A CAREFUL EXAMINATION OF THE PROPOSED LIVE NATION-TICKETMASTER MERGER

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People deserve better. They deserve the truth. They deserve honesty. The best music, you can seek some shelter in it momentarily, but it's essentially there to provide you something to face the world with.
--Bruce Springsteen

God have mercy on the man who doubts what he's sure of.
"Brilliant Disguise"
Tunnel of Love (1987)

As great admirers of The Boss and as fans of live entertainment, we share in the popular dismay over rising ticket prices for live performances. But we have been asked as antitrust scholars to examine the proposed merger of Live Nation and Ticketmaster, and we do so with the objectivity and honesty called for by The Boss's quotes above. The proposed merger has been the target of aggressive attacks from several industry commentators and popular figures, but the legal and policy question is whether the transaction is at odds with the nation's antitrust laws.

One primary source of concern to critics is that Ticketmaster and Live Nation are two leading providers of ticket distribution services, and these critics argue that the merged entity would have a combined market share that is presumptively anticompetitive. We observe, however, that this transaction is taking place within a rapidly changing industry. The spread of Internet technologies has transformed the entertainment industry, and along with it the ticket distribution business such that a reliance on market shares based on historical sales is misleading. A growing number of venues, aided by a competitive bidding process that creates moments of focused competition, can now acquire the requisite capabilities to distribute tickets to their own events and can thus easily forgo reliance upon providers of outsourced distribution services. If self-distribution is an available and attractive option for venues, as it appears to be, then it is unlikely that even a monopolist provider of fully outsourced ticketing services could exercise market power. Ultimately, a proper assessment of the horizontal effects of this merger would have to weigh heavily the emerging role of Internet technologies in this dynamic business and the industry-wide trend towards self-distribution.

The second category of arguments by critics opposing the merger rests on claims that vertical aspects of the transaction would produce anticompetitive effects. Indeed,

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Ticketmaster's and Live Nation's core businesses are in successive markets, and thus the proposed transaction is primarily a vertical merger, but there is broad agreement among economists and antitrust authorities that vertical mergers rarely introduce competitive concerns and are usually driven by efficiency motivations. This wealth of academic scholarship, which is reflected in current antitrust law, has not—from our vantage point—been properly incorporated into the public dialogue concerning the proposed merger. To the contrary, critics articulate concerns, including the fears that the merger would lead to the leveraging of market power and the foreclosure of downstream competition, that are refuted by accepted scholarship. Moreover, there are a number of specific efficiencies that, consistent with economic and organizational theory, are likely to emerge from a Live Nation-Ticketmaster merger and would be unlikely but for the companies' integration. For these reasons, we submit this analysis in an effort to inform the debate with current economic and legal scholarship.

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Executive Summary

On February 10, 2009, Live Nation, Inc. and Ticketmaster Entertainment, Inc. announced their intentions to merge and create Live Nation Entertainment. The proposed merger is one of several recent and significant developments in a rapidly changing industry, and it reflects the search for new business models that capitalize on Internet technologies and respond to disruptions to previously reliable revenue flows. The Department of Justice's Antitrust Division has been investigating whether the merger is permissible under the nation's antitrust laws, and the parties have asked us to examine the legality and competitive consequences of the merger in light of public criticism. Our analysis reflects our own views, not those of the parties or their counsel, and is based only on publicly available information.

Live Nation and Ticketmaster both provide multiple services that contribute to the production of live entertainment. Live Nation, the world's largest producer of live concerts, engages in the promotion of concerts and other events, the operation and management of live entertainment venues, various forms of entertainment-related merchandising, and the sale of tickets for events at venues it owns or operates. Ticketmaster, the world's leading live entertainment ticketing and marketing company, sells tickets in the primary and secondary markets, licenses technology that facilitates the self-distribution of tickets for assorted venues, and manages entertainment talent. Because Live Nation's primary business is in live entertainment promotion and Ticketmaster's primary business is in primary ticket sales distribution, the proposed transaction is chiefly a vertical merger and leads to the integration of successive stages in

the value chain for producing and delivering live entertainment. Economic theory instructs that such vertical arrangements are usually motivated by efficiency considerations, and antitrust law accordingly has adopted a very permissive approach to such mergers. Nonetheless, Live Nation is also engaged in primary ticket sales (primarily for venues it owns or operates), and some have argued that it is poised to compete vigorously with Ticketmaster to distribute tickets for venues with which it has no affiliation. We therefore examine both the horizontal and the vertical consequences of the transaction.

Horizontal Analysis. Our horizontal analysis focuses on how a Live Nation-Ticketmaster merger would impact the market for primary ticket distribution. Following the Department of Justice Merger Guidelines, it includes a discussion of market definition, market participants, and approximation of market shares; the likelihood of any coordinated or unilateral adverse effects caused by the merger; any potential competition that is foreclosed by the merger; and any horizontal efficiencies created by the merger. Our main conclusions are as follows:

- Venues (rather than ticket purchasers, i.e., concert-goers) are the principal purchasers of ticket distribution services. Defining the relevant market requires evaluating how venues would respond to a non-transitory price increase by providers of these services.

- Venues pursue many different methods of distributing tickets. Many enter into contracts with ticket distributors that serve as outsourced agents, but an increasing number have pursued vertical integration strategies, in which venues self-distribute tickets to the events they host. Some pursue vertical integration strategies by developing in-house technology to self-distribute tickets, and some purchase "enabling" technology and services from ticketing technology companies that support ticket self-distribution. This "enabling" option has become increasingly common, indicating that the technology underlying Internet ticketing has become widespread and has measurably contributed to major organizational changes in the marketing of live entertainment.

- Many venues consider vertical integration to be a reasonable substitute for outsourced ticket distribution. If self-distribution technology is widely available, then venues would self-distribute in response to a significant price increase by a hypothetical monopolist of outsourced ticket distribution services. Thus, a critical question in evaluating the competitiveness of the proposed merger—one that overrides the significance of calculating market shares and most other determinations required by the merger guidelines—is whether the ease and attractiveness of self-distribution strategies would offset any possibility of supracompetitive pricing. For this reason, criticism of the proposed merger that rests on the parties' historical market shares fails to recognize the market's technological dynamism and is unlikely to accurately identify market power.

- The widespread possibility of self-distribution, heterogeneity of ticket distribution contracts, and concealment of contractual terms mitigate the likelihood that the merger would encourage any collusion among remaining market competitors. Moreover, the competitive bidding process that venues adopt when ticket distribution contracts expire creates moments of focused competition in which outsiders can gain entry and small firms can increase market share, with the result that collusion among market participants appears unlikely.

- An analysis of the merger's unilateral competitive effects will also require a determination of the attractiveness and ease of self-distribution. If self-distribution technology is widely available, then the market's many providers of enabling technology would promptly respond to any unilateral increase in price by the merged entity. A number of assorted providers have responded to recent invitations by venues for bids to provide or support ticket distribution services. These experiences suggest that current market participants have the capabilities to meet the needs of venues that seek alternatives to a merged Live Nation Entertainment. It additionally confirms that historical market sales belie the current level of competitiveness in the ticket distribution market.

- Competitive entry into, and competitive expansion in, the ticket distribution market could either come from the many companies that distribute and tailor Internet ticketing technologies for venues, such as Veritix, or from large venue operators and promoters, such as AEG. These firms are at least as likely to sustain a competitive threat to the merged company as Live Nation was to pose a threat to Ticketmaster if the merger were not consummated. Moreover, if enablement technologies have become as attractive and widespread as they appear to be, then the ready availability of these technologies could alone deter a merged Live Nation-Ticketmaster from charging supracompetitive prices.

- It is possible that horizontal efficiencies could result from the proposed merger, perhaps if one company can provide ticket distribution services at a lower cost than the other, but we have not encountered any evidence suggesting that horizontal efficiencies will be more than modest.

Vertical Analysis. There is broad consensus among economists and legal scholars that vertical mergers only very rarely pose competitive risks and instead generally reflect procompetitive efforts to minimize transaction costs. The substantial vertical elements of the proposed Live Nation-Ticketmaster merger therefore suggest that many efficiency motivations underlie the transaction. Nonetheless, critics of the proposed Live Nation-Ticketmaster merger persist in expressing opposition to vertical components of the merger. Such criticisms were common in antitrust decisions several decades ago, when the "inhospitality tradition" directed antitrust policy to be suspicious of most vertical arrangements, including vertical integration, but advances in economic theory have revealed deep flaws in those suspicions. Current antitrust law has evolved accordingly, becoming much more accepting of vertical mergers, and nearly all such transactions survive antitrust scrutiny.

In addition to posing little risk of competitive harm, vertical mergers also have the potential to generate many efficiencies that would be unattainable through contractual or market organization. Recent developments in the live entertainment industry and statements made the management of both Live Nation and Ticketmaster suggest that the proposed merger has the potential to generate the following efficiencies:

- <u>Investments in promotion and information</u>. Internet technologies have presented lucrative opportunities to generate new content, consumer data, and promotional strategies for fans of live entertainment. Creating the platforms for these strategies, however, requires investments that are difficult to specify and monitor by contract. When activities such as these are hard to observe and are therefore noncontractible, yet are important in creating value, vertical

integration is a common efficiency response. Vertical integration strategies could help providers of live entertainment invest in promotion (for example, to reduce excess capacity in concerts) and develop Internet content and marketing strategies.

- Meeting Artist Demands and Market Changes. The Wall Street Journal has described the world of live entertainment as "an industry undergoing seismic shifts." Adjusting to a changing market environment is additionally difficult when different players contribute at each stage in the value chain. One of the hallmarks of vertical integration, however, is the ability to pursue cooperative adaptation. Vertically integrated strategies such as the Live Nation-Ticketmaster merger could facilitate innovations that would organize the assorted inputs to live entertainment into an effective business model.

- Linking Venues, Entertainers, and Fans. The many market segments required to produce live entertainment in today's mostly non-integrated industry create distance between artists and their fans, and establishing direct linkages between artists and fans is perhaps the most oft-stated justification for the Live Nation-Ticketmaster merger. One of the attributes of vertical integration is the ability to facilitate the sharing of knowledge. It is thus no surprise that artists and venues are seeking vertically integrated mechanisms to communicate with fans. Moreover, vertical integration facilitates the creation and dissemination of information that could serve as a platform for better artist-fan communication and the marketing of additional content and merchandise.

Efficiencies such as these are likely to follow from a Live Nation-Ticketmaster merger, and we suspect that they also account for the broader industry-wide trend towards vertical integration.

Critics of the proposed merger have expressed fears that the merged entity would foreclose entry in both the ticket distribution and the promotion markets, and that the merged entity would leverage its market power in one market for anticompetitive gain in the other. We conclude that neither available evidence nor economic theory support these fears. To be sure, the merged company would contribute to the changing face of the live entertainment industry, and industry players will need to continue searching for innovative business models. But the merger does not change market concentration or

entry possibilities in the promotion market, and we suspect that the spread of Internet technologies has greatly removed the possibility of obtaining or leveraging market power in the ticket distribution market. To the degree that the merger generates competitive advantages to the merged firm, these appear to be procompetitive adaptations that the antitrust laws should encourage and not condemn.

I. Introduction

On February 10, 2009, Live Nation, Inc. and Ticketmaster Entertainment, Inc. announced their intentions to merge and create Live Nation Entertainment. This "merger of equals" would combine the nation's leaders in ticket distribution services and live entertainment promotion, creating by all accounts an industry leader in live entertainment.[1] Not surprisingly, smaller competitors have raised concerns about their ability to compete with Live Nation Entertainment,[2] and public figures—including Bruce Springsteen, a particular favorite to one of the instant authors—have decried the economic and artistic consequences of such a combination.[3] Political attention was

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[1] Press Release, Live Nation and Ticketmaster Entertainment to Combine in Merger of Equals to Create World's Premier Live Entertainment Company (Feb. 10, 2009), *available at* http://mediacenter.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=8080&fragment=0&SearchType=OR&terms= (last visited Sept. 9, 2009).

[2] *See*, *e.g.*, 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 of Jam Productions, Ltd. [hereinafter Mickelson Testimony] and Seth Hurwitz, Co-Owner of I.M.P. Productions and 9:30 Club Washington, D.C. [hereinafter Hurwitz Testimony]; National Association of Ticket Brokers, *Press Release – Consumer Protection, Industry Groups Joint Statement on Ticketmaster/Live Nation Merger Investigation*, http://www.natb.org/MediaCenter/index.cfm?article=42.

[3] *See Bruce Springsteen "Furious" at Ticketmaster, Rails Against Live Nation Merger*, ROLLING STONE, http://www.rollingstone.com/rockdaily/index.php/2009/02/04/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger/ (last visited Sept. 9, 2009) (publishing letter from Bruce Springsteen and his tour team to fans stating that "[t]he abuse of our fans and our trust by Ticketmaster has made us as furious as it has made many of you . . . . [T]he one thing that would make the current ticket situation even worse for the fan than it is now would be Ticketmaster and Live Nation coming up with a single system, thereby returning us to a near monopoly situation in music ticketing."). Joel Rose, *Ticketmaster, Live Nation Merger Investigated,* NPR, Feb. 12, 2009, http://www.npr.org/templates/story/story.php?storyId =100616154 (last visited Sept. 9, 2009) (reporting statement by Senator Charles Schumer, following the Live Nation-Ticketmaster merger announcement, that , "[t]he last thing we should do is give Ticketmaster more influence… If these two entities were to merge, control of concert

recently directed at the proposed merger as Senator Herb Kohl, Chairman of the Senate Subcommittee on Antitrust, and Congressman Bill Pascrell each sent letters to Assistant Attorney General Christine Varney requesting the Antitrust Division to scrutinize the merger with skepticism and care.[4]

Although such popular backlash against economic giants is a common refrain in American antitrust law, these concerns do not reflect what antitrust law is designed to achieve. The Sherman and Clayton Acts "were enacted for the protection of competition, not competitors,"[5] and it is not uncommon for certain resentments and intuitions to channel anger at what actually is procompetitive and economically desirable conduct. As scholars of antitrust law and institutional economics, we have been asked by the parties to examine the legality and the competitive consequences of the proposed merger. We should state upfront that, while we are being compensated, we are writing in our capacity as experts in antitrust law and policy, and we are presenting only our own views and not those of the parties or their counsel. We accordingly apply our analysis relying on publicly available information and our understanding of the legal and economic methodologies that guide merger analysis in the U.S.

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venues and representation of artists in those venues would be controlled by one organization, having profound and far-reaching implication for consumers, promoters and artists alike.").

[4] Letter from Senator Herb Kohl, Chairman, Subcomm. on Antitrust, Competition Policy and Consumer Rights to Christine Varney, Assistant Attorney General, Antitrust Division, United States Dep't of Justice (July 27, 2009) [hereinafter Kohl Letter]; Letter from Congressman Bill Pascrell, et. al to Christine A. Varney, Assistant Attorney General, Antitrust Division, United States Dep't of Justice (July 27, 2009) [hereinafter Pascrell Letter].

[5] *See* Cargill Inc. v. Monfort of Colorado, 479 U.S. 104, 115 (1986); Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 488 (1977).

This memorandum first describes the industry structure and emerging trends and then assesses the merger's likely horizontal and vertical impact on competition. We observe that both ticket distribution and the entire business of live entertainment are technologically dynamic and rapidly evolving industries, and each has been undergoing substantial structural changes in recent years. It is within this changing landscape that the proposed merger reflects a broader industry trend towards vertical integration, wherein creators of live entertainment are generating efficiencies and valuable new markets by interacting directly with fans.

Because Ticketmaster and Live Nation are both in the ticket distribution business, with Live Nation having recently entered, there is a horizontal element to the proposed merger, requiring analysis of how it might affect both actual and potential competition. We conduct a full horizontal analysis, beginning with market definition and proceeding through calculation (or approximation) of market shares, assessment of possible adverse effects, prospect of post-merger entry, and consideration of horizontal efficiencies. The merger also has vertical dimensions, with Live Nation having been until recently Ticketmaster's largest client. We begin a vertical examination by reviewing developments in institutional economics and antitrust law regarding vertical integration and briefly review the results of an earlier Department of Justice investigation into Ticketmaster's use of exclusive contracts. We then discuss the potential for merger-specific efficiencies and assess arguments made by some of the merger's critics, including Senator Kohl and Congressman Pascrell, who have warned that the merger may have anticompetitive consequences.

We do not have access to the same confidential information possessed by the enforcement agencies or the parties. Our information is thus incomplete and our conclusions can only be preliminary. Nonetheless, we find reason to believe that a Live Nation-Ticketmaster merger is likely to produce certain efficiencies that commonly accompany vertical integration. We observe that the technology to distribute tickets is becoming increasingly widespread, that several technology companies have emerged with platforms that can cater to clients' specific needs, that there is a competitive bidding process in which these offerings are presented to potential clients, and that an increasing number of venues are now pursuing self-distribution strategies. Given this rapid emergence of new technologies and the evident attractiveness of self-distribution strategies, concentration calculations based on historical market shares likely do not accurately reflect the transaction's propensity to facilitate the exercise of market power. A proper determination of the merger's horizontal competitive consequences instead rests, above all, on how easily venues can pursue self-distribution strategies and how many providers of ticket distribution services would be available to offer alternatives to a merged Live Nation and Ticketmaster.

Although the results of this dispassionate antitrust analysis might be more supportive of the merger than many critics would hope, we offer this analysis echoing the Boss's admonition to seek truth and maintain an appropriate amount of self-doubt.

II. Background on Live Entertainment: Industry Structure and Trends[6]

Overview

The market for live entertainment events generated roughly $21 billion in ticket sales in 2007, with $14.3 billion generated by sporting events, $6.7 billion generated by concerts, and a small remainder generated by theatre performances, art exhibits, and other events that utilized ticketing services.[7] Participants in the live entertainment industry also rely on revenue from ancillary products, such as sales of merchandise, concessions, and music. Although the industry is becoming increasingly vertically integrated, most concerts and performances require contractual arrangements among a number of different and otherwise independent parties.

Artists contract with promoters to arrange live concert performances. Artists often contract through a manager that handles the artists' performance and business needs, and many of these managers further contract with booking agents to arrange an agreement with a promoter for individual performances or a tour. The promoter is then responsible for securing a venue for the performances, and the venue is accompanied by other revenue-producing services such as parking, concessions, sponsorship, and band-related merchandise. The venue, or sometimes the promoter, contracts with ticket

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[6] This section relies heavily on Krueger, *infra* note 9, and Barclays Capital, *infra* note 70.

[7] The Potential Anticompetitive Effects of the Proposed Combination of Ticketmaster Entertainment Inc. and Live Nation, Inc., Hearing on Competition in the Ticketing and Promotion Industry Before the Subcomm. on Courts and Competition Policy of the House Comm. on the Judiciary, 111 Cong. 7-8 (2009) [hereinafter Doyle Testimony] (written testimony of Robert W. Doyle, Jr., Partner, Doyle, Barlow & Mazard, PLLC). Secondary ticket sales, which for 2007 totaled $2.6 billion, are brokered by agents who purchase performance tickets from the primary sales agents or initial purchasers and then resell to end-consumers either with a mark-up above the sales price or through auction mechanisms.

distributors that administer ticket sales to performances through Internet, retail, telephone and box office sales.

Contracts between artists (via their managers and agents) and promoters have been likened to book contracts between authors and publishers in that they allocate serial revenues and often involve upfront payments. Although contractual agreements vary significantly based on the popularity of the band, the record of the promoters, and other circumstances, the typical contract distributes the revenue generated by concert tours sequentially. The first-dollar revenues generated by the performances go to the band in a "guaranteed advance," and then subsequent revenue secures for the promoter a "guaranteed profit," which includes expenses (including advertising, rent for the venue, labor, etc) and a negotiated profit. The promoter and band then share additional revenues (if any) that exceed both the guaranteed advance and guaranteed profit, with the band typically recovering around 85%. These contracts allocate other revenues as well, with the band typically receiving revenue from merchandise sales and the venue receiving revenue from parking and concessions. Live Nation has recently experimented with some "360" contracts with certain marquee performers that give the artist a lump sum guarantee for an entire tour, with Live Nation recovering all of the residual revenues,[8] but most contracts divide such residual revenue between promoters and artists. This means that promoters and artists tend to share (though not equally) the economic risks and benefits of ticketed performances, and both suffer from lost revenue when venues are unfilled.

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[8] Ethan Smith, *Deal to Rock Music Industry*, WALL ST. J., Feb. 5, 2009, at B10. Record labels, such as Warner Music Group and Sony Music Entertainment have also experimented with 360 deals, though with lesser-known artists. *Id.*

The contracts between artists and promoters also set the face value of concert tickets—i.e., the price of the ticket excluding any service fees, credit card fees, or taxes. Although face value ticket prices have been rising faster than the rate of inflation over the past decade,[9] many purchased tickets are later resold at significantly higher prices on a secondary market. Some suggest that the persistence of the secondary market is evidence of underpricing by bands in the primary market (and there are various explanations for such underpricing),[10] but others describe the secondary market as a more flexible distribution mechanism that can cater to fans who are less able to purchase on the primary market.[11] Scholars and industry commentators have offered varying characterizations of the secondary market, with different characterizations offering alternative implications for how much social value players in the secondary market create.[12]

Many venues and promoters contract with ticket distribution service companies, such as Ticketmaster, to handle all their ticketing needs. These contracts tend to be exclusive agreements, in which the ticket distributor agrees to handle all services for a venue for a period of time in exchange for the right to charge service fees that are

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[9] Alan B. Krueger, *The Economics of Real Superstars: The Market for Rock Concerts in the Material World*, 23 J.L. & ECON. 1, 3 (2005).

[10] *See, e.g.*, *id*. at 13.

[11] Pascal Courty, *Some Economics of Ticket Resale,* 17 J. ECON. PERSP. 85, 86 (2003) (suggesting that ticket resale is a function of heterogeneous consumer preferences, in that some consumers prefer to plan ahead while others prefer delay scheduling decisions, even if it requires paying higher prices).

[12] Although an assessment of the secondary market is beyond the scope of this paper, some commentators on the Live Nation-Ticketmaster merger have expressed concern for how the merger would affect the secondary market. Any such assessment would first have to articulate what services the secondary market provides, whether those services enhance social welfare, and whether direct competition between the primary and secondary markets enhances social welfare.

negotiated between the ticket distributor and the venue.[13] Most such agreements run for several years, with typical contracts lasting at least three and running for an average of six, and approximately 20 percent of all ticket distribution contracts expire in any given year,[14] and as these contracts approach their expiration dates, competing ticket distributors place bids with venues to compete for a subsequent exclusive contract.[15]

These distribution agreements appoint ticket distributors as agents for venues, establish whatever putative "processing fees" (alternatively called handling, convenience, or service fees) that are charged to ticket purchasers, and allocate processing fee revenues between the distributor and the venue.[16] Such processing fees usually are fixed by a schedule agreed to by the parties and can vary from event to event. In many cases, the ticket distribution agreement will require the distributor to provide the venue with an upfront payment, which might help the venue to finance certain physical improvements to the venue or even construction of the venue itself. The upfront payment amounts to a discount to the effective price the venue pays for distribution.[17] The allocation of these fees, along with the length of the contract and any other payments or discounts, determines the effective price charged by the ticket distributor for the services it provides to venues. There is evidence that the ticket distribution services industry has become

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[13] *See* Ticketmaster Corp. v. Tickets.com, Inc., 2003-1 Trade Cas. (CCH) ¶74,013, at 96,239-40 (C.D. Cal. 2003) (describing process of "arms length" bargaining between venues and ticket distribution companies and resulting price structure).

[14] *See id*. at 96,240-41 (reporting that at least 20 percent of such contracts expire each year).

[15] *Id*. (describing this bidding process).

[16] This should dispel the misconception, implicit in some critiques of the transaction, that the ticket distributor is solely responsible for, and retains all of, the processing fees. Typically, none of the processing fee revenues go to the artists.

[17] *See Ticketmaster Corp*, 2003-1 Trade Cas. at 96,240.

increasingly competitive in recent years, resulting in a larger percentage of the processing fees (or larger upfront payments) allocated to venues and promoters.[18]

There are other mechanisms available to venues to administer ticket sales, in addition to outsourcing this task to a distributor. An increasing number of venues have chosen to "make" instead of "buy" their ticket distribution, either by operating their own ticket distribution services with technology they have purchased from others or developed themselves or, more frequently, by licensing software from technology companies. Many venues have pursued a hybrid strategy, outsourcing their ticket distribution services while engaging in some self-distribution, for example, by selling directly to season ticket holders or purchasers at the box office. Larger venues may demand more sophisticated software than smaller venues, to handle the demands of responding to a high volume of simultaneous ticket purchases (this is particularly demanding for events where demand exceeds supply, such as playoff sporting events and marquee concerts). Several technology companies, such as Paciolan (acquired by Ticketmaster in 2008), Veritix, Front Gate, ShoWare, Tessitura, TicketReturn, and AudienceView, have developed and made available for licensing ticket distribution technologies that enable individual venues to distribute tickets on their own behalf in lieu of outsourcing this task to agents such as Ticketmaster.[19] These firms offer

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[18] The Potential Anticompetitive Effects of the Proposed Combination of Ticketmaster Entertainment Inc. and Live Nation, Inc., Hearing on Competition in the Ticketing and Promotion Industry Before the Subcomm. on Courts and Competition Policy of the House Comm. on the Judiciary, 111 Cong. (2009) [hereinafter Froeb Testimony] (written testimony of Luke Froeb, Oehmig Associate Professor of Management at Vanderbilt University).

[19] *See infra* notes 89-102 and accompanying text (listing numerous examples of venues that have recently taken on the task of distributing their own tickets). *See also Ticketmaster Corp.*, 2003-1 Trade Cas. at 96,241 (explaining that the option of self-

technologically sophisticated support for venues' efforts to gather, synthesize, and interpret information about their ticket buyers, fans, and in some cases, donors, information that can facilitate targeted promotion and more rational pricing strategies.[20]

A growing number of venues have recently internalized their ticket distribution operations relying on these technologies. For example, Kroenke Sports Enterprises based in Denver, numerous universities, International Speedway Corporation, Comcast-Spectacor ("Comcast"), and many others currently employ internal mechanisms to distribute tickets over the Internet.[21] Live Nation itself recently received a software license from CTS to power the self-distribution of tickets to venues that it owns and manages. Moreover, ticket distribution is being implemented through a diverse range of vertical arrangements. Tickets.com, for example, is owned by a subsidiary of Major League Baseball and distributes tickets to MLB games, yet each MLB team is permitted to develop (and many have) their own ticket distribution capabilities. Other venues pursue hybrid strategies for separate clienteles, such as season ticket holders versus single-ticket purchasers. For example, many universities with large sports programs (including Maryland, Georgia Tech, West Virginia, North Carolina State, and the

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distribution via reliance on outside technology providers prevents Ticketmaster from exercising market power).

[20] *See* Veritix, www.veritix.com/ (last visited Sept. 9, 2009) ("By applying dynamic, client-branded technologies—like exclusive digital ticketing delivery tools—Veritix enables its partners to develop rich behavioral profiles that maximize the lifetime value of their ticket buyers and fans. With the use of advanced Veritix applications, clients have the unique capability of understanding the nature of the true attendees at every event . . . . Never before has a single ticketing and live entertainment company delivered such advanced digital ticketing services and tools that empower clients to truly understand their customers' habits, improve fan relationships and drive more revenue.").

[21] *See, e.g.*, *infra* notes 79-88, 103-110. Note also that the University of Michigan, the University of Tennessee, and various other universities both self-distribute as well, using Paciolan technology.

University of Virginia) use technologies "powered by Paciolan" to distribute tickets to the public but maintain separate systems for student ticketing supported by TicketReturn. These multi-pronged strategies illustrate the many organizational solutions that providers of live entertainment are currently pursuing for ticket distribution as well as the many ancillary profit opportunities that can become available through integrated ticket distribution systems.

