

## **"Not for You"; Only for Ticketmaster: Do Ticketmaster's Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?**

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# **“NOT FOR YOU”;<sup>1</sup> ONLY FOR TICKETMASTER: DO TICKETMASTER’S EXCLUSIVE AGREEMENTS WITH CONCERT VENUES VIOLATE FEDERAL ANTITRUST LAW?**

America’s antitrust laws are premised upon the belief that competition fosters the best allocation of resources within a given industry.<sup>2</sup> Lower prices, higher output, and better product quality that result from vigorous competition<sup>3</sup> are desirable from both social and economic perspectives.<sup>4</sup>

The inherent conflict in applying antitrust law is that an efficient or innovative company may drive competitors out of business.<sup>5</sup> A question then arises as to whether the dominant firm may have violated antitrust law simply because, through effi-

<sup>1</sup> PEARL JAM, *Not For You*, on VITALOGY (Sony Records 1994).

<sup>2</sup> See National Soc’y of Professional Eng’rs v. United States, 435 U.S. 679, 695 (1978). In *Professional Eng’rs*, the Court stated that “[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce lower prices, but better goods and services.” *Id.*; see also *Northern Pac. Ry. v. United States*, 356 U.S. 1, 2 (1958). In *Northern Pacific*, the defendant railroad leased and sold land to farmers on the condition that they use Northern Pacific as long as the railroad’s prices were “competitive.” *Id.* at 2-3. Finding the practice illegal, the Court noted the purpose of the antitrust laws:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions. But even were that premise open to question, the policy unequivocally laid down by the act is competition.

*Id.* at 4. See generally PHILIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 103 (1978) (discussing objectives of antitrust law).

<sup>3</sup> See *supra* note 2 and accompanying text (noting allocative efficiencies resulting from competition); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 9.3, at 277 (4th ed. 1992). Monopolies occasionally result in consumers satisfying their demands by switching to goods that cost society more to produce. *Id.* The additional cost that results is detrimental to society. *Id.*

<sup>4</sup> See POSNER, *supra* note 3, § 9.3, at 277 (technological stagnation is another possible economic inefficiency from lack of competition); see also *Northern Pacific*, 356 U.S. at 4 (noting that antitrust laws provide “an environment conducive to the preservation of our democratic and social institutions”); PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 107-110 (1988) (discussing societal goals implicit in antitrust laws).

<sup>5</sup> ABA *ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS* 196 (3d ed. 1993) [hereinafter *ANTITRUST LAW DEVELOPMENTS*] (courts faced with dilemma that many strategies monopolists employ, like lower prices and new products, are pro-competitive acts antitrust laws were designed to foster).

ciency and innovation, the firm provided a better product at a lower cost than its competitors. Courts have struggled over whether to prevent market domination because of its detrimental effect on competitors<sup>6</sup> or to protect competition.<sup>7</sup> The majority of the courts have been reluctant to condemn the mere status of monopoly.<sup>8</sup> Rather, courts scrutinize the manner by which the firm acquired monopoly power and its actions while in possession of such power.<sup>9</sup> Ticketmaster, the dominant firm<sup>10</sup> in the remote ticket distribution industry,<sup>11</sup> contends that its market position was attained and is maintained through efficiency and innovation.<sup>12</sup> Others contend, however, that Ticketmaster's longterm, exclusive agreements with venues facilitated their rise to dominance in the industry.<sup>13</sup>

This Note examines whether Ticketmaster's exclusive agreements with venues violates federal antitrust law. Part One discusses the past and present state of the remote ticket distribution industry. Part Two outlines the business reasons for entering into exclusive dealing arrangements, and notes the potential for antitrust concern. Part Three discusses offenses under the Sherman Act and applies the Act to Ticketmaster's conduct. Lastly, Part Four proposes solutions to stimulate competition in the industry.

<sup>6</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 333 (1962). The Court stated: "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business." *Id.*

<sup>7</sup> *Id.* at 320. "Taken as a whole, the legislative history illuminates congressional concern with the protection of competition not competitors." *Id.*; see also *U.S. Healthcare Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993) (noting permanent tension in antitrust policy between protecting small companies and protecting competition).

<sup>8</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (monopoly status not condemned if maintained or acquired through development of "superior product, business acumen, or historic accident").

<sup>9</sup> *Id.*; see also *Aspen Skiing Co. v. Aspen Highlands Corp.*, 472 U.S. 585, 605 (1985). "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* (citing ROBERT H. BORK, *THE ANTITRUST PARADOX* 160 (1978)).

<sup>10</sup> See Anthony Ramirez, *Ticketmaster's Mr. Tough Guy*, N.Y. TIMES, Nov. 6, 1994, at D1. The author states: "In the pugnacious world of selling entertainment and sports tickets, Ticketmaster is the winner and still ambitious champion." *Id.*

<sup>11</sup> See *infra* notes 96-117 and accompanying text (discussing relevant product market). This industry encompasses nonbox-office tickets for events held at venues in the United States. *Id.*

<sup>12</sup> "Is There Competition in the Ticket Distribution Industry?": *Hearings Before the Subcomm. on Information, Justice, Transportation and Agriculture of the House Comm. on Government Operations*, 103d Cong., 2d Sess. 18 (1994) [hereinafter *June Hearings*] (statement of Ticketmaster Corp.).

<sup>13</sup> *Id.* (statement of Pearl Jam) (noting requirement to deal with Ticketmaster because of their exclusive agreements with venues).

## I. TRACING TICKETMASTER'S RISE TO DOMINANCE

A consumer purchases tickets for most forms of entertainment either by travelling to the box office or by purchasing tickets from a remote or off-site vendor.<sup>14</sup> The remote vendor charges a service fee for this convenience.<sup>15</sup> This convenience becomes a necessity, however, when the venue decides to sell tickets exclusively through its remote vendor.<sup>16</sup> Many consumers prefer this method of acquiring tickets rather than camping out at the box office the night before tickets are scheduled to go on sale, a common practice before the advent of computerized ticketing.<sup>17</sup> Box offices needed to hire additional security for crowd control and sanitation crews to clean up the post-sale debris.<sup>18</sup> In recent years, however, consumers have grown weary of the rising service fees imposed on tickets to their favorite artists.<sup>19</sup>

Ticketmaster, the pioneer of these high fees,<sup>20</sup> arose from humble beginnings. The company was launched in 1978 by two computer students from Arizona State University who developed a software program that improved the system by which tickets are distributed.<sup>21</sup> Although the company was initially engaged in sell-

<sup>14</sup> See *Ticket Fee Disclosure: Hearing Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 103d Cong., 3d Sess. (1994) [hereinafter *September Hearings*] (statement of Ned S. Goldstein, Vice President, Ticketmaster Corp.). Consumers can purchase tickets from remote vendors either at a retail outlet or by telephone. *Id.*

<sup>15</sup> See UNITED STATES PUBLIC INTEREST RESEARCH GROUP, SURVEY, WHAT TICKETMASTER SERVICE & HANDLING CHARGES ADD TO THE COST OF A TICKET, (1994) [hereinafter PIRG SURVEY]. Ticketmaster's service fees range from \$1.75 for Disney's "World on Ice" up to \$7.00 per ticket for concerts by popular artists such as The Rolling Stones. *Id.* Consumers who order the tickets by telephone are charged an additional "convenience fee" ranging from \$1.50 to \$3.05 per order. *Id.* Ticketmaster claims that this fee is imposed to cover the cost of phone systems and operators, additional office space, and shipping charges (via ordinary first class mail). See *June Hearings*, *supra* note 12 (statement of Ticketmaster Corp.).

<sup>16</sup> See *September Hearings*, *supra* note 14, at 16 (statement of Ned Goldstein) (noting venues occasionally decide not to open box office for ticket sales).

<sup>17</sup> See *June Hearings*, *supra* note 12 (statement of Ticketmaster Corp.) (discussing problems with box office sales for immensely popular events).

<sup>18</sup> *Id.*

<sup>19</sup> See Note, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM. & ENT. L.J. 349, 359-80 (1993) [hereinafter *The High Cost of Convenience*] (analyzing class actions against Ticketmaster under California law).

<sup>20</sup> See *infra* notes 30-33 and accompanying text (noting Ticketmaster's initiation of higher service fees).

<sup>21</sup> Eric Boehlert, *Ticketmaster is Under Fire; How David Became the Industry's Goliath*, BILLBOARD, July 9, 1994, at 1, 97. Essentially, Ticketmaster developed an innovative computer system that enabled a venue to have one centralized system for keeping track of its total ticket inventory. *Id.* at 97. As a result, all tickets were drawn from the same com-

ing ticketing systems to arenas, it later began to sell tickets to the general public.<sup>22</sup>

At the time of Ticketmaster's inception, Ticketron—another ticket distribution firm—held a large percentage of the national remote ticket sales market.<sup>23</sup> Ticketron's customers purchased tickets at satellite locations, thereby avoiding long lines at the theater or arena box office.<sup>24</sup> Ticketron would typically charge each customer a fee of one dollar per ticket for its services, regardless of the face value of the ticket.<sup>25</sup>

Although Ticketmaster had attracted the interest of several venture capital groups, the company did not embark upon its journey of domination until Fred Rosen assumed control of the company in 1982.<sup>26</sup> Rosen convinced Jay Pritzker to invest \$4,000,000 in the company.<sup>27</sup> Rosen also persuaded Pritzker to name him to the position of Chairman of the Board and Chief Executive Officer.<sup>28</sup> Rosen's aggressive management style contributed to Ticketmaster's rise to dominance in the ticket distribution market.<sup>29</sup>

puter, thereby allowing tickets to be available at convenient satellite locations. See *June Hearings*, *supra* note 12 (statement of Ticketmaster).

