THE MERGER AND THE DAMAGE DONE: HOW THE DOJ ENABLED AN EMPIRE IN THE LIVE MUSIC INDUSTRY

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In 2010, the Antitrust Division of the Department of Justice approved the merger of Ticketmaster and Live Nation, who combined to form Live Nation Entertainment. This paper revisits the Department's antitrust analysis from its merger investigation in light of recent trends in the live music industry. It explores alternative theories of antitrust scrutiny that the Department either did not emphasize or omitted discussion of. Finally, it concludes that the merger posed a more significant threat to competition than the Department acknowledged, and that the remedies the Department imposed as conditions on the merger were insufficient to preserve effective competition in the relevant markets. The Department missed a tremendous opportunity to establish long-term competition in the nascent market for vertically integrated services. Artists, competing service providers, and ultimately consumers are worse off for it.

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INTRODUCTION

In February 2009, Ticketmaster Entertainment and Live Nation announced a "merger of equals" that would unite these two titans of live entertainment, sending shockwaves through the industry.[1] On January 25, 2010, the United States Department of Justice approved the merger. When the Antitrust Division of the Department of Justice ("DOJ") announced its decision, it encountered harsh criticism and backlash from within the industry for allowing these already-dominant firms to join forces. Spurred on by outcries from rock stars and politicians, the public regarded this deal with serious skepticism.[2]

Nevertheless, the merger went through and Live Nation Entertainment ("LNE") was born. A close examination of the merger can shed light on aspects of the music industry that inform the antitrust analysis, the efficacy of the remedies imposed in the consent decree, and the effects of the merger on the live music industry. This analysis will show that the DOJ should not have permitted the merger to proceed.

In Part I of this Note I will detail the aspects of the music industry that are relevant to an examination of this merger. In Part II I will reexamine the DOJ's antitrust analysis of the merger while Part III will explain how the structural and behavioral remedies imposed have failed to engender competition. Finally, I will argue that the DOJ overlooked a vital opportunity to create competition in the budding market of fully integrated live performance services.

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[1] *Live Nation, Ticketmaster Announce Merger*, POLLSTAR (Feb. 2, 2009), http://www.pollstar.com/news_article.aspx?ID=647940.

[2] *See, e.g.*, Daniel Kreps, *Bruce Springsteen "Furious" At Ticketmaster, Rails Against Live Nation Merger*, ROLLING STONE (Feb. 4, 2009), http://www.rollingstone.com/music/news/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger-20090204; Cecilia Kang, *Senator Urges Scrutiny of Ticketmaster Deal*, WASH. POST (July 28, 2009) (referring to Sen. Herb Kohl), http://articles.washingtonpost.com/2009-07-28/politics/36776418_1_ticket-prices-paperless-tickets-ticketmaster; Alfred Branch Jr., *Ticketmaster/Live Nation merger: Pascrell letter to Justice Department yields impressive numbers*, TICKET NEWS (July 29, 2009) (referring to Rep. Bill Pascrell), http://www.ticketnews.com/features/Ticketmaster-Live-Nation-merger-Pascrell-letter-to-Justice-Department-yields-impressive-numbers7092917.

I
THE LIVE MUSIC INDUSTRY

A. Yesterday: A Brief History of the Music Industry

Since the turn of the century, the music industry has been popularly characterized as a sinking ship, doomed by the prevalence of piracy and file-sharing. However, this depiction ignores half of the story. From 1999 to 2009 as the recording industry flailed, revenue from concert ticket sales in the United States skyrocketed from $1.5 billion to $4.6 billion.[3] It should be noted that such figures are a relatively new phenomenon, as the live music industry was not always so profitable.

Prior to the 1950s, live concerts were only seen at nightclubs, dance halls, and restaurants. In the decade following World War II, technological advances helped create a mass market for recorded music. Record companies formed, signing artists to multi-album contracts and helping artists expand their audiences. The record companies encouraged artists to perform large concerts to draw fans and drive record sales. As some artists began to surge in popularity they were able to tour regionally, and the more successful ones, nationally. These artists would use local promoters to market their performances at each venue. The mass market for popular music grew rapidly, and soon enough promoters and other entrepreneurs began to build concert venues to accommodate larger audiences.

Artists with a substantial fan base would perform in indoor clubs and artists who could draw a larger audience played in amphitheaters. The most popular artists began performing in arenas and stadiums. These "superstar" artists typically generated the lion's share of ticket sale revenues. By 2009, gross revenues from the top one hundred tours had reached $2.5 billion.[4] However, superstar artists are few and far between. In 2009 fewer than one hundred artists worldwide were capable of drawing enough fans to fill amphitheaters or larger venues, and not all of these superstars tour each year.[5] The services of superstar artists are thus a scarce and crucial resource, fervently sought after by concert promoters.

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[3] Timothy B. Lee, *Why We Shouldn't Worry About The (Alleged) Decline Of The Music Industry*, FORBES (Jan. 30, 2012), http://www.forbes.com/sites/timothylee/2012/01/30/why-we-shouldnt-worry-about-the-decline-of-the-music-industry.

[4] Steve Jones, *2010 wasn't exactly rocking for the music concert industry*, USA TODAY (Jan. 12, 2011), http://usatoday30.usatoday.com/life/music/news/2011-01-12-touring12_ST_N.htm.

[5] Complaint at ¶¶ 53-54, It's My Party, Inc. v. Live Nation, Inc., No. 109CV00547, 2009 WL 1473260 (D. Md. Mar. 5, 2009) [hereinafter "IMP Complaint"].

B. A Day In The Life: Staging a Concert

A complex string of relationships is required to produce a concert. The key figures and entities in the chain are the artist, manager, booking agent, promoter, venue, venue service providers (including the ticket distributor), secondary ticket market, and consumers. Understanding each role in the process is crucial to analyzing the Live Nation-Ticketmaster merger under antitrust law.

The first link is the artist's personal manager. The manager serves a variety of purposes, one of which is arranging performances via the booking agent. The booking agent contracts with a promoter (such as Live Nation) to produce either an individual show or a multi-performance tour. The artist generally receives a guaranteed payout from each performance, or alternatively, a percentage of revenues. The manager and agent receive percentages of the artist's income (typically 15% and 5%, respectively).

The promoter is responsible for obtaining the performance space and marketing the event. The promoter usually receives a guaranteed payout, subordinate to the artist's. After the guaranteed payouts are made, the remaining revenue is split between the artist and the promoter.

The venue rents out the performance space and contracts for ticket distribution, concessions, merchandise, security and other services, or provides them in-house. The venue receives a percentage of the ticket distributor's fees as well as a percentage of the concessions and merchandise sold during the performance. Artists receive the largest share of merchandise revenue.

The ticket distributor delivers tickets to consumers ("primary ticketing services"). The distributor receives a portion of the ticket service fees, which are added to the face value of the tickets. To clarify a common misunderstanding, the face value of the ticket is split between, and determined by, only the artist and the promoter. It is beyond the purview of ticket distributors. Critics of surging ticket prices must understand that ticket distributors (such as Ticketmaster) should only be held responsible for increases in service fees, not increases in ticket prices.

Finally, the consumer pays the face value of the ticket, plus the service fees, in exchange for admission to the concert. Once the tickets are purchased, secondary ticketing services (such as StubHub.com) allow for the resale of tickets between consumers. On the secondary market, prices may fluctuate considerably. The secondary ticketing service provider also charges a fee for each sale.

C. Hello, Goodbye: Recent Industry Developments

For a litany of reasons, sales of physical albums have declined precipitously from levels seen at the turn of the century. Per Nielsen SoundScan, total album sales in 1999 reached 755 million—648 million from CDs and 105 million from cassettes.[6] By 2009, total album sales had dropped to 374 million.[7] Digital sales, which accounted for 40% of all music purchases in 2009, are increasing but have not yet replaced the losses incurred from declining physical sales.

