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## DOJ: Event Powerhouse Live Nation Punished Concert Venues for Using Competing Ticketers Despite Bar

Highlights contracts conglomerates use to lock down artists and venues.

By Jennifer M. Oliver



Live Nation Entertainment, Inc., owner of some of the world's biggest music venues, events and festivals, is currently operating under what the Department of Justice's Antitrust Division calls "the most significant enforcement action" of an existing antitrust consent decree in its history, one that has secured stricter and longer lasting terms designed to rein in the event conglomerate's anticompetitive behavior.

The DOJ action began more than a decade ago after the company acquired Ticketmaster Entertainment, Inc. A 2010 final judgment permitted the merger but prohibited the company from retaliating against concert venues for using competing ticket companies, threatening concert venues, or taking other actions against concert venues for 10 years (*United States v. Ticketmaster*

*Entertainment, Inc., et al.*, Case No. 1:10-cv-00139-RMC [July 30, 2010]).

These are highly lucrative companies. Live Nation's 2018 revenues were \$10.8 billion. Ticketmaster, a wholly-owned subsidiary following their merger in 2010, made \$1.5 billion in 2018.

Despite the 2010 judgment, the DOJ announced earlier this year that Live Nation had been repeatedly violating it for years. The government hopes the modified and extended judgment clarifies for Live Nation what conduct is out of bounds, and gives consumers and venues the relief the DOJ wanted in the first place.

The modified judgment states that, should a venue select a ticketing service other than Ticketmaster, Live Nation will not threaten to withhold concerts from that venue. The company must also appoint an internal antitrust compliance officer, conduct regular internal training to ensure its employees fully comply with the judgment, notify customers of the judgment, and pay costs and fees associated with the enforcement action. The DOJ will assign an independent monitor to Live Nation to more effectively detect violations, each of which would earn Live Nation a \$1 million penalty. The terms of the judgment were set to expire this year, but have been extended for another 5-1/2 years.

According to an April 1, 2018, New York Times article, Live Nation's number one rival, Anschutz Entertainment Group, Inc. (AEG), informed government officials that some of the venues it manages in Atlanta, Las Vegas, Minneapolis, Salt Lake City, Louisville, Ky., and Oakland, Calif., were told they would lose valuable shows if Live Nation's Ticketmaster was not used.

## The Radius Clause: Anticompetitive Overkill?

One contractual provision companies like Live Nation use is the “geographically and temporally broad radius clause” which restricts acts from playing within a specified radius of a booked show for specified period of time, preventing competing venues from booking artists. Radius clauses are common in the music industry, especially around music festivals. The justification is that promoters must protect their financial investment in festivals.

The clause was addressed thoroughly in a *Seattle University Law Review* article – titled “*Defining Unreasonable Radius Clauses for American Music Festivals*” – written by then-student Trevor Lane, who is now is an attorney at the Seattle law firm of Ahlers Cressman & Sleight PLLC.

Lane wrote that, beginning in 2010 – the year Live Nation acquired Ticketmaster – legal challenges alleged that such radius clauses used by music festival promoters violate Section 1 of the Sherman Antitrust Act. Lane essentially concluded that the clauses are anticompetitive overkill. “[R]adius clauses which limit artists from performing beyond the festival’s geographic market and fail to distinguish between festivals and concert performances should be considered unreasonable restraints of trade in violation of the Sherman Antitrust Act,” Lane wrote, “because such radius clauses restrict more competition than is necessary to protect the festival promoter’s legitimate objectives.”

## Radius clause litigation. Even Ozzy joins the fray.

### SFX

In *SFX React-Operating LLC v. Eagle Theatre Entertainment, LLC* (No. 16-13288, E.D. Mich., S. Div.), the plaintiff alleged defendants’ radius clause constituted an unreasonable restraint in violation of Section 1. On Aug. 23, 2017, U.S. Judge Denise Page Hood applied a “rule of reason” analysis, finding that the antitrust plaintiff established a prima facie Section 1 case but then granted defendants’ motion to dismiss on unrelated grounds.

### Soul’d Out

*Soul’d Out Productions, LLC v. Anschutz Entertainment Group, Inc.* (No. 3:18-CV-00598, D. Ore., Portland Div.) is a similar case related to the radius clause used by AEG, owners of the wildly successful Coachella music festival (*Soul’d out Prods., LLC v. Anschutz Entm’t Grp., Inc.*, 2019 U.S. Dist. LEXIS 42648).

Soul’d Out claimed AEG was an illegal live festival monopoly that “unreasonably restrict[ed] the price and cost of competition among live concert venues” with “[limited] entry or expansion of competitors.” Attorneys for AEG argued that artists could always play at festivals other than Coachella if they didn’t like the contract. “The entire purpose of the radius clause is to protect AEG from competitors unfairly free-riding on its creative choices in selecting its artist lineup,” the company argued.

The AEG Coachella radius clause says artists cannot:

- Perform at any festival in North America from December 15th to May 1st.
  - Play at “hard ticket” concerts in Southern California during that time.
  - “Advertise, publicize, or leak” performances at competing festivals taking place in California, Nevada, Oregon, Washington, or Arizona that take place after May 1st until after May 7th. (This also applies to headliner concerts in Southern California.)
  - Announce festival appearances for 45 states in the U.S. until after Coachella reveals its lineup in January. (Exceptions are made for certain events.)
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- Reveal their own tour stops in California, Arizona, Washington, and Oregon until after Coachella unveils its lineup in January.

