JOINT VENTURES AND THE ONLINE DISTRIBUTION OF DIGITAL CONTENT

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The proliferation of digital media and the widespread adoption of broadband technology have created new opportunities, and new challenges, for the online exchange of entertainment content.[1] Digital technology has afforded consumers "unprecedented power to access, store, manipulate, reproduce and distribute entertainment content."[2] This increased capacity, however, is accompanied by serious issues of digital piracy derived from the sharing of unauthorized digital reproductions among end-users.[3]

In response, the entertainment industry has adopted numerous conventional strategies to preserve its interests, ranging from lobbying and litigation to copy-protection technologies and licensing.[4] Yet, in a bolder effort, providers of both music and film content have steadily engaged in the formation of joint ventures in order to exert greater control over the online distribution of content.[5] Content owners have pursued, and continue to pursue, horizontal collaborations that seek to vertically integrate their ownership of content with delivery via the Internet.[6] These collective ac-

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1. *See, e.g.*, Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 118-19 (2002-2003) (discussing the implications of digital content for the entertainment industry).

2. *Id.* at 118.

3. *See* Anthony Maul, Note, *Are the Major Labels Sandbagging Online Music? An Antitrust Analysis of Strategic Licensing Practices*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 365, 366 (2003-2004).

4. *See* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 909 (2004) (exploring five strategies used by the entertainment industry to combat the copyright concerns raised by digital technology).

5. *See* HARRY FIRST, ONLINE MUSIC JOINT VENTURES: TAKEN FOR A SONG 10-12 (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 04-006, 2004), *available at* http://ssrn.com/abstract=508685.

6. *See* Press Release, Department of Justice, Justice Department Closes Antitrust Investigation into the Movielink Movies-On-Demand Joint Venture (June 3, 2004), [here-

tions, however, have been subject to varying degrees of antitrust scrutiny by both the antitrust division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC).[7] This Note briefly considers the impetus driving the use of joint ventures by content owners in their attempts to guide the development of online distribution, and explores what characteristics are relevant in enabling a given joint venture to withstand antitrust scrutiny.

Part I provides a brief overview of the development of digital media and the changes in technology that gave rise to the online distribution of content. Part II examines the utilization of joint ventures by content owners and the stated advantages of such organizations as perceived by the entertainment industry. Part III briefly explores the regulatory framework guiding antitrust analysis. Finally, Part IV examines the structure of joint ventures organized for online distribution and the characteristics that enable them to withstand antitrust challenges.

I. THE DIGITAL REVOLUTION

The development of digital technology and the Internet has led to a revolution in the ability of individuals to process and manipulate information.[8] Analog technology requires that information be "fixed" through "some human or mechanical process of deforming a physical object."[9] Thus, it utilizes an "analogy" to represent the information to be stored and transmitted.[10] These analogies, however, are subject to multiple variables; for example, the etching in vinyl records or the color intensity on film affecting their quality.[11]

For decades the entertainment industry organized around analog technology platforms.[12] This was, to a large extent, due to the fact that the deterioration in quality upon subsequent reproductions of analog works acted

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inafter *Movielink Press Release*], *available at* www.usdoj.gov/opa/pr/2004/June/04_at_388.htm; Press Release, Department of Justice, Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Digital Music Investigation (Dec. 23, 2003) [hereinafter *Digital Music Press Release*], *available at* www.usdoj.gov/atr/public/press_releases/2003/201946.pdf.

7. *Id.*

8. *See* Paul Romer, *In the Beginning was the Transistor*, FORBES MAG., Dec. 2, 1996, at S43.

9. Menell, *supra* note 1, at 104 (explaining that digitization is the encoding of information using an array of binary switches).

10. *Id.* at 104-05.

11. *See id.* at 105; *Analogue*, FREE ON-LINE DICTIONARY OF COMPUTING, Nov. 14, 1998, *at* http://foldoc.doc.ic.ac.uk/foldoc/foldoc.cgi?analogue.

12. Menell, *supra* note 1, at 105.

as a natural impediment to content piracy.[13] An analog reproduction could not compete with the quality of an original work held by the content owners.[14] Even with the development of the photocopier, the audio cassette, and the video cassette recorder, content owners maintained a distinct advantage because of the inherent degradation in the quality of analog media.[15]

The development of digital technology, however, removed the natural advantages afforded to content owners by allowing perfect reproductions across unlimited generations and providing alternative channels of distribution which could not easily be controlled or monitored.[16] Whereas, in the past, the distribution of content was limited to tightly controlled broadcasts or the sale of analog media, the digital revolution fostered the Internet as a new, efficient, distribution channel.[17]

The speed with which the adoption of digital technology has wrought change is largely driven by the continuous, exponential growth in computing power.[18] While digital technology, in some form, has existed for over fifty years, the recent expansion in processing speed and memory storage capacity coupled with developments in data compression has allowed computer technology to serve as a viable platform for digital content.[19] In turn, this capacity to manipulate copyrighted content threatens the ability of content owners to control and monitor unauthorized reproductions and distributions of their works, in the enforcement of their intellectual property rights.[20]

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13. *See id.*

14. *See id.* at 105-06.

15. *See id.*

16. *See id.* at 108-09. Digitization allows for the storage and transfer of data as a "sequence of discrete symbols from a finite set," likely in the form of binary (i.e., ones and zeros). Thus, as each datum is composed of a discrete set of symbols, perfect reproductions are possible as any digital copy may be replicated symbol by symbol. *Digital*, FREE ON-LINE DICTIONARY OF COMPUTING, Oct. 28, 1998, *at* http://foldoc.doc.ic.ac.uk/foldoc/foldoc.cgi?digital.

17. *See* FIRST, *supra* note 5, at 1; Menell, *supra* note 1, at 108-09.

18. *See* Menell, *supra* note 1, at 110-11.

