

JAMMING TICKETMASTER: DEFINING THE RELEVANT MARKET IN THE PEARL JAM - TICKETMASTER CONTROVERSY

Matthew A. Ryen

Over the past few years, concert patrons have found significantly less money in their pockets after attending their favorite performances. An average fan spends at least twenty dollars per ticket to attend some of the lowest-priced concerts.¹ Some big acts, like Barbara Streisand and The Eagles, charge up to \$350 per ticket.² And if a fan wishes to bring something home to remember the experience, a souvenir such as a shirt costs approximately twenty dollars. In addition to these costs, fans must spend money on food and transportation.

While it may be more expensive to buy a concert ticket today, it is also more convenient than it was ten years ago. Now, a person can simply pick up the phone, call Ticketmaster (one of the largest companies in the United States who, for a fee, distributes tickets over the phone to events at large venues throughout the country), charge the ticket to a credit card, and have the ticket mailed.³ Telephone charging was not available ten years ago. If a person

wanted to see a popular concert, he or she might have tried camping out over night in a line of people at the local record store to secure the opportunity to buy a ticket.

On May 6, 1994, the rock band Pearl Jam ("the Band"), one of the best selling bands in the country,⁴ filed a memorandum with the Antitrust Division of the United States Department of Justice ("D.O.J.") arguing that Ticketmaster acted anticompetitively in violation of Sections 1 and 2 of the Sherman Act.⁵ In the complaining memorandum, the Band concluded that Ticketmaster was a monopoly and illegally controlled the price of tickets sold at most major venues.⁶ The D.O.J. investigated the allegations made by the Band from approximately May 1994 to July 1995.⁷ Before concluding that there was no antitrust violation, the D.O.J. conducted numerous interviews with members of the music and entertainment industries.⁸ The central focus of the D.O.J. investigation was "Ticketmaster's practice of paying a portion of

¹ "Tickets for most rock concerts range from around \$22 to \$55, plus phone service charges that often add about \$6 to \$8." Chuck Philips, *Whaddaya Want for \$20? A Ticket to Pearl Jam?*, L.A. TIMES, Apr. 10, 1994 (Calendar), at 59.

² *Id.* Fans of the Eagles paid as much as \$115 and Barbara Streisand concert tickets cost up to \$350 per ticket. *Id.*

³ In the case of Ticketmaster, a customer can call a toll free number, pay for tickets with a credit card, then receive the tickets in the mail. *Id.* People are forced to buy tickets over the phone since very few tickets are available at the venue a few hours after the tickets are released. "Only about 100 tickets for the rock package starring the Red Hot Chili Peppers and Pearl Jam were still available at the amphitheater box office when it opened at noon — three hours after the tickets went on sale at Ticketmaster outlets throughout Southern California." Chuck Philips, *Breaking Down Those \$4 to \$7.75 Service Charges*, L.A. TIMES, June 9, 1992, at F1.

⁴ See Chuck Philips, *Pearl Jam, Ticketmaster and Now Congress*, L.A. TIMES, June 30, 1994, at F1.

⁵ Memorandum of Pearl Jam to the Antitrust Division of the United States Department of Justice Concerning Anticompetitive Actions Engaged in by Ticketmaster Holdings Group Ltd. (May 6, 1994)[hereinafter May Memorandum]; The Sherman

Antitrust Act, 15 U.S.C. §§ 1-2 (1994); Richard C. Reuben, *Ticketmaster in a Jam: Rock Group, Lawsuits Claim Antitrust Violations*, 80 A.B.A. J. 17 (1994).

⁶ The band argued that

freedom of choice - a basic principal of competition in this country - does not effectively exist in the music industry today. Something is vastly wrong with a structure under which a ticket distribution service can dictate the markup on the price of a concert ticket, can prevent a band from using other, less expensive, methods of tickets [sic], and can effectively preclude a band from performing at a particular arena if it does not accede to using Ticketmaster.

Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theater Ticket Handling Charges and Other Practices, Hearing Before the Information, Justice, Transportation, and Agriculture Subcomm. of the Comm. on Government Operations House of Representatives, 103d Cong., 2d Sess. 22 (1994)[hereinafter *Hearing*](statement of Pearl Jam); see also May Memorandum, *supra* note 5.

⁷ Chuck Philips, *Rock Group Files Complaint Over Alleged Tactics of Ticketmaster*, L.A. TIMES, May 28, 1994, at A38.

⁸ Chuck Philips, *Ticketmaster Cleared*, WASH. POST, July 6, 1995, at C2. Talent managers, promoters, venue owners, and

the service fees it collects to the owners of major venues and promotion firms in exchange for exclusive contracts to ticket all events at those venues."⁹ By ultimately dropping the antitrust investigation, the D.O.J. may have placed a stamp of approval on the controversial contracts that Ticketmaster employs. One message is clear, consumers who think concert tickets are too expensive will not gain assistance from the D.O.J.

This comment evaluates the D.O.J.'s decision to drop Pearl Jam's antitrust complaint against Ticketmaster and, in particular, how the D.O.J. defined Ticketmaster's relevant market, a key component needed to determine Ticketmaster's market share in the context of a claim of monopolization under Section 2 of the Sherman Antitrust Act.¹⁰ Part I summarizes the events involved in the dispute between Pearl Jam and Ticketmaster. Part II lays out a framework of the issues considered in a claim of monopolization under Section 2. Part III examines Pearl Jam's claim that Ticketmaster monopolized the distribution of tickets to most major concert and entertainment events in the United States. Part IV analyzes Ticketmaster's relevant product and geographic markets as they might be used to evaluate Ticketmaster's alleged monopolistic position in the market. Part V concludes that the relevant market that should be used to evaluate Ticketmaster's alleged monopolistic stance includes the distribution of tickets to rock concerts at "large" or "main line" venues in heavily populated metropolitan areas.

ticket software firms were among those reportedly interviewed. *Id.*

⁹ *Id.*

¹⁰ Pearl Jam also argues that Ticketmaster violates § 1 of the Sherman Act. May Memorandum, *supra* note 5, at 5. Analysis of the § 1 claim is outside the scope of this comment.

