March 7, 2012

Mr. Richard Feinstein, Director
Mr. Norman Armstrong, Deputy Director
Office of Policy and Coordination
Bureau of Competition, H-374
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mr. Feinstein and Mr. Armstrong:

We write to you to express concern over how musicians and audiences will be impacted by Universal Music Group's proposed acquisition of EMI's recorded-music division and the proposed acquisition of EMI's music publishing division by a consortium led by Sony Corporation of America. As the Federal Trade Commission makes its assessment of whether the proposed transactions are consistent with antitrust law, we urge you to consider how these transactions will impede investment, innovation, and therefore competition, which the FTC is charged with promoting. Accordingly, we also urge you to assess the public interest impacts of the proposed acquisitions and consider the consequences these transactions could have upon the development of music distribution and other services that ultimately benefit musicians and their fans everywhere.

Our organizations long have supported policies that promote innovation and creativity in the digital environment. A critical part of this mission is encouraging the growth of services that help artists develop their craft and reach fans. These sorts of services increase the availability of content, help drive innovation, and promote a healthy, competitive environment in which consumers are the winners.

The advent of digital music services was a boon to both musicians and audiences, offering exciting new opportunities for artists to create, promote, distribute, and monetize their works. Digital technology opens an entire new world of options for musicians as they decide how they want to make and share their music. New development and distribution services empower musicians to choose how they will shape their careers and help musicians be more responsive to audience demand for their work. Musicians may still choose a more traditional, transaction-based outreach and distribution model, or they may choose to build deeper relationships with their fans. Each strategy presents different advantages and challenges, and the right choice will depend upon the unique position of each individual artist. By giving musicians more options from which to choose, digital music services increase musicians' ability to craft artistically and financially successful career models. And empowering musicians benefits audiences, who enjoy new ways to access, experience, and interact with music.

When record labels and other copyright owners are willing to explore new digital distribution technologies, new services that benefit both consumers and artists enter the marketplace. For example, the Cantora Labs initiative functions as a platform for new digital technologies that, at least initially, utilize the Cantora Records catalog to develop new offerings and interfaces to connect musicians and their fans. EMI Music itself has launched a project called OpenEMI, which allows developers to access parts of the EMI Music catalog to develop new applications to distribute music. Although these examples are more limited in content scope, any digital music service that depends upon a music library of substantial breadth and depth, such as Spotify or the iTunes music store, will fail if it cannot offer a critical mass of popular music to consumers. The success of these outlets will affect other distribution platform developers as well as consumers looking for easy, reasonable access to music. For example, this past November, Spotify announced that it would be granting developers access to its music library by way of an app framework. In theory, now anyone can create an app that uses all of the songs that Spotify currently offers.

EMI Music in particular has shown willingness to explore the viability of new digital music services, even when it was the sole major record label taking such risks. By 2002, EMI had entered into nine different digital download deals with digital distribution companies like MusicNet, PressPlay, Ecast, and Liquid Audio. In 2007, EMI became the first of the major labels to offer digital downloads through the iTunes music store without digital rights management restrictions. Unsurprisingly, other major labels followed suit within the next year.

Often digital music services depend upon the cooperation or collaboration of the record labels that own the relevant sound recording copyrights or the publishers that control the musical compositions. As audience demand currently turns to a streaming, cloud-based model, new distribution services will have trouble launching without a major label willing to be the first to grant licenses, and ultimately may never succeed if a single major label can withhold 40% of the recorded music market even after other labels have started working with the service. Even in today's marketplace a major label can wield sufficient power to demand that potential new digital music services pay the label hefty advances and a high percentage of future revenue, or give the record label an equity stake in the new company. A combined Universal/EMI entity would only be able to exert even more control over new music services.

