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Joycelyn Stevenson

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CHANGES IN THE TICKET DISTRIBUTION INDUSTRY:

by Joycelyn Stevenson

IS THIS THE BEGINNING OF THE END FOR TICKETMASTER?

The music industry, born and sustained by its consumers, has been less than "consumer-friendly" over the years. The burgeoning electronic ticket distribution industry provides a perfect example of a domain that has created a conflict between consumer choice and industry standards. While technological improvements have allowed for important developments in ticket sales and distribution, increased prices and massive service charges have tempered newfound convenience with added frustration. A prime target for complaints, the so-called "Ticketmaster monopoly" routinely draws the ire of not only consumers, who bear the burden of non-competition in the form of high prices, but also the entertainers themselves, who continue to lose control over the production of their concerts.

Ticketmaster's size makes it an easy, if not an appropriate, target. Currently, Ticketmaster is by far the top distributor of concert tickets in the country, serving approximately eighty-five percent of the largest venues in the United States.[1]

It maintains its dominance primarily through "exclusive dealing" agreements with such venues, where it also installs servers and terminals, adding to its apparent ubiquity.[2] In all, the ticketing giant has twenty-four call centers, 3400 points of distribution, and can claim per-quarter revenues near $60 million for its online units alone.[3]

This Note aims to explore the legal underpinnings of consumer frustration with Ticketmaster and the rest of the ticket distribution industry as it moves into the electronic age. First, this Note introduces Ticketmaster and examines its use of exclusive dealing agreements with local venues. It then discusses the relevant federal antitrust statutes affecting the industry and the market in which distributors operate. It also analyzes the role exclusive dealing agreements play in stifling competition. Next, this Note discusses the challenges—both legal and economic—to the industry's most visible member. It then discusses Ticketmaster as a possible product of competition in light of some of the new competitors that have entered the marketplace. Finally, this Note shows Ticketmaster as the aggressor in recent lawsuits against potential competitors and addresses the competing values of short-term price decreases versus a more long-term consumer-friendly market. Lastly, it summarizes the challenges facing the ticket distribution industry and recommends possible avenues for a compromise beneficial to all sides of the debate.

THE BIRTH OF TICKETMASTER

The first major ticket distribution company in the United States was New York based Ticketron (also known as Ticket Reservation Systems), which handled tickets for about one hundred large venues.[4] Ticketron introduced the option of buying tickets at a local outlet instead of at the box office.[5] A household name in the late 1970's, Ticketron soon encountered great difficulties in the market.[6] When consumers purchased tickets, they could not be sure exactly where the seats they purchased were located because they were only allowed to purchase the "best available seat," instead of purchasing a specific seat they wanted.[7] In addition, "the best seats often were available only through the box office," which made it cumbersome for consumers to retrieve seats to the most popular events via Ticketron.[8]

During Ticketron's prominence, Ticketmaster was virtually unknown. When the former began to falter in the market, however, Ticketmaster purchased its competitor and went about trying to refine its business model. Leading the charge was Fred Rosen, who took control of the company in 1982,[9] and immediately began to improve the ticket distribution system pioneered by Ticketron.[10] Some of the changes introduced included a heavier emphasis on concert promotion rather than sporting events, and a dramatic increase in the $1 service charge that Ticketron had originally charged for its tickets.[11] Ticketmaster executives also invented a profit-sharing scheme whereby event venues received a piece of the service charge, levied against consumers.[12] Critics likened this scheme to a form of "kickbacks;" supporters hailed the payments as a form of royalties on an investment.[13] Venues, on the other hand, were almost universally behind Ticketmaster's innovative and creative entry into a previously unutilized market.[14] As Ticketmaster poured millions into developing its distribution system, other companies gradually found themselves unable to compete.[15]

The perceptions of Ticketmaster as a monopolistic entity grew out of the takeover of Ticketron and the exclusive deals that emerged. Though the United States Justice Department approved Ticketmaster's request to purchase Ticketron, some critics insisted the merger was illegal.[16] With only one major player in the ticket distribution game in the early 1990's, they argued, it was unlikely that service fees would decrease for many years to come—a belief that has proven true.[17] Ticketmaster currently "sells tickets for eighty-five percent of the largest venues in the United States."[18] The company's relationship with these venues arose out of exclusive dealing agreements, whereby a venue agrees to allow Ticketmaster—and only Ticketmaster—to distribute tickets to its events. These contracts usually last around five to seven years, depending on the circumstances.[19] Not only does the company give venues a portion of the service fees it charges, it also provides venues with "servers, terminals and other equipment which can be useful in distributing tickets to consumers."[20]

Ticketmaster's fees and exclusive deals with venues have sparked a debate about the extent to which the ticket distribution industry can be considered competitive.[21] The company's reputation also has sparked a large amount of litigation, though investigations arising under federal antitrust law have routinely failed to find proof behind allegations regarding the company's alleged monopolistic hold over competition.

FEDERAL ANTITRUST STATUTES

Anti-competitive claims brought against businesses have historically arisen under §1 or §2[22] of the Sherman Act.[23] As one commentator noted, "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise . . . the freedom guaranteed each and every business is the freedom to compete."[24] The Supreme Court also announced the purpose of the Sherman Act in Apex Hosiery v. Leader:

> The end sought was the prevention of restraints to free competition in business and commercial transactions, which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.[25]

Price predation has been a part of the antitrust debate for the last twenty years.[26] The classic example of a predator is an entity "of such unequalled size and financial strength that [could use] a drastic cut in price . . . [to] eliminate a smaller competitor . . . and recoup its losses in that local market."[27] Any corporation's possible predatory practices should be analyzed under the Sherman Act, which then necessarily entails an inquiry into the relevant market for indications of relative market power.

With whom could Ticketmaster conspire in order to be in violation of § 1 of the Act? Collusion with the venues seems most likely, due to the exclusive dealing arrangements through which Ticketmaster offers software and services in exchange for the exclusive rights to sell tickets.

THE SHERMAN ACT

Section 1

Section 1 of the Sherman Act states that "every contract, combination . . . or conspiracy in restraint of trade among the several States is illegal."[28] To prevail under a §1 claim, the plaintiff must prove not only the requisite concerted action, but also that the conduct resulted in a restraint of trade.[29] There has been rigorous debate as to how much of a restraint is necessary for a violation. Clearly, however, §1 does not cover actions by single entities due to the "concerted activities" language in the statute. Thus, market dominance alone is not enough to infer that an entity is engaged in monopolistic practices.[30] Rather, violations occur as a result of activity between two or more entities acting together with a single purpose which negatively affects trade.[31] Evidence must "tend to exclude the possibility that the alleged conspirators acted independently."[32]

With whom could Ticketmaster conspire in order to be in violation of §1 of the Act? Three possibilities exist: (1) competitors, (2) promoters, or (3) venues. The first two possibilities are highly unlikely because neither group stands to gain from Ticketmaster's practices, and both have been leaders in the fight against the company. Thus, collusion with the venues seems most likely, due to the exclusive dealing arrangements through which Ticketmaster offers software and services in exchange for the exclusive rights to sell tickets. There has been no evidence, however, that concert venues have in any way conspired with Ticketmaster to cheat consumers.

Moreover, Ticketmaster's actions with respect to venues probably do not run afoul of §1 because the exclusive dealing arrangements are not part of a "conspiracy" to restrain trade. When Ticketmaster acquired Ticketron, it became the only full-service ticket distribution entity in the market, and many venues felt they lacked viable alternatives at the time they decided to enter into these agreements. Collusion and conspiracy to restrain trade were hardly the aims of the venues, which had a motive to enter the agreements entirely separate from Ticketmaster's. True, the venues also were interested in the exclusive agreements because of the benefits they would receive. But vendors are not necessarily concerned with whom they have exclusive agreements or what the other side might hope to achieve; they simply contract with distributors that give them the best deal. Therefore, §1 claims simply do not apply in such a case.