19. *See id.* With the increase in computing power and the expanded capacity to store large files, personal computers now maintain the capability to store and reproduce complex entertainment works. Moreover, the development of data compression formats, like MP3 and DivX, reduce the amount of memory to store and bandwidth required to transfer digital content. These technologies thus facilitate the use of digital content by ordinary consumers through the maintenance of high quality through subsequent reproductions and increased portability and manipulability. *Id.*

20. *See id.* at 118-19 ("Enforcement of copyrights throughout the Internet and beyond becomes increasingly difficult as information flows ever more freely, decentralized

Peer-to-Peer (P2P) technology is one such threat because of its ability to make "public distribution of music to the world as easy as sharing music with a friend."[21] The rise of P2P has been facilitated by the digitization of music and film and by the development of compression technologies, like MP3, that allow content to be compressed into small, high-quality, readily transferable files free of any copy-protection technology.[22] Through a network of ad hoc relationships between personal computers, unauthorized digital copies of entertainment content are uploaded and shared through an ever-expanding network resulting in an expansive, and highly efficient, piracy of copyrighted material.[23]

II. INDUSTRY RESPONSE: JOINT VENTURES AMONG CONTENT OWNERS

A. Legal, Political, and Technological Strategies

Faced with the substantial uncertainties associated with the increasing reproduction and distribution of digital media, content owners have considered and implemented numerous strategies to secure their interests.[24] The entertainment industry has routinely lobbied for protective legislation when presented with the development of any technology affecting the storage, use or transfer of entertainment content.[25] With the rise of the Internet, content owners sought special protection for digitized works distributed online.[26] Congress subsequently enacted the Digital Millennium Copyright Act (DMCA) in 1998, prohibiting circumvention of copy protection technologies and protecting the integrity of copy management systems.[27]

In addition to legislation, the entertainment industry has sought to initiate litigation against alleged infringers under existing copyright law.[28] In

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networks take root, and the cost of memory devices and faster processors continue to fall.").

21. Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 457 (2002).

22. *Id.* at 458.

23. *See* FIRST, *supra* note 5, at 7-8; Yu, *supra* note 4, at 907. *See generally* Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1132 (2000) (discussing the issues posed by digital networks and online transactions).

24. *See* Yu, *supra* note 4, at 909.

25. *See* Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22 (1996).

26. Yu, *supra* note 4, at 910.

27. *Id.* at 911.

28. *Id.* at 913.

1999, Napster, one of the earliest successful P2P networks, was the target of a suit filed by several record labels alleging contributory and vicarious copyright infringement in its facilitation of the sharing of unauthorized digital reproductions of copyrighted songs.[29] After implementing a modified preliminary injunction, the district court found that Napster was not in "satisfactory compliance" with the terms of the injunction and ordered Napster to shut down its file-sharing service until certain conditions were met.[30] Napster never relaunched its free file-sharing service and was subsequently acquired.[31]

Successor file-sharing services, like KaZaa, altered the structure of their P2P networks to better comply with the mandates of copyright law.[32] As a consequence, subsequent litigation targeting these new networks has met with limited success.[33] In response, the entertainment industry has shifted to the direct pursuit of infringement actions against individual file-sharers.[34] The deterrent effect of these individualized suits, as of late, remains unclear.[35]

In an effort to supplement the effects of litigation, content owners have also adopted educational measures to deter consumers from file-sharing. Entertainment interest groups have sent letters to universities alerting them of possible infringement activity on their networks while celebrities have sought public outlets to express their concerns.[36] In a more institutionalized effort, the National Academy of Recording Arts & Sciences recently

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29. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

30. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1096 (9th Cir. 2002); Fagin et al., *supra* note 21, at 459-60.

31. *See* Matt Richtel, *Napster Says It Is Likely to be Liquidated*, N.Y. TIMES, Sept. 4, 2002, at C2.

32. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 259 F. Supp. 2d 1029, 1045 (C.D. Cal. 2003) (differentiating Napster's "integrated service," from Defendant's services, which "provide[d] software that communicate[d] across networks that [were] entirely outside Defendants control") *aff'd*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

33. *See id.*

34. *See* A.J. Bedel, *Lights, Camera, Lawsuit*, 2003 DUKE L. & TECH. REV. 31 (exploring litigation against different parties as a means of combating digital piracy); Jefferson Graham, *Music Industry Weighs its Option; Lawmakers Want to Hear Proposals for Fighting Piracy Without Lawsuits*, USA TODAY, Sept. 29, 2003, at D6.

35. FIRST, *supra* note 5, at 10. It should also be noted that the film industry has elected to pursue similar lawsuits against individual infringers. Sarah McBride, *Film Industry Vows Crackdown on Online Movie Thieves*, WALL ST. J., Nov. 5, 2004, at B1. *See generally* Kristina Groennings, Note, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571 (2005).

36. *Entertainment Industry Widens War*, USA TODAY, Feb. 13, 2003, at D9.

unveiled a major "public education campaign" utilizing a new website, print and radio public service announcements and retail activities.[37]

In conjunction with these efforts, the entertainment industry has also pursued the development and implementation of copy-protection technology, including encryption, digital watermarking, and the use of trusted systems.[38] In broader terms, the industry has sought to utilize a system of "digital rights management" (DRM) and "access protection" in developing software and hardware controls to facilitate the monitoring, regulation and pricing of digital content.[39]

In practice, however, these technologies often result in imperfect solutions. First, the utility of any given technology is subject to decryption by hackers.[40] Once the technology is defeated, the general public can piggyback on the hacker's breakthrough. Second, there are substantial consumer rights concerns related to the continued utility of existing hardware, like stereos and computers, and the ability of individuals to exploit previously available functions, like reproductions for personal use, supported by the "fair use" privilege.[41] Consumer groups are, thus, wary of the potential for copy-protected media preventing consumers from making fair use reproductions of their purchases or limiting the ability of consumers to use the new media with their existing hardware.

Altogether, the practical success of these strategies has been limited. Despite the victory in the *Napster* litigation, the industry has struggled in its attempts to target less centralized file-sharing services.[42] The individual lawsuits remain controversial and the effects of the industry's educational efforts are unclear.[43] Copy-Protection technologies and DRM remain viable options but are vulnerable to decryption and consumer rights concerns. As a consequence, the industry has turned to business solutions as an alternative means of addressing these issues.

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37. Yu, *supra* note 4, at 921.

38. *Id.* at 918.

39. Michael A. Einhorn, *Digitization and Its Discontents: Digital Rights Management, Access Protection, and Free Markets*, 51 J. COPYRIGHT SOC'Y U.S.A. 279 (2004).

40. Yu, *supra* note 4, at 919.

41. *Id.* at 920.

42. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 259 F. Supp. 2d 1029, 1045 (C.D. Cal. 2003) (holding that the lack of control, by defendants, in the operation of their P2P networks undermined claims of vicarious copyright infringement) *aff'd*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

43. FIRST, *supra* note 5, at 10; Yu, *supra* note 4, at 921.

B. Licensing

While the entertainment industry has been reluctant to relax its control over content, in some instances the market has introduced licensing as a possible solution to the digital problem.[44] By the end of 2002, Rhapsody, an independent online music service, announced that it had signed agreements with all five major record labels to distribute music online, with four of the five agreeing to allow Rhapsody to offer the burning of songs on to CDs.[45] Subsequently, four new independent ventures entered the market, spearheaded by Apple Computer and its iTunes Music Store.[46] iTunes offers individual songs and albums for download from all five major labels.[47] Most recently, Yahoo Inc. concluded a $160 million deal to buy Musicmatch Inc., a song management software maker, providing Yahoo the capacity to offer "online music downloading and subscription services."[48] In addition, a group of music retailers, including Best Buy Co. and Tower Records, recently announced the formation of Echo, Inc., a consortium aimed at developing an "online music subscription service that will let each of the retailers distribute music on the Internet under their respective brand names."[49]

Despite the apparent success of these services and the popularity of legitimate downloads among consumers, numerous concerns persist relating to the legal nature of online content and the implications of their possible resale.[50] Questions also remain as to the security of the delivery format.[51] Moreover, from an economic perspective, it may not be in the industry's interest to see legitimate online distribution prevail.[52] Notwithstanding the

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44. *See* Yu, *supra* note 4, at 922. *See generally* Cydney A. Tune, *Licensing Music on the Internet*, ENT. & SPORTS LAW., Summer 2004, at 1 (discussing the licensing of music on the Internet), *available at* http://pillsbury.admin.hubbardone.com/files/tbl_s17PDFRepository/PDFUpload121/167/Ent%20%20Sports%20Lawyer%20(Summer-2004)%20Tune.pdf.

45. John Borland, *Listen.com Lands Last Big Five Label*, CNET NEWS.COM, July 1, 2002, *at* http://news.com.com/2100-1023-940841.html?tag=bplst.

46. FIRST, *supra* note 5, at 12.

47. Pui-Wing Tam & Anna Wilde Mathews, *Apple Polishes Its Music Service*, WALL ST. J., Apr. 14, 2003, at B1.

48. Benny Evangelista, *Yahoo to Enter Music Fray / Web Giant to Buy Musicmatch for $160 Million*, S.F. CHRON., Sept. 15, 2004, at C1. Yahoo joined RealNetworks, Roxio's Napster, Wal-Mart, Sony, MusicNow, Microsoft's MSN Music Store, and eBay. John Schwartz & John Markoff, *Power Players*, N.Y. TIMES, Jan. 12, 2004, at C1.

49. FIRST, *supra* note 5, at 14.

50. *See* Yu, *supra* note 4, at 922.

51. John Borland, *Program Points Way to iTunes DRM Hack*, CNET NEWS.COM, Nov. 24, 2003, *at* http://news.com.com/2100-1027-5111426.html.

52. *See* Maul, *supra* note 3, at 370.

wide consumer interest in authorized third-party online services, it is widely understood that such services "must be inexpensive as well as comprehensive" to remain attractive to consumers.[53] According to the music industry's own research, such "inexpensive" pricing would likely result in a price point of twenty-five cents per download.[54] This would result in a substantial drop from the thirty to forty percent profit margins currently reaped from the sale of CDs.[55] Indeed, some industry insiders suspect that the industry would ultimately rather see online ventures fail, thereby securing their interests in the distribution of physical media.[56]

C. Joint Ventures

Given the deficiencies in these approaches, many content owners have proceeded to form joint ventures as a means of securing their interests. In light of the substantial demand for a legal alternative to P2P file-sharing, these collaborations have sought to personally oversee and control the development of online distribution.[57]

1. Generally Accepted Advantages

Joint ventures are collaborations where disparate parties combine resources and efforts to undertake a given enterprise for profit.[58] The perceived value of such collaborations lies in the expectation that by pooling resources the "resulting whole will be greater than the sum of the constituent parts."[59] The combination, thus, is intended to create significant efficiencies and provide competitive and synergistic advantages over alternative arrangements.[60]

There are numerous concerns that typically underlie any joint venture. Some of these concerns relate to the sharing of risks, whether between companies in an emerging market or with a local partner in a new geographic area.[61] Other joint ventures seek to leverage the existing strengths or resources of partner firms to create new opportunities in serving global

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53. *Id.*

54. *See id.*; Amy Harmon, *Grudgingly, Music Labels Sell Their Songs Online*, N.Y. TIMES, July 1, 2002, at C1.

55. Maul, *supra* note 3, at 369.

56. Fagin et al., *supra* note 21, at 464; Maul, *supra* note 3, at 370 (quoting Neil Strauss, *Online Fans Start to Pay the Piper*, N.Y. TIMES, Sept. 25, 2002, at E1);

57. Fagin et al., *supra* note 21, at 464.

58. Stephen Fraidin & Radu Lelutiu, *Strategic Alliances and Corporate Control*, 53 CASE W. RES. L. REV. 865, 867 (2003).

59. *Id.*

60. *Id.*

61. *Id.* at 869-70.

clients, in initiating joint marketing, distribution or product development efforts, or in generating enough critical mass with a new technology to realize the benefits of network effects.[62]

2. *Pooling of Rights*

Specific to the entertainment industry, and the diversity of content owners, joint ventures have been used as a means of pooling rights. These collective efforts have sought out efficiencies that "stem from combinations of different capabilities or resources."[63] They thus allow for the "pooling" of intellectual property rights to avoid the licensing entanglements caused by the fragmentation of rights among countless different owners.[64] In some instances, where there are overlapping or conflicting rights, as in the case of blocking patents, pooling serves to consolidate potentially conflicting interests to enable a given product or products to be produced.[65] From an entertainment perspective, this is particularly relevant in relation to the "splintering of rights" in the music industry.[66]

The specific advantages of joint ventures, with regard to pooling, are most readily perceived in the operation of the American Society of Composers, Authors & Publishers (ASCAP) and Broadcast Music, Inc. (BMI). ASCAP and BMI are performing rights organizations which serve as intermediaries charged with the monitoring of music licensees and the collection of royalties.[67] The Supreme Court noted that the ultimate development of blanket licenses, and organizations like ASCAP, grew out of the "practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions."[68] The advantage of pooling rights, in the words of the Court, existed in the avoidance of "thousands of individual negotiations," which the court deemed to be a "virtual impossibility," and the balancing of "unplanned, rapid and indemnified access to any and all of the repertory of compositions" sought by users against a "reliable method of collect[ion] for the use of . . . copyrights" sought by owners.[69] Thus, pooling ensures that the desired media is

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62. *Id.* at 871.

63. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.36 (2000) [hereinafter COLLABORATION GUIDELINES].

64. FIRST, *supra* note 5, at 18.

65. *Id.*

66. *Id.*; *see* Amy Harmon, *Copyright Hurdles Confront Selling of Music on the Internet*, N.Y. TIMES, Sept. 23, 2002, at C1.

