Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

The NFL-DirecTV Antitrust Controversy and Potential Parallels in TIDAL's Approach to the Music Streaming Market

Wonnie Song

I. Introduction

2016 was a landmark year for music streaming in the United States. For the first time, streaming represented the majority of US music revenues.[1] This was particularly notable in a year where estimated retail revenues from recorded music saw 11.4% year-over-year growth despite declines in both digital downloads and physical record sales.[2] The momentum continued into 2017.[3] By mid-2017, streaming represented 62% of US music industry revenues[4] and, by year-end, Nielsen reported a 59% year-over-year increase in on-demand audio streams.[5] As in 2016, dramatic growth in the streaming category fueled overall growth in the industry—recording a 12.5% increase in consumption over 2016, despite decreases in sales of nearly all other formats.[6] Goldman Sachs predicts that this growth will con-

---

[1] Recording Indus. Ass'n. of Am., *News and Notes on 2016 RIAA Shipment and Revenue Statistics* 1 (2017).

[2] *Id.* at 2–3.

[3] *See* Peter Kafka, *The Music Business is Growing Again—Really Growing—and it's Because of Streaming*, Recode.com (Sept. 20, 2017, 1:00 PM), https://www.recode.net/2017/9/20/16339484/music-streaming-riaa-spotify-apple-music-youtube-2017-revenue-subscription [https://perma.cc/4PMU-TMAM].

[4] Recording Indus. Ass'n. of Am., *News and Notes on 2017 Mid-Year RIAA Revenue Statistics*, 1 (2017). Full 2017 report was not yet released, as of March 2018.

[5] *2017 U.S. Music Year-End Report,* Nielsen (Jan. 3, 2018), http://www.nielsen.com/us/en/insights/reports/2018/2017-music-us-year-end-report.html [https://perma.cc/Q3LG-7GM5].

[6] *Id.*

tinue: its recent "Music in the Air" report predicts that the global recorded music industry will be worth nearly $41 billion by 2030.[7]

Though it must be ceded that not all actors in the business are benefiting equally,[8] streaming's ascent is still welcome news to an industry that has been in overall decline since the late 1990s.[9] 2016 marked the first time that the industry recorded two consecutive years of growth since 1999.[10]

In particular, subscription-based streaming services have seen exponential growth. Although 2017 year-end numbers are yet to be released, the Recording Industry Association of America ("RIAA") 2017 mid-year report shows that paid subscriptions revenue grew 61% year-over-year to $1.7 billion at estimated retail value.[11] Paid subscription revenue thus jumped from representing an already substantial one third of total US recorded music industry revenue in 2016, to 43% through Q2 of 2017.[12] With nearly 1 million new subscriptions per month, the number of paid subscribers reached a record 30.4 million in the first half of 2017.[13]

Indeed, competition in the paid subscription service category is increasingly fierce and questions of antitrust loom ever larger.[14] By means of

---

[7] Ed Christman, *Music Industry Will Hit $41 Billion by 2030 According to New Goldman Sachs Report,* BILLBOARD (Aug. 29, 2017), https://www.billboard.com/articles/business/7949040/music-industry-will-hit-41-billion-by-2030-according-to-new-goldman-sachs, [https://perma.cc/8CFR-VPMV]. *But see* Bobby Owsinski, *Goldman Sachs Predicts $28 Billion Streaming Music Market, But Should Anyone Care?*, FORBES (Sept. 2, 2017, 1:54 PM), https://www.forbes.com/sites/bobbyowsinski/2017/09/02/goldman-sachs-predicts-28-billion-streaming-music-market-but-should-anyone-care/#5b7142223150 [https://perma.cc/8FNU-LJ44].

[8] *See, e.g., ASCAP and BMI Join Forces to Fight the Department of Justice's Interpretation of Their Consent Decrees,* AMERICAN SOC'Y OF COMPOSERS, AUTHORS & PUBLISHERS (Aug. 4, 2016), https://www.ascap.com/press/2016/08-04-ascap-bmi-join-forces-to-fight-doj [https://perma.cc/4DC8-MRLC].

[9] Lucas Shaw, *The Music Industry is Finally Making Money on Streaming*, BLOOMBERG (Sept. 19, 2016, 9:16 PM), https://www.bloomberg.com/news/articles/2016-09-20/spotify-apple-drive-u-s-music-industry-s-8-first-half-growth [https://perma.cc/U9XS-AZD3].

[10] *Id.*

[11] RECORDING INDUS. ASS'N. OF AM., *supra* note 4, at 2.

[12] *Id.*

[13] *Id.*

[14] For example, in 2015, the Federal Trade Commission conducted an antitrust investigation around Apple Inc.'s dual role in the music streaming market. Apple is proprietor of both the streaming service Apple Music and the iTunes App store, which serves as one of the primary retail channels for Apple Music's competitors. *See* Cecilia Kang, *Everything to Know About the FTC's Antitrust Review of Apple's Music Business*, WASHINGTON POST, July 16, 2015, https://www.washingtonpost.com/news/the-switch/wp/2015/07/16/everything-with-know-about-the-ftcs-antitrust-re

comparative case study, this article considers one particular issue that may emerge in the paid subscription space: namely, the legality of using exclusive release deals in the race to grow streaming service user bases. Given that most music streaming services offer largely overlapping catalogs,[15] customers are likely to subscribe to only one service at a time. One service's success in driving user acquisition—by offering exclusive content or otherwise—is likely to come at the expense of other services' shares of wallet. In view of the rising popularity of exclusive release deals, it behooves the industry to examine any antitrust implications such deals may invoke.[16]

This paper first examines the structure and approach of TIDAL, a streaming service that signed several high-profile deals for exclusive release rights in 2016 and continues to rely on this exclusive release model.[17] The paper then takes a critical look at the possible antitrust issues that TIDAL might encounter, should it successfully achieve market dominance by continuing its current business model. The study considers possible parallels between antitrust problems that may arise from TIDAL's quest for growth and the recent antitrust litigation surrounding the National Football League's deal with DirecTV for exclusive television broadcasting rights.[18]

---

view-of-apples-music-business/?utm_term=.3fc75775b8b9 [https://perma.cc/7JM6-ZGST].