Conversely over the same time period, revenue from live performances has been steadily increasing. Even with ticket prices on the rise, concert attendance is growing. Artists used to go on tour to promote album sales, but now the relationship has flipped. In 1999, *Millenium* by the Backstreet Boys was the top selling album, generating $187 million in sales.[8] The Backstreet Boys' touring revenues however only came to $37.1 million.[9] In contrast, U2's record-breaking 2011 tour grossed $156 million in ticket sales, while the band pulled in a mere $4.8 million from combined album and digital sales.[10]

Another significant trend the music industry has recently experienced is the emergence of "360 deals." While the proliferation of these deals may seem revolutionary, this is not an altogether unexpected phenomenon. For years, record companies were models of vertical integration, providing artists with distribution, marketing, promotion, production and other services that were crucial to commercial success. Artists dreamed of signing "the big record deal," seeking a big company to provide them with everything needed to release a successful album, since that used to translate into financial success. There is a well-

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[6] Nielsen SoundScan is the official method of tracking sales of music throughout the United States. *SoundScan 1999 Year-End Music Industry Report*, BACKSTREET.NET (Jan. 6, 2000), http://www.backstreet.net/www.cgi?x=show&d=news&i=000106-0859-01&c=0.

[7] *The Nielsen Company 2009 Year-End Music Industry Report*, BUS. WIRE (Jan. 6, 2010), http://www.businesswire.com/news/home/20100106007077/en/2009-U.S.-Music-Purchases-2.1-2008-Music. The top selling album of 2009 (Taylor Swift's *Fearless*) would not have ranked in the top ten in 1999.

[8] *musicNEWS: The Top 10 Biggest Sellers of '99*, http://www.antimusic.com/news/2000/jan/item3.shtml (last visited Oct. 26, 2013).

[9] *Id.* 1999's top grossing tour (the Rolling Stones) earned $64.7 million. *Mick Jagger, Rolling Stones Top Grossing At $64.7 Million*, CHI. TRIBUNE (Dec. 30, 1999), http://articles.chicagotribune.com/1999-12-30/news/9912310378_1_rolling-stones-reunion-tour-ricky-martin.

[10] Randy Lewis, *U2 is tops again in concert and music-sales revenue*, L.A. TIMES (Jan. 8, 2012), http://latimesblogs.latimes.com/music_blog/2012/01/u2-is-the-top-grosser-in-concert-and-music-sales-revenues.html.

documented history of artists agreeing to long-term contracts with the biggest labels, pursuing lucrative upfront advances and instant celebrity. The recent change has not been the behavioral pattern of artists, but rather that companies on the live performance side of the industry have begun consolidating their many roles. Artists still demand one-stop shopping, and with touring replacing album sales as the primary source of revenue, the major entities in the concert business are developing their capacity to supply those services.

D. Come Together: Live Nation, Ticketmaster, and the Merger

Live Nation and Ticketmaster were the two premier examples of increasingly vertically integrated firms in the live performance industry. Each had a history of pursuing vertical integration by acquiring companies in complementary markets. The merger of these two firms demonstrated their commitment to this strategy.

1. Live Nation: History and Strategy

Live Nation was principally a promotion company that started in the late 1990s as SFX Entertainment. Around 1997, SFX Entertainment began acquiring competing major promoters around the country to develop a national network. As SFX expanded, it introduced the practice of exclusively promoting significant portions, or even the entirety, of an artist's national tour. Previously, artists (via their booking agents) would contract with individual local promoters in the regional markets where they wished to perform. In 2000, Clear Channel bought SFX and renamed it Clear Channel Entertainment.[11] Over the next few years, Clear Channel Entertainment significantly increased its share of the concert promotion market and acquired exclusive rights (via sale or contract) to numerous prestigious amphitheaters and other performance venues across the country. In 2005, following antitrust investigations, Clear Channel was forced to spin off Clear Channel Entertainment as a new entity, Live Nation.

In 2008, Live Nation boasted that it was "the largest producer of live concerts in the world, annually producing over 16,000 concerts for 1,500 artists in

[11] In recent years Clear Channel has owned or operated a stable of over 1,200 radio stations across the country (a figure estimated to be closer to 850 presently), an extremely dominant position in a market that was once crucial to promotional efforts. The increasing influence of social media and shifting consumer listening habits have eroded the position of radio as the only medium for reaching potential fans.

57 countries."[12] In the United States alone, Live Nation owned 18 venues, held leases on 70 more, and operated many beyond that. Live Nation also owned or operated approximately 90% of the amphitheater venues in the United States. Additionally, Live Nation's subsidiaries held booking rights for 159 venues around the world, and their events represented between 35-58% of all concerts, depending on the estimate.[13]

In addition to achieving horizontal integration through the acquisition of competitors, Live Nation began to expand its reach vertically as well. In 2006, Live Nation acquired MusicToday, an online retailer for music merchandise. Although Live Nation was a longtime Ticketmaster client, in 2008 Live Nation announced that it would partner with CTS Eventim (Europe's largest ticket distributor) to create its own ticket distribution platform. This platform was expected to compete directly with Ticketmaster in the market for primary ticketing services.[14] That same year, Live Nation also announced an agreement with SMG, a venue operator and former Ticketmaster client, to provide ticketing services for SMG venues.

Live Nation has drawn antitrust scrutiny and allegations of engaging in anticompetitive behavior on multiple occasions. A set of class action lawsuits commencing in 2002 claimed that Clear Channel (prior to divesting Live Nation) restricted airplay on its radio stations for artists that competing promoters had booked.[15] A 2009 claim brought by an independent promoter claimed that Live Nation engaged in anticompetitive tying arrangements by leveraging its venues and promotional services, illegally monopolizing markets for amphitheater venues and promotional services, and denying competitors access to major artists (a "critical input").[16] After the merger, in 2011, a separate class action by concertgoers claimed that Live Nation imposed mandatory parking fees as a form of illegal tying.[17]

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[12] Alan J. Meese & Barak D. Richman, *A Careful Examination of the Proposed Live Nation-Ticketmaster Merger* 16 (William & Mary Law School Research Paper No. 09-41, 2009).

[13] *Id.*

[14] An errant prediction, discussed in greater detail in Part II.

[15] *See In re* Live Concert Antitrust Litigation, 863 F.Supp.2d 966 (C.D. Cal. 2012) (consolidating claims brought by Malinda Heerwagen and Nobody in Particular Presents).

[16] IMP complaint, *supra* note 5, ¶¶ 177-85.

[17] *See* Batson v. Live Nation Entertainment, Inc., No. 11 C 1226, 2013 WL 992641 (N.D. Ill. Mar. 13, 2013); *Concert Fan Scream At Live Nation's Fees For Phantom Parking Spaces*, ANTITRUST TODAY (Mar. 18, 2011), http://www.antitrusttoday.com/2011/03/18/concert-fans-scream-at-live-nation%E2%80%99s-fees-for-phantom-parking-spaces/.

2. *Ticketmaster: History and Strategy*

Ticketmaster offers integrated, full-service ticket distribution, which includes online sales, retail outlets, call centers and venue box office operations. In its early years, Ticketmaster competed with Ticketron, another primary ticket distribution service provider. With superior online technology and service, Ticketmaster surpassed and eventually acquired Ticketron. Over the past decade, Ticketmaster.com has grown into one of the five largest e-commerce sites in the world, with over 26 million unique visitors each month.[18]

Ticketmaster has also demonstrated a predilection for pursuing vertical integration. In 2008, Ticketmaster acquired Front Line Management Group. Front Line is the world's leading artist management firm, representing over 250 artists.[19] Ticketmaster also acquired Paciolan, a leading supplier of ticketing software, as well as TicketsNow and GetMeIn, which offer secondary ticketing services. Both Ticketmaster and its subsidiary Front Line have distinct histories of acquiring rivals and companies in complementary markets.

Ticket buyers and artists have launched a bevy of complaints over the years alleging that Ticketmaster charges excessive fees on primary ticket sales as a result of its monopoly power.[20] Pearl Jam was involved in a very public (if ultimately fruitless) spat with Ticketmaster over excessive service fees in the mid-1990s.[21] In 2003, The String Cheese Incident and its associated booking group claimed Ticketmaster had abused its market power by denying the group a customary percentage of the tickets to a concert through the use of exclusive contracts.[22] In another case which began in 2003, the Superior Court of California granted class certification on allegations that Ticketmaster misrepresents or omits the fact of a profit component in its shipping and processing fees.[23] Immediately preceding the

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[18] *Who We Are*, TICKETMASTER, http://www.ticketmaster.com/h/about_us.html (last visited Oct. 26, 2013).

[19] *Id*.

