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The Long-Playing Blues: Did the Recording Industry's Shift from Singles to Albums Violate Antitrust Law?

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The Long-Playing Blues: Did the Recording Industry’s Shift from Singles to Albums Violate Antitrust Law?

Jeffrey Philip Wachs*

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* J.D., 2012, University of California, Irvine, School of Law. This Note is lovingly dedicated to my wife, Hannah, and to my daughters, Sylvia and Judith, for their constant support and encouragement. I am grateful to Professors Christopher R. Leslie and R. Anthony Reese for providing me with the inspiration and tools for this undertaking, to my editor, Jennifer Noelle Henry, for her insights and able assistance, and to the members of our beloved *UC Irvine Law Review*.

INTRODUCTION

Nineteen forty-eight was a pretty good year to go to the movies. Audiences could watch Humphrey Bogart contract gold fever in *The Treasure of Sierra Madre*, swoon over Moira Shearer's flawless pirouettes in *The Red Shoes*, or laugh at their favorite funnymen cavorting with monsters in *Abbott and Costello Meet Frankenstein*. But for every hit like *The Big Clock*, there were scores of low-budget, often lowbrow films like *Mr. Reckless* (in which a man tries to woo his sweetie through "daredevil oilfield exploits")¹ and *Caged Fury* (in which the city is at the mercy of an evil lion tamer)² that generated income to finance the more prestigious pictures. Indeed, prior to 1948, movie studios refused to license desirable films to theaters unless the theaters also took exhibition licenses, or booked, the lesser films. But the Supreme Court's 1948 decision in *United States v. Paramount* made the practice known as "block booking" an antitrust violation.³ Central to the *Paramount* Court's decision was the notion that it is anticompetitive conduct to leverage the value of one copyrighted work to force the license or sale of another.

In its *Paramount* decision, the Court extended its past holdings, which proscribed the tying of patented manufactured products, to nonpatented manufactured products. It held that compelling the sale of one copyrighted work with another unlawfully draws upon the monopoly power of the more desirable film to a less desirable film. Because the Court framed the decision in remarkably unbounded language, *Paramount* can be read to apply broadly to *all* copyrighted works. Thirteen years later, the Court extended the *Paramount* holding to apply to the licensing of films for television viewing in *United States v. Loew's Inc.*⁴

This Note pulls on this loose thread of the Court's jurisprudence and attempts to tie it around the practices of the recording industry during the second half of the twentieth century. It argues that, had a case ever been brought, the *Paramount* and *Loew's* decisions would have effectively damned the emerging practices of the recording industry as anticompetitive conduct. In the mid-twentieth century, the long-playing record album—a collection or "block" of songs protected individually by copyright—became the dominant means of acquiring popular music. Indeed, until the intrusion of digital technology and the Internet some five decades later, the album—not the single—was the foundation of the musical economy; this Note therefore refers to these five decades as the "Album Era." Innovations like iTunes gave the consumer the ability to purchase music in smaller units, and the resurgent popularity of the single appears to have

1. *Plot Summary for Mr. Reckless*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0040616/plotsummary> (last visited Oct. 26, 2012).

2. *Caged Fury*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0040196> (last visited Oct. 26, 2012).

3. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

4. *United States v. Loew's, Inc.*, 371 U.S. 38, 50 (1962), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006).

vindicated the song as the appropriate unit of musical measurement. This turn of events also raises colorable claims that, during the Album Era, consumers would have preferred to purchase only one song at a time rather than the entire album, and therefore the recording industry perpetrated an ongoing violation of the antitrust laws by compelling consumers to purchase unwanted songs along with the more desirable ones that motivated the purchase. Although the digital era has largely obviated the recording industry's ability to force consumers to accept (unwanted) bundled songs, this inquiry retains applicability to the present consumer market for copyrighted works when considering such practices as foreclosing a consumer's ability to purchase certain movies without taking others in a film collection, or "box set." Further, questions can be raised as to whether modern consumers of movies on DVD or Blu-ray are paying inflated prices for products that contain not just the film, but also the so-called "value added" material consumers must accept on the disc. Finally, one could argue that by forcing bundles of channels on consumers instead of allowing à la carte selections, cable providers effectively engage in impermissible block booking.

Part I of this Note highlights the jurisprudence surrounding tying generally, block booking more specifically, and later developments in case law that could affect the analysis of recording industry practices. Part II offers a brief historical survey of the recording industry during its late twentieth-century album heyday and its digital disintegration. Part III applies the Court's tying and block-booking jurisprudence to the recording industry's shift from single to long-playing albums for pop music.⁵ This analysis reveals that the advent of the long-playing record in 1948 ushered in an era of potential antitrust liability that was only corrected with the rise of the digital marketplace in the twenty-first century.

I. LEGAL BACKGROUND: ANTITRUST, TYING, AND BLOCK BOOKING OF COPYRIGHTS

Tying has long been held to be a per se violation of the antitrust laws. Early cases brought under the Sherman Act⁶ included suits against button-machinery manufacturers and printing-machine makers who forced the license or sale of unpatented goods with patented products.⁷ As the Court in *Illinois Tool Works v. Independent Ink* noted, tying arrangements were historically viewed as violations of four separate legal doctrines or laws: patent misuse, unfair competition under the

5. Previous authors have commented on the antitrust implications of recording industry practices, but none has analyzed in depth whether antitrust jurisprudence supports such claims. See, e.g., Stan J. Liebowitz & Stephen E. Margolis, *Bundles of Joy: The Ubiquity and Efficiency of Bundles in New Technology Markets*, 5 J. COMPETITION L. & ECON. 1, 27–30 (2009); Henry H. Perritt, Jr., *Music Markets and Mythologies*, 9 J. MARSHALL REV. INTELL. PROP. L. 831, 836 (2010) (referring to "tied sales").

6. Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (2006)) (covering antitrust).

7. See, e.g., *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912); *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 F. 288 (6th Cir. 1896).

Federal Trade Commission Act,⁸ section 3 of the Clayton Act,⁹ and as a contract in restraint of trade under section 1 of the Sherman Act.¹⁰ For claims brought under any of these laws and doctrines, Justice Stevens noted that “[i]n all of those instances, the justification for the challenge rested on either an assumption or a showing that the defendant’s position of power in the market for the tying product was being used to restrain competition in the market for the tied product.”¹¹

As antitrust jurisprudence has evolved, courts have most commonly analyzed tying as a violation of section 1 of the Sherman Act, which states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹² Thus, under the broad sweep of section 1, the consumer of the tied products becomes a party to unlawful conduct.¹³ Most vertical restraints—that is, downstream restrictions imposed by a higher party in the channel of commerce—are analyzed under the “rule of reason,” which requires a searching analysis of the purpose and effects of the restraint before finding it violates antitrust law.¹⁴ In contrast, courts historically deemed tying arrangements to be unlawful per se, with the purpose and effect of the restrictions being immaterial in light of the harms to competition created by the coercive sales arrangement.¹⁵ Because courts could not reach such considerations under a per se analysis (but could under the more forgiving rule of reason analysis applied in other antitrust matters), per se analysis was often harsh and unforgiving; hence, practices subjected to per se analysis were considered “condemned.”¹⁶

However, in recent decades the Court has softened its stance on tying claims. Since its 1977 decision in *United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*, the Court has resisted per se condemnation of tying arrangements.¹⁷ As the Court stated in *Jefferson Parish Hospital District No. 2 v. Hyde*, “per se

8. 15 U.S.C. § 45 (2006).

9. *Id.* § 14.

10. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006).

11. *Id.*

12. 15 U.S.C. § 1 (2006). Tying arrangements of commodities are also prohibited under section 3 of the Clayton Act. 15 U.S.C. § 14 (2006). Section 5 of the Federal Trade Commission Act also prohibits tying as an unfair practice. 15 U.S.C. § 45(a).

13. For a thorough critique analyzing tying under section 1, see Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust’s Concerted Action Requirement*, 60 OHIO ST. L.J. 1773 (1999).

14. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1219 (2008).

15. See 1 WILLIAM C. HOLMES, *INTELLECTUAL PROPERTY AND ANTITRUST LAW* § 8:2 (2012).

16. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984), *abrogated by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006).

17. See *Ill. Tool Works Inc.*, 547 U.S. at 36; *U.S. Steel Corp. v. Fortner Enters., Inc. (Fortner II)*, 429 U.S. 610, 622 (1977).

condemnation . . . is only appropriate if the existence of forcing is probable.”¹⁸ Nevertheless, courts have retained the per se label to invalidate tying practices, but have softened its bite by requiring a thorough analysis of the market as well as the purpose and effects of the arrangement.¹⁹ This analysis is more consonant with the rule of reason approach.²⁰ Prior to the *Illinois Tool Works* decision in 2006, the Court presumed that companies holding patents or copyrights held sufficient market power to force a sale, effectively rendering all tying of works protected by intellectual property law per se violations of the Sherman Act. Post-*Illinois Tool Works*, that presumption of market power has been eliminated in favor of a case-by-case analysis of whether the intellectual property rights holder actually enjoys sufficient market power to force the consumer into accepting the arrangement.

The modern test for tying, as enunciated in *Jefferson Parish*, requires (1) an assessment as to whether there are in fact two separate products in two separate markets being tied, (2) whether there is coercion or conditioning that compels a consumer’s decision to purchase the tied products, (3) whether the defendant has sufficient market power in the tying product market,²¹ and (4) whether there is a not-insubstantial effect on interstate commerce in the tied product market affected by the arrangement.²²

A. The Block-Booking Cases

The *Paramount* and *Loew’s* decisions established block booking as a per se form of tying that violated the antitrust laws. The *Paramount* Court emphasized parallels with patent law, upholding the lower court’s prohibition on tying and citing to the lower court’s reasoning relying on the principle that “the owner of a patent [is forbidden] to condition its use on the purchase or use of patented or unpatented materials.”²³ Drawing a connection to patent misuse, Justice Douglas explained the Supreme Court’s reasoning in proscribing the tying practice: “It is said that reward to the author or artist [from intellectual property rights] serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright.”²⁴ In other words, the very purpose of the copyright grant would be adulterated by block booking, which resulted in studios generating lower budget

18. *Jefferson Parish*, 466 U.S. at 15.