[15] Christopher Breen, *Which Music Subscription Service Should You Use?*, PC World (May 2, 2012 6:00 AM), https://www.pcworld.com/article/2000051/which-music-subscription-service-should-you-use.html [https://perma.cc/733H-L9GR].

[16] *See* Steve Knopper, *How Apple Music, Tidal Exclusives Are Reshaping the Music Industry*, Rolling Stone (Oct. 5, 2016), http://www.rollingstone.com/music/news/inside-the-war-over-album-exclusives-w443385 [https://perma.cc/QVG8-TZ77].

[17] *Id. See also* Jem Aswad, *Jay-Z's New Album, '4:44,' Has Dropped — But Sources Say Tidal's Exclusive Will Only Last a Week*, Variety (June 29, 2017, 9:09 PM), http://variety.com/2017/digital/news/jay-z-new-album-444-tidal-exclusive-1202483883/ [https://perma.cc/EFV6-8BUC].

[18] Eriq Gardner, *NFL's $12 Billion Deal with DirecTV Faces Major Antitrust Lawsuit*, Hollywood Reporter (July 14, 2015, 10:34 AM), http://www.hollywoodreporter.com/thr-esq/nfls-12-billion-deal-directv-808544 [https://perma.cc/5YQ2-48Y9].

II. TIDAL's Strategy in the Fast-Evolving Music Streaming Market

A. *The Market Shift Toward Exclusive Releases*

2016 saw a marked increase in exclusive streaming deals.[19] In the battle for dominance of the subscription-based music streaming market, streaming services are seeking to differentiate themselves not only on the basis of price or better product features, such as smart playlist algorithms driven by user data or social media connectivity, but also on content.[20] Digital streaming platforms such as Apple Music and TIDAL are investing heavily in exclusive release deals that give them timed or "windowed" exclusives on new album releases. For example, TIDAL signed agreements with star artists Beyoncé and Kanye West to release their respective latest albums as windowed exclusives on TIDAL's subscription service, and Apple Music struck similar deals with artists Drake and Frank Ocean.[21] Combined, these four exclusive release deals generated approximately 2.06 million units in first-week sales.[22] The successful release of Beyoncé's album *Lemonade* best explains the rationale behind investing in the exclusive release model: TIDAL gained 1.2 million new users within the first week of *Lemonade*'s release—a 40% increase over its self-reported user base of 3 million the month prior—and the TIDAL app briefly rose to the top of the iTunes App Store rankings that week.[23]

Perhaps most indicative of the trend is the recent about-face from two of the industry's biggest holdouts. A handful of major industry stakeholders warned against the lure of exclusive release deals. For example, Spotify, the world's largest on-demand music-streaming service (by paying users), and artists such as Lady Gaga declared that exclusives were bad for artists and fans alike.[24] Similarly, in August 2016, Universal Music Group announced a

---

[19] *See* Knopper, *supra* note 16.

[20] Seth Fiegerman, *The Streaming Music War is Getting Ugly*, CNN (Aug. 31, 2016, 8:50 AM), http://money.cnn.com/2016/08/31/technology/streaming-music-wars/ [https://perma.cc/2ZZK-863Y].

[21] *See* Knopper, *supra* note 16.

[22] *See id.* (calculating first-week sales based on track-equivalent units, including streaming and download numbers).

[23] *See id.*; *see also* Joe Coscarelli, *Measuring How Tidal Fared with Beyoncé's 'Lemonade'*, N.Y. Times, May 12, 2016, https://www.nytimes.com/2016/05/13/arts/music/beyonce-lemonade-tidal-streams.html?_r=0 [https://perma.cc/YG2Z-RL5U].

[24] Knopper, *supra* note 16. *See also* John Paul Titlow, *Frank Ocean, Apple Music, and the Headache of Streaming Exclusives*, Fast Company (Aug. 25, 2016, 6:37 PM),

"strategic commitment" to avoiding exclusive deals. The label painted such deals as myopic decisions that seduced artists with short-term money at the cost of limiting audiences and, ultimately, revenue in the long run.[25] However, less than twelve months later, Universal issued a new joint statement with Spotify that stood in almost diametric opposition to its previous "commitment." On April 4, 2017, the two companies announced a new, multi-year license agreement that, amongst other provisions, allows Universal artists to release new albums on Spotify's paid service only for two weeks.[26]

B. *TIDAL's Structure and Business Model*

TIDAL is a subscription-only music streaming service that does not offer an ad-based freemium option.[27] The monthly price of its basic product, TIDAL Premium, is $9.99, matching the subscription prices of similar services from competitors such as Apple Music and Spotify.[28] Its higher-tier product, TIDAL HiFi, offers access to the same catalog but in the form of lossless high-fidelity sound files for $19.99 per month.[29]

When the service launched in its current incarnation, it sought to differentiate itself from competitors on three fronts. First, it proclaimed that it was "an artist-owned coalition"—a platform created by artists, for artists.[30] Though Sprint recently acquired a 33% stake in the company, TIDAL still counts twenty high-profile recording artists amongst its shareholders and offers a stock appreciation rights program to artists that join.[31] It promises

---

https://www.fastcompany.com/3063108/frank-ocean-apple-music-and-the-headache-of-streaming-exclusives [https://perma.cc/3VTQ-GA2R].

[25] *See* Knopper, *supra* note 16.

