

Klick  
Antitrust  
Final Exam  
Fall 2014

You may use your casebook, notes, and commercial outlines in the completion of this exam, but you may not confer with anyone else about it during the exam period (December 9-December 19). You have 24 hours to complete the exam starting once you download it, but it must be submitted by 11:59 am on December 19. Each question (1, 2, and 3) is equally weighted subject to your choice in question 4. Good luck.

1. On November 30, 2014, five players on the St. Louis Rams NFL football team preceded their pre-game field entrance with the “hands up; don’t shoot” display meant as a sign of protest regarding the police shooting death of 18 year old Michael Brown in nearby Ferguson Missouri and the subsequent decision by a grand jury not to indict the police officer involved. The St. Louis Police Officers Association demanded that the players be disciplined and requested an official apology from the Rams organization. The Rams and the NFL provided neither the discipline nor the apology. In NFL stadiums throughout the country, off duty police officers provide much of the game day security. The NFL favors this labor source since it provides relatively low cost but well trained individuals for the purpose of crowd and traffic control. Given that violent crime before, during, and after NFL games is a relatively frequent occurrence, trained officers also provide a better expectation of safety for fans and NFL personnel alike than do private security forces.

Assume that the St. Louis police are unionized, but the union contract does not cover off-duty work such as providing security at the Rams’ stadium. If the union calls on its members to refuse to provide security services to the Rams and its members comply, discuss the application of antitrust law to this case from both the potential plaintiff and defendant perspectives. Further, assume that the NFL mandates that its other teams stop hiring off duty police for security purposes until the St. Louis police end their concerted action against the Rams. Discuss the potential application of antitrust law to this policy by the NFL.

**The potential case where the police would be the defendants would be analyzed as a group boycott. The closest parallel we studied would be the FTC v. Superior Court Trial Lawyers Association. While it may be tempting to suggest that the police in this case would be immune to such a claim since the concerted action was prompted by the police union, the action fell outside of the scope of the union (which, as explicitly mentioned does not cover after-hours private security work). As suggested in the trial lawyers case, group boycotts such as the one described above are potentially illegal. A claim along these lines would suggest that this group boycott surely constitutes an agreement to restrain trade.**

**The counter argument would note (similar to the trial lawyers case) that there are competing values here, namely the freedom of expression and freedom of association. The courts, in cases like these, do recognize that a trade-off exists, but generally tend to find that antitrust law takes competition as the paramount value (subject to constitutional constraints or clear legislative exceptions) as happened in the trial lawyers case. However, the police case presented here should be distinguished from many group boycott cases encountered in**

antitrust law (including the trial lawyers case) in that the goal here is not to achieve a higher price, which is the primary indicator of a competitive harm in antitrust law. Because of that difference, it is likely that a court would find that any competitive harm is small relative to the other interests at stake.

In the potential case where the NFL would be the defendant, a similar argument would exist in that the potential competitive harms would appear to be negligible. Putting that aside, there are also issues regarding whether the mandate that teams not hire police constitutes a concerted action (refusal to deal) among the various franchises (section 1 issue) or whether it is merely a business decision by the unitary NFL itself (section 2 issue which would be much harder to succeed on). The *American Needle Inc v. NFL* provides direction on this determination. For some purposes, the NFL is taken to be a unitary actor (in which case such business decisions represent no problem with respect to antitrust law) such as rule setting, scheduling, etc. These activities are seen as being crucial to the product existing at all. For other purposes (such as the retail sale of apparel as in the *American Needle* case), the individual teams are viewed as competitors. Security issues are ambiguous. On the one hand, teams presumably compete for spectators and fans (who buy team apparel and the like) and these factors may be related to the amenities and images projected by the teams. Such effects may be small in most cases, however, as it is unlikely that fans from Philadelphia will drive to watch games in St. Louis and the effect of in-game security on image is probably small. The NFL itself may have legitimate interests in setting uniform security policies (since security presumably affects personnel from visiting teams too, worries about tort liability, interest in projecting a league-wide image as being well run/fan friendly/etc). The fact that the NFL does not (outside of the hypothetical change presented in the question) set security policies at stadiums, however, cuts against this inference.

2. A collection of book publishers (all of which focus on copyrighted material) brings a private antitrust action against Amazon arguing that the online book seller is engaging in predatory pricing with the intent of driving physical bookstores out of business. They claim that while it costs \$5 on average to produce a book, the average price of a book on Amazon is \$4; further, the publishers suggest that even this number understates the degree of predatory pricing since Amazon provides free shipping while the cost to ship the average book is \$1.50. Amazon counters that the quoted \$5 figure includes overhead costs, and Amazon claims that its buying power allows it to negotiate better rates with publishers and its logistical capabilities allow it to reduce its own overhead substantially. Discuss the legal and economic merits of this hypothetical case from the perspectives of both the book publishers and Amazon.