The emergence of varied vertical integration strategies also illustrates how much the industry has changed in a relatively short period of time. Just eleven years ago, appellate courts and the enforcement agencies could describe the ticket distribution industry without mentioning the Internet.[22] Now, it would be unfathomable for professional ticket distribution to exclude substantial Internet distribution, or perhaps even to have anything but Internet distribution as the primary sales vehicle. The centrality of Internet sales has called into question the requirement of establishing retail booths or call centers, both of which were necessary channels for ticket distribution not long ago, and it has drastically reduced the costs and complexity for venues that decide to distribute their own tickets. Internet technologies have leapfrogged the once-prevalent model of telephone and retail distribution and have enabled many venues to self-distribute tickets over the Internet.[23]

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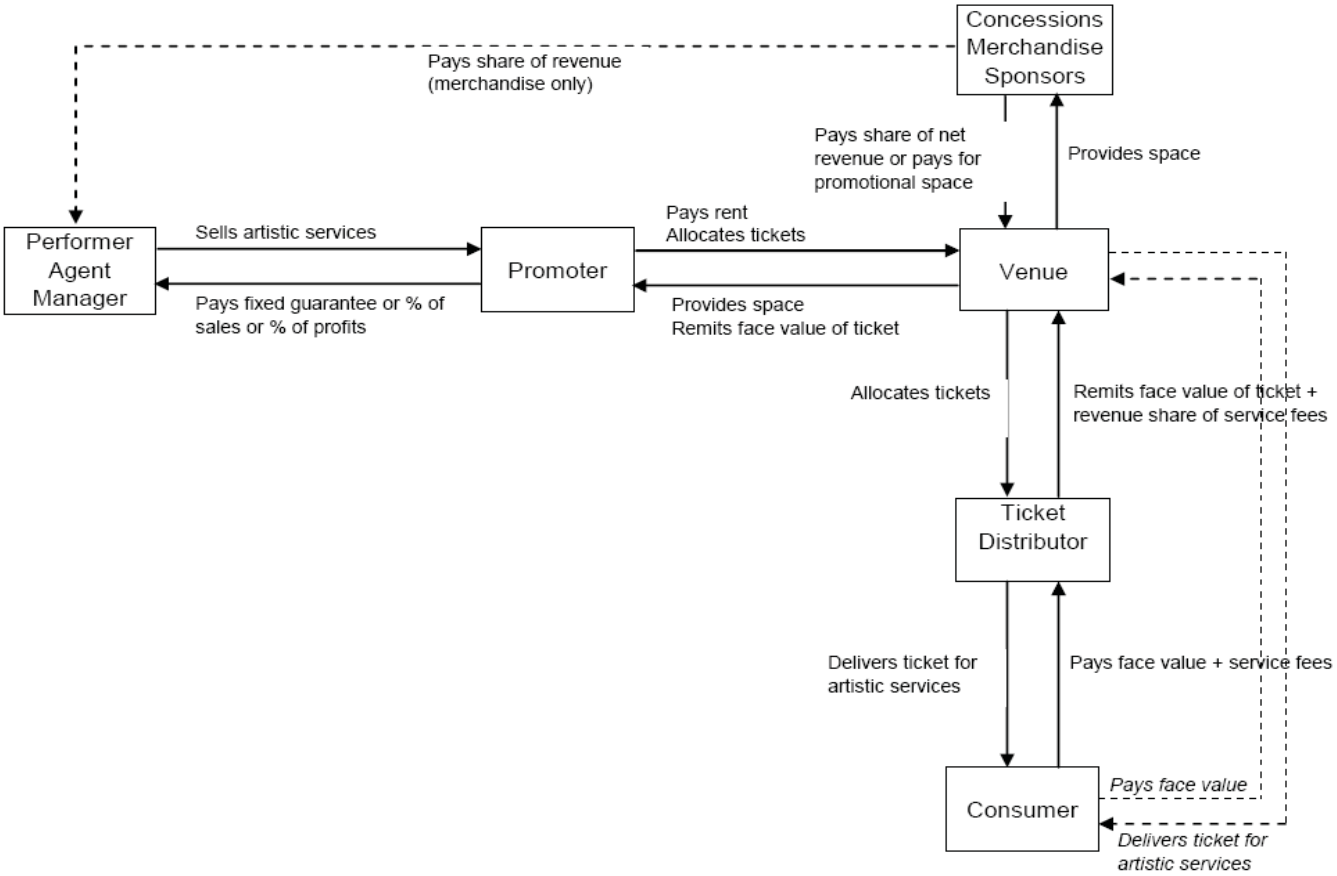
[22] *See* Campos v. Ticketmaster, 140 F.3d 1166 (8th Cir. 1998); Brief Amicus Curiae for the United States and Federal Trade Commission, Campos v. Ticketmaster, No. 98-127 (Dec. 1998).

[23] *See* United States v. SunGard Data Sys., 172 F. Supp. 2d 172, 188-89 (D.D.C. 2001) (noting that recent technological advances had significantly reduced the cost of vertical integration by customers who might otherwise suffer at the hands of a hypothetical monopolist. Invoking prior decision for the proposition that "the market definition should be expanded because the ability of a substitute product to compete 'will be enhanced in the future because of further technological and market developments.'").

There are similarly many variations in how promoters administer venues. Promoters may merely rent a site for a particular event, but many promoters have long-term commitments to certain venues. Promoters may own venues (and may lease them occasionally to others) and may have additional exclusive arrangements with others that preclude competing promoters from the venue. Promoters such as Live Nation also are providing services that traditionally have remained under the control of booking agents, where they not only organize and promote live performances but also coordinate and arrange lengthy tours at many venues.

Figure 1, created by Barclay's Capital, does a reasonably good job of characterizing the different contractual relationships that enable live performances. The chart understates the variation in both the extent of integration between venues and promoters as well as the extent of integration between venues and ticket distributors. It also suggests that ticket distributors contract directly with venues, whereas sometimes they instead contract with promoters. But the chart effectively conveys the several vertical relationships and multiple inputs that are required to deliver live entertainment and associated products to consumers.

Figure 1: Live Entertainment Market Structure – Ticket Distributor Contracts with Venue



Source: Barclays Capital

Parties to Proposed Merger

The parties to this proposed merger, Live Nation and Ticketmaster, are leaders in several of the market segments described above. Ticketmaster Entertainment, Inc., includes Ticketmaster, "the world's leading live entertainment ticketing and marketing company,"[24] Front Line Management Group, "the world's leading artist management company,"[25] TicketsNow, a secondary ticket seller, and a handful of other business

[24] *See* About Ticketmaster Entertainment, Inc., http://www.ticketmaster.com/h/about_us.html?tm_link=tm_homeA_i_abouttm (last visited Sept. 9, 2009).
[25] *Id.*

interests.[26] Ticketmaster's central asset, and its primary mechanism for distributing tickets, is its signature Website, Ticketmaster.com, but it was not always so. Before Internet commerce became routine, Ticketmaster's sales over the telephone and at retail outlets dominated the firm's business. Currently, however, Internet sales account for more than 73 percent of the company's worldwide sales, a growing percentage that reflects the rapidly evolving nature of the industry. Sales from 6,700 retail locations (not including those at the locations of the venues themselves) account for just 16 percent of overall transactions, a proportion that is falling, and its 19 call centers account for 11 percent.

Ticketmaster.com attracts more Web traffic and enjoys more ticket sales than any other Internet sales site. According to TicketNews' power rankings (which are based on Web traffic received by a ticket seller's Web site, not actual sales, though TicketNews claims that Web traffic "has been shown to be a good estimator of the number of transactions made by a seller"[27]), Ticketmaster.com is the leading seller both among primary and overall ticket sellers, with about 60 percent and 31 percent of recorded sales respectively.[28] Some sources indicate that Ticketmaster's share for large-scale popular

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[26] *See* Ticketmaster Businesses & Interests, http://www.ticketmaster.com/h/businesses.html (last visited Sept. 9, 2009).

[27] *See* TicketNews, http://www.ticketnews.com/ticket_industry_rankings (last visited Sept. 9, 2009).

[28] For the week ending August 22, 2009, TicketNews reports the following power scores for primary and combined ticket sellers:

Top Primary Sellers		Score	Top Combined Sellers		Score
1	Ticketmaster.com	60.29	1	Ticketmaster.com	30.68
2	LiveNation.com	16.11	2	StubHub.com	20.14
3	Telecharge.com	4.89	3	LiveNation.com	8.17
4	TicketWeb.com	3.50	4	TicketsNow.com	5.48
5	ETix.com	3.16	5	TicketLiquidator.com	3.33

music events might be even higher, approaching 75-90 percent.[29] Other full service ticket distributors appear to have much smaller market shares, with most below 5 percent. Unfortunately, public data regarding ticket sales do not distinguish between outsourced distribution, on the one hand, and self-distribution, on the other, a distinction we find to be of great competitive significance, as discussed in Part III, below.[30]

Ticketmaster Entertainment's Front Line Management occupies a significant position in the market for talent management and "is widely regarded as the music world's most powerful artist-management company."[31] Front Line's roster includes close

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6	BrownPaperTickets.com	1.82	6	Telecharge.com	2.48
7	Tix.com	1.80	7	TicketCity.com	2.31
8	Tickets.com	1.20	8	TicketWeb.com	1.77
9	Wantickets.com	0.96	9	ETix.com	1.60
10	SmithsTix.com	0.44	10	CoasttoCoastTickets.com	1.16

Id. (last visited Aug. 31, 2009) These figures apparently include self-distributed tickets, a fact that explains LiveNation.com's inclusion on the list.

Data sources for ticket sales conflict slightly with each other, and we have no knowledge suggesting that one source is superior to others, but all the sources we consult generate similar results. For example, Nielsen Online Netview offers a slightly different comparison of Ticketmaster and LiveNation.com that perhaps indicates that LiveNation.com has a less significant Web presence. Indeed, its figures from January 2009 reveal that Ticketmaster attracts roughly 12.1 million monthly unique visitors, almost four times LiveNation.com's, and 53 percent of LiveNation.com's audience also visited Ticketmaster in January 2009, whereas only 14 percent of Ticketmaster's audience visited LiveNation.com. *See* http://www.nielsen-online.com/emc/btn/0902_indnews/indnews_0902.htm (last visited Sept. 9, 2009). The New York Times reported data from Forrester Research indicating that Ticketmaster had 30 percent of the $21 billion events market in 2008 and data from Stifel Nicolaus suggesting that Ticketmaster's market share for music concert tickets was closer to 70 percent. Andrew Ross Sorkin, ed., *Ticketmaster Merger Plan Could Touch on Antitrust*, N.Y. TIMES, Feb. 4, 2009, at B3.

[29] *Ticketmaster Corp.*, 2003-1 Trade Cas. at 96,241.

[30] We anticipate that the ultimate fact finder will have superior data that both distinguishes between outsourced and self-distribution and is not derived from proxy information, such as TicketNews's power rankings.

[31] Ethan Smith, *Ticketmaster to Acquire Star Power in Azoff Deal*, WALL ST. J., Oct. 23, 2008, at B1.

to 200 artists, including many who perform in large venues. Ticketmaster's purchase of Front Line in October 2008 was characterized by *The Wall Street Journal* as an effort "to find a new business model for an industry undergoing seismic shifts."[32] The merger of Ticketmaster Entertainment with Live Nation appears to be a continuation of Ticketmaster's new business model, in which it is integrating its ticketing operations with other elements of live entertainment.

Live Nation, Inc. describes itself as "the largest producer of live concerts in the world, annually producing over 16,000 concerts for 1,500 artists in 57 countries."[33] Live Nation owns 18 venues in the US, has leases on 70 more, and operates many others in which it organizes live events.[34] With its subsidiaries, it has booking rights for 159 venues, with 140 in the US, and has been responsible for organizing many of the industry's largest tours.[35] Live Nation events represent approximately 35 to 38 percent of all live music concerts, although Live Nation owns or operates approximately 90 percent of the outdoor amphitheatres in the US. At congressional hearings, many smaller venues have complained that they cannot offer marquee bands the revenues and venues that would enable them to compete with Live Nation.[36]

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[32] *Id.*

[33] *See* About Live Nation, http://www.livenation.com/company/getCompanyInfo (last visited Sept. 9, 2009).

[34] The Potential Anticompetitive Effects of the Proposed Combination of Ticketmaster Entertainment Inc. and Live Nation, Inc., Hearing on Competition in the Ticketing and Promotion Industry Before the Subcomm. on Courts and Competition Policy of the House Comm. on the Judiciary, 111 Cong. 13 (2009) [hereinafter Rapino Testimony] (written testimony of Michael Rapino, President & Chief Executive Officer, Live Nation).

[35] Live Nation, Inc., Annual Report (Form 10-K) at 1 (Mar. 5, 2009) http://www.sec.gov/Archives/edgar/data/1335258/000119312509045320/0001193125-09-045320-index.htm (last visited Sept. 9, 2009).

[36] *See supra*, note 2.

Live Nation, like Ticketmaster Entertainment, also has been expanding into vertically related segments of live entertainment in an apparent effort to implement a new business model. In 2006, Live Nation acquired a controlling interest in MusicToday, an online store for artist merchandise, and MusicToday became part of the company's "Artist Nation" division, which "was formed to partner with artists to manage their diverse rights, grow their fan bases and provide a direct connection" in marketing music, tickets, and merchandise.[37]

In another recent effort to integrate downstream into consumer sales, and thus to gain greater contact with consumer sales and preferences, Live Nation now internally maintains its own ticket distribution operations. Previously a long-time Ticketmaster client (and the source of 17% of Ticketmaster's revenues in 2007), Live Nation ended most of its dealings with Ticketmaster in December 2008 after it entered an agreement with CTS Eventim, the largest ticketing company in Europe, to license CTS ticket distribution technology. The agreement enabled Live Nation to create a technological platform so the company could distribute tickets to events at the venues it owns or operates, and the resulting (captive) sales account for all or most of the ticket sales currently attributed to Live Nation. Live Nation also announced in September 2008 that it had entered a strategic alliance with venue-operator SMG, currently a Ticketmaster client. According to public reports, the agreement contemplates that Live Nation will sell tickets to events at venues operated by SMG, regardless whether Live Nation promotes

[37] Press Release, PRNewswire, Live Nation's Artist Nation Division Redefines the Music Industry with Unified Rights Model, (Oct. 16, 2007), http://www.prnewswire.co.uk /cgi/news/release?id=210077 (last visited Sept. 9, 2009).

such events, after SMG's contract with Ticketmaster expires in December, 2010.[38] Currently, LiveNation.com, which distributes tickets to events at Live Nation venues, is ranked a distant second in Internet primary ticket sales, behind Ticketmaster.[39] Some industry observers expect Live Nation (if and until its merger with Ticketmaster is consummated) to compete along with other distributors for Ticketmaster's business as Ticketmaster's distribution contracts expire.

Recent Industry Developments

Both Ticketmaster Entertainment's and Live Nation's recent acquisitions, and their respective pursuits of new business models, appear to be responses to a live entertainment industry that is undergoing significant structural change.[40] Accordingly, the company's proposed merger should be viewed within the context of a rapidly shifting industry landscape.

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[38] *See Live Nation Signs Ticketing deal with SMG,* Reuters News Service (September 11, 2008); http://investors.ticketmaster.com/releasedetail.cfm?releaseid=334097 (detailing Ticketmaster's exclusive agreements with SMG that expire on December 31, 2010). Ticketmaster has argued that Live Nation would sell only a modest fraction of tickets to SMG-operated venues by late 2009. *See id.* ("[L]ess than 250 thousand tickets (of the 141 million we sold in 2007) are at possible risk with SMG in 2009."). This is because, in part, although events at SMG-operated venues account for up to 5 million tickets annually, Ticketmaster suggests that the arrangement will not obligate all SMG venues to rely upon Live Nation for ticket distribution. Ticketmaster contends that most venues operated by SMG are in fact owned by municipalities that employ a "request for proposal" or "competitive bidding" process for selecting their ticket distributors and that Ticketmaster expects to compete for such business even after its current contract with SMG expires on December 31, 2010. *Id. See also* Michael Peters, *Ticketmaster Responds to Live Nation/SMG Deal*, BILLBOARD MAG., Sept. 11, 2008, *available at*: http://www.billboard.biz/bbbiz/content_display/industry/e3ia6592177cf3e47ef913e13148951ec2e (recounting Ticketmaster's characterization of the deal and SMG's response).

[39] *See supra*, note 28.

[40] *See supra*, note 31 (describing the music world as "an industry undergoing seismic shifts").

Perhaps the most significant development in the music industry, one with effects well beyond live entertainment, is the Internet-driven spread of digital music technology and the concomitant rise of music piracy. Alan Krueger has observed that the emergence of digital music coincided with a rise in concert ticket prices that was both significantly faster than the rate of inflation and additionally faster than similar increases in ticket prices to movies, theatre, and sporting events.[41] Krueger finds empirical evidence for a "Bowie hypothesis" that suggests that "concert prices have soared because recording artists have seen a large decline in their income from record sales, a complementary product to concerts."[42] In other words, whereas performers previously underpriced their concert tickets in order to boost their record sales, they now are charging closer to what the market will bear. Consistent with the economic theory underlying this hypothesis, these ticket price increases have been associated with higher overall concert revenues, fewer tickets sold, larger yet fewer concerts, and fewer sellouts. Krueger additionally finds evidence for a predicted "superstar" effect that has channeled a disproportionately large and growing share of concert revenues to the most popular bands. These popular and established bands also seem to be engaging in more price discrimination, with the prices for good concert seats rising faster than the price for the average seat.

In other words, data on concert ticket prices suggest that since 1997 concerts are increasingly being priced like single-market monopoly products, rather than being underpriced to boost popularity and record sales. They have accordingly become the

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[41] Krueger, *supra* note 9, at 7-10.

[42] *Id*. at 25. Kruger calls this the "Bowie hypothesis" because of David Bowie's prescient remark in 2002 that "music itself is going to becomes like running water or electricity," which meant that performers "better be prepared for doing a lot of touring because that's really the only unique situation that's going to be left." *Id*. at 26.

primary source of revenue for most top artists.[43] In turn, they have unleashed new revenue opportunities for concert promoters and, especially when combined with the "superstar effect," have opened profitable opportunities for promoters who organize events for the nation's marquee performers.

Additionally, emerging Internet technologies are permitting a similar pursuit of new revenue opportunities in other segments of the live entertainment value chain. Live Nation's development of MusicToday and Artist Nation reflect these new Internet opportunities to sell merchandise and other goods. Meanwhile, Internet technologies—including technologies to distribute tickets over the Internet—are becoming more widespread and commoditized. As noted above, recent years have witnessed the emergence of several technology companies that license or sell ticketing distribution technologies to venues that choose to distribute their own tickets.[44] This spread of Internet technologies for ticket distribution, along with the growing economic importance of concerts, has meant that ticket platforms also have become important mediums to market merchandise and related goods. Consequently, the locus of competition in ticket distribution appears to be shifting. Whereas competition in the ticket distribution market has historically taken the form of technological rivalry—Ticketmaster's displacement of Ticketron as the market leader was largely due to its superior technological capabilities—competition now increasingly revolves around the ability of outsourced distributors or

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[43] Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music*, at Table 1.1, NBER Working Paper No. W11282 (Apr. 2005).

[44] *See infra* notes 79-110 and accompanying text (listing numerous examples of venues that have recently taken on the task of distributing their own tickets). *See also Ticketmaster Corp* 2003-1 Trade Cas. at 96,241 (explaining that the option of self-distribution via reliance on outside technology providers prevents Ticketmaster from exercising market power).

firms that support self-distribution to assist venues in promoting and marketing content and related products.

The growing importance of marketable content and ancillary products explain what would otherwise appear to be an economic curiosity. Economic theory would normally predict that the outsourcing of a particular service becomes more common when its underlying technology becomes commoditized and thus subject to large-scale market production.[45] If competition were truly over efficient ticket distribution, then the industry would rely on outsourced services. In contrast to this prediction, however, the spread of Internet ticketing technology and reduced costs in ticket distribution has given rise to *greater* vertical integration, as venues are now increasingly pursuing self-distribution strategies.

This trend in vertical integration is apparently driven by promoters and artists who are pursuing new revenue sources by establishing greater contact with fans. For example, revenue sources that traditionally accompany live entertainment, such as merchandise sales and perhaps music sales, might accrue to venues and performers if they maintain contact with consumers. The "superstar" effect additionally magnifies these profit opportunities, especially for top-name performers. Similarly, acquiring and interpreting information about the profile of ticket purchasers facilitates efforts by venues and performers to develop targeted communications and marketing strategies designed to respond to consumer preferences and maximize fan demand for live entertainment. These opportunities are lost if independent ticket distribution firms lack the incentive to

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[45] *See, e.g.,* OLIVER E. WILLIAMSON, MARKETS & HIERARCHIES (1975). *Cf.* George J. Stigler, *The Division of Labor is Limited by the Extent of Market*, 59 J. POL. ECON. 185 (1951).

develop such profiles and acquire a more thorough understanding, and a broader data set, of performers' fans. Accordingly, the value of ticket distribution services has become less about technological capabilities and more about establishing direct linkages to, and information about, fans and their interests in content.[46]

Such trends comport with public statements by Ticketmaster and Live Nation explaining their rationale for the merger. Ticketmaster has noted that it needs to integrate away from the increasingly competitive market for ticket distribution,[47] and both companies have argued that their integration would enable the production of more content and more products. This industry-wide shift towards vertical integration, and the accompanying opportunities to pursue additional revenue sources, explains both parties' motivations for the transaction.

These industry-wide developments—the growing economic centrality of live concerts and the economic opportunities afforded by vertical integration—not only might explain Live Nation's and Ticketmaster's intentions to merge, but should also inform any evaluation of how the merger might affect competition. In the following two sections, we

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[46] Veritix.com, http://www.veritix.com (last visited Sept. 9, 2009) (describing how Veritix self-ticketing technology allows venues to "develop rich behavioral profiles that maximize the lifetime value of their ticket buyers and their fans" and "empower clients to truly understand their customers' habits, improve fan relationships, and drive more revenue").

[47] *See* Peter Kafka, *Ticketmaster CEO Irving Azoff: How to Make Money While Music Becomes "Demonetized,"* ALL THINGS DIGITAL, May 27, 2009, http://d7.allthingsd.com/20090527/irving-azoff/?mod=ATD_search (last visited Sept. 9, 2009) (reporting that Ticketmaster's merger with Live Nation is motivated by Ticketmaster's need to integrate with promotion and marketing, without which Ticketmaster's survival would be jeopardized, and quoting Azoff as saying "[a]ny of you guys can write a program that does what Ticketmaster does. . . . I've been there a couple of months and I have gripes myself.").

evaluate the probable consequences of this transaction on horizontal and vertical competition while keeping these industry developments in mind.

III. Analysis of Merger's Horizontal Consequences

An analysis of the horizontal consequences of the Live Nation-Ticketmaster merger begins with identifying the market segments in which both companies compete. The production of live entertainment involves a number of market segments, and although both firms have core businesses that lie primarily in specific segments, each now participates in multiple levels of the industry. Live Nation currently engages in the promotion of concerts and other events, the operation and management of venues, various forms of merchandising, and the distribution of primary tickets. Ticketmaster meanwhile engages in the distribution of primary tickets, the secondary market for ticket sales, the licensing of technology that facilitates the self-distribution of tickets for a venue's own events, and the management of entertainment talent.

Consequently, most of both firms' business activities do not come into direct competition with each other. However, on January 1 of this year, Live Nation, which was previously an important Ticketmaster client, began to self-distribute tickets to events at venues it owns or operates and has also sought to offer outsourced ticket distribution services to other venues. Accordingly, the parties now appear to be competing for contracts to provide ticket distribution services to venues that choose not to distribute their own tickets. This recent competition has led some to criticize the transaction on the ground that it purportedly reduces present and future competition in a market for ticket

distribution services, and it impels us to examine the horizontal consequences of this transaction.

By most publicly available accounts, Ticketmaster and Live Nation are numbers one and two in ticket sales,[48] with combined sales approaching 80 percent of the industry total.[49] Some critics decry the purported reduction of competition in such sales that this merger would entail. A careful analysis of this market segment, however, suggests that technological innovations have made this a very dynamic and rapidly changing market, in which new products are facilitating vertical integration and easing entry. At the same time, Live Nation's ticket sales, nearly all of which entail distribution for events it promotes or venues it owns or operates, significantly overstate its present or future competitive significance in any properly defined market for ticket distribution. Consequently, an appropriate evaluation of the merger suggests that it would have a minimal effect on the market's competitiveness.

The remainder of this section employs the law of horizontal mergers as the framework for evaluating the probable horizontal consequences of the proposed transaction. Section 7 of the Clayton Act requires courts and enforcement agencies to ascertain the competitive impact of a transaction upon "any line of commerce or [line of] activity affecting commerce in any section of the country."[50] Such an analysis generally involves the following steps: 1) defining the relevant market, 2) identifying market

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[48] Live Nation is primarily considered a large ticket distributor on account of its self-distribution of its own tickets. This qualification becomes meaningful in a horizontal merger analysis, *see infra* notes 129-130 and accompanying text.

[49] *See, e.g.*, *supra* note 27 (attributing 60.3% and 16.1% of the market for ticket sales to Ticketmaster, and Live Nation, respectively). Of course, TicketNews scores are only approximations of relative sales.

[50] 15 U.S.C. §18 (2006).

participants and calculating market shares, 3) analyzing "other factors" that bear upon whether a transaction will produce anticompetitive effects; 4) examining possibilities for entry in the market, assuming the possibility of anticompetitive effects, and 5) determining whether the merger might create horizontal efficiencies.[51]

Market Definition

To ascertain the relevant "line[s] of commerce" and "section[s] of the country," courts and the enforcement agencies must determine the relevant product market(s) and geographic market(s) in which the merging parties participate.[52] Plaintiffs challenging a merger, including the federal enforcement agencies, bear the burden of pleading and proving the relevant product and geographic markets. Failure to discharge these burdens dooms any challenge to a merger.[53]

1. General Standards Governing Market Definition

The market definition inquiry does not involve identifying "markets" in a colloquial sense or even in the sense that market participants or industry observers may employ the term.[54] Instead, market definition in the merger context is a rigorous process designed to identify markets that are "economically meaningful" in the sense that firms

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[51] *See* 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 0.2 [hereinafter 1992 Joint Merger Guidelines].

[52] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

[53] *See* United States v. Engelhard Corp., 126 F.3d 1302 (11th Cir. 1997) (government challenge to merger fails for lack of proof of relevant product market); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1110 (N.D. Ca. 2004) (proof of market definition a "necessary predicate" for a successful challenge to a merger); *id.* at 1152-68 (rejecting challenge because of failure to establish a relevant market); *SunGard*, 172 F. Supp. 2d at 181-93 (rejecting government challenge to a merger because of failure to prove relevant market in which transaction would result in significant concentration).

[54] 2006 Department of Justice and Federal Trade Commission Commentary on the Horizontal Merger Guidelines, 11-12 (Mar. 2006) [hereinafter 2006 Commentary on Horizontal Merger Guidelines] ("Industry Usage of the Word 'Market' is Not Controlling").

participating in them could exercise market power.[55] If the participants in a proposed market could not exercise market power, even when acting in concert, because a sufficient number of consumers would turn to products outside the putative market, then the "market" in question is not economically meaningful and cannot serve as the basis for an evaluation of the competitive effects of the transaction.[56]

At one time, market definition involved the consideration of various factors ("practical indicia") purportedly bearing upon the "reasonable interchangeability" of potential substitutes.[57] More recently, the enforcement agencies have articulated a more rigorous analytic process that has been embraced by an increasing number of courts.[58] Under this approach, the agencies seek to identify a category of products, including but not necessarily limited to the type of products sold by the merging parties, with respect to which a hypothetical monopolist of such products could profitably exercise market power

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[55] *See* 1992 Joint Merger Guidelines, *supra* note 51, § 1.0 ("The analytic process described in this section [describing the standards governing market definition] ensures that the Agency evaluates the likely competitive impact of a merger within the context of economically meaningful markets, *i.e.*, markets that could be subject to the exercise of market power.").

[56] *See id.*, § 1.0.

[57] *See Brown Shoe*, 370 U.S. at 325 (identifying various "practical indicia" bearing upon reasonable interchangeability and thus market definition).

[58] *See* 1992 Joint Merger Guidelines, *supra* note 51, § 1.0; 1984 Department of Justice Merger Guidelines, §§ 2.1, 2.11 [hereinafter 1984 Merger Guidelines]. *See also Oracle Corp.*, 331 F. Supp. 2d at 1110-13 (explaining that proof of relevant product market is "necessary predicate" for successful merger challenge and invoking Joint Merger Guidelines' hypothetical monopolist methodology); *SunGard*, 172 F. Supp. 2d at 181-82 (market definition is the "key to the ultimate resolution of this type of case, since the scope of the market will necessarily impact any analysis of the anticompetitive effects of the transaction"; invoking both "reasonable interchangeability" test and agencies' hypothetical monopolist test); FTC v. Swedish Match N. Am., Inc., 131 F. Supp. 2d 151, 159-60 (D.D.C. 2000) ("practical indicia" are "not necessarily criteria to be rigidly applied" in a "talismanic fashion"; explaining that 1992 Joint Merger Guidelines' hypothetical monopolist test is one method for evaluating "price sensitivity" and thus reasonable interchangeability) (quotations omitted); FTC v. Cardinal Health, 12 F. Supp. 2d 34, 45, n.8 (D.D.C. 1998).

because an insufficient numbers of purchasers would avail themselves of substitutes for the category of products in question.[59]

2. Identification of Relevant Consumers

Applying the hypothetical monopolist test requires the court or agency to identify the class of purchasers of the product or products that comprise the provisional market. As is detailed in Part II, ticket distributors are retained by venues (and sometimes promoters) to provide ticketing services for a particular event or series of events. Accordingly, even though concert goers purchase their tickets from these distributors, who act as agents for venues, it is the venues who are the true purchasers of the ticket distribution services.