19. This shift is particularly evident in a case central to this inquiry, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

20. See *Jefferson Parish*, 466 U.S. at 28–29 (finding no per se tying arrangement after ten pages of searching factual analysis).

21. The *Fortner II* Court defined market power as “the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.” *Fortner II*, 429 U.S. at 620.

22. *Jefferson Parish*, 466 U.S. at 8.

23. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157 (1948).

24. *Id.* at 158.

(and often lower quality) films to pad out licensing contracts. The *Paramount* Court noted that

[t]he practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have.²⁵

In other words, the Court held that each copyright must fend for itself in the market, or risk antitrust condemnation.

The *Paramount* Court concluded that film studios were free to release their films in blocks, so long as they were offered at the exhibitor's option, stating that "[a]ll we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted."²⁶ For the purposes of this Note, it is important to highlight that, although the Court may only have contemplated that its holding would apply in the film exhibition context, the block-booking holding, read literally, applies to *all* copyrighted works.

Thirteen years later, the Court revisited block booking in the context of licensing theatrical releases to television stations in *United States v. Loew's*.²⁷ The practice was the same as it had been in the theatrical context, with Justice Fortas noting that to license "*Treasure of the Sierra Madre, Casablanca, Johnny Belinda, Sergeant York, and The Man Who Came to Dinner, among others, [a Plaintiff station] also had to take such films as Nancy Drew Troublesooter, Tugboat Annie Sails Again, Kid Nightingale, Gorilla Man, and Tear Gas Squad.*"²⁸ Once again, the Court rejected the practice. Here it found that, although the theatrical films competing with original TV programming comprised less than eight percent of television programming, each film's market power imbued by its copyright was not diminished:

The district judge found that each copyrighted film block booked by appellants for television use "was in itself a unique product"; that feature films "varied in theme, in artistic performance, in stars, in audience appeal, etc.," and were not fungible; and that since *each defendant by reason of its copyright had a "monopolistic" position as to each tying product*, "sufficient economic power" to impose an appreciable restraint on free competition in the tied product was present²⁹

By delving deeper into the tying analysis as applied to copyrights and block booking, the *Loew's* Court significantly muddied the waters. On the one hand, the *Loew's* Court recognized that each work is unique and a product of the skill and

25. *Id.*

26. *Id.* at 159.

27. *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006).

28. *Id.* at 41–42.

29. *Id.* at 48 (emphasis added).

talent that went into its making. Indeed, in a famous footnote immediately following the excerpted passage above, the Court noted the impropriety of “forcing a television station which wants *Gone With The Wind* to take *Getting Gertie’s Garter* as well as taking undue advantage of the fact that to television as well as motion picture viewers there is but one *Gone With The Wind*.”³⁰ But on the other hand, the Court expressly stated that it was the *copyright itself*, a government-given credential, that granted the tying product its monopoly power.³¹ It was this latter aspect of the Court’s holding that survived—the Court’s previous recognition of the varying levels of audience appeal various films might enjoy seemed to be cast aside in this opinion—and the “by reason of its copyright” reasoning became ingrained in the common law as the presumption of market power accorded to copyrighted works.³²

The advantages of block booking were clearly evident to the studios, as the practice facilitated price discrimination—that is, “a method of selling calculated to extract larger sums than otherwise would be possible.”³³ The studios also relied upon their ability to leverage the successes and failures of block-booked films together for budgeting and production purposes; the revenues received from a B picture like *Caged Heat* were pooled and applied toward more prestigious productions like *Sierra Madre*.³⁴ Nonetheless, the *Paramount* and *Loew’s* Courts found the proffered justifications that block booking was integral to studios’ finances unavailing.³⁵ The industry’s dependence on the practice was no excuse for antitrust violation.

Under the block-booking cases, then, any copyrighted work could become a tying product simply by virtue of the market power inherent in its own copyright.³⁶ The market power presumption accorded to copyrighted works endured until *Illinois Tool Works* forty-four years later. Moreover, although the *Loew’s* decision seems to be limited to motion picture works, the Court’s broader holding in *Paramount* (“All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.”)³⁷ seems applicable to all copyrighted works, film or otherwise.

30. *Id.* at 56 n.6.

31. *Id.* at 48.

32. *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 38–42 (2006).

33. George J. Stigler, *United States v. Loew’s Inc.: A Note on Block-Booking*, 1963 SUP. CT. REV. 152, 153 (1963).

34. *See* JOHN FAWELL, *THE HIDDEN ART OF HOLLYWOOD: IN DEFENSE OF THE STUDIO ERA FILM 3* (2008) (“When the studio had control of theaters and could block book . . . they had the freedom to take a loss on a film here or there.”); *see also* BRIAN GREENBERG & LINDA C. WATTS, *1 THE SOCIAL HISTORY OF THE UNITED STATES 329* (2009).

35. *Loew’s*, 371 U.S. at 50; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948).

36. *See* 2 WILLIAM C. HOLMES, *INTELLECTUAL PROPERTY AND ANITRUST LAW* § 36:5 (2012) (“[P]arties asserting claims of copyright tying or compulsory block booking were greatly helped . . . if the tying item was either patented or copyrighted.”).

37. *Paramount*, 334 U.S. at 159.

B. *The Blanket License*: Broadcast Music, Inc. v. Columbia Broadcasting System

Two decades later, the Court contemplated block booking in a different context: for the blanket musical performance license. In *Broadcast Music, Inc. v. Columbia Broadcasting System (BMI)*, the Court reviewed the practices of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), the agencies that handled the licensing of musical performances.³⁸ Both ASCAP and BMI serve as clearing houses for copyright owners, who grant the organizations the “nonexclusive rights to license nondramatic performances of their works” to broadcasters, producers, venue owners, and anyone else seeking the right to use copyrighted music in their ventures.³⁹ The organizations used blanket licenses to serve these interests. The blanket licenses “give the licensees the right to perform any and all of the compositions owned by the members . . . as often as the licensees desire for a stated term,” and fees were determined as a percentage of revenue or a negotiated flat fee.⁴⁰

Within two decades of its 1914 founding, ASCAP was already facing criminal charges by the Justice Department for anticompetitive conduct, scrutiny that evolved into a series of consent decrees that not only limited the conduct of ASCAP, but also that of later-comer BMI.⁴¹ From these decrees emerged the contours of the licensing organizations’ contemporary practices: BMI and ASCAP could sell the blanket licenses on *nonexclusive* bases while preserving the option of direct artist negotiations for individual licenses. Under these consent decrees, the party seeking the license must be offered “a genuine economic choice between the per-program license and the . . . blanket license.”⁴²

Its decades of subscribing to the blanket license notwithstanding, Columbia Broadcasting System (CBS) brought a challenge to the blanket license in the mid-1970s, claiming that BMI and ASCAP “are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights.”⁴³ The trial court found that because direct negotiation with the copyright holders was still feasible, there was no tying, restraint of trade, refusal to deal, or monopolization.⁴⁴ Thus, the *BMI* Court effectively rejected CBS’s claim that the blanket license was tantamount to block booking or tying so long as there remained “real choice” in one’s ability to acquire the rights to individual copyrights in addition to the availability of the blanket license.

38. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1, 4 (1979).

39. *Id.* at 5.

40. *Id.*

41. *See id.* at 10–14.

42. *Id.* at 11.

43. *Id.* at 6.

44. *Id.*

Having set aside the question of tying, the Supreme Court then took up the issue of whether the blanket license itself was horizontal price fixing among competitors (that is, copyright owners competing for airplay), and found that, considering the difficulties and inefficiencies involved in attempting to meet the various would-be licensee's needs through direct negotiations with copyright holders—an option still available to the applicants, the Court hastened to add—“a blanket license was an obvious necessity.”⁴⁵ The Court concluded that because the blanket license is a “whole . . . truly greater than the sum of its parts[,] it is . . . a different product,” and because “agreement on price is necessary to market the product,” per se condemnation was inappropriate.⁴⁶

The theory that a blanket license is permissible so long as individual licenses are obtainable was tested in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, published shortly after the *BMI* decision was handed down.⁴⁷ There, the district court found that because a copyright holder of customized Catholic hymnals refused to license individual hymns, the putative license he offered was in fact block booking of copyrights.⁴⁸ The Seventh Circuit reversed in an unpublished decision that held that because churches had other means of acquiring the hymns outside of the customized hymnals, the license was permissible under *BMI*.⁴⁹ Consequently, the line between block booking and blanket licensing seems to be drawn at the point where alternate means of securing licenses or sales of other copyrighted works is not a “real choice” for the consumer.⁵⁰

II. FACTUAL BACKGROUND

A brief history lesson about the practices of the music and recording industries during the second half of the twentieth century will establish a basis for application of the legal doctrines discussed above, and reveals an ongoing tension between technological innovation and consumer preference. Post-World War II culture was marked by the consumer's growing love of home entertainment technology. The phonograph, the radio, the television, the audio cassette, home gaming systems, the VCR, and the compact disc formed a steady progression that seemed to point to the Internet and what once was called “convergence”—the concept of a seamless interface between user need and digital delivery of

45. *Id.* at 20.

46. *Id.* at 21–24.

47. *F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chi.*, 506 F. Supp. 1127 (N.D. Ill. 1981), *rev'd*, No. 81-1333, 1982 WL 19198 (7th Cir. Mar. 25, 1982).