[26] *Spotify and Universal Music Group Announce Global, Multi-Year License Agreement,* SPOTIFY (Apr. 4, 2017), https://press.spotify.com/us/2017/04/04/spotify-and-universal-music-group-announce-global-multi-year-license-agreement/ [https://perma.cc/R5EG-U62Z].

[27] *See Try Now*, TIDAL, http://tidal.com/us/try-now [https://perma.cc/Q4Z8-EZKN] (last visited Apr. 21, 2017).

[28] *See Subscription Types*, TIDAL, https://support.tidal.com/hc/en-us/articles/115003662825-Subscription-Types [https://perma.cc/XYW8-B3FN], (last visited Mar. 10, 2018); *Membership*, APPLE, https://www.apple.com/apple-music/membership/. [https://perma.cc/DPV8-NP2R], (last visited Apr. 21, 2017); *Premium*, SPOTIFY, https://www.spotify.com/us/premium/ [https://perma.cc/SVV2-PG3U], (last visited Apr. 21, 2017).

[29] *See Subscription Types*, *supra* note 28.

[30] *See Who Owns TIDAL?*, TIDAL, http://tidal.com/us/try-now [https://perma.cc/K43Q-MKGG], (last visited Apr. 21, 2017).

[31] *See* Ben Sisario, *Tidal, Jay Z's Streaming Service, Sells a Stake to Sprint*, N.Y. TIMES, Jan. 23, 2017, https://www.nytimes.com/2017/01/23/business/media/tidal-

artists a greater portion of streaming revenue and, relative to its peers, TIDAL does indeed pay the highest royalty percentage to artists—75% of revenue compared to Spotify's 70%, for example.[32]

Second, TIDAL promised quality. It promised higher quality audio files than its peers, as well as playlists and new talent curated by industry experts.[33] Finally, and relatedly, TIDAL offered an aura of exclusivity. Notwithstanding its folksy "by artists, for artists" messaging, TIDAL leveraged the star power of its founding artist-owners—including marquee names such as Jay Z, Chris Martin, and Madonna—to generate hype. At launch, TIDAL's founding artists represented a combined 213.3 million total album sales in the US, and approximately 428.7 million digital song sales.[34] In conjunction with the promise of sound quality that could only really matter to audiophiles who had the urbanity (and equipment) to appreciate it, the marketing around TIDAL's star-studded launch campaign seemed to offer a niche, quasi-luxury product only for fans who understand the value of music as art.

Perhaps on account of this conflicting picture of an "art-for-art's-sake" artists' commune, swaddled in the glamor of celebrities whose combined net worth is estimated to be approximately $2.5 billion, TIDAL was quickly labeled a tone-deaf vanity project.[35] Struggling to win over subscribers on brand message alone, the service soon decided to utilize its owners' commer-

---

streaming-music-jayz-sprint.html?_r=0 [https://perma.cc/56FS-NNQJ]; Meskin Fekadu, *Tidal Executive Says Streaming Service Seeks More Artists to Join Jay Z, Rihanna ad Co-Owners*, U.S. NEWS (Apr. 1, 2015) https://www.usnews.com/news/business/articles/2015/04/01/tidal-streaming-service-seeks-more-artists-to-join-as-owners [https://perma.cc/G95G-QTW8]. *But see Kanye West Quits Tidal, Claiming Service Owes Him $3m – Report,* MUSIC BUSINESS WORLDWIDE (July 2, 2017), https://www.musicbusinessworldwide.com/kanye-west-quits-tidal-claiming-service-owes-3m-report/ [https://perma.cc/X3Q7-355S].

[32] Devin Leonard, *That's Business, Man: Why Jay Z's Tidal is a Complete Disaster*, BLOOMBERG BUSINESSWEEK (May 28, 2015), https://www.bloomberg.com/news/features/2015-05-28/why-jay-z-s-tidal-streaming-music-service-has-been-a-disaster [https://perma.cc/ULE2-XNHE].

[33] *See Try Now*, *supra* note 27.

[34] Marc Schneider, *Jay Z's Superstar Tidal Backers Have How Many Twitter Followers?*, BILLBOARD (Mar. 30, 2015), http://www.billboard.com/articles/business/6516951/tidal-backers-twitter-followers [https://perma.cc/2GSY-H36G].

[35] *See* Leonard, *supra* note 32; *see also* Sam Sanders, *Jay Z's Music Service, Tidal, Arrives with a Splash, and Questions Follow*, GEORGIA PUBLIC BROADCASTING (Apr. 1, 2015), http://www.gpb.org/news/2015/04/01/jay-zs-music-service-tidal-arrives-splash-and-questions-follow [https://perma.cc/AC5G-P9MT].

cial viability and converted its aura of exclusivity into actual exclusives.[36] Several artist-owners chose to release their music as windowed exclusives on TIDAL and, over the course of 2016, 32 albums were available exclusively on the service.[37] Each exclusive release saw TIDAL's user base grow dramatically.[38] In December 2016, the company released a video entitled *TIDAL 2016: A Year of Exclusives*, embracing and celebrating its status as a destination for exclusive access to "anything that [matters]" in the music industry."[39]

TIDAL seems committed to this business model: in April 2017, Jay Z, TIDAL's lead investor, removed all of his albums from Apple Music and Spotify and the service continues to tout the exclusivity of its offerings.[40] Reportedly, the $200m Sprint investment included a $75m fund for exclusive content.[41]

However, it should be noted that TIDAL has a long way to go before it achieves meaningful market share. TIDAL is notoriously evasive about its subscription data, but in December 2016, paying TIDAL subscribers were reported to represent less than 1% of the global subscription-based streaming market.[42]

---

[36] *See* Matt Miller, *How Can Tidal Bounce Back From This One?,* ESQUIRE (Sept. 14, 2016), http://www.esquire.com/entertainment/music/news/a48590/tidal-is-fcked-lost-millions/ [https://perma.cc/RA6C-PMD5].

