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# LIVE ALIENATION: ONE SUPER-PROMOTER ELIMINATES COMPETITION, CONCERT FANS PAY THE PRICE, AND THE SHERMAN ACT WAITS IN THE WINGS

LAURA C. HOWARD\*

## INTRODUCTION

On August 15, 1965, The Beatles played a concert in New York City's Shea Stadium for 55,600 screaming devotees.<sup>1</sup> It was the "first-ever stadium rock concert."<sup>2</sup> Fans were unable to hear the group's thirty minute set over the din of the crowd due to the stadium's ineffective PA system.<sup>3</sup> When Grand Funk Railroad played the same venue in 1971, the band brought a sound system that would reach the entire crowd.<sup>4</sup> As the popularity of large-scale rock concerts grew, it became impractical for musical acts to control all aspects of the performance and a new industry of local promotion companies emerged to handle the logistics of concert production.<sup>5</sup>

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\* J.D., May 2008, The John Marshall Law School.

1. TheRockRadio.com, Flashback: The Beatles Rock Shea Stadium, <http://www.therockradio.com/2005/08/flashback-beatles-rock-shea-stadium.html> (last visited Apr. 14, 2008)

2. *Id.*

3. NDTV.com, Bernstein Remembers the Beatles on 40th Anniversary, [http://www.ndtv.com/ent/musicnew/story\\_ie.asp?section=Music&slug=Bernstein+remembers+The+Beatles+&id=3871](http://www.ndtv.com/ent/musicnew/story_ie.asp?section=Music&slug=Bernstein+remembers+The+Beatles+&id=3871) (last visited Apr. 14, 2008). See TONY BRAMWELL WITH ROSEMARY KINGSLAND, *MAGICAL MYSTERY TOURS: MY LIFE WITH THE BEATLES 162-65* (Thomas Dunne Books 2005) (stating that the noise from the crowd was so deafening that the Beatles had to re-record the set in studio for national broadcast); see also BOB SPITZ, *THE BEATLES: THE BIOGRAPHY 578* (Little Brown 2005) (quoting John Lennon's comment regarding the stage conditions that evening: "It was ridiculous! We couldn't hear ourselves sing").

4. See Jim Beckerman, *Grand Funk Railroad Spoke Volumes; So Did the Band's Sound System*, RECORD (Bergen County, New Jersey), Nov. 4, 2005, at G19 (interviewing GFRR drummer Don Brewer who stated that while conditions had improved, most stadiums across the country were not prepared to handle a rock show, so the band chose to travel with its own PA system for amplification).

5. *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 223 (2d Cir. 2006). See also JOHN GLATT, *RAGE & ROLL: BILL GRAHAM AND THE SELLING OF ROCK 148* (Birch Lane Press 1993) (indicating that as rock and roll

For the next thirty years, the industry was largely regional and divided into territories.<sup>6</sup>

In 2000, Clear Channel Communications, Inc., a holding company for the ownership of various media interests,<sup>7</sup> including radio and television stations, as well as fixed billboard advertising,<sup>8</sup> purchased a concert promotion company called SFX.<sup>9</sup> SFX was a “corporate raider” that was buying up longstanding, independent local promotion companies,<sup>10</sup> and producing more than 26,000 events annually.<sup>11</sup> Soon enough, Clear Channel was “booking thousands of concerts a year.”<sup>12</sup> The “hands on”<sup>13</sup> local promotion business had become a decidedly national industry.<sup>14</sup>

This Comment will examine how Clear Channel Communications entered the boutique business of concert promotion and nationalized the industry by virtue of its size and control over various media outlets.<sup>15</sup> The resultant national

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emerged from a sub-culture and was embraced by mainstream America, the number of promoters grew in response to the potential of huge financial gain).

6. See GLATT, *supra* note 5, at 85 (asserting that “slowly but surely the American concert cake was carved up” by the concert promotion business); see also *id.* at 209 (stating that in 1983, when Bill Graham sought to re-enter the New York City promoter market, the *New York Post* wrote, “The rock and roll scene is like the Mafia – everybody has his territory”).

7. *Nobody In Particular Presents, Inc. v. Clear Channel Commc’ns, Inc.*, 311 F. Supp. 2d 1048, 1056 (D. Colo. 2004).

8. G.R. Anderson Jr., *Clear Channel Rules the World*, CITYPAGES (Minneapolis/St. Paul), Feb. 16, 2005, <http://www.citypages.com/databank/26/1263/article12961.asp>.

9. *Id.*

10. *Id.* SFX even purchased longstanding promotions giant Bill Graham Presents.

11. *Id.*

12. *Id.*

13. See GLATT, *supra* note 5, at 84 (interviewing Larry Magid, a young promoter from The Electric Factory in the 1970’s, who stated that local promoters would paper the streets with posters, take phone calls, and sell tickets to events from the office).

14. See Jim DeRogatis, *Monster Deal Could Oust the Little Guy: Live Nation’s Acquisition of House of Blues Could Mean the Beginning of the End for Independent Promoters*, CHI. SUN-TIMES, July 16, 2006, at D6 (stating that “Live Nation [SFX] set out to create a giant national monopoly, spending billions of dollars buying up regional concert promoters”); see also Mark Brown, *Anschutz Entry Reignites Concert-Bookings Battle*, DENVER ROCKY MOUNTAIN NEWS, Aug. 26, 2006, at 3D (maintaining that SFX was formerly a number of independent promoters across the United States); *Heerwagen*, 435 F.3d at 223 (stating that when Clear Channel purchased SFX in 2000, the company became the largest promoter and producer of live entertainment events in the nation).

15. See Greg Kot, *Will Live Nation Deal Give Concertgoers the Blues?*, CHI. TRIB., July 9, 2006, at 7 (stating that Clear Channel is the largest owner of commercial radio stations in the United States and the “conglomerate has effectively controlled the forums most valued by working musicians for exposure: radio airplay and live performances”); DeRogatis, *supra* note 14, at

market prevents independent promoters from competing meaningfully in the trade, and concert fans are paying hugely inflated prices to see shows.<sup>16</sup>

Section I gives a brief history of the development of the concert promotion industry and Clear Channel's entry into the market. Section I also summarizes allegations against Clear Channel of suspect activity that may come under the purview of the Sherman Antitrust Act. Section II analyzes the litigation surrounding this issue from the perspective of businesses competing with Clear Channel. Finally, Section III of this Comment will scrutinize why no single producer suit alleging monopolistic activities has ever been successfully concluded against Clear Channel. Part III proposes that the argument must be reframed from the perspective of individual end users (i.e. concert fans) so that future proceedings may be triumphant in terms of a Sherman Act claim.

### I. CONCERT PROMOTION: PAST AND PRESENT

A live concert is the result of negotiations between a concert promoter and a booking agent or manager who represents an artist.<sup>17</sup> The booking agent sells the right to organize an event or an entire tour to the promoter, who is responsible for overseeing logistics, selling tickets to the public, and paying for the costs of production associated with the show.<sup>18</sup>

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D6 (discussing an interview with Jerry Mickelson of Jam Productions in which Mickelson laments Live Nation's purchase of the House of Blues chain). Mickelson indicates that the elimination of another promotional competitor is both bad for the consumer and the other companies in live entertainment. *Id.* He posits that Clear Channel/Live Nation will be "only one company" soon. *Id.*

16. DeRogatis, *supra* note 14, at D6.

17. *Heerwagen*, 435 F.3d at 223; see also SPITZ, *supra* note 3, at 443 (exemplifying how Sid Bernstein negotiated with Brian Epstein for The Beatles to play at Carnegie Hall in 1964); see also GLATT, *supra* note 5, at 99 (explaining that when a band wants to go out on tour, the manager hires a booking agent who sells the services of the band to promoters for a fixed price).

18. *Heerwagen*, 435 F.3d at 223; see also GLATT, *supra* note 5, at 99 (explaining that the promoter assumed all risk for an event and was responsible for all local production). After providing a guarantee to the act, the promoter would have to buy sufficient newspaper and radio advertising to sell seats. *Id.* The promoter would also have the responsibility of ticketing the show, hiring the venue, and organizing security, medical services and catering. *Id.*; see also BILL GRAHAM & ROBERT GREENFIELD, *BILL GRAHAM PRESENTS: MY LIFE INSIDE ROCK AND OUT*, 296-99 (Doubleday 1992) (illustrating that a promoter may take additional non-monetary risks when he signs on for a particular event). While Bill Graham was not officially associated with the Rolling Stones appearance at Altamont, where one person was killed along with three accidental deaths, Graham did lend the services of his crew for production. *Id.*

## A. A Brief History of Concert Promotion Before 2000

### 1. Bill Graham: A True Frontiersman

Bill Graham transformed local concert promotion into a formidable industry and has been called the “godfather” of modern concert promotion.<sup>19</sup> Graham’s successful model<sup>20</sup> spurred the formation of a number of promoterships throughout the country.<sup>21</sup> In 1965, Graham set out to produce concerts and manage the San Francisco Mime Troupe.<sup>22</sup> Following his success with the Mime Troupe, he operated the Fillmore Theatre in San Francisco, attracting some of the strongest talent of the time.<sup>23</sup> His personable style and practical approach to the business allowed him to become the top rock promoter in the industry.<sup>24</sup>

In December of 1990, the concert industry faced a slump while the country’s economy entered a severe recession.<sup>25</sup> Graham

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19. See GLATT, *supra* note 5, at 13-14 (discussing how Graham achieved fame and fortune despite his humble beginnings as a “penniless refugee” by “single-handedly turn[ing] rock ‘n’ roll concert promotion into big business”).

20. Graham was known as a fierce competitor who managed to maintain a high level of care for both the artists and attendees at his concerts. In an interview with journalist Roger Trilling, Graham stated that his empire was immune to the “attack of ambitious wanna-be promoters” because he cultivated and nurtured his big name acts before they were household names. GLATT, *supra* note 5, at 100-01. Graham was even willing to lose money in the process because his loyalty to the band would ultimately be rewarded. See *id.* at 149 (interviewing Michael Klefner, a dear friend of Graham’s, who indicated that the promotion style and business philosophy of Bill’s company “came from the street”). Bill was known for a personal business style that included honesty and loyalty to friendship. *Id.* “If a guy was a straight shooter, Bill was with you. If he wasn’t, he was a shithead.” *Id.*

21. See GLATT, *supra* note 5, at 149 (demonstrating how a young Chicago promoter named Arny Granat looked to Bill Graham as a model for the creation of Jam Productions, referring to Mr. Graham as “Mr. Music”); see also *id.* at 160 (indicating that Arny Granat believed that Bill Graham Presents could have taken over the national concert tour business during the 1970s, but Bill chose not to because “he thought it was the wrong thing to do”).

22. The liberal group of “colorful revolutionaries” performed for free in San Francisco parks and had a strong following. GLATT, *supra* note 5, at 25. Graham was invited to join the troupe as a promoter and business manager, and he eventually insisted that “Bill Graham Presents” appear on the group’s handbills. *Id.* at 25-27. After he booked the Mime Troupe at a successful multimedia dance event known as the Trips Festival, Graham sought to cement his position in the San Francisco Music scene by setting up an official organization and signed as the sole leaseholder of the Fillmore theatre in San Francisco. *Id.* at 37-40.

23. See GRAHAM & GREENFIELD, *supra* note 18, at 165, 174, 199 (detailing Graham’s relationships with his more famous acts including Janis Joplin, The Grateful Dead, and Jefferson Airplane).

24. *Id.*; see also *supra* note 20 and accompanying text.