¹¹ May Memorandum, *supra* note 5, at 1. Ticketmaster is no stranger to lawsuits and criticism concerning its market share and service fees. Chuck Philips, *Nix Ticket-Fee Settlement, Consumer Group Urges*, L.A. TIMES, Apr. 12, 1994, at F2. In April 1994, a week after Pearl Jam's initial request to Ticketmaster for a cap on service charges at its concerts, Consumer Action, a California consumer rights group, urged members of a class action suit to reject a settlement with Ticketmaster since the ticket company would not acknowledge fault. *Id.* The consumer action group contended that the settlement "[did] nothing to lower convenience fees or to address the issue of competition in the ticket service market." *Id.*

¹² May Memorandum, *supra* note 5, at 1; "Pearl Jam does not seek any portion of the service charges imposed by Ticketmaster." *Id.* at 3.

¹³ Supplemental Memorandum of Pearl Jam to the Antitrust Division of the United States Department of Justice Responding to Various Assertions Made by Ticketmaster Corporation 7 (July 20, 1994).

I. EVENTS LEADING UP TO PEARL JAM'S COMPLAINT

On May 6, 1994, Pearl Jam submitted a memorandum to the D.O.J. urging the "Antitrust Division [to] investigate recent anticompetitive actions by Ticketmaster directed against Pearl Jam in violation of Sections 1 and 2 of the Sherman Act."¹¹ In its brief, the Band stated that their efforts to cap service fees grew out of concern for their fans' ability to pay the large ticket prices, now standard in the industry.¹² In addition to the price of a ticket, service charges levied by Ticketmaster range from \$1.50 for a movie ticket¹³ to \$15 for a concert.¹⁴ Pearl Jam asserted that Ticketmaster typically charges anywhere from four to six dollars in service fees for their concerts.¹⁵

After their summer tour in 1993, Pearl Jam requested that Ticketmaster list its service fee separately on the ticket so customers would know how much the Band was actually charging.¹⁶ Frustrated and ultimately unable to influence Ticketmaster's practice, Pearl Jam tried to distribute tickets on their own through a lottery.¹⁷ That plan did not work. The promoter involved in the lottery scheme to distribute tickets was subsequently threatened "with a lawsuit for breaching its exclusive dealing agreement with Ticketmaster by allowing Pearl Jam to distribute tickets to the concert other than through Ticketmaster."¹⁸ After some discussion with Pearl

¹⁴ *In the News*, FED. NEWS SERVICE, July 1, 1994. "As anyone who has read the papers this summer is undoubtedly aware, the Ticketmaster service charge has in at least one case been reported to have gone as high as \$15 per ticket." *Id.*

¹⁵ May Memorandum, *supra* note 5, at 3.

Sources estimate that about \$2 of the \$4 convenience fee pays for operating expenses such as rent, payroll, facility phone lines, credit card fees, programming and maintenance of computers. Another \$1 of the \$4 fee is paid to Music Plus, May Co. and other stores for acting as Ticketmaster outlets. There are 180 outlets in Southern California. At least 15% (or 60 cents) of the \$4 convenience fee is paid to venue owners to subsidize long-term, six-figure contracts with each facility guaranteeing Ticketmaster exclusive ticket distribution rights to the building.

Philips, *supra* note 3.

¹⁶ May Memorandum, *supra* note 5, at 3.

¹⁷ *Id.* "Persons interested in purchasing tickets to the concert were asked to send in written requests, and the social security numbers of lottery winners were printed in Detroit newspapers along with instructions about where and when to pick up tickets." *Id.*

¹⁸ *Id.* The following excerpt from a memorandum dated March 25, 1994, from the North American Concert Promoters

Jam and its agents,¹⁹ the ticket company agreed to limit their service charge to \$1.80 per ticket, but only for Pearl Jam's Boston show.²⁰

In preparation for a later concert in New York's Madison Square Garden ("MSG"), the Band enticed eleven radio stations to give away the right to buy tickets for eighteen dollars, thus avoiding Ticketmaster's services and charges.²¹ In response, Ticketmaster allegedly threatened to sue Paramount Communications, the owners of MSG, because of an exclusive distribution agreement between MSG and Ticketmaster.²² The use of creative ticket distribution mechanisms coupled with Pearl Jam's efforts to undermine Ticketmaster's exclusive contract agreements prompted Ticketmaster to warn Pearl Jam to "watch their backs."²³ Later, Ticketmaster threatened to sue Pearl Jam in tort for interfering with its exclusive dealing agreements with venues and promoters.²⁴

A. Pearl Jam's Memorandum

In May 1994, Pearl Jam filed a memorandum soliciting the D.O.J. to investigate Ticketmaster.