Section 2

Section 2 of the Sherman Act prohibits actual and attempted monopolization by a single entity.[33] The Supreme Court has defined the offense of unlawful monopolization under §2 as having two elements: "(1) the possession of monopoly power (i.e., the power to control prices or exclude competition in a relevant market); and

(2) an element of deliberateness (i.e., the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident)."[34] Simplified, the two elements can be viewed as an inquiry into both market dominance and the conduct establishing it. In order to demonstrate attempted monopolization, a plaintiff must prove: "(1) a specific intent to monopolize; (2) predatory or anti-competitive conduct; and (3) a dangerous probability of success in achieving monopoly power."[35]

Nevertheless, opinions diverge when it comes to deciding how and when monopolies form.[36] One side of the debate focuses on the disparity of power between large, dominant firms and their smaller competitors.[37] This side argues that the dominant-firm setting lacks the creative process necessary to drive competition.[38] As one commentator notes, "Small firms must endure extreme degrees of pressure and risk, while the dominant firm faces only light pressure."[39] However, another school of thought believes that "monopolies do not in fact exist [and that] . . . any high market shares merely embody efficiency."[40] Dominance accusations are viewed as justifying superior efficiency by the accused.[41]

This "efficiency school" has been successful in blocking many §2 actions since the middle of the 1970's,[42] and could explain Ticketmaster's continued dominance. The successes of Ticketmaster may merely stem from business efficiency and the idea that success comes to those who produce the best product. Based on the test set forth in §2, it is arguable whether or not Ticketmaster intended to monopolize the concert ticket distribution industry. Most critics believe that the lack of competition over the last ten years is a testimony to Ticketmaster's monopolization. However, it is much more likely that Ticketmaster offered consumers a better alternative through improved electronic ticketing access. Viewed this way, while they do prevent other companies from providing ticket distribution services at certain venues, exclusive dealing agreements are not per se anticompetitive.

Nevertheless, in order to investigate claims of monopolistic action, courts have consistently studied the relevant market in which alleged monopolies operate. Only through determining the relevant product and geographic markets in which a company operates can courts measure the market power of dominant firms in relation to smaller competitors, and thus make realistic determinations of monopolistic power.

Relevant Market

"The relevant market is the area of effective competition within which the defendant conducts business."[43] This market is usually defined in terms of products or geographic region.[44] A product market analysis examines possible substitutes for the product and whether competitors have been excluded from the market.[45] Geographic market analysis, however, looks at the "area in which the seller operates and to which the purchaser can practicably turn for supplies or services."[46] It is against both of these markets that Ticketmaster's power should be assessed.

The Supreme Court articulated the standard for determining the relevant product market in United States v. E.I. du Pont de Nemours & Co.[47] There, the court faced the issue of whether, if cellophane and other wrapping materials were neither fungible nor priced similarly, the market for other wrappings could be considered distinct from the cellophane market.[48] The court held that because the facts established that "cellophane was functionally interchangeable with other flexible packaging materials, there was no cellophane market separate and distinct from other flexible packaging materials," making it less likely that a monopoly was at work.[49] The Court also took into account other factors, such as price of services, use, and quality, in determining if there was a §2 violation.[50]

Similarly, in International Boxing Club of New York, Inc. v. United States,[51] the Supreme Court determined that "the relevant market was specifically the promotion of championship boxing rather than all professional boxing events."[52] The Court believed that "non-championship fights are not reasonably interchangeable for the same purpose as championship contests and there exists a separate identifiable market for championship boxing contests."[53] More recently the same reasoning was applied in NCAA v. Board of Regents of University of Oklahoma, in which the Supreme Court found that "intercollegiate football telecasts constitute a separate market because they generate an audience uniquely attractive to advertisers," and "competitors are unable to offer programming that can attract a similar audience."[54]

Unlike the dichotomy between "championship boxing" and all "professional boxing," the distinctions between concert tickets, sports tickets, and theater tick-

ets is not clear when debating possible monopolization in the ticketing industry. Ticket distribution companies primarily compete by soliciting exclusive agreements to distribute all types of tickets for particular venues. Those who argue that Ticketmaster's product market should be limited to those exclusive agreements with concert venues do so because this is where Ticketmaster garners most of its income.[55] The premise is that Ticketmaster has targeted large venues that have products for which an inelastic demand exists, comprised of people who go to certain events no matter the cost. In other words, if only thirty venues can handle the concerts everyone wants to see, and Ticketmaster has exclusive deals with twenty-five of them, it is effectively closing off the possibility of competition. This reasoning explains why defining the precise product market to which Ticketmaster caters is critical to determine if Ticketmaster has engaged in monopolistic behavior.

Critics of Ticketmaster have characterized its relevant market as a small, regional one consisting only of ticketing services to concerts. Ticketmaster, on the other hand, has pushed for a broader market consideration, given that it sells tickets to all kinds of events outside of the concert category. One could argue that the concert ticket industry is not interchangeable with that for sporting events and other forms of entertainment, and therefore a separate, identifiable market exists. Ticketmaster's characterization of its product market as a broad one, if accepted, lessens the likelihood that it would be considered a monopoly. Accordingly, Ticketmaster has argued that its product market encompasses "all tickets sold for entertainment events in the United States."[56] Thus, any effect Ticketmaster has on concert ticketing is small when compared to other events where consumers purchase tickets directly from the venue itself or even a competitor. For instance, even if the relevant product market is characterized as entertainment events held at stadiums, arenas, and auditoriums, Ticketmaster's market share is only thirty-seven percent.[57]

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An alternative analysis involves examining a relevant geographic market. Geographic market is the "area in which the seller operates, and to which the purchaser can practicably turn for supplies."[58] The court in American Football League v. National Football League held that it is "appropriate to limit the relevant geographic market to the area which the defendant sought to appropriate to itself."[59] As a result, some argue that Ticketmaster's geographic market is local because it is on the local level that Ticketmaster finds competitors trying to break its exclusive arrangements with venues. However, one could also contend that Ticketmaster is a national enterprise that operates throughout the United States. Moreover, as the Supreme Court stated in Brown Shoe Co. v. United States, the geographic market selected must "both correspond to the commercial realities of the industry and be economically significant."[60] Ticketmaster's reality is that it serves countless venues and consumers nationwide. Given the caliber of the services offered by Ticketmaster, it seems unrealistic to label its geographic market as merely local solely because competitors have only been able to compete on that level. The purpose of competition is to have other entities rise to the level of the industry leader in order to give consumers more efficient and effective alternatives.

Once courts define the relevant market, monopolistic power must then be proven.[61] The Supreme Court has determined that a party has monopoly power if it has "a power of controlling price or unreasonably restricting competition."[62] Monopoly power usually involves even more than "extraordinary commercial success."[63] It involves "the use of means which [make] it impossible for other persons to engage in fair competition."[64] Nevertheless, the defendant's market share can be a factor in inferring a monopoly. Also, even if a company's market share is less than seventy-five percent, if there are significant barriers to market entry, courts can still find a monopoly.

It has long been argued that exclusive dealing arrangements are a barrier to entry because they necessarily prevent competitors from gaining a share of the market.[65] Such agreements allow a venue to maintain a business relationship with only one particular ticket distributor for the entire period set forth in the contract. But these agreements are a vital feature of the current

ticket distribution system because they minimize the risk of conducting business in uncertain markets.[66] In addition, they reduce transaction costs, as venues and distributors can avoid needless negotiations of separate contracts for separate ventures.[67]

Still, exclusive dealing agreements remain subject to antitrust law, and hence must be analyzed under both the Sherman and Clayton Acts.[68] As a basic matter, selling a product on the condition that the purchaser cannot purchase or associate with a competing product is not permitted if the restriction negatively affects competition.[69] In United States Healthcare v. Healthsource Inc., the First Circuit Court of Appeals found that "[a]n exclusive arrangement may foreclose so much of the available

The Proper Aims of Antitrust?