AEG distinguished the facts in the *Soul'd Out* case from *SFX*, arguing that the festival in question in *SFX* involved tying up all artists in a particular genre for eight months, whereas AEG's Coachella radius clause involved only a few artists across various genres for four months, and only restricted them from performing at other festivals. For that reason, AEG argued there was no "market-wide harm" or lockout, no exclusion from competition, and no antitrust standing. On March 14, 2019, Chief U.S. District Judge Michael W. Mosman ruled for AEG and held that *Soul'd Out* had not plausibly alleged an antitrust violation.

Live Nation uses such broad radius clauses, not restricted to festivals, and some sources we interviewed for this article say that Live Nation waives those clauses for bookings at other Live Nation venues. Sources also claim that the clauses apply even after the festivals are sold out, undermining their financial investment justifications.

### **Ozzy Osbourne**

Heavy metal legend Ozzy Osbourne, who is said to be an ally of Live Nation, filed an antitrust suit against that company's largest competitor, AEG, in March 2018. The artist alleged AEG tried to force him to perform at AEG's Staples Center in Los Angeles instead of The Forum, operated by MSG Entertainment, whose parent company is Madison Square Garden. Osbourne alleged AEG said that if he wanted to perform at London's O2 arena, he had to also play the Staples Center. Live Nation joined the suit arguing that it, too, was aggrieved because AEG harms many promoters and venue operators by "block booking" acts and venues in violation of antitrust laws, an argument AEG found hypocritical given what it argued was the much larger Live Nation's abuse of its own market dominance. In the end, AEG agreed to stop its practice of block booking their venues (something it had denied it was doing) – which Osbourne's attorneys characterized as illegal tying – and he dropped the case. (For additional background see reports from *Variety Magazine* and *CompleteMusicUpdate.com*).

### **Songkick**

In January 2018, Live Nation settled an antitrust claim brought against it by ticketing startup Songkick for abusing the market power Live Nation grabbed by buying Ticketmaster. According to the *New York Times*, Live Nation paid \$110 million to resolve the dispute. Songkick, which specialized in artist pre-sales, said Live Nation was blocking access to tickets and that Ticketmaster had even engaged in corporate espionage against the startup.

### **It's My Party**

In 2016, Live Nation won a Fourth Circuit ruling in an antitrust case brought against it by It's My Party, Inc., (IMP) operator of the Merriweather Post Pavilion in Maryland, which claimed Live Nation forced artists to appear only at its venues. A district court held that IMP failed to define the relevant markets or to demonstrate any anticompetitive conduct, and the Fourth Circuit affirmed.

The case involved "two separate but related markets," the court explained, one for concert promotion and the other for venues. The "consumers" are the performers, the court said, adding that IMP defined the promotion market as "national rather than local and restricted the venue market to major amphitheaters to the exclusion of other venues." The Fourth Circuit agreed with the lower court that "definitions were plainly designed to bolster IMP's monopolization and tying claims by artificially exaggerating [Live Nation's] market power and shrinking the scope of artists' choices."

The relevant geographic market in antitrust cases is defined by the area within which customers can find alternatives if prices are raised. "Applied to this case, that inquiry focuses on the area within which

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artists can find alternative promoters if any one promoter were to increase its prices,” the Fourth Circuit wrote. “The goal of concert promotion is of course to boost ticket sales. Therefore, artists’ demand for promotion services is derivative of the public’s demand for concert performances. Concertgoers will typically not travel out of their region to attend a concert in response to higher ticket ----prices in their area.” Ruling against IMP, the Fourth Circuit concluded that the market for concert promotion is local, and that in their case it was the Washington-Baltimore area.

The court also said IMP’s definition of the venue market was defective for its narrowness. The only venues that could have met IMP’s definition happened to be the venues at issue in the case. The court said IMP’s approach was like “defining a market to include tennis players who have won more than three Olympic gold medals and finding that only Venus and Serena Williams fit the bill.”

“The loser in all this,” the court continued, “is of course the consumer, left with a patchwork of localized monopolies and one-product wonders flourishing at the expense of larger and more diverse competitors.”

“To help prevent antitrust law from being hijacked for such anticompetitive ends,” the Fourth Circuit concluded, “we join the district court in sending this tussle between two rivals back to the marketplace from whence it came.”

### **Behavioral remedies are too easily ignored.**

Historically, structural remedies (such as divestitures) have been preferable to behavioral remedies (like consent decrees) in addressing antitrust concerns over proposed mergers. This case supports that policy: behavioral remedies are too easily ignored or abused by post-merger behemoths, and the benefits of violation often outweigh the punishment.

Live Nation/Ticketmaster’s behavior also highlights the anticompetitive effects that can result from large-scale vertical mergers, which have been rampant in recent years.

Bundling, tying, and exclusive contracts are just a few of the competitive concerns that we see playing out here, not to mention a stagnation in the entry of new competitors in various complementary markets. Independent venue owners and promoters may feel they have insufficient power or resources to challenge Live Nation/Ticketmaster’s behavior, but an organization like the American Federation of Musicians, the Music Artists Coalition, the Music Business Association (Music Biz), the Music Managers Forum-USA (MMF), or the Music Performance Trust Fund (MPTF) may have grounds for injunctive relief.

While in this case the public enforcers may not have done enough to protect competitive markets, private enforcers still might.



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