

Questions for the Record
Senator Chuck Grassley
“That’s the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment Hearing”
January 24, 2023

Question for Mr. Nuzzo

1) You spoke about Live Nation’s disregard for the consent orders and important consumer welfare concerns relating to Live Nation’s dominance in the entertainment industry. How has the failure by the DOJ/FTC to enforce these orders harmed consumers in the past decade? Also, could you elaborate on possible solutions to protect consumers?

It is my contention that the lack of enforcement has enabled Live Nation to continue and potentially expand their tactics. As recently as this past month, Barclays Center in New York left SeatGeek after only one year and returned to Ticketmaster when they began seeing a substantial drop off in the number of acts performing at their venue. This is, in our opinion, a clear example of how the tactics serve to reinforce the “implicit threat” of not using Ticketmaster as the provider. Without those live acts, the economics of the venue don’t work.

As to the harms on consumers – the biggest and most obvious harm is with respect to fees. Leveraging its dominance, Ticketmaster is able to command up to, and in some cases greater than, 30 percent service fees on tickets. These fees are tacked on at the very end of the process, on the very last screen before purchasing. So an individual purchasing is left with two bad choices – pay the exorbitant fees on top of the ticket price (a choice they didn’t realize until the very end of the transaction), or give up their place in line and lost the seats.

A helpful analogy would be the auto market. If I work up a price and payment plan for a used Ford F-150 with a dealership, and then at the end they attempt to add on a bunch of fees, I can choose to get up, leave the dealership, and purchase a used F-150 from any number of other willing sellers. I can even pull up my phone and find the exact same year/make/color/mileage/options and negotiate. That’s because the auto market is competitive. The same should be the case for the ticketing and live event market. It is not – and while Live Nation would attempt to make the case that tickets and autos are apples and oranges, the fact is that ultimately they are both consumer-driven markets where choice and competition benefit consumers more than anticompetitive tactics.

As to the question on solutions – I think there are solutions to address issues on pricing, solutions to address some of the contract challenges (how long the venues are forced to have an exclusive ticket provider), and solutions to the vertical integration challenges. Ultimately, however, what we should all seek is more competition. At this juncture, I don’t know of a solution short of a complete spin-off of the merger that gets at the core challenge.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Sal Nuzzo, Senior Vice President, James Madison Institute

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous witness declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. What, in your opinion, makes a Live Nation Entertainment a monopoly?

In our opinion, Live Nation presents three components making it a monopoly worthy of action.

- *First is the vertical integration present between Ticketmaster as a ticket platform and Live Nation representing talent.*
- *Second is market size. While Ticketmaster would contend that they only control about 50 percent of the venue market, the devil is in the details on that statistic. A more important and valuable way to look at this is what percentage of the major venues does the company control? Take out the small venues holding less than a few thousand people, the small community theaters probably being included in the denominator that Live Nation would like to use. The number is almost certainly at 80 percent or above.*
- *Lastly, and this is vital to the question of Congressional/DOJ action, is that Live Nation has, and likely will continue to, used its market dominance to stifle competition in ways outside of the normal market forces, and in ways that violate the consumer welfare standard.*

2. What remedies should be taken by the DOJ and FTC to address this concentrated market power?

In 2019, the DOJ found that Live Nation repeatedly violated the original terms of the 2010 consent decree authorizing the merger. If recollection is correct, Live Nation agreed to six of the incidents of finding by DOJ.

While neither I nor JMI are antitrust attorneys, it is our position that these violations represent evidence worthy of DOJ taking action up to and including the dissolution of the merger.

3. In light of violations found by the DOJ, the Live Nation/Ticketmaster consent decree was extended for another five years. Do you consider the 2010 DOJ consent agreement to have been a successful solution to the concerns posed by the Live Nation/Ticketmaster merger?

Simply put, no. The market continues to move in a direction that is anticompetitive. The recent case of Barclays arena canceling its contract with SeatGeek after just one year, returning to Ticketmaster, and the clear evidence that as a result of using SeatGeek the

arena saw a decline in the number of artists they were able to book, shows that what is happening is a mob-style implicit threat. Other venues around the country take notice. They don't want to be the next Barclays arena.

4. In what way(s) did the 2010 DOJ consent agreement fail to address the market domination issues posed by Live Nation/Ticketmaster?

From our perspective, the original consent agreement sounded reasonable. It was the execution, monitoring, and enforcement of the agreement where the failures occurred.

5. Should similar mergers in this industry be permitted in the future?

I would be hesitant to give a definitive yes/no answer on a hypothetical, but what I can certainly say is that any future merger in this specific industry should be viewed far more critically than the Ticketmaster Live Nation merger was at the time.