Association to the Association's membership, illustrates Ticketmaster's influence over promoters and venues:

This is an update on the Pearl Jam/Ticketmaster controversy. Fred has indicated that he intends to take a very strong stand on this issue to protect Ticketmaster's existing contracts with promoters and facilities and, further, TM will use all available remedies to protect itself from outside third parties that attempt to interfere with those existing contracts. TM views the Pearl Jam issue as an all or nothing proposition, meaning they will not agree to handle half of the available inventory on a show in any situation where a contract exists. If asked, you may wish to consider and cite this fact: you and/or your venue have an existing contract with TM which precludes you from contracting with others to distribute tickets. I urge you to be very careful about entering into a conflicting agreement which could expose you to a lawsuit. I know all of you hope this matter is resolved amicably to everyone's satisfaction. In the interim, you may want to review your situation in preparation for an important decision that you may be asked to make next week.

Hearing, *supra* note 6, at 26 (Letter from Ben Liss, Executive Director, North American Concert Promoters Association, to Membership of the Association (Mar. 25, 1994)).

¹⁹ *Id.*

²⁰ May Memorandum, *supra* note 5, at 4. Ticketmaster eventually acquiesced, but the company was adamant that it would not limit service charges again. *Id.* Ticketmaster agreed to sell tickets only over the phone in an effort to block scalpers from buying large blocks of tickets at Ticketmaster outlets and then selling them at inflated prices. *Id.*

²¹ *Id.* "Pearl Jam in New York opted to have eleven radio stations give away rights to purchase two tickets for \$18.00

Pearl Jam complained that Ticketmaster "dominated the ticket market since 1991"²⁵ and that today it is "virtually impossible for a band to do a tour of large arenas or other significant venues in major cities and not deal with Ticketmaster."²⁶ The Band pointed to the "Exclusive Rights" section of one promoter's contract which gave Ticketmaster the sole right to distribute tickets for any concert produced by the contracting party²⁷ and hypothesized that most of Ticketmaster's contracts included the "Exclusive Rights" clause to ensure market security for Ticketmaster.²⁸

B. Congressional Attention

On June 30, 1994, Pearl Jam and Ticketmaster representatives were invited to testify before the House Information, Justice, Transportation, and Agriculture Subcommittee of the House Committee on Government Operations.²⁹ Pearl Jam's Stone Gossard³⁰ and Jeff Ament³¹ argued that Ticketmaster was unlawfully interfering with their freedom to determine the price and terms of ticket sales

apiece to fans calling in during the forty-eight hours preceding the concert. The tickets could be picked up in advance at the Madison Square Garden box office." *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Chuck Philips, *Ticketmaster Documents Sought in Probe*, L.A. TIMES, June 8, 1994, at D2. In 1991, the D.O.J. allowed Ticketmaster to buy certain assets from Ticketron, "which at the time was its only major competitor." *Id.*

²⁶ *Testimony June 30, 1994 Pearl Jam House Government Operations/Information, Justice, Transportation and Agriculture Ticket Distribution Industry*, FED. DOCUMENT CLEARINGHOUSE, June 30, 1994, at 38 [hereinafter *Testimony*]. "Ticketmaster . . . has a virtual monopoly on the distribution of tickets to concerts in this country." *Id.* at 1.

²⁷ May Memorandum, *supra* note 5, at 2; Pearl Jam explained that it was difficult to obtain a portion of the contract due to Ticketmaster's strength in the industry. *Id.*

²⁸ See *id.* The "Exclusive Rights" section:

Principal hereby grants to Ticketmaster and Ticketmaster accepts from Principal the exclusive right during the term of this agreement to sell as Principal's agent at outlets and/or by telephone sales all tickets made available to the public for any attraction scheduled or presented by the Principal at the facility and sold at the facility box office.

Id. (quoting an "Exclusive Rights" section from a contract between Ticketmaster and a promoter).

²⁹ See *Testimony*, *supra* note 26.

³⁰ Stone Gossard is Pearl Jam's lead guitarist. Philips, *supra* note 4.

³¹ Jeff Ament is Pearl Jam's bassist. *Hearing, supra* note 6, at 6.

to their concerts.³² Ticketmaster responded by asserting that the memorandum submitted to the D.O.J. was a "work of fiction."³³

Gossard and Ament's testimony in June caught at least one representative's attention.³⁴ On August 19, 1994, Representative John D. Dingell (D-Mich.) submitted a bill "requiring ticket distributors to disclose the fees they add to the price of each ticket."³⁵ The bill, if passed, would be the first federal law regulating ticket distribution.³⁶

C. ETM and the End of the D.O.J. Investigation

On April 4, 1995, the Band announced a thirteen date tour and its decision to use a new ticketing company, ETM.³⁷ ETM, much like Ticketmaster, is able to process numerous ticket orders over the phone in a short period of time.³⁸ However, ETM has proven to be more flexible in determining the service charge. The company agreed to add only a two dollar service fee and a forty five cent handling charge for Pearl Jam's tickets.³⁹

On July 5, 1995, the D.O.J., in a two sentence statement, announced the end of its year long Ticketmaster investigation as well as its decision to not take any formal action.⁴⁰ The D.O.J.'s Antitrust Division said that it would "continue to monitor competitive developments in the ticketing industry."⁴¹ While one newspaper hypothesized that the investigation centered on Ticketmaster's practice of paying a portion of its fees to promoters and venue owners

in exchange for exclusive contracts,⁴² Attorney General Janet Reno explained⁴³ that "[her] understanding is that the Division dropped its probe at this point because 'new enterprises' are entering the market."⁴⁴

II. A FRAMEWORK FOR MONOPOLIZATION UNDER SECTION 2 OF THE SHERMAN ACT

In its memorandum to the D.O.J., Pearl Jam argued that "because Ticketmaster is dominant in the distribution of tickets to concerts, its rigid enforcement of exclusive dealing agreements with virtually every promoter and venue in the United States is a blatant exercise of monopoly power in violation of Section 2 of the Sherman Act."⁴⁵

The D.O.J. apparently considered the charge in light of Section 2 of the Sherman Act which states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"⁴⁶ Section 2 was passed in reaction to the fear of the rapid growth of individual and corporate wealth from trade and industry.⁴⁷ Since it is couched in broad terms, it has been adaptable to the changes in commercial production and distribution that have evolved since its passage.⁴⁸

To prove monopolization in violation of Section 2,

³² *Testimony, supra* note 26. Pearl Jam received support from other musicians including Garth Brooks, Neil Young, R.E.M., the Grateful Dead, and Aerosmith. Philips, *supra* note 4.

