a result, Section 317 of the Communications Act 1934 was amended in 1960,⁴⁵⁴ specifying under which conditions the receipt of consideration with the requirement to make a relevant announcement on the radio was legal and making the disclosure of consideration received by radio station employees (the DJs) obligatory.⁴⁵⁵ These requirements however, became

⁴⁵¹ Ibid 312. See also P Tschmuck, *Creativity and Innovation in the Music Industry* (2012).

⁴⁵² Coase (n 450).

⁴⁵³ As explained in the third chapter of the present, in Ryan (n 273).

⁴⁵⁴ It is reminded that the third chapter also discussed the adoption of the relevant Trade Practice Rules in 1964, highlighting the interest that the FTC showed in the music industry at that time (n 323 & n 324).

⁴⁵⁵ 47 U.S.C. § 317. (a) *Disclosure of person furnishing*

(1) *All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That “service or other valuable consideration” shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.*

(2) *Nothing in this Section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.*

(b) *Disclosure to station of payments*

In any case where a report has been made to a radio station, as required by Section 508 of this title, of circumstances which would have required an announcement under this Section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) *Acquiring information from station employees*

The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any

considerably relaxed in the following years through the FCC's administrative hearings, resulting in the infamous 'friendship exception', under which social exchanges among friends do not constitute payola,⁴⁵⁶ leaving outsourced independent promotion by 'hit brokers' virtually untouched by the law.⁴⁵⁷ It follows that pay-for-play was not eliminated from the radio, as the anti-payola legislation was not rigorously enforced and the practice itself was not illegal. In any event, the US authorities appeared more concerned with payola when it was accompanied by tax evasion, a finding revealed by the initial investigations in 1959.⁴⁵⁸

In the same vein, the role of the independent promoter became even more important in the 1970s, pursuant to the enactment of the Racketeer Influenced and Corrupt Organizations (RICO) Act in 1971.⁴⁵⁹ Record companies could potentially be prosecuted by the US government and face criminal liability "*if found to aid, abet, counsel, command, induce or procure acts of payola; or if found to have wilfully caused an act of payola.*"⁴⁶⁰ Thus, record companies chose to contract the services of independent promoters that would sign purposely vague contracts in order for the former to avoid knowledge and consequently, liability.⁴⁶¹

This new triadic relationship came under investigation in the 1980s, with the second wave of 'payola scandals' triggered by the role of the independent promoters.⁴⁶² The rekindled interest in payola highlighted not only that the practice had not been abandoned, but also that it had moved to the highest levels of the corporate hierarchy in record companies and radio stations, taking the form of extensive

program or program matter for broadcast, information to enable such licensee to make the announcement required by this Section.

(d) Waiver of announcement

The Commission may waive the requirement of an announcement as provided in this Section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

⁴⁵⁶ *In re Applications of Kaye-Smith Enter.*, 71 F.C.C. 2d 1402, 1408 (1979).

⁴⁵⁷ J G Sidak and D E Kronemyer, "The 'new payola' and the American record industry: transaction costs and precautionary ignorance in contracts for illicit services" (1987) 10 Harv LJ & Pub Pol'y 521.

⁴⁵⁸ K L Repyneck, "The ghost of Alan Freed: an analysis of the merit and purpose of anti-payola laws in today's music industry" (2006) 51 The VillLRev 695.

⁴⁵⁹ Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) [at 18 U.S.C. §§ 1961-1968 (2005)].

⁴⁶⁰ See Sidak and Kronemyer (n 457) 537-538 in Repyneck (n 458) 709.

⁴⁶¹ *Ibid.*

⁴⁶² Sidak and Kronemyer (n 457) 549.

nation-wide promotional campaigns: independent middlemen were even distributing drugs and cash in exchange for airplay, whether this paid-for airplay was actual or just on paper.⁴⁶³ If anything, being able to offer bribes of this nature, suggests that the barrier to entry became progressively higher.

It seems that the recorded music industry would indeed go into great lengths to guarantee the promotion and the exposure necessary for the making of new hit music. It follows that a lot of money was invested, or even lost, in the process of 'breaking' hit singles. Even though RIAA attempted to tackle payola by launching an investigation between 1985 and 1986, no single record company would appear eager to singlehandedly oppose payola and abandon it, as this would result in the other players of the oligonomy gaining the advantage, should they choose to continue the practice.⁴⁶⁴ Hence, the vicious circle of quasi-blackmailing continued throughout the 1980s, the 1990s, and in the 2000s, with the so-called 'Sony scandals'.⁴⁶⁵

Further, the business model of the recorded music industry itself appears to have paved the way for the sustainability of payola, as it is based on the promotion and the distribution of music products the success of which 'nobody knows.'⁴⁶⁶ Since less than fifteen percent of all records recoup and become successful,⁴⁶⁷ promoting music via the radio eliminates the uncertainty factor substantially, adding to the indispensability of the radio for the business model. Moreover, once the successful album has recouped its initial cost, the marginal cost of production of additional units falls dramatically, guaranteeing immense profits for the record company.

⁴⁶³ Repyneck (n 458) 716. See also *United States v. Isgro*, 751 F. Supp. 846, 847 (C.D. Cal. 1990), rev'd, 974 F.2d 1091 (9th. Cir. 1992), where the "*independent promotion powerhouse*" Joseph Isgro was indicted on fifty-six accounts including RICO violations, payola, and filing false income tax turns.

⁴⁶⁴ In *Sidak and Kronemyer* (n 457) 555. It should be noted Warner Communications did attempt to boycott independent promotion in 1980. This resulted in the rest of the major doing the exact opposite by "*increasing their independent promotion expenditures to gain greater shares of airplay*," whereas a more coordinated ban on independent promotion followed in 1986 in *ibid* (n 457) 549. It should be noted that what was targeted was independent promotion *per se*, rather than the practice of payola on the radio.

⁴⁶⁵ M Gormley, "Sony BMG Music agrees to \$10 million 'Payola' settlement" 2005 Law.Com, available at <http://www.law.com/jsp/article.jsp?id=1122294925140>.

⁴⁶⁶ As per Coase's (n 450) "*nobody knows property*" notion, which applies to cultural products in general.

⁴⁶⁷ Galuszka (n 445) 41. Indeed, as it will be explained later in this chapter with regard to the UK, 'making', 'breaking' and 'capturing' superstar value via exclusive contracts with the artists, lies at the core of the business model, acting as its feeding hand. What can be observed here is how 'tight' the business model is across its whole spectrum.

Therefore, even if the expenses of paid promotion appear ‘extortionate’, the prospect of a ‘superstar’ makes the costs worth assuming.

Lastly, the high concentration of the majors gives them almost exclusive access to radio promotion,⁴⁶⁸ a realisation that prevented them from forgoing payola in the past, for fear that a minor label with access to funds could ‘step in’ and threaten their market share.⁴⁶⁹ It was indeed argued in the previous chapter, as well as by Bishop who discussed concentration and the oligonomy’s gatekeeper function,⁴⁷⁰ that competition among the majors for the ‘lion’s share’ is fierce, even if they do operate as a tight oligonomy. Payola practices further point to that direction and highlight the majors’ coordination in promoting their common interests.

This was also evident in the investigations launched in 2004 into all the majors at the time by the Attorney General of the State of New York Eliot Spitzer,⁴⁷¹ who sought Assurance of Discontinuance for commercial bribery,⁴⁷² even though the balance of liability had shifted towards the independent promoters since the 1970s.⁴⁷³ Indeed, the Attorney General actually noted in the first paragraph of the Sony BMG investigation that “*the practices...are pervasive within the music industry and by no means unique*” to a single firm.⁴⁷⁴ Under these investigations it was made clear that both independent and direct radio payola never ceased to occur. The majors finally settled with the Attorney General, agreeing to revise their guidelines and to eliminate payola practices in the future.⁴⁷⁵

⁴⁶⁸ Ibid 43.

⁴⁶⁹ Ibid.

⁴⁷⁰ J Bishop (n 296).

⁴⁷¹ The majors subpoenaed were the following members of the oligonomy: Warner Music Group, EMI Group, Sony BMG Music Entertainment, and Vivendi Universal Music Group.

⁴⁷² N.Y. Penal Law § 180, Article 22-A of the General Business Law (N.Y. Gen. Bus. Law § § 349,350, and N.Y. Exec. Law § 63).

⁴⁷³ The literature consulted above focused mainly on the economic rationales behind payola. The respective authors investigate the possibilities of introducing a legal market for radio promotion. Galuszka further contemplates on the impact of internet radio on payola practices.

⁴⁷⁴ Attorney General of the State of New York Press release, “In the matter of Sony MBG Music Entertainment, Respondent, Assurance of Discontinuance Pursuant to Executive Law § 63(15)” July 22 2005, available at <http://www.ag.ny.gov/sites/default/files/press-releases/archived/payola.pdf>.

⁴⁷⁵ See e.g. J Leeds, “Universal Music settles big payola case,” (2006) May 12 The New York Times, available at http://www.nytimes.com/2006/05/12/business/12payola.html?_r=0.

The FCC followed suit, launching its own investigations in 2007, focusing this time on the radio and communication giants Entercom Communications, CBS Radio, Citadel Broadcasting, and Clear Channel Communications.⁴⁷⁶ As both parties to payola are being investigated, their relationship comes to the foreground. However, it is of interest to note how the oligonomy's prosecution for commercial bribery signals that the power in this relationship lies with the radio stations. Furthermore, even though the radio stations appear to have the upper hand in this *key partnership*, their role strengthened substantially with every deregulatory initiative the US government would take. As a matter of fact, the radio landscape in the US entered an era of formidable concentration following the deregulation of broadcast ownership, pursuant to the Telecommunications Act of 1996. This move led to the dominance of the US radio markets by a handful of companies, the most prominent example being Clear Channel Communications, Inc. This deregulation of ownership allowed Clear Channel and its former competitor AMFM to merge, creating the "*world's largest radio company with 830 stations in small, medium, and large cities around the United States and reaching more than 100 million listeners weekly.*"⁴⁷⁷

It follows that Clear Channel-owned radio stations were in position to leverage their incredible power and create an environment where the record companies were left with fewer opportunities to negotiate access to airwaves for their music. This consolidation of power made the role of the independent promoter further redundant. "*Clear Channel began using the clout of over 1,200 stations to go directly to the labels for contests, promotions, and marketing,*"⁴⁷⁸ a move characterised as considerably bold, since Sections 317 and 508 of the Telecommunications Act that necessitated the existence of middlemen at the first place, had not been abolished.

Consequently, the investigations opened by Eliot Spitzer and the FCC crackdown on payola that followed, were hardly anticipated by a company the size of Clear

⁴⁷⁶ Order In the Matter of Clear Channel Communications, Inc., File Nos. EB-05-IH-0059, EB-05-IH-0144, Acct. No. 200732080011, FRN No. 0003720935, 5-11, Adopted: Mar.21,2007.

⁴⁷⁷ D Abell, "Pay-for-play: an old tactic in a new environment" (2000) 2 (1) Vanderbilt Journal of Entertainment Law & Practice 52-69.

⁴⁷⁸ H Bordowitz, *Dirty Little Secrets of the Record Business* (2007) 123-25.

Channel. On the other hand, the time for the investigation was ripe, as according to Galuszka “*communication between radio stations and record labels has now been easier to prove... parties exchanged emails and text messages.*”⁴⁷⁹

Furthermore, radio stations grew so much in power that they had much more to lose (e.g. their FCC licences). As a result, the investigations above coupled with the subsequent promises of both radio stations and record companies to tackle payola by implementing relevant codes of conduct, had a deterrent effect on the practice.

However, another issue had emerged by the time the investigations came to an end, as the oligonomy and its business model were challenged by both the internet and the end consumer. By 2007, the oligonomy was already facing the problem of its customer base migrating to other means of consumption and one is left to speculate to what extent continuing with payola practices on terrestrial radio would make economic and business sense in the internet era.⁴⁸⁰ In addition, terrestrial radio had been facing competition from internet radio services such as Pandora, in addition to the emergence of streaming services.⁴⁸¹ The business model of the oligonomy had always been heavily reliant on promotion via the airwaves; however, consuming (or even sampling) music online challenged the foundations of this *key relationship*.

Nevertheless, discussing the relationship between anti-payola legislation and the radio *per se*, falls outside the scope of the present bar from the instances identified above: the emergence of Clear Channel Communications as a stronghold of the deregulated American radio following the Telecommunications Act 1996 and its integration into complementary markets, namely live music production. In 2000, Clear Channel created Clear Channel Entertainment with the acquisition of SFX Entertainment, a network of formerly competing live music promoters. Given the power consolidated by Clear Channel, this decision comes hardly as a surprise. With live music promotion being another traditional means of promoting an album and with radio airplay being the other one, Clear Channel attempted to create a solid

⁴⁷⁹ Galuszka (n445) 68.

⁴⁸⁰ The main theme in the literature consulted has been whether internet radio should be subjected to anti-payola legislation as well. This is an interesting point for further discussion following the 2015 decision by the FCC to regulate broadband internet.

⁴⁸¹ For a 2015 analysis of the media landscape in the US, including digital and terrestrial radio, see Pew Research Centre, <http://www.journalism.org/files/2015/04/FINAL-STATE-OF-THE-NEWS-MEDIA1.pdf>.

bottleneck around the exposure of music to the end consumer, inarguably with the ability to negatively affect consumer welfare. Indeed, a class action lawsuit followed in 2002, claiming that Clear Channel restricted airplay for artists that were booked with competitors of Clear Channel's promotion leg.⁴⁸² Ultimately, Clear Channel was forced to spin off its live music promotion leg in 2005, in what was to become Live Nation.

In a nutshell, Clear Channel emerged as a firm with leveraging capabilities towards the wider spectrum of the provision of the musical product. It is not only its ability to blackmail payola from the recorded music industry that attracts attention; Clear Channel was able to foresee the importance of controlling several *channels* for the enjoyment of music and was able to position itself strategically between the recorded music industry and the consumer. This practice reconfigures the nature of the provision and the distribution of music to the mass market to the potential detriment of the end consumer, who is surrounded by even more gatekeepers. Further, the importance of the live music sector comes into the limelight via the practices of Clear Channel, which further highlights how controlling all outputs in the music industries does make strategic sense, a realisation further emphasised in the studies consulted in the previous chapter. The thesis explores this concept further in the fifth chapter, when merger control is being introduced.

Additionally, the examination of payola as a significant barrier to entry brings the practices of the oligonomic recorded music industry as close to a regulatory framework as they would ever get, thanks to the FCC's oversight of the radio. Even though the communications regulator touches upon the music industry indirectly, the payola investigations still afford us with an instance of regulatory oversight of the industry's practices. Consequently, the business model is also assessed to reveal that indeed the product is directed to the mass audience, that the oligonomy, even though in fierce competition on firm level, remains virtually impenetrable by potential competitors, and that it acts in a coordinated manner to promote its interests. This coordination has been observed throughout the present thesis with

⁴⁸² In re Live Concert Antitrust Litigation, 863 F.Supp 2d 966 (consolidating claims brought by Malinda Heerwagen and Nobody in Particular Presents).

regard to lobbying, payola, and the ‘similar’ practices of securing exclusivity with artists, as the UK investigation will reveal.

4.1.2 *Thoughts beyond payola*

Ultimately, as payola discussions enter the digital era, academic literature seems to focus on the impact of the digital radio on the terrestrial one, as well as on the changing dynamics between the radio and the recorded music industry, if any. Traditional terrestrial radio provided a sampling effect to the prospective consumers of the tangible music product, a basis on which this *key relationship* was built. Is the digital radio able to duplicate this effect given that the consumption of music has turned to alternative models altogether?

As the relationship between the radio and the recorded music industry entered the digital era, it is worth contemplating on the future of this *key relationship* and on what it can reveal about methods of consumption and the end consumer. As access to the product of recorded music has gradually become an activity concentrated in the online environment, it is possible to envision a new type of payola ‘fit’ for the digital era; one that prioritises access to online content rather than one designed for push models of broadcast communications. This type of payola could mirror the ‘decentralised’ consumer’s access and consumption patterns.

However, another example that proves the perplexity of apprehending the role of the end consumer in the present era of consumption, can be observed in the field of digital copyright. Even though the end consumer can access the recorded music product online either via internet radio services (Pandora, Last.fm) or via interactive streaming services (e.g. Spotify), the legal framework governing these practices mirrors distinctions made for the analogue era here as well. When the US Congress extended the compulsory licensing system to streaming services for the first time in 1995,⁴⁸³ a distinction was made between ‘interactive’ and ‘non-interactive’ services with respect to the rights of songwriters. Thus, whereas compulsory licensing for public performances of compositions applies to all streaming services equally, compulsory licensing for sound recordings and performers covers only ‘non-

⁴⁸³ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, Stat. 336.

interactive' services, excluding services like Spotify.⁴⁸⁴ As a result, songwriters cannot pull their compositions off of any type of streaming service, even though the opposite is applicable for owners of copyright in sound recordings, another example of the oligonomy's power consolidation that can affect consumer welfare by controlling (here limiting) access. Further, as explained in the previous chapters, compulsory licenses are administered by collecting societies and the rate is set by Congress. The flat rate has attracted criticism as being too low, leaving the songwriters disadvantaged.⁴⁸⁵ Here, the argument that academic commentators raise is that the rate is set at low levels, since Congress had envisioned all streaming services to substitute the act of listening to the radio, rather than become the actual distribution system for recorded music,⁴⁸⁶ highlighting the inability of the law to appreciate the business or the commercial reality as such.

What the above comes to prove in relation to the present chapter is that it is not only the relationship between the radio and the record company that is changing, compared to the time when payola was prevalent; it is once again the role of the end consumer that needs to be accommodated in these matters as a driver of change in the music industries. Indeed, it is consumer choice in consumption that can either make payola on terrestrial radio redundant or transfer it to adjacent digital fields, something that should be borne in mind by both regulators and legislators.

As a result, this first section set to examine how authorities and legislators appreciate the business model of the oligonomy using the *key relationship* with the radio as a proxy. The relationship between the radio and the oligonomy of the majors reflects the reality of the old business model, with the regulator's intervention reaffirming the push model of communication towards the mass audience, recipient of the homogeneous product. Moreover, in the case of compulsory licences in the digital environment, it is further highlighted how the legislator perceives this relationship between communication media and the recorded music industry and of course, the role of the end consumer therein.

⁴⁸⁴ A Blacc, I D Manta, and D S Olson, "A sustainable music industry for the 21st Century" (2015-2016) 101 Cornell LRev Online 39.

⁴⁸⁵ 9.1 cents per copy at the time of writing (11/2016). Criticism in *ibid*.

⁴⁸⁶ *Ibid* 45.

From a regulatory perspective, the examination above provided an insight into the music industry from the point of view of the telecommunications regulator with respect to the radio. As the radio was progressively left to the open market, any developments in this sector have had consequences the music industries, such as the emergence of Clear Channel Communications. It would have of course been impossible for the regulator to envision the aftermath of radio deregulation with regard to the music industry, let alone the live music one. However, and as a concluding remark to the present section, it is exactly this unpredictability alongside the nexus of interwoven affiliations that calls for extra attention when dealing with the music industries.

This becomes clearer as the chapter moves closer to intervention into matters of the recorded music industry *per se*. Having presented a first occurrence of intervention into the music industries and their *key relationships*, the following section is dedicated to the first full length antitrust investigation into the business model of the majors *per se*.

4.2 *Intervention and appreciation of industry's business model ex post: US and UK perspectives*

4.2.1 *Columbia Broadcasting System, Inc., and Columbia Record club, Inc., Petitioners, v. Federal Trade Commission, Respondent, 414 F.2d 974 (7th Cir. 1969)*

4.2.1.1 *The case in brief*

With the examination of the first major intervention of a competition authority into the majors, the thesis simultaneously examines another piece of Osterwalder's old business model canvas: the *key partnership* of distribution. Distribution was indeed presented in the previous chapter as a *key partner* worth expanding into vertically, allowing the oligonomy to reaffirm its strong gatekeeping function. It was established that the oligonomic business model seeks to control distribution to the mass market as closely as possible, a need that also justifies the relationship developed with the radio.

As far as the present investigation is concerned, emphasis is placed on two elements: on the attempts of a key participant of the oligonomy to foreclose competitors downstream and engage in unlawful restraint of trade⁴⁸⁷ and on the relevant product market identified for the purposes of this investigation. A further point raised is the struggle that the competition authorities faced in approaching the music industries, as far back as the 1950s and the 1960s.

The analysis follows the case from the initial investigation in 1959 until Columbia's appeal in 1969, showing how stalling of the case raised administrative issues in the US courts.⁴⁸⁸ However, in the present context it is also important to assess the treatment of the case as to its business model dimensions; as the first point of entry into the investigation of the anticompetitive practices of the oligonomy. Thus, this section examines the extent to which the legal framework (and the competition policy) in the US, was in position to successfully interfere with one of the majors at the time.

In 1959 and at the time of the payola hiatus, the Federal Trade Commission launched an investigation into Columbia Broadcasting System, Inc. (CBS) and its subsidiary, Columbia Record Club (hereafter CRC) for alleged use of unfair licensing and royalty agreements in violation of Section 5 of the Federal Trade Commission Act.⁴⁸⁹ The investigations focused on the distribution of Columbia's records via its own record club, a subscription method of delivering the finalised product directly to the end consumer, by-passing the retailer.

Columbia had entered the direct or record club sales in 1955 "*in response to a threat of competition from other companies.*"⁴⁹⁰ Initially, the club would offer only recordings from the Columbia catalogue; however, this did not prove sustainable due to consumer demand for diversified genres and sounds. Consequently,

⁴⁸⁷ Section 5 of the Federal Trade Commission Act.

⁴⁸⁸ Judicial Review, Recent Decision, "Administrative delay: why reply a stale record? Columbia Broadcasting Sys., Inc. v. FTC (7th Cir. 1969)" (1969-1970) 58 Georgetown Law Journal.

⁴⁸⁹ Ibid. It is reminded that that era coincides with the FTC's interest in 'approaching' the industry. The Trade Practice Rules aimed to tackle price-discrimination downstream in the supply chain. Further, a violation of the Robinson-Patman Act was also alluded in the present investigation.

⁴⁹⁰ Columbia Broadcasting System, Inc., and Columbia Record club, Inc., Petitioners, v. Federal Trade Commission, Respondent, 414 F.2d 974 (7th Cir. 1969) at 5.

Columbia entered in explicit licensing agreements with smaller manufacturers providing more diversified sounds, such as teenager-oriented popular music including rock'n'roll and later twist, jazz, folk, spoken word, and novelty acts.⁴⁹¹ The contracts under investigation prevented the licensor from selling its catalogue to another club; however, selling to wholesalers was still permitted. In return, Columbia would guarantee the sale of a prescribed number of records. Thus, effective competition between CRC and its competitors would be suppressed, as any other record club wishing to offer their members the same recordings, would have to purchase them at the open market, where the price would be substantially higher.⁴⁹²

Additionally, the agreements in question made provisions so that the licensors would reduce recording artists' royalties to 50 percent for records sold via the club and that any difference in royalties above that level would be assumed by the licensor alone.⁴⁹³ Based on this, the FTC alleged that by fixing and depressing artists' royalties the agreements "*operated to restrict free and open competitive bidding for the artists' services.*"⁴⁹⁴

As a result, a complaint was issued in 1962 alleging unlawful restraint of trade as regards record club sales. This was however dismissed by the hearing examiner two years later, in 1964.⁴⁹⁵ Three years after that in 1967, the FTC reversed the examiner's findings, which led CBS to appeal the decision. The Court of Appeals finally reversed the 1967 decision, Kiley J dissenting, and remanded the case to the FTC for further proceedings as to the structure of the record club market.⁴⁹⁶

The latter comes as no surprise, given that the FTC's investigations started in 1959 and the hearing examiner's findings were reversed in 1967. Further, it also comes as no surprise that one of the bases of CBS's appeal was that the 1967 decision was

⁴⁹¹ CRC entered into such licensing agreements with labels such as Caedmon, United Artists, Kapp, and Liberty among others. See Columbia Broadcasting Sys., et al., Complaint, 72 F.T.C. Initial Decision 75-125.

⁴⁹² 414 F. 2d at 6.

⁴⁹³ Ibid.

⁴⁹⁴ 414 F.2d at 7, Brief for Respondent at 100.

⁴⁹⁵ 72 F.T.C. 41-43.

⁴⁹⁶ Consent Order following the Appeal issued in 1971. FTC, Decision and Order in the matter of Columbia Broadcasting System, Inc., Mar. 22, 1971.

based on a stale record.⁴⁹⁷ The petitioners further contended (among other arguments advanced)⁴⁹⁸ that the agency's findings were lacking substantial evidence⁴⁹⁹ and, coming closer to the aims of the present thesis, that the FTC had not succeeded in defining the relevant market as the basis for its findings.⁵⁰⁰

The specific case has not attracted much commentary. Nevertheless, it comes to highlight some very important aspects of the dominant business model and about its oligopolistic nature (referring to the oligonomy in a competition law context this time). The points that require further elaboration include the relevant market definition and the basis of staleness itself, both of which can be particularly revealing about the industry as it entered an era of major consolidation.

Even though the Court of Appeals for the Seventh Circuit reversed and remanded the case on the basis of a stale record, it should be clarified that the FTC's relevant market was approved, and that further, substantial evidence of anticompetitive practices were found to exist.⁵⁰¹ These however need to be viewed with extra consideration, as the approval of the relevant product market as defined at the time of the investigation in conjunction with the reversal based on staleness, come to show that the market had changed in the interim course of almost a decade.

4.2.1.2 Addressing the key points

Starting from the relevant market definition part of the Columbia saga, it is important to compare and contrast the attempts to define the market in both the

⁴⁹⁷ See (n 488). Brief for Appellant at 21. "*C.B.S urged that a six-year-lapse, coupled with the entry of four new clubs, including the Record Club of America which now claimed to be the second largest in the country, rendered the FTC's record outdated,*" at 89-91.

⁴⁹⁸ Additional arguments advanced included a. improper overruling of the examiner's findings; improper reliance on trade-press reports, and; prejudicial participation by Commissioner MacIntyre, at 19,83, 86.

⁴⁹⁹ Ibid, Brief for Appellant at 21. "*In appealing from an adverse administrative decision, appellant must show that the evidence as a whole was inadequate to support the decision below.*" Federal Trade Commission Act §5 (c). For a more thorough analysis of the "Substantial Evidence" Rule at the time, see e.g. E B Stason, 'Substantial evidence' in administrative law" (1941) 89 (8) University of Pennsylvania Law Review and American Law Register 1026-1051.

⁵⁰⁰ 414 F.2d at 31.

⁵⁰¹ 414 F.2d at 31.

1962 initial complaint and in the hearing examiner's dismissal of 1964,⁵⁰² since this provided one of the contested points in the appeal that followed.

Initially, in the 1962 complaint the FTC accused CBS of monopolising or attempting to monopolise four separate markets or lines of commerce:

*“a. the manufacture, sale and distribution of phonographs records generally... b. the manufacture, sale and distribution of LPs generally... c. the retail sale and distribution of LPs, and d. the manufacture, sale and distribution of LPs sold through the ‘subscription method’ – in other words, the so-called record club market.”*⁵⁰³

Therefore, the FTC looked for anticompetitive effects in two further submarkets inside the broader LP market: retail sales and sales via subscription clubs. Important to also note that the initial complaint stipulates that additionally, each record constitutes its own separate market since each record is *“unique, distinctive and non-substitutable.”*⁵⁰⁴

Setting to refute the above, the hearing examiner in the 1964 dismissal reached the exact opposite conclusion, rejecting the notion that each record constitutes its own market for antitrust purposes and that LPs belong in a separate market than all other records in general.⁵⁰⁵ In examining whether LPs constitute a well-defined submarket within the market for all records, the examiner looked at the differentiation between LPs and singles (45s) and found that apart from physical differences, the two do not bear other distinct characteristics, since it is the same music that is being recorded on them, either broadly in terms of genre or literally, thanks to the compulsory licensing system.⁵⁰⁶ The hearing examiner further highlighted that both formats are manufactured, distributed, and marketed via the same channels by the same companies, whereas with regard to the end consumer, the examiner agreed with CBS in that *“the purchasing public for records cannot be classified into rigid and distinctive age groups. All age groups purchase records on all speeds.”*⁵⁰⁷ Finally, the examiner referred to the opinion of the only economic

⁵⁰² In the Appeal, CBS insisted that the relevant market is the one as defined by the hearing examiner in 1964, 414 F. 2d at 12.

⁵⁰³ 72 F.T.C. Initial Decision Competitive Effect 160.

⁵⁰⁴ 72 F.T.C. Initial Decision 161.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid 167.

expert to testify that “*in any meaningful analysis of the effectiveness of competition in the record industry, LPs and singles should be included in the same market.*”⁵⁰⁸

More intriguing was the conclusion that individual records do not constitute separate markets, even though each commodified artistic performance on a record is unique. The examiner did acknowledge that each performance is a “*little monopoly in the sense that there is only one like it, it is made by a particular artist, it is made in a particular arrangement.*” However, he did not perceive this to amount to a monopoly in the legal sense for antitrust purposes.⁵⁰⁹

The FTC had aimed to show in the original complaint that each recording constituted a separate market susceptible to monopolisation by the majors, since every recording is “*unique, distinctive, and nonsubstitutable.*”⁵¹⁰ Whilst acknowledging that this is so, the hearing examiner went on to distinguish the market for antitrust purposes by noting how recordings compete with each other for the ‘consumer’s dollar’, despite their uniqueness. Referring to covers and renditions of hit songs and music, the examiner noted that they are in competition with each other, even though they are not identical. Thus, the examiner reaffirmed the reasoning behind the existence of the compulsory licensing system, which as seen earlier, was to promote competition by avoiding the monopolisation of potentially hit music, creating the possibility for record companies to offer several competing versions of the same music; similar enough, yet not the same. According to the examiner’s reasoning, records compete between them through “*the practice of imitation and copying,*” not just literally as in the case of covers of music, but also on genre level (speaking of music “*fads*”).⁵¹¹ By referring to an example of costumers who refused to purchase a different bossa nova recording in lieu of a recording by Stan Getz that was out of stock, the examiner highlighted both the nonsubstitutable nature of the recordings, and the competition that exists between them.⁵¹²

⁵⁰⁸ Ibid 170.

⁵⁰⁹ Ibid 170.

⁵¹⁰ Ibid.

⁵¹¹ Ibid 171.

⁵¹² Ibid, referring in fact to an example brought forward by the Government aiming to highlight uniqueness and nonsubstitutability by use of witness.

According to the examiner's reasoning, since all individual recordings compete for the end consumer's income allocation, they remain in competition with each other⁵¹³ and therefore, the market should be perceived as one overall market comprising of all recordings. Here of course, the examiner also treated the end consumer as the mass audience that would purchase either an LP or a single containing an edition of a popular song in general, through all retail channels available.⁵¹⁴

Hence, the first complications in relevant product market definition in the music industries can be observed; pointing to opposite directions, both the FTC and the hearing examiner in his dismissal attempted to reach contradicting conclusions, starting from the same point of nonsubstitutability. However, this first attempt to define a relevant product market for the music in the antitrust sense needs to be read in conjunction with its era, since the events took place twenty years before the hypothetical monopolist test was introduced in the US. Following a post-Merger Guidelines reading into the matter of substitutability, close substitutes and interchangeable items would most likely form part of the same market for relevant product market definition purposes. Here, the market for all records seems to consist of unique, nonsubstitutable and non-interchangeable items that remain in competition with each other for the consumer's disposable income.

In a nutshell, the examiner concluded that the only market that the evidence pointed to, was the market encompassing not only all phonograph records (LPs and singles), but also all channels of distribution as well, since record clubs were not found to constitute a separate line of commerce either. The arguments advanced by the examiner sound familiar here as well, as he builds his argumentation on the homogeneity of the recordings as products,⁵¹⁵ adding that consumers regard these methods of distribution as comparable, since "*market research reports further demonstrate that consumers regard clubs and stores as comparable distribution channels.*"⁵¹⁶ Further, the economic expert for the respondents provided that indeed "*record clubs are not a separate market but merely a part of a single retail market*

⁵¹³ Ibid.

⁵¹⁴ Ibid 172.

⁵¹⁵ Ibid 175 "They offer consumers identical, or highly similar products."

⁵¹⁶ Ibid 174.

*that embraces all types of retail outlets selling records to the consumer,*⁵¹⁷ an opinion also shared by the examiner.

Consequently, in a market of such broad nature, monopolisation or attempts to monopolisation are harder to discern and justify. As per the examiner's words "*in weighing charges of monopolization...and also a claimed 'dangerous tendency to create in respondents a monopoly,' the examiner will look primarily to the structure of the total record industry, not just the segments...urged by the Government.*"⁵¹⁸ A narrower market definition is traditionally attempted by the authorities, given that therein anticompetitive effects are easier to establish, whereas it is in the best interest of the firms to argue for as broad a market definition as possible.

Thus, the market for all records supplied and distributed through all means was found to be substantially dynamic and competitive overall, experiencing dynamic growth on industrial level⁵¹⁹ and "*high and effective rate of entry at every level,*"⁵²⁰ which resulted in price competition with low and declining prices. Further, other dealers and manufacturers of recordings were not found to be threatened, thanks to the existence of this procompetitive environment enabling other labels to access customers either via clubs, or by strengthening their retailing channels indirectly.⁵²¹ Here of course, it is highlighted how the key element examined is the producers' access to consumers (the mass market), rather than vice versa.

Lastly, considering the agreements from the royalties' perspective, the examiner noted that the FTC had presented only suggestive and speculative evidence to support that the reduced royalty rates constituted any reliable proof of anticompetitive injury, actual or potential.⁵²² Such rates did appear to be the norm or the tradition in the industry, but in any event, the examiner highlighted the lack

⁵¹⁷ Ibid 175.

⁵¹⁸ Ibid 176.

⁵¹⁹ Ibid 176 "*Total sales of the record industry have increased more than 20 times since Columbia's entry into the field... since 1955, the industry's rate growth has accelerated sharply.*"

⁵²⁰ Ibid 177.

⁵²¹ Ibid 202.

⁵²² Ibid 208.

of substantial evidence from the part of the FTC throughout his reasoning.⁵²³ Hence, not much evidence was provided from either side to assess the oligopsony side of things, meaning foreclosing musical compositions and creating a bottleneck around the music product. As discussed in the previous chapter, the oligonomy of the majors represented in this case by CBS, acts as a gatekeeper towards both the side of the consumer and the side of the initial copyright owners. This function of CBS came into investigation in this specific case; however, the lack of proper evidence from the part of the FTC was heavily criticised.

On the contrary, addressing the issue of benefits to both the industry and the public that CBS and CRC's practices (the agreements) afforded, the hearing examiner went as far as to declare that the FTC's order would have an adversary effect "*on the record industry as a whole, particularly the smaller manufacturers, songwriters, music publishers, musicians and artists... record buyers, especially record club members.*"⁵²⁴ Securing access to a vast variety of recordings benefits the public as well as the copyright owners and the performers, whereas competition thrives on manufacture and distribution level. It seems that according to this line of reasoning, the very existence of an oligonomy as a business model is in position to create positive effects, exactly because this nexus of channels and partnerships exists. This in turn, comes to prove just how far from envisioning a market failure the examiner was.

Finally, in the *memorandum opinion*, and whilst repeating the ambivalence surrounding the evidence provided and the tendency of the government to stretch the facts in a *procrustean* manner in order to fit the allegations, the hearing examiner made this interesting remark that highlights many of the industry's peculiarities: "*with such a melange of charges...there is a strong temptation to say that there must be an antitrust violation here.*"⁵²⁵ The specific investigation notwithstanding, this statement appears to be at the core of the oligonomy's nature. Hence, on a broader level it is of interest to consider whether this lack of an antitrust violation when such a "*melange of charges*" is being evoked, reveals more than the

⁵²³ Ibid 207-209.

⁵²⁴ Ibid 231.

⁵²⁵ Ibid 262.

absence of illegal activities (or of a practice not worthy of antitrust attention) and points to the inefficiency of the legal framework to address the industry instead.

To further illustrate and consider this point, the importance of defining a relevant product market came into the limelight once again in the *memorandum opinion*. The examiner notes the importance of an accurate product definition in order to find an antitrust violation as per *du Pont*⁵²⁶ and also states that the defined market for testing a merger under Section 7 of the Clayton Act might differ from the market defined to assess anticompetitive effects, or even from the market as defined by an economist.⁵²⁷ However, he proceeds to describe these distinctions as purely “*academic*” and of little importance in the case of the music industry, which he qualifies as “*uncomplicated*”. Interestingly enough, in his very next sentence the examiner makes a note of how both parties to the investigation relied on the submarket approach as per *Brown Shoe* to support their opposing contentions, even “*disagreeing violently*”⁵²⁸ on the matter; a statement which seems to bring the examiner in contradiction with himself.

