

5-31-2024

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TIED TOGETHER WITH TICKETMASTER: ANALYZING THE EXCLUSIVE
CONTRACTS OF TICKETMASTER THROUGH THE LENS OF ANTITRUST
SCHOLARS

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A project submitted in partial fulfillment of the requirements
for the Bachelor of Arts degree in Honors Liberal Arts
Seattle Pacific University
2024

Presented at the SPU Honors Research Symposium, May 18th, 2024

Abstract

The Eras Tour Verified Fan Sale in 2022 revealed major flaws in the ticket-buying process, which many attributed to Ticketmaster's dominant industry position. The exclusive contracts of Ticketmaster have been their source of gaining a competitive advantage in the ticketing industry, but many have been critical of these contracts for restricting competition in this industry. This research analyzes the effect of the exclusive contracts of the merged Ticketmaster-Live Nation entity on competition in the ticketing industry through the lens of prominent antitrust scholars. Previous literature reveals differing ideas about whether exclusive contracts are an exclusionary practice and literature identifies the need for more economic consideration in antitrust cases. Through applying the thoughts of antitrust scholars to Ticketmaster's situation, this research aims to provide unique insight into how the competitiveness of exclusive contracts can be evaluated. The ideas of scholars from the Chicago School and New Brandeis movements provide the criteria for analysis of Ticketmaster's exclusionary contracts. The findings of this research are that Chicago School thinkers would support the idea that Ticketmaster's exclusive contracts maximize efficiency for consumers and producers and as a result should not be subject to antitrust legislation. The New Brandeis movement would support the idea that the exclusive contracts of Ticketmaster have excluded competitors, which has led to a lack of innovation and product differentiation in the ticketing industry. The conclusion is reached that the New Brandeis account of Ticketmaster's exclusive contracts effect on competition in the ticketing industry provides the most accurate view of the situation. In addition, the New Brandeis proposal of more regulation, such as issuing an Essential Facilities Doctrine requiring Ticketmaster to license their ticketing software and database to other companies, would be the most effective solution moving forward.

Section I Introduction

On November 15, 2022, many Taylor Swift fans stared at their computers in shock, disappointment, and anger. After a lengthy wait in the queue, lasting 3-4 hours for some, fans were met with error messages, getting beat by other fans to tickets, and losing tickets they had put in the cart. The disappointment reached a climax for many when Ticketmaster informed them of the show selling out before they secured a ticket. This was the Verified Fan Sale for Taylor Swift's 2023 U.S. leg of the Eras Tour, a tour that broke the record of becoming the highest grossing music tour, surpassing \$1 billion in revenue (CBS Interactive 2023). Fans participating in this sale had to register and be selected to gain access to this sale. While Ticketmaster explains that being selected does not guarantee tickets to the event, the purpose of these sales is to ensure that tickets are in the hands of fans who want to attend the shows and out of the hands of bots. In the days following the pre-sale, Ticketmaster announced that the general sale, which was supposed to take place on November 18th was cancelled due to "insufficient remaining ticket inventory and high demand on ticketing systems" (Ticketmaster 2022). Many fans took to social media to express their disappointment and frustration with the company, with Taylor Swift herself commenting "it really pisses me off that a lot of them¹ feel like they went through several bear attacks to get them²" (Pop Base 2022). Ticketmaster faced accusations of having a monopoly, with politicians such as Alexandria Ocasio-Cortez tweeting, "Daily reminder that Ticketmaster is a monopoly, its merger with LiveNation (sic) should have never been approved, and they need to be reined in. Break them up" (Occasio-Cortez 2022). Many of these criticisms cited the exclusive contracts, the source of Ticketmaster's competitive advantage, and merger with Live Nation as the main evidence for exclusion in the industry. Ticketmaster published a response to the criticism, alleging that higher demand occurred than was expected which caused issues with their systems. Figure 1 in the Appendix shows the average traffic to the website on the day of the sale and preceding days. This sale was not the

¹ The fans

² Tickets

first time Ticketmaster has faced backlash from artists, the public, and the Department of Justice about the ticket buying process.

This Note will analyze the implications of Ticketmaster's exclusive contracts with venues on consumers and the competitive process through the lens of prominent antitrust scholars. One view, supported by the Chicago School, focuses on consumer welfare as the legislative purpose of antitrust, which these scholars define as providing the lowest price to consumers through maximizing efficiency. The other view, supported by the New Brandeis movement, focuses on the goal of antitrust being the preservation of competitive processes and market structures. This approach focuses on preventing companies from gaining too much political power and keeping barriers to entry lower, so that new companies can enter a market. Khan specifically mentions that preserving the openness of the market also includes assessing industry factors such as conflicts of interests, gatekeepers and bottlenecks, use and control of data, and bargaining power (Khan 2017). Recommendations will be provided for the Department of Justice moving forward based on the thoughts of these scholars.

The rest of this paper will be organized as follows: Section II will discuss the history of Ticketmaster and how they rose to their dominant position in the remote ticketing industry. Section III introduces the antitrust laws and former exclusive dealing cases³, and section IV will provide a survey of previous literature on Ticketmaster and exclusive contracts. Section V will explore the 2010 merger of Ticketmaster and Live Nation and discuss the industry implications. Section VI will analyze the thoughts of antitrust schools on antitrust laws and exclusive contracts while section VII applies the thoughts of these scholars to Ticketmaster's exclusive contracts and the current situation of the ticketing industry. Section VIII will provide recommendations for moving forward and Section IX will provide a conclusion.

Section II Company History and Gaining Their Competitive Advantage

Ticketmaster was founded in Phoenix, Arizona in 1976 by Albert Leffler and Peter Gadwa, both affiliated with Arizona State University, and businessman Gordan Gun II. When

³ The terms exclusive contracts and exclusive dealing will be used interchangeably throughout this paper

Ticketmaster started, companies in the ticketing industry placed a heavy emphasis on improving the technology and computers used for ticketing, rather than improving the ticketing process. Ticketmaster's early business model consisted of selling ticketing hardware and software systems to individual venues. Computerized ticketing was a new concept with companies setting up remote ticket purchasing locations where consumers could select seats using a map and have the ticket printed from the kiosk. Ticketmaster's first ticket sale was for Electric Light Orchestra at the University of New Mexico on January 23, 1977. Under Fred Rosen, the CEO of Ticketmaster from 1982-1998 credited with the success of disrupting the ticketing industry, Ticketmaster moved away from providing software and hardware systems to providing ticketing services to venues directly.

Ticketmaster's largest competitor, Ticketron, had many gaps in their service, leaving room for Ticketmaster to completely upend them and change the remote ticketing industry. For example, Ticketron had faced criticism for not offering the "best seats available" to shows since they only had access to a limited allotment of tickets. In addition, their software could not handle season ticket bundles or the volume that rock concerts needed (Budnick & Baron 2011). Fred Rosen recognized these weaknesses, and decided to change how ticketing was done. He started by moving Ticketmaster headquarters to Los Angeles and making exclusive contracts with venues, such as the L.A. Forum which he viewed as providing the company with the ticketing inventory to prove their legitimacy as a competitor in the region (Orozco 2021). Venues signed these contracts due to the additional revenue streams that Ticketmaster provided with these exclusive contracts. The main difference that attracted venues to sign contracts with Ticketmaster was their provision of equipment "for free" to these venues. Instead of charging venues to provide this equipment, as was standard in the industry, Ticketmaster provided this for free and even providing training for these systems to venue staff. In exchange, Ticketmaster was to be the exclusive provider of tickets for these venues, which gave them access to distribution of 100% of these tickets (Budnick & Baron 2011). Access to the full inventory allowed Ticketmaster to provide the best seats to fans, unlike Ticketron. Ticketmaster made money on these contracts by doubling existing service fees rather than charging equipment fees, meaning that the cost of fees was passed to consumers rather than the venues.

Ticketmaster then split these services fees in half with the venues they were ticketing for (Orozco 2021). These contracts typically ran anywhere from three to five years. Ultimately, venues were Ticketmaster's consumer, rather than fans. The relationships between Ticketmaster and venues were strategic partnerships rather than supplier relationships (Orozco 2021). Ticketmaster also required the physical box office to be closed on the first day of ticket sales (when physical box offices were still a main source of tickets) to incentivize people to pay the service fee that was only incurred online (Budnick & Baron 2021). The Ticketmaster model provided more value to venues than previous models, explaining why venues continue to sign exclusive contracts with Ticketmaster.