<sup>22</sup> See *June Hearings*, *supra* note 12. Ticketmaster contends that it is not a broker buying and reselling tickets. *Id.* Instead, it functions as an agent for its clients. *Id.*

<sup>23</sup> See Letter from Matthew Walker and David R. Koff, Hotel Employees and Restaurant Employees International Union, to Jonathan Rich, Esq., and Brent Marshall, Esq., U.S. Department of Justice, Anti-Trust Division, Communication and Finance Department (Mar. 21, 1991) [hereinafter Letter from Matthew Walker] (on file with author). By the late 1970s, Ticketron had over 700 locations throughout the United States. Boehlert, *supra* note 21, at 1. By way of example, Ticketmaster sold \$1,000,000 worth of tickets in 1981 while Ticketron was the industry's clear leader with over \$100,000,000 in sales. *Id.*

<sup>24</sup> See Boehlert, *supra* note 21, at 97. As previously discussed, Ticketron could not provide the customer with a better seat than that which he could purchase at the box office. *Id.*

<sup>25</sup> *Id.* In contrast, Ticketmaster's service charges are not uniform and appear to vary widely according to both the event and the location of the arena. *Id.*; see also *September Hearings*, *supra* note 14, at 72 (statement of William A. Wood, U.S. Public Interest Research Group). Mr. Wood testified that the Ticketmaster service fee for Walt Disney's "World on Ice" in Portland, Oregon was \$1.75 per ticket while the service fee to see The Rolling Stones in Los Angeles was \$7 per ticket. *Id.*

<sup>26</sup> Boehlert, *supra* note 21, at 97. In its early years, Ticketmaster was a revolving door for investors. *Id.* The company's first investor was Denzill Skinner, head of Facility Management Group. *Id.* In 1981, Chicago venture capitalist, Burt Kanter became the company's majority shareholder. *Id.* Kanter offered Fred Rosen, a New York corporate lawyer serving as his special counsel, the opportunity to take over the company. *Id.*

<sup>27</sup> See *id.* Pritzker is the owner of the Hyatt Hotel Corporation and his worth was estimated to be \$2.3 billion by *Fortune* magazine in 1993. *Id.* Pritzker was included in *Forbes'* list of billionaires for 1994 with an estimated worth of \$2.2 billion. Hiroko Asuami et al., *The Billionaires*, *FORBES*, July 18, 1994, at 154.

<sup>28</sup> Boehlert, *supra* note 21, at 97.

<sup>29</sup> *Id.* "Rosen seems to relish his pit-bull image and is fond of saying that whenever he walks into a room, the crowd instinctively divides into those people who want to salute him and those who want to slug him." *Id.*

He determined that the sale of tickets to popular music concerts held the greatest earnings potential.<sup>30</sup> Rosen also realized that the key to dominating the industry was to work with concert promoters to obtain exclusive arrangements with the concert venues.<sup>31</sup> To obtain these exclusive arrangements, Ticketmaster devised a program whereby it would give both the concert venues and promoters a portion of the service fee it charged customers.<sup>32</sup> To make the deal more lucrative, Ticketmaster raised its service fees.<sup>33</sup>

Ticketron was not prepared to face Ticketmaster's challenge.<sup>34</sup> Ticketmaster was able to provide the "best available seat," whereas Ticketron was only able to sell tickets that were not preprinted and sold at the box office.<sup>35</sup> Ticketron attempted to

<sup>30</sup> *Id.* Several factors come into play to reach this conclusion. First, tickets to sporting events are often sold in packages by the arenas as "season" tickets. *Id.* Second, tickets to concerts are often more expensive than those to individual sporting events. *See id.* Third, concerts often attract fanatical followers who are willing to purchase tickets at a premium merely for the privilege to attend. *Id.* The rationale behind this third factor lends itself to a brief discussion of supply and demand. Because of their limited seating capabilities and a concert's nature as a one-time event, the supply of tickets is limited. However, demand for these tickets is high. *Id.* As such, fans will be willing to pay a premium for concert tickets and will not be stopped by a service charge. *Id.* *See generally* Letter from Matthew Walker, *supra* note 23, at 7.

<sup>31</sup> *See* Boehlert, *supra* note 21, at 97 (discussing success of Ticketmaster's arrangements with venues and promoters); *see also infra* notes 47-57 and accompanying text (discussing benefits and potential anticompetitive effects of exclusive dealing arrangements).

<sup>32</sup> *See* Boehlert, *supra* note 21, at 97. Although Ticketmaster has labeled this revenue stream "royalties," critics contend that the remittances are nothing more than cleverly disguised kickbacks. *Id.*

<sup>33</sup> *Id.* Ticketmaster's tickets often have surcharges as large as 25% of the base ticket price. *Id.* at 99. The ticket giant typically collects between \$4 and \$8 per ticket for rock and pop concerts. *See* Chuck Philips, *America's Biggest Band Sent Shock Waves Through the Music Business when it Filed a Complaint with the Justice Department about Ticketmaster*, L.A. TIMES, June 30, 1994, at F1.

<sup>34</sup> *See* Boehlert, *supra* note 21, at 97. It took a while for Ticketron to realize what Ticketmaster was doing. *Id.*; *see also The High Cost of Convenience*, *supra* note 19, at 352. Ticketmaster's sharp inroads into Ticketron's previous dominance in the ticket distribution industry occurred quickly, leaving Ticketron with little time to act. *Id.*

<sup>35</sup> *See* Boehlert, *supra* note 21, at 97. Ticketmaster's utilization of a centralized computer inventory system gave it the capacity to provide tickets at numerous satellite locations. *Id.* Since all tickets were drawn from one centralized computer bank it could provide the best seats available at the time the ticket purchase was made. *Id.* In contrast, its competitor, Ticketron, utilized two centralized computer systems and, as a result, its customers did not know which seat they were purchasing. *Id.*; *see also June Hearings*, *supra* note 12 (statement of Ticketmaster Corp.). Ticketron relied upon an "allocation" system whereby each outlet was provided with printed tickets or "hard" tickets. *Id.* Therefore, customers could only purchase the best available seat at that particular Ticketron location. *Id.*; Letter from Matthew Walker, *supra* note 23, at 2. Over a seven-year period, Ticketmaster enjoyed explosive growth elevating net revenues from \$1,000,000 to \$80,000,000 and supplanted Ticketron as the industry leader. *Id.*

compete with Ticketmaster by offering a similar deal to venues,<sup>36</sup> but Ticketmaster responded by offering up-front money guarantees to the venues, which effectively eliminated<sup>37</sup> Ticketron's ability to compete.<sup>38</sup> In 1991, Ticketmaster purchased all of Ticketron's key assets,<sup>39</sup> and became the sole distributor of concert tickets.

Ticketmaster's industry dominance has led to disputes with popular music bands.<sup>40</sup> On May 6, 1994, Pearl Jam, a popular alternative rock band, filed a complaint with the Antitrust Division of the Justice Department.<sup>41</sup> The complaint triggered a Justice

<sup>36</sup> See Boehlert, *supra* note 21, at 97. Ticketron eventually began to offer profit-sharing deals similar to those offered by Ticketmaster. *Id.* However, without the financial backing of a mogul like Pritzker, Ticketron did not have the wherewithal to meet Ticketmaster's challenge. *Id.*

<sup>37</sup> See *id.* Ticketmaster estimated how many tickets a venue was likely to sell in a given year, determined its service charge cut, and then presented the venue with a check up front. *Id.* An example of this practice is found in Ticketmaster's contract with the New Jersey Sports and Exposition Authority (the "Authority"). See *September Hearings, supra* note 14, at 32. In 1990, Ticketmaster agreed to make a "one-time incentive payment" of \$1,000,000 to the Authority. *Id.* In addition, Ticketmaster agreed to provide the Authority with a "Guaranteed Sales Allowance" of \$5,000,000, payable in four yearly installments. *Id.*

<sup>38</sup> *Id.* Ticketmaster was able to eliminate its competition by offering up-front guarantees which its competitors were not able to provide due to a lack of capital. *Id.* Additionally, since Ticketmaster initiated this program, many of its competitors did not learn of this tactic until after contracts were already signed between Ticketmaster and the venue. *Id.* As a result, the competitors were not provided with ample opportunity to compete head-on. *Id.*

<sup>39</sup> See *id.* Since the reports of the Justice Department are not released upon the approval of an acquisition, one can only speculate as to why the Department would permit Ticketmaster essentially to buy out its competition. *Id.* at 97, 99. Some have criticized the decision. See *June Hearings, supra* note 12 (statement of Gary A. Condit). Representative Gary A. Condit contends that the Justice Department ignored the anticompetitive effects of Ticketmaster's long term exclusive agreements in approving the merger. *Id.* Ticketmaster contends that since Ticketron was a "failing firm," failure to approve the buyout would not preserve Ticketron as a viable competitor. See *June Hearings, supra* note 12 (statement of Ticketmaster Corp.). But see Letter of Matthew Walker, *supra* note 23, at 11-13 (arguing that failing firm argument is without merit).

<sup>40</sup> See *June Hearings, supra* note 12 (statement of Tim Collins, Manager of Aerosmith) (noting difficulties in negotiating with Ticketmaster because of their virtual monopoly); see also Bill Holland, *Ticketmaster is Under Fire; House Hearings Begin*, BILLBOARD, July 9, 1994, at 1, 97, 99 (tracing Pearl Jam's dispute with Ticketmaster).

