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March 2024

To our Readers,

We are delighted to welcome you to the first issue of the Harvard Journal on Sports & Entertainment Law's fifteenth-anniversary volume. We find ourselves in a time of great transformation in the entertainment and sports industries. Whether it be through the pressures of digital streaming platforms, demands for compensating college athletes, the impacts from the rise of generative artificial intelligence, or increasing antitrust scrutiny from federal regulators, our industries are facing demands to respond and adapt to new technologies and changes to governing legal frameworks.

This issue includes four articles that capture debates surrounding these ongoing developments. We hope that scholars and industry professionals alike find these articles illuminating as they navigate the changing business and regulatory landscape.

First, in *The Antitrust Case Against Live Nation Entertainment*, Professor Michael Carrier of Rutgers University argues why Live Nation Entertainment's practices in the ticketing and event promotion industries violate federal antitrust law. As this issue goes to print, the United States Department of Justice is allegedly considering whether to pursue antitrust charges against Live Nation Entertainment in the aftermath of Ticketmaster's widely criticized sale of Taylor Swift's 2023 Eras Tour tickets.[1] Using the Swift ticketing example as a starting point, Professor Carrier's article provides his case for why, more comprehensively, Live Nation Entertainment's practices violate the nation's antitrust laws.

Second, in *Shapley Values—A Cautionary Tale*, Professor Doug Lichtman of UCLA discusses a persistent challenge surrounding the underlying regulatory framework for compensating artists on music streaming services. Professor Lichtman traces back how the concept of "Shapley values" serves as a basis for how licensing compensation rates are set, arguing that the federal Copyright Royalty Board should revisit how they set compensation rates and reconsider the Shapley value framework altogether.

Third, in *Betting on Addiction Money: Can Sports Betting Advertising be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?*,

[1] Dave McCabe & Ben Sisarco, Justice Dept. Is Said to Investigate Ticketmaster's Parent Company, N.Y. Times (Nov. 18, 2023), https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html [https://perma.cc/4LPH-64Q3].

Professor Mark Conrad of Fordham University describes the rising concern of problem gambling as an increasing number of states legalize online sports betting. In 2018, the Supreme Court decided *Murphy v. NCAA*, ruling that Congress's ban on state legalization of gambling was unconstitutional, opening the door to states permitting such businesses and allowing for the modern rise of online sports betting. Professor Conrad highlights an associated problem developing alongside the growth of online sports betting: increased reports of problem gambling among users. Professor Conrad explores the potential regulatory alternatives to address problem gambling concerns, both within the United States and internationally.

Fourth, in *Sharing Broadcast and Streaming Revenues with College Athletes*, Professor Michael McCann of the University of New Hampshire discusses an associated effort to the rise of name, image, and likeness issues (NIL) in college athletics: an increasing demand by college athletes to unionize under the National Labor Relations Act. Professor McCann explores how these developments could impact the economics of college athletics going forward and its potential implications.

We thank all our authors for allowing JSEL to serve as a forum to discuss these pressing topics. It has truly been a pleasure to work closely with them. None of this would have been possible without our incredible editorial staff, our faculty advisor Peter A. Carfagna '79, our partners at the Harvard Committee for Sports & Entertainment Law (CSEL), and the staff at the Harvard Law School Office of Committee Engagement and Belonging (CEEB). We are grateful for their tireless effort and endless support in producing this journal and sustaining our community at Harvard Law School.

In addition, a special thanks goes to our sponsors for Volume 15, including DLA Piper, Paul Weiss, Sidley Austin, and Sullivan & Cromwell, without whom none of this would have been possible.

Happy reading!

All the best,

Brandon Broukhim
President & Editor-in-Chief

Brandon McCoy
President & Editor-in-Chief

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The Antitrust Case Against Live Nation Entertainment

Michael A. Carrier*

Abstract

One of many "Ticketmaster horror stories" is the ticketing fiasco of the 2022 Taylor Swift tour, with tickets removed from baskets and fans kicked out of the queue, unable to buy tickets. Live Nation Entertainment, the combination of promoter Live Nation and ticketing company Ticketmaster, blamed unexpected demand.

But while the company had an incentive to cast blame elsewhere, it also had no reason to care about quality. As a monopolist, it was not subject to a competitive marketplace. It could offer a bad product and not worry about customers fleeing from bots and cyberattacks. Ticketmaster has had control over the ticketing market for decades. And after its merger with Live Nation, the top U.S. entertainment provider, in 2010, its power expanded into promotion, where it has relationships with many of the top artists. Together, the combined company appears to have engaged in multiple antitrust violations.

For starters, Ticketmaster harmed ticketing rivals by locking venues into multiyear contracts to take its ticketing services. This is "exclusive dealing." For any venues not part of these arrangements, the company threatened: "You want our artist? You must take our tickets." This is a classic "tying" violation. It engaged in deception when it used "bait-and-switch tactics" in selling tickets to fans that led to a settlement with the Federal Trade Commission (FTC). Putting together all of these—and other—actions presents an overall course of conduct that constitutes monopolization.

* Board of Governors Professor, Rutgers Law School. I would like to thank Brandon Broukhim and Mason Mandell for outstanding research assistance and Jon Baker, Krista Brown, Dean Budnick, Steve Calkins, Kevin Erickson, Herb Hovenkamp, and Doug Melamed for very helpful comments.

The typical remedies for antitrust violations lean toward the modest rather than aggressive side. This case is different. The 2010 merger of Ticketmaster and Live Nation required the company to not force venues wishing to book Live Nation artists to use Ticketmaster's ticketing. But there were so many breaches that the consent decree was extended. Given its numerous blatant violations, the company cannot be trusted to undertake actions a court might compel. For that reason, a breakup of Ticketmaster and Live Nation should be the preferred remedy.

Taylor Swift fans rightly were upset when Ticketmaster bungled the rollout of tickets for her 2022 tour. We should all be upset. This Article highlights the strong antitrust case against the company and remedy that can fix this.

Introduction

In November 2022, millions of Taylor Swift fans were angry. For the first time since 2018, Swift was going on tour. Demand was through the roof. But the process of getting tickets was a disaster. Some fans waited for hours in a queue before being kicked out.[1] Others made "multiple failed attempts" to buy tickets that "had been removed from their basket without adequate time to check out."[2] And some "Verified Fans" were waitlisted, unable to buy tickets until the general public sale. Adding insult to injury, this sale was canceled.[3]

Live Nation Entertainment, the combination of promoter Live Nation and ticketing company Ticketmaster, blamed unexpected demand. President Joe Berchtold said "industrial-scale ticket scalping" from automated "bots" was "the real problem, with a $5 billion market in secondary sales standing between artists and fans."[4] Chairman of the Board Greg Maffei explained that

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[1] Chris Willman & E.J. Panaligan, *Taylor Swift Says Ticketmaster Fiasco "Pisses Me Off": "It's Excruciating for Me to Just Watch Mistakes Happen*," Variety (Nov. 18, 2022), https://variety.com/2022/music/news/taylor-swift-addresses-eras-tour-ticketmaster-fiasco-1235436036/ [https://perma.cc/6Q3H-AJEJ].

[2] Ashley Cullins, *Taylor Swift "Ticket Sale Disaster" Sparks Suit Against Ticketmaster, Live Nation*, Hollywood Reporter (Dec. 5, 2022), https://www.hollywoodreporter.com/news/music-news/taylor-swift-fans-lawsuit-ticketmaster-live-nation-eras-tour-1235275035/ [https://perma.cc/2TRS-3ZP2].

[3] Willman & Panaligan, *supra* note 1.

[4] Anna Edgerton & Leah Nylen, *Senators Fault Ticketmaster "Monopoly" for Taylor Swift Debacle*, Bloomberg (Jan. 24, 2023), https://www.bloomberg.com/news/articles/2023-01-24/senators-blame-ticketmaster-monopoly-for-taylor-swift-debacle?embedded-checkout=true [https://perma.cc/5THL-FBUW?type=standard].

"[i]t's a function of Taylor Swift," as "the site was supposed to open up for 1.5 million verified Taylor Swift fans" but "had 14 million people hit the site, including bots, which are not supposed to be there."[5] And former Ticketmaster CEO Fred Rosen had "no sympathy for people whining about high ticket prices" because "[t]he public brought all this on itself."[6]

The company had every reason to cast blame elsewhere. But it also had no reason to care about quality. As a monopolist, it was not subject to a competitive marketplace.[7] It could offer a bad product and not worry about customers fleeing from bots and cyberattacks. In fact, it could continue raising prices.

Taylor Swift asked Ticketmaster "multiple times" if it "could handle this kind of demand" and was "assured" it could.[8] Obviously, it could not (or chose not to). Swift lamented that even the more than two million people who were able to obtain tickets felt like "they went through several bear attacks to get them."[9]

Such a fiasco is not unique to this event. Many fans have "a Ticketmaster horror story" of tickets "disappearing" in the checkout cart or "prices jumping due to 'dynamic pricing' or 'unapparent fees' attached to tickets at the end of the purchasing process."[10] These long-known quality concerns, however, have

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See also id. ("Industrial scalpers breaking the law using bots and cyberattacks to try to unfairly gain tickets contributes to an awful consumer experience.").

[5] Sarah Whitten, *Ticketmaster's Largest Shareholder Blames Massive Demand—including from Bots—for Taylor Swift Ticket Fiasco*, CNBC (Nov. 17, 2022), https://www.cnbc.com/2022/11/17/taylor-swift-ticketmaster-fiasco-due-to-demand-bots-liberty-media-ceo-says.html [https://perma.cc/DJ8Y-527H].

[6] August Brown, *How Ticketmaster Became the Most Hated Name in Music*, L.A. Times (Jan. 23, 2023), https://www.latimes.com/entertainment-arts/music/story/2023-01-23/ticketmaster-live-nation-taylor-swift-pearl-jam [https://perma.cc/4CVR-LH75].

[7] *See* Dave Brooks, *Live Nation's Michael Rapino Admits Some Ticket Fees "Not Defendable,"* Billboard (Oct. 13, 2017), https://www.billboard.com/pro/michael-rapino-deposition-ticketmaster-fees-songkick-shuts-down/ [https://perma.cc/54JC-LQHY] (Live Nation CEO admits that some Ticketmaster fees are "not defendable").

[8] David McCabe & Ben Sisario, *Justice Dept. Is Said to Investigate Ticketmaster's Parent Company*, N.Y. Times (Nov. 18, 2022), https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html [https://perma.cc/ZKX3-TQST].

[9] Rebecca Klar, *How a Taylor Swift Tour Thrust Antitrust Concerns Into the Spotlight*, The Hill (Nov. 19, 2022), https://thehill.com/policy/technology/3742563-how-a-taylor-swift-tour-thrust-antitrust-concerns-into-the-spotlight/ [https://perma.cc/NVX6-5N4K].

[10] *Id.*

not resulted in fans using alternative options. As Swift explained: "I didn't have many alternatives," as "I had to play these venues in big cities, and that's where Ticketmaster's market power manifests."[11]

Ticketmaster has had control over the ticketing market for decades. And after its merger with Live Nation, the top U.S. entertainment provider, in 2010, its power expanded into promotion, where it has relationships with many of the top artists. Together, the combined company appears to have engaged in multiple antitrust violations.

For starters, Ticketmaster harmed ticketing rivals by locking venues into multiyear contracts to take its ticketing services. This is "exclusive dealing."[12]

For any venues not part of these arrangements, the company threatened: "You want our artist? You must take our tickets." This is a classic "tying" violation.[13]

It engaged in deception when it used "bait-and-switch tactics" in selling tickets to fans that led to a settlement with the Federal Trade Commission (FTC).[14]

Putting together all of these—and other—actions presents an overall course of conduct that constitutes monopolization.[15]

Typical remedies for antitrust violations lean toward the modest rather than aggressive side, such as an injunction to stop engaging in particular conduct like tying or exclusive dealing. This case is different. The reason is that the more modest approach already has been tried. The U.S. Department of Justice (DOJ) allowed the 2010 merger of Ticketmaster and Live Nation to proceed on the condition that the company do certain things, like not forcing venues wishing to book Live Nation artists to use Ticketmaster's ticketing. In the vast majority of these "consent decrees," the parties follow the terms. In this case, however, there were so many breaches that the consent decree was extended, which almost never happens.[16]

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[11] Brown, *supra* note 6 (quoting Swift).

[12] *See infra* Part VI.

[13] *See infra* Part VII.

[14] *See infra* notes 401–407 and accompanying text.

[15] *See infra* Part IX (discussing (1) criminal misappropriation harming ticketing rivals, (2) radius clauses injuring promoters, and (3) tying promotion to venues, and (4) leveraging various markets to control arenas harming other promoters and non-Ticketmaster-affiliated venues).

[16] *See* Press Release, U.S. Dep't of Justice, Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster (Dec. 19, 2019), https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live [https://perma.cc/664V-XTGB] (extension

Given its numerous blatant infractions, the company cannot be trusted to undertake actions a court might compel as a remedy for antitrust liability. For that reason and because a structural remedy is more promising in addressing the core harms threatened by the company,[17] a breakup of Ticketmaster and Live Nation should be the preferred remedy. Additional remedies could require the company to sell venues and end exclusive dealing arrangements, impose injunctive relief against deception, and address behavior that is part of the overall course of conduct.

This Article first traces the history of Ticketmaster and Live Nation. It next offers an overview of the relevant antitrust framework and explores the company's power in several markets. It then examines harm to various parties, in particular, consumers, and explores the company's inconsistent approach to secondary ticketing. The succeeding four parts then analyze antitrust theories of exclusive contracts with venues, tying promotion and tickets, deception, and an overall course of conduct. The Article concludes by discussing remedies.

I. History

Before beginning the antitrust analysis of a case that could be brought against Live Nation Entertainment, some stage-setting is in order. This Part offers a quick primer on the relevant markets and then provides background on two of the company's divisions, the ones central to this Article: Ticketmaster and Live Nation.[18]

A. Relevant Markets

As Live Nation Entertainment has explained, "[t]he live music industry includes concert promotion and/or production of music events or tours."[19] To

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of decree was "the most significant enforcement action of an existing antitrust decree by the Department [of Justice] in 20 years").