25. See GLATT, *supra* note 5, at 271-72 (describing how promoters were “alarmed” by falling ticket sales, and Bill was forced to cancel a major summer tour).

blamed skyrocketing prices on the demands of artists, ticket scalpers, and Ticketmaster surcharges.<sup>26</sup> Graham recognized that times were changing;<sup>27</sup> perhaps he had some insight into the future. Unfortunately, Graham died in a tragic crash on October 25, 1991, when his helicopter became entwined in power lines near Vallejo, California.<sup>28</sup> Following his death, Bill Graham Presents continued operations through its employees, but the organization was fractured internally.<sup>29</sup> Eventually, SFX purchased Bill Graham Presents, and in 2000, Clear Channel acquired SFX.<sup>30</sup>

## 2. *Chicago's JAM Productions: Two Rogue Promoters Find Success by Modeling Their Business on Bill Graham Presents*

In 1971, as Bill Graham continued to rise to the top of the promoter industry, Jerry Mickelson and Army Granat met and formed a promoter partnership in Chicago. After eight months of working together and using an apartment as an office, they put on their first show as JAM Productions: a sold-out Fleetwood Mac concert.<sup>31</sup> Thirty-six years later, the company has staged more than 15,000 events and in 2005, earned more than \$107 million according to Mickelson.<sup>32</sup> The duo credits their success to forming strong personal relationships with artists that withstood time, a strategy perfected by Bill Graham in the 1970s.<sup>33</sup>

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26. Bill Graham bemoaned the transformation of the “phenomena of rock ‘n’ roll” and actively campaigned against rising ticket prices so people could afford to attend concerts. *Id.* He urged artists to charge lower guarantees, organized Californians Against Ticket Scalping, and testified before the California Senate Judiciary Committee on April 30, 1991 against the charges levied by Ticketmaster. *Id.*

27. *Id.* at 271.

28. *Id.* at 274.

29. See GLATT, *supra* note 5, at 277-78 (stating that the company had a “business as usual” attitude following Graham’s death, but top executives were fighting for power and other executives were staging hostile takeovers).

30. Live Nation, History of BGP, <http://bgp.com/history.html> (last visited Apr. 15, 2008).

31. Matt Golosinski, *All the World's a Stage for Entertainment Maven*, KELLOGG SCH. MGMT. NEWS, [http://www.kellogg.northwestern.edu/news/whatsnew/Jam\\_JerryM.htm](http://www.kellogg.northwestern.edu/news/whatsnew/Jam_JerryM.htm) (last visited Apr. 15, 2008) (reporting Jerry Mickelson’s, co-founder of JAM Productions, speech at Northwestern University Kellogg School of Management’s Distinguished Entrepreneur Speaker Series on January 17, 2006).

32. *Id.*

33. See GLATT, *supra* note 5, at 149 (stating that Army Granat was a “devoted student” of Graham’s who gleaned from his mentor the strong qualities required for success in the promoter business). “[Graham] was the type of guy who always lived by the credo of not screwing or fucking in business people who were friends. He always held to that 100 percent when it came to us.” *Id.*; see also Golosinski, *supra* note 31 (reporting Jerry Mickelson’s statement in a speech to the Kellogg School of Management that the secret to JAM’s success is working “hard to build and keep relationships from the bottom up”). Mickelson indicated that JAM cultivates clients while

JAM Productions is only one of the many promotion companies that developed when rock 'n' roll hit the mainstream in 1972.<sup>34</sup> However, JAM is unique as one of the few independent promoters that resisted a buy out when SFX sought to purchase as many regional businesses as possible.<sup>35</sup>

### B. Clear Channel's Vertical Leap

L. Lowry Mays founded Clear Channel Communications in 1972. He began by purchasing the local radio station KEEZ-FM in San Antonio.<sup>36</sup> The company continued to buy fledgling radio stations in various markets throughout the country, slowly amassing a radio empire comprised of more than 1200 stations by 2000.<sup>37</sup> While maintaining its radio empire, Clear Channel began to make "vertical acquisitions" by purchasing other companies in the "media/entertainment" supply chain.<sup>38</sup> In 2000, Clear Channel acquired promotions company SFX Entertainment for \$4.4 billion.<sup>39</sup> SFX was an organization that had already begun the purchase and consolidation of regional concert promoters, and was staging thousands of events per year.<sup>40</sup> The merger between Clear

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they are still struggling in local clubs and sees those relationships through to future stardom. *Id.*

34. See GLATT, *supra* note 5, at 146 (commenting that in 1968, a record only needed to sell 200,000-300,000 copies to be considered a best seller). Four years later, lead artists were selling more than one million records. *Id.*

35. See DeRogatis, *supra* note 14, at D6 (quoting Gary Bongiovanni, editor of the concert trade magazine *Pollstar*, who stated that Belkin sold in Cleveland; Bill Graham sold in San Francisco; Delsener-Slater sold in New York; and the Electric Factory sold in Philadelphia, yet JAM Productions remained a solvent independent promoter).

36. Anderson, *supra* note 8.

37. See *id.* (detailing steps along Clear Channel's path to consolidation). Clear Channel bought forty-nine radio stations in 1996, and the following year it purchased seventy. *Id.* In 1998, Clear Channel spent \$6.5 billion to buy Jacor Communications, adding another 206 stations to its inventory. By October 1999, the company added 830 stations when it acquired AMFM for \$24 billion (and quickly unloaded 100 stations to avoid antitrust issues). *Id.* Clear Channel had become the leader in the industry. Its closest competitor, Cumulus, was a far second, owning only 230 stations at the time. *Id.*

38. See *id.* (stating that Clear Channel's holdings began to include television stations, concert venues, outdoor advertising, satellite services, high speed internet services, trade publications and an advertising firm); see also *Nobody In Particular Presents*, 311 F. Supp. 2d at 1055 (indicating that after Congress enacted the Telecommunications Act of 1996, Clear Channel Communications began acquiring broadcast and entertainment companies at amazing speed).

39. *Id.*

40. See Carlye Adler, *Backstage Brawl; In the Fight No One Else Wanted To Take On, A Tiny Concert Promoter Is Defending Its Turf Against a Massive Global Media Company. Is This Brave or Just Crazy?*, FORTUNE SMALL BUS., Mar. 4, 2002, at 170 (asserting that the number of independent promoters shrank from several dozen to less than ten because most companies merged

Channel and SFX was hailed as a union that would “represent[] a profound shift of power in the rock ‘n’ roll concert business.”<sup>41</sup> While Clear Channel CEO Lowry Mays described the union as a means for the company to break into live entertainment because it could take advantage of the “natural synergy between radio and live music events,”<sup>42</sup> independent promoters watched their local universe shrink from the front row.<sup>43</sup>

Clear Channel christened the new acquisition Clear Channel Entertainment and in December 2005, spun the live event arm of the company into an independent and publicly traded company, Beverly Hills based Live Nation.<sup>44</sup> Today, Live Nation is the nation’s largest concert promoter controlling approximately 119 venues.<sup>45</sup> The company reported more than \$2.9 billion in sales in 2005.<sup>46</sup>

On July 6, 2005, Live Nation announced an agreement for the purchase of the House of Blues Clubs and HOB Entertainment for \$350 million, with the merger to conclude before the end of the year.<sup>47</sup> The House of Blues Merger effectively knocked out Live

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with SFX Entertainment during its consolidation period before Clear Channel acquired SFX).

41. Mark Schapiro, *The Day the Music Died*, SALON, July 25, 2000, <http://archive.salon.com/business/feature/2000/07/25/sfx>.

42. *Clear Channel Closes SFX Deal*, SPORTBUSINESS, Sept. 27, 2001, <http://sportbusiness.com/news/139115/clear-channel-closes-sfx-deal>. *But see* Schapiro, *supra* note 41 (showing that the merger was not simply a marriage of convenience). SFX had already successfully destroyed the “relationships and loyalties” that made up the live entertainment business. *Id.* SFX’s production model assumed the roles of booking agent, promoter and radio programmer, streamlining and making production a “one-stop” process. *Id.* Clear Channel was not looking to cultivate a new business; it wanted to buy pre-fabricated success. *Id.*

43. *See* Schapiro, *supra* note 41 (indicating that the new conglomerate would be the “primary conduit through which Americans” would be exposed to music trends). The Clear Channel behemoth would effectively squeeze out competition because it would have a “near-lock” on the tools of promotion including radio play and venues. *Id.*

44. DeRogatis, *supra* note 14, at D6; *see also* Bill Sloat, *Fan Sues Media Giant, Citing Cost of Concerts*, CLEVELAND PLAIN DEALER, June 3, 2006, at C1 (emphasizing Clear Channel’s efforts to establish Live Nation as a separate company in the midst of a Justice Department investigation for antitrust allegations); *but see* Paul Egan, *Concertgoers Sing the Blues Over High Ticket Prices*, DETROIT NEWS, June 9, 2006, at 1A (stating that Live Nation is a distinct entity, separate from the Clear Channel umbrella; however, many Clear Channel principals are a part of Live Nation’s board of directors).

45. Brent Snavely, *A Headline Act: Live Nation Works to Build Regional Concert Profile*, CRAIN’S DETROIT BUS., June 5, 2006, at 1.

46. *Id.*

47. Kot, *supra* note 15, at 7. *See Live Nation to Purchase HOB Entertainment*, PROSOUND NEWS, July 6, 2006, [http://prosoundnews.com/articles/article\\_3968.shtml](http://prosoundnews.com/articles/article_3968.shtml) (noting that this may be the beginning of another string of acquisitions). The announcement came immediately after Live Nation purchased a controlling interest in the touring division of Michael



Nation's closest competitor in the industry.<sup>48</sup> With HOB out of the picture, Live Nation has more discretion to expand or restrict the artistic diversity in a regional music profile, as well as to determine the range of local ticket prices.<sup>49</sup>

C. *Suspicious that Clear Channel/Live Nation May Have Too Much Control Over the Live Entertainment Market*

Industry insiders, from artists down to ticket takers, began to suspect that Clear Channel was running an illegal monopoly that thwarted competition.<sup>50</sup> Many listeners complained of the homogeneous and repetitious radio programming that became a national norm as a result of Clear Channel's market dominance.<sup>51</sup> Some commentators find that Clear Channel's efforts to consolidate radio have de-localized stations through the implementation of prefabricated formats.<sup>52</sup> Others accuse the company of "pay for play" practices in which stations are paid to play the songs that they spin by the companies that manufacture the records.<sup>53</sup> Some complaints even stem from artists who insist that they have suffered decreased airplay on Clear Channel radio stations because they failed to hire Clear Channel Entertainment as the promoter for a concert tour.<sup>54</sup> Perhaps the most vocal

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Cohl's Concert Productions International. *Id.*

48. See Kot, *supra* note 15, at 7 (observing that the House of Blues Group is Live Nation's closest competitor even though it only sold one quarter of the 29 million tickets sold by Live Nation in 2005).

49. *Id.*

50. Eric Boehlert, *Suit: Clear Channel is an Illegal Monopoly*, SALON, Aug. 8, 2001, [http://archive.salon.com/ent/clear\\_channel/2001/08/08/antitrust/index.html](http://archive.salon.com/ent/clear_channel/2001/08/08/antitrust/index.html). The article reports that, at this point, there was only a single independent concert promoter from Denver who had come forward to confront the multi-media giant with allegations of monopolistic, predatory and anticompetitive practices. *Id.*

51. See Anderson, *supra* note 8 (stating that "[p]op music aficionados" believe Clear Channel used general market research to create "repetitious, lowest-common-denominator playlists around the country"). However, Clear Channel's CEO insists that all market research is performed locally. *Id.*

52. See Todd Spencer, *Radio Killed the Radio Star*, SALON, Oct. 1, 2002, <http://dir.salon.com/story/tech/feature/2002/10/01/nab/index.html> (referring to Clear Channel's streamlined practice of implementing similar formats in a number of markets through stations such as KISS FM, Mix, and Alice as "the McDonaldization of radio"). Spencer writes that these cost effective methods of consolidation undermine the local character of radio to the point that people are now listening to disc jockeys that are on tape and not even broadcasting from the local region. *Id.*

53. See Eric Boehlert, *Pay for Play*, SALON, Mar. 14, 2001, <http://archive.salon.com/ent/feature/2001/03/14/payola/index.html> (illustrating a modern version of "payola" in which independent record promoters ("indies") serve as middlemen between the record company and the radio station, and offer "promotional payments" to broadcasters for increasing the number of spins for the represented artist).