The examiner characterised his approach to defining the market as pragmatic and realistic; his view resulted in a broader definition, relying on actual competing products and examining *economic realities*,⁵²⁹ where neither LPs nor record clubs constitute substantial markets on their own, even though and in line with what was presented above, “*the Government wants the breakdown because the ‘sub-market’ statistics tend to show greater concentration and give Columbia a greater market share.*”⁵³⁰

A market defined as consisting of all recordings (or all products on offer through all available channels) is a market that consists of all competing versions of largely the same product (same genre or covers of same compositions),⁵³¹ where no submarkets

⁵²⁶ U.S. v. E.I. du Pont de Nemours and Co., 353 U.S. 586 (1957).

⁵²⁷ 72 F.T.C. Initial Decision 279, citing U.S. v. Bethlehem Steel Corporation, 168 F. Supp. 576 (N.Y. 1958).

⁵²⁸ Ibid 279.

⁵²⁹ Ibid 280.

⁵³⁰ Ibid.

⁵³¹ Ibid 280-281. The examiner cites U.S. v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D. N.Y. 1960). There, the relevant product market for determining the legality of the acquisition of exclusive rights to feature films for television broadcasting, was defined as the market for all forms of television programming material. The examiner further contested that LPs and

as per *Brown Shoe* can be discerned. What the examiner actually singled out by this reasoning, is the homogeneity of the product also in an antitrust context, as evidenced in the previous chapter of the present.

Ultimately, having established what the market is, the examiner contested both its monopolisation and the probability of substantial lessening competition or attempting to create a monopoly. When considering the competitive effects of the agreements as such, the examiner reached the optimal point of examining industrial concentration: are the agreements CBS and CRC entered into anticompetitive because of the concentration levels in the industry? This provided a closer look at the practices of the majors in the aggregate for the first time in antitrust history.

When addressing the issue of concentration in the record industry, the examiner relied on the FTC and the 1963 case of *Procter & Gamble*,⁵³² in order to apply to the agreements in question the tests of legality under Section 7 of the Clayton Act.⁵³³ The effect of *Procter & Gamble* that the examiner ‘capitalised’ on was the examination of conglomerate mergers under Section 7 of the Clayton Act for the first time. The opinion in the said case laid down the “*basic principles for the application and the interpretation of Section 7 – principles that may govern, at least to a degree, the instant case. First, ‘All mergers are within the reach of the amended §7,⁵³⁴ whether they be classified as horizontal, vertical, or conglomerate, and all are to be tested by the same standard’... whether its effect may be to substantially lessen competition or tend to create a monopoly.*”⁵³⁵

singles are not submarkets that in themselves constitute appropriate product markets for antitrust purposes, as “*the boundaries of the product market are determined by reasonable interchangeability of use and cross-elasticity of demand between the LPs and singles.*”

⁵³² The Procter & Gamble Co., Docket 6901, 63 F.T.C. 1465 (1963).

⁵³³ 15 U.S.C. § 18.

⁵³⁴ Referring to the (still recent at the time) Celler-Kefauver Antimerger Act of 1950, 64 Stat. 1225. This was enacted in order to address the ‘loophole’ in the original Section 7 of the Clayton Act 1914, prohibiting only the acquisition of ‘stocks’ of one corporation by another, thus leaving the acquisition of ‘assets’ outside the Section’s reach. The Celler-Kefauver amendments allowed vertical and conglomerate mergers to also be brought under Section 7, such as the case of *Procter & Gamble*, above.

⁵³⁵ 72 F.T.C. Initial Decision 288.

This approach allowed the examiner to view the licensing agreements as a horizontal merger, assessed under Section 7 of the Clayton Act.⁵³⁶ The temporality of the horizontal merger situation was also noted, given that the assets are acquired by Columbia temporarily pursuant to the agreements. As such, and pursuant to the Celler-Kefauver amendments, the standard of Section 7 applies, which calls for assessment of the *probability* of a substantial anticompetitive effect, with the burden of proof lying with the complainant. The standard of proof for anticompetitive effects under this Section, as well as in all merger cases and in monopolisation and monopolisation attempts, requires a Rule of Reason approach,⁵³⁷ which in essence leaves the factual basis to be argued by the complainant, or the FTC in the present case. Nevertheless, according to the examiner the FTC had failed to provide the necessary evidence, as stated above.

However, a closer examination of the cases and the literature of the time reveals that the FTC engaged in a 'free' use of Section 5 of the Federal Trade Commission Act with the blessings of the Supreme Court,⁵³⁸ in the pursuit of creating Per Se antitrust violations, which it could adequately enforce, in order precisely to rely on Section 5's rationale.

⁵³⁶ Ibid 287. "In another sense, the licensing agreements might be viewed as in the nature of what the Procter & Gamble opinion called a "market expansion" merger (p.1543). That is on the basis that Columbia and the licensors are selling to different customer classes... the licensor (viewed as the "acquired firm") sells the same product as Columbia ("the acquiring firm") and may be a prospective entrant into the so-called club market. The analogy obviously is imperfect..." The Commission has relied on merger law and a Per Se horizontal merger standard, which as CBS complained in the appeal, was misplaced. The viewing of the agreements as a temporary horizontal merger will be evaluated later in the present (at the Appeal). For the time being, it is not the horizontal merger situation that the examiner contests. Rather it is the application of Section 5 Federal Trade Commission Act as opposed to Section 7 of the Clayton Act.

⁵³⁷ A more thorough analysis of the Rule of Reason falls beyond the scope of the present. However, it is important to present the distinction between the Per Se Rule and the Rule of Reason, albeit briefly. In the US, the courts assess anticompetitive conduct either as illegal Per Se (e.g. horizontal price fixing) or they follow a more extensive evaluation under the Rule of Reason looking for unreasonable interference with competition. Thus, in the example of horizontal price-fixing agreements, engaging in the practice is the only thing that needs to be proved. Richard Posner uses the analogy of rules and standards respectively. R Posner, *Antitrust Law*, 2nd edn (2001) 39. However, the US Supreme Court steadily dissolved the distinction between the two by the late 1970s (*Broadcast Music, Inc. v. CBS* (441 U.S. 1 [1979])), whereby the Per Se Rule, is not to be taken literally.

⁵³⁸ *Brown Shoe Co., Inc. v. United States* 370 U.S. 294 (1962).

As David Alan Leipziger argued in 1966, commenting on the application of the several antitrust statutes:

*“if the other statute is not applicable for technical reasons, it is consonant with the purposes of Section 5 to use it to fill the gap. The terms of the other statute may require a finding of probable injury to competition, a requirement which can be avoided under Section 5 by invoking the incipency rationale.”*⁵³⁹

In context, Section 5 can examine the case in a nascent light as opposed to the Clayton Act. However, the intention behind a Section 5 application would be restrictive of a more inclusive assessment, which would otherwise allow pro-competitive effects to be taken into consideration, something that the examiner proceeded to do in this present case.

Following from this, and continuing the examination under Section 7 and in the spirit of the Rule of Reason, the examiner considered the ‘problem of oligopoly’ via the levels of industrial concentration, acknowledging that in an oligopolistic market tacit collusion is more likely.⁵⁴⁰ Dispelling the ‘symptoms of oligopoly’ in the overall industry, the examiner noted evidence of vigorous competition including price competition, ease to entry, and other forms of rivalry, despite *“the sameness of prices.”*⁵⁴¹ Overall the industry was praised as one where the *“role and the dominance of the big-business factors have been eroded.”*⁵⁴² The paradox of attesting both price competition and sameness in prices, eluded the examiner at that time. Further, it constitutes a pattern followed in all subsequent evaluations attempted across jurisdictions.

The examiner lists a significant number of factors pointing to a competitive and innovative environment for the record industry, including the growth of new and smaller in size companies, the high degree of dispersion in retail outlets, an increase in the number of manufacturers, innovation in the face of A&R activities (talent acquisition and new music genera), product and marketing innovation, and innovation and competition in distribution channels. In a quasi-paternalistic tone, the examiner adds that in such a thriving environment having the size of Columbia

⁵³⁹ D A Leipziger, "Per Se Rules and Section 5 of the Federal Trade Commission Act" (1966) California Law Review 2049-2077.

⁵⁴⁰ 72 F.TC. Initial Decision 289.

⁵⁴¹ Ibid 289-292.

⁵⁴² Ibid.

should not be attracting scrutiny *per se*, as bigness in itself is not to be condemned.⁵⁴³ He suggests that in a realistic and reasonable viewing of the industry, all the aforementioned efficiencies should be considered.

Furthermore, the examiner contends that:

*“Columbia’s growth has been internally generated and not the result of a merger or acquisition. The competitive innovation of the LP gave Columbia a temporary jump on the industry, but... it now faces vigorous competition.”*⁵⁴⁴

This is an interesting point to consider, as it was shown in the second chapter of the present thesis that the music industry came about as a patent-centred industry switched to a copyright-centred one and was subsequently met by the vertical integration interests of Hollywood mega studios.

At the forefront of this wave, Columbia was among the pioneers in the competition of sound recording and remained a strong contestant on the technical front with the introduction of the LP on the 21st of June 1948.⁵⁴⁵ However, it is an exaggeration if not a factual error to suggest that Columbia has not profited from an income stream generated by a series of mergers and acquisitions, when in fact the past of CBS and Columbia Records (ex-American Graphophone Company) consists of a complex nexus of mergers and acquisitions: in 1928 the record company was separated from the broadcasting leg and in 1931 the merger of Columbia Gramophone Ltd., the Columbia operation in England, with the RCA Victor-owned HMV Gramophone Ltd., formed the largest record conglomerate in the world, Electrical and Musical Industries Ltd. (EMI), making RCA Victor part-owner of American Columbia. In 1934 Columbia was bought by ARC (American Record Company).⁵⁴⁶ A few year later in 1938, Columbia Broadcasting System acquired ARC, re-unifying the two formerly

⁵⁴³ Ibid, quoting U.S. v. Steel Corp., 351 U.S. 417 (1920). The issue of ‘bigness’ on US soil has been marked by L Brandeis’s seminal work *The Curse of Bigness* (1934), who remained highly critical of the efficiencies ‘bigness’ can afford.

⁵⁴⁴ Ibid.

⁵⁴⁵ *“Columbia introduces the LP: this first pop release came soon after the very first long-playing recording of Nathan Milstein performing Mendelssohn’s Violin Concerto in E minor with the New York Philharmonic. The Voice of Frank Sinatra was released in the 10-inch format, although most of the label’s new pop recordings would remain for the time being on 78s. By the end of 1948, Columbia had sold 1,250,000 long-playing records.”* Columbia’s history at the following timeline

http://www.columbiarecords.com/timeline/#!date=1894-03-25_22:57:53.

⁵⁴⁶ Ibid.

separated entities.⁵⁴⁷ If anything, the dynamic and fierce wave of mergers and acquisitions in the music industries is as strong as it can get in the face of these companies, contrary to the examiner's assessment.

The conclusions of the examiner in 1964 offered a highly detailed (304 pages) viewing of the industry as a whole and painted the picture of a pro-competitive and innovative environment, where no competition concerns arise, despite the existence of few major dominant players and despite the aforementioned "*sameness in prices*", a matter which was otherwise not addressed to a greater extent. Interestingly enough, the price of recordings is an issue that the FTC did not abandon. 36 years later, the FTC found that the majors were forcing retailers to keep prices artificially high on a collective level, in exchange for substantial cooperative advertising payments. According to the FTC, this constituted a form of Section 5-triggering price-fixing practices, which increase the risk of collusion or interdependent conduct by the market participants. As mentioned briefly earlier, in 2003 a lawsuit was filed on behalf of compact disc (this time) club members, alleging inflated prices following a price-fixing conspiracy.⁵⁴⁸

More recently, the Department of Justice (DOJ) launched investigations into the price-fixing practices of digital downloads, a wave of investigations that also reached the EU.⁵⁴⁹ All of the above come to show that the "*sameness in prices*" observed by the examiner as far back as 1964, depicts a well-established practice that never ceased to feature at the core of the oligonomy's control of the distribution channels. Ironically, at the time of the investigation the FTC was highly criticised in its

⁵⁴⁷ Ibid. Also see <https://nocable.org/timeline/cbs-history>. If anything, delving into the past of the oligonomy and its competitors to examine the series of acquisitions and divestitures, is an exhausting and quite daunting endeavour.

⁵⁴⁸ FTC Press release "Record companies settle FTC charges of restraining competition in CD market" May 10 2000, available at <https://www.ftc.gov/news-events/press-releases/2000/05/record-companies-settle-ftc-charges-restraining-competition-cd>. Similar investigations followed in 2002 and in 2003 see e.g. S Coffrey, "Settlement in CD-record club suit" (2003) CBS News, available at <http://www.cbsnews.com/news/settlement-in-cd-record-club-suit/>. European Competition Commission Press release, "Competition: European Commission confirms sending a statement of objections against alleged territorial restrictions in on-line music sales to major record companies and Apple" April 3 2007, available at http://europa.eu/rapid/press-release_MEMO-07-126_en.htm.

⁵⁴⁹ B Johnson, "US opens inquiry into pricing of music downloads" (2006) March 4 The Guardian, available at <https://www.theguardian.com/world/2006/mar/04/arts.netmusic>.

inability to appreciate the vibe and the nature of the industry as a whole in its pursuit of 'big businesses' to punish, by stretching the facts to fit the legal provisions.

Resuming the analysis of the 1964 dismissal, and price-fixing aide, another issue came to the forefront of this parley between the examiner and the FTC, which is investigated by the present thesis: the relevant market for music and its competitive assessment. Is there a relevant product market for all music products delivered via all channels and enjoyed by all consumers in the aggregate, or is the market essentially broken down to unlimited nodes of commercial activity, as per the FTC's appreciation of the case in hand? It is noted later as the chapter unfolds, that this narrative has not become obsolete over the years and that similarly contradicting observations can still be made.

4.2.1.3 *The FTC fights back*

As explained earlier in the chapter, the FTC declared the dismissal erroneous and decided it should be set aside three years later, in 1967. Reiterating the initial argument that sales through record clubs constitute a defined submarket in which the anticompetitive effects of the licensing agreements should be evaluated, the FTC emphasised the distinct characteristics of the end consumers who are more likely to shop via this method. These were the younger demographic "*interested in having someone else select for them the most 'popular' or 'hit' records at lower prices that can be secured in the conventional record dealers' stores,*"⁵⁵⁰ thus alleging a price sensitive, yet still passive end consumer of the 'popular' product. In essence, the mass market design is evidenced here as well: the end consumer would undeniably buy recordings, and most importantly 'hit' recordings, the real question being *how*. This realisation becomes relevant in the assessment of new business models in the music industries further on, when the undeniable element of purchasing recordings disappears altogether. For the time being, it becomes clearer that the premise of the old business model as designed top-down to deliver hit music to the mass consumer can indeed be affirmed in a competition context as well.

The clubs therefore, allegedly met the demand of this category of consumers by offering a 'limited variety of hits' at lower prices than those offered at dealer level,

⁵⁵⁰ 72 F.TC. Opinion of the Commission 367-368.

thanks to the reduced costs resulting from the royalty-fixing agreements with several competing manufacturers and producers, to the ultimate detriment of the artists.

“Different prices and different costs in the two channels of distribution clearly indicate that different conditions of supply and demand prevail in each and that they therefore belong to separate and distinct markets,” repeated the FTC.⁵⁵¹

These agreements are found to be posing barriers to potential entrants, since Columbia (here the FTC broadens the narrative and mentions the practice as characteristic of the ‘Big Three’ dominating the industry at the time) has achieved exclusionary for its competitors terms. The result as per the FTC is that *“a competitive industry structure has never been allowed to develop in that market... together the ‘big three’ controlled 90,6 percent of all phonograph record sales through clubs.”*⁵⁵² Overall, a pro-competitive environment could have been created if more players had access to the club market with similar prices to those that the majors enjoyed, allowing the end consumers to benefit from the lower prices that a competitive environment offers. A violation of Section 5 of the Federal Trade Commission Act was once again found in the market for club sales. Based on the above, it is of interest to consider the attempt made by the FTC to ‘cry wolf’, evidenced by its appeal to the practices of the oligonomy as a whole via its CBS investigation. However sympathetic to the FTC’s concerns one might be, the specific agreements of a specific firm were under investigation at that time.

Nevertheless, since the examiner did take a closer look at industrial concentration, it should be repeated that the popular music industry as a cultural industry, moves in cycles of prolonged concentration interrupted by sharp short bursts of competition and product diversity, only to return to the concentration patterns once the diversified and innovative products (and practices) have been ‘absorbed’. An empirical study conducted by Richard Peterson and David Berger for the American Sociological Review in 1975, looks at the recording industry over a period which engulfs the period of the investigation (1948-1973), examining concentration and competition patterns.⁵⁵³ Reaffirming the oligopolistic nature of the industry in principle and highlighting its reliance on vertical downstream integration into the

⁵⁵¹ Ibid.

⁵⁵² Ibid 368.

⁵⁵³ R Peterson and D G Berger, “Cycles in symbol production: the case of popular music” (1975) 40 (April) American Sociological Review 158-173.

control of distribution and manufacturing, they find the industry highly consolidated overall, but for the advent of jazz and the rock'n'roll revolution, the latter spanning from 1955 to 1959, the year the investigation began. As stated in the previous chapter, rock'n'roll as a niche sound allowed for the emergence of smaller versatile firms, who challenged the shares of the majors. The industry would gradually return to its cycle of consolidation between then and 1963, only to experience a new cycle of growth and diversity in 1964 with 'Beatlemania' and the British Invasion.⁵⁵⁴

What is actually revealed by the authors is that from the time of the initial investigation until the time the appeal was heard, the concentration levels in the industry had already changed from initial concentration, to competition, to consolidation, and *da capo*. Thus, the initial investigation started at a time of industrial growth and competition with many smaller independent players. The Order coincided with a renewed wave of concentration and the 1964 dismissal with the establishment of the British sound. Inevitably, providing an accurate and precise assessment of the industry in order to assess anticompetitive behaviour would soon turn into a game of 'hide and seek' or, even worse, into a fool's errand.

4.2.1.4 *Too little too late?*

By the time of the Appeal to the 1967 Order, 8 years had passed since the initial investigation, and further 4 by the time the parties settled in 1971.⁵⁵⁵ This means that the case lasted for an astonishing 12 years, during which the face of the industry had already changed more than once. This was indeed acknowledged by the Court of Appeals which stated:

*“the market itself has undergone a significant change since the hearing examiner completed his hearings and entered his findings... Too, consumer tastes have undergone a substantial change and with this, the entire record industry.”*⁵⁵⁶

As stated earlier, and as it has become evident thus far, the Court reversed and remanded on the basis of a stale record, an issue the US administrative agencies were well familiar with. As Kiley J stated in CBS dissenting, *“the evils of the delays*

⁵⁵⁴ Ibid. Return to consolidation is noted again in the late 1960s.

⁵⁵⁵ Decision and Order in the Matter of Columbia Broadcasting System Inc., Consent Order, etc., in regard to the alleged violation of the Federal Trade Commission Act. Docket 8512, June 25, 1962 – Decision, Mar. 22, 1971.

⁵⁵⁶ 414 F2d at 31.

*inhere in the nature of our legal system and economy, and are 'fleas that come with the dog'.*⁵⁵⁷ Similar concerns had been expressed by the Supreme Court in *ICC v. City of Jersey City* in 1944.⁵⁵⁸

Stating that he would affirm the FTC's order, Kiley J continues to say:

*"if petitioners thereafter wish to achieve a modification, they should have the burden of showing before the Commission that justice requires modification in view of the changed market conditions."*⁵⁵⁹

From the above it can be observed that not only is the legal framework unable to deal with the industry, but also that the basis of staleness highly favours the petitioner as opposed to the agency. Had the Court decided to affirm the order, the burden of proof would have rested with CBS, which would have had to argue for a change in market conditions before the FTC rather than at court. Overall, the bitterness that characterises Kiley J's dissent aligns with the question posed by the present thesis of whether more apt competition policy might be required (or if it were ever in place).

The above notwithstanding, it is worth repeating here that the Court of Appeals agreed with the market definition provided by the FTC. Indeed, the Court acknowledged that *"all record sales constitute an industry-wide product market,"* since the boundaries of a product market are determined by reasonable interchangeability of use. Since CBS had provided for the complete interchangeability between LPs and singles, the Court further delineated the record clubs' submarket as per *Brown Shoe* and *Philadelphia National Bank*,⁵⁶⁰ noting that submarkets for antitrust purposes can be defined by examining more practical indicia. In the present case, the relevant factors were: *"1) Columbia by its own acts*

⁵⁵⁷ Ibid at 41.

⁵⁵⁸ *ICC v. City of Jersey City*, 322 U.S. 503, 514 (1944) *"If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."*

⁵⁵⁹ Ibid.

⁵⁶⁰ *United States v. Philadelphia National Bank*, 374 U.S. 321, 356-357, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), whereby commercial banking was found to constitute a separate submarket within the broader banking sector.

*treated the club market as being separate; 2) differences in demand; and 3) differences in cost.*⁵⁶¹

In this defined submarket, a violation of Section 5 was found to exist in the face of the exclusivity agreements, which the Court agreed should be evaluated primarily on merger standards. As stated earlier in the present albeit briefly, CBS contested the Per Se horizontal merger standard, arguing for a Rule of Reason approach to the agreements, stating that their exclusivity provisions performed an ancillary function, which should be sustained if found to be reasonable.⁵⁶² The Court of Appeals however, categorised the relation between Columbia and its licensors as “*in the nature of a horizontal merger with the effects of a vertical merger*,”⁵⁶³ in order to look into foreclosure effects in relation to the market structure. The Court held that even though in vertical mergers the standard of legality is determined by the degree of market foreclosure,⁵⁶⁴ the percentage of the market foreclosed by the vertical arrangement cannot be a decisive factor in situations where foreclosure is either of monopoly or of de minimis proportions, as per *Brown Shoe*. Thus, a closer look at the market structure itself is required. This however, was not provided by the FTC not only due to the Per Se approach that the agency had traditionally taken, as presented with regard to the examiner’s comments of 1964, but further due to the changes in market structure that occurred over the same period of time.

Ultimately, what this saga reveals with respect to rationale of the thesis is that the FTC was faced with many hurdles, even though it sought to address potential and actual anticompetitive concerns in the oligonomy as such. This of course, justifies intervention should the history of the music industry be viewed holistically, as a market failure waiting to happen (if it had not already happened at the time of the investigation). It was highlighted how the end consumer remained absent from the debate *per se* and was even found to profit from the exclusive agreements, offering more products through a major’s channels: products that the consumer could not have access to otherwise, exactly because of the very same majors controlling the

⁵⁶¹ 414 F2d at 15.

⁵⁶² Ibid.

⁵⁶³ Ibid.

⁵⁶⁴ *Standard Oil Co. of California v. United States*, 337 U.S. 293, 69 S.Ct 1051, 93 L.Ed. 1371 (1949), and *F.T.C v. Motion Picture Advertising Serv. Co.*, 344 U.S. 73 S.Ct. 361, 97 L.Ed. 426 (1953).

relevant distribution channels. It appeared that, based on for the hearing examiner's view, if Columbia was both the problem, then Columbia was also the remedy. Ultimately, it was shown that by the time the saga reached the stage of appeal, the 'record' was already stale.

4.2.1.5 Connecting the dots

Nevertheless, an evaluation of the case would be incomplete without a big leap forward in time and the 1995 Antitrust Guidelines for the licencing of intellectual property issued jointly by the Department of Justice and the Federal Trade Commission.⁵⁶⁵ The guidelines do affirm IP licensing as generally pro-competitive for the advancement of the aim shared by intellectual property and competition law, meaning the promotion of innovation and the enhancement of consumer welfare. However, they also stretch that anticompetitive effects can arise on a both horizontal (when the licensing parties are actual or potential competitors) and vertical level, which can consequently trigger the relevant merger laws.⁵⁶⁶

In this light, licensing agreements are to be viewed under a Rule of Reason approach and they are generally favoured, unless they go beyond their legitimate aim to conceal price-fixing, market allocation, or other anticompetitive practices the courts are strongly antipathetic to. As per the Court of Appeals for the Ninth Circuit in *A&E Plastik Pak Co.*:

*"the critical question in an antitrust context is whether the restriction may fairly be said to be ancillary to a commercially supportable licensing arrangement, or whether the licensing scheme is a sham set up for the purpose of controlling competition while avoiding the consequences of the antitrust laws."*⁵⁶⁷

As per the guidelines, IP licensing agreements will most of the times fall into the so described 'safety zones' and an investigation will not be triggered unless a restraint

⁵⁶⁵ U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995), available at <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf/>

⁵⁶⁶ Ibid at §4.1 "When a licensing arrangement affects parties in a horizontal relationship, a restraint in that arrangement may increase the risk of coordinated pricing, output restrictions, or the acquisition or maintenance of market power... When the licensor and licensees are in a vertical relationship, the Agencies will analyse whether the licensing arrangement may harm competition among entities in a horizontal relationship at either the level of the licensor or the licensees, or possibly in another relevant market."

⁵⁶⁷ *A&E Plastik Pak Co. v. Monstanto Co.*, 396 F.2d 710 (9th Cir. 1968).

on trade is ‘facially’ anticompetitive and if one the additional criteria set forth is met, depending on the nature of the market (goods, technology, or innovation). In this vein, the guidelines note that an exclusive licence may raise antitrust concerns only if the licensees themselves, or the licensor and its licensees, are in a horizontal relationship. However, the Rule of Reason will still be applied to evaluate the purposes and the effects of the licence “*in light of the licensing party’s market power.*”⁵⁶⁸ Hence, antitrust concerns will arise when the exclusivity aims to sustain or affect monopolisation.⁵⁶⁹

Based on the above, and following the argumentation provided by the examiner in 1964, who noted the procompetitive effects of the agreements as allowing for smaller competitors to reach the market, it is harder to imagine a more critical treatment of the case pursuant to the licensing guidelines. However, as stated earlier, the market is harder to reach because of the existence and the business model of the ‘bigger’ competitors. It cannot become clearer that the oligonomy has the utmost discretion to control what passes through its channels and what reaches the end consumer, meaning both music that the oligonomy represents through own labels and music licensed by smaller players.

However, as intellectual property and competition law share the common aim of promoting innovation and enhancing consumer welfare, a more tolerant environment seems to be created, which can let cases such as the one described herein pass more easily below the radar. Thus, inserting intellectual property rationale into competition law and policy, as justified by the relevant policy concerns, leads to a de facto broadening of what constitutes an antitrust violation, to allow for the inherent monopoly that intellectual property affords. Thus, potential anticompetitive concerns can get overlooked, in the hope that this common aim will see the consumer benefit from the products of innovation. However, it should not be forgotten that the process of innovation is in need of own policies to guarantee that its fruits reach the end consumer after all.

⁵⁶⁸ S D Anderman, *The interface between Intellectual Property Laws and Competition Policy* (2009) 217.

⁵⁶⁹ In the Matter of Biovail Corp., 2002 FTC LEXIS 54 (4 October 2002) (consent order Dkt. No. C-4060).

All of these concerns become scrutinised in the following part, dealing with the long-lasting debate of “*sameness in prices*”, albeit from a UK perspective. It was stated that the “*sameness in prices*” is more than a mere coincidence and that it has attracted much interest over the years. As it will be shown, “*sameness in prices*” is actually invited by the oligonomy’s own business model, due to practices such as the ones described above (licensing, exclusivity, and subsidisation of less successful artists). It is therefore vital to see how the authorities have dealt with copyright’s tangible embodiment, the price of which is in essence the price of not just one, but several IP afforded monopolies at the same time (sound recording, music, and lyrics).

4.2.2 *MMC Report into the price of CDs, 1994*

It is reminded that this report provides a closer look at the matters of the oligonomy from a UK perspective. It addresses the ‘practices’ of the oligonomy regarding the supply of recordings and elaborates on the ‘practices’ of the majors vis-à-vis the artists (exclusivity in artists’ contracts). This section places the UK competition regime, as it stood at the time of the investigation, under scrutiny and comments on the MMC’s inability to ‘see through’ the oligonomy’s business model and promote effective competition for the benefit of the end consumer.

The former UK Monopolies and Mergers Commission (MMC) launched its own investigation into the recorded music industry in 1994 “*prompted by a concern about the prices of compact discs (CDs), and particularly the fact that prices appeared to be significantly higher in the UK than in the US,*”⁵⁷⁰ pursuant to a referral by the Director General of Fair Trading.⁵⁷¹ The resulting report (hereafter the MMC Report) of 406 pages constitutes the longest report in the matters of the recorded music industry and its retail conducted on UK soil at that time. It afforded a first thorough look into the UK market for pre-recorded music, the retail market, the prices of recordings, and the legal framework in place (UK copyright and competition regime), supplemented by an abundance of evidence from various stakeholders, including interested organisations and members of the public,

⁵⁷⁰ Monopolies and Mergers Commission *The supply of recorded music* London HMSO (Cm 2599: 1994) 3 at 1.5.

⁵⁷¹ Fair Trading Act 1973 ss44-53, Powers of Director to require information.

industry bodies, both the independent and the major record companies at the time, as well as distributors and record clubs. This Report, along with the subsequent investigation of the MMC into performing rights in 1996,⁵⁷² offered a wealth of institutional description and data. Further, it opened the door for researching the dialectic between the cultural industries and their legal and economic aspects,⁵⁷³ despite the long-standing history and presence of the majors in the UK and the acknowledgment that the “*UK has a large and internationally important recorded music industry.*”⁵⁷⁴

For the purposes of the present, this investigation allows for a closer look at the competition authorities of the UK at the time and the appreciation of the business model from their point of view. This part of the thesis examines the extent to which similar concerns to those arising in the US exist and evaluates their treatment compared to the US authorities’ attempts to investigate the same industry and in essence the same handful of companies. Hence, this part of the thesis examines the way that the UK Competition Authorities perceived the operating business model of the music industry in the past. Was the competition framework at the time able to provide a thorough investigation of the competitive status of the industry? Were there any market failures encountered and if so, how were they addressed? As such, this investigation offers an evaluation of the UK Competition framework with regard to *monopolies*⁵⁷⁵ and their alleged anticompetitive practices under the Fair Trading Act 1973, which also corresponds to the old business model.

At the time of the investigation, section 6 of the Fair Trading Act 1973 provided for the investigation of *scale* and *complex* monopoly situations.⁵⁷⁶ In relation to goods, pursuant to section 6(1)(a) or (b) of the Act, a scale monopoly would exist when “*at least one-quarter of all goods of a particular description which are supplied in the*

⁵⁷² Monopolies and Mergers Commission Performing rights London HMSO (Cm 3147: 1996).

⁵⁷³ R Towse, “Communication, The Monopolies and Mergers Commission’s Investigation of the U.K. Music Market” (1997) 21 *Journal of Cultural Economics* 147-151.

⁵⁷⁴ MMC Report 7 at 2.4.

⁵⁷⁵ It is a misnomer to employ the word ‘monopolies’ as for the purposes of the Act, the meaning is closer to ‘markets’, and the monopoly provisions of the FTA were ultimately superseded by the market investigation provisions in the Enterprise Act 2002.

⁵⁷⁶ As well as mergers. More at M Furse, *Competition and the Enterprise Act 2002* (2003) 3, referring to JP Cunningham, *The Fair Trading Act 1973* (1974) and D Livingston, *Competition Law and Practice* (1995).

UK are supplied by or to the same person, or by or to members of the same group of interconnected bodies corporate.”

A complex monopoly situation would arise under section 6(1)(c) and (2), when “*at least one-quarter of all the goods of a particular description which are supplied in the UK are supplied by or to members of the same group consisting of two or more persons (not being a group of interconnected bodies corporate) who, either voluntarily or not and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description.*”

Here, it should be noted that the purpose of the UK competition regime is not to proscribe monopoly situations, but to investigate whether the identified monopoly operates against the public interest, meaning that not all monopoly situations would be referred. In this sense, the now defunct Office of Trade Trading established with the 1973 Act, was in charge of monitoring industries and firms concentrating on those with larger market shares, where monopoly situations and abuses thereof could be identified. It would further receive complaints from consumer bodies and other stakeholders, also having the potential to trigger investigations.⁵⁷⁷ Following an initial assessment from the OFT, its Director had the power to refer a particular monopoly situation to the MMC, which would investigate whether the referred monopoly operated or not against the public interest.⁵⁷⁸ The public interest test itself was further explained in section 84 of the Act, maintaining in essence the case-specificity of each investigation and the desirability of “*maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom*”⁵⁷⁹ among other considerations; as such its ambiguity was acknowledged and criticised.⁵⁸⁰

⁵⁷⁷ Pursuant to s2 of the FTA. More at T Usher “This monopoly of music” (1995) 6 (1) EntLR 27-31.

⁵⁷⁸ The public interest test was subsequently repealed and replaced by the “*adverse effect on competition*” in the Enterprise Act 2002. Currently, market investigations are undertaken by the Competition and Markets Authority, which replaced the Office of Fair Trading and the Competition Commission in 2013.

⁵⁷⁹ Fair Trading Act 1973 s84 “(1)*In determining for any purposes to which this section applies whether any particular matter operates, or may be expected to operate, against the public interest, the Commission shall take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regard to*

Thus, it is important to elaborate briefly on the public interest test, which is served by the notion of effective competition and the general interest of consumers in a procompetitive environment. For the purposes of this Act, it was not only the public interest test that lacked proper definition and backing; furthermore, the notion of effective competition itself is something that has attracted much commentary due to its vagueness.⁵⁸¹ The above leave substantial conceptual gaps behind the rationale and the application of this Act and the investigations deriving from it. Coupled with the inability of the MMC to fine or impose sanctions, it would come as no surprise that very few market conditions were found to operate against the public interest under the 1973 Act.⁵⁸² Besides, this is reflective of the overall stance of UK competition law, which traditionally has a broad purpose of determining effective competition in a market as a whole, rather than asserting legality or illegality of a certain industrial practice.⁵⁸³

In the present case, the recorded music industry was referred for assessment to the MMC, following a report by the National Heritage Select Committee, which

the desirability— (a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom; (b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied; (c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets; (d) of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and (e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom.

⁵⁸⁰ Furse (n 576) 4 point 20 “*The DFGT defined the public interest as ‘consumer well-being’ but admitted that ‘I do not think anybody could possibly pretend that they could sit down and do some sums and have an answer they can defend against all comers at the end of the day.’ The Chairman of the MMC said that it was impossible to define the public interest in a general context, and the Minister simply referred to the criteria set out in the Act.*”

Referring to HC249 Trade and Industry Committee, Fifth report: UK policy on monopolies London HMSO 1995.

⁵⁸¹ R Whish and D Bailey, *Competition Law* (2015), S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3rd edn, (2010) ch 2.

⁵⁸² B J Rodger and A MacCulloch, *Competition Law and Policy in the EU and UK*, 5th edn, (2015) 154.

⁵⁸³ *Ibid.*

indicated substantial differences in the prices of recordings between the UK and the US.⁵⁸⁴ The MMC was asked to indicate:

*“a. whether a monopoly situation exists, and if so, in favour of what person or persons; b. whether any steps are being taken... to exploit that monopoly; and c. whether any facts found by the MMC operate or may be expected to operate against the public interest.”*⁵⁸⁵

4.2.2.1 *The complex monopoly of the majors: anticompetitive conduct and the public interest test*

Starting with the first question and the existence of a monopoly situation as per the Act, three separate monopolies were found to exist in the industry: a scale monopoly in retail (W.H. Smith group) and two complex ones, one on retail level (with respect to the group consisting of W.H. Smith, Our Price, HMV, and Woolworths), and one among the majors, which were five at the time of the investigation (BMG, EMI, Polygram, Sony, Warner).⁵⁸⁶

Focusing on the majors themselves, it was identified that they did supply one-quarter of the market between them (combined market share of 72 percent),⁵⁸⁷ even though no single firm reached a 25 percent market share.⁵⁸⁸ The majors contested the existence of a complex monopoly situation pointing out that the practices they were accused of **“were common throughout the industry”** (emphasis added), and hence the MMC *“should not single out the five majors as members of a group constituting a complex monopoly situation.”*⁵⁸⁹

The practices able to restrict competition identified were: similar pricing policies, the restriction of parallel imports (it was suggested that allowing parallel imports

⁵⁸⁴ In T Usher (n 577) 2. Reported by D Lister, “MPs hear fierce attack on high price of CDs: record companies have been put under renewed pressure as a select committee is addressed by pop managers” (1993) April 15 The Independent, available at <http://www.independent.co.uk/news/uk/politics/mps-hear-fierce-attack-on-high-price-of-cds-record-companies-have-been-put-under-renewed-pressure-as-1455488.html>.

⁵⁸⁵ T Usher (n 577) 2.

⁵⁸⁶ MMC Report 7 at 2.8.

⁵⁸⁷ Ibid 8 at 2.8.

⁵⁸⁸ Ibid. EMI had a market share of 23.8 percent at the time.