Understanding this arrangement, in which a distributor is retained by a manufacturer or service provider and acts as a liaison to the ultimate consumer, is often central to a proper application of the antitrust laws. Numerous decisions in the merger context have properly determined that business firms, and not individual downstream purchasers, are the relevant consumers for the purpose of conducting the hypothetical monopolist test, even if these businesses themselves sell a resulting product to ultimate consumers.[60] Moreover, the Eighth Circuit Court of Appeals, on precisely this question in a previous suit involving Ticketmaster, ruled that venues, and not fans, are the initial and direct purchasers of services provided by Ticketmaster and similar providers of

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[59] *See* 1992 Joint Merger Guidelines, *supra* note 51, §§ 1.0, 1.11.

[60] *See, e.g., Cardinal Health, Inc.*, 12 F. Supp. 2d at 36 (defining market of wholesale warehousing and distribution of pharmaceuticals sold to retail pharmacies); Grumman Corp. v. LTV Corp., 665 F.2d 10, 13-14 (2d Cir. 1981) (approving product market of "major airframe subassemblies" sold to manufacturers of civilian aircraft).

ticketing distribution services.[61] Additionally, the Department of Justice and the Federal Trade Commission jointly filed a Supreme Court brief in 1999 endorsing an Eighth Circuit determination that venues, and not consumers, are the actual purchasers of Ticketmaster's ticket distribution services.[62] The joint DOJ and FTC brief is an instructive interpretation of the economic relationship between Ticketmaster, the venues it serves, and fans of live entertainment. As the brief pointed out, "[t]he typical contract provides that the venue is the 'Principal' who grants to Ticketmaster a right 'to sell [tickets] as the *Principal's agent*.'"[63] Thus, we think it likely that, for purposes of applying the hypothetical monopolist test articulated by the Merger Guidelines, the Department of Justice will examine whether a price increase by all ticket distributors would cause enough *venues* to reduce their purchases of ticket distribution services so as to render such a price increase unprofitable.

3. Geographic and Product Markets

Given the portability of Internet software and the ease with which ticket distributors can provide services throughout the country, there are unlikely to be any geographic boundaries to this market. In a related determination in 2003, before Internet software became as widespread as it is now, a federal court found that Ticketmaster

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[61] *See Campos*, 140 F.3d at 1171-72 .

[62] *See* Brief Amicus Curiae for the United States and the Federal Trade Commission in Campos v. Ticketmaster, No. 98-127 (Dec. 1998).

[63] *See id.* at 9 (quoting plaintiff's complaint) (emphasis in the brief). Like the Eighth Circuit's opinion, the joint brief of the DOJ and the FTC treated the allegations in the plaintiff's complaint about the nature of the relationship between venues and ticket distribution companies as true, given the procedural posture of the case, *i.e.*, appellate review of a decision to grant a motion to dismiss. We have no reason to believe that these particular allegations were not well-grounded in facts about the industry at the time or that these facts have changed.

competed in markets throughout the United States,[64] and a court is likely to similarly define the market now.

Determining the product market is a more difficult task. Purchasers of ticket distribution services range from large stadiums and arenas, with capacities of 20,000, 50,000 or even 100,000 fans, to amphitheaters and local clubs with much smaller capacities.[65] In addition, ticket distributors can supply distribution efforts through any combination of four different channels: the Internet, telephone call centers, sales from the venue's box office, and retail distribution outlets, the latter of which are generally located in shopping malls or large department stores.[66] Venues' and promoters' needs for distribution services can vary significantly, and they also can purchase different assortments of services. For example, it is common for venues to retain ticket distributors while also engaging in some self-distribution by, for instance, selling tickets from their own box office and making group sales and/or selling season tickets. Moreover, some venues and promoters rely upon distributors to support their box office, season ticket, and group sales operations, while others require distributors to handle large volumes of ticket orders in a short period of time, e.g., shortly after the announcement of a popular concert or playoff schedule, and others expect distributors to assist in promoting the venue's events. Finally, venues increasingly expect distributors to assist

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[64] *See Ticketmaster Corp.*, 2003-1 Trade Cas. at 96,241 (determining that the parties compete in markets throughout the nation).

[65] For example, Ticketmaster's current clients include both Madison Square Garden, "the world's most famous arena," http://www.thegarden.com/, and Mercury Lounge, a Bowery Ballroom venue in New York City with a capacity of only 575. *See* Ben Sisario, *A Small Strategy for Selling Concerts*, N.Y. TIMES, June 7, 2001, *available at* http://www.nytimes.com/2007/06/07/arts/music/07bowe.html?pagewanted=all

[66] *See Ticketmaster Corp.*, 2003-1 Trade Cas. at 96,239-40 (describing these channels of distribution).

the venue in managing customer-related information, so as to better gauge fans' preferences for live entertainment and ancillary products. Such services meaningfully facilitate the venue's subsequent targeted promotional efforts.[67] Individually negotiated contracts between ticket distributors and venues memorialize the division of ticket revenue and presumably the particularized service expectations for each particular venue.[68]

A prior court defined the product market (though only for the sake of argument) as "the market for full service ticket distribution services purchased by major venues,"[69] thus separating distribution services for large venues from those designed for small ones. Observers supporting this distinction claim that the technological and equipment needs of

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[67] Indeed, we understand that in many cases loyal fans of particular entertainers never learn that their favorite performer is "in town," despite vigorous promotional efforts. See Michael Rapino, Transcript of Hearing of Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, CQ Transcriptions, LLC (Feb. 24, 2009) (testifying that one of the top reasons given by fans for not attending a concert is that they were unaware of the performance).

Note in this connection that a venue can reduce its expenses on broad-gauged advertising and promotion if it can instead target its advertising toward those fans who it believes will have a particular interest in attending the event in question. *See infra* Part IV.3 (discussing efficiencies—specifically, the benefits of coordinated adaptation and targeted promotion—that often accompany vertical integration).

[68] *Ticketmaster Corp*., 2003-1 Trade Cas. at 96,240 (explaining that contracts with venues are individually negotiated and allocate revenues between venue and distributor).

[69] *See id.* at 96,239-40 (describing and adopting for the sake of argument relevant product market including only ticket distribution for large venues). *See also* FTC v. PPG Indus., 798 F.2d 1500 (D.C. Cir. 1986) (affirming preliminary injunction against merger between firms that produced glass and acrylic transparencies for sales to aircraft manufacturers); *Grumman Corp.,* 665 F.2d at 13 (approving market defined as "major airframe assemblies for large civilian aircraft" sold to Boeing and McDonnell Douglas). In a different context, an economist has drawn a distinction between firms able to serve large and small clients, on the one hand, and those only able to serve smaller clients, on the other. *See* Mary W. Sullivan, *The Effect of the Big Eight Accounting Mergers on the Market for Audit Services*, 45 J.L. & ECON. 375, 396 (2002) (building model based upon distinction between "Big Eight" accounting firms, on the one hand, and so-called "fringe" firms, on the other); *id*. at 386 ("Fringe firms are reasonable alternatives to the Big Eight for small audit buyers, and the fringe firms are fairly competitive.").

large venues are qualitatively distinct from those of smaller venues, so firms perfectly capable of serving the needs of small venues may not be able to serve those of larger ones.[70] At the same time, no precedent or economic principle *compels* such a distinction. Moreover, any effort to define a relevant market around the size of venues may fail to capture and account for the great diversity of needs that otherwise similar venues might possess. For instance, some large venues may require relatively straightforward Internet-based ticket distribution, without complex ancillary services, while other large or even medium-sized venues may require (or believe they require) ticket distribution in several channels, along with multifaceted services such as gate control, management of season ticket sales, donor management (for universities and other non-profit organizations), event promotion, and collection and synthesis of information about fans. Adding to this complexity is the fact that many venues, both large and small, serve numerous purposes and promoters organize a diversity of offerings. Popular venues may host concerts, sporting events, auto shows, and horse shows within a short period of time. As such, the venue might require a complex bundle of ticket distribution services for some events, and a much more modest bundle for others. And, in fact, some

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[70] As one neutral analyst has put it,

> Large events are typically associated with ticket sales through multiple distribution channels, including the Internet, call centers, retail outlets, and the box office. Considering the potential for a high level of demand for tickets in a short period of time for large events, ticket distribution service providers must be able to handle large volumes and coordinate the distribution of tickets through all channels using complicated software and centralized inventory systems.

See Evren Ergin, Barclays Capital, *Ticketmaster-Live Nation Antitrust Analysis*, Apr. 30, 2009, at 5.

venues employ different ticket distribution companies to service different event or fan categories.[71] Promoters also have varying needs for a similarly diverse set of events.

We therefore believe it would be difficult to articulate and prove with any precision the existence of a market that includes some ticket distribution firms but not others. There is no clear boundary separating one category of firm from another, particularly in light of the ability of venues and promoters to take on various facets of the distribution task themselves.[72] Thus, a legal challenge to this transaction could fail for this reason alone, i.e., the inability to conceive of, articulate, and prove a tractable distinction between some providers of ticket distribution services and others.[73] We may, however, assume for the sake of argument that firms providing ticket distribution services to large venues and promoters, or at least large venues and promoters with sophisticated needs, offer a distinctive set of services that constitute an identifiable product market.[74]

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[71] For example, the American Airlines Center in Dallas, TX uses Ticketmaster to sell concert and NBA Mavericks tickets, but Tickets.com to distribute NHL Stars tickets. *See* http://www.americanairlinescenter.com/events-and-tickets/purchase_tickets.php (last visited Sept. 9, 2009) and NHL.COM Network, http://stars.nhl.com/club/page.htm?id=39263 (last visited Sept. 9, 2009) ; Ticketmaster, http://www.ticketmaster.com/artist/805932?brand=mavericks (last visited Sept. 9, 2009). Moreover, as noted in Part II, several universities employ Paciolan software to power most of their ticket self-distribution while at the same time relying upon TicketReturn software to power distribution of tickets to their students.

[72] For instance, some universities might require their ticket distributor to provide integrated donor management software, while other universities may obtain such software from independent vendors.

[73] *See Oracle Corp.*, 331 F. Supp. 2d at 1159 (finding that government did not carry its burden of proving market definition because government's efforts to "delineate" the boundaries of the product market could "[not] be expressed in terms to make a judgment of the court have meaning" and noting that plaintiff's expert witness had conceded that there was no "quantitative metric" distinguishing products within the market from those outside it); *SunGard*, 172 F. Supp. 2d at 181-83.

[74] *See Ticketmaster Corp.* 2003-1 Trade Cas. at 96,239-40.

4. Applying the SSNIP Test

Assuming the demands of large purchasers of ticket distribution services are distinct from their smaller counterparts, the operative inquiry for the sake of market definition focuses on how such purchasers, what we will provisionally call "large venues," would react to a "small but significant and non-transitory increase" (SSNIP) in the price of outsourced ticket distribution services, and whether this increase would be profitable in light of that reaction. Key to answering this question is the recognition that venues have increasingly turned to self-distributing tickets to their own events in lieu of outsourcing this task to agents such as Ticketmaster. Some have done so in reliance on software they have purchased or developed; more frequently such firms have licensed such software from third parties. Indeed, in recent years numerous firms have developed and offered for licensing Internet-based ticket distribution technologies that have enabled many venues to engage in Internet-based self distribution. These developments reflect the rapid spread of Internet-based technologies that can handle rigorous ticketing demands, reduce the minimum viable scale of ticket distribution, and facilitate the realization of the sort of efficiencies not available from outsourced distribution. Courts have recognized that such technological dynamism should inform the exercise of market definition.[75]

Accordingly, the number of large venues that now distribute their own tickets, with apparent success, relying upon software they own or license from third parties, has

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[75] *See SunGard*, 172 F. Supp. 2d at 189 (noting that recent technological advances had significantly reduced the cost of vertical integration by customers who might otherwise suffer at the hands of a hypothetical monopolist, and invoking prior decision for the proposition that "the market definition should be expanded because the ability of a substitute product to compete 'will be enhanced in the future because of further technological and market developments.'").

grown significantly.[76] Indeed, one might even say that such self-distribution has become an industry trend.[77] Ironically, many of these venues were at one time clients of Ticketmaster, thereby suggesting that the firm's exclusive contracts with venues do not have the exclusionary impact that some have suggested.[78] Below we provide numerous examples of venues that have taken on the task of distributing their tickets and, in the process, highlight some of the firms that provide technological support for such vertical integration.

> 1. Live Nation is itself a prime example, having recently received a software license from CTS, the leading distributor of entertainment tickets in Europe, to power its self-distribution of tickets to venues that it owns and manages. As opponents of the transaction emphasize, Live Nation previously outsourced its ticket distribution services, relying upon Ticketmaster to provide them. Relying upon this license, Live Nation now distributes millions of tickets for events at venues that it owns or manages.
>
> 2. The Houston-Toyota Center, owned by the Houston Rockets of the National Basketball Association, has partnered with Veritix, another developer of ticket distribution software, to facilitate self-distribution of tickets for events at the venue, which seats up to 19,000 fans for basketball.[79] Formerly a client of

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[76] *See Ticketmaster Corp.*, 2003-1 Trade Cas. at 96,239 (noting that "there is a growing portion of the [ticket distribution] market where the arena itself does its own ticketing business using software sold or leased to it by Paciolan . . . or [the plaintiff].").

[77] *See infra* notes 79-111110 and accompanying text (discussing various examples of recent vertical integration by venues); *Ticketmaster Corp.*, 2003-1 Trad. Cas. at 96,239 (discussing "growing portion of the market" characterized by self-distribution).

[78] *See infra* notes 169-171 and accompanying text (explaining that such exclusive agreements do not prevent competitive entry into the ticket distribution marketplace).

[79] *See* Ergin, *supra* note 70, at 10 ("Veritix offers professional sports teams, universities and entertainment venues an electronic, integrated, primary and secondary ticketing platform for managing ticket inventory and creat[ing] a relationship marketing database. It features a paperless ticketing technology. The company seems capable of handling large venues as it has had a partnership with the Houston Toyota Center since 2003."). *See* Toyota Houston Center, *http://www.houstontoyotacenter.com/ about/atozguide.php* (last visited June 4, 2009) (reporting center's seating capacity as "18,300 for basketball, 17,800 for hockey [and] up to 19,000 for concerts"); http://www.nba.com/games/20090514/LALHOU/boxscore.html (last visited June 4, 2009) (reporting attendance of 18,501 in Houston playoff game against the Los Angeles Lakers).

Ticketmaster,[80] the Houston-Toyota Center also frequently hosts premier entertainers, including, in 2009 alone, Beyonce, Brittany Spears, the Jonas Brothers, Pink, Eric Clapton and Steve Winwood, Elton John & Billy Joel, Nickelback, Celtic Woman, and Fleetwood Mac.[81] Veritix recently entered into a similar agreement with Salt Lake City's EnergySolutions Arena.[82]

3. Kroenke Sports Enterprises owns Denver's Pepsi Center arena (capacity up to 20,000), Dick's Sporting Goods Park Stadium (capacity just over 18,000), and Denver's Paramount Theatre, capacity 1,870, which bills itself as "Denver's best intimate concert venue."[83] In July, 2008, Kroenke and Veritix jointly announced a partnership whereby the latter would "provide technology for the company's newly established ticketing services organization, TicketHorse."[84] TicketHorse, in turn, provides ticket distribution services for each of the venues listed above, previously served by Ticketmaster, as well as Infinity Park, in the Village of Glendale, Colorado.[85] The arrangement thus covers distribution of tickets for the Denver Nuggets, the Colorado Rapids (professional soccer), Colorado Avalanche (National Hockey League), the Colorado Crush (Arena Football), and Colorado Mammoth (National Lacrosse League).[86]

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[80] *See* Jeff Bounds & Jennifer Dawson, *Vertical Alliance in Houston Arena Deal*, DALLAS BUS. J., Sept. 19, 2003, *available at*: http://dallas.bizjournals.com/dallas/stories /2003/09/22/story3.html (last visited Sept.9, 2009) (describing Houston-Toyota/Vertical Alliance deal as example of how "the emergence of the Internet has opened the door for smaller rivals, some of whom are quietly stealing Ticketmaster's business."). Vertical Alliance, it should be noted, is the predecessor of Veritix.

[81] *See supra* note 80, http://www.houstontoyotacenter.com/events (last visited Sept. 9, 2009) (listing June through October 2009 events); http://www.ticketliquidator.com/tix/ toyota-center-vv-tickets.aspx (last visited June 19, 2009).

[82] *See* Veritix Signs Exclusive Ticketing Contract for Utah Jazz, EnergySolutions Arena, TicketNews (Sept. 9, 2009), *available at*: http://www.ticketnews.com/Veritix-signs-exclusive-ticketing-contract-for-Utah-Jazz-EnergySolutions-Arena9929188

[83] *See* NBA, http//www.nba.com/nuggets/contact/faqs.html (last visited Sept. 9, 2009) ("The capacity of the Pepsi Center for a Nuggets game is 19,155. Capacity is 18,129 for Avalanche games and 17,600 for concerts with an end stage and 20,100 with a center stage."); http://www.dicksssportinggoodspark.com/Stadium/Facts.aspx (last visited Sept. 9, 2009) ("Dicks Sporting Goods Park is comprised of the 18,000-seat home stadium of the Colorado Rapids and its surrounding 24-field, fully lit soccer complex."); Paramount Theater, http://www.paramountdenver.com/ (last visited Sept. 9, 2009).

[84] *See* Press Release, Veritix, Kroenke Sports Enterprises to Move Ticketing Operations for Pepsi Center, Denver Nuggets and Colorado Avalanche to Veritix in 2009 (July 30, 0208), *available at* http://www.veritix.com/news/Veritix_&_Kroenke_Sports_Extend_ Partnership.pdf (last visited Sept.9, 2009).

[85] *See* TicketHorse, http://www.tickethorse.com/ (last visited Sept. 9, 2009).

[86] Bounds & Dawson, *supra* note 81.

4. Kroenke recently announced that it is partnering with AEG, a leading owner and manager of venues, to manage the Broomfield event center in Broomfield, Colorado.[87] The venue is publicly owned and has a capacity of 6,000 for hockey and basketball and 7,500 for concerts.[88] If negotiations between the partners and the city council are successful, TicketHorse will replace Ticketmaster as the distributor of the venue's tickets.

5. Lollapalooza relies upon software licensed from Front Gate Solutions to power its self-distribution of tickets to the event, which takes place at Chicago's Grant Park In 2008, the event drew 225,000 fans over three days.[89] Front Gate also recently announced a "long-term ticket selling deal" with Warehouse Live, capacity 1,500, which bills itself as "one of Houston's signature multipurpose facilities."[90] Warehouse Live is affiliated with AEG, and the agreement with Front Gate displaced Ticketmaster as the distributor of tickets to Warehouse Live events.[91] According to one neutral source, Front Gate Software powers the platforms of 1,788 venues that have chosen to distribute tickets for events at their respective venues.[92]

6. The University of Minnesota relies upon software produced by AudienceView to power its self-distribution of tickets to a wide variety of cultural and sporting events, including Big Ten football games at its TCF Bank Stadium, which has a capacity of 50,000, and basketball and hockey games at its Williams Arena, which has a capacity of 16,000.[93] AudienceView also provides such enablement

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[87] *See* Michael Davidson, *Broomfield Event Center to Get New Management, Name*, BROOMFIELD ENTERPRISE, Aug. 26, 2009, *available at* http://www.broomfieldenterprise.com/ci_13204115.

[88] *See By the Numbers: Broomfield Event Center*, BROOMFIELD ENTERPRISE, Apr. 14, 2008, *available at* http://www.broomfieldenterprise.com/ci_13140448.

[89] *See* Front Gate Tickets, http://pages.exacttarget.com/page.aspx?QS=c76003443ff9837dd4009700e262f1050f35994654bc7b06880d920a5ce5f38b (last visited Sept. 9, 2009); Greg Kot, *Turn It Up: A Guided Tour Through the Worlds of Pop, Rock and Wrap,* CHI. TRIB., Nov. 6, 2008, *available at* http://leisureblogs.chicagotribune.com/turn_it_up/2008/11/parks-aim-to-ex.html.

[90] *See* Front Gate Solutions, http://www.frontgatesolutions.com/index.php?content=news&item=65 (last visited Sept.9, 2009). *See also* Warehouse Live, http://www.warehouselive.com/index.php?content=home&section=1 (last visited [date]).

[91] *See* AEG Live, http://aeglive.com/aboutus.php (last visited Sept.9, 2009) (listing Warehouse Live as one of the venues "owned, managed and/or programmed by AEG.").

[92] *See* Ergin, *supra* note 70. It should be noted that Front Gate also maintains a ticketing agency for venues that outsource their ticket distribution services. *See* Front Gate Tickets, http://www.frontgatetickets.com/ (last visited Sept.9, 2009). Front Gate's clients include the Austin Aztecs, who play at Nelson Field, which has a seating capacity of 8,800.

[93] *See* Audience View Ticketing, http://www.audienceview.com/customers/?t=6 (last visited Sept. 9, 2009) (listing customers to include the University of Minnesota);

software to several dozen other clients, including Dartmouth College, the Tribeca Film Festival, the New York Red Bulls of Major League Soccer, and the ACC Liverpool Arena in Liverpool, England.[94] Similarly, the Toronto Blue Jays of Major League Baseball also employ software licensed from AudienceView to power their self-distribution of tickets.[95] The Blue Jays play their home games at Rogers Centre, which seats over 49,000 fans.[96]

7. International Speedway Corporation (ISC), owns 13 automobile racing speedways, including tracks with capacities of 168,000 (Daytona), 143,000 (Talladega), 137,000 (Michigan), and 107,000 (Richmond).[97] These venues host numerous events, including automobile races sanctioned by NASCAR and the Indianapolis Racing League (IRL), as well as the Grand Am and American Motor Association leagues. Recently, ISC purchased software from Veritix that helped create a ticket distribution platform centered around Racetickets.com.

8. Comcast Corporation employs Paciolan software to power its "New Era" Ticketing Subsidiary, which distributes tickets for venues owned by Comcast, such as Philadelphia's Wachovia Center, which seats 21,600 for basketball and 18,000 for hockey.[98] The Center also hosts numerous concerts by premier entertainers. In 2009 alone the following artists performed at the Wachovia Center or are scheduled to do so later in the year: Beyonce, Eric Clapton, Keith Urban, Miley Cyrus, the Jonas Brothers, Bruce Springsteen, and Pink.[99] New Era also provides technological support for the distribution of tickets by various venues not owned by Comcast, including the Dover International Speedway (135,000); the Portland Rose Quarter, and Constant Center at Old Dominion

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University of Minnesota, Buy Tickets, https://www.tickets.umn.edu/AudienceViewSplash/ (last visited Sept. 9, 2009) ("Shopping Cart for purchase of Minnesota Gophers tickets states Powered By AudienceView Ticketing") ; University of Minnesota's TCF Bank Stadium, http://stadium.gophersports.com/about_the_stadium.html (last visited Sept. 9, 2009) (report that capacity of new TCF Bank stadium, will be 50,000) ; GopherSports.com: The Official Website of Minnesota Athletics, www.gophersports.com/ViewArticle.dbml?&ATCLID=310102 (last visited Sept. 9, 2009) (reporting current capacity of Williams basketball arena as 14,625).

[94] *See supra* note 93 at http://www.audienceview.com/customers/customer_list.asp (last visited Sept. 9, 2009).

[95] *Id.*

[96] *See* ESPN, http://sports.espn.go.com/travel/stadium/index?stadium=mlb_2790 (last visited Sept. 9, 2009) (page providing information about Rogers Centre and its environs).

[97] *See* ISC: A Motorsports Entertainment Co., http://ir.iscmotorsports.com/phoenix.zhtml?c=113983&p=irol-facilities (last visited Sept. 9, 2009).

[98] *See* Online Seats.com, http://www.onlineseats.com/venue/wachovia-center.htm (last visited Sept. 9, 2009). Comcast also owned the famous Philadelphia Spectrum, which was recently demolished.

[99] *See* Wachovia Center, http://www.wachoviacenter.com/events/calendar_calendarView.asp (last visited Sept. 9, 2009).

University (capacity of 9,500).[100] The Rose Quarter is home to the Rose Garden, which seats over 20,000 fans for basketball, and is home to the Portland Trailblazers and Portland Winterhawks. The venue also hosts numerous concerts and other events, including, in 2009 alone: The Jonas Brothers, Keith Urban, Bob Dylan, Earth Wind and Fire, Killers, Miley Cyrus, Billy Joel and Elton John, the Ringling Brothers and Barnum and Bailey Circus, religious figure Joel Osteen, Disney on Ice, and "So You Think You Can Dance," among others.[101]

9. In 2005 Major League Baseball ("MLB") purchased Tickets.com, then an independent distributor of tickets. Tickets.com now powers the distribution of tickets for several major league baseball teams and continues to distribute tickets for numerous other sports and entertainment venues that outsource their ticket distribution. The firm also offers its technology to venues that wish to distribute their tickets in house.[102]

10. More than fifty minor league baseball teams rely upon TicketReturn to power their self-distribution of tickets.[103] These teams include the Durham Bulls, Akron Racers, Kansas City T-Bones, Lexington Legends, Toledo Mudhens, Memphis Redbirds, Charlotte Knights, and San Jose Giants. Numerous colleges and universities also rely upon TicketReturn to support their ticket distribution, including Appalachian State University, Western Carolina University, Liberty University, Christopher Newport University, the University of San Francisco, and William and Mary.[104] Several larger institutions employ a TicketReturn platform to power their student ticketing operations, including the University of Maryland, University of South Carolina, Georgia Tech, North Carolina State, and West Virginia University. Like Veritix, Front Gate, AudienceView and others, TicketReturn offers a wide variety of support to venues it serves, including the ability to gather and synthesize data about individual fans and their entertainment preferences.[105]

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[100] *See* New Era Ticketing, http://www.neweratickets.com/our-clients/our-clients/client-list/ (last visited Sept.9, 2009); http://www.rosequarter.com/Home/BoxOffice /tabid/56/Default.aspx (last visited Sept. 9, 2009); Rose Quarter, http://www.rosequarter.com/Home/BoxOffice/tabid/56/Default.aspx (last visited Sept. 9, 2009). The Rose Quarter also lists fifty-six retail ticket outlets, most of them at Safeway Supermarkets in the Portland area. *See id.* at www.rosequarter.com/Home/TicketOutlets/tabid/58/Default.aspx (last visited Sept. 9, 2009). Although the Constant Center advertises that it is powered by "CoxTix," the website indicates that it is "Powered by Paciolan and New Era Tickets."

[101] *See id.* at http://www.rosequarter.com/ (last visited Sept. 9, 2009).

[102] *See* http://provenue.tickets.com/US/ticketing_solutions/index.shtml (discussing "ProvenueMax, an in- house licensed ticketing system").

[103] *See* https://www.ticketreturn.com/prod2/customerspro.asp (listing the firm's Professional Sports clients).

[104] *See* https://www.ticketreturn.com/prod2/customerscollege.asp.

[105] TicketReturn's Website claims:

11. Over a decade ago the New York Metropolitan Opera developed and launched its "Impresario" ticketing system *de novo*.[106] Shortly thereafter the Met renamed the system "Tessitura" and formed a non-profit Limited Liability Company to own the new ticketing platform and license the technology to others.[107] By 2002, the LLC had evolved into a licensee-owned non-profit corporation formed under Delaware law, with owner-licensees including the Met, the Chicago Lyric Opera, the San Francisco Symphony, the Kennedy Center, the Seattle and Santa Fe Operas and nineteen other licensees. Today the entity boasts 188 licensees and at least 80 sublicenses in the United States and five foreign countries. The Tessitura system promises to provide "full no fee Internet transactional capability for ticketing (including select your own seat)" as well as support for "customer relationship management," "fundraising, memberships, sponsorships and contributions," and "flexible reporting, executive information and analysis tools."[108] Although a "not for profit" enterprise, the firm apparently considers itself a rival to commercial ticketing firms, as its Website includes a chart comparing Tessitura's attributes and capabilities to those of for-profit technology firms.[109] Indeed, just recently, the firm won a significant client, the Tennessee Performing Arts Center, from Ticketmaster, which had distributed tickets for the Center for 29 years.[110]

12. Bloomberg.com recently reported that AEG, like Live Nation before it, is exploring alternatives to Ticketmaster. The report indicates that AEG is considering both distributors, such as Veritix and Tickets.com, as well as self-distribution strategies. One industry analyst said of AEG's move that AEG has "the ability to instantly become a viable competitor" in the market for ticket distribution services.[111]

> TicketReturn's exclusive barcoding and Fanticket management systems put you in touch with customers and their ticket usage habits. Sell and deliver print at home e-tickets online; Target no-shows; Automate the return of unused seats; Reward your most loyal fans; E-mail customers based on attendance history; Develop qualified sales leads from pass-along ticket users; Automate attendance counts with real time admission reporting; Eliminate audits of paper ticket stubs; Track ticket ownership changes online; Create ticket usage profiles for every customer.

See https://www.ticketreturn.com/prod2/customers.html.