These innovations were instrumental to Ticketmaster becoming the dominant firm in the industry. Ticketron could not compete with the contracts that Ticketmaster offered venues and were not able to handle same ticket volumes as Ticketmaster. Ticketmaster bought Ticketron on February 27, 1991, for \$11 million, eliminating their largest competitor.

Section III Exclusive Contracts and Antitrust Laws

The exclusive contracts that Ticketmaster makes with venues plays a major role in the company's business model and contributes to their competitive advantage. The Department of Justice defines exclusive dealing as "... an arrangement whereby one party's willingness to deal with another is contingent upon that other party dealing with it exclusively or (2) purchasing a large share of its requirements from it" (Department of Justice n.d). Ticketmaster demonstrates exclusive dealing through refusing to provide ticketing hardware and services unless they are the sole provider of tickets for that venue. While exclusive contracts provide a competitive advantage to firms, there is potential for these practices to be anticompetitive, such as one manufacturer monopolizing efficient distribution services and thereby preventing its rivals from competing effectively (Department of Justice n.d). Ticketmaster's contracts span several years which has helped them to maintain exclusivity. Many are skeptical of Ticketmaster's contracts, with Finklestein writing that Ticketmaster has legitimate business reasons for their exclusive agreements, but these reasons are outweighed by their anticompetitive effects (Finklestein &

Lagan 1995). The relationship between exclusive contracts and competition in the ticketing industry will be analyzed further in later sections.

Antitrust laws have served as the guide for identifying and punishing monopolies and anticompetitive practices in the United States. The purpose of antitrust laws as stated by the Department of Justice is “to promote competition by enforcing the antitrust laws to protect economic freedom and opportunity on behalf of the American people” (Department of Justice n.d). The four provisions of Antitrust Law under which exclusive contracts may be condemned are sections one and two of the Sherman Act, section three of the Clayton Act, and section five of the FTC Act (Department of Justice n.d). A practice is considered anticompetitive when actual or probable harm to competition is shown. The Department of Justice believes that exclusive dealing should be illegal only when (1) it has no procompetitive benefits, or (2) if there are procompetitive benefits, the exclusivity arrangement produces harm substantially disproportionate to those benefits” (Department of Justice n.d).

One of the earliest landmark Antitrust cases that set the precedent regarding exclusive contracts was *Standard Oil Co. of California vs. the United States* in which the court ruled that Standard Oil’s contracts violated section three of the Clayton Act. These contracts required gas stations in seven states to purchase exclusively from Standard Oil, which the court ultimately ruled “substantially lessened competition” in the industry (*United States v. Standard Oil Co. of California* 1947). Another noteworthy company is Brown Shoe Co. who faced antitrust trials for a merger case in 1962, and an exclusive dealing case in 1966. The merger case, *Brown Shoe Co. Inc vs. United States* found that the proposed merger between G.R. Kinney Company Inc. and Brown Shoe Co. violated section seven of the Clayton Act since this merger would “substantially lessen competition or to tend to create a monopoly” (*Brown Shoe Co., Inc. v. United States* 1962). In the other Brown Shoe case concerning exclusive dealing, the courts ruled that Brown Shoe’s exclusive contracts with shoe retailers violated section five of the FTC Act (*FTC v Brown Shoe Co., Inc.* 1966). However, this ruling was reversed by the US Court of Appeals because the FTC “failed to prove an exclusive dealing agreement.” These have been landmark cases for setting precedent related to mergers and exclusive contracts, with these cases repeatedly being referenced in prior literature.

While Ticketmaster has not been investigated by the Department of Justice for anticompetitive exclusive contracts, their merger with Live Nation was investigated under section seven of the Clayton Act before the merger of the company was approved in 2010. The filers of this complaint, the United States and Plaintiff States, said that allowing the merger of Ticketmaster and Live Nation would likely “lessen competition in interstate trade and commerce” (US and Plaintiff States vs Ticketmaster and Live Nation 2010). However, the court ultimately allowed the merger to pass without this case going to trial. However, they imposed structural and behavior decrees upon the merged entity, which will be discussed in Section V.

Section IV Survey of Prior Literature

Prior research on the relationship between exclusive contracts and antitrust laws is dominated by differing opinions on the anticompetitive nature of exclusive contracts. The work and criticisms of economic and legal scholars has largely influenced these conversations. The core of these differing opinions lay in the fundamental disagreement surrounding the purpose and legislative intent of antitrust laws. The Chicago School of Antitrust provides an understanding of antitrust based on consumer welfare through maximizing efficiency as the primary goal of antitrust. One supporter of this school is Robert Bork, former US Solicitor General and law professor, who contributes to the conversation through the book The Antitrust Paradox. In addition, this school is supported by Richard Posner, former federal appellate judge, and senior lecturer at the University of Chicago school of law, who contributed to this school through the book Antitrust Law: An Economic Perspective. Both scholars support the position that exclusive contracts are not effective tools to exclude competitors because financial incentives are necessary to entice customers to sign these contracts. For this reason, these scholars do not support exclusive contracts receiving strict scrutiny under antitrust law.

The New Brandeis movement understands the main goal of antitrust being the preservation of competitive processes and market structures, which includes limiting a company’s political power and keeping barriers to entry low. Lina Khan, chairwoman of the Federal Trade Commission contributed to this movement through her article, The Antitrust Paradox of Amazon, which analyzes the business practices of Amazon through the New

Brandeisian lens, while also providing disagreement with the principles laid out in Bork's book. Tim Wu, a professor of law at Columbia University and former Special Assistant to the President for Technology and Competition Policy, supports the New Brandeis movement in his book, The Curse of Bigness. These scholars support the position that exclusive contracts can be used as an anticompetitive practice and should be subject to regulation through antitrust laws. While the Chicago school and New Brandeis movement have had a large influence on the literature surrounding antitrust laws, other authors have contributed to the conversation surrounding antitrust and exclusive contracts, such as discussing the potential for exclusive contracts to create high barriers to entry (Aghion et al 1987; Calozari et al 2015). No definitive stance on the anticompetitive nature of exclusive contracts has been reached by prior literature, therefore antitrust rulings surrounding exclusive contracts occur on a case-by-case basis.

Much of the prior literature about Ticketmaster focuses on their rise to dominance in the ticketing industry and their merger with Live Nation in 2010. The dominance and business success of Ticketmaster has been attributed to the exclusive contracts they have made with venues by authors such as Budnick and Baron, who wrote the book Ticket Masters. In addition, studies have analyzed how Ticketmaster's exclusive contracts have disrupted the ticketing industry and been used as a strategic tool (Orozco 2021). However, research is extremely limited on the exclusive contracts of Ticketmaster after their merger with Live Nation in 2010, and no conclusive stance has been reached on the anticompetitive nature of the merged entity's exclusive contracts. Studies that have analyzed Ticketmaster's exclusive contracts often have been written before their 2010 merger (Hardack 2003) or analyzed these contracts from a strictly legal rather than economic perspective (Finklestein & Lagan 1995) with the authors of both studies pointing to Ticketmaster's exclusive contracts being exclusionary. Prior literature exists about the anticompetitive nature of the Ticketmaster-Live Nation merger itself (Meese et al 2014; Kwoka et al 2014; Gastelum 2024) with many conferring that this merger significantly decreased market concentration in the ticketing industry. When this merger was passed, a speech from an antitrust assistant attorney general was published on the DOJ website that provided their rationale for passing this merger. Regarding customers, she specifically mentions that "a merger does not provide us an open invitation to remake a firm's business model to

make it more consumer friendly” (Varney 2010). While she mentions the importance of customer concerns and complaints, she also says that merger enforcement cannot address all these complaints. Regarding competitive processes, she mentions that the DOJ investigated the effects of vertical integration on competition but concluded that Live Nation did not have “monopoly power” in the artist management and promotion parts of the supply chain. They also concluded that barriers to entry for new agents and promoters were low. Based on this criteria, they allowed the merger to pass with the implementation of structural and behavioral consent decrees, which will be discussed in Section V, to address Ticketmaster’s dominant position in the primary ticketing part of the supply chain. Prior literature has also analyzed the effectiveness of the consent decrees of this merger (Kwoka et al 2011), but none of this literature addresses the relationship between Ticketmaster’s exclusive contracts and the merger. While literature exists analyzing Amazon’s business practices through a New Brandeis lens (Khan 2018), literature applying the thoughts of the Chicago School scholars and New Brandeis Movement scholars to Ticketmaster’s exclusive contracts does not exist.