As recent high-profile telecommunications mergers have spawned more support for increased antitrust regulation, old debates about the true purpose of antitrust regulation have returned in kind. Whom do antitrust laws strive to protect? When should that protection properly displace normal market forces? And to what extent? At times, there seems to be a different set of answers from each theorist confronting these questions.

Some commentators argue that instead of helping consumers, most antitrust laws only hurt in the long run. Others argue that antitrust regulation was never intended to protect consumers at all. Instead, they contend, such laws were intended to shield some firms from the efficiency of other large firms—completely eliminating the consumer from the equation.[1] Still others place consumer concerns at the forefront, claiming that antitrust is necessary to break up market concentration and to achieve maximum competitive benefits for the consumer.[2]

Responding to this debate, one school of thought rejects the legitimacy of antitrust regulation altogether. Critical of the ambiguity inherent in factors used to justify regulatory interference, members of the Austrian School of Economics believe that "real-world departures from perfect competition [are] not necessarily examples of market failure, nor [do] such departures rationalize antitrust intervention."[3] For instance, these scholars point to the inevitable problems involved with trying to measure abstract concepts such as "monopoly power" or "social loss." They suggest that, rather than summarily concluding monopoly power exists where large firms exist, "business organizations [with] above-normal profits [are] simply more efficient at managing risk, discovering preferences, and reducing costs over the long run."[4] As a result, the Austrian School argues that antitrust regulations unambiguously lower the efficiency of the market process and thus should be repealed.

On one hand, this sort of extremism seems to provide little in the way of practical guidance for antitrust analysis. On the other hand, however, theories such as that advocated by the Austrian School may lend some insight into the troubles with properly administering the regulations currently in place. Thus, while repealing the Sherman and Clayton Acts might ultimately be as unwise as it is unlikely, continued attention to divergent opinions about the proper aims of antitrust law is necessary to ensure that some sort of efficiency concerns are applied to the decisions to enforce those laws as they are to the subjects of enforcement themselves.

[1] D.T. Armentano, *Ideas on Liberty* (visited Feb. 2, 2000) <http://www.fee.org/freeman/94/Armentano.html>.
[2] See id. at 1.
[3] Id. at 3.
[4] Id. at 4.

supply or outlet capacity that existing competitors or new entrants may be limited or excluded . . . [reinforcing] market power and [raising] prices for consumers."[70]

When suppliers can only transact with one distributor, other distributors are foreclosed from transacting with these specific suppliers. Accordingly, if one distributor monopolizes the big suppliers in the industry, this exclusive distributor is virtually untouchable.[71]

The Supreme Court first addressed the legality of exclusive dealing arrangements in Standard Oil Co. v. United States.[72] There, the Court used a "quantitative substantiality" test to decide the validity of such agreements. The Court found that the effects on commerce could show the likelihood that the defendant would stifle competition.[73] Oddly, the Court failed to take into account the number and strength of other competitors or barriers to entry in that case.[74] However, the Court did abstractly analyze the number of competitors and entry barriers that can arise out of exclusive dealings.[75] This focus was illustrated when the Supreme Court held:

> In evaluating the substantiality of the market foreclosure in any given case, the court reasoned that it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the strength of the parties, the proportionate volume of commerce involved and the probable immediate and future effects which preemption of that share of the market might have on effect competition therein.[76]

Therefore, precedent shows that in deciding the validity of exclusive dealing arrangements, courts will focus on the relevant market of the accused entity because anti-competitiveness can only be measured against the specific market in which the entity is competing.[77] Put another way, if the entity is not competing in a particular market, then obviously it is not exerting a monopolistic hold in that market. Rather, "the relevant market is the area of competition within which the defendant conducts business."[78]

Defining relevant market becomes even more essential when formal charges have been filed against a company.[79] This bias is reflected in the belief that "market definition is intended to determine whether competitors have been foreclosed unreasonably such that other firms in the same market do not have the ability to keep the dominant firm from raising prices to supercompetitive levels."[80] Given the structure of the ticketing industry and Ticketmaster's position therein, what began as criticism has predictably resulted in formal allegations of monopolization being brought against the company not only by consumers, but by artists as well.

TICKETMASTER UNDER FIRE: ALLEGATIONS OF MONOPOLIZATION

Despite Ticketmaster's success, charges of monopolistic behavior have been an almost constant cloud over the company. Sources estimate that "in the post-Ticketron era, for every dollar of service fee increase passed along to consumers, seventy-five cents goes to Ticketmaster."[81] Some ticket buyers have argued that Ticketmaster "squashed any way of getting around service fees" by convincing venues not to open their windows the day shows go on sale.[82] Other criticism has come from concert artists, the very groups for whom the tickets are sold.

THE PEARL JAM FACTOR

On May 6, 1999, the band Pearl Jam filed a memorandum with the United States Department of Justice alleging that Ticketmaster's business practices amounted to anti-competitive, monopolistic action in violation of the Sherman Act.[83] Pearl Jam argued that Ticketmaster's overwhelming share of the ticket distribution market robbed consumers of free market choice.[84] The band also asserted that the company prevented them from using other distributors because of its exclusive dealing arrangements with nearly all of the major venues in the United States.[85]

The dispute began with Pearl Jam's Summer Tour in 1993, when the band requested that Ticketmaster list its service fee separately on the ticket so that customers would know what the band was actually charging.[86] Pearl Jam also tried to distribute tickets on their own, but ultimately failed because their promoter could not circumvent Ticketmaster's exclusive distribution agreements.[87] Unable to compromise privately, on June 30, 1994, Pearl Jam and Ticketmaster representatives testified before a subcommittee of the House Committee on Government Operations.[88] As a result of the ensuing debate, Representative John Dingell (D-Mich) proposed a bill "requiring ticket distributors to disclose the fee they add to the price of each ticket."[89] The bill eventually died, but Pearl Jam's resentment of Ticketmaster's operation did not. Years of small, non-Ticketmaster venue touring were followed by a brief period where the band

simply ceased playing live concerts entirely. Finally, Pearl Jam had enough and filed its action with the Department of Justice.

The D.O.J. investigation centered on the service fee that Ticketmaster divides among the major venues and promotion firms and the exclusive contracts with the venues.[90] In analyzing whether or not Ticketmaster constituted a monopoly by virtue of these practices, the Department of Justice used §2 of the Sherman Act as its reference point.[91] The Department found that to prove a violation of §2,[92] "the complainant must show that the firm possess monopoly power in a relevant market and that it willfully holds that power."[93] In addition to market share, some other factors that the D.O.J. analyzed included: "a decline in market share over time, testimony that the market was very competitive, a dominant firm's decision to lower its price in an effort to hold its market share, a substantial number of competitor's entering the market, and high technology and research costs."[94]

During the proceedings, it did not matter if Ticketmaster necessarily intended to monopolize the industry. Commentators have stated, "General intent is not an essential element of monopolization."[95] Pearl Jam relied on Lurian Bros. & Co. v. FTC, in which the Supreme Court held that agreements that on their face may not stifle competition, could still violate §2 of the Act.[96] The band claimed that Ticketmaster's dominance left no alternatives for them to use, causing the band to subsequently cancel its 1994 summer concert tour—a detriment to the band and to the consumers wanting to see them perform.[97] Ultimately, the case boiled down to a single issue, namely whether Ticketmaster's behavior was anticompetitive or if the company's rise to dominance in the business was a product of pure competition.[98] Pearl Jam suggested, "Ticketmaster acted like a predator when it reduced its profits in the short term in order to limit the growth of the alternative ticket distribution services."[99]

In the end, the D.O.J. found no wrongdoing on the part of Ticketmaster. But Ticketmaster's problems did not end with the D.O.J.'s ruling. A group of consumers subsequently filed an action against the company alleging price fixing violations and anticompetitive behavior. Although the case result did not cripple Ticketmaster, it did mark a pivotal point in the Ticketmaster reign and also may have exposed Ticketmaster's vulnerable spots to the rest of the world.