⁵⁸⁹ Report 11 at 2.26.

from the US would reduce prices), and the exclusive contractual relationships that artists enter with the record companies.

The MMC insisted in that since, even within the members of the industry, these companies were characterised as the ‘majors’, this alone signalled the existence of a group for the purposes of the Act. As the reports states:

*“the evidence of market share and the way they are regarded by others in the industry as well as outside it leads us to conclude that the commercial reality is that **if these five companies were to act in a similar fashion, they could influence the practices of the whole industry**”*⁵⁹⁰ (emphasis added).

Therefore, it would be of interest to examine the extent to which these practices that are common throughout the industry, are in effect the result of the similar fashion the majors operate, which creates the industrial practice canvas for the whole the industry; a realisation that could carry significant anticompetitive weight. This observation should be measured against the outcome of the investigation that the identified monopolies do not operate against the public interest, in that *“the companies in whose favour they [the monopolies] operate are not able to exercise market power in a way which enables them to exploit their monopoly positions,”*⁵⁹¹ since they were found to compete with each other rigorously.

Hence, the extent to which these companies did act in a similar fashion and did influence the whole industry was unfortunately not addressed *per se*, since the definition of a complex monopoly in the Act does not necessitate such an evaluation. Nevertheless, a significant amount of though-provoking evidence is to be found in the views of independent record companies in the Report: e.g. MCA admitted being a *“price follower”*⁵⁹² and another anonymous respondent provided that *“the major companies and the major retailer chains had an affinity of interest to maintain CD prices at their current levels.”*⁵⁹³ The same anonymous respondent further suggested that the majors divest their acquisitions in both recording and publishing, demerge in order to allow for more competition, and reduce their shares in

⁵⁹⁰ Report 11 at 2.30.

⁵⁹¹ Report 37 at 2.184.

⁵⁹² Report 226 at 11.3.

⁵⁹³ Report 232 at 11.48.

engineering and manufacturing in order to liberate the production process,⁵⁹⁴ hinting at the undeniable role and position the majors hold in the industry.

The evidence provided above, describe and point at the same dominant business model that the oligonomy had been maintaining for decades, at the very core of which the bottleneck around the provision of the creative output is encountered. It is the structure of the industry itself that seems to be restricting or preventing competition; it was seen that the oligonomy is positioned at its core, in a way that forces minor players to either deal or get absorbed by the majors, proving a highly consolidated environment. It was established in the previous chapter that the minor players are acting as a risk evaluation mechanism for the oligonomy, which proceeds to engulf them and their niche genres, should they become successful enough,⁵⁹⁵ even though they set out to ‘disturb’ their dominant presence.⁵⁹⁶ In brief, the minors are a ‘feeding hand’ for the oligonomy.

Indeed, all the independent record companies that responded, admitted that competition with the majors was rigorous; however, this observation on its own does not necessarily evaluate the nature of the competitive process. It might be the case that the competitive process need not be fair or even considerate of competitors.⁵⁹⁷ However, it needs to be somehow considered how competition in a market where the lengthy history of commercial reality views the minors as unable to operate outside the reach of the oligonomy, can actually be *effective*,⁵⁹⁸ given that it might have never functioned properly at the first place. Hence, it comes as no surprise that out of the four independent respondents in the Report, two are currently part of Universal (MCA and Pickwick), one went bankrupt in 2004 (Telstar), whereas only the third one remains one of the few prominent independent

⁵⁹⁴ Report 233 at 11.48.

⁵⁹⁵ As per the third chapter of the present in Burnett (n 242) and Bishop (n 296).

⁵⁹⁶ See e.g. the payola scandals, where the majors alleged illegal activity from the part of the dominance-shaking minors.

⁵⁹⁷ E.g. “*From an economic perspective, competition policy is not about ‘fairness’*,” in Niels et al., *Economics* (n 231) 20.

⁵⁹⁸ See in Bishop and Walker (n 581) ch 2 an exploration of ‘effective competition’. Effective competition is viewed from an EU perspective; however, some important observations can be made here as well. Effective would be the type of competition that promotes consumer welfare, since efficiency is not described by the authors as an end in itself (citing Neelie Kroes “*First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm*,” 18). In the given context, the standard should be viewed per jurisdiction.

‘activists’ in the music world and has built its own network of connections, the “*Beggars Group*”.

Again, this might hold merit should one consider the particular history of the industry and the oligonomic business model, which surrounds the provision of music by creating the bottleneck often referred to in the present, marking the necessity of ‘passing through’ the majors’ channels, either as a competitor or as the end consumer.⁵⁹⁹ Indeed, in order for the discussion to reach the competition law framework, the focus should be on the consumer rather than on the competitor. This was hard to achieve under the specific legislative framework, since no direct evidence of consumer harm could be provided against the vague wording of the Act. Furthermore, bottlenecking the content was not something the authorities were ‘watching out’ for in a complaint around the pricing of CDs: in the top-down designed business model, the mass market would be served.

Nevertheless, it is not overlooked at the current stage that the market investigations brought under the Act were not aimed at safeguarding the position of competitors and that generally, competition policy is aimed at promoting and protecting the competitive process for the ultimate benefit of consumers.⁶⁰⁰ In this light, the existence of minors or independents competing with the majors can always be attested at every point in the history of the industry and across jurisdictions, even though their individual success and presence in the market is notoriously short-lived, something which was raised during the present investigation⁶⁰¹ and was also evidenced in the previous chapters of the thesis. Hence, when investigating the existence of constraints upon the majors and a fast-paced rigorously competitive environment, these will always be evidenced. A closer and more thorough look into the industry itself is required, in order to appreciate its dynamics and evaluate the fate of competition, even if the fate of the competitor is not an advocated aim.

⁵⁹⁹ Market failure was not so evident at the time of the investigation. However, it became apparent when the end consumer demand was not met by the industry.

⁶⁰⁰ The ‘protection’ of smaller competitors rests as a rationale behind the pure competition policy objective, as competition policy may ‘*seek to foster the ability of smaller companies to compete with established, powerful companies*’ according to Rodger and MacCulloch (n 582) 17. It rests behind the adoption of the Sharman Act, as well as behind the concept of ‘countervailing power’. However, it does not appear as an end in itself.

⁶⁰¹ Report 233 at 11.52.

In this vein, it is important to repeat that when evaluating the group of majors or the oligonomy described herein, it is not simply a matter of ‘trend setting’ or influencing industrial conduct. For instance, with respect to the specific Act, a complex monopoly is described as one that does engage in activity that distorts, restricts or prevents competition; however, it further needs to operate against the vaguely described ‘public interest’, as the Act prescribes. It follows that for as long as a degree of effective competition is maintained, the public interest will broadly be served. All the evidence in the Report reveals the existence of “*vigorous competition*” as per the interviewees,⁶⁰² which allows for the public interest test to be easily satisfied. One should be particular critical at this point however, as the existence of a competitive framework appears to be tipped in favour of the oligonomy, given that minor or independent players are either being completely absorbed by the majors or forced to collaborate closely with them, creating the nexus examined earlier.⁶⁰³

Even though in Columbia for instance, the examiner was seen repeating that ‘bigness’ itself is not an alarming issue and that one should look out for efficiencies in a market,⁶⁰⁴ it should be contemplated whether the mere existence of independents and minors when taking snap-shots of the industry suffices and whether there are deficiencies in the competitive process, even when the authorities can characterise a competitive framework as effective overall. Ultimately, it was presented in the second chapter of the thesis that the majors, as they stemmed out of the hardware era, in fact *predate* rather than simply influence the business model of the recorded music industry. This calls for a more holistic macro-perception of the industrial framework. It follows that focusing on compartmentalised investigations and their accompanying legal provisions, will have the effect of focusing on a tree rather than the forest.

This observation should also be viewed in conjunction with FTC’s attempts to tackle the majors’ practices several decades prior in the US, by focusing on one representative (Columbia): in the US, a similar pro-competitive environment was observed, consisting of the same few majors and a nexus of minors engaging in

⁶⁰² Referring mainly to evidence provided by the independents interviewed 226-235.

⁶⁰³ Burnett (n 242) and Bishop (n 296).

⁶⁰⁴ Also in Columbia, 72 F.T.C Initial Decision 292-293.

comparable practices, which are apparently able to attract antitrust and investigatory scrutiny under very different competition regimes and at very different points in history. Nevertheless, the examiner in that case referred to the overall picture of the industry where the oligonomy operates as a vigorously competitive environment, with low barriers to entry, where innovation is allowed to thrive (even though minor players are not).

Staying at Columbia, it should be borne in mind that the hearing examiner attested the ‘temptation’ to find antitrust violations in such perplex industrial setting like the record music industry, under a “*melange of charges*”.⁶⁰⁵ At that point, the thesis commented that perhaps it is the absence of a framework capable of addressing a “*melange of charges*” that should be reconsidered. The observations raised by the MMC Report attest that this was even more so the case on this side of the Atlantic, at least at the time of the investigation.⁶⁰⁶

One could say that the UK market investigation scheme which “*embodies the traditional UK approach to competition law*,”⁶⁰⁷ by exactly attempting a broader look into whole *markets* for corrective rather than punitive causes, offers an opportunity to appreciate the majors in a manner that the FTC was not able to do. This further offers the opportunity to view how different competition regimes and policies approach the same companies and the same business model. Consequently, this approach aligns with the overall aim of the thesis as repeated earlier in Columbia: whether these similar tactics and practices operating on (market) industrial⁶⁰⁸ level across and multiple jurisdictions, are in need of more apt understanding and solutions in the first place. Based on the evaluation above, it would appear that this is the case.

⁶⁰⁵ (n 525).

⁶⁰⁶ It should be stated here that the monopoly provisions introduced by the FTA 1973, were maintained in the Competition Act 1998. The FTA allowed for the investigation of situations of ‘parallel conduct’, when the (then) EC provisions, and namely the former Articles 81 and 82 EC Treaty (currently 101, 102 TFEU), were difficult to apply due to their stricter requirements of ‘agreement’ or ‘concerted practice’. The investigations were re-introduced as market investigations under Part 4 of the Enterprise Act 2002. Currently, market investigations are conducted by the Competitions and Markets Authority, pursuant to the Enterprise and Regulatory Reform Act 2013.

⁶⁰⁷ B J Rodger and A MacCulloch (n 582) 142.

⁶⁰⁸ Here, ‘market’ corresponds to ‘industry’ as no relevant product market definition is attempted in the stricter antitrust sense.

In this framework, the inability of the market investigations under the Fair Trading Act to offer a more thorough look at the industry is again highlighted. If the public interest test allowed for more elaboration in the present case for instance, there could have been an opportunity to by-pass any vagueness in wording, assessing access to content *per se*. However, 1994 was not the time and the MMC was not the authority to evaluate this, especially under the FTA 1973, which asked if the exploitation of a practice that *prima facie* restricts, distorts, or prevents competition operated against the public interest, served by the notion of effective competition.

Proceeding with the present investigation, and complex monopoly aside, the difference in the prices of CDs between the two countries was ultimately found to also reflect broader reasons behind price differentials “*such as the much larger size of the US market... and the generally lower US retailing costs,*”⁶⁰⁹ arguments which applied not only to CDs, but also to a wider range of manufactured goods.⁶¹⁰ Nevertheless, many interesting points were made in relation to the industry, the majors, and the copyright regime of the UK for the first time. For instance, it is of interest to note how the nature of copyright exploitation and its legal framework was addressed directly by the MMC, which consequently unfolds the competition authority’s understanding of the business model built around it.

4.2.2.2 Control of parallel imports

Firstly, the MMC looked at the right to control parallel imports, following a claim by the Consumers’ Association that “*if retailers were free to import records from the US they would do so and this would force the UK record companies to lower their prices.*”⁶¹¹ However, the control of parallel imports falls under section 22 of the CPDA 1988, ⁶¹² as the UK, even before the introduction of Directive 92/100/EEC, provided for the control of imports of copyrighted material. In the case of music recordings, the permission of both the owner of the copyright in music and the

⁶⁰⁹ Report 4 at 1.8.

⁶¹⁰ Ibid.

⁶¹¹ Report 21-22 at 2.90.

⁶¹² Copyright, Designs and Patents Act 1988 s22 “*Secondary infringement: importing infringing copy. The copyright in a work is infringed by a person who, without the licence of the copyright owner, imports into the United Kingdom, otherwise than for his private and domestic use, an article which is, and which he knows or has reason to believe is, an infringing copy of the work.*”

owner of the copyright in the sound recording was required for records to be imported into the country.⁶¹³ The Act however, did not oblige the copyright owner to control or restrict imports and indeed, licensing schemes were in place,⁶¹⁴ should the rightsholders choose to use them.

Furthermore, section 144 of the CDPA 1988 provided for the Secretary of State to order compulsory licences, pursuant to an MMC report finding adverse effect on the public interest. Hence, the exercise of the rights provided under the CDPA could be done compatibly with the purposes of the Fair Trading Act. The majors' practices of prohibiting all imports in certain circumstances and charging the same fees when imports were allowed, was considered by the MMC as a practice "*capable of forming the basis of a complex monopoly situation.*"⁶¹⁵

Ultimately, the claim of the Consumers' Association to remove this control was dismissed both as unfounded and as opposing the EC Rental Directive, which was about to be introduced. Under the Directive all members states would be required to control parallel imports from outside the EC (at the time), something the CDPA already provided for.⁶¹⁶

Controlling parallel imports from outside the EC was deemed integral to the "*international developments in the protection of intellectual property*"⁶¹⁷ and vital to affording strong territorial-based protection for the copyright owner, an intrinsic part of intellectual property policy. The ability to control parallel imports, strengthens the rightsholder's position in that among other things, it becomes more

⁶¹³ Report 9 at 2.20.

⁶¹⁴ The MCPS/BPI import licensing scheme provided for imports subject to a fee, in Report 13 at 2.36.

⁶¹⁵ Report 13 at 2.38.

⁶¹⁶ Art 9 Directive 92/100/EEC provided that "*Member States shall provide – for performers, in respect of fixations of their performances, – for phonogram producers, in respect of their phonograms, – for producers of the first fixations of films, in respect of the original and copies of their films, – for broadcasting organizations, in respect of fixations of their broadcast as set out in Article 6 (2), the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise, hereafter referred to as the 'distribution right'. 2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.*" Pursuant to this, allowing for parallel imports in the UK from the US, would be inconsistent with the exclusive rights of rightsholders.

⁶¹⁷ Report 22-23 at 2.95.

difficult to confine piracy in its absence.⁶¹⁸ In other words, the absence of any anticompetitive dimension of the practice, even though initially relevant to the provisions of the FTA, was to be found in the essence of copyright law. Even though the MMC did not refer to the public interest *per se* in this part of the Report, it appeals to the broader premise that the nature of copyright protection is such that eradicates competition concerns in most circumstances. It follows that the protection of intellectual property is in the public interest *per se*.⁶¹⁹

With regard to the other two practices however (similar pricing policies and artists' contracts), a closer look into the market for the supply of recorded music as identified, is permitted.⁶²⁰ Even though it is the same business model investigated in both countries, the UK competition landscape allowed for groups of firms to be investigated together as per the wording of the Fair Trading Act and less attention was paid to the definition of a relevant product market. This is different from the US, where the FTC had to operate on single firm level and where hurdles in defining the product market were observed. Interesting to repeat here again how, regardless of the broader or narrower approach, the result is favourable to the oligonomy's members in both countries, even when the similar issue of supply and distribution is in question, both as a result of 'looser' legal provisions (UK) and as a result of more rigorous enforcement (US).

⁶¹⁸ Report, 23 at 2.96.

⁶¹⁹ Before leaving the discussion on import control, it should be emphasised that the issue re-appeared in an anticompetitive context following the UK competition reforms (Competition Act 1998 and Enterprise Act 2002). A new investigation followed at the Office of Trading in 2002, for hope that the new agency would perhaps offer an updated reading of the oligonomy and the issue of controlling imports from within the EEA (this time) that resulted in higher prices for the consumers. The OFT received allegations about vertical agreements to control imports, which would trigger an investigation as per Chapter I of the CA 98. Nevertheless, since the agreements complained of had concluded prior to the investigation, the OFT could not take any action. In any event, the OFT promised to "*keep the CD market under review*" as the agreements had indeed taken place between "*some major UK record companies.*" Office of Trading, Wholesale supply of compact discs September 2002 OFT 391 1. This promise notwithstanding, it is argued herein that keeping an eye on the future of the CD market in 2002 would hold little merit given its immediate future.

⁶²⁰ Indeed, and contrary to the lengthy Columbia conundrum in the US, the MMC believed that "*the supply of recorded music as defined in our terms of reference is the relevant economic market in which to consider these questions,*" and no argument to the contrary was raised. In the Report 15 at 2.55.

4.2.2.3 Similar prices

On the matter of similar pricing, it was found that the similarities in prices constituted a *practice* and that “*since price is an important component of competition... competition is restricted by the similarity of pricing policies between the companies.*”⁶²¹ The restriction, prevention or distortion on competition resulting from the practice however, needs to be operating against the public interest for the purposes of the Act and this was not ultimately sustained by the MMC, thanks to the existence of rigorous competition in the industry (on firm level), as also advanced earlier in the US.⁶²²

According to the majors, the sameness in prices was a result of “*a competitive market and did not reflect any dominance of the major record companies or collusion between them.*”⁶²³ An issue featuring in the authorities’ vocabulary since the time of Columbia, “*sameness in prices*” features here once again as an aspect of the concentrated industry, which remains dictated by the few major players’ practices. It was shown how the issue of “*sameness in prices*” was not paid great attention during Columbia, since the overall industrial environment was described as highly competitive and innovative. In the present case, the MMC agreed with the majors’ contentions that the prices of CDs were a result of inherent unpredictability of demand (which prevents dissimilar pricing at the first place), consumer insensitivity to price changes as whole, format specific pricing mechanisms, and the retailers’ own pricing conduct.⁶²⁴

⁶²¹ Report 12 at 2.35.

⁶²² (n 543).

⁶²³ Report 26 at 2.113. However, it should be borne in mind that more recent literature suggests that there exist more categories of horizontal relationships between competitors than competition or collusion. See for instance the case of ‘coopetition’. As such “*a firm can live in symbiosis by coexisting with other relationships, or being involved in a relationship simultaneously containing elements of both cooperation and competition,*” in M Bengtsson and S Kock, “Cooperation and competition in relationships between competitors in business networks” (1999) 14 (3) *Journal of Business & Industrial Marketing* 178-194. Without wishing to analyse or provide the reasons behind the sameness in prices at this instance, it is important to draw the reader’s attention to alternative literature on the topic to highlight how relationships such as the one described herein have not caught the attention of the legislator, despite their potential relevance and impact.

⁶²⁴ Report 26.

The majors argued that aiming to maximise the value of their investment in copyright, they did charge higher for CDs, a practice reflective of the end consumers' willingness to *"pay for the higher sound quality, durability and user-friendliness,"*⁶²⁵ even though the manufacturing costs did not vary greatly between formats. Price differentials across formats are common practice across the copyright exploitation sector (books, films etc.) and they correspond to consumer demand, since the product (copyrighted material) can be accessed in a *"range in terms of price and quality to suit different consumers' needs."*⁶²⁶ This constituted one of the reasons behind the segregated market definition advocated by the FTC in the US. Even though the UK competition regime had found a way to accommodate both a broader market reading (concentrating on groups) and the concern in question without compartmentalising the market for the sake of definition, it needs to be reaffirmed that in both cases, price differentiation by format (CDs and cassettes in the UK, LPs and singles in the US) corresponds to end consumer demand preferences.

As a matter of fact, the report itself dedicates almost twenty pages to the analysis of pricing mechanisms, including price comparisons with the US.⁶²⁷ The detailed analysis provides a thorough look into *formats* and price categories (full price for new and potentially successful releases, mid-price for slower-selling re-releases, budget-price for releases with generally low brand image) and addresses the reasons behind the categorisations.⁶²⁸ Again, the rationale reflects the unpredictability of success, the inability to price per unit based on manufacturing cost, as well as the general perception that price reflects quality from the point of view of artists, retailers, and consumers.⁶²⁹ Competition exists on firm level thanks to promotional campaigns and discounts offered, aiming to achieve sales. The record companies claimed that these prices had been established over time through competition between them and through *"interaction between record companies, on the one hand, and retailers on the other, to become 'standard' form of pricing in the*

⁶²⁵ Report 26 at 2.117.

⁶²⁶ Report 26 at 2.118.

⁶²⁷ Report 140 onwards Part 7.

⁶²⁸ Report 142 at 7.7.

⁶²⁹ Ibid.

*industry in the UK and in other countries.*⁶³⁰ Is it the case that since these price differentials are invited by similar policies and similar practices, the advocated ‘fierce competition’ is hardly any competition at all, as judged by the point of view of the end consumer?

Furthermore, prices were differentiated by format, with the CD being priced differently reflecting this format’s higher quality, a common feature in the copyright-based industries. Record companies normally release all formats at the same time, providing a variety of choice for the end consumer, who would purchase the same music according to personal budget or sound quality requirements. They argued that this resulted in increased demand for recorded music, greater sales, lower unit costs, greater product variety, and lower prices, or in other words, in an environment that does not leave the consumer worse off, allowing for the public interest test to be met.⁶³¹

A standardised form of pricing restrictive of competition as it may be, needs to be evaluated as to its operation against the public interest, as explained with respect to the Act. Nevertheless, making sense of the public interest test also means looking out for effective competition in a market. It seems however, that the reasoning behind the standardised pricing as provided above, does not leave any room for the evaluation of a *competitive environment*, let alone an *effective* one, even though the majors did claim that one existed and that these prices constituted its reflection.⁶³²

Making sense of the above requires a closer look into the UK regime yet again, as it should be noted that “*at no point has the objective of UK competition law been clearly stated and defined,*”⁶³³ leaving this open to political interpretation, especially with regard to the 1973 Act (which introduced the public interest test).⁶³⁴ The Act’s flexibility and purposely broad catchment area allowed for a plethora of market

⁶³⁰ Report 143 at 7.15.

⁶³¹ Report 147 at 7.28.

⁶³² Report 26 at 2.113. Sameness in prices was a result of “*a competitive market and did not reflect any dominance of the major record companies or collusion between them.*”

⁶³³ Rodger and MacCulloch (n 582) 26.

⁶³⁴ This politically influenced landscape for UK competition laws altered with the enactment of the Competition Act 1998, the Enterprise Act 2002 (under which market investigations subsequently fell), and of course with the overall influence of EU competition law.

investigations on the one hand, but also for the majority of them to be found 'healthy' on the other. In past, the MMC had been characterised as 'toothless' and its investigations had caused concern among consumers and consumer groups.⁶³⁵ Hence, making use of *effective competition* should require a clearer interpretation of what aims and objectives competition is working towards, otherwise a lot of ambiguity can remain in the market under examination.

With respect to the prices of CDs in the present investigation, the pricing mechanisms presented above, were found to be ultimately effective since the "*similarity in pricing policies of the major companies does not appear to be the result of any lack of competition. Rather it is a reflection that competitive pressures have forced them to act in broadly similar ways.*"⁶³⁶ In this sense, effective competition becomes (roughly) *any non-objectionable* competition, for lack of a predefined benchmark.⁶³⁷

Nevertheless, assuming or suggesting that the oligonomy operates in a competitive environment because competition is not absent, requires caution. The history of the members of this complex monopoly (or oligonomy) is one of a constant series of mergers, acquisitions and serious cooperation on industrial level, suggesting orchestrated conduct (e.g. payola). In such a consolidated environment, asserting that since prices are set in an analogous manner because competition is not absent, should not imply that the environment is procompetitive instead, even if such competition is described as *effective* in the Act.

Given that the purpose of this part of the thesis is to evaluate the efficiency of the Act employed to investigate the business model of the industry, it can be deduced that

⁶³⁵ T Usher (n 577).

⁶³⁶ Report 27 at 2.121.

⁶³⁷ According to Whish and Bailey (n 581) 18, "*the idea of effective competition does not appear to be the product of any particular theory or model of competition – perfect, workable, contestable or any other... Effective competition does connote the idea, however, that firms should be subject to a reasonable degree of competitive constraint, from actual and potential competitors and from customers, and that the role of a competition authority is to see that constraints are present on the market.*" However, definitions of effective competition have been attempted in the US from early on see e.g. B Smith, 1951, "Effective competition: hypothesis for modernizing the antitrust laws" (1951) 26 NYUL Rev 405. Further, the term has been used as closely synonymous to workable competition in M A Adelman, "Effective competition and the antitrust laws" (1948) 61 (8) HarvLRev 1289-1350. More recently in Bishop and Walker (n 581) ch 2.

its vagueness (relying on the public interest and the notion of effective competition) does not serve a welfare-enhancing purpose. Further, it fails to elaborate on the aggregate conduct of the members of the identified monopoly group by focusing on the issue of prices, which appears to be a resulting symptom of the oligonomy's business model and of its overall industrial structure.

Indeed, not much can be learned by focusing on the matter of prices *per se* over the years and across jurisdictions, as first evidenced in Columbia, where the prices just 'happened' to be the same. In the UK, *sameness* was treated as a competition-restricting practice, relevant to the investigation of a complex monopoly, which however, did not result in any consumer-harming conduct. This comes as no surprise, since this sameness was seen as a result of 'competitive pressures'. Naturally, the paradox of describing a practice as both able to restrict or distort competition and as being the result of competitive pressures, should not be overlooked.

Another important point with regard to the prices, is the differentiation by format and the role of the end consumer. In Columbia, it was argued *inter alia* that, since the different formats (LPs and singles) were priced differently and consumer demand reflected that difference, then separate submarkets should be defined. In the UK, pricing was investigated as a practice of anticompetitive concern, without the need for an elaborate and technical market definition. Even though flexibility from the part of the UK investigation scheme was noted, the end result does not differ greatly: in neither case did the "sameness in prices" raise concern, since it was the direct result of a (so-called) procompetitive environment, characterised by great unpredictability in product success, which alone justifies *sameness*.

However, in both investigations the end consumer was also found to appreciate different formats differently. Subsequently, it can be said that different formats compete for "*the consumer's dollar*" in the UK as well.⁶³⁸ This realisation becomes even more important in the digital age, when the majors neglect to cater for the end

⁶³⁸ Report 80 at 5.52. "*Different line items, whether the recordings of the same title on different formats or of different titles, are in competition with one another.*"

consumer's preferred format altogether (digital consumption),⁶³⁹ or seek to control alternative methods of consumption broadly defined (live music). With the treatment of the market as mass, as repeated throughout the present, access to content was never an issue or at least an issue that the competition authorities were worried about. Nevertheless, it was access to content that was being engulfed and bottlenecked by the members of the oligonomy. Insisting on its symptoms (e.g. pricing) or compartmentalising the oligonomy's conduct, did not allow for this main anticompetitive concern and market failure to come forward, as one directly tied to consumer welfare or the public interest. Even if the MMC was ready to investigate both sides of the oligonomy and address the bottleneck around the music product itself, the Act at its disposal did not allow for conduct that operated against the public interest to be found.

Therefore, with the MMC asserting that the prices are a result of effective or non-objectionable competition, the next practice that was found to prevent, restrict or distort competition and that was subsequently evaluated, was the practice of signing exclusive recording contracts with the artists.⁶⁴⁰ The following section allows the thesis to assess both the distribution and the *key resource* of the old business model, or in other terms, the bottleneck and the accompanying gatekeeper function. In that respect, the MMC's investigation is broader than the one conducted by the FTC, as it touches on the explicit matter of securing artists access to the public (end consumers), focusing on the distribution chain of recorded music as a whole. The thesis examines whether these issues were actually 'picked up' by the UK competition authority.

⁶³⁹ When the consumer protection organisation "Which?" turned to the price of digital downloads and their higher UK prices, the matter was referred to the European Commission by the OFT and it focused around Apple's anticompetitive conduct "*the Commission's antitrust proceedings have also clarified that it is not agreements between Apple and the major record companies which determine how the iTunes store is organised in Europe. Consequently, the Commission does not intend to take further action in this case.*" European Commission Press release, "Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe" January 9 2008, available at http://europa.eu/rapid/press-release_IP-08-22_en.htm.

⁶⁴⁰ In T Usher (n 577).

4.2.2.4 *Exclusive contractual relationships between recording artists and record companies*⁶⁴¹

The investigation proceeded with considering the *practice* of “entering into recording contracts with artists which include terms that restrict the artists’ ability to exploit their talent fully and restrict competition in the supply of recorded music”.⁶⁴² As with pricing and import control, this practice was found to prevent, distort, or restrict competition by the complex monopoly of the majors who *whether voluntarily or not and whether by agreement or not* so conducted their affairs. Nevertheless, the Act is satisfied if the restriction operates against the public interest, which was the basis of the MMC’s evaluation here as well.

Before proceeding with the specifics, it should be repeated that this part of the investigation offers a more thorough look at the business model and its evolution, since it deals specifically with *key resources, cost structures, key activities, and revenue streams*. Further, it offers the possibility to assess how unreasonable restraint of trade⁶⁴³ operates in this context. As such, it allows for a broader legal evaluation of the Building Blocks of the business model canvas. Additionally, the investigation coincides with the time when the late George Michael brought an unsuccessful action against his record company on the basis of unreasonable restraint of trade and infringement of (former) Article 85(1) EC Treaty, which prohibits agreements affecting trade between member states and restricting competition.⁶⁴⁴ Thus, a clearer evaluation of the *oligopsony* towards artists and of the majors’ gatekeeper function, follows in the current section of the chapter.

⁶⁴¹ CDPA 1988 s185 defines an exclusive recording contract as “a contract between a performer and another person, under which that person is entitled to the exclusion of all other persons (including the performer) to make recordings of one or more of his performances with a view to their commercial exploitation.”

⁶⁴² Report 10 at 2.23. It is worth repeating here that the artist is encountered in the following Building Blocks of the old business model: *key resource* (portfolio of artists and copyrighted content), *cost structure* (royalty payments and subsidising unsuccessful artists), *key activities* (in A& R), and *revenue streams* (huge sales from a few superstars).

⁶⁴³ Restraint of trade with respect to the relationship between musicians and intermediaries (publishers and record companies) has been encountered since the case of *Schroder Music Publishing v Macaulay* [1974] 1 WLR 1308, [1974] 3 All ER 616, and *Elton John v James* (1983) [1991] FSR 397.

⁶⁴⁴ *Panayiotou and others v Sony Music Entertainment* [1994] EMLR 229. The case took place before the introduction of Commission Regulation 330/2010 OJ L109/1 on the

At first, with regard to establishing a *practice*, the majors argued that the agreements are drafted as to allow the artists to fully develop and exploit their talents and as such, they do not restrict, prevent, or distort competition.⁶⁴⁵ If anything, they added, exclusivity with regard to the assignment of copyright coupled with a prolonged contractual period is essential for the industry to function *at all*.⁶⁴⁶ The MMC concluded that the artists are indeed restricted. However, this did not imply that the way the oligonomy conducts its affairs *is good or bad*, or that this operates against the public interest. At that part of the investigation it sufficed to establish that restrictive contractual clauses in e.g. financial matters, as well as the uniform, standardised contracts across all members of the oligonomy, constituted a *practice* pursued by the five companies investigated.⁶⁴⁷

This is not far from the truth and, had the investigation allowed for a more in-depth evaluation, it would have become obvious that this uniform practice of signing exclusive contracts with artists, relates to the time when patent holders sought to secure the services of performing artists, and most importantly of the most famous performers, in order to showcase their sound recording technological advancements.⁶⁴⁸ It further constitutes a practice born out of the majors themselves, as it was conceived by Eldridge Johnson of Victor.⁶⁴⁹ Thus, it forms an intrinsic part of the business model and it does lie at the core of the oligonomy and the industry

application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, which provides for block exemptions for vertical agreements unless the primary object of the agreement concerns intellectual property. Further, in 2004, Art 101(3) became directly applicable by competition authorities and domestic courts, which could potentially justify a different treatment of a similar case, should one arise. Council Regulation (EC) 1/2003 OJ L1/1 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. As Bently and Sherman suggest, domestic courts could have relied on the *Panayiotou* ruling to avoid referral to the Commission, which is no longer the case. In L Bently and B Sherman, *Intellectual Property*, 4th edn, (2015) 318.

⁶⁴⁵ Report 13-14 at 2.41.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Report 13-14 at 2.42.

⁶⁴⁸ (n 134).

⁶⁴⁹ Victor appears in the genealogical tree of many of the majors. It became RCA Victor in 1929 and is part of Sony.

from the time when copyright in sound recordings remained under the provisions of state law in the US.⁶⁵⁰

History attests that exclusivity in securing the services of recording artists and composers is indeed a *practice* initiated by the forefathers of the oligonomy and its initial purpose was to boost the sales of ‘talking machines’ and player pianos and to secure return on investment in music copyright. This refers to the relationships between composers and the big publishing houses of Tin Pan Alley (who were the most powerful people in the music industry at the time).⁶⁵¹ Later it was shown how Aeolian’s attempted to sign long-term exclusivity contracts with the leading publishers in order to control the reproduction of all the music they represented, led to the introduction of the compulsory licensing system in the US. It is very interesting therefore to observe how the business model transcends jurisdictions in order to form an established industrial practice (especially considering, yet again, that it the same handful of companies constituting the oligonomy).

Thus, exclusivity remains at the core of the recording (and the publishing to a smaller extent) activity, since before the oligonomy attained its dominant traits and business model; if anything, it could be deduced that securing these exclusive relationships constitutes the business model itself. Hence, as a relevant practice that predates the industry and the business model even, its value to the artists and its effect on competition had not been investigated much, bar from the statutory compulsory licensing scheme under US copyright laws which, as introduced,

⁶⁵⁰ See ch 2 of the present. According to §101 of the 1976 Copyright Act “*material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*” Section 301(c) of the 1976 Copyright Act specified that federal law covered only recordings made after February 15, 1972; all those made prior to that date remained under state law, which in some time cases even meant common law, as illustrated in the 2005 case of *Capitol v. Naxos*. The New York State Court of Appeals declared that since the New York State had not passed explicit statutes dealing with copyright in recordings, they were in fact governed by common law, and thus protection was absolute and perpetual. In T Brooks, "Only in America: the unique status of sound recordings under US copyright law and how it threatens our audio heritage" (2009) 27 (2) *American Music* 125-137.

⁶⁵¹ See also in D Passman (n 48) 232. Songwriters would transfer ownership of the copyright in music and lyrics (one copyright per song under US laws) to the publishers, who would control the first use of the music by deciding which performing artist (and record company) would record the new work, as seen in the second chapter.

suggested that competition should exist at musical composition level (avoidance of monopoly in hit or popular songs). Since musical compositions can be recorded by various artists, exclusivity is required to secure the most popular performer whose version of a recording would be the most successful in the market.⁶⁵²

It would not be an exaggeration to make this connection at this stage, since this practice is rooted deep in the industry's history. As the huge sales from a few superstars became the main revenue stream of the oligonomy's business model,⁶⁵³ it becomes evident that securing maximum return on investment in making and breaking a superstar requires monopolisation, which can only be secured contractually through exclusivity agreements, with or without covering the same music.⁶⁵⁴

Indeed, exclusive contractual relationships do make sense in a business context first in publishing and then in recording; however, it was observed that the US Congress interfered to 'break' the monopolisation of musical compositions, when a hardware manufacturer (Aeolian) sought exclusivity over the mechanical reproduction: since the music was not be monopolised, why should the artist be in a reversed scenario? This shows that a similar relevant practice was rectified as *bad* rather than *good* over a century ago in the US⁶⁵⁵ and acknowledged in the Berne convention.⁶⁵⁶ Nevertheless, at this stage the investigation does not allow for a more qualitative (or comparative as a matter of fact) approach and so the matter is to be evaluated further on in the Report, when the exploitation of the practice is discussed regarding its operation against the public interest.⁶⁵⁷

⁶⁵² See e.g. Elvis Presley's career started with the cover of "That's alright" first written and recorded by Arthur Crudup. <http://www.allmusic.com/album/thats-all-right-mama-bluebird-mw0000678956>.

⁶⁵³ Osterwalder's presentation (n52).

⁶⁵⁴ Currently the compulsory licensing scheme is hardly ever used due its to burdensome administration, in Passman 227.

⁶⁵⁵ See e.g. A Packard, *Digital Media Law*, 2nd edn, (2014)195-196, whereby the US Congress's interventions to deter monopolistic behaviour in sound recordings and music compositions is laid out.

⁶⁵⁶ Berne, Arts 11*bis* (2), 13.

⁶⁵⁷ It should be repeated here that the UK system has not introduced the compulsory licensing scheme, as first presented in the second chapter. In a UK context, compulsory licenses in copyright are granted in respect of conditions whereby the copyright owner's position is unduly strengthened e.g. in the Broadcasting Act 1990 ss175, 176, and Sch17, whereby the practice of television companies reserving the weekly guides market was

The exclusive contracts were investigated in relation to their operation against the public interest in three features, as highlighted by artists' managers. These were the ownership of copyright, their standardised format, and their exclusivity *per se*.