³³ *Testimony, supra* note 26, at 21. Ticketmaster stated that "[t]he heart of the campaign is a memorandum written by Pearl Jam's lawyers . . . which is — to put it charitably — a work of fiction." *Id.* The Memorandum was prepared by the prominent law firm Sullivan and Cromwell. *Id.*

³⁴ *Id.*

³⁵ Chuck Philips, *Bill Would Require Ticket Fee Disclosures*, L.A. TIMES, Aug. 12, 1994, at D4.

³⁶ Chuck Philips, *House to Weigh Ticket Vendor Law*, L.A. TIMES, Aug. 19, 1994, at D4.

³⁷ Eric Boehlert, *Play-By-Play Account of Pearl Jam Saga*, BILLBOARD, July 8, 1995, at 85.

³⁸ Eric Boehlert, *Ticketmaster Rivals Seek New Biz*, BILLBOARD, July 22, 1995, at 1. ETM sets itself apart by customizing each ticket with the purchasers name and a bar code. These identification markings are used to prevent unauthorized resale of tickets, or what is referred to as scalping. *Id.* at 79.

³⁹ *Id.*

⁴⁰ Philips, *supra* note 8.

⁴¹ *Division Drops Investigation of Practices By Ticketmaster*, 69 Antitrust & Trade Reg. Rep., (BNA) No.1721, at

32 (July 13, 1995)[hereinafter *Division Drops Investigation*].

⁴² Philips, *supra* note 8.

⁴³ *Division Drops Investigation, supra* note 41.

⁴⁴ *Id.*

⁴⁵ See May Memorandum, *supra* note 5, at 7.

⁴⁶ 45 U.S.C. §§ 1-2.

⁴⁷ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911).

[T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to repress individuals and injure the public generally.

Id.

⁴⁸ *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 386 (1956). "Section 2 does not define the elements of the offense of attempted monopolization. Nor is there much guidance to be had in the scant legislative history of that provision, which was added late in the legislative process." *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 889 (1993).

the complainant must show that the firm possesses monopoly power in a relevant market and that it willfully holds that power.⁴⁹ To measure a firm's monopoly power, or market power, the firm's market share must be calculated.⁵⁰ To calculate market share in a relevant market, the market can be defined through an evaluation of the relevant product and geographic markets.⁵¹ Once a firm is shown to have what a court will consider to be sufficient market power, then it must find that the firm willfully acquired or attained its power.⁵²

"Monopoly power is the power to control prices or exclude competition."⁵³ It has also been described as "a high degree of market power."⁵⁴ When determining whether the firm in question has enough market power to be guilty of illegal monopolization, a court will generally hold that a ninety percent market share is enough to support the necessary inference of market power.⁵⁵ However, in some instances courts have found a market share of approximately seventy-five percent to be sufficient.⁵⁶ At least one court has determined that market share is not the sole factor used to determine monopoly power.⁵⁷ Other factors considered might include: a decline in market share over time, testimony that the market was very competitive, a dominant firm's decision to lower its price in an effort to hold its market share, a substantial number of competitors entering the market, and high technology and product research costs.⁵⁸

One antitrust scholar suggests that two factors should be used to determine a relevant product market.⁵⁹ The first factor is the extent to which a product is "interchangeable in use" with alternatives, and the second is the degree of "cross-elasticity of demand" between the product at issue and close substitutes to it.⁶⁰ Interchangeable products are identified by the willingness of consumers to substitute a particular product for the product in question.⁶¹ If purchasers are willing to use one product instead of another, then those products are probably in the same product market.⁶² Testing for cross-elasticity evaluates the change in demand for one product when the price of another is altered.⁶³ When the products are substitutes, the increase in the price of one will result in a rise in the demand for the other.⁶⁴ Products which react in this way are considered part of the same product market.⁶⁵

The geographic market is the area of effective competition where the defendant operates, and where purchasers can purchase substitute products or services.⁶⁶ In determining the geographic market, a number of questions can be asked. Do the firms competing in the industry perceive it as separate and distinct?⁶⁷ Do firms from outside the region make sales within it?⁶⁸ Are prices responsive to economic activity from outside the region?⁶⁹ Do transportation costs or lack of storage and distribution facilities block firms outside the region from competing?⁷⁰ With reference to seller and buyer conduct - who are

⁴⁹ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

⁵⁰ See generally HERBERT HOVENCAMP, *FEDERAL ANTI-TRUST POLICY THE LAW OF COMPETITION AND ITS PRACTICE* § 6.2 (1994).

⁵¹ KENNETH M. PARZYCH, *A PRIMER TO ANTITRUST LAW AND REGULATORY POLICY* 43 (1987).

⁵² 384 U.S. at 570-71. The Court notes that willful acquisition is not the same as the growth or development associated with a better product or smarter business planning. *Id.*

⁵³ *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956).