CAMPOS V. TICKETMASTER CORPORATION

In Campos v. Ticketmaster Corp., a group of consumers sued Ticketmaster for damages and injunctive relief related to anti-competitive business practices.[100] The complaint alleged a violation of §1 of the Sherman Act for "engaging in price fixing with various concert venues and promoters and [for] boycotting the band Pearl Jam."[101] The complaint also added allegations of "monopolizing or attempting to monopolize the market for ticket distribution services."[102] Finally, the plaintiffs cited a violation of §7 of the Clayton Act for Ticketmaster's attempt to acquire its competitors.[103]

The district court held that the plaintiffs lacked standing to sue because they were indirect purchasers in the market.[104] The court reasoned that the venues are the parties in a direct contractual relationship with Ticketmaster, not the consumers, and therefore only the venues would have standing to sue.[105] The court lastly held that the consolidated cases were "improperly venued" and thus dismissed the suit.[106]

STANDING

The Supreme Court held in Illinois Brick Co. v. Illinois[107] that "only the direct purchaser from a monopoly supplier could sue for damages under §4 of the Clayton Act." Additionally, "indirect purchasers generally lack standing under the antitrust laws and so cannot bring suits for damages."[108] Thus, in deciding who has standing to sue, defining a direct purchaser is important in the antitrust analysis. Commentators have observed that "an indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another independent purchaser . . . [and] such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear."[109]

The justification for the dichotomy between a direct and indirect purchaser is that a monopoly overcharge can injure direct purchasers and those who deal derivatively with a monopolist.[110] For example, a direct purchaser could deal directly with a monopolist and in turn pass on the consequences of this relationship (i.e. increased prices) to indirect purchasers (i.e. consumers). Although the indirect purchaser has still been affected by the monopolistic power, this is generally considered an example of "incidence analysis."[111] However, if indirect and direct purchasers both had standing to sue, courts would have to apportion payment of overcharges between the

two types of purchasers. Alternatively, they would have to allow duplicative recovery—which the Supreme Court has expressly and continuously rejected.

The consumers in Campos claimed that they were in fact direct purchasers of "ticket distribution services" from Ticketmaster, given that Ticketmaster's service fees are paid directly to the company.[112] The Court of Appeals, however, found billing practices to be indeterminate of purchaser status, holding that "plaintiffs' inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so."[113] While performers and entertainers cater to the needs of consumers, the ticket distribution industry serves the needs of venues. Moreover, consumers buy the tickets from Ticketmaster only after the venues have first bought distribution service. Given these facts, the court concluded, "Such derivative dealing is the essence of indirect purchaser status, and it constitutes a bar under the antitrust laws to the plaintiffs' suit for damages."[114] Accordingly, the Campos court dismissed plaintiffs' claims for damages under §4 of the Clayton Act.[115]

But that holding was far from the end of the case. While consumers cannot sue for damages under §4, "indirect purchaser status does not bar the plaintiffs from seeking injunctive relief under §16 of the Clayton Act" because there is no need to trace damages when injunctive relief is sought.[116] Consequently, the court rejected Ticketmaster's argument that no antitrust plaintiff can seek injunctive relief unless he also may seek damages.[117] Instead, the court held that the payment of service fees by plaintiffs established standing to pursue a claim for injunctive relief and remanded the case based on this holding.

The Court of Appeals lastly addressed the district court finding that pursuant to §12 of the Clayton Act, Ticketmaster was not transacting business in Georgia, Washington, or Michigan "because it did not exercise 'day to day' control over the operations of its subsidiaries located in those districts."[118] The Court of Appeals held that the district court applied the wrong venue standard in the case. Section 12 of the Clayton Act provides in part, "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business."[119] When a parent company is brought into a suit based on the activities of a subsidiary, the court usually focuses on "whether the parent exercises sufficient control over its subsidiary to cause the parent to transact business." If the parent company exercises such control, it is virtually impossible to argue that the parent is not conducting business in the state where the subsidiary is located. Of particular importance is the parent company's ability to influence decisions of the subsidiary.

The Campos decision was troubling because it virtually precluded any consumers in the Eighth Circuit from being able to seek damages from Ticketmaster based on anticompetitive and monopolistic principles. Relying heavily on the Illinois Brick indirect purchaser analysis, the Court of Appeals found that the venues, not the consumers, were within the direct chain of purchasing with Ticketmaster, and thus the consumer could not be afforded a remedy in this situation.

However, the consumers' relationship with Ticketmaster is not necessarily through the venues. The venue does not purchase the tickets from Ticketmaster to sell to the consumer; the consumer purchases tickets directly through Ticketmaster. In fact, consumers may not even know which venue a particular concert is in until they buy the tickets. In other words, the venues are not true middlemen in the direct/indirect purchasers' sense. Ticketmaster, not the venue, bills the service charges directly to the consumer. Moreover, since the venues, under their contract with Ticketmaster, receive a cut of the service charges on the ticket, they are not merely "passing along" costs to the final purchaser.

This point highlights another flaw with the decision. Under the court's reasoning, the venues would have to bring suit in order to sustain an action for monetary damages. However, it is highly improbable that a venue would ever bring suit against Ticketmaster when they receive software, servers, and portions of huge service charges from the company. Thus, consumers are completely barred from even being able to argue the right to some form of monetary compensation, while the venues that can sue benefit from not doing so.

On January 19, 1999, the U.S. Supreme Court denied the consumer's petition for a writ of certiorari from the United States Court of Appeals for the Eighth Circuit.[120] As a result, once again, the merit of whether or not Ticketmaster exerts a monopolistic stronghold over the ticket distribution industry remained undecided. Of course, that the Campos decision is troubling does not automatically mean that Ticketmaster is a monopoly. It may be that Ticketmaster is just another company in the

ticket distribution industry vying for a large share of the market. Even so, consumers should still have the right to challenge these practices and have their concerns litigated on the merits.

Given the strict governance of the dichotomy between indirect and direct purchasers, however, the issue of Ticketmaster's power may never be litigated. The Justice Department could still independently investigate the alleged monopolistic behavior of the company, but even this possibility seems unlikely. After all, the consumers who brought the suit against Ticketmaster alleged that the company's 1991 purchase of Ticketron gave the company a monopoly.[121] Even back then, critics had echoed such concerns given that there were no other real competitors in the industry, and that the acquisition would allow Ticketmaster to dominate the ticket distribution industry. But the D.O.J. approved the purchase nonetheless. Given that the Justice Department was aware of the potential domination of the company when it approved Ticketron's acquisition, it is unlikely that the D.O.J. would be moved today to declare the company a monopoly. But almost nine years after the D.O.J. hearings, it remains necessary to at least discuss whether competition exists to support the argument that Ticketmaster's dominance is more a product of the market than a pure monopoly.