[17] *See infra* notes 499–501 and accompanying text.

[18] As mentioned above, see *supra* note 4, the overall company, Live Nation Entertainment, consists of divisions including ticketing-based Ticketmaster and promotion-based Live Nation.

[19] Live Nation Entertainment, Inc., Annual Report (Form 10-K), at 4 (Dec. 31, 2022), https://investors.livenationentertainment.com/sec-filings/annual-reports/content/0001335258-23-000014/0001335258-23-000014.pdf [https://perma.cc/J3XU-SJWF] [hereinafter Live Nation 10-K].

go on tour or set up live music events, "booking agents contract with artists to represent them" and the agents work with promoters to arrange events.[20] Promoters, who "earn revenue primarily from the sale of tickets, . . . market events, sell tickets, rent or otherwise provide venues[,] and arrange for local production services, such as stages and equipment."[21]

Venues are "the physical locations where concerts occur."[22] Venue operators "typically contract with promoters to have their venues rented for specific events on specific dates," and provide "services such as concessions, parking, security, ushering and ticket scanning at the gate."[23]

Ticketing services "generally refers to the sale of tickets primarily through online and mobile channels" and "also includes sales through phone, outlet and box office channels."[24] Ticketing companies "will contract with venues and/or promoters to sell tickets to events over a period of time, generally three to five years."[25]

Live Nation Entertainment has power in all of these markets.[26] But that was not always the case.

B. Ticketmaster's Growth

When Ticketmaster entered the market in the late 1970s, the industry leader was Ticketron, whose $100 million in sales dwarfed Ticketmaster's $1 million.[27] In 1982, Fred Rosen took over leadership of Ticketmaster. Rosen believed that "the real money was in concerts, not sporting events" because of the "fanatic followers willing to shell out big bucks simply for the chance to attend . . . one-time events."[28]

Rosen increased the then-$1 service charge and shared it with "appreciative promoters and venue managers."[29] Ticketmaster's deals "represented

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[20] *Id.*

[21] *Id.*

[22] Competitive Impact Statement at 3, U.S. v. Ticketmaster Entertainment, Inc., No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010).

[23] Live Nation 10-K, *supra* note 19, at 4.

[24] *Id.*

[25] *Id.*

[26] *See infra* Part III. The company also has power in artist management. *See infra* notes 104–105 and accompanying text.

[27] Eric Boehlert, *Ticketmaster Is Under Fire: How David Became the Industry's Goliath*, 106 Billboard 1, 97 (1994).

[28] *Id.*

[29] *Id.*

found money, a net of several hundred thousand dollars a year" for major-market arenas, and also helped promoters, who were "hurt at the time by the increasingly large guarantees demanded by artists."[30] In offering "the revenue share and the mechanisms to earn it, Ticketmaster required full inventory of all tickets sold to the public and an exclusive agreement to provide ticketing services for each client."[31]

Rosen would tell the venues:

> Right now you have a cost center, it's called your box office. You pay for the equipment and you have to pay for the labor to sell the tickets. I'm going to give you the equipment for free. I'm going to equip your entire box office with terminals. I'm going to teach your people how to sell tickets over those terminals, and I'm going to support those people. What I'm going to ask you to do is close down the first day of sale on concerts and let me sell those tickets through my outlets. So now you don't even have to pay the labor on the first day of sale. But if that's not enough, I'm going to give you a piece of every ticket I sell. So I've just turned your cost center into a profit center.[32]

That was not all. The venue "would get an advance on future sales . . . and, occasionally, a signing bonus."[33] And "[o]nce the advance was recouped, the buildings and promoters would get annual rebates as part of a revenue share of the service fees with Ticketmaster."[34] The company's sharing of the spoils with promoters and venues aligned the incentives of each to benefit from higher fees. Even better for the promoters and venues (though not the fans), Ticketmaster recognized that "[b]uying a ticket is not a real enjoyable process" and agreed to "take the bruises from people who don't like the process."[35]

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[30] *Id.*

[31] Dean Budnick & Josh Baron, Ticket Masters: The Rise of the Concert Industry and How the Public Got Scalped 72 (2012). *See also id.* ("Everything was exclusive from day one in every building.").

[32] *Id.* at 75.

[33] *Id.* at 116–17. *See, e.g.*, Fred Goodman, *The Price Is Not Right*, Rolling Stone (Oct. 6, 1994), https://www.rollingstone.com/music/music-news/the-price-is-not-right-183787/ [https://perma.cc/L52P-F5ND] (noting that Ticketmaster "has become a de facto bank," with, for example, a "five-year exclusive deal with the New Jersey Sports and Exposition authority guarantee[ing] the Meadowlands venue about $6.5 million—including $1 million for signing").

[34] Budnick & Baron, *supra* note 31, at 117.

[35] *Id.* at 73 ("Part of the unspoken agreement, or maybe even spoken, was that we will be the face of ticketing."); *id.* (Ticketmaster's senior vice president for new media stated that in return for the exclusive contracts, the company "agreed to take it on the chin"); Jem Aswad, *John Oliver Blasts Ticketmaster in Scathing Broadside Against Ticket*

C. Ticketmaster and Live Nation

Ticketmaster's exclusive contracts with venues allowed it to amass significant power in ticketing.[36] From roughly 1990 until 2009, as the DOJ explained, Ticketmaster "dominated the market for primary ticketing services to major [U.S.] concert venues" with more than an 80 percent share of the market.[37] By 2008, however, the company's "longstanding dominance faced a major threat."[38]

Live Nation was "the largest concert promoter in the United States, . . . promoting shows representing 33%" of the revenues at "major concert venues"[39] and owning or operating roughly 70 of these venues.[40] From 1998 to 2007, Live Nation was in an exclusive arrangement to use Ticketmaster for ticketing at its venues.[41] Perhaps seeing "the potential to compete directly and cut out Ticketmaster," Live Nation ended that arrangement,[42] which likely played a role in Ticketmaster's profits falling 78 percent.[43]

Prices, Fees, Secondary Market, Variety (Mar. 14, 2022), https://variety.com/2022/music/news/john-oliver-ticketmaster-prices-fees-secondary-market-1235204410 [https://perma.cc/MY3Q-BMKM] (video at 5:36 to 5:54) (Ticketmaster "was set up as a system where they took the heat for everybody. Within that service charge are the credit card fees, the rebates to the buildings, rebates sometimes to artists, sometimes rebates to promoters. Ticketmaster is like the IRS—we deliver bad news.").

[36] Ticketmaster also expanded its universe in 2008 by acquiring artist management company Front Line. Phil Gallo, *Ticketmaster Takes Over Front Line*, Variety (Oct. 23, 2008), https://variety.com/2008/music/markets-festivals/ticketmaster-takes-over-front-line-111799450 [https://perma.cc/E2TC-4BLU].

[37] Competitive Impact Statement, *supra* note 22, at 8. *See infra* note 78 and accompanying text.

[38] *Id.* at 10.

[39] *Id.* at 4.

[40] *Id.* at 5.

[41] Maureen Tkacik & Krista Brown, *Ticketmaster's Dark History*, Am. Prospect (Dec. 21, 2022), https://prospect.org/power/ticketmasters-dark-history/ [https://perma.cc/EK7L-3D6X] (referring to Live Nation's predecessor, SFX, using its "reasonable best efforts" to "exclusively employ Ticketmaster in every venue that hosted one of its events"); Amended Complaint, United States v. Ticketmaster Entertainment, Inc. ¶¶ 24–25 (D.D.C. Jan. 28, 2010).

[42] Krista Brown, *Better than Revenge: Swifties Help Expose Ticketmaster's Monopoly*, Rolling Stone (Nov. 23, 2022), https://www.rollingstone.com/music/music-features/taylor-swift-ticketmaster-live-nation-monopoly-antitrust-commentary-1234635257/ [https://perma.cc/7C2H-7Y6C].

[43] Janet Morrissey, *Ticketmaster, Live Nation: Obama's Antitrust Test*, Time (June 10, 2009), https://content.time.com/time/business/article/0,8599,1903447,00.html [https://perma.cc/5VVT-R33S].

Entering the primary-ticketing market in December 2008,[44] Live Nation was uniquely positioned to compete against Ticketmaster because it "could achieve sufficient scale to compete effectively . . . simply by ticketing its own venues" and "could bundle access to important concerts with its ticketing service."[45] Less than two months later, the two companies agreed to merge.[46]

At the time, there was significant concern with the merger. For example, Bruce Springsteen lamented that "the one thing that would make the current ticket situation even worse for the fan than it is now would be Ticketmaster and Live Nation coming up with a single system, thereby returning us to a near monopoly situation in music ticketing."[47] A promoter warned that if the merger took place, "all independent promoters" would be at "an irreparable, competitive, disadvantage."[48] And a producer was worried that the two companies "are both Goliaths" and that "their unification will create a business with extraordinary market power and clout unlike any that I have ever seen in my lifetime."[49]

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[44] *Id.*

[45] Competitive Impact Statement, *supra* note 22, at 10.

[46] Morrissey, *supra* note 43. *See also* Boehlert, *supra* note 27 (noting that Ticketron could not compete with Ticketmaster, which was funded by billionaire Jay Pritzker, and that when Ticketron caught on to what its rival was doing, Ticketmaster raised the stakes, offering upfront guarantees of service charges).

[47] Daniel Kreps, *Bruce Springsteen "Furious" at Ticketmaster, Rails Against Live Nation Merger*, Rolling Stone (Feb. 4, 2009), https://www.rollingstone.com/music/music-news/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger-97368/ [https://perma.cc/B4Y9-3GNX].

[48] The *Ticketmaster/Live Nation Merger: What Does It Mean for Consumers and the Future of the Concert Business*: *Hearing before the Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 111th Cong. 12 (2009) (statement of Seth Hurwitz, Co-Owner, I.M.P. Productions and 9:30 Club), https://www.govinfo.gov/content/pkg/CHRG-111shrg54048/html/CHRG-111shrg54048.htm [https://perma.cc/B2N4-JLGK]. *See also id.* (explaining that the promoter's "biggest competitor will have access to all of my sales records, customer information, on-sale dates for tentative shows, [and] ticket counts" and "can control which shows are promoted and much more," which "would be like Pepsi forcing Coke to use its services as distributor").

[49] *Id.* at 11 (statement of Jerry Mickelson, Chairman and Executive Vice President, Jam Productions, LLC). *See also, e.g.*, Ben Sisario, *Justice Dept. Clears Ticketmaster Deal*, N.Y. Times, Jan. 25, 2010, https://www.nytimes.com/2010/01/26/business/26ticket.html [https://perma.cc/J2S2-Y7SE] (noting that merger "has faced vocal opposition from consumer groups, politicians, and independent concert promoters"); David Balto, *The Ticketmaster-Live Nation Merger: What Does It Mean for Consumers and the Future of the Concert Business?*, CAP Action 20 (Feb. 24, 2009), https://www.americanprogressaction.org/article/

The DOJ nonetheless allowed the merger to proceed subject to certain conditions.[50] As discussed below, however, the merged company breached its promises, which resulted in an extension of the consent decree.[51] With each passing day, Live Nation Entertainment increases its power, and without any legitimate justification, harms multiple levels of the industry, including, as discussed below, artists, venues, promoters, and consumers.[52] The next Part sets out the broadest outlines of an antitrust claim.

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the-ticketmaster-live-nation-merger-what-does-it-mean-for-consumers-and-the-future-of-the-concert-business/ [https://perma.cc/Y3LA-3N7P] (merger "raises serious competitive concerns and could potentially lead to significantly higher prices for the hundreds of thousands of consumers who purchase tickets every day"); *see also id.* ("By acquiring Live Nation, Ticketmaster will cut off the air supply for any future rival to challenge its monopoly in the ticket distribution market," and "[t]he merged firm will control hundreds of venues, including the key venues and many of the crucial marquee artists that produce the most lucrative tours.").

[50] *See infra* note 358 and accompanying text (discussing prohibition of (1) conditioning availability of concerts on use of Ticketmaster's ticketing and (2) retaliation for venues using other ticketing companies). In addition, the settlement "requir[ed] Ticketmaster to license its ticketing platform to AEG, another major promoter and owner of some of the country's most significant venues," and mandated that the company "divest to Comcast-Spectacor its Paciolan line of business," which "allows venues to host their own primary ticketing service on their own websites." Christine A. Varney, Ass't Att'y Gen'l, DOJ Antitrust Div., The TicketMaster/Live Nation Merger Review and Consent Decree in Perspective, Address (Mar. 18, 2010), https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective#N_7_ [https://perma.cc/7JWJ-59U4].

In a statement that appears to have been overly optimistic, the head of the Antitrust Division believed that these conditions addressed any competitive concerns that the merger presented. *See id.* ("We believe that the creation of two new competitors to Ticketmaster, employing two very different business models, will give existing independent players and people thinking of getting into the business a more varied package of choices as to how they will try to best serve consumers in the live music business," as "[t]hey can choose to find their place within the Ticketmaster / Live Nation model, the AEG model, the Paciolan model, or another model of their own design."). The Assistant Attorney General continued: "[W]hat we protect is competition, not competitors, and so the task of making those models work for them has to be theirs, not ours," as "[w]e believe that we have provided a fair playing field on which they can compete, and we hope that they can take this opportunity to show that consumers prefer the product that they can provide." *Id.*

[51] *See infra* notes 358–370 and accompanying text.

[52] *See infra* Part IV.