[37] *See 2016 Exclusives*, TIDAL, http://tidal.com/us/2016exclusives [https://perma.cc/64M7-CCNK] (last visited Apr. 22, 2017).

[38] *Cf.* Glenn People, *After Beyoncé, Tidal's Exclusive Strategy Remains Its Best (Perhaps Only) Weapon*, BILLBOARD.COM (Apr. 25, 2016), http://www.billboard.com/articles/business/7341864/tidal-exclusive-content-strategy-beyonce-lemonade [https://perma.cc/LT6N-9SDX].

[39] *2016 Exclusives*, *supra* note 37.

[40] Jay Z has, however, restored some of his catalog to Apple Music. *See* David Z. Morris, *Tidal Owner Jay-Z Pulls Every Album from Spotify, Apple Music*, FORTUNE (Apr. 8, 2017), http://fortune.com/2017/04/08/tidal-jay-z-spotify-apple/ [https://perma.cc/7S49-U5RV]. *See also* TIDAL, http://tidal.com/us [https://perma.cc/S5XG-ZUZV] (last visited Jan. 24, 2018).

[41] Saqib Shah, *Tidal May Only Have Enough Cash Left to Last Six Months*, ENGADGET (Dec. 13, 2017), https://www.engadget.com/2017/12/13/tidal-jay-z-financial-trouble/, [https://perma.cc/4MDZ-9ZB8].

[42] *See* Tim Ingham, *Smashed by Spotify, can Tidal Find a Future Which Doesn't End Badly?*, MUSIC BUSINESS WORLDWIDE (Jan. 22, 2017), https://www.musicbusinessworldwide.com/smashed-by-spotify-can-tidal-find-a-future-which-doesnt-end-badly/ [https://perma.cc/73Q7-L9VT].

III. Antitrust Issues Surrounding Exclusive NFL Broadcasting Rights

A. *Historical Background*

1. The Sherman Antitrust Act's Statutory Protections

Section 1 of the Sherman Antitrust Act prohibits contracts or conspiracies in restraint of interstate trade or commerce.[43] In *Standard Oil Co. of New Jersey v. United States*, the Supreme Court of the United States applied the common law's "rule of reason" approach to extend the statute's reach beyond inherently, or *per se*, anticompetitive practices.[44] A plaintiff must be able to show that there is an agreement between two or more persons, that the agreement is intended to harm competition, and that there was actual harm.[45]

Section 2 more specifically targets "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" trade.[46] A plaintiff must be able to show that there is a defined market in which the defendant is alleged to have monopoly power, that the defendant intended to acquire and maintain that power through illegal means (as distinguished from market dominance as a consequence of a superior product, business acumen, or historic accident), and that the defendant, does in fact, have monopoly power.[47]

2. The Evolution of the Sports Broadcasting Act of 1961

In *United States v. National Football League* ("*NFL I*"), the United States Department of Justice brought suit against the NFL and its member teams, alleging that certain by-laws in the NFL Constitution illegally restrained the broadcasts of the league's games.[48] Article X of the NFL Constitution prohibited individual teams from selling broadcast rights in any market other than their own on days that the target market's local NFL team was

---

[43] Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

[44] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 67–68 (1911).

[45] *See* Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988).

[46] Sherman Antitrust Act, 15 U.S.C. § 2 (2012).

[47] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1368 (2d Cir. 1988).

[48] *See* United States v. Nat'l Football League, 116 F.Supp. 319, 321 (E.D. Pa. 1953).

playing at home or was broadcasting its away game.[49] The DOJ alleged this was a classic example of unreasonably restricting competition by allocating marketing territories amongst competitors.[50]

However, the *NFL I* court held that the allocation of marketing territories was not a *per se* violation of antitrust law. In a narrow ruling, the court determined that only the restriction on sale of rights when a local team was *broadcasting its own away game* was a violation.[51] Applying the rule of reason standard, the *NFL I* court held that the restriction on broadcasting when a target market's local team was physically playing at home did *not* violate Section 1 of the Sherman Act, because it did not *unreasonably* restrict competition.[52] Rather, the court reasoned, restricting the projection of games into the home territories of other teams actually *promoted* competition, by protecting weaker teams from stronger ones and ultimately keeping its teams at approximately equal strength.[53] Accordingly, the *NFL I* court ruled that such restrictions were not anticompetitive.

Years later, in *United States v. National Football League* ("*NFL II*"), the NFL sought an interpretation of the final judgment in *NFL I* that would affirmatively uphold the legality of the NFL's recently negotiated broadcasting agreement with CBS.[54] The agreement granted to CBS the sole and exclusive right to televise substantially all NFL games.[55] However, the *NFL II* court construed *NFL I* to mean that the NFL-CBS agreement did indeed constitute an unreasonable restraint of trade because it required member teams to eliminate competition amongst themselves, by means of horizontal agreement, in the sale of their television rights.[56]

In direct response to the *NFL II* decision, Congress passed the Sports Broadcasting Act of 1961 ("SBA").[57] The Act affords any professional football, baseball, basketball or hockey league an explicit statutory exemption from the Sherman Act.[58] The exemption precludes from antitrust review any

[49] Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 Hastings L.J. 501, 531–32 (2014).
[50] Nat'l Football League, 116 F.Supp. at 322.
[51] *Id.* at 330.
[52] *Id.*
[53] *Id.* at 325.
[54] Lacie L. Kaiser, *Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act for All Professional Sport Leagues*, 54 DePaul L. Rev. 1237, 1245 (2005).
[55] United States v. Nat'l Football League, 196 F.Supp. 445, 446 (E.D. Pa. 1961).
[56] The NFL-CBS deal required all NFL teams to pool their television rights to be sold as a packaged bundle. *Id.* at 447.
[57] Kaiser, *supra* note 54, at 1245.
[58] Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

agreements such leagues may enter into in order to sell the pooled rights of their member teams in the "sponsored telecasting" of their games.[59] The SBA legislatively overruled *NFL II* and allowed the NFL-CBS agreement to bypass antitrust review.[60]