[20] Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998); *Another TM Suit In Canada*, POLLSTAR.COM (Feb. 17, 2009), http://www.pollstar.com/news_article.aspx?ID=649152.

[21] Chuck Philips, *U.S. Drop Ticketmaster Antitrust Probe*, L.A. TIMES (July 6, 1995), http://articles.latimes.com/1995-07-06/business/fi-20602_1_antitrust-probe.

[22] Ben Sisario, *A Band Battles Ticketmaster on Sales Fees*, N.Y. TIMES (May 15, 2012), http://www.nytimes.com/2012/05/16/arts/music/string-cheese-incident-takes-on-ticketmaster.html?_r=0.

[23] The parties settled the litigation in December 2010. Live Nation Entertainment, Inc., Annual Report (Form 10-K) at 38-39 (Feb. 26, 2013), *available at* http://phx.corporate-

merger with Live Nation, Ticketmaster faced public outcry and claims that it had conspired to divert tickets for popular events directly to TicketsNow, where tickets were sold at substantially higher prices.[24] A series of class action complaints regarding this alleged behavior were filed in Canada in February 2009, and later settled in February 2012.[25]

3. The Merger Investigation and Consent Agreement

On February 10, 2009, Live Nation and Ticketmaster entered into an agreement under which they would merge into a new entity called Live Nation Entertainment. The companies joined in a tax-free, all-stock merger with a combined enterprise value of approximately $2.5 billion.[26] Over the course of the following year, the DOJ conducted an investigation into the effects the merger might have on competition. A number of competitors and interested parties submitted comments opposing the merger.[27] Ultimately, the DOJ found that the merger would substantially decrease competition in primary ticketing services for major concert venues. To allay this concern, on January 25, 2010, the DOJ and the parties entered into a consent agreement that would permit the merger provided that specific measures were taken to address the effect on the primary ticketing market. Although the DOJ's Competitive Impact Statement said its only concern was the primary ticketing market, their remedies and analysis touched on other potential anticompetitive effects.[28] These secondary concerns will be discussed in Part II, *infra*.

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ir.net/phoenix.zhtml?c=194146&p=irol-reportsAnnual [hereafter Live Nation Entertainment 10-K].

[24] Matt O'Donnell, *Ticketmaster, TicketsNow Fee Class Action Settlement*, TOPCLASSACTIONS.COM (Oct. 24, 2011), http://www.topclassactions.com/lawsuit-settlements/lawsuit-news/1430-ticketmaster-ticketsnow-fee-class-action-settlement.

[25] Live Nation Entertainment 10-K, *supra* note 23, at 39.

[26] *Live Nation, Ticketmaster Announce Merger, supra* note 1.

[27] *See The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 111th Cong. (2009) (written testimony of Jerry Mickelson, Chairman and Executive Vice President, JAM Productions) [hereinafter Mickelson testimony]; David A. Balto, Senior Fellow, Center for American Progress Action Fund [hereinafter Balto testimony]; Seth Hurwitz, Co-Owener, I.M.P. Productions and 9:30 Club [hereinafter Hurwitz testimony]), *available at* http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da143edaa.

[28] Competitive Impact Statement, United States v. Ticketmaster Entm't Inc., et al., No.1:10-cv- 00139, 13 (D.D.C. Jan. 25, 2010).

The ten-year consent agreement—still in effect—includes both structural and behavioral remedies. Ticketmaster agreed to license its ticketing software to AEG, the second leading promoter in the United States, and to divest its Paciolan division to Comcast-Spectacor, one of Ticketmaster's competitors in the primary ticketing services market.[29] The consent agreement also prohibits LNE from misusing proprietary ticketing information.[30] Promoters that were Ticketmaster clients would be at a significant disadvantage if their chief rival, Live Nation, were privy to such sensitive information, so LNE is restricted from sharing this information between their ticketing and promotion operations. The agreement also stipulates that Ticketmaster provide these clients with a copy of this information should the clients decline to renew their contracts with Ticketmaster.[31] Further, the agreement forbids LNE from engaging in retaliatory measures against competitors, which might occur via anticompetitive tying practices involving their venues, ticketing services, promotional services and Front Line-managed artists.[32] To enforce the agreement, the DOJ established a new Compliance Committee to monitor industry developments and encourage consumers and competitors to report violations. The Committee is authorized to interview employees of the firm and demand corporate documents regarding matters relating to the consent decree.[33]

II
THE DEPARTMENT OF JUSTICE'S ANTITRUST ANALYSIS

The Clayton Act prohibits combinations and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[34] A central tenet of antitrust law is that effective competition drives prices towards marginal costs, spurring innovation, incentivizing efficiency, and benefiting consumers. The antitrust analysis resulting from the DOJ's investigation into the Live Nation-Ticketmaster merger formed the basis for the consent order and the remedies included therein. This section will scrutinize the DOJ's antitrust analysis and examine alternative theories the DOJ should have considered.

[29] Final Judgment, United States v. Ticketmaster Entm't Inc., et al., No.1:10-cv- 00139, 2010 WL 5699134, at *4-7 (D.D.C. July 30, 2010).

[30] *Id.*

[31] *Id.*

[32] *Id.* at *9-10.

[33] Aaron Silvenis, *Live Aid? Assessing the Ability of the Ticketmaster-Live Nation Consent Decree to Restore Competition Levels in the Primary Ticketing Market* 18 (The Am. Antitrust Inst., Working Paper No. 11-02, 2011).

[34] 15 U.S.C. § 18.

A. Jigsaw Puzzle: Horizontal Components of the Merger

The focus of the DOJ's antitrust analysis was the market for primary ticketing services, the sole significant market in which Ticketmaster and Live Nation both already participated and where they had been chief rivals. When Live Nation partnered with CTS Eventim to enter the primary ticketing services market, it became Ticketmaster's fiercest competitor. The merger threatened to eliminate this significant competitive force.

1. The Market for Primary Ticketing Services

A proper analysis of the horizontal effects of this merger must begin with a definition of the competitive market at stake. A standard test for appropriate market definition, the "SSNIP test," entails identifying a set of products or services over which a hypothetical monopolist (i.e. the merged firm) could profitably impose a small but significant and non-transitory increase in price. For the merger at hand, the relevant market included major concert venues and primary ticketing service providers.[35] If a monopolist in this market were to impose a SSNIP above the otherwise competitive pricing level, major concert venues would not be able to freely substitute an alternative. Venues must provide a primary ticketing service to consumers, and there are no viable alternatives to providing such a service outside of the identified market.

In the market for primary ticketing services, sellers are able to price discriminate among different venues, as contracts between ticketing companies and venues are individually negotiated and typically prohibit the resale of those services.[36] Price discrimination could therefore result in the merger affecting each class of venues differently. Hence, the antitrust analysis focused on venues with few alternate service providers because the merger could disproportionately disadvantage such venues. The analysis found that the venues most affected by this merger were major concert venues.[37] These venues require sophisticated

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[35] Primary ticketing services can be obtained through a third party, such as Ticketmaster, or provided in-house with the assistance of firms that facilitate self-distribution. Meese, *supra* note 12, at 41 n. 116. Notably, consumers are not relevant participants in this market. Although effects on consumer welfare are important to consider, and consumers will surely feel the effects passed on through end prices, they have no bearing on the immediate inquiry. *See Campos*, 140 F.3d at 1174.

[36] Competitive Impact Statement, *supra* note 28, at 6.

[37] The DOJ defined "major concert venues" as the top 500 venues by annual revenue, as reported to Pollstar. *Id*. at 4 n. 2. Alternative proposed definitions restrict the number of distinctly affected venues to those with a capacity of over 8,000. *See* Plaintiff United States'

ticketing services that can withstand heavy transaction volume and complex marketing and distribution needs.[38] Only a limited set of firms was capable of providing these specialized services and fewer still had the proven track record that these venues desired. Live Nation and Ticketmaster were both among this select group.

Defining the market at issue also requires examining geographical boundaries. For this merger, the relevant geographic market was the United States.[39] Although foreign ticketing services could potentially enter into the domestic market, at the time of the merger they were not significant market participants and have still not exerted much competitive influence within the domestic market. Therefore, the relevant market was defined as major concert venues within the United States.