While, in theory, predatory pricing determinations should be made on the basis of comparing marginal cost with price, this is not feasible in practice. Given that, courts make the determination by comparing average variable cost with price. It is alleged here that Amazon is selling below cost ( $\$4 < \$5$ ) but that cost is not broken down between variable and fixed costs and Amazon has provided a plausible story regarding how they are not actually selling below cost. To rebut this plausible story, the book publishers would need more detailed accounting figures. That said, if such figures were provided, the shipping discount would need to be factored into the comparison. Assuming the more detailed cost data (including the shipping discount) supported a below cost pricing strategy, it would be necessary to provide a rationale regarding how this strategy would be successful in eliminating other retailers and achieving subsequent market power such that Amazon could recoup its losses. While such

rationales are often hard to come by, perhaps an argument could be made that luring book buyers to Amazon increases its profit margins on non-book products and/or its advertising revenue. Such factors would lower the necessary recoupment making the rationale more plausible. As for market power, one potential story may involve economies of scale wherein other book retailers (as well as potential future retailers) are not able to compete. Any such story would require some argument as to why these economies of scale would be unlikely to be passed on to consumers. For example, if the economies were purely logistical (warehouses, shipping, etc), it may seem likely that retailers of e-books would continue to impose competitive pressures regardless of logistical advantages. If the economies of scale instead involved better bargaining power with respect to the publishers themselves, it is not clear why the publishers could not directly sell to consumers (in a world where consumers are no longer seeking a physical bookstore), creating competitive constraints on Amazon's pricing power. All in all, given the difficulty in demonstrating predatory pricing, a much stronger story regarding how Amazon would maintain its market power long enough to recoup losses would likely be needed from a legal standpoint. Of course, things are different in Europe where a case such as this could be maintained as an abuse of Amazon's dominant position, but there is no analogue to that doctrine in the United States.

3. Bruce Springsteen and Bon Jovi decide that they should mount a joint tour given that they both have a strong New Jersey following. On January 1, 2015, they announce the tour which will include 30 stadium concerts across the country and end with a month of shows at the New Jersey Meadowlands. The tour begins on March 1, 2015. In 2014, each of the performers mounted tours that grossed \$300 million. This stands in contrast to the down touring year experienced by other nationwide performers. In that year, 10 other acts mounted nationwide tours and each grossed approximately \$50 million. The draw of Springsteen and Bon Jovi was particularly concentrated in New Jersey where each performer did 2 shows in 2014 each show generating a \$10 million gross, whereas only 3 other bands played shows in New Jersey that year, each grossing just \$2 million. For tax and liability reasons, Springsteen and Bon Jovi collectively form a single LLC prior to the tour. On March 2, 2015, when you come to work at the FTC, you read about the previous night's show in Washington D.C. and notice that the Springsteen/Bon Jovi LLC had not filed any forms related to the merger with the FTC or the DOJ. You mention this to your boss who directs you to draft a memo regarding whether the failure to make a filing constitutes any kind of violation, as well as a section analyzing the now consummated merger, including what additional data would be necessary for regulators to perform a complete analysis.

**In short, no filing is necessary because the Clayton Act (via HSR amendments) is triggered by combinations of assets. While it is true, in an economic sense, human capital and goodwill are assets, these kinds of assets are not considered for HSR purposes. No combination of assets (including voting shares, etc) implies that HSR does not apply here.**

**That said, since the Sherman Act is quite broad (agreement that affects competition), this could be actionable and it might even be actionable under the FTC Act (section 5) given the breadth of the FTC's power there.**

**The horizontal merger guidelines presumably provide some guidance regarding whether the FTC would want to pursue this. Section 5.3 provides the relevant thresholds. Taking the 2014 data as given and defining the product market as national tours and the geographic market as**

the US, we find that Springsteen and Bon Jovi each have 27% market shares (300M/1100M) and the other ten acts each have 4.5% market shares. The HHI then is  $2*(27^2) + 10*(4.5^2) = 1458 + 202.5 = 1660.5$  pre-merger. After the merger, the HHI will be  $55^2 + 10*(4.5^2) = 3227.5$  which is a highly concentrated market. The increase of 1567 “will be presumed to be likely to enhance market power” in a highly concentrated market.

The corresponding effect in New Jersey is even more significant. Focusing on New Jersey alone, however, may not be warranted given that the hypothetical posits that Springsteen and Bon Jovi are *increasing* output there quite substantially. This goes against the presumption that market power is increased (and that consumer welfare will be reduced).

Other information that would be useful for analysis would include the count of shows by the performers in 2014 nationwide (so as to be able to consider whether the groups will be reducing output outside of New Jersey). Also, it would be useful to determine whether musical tours like this compete with other forms of entertainment by calculating cross price elasticities between, for example, concerts and sporting events, theater productions, non-stadium shows (arena shows, club shows, etc). If these other forms of entertainment constrain the pricing power of Springsteen/Bon Jovi, the situation may not be as troubling as suggested by the HHI analysis above. It may be the case that the answer to this differs based upon the market and, so, the FTC may push for separate shows in markets where other entertainment options do not compete. Further, it would be useful to try to determine how much substitution there is between Springsteen concert fans and Bon Jovi concert fans. If the two groups of fans are, in fact, distinct (such that fans of one rarely attend concerts of the other), there will be fewer competitive concerns.

As a practical matter, these kinds of “mergers” are never challenged (even without looking at the kind of data suggested above). Why that is is an interesting puzzle.

4. Choose one of questions 1, 2, or 3 above to count double or choose to have each question count the same (i.e., multiply your point total for each question by 4/3). If your choice is not clearly noted, you will automatically lose 25% of the available points on the exam.

**Note on grading: More or less, answers fall into 3 categories – 3) indicates grasp of the relevant law/economic point(s) and applies it correctly to the issues found in the question; 2) on the right track but with some lapses regarding the relevant law/economic point(s) and/or their application; 1) no indication that the law/economic point(s) are known and there is no sensible application to the issues in the question.**