The artists, as represented by their managers, claimed that the inequitable contracts they were called to sign restricted the full exploitation of their talent, leading to reduced competition and high prices through these three practices. They argued that the negotiating power lied with the majors, resulting in 'take it or leave' it deals, especially for non-established acts. In that, the MMC responded that it is inevitable for the majors to seek the maximisation of their control over copyrights (return on investment).⁶⁵⁸ In any event, they agreed that the contracts were not inequitable, since artists were prompted to seek professional legal advice and since the record companies would rather safeguard themselves from getting sued for restraint of trade.⁶⁵⁹

Interestingly enough, the MMC highlighted the existence of the restraint of trade doctrine as being enough of a safeguard and justified the necessity of securing exclusive contractual relationships, even though they constituted:

*“the most restrictive aspect of contracts – on the face of them such clauses restrict competition because they prevent an artist performing for a competing record label. However... the company would have no way of securing a return on its investment if the artist were free to make records for another company. We accept therefore that in general a degree of exclusivity is necessary.”*⁶⁶⁰

Unsurprisingly, this was the rationale of Parker J, when considering whether George Michael's agreement with Sony could amount to unreasonable restraint of trade. Even though restraint of trade was *prima facie* evident, it was not unreasonable,

rectified following an MMC report. The British Broadcasting Commission and Independent Television publications: a report on the policies and practices of the BBC and ITP of limiting the publication of advance programme information (Cmnd 9614: 1995). Similarly, in an EU context see *RTE and Independent Television Publications v Commission* [1991] ECR II-485, [1991] 4 CLMR 586, where abuse of dominant position was found (Article 102 TFEU).

⁶⁵⁸ Report 28 at 2.130.

⁶⁵⁹ Report 28 at 2.133. Lack of independent legal advice has been found to justify restraint of trade even more recently in *Proactive Sports Management v Rooney* [2011] EWCA Civ 1444, a case regarding exclusivity in image rights.

⁶⁶⁰ Report 31 at 2.147.

since the record company's investment and assumption of risk in breaking new artists should be accounted for.⁶⁶¹ Thus, the ability to secure independent advice coupled with the possibility to bring an action for restraint of trade were enough to justify that the 'most restrictive' practice of the oligonomy did not operate against the public interest.

Regarding the case of George Michael as anticompetitive under EU law, not much can be learned, as Parker J could not justify an application of Article 85 (now Article 101).⁶⁶² Nevertheless, according to Lionel Bently, "*the Commission would have been required to consider a deluge of individual applications under Article 101 (3).*"⁶⁶³ However, and following the developments in vertical agreements regarding IP and the ability to apply Article 101(3) domestically, there might still be the case of finding similar agreements anticompetitive today, especially should one consider the infamous 360 deals.⁶⁶⁴

Indeed, it was shown that norm has become for contractual relationships between artists and record companies or promoters such as Live Nation, to encompass some form of multiple rights deals, where the company tries to secure a share of the artist's all potential income streams.⁶⁶⁵ Such deals were introduced to subsidise for the record companies' lost earnings in record sales and to ensure that "*significant innovation was taking place in the music industry*".⁶⁶⁶ A sign of our times, they do represent the industry's attempts to foresee where consumer demand and consumption lies in order to profit off the several channels, as it was presented in the previous chapter with regard to complementarity patterns. Furthermore, they signal the experimentation with several business models and business model innovation, as the quote above demonstrates. Nevertheless, for the current stage of

⁶⁶¹ *Panayiotou v Sony Music Entertainment* [1994] EMLR 361. The specifics of the case fall outside the scope of the present due to the parties' long history. However, for more information see Lionel Bently and Brad Sherman, 4th edn, (2015) 315-316.

⁶⁶² Parker J further noted that the agreement did not affect trade between member states as the contract (as most recording contracts) operated 'worldwide', that it did not have an effect on trade at all, and that it did not restrict competition [1994] EMLR, 416, 420, 425.

⁶⁶³ Bently and Sherman (n 644) 317.

⁶⁶⁴ In *Passman* 102-108. See more at S Karubian, "360 deals: An industry reaction to the devaluation of recorded music" (2008) 18 S Cal Interdisc LJ 395.

⁶⁶⁵ T Anderson, "The origins and pitfalls of 360 degree contracts for musicians" (2014) 25 (2) EntLR 35-40.

⁶⁶⁶ *Ibid.*

the chapter, they are mentioned to suggest that the anticompetitive nature of the artists' contracts has not subsided, but it has evolved and adjusted, however to the detriment of the artists. Hence, competition law still has a role to play in rectifying any unbalances between artists and intermediaries, for the ultimate benefit of the consumer.

Lastly, turning to the issue of the copyright ownership, the artists' claims and the majors' counterclaims come as no surprise: the artists claimed that their copyrights should be licensed for limited periods rather than transferred to the record companies and that the benefits from such a shortened period of exclusivity would be securing competition and efficiency in the open market.⁶⁶⁷ On the contrary, the record companies counterclaimed that most of the artists preferred securing royalty sharing agreements in lengthy contracts over copyright ownership.⁶⁶⁸ They also highlighted:

*“even where successful artists have acquired control of the copyright, there is no benefit to the public interest. An artist’s only avenue for protecting and exploiting his copyright is to license it to a record company and this is achieved by auctioning it to the highest bidder.”*⁶⁶⁹

The MMC agreed that there existed ‘free bargaining’ and that artists were free to *“have the possibility of negotiating a different type of contract with an independent.”*⁶⁷⁰ Nevertheless, it remains arguable whether an independent could ‘bid’ successfully. Additionally, the existence of a ‘bidding’ war seems to emerge as a practice with the potential to raise the copyright-monopoly price substantially, should one think of stars the size of the late George Michael, for instance.

⁶⁶⁷ Report 29 at 2.135. At evidence stage (Report 212), the International Managers’ Forum suggested that Minimum Term Agreements should be introduced industry-wide, securing that ownership of copyright remains with the artist or reverts to the artist when the recording costs had been recouped or a given number of years had passed post recoupment/release, or the artist had moved to a new label; or the record company had become insolvent. It should be highlighted that the most problematic issues in the industry, refer to the instances where artists transferred ownership of the copyright in the master recording to the record company, rather than when the record company financed the recording at the first place. The latest trend in by-passing the record company and gaining control of the copyright in the sound recording has found many older bands re-recording and self-releasing their own material e.g. Def Leppard, see <http://www.hollywoodreporter.com/news/def-leppard-universal-recording-hits-356397>.

⁶⁶⁸ Report 29 at 2.136.

⁶⁶⁹ Report 29-30 at 2.137.

⁶⁷⁰ Report 30 at 2.139.

The MMC further acknowledged that the prolonged ownership of copyright was justified by the risk assumed in breaking a successful artist and in subsidising those who did not ‘make it’.⁶⁷¹ In other words, the prolonged ownership was justified by the business model *per se*. It was repeated that record companies benefit from extensive back catalogues that can be re-released, even when the artists were no longer contractually affiliated with a given company, despite the fact that superstars like the late David Bowie and the Rolling Stones, and more recently the late Prince, had been able to negotiate rights in previous recordings, thanks to the incredible leverage their names carried.⁶⁷²

The special status of superstars the size of Bowie and the Rolling Stones, was further evident in their negotiating powers, as it was “*common for the term of a contract, in particular the size of the advance and the royalty rate, to be renegotiated in the artist’s favour if he becomes successful.*”⁶⁷³ It is no secret that artists with successful careers will get the better side of the deal, as they are called to subsidise for the expenditure lost in promoting least successful acts. Naturally, securing the most famous artists via exclusive agreements rests in the heart of the oligonomy’s activities. Competition or a ‘bidding war’ can commence once the artist’s contract with a given record company expires, a practice which has been attested as constituting the so-called fierce, if not the only, competition for the ‘lion’s share.’⁶⁷⁴

It is this competition within the oligonomy that suggests that the public interest is *found* to be served, even though competition for the very few names appears rather restricted. Additionally, the existence of this so-called ‘fierce’ level of competition should also be viewed in context, since it is aimed at restricting access to the artist from the point of view of the end consumer (turning to the oligopsony side of things). Had the investigation allowed for the matter of access to content to be evaluated, it would have been more obvious how restriction to artists’ services via exclusivity is relevant to the public interest, despite the majors’ and the MMC’s contestations.

⁶⁷¹ Report 30 at 2.140.

⁶⁷² Report 92-100. Here, the Report describes to some extent the structure of the market for recorded music.

⁶⁷³ Report 99 at 5.138.

⁶⁷⁴ As in Bishop (n 296).

It was claimed that freeing the artists from the restrictive contracts would be of no relevance to the public, as it was the artist that would benefit directly and that in any event, the mere existence of competition is enough to satisfy the public interest test. It is argued that this narrow perception of what constitutes both the public interest and the double-sided nature of the oligonomic model, did not allow for an extensive evaluation of the real issue that would emerge a few years later, that of alternative consumption and access to the artist and to content *per se*. As it turned out to be the case, the oligonomy found itself in position to engulf the artists as a product through multiple rights deals unrestrained, when the time was ripe.

Further, it seems to emerge that exclusivity plays a significant role in inviting price coordination among catalogues and categories of products, exactly due to the long-standing practice of attaching a premium fee to a successful artist, in order to subsidise the rest. Since the success of each artist cannot be known in advance, the focus switches to the few established acts, for which the oligonomy can engage in a so-called 'fierce competition'. This practice, far from being welfare-enhancing, is inviting price coordination across catalogues and among substitutable artists, leaving the end consumer with similar, and arguably higher, prices. It follows that such a practice can justify consumer welfare-oriented policy as a remedy.

Moreover, it is important to repeat that in this practice of 'bottlenecking' and 'engulfing', the traditional oligonomy is not alone, but it is now met with powerful oligonomic players such as Live Nation, the by-product of the deregulated radio industry. And indeed, even if just focusing on the price of a CD or digital download did not raise concerns, concerns can and should be raised at the point where these powers meet.

4.2.3 *Concluding thoughts*

To conclude, the MMC investigation into the prices of CDs allowed for a more elaborate and thorough discussion on both sides of the oligonomic model. It was shown how restrictive practices across the business model's spectrum were not found to be alarming, due to the vagueness of the provisions at the MMC's disposal. This allowed the oligonomic model to be described as competitive in the UK as well. Further, this investigation was employed at this stage of the thesis to provide a thorough look at a substantially big music market where the oligonomy operates, the

UK. It was shown how, despite differences in the legal framework, the practices and the history of the oligonomy's business model dictate the industry standard and how both jurisdictions were unable to employ competition laws successfully to avoid the foreclosure of the music product. This was partly due to the fact that the effects of foreclosure were to be found elsewhere...

Indeed, consumer access was yet again not addressed. To make things 'worse', the public interest was actually found to be served by the 'fierce' levels of competition between the majors, a realisation that does not seem to change with the passing of time across jurisdictions. However, the provisions and the legal framework at the MMC's disposal were proven rather weak and vague, as opposed to their US counterparts. In summary, it appears that in both jurisdictions the authorities could not interfere successfully, albeit for very different reasons: the FTC wanted but could not, whereas the MMC lacked the necessary legal 'backing' to do so.

Finally, when faced with the 'practices' of the oligonomy, the MMC described a pro-competitive environment that was in position to serve the public interest. However, as this thesis sets out to prove, the public interest might be found to be served, yet the public itself is not. Whilst focusing on the issue of prices and trying to justify their sameness does not seem to bear fruit, the 'business model' analysis attempted by the thesis has shown that issues of foreclosure and access could and should have been 'picked up' by the authorities.

These issues culminate in the matter of exclusive contracts, a matter which was ultimately not of the 'public's concern', as per the MMC. It is also reminded that the issue of exclusivity featured in the US as well, in the face of the licensing agreements that Columbia had entered into. There, it was observed that such exclusive agreements can also serve the public by exposing consumers to music represented by minor players. Therefore, it was also taken for granted that passing by the oligonomy one way or another, is a one-way street in the music industry and that it is not something competition authorities should worry about.

To conclude, the issues examined in the present chapter are also referred to in the fifth one, which is dedicated to merger control. The penultimate chapter shows that it is not only the relevant investigations that have been 'struggling' with the business model of the oligonomy; additionally, substantial lessening and significant

impediment on competition have been equally difficult to assess in merger cases. It will be examined how a business model reading of the music industries can bring the end consumer to the centre of attention, also in a merger control context.

CHAPTER V

5 *'Counterparts': Investigating Business Models and Merger Control in the US and the EU*

*"Bad times are comin'
and I reap what I don't sow
hey hey
well let me tell you somethin'
all that glitters ain't gold"*
Aloe Blacc, 2010

5.1 *Introduction*

This chapter deals with merger control in the music industries. It is dedicated to the *ex ante* evaluation of the business model and it introduces in more depth the world's second most prominent competition jurisdiction, the EU. This adds a wealth of cases and materials for consultation and elaboration in the field of merger control. Additionally, the US merger control regime also features herein, offering a diversified viewing of the relevant issues.

Further, the chapter allows for a closer look at consumer consumption patterns as promised in the third chapter; as such, it addresses the issue of relevant product marketing definition more closely. Does the market as resulting from a specific business model relate to the relevant product market identified for competition law purposes? It is reminded that the third chapter of the thesis introduced the business or commercial reality under old and emerging business models in the *music industry* and the *music industries* respectively, focusing on the issues most relevant in a competition law context, namely supply and demand patterns, including complementarity and substitutability. Thus, towards the end of that chapter it was posited that these patterns of consumption should be taken into consideration in a relevant competition law scenario. Nevertheless, as this part of the chapter attests, this is something not possible to occur, since the relevant product market definition toolkits employed, examine relationships between producers and their direct customers higher up in the supply chain, leaving the end consumer mostly outside the evaluation.

In order to provide a most accurate examination at this crucial part of the thesis, the chapter investigates the circumstances where the market for hit music, which

constitutes the marketers' *offering* (or *offer* as per the old business model) has been identified as a relevant product market in a merger control scenario, how and why the end consumer of the musical product (or the *mass market* in business model terms) remains mostly neglected in the cases examined; and how several Building Blocks of the business model such as *key activities* (A&R), *key resources* (copyrighted content), *key partners* (manufacturing and distribution), and several *revenue streams* (tours and concerts), were identified as distinct relevant product markets in similar merger cases.

Indeed, turning to EU merger control, it has been established in *Coca-Cola Co v Commission*⁶⁷⁵ that the Commission's relevant product market definition cannot be binding in a subsequent case, and hence each case will be treated on an individual basis.⁶⁷⁶ It follows that such a compartmentalised approach to relevant product market definition has the power to alienate the competition law market from the business reality even further,⁶⁷⁷ especially since empirical studies suggest consumer migration to alternative consumption patterns and products for music.⁶⁷⁸ However, the analysis shows how the Commission acquired a rather repetitive stance towards relevant product market definition in the music industry, and only altered its approach once online music distribution patterns had emerged, a time that coincides with the major reforms that the EU merger regime faced.⁶⁷⁹

Thus, it is important to examine the concept of relevant product market definition for merger control more closely, as it allows for this gap to come to foreground, and provide the evidence necessary for the purposes of this thesis: the market deriving from the business model in the music industry of the past and in the music

⁶⁷⁵ Cases T-125/97 and T-127/97 [2000] ECR II-1733, [2000] 5 CMLR 467.

⁶⁷⁶ As per Whish and Bailey (n581) 864 "it follows that the notifying parties should not expect that the Commission will define a relevant market in the way it did in a previous decision," referring to the cases of Case T-151/05 *Nederlandse Vakbond Varkenshouders v Commission* [2009] ECR II-1219, (2009) 5 CMLR 1613, at 136-140.

⁶⁷⁷ Of course, and as it was stated at the very beginning of the third chapter, the relevant product market defined in a competition analysis is materially different from a market in an economics context, as per P Massey (n 230) 309-328. Nevertheless, the present thesis remains critical of this point exactly.

⁶⁷⁸ (n 413), (n 378), (n 393).

⁶⁷⁹ Moving from the old ECMR, Regulation 4046/89 OJ 1990 L257/13 to the new EUMR 139/2004 2004 OJ L24/1, via the famous 'merger trio': Case T-310/01 *Schneider Electric SA v Comm'n* [2002] ECR 11-4071, Case T-5/02 *Tetra-Laval BV v Commission* [2002] ECR 11-4381, Case T-342/99 *Airtours PLC v Commission* [2002] ECR 11-2585.

industries of today, as shaped by the decisive role that the end consumer plays, is not always able to obtain a legal ‘reading’ in the world’s most mature jurisdictions, due to their legal framework. Of course, it should be repeated that relevant product market definition in competition law can be a rather contested area,⁶⁸⁰ which has attracted elaborate commentary over the years and among jurisdictions.⁶⁸¹ However, in law, a relevant product market definition is a prerequisite under both the EUMR (and the ECMR before it),⁶⁸² and the US Merger Guidelines, since 1982.⁶⁸³ This chapter furthers the argument that the competition authorities have not been successful in their encounters with the business models operating in the music industries. Hence, relevant product market definition and the resulting competitive assessment in merger control are both necessary pieces of the puzzle.

Relevant product market definition aside, it is also vital to pay closer attention to the forward-looking scope of merger control, as its role is to evaluate forthcoming, potential harmful effects on competition. Assessing the future of this highly concentrated landscape, which nevertheless was found to thrive in innovation and competition (as seen both in the US and the UK), is certainly a task with many hurdles. This is further observed in the *Sony/BMG* merger conundrum. This realisation adds to the inability of merger control regimes to deal with concentration issues in the music industries, since the very essence of merger control is to assess the near future with the present as the departing point, as per the European

⁶⁸⁰ E.g. (n 230).

⁶⁸¹ See e.g. A Ten Kate and G Niels, “The relevant market: a concept still in search of a definition” (2008) 5 (2) *JCLaw & E* 297-333, M B Coate and J J Simons, “In defense of market definition” (2012) 57 (4) *The Antitrust Bulletin* 667, J Farrell and C Shapiro, “Antitrust evaluation of horizontal mergers: an economic alternative to market definition” (2010) 10 *BEJ Theoretical Econ* 1, L Kaplow, “Why (ever) define markets?” (2010) 124 *HarvLR* 437-517.

⁶⁸² *France v Commission*, Cases C-68/94 and C-30/95 etc [1998] *ECR I*-1375, [1998] 4 *CMLR* 829, at 143.

⁶⁸³ See *inter alia* G J Werden, “Market definition under the merger guidelines: a tenth anniversary retrospective” (1993) 38 *Antitrust Bull* 517, and “The 1982 merger guidelines and the ascent of the hypothetical monopolist paradigm” (2003) 71 *Antitrust LJ* 253, US Department of Justice, Merger Guidelines 1968, 1982, 1984, 1992, 1997, and 2010. Note in the 1968 Merger Guidelines at 3 “A rational appraisal of the probable competitive effects of a merger normally requires definition of one or more relevant markets,” which changed to “the Department will define and measure the market for each product or service (“product”) of each of the merging firms” in 1982. The US Horizontal Merger Guidelines only departed from this stance in 2010 “The Agencies’ analysis need not start with market definition.”

Horizontal Merger Guidelines.⁶⁸⁴ Finally, substantial indications that the very essence of merger control is not in position to provide an accurate competitive assessment of the music industries emerge, in the face of the attempts to establish collective dominance in the case of *Sony/BMG*.

To summarise, the research conducted has identified three major indicators that the merger control regimes are not 'fit' for an *ex ante* competitive assessment of these industries: the by definition forward thinking nature of merger control, the issues with defining an accurate relevant product market apt for accommodating end consumer consumption patterns, and the inability to address issues with concentration, coordinated effects, and collective dominance, as evidenced by the *Sony/BMG* merger conundrum. These pointers are being highlighted throughout the forthcoming analysis.

It is argued that the merger control regimes under examination have been unable to incorporate a coherent understanding of both the *modus operandi* of the music industry and of the business model itself. In reality, none of the merger control regimes examined herein is equipped with a framework capable of considering the business model as such. This becomes rather evident in the digital era, when market failures come to the forefront.

To examine these issues in detail, this chapter is divided in two parts: the first part looks into merger control and the oliginomy across jurisdictions, whereas the second one is dedicated to the new emerging gatekeepers of the music industries operating under new business models. Consequently, this chapter pays attention to merger cases corresponding with the digital era, such as the *Sony/BMG* merger. Furthermore, it evaluates the merger between Live Nation and Ticketmaster, as anticipated. Thus, both market failures and business model innovation are being addressed, highlighting the need for a business model reading of the music industries. This realisation leads the thesis to its conclusion, which follows in the sixth chapter.

⁶⁸⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004/C 31/03.

5.2 Merger control and the oligonomy through the years

5.2.1 Federal Trade Commission v. Warner Communications, Inc.

The first case which concerns a member of the oligonomy to be examined is *Federal Trade Commission v. Warner Communications, Inc.*⁶⁸⁵ Even though not widely reported, it nevertheless offers an unprecedented evaluation of the oligonomy for merger control purposes in the US, as well as a first attempt to place the end consumer in the supply chain for music and to comprehend end consumer preferences. Additionally, it ‘reunites’ the oligonomy with the FTC some years past the Columbia investigation, signalling a small, yet sought after victory for the agency.

In brief, the FTC filed an action seeking a preliminary injunction to block the proposed joint venture in the distribution operations of Warner and PolyGram, under Section 13(b) of the FTC Act,⁶⁸⁶ alleging that this joint venture between these two majors would violate Section 7 of the Clayton Act⁶⁸⁷ and Section 5 of the FTC Act.⁶⁸⁸ The District Court denied the Commission’s application leading to the FTC’s appeal at the Court of Appeals, Ninth Circuit, which reversed on the basis of the legal standard applied,⁶⁸⁹ supplemented by an assessment of a procedural error by the lower Court.⁶⁹⁰ The injunctive relief was warranted.

⁶⁸⁵ 742 F.2d 1156 (9th Cir. 1984).

⁶⁸⁶ 15 U.S.C. § 53(b) (West. Supp. 1985) “Whenever the Commission has reason to believe that any ...corporation is violating or is about to violate, any provision of law enforced by the Federal Trade Commission... the Commission... may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission’s likelihood of success, such an action would be in the public interest, [the injunction may be granted].”

⁶⁸⁷ 15 U.S.C. § 18. It is repeated that under Section 7, mergers are blocked when “the trend to a lessening of competition in a line of commerce was still in its incipiency.” The substantive test deriving from the Clayton seeks to assess a substantial lessening of competition (SLC) in the affected market.

⁶⁸⁸ 15 U.S.C. § 45.

⁶⁸⁹ The lower court in its conclusions of law focused on ‘collusion’ as a standard required under Section 1 of the Sherman Act, whereas the FTC had alleged violation of Section 7 of the Clayton Act instead, calling for the prohibition of mergers whose effect “may be to substantially lessen competition or tend to create a monopoly.”

⁶⁹⁰ The memoranda that the FTC contended were protected from disclosure under the deliberative process privilege, 742 F.2d 1156 at 1161.

Polygram, a subsidiary of N.V. Philips and Siemens AG, was the sixth largest distributor of pre-recorded music in the US and had agreed to close its distribution operations in the US, pursuant to the merger. Warner, a diversified communications company operating the successful labels of Warner, Atlantic,⁶⁹¹ and Elektra/Asylum,⁶⁹² was the second largest distributor at the time. The FTC initiated proceedings for violation of Section 7 of the Clayton Act, as the act is intending to “*arrest the anticipated anticompetitive effects of acquisitions and other intercorporate transactions in their incipiency.*”⁶⁹³ The standard under Section 7 is a reasonable probability of anticompetitive effect and this was where the lower Court erred, as it incorrectly sought to establish collusive behaviour (inarguably a higher standard).

In examining whether preliminary relief should be granted, the Appellate Court disregarded the District Court’s findings regarding relevant product market definition, market concentration, and barriers to entry for the determination of the likelihood of the FTC’s success on the merits and balance of the equities, since those were improperly disclosed.⁶⁹⁴ With regard to the above, since the Appellate Court was only required to make a preliminary assessment of the effects of the merger rather than establish a violation of Section 7 of the Clayton Act, it was decided that the FTC had met its burden of showing a likelihood of success on the merits, an extensive anticompetitive analysis not being required at that stage. As per the court, the FTC meets its burden if:

*it “raises questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.”*⁶⁹⁵

Hence, this case does not offer a thorough evaluation of the US merger regime at the time; neither does it allow for a detailed elaboration of the business model of the oligonomy, as it only touched upon the surface of the substantive issues.

⁶⁹¹ One of the most successful record labels in the US, responsible for the ‘breaking’ of Aretha Franklin and Ray Charles, which had become a wholly owned subsidiary of Warner in 1967. More at <http://www.atlanticrecords.com/posts/category/our-label>.

⁶⁹² Acquired in 1970, <http://www.elektra.com/?frontpage=true/>.

⁶⁹³ 742 F.2d 1156 at 1160.

⁶⁹⁴ Ibid at 1162.

⁶⁹⁵ Ibid at 1162.

Nevertheless, some insight is offered in the face of the FTC's views of the industry in the 1980s, two decades after the Columbia investigation. Interesting to note that, similarly to the Seventh Circuit at the Columbia case presented earlier, the relevant product market definition provided by the FTC was accepted in this case as well (notwithstanding the narrow aim of granting injunctive relief). Of equal importance is the fact that the FTC here adopted a broad relevant market definition, departing greatly from its compartmentalised definition of 1962,⁶⁹⁶ and mirroring the point of view of the then hearing examiner instead. Finally, the fact that the parties to the joint venture ultimately abandoned their plans following the decision should also be noted as a victory for the FTC.

According to the FTC, the relevant market was the market for *pre-recorded* music inclusive of “*all recorded sound performances sold to consumers in form of singles, long playing albums, cassettes, tapes, eight track cartridges and compact disks.*”⁶⁹⁷ On the other hand, and according to the defendants' view, the relevant market was the one for *recorded* music, which also included *home tapes*.⁶⁹⁸

The Court agreed with the FTC, reiterating that the relevant product market is determined by examining reasonable interchangeability of use between the product and its substitutes as per *Brown Shoe*, and that further, market boundaries are determined by factors such as industry or public recognition of the market, product characteristics and uses, production facilities, distinct customers and prices, and price sensitivity. It followed that the FTC had succeeded in meeting its burden of proof, by presenting how *pre-recorded* and *recorded* music had different structures, how the industry recognised them as separate, and how the two bore distinct characteristics.

Indeed, the pre-recorded music market was distinct in its ready-to-play capacity and its “*attractive package which often includes artwork and liner notes,*” and even though no direct consumer evidence were provided, home tapes and pre-recorded music were not found to be interchangeable.⁶⁹⁹ The FTC further provided evidence that an increase in the price of pre-recorded music “*would not cause a massive shift*

⁶⁹⁶ (n 503).

⁶⁹⁷ 742 F.2d 1156 at 1163.

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid.

to home taping,” as there was a price difference of “approximately 300 percent” between the two.⁷⁰⁰ Lastly, the market for pre-recorded music was found to be moderately concentrated with a trend towards increased concentration that the joint venture would accelerate, whereas substantial barriers to entry were observed in distribution.⁷⁰¹

Naturally, the decision was considered a victory for the FTC that had been trying to ‘break into’ the oligonomy since 1959. One commentator went as far as to indicate that the law was “providing a strong right arm” for joint ventures and mergers in the entertainment industries characterised as a “growing concern.”⁷⁰² Indeed, the President of CBS, Walter R. Yetnikoff had just declared his interest in pursuing a course of acquisitions, motivated by Warner and Polygram: “I never thought this sort of thing was legal... if it is given legal approval, then we too would like to pursue a course of acquisition.”⁷⁰³

Victory though it might have been for the FTC, the decision surely did not ultimately affect the growing power of Warner, one of the oligonomy’s members still in existence (whereas Polygram is currently part of Universal). Nevertheless, the most fascinating part of the case comes the FTC’s relevant market definition provided, which seems quite ahead of its time in that home tapes, or pirated music, were explicitly discussed as far back as 1983-1984.

It is of interest to note how both the FTC and the Appellate Court agreed that home tapes are not substitutes for pre-recorded music based *inter alia* on product characteristics (artwork), and pricing, including the assumption that a price increase in pre-recorded music would not result in increased consumption of home tapes.

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid at 1163. “The Commission presented evidence showing the difficulty of entering the distribution market due to high capital costs, lack of expertise, inability to attract top performers, disadvantages in obtaining radio air play and point sale promotion, and inability to demand and receive payment from retailers on an equal basis with established distributors.”

⁷⁰² J B Friedman, “Antitrust Law: FTC overdubs merger by recording giants” (1986) 6 Loy EntLJ 73.

⁷⁰³ S Salmans, “CBS Seeks Record Companies: ... Walter R. Yetnikoff, president of the CBS Records Group, said CBS had been motivated by the proposed merger of Warner Communications’ recorded music business and Polygram Records, which is owned by Philips N.V. of the Netherlands and Siemens of West Germany” (1983) October 18, The New York Times, available at <http://www.nytimes.com/1983/10/18/business/cbs-seeks-record-companies.html>.

The mentioning of the considerable difference in prices the pre-recorded product and the home tape however, could have acted as an indicator of the actual value the end consumer attach to the recording *per se*, something that would become notoriously evidenced towards the end of the 1990s. Unfortunately, the above were not backed by direct consumer evidence and they seem to contradict all the empirical studies conducted after the late 1990s, which explicitly suggest the direct substitutability between pre-recorded music and its ‘pirated’ version, as presented in the third chapter.⁷⁰⁴

Nevertheless, the relevant market definition proposed by the FTC and accepted by the Court, attempts to perceive the business model holistically, as concentrated around the offering of pre-recorded music to end consumers in all formats (bar the illegal ones). From there, concentration and barriers to entry were assessed in the distribution operations, even though distribution was not singled out as a separate, distinct submarket *per se*, as in Columbia. Even though this can be partly attributed to the altering landscape in US merger control after the introduction of the 1982 Horizontal Merger Guidelines⁷⁰⁵ and to the limited time and scope of the case, it is nevertheless a holistic appreciation of the oligonomy’s business model as concentrated around the provision of pre-recorded music in all formats, and a realisation of its high levels of concentration, albeit only on distribution level. In addition, by acknowledging that “*many other record companies have attempted to enter the distribution market but have failed,*”⁷⁰⁶ the Court highlights and affirms how the smaller players can face substantial barriers by the oligonomy, which operates through successfully integrated *key partners* (distribution), reaffirming the business model of the oligonomy as consisting of various Building Blocks.

To summarise, this case constitutes an initial victory for the FTC and offers a broader and holistic attempt to providing a relevant product market definition consistent with the oligonomy’s business model. However, this attempt also highlights the inability to understand or foresee consumer preferences and establish demand substitution patterns with precision and accuracy. As such, both the FTC

⁷⁰⁴ See e.g. (n 410) (n 413).

⁷⁰⁵ As proposed by the FTC, since the Court is following precedent citing *Brown Shoe* and *Equifax, Inc. v. Federal Trade Commission*, 618 F. 2d 63, 66 (9th Cir. 1980).

⁷⁰⁶ 742 F.2d 1156 at 1163.

and the Appellate Court failed to perceive the incredible power the end consumer possesses with respect to consumption. Nevertheless, this case is also one of the few instances where the end consumer appears in the supply chain of the recorded product, as according to the EU cases to be examined later, the supply chain mostly ends at retailer or wholesaler level, rendering end consumer demand substitution irrelevant.

5.2.2 *EU Merger Control and the oligonomy before and after Sony/BMG*

5.2.2.1 *Decisions before Sony/BMG*

This part of the chapter is dedicated to the assessment of the oligonomy's business model from an EU perspective. For this reason, a brief overview of the legal framework that applies, as well as the scope of EU merger control are mandatory before proceeding any further. Firstly, it should be stated that the overarching EU competition policy framework is unique in its incipency, in that it serves traditionally two (often conflicting) goals: the economic / consumer welfare one,⁷⁰⁷ but also the goal of common market integration.⁷⁰⁸ To that dual aim, a plurality of objectives has been proposed, mostly broadening the welfare argumentation to encompass non-economic aspects, including protection of competitors and smaller actors, and also cultural diversity.⁷⁰⁹ Thus, the EU competition policy landscape remains rather contested, with many voices raised mirroring overall EU policies and interventionary approaches.

This multiplicity of stated aims makes appearances in the examined merger cases: the interests of competitors (third parties) manifest in IMPALA's attempts to block the *Sony/BMG* merger, and *cultural diversity* creeps into the EMI 'break-up' cases. Nonetheless, the European Commission's analysis takes a more econometric / empirical approach with a strong focus on consumer welfare via *effective*

⁷⁰⁷ The economic objective is to prevent distortion of competition and thus, to safeguard the interests of consumers. According to Neelie Kroes "*first is competition, and not competitors that need to be protected. Second, ultimately the aim is to avoid consumers harm.*" In Bishop and Walker (n 581) 2-004.

⁷⁰⁸ See Bishop and Walker ch 2.

⁷⁰⁹ For an interesting reflective exercise on the above, see I Lianos "Some reflections on the questions of the goals of EU competition law" (2013) 3 Centre for Law Economics and Society Faculty of Laws UCL working paper series.

competition and jurisprudence has developed in a similar manner. In any event, the present thesis argues that competition policy can be effective without consideration to aims outside consumer welfare, should a closer look be paid into the market failures resulting from the oligonomic business model and the role of the end consumer.

Indeed, the world's second most mature antitrust jurisdiction has been 'meeting' with the members of the oligonomy since the early stages of the EU's first merger control regime, the Merger Regulation (ECMR) adopted in December 1989.⁷¹⁰ The ECMR was aiming to assess whether concentrations between undertakings would result in *a significant impediment of effective competition in the common market* by the creation or the strengthening of a *dominant position*, as the substantive test originally stated.⁷¹¹ This first Merger Regulation was adopted in order to establish Community jurisdiction (one-stop-shop principle) over concentrations with Community dimension,⁷¹² thus alleviating prospective undertakings from the administrative burden of filing notifications across multiple member states.⁷¹³

Initially, the EU merger regime under the ECMR was concerned with the concept of single firm dominance, seeking to prevent the creation or strengthening of a dominant position. This in turn caused great confusion in situations where a concentration between firms would affect competition without resulting in the creation or the strengthening of a single dominant position, particularly in situations of tacit collusion.⁷¹⁴ At first instance, it would appear that a merger regime lacking a proper tool for asserting and preventing collective dominance was not fit to assess the music industries, and especially the doubly oligopolistic (*oligonomic*) business

⁷¹⁰ Regulation 4064/89 OJ 1990 L257/13 on the control of concentrations between undertakings.

⁷¹¹ Art 2(2) ECMR 1989 art 2(2).

⁷¹² Art 1 ECMR and Art 5 ECMR.

⁷¹³ The ECMR was accompanied by a series of texts by which the Commission is also bound, including the Notice on the definition of the relevant market OJ 1997 L 279/3.

⁷¹⁴ S Baxter and F Dethmers "Unilateral effects under the European merger regulation: how big is the gap?" (2005) 26 (7) ECLR 26 380-389. A dominant position is one where a single undertaking is able to act independently from the other players in the market (competitors and consumers alike). Also in Niels et al. (n 231) ch 7, and in particular 335-337. Also, in ch 3 145 "For the purposes of competition law, tacit collusion can also be referred to as collective or joint dominance, coordinated effects, concerted parties, or conscious parallelism," as the underlying principle is the incentive shared by the members of the an oligonomy to limit production and raise prices without formal communication.

model. Nevertheless, a departure from the single dominance concept was achieved thanks to a series of decisions,⁷¹⁵ and most importantly, thanks to *Airtours v Commission*,⁷¹⁶ whereby the tripartite collective dominance test was introduced.

As per *Airtours*, in order to assert collective dominance, the Commission will look out for a number of factors: sufficient market transparency (allowing every member of the oligopoly to monitor the group's behaviour and adopt similar policies), the existence of a retaliation mechanism (so that members of the oligopoly are not induced to abandon the common policy), which further secures the sustainability of the dominant situation, and the inability of current and potential competitors to jeopardise the oligopoly's common policy. In other words, the adoption a common policy by an oligopoly must be "*possible, economically rational, and hence preferable.*"⁷¹⁷

Assessing the above factors in perplex market situations is no easy task. Nevertheless, a number of indicators can be employed in asserting a possibility of tacit collusion or collective dominance. For instance, transparency can be evidenced in a market with transparent pricing and homogeneous products, retaliation may be possible when there is excess capacity and participant contact in multiple markets, whereas a common policy can be sustained when an oligopoly is considered 'tight' with high barriers to entry, and demand is inelastic and rather stable.⁷¹⁸ These factors are evident in *Sony/BMG*, as presented later on in more detail.