3. The Limited Scope of the Sports Broadcasting Act of 1961

The Third Circuit has held that the SBA applies only to sponsored telecasts of professional sports games.[61] In *Shaw v. Dallas Cowboys Football Club, Ltd.*, plaintiffs alleged that the NFL member teams' agreement to jointly sell broadcast rights to DirecTV violated the Sherman Act.[62] Denying the NFL's motion to dismiss, the *Shaw* court held that the term "sponsored telecasting" as used in the SBA refers only to free commercial television, not to paid subscription-based satellite television, and ruled that the SBA does not exempt the NFL-DirecTV deal from antitrust review.[63]

The SBA's limited scope was again confirmed in *Kingray, Inc. v. National Basketball Association*.[64] In a complaint similar to the one recently brought against the NFL and DirecTV for their "NFL Sunday Ticket" agreement,[65] plaintiffs alleged that the National Basketball Association and DirecTV violated state and federal antitrust law by exclusively granting DirecTV the rights to broadcast out-of-market NBA basketball games.[66] Though the *Kingray* court ultimately rejected the plaintiffs' theories under the Sherman Act, it explicitly declared that the SBA did not shield the case from antitrust review because "sponsored telecasting" under the SBA does not include cable, pay-per-view, or satellite television.[67]

---

[59] *See id.*

[60] Kaiser, *supra* note 54, at 1245–46.

[61] *See* Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 303 (3d Cir. 1999).

[62] *Id.* at 299–300.

[63] On interlocutory review, the court did not reach the question of whether the NFL-DirecTV agreement actually violates antitrust law and the case was later settled without resolving the question. *Id.* at 302–03. *See also* Chicago Pro. Sports Ltd. P'Ship v. Nat'l Basketball Assoc., 808 F. Supp. 646, 649–50 (N.D. Ill. 1992).

[64] Kingray, Inc. v. Nat'l Basketball Assoc., 188 F.Supp.2d 1177, 1183 (S.D. Cal. 2002).

[65] *See generally* Ashley Cullins, *NFL, DirecTV Defeat "Sunday Ticket" Lawsuit*, The Hollywood Reporter (June 30, 2017, 3:10 PM), https://www.hollywoodreporter.com/thr-esq/nfl-directv-defeat-sunday-ticket-lawsuit-1018317 [https://perma.cc/9832-HVM9].

[66] Kingray, 188 F.Supp.2d at 1182.

[67] *Id.* at 1183.

B. The Recent "NFL Sunday Ticket" Controversy

1. The NFL-DirecTV Agreement

In 2014, DirecTV signed an eight-year extension to its agreement with the NFL for exclusive rights to broadcast out-of-market games in the US.[68] The deal allows DirecTV to continue offering "NFL Sunday Ticket," one of its key products, through the 2022–23 NFL season. NFL Sunday Ticket is a premium subscription-based package that provides customers with access to all Sunday afternoon games broadcast on Fox and CBS, regardless of their location in the US. Residential DirecTV subscribers pay a fixed charge either for satellite TV service that includes the Sunday Ticket package or for a live streaming service accessible via connected devices such as computers, tablets and game consoles.[69] Commercial subscribers, such as bars and restaurants, pay fees based on the maximum occupancy of their premises.[70] In 2015, the least expensive commercial package was $1,458 per season and the most expensive exceeded $120,000.[71]

The $12 billion deal means that DirecTV will pay the NFL an average of $1.5 billion per year through 2023.[72] Though DirecTV only recoups a portion of this cost through subscription fees, Sunday Ticket's value as a loss leader in DirecTV's overall offerings was confirmed when AT&T acquired DirecTV for $49 billion in 2015.[73] AT&T conditioned its acquisition offer on the extension of DirecTV's exclusive agreement with the NFL.[74] It reserved the right to terminate the merger if DirecTV failed to secure the exclusive distribution rights needed to maintain the Sunday Ticket service.[75]

---

[68] Great Speculations, *DirecTV Extends its Deal with NFL for $12 Billion*, FORBES (Oct. 8, 2014, 8:42 AM), https://www.forbes.com/sites/greatspeculations/2014/10/08/directv-extends-its-deal-with-nfl-for-12-billion/#401cc4d6639b [https://perma.cc/87BC-6T4N].

[69] *Id. See also* John Breech, *NFL Sunday Ticket Available to More Viewers without DirecTV Subscription*, CBS SPORTS (Aug. 10, 2015), http://www.cbssports.com/nfl/news/nfl-sunday-ticket-available-to-more-viewers-without-directv-subscription/ [https://perma.cc/SC3P-35BH], (standalone streaming service offered by AT&T, which acquired DirecTV in 2015).

[70] Complaint at 10, Jammers, Inc. v. Nat'l Football League, No. 2:15-CV-06959 (C.D. Cal. Sept. 3, 2015).

[71] *Id.* at 11.

[72] Great Speculations, *supra* note 68.

[73] Thomas Gryta, *AT&T Closes $49 Billion DirecTV Buy*, WALL STREET JOURNAL, July 24, 2015, https://www.wsj.com/articles/at-t-closes-49-billion-directv-acquisition-1437766932 [https://perma.cc/WLX2-45BU].

[74] Jammers complaint, *supra* note 70, at 12.

[75] Jammers complaint, *supra* note 70, at 9.