54. See *Nobody In Particular Presents*, 311 F. Supp. 2d at 1063 (alleging

protestors are the fans themselves,<sup>55</sup> objecting to an unnatural rise in ticket prices.<sup>56</sup> Experts figure that the average price of a U.S. concert ticket rose 82% between 1996 and 2003, a rate exponentially faster than the inflation rate.<sup>57</sup> Regardless of the source of the grumblings, it is apparent that Clear Channel manages a number of the resources that figure prominently in live event production.<sup>58</sup>

#### *D. The Sherman Act: Federal Legislation Designed to Control Monopolies and Restraints of Trade*

The Sherman Act of 1890 was the first piece of anti-monopoly legislation passed to guarantee the federal government's ability to regulate industry so there is no "collusion or dominance" of one company in any given sector.<sup>59</sup> The Sherman Act is based upon the legislative premise that healthy competition within a given product sector will yield the "best allocation of economic resources."<sup>60</sup> However, while the Sherman Act protects notions of

that the number of radio "spins" for artist Puddle of Mudd decreased from twenty-five per week to zero when the band confirmed a concert booking with a local promoter as opposed to Clear Channel Entertainment); *see also* Anderson, *supra* note 8 (urging that Clear Channel sometimes sets guarantees for artists that a local promoter simply cannot match). Prominent artists Neil Young and Steve Miller have begun to speak out about the Clear Channel "squeeze" and Don Henley has testified before Congress insisting that Clear Channel's booking operations are monopolistic practices. *Id.*

55. *See* Sloat, *supra* note 44 (recounting Daniel Woodring's efforts to sue Clear Channel Communications for the use of coercive radio practices to convince artists to use Live Nation as their concert promoter). Woodring claims the result is ticket gouging in which people paid more to see "favored" artists. *Id.*

56. *See Heerwagen*, 435 F.3d at 223-24 (detailing the plaintiffs' allegations that she paid inflated prices for concert tickets due to Clear Channel's monopolistic activities).

57. Egan, *supra* note 44, at 1A; *see also* Sloat, *supra* note 44 (noting that the Consumer Price Index that measures the rate of inflation in the U.S. economy increased only thirteen percent between 1997 and 2002); Egan, *supra* note 44, at 1A (providing an example comparing ticket prices in Clarkston, Michigan where The Dave Matthews Band played at the DTE Energy Music Theatre in June, 2006: pavilion seats sold for \$60 while lawn seats cost \$40). These figures are significantly higher than the average \$19 ticket price charged by the band in 1995. *Id.*

58. *See* Anderson, *supra* note 8 (quoting Clay Steinmen, a media professor at Macalester College, who stated "[t]hey've reached a point that's similar to the prohibition on movie studios owning local theaters . . . we don't want people at one end of the production process controlling how that product gets to people locally").

59. *Id.*

60. 58 C.J.S. *Monopolies* § 21 (2006). The assumption presumes that resources will be allocated efficiently, yielding the lowest product price with higher quality, but will also preserve social ideals imbued in the customer. *Id.*

vigorous competition, it does not “protect competitors.”<sup>61</sup> Federal antitrust legislation seeks to protect the economic freedom of the participants in a relevant market to the benefit of consumers, not to their detriment.<sup>62</sup> “To demonstrate an antitrust injury, the plaintiffs must show that there is an injury to *competition*.” Whether there has been an injury to a competitor is irrelevant, because the antitrust laws were enacted “for the protection of competition, not competitors.”<sup>63</sup>

While courts generally agree with this sentiment, they are split as to what constitutes an antitrust injury.<sup>64</sup> Courts struggle to determine if “injury to consumers is an essential ingredient of liability”<sup>65</sup> or if actual practices that restrict competition are the true source of injury.<sup>66</sup> The language of § 1 and § 2 of the Sherman Act<sup>67</sup> is very broad,<sup>68</sup> indicating that the 1890 legislature did not

61. Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 372 (6th Cir. 2003); *see also* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (stating that “The law [The Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself”).

62. 58 C.J.S. *Monopolies* § 23 (2006). The problem that the laws are designed to combat is the “raw deal” consumers face when producers are not engaged in meaningful competition with other forces, and the result is often a lower service at an inflated price. *Id.*

63. Mich. State Podiatry Ass’n v. Blue Cross Blue Shield of Mich., 671 F. Supp. 1139, 1151 (E.D. Mich. 1987).

64. JamSports & Entm’t, LLC v. Paradama Prods., Inc. (*JamSports I*), 336 F. Supp. 2d 824, 835 (N.D. Ill. 2004).

65. *Id.* (quoting dissent of Judge Easterbrook in *Fishman v. Estate of Wirtz*, 807 F.2d 520, 568 (7th Cir. 1986); *see also* Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984) (citing Judge Posner’s holding that if no consumer interest can be discerned in a suit brought by a competitor, a victory for that competitor confers no benefit on consumers, thus making the application of antitrust legislation questionable).

66. *See Fishman*, 807 F.2d at 536 (stressing that the “antitrust laws are concerned with the competitive *process*, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect”). “A healthy and unimpaired competitive process is presumed to be in the consumer interest.” *Id.*

67. The Sherman Act §§ 1-2:

§ 1. Trusts, etc., in restraint of trade illegal; penalty: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty: Every 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

intend for the courts to construe the words literally, but to give the scheme meaning according to the common law practice of resolving issues on a case-by-case basis.<sup>69</sup> In an effort to give meaning to the broad standards enunciated by the statute, many court decisions have contradicted one another and the result is a jurisprudence that seems ad hoc and almost arbitrary in nature.<sup>70</sup>

Section 1 of the statute addresses bilateral activities that are interpreted as “restraints of trade.”<sup>71</sup> “Restraints of trade” necessarily includes “restraints of competition” and courts often interpret them to be one and the same.<sup>72</sup> The statute outlaws contracts between multiple actors<sup>73</sup> that have a monopolistic tendency to eliminate competition, prevent future competition, or

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commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. §§ 1-2 (2000).

68. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 386 (1956); *see also* MARKHAM, *infra* note 70 (stating that because the antitrust statutes are couched in general language, they can have no practical meaning until courts actually enforce them); *see also* *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) (stating that “[t]he prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself does not define them”). “In consequence of the vagueness of its language . . . the courts have been left to give content to the statute . . .” *Id.*

69. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (stating that in antitrust litigation there is a need to adapt to changing commercial circumstances and that it is the accepted view that Congress expected courts to shape the meaning of the statute’s broad terms by drawing on common law tradition).

70. *See* WILLIAM A. MARKHAM, AN OVERVIEW OF ANTITRUST LAW (2000), <http://www.maldonadomarkham.com/Antitrust-Law-San-Diego.htm> (questioning whether the law is supposed to be understood to prohibit specific conduct or if its application is “unpredictable, unknowable, seemingly arbitrary, and therefore disruptive?”). Markham continues to opine that, “[s]ome courts have been disposed to find antitrust violations in every corner, while others have refused to see it in even the most brazen instances of predatory exclusions and anticompetitive conspiracies.” *Id.*

71. 58 C.J.S. *Monopolies* § 26 (2006); *see also* LOUIS ALTMAN, 1 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:21 (4th ed. 2006) (stating that § 1’s broad prohibition of “restraint of trade” can only be violated by meeting the restrictive requirement of collective action).

72. *Mich. State Podiatry Ass’n*, 671 F. Supp. at 1151.

73. *See* JOHN H. SHENEFIELD & IRWIN M. STELZER, THE ANTITRUST LAWS: A PRIMER 16 (AEI Press 2001) (stating that without collective action, even if certain conduct puts a restraint on trade, § 1 is not applicable); *see also* Answers.com, Sherman Antitrust Act, <http://www.answers.com/topic/sherman-antitrust-act> (last visited Apr. 27, 2008) (articulating that § 1 of the Sherman Act prohibits concerted action, requiring “more than a unilateral act by a person or business alone” in restraint of trade).

control the resources that competition relies upon for its own output.<sup>74</sup>

However, in keeping with legislative intent, courts interpret the statute in light of changing conditions.<sup>75</sup> Although the text of the statute makes illegal any "combination . . . in restraint of trade,"<sup>76</sup> the Supreme Court ruled long ago that the statute only applied to restraints that are "unreasonably restrictive of competitive conditions."<sup>77</sup> The Supreme Court has deemed four categories of conduct per se illegal under § 1: price fixing, territorial allocations of the market, group boycotts, and tying arrangements.<sup>78</sup> When courts consider what is "unreasonable" for other types of activity and arrangements, they do not employ a bright line test; instead they apply the "rule of reason."<sup>79</sup> When evaluating conduct in terms of § 1, the "rule of reason" urges that a court weigh the relevant circumstances to decide whether the

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74. *Id.* The statute makes illegal *any* means that would restrain interstate commerce, including "unlawful contracts, trusts, pooling arrangements, black lists, boycotts, coercion, threats, [and] intimidation." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 438 (1911) (citing *Loewe v. Lawlor*, 208 U.S. 274 (1908)).

75. *See* *Cont'l Airlines, Inc. v. United Airlines Inc.*, 277 F.3d 499, 513 (4th Cir. 2002) (showing how the court manages the statute in light of specific facts). When geographic and physical limitations required coordination among competitors, the court applied the Sherman Act requirements with flexibility. *Id.*

76. 15 U.S.C. § 1 (1997).

77. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *see also* SHENEFIELD & STELZER, *supra* note 73, at 16 (stating that if read literally, the text of § 1 would prohibit all contracts having an incidental or secondary effect of restraining trade "regardless of the effect on competition or economic welfare"). The author states that all contracts have some effect on trade because they effectively remove one buyer and seller from the market during that time. *Id.* The Supreme Court articulated the "unreasonable" rule of *Standard Oil* to circumvent the problem so that every contract would not be subject to Sherman scrutiny. *Id.*

78. RICHARD M. CALKINS, *ANTITRUST: GUIDELINES FOR THE BUSINESS EXECUTIVE* 57 (Dow Jones-Irwin 1981). In explaining the per se doctrine of liability under § 1 of the Act, Justice Black wrote that:

[There] are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use . . . . Among the practices which the courts have heretofore deemed to be unlawful . . . are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211; group boycotts, *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392.

*Id.* at 57-58.

79. SHENEFIELD & STELZER, *supra* note 73, at 17.

conduct under scrutiny tips the balance toward being pro-competitive or anticompetitive (unreasonable).<sup>80</sup>

Section 2 of the Sherman Act focuses on unilateral or monopolistic practices that create barriers to entry for other competitors in the area of interstate, foreign trade, or commerce.<sup>81</sup> The language of the statute dubs the offense “monopoliz[ation]” and “attempts to monopolize”<sup>82</sup> as opposed to “monopoly.”<sup>83</sup> Natural monopolies that develop as a result of efficiency are not subject to the legislation,<sup>84</sup> only behavior that is systematically designed to harm competitors and consumers in an effort to achieve a monopoly or maintain a monopoly is subject to § 2.<sup>85</sup> Therefore, the offense of “monopolization” has two distinct elements: first, there must be possession of monopoly power in the relevant market, and second, there must be willful acquisition or maintenance of that power.<sup>86</sup> In determining whether a company

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80. *See id.* (articulating that the rule of reason subjects suspect conduct to evaluation in terms of market circumstances by assessing the extent of market power that one party possesses and the substantial effect on its competition (injury to competition) or whether the alleged restraint will restrict output and raise prices (injury to the consumer)).

81. Lee C. Van Orsdel, *Antitrust Issues in Scholarly and Legal Publishing: Report on an Invitational Symposium in Washington D.C.*, 66 C&RL NEWS, May 2005, available at <http://www.ala.org/ala/acrl/pubs/crlnews/backissues2005/may05/antitrust.cfm>; *see* ALTMAN, *supra* note 71, at § 4:21 (stating that the test for monopolization under § 2 of the Sherman Act does not require collective behavior and a single actor as a monopoly may be a threat to competition itself); *see also* 54 AM. JUR. 2D *Monopolies* § 53 (2006) (indicating that § 2 does not have a contractual element and governs the conduct of single actors, making unilateral monopolization a violation of the Sherman Act); *see also* 58 C.J.S. *Monopolies* § 28 (2006) (articulating that § 2 of the Act is used to reach actions and conduct that bring about the forbidden end of monopolization).

82. 15 U.S.C. § 2 (1997).