67. FIRST, *supra* note 5, at 20.

68. Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 20 (1979).

69. *Id.*

delivered in a "sure and speedy way," reassures licensees that they have obtained proper permission to use the media, and bolsters the ability of licensors to enforce their rights.[70]

3. *One-Stop Shopping and Uniform Standards*

The delivery of "one-stop-shopping" is another impetus for collaborations among licensors in their efforts to satisfy consumer wants.[71] Because of the claimed "infinite economies of scale" associated with online distribution, content suppliers have looked to create "celestial jukeboxes" to provide in one place all the music, or any other form of content for that matter, that exists worldwide.[72] This addresses the consumer desire to minimize "search costs" by providing "access to any and all of the repertory of compositions" available, as discussed by the Supreme Court.[73]

Related to this conception of one-stop shopping is the importance of obtaining uniformity in the digital media standards used for online distribution. While there is great perceived value in the simple combination of the libraries of the major content providers, there is a secondary advantage in the standardization of digital formats.[74] Consumers might be put off from shopping for content online if studio or label libraries were only available from each content owner, individually, in a different proprietary format. The existence of a single distribution format for online content coupled with the consolidation of a comprehensive content library streamlines the online purchase of content and addresses the needs of consumers.[75]

The entertainment industry is justifiably wary of the distribution of their content in "digital form," given the ease with which pirates might reproduce and distribute illegal copies.[76] As with the development of technical standards, joint ventures enable content owners to control anti-piracy measures which they hope will stem the rise of *Napster*-like distribution networks for other forms of content.[77]

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70. FIRST, *supra* note 5, at 20.

71. *Id.* at 23.

72. *Id.*

73. *Id.*; *Broadcast Music, Inc.*, 441 U.S. at 20.

74. *See* Karen Kaplan & Corie Brown, *Five Studios Plan Joint Venture to Offer Movie Downloads*, L.A. TIMES, Aug. 17, 2001, at A1.

75. Katherine L. Race, *The Future of Digital Movie Distribution on the Internet: Antitrust Concerns with the Movielink and Movies.com Proposals*, 29 RUTGERS COMPUTER & TECH. L.J. 89, 99-100 (2003).

76. *See id.* at 97.

77. *Id.* That is not to say, however, that there are no services which currently facilitate the online trading of music. *See* McBride, *supra* note 35, at B1.

4. *Control over the Internet as a Means of Distribution*

Lastly, given the relatively recent rise of digital technology, there is an additional incentive to form joint ventures in order to control the development of the Internet as a new medium of distribution. This rationale has been utilized to support past collaborations among content owners, notably upon the development of pay television. With the development of the Home Box Office (HBO) pay television network, the movie studios found themselves somewhat dissatisfied with the seemingly disproportionate amount of revenue being diverted to cable operators and programming companies.[78] As a consequence, four major studios formed a joint venture (Premiere) to collectively manage the distribution of their films via pay television.[79] The studios believed that by controlling the distribution they could increase revenues, mitigate "potential problems on the theatrical distribution side," and create an "outlet for 'marginal productions' that would not otherwise be accepted on pay television."[80] Thus, rather than defer to the wilds of the market and the existing third-party pay television operators, the studios sought to utilize a joint venture to leverage their content ownership and thereby control the development of a new medium of distribution to suit their interests.

It must be noted that the district court held the Premiere joint venture to be potentially in violation of antitrust laws and subsequently granted a preliminary injunction.[81] That is not to say, however, that the role of content owners in guiding the development of a new technology cannot be procompetitive. Certainly the need for standardization, the need for the implementation of protective measures, and the support of content providers are crucial to the successful adoption of a new technology. Thus, to the extent that the legitimate interests of a content industry in guiding the advancement of a new means of distribution prevails, there can be significant strategic value, and procompetitive benefits, in exerting some control over the development of the new technology.

Content owner collaborations thus provide significant strategic advantages in: (1) the consolidation of fragmented rights; (2) the provision of a single comprehensive source of content; (3) the formulation of security and technical standards; and (4) the general development of a new technology.

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78. United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 419 (S.D.N.Y. 1980).

79. *Id.*

80. *Id.* (internal citations omitted).

81. *Id.* at 434.

III. ANTITRUST CONSIDERATIONS

A. Regulatory Framework

The threat posed by the concentration of economic power in the hands of a few corporations and individuals prompted the promulgation of antitrust legislation.[82] In the interests of the public, these laws serve to promote and preserve competition, eliminate price controls, foster innovation, and, altogether, facilitate the proper functioning of the market.[83] Thus, section 1 of the Sherman Act declares illegal "[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."[84]

To assist economic actors in abiding by the principles espoused by U.S. antitrust laws, the DOJ and the FTC have implemented guidelines to "articulate the analytical framework" applied in determining whether a given action or transaction is anticompetitive.[85] These guidelines focus on preventing the creation, enhancement or use of market power, defined as the ability of a given seller to profitably maintain prices above the level ordinarily achieved by competition for an extended period of time.[86] This enhanced profitability, brought about by the ability of a firm or a group of firms to control the market, is coupled by reduced output and an overall "misallocation of resources" through the "transfer of wealth from buyers to sellers."[87]

This concern, relating to the concentration of market power, extends to the organization of joint ventures. Horizontally, concerns exist as to the cooperation between competitors in an effort to collectively restrict output and raise prices. Yet, in cases where horizontal competitors join together to exploit an opportunity on another level of the marketing chain, the issue of vertical integration arises. With the music industry as an example, the concern as to the collaboration of music labels in forming a joint venture to spearhead the online distribution of music lies not in the prospect of a reduction in the creation of content, a horizontal integration. Rather the issue lies in the impact on competition by integrating two segments of the marketing channel, content and delivery, which would then allow the content providers to also control a means of distribution. Thus, the issue of

82. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 1 (2004).

83. *Id.*

84. 15 U.S.C. § 1 (2000).

85. *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 0.1 (2d ed. 1997).

86. *Id.*

87. *Id.*

horizontal collaboration raises antitrust concerns insofar as the potential economic power of the collaborating music labels is exercised vertically in the control of online distribution.