Based on 2010 year-end figures, the four major record labels account for almost 90% of recorded music sales in the U.S. Universal is the largest company, with a share of 30.8%, followed by its nearest competitor, Sony (at 28.0%), then Warner Music Group (WMG) (20.0%), and EMI (10.2%).[1] This leaves only an 11.0% market share for independent labels.[2] Globally, independent labels earned a 23.2% share of total recorded music sales in 2010, down from 23.9% in 2009.[3]

Moving forward, a post-acquisition Universal would be in a position to further its dominance by withholding licenses for its recorded music and music publishing rights. Preliminary estimates show that after Universal acquires EMI's recorded music division, it would control 41.0% of all recorded music sales in the U.S. (based on 2010 data)—more than

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[1] Alice Enders & Ben Rumley, *EMI: The Game of Music Chairs Continues*, ENDERS ANALYSIS at 6 (Dec. 7, 2011).

[2] *Id.*

[3] *Music & Copyright*, INFORMA TELECOMS & MEDIA, 3 (Mar. 23, 2011).

twice WMG's 20.0% share.[4] After the acquisition, the joint entity would control the recorded music rights and/or at least some portion of the music publishing rights to some of the most popular music in today's market, including 68 of the Billboard Hot 100 titles for calendar year 2011.[5] This sort of control would put Universal in a position to "make or break" any new service all by itself, allowing it to hamper innovation and/or demand exorbitant terms and conditions. As a result, consumers must either miss out on potential new services or pay excessive fees for those services.

Similarly, Sony's acquisition of EMI would give it a significant blocking position in music publishing worldwide.[6] If combined, the Sony/EMI publisher would control 32.2% of music publishing revenues worldwide, making the combined entity 40% larger than its nearest competitor, Universal, and more than twice the size of Warner's publishing operations.[7] Here in the U.S., it would hold at least some portion of the publishing rights to 64 of the Billboard Hot 100 titles for calendar year 2011, including titles for which the recording rights are currently held by its competitors.[8] Moreover, it would control the recorded music rights and/or at least some portion of the music publishing rights to 79 of the Billboard Hot 100 titles for calendar year 2011.[9]

In essence, the two majors' whims would control the emergence of new distribution options for the entire industry. Digital services that do not require performance rights or non-statutory mechanical rights in music publishing would still come up against Universal, as the dominant player in recorded music, while services requiring performance rights licenses or non-statutory mechanical rights licenses would need to deal with both Universal and Sony, on each company's own terms, in order to launch a viable service.

Competition among production and distribution intermediaries in the music industry ultimately gives more choice to musicians and leads to better market offerings for consumers. Competition increases the diversity of choices for consumers, empowering consumers to choose the services that best fit their needs at the best price. If one or two major labels obtain enough influence to stifle the development of new digital music services, those services never will be

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[4] Alice Enders & Ben Rumley, *EMI: The Game of Music Chairs Continues*, ENDERS ANALYSIS at 6 (Dec. 7, 2011). These numbers include sound recordings owned by independent labels or musicians but distributed through one of the major labels. To the extent that UMG's distribution contracts with smaller labels allow it to set (or refuse to set) prices and rates with digital distributors for those labels' recordings, those contracts increase UMG's leverage over digital distributors and should be considered here. In turn, UMG's increased control over digital distribution will allow it to demand a higher percentage of sales and licenses from the smaller labels in its general distribution agreements.

[5] *Billboard Hot 100*, http://www.artsjournal.com/artsjournal1/media.xml (last visited Feb. 29, 2012).

[6] *Music & Copyright*, INFORMA TELECOMS & MEDIA, 3 (Mar. 23, 2011) (estimating a 19.7% music publishing market share for EMI and a 12.5% market share for Sony).

[7] *Id.*

[8] *Billboard Hot 100*, http://www.artsjournal.com/artsjournal1/media.xml (last visited Feb. 29, 2012).

[9] *Id.*

able to gain traction in the marketplace, and potential competitors will fail, not on their merits but based on the service's inability to strike a deal with an inordinately powerful supplier. As a result, both musicians and audiences will suffer for lack of innovative competitors in the online music service marketplace.

We therefore are concerned that allowing these two transactions to proceed not only will thwart burgeoning digital music innovations, but will potentially drive up prices and minimize choice for consumers. We hope you will carefully examine these issues in your review of the proposed transactions, and are happy to meet with your staff to further discuss our analysis.

Sincerely,

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