Ultimately, the *Airtours* decision signalled a new era in EU merger control, leading to the adoption of the new EU Merger Regulation in 2004⁷¹⁹ and the new substantive test (SIEC) under Article 2 (2):

⁷¹⁵ The Commission had been 'experimenting' with the notion of 'joint dominance' since Case IV/M308 *Kali/Salz/Treuhand* OJ 1994 L186/38 and Case IV/M619 *Gencor/Lonrho* OJ 1997 L11/30. The Commission chose to rely on the theory of interdependency in order to expand the single dominance concept. In *Gencor*, collective dominance was defined as "*a relationship of interdependence between the parties of an oligopoly that encourages them to align their conduct in such a way as to maximise joint profits.*"

⁷¹⁶ Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

⁷¹⁷ *Airtours v Commission*, at 61.

⁷¹⁸ Niels et al. (n 231) p 148.

⁷¹⁹ Council Regulation 139/04 2004 OJ L 24/I, Horizontal Merger Guidelines 31/03 OJ 2004 C 31/5.

“a concentration which would significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”

A further major change brought forward by the revised Merger Regulation is found in the concept of collective dominance, as replaced by *coordinated effects* on the one hand, and *unilateral effects* on the other.⁷²⁰ More specifically, according to paragraph 25:

“... mergers in oligopolistic markets involving the elimination of important competitive constraints ... may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition.”

Further, the impact of *Airtours* marked the introduction of modern oligopoly theory into EU competition law (as shaped by Stigler and the Chicago School), and raised the standard of proof required for the Commission to block a proposed merger. Hence, it marks an era of convergence with the US antitrust regime, marking departure from concerns over the merged entity’s market position, allowing for the consideration of a wider range of effects on consumer welfare.⁷²¹

Additionally, and closer to the *Sony/BMG* merger to follow, the decision in *Airtours* coincides with the time when the (formerly known as) Court of First Instance of the European Communities (hereafter CFI) started showing both willingness and ability to reverse the Commission,⁷²² asserting flawed economic analysis, *inter alia*.⁷²³ This trend continued with the CFI’s decision in *IMPALA v Commission*,⁷²⁴ which sought to overturn the cleared merger between Sony and BMG as approved in 2004. Hence, following a series of reversals, the European merger control landscape was set to change drastically, as further evidenced by the length and depth of the Commission’s subsequent merger decisions.

⁷²⁰ Horizontal Merger Guidelines at 24-57.

⁷²¹ Of course, this chapters focuses on how these wider effects were actually taken into account with respect to the consumer they are supposed to serve.

⁷²² The ‘*Merger Trio*’ as presented above (n 679). It is reminded that the CFI is now the General Court of the European Union (ECG). However, the abbreviation CFI corresponds to the time of the case.

⁷²³ E Vranas-Liveris, “IMPALA v. Commission: Changing the Tune of European Competition Law” (2008) 83 Chi-Kent LR 1497.

⁷²⁴ Case T-464/04 *Independent Music Publishers and Labels Association (Impala, international association) v Commission* [2006] ECR II-2298.

For the purposes of the present, and putting the above into perspective, the merger decisions concerning members of the oligonomy before and after *Sony/BMG* come in sharp contrast in relation to their complexity and analytical level. Starting with the decision not to oppose the merger between Thorn EMI and Virgin Music in 1992,⁷²⁵ all the way to the 2012 merger between Universal Music Group and EMI,⁷²⁶ signalling the end of one of the historic members of the oligonomy, the Commission's journey through antitrust maturity coincides with its evolving assessment of the oligonomic business model. Hence, with the *Sony/BMG* saga acting as a benchmark, it is necessary to assess both the Commission's attempts to provide a relevant product market definition, and most importantly, a comprehensive assessment of the competition levels in the music industry, by making use of the regulations and further accompanying texts, as well as EGC (ex-CFI) jurisprudence.

Indeed, the first encounters between the oligonomy and the Commission resulted in non-opposition at notification stage.⁷²⁷ Hence, Thorn EMI successfully acquired Virgin Music, a concentration which resulted in the loss of the "*last remaining significant independent record company*,"⁷²⁸ at the time. Seagram (operating through its subsidiary Universal Studio, Inc., but not a major record company in Europe at the time) and Polygram merged in 1998,⁷²⁹ and Bertelsmann (BMG) acquired the whole of Zomba in 2002, eliminating once again "*the largest independent record company word-wide*."⁷³⁰

The European merger control regime, construed around the concept of the dominant position and the effect on competition of a given merger based on current market conditions, was in no position to delve into the past of the oligonomic

⁷²⁵ Case No IV/M202 *Thorn EMI/Virgin Music* OJ 1992 C/120.

⁷²⁶ Case No COMP/M6458 *Universal Music Group/EMI Music*, September 21, 2012.

⁷²⁷ Art 6(1)(b) ECMR "*The Commission shall examine the notification as soon as it is received (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.*"

⁷²⁸ *Thorn EMI/Virgin Music*, at 4.

⁷²⁹ Case No IV/M1219 *Seagram/PolyGram* OJ 1998 C309.

⁷³⁰ Case No COMP/M2883 *Bertelsmann/Zomba* OJ 2002 C223.

business model and evaluate the fate of the independent record companies ‘feeding’ into the few dominant players.

In merger cases, the idea of the counterfactual is significantly forward thinking, as the situation expected to arise pursuant to the merger is compared against the situation expected to arise without the merger, yet inclusive of imminent but not materialised forthcoming changes. Hence, in a music industry context, the anticompetitive effects of the absorbance of the niche by a member of the oligonomy will always be negligent, whereas new niche players would always ‘pop up’ in the ‘thriving and innovative’ environment that both the Columbia and the MMC investigations described in the past.⁷³¹ This can be read *quasi verbatim* in both European cases concerning the absorbance / merger between a major and an independent: in an environment that is already highly concentrated, there is “*no indication that the acquisition will fundamentally change conditions of competition in the market(s) for recorded music.*”⁷³²

A similar rationale was presented in *Bertelsmann/Zomba*,⁷³³ even though at this specific case of equal importance was the realisation by the Commission of another key characteristic of the music industry: Zomba was never truly independent of the majors, since both BMG (in North America) and EMI (in Europe) held stakes in Zomba’s manufacturing and distribution.⁷³⁴ What the Commission actually pointed at is that the competitive landscape of the music industry was part result of agreements signed between ‘independents’ and majors, or the “nexus” of smaller and bigger firms as observed in the third chapter.⁷³⁵ Indeed, throughout the decision, the word ‘*independents*’ appears in brackets, whereas additionally, their function and purpose in the industry was explicitly acknowledged as “*to discover unknown talents to sign them...[...]*”⁷³⁶ It appears that according to the Commission once an ‘independent’ had fulfilled its purpose, the natural next stage would be full

⁷³¹ (n 541), (n 602).

⁷³² *Thorn EMI/Virgin Music* at 40.

⁷³³ *Bertelsmann/Zomba* at 27.

⁷³⁴ *Bertelsmann/Zomba* at 29.

⁷³⁵ In Burnett (n 242) and Bishop (n 296).

⁷³⁶ *Bertelsmann/Zomba* at 28.

integration into a major, as was the case of Zomba, a company which had failed to break more ‘new stars’ prior to the concentration.⁷³⁷

Loss of an independent aside, and adding the *Seagram/Polygram*⁷³⁸ merger into the equation, these cases further offer some initial findings regarding the perception of the relevant markets operating in the music industry and of the relevant supply chain that determines substitutability of demand: the Commission discerns between recording, publishing, distribution and manufacturing as relevant product markets, and further segregates ‘pop’ music from ‘classical’, and as well as mechanical, performance, and synchronisation rights in the publishing sector. This segregation continues in both *Sony/BMG* and the *EMI* cases to follow, and is representative of the Commission’s viewing of the supply chain of music: the retailer is the purchaser of the recorded product⁷³⁹ and as far as publishing is concerned: “*the exploitation according to different sources may lead to definition of separate product markets.*”⁷⁴⁰ This is of great importance for the purposes of the present thesis, since the end consumer-driven changes in the music industry, and their subsequent ability to alter substitution and complementarity patterns, are of no significance in a supply chain, where the end consumer is not recognised as such.

Another characteristic of the Commission’s short-sightedness can be observed in the fact that, when it comes to the product markets defined above, it appears that each Building Block of the business model is able to constitute its own market, rather than be evaluated in its business function, i.e. in its support of the main offering to the end consumer. Yet, the Commission was part correct in its realisation that pop or popular music is indeed the product, nevertheless, pop music featured as an element of either the recording or the publishing sector. What this viewing of the relevant product markets results in is a constant ‘bouncing’ within the boundaries of the

⁷³⁷ *Bertlesmann/Zomba* at 28 “*These decreasing market shares reflect Zomba Record’s strong dependence on few very successful ‘acts’, which have not been followed recently by similar successful ‘new stars’. Moreover, for “independents” it is particularly vital to discover unknown talents and to sign them....*”

⁷³⁸ On a similar note, the merger between Polygram and Seagram was not found to create or strengthen a dominant position given that in Europe Seagram was not a major company, *Seagram/Polygram* at 25.

⁷³⁹ See e.g. “*However, the retailers, who are the customers of the record companies...*” In *Thorn EMI/ Virgin Music* at 11.

⁷⁴⁰ *Seagram/Polygram* at 17.

business model, as the Commission aims to assess the competitive landscape between the several Building Blocks, rather than between the business model as a whole (in the face of its offering) and the end consumer, who might be denied access or face high prices and limited choice. Taking a holistic view of the business model and its resulting product (*hits or wannabe hits*) would entail assessing these vis-à-vis the end consumer, who seeks access to the offering *per se*.

Distribution and manufacturing in particular, as *key partners* in the oligonomic business model presented by Osterwalder, constitute the network that sets the business model in motion, securing optimisation and economies of scale.⁷⁴¹ Thus, their function is to empower the oligonomic business model and create synergies that would directly affect competitiveness in the provision of popular music, creating significant barriers to entry. However, even though such vertical integration was acknowledged in both *Thorn EMI/Virgin* and *Seagram/Polygram*, barriers to entry in music recording and distribution were not significant,⁷⁴² and naturally so, since it is not the entry that is being problematic as repeated throughout the present (and addressed in both Columbia and the MMC's report);⁷⁴³ rather it is successful and sustainable entry, able to distort rather than empower the oligonomy.

Nevertheless, merger control and competition law as a whole are not concerned with this directly, unless an ultimate harm to competition to the detriment of the consumer can be assessed. Be that as it may, and as it has already been pointed out, up until this particular set of cases the end consumer is not of the Commission's concern either.

On the antipode of these non-oppositions, the Commission decided to open a full investigation into the merger between Time Warner and EMI in 2000.⁷⁴⁴ Serious concerns were raised regarding the creation of dominant oligopoly of four (Time Warner/EMI, Universal Music Group, Bertlesmann Music Group, and Sony Music) in the recorded music market, and the emergence of Time Warner / EMI as dominant on its own in both music publishing and digital delivery of music. Digital delivery of music was of concern due the (eventually) successful concentration

⁷⁴¹ *Business Model Generation* 8.

⁷⁴² *Thorn/EMI* at 24 and *Seagram/Polygram* at 30.

⁷⁴³ Indicatively (n 520) and (n 601).

⁷⁴⁴ Case COMP/M1852 *Time Warner/EMI* OJ 2000 C180.

between America Online and Time Warner⁷⁴⁵ that the Commission was investigating simultaneously.⁷⁴⁶ Ultimately, the *Time Warner/EMI* concentration was abandoned by the parties, to the ultimate detriment of the EMI, the only major that remained without a strong corporate parent at a time when the oligonomy's business model started to crumble. The break-up and sale of EMI's recording and publishing activities to the remaining majors marked the end of an era for the recorded music industry and the oligonomy as a whole.⁷⁴⁷

Back to the proposed concentration between AOL and Time Warner, this was investigated as to its music dimensions, since AOL and Bertelsmann had entered a four-year agreement in 2000, in light of the latter's planned exit from AOL Europe. The concentration was assessed as to its effect on the markets for online music and music software (music players) alongside internet dial-up and broad-band access. Thus, the investigation concentrated on online delivery and access to content via the internet for the first time in 2000.⁷⁴⁸ A concentration between Time Warner and EMI would result in considerable foreclosure of the music content, as Time Warner would own the music catalogue of three former members of the oligonomy, securing exclusivity in the provision of online content and its delivery.

Inarguably, asserting this level of concentration and assessing that a position of single dominance would be created was an 'easier' task for the Commission than the assessment of collective dominance in the traditional business model of the music industry's oligonomy (especially before the 2004 Regulation and the decision in *Airtours*). Indeed, the ability of the Commission to appreciate content foreclosure at the emerging internet markets is commendable, as is the attempt to investigate end consumer consumption patterns by addressing both downloading ("*a new form of distribution of music to consumers over the internet*")⁷⁴⁹ and streaming ("*a method*

⁷⁴⁵ Case No COMP/M1845 *AOL/Time Warner* OJ 2001 L268/28.

⁷⁴⁶ European Commission Press release, "Commission opens full investigation into Time Warner/EMI Merger" June 14 2000 IP/00/617, available at http://europa.eu/rapid/press-release_IP-00-617_en.htm.

⁷⁴⁷ Case No COMP/M6458 *Universal Music Group/EMI Music*, September 29 2012, and Case No COMP/M6459 *Sony/Mubadala Development/EMI Music Publishing*, April 19, 2012

⁷⁴⁸ *AOL/Time Warner* at 17-32.

⁷⁴⁹ *AOL/Time Warner* at 18.

*of transmitting audio over the internet... transforms the computer into a virtual jukebox”).*⁷⁵⁰

The Commission’s observation that “*a company holding a dominant position in the market for the licensing of music publishing rights required for on-line delivery would be in position to play the gatekeeper’s role dictating the conditions for the delivery of music via the Internet by refusing to license or threatening to withhold rights,*”⁷⁵¹ is both very astute and ironic when placed in its historical context. Aiming to engage with the role of the digitally active end consumer, the Commission overlooked the fact that at the time of the proposed concentration, the end consumer had already started to engage in online activities that by-passed foreclosure and drove the value of online music publishing rights closer to zero.

Ultimately, the Commission concluded that there existed an emerging market for online music delivery to the end consumer, whereby a dominant firm could exercise considerable market power by refusing to license and by increasing the relevant prices. Hence, the *AOL/Time Warner* merger was only deemed compatible with the common market, after the merged entity had proposed considerable structural remedies, including Bertelsmann’s progressive exit from AOL Europe SA.⁷⁵²

Even though the Commission’s assessment of the emergence of digital technologies and online content delivery does not deviate substantially from the truth, and even though the end consumer is indeed placed in the supply chain of the music content this time, it is still evident that the Commission was struggling with the traditional business model of the oligonomy and the establishment of collective dominance, as well as with the continuous ‘absorbance’ of smaller independent players by the few. Potentially, merger control could have had a role play in relation to the absorbance or disappearance of the niche, as seen in the *Virgin* and *Zomba* concentrations. The Horizontal Merger Guidelines acknowledge that, should the concentration lead to the disappearance of a maverick firm, this needs to be evaluated as a factor that facilitates coordination.⁷⁵³ Nevertheless, the Commission had established early on that the role of the independents was not to provide a constraint on collusion, but

⁷⁵⁰ *AOL/Time Warner* at 6.

⁷⁵¹ *AOL/Time Warner* at 25.

⁷⁵² *AOL/Time Warner V Undertaking* proposed by the parties at 95 (a)-(d).

⁷⁵³ Horizontal Merger Guidelines at 42.

rather to feed into it by being an integral part of the business model. Thus, for the purposes of EU merger control, an independent firm was never seen a maverick the disappearance of which could attract the Commission's scrutiny.

5.2.2.2 *Sony/BMG*

5.2.2.2.1 *Introductory remarks*

Against the changing background of the EU merger regime post-*Airtours* came the proposed merger between two key members of the oligonomy, Sony and BMG. More specifically, it concerned the creation of three or more joint ventures under the name of *Sony/BMG*, active in the fields of A&R, marketing and sales of recorded music. The case was assessed under the old Regulation, since the concentration was notified before the 2004 revised Merger Regulation had entered into force. Hence, the *Airtours* tripartite test was employed to examine collective dominance.

Before it all else, it is worth explaining that the *Sony/BMG* ordeal lasted for five years, counting from notification on 9 January 2004 to June 2009, when the CFI held that no more adjudication on the matter was to take place. This brings back memories of the Columbia investigation in the US, highlighting that despite the many years that had passed, and the crossing of regimes and jurisdictions, the job of the competition authorities with respect to the oligonomy was still no easy task.

It should also be noted that the first unconditional clearance of the proposed joint venture by the Commission follows the clearance of the same joint venture by the FTC, due to lack of sufficient evidence that the venture would “*facilitate coordination in the relevant market in violation of the antitrust laws,*” and despite the reluctance noted by the (then) Commissioner Thompson.⁷⁵⁴ The FTC's clearance might have contributed to the ‘sloppy’ job the EU Commission did with respect to

⁷⁵⁴ FTC, Statement of Commissioner Mozelle W. Thompson Sony Corporation of America/Bertelsmann Music Group Joint Venture, File No 041-0054, available at https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-joint-venture-between-sony-corporation-america-and-bertelsmann-ag/040728mwtstmnto410054.pdf. “*Although I concur in this determination, my decision was a difficult one, in part because I am particularly concerned about the impact of media mergers on the prices and quantity of media, as well as the diversity of content, available to consumers.*”

the proposed joint venture, as acknowledged later on by the CFI, and as reported in the media e.g. in *The Financial Times*.⁷⁵⁵

Specifically, following the 2004 clearance by the Commission, IMPALA, the Independent Music Companies Association,⁷⁵⁶ appealed the Commission's decision at the CFI,⁷⁵⁷ securing a Pyrrhic victory, as the Commission re-approved the merger in 2007. IMPALA set to appeal this second approval as well, even though in 2008, Sony Corporation acquired sole control of Sony BMG,⁷⁵⁸ following the non-opposition of the Commission. Further, in July 2008, the merging parties lodged an appeal to the European Court of Justice (ECJ), annulling the CFI's judgment. Hence, the judgement was sent back to the CFI for re-assessment. Ultimately, on the 30th of June 2009, the CFI acknowledged that any IMPALA appeal would be void, given that BMG would not be in position to return to the market so as to restore competitive levels to those prior to the first approval of the merger.⁷⁵⁹

The above coincided with a time of fast-paced advancements and tremendous consumer empowerment in the music industries, as presented in the third chapter. Dragging the case from the Commission to the CFI, and from there to the ECJ and back again, was not serving any purpose that could be beneficial to either the market participants or the consumers. Similarly to the Columbia saga, the European regime appeared too slow to follow industrial and business model advancements. Indeed, the *Sony/BMG* case came at a time when history was being made and changes were being affected in the music industries. It was already presented earlier that this time was characterised by apparent market failure, in that the consumers chose to migrate to alternative methods of consuming the offering of hit music, which was met by the oligonomy's wrath (lawsuits and lobbying for stronger IP protection). It is therefore rather unfortunate to observe how the EU competition regime got in its

⁷⁵⁵ T Buck, "Watchdog reels at Sony/BMG ruling" (2006) July 13 *The Financial Times* "*The Commission's ruling in Sony/Bmg appears to be a bit of a Friday afternoon job*," available at <https://www.ft.com/content/0b10fd9e-1290-11db-aecf-0000779e2340>.

⁷⁵⁶ More at IMPALA's official website <http://www.impalamusic.org/>.

⁷⁵⁷ Case T464/04 *Independent Music Publishers & Labels Association (Impala) v Commission of the European Communities* [2006] ECR II-2289.

⁷⁵⁸ Case No COMP/M5272 *Sony/SonyBMG* OJ 2008 C259.

⁷⁵⁹ J-F Bellis, "Round-up June September 2009" (2010) 1 (1) *Journal of European Competition Law and Practice*.

own ‘trap’, at a time when it could have had a decisive role to play in promoting consumer welfare.

5.2.2.2.2 *The first approval*

The first approval of *Sony/BMG* is characterised as rather laconic, as opposed to the extensive second investigation that followed. The Commission was almost forced to clear the merger, partly due to the high standards that the Court of *Airtours* had required. Repeating that no sufficient evidence to prove collective dominance could be provided throughout the decision, the Commission cleared the proposed concentration unconditionally.

Firstly, with regard to the markets identified, the Commission noted three fields of activity: recorded music, online music markets, and music publishing. In relation to the first, the Commission cited both *Thorn EMI/Virgin* and *Seagram/Polygram* providing a brief description thereof,⁷⁶⁰ but concluded nevertheless that:

*“it is ... not necessary to decide whether the various genres or categories constitute separate markets as, whatever the market definition considered, no creation or strengthening of a dominant position arises.”*⁷⁶¹

Rather, more attention was paid to the emerging online music markets, characterised by up and coming players such as Apple’s iTunes, and operating under several business models, such as streaming and downloading.⁷⁶² The Commission, giving an overview of the different approaches to how end consumers operate in the physical versus the online environment, concluded that this market is distinct from the physical recorded music one, especially due to these distinct business models in operation, and to the different structures for online music delivery. Thus, the relevant product markets defined were the wholesale market for licences for online music, and the retail market for distribution of online music.⁷⁶³

The Commission confirmed the importance of the emerging market for granting licences to online music providers, illustrating how separate rights give birth to distinct markets, depending on the applicable intellectual property right (f.i.

⁷⁶⁰ *Sony/BMG* 2004 at 10-12.

⁷⁶¹ *Sony/BMG* 2004 at 13.

⁷⁶² *Sony/BMG* 2004 at 19.

⁷⁶³ *Sony/BMG* 2004 at 24.

communication to the public for streaming, right to copy in downloading).⁷⁶⁴ The ‘as many rights that many markets’ approach gets reaffirmed later in the present, as the Commission proceeds with the definition of relevant product markets in music publishing.⁷⁶⁵ Further, it features in more recent merger cases between the publishing legs of the oligonomy’s members.⁷⁶⁶ As such, it configures the segregated appreciation of the business model by following each right’s supply chain.⁷⁶⁷

As subsequently concluded:

*“the licensing of publishing rights therefore involves publishers and/or collecting societies on the supply side, and online music service providers on the demand side. It is therefore not part of the market at stake in which, on the supply side, record companies license the performing artists’ copyrights (which are assigned to them) and/or their own rights, and the online music service providers are on the demand side.”*⁷⁶⁸

Nevertheless, no further consideration was given and no evaluation was attempted, as the competitive assessment would have been the same either way. Similarly, and turning to the retail market, it was found to consist of content providers such as iTunes and the major themselves, without any further evaluation of consumption patterns from the part of the end consumer, ‘emerging’ though they were found to be.⁷⁶⁹

Hence, the Commission did not spend more time at the relevant product market definition stage. Nevertheless, interesting remarks regarding the impact of illegal downloading and file-sharing were to be found later at assessment stage, when the development of demand in markets for recorded music was discussed. The

⁷⁶⁴ *Sony/BMG* 2004 at 25.

⁷⁶⁵ *Ibid* at 37-43.

⁷⁶⁶ E.g. in *In Sony/Mubadala/EMI Music Publishing*, the Commission defined separate markets for (i) mechanical rights, (ii) performance rights, (iii) synchronisation rights, (iv) print rights and (v) online rights, as it will be shown later.

⁷⁶⁷ This approach is also found in other media market definitions provided by the Commission e.g. with respect to books, separate narrow markets for the reproduction rights of images and maps contained therein were found, as well as markets for publishing rights, for marketing and distribution services provided to publishers, and separate markets for the sales of e-books in Cases No COMP/M2978 *Lagardere /Natexis/VUP* OJ 2004 L125; Case No COMP/AT39847 *E-books*, 2012. A similar approach is taken with respect to broadcasts in e.g. Case COMP/C-2/37.214 *Joint selling of the media rights to the German Bundesliga* OJ 2005 L134.

⁷⁶⁸ *Sony/BMG* 2004 at 26.

⁷⁶⁹ *Ibid* at 29.

Commission described the impact of illegal downloading and file-sharing as overestimated, citing the study conducted by Oberholzer-Gee and Strumpf,⁷⁷⁰ even though the existence of contradictory studies was acknowledged (but not provided).⁷⁷¹ According to the Commission, the strengthening of copyright laws on EU soil,⁷⁷² coupled with the litigation attempts in the US, and the digital rights management (DRM) systems in operation, were sufficient reasons to divert the blame of the recorded music sector's decline from copyright infringement. As per the Commission, the recovery of the recorded sector was estimated.⁷⁷³ Indeed, describing the market as growing in demand is in the Commission's best interest at the present stage, as a growing market offers little incentive for collusion, something that had also been acknowledged in *Airtours*.⁷⁷⁴

Thus, turning to the examination of a possible strengthening of a collective dominant position in recoded music markets,⁷⁷⁵ the Commission focused on the five biggest markets at the time (the United Kingdom, France, Germany, Italy, and Spain) analysing their market structure, based on data provided by price surveys. The Commission proceeded with the provision of the *Airtours* criteria, examining whether there existed a situation of collective dominance that would significantly impede effective competition in the common market or in a substantial part thereof. Firstly, the Commission looked into price coordination: could there be a coordinated price policy of the majors identified in the five biggest markets and in the three to four years prior to the merger?⁷⁷⁶ As the Commission did not find sufficient evidence to establish existing collective dominance this way,⁷⁷⁷ the investigation proceeded with further factors that facilitate collective dominance, namely, product homogeneity, transparency, and retaliation.

⁷⁷⁰ Indeed, it was presented in the third chapter that contradictory studies on the impact of illegal file-sharing, and mainly the one conducted by Oberholzer-Gee and Strumpf, are being cited depending on claim attempted. See (n 383).

⁷⁷¹ *Sony/BMG* 2004 at 57.

⁷⁷² Directive 2004/48 OJ 2004 L195/16.

⁷⁷³ *Sony/BMG* 2004 at 59 “there have been several indications, confirmed by the expectations of small and large record companies, that the decline trend is decelerating and that demand is likely to stabilise. According to the IFPI, the U.S. market for recorded music saw a recovery in the second half of 2003 which continued in the early months of 2004.”

⁷⁷⁴ *Airtours* at 97.

⁷⁷⁵ *Sony/BMG* 2004 at 60-154.

⁷⁷⁶ *Sony/BMG* 2004 at 69.

⁷⁷⁷ *Sony/BMG* 2004 at 109.

Product homogeneity has been established in the present as being at the core of the business model the members of the oligonomy operated (recording of *hits and wannabe hits* marketed top-down). The parties to the merger however, provided that their products were heterogeneous; as such collusion would be more difficult to achieve in a differentiated market. Indeed, ‘toying’ with product homogeneity and heterogeneity in the recorded music markets has been featuring since the days of the Columbia investigation, and proving either is a strong asset to the party making the claim.⁷⁷⁸

In the present case, the Commission did appreciate the heterogeneity of each recording (heterogeneity in content), but further acknowledged that “*despite the heterogeneity of the content, the way in which albums are priced and marketed on the wholesale level appears to be quite standardized,*”⁷⁷⁹ coming closer to the business model reality. Nevertheless, the conclusion was reached that “*the heterogeneity in the content, with these implications for pricing, reduces transparency in the market and makes tacit collusion more difficult since it requires some monitoring on the level of individual albums,*”⁷⁸⁰ without further elaboration on the matter. However, as Fabio Polverino accurately notes, products characterised by content heterogeneity can still be homogeneous when considering Stigler’s argument of uniform pricing; as price becomes uniform so does the product, leading to feasible and sustainable collusion.⁷⁸¹ This argument seems to complement the business model reality that views the homogeneous product marketed and delivered as such, and certainly helps explain collusion by the members of the oligonomy through the years.⁷⁸²

Turning to transparency, the Commission did not find sufficient evidence to justify collusion here either, commenting on product heterogeneity indirectly “*despite the*

⁷⁷⁸ It is reminded that in Columbia, the FTC was arguing that each recording is so unique as to constitute a ‘little monopoly’ (n 520), (n 510).

⁷⁷⁹ *Sony/BMG* 2004 at 110.

⁷⁸⁰ *Sony/BMG* 2004 at 110.

⁷⁸¹ F Polverino, “Assessment of coordinated effects in merger control: between presumption and analysis” (2006) 6 University College Dublin Law Review, G Stigler, “A theory of oligopoly” (1964) 72 (1) *Journal of Political Economy* 44-61.

⁷⁸² As combined with the overall structure of the oligonomy around the need to sign mega stars to subsidise the least successful ones, as seen in the MMC investigation.

*fact that sales of albums take place in few price points, the variety of albums priced at different list prices could complicate the monitoring of a tacit agreement.*⁷⁸³

What the Commission points to, is the existence of various campaign discounts that can reduce transparency in the market, notwithstanding the aforementioned uniform prices to retailers. Further, it was observed that transparency can be achieved by the publication of weekly hit charts, and by the existence of long-term relationships between the majors and the retailers (their direct customers),⁷⁸⁴ leading to a large part of the majors' sales of recorded music being channelled not only to a limited number of customers,⁷⁸⁵ but also at uniform prices.

Ultimately, the Commission managed to describe a highly transparent situation, only to arrive to the contradictory conclusion that the situation it presented was not 'evidence enough' for the establishment of collusion. Furthermore, it should be repeated that the retailers are *channels* of the business model; hence, the constantly open paths of communication are vital for the delivery and the success of the offering. It is worth contemplating here whether homogeneous products with uniform prices would also presuppose a homogeneous and uniform way of communication between the oligonomy and its *channels*.

The last factor the Commission chose to evaluate in relation to collective dominance, was the prior employment of retaliatory measures against any 'cheating' member.⁷⁸⁶ The Commission looked into the retaliatory function of compilations, the success of which depends on the possibility to offer songs by as many record companies as possible, in return for advertisement and exposure. No evidence was found that such a retaliatory measure had ever occurred, "*although these measures could in general represent credible possibilities for retaliation by the majors in the markets for recorded music.*"⁷⁸⁷ This point was subsequently picked up by the CFI, reminding the Commission that the mere existence of credible and effective retaliation mechanisms suffices, and that there is no need to prove that they have actually been

⁷⁸³ *Sony/BMG* 2004 at 111.

⁷⁸⁴ *Sony/BMG* 2004 at 112.

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *Sony/BMG* 2004 at 114-118.

⁷⁸⁷ *Sony/BMG* 2004 at 188. The Commission also mentioned the possibility of retaliation in the online music market and in the music publishing markets, even though no further commentary was offered.

employed in the past.⁷⁸⁸ Overall, the Commission concluded that the markets for recorded music do have characteristics of conduciveness to collective dominance, but that there was no sufficient evidence that the concentration would lead to the creation or the strengthening of collective dominance.

Regarding the online markets (and the wholesale market for licensing music online more specifically), those were described as being at a stage of infancy,⁷⁸⁹ with insufficient data to establish a possibility of collective dominance. Additionally, an interesting point was raised regarding potential downstream foreclosure in the distribution of online content, should Sony choose not to license its back catalogue to competitors (e.g. Apple's iTunes).⁷⁹⁰ In addition to credible data not being available yet, the Commission further stated that "*Sony would forego considerable licence revenues for the tracks sold by competing platforms,*" and hence it "*appears very doubtful whether this could be a profitable strategy.*"⁷⁹¹

The role that EU competition law could play in such a scenario, where consumers are deprived of new and innovative products, and where Sony, or any member of the oligonomy as a matter of fact, would be abusing a dominant position, was not addressed herein. Neither was there established a possibility of a spill-over effect in the merging parties' publishing activities,⁷⁹² as it fell outside the scope of the proposed concentration.

The Commission had arrived at its decision that no sufficient evidence of collective dominance existed in any of the markets examined. In retrospect, this decision can be partly justified, despite the outcry that it caused and the ordeals that it led to. For once, and following *Airtours*, the Commission had sought to establish that there already existed coordination in the market, and the merger would stabilise this coordination further. Nevertheless, supporting this with the requisite "*sufficiently*

⁷⁸⁸ *Impala v Commission* at 466.

⁷⁸⁹ *Sony/BMG* 2004 at 165.

⁷⁹⁰ *Sony/BMG* 2004 at 171.

⁷⁹¹ *Ibid* at 174. Even though the members of the oligonomy signed deals with iTunes early on, it is of interest to note that the Japanese branch of Sony only licensed its content to Apple in the year 2012. See CMU, "Sony Japan finally embraces iTunes, as Sony Entertainment Network chief steps down" (2012) November 8, available at <http://www.completemusicupdate.com/article/sony-japan-finally-embraces-itunes-as-sony-entertainment-network-chief-steps-down/>.

⁷⁹² *Sony/BMG* 2004 at 176-182.

*cogent and consistent body of evidence*⁷⁹³ was not possible, meaning that the required standard of proof was not, according to the Commission, possible to be met. This hardly comes as a surprise given that since the days of the Columbia investigation, every competition authority examined herein had already tried and failed to address (at least) the “*sameness in prices*” issues in a sufficiently cogent and sufficiently evident manner.

Nevertheless, this unconditional clearance from the part of the Commission opened the gates to one of the most contested merger cases in the EU, where both the EU merger regime and the courts’ role in it were placed under scrutiny. As far as the present thesis is concerned, the *Sony/BMG* conundrum comes to highlight once more the gap between the business reality and the competition regime called to assess it. More specifically, during the time the *Sony/BMG* was discussed, the so called ‘seismic’ changes in the music industries were occurring contemporaneously, and the end consumer was demanding offerings outside the traditional business model. Still, the Commission, the CFI, and the ECJ were concerned with whether collective dominance or more specifically, whether *evidence* of collective dominance, existed in the recorded music industry at the first place...

5.2.2.2.3 *IMPALA appeals*

The clearance was met with an appeal by IMPALA, and was later annulled by the CFI in 2006, only to return to the Commission for re-approval in an unprecedented turn of events. Many commentators started considering the future of the European merger control regime and the ever-increasing role of judicial review in light of those developments.⁷⁹⁴ Of particular concern was the fact that Sony and BMG were already operating as a merged entity for two years by the time of the CFI’s decision.⁷⁹⁵ The role of the CFI in the merger trio was addressed earlier in the present⁷⁹⁶ and its ability to affect change was noted when the relevant decisions were

⁷⁹³ *Sony/BMG* 2004 at 68.

⁷⁹⁴ Brandenburger and Janssens, 2007, “The Impala judgment: does the EC merger control need to be fixed or fine-tuned?” 3 (1) Competition Policy International 301, E Vranas-Liveris (n 723).

⁷⁹⁵ The author of the present worked at Sony/BMG in Greece, in 2006.

⁷⁹⁶ Decisions of the Commission under the EUMR are subject to judicial review by the EU Courts under article 263 TFEU (ex-23) “*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers.*”

discussed culminating in *Airtours*. Nevertheless, overturning cleared mergers was not the norm,⁷⁹⁷ and as such the decision to overturn a ‘done deal’ caused great concern in the recorded music industries, the parties, and the business world in general.⁷⁹⁸ Here, the CFI appeared highly critical of the Commission’s rushed approval of a merger it had *prima facie* opposed.⁷⁹⁹

Seeking to examine whether the Commission had committed a manifest error of assessment, the CFI concluded that the “*decision is vitiated by, first, inadequate reasoning and, second, a manifest error of assessment.*”⁸⁰⁰ The decision was ultimately annulled in respect of two out of the applicant’s five pleas.

Indeed, IMPALA had originally put forward five pleas in law, the last three of which the Court found no need to examine: a. a manifest error of assessment and error of law in not finding that a collective dominant position in the market for recorded music existed before the merger and that that dominant position would be strengthened, b. a manifest error of assessment and error of law in not finding that the merger would result in a collective dominant position on the market for recorded music, c. alleged infringement of Article 2 of the Merger Regulation in that the Commission did not consider that a collective dominant position on the worldwide market for online music licences would be created or strengthened, d. manifest error of assessment and error of law in not finding that Sony would achieve an individual dominant position on the market for online music distribution; and finally e. a manifest error of assessment and infringement of (former) Article 81 EC, in conjunction with Article 2(4) of the Merger Regulation, in concluding that the

⁷⁹⁷ Case T-156/98 *RJB Mining v Commission* [2001] ECR II-337, C-68/94 and C-30/95, *France v Commission (Kali + Salz)* [1998] ECR I-1375, Case T-114/02 *BaByliss v Commission* [2003] ECR II-1279, up to the time of the decision.

⁷⁹⁸ See e.g. “Takeover Makeover” (2006) August 9 Financial Times, available at http://www.ft.com/cms/s/o/bda61f86-2742-11db-80ba-0000779e2340.html?ft_site=falcon&desktop=true#axzz4b8l6KbnE.

⁷⁹⁹ Indeed, prior to the merger’s approval, the Commission had issued a statement of objections noting that the proposed concentration is incompatible with the common market. Evidently, the subsequent decision to unconditionally clear the merger constitutes a so-called u-turn, which the Commission never fully justified. See *Impala v Commission* at 9.

