

United States Senate Committee on the Judiciary
Hearing: January 24, 2003: “That’s the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment”

Joint statement of:

**Future of Music Coalition
Artist Rights Alliance
American Association of Independent Music
Music Workers Alliance
Union of Musicians & Allied Workers**

As groups working to elevate the voices of varied communities of musicians, songwriters, composers, producers, engineers, DJs, and independent record labels, we welcome the committee’s attention to this important and timely topic. We also welcome renewed attention to the intersection of music industry issues and antitrust policy.

This hearing comes at a pivotal moment for competition policy generally and for music communities specifically. In the past several years, a growing movement to revitalize antitrust policy has challenged regulators, enforcers, and policymakers to look beyond short-term consumer-facing price effects to the impacts on producers and the health of the overall marketplace, using all the available tools to ensure antitrust keeps up with the massive changes happening in our economy. Meanwhile, the pandemic and the resulting stress on many music revenue streams has made visible a range of systemic problems and long-standing power imbalances within our industry. While pandemic relief measures, including Save Our Stages offered crucially important emergency steps to keep independent venues alive, we cannot be content to build our way back to a pre-pandemic live events status quo that was unsustainable for too many.

In competition policy, the interests of music creators and music listeners are closely aligned: both benefit from a marketplace environment where a broad range of diverse partners—promoters, venues, ticketing providers, and others— all compete to best serve diverse artists and audiences’ needs. Ownership consolidation can alter both the scope and character of competition, centralizing power while creating new incentives to abuse that power. Consolidation in live music was causing problems long before Live Nation and Ticketmaster (LNE/TM) were allowed to merge, but it’s worth looking specifically at some of the outcomes musicians and fans have experienced since that merger closed.

It is easy to overestimate the amount of leverage that most musicians have over ticketing arrangements, particularly in the current environment. Most often, musicians are stuck using whatever arrangement the venue uses, and if they have objections, they must either find a different venue that uses a different ticket provider or skip the market entirely. Musicians with

leverage may be able to negotiate to offer fan-club or other presales, but still face fewer options than they would in a more competitive environment; as the demise of Songkick's ticketing platform illustrates.

Musicians have a role in setting the face price of the ticket—it usually represents a negotiated agreement between the artist's team and a live event promoter. Artists regularly work to balance their desire to offer fans an affordable experience with the need to generate revenue, particularly as production costs, travel costs, and audience expectations are all trending upward. Margins are narrow for many tours, and even now a positive COVID test on the road or unexpected COVID related expenses can easily imperil tours' profitability.

Typically, though, musicians have no role in setting fees above the face price of the ticket. Ticket fees are higher across the board, but it's important to understand LNE/TM's role in driving this dynamic. LNE/TM's huge footprint means the company is earning on ticketing fees for a huge swath of overall ticket transactions. Every time an independent promoter does a show at a Ticketmaster-contracted venue, they're helping enrich their most powerful competitor. Often though, they have no real choice. To be able to understand the degree to which TM/LNE control the landscape, one must look not just at the national marketplace but at individual geographic markets, and at particular categories of venue: large clubs, amphitheaters, arenas, and stadiums. If the promoter of Taylor Swift's tour can't find a way around working with Ticketmaster, that's a strong indicator of a monopoly problem.

Even venues that choose not to work with Ticketmaster may find that their tickets end up on Ticketmaster's resale site. LNE/TM can leverage its highly profitable ticketing business to advance its position in its lower-margin venue and concert promotion businesses, outbidding independent venues for top-grossing talent. To stay competitive, independent venues feel they must make that revenue back some other way. They often do this with increases in venue fees or food & beverage costs, passed along to consumers, or by taking a cut of artists' merchandise sales, which is a financial hit to artists and is also often ultimately passed along to consumers. While proponents of the 2010 merger pointed to the potential for lower fees because of the elimination of double marginalization, fees at LiveNation owned venues like the Fillmore San Francisco are frequently as high or higher than those offered by competitors. Without the financial cushion provided by top-grossing events, independent venues may feel less able to take creative risks by booking emerging talents and unheard community voices. This, coupled with further consolidation, harms communities, imperiling cultural diversity.