6. What legislative language would you recommend adoption to strengthen protections against exclusionary conduct?

From our perspective, the fix for the challenges related to exclusionary conduct are rooted in the vertically integrated monopoly present in ticketing and talent representation. This has resulted in a considerable lack of competition as technology has advanced. Congress, in our opinion, doesn't necessarily need to pass a legislative fix – the remedy is to address the specific monopoly and anticompetitive behavior at its root and then allow an actual market to fill the space.

Without a vertically integrated monopoly like Live Nation Ticketmaster, competitors would have more equitable access to the market. Equity of opportunity is the goal.

7. What legislative language would you recommend to prevent self-preferencing by digital firms?

I would reiterate our answer in question six here. We don't believe that legislation would be specifically appropriate in trying to catch up to technology advances. Ultimately the question should be asked as to why self-preferencing occurs. It occurs because one dominant player has all of the market share and can dictate the terms of the market.

The key is more competition in the marketplace. From there, self-preferencing would be

minimal, as it would become a liability in the process. Venues and talent would be able to choose from a provider that doesn't require such conditions.

8. What are possible legislative solutions to prevent the ticketing market from arriving at this type of anti-competitive behavior in the future?

I believe that protecting ticket transferability is one critical component of the puzzle where Congress can play a role. The secondary ticket market is vital to the economics of live event. As I stipulated in an answer to a question presented during the hearing, the majority of tickets on the secondary market are sold for face value or less than face value. Without this option, many acts would be playing in half-empty venues. It's only the Bruce Springsteen and Taylor Swift price spike examples that make media mention. For every \$5,000 Springsteen ticket, there are thousands of tickets to acts all over the country that are sold for a fraction of the face value to fans looking to see a new performer.

Another is all-in pricing. The dynamics at play in concert ticketing, with at times millions of people trying to obtain tickets at the same time, make it far easier for a company like Ticketmaster to hide fees until the last possible point in the sales process. This presents a Hobson's Choice – a fan has to accept a 30-plus percent bump in the final cost, or start the process all over and lose the seats that they had been seeking.

Questions from Senator Tillis
for Sal Nuzzo

1. Do you think that greater transparency in ticketing will improve the ticket purchasing experience for consumers? Please explain your thinking.

I think it will – and the reason has to do with the nature of the timing on purchasing tickets for high-demand acts. By the time a person gets to the final screen of a ticket purchase, if they see a final price 30 percent higher than they thought, they are left with two bad choices – pay the inflated price that they didn't know about until then, or start the process over and forfeit the seats they wanted (and which will likely be gone).

I would like to indicate though, that the hidden fee issue is a symptom of the lack of competition in the market, not the sole challenge. With a robust market for ticketing services, this issue would likely not occur, because competitors would address it on their own. Because Ticketmaster has such a stranglehold on the market, they have been able to perpetrate the fee tactic.

2. What legislative solutions do you recommend to benefit consumers and to improve operations in this industry?

At the federal level – I think the congress could protect transferability in ticket purchases, and also could mandate all-in pricing.

In theory, I think the ticket transferability issue is a more reasonable path for the congress than all-in pricing, because I would like the market to address pricing issues on its own. With that said, I don't believe the market forces exist currently to address that.

3. The process of transferring ownership of a ticket can be confusing and cumbersome for consumers. What can be done to streamline this process for consumers?

Protecting ticket transferability would go a long way to breaking apart many of the tactics that Ticketmaster appears to be using to throttle the secondary ticket market (as it attempts to get control of it).

Our fundamental position is that choice leads to competition which breeds market solutions. So, if the issue of competition can be addressed (i.e. more of it in this arena), market solutions that solve challenges present in the secondary market and with transferability will be worked through in the most efficient way.

4. Does the industry currently have the necessary tools, be it legislative (e.g., the Better Online Ticket Sales Act), legal, and/or technical, to stop bots from impacting ticketing platforms? If not, what more is needed?

I would suggest that in its current form, no. The reason is that, ultimately, Ticketmaster is in the business of selling tickets. At the end of the day, they have no specific incentive to care if tickets are purchased by fans, or by bots and then resold to fans. In fact, the “best” possible scenario for Ticketmaster is to have exclusive rights to the secondary market and then bots buy up all the tickets and resell them on the Ticketmaster platform. Ticketmaster makes money on the selling, and then on the resale. With as much of the market cornered as they have, there is no financial reason for them to operate otherwise.

With a more robust and competitive environment in both the primary and secondary markets, innovations like blockchain can provide value to ALL parties – the artist, venue, and consumer. I’ve personally seen companies working on solutions using blockchain technology with ticketing that would remedy many of the challenges concerning bots, hackers, fake tickets, etc. – these technologies are stifled as a result of anticompetitive and monopolistic tactics.

It's also important to note that bots, hackers, and nefarious actors in the industry will always exist. It is our contention that because there is practically speaking only one vertically integrated player in the industry, bots and hackers will always be a step or two ahead. There's only one system they (bad actors) need to beat. With a robust and competitive market, innovative methods to thwart bots and hackers will develop on their own.