⁸⁰⁰ *Impala v Commission* at 542.

proposed concentration would not have the effect of coordinating the parties' publishing activities.⁸⁰¹

The most ground-breaking aspect of the Court's judgment was the complete re-evaluation of the case. The CFI chose to re-examine the case and conduct its own analysis, thus taking an even more aggressive approach towards the Commission than the one witnessed in the *Merger Trio* cases. The hard stance towards the Commission's merger decisions could potentially be viewed as a welcomed fact-checking and review mechanism, had it not been the case that at least in the case of the recorded music industries (and the same few members of the oligonomy) this has led nowhere in particular in the past; indeed, viewing the *Sony/BMG* merger ordeal retrospectively, does not allow for any direct conclusion as to the level of transparency in the market and the possibility of collusion, since the Commission on the one hand and the EU Courts on the other (including the ECJ that would set the CFI'S judgment aside later on) provided alternating perspectives, at a time of fast-paced developments.

Turning to the re-examination of collective dominance, the CFI first revisited the *Airtours* criteria and provided that:

“in the present case, the alignment of prices... over the last six years, even though the products are not the same, and also the fact that they maintained at such a stable level, and at a level seen as high in spite of a significant fall in demand, together with other factors (power of the undertakings in an oligopoly situation, stability of market shares, etc.), ... might, in the absence of an alternative explanation, suggest, or constitute an indication, that the alignment of prices is not the result of the normal play of effective competition and that the market is sufficiently transparent in that it allowed tacit price coordination.”⁸⁰²

This observation raised by the Court could have indeed allowed for the oligonomic business model to be scrutinised, as it would rid of the *Airtours* requirement to establish transparency. Indeed, the Court acknowledged the validity of such a theory, albeit indirectly. This was not raised by the applicant, who chose to rely on the incorrect application of the *Airtours*' criteria by the Commission instead.⁸⁰³ Thus

⁸⁰¹ *Impala v Commission* at 31.

⁸⁰² *Impala v Commission* at 253.

⁸⁰³ *Impala v Commission* at 254.

the Court, in view of the *inter partes* principle, was obliged to follow that approach as well, interesting though such an investigation would have been.⁸⁰⁴

Rather, the Court focused on the issues of transparency, homogeneity, and retaliation with regard to Impala's first plea, reaching the following result:

*“the assertion that the markets for recorded music are not sufficiently transparent to permit a collective dominant position is not supported by a statement of reasons of the requisite legal standard and is vitiated by a manifest error of assessment in that elements on which it is based are incomplete.”*⁸⁰⁵

Indeed, the greatest part of the judgment at this stage is dedicated to the analysis of transparency in the market,⁸⁰⁶ finding insufficient reasoning from the part of the Commission, which itself was reason enough to annul the Decision. The Commission was criticised for making contradictory remarks and for deviating from its own assessment in order to reach its desired outcome, often without providing further explanations.⁸⁰⁷ Especially with respect to the issue of product heterogeneity (which the Court acknowledges as a fact),⁸⁰⁸ the Court notes how the Commission reached the conclusion that the market did not present the requisite degree of transparency, despite its assessment that *“the list prices of the best-selling albums appeared to be rather aligned,”*⁸⁰⁹ even though it had asserted earlier that *“heterogeneity in the content and its ... implications for pricing reduced transparency.”*⁸¹⁰ Moreover, with regard to retaliation, the Commission's assessments were indeed found to be vitiated by an error of law and a manifest error of assessment, since the mere existence of retaliation mechanisms suffices for that part of the *Airtours* test to be satisfied.⁸¹¹

Having addressed IMPALA's first plea, the Court went to examine the second in the *interest of completeness*, where the Commission's examination on whether there

⁸⁰⁴ Note that Bishop and Walker appear rather critical of such a theory of harm (n 581) 7-075.

⁸⁰⁵ *Impala v Commission* at 475.

⁸⁰⁶ *Impala v Commission* at 278-459.

⁸⁰⁷ See e.g. at 460.

⁸⁰⁸ *Impala v Commission* at 462 *“the fact that the product is heterogeneous, at least as regards its content.”*

⁸⁰⁹ *Ibid* at 462.

⁸¹⁰ *Ibid* at 460.

⁸¹¹ *Ibid* at 466 *“...there is no need to resort to the exercise of a sanction. As the applicant observes, moreover, the most effective deterrent is that which has not been used.”*

existed a risk that a collective dominant position would be created post-merger, was characterised as succinct⁸¹² and superficial.⁸¹³ The Court emphasised once again the error of law in necessitating that a retaliation mechanism had been used in the past, and also highlighted that such mechanisms did indeed exist, as a major could be excluded from a compilation in the future.⁸¹⁴ With the applicant's first and second pleas answered, the Court annulled the Commission's decision, and so the merger was returned for re-examination.

Before proceeding any further with the Commission's second approval in 2007, it should be noted that seeking to address the *Airtours* criteria in the oligonomic business model does not seem to lead to any tangible result, especially with respect to the issues of transparency and retaliation. In an industry born out of mergers, acquisitions, and a close nexus of connections, relying on price transparency within the business model's own *channels* cannot provide answers about the competitive environment where the business model operates (if such an environment exists at all).

Additionally, as previously mentioned, the timing of the *Sony/BMG* merger case coincides with the era of drastic changes in the music industries that did see the oligonomy shrink in power. This was due to a series of empowered consumer choices and the entry of new players in the markets for the provision of music to the end consumer, and not necessarily in the markets identified for competition law purposes. Nevertheless, taking a 'screen shot' of the music industry at the time would not have necessarily provided an outcome corresponding to years of business model reality, especially should one consider the need to conduct a prospective analysis as per *Airtours*.

As evidenced throughout the present, at the time of *Sony/BMG*, it was the consumer who sought to alter the business landscape. Where does this leave the issue of collective dominance as far as the EU regime is concerned? At that stage, it would have been best to evaluate the collective reactions of the oligonomy's members vis-à-

⁸¹² *Impala v Commission* at 525.

⁸¹³ *Ibid* at 528.

⁸¹⁴ *Ibid* at 538.

vis the end consumer,⁸¹⁵ and the efforts to re-capture the value of copyrighted content (either through legislation or via business models such as a 360 degree deals), in order to assess the majors' dominance. Indeed, this was a time characterised by an evident market failure; as such, it would have been best to see the Commission's (and the Court's) efforts dedicated to appreciating exactly that. It follows that if the relevant answers to assess the above are not to be found in competition law, updating competition law and policy should be considered instead.

5.2.2.2.4 *Second approval*

In 2007, the Commission was called to re-assess the already completed merger between Sony and BMG. Indeed, such an unprecedented occurrence was surprising at best: The Commission would have to re-apply the *Airtours* criteria and the ECMR 4064/89, three years after the new Merger Regulation had entered into force. This meant that instead of applying the newly introduced concepts of coordinated and unilateral effects, the previous (and problematic) narrative had to be employed once more.

Nevertheless, of critical importance is the fact that, for the purposes of the second examination, the Commission would have to apply current market conditions,⁸¹⁶ which means conditions that represent the market reality at that time. As a matter of fact, the Commission underwent a thorough and detailed examination across the whole of the EU, analysing perplex quantitative data, retaining the economic approach. How did this methodology allow the Commission to take into account its contemporary market developments? And how was the issue of end consumer access accommodated therein? These are the issues that the present section seeks to address in light of the Commission's second approval of the 'done deal' that was *Sony/BMG*.

At first instance, it is of interest to note that the Commission defined relevant product markets for both the physical recorded activity, and for music recorded in digital formats, spending a great part of the analysis on the latter.⁸¹⁷ With regard to the definition of the online markets, it was found that "*piracy and the ability to*

⁸¹⁵ E.g. (n 389).

⁸¹⁶ Case No COMP/M3333 *Sony/BMG*, October 3, 2007 at 4, see also Summary at 2008 OJ 2008 C94/19.

⁸¹⁷ *Sony/BMG* 2007 at 12-34.

consumers to choose music other than bundled in the form of a CD have challenged the music industry's business model."⁸¹⁸ The Commission added that digital sales had yet to offset the decline of the physical market, caused by unauthorised copying and downloading, and "*the growing importance of other entertainment products.*"⁸¹⁹

Despite these timely observations, the market identified was the wholesale market for licensing content to providers, as separate and distinguished from the market for publishing services to artists.⁸²⁰ It appears that for as far as the Commission is concerned, once again the direct customer of the record company is the intermediary. Further, in the specific case it was highlighted that the digital market bears distinct characteristics with respect to pricing mechanisms and marketing strategies vis-à-vis the digital service provider, as opposed to the retailer of the physical world. Ultimately, the Commission did not appear to be convinced by the parties' statements that final users do substitute between physical and digital versions of music, highlighting differentiated product characteristics such as the CD's better sound quality and added value,⁸²¹ contrary to the empirical studies presented in the third chapter of the present.⁸²² Thus, despite the empowered nature of the end consumer and the acknowledgment that this is the case, the supply chain once again stays within the business model boundaries.

The Commission then turned to the examination of the compatibility with the common market of the online and offline markets separately, dedicating the greatest part of the decision to the digital format. The Commission chose to address not only the *Airtours* criteria, but a number of further indicators too, as an answer to the CFI's earlier criticisms that not enough evidence was provided during the first approval. Indeed, the digital market was characterised as *emerging and growing*, with room for further development and growth opportunities, even for independents and newcomers. Additionally, it was presented as dynamic with rapid entry, but also uncertain, as to business model success and sustainability. Here, a la carte

⁸¹⁸ Ibid at 21.

⁸¹⁹ Ibid at 21.

⁸²⁰ Ibid at 22-27.

⁸²¹ Ibid at 25.

⁸²² E.g. (n 393). Here, the Commission mirrors the FTC's pre-recorded music market identified under *Brown Shoe*, as above (n 697).

downloads, play-lists, and subscription services were specifically addressed.⁸²³ A further characteristic noted, was the fact that in the online markets, the prices were uniform, despite the heterogeneity in content. This was justified as an attempt to help the market take off, following the ‘one size fits all’ iTunes’ pricing model.⁸²⁴ Thus, this time, the evident and apparent “*sameness in prices*” was justified against a heterogeneous content as a market necessity, in a vibrant and growing market, and as such it did not raise any transparency concerns.

The role of the digital retailer was considered separately, as the interface between the record company and the end consumer, not unlike the traditional retailer, who is the direct purchaser in the supply chain of the recorded product. The investigation shows that “*all majors have indicated ... that non-vertically integrated digital music providers will remain their most important channel to the market.*”⁸²⁵ Of course, this is in direct alignment with Osterwalder’s old business model canvas, where both physical retailers and digital providers are described as *channels*. For business model purposes, the power that Apple/iTunes possessed is not unlike the power of the traditional retailer of the physical environment e.g. HMV. Hence, even though new entrants in the provision of digital content operating under various business models appeared constantly at that time, the Commission still addresses the same dominant business model of the traditional record company in its assessment. Overall, the Commission attempted to paint a picture of a market closer to what Osterwalder describes a “*business model playground.*” Nevertheless, it still appears not eager to discern between separate business models and various blocks of one and the same business model.

Against this background, the Commission proceeded to find that, even though the recorded music industry had already been highly concentrated prior to the 2004 notification the merger had not led to a position of single dominance in the national markets for the distribution of music.⁸²⁶ With respect to issues of foreclosure, neither digital music retailers nor independent records companies were found to

⁸²³ *Sony/BMG 2007* at 43-64.

⁸²⁴ *Ibid* at 51.

⁸²⁵ *Ibid* at 77.

⁸²⁶ *Ibid* at 84-86.

have faced such anticompetitive issues, thanks to the dynamic nature of the internet.⁸²⁷

Subsequently, the Commission turned to the issue of collective dominance and the application of *Airtours* once more:

“The question investigated is whether the Sony BMG merger could, in an already concentrated market, be seen to have enabled or significantly facilitated the majors to jointly control the wholesale licensing of digital music. Tacit collusion would, on the one hand, generally be considered incompatible with the dynamic, unstable and uncertain nature that characterises the emerging digital market. On the other hand, the market investigation assessed to what extent the majors have aligned price levels in their contracts with digital music providers, and where a certain degree of wholesale price alignment could be observed, whether this was the likely result of coordination or rather of competitive factors such as the bargaining power of large digital retailers or of the nascent state of the digital markets.”⁸²⁸

Indeed, having established that the market had already been concentrated and that the prices were uniform, countervailing abilities of competitors (independents) and customers (iTunes being the largest) would have a more decisive role to play than transparency and retaliation, in the present case. In fact, it was already established earlier and repeated here that *“Apple has reportedly refused to abandon its one price fits all policy”⁸²⁹* even though the majors were attempting to introduce differentiated pricing. Expanding on this, and addressing the issue of transparency, the leverage that Apple/iTunes possessed was emphasised once more. In any event, price coordination and collusion *“with regard to iTunes pricing in order to control other online download contracts,”⁸³⁰* was not feasibly reached and sustained given that new and emergent business models to the one iTunes operated were observed (e.g. Amazon, Myspace, YouTube).⁸³¹

Further, Universal was provided as an example of a major that significantly reduced its prices to encourage albums sales, a course of conduct not followed by the others.⁸³² Equally, EMI attempted to offer new premium types of agreements via the iTunes platform (DRM-free and better quality content), which again was not

⁸²⁷ Ibid at 87-92.

⁸²⁸ *Sony/BMG* 2007 at 93.

⁸²⁹ Ibid at 116.

⁸³⁰ Ibid at 135.

⁸³¹ Ibid at 135.

⁸³² Ibid at 142.

followed, showcasing that there did not exist a collusive behaviour with a credible retaliation mechanism in place.⁸³³ Amidst the ever-changing landscape of online content delivery and the countervailing abilities that Apple possessed at that time, collusion and collective dominance were almost impossible to discern. Nevertheless, the fact that Apple possessed tremendous power vis-à-vis the oligonomy tells us nothing about the role of the end consumer, who was simply faced with new gatekeepers around the content. Addressing the online markets at the second *Sony/BMG* approval was indeed the time to undertake an elaborate view of supply, demand, and consumption patterns of music. It is actually reassuring to see innovation, business model innovation to be specific, feature in the Commission's analysis as a way to describe a dynamic and forward-thinking market. The only problem was that from a competition law perspective, the analysis never left the borders of the oligonomic business model.

To conclude the second *Sony/BMG* approval, a brief look into the physical recorded music markets should also be offered. Similar to every other investigation and case examined herein, the Commission described a fierce and competitive market for the signing of new talent,⁸³⁴ and further provided that the internet had enabled the establishment and the promotion of new acts independently,⁸³⁵ alleging a competitive constraint upon the oligonomy. This way, the Commission sought to also address culture diversity concerns that had been raised by independent market observers and by IMPALA explicitly, not only in the appeal but also after the second clearance.⁸³⁶ According to the Commission, since cultural diversity was promoted by

⁸³³ Ibid at 143.

⁸³⁴ *Sony/BMG* 2007 at 415-428.

⁸³⁵ Ibid at 477.

⁸³⁶ Impala Press release, "Sony/BMG merger Impala background note" (2007) December, available at http://www.impalamusic.org/arc_static/docum/04-press/2007/Press%20Release%2013-12-07%20Background.htm. "As in other sectors, it is the SMEs in music that drive creativity and innovation. There is no issue competing if they have the same chance as the big companies. The problem lies where the playing field is not level due to severe market access problems created by over concentration in a cultural industry." Indeed, the cultural diversity arguments feature strongly in EU competition policy, especially with respect to the Media sector (plurality and diversity issues) and stem directly from Article 167 (ex 151) TFEU. Viewing the matter from a cultural diversity perspective can be a valid point. However, the present thesis seeks to address the business model and end consumer welfare perspective, attempting a retrospective evaluation across jurisdictions (especially since a relevant cultural argument cannot be raised under US antitrust laws).

new technologies, and by opportunities provided by the internet for the distribution and retail of new content, it could not be negatively affected by the merger.

Apart from the ‘disruptive’ internet, the overall decline of demand for recordings in physical format also acts as a *panacea* against transparency. Here the Commission chose to quote the Court at *Kali and Salz*, turning to the point of evolution of demand “*a failing market is generally considered to promote, in principle, competition between the undertakings in the sector concerned.*”⁸³⁷

The Commission conducted an elaborate empirical investigation across the EU, as opposed to the first approval, and highlighted that a prospective analysis at that stage (with the merged entity already in operation) would be limited. This gave the Commission ample of grounds to dismiss the proposed theories of harm as:

*“(i) terms of coordination leave significant flexibility so that they are not compatible with tacit coordination; and (ii) that there is not sufficient transparency on the market for recorded music to verify that allegedly colluding major recording companies comply with the terms of coordination.”*⁸³⁸

Indeed, the theories of harm proposed during the investigation, including those suggested by IMPALA, focused either on coordination to stabilise net wholesale prices of physical albums above the competitive level, or on foreclosure issues potentially faced by independents vis-à-vis the retailers.

An interesting remark can be found at the evaluation of the theory that majors coordinate at the level of their general pricing policy, by enjoying a stable and predictable business environment, which inevitably results in similar prices.⁸³⁹ Even though this theory seems closer to the appreciation of the business environment of the oligonomy and its business model, it is not difficult to understand why and how the Commission could not easily classify it under coordinated effects, or justify it as a token of common policy. As it is the *Airtours* criteria and the old Merger Regulation that are being applied, the timing was rather inappropriate for such an evaluation to be made. Additionally, it appears that what the Commission suggests by raising this theory is closer to what is described in the present thesis as a *business*

⁸³⁷ *Sony/BMG* 2007 at 442, quoting C-68/94 and C-30/95 *Kali + Salz* [1998] ECR I-1375 at 238.

⁸³⁸ *Sony/BMG* 2007 at 527.

⁸³⁹ *Sony/BMG* 2007 at 547.

model, rather than to the notion of the *environment* in a business context, which comprises of both internal and external influences upon a business e.g. legal, geographical, socio-economic, political, and operational factors that impact decision-making.⁸⁴⁰

Proceeding and turning to non-price coordination, the Commission addressed, apart from the independents' access to retail, competitor foreclosure to radio play, influencing chart rules, and coordinating publishing and recording activities, among other things.⁸⁴¹ Access to retailers was not found to be coordinated as shelf space is allocated by retailers independently,⁸⁴² notwithstanding the aforementioned observation made by the Commission, of how the internet has opened new channels to independents. Access to airplay was merely discussed in passing, even though the same topic has been evaluated as of critical importance to the sustainability of the business model in the US, as of course, radio deregulation came early on across the pond. The effects of radio deregulation can explain the overall growth of the oligonomy historically,⁸⁴³ as well the emergence of new gatekeepers e.g. Clear Channel; however, this evaluation was of no interest and of use to the Commission at that point.

Lastly, the Commission turned to the possibility of coordination between publishing and recording activities, only to reaffirm the strong position of collecting societies, recognising that publishers can hardly exercise any influence on the market for recorded music.⁸⁴⁴ Treating this side of the business model in isolation and outside its business model functions, whilst further separating markets per copyright,⁸⁴⁵ again does not highlight how the oligonomy functions so as to bottleneck the content, and consequently, this theory of harm was rejected as well.

The overall analysis provided by the Commission presented a strong, dynamic online market, a "*playground for business model innovation*" as per Osterwalder at

⁸⁴⁰ See indicatively I Worthington and C Britton, *The Business Environment* (2014), D Otter and P Wetherly, *The Business Environment: Themes and Issues* (2011). Such an angle would make for an interesting debate, but it falls outside the scope of the present at this stage.

⁸⁴¹ *Sony/BMG 2007* at 604-635.

⁸⁴² *Ibid* at 610.

⁸⁴³ E.g. (n 446), (n 477).

⁸⁴⁴ *Sony/BMG 2007* at 629.

⁸⁴⁵ Indeed, each right was presented as potentially forming its own market here as well. *Sony/BMG 2007* at 627.

distribution or *channels* level (iTunes and related players), and a failing one in the physical layer. Therefore, the timing could not have been better for the Commission to re-approve the merger, having taken “*due account of the findings of the Court of First Instance in the Impala Case.*”⁸⁴⁶ Hence, it would be business as usual for both the Commission and the merged entity from that moment on, despite Impala’s objections.⁸⁴⁷ As for the role of the end consumer and the fact that new players were on the rise, competition law and policy should be looking for answers elsewhere, as two decades of EU merger control did not account for the end consumer’s role in the supply chain for the recorded music product as such. Ultimately, it is worth repeating how the *Sony/BMG* conundrum highlights the separation between the slow-moving application of the law and the fast-paced nature of the music industries, something that the US authorities were already familiar with, due to the basis of a stale record.⁸⁴⁸

Moreover, as the above was ongoing, Universal made a step to acquire BMG Music Publishing’s leg, a merger that was approved by the Commission following a series of structural remedies,⁸⁴⁹ whereas, in 2008, the Sony Corporation of America acquired sole control of the Sony/BMG joint venture, a concentration that did not meet any opposition from the part of the Commission.⁸⁵⁰ With the dismantling of EMI to follow in 2012, the members of the oligonomy were reduced to three.

5.2.2.3 *Post Sony/BMG: The break-up of EMI marks the ‘death’ a major*

The final cases bringing the EU Merger Control regime under evaluation are the more recent decisions in *Universal Music Group/EMI Music*⁸⁵¹ and *Sony/Mubadala/EMI Music Publishing*,⁸⁵² both of which deal with the unfortunate fate of EMI and the separation of its recording from its publishing leg in 2012. This

⁸⁴⁶ Opinion of the Advisory Committee on Mergers given at its meeting of 17 September 2007 on a draft decision relating to Case COMP/M333 *Sony/BMG* Rapporteur Denmark OJ 2008 C94 at 11.

⁸⁴⁷ See IMPALA’s press release, available at http://www.impalamusic.org/arc_static/docum/04-press/2007/Press%20Release%2013-12-07%20Background.htm.

⁸⁴⁸ (n 497).

⁸⁴⁹ Case No COMP/M4404 *Universal/BMG Music Publishing* OJ 2007 L230.

⁸⁵⁰ Case No COMP/M5272 *Sony/SonyBMG* OJ 2008 C259.

⁸⁵¹ Case No COMP/M6458 *Universal Music Group/ EMI Music*, September 21, 2012.

⁸⁵² Case No COMP/M6459 *Sony/Mubadala Development/EMI Music Publishing*, April 19, 2012.

section examines the Commission's view by following the *Universal/EMI* decision more closely, and comments on the differences and similarities with *Sony/Mubadala/EMI* when needed. The former decision relates to the end consumer facing side of the oligonomic business model and indeed, the Commission provided in *Universal/BMG* that: “the publishing business has no direct relationship with final/end consumers and can therefore be considered as a wholesale market.”⁸⁵³ It follows that this observation lies at the core of the compartmentalised stance of the Commission vis-à-vis the business model.

The cases, apart from the immediate result of reducing the oligonomy's players to three (their lowest number ever), further mark the end of an era in recorded music history.⁸⁵⁴ EMI had a rich history and was responsible for the 'breaking' of numerous successful artists from Nat King Cole, to the Beatles and the Beach Boys, to Pink Floyd, Mariah Carey, and Coldplay. Its financial woes were marked earlier in the present when the *Time Warner/EMI* concentration was ultimately abandoned in 2000, leaving EMI without a strong corporate parent.⁸⁵⁵

Nevertheless, EMI was at the foreground of the business model developments that marked the past decade, not least thanks to the introduction of the first ever 360-type deal with superstar recording artist Robbie Williams,⁸⁵⁶ evolving from the traditional recording contract to incorporate a stake on all future earnings even outside recording, a pattern that EMI later followed with metal band Korn. EMI's swan song was to attempt its transformation into a service company in partnership with its artists as, according to Roger Faxon who was appointed Head in 2010, “we cannot continue... as being limited to selling CDs.”⁸⁵⁷ Either solely due to its financial woes or due to a combination of its own financial problems and the overall decline in the recorded music industries, EMI briefly found itself at the foreground

⁸⁵³ *Universal/BMG* 5 ft 4.

⁸⁵⁴ See B Southall (n 124).

⁸⁵⁵ For the transition of EMI into an 'independent' major and its final control by private equity firm Terra Firm and by Citibank, see JR Wueller, “Mergers of majors: applying the failing firm doctrine in the recorded music industry” (2012-2013) 7 *BrookJCorpFin & ComL* 589.

⁸⁵⁶ See earlier in D Passman (n 48), but also in L Marshall “The 360 deal and the 'new' music industry” (2012) 16 (1) *European Journal of Cultural Studies* 77-99.

⁸⁵⁷ As above in L Marshall 83.

of business developments and attempted to capitalise on the patterns of substitution and complementarity, as presented in the third chapter of the present.⁸⁵⁸

Unfortunately, following a series of attempts by Terra Firma, the private equity firm behind EMI, to restore it to solvency, the main creditor (Citibank) gained control and put EMI up for auction, separating the recording from the publishing business.⁸⁵⁹ Hence, the recorded music division was sold to Universal Music Group, and the publishing to a consortium led by Sony Entertainment.⁸⁶⁰ In dealing with the proposed *Universal/EMI* merger, the FTC chose to ‘work closely’ with its European counterparts,⁸⁶¹ even though different outcomes were reached, since market characteristics in the jurisdictions differ greatly, and the concentration levels in the EU were found to be significantly higher. Interestingly for the purposes of the present, the very final sentence of the FTC’s statement that “*the remedy obtained by the European Commission to address the different market conditions in Europe will reduce concentration in the market in the United States as well,*”⁸⁶² is a most welcomed (even though indirect) realisation of the extensive business model the majors had been operating under, as well as of its impact.

In Europe, the proposed merger between Universal and EMI was viewed as a merger between the largest record company and a close competitor or an “*important competitive force,*”⁸⁶³ despite the many financial troubles that EMI was undergoing. The merger was, of course, considered under the ‘new’ Merger Regulation,⁸⁶⁴ thus departing from the need to prove collective dominance following the *Airtours* criteria. The Commission’s decision span over 400 pages, attesting that the ‘rushed’ days of *Sony/BMG* were long gone. Indeed, the detailed analysis conducted by the Commission relied only partially on official industry (IFPI) data, providing that “*no industry source gives a completely reliable view of the merged entity’s position*

⁸⁵⁸ (n 413), (n 378), (n 393).

⁸⁵⁹ See e.g. “Citigroup agrees sale of EMI for \$4bn” (2011) November 11 The Financial Times, available at <https://www.ft.com/content/80efb2e0-obfe-11e1-9861-00144feabdco>.

⁸⁶⁰ And including Michael Jackson, David Geffen, and other private investment firms.

⁸⁶¹ FTC, Statement of bureau of competition director R A Feinstein in the matter of Vivendi SA and EMI recorded music, (2012) September 21, available at https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-vivendi-s.a.emi-recorded-music/120921emifeinsteinstatement.pdf.

⁸⁶² In *ibid.*

⁸⁶³ Summary of Commission Decision 220/08 OJ 2003 C 220/15 at 36.

⁸⁶⁴ Article 8(2) Council Regulation 139/2004 OJ 2004 L24/1.

post-merger,⁸⁶⁵ and relying on a wealth of sources instead, including a relativity exercise between the four majors in a hypothetical market.⁸⁶⁶ The Commission concluded that the merged entity would have been an inevitable and undisputed market leader, which comes in sharp contrast with both *Sony/BMG* approvals, whereby efforts were placed in proving collective dominance instead.

The Commission, having in its arsenal many years of relevant empirical experience and a trial-and-error relationship with the European Courts, as evidenced through *Sony/BMG inter alia*, was indeed ideally positioned to carry out an extensive investigation of this kind, with apparently several never addressed issues being flagged up.

At first instance, with respect the A&R, the Commission contemplated (even though the outcome was to the contrary) whether A&R activities should be analysed as a separate product market or:

*“even whether the recorded music market should be viewed as a two-sided market, where the strength of a record company on one side of the market ... has a positive influence over its market position on the other (wholesale of recorded music) and conversely.”*⁸⁶⁷

This point brings the Commission closer to evaluating and assessing the *oligonomy* as such, even though the strength of the majors in A&R was to be ultimately assessed as contributory to the market position in wholesale and vice versa. Even though pursuing this line of thinking holds merit, strictly speaking, a two-sided platform faces demand by two groups of customers creating positive externalities between them, and attracting both sides as participants, which is crucial to their survival. In this sense, they act as ‘meeting’ places of two or more separate groups and create strong associations between them.⁸⁶⁸ The traditional oligonomic business model is however, designed vertically with the majors foreclosing the product, as they operate as powerful *buyers* and powerful *sellers* simultaneously.

⁸⁶⁵ In *Universal/EMI Music* Summary, at 32.

⁸⁶⁶ *Universal/EMI Music* at 348.

⁸⁶⁷ Summary at 19 and *Universal/EMI Music* at 103.

⁸⁶⁸ More at Niels et al. (n 231) 89. Also see *Visa International-Multilateral Interchange Fee* Case COMP/29.373 OJ 2002 318/17.

Nevertheless, the progress made vis-à-vis the nature of the music industries should be noted, as should the similarly fated contemplation of whether ancillary industries (such as artist management services, merchandising and live show and event management services, referring to 360-degrees deals explicitly) should be defined, a matter on which the Commission did not ultimately take a view.⁸⁶⁹

Additionally, and still in relevant product market definition stage, the Commission had a say on the long-lasting debate of recorded / pre-recorded music substitutability, concluding that, contrary to the notifying party's claims:

“it is not appropriate from the demand or from the supply side, to consider legal and illegal music as part of the same relevant product market,”⁸⁷⁰ since notwithstanding end consumer consumption patterns, the two “do not appear to be substitutes from the point of view of the record companies’ direct customers – physical and digital music retailers.”⁸⁷¹

The Commission's stance towards piracy was reaffirmed in the competitive assessment, whereby it was concluded that even though piracy 'shrinks' the overall market, this in itself could not constraint recorded music companies in their commercial behaviour,⁸⁷² since piracy is not affecting the negotiations between majors and their customers, and also, since piracy is constantly becoming less of an issue.⁸⁷³

Similarly, in *Sony/Mubadala/EMI*, the Commission further noted that:

“if one were to assume that there is perfect substitution between legal music and illegal music content ... a decision by the merged entity to increase royalty rates or advances or impose other onerous licensing terms would still likely result in anticompetitive effects.”⁸⁷⁴

In the aggregate, by combining the two decisions, it appears that the Commission is of the view that piracy does not have an anticompetitive effect in either the recording or the publishing leg, which in extension reduces the effect of piracy on the oligonomic business model as such. Thus, and despite the holistic approach that the

⁸⁶⁹ *Universal/EMI* at 184.

⁸⁷⁰ *Universal/EMI Music Summary* at 29-30.

⁸⁷¹ Summary at 29.

⁸⁷² Summary at 53, *Universal/EMI Music* at 674-705.

⁸⁷³ The Commission confirmed the inconclusive nature of empirical studies on the matter referring again to the plethora of empirical studies conducted, see *Universal/EMI* ft 412-419, and appraised the effect of copyright reforms such as the French HADOPI law.

⁸⁷⁴ *Sony/Mubadala/EMI* at 241.

Commission attempted, the problematic issues identified in the present e.g. substitutability and complementary from the part of the end consumer cannot be addressed as to their market dimensions. Once again, what the end consumer does, does not fit the debate.

At assessment stage, in *Universal/EMI* the Commission focused on horizontal non-coordinated effects,⁸⁷⁵ relying on a wealth of data sources, as stated above, to conclude that:

*“the existing competitive dynamics, which are based on a certain balance of power between, at least the majors (despite Universal’s already existing market leadership), would be completely altered by the proposed transaction in favour of the merged entity.”*⁸⁷⁶

EMI was viewed as a strong competitive force and a close competitor to Universal with considerable power in terms of its back catalogue, which would be eliminated pursuant to the merger. This comes despite EMI’s financial troubles that, as raised by Lee Marshall,⁸⁷⁷ could have made EMI qualify for the rescue merger (failing firm defence in the US). The defence can apply when a firm *“would in the near future be forced out of the market if not taken over by another”*,⁸⁷⁸ something that the author argues was in line with EMI’s contested future.⁸⁷⁹ Instead, the Commission considered that:

*“EMI was a viable, competitive and financially viable business, with a very strong back catalogue and some successful active artists, which, absent the proposed concentration, would have continued to constitute a close competitor to Universal and a strong competitive force in the relevant recorded music markets,”*⁸⁸⁰ despite the loss of its publishing leg pursuant to *Sony/Mubadala /EMI*.⁸⁸¹

The Commission examined the power of the merged entity vis-à-vis their direct customers (the retailers), who would have limited ability to switch between suppliers since the merged entity’s repertoire would be a *“must have”*.⁸⁸² This would make the

⁸⁷⁵ *Universal/EMI* at 241 to 734.

⁸⁷⁶ Summary at 35.

⁸⁷⁷ L Marshall (n 855).

⁸⁷⁸ Case No 94/449/EC *Kali + Salz* OJ 1994 L 186/38 at 71.

⁸⁷⁹ As the defence was never raised, this remains but an interesting speculation.

⁸⁸⁰ *Universal/EMI Music* at 413.

⁸⁸¹ *Sony/Mubadala/EMI* at 229-230, whereby the Commission focused solely on the effects of adding EMI’s publishing catalogue to Sony ATV’s.

⁸⁸² *Universal/EMI Music* Summary at 37.

retailers particularly vulnerable to price increase,⁸⁸³ readily ‘exploited’⁸⁸⁴ by the merged entity. In the market for digital distribution of music more specifically, Universal was found able to obtain more favourable licensing terms and conditions from its customers than its competitors, EMI included, a bargaining power that could extend to EMI’s repertoire post-merger.⁸⁸⁵

This could be particularly onerous to smaller independent digital customers, since the data showed that “*the rent that recorded music companies can extract increases with their size,*” an effect pronounced for smaller platforms, but not absent vis-à-vis platforms with greater bargaining power. It was particularly noted how “*there is a positive relation between the size of a recorded music company’s repertoire and the wholesale price it negotiates with online platforms.*”⁸⁸⁶ Thus, the Commission concluded that in digital distribution the merger would result in higher prices for the digital distributors, the platforms.⁸⁸⁷

Pursuant to this, the Commission attempted an astute evaluation of the oligonomic business model: the combined market position of the oligonomy in the recording music and in the music publishing sectors.⁸⁸⁸ Thus, the Commission examined the role of the majors as publishers more closely. It was noted that the publishers had started to withdraw the online mechanical rights for Anglo-American repertoire from collecting societies, which were traditionally viewed (i.e. in the second *Sony/BMG* approval) as exercising great power between publishers and recording

⁸⁸³ Horizontal Merger Guidelines at 31. It is reminded that ‘increase of prices’ is used as a shorthand for any competitive harm that may result from a proposed merger, which includes price increases, reduced output, choice or quality of goods and services and the reduction of innovation. Horizontal Merger Guidelines at 8.

⁸⁸⁴ *Universal/EMI Music* Summary at 37 “... and the merged entity’s ability to exploit customers will likely significantly increase.”

⁸⁸⁵ Summary at 38-40.

⁸⁸⁶ Summary at 43.

⁸⁸⁷ Note that at this stage, digital retailers and streaming services are both considered as digital customers. The Commission looked into their respective commercial agreements in order to assess the notifying party’s bargaining power, but does not separate between the two on any other basis. Thus, “*considering their importance for the merging companies’ digital revenues, the Commission has focused its analysis of commercial terms on eleven digital customers: Apple, Spotify, Amazon MP3, Vodafone, Nokia, Orange, Napster, Deutsche Telekom, Deezer, Virgin Media and YouTube.*” *Universal/EMI Music* at 453.

⁸⁸⁸ *Universal/EMI Music* at 553-673.

companies, and to subsequently re-acquire control over their exploitation.⁸⁸⁹ This would leave the digital platforms willing to offer as much music as possible to the end users in a position of disadvantage, having to negotiate separately with recording companies, collecting societies, and publishers with respect to the Anglo-American repertoire.⁸⁹⁰ Of course, consumer welfare can also be negatively impacted.

The Commission assessed the above relying on ‘control shares’,⁸⁹¹ meaning the percentage of control the merged entity would have over a song in both the publishing and the recording dimension.⁸⁹² Hence, for a realistic and a holistic understanding the merged entity would hold vis-à-vis the digital retailers, the Commission accurately decided to evaluate the combined market position in both recording and publishing:

“In other words, in this case, the Commission considers control shares as an ‘aggravating factor’, which exacerbates the anti-competitive effects deriving from the proposed concentration based on the combination of the merging parties’ activities in the recorded music sector.”⁸⁹³

Indeed, this aggravating factor is intensified by the trend to withdraw the Anglo-American repertoire from the hands of the collecting societies,⁸⁹⁴ illustrating how the oligonomy responds to changes in the aggregate market for music, by seeking a more active participatory role in the supply of the product, by controlling “as much

⁸⁸⁹ For this part of the case, the Commission relied heavily on its previous decision of 22 May 2007 in Case No COMP/M.4404 *Universal/BMG Music Publishing*.