<sup>41</sup> See Philips, *supra* note 33, at F1. The dispute between Pearl Jam and Ticketmaster began when Ticketmaster requested a service fee to distribute passes to a free concert which the band was to perform on Labor Day. *Id.* The band and Ticketmaster previously had several confrontations; the one giving rise to Pearl Jam's complaint occurred when, in an attempt to keep ticket prices low, they requested that Ticketmaster limit the service fee to \$1.80 and print the fee on the face of the tickets. *Id.* When Ticketmaster refused to comply with Pearl Jam's requests, the band searched for alternative ticket distribution methods. *Id.*

Department civil investigation<sup>42</sup> into possible anticompetitive practices by Ticketmaster in the ticket distribution industry.<sup>43</sup>

## II. EXCLUSIVE DEALING

Exclusive dealing arrangements exist when a firm agrees to purchase all the goods or services it requires exclusively from one seller.<sup>44</sup> By their very nature, exclusive dealing arrangements forbid the buyer from dealing with another supplier during the term of the agreement. Thus, by entering into such an agreement, a supplier forecloses its competitors from dealing with that particular buyer.<sup>45</sup> In certain circumstances, the benefits derived from an exclusive agreement<sup>46</sup> outweigh the potential chilling effect the agreement has on competition.<sup>47</sup>

### A. Competitive Benefits

In *Standard Oil v. United States*,<sup>48</sup> the Supreme Court recognized the potential benefits of exclusive dealing arrangements to both buyers and sellers.<sup>49</sup> Specifically, the Court noted that such agreements may provide a buyer with a guarantee of future supply and protection from volatile prices, which encourages long term planning.<sup>50</sup> Moreover, exclusive dealing agreements reduce sellers' sales costs and provide suppliers with an assured demand

<sup>42</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 556-61 (discussing civil investigation procedures of Justice Departments Antitrust Division).

<sup>43</sup> See Chuck Philips, *Documents Sought in Probe*, L.A. TIMES, June 8, 1994, at D2. After numerous interviews with those involved in the concert industry, the Justice Department announced, on July 5, 1995 that it had dropped its investigation of Ticketmaster. See Chuck Philips, *U.S. Drops Antitrust Probe*, L.A. TIMES, July 5, 1995, at D1. Attorney General Janet Reno cited the emergence of new ticketing firms as the reason for dropping the investigation. Jim Derogatis, *Fans, Rival Firm Keep Legal Heat on Ticketmaster*, CHICAGO SUN-TIMES, July 8, 1995.

<sup>44</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 169.

<sup>45</sup> *Id.*; see also Lynn A. Pasahow, *Vertical Restrictions Upon Buyers Limiting Purchases of Goods From Others*, 8 A.B.A. SEC. ANTITRUST L. 84, 84 (1982) (explaining that buyers are foreclosed from dealing with sellers' competitors by requirements contracts).

<sup>46</sup> See *infra* notes 48-52 and accompanying text (discussing potential benefits derived from exclusive dealing contracts).

<sup>47</sup> See *infra* notes 55-59 and accompanying text (discussing exclusive agreements' potential anticompetitive effect).

<sup>48</sup> 337 U.S. 293, 306 (1949) (recognizing that potential benefits to buyers and sellers from exclusive agreements may indirectly benefit consuming public).

<sup>49</sup> *Id.* at 306-07. In *Standard Stations*, the Court found that Standard Oil's practice of requiring gas stations to deal exclusively with them created "such a potential clog on competition" that it was the kind of situation that § 3 of the Clayton Act sought to remove. *Id.* at 314.

<sup>50</sup> *Id.*



for their goods or services.<sup>51</sup> In light of these potential benefits, the Court declined to condemn the mere existence of exclusive agreements.<sup>52</sup> The Court required, however, that these types of agreements serve legitimate business purposes other than destroying competition.<sup>53</sup>

### B. Anticompetitive Dangers

The anticompetitive potential for exclusive dealing arrangements exists when the arrangements are pervasive within a dominant firm's course of dealing.<sup>54</sup> If a supplier has exclusive agreements with many of the market's buyers, competing suppliers may be foreclosed from such a large percentage of the market that they cannot compete effectively.<sup>55</sup> Consequently, a supplier may drive its existing competitors out of business and discourage the entry of new rivals by foreclosing the relevant market.<sup>56</sup> Therefore, market foreclosure allows a firm to acquire and maintain monopoly power.

The anticompetitive impact of exclusive arrangements is compounded when the agreements cover an "excessive" period of time.<sup>57</sup> Logic dictates that the longer the duration of the agreement, the longer that particular buyer is prevented from dealing with other suppliers. Courts consider exclusive agreements covering one year or less to be presumptively valid.<sup>58</sup> In contrast, agree-

<sup>51</sup> *Id.* at 306-07.

<sup>52</sup> *Standard Oil*, 337 U.S. at 312.

<sup>53</sup> *Id.* at 307. The Court contrasted exclusive dealing with tying; it determined economic justifications for tying to be unpersuasive, while deeming justifications for exclusive dealing to be procompetitive in certain cases. *Id.*; see also Pasahow, *supra* note 45, at 87-89 (discussing differences between exclusive agreements and tying).

<sup>54</sup> See *infra* notes 55-56 and accompanying text (noting anticompetitive effect when exclusive arrangements are pervasive).

<sup>55</sup> *U.S. Healthcare v. Healthsource*, 986 F.2d 589, 595 (1st Cir. 1993). In *U.S. Healthcare*, independent doctors signed exclusive dealing contracts with Healthsource in which they agreed not to provide services with any other HMO during the term of the contract. *Id.* The doctors could terminate the contract by giving sufficient notice. *Id.* at 592. The court ruled in favor of Healthsource because U.S. Healthcare made no effort to demonstrate either Healthsource's market power or that the agreements foreclosed a substantial percentage of the market. *Id.* at 597, 599.

<sup>56</sup> *Id.* at 595 (noting exclusive arrangement may foreclose so much of available supply that new entrants or existing competitors may be excluded).

<sup>57</sup> See AREEDA & TURNER, *supra* note 2, ¶ 731c (for market to operate properly, all prospective buyers must have access to supplies at reasonably frequent intervals).

<sup>58</sup> See *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 395 (7th Cir. 1984) (noting that exclusive arrangements terminable within one year are "presumptively lawful under Section 3" of Clayton Act); see also DEPARTMENT OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES, 50 Fed. reg. 6263 (1985) (discussing allowable duration of agreements).

ments that exceed one year require increasingly persuasive justification.<sup>59</sup>

### C. Federal Antitrust Statutes

Exclusive agreements may be challenged under sections 1 and 2 of the Sherman Act,<sup>60</sup> section 3 of the Clayton Act,<sup>61</sup> and section 5 of the Federal Trade Commission Act.<sup>62</sup>

In *Tampa Electric Co. v. Nashville Coal Co.*,<sup>63</sup> the Supreme Court adopted a qualitative standard of review for determining whether an exclusive agreement violates antitrust law.<sup>64</sup> This standard focuses on the long and short term effects of the foreclosure percentage on the relevant market.<sup>65</sup> Critics, however, have argued that this standard is overly vague.<sup>66</sup> To alleviate this problem, the Court in *Jefferson Parish Hospital District No. 2 v. Hyde*<sup>67</sup> provided specific guidance regarding the application of the standard outlined in *Tampa Electric*. In a plurality opinion of four Justices, the Court noted specific factors that should be examined in determining whether the agreements foreclose "a substantial share of the line of commerce affected" so as to effectively lessen competition.<sup>68</sup>

The Federal Courts of Appeal have adopted the *Tampa Electric* qualitative approach.<sup>69</sup> Courts consider numerous factors when

<sup>59</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 177 n.973 (citing cases validating and invalidating exclusive agreements of varying duration).

<sup>60</sup> 15 U.S.C. § 1 (1988).

<sup>61</sup> 15 U.S.C. § 7 (1988).

<sup>62</sup> 15 U.S.C. § 15 (1988). Since § 3 of the Clayton Act does not mention services and the FTC is the only entity with jurisdiction over the FTC act, this Note shall examine the exclusive agreements under the Sherman Act.

<sup>63</sup> 365 U.S. 320 (1961).

<sup>64</sup> *Tampa Electric*, 365 U.S. at 329. In *Tampa Electric*, an electric utility sought enforcement of an exclusive contract with a coal supplier. *Id.* at 324. The Supreme Court reversed the lower courts' determination that the contract violated § 3 of the Clayton Act because, while the dollar amount was not "insignificant," neither party was in a dominant position with respect to the total market. *Id.* at 334. The Court also found that the twenty-year term of the contract was permissible because of Tampa's status as a public utility, for which the steady supply of coal is in the public's interest. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Derek C. Bok, *The Tampa Electric Case and the Problem of Exclusive Dealing Agreements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 283 (1961). "[The *Tampa Electric* decision's] great weakness lies in its vagueness as a prescription for future cases." *Id.*

<sup>67</sup> 466 U.S. 2 (1984).

<sup>68</sup> *Id.* at 45-46. Specifically, courts should consider the market structure (e.g. number of buyers and sellers), the volume of business, and the availability of alternative sources of supply or sales. *Id.*

<sup>69</sup> See *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1233 (8th Cir. 1987) (analyzing "dynamic nature" of foreclosed market as preferable to quantitative test).

deciding whether the agreement is unlawful, such as the foreclosure percentage of the relevant market, the duration of the agreement, the level in the distribution chain of the foreclosed outlets, the availability of alternative methods of distribution, the barriers to entry, the pervasiveness of exclusive dealing in the industry, and the probability that consumers will shop at other outlets before buying the goods or services in question.<sup>70</sup>

#### D. Ticketmaster's Exclusive Agreements

Ticketmaster's exclusive agreements with venues generally extend for three to five years.<sup>71</sup> The agreements typically provide that Ticketmaster is to be "the exclusive agent for the sale of all remote tickets."<sup>72</sup> Venues often receive consideration in the form of a percentage of the service fee that Ticketmaster charges consumers.<sup>73</sup> Ticketmaster's exclusive agreements with venues violate section 1 of the Sherman Act if Ticketmaster colluded with venues to exclude rivals, and qualify as conduct evidencing a violation of section 2 of the Sherman Act if, on balance, their anticompetitive effect outweighs Ticketmaster's legitimate business reasons for exclusive dealing.<sup>74</sup>

### III. THE SHERMAN ACT

#### A. Section 1

Section 1 of the Sherman Act condemns every "contract, combination . . . or conspiracy in restraint of trade among the several states."<sup>75</sup> The phrase, "restraint of trade," refers to higher prices, lower output, and overall economic inefficiency, characteristic of

<sup>70</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 177. Market foreclosure over 30% will probably constitute a violation. *Id.* When a firm's foreclosure is under 30%, courts will only find a violation where other factors contribute to the agreement's detrimental effect on competition. *Id.* at 177-78.