83. *See* SHENEFIELD & STELZER, *supra* note 73, at 19 (averring that abusive conduct as opposed to sheer size of a monopolist, such as exclusionary or predatory conduct to gain monopoly status, is subject to antitrust enforcement); *see also* 58 C.J.S. *Monopolies* § 32 (2006) (stating that an actor with a monopoly can engage in a competitive course of conduct for valid business reasons rather than as a means to stifle competition); *see also* 58 C.J.S. *Monopolies* § 28 (2006) (stating that the prohibition is aimed at the acquisition or retention of effective market control, not natural market trends).

84. *See id.* (stating that a high market share that results from natural forces is unobjectionable in terms of the statute); *see also* *Fishman*, 807 F.2d at 537-38 (finding that monopolies do not injure the competitive process as long as the winner of the natural monopoly competes freely and the process is not short-circuited in its acquisition of the monopoly).

85. *Id.*

86. 54 AM. JUR. 2D *Monopolies* § 53 (2006); *see also* *Commercial Data Servers, Inc. v. Int'l Bus. Machs. Corp.*, 262 F. Supp. 2d 50, 79 (S.D.N.Y. 2003) (stating that in order to establish monopolization there must be a willful acquisition of monopoly power as opposed to growth that is a consequence of

willfully acquired or maintained monopoly power, it is necessary to consider whether the acts complained of unreasonably restricted competition rather than harmed individual competitors.<sup>87</sup>

A complaint alleging an attempt to monopolize must also carry the element of specific intent to monopolize as well as a dangerous probability of success in monopolizing the relevant product market.<sup>88</sup> However, in proving the violation, it is not necessary for the actor to have already achieved a monopoly, only that it has sufficient market power to accomplish the objective.<sup>89</sup>

Any contention that Clear Channel is a monopoly engaging in activity that unreasonably restricts competition would be subject to scrutiny under § 2 of the Sherman Act.<sup>90</sup> In order to be successful with any such claim, a plaintiff must establish that Clear Channel engages in anticompetitive, predatory, or exclusionary behavior in the course of acquiring, maintaining, and extending its monopoly power (or attempting to do so) in a relevant product and geographic market.<sup>91</sup>

### E. Accusations and the Sherman Act

The first claims of Clear Channel's monopolistic behavior were filed by members of the live entertainment industry, citing violations of § 2 of the Sherman Act to little avail. In 2001,

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"superior product, business acumen, or historic accident"); see also 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 487 (2006) (stating that the proof required to show the completed offense of monopolization requires evidence of a generalized intent to monopolize, whereas attempted monopolization requires a specific intent to acquire the monopoly).

87. See *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1174 (9th Cir. 1988) (arguing that predatory and anticompetitive practices are actions that harm the competitive process by obstructing competition's basic goals of lower prices, better products, and more efficient production methods); see also *Kruman v. Christie's Int'l PLC.*, 284 F.3d 384, 399 (2d Cir. 2002) (showing that evidence of higher prices in the absence of demonstrating anticompetitive practices is not enough to satisfy § 2 of the Sherman Act).

88. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 487 (2006).

89. See *id.* (outlining that a complaint for "attempted monopolization" must contain allegations specifying the market in which the defendant has attempted to create a monopoly, as well as the offender's economic prowess in that market).

90. There is an argument beyond the scope of this Comment postulating that Clear Channel *alone* may be subject to claims of violation of § 1 of the Sherman Act. See *Nobody In Particular Presents*, 311 F. Supp. 2d at 1069 (indicating that there may be a conclusion that a holding company can direct and mandate the anticompetitive conduct of its subsidiaries and thus be subject to the bilateral (contract) requirements of § 1 of the Sherman Act). *But see* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (providing dicta that "[a]ny anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine . . . the enterprise is fully subject to § 2 of the Sherman Act") (emphasis added).

91. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1096-97.

Nobody In Particular Presents (NIPP), a Denver independent concert promoter, filed an antitrust lawsuit in a Denver federal court charging Clear Channel with anticompetitive practices.<sup>92</sup> NIPP accused Clear Channel of using airplay control to coerce artists in concert promotions decisions<sup>93</sup> and refusing promotional support on the radio for NIPP concerts.<sup>94</sup>

A few years later, in 2004, JamSports & Entertainment, LLC filed an antitrust suit against Clear Channel stating that the company violated § 2 of the Sherman Act when it sought to interfere with a contract that JamSports possessed for the promotion of the American Motorcyclist Association (AMA) Supercross Series from 2003 to 2009.<sup>95</sup> A letter of intent between JamSports and the AMA gave JamSports ninety days of exclusive negotiating rights for the series.<sup>96</sup> Clear Channel contacted the AMA during this time to present its own proposal.<sup>97</sup> JamSports alleged that Clear Channel's methods of obtaining the contract, and pressuring venues to deny JamSports access for supercross

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92. Boehlert, *supra* note 50. NIPP presented testimony and internal Clear Channel e-mails showing that the company had refused airplay on its Denver radio stations for artists and labels who had booked shows with promoters other than Clear Channel Entertainment. *Id.* Jason Martin, a representative of Roadrunner Records, testified that the director of programming at a Denver Clear Channel station threatened to pull promotional support for the "Tattoo the Earth Tour" because Roadrunner had hired NIPP as its promoter. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1062.

93. *Id.* at 1061. NIPP alleged rock artists were afraid that if they failed to book their concert tour with SFX/Clear Channel Entertainment, Clear Channel Radio Stations would reduce or refuse those artists' airplay. *Id.* NIPP cited testimony and messages from former Clear Channel employees and record label owners to support its position. *Id.*

94. *Id.* at 1063. NIPP argued that it was customary for local concert promoters to have contact with radio program directors, and the stations would usually give free promotional support in the form of ticket giveaways and on-air mentions for concerts that were musically similar to the format of the given station. *Id.* NIPP claimed that Clear Channel stations gave preferential treatment to its own concert promotion business. *Id.* NIPP supported its allegations with a copy of an e-mail message sent from Clear Channel to all radio program, promotions and music directors at Denver Clear Channel rock stations that prohibited providing on-air support to promoters other than SFX/Clear Channel Entertainment unless the promoter bought commercial time with the station. *Id.*

95. *JamSports & Entm't, LLC v. Paradama Prods., Inc.* 336 F. Supp. 2d 824 (N.D. Ill. 2004).

96. *Id.* at 828.

97. *Id.* at 830.



events,<sup>98</sup> constituted anticompetitive conduct in violation of the Act.<sup>99</sup>

Unfortunately, although Clear Channel's practices directly affected NIPP and JamSports's ability to compete effectively in the live event industry, no definitive ruling was ever issued with regard to Clear Channel's practices and the Sherman Act. The independent concert promoters were unable to continue to pursue protracted litigation, perhaps because of the day-to-day demands of their businesses, and settled with Clear Channel for undisclosed amounts.<sup>100</sup>

## II. APPLICATION OF THE SHERMAN ACT: A PERPLEXING CONUNDRUM

### A. *Competing Interpretations of Antitrust Legislation*

It is difficult to assign meaning to the language of the Sherman Act because its interpretation<sup>101</sup> by courts and scholars provides some trends, but no unanimous translation.<sup>102</sup> Generally, the Act is a set of rules designed to preserve the competitive process and maintain the integrity of the markets, making it unnecessary for the government to interfere directly in business affairs.<sup>103</sup>

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98. See *id.* at 844 (showing that Clear Channel took a "threatening posture" in emails to the manager of the Astrodome and Reliant Parks, two traditional supercross venues, when Clear Channel threatened to cease production of future shows in either venue if the parks booked a JamSports event).

99. *Id.* at 827.

100. See *infra* notes 157 and 179 and accompanying text (discussing settlements Clear Channel reached with both NIPP and JamSports).

101. See SHENEFIELD & STELZER, *supra* note 73, at 9 (stating that the meaning of the statute was not entirely clear because the framers failed to include a detailed list of prohibited activities in favor of a "generalized statute of constitutional breadth"); see also RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 3 (University of Chicago Press 1976) (pointing out that while the federal antitrust statutes are easily "readable" on their face, the operative terms such as "monopolize" and "restraint of trade" are "opaque").

102. SHENEFIELD & STELZER, *supra* note 73, at 11. An understanding of the goals of antitrust legislation "appears to depend on which antitrust statute is being analyzed, by whom, and for what purpose." *Id.*

103. See *id.* at 1-2 (asserting that preserving the competitive health of markets makes it unnecessary for government to make specific decisions regarding what should be produced, who should produce it and who should have access to the necessary materials). In essence, the laws safeguard ideals of free enterprise and only allow government interference when competition is compromised and the market fails. *Id.* The central notion that competition is worthy of protection is an ideal that is accepted by all "regardless of political party or school of economic thought." *Id.* at 10.

### 1. *Economic Efficiency and the Market*

One school of thought urges that courts distinguish between the behavior of monopolizing companies and those actors who are simply competing vigorously.<sup>104</sup> Judge Richard A. Posner, while a professor of economics at the University of Chicago, postulated that economic efficiency<sup>105</sup> is the ultimate goal of antitrust enforcement,<sup>106</sup> and there is no justification for applying antitrust enforcement to areas that are simply strongly competitive and not inefficient.<sup>107</sup> Inefficiency happens when competition is compromised by synthetic forces made up of exclusionary or anticompetitive conduct.<sup>108</sup> Posner and those who share his views believe the concentration of production in the hands of one or a few actors bolsters economic efficiency as long as competition remains hale and hearty.<sup>109</sup> Ultimately, the purely economic objective of antitrust legislation as advanced by the “Chicago School” enhances consumer welfare in the form of competitive pricing through the efficient allocation of resources with optimal output.<sup>110</sup> According to court decisions that echo these tenets, the Sherman Act should provide consequences for violations when consumer welfare is demonstrably injured.<sup>111</sup>

### 2. *Market Diversity and Opportunity*

There are a number of sociopolitical objections to the efficiency argument, which posit that conduct undermining the tools of competition can trigger an antitrust violation in the

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104. See POSNER, *supra* note 101, at 4 (arguing that economic theory provides a basis for the belief that monopoly pricing (creating an artificial scarcity of a product, thus driving its price up more than would happen under healthy competition) is inefficient and subject to antitrust scrutiny).

105. Economic efficiency has been defined as “[t]he extent to which a given set of resources is being allocated across uses or activities in a manner that maximizes whatever value they are intended to produce, such as output, market value, or utility.” Deardorff’s Glossary of International Economics, <http://www-personal.umich.edu/~alandear/glossary/e.html> (last visited Apr. 27, 2008).

106. POSNER, *supra* note 101, at 4.

107. See *id.* (insisting that it is improper to use antitrust enforcement to promote goals other than economic efficiency, “such as promoting a society of small trades people”).

108. See SHENEFIELD & STELZER, *supra* note 73, at 11 (stating that the Sherman Act proscribing monopolizing behavior reflects the economic objective of enhancing consumer welfares by preventing practices that reduce competition).

109. See POSNER, *supra* note 101, at 22 (maintaining that “whenever a monopoly would increase efficiency, it should be tolerated”).

110. SHENEFIELD & STELZER, *supra* note 73, at 11.

111. See *JamSports I*, 336 F. Supp. 2d at 832 (stating that several Seventh Circuit decisions authored by Judge Easterbrook adopt a definition of antitrust injury requiring the plaintiff to show that the loss comes from acts that “reduce output or raise prices to consumers”).

absence of or in addition to consumer injury.<sup>112</sup> These arguments advance the notion that the antitrust laws aim at protecting varying societal concerns beyond the pure belief in economic efficiency.<sup>113</sup>

First, there is the notion that monopoly transfers wealth from consumers to the stockholders of monopolistic firms.<sup>114</sup> Second, there is speculation that monopolies, or the concentration of a market in the hand of a few, will lead to a strong influence on the political process for laws aimed at protecting the industry.<sup>115</sup> Finally, there is a popular notion that antitrust legislation should restrict the freedom of large businesses in favor of promoting the interests of small businesses.<sup>116</sup> Producer welfare, rather than consumer welfare, is now being emphasized by some proponents as fundamentally fair in our economic framework.<sup>117</sup> Others argue that the market society is built upon the framework of "individual enterprise" and there must be diverse power in the private sector and maximum opportunity for personal endeavors.<sup>118</sup>

### 3. *Antitrust Philosophies and Clear Channel Concert Promotion*

A careful examination of the litigation involving Clear Channel Entertainment (Live Nation) and the Sherman Act is necessary in order to grasp how the "confusing and often conflicting objectives [of antitrust legislation]"<sup>119</sup> apply in practice to alleged anticompetitive practices in concert promotion. This Comment will isolate the social and economic values embraced by each court in an effort to determine if Clear Channel's activities fall within the purview of the Act, or if the company is simply engaging in lively competition. Generally, courts focus on the economic goal of the legislation, but the philosophical and social subtext of the antitrust laws requires that they be sensitive to the non-economic goals as well.<sup>120</sup>

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112. POSNER, *supra* note 101, at 18.