Once the market is defined, market participants must be identified and their respective market shares need to be calculated. Ticketmaster has long been the dominant supplier of primary ticketing services to major venues, with over an 80% market share before 2009.[40] In fact, in 2008 no other firm held more than a 4% share.[41] In the months preceding the merger, Live Nation declined to renew its contract with Ticketmaster and began to compete in primary ticketing services. According to TicketNews, the power scores (a market share approximation using an estimation of actual transactions) of Ticketmaster.com and LiveNation.com at the end of August 2009 were 60.32 and 16.02, respectively.[42] Using these power score figures, the Herfindahl-Hirschman Index (HHI)—a metric used by the DOJ as well as the Federal Trade Commission since 1982 to measure market concentration—for this market was nearly 4,000 prior to the merger, even ignoring all other firms.[43] The DOJ-FTC 1992 Horizontal Merger Guidelines regard a

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Response To Public Comments, United States v. Ticketmaster Entm't Inc., et al., No.1:10-cv-00139-RMC at 20 (D.D.C. June 21, 2010) [hereinafter Response To Public Comments]. Others have argued that venue size is an altogether arbitrary and improper distinction for identifying relevant market participants. Meese, *supra* note 12, at 32.

[38] Meese, *supra* note 12, at 31 n.70 (citing Evren Ergin, Barclays Capital, *Ticketmaster-Live Nation Antitrust Analysis*, Apr. 30, 2009, at 5).

[39] Competitive Impact Statement, *supra* note 28, at 8.

[40] *Id.*

[41] *Id.*

[42] *Top Primary Ticket Sellers*, TICKETNEWS, http://www.ticketnews.com/view/TopPrimarySellers?page=4 (week ending Aug. 29, 2009). The next closest competitor, Telecharge.com, had a score of 5.03.

[43] HHI is the sum of the squares of the market shares of each participant, so including other firms would only increase the HHI.

market with a HHI greater than 1,800 as "highly concentrated."[44] The Merger Guidelines declared that a merger is presumed "likely to create or enhance market power" if it increases the HHI of a highly concentrated market by more than one hundred.[45] Based on the power score figures, this merger increased the HHI by almost two thousand. Although this illustration omits important parts of the market, such as companies that enable self-distribution, the merger still presented significant concerns under traditional horizontal merger analysis.

However, calculating the HHI of a potential merger produces only a presumption of market power. It does not constitute a full analysis of the effects the transaction could have on competition. Accordingly, the DOJ has stated that the calculation of market shares and concentration ratios "provide only the starting point for analyzing the competitive impact of a merger."[46] Importantly, the presumption that the merger is likely to increase market power does not necessarily indicate that the merged firm will, or has the ability to, act anticompetitively.

One key factor the HHI calculation does not take into account is potential competitors not presently participating in the market. A hypothetical price increase by the merged firm could entice outsider firms to enter the market, making the price increase unsustainable. However, in the primary ticketing market, substantial barriers to entry prevent potential entrants from supplying a competitive check on LNE's behavior. The DOJ identified a number of these barriers to entry in its investigation of the merger.

Providing ticket distribution services to major concert venues requires platforms that are technologically complex and expensive to develop.[47] The high fixed costs necessary for developing and maintaining such platforms are especially problematic for potential entrants because they exacerbate the difficulty of achieving sufficient scale to provide effective market competition.[48] Furthermore, after years of operating at an impressive scale, LNE has unparalleled access to

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[44] U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, 1992 Horizontal Merger Guidelines, *available at* http://www.ftc.gov/bc/docs/horizmer.shtm [hereinafter 1992 Guidelines]. The Guidelines were updated on August 19, 2010, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html [hereinafter 2010 Guidelines]. The threshold for "highly concentrated" markets in the 2010 Guidelines is 2,500.

[45] 1992 Guidelines, *supra* note 44. The 2010 Guidelines threshold for mergers "likely to enhance market power" is an increase of 200 points.

[46] *Id.* at 18.

[47] Competitive Impact Statement, *supra* note 28, at 9.

[48] *Id.*

individual consumer data. The firm can leverage this data to provide marketing services that others could not initially offer venues.[49]

Other aspects of Ticketmaster's business model also discourage market entry. Ticketmaster regularly uses medium- to long-term exclusive contracts with venues (averaging six years in duration), with approximately twenty percent of these contracts expiring each year.[50] These contracts limit how quickly another firm could obtain a competitively effective scale. Venues also incur costs to install and teach employees to use new platforms; these costs act as counterincentives to the venue switching its primary ticketing service provider.[51] To evade these prohibitive cost barriers, new entrants might adopt software platforms that offer cheaper, yet effective, online distribution alternatives.[52] The licensing of web-based ticketing platforms involves extremely low marginal costs, which may help attract potential entrants. However, this would still not avoid the scale effects and costs to venues of switching service providers.

Even firms already engaged in the business of ticket distribution face barriers to real competition for major concert venues. The major venues have complex ticketing needs, such as a high volume of sales upon initial ticket availability, and accordingly can be extremely reluctant to sign long-term deals with unproven ticketing companies. The slightest hiccup in primary ticketing services can produce disastrous effects for a venue, so a track record of reliability is a prized commodity.[53] Ticketmaster has established a strong reputation for capably providing complex ticketing solutions. Immediately prior to the merger, Live Nation, in an effort to establish a reputation for its own ticketing platform, was attempting to build experience handling ticketing services for its own venues. As the DOJ stated in its Competitive Impact Statement assessing the merger, "[n]o primary ticketing company other than Ticketmaster and Live Nation has amassed or likely could have amassed in the near term sufficient scale to develop a reputation for successfully delivering similarly sophisticated primary ticketing services."[54] The DOJ recognized that potential entrants would be hard-pressed to convince venues to gamble on unproven ticketing partners that may encounter growing pains.

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[49] *Id.* at 9-10.

[50] Meese, *supra* note 12, at 62.

[51] Competitive Impact Statement, *supra* note 28, at 9.

[52] Meese, *supra* note 12, at 33.

[53] *See* JAMES D. HURWITZ, COMMENTARY: TICKETMASTER – LIVE NATION 34 (The Am. Antitrust Institute, 2009).

[54] Competitive Impact Statement, *supra* note 28, at 7.

The DOJ identified one firm who could potentially provide direct competition in the primary ticketing services market: CTS Eventim, a German ticketing firm. While the DOJ pointed to Live Nation's agreement with CTS as evidence that former Ticketmaster clients could emigrate to newer competitors, the merger itself showed that such competition was not yet viable on a significant scale.[55] After Live Nation explored engaging in direct competition with Ticketmaster via licensing CTS software and adapting it to the North American market, it decided to forego this option. According to LNE's own 10-K filing, the company terminated its agreement with CTS because the German firm "fail[ed] to deliver a North American ticketing system that met the contractual requirements of being a 'world class ticketing system . . . that fits the needs of the North American market.'"[56] While new competitors may be better equipped to compete with LNE in the primary ticketing market, CTS was the most likely entrant and most viable competitor at a significant scale. Live Nation's decision to join, rather than compete, was at least partially motivated by a lack of competing services capable of rivaling Ticketmaster's dominant platform.

One consideration the DOJ omitted from its analysis was the potential for substitution, specifically in the form of self-distribution. Rather than contract out to Ticketmaster or Live Nation for primary ticketing services, venues could turn, and have turned, to companies that offer software solutions that enable venues to handle ticket distribution in-house. Even with a dearth of effective competitors in the market for third-party ticketing services, were LNE to significantly raise prices for its ticketing services, venues in that market could substitute this in-house distribution option. In fact, a number of former Ticketmaster clients did just that.[57] Companies that offer these services have already developed the capacity to serve major venues and thus face fewer cost barriers to entry. This in-house option provides at least a plausible restraint on the sustainability of potential price increases from LNE.

2. The Market for Integrated Service Packages

The second horizontal concern the DOJ identified in its analysis of the merger was the effect on the market for vertically integrated service packages.[58]

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[55] *See id.* at 10.

[56] Live Nation Entertainment 10-K, *supra* note 23, at 37.

[57] Examples include the Houston-Toyota Center, Kroenke Sports Enterprises, Lollapalooza, International Speedway Corporation and the New York Metropolitan Opera. Meese, *supra* note 12, at 36-39.

[58] Although the DOJ framed this issue as an increased barrier to entry rather than a separate horizontal component of the merger, it undoubtedly recognized this as a competitive concern.