Most critics of Ticketmaster argue that the company's practices meet §2 of the Sherman Act criteria for monopolization or attempted monopolization. They argue that Ticketmaster has acquired and maintained its power through deliberate anticompetitive conduct. It may be more realistic, however, to suggest that Ticketmaster is a product of the market, not the illegal dominator of it. In other words, if one looks at the new companies poised to challenge Ticketmaster, it becomes clear that Ticketmaster's rise and ten-year reign on top is a product of competitive market forces, not necessarily anti-competition.

Inquiries into Ticketmaster's continued domination of the ticket-distribution industry must also be sensitive to the critical developments within that industry. Many of these new changes are due to the Internet. More promoters, and even some venues, are viewing the web as an untapped channel through which to sell tickets to consumers.[122] Commentators suggest that, "now that ticketing companies are emerging to meet their needs with different business strategies, competition is back in the ticketing industry."[123]

In all, several new and old entities have the potential to give consumers viable alternatives to Ticketmaster's alleged monopoly.[124] These entities also further advance the arguments that only in certain conditions will a suit against a dominant firm prove successful.[125] In order to illustrate Ticketmaster as a mere product of competition, one must examine some of the potential market threats to Ticketmaster's dominance, in the wake of allegations of monopolization.

COMPETITORS

TICKETWEB

TicketWeb proclaims itself as a "proconsumer" company that "exploits the efficiencies of the Web and computerized voice-mail to reduce service charges."[126] For the last three years, the company has promoted itself as an alternative to Ticketmaster, and successfully secured large-scale events at the Louvre, Wimbledon, and Premier Parks.[127] One year after Pearl Jam went head-to-head against Ticketmaster, the CEO of TicketWeb decided to "kill service charges using the web."[128] The strategy of the company is to go after "nightclubs, film festivals, performing arts centers"—virtually any place where "anti-monopoly sentiment and regional distinctions make it more difficult for Ticketmaster to infiltrate."[129] TicketWeb has even ventured to South Africa, landing a deal with the 30,000-seat Dome in Johannesburg.[130] As a result, the company netted $4.5 million in 1999 ticket sales and is expected to jump to $22 million at the end of 2000.[131]

But TicketWeb is no longer exactly a competitive threat to Ticketmaster, which announced on May 30, 2000, that it is acquiring TicketWeb for about $35 million in stock.[132] TicketWeb will keep its website and customers will be able to link to the company's site through Ticketmaster's webpage. In the end, TicketWeb will receive much more exposure for smaller-scaled events, while Ticketmaster increases in dominance in the industry.

TICKETS.COM

In June 1996, a Connecticut-based ticketing software company, Hill Arts and Entertainment purchased nine ticketing companies and created "Tickets.com."[133] This new entity in turn acquired two types of companies: "software-licensing firms and ticketing distributors."[134] Like Ticketmaster, Tickets.com offers venues hardware and software, and charges high services charges for its tick-

ets. In June of 1999, the company filed to go public, positioning itself as "Ticketmaster's first competitor with any real muscle."[135] The company has a website offering links to artists and events. If one searches for a particular entertainer, not only will he or she get information on the artist, but if the company is not handling the shows personally, the consumer will also get links to brokers that have the artist's tickets and the ticketers that sell the tickets—"even if it's the competition."[136]

With the launch of its Virtual Wristband service, Tickets.com now offers another alternative for consumers. [137] Under the program, consumers who register for hot ticket events during a window period are assigned numbers and given seat selections through a lottery system.[138] At present, it is impossible to predict what impact such an innovation will have on the industry, but it should be recalled that it was only through such types of innovations that Ticketmaster became the dominant player it is today.

SFX Entertainment

SFX is probably in the best position to tackle Ticketmaster's power. The new concert-business conglomerate "threatens to transform the $1.3 billion live-music industry."[139] It is the first nationwide concert promoter. Last year, SFX began buying a handful of the best-run, most powerful independent concert promotion companies, and it now controls forty-two major concert venues and more than one hundred clubs and theaters.[140] SFX has also purchased several concert sites in the New England area, furthering rumors that it is setting the stage to take over all concert events.[141]

Ticketing is another arena in which SFX is trying to make a dent. While Ticketmaster has overshadowed many of the smaller, unfamiliar ticket distributors, SFX may prove more of an adversary. SFX acquired the company, "Contemporary Group," which operates its own regional ticketing operation.[142] Insiders at SFX have alluded to plans to directly challenge Ticketmaster's operation.

Interestingly, SFX is coming under fire in much the same way as Ticketmaster. SFX has been accused of trying to dominate not only the ticket distribution industry, but also the concert industry as a whole. Of particular concern to industry observers is SFX's alignment with the Marquee Group.[143] The current head of SFX, Robert Sillerman, is also chairman of Marquee, "a New York based agency that brokers corporate sponsorship deals for arenas."[144] Big sponsorship typically delivers blocks of seats to big companies who pay for logo placement. As a result, average ticket buyers lose out in many of the best seats.

SFX hopes to become a "vertically integrated" company, with the capability "to produce shows, book tours, manage and book artists, cut deals on its purchases of concession goods and other supplies, and lastly sell tickets."[145] The company has the potential of being a one-stop shopping conglomerate. On February 29, 2000, Clear Channel Communications Inc. acquired SFX Entertainment Inc.[146] Through this deal, Clear Channel will own radio stations, outdoor advertising properties, and live entertainment venues in more than half of the top fifty U.S. markets.[147] Clear Channel, the world's largest billboard company, also owns 400 radio stations in one hundred markets in the United States and Puerto Rico.[148]

When CEO Sillerman was asked if Ticketmaster should be worried, he replied that SFX has invested a large amount of capital development in the ticketing business.[149] Sillerman also noted that Ticketmaster has had the benefit of relatively sparse competition over the past few years.[150] Insiders argue that it will take at least a year for the savings of SFX to trickle down to the consumer, if and when it decides to tackle Ticketmaster's dominance.[151] But with $1.3 billion spent by consumers in North America alone on concert tickets in 1999, the savings may be worth the wait.

Other Small Companies

There are other smaller companies that have not reached the level of SFX, but nonetheless remain key to the debate on the market power of ticket distribution agencies. One of these companies is BASS Corporation. BASS is a San Francisco Bay area vendor that handled the ticketing for Billy Graham Presents.[152] In 1986, BASS was the dominant computerized ticketing service in Northern California.[153] The company entered into a licensing agreement with Ticketmaster, which allowed BASS to use Ticketmaster's computer system and its name in advertising.[154] Ticketmaster also allocated the Northern market exclusively to BASS.[155]

Another small company is ETM, the company Pearl Jam turned to during its battle with Ticketmaster in 1994.[156] "ETM builds interactive kiosks in grocery stores where consumers can buy tickets that carry a fraction of Ticketmaster's service charge."[157] The company

operates in fourteen major markets with exclusive contracts with ten major-league sports teams.[158]

Launch.com and CultureFinder.com are two more web-based companies offering information about artists as well as tickets to consumers at lower prices. Launch.com is a music website offering news about bands, interviews, videos, etc.[159] The company is contemplating selling tickets online to the already popular base it has established. Similarly, CultureFinder.com is a website that offers a database of listings for various events.[160] Plug in the name of an event or city, and CultureFinder calls the venue and reserves tickets for the consumer at the box office.[161]

THE FUTURE OF TICKETMASTER

The foregoing companies make up the short list of competitors that have the potential to threaten Ticketmaster's dominance. Many are in the position similar to that of Ticketmaster years ago when Ticketron was on its way out of the distribution game. The rise of competitors has left Ticketmaster on the defensive, not nearly as untouchable as it had been in the past. Part of this defensive stance is evident in the increased amount of Ticketmaster-initiated litigation in the last couple of years.