113. See SHENEFIELD & STELZER, *supra* note 73, at 12 (advancing the belief that there are factors in addition to consumer welfare that cannot be ignored in light of the enforcement of antitrust laws).

114. POSNER, *supra* note 101, at 18.

115. *Id.*

116. *Id.* at 19. In fact, some of the antitrust statutes were motivated by a purpose to protect the "Jeffersonian model of small dealers and competitors, notwithstanding some possible costs to society in terms of reduced efficiency." SHENEFIELD & STELZER, *supra* note 73, at 11.

117. See POSNER, *supra* note 101, at 12 (asking why consumers should be favored over producers in terms of antitrust enforcement).

118. *Id.*

119. *Id.* Courts are faced with reconciling the social goals of antitrust policy (dispersed power and individual opportunity) and its economic objectives (consumer welfare and efficiency). *Id.*

120. *Id.* at 14.

*B. Nobody in Particular Presents: A Court Acknowledging the Importance of Consumer Welfare But Intimating That Producer Interest May Be Relevant to the Inquiry*

United States District Judge Edward W. Nottingham issued a seventy-three page opinion giving a detailed analysis of NIPP's Sherman Act claims against Clear Channel Communications, the party moving for summary judgment on all claims.<sup>121</sup> As Judge Nottingham scrutinized the grievance, he provided a detailed breakdown of the elements of an antitrust violation.<sup>122</sup> Without deciding the case on its merits, Nottingham made a painstaking record of the injury that NIPP claimed to have suffered. While not obvious, it seems that the opinion meant to illustrate that, in addition to economic efficiency, this court was concerned with a number of alternative factors regarding the overall health of the competitive process of concert promotion in Denver.<sup>123</sup>

*1. Defining the Relevant Market*

The first step to analyzing an antitrust claim is determining the relevant product and geographic market in which the defendant operates.<sup>124</sup> Generally, the relevant market consists of all goods that consumers view as realistic substitutes for one another.<sup>125</sup> In analyzing the market, Judge Nottingham determined that the relevant market for the § 2 claims was the market for live music concerts where the seller is the music concert promoter and the buyer is the concert-going public.<sup>126</sup> He

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121. *Nobody in Particular Presents Inc., v. Clear Channel Comm'ns, Inc.*, 311 F. Supp. 2d 1048 (D. Colo. 2004).

122. *See generally id.* (establishing a framework for the antitrust claims of monopolization and attempted monopolization, with each claim divided into its individual elements including the court's reasoning for resolving each portion of the argument).

123. The court examined evidence that Clear Channel prevented competitors from entering the market through its influence over the rock radio market and promotion, and only mentioned consumer welfare *once* when detailing Clear Channel's practice of charging prices that are above average. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1099.

124. *Telecor Comm'ns Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124, 1130 (10th Cir. 2002); *see also* 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 56 (2006) (indicating that the relevant market must be shown because a charge of monopolization in violation of § 2 demands a showing of monopoly power or an attempt to monopolize; it is impossible to determine the presence of a monopoly without a specific delineation of the market); *see also* SHENEFIELD & STELZER, *supra* note 73, at 31 (charging that the aim of market definition is to determine what competitors may be engaged in a "competitive battle" given a specific product within certain geographic boundaries).

125. *See* SHENEFIELD & STELZER, *supra* note 73, at 31 (stating that not only does a relevant market include identical substitutes but also products that consumers may readily switch).

126. *See Nobody in Particular Presents*, 311 F. Supp 2d at 1076 (noting that antitrust laws apply to restraints on input markets as well as output

argued that a jury could reasonably find that the output market (tickets) is the relevant market, and would thus require an analysis of the input markets that Clear Channel controls to NIPP's detriment.<sup>127</sup> He believed that in order to evaluate the anticompetitive nature of Clear Channel's conduct, the court should analyze consumer injury in terms of producer injury (control over input streams).<sup>128</sup> Judge Nottingham's discussion of a relevant market definition indicated that the relevant consumer was not necessarily the end user of the product, but a court could also define it in terms of the "level of commerce [a]ffected by the defendant's behavior."<sup>129</sup> Nottingham went so far as to quote *Telecor Communications Inc. v. Southwestern Bell Telephone Co.*, in which the court stated that "[the] Sherman Act does not confine its protection to consumers . . . [the] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices."<sup>130</sup>

## 2. Monopolization

Nottingham's opinion continues by examining the monopolization claim.<sup>131</sup> In order to prove monopolization, it is necessary for a plaintiff to show the defendant's possession of

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markets); see also *id.* at 1083 (stating that NIPP set forth evidence, through its expert witness and economist, Dr. Phillips, of the "practical indicia necessary to define the relevant market as tickets for rock concerts"). Based on Dr. Phillips's testimony, rock concerts have distinct qualities from other concerts, including unique sources of advertising and promotional input (rock radio). *Id.*; see also *id.* at 1075 (stating that there was no need to investigate the geographic scope because the parties had stipulated to the region: the Denver area).

127. See *id.* at 1077-78 (claiming that Clear Channel's behavior under these circumstances is asserted to affect multiple input markets (the market for promotional services, radio airplay, advertising and promotional support) in addition to the downstream output market).

128. *Id.* at 1078. The court continues to posit that even if Clear Channel's conduct did not show injury to competition in each separate input category, the company's comprehensive conduct in all of the input markets may "injure competition in the downstream market collectively." *Id.*

129. See *id.* at 1076 (demonstrating that in *Telecor*, Southwestern Bell and Telecor competed for pay-telephone locations and therefore the relevant consumers for purposes of market definition were the owners of the location, not those end-users of telephones). "The Supreme Court has . . . held that antitrust laws apply not only to restraints on output markets but to input markets as well, including both labor and input commodities . . ." *Id.* (citing *Telecor*, 305 F.3d at 1135).

130. *Id.*

131. See *id.* at 1098 (stating that "NIPP allege[d] that Clear Channel . . . monopolized the market for rock-concert tickets in the Denver metropolitan area by engaging in anticompetitive conduct such as predatory pricing, tying, and preventing its competitors from using radio for promotions").

monopoly power in the relevant market and the willful acquisition of that power.<sup>132</sup>

a. Monopoly Power

A court may deduce that monopoly power exists by analyzing an actor's control of the dominant share of the relevant market coupled with the actor's protection of that share via entrance barriers.<sup>133</sup> In this case, Nottingham acknowledged that NIPP provided evidence that Clear Channel charged "super competitive prices" and "excluded competition"<sup>134</sup> by blocking access to certain necessary input markets,<sup>135</sup> but failed to assert that Clear Channel's market share was sufficient to constitute a monopoly power.<sup>136</sup> It appeared that Judge Nottingham was hinting that the second element of the charge may have been fulfilled but the market share was too disparately low to pursue the claim.<sup>137</sup> After determining that the company did not possess a monopoly in the relevant market, there was no need for the court to address the

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132. *Id.* at 1098; see also SHENEFIELD & STELZER, *supra* note 73, at 37 (reminding that monopoly power is only a threshold requirement of § 2 of the Sherman Act and is not in and of itself illegal). Antitrust laws do not prohibit fierce, even cut-throat competition, and competitors should not be punished for fairly winning a market. *Id.*

133. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001); see also SHENEFIELD & STELZER, *supra* note 73, at 42 (urging that while a company may achieve monopoly status through purely lawful means, it cannot raise barriers to entry by other competitors unless it has a justification based upon efficiency).

134. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1098.

135. See *id.* (listing the various inputs that Clear Channel allegedly controlled, blocking access from competitors including: artists, rock radio airplay and rock radio promotional support).

136. See *id.* (indicating that the 50.48% market share that Clear Channel allegedly possessed was impressive but not enough to be considered monopolistic). The court recognized that the Supreme Court has not given a minimum indicator as to what percentage of market power constitutes a monopoly, however lower courts generally look for a minimum market share between 70 and 80%. *Id.*; see also SHENEFIELD & STELZER, *supra* note 73, at 36-37 (showing that a firm may have less than 100% of market share to demonstrate market power, but the definition of "market power" was historically (though by no means concretely) based upon a "short hand indicator" that a single firm with 75 to 80% or more of a relevant market would be deemed a monopoly).

137. Once again the judge is hinting that restricted input markets (rock promotional services and rock radio play) create a supply side barrier to entry for other promoters and may be worthy of the protection of antitrust legislation in addition to consumer welfare. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1084. Judge Nottingham continues by stating that, "[a]llegedly, this single competitor has increased the cost for these inputs to a point where no competitor could enter the market for rock concert tickets and provide tickets at lower prices than the competitor who has control of the cost of these inputs." *Id.* at 1085.

“willful” element of the claim. The court ultimately granted Clear Channel’s motion for summary judgment on the claim of monopolization.<sup>138</sup>

### 3. Attempted Monopolization

NIPP also accused Clear Channel of “attempted monopolization” under § 2 of the Sherman Act. The four elements needed to prove an attempt to monopolize are: 1) relevant market,<sup>139</sup> 2) dangerous probability of success in monopolizing the relevant market, 3) specific intent to monopolize, and 4) conduct in furtherance of such attempt.<sup>140</sup>

#### a. The Dangerous Probability of Success

In assessing the dangerous probability of success in terms of Clear Channel’s alleged exclusionary conduct, Judge Nottingham considered a number of factors. First, he contemplated Clear Channel’s ability to control prices<sup>141</sup> or exclude competition.<sup>142</sup> Nottingham determined that NIPP provided sufficient evidence that Clear Channel charged prices above the competitive level.<sup>143</sup> He also found that NIPP effectively demonstrated that Clear Channel’s control of the Denver rock radio industry limited other promoters’ access to artists and promotional support.<sup>144</sup>

Nottingham also evaluated probability in terms of Clear Channel’s market share and determined that NIPP set forth evidence that Clear Channel holds a 50.48% share of the market for rock concerts, indicating that the company has “substantial

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138. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1099.

139. NIPP already put forth sufficient evidence to demonstrate that the relevant market is for rock tickets. *Id.*

140. *Id.* In essence, even if a firm has not achieved an actual monopoly, if the court finds a “dangerous probability” that there is a plan to reach a monopoly by restricting competition, the claim for attempted monopolization will succeed. SHENEFIELD & STELZER, *supra* note 73, at 38.

141. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1099. One must make a finding that the defendant can continually control prices as a sign of the market power necessary for attempted monopolization. *Id.*

142. *Id.* When one actor has the ability to exclude competition he may necessarily control output, because other firms have no access to the necessary inputs needed to increase output. *Id.* at 1101.