48. *Id.* at 1136.

49. *F.E.L. Publ'ns*, No. 81-1333, 1982 WL 19198, at *10 (7th Cir. Mar. 25, 1982).

50. *BMI*, 441 U.S. at 24. *But see* *Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 769 (D. Del. 1981) (finding blanket licenses a necessity even while acknowledging that neither individual licenses nor creation of more limited licenses were realistic possibilities for small and independent licensees like the bar owners bringing the antitrust counterclaim in that action), *aff'd*, 691 F.2d 490 (3d Cir. 1982).

information, entertainment, and utility.⁵¹ For forty-five years, the continuing progression of innovation was a boon to the recording industry and the rise of popular music. But, the years that followed—the years of Internet ascendance and dominance—were less kind to the recording industry as it lost its tight grip on the album as the dominant unit of musical measurement.

A. The Music Industry, 1948–1999

Prior to 1948, the 78 revolutions-per-minute (RPM) record was the only means of listening to recorded phonographic music,⁵² and had been so for decades. Although early sound recordings were pressed at a variety of recording speeds ranging from 60 to 130 RPM, by 1925 the 78 RPM shellac record, boasting up to three minutes of recorded sound on each side, had established its dominance.⁵³ The limiting effects of the 78 RPM record affected the artists—whose compositions had to be short or required listener effort to continue the song on another record side—as well as retailers and consumers, who had to transport, display, and ultimately store at home bulky “albums” (literally bound, book-like collections of records) of 78s to enable listening to longer musical works.⁵⁴ A typical symphonic work could stretch to three or more records, totaling six sides of music.⁵⁵ But, none of this deterred postwar consumers from enjoying the thrill of music in the comfort of their own homes; historian Gary Marmorstein notes that “more than \$200 million worth of records were sold” in 1947—an all-time industry high.⁵⁶

The year 1948—ironically, the same year the Supreme Court decided block booking was illegal—also saw the advent of the long-playing 33 $\frac{1}{3}$ RPM record. The long-playing record was the latest move in an ongoing rivalry between entertainment technology pioneers RCA and Columbia, which were fighting a multifront war for media dominance via radio, television, and home audio recordings.⁵⁷ RCA had one-upped Columbia and its lead engineer Peter Goldmark by introducing the color-wheel television system; the long-playing record was

51. See, e.g., *TV on Your Phone*, ECONOMIST (Jan. 13, 2005), <http://www.economist.com/node/3566995>; Mark Jones, *Preaching to the Convergence Choir*, INFOWORLD (Jan. 17, 2003), <http://www.infoworld.com/t/networking/preaching-convergence-choir-256>.

52. This is distinct from music reproduced from piano rolls, another popular means of enjoying recorded music at home. See GEOFFREY HULL, *THE RECORDING INDUSTRY* 46 (2d ed. 2004) (noting that 342,000 player pianos were sold during peak years).

53. *Gramophone Record*, WIKIPEDIA, http://en.wikipedia.org/wiki/Gramophone_record (last visited Oct. 26, 2012).

54. *LP Record*, WIKIPEDIA, http://en.wikipedia.org/wiki/LP_record (last visited Oct. 26, 2012).

55. See, for example, the four-record set comprising RCA Victor Album DM-156, a recording of the London Symphony Orchestra performing Beethoven’s Fourth Piano Concerto (released in 1940). *Victor Musical Masterpieces Listing*, <http://www.78rpmcommunity.com/documents/6/20/rca-victor-m-series-78rpm-albums> (last visited Oct. 26, 2012).

56. GARY MARMORSTEIN, *THE LABEL* 160 (2007).

57. See generally *id.* at 153, 160–64.

Columbia's—and Goldmark's—revenge on their rival.⁵⁸ The prize in this latest battle between RCA and Columbia would be the lucrative classical music market. Indeed, the roughly twenty-two-minute-per-side recording length of what became known (thanks to Columbia's trademark on the long-playing album) as the "LP" was purposed to "hold nearly any movement of existing Columbia classical recordings on a single side."⁵⁹ As historian Gary Marmorstein notes, the pop music market was not a consideration in the development of the long-playing record; "for pop music listeners, the 78 worked fine, thank you."⁶⁰

Meanwhile, RCA was about to introduce the 45 RPM single in its bid for dominance of the very pop market Columbia was ignoring. RCA saw the 45 as a lighter, better quality, and more user-friendly version of the single-song music format that already appealed to pop music consumers.⁶¹ The company accompanied the introduction of the format with a mechanism that enabled record players to drop new songs onto the spindle in just three seconds—an efficiency that "went a long way toward making the 45 the dominant singles format for the next twenty years."⁶² Within a few years, record players were equipped with variable speeds that allowed listeners to play all three formats (LPs, 45s, and soon-to-be obsolete 78s) with relatively easy adjustments, and soon enough even Columbia—chuffed with the success of its Masterworks LP classical label—began releasing 45s (while still exploring putting pop music into the LP format).⁶³

And so the 1950s and 1960s became a tug of war—indeed, a "trade war"⁶⁴—between the three phonograph formats for the massive baby boomer listening base. While classical music dominated LP sales, popular music seemed more comfortable on 45s—despite RCA's efforts to sell classical consumers on classical albums on 45s.⁶⁵ Indeed, some listeners saw the LP as nothing more than a means of creating musical wallpaper, as Marmorstein notes that some "consumers equated active listening with record-changing."⁶⁶ The "War of the Speeds" resulted, according to David Morton, in a compromise: the LP would win the classical and "album" market, while the 45 would be used "almost exclusively for singles."⁶⁷ The casualty was the 78, which could not compete with the newer

58. *See generally id.*

59. DAVID MORTON, *SOUND RECORDING: THE LIFE STORY OF A TECHNOLOGY* 136 (2004).

60. MARMORSTEIN, *supra* note 56, at 160.

61. *See id.* at 170.

62. *Id.*

63. *Id.* at 172.

64. Harold Faber, *Trade War Traps Record Buyers; Three Devices Needed to Play All Types*, N.Y. TIMES, Jan. 10, 1949, at 1, 14.

65. MORTON, *supra* note 59, at 139.

66. MARMORSTEIN, *supra* note 56, at 173.

67. MORTON, *supra* note 59, at 139.

market entrants.⁶⁸ Ten years after its introduction, the LP accounted for “nearly 60 percent of a record business . . . approaching the \$400-million-a-year [sic] line.”⁶⁹

The question then became where would pop music fit in: the album or the single? Frank Sinatra is often credited for introducing the first “concept albums”—long-playing collections of songs sharing a theme or a mood—with *Songs for Young Lovers!* (a 10-inch LP in 1954) and *In the Wee Small Hours of the Morning* (a 12-inch, or “full sized,” LP in 1955).⁷⁰ As rock and roll rose to pop music dominance during the late 1950s and early 1960s, the shift from the single song to the LP “album” (now a vestigial misnomer, because most releases since the 1960s have consisted of single discs rather than albums holding many records) as the primary vessel of musical listening seemed more and more pronounced. Bands like the Beach Boys and the Beatles were stretching the boundaries of pop and rock and roll to better occupy the bigger and richer canvas the LP presented.

The recording industry, recording artists, and music consumers all drove the shift from a singles-driven pop music market to a market dominated by albums. The recording industry certainly had multiple incentives to accomplish this task. First and foremost, albums represented a more expensive product. At the peak of the Album Era in the early 1980s, full-length records cost \$8.99,⁷¹ while a 45 RPM single only cost about \$1.50.⁷² The added expenses of album production were offset by the efficiencies of recording and producing multiple songs instead of going into the studio one song at a time. These efficiencies were replicated on the distribution and retail end as well—selling a group of songs in a single, higher-priced product was more efficient than trying to sell multiple singles at lower prices. Setting aside brief rises in singles sales that could be attributed to the brief popularity of disco (1976 to 1979) and a tiny bump in 1983 most likely attributable to the phenomenon surrounding Michael Jackson’s *Thriller* and its ten commercially available seven-inch singles,⁷³ single sales dramatically declined with each passing year, from 222.8 million units in 1973, to under 50 million units by 1989, to nearly nothing by the 1990s.⁷⁴ The difference in sales is illustrated in Figure 1.

68. *Id.* at 140.

69. Martin Mayer, *Rocking the Boat*, N.Y. TIMES, Mar. 16, 1958, § 11, at 2.

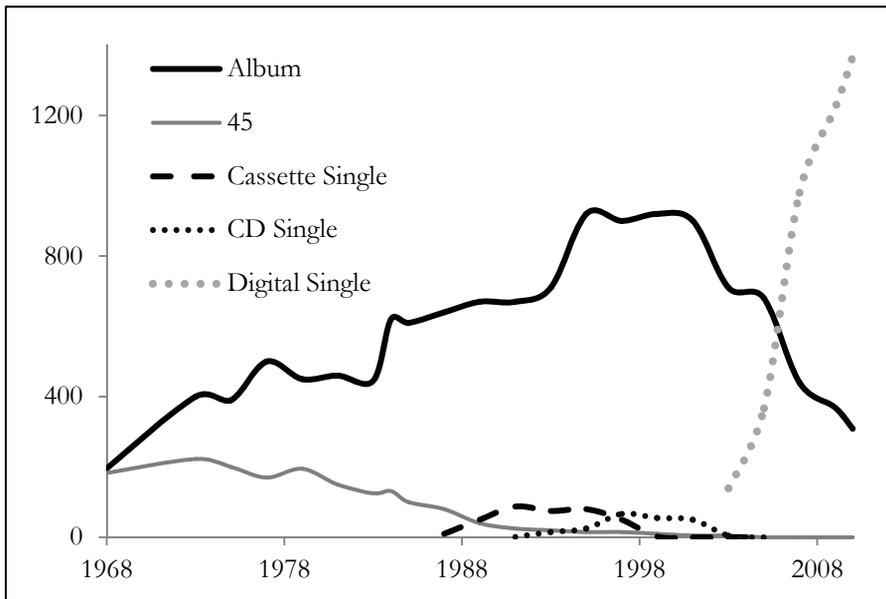
70. See generally *Frank Sinatra*, ALLMUSIC, <http://allmusic.com/artist/frank-sinatra-p3150> (last visited Oct. 26, 2012).

71. STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION* 31 (2009).

72. E-mail Interview with Marc Weinstein, co-founder and co-owner, Amoeba Music (Sept. 21, 2012) (on file with author).

73. See listings of Michael Jackson’s 45 RPM singles at 45cat, *Michael Jackson—Discography*, 45CAT, <http://www.45cat.com/artist/michael-jackson/us> (last visited Oct. 26, 2012).

74. GEOFFREY HULL ET AL., *THE MUSIC BUSINESS AND RECORDING INDUSTRY: DELIVERING MUSIC IN THE 21ST CENTURY* 246 (3d ed. 2011).

Figure 1: Album vs. Single Sales (in millions of units), 1968–2010⁷⁵

From the recording artist's perspective, the format battle was over much earlier, in 1967. That year, the Beatles released *Sgt. Pepper's Lonely Hearts Club Band* without accompanying singles.⁷⁶ The band did not even promote the album by single directly; the Fab Four's only single from the time of the album's release featured two songs ("Penny Lane" and "Strawberry Fields Forever") that were not on the album and would only later find homes on the later *The Magical Mystery Tour* album.⁷⁷ And where went the Beatles, so went the industry: by the 1970s, singles became little more than a marketing tool—and not a recording artist's focus—by which labels would promote their full-length records.⁷⁸ Most songs were not available for single sales; listeners who wanted to acquire the album's offerings on an à la carte basis were simply out of luck.⁷⁹ The Album Era had well and truly begun.

75. See R. SERGE DENISOFF, *SOLID GOLD: THE POPULAR RECORD INDUSTRY 4* (1971); HULL, *supra* note 52, at 245; *RIAA 2011 Year-End Shipment Statistics*, RIAA, <http://76.74.24.142/FA8A2072-6BF8-D44D-B9C8-CE5F55BBC050.pdf> (last visited Oct. 26, 2012) [hereinafter *RIAA Year-End Statistics*]; *The History of Recording Industry Sales, 1973–2003*, DIGITAL MUSIC NEWS (Feb. 17, 2011), <http://digitalmusicnews.com/stories/021711disruption>.

76. See listings of The Beatles' 45 RPM singles at 45cat, *The Beatles—Discography*, 45CAT, <http://www.45cat.com/artist/the-beatles/us/2> (last visited Oct. 26, 2012).

77. Jon Pareles, *At Age 20, Sgt. Pepper Marches On*, N.Y. TIMES, May 31, 1987, § 2, at 1.

78. HULL, *supra* note 52, at 244 ("Until the recent resurgence of singles in the digital realm, the single was primarily a promotional tool—an expense.")

79. See John B. Horrigan, *The Internet and Consumer Choice*, PEW INTERNET & AM. LIFE

It is less clear whether consumer desire as manifested in rising album sales over single sales during this period was the tail wagging the dog—demanding longer, more expensive products from favorite recording artists—or merely accepting a shift in market conditions and buying what was available. The rise in the early 1970s in the popularity of “album oriented rock” radio stations, stations that focused on playing songs that were not released as singles,⁸⁰ could be read as an indicator that songs not available as singles remained desirable to listeners.

The introduction of the compact disc in the 1980s further reinforced this “album-as-product” reality. CDs offered consumers more of everything: listening times approaching eighty minutes, unsurpassed audio fidelity, a durable, difficult-to-scratch surface, and the convenience of never having to rewind or fast forward between songs. Correspondingly, the recording industry saw “an opportunity to change consumers’ expectations about what music should cost.”⁸¹ Consumers soon spent upwards of \$16 for an album that used to cost \$9 on vinyl.⁸² The result was a music industry boom from 1984 to 2000, with CDs earning \$17.2 million in 1983, then a 500-plus percent leap the following year to \$103.3 million, to \$12.8 billion at its peak in 1999.⁸³ Against this backdrop, it is unsurprising that sales of singles—on CDs or cassette single (the “cassingle”)—never reached the success or market share once enjoyed by vinyl singles. Since the costs of producing cassette and CD singles “rivalled that of manufacturing costs for an entire album,”⁸⁴ the conventional single—that is, a single musical work embodied in a physical object—was effectively dead by 2000.⁸⁵

B. *The Music Industry, 2000–2012*

Until the Internet came. Although the introduction of the MP3 file format for reproducing music digitally in 1991 was a muted affair, advances in Internet connectivity over the following decade resulted in a digital music explosion. It began in 1997, when WinAmp, a free program for playing MP3s, became widely available and the MP3.com website launched as a “hub for finding free music on the web.”⁸⁶ Free music became even more popular with the ascendance of Napster, the music file-sharing site that launched in 1999 and garnered nearly 20

PROJECT 13 (May 18, 2008), http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Consumer.Decisions.pdf.pdf (“[A]fter the demise of the single 45rpm record (in which the consumer still paid for the obscure B-side), [consumers] had to buy a collection of songs.”).

80. *Album Oriented Rock*, WIKIPEDIA, http://en.wikipedia.org/wiki/Album-oriented_rock (last visited Oct. 26, 2012).

81. KNOPPER, *supra* note 71, at 32.

82. *Id.* at 31.

83. *Id.* at 34–35.

84. HULL, *supra* note 52, at 246.

85. *See id.* (“Singles accounted for less than 1 percent of unit volume and less than 0.5 percent of sales dollars in 2002.”).

86. KNOPPER, *supra* note 71, at 118–19.

million users by July 2000.⁸⁷ The site seemed to offer users the long-awaited “celestial jukebox”: on-demand access to almost any song or album. The recording industry’s legal efforts to prevent peer-to-peer file sharing resulted in the rapid demise of the service, but left a gaping chasm in the marketplace for pop music: where would an online-savvy public gets its music? And how would the public get it quickly, easily, legally, and—for the recording industry—profitably?

The answer was iTunes. Steve Jobs introduced the iPod in 2001, and the iTunes Store launched in 2003, offering a catalog of 200,000 songs for ninety-nine cents each.⁸⁸ The singles market was effectively reborn overnight with the launch of the iTunes Store: digital single sales launched in 2003 with 139.4 million sales—a greater number of single sales than any year since the post-*Thriller* 1983 bump—and rose dramatically each year thereafter, as evident in Figure 1, above.⁸⁹ By 2007, digital singles sold more than 844 million units,⁹⁰ compared to 584.9 million albums downloaded digitally or sold as CDs.⁹¹

With the resurgence of the single came a panic in the recording industry. As one industry executive noted, “[T]he problem is [people in the music business are] selling songs and not albums . . . [D]o the math.”⁹² Steve Knopper summarizes:

Sales of iTunes singles surged, while old-fashioned album sales—and major label revenues—dropped. While CD sales continue to make up the bulk of the major labels’ profits, iTunes shifted the balance dramatically and quickly. Although this shift is great for consumers, it’s a negative for record companies: At least for now, digital music just isn’t as profitable⁹³

Profits aside, the contemporary economic landscape for the music industry is indisputably dominated by the now-digital single: digital singles sold over a billion units in 2009, compared to 385 million CD shipments, and 76 million digital album sales.⁹⁴ The recording industry and artists alike have shifted their attention in response, and modern artist success is defined by single sales, not album sales.⁹⁵

Equally important is the renewed availability of the single. Though it may have been nearly impossible to purchase a single song by any popular artist just a decade ago, today nearly any song by any artist can be acquired easily and instantly with just a few clicks of a mouse. Thus, the catalogs of artists that were once only

87. *Id.* at 135.

88. *Id.* at 177.

89. HULL, *supra* note 52, at 246.

90. KNOPPER, *supra* note 71, at 181.

91. HULL, *supra* note 52, at 245.

92. *Id.*

93. KNOPPER, *supra* note 71, at 181.

94. Perritt, *supra* note 5, at 835.

95. See John Seabrook, *The Song Machine*, NEW YORKER, Mar. 26, 2012, at 50. Note that Seabrook draws a line between “the rock era” defined by album sales and a resurgent “pop era” defined by singles sales. I disagree with this distinction. See *infra* Part III.A.3.

acquirable by purchase of physical albums—including the individual tracks from *Sgt. Pepper's Lonely Hearts Club Band*—are now easily attainable on an à la carte basis.⁹⁶

III. ARGUMENT

In light of the history of the music and recording industry discussed above, it seems clear that recording industry practices in the late twentieth century raised compelling questions of antitrust jurisprudence. Did the shift from the single to the album as the dominant unit of popular musical measurement violate the *Paramount* Court's holding that "a refusal to license one or more copyrights unless another copyright is accepted [is illegal]"?⁹⁷ Moreover, did the shift to albums result in conventional tying? However, before addressing whether the practices were unlawful, it is necessary to address the threshold inquiry of whether the single song or the album is the relevant product for tying analysis. Under the *Paramount* test for tying, if the album is its own unique product apart from a single, singles within it are not tied in a manner that violates antitrust law.

A. Which is the Relevant Product for Antitrust Analysis—the Single or the Album?

The threshold inquiry asks which is the appropriate product for antitrust analysis, the single song or the long-playing album. As discussed above, the first element of the test for tying requires that there be two separate products to establish the conditioned or coercive relationship between them.