Recently, Ticketmaster has filed a series of lawsuits against entities that deep-link to its website. For example, Ticketmaster sued Tickets.com, accusing it of "illegally linking into Ticketmaster's web pages and providing false and misleading ticket price information to the public."[162] On April 28, 1997, Ticketmaster also sued Microsoft for including a link to the Ticketmaster home page on Microsoft's Seattle Sidewalk entertainment site.[163] Ticketmaster argues that a company needs a formal license agreement in order to link to its site. The linking problem ultimately stems from the contracts that Ticketmaster has with certain advertisers, requiring them to display certain ads on Ticketmaster's main web page. When consumers log onto Ticketmaster's website, they go through several pages of ads before getting to the page where one purchases tickets. When other entities link directly to the purchasing page, they bypass the advertisements, violating Ticketmaster's deals with various advertisers.

One could argue that Ticketmaster's attempt to prohibit "deep-linking" onto its site is yet another example of the company's attempt to monopolize the ticket distribution industry by crippling the competition. However, no proof of such a motive exists. Alternatively, Ticketmaster's efforts could be aimed at trying to preserve its existing legal trademark and sponsorship deals. Given that the exclusive deals Ticketmaster engages in are perfectly legal, and that new competition is entering the market, it is less likely that the deep-linking controversy would be construed as sufficient evidence of the company's monopoly over the ticketing industry.

CONSUMER POLICY

The controversies surrounding the ticket distribution industry inherently implicate two competing values that consumers, promoters, venues, and ticketing companies must tackle—short-term price decreases versus a long-term better market. The short-term/long-term price dichotomy stems from the service charges that Ticketmaster and even some new entities are using. These service charges can be extremely high, especially with high-selling tickets. As mentioned, consumers in the United States have been virtually precluded by the Supreme Court from receiving relief from these sometimes exorbitant fees. The Department of Justice also concluded that Ticketmaster's actions do not meet the stringent test of being monopolistic. Both conclusions beg the question of what remedy, if any, the consumer has with respect to the purchasing of tickets.

The controversies surrounding the ticket distribution industry inherently implicate two competing values that consumers, promoters, venues, and ticketing companies must tackle—short-term price decreases versus a long-term better market.

There is, however, a bigger issue besides the short-term benefit of lower service charges. Antitrust laws aim to protect competition and the ability of different types of companies to fill certain needs in the marketplace. When Ticketmaster bought Ticketron in 1991, there were no comparable entities in the market to challenge the company's power. However, the Justice Department allowed the Ticketron acquisition, and subsequent courts have been unwilling to label Ticketmaster a monopoly because of the importance of a better long-term market. Today, Ticketmaster is being challenged by entities that are able to capitalize on Ticketmaster's poor reputation and pick

up some of the exclusive deals that are expiring between Ticketmaster and some larger venues. Also, there are hundreds of untapped, smaller venues not under contract with Ticketmaster, that competitors can utilize to gain market share. Some companies are using these smaller venues to build up their base so that when exclusive deals begin to expire with Ticketmaster, they are in a position to fill the void.

The individuals who are usually overlooked in the long-term market scenario are the consumers. In theory, the concert industry and most conglomerates cater to the needs of the consumers who purchase the music and concert tickets, thereby creating the popularity of many artists. Concern for consumer welfare was one the factors motivating Pearl Jam's actions back in 1994. But as those actions have continued to fail, so too does the consumer continue to bear the brunt of the service charges that many of these ticket distribution companies charge. As a result, the issue today is not so much whether there is a monopoly in the ticket distribution industry that negatively affects consumer choice, but what consumers and the industry can do in the short-term to lessen any negative affects of a long-term better market.

The emergence of new players in the ticket distribution industry will not automatically break up the alleged Ticketmaster monopoly. But they do call into question whether or not Ticketmaster can maintain both its dominance and its consumer relations on equal footing. Ticketmaster would not be what it is today if consumers had not availed themselves of its services. The question is whether consumers use Ticketmaster because they have no choice or because of the convenience of Ticketmaster's service. The answer, clearly, is key in this ongoing monopolization debate.

Antitrust law is traditionally viewed in terms of the black letter law and the Supreme Court's treatment of the Sherman Act. But recently, another perspective has evolved that investigates how consumer policy fits into the antitrust debate.[164] Some believe that too much protection "fosters too much dependence . . . that [in turn] undermines consumer sovereignty and discourages individual judgment."[165] The idea is that companies/sellers who provide the best service will be amply rewarded.[166] The marketplace presupposes a semblance of equality of power between sellers and buyers.[167] Consumers, thus, bear some responsibility in how the market treats them. In the words of one commentator:

> Unceasing vigilance on behalf of consumer rights is—and must remain—a hallmark of market improvement policy. At the same time, the pendulum must not be allowed to swing all the way from letting the buyer beware to letting the seller alone to do so . . . this would lead to market replacement substituting for market improvement.[168]

ENCORE! ENCORE!

Over the past decade, the market, the courts, and increased competition have all provided indications that Ticketmaster was and is not a monopoly aimed at stifling competition in the ticket distribution industry. While the cost to consumers has been relatively high in the wake of increased service charges and fees, efficiency sometimes comes at a price. After acquiring Ticketron, Ticketmaster became, and still is, the premier ticket distribution outlet for concerts and sporting events in the United States. This power and dominance has sparked allegations that the company attempted to monopolize, and in some instances had held a monopoly on, the ticketing industry due to the decade-long lack of real competition in the industry. This dominance could be explained partly by the exclusive dealing agreements entered into with several large venues, making the company the sole distributor for these venues for five to seven years at a time.

Antitrust violations are typically analyzed under §1 and §2 of the Sherman Act. Ticketmaster has not conspired with competitors, promoters, or venues to cheat consumers or other competitors out of their share of the market; therefore, §1 should not apply. Section 2 does cover attempted and actual monopolization of an industry by a single entity, however no proof exists that Ticketmaster has the predatory conduct necessary to fall under this rule. Additionally, market realities suggest that Ticketmaster's relevant market should be viewed as a broad one, encompassing all entertainment ticketing instead of mere concert ticket sales on a local level. A huge part of determining relevant market is determining in which arena a particular company intended to be bound. Narrowing Ticketmaster's market to concert ticket distribution unfairly breaks the conglomerate into marginalized parts solely for the benefit of competitors in local arenas.

In addition, while the exclusive dealing agreements prevent other competitors from dealing with certain venues for a period of years, most of these agreements have

been judged perfectly legal. Considering that many of these deals were entered into in the early 1990's, it is now possible for competing companies to fill the void if they offer a more efficient and effective alternative to Ticketmaster. SFX Entertainment is a prime example of an enterprise that is able to introduce a new type of ticket distribution methodology to consumers. SFX not only distributes tickets, but also promotes and sponsors actual concerts—a "one-stop shopping" approach. Of course, a big concern is that SFX is almost worse than Ticketmaster in that a large number of businesses will be unable to compete with the large-scale events and ticketing devices.

