

Testimony of the U.S. Public Interest Research Group

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Hearing on
Competition in the
Ticketing and Promotion Industry

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Committee on the Judiciary
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Chairman Johnson, Chairman Conyers, Rep. Coble and members of the subcommittee: Thank you for the opportunity to testify before the Subcommittee today. I am Edmund Mierzwinski, Consumer Program Director for U.S. PIRG, the federation of non-profit, non-partisan state Public Interest Research Groups. PIRGs are public interest advocacy groups that take on powerful interests on behalf of their members.

Summary

We have long been concerned with the important matter of fairness in the ticket industry that is before the committee today. Nearly fifteen years ago we were part of the unsuccessful Pearl Jam-led effort to convince the government to investigate what then appeared to be monopolistic consolidation and anti-competitive behavior by Ticketmaster. We were disappointed that no action was taken then. The government's arguments against action then have turned out to be based on a naïve understanding of the invisible hand of market forces. Things have only gotten worse. Since then, we have also fought in several states, notably New York, against the repeal of anti-ticket scalping laws.

Today, it is our view that the proposed merger between Ticketmaster and Live Nation is anti-consumer, violates the Clayton Act¹ and should be rejected.

We further believe that in general the last eight years have represented a low point in U.S. competition policy enforcement. We urge the committee to keep a strong spotlight on Department of Justice and Federal Trade Commission activities on competition policy, to ensure that the interests of the American people are protected against business combinations that lead to higher prices, less competition and less innovation.

Discussion

Without any doubt, Ticketmaster is the market leader in concert and event primary ticket sales, whether directly or as agent for venues; it also owns a leading artist management firm. While its witnesses will doubtless claim the relevant ticket market should include everything from dry cleaning tickets to PTA raffle sales and minor league baseball walkup tickets, such arguments are a red herring. Ticketmaster dominates the relevant market of online concert and event sales; it has market power. It controls prices and raises prices with impunity without improving service; consumers have no choice in the marketplace. The only relevant market analysis is that Ticketmaster controls the market.

Live Nation bills itself as the leading concert, venue and tour promoter; it too is a leading artist management firm. Less than a year ago, it announced termination of a longstanding relationship with Ticketmaster. Consumers and artists both felt that this could lead to establishment of a viable primary ticket sales market competitor for Ticketmaster. The only other firm of note, Tickets.com, is unfortunately non-dominant with some significant footing in sports ticketing only.

¹ Mergers subject to Section 7 are prohibited if their effect "may be substantially to lessen competition, or tend to create monopoly."

Yet now, less than a year later, Ticketmaster and Live Nation have proposed to merge instead of to compete. For that reason alone, the merger should be rejected. “It is a cornerstone principle of the antitrust laws that a dominant firm cannot use acquisitions, like this one to preserve its monopoly power.”²

Worse, though, the merger also raises the specter of a vertical monopoly, since Live Nation by all accounts controls – through exclusive, long-term contracts – the market for marquee venues and events and major tours. The combined firm would control ticketing, artists and event promotion, leaving both consumers and artists with no choice but to accept their terms of trade: higher prices and fewer choices. This combination would subject any prospective competitor to massive barriers to entry. Certainly, bands might find an American Legion hall or a county fairground as a potential venue not controlled by the combination; but these venues don’t offer any opportunity to other promoters to establish a competitive marketplace. If the firms combine, artists would not be able to play them off against one another to get better deals.