[106] *See* http://www.tessituranetwork.com/About/Timeline.aspx (providing a timeline of the development and widespread adoption of the Tessitura ticketing platform).

[107] *See id.*

[108] *See* http://www.tessituranetwork.com/Products/Software.aspx.

[109] *See* http://www.tessituranetwork.com/en/Products/~/media/Public Site/Tessitura Software Industry Comparison_2008.ashx.

[110] *See TPAC Dumps Ticketmaster After 29 Years*, NASHVILLE BUS. J., July 1, 2009, *available at*: http://nashville.bizjournals.com/nashville/stories/2009/06/29/daily23.html.

[111] *Ticketmaster Client AEG Said to Explore new Partner*, Bloomberg.com, Nov. 2, 2009.

These various examples—and there are more—demonstrate, at a minimum, the technological and commercial feasibility of a venue, whether large or more modest, to vertically integrate into the self-provision of ticket distribution services.[112] Indeed, the trend toward such integration strongly suggests that combining previously separate functions produces efficiencies not realizable through market contracting.[113] Nor is there any reason to believe that these examples are idiosyncratic or that the capacity for such integration in the future is somehow limited.[114] The necessary technology for such integration is more available now than just a few years ago, when a federal court—in the course of rejecting an antitrust suit against Ticketmaster—all but predicted that self-distribution would take on increased significance in the near future and discipline any possible exercise of market power by firms like Ticketmaster.[115] We would expect this trend to accelerate as more ticket distribution contracts expire over the next few years.

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[112] *See* Ticketmaster Corp. v. Tickets.com, Inc., 2003-1 Trade Cas. (CCH) ¶ 74,013, at 96,241 (C.D. Cal. 2003) (explaining that numerous colleges and universities rely upon self-distribution).

[113] *See infra* Part IV.3.

[114] *See generally SunGard*, 172 F. Supp. at 190-91 (asking whether customers who would switch in response to a hypothetical price increase were truly representative of the customer population as a whole); *Cardinal Health*, 12 F. Supp. 2d at 48-50 (holding that vertical integration would not defeat a hypothetical price increase because most of the hypothetical monopolist's customers did not have the capacity to integrate in this fashion); FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 37, *vacated as moot,* 850 F.2d 694 (D.D.C 1988) (fact that a trivial number of customers would not respond to SSNPI did not establish relevant product market where numerous more representative customers would).

[115] It should be noted in this connection that contracts between software providers and venues are generally non-exclusive, *i.e.*, do not preclude the licensor from licensing the same ticket distribution platform to other venues or, for that matter, preclude the venue from employing that platform to distribute tickets to events at other venues. For instance, New Era Tickets, a subsidiary of Comcast, both relies upon Paciolan technology to distribute tickets for events at Comcast-owned venues and, in addition, licenses the same technology to unrelated venues to facilitate their self-distribution. In any event, for the

Indeed, the line between "outsourced" distribution, by agents such as Ticketmaster, on the one hand, and "self distribution" supported and enabled by independent technology providers, on the other, is by no means bright. For instance, many venues that "outsource" ticket distribution to Ticketmaster or one of its rivals retain the right and ability to distribute some tickets themselves, often from the box office and/or to season ticket holders. At the same time, many venues purportedly engaged in self-distribution nonetheless still outsource key aspects of the distribution function to third parties, including technology providers themselves.[116] In truth, numerous firms — Ticketmaster, Tickets.com, Veritix, AudienceView, and others—offer each venue a cafeteria-style menu of distribution options and related services, and each venue selects the particular bundle that suits its needs at the time of contracting, a bundle that may be adjusted as a venue's needs and/or capabilities evolve. Moreover, all such firms also offer software options that empower venues—whether engaged in outsourcing or self-distribution—to gather and synthesize data for the purpose of better understanding the characteristics of fans and the preferences for entertainment and ancillary services.

Importantly, whether a firm offers to distribute tickets as a venue's agent, as Ticketmaster does, or instead enable a venue to distribute tickets itself, both services achieve the same functions of distributing tickets to fans and collecting and managing related information. It is therefore not surprising that firms that enable self-distribution

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purpose of market definition, we assume, as do the Guidelines, that self-distribution is infinitely available at current (per-merger) prices. *See* Joint Merger Guidelines § 1.11, n. 9.

[116] For instance, firms such as Veritix that focus on facilitating self-distribution also provide server capacity for venues that choose not to own and operate such capacity themselves. Such firms may also provide or recommend equipment that scans barcoded tickets, for instance, as well as assistance processing credit card transactions. *See* https://www.ticketreturn.com/prod2/faq.html.

effectively bid against firms like Ticketmaster when a distribution contract has expired and a venue is tempted to forgo outsourcing in favor of self-distribution.[117] The overlap and real world rivalry between the services provided by "firms that enable self distribution," on the one hand, and those that provide "outsourced ticket distribution services," on the other, itself militates in favor of a finding that both firms occupy the same product market.[118]

To be sure, it is unlikely that all venues would pursue self-distribution strategies in response to a SSNIP by a hypothetical monopolist of outsourced ticket distribution services. Nonetheless, the successful vertical integration by such a wide variety of venues—large, small, and medium, sports, musical and mixed use, profit and not-for-profit—suggests that the option is in fact a realistic one for most if not all of those venues that still outsource the distribution of most or all of their tickets. Moreover, we are not aware of any particular types or categories of venue for which such integration would be especially difficult or costly, thereby exposing such venues to selective price increases by a hypothetical monopolist.[119] As a result, substitution by a even a modest number of venues would render a small but significant price increase unprofitable, thereby protecting any venues that may be less price sensitive.[120]

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[117] *See Ticketmaster*, 2003-1 Trade Cas. at 96,241 (finding that "virtually all long term contracts are awarded after some form of bidding competition" and that firms that support and enable self-distribution are a "viable option" to firms like Ticketmaster that distribute tickets for firms that choose to outsource this task).

[118] *Id.* at 96,241-42.

[119] *Cf. Cardinal Health*, 12 F. Supp. 2d at 36-49 (finding that prospect of self-distribution by large drug store chains would not protect small "Mom and Pop" chains from a hypothesized price increase).

[120] *See* United States v. Engelhard Corp., 126 F.3d 1302, 1306 (11th Cir. 1997) ("[I]t is possible for only a few customers who switch to alternatives to make the price increase unprofitable. . . ."); *SunGard*, 172 F. Supp. 2d at 193 (finding broader market even

Equally important, antitrust principles and legal authority readily support the treatment of such integration as a close substitute for outsourced ticket distribution services. More than two decades ago, a leading jurist explained that "vertical integration is a universal feature of economic life," and that firms frequently take on the task of distributing their own product to displace an inefficient supplier or threaten to do so as a means of holding down the cost of outsourced inputs.[121] When it comes to market definition itself, various courts have recognized that "captive production" resulting from vertical integration can be a close substitute for outsourced production and might thereby prevent independent producers from exercising market power.[122]

Therefore, a properly defined market for "ticket distribution services" must include not only outsourced ticket distribution services, such as those provided by Ticketmaster and similar firms, but also distribution services that venues could provide

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though "the demand of some customers [for the product identified by the government] is inelastic").

[121] *See generally* Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698, 710 (7th Cir. 1984) (Posner, J.) ("A common type of vertical integration is for a manufacturer to take over the distribution of his product.… [T]he option of vertical integration places competitive pressure on the firm's suppliers and buyers, who know that if they charge too much for their services the firm may decide to perform them itself."). *Cf.* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 381 (1932).

[122] *Grumman Corp.*, 665 F.2d at 13-14 (holding that potential captive production of aircraft subassemblies by Boeing and McDonald Douglas would properly be included in relevant product market if such manufacturers would in fact bring such work in-house in response to significant price increases by subcontractors); *SunGard.*, at 172 (asking whether customers who would switch in response to a hypothetical price increase were truly representative of the customer population as a whole); *Cardinal Health*, 12 Supp. 2d at 48 (declining to include potential captive production in the relevant market because most customers would not, in fact, view such vertical integration as a plausible substitute for their current practice of purchasing supplies directly from wholesalers). *See also* Geraldine Alpert & Howard P. Kitt, *Is Structure All?*, 53 ANTITRUST L.J. 255, 266-67 (1984) (contending that "do-it-yourself" or "make or buy" options are often plausible substitutes for purchase of putative product on the open market and thus can be properly included in the relevant market).

for themselves by licensing or purchasing technology from firms that support such distribution.[123] Given the current dynamic and rapidly evolving technological landscape, including the ready availability of licensing technology and other support for such vertical integration, one might therefore conclude that it would be difficult for *any* hypothetical monopolist of outsourced ticket distribution services for any category of venues or promoters to profitably maintain a significant, non-transitory price increase. Unlike some industries, the ticket distribution industry is not characterized by network effects that could entrench or protect a dominant firm in the face of vertical integration by venues. Nor are we aware of any plausible exclusionary practices that could hamper competitive challenges to incumbents.[124] Perhaps, then, the market is simply not "monopolizeable," and our inquiry need not proceed to the calculation of market shares.[125] We nonetheless proceed with the complete horizontal analysis.

Identification of Market Participants and Calculation of Market Shares

Following the definition of the relevant market, a challenger to a merger must also establish which firms participate in that relevant market and the relative market shares of such firms.[126] Obviously firms such as Ticketmaster, Etix.com, Tickets.com, Frontgate,

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[123] Testimony of Luke Froeb before the House Subcommittee on Courts and Competition Policy, 5-6 (February 26, 2009) (treating firms such as Veritix and AudienceView as participants in the same product market as Ticketmaster).

[124] *See infra* notes 169-171 and accompanying text (explaining why exclusive arrangements between venues and ticket providers are not plausible methods of raising rivals' costs and entrenching monopoly).

[125] *See, e.g.,* United States v. Microsoft, 253 F.3d 34, 82-84 (D.C. Cir. 2001) (*en banc*) (per curiam) (ease of entry into browser market suggests the market is not monopolizeable and supracompetitive pricing is not possible, even for a provider with an extremely large market share). *Cf*. United States v. Gen. Dynamics, 415 U.S. 486, 510-511 (1974) (declining to entertain government's appeal of district court's product market definition because government's case would fail under any such definition).

[126] *See* 1992 Joint Merger Guidelines, *supra* note 51, § 1.3.

Metrotix.com, TicketWeb.com, and Tele-charge, participate in the market as defined because they each distribute tickets on behalf of venues that host large events and outsource ticket distribution.[127] It is also clear that any venues that contract with other venues to provide ticket distribution services also participate in the market. For example, should Live Nation's own ticket distribution operation service the ticketing needs of venues managed by SMG, it would clearly be a market participant because it would be providing ticket distribution services for venues that chose to outsource such distribution. The more difficult market share determinations involve assessing the extent of self-ticketing before the transaction, the dynamic responses to price changes by venues that have already vertically integrated into ticket distribution, as well as the potential growth of additional self-ticketing in the near future.[128]

It is useful at the outset to distinguish between two categories of vertical integration: (1) integration that has already occurred before the transaction that is under review, such as the numerous examples listed above, and (2) integration that might potentially take place after such a transaction. Ironically, venues that engaged in self-distribution *before* this transaction, including those owned or operated by Live Nation,

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[127] Some of these firms, of course, also distribute tickets for venues they own or control, but this fact does not militate against their inclusion in the market for ticket distribution services to the extent that they do, in fact, perform this function.

[128] We pause here to note that our conclusions regarding market definition, the identification of participants in the relevant market, and the (unlikely) prospect of coordinated or unilateral anticompetitive effects do not turn on any determination that technology companies that support self-distribution are properly treated as market participants within the taxonomy employed by current merger law. Whether or not such firms are technically "in" the relevant product market, they certainly provide inputs that facilitate and encourage venues' self-distribution of tickets, and such self-distribution appears to be a reasonable substitute for outsourced ticket distribution services.

are arguably less likely to be meaningful participants in the relevant market than those venues that might so integrate in the future.

As the enforcement agencies have themselves emphasized, internal or captive production should be included in the relevant market only to the extent that it is economically meaningful, that is, could alter the competitive dynamics of the market in response to collusive behavior or a monopolistic exercise of market power.[129] Moreover, merger law has long recognized that a firm's nominal output of a product does not by itself establish the magnitude of the firm's competitive significance. For instance, where, before a merger, a firm's future output is committed to particular customers by contract, removal of that firm from the marketplace has no competitive significance, and a merger of that firm with another does not, in fact, reduce competition, regardless of the nominal level of concentration that results.[130]

Here "captive production" generally consists of a venue's distribution of tickets to its own events, or a promoter's distribution of tickets to events at venues it owns or operates. It is not obvious how venues or promoters could divert such production to a

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[129] *See* 1992 Joint Merger Guidelines, §1.31 (vertically-integrated firms will be included as participants in relevant market "to the extent that such inclusion accurately reflects their competitive significance in the relevant market before the merger"); Brief for the Federal Trade Commission, FTC v. Cardinal Health, Nos. 98-595 & 98-596, at 14-15 (same). *See also* 1984 Department of Justice Merger Guidelines, § 2.23 (asking whether vertically integrated firms would shift internal production to relevant market or participate via downstream competition in response to a small but significant non-transitory price increase). The 1992 Horizontal Merger Guidelines supersede the corresponding portions of the 1984 Guidelines. Nonetheless, we believe that § 2.23 of the 1984 Guidelines states the appropriate methodology for determining whether in fact captive production is properly considered part of the relevant market. Indeed, the 1992 Joint Merger Guidelines employ such an analysis to identify firms outside the relevant market that may "participate through supply responses." *See* 1992 Joint Merger Guidelines § 1.32.

[130] *See Gen. Dynamics*, 415 U.S. at 501-510; Ball Mem'l Hosp. v. Mut. Hosp. Ins. Co., 784 F.2d 1325, 1336 (7th Cir. 1985) (explaining rationale of *Gen. Dynamics*).

properly defined distribution market in response to a hypothesized price increase (the Houston Rockets, for instance, will not suspend their home games so the Houston Toyota Center can somehow divert its self-distribution of tickets to the open market!).[131] Thus, because the pre-merger captive production of ticket distribution services is reserved by definition for venues themselves, such production does not have the same competitive significance as services available for purchase by venues that choose to outsource. Live Nation, of course, is one firm with significant "captive production" of ticket distribution services, given that it distributes tickets for events at the numerous venues it owns or operates as well as events it promotes at independent venues. Indeed, many of the data purporting to show that Live Nation is a significant participant in the ticketing distribution market in fact refer to such captive production for internal use by venues the firm owns or manages.[132] Because such production is not available in any economically meaningful sense to third-party venues that seek to outsource the distribution of their tickets, it is unlikely to significantly affect the relevant market and thus is not a meaningful substitute for venues that outsource their ticket distribution.[133]

Vertically integrated firms could, however, participate in the relevant market if they would respond to a price increase imposed by a hypothetical monopolist of

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[131] By contrast, one can certainly imagine, say, a vertically-integrated power company that relies on plants fueled by natural gas and coal reducing its reliance on gas and diverting such gas into the "spot" market in response to a significant price increase in that market.

[132] *See* Kohl Letter, *supra* note 4 (asserting that Live Nation "start[ed] a ticketing business to compete with Ticketmaster (and as a result sold 5.8 million tickets in the first four months of 2009). If the merger occurs, this direct competition will be lost.").

[133] *Cf. Gen. Dynamics,* 415 U.S. 486.

outsourced ticket distribution services.[134] For instance, such firms could expand the scope of their distribution activities beyond their own venues, taking on the task of distributing tickets for other venues as well.[135] Such firms could also expand their own downstream output of entertainment services, which would necessarily entail increased production of inputs to such services, including ticket distribution.[136]

If vertically integrated firms respond to a hypothetical price increase in one or both of these ways, then it would be appropriate to attribute such incremental, expanded output to the relevant market for the purpose of determining overall market concentration. However, such a finding might still not justify attributing a firm's captive production to that market due to that firm's inability to "sell" its self-distribution to a venue that outsources it ticket distribution. Although either of these responses is possible, we think they are unlikely for any given venue in light of what appears to be the motivation behind the vertical integration that has already occurred. As explained previously, such integration appears to be an effort by promoters, venues, and artists to capture efficiencies from marketing live entertainment directly to fans, by, for instance, facilitating the production and synthesis of information about fans' entertainment

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[134] *See SunGard,* 172 F. Supp. 2d at 186, n.14*, quoting* P. AREEDA, IIA ANTITRUST LAW, ¶ 535e (1995) (*citing* 1992 Joint Merger Guidelines, § 1.31); 1984 Department of Justice Merger Guidelines, §2.23 ("Captive production and consumption of the relevant product by vertically integrated firms are part of the overall market supply and demand. Such firms may respond to an increase in the price of the relevant product in one of two ways. They may begin selling the relevant product [*i.e.*, in the open market], or alternatively, they may continue to consume all of their production but increase their production of both the relevant product and products in which the relevant product is embodied. Either kind of supply response could frustrate collusion by firms currently selling the relevant product.").

[135] *See* 1984 Department of Justice Merger Guidelines, § 2.23.

[136] *See* 1984 Department of Justice Merger Guidelines,§ 2.23. *See generally* 1992 Joint Merger Guidelines, § 1.11 (treating presence of downstream competition as a factor that can defeat a hypothetical price increase).

preferences. It does not appear to be an independent effort to profit from ticket distribution in the same way that Ticketmaster or Tickets.com seek to profit from such distribution. While there may be vertically integrated firms that, like Live Nation, have endeavored to provide ticket distribution services for venues to which they are not otherwise related, these firms appear to be the exception rather than the rule. It seems similarly unlikely that venues would increase their output of live entertainment if the cost of ticket distribution changes, especially because artists, more than venues or promoters, are the primary drivers of output.

More significant is whether venues that *currently* outsource their ticket distribution services would respond to a small but significant price increase by vertically integrating and taking on the task of distributing tickets themselves, thereby meriting treatment as participants in the relevant market.[137] This is a difficult determination to make for any particular venue, especially because the trend towards vertical integration appears to be accelerating independent of any hypothesized price increase (and, in fact, in the face of reportedly steadily declining prices).[138] We can, however, identify with certainty the many firms that supply the technology and other inputs necessary to vertically integrate in this manner, such as Veritix, AudienceView, Front Gate, Showare, TicketReturn, Tessitura, and Tickets.com (Paciolan would otherwise belong in this list

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[137] *See* 1992 Joint Merger Guidelines, § 1.31. *See also SunGard*, 172 F. Supp. 2d at 187 ("[W]hat is significant is not whether the companies that currently use internal solutions have the capacity to enter the market as vendors for others, but whether the customers that currently use [outsourced] hotsites would switch to an internal hotsite [*i.e.*, vertically integrate] in response to a SSNIP."). Some may argue that such firms are better characterized as "firms that participate through supply responses." *See* 1992 Joint Merger Guidelines, §§ 1.31, 1.321 & 1.322.

[138] Alpert & Kitt, *supra* note 122, at 266-67 (noting difficulty of calculating market concentration where "do-it-yourself" production is a meaningful substitute for purchasing input on the open market).

but is now owned by Ticketmaster). These firms could be included as participants in the relevant product market as proxies for anticipated increases in vertical integration and assign them market shares accordingly. Here again the central question is whether the actual or potential captive production would be forthcoming in response to a hypothesized price increase.[139] As widespread as vertical integration has become, and as likely as it is to spread, it is difficult to determine the exact degree of additional post-merger vertical integration with any certainty.

Within these parameters, a current market share calculation—whether it includes all or part or none of Live Nation's captive production, whether it includes New Era's growth outside Comcast venues, etc.—would indicate that Ticketmaster has a market share far larger than its rivals. There is no doubt that Ticketmaster has been hands-down the industry leader, and historical measures of sales of ticket distribution services—or, more precisely, the quantity of tickets distributed—have been used by opponents of the proposed merger to assert that Ticketmaster dominates the relevant market.[140] But arguably such data do not accurately reflect the underlying competitive and economic realities in the industry. Both courts and the antitrust enforcement agencies have repeatedly stated that reliance upon historical unit sales is merely one of several methods

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[139] *See* 1984 Department of Justice Merger Guidelines, § 2.23 (asking whether vertically integrated firms would shift internal production to relevant market or participate via downstream competition in response to a small but significant non-transitory price increase). *See also* 1992 Joint Merger Guidelines § 1.32 (articulating similar test for identifying "firms that participate [in the relevant market] through supply responses").

[140] *See supra* note 28 with TicketNews scores and other data sources approximating market shares.

of determining firms' respective shares of the relevant market and may, in fact, result in a misleading assessment of the competitive consequences of a transaction.[141]

To begin with, historical sales ignore venues' ability to switch to self-distribution. Moreover, because the marginal costs of licensing Internet ticket distribution software (a non-rival good) is obviously low, participants' capacity and not their historical sales provides a more accurate estimate of overall market concentration. Perhaps most important, the competitive bidding process that venues use to solicit competition following the expiration of distribution contracts creates moments of focused competition that dull any advantages of incumbency or historical market share. In circumstances such as these, in which all market participants have equal access to buyers, the merger guidelines adopted by the antitrust enforcement agencies abjure reliance on historical market shares and instead rely upon the capacity of individual firms to provide the service in question as the appropriate market shares.[142] These Guidelines expressly

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[141] Joint Merger Guidelines § 1.521 ("[R]ecent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. . . . The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting [historical] market concentration and market share data. "); Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962) ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger."); FTC v. Bass Bros., 1984 U.S. Dist. LEXIS 16122, *19 (N.D. Ohio June 6, 1984) (identifying "productive capacity" as "the appropriate statistical basis for measurement of future industry competitive performance"); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 128 (D.D.C. 2004) (identifying reserves, loadout capacity, and production and practical capacity "all informative to some degree, yet . . . imperfect" indicators of future ability to compete," and therefore, considering all measures together)..

[142] *See* 1992 Joint Merger Guidelines, § 1.41 ("Calculating Market Shares: General Approach"); *id*. ("Physical capacity or reserves generally will be used [to measure

provide that, "[w]here all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Agency will assign firms equal shares."[143] The Department of Justice has even gone so far as to argue—successfully—that the presence of three bidders suffices to ensure sufficient competition for the right to publish a state's official legal reports.[144] Firms such as Tickets.com can bid head to head with Ticketmaster to provide outsourced ticket distribution services,[145] and at the same time, firms such as Veritix, AudienceView, Frontgate, Tessitura, TicketReturn, and others can bid for the right to provide technology that enables a venue to forgo outsourcing in favor of self-distribution. As a result, a capacity-based approach in this context would result in an HHI much lower than that derived from historical market shares, regardless of the number of venues that would, in fact, vertically integrate into ticket distribution shortly after consummation of this transaction.

Consequently, the identification of market participants and market shares brings the inquiry back to the original question of how easily a venue can acquire the Internet technology required to self-distribute tickets. Developments in the industry suggest that vertical integration is becoming both increasingly inexpensive and otherwise desirable, such that venues could counteract any monopoly pricing by pursuing such a strategy. Ultimately, assessing the practicability of vertical integration is necessary both to

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concentration] if it is these measures that most effectively distinguish firms."). *See also* United States v. Thomson Corp., 949 F. Supp. 907, 919 (D.D.C. 1996).

[143] *See* 1992 Joint Merger Guidelines, § 1.41 ("Calculating Market Shares: General Approach"), n. 15.

[144] *See The Thomson Corp.*, 949 F. Supp. 907, 919 (approving consent decree that did not order divestiture of publishing contracts for the state of Washington because presence of two other publishers capable of bidding for the right to publish Washington official reports would, as the government argued, "ensure vigorous competition in Washington").

[145] *See* Ticketmaster Corp. v. Tickets.com, 2003-1 Trade Cas. ¶ 74,013, at 96,240-41 (C.D. Cal.2003).

properly define the market and to arrive at meaningful measures of market concentration and power.

Potential Adverse Effects

Both courts and the enforcement agencies have repeatedly stated that calculation of market shares and resulting concentration ratios is simply a "starting point" in determining whether a merger will likely result in anticompetitive consequences.[146] The enforcement agencies in particular have recently cautioned against "undue emphasis on market share and concentration statistics" as opposed to application of merger analysis "as an integrated whole to case-specific facts."[147] That integrated approach, enshrined in the Horizontal Merger Guidelines and employed by both courts and the enforcement agencies, involves investigating and assessing the risk of two particular potential post-merger harms: "coordinated interaction," whereby remaining participants in the industry "pursue parallel policies of mutual advantage,"[148] and "unilateral effects," whereby the

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[146] *See* Joint Merger Guidelines, § 2.0 ("Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. . . . However, market share and concentration data provide only the starting point for analyzing the competitive impact of a merger."); Department of Justice and Federal Trade Commission Commentary on Joint Merger Guidelines, at 15-16 ("The agencies have often not challenged mergers involving market shares and concentration that fall outside the [safe harbors] set forth in Guidelines § 1.51. This does not mean the [concentration thresholds] are not meaningful, but rather that market shares and concentration are but a 'starting point' and that many mergers falling outside these concentration zones [i.e., in concentrated markets] nevertheless, upon full consideration of the factual and economic evidence, are found unlikely substantially to lessen competition. Application of the Guidelines as an integrated whole to case-specific facts—not undue emphasis on market share and concentration statistics—determines whether the Agency will challenge a particular merger.").

[147] *See* Department of Justice and Federal Trade Commission Commentary on Joint Merger Guidelines, at 15-16.

[148] United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964); FTC v. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001) ("Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or

firm created by the merger itself exercises market power after the transaction, without regard to the reaction of other participants in the marketplace.[149]

We assume for the sake of argument a relevant market of "Ticket Distribution Services for Large Venues" and also assume that, regardless of which participants are included in that market, Ticketmaster has a substantial market share based on historical sales as a clear market leader and, moreover, that the market would be characterized as moderately or highly concentrated. We might proceed with the additional assumption, again for the sake of argument, that Live Nation is a *bona fide* market participant (and not, as we think more likely, far better viewed as an integrated producer with committed output) and that Live Nation's output is significant enough that a merger with Ticketmaster would increase market concentration enough to raise a presumption under the Merger Guidelines that the merger would facilitate the exercise of market power.[150] Even if one were to make these various assumptions, the structure of the market for ticket distribution services and the nature of the rivalry that takes place within it make it unlikely that the merger will facilitate either coordinated interaction or unilateral actions that create market power to the detriment of purchasers.

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implicit understanding, in order to restrict output and achieve profits above competitive levels.'") *quoting* FTC v. PPG Indus., 798 F.2d 1500, 1503 (D.C. Cir. 1986); Joint Merger Guidelines, § 2.1 (describing theory of coordinated interaction).

[149] *See* Joint Merger Guidelines, § 2.2.

[150] *See* Joint Merger Guidelines § 1.51 (b) (mergers that increase HHI less than 100 points in moderately concentrated market "are unlikely to have adverse competitive consequences and ordinarily require no further analysis"); *id.* at 151(c) (mergers that increase HHI less than 50 points in highly concentrated market "are unlikely to have adverse competitive consequences and ordinarily require no further analysis").

We are of course aware that some opponents to the transaction have claimed that the combination of Live Nation and Ticketmaster is effectively a merger to monopoly.[151] Such arguments, however, ignore the availability of vertical integration and self-distribution as substitutes for outsourced distribution, and thus narrowly focus on a segment of the market—outsourced distribution of ticketing services *simpliciter*—that is not economically meaningful for antitrust analysis. A more appropriate definition of the market, which recognizes and incorporates the potential for vertical integration and self-distribution, offers strong counterarguments to the claim that the proposed transaction will produce market power. With this in mind, and recognizing that numerous independent firms provide and support ticket distribution services, we follow the template of the Merger Guidelines and turn first to examine whether the transaction will lead to "coordinated interaction" in the market as we believe courts would likely define it.

1. Coordinated Interaction

To be successful, coordinated interaction requires participants in a collusive scheme, at a minimum, to reach a mutual understanding regarding the price and output to which parties to the understanding will purportedly adhere. Such an understanding is easiest when the product or service provided by the parties is homogeneous and sold at a standard price that is visible and known to all parties. Under these circumstances, participants in such an arrangement can readily agree on price terms and monitor each other's compliance with the scheme. Where, by contrast, products or services are not

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[151] *See, e.g.*, 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. 3 (2009), available at: http://judiciary.senate.gov/hearings/testimony.cfm ?id=3674&wit_id=7624 [hereinafter Balto Testimony] (written testimony of David Balto, Senior Fellow, Center for American Progress Action Fund).

homogenous, and where price and related terms are not observable, reaching (and enforcing) such an understanding becomes much more difficult.[152]

As was noted above, providers of ticket distribution services vary widely and include traditional distribution companies, such as Ticketmaster and Tickets.com, venues that currently engage in self-distribution and also offer distribution services to other venues, an unknown but substantial number of venues that could, with assistance from sophisticated technology companies, establish their own system of distribution, and firms that have already vertically integrated whose captive output may perhaps influence the market even if not technically included within it.[153] Perhaps more significant, the venues that purchase ticket distribution services, including those vertically integrated firms that "purchase" from themselves, exhibit a wide diversity of needs. Some venues, for instance, require upgrades to their computers and software, which ticket distribution companies might provide for free or at a discount.[154] Others might require training of box office personnel and/or assistance in developing fan profiles and resulting targeted

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[152] *See* Joint Merger Guidelines, § 2.11 ("reaching terms of coordination may be facilitated by product or firm homogeneity"); International Competition Network Merger Working Group, Report on Coordinated Effects Analysis Under International Merger Regimes, ch.4 at 13 (2004) (reporting consensus among enforcement agencies of various nations, including the United States, that "[c]oordination is simplified when the level of product differentiation is minimal. Markets characterized by relatively undifferentiated products typically involve fewer terms of sale, making it easier for competitors to predict the likely responses of their rivals.").