This paper will contribute to existing literature by analyzing and comparing the thoughts of antitrust scholars, Chicago school thinkers Robert Bork and Richard Posner with those of New Brandeis thinkers Lina Khan and Tim Wu, in the context of the Ticketmaster-Live Nation exclusive contracts and provide recommendations for moving forward based on these viewpoints. These authors provide valuable criteria for determining how exclusive contracts and antitrust cases should be handled, and focusing on their insight may introduce alternative perspectives on the competitiveness of exclusive contracts. Many of these scholars have expressed dissatisfaction with the lack of consideration given to economic factors in former antitrust cases and this research will focus specifically on the economic implications of Ticketmaster’s exclusive contracts. This research is relevant given the renewed attention to competition in the ticketing industry after the recent Eras tour Verified Fan sale. In addition, this research creates conversation about the effect that mergers paired with exclusive contracts have on competition through the analysis of the Ticketmaster-Live Nation case. By applying the voice of these scholars to the situation faced by the ticketing industry, I hope to provide new insight into how the competitiveness of exclusive contracts can be evaluated.

Section V 2010 Merger with Live Nation

The issue of using exclusive contracts becomes more complicated with the merger between Ticketmaster and Live Nation. In 2010, Ticketmaster and Live Nation approached the Department of Justice proposing to merge the two businesses. Live Nation was the dominant company in the promotion part of the supply chain, Figure 4 in the Appendix, and was also a venue owner/manager. The motivations for merging stated by the companies were, “The parties to the merger proclaimed that it would ‘expand access, improve transparency, and deliver artists and fans more choice,’” (Budnick & Baron 2021). However, another motive may have included eliminating a potential competitor. Live Nation started its own self-ticketing business in 2009 and would have been Ticketmaster’s largest competitor (Varney 2010). Live Nation could provide viable competition because they would provide ticketing services to their own venues and had a large enough legitimacy to take other clients from Ticketmaster.

This merger is unique due to the simultaneous horizontal and vertical elements of the merger. The vertical element is the move from two different areas of the supply chain in this industry. This vertical merger would combine the ticketing and artists management business functions of Ticketmaster with the promoter and venue operator business functions of Live Nation. Vertical mergers are subject to antitrust investigation because they make barriers to entry higher for any companies entering an individual function of the supply chain. The horizontal element of this merger was the combination of the ticketing function of the supply chain. Ticketmaster was the dominant ticket provider in this market and Live Nation was the first major entrant. The combination of vertical and horizontal elements of this merger created a company who was involved in a majority of the major business function in the live events supply chain” (American Antitrust Institute 2023). Before this merger was allowed to proceed, the Department of Justice conducted a thorough investigation of the industry. One of the major concessions investigated by the Department of Justice regarding this merger was that the merged Live Nation-Ticketmaster entity would be the only company in the industry fully integrated into all parts of the supply chain. In addition, they considered that allowing this

merger to go through would end competition between Ticketmaster and Live Nation, the two most dominant ticketing companies in the industry.

Ultimately, the Department of Justice allowed the merger to go through, creating the company Live Nation Entertainment. For this merger to be approved, the DOJ imposed structural and behavioral remedies on the merged company. These structural remedies included the divestiture of Panciolan, a sports ticketing company owned by Ticketmaster, to Comcast-Spectator and licensing Ticketmaster's primary ticketing software to AEG, a different company in the rock concert industry. These effects were intended to preserve competition in this industry. The behavioral remedies imposed on the merged company included prohibiting Live Nation from retaliating against venues that use another company's ticketing or promotional services. In addition, the firms are not allowed to create mandatory service "bundles" which would require customers using one company's services to have to use the others. Finally, they were also not allowed to use ticketing data to help their promotion or artist management business.

In 2020, 10 years after the merger was approved, the DOJ amended the behavioral consent decree with Live Nation Entertainment. The Department of Justice reported in their press release that Live Nation had engaged in conduct over several years that violated the behavioral consent decree (Department of Justice 2020). The Department of Justice extended the original decree for an additional five and a half years and made the conduct provisions clearer. Specifically, they outline that Live Nation could not threaten to withhold concerts from a venue that used ticketing services other than Ticketmaster. In addition, Live Nation was required to appoint an internal antitrust compliance officer, and they have become subject to a \$1 million dollar penalty for each violation of the Final Judgement (Department of Justice 2020).

Despite these amendment to the final judgement, the Department of Justice opened another investigation of Live Nation Entertainment on November 18th, 2022, following the Eras Tour Verified Fan Sale. On November 22nd, 2022, congress announced an antitrust hearing which occurred on January 23rd, 2023. In addition, multiple lawsuits against Live Nation Entertainment have been filed in response to the Eras tour incident, including Barfuss et al vs. Live Nation Entertainment Inc and Ticketmaster LLC filed in the Los Angeles County Superior Court. Trials and hearing surrounding Ticketmaster are still ongoing at the time of writing and

no conclusive stance has been reached for Ticketmaster moving forward. I will now turn to the views of antitrust scholars on this issue.

Section VI Introduction to Antitrust Scholars

CHICAGO SCHOOL

Economists belonging to the Chicago School of economic thought began writing about antitrust laws around the 1970s as a response to the outcomes of antitrust cases. Supported by economists such as Robert Bork and Richard Posner, they believed that the purpose of antitrust laws as intended by the original antitrust statutes and judicial behavior was maximizing consumer welfare through increased efficiency (Bork 1978). In addition, Chicago School thinkers identified a lack of consideration for economic principles in antitrust rulings, and often saw courts trying to serve multiple goals such as also protecting smaller, less efficient firms (Bork 1978). According to this school, two aspects of efficiency impact consumer welfare. One of these is allocative efficiency can be defined as, “equating demand and marginal cost” (Bork 1978). This occurs when there is optimal distribution of goods. The other aspect is productive efficiency which is defined as, “...any activity by a business firm that creates wealth...it follows that productive efficiency consists in offering anything, whether products or services, that consumers are willing to pay for” (Bork 1978). Bork argues that the goal of antitrust should be improving allocative efficiency without sacrificing productive efficiency (Bork 1978). In other words, to maximize consumer welfare producers must produce the largest amount of goods with the lowest number of resources without affecting the distribution of these goods.

Many Chicago school thinkers find no inherent problem with exclusive contracts because they often maximize the productive efficiency of a firm. Specifically, exclusive contracts maximize efficiency for producers since sellers compete for the whole market rather than each marginal unit (Calzolari 2020). In addition, Chicago thinkers argue that exclusive dealing is often not used as an anticompetitive practice because exclusive dealing has a cost, since buyers must be compensated for accepting these exclusive deals (Calzolari et al 2015). Posner gives the

example of the United States vs. United Shoes Machinery case in which United offered extensive financial concessions to incentivize shoe manufacturers to lease their machinery. He argues that if United's purpose was exclusion, these concessions may have removed all or most of the potential monopoly profits to be gained by excluding competitors (Posner 1976). However, the Chicago School does find instances in which exclusive contracts can become anticompetitive. The main instance of exclusive contracts being anticompetitive is when a firm of unreasonable size uses these exclusive contracts (Posner 1976). These authors provide a market concentration percentage that can indicate anticompetitive practices, which will be discussed in Section VII.

Ultimately, Chicago thinkers believe in the role of the free market in resolving antitrust cases. Bork argues that the idea of free markets is not supported by courts and lawyers, which has led to antimarket stance (Bork 1978). In summary, the Chicago school thinks that promoting consumer welfare is the intended purpose of antitrust laws and that markets will organize themselves in a way that promotes efficiency.

NEW BRANDEIS MOVEMENT

A more modern theory of antitrust, known as the New Brandeis movement, focuses on preserving the market structure and competitive processes of industries as the main purpose of antitrust laws. This movement is supported by Lina Khan, chair of the Federal Trade Commission, and Tim Wu, legal scholar at Columbia University. This movement disagrees with the view of the Chicago school view that consumer welfare, determined by price increases and output restriction are the main determinants of antitrust (Khan 2017). Khan argues that the legislative intent of Congress passing antitrust laws was to order to safeguard against excessive concentrations of economic power (Khan 2017). In addition, Khan criticizes the Chicago School idea that consumer welfare is determined solely by efficiency and argues that consumers also value attributes such as product quality, variety, and innovation (Khan 2017). Looking at the market structure shows how a higher market concentration can endanger interests such as innovation and consumer choice. With technology platforms specifically, competition is

important to motivating and driving innovation. Highly concentrated market structures can harm the long-term interests of an industry, since firms don't need improve old products or create news ones to compete" (Khan 2017). For this reason, the school opposes vertical mergers due to the market becoming less concentrated. In addition, many New Brandeis supporters oppose higher market concentration since it can lead to more political power for companies. The Department of Justice also considered the effect of the merger on innovation when researching the Live-Nation and Ticketmaster merger. They noted that there would likely be a lack in innovation due to a lack of incentives to develop new features and technology (Budnick & Baron 2011). For this reason, Tim Wu mentions that the reform of merger review and standards is one of the main priorities for Neo-Brandeisians (Wu 2018).