<sup>71</sup> See Ned S. Goldstein, *Ticketmaster Responds: Pearl Jam Has No Clothes*, SEATTLE TIMES, Sept. 8, 1994, at B5 (refuting Pearl Jam's allegations).

<sup>72</sup> See Neil Strauss, *The Pop Life*, N.Y. TIMES, Aug. 11, 1994, at C16 (discussing Ticketmaster's exclusive agreements with venues).

<sup>73</sup> See Goldstein, *supra* note 71, at B5. "It has never been a secret . . . that buildings and promoters participate in the service-charge revenues." *Id.*

<sup>74</sup> See, e.g., *Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949) (discussing need to evaluate procompetitive effects before invalidating agreement); see also *infra* notes 178-82 and accompanying text (balancing Ticketmaster's justifications for exclusive agreements against their anticompetitive effect).

<sup>75</sup> 15 U.S.C. § 1 (1988).

an uncompetitive market.<sup>76</sup> Section 1 does not reach unilateral conduct by a single entity;<sup>77</sup> instead, it prohibits concerted activity by two or more entities.<sup>78</sup> The agreement may be either tacit or explicit in nature,<sup>79</sup> as long as there is a single purpose for which the parties conspire.<sup>80</sup> Once a conspiracy is established, it must be shown that the agreement unreasonably restrains trade.<sup>81</sup> That is, the agreement must have a detrimental effect on competitive conditions.<sup>82</sup> Lastly, the agreement must affect interstate commerce.<sup>83</sup>

Ticketmaster's exclusive agreements with venues constitute an unreasonable restraint of trade because they foreclose competitors from striving for a substantial share of venues.<sup>84</sup> In addition, under the Supreme Court's broad interpretation of the Commerce Clause,<sup>85</sup> the national scope of Ticketmaster's operations supports the inference that its actions "affect interstate commerce" within the meaning of the Clause.

<sup>76</sup> See *supra* note 3 and accompanying text (noting economic benefits from competition).

<sup>77</sup> See 15 U.S.C. § 1 (1988) (forbidding "contracts, combinations, or conspiracies in restraint of trade").

<sup>78</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). The Court stated: "It is not enough [under § 1] that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." *Id.*; see also *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (distinguishing permissible unilateral action under § 1 from concerted action which § 1 condemns).

<sup>79</sup> See *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966) (stating § 1 does not require explicit agreement when evidence of collaboration exists); see also *United States v. Sealy*, 388 U.S. 350, 352 (1967) (involving antitrust action against licensor of mattresses).

<sup>80</sup> *Monsanto*, 465 U.S. at 768. In *Monsanto* the Court required that the evidence "tend to exclude the possibility of independent action" by the alleged conspirators. *Id.* While either direct or circumstantial evidence will suffice, it must prove that the conspirators "have a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.*

<sup>81</sup> See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (concluding Congress intended that reasonableness standard be used to determine whether defendant's action violates statute); see also *United States v. Reading & Co.*, 226 U.S. 324, 369 (1912) (reaffirming plain interpretation of statute as articulated in *Standard Stations*).

<sup>82</sup> See *National Soc'y of Professional Engrs v. United States*, 435 U.S. 679, 695 (1978). In *Professional Engrs*, the Court allowed the Society to explain the purpose behind its ban on competitive bidding. *Id.* at 694. The Court rejected the argument that safety and quality concerns override the benefits of competitive bidding. *Id.* at 695. The Court went on to state that excepting the "almost endless" number of potentially dangerous items "would be tantamount to a repeal of the statute." *Id.* at 695.

<sup>83</sup> See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). "[J]urisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or 'effect on commerce' theory." *Id.* *Gulf Oil Corp. v. Copper Pawing Corp.*, 419 U.S. 186, 202 (1974) (noting Congress intended Sherman Act to reach as far as possible to further its purpose of fostering competition).

<sup>84</sup> See *infra* note 119 and accompanying text (noting percentage of foreclosed venues).

<sup>85</sup> See *supra* note 83 and accompanying text (noting Court's interpretation of commerce clause).

Ticketmaster's agreements will probably not be found to have violated section 1, however, because its conduct appears unilateral in nature.<sup>86</sup> The Supreme Court's standard for proving collusion among separate entities requires that the evidence "tend to exclude the possibility that the alleged conspirators acted independently."<sup>87</sup> Here, it appears that the venues were not colluding with Ticketmaster purposefully to exclude competitors from the ticket distribution market. Rather, it seems that when Ticketmaster was competing with Ticketron for exclusive agreements with venues, Ticketmaster was offering a more attractive package of services and royalties in exchange for their exclusive patronage.<sup>88</sup> Any venue acting in its own best interests presumably would prefer to receive up-front royalties<sup>89</sup> as opposed to receiving them on an event-by-event basis. The fact that Ticketmaster has exclusive agreements with a substantial share of the major venues<sup>90</sup> does not evidence collusion; instead, venues may align themselves with Ticketmaster simply because Ticketmaster "is the only game in town."<sup>91</sup> Indeed, it is the venues who would benefit from having alternatives to Ticketmaster, thereby ensuring continually improving service and technology. Such needs are inconsistent with the idea that venues have conspired with Ticketmaster to help it become a monopoly.

## B. Section 2

Section 2 of the Sherman Act condemns monopolization and attempted monopolization by a single entity.<sup>92</sup> The monopolization

<sup>86</sup> See *supra* notes 26-39 and accompanying text (discussing Ticketmaster's business practices).

<sup>87</sup> See *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (articulating standard required for conspiracy).

<sup>88</sup> See *supra* notes 31-37 and accompanying text (discussing Ticketmaster's offers to venues).

<sup>89</sup> See *supra* notes 34-39 and accompanying text (outlining events preceding Ticketron's demise).

<sup>90</sup> See *June Hearings*, *supra* note 12 (statement of Pearl Jam) (noting "Ticketmaster has exclusive contracts with most major venues for concerts . . . in the United States"); see also *infra* note 137 and accompanying text (discussing data on Ticketmaster's exclusive dealing with venues in U.S.).

<sup>91</sup> *June Hearings*, *supra* note 12 (statement of Pearl Jam). The band stated: "Ticketmaster has a virtual monopoly on the distribution of tickets to concerts in this country." *Id.*

<sup>92</sup> 15 U.S.C. § 2 (1988). Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States shall be deemed guilty of a felony." *Id.* In addition, § 2 prohibits combinations and conspiracies to monopolize trade. *Id.* Conspir-

offense under section 2 requires that the defendant possess "monopoly power" in the relevant market which was willfully acquired or maintained through deliberate anticompetitive conduct.<sup>93</sup> Monopoly power is the ability to control market prices or exclude competition.<sup>94</sup> Attempted monopolization exists when anticompetitive conduct is undertaken with the specific intent to control prices or exclude competition in the relevant market.<sup>95</sup>

In evaluating the conduct element of attempted monopolization, courts utilize the same standard employed in monopolization claims to distinguish predatory acts from mere aggressive competition.<sup>96</sup> The attempt offense may be viewed as a "back-up" claim for plaintiffs who are unable to prove actual monopoly power.<sup>97</sup> In addition, the majority of courts require that, through predatory conduct, the defendant have a "dangerous probability of success" of monopolizing the relevant market.<sup>98</sup> To evaluate the defendant's market power, however, the relevant market in which it op-

acy under § 2 is evaluated under the same standard as conspiracy under § 1 of the Sherman Act. See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 271. Since this Note has already determined that the recited facts do not establish a conspiracy between Ticketmaster and venues in violation of § 1, it is unnecessary to address conspiracy under § 2. Therefore, this Note shall proceed to examine Ticketmaster's conduct in the context of monopolization and attempted monopolization.

<sup>93</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (articulating elements for monopolization offense under § 1 of Sherman Act).

<sup>94</sup> *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 389 (1956). The Court stated: "[A] party has monopoly power if it has . . . a power of controlling prices or unreasonably restraining competition." *Id.* (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911)).

<sup>95</sup> See *Advanced Health-Care Servs. v. Radford Community Hospital*, 910 F.2d 139, 147 (4th Cir. 1990). While monopolization requires that the defendant actually possess monopoly power, attempt requires the more permissive showing that the defendant would succeed in monopolizing the relevant market if the conduct at issue were allowed to continue. See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 260. In contrast, the intent element of attempted monopolization requires more than a defendant's "willful acquisition" of monopoly power. *Id.* Rather, the attempt offense mandates a showing that the purpose of engaging in the anticompetitive conduct was to eliminate competition. *Id.* Conduct which has legitimate business goals but also has an exclusionary effect will generally not support an inference that the conduct was undertaken with the specific intent to monopolize. *Id.* For instance, conduct undertaken to increase market share or lure customers away from a competitor will not support an attempt claim. *Id.* at 260.

<sup>96</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 260-63 (noting conduct supporting monopolization claim will satisfy requirement under intent).