As a general principle, the courts have long been wary of vertical integration in the entertainment industry.[88] In *United States v. Paramount Pictures, Inc.*, the Supreme Court held that a collaboration between movie studios and movie theaters constituted a vertical integration of production, distribution, and exhibition and led to an unlawful restraint on trade.[89]

However, since the *Paramount* decision, courts have become more accepting of vertical integration, consistently declining to find antitrust violations.[90] This shift reflects, to some extent, the Chicago school analysis of vertical integration which holds that "vertical integration should be per se legal because vertical integration is either competitively neutral or procompetitive."[91] Many content providers argue that vertical integration is justified due to the rise of multiple competing methods of distribution.[92] Nevertheless, notwithstanding the existence of procompetitive benefits or competition-neutral circumstances, in any case of vertical integration there remains the potential for anticompetitive consequences.[93] Thus, the FTC and the DOJ have implemented guidelines to regulate the use of joint ventures among competitors.[94]

B. Federal Guidelines

Two types of analysis, per se and rule of reason, are utilized in evaluating the antitrust implications of a given collaboration.[95] The rule of reason analysis evaluates the overall competitive effect of a given agreement.[96] It considers whether the agreement is anticompetitive in encourag-

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88. Race, *supra* note 75, at 121-22.

89. 334 U.S. 131, 173-74 (1948); Konrad Gatien, *Internet Killed the Video Star: How In-House Internet Distribution of Home Video Will Affect Profit Participants*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 909, 936 (2003).

90. Gatien, *supra* note 89, at 937.

91. *Id.* at 941.

92. *Id.* For example, with the motion picture industry, movies may distributed via theatres, video-rental outlets, pay-per-view, pay television, DVDs, broadcast or cable television, or online.

93. *Id.* at 942.

94. The FTC and DOJ share responsibilities in enforcing antitrust law. *Id.* at 943; *see* COLLABORATION GUIDELINES, *supra* note 63, § 1.1. With matters involving media and entertainment, the FTC has ceded oversight to the Department of Justice. Gatien, *supra* note 89, at 943.

95. COLLABORATION GUIDELINES, *supra* note 63, § 1.2.

96. *Id.* § 3.3.

ing higher prices or reduced output, quality, service or innovation.[97] Such an analysis "entails a flexible inquiry," colored by the nature of the agreement and the market circumstances.[98] Initially, the FTC and DOJ will consider the "nature of the agreement," exploring the "business purpose" of the agreement and determining whether the agreement has caused actual anticompetitive harm.[99] This analysis serves to explore whether the relevant agreement might "limit[] independent decision making," "combine[] control or financial interests," or facilitate explicit or tacit collusion, thereby resulting in a decrease in competition.[100] These considerations relate to reductions in the ability to compete, decreases in the incentive to compete, and facilitation of collusion through the sharing of information.[101]

If the resulting analysis indicates the absence of anticompetitive harm there generally is no antitrust challenge. However, where there is a likelihood of, or demonstrated, anticompetitive harm, the regulatory authorities initiate a more detailed market analysis.[102] They define the affected markets, determine the ease of market entry, and calculate market shares, concentration, and market power.[103] In addition, they seek to evaluate the ability and incentives for the collaborators to compete independently by considering exclusivity, control over assets, financial interests, control over decision-making, information sharing, and duration.[104] If these factors indicate minimal potential for anticompetitive harm the investigation ends.[105] Otherwise, the FTC and DOJ consider whether the procompetitive benefits of the relevant agreement offset the predicted anticompetitive harms.[106] These procompetitive benefits are recognized when the relevant agreement is reasonably necessary to achieve verifiable "cognizable efficiencies."[107]

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97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* § 3.31.
101. *See id.*
102. *Id.* § 3.3.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* § 3.36. Cognizable efficiencies are described as those efficiencies that do not arise "from anticompetitive reductions in output or service" and "cannot be achieved through practical, significantly less restrictive means." *Id.*

Conversely, per se illegal agreements will always, or almost always, tend to raise prices or reduce output.[108] They are "so likely to harm competition and . . . have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects."[109] The courts have identified certain specific types of agreements, including those that "fix price or output, rig bids, or share or divide markets," as per se illegal.[110] That being said, even where a certain agreement falls within a category ordinarily considered per se illegal, if that agreement provides for an "efficiency-enhancing integration of economic activity" and is "reasonably necessary to achieve [the alleged] procompetitive benefits," then regulators will defer to the "rule of reason."[111]

In addition to these rules for competitor collaborations, the FTC and DOJ have also published antitrust guidelines specifically addressing the licensing of intellectual property.[112] Restraints related to the licensing of intellectual property are evaluated under the rule of reason analysis, unless the restraint's "nature and necessary effect are so plainly anticompetitive" with no contribution to "an efficiency-enhancing integration of economic activity."[113] Where a licensing arrangement is horizontal in nature, a given restraint might increase the potential for coordinated output and pricing, or the acquisition and maintenance of market power.[114] Yet, where a licensing arrangement is vertical in nature, the agreement could conceivably impair competition between horizontal entities on either the licensor or licensee level, or in another relevant market.[115] This potential is rooted in the concern that such an agreement might prevent competitors from accessing crucial inputs, increase the costs of such inputs, or "facilitate[] coordination to increase price or reduce output."[116] Of course, whatever potential may exist for anticompetitive harm, the existence of overriding procompetitive efficiencies will tend to justify restraints necessary to achieve such efficiencies.[117] The question is whether, on balance, the anticompetitive restraints are outweighed by the procompetitive benefits.

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108. *Id.* §1.2.
109. *Id.*
110. *Id.* § 3.2.
111. *Id.*
112. *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995) [hereinafter LICENSING GUIDELINES].
113. *Id.* § 3.4 (citations omitted).
114. *Id.* § 4.1.1.
115. *Id.*
116. *Id.*
117. *Id.* § 4.2.

These guidelines specifically address the pooling arrangements discussed as a rationale supporting the formation of joint ventures.[118] Broadly speaking, these arrangements are not fundamentally anticompetitive.[119] Indeed, they might produce significant procompetitive benefits by "integrating complementary technologies, reducing transaction costs, . . . and avoiding costly infringement litigation."[120] However, the "the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions, may be deemed unlawful if [the restraints] do not contribute to an efficiency-enhancing integration of economic activity among participants."[121] In sum, any restraints on competition must have a procompetitive rationale to counteract any anticompetitive effects.[122]

IV. FORWARD-LOOKING CONSIDERATIONS: STRUCTURING A JOINT VENTURE TO WITHSTAND ANTITRUST SCRUTINY

Joint ventures are potentially viable instruments for any combination of organizations in their efforts to collaborate in the pursuit of a given opportunity. With a collaboration among content providers in the pursuit of online distribution, a general structure involving both a horizontal and vertical component predominates. Within any given content industry, the content providers are rivals competing for consumers to purchase their brand, or brands, of films, music, video games, novels or so forth. However, with the rise of digital technology, they collectively have an interest in guiding the development and implementation of Internet technologies, as a means of distribution, in order to secure the interests of the industry as a whole. As a consequence, the horizontal aspect of a distribution joint venture lies in this collective effort.