[153] *See* 2006 DOJ And FTC Commentary on the Merger Guidelines, at 15 (noting that the Agencies will consider the impact of rivalry from products that, while technically not in the relevant marketplace, nonetheless still exercise some competitive influence on that market).

[154] *See Ticketmaster Corp*., 2003-1 Trade Cas. at 96,239-40 (reporting that, in some cases, Ticketmaster provides venues with upfront cash payments to help pay for the purchase and installation of new equipment).

promotional strategies.[155] Accordingly, contracts between ticket distributors and venues, for instance, are individually negotiated and presumably exhibit service expectations that are particularized for each venue.[156] Moreover, these contracts are not public and therefore not observable to rivals before other bids are placed, and vertically integrated arrangements of course are completely hidden from view.[157]

A market characterized by such heterogeneity and lack of disclosure is very unfriendly to collusion. There is neither a single service nor a single price that can serve as the focus and basis of a collusive agreement, and any meaningful details that underlie the provision of that service are hidden from rivals' view. Moreover, the process in which competition plays out makes collusion additionally difficult. Large venues do not

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[155] For instance, Kroenke Sports Enterprises recently announced it had selected Veritix's patented Flash Seats technology to power Kroenke's TicketHorse primary ticketing service, in part, because the Flash Seats technology allows teams and venues to "know who is in each and every seat, making marketing and customer service far more focused on the actual ticket holder." Press Release, Veritix, Kroenke Sports Enterprises Selects Flash Seats as Exclusive Digital Ticketing Provider for Venues and Events (July 1, 2009), *available at* http://www.veritix.com/news/Kroenke_Flash_Seats_Release.pdf.

[156] *See Ticketmaster Corp.,* 2003-1 Trade Cas. at 96,240 (explaining that such contracts "are negotiated at arms length between the venue and [Ticketmaster] and do not follow a standard form. There are no contracts of adhesion.").

[157] It should be noted that publicly-owned venues and public universities usually release the results of a bidding process, but only after awarding the contract in question. Such *ex post* disclosure of the terms of, say, a three to five year contract would not, in such a dynamic industry, facilitate the actual or tacit negotiation of a collusive scheme. For vertically integrated venues, it might even be impossible to specify the transfer price that corresponds to the market price for distribution services. Moreover, comparing full integration with self-distribution following the licensing of Internet technology is difficult. This further illustrates the variation in how ticket distribution services are provided and the difficulty of making meaningful comparisons. *See generally* Coase, *supra* note 121, at 381 (equating complete vertical integration with "suppression of the price mechanism" for allocating resources). *See also* Joint Merger Guidelines, § 2.11 ("reaching terms of coordination may be facilitated by product *or firm* homogeneity") (emphasis added); ("Firms with similar capacity, similar cost structure, common aspects of vertical integration, similar market share, or some combination of these factors are more likely to coordinate.").

simply purchase such services in small increments in a spot market but instead seek bids for the long-term exclusive provision of such services from possible suppliers, comparing the results of such bids to the cost of self-distribution enabled by providers of software and expertise that support such vertical integration.[158] These conditions provide purchasers with the requisite incentive to structure bidding processes in a manner that protects themselves from collusive bids. The prospect of winning a bid for such a long-term arrangement may itself cause firms to deviate from putative terms of coordinated interaction.[159] At the same time, the prevalence of long-term contracts that guarantee firms a fixed amount of business may protect firms that do deviate from immediate retaliation by firms seeking to enforce the tacit arrangement.[160] One federal court concluded that such a bidding process, especially against the backdrop of the possibility of vertical integration by venues themselves, "is a powerful deterrent" of the exercise of market power by ticket distributors.[161] Other courts have also recognized that the

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[158] *See Ticketmaster Corp*. 2003-1 Trade Cas., at 96,239-41 (elaborating on process of bidding for venues' ticket distribution business and noting that Tickets.com bid against Ticketmaster on all 140 contracts that had become available between 1998 and the time of the litigation). Michael Rapino, Live Nation's CEO, testified that when it decided to contract with an alternative to Ticketmaster, Live Nation "had a line-up of companies around the world that wanted to be our ticketing company." *See* Michael Rapino Tesimony, *supra* note 67, at 36-37.

[159] *See* Joint Merger Guidelines, § 2.12 ("Where large buyers likely would engage in long term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate [from any collusive agreement].").

[160] *See* Joint Merger Guidelines, § 2.12 ("Where detection or punishment [of deviation] is likely to be slow, incentives to deviate are enhanced and coordinated interaction is unlikely to be successful.").

[161] *See Ticketmaster Corp*., 2003-1 Trade Cas. at 96,241 ("The bidding nature of the competition is a powerful deterrent against the existence of monopoly power so long as there are competitors to bid so as to give the customer an alternative."); *id.* (citing cases for the proposition that "the use of a bidding system is an indication of lack of power to exclude competitors from the market").

existence of a bidding process can protect customers from the creation and exercise of market power.[162] This result is consistent with economic theory, which suggests that properly structured bidding among a small number of potential sellers can prevent an exercise of market power, even in the face of a relatively concentrated marketplace.[163]

2. Unilateral Effects

The enforcement guidelines employed by the Department of Justice and Federal Trade Commission articulate two scenarios under which a merger that does not lead to a monopoly may nonetheless cause a unilateral exercise of market power, that is, market power that the merged firm can profitably exploit without regard to reactions by consumers and competitors. The first is a merger between firms that produce very close substitutes, thereby empowering the new entity unilaterally to raise the price of one such product.[164] The second is a merger in a market where the merged firm's rivals do not have sufficient capacity to promptly meet a rise in demand prompted by an increase in

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[162] *See* Nat'l Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1025 (8th Cir. 1985) (no dangerous probability of obtaining a monopoly for court reporting services where court adopted single vendor for such service after competitive bidding); *Owens Illinois,* 681 F. Supp. at 48, *vacated as moot*, 850 F.2d 694 (explaining how customers protected themselves from potential price increases by adopting a bidding process and negotiating contracts requiring cost-justification for price increases); Kirk-Mayer, Inc. v. PAC ORD, Inc., 626 F. Supp. 1168, 1171-72 (C.D. Cal. 1986) (no dangerous probability of obtaining monopoly over government repair and maintenance contract where defendant obtained such contract after competitive bidding which set a fixed price, and any renewal of such agreement would require a new round of bidding).

[163] *See* Mary Sullivan, *The Effect of the Big Eight Accounting Firm Mergers on the Market for Audit Services*, 45 J.L. & ECON. 375 (2002) (finding that two mergers by Big Eight accounting firms did not injure purchasers of such services but instead produced significant efficiencies).

[164] *See* Joint Merger Guidelines, § 2.21.

price or reduction in output by the new entity.[165] Neither scenario appears to be a plausible result of the Live Nation-Ticketmaster transaction.

The first scenario is inapt because Live Nation and Ticketmaster do not appear to offer substitutable services to a common set of purchasers. The majority of Ticketmaster's ticketing business consists of distributing tickets for venues that have chosen to outsource their ticketing distribution, with the balance taking the form of licensing technology to firms that choose to vertically integrate and engage in self-distribution via the firm's Paciolan subsidiary. By contrast, Live Nation primarily distributes tickets on behalf of venues that it owns or operates. While Live Nation appears to now offer ticketing services to some firms with whom it has no affiliation, we are aware of no evidence that venues consider the Live Nation offering to be particularly similar to that produced by Ticketmaster, especially when compared to the market's other offerings. This could be because Live Nation (unlike Ticketmaster and its other competitors) might not yet tailor its services to meet the specific needs of the venues it aims to service. Indeed, the paucity of contracts between Live Nation and unaffiliated venues makes it particularly difficult to determine whether purchasers of ticketing services view the services offered by the merging parties to be close substitutes.

Nor would a challenge based on rivals' capacity limitations fare any better. For one thing, such a challenge would depend upon proof *negating* the presence of product differentiation within the ticketing industry. Moreover, even if one were to stipulate the absence of product differentiation, this theory requires demonstrating that rivals cannot promptly respond to supracompetitive prices. However, the spread of Internet

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[165] *See* Joint Merger Guidelines, § 2.22.

technologies, the non-rival nature of distribution software, and the industry's practice of soliciting bids for term contracts suggest that rival ticket distributors could quickly replace any reduction in output. And more significantly, recent developments in the industry suggest that venues would have little difficulty to vertically integrate and self-distribute their own tickets.[166]

Therefore, determining how the merged entity might unilaterally aim to capitalize on market power raises the same question, oft-repeated in this document, of how easily venues can acquire the requisite technology to self-distribute their tickets. If such self-distribution alternatives are as inexpensive and attractive as recent market changes indicate—and most venues have the capacity, by partnering with a technology partner such as Veritix, AudienceView, Front Gate, or TicketReturn to assume ticket distribution itself—then that would negate any opportunity for a distributor to exercise market power.[167]

One alarm raised by some critics of the merger is that even if the technology for self-distribution is widely available, Ticketmaster "controls" the business of the nation's

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[166] *See infra* note 171 and accompanying text (explaining how bidding nature of ticket distribution market undermines reliance upon historical market shares as indicators of market concentration).

[167] Even some critics of the merger concede that the technology required for self-distribution is easily acquired and available from many market participants. *See e.g,* Robert W. Doyle, Jr., Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition Policy (Feb. 26, 2009) (stating that "[s]ome venue will explain that they have been able to set up their own systems. The venue operators that have been successful in setting up their own system did so by licensing software, hiring telephone operators, and opening a local box office . . ."). To be sure, Mr. Doyle also suggested that self-ticketing is only likely when a venue sells a large number of tickets, such as when a firm controls more than one venue or more than one sports team. *See id*. at 16. Nonetheless, we have identified numerous venues with relatively modest sales that currently distribute their own tickets. *See supra* notes 90, 100, 106 and accompanying text.

largest venues with exclusive, long-term contracts.[168] Ticketmaster's merger with Live Nation, these critics fear, would further enshrine Ticketmaster's current market position. If rivals and potential entrants are unable to challenge Ticketmaster's industry leadership, then these exclusive contracts could endow the merged firm with anticompetitive market power.

Although exclusive contracts appear to be commonly employed throughout the ticketing services industry, and venues in exclusive contracts are bound to particular distributors by contracts of varying lengths, it is easy to overestimate the impact of such contracts on the future market shares of market participants.[169] Where venues are bound by express contracts, the terms of such agreements are generally for more than three and are for an average of six years, with the result that hundreds of such agreements with large venues (approximately 20 percent) expire each year.[170] Before the expiration of such agreements, the venue typically invites proposals from several different ticketing service and technology providers, initiating a competitive bargaining process for a new contract. When Live Nation, for example, decided to seek an alternative to Ticketmaster, it entertained a competitive bidding process and found many suitors with attractive proposals before settling on vertical integration employing technology supplied by CTS.[171] AEG is now reportedly holding a similar bidding process in anticipation of the expiration of its contract with Ticketmaster. This competitive bidding process is pitting

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[168] Balto Testimony, *supra* note 151.

[169] *Cf.* Thomas G. Krattenmaker & Steven C. Salop, *Raising Rivals Costs: Anticompetitive Exclusion to Achieve Power over Price*, 96 YALE L.J. 209, 267 (1986) ("Certainly in most industries exclusionary rights contracts cannot be profitably employed for anticompetitive ends.").

[170] *See* Ticketmaster Corp. v. Tickets.com, Inc., 2003-1 Trade Cas. (CCH) ¶74,013, at 96,240-41 (C.D. Cal. 2003).

[171] Michael Rapino Testimony, *supra* note 158, at 36-37.

distributors both against each other and also against AEG's alternative vertical integration strategies.[172]

Indeed, over the past three years, Ticketmaster has itself lost several bidding contests upon the expiration of contracts with large venues and several others with smaller venues. For instance, Veritix recently announced that it will take over all ticketing operations for Salt Lake City's EnergySolutions Arena, home of the Utah Jazz and until now a Ticketmaster client.[173] Ticketmaster loses many such contests to the venue itself, which chooses to take on the task of distributing its own tickets instead of renewing its distribution contract with Ticketmaster. Because Ticketmaster's exclusive agreements with venues expire on a regular basis, the nation's ticket distribution business is subject to a regular and ongoing competitive process, with some reports indicating that perhaps all such business will be available for bidding at some point over the next six years. Because there are no apparent scale economies that would cause a large market share to reduce the costs of ticket distribution, nor would any other externalities give advantages to incumbents with large market shares, there is no reason to believe that Ticketmaster has an undue advantage in that bidding process over rival bidders. Consequently, there is little reason to conclude that the exclusivity that is typical to ticket distribution agreements would enshrine or facilitate any meaningful market power.

Perhaps more significant, and as is discussed in detail in Part IV, *infra*, the exclusivity of such agreements often have procompetitive purposes and effects, and antitrust scholars, enforcement officials, and courts have historically overestimated the

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[172] Bloomberg.com, *supra* note 111.

[173] *See* Veritix Signs Exclusive Ticketing Contract for Utah Jazz, EnergySolutions Arena, TicketNews (Sept. 9, 2009), *available at*: http://www.ticketnews.com/Veritix-signs-exclusive-ticketing-contract-for-Utah-Jazz-EnergySolutions-Arena9929188

prospect that such agreements would produce competitive harm. One reason that recent scholars and policymakers have applied less scrutiny to such vertical exclusive arrangements is that they have easily recognizable efficiency explanations, such as, for instance, encouraging investment in and financing of improvements to the venue. Moreover, a court expressly ruled on specific efficiencies and mutual benefits stemming from exclusive agreements used by ticket distributors, which also enable desirable features such as "best seat available" searches and coordination of multiple marketing efforts.[174] Any apparent "exclusionary" impact, then, is likely to be incidental to the creation of economic benefits.

Entry

Even if the proposed transaction were found to enhance market concentration and pose a plausible risk of anticompetitive harm, the prospect of new entry could deter and defeat any efforts by incumbent firms to exercise market power.[175] The entry analysis would turn on many of the same industry-wide conditions and trends that have been central to our analysis to this point. Our market definition section squarely asked whether technology companies and other forms of technological progress would enable venues to self-distribute and thus become part of the relevant market. Our market participants section asked a similar question when determining whether venues that currently outsource ticket distribution might become market participants in the face of supracompetitive prices. And our examination of the proposed merger's unilateral effects

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[174] Ticketmaster Corp. v. Tickets.com, Inc., 2003-1 Trade Cas. (CCH) ¶ 74,013, at 96,241 (C.D. Cal. 2003).

[175] *See* United States v. Waste Mgmt., 743 F.2d 976 (2d Cir. 1984) (holding that prospect of new entry rebutted government's *prima facie* case that merger producing highly concentrated market would result in anticompetitive effects).

inquires whether vertical integration and new technologies would counteract any effort by a market leader to assert market power.

All of these sections turn on the ability of Internet software companies, promoters, and venues to spread the capacity to sell tickets for live performances at large venues, either to venues themselves or to outsourced distributors. As has been noted above, there is substantial evidence that venues are pursuing self-distribution strategies, that technology companies are increasingly available to facilitate self-distribution, and that there are a growing number of competitive options to venues seeking to contract for distribution services.[176] The Horizontal Merger Guidelines focus attention to the timeliness, the likelihood, and the sufficiency of entry to counteract market power.[177] Our sense is that the industry's recent developments indicate that such entry has already occurred and that venues will continue to adopt self-distribution strategies so as to realize efficiencies resulting from the integration of the production, promotion, and ticketing of live entertainment. Thus, such entry would certainly be "likely" if incumbent firms were to attempt to exercise market power.

A review of entrants' success suggest that the threat of additional entry is both real and imminent. For example, Tessitura, a not-for-profit enterprise, entered the market in the late 1990s by developing its own software *de novo* and was operational within two

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[176] *See supra* notes 79-111 and accompanying text (listing numerous examples of venues that have recently taken on the task of distributing their own tickets). *See also Ticketmaster Corp* 2003-1 Trade Cas. at 96,241 (explaining that the option of self-distribution via reliance on outside technology providers prevents Ticketmaster from exercising market power).

[177] *See* 1992 Joint Merger Guidelines § 3.0. *See also Cardinal Health*, 12 F. Supp. 2d at 54-58 (applying this taxonomy to evaluate defendants' claim that prospect of new entry should rebut plaintiff's *prima facie* case).

to three years.[178] Given technological developments since then, including the rapid diffusion of Internet ticketing technology, we would expect that *de novo* entry could occur much more quickly today. Indeed, opponents of the transaction claim that Live Nation entered the ticket distribution market just a few short months after it decided to do so, and there is no reason that other participants in the entertainment business could not do the same.[179] AEG, for instance, owns or manages dozens of venues, including the Los Angeles Staples Center, Miami's American Airlines Arena, the Target Center in Minneapolis, Charlotte's Time Warner Cable Arena, Portland, Oregon's Rose Quarter, Kansas City's Sprint Center, and San Antonio's AT&T Arena, among others.[180] The firm recently partnered with Kroenke Sports, the owner of TicketHorse, to manage a venue in Colorado. Currently AEG outsources the distribution at most of its venues to Ticketmaster,[181] but it reportedly is preparing to seek alternative distribution arrangements[182] (indeed, the firm had earlier suggested that it might take its business elsewhere if the Live Nation/Ticketmaster merger is approved).[183] If, contrary to our expectations, the merger were to result in an exercise of market power, AEG and other adjacent market players are likely to create their own ticketing technologies or license

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[178] *See* http://www.tessituranetwork.com/en/About/Timeline.aspx (reporting that the New York Metropolitan Opera authorized entry in 1996 and that the project was completed in 1998-1999).
[179] Balto Testimony, *supra* note 151, at 2.
[180] *See* http://www.aegworldwide.com/01_venues/venues.php (listing numerous venues owned by AEG) (last visited Aug. 10, 2009).
[181] The Portland Rose Garden, however, self distributes with Paciolan technology.
[182] *See supra*, note 111.
[183] *See Ticketmaster Client May End Contract if Merger OKed*, REUTERS, Feb. 26, 2009, *available at* http://www.reuters.com/article/innovationNewsConsumerGoodsAndRetail/idUSTRE51P7W820090226 (reporting AEG letter advising Ticketmaster that approval of Live Nation-Ticketmaster merger would release AEG from its ticket distribution agreement with Ticketmaster).

such technology from others and entering the distribution market (and they may do so even if the merged Live Nation Entertainment does not exercise market power). One critic of the proposed transaction has argued that entry by Live Nation would, all by itself, lower ticket prices.[184] If so, then presumably entry by AEG would have the same effect and thus be "sufficient" to counteract any purported antitcompetitive effects from the transaction.[185]

Nor is AEG the only likely entrant. At least one major record label—Warner Music Group—has predicted that it will soon enter the ticket distribution market, using its relationships with artists as a segue.[186] Other major promoters could follow in the steps of AEG and Live Nation. Indeed, in August 2009, Cablevision announced that it would be spinning off Madison Square Garden, currently a Ticketmaster client, along with Radio City Music Hall and other assets. The leading ticket industry newsletter opined that the spin off, creating a new entity worth $1.5 billion, would "instantly creat[e] a possible future competitor to proposed entertainment partners Ticketmaster and Live Nation."[187] Presumably such rivalry would include rivalry in ticketing.

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[184] Balto Testimony, *supra* note 151, at 3.

[185] *Cf. Cardinal Health*, 12 F. Supp. 2d at 58 (finding that entry, while timely and likely, would not be "sufficient" to counter-act hypothesized output reduction in the relevant market).

[186] *See* Transcript of Warner Music Group Call, Addressing Fourth Quarter 2008 Earnings (February 9, 2009) (recounting the steps that the firm is taking to "broaden its revenue mix in the growing areas of the music business, including sponsorship, fanclub, Websites, merchandising, touring, ticketing and artist management."); *id*. (stating that the firm has been involved in "fan club management" since 2004, including "VIP ticketing"); *id*. (stating that, going forward "physical recorded music business will continue to be a smaller and smaller part of our business . . . . we'll also be significantly in the business of sharing the revenues with artists, ticketing, touring, artist management, sponsorship, fan clubs, etc.").

[187] *See* http://www.ticketnews.com/Ticket-News-Announces-Top-Ticket-Sellers-for-Week-Ending-August-1-2009.

It is difficult to credit the claim made by some that exclusive contracts entered by Ticketmaster, Tickets.com, and other providers of distribution services prevent the sort of entry that would be necessary to counteract any exercise of market power.[188] With the spread of ticketing technologies, there remains the potential for entry by full-service outsourced ticket distributors with the business model popularized by Ticketmaster. For firms aiming to enter the market with this business model, exclusive contracts can actually facilitate this category of entry by providing upstart firms with the assurance that any sunk investments will pay off before a customer switches to a different supplier.[189]

More significantly, recent technological developments have permitted entry to take place through alternative mechanisms. Firms that market "enabling" technologies that facilitate self-distribution strategies, such as Veritix and AudienceView, have found a growing demand among venues to pursue cost-effective self-distribution, and it might be said that these enabling firms represent two different kinds of entry: entry by venues into self-distribution, and entry by technology firms that enable self-distribution. Accordingly, the emergence of even a small number of enabling firms has the potential to

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[188] The Department of Justice in the 1990s investigated allegations of illegal monopolization, which charged that Ticketmaster's exclusive contracts restricted entry and caused anticompetitive harm. The Antitrust Division ultimately declined to pursue these claims. *See U.S. Ends Ticketmaster Investigation*, N.Y. TIMES, July 6, 1995, at C14. One opponent of this transaction has reported that the Department concluded that Ticketmaster's contracts with venues are procompetitive and that there are no barriers to entering the ticket distribution business. *See* Balto Testimony, *supra* note 151, at 1-2. *See also Ticketmaster Corp v. Tickets.com, Inc.*, 2003-1 Trade Cas.(CCH) ¶ 74,013 (C.D. Cal. 2003) (granting summary judgment against claim of attempted monopolization on similar and other bases). In Part IV we offer a complete assessment of the competitive consequences of such agreements.

[189] *See* Joint Merger Guidelines, § 3.3 (explaining that "forward contracting" can help new entrants divest sales from incumbents).

significantly shape the economic impact of new sources of output.[190] Should Ticketmaster or any market participant raise prices, we would expect acceleration in the trend toward self-distribution and perhaps the addition of new species of entrants. At the very least, it appears that currently available technology empowers entrants to counter any SSNIP by Ticketmaster with comparable services at competitive prices.

Concerns About a Purported Loss of "Future" or "Potential" Competition

Some critics argue that, regardless of the transaction's impact (or lack thereof) on the firms' *current* rivalry, combining Live Nation and Ticketmaster will prevent competition that *would have occurred* had the parties remained separate entities. That is, these critics claim that, before the announcement of this merger, Live Nation was poised to become a particularly effective rival in the non-captive segment of the ticket distribution market, distributing millions of tickets for venues with whom it had no prior affiliation. By merging with Live Nation, these critics claim, Ticketmaster would thwart Live Nation's impending substantial and procompetitive expansion in a market segment where it now barely participates. More colloquially, it might be said, the merger eliminates "potential competition" in addition to whatever actual rivalry might exist between Ticketmaster and Live Nation.

The antitrust laws do not by their terms prevent transactions or practices that reduce competition that never in fact existed. Still, it is perhaps possible to accommodate this sort of concern within the existing framework of merger doctrine. For instance, just as a firm's apparent market share might *overstate* its actual competitive significance, so too might its apparent market presence *understate* its competitive influence, influence

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[190] *See* Joint Merger Guidelines, § 3.3 (likelihood of new entry depends upon availability of sales and the minimum viable scale of production).

that a proposed transaction could eliminate.[191] That competitive influence could be tangible, such as when a recent entrant or a firm outside the market altogether poses a credible threat of sudden output increases or new entry and thus deters exercises of market power by established market participants.[192] Or the influence could be nascent and potential, resting merely on a prediction that a competitive challenge would have occurred absent the transaction.[193]

At the same time, any potential competition claim should not serve as a vehicle for circumventing and avoiding the rigorous principles that ordinarily guide merger analysis. Every merger that eliminates a "nascent competitor" does not violate the antitrust laws. The antitrust laws do not smash the economy into individual atoms and require courts to undo productive cooperation to ensure the maximum amount of putative

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[191] *Cf. Gen. Dynamics*, 415 U.S. at 498-99, 503-10 (concluding that market concentration statistics significantly overstated competitive impact of merger).

[192] *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 533-37 (1973) (relying on this theory to remand decision for reconsideration by lower court); *id.* at 559 (Marshall, J. concurring in the judgment) ("From the perspective of the firms already in the market, the possibility of entry by such a lingering firm may be an important consideration in their pricing and marketing decisions. When the lingering firm enters the market by acquisition, the competitive influence exerted by the firm is lost with no offsetting gain through an increase in the number of companies seeking a share of the relevant market. The result is a net decrease in competitive pressure.") (citation omitted); Department of Justice and Federal Trade Commission Commentary on the Horizontal Merger Guidelines, 24-25 (March 2006) (discussing enforcement actions premised on theory that acquired firm was a "maverick" capable of rapidly expanding output in response to anticompetitive output reductions by other market participants); Joint Merger Guidelines, § 4.111 ("By eliminating a significant present competitive threat that constrains the behavior of the firms already in the market, the merger could result in an immediate deterioration in market performance.").

[193] *Cf.* Tenneco Inc. v. FTC, 689 F.2d 346, 355-58 (2d Cir. 1982) (articulating standards governing application of actual potential competition doctrine); FTC v. Atl. Richfield Co., 549 F. 2d 289 (4th Cir. 1977) (same); 1984 Department of Justice Non-Horizontal Merger Guidelines, § 4.112 (same).

rivalry that is possible.[194] Moreover, as Yogi Berra put it, "prediction is very hard, especially about the future," and government agencies and courts have no special wisdom allowing them to forecast how a dynamic and rapidly evolving marketplace would have unfolded but for a voluntary transaction under review.[195]

Banning otherwise beneficial integration based on an incorrect prediction that it would eliminate meaningful competition that has not yet occurred can deprive the public

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[194] *See* White Consol. Indus., Inc. v. Whirlpool Corp., 781 F.2d 1224, 1233 (6thCir. 1986) ("[I]t is not this Court's duty to permit only the most competitive agreement imaginable. This Court may only block proposed transactions the effect of which may be to substantially lessen competition."); United States v. AMAX, Inc., 402 F. Supp. 956, 959 (D. Conn. 1975) (mere fact that parties could achieve their objectives via less restrictive means does not require condemnation of merger that does not otherwise substantially lessen competition). *See also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 44, n.13 (1984) (O'Connor, J. concurring) (purported less restrictive means of achieving agreement's objective only relevant for rule of reason purposes if the agreement produces harm in the first place); Broad. Music, Inc. v. CBS, 441 U.S. 1, 23 (1979) (mere fact that agreement or merger eliminates competition does not thereby render it inherently suspect); Am. Tobacco Co. v. United States, 221 U.S. 106, 180 (1911) (ban on any arrangement that reduces rivalry would "render difficult if not impossible any movement of trade in the channels of interstate commerce"); N. Sec. Co. v. United States, 193 U.S. 197, 411 (1904) (Holmes, J. dissenting) (noting that majority of the Court had rejected "an interpretation of the law which in [Holmes'] opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms"); *id.* at 361-64 (Brewer, J. concurring) (opining that Sherman Act only banned combinations that resulted in unreasonable reductions in competition).

[195] For instance, recent testimony about this transaction by a noted authority on mergers recalled that, more than forty years ago, the Supreme Court ordered Procter and Gamble to divest Clorox at the behest of the United States on the theory that Procter and Gamble would then enter the household bleach market. *See FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580-81 (1967) (sustaining FTC's determination that Procter and Gamble was the "most likely entrant" into the household bleach market). Four decades later, Procter still does not participate in the household bleach market. Luke Froeb, Testimony Before the House Committee on Courts and Competition, 6 n. 4 (2009). *See also e.g.* John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145 (2000) (collecting numerous predictions by antitrust scholars and lawyers that IBM would perpetually retain unassailable monopoly over personal computers).

of beneficial integration and deter future beneficial transactions as well.[196] Indeed, this concern may well explain why courts are so reluctant to sustain challenges to mergers based upon a "potential competition" theory.[197] This concern is particularly salient here, where the trend toward vertical integration raises the inference that the vertical aspects of this transaction will create efficiencies that society would forgo if the transaction is scuttled.[198]

Even if we assume that a potential competition doctrine applies here, we do not believe that Live Nation's future influence on the marketplace changes the more conventional analysis of this transaction. One reason is that our horizontal effects analysis—evaluating actual, as opposed to potential, competition—already assesses the possibility of Live Nation possessing captive production, which would suggest that its market share overstates its competitive significance. A claim based on a theory of potential competition suggests that Live Nation is likely to expand in its non-captive ticket distribution capabilities. No such specific plans have been announced. But even if

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[196] *Cf*. Department of Justice and Federal Trade Commission Commentary on the Horizontal Merger Guidelines, 1 (March 2006) ("Mergers between competing firms, *i.e.,* 'horizontal' mergers, are a significant dynamic force in the American economy. The vast majority of mergers pose no harm to consumers, and many produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation. Efficiencies such as these enable companies to compete more effectively, both domestically and overseas."); 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 0.1 ("the agency seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral.").