<sup>97</sup> *Id.* at 259 (explaining when firm's market power falls short of monopoly, it may still be found guilty of attempted monopolization).

<sup>98</sup> See *id.* "[B]ecause the attempt offense requires only that the defendant have a reasonable prospect of acquiring market power, whereas the monopolization offense requires that the defendant possess such power, a lesser showing is required in an attempt case." *Id.*

erates must first be defined.<sup>99</sup> The two essential components of the relevant market are the product market and the geographic market.<sup>100</sup>

### 1. Product Market

In *United States v. E.I. duPont de Nemours & Co.*, the Supreme Court articulated the applicable standard for determining the relevant product market.<sup>101</sup> The Court noted that the market is comprised of items that are reasonably interchangeable with the defendant's product, taking into account factors such as price, use, and quality.<sup>102</sup> Therefore, the question to be determined is what products are reasonable substitutes for the product allegedly monopolized by the defendant.

In *International Boxing Club of New York, Inc. v. United States*,<sup>103</sup> the Supreme Court noted that a "determination of the 'part of the trade or commerce' encompassed by the Sherman Act involves distinctions in degree as well as distinctions in kind."<sup>104</sup> Therefore, the Court determined that the relevant market was the promotion of *championship* boxing contests as opposed to the promotion of *all* professional boxing events.<sup>105</sup> The Court noted that "non-championship fights are not 'reasonably interchangeable for the same purpose' as championship contests," and that "there ex-

<sup>99</sup> See *RCM Supply Co. v. Hunter Douglas, Inc.*, 686 F.2d 1074, 1076 (4th Cir. 1982) (noting "market must be delineated with respect to relevant product and geographic area affected").

<sup>100</sup> See *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487 (5th Cir. 1984). "The relevant market has both geographic dimensions and product dimensions." *Id.*; see also *Hornsby Oil Co., Inc. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1393 (5th Cir. 1983) (noting relevant market is defined in terms of product differentiation and geographical boundaries); *RCM Supply Co., Inc.*, 686 F.2d at 1076. "[T]he market must be delineated with respect to the relevant product and geographic area affected." *Id.*

<sup>101</sup> 351 U.S. 377 (1956) (holding cellophane to be part of larger flexible packaging market).

<sup>102</sup> *Id.* at 404. The Court stated: "[N]o 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.

<sup>103</sup> 358 U.S. 242, 251 (1959).

<sup>104</sup> *Id.* at 250-51. The Court noted that championship fights generate more revenue, through higher television ratings and ticket prices, than nonchampionship fights. *Id.* International Boxing Club had bought out all its major competitors, controlled contending boxers with exclusive agreements, and staged events in stadiums that it either owned or leased. *Id.* The Court held that these acts evidenced International Boxing Club's market power. *Id.*

<sup>105</sup> *Id.*

ists a 'separate, identifiable market' for championship boxing contests."<sup>106</sup>

The Court reached a similar conclusion in *NCAA v. Board of Regents of University of Oklahoma*.<sup>107</sup> In *NCAA*, the Court held 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."<sup>108</sup> Thus, if a product is unique, then it may be concluded that the defendant possesses market power.<sup>109</sup> An indication of such power is the consumer's willingness to pay a premium for the product.<sup>110</sup> For example, in *NCAA*, the Supreme Court agreed with the district court's conclusion that the NCAA possessed market power since advertisers were willing to pay a premium price per viewer to reach audiences of the particular demographic characteristics who watch college football.<sup>111</sup>

Ticketmaster has argued for a broad definition of the product market, encompassing all tickets sold for entertainment events in the United States.<sup>112</sup> Under this definition, Ticketmaster's market share is less than two percent.<sup>113</sup> This definition, however, appears to be overly broad, and fails to acknowledge the realities of the marketplace. While Ticketmaster's definition excludes movie tickets from the product market,<sup>114</sup> its definition includes tickets

<sup>106</sup> *Id.* at 250-51 (finding lower court not "clearly erroneous" in concluding that defendant had violated Sherman Act); see also *International Boxing Club of N.Y. v. United States*, 150 F. Supp. 397, 405 (S.D.N.Y. 1957) (lower court's fact findings).

<sup>107</sup> 468 U.S. 85 (1984) (enjoining NCAA from restricting number of college football games shown on national television).

<sup>108</sup> *Id.* at 111.

<sup>109</sup> *Id.*; see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 38 n.7 (1984) (O'Connor, J., concurring) (indicating definition of market for purposes of determining market share in antitrust litigation must include "all reasonable substitutes for the product"); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394 (1956). "When a product is controlled by one interest, without substitutes available in the market there is monopoly power." *Id.*

<sup>110</sup> See *NCAA*, 468 U.S. at 111 (concluding advertisers' willingness to pay special premium to reach viewers of college football games evidenced NCAA's market power).

<sup>111</sup> *Id.*

<sup>112</sup> See Ramirez, *supra* note 10, at D1 (citing market study commissioned by Ticketmaster).

<sup>113</sup> *Id.* Out of 1.5 billion tickets sold for entertainment events, Ticketmaster sold 61 million tickets through outlets it either directly owns or licenses. *Id.*

<sup>114</sup> *Id.* Some suspect that Ticketmaster has plans to expand into the movie business. See Chuck Phillips, *Tickets are a Hot Topic on Capitol Hill*, L.A. TIMES, Sept. 29, 1994, at F1. Ticketmaster recently acquired a majority interest Pacer-CATS, a movie ticketing software company. *Id.*



for museums, amusement parks, state parks, and county fairs.<sup>115</sup> These other events, for which Ticketmaster sells few tickets, comprise over two-thirds of this "market."<sup>116</sup> Others have suggested that the market should be limited to tickets for entertainment events which are held at stadiums, arenas, theaters, and auditoriums.<sup>117</sup> Under this definition, Ticketmaster's market share is about thirty-seven percent.<sup>118</sup>

Both these definitions, however, fail to identify the actual product market. Ticketmaster does not compete to *sell* tickets, nor does Ticketmaster lure customers from non-Ticketmaster events to Ticketmaster events.<sup>119</sup> Instead, Ticketmaster competes for the *right* to sell all remote tickets for events at venues.<sup>120</sup> Thus, the proper product market is the service Ticketmaster provides to concert venues.<sup>121</sup> Ticketmaster and Ticketron competed, not to sell more tickets, but for venues' exclusive sales contracts, which gave the winner the *right* to sell all of the tickets a venue sold via remote outlets or telephone.<sup>122</sup>

This definition is consistent with *duPont*, since the only possible substitutes for Ticketmaster's services are direct distribution by venues, or mail order distribution.<sup>123</sup> These alternatives are not "reasonable substitutes," however, because they are inferior to direct purchases at remote outlets or telephone purchases.<sup>124</sup>

<sup>115</sup> See Ramirez, *supra* note 10, at D1 (describing Ticketmaster's characterization of product market).

<sup>116</sup> *Id.*

<sup>117</sup> See *id.* This definition reduces the total number of tickets sold from 1.5 billion to 178 million. *Id.*

<sup>118</sup> *Id.* (characterizing figure as more reasonable).

<sup>119</sup> See *September hearings*, *supra* note 14, at 16 (statement of Ned Goldstein) ("Ticketmaster does not advertise in newspapers, magazines, television or radio.").

<sup>120</sup> *Id.* at 45 (statement of Ned Goldstein) ("Basically, the way Ticketmaster competes is that it competes to provide the computerized inventory control and ticketing systems to principal venues."). This definition is also supported by Ticketmaster's CEO Fred Rosen. See Ramirez, *supra* note 10, at D1. Rosen maintains that each venue controls its own inventory and often sells many tickets through group or subscription sales, while Ticketmaster, "as a service company, control[s] nothing." *Id.*

<sup>121</sup> See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2090 (1992). In *Kodak*, the Court defined the relevant market as service of Kodak's high-tech copiers, rather than defining the market to include the entire package of sales and service of high tech copiers. *Id.*

<sup>122</sup> See *supra* notes 34-39 and accompanying text (noting Ticketmaster was competing against Ticketron for contracts with venues).

<sup>123</sup> See David Hinckley, *Grateful Dead Live Outside Rigid Music System*, N.Y. DAILY NEWS, Sept. 3, 1994, at D6 (noting band utilizes fan network to distribute tickets).

<sup>124</sup> See *June Hearings*, *supra* note 12 (statement of Ticketmaster). At one time, venues distributed tickets only through their box offices. *Id.* The overwhelming consumer demand for tickets created the need for telephone and remote sales. *Id.* There are scale economies

## 2. Geographic Market

The second component of the relevant market is the geographic market.<sup>125</sup> In *American Football League v. National Football League*, the United States Court of Appeals for the Fourth Circuit held that, in evaluating an attempt to monopolize, it is "appropriate to limit [the] relevant geographic market to the area which the defendant sought to appropriate to itself."<sup>126</sup> The geographic market has also been defined as the "'area of effective competition' for the relevant services or products which are in the product market."<sup>127</sup>

To determine the scope of Ticketmaster's relevant geographic market, it must be determined what area it sought to appropriate for itself.<sup>128</sup> The market for Ticketmaster's services is national in scope, as evidenced by the company's exclusive agreements with venues throughout the United States.<sup>129</sup> Thus, Ticketmaster's relevant market is the right to sell tickets for venues throughout the nation.

## 3. Monopoly Power

Once the relevant market is properly defined, a plaintiff must prove that the alleged monopolist possesses monopoly power.<sup>130</sup> Since it is difficult to obtain direct evidence demonstrating that the defendant has the power to control prices or exclude competi-

from handling a larger volume of these remote sales, which is a disincentive for venues to handle their own remote sales. *Id.*; see also Ramirez, *supra* note 10, at D1 (acknowledging difficulty of venues handling their own ticketing). Mail order distribution is difficult for most bands because it is necessary to have a wide and loyal fan network to be successful. See Hinkley, *supra* note 123, at D6.