II. Antitrust Framework

The primary antitrust claim a plaintiff could bring against Live Nation Entertainment would be monopolization.[53] This offense has two elements: monopoly power and exclusionary conduct.[54]

The first element is monopoly power, which has been defined as "the power to control prices or exclude competition."[55] Monopoly power can be shown in one of two ways. First, it can be proved indirectly by examining a defendant's market share along with barriers to entry that could entrench that market position.[56] A market share of at least 70 percent "generally establishes a prima facie case of monopoly power," with some courts finding such power between 50 percent and 70 percent.[57] The leading antitrust treatise suggests a presumption of monopoly power from a "share of a well-defined market protected by sufficient entry barriers" that "has exceeded 60 percent for the five years preceding the complaint."[58]

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[53] The Article focuses on a case a government agency could bring. Private plaintiffs could use these arguments though they also would need to satisfy standing requirements. *See, e.g., generally*, IIA Phillip E. Areeda, Herbert Hovenkamp, Roger D. Blair, & Christine Piette Durrance, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶¶ 335–59 (5th ed. 2020) (discussing standing).

[54] *E.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[55] United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956).

[56] See Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 6.2b, at 359–60 (5th ed. 2016) [hereinafter Hovenkamp].

[57] ABA Section of Antitrust Law, Antitrust Law Developments 230–32 (7th ed. 2012) [hereinafter Antitrust Law Developments]. *See, e.g.*, FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 18 (D.D.C. 2021) (noting that alleged market share of 60 percent "might sometimes be acceptable"); BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr., 176 F. Supp. 3d 606, 611 (W.D. La. 2016) (denying motion to dismiss where market share was 60 percent to 75 percent); Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1124 (10th Cir. 2014) (fact-finder "could reasonably consider . . . 62% market share as evidence of monopoly power"); Royal Mile Co. v. UPMC, No. 10-1609, 2013 WL 5436925, at *31 (W.D. Pa. Sept. 27, 2013) (defendant "sufficiently alleged . . . monopoly power" based on market share that "exceeded 60%"); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1207 (9th Cir. 1997) (65 percent sufficient for monopoly power); Syufy Enterprises v. Am. Multicinema, Inc., 793 F.2d 990, 996 (9th Cir. 1986) (finding "market share of 60-69% . . . adequate to support a jury determination of monopoly power").

[58] IIIB Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 801a, at 427 (5th ed. 2022). *See also id.* ¶

Second, monopoly power can be proved directly.[59] In *United States v. Microsoft*, the D.C. Circuit found a "clear" example of such proof when a firm could "profitably raise prices substantially above the competitive level."[60] Similarly, the Third Circuit in *Broadcom v. Qualcomm* stated that "[t]he existence of monopoly power may be proven through direct evidence of supra-competitive prices and restricted output."[61] Most generally, direct evidence can take the form of "the actual exercise of control over prices and/or the actual exclusion of competition from the relevant market."[62]

The second element of monopolization is predatory or exclusionary conduct. The Supreme Court in *United States v. Grinnell Corporation* articulated the oft-cited test: whether the conduct reflects the "willful acquisition or maintenance of [monopoly] power" as opposed to a "superior product, business acumen, or historic accident."[63] The Court in *Aspen Skiing v. Aspen Highlands Skiing* elaborated, finding it "relevant to consider [the conduct's] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way."[64] Similarly, the *Broadcom* court stated that anticompetitive conduct "is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits."[65] Even more guidance is provided when a company engages in conduct that constitutes long-recognized forms of potentially anticompetitive behavior. Most of this Article analyzes such conduct: exclusive ticketing contracts with venues, tying promotion to ticketing, deception, and an overall course of conduct.[66]

801a2, at 430 (explaining that presumption is strengthened by recent increases in market share).

[59] Antitrust Law Developments, *supra* note 57, at 69–70 (noting that "direct proof has provided the basis for findings of substantial anticompetitive effects in some prominent cases").

[60] 253 F.3d 34, 51 (D.C. Cir. 2001); *see also, e.g.*, Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir.1986) (explaining that market power is "the ability to cut back the market's total output and so raise price"); *In re* Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 388 n.19 (D. Mass. 2013) (stating that "[w]here direct evidence of market power is available, . . . a plaintiff need not attempt to define the relevant market" and finding that that was the case when a brand-name drug company was able to "maintain the price of [a] drug . . . at supracompetitive levels without losing substantial sales . . .").

[61] 501 F.3d 297, 307 (3d Cir. 2007).

[62] Antitrust Law Developments, *supra* note 57, at 226.

[63] 384 U.S. 563, 570–71 (1966).

[64] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

[65] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007).

[66] *See infra* Parts VI–IX.

III. Monopoly Power

The first issue is monopoly power. This Part considers this inquiry in three markets: primary ticketing,[67] promotion, and venues. [68]

As a starting point, market definition depends on substitutability from the purchaser's standpoint. As the Supreme Court explained in *United States v. E.I. du Pont de Nemours*, a relevant market is based on the array of "commodities reasonably interchangeable by consumers."[69] Demand substitution, which "focuses on buyers' views of which products are acceptable substitutes or alternatives," thus plays a critical role in defining the market.[70]

The scope of the market need not cover the broadest possible collection of products. In *International Boxing Club of N.Y. v. United States*, for example, the Supreme Court upheld a finding of a separate market for "championship boxing contests" as opposed to all such contests.[71] Similarly, the Court in *NCAA v. Board of Regents of University of Oklahoma* found a separate market in "intercollegiate football telecasts" because they "generate an audience uniquely attractive to advertisers" and "competitors are unable to offer programming that can attract a similar audience."[72]

In this case, three markets reveal monopoly power.[73] The remainder of this Part highlights the company's market share. These findings are buttressed

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[67] Distinguished from primary ticketing is secondary (or resale) ticketing, which "refers to the sale of tickets by a holder who originally obtained the tickets from a venue or other entity, or a ticketing services provider selling on behalf of a venue or other entity." *See* Live Nation 10-K, *supra* note 19, at 4; *see also That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 96–113 (2023) (testimony of Jerry Mickelson, CEO and President, Jam Productions, LLC), https://www.congress.gov/event/118th-congress/senate-event/333501/text?s=1&r=92 [https://perma.cc/8GB5-9BN3]; *infra* note 173 and accompanying text.

[68] As mentioned above, the company also has power in artist management. *See infra* notes 104–105 and accompanying text.

[69] 358 U.S. 377, 395 (1956).

[70] *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, DOJ Archives (2009), https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2 - N_54 [https://perma.cc/3H27-T2W4].

[71] 358 U.S. 242, 250 (1959).

[72] 468 U.S. 85, 111 (1984).

[73] The geographic scope of each of the markets is the United States. In its 2010 complaint, the DOJ alleged a market based on "[m]ajor concert venues purchasing primary ticketing services . . . located throughout the United States." *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 36. In another 2010 filing, the DOJ

by direct evidence[74] discussed throughout this Article like increased prices and reduced quality in the ticketing market and exclusion of competition in the promotion and venue markets.

A. Primary Ticketing

The first market covers primary ticketing. As the DOJ explained in its 2010 complaint against Ticketmaster and Live Nation (which, as discussed above,[75] was settled by consent decree), "[m]ajor concert venues that generate substantial income from live music events can be readily identified, and market power can be selectively exercised against them, because there is no reasonable substitute service to which the customers could turn."[76]

Ticketmaster has had control over this market for decades.[77] In the complaint, the DOJ explained how Ticketmaster "dominated primary ticketing, including primary ticketing for major concert venues, for over two decades."[78] At that time, Ticketmaster's share was more than 80 percent, and other than merging partner Live Nation, "no other competitor . . . ha[d] more than a four percent share."[79]

This high market share was entrenched by several factors, including renewal rates of at least 85 percent,[80] the integration of ticketing with promotion and artist management,[81] Ticketmaster's "economies of scale, long-term contracts, and brand recognition," and "the technological hurdles necessary to compete in primary ticketing."[82] Major concert venues, as the DOJ has

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"include[d] only major concert venues located in the United States" in the relevant market on the grounds that "the merged firm could price discriminate," which would mean that "any effects of the proposed transaction on foreign venues would be distinct from any effects on domestic venues." Plaintiff United States' Response to Public Comments at 5, U.S. v. Ticketmaster Entertainment, Inc., Case. 1:10-cv-00139 (D.D.C. June 21, 2010).

[74] *See supra* notes 55–62 and accompanying text.

[75] *See supra* note 50 and accompanying text.

[76] *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 35.

[77] For a discussion of antitrust investigations and litigation Ticketmaster has faced, see Tkacik & Brown, *supra* note 41 and accompanying text.

[78] *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 21.

[79] *Id.* (providing figures from 2008).

[80] *Id.* ¶ 2.

[81] *Id.* ¶ 43.

[82] *Id.* ¶ 5.

explained, are required to have "the most sophisticated ticketing services," which leaves them with "few ticketing options."[83]

This dominance has continued unabated. For the largest U.S. venues today, the company is widely understood to have an 80 percent market share of the primary ticketing market. One source concluded that Ticketmaster "tickets 80 of the top 100 arenas in the country," with "[n]o other company" having "more than a handful."[84] A senior Ticketmaster official agreed with the suggestion in 2021 that the "market share within the primary market" is "about 80 percent."[85]

Recent figures support these findings. In 2022, Ticketmaster provided ticketing services for 87 percent of Billboard's Top 40 U.S. tours.[86] Similarly, 89 percent of U.S. shows in "Billboard's 2022 Top 25 Stadiums were ticketed by Ticketmaster."[87] Showing its reach across the country, those stadiums were in Arlington, Texas; Atlanta, Georgia; Charlotte, North Carolina; Chicago, Illinois; Denver, Colorado; East Rutherford, New Jersey; Foxborough, Massachusetts; Houston, Texas; Inglewood, California; Las Vegas, Nevada; Miami, Florida; Orlando, Florida; San Diego, California; Santa Clara, California;

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[83] Plaintiff United States' Response to Public Comments at 5, U.S. v. Ticketmaster Entertainment, Inc., Case 1:10-cv-00139-RMC (D.D.C. June 21, 2010). For a discussion of how the DOJ believed its conditions addressed the competitive concerns presented by the merger, see *supra* note 50 and accompanying text.

[84] Ben Sisario & Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, N.Y. Times (Apr. 1, 2018), https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html [https://perma.cc/3F8Z-RF8L].

[85] *Joint Public Hearing, To Examine Potentially Unfair and Deceptive Practices Occurring in New York State's Primary and Secondary Ticket Marketplaces for Live Events in Order to Identify Any Legislative and Policy Reforms,* N.Y. Senate Standing Comm. on Investigations and Government Operations and Standing Comm. on Commerce, Econ. Devel., & Small Bus., 17–18 (Apr. 22, 2021), https://www.nysenate.gov/calendar/public_hearings/april-22-2021/joint-public-hearing-examine-potentially-unfair-and [https://perma.cc/7DEQ-XMY2].

[86] *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 5 (2023) (statement of Jerry Mickelson, CEO and President of Jam Productions, LLC), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Mickelson%202023-01-24.pdf [https://perma.cc/9SRB-QER7]. This figure has been consistent across Top 25 stadiums (89%), other stadiums (89%), Top 50 venues (15,000+ capacity) (86%), Top 25 venues (10,000–15,000 capacity) (79%), other amphitheaters (94%), other arenas (81%), theaters (82%), and Atlantic City beach (100%). The remaining 13% was split among AXS (7%), Paciolan (3%), Tickets.com (2%), SeatGeek (1%), Amp Tickets (0%), and eTix (0%). *See id.* at Exhibit G.

[87] *Id.* at Exhibit H. 17 of the 25 stadiums are in the United States.

and Washington, D.C. with only stadiums in Boston, Massachusetts and Chicago, Illinois not ticketed by Ticketmaster.[88]

The level below stadiums consists of amphitheaters, with capacities between 5,000 and 30,000.[89] There is power here too. One study found that Ticketmaster was "the sole ticketing provider" for 82 percent of U.S. amphitheaters.[90] As a leading promoter explained, the company's use of 68 amphitheaters ensures that it "has no competition during the summer months in its outdoor venues."[91]

Professional sports teams provide a final example of Ticketmaster's power. The company has exclusive ticketing agreements with 87 percent of NBA teams, 88 percent of NHL teams, and 93 percent of NFL teams.[92]

B. Promotion

The second market covers promotion. Promoters play a unique role in the music ecosystem, working "on behalf of the venue or event organizers" to "book[] artists, arrang[e] logistics, market[] the event, and ensur[e] its success."[93] After receiving the proceeds from ticketing, promoters pay the "performer, venue, and other expenses," taking on the financial risks of the event.[94]

Concert promoters "were historically small independent shops that often boosted the local music scene."[95] But SFX, Live Nation's predecessor, "spent $2 billion purchasing these independent players" between 1996 and 1999, "consolidating the industry" and drawing a DOJ antitrust investigation.[96]

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[88] *Id.* The two non-Ticketmaster venues were ticketed by Tickets.com.

[89] *Id.* at Exhibit I.

[90] Krista Brown, *The Depth of Live Nation's Dominance*, Am. Econ. Liberties Project (June 2023), https://www.economicliberties.us/our-work/the-depth-of-live-nations-dominance/# [https://perma.cc/G8EZ-BDQB].

[91] Mickelson, *supra* note 86, at 6.

[92] *Id.* at 4–5. A primary reason why ticketing rivals have focused on the secondary market is because Ticketmaster "has the primary ticket marketplace mostly locked down." *Joint Statement on Ticketmaster/Live Nation*, Future of Music (Jan. 24, 2023), https://www.futureofmusic.org/news/2023/1/24/joint-statement-on-ticketmasterlive-nation [https://perma.cc/3XTB-5ZUL].

[93] Antonia Sulley, *What Does a Live Music Promoter Do?*, Groover Blog (Sept. 2, 2022), https://blog.groover.co/en/tips/live-music-promoter/ [https://perma.cc/36KB-6DS2].

[94] *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 17.

[95] Brown, *supra* note 42.

[96] *Id.*

In the past 15 years, the company has expanded control over the promotion market. Before merging with Ticketmaster, Live Nation was "the country's largest concert promoter."[97] But even after the merger, it continued its acquisitions, purchasing the third largest concert promoter in the world, OCESA, in 2021.[98] The promotion market is particularly important today given how essential touring is for artists to make money.[99] Along these lines, Live Nation's power is even more critical.