This horizontal collaboration is the source of concern, in terms of antitrust scrutiny, but only in relation to the vertical integration of content and delivery.[123] In forming the joint venture, the content owners are not seek-

118. *See* discussion *supra* Part II.C.2.

119. *See* LICENSING GUIDELINES, *supra* note 112, §§ 5.1, 5.5.

120. *Id.* § 5.5.

121. *Id.*

122. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 114-15 (1984) (holding that a restriction on the televising of college football games was unlawful because it was not reasonably related to any efficiency justification).

123. The issues faced by content providers in forming joint ventures for the purpose of distributing content online mirrors, in many ways, the trials of standard-setting organizations in the computer industry. The procompetitive benefits of implementing an indus-

ing to collaborate on the creation of content. Rather, they are seeking to collectively engage in the delivery of that content. Thus, the potential for anticompetitive behavior stems from the joint venture's relationship vis-à-vis third-parties engaged in delivery.

There are, subsequently, two dimensions of this relationship relevant to an antitrust analysis: upstream and downstream. The content owners are in the business of producing entertainment content for consumption by individuals. There are often intermediaries, like movie theaters or television networks, who facilitate the distribution of that content between the content owners and the consumers. In the formation of a joint venture, rather than solely relying on third-party distributors similar to Apple's iTunes, content owners operating as online retailers expand their operations beyond the mere creation of content by distributing directly to consumers themselves.

As such, there are upstream concerns relating to the possible exercise of market power by the collaborating content owners in their licensing arrangements with third-party distributors.[124] In order for third-party distributors to compete with the joint venture, they must license content from the same companies that own the joint venture. To the extent that the content owners use their control over the content to favor the joint venture, antitrust concerns abound.

In addition to the direct effects upstream, there are corresponding consequences downstream in the ultimate distribution of content to consumers. In an effort to restrain competition among third-party distributors, and control the development of the Internet as a new means of distribution, consumers may suffer from the increased prices and decreased innovation resulting from the joint venture's stranglehold over the new medium.

This Part discusses the relevant considerations when attempting to structure a joint venture, for the online distribution of content, to withstand antitrust scrutiny. First, the fundamental purpose for organizing a joint venture is explored. The upstream and downstream levels are then considered in turn. A discussion of the broader policy concerns follows.

A. Fundamental Purpose of the Joint Venture

There are, as previously discussed, many reasons why a collective of content owners might seek to form a joint venture. Certainly, these reasons

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try standard are balanced against the anticompetitive threats of technology exclusion, collusion and monopoly power. *See* Robert M. Webb, *There Is a Better Way: It's Time to Overhaul the Model for Participation in Private Standard-Setting*, 12 J. INTELL. PROP. L. 163, 209-15 (2004).

124. *See Digital Music Press Release*, *supra* note 6, at 3.

might be anticompetitive. If a given content industry has a substantial investment in the current means of distribution, a new technology may be recognized as an economic threat, disturbing the status quo. As a consequence, that industry may see a joint venture as an effective means of quashing the new technology. Or a group of content owners may view the efficiencies of a new technology as an opportunity to vertically integrate their creation of content with delivery, thereby forcing out third-party distributors. In either case, such clear abuses of market power, in efforts to reduce competition, will garner serious antitrust scrutiny.

Contrarily, joint ventures are also used to generate procompetitive benefits. Where there is a fragmentation of content owners, a joint venture might allow for an appropriate means of creating a one-stop shop. However, this objective ought to be a means to an end. In other words, the rise of Internet technology presents the potential for a new, more efficient, means of distribution. Yet, in order to effectively serve consumers and promote competition, it is important that the technology is widely implemented so that it may be widely adopted. This requires technology sufficiently amenable to consumers and that proper standards and protections are developed in order to ensure the smooth functioning of commerce.

Hence, the one-stop shop does not serve the rigid achievement of vertical integration, to the exclusion of third-party distributors, but rather it acts to spearhead the introduction of online content distributors to demonstrate the viability of online distribution in its ability to offer a wide selection of content. The objective is to launch a new means of distribution. It is an effort, by the industry, to facilitate the advancement of technology to better serve consumers. Thus, the collaboration is geared toward the successful realization of the broader social and economic benefits of the new means of distribution. The day-to-day operations of the joint venture are merely incidental to dual objectives of fostering the growth of the new technology and ensuring that the proper standards and protections are implemented. The economic power of the joint venture is thus being used to promote competition rather than restrain it.

B. Upstream Level

Generally, collaboration at the upstream level translates to cooperation between the venture owners in the areas of research and development, purchasing, and standard-setting.[125] Proceeding collectively for these purposes generally has no direct effect on output or pricing and, indeed, can

125. Thomas A. Piraino, *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 62, 141 (2002).

generate "substantial efficiencies" and other procompetitive benefits.[126] In terms of the antitrust concerns related to online distribution joint ventures, the focus on the upstream level of development primarily involves the licensing of existing content to the joint venture and to third-parties.[127] As such, antitrust scrutiny is likely to focus on the degree to which the licensing arrangements might restrain competition among potential licensors.[128] Specifically, the concern relates to the potential for collaborating content owners to (1) collectively set unfavorable licensing terms vis-à-vis third-parties or (2) utilize exclusive licensing and block-out third-party distributors altogether while (3) operating at less than arms-length when transacting with the venture itself.

1. Collective Licensing Terms

The structure of a joint venture, and the resulting collaboration, facilitates the possibility of explicit or tacit collusion as to licensing arrangements.[129] This risk of collusion is perpetuated by the potential for the "exchange of competitively sensitive information relevant to each [content owner's] licensing considerations."[130] Any joint venture structure that clearly serves to collectively set licensing terms or allows for the exchange of information that could lead to the collective setting of such terms will likely fail to pass antitrust muster.[131]

2. Exclusive Licensing Terms

Past entertainment joint ventures have engaged in exclusive licensing. Two clear examples are the Premiere pay television network and the Movies.com joint venture. With Premiere, the participating movie studios agreed that the pay television joint venture was "to have certain films distributed by the movie company venturers available to it exclusively for a nine-month period, before those films [were] shown on the existing satel-

126. *Id.* at 141-44.

127. *See Movielink Press Release*, *supra* note 6, at 3. However, it is arguable that the purpose of any given online entertainment joint venture is to create a new product (i.e., digital video downloads or digital music) and thus the collaboration is necessary in order to develop the technology and the appropriate standards. Race, *supra* note 75, at 121-22. It remains, however, debatable whether these products are indeed "new" and whether it is truly necessary for the content owners to control this new means of distribution in order to facilitate the accompanying technological development. *See id.* at 122-23.