[197] *See infra* notes 210-212 (collecting numerous authorities in which courts rejected such challenges). *See also* Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1317-18 (1965) (describing various benefits of mergers the existence of which counsels against overbroad rules prohibiting such transactions).

[198] Specific efficiencies related to the vertical integration of Ticketmaster and Live Nation are discussed *infra* Part IV.3.

Live Nation had such a credible plan, any showing that Live Nation would have exercised procompetitive influence on the market but for its merger with Ticketmaster requires a threshold showing that the market is less than competitive and thus is susceptible to procompetitive influence.[199] However, our evaluation of the ticket

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[199] Thus, by analogy, courts and the enforcement agencies have repeatedly held that both a "perceived potential entrant" and an "actual potential entrant" cannot exercise a procompetitive influence on the marketplace unless concentration and other indicia establish that the market is otherwise susceptible to coordinated or unilateral anticompetitive behavior. There is no reason to reject this logic simply because Live Nation is already present in the marketplace. The Supreme Court has itself made it plain that there can be no concern about a loss of potential competition if the market in question is already competitive.

> The [actual and perceived] potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods and services. If the target market performs as a competitive market in traditional antitrust terms . . . . there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive.

See United States v. Marine Bancorporation, Inc., 418 U.S. 602,630 (1974). *Accord e.g. Tenneco*, 689 F. 2d at 352-53 (sustaining Commission finding that "market was not genuinely competitive," a necessary element for application of the doctrine). *See also* United States v. Siemens Corp., 621 F.2d 499, 505 n.6 (2d Cir. 1980) ("As Professor Turner points out the perceived potential competition doctrine is only available to the Government if the market is oligopolistic. If the market is sufficiently competitive to enforce competitive behavior on existing sellers, their behavior will not be influenced by the threat of new entry, thus making the loss of a perceived potential entrant insignificant.") (*citing* Donald Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1363 (1965)); United States v. Consol. Foods Corp., 455 F. Supp. 108, 139-140 (E.D. Pa. 1978) (rejecting application of the perceived potential entry doctrine where there was "no evidence of oligopolistic behavior" and levels of profitability were "indicative of competitive, rather than oligopolistic practices") (alternate holding); United States v. Hughes Tool Co., 415 F. Supp. 637, 645 (C.D. Cal. 1976) (rejecting application of perceived potential competition doctrine because "the relevant market here is not highly concentrated and is freely competitive"); *In re B.A.T.*, 104 F.T.C. at 923, n.22 (collecting authorities for the proposition that the doctrine does not apply where nominally high concentration statistics present a misleading picture of competition in the relevant market); 1984 Department of Justice Non-Horizontal Merger Guidelines, § 4.111 (application of perceived potential competition doctrine depends

distribution market suggests that it is an increasingly dynamic and competitive market, such that Ticketmaster's current significant market share, even when included with Live Nation's output, is unlikely to translate into market power. It would seem that the potential competition claim would have significant difficulty overcoming this initial requirement and would thus fail.[200] The antitrust laws do not empower courts to thwart a merger merely to add yet another rival to an already competitive market.[201]

Moreover, there is no reason to believe that Live Nation—as opposed to any number of other firms that could enter the distribution market or expand their presence in it—is uniquely well-suited to be the source of potential competition in the outsourced ticket distribution segment and thereby deter anticompetitive conduct. That is to say, even assuming Live Nation would have rapidly expanded its presence in this segment but for the merger, there are other firms that are well suited to enter the market or rapidly expand their presence within it. If this is the case, then eliminating Live Nation's

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upon the "economic theory of limit pricing" and assumption that potential competition encourages "monopolists and groups of colluding firms" to "restrain their pricing in order to deter new entry"). *See also Tenneco Inc.*, 689 F.2d at 355-58 (rejecting application of the "perceived potential competition" doctrine where market had recently become significantly competitive independent of any influence exercised by putative potential entrant). It should be noted that Professor Turner, cited in the *Siemens* decision above, served as head of the Antitrust Division during President Johnson's administration and was a preeminent authority on antitrust doctrine and policy.

[200] Moreover, there need to be meaningful limits on any potential competition doctrine, otherwise it would swallow the whole of merger law. *See AMAX, Inc.,* 402 F. Supp. at 959 (noting that the argument that internal expansion would be more competitive than a merger could be made "against any horizontal merger" and thus does not justify preventing such a transaction). *See also BMI*, 441 U.S. at 23 (explaining that numerous mergers between competitors and other competition-reducing transactions properly withstand antitrust scrutiny).

[201] *See White Consol. Indus., Inc.*, 781 F.2d at 1233; *AMAX, Inc*, 402 F. Supp. at 959.

competitive influence cannot produce anticompetitive harm and cannot serve as a basis for disallowing the merger.[202]

As admirers of Yogi Berra, we hesitate to predict which firms will, in fact, enter the market or expand their presence within it. Nonetheless, two prime candidates emerged in the previous section discussing market entry. The first is AEG, the world's second largest promoter of live music and entertainment (after Live Nation) and the world's largest owner of sporting teams and events. If Live Nation, having entered the market just a few months ago after obtaining technology from a third party, is poised rapidly to expand its presence in a segment in which it now participates only for its internal business needs, then presumably AEG could do the same by pursuing its reported plans to acquire self-distribution technology.[203] A second likely candidate is Veritix. Given the trend toward ticket self-distribution, Veritix is likely to continue expanding its client base, both independently and via its downstream relationship with Kroenke Sports and its TicketHorse subsidiary, particularly as contracts between Ticketmaster and

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[202] *See Atl. Richfield Co*., 549 F.2d at 300 (declining to ban merger that purportedly reduced potential competition because there were several other possible entrants); *Hughes Tool*, 415 F. Supp. at 646 (same). *See also In re B.A.T. Indus. Ltd.,* 104 F.T.C. 852, 924 (1984) ("[E]liminating one of many potential entrants could not be expected to eliminate substantial future competition."). Here again one finds a ready analogy in the "perceived potential competition doctrine," the application of which requires a showing that the alleged potential entrant is one of very few likely entrants such that elimination of the entrant would in fact eliminate or substantially reduce the overall threat of entry into the relevant market. *See Siemens*, 621 F.2d at 509 (rejecting application of the perceived potential entry doctrine where there were various other potential entrants into the market in question); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729,771-773 (D. Md. 1976) (same); Frank H. Easterbrook, Comment, *Toehold Acquisitions and the Potential Competition Doctrine*, 40 U. CHI. L. REV. 156, 169 (1972) ("If there are many potential competitors, the removal of one of them cannot be important, because the continued presence of the remaining firms will discipline the market to the same extent.").

[203] *See suora*, note 111.

various venues expire.[204] Any claim that an independent Live Nation, and not AEG or Veritix, will make sizeable market inroads over the next few years rests on additional speculation.

Some speculation is an inevitable part of merger analysis, which by its nature requires courts and enforcement agencies to make predictions about the state of competition after the transaction.[205] Nonetheless, courts, including the Supreme Court, have repeatedly ruled out the imposition of liability based upon "uncabined speculation"[206] "ephemeral possibilities,"[207] or "remote possibilities."[208] Instead, as the Supreme Court said more than four decades ago, Section 7 bans only those mergers where the anticompetitive effect is "probable."[209] Not surprisingly, courts have placed particular emphasis on these considerations when assessing claims that mergers eliminate competition that has not yet occurred.[210] Indeed, at least one court has relied on these

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[204] *See supra* note 170 and accompanying text (explaining that most distribution agreements between Ticketmaster and various venues will expire over the next three to six years). *Cf.* 1992 Joint Merger Guidelines § 3.3 (providing that downstream integration can facilitate entry into a new market).

[205] *See Brown Shoe*, 370 U.S. at 323 (concern of Section 7 of the Clayton Act is with "probabilities, not certainties").

[206] *See* British Oxygen Co. v. FTC, 557 F.2d 24, 29 (2d Cir. 1977).

[207] *See Brown Shoe*, 370 U.S. at 323; FTC v. Tenet Health Care, 186 F.3d 1045, 1051 (8th Cir. 1999); *British Oxygen*, 557 F.2d at 28.

[208] *See Marine Bancorp., Inc.*, 418 U.S. 623, n. 22 ("[R]emote possibilities are not sufficient to satisfy the test set forth in § 7.") (*quoting* United States v. Falstaff, 410 U.S. 526, 555 (1972) (Marshall, J. concurring)).

[209] *Brown Shoe*, 370 U.S. at 323 ("[N]o statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act"); *id.* at n. 39 (citing legislative history to this effect); *Tenet Health*, 186 F.3d at 1051 (Clayton Act "deals in probabilities, not ephemeral possibilities"). *See also* Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 0.1 ("Throughout the Guidelines, the analysis is focused on whether consumers or producers 'likely would' take certain actions.").

[210] *See Tenneco,* 689 F.2d at 354 (rejecting government's invocation of the actual potential competition doctrine for reliance upon "speculation" and "ephemeral

admonitions when rejecting the claim—like that made here—that a merging party's market share understated its competitive significance because it had pre-merger expansion plans.[211] Some courts have even suggested that claims based on the elimination of "actual potential competition" require a showing that future entry by one of the merging firms was "almost certain."[212]

The claim that Live Nation would have become a particularly and irreplaceably influential competitor but for this merger rests on the sort of unjustified speculation that courts have rejected. Given Live Nation's very limited track record in this segment, the established records and capabilities of other participants, the prospect of other entrants, and the lack of apparent structural features conferring unique advantages on Live Nation, any prediction that Live Nation would pose a unique and substantial competitive challenge to Ticketmaster seems to lack the factual grounding in objective reality that courts have repeatedly required (and often found wanting) when evaluating analogous claims.[213]

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possibilities"); *British Oxygen,* 557 F.2d at 28-30 (rejecting government's reliance upon "uncabined speculation" and "wholly speculative . . . 'eventual entry' test").

[211] *See AMAX, Inc.,* 402 F. Supp. at 960 (rejecting government's reliance on pre-merger expansion plans to inflate merging parties' competitive significance because such an approach would "ask that this court adopt 'ephemeral possibilities' rather than the 'probability' which § 7 requires") (citations omitted).

[212] *See Siemens*, 621 F. 2d at 506 (requiring "at least" a reasonable probability and "preferably clear proof"); *Atl. Richfield Co.*, 549 F.2d at 294-95, 300 (requiring "clear proof"). *See also* Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1384 (arguing for requirement of "clear proof that the firm would in fact have entered" such that preventing merger will lead to future entry "[g]iven the less than overwhelming case for prohibition to begin with"); *id*. at 1386 (advocating requirement that such future entry was "certain").

[213] *See Tenneco,* 689 F.2d at 354; *British Oxygen,* 557 F.2d at 28-30; *Atl. Richfield Co*., 549 F.2d at 300 (declining to ban merger that purportedly reduced potential competition because there were several other possible entrants as well); *Hughes Tool*, 415 F. Supp. at 646 (same). *See also* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*,

Horizontal Efficiencies Resulting from the Merger

Although Live Nation and Ticketmaster claim that their merger will create many efficiencies, these efficiencies will likely result from the vertical elements of the merger, discussed in Part IV, *infra*. It is less certain whether the horizontal elements would yield any substantial efficiencies that are directly attributable to the consolidation of their ticketing distribution services, but some efficiencies might be possible.

Like most information technology services, there are probably some scale economies in ticket distribution. If scale efficiencies are nontrivial, then consolidation would avoid duplicative investments and could yield some savings. A more interesting possibility for horizontal efficiencies is that the merger would enable Ticketmaster, the accomplished technology company, to handle ticket distribution and provide services of higher quality and at lower costs than what Live Nation could build and operate on its own. Certainly, it is possible that Ticketmaster, a historically successful distributor, has certain capabilities that Live Nation, a relative a newcomer to ticket distribution, does not.[214] However, this argument is in tension with the growing evidence that Internet technologies are easy to acquire. If the underlying technology really is widespread and commoditized, then any one company's technological advantage would be limited.

We suspect the truth lies somewhere in the middle. Accomplished technology companies are likely to have capabilities that other companies cannot duplicate, even

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78 HARV. L. REV. at 1382 ("Unless a firm possesses unique capabilities, its preparation to enter a market by internal expansion suggests that the market presents attractive opportunities that at least one other firm will be likely to seek, also by internal expansion if necessary.").

[214] Because Ticketmaster is the recognized industry leader and purportedly enjoys these efficiencies already, these particular efficiencies would be "merger specific." Live Nation could not realize them by, say, merging with a different entity.

when the market's technological demands are not great, and this suggests that ticket distribution for Live Nation events would occur more efficiently with the merger than without it. However, the proliferation of self-distribution strategies by diverse venues, most of which do not have track records as technology companies, reveal that the venues' vertical integration strategies generate efficiencies that exceed whatever costs they encounter (and otherwise could save from outsourcing) by pursuing the technologies themselves. Accordingly, if any horizontal efficiencies are possible, they either are modest or they are easily swamped by the efficiencies from vertical integration.

Summary

We close this analysis of the horizontal elements of the proposed merger with the following preliminary conclusions:

1. Venues that purchase ticket distribution services vary in size, sophistication, and needs, and service providers accordingly present a menu of offerings. Service providers also range from full-service ticket distributors to providers of technology that enables self-distribution. Subsequently, although we lack sufficient information to conduct the required cross-elasticity tests for market definition, we observe that there is wide variation in services offered and that defining a distinct product market is a difficult determination. .

2. The technology required for large and smaller venues to self-distribute their tickets is becoming increasingly available, and venues are increasingly vertically integrating into ticket distribution.

3. Under most characterizations of market participants and market shares, Ticketmaster enjoys a large market share, such that the market appears to be moderately or highly concentrated. Live Nation, under some market characterizations, has a much smaller but still sizable market share, but most or all of its output is captive and thus is unlikely to be competitively significant.

4. Even under narrow market definitions in which Ticketmaster and Live Nation enjoy large market shares, the ease and attractiveness of vertical integration as well as the nature of rivalry within the ticketing market prevents Ticketmaster, or any other ticket distributor, from exercising market power and charging supracompetitive prices. This critical determination hinges on precisely how

easy and attractive vertical integration is for large venues. Moreover, because venues appear to solicit bids from multiple providers, there are moments of focused competition that dull any advantage of incumbency or historical market share.

5. The elimination of Live Nation as a potential competitor to Ticketmaster and other ticket distributors is unlikely to produce anticompetitive harm cognizable under the antirust laws because the market is apparently behaving in a competitive manner.

6. Any horizontal efficiencies produced by this merger appear to be modest.

IV. Analysis of Merger's Vertical Consequences

Although the proposed Live Nation-Ticketmaster merger has some important horizontal elements, the companies' core businesses lie in different market segments. Accordingly, the transaction is more accurately described as a primarily vertical merger, resulting in the integration of successive stages of the process of producing and delivering entertainment to the consumer. There is a broad consensus among economists and legal scholars that vertical mergers only very rarely pose competitive risks. Indeed, over the past three decades, the antitrust enforcement agencies have challenged only a handful of the thousands of vertical mergers that have occurred in the United States, and very few private challenges during this period have been successful.[215] Such consistency among scholars, policymakers, and courts reveal a recognition that vertical mergers are motivated primarily by efficiency concerns, rather than efforts to acquire or protect market power.

[215] *See*, *e.g,* Alberta Gas Chems. v. E.I. Du Pont De Nemours, 826 F.2d 1235, 1244-46 (3d Cir. 1987) (summarizing law governing vertical mergers); Fruehauf Corp. v. FTC, 603 F.2d 345, 351-359 (2d Cir. 1979) (rejecting challenge to vertical merger); Crouse-Hinds Co. v. Internorth, Inc., 518 F. Supp. 416, 428-34 (same); Crane Co. v. Harsco Corp., 509 F. Supp. 115, 125-26 (D. Del. 1981) (same).

Nonetheless, some critics of the Live Nation-Ticketmaster merger claim that vertical integration between these two particular firms will produce various anticompetitive consequences. In reviewing the vertical aspects of this merger, we identify many reasons to believe that the merger will more likely result in substantial transactional efficiencies. Indeed, the efficiency considerations that have convinced Live Nation and Ticketmaster to now seek vertical integration are analogous to the procompetitive motivations that underlie the use of exclusive contracts between ticket distributors, as the Department of Justice apparently concluded after investigating those practices during the 1990s. Furthermore, the proposed Live Nation-Ticketmaster merger reflects the industry's general trend towards vertical integration, including but not limited to the integration of venue ownership and ticket distribution. We lastly review the major arguments that vertical aspects of the transaction will produce anticompetitive harm, and we find them to rest on speculative predictions of harm that are generally implausible in light of the industry's structure.

The Evolving Economic and Legal Treatment of Vertical Integration

Broadly conceived, "vertical integration" entails any conscious coordination, by contract or ownership, of two or more successive stages of the production process, where "production" can include the provision of services or goods. By definition, all business firms are "vertically integrated," in the sense that they perform tasks by two or more actors who might otherwise operate as independent market actors and cooperate together by contract. Even the child's corner lemonade stand can exemplify such integration–if the child produces the lemonade (instead of buying lemonade on the market) and then distributes it at retail. Nobel Laureate Ronald Coase first famously observed that markets

and firms are merely alternative mechanisms to organize economic activity,[216] and this analytical lens has deeply penetrated the fields of both law and economics. When Richard Posner stated that "[v]ertical integration is a universal feature of economic life,"[217] and Frank Easterbrook, shortly before his appointment to the bench, remarked that "[t]he dichotomy between cooperation inside a 'firm' and competition in a 'market' is just a convenient shorthand for a far more complicated continuum,"[218] they were repeating Coase's prescient insight.

Still, several decades ago, courts, the enforcement agencies, and legal scholars were quite hostile to vertical integration, despite its ubiquity, whether such integration occurred by merger, internal expansion, or long-term contract. By taking control of a new stage of the process of production or distribution, it was said, such integration could "foreclose" rivals from particular upstream inputs or downstream channels for distributing their products, thereby creating a "clog on competition" to the ultimate detriment of downstream consumers.[219] A classic example was the merger between the Brown Shoe Company—a shoe manufacturer—and Kinney Shoe Co., which

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[216] *See* Coase, *supra* note 121, at 389 ("It can, I think, be assumed that the distinguishing mark of the firm is the supersession of the price mechanism.").

[217] *See generally* Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984) (Posner, J.) ("Vertical integration is a universal feature of economic life . . . . A common type of vertical integration is for a manufacturer to take over the distribution of his own product."); *id.* at 698.

[218] Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984). To be fair, this remark (like Bork's, *supra* note 230) embraces an approach that began with Ronald Coase's seminal article, *The Nature of the Firm*, *supra* note 121, and predated TCE.

[219] *See Brown Shoe*, 370 U.S. at 324 (invoking these metaphors when condemning a vertical merger); Standard Oil Co. v. United States, 337 U.S. 293, 314 (1940) (invoking these metaphors when condemning exclusive dealing agreements).

manufactured shoes and also owned four hundred shoe stores throughout the country.[220] After purchasing Kinney, the government argued, Brown would presumably "force" Kinney stores to stock Brown Shoes, thereby foreclosing its rivals from access to Kinney's stores, which had, before the merger, stocked shoes from various manufacturers.[221] This approach dominated antitrust analysis by courts and the enforcement agencies, giving rise to what subsequently became known as the "inhospitality tradition," in which vertical arrangements, including vertical mergers, were suspected to have monopoly motivations and anticompetitive consequences.[222]

Although judicial and administrative hostility, or inhospitality, to vertical integration might have made sense given the state of economic science at the time,[223]

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[220] *See Brown Shoe*, 370 U.S. at 302-304 (reporting that Kinney owned 400 shoe stores which sold about 1.6 percent of the nation's shoes).

[221] *See id*. at 304 (finding that, after the merger, Brown supplied 7.9 percent of the shoes sold at Kinney stores); *id.* at 334 (banning merger because of "trend toward vertical integration in the shoe industry, when combined with Brown's avowed policy of forcing its own shoes upon its retail subsidiaries, may foreclose competition from a substantial share of the markets for men's, women's and children's shoes, without producing any countervailing competitive, economic or social advantages."). *See also* FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966) (finding that a quasi-exclusive dealing agreement involving 1% of the nation's shoe retailers offended the "central policy of the Sherman Act" and thus constituted an "unfair trade practice" in violation of Section 5 of the FTC Act); Dictograph Prod, Inc. v. FTC, 217 F.2d 821, 828 (2d Cir. 1954) ("It is the policy of the Congress that [the defendant's] merchandise must stand on its own feet in the open market . . . without the competitive advantage to be obtained by the use of prohibited exclusionary agreements.").

[222] Donald Turner, then head of the Department of Justice's Antitrust Division, was famously quoted to have said, "I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law." Alan J. Meese*, Raising Rivals' Costs: Can the Agencies Do More Good Than Harm*?, 12 GEO. MASON L. REV. 241, 260 (2003). n.98 (*quoting* Donald F. Turner, Some Reflections on Antitrust, 1966 N.Y. St. B.A. Antitrust L. Symp. 1, 1–2 (1966)).

[223] *See* JOE S. BAIN, INDUSTRIAL ORGANIZATION, 381 (1959) ("The trained observer tends to form a considerable suspicion from casual observation that there is a good deal of vertical integration which, although not actually uneconomical, is also not justified on the basis of any cost savings. This is apparently true in particular of the integration of

economic theory has advanced significantly since the 1950s and views the causes and consequences of vertical integration much more sympathetically. In what one prominent economist has properly characterized as a scientific revolution, the profession has completely reconceptualized the theoretical rationale for the business firm and other forms of vertical integration.[224] Building on Coase's original insight, economists and others have recognized that vertical integration ("making" a product or service) is best understood as an effort to economize on what Coase dubbed "transaction costs."[225] By making instead of buying a product, Coase said, a firm could avoid these costs and might

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distributive facilities by manufacturing firms. In most cases the rationale of the integration is evidently the increase of market power of the firms rather than a reduction in cost."). *See also* Oliver E. Williamson, *Technology and Transaction Cost Economics*, 10 J. ECON. BEH. & ORG. 355, 356 (1988) (asserting that under, price-theoretic paradigm extant in the 1940s, 50s and 60s, "the 'natural' boundaries of the firm were thought to be defined by engineering considerations."); WILLIAMSON, ECONOMIC INSTITUTIONS OF CAPITALISM, at 7-8 ("The prevailing orientation toward economic organization [under price theory] was that technological features of firm and market organization were determinative."); *id.* at 23-26, 86-89; George Stigler, *The Division of Labor is Limited By the Extent of the Market*, 59 J. POL. ECON. 185, 185 (1951) (stating that economic theory has "generally treated as a (technological?) datum the problem of what the firm does – what governs its range of activities or functions."). Even the Chicago school shared the belief that vertical integration produced only technological efficiencies. *See* Robert H. Bork, *Vertical Integration and the Sherman Act*, 22 U. CHI. L. REV. 157, 200 (1954) (describing the benefits of vertical integration as "bypassing a monopoly at one level, or . . . enabling the achievement of internal efficiencies"). The stock example of such technological efficiencies was the integration of iron-making and steel production, which supposedly produced efficiencies by eliminating the need to reheat iron before feeding it into a steel furnace. *See* F.M. SCHERER, INDUSTRIAL STRUCTURE AND ECONOMIC PERFORMANCE, 70 (1970); JOE S. BAIN, INDUSTRIAL ORGANIZATION, 156-57 (1959); CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY, 120 (1959). Indeed, as early as 1942, George Stigler would refer to this as a "stock" example of a technological determinant of vertical integration. *See* George J. Stigler, *The Extent and Bases of Monopoly*, 32 AM. ECON. REV. 1, 22 (1942) ("[T]he stock example [of vertical integration producing economies] is the hot strip mill.").

[224] *See* Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 274 (1986) (contending that Transaction Cost Economics and resulting reconception of the economic origins of vertical integration was manifestation of a "genuine scientific revolution").

[225] *See* Coase, *supra* note 121, at 390-92.

reduce its overall cost of production.[226]

Several decades later, scholars rediscovered Coase's insight and proceeded to identify a much wider range of "transaction costs" that might induce economic actors to forgo reliance on market organization in favor of firms.[227] For example, some scholars argued that committed vertical arrangements, including vertical integration, are efficiency responses to transacting in the presence of relationship-specific investments and the resulting vulnerability to post-transaction opportunism.[228] Others additionally recognized that vertical integration enabled coordinated adaptation and production that

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[226] *See id*. at 390 ("The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism.").

[227] Major contributions include: OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985); Benjamin Klein, Robert Crawford, & Armen Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1965); Lester G. Telser, *Why Do Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960).

The instant authors have also contributed to this literature. *See e.g.* Barak Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV. 325 (2009); Barak D. Richman & Jeffrey T. Macher, "Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences," *Business and Politics* (2008); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms*: *Towards A Positive Theory of Private Ordering* 104 COLUM. L. REV. 2328 (2004); Alan J. Meese, *Exclusive Dealing, Raising Rivals Costs and the Theory of the Firm: Toward a New Synthesis*, 50 ANTITRUST BULL. 371 (2005); *Monopolization, Exclusion and the Theory of the Firm,* 89 MINN. L. REV. 743 (2005); *Price Theory, Competition and the Rule of Reason*, 2003 ILL. L. REV. 77.

[228] *See* Benjamin Klein, Robert Crawford, & Armen Alchian, *Vertical Integration, Appropriable Rents, And The Competitive Contracting Process*, 21 J.L. ECON. & ORG. 297 (1978); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES, 20-40, 82-105 (1975). *See also* Oliver E. Williamson, *The Logic of Economic Organization,* 4 J.L. ECON. & ORG. 65 (1988) (articulating mainstream view regarding rediscovery of Coase's insight); OLIVER E. WILLIAMSON, ECONOMIC INSTITUTIONS OF CAPITALISM, at 31-32 (explaining that, where asset specificity is absent, discrete market contracting functions well despite bounded rationality and opportunism).

market relationships could not produce.[229] All of these arguments rested upon the assumption that transacting in atomistic markets can invite certain market failures that vertical arrangements arise to correct.

Antitrust doctrine has properly followed suit. Prodded by leading antitrust scholars (Robert Bork once remarked that "[w]hat antitrust law perceives as vertical merger, and therefore as a suspect and probably traumatic event, is merely an instance of replacing a market transaction with administrative direction because the latter is believed to be a more efficient method of coordination"[230]), the Supreme Court and lower courts have relaxed numerous doctrines from the inhospitality era that were hostile to partial and complete integration.[231] Beginning in the late 1970s, courts have repeatedly rejected arguments that challenged mergers injure competition by "foreclosing" rivals from access to inputs or channels of distribution.[232] Instead these courts have adopted a much more flexible and multi-factored approach that focus the inquiry on whether the vertical

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[229] *See, e.g.*, OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985).

[230] ROBERT H. BORK, THE ANTITRUST PARADOX 227 (1978). Bork is significantly more expansive than Williamson, remarking that "Antitrust's concern with vertical mergers is mistaken. . . . The vertical mergers the law currently outlaws have no effect other than the creation of efficiency." *Id.* at 226.

[231] *See, e.g.,* Leegin Creative Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (reversing 96 year ban on minimum resale price maintenance); State Oil Co. v. Khan, 522 U.S. 3 (1997) (reversing 28 year ban on maximum resale price maintenance); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1985) (significantly increasing nature and quantum of market power necessary to establish requisite element of tying case); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (reversing per se ban on exclusive territories and location clauses).