It has been widely reported that the company "controls 60% of the promotion business for major concerts."[100] That number is even higher for the largest concerts. In 2018, the company's president said during an investor call that it "expect[ed] to promote 20 of the top 25 global tours" during the year.[101] And in 2021, Live Nation promoted 73 percent of the top 25 U.S. concert tours by gross revenue.[102] AEG, the second-ranking promoter, is far behind with roughly 20 percent of the market.[103]

In a filing with the Securities and Exchange Commission (SEC), Live Nation underscored its power in several promotion-related markets:

> We believe that we are the largest live entertainment company in the world, connecting over 670 million fans across all of our concerts and ticketing platforms in 48 countries during 2022. We believe we are the largest

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[97] *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 3.

[98] Andrew Mies, *Explained: How Ticketmaster & Live Nation Control the Live Music Industry*, WhiskeyRiff (June 28, 2023), https://www.whiskeyriff.com/2023/06/28/explained-how-ticketmaster-live-nation-control-the-live-music-industry/ [https://perma.cc/5YG3-V8ZM].

[99] Devon Delfino, *How Musicians Really Make Their Money—And It Has Nothing To Do with How Many Times People Listen to their Songs*, Bus. Insider (Oct. 19, 2018), https://www.businessinsider.com/how-do-musicians-make-money-2018-10 [https://perma.cc/2XJD-V75D] (noting that in 2017, U2 made 95 percent, Garth Brooks 89 percent, and Metallica 71 percent of their earnings from touring).

[100] Jennifer Oliver, *Live Nation Threatens Anyone Who Doesn't Play Along, Plaintiffs Allege*, Morgan Rubin (May 4, 2023), https://blog.moginrubin.com/ticketmaster-live-nation-get-booed-concert-goers-file-class-action-for-unchecked-abuse-of-market-power [https://perma.cc/QH4C-J9N3].

[101] Matthew Blake, *Is Live Nation Legal?*, Los Angeles Bus. J. (Sept. 6, 2018), https://labusinessjournal.com/media/live-nation-legal/ [https://perma.cc/J3GR-RXHQ].

[102] Jack Groetzinger, *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment Before the S. Comm. On the Judiciary*, 118th Cong. 4 (2023) (statement of Jack Groetzinger, Co-Founder and CEO, SeatGeek), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Groetzinger%20-%202023-01-24.pdf [https://perma.cc/M7RR-Q4UT].

[103] Oliver, *supra* note 100.

> producer of live music concerts in the world, based on total fans that attend Live Nation events as compared to events of other promoters, connecting over 121 million fans to more than 43,600 events for over 7,800 artists in 2022. We believe we are one of the world's leading artist management companies based on the number of artists represented.[104]

As of the time this Article was published, Live Nation had "relationships with more than 500 artists."[105]

Live Nation stated in its SEC filing that "[d]espite the concert business not fully emerging from closures and mandated restrictions until well into the first quarter of 2022," the company "still had its best year ever, breaking both financial and operational records."[106] It highlighted some of its top acts during the year: "Coldplay, Harry Styles, Bad Bunny, and Billie Eilish," together with "nearly 150 festivals" that "attracted over 13 million fans globally, powered by global brands including Lollapalooza, Electric Daisy Carnival, and Rock in Rio Brazil."[107]

C. Venues

The third market consists of major concert venues. As the DOJ explained in its 2010 complaint, these venues, which "generate substantial income from live music events, can be readily identified, and market power can be selectively exercised against them, because there is no reasonable substitute service to which the customers could turn."[108]

As far back as 1994, Ticketmaster had exclusive contracts with 63 percent of the venues that hosted roughly 10 million concert tickets, with two commentators noting that the company "unquestionably had exclusive contracts with the majority of venues that hosted large-scale concerts" and that it "had a firm grasp on the most coveted" venues.[109]

In a case brought against Ticketmaster, a court in 2003 found that the company "has exclusive contracts which cover 75% of the tickets sold" in the

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[104] Live Nation 10-K, *supra* note 19, at 2.

[105] Live Nation Entertainment, *Live Nation's Artist Nation Division Redefines the Music Industry with Unified Rights Model* (Oct. 16, 2007), https://www.livenationentertainment.com/2007/10/live-nations-artist-nation-division-redefines-the-music-industry-with-unified-rights-model/ [https://perma.cc/3T36-ZZ9T].

[106] Live Nation 10-K, *supra* note 19, at 30.

[107] *Id.*

[108] *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 35.

[109] Budnick & Baron, *supra* note 31, at 136–37.

larger arenas in "31 of the 41 regional areas" and that "[i]n 25 of the regional areas," its share "was about 90%."[110] Ticketmaster provided ticketing services to 87 of the top 100 U.S. venues in 2007 and 84 in 2008,[111] and it had roughly 83 percent market share at the time of the merger in 2010.[112]

One witness at a congressional hearing stated that "Ticketmaster would contend" that it "only control[s] about 50 percent of the venue market" but that likely includes "small venues holding less than a few thousand people" and "small community theaters."[113] The witness stated that "[t]he number is almost certainly at 80 percent or above."[114]

A general consensus of "industry experts" has found that "70% to 80% of major U.S. venues have exclusive contracts with Ticketmaster."[115] Similarly, in a congressional hearing, Senators cited "various estimates" that "Ticketmaster controls the ticketing at 70 to 80 percent of major concert venues in

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[110] Ticketmaster Corp. v. Tickets.Com, Inc., No. CV99-7654-HLH(VBKX), 2003 WL 21397701, at *2 (C.D. Cal. Mar. 7, 2003), *aff'd*, 127 F. App'x 346 (9th Cir. 2005). Based on the venues preferring long-term exclusive contracts and the plaintiff ticketing rival's ability to compete for contracts, the court granted Ticketmaster's motion for summary judgment. *Id.* at *5–6.

[111] Budnick & Baron, *supra* note 31, at 321. *See id.* ("Despite their best efforts to obscure the fact, it was clear that Live Nation and Ticketmaster controlled the majority of the country's premier venues.").

[112] *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 21.

[113] *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 241 (2023) (responses of Sal Nuzzo, Senior Vice President, The James Madison Institute, to Questions for the Record), https://www.judiciary.senate.gov/download/2023-01-24-qfr-responses-nuzzo [https://perma.cc/G9MP-EW7T].

[114] *Id.*

[115] Mark Dent, *The Sneaky Economics of Ticketmaster*, The Hustle (Dec. 10, 2022), https://thehustle.co/the-sneaky-economics-of-ticketmaster/ [https://perma.cc/FWV5-K63E].

the United States."[116] More generally, one commentator noted that "most . . . of the stadiums have relationships with Ticketmaster."[117]

Live Nation has stated that it "owns, operates, has exclusive booking rights for, or has an equity interest for which [it has] a significant influence in 338 venues globally, including House of Blues music venues and prestigious locations such as The Fillmore in San Francisco, Brooklyn Bowl, the Hollywood Palladium, the Ziggo Dome in Amsterdam, 3Arena in Ireland, Royal Arena in Copenhagen, and Spark Arena in New Zealand."[118] Empirical analysis has found that Live Nation operates 64 percent of the top 88 U.S. amphitheaters and Ticketmaster services 78 percent of the 68 top grossing arenas in the country.[119]

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[116] Ben Sisario & Matt Stevens, *Ticketmaster Cast as Powerful "Monopoly" at Senate Hearing*, N.Y. Times (Jan. 24, 2023), https://www.nytimes.com/2023/01/24/arts/music/ticketmaster-taylor-swift-senate-hearing.html [https://perma.cc/N6U8-8VYR]. *See also* American Antitrust Institute (AAI), Busting the Live Nation-Ticketmaster Monopoly: What Would a Break-Up Remedy Look Like?, at 2 (July 11, 2023), https://www.antitrustinstitute.org/work-product/busting-the-live-nation-ticketmaster-monopoly-what-would-a-break-up-remedy-look-like/ [https://perma.cc/SEX7-8PVB] (Live Nation is "estimated to have exclusive contracts with about 70% of venues.") [hereinafter AAI Report].

[117] Nilay Patel, *Taylor Swift vs. Ronald Reagan: The Ticketmaster Story*, The Verge (Mar. 21, 2023), https://www.theverge.com/23645057/taylor-swift-ticketmaster-eras-tour-beyonce-antitrust-monopoly-reagan-senate-hearing-congress [https://perma.cc/7YD5-J3UY].

[118] Live Nation 10-K, *supra* note 19, at 2. As a leading concert promoter explained:

> Live Nation owns, operates, has exclusive booking rights for, or has an equity interest in 320 venues that include 68 outdoor amphitheaters (5,000 to 30,000 capacity), 21 arenas (5,000 to 20,000 capacity), 104 theatres (1,000 to 6,500 capacity), 57 clubs (less than 1,000 capacity), 15 music halls (1,000 to 2,000), 39 festival sites and 15 other venues.

Mickelson testimony, *supra* note 86, at 4. *See also That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 219–38 (2023) (responses of Jerry Mickelson, CEO and President of Jam Productions, LLC, to Questions for the Record), https://www.judiciary.senate.gov/imo/media/doc/2023-01-24%20-%20QFR%20Responses%20-%20Mickelson1.pdf [https://perma.cc/F7N8-D52V] (last visited Nov. 12, 2023) ("Live Nation operates or is affiliated with 226 of the best North American venues, including the overwhelming majority of amphitheaters and best outdoor festivals, important segments in our industry.").

[119] *See* Brown, *supra* note 90, at 3–4. One example of the company's advantages is offered by the San Antonio City Council's decision to choose Ticketmaster for an exclusive contract because it ensured $2,050,000 that the city could allocate "anywhere they choose" while its rival offered a modestly lower number, but with the

In summary, Live Nation Entertainment has roughly 60 percent to 80 percent market share in the markets for primary ticketing, promotion, and venues. This high market share has been consistent over a very long period of time: roughly 30 years.[120] As mentioned above, it is entrenched by barriers to entry that include economies of scale, long-term contracts, brand recognition, and technological hurdles.[121] And as will be discussed throughout this Article, these market share findings are buttressed by direct evidence like increased prices and reduced quality in the ticketing market and exclusion of competition in the promotion and venues markets. The company, in short, has monopoly power.[122]

IV. Harm to Consumers and Others

Central to an antitrust claim against Live Nation Entertainment is consumer harm. This Part discusses harms that consumers—namely fans—have suffered in the form of higher prices and reduced quality. Nor is it just fans who have suffered. As explained in Section A, several major industry players have been harmed.

A. Industry Harm

Live Nation Entertainment's anticompetitive behavior has injured artists, venues, and promoters.[123]

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revenue "stay[ing] at the Tobin [Center,] which the city did not own" in contrast to Ticketmaster funds that "could be utilized by the City and would not be earmarked . . . ." Texas County of Bexar, City of San Antonio, Meeting Minutes: City Council B Session, at 4–5 (Sept. 18, 2019), https://webapp9.sanantonio.gov/FileNetArchive/{FF3B10D8-C4D8-4FAB-A3D0-56907941475A}/{FF3B10D8-C4D8-4FAB-A3D0-56907941475A}.pdf [https://perma.cc/8BTV-9X2L]. *See also id.* at 6 (highlighting Ticketmaster's advantages from being "internationally known," with consumers "naturally migrat[ing]" to it "when purchasing tickets").

[120] *See supra* notes 78 & 109 and accompanying text (33 years in ticketing and 29 years with venues).

[121] *See supra* notes 80–83 and accompanying text.

[122] *See also supra* note 58 and accompanying text (suggesting presumption of monopoly power from "share of a well-defined market protected by sufficient entry barriers" that "has exceeded 60 percent for the five years preceding the complaint"). IIIB Hovenkamp, *supra* note 58, ¶ 801a, at 427.

[123] *See* Mickelson QFR Responses, *supra* note 118, at 9 (pointing to harm suffered by "promoters, primary and secondary ticketing companies, artist management firms, venue management companies, and artist merchandise companies").

1. Artists

First, artists suffer from the company's control over each segment of the supply chain. As a consequence of Ticketmaster's exclusive contracts with venues and Live Nation Entertainment's tying of promotion to ticketing, artists are forced to use Ticketmaster for ticketing.[124] Those who do not want to use Ticketmaster end up with limited venue options.[125] And even when artists (other than the most successful ones) enter into deals, their lack of bargaining power "forces them into lopsided revenue-sharing agreements with venues."[126]

One example is provided by a Live Nation memorandum leaked in 2020 that reduced "artist guarantees (the money artists are assured to receive, regardless of turnout) . . . 20 percent from 2020 rates."[127] The new terms also increased the "financial burden for the cancellation of a concert due to poor ticket sales" from "100 percent of the guarantee . . . to 25 percent."[128] And in a change that Billboard magazine called "unheard of in the music industry," it required artists "to repay the promoter two times their fee," which was

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[124] *See infra* Parts VI & VII.

[125] Juliana Kaplan, *It's Not Just Taylor Swift.*, Bus. Insider, (June 8, 2023), https://www.businessinsider.com/musicians-make-money-touring-taylor-swift-tickets-ticketmaster-live-nation-2022-12 [https://perma.cc/FF5M-R3N4] (quoting one expert: "When you're an artist the size of Taylor Swift . . . [y]ou're pretty much locked in to touring with these well-established big arenas, and it's hard to find substitutes for them."); *see also id.* (Swift "could choose a different venue if she isn't happy with a particular partner that they're dealing with. But then she would have to skip the market in a lot of these cases, because there's only one stadium in that city.").