1. Why the Single?

History, statutes, and the present market all support the conclusion that the single is the appropriate unit of measurement for pop music. Over the last sixty years, the pendulum has swung back and forth between the single song and the album as the dominant measure of pop music consumption.⁹⁸ It is necessary to determine whether, from an antitrust perspective, the song remained the appropriate unit of measurement, even during the Album Era, when album sales were at their peak. This Note proceeds first by examining of the Copyright Act, then the recording industry's own practices, and finally the sudden shift in consumer behavior when singles once again became available.

The Copyright Act itself may be read as support for finding the song to be the relevant product. The Act grants exclusive rights to owners of musical works, including the rights of reproduction, distribution, performance, and display.⁹⁹ The

96. See *MP3 Downloads: Sgt. Pepper's Lonely Hearts Club Band*, AMAZON, <http://www.amazon.com> (product search MP3 Music for Sgt. Pepper's Lonely Hearts Club Band) (last visited Oct. 26, 2012).

97. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948).

98. See discussion *supra* Part II.

99. 17 U.S.C. § 106 (2006).

Act does not explicitly define the scope of musical works—that is, whether a musical work is a song or a collection of songs.¹⁰⁰ However, individual songs are indisputably protected as musical works by copyright, regardless of the copyright status of the recording or compilation in which they are presented.¹⁰¹ Albums are often registered with the U.S. Copyright Office as compilations of musical works;¹⁰² copyright protection in compilations extends only to the selection and arrangement of the works comprising the whole.¹⁰³ So viewed, an inference can be drawn that the compilations and sound recordings are simply the conduits by which the songs reach the market, but that it is the songs—representing original works of authorship—that are closer to the core of copyright protection, and thus are the more essential products. The Second Circuit recently endorsed this view in *Bryant v. Media Right Productions, Inc.*,¹⁰⁴ noting that, because an “album is a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album,”¹⁰⁵ the “album falls within the Act’s expansive definition of compilation.”¹⁰⁶

Although recording industry practices are ever shifting, the single song has always been central to the music marketplace, even when bundled with other songs in album form. As discussed above, even during the years during which singles were difficult to obtain by listener-consumers, labels used singles as promotional tools. In other words, it was the song that sold the album, not the album that sold the song. The industry practices directed to other consumers—such as licensees like the radio stations using a blanket license discussed in *BMI*—also support a song-centric view of the musical marketplace. Although the blanket license permits access to a deep well of works, it is applied song-by-song, and does not require that a bundle of songs be played together. At the time that a license is

100. See *id.* § 101, where the list of the Act’s defined terms does not include “musical works.”

101. See, for example, the district court’s discussion in *King Records, Inc. v. Bennett*, 438 F. Supp. 2d 812, 841 (M.D. Tenn. 2006).

102. See, e.g., *Blood on the Tracks / [Words and Music by] Bob Dylan*, U.S. COPYRIGHT OFF., <http://cocatalog.loc.gov> (basic search for registration number “TX0001298888”) (last visited Oct. 26, 2012). The songs comprising the album are separately registered as musical works. See, e.g., *Idiot Wind*, U.S. COPYRIGHT OFF., <http://cocatalog.loc.gov> (basic search for registration number “RE0000862514”) (last visited Oct. 26, 2012).

103. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991); see also 1-3 NIMMER ON COPYRIGHT § 3.04 (noting that *Feist* applies to all compilations, not just factual compilations).

104. *Bryant v. Media Right Prods, Inc.*, 603 F.3d 135 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010).

105. *Id.* at 140–41; see also *Arista Records LLC v. Lime Grp. LLC*, No. 06 CV 5936 KMW, 2011 WL 1311771, at *3 (S.D.N.Y. Apr. 4, 2011) (holding “[n]othing in the Copyright Act bars a plaintiff from recovering a statutory damage award for a sound recording issued as an individual track. . .”).

106. *Bryant*, 603 F.3d at 140. Also relevant as an example are the reflections by members of Fleetwood Mac that a number of the songs on *Rumours*, an album justly celebrated for its cohesiveness, were holdovers from earlier creative periods and personnel configurations. CLASSIC ALBUMS: FLEETWOOD MAC: *RUMOURS* (Rhino Home Video 1998).

granted, it provides access to any *song* under the license, and there is no requirement to license multiple works by a single artist, or indeed multiple works at all. These practices indicate that the song rather than the album is the appropriate unit for legal analysis.

Consumer behavior is perhaps the strongest indicator that the song rather than the album is the relevant product. As discussed below in Part II.B, in the post-digital marketplace, single song sales dominate both CD album and digital album sales by orders of magnitude (billions to millions). In 2010, the Recording Industry Association of America reported that 1.28 billion single songs were downloaded, compared to 85.8 million downloaded albums that same year.¹⁰⁷ While it is certainly possible that consumer tastes shifted suddenly upon the opening of the iTunes music store from an album-oriented mindset to one preferring singles, it seems more likely that the shift represents a popular declaration of preference: if given the option, listeners prefer to pick and choose their music by the song.¹⁰⁸

2. *Why the Album?*

Nevertheless, there is considerable support for the view that the album, at least for a time, supplanted the song as the relevant product and the appropriate unit of musical measurement. For artistic, economic, and some consumer-driven reasons, pop music—especially during the “rock era” of the mid-1960s through the end of the twentieth century—may have been better served by the long-playing format, and defenders could argue that the end result was the defining product of the musical marketplace.

There is general consensus among music fans that the expansion of the musical artist’s tableau to album-length recordings enriched the medium. The Beach Boys’ 1966 *Pet Sounds* is credited as one of the great leaps forward in pop and rock music, heralding both the dawn of the psychedelic era in pop music and a deeper commitment to exploring the capabilities of ever-advancing recording techniques.¹⁰⁹ Paul McCartney credited the album as a defining influence on *Sgt. Pepper’s*,¹¹⁰ which—as discussed above—then influenced the entire industry. After the releases of *Pet Sounds* and its British counterpoint *Sgt. Pepper’s*, pop and rock music grew more grandiose in its ambitions, as reflected in the success of concept albums (such as the Who’s *Tommy* and Pink Floyd’s *The Dark Side of the Moon*),

107. RIAA *Year-End Statistics*, *supra* note 75, at 1.

108. See Perritt, *supra* note 5, at 835 (concluding that it is plausible that “consumers who are free to buy only what they want would choose to buy only about a third of what is available on albums”).

109. See, e.g., David M. Beard, *True 5-Star Albums: The Beach Boys’ “Pet Sounds,”* GOLDMINE (Apr. 19, 2011), <http://www.goldminemag.com/article/true-5-star-albums-the-beach-boys-pet-sounds>.

110. Jack Doyle, “*Early Beach Boys*”: 1962-1966, POPHISTORYDIG (June 14, 2010), <http://www.pophistorydig.com/?tag=pet-sounds-sgt-peppers>.

double-length studio albums (such as the Beatles' *White Album* and Pink Floyd's *The Wall*), and double-length live concert albums (such as Cheap Trick's *Live at Budokan* and Peter Frampton's *Frampton Comes Alive!*).

From artistic, production, marketing, and distribution standpoints, the album brought with it numerous efficiencies, some of which shaped consumer response. Although consumers also benefited from efficiencies in collecting songs more easily in album format, it is better to include the consumer efficiencies in an overall analysis of legitimate business justifications, because tying is a section 1 violation that makes the end consumer a party to the unlawful conduct. Considerable efficiencies on the supply side (manufacturing, distributing, and retail) and on the consumer side could combine to make a collection of songs a more appealing proposition than having to collect those songs one by one—especially during a pre-digital age when the physical objects embodying the songs were bulky and competed with other purchases for physical space.¹¹¹

3. Conclusion

The question of whether it is the song or the album that is the appropriate unit of musical measurement does not yield a clear-cut answer. While it seems that many albums are mere compilations of single songs, for a time at least *some* artists treated *some* albums as distinct art forms, expanding the artistic reach of composers and recording artists beyond single songs into more complex and rewarding works—if not for consumers, certainly for producers. Arguably, a dotted line could be drawn distinguishing rock *albums* from pop *songs* as the relevant product.¹¹² But this distinction between pop music and rock music would be nearly impossible to apply: were the Beatles a pop band that made rock music, or vice versa?¹¹³ Further, for every *Dark Side of the Moon* (and its thousands of weeks of residency on various *Billboard* charts since its 1973 release),¹¹⁴ there is a collection of singles with enduring popularity and massive commercial appeal, like *Eagles: Their Greatest Hits 1971–1976*, which remains tied with *Thriller* for the greatest selling album of all time.¹¹⁵ Indeed, even Pink Floyd, a band closely associated with album-length opuses, has released no fewer than three “best of”

111. See Liebowitz & Margolis, *supra* note 5, at 29–30 (discussing enhanced production and distribution efficiencies in the post-digital era).

112. See Seabrook, *supra* note 95.

113. A district court also came to this conclusion when contemplating the creation of genre-specific mini-blanket licenses, and found that “it is simply not feasible to categorize music for licensing purposes into such performance style labels.” *Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 768 (D. Del. 1981), *aff'd*, 691 F.2d 490 (3d Cir. 1982).

114. See *Dark Side of the Moon*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Dark_Side_of_the_Moon (last visited Oct. 26, 2012).

115. *Top 100 Albums*, RIAA, http://riaa.com/goldandplatinum.php?content_selector=top-100-albums (last visited Oct. 26, 2012). Note that three of the seven top-selling albums of all time are collections of previously released songs: either greatest-hits or live-concert albums.

compilations presenting popular songs divorced from their album-length conceptual settings.¹¹⁶ While this could be mere commercialism from the label's front offices and not reflective of the band's intent, such releases nonetheless cut against the argument that the album—and not the song—is what matters most to listeners.