[232] *See Alberta Gas Chems.*, 826 F.2d at 1244-46; Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979); Crouse-Hinds Co. v. Internorth, 518 F. Supp. 416 (N.D.N.Y 1980); Crane v. Harsco Corp., 509 F. Supp. 115, 125-26 (D. Del. 1981). *See also* United States v. Loew's, Inc., 882 F. 2d 29 (2d Cir. 1989).

arrangements meaningfully enshrine or expand market power.[233] Applying this test, courts have routinely rejected challenges to vertical mergers, even in cases in which the vertical foreclosure was several times that which had, in previous decades, supported, along with other factors, a finding that the merger would probably produce competitive harm.[234] At the same time, government enforcement guidelines governing vertical mergers reflected this new learning as well, expressly noting that "non-horizontal mergers are less likely than horizontal mergers to create competitive problems."[235] Courts have similarly declined to condemn vertical integration in evaluating claims that a single firm has "monopolized" the market in violation of Section 2 of the Sherman Act.[236]

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[233] *See Fruehauf*, 603 F.2d at 353 (instructing courts to examine, among other factors, the "nature and economic purpose of the arrangement, the likelihood and size of market foreclosure, the extent of concentration of buyers and sellers in the industry, the capital cost required to enter the market, the market share needed by a buyer or seller to achieve a profitable level of production (sometimes referred to as 'scale economy'), the existence of a trend toward vertical concentration or oligopoly in the industry, and whether the merger will eliminate potential competition by one of the merging parties. To these factors may be added the degree of market power that would be possessed by the enterprise and the strength of competing suppliers and purchasers."); *see also* HTI Health Servs., Inc. v. Quorum Health Group, Inc., 960 F. Supp. 1104, 1136 (S.D. Miss. 1997) (articulating the same factors).

[234] *See Fruehauf*, 603 F. 2d at 358-59 (rejecting FTC challenge to vertical merger that foreclosed rivals from selling 5.8% of the market's output to one of the merging parties); *Crane Co.*, 509 F. Supp. at 125 (rejecting claim that vertical merger violated Section 7 despite 8.8% foreclosure).

[235] *See* Department of Justice 1984 Merger Guidelines § 4.0. This paragraph continued "they are not invariably innocuous." *See also* "Roundtable Submission," *available at* http://www.ftc.gov/bc/international/docs/07RoundtableonVerticalMergers.pdf (noting that "vertical mergers merit a stronger presumption of being efficient than do horizontal mergers, and should be allowed to proceed except in those few cases where convincing, fact-based evidence relating to the specific circumstances of the vertical merger indicates likely competitive harm").

[236] *See* Belfiore v. N.Y. Times, 826 F.2d 177 (2d Cir. 1987) (rejecting claim that vertical integration by a monopolist offended Section 2 of the Sherman Act despite negative

These are not, it should be emphasized, recent or untested developments, but instead principles that are now fundamental to how courts and the enforcement agencies approach vertical integration. Indeed, it was more than twenty-five years ago that Judge Richard Posner summarized the state of scholarship and antitrust law by noting:

> Vertical integration is not an unlawful or even a suspect category under the antitrust laws: 'Firms constantly face 'make or buy' decisions—that is, decisions whether to purchase a good or service in the market or to produce it internally—and ordinarily the decision, whichever way it goes, raises no antitrust question.' . . . .When a corporation that has been using a law firm to handle a particular type of litigation hires a lawyer to do the litigation in house, it is vertically integrating into litigation services. When a law firm that has been buying a billing service from a computer time-sharing firm buys its own computer to perform the service, it is vertically integrating into computer services. Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.[237]

Scrutiny of Ticketmaster's Vertical Agreements

Although vertical integration is often used to denote the merger of two economic entities in sequential markets, it more accurately refers to a spectrum of relationships that spans a diverse array of organizational arrangements. Complete vertical integration—which includes mergers and acquisitions—is at one end of this spectrum with spot-market transactions at the other, and a variety of intermediate forms, or "hybrid" [238] arrangements that reflect assorted levels of partial integration, occupy the middle. The

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impact on firm's dealer); Paschall v. Kan. City Star Co., 727 F.2d 692 (8th Cir. 1984) (*en banc*) (same).

[237] *See* Jack Walters & Sons v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984) (Posner, J.) (*quoting* Univ. Life Ins. Co. of America v. Unimarc Ltd., 699 F.2d 846, 852 (7th Cir. 1983)).

[238] Oliver Williamson employed this term to describe arrangements that lie between the "polar modes" of atomistic markets, on the on hand, and "hierarchy," (complete vertical integration), on the other. *See* OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE, 104 (1996) ("hybrid" modes of economic organization include "various forms of long-term contracting, reciprocal trading, regulation, franchising, and the like").

category of partially integrated hybrids includes long term contracts, exclusive contracts, repeated interactions with reputational effects, joint ventures, cross-ownership, and an assortment of other arrangements.

Ticketmaster (as well as, we believe, other outsourced providers of ticket distribution services) sells its ticket distribution services to venues under exclusive contracts,[239] which are a species of partially integrated hybrid arrangements. Both in the past and recently, the exclusivity of these contracts has drawn some antitrust ire from commentators and attention from some antitrust enforcers. Exclusive contracts of this kind, especially if extended for long periods of time, can sometimes secure incumbent firms with monopoly power against competitive entry by rivals and thus have anticompetitive consequences.[240] Some Ticketmaster critics have alleged that the company's use of exclusive contracts has enshrined its leading market share and stifled entry possibilities from potential and smaller competitors.[241] Such critics therefore argue that Ticketmaster's use of exclusive contracts is anticompetitive and amounts to an antitrust violation.

Accusations of anticompetitive conduct, most notably from Pearl Jam, caused the Department of Justice to launch an investigation into Ticketmaster's contracting practices

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[239] *See supra*, Part II.

[240] *See, e.g.,* United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005). Exclusive vertical agreements by a market leader were also found to violate Section 2 in *United States v. Microsoft, Inc.*, 253 F.3d 34 (D.C. Cir. 2001) (*en banc*) (per curiam), but the *Microsoft* court was particularly concerned about how exclusive agreements might combine with the network externalities of the operating system market to lock in an inferior technological standard. Network externalities of this sort do not appear to be present in the market for ticket distribution services.

[241] Balto Testimony, *supra* note 151, at 1 ("Ticketmaster's monopoly power is preserved through a series of exclusionary arrangements that diminish the potential for rivals to arise and challenge the monopoly.")

in 1994, but the investigation was closed the following year without any finding of anticompetitive conduct.[242] It seems likely, as one opponent of the transaction has claimed, that the investigation was closed at least in part because the Antitrust Division recognized that exclusive contracts can yield identifiable efficiencies when used for ticket distribution.[243] Like other forms of vertical integration, contracts that designate a single ticket distributor as a venue's exclusive distributor provide the necessary assurances to induce the distributor to make valuable investments in performing its services without fear that a follow-on distributor would exploit those investments. Consequently, Ticketmaster is able to provide certain services that it otherwise would be unwilling or unable to provide. For example, exclusivity enables distributors to offer "best seat available" searches, which are only possible if the distributor sells—and therefore knows the availability of—all of a performance's tickets.[244] Exclusive arrangements have also enabled Ticketmaster (and other distribution companies) to finance investments in upgrading a venue's ticketing facilities. Without an exclusive distribution period, which also tends to appear in contracts negotiated by Ticketmaster's rivals, the distribution companies would be unwilling to sink upfront investments in improving a venue's ticketing infrastructure.[245] Courts, in conjunction with a renewed appreciation for the

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[242] *U.S. Ends Ticketmaster Investigation*, N.Y. TIMES, July 6, 1995, at C14. *See also* Antitrust Division Statement, (July 5, 1995) http://www.usdoj.gov/atr/public/press_releases/1995/0264.pdf.

[243] *See* Balto Testimony, *supra* note 151, at 1-2.

[244] *See* John Seabrook, *The Price of the Ticket*, NEW YORKER MAG., Aug. 10 & 17 2009, at 34, 39 (with the exclusive right to sell tickets to a particular event, "Ticketmaster could offer fans the best available seats, no matter where they purchased tickets").

[245] *See* Benjamin Klein, Robert Crawford and Armen Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 298-302, 302-307 (1978). *Cf.* Broad. Music, Inc. v. CBS, 441 U.S. 1, 22 (1979) (fact that

efficiencies of restrictive vertical contracts and vertical integration, have long recognized that exclusive dealing arrangements can produce these and similar efficiencies.[246]

Despite the efficiencies from exclusive contracts, such arrangements do limit a potential competitive threat from rivals, so a complete evaluation of any body of exclusive contracts would have to weigh the efficiencies against the anticompetitive consequences. There is reason to believe, however, that Ticketmaster's current array of exclusive contacts does not cause antitrust harm. A significant number of such contracts expire each year, and venues regularly invite bids from alternative ticket distributors before considering renewing with Ticketmaster. Moreover, there appears to be a relatively modest minimum viable scale for providing distribution services, so small entrants do not require large volumes to offer profitable services. Consequently, it is likely difficult for any monopolist in ticket distribution to employ exclusive arrangements to block entry to the market.[247] Although a venue might encounter some switching costs when initiating a new contract with a different ticket distributor, there do not appear to be any network externalities that would enable a hypothetical monopolist in the ticketing business to enjoy cost advantages over entrants, nor are there interoperability concerns

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smaller performing rights societies had also adopted so-called blanket licenses militated against their automatic condemnation).

[246] United States v. Addyston Pipe & Steel Co., 85 F. 271, 287 (6th Cir. 1898) (Taft, J.), *aff'd* 175 U.S. 211 (1899) (explaining that railroad could confer upon sleeping car company the exclusive right to provide railroad such cars and that such exclusivity was necessary "to secure the necessary investment of capital in the discharge of the duty").

[247] *See* IIA P. AREEDA ET AL., ANTITRUST LAW ¶ 421f at 68 (1995) ("[A]ll customers might contract to buy exclusively from incumbents and yet allow effective entry if 20 percent of the contracts expire monthly or even annually."). *Cf.* Gilbarco, Inc. v. Omega Envtl., Inc., 127 F.3d 1157, 1162-64 (9th Cir. 1997) (no chance that exclusive dealing contracts could foreclose competition among manufacturers for distributors where contracts were of relatively short duration and manufacturers could offer dealers better terms upon expiration).

that create an industry-wide lock-in effect.[248] Perhaps most significant, switching and negotiation costs evidently did not prevent a number of venues, including Live Nation itself, from leaving one distributor and selecting a new one or choosing self-distribution.[249] Ticketmaster regularly loses clients as the exclusive contracts expire, and the exclusive contracts—either individually or collectively—do not appear to have deterred entry by firms hoping to wrest ticket distribution business away from Ticketmaster and its rivals.[250] For these reasons, a court evaluating a rival's claim that Ticketmaster's use of exclusive agreements foreclosed competition ruled that providers of ticket distribution services use "the long term exclusive contract to accommodate their customers' desires, to their mutual benefit…. [the] exclusive contract is not for the purpose of excluding competition, but for the mutual economic benefit of both competitors. It is a mutually desired reasonable business practice from which no antitrust inferences may be drawn."[251]

However important it might be that Ticketmaster's current use of exclusive contracts does little to stifle entry and competition, the more important observation is that these exclusive contracts generate identifiable efficiencies. This use of partial integration

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[248] *Cf.* United States v. Microsoft Corp., 253 F. 3d 34, 54-56 (D.C. Cir. 2001) (*en banc*) (per curiam) (affirming district court's finding that the benefits of interoperability contributed to Microsoft's operating system monopoly and erected barriers to entry for new technological paradigms).

[249] *See Ticketmaster Corp.*, 2003-1 Trade Cas. at 96,240-41 (describing vigorous competition between providers of ticket distribution services); *id.* at 96,241(explaining that the option of self-distribution via reliance on outside technology providers prevents Ticketmaster from exercising market power).

[250] *See supra* notes 79-111 and accompanying text (listing numerous examples of venues that have recently taken on the task of distributing their own tickets).

[251] Ticketmaster Corp. v. Tickets.com, Inc., 2003-1 Trade Cas. (CCH) ¶ 74,013, at 96,241 (C.D. Cal. 2003).

hints at some additional benefits that might accompany the firms' complete vertical integration.

Efficiencies from Vertical Integration

Even though current antitrust law no longer views vertical mergers with suspicion, it still inquires into the "nature and purpose of the agreement" to determine whether efficiency motivations underlie a particular merger. The centrality of this inquiry highlights that while some mergers are little more than shortcuts towards extracting market rents, others are motivated by innovative possibilities and pursuing efficiencies, and antitrust demands distinguishing one from the other. Even if economic theory tells us that vertical mergers are presumptively in this second category, an efficiency analysis is still a routine element of any antitrust analysis.

An application of institutional economics and organizational theory suggests that many efficiency motivations underlie the Live Nation-Ticketmaster merger. It might even be said, as a preliminary matter, that the companies were partially integrated by contract, when exclusive contracts fixed Ticketmaster as Live Nation's ticket distributor. The efficiencies of that partial integration, discussed above, illustrate how exclusivity facilitated valuable investments and the development of useful features and services.[252] A similarly motivated analysis suggests that the complete integration of Ticketmaster with Live Nation is likely to create several additional efficiencies that might not be realized in their entirety without complete vertical integration. These merger-specific efficiencies, all of which are consistent with economic theory, by themselves offer a compelling endorsement of the proposed merger.

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[252] *See supra* notes 244-246and accompanying text (discussing efficiencies achieved from exclusive contracts).

1. Investments in Promotion and Information

It is well understood that vertical integration achieves efficiencies when it can organize behavior that is effectively beyond the reach of arms-length contracts.[253] One element that frequently is listed as a "noncontractible" is effort, especially effort that is invested to enhance the value of already-sunk investments. Parties, in the typical collective action problem, routinely undersupply effort and other marginal investments that would enhance the value of collective assets when the rewards from those marginal investments are shared by others. In other words, when team effort among separate economic actors is required to maximize value, value is rarely maximized.[254]

This is precisely the situation that currently confronts concert promoters. The several players along the value chain, including artists, promoters, venue managers, and ticket distributors, all benefit from maximizing revenues from ticket sales and other products, but each party only receives a fraction of the revenue from each ticket sale. Accordingly, each party is not optimally incentivized to invest the resources and effort to maximize value for the team. To be sure, Ticketmaster and other outsourced ticket distributors enjoy a commission for each ticket sold, but this fee is only a fraction of the overall cost of the ticket, and thus the distributor (like every other actor along the value chain) is underincentivized to invest in the promotion required to sell remaining tickets and maximally utilize capacity. Vertical integration is one efficiency response to this coordination problem. If a single firm is responsible for promotion, venue management, and ticket sales, then it would be incentivized to make appropriate investments that would

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[253] *See, e.g.,* OLIVER HART, PROPERTY RIGHTS AND THE NATURE OF THE FIRM (1988).
[254] *See, e.g.,* Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324 (1982); Ilya Segal, *Contracting with Externalities*, 114 Q.J. ECON. 337 (1999).

improve efficiency, thus increasing both revenue for the performers and the collective welfare of all those in the value chain.

The live entertainment industry currently shows evidence of inefficiencies that could be reduced by improving incentives to make value-enhancing investments. One significant and growing industry-wide challenge, for example, is the unfilled capacity in concert halls.[255] These empty seats and unpurchased tickets represent significant unutilized capacity and lost income to the venues, promoters, and artists. One potential solution to reducing excess capacity is to make additional investments in advertising and publicity, especially in the form of targeted promotions for specific shows. If the returns from such targeted promotion are diffusely allocated, parties are unlikely to invest the requisite effort and resources. Alternatively, an integrated promoter would reap greater returns and is more likely to seek greater capacity.

Similar coordination problems might be responsible for impeding valuable innovations along the value chain. For example, intensified advertising is only one potential solution to the problem of unsold tickets, described above. Others might include investing in marketing research or acquiring information on a fan base, such that promotional activities could be directed at specific consumer segments. Investments in this sort of research, and any investments in acquiring or distributing information that increases capacity, also are vulnerable to a collective action problem that could be mitigated by vertical integration. The same principle also applies to other revenue sources, such as merchandise sales, that could be enhanced by obtaining better information about a fan base. Because investments in the effort and resources necessary

[255] Krueger, *supra* note 9, at 12.

to obtain and disseminate new information are so difficult to specify by contract, vertical integration arises as a useful mechanism to increase efficiency along a value chain. Peter Luukko, Chairman of vertically integrated Comcast-Spectacor, attested to these same efficiencies in his testimony before Congress.[256]

Decreasing the excess capacity and pursuing new sources of revenue have been described as two central challenges that currently confront the live entertainment industry, and the Live Nation-Ticketmaster merger has been characterized as an effort to pursue both opportunities. Economic theory confirms that vertical integration is one mechanism that can overcome collective action problems that prevent parties from making the necessary investments to appropriate these revenue opportunities.

2. Cooperative Adaptation to Meet Artists' Demands, Respond to Market Changes, & Pursue Innovations

Another organizational feature that vertical integration exhibits is the capacity to pursue cooperative adaptation. That is, when unforeseen changed circumstances, including those that are common in a rapidly evolving industry, necessitate adjustments by numerous co-venturers, integration with within a single entity can facilitate the

[256] Peter Lukko, President and Chief Operating Officer, Comcast-Spectacor, L.P., Statement Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition, at 2-3 (Feb. 26, 2009) ("By being part of a company that owns, manages, and/or operates venues, owns several sports teams and other content, and provides its own ticketing solution and food and beverage services to arenas, stadiums and amphitheatres throughout the country, we have the ability to cross-promote among these different levels in the vertical distribution chain and to touch the fan directly at multiple points in his or her sports/entertainment experience. Additionally, because we have more assets in some cities like Philadelphia, we have the ability to create unique packages to offer to sponsors and fans alike. This is where the industry trend is clearly moving—in large part because content providers want to have more direct control of the connection to their fans.").

required adaptation. For these circumstances, vertical integration serves as a more efficient organizational form than alternatives.[257]

Given the growing number of parties involved in producing live performances, coordination might be especially valuable to artists who find themselves increasingly separated from fans as new market segments enter the production chain. A vertically integrated infrastructure would give artists access to communication and other media that would help them shape their image and disseminate their music. Such coordinated efforts to promote merchandise, concerts tickets, and other reputational goods might be especially important for artists who target certain distinctive fan bases or who place value in managing a particular brand image. The coordination of concert promotions, merchandise sales, and other initiatives would enhance artists' abilities to manage these activities that are commonly so important to performers.

Coordinated adaptation would also facilitate a collective reprioritization of promotional effort, and thus could also mitigate lost revenues from underutilization of capacity in concerts. Outsourced ticket distributors generally make comparable sums for selling tickets of any sort, so they might not be incentivized to promote ticket sales for performances with substantial capacity remaining. Under these contractual arrangements, promoters—who feel most of the pain from unsold tickets[258]—would have difficulty directing distributors to promote sales for certain concerts. This is because promoters, at the time ticket distribution contracts are signed, do not know and therefore cannot specify how ticket distributors should direct consumer inquiries. Vertical

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[257] *See, e.g.,* CHESTER I. BERNARD, THE FUNCTIONS OF THE EXECUTIVE (1954).

[258] As discussed above, *see supra* Part II, the first dollar revenues generated by a performances goes to the band as a "guaranteed advance." Only after this guaranteed advance is paid does the promoter share in any revenue generated by the performance.

integration enables the coordination of promotion efforts along the value chain and could therefore respond effectively to unanticipated market developments and consumer behavior. Vertically integrated promoters can flexibly adjust to initial sales by targeting shows that have substantial numbers of available tickets, especially through mechanisms that give promoters direct contact with ticket purchasers. Such coordinated adaptation, which responds to changing circumstances after activities already commence, is a central economic benefit to vertical integration.

The ability to coordinate the many actors in the live entertainment value chain could also lead to innovations that might generate new revenue opportunities. For example, Ticketmaster has said that consumers would prefer "end-price ticketing," in which ticket purchasers are quoted a single end price rather than a face value for a ticket upon which taxes, service fees, and other additions are added. However, securing an innovative pricing scheme, which would require new contractual relationships between artists (and their managers), promoters, venues, and ticket distributors, might require coordination and collective investments that may be difficult to engineer with multiple parties. This is especially true if any one party could extort the others by resisting change and holding out for a disproportionate share. Innovations that require such coordinated investments and collaborative information sharing from multiple parties are accordingly often pursued by vertically integrated entities. Although the literature regarding how organizations spur innovation is extensive, complicated, and replete with different conclusions, certainly it is plausible that innovations such as end-price ticketing and other creative reorganizations of ticket pricing would be pursued more effectively by a vertically integrated value chain.

3. Targeted Linkages Between Venues, Entertainers, and Fans

The CEOs of both Ticketmaster and Live Nation have stated repeatedly in public that the merger's objective is to develop new and better avenues to link artists with their fans.[259] These statements of "linkages," and other statements suggesting the possibilities of creating "new content,"[260] reflect the perception that connecting the creators of live entertainment with their fans can create desirable activities that are very costly, and perhaps impossible, to achieve under the current fragmented industry structure.

Firms that offer ticket distribution technology advertise that self-distribution empowers venues with a complete and thorough understanding of their fan base.[261] This is even truer for promoters like Live Nation that own numerous venues and serve a diverse and increasingly mobile fan base. The information garnered about ticket purchasers from Internet sales can facilitate the development of targeted and thus less

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[259] Michael Rapino, President & Chief Executive Officer, Live Nation, Written Testimony Before the Subcommittee on Courts and Competition Policy of the House Committee on the Judiciary, CQ Financial Transcripts (Feb. 26, 2009) ("This merger can help bring about the reconfiguration we urgently need. . . . Artists would be able to communicate directly with fans, and have the flexibility to experience with new approaches to deliver music."); Press Release, Live Nation & Ticketmaster, *supra* note 1 ("There is nothing more magical than the bond and the intimate relationship of fans to artists. It is truly an experience that needs to be embraced and nurtured with both integrity and respect. One of the mandates of the combined company will be to develop that bond to unsurpassed levels.").

[260] *Id.*; Irving Azoff, Chief Executive Officer, Ticketmaster Entertainment, Inc., Testimony Before the Subcommittee on Courts and Competition Policy of the House Committee on the Judiciary at 4 (Feb. 26, 2009) (Explaining the merged company "will be better able to develop new and innovative products and services that enhance the fan experience and make all forms of entertainment more accessible to everyone").

[261] http://www.veritix.com/solutions/ticket_event_marketing.aspx ("Veritix offers the most advanced marketing and data management tools in the industry, which means you'll know more about your customers than ever before"); www.neweratickets.com/why-net/whynet/you-own-your-data/ ("One of the first steps in marketing success is owning your customer data. . . . New Era Tickets provides a fully integrated and sophisticated database marketing product with your ticketing system that helps you use your customer data to increase sales.").

costly marketing strategies. Such information about the demands and preferences of a fan base also lays the ground work for the promotion of complementary goods and services such as recorded music, apparel, and other merchandise.[262] Promoters would be able to selectively market products to fans who have expressed specific interest in the promoted artists. Artists too can communicate and interface with their fan base such that they can both receive fan feedback and disseminate communications that would complement their performances. These interactions not only amount to new goods and content; they also create complementarities to the concert experience that enhance the quality of live performances.

Information on ticket purchasers would likely enhance the value of other sources of consumer information, such as data on music or merchandise sales that many promoters have. The synthesis of multiple sources of consumer information would seem to enable a valuable business platform for marketing multiple sources of content, goods, and services. Perhaps an important question is, if joining these sources of information could be so valuable, why Ticketmaster and Live Nation have not already entered information-sharing agreements to learn from each other's consumer data and jointly launch an e-commerce platform. Although a merger of the distributor and promoter is one way to unite the complementary commercial interests, antitrust law generally

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[262] Acquiring information on ticket purchasers can easily support parallel revenue sources. The Tessitura Network, for example, offers ticketing software that is tailored for the needs of non-profit organizations that produce arts and cultural entertainment. Its software "fully integrate[s] in one database ticketing, fundraising, memberships, marketing, reporting, customer relationship management, Web transactions, custom capabilities and more." *See* http://www.tessituranetwork.com/Products.aspx. Tessitura offers one illustration of how gathering information on ticket purchasers creates value for other organizational objectives.

requires parties (before claiming merger-specific efficiencies) to first entertain whether an alternative that is less restrictive to a merger would achieve the same efficiencies.

It does seem possible that careful contracts between Ticketmaster and the venues it services—contracts that carefully define property rights and privacy policies that would govern the consumer information for particular fan bases—could enable Ticketmaster's clients to pursue these revenue opportunities absent a merger, and if the merger were prohibited it is possible that these contracts would emerge.[263] However, Internet marketing has consumed e-commerce for nearly a decade, and it is surprising that a successful technology company like Ticketmaster has not developed such an Internet platform for clients that are highly tuned to emerging markets. Perhaps defining property rights and privacy policies are either noncontractible or extremely costly to contract for, or perhaps there is a collective action problem (similar to the general problem, described above, that results in suboptimal promotion) that deters the complete development of a useful database of fan preferences and consumer behaviors.

Another potential explanation for the lack of an e-commerce platform is that a Ticketmaster client might fear being beholden to Ticketmaster after proprietary information on its fans is assembled, or conversely, Ticketmaster might fear making sunk investments in acquiring such information only to see a client will then leave for an alternative distributor. Mitigating the hazards of such exposure is often difficult to do by contract given that a contractual solution would have to anticipate a great many risks that are difficult to anticipate. Under such circumstances, vertical integration offers a reliable

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[263] Scott Masten, *A Legal Basis for the Firm*, 4 J.L. ECON. & ORG. 181, 194-95 (1988) (observing that, in theory, multiple parties can always replicate the activities of the firm by entering into, monitoring, and perfectly enforcing multiple contracts).

solution. An integrated entity would not suffer from imprecise property rights or proprietary concerns over consumer information, and it would assuredly capitalize on the complementarities of, and the optimal incentives to produce and acquire, such consumer information.

In any event, it is curious that two highly successful companies have not yet managed to construct an e-commerce platform that current technology would permit, and one ready explanation is that contracts could not provide both companies the necessary security from expropriation of property rights or sunk investments. The promise of new content and fan-oriented complementarities seem to be compelling motivations, and perhaps more than any other factor are the primary motivation behind the merger, so one would expect that the companies would have previously pursued these opportunities if they could have. Vertical integration certainly would enable them to pursue these new markets, and there is good reason to suspect that without complete integration they might be unattainable.

4. Industry-wide Vertical Integration

Perhaps the most convincing evidence of efficiencies from vertical integration is that vertical acquisitions and integration strategies appear to be spreading across the industry. Antitrust law and the enforcement agencies have recognized that such an industry-wide trend can constitute prima facie evidence that vertical integration generates substantial efficiencies.[264] When, as here, firms without any chance of obtaining or protecting market power are pursuing such integration strategies, this trend is especially

[264] Dept. of Justice 1984 Merger Guidelines, § 4.24 ("An extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration.").

suggestive that the organizational shift reflects the realization of efficiencies not otherwise obtainable via traditional methods of ticket distribution.[265]

As is discussed extensively in Section III, self-distribution is becoming an increasingly popular mechanism for venues to sell tickets to their events. Self-distribution strategies are being pursued by small and large venues alike, and companies advertising the merits of self-distribution offer compelling efficiency (not market power) justifications. But recent years have also witnessed an assortment of vertical integration strategies that have brought venues, promoters, sports teams, and other producers of live entertainment closer to their respective fan bases, not just through ticket distribution but also through broadcasting and an assortment of Internet-based products. Some examples include:

1. Kroenke Sports Entertainment ("KSE") owns and operates the NHL Colorado Avalanche, NBA Denver Nuggets, MLS Colorado Rapids, Dick's Sporting Goods Park stadium, Paramount Theatre, Opera Shop theatrical company, and the Denver's Pepsi Center. In 2004, Kroenke dropped the Fox Sports Network, which had delivered games of KSE teams to more than 2 million households across the mountain west and created its own network called Altitude Sports & Entertainment. In 2007, KSE unveiled TicketHorse (powered by Veritix) as to service all events at KSE's soccer stadium, a year later KSE announced that the Pepsi Center, Nuggets, and Avalanche would begin utilizing Veritix's ticketing platform beginning in July 2009.[266]

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[265] Ronald H. Coase, *The Nature of the Firm: Influence,* 4 J.L. ECON. & ORG. 33, 39-40 (1988) (competition between economic actors will result in optimal degree of vertical integration).