The New Brandeis school are aware of the roles of high barriers to entry in antitrust considerations. In industries with high market concentration, the barriers to entry are higher because of the costs of entering the market include the cost of taking customers from the incumbent. This in turn decreases competition because new firms do not have the incentive or financial means to enter the market. Khan argues that the shift towards focusing on consumer welfare and efficiency in antitrust has led to a narrowing of the concept of barriers to entry (Khan 2017). The Chicago school does not view incumbent advantages as barriers to entry for new firms.

Ultimately, the New Brandeis school differs because they don't support the Chicago School belief that the free market is a solution to antitrust. They are in favor of reforming antitrust laws to be harsher on anticompetitive practices and monopolies. The New Brandeis school is critical of the outcomes of antitrust cases due to their focus on price, outputs and productive efficiency, rather than innovation or non-price effects (Khan 2017). The Chicago School and New Brandeis school differ in their ideas about the purpose and regulation of antitrust laws, which had led to differing views on Ticketmaster's exclusive contracts and ideas for moving forward.

Section VII: Comparative Analysis of Antitrust School Principles Applied to Ticketmaster Case

The main overlap between the thoughts of the Chicago School and New Brandeis movement is that the market share of a firm is an extremely important determinant of whether their business practices are anticompetitive. However, the question arises of the market share at which a firm's practices become anticompetitive. Thinkers from the Chicago school provides the figure of a company occupying 80 to 90 percent of market share being when the law can attack a firm's use of exclusive dealing as predation (Bork 1978). The New Brandeis school does not provide a specific number but says that the market structure of each industry determines whether a practice is anticompetitive.

Determining the market that a company does business in is the first step to determining whether their exclusive contracts are used to exclude competition. When conducting research about the proposed Ticketmaster-Live Nation merger, the Department of Justice concluded that Ticketmaster belonged to the 'ticketing services to major concert venues in the U.S. market' (Kwoka 2014). Figure 2 in the Appendix, a pie chart from the Department of Justice Ticketmaster Amended Complaint document, shows that Ticketmaster's share of venue capacity was 82.9% of the market in 2008. Figure 3 shows that Ticketmaster's share of venue capacity fell to 66.4% after Live Nation started their own self-ticketing service. Live Nation's ticketing service challenged Ticketmaster's dominant position in the market. However, the merger between these two companies restored the higher share of venue capacity for the new Live Nation Entertainment company. Based solely on these figures, both schools would point to Ticketmaster's exclusive contracts being exclusionary.

Another tool used by the Department of Justice to analyze a company's size is the Herfindahl Index (HHI), which measures firm size relative to market size (Hashimzade et. al 2017). The Department of Justice defines a market with a number higher than 2500 to be highly concentrated (Department of Justice 2018). The Department of Justice calculated the market concentration of this industry based on the companies listed in Figure 2 and found that the HHI of the ticketing services to major concert venues industry was 6900, which is considered "highly concentrated." When a market is "highly concentrated" according to this index, mergers are presumed to have anticompetitive effects (Kwoka 2014). After Live Nation decided to start their own ticketing service, the HHI Index for this industry declined to 4709, which is still highly

concentrated but lower by nearly 2200 points. However, this reduction in concentration was reversed by the merger (Kwoka 2014). Both the HHI index and the share of venue capacity demonstrate how Live Nation's ticketing system provided competition in this industry. However, these effects were reversed when the companies decided to merge in 2010.

The high concentration of this industry and dominant position of Ticketmaster are no secret, as Live Nation themselves acknowledged their awareness of Ticketmaster's position in a press release sent the day after the Eras Tour Verified Fan Sale. Their website said, "Ticketmaster has a significant share of the primary ticketing services market because of the large gap that exists between the quality of the Ticketmaster system and the next best primary ticketing system" (Rubin 2022). While they acknowledge the dominant position of Ticketmaster, they claim that it is due to the quality of the Ticketmaster system. Based on these numbers, both the Chicago School and New Brandeis movement would recognize that this large market concentration leaves this industry vulnerable to anticompetitive behavior.

While the Chicago School may acknowledge that the size of Ticketmaster could make their exclusive contracts exclusionary, they would argue that that these exclusive contracts are the most efficient organization of this market. Posner and Bork both believe that if a society's economic welfare would be greater if a monopoly were permitted than forbidden, that the monopoly should remain (Posner 1976). While Ticketmaster's size and exclusive contracts point to anticompetitive practices, the high contract renewal rates and sold-out shows indicate that this market is operating efficiently. In addition, their belief in the free market leads them to believe that the market will organize itself in the most efficient way possible. If Ticketmaster was not providing the best deals, venues would not sign their contracts. While the New Brandeis school acknowledges that some industries may be organized more monopolistically, they believe that highly concentrated industries should be subject to public regulation. They would specifically oppose the Ticketmaster-Live Nation merger, on the grounds that Ticketmaster was already in a dominant position in the industry, with Tim Wu naming the Ticketmaster/Live Nation merger as one of antitrust's most wanted. In addition, the regulations set forth by the Department of Justice when this merger was approved have not been followed. Even if this

market was meant to be organized more monopolistically, the merger has made concentration unnecessarily high and should not have been approved.

Another area of disagreement between the Chicago School and New Brandeis movement is whether Ticketmaster efficiently allocates their tickets. The recent Eras Tour Verified Fan Sale ticket demonstrated how Ticketmaster's infrastructure restricted the optimal allocation of tickets to fans. Ticketmaster's website says, "Overall we estimate about 15% of interactions across the site experienced issues, and that's 15% too many, including passcode validation errors that caused fans to lose tickets they had carted" (Ticketmaster 2022). The Chicago School would argue that even though consumers had a difficult time purchasing tickets, ultimately these shows all sold out immediately, which means that allocative efficiency was maximized. They would argue that difficulties from this sale arose from the extremely high demand, as shown in Figure 1 of the Appendix. The New Brandeis school would say that the difficulty in buying tickets is a direct consequence of the lack of competition in the industry because Ticketmaster has had no incentive to innovate and improve their technology. As a result, fans lost access to purchasing tickets, which is not optimal allocation of these tickets. The New Brandeis school would argue that Ticketmaster only appears efficient because of the lack of alternatives to consumers and venues. The exclusive contracts of Ticketmaster may have once been the best offer for producers, which incentivized venues to sign deals. Ticketmaster was able to lock venues in through their long contracts, which led to other companies going out of business. Ticketmaster's high contract renewal rate, shown in Figure 5 in the Appendix, can be attributed to their brand image and lack of alternatives (Kwoka 2014). New Brandeis thinkers would argue that Ticketmaster used these exclusive contracts to gain a competitive advantage which eventually turned into exclusion, causing new companies not to enter the market. Even if these exclusive contracts are still the most efficient market structure for producers, these contracts aren't facilitating a focus on innovation and product variety. In addition, these exclusive contracts harm end consumers who do not have a choice of the ticketing service they use to purchase tickets. Instead, end consumers are victims of Ticketmaster's lack in innovation, which resulted in the loss of Eras tour tickets for many.

Another area in which these schools disagree are barriers to entry being exclusionary. The New Brandeis school believes that high barriers to entry cause and are a direct result of anticompetitive practices such as Ticketmaster's exclusive contracts. Tim Wu mentions that high barriers to entry in the ticketing industry have caused new and innovative entrants such as SongKick and Crowdsurge to go out of business. However, the Chicago school believes that barriers to entry are "the cost of doing business." Bork specifically mentions that costs of entry are "natural" and that there are only problems if these barriers are artificial, and not created by efficiency (Bork 1978). While exclusionary practices would fall under their definition of artificial barriers, Bork and Posner both argue that exclusive contracts are very rarely used to exclude competitors. In the case of Ticketmaster, they would argue that their exclusive dealing contracts are not artificial barriers to entry because these contracts are willingly signed by venues. However, the Department of Justice investigated high barriers to entry created by the Ticketmaster and Live Nation merger. They specifically mention that economies of scale, switching costs for venues, long-term contracts, and brand recognition made it difficult for new companies to enter the ticketing industry. However, in assessing the vertical elements of the merger, the DOJ ultimately concluded that the merger did not seem to affect ease of entry for promoters and management (Varney 2010). However, this conclusion was reached for the promotion part of the supply chain, not the primary ticketing portion.