128. *See id.* at 123.

129. *See* Maul, *supra* note 3, at 378.

130. *Digital Music Press Release*, *supra* note 6, at 3.

131. *See id.*; *Movielink Press Release*, *supra* note 6, at 3.

lite-fed network programming services."[132] In considering whether such an arrangement was anticompetitive, a federal district court in New York found that there was "ample evidence that the nine-month window was meant to be 'exclusionary and coercive.'"[133] As a consequence, the court held that such an agreement constituted a "group boycott," albeit one that was time-limited, and thus unreasonably restrained competition.[134]

In a similar manner, Movies.com, a proposed joint venture between the Walt Disney Company and 20th Century Fox, planned to control the "exclusive distribution rights [of new film releases from each content owner] for the period of time beginning 'sometime after the movies are available at the video store but before they appear on any cable, satellite or broadcast TV service.'"[135] Ultimately, out of concern over antitrust scrutiny, Fox pulled out of the proposal, leaving Movies.com a strictly Disney-run enterprise and prompting the end of a DOJ investigation.[136]

Viewing these examples, despite whatever mitigating characteristics, such as time-limits, a joint venture might put in place, any attempt at exclusivity in licensing will generally be deemed to have no other reasonably justifiable purpose than to restrain competition. While it is arguable that certain efficiencies could be demonstrated to outweigh the seemingly per se illegal qualities of the exclusive license, it is nevertheless likely that any such agreement will be met with heavy scrutiny.

3. *Arms-Length Licensing*

The most successful form of structuring, at least insofar as licensing is concerned, is an arms-length relationship between the individual content owners and the joint venture. As an example, the pressplay and MusicNet online music joint ventures were cleared by the DOJ, as to their licensing practices, due to the evidence that the licensing arrangements between the labels and third-parties varied significantly and that each label had independently adopted its own unique approach to third-party distribution online.[137] This finding was bolstered by the apparent success of safeguards adopted by the labels to prevent the sharing of confidential business information through the joint ventures.[138] The DOJ similarly cleared the

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132. United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 419 (S.D.N.Y. 1980).

133. *Id.* at 428.

134. *Id.* at 429, 431.

135. Race, *supra* note 75, at 94.

136. *Id.*; *Movielink Press Release*, *supra* note 6, at 1.

137. *Digital Music Press Release*, *supra* note 6, at 3.

138. *Id.*

Movielink joint venture, where the individual studios independently negotiated with the venture as to the pricing and distribution of their respective films.[139]

Thus, a joint venture would likely be able to withstand antitrust scrutiny by requiring the venture owners to transact at arms-length with the venture and to adopt separate licensing terms vis-à-vis both the joint venture and third-parties. This should be accompanied by the implementation of rigorous safeguards to sufficiently demonstrate to regulatory authorities that the sharing of confidential business information has been effectively suppressed.

This is not to suggest that the collaborators should step back from their roles in collectively supporting the new means of distribution or jointly innovating technical and security standards. However, there is an emphasis on the importance of avoiding any improper cooperation as to the vertical integration of content and delivery and setting the boundaries of the venture's operations.

C. Downstream Level

Through the operation of the joint venture, the downstream level relating to consumer retail sales is vertically integrated with the upstream licensing level of the content owners.[140] To a significant extent the antitrust implications of the downstream level are affected by the upstream level. In other words, anticompetitive licensing arrangements upstream might translate into (1) a reduction in competition or (2) a restriction in technological development downstream.

1. Reduction in Competition

As competition is constrained upstream, through exclusive or collusive licensing, there is the potential for restrained innovation, increased prices, or decreased output on the retail distribution level. Thus, in cases of vertical integration, the FTC and DOJ generally seek to examine whether there is the possibility of collusion, generally through the sharing of confidential business information, and the extent to which the products distributed by the joint venture compete with third-party products.[141] The collective organization of major competitors carries a significant incentive to tacitly engage in restrictive licensing[142] and other anticompetitive behavior. The venture may be vested with the exclusive right to distribute, effectively

139. *Movielink Press Release, supra* note 6, at 2.
140. *See id.* at 3.
141. *Id.*
142. *Id.*

blocking out third-party competitors, or it might be afforded an advantage through price-fixing[143] or improper uses of Most Favored Nation clauses.[144]

Thus, in terms of structuring an online distribution joint venture to withstand an antitrust investigation, it would be necessary to adhere to the same principles guiding the upstream analysis. Safeguards should be taken to avoid any appearance of sharing confidential information and licensing decisions should be made independently by the participant content owners at arms-length. Pricing decisions should be made independently and any provisions appearing to discriminate against third-parties, including Most Favored Nations clauses, should generally be avoided. That is not to say that any specific type of clause is fundamentally disfavored. But, to the extent that any given clause enables the content owners of a given joint venture to restrain competition without any clear overriding efficiency benefits, it is likely to become the focus of an antitrust investigation.

Altogether, the hallmark of a joint venture structure should be the independence with which the operations of the joint venture interact with the venturers and with third-parties. Apart from the general collaboration relating to support and development of the new distribution channel, the terms of the licensing agreements, the selection of third-party licensors, and other operational decisions should remain within the province of the venture itself. The venture is a vehicle to produce procompetitive benefits. Thus, it should impose clear safeguards to prevent and minimize the potential for anticompetitive abuse.

2. *Restriction In New Means of Distribution*

Where restrictive licensing takes hold there is also a reduced incentive to innovate and develop the Internet as a means of distribution.[145] In other words, the general purpose of the joint ventures under discussion is to provide for online distribution. There is no reduction in the incentive to innovate content, as competition between the content creators persists.

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143. Explicit price-fixing includes the use of allocation formulas. *See* United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 427 (S.D.N.Y. 1980).

144. Most Favored Nation clauses "are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers." Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995). These clauses might be used by "a small number of sellers" to "coordinate manipulation of prices or quantities." Maul, *supra* note 3, at 379.

145. *See Digital Music Press Release*, *supra* note 6, at 3 ("The Division considered in its investigation whether the major record labels used their joint ventures to suppress the growth of the Internet as a means of promoting and distributing music, in order to protect their present positions in the distribution of music on physical media . . . .").