⁵⁴ William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

⁵⁵ HOVENCAMP, *supra* note 50 at 244.

⁵⁶ *Id.*; see also *Grinnell*, 384 U.S. at 571 (stating that 87% is sufficient); *United States v. Paramount Pictures Inc.*, 334 U.S. 131 (1948) (stating that 70% is sufficient).

⁵⁷ CARLA A. HILLS, *ANTITRUST ADVISOR* § 1.20, at 30 (3rd ed. 1985).

⁵⁸ *Id.* Hills refers to some factors laid out in a Federal District Court decision from 1980. *Id.*

⁵⁹ WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* § 203[1], at 344 (1994 ed.).

⁶⁰ *Id.*

⁶¹ See generally *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 393 (1956) (determining the relevant market depends upon differences between products and at what point buyers will substitute one product for another).

⁶² HOLMES, *supra* note 59, at 344.

⁶³ See generally *Du Pont*, 351 U.S. at 400. "An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other." *Id.* The Court concluded that cellophane is interchangeable with other flexible packaging material and, therefore, included as a part of the flexible packaging material market. *Id.*

⁶⁴ *Id.* "If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market." *Id.*

⁶⁵ *Id.*

⁶⁶ HILLS, *supra* note 57, at 34; see also *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5 (1949).

⁶⁷ LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 19, at 68 (1977).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

the actual competitive forces?⁷¹

Generally, intent is not an essential element of monopolization.⁷² However, a monopoly will not be found where firms find themselves in possession of monopoly power without having intended to quash competition.⁷³ To prove an attempted monopoly, intent may be required.⁷⁴ On the other hand, "[w]illful acquisition or maintenance of [monopoly] power" is required when showing an offense of monopoly under Section 2 of the Sherman Act.⁷⁵ Testing whether or not conduct by a dominant party is willful should be based on "considerations of fairness and the need to preserve proper economic incentives . . ."⁷⁶ A party who finds itself innocently possessing monopoly power may be in violation of Section 2 by "maintaining or extending market control . . ."⁷⁷

III. PEARL JAM'S ARGUMENT THAT TICKETMASTER HOLDS MONOPOLY POWER IN VIOLATION OF SECTION 2

Pearl Jam argued that after Ticketmaster purchased Ticketron in 1991, it became "far and away the country's largest . . . distributor" of tickets to most major concerts and entertainment events in the United States.⁷⁸ The Band further argued that Ticketmaster's exclusive dealing agreements left major venues with no alternative means of distributing tickets.⁷⁹

The Band relied upon the Supreme Court's finding in *Luria Bros. & Co. v. F.T.C.*,⁸⁰ that certain agreements, although not on their face absolutely restrictive of competition, may in effect violate Section

2.⁸¹ This concept of *de facto* restraint on competition parallels the facts of this case because of the ambiguous nature of Ticketmaster's control over the large concert venue.⁸² Although Pearl Jam and other bands⁸³ have taken steps to circumvent Ticketmaster and still compete in the national music arena, the Band claimed it had to cancel its summer tour on account of their disagreement with Ticketmaster.⁸⁴

Pearl Jam also argued that both *Lorain Journal Co. v. United States*⁸⁵ and *Advanced Health-Care Serv. v. Radford Community Hosp.*⁸⁶ are applicable to their complaint. In *Lorain*, the Court found that a publisher engaged in an attempt to monopolize by placing certain restrictions on the advertising space in its newspaper.⁸⁷ Although the advertisers had a choice to use an alternative radio station, most "could not afford to discontinue their newspaper advertising in order to use the radio" because of the newspaper's large market share.⁸⁸ The same is true in the Pearl Jam - Ticketmaster controversy because of Ticketmaster's dominance in the ticket distribution market.

In *Advanced Health-Care*, the Fourth Circuit held that, "if a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anti-competitive objectives, it has shown predation by that defendant."⁸⁹ Pearl Jam argued that Ticketmaster acted like a predator when it reduced its profits in the short term in order to limit the growth of alternative ticket distribution services.⁹⁰ Their memorandum referred to a memo written by the executive director of the North American Concert Pro-

were formally terminated within a short time, the Commission was justified in finding that in fact the relationship remained unchanged." *Id.* The court in *Luria* found that the agreements were restrictive of competition. *Id.*

⁸² This ambiguity runs from the fact that Pearl Jam is seeking alternative venues. Bruce Haring, *Pop Eye*, L.A. TIMES, Aug. 7, 1994 (Calendar), at 64.

⁸³ "Representatives of [Neil] Young and Pearl Jam confirm that tentative plans are being made for shows to be held in fields and other alternative venues with low ticket prices — a nod to Pearl Jam's well-publicized battle with Ticketmaster." *Id.*

⁸⁴ May Memorandum, *supra* note 5, at 6.

⁸⁵ 342 U.S. 143 (1951).

⁸⁶ 910 F.2d 139 (4th Cir. 1990).

⁸⁷ The publisher did not allow advertisements from firms who also advertised on the competing radio station in the locality. *Lorain Journal*, 342 U.S. at 152.

⁸⁸ *Id.* at 153. The newspaper was seen as the most effective advertising medium because of the large percentage of the population who read it. *Id.*

⁸⁹ *Advanced Health-Care*, 910 F.2d at 148.

⁹⁰ See May Memorandum, *supra* note 5, at 12.

⁷¹ *Id.*

⁷² HOVENCAMP, *supra* note 50, at 249 (explaining that most courts require only evidence of exclusionary practice by a firm with monopoly power).