Ultimately, I conclude that the New Brandeis movement has the most accurate assessment of Ticketmaster's exclusive contracts. Reduced allocative efficiency in this market is a direct result of the combination of these exclusive contracts paired with the large market share of the merged Live Nation Entertainment entity. Even though this may be the most efficient organization of this market from a producer standpoint, these contracts have demonstrated the exclusion of competitors through creating high barriers to entry and causing harmful outcomes such as lack of consumer choice and innovation. The Eras Tour Verified Fan sale is a direct result of Ticketmaster's lack of innovation and investment in infrastructure. To prevent sales like this from occurring in the future, regulation that incentivizes competition and innovation needs to occur.

Section VIII Moving Forward

The Chicago school and New Brandeis movement scholars have different views on how the Department Justice should move forward regarding Ticketmaster. One area of agreement would be that breaking up this company is not the optimal solution. Breaking up this company would upend the ticketing industry and leave venues with limited alternatives to selling tickets (Mncube et al 2021). The Chicago School also disagrees with imposing additional structural consent decrees such as the Ticketmaster's required divestiture of Paciolan to Comcast-Spectator because these decrees can cause a firm to lose its efficiency and poses higher costs than benefits. The Chicago school would propose two potential options moving forward, leaving the Ticketmaster monopoly as is or imposing a monetary penalty for anticompetitive practices. Those supporting the option to leave the monopoly as is would argue that having one seller is the most efficient organization of the primary ticketing market. Posner states that if a firm enjoys a monopolistic position for many years without engaging in anticompetitive practices, then either the monopolistic organization of the market is most efficient, or the company is selling at the competitive price (Posner 1976). However, this option breaks down in Ticketmaster's case as Posner says that this monopolistic position must be achieved without engaging in anticompetitive practices. This leads to the second option proposed by Posner and other Chicago School thinkers, which is to impose monetary injunctions on firms who exhibit anticompetitive behavior. Posner argues that monetary penalties are more effective than criminal sanction, which has been the typical form of punishment in antitrust cases, because criminal sanctions have higher costs to society. In addition, he argues that it is difficult to translate the monetary cost of an action to a criminal punishment such as days served in prison (Posner 1976). While this may be a potential solution, this would not necessarily stop a firm from engaging in exclusionary practices, especially if they are the size of Live Nation Entertainment and could pay these fines. This method does not change the market structure of the ticketing industry or provide incentive for new entrants. While it punishes the company employing the anticompetitive practice, it does not make substantial changes to the industry that would increase competition, meaning it is not the optimal solution for antitrust violations.

New Brandeis movement scholars would take a vastly different approach to moving forward. First, it should be stated that New Brandeis scholars would have opposed the merger of Ticketmaster and Live Nation from its inception because they believe vertical mergers are often grounds for anticompetitive practices (Khan 2017). However, the merger was approved by the Department of Justice which leads to the other option of allowing Live Nation Entertainment to accept the benefits of a monopoly and restricting the amount of power they have through regulation. One option laid out by Khan surrounding regulation is the essential facilities doctrine. This doctrine requires a dominant firm to grant access of an essential facility to their competitors. To be an essential facility four conditions must be met which include “(1) a monopolist controls the essential facility; (2) a competitor is unable practically or reasonably to duplicate the essential facility; (3) the monopolist is denying use of the facility to a competitor; and (4) providing the facility is feasible” (Khan 2017). In the case of Ticketmaster, venues would not be considered an essential facility because Ticketmaster does not ‘control’ the facility and can’t provide access to the facility (Finklestein & Lagan 1995). However, it can be argued that Ticketmaster’s computer ticketing system is an essential facility since competitors can’t duplicate this system without unreasonable expense. Courts could order Ticketmaster to share their infrastructure and ticketing database (Hardack 2003). While their modern-day infrastructure has not evolved to meet the high demand of concerts, it is still the dominant existing infrastructure in the industry. Licensing the Ticketmaster ticketing infrastructure to other companies would lower barriers to entry since competitors would not need to make a large up-front investment to develop infrastructure. Instead, new entrants could focus on building their brand recognition and finding alternative ways to provide value to venues. In addition, these companies may invest in improvements to the infrastructure in order to gain a competitive advantage over Ticketmaster. When approving of the Ticketmaster-Live Nation merger in 2010, one of the requirements for the merger to go through was that Ticketmaster was supposed to license their software to AEG. Part of the reasoning for doing this was to promote competition through allowing AEG to market this ticketing system to venues. In addition, at the end of the five years AEG could decide to buy the software, create its own software, or partner with a different ticketing company (Department of Justice 2010). However,

AEG chose not to use Ticketmaster's platform and created their own, called Axs. However, Axs was not successful in taking venues from Ticketmaster (Kwoka 2011). While this attempt to increase competition was not successful, providing the opportunity to license Ticketmaster's software to other ticketing companies be more successful if these companies choose to use Ticketmaster's software. Allowing multiple companies to access this software may increase competition in the industry, improve industry infrastructure and software, and create a better fan experience.

The New Brandeis movement view on the necessity of more regulation for Ticketmaster provides a viable option for moving forward. While the Department of Justice has attempted to regulate this company through the consent and behavior decrees, enforcement of these decrees has not occurred, as evidenced by the amendment to these decrees in 2020. In addition, these decrees have not stopped the restriction of output or incentivized technological innovation, as evidenced by the Eras Tour Verified Fan Sale. While more regulation is a challenge due to the lack of capacity for monitoring and enforcement by the DOJ, the essential facilities doctrine provides a mechanism for regulation without needing constant enforcement. Allowing other ticketing companies to license the ticketing software and database from Ticketmaster would lower barrier to entry for new entrants through eliminating the costs of developing a new ticketing system with the capacity to handle rock concert demand. In addition, these companies may innovate and improve this infrastructure to gain a competitive advantage. The argument can be made that the essential facilities doctrine will provide a competitive disadvantage to Ticketmaster. While the purpose of this doctrine is to increase competition in the ticketing industry by lowering barriers to entry, Ticketmaster will still retain a competitive advantage through their brand name recognition and existing contracts with venues. Ultimately, more regulation such as the essential utilities doctrine, is necessary to preventing further ticket sale disasters and increasing competition in the ticketing industry.

Section IX Conclusion

This Note explored the evolution of Ticketmaster's exclusive contracts and analyzed the implication that these contracts have had on the competition in the ticketing industry through the lens of prominent antitrust scholars. My findings included agreement among the antitrust scholars that the combination of Ticketmaster's exclusive contracts and their highly concentrated market share, especially after their merger with Live Nation, has led to a dominant industry position for Ticketmaster. However, differing ideas about the goal and legislative intent of antitrust law has led these scholars to form different conclusions about how the Department of Justice should move forward regarding Ticketmaster. The Chicago school would argue that this dominant position is a result of the company's efficiency and should be left as is since they are maximizing consumer welfare. Chicago thinkers would agree with Ticketmaster's claim that the difficulties associated with the Eras Tour Verified Fan sale were a result of high demand, not a failing infrastructure. The New Brandeis movement would say that Ticketmaster's dominant position is a result of the high barriers to entry in the ticketing industry which has been caused and perpetuated by their exclusionary exclusive contracts. Their dominant position has disincentivized innovation and investment in infrastructure, which led to the Eras Tour Verified Fan Sale disaster. Ultimately, I agree with the New Brandeis movement that the lack of innovation and investment in infrastructure has led to issues with ticket sales and more regulation is necessary to increasing competition and providing a better experience for end consumers. I am in favor of an approach such as the essential facilities doctrine, proposed by the New Brandeis movement, which would license Ticketmaster's ticketing database and infrastructure to competitors and entrants to increase competition in the industry. This would incentivize new entrants through reducing barriers to entry and in turn increase competition and innovation in the ticketing industry.

While this research has provided insight into the effect Ticketmaster's exclusive contracts on competition in the ticketing industry in the context of antitrust scholars, this research does not discuss other business practices of Ticketmaster that may contribute to a lack of competition in the industry. Further areas of exploration include their involvement in the secondary ticketing market, the presence of 'bots' in their queues, and the price of

Ticketmaster's service fees. At the time of this writing, there are active Ticketmaster lawsuits and investigations which may provide new legislation and insight on this issue.