2. Plaintiffs' Class Action Complaint

In December 2015, the United States Judicial Panel On Multidistrict Litigation centralized 26 pending lawsuits related to DirecTV's "NFL Sunday Ticket" package.[76] Per the holding in *Shaw*, the NFL-DirecTV agreement was subject to antitrust review.[77] Accordingly, the Central District of California ("CDCA") was appointed to review the plaintiffs' allegations that the NFL-DirecTV agreement constitutes anticompetitive conduct.[78]

The putative class members were customers who had purchased a subscription to DirecTV's NFL Sunday Ticket package.[79] Citing the United States Supreme Court decision in *National Collegiate Athletic Assoc. v. Bd. of Regents of Univ. of Oklahoma*, plaintiffs asserted that the NFL-DirecTV agreement unreasonably restrains trade because it "raises prices, lowers output, or renders output unresponsive to consumer preference."[80]

Plaintiffs' first claim was a charge of vertical collusion under Section 1 of the Sherman Act: they alleged that defendants—the NFL, its member teams and DirecTV—entered into an agreement with the intent and effect of restraining horizontal competition amongst DirecTV and its peer multichannel video programming distributors ("MVPDs").[81] Plaintiffs argued that this allowed DirecTV to charge supra-competitive prices and reduce overall market output.[82]

The complaint also claimed that defendants were in violation of Section 2 of the Sherman Act because DirecTV had willfully acquired and maintained monopoly power in the market for live distribution of NFL games, and the NFL had acted with the intent to do so.[83]

---

76 *See* DirecTV's Opposition to Plaintiff Lippincott's Motion to Remand at 4, *In re* Nat'l Football League's "Sunday Ticket" Antitrust Litig., No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Mar. 15, 2016).

77 *See* Shaw, 172 F.3d at 303.

78 *See* DirecTV's Opposition to Plaintiff Lippincott's Motion to Remand at 7, *In re* Nat'l Football League's "Sunday Ticket" Antitrust Litig., No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Mar. 15, 2016).

79 *See id.* at 3–4.

80 Jammers complaint, *supra* note 70, at 7.

81 *See id.* at 36.

82 *Id.* at 28, 37.

83 *Id.* at 38.

3. Defendant NFL's Motion to Dismiss

The NFL moved to dismiss this class action for failure to state a claim.[84] It rested its motion to dismiss on four primary justifications. First, the NFL contended that plaintiffs' claims under Section 1 of the Sherman Act failed because exclusive distribution agreements such as the NFL-DirecTV contract do not violate antitrust law *per se* and the NFL-DirecTV agreement, in particular, could not be shown to have anticompetitive effect.[85] The NFL cited both binding and persuasive authority to establish that exclusive vertical agreements like the NFL-DirecTV contract are "presumptively legal" under antitrust law because they can have pro-competitive and pro-consumer effects.[86] The league went on to assert that its DirecTV agreement actually benefits competition by incentivizing MVPDs like DirecTV to differentiate their content offerings and by increasing output of NFL broadcasts overall (as measured by viewership) because DirecTV is incentivized to invest in Sunday Ticket marketing.[87]

Second, the NFL argued that plaintiffs failed to allege a relevant market to support their antitrust claims.[88] The league rejected the plaintiffs' assertion that the DirecTV agreement disrupted the "market for 'the live video presentation of regular season NFL games'" or any "sub-market" for out-of-market games.[89] The NFL argued that such "gerrymandered, made-for-litigation" markets are too narrow to be considered legitimate markets over which either the NFL or DirecTV could be said to exercise illegal restraint.[90]

Third, the NFL argued that the plaintiffs—Sunday Ticket subscribers—lack antitrust standing because they are not participants in the market in

---

[84] *See* Reply in Support of the NFL Defendants' Motion to Dismiss at 5, *In re* Nat'l Football League's "Sunday Ticket" Antitrust Litig., No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Dec. 12, 2016).

[85] *See* Memorandum in Support of the NFL Defendants' Motion to Dismiss at 4, *In re* Nat'l Football League's "Sunday Ticket" Antitrust Litig., No. 2:15-ml-02668-BRO-JEM (C.D. Cal. Aug. 8, 2016).

[86] *Id.* at 6; Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987) (rejecting "exclusive distributorship theory" as basis for antitrust claims). *See also* Kingray, Inc. v. NBA, Inc., 188 F.Supp.2d 1177, 1188 (S.D. Cal. 2002); Spinelli v. Nat'l Football League, 96 F.Supp.3d 81, 116 (S.D.N.Y. 2015).

[87] *See* Reply in Support of NFL Defendants' Motion to Dismiss, *supra* note 84, at 3, 6.

[88] Memorandum in Support of the NFL Defendants' Motion to Dismiss, *supra* note 85, at 14.

[89] *Id.*

[90] *See id.* at 17–19.

which they allege antitrust injury.[91] The league distinguished the market for broadcast rights and the market for live video presentations.[92] It compared prices in the NFL broadcast rights market against the prices of the live video presentation market plaintiffs participate in (to purchase products like Sunday Ticket) by highlighting the stark difference between the 10-figure offers for NFL broadcast rights and Sunday Ticket subscription fees that typically range from $250 for individual consumers and $2,300 for commercial enterprises.[93]

Finally, the NFL asserted that any claims under Section 2 of the Sherman Act must fail because plaintiffs cannot establish the necessary elements for actual monopolization.[94] According to the league, plaintiffs not only failed to show standing or a relevant market but also failed to show specific intent to acquire illegal monopoly power (as distinguished from natural and reasonable merit-driven growth) or any actual antitrust injury in the broadcast rights market.[95]

4. Central District of California Decision to Dismiss Plaintiffs' Claims

In June 2017, in *In re Nat'l Football League's Sunday Ticket Antitrust Litigation* ("*In re Sunday Ticket*") Judge O'Connell granted the NFL's motion to dismiss and dismissed both claims in the plaintiffs' class action—under Sections 1 and 2 of the Sherman Act, respectively—with prejudice.[96]