There does remain, however, the possibility of reduced competition as to distribution. Rather than seeking to promote the new technology, there exists a possible incentive to suppress the adoption of the new means of distribution in order to protect existing investments in the status quo.[146]

That is not to say, however, that content owners cannot meaningfully contribute and even bolster the development of a new technology. Certainly there are substantial benefits, as to the ultimate adoption and success of a new means of distribution, in the support and guidance of the major content owners as representatives of the industry. Nevertheless, given the particular interests of content owners in the ultimate success of their existing operations, it is difficult to say where support and guidance ends and restrictive, self-interested control begins.

In the case of pressplay and MusicNet, the DOJ speculated that a collective action by the major record labels might have been directed at exploring the Internet as a means to market and distribute their content "without relinquishing control over the pace and direction of those activities."[147] The initial poor quality and restrictive nature of the online music joint ventures' services supported this theory.[148] Ultimately, though, market pressures prevailed and the liberalization of the online music services, with more consumer-friendly technologies and broad licensing to third-parties, led the DOJ to drop its investigation.[149]

Altogether, there does not appear to be a clear objective standard as to what level of technological development would be considered procompetitive. Yet, it is apparent that attempts to overly control the development of a new technology or a new means of distribution will raise antitrust concerns. The overriding issue is the prospect of content owners suppressing a new, possibly more efficient, means of distribution to further their own interests. Any sort of control exerted by a joint venture should have clear efficiency or procompetitive benefits, especially if such control limits the ability of third-parties to engage in or develop the same means of distribution. Thus, rather than seeking to control and dominate, a given joint venture should focus on guidance and support. The difference, apart from semantics, is the open nature of guidance. The support of the industry is crucial to the successful implementation of a new technology or a new means of distribution. The content owners ought to play a prominent role to en-

146. *Id.*
147. *Id.* at 4.
148. *Id.* at 3-4.
149. *Id.* at 4.

sure that proper standards are developed and to protect their intellectual property. But it is imperative that they use a light touch.

The control asserted by the joint venturers should be limited to guiding development, managing the creation of standards, and encouraging the adoption of the technology throughout the industry. There should be open cooperation with third-party licensors and other possible innovators who might contribute to the development of the technology. Thus, there should be a policy of interacting with third-parties and encouraging innovation and, indeed, competition. The stated intent should be inclusiveness. Otherwise, any attempt to broadly suppress innovation or to otherwise exclude third-parties would raise serious antitrust concerns.

D. Broader Policy Considerations

While the alleged efficiencies and procompetitive benefits of joint ventures have been explored at length above, many scholars contend that these advantages are not supported by a more focused analysis.[150] The agreement forming the Movielink joint venture, owned by five of the major movie studios, advocates for an "open-access technology that does not exclude competitors."[151] Despite the appearances of propriety, scholars have argued that the true intent of the co-venturers should be carefully scrutinized given the potential for these collaborations to engage in anticompetitive behavior.[152] Much of this concern is derived from the leverage afforded to content owners through their intellectual property rights.[153] Similarly, at least one scholar argues that the benefits associated with pooling rights or creating a one-stop shop are overstated given the ability of third-parties to sufficiently deal with multiple rights-holders and provide the same one-stop shopping offered by the content owners.[154]

To the extent that a given joint venture among content owners seeks to dominate a new technology or a new means of distribution through the imposition of vertical or horizontal restraints, its procompetitive benefits are questionable. The impetus behind the organization of the joint ventures previously discussed, however, is to guide the development and implementation of a new technology. Unfortunately, such high-level ideals do not apply perfectly in the real world. Critics are right to suggest that the intent of a given joint venture should be questioned. There may be benefits to pooling rights, like a clearinghouse, or service as a one-stop shop. But

150. *See, e.g.*, FIRST, *supra* note 5; Race, *supra* note 75, at 123.
151. Race, *supra* note 75, at 123.
152. *Id.* at 123-25.
153. *See id.* at 124.
154. *See* FIRST, *supra* note 5, at 21.

where these efficiencies are eroded, the introduction of third-parties and competition would seem to outweigh the benefits of collective action.

On balance, joint ventures may provide substantial procompetitive benefits, but it cannot be denied that the prospect of collective action, particularly given the leverage afforded by intellectual property rights, raises the potential for anticompetitive behavior. Certainly, the intent of the co-venturers must be carefully scrutinized, but so must the structure of the underlying venture. The recommendations described above focus on the distinction between the operations of the joint venture and the higher sócio-economic benefits sought by the venturers. Where the joint venture seeks to dominate the new technology, to stifle innovation, to minimize competition, and to exclude third-parties, certainly the alleged procompetitive benefits are suspect. If, for example, a joint venture seeks to be the sole online distributor, the potential for antitrust abuses is significant. But if the purpose of the venture is to guide the development of the technology, the venture serves only as a vehicle. It may be an example of vertical integration, but to the extent that competition is allowed and encouraged, the procompetitive benefits would seem to prevail.

Ultimately, the line is difficult to draw. The intent to guide and support might easily give way to an intent to manipulate and restrict. There is no clear way to differentiate an attempt to control a new technology, in order to serve the interests of the venturers, from an industry attempt to guide the adoption of a new technology to ensure that it is implemented in an efficient manner. Joint ventures provide ample potential for anticompetitive behavior. But a properly structured entity, founded on the principals of transparency, innovation and competition, can legitimately generate substantial procompetitive benefits.

V. CONCLUSION

The development of digital technology has fostered numerous challenges, and opportunities, for the providers of entertainment content. With the arrival of the Internet as a new means of distribution, joint ventures serve as useful vehicles to enable content owners to collaborate in guiding the development and adoption of online distribution. However, antitrust concerns arise in any collaboration among competitors. Particularly, with the vertical integration of content and delivery, the peril of collusion threatens competition among third-party online distributors.

Nevertheless, significant efficiency and other procompetitive benefits support the formation of such ventures. To realize these benefits, it is necessary to structure a given joint venture to allow for procompetitive advan-

tages, derived from industry support of a new technology and collective standard-setting, while clearly eliminating the potential for anticompetitive behavior.

Thus, in order to structure a joint venture to withstand antitrust scrutiny, it is important to (1) clearly demonstrate the efficiency and other procompetitive benefits unique to the venture; (2) allow for an arms-length relationship between the content owner and the venture; (3) implement safeguards to prevent the sharing of confidential business information; (4) avoid terms that may be deemed to be per se illegal (that is, price-fixing provisions); (5) allow for independent licensing to third-party distributors by co-venturers; (6) avoid exclusive arrangements with the venture; and (7) adequately develop technology to facilitate the use of the Internet as a means of distribution. By emphasizing the procompetitive benefits of a given joint venture and avoiding any structural characteristics that provide for anticompetitive harm, content owners can legally achieve the benefits of a distribution joint venture.