Some artists and managers have reported overall positive experiences with Live Nation, but that is not a defense against practices and terms that lower standards for the entire artist community. In 2020, news broke about a leaked memo where Live Nation unilaterally announced changes to contracts between its promoter business and artists. The conglomerate used its market power to dictate a 20 percent reduction in the compensation guaranteed to artists for playing a show regardless of ticket sales. Live Nation also shifted more financial responsibility to artists in the event that a concert or festival is canceled.

While it's true Live Nation walked back some of these provisions after the leaked memo provoked a strong backlash, it serves as a compelling example of just how brazenly Live Nation feels it can wield its market power. In a healthy competitive market, workers can respond to bad contract terms by choosing a different employer. But Live Nation operates so many popular festivals and venues that refusing to accept these terms is a choice many artists feel they can't make.

These are some of the reasons that our groups have encouraged the Department of Justice to unwind the LiveNation/Ticketmaster merger. We are proud to be members of the Break Up Ticketmaster coalition alongside a diverse array of groups who are similarly concerned about the company's unchecked power, and have helped focus public attention on this problem.

At the same time, we also want to be clear that Ticketmaster is not the only company in live music engaging in unfair business practices that harm musicians, independent venues, and fans. Taking a holistic view of the ticketing marketplace requires a serious critical look at the role played by resellers and brokers.

These companies also represent a key driver of high ticket prices by making it more difficult for artists to get tickets to fans at prices below what a theoretical market would bear. The worst of these companies employ automated technologies like those targeted by the BOTS Act. Some sell speculative tickets, where fictional tickets are sold before the actual on-sale date, based on the speculation that the seller will be able to obtain tickets to meet demand. One company even offers to purchase existing Ticketmaster consumer accounts in an apparent attempt to use these old accounts to bypass Ticketmaster's bot detection and fraud prevention protocols and more effectively pose as legitimate ticket buyers. At a structural level, even the most reputable secondary market companies operate with a business model that incentivises them to increase prices as much as possible, funneling as much revenue as possible away from artists, venues, and promoters to third parties that contribute nothing to the event but higher prices that have put the price of attending a live music performance out of reach for too many consumers.

While artists and fans alike would benefit from efforts to increase competition in the primary ticketing marketplace, there's nothing inherently anti-competitive about artists choosing to work with ticketing companies to limit the availability of tickets on the secondary market, or to ensure tickets make it to real fans rather than brokers and resellers. Ticketbuyers' frustration with Ticketmaster/LiveNation should not be used to advance policies that would primarily benefit extractive secondary sellers.

Concern about the secondary market doesn't mean that ticket buyers who are unable to attend the event due to illness or conflicts must take a financial hit. Many of these consumer concerns could be addressed by broader implementation of face value fan-to-fan marketplaces, ideally without additional fees. Ticketmaster and AXS both have implemented versions of this technology.

There is a connection between the bad practices happening in the secondary marketplace and Ticketmaster's domination of primary ticketing. Because Ticketmaster has the primary ticket marketplace mostly locked down, would-be competitors and their investors focus instead mostly on the secondary marketplace. Too much of the investment flowing into ticketing ends up directed toward innovative and efficient ways to snap up tickets before real fans, to be sold at wildly inflated prices. In turn, primary ticketing companies end up feeling forced to focus more of their resources on systems and technologies aimed at keeping inventory away from predatory resellers, in an escalating arms race. It defies common sense that Ticketmaster itself should be allowed to enter the secondary ticket marketplace, where it becomes both the primary seller and buyer of the same good.

Out of control prices on the primary and secondary ticket markets places further distance between artists and their fans. That distance undermines one primary reason for artists to subject themselves to grueling tour schedules, namely the ability to promote new music to likely consumers of sound recordings, which are now ubiquitously available to consumers through digital streaming services, but at shockingly low royalty rates for artists and their label partners. Live performance and selling recorded music are two separate businesses, and artists shouldn't have to combine both (often supplemented by gig economy work or service economy jobs) just to support their families.