[126] AAI Report, *supra* note 116. *See infra* notes 277–282 and accompanying text (explaining how integration of previous separate worlds of promotion and venue operation harms artists). *See also* Your Favorite Band Sucks, *Ticketmaster Sucks*, Apple Podcasts, at 1:06:30–1:07:55 (Apr. 1, 2023), https://podcasts.apple.com/us/podcast/ticketmaster-sucks-and-so-does-pearl-jam-taylor-swift/id1322283290?i=1000606909278 [https://perma.cc/9XJH-KRDN] (noting how top artists received 100 percent—or even more—of door sales, how they in turn paid a percentage of their merchandise sales to the venue, how this has harmed smaller and mid-tier artists who "don't have a leg to stand on when it comes to negotiating," and how such an arrangement "became standard because someone . . . making millions of dollars is getting a sweetheart deal that mid-tier bands and lower-level bands can never get" even though "they still have to pay their cut").

[127] Michael Broerman, *Live Nation Details Contract Changes For Artists Including Pay Cuts, Shifts in Financial Burden for Canceled Events*, Live for Live Music (June 18, 2020), https://liveforlivemusic.com/news/live-nation-contract-changes/ [https://perma.cc/2VHB-YWKA].

[128] *Id.*

"essentially, a hefty fine."[129] Even if some of these terms were modified after a "strong backlash," they still "serve[] as a compelling example of just how brazenly Live Nation feels it can wield its market power."[130]

The universe of artists that can attain success also is restricted, with "emerging and diverse artists" having fewer opportunities given Live Nation's "emphasis on well-known, established acts."[131] And more generally, the "specter of dealing with a monopolistic provider of services in the live events market can chill incentives for innovation in the creative arts."[132]

2. Venues

Venues that are not in exclusive contracts also suffer by being forced to take Ticketmaster's ticketing services as a condition of obtaining access to Live Nation artists.[133] Nor is this harm theoretical. As discussed below, Ticketmaster and Live Nation "repeatedly conditioned and threatened to condition Live Nation's provision of live concerts on a venue's purchase of Ticketmaster ticketing services" and "retaliated against venues that opted to use competing ticketing services—all in violation of the plain language of

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[129] *Id.* (emphasis omitted).

[130] Future of Music Coalition, Artist Rights Alliance, American Association of Independent Music, Music Workers Alliance, & Union of Musicians & Allied Workers, *Joint Statement on Ticketmaster/LiveNation*, (Jan. 24, 2023), https://www.futureofmusic.org/news/2023/1/24/joint-statement-on-ticketmasterlive-nation [https://perma.cc/LA76-HPM7].

[131] Mickelson QFR Responses, *supra* note 118, at 9.

[132] AAI Report, *supra* note 116.

[133] *See infra* Part VII. For a discussion of the harms from exclusive long-term venue deals with Ticketmaster, see *infra* Part VI. When a Live Nation venue enters an area, independent venues face a potential loss of shows and even threats to their viability. *See* Matt Wild, *Common Council Gives Final Approval to FPC Live Concert Venues in Deer District*, Milwaukee Record, (Nov. 1, 2022), https://milwaukeerecord.com/music/common-council-gives-final-approval-to-fpc-live-concert-venues-in-deer-district/ [https://perma.cc/6CKY-YNZ2] (venue operator stated: "Live Nation will be directly across the street from us. They want their artists and concert tours to appear at their venues, which cuts out the independent venues like us. This threatens our viability and very existence, which relies upon revenue from live concert performances."); Rich Rovito, *3 Issues with Milwaukee's Proposed New Music Venues*, Milwaukee (Dec. 8, 2022), https://www.milwaukeemag.com/3-issues-with-milwaukees-proposed-new-music-venues/ [https://perma.cc/68SV-8FP7] (venue operator explains that "[i]f there is a Live Nation facility in a city, no other venue there has a chance to bid on that band").

the [consent] decree."[134] In fact, the companies' "well-earned reputation for threatening behavior and retaliation . . . has so permeated the industry that venues are afraid to leave Ticketmaster lest they risk losing Live Nation concerts, hindering effective competition for primary ticketing services."[135] In at least two cases, Live Nation punished venues that sought to use ticketing companies other than Ticketmaster by cutting their number of tours in half.

First, seemingly in response to the decision by the Gwinnett Center, a popular arena outside Atlanta, to use AEG instead of Ticketmaster for ticketing a concert by the band Matchbox Twenty, Live Nation decided not to use the venue.[136] The venue's booking director wrote to a Live Nation official: "Don't abandon Gwinnett . . . . If there's an issue or issues let's address."[137] But that official wrote back: "Issue? . . . Three letters. Can you guess what they are?"[138] In case there were any doubt about its intentions, the following year, Live Nation "cut the number of tours it brought to Gwinnett in half, from four to two," and the Gwinnett official explained that "he had expected the drop-off because Live Nation 'warned us that they would put us in a literal boycott.'"[139]

A second example is provided by the Barclays Center in Brooklyn. In 2021, the venue switched its ticketing services from Ticketmaster to rival SeatGeek.[140] After that, the number of tours it put on fell from "about two dozen" to thirteen.[141] One year into a seven-year contract, the venue "cancel[ed] its partnership with SeatGeek and return[ed] to Ticketmaster."[142] One commentator could not "think of a time over the last decade where a major venue has dropped a ticketing platform early on in the deal cycle."[143]

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[134] *See infra* note 360.

[135] *See infra* note 360 and accompanying text.

[136] Sisario & Bowley, *supra* note 84.

[137] *Id.*

[138] *Id.*

[139] *Id. See also id.* (noting that "AEG provided The New York Times with copies of those emails, and others, to support its account of threats").

[140] Ben Sisario, *Barclays Center Drops a New Ticket Vendor for Its Old One: Ticketmaster*, N.Y. Times, Jan. 13, 2023, https://www.nytimes.com/2023/01/13/arts/music/barclays-center-ticketmaster-seatgeek.html [https://perma.cc/6R52-PGKP].

[141] *Id.*

[142] *Id.*

[143] *Id.*

3. Promoters

Promoters also are harmed by Live Nation Entertainment's behavior. The company's control over artists and ticketing prevents smaller firms from being able to obtain top talent and attract audiences. One company that has produced "thousands of indoor arena-level concerts" saw its production of 50 top-tier performers plummet from 1,677 shows since 1974 to 94 shows after 2010 (when Live Nation merged with Ticketmaster), 13 after 2015, and 1 after 2019.[144]

In fact, Live Nation Entertainment has used promotion as a "loss leader"[145] to increase ticketing. In a 2009 hearing, the CEO of then-Live Nation acknowledged that the company lost $70 million on artist guarantees.[146] In 2019, Ticketmaster gained $232 million in operating income while the overall company, Live Nation Entertainment, suffered a $53 million loss.[147] And a 2023 source stated that "[f]or each of the past five years, Live Nation's concert division has run at a loss" and that it "will sometimes offer 100% or more of revenue from the face value of tickets . . . to attract top artists."[148]

One analyst explained that margins in the concert business are around 1 percent, with Live Nation "making the bulk of its cash through ticketing, sponsorships, and advertising."[149] Ticketing offers substantial margins because of its "lower costs and higher user fees."[150] In particular, "[s]elling tickets has a much lower 'overhead' cost structure than putting on concerts,"

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[144] Mickelson QFR Responses, *supra* note 118, at 5.

[145] *See infra* notes 148 and 159 and accompanying text.

[146] *See* Budnick & Baron, *supra* note 31, at 322.

[147] Live Nation Entertainment, Inc., Annual Report (Form 10-K), at 35 (Dec. 31, 2019), https://investors.livenationentertainment.com/sec-filings/all-sec-filings?page=26 [https://perma.cc/4MCW-SHBT] (figures rounded to nearest million).

[148] The Capitol Forum, Live Nation Entertainment: Industry Players' Descriptions of Live Nation's Domination of the Live Music Industry Mirror FTC Lawsuit's Narrative of Amazon's Domination of eCommerce 3 (2023), https://library.thecapitolforum.com/docs/797htd75zwqb [https://perma.cc/E7QF-VMTT].

[149] Alexandra Canal, *Live Nation Would Be a "Shell of Itself" Without Ticketmaster: Analyst*, Yahoo! Finance, (Jan. 25, 2023), https://finance.yahoo.com/news/live-nation-would-be-a-shell-of-itself-without-ticketmaster-analyst-212935847.html [https://perma.cc/W2YC-BPDP].

[150] Larry Wayte, Pay for Play: How the Music Industry Works, Where the Money Goes, and Why, Chap. 19 (2023) (ebook), https://opentext.uoregon.edu/payforplay/chapter/chapter-19-the-live-music-industry/ [https://perma.cc/G43E-MU37].

which "requires a great deal of coordination and effort, including venue rental, marketing, talent booking, management and maintenance, food and beverage concessions, security, sound, lighting, stage construction and design, [and] merchandising management."[151] As one commentator explained, without "Ticketmaster in the center of . . . that machine, the parts wouldn't hold together as well."[152]

Live Nation Entertainment's earning reports show the outsized position of ticketing in its profits. During the first three quarters of 2023, of $16.9 billion in total revenues, $13.9 billion came from concert promotion.[153] Ticketing, by contrast, accounted for only $2.2 billion.[154] In other words, more than 80 percent of Live Nation Entertainment's *revenues* are in concert promotion while ticketing accounts for a mere 13 percent.

When looking at these figures in the context of the businesses' costs, however, Live Nation Entertainment's use of its multi-level dominance to funnel profits through ticketing becomes clear. In considering adjusted operating income, which reflects the *profits* in the business segments,[155] Ticketmaster accounts for roughly half of Live Nation Entertainment's total ($880 million of $1.745 billion).[156] In other words, while Ticketmaster accounts for 13 percent of Live Nation Entertainment's sales, it makes up more than 50 percent of the company's profits.

These figures are even more extreme in shorter periods. For example, in the first quarter of 2023, ticketing accounted for $271 million in adjusted

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[151] *Id. See also id.* (ticketing "involves far less complexity and costs" and allows the company to charge service fees).

[152] Canal, *supra* note 149.

[153] Live Nation Entertainment, Inc., Quarterly Report (Form 10-Q), at 20 (Sept. 30, 2023), https://investors.livenationentertainment.com/sec-filings/all-sec-filings/content/0001335258-23-000102/0001335258-23-000102.pdf [https://perma.cc/CY85-8ZW5] (figures rounded to nearest hundred million).

[154] *Id.* (figure rounded to nearest hundred million). In addition, there was roughly $840 million from sponsorship and advertising. *Id.*

[155] *Income Information*, Uncle Stock, https://www.unclestock.com/documentation/income.html [https://perma.cc/TG22-L7GY] (last visited Nov. 30, 2023) (defining adjusted operating income as "[t]he amount of profit realized from a business's operations after taking out operating expenses").

[156] Live Nation Entertainment Form 10-Q, *supra* note 153, at 21. The figures are even higher (63 percent) for operating income (which differs from adjusted operating income because it includes depreciation, amortization, and other factors): $727 million in ticketing out of $1.148 billion overall. *Id.* at 21, 31 (figures rounded to nearest million).

operating income, 85 percent of the total $320 million.[157] In contrast, less than $1 million (0.3 percent) was contributed by concert promotion.[158]

The company's loss-leader strategy of undercharging in promotion to overcharge in ticketing harms other promoters, who are not able to compete with Live Nation's artificially low prices. The ability to rely on ticketing gives the company an ability to continue amassing power in the market for promotion.[159]

B. Consumer Harm

In addition to the harms suffered throughout the industry, consumers also have been injured by Ticketmaster's power. This section focuses on two harms: fees and quality.

1. Fees

Anyone who has ever purchased a ticket using Ticketmaster does not need a reminder about its high fees. A report by the N.Y. Attorney General found that the fees charged in the ticketing industry tend to be higher than by online vendors such as Amazon, Etsy, Expedia, and Priceline.[160] Nor is it clear what services the fans obtain through "'convenience charges,' 'service fees,' and 'processing fees' collected by online vendors," especially with the shift online in recent years, which reduced costs.[161] A 2016 report by the National Economic Council found that "in most cases," these fees "are not connected to any additional goods and services beyond that of receiving the purchased ticket."[162]

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[157] Live Nation Entertainment, Inc., Quarterly Report (Form 10-Q), at 18 (Mar. 31, 2023), https://investors.livenationentertainment.com/sec-filings/all-sec-filings?form_type=10-Q&year= [https://perma.cc/GX48-YDZV].

[158] *Id.*

[159] *See also* Budnick & Baron, *supra* note 31, at 317 (noting that this competitive strength is buttressed from Ticketmaster's "access to highly sensitive information"); *infra* notes 454–455 and accompanying text.

[160] N.Y. Att'y Gen., Obstructed View: What's Blocking New Yorkers from Getting Tickets 31 (2016), https://ag.ny.gov/sites/default/files/reports/Ticket_Sales_Report.pdf [https://perma.cc/2ZWL-HE5R].

[161] *Id.*

[162] National Economic Council, The Competition Initiative and Hidden Fees 11 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf [https://perma.cc/XM9D-WJ9H].

It is no surprise, then, that an empirical survey found that 99 percent of consumers said they thought Ticketmaster's fees "were too high."[163] A report by the U.S. Government Accountability Office (GAO) in 2018 generally concluded that 27 percent of ticketing companies' prices are fees.[164] And an analysis of "fees on 40 tickets to recent concerts, including [Taylor Swift's] Eras Tour" found that "the average fees took up [roughly] 28% of a ticket's face value."[165] These fees are even more debilitating given that prices "more than tripled" from the mid-1990s to 2022.[166]

Some fans have paid more in fees than the price of the ticket.[167] One artist noted that "[a]lthough many ticketing companies have large fees, in our experience, Ticketmaster's are typically the highest, with us having seen as much as an 82% fee."[168] One venue owner stated that Ticketmaster "directly encourages them to further raise ticket fees," urging: "You know you could charge more, you could put more into the fee."[169] For "an April 2016 concert in Nashville," for example, Ticketmaster "added a $14.75 fee on top of a $36 ticket for a show in an amphitheater Live Nation owned,"[170] which the CEO admitted was "not defendable."[171] The company's position as a self-proclaimed "leading artist management compan[y]" provides an incentive to not challenge high fees that would benefit the artists who gain from the fees.[172]

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[163] Dent, *supra* note 115.