⁷³ See generally *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429-30 (noting one instance where a monopoly may exist because of circumstances surrounding the industry rather than planning or desire on the part of a firm).

⁷⁴ HOVENCAMP, *supra* note 50, at 249.

⁷⁵ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

⁷⁶ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979) (explaining that the considerations of fairness block the application of § 2 where a firm is merely competing), *cert. denied*, 444 U.S. 1093 (1979).

⁷⁷ *Id.* (explaining the rule in *Grinnell*, 384 U.S. 563).

⁷⁸ Reuben, *supra* note 5.

⁷⁹ May Memorandum, *supra* note 5, at 5-7. In effect Ticketmaster controls who and under what terms a venue may schedule a show. *Id.*

⁸⁰ 389 F.2d 847 (3rd Cir. 1966).

⁸¹ *Id.* at 860. "Although, it is true that these agreements

motors Association to the association's members⁹¹ in which it states that "[Ticketmaster] views the Pearl Jam issue as an all or nothing proposition, meaning they will not agree to handle half of the available inventory on a show in any situation where a contract exists."⁹² This memo reveals Ticketmaster's decision to forego revenue in order to protect its market share. Because of Ticketmaster's anticompetitive behavior, Pearl Jam could not choose to play at large venues with alternative ticket distributors; thus, because of Ticketmaster, the Band automatically limits its exposure and ability to compete in the national music market.

The Band concluded its memorandum by urging the D.O.J.'s Antitrust Division to launch an investigation of Ticketmaster's anti-competitive actions and its "monopolistic enforcement of exclusive dealing agreements with promoters and venues for concerts."⁹³

IV. AN ANALYSIS OF TICKETMASTER'S RELEVANT MARKET

Pearl Jam and its attorneys failed to adequately address the factors surrounding Ticketmaster's relevant market in their effort to lay out a clear case of monopolization in violation of Section 2 of the Sherman Act. The memorandum does not define the relevant product or geographic market. Pearl Jam's facts, as applied to the law pertaining to delineation of the relevant market in an alleged monopolization, lead to the conclusion that a small market should be defined to include only ticket distribution to concerts at "main line" venues at major cities in the United States.

A. Ticketmaster's Product Market

An evaluation of the relevant product market is

⁹¹ *Id.* at 6.

⁹² *Id.* at 16.

⁹³ *Id.* at 13.

⁹⁴ See *United States v. Grinnell*, 384 U.S. 563, 571 (1966)(stating that a monopoly under § 2 must have monopoly power in the relevant market); *HOLMES*, *supra* note 59, at 344 (holding that a relevant market includes a product and a geographic market).

⁹⁵ Letter from Matthew Walker, Senior Research Analyst, Hotel Employees & Restaurant Employees International Union, to Jonathan Rich, U.S. Department of Justice (Mar. 21, 1991)[hereinafter Union Letter](on file with the D.O.J.). The letter was in response to the D.O.J. investigation of Ticketmaster's proposed acquisition of significant assets of Ticketron. *Id.* Ticketron was founded in 1968 and became the dominant

essential to analyzing Ticketmaster's market share and proving monopoly status.⁹⁴ On one hand, all tickets sold might be considered the relevant product market in which Ticketmaster participates.⁹⁵ On the other hand, there are a number of persuasive factors which indicate that the relevant market to be considered is a very small one, including only tickets to major or "main line" venues for rock concerts. A larger product market (e.g., all tickets sold to entertainment events in the United States) makes it more difficult to show that Ticketmaster controls the requisite percentage of market share needed to violate Section 2.⁹⁶ In contrast, a small market, including only those tickets to music performances at venues seating over 50,000 people, makes it easier to show that Ticketmaster's market share is large enough to violate Section 2.⁹⁷

B. The Industry Defines the Market

Pearl Jam could have relied on the 1959 Supreme Court case, *International Boxing Club of N.Y., Inc. v. United States*.⁹⁸ In *International Boxing*, the Court upheld the lower court's holding that the promotion of championship boxing contests rather than all boxing events constituted the relevant market for evaluation of the industry under the antitrust laws.⁹⁹ The Court supported its delineation by pointing to detailed findings in the record which showed that championship fights or bouts brought in over three times the revenue of non-championship bouts; television rights for championship fights brought more than two times the revenue compared with non-championship contests; several million more television viewers watched championship bouts according to Nielsen ratings; and no movie rights were sold for non-championship bouts, whereas movie rights for championship bouts were shown to be quite lucrative.¹⁰⁰ The rationale is linked to the way the indus-

force in the ticketing industry. The firm began its down turn in the 1980's. *Id.* The letter predicts that the merging parties will want to include all tickets in the relevant market, including cinema, and minor league baseball. *Id.*

⁹⁶ See generally HOVENCAMP, *supra* note 50, at 83-84 (noting, for example, that a market for automobiles is much larger than the market for Ford automobiles).

⁹⁷ See *International Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 251 (1959)(upholding the lower court's finding that production of non-championship boxing fights are not reasonably interchangeable with championship contests).

⁹⁸ 358 U.S. 242 (1959).

⁹⁹ *Id.* at 251.

¹⁰⁰ *Id.* at 250-51.

try and the Boxing Club chose to define itself through its coordinated operation.