The DOJ noted that prior to the merger, both companies strove to supply a package that included both primary ticketing services and access to concert content.[59] Live Nation was able to offer this bundle (at least implicitly) when it entered the primary ticketing services market, and showed it could serve both the ticketing and promotional needs for venue clients.[60] In response, Ticketmaster acquired a majority stake in Front Line, allowing Ticketmaster to grow its capacity to offer its own ticketing and concert content package.[61] As the DOJ explained, "the merged firm's ability to bundle primary ticketing services (implicitly or explicitly) with access to artists managed by Front Line and/or promoted by Live Nation would require competitors to offer venues both primary ticketing services and access to content in order to compete effectively."[62] In 2009, the American Antitrust Institute published an article alleging that "[i]f the merger is consummated, firms seeking to enter the market would, to an even greater extent than at present, need to enter on several levels at once," which would serve as a significant barrier to entry.[63] The issue was not that the firms engaged in bundling—which the DOJ did not deem anticompetitive behavior—but that save for the merger, the companies would have competed with each other in a newly minted market for integrated service-and-content packages.

The DOJ should have expanded on this insight. For a brief few months, Live Nation had spurred Ticketmaster into a new arena of competition—albeit one which included only these two firms—forcing both Ticketmaster and Live Nation to experiment with innovative business models that championed vertically integrated services. Regardless of whether this development is characterized as having birthed a new market or having transformed the existing one, the two firms were nevertheless engaged in productive competition. Based on the companies' respective histories of pursuing vertical integration, the DOJ anticipated that both would have continued on this path, save for the merger. The DOJ surmised that, "but for the proposed transaction, venues and concertgoers would have continued

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[59] Competitive Impact Statement, *supra* note 28, at 11.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 11-12. It should be noted that the bundling practice itself was not deemed anticompetitive. The bundling by each company resulted in a new market comprised of competing bundles of integrated services.

[63] HURWITZ, *supra* note 53, at 49. The essay continued, conjecturing that "[t]he available evidence provides no indication that a substantial competitor can or will be created within any reasonable time horizon." *Id.* at 53.

to enjoy the benefits of competition between two vertically integrated competitors."[64]

Notably, the merger proposal itself evidenced the intentions of both Live Nation and Ticketmaster to pursue vertical integration. The firms were not mirror images, as they were direct competitors only in the individual market for primary ticketing services. Aside from primary ticketing services, each firm had access to markets that the other had yet to penetrate, suggesting that Ticketmaster and Live Nation, respectively, were significant and likely entrants into a number of markets in which the other already participated. Competition likely would have spurred the firms to expand into these complementary markets. For instance, Live Nation could have entered (via acquisition) the markets for artist management and/or secondary ticketing. Conversely, Ticketmaster could have entered the markets for promotions and/or merchandising. Even if they never actually entered those markets, the standing threat of entry would have exerted significant competitive effects on those markets.[65] These complementary markets may have been competitive in their own right, but the merger eliminated significant potential competition in each of them. The DOJ should have recognized that two vertically integrated competitors, each with a history of pursuing vertical integration, were well-positioned to compete or threaten to compete in complementary markets.[66]

B. All Down The Line: Vertical Components of the Merger

Vertical mergers, and the vertical components of mergers, have historically received lower antitrust scrutiny than their horizontal counterparts. Enforcement agencies rarely view these types of mergers as posing competitive risks since they are most often motivated by efficiency concerns rather than efforts to grow or maintain market power.[67] Nevertheless, certain vertical behaviors still draw antitrust scrutiny.

Vertical combinations and agreements can be illegal if they injure the competitive process. The "principal concern with vertical transactions is the possibility that companies will be denied significant access to suppliers and

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[64] Competitive Impact Statement, *supra* note 28, at 12.

[65] Just as current competitors exert downward price pressure on each other, a monopolistic price increase could also invite firms outside the market to enter at a lower price point.

[66] The DOJ likely neglected to include this theory because of its admittedly speculative nature.

[67] Meese, *supra* note 12, at 80.

customers."[68] The Financial Times, considering the Live Nation - Ticketmaster merger in 2009, opined that a vertically integrated firm "running the entire process… would stifle competition. This would work against fans in the longer term, no matter what innovations were on offer initially."[69] The DOJ neglected to include potential anticompetitive effects arising from the vertical components of the merger in its analysis, but did address some of these concerns by imposing behavioral remedies in its Final Judgment.

1. Anticompetitive Concerns of Vertical Integration

The Ticketmaster-Live Nation merger implicated some of the worrisome behaviors associated with vertical integration. One such behavior relating to the vertical components of this merger was anticompetitive tying or bundling practices. Although most tying is lawful, courts have held parties liable for "anticompetitive forcing," where a firm coerces buyers of the tying product to also buy the tied product.[70] For example, here the concern was that LNE could require that venues exclusively book Live Nation artists (the "tied" product) as a condition for access to Ticketmaster's ticketing services (the "tying" product).[71] Mere bundling, however, is often a desirable procompetitive behavior, which does not violate federal antitrust laws.[72] For a tying practice to be considered anticompetitive, the firm must use its market power in the tying market to coerce buyers to purchase the firm's products or services in the tied market for reasons unrelated to the quality or price of the products offered.[73] Traditional industrial organization economics suggest that this strategy often makes little economic sense, as the firm would prefer to market its monopolized product independently.[74] Yet, there is reason to believe that in the primary ticketing services industry, LNE might have sufficient incentive to pursue this anticompetitive strategy.

Competitors have asserted that, prior to the merger, Live Nation unlawfully tied the purchase of its promotional services to the use of its venues and venue services, with the intent to foreclose competing promoters and venues from

[68] HURWITZ, *supra* note 54, at 50 (quoting ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 380 (6th ed. 2007)).

[69] *Best Show in Town*, FIN. TIMES (March 1, 2009), http://www.ft.com/intl/cms/s/0/5f7ecefe-06a0-11de-ab0f-000077b07658.html?nclick_check=1#axzz2NAGYGivJ.

[70] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14–16 (1984).

[71] *See* Balto Testimony, *supra* note 27; Mickelson Testimony, *supra* note 27.

[72] *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979).

[73] Meese, *supra* note 12, at 108–09.

[74] *Id.* at 109–10.

accessing major artists.[75] Live Nation was (and remains) the only promoter capable of booking an artist's entire national tour—its competitors tend to be concentrated in local markets—arguably providing Live Nation with substantial market power on its own (an issue distinct from the immediate merger). Live Nation could exert its market power to coerce artists not to partner with a competing regional promoter or venue. Without access to artists, these smaller rivals cannot compete effectively, giving Live Nation sufficient incentive to tie its products as a means of further entrenching its dominance in promotions and choking off competition in the market for venues. The merger could aggravate this concern, affording LNE increased leverage (in its superior market position in ticketing services) to persist in this exclusionary strategy. LNE incurred operating losses of $203.8 million, $70.4 million and $161.9 million in 2010, 2011 and 2012, respectively, possibly indicating an anticompetitive strategy of offering artists and venues unsustainable supercompetitive prices in order to exclude and eliminate competitors.[76]

On the other hand, neither Live Nation nor Ticketmaster has yet been found liable for such conduct, as the IMP suit is still pending. In its response to public comments regarding the proposed final order in the DOJ's investigation, the DOJ expressed doubts that Live Nation wields the significant market power alleged.[77] If the DOJ is correct, concerns over anticompetitive tying are purely speculative. However, the DOJ did specifically account for the increased potential for coercive tying in its behavioral remedies, in the form of anti-retaliation provisions.[78] Retaliation represents the enforcement or punishment side of anticompetitive tying offers.[79]

Another antitrust concern relating to the vertical components of this merger was the use of exclusive contracts. Long-term exclusive contracts can be used by firms with strong market power to prevent competitors from entering a market, an anticompetitive practice that may violate sections 1 or 2 of the Sherman Act.[80] Ticketmaster has been accused of using such contracts to foreclose rivals in

[75] *See* IMP complaint, *supra* note 5, ¶¶ 139–45.
[76] Live Nation Entertainment 10-K, *supra* note 23, at 22.
[77] *See* Response to Public Comments, *supra* note 37, at 18–21.
[78] *Id.* at 16–17.
[79] The efficacy of the DOJ's solution is addressed *infra* Part III.B.
[80] *See, e.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); *see also* 15 U.S.C. § 1 (2006) ("Every contract . . . in restraint of trade or commerce . . . is declared to be illegal."); 15 U.S.C. § 2 (2006) (prohibiting "Every person who shall monopolize, or attempt to monopolize…any part of the trade or commerce . . . . ").