The *In re Sunday Ticket* court first examined the plaintiffs' claim of vertical collusion between the NFL, its member teams, and DirecTV, brought under Section 1 of the Sherman Act. Before beginning its analysis, the court bifurcated the plaintiffs' claim to look separately at the vertical agreement between the NFL and DirecTV, on the one hand, and the horizontal agreement between the NFL and its member teams, on the other.[97]

In evaluating the former, the court first established that plaintiffs did, indeed have standing to challenge the vertical agreement.[98] It rejected the NFL's argument that the market for broadcast rights and the market for live video presentations were distinct and, rather, asserted that they are "two

---

[91] *See id.* at 19–20.
[92] *See id.*
[93] *See id.* at 20.
[94] *See id.* at 24–25.
[95] *See id.*
[96] *See In re* Nat'l Football League's Sunday Ticket Antitrust Litig., No. ML15-02668-BRO (JEMX), 2017 WL 3084276, at *21 (C.D. Cal. June 30, 2017).
[97] *See id.* at *8.
[98] *See id.* at *9.

sides of the same coin."[99] The court held that the plaintiffs had standing because they were, like DirecTV, participants in the market for "broadcast rights for live video presentations": DirecTV participates in the market at the distributorship level and plaintiffs participate at the consumer level.[100]

Having found the plaintiffs' first claim justiciable, the court sided with the NFL on its substantive arguments. The court held that plaintiffs failed to establish the anticompetitive effect of the vertical agreement because they showed neither its limitation on output nor artificial price inflation.[101] Further, the court accepted the defendants' arguments that the agreement may have other *procompetitive* effects and accordingly dismissed the plaintiffs' Section 1 claim to the extent that it was based on the NFL-DirecTV agreement.[102]

Turning to the horizontal agreement between the NFL and its member teams, the CDCA court again found the collaboration was not anticompetitive and dismissed the plaintiffs' remaining Section 1 claim.[103] Although the court denied that the statutory protections of the SBA applied, it held that the agreement was necessary to produce the game broadcasts and affirmed the defendants' argument that plaintiffs did not have standing to challenge it regardless.[104]

The court took a similarly nuanced view about whether plaintiffs had pleaded a viable market. Although it found that the "live presentation of professional football games" was a viable market, as plaintiffs claimed, the court held that plaintiffs did not adequately show that defendants had or could have restrained trade within it.[105] Further siding with the defendants, it held that the submarket of "out-of-market football broadcasts" was too narrow to support a claim under Section 1 of the Sherman Act.[106]

Finally, the CDCA court also dismissed the plaintiffs' claims under Section 2 of the Sherman Act, finding that—per the defendants' rebuttal—

[99] *Id. See also* Memorandum in Support of the NFL Defendants' Motion to Dismiss at 19–20, *supra* note 85.

[100] *See In re* Nat'l Football League's Sunday Ticket Antitrust Litig, *supra* note 96, at *9.

[101] *See id.* at *10–12.

[102] *Id.* at *12–13.

[103] *See id.* at *17.

[104] *See id.* at *16 ("Plaintiffs do not directly purchase Sunday Ticket from the NFL Defendants. . .Accordingly, Plaintiffs do not have standing to sue. . .with respect to the horizontal agreements.").

[105] *Id.* at *18.

[106] *Id.* at *19.

plaintiffs had failed to adequately plead specific intent to monopolize or actual antitrust injury.[107]

Stating that the plaintiffs' claims fail as a matter of law and that the claims' deficiencies could not be cured by additional facts, Judge O'Connell dismissed the suit with prejudice.[108]

IV. Comparing "NFL Sunday Ticket" and TIDAL's Exclusive Release Strategy

A. Potential Claims Against TIDAL Under Section 1 of the Sherman Act

As highlighted in the above survey of antitrust issues in sports broadcasting, challenges under Section 1 of the Sherman Act can be brought against parties to both "horizontal agreements" (agreements made between competitors, such as the 32 member teams of the NFL) and "vertical agreements" (made up and down a supply chain, such as the one between the NFL and DirecTV).[109]

It may be possible to establish a Section 1 claim against TIDAL's exclusive release agreements by alleging horizontal collusion—either amongst TIDAL's artist-owners or amongst the record labels the artists are signed to. TIDAL's artist-owners may be incentivized to release their music exclusively on TIDAL because, as equity shareholders, they will necessarily benefit from the platform's success.[110] If two or more of the artist-owners explicitly agree to release their music exclusively on TIDAL in order to increase user subscriptions, the agreement may be considered a concerted refusal to deal and, thus, a *per se* violation of Section 1.[111] Once the existence of such an agreement is established, no further inquiry into its actual effect on the market or the parties' intentions is necessary to establish a Section 1 violation.[112]

Such horizontal agreements between TIDAL's artist-owners can be distinguished from the protected horizontal agreements referenced in the NFL-DirecTV controversy. While some forms of cooperation between NFL member teams is shielded from antitrust review by the SBA, agreements between

---

[107] *See id.* at *20.

[108] *See id.*

[109] *See* In re Musical Instruments and Equip. Antitrust Litig., 798 F.3d 1186, 1191 (9th Cir. 2015).

[110] Sisario, *supra* note 31.

[111] *See, e.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293–94 (1985).

[112] Musical Instruments*,* 798 F.3d at 1191.

TIDAL's artist-owners would have no comparable statutory protection.[113] Further, although the NFL argued—and the CDCA court agreed—that any broadcast of NFL games necessarily requires horizontal cooperation because it features intellectual property owned by three parties (two NFL member teams and the league itself), artist-owners could not extend this argument because they could certainly release music without cooperating with other artists.[114]

On the other hand, Section 1 claims based on vertical collusion would necessarily fail due to TIDAL's limited market penetration at this time.[115] The rule of reason analysis would be applied to agreements between TIDAL and an individual artist or record label and such analysis would require proof of actual anticompetitive effect.[116] This is in order to account for the fact that some vertical agreements (including exclusive distribution contracts) can promote competition and benefit consumers, as asserted by the NFL with regards to its DirecTV agreement.[117] Even if TIDAL did have dominant market share, it could be argued that TIDAL's vertical agreements are presumptively legal and that they actually incentivize TIDAL and its competitors to innovate and invest in their respective music streaming products.