The relevant market for Ticketmaster can be analyzed in a similar way. Consider a letter written by the Hotel Employees & Restaurant Employees International Union ("Union") in response to the 1991 D.O.J. evaluation of Ticketmaster's proposed acquisition of Ticketron.¹⁰¹ The Union's letter included an exhibit entitled "Contract Status of Major Venues - 1990. By State, City and Seating Capacity."¹⁰² The list helped to define the relevant product market by including facilities that the Union, an actor in the industry, believed were relevant to Ticketmaster's business.¹⁰³ The list included facilities that seat between approximately 400 to 95,000 people.¹⁰⁴ A pie graph attached to the list indicated that in 1990 Ticketmaster held exclusive contracts for sixty-eight percent of the total number of seats in venues that seat over 50,000 people.¹⁰⁵

At that time, the letter reported that Ticketron held twenty-one percent of the seating in similar venues where exclusive contracts existed.¹⁰⁶ Shortly after the letter was written, Ticketmaster bought Ticketron.¹⁰⁷ In addition, some news writers assert that Ticketmaster currently has exclusive contracts with two thirds of the major venues in this country.¹⁰⁸

Ticketmaster submitted a list of "well known or larger venues" in the top fifty most highly populated cities in the country at the request of the Information, Justice, Transportation, and Agriculture, Subcommittee of the Committee on Government Operations House of Representatives ("House Subcommittee").¹⁰⁹ Although Ticketmaster stated that the list is not exhaustive,¹¹⁰ it is coincidental that the company chose only to include well known venues in large metropolitan areas. For instance, the list includes eleven stadiums and halls such as Shea Stadium, Yankee Stadium, Carnegie Hall and Lin-

coln Center in New York City.¹¹¹ Smaller venues such as the Beacon Theater and Radio City Music Hall are not mentioned.¹¹² This implies that Ticketmaster considers these larger, well known locations to be a part of a separate and distinct market, relevant to the issues raised by Pearl Jam. Reflecting on the data provided in the letter, the reports in the news, and Ticketmaster's own list, it appears that even Ticketmaster defines a relevant market by including large venues in heavily populated metropolitan areas.

C. Cross-elasticity

The Supreme Court in *United States v. E.I. Du Pont De Nemours and Co.*¹¹³ called for "an appraisal of the 'cross-elasticity' of demand" when identifying the relevant product market.¹¹⁴ As stated in Part II of this Comment, the cross-elasticity of demand measures the extent to which the change in price of one product will alter the demand for another.¹¹⁵ Two factors should be considered: the extent to which a product is interchangeable in use with alternatives; and the degree of cross-elasticity of demand between the product at issue and close substitutes to it.¹¹⁶

In the case of Ticketmaster, there are few substitutes to use in calculating the cross-elasticity.¹¹⁷ In July, 1995, *Billboard* magazine named four "challengers" to Ticketmaster: Dillard's, Tele-charge, ProTix, Select-A-Seat, and ETM.¹¹⁸ The article reported that these companies offer essentially the same services as Ticketmaster.¹¹⁹ However, the companies mentioned in the article control very small markets scattered throughout the United States.¹²⁰

Pearl Jam, and at least one other band, have attempted to distribute tickets through "alternative

¹⁰¹ Union Letter, *supra* note 95.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., Boehlert, *supra* note 38.

¹⁰⁸ Ralph Blumenthal, *Oddities Continue With Ticketmaster and Pearl Jam*, N.Y. TIMES, Aug. 23, 1995, at C11 (estimating that Ticketmaster has exclusive contracts with two thirds of the nation's largest arenas); Linda Himmelstein, *Will Ticketmaster Get Scalped?*, BUS. WK., June 26, 1995, at 64.

¹⁰⁹ *Hearing*, *supra* note 6, at 128-34.

¹¹⁰ *Id.* at 128.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 351 U.S. 377 (1956).

¹¹⁴ *Id.* at 394.

¹¹⁵ *Id.* at 400.

¹¹⁶ HOLMES, *supra* note 59, at 344.

¹¹⁷ See generally Boehlert, *supra* note 38.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* Dillard's does most of its business in the southwest. *Id.* at 78. Tele-charge has money to help market itself nationwide, but insiders in the industry expect it to 'pick its spots,' rather than take on Ticketmaster nationally. *Id.* ProTix, out of Wisconsin, has a few large contracts scattered throughout the United States. It recently won a contract to provide ticketing for the summer Olympics in Atlanta. *Id.* Select-A-Seat concentrates its efforts in North and South Carolina. *Id.* at 79. ETM, Pearl Jam's ticketor of choice, has national aspirations. *Id.*

means."¹²¹ However, real substitutes for Ticketmaster appear to be few and far between.¹²² If this market were competitive, when the concept of cross-elasticity of demand is applied, the substitute firms would see a rise in demand for their tickets when Ticketmaster increased its price.¹²³ In a market where a monopoly exists, the demand for tickets sold by substitutes to Ticketmaster would stay essentially unchanged when Ticketmaster increased its price.¹²⁴ Here, the reported substitute firms could be excluded from the relevant market if it can be shown that Ticketmaster has been able to increase its price while demand for tickets sold by other firms remained constant.