After weighing various factors, including LP-innovator Columbia's original intention that the long-playing album was for classical and not popular songs, and the unmistakable consumer preference for single songs evident after the launch of the iTunes Store and renewed access to singles, it is fair to conclude that it is the song, and not the album, at the root of popular and even rock music.

B. Did Recording Industry Practices Violate Antitrust Laws?

Assuming that the song is the appropriate unit of analysis, did the recording industry's practices violate antitrust law? Although this inquiry is driven by the Court's *Paramount* and *Loew's* block-booking holdings, it is also necessary to determine whether the recording industry's practices ran afoul of antitrust law's more conventional tying doctrines.

As discussed in Part I, the modern test for tying as enunciated in *Jefferson Parish* requires determining (1) whether there are in fact two separate products in separate markets being tied, (2) whether there is coercion or conditioning compelling a consumer's decision to purchase the tied products, (3) whether the defendant has sufficient market power in the tying product market, and (4) whether there is a not-insubstantial dollar volume in the tied product market affected by the arrangement that affects interstate commerce.¹¹⁷

1. Is the Album a Product Apart from the Song?

As argued above, the song and not the album is the relevant product in antitrust analysis. From that standpoint, it seems almost tautological to assert that because the song is the relevant product, each song is itself a *separate* product. Nevertheless, this view is reasonable as applied to the Album Era because, prior to 2006's *Illinois Tool Works* decision, a copyrighted work “by reason of its copyright” enjoyed a “‘monopolistic’ position” creating a presumption of market power as a tying product.¹¹⁸ However, this presumption of market power due to the copyright is at odds with *Jefferson Parish*, which stated that “whether one or two products are involved turns . . . on the *character of the demand* for the two items . . . [A] tying arrangement cannot exist unless two separate product markets have been

116. *Pink Floyd: Discography (Compilations)*, ALLMUSIC, <http://allmusic.com/artist/pink-floyd-p76669/discography/compilations> (last visited Oct. 26, 2012).

117. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 8 (1984), *abrogated by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006).

118. *United States v. Loew's, Inc.*, 371 U.S. 38, 48 (1962), *abrogated by Ill. Tool Works*, 547 U.S. at 34.

linked.”¹¹⁹ In *Jefferson Parish*, the Court noted that “no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.”¹²⁰

The “character of the demand” required by the Court to establish separate products in *Jefferson Parish* can be analyzed in terms of the relative popularity of the songs themselves. For this inquiry, the marketplace itself—namely, the iTunes Store¹²¹—provides a window into consumer decisions. As in the example of *Sgt. Pepper’s*, consumers have downloaded individual Beatles songs at a rate of nearly five-to-one over digital albums. From this baseline demand for single songs, a glimpse at the *Sgt. Pepper’s* iTunes Store page (Illustration 1) reveals a wide disparity in the popularity of individual songs, favoring some (“Lucy in the Sky with Diamonds,” “When I’m Sixty-Four”) far above others (“Within You Without You”), while favoring some (“Fixing a Hole”) hardly at all.

Illustration 1: iTunes Store Popularity Rankings for Songs Sold from *Sgt. Pepper’s Lonely Hearts Club Band* Album¹²²

▲	Name	Time	Popularity
	Sgt. Pepper's Lonely Hearts Club Band - iTunes LP	—	
1	Sgt. Pepper's Lonely Hearts Club Band	2:01	■■■■■■■■■■
2	With a Little Help From My Friends	2:44	■■■■■■■■■■
3	Lucy In the Sky With Diamonds	3:28	■■■■■■■■■■
4	Getting Better	2:48	■■■■■■■■■■
5	Fixing a Hole	2:36	■■■■■■■■■■
6	She's Leaving Home	3:35	■■■■■■■■■■
7	Being For the Benefit of Mr. Kite!	2:37	■■■■■■■■■■
8	Within You Without You	5:04	■■■■■■■■■■
9	When I'm Sixty-Four	2:37	■■■■■■■■■■
10	Lovely Rita	2:42	■■■■■■■■■■
11	Good Morning Good Morning	2:41	■■■■■■■■■■
12	Sgt. Pepper's Lonely Hearts Club Band (Reprise)	1:19	■■■■■■■■■■
13	A Day In the Life	5:35	■■■■■■■■■■

119. *Jefferson Parish*, 466 U.S. at 19–21 (emphasis added).

120. *Id.* at 21–22.

121. While I use the iTunes Store in this Note, the iTunes Store is not the only vendor in the market; Amazon is one competitor, among many others.

122. Screenshot from the iTunes Store for The Beatles, *Sgt. Pepper’s Lonely Hearts Club Band*, taken Apr. 7, 2012.

This lack of uniformity of demand, especially when considering the songs on a popular album by a band as popular as the Beatles, underscores that each song is a product competing with others songs on the same album.

The separate demand requirement can also be satisfied through an examination of the choices implicated by a consumer's musical listening habits. Current audio devices like CD players (especially the multidisc CD changer) and MP3 players permit—and arguably have conditioned—the listener to self-curate the order and origin of musical selections. As discussed above in Part II.A, this was also the norm for popular music in the years before the prevalence of the long-playing album. While listeners are technically free to self-curate their long-playing albums, the recording industry's practices during the Album Era set a default rule that effectively eliminated the competition for the *next* song, a market that is preserved by the à la carte musical options provided by singles. In other words, while singles preserve the listener's right to determine which song should be played next, the album—be it in LP form, or on cassette or CD—obstructs this opportunity to self-curate. That the innovations in consumer audio devices have enhanced listeners' abilities to self-curate song selection (as evidenced by popular acceptance of the “playlist” of listener-selected songs) further supports a finding that each song is a separate product subject to separate demand, capable of fulfilling a listener-consumer's selection in the “next song market” re-enabled by digital technologies.

2. *Is There Coercion or a Conditioned Sale?*

The question then became whether the sale of the tying product to the tied product was coerced or conditioned. In *Jefferson Parish*, the Court stated that “[i]f each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market”¹²³ But as discussed above in Part II, the availability of singles (on 45, cassette, or CD) declined dramatically from 1973 until the launch of the iTunes Store in 2003, to the point where they were almost completely unavailable for most of the 1980s and 1990s. Thus, in many cases (for example, *Sgt. Pepper's*), there was no way of purchasing a desired song (for example, “A Day in the Life,” “When I'm Sixty-Four”) without purchasing at least one—and often many—less desired or undesired songs (for example, “Within You Without You,” “Being for the Benefit of Mr. Kite”).¹²⁴ Where once studios conditioned exhibitors into block booking their copyrighted films, here too the labels effectively forced block sales of copyrighted songs. Consequently, at least

123. *Jefferson Parish*, 466 U.S. at 11–12.

124. Although this Note relies on *Sgt. Pepper's* for this analysis, perhaps *The Beatles* (popularly known as *The White Album*) would be a stronger example: it is a two-album, thirty-song behemoth also marketed without singles. To enjoy popular favorites like “Back in the U.S.S.R.,” one also had to purchase “Honey Pie” or the much-debated “Revolution 9.”

for songs that were only available as part of an album—which, as discussed above, represented an increasing percentage of the overall pop music market between 1973 and 2003—there was a coerced or conditioned sale of other songs. To the extent technology made self-curation of songs more difficult or impossible by tying the second *next song* market, there was an interference with that market.

3. Is there Market Power in the Tying Product Market?

The bold presumption of market power in copyrighted works established in *Loew's* is predicated both on uniqueness—an empirically objective condition—and on customer appeal—a subjective one. The *Loew's* holding thus presumes market power in every copyrighted sound recording ever released. As discussed in Part I, *Illinois Tool Works* effectively destroyed this presumption. For the purposes of this Note, however, the *Illinois Tool Works* holding is of limited impact for two reasons.

First, it is important to note that the *Illinois Tool Works* decision came down in 2006, three years after the launch of the iTunes Store, and mere months before the Amazon MP3 store launched in 2007.¹²⁵ Thus, by the time the Supreme Court abrogated the presumption of market power in copyrighted works, the market had already evolved to the point where widespread single digital-song download purchases effectively nullified the label-imposed tying conditions. After *Illinois Tool Works*, consumers had the option of purchasing a growing catalog of songs on an à la carte basis.¹²⁶

Even beyond the obsolescence of the *Illinois Tool Works* holding as applied to the relevant period, the Album Era tying case law regarding “unique” products may support a finding of market power in the tying product market—that is, the market for the desired single song. As stated in *Loew's*, “each film . . . ‘was . . . a unique product,’”¹²⁷ and “economic power may be inferred from uniqueness”¹²⁸ in tandem with its copyright.¹²⁹ The Court attempted to cabin the broad-brush *Loew's* presumption for years before dealing it a coup de grace in *Illinois Tool Works*, notably in the *Fortner* cases. At issue there was whether a financing arrangement was tied to the purchase of overpriced prefabricated steel homes.¹³⁰ In *Fortner I*, the Court stated in a footnote that “[u]niqueness confers economic power only when other competitors are in some way prevented from offering the

125. *Amazon.com Launches Public Beta of Amazon MP3, a Digital Music Store Offering Customers Earth's Biggest Selection of a la Carte DRM-Free MP3 Music Downloads* (press release), BUSINESSWIRE, (Sept. 26, 2007), http://www.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070925005710.

126. See discussion *supra* Part II.

127. *United States v. Loew's, Inc.*, 371 U.S. 38, 48 (1962), *abrogated by* *Ill. Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006).

128. *Id.* at 45.

129. *Id.* at 48.