While no consequence has been determined by the Department of Justice regarding the Eras Tour Verified Fan Sale, end consumers and politicians have been vocal in demanding change. At the time of this writing, investigations of Live Nation are occurring, with news articles reporting that the DOJ has requested more documents from the company (Nylen 2024). While the future of the legal environment of this company and industry is uncertain, this research has provided new economic insight into evaluating the competitiveness of exclusive contracts in the ticketing industry through the lens of Chicago School and New Brandeis scholars. In addition, this research has provided recommendations for more regulation, such as implementing an Essential Facilities doctrine, moving forward. Ultimately, Ticketmaster should heed the lyrics of Swift which say, "These things will change, can you feel it now? (Swift 2021)

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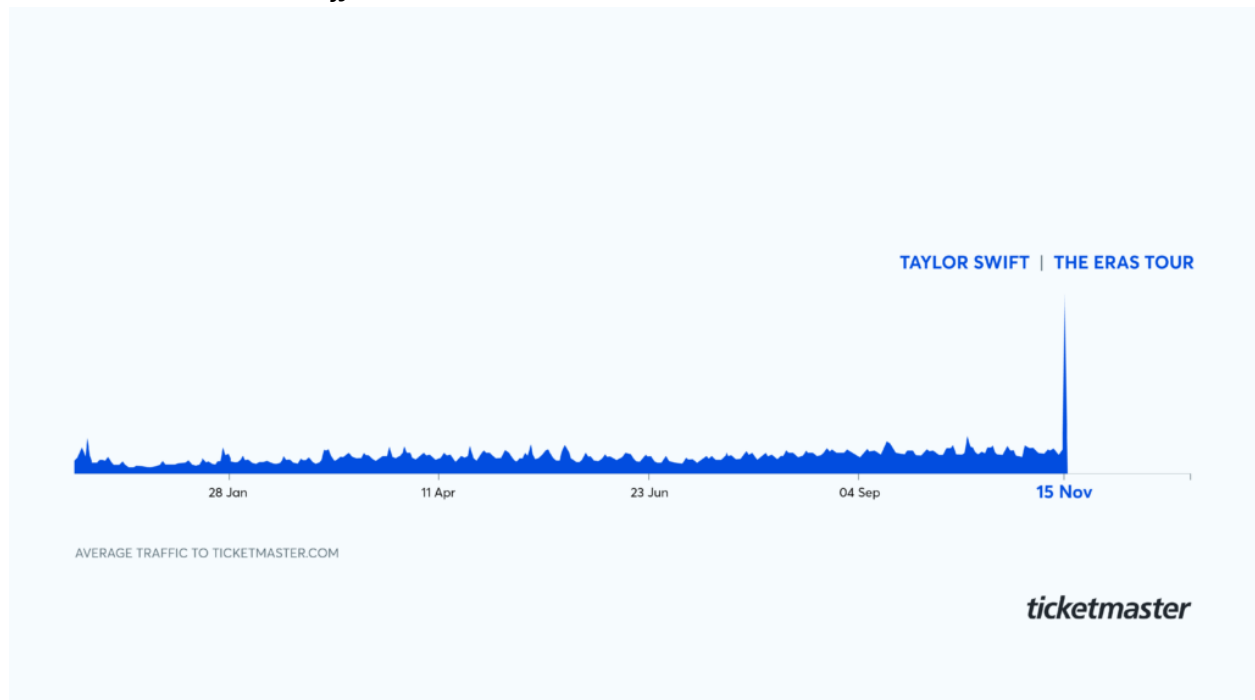
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Appendix A

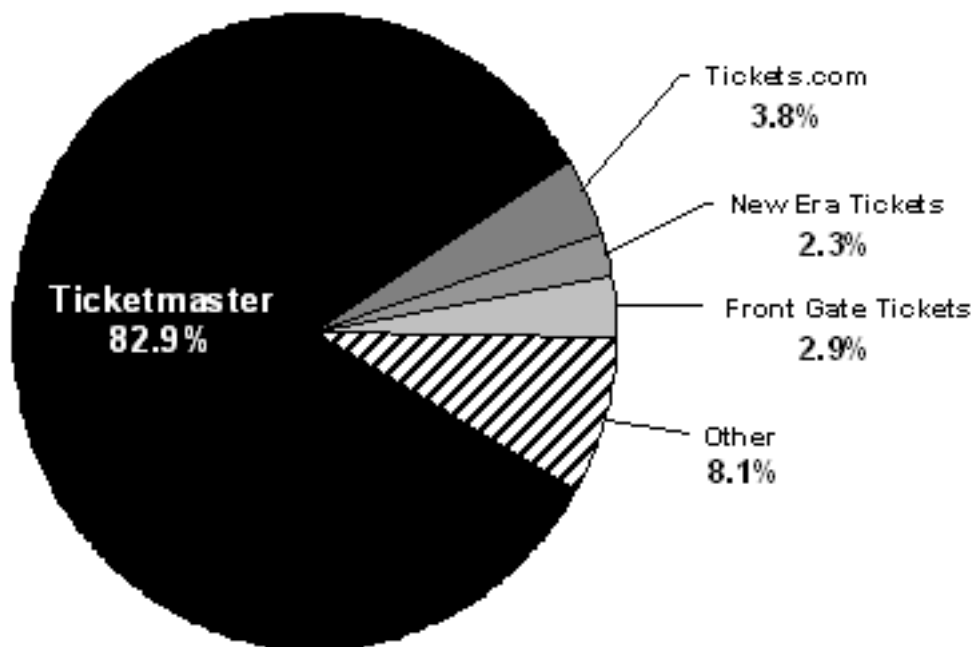
Figure 1

Ticketmaster Website Traffic

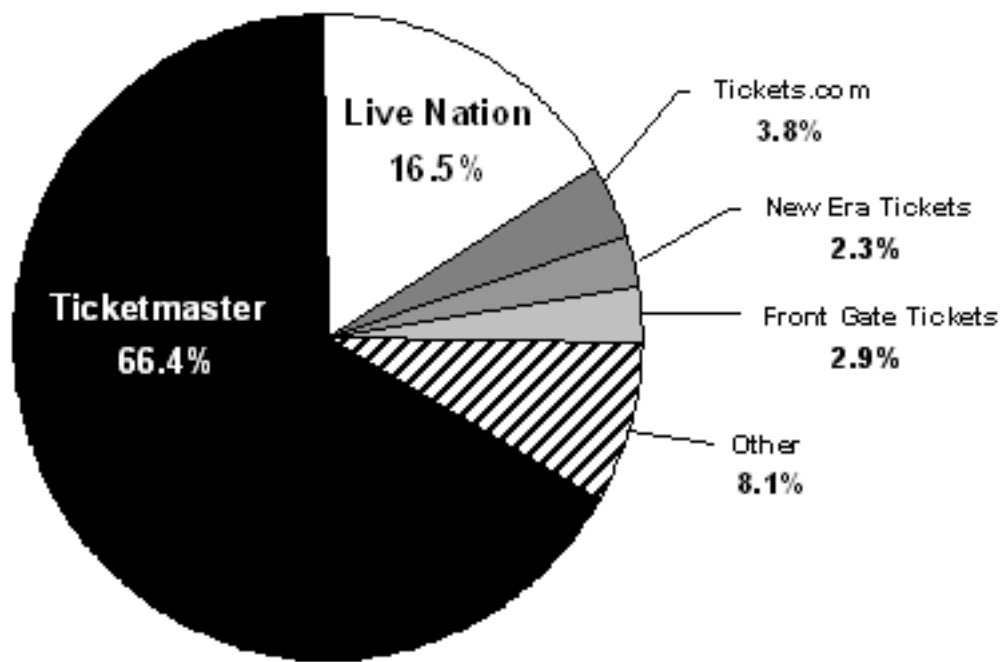


(Ticketmaster Business 2022)

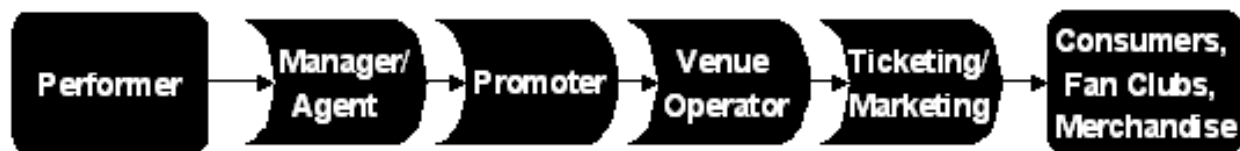
Figure 2
Pre-Live Nation Entry Share of Venue Capacity