⁸⁹⁰ *Universal/EMI Music* at 554. See also *Sony/Mubadala /EMI Music Publishing* at 148. As a matter of fact, this trend began with the Commission Recommendation 737/2005 OJ 2005 L276/54 on collective cross-border collective management of copyright and related rights for legitimate online music services.

⁸⁹¹ Also followed in *Universal/BMG* and in *Sony/Mubadala/EMI Music Publishing* at 177 “in *Universal/BMG*, the Commission concluded that a publisher with a higher control share would be able to extract a higher price for their repertoire.” Nevertheless, in the latter case it was concluded that due to the specific corporate structure and revenue distribution between publishing and recording, the parties would have been unable to negotiate successfully and to yield rewards.

⁸⁹² *Universal/EMI Music* at 556 “control shares can be used to assess market power purely on a music publishing level by looking at the number of songs within a given selection over which the publisher “controls” at least part of the publishing rights; and across recording and music publishing rights by looking at the number of songs within a given selection over which the company “controls” the recording rights or at least part of the publishing rights.”

⁸⁹³ *Ibid* at 560.

⁸⁹⁴ Note however that this was not the case for mechanical and performance publishing rights offline, whereby collecting societies were still found to exercise control and power. *Sony/Mubadala/EMI Music Publishing* at 100.

as possible”, as per Ted Cohen in the third chapter.⁸⁹⁵ Consequently, the oligonomy fulfils its function of being the bottleneck of the music product, something which has been noted since the beginning of the present thesis. By choosing to gain control over an activity traditionally placed in the care of collecting societies, a vital part of the oligonomic business model comes into the limelight, and raises relevant anticompetitive concerns. Indeed, the Commission concluded that the proposed transaction would likely lead to a significant impediment to effective competition, taking into account the ‘control shares’ of the merged entity and the power it could exercise vis-à-vis the digital customer.

Here, the Commission had the opportunity to further assess the impact of the merger upon the end user (or end consumer) as well, following the Horizontal Merger Guidelines,⁸⁹⁶ by acknowledging the competitive harm upon the end users of digital services,⁸⁹⁷ in terms of reduced innovation and choice. This could either be the result of costs being passed on to the end user/consumer⁸⁹⁸ from the merged entity’s customers, the result of a reduction in innovative business models and relevant digital services, or finally, the result of the negative impact of the merger on cultural diversity.⁸⁹⁹

Nevertheless, it should be noted that the impact on cultural diversity was not given more thought than necessary for the Commission to comply with the provisions of

⁸⁹⁵ In Bishop (n 296).

⁸⁹⁶ Horizontal Merger Guidelines ft 105 “pursuant to Article 2(1)(b), the concept of ‘consumers’ encompasses intermediate and ultimate consumers, i.e. users of the products covered by the merger. In other words, consumers within the meaning of this provision include the customers, potential and/or actual, of the parties to the merger.”

⁸⁹⁷ *Universal/EMI Music* at 621 “in addition, the Commission considers that the proposed concentration is also likely to result in competitive harm to end-consumers that use these digital services. This harm could take the form of retail price increases for the consumption of digital music and reduced innovation and consumer choice for the end-users of these services.”

⁸⁹⁸ At 621-623 and Summary at 47.

⁸⁹⁹ Article 167 (4) TFEU “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures,” pursuant to the UNESCO Convention on the protection and the promotion of the diversity of cultural expressions to which the Union is a Party, and following set case-law that allows for an ‘enriched’ approach to concentration assessment encompassing other objectives of the TFEU e.g. Case T-96/92 *Comité Central d’Entreprise de la Société Générale des Grandes Sources and Others v Commission* [1995] ECR II-1213 at 28ff and Case T-224/10 *Association belge des consommateurs test-achats v Commission* judgment of 12 October 2011 at 45.

the Treaty,⁹⁰⁰ and no extensive arguments were provided other than that cultural diversity is intrinsically linked to consumer choice, and should consumer choice be restricted, there would be a negative impact on cultural diversity as well, something taken axiomatically.⁹⁰¹ However, it is worth considering how the impact on cultural diversity in this case in particular might have been negative, given that it was the Anglo-American repertoire (and the popular one most importantly) that Universal would be leveraging its power over, as stated earlier. Instead, the present thesis argues that paying consideration to business model innovation as such, is enough to justify anticompetitive concerns. Even though business model innovation was examined in relation with the oligonomy's customers rather than from an end consumer perspective, their importance in the competitive assessment cannot be underestimated.

Indeed, the Commission made a connection between the issues of end consumer choice and business models. Third party-provided evidence attested how Universal leveraged its power to impose restrictions on the business models of the digital platforms,⁹⁰² which according to the Commission, constitutes efforts to hinder *business model innovation* and increase prices to the ultimate detriment of the end consumer.

Additionally, the Commission's assessment and the accommodation of end consumers concerns therein are a most welcome development, as stated previously. Even though in the *Universal/BMG Music Publishing* decision the impact of a price increase on end consumers and their ability to access the music of their choice was also considered,⁹⁰³ what was missing was the explicit connection between business model innovation, price increase, and consumer welfare in a competition law context. This decision does provide enlarged assessment dimensions, departing from the stricter economic rationale of the past decade, yet it remains elaborate and

⁹⁰⁰ Similarly, in *Sony/Mubadala/EMI Music Publishing* at 240, where this can read quasi-verbatim, albeit in a publishing context.

⁹⁰¹ *Universal/EMI Music* at 645 "the Commission also finds that the proposed concentration would in addition reduce consumer choice and innovation and hence cultural diversity."

⁹⁰² At 650 onwards "Decision n°11/55727 of the Tribunal de Grande Instance de Paris of [read: 5 September] 2011 follows Universal's attempt to impose certain limitations on Deezer's free streaming service in France and to prohibit Deezer from distributing its recorded music if it did not comply with such limitations."

⁹⁰³ *Universal/BMG Music Publishing* at 364-380.

detailed at assessment stage, consulting a wealth of empirical evidence. Here, it is suggested that an enlarged appreciation of the operating business model, could have enabled the Commission to assess *significant impediment on effective competition* in the market where the business model operates, as this results in reduced consumer welfare. From there, the Commission could have proceeded to ascertain that promoting innovation and competition through competition law and policy in such markets is imperative, affirming the arguments brought forward by Potts and Cunningham, at the beginning for the present thesis.

To summarise, the merged *Universal/EMI* would be in position to negatively impact direct customers and end consumers, as well as business model innovation and cultural diversity. Further, it was concluded that there did not exist any adequate evidence of either countervailing buyer power⁹⁰⁴ or competitors that could attempt a timely and sufficient entry⁹⁰⁵ and that could counter the anticompetitive effects. Contrary to the *Sony/BMG* decisions, Apple/iTunes and Spotify were presented as no longer in position to pose a constraint to the merging party. Hence, according to the Commission, even though in the mid-2000s the recorded music industry was relying heavily on the pipelines provided by their distributing *channels*, this was no longer the case once the market had stabilised. At present, the recorded music industries are faced with a newfound wave of growth especially thanks to services such as a Spotify and more recently Apple Music.⁹⁰⁶ Given that the major recorded music companies' business model has not altered *in the interim*, what we are faced with is the replacement of the traditional retailer or distributor with a powerful digital service. In effect, it can be argued that even though the players have changed, the game has not, as regards the oligonomy. Consequently, it is in the best interest of the oligonomy, adhering to the norms of the traditional business model, to create strong ties with these *key partners* and *channels* in order to maximise profits.

⁹⁰⁴ *Universal/EMI Music* at 713-723, whereby it was noted that both Apples/iTunes and Spotify depend upon the merged entity's catalogue.

⁹⁰⁵ At 727-734. Indeed, this merger concerns the reduction of the oligonomy's members to three for the first time in history.

⁹⁰⁶ B Sisario, "Streaming drives US music sales Up 11 percent in 2016"(2017) March 30 March The New York Times, available at https://www.nytimes.com/2017/03/30/business/media/digital-music-spotify-apple-record-labels.html?_r=1.

Ultimately, the Commission was able to establish a viable theory of harm without the need to provide an elaborate assessment of coordinated effects, which has proven to be a hurdle in the past. Indeed, the Commission reiterated that:

“the majors active on markets for the wholesale of recorded music are not likely to easily reach a common understanding on the terms of coordination, given their complexities and the relative lack of transparency on the market.”⁹⁰⁷

Paying attention to non-coordinated effects had freed the Commission from the requirement to prove collusive behaviour and most importantly, retaliation, and still arrive at the sought-after result. Thus, the Commission concluded that the transaction would lead to a significant impediment on effective competition as a result of the creation of a dominant position in the markets for the wholesale of digital music, to which Universal provided a thorough and elaborate commitments package, including extended divestiture of assets as well as behavioural remedies.⁹⁰⁸ This combined with the fact that a major’s recording and publishing activities were separated and sold separately, can address power consolidation.⁹⁰⁹ However, caution should be paid when these are acquired by the remaining members of the oligonomy, given that the industry does move in cycles and returning to consolidation is always possible, if not imminent.

5.2.2.4 Conclusions on EU merger control

To conclude this EU part, it is argued that the Commission’s perception of the oligonomic business model in the EMI cases was as accurate as it could be, given the regulatory framework (mainly the new Regulation, the Horizontal Merger Guidelines, and settled case-law) at its disposal. From the first cases in the early 1990s all the way to 2012, the Commission was faced with the constant changes in the landscape of the music industries and was called to apply a competition toolkit that traditionally excluded the end consumer from music’s supply chain, despite

⁹⁰⁷ *Universal/EMI Music* at 761.

⁹⁰⁸ See at 819 onwards. Also in Summary at 71 *“The Commission concluded that the final commitments submitted ... are of a scale and nature such as to decrease Universal’s market power on a sustainable basis so that no significant impediment to effective competition arises.”*

⁹⁰⁹ Also note how the DOJ proposed similar ‘creative’ remedies to counter the anticompetitive effects of the merger between Live Nation and Ticketmaster. This follows in the next section.

consumer welfare constituting EU competition law's stated aim.⁹¹⁰ The conclusion of the dominant position Universal would enjoy pursuant to the merger with EMI perhaps comes to highlight that the recorded music industries have gone full circle and are enjoying growth and potential expansion, despite the woes of the last decade.⁹¹¹ This becomes evident as the oligonomy members declare digital profits and their digital *key channels* and *partnerships* grow.

Indeed, the business model reality presented in the third chapter has suggested cycles of disruption, which however, find the oligonomy bounce back, and continue its gatekeeping function. It is important, however to further raise the red flag with respect to the end consumer, who is actually faced with more gatekeepers than ever before. Oligonomy aside, the power of Spotify and Apple should be stated, despite what the Commission suggested in EMI when addressing their buyer power. In fact, with the launch of Apple's streaming service in 2015, its CEO announced his intentions to undercut competition with Spotify by using Apple's 'economic muscle' to pay more for music licenses than Spotify and to even operate at a loss in order to gain Spotify's market "*whilst being dominant with iTunes,*" and benefit the sales of iPhones.⁹¹² Even though this has not materialised at the time of writing, caution should be paid to the fact that more powerful gatekeepers are being added vis-à-vis the end consumer, and especially ones possessing market disruption abilities and perhaps, intentions. And since according to EU settled case law *streaming* and *downloading* activities belong in separate markets as they exploit different rights, Apple's (or Spotify's) potential dominance in a market for access to music as such would be harder to argue.

Perhaps there is no better time for the Commission to realise and address consumer access in the markets for music, given the current shape the music industries are taking. The end consumer, even though no longer passive, as well-established in the past decade, is now faced with the traditional oligonomy and its new powerful

⁹¹⁰ More on this contested issue can be found at S Alboek "Consumer welfare in EU competition policy" (2013), available at http://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf.

⁹¹¹ "Warner Music logs highest sales in 8 years on streaming growth" (2016) December 8 The Financial Times, available at <https://www.ft.com/content/5703c9be-fa8a-3066-a285-f64f2ead9083>.

⁹¹² J N Otegui Nieto, "Apple and Spotify, a competition law song?" (2015) 10 (36) ECLR 436-438.

channels and partners, and with emerging gatekeepers guarding access to complementary and substitute products such as live music, streaming and downloading. Even though the Commission has considered that the end user/consumer benefits from the existence of innovative business models, this is but half the story. It needs to be addressed explicitly that these business models operate as a result of consumer demand and are thus, demand-driven. This will enable the Commission, and any other competition authority to view and assess the markets for music bottom-up instead of top-down. By extension, issues of price and access in a business model context are paramount to safeguarding consumer welfare, and the Commission needs to evaluate these matters holistically.

Finally, empirical data presented in the third chapter from as recently as December 2015,⁹¹³ confirm complementarity and substitutability patterns from the point of view of the end consumer and support the argument that the music product is consumed holistically. Even though the Commission did find anticompetitive concerns in its most recent encounters with the oligonomy, it still failed to take the above issues into consideration. Nevertheless, the Commission appears to have been ‘circling’ a business-model-compatible evaluation of the music industries. It is worth exploring whether an ‘extended’ application of the SIEC test compatible with the business model perspective is possible, and thus, if it can address these issues per se.

5.3 *Live Nation Entertainment: new gatekeepers, but who’s listening?*⁹¹⁴

5.3.1 *Re-introducing the live music industry*

As a direct consequence of the presence of many gatekeepers described above, the thesis would be incomplete without an evaluation of gatekeepers in live music. There is no need to repeat to the same extent that live music transitioned from an ancillary industry, supportive of the offering of recorded hit music, to a lucrative *music industry*. Additionally, the third chapter attested the complementarity and potential

⁹¹³ E.g. (n 413), (,378), (n 393).

⁹¹⁴ This section contains parts from the author’s own work, submitted for the award of the LLM in International Commercial Law, at the University of Glasgow, during the academic year 2010-2011, as stated in the declaration.

substitutability between the consumption of the recorded and the live music product, as a justification of both the *Bowie Theory* and of the 360 degree deals (operated not only by the defunct EMI but also by live music promoters), which aim to capture the end consumer's 'wallet share'.⁹¹⁵

Building on the empirical studies presented in the third chapter, the thesis proceeded with the evaluation of the radio and its deregulation in the US, in order to highlight the past and present of players with immense power vis-à-vis the oligonomy, such as Clear Channel, and the various payola scandals of the past.⁹¹⁶ It was presented how Clear Channel was not a stranger to either the US authorities or the courts,⁹¹⁷ and how it “*attempted to create a solid bottleneck around the exposure of music to the audience,*” ultimately being forced to divest what was to become Live Nation, in 2005. Live Nation Entertainment (hereafter LNE) the fully vertically integrated artist-to-fan platform, followed pursuant to the *Live Nation/Ticketmaster* merger.

Before the merger, Live Nation had expanded vertically to engulf the whole supply chain of live music production, even touching upon the recorded music industry entering in 360 degree deals with artists such as Madonna and Jay Z.⁹¹⁸ The ‘Madonna deal’ led leading music magazine NME to wonder back in 2007: “*could it be a new business model for the music industry?*”⁹¹⁹ At a time when the music industries, and the recorded music industry in particular, were undergoing seismic changes, it would appear that Live Nation was strategically positioned to profit directly from the identified end consumer consumption patterns through its integrated business model.

According to LNE's annual report of 2015, it operates:

⁹¹⁵ (n 55).

⁹¹⁶ See “Intervention by proxy” in the previous chapter.

⁹¹⁷ (n 476).

⁹¹⁸ NME news (2007) October 16, available at <http://www.nme.com/news/music/madonna-411-1350310#CshBzbkhvzIot7kY.99>. “*In a joint statement issued today by Madonna and Live Nation, the singer said “The paradigm in the music business has shifted and as an artist and a business woman, I have to move with that shift.”*”

⁹¹⁹ Ibid NME news “*Madonna signs deal with Live Nation.*”

*“in five main industries within the live entertainment business; live music events, venue operations, ticketing services, artist management and services, and sponsorship and advertising sales.”*⁹²⁰

Thus, the presence of LNE post-merger, expands into the aggregate music experience remaining artist-focused, and brings the *Bowie Theory* to life. Further, with respect to the end consumer, the business model of LNE confirms a two-sided market, with the company operating as a platform that connects not only artists to fans (as the company purports), but also advertisers to fans.

Indeed, fans are an asset (or a *key resource*) according to the company:

*“Our database of fans and their interests provides us with the means to efficiently market our shows to them as well as to offer other music-related products and services. This fan database is an invaluable asset that we are able to use to provide unique services to our artists and corporate clients.”*⁹²¹

By extension, contrary to the traditional business model of the oligonomy, the end consumer is vital for this model’s survival, by becoming an integrated part. If we were to attempt ‘canvassing’ the business model LNE operates, the result would be further revealing: LNE is active (*activities*) in live shows promotion, artist management, ticketing, venue operation, and the attraction of sponsoring and advertising. As *key partnerships* operating through the relevant *key channels*, we could therefore identify ticket agents, venue operators, and advertisers. LNE however, following the merger with Ticketmaster, sells its own tickets and promotes shows by its own-managed artists in its own venues,⁹²² which leads to a significantly reduced *cost structure*, resulting in a strong portfolio of activities.

Further, LNE’s *revenue streams* consist of ticket sales, the percentage of the artists’ income through their respective revenue streams as contracted, the rental of own

⁹²⁰ Live Nation Annual Report 2015 4, available at http://investors.livenationentertainment.com/files/doc_financials/2015/Annual-Report.pdf.

⁹²¹ In *ibid.*

⁹²² Annual Report 2 “*Live Nation owns, operates, has exclusive booking rights for or has an equity interest in 167 venues, including House of Blues ® music venues and prestigious locations such as The Fillmore in San Francisco, the Hollywood Palladium, the Ziggo Dome in Amsterdam and 3Arena in Ireland.*” Note that Ticketmaster operated its own artists’ management agency prior to the merger, Front Line. See United States District Court for the District of Columbia, Case: 1:10-cv-00139, United States of America et al., Plaintiffs, v. Ticketmaster Entertainment Inc., et al., Defendants, Competitive Impact Statement (hereafter competitive impact statement).

venues to third parties, and of course the sponsorship and advertising deals. Operating a two-sided platform, LNE's *customers* are both advertisers and fans. More specifically, with respect to the latter, what is on offer to them is both 'access' to the hit or popular artist *per se*, and an extended music 'experience'. Indeed, the 'experience' materialises in the introduction of VIP ticket packages, 'megatickets', promotional 'meet'n'greet' sweepstakes, and the Premium Seats programme, which includes closer to the stage seats, merchandise, parking, and priority newsletters.⁹²³ Thus, it appears that LNE segregates and price discriminates between fans (*customer segments*), introducing price categories of tickets. This segregation however, is a vital asset for LNE's advertising *activity*, offering crucial clientele information to potential advertisers.

To summarise, LNE's business model is both end consumer and artist centred, and as such it either has the ability to indeed offer what it purports to (direct access to the artists) or to 'bottleneck' access even further. Therefore, when the proposed merger was notified in the US (and in the UK),⁹²⁴ the competition authorities were called to evaluate a new business model and a new supply chain in live music production. It should come as no surprise to note how once again, the competition regimes called to evaluate this business model did not have the ability to address consumer access issues.

5.3.2 *The merger in question*

With regard to the merger in question, it had both horizontal and vertical dimensions, since Live Nation was about to become Ticketmaster's direct competitor in ticketing. Prior to the merger, Ticketmaster and Live Nation had entered a contractual agreement, whereby the former was acting as the primary ticket agent for the latter.⁹²⁵ However, in December 2007, Live Nation entered into an exclusive

⁹²³ More at the official website, available at <http://www.livenationpremiumtickets.com/>. Currently available only in the US.

⁹²⁴ The analysis will remain US-focused as in the UK the merger was found unlikely to result in a substantial lessening of competition (SLC) in the examined markets. The US-focused approach is further justified by LNE's past (Clear Channel), by the innovative remedies proposed by the DOJ, and by the smaller role of Live Nation as Ticketmaster's competitor in the UK. Nevertheless, references to the UK jurisdiction will be made when needed.

⁹²⁵ Competition Commission, Ticketmaster and Live Nation a report on the completed merger between Ticketmaster Entertainment, Inc and Live Nation Inc, 7 May 2010 at 5. The full report is available at

agreement with German Eventim. Under that agreement, Eventim would provide Live Nation with the technological know-how that would enable it to enter the ticketing market. As a result, Live Nation would become a direct competitor to Ticketmaster.⁹²⁶ Additionally, prior to the merger, Live Nation owned music venues, promoted tours and concerts, and had started expanding upstream in artists' management.⁹²⁷ Ticketmaster, apart from being the largest primary ticketing company in the US,⁹²⁸ had also entered the upstream market for management services to the artists, having acquired Frontline Management Group Inc. in 2008.⁹²⁹

In anticipation of anticompetitive effects should the merger between the two parties materialise, the US government (Department of Justice, hereafter the DOJ) made its move. On the 25th of January 2010, the US government, seeking to enjoin the merger, filed a civil antitrust complaint, which provides us with the plaintiffs' objections to the proposed transaction, with market participants' testimonies, and with the competitive impact statement. Along with the complaint, the plaintiffs also filed a hold separate stipulation and order, and a proposed final judgment, which included behavioural and structural remedies designed to eliminate the anticompetitive effects of the proposed acquisition.⁹³⁰

As mentioned previously, Ticketmaster was the largest primary ticketing company in the US offering two principal primary products to its customers (concert venues): a Ticketmaster-managed platform named Host, which was designed to sell tickets through Ticketmaster-managed channels, and Paciolian, a platform which allowed venues to sell their own tickets.⁹³¹ As stated earlier, following the agreement with Eventim, Live Nation entered the market for primary ticket services to major concert

https://assets.publishing.service.gov.uk/media/5519473540f0b61401000087/final_report.pdf.

⁹²⁶ J Baker "The merger and the damage done: how the DOJ enabled an empire in the live music industry" (2013) 3 NYU Journal of IntellProp & EntLaw 76.

⁹²⁷ A Meese and B Richman (n 2).

⁹²⁸ (n 2) 13-14.

⁹²⁹ Competitive impact statement at B. Live Nation and Ticketmaster's fields of operation were similar in the UK, apart from Frontline Management, which did not operate this side of the Atlantic.

⁹³⁰ Case: 1:10-cv-00139 United States of America, et al., Plaintiffs, v. Ticketmaster Entertainment, Inc. and Live Nation, Inc., Defendants, Competitive impact statement.

⁹³¹ Ibid at B

venues in the United States in 2008. It was rapidly evolving to become a significant competitor to Ticketmaster.⁹³² Consequently, despite any vertical relevance, the DOJ's primary focus lied on the horizontal effects of the proposed acquisition. It was examined whether these would substantially lessen competition in the ticketing market.⁹³³

By applying the hypothetical monopolist test (SSNIP), it was concluded that in the event of a significant rise in prices above levels that would have prevailed absent the transaction, the major concert venues in the US would have no alternatives for their primary ticketing services.⁹³⁴ The provision of primary ticketing services to major concert venues was a relevant price discrimination market and a 'line of commerce' within the meaning of Section 7 of the Clayton Act. Indeed, the market definition included only major concert venues and not smaller ones, given that ticket agents were considered able to price-discriminate among different venues.⁹³⁵ It was observed that venues and ticket agents negotiated their individual contracts on different terms, and that most of the times, venues were prohibited from reselling primary ticket services.⁹³⁶ Moreover, major concert venues required more sophisticated ticketing services in order to deal with heavier transaction volumes. Indeed, it was Ticketmaster which attracted most of the major concert venues as clients, thanks to its established presence in the market and its good reputation.⁹³⁷

Live Nation was the only company capable of competing with Ticketmaster in serving major concert venues. This was a result of its presence in the concert promoting market, and a result of its strong reputation, which had enabled it to establish long-term professional relationships with many major concert venues.⁹³⁸ For example, SMG, the largest venue management company in the US, had agreed to switch from Ticketmaster to Live Nation to cover its primary ticketing needs, if Live Nation was to develop a first class ticketing platform.⁹³⁹ SMG was looking forward to establishing a contractual agreement with Live Nation in order to secure Live

⁹³² Ibid at C

⁹³³ Ibid at D

⁹³⁴ Ibid at C.

⁹³⁵ Ibid.

⁹³⁶ Ibid.

⁹³⁷ Ibid.

⁹³⁸ Ibid.

⁹³⁹ Ibid at D.

Nation-promoted concerts. This proves that upon entering the ticketing market, Live Nation would not only become a direct competitor to Ticketmaster, but it would also gain an advantage, thanks to its vertically integrated structure, and more specifically thanks to its concert promoting activities.

Ultimately, the Department of Justice, distinguished a market where entry is both time-consuming and costly.⁹⁴⁰ Further, this market is characterised by high barriers for competitors to successfully, substantially and profitably enter and expand, due to a number of reasons laid out in the competitive impact statement.

Firstly, entry in the market required technically advanced and expensive ticketing platforms like those that Ticketmaster possessed. These costs made it quite impossible for entrants to obtain the scale required to compete efficiently.⁹⁴¹ Furthermore, new entrants lacked Ticketmaster's reputation, and did not possess its extensive client databases that enabled Ticketmaster to establish long-term contractual relationships with venues.⁹⁴² Due to these contractual relationships, entry becomes time consuming for the potential competitor.

The only firm that managed to circumvent these barriers and enter the market efficiently was Live Nation. Live Nation's entry was followed by a series of pro-competitive effects. Indeed, Ticketmaster had altered the terms of contracts which were about to expire by making them more appealing to customers, for fear that they might switch to Live Nation.⁹⁴³ In addition, as presented above, Ticketmaster operated a vertically integrated business model by acquiring Frontline in October 2008.⁹⁴⁴ For a moment it appeared that Ticketmaster and Live Nation would 'fight on equal terms' in their quest for market share acquisition.

However, by agreeing to the proposed transaction, Ticketmaster chose to eliminate competition with Live Nation, and the DOJ feared that this would result in a series of anti-competitive effects. The merged entity would have less initiative to offer lower prices to its clients and to invest in better ticketing technology, since it would

⁹⁴⁰ Ibid.

⁹⁴¹ Ibid.

⁹⁴² Ibid.

⁹⁴³ Ibid.

⁹⁴⁴ Ibid.

be enjoying all the benefits of a vertically integrated monopolist imposing even higher barriers to entry.⁹⁴⁵

As stated in the complaint filed by the plaintiffs on the 28th of January 2010, the market for primary ticketing for major concert venues was highly concentrated. The HHI (Herfindahl-Hirschman Index) post-acquisition would be over 6,900,⁹⁴⁶ resulting in an even more concentrated market.⁹⁴⁷ In conclusion, the merger posed a serious threat to competition in the specific market, by resulting in a substantial lessening of competition in violation of antitrust laws. However, the parties to the case managed to reach a settlement agreement, notwithstanding these threats.

5.3.3 Vertical thoughts

The above come as no surprise, since operating an innovative and vertically integrated business model does not give rise to anticompetitive concerns *per se*,⁹⁴⁸ as further attested by Christine Varney⁹⁴⁹ in 1995:

*“vertical integration can lower transaction costs, lead to synergistic improvements in design production and distribution of the final output product and thus enhance competition.”*⁹⁵⁰

However, such issues arise should both the upstream and the downstream market be concentrated with significant barriers to entry.⁹⁵¹ Further, during the Clinton and later during the Obama administration, post-Chicago theories of foreclosure found their way in antitrust policies, bringing vertical integration, and by extension vertical

⁹⁴⁵ Ibid.

⁹⁴⁶ Amended Complaint Section VI at 38-39.

⁹⁴⁷ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (revised 1997). The Guidelines were updated on August 19, 2010. According to the 1992 Guidelines at 1.51(c), transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise significant antitrust concerns.

⁹⁴⁸ The Chicago approach traditionally favours vertical mergers as based on R H Bork's *The Antitrust Paradox* (n 105). Guided by the aim to maximise economic efficiency, vertical mergers should be allowed.

⁹⁴⁹ US Attorney General Antitrust Division, during the Obama administration, and Federal Trade Commissioner under Clinton.

⁹⁵⁰ FTC, “Vertical merger enforcement challenges at the FTC” (1995) July 17, available at <http://www.ftc.gov/speeches/varney/varta.shtm>.

⁹⁵¹ M Furse, *Competition Law of the EC and the UK* (2008) 378-379.

mergers, under close-r examination than under conservative administrations.⁹⁵² As per the US Supreme Court in *Brown Shoe*:

*“the primary vice of a vertical merger ... is that by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete.”*⁹⁵³

Indeed, the ability of the merged entity to foreclose competitors was evidenced in both the high levels of concentration in the ticketing market, and in the market shares that both parties enjoyed. With respect to the latter, Pollstar⁹⁵⁴ reported that prior to Live Nation’s downstream integration to ticketing Ticketmaster enjoyed a market share of 82.9 percent, with the second largest competitor having a market share of only 3.8 percent. On the other hand, post-Live Nation’s entry, Ticketmaster’s share dropped to 66.4 percent, with Live Nation acquiring a market share of 16.5 percent *“almost overnight.”*⁹⁵⁵ Thus, the merger would result primarily in the loss of a strong, nascent competitor, giving rise to anticompetitive horizontal effects, in addition to its vertical dimensions.

Equally, with respect to levels of concentration, the market for primary ticketing for major concert venues was described as highly concentrated. As stated earlier, according to the amended complaint:⁹⁵⁶

*“the proposed merger will further increase the degree of concentration to levels raising serious antitrust concerns...using a measure of market concentration called the Herfindahl-Hirschman Index (“HHI”) ... the post-acquisition HHIs increase by over 2,190 points, resulting in a post-acquisition HHI of over 6,900.”*⁹⁵⁷

⁹⁵² P Cox, “What comes up must come down: grounding the dizzying height of vertical mergers in the entertainment industry” (1996) 25 Hofstra LRev 261.

⁹⁵³ *Brown Shoe*. Further see D L Feinstein “Editor’s note: are the vertical merger guidelines ripe for revision” (2009) 24 Antitrust 5.

⁹⁵⁴ Pollstar official website, available at <https://www.pollstar.com/about.aspx>. “Pollstar is the only trade publication covering the worldwide concert industry. We have been supplying in-depth information to every professional concert promoter, booking agent, artist manager, facility executive and every other entity involved in the live entertainment business for 30 years.”

⁹⁵⁵ Also at Pollstar, “Live Nation, Ticketmastr announce merger” (2009) October 2, available at https://www.pollstar.com/news_article.aspx?ID=647940.

⁹⁵⁶ Note that all relevant case files can be found at the Department of Justice’s website <https://www.justice.gov/atr/case/us-et-al-v-ticketmaster-entertainment-inc-et-al>.

⁹⁵⁷ U.S., et al. v. Ticketmaster Entertainment, Inc., et al., Amended Complaint, file 28/01/2010 at 38-39 (hereafter Amended Complaint).

As seen, with respect to ticketing, the market was further characterised by significant barriers to entry. This was evidenced in both Ticketmaster's and Live Nation's ability to offer highly sophisticated ticketing platforms, based on complex technologies requiring high fixed costs to develop and maintain.⁹⁵⁸ Further, and perhaps most importantly, both parties held "*unparalleled access to individual consumer data*"⁹⁵⁹ that would have taken potential competitors considerable time and effort to amass. These, combined with the parties' "*reputation for delivering ... sophisticated primary ticketing services,*"⁹⁶⁰ would hinder potential competitors from entering the market significantly.

As a result, not only would the merger signal the loss of competition from a horizontal perspective, leading in substantial lessening of competition⁹⁶¹ in the provision of ticketing services to major concert venues,⁹⁶² but it would further raise serious vertical concerns.

Even though the DOJ opted to focus on the horizontal aspects (as these would be easier to argue and justify) vertical concerns can be read in the competitive impact statement:

*"while appreciating that vertical integration may benefit consumers in some situations, the United States does not fully credit Defendants' efficiency claims because they each could realize many of the asserted efficiencies without consummating the transaction ... but for the proposed transaction, venues and concertgoers would have continued to enjoy the benefits of competition between two vertically integrated competitors. A vertically integrated monopoly is less likely to spur innovation and efficiency."*⁹⁶³

Thus, the DOJ remained close to the pro-vertical integration school of thought, whilst managing to maintain a critical stance towards the proposed merger. From the DOJ's point of view, the concertgoer would be worse off as a result of the loss of competition between the parties, even though the business model *per se* has pro-

⁹⁵⁸ In J Baker (n 925) 88.

⁹⁵⁹ Ibid 89.

⁹⁶⁰ Competitive impact statement at 7.

⁹⁶¹ It is repeated that US law bars mergers when the effect "*may be substantially to lessen competition or to tend to create a monopoly*" under Section 7 Clayton Act.

⁹⁶² Note that the UK Competition Commission, also employing the SSNIP test, defined as relevant markets a. the primary ticketing services for live music events, b. the promotion of live music events, and c. the operation of venues used for live music events. In the CC's report at 5.

⁹⁶³ Competitive impact statement at 12.

competitive effects, since it results in innovative services to the market. Thus, the DOJ was rather concerned with the inability of future competitors to expand in upstream and downstream markets and “*compete effectively*.”⁹⁶⁴ Hence, the DOJ did not concern itself with the merged entity’s ability to tie or bundle its products, e.g. by coercing venue operators wishing to book a LNE managed artists (content) to also employ their respective ticketing services.⁹⁶⁵ Such a practice would have intensified foreclosure issues and would have left ‘non-compliant’ venue operators without a viable alternative.

Equally, the DOJ took the negative impact to concertgoers at face value and did not analyse this further. Interesting to notice how, similarly to the authorities’ encounters with the oligonomy, the end consumer’s interests lie in reaping the benefits of competition indirectly. Content foreclosure issues were addressed vis-à-vis the independent promoter and the venue operator rather than the end consumer as such. Hence, the opportunity to address access from the point of view of the end consumer, who readily substitutes or complements between recorded and live music, was missed here as well.

Nevertheless, neither Live Nation⁹⁶⁶ nor Ticketmaster were stranger to end consumers themselves, as evidenced by several cases heard in front of US courts. End consumers alleged anticompetitive practices, monopolisation, and attempt to monopolisation from the part of Clear Channel, Live Nation, and Ticketmaster.⁹⁶⁷ In *Campos* for instance, end customers (concertgoers) alleged that Ticketmaster monopolised the market of ticket distribution and that it used its power to levy fees to the end customer, resulting in increased ticket prices. The Court however, found that the plaintiffs lacked standing as the direct purchasers of Ticketmaster were the

⁹⁶⁴ Competitive impact statement at 11-12.

⁹⁶⁵ Ibid. Note that such issues are only addressed as anti-retaliation behavioural remedies.

⁹⁶⁶ As seen above in re Live Concert Antitrust Litigation, 863 F.Supp 2d 966 (consolidating claims brought by Malinda Heerwagen and Nobody in Particular Presents). In 2002, Malinda Heerwagen had filed a putative class action in the United States Court for the Southern District of New York, alleging claims of monopolisation, attempted monopolisation, and unjust enrichment against Clear Channel.

⁹⁶⁷ *Campos v. Ticketmaster Corp.*, 140 F. 3d 1166, 1168 (8th Circuit 1998), *Ticketmaster L.L.C. v. RMG Technologies, Inc.* 536 F. Supp. 2d 1191 (C.D. Cal. 2008), *Gurvey v. Cowan, Liebowitz and Latman, P.C.*, No 06 CV 1202, 2009 WL 1117278.

venues, affirming what has been presented herein since the very beginning of the thesis.

5.3.4 *'I got the poison, I got the remedy'*

Ultimately, the DOJ sought to address both horizontal and vertical concerns in its Final Judgment, offering a creative bundle of structural and behavioural remedies.⁹⁶⁸ The Final Judgment was followed by severe criticism from competitors, artists, consumer advocates and scholars alike, who described the settlement agreement as a 'failure' from the DOJ's part and the merged entity as 'diabolical'.⁹⁶⁹

As for the chosen remedies, the US agencies had always shown a preference for structural remedies as they considered them 'clean and certain',⁹⁷⁰ whereas conduct or behavioural remedies require the agencies' and the courts' involvement in market practices, and are considered costlier to monitor.⁹⁷¹ Nevertheless, in the present case the DOJ aimed to create through divestiture two new vertically integrated and financially viable competitors, namely Anschutz Entertainment Group, AEG, and Comcast-Spectator.⁹⁷²

With respect to behavioural remedies, the final judgment included an anti-retaliation provision aiming to prevent potential foreclosure of competitors in any level of the live music events supply chain. As such, the merged entity was prohibited from retaliating against any venue owner that chose to collaborate with a competing firm for primary ticketing services, by conditioning the provision of live music events on the basis the same venue owner contracts with LNE for primary ticketing services, and vice versa (conditioning the provision of ticketing services on the basis that a venue operator contracts with LNE for event promotion).⁹⁷³ This

⁹⁶⁸ Case: 1:10-cv-00139 Final Judgment July 30 2010.