In the end, the consumer ultimately controls the market. If consumers were less willing to pay for events at any cost, then companies like Ticketmaster and SFX would not be able to sustain their dominance for so long. But at least for now, efficiency seems more important to the consumer than price. Ticketmaster has succeeded because a consumer can purchase a ticket online, view where they are sitting, and link to a similar site all at the same time. Any competitor wanting to displace Ticketmaster will have to provide at least that much to attract any substantial number of consumers. After all, while the Campos decision did not allow consumers to directly sue Ticketmaster for damages, consumers are still able to sue for injunctive relief if they choose to do so. The fact that the plaintiffs in Campus did not pursue that option is a testament to the apathy many feel in connection with the ticketing industry. Competitors who have been complaining for the past ten years about Ticketmaster will also have to be more aggressive and innovative in their approach to needs in the market. Ticketmaster was able to takeover Ticketron because of innovation and increased efficiency in the method of ticket distribution offered to consumers. Since "consumer friendliness" is the objective, making it easier for consumer to retrieve tickets may be the wave of the future. Ticketmaster pioneered the most efficient way to purchase tickets; a system allowing consumers to print tickets from home could be the next big move in the industry. It should come as no surprise then that Ticketmaster, along with rival Tickets.com, is currently working on providing such a service to consumers.[169]

A more drastic solution, but perhaps a necessary one, is to eliminate exclusive dealing agreements from the ticket distribution industry altogether. Exclusive dealing agreements, while not illegal, are technically unfair to those competitors who do not operate their businesses on such a large-scale. Granted, the venues with which Ticketmaster has exclusive agreements were not necessarily strong-armed into these agreements. And to Ticketmaster's credit, it has generally provided the best service to consumers, while providing venues service equipment, terminals, and monetary benefits in exchange for the ability to be the sole distributor for their events. Nevertheless, if venues were able to switch companies when they grew dissatisfied with particular distribution services, it would give smaller competitors the opportunity to get into the ticketing game much sooner. Venues should be allowed to enter into a contract with a distributor that works for them, without having to stipulate that it will not hire someone else for several years, even if they are dissatisfied with the service.

For now, however, the bottom line is that Ticketmaster continues to dominate because it builds the best mousetrap, so to speak. High service charges are simply a by-product of marketing efficiency—one that consumers appear willing, if not always happy, to accept. The emergence of new competitors in the marketplace will test whether this compromise remains a viable one in the future. Just as Ticketron was eliminated by Ticketmaster in the early 1990's, it is quite possible for other entities to threaten Ticketmaster's dominance as well. Ultimately, only time will tell if Ticketmaster's reign has come to an end and what the future holds for the entire ticket distribution industry—and for the millions of music, sports, and theater fans it purports to serve.

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[1] Lessley Anderson, *Tickets! Please*, THE INDUSTRY STANDARD. Oct. 4, 1999, at 3.

[2] See id. at 1.

[3] Id.

[4] Id.

[5] Eric Boehlert, *Ticketmaster is Under Fire; How David Became The Industry's Goliath*, BILLBOARD. July 9, 1994, at 2.

[6] See id.

[7] Id.

[8] See id.

[9] See id. at 1.

[10] See id. at 2. ("Ticketmaster set out to improve [the] system so that all tickets, drawn from the same computers, would be availbe at satellite locations as well as the box office. The move represented a marked improvement for customers.").

[11] See Boehlert, *supra* note 5, at 3.

[12] See id.

[13] See id.

[14] See id. at 4.

[15] See id. at 5.

[16] Id.

[17] See Boehlert, *supra* note 5, at 6 ("A 1991 survey by the New York State Consumer Protection Board found that fees vary widely, with some climbing as high as 55% of the ticket price.")

[18] See *Ticket Distribution Industry: Hearings on Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theatre Ticket Handling Charges and Other Practices Before the Subcomm. on Information, Justice, Transportation and Agriculture of the House Comm. on Government Operations*, 103rd Cong., 2d Sess. 18 (1994) (statement of Tim Collins, manager of rock and roll band Aerosmith).

[19] Matthew K. Finkelstein & Colleen Lagan, *"Not for You"; Only for Ticketmaster: Do Ticketmaster's Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?*, 10 ST. JOHN'S J. LEGAL COMMENT 403, 417 (1995).

[20] See id. at 430 n.192.

[21] See Boehlert, *supra* note 5.

[22] 1 THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS 606 (Theodore P. Kovaleff ed.1994).

[23] 15 U.S.C. § 1 (1994).

[24] Kovaleff, *supra* note 22, at 608.

[25] See Kovaleff, *supra* note 22, at 611 n.22. (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940)).

[26] Id. at 612.

[27] Id. at 613.

[28] See 15 U.S.C. § 1 (1994) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.").

[29] 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REG. (MB) § 12.01 (2d ed. 1996 & Supp. 2000).

[30] In Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Court specifically held that only unreasonable restraints are prohibited by Section 1. Interestingly, in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), the Court seemed to initially adopt the position that the Sherman Act prohibits every agreement that restrains trade, no matter the form of the restraint, its purpose or effect. 1 VON KALINOWSKI, *supra* note 29, at § 12.01.

[31] See 15 U.S.C. § 2 (1994) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.").

[32] See id.

[33] See id.

[34] 2 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REG. (MB) § 25.02 (2d ed. 1996 & Supp. 2000). Additionally, a private plaintiff seeking damages also must demonstrate "antitrust injury" caused by the monopolization. The ban against monopoly applies to buyers, as well as to sellers. The offense of unlawfully obtaining monopoly power by buyers is known as monopsony. Id.

[35] While the language of Section 2 establishes the substantive offense of monopolization, that Section does not define the offense. Nor does any other Section of the Sherman Act provide a definition. Some commentators have opined that Congress intentionally chose not to draft an antimonopoly statute that delineated the types of conduct outlawed. These commentators believe Congress purposely drafted a broad statute, whose meaning would be provided by the courts in light of the evils at which the legislation was aimed, in order to prevent creative monopolists from escaping liability by adopting even new forms of combinations or anticompetitive conduct. The Supreme Court has agreed with this view. The courts, therefore, have had to define the offense and the elements of actual monopolization, as well as of the other Section 2 offenses, attempts and conspiracies to monopolize. 2 VON KALINOWSKI, *supra* note 34, at § 25.01.

[36] See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[37] See Advanced Health-Care Servs. v. Radford Community Hosp., 910 F.2d 139, 147 (4th Cir. 1990).

[38] See Kovaleff, *supra* note 22, at 1011.

[39] Wanda Jane Rogers, *Beyond Economic Theory: A Model For Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1015 (1996).

[40] See Kovaleff, *supra* note 22, at 1015.

[41] Id.; But see id. at 1019 ("But because the new economic exonerations of market dominance are logically flawed and lacking in empirical support, the supposed economic case against section 2 is largely weightless.").

[42] See id. at 1015.

[43] Id.

[44] See Tampa Elec. Co. v. Nashville Coal Co. 365 U.S. 320 (1961).

[45] See Brown Shoe Co. v. United States, 370 U.S. 294, 297 (1962); United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 379-81 (1956).

[46] Tampa Elec. Co., 365 U.S. at 327.

[47] E.I. Du Pont de Nemours, 351 U.S. 377.

[48] Id. at 378.

[49] Id. at 404. ("No more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce", monopolization of which may be illegal."); Id. at 395.

[50] Id. ("The Supreme Court held that cellophane's interchangeability with other materials sufficed to make it a part of the flexible packaging material market and that the manufacturer of cellophane lacked monopoly control over that market.").

[51] See Int'l Boxing Club of New York v. U.S., 358 U.S. 242, 251 (1959).

[52] Id. at 249.

[53] Id. at 249-50.

54 NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 111 (1984).

55 Matthew K. Finkelstein & Colleen Lagan, *"Not for You"; Only for Ticketmaster: Do Ticketmaster's Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?*, 10 ST. JOHN'S J. LEGAL COMMENT 403, 417 (1995).

56 Id. at 418.

57 Id. at 419.

58 Rogers, *supra* note 39, at 1037. See also Tampa Elec. Co., 365 U.S. at 327.

59 See American Football League v. National Football League, 323 F.2d 124,129 (4th Cir. 1963) (stating "[i]f the relevant market [for professional football teams] is not limited to [New York, Dallas, San Francisco/Oakland and Los Angeles], it must be, geographically, at least as broad as the United States . . . .").

60 See Brown Shoe, 370 U.S. at 327.

61 1 VON KALINOWSKI, *supra* note 29, at § 12.01.