[164] U.S Gov't Accountability Off., GAO-18-347, Event Ticket Sales: Market Characteristics and Consumer Protection Issues 6 (2018), https://www.gao.gov/products/gao-18-347 [https://perma.cc/9VA8-D6AU].

[165] Dent, *supra* note 115.

[166] Aswad, *supra* note 35 (presenting figures based on face value as opposed to secondary-market price).

[167] Alyssa Lukpat, *The Cure Says Ticketmaster Will Refund Fans Who Paid "Unduly High" Fees*, Wall St. J. (Mar. 17, 2023), https://www.wsj.com/articles/the-cure-says-ticketmaster-will-refund-fans-who-paid-unduly-high-fees-81a6c930?mod=pls_whats_news_us_business_f [https://perma.cc/2WJR-EULK].

[168] *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment Before the S. Comm. On the Judiciary*, 118th Cong. 3 (2023) (statement of Clyde Lawrence, singer-songwriter), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Lawrence%20-%202023-01-24.pdf [https://perma.cc/8DR3-J72V].

[169] The Capitol Forum, *supra* note 148, at 5.

[170] Sisario & Bowley, *supra* note 84.

[171] *Id.*

[172] *See supra* notes 104–105 and accompanying text.

High fees and prices characterize not only tickets sold on the primary market but also secondary tickets.[173] The GAO report found that these tickets are, on average, marked up 31 percent to the buyer in addition to 10 percent to the seller.[174] One commentator noted that Ticketmaster "makes a much higher margin on resale tickets" because it "keeps all of the fees it charges—typically 10 percent of the sale price for the seller and another 20 percent for the buyer," in contrast to primary ticket sales, where it keeps a much smaller percentage.[175]

In general, selling in the secondary market, sometimes called "scalping," can harm fans by removing seats they may be interested in and "dramatically

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[173] For a discussion of secondary (or resale) markets, see Mickelson testimony, *supra* note 67. Ticketmaster's interest in the secondary market is heightened because of the performer's role in setting price in the primary market. *See, e.g.*, Daniel A. Rascher & Andrew D. Schwarz, *The Antitrust Implications of "Paperless Ticketing" on Secondary Markets*, 9 J. Comp. L. & Econ. 655, 694 (2013). This thus differs from the case in which "an upstream monopolist can extract monopoly rents from the downstream market . . . by pricing appropriately in the upstream market," and reveals a "true leveraging of the monopolist's power in the primary market." *Id.*

[174] U.S. Gov't Accountability Off., *supra* note 164, at 6, 18. The fees on the primary market are lower: 27 percent to buyers and no fees to sellers; *see id.*

[175] Dave Brooks, *Taylor Swift's Eras Tour on Track to Sell $590M in Tickets. Here's Where That Money Goes*, Billboard (Dec. 16, 2022), https://www.billboard.com/pro/taylor-swift-eras-tour-ticket-sales-who-gets-paid/ [https://perma.cc/6EEM-Z6AM]; *see id.* (noting that fees from primary market are shared with venues and promoters).

Ticketmaster has admitted that its market share in the secondary market "is likely in the 20–25% range." Daniel M. Wall letter to Sen. Jud. Comm., Feb. 14, 2023, at 13, https://www.livenationentertainment.com/wp-content/uploads/2023/02/Response-to-Senate-Judiciary-Written-Questions-2.14.23-FINAL1.pdf [https://perma.cc/9PLS-UQP4]. A 2016 government report noted that Ticketmaster had the "second-largest market share" of the secondary market. U.S. Gov't Accountability Off., *supra* note 164, at 4. And a congressional letter in 2021 noted that the company is "one of the largest ticket resellers in the United States." Letter from Bill Pascrell, Jr. et al. to Att'y Gen. Merrick Garland & Acting FTC Chair Rebecca Kelly Slaughter, Apr. 19, 2021, https://pascrell.house.gov/uploadedfiles/letter_to_attorney_general_garland_and_acting_chairwoman_slaughter_on_lne_investigation_-_final.pdf [https://perma.cc/399N-DH4M]. Live Nation stated in a 2022 filing that "[o]ur resale business continued to grow, with nearly $4.5 billion . . . in gross transaction value for 2022, more than doubling resale gross transaction value in 2019." Live Nation 10-K, *supra* note 19, at 31. In terms of a combined ticketing market share over both primary and secondary ticketing, a Bloomberg analytics service found that Ticketmaster "earned 65% of U.S. sales among major ticketing platforms in 2022." Edgerton & Nylen, *supra* note 4.

increas[ing] the price of these tickets."[176] The N.Y. report found that the prices of resold tickets increased by "49% on average" and "sometimes by more than 1,000%" or even 7,000 percent.[177] In the first nine months of 2022, "the average secondary ticket price in the U.S." was "almost twice that of a primary ticket."[178]

One famous example is Bruce Springsteen's 2009 tour. Springsteen "had set ticket prices low on purpose" but Ticketmaster directed fans to a reseller that charged the fans "hundreds of dollars over face value."[179] Springsteen responded: "The abuse of our fans and our trust by Ticketmaster has made us as furious as it has made many of you."[180] In response, Ticketmaster's CEO apologized.[181] More recent examples offered in 2023 congressional testimony included Weyes Blood tickets that "have a face value of $25 but are listed on Ticketmaster for $654/ticket" and Lizzy McAlpine tickets that "have a face value of $34.50 for the Second Balcony," but "are listed on Ticketmaster for $7,193 to $9,371."[182]

The company is not bashful about its high prices. In a 2022 SEC filing, it boasted of "upward pricing momentum," a euphemism for higher prices.[183]

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[176] Mickelson testimony, *supra* note 86, at 8.

[177] N.Y. Att'y Gen., *supra* note 160, at 4.

[178] Live Nation Entertainment, *Third Quarter 2022 Supplemental Operational and Financial Information*, at 1 (2022) (last visited Nov. 14, 2023), https://d1io3yog0oux5.cloudfront.net/_d2b887510cdc4efb0a99d3749abb92db/livenationentertainment/db/670/6235/supplemental_operational_and_financial_information/Q3+2022+Supplemental+Operational+and+Financial+Information.pdf [https://perma.cc/36F8-26L6].

[179] Daniel de Visé, *From Pearl Jam to Congress to Springsteen: Five of the Biggest Ticketmaster Dustups*, The Hill (Nov. 19, 2022), https://thehill.com/changing-america/enrichment/arts-culture/3742639-from-pearl-jam-to-congress-to-springsteen-five-of-the-biggest-ticketmaster-dustups/ [https://perma.cc/D9RS-A8CF].

[180] *Id.*

[181] In 2022, a Springsteen concert again received widespread attention for high ticket prices, which the N.Y. Times called "The Case of the $5,000 Springsteen Tickets." *Id.*; *see* Ron Lieber, *The Case of the $5,000 Springsteen Tickets*, N.Y. Times (July 26, 2022), https://www.nytimes.com/2022/07/26/your-money/bruce-springsteen-tickets.html [https://perma.cc/N73Q-MDRN]. In response, Springsteen's manager stated that the "average ticket price" was "in the mid-$200 range" and Ticketmaster "reported that only 1.3 percent of buyers had paid four figures." The pricing, however, led "many Springsteen fans" to "walk[] away from the sale feeling that their working-class hero had sold out." de Visé, *supra* note 179.

[182] Mickelson QFR Responses, *supra* note 118, at 1.

[183] Live Nation 10-K, *supra* note 19, at 31. *See also id.* ("Overall pricing on our fee-bearing tickets for the year is up 20% compared to 2019 as consumer demand for

And it proclaimed: "Our fee-bearing ticket sales for the year were a record breaking 281 million, over 50 million higher than our previous best year."[184] But Ticketmaster's gain is fans' loss. And again, consumers are forced to pay higher ticketing prices and fees because Live Nation has decided to make its profits in that market.[185]

2. Quality

Perhaps high fees could be the downside of high quality. Alas, that is not the case. The Taylor Swift fiasco described in the Introduction is just one example of the shoddy quality that often has characterized the Ticketmaster experience. As discussed above, Swift fans suffered harms like waiting in a queue for hours before being kicked out and being prevented from buying tickets until the general public sale, which was then canceled.[186] Nor is this an aberration from an especially popular concert. Many fans have suffered a "Ticketmaster horror story" of disappearing tickets and "jumping" prices.[187]

In a competitive market, these failings would be followed by rivals gaining market share, Ticketmaster improving its services, or both. Neither of these has happened. The quality issues have continued, and Ticketmaster has maintained its dominance over rivals.

The lack of quality is confirmed by the ease with which the Swift disaster could have been avoided. One approach could have been to "minimiz[e] the time it takes to compete a transaction by only allowing the fans to choose 'Best Available'" tickets.[188] Instead, "Ticketmaster decided to slow the process down by using 'Pick A Seat' mode to increase ticket prices," which increased the fees it received.[189] The company also could have "[p]ut fewer shows on sale at the same time" or "stagger[ed] the times the Verified Fans could get into the queue."[190] But by "announcing all 52 dates at once," it "created untenable

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premium seats and VIP experiences has continued unabated, occasionally outstripping supply.").

[184] *Id.* at 31.

[185] *See supra* notes 146–152 and accompanying text.

[186] *See supra* notes 1–9 and accompanying text.

[187] *See supra* note 10 and accompanying text.

[188] Mickelson testimony, *supra* note 86, at 7.

[189] *Id.*

[190] *Id.* at 8.

demand that crashed its website" rather than spreading them out "over the course of a week, which is often what happens."[191]

None of this is a surprise. A leading Ticketmaster official conceded that the company is "not trying to sell all" of its tickets "in one minute" but is "trying to figure out how to sell tickets in a more modern way."[192] Reading through the corporate-speak, Ticketmaster is trying to slow the process down to "drive[] the price up since the supply is being manipulated to limit its release."[193]

Another example of quality harms comes from denying fans entry to concerts. In December 2022, more than 1,600 fans were turned away from a Bad Bunny concert in Mexico.[194] The "sold-out stadium's floor was half empty" and some fans "scal[ed] the stadium fence after their tickets . . . were rejected as fakes by malfunctioning scanning machines."[195] Ticketmaster "claimed that the tickets were counterfeit, but an investigation determined those allegations to be false."[196] The incident "caught the attention" of the President of Mexico, and "[t]he Mexican government secured refunds for fans and fined Ticketmaster Mexico."[197]

One final example of inferior quality is presented by bots. A bot is "software that automates ticket-buying" to "(1) perform each transaction at lightning speed, and (2) perform hundreds or thousands of transactions simultaneously."[198] Bots tend to "crowd out human purchasers and . . . snap up most of the good seats" immediately as tickets are initially listed.[199] For

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[191] Patel, *supra* note 117. To the extent any of the decisions in the paragraph in the text involved Taylor Swift or her promoter, they came after Swift "asked [the company], multiple times, if they could handle this kind of demand" and "w[as] assured they could." McCabe & Sisario, *supra* note 8.

[192] Mickelson testimony, *supra* note 86, at 7 (quoting Ticketmaster official David Marcus).

[193] *Id.*

[194] *See* Olivia Nacionales, *Ticketmaster and Live Nation Know Antitrust Laws All Too Well*, Cardozo Arts & Ent. L.J. (Mar. 1, 2023), https://cardozoaelj.com/2023/03/01/ticketmaster-and-live-nation-know-antitrust-laws-all-too-well/ [https://perma.cc/DK9S-G2VC]; Maria Abi-Habib, *Spending a Month's Salary to See Bad Bunny, Only to Be Turned Away*, N.Y. Times (Dec. 16, 2022), https://www.nytimes.com/2022/12/16/world/americas/bad-bunny-ticketmaster-mexico.html [https://perma.cc/CBE4-9QC2].

[195] Abi-Habib, *supra* note 194.

[196] Nacionales, *supra* note 194.

[197] *Id.*

[198] Obstructed View, *supra* note 160, at 8 (emphasis omitted).

[199] *Id.* More specifically, bots (1) "constantly monitor ticketing sites to detect the release, or 'drop,' of tickets"; (2) "automate the search for and reservation of tickets

example, for the 2015 U2 tour, bots bought more than 1,000 tickets in 1 minute and 15,000 tickets in one day.[200]

Because issues presented by bots play an important role in assessments of quality and the justifications Ticketmaster would offer in support of its conduct,[201] the next Part addresses them in greater detail.

V. Quality Concern: Two-Faced Treatment of Bots and Secondary Ticketing

On the issue of bots and secondary ticketing more generally, Ticketmaster has stated a desire to address the conduct, but it has actively undermined these purported objectives. This Part shows how Ticketmaster's ineffectiveness in addressing the bot problem is not an accident.

A. Stated Desire to Address Bots

As far back as the 2010 merger between Live Nation and Ticketmaster, the then-Ticketmaster CEO stated that "scalping and resales should be illegal" and that there should not "be a secondary market at all."[202] Since then, the company has claimed to be engaging in its best efforts to address the issue.

Ticketmaster has stated that the "unauthorized resale of tickets for profit does not promote fair and equitable distribution of tickets, and drains tickets away from the primary market, thus restricting the opportunity for genuine fans to purchase them legitimately."[203] In a securities filing, the company

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that are up for sale"; (3) "automate the process of purchasing tickets, using dozens or hundreds of purchaser names, addresses, and credit card numbers"; and (4) "defeat the anti-Bot security measures" by being "train[ed]" to "read" CAPTCHAs or "transmit[ting] in real-time images of the CAPTCHAs . . . to armies of 'typers.'" *Id.* at 15–17.

[200] *Id.* at 18 fig. 6. *See also* Adam Hetrick, *Ticketmaster Sues Scalping Company that Bought Nearly 30,000 Hamilton Tickets*, Playbill (Oct. 4, 2017), https://playbill.com/article/ticketmaster-sues-scalping-company-that-bought-nearly-30-000-hamilton-tickets [https://perma.cc/C8CL-XS55].