143. *Id.* at 1099. The ability to raise prices above the average in the industry while simultaneously increasing one’s market share is evidence of a potential ability to control prices. *Id.* Using expert opinion and data from *Pollstar* magazine, NIPP presented evidence that in 2000, NIPP charged an average \$13.32 per concert ticket while SFX/Clear Channel Entertainment averaged \$33.69. *Id.* at 1065. As Clear Channel acquired a larger market share of the Denver concert region between 2000 and 2001, the average price for a rock concert ticket rose 3.7%. NIPP increased its ticket prices consistent with that average while the mean cost of SFX/Clear Channel Entertainment concert admission jumped 23.5% to \$41.59 per ticket. *Id.*

144. *Id.* at 1102.

economic power” in the market and could elevate that status to monopolistic levels.<sup>145</sup> He examined Clear Channel’s resources and concluded that the company’s financial strength and “multi-market domination” supported NIPP’s claim for attempted monopolization.<sup>146</sup> Nottingham also indicated that market trends may lead to a probability of success in monopolization because Clear Channel’s market share grew rapidly in a short period of time, while its competitors’ market share decreased, making probability a potential reality.<sup>147</sup>

NIPP also put forth a showing that there were significant barriers to market entry in the Denver area in support of its claim of attempted monopolization.<sup>148</sup> The court ultimately concluded that NIPP satisfied its burden on summary judgment to show Clear Channel’s probability of success in monopolization.<sup>149</sup>

#### b. Specific Intent to Monopolize

The court then addressed the element of the specific intent to monopolize.<sup>150</sup> According to Judge Nottingham, intent is necessarily derived from exclusionary behavior and NIPP presented evidence that constituted improper exclusion.<sup>151</sup>

145. *Id.* A market share of 41% is sufficient to show “substantial economic power.” *Id.*

146. *Id.* at 1103. Showing that Clear Channel’s competitors have a fraction of the financial strength and diversity because none own rock radio stations, further hindering access to necessary inputs (artist airplay and radio advertising) and making the probability of success of monopolization all that more likely. *Id.*

147. *Id.* NIPP presented evidence that Clear Channel’s share of the market skyrocketed in Denver from .45% in 1999 to 50.48% in 2001, while NIPP’s market share shrunk. *Id.*

148. *Id.* at 1004. Those listed barriers included: Clear Channels ownership of radio stations and consequent access to promotional support, relationships with rock artists, Clear Channel’s ownership of venues in Denver, Clear Channel’s national presence, and Clear Channel’s significant working capital. The court reinforced that it would be difficult for any competitive promoter to also own and operate a radio station because it would be cost prohibitive as a means of running a promotion company. *Id.* at 1103.

149. *Id.*

150. *Id.* at 1105. The requisite intent may be revealed by direct evidence (the proverbial smoking gun, such as a document outlining a plan to do “whatever it takes to take over a market”) or it may be established by indirect evidence in the form of improper conduct often described as “predatory, exclusionary or otherwise anticompetitive.” SHENEFIELD & STELZER, *supra* note 73, at 39. Improper conduct may be identified in that it “is not rational from a business point of view but for its tendency to harm a competitor or undermine competition.” *Id.* at 40.

151. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1105. Electronic messages between executives and Clear Channel radio programmers indicated that Clear Channel had the specific intent to exclude promoters from access to radio promotional support and advertising even though such support could have been financially beneficial to those radio stations. *Id.* For example,



### c. Anticompetitive Conduct

The final element of an attempted monopolization claim is proof that the defendant engaged in anticompetitive conduct.<sup>152</sup> Anticompetitive or exclusionary conduct is “conduct constituting an abnormal response to market opportunities.”<sup>153</sup> Judge Nottingham determined that evidence of Clear Channel’s refusal to accept paid advertisements from competitors for concert promotion could indicate the intent to create a monopoly for itself.<sup>154</sup> He also concluded that there was a dispute of material fact with regard to the tying claim that Clear Channel conditioned airplay of artists’ songs to their use of Clear Channel as a promoter.<sup>155</sup>

Nottingham closed the opinion by stating that the result compelled a trial on the issue of anticompetitive conduct for the claim of attempted monopolization.<sup>156</sup> Unfortunately, NIPP never reached trial because the two companies settled in June 2004 under undisclosed terms.<sup>157</sup> Judge Nottingham’s opinion addressed,<sup>158</sup> but did not primarily concern, consumer welfare. Instead, he spent considerable time examining conduct that may

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consistent pricing below cost is not financially beneficial, and it has the “predatory purpose” of excluding the competition from market participation or even causing bankruptcy (without business justification) and should be considered specific intent for purposes of attempted monopolization. SHENEFIELD & STELZER, *supra* note 73, at 40. NIPP maintained that Clear Channel engaged in the “specific intent” to monopolize with regard to a Styx, Bad Company concert promoted by House of Blues. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1064. House of Blues chose a station owned by Tribune Broadcasting to promote the concert, and Clear Channel sent internal messages discouraging Clear Channel radio stations from accepting any additional advertising for the event with the purpose of encouraging failure. *Id.* One e-mail from Mike O’Connor, Clear Channel’s director of FM programming to the Denver read: “Let’s crush the [Tribune station] and HOB on this show . . . hope you will tow the line . . . do not give free impressions to this Hawk festival on any of your stations . . . avoid accepting advertising . . . let’s get our f\*cksticks out.” *Id.*

152. *Nobody in Particular Presents*, 311 F. Supp. 2d at 1105.

153. *Id.* One hypothetical example of anticompetitive conduct that has no reasonable business justification would be that of a railroad company who owns the only bridge across a river. If the railroad company denies use of that bridge to a “desperate” competitor, it will eventually drive the competitor out of business leaving the railroad in possession of a monopoly. SHENEFIELD & STELZER, *supra* note 73, at 40.

154. *Nobody In Particular Presents*, 311 F. Supp. 2d at 1107.

155. *Id.* at 1108.

156. *Id.* at 1109.

157. *NIPP Settles with Clear Channel*, DENVER BUS. J., June 2, 2004, <http://denver.bizjournals.com/denver/stories/2004/05/31/daily20.html>. Clear Channel admitted no wrongdoing in the settlement. *Id.*

158. See *supra* note 123 and accompanying text.

injure producers as a whole, ultimately breaking down free competitive enterprise.<sup>159</sup>

*C. JamSports: The Seventh Circuit Interprets the Sherman Act in Terms of Consumer Welfare and Compels a Similar Result*

In a summary judgment proceeding, Clear Channel raised two arguments as to why JamSports would not be able to succeed on its antitrust claims.<sup>160</sup> First, Clear Channel claimed that JamSports was unable to show that Clear Channel's anticompetitive conduct was the cause of consumer injury, the type of damage that the Sherman Act intended to combat.<sup>161</sup> Second, the company argued that it was entitled to summary judgment because JamSports could not prove that Clear Channel's conduct was anticompetitive in terms of a monopolization claim under § 2 of the Sherman Act.<sup>162</sup> The court found that there was adequate evidence to prove economic inefficiency resulting in potential injury to the consumer and sent the matter to trial.<sup>163</sup>

*1. The Debate Over Antitrust Injury*

Clear Channel argued that in order to show antitrust injury, the plaintiff must illustrate harm to consumers either through decreased output or an increase in prices.<sup>164</sup> The company continued to argue that JamSports was unable to do so because

159. See SHENEFIELD & STELZER, *supra* note 73, at 12 (stating that preventing the accumulation of monopoly power contributes to consumer welfare because it inhibits "price gouging," but it also meets the "socio-political objective of dispersing economic power").

160. *JamSports I*, 336 F. Supp. 2d at 832.

161. *Id.* The purpose of proving antitrust injury is to ensure that the harm corresponds with the reason for finding a violation of the antitrust laws to begin with: namely, proof that anticompetitive conduct injures competition, not individual competitors. *Id.* In fact the Seventh Circuit has "stressed that antitrust [law] is designed to protect consumers from producers, not to protect producers from each other . . ." *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996).

162. *JamSports I*, 336 F. Supp. 2d at 832. JamSports alleged that Clear Channel engaged in anticompetitive behavior with the intent to "lock up" or prevent JamSports from using stadiums owned by Clear Channel for supercross events. *Id.* at 833. Clear Channel maintained that the conduct was not anticompetitive and had a legitimate business justification; however, Clear Channel does not give any indication as to what that business purpose could be. *Id.* at 843.

163. See *id.* at 852 (showing that the court denied Clear Channel's motion for summary judgment on the Sherman Act claims and set the date for the filing of the final pretrial order for November 15, 2004).

164. *Id.* at 833. Several Seventh Circuit opinions adopt this definition of antitrust injury: *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992); *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir 2003); *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992).

the number of promoters of the AMA Supercross Series remained unchanged.<sup>165</sup> Ultimately, Clear Channel maintained, as a matter of law, that no antitrust injury can be demonstrated when one “natural” monopolist prevents another firm from replacing it as a monopoly.<sup>166</sup>

The court recognized that the Seventh Circuit generally follows the doctrine that establishing harm to consumers is the crux of antitrust injury,<sup>167</sup> but it maintained that Clear Channel did not make an accurate showing that JamSports was simply trying to replace one monopolist with another.<sup>168</sup> In fact, the court found that JamSports’s attempt to promote AMA supercross events did not necessarily mean that Clear Channel was precluded from promoting supercross events generally.<sup>169</sup> The opinion reasons that a jury could have concluded that if both companies sponsored competing series, there would have been increased output, decreased prices, and an ultimate benefit to the consumer.<sup>170</sup> It follows that Clear Channel’s actions preventing JamSports from fulfilling the contract for the supercross series

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165. See *JamSports I*, 336 F. Supp. 2d at 834 (arguing that because Clear Channel was the only promoter of the AMA sanctioned series, JamSports was attempting to replace Clear Channel as the single promoter and regardless of whoever won the contract, there would be no decrease in output because there would be no difference to the consumer).

166. *Id.* at 834. Clear Channel relies on the holding of *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984), in which Judge Posner did not find any “consumer interest” when a plaintiff accused a defendant of fraudulently patenting antistatic yarn invented by the plaintiff, and enjoying a patent-based monopoly to which the plaintiff felt entitled. *Id.* The court concluded that “if no consumer interest can be discerned even remotely in a suit brought by a competitor . . . a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers.” *Id.*

167. *Id.* But see *Fishman*, 807 F.2d at 535 (holding that a defendant’s attempt to acquire a natural monopoly was not precluded from examination under the Sherman Act even absent a plaintiff’s showing of consumer injury because producer injury resulting from interference with the competitive process is also worthy of antitrust enforcement). *JamSports I* continues by suggesting that the key to antitrust legislation is to protect consumer well-being through “unfettered competition,” and a concrete showing of public harm may not be the lynchpin of the inquiry. 336 F. Supp. 2d at 835 (quoting *Fishman*, 807 F.2d at 537-38). However the court finds no need to resolve the issue and answers the question based on these circumstances, determining that there is a potential for actual injury to the consumer. *Id.* at 837.

168. *Id.* at 836-37.

169. *Id.* JamSports’s expert witness said that supercross may eventually “resolve itself into a single series” but that does not preclude the possibility that competition may occur. *Id.* at 836 n.2.

170. *Id.* at 836-37. Even if the market was only able to sustain competition for a short period of time before it collapsed into one series, there would still be increased output during that time. *Id.* at 836 n.2.

harmed the competitive process and may be indicative of antitrust injury in the form of decreased output or increased prices.<sup>171</sup>

## 2. *Arguing the Anticompetitive Nature of Clear Channel's Conduct*

As key examples of anticompetitive conduct, JamSports presented evidence that Clear Channel threatened to withdraw all of its events from certain stadiums if those stadiums persisted in booking the JamSports AMA supercross events.<sup>172</sup> Clear Channel maintained that because “intent”<sup>173</sup> is not an element of a monopolization claim, its “desire for JamSports to be regarded as ‘poison’”<sup>174</sup> cannot be a basis of liability for anticompetitive conduct.<sup>175</sup> The company insisted that regardless of intent, it had a relevant business justification for seeking “protection periods” other than to stifle the competitive process and should not be subject to § 2 scrutiny.<sup>176</sup>

The court dismissed Clear Channel's insistence that intent is irrelevant, and instead found that it is pertinent to determining if conduct is exclusionary or anticompetitive.<sup>177</sup> The court held that a jury *might* find that Clear Channel had a legitimate business purpose for its conduct, but that JamSports raised a genuine issue as to whether Clear Channel engaged in “conduct aimed solely at

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171. *Id.* at 837.

172. *Id.* at 843. The president of Clear Channel's motor sports division, Charlie Mancuso, e-mailed the company's vice-president of booking motor events, Eric Cole, indicating that they needed to “lock up” those key stadiums used for supercross events for at least the next three years, thus attempting to prevent JamSports from booking in supercross friendly stadiums. *Id.* at 843-44. Mancuso instructed Cole to have the venues sign “protection clauses” in which the venue would guarantee that it “would not host other motor sports events within a certain number of days or months of Clear Channel's events.” *Id.* at 844. After being informed that JamSports was inquiring about booking supercross dates at the Astrodome and Reliant Field, Cole reminded the general manager of the venues that “we have been producing motor sports s [sic] events in that facility for 30 years” and it was “unacceptable” for the facility to book a JamSports race. *Id.*

173. “The intent to achieve . . . a monopoly is no more unlawful than the possession of a monopoly.” *Id.* at 843 (quoting *Ill. v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1981)).