None of these problems are inevitable; rather they reflect the outcome of a series of public policy choices. The Department of Justice conditioned its approval of the Ticketmaster/LiveNation merger on a consent decree that included both structural and behavioral elements, and promised "vigorous enforcement." With the benefit of hindsight, we can see the error of that approach: the structural elements of the consent decree failed to create any meaningful competition. For example, it required that Ticketmaster license a ticketing software product to competitor AEG, but AEG decided not to even use that software. Behavioral conditions included a prohibition on retaliating against venues that chose other ticket services, or sharing data between the ticketing and promotions side of the business, but while the Trump DOJ found clear evidence of consent decree violations, they chose only to modify and extend the consent decree rather than undoing the merger.

One of the many problems with behavioral conditions is that they create an ongoing monitoring obligation, not just for enforcers, but for the stakeholders that may have the least amount of agency and capacity: workers and small businesses. Essentially this amounts to a new form of uncompensated labor that artists and their teams are expected to perform, even though many lack expertise or legal resources to know whether any unfair treatment they may be experiencing is illegal. This can be true for venues as well, and the challenge is made even more difficult by massive information asymmetries; artists and venues may be impacted by anticompetitive behavior but may not have access to direct documentary evidence. Fears of retaliation remain widespread, and with good reason, given the results of the last DOJ investigation.

Media reports indicate that current DOJ leadership has undertaken a fresh investigation, and our groups have encouraged the DOJ to use the opportunity to correct past mistakes and break up LiveNation/Ticketmaster. However, the agencies need not stop there; they can use the lessons of this merger to shape their approach to merger reviews moving forward. DOJ and FTC are currently in the process of drafting revised merger guidelines, and these new guidelines should explicitly make clear that if the authorities conclude that a merger is likely to lessen competition, they should seek to block the transaction outright. The guidelines can incorporate insights about new ways that dominant firms can use gatekeeper power, leveraging across markets, and data exploitation to reinforce their dominance, marginalize rivals, and lower wages.

Furthermore, the FTC can make use of its broad Section 5 authority to ensure some clear rules of the road that protect workers and fans against the harms resulting from unfair methods of competition in the live sector and in other parts of the music ecosystem. The FTC's recent policy statement on Section 5 offers a promising framework. All-in pricing disclosure is currently on the table in the FTC's current "junk fees" rulemaking, and this could address one recurrent consumer frustration, as long as the rule is well-enforced and includes specific itemization of all the various types of fees.

DOJ and FTC both benefit from congressional oversight, but Congress can also do more. As conversations about possible ticket reform move forward, it's crucial to center the lived experience of working musicians and other impacted parties, including fans and independent venues. Legislation could address speculative ticketing, and require transparency provisions, without weakening artists' ability to make decisions about how to run ticketing for their own shows, based on what they understand about their specific audiences. Ultimately, music communities need a live music marketplace characterized by competition, diversity of practice, and creative autonomy. For that to happen, neither Ticketmaster/Live Nation nor the brokers and resellers should be making the rules.

Last week, country artist Zach Bryan announced a summer tour of arenas and amphitheaters, avoiding Ticketmaster-contracted venues entirely. While this may have required skipping some major markets (and might not have been possible at all if he was touring stadiums), Bryan aims to offer a fan-friendly experience, with comparatively low prices and fees. Notably, Bryan also made clear his intention to ensure tickets get to fans rather than bots and resellers by working with AXS to use rotating bar code technology instead of paper tickets, instituting limits on transferability, and creating a fan-to-fan face value resale option so no one is stuck with a ticket they can't use. This approach isn't right for every artist, but it's important that artists be able to choose the options that make sense for their specific fan communities. As the Committee considers these issues, one guiding question might be: what would make it possible for more artists-particularly those without Bryan's fame and clout- to have the agency and freedom to ensure a better fan experience?

We look forward to further discussion with the Committee and thank you for your consideration.