[201] *See infra* note 474 and accompanying text.

[202] Robert Cribb & Marco Chown Oved, *We Went Undercover as Ticket Scalpers—and Ticketmaster Offered to Help Us Do Business*, Toronto Star (Sept. 19, 2018), https://www.thestar.com/news/investigations/we-went-undercover-as-ticket-scalpers-and-ticketmaster-offered-to-help-us-do-business/article_475cbd40-6c6b-555f-83a3-7d225694669d.html [https://perma.cc/7HXD-7C39].

[203] *Id.*

warned that "[t]he techniques used to obtain unauthorized access, automate or expedite transactions or other activities on our platform (e.g., "bots"), [or] disable or degrade service or sabotage systems . . . may change frequently and as a result, may be difficult for our business to detect," thus "impact[ing] the efficacy of our defenses and/or the products and services we provide."[204] For example, for the Taylor Swift concert in November 2022, "significant bot activity in connection with a large ticket onsale significantly contributed to a degraded website experience for customers and our eventually needing to pause the on-sale to address these issues."[205]

Ticketmaster claims to be addressing the problem. It has explained that it has "expended significant capital and other resources to protect against and remedy . . . potential security breaches, incidents, and their consequences, including the establishment of a dedicated cybersecurity organization."[206] Similarly, a senior Ticketmaster official testified that the company "spend[s] an inordinate amount of time and money defending our site against bots[,] working with third parties, building our own software, using our new smart-key platform, and having teams in real-time at every on-sale, trying to identify bot traffic and defend against it."[207] The company even purports to have "hands-down the most sophisticated bot fighting technologies in the world," doing "more to fight bots than all others in the industry combined."[208]

Along those lines, Ticketmaster's terms of use, in order to "discourage unfair ticket buying practices," provide: "When purchasing tickets on our Site, you are limited to a specified number of tickets for each event,"[209] which

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[204] Live Nation 10-K, *supra* note 19, at 19. *See also id.* at 2 ("We actively develop and apply methods to mitigate the impact of . . . bots.").

[205] *Id.*

[206] *Id.*

[207] N.Y. State S., Investigative Rep.: Live Event Ticketing Practices, at 20 (2021), https://www.nysenate.gov/sites/default/files/article/attachment/nys_senate_igo_committee_report_-_live_event_ticketing_practices.pdf [https://perma.cc/5NSJ-UVMK]. *See also* Robert Cribb & Marco Chown Oved, *Ticketmaster's "TradeDesk" Scalper Tool Explained*, Toronto Star (Sept. 25, 2018), https://www.thestar.com/news/investigations/ticketmaster-s-tradedesk-scalper-tool-explained/article_579131a4-73dd-5369-93e9-09a45a5648d6.html [https://perma.cc/7FY5-S362] (company "spend[s] a ton of money and a ton of time doing things like building software that prevents bots from buying tickets" and claims to "have gotten pretty effective at blocking people from buying lots of tickets").

[208] *See* Wall, *supra* note 175, at 5.

[209] *Purchase Policy*, Ticketmaster, https://ticketmaster-us.zendesk.com/hc/en-us/articles/10465798887953-Purchase-Policy [https://perma.cc/HG2L-B846] (last updated Jan. 1, 2021).

is "typically six or eight seats per buyer."[210] In addition: "Multiple accounts may not be used to circumvent or exceed published ticket limits," and "[i]f you exceed or attempt to exceed the posted ticket limits," the company "reserve[s] the right to cancel, without notice, any or all orders and tickets, in addition to prohibiting your ticket purchasing abilities."[211]

Similarly, the terms of use allow those accessing the site to obtain a conditional license only if they do not "[u]se any automated software or computer system to search for, reserve, buy, or otherwise obtain tickets" or "[u]se any computer program, bot, robot, spider, offline reader, site search/retrieval application, or other manual or automatic device, tool, or process to retrieve, index, data mine, or in any way reproduce or circumvent the security structure, navigational structure, or presentation of the Content or the Site."[212]

Users also must agree not to "[r]equest more than 1,000 pages of the Site in any 24-hour period," "[m]ake more than 800 reserve requests on the Site in any 24-hour period," or refresh the ticketing page "more than once during any three-second interval."[213] The company reserves the right to block users from buying tickets if they "refresh[] [their] browser too frequently" because "[o]ur system thinks you're a bot, an automated program trying to scoop up tickets, and we automatically block bots!"[214] In addition, a user "may inadvertently trigger an error if you're using a [virtual private network[215]] or other software that makes it look like you're using multiple IPs."[216]

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[210] Cribb & Oved, *supra* note 202.

[211] *Purchase Policy*, *supra* note 209.

[212] *Terms of Use*, Ticketmaster, https://ticketmaster-us.zendesk.com/hc/en-us/articles/10468830739345-Terms-of-Use [https://perma.cc/RNC5-FNJL] (last updated July 2, 2021).

[213] *Id.*

[214] *Buy Tickets*, Ticketmaster, https://help.ticketmaster.com/hc/en-us/articles/9787702587409-Why-am-I-getting-a-blocked-forbidden-or-403-error-message- [https://perma.cc/SZB8-TKZC] (last visited Nov. 20, 2023).

[215] A virtual private network (VPN) is "an encrypted connection over the Internet from a device to a network." *What Is a Virtual Private Network (VPN)?*, Cisco, https://www.cisco.com/c/en/us/products/security/vpn-endpoint-security-clients/what-is-vpn.html#:~:text=A%20virtual%20private%20network%2C%20or,user%20to%20conduct%20work%20remotely [https://perma.cc/2AYK-42U4] (last visited Dec. 6, 2023).

[216] *Id.*

B. Actively Undermining its Purported Objectives

Ticketmaster, in short, talks a good game in its terms of use and claimed resources addressing bots, but all of these promises must be taken with a grain of salt. Not only is Ticketmaster not pursuing these objectives, but it also is directly *undermining* them. The example that reveals all is TradeDesk, which Ticketmaster has quietly created to facilitate scalping. TradeDesk is not "mentioned anywhere on Ticketmaster's website or in its corporate reports," and "[t]o access the company's TradeDesk website, a person must first send in a registration request."[217]

In 2018, CBC and the Toronto Star sent undercover reporters to a live-entertainment conference where "representatives for Ticketmaster pitched them on TradeDesk, the company's invite-only proprietary platform for reselling tickets."[218] The reporters "capture[d] a rep on camera saying that Ticketmaster's 'buyer abuse' team will look the other way when such practices take place on its own platforms."[219]

The TradeDesk executive admitted: "We don't spend any time looking at your Ticketmaster.com account. I don't care what you buy. It doesn't matter to me. . . . There's a total separation between Ticketmaster and our division. It's church and state."[220] The executive understood that if "the ticket limit is six or eight (seats), you're not going to make a living."[221] And if staff detect "unusual activity in the purchasing patterns of a Trade Desk user, such as the use of bots," they wouldn't "ask for information" as they "don't share reports" and "don't share names."[222] Undercover reporters "asked a sales executive how many TradeDesk users have multiple Ticketmaster accounts" and the executive responded: "I'd say pretty damn near every one of them" as "I can't think of any of my clients that aren't using multiple (accounts)."[223]

Journalists found out that "despite the existence of a Ticketmaster 'buyer abuse' division that looks for suspicious online activity in ticket sales," the

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[217] Dave Seglins, Rachel Houlihan & Laura Clementson, '*A Public Relations Nightmare': Ticketmaster Recruits Pros for Secret Scalper Program*, CBC News (Sept. 19, 2018), https://www.cbc.ca/news/business/ticketmaster-resellers-las-vegas-1.4828535 [https://perma.cc/WGT9-NLGT].

[218] Aswad, *supra* note 35.

[219] *Id.*

[220] Cribb & Oved, *supra* note 202.

[221] *Id.*

[222] *Id.*

[223] Cribb & Oved, *supra* note 207.

company "turns a blind eye to its TradeDesk users who grab lots of tickets."[224] A sales representative conceded that some brokers have "literally a couple of hundred accounts" on TradeDesk, and "[it's] not something that [they] look at or report."[225] Further, Ticketmaster's president of North America operations conceded that "[w]e probably don't do enough to look into TradeDesk," as "[t]he reality" is that TradeDesk users "could have more than their ticket limit."[226]

Why doesn't Ticketmaster "want to catch scalpers using multiple accounts[?]"[227] Because it has "spent millions of dollars on this tool," and it does not want to "get brokers caught up to where they can't sell inventory with [Ticketmaster]."[228] According to a Trade Desk sales executive, "[w]e're not trying to build a better mousetrap" as "the last thing we want to do is impair your ability to sell inventory" as that is "our whole goal . . . on the resale side of the business."[229]

Nor is that all. Believe it or not, Ticketmaster provides *incentives* for large reselling activity. TradeDesk "brings an immediate 3 percent discount on Ticketmaster's usual 7 percent selling fee on a resale ticket."[230] Users who "hit $500,000 in sales" get "a percentage point . . . shaved off their fees," and "[a]t $1 million another percentage point falls off."[231] Showing how fans really are not the company's priority, "[s]calpers get preferential treatment over consumers."[232] An "average consumer would not need this software to list

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[224] Amy X. Wang, *Ticketmaster Has Secretly Been Cheating You With Its Own Scalpers*, Rolling Stone (Sept. 19, 2018), https://www.rollingstone.com/pro/news/ticketmaster-cheating-scalpers-726353/ [https://perma.cc/2HQL-TRV4].

[225] *Id.; Ticketmaster's Statements to CBC News*, CBC News, at *7, https://www.documentcloud.org/documents/4891602-TICKETMASTER-S-STATEMENTS-to-CBC-NEWS-2FTORONTO [https://perma.cc/TCL7-RLUY] (Ticketmaster never responded to questions from CBC News on issues such as: why it was important to "directly sync a user's Ticketmaster inventory for online resale" in tension with the "terms of use and code of conduct that stipulate strict ticket purchasing limits," why the company had "a presence at a convention for ticket brokers," or why "all Trade Desk users have multiple Ticketmaster accounts, in some cases hundreds of them, for the purpose of obtaining large quantities of tickets," with "Ticketmaster Resale . . . aware of , and facilitat[ing] that activity without penalty").

[226] Cribb & Oved, *supra* note 207.

[227] *Id.*

[228] *Id. See also* Seglins et al., *supra* note 217 (touting TradeDesk as "[t]he most powerful ticket sales tool. Ever.").

[229] Cribb & Oved, *supra* note 207.

[230] *Id.*

[231] *Id.*

[232] *Id.*

the ticket they could no longer use," but the incentive structure is employed "to assist . . . scalpers in processing more and more tickets faster."[233]

Just as concerning, public awareness of Ticketmaster's two-faced behavior does not seem to have stopped the company. Three years after the undercover operation was publicized, Ticketmaster returned to "market its services to ticket resale operations" at the World Ticket Conference in Las Vegas.[234]

In short, its claims notwithstanding, Ticketmaster actively encourages the use of bots and the secondary market to increase the fees it receives.

The discussion in the last two Parts on the widespread harms and the encouragement of the resale market are important building blocks in the discussion that follows, which applies antitrust law to the company's behavior. The next four Parts weave together a story of a multi-pronged attack on competition utilizing the company's control of multiple business lines.

First, Live Nation Entertainment engaged in exclusive dealing by locking up most of the venues able to host large concerts, foreclosing rival ticketing services. Second, venues not in exclusive contracts confronted a tying arrangement that required them to use Ticketmaster's ticketing if they wished to book one of Live Nation's many artists. Third, several of these schemes were exacerbated by deception. And fourth, an overall course of conduct consisted of all of this activity as well as additional behavior.[235]

The next four Parts will describe the elements of each of the offenses. But one general comment deserves mention. Because the setting is monopolization, "technical requirements" like the tests for "tying and exclusive dealing" are "relax[ed]."[236] A leading hornbook explains that this is mandated by "the general test for monopolization," which "requires an exclusionary practice" that "harms rivals unnecessarily, whether or not the technical tying [or exclusive dealing] requirements have been met."[237]

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[233] *Id.*

[234] Dave Clark, *Ticketmaster Resale Returns to Broker-Focused Conferences Despite Past Controversy*, Ticket News, https://www.ticketnews.com/2021/07/ticketmaster-resale-returns-to-broker-focused-conferences-despite-past-controversy/ [https://perma.cc/YHC3-NLWM] (last visited Nov. 27, 2023).

[235] The tying and exclusive dealing claims can be viewed under the umbrella of "conditional refusals to deal," which are "actions in which the rights holder expresses a willingness to deal only if some condition is met." *See* Herbert Hovenkamp, *FRAND and Antitrust*, 105 Cornell L. Rev. 1683, 1697 (2020) (explaining that "[t]he basis for antitrust attacks on conditional refusals is much broader than for unconditional refusals" and that "[t]ying and exclusive dealing are two common examples").

[236] Hovenkamp, *supra* note 56, § 7.6(c), at 406.

[237] *Id. See also* Hovenkamp, *supra* note 235, at 1701 ("when the defendant has a dominant position in its own market, then the foreclosure requirement is less categorical").

VI. Exclusive Dealing

The first claim a plaintiff could bring is exclusive dealing. This targets Ticketmaster's multiyear contracts with venues that block ticketing rivals from the market and harm competition.

A. Law

An exclusive dealing arrangement "is a contract under which a buyer promises to buy its requirements . . . exclusively from a particular seller."[238] The primary concern with such an agreement is that it could foreclose a supplier's competitors from selling their products to the buyer.[239] "Exclusive contracts" such as this may represent the "wrongful act" element of monopolization claims.[240]

As discussed above,[241] the courts have been more flexible when considering market share and the relevant effects of exclusive dealing claims in monopolization cases, finding liability "even though the contracts foreclose less than the roughly 40% or 50% share usually required" to establish a Section 1 violation.[242] The reason, as the leading antitrust treatise explains, is that in non-monopolization cases, "a higher foreclosure percentage is necessary to establish the requisite anticompetitive effects," but "[w]hen the defendant has an upstream market monopoly, . . . a smaller foreclosure percentage may have much greater effects."[243] As a consequence, "the general test for monopolization—whether the conduct injured rivals unnecessarily without a sufficient business justification—controls."[244]

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[238] Hovenkamp, *supra* note 56, § 10.9, at 587.