⁹⁶⁹ C J Jeremy and P R Bock, 2010, "Merger control remedies: a more flexible administration?" (2010) 24 Antitrust 15.

⁹⁷⁰ DOJ, Antitrust Division Policy Guide to Merger Remedies, (2004) October, available at <https://www.justice.gov/atr/archived-antitrust-division-policy-guide-merger-remedies-october-2004>.

⁹⁷¹ See e.g. J E Kwoka and D L Moss, "Behavioural merger remedies: evaluation and implications for antitrust enforcement" (2011) The American Antitrust Institute 3-4.

⁹⁷² See official websites at <http://www.comcastspectacor.com/> and <https://www.aegpresents.com/>.

⁹⁷³ Case: 1:10-cv-00139 Final Judgment Anti-retaliation and Other Provisions Designed to Promote Competition at A.

remedy would prevent ‘leveraging’ power in either direction of the supply chain, prohibiting the merged entity from eliminating competition at any stage.

Moreover, in order to address the issue of Ticketmaster’s extensive clientele databases that could be used against potential competitors, the final judgment required that any client (venue operator) that chose not to renew a contract for primary ticketing services would be provided with a copy of all client and buyer ticketing data for that specific venue.⁹⁷⁴ In addition, Live Nation Entertainment was not to disclose any client ticketing data to any of its employees, unless required by their specific job functions.⁹⁷⁵ Finally, Live Nation Entertainment was prohibited from acquiring directly or indirectly any competitor in the market for primary ticketing without prior notification to the plaintiffs, and it was also prohibited from reacquiring any part of the divested assets.⁹⁷⁶

Ultimately, just before the issue of the final judgment in July 2010, the DOJ promised to keep a “*watchful eye*” on the merged entity for a decade.⁹⁷⁷ Christine Varney characterised the settlement as “*vigorous antitrust enforcement - only with a scalpel not a sledgehammer,*” and used Shakespeare’s words to emphasise that the specific remedies sought to “*make assurance double sure*” and guarantee that concertgoers, artists, and all stakeholders eventually benefit from the settlement’s results.⁹⁷⁸

5.3.5 Concluding remarks on Live Nation and the future of live music promotion

The reaction to the merger was fierce, and LNE was characterised as ‘Monsternation’, ‘Satan’s Box Office’, and even ‘Microsoft of the Music World’.⁹⁷⁹

⁹⁷⁴ DOJ, The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective, March 18 2010 at B, available at <https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective>.

⁹⁷⁵ Ibid at B.

⁹⁷⁶ Ibid at sections XII Notification and XIII No Reacquisition.

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ See e.g C Walter, “Ticketmaster, Live Nation consider merging, destroying concertgoing forever” (2009) February 4 The Consumerist, available at <https://consumerist.com/2009/02/04/ticketmaster-live-nation-consider-merging-destroying-concertgoing-forever/>.

Bruce Springsteen spoke of “*abuse of fans.*”⁹⁸⁰ Further concerns about the concert-going experience had already been raised by New York hardcore pioneers Sick of it All:

*“in New York Live Nation owns everything. Every venue is a Live Nation venue and if you don’t comply with the rules you are left with no other option... this has changed the way we reach out to our audience.”*⁹⁸¹

It is argued that the DOJ had failed to properly realise the pivotal for the music industries times, and was not able to oppose this jigsaw merger between Ticketmaster and its nascent, aggressive competitor.⁹⁸² Moreover, the business model operating in the live music industry was indirectly acknowledged as pro-competitive, building on efficiencies produced by vertical integration, with the problem being the size of the specific parties. However, a similar observation to the European Commission can be made: the DOJ took a compartmentalised approach and assessed one part of the business model (ticketing), instead of appreciating the business model holistically vis-à-vis the consumer.

Nevertheless, the present thesis argues that the end consumer is faced with a business model able to foreclose access to content, and that even further, this content is not dissimilar from the content offered by the oligonomy, as evidenced by end consumer consumption patterns. Faced with a merged entity the size of Live Nation, whose past even reveals close connections with the traditional oligonomy, does not look positive for the future. If anything, speaking strictly in *economic welfare* terms, the prices of tickets have skyrocketed in past years, to the point of even being considered a luxury.⁹⁸³

⁹⁸⁰ D Kreps, “Bruce Springsteen ‘furious’ at Ticketmaster, rails against Live Nation merger” (2009) February 4 Rolling Stone, available at <http://www.rollingstone.com/music/news/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger-20090204>.

⁹⁸¹ Lou Koller interviewed for Metal Hammer magazine Greece, by the author of the present (2010) 304 Metal Hammer.

⁹⁸² For a complete picture, also compare with the former UK Competition Commission’s clearance of the merger, as per above (n 924).

⁹⁸³ E.g. R Jones, “Out of tune: how music festival ticket prices keep moving on up” (2015) May 2 The Guardian, available at <https://www.theguardian.com/money/2015/may/02/music-festival-ticket-prices-rising-latitude-inflation>, and “Live Nation calls for more aggressive ticket pricing from artists” (2016) March 13 The Financial Times, available at <https://www.ft.com/content/d37c634c-e777-11e5-a09b-1f8bod268c39>.

For the sake of completion, in order to assess the efficiency of the proposed remedies, it should be acknowledged that Anschutz Entertainment Group, LNE's competitor, is indeed financially viable and vertically integrated, as envisioned by the DOJ. As per its official website, it owns, controls or is affiliated with a collection of companies, including over 100 of the world's preeminent facilities such as the STAPLES Center in Los Angeles and The O2 in London.

All of these “are part of the portfolio of AEG Facilities; AEG Merchandising, a full service merchandising company; and AEG Global Partnerships, responsible for worldwide sales and servicing of sponsorships naming rights and other strategic partnerships.”⁹⁸⁴ AEG Presents, the live music division “is comprised of touring, festival, broadcast and special event divisions, fifteen regional offices and owns, operates or exclusively books thirty-five state-of-the-art venues.” It represents names such as Bruno Mars, Bon Jovi, Paul McCartney, Taylor Swift, and The WHO. It remains the largest producer of music festivals in North America (including Coachella Valley Music & Arts Festival and New Orleans Jazz & Heritage Festival). Lastly, AEG is integrated into ticketing through its AXS platform.

Comcast-Spectator is mainly active in the promotion of sporting events. However, through its Spectra division, it is also a third-party venue manager, a food and drinks supplier, and it offers ticketing and fan management services to the overall MICE (meetings, incentives, conferences, and events) industry.⁹⁸⁵ As such, it is not really ‘obvious’ where and how it is posing a competitive constraint to the other two companies.

Therefore, even though the DOJ succeeding in creating (at least one) viable competitor to LNE, it did so by facilitating the creation of a new oligopoly (or perhaps an oligonomy) in the overall artist-to-fan experience, at least in the US. Keeping a watchful eye, as Christine Varney once promised, remains of paramount importance to secure end consumer welfare.

This aside, the present thesis has tried to show that the end consumer faces double foreclosure vis-à-vis products considered substitutes or complements, and this has

⁹⁸⁴ AEGWORLDWIDE official website, available at <http://aegworldwide.com/about/companyoverview/companyoverview>.

⁹⁸⁵ More on Spectra at <http://www.spectraexperiences.com>.

been a direct result of the business models operating in the music industries. The evaluation of the merger between Live Nation and Ticketmaster came to attest that this is indeed the case. Despite the operation of novel and innovative business models in the *music industries*, end consumer welfare has yet to be addressed in a direct manner. The difference in the live music industry as opposed to the traditional oligonomy however, lies with the fact that the former came as a reaction to the market failures brought by the latter. Hence, history has shown that end consumers, when faced with a dilemma, can 'vote with their feet'. To that however, comes the ever-expanding hand of both the old oligonomy and of the new gatekeepers, seeking to engulf what is valued, thus leading to inevitable cycles of consolidation. This is met by the inability of the competition authorities to 'see things' from an end consumer perspective.

Additionally, the fact that new, innovative business models operate in the *music industries* (like the vertically aligned live music promoter), has been attested since the beginning of the thesis as inviting intervention with respect to the promotion of innovation and competition. This is not miles away from what Christine Varney promised when LNE's competitors were being created. Even if the DOJ's intention was 'noble' at the time, the inability to address foreclosure and access renders this endeavour incomplete (e.g. applying the SSNIP test in the narrow ticketing market). Nevertheless, it can be observed that thanks to 'creative' structural and behavioural remedies, competition design can be possible in this context. However, it is crucial that the end consumer has a key role to play in it.

Some key thoughts and reflection on these, as well as on the overall work, follow in the subsequent, concluding chapter.

6 'YYZ': *Concluding Remarks and Further Reflections*

The thesis has shown that the music industries are in need of policy design capable of accommodating their business models, in order to safeguard consumer welfare and promote innovation and competition.

The thesis has attempted a long journey, and not only in historical terms. Starting from the time when an industry for copyright exploitation, operating under a stable business model and catering to the mass market, was born, it reached the current narrative of the *music industries*, characterised by fast-paced and consumer-led business model innovation. The thesis 'stopped' along the way to introduce the most important developments in business models and technology and contemplate on their relationship with the law. Furthermore, this 'journey' reached the most relevant jurisdictions for both industry-specific and competition-specific reasons. Thus, it provided a holistic appreciation of the arising issues and identified common patterns in the US, the EU, and in the UK. Even though a plethora of patterns, arguments, and issues emerged, the thesis is concerned with the evaluation of its main question: has a role for competition law and policy been established through this journey? Are the music industries due for intervention through competition design?

Hence, among a wealth of arguments raised along the way the thesis focused on the two most prominent themes, as emerging by the research conducted: the safeguard of consumer welfare and the promotion of competition and innovation. The thesis concludes that in both areas shortcomings were identified throughout the years and across jurisdictions, not least due to the particularities of the business models in operation. It is indeed the role of competition law and policy to address these explicitly and place the end consumer in the forefront of both market and legal developments. To this aim, the thesis employed business model literature, especially as developed by Alexander Osterwalder's *Business Model Generation*, in hope that it would enable the appreciation of both the role of the end consumer in the supply of

the music product and of the innovative process in the music industries, in the face of *business model innovation*.

Following this narrative enables the justification of competition policy making: a market characterised by business model innovation following ‘disruptive’ patterns of consumption, is a market that needs to safeguard the smooth operation of competition between those purporting to provide what the consumer values. In other words, competition policy should ensure that end consumers end up ‘better off’ in the markets for the consumption of music, whilst acknowledging the bottlenecks that an intellectual property product is bound to attract.

In any event, the history of the music industry since its inception has offered grounds for questioning the ability of the competition authorities and the legal regimes in operation to *prima facie* raise the appropriate concerns or to successfully ‘see them through’. It was further attested that, even when accurate relevant concerns were raised, the fast-paced nature of the music industries moving in cycles of consolidation, made their holistic evaluation rather impossible. In its most practical form this was evidenced by the lengthy cases and investigations brought forward by the relevant authorities, even spanning across decades as in the case of Columbia. Indeed, whereas the FTC was concerned with the anticompetitive practices of a single company, the market where that company operated had altered drastically by the time of the appeal in front of the administrative court. This was also the case in the merger between Sony and BMG, despite the passing of the time and the crossing of jurisdictions. It follows that the business model the traditional music industry operated, and probably more recent business models as well, transcend jurisdictions and give rise to the same causes of concern: end consumer welfare under an oligonomic prism.

Apart from the oligonomic business model and the issues it raised with respect to end consumer welfare, the thesis identified that the *music industries* are also able to justify competition policy design, should they be viewed as a ‘business model playground’ thriving in innovation, with respect to the way value is generated, marketed, delivered, and ‘measured’ by the end consumer. In that regard, the role of competition policy is to guarantee that this continues to be the case. Safeguarding the competitive process for the ultimate benefit of the consumer is paramount to the

prolongment of competition in the music industries, where the oligonomy of the past still operates and where new ones are born.

6.1 Key findings

Addressing the above, the chapters of the thesis reached the following conclusions: the *first* chapter, also acting as an introduction, set out to phrase the lacuna at the intersection of competition law and the music industries by raising the relevant research question and respective hypothesis. As such, first and foremost it aimed to identify that the ‘music industries’ debate is in fact an end consumer debate and that all relevant issues should be evaluated under this light: a market designed to deliver a homogeneous product to the mass market top-down is not a market where much attention is paid to end consumer welfare as such. Hence, when the end consumer started disrupting the ‘market status quo’, the resulting business models were constructed around the provision of products alternative to the one that the traditional oligonomic business model had always offered. Nevertheless, as identified in more recent cases,⁹⁸⁶ newer and innovative business models regarding the method of the delivery of the recording still operate within the oligonomy, offering new channels and partnerships to those that still bottleneck the music product. If anything, history has shown that since the oligonomy moves in cycles of consolidation, such concentration is still imminent, if it has not already occurred.

Additionally, the first chapter argued that since the music industries are characterised by innovation in their business models, this on its own can also justify competition policy making, as proposed *inter alia* by Potts and Cunningham with respect to the overall creative industries. Furthermore, the discussion on business model innovation invites a closer evaluation of what a business model actually is and how it can assist in the justification of relevant policy making.

It was examined that business model literature has been employed in the past with respect to the music industries and more generally with respect to industrial organisation. Thus, its employment can be *prima facie* justified. Subsequently, the thesis hypothesised that a specific business model generates a specific market and

⁹⁸⁶ EMI ‘break-up’ cases.

that it is this market that competition law should acknowledge in the relevant cases and market investigations. Further, it was argued that business model literature can place the end consumer in the centre of attention, evaluating developments from an end consumer point of view. As such, it can help competition authorities adopt a holistic approach to defining a relevant product market without risking overly departing from their traditional narrow perspective; a business model perspective can help by introducing the question of how does the offering reach the end consumer and what constraints are identified along in the way, in the face of the relevant Building Blocks.

After having established the relevance of business models in both the music industries and competition law, the thesis sought to address business models in markets for music in particular. To this aim, the second chapter evaluated the traditional business model of the music industry as constructed around copyright exploitation. The second chapter therefore, examined how an industry for dealing in musical recordings was born alongside its dominant business model. Indeed, the second chapter addressed the relationship between copyright and business modelling, aiming to assess whether the law impacts the business model or vice versa. To this aim, it was presented that the industry for the provision of the patent-protected hardware turned into the industry for the provision of the copyright-protected software, once it made commercial sense to do so; once the law provided the necessary protective framework in the face of copyright accretion that would justify the respective return on investment. Thus, the business model of the music industry is a de facto monopolistic business model, able to sustain only those players that channelled parent funds into the marketing and the delivery of the music product top-down.

Ultimately, the second chapter recognised the importance of competition law in a IP-centred industry, even though the justification would become clearer later in history, when this top-down designed market stopped catering for what the consumer valued (what the thesis describes as a market failure). Additionally, this initial stage of the music industry is characterised by an era of relevant growth, as the commercial activity of dealing in music becomes established as an industrial practice, seeking to generate surplus value in its respective market. The second chapter concluded with the realisation that the foundations of this oligopolistic, or

oligonomic, industry were laid since the industry's very first steps. It was a matter of time before the foreclosure of the end consumer would become evident.

In this vein, the third chapter proceeded with the analysis of business model evolution *per se*, highlighting the establishment of a dominant and omnipresent oligonomy bottlenecking the provision of music through the continuous absorbance of the niche (the smaller independent firms) and of additionally arising 'disturbances' e.g. technological developments. As the market resulting from the dominant business model was characterised by the top-down delivery of the recorded product, little attention was paid to the end consumer, but for research conducted in cultural studies. Thus, through the presentation of the supply-side of the market, the operation of the dominant business model by the members of the oligonomy became clearer, as did the issues of actual content foreclosure. Turning to the demand side, it was shown that little to any attention had been paid to the end consumer in literature, a key characteristic of a mass market narrative.

The role of the end consumer was pronounced only in the digital era, once alternative ways of consumption started to emerge, firstly through the sharing culture enabled by the internet. The thesis examined a number of empirical studies conducted on the demand side, trying to evaluate the role of end consumer and the generation of new and innovative business models as a response to what the end consumer actually values. The thesis acknowledged the existence of patterns of complementarity and substitutability between products for music and contemplated on whether these should be identified as relevant product markets for music from a competition law perspective.

Indeed, in that regard the third chapter of the thesis, examining business models from a historical perspective, commented on how the competition authorities, and the US Federal Trade Commission in particular, had shown an interest in 'approaching' the oligonomy in the past e.g. through regulatory intervention, even though this did not bear any fruit. This way, the third chapter laid the foundations for the evaluation of the stance of the competition authorities primarily in the US, as home of the relevant legal developments in both intellectual property and in antitrust law, and subsequently in the EU, and in the UK.

In the early 2000s, a plethora of new and innovative business models emerged, centred around end consumer's consumption patterns. This era was further marked

by the emergence of the 'music industries' discourse. As the traditional oligonomic business model seemed to be surpassed by new and innovative ones, competition policy was invited to ensure that the end consumer remained in the forefront of the developments, for fear that the music product would be further foreclosed. Additionally, the fact that this 'multiple business models' era is seen as an era of industrial innovation justifies competition policy making with respect to the promotion and sustainability of competition and innovation *per se*.

Against this background, the thesis proceeded with the evaluation of the relevant interventions, investigations, and merger cases. To this aim, two chapters were devised, dedicated to ex post and ex ante evaluations. The role of the competition authorities and the courts was emphasised with respect to the perception of the business models and the music industries in general. As such, the need to approach several Building Blocks was established. Hence, the radio was chosen as an attempt to regulate, or rather deregulate, an aspect of the oligonomic business model. Investigating the US radio offered a wealth of evidence of power consolidation in the business model itself. Further, it showcased the ability to foreclose what the consumer values from various angles (e.g. the emergence of Clear Channel and Live Nation).

That aside, in terms of assessing the traditional oligonomy itself, it was posited that the legal regimes in place, both in 1960s US and in 1990s UK, were in no position to successfully intervene in the anticompetitive and welfare reducing practices of the oligonomy. This was either a result of the encounters with the administrative courts in the US, or of the 'lack of purpose' and the accompanying vagueness that characterised the UK competition law landscape at the time.

Additionally, the thesis attempted to shed light into the role of end consumer in the market for music as perceived by the intervening authorities, only to conclude that the role is contested at best. As far as the ex post investigations are concerned, the end consumer's role is reaffirmed as the mass market that would purchase the oligonomy's offering, the question being *how*.

It was shown that the narrow product markets that the competition authorities define, leave little room for end consumer involvement and follow the supply chain of the product within the confines of the business model instead e.g. downstream to retailers (as it would be further attested in the merger cases reviewed in the *fifth*

chapter). Thus, even when the authorities' intentions are 'noble', their ability to assess the oligonomy and the role of the end consumer therein remained questionable.

What further follows, and is indeed repeated across jurisdictions, is that the music industry's main players remained in *fierce competition* with each other for the few major names that would subsidise least successful artists, perpetuating the business model in operation. From this realisation stemmed the ever-lasting issue of *same prices*, as first addressed in Columbia and scrutinised in the MMC report. Ultimately, *sameness in prices*, seen as the result of 'fierce competition', was treated like a non-issue, despite the arising remark made by the thesis: if the so-called 'fierce competition' results in similar prices, an issue unchanged through the years, then the 'fierceness' or even the existence of *effective* competition should be re-visited.

In the aggregate, the two investigations into the old business model of the oligonomy failed to bear any fruit and were criticised in their inability to do so. This approach remained in line with the viewing of the oligonomy as catering to the mass market. The neglected end consumer relationships that Osterwalder had included in his presentation, were configured as such. Even when attention turned to the other side of the bottleneck, the oligopsony towards the artists, the oligonomy's practice of exclusive contractual relationships was not found to impact on the public interest directly, as the matter concerned the artists themselves (as per the MMC report).

It was argued that a doubly oligopolistic business model, at the core of which lies the issue of access to the music product, needs to be regarded as such. Only then can the issues of foreclosure vis-à-vis the end consumer be clearly observed.

It follows that similar observations were made in the *fifth* chapter, which addressed merger control in the oligonomic business model and in business models operating in the *music industries*. Even though the FTC in *Warner* was able to address the role of the end consumer at product market definition stage and secure a much-needed victory against two key oligonomic players, it missed the opportunity to accurately assess the substitutability between 'official' and 'pirated' music, and as such it failed to adopt the end consumer point of view.

As far the EU merger control regime is concerned, this was evidenced to be affirmative of the oligonomic business model, acknowledging both the continuous

absorbance of niche as ‘normal’ and the absence of the end consumer from the product’s supply chain. Furthermore, the merger between Sony and BMG came to highlight the EU merger control regime’s inability to deal with the fact-paced developments occurring at the time of the notification. Additionally, this case highlighted the shortcoming of merger control to adopt a holistic approach vis-à-vis the rich past of the oligonomy that could have potentially identified anticompetitive conduct. Ultimately, ‘bouncing’ between competitive assessment and judicial review, showcases stalling effects like the ones observed in the US (in *Columbia*).

Finally, at the time of the second approval, the merged entity was found to operate in a rather competitive environment characterised by business model innovation, where collusion would not be possible to sustain. Here, the thesis argues that a legal regime not equipped with the ability to evaluate foreclosure in an oligonomic business model but affirming a competitive environment instead, is in need of updating with respect to end consumer welfare. This, the thesis argues, is possible by adopting a business model approach.

Indeed, when the thesis turned to the evaluation of the most recent cases attesting the ‘break-up’ of EMI, it was argued that perhaps the separation of a major’s recording and publishing activities could provide an answer to consolidation. Nevertheless, the relevance of this measure in the case of the ‘failing’ EMI and the fact that these ‘legs’ were acquired by the remaining members of the oligonomy, should be viewed with extra caution.

Nevertheless, the post-Sony lengthy and detailed assessment that the Commission attempted was noticed and so was the ‘enhanced’ approach, reaching the ultimate consumer or *end user* specifically. Here however, attention should be paid to the fact that the end consumer is faced with new *channels*, which support the same oligonomic business model leading to re-enforced consolidation, should attention not be paid to access as such. Thus, even though the final EU cases that the thesis investigates, are as ‘up-to-date’ as they can be, it is still argued that the EU competition regime, and more specifically merger control, need to adopt an end consumer focused narrative within the auspices of the SIEC test. This narrative should be able to assess the provision of the product via a business model’s operating channels, as passing through the supporting Building Blocks.

Hence, the holistic and business model inclusive approach would help appreciate not only end consumer access and the role of the oligonomy, but also the role of new supportive channels, such as the digital retailers and subscription services providers. It is repeated that at a time of business model innovation, or in other words in a 'business model playground', competition policy is invited also with respect to safeguarding innovation and competition as an end in itself. However, attention should be paid to the fact that these new and innovative business models now operate within the oligonomic business model, acting as its new *channels* and *partnerships*.

Further, attention should be paid to trends of foreclosure in formerly considered as ancillary industries, such as live music promotion. Not only is the end consumer faced with new consolidated gatekeepers born out of strong corporate parents, such as Live Nation Entertainment, but also new concerns arise in the discussion of access to music *per se*; concerns that current competition law regimes are not able to address, since they insist on the adoption of compartmentalised views of the markets for music. The need to 'broaden' the perception of what a market for music consists of by adopting an end consumer perspective is therefore critical for competition assessment. Indeed, the business model that live music promoters the size of Live Nation operate, has managed to 'tap into' the complementarity between the recorded product and the live music ticket, as seen from the point of view of the end consumer, and expand into the market for the 'overall music experience' instead. If the 'overall music experience' constitutes a market on its own, then there should be a possibility for competition law to appreciate exactly this.⁹⁸⁷ Ultimately, with respect to the Live Nation/Ticketmaster merger, the thesis 'welcomed' the DOJ's attempts to introduce 'creative' remedies and sustain competition. However, this was done by inviting new vertically aligned powerful players and hoping that the end consumer benefits indirectly. Apart from inviting foreclosure as in the case of the traditional oligonomy, the thesis observed that the live music industry is characterised by an innovative vertical business model and so, competition policy is invited as resulting from Potts' and Cunningham's *innovation model*.

⁹⁸⁷ At this point, the thesis further invites empirical research to be conducted on the effect of behavioural and structural remedies imposed in the relevant cases in both the US and the EU, in order to complement the picture.

To summarise this section, it should be noted that even though the aim of the present is not to offer a comparative approach to jurisdictions but to follow a business model journey instead, some inevitable conclusions can still be drawn, especially between the EU and the US, as per above.

In the field of merger control par example, the *post-Airtours* ‘era of convergence’ with the US regime was noted in the relevant chapter. However, the more recent cases of *EMI* and *Live Nation/Ticketmaster* allow for divergent realisations. The EU regime appears to ever-expand its scope and to remain more faithful to both its econometric and jurisprudential approach, attempting to address ancillary concerns by the letter of the law and the EU Merger Regulation more specifically. It was argued that business model concerns can find their way into the narrative, as cultural diversity concerns seem to do. In contrast, the US merger control regime and antitrust enforcement more generally, remain an administrative exercise, undertaken by the relevant authorities, and prone to the country’s political landscape (e.g. a Democratic administration being more rigorous vis-à-vis antitrust enforcement than a Republican one). Overall, the EU seems to be moving towards a more end consumer-compatible stance as opposed to the US, whereby the end consumer is traditionally excluded from the competitive process and will reap the benefits indirectly.

Both however, seem to be favouring creativity and innovation when it comes to designing and proposing remedies, the impact of which should be measured by subsequent research. At first instance, it can be agreed upon that remedies can provide a modern and efficient way of antitrust enforcement, as Christine Varney once argued, provided that the jurisdictions do not mirror each other’s practices (despite their convergence and the globalised business landscape) and arrive at bespoke and market-informed solutions instead.

Additionally, both regimes seem to invite lengthy processing times due to procedural restraints either on EU level or at the US administrative courts. Here, both jurisdictions appear to be in need of more flexibility, when dealing with fast-paced industrial advancements and innovative business models. Going back to the very beginning of the thesis, where it was asked “*how much flexibility and ‘broadening’ can the authorities accommodate,*” it is suggested that any policies to be formulated should take this ‘hurdle’ into consideration. Hence, flexibility should not only

concern itself with the advancement of consumer welfare in substantial terms, but also in procedural ones. The thesis questions to what extent inviting the competitors in the legal process (the *IMPALA appeal*) and excluding the end consumers altogether in the US (e.g. lack of standing in *re Live Concert Antitrust Litigation*), answers questions about consumer welfare as such.

6.2 Key remarks: one step beyond

6.2.1 Markets for music

Having aligned each chapter with its crucial observations, this concluding part can now offer some further remarks on the key issues identified above. It is worth repeating that, even though the thesis was initiated by the need to examine relevant product market definition in the music industries with *Live Nation/Ticketmaster* as an initial point of concern, this demand-driven perspective helped the thesis embark on a quest to identify *why* and *how* the end consumer remained disenfranchised through the history of the music industry and consider whether this remains the case.

This ‘tale of disenfranchised consumer’ helps reflect on the need to perhaps align the concept of a market, as resulting from business models in operation, and the concept of a relevant product market in competition law. Indeed, the thesis acknowledged that these concepts differ in a legal context yet, the prevailing questions could perhaps be: *why*, and *should they?*⁹⁸⁸

Indeed, viewing a market as the social mechanism or the construct for exchange purposes that it is, can assist in the placement of the end consumer in the evaluation followed by competition authorities. This realisation could have been crucial at the time of market failures: the fact that the price of the oligonomy’s traditional offering was valued at close to zero, is a signal that conveys information about what the market is and about the end consumer’s role in it.⁹⁸⁹ This signal should have been

⁹⁸⁸ Whilst the thesis acknowledged the discrepancy between these concepts, future research is invited on the possibilities to bridge the ‘gap’, with the participation of various stakeholders and representatives of marketing and strategy studies.

⁹⁸⁹ As also presented in the overall creative industries discourse by Hartley et al. (n 15) 132.

‘picked up’ in a competition law context, as it would have assisted in the definition of a *market* as such.⁹⁹⁰ It was established however, that this is not possible for as long as the competition authorities’ assessment remains closer to the perception of an *intermediate* market⁹⁹¹ at relevant product market definition stage.

Further, as the inherent design of the broader creative sector is to capture as much value as possible and maintain a diverse portfolio of content, this explains the monopolistic or oligonomic in the present case, nature of the markets in operation.⁹⁹² This of course, affirms the relevance of the respective competition policy to safeguard both access and the competitive process *per se*. It is therefore in the best interests of competition to adopt an end consumer narrative and depart from the cultural policy debate e.g. one that seeks to identify externalities in the creative output⁹⁹³ in order to justify intervention. Even though this approach crept into EU merger control with respect to cultural diversity, it was worth considering whether this perpetuates rather than addresses the main issue; a cultural output approach justifies the mass market narrative, whereas a consumer-focused approach can address access and bottlenecks to content as such. Indeed, this approach is easier to achieve on EU level, exactly thanks to the Horizontal Merger Guidelines providing for the role of end consumer or user to be evaluated in merger cases.

Going full circle, markets for music should be understood as markets in their literal sense and it is worth elaborating on the possibility to ‘transplant’ this approach in a competition law context. The business model narrative proposed herein can help accommodate such end consumer concerns, as the analysis conducted throughout the thesis has shown. Viewing markets as resulting from business models and considering how consumers access what they value, can be a way forward for the competition authorities concerned, especially in the context of markets for music,

⁹⁹⁰ For the sake of clarification, this is not a debate on whether public intervention with respect to market failures can arise from externalities. Here, the debate is internalised as to appreciate whether the provision of what the end consumer values is met with the relevant supply, in an efficient and welfare enhancing manner.

⁹⁹¹ Meaning a market where a firm’s output becomes another firm’s input, or a ‘wholesale’ market as seen in the cases examined.

⁹⁹² As Ted Cohen in Bishop (n 296). Also see R Caves, *Creative Industries: Contracts Between Art and Commerce* (2000).

⁹⁹³ ‘Too little art’ being generated as a negative externality in a cultural market discourse, Hartley et al. (n 15) 133.

meaning markets that more recently responded to end consumer demand and redefined their business models and dynamics.

6.2.2 *Business models and innovation*

This realisation brings us closer to the concepts of business models and innovation, around which the thesis is construed. Competition policy appreciates and interferes to promote innovation, and as proven thus far, business model innovation does constitute a form of innovation that fits in a competition law narrative. The thesis set out to align the concept of markets with their accompanying business models, hypothesising at first instance that a business model results in a specific market for the provision of an offering to the end consumer. The third chapter of the present was dedicated to this point exactly, examining first and foremost, the gatekeeping dimensions of an oligonomic business model. The subsequent discrepancy between this realisation and the way markets are defined in the jurisdictions examined, followed right after.

Against this background, the thesis argued that it is not only market failure that justified intervention, but also innovation in the face of business modelling. In fact, in the first chapter of the present it was argued that borrowing from the *Innovation Markets* discourse, could assist in the bespoke treatment of the creative sector as well. Even though for the reader in 2017 this debate perhaps sounds a bit dated, some concepts are still relevant to the creative markets discourse, including the future-facing negative effects on competition based on the parties' market positions and on high levels of concentration.⁹⁹⁴ Here it was argued that "*speedy and efficient introduction of products... as well as competition in this market*"⁹⁹⁵ is key. This characteristic was found to be borne by the music markets, where competitors to the oligonomy could exist only through a consolidated nexus of *channels* in a business model context. Hence, further research and contemplation is invited with respect to this perspective. Future market development is indeed of great concern in the context of the music and the overall creative industries, especially in a business model innovation terms.

⁹⁹⁴ Here, Marcus Glader speaks of concentrated capabilities in R&D, however A&R could be accounted for as well. In *Innovation Markets* (n 14) 313.

⁹⁹⁵ *Ibid* 314.

Indeed, safeguarding the innovative process is of paramount importance to consumer welfare and the role of competition policy is to sustain healthy levels of competition for the consumer's benefit through the relevant laws. Perhaps, introducing the concepts of business modelling and innovation in this debate can bear the sought-after results, by establishing an end consumer-centred perspective. Leaving the end consumer outside the supply chain of the product offered, does not help in that respect. Introducing the possibility for competition law and policy to 'do' business modelling as such, especially since the concept has started figuring in the relevant cases one way or the other, is of critical importance, the thesis argues.

This perspective could have been accommodated in the more recent merger cases in both the EU and the US, as it would have enabled the DOJ to place consumer consumption patterns with respect to innovative business models in live music into perspective and 'foresee' foreclosure as such. Additionally, a business model perspective could have addressed the interventionary attempts and the deregulation of the radio in the US as Building Blocks of the same business model. To further illustrate, a business model approach could have also justified the artist side of the oligonomy in the MMC report and address the issue with the "*sameness in prices*" as such. Of course, the purpose of the thesis is not to argue that business models are a panacea for anticompetitive concerns. However, adopting this narrative can result in a diversified perspective of the operation of the respective markets and can also help address non-previously answered concerns.

Thus, borrowing from what Marcus Glader once argued with respect to the *Innovation Markets*, a more future-facing approach is vital. Indeed, this could have enabled the FTC to successfully justify its interventionary attempts even at the time of *Columbia*, when all the signs were evident; however, they failed to fit the box that the law prescribed. If anything has been observed with almost mathematical certainty throughout the thesis, it is that taking screenshots of the music industry, or even the music industries more recently, for competition law purposes is not enough to shed light into the long history of foreclosure and consolidation. The cycles in which the music industries move call for such a holistic evaluation. A business model perspective can assist in the future-facing evaluation of anticompetitive practices and concerns, and it can do so by delving into the distant past. This way, the role of the end consumer becomes pronounced and so does the purpose of promoting innovation and competition.

6.2.3 *Music industries as a key component of the creative industries*

Last but not least, the thesis seeks to open the door to the study of the same issues as pertaining to the overall creative industries, as per the first chapter of the present. The application of business modelling in competition law cannot be confined to a music industries debate, but can expand and be accommodated into the overall creative sector. Indeed, in order to study the music industries, key concepts were borrowed from the studies conducted by Potts, Cunningham, and Hartley et al. in the aggregate creative industries. Examining the relationship between business model innovation and other copyright markets, as prone to the same issues of foreclosure and monopolisation, can offer fresh and enlightening perspectives in the fields of both competition law and cultural studies. The groundwork has been laid since the late 1990s, as the creative industries discourse entered an era of de-clustering with respect to research and study, with much being written on developing policies and programmes for the sustainability of particular creative sectors. With the concepts of markets and industries coming closer together in the creative economy discourse, it is high time the end consumers were appreciated as a market participants as well, in addition to any cultural and aesthetic dimensions they might have. Thus, this thesis can assist in this interdisciplinary dialogue in both the *jurisdictions* identified as leaders in the creative economy and in other countries where similar patterns arise.⁹⁹⁶

6.3 *Concluding remarks on the thesis*

As a final remark, the thesis has also laid out two retrospective analyses of the music industries that can be employed as tool in any related future research project: a business model overview and a competition law retrospective analysis of the key market investigations, antitrust, and merger cases. This way, the thesis also hopes to serve as a canvas or point of reference for future work. Even though the scope of the present work remained limited to the confines of answering the set research

⁹⁹⁶ e.g. in Australia, home of Hartley, Potts, Cunningham et al.

question, the wealth of the material consulted cannot be underestimated. It was mentioned earlier in the thesis that good knowledge of history can avoid the repetition of similar mistakes in the future. This cannot be more accurate in the current state of the music industries, should one take into account the aforementioned cycles of consolidation and concentration.⁹⁹⁷ Having conducted an analysis of the key cases in the key jurisdictions, the thesis can confirm that this is indeed the case. Thus, the present thesis can further fit in a ‘Global Competition’⁹⁹⁸ discourse, as the music industries are characterised by multinational oligonomists and by ever-expanding new players.⁹⁹⁹ It follows that under this lens jurisdictions, consumers, and competitors can learn from any shortcomings of the past and plan a viable, competitive future accordingly.

Similar observations can be made about the employment of business model literature in competition law more generally, should one consider the overarching question of whether there is and whether there should be room for this type of literature in a competition law context.¹⁰⁰⁰ Even though this debate can deviate substantially from the purposes of the present, more thinking is invited also in the context of aligning the perception of markets with the aims of competition law; something the thesis posits can be achieved through the employment of a business model and end-consumer perspective.

Ultimately, the thesis has shown that when the narrative excludes the end consumer as such, so does the benefit of competition. This is true not only in the assessment of the creative or the music industries, but in a market-based economy as a whole.

⁹⁹⁷ Meaning the ability to internalise disruptive forces whenever the oligonomy’s market shares are in peril, as seen in the 1950s and later the digital era.

⁹⁹⁸ See e.g. D J Gerber, *Global Competition: Law, Markets, and Globalization* (2010).

⁹⁹⁹ e.g. both LNE and AEG Live operate worldwide.

¹⁰⁰⁰ An example of this would be the software industry where integrated platforms operate. Similarly, the thesis can ‘feedback’ to the *Innovation Markets*’ discourse and provide a fresh reading.

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