FACILITATING COMPETITION BY PUNITIVE REGULATION

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In music licensing, powerful music publishers have begun – for the first time ever – to withdraw their digital copyrights from the collectives that license those rights, in order to negotiate considerably higher rates in private deals. At the beginning of the year, two of these publishing companies commanded a private royalty rate nearly twice that of the going collective rate. One view of this result is as a coup for the free market: constrained by consent decrees and conflicting interests, collectives are simply not able to establish and enforce a true market rate in the new, digital age. Another view of this result is as a pathological form of private ordering: powerful licensors using their considerable market power to impose a supracompetitive rate on a hapless licensee. While there is no way to know what the "market rate" looks like in a highly regulated industry like music publishing, the potential anticompetitive consequence of these withdrawals for artists, licensees, and consumers alike is clear: In industries with a tendency toward natural oligopoly – such as music licensing – network effects, parallel pricing and tacit collusion can work to eliminate meaningful competition from the marketplace. The resulting lack of competition threatens to stifle innovation in both the affected, and related, industries.

Normally, where a market operates in a workably competitive manner, the remedy for anticompetitive behavior can be found in antitrust law. In music licensing, however, some concerning behaviors – including both parallel pricing and tacit collusion – do not rise to the level of antitrust violations; as such, they cannot be addressed by antitrust law. This is no small irony. At one point, antitrust served as a check on the licensing collectives by establishing consent decrees to govern their behavior. Due to a series of acquisitions that have reduced the music publishing industry to a mere three entities, the collectives that are being circumvented by these withdrawals – and whose conduct is governed by consent decree – now pose less of a competitive concern than do individual publishing companies acting privately, or in concert through tacit collusion. The case of intellectual property rights, which defer competition for creators and inventors for a limited period of time, is particularly challenging for antitrust.

Running contrary to conventional wisdom, this Article posits that regulation – not antitrust – is the optimal means of opening the market for music licensing and maintaining competition therein. While regulation is conventionally understood to restrict new entry and to interfere with competition, this Article demonstrates that where a market is structurally noncompetitive, regulation can actually encourage competition by punitive the lack of it. While not without its drawbacks – primarily, an increase in the cost of private action – such punitive regulation in music licensing corrects anticompetitive behavior and ensures ongoing access to content and fair payment to artists, while supporting continued innovation in content distribution.

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