<sup>125</sup> See *supra* note 100 and accompanying text (noting relevant market is composed of product market and geographic market).

<sup>126</sup> See *American Football League v. National Football League*, 323 F.2d 124, 129 (4th Cir. 1963). The court also found that the relevant market for professional football teams "must be geographically, at least as broad as the United States." *Id.* at 130.

<sup>127</sup> *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.* 714 F.2d 351, 357 (4th Cir. 1983) (defining "market" broadly to include areas of actual competition), *cert. denied*, 465 U.S. 1027 (1984).

<sup>128</sup> See *supra* notes 125-29 and accompanying text (discussing standard for determining geographic market).

<sup>129</sup> See POLLSTAR CONCERT VENUE DIRECTORY (1995). Ticketmaster has exclusive agreements with venues in 44 states. *Id.* A national geographic market for the remote ticketing industry is consistent with the conclusion reached by the court in *American Football League*, that the market for professional football is national in scope and cannot be limited to those cities in which football franchises currently existed. *American Football League*, 323 F.2d at 129. See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 211-17.

<sup>130</sup> See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 211-17 (discussing meaning of monopoly power).

tion, courts usually examine the defendant's market share as indirect evidence of market power.<sup>131</sup> If the defendant's market share exceeds seventy percent, courts typically infer monopoly power, unless other evidence, such as the existence of barriers to entry, negates the inference.<sup>132</sup> Conversely, courts rarely infer monopoly power where the defendant's share is under forty percent.<sup>133</sup>

Courts may also utilize the ability of potential competitors to enter the market as indirect evidence of monopoly power.<sup>134</sup> Although a defendant's market share may be well below seventy percent, the existence of substantial barriers to entry will nevertheless support an inference of monopoly power.<sup>135</sup> Where there are minimal restrictions on potential competitors' ability to enter the market, however, courts often will refuse to find monopoly power because the threat of potential competitors' entry would discourage a monopolist from raising prices above competitive levels.<sup>136</sup>

Assuming the relevant market is the right to sell remote tickets for venues, Ticketmaster's market share is fifty-three percent.<sup>137</sup> This figure alone is probably not enough to support an inference of monopoly power. However, the remote ticket distribution industry has significant barriers to entry. First, Ticketmaster's exclusive agreements are a barrier to entry because they foreclose competitors from a substantial share of the relevant market.<sup>138</sup> Second, potential competitors face high start-up costs in entering the remote ticket distribution industry.<sup>139</sup> Therefore, Tick-

<sup>131</sup> *Id.* at 212 (noting frequent lack of availability of direct evidence causes courts to examine indirect evidence of monopoly power).

<sup>132</sup> *Id.* at 213. If market share is either not available or does not support an inference of monopoly power, the court will examine other specific evidence that may establish defendant's power to control prices or exclude competition. *Id.* at 215. Other evidence includes the existence of barriers to entry or expansion, technological superiority resulting in cost advantages, relative size of competitors, competitors' performance, pricing trends or practices, the ability to maintain market share with an inferior product or service, and the existence of "supra-normal profits." *Id.* at 215-16.

<sup>133</sup> *Id.* at 212 (citing Judge Learned Hand's monopoly power standard).

<sup>134</sup> *Id.* The phrase "barrier to entry" is defined by the courts as any condition which restricts other firms' ability to enter the market on a substantial scale. *Id.* at 216.

<sup>135</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 216.

<sup>136</sup> *Id.* at 217.

<sup>137</sup> See POLLSTAR CONCERT VENUE DIRECTORY (1995) (noting each venue's contractual status).

<sup>138</sup> See AREEDA & TURNER, *supra* note 2, ¶ 732 (discussing barriers to entry in foreclosed market).

<sup>139</sup> See Letter of Matthew Walker, *supra* note 23, at 9-11 (noting Ticketmaster expended \$12-13 million to enter national market which at the time was dominated by Ticketron).

etmaster's market share, coupled with attendant barriers to entry, lend support to an inference that Ticketmaster has monopoly power.

#### 4. Anticompetitive Conduct

The second element of the monopolization offense is willfully engaging in anticompetitive conduct.<sup>140</sup> Distinguishing permissible competitive conduct from proscribed anticompetitive conduct is often a daunting task.<sup>141</sup> Therefore, courts will not automatically find any conduct which confers monopoly power on a defendant anticompetitive.<sup>142</sup> Instead, courts condemn conduct which is viewed as "anticompetitive predatory," or "exclusionary."<sup>143</sup> Permissible conduct is referred to as "competitive" or as furthering "legitimate business" goals.<sup>144</sup> One theory of anticompetitive conduct is when a monopolist denies its competitor the use of an "essential facility" that it controls.<sup>145</sup>

##### a. Essential Facility?

Some suggest that Ticketmaster may be held liable under the "essential facilities," or "bottleneck" doctrine,<sup>146</sup> as conduct prohibited by section 2 of the Sherman Act. In an "essential facilities" claim, the plaintiff generally argues that they are denied ac-

<sup>140</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1906) (noting possession and willful acquisition of monopoly power constitute elements of monopolization under § 2 of Sherman Act).

<sup>141</sup> See *Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). The court stated: "There is obviously a tension inherent in the legal assignment to protect competition but not competitors." *Id.* Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 972 (1986). "Competitive and exclusionary conduct look alike." *Id.*

<sup>142</sup> See *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 712 (7th Cir. 1977) (noting that monopolist may increase sales through efficient manufacturing and marketing), *cert. denied*, 439 U.S. 822 (1978). See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 221. "[I]n recent years the courts have generally abandoned the view that any conduct that confers monopoly power on a firm or that enhances a monopolist's market position necessarily satisfies the second element of the offense of monopolization." *Id.*

<sup>143</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 221 (noting courts' characterization of unlawful conduct).

<sup>144</sup> *Id.* The courts do not always adhere to these labels as guidelines to distinguish between lawful and unlawful conduct. See, e.g., *Adjusters Replace-A-Car*, 735 F.2d at 888. The court noted: "Fighting hard but fair, avoiding ruinous competition and avoiding predation are often catch words that fail." *Id.*

<sup>145</sup> See *infra* notes 146-54 and accompanying text (discussing essential facilities).

<sup>146</sup> See *Pearl Jam's Antitrust Case: Questions About Concert, Sports and Theater Ticket Handling Charges and Other Practices, Background Memorandum for Public Hearing, Subcomm. on Information, Justice, Transportation and Agriculture*, 103d Cong., 2d Sess. (1994).

cess to a resource that the monopolist controls.<sup>147</sup> Some commentators suggest that "essential facilities" is not really a doctrine, or an independent tool of analysis, but merely a "label" courts attach to certain fact-specific circumstances.<sup>148</sup> "Essential facilities" applies when the monopolist unreasonably refuses to provide access to a vital facility which it controls, and the claimant cannot practicably duplicate such facility.<sup>149</sup>

Commentators have suggested that the essential facilities "label" should be limited to cases where the above circumstances "clearly" exist,<sup>150</sup> and when condemning the defendant's conduct will substantially improve competition.<sup>151</sup> The overbroad application of this "so-called" doctrine would discourage otherwise beneficial enterprises.<sup>152</sup> In addition, the class of potential essential facilities claimants should be limited to direct competitors and customers in a related market when the monopolist's denial of access to the facility purposefully impairs competition in that market.<sup>153</sup> Lastly, courts should deny essential facilities claims of ordinary consumers or other customers because such refusals by a monopolist neither impair competition nor add to its monopoly

<sup>147</sup> See *United States v. Terminal R.R. Ass'n.*, 224 U.S. 383, 391 (1912). In *Terminal R.R.*, an association of railroads controlled access to the only railroad bridge to St. Louis from the west. *Id.* at 397. The Court noted that St. Louis's "peculiar" topography made this the only practical approach to St. Louis from the West, and that the Railroad Association's control of the bridge "constitutes such a grip upon . . . commerce," that it is a restraint of trade which supports a claim of attempted monopolization. *Id.* at 405, 410. The Court directed the Railroad Association to make the bridge available to Association members or nonmembers "on just and reasonable terms." *Id.* at 411.

<sup>148</sup> See AREEDA & HOVENKAMP, *supra* note 4, ¶ 736.1a (discussing factual situations where courts found defendant controlled essential facility).

<sup>149</sup> See *M.C.I. Communications Corp. v. AT&T*, 708 F.2d 1081, 1133 (6th Cir. 1983). In *MCI*, AT&T unreasonably refused MCI access to the local "Bell" lines which AT&T owned at the time. *Id.* at 1132. In holding AT&T liable by ruling that these local lines were "essential" to MCI's competitive viability, the court articulated the following test:

The . . . four elements necessary to establish liability under the essential facilities doctrine [are]: (1) control of the essential facility by a monopolist; (2) a competitor's inability to practically or reasonably duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

*Id.* at 1132-33. The court found that the local "Bell" lines owned by AT&T satisfied this criteria. *Id.* at 1133.

<sup>150</sup> AREEDA & HOVENKAMP, *supra* note 4, ¶ 736.26. The authors do not elaborate whether this would require courts to use a "clear and convincing" standard of proof in evaluating an essential facilities claim. *Id.* If so, this conflicts with their earlier assertion that essential facilities is a mere label rather than independent tool of analysis. *Id.*

<sup>151</sup> *Id.* (arguing for limited application of essential facilities doctrine)

<sup>152</sup> *Id.* Otherwise, the doctrine could prove to be a disincentive for businesses to invest in building new potentially "essential" facilities. *Id.*

<sup>153</sup> See *id.*

power.<sup>154</sup> Therefore, for the purposes of this Note, essential facilities shall be analyzed from a direct competitor's perspective.