(United States Department of Justice 2010)

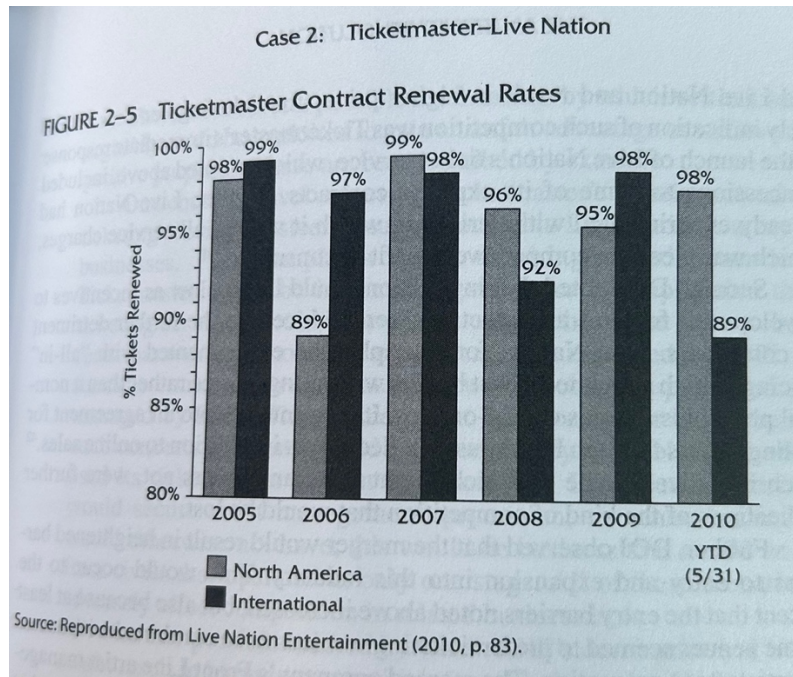
Figure 3*Post-Live Nation Entry Share of Venue Capacity*

(United States Department of Justice 2010)

Figure 4*Components of the Live Music Industry*

(United States Department of Justice 2010)

Figure 5
Ticketmaster Contract Renewal Rates



(Kwoka 2014)

Appendix B: Honors Symposium Speech

Presented on the panel: *Power and Control: The Effects of Powerful Institutions Controlling Labor Unions, Higher Education, and Taylor Swift.*

Panel Description: Institutions act as regimes of value in society, dictating what consumers can access. Our panel identifies the effects of these powerful institutions and analyzes how economic, legal, and sociological systems have supported them. Our projects specifically identify how regulatory bodies have prioritized the interests of corporations over stakeholders and provide recommendations for legal action and reform.

SPU Honors Symposium, May 18th, 2024

Hi everyone! Thank you all for coming to our panel. My name is Jenna Gillam and I am a business and economics double major in addition to being a part of the Honors program.

Before I start, I would like to take a minute to thank Annabelle for opening our panel and for her informative presentation about Affirmative Action at Harvard. I will continue the discussion regarding powerful institutions and legal reform by talking about Ticketmaster, a company who has captured the attention of fans, consumers, and politicians in recent years. The event that brought this company to my attention, as well as many others, was Taylor Swift's Eras Tour Verified Fan Sale controversy which occurred in November of 2022. I, like many Swifties, attempted to purchase tickets to Taylor Swift's highly demanded Era's tour, which has broken the record for the highest grossing music tour. While I was successfully able to secure tickets and attend the Eras tour last summer, many other fans were not so lucky. In fact, many spent hours waiting in queues to be met with error messages and being beat to tickets by other fans. If you turn your attention to the screen, you'll see an actual screenshot of a message received by a fan during the Eras Tour Verified Fan Sale. Due to the disastrous East Coast sales, which occurred at 10 AM local venue time, the West Coast sales were postponed to later that

afternoon. In the following days, the general sale of tickets for this tour was cancelled due to insufficient remaining demand. Frustrated fans and politicians bashed the company, using accusations of them having a monopoly to explain this disastrous sale. These accusations focused on Ticketmaster's engagement in practices such as making exclusive contracts with venues and merging with Live Nation in 2010 as decreasing competition in the industry.

Ticketmaster's response to this event claimed that the historic demand and bots infiltrating the queue led to this disastrous sale. They published a webpage which said, "Overall we estimate about 15% of interactions across the site experienced issues, and that's 15% too many, including passcode validation errors that caused fans to lose tickets they had carted." The disastrous nature of this sale sparked my curiosity, leading me to research this company for my Honors project. I was particularly interested in the claims about the anticompetitive nature of this company's practices. From this, I arrived at my research question, which was to analyze the effects of the exclusive contracts that Ticketmaster makes with venues on competition in the ticketing industry through the lens of antitrust scholars. Specifically, I focused on studying the period after their merger with Live Nation in 2010, which further increased concentration in the ticketing industry. This is an area that hasn't been heavily explored in previous literature.

Before diving into the thoughts of these scholars, it is important to define exclusive contracts and understand how they have contributed to the competitive advantage of Ticketmaster. Exclusive contracts are defined by the Department of Justice as "... an arrangement whereby one party's willingness to deal with another is contingent upon that other party dealing with it exclusively or purchasing a large share of its requirements from it." When Ticketmaster first started, they followed the industry standard of charging venues to use

their ticketing hardware or software. However, CEO Fred Rosen, who is credited with this company's rise to the top, saw an opportunity to disrupt the industry. First, he moved the company's headquarters from Phoenix to Los Angeles and began making exclusive contracts with venues. One major deal was with the LA Forum in 1983, described by Rosen as the deal he viewed with providing legitimacy to the company. These contracts were looked upon favorably by venues since they turned ticketing from a cost center to a profit center. Where the industry standard was for ticketing companies to charge venues to use their ticketing hardware, Ticketmaster would provide these systems for free and train venue employees on how to use them. To make money, Ticketmaster doubled the service fees charged to end consumers and the profits from these fees were split equally between Ticketmaster and the venue. The only requirements on Ticketmaster's end was to be the exclusive ticket provider for venues so that they were able to sell the best seats to shows, a fault of their main competitor, Ticketron. In addition, the physical box office had to be closed on the first day of sales so that end consumers were forced to pay the online service fee. These contracts typically lasted between 3-5 years and were so successful that Ticketmaster's competitor, Ticketron, went out of business and was acquired by Ticketmaster in 1991. While exclusive contracts provided Ticketmaster with their competitive advantage, they have been used by companies throughout history to exclude competitors. They have become a large focus of antitrust laws, which have served as the legal framework for identifying and punishing monopolies and anticompetitive practices in the United States. The Department of Justice describes the purpose of these laws as "to promote competition and to protect economic freedom and opportunity on behalf of the American people." The four provisions of Antitrust Law relevant to exclusive contracts are sections one

and two of the Sherman Act, section three of the Clayton Act, and section five of the Federal Trade Commission Act. Regarding exclusive contracts, these laws say that exclusive dealing should be illegal only when it has no procompetitive benefits, or if there are procompetitive benefits, the exclusivity arrangement produces harms substantially disproportionate to those benefits.”

Competition in the ticketing industry has been further complicated by the merger with Live Nation in 2010. Live Nation was an entertainment company, mostly focusing on the promotion and venue management parts of the live music supply chain. They started their own ticketing service in 2008, which became Ticketmaster’s main competition until they merged in 2010. This entity became the only in the industry to be involved in every area of the supply chain. Despite public outcry and an investigation by the Department of Justice, the merger was passed in 2010 with the implementation of behavioral and structural consent decrees, which were intended to preserve competition in the ticketing industry. These structural remedies included the divestiture of Panciolan, a sports ticketing company owned by Ticketmaster, to Comcast-Spectator and licensing Ticketmaster’s primary ticketing software to AEG, a different company in the rock concert industry. The behavioral remedies imposed on the merged company included prohibiting Live Nation from retaliating against venues that use another company’s ticketing or promotional services. In addition, the firms are not allowed to create mandatory service “bundles” which would require customers using one company’s services to have to use the others. Finally, they were also not allowed to use ticketing data to help their promotion or artist management business. In 2020, the Department of Justice found that Live

Nation entertainment had violated the behavioral consent decrees and decided to amend the Final judgement and extend it for an additional five and a half years.