precisely this manner.[81] Likewise, Live Nation has been accused of abusing exclusive dealings contracts to foreclose competition.[82] However, the use of exclusive agreements is generally seen as efficient, procompetitive conduct.[83]

Finally, a number of competing independent promoters related concerns that the merger would give Live Nation access to their proprietary information. As a primary ticketing service provider, Ticketmaster has access to this information as a result of its independent contracts with venues. Seth Hurwitz, a prominent independent promoter, described this issue in his testimony before the Senate subcommittee, explaining, "my biggest competitor will have access to all of my sales records, customer information, on sale dates for tentative shows, my ticket counts, they can control which shows are promoted and much more. This will put ALL independent promoters at an irreparable competitive disadvantage."[84] The

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[81] In 1992, a California consumer group filed a class action antitrust suit against Ticketmaster, alleging the company's contracts with venues and promoters constituted exclusive dealings agreements in restraint of trade and were therefore prohibited by antitrust law. *See* Kevin E. Stern, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM. & ENT. L.J. 349, 358 (1994). Pearl Jam spearheaded a well-publicized antitrust investigation against Ticketmaster in 1994, alleging that Ticketmaster's exclusive contracts foreclosed access to "a significant percentage of the suppliers of services necessary to hold entertainment events." Wanda Jane Rogers, *Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1016 n.28 (1996); *Pearl Jam Musicians Testify On Ticketmaster's Prices*, N.Y. TIMES (July 1, 1994), http://www.nytimes.com/1994/07/01/arts/pearl-jam-musicians-testify-on-ticketmaster-s-prices.html. The investigation closed in 1995 with no finding of anticompetitive conduct. Press Release, Dep't of Justice, Antitrust Division Statement Regarding Ticketmaster Inquiry (July 5, 1995), *available at* http://www.justice.gov/atr/public/press_releases/1995/0264.pdf.

[82] In a pre-merger suit that is still pending, a prominent independent promoter claimed that Live Nation used exclusive contracts with artists to prevent other promoters and venues from competing for their business. IMP complaint, *supra* note 5, ¶¶ 83-91. When Live Nation was a subsidiary of Clear Channel Communications, another independent promoter made similar claims regarding the company's practice of securing exclusive contracts to promote artists' entire national tours, precluding competing promoters from bidding on local engagements. *See* Amended Complaint at ¶ 52, NIPP v. Clear Channel Communications, Inc., 311 F. Supp. 2d 1048 (D. Colo. 2004) (No. 01-N-152). The case was eventually settled out of court.

[83] When Tickets.com brought suit against Ticketmaster for similar claims (among other antitrust allegations), the court ruled that the long term exclusive contracts were used by Ticketmaster to "accommodate their customers' desires, to their mutual benefit." The court held that these exclusive contracts represented "a mutually desired reasonable business practice from which no antitrust inferences may be drawn." Ticketmaster Corp. v. Tickets.com, Inc., No. CV99-7654-HLH(VBKX), 2003 WL 21397701, at *5 (C.D. Cal. March 7, 2003).

[84] Hurwitz Testimony, *supra* note 27.

DOJ directly addressed this problem in the Final Judgment through a firewall provision.[85]

2. The Firms' Asserted Procompetitive Justifications

Vertical mergers are generally presumed procompetitive, but courts and enforcement agencies still inquire into the particular efficiency gains asserted by the merging parties. In this case, the DOJ refused to credit a number of LNE's asserted efficiencies. The DOJ's Merger Guidelines require that the claimed efficiencies be merger-specific and non-speculative; the burden of substantiating the claims is imposed on the merging firms.[86] Ultimately, "if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market," the DOJ will not challenge the merger.[87]

The press release announcing the merger of Ticketmaster and Live Nation claimed that the firms anticipated "approximately $40 million of operating synergies through the combination of their ticketing, marketing, data centers and back-office functions."[88] A few weeks later, the CEOs of the two companies—Michael Rapino (Live Nation) and Irving Azoff (Ticketmaster)—outlined the benefits of the merger during a congressional hearing.[89] According to Azoff, "[i]t is designed to address the obvious inefficiencies in the supply chain -- the large volume of unsold tickets to events, higher costs, surcharges and the explosion of the resale market."[90]

The DOJ largely rejected the procompetitive efficiencies claimed, explaining that the parties "could realize many of the asserted efficiencies without consummating the proposed transaction," pointing to the fact that each company had already started to pursue strategies of vertical integration before the merger agreement.[91] The DOJ debunked claims of increased innovation by describing how a vertically integrated monopolist is actually less likely to innovate and yield efficiency gains than two competing firms would be. The DOJ also noted that a

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[85] *See* Competitive Impact Statement, *supra* note 28, at 17. How effective this behavioral remedy might be is discussed *infra* Part III.B.

[86] 1992 Guidelines, *supra* note 45, at 30-32.

[87] *Id.*

[88] *Live Nation, Ticketmaster Announce Merger*, *supra* note 1.

[89] *Live Nation and Ticketmaster CEOs Outline Benefits of Merger*, BLOOMBERG (Feb. 24, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aRuTxkXLh0Pk.

[90] *Id.*

[91] Competitive Impact Statement, *supra* note 28, at 12.

pair of competing firms had a greater likelihood of passing these advantages on to consumers.[92]

C. Under My Thumb: The DOJ's Final Judgment

After weighing the anticompetitive effects and the firms' procompetitive justifications, the DOJ determined that the merger could not proceed as proposed. In its Final Judgment, the DOJ allowed the merger, provided that certain steps were taken to alleviate the anticompetitive effects on the primary ticketing services market.[93] The remedies stipulated therein indicate the DOJ's concern with horizontal effects in the market for vertically integrated services.

However, the Final Judgment neglected to address how the merger extinguished the competitive effects of having potential entrants to complementary markets (promotions, artist management, etc.). With its proscription against retaliation, the DOJ subtly attempted to remedy the increased potential for LNE to engage in anticompetitive exclusive dealings and coercive tying.[94] In sum, although the DOJ spoke warily of the anticompetitive effects of the merger and discredited the parties' explicit procompetitive efficiency claims, it nevertheless allowed the merger to proceed. While the Final Judgment was an effort to quell the DOJ's antitrust concerns and produce effective competitive markets, as the next section will explain, that effort fell short.

III
REMEDIES

The DOJ's Final Judgment employed a hybrid solution to address the anticompetitive concerns raised by the merger, including both structural and behavioral remedies. This section will argue that the structural remedies implemented were insufficient to cure the anticompetitive ills. Furthermore, in employing a then-novel enforcement strategy of imposing behavioral restrictions along with structural fixes, the DOJ imprudently neglected to address a number of concerns inherent with behavioral remedies in general. In the case of the behavioral restrictions on the Live Nation-Ticketmaster merger, those concerns are particularly apparent.

[92] *Id.*
[93] *See id.* at 13–18.
[94] The DOJ did not explicitly identify this concern in its Competitive Impact Statement, but the inclusion of this remedy speaks to the DOJ's apprehension regarding the issue. *See id.* at 16–17.

A. I Want To Break Free: Structural Remedies

The primary distinction between structural and behavioral remedies is that structural remedies create or preserve independent firms to maintain market competition, while behavioral remedies permit integration, subject to operating rules that aim to prevent the newly formed firm from undermining competition post-merger.[95] Historically, structural remedies have been preferred in addressing antitrust concerns over proposed mergers. The DOJ's 2004 Antitrust Division Policy Guide to Merger Remedies ("2004 Guide") stated that structural remedies, compared to behavioral remedies, "are relatively clean and certain, and generally avoid costly government entanglement in the market."[96] The DOJ followed this preference in many merger investigations, both before and after publication of the 2004 Guide.[97] A number of studies, including reports by the FTC as well as European and Canadian agencies, have examined the strengths and limitations of structural remedies, concluding that they have been "largely effective —and superior to alternatives—in accomplishing their stated goal."[98]

The DOJ viewed decreased competition in the market for primary ticketing services as the primary evil presented by the Live Nation-Ticketmaster merger, and imposed two structural remedies to combat it. First, the DOJ sought to establish AEG as a viable, vertically integrated competitor in the primary ticketing services market because it was LNE's most likely competitor. The DOJ required LNE to grant AEG a perpetual license of its Host ticketing platform, believing this would

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[95] JOHN E. KWOKA & DIANA L. MOSS, THE AMERICAN ANTITRUST INSTITUTE, BEHAVIORAL MERGER REMEDIES: EVALUATION AND IMPLICATIONS FOR ANTITRUST ENFORCEMENT 3–4 (2011).