For a competitor of Ticketmaster to make a successful essential facilities claim, the concert venues with whom Ticketmaster does business would have to be vital to that competitor's ability to compete.<sup>155</sup> It seems that this element is satisfied at least as to some venues in some cities; a remote ticketing company could not compete if it was denied access to almost all facilities where major entertainment events occur.<sup>156</sup> Given the large expense, it is unlikely that competitors of Ticketmaster could practicably build their own venues, nor would courts require them to do so.<sup>157</sup> Such a requirement would, in effect, force a competitor to enter two markets at once.<sup>158</sup> In addition, it seems that Ticketmaster has effectively denied competitors' access to such facilities through their exclusive agreements with concert venues. Given their foreclosure rate of fifty-three percent, the small percentage of remaining venues is probably not sufficient to support other competitors.

The essential facilities claim is probably inapplicable here, however, because of the related requirements that Ticketmaster "control" the facility and that it be feasible for Ticketmaster to provide access to the facility. On the one hand, Ticketmaster's exclusive agreements functionally deny others access to the facility for a period of three to five years.<sup>159</sup> On the other hand, Ticketmaster does

<sup>154</sup> *Id.*

<sup>155</sup> AREEDA & HOVENKAMP, *supra* note 4, ¶ 736.26; *see also* Flip Side Productions v. Jam Productions, Ltd., 843 F.2d 1024, 1034 (7th Cir.) (arena for concerts not essential if more than a few others exist), *cert. denied*, 488 U.S. 909 (1988); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520 (10th Cir. 1984) (jointly offered multiday multimountain lift ticket qualified as essential facility when plaintiff could not compete without defendant's cooperation), *aff'd.*, 472 U.S. 585 (1985); M.C.I. Communications Corp. v. AT&T, 708 F.2d 1081, 1133 (6th Cir. 1983) (local telephone interconnectedness essential to MCI's ability to compete in long distance telephone market).

<sup>156</sup> The plaintiff would then have to put in proof of each facility's essentiality, which would probably be a costly undertaking in litigation.

<sup>157</sup> *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 539-40 (7th Cir. 1986). Fishman's investor group had an agreement to purchase the Chicago Bulls NBA franchise, conditioned upon their ability to acquire a stadium lease. *Id.* at 526-27. Wirtz, a competing bidder, held the lease to Chicago Stadium and "made it clear to the NBA that IBI [Fishman's group] did not, and would not, have a lease at Chicago Stadium . . . and that the Crown-Wirtz group wanted to purchase the Bulls." *Id.* at 528. The court agreed with the district court's finding that Chicago Stadium was an essential facility because it was unique, and held that the Stadium could not be duplicated without an unreasonable expenditure relative to the underlying transaction. *Id.* at 539-40.

<sup>158</sup> *Id.* at 540. The court noted: "[T]he point of the essential facilities doctrine is that a potential entrant should not be forced simultaneously to enter a second market." *Id.*

<sup>159</sup> *See* Goldstein, *supra* note 71, at B5 (noting length of Ticketmaster's exclusive agreements with venues).

not own these facilities. While Ticketmaster could remove the denial of access by removing the exclusivity clause, Ticketmaster cannot unilaterally provide access to facilities which it does not own.

Since the essential facilities doctrine does not apply, it is necessary to apply other theories of anticompetitive conduct to Ticketmaster's actions.

### b. *Aspen Skiing*

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,<sup>160</sup> the Supreme Court articulated a test which requires courts to examine the consumer impact of the conduct and to determine whether it excludes rivals for some reason other than efficiency.<sup>161</sup> The Court, however, did not provide guidelines to apply this standard, leaving lower courts to develop their own criteria on a case-by-case basis.<sup>162</sup> While the precedential value of *Aspen Skiing* may be debated, the standard for evaluating anticompetitive conduct is still useful.

### i. Consumer Impact

Since consumers are not a party to Ticketmaster's exclusive agreements with venues, the agreements' effect on consumers is an externality.<sup>163</sup> The money that Ticketmaster pays to venues

<sup>160</sup> 472 U.S. 585 (1985).

<sup>161</sup> See *Aspen Skiing*, 472 U.S. at 605. Aspen Skiing Co. controlled three mountains in a "four mountain market." *Id.* at 587-89. The two companies marketed the mountains jointly and allowed skiers access to all four by purchasing a lift ticket package. *Id.* at 589-90. Ski Co., who controlled three mountains, effectively canceled the joint program, which caused Highland's market share and revenue to decline sharply. *Id.* at 592-95. The Court upheld a jury verdict which found that Ski Co.'s actions were not motivated by efficiency but were undertaken to inflict longterm damage on its competitor. *Id.* at 610-11. The *Aspen Skiing* test is analytically useful, but it presents practical difficulties in its application. See Easterbrook, *supra* note 141, at 977. Judge Easterbrook credits *Aspen Skiing* as an "advance in the application of economic analysis to antitrust law." *Id.* The practical difficulties of applying the *Aspen Skiing* test arise in determining the measure of efficiency. *Id.* at 974-77.

<sup>162</sup> See Easterbrook, *supra* note 141, at 974-77 (discussing forms of predatory conduct undertaken "for reasons other than efficiency"); see also *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987). "[T]he credit and supply restrictions Hartz arbitrarily imposed upon GI . . . were not reasonably gauged to promote competition on the merits." *Id.*

<sup>163</sup> See Bailey Kuklin, *The Gaps Between the Fingers of the Invisible Hand*, 58 BROOK. L. REV. 835, 839 (1992) (defining externality as "neighborhood" or "third party" effect of a market exchange—an effect on someone's well-being which is not taken into account in the market exchange").

and promoters<sup>164</sup> causes Ticketmaster's service fee to be far more than the actual costs of providing remote tickets to consumers.<sup>165</sup>

This practice of externalizing costs is undoubtedly unfair to consumers. Nonetheless, consumers may consider Ticketmaster's service valuable enough to justify the fees. It is more likely, however, that consumers place a high value on the *events* for which they pay these high fees.<sup>166</sup> If the *service* was so valuable, then Ticketmaster's service fee would likely be more uniformly imposed, so that service fees for highly popular bands would be the same as fees for lesser known acts. In fact, there is a tremendous disparity in the service fees Ticketmaster charges.<sup>167</sup> In addition, artists like Pearl Jam, who wish to confer a benefit on consumers in the form of lower prices and service fees, are unable to do so.<sup>168</sup>

Venues also "consume" Ticketmaster's product. By granting Ticketmaster the exclusive right to sell remote tickets for their events, venues receive a package of services.<sup>169</sup> With little or no competition in the remote ticket distribution industry, Ticketmaster has little incentive to improve this package of services.<sup>170</sup> Therefore, although Ticketmaster's payment system may originally have been a great benefit for venues, the long run effects of Ticketmaster's dominance could prove detrimental.

Another example of anti-consumer effects of unfettered monopoly power is the ability of the monopolist to condition the purchase

<sup>164</sup> See Bruce Mohl, *Rising Fees Pad Concert Profits*, BOSTON GLOBE, Sept. 20, 1992, at B1 (noting promoters often receive share of service fees); see also Bill Holland, *Pearl Jam Targeting Stones' Alleged Ticketmaster Ties*, BILLBOARD, Aug. 6, 1994, at 3 (noting Pearl Jam's claim that Rolling Stones receive share of service fee); Bill Holland, *Ticketmaster is Under Fire; House Hearings Begin*, BILLBOARD, July 9, 1994, at 1 [hereinafter *Ticketmaster is Under Fire*] (Aerosmith's manager offered share of service fee).

<sup>165</sup> See Chuck Philips, *How a Ticket Goes From \$18.50 to \$26.75*, WASH. POST, June 30, 1994, at C9; Laura S. Stepp, *Ticket Thicket Thickens*, WASH. POST, July 1, 1994, at D1. The actual costs presumably would include ticket printing, computer software maintenance and development, outlets which sell remote tickets, and expenses related to phone sales. *Id.*

<sup>166</sup> See Mohl, *supra* note 164, at B1. For the largest shows, box offices only open long after tickets go on sale, sometimes not until the day of the show. *Id.* Therefore, it seems that consumers, rather than valuing the service highly, use Ticketmaster because they have no choice.

<sup>167</sup> See PIRG SURVEY, *supra* note 15.

<sup>168</sup> See *Ticketmaster is Under Fire*, *supra* note 164, at 1 (noting Aerosmith's futile efforts to negotiate volume discount for its fans); Chuck Philips, *Pearl Jam, Ticketmaster and Now Congress*, L.A. TIMES, June 30, 1994, at F1 (describing Pearl Jam's unsuccessful efforts to hold service fee below \$2.00 per ticket).

<sup>169</sup> See *June Hearings*, *supra* note 12. (explaining services Ticketmaster provides to venues).

<sup>170</sup> See Ramirez, *supra* note 10, at D1 (quoting New Jersey entrepreneur Michael Green, "Why spend the money [to innovate] when they already own the market?").



of one product on the purchase of another product.<sup>171</sup> This practice, referred to in antitrust nomenclature as "tying,"<sup>172</sup> is considered illegal per se under federal antitrust law.<sup>173</sup> The monopolist who has monopoly power in one product, the "tying product," can extract additional monopoly profits from the sale of another "tied product" by selling the goods or services together as a package.<sup>174</sup>

For example, Ticketmaster occasionally includes a parking fee as a separate charge in the ticket price.<sup>175</sup> Consumers must pay the parking fee whether they walk to the venue, take public transportation, or prefer to park outside the venue's lot.