My research focused on analyzing the competitiveness of exclusive contracts through the voices of economic antitrust scholars. Since the Department of Justice has not investigated Ticketmaster's exclusive contracts, outside voices were necessary for the analysis of these contracts. The first viewpoint I considered was that of the Chicago School of Economics, championed by scholars such as Robert Bork, former US Solicitor General and law professor and Richard Posner, former federal appellate judge and senior lecturer at the University of Chicago school of law. The other viewpoint I considered was that of the New Brandeis movement scholars such as Lina Khan, chairwoman of the Federal Trade Commission and Tim Wu, a professor of law at Columbia University and former Special Assistant to the President for Technology and Competition Policy. The core beliefs of these schools surrounding the original purpose and legislative intent of antitrust laws has influenced their views on the competitiveness of exclusive contracts.

The Chicago School thinkers believe in the role of the free market in resolving antitrust cases. Economists from this school prioritize economic efficiency and claim that the goal of antitrust laws are maximizing consumer welfare through maximizing efficiency. They claim that two factors affect consumer welfare, productive and allocative efficiency. These are maximized when producers produce the largest amount of goods with the lowest number of resources without affecting the distribution of these goods. Because of this belief, many Chicago school thinkers find no inherent problem with exclusive contracts because they maximize the productive efficiency of a firm and keep costs lower for end consumers. In addition, Chicago

school thinkers argue that exclusive dealing is often not used as an anticompetitive practice because exclusive dealing has a cost, since buyers must be compensated for accepting these exclusive deals.

In contrast, the New Brandeis movement thinkers prioritize preserving the market structure and competitive processes of industries as the main purpose of antitrust laws. Khan argues that the legislative intent of Congress passing antitrust laws was to safeguard against excessive concentrations of economic power. In addition, Khan criticizes the Chicago School idea that consumer welfare is determined solely by efficiency and argues that consumers also value attributes such as product quality, variety, and innovation. The New Brandeis movement thinkers also argue that high market concentration leads to high barriers to entry since the costs of entering the market include the cost of taking customers from the incumbent firm. Higher barriers to entry have the effect of decreasing competition and should be considered in antitrust cases. Ultimately, New Brandeisians are in favor of reforming antitrust laws to be harsher on anticompetitive practices and monopolies.

My findings from the critical analysis of the thoughts of these scholars applied to the case of Ticketmaster included one area of agreement between these schools. Both schools of thought said that the market share of Ticketmaster is an important determinant of whether their exclusive contracts are predatory. Chicago School scholar Bork specifically mentions the law can attack a firm's use of exclusive dealing as predation when the firm has an 80-90% market share. The New Brandeis school does not provide a specific number but says that the market structure of each industry determines whether a practice is anticompetitive. According to documents from the Department of Justice, Ticketmaster's share of venue capacity was

82.9% of the market in 2008. After Live Nation started their own ticketing company in 2008, Ticketmaster's share of venue capacity fell to 66.4%. However, their original market share was restored when the companies merged in 2010. Another tool used to analyze a company's size relative to the market is the Herfindahl Index, also known as HHI. The Department of Justice found the HHI of Ticketmaster in 2008 to be 6900, which is considered "highly concentrated", and mergers are presumed to have an anticompetitive effect. Scholars from both schools would agree that the merger with Live Nation has increased the market concentration to a number where Ticketmaster's exclusive contracts may have been predatory.

Despite the implication that the exclusive contracts of Ticketmaster were predatory due to their large market share, the Chicago school would argue that these contracts are the most efficient organization of this market. Posner and Bork both believe that if a society's economic welfare would be greater if a monopoly were permitted rather than forbidden, that the monopoly should remain. While Ticketmaster's size and exclusive contracts point to anticompetitive practices, the high contract renewal rates and sold-out shows indicate that this market is operating efficiently. In addition, their belief in the free market leads them to believe that the market will organize itself in the most efficient way possible. If Ticketmaster was not providing the best deals, venues would not sign their contracts. They would argue that there was optimal allocation of tickets from this sale since they all sold out, and difficulties from the Eras Tour Verified fan sale arose from the extremely high demand.

Their ideas for moving forward include leaving the monopoly as is since it achieves maximum allocative and productive efficiency. However, this option breaks down in Ticketmaster's case as Posner says that this monopolistic position must be achieved without

engaging in anticompetitive practices. The other option they may propose is imposing monetary punishments for antitrust violations rather than criminal punishments. Posner argues that monetary penalties are more effective than criminal sanction because criminal sanctions have higher costs to society. Criminal punishments have, however, been the typical form of punishment in antitrust cases. In addition, he argues that it is difficult to translate the monetary cost of an action to a criminal punishment such as days served in prison.

In contrast, the New Brandeis movement believes that the Ticketmaster-Live Nation merger created an entity with too high of a market concentration, with Tim Wu naming the Ticketmaster/Live Nation merger as one of antitrust's most wanted. These scholars would say that the difficulty in buying tickets is a direct consequence of the lack of competition in the industry because Ticketmaster has had no incentive to innovate and improve their technology. The New Brandeis school would argue that Ticketmaster only appears efficient because of the lack of alternatives to consumers and venues. The New Brandeis school believes that high barriers to entry cause and are a direct result of anticompetitive practices such as Ticketmaster's exclusive contracts. Tim Wu mentions that high barriers to entry in the ticketing industry have caused new and innovative entrants such as SongKick and Crowdsurge to go out of business.

The New Brandeis movement would support more regulation of the company moving forward. One potential solution is an Essential Facilities Doctrine. This doctrine requires a dominant firm to grant access of an essential facility to their competitors. To be an essential facility four conditions must be met which include "1) a monopolist controls the essential facility; (2) a competitor is unable practically or reasonably to duplicate the essential facility; (3)

the monopolist is denying use of the facility to a competitor; and (4) providing the facility is feasible.” It can be argued that Ticketmaster’s computer ticketing system is an essential facility since competitors can’t duplicate this system without unreasonable expense. Courts could order Ticketmaster to share their infrastructure and ticketing database with competitors. While their modern-day infrastructure has not evolved to meet the high demand of concerts, it is still the dominant existing infrastructure in the industry. Licensing the Ticketmaster infrastructure to other companies would lower barriers to entry since competitors would not need to make a large up-front investment to develop infrastructure. In addition, these companies may increase innovation through making improvements to the infrastructure in order to gain a competitive advantage over Ticketmaster. Allowing multiple companies to access this software may increase competition in the industry, improve industry infrastructure and software, and create a better fan experience.

Ultimately, I agree with the New Brandeis assessment of Ticketmaster’s exclusive contracts. Reduced allocative efficiency in this market is a direct result of the combination of these exclusive contracts paired with the large market share of the merged Live Nation Entertainment entity. Even though this may be the most efficient organization of this market from a producer standpoint, these contracts have demonstrated the exclusion of competitors through creating high barriers to entry and causing harmful outcomes such as lack of consumer choice and innovation. The Eras Tour Verified Fan sale is a direct result of Ticketmaster’s lack of innovation and investment in infrastructure. To prevent sales like this from occurring in the future, regulation that incentivizes competition and innovation, such as implementing the Essential Facilities Doctrine needs to occur. Monetary punishments as suggested by Chicago

school thinkers, would not make substantial changes that would increase competition in the industry.

Ultimately, the purpose of this project was to provide commentary on the institutions and voices that determine the consumption of events that honor our shared humanity, such as the arts, sports, music, and other live entertainment. Participating in these communal activities is an essential part of being human, but the consumption of these activities is restricted by institutions such as Ticketmaster. This project also offers a critique of antitrust laws and the legal system by drawing attention to the way that these laws have failed to protect competition in the ticketing industry. In addition, my project comments on the importance of stakeholders in knowledge marking by analyzing the issue of competition in the ticketing industry through the voices of antitrust scholars. Considering how a practice will affect all stakeholders is an essential part of monitoring institutions, especially those that regulate access to such humanity defining activities. These findings align with the research done by my peers, Sophia, and Annabelle, who have also analyzed the effect of powerful institutions on various stakeholders. Each of our projects advocate for legal reform that better protects consumers and employees.

While Ticketmaster has continued to exist without being punished for violation of antitrust laws, the attention of the public and lawmakers is on them. At the time of researching and writing this project, investigations of Live Nation by the Department of Justice were occurring. News articles reporting that the DOJ requested more documents from the company came out in February 2024. The eyes of the world are on the company and now is the time to determine the role that this institution should play in access to events critical to honoring

humanity. I want to end this speech with the words of Taylor Swift who says, "These things will change, can you feel it now?" Thank you for listening.