174. *Id.* at 842.

175. *Id.* Clear Channel relies on Seventh Circuit holdings that “if conduct is not objectively anticompetitive[,] the fact that it was motivated by hostility to competitors . . . is irrelevant.” *Id.* (quoting *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986)).

176. *Id.* at 843, 845.

177. *Id.* at 842. The opinion quotes Learned Hand, who stated that “no monopolist monopolizes unconscious of what he is doing” and ultimately concluded that the level of intent necessary for a § 2 Sherman Act claim is the “intent to maintain or achieve monopoly power by *anticompetitive means*.” *Id.* at 843 (quoting *Illinois v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1981)).

hindering competition.”<sup>178</sup> Conduct intended to allow a firm to compete more effectively is permissible while actions designed to insulate a company from competitive pressure are decidedly anticompetitive.<sup>179</sup> Once again, the court indicated that the jury would have to look at Clear Channel’s behavior in terms of economic efficiency. If there was justification for its behavior, Clear Channel should not be found to be in violation of the Sherman Act.<sup>180</sup>

### III. CONSUMERS ARE SUFFERING FROM MORE THAN JUST HIGH PRICES

To date, no court has issued a clear disposition on the question of Clear Channel/Live Nation’s alleged anticompetitive conduct in concert promotion as applied to the antitrust laws. There is indication that the federal court system finds the nature of Clear Channel’s behavior to be a sufficient question of fact, worthy of jury determination on its anticompetitiveness.<sup>181</sup>

In addition to the economic impact on the price of concert tickets, consumers suffer the effect of various non-economic factors that ultimately deny them meaningful choice when deciding to attend events. The regional approach to concert promotion has largely disappeared and consumers are left paying high prices for streamlined events that may not cater to the local fan base. However, in terms of the Sherman Act, these consumers may have the unique ability to bring about change through class action lawsuits. These class actions can concretely address the concept of

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178. *Id.*; see also *id.* at 845 (stating that a reasonable jury could make the determination that Clear Channel, by virtue of its market power, pressured venues and stadiums not to host competing motor sporting events “with the sole intent of restraining the competitive process”).

179. *Id.*

180. See *JamSports & Entm’t, LLC v. Paradama Prods., Inc. (JamSports II)*, 382 F. Supp. 2d 1056, 1058 (N.D. Ill. 2005) (reporting that a jury returned a verdict in favor of Clear Channel for JamSports’s claims of Sherman Act violations). The opinion gives no reasoning behind the jury decision but indicates that the jury found in favor of the JamSports for its tortious interference with contract claim. *Id.* The federal jury awarded JamSports a \$90 million verdict. Geoff Dougherty, *Jam Wins Racing Case Against Clear Channel*, CHI. TRIB., Mar. 22, 2005, § 2, at 1. The verdict was eventually overturned on appeal, but Clear Channel reportedly paid JamSports a significant settlement before JamSports could bring the case back to court. DeRogatis, *supra* note 14, at D6.

181. See generally *JamSports I*, 336 F. Supp. 2d 824 (N.D. Ill. 2004) (providing an example of a federal judge denying summary judgment in favor of Clear Channel on the Sherman Act claim in favor of empaneling a jury to determine whether the evidence JamSports presented would qualify as anticompetitive conduct). See also *Nobody In Particular Presents*, 311 F. Supp. 2d at 1048 (denying Clear Channel’s motion for summary judgment in favor of NIPP’s ability to present competent evidence that could allow a jury to find that Clear Channel was guilty of attempted monopolization).

consumer injury that is lacking in the promoter suits, perhaps with a level of success.

### A. *Non-Economic Factors Affecting Concert Fans*

The court in *JamSportsI* would not commit to the notion that consumer injury is the “sine qua non” of antitrust injury,<sup>182</sup> and Judge Nottingham in *Nobody Particular Presents* was reluctant to find that only an injury to the consumer constituted antitrust injury.<sup>183</sup> However, there is no doubt that the consumer is indeed suffering as a result of Clear Channel/Live Nation’s expansive control over the live concert industry. In addition to the classic economic injury resulting from higher concert tickets,<sup>184</sup> the public also endures a variety of intangible wounds that antitrust legislation may address.<sup>185</sup> Economic efficiency may be where the inquiry begins, but it is certainly not where it ends.<sup>186</sup>

First, concentrating concert promotion in the hands of one promoter denies the consumer choice.<sup>187</sup> Fans have no freedom to

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182. See *JamSports I*, 336 F. Supp 2d at 836 (stating that the Seventh Circuit is split on the concept: some cases hold that reduction in output or a raise in prices directly affecting the customer constitutes antitrust injury with other cases holding that the application of the antitrust laws does not rest on the demonstration of consumer injury).

183. See *supra* notes 128-29 and accompanying text (demonstrating Nottingham’s opinion that antitrust injury under the laws is not limited to consumer injury but also injury to the competitive process via damage to the tools of competition).

184. See Bill Wyman, *Fleece Your Children*, SALON, Apr. 12, 2000, [http://archive.salon.com/ent/log/2000/04/12/csny\\_tix/index.html](http://archive.salon.com/ent/log/2000/04/12/csny_tix/index.html) (noting that the overall gross revenues from the top fifty tours in the United States increased 30% from 1999 to 2000 and could be attributed to SFX taking over a large chunk of the concert industry and “energetically mov[ing] to exploit as much of the . . . economic value as possible of the concerts it promotes”).

185. These intangible non-economic effects of Clear Channel’s alleged anticompetitive conduct are much akin to the socio-political arguments in favor of antitrust enforcement to advance the dispersal of economic power and favor the “role of individual entrepreneurs.” SHENEFIELD & STELZER, *supra* note 73, at 12; see also Cassie Connor, *Clear Channel: The Microsoft of Music*, <http://www.openingbands.com/features/?forceissue=2002-03-15#1> (last visited Apr. 28, 2008) (recognizing that America’s economic history is rooted in “entrepreneurship and corporations, but the American people depend on responsible corporations in order to maintain a decent quality of life . . . [and] Clear Channel is not filling this role of a responsible corporation”).

186. See DeRogatis, *supra* note 14, at D6 (quoting *JamSports’s* Jerry Mickelson, “As the concert business gets smaller and smaller, the consumer is hurt more and more[;] [t]he fewer choices we have, the worse it is in any segment of our lives”).

187. See Connor, *supra* note 184 (quoting a consumer complaining about the homogenization of the concert industry, “[Clear Channel] will buy up the major venues in a town then hold concerts in their venues, sponsored by their radio stations, booked by their employees, and only featuring bands that are friendly to Clear Channel”).

participate in independent concert communities that local promoters foster and cater to with customized concert experiences.<sup>188</sup> Instead, concertgoers nationwide are subject to the same uniform experience, developed by one core group of producers working for Clear Channel.

Second, in addition to experiencing a marked rise in ticket prices,<sup>189</sup> some of the entrance fees are so high that fans are unable to attend.<sup>190</sup> Those consumers are effectively disenfranchised from the experience,<sup>191</sup> and must be content to stay home and listen to their favorite artists on the radio.<sup>192</sup>

Third, consumers will never be exposed to independent artists over the radio waves by virtue of Clear Channel's stranglehold on the broadcast industry.<sup>193</sup> Artists need radio airplay in order to

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188. See *id.* (stating that the Clear Channel business plan eventually puts local concert promoters out of business, and this is not only harmful to the competitor, but to the public as well). The author states that Clear Channel will often ignore local bands for promotion, thus preventing the public from hearing diverse product. *Id.* Connor also indicates that the public suffers because it no longer sees concerts produced by regional companies that are in tune with the unique proclivities of a local market, but rather concerts assembled "hundreds of miles away" that are generic and mainstreamed. *Id.*

189. See Jake McGee, *Live Nation is a Minion of Evil*, KOTORI MAG., Dec. 1, 2006, available at [http://www.getunderground.com/underground/features/article.cfm?Article\\_ID=2042](http://www.getunderground.com/underground/features/article.cfm?Article_ID=2042) (citing *Pollstar* statistics stating that the number of concert tickets dropped by one million between 2004 and 2005 while the revenue for concert tickets rose from \$2.8 billion in 2004 to \$3.1 billion in 2005).

190. Jennifer Duffield of Waterford, Michigan told Paul Egan of the Detroit News that she used to attend concerts "casually, checking out what performers were in town in much the same way people check out movie listings." Egan, *supra* note 44, at 1A. Today fewer teenagers are attending concerts and she states that she could not attend "nearly as many concerts if she was a student today." *Id.* Not only have the face values of tickets risen, the increase in the number of "add-on" convenience fees are "spin[ing] out of control," most of which end up in the pockets of Ticketmaster and Clear Channel Entertainment. Eric Boehlert, *What's Wrong With the Music Biz?*, SALON, July 19, 2001, [http://archive.salon.com/ent/music/feature/2001/07/19/industry\\_downturn/index.html](http://archive.salon.com/ent/music/feature/2001/07/19/industry_downturn/index.html).

191. See McGee, *supra* note 189 (likening the modern Clear Channel concert experience to "expensive yuppie galas where lattes are sold at punk rock shows"). The "golden circle" pricing standard has become the norm in the rock concert industry where prime seats were originally sold at higher prices. Wyman, *supra* note 184. Eventually the "golden circle" expanded to comprise a hefty chunk of any venue. *Id.*; see also, Egan, *supra* note 44, at 1A (quoting Owen Sloane, a Southern California lawyer who includes Elton John, Kenny Rogers and Bonnie Raitt amongst his clients, "I think most people in the business feel that the prices are too high and you're basically cutting out a lot of people").

192. Chances are the fan will be listening to a Clear Channel Radio Station. Today, Clear Channel owns about 1,200 stations, 10% of all radio station in this country. Connor, *supra* note 184.

193. See Spencer, *supra* note 52 (indicating that Clear Channel owns only eleven percent of commercial radio stations, hardly a monopoly but in the

gain exposure and sell a number of concert tickets, while concert promoters need radio advertising to make sure those same tickets are sold.<sup>194</sup> Clear Channel is known to leverage its playlists to make sure its concert promotion division lands certain tours, wresting them from the competition.<sup>195</sup> Thus, if Clear Channel is creating cookie cutter playlists, featuring only artists who will yield the most lucrative live tour, lesser known bands are left with fewer places to showcase their sound and independent promoters cannot afford to take a chance on a tour because the public is not familiar with the Act.<sup>196</sup>

### B. Consumer Power to Effectuate Change

While producer antitrust lawsuits have garnered the intrigue of the court, perhaps the most effective way to illustrate antitrust injury (so as to avoid the necessity of a debate over what constitutes actual injury) would be to present it from the perspective of the concert attendee.<sup>197</sup> A lawsuit claiming consumer injury and illustrating that such injury is the necessary effect of anticompetitive conduct would eliminate the hurdles that courts face in producer suits, where they attempt to reject the notion that consumer injury is necessary to illustrate an antitrust injury.<sup>198</sup> By presenting definitive consumer injury, both economic and socio-political, the debate becomes moot, and producers concerns about the breakdown of the competitive process will still be addressed because consumer injury flows from the same collapse.<sup>199</sup>

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particular industry it is certainly a "hegemony" as the largest radio group of any by far).

194. Boehlert, *supra* note 50.

195. Eric Boehlert, *Radio's Big Bully*, SALON, Apr. 30, 2001, [http://archive.salon.com/ent/feature/2001/04/30/clear\\_channel/index.html](http://archive.salon.com/ent/feature/2001/04/30/clear_channel/index.html).

196. See Schapiro, *supra* note 41 (indicating that the rock 'n' roll industry thrived on the creative triumvirate that existed between radio programmers, concert promoters and artists and now that entire dynamic is centralized with successful bands continually being offered a lot of money for concert tours while unknown groups are at a loss).

197. Section 4 of the Clayton Act creates a private right of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1997).

198. See *JamSports I*, 336 F. Supp. 2d at 836 (holding that consumer injury is not necessary to show antitrust injury).

199. See SHENEFIELD & STELZER, *supra* note 73, at 13 (stating that Adam Smith's idea that the "invisible hand" of competition should drive the economy creating the most efficient use of resources, stimulating technological innovations, mandating that companies produce high quality product for low prices in quantities that consumers need all add up to "consumer welfare").