How big would this merged company be? What power would it wield? If Ticketmaster is permitted to merge with LiveNation a single firm will: (1) sell most of the concert tickets in this country through its contracts with venues (11,000 venue clients across 20 countries); (2) manage a significant number of the marquee performers in the world or control their tours (e.g., Madonna, U2, Jay Z, Shakira, Nickelback, Eagles, Christina Aguilera, Aerosmith, Jimmy Buffett, Guns 'n Roses, Steely Dan and more than 200 others); (3) own most of the amphitheatres in the US and own more 'club' venues (including 11 House of Blues) as well as controlling, through owning/leasing, a large amount of other clubs and theatres; (4) own two of the major resellers of tickets: and (5) own various sources of competitively sensitive data. As described below, this will give the merged firm the incentive and ability to raise rivals costs and foreclose competition, in many segments of the concert promotion and ticket marketplace.³

To elaborate further on the impact on independent promoters, the leverage of competitors in ticket sales or promotion or artist management firms would be severely diminished, since the vertically-integrated firm would have the ability to promise the best deal on packaged services that come only as a package. Want the top performer? You need to take the ticketing package and the venue.

Worse for a local independent promoter would be the situation where she or he is forced to set up an event at a Ticketmaster-controlled venue, and Live Nation, his promoter-competitor, learns all her or his secrets, as Seth Hurwitz, owner of Washington, DC’s 930 Club, testified to the Senate this week:

² “The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business?” Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Testimony of David Balto, Senior Fellow, Center for American Progress Action Fund, also on behalf of the Consumer Federation of America and U.S. PIRG, 24 February 2009, U.S. Senate Committee on the Judiciary, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3674&wit_id=7624.

³ This paragraph is derived directly from David Balto’s Senate testimony on behalf of Center for American Progress Action Fund, also on behalf of the Consumer Federation of America and U.S. PIRG. See footnote 2 *supra*.

If this merger is allowed to happen, my biggest competitor will have access to all of my sales records, customer information, on sale dates for tentative shows, my ticket counts, they can control which shows are promoted and much more. This will put ALL independent promoters at an irreparable competitive disadvantage.⁴

We further believe that the committee should examine three other important matters: joint ownership of primary and secondary (legal scalping) services, the relationship between these powerful monopolists and the taxpayer-subsidized venues they increasingly control through long-term contracts, and, third, consumer complaints over Ticketmaster convenience and handling fees.

1) Ticketmaster and its reseller affiliate Ticketsnow.

First, the committee should investigate the relationship between Ticketmaster, which sells tickets at “face value” (albeit augmented with a number of lucrative add-on convenience and handling fees that drive consumers crazy), and its reseller (as opposed to scalper) affiliate TicketsNow. Although Ticketmaster claims to have settled issues related to the widely-reported inability of Bruce Springsteen fans to obtain face-value tickets to his current tour and their forced re-direction to the Ticketsnow site where tickets are offered for sale for as much as 4-10 times face value, the entire business model of a primary agent and a reseller under the same roof raises serious structural and unfair and deceptive practices questions.

2) Mega-firms, taxpayer-subsidized venues and “legal” ticket scalping

Second, the committee should investigate the relationship between these two mega-firms, whether combined or separate, and the often-taxpayer-subsidized venues that they gain business control over through their long-term contractual arrangements. Virtually all mid- and large sized venues in this country are built and/or subsidized by taxpayers through various mechanisms. Yet the very taxpayers who pay to build and maintain the stadiums are left outside looking in when it comes to getting tickets to events at those venues. What of the taxpayer-fans who paid for the building and ongoing support of many of the large venues and theaters that present popular entertainment? Is there no obligation that taxpayer-funded venues prevent secondary sellers from gobbling up choice seats and pricing the taxpayer—and average fan—out of the market?

Moreover, the creative talent and producers who create entertainment and sports events don't share in the huge profits often realized by scalpers. To be clear, when tickets are “re-sold,” or scalped, the value-added goes to the reseller, not the artist.

⁴ “The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business?” Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Testimony of Seth Hurwitz, 24 February 2009, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3674&wit_id=7625

All the “efficiencies” have been largely wrung out of the ticket distribution system—scalpers, who euphemistically relabel themselves as “resellers”—are feeding richly off the ingenuity, talent and business acumen of others. These resellers pit average fans against corporate expense accounts, with businesses easily able to outbid consumers for choice seats to popular events staged in venues the consumers have subsidized.