[96] U.S. DEP'T OF JUSTICE, ANTITRUST DIV. POL'Y GUIDE TO MERGER REMEDIES § III(A) (Oct. 2004) [hereinafter 2004 GUIDE], *available at* http://www.justice.gov/atr/public/guidelines/205108.pdf. The DOJ updated the Guide in 2011, incorporating significant policy shifts. The 2011 Guide omits an explicit preference for structural remedies and no longer restricts when it is appropriate to institute behavioral relief (previously limited to ancillary restrictions on vertical mergers). *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV. POL'Y GUIDE TO MERGER REMEDIES (June 2011) [hereinafter 2011 GUIDE], *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf. Notably, the updated Guide deletes without explanation all mention of the four substantial costs associated with conduct remedies, costs that were central to the approach taken in the 2004 Guide. Kwoka, *supra* note 95, at 6 n.8.

[97] Kwoka, *supra* note 95, at 11.

[98] *Id.* at 12. Some drawbacks of structural remedies include information asymmetries between the agency, merging parties and third-party buyers; incentives to dispose assets that may insufficiently restore competition; an altered market post-remedy; and the conduciveness of the market to collusion following a divestiture. However, the failures and limitations of structural remedy policies have generally been addressed and improved over time. *Id.* at 10.

fill the market's competitive void.[99] Second, the DOJ wanted to "establish another independent and economically viable competitor" in the primary ticketing services market and thus directed the divestiture of Ticketmaster's Paciolan division to Comcast-Spectacor.[100]

In February 2011, one year after the DOJ closed its merger investigation, AEG announced that rather than implementing Ticketmaster's Host platform, it would be partnering with Outbox Enterprises.[101] Prior to the merger, AEG had been a Ticketmaster client. As the prime competitor affected by the merger, it follows that AEG sought to replace Ticketmaster as the provider of its in-house ticketing services and compete with LNE in that market generally. The fact that AEG chose Outbox over the DOJ-prescribed Host platform shows that this structural remedy had no appreciable effect on competition in this market. The intended effect of this remedy was to provide a competing platform seller. By rejecting the option to license the Host platform, AEG nullified any possible remedial effect on the competitive imbalance that concerned the DOJ.

Conversely, the AEG-Outbox partnership demonstrated that competing promoters and venues may have more options available to fulfill their ticketing needs than the DOJ anticipated. Outbox, which operates on a venue's website as opposed to a ticket company's site, allows venues more power and control over customer service, and the venue retains consumer data and profiles without any third party involvement.[102] Other ticketing service purveyors have lauded this approach as embracing innovation and opening the door for viable competition.[103] In the wake of the merger, other competing venues have followed suit, so as not to

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[99] AEG was the second leading promoter in the country, owned or operated more than thirty major concert venues, and held a 50% share of a reputable talent management agency. Competitive Impact Statement, *supra* note 28, at 13.

[100] *Id.* at 15. Paciolan occupied 3% of the market for direct ticketing services at major concert venues, and an additional 4% of the market through sublicenses (half of which already included Comcast's New Era division). *Id.* Comcast was, and still is, seen as a potential competitor in ticketing services, but the company's central focus remains with sports teams and arena venues. *See* Ray Waddell, *Brave New World*, BILLBOARD (Mar. 27, 2010), http://start.ticketfly.com/blog/brave-new-world-after-the-ticketmasterlive-nation-merger/. Though somewhat vertically integrated, Comcast has yet to venture substantially into the other elements of the live music industry.

[101] Ethan Smith, *Promoter Crowds Ticketmaster*, WALL ST. J. (Feb. 3, 2011), http://online.wsj.com/article/SB10001424052748704775604576120361649762354.html.

[102] Alfred Branch Jr., *AEG teams with Outbox Technology to compete with Ticketmaster on ticketing*, TICKETNEWS (Feb. 3, 2011), http://www.ticketnews.com/news/AEG-teams-with-Outbox-Technology-to-compete-with-Ticketmaster-on-ticketing021103456.

[103] *See id.*

provide business to LNE.[104] However, as promising as these developments may be with regard to increased innovation and competition in the primary ticketing services market, it remains unclear whether these cases are examples of a trend or temporary aberrations. If the newcomers prove sustainable, they may obviate the need for the DOJ's structural remedies altogether.

Prior to the merger, Ticketmaster's usual renewal rate with venue clients was higher than 85%.[105] In 2010, the rate increased to 95%.[106] According to LNE's Supplemental Operational and Financial Information, Ticketmaster "again achieved a net renewal rate of over 100% for 2012."[107] In the company's 2012 year-end financial report, it showed growth of 3.6% and 5.6% for the adjusted operating incomes of its concerts and ticketing divisions, respectively, over the previous year. Since 2010, the firm's revenue has increased from $5.1 billion in 2010, to $5.4 billion in 2011, to $5.8 billion in 2012.[108] LNE has also continued to pursue its strategy of acquiring competitors.[109] Furthermore, Outbox and other upstart challengers have only just reached a scale where they can compete, so it remains to be seen whether their new technologies will prove viable substitutes. To truly exert a competitive influence on the market, the firms will need to attract more than just sympathetic (or vindictive) venue clients. These upstarts will need to prove that they can provide reliable service for venues with various capacities and ticketing needs. Until they do, current Ticketmaster clients will be reluctant to risk a change by implementing unproven software, no matter how innovative.

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[104] *See* Alfred Branch Jr., *Merriweather Post Pavilion switches from Ticketmaster to TicketFly*, TICKETNEWS (Feb. 19, 2010), http://www.ticketnews.com/news/Merriweather-Post-Pavilion-switches-from-Ticketmaster-to-TicketFly2101954. In May of 2010, even before AEG made the switch, Merriweather Post Pavilion became the country's first major venue to leave Ticketmaster for another competing ticketing service provider, Ticketfly. Scott Bernstein, *Considering The Ticketfly Alternative*, GLIDE MAG. (May 13, 2010), http://www.glidemagazine.com/hiddentrack/considering-the-ticketfly-alternative. Ticketfly offers an integrated content management system, lower service fees and social networking platforms to facilitate distribution and marketing services. Silvenis, *supra* note 33, at 24; *see also About*, TICKETFLY, http://www.ticketfly.com/about-us (last visited Oct. 12, 2013).

[105] Silvenis, *supra* note 33, at 6.

[106] *Id.*

[107] LIVE NATION ENTERTAINMENT, FOURTH QUARTER AND FULL YEAR 2012 SUPPLEMENTAL OPERATIONAL AND FINANCIAL INFORMATION 1 (Feb. 26, 2013), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=quarterlyEarnings.

[108] LIVE NATION ENTERTAINMENT 10-K, *supra* note 23, at 41.

[109] Its acquisitions include Coppel (a concert promoter based in Australia and New Zealand), Cream (a festival promoter based in the United Kingdom) and HARD (a festival promoter based in Los Angeles) in 2012 alone. *Id.* at 7.

B. Don't Stop Me Now: Behavioral Remedies

Behavioral or "conduct" remedies allow merging parties to consummate the deal, subject to conditions on their operational behavior. The aim is to create room for the procompetitive efficiencies gained from the merger while regulating anticompetitive behavior that the newly-merged firm might pursue.[110] Naturally, this creates a tension with the firm's profit-maximizing incentives. A number of significant concerns derive from this tension and therefore behavioral remedies must be supplemented with continuous oversight of the firm's conduct.[111] Such oversight is analogous to the work of a regulatory body; hence conduct remedies face shortcomings similar to those associated with industry regulation.[112] These shortcomings include informational asymmetries, vagueness, inconsistent incentives, implementation costs, and enforcement problems.