62 E.I. Du Pont de Nemours & Co., 351 U.S. 377; See also Standard Oil, 221 U.S. at 51.

63 E.I. Du Pont de Nemours & Co., 351 U.S. at 390; See also Standard Oil, 221 U.S. 1.

64 Id. (quoting debates on the definition of "monopoly" in 21 Cong. Rec. 3151).

65 Finkelstein, *supra* note 55, at 403.

66 Rogers, *supra* note 39, at 1015 (1996).

67 See id. at 1018.

68 See 38 Stat. 730 § 3 (1913) (Clayton Act).

69 See id.

70 United States Healthcare v. Healthsource, Inc., 986 F.2d 589, 595 (1st Cir. 1993).

71 See Rogers, *supra* note 39, at 1019.

72 See Standard Oil Co. v. United States, 337 U.S. 293 (1949). This case is also known as "Standard Stations".

73 Id. at 314.

74 Id.

75 See Tampa Elec. Co., 365 U.S. 320. The Supreme Court adopted a test in order to detrermined whether execlusive dealing contracts "foreclose competition in a substantial share of the line of commerce affected" in a relevant market. Id. at 327.

76 See Rogers, *supra* note 39, at 1024.

77 See Tampa Electric Co., 365 U.S. at 329.

78 See id. at 328.

79 See Rogers, *supra* note 39, at 1033.

80 See id.

81 Id.

82 Lessley Anderson. *Tickets! Please*, THE INDUSTRY STANDARD. Oct. 4, 1999, at 1.

83 Memorandum of Pearl Jam to the Antitrust Division of the United States Department of Justice Concerning Anticompetitive Actions Engaged in by Ticketmater Holdings Group Ltd. (May 6, 1994) [hereinafter May Memorandum]; Richard C. Reuben, *Ticketmaster in a Jam: Rock Group, Lawsuits Claim Antitrust Violations*, 80 A.B.A. J. 17 (1994).

84 Matthew A. Ryen. Comment, *Jamming Ticketmaster: Defining the Relevant Market in the Pearl Jam-Ticketmaster Controversy*, 4 COMMLAW CONSPECTUS 119, 124 (1996).

85 See Reuben, *supra* note 83, at 17.

86 See *Ticket Distribution Industry: Hearings on Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theatre Ticket Handling Charges and Other Practices Before the Subcomm. on Information, Justice, Transportation and Agriculture of the House Comm. on Government Operations*, 103rd Cong., 2d Sess. 18 (1994) (statement of Chuck Morris, president of Morris, Bleitner and Associates).

87 See Ryen, *supra* note 84, at 120.

88 See id. at 121.

89 Id. at 122 (quoting Chuck Philips, *Bill Would Require Ticket Fee Disclosures*, L.A. TIMES. Aug. 12, 1994. D4.).

90 Id. at 122. See also 15 U.S.C. § 2 (1994) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

91 15 U.S.C. §2 (1994)

92 See Ryen, *supra* note 84, at 122-23.

93 See id. at 123.

94 See id.

95 See id. at 124.

96 See Ryen, *supra* note 84, at 124 (citing Luria Bros. & Co. v. F.T.C., 389 F.2d 847, 860 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968)).

97 See Ryen, *supra* note 84, at 124.

98 See *Ticket Distribution Industry: Hearings on Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theatre Ticket Handling Charges and Other Practices Before the Subcomm. on Information, Justice, Transportation and Agriculture of the House Comm. on Government Operations*, 103rd Cong., 2d Sess. 18 (1994) (statement of Gary Condit, Subcommittee Chairman).

99 See Ryen, *supra* note 84, at 124.

100 Campos v. Ticketmaster Corp, 140 F.3d 1166 (1998), *cert. denied*, 525 U.S. 1102 (1999).

101 See id. at 1168.

102 See id.

103 See id.

104 Id.

105 See id.

106 See Campos, 140 F.3d at 1168.

107 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

108 See Campos, 140 F.3d at 1169.

109 See id.

110 See id. at 1170.

111 See id.

112 See id. at 1171.

113 Campos, 140 F.3d at 1171.

114 See id.

115 See id. at 1170

116 See id. at 1172.

117 See id.

118 See id. at 1173.

119 15 U.S.C. § 22 (1994); see also U.S. v. Scophony Corp., 333 U.S. 795, 808 (1948) ("The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' [is] the test of venue.") (quoting Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927)).

120 See Campos v. Ticketmaster Corp., 525 U.S. 1102 (1999).

121 See *Company Town Justices Reject Lawsuit Against Ticketmaster Consumers: Supreme Court, Finding that Buyers Have No Clam to Damages, Leaves Earlier Ruling Intact*, L.A. TIMES. Jan. 20 1999. C5 (reporting the outcome of Campos, 140 F.3d 1166, *cert. denied*, 525 U.S. 1102).

122 See id.

123 Id.

124 See Anthony Ramirez, *Ticketmaster's Mr. Tough Guy*, L.A. TIMES, Nov. 6, 1994. S3 ("History repeats itself," said Laurence F. Schwartz, founder of Hill Arts and Entertainment Systems, which sells ticketing software to Ticketmaster rivals. Ticketmaster, with 1970's technology, defeated Ticketron, which had 1960's technology. And people like us, with our more advanced technology, will defeat Ticketmaster by the year 2000.").

125 See Kovaleff, *supra* note 22, at 1030; see also id. at 1031 ("Section 2 worked best against a fading but still profitable dominant firm, which has committed evident abuses and is inept in its defense, when the prosecution and judges are unusually competent, and when a clear and easy basis for remedy exists.").

126 Anderson, *supra* note 1, at 1.

127 See id. at 2.

128 Id.

129 See id.

130 See id.

131 See id.

132 Jennifer Couzin, *Two Tickets to Paradise*, THE STANDARD, May 30, 2000, at 1.

133 Anderson, *supra* note 1, at 4.

134 See id.

135 Id.

136 Id.

137 Entertainment/Business Editors, *Tickets.com Pioneers Virtual Wristbands to Improve Ticket Distribution for High Demand Concerts*, BUSINESS WIRE, Oct. 6, 1999, at 1.

138 See id. at 1.

139 Ted Drozdowski, *SFX Entertainment is Buying Up the Nation's Concert Industry. What Will the Slide Toward Rock Monopoly Mean for Those Who Play—and Go See—Live Music?*, THE BOSTON PHOENIX, Mar. 23, 1998, at 1.

140 See id.

141 See id. at 2.

142 See id. at 3.

143 See id.

144 Id.

145 Drozdowski, *supra* note 139, at 4.

146 See also *Clear Channel to Buy SFX for about $3.3 Billion*, CHICAGO SUN-TIMES. Feb. 29, 2000, at Financial 4.

147 Id.

148 Id.

149 Drozdowski, *supra* note 139, at 13.

150 See id.

151 See id.

152 See id.

153 Kevin E. Stern, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM. & ENT. L.J. 349, 355 (1994).

154 See id.

155 See id.

156 Anderson, *supra* note 1, at 4.

157 Id.

158 See id.

159 See id.

160 See id. at 6.

161 See id.

162 Brian Garrity, *Internet Upstarts Find Lawsuits the Price of Success*, IPO REPORTER, Aug. 23, 1999, at 1.

163 *Ticketmaster Sues Microsoft over Web Site Link*, MEDIA DAILY, Apr. 29, 1997, at 1.

164 Kovaleff, *supra* note 22, at 974.

165 Id. at 975.

166 See id. ("Consumer policy is not only the logical but the indispensable complement of antitrust in an overall open market policy.").

167 Id.

168 Id.

169 Couzin, *supra* note 132, at 2.