### C. *The Need for Class Action*

The two antitrust suits brought by producers against Clear Channel/Live Nation both reached resolution through settlement.<sup>200</sup> Perhaps Clear Channel's pockets are so deep that settlement is always a viable solution, or maybe producers accept settlements so that they can continue to operate as concert promoters, rather than becoming mired in time-consuming litigation. No court has been able to issue a final word on Clear Channel's activities because of the prevalence of settlement with regard to such matters.

Individual concert fans do not necessarily have the financial resources or damage interest to bring an antitrust suit in federal court against a large corporation such as Clear Channel Communications.<sup>201</sup> A class action provides an ideal mechanism for potential plaintiffs to bring claims while promoting judicial economy.<sup>202</sup> The class action would allow a single plaintiff/consumer to file one complaint on behalf of an entire class of individuals with the resolution binding on all members.<sup>203</sup> Not only is the class action an efficient tool of litigation, it would prompt a definitive answer to the question of whether Clear Channel engages in anticompetitive or exclusionary practices in violation of § 2 of the Sherman Act.

### D. *Heerwagen: The Class Action Pioneer*

In June of 2002, Melinda Heerwagen of Chicago filed a class action suit against Clear Channel on behalf of individuals who purchased tickets to any live rock concert produced by Clear Channel since 1997.<sup>204</sup> She alleged sharp increases in ticket prices that were unrelated to inflation and a direct result of Clear Channel's "unlawful and anticompetitive" practices, constituting monopolization and attempted monopolization in violation of § 2 of the Sherman Act.<sup>205</sup> Namely, she asserted that Clear Channel's

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200. See *supra* notes 157 and 179 and accompanying text.

201. See MARGARET C. JASPER, *YOUR RIGHTS IN A CLASS ACTION SUIT 2* (Oceana Publications, Inc. 2005) (indicating that in many cases the damages suffered by the individual are too small to justify hiring a lawyer to bring suit, thus allowing suspect business practices to go unchecked). It is also not economically feasible for any lawyer to undertake a lawsuit against a large company who has violated an individual's rights. *Id.* at vii.

202. See *id.* at 2 (illustrating that if each individual plaintiff filed a separate complaint alleging the virtually identical allegations it would be a waste of judicial resources, and there would be a risk of varying outcomes for "essentially the same claim").

203. *Id.*

204. *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 224 (2d Cir. 2006)

205. *Id.* at 223-24. Ms. Heerwagen presented evidence through her expert, Princeton University Economics Professor Alan B. Krueger, that the ticket

dominance in the radio market directly related to the creation of monopolistic pricing for concert tickets.<sup>206</sup> The court denied certification of a national class,<sup>207</sup> determining that the relevant market was local in nature because there is no cross-elasticity of demand for live concert tickets between geographic areas nationally.<sup>208</sup>

In order to pass class certification to proceed on the issue of Clear Channel's alleged violation of the antitrust laws, the class itself must be redefined. The most effective way to define the class locally while still attracting greater numbers of plaintiffs and implicating interstate commerce for purposes of § 2 of the Sherman Act is to create a regional profile that crosses state lines but does not purport to be national.<sup>209</sup>

### *E. Redefining the Class*

On June 3, 2006, Daniel Woodring, a rock music fan from Cincinnati filed a federal antitrust suit against Clear Channel,<sup>210</sup>

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prices rose 21% from 1991 to 1996, while the Consumer Price Index showed that overall prices only rose 15%. *Id.* at 223. In fact, according to Professor Krueger, during that period, the price of concert tickets rose more than tickets to other events including movies, theatrical performances and sporting events. *Id.*

206. *Id.* at 224. She claimed that Clear Channel excluded competitors from the concert promotion market, putting pressure on artists to steer away from independent promoters by limiting competitors access to advertising on Clear Channel radio stations, charging excessive advertising rates, misrepresenting the availability of advertising and neglecting to include competitors in "miscellaneous promotions such as ticket giveaway contests." *Id.*

207. *Id.* at 225. The appellate court reviewed the district court's decision failing to certify the class for an abuse of discretion. *Id.* Ultimately, the court renewed the lower court's finding that the "plaintiff is . . . not an adequate or typical representative of a class of ticket purchasers beyond those in plaintiff's local market." *Id.* at 226.

208. *Id.* at 228. The court reasoned that a purchaser of rock concert tickets is not likely to travel out of his/her own geographic region to purchase tickets even if the price is lower than in his/her own region. *Id.* Though not within the scope of this comment, one may argue that there is a class of concert ticket purchasers who definitely would qualify as a national class by virtue of the fact that they frequently travel outside of their geographic region in order to attend concerts all over the country. Super-fans who follow the likes of the Grateful Dead, Widespread Panic, or even Jimmy Buffett are known for traveling far and wide to catch as many shows of a national tour as possible.

209. *See* Sloat, *supra* note 44, at C1 (stating that there are defined "concert booking" markets that affect how anti-monopoly laws are litigated in federal courts).

210. *Concert Fan Sues Clear Channel*, LEXINGTON HERALD-LEADER, Jun. 4, 2006, at b3. The lawsuit alleges that Clear Channel limited radio airplay for artists who did not use its promoter, refused advertising to competing promoters, charged them excessive advertising rates or gave them undesirable time slots. *Id.* In addition, the suit alleges that Clear Channel pays artists fees in excess of contract demands to discourage competitors from getting desirable tours allowing Clear Channel to recoup its costs via increased ticket

seeking class action status for individuals who purchased tickets to rock concerts in Kentucky, Indiana, and portions of Ohio since 1998.<sup>211</sup> Class certification would cover millions of concertgoers throughout the Midwest.<sup>212</sup>

Katherine Ludt, a Madison, Wisconsin resident, filed a similar class action suit in federal court in 2006.<sup>213</sup> The suit alleged that Clear Channel's acquisition of dominance in rock music radio curtailed competition in concert promotion and boosted ticket prices by reducing radio airplay for artists refusing to use Clear Channel's promotion services, charging excessive fees or refusing advertising from competitors, and inflating fees paid to artists in order to exclude competitors from the concert promotion market.<sup>214</sup>

These two regional class actions are examples of more than a dozen similar lawsuits that were pending across the country with limited media attention.<sup>215</sup> In an effort to conserve the "costly and time-consuming pre-certification steps that must be undertaken before there is any guarantee that a class action can go forward,"<sup>216</sup> the legal system eventually stepped in to consolidate the claims.

In 2005, one of these regional class action plaintiffs filed a complaint in Southern California alleging that Clear Channel was engaged in "anticompetitive activities to acquire, maintain, and extend its monopoly power in various regional ticket markets for live rock concerts."<sup>217</sup> The federal Judicial Panel on Multidistrict Litigation ordered the transfer of similar and related actions that were pending outside the California court.<sup>218</sup> For purposes of discovery, the court ordered that the scope would be limited to five

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prices. *Id.*

211. *See id.* (indicating that residents of Northern Ohio are not included in the class because they do not fall within the courts jurisdiction and reside in a different booking market).

212. *Id.*

213. Kevin Murphy, *Clear Channel Hit With Lawsuit*, CAPITAL TIMES (Madison, WI.), June 3, 2006, at D12. The suit seeks class action status for all persons who bought tickets to rock concerts promoted by Clear Channel between June 13, 1998 and December 21, 2005, in Wisconsin, Chicago, Michigan and Northeast Iowa. *Id.*

214. *Id.*

215. Sloat, *supra* note 44, at C1. Hollis L. Salzman, co-counsel on the Daniel Woodring Case, stated that there are a number of consumers who may be "interested in stepping forward soon" as the firm has received a number of telephone calls about ticket prices around the country. *Id.*

216. JASPER, *supra* note 200, at 3.

217. *In re Live Concert Antitrust Litigation*, No. 06-ML-1745-SVW(RCx), 2007 U.S. Dist. LEXIS 82894, at \*14 (C.D. Cal. Oct. 22, 2007).

218. *Id.* A total of twenty-one cases were transferred from outside the Central District of California and each complaint was substantively identical. *Id.*

regions: Boston, Chicago, Denver, Los Angeles, and New York/New Jersey.<sup>219</sup>

Following a hearing on the plaintiffs' motion for class certification, the court held that the plaintiffs had fulfilled the requirements of Federal Rule 23(a) and granted the motion to certify the class.<sup>220</sup> The court favored the class action method as the "superior method for adjudicating this controversy because resolution of common questions of market definition, market power, anticompetitive conduct and antitrust impact in these class actions is more efficient than relitigating [them] on a case-by-case basis thousands of times."<sup>221</sup> The court certified five different classes that corresponded to the five different regions used for purposes of discovery.<sup>222</sup>

Judge Wilson noted specifically that he was not making or indicating any opinion as to the merits of the antitrust litigation.<sup>223</sup> Certifying the class is only the first step. Showing that Clear Channel/Live Nation has used its powers in the radio and promotion industry to engage in anticompetitive conduct that drove up ticket prices for live events will be a tedious process for these plaintiffs. The future for these litigants involves extensive discovery and will likely hinge on the battle between financial experts. The litigants in *Nobody In Particular Presents* and *Heerwagen* each presented the testimony of learned economic specialists as to the presence or absence of the elements of monopolization and attempted monopolization.<sup>224</sup> Similarly, these parties will have to present evidence that defines the relevant market and whether or not Clear Channel holds enough market power to constitute a monopoly. Experts will also have to characterize anticompetitive conduct and whether or not such conduct would have a "dangerous probability of success." Not only is the litigation likely to be drawn out, it will most certainly be

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219. *Id.* at \*14-15.

220. *Id.* at \*203. Rule 23(a) of the Federal Rules of Civil Procedure requires that a plaintiff seeking class certification show (1) that the number of class members is so great that joinder of all of the parties would be impracticable, (2) there are questions of law and fact that are common to all class members, (3) the claims and defenses of the parties representing the class are typical of the claims and defenses of the members of the class, and (4) the representative parties will "fairly and adequately" protect the interests of the entire class. FED. R. CIV. P. 23(A)(1-4).

221. *In re Live Concert Antitrust Litigation*, 2007 U.S. Dist. LEXIS 82894, at 203.

222. *Id.* at 204-05.

223. *Id.* at 202-03.

224. See generally *Nobody In Particular Presents*, 311 F. Supp. 2d 1048 (2004); *Heerwagen*, 435 F.3d 219 (2006). Interestingly enough, Malinda Riley (*nee* Heerwagen) is one of the plaintiffs representing the Chicago class. *In re Live Concert Antitrust Litigation*, 2007 U.S. Dist. LEXIS 82894, at \*204-05.

costly. Uniting as a class will make such dynamics more manageable and certainly more efficient.

#### IV. CONCLUSION

Antitrust legislation is confusing in its purpose and is subject to varying interpretation. Some believe its design purpose is to maintain consumer welfare in purely economic terms while others articulate that the Sherman Act and its progeny were enacted to preserve diversity in the market and the endeavors of the "little guy." Another argument centers around what constitutes antitrust injury: is it demonstrable injury to the consumer, or can it include injury to the means of competition? The class action suit brought by consumers against Clear Channel/Live Nation would address all of these concerns in turn.

The new proposed regional class action would satisfy the economic efficiency experts because the suit would provide evidence of an increase in ticket prices and anticompetitive conduct that defies business justification. The class action would also address other factors that are not immediately tangible. There is an argument that lack of diversity in the concert promotion industry is restricting consumers' access to lesser-known artists that possibly constitutes anticompetitive conduct that would tickle the fancy of staunch protectionists. The dramatic increase in rock concert ticket prices provides direct proof of consumer injury. Even injury to the means of production has secondary effects on the consumer because he/she lacks choice due to constricted competition. The class action consumer suit encompasses much more than the individual producer suit can on its own. It also has the unique capacity to satisfy all parties involved, with the exception of Clear Channel/Live Nation, of course.

"Bill Graham was diametrically opposed to the synthetic video world of MTV and kept his distance."<sup>225</sup> He never could have anticipated the likes of Clear Channel.

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225. GLATT, *supra* note 5, at 235.