Is there no obligation that taxpayer-funded venues provide more choices and opportunities to artists as well as fans?

We would also like to bring to the committee’s attention laudatory efforts at the state level to rein in ticket scalping. NYPIRG, for example, has fought for years to defend the rights of average consumers against ticket scalpers and resellers. In 2009, ticket scalpers are seeking to extend the temporary suspension of anti-ticket scalping legislation that had been in place in that state for over 80 years until 2007. The state Attorney General’s 1999 report, *Why Can’t I Get Tickets*, examined each of the legal and illegal ways that tickets are sold, including the illegal brokers that operate just outside New York’s geographic borders.⁵ Based on documents and testimony secured through subpoena, the report described in great detail a so-called market that is underpinned by systematic bribery and deceptive practices. The result is the large-scale diversion of tickets to brokers and the re-sale to corporate clients—often in the financial, legal, fashion worlds. One of the shocking—if not surprising—revelations in the report is that one New York City brokerage firm paid a New Jersey ticket broker \$367,980 for scalped tickets for the year 1994 alone. This pointedly shows how ticket scalping pits average fans in a losing battle against corporate expense accounts. There is no “free market” when it comes to ticket sales. So long as bribery and corruption are part of the system of ticket sales—and there’s little reason to believe the system today is different than the one described in the 1999 report—we should have no illusions that deregulation will eliminate the illegal conduct upstream and produce a fairer system.

We urge the subcommittee to make *Why Can’t I Get Tickets* a part of the record of this hearing.

3) Ticketmaster’s convenience and handling fees and disdain toward consumer complaints

As a consumer advocacy group, we would be remiss if we did not remind the committee that Ticketmaster’s exclusive arrangements with venues and its dominance over ticketing have allowed it to treat consumers with disdain. It is a hallmark of a monopolist that it is a price-maker, not a price-taker; that it dictates the terms of trade. When you have a complaint against Ticketmaster, who ya gonna call? Ghostbusters? They’re probably under Ticketmaster contract, although I haven’t checked.

⁵ *Why Can’t I Get Tickets,? Report on Ticket Distribution Practices*, Bureau of Investor Protection and Securities, Office of New York State Attorney General Eliot Spitzer, May 27, 1999 (www.oag.state.ny.us/press/reports/scalping/full_text.html).

If you have a complaint about Ticketmaster, you cannot walk across the street and buy your tickets from someone else. If you want to go to the show, you go through Ticketmaster. This power over consumers has allowed it to develop a variety of usually non-refundable per-ticket and per-order handling fees that increase the face value of tickets sometimes astronomically. Delivery fees are even imposed for Internet email delivery. These services are not superior, they are not extra. These sorts of services are provided routinely without surcharges by others that sell goods and services over the Internet. Ticketmaster charges these fees simply because it can.

Consumer frustration over disputes regarding these fees and other Ticketmaster miscues has resulted in numerous consumer complaints to general consumer complaint websites and the establishment of a number of Ticketmastersucks, Ticketbastard and similar websites. While every large corporation probably has at least one of these sucks.com sites from a frustrated consumer, in virtually all of those other cases, a consumer has a choice. She can get a new cell phone company, can get satellite instead of cable, can get gas at Shell instead of ExxonMobil, can buy a Ford instead of a BMW. You get the idea. With a monopolist, you must put up with the bad service. Ticketmaster is already so big it doesn't seem to care. Letting it get bigger will make things worse. Further, a monopolist does not have to pass on the alleged efficiencies it would gain from a merger (only \$40 million/year?) to its customers, and we don't expect that Ticketmaster will.

Conclusion

We appreciate the opportunity to provide our views in opposition to the proposed Ticketmaster merger with Live Nation and other issues related to ticket sales services. We hope that this testimony has assisted the committee in its work and we look forward to working with you on solutions to this and other problems of unfair competition in the marketplace.