The 2004 Guide warned that behavioral remedies are typically "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent."[113] Firewalls, fair-dealing, and transparency provisions were all characterized as posing "substantial policy and practical concerns," requiring considerable resources to oversee and carrying potential for "harm as well as good."[114] Nevertheless, the DOJ's Final Judgment imposed a set of behavioral remedies including anti-retaliation and firewall provisions as well as establishing a Compliance Committee. These remedies implicate a number of the general concerns with behavioral remedies and regulation.

The anti-retaliation provisions of the consent agreement demonstrate the asymmetry of information between the firm and its regulating agency. In the Final Judgment the DOJ defined retaliation as

> [R]efusing to Provide Live Entertainment Events to a Venue Owner, or Providing Live Entertainment Events to a Venue Owner on less favorable terms, for the purpose of punishing or disciplining a

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[110] Kwoka, *supra* note 95, at 4.

[111] *Id.* at 5.

[112] Mounting empirical evidence establishes that traditional industry regulation is not consistently effective at modifying firm behavior and often incurs distorting economic effects on the industry or market being regulated. *Id.* at 22 (citing Paul Joskow & Nancy Rose, *The Effects of Economic Regulation*, in 2 HANDBOOK OF INDUS. ORG., 1449 (Richard Schmalensee & Robert D. Willig eds., 1989); KIP VISCUSI, JOSEPH HARRINGTON & JOHN VERNON, ECONOMICS OF REGULATION AND ANTITRUST (2005)).

[113] 2004 GUIDE, *supra* note 96, at § III(A).

[114] *Id.* at §§ III(E)(2) & III(E)(2)(b).

> Venue Owner because the Venue Owner has contracted or is contemplating contracting with a company other than Defendants for Primary Ticketing Services. The term "Retaliate" does not mean pursuing a more advantageous deal with a competing Venue Owner.[115]

It is readily apparent that this definition may be subject to multiple interpretations, with the inquiry into a retaliatory action resting on a determination of the firm's motives. The firm is considerably better positioned than the agency to know or obtain knowledge as to the motivation driving a particular business decision. This inherent informational disadvantage leaves the agency in the uncomfortable and ineffective position of deferring to the firm's proffered explanation for engaging in the behavior in question.[116] Even a marginally clever company can understand this flaw and manipulate evidence to support a permissible motive. When the proscribed behavior is vague and motive-dependent, this type of remedy does mere lip service to actual behavioral modification.

The firewall provisions of the consent order present another significant flaw with behavioral remedies: countervailing incentives. Although the DOJ prohibited LNE's ticketing service from sharing sensitive promotional and consumer data with LNE's promotional arm, the company's profit-maximizing incentives run counter to this firewall. Hence, LNE will consistently be confronted with opportunities to misuse the firewalled information.[117] The firm is thereby incentivized to subvert the restrictions and avoid detection; such behavior is illegal, socially inefficient and, more importantly, undermines the effectiveness of the firewall provision.[118] Inconsistent incentives have a similar effect on the aforementioned anti-retaliation provisions, which require LNE to forego the full exertion of its vertical integration leverage. In effect, LNE is directed to "leave money on the table," which will only encourage the company to exploit the vague boundaries of the consent order and find ways to circumvent the restrictions.[119]

Behavioral remedies also carry significant costs to implement. Conduct restrictions must be monitored, interpreted, and enforced at the expense of the

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[115] Final Judgment, *supra* note 29, at *3.

[116] Kwoka, *supra* note 95, at 23.

[117] *Id.* at 25-26.

[118] It does not strain the imagination to envision a company surreptitiously transferring valuable information from Employee A to Employee B, staying one step ahead of the regulators.

[119] Kwoka, *supra* note 95, at 26.

DOJ. This expense may be substantial and will draw resources from the agency's total budget. In 2010, the Federal Energy Regulatory Commission ("FERC") and Federal Communications Commission ("FCC") each spent close to 15% on oversight and enforcement expenses.[120] The DOJ also has to develop an expertise in regulatory oversight and the appropriate accompanying structure, requiring institutional changes and associated personnel costs.[121]

When behavioral remedies are compared with traditional regulation, additional enforcement challenges come to light. Where traditional regulators such as the FERC or the FCC have broader powers to restrict a firm's conduct, the procedural and control rights of the DOJ are limited to ensuring compliance with consent orders.[122] The DOJ is also limited to *ex post* intervention for a limited term, rather than being afforded *ex ante* authority.[123] Finally, behavioral remedies enhance the risk of agency capture, through increased interactions between the large firm and the government enforcers.[124] LNE will have strong incentives to lobby agencies and legislative bodies for certain types of behavioral restraints that allow the firm to pursue its natural profit-maximizing tendencies.[125] The ineffective consent order constraining LNE in this case may be a good example of this sort of lobbying at work. LNE had considerably more lobbying resources than any of its competitors and the Final Judgment employed a then-novel enforcement strategy that, as I have explained, was largely ineffective in restraining LNE's conduct. The DOJ has its own interests in effective enforcement, but in the end the agency is a political entity.

CONCLUSION

The Department of Justice recognized anticompetitive harm stemming from the horizontal components of the Ticketmaster-Live Nation merger, specifically within the primary ticketing services market. However, it did not adequately identify the serious potential harms involved in the combination of two vertically integrated competitors in the live music industry. The DOJ also ignored the loss of significant potential entrants to the various markets complementing ticket

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[120] *Id.* at 27 (citing FERC, FISCAL YEAR 2012 CONGRESSIONAL PERFORMANCE BUDGET REQUEST, at 2 & 4, *available at* http://www.ferc.gov/about/strat-docs/FY12-budg.pdf and FCC, *FISCAL YEAR 2012 BUDGET ESTIMATES SUBMITTED TO CONGRESS*, at 39 & 69 (Feb. 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304636A1.pdf).

[121] *See id.* at 27.

[122] *Id.* at 30-31.

[123] *Id.*

[124] *Id.* at 34.

[125] *Id.* at 35.

distribution. Although the DOJ refused to credit many of the merging parties' procompetitive efficiency claims, it failed to recognize the perils associated with the vertical components of the merger. Ultimately, the DOJ settled on structural remedies to address the horizontal concerns in the primary ticketing services market and instituted behavioral remedies to placate distressed competitors.

The remedies imposed by the DOJ as conditions to the merger's approval were insufficient to maintain or stimulate competition. The Paciolan divestiture transferred a small slice of the market share for primary ticketing services to a legitimate, vertically integrated competitor, Comcast-Spectacor. However, Comcast does not participate in the other complimentary markets involved in the live music industry, save for a few sports arenas. Furthermore, granting a favorable license of the Host software to AEG was rendered completely ineffective by AEG's decision to partner with Outbox Technologies instead. Only after years of successful, reliable, large-scale service by innovative competitors, will a substantial number of major concert venues decide to risk a partnership with market newcomers such as Outbox or Ticketfly. Until such time, or until a competitor attains a significant market share in a bundle of complementary fields, LNE will stand alone as the dominant firm in the market for vertically integrated live music services.

Most importantly, the DOJ missed a glaring opportunity to restructure a nascent industry. It should have recognized the burgeoning trend toward vertical integration in the live music industry, with two market leaders forging the way. Artists are growing increasingly reliant on touring income to support their careers and historically have been inclined to utilize one-stop shopping.[126] Vertically integrated firms like Ticketmaster and Live Nation stood ready to replace record companies in providing these services, capable of signing artists to lucrative 360 deals. Thus it seemed inevitable that Ticketmaster and Live Nation would become each other's chief competitor, lowering prices for consumers, spurring innovation and generating efficiencies. Now, as a single firm, such benefits remain unrealized and LNE stands alone in its capabilities.

The merger of Ticketmaster and Live Nation had an undeniable impact on the live music industry. Artists and competing service providers would all likely be better off had the DOJ prevented the merger and forced the firms to compete. Now it is up to the market to recognize the trends set by LNE and take advantage of a reconfigured landscape. Competitors in primary ticketing should take advantage of new technology to establish a reputation for reliability with new

[126] *See supra* Part I.

clients and eventually erode LNE's dominance in the market. Other entities in the music industry, such as record labels, should follow LNE's lead in creating full-service packages that center on live performances. The concert industry provides fertile ground for profitable competition in this new market and enterprising challengers would be wise to seize this opportunity.