Ticketmaster claims that it merely collects the parking fee for the venue who imposes the charge.<sup>176</sup> Whether Ticketmaster is the party legally responsible is not the issue.<sup>177</sup> The mere existence of this practice is an illustration of the anti-consumer effects of monopoly power.

## ii. Efficiency?

*Aspen Skiing* also examined whether the defendant's conduct excluded rivals on some basis other than efficiency.<sup>178</sup> Therefore, it is necessary to examine whether Ticketmaster's reasons for long-term exclusive relationships with venues are based on efficiency.

The benefits that Ticketmaster receives from the exclusive agreements include guaranteed demand, price stability, and reduced sales costs.<sup>179</sup> While, from a business standpoint, these are

<sup>171</sup> Cf. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958). The Court noted: "Where the seller has no dominance over the tying product . . . it does not . . . pressure buyers into taking the tied item." *Id.*

<sup>172</sup> See *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). The "illegal per se" status means that, except for rare circumstances, tying is "conclusively presumed" to be an unreasonable restraint of trade. *Id.*; see also *Northern Pac. Ry.*, 356 U.S. at 5.

<sup>173</sup> See 15 U.S.C. §§ 1, 2 (1988) (providing authority for holding "tying" illegal); 15 U.S.C. § 14 (1988) (same); 15 U.S.C. § 45(a)(1) (1988) (same); see also ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 133 (discussing cases finding tying illegal under these statutes).

<sup>174</sup> See *International Salt*, 332 U.S. at 393-96 (referring to use of patent for salt machine to extend monopoly to sales of salt).

<sup>175</sup> See *September Hearings*, *supra* note 14, at 16 (statement of Ned Goldstein) (conceding collection of parking fee as part of price of ticket).

<sup>176</sup> *Id.* (arguing it acts as agent for venue in collecting parking fee).

<sup>177</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 178 (stating defendant must derive economic benefit from tied product).

<sup>178</sup> See *supra* note 161 and accompanying text (discussing *Aspen Skiing* decision).

<sup>179</sup> See *supra* notes 71-73 and accompanying text. Actually, the "price stability" enjoyed by Ticketmaster takes the form of a fixed royalty which it pays to venues during the life of the contract. *Id.*

all desirable benefits, it seems that these are the very benefits that monopolists enjoy from market domination. In addition, it is difficult to imagine what "efficiencies" Ticketmaster achieves by locking up a substantial share of the venues in longterm exclusive agreements.<sup>180</sup>

Ticketmaster's exclusive agreements with venues have an anticompetitive effect because they are pervasive within Ticketmaster's course of dealing.<sup>181</sup> In addition, the agreements cover three to five years, a duration which courts consider "excessive."<sup>182</sup> It is difficult to imagine a legitimate business reason why these arrangements must cover such a long period of time. The pervasiveness of Ticketmaster's exclusive agreements, coupled with their excessive duration and the manner in which they are procured,<sup>183</sup> thus support a finding that Ticketmaster has engaged in anticompetitive conduct under section 2 of the Sherman Act.

#### IV. SOLUTIONS

##### A. *Ticket Fee Disclosure Act*

The Ticket Fee Disclosure Act of 1995, introduced by Representative Gary Condit, mandates that consumers be informed of all service charges on tickets for admission to entertainment or sporting events.<sup>184</sup> Ticketmaster claims to support this measure and maintains that it has printed its service charges separately for

<sup>180</sup> See *The High Cost of Convenience*, *supra* note 19, at 369. Ticketmaster points out that venues have such agreements with concessionaires. *Id.* Even if these contracts with concessionaires are legal, it does not a fortiori mean that Ticketmaster's contracts do not violate the Sherman Act. *Id.* One important distinction is that, from a consumer's standpoint, one may attend an event without patronizing the concessionaire, but cannot attend the event without purchasing a ticket. *Id.* Notwithstanding, if a concessionaire locked up its market with long term exclusive agreements, then the agreements *should* be condemned under Section 2 of the Sherman Act. In *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1981), the court found that a concessionaire violated § 2 of the Sherman Act by foreclosing 23% of the relevant market with 10 year exclusive agreements procured through predatory cash advances. *Id.* at 1309.

<sup>181</sup> See *supra* note 137 and accompanying text (noting Ticketmaster has exclusive agreements with 53% of venues).

<sup>182</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 177-78 (articulating standard for finding duration "excessive").

<sup>183</sup> Ticketmaster's cash advances made to venues while competing for the agreements could be considered predatory. In *Twin City Sportservice*, the court found cash advances and payments to be a "blatant" indication of the concessionaire's intent to monopolize. 676 F.2d at 1309.

<sup>184</sup> See H.R. 857, 104th Cong., 1st Sess. (1995) (requiring service fees to be printed on face of ticket or on receipt evidencing sale).

years.<sup>185</sup> A recent survey by the United States Public Interest Research Group, however, indicates otherwise,<sup>186</sup> as does testimony from the rock band Aerosmith.<sup>187</sup> Although consumers invariably desire and benefit from more information about a product, the proposed legislation does not do enough. Primarily, the bill fails to take action regarding the industry's anticompetitive structure.<sup>188</sup>

### *B. Steps to Enhance Competition*

The Justice Department's Antitrust Division recently investigated Ticketmaster's dealings and will continue to monitor developments in the industry.<sup>189</sup> Under the antitrust laws the Justice Department may file a civil suit seeking injunctive relief.<sup>190</sup> Alternatively, the Justice Department can negotiate a judicially enforceable consent decree with Ticketmaster to encourage them to voluntarily refrain from engaging in anticompetitive behavior.<sup>191</sup> In either case, the Justice Department's intervention could promote competition in the remote ticket distribution industry in several ways.

First, by eliminating the excessive duration and the sharing of service fee aspects of the exclusive agreements, other companies may be encouraged to enter the market. Second, by eliminating the royalties paid from ticket firms to venues, smaller firms without Ticketmaster's cash reserves may be able to compete by offering superior service. Furthermore, removal of these two elements would lift the most significant barriers to entry—large start-up costs and a foreclosed market.

The solution that would probably stimulate the most vigorous competition, however, would be to break up the package of serv-

<sup>185</sup> See *September Hearings*, *supra* note 14, at 14 (statement of Ned Goldstein).

<sup>186</sup> See PIRG SURVEY, *supra* note 15 (demonstrating tickets for many of shows surveyed carried no such notification).

<sup>187</sup> See *June Hearings*, *supra* note 12 (statement of Tim Collins) (testifying Rosen sought to merge ticket price and service charge).

<sup>188</sup> See H.R. 857, 104th Cong., 1st Sess. (1995). The bill does mandate, however, that the F.T.C. investigate potentially anticompetitive practices in the concert industry, including the effect of exclusive agreements. *Id.* § 6.

<sup>189</sup> See Philips, *U.S. Drops Antitrust Probe*, *supra* note 43, at D1 (noting that Justice Department will continue to evaluate changing conditions).

<sup>190</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 5, at 569 (discussing Department's power to seek remedies).

<sup>191</sup> *Id.* (negotiating consent decree is one measure within Department's power)

ices that Ticketmaster offers.<sup>192</sup> Ticketmaster originally sold software systems; it later entered the remote ticket distribution industry.<sup>193</sup> Since the software and ticket distribution is part of a package, venues may be reluctant to switch distribution firms if they are satisfied with the software but not the service. With modern technology and the imminent approach of the information superhighway,<sup>194</sup> it is possible to make ticketing software universally compatible so that other firms could use it to distribute a venue's tickets.<sup>195</sup>

In an analogous situation, hotels, hospitals, and airports were granting exclusive licenses to Alternative Operator Systems ("AOS") through which the hotel patrons would make long distance calls.<sup>196</sup> The AOS paid "royalties" for the exclusive license, and would then charge the caller two to ten times the normal rate to use the telephones.<sup>197</sup> Congress passed legislation requiring AOS services to allow callers to access other long distance carriers at no additional charge.<sup>198</sup> Similar legislation in the remote ticketing industry could effectively eliminate ticket fee overcharges.

## V. CONCLUSION

Ticketmaster's exclusive agreements have enabled it to monopolize the remote ticket distribution industry. Service fees for remote tickets are significantly higher than they would be in a competitive market. While Ticketmaster has legitimate business reasons for their exclusive agreements, such goals are far outweighed by their stifling effect on competition. Ticketmaster's Chief Executive Officer believes that he is wrongfully vilified, stating: "Nobody knew this was a good business. And nobody took the

<sup>192</sup> See *September Hearings*, *supra* note 14, at 1 (statement of Ticketmaster Corp.). Currently, Ticketmaster provides the computer hardware and software in addition to selling the venue's remote tickets. *Id.*

<sup>193</sup> See *supra* notes 21-22 and accompanying text (noting Ticketmaster's evolution from computer service to ticketing).

<sup>194</sup> See Neil Strauss, *The Pop Life*, N.Y. TIMES, Aug. 11, 1994, at C16. One New York ticketing service, SonicNet, allows subscribers to print out their own tickets on-line for \$10 a month. *Id.*

<sup>195</sup> See Ramirez, *supra* note 10, at D1 (reporting Ticketmaster realizes it will soon need to install technology to allow other computers to interact with Ticketmaster's).

<sup>196</sup> See *September Hearings*, *supra* note 14, at 74 (statement of William A. Wood) (describing how Alternative Operator Systems engaged in similar acts as Ticketmaster).

<sup>197</sup> *Id.*

<sup>198</sup> See Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226 (Supp. V 1993)).

time to do it correctly.”<sup>199</sup> If Mr. Rosen thinks that he can “patent” that idea with these exclusive agreements, it seems that the Sherman Act says “think again.”

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<sup>199</sup> See Ramirez, *supra* note 10, at D1 (noting Rosen’s belief that his critics are motivated by “jealousy and envy”).