[266] *See Kroenke Sports Enterprises Extends Deal with Vertix*, TicketNews (July 31, 2008), *available at* http://www.ticketnews.com/node/3411; Greg Griffin & Robert Sanchez, *A Look Inside Kroenke's Empire*, Denverpost.com (July 8, 2007), *available at* http://www.denverpost.com/null/ci_6318716. Kroenke Sports Executive Vice President Paul Andrews noted the value of vertical integration when he remarked, "[u]ltimately, we want the success or failure of that fan's experience to begin and end with us . . . . We can get you that ticket to the Rapids game; we can get you inside a great stadium; we can get you out of the parking lot quickly after the game; and when you get home, you can watch the highlights on TV." *Id.*

2. Comcast-Spectacor is a growing sports and entertainment venture that includes the Philadelphia Flyers, the Philadelphia 76ers, the AHL Philadelphia Phantoms, the Wachovia Center, and a 24-hour regional sports programming network, Comcast SportsNet. In 2003, Comcast-Spectacor used Paciolan's enablement solutions to develop New Era Tickets, a full-service ticketing company. In addition to these ventures, Comcast-Spectacor also operates two marketing services companies – Front Row Marketing Services (corporate sponsorships) and 3601 Creative Group (full-service marketing communications agency).[267]

3. Major League Baseball Advanced Media ("MLBAM") was created by Major League Baseball in 2000 to operate baseball's digital assets. In February 2005, MLB announced MLBAM had reached an agreement to purchase Tickets.com, which two years later introduced mobile ticketing, allowing fan's to receive ticket bar codes on their cell phones. MLB.com also offers live-streaming of all regular season games and other MLB-related content, including services that send content directly to subscribers' cell phones.[268]

4. OCESA Entretenimiento is a strategic alliance, formed in October 2002, by Grupo Televisa, the largest media company in the Spanish-speaking world, and Corporacion Interamericana de Entretenimiento, the leading live entertainment company in Latin America, Spain, and the Latin U.S. market. The deal vertically integrates the ticketing and promotion for concerts for Televisa's roster of Latino stars.[269]

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[267] *See* http://www.comcast-spectacor.com/CompanyHistory.asp. Comcast-Spectacor's annual summary notes that "the resources of other Comcast-Spectacor companies create[] a synergy that greatly benefits Global Spectrum clients. Whether it's by creating events, finding and developing naming rights and evaluating sponsorship opportunities (Front Row Marketing Services), establishing new revenue sources through concessions improvements and upgrades (Ovations Food Services) or engaging in out-of-the-box thinking about new ticketing and technology breakthroughs (New Era Tickets), Global Spectrum maximizes revenue potential and attracts a greater number of visitors at the venues it manages." Comcast Spectacor: Providing a Total Entertainment Experience, Annual Summary (2009), at 11.

[268] Jorge L. Ortiz, *MLB's Advanced Media Arm Pulls in Profits*, USA TODAY, Dec. 5, 2007, *available at* http://www.usatoday.com/sports/baseball/2007-12-04-baseball-online_N.htm; Tim Gray, *MLB Acquires Tickets.com: Major League Baseball Agrees to Purchase the Ticket Seller to Make the Ticket-Buying Process Easier for Fans*, InternetNews.com, Feb. 15, 2005, *available at* http://www.Internetnews.com/ec-news/article.php/3483356.

[269] Simeon Tegel, *Televisa's CIE stake OK'd, Deal joins ticketing, live entertainment businesses*, VARIETY, June 26, 2003, *available at* http://www.variety.com/index.asp?layout=print_story&articleid=VR1117888535&categoryid=1237. The companies state that the merger was motivated the prospect of developing new content and complimentary products. *See* Press Release, Grupo Televisa and CIE Form Strategic

5. Edgar Bronfman, Jr., CEO of Warner Music Group, suggested recently the record label will expand into downstream markets in an expanded effort to market and sell music and music products. Bronfman said the company is taking steps to offer ticketing services, touring, merchandising, fan club management, sponsorship, and artist management. Warner Music also has adopted a "360 strategy" that acquires all revenue streams for an artist's music rights, including ticketing, touring, merchandise, and sponsorship.[270]

It is difficult to determine how accurately these developments represent the industry at large, but at minimum they illustrate that the Live Nation-Ticketmaster transaction is one of several similar organizational developments in the vertical integration of live entertainment. It is significant that this trend has included companies in both vibrant and struggling economic sectors, companies that might plausibly enjoy market power and companies that in all likelihood have little-to-no market power, and an assortment of strategies that bring performers and content to end-users. Yet despite the diversity of players moving towards vertical integration, they all seem to state parallel motivations and seek the same category of efficiencies in their organizational strategies. Consequently, they strongly hint at some of the efficiencies that are likely to result from a Live Nation-Ticketmaster merger.

Addressing Critics of the Live Nation-Ticketmaster Transaction

On July 27, Senator Herb Kohl, Chairman of the Senate Subcommittee on

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Alliance for Live Entertainment In Mexico (Oct. 18, 2002) ("CIE and Televisa will benefit from the advantages of the live entertainment vertical integration model, the production and promotion of the best quality concerts, theatrical, family and cultural events, as well as the operation of entertainment venues, the sale of entrance tickets, food, beverage and souvenirs, and the organization of special, and corporate events.").

[270] Warner Music Group Corp F1Q08 (Qtr End 12/31/08) Earnings Call Transcript, http://seekingalpha.com/article/118835-warner-music-group-corp-f1q08-qtr-end-12-31-08; Caroline McCarthy, *Warner's Bronfman, MySpace's DeWolfe Talk Music*, http://news.cnet.com/8301-13577_3-10084715-36.html.

Antitrust, sent a letter to Assistant Attorney General Christine Varney to convey his belief that the proposed Live Nation-Ticketmaster merger "presents serious competition concerns."[271] That same day, Congressman Bill Pascrell sent a similar letter to Assistant Attorney General Varney, signed by fifty of his colleagues in the U.S. House of Representatives, that "urge[d] the Justice Department to analyze this proposed transaction closely and with great skepticism" and concluded that "[c]onsumers, business managers, artists, independent promoters, and music fans in every state are likely to suffer if the merger is allowed to occur."[272] These letters were reflections of recent opposition to the proposed Live Nation-Ticketmaster merger and articulate the most common arguments predicting that the merger will lead to anticompetitive consequences.

This is not the first time that congressional politics has intervened in agency merger review and not even the first time congressional politics has focused its ire at Ticketmaster. In 1994, congressional hearings featured Pearl Jam's testimony decrying Ticketmaster's pricing policies. These events illustrate the interesting tension between proper applications of antitrust law and popular (and often politicized) demands made on the enforcement agencies.

Most of the arguments that the letters—and other critics—articulate are addressed in the sections above. Both letters, for example, express fears that the consolidation of two current and future competitors will reduce horizontal competition in the market for ticket distribution services. Both letters also fail to recognize the efficiencies created in this industry by vertical integration, with one letter using "vertically integrated

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[271] *See* Kohl Letter, *supra* note 4 (asserting that Live Nation "start[ed] a ticketing business to compete with Ticketmaster (and as a result sold 5.8 million tickets in the first four months of 2009). If the merger occurs, this direct competition will be lost.").
[272] Pascrell Letter, *supra* note 4.

entertainment giant" as a pejorative term.[273] This section focuses on two arguments that are conveyed in the letters and by other critics yet are not addressed directly by the previous sections. Importantly, these two particular arguments are also iterations of common—and mistaken—fears that vertical mergers will enable a new entity to exploit its presence in one market to create unfair advantages in another. Current economic theory refutes these typical claims, and it similarly undermines the two arguments we address here.

1. Leveraging Market Power from Ticket Distribution to Concert Promotion

Critics of the proposed Live Nation-Ticketmaster merger have claimed that the transaction will empower the merged entity to leverage its monopoly position in the market for ticket distribution services to anticompetitively expand its position and harm competition in the market for concert promotion.[274] After the transaction, it is said, the new entity will condition access to Ticketmaster's ticket distribution services on venues' agreement also to book only Live Nation-promoted acts, thereby foreclosing other promoters from doing business with these venues.[275] Put another way, these critics predict that the new entity will be in a position to force venues to replace promoters they currently retain with Live Nation.

Such conduct would essentially amount to what one might call "a theory of prospective tying." Tying, of course, is already regulated under Section 1 of the Sherman Act, and while most ties are lawful, courts have held parties liable for arrangements that

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[273] Kohl Letter, *supra* note 4.

[274] Kohl Letter, *supra* note 4 ("[I]ndependent concert promoters may find it very difficult to attract artists who could otherwise use the vertically integrated Live Nation/Ticketmaster for its range of services."). *See also* Balto Testimony, *supra* note 151.

[275] *See* Balto Testimony, *supra* note 151.

create an undue risk of anticompetitive harm.[276] So-called "anticompetitive forcing," that is, the use of the seller's economic power over the tying product to coerce purchase of the tied product, is one such tying violation.[277] If the evidence indicated that the merged entity creates a high probability of such tying, then perhaps it would be appropriate to challenge it on that basis.[278]

However, as is explained in Part III, *supra*, it is doubtful that the new entity will possess economic power in the ticket distribution market, and therefore is unlikely to be able to coerce purchasers of live entertainment promotion.[279] To be sure, the merged entity would be entitled to reap the benefits flowing from such integration, such as cross-marketing products, and many of the stated purposes of seeking the merger was to bundle goods and services such that multiple revenue streams would accrue to artists and promoters.[280] Such bundling of goods is permissible so long as it does not coercively use market power to force purchases for reasons unrelated to the quality and price of the

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[276] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). Some tying arrangements are still deemed to be per se violations. *Id.*

[277] *See Jefferson Parish*, 466 U.S. at 14-16 (describing purported harm from such tying contracts in this manner). *See also* Fortner Enter. v. U.S. Steel, 429 U.S. 610 (1977) (same).

[278] *Cf.* FTC v. Consol. Foods Corp., 380 U.S. 592 (1965) (affirming FTC's determination that merger violated Section 7 because it resulted in probable reciprocal dealing between the remaining firm and its customers, thereby disadvantaging other potential suppliers to these same customers). *See also* Crouse-Hinds Co. v. Internorth, Inc., 518 F. Supp. 416, 442-43 (N.D.N.Y. 1981) (applying such a framework to determine whether vertical transaction would result in a propensity of tying that would justify its condemnation).

[279] *See On the Case: DOJ Quizzes Live Venues about Ticketmaster-Live Nation Merger*, BILLBOARD, Aug. 22, 2009 (reporting confidence of several small venue operators that Live Nation-Ticketmaster merger would not suppress competition in promotion market and that promoters would still bring live entertainment to small venues); *cf. Jefferson Parish*, 466 U.S. at 26-29 (holding that 30 percent share of the relevant market did not constitute economic power sufficient to establish per se tying violation).

[280] *See supra* notes 44-47 and accompanying text (describing the heightened economic significance of developing, and the corresponding plans to develop, Internet platforms to jointly market and distribute concert tickets with accompanying merchandise).

products offered.[281] But the mere prospect of bundled sales does not implicate the Clayton Act. A violation is possible only from the exercise of coercion that the merged entity does not seem to have.[282]

More fundamentally, the sort of conduct these critics describe would make little economic sense. Assuming the merged entity has monopoly power in the ticket distribution market, it would be diluting the profitability of that monopoly by subsidizing inefficient entry into the promotion market. Rudimentary industrial organization economics instruct that a monopolist's profit-maximizing strategy is to market its

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[281] *See* Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979) ("[A] large firm does not violate § 2 [of the Sherman Act] simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity – more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power."). This even applies to monopolists, who may make package sales so long as the purchaser's purchase of the package is voluntary. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) ("Where the buyer is free to take either product by itself there is no tying problem even though the seller may offer the two items as a unit at a single price."); *Marts v. Xerox, Inc.*, 77 F. 3d 1109 (8th Cir. 1996) (same).

[282] It is worth noting that even if Ticketmaster and Live Nation did intend on implementing a coercive tying arrangement, they would not have to merge to do so. Instead, they could simply pursue such a strategy via contractual cooperation, in which Ticketmaster would only provide ticket distribution services to firms that use the independent Live Nation as a promoter. Some firms have pursued tying arrangements by contract, *see, e.g., Atl. Refining Co. v. FTC*, 381 U.S. 357 (1965) (banning as unfair trade practice arrangement whereby oil company coerced its dealers into stocking and promoting tires, batteries and accessories manufactured by Goodyear), and even the leading tying decision in the past three decades involved a contract-based tying arrangement, *Jefferson Parish*, 466 U.S. at 5-8 (holding liable a hospital that allegedly required its surgery patients to employ anesthesiologists employed by an independent firm selected by the hospital). Such a policy would have the very same effect (or lack thereof) on competition in the promotion market as would the consummation of this merger.

monopolized product independently.[283] Moreover, this strategy also is vulnerable to common sense scrutiny. Requiring venues to deal with an unwanted promoter as a condition of employing the new entity's ticket distribution services would alienate many venues and effectively increase raise the price of its distribution services. A likely consequence would be a migration of business to competitors or the significant spread of additional self-distribution.[284] And because many venues are subject to medium term contracts, either with ticket distribution firms or suppliers of software that support self-distribution, such a tying strategy would face a temporal problem, as it would require the new entity to enforce promises made today several years from now, when conditions facing venues may well have changed. In the most basic sense, it would not be a wise, profit-maximizing strategy.

The congressional hearings examining the proposed merger included several regional promoters and operators of small-to-midsized venues who feared being continually outbid by an industry giant. Of course, outbidding competitors is part of the competitive process and translates into greater revenues for artists. More important, a competitive bidding process means that promoters who win bids are the ones who can generate the greatest revenue from those live performers. If Live Nation's merger with Ticketmaster or its access to upstream markets and creators of entertainment content enables it to outbid its competitors, then such bidding success is evidence of efficiencies that accrued from vertical integration and is a product of a procompetitive—not anticompetitive—advantage over its rivals. Smaller venue operators and promoters

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[283] JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION §8.4 (1997).

[284] *See Fruehauf*, 603 F.2d at 355 (rejecting FTC's conclusion that entity would favor its own downstream purchaser in time of shortage because such tactics would risk customer retaliation that would cause the new entity "greater economic harm").

might be advised to seek similar vertical integration strategies to obtain comparable efficiencies, and pursuing such strategies would make them part of the industry-wide trend towards vertical integration. But seeking to block an efficiency-enhancing merger because it might enhance a rival's competitiveness is antithetical to the aims of the nation's antitrust laws.[285]

2. Foreclosing Competition in Ticket Distribution

Congressional critics of the transaction have also claimed that a Live Nation-Ticketmaster merger will reduce competition and thus produce harmful effects in the market for ticket distribution, separate and apart from any impact on the market for concert promotion. These critics suggest that harm to the market for ticket distribution will occur through two mechanisms. First, they argue that the integrated firm will force

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[285] Live Nation's competitors—and Senator Kohl's letter to Assistant Attorney General Varney—expressed a related concern about how a Live Nation-Ticketmaster merger might affect competition in the promotion market. *See* Kohl Letter, *supra* note 4 ("Live Nation/Ticketmaster will automatically have valuable information about independent promoters' business, such as customer email addresses, demographics of concertgoers, and pricing of tickets, which they can use to directly compete for concert promotion business."); *see also* Hurwitz Testimony,*supra* note 2. Many of these smaller promoters and venues had previously contracted with Ticketmaster as a ticket distributor, and Ticketmaster consequently acquired information on these venues and their fan base over the course of providing distribution services. These promoters and venue operators, who are competitors with Live Nation, now fear that a merged Live Nation Entertainment will have access to give proprietary information to their competitor and damage fair competition in the market for live entertainment promotion.

We have no evidence suggesting whether these fears are well-founded, though we suspect that violating the trust of former clients would not help Live Nation Entertainment's commercial success as it aims to acquire new information on artists and fans throughout the country. We do suspect that an expropriation of this data would violate the terms of the service contract that Ticketmaster signed when agreeing to provide distribution services, and thus the merged company would be prohibited from improperly exploiting the data. Moreover, the Federal Trade Commission's Bureau of Consumer Protection monitors business use of private information, and any misuse of data by Live Nation Entertainment would invite appropriate scrutiny from that office. In short, there appear to be other legal means to prevent the misappropriation of private data in addition to preventing an otherwise efficient merger.

Ticketmaster services upon independent concert promoters, consequently reducing opportunities for competing ticket distributors,[286] and second, that the merger will effectively commit Live Nation to using the distribution services of the merged entity, thus depriving other distributors of that substantial business.

This first theory might be considered the flip-side of the previous argument: whereas some critics fear that the merger will enable the leveraging of market power in ticket distribution to harm competition in the promotion market, this argument suggests that the merged firm will leverage market power in the promotion market to harm competition in ticket distribution. At the risk of being repetitive, we note again that a theory of "prospective tying" is colorable only if market power enables anticompetitive forcing that coerces purchases of a tied product or service. Thus, as a preliminary matter, that this theory requires a showing that Live Nation has market power in a properly defined market for promotion. Because Ticketmaster does not currently participate in the market for promotion of live entertainment, the Live Nation-Ticketmaster merger would not change that market's concentration, and therefore the merged entity will be no more capable of coercive bundling than Live Nation is now. Since there have been no allegations that Live Nation currently attempts to tie its ticket distribution services to its promotional offerings (and, indeed, its market share in ticket distribution remains very small), then there is little reason to fear competitive harm after the merger.

Moreover, for the same reasons it makes little economic sense to bundle promotion with ticket distribution, it makes little economic sense to bundle ticket

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[286] *See* Kohl Letter, *supra* note 4 ("In addition, independent concert halls will likely be under strong pressure to use Ticketmaster's ticketing services if these venues wish to get booking from the leading acts promoted by Live Nation.").

distribution with promotion. Such attempts at coerced tying would not be in the merged company's best interest unless it harbored a hope that it could soon monopolize the market for ticket distribution services, but that market instead has exhibited declining margins and, due to widespread Internet technologies, might be unmonopolizeable. Again, difficulties in achieving coercive bundling does not mean that product and service bundling will not occur, and all suggestions from the merging parties indicate that they intend to offer clients and fans a menu of bundled products, merchandise, and other services. Without the possibility that this bundling is coercive, the presumption is that it reflects procompetitive efficiencies.

The second theory, that Live Nation's needs for ticket distribution services will be captured exclusively by the merged company, thus depriving Ticketmaster's rivals and potential entrants from that share of the market, is motivated by Live Nation's past as a large purchaser of ticket distribution services. In other words, the theory goes, the new venture will refuse to deal with competitors and entrants in the business of ticket distribution, and the remaining venues would not supply adequate demand to fuel a competitive threat to Ticketmaster. These critics conclude that for any firm to challenge the new entity's leadership in ticket distribution, it must enter the market at two levels–venue ownership and ticket distribution.[287]

There are several faults to this theory. First, the theory rests upon the assumption

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[287] *Id.* ("[V]enues can now [sic] be expected to solely utilize Ticketmaster's ticketing services. Being locked out of these concert halls is likely to make it difficult for any new significant ticketing service to emerge after the merger."); Pascrell Letter, *supra* note 4 ("The vertically integrated firm can withhold these critical inputs, and its rival will suffer. To avoid such problems, an entrant would need to enter the industry on several levels at once….). *See generally* 1984 Department of Justice Merger Guidelines, § 4.221 (describing how a vertical merger's propensity to raise barriers to entry by creating a market structure that requires two level entry can facilitate the exercise of market power).

that the market for ticket distribution is concentrated and that the merger enshrines Ticketmaster in a position of market power. The evidence detailed in Part III, however, indicates that the market for ticket distribution services currently appears to be quite competitive. The technology for ticket distribution is becoming increasingly widespread, with a number of new entrants in recent years as well as a growing number of venues that are pursuing self-distribution strategies. Because anticompetitive consequences in this market appear unlikely, it is unnecessary to scrutinize whether the merger forecloses entry because entry is not necessary to maintain competitive conditions.[288]

Second, the theory ignores the implications of Live Nation's recent decision to self-distribute the tickets to events at the venues that it owns or operates, a decision made before and independent of this transaction. Given Live Nation's self-distribution, pursuant to a long-term contract with CTS Eventim, potential entrants *already* lack access to the business of distributing tickets for venues owned or managed by Live Nation. Thus, even if the transaction somehow causes Live Nation eventually to abjure self-distribution, in favor of distribution by Ticketmaster (an eventuality about which we can only speculate), such substitution of Ticketmaster for CTS Eventim will have no impact whatsoever upon the opportunities for entry by possible rivals in the ticket distribution business and thus cannot for the basis for a finding that the transaction violates Section 7.[289] This would have been the case even if the merger had been

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[288] *See* 1984 Department of Justice Merger Guidelines, § 4.213 ("Barriers to entry are unlikely to affect performance if the structure of the primary market is otherwise not conducive to monopolization or collusion.").

[289] *See* Geneva Pharms. Tech. Corp. v. Barr Labs., Inc, 386 F.3d 485, 511 (2d Cir. 2004) (Section 7 did not forbid merger that itself had no impact on parties' ability to exercise market power, where any such power existed before the transaction and was not enhanced by it). Cf. *Alberta Gas Chems.*, 826 F.2d at 1245 (plaintiff did not suffer injury

proposed before Live Nation began self-distribution, when it enlisted the services of Ticketmaster. Those services were provided under exclusive contracts, so any fears of future foreclosure cannot be more severe than what was previously foreclosed under those contractual relationships. In fact, it was during Live Nation's exclusive ten-year agreement with Ticketmaster when new technologies began changing the landscape of the ticketing business and helped usher in several new market entrants, many of which have since challenged Ticketmaster in its traditional business. Consequently, the ticket distribution market is unlikely to be altered by the merger and should be expected to continue its recent dynamism.

Third, this theory of anticompetitive harm assumes that competitors and entrants in the ticket distribution market require access to Live Nation's venues in order to maintain competitive profitability. This vastly overstates the significance of Live Nation's control over America's venues. Some ticket distributors cater to niche markets and rely on sales to small or specialized venues to recapture a portion of their fixed costs, thereby reducing the number of large venue customers they would have to acquire to enter the market profitably.[290] For instance, Tessitura tailors its services to the needs of

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cognizable under the antitrust laws as the result of a vertical merger where a perfectly lawful transaction and subsequent conduct would have produced the very same harm); Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1983). *See also* United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1282 (W. D. Pa. 1977) (declining to count as "'foreclosed" output that had already been sold to merger partner before the transaction and thus was not available to the open market in the first place).

[290] *See Fruehauf*, 603 F. 2d at 358 (finding that FTC overstated minimum viable scale by ignoring fact that facilities could produce various forms of output in addition to products in the relevant market).

non-profits that produce artistic performances.[291] Additionally, experience in recent years has shown that ticket distribution companies or firms that provide the software supporting self-distribution can enter the market and remain profitable at relatively modest scale.[292] Thus, this is a case in which, to quote the Department of Justice Merger Guidelines, a secondary market—venues—is "sufficiently large and diverse [that] new entrants to the primary market [are] able to participate without simultaneous entry into the secondary market."[293] Any case against the Live Nation-Ticketmaster merger based on this "two-level entry" theory would fail for this reason alone.[294]

Summary

We close this analysis of the vertical elements of the proposed merger with the following summarizing remarks and preliminary conclusions:

1. Vertical arrangements, including vertical integration, arise to mitigate the costs of transacting in atomistic markets. Economists therefore broadly view vertical integration as a manifestation of organizational efficiencies, rather than as the exercise of market power. Antitrust doctrine has properly followed suit, with the enforcement agencies and courts generally taking a very lenient view towards vertical agreements and vertical mergers.

2. Economic theory predicts that the proposed Live Nation-Ticketmaster merger is likely to produce certain efficiencies that would not be attainable without complete integration.

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[291] Note that a firm could simultaneously enter the market for distribution to large venues and the market for distribution for small venues, thereby reducing the minimum number of large venues a firm would have to serve in order to recoup its investment.

[292] *Cf. Fruehauf*, 603 F.2d at 353 (stating that minimum viable scale of possible entrant is relevant consideration when determining impact of vertical transaction).

[293] 1984 Department of Justice Merger Guidelines, § 4.211 & n.31; *id*. at § 4.211 ("If there is sufficient unintegrated capacity in the secondary market [here, the venue market] new entrants to the primary market would not have to enter both market simultaneously.").

[294] *See* 1984 Department of Justice Merger Guidelines, § 4.21 (requirement of two level entry a necessary condition for a vertical merger to create harm under a "two level entry theory").

3. The live entertainment industry appears to have exhibited a broad trend towards vertical integration over the past decade, with many providers of entertainment—including those that are unlikely to enjoy any appreciable market power—internalizing ticket distribution, live broadcasts, and other services that create a direct interface with fans. The proposed Live Nation-Ticketmaster merger appears to be part of this larger trend.

4. Critics suggest that a Live Nation-Ticketmaster merger would enshrine Ticketmaster with market power in the ticket distribution market and enable Live Nation to leverage such market power to anticompetitively harm rival promoters. A careful examination of the industry structure and rudimentary economic logic, however, indicate that the vertical aspects of the merger would have no impact on either firm's market power.

V. Conclusion

In reviewing the proposed Live Nation-Ticketmaster merger, we observe that it is emerging out of a rapidly changing industry in which important technological developments are precipitating significant organizational transformations. These technological developments—especially the spread of software platforms that enable large and small venues to self-distribute tickets to their events—appear to have placed a check on any market power that Ticketmaster, or a merged Live Nation-Ticketmaster, would have to impose supracompetitive prices. Ultimately, whether the merged entity can exercise market power depends heavily on the ease of self-distribution and the general availability of ticketing technologies.

These and other technological developments (including the rise of pirated music and the evident growing reliance by artists on revenue from concerts) have induced performers, promoters, and venues to establish closer linkages with their respective fan base. These organizational changes appear able to generate sizable efficiencies. Vertical integration mitigates a coordination problem that hinders investment in acquiring and disseminating information, facilitates the cooperative adaptation necessary to respond to

unforeseen market changes and tailor responses, and enables creators of live entertainment to develop and market new content. We do not find convincing concerns expressed by critics that the vertical integration of these companies will foreclose possibilities for efficient entry. To the contrary, and consistent with advances in institutional economics and antitrust law over the past three decades, the vertical aspects of the Live Nation-Ticketmaster merger will more likely lead to efficiencies that will benefit both consumers and the competitive process.

Our analysis does not offer balm to all of those who have expressed fears for this merger. We should be clear that even though most evidence suggests that the Live Nation-Ticketmaster merger is procompetitive and therefore should not require intervention by enforcement agencies, there is no evidence indicating that the merger's efficiencies will slow the steady rise in the face price of concert tickets. It is hard to determine how the mechanisms underlying recent price increases would be affected by this merger, and the efficiencies we anticipate are perhaps more likely to translate into the creation of new markets, improved concert quality, and greater capacity utilization than in lower prices.

Moreover, the merger, along with the other forces that appear to be reshaping the industry, will probably be detrimental to certain parties. Some have feared that the merger—and probably the general trend towards vertical integration—will negatively impact the secondary ticket market. Certainly innovations such as paperless ticketing will reduce opportunities for secondary sellers, and perhaps other direct linkages between venues and fans will shut out those who seek to purchase and resell tickets. However, any such pain inflicted on secondary sellers is the competitive process at work and should

be compared, for example, to ills suffered by travel agents when airlines popularized and reaped efficiencies from Internet ticketing.

We also find no evidence to suggest that the merger will mitigate the difficulties that smaller venues currently have in securing marquee performers. In fact, their difficulties might be exacerbated. If the Live Nation-Ticketmaster merger produces the efficiencies we anticipate, the merged entity might be in the position to make even more attractive offers to artists. While the vertical efficiencies are clearly good for artists and fans, they do place more competitive pressures on Live Nation's competitors. Our analysis, however, does suggest that ticketing and other technologies should bring benefits to smaller venues as well (and we predict that many small venues will soon distribute their own tickets and construct their own Internet platforms) and they, like other parties in the industry, will have to retool to reap new opportunities.

Finally, our analysis offers no comfort to those who fear that the combination of two industry leaders creates a company so large and far-reaching that smaller competitors will be unable to effectively compete. This per se fear of size and economic power appears to be the source of most of the anxiety and ill will towards the proposed Live Nation-Ticketmaster merger. To these critics, antitrust has tersely and squarely said that the nation's antitrust laws "were enacted to protect competition, not competitors."[295] If the merged entity generates efficiencies such that they can produce live entertainment and serve artists and consumers alike at lower costs and with higher quality than their competitors, such that their competitors suffer economically, then the antitrust laws

[295] *See* Cargill Inc. v. Monfort of Colorado, 479 U.S. 104, 115 (1986); Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 488 (1979).

should provide no relief.[296] And if the proposed merger does not create efficiencies, then it necessarily creates market opportunities for these competitors. Mere size, whether resulting from internal expansion or a merger, does not offend the antitrust laws.[297]

To be sure, the live entertainment industry—and the entire music industry—is undergoing significant structural change that will require developing new business models and bracing for adjustments, but times of transition are not exemptions from competition. To the contrary, such times are often when competition is most critical. But whatever one's beliefs about the merits of competition, the antitrust laws are the law of the land and should be applied with discipline (as we aim to do here) and without second-guessing the deep-rooted statutory policy of maintaining competitive markets.[298]

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[296] *See* Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979) ("[A] large firm does not violate § 2 [of the Sherman Act] simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity – more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.").

[297] *Gen. Dynamics*, 415 U.S. at *passim* (government must prove that merger will likely produce anticompetitive effects); United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (mere size is not an offense under Section 2).

[298] In 1898, then circuit judge William Howard Taft famously warned against relying on "the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898). Although antitrust enforcers necessarily exercise some discretion in allocating their resources, their priorities have generally not reflected their policy views about the wisdom of fostering competition in a particular sector. Those who lament recent increases in concert prices, or who wistfully recall days of attending inexpensive and spirit-lifting concerts, *see, e.g.*, opening statements, House Committee Hearings, and question antitrust enforcement in the live entertainment industry because of their own policy preferences are subversive in a way that those who advocate rigorous enforcement of laws already on the books are not.