Further, the rule of reason analysis would likely be affected by whether TIDAL chooses to continue investing only in timed exclusives or begins investing more heavily in permanent exclusives that would prevent other streaming services from licensing certain tracks at all. This choice would probably affect a plaintiffs' ability to show actual anticompetitive effect because it would impact the degree to which other streaming services' user bases might suffer as a result of TIDAL's conduct.[118]

Finally, even if TIDAL did acquire greater market share and plaintiffs could show the anticompetitive effect of its conduct, plaintiffs would also

---

[113] Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2012).

[114] *See generally* Washington v. Nat'l Football League, 880 F.Supp.2d 1004, 1007 (D. Minn. 2012); Spinelli,v. Nat'l Football League, 96 F.Supp.3d 81, 114 (S.D.N.Y. 2015).

[115] Ingham, *supra* note 42. Note, however, that TIDAL's ownership structure makes it difficult to determine whether agreements made to facilitate exclusive releases would be considered horizontal or vertical. For instance, potential parties to a Section 1 claim regarding an exclusive release deal between Madonna and TIDAL could not only include the record label supplying the rights to stream the recordings and TIDAL as a corporate entity, but could also include Madonna as a TIDAL shareholder and Madonna as the singer-songwriter signed to her record label.

[116] *See* Musical Instruments*,* 798 F.3d at 1191–92.

[117] *Id. and* Reply in Support of NFL Defendants' Motion to Dismiss, *supra* note 84, at 3, 6.

[118] *See* Breen, *supra* note 15.

need to establish antitrust standing by showing they are participants in the market that they allege has been directly restrained. The recent NFL-DirecTV decision indicates this is a delicate matter.[119]

On the one hand, the *In re Sunday Ticket* court held that the plaintiffs in the NFL-DirecTV suit did not have standing to challenge the horizontal agreement between the NFL and its member teams.[120] In a hypothetical challenge about horizontal agreements amongst TIDAL's artist-owners, it could similarly be argued that a class action from subscribers should fail because they are indirect purchasers, who do not purchase directly from the artists.[121]

On the other hand, Judge O'Connell held that the *In re Sunday Ticket* plaintiffs *did* have standing to challenge the vertical agreement between the NFL and DirecTV.[122] She rejected the distinction that the NFL drew in its motion to dismiss between the market for exclusive distribution rights (in TIDAL's case, a platform's exclusive right to release certain tracks) and the market for media consumption (in TIDAL's case, subscription-based access to music).[123] Thus, in the event of a challenge to the vertical agreements underlying TIDAL's structure, a court may be persuaded that not only other streaming services, but downstream, end-users of the services (i.e., TIDAL's subscribers) would have standing to bring claims under the Sherman Act too.

B. Potential Claims Against TIDAL Under Section 2 of the Sherman Act

Like Section 1 claims based on vertical collusion, Section 2 claims against TIDAL's exclusive release approach would necessary fail due to its current market share.[124] However, even in the event that TIDAL achieves greater market penetration and it could be shown that TIDAL or its artist-owners wield monopolistic power in the music streaming market (in either the end-users' market for music streams or the platforms' market for exclusivity rights), plaintiffs would still need to prove TIDAL's specific intent to acquire and maintain that power through illegal means, as distinguished

---

[119] *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., No. ML15-02668-BRO (JEMX), 2017 WL 3084276, at *20 (C.D. Cal. June 30, 2017).

[120] *Id.* at *16.

[121] *See* Reply in Support of NFL Defendants' Motion to Dismiss, *supra* note 74, at 9.

[122] *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., No. ML15-02668-BRO (JEMX), 2017 WL 3084276 at *9 (C.D. Cal. June 30, 2017).

[123] *Id. See also* Memorandum in Support of the NFL Defendants' Motion to Dismiss, *supra* note 75, at 19–20.

[124] Ingham, *supra* note 42.

from dominance as a consequence of a superior product or business acumen.[125]

In this hypothetical, it would be interesting to see if TIDAL could argue that its success was not a result of illegal, monopolistic strategy but rather, the result of business acumen. If TIDAL were able to ascend to market dominance by securing scores of exclusive release agreements with top-grossing artists, could TIDAL argue that it was the natural result of its ownership structure and that its decision to attract top-selling artists as investors was a result of its own business acumen? Further, could it argue that its market power was simply driven by consumer preference for a superior product—a platform created "by artists, for artists" that better understands consumer tastes and consumption?

V. Conclusion

Against a backdrop of ever-improving technology, such as increased internet bandwidths and faster, smarter devices, as well as rising disposable incomes and increased spending on digital entertainment, industry pundits are bullish on music streaming.[126] The Goldman Sachs prediction about the state of the music industry in 2030 assumes that streaming will represent $34 billion—over 80%—of a $41 billion industry.[127] In the race to capture this growing lucrative market and in the "content wars" along the way, important questions of competition law will inevitably arise. Though TIDAL's minimal market share currently shields it from antitrust litigation, both TIDAL and its competitors should proceed with caution as they leverage exclusive content deals to distinguish themselves in the marketplace.

125 Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

126 *See* Glob. Indus. Analysts, Inc., *Music Streaming: A Global Strategic Business Report, Abstract* (2016).

127 Ed Christman, *Music Industry Will Hit $41 Billion by 2030 According to New Goldman Sachs Report,* Billboard.com (Aug. 29, 2017), https://www.billboard.com/articles/business/7949040/music-industry-will-hit-41-billion-by-2030-according-to-new-goldman-sachs, [https://perma.cc/888N-YX2F].