Once again, the 1991 Union letter to the D.O.J. raises several interesting points.¹²⁵ At that time, the relevant market needed was identified in the context of a merger.¹²⁶ However, the method used to delineate the market does not change in a monopoly analysis.¹²⁷ The Union also contended that a ticket to a rock concert should constitute a separate product from a ticket to a movie or a sporting event since a music fan would not choose to buy a movie ticket just because the price of concert tickets increased.¹²⁸ Finally, the Union suggested that the exclusive nature of the agreements in the industry function as a barrier to firms who would like to enter the ticketing market.¹²⁹

D. Ticketmaster's Geographic Market

One statement used by the Supreme Court to describe the geographic market is that the market chosen must "correspond to the commercial realities of the industry."¹³⁰ In the case of Ticketmaster and the ticket distribution industry, there are some cities

where a venue or a producer has more than one choice for ticketing services.¹³¹ There are some companies, aside from Ticketmaster, who participate in the industry on a regional level.¹³² There are even a few companies who might be able to offer services in a national market.¹³³ In accordance with "commercial realities," there are different choices depending on the location in question.¹³⁴ However, Ticketmaster appears to function in a national market even though it has little competition in some regions.¹³⁵

E. Applying the Grinnell Rational

The Supreme Court in *United States v. Grinnell*¹³⁶ held that Grinnell's market was national even though its services were local in scope.¹³⁷ The Court found that Grinnell had a national business plan, dealt with national companies, and made agreements involving activities in many States.¹³⁸ Ticketmaster could be viewed in the same light. While it may provide services that are consumed in one definable location, Ticketmaster markets itself and pursues business opportunities in major cities all over the country.¹³⁹

Part II of this comment identified some questions that could be asked to determine the relevant geographic market. The first question asked whether or not the firms who compete perceive their specific market as separate and distinct.¹⁴⁰ Here, it is clear that Ticketmaster views its market nationally. The list of venues, as submitted to the House Subcommittee, lists arenas and halls all around the country.¹⁴¹ Another question that appears relevant is whether transportation costs or the lack of storage and distribution facilities block firms outside a particular re-

¹²¹ See generally Eric Boehlert, *STP Eye Tix System*, BILLBOARD, Mar. 4, 1995, at 1 (explaining a move by the rock group, Stone Temple Pilots, to create and implement its own ticketing system); see also *Hearing*, supra note 6, at 17-18 (recounts Pearl Jam's attempts at distributing tickets themselves in both Detroit and New York City).

¹²² Boehlert, supra note 38.

¹²³ See generally HOLMES, supra note 59, at 345-46 (explaining the application of cross-elasticity of demand).

¹²⁴ *Id.*

¹²⁵ Union Letter, supra note 95.

¹²⁶ *Id.*

¹²⁷ See generally HOVENCAMP, supra note 50, at 83 (suggesting that both merger and monopoly analyses use the same approach to determine the relevant antitrust market).

¹²⁸ See Union Letter, supra note 95.

¹²⁹ *Id.*

¹³⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37

(1962)(citation omitted)(suggesting that Congress intended a factual rather than legalistic approach to defining the relevant market); see also HOLMES, supra note 59, at 351-52.

¹³¹ See generally Boehlert supra note 38, at 1.

¹³² *Id.*

¹³³ *Id.* (suggesting that ETM and Tele-charge in particular could have the ability to compete with Ticketmaster in the future).

¹³⁴ In Utah there is just one ticket company to do business with. *Hearing*, supra note 6, at 37.

¹³⁵ See generally Himmelstein, supra note 108, at 65.

¹³⁶ 384 U.S. 563 (1966).

¹³⁷ *Id.* at 575.

¹³⁸ *Id.*

¹³⁹ See generally Himmelstein, supra note 108, at 65.

¹⁴⁰ SULLIVAN, supra note 67, at 68.

¹⁴¹ *Hearing*, supra note 6, at 128-34.

gion from entering the market.¹⁴² The use of computers and communication technology in ticket distribution makes it adaptable to many locations throughout the country.¹⁴³ Unlike the production of cement blocks, which would be heavy and costly to transport, ticket distribution firms appear to have relatively low costs associated with distributing their product throughout the country.

While some substitute firms operate only in one region of the country, Ticketmaster and others appear to be after contracts with certain venues all around the United States.¹⁴⁴ Still, Ticketmaster, Pearl Jam, the Union, and at least one news writer appear to define the market nationally.¹⁴⁵ If the commercial realities in the industry govern, the national market is the appropriate geographic market here.¹⁴⁶

¹⁴² SULLIVAN, *supra* note 67, at 68.

¹⁴³ See generally Boehlert, *supra* note 38 (tracking the use of computer and telecommunications technology in the industry).

¹⁴⁴ *Id.* (tracing the regional or scattered markets Ticketmaster rivals participate in).

¹⁴⁵ See *Hearing*, *supra* note 6, at 128-34 (listing venues where Ticketmaster says it does or does not have exclusive contracts); Union Letter, *supra* note 95; Boehlert, *supra* note 38 (suggesting that Ticketmaster faces little national competition).

V. CONCLUSION

In its memorandum to the D.O.J., Pearl Jam argued that "because Ticketmaster is dominant in the distribution of tickets to concerts, its rigid enforcement of exclusive dealing agreements with virtually every promoter and venue in the United States is a blatant exercise of monopoly power in violation of Section 2 of the Sherman Act."¹⁴⁷ To prove monopolization in violation of Section 2, one must show that the firm possesses monopoly power in a relevant market and that it willfully holds that power.¹⁴⁸ As this Comment demonstrates, Ticketmaster's relevant market includes the distribution of tickets to rock concerts at large venues, nationally. While the D.O.J. ended or paused its investigation of Ticketmaster, this analysis can serve as a starting point for a further evaluation of the ticketing industry.¹⁴⁹

¹⁴⁶ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (suggesting that Congress intended a factual rather than legalistic approach to defining the relevant market); see also HOLMES, *supra* note 59, at 351-52.

¹⁴⁷ See May Memorandum, *supra* note 5, at 7.

¹⁴⁸ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

¹⁴⁹ Philips, *supra* note 8.