130. *U.S. Steel Corp. v. Fortner Enters., Inc. (Fortner I)*, 394 U.S. 495, 497 (1969); *Fortner II*, 429 U.S. at 610 (1977).

distinctive product themselves,”¹³¹ concluded that the financing arrangements were sufficiently unique to potentially support a finding of market power, and allowed the case to proceed.¹³²

A decade later, the *Fortner II* Court backtracked and found that while “copyright monopolies in [*Paramount*] . . . represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power,”¹³³ the financing arrangements at issue lacked such uniqueness.¹³⁴ Seven years later, the *Jefferson Parish* Court tried to further limit the reach of *Loew’s* by ignoring it—noting that no “presumption of market power find[s] support in our prior cases”—and distinguishing *Paramount* and *Loew’s* by their foundation in patent misuse doctrines instead of conventional tying.¹³⁵ The *Jefferson Parish* Court limited the holdings in *Paramount* and *Loew’s*, acknowledging that uniqueness accorded a presumption of power, but only “when the seller offers a unique product that competitors are not able to offer.”¹³⁶ One district court interpreted the *Fortner* and *Jefferson Parish* holdings to mean that establishing market power based on uniqueness of a good means establishing that no “competitors *could have* produced products which would perform the functions performed by defendants’ products, because defendants possessed some advantage not shared by their competitors.”¹³⁷

Even as the Court shifted its jurisprudence, it appears that songs—and here particularly, sound recordings—could reasonably be found to enjoy market power largely as a function of their status as unique works. First, songs reflect the same sort of creativity the *Fortner II* Court (as well as the *Loew’s* Court) seemed to recognize as being categorically unique.¹³⁸ More importantly, it can be argued that songs are unique because copyright theoretically ensures that competitors cannot lawfully offer the same product, which is consonant with the more restrictive view of uniqueness advanced in *Jefferson Parish*.¹³⁹

Thus, during the years under present analysis, and indeed until the *Illinois Tool Works* Court destroyed any presumption of market power based on the uniqueness of a tying good,¹⁴⁰ sound recordings of songs could be deemed unique, which—in addition to their similarity to the creative works at issue in *Paramount*

131. *Fortner I*, 394 U.S. at 505 n.2.

132. *Id.* at 510.

133. *Fortner II*, 429 U.S. at 619.

134. *Id.* at 622.

135. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 37 n.7 (1984), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink., Inc.*, 547 U.S. 28, 34 (2006).

136. *Id.* at 17.

137. *3 P.M., Inc. v. Basic Four Corp.*, 591 F. Supp. 1350, 1358 (E.D. Mich. 1984).

138. *See Fortner II*, 429 U.S. at 619.

139. *Jefferson Parish*, 466 U.S. at 17.

140. *See, e.g., Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673 RMW, 2008 WL 4809441, at *14 (N.D. Cal. Oct. 28, 2008) (holding impermissible a presumption of market power based on IP rights post-*Illinois Tool Works*).

and *Loew's* and the *Loew's* presumption of market power for copyrighted works—provides a reasonable basis for finding that such works enjoyed market power.

4. *Is There a Not-Insubstantial Dollar Amount in the Tied Market?*

A finding of unlawful tying also requires that a not-insubstantial dollar volume of the tied product market be affected in order to establish an effect on interstate commerce.¹⁴¹ Here, one need only consider the dollar amounts at stake to find that the industry practices meet the Court's standards. Under the "next song market" analysis discussed in Part III.B.1, any single song could satisfy the demand of that market, depending on taste—that is, the tied market. In 2010, the recording industry brought in \$1.3 billion in single song downloads, a twelve percent increase over the year before.¹⁴² And the recording industry had been a billion dollar business since 1967 for the combined singles and album market.¹⁴³ Thus, pop music has long been big business, and abundant evidence exists to support a finding that the tied market involves a substantial dollar volume. These figures support a finding that the dollar amount in the tied market is "enough . . . so as not to be merely *de minimis*," the threshold established by the Supreme Court.¹⁴⁴

Thus, there is a colorable argument that the recording industry's shift from the single to the album resulted in widespread tying in violation of the antitrust laws.

5. *Is There a Legitimate Business Justification?*

The tying analysis then turns to whether the efficiencies and benefits of the tying arrangement are legitimate business justifications that outweigh the risks to competition.¹⁴⁵ As discussed above in Parts II and III.A.2, the recording industry could point to numerous efficiencies in production, manufacturing, distribution, and retail that could cut against condemnation—per se or otherwise—of the tying arrangements constructed by the shift to albums. Certainly, during the period central to this Note's analysis (1973 through 2003), the fact that music commerce was still rooted in physical objects (records, cassettes, and CDs) as opposed to downloadable digital files made such efficiencies more of a concern than they are today. Now, the digital marketplace has reduced or eliminated many of the

141. *Jefferson Parish*, 466 U.S. at 16.

142. *RLAA Year-End Statistics*, *supra* note 75, at 1.

143. DENISOFF, *supra* note 75, at 5.

144. *Fortner II*, 394 U.S. 495, 501 (1969).

145. *See, e.g., Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987) ("A tie-in does not violate the antitrust laws 'if implemented for a legitimate purpose and if no less restrictive alternative is available.'") (citation omitted).

distribution costs that were once driving forces of the consolidation of the industry in the 1960s and 1970s.¹⁴⁶

Furthermore, the same economic considerations that were at the core of the movie studios' block-booking practices could be inferred from the recording industry's shift to the album. The price discrimination hypothesis maps cleanly onto the long-playing album context: the labels could earn more for an album comprising a group of songs with varying values to consumers at a single block price than they could selling one song at a time at a fixed price.¹⁴⁷

Are these justifications sufficient to trump application of the antitrust laws? If the Court's *Paramount* decision provides any indication, they are not. There, the defendants asserted that the very future of their operations depended in large part on their ability to block book films.

An unsympathetic Court denied that such dire efficiencies were cause to avoid antitrust liability, stating that

enforcement of the restriction as to block-booking will be very disadvantageous to it and will greatly impair its ability to operate profitably. But the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest, in a practice which contravenes the policy of the anti-trust laws, receive judicial sanction.¹⁴⁸

Thus, even with the potential health of a massive industry in the balance of efficiency, the *Paramount* Court did not look kindly on efficiency as a legitimate business justification. And so, even with the economic fate of the recording industry hanging in the balance, the justifications seem unlikely to sway a court that has found anticompetitive conduct—particularly if the Court actually decides to apply the harsh and unforgiving per se analysis.

It remains necessary to consider whether legitimate business justifications supported recording industry practices.¹⁴⁹ Consumer preference may provide a legitimate business justification for the shift away from singles to the album format. In essence, the labels could argue that albums give consumers more of what they want for less money on a per-unit basis.¹⁵⁰ In *In re Data General Corp.*

146. See HULL, *supra* note 52, at 31; see also Liebowitz & Margolis, *supra* note 5, at 27-30 (discussing the history of singles and albums).

147. See generally Stigler, *supra* note 33 (discussing price discrimination theory).

148. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948).

149. See *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997) (“When a legitimate business justification supports a monopolist's exclusionary conduct, that conduct does not violate § 2 of the Sherman Act.”).

150. Assuming an average of twelve songs, the per-song cost of an \$8.99 album was approximately seventy-five cents; singles cost \$1.50. See discussion *supra* Part II. I acknowledge the possibility that an entire album of songs *could* be assembled from singles for the same price as an album, but this ignores the realities that B-sides often provided alternate versions or non-album tracks, thereby rendering the task almost impossible.

Although not explored in this Note, the more-for-less argument could also open a door to

Antitrust Litigation,¹⁵¹ defendant Data General attempted to justify its tying of its operating software to computer hardware by asserting that customers preferred the “single vendor accountability” the tie offered.¹⁵² The trial court rejected this proffered justification, concluding that Data General could achieve this goal using less restrictive means.¹⁵³ Similarly, a decade later in *United States v. Microsoft*,¹⁵⁴ the D.C. Circuit remanded the question of Microsoft’s proffered consumer-demand justification that users preferred web browsers to be bundled with operating systems, and set as the default, finding that the plaintiffs were entitled to the opportunity to rebut Microsoft’s claim that the consumer demands offset the harms to competition created by the tie.¹⁵⁵

The same concerns that made the courts skeptical of the consumer demand arguments in *Data General* and *Microsoft* are relevant in this analysis. As in *Data General*, the question becomes whether the recording labels’ gradual abandonment of the single song as a consumer product ignored less restrictive means of addressing marketplace demand. It would be impractical at best to release every single song of every single pop artist available on albums as singles, whether on a 45 or as a CD single. The increased costs and physical needs demanded from production through distribution and retail render such an arrangement impossible. But impossibility at the extremes does not render impracticable more balanced solutions than simply eliminating singles from commerce. For example, labels could have been subject to a “popularity threshold,” by which any songs “hitting,” as determined by an algorithm of the song’s airplay, licensing, and tied album sales, must be released as singles.¹⁵⁶ As *Data General* informs, a seller “need not pit the dictates of the marketplace against the mandate of the antitrust laws.”¹⁵⁷

Thus, in light of the costs to consumers (both added expenses of paying for unwanted tied music, and the “next song markets” made more inaccessible by album tie-ins), the labels’ proffered justifications would seem unpersuasive in light of the *Jefferson Parish* jurisprudence, which skeptically regards any harm to competition under the shibboleths of efficiency or market preference.

antitrust condemnation on bundling theories, upon which a violation could be found if the “unbundled price [of the bundled goods] exceeds the but-for price for the product over which the firm has market power.” Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 403 (2009); see also generally Herbert Hovenkamp, *Discounts and Exclusion*, 2006 UTAH L. REV. 841 (2006) (discussing discounting and antitrust).

151. *In re Data Gen. Corp. Antitrust Litig.*, 490 F. Supp. 1089 (N.D. Cal. 1980).

152. *Id.* at 1122.

153. *Id.* at 1123.

154. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

155. *Id.* at 96.

156. I am exceptionally grateful to Professor Christopher R. Leslie for this idea.

157. *Data Gen.*, 490 F. Supp. at 1123.

6. Conclusion

Under the test for conventional tying, there is a colorable argument for finding antitrust liability. By using the long-playing album format, the recording industry ties separate products in separate markets, conditions or coerces the sale of the tying product to the tied product, enjoys market power in the tying product, and involves a not-insubstantial dollar amount in the tied market, thereby affecting interstate commerce.

This conclusion is strengthened by the presumptions of market power provided by the block-booking cases (until the 2006 *Illinois Tool Works* decision essentially did away with them). As discussed in Part I above, the *Paramount* Court affirmed the district court's enjoinder of the "defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features."¹⁵⁸ Notably, the Court appeared to leave the door open for condemnation of block booking outside of the motion picture context with its statement that "[a]ll [it] hold[s] to be illegal is a refusal to license one or more copyrights unless another copyright is accepted."¹⁵⁹ In sum, the antitrust implications for a recording industry dependent on the album as the primary product would seem dire, as all that was required to violate the law was the sale of two or more copyrighted works together where they were not available separately.

Thus, analysis results in the conclusion that the sale of albums—at least those featuring songs not available separately for single purchase—violates the Court's doctrines proscribing tying.

C. Is BMI a Shield Against Tying Claims?

Finally, it is necessary to assess whether the Court's decision in *BMI* established a defense to tying and/or block-booking claims against the recording industry during the Album Era of 1973–2003. As discussed in Part I above, *BMI* held that the blanket licenses offered by ASCAP and BMI did not constitute unlawful tying arrangements because would-be licensees were still free to negotiate one-off licenses with artists directly.¹⁶⁰ The Court also found that BMI and ASCAP were not liable for price fixing because the blanket license represented a new product that is "greater than the sum of its parts."¹⁶¹

Applied here, there are strong arguments in favor of finding that albums are indeed "new products" greater than the sum of their parts. As discussed above, the long-playing album offered recording artists a more expansive canvas than the three-and-a-half minutes to which pop music had been limited on 78s and even on

158. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157 (1948).

159. *Id.* at 159.

160. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 6 (1979).

161. *Id.* at 21–22.

45 singles. This in turn led to the development of more ambitious sonic endeavors, culminating in conceptually unified album-length works like *Pet Sounds*, *Sgt. Pepper's*, or *The Dark Side of the Moon*. It could be argued that not every album was—and indeed, most albums were not—as cohesive or unified a work as those albums, which continue to represent the frontiers of popular music. Nonetheless, the “new product” argument is undoubtedly the most germane and potent rebuttal to attempts to impugn recording industry practices with antitrust concerns, especially in light of the albums like those named above that were produced with clear creative intent to present songs as part of a unified whole.

However, this defense is not impervious to antitrust challenge. It is important to recall that the *BMI* Court primarily treated that case as a price fixing and not a tying case. Critical to the decision was the fact that there was no tying because individual performance licenses remained available outside of the blanket license; the Court stresses this by stating that “CBS . . . had a real choice” in the means of securing its licenses.¹⁶² Absent concern about unlawful tying, the Court was free to find room for the creation and pricing of new products like the blanket license.

But in the context of long-playing albums, circumstances are different: as discussed in Part II, many—and by the 1980s, most—songs were *only* available on albums collecting multiple copyrighted works. This in essence deprived consumers of the “real choice” fundamental to the *BMI* Court’s reasoning in allowing the blanket license. Without that real choice, the *BMI* Court’s acceptance of the blanket license seems to be of limited application here. The later decisions testing this theory, particularly in the Chicago hymnal cases discussed above, have not closed the door on a lack of real choice being fatal to tying arrangements involving copyrighted works.

CONCLUSION

Although there is no denying that the *Paramount* and *Loew's* decisions were purposed towards the practices of the film industry, the broadly worded holdings with respect to the sale or license of copyrighted works in those holdings support attempts at applying them in other contexts. Application of the block-booking and

162. *Id.* at 24. *But see* *Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 769 (D. Del. 1981), *aff'd*, 691 F.2d 490 (3d Cir. 1982). There, the district court allowed the blanket license for independent licensees like bar and restaurant owners, rejecting the antitrust counterclaimant’s proposed alternatives as unviable, and distinguished the blanket license at issue from the block-booking cases by noting that “in those markets buyers could identify in advance the specific ‘blockbuster’ films or compositions desired. Thus, ‘untying’ the package was much more feasible in those cases than here.” *Id.* at 765 n.9. The court’s logic was questionable, as the would-be licensees select songs they seek to license based on the specific desirability of those known songs, whereas the block-booked films were “blind licensed.” *See Paramount*, 334 U.S. at 157 n.11. In the end, the *Moor-Law* court relied heavily on *BMI* and found that the blanket license was a new product and thus not subject to tying. *Moor-Law*, 527 F. Supp. at 769.

tying doctrines to the practices of the recording industry during the Album Era of 1973–2003 results in two primary observations.

First, by placing no boundaries on its block-booking holding in *Paramount*—later buttressed by the presumption of market power accorded to copyrighted works in *Loew's*—the Court laid a trap for the format of music that dominated popular culture for the next fifty years: the long-playing record. The *Paramount* and *Loew's* holdings support a finding of market power to enforce a tying arrangement in songs as unique, creative, and copyrighted works. As such, “album-only tracks” not available for single consumption could be found to be per se violations of the antitrust laws, a conclusion supported by a more far-reaching analysis under the rule of reason. But following the *Loew's* holding that “to be illegal is a refusal to license one or more copyrights unless another copyright is accepted”¹⁶³ in the context of music would have resulted in a developmental halt of the recording industry that instead boomed with the advent of the long-playing record. A lack of action by the Department of Justice during the Album Era may indicate that it, too, saw through the Court’s overbroad language as being intended for the film industry’s practices alone.

The carelessness with the Court’s verbiage and the scope of its holdings notwithstanding, these decisions nevertheless reflect the Court’s general belief that consumer desires are generally better served by an à la carte option of copyright consumption. The current digital music marketplace, where single-song sales far outsell albums, validates this belief. Today’s market reveals that customers, if given the option of picking songs one at a time or buying them in contrived bundles, prefer the former. Thus, the celestial jukebox—as implemented by the iTunes Store, the Amazon MP3 store, and other vendors—has effectively corrected the market imbalance created by the recording industry’s insistence on making the long-playing album “the thing” for the five decades following its baby boom advent.

Nevertheless, the digital era has not fully obviated cause for antitrust questions in the recording and motion picture and TV industries. Block booking remains in practice, although in more muted forms. Most akin to the practices prohibited in the block-booking decisions, certain films are unavailable at retail except as parts of collections of films. For example, the 1984 documentary feature *Terror in the Aisles* is only available for purchase on Blu-ray as part of the “30th Anniversary Edition” of *Halloween II*,¹⁶⁴ for global cinephiles, the films comprising Roberto Rossellini’s *War Trilogy* are currently only available as part of a collection,¹⁶⁵ and fans of American films must purchase the 24-film/20-disc *Ford*

163. *Paramount*, 334 U.S. at 159.

164. See *Halloween II* (product listing), AMAZON, <http://www.amazon.com/Halloween-30th-Anniversary-Edition-Blu-ray/dp/B0058S0OMS> (last visited Oct. 26, 2012).

165. See *Roberto Rossellini's War Trilogy* (product listing), AMAZON, <http://www.amazon.com/Roberto-Rossellini-Trilogy-Criterion-Collection/dp/B002U6DVQ2> (last visited Oct. 26, 2012).

at Fox megaset to lay hands on individual John Ford films like *Four Men and a Prayer*, *Tobacco Road*, and *Seas Beneath*.¹⁶⁶ Similarly, the inclusion of copyrighted “value added” content to films on DVD and Blu-ray, such as “making of” documentaries and other bonus features, when viewed through the lens of block booking, could support consumer claims that they are being forced to accept unwanted copyrights along with the desired ones that motivated the purchase. Studios could use these additional features to inflate the price of their films to consumers at retail.¹⁶⁷ Finally, it could be argued that the bundling of cable channels is block booking in disguise: to the extent that the purpose of channels is to deliver copyrighted content, compelling consumer acceptance of a bundle of potentially unwanted channels is only a step removed from cable providers’ conditioning the license of certain copyrighted works upon acceptance of other, potentially unwanted, works.¹⁶⁸

Meanwhile, the modern recording industry is still grappling with the postdigital marketplace, where survival demands more than selling “just” songs.¹⁶⁹ When the democratization of the media landscape (thanks to the Internet) meets the democratization of music production (thanks to ProTools or Apple’s Garage Band), it seems that competition for the ears of listeners may be more robust than ever before. But for the corporate interests that defined the recording industry in the second half of the twentieth century when album sales led to record profits, the challenge seems to be no longer for market dominance, but rather for relevance in a postdigital age.

166. See *Ford at Fox—The Collection* (product listing), AMAZON, <http://www.amazon.com/Ford-At-Fox-The-Collection/dp/B000WMA6HI> (last visited Oct. 26, 2012).

167. Note, however, that here the question of whether there is an independent market for the value added content may shield studios from antitrust condemnation, in that a court could determine that because there is no separate consumer market for such material, there is no tying under the *Jefferson Parish* test discussed above.

168. For a fuller discussion about questions surrounding cable channel bundling, see, for example, Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1706–10 (2003).

169. See Timothy B. Lee, *Why We Shouldn’t Worry About the Decline of the Music Industry* (Jan. 30, 2012), FORBES, <http://www.forbes.com/sites/timothylee/2012/01/30/why-we-shouldnt-worry-about-the-decline-of-the-music-industry>.