[239] Antitrust Law Developments, *supra* note 57, at 208.

[240] *See* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 597 (1st Cir. 1993).

[241] *See supra* notes 236–237 and accompanying text.

[242] *See* United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001).

[243] Herbert Hovenkamp, Mark D. Janus, Mark A. Lemley, & Christopher R. Leslie, IP and Antitrust: An Application of Antitrust Principles Applied to Intellectual Property Law § 21.8c, at 21–182 (2d ed. 2014).

[244] *Id. See also* Antitrust Law Developments, *supra* note 57, at 254 ("most courts [that] consider exclusive dealing" begin the analysis by assessing "substantial foreclosure" and then, "in much the same way as other monopolization claims, conducting a rule of reason analysis to determine if the exclusive dealing conduct caused anticompetitive harm").

For non-monopolization exclusive dealing cases, *Tampa Electric Co. v. Nashville Coal Co.* plays a central role.[245] In that case, the Court put forward a "qualitative substantiality" approach that requires judges to "weigh the probable effect of the contract on the relevant area of effective competition . . . and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein."[246] As a leading hornbook explains, "[n]early all lower courts today follow *Tampa*'s suggested rule of reason approach."[247] Plaintiffs generally need to show foreclosure of 30 percent to 40 percent of the market, and once they do, courts analyze the factors in the *Tampa* opinion.[248] The extent of foreclosure, however, is still important. Courts "routinely condemn" agreements foreclosing at least 50 percent of the market "when the practice is complete exclusion by a contract of fairly long duration."[249] And "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."[250]

In addition to foreclosure, one of the most important factors for analyzing an exclusive dealing arrangement is duration. Agreements with terms that span a longer time period raise greater concern because they foreclose the market more substantially.[251] Courts have struck down arrangements lasting two,[252] three,[253] and ten[254] years.

Contracts with shorter terms are more likely to be upheld, but "when, as a matter of practical economics, termination is difficult or infeasible," courts have invalidated the agreements.[255] In *McWane v. FTC*, for example,

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[245] 365 U.S. 320 (1961).

[246] *Id.* at 329.

[247] Hovenkamp, *supra* note 56, § 10.9e, at 596.

[248] *Id.* § 10.9e, at 596 n.307 (citing cases). *See infra* note 263 for a listing of factors courts consider.

[249] XI Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1821c, at 207 n.35 (4th ed. 2018) (citing cases with 84 percent, 62 percent, and 50 percent foreclosure).

[250] United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005).

[251] Antitrust Law Developments, *supra* note 57, at 216 (citing cases invalidating agreements lasting one year, ten years, and seven to twenty years).

[252] *See* Mytinger & Casselberry, Inc. v. FTC, 301 F.2d 534, 539 (D.C. Cir. 1962).

[253] *See* L.G. Balfour Co. v. FTC, 442 F.2d 1, 23 (7th Cir. 1971) (upholding FTC order).

[254] *See* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1308 (9th Cir. 1982); *see also* FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 393–95 (1953) (one to five years). *See generally* XI Hovenkamp, Antitrust Law, *supra* note 249, at 103–04 n.85.

[255] Antitrust Law Developments, *supra* note 57, at 217.

the court rejected the argument that a program was "'presumptively legal' because it was nonbinding and short-term"[256] on the grounds that distributors purchasing competing products could lose their accrued rebates and be unable to purchase the manufacturer's products.[257] The court found that the "'practical effect'" of the program was to "'make it economically infeasible'" for distributors to switch to a rival.[258]

Similarly, the court in *United States v. Dentsply* addressed a policy by which a dominant manufacturer of artificial teeth restricted distributors from dealing with rivals.[259] Even though the defendant sold the product "on an individual transaction basis," which was "essentially" an at-will arrangement, the court recognized that the defendant's large market share and "its conduct excluding competing manufacturers . . . realistically make the arrangements here as effective as those in written contracts."[260] And the court found that, by "help[ing to] keep sales of competing teeth below the critical level necessary for any rival to pose a real threat to [the defendant's] market share," the arrangements were anticompetitive.[261] As Doug Melamed has generally explained: "[I]f one manufacturer is uniquely able to use the exclusive agreement to gain or maintain market power (because, for example, it already has a large market share), it would be uniquely able to share supracompetitive profits with the distributor" and then could "retain the exclusive arrangement regardless of the duration of its contract with the distributor or, indeed, without entering into any cognizable agreement at all."[262]

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[256] 783 F.3d 814, 833 (11th Cir. 2015).

[257] *Id.* at 820–21.

[258] *Id.* at 834.

[259] 399 F.3d 181, 184 (3d Cir. 2005). *See also id.* at 190 (explaining that defendant "had supremacy over the dealer network" and "has been able to exclude competitors from the dealers' network").

[260] *Id.* at 193.

[261] *Id.* at 191. A similar example of companies not having the practical ability to deal with a dominant firm's rivals was presented in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). In that case, a newspaper publisher refused to accept advertising from parties that had advertised on a local radio station. *Id.* at 149. The Court found that, based on the publisher's significant market share, the conduct "forced numerous advertisers to refrain from using [the rival]" and the refusal "often amounted to an effective prohibition." *Id.* at 149–50, 153. *See also id.* at 153 (noting that "[n]umerous . . . advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio").

[262] A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 Antitrust L.J. 375, 405 (2006).

Other factors that courts have examined include the likelihood of industry collusion, the extent to which other firms use exclusive dealing, entry barriers, distribution alternatives, and other anticompetitive or procompetitive effects.[263] On the last issue, the typical procompetitive justifications considered are "preventi[ng] free riding" and encouraging dealers to more rigorously promote suppliers' products.[264]

B. Application

Applying the caselaw, Live Nation engages in exclusive dealing in the form of multiyear contracts by which venues are required to use Ticketmaster's ticketing service.

Rival ticketing companies are foreclosed from offering their services to most large venues, which prevents them from effectively competing with Ticketmaster, depriving them of scale economies, data, and market credibility that could potentially constrain the market leader.[265] It is generally understood that Ticketmaster has exclusive contracts with 70 percent to 80 percent of major U.S. venues.[266] The company operates 64 percent of the top U.S. amphitheaters and 78 percent of the top U.S. arenas.[267] Nor is it just ticketers that are harmed. For example, during Taylor Swift's 2022 tour, rival promoter AEG lamented that "Ticketmaster's exclusive deals with the vast majority of venues . . . required . . . ticket[ing] through their system" and "didn't [give them] a choice."[268]

In terms of duration, a senior Ticketmaster official testified that the company "contract[s], usually, a multi-year agreement."[269] This is not new. As

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[263] Hovenkamp, *supra* note 56, § 10.9e, at 597.

[264] *Id.* § 10.9e, at 598 (citing cases).

[265] *See supra* Part III.C and *infra* notes 467–469 and accompanying text.

[266] *See supra* notes 115–117 and accompanying text.

[267] *See supra* note 119 and accompanying text.

[268] Julian Mark, *Taylor Swift's Ticketmaster Meltdown: What Happened? Who's To Blame?*, Wash. Post (Nov. 18, 2022), https://www.washingtonpost.com/business/2022/11/18/ticketmaster-taylor-swift-faq/ [https://perma.cc/228W-WNGV]. The company's exclusive dealing arrangements reach expansively. *See Golden State Warriors and Ticketmaster Extend Partnership to Chase Center*, Ticketmaster Business (June 10, 2019), https://business.ticketmaster.com/business-solutions/golden-state-warriors-and-ticketmaster-extend-partnership-to-chase-center/ [https://perma.cc/W6WX-VDES] (discussing "exclusive partnerships with thousands of venues, artists, sports leagues, and performing arts centers and theaters").

[269] *Joint Public Hearing*, *supra* note 85, at 19.

early as 1994, the Ticketmaster CEO conceded that the exclusive deals "have durations of three to five years."[270] This continues to be the case, as a 2022 company filing makes clear that ticketing companies "will contract with venues and/or promoters to sell tickets to events over a period of time, generally three to five years."[271] Recently, according to industry insiders, Ticketmaster has entered into "longer exclusive agreements with venues, sometimes as long as ten years."[272] This may have occurred in response to oversight, which has led the company to "try[] to lock things down so that if there is more pressure, they've at least signed a lot of these decade-long deals."[273]

These long terms are exacerbated by two realities. First, as discussed in the next Part, is Ticketmaster's tying of promotion to ticketing.[274] Venues that wish to book one of the company's many artists are required to use its ticketing services. As a result, the share of venues contractually confined to Ticketmaster through exclusive dealing understates the share that are unavailable as a practical matter to ticketing rivals.

Second, Ticketmaster has a renewal rate over 100 percent, which means that it adds more venues than it loses each year. For example, in the first half of 2013, the company "had a net client renewal rate in excess of 100%."[275] Similarly, an industry report from 2016 found "a renewal rate over 100% for the past six years."[276] This is further evidence that, at a minimum, an exceedingly small number of venues (if any) do not renew their contracts with Ticketmaster, which shows a lack of real competition when the agreements expire.

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[270] Budnick & Baron, *supra* note 31, at 135.

[271] Live Nation 10-K, *supra* note 19, at 4.

[272] Groetzinger testimony, *supra* note 102, at 7. *See also* Brown, *supra* note 6 (quoting promoter who explained that in the United States, "venues have 5- to 10-year exclusive contracts with ticketing platforms like Ticketmaster"). *See also National Hockey League and Ticketmaster Announce Landmark 10-Year Deal*, Cision (May 27, 2019), https://www.prnewswire.com/news-releases/national-hockey-league-and-ticketmaster-announce-landmark-10-year-deal-300857071.html [https://perma.cc/8WWN-TSAT] (ten-year deal with NHL).

[273] Video: Sen. Jud. Comm. Hrg., Jan. 24, 2023 (1:30:06-1:30:37), https://www.judiciary.senate.gov/committee-activity/hearings/thats-the-ticket-promoting-competition-and-protecting-consumers-in-live-entertainment [https://perma.cc/YHJ6-7DT2].

[274] *See infra* Part VII.

[275] Live Nation Entertainment, Inc., Second Quarter 2013 Supp. Operational and Financial Info., at 1, Aug. 6, 2013, https://d1io3yog0oux5.cloudfront.net/_b33a81b8f18a41ae36642223bbc59159/livenationentertainment/db/670/5088/supplemental_operational_and_financial_information/Q2+2013+Supplemental+Operational+and+Financial-Information.pdf [https://perma.cc/2T5H-U52T].

[276] Groetzinger testimony, *supra* note 102, at 9.

In addition to harms to ticketers and fans (who are forced to pay higher prices), the agreements hurt artists—particularly those who are not the most successful ones—because of the integration of the previously separate worlds of promotion and venue operation.[277] As one artist explained: "In a world where the promoter and the venue are not affiliated with each other, we can trust that the promoter will look to get the best deal from the venue."[278] As this observer further testified: "Live Nation acts as the exclusive 'promoter' for a large percentage of the venues throughout the country, including many, such as the House of Blues chain, that they own directly," and "[f]or any of these venues, when an artist chooses to put on a show there, they have no choice but to have Live Nation act as the 'promoter.'"[279]

In theory, the promoter "should be a true partner" to the artist: "Since both our pay and theirs is theoretically a share of the show's profits, we should be aligned in our incentives: keep costs low while ensuring the best fan experience."[280] But instead, because "the promoter and the venue are part of the same corporate entity, . . . the line items are essentially Live Nation negotiating to pay itself."[281] More concretely: "If [Live Nation] want[s] to take 10% of every ticket and call it a 'facility fee,' they can (and have); if they want to charge us $250 for a stack of 10 clean towels[,] they can (and have)."[282]

In fact, this collapsing of the roles of promoter and venue reveals the dishonesty of Ticketmaster's attempts to "point the finger at venues and artists and promoters who set the fees that they end up charging."[283] The company, for example, has claimed that the "fees are negotiated with the venue, and typically set at the venue's direction," with Ticketmaster "look[ing] to them

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[277] Artists also are harmed because those who "want to play a certain size venue in a particular city . . . are sometimes left [with] no choice other than to use Live Nation," and "if they would like to use another ticketer other than Ticketmaster, . . . that is not an option." Emily Lorsch, *Why Live Nation and Ticketmaster Dominate the Live Entertainment Industry*, CNBC (Jan. 25, 2023), https://www.cnbc.com/2023/01/25/the-live-nation-and-ticketmaster-monopoly-of-live-entertainment.html [https://perma.cc/UR5Y-PGZ4].

[278] *Id.*

[279] Lawrence testimony, *supra* note 168, at 1.

[280] *Id.*

[281] *Id.* at 2.

[282] *Id. See also id.* ("[D]ue to Live Nation's control across the industry, we have practically no say or leverage in discussing these line items, nor are we afforded much transparency surrounding them.").

[283] *Joint Public Hearing*, *supra* note 85, at 217.

for guidance on what the fee schedule should look like."[284] All the while, it "neglect[s] to mention" that "those same promoters and venues and artists, and Ticketmaster itself, are all owned by the same company, Live Nation Entertainment."[285]

The company could attempt to offer justifications for the agreements.[286] Based on a contract available online, Ticketmaster provides hardware that includes "up to four (4) POS Terminals,[287] up to four (4) Ticket Printers, one (1) Access Control Server, one (1) Router, up to two (2) Access Points, [and] up to three (3) Scanners,"[288] as well as "computerized ticketing software."[289] The company could claim that it does not wish to have its efforts in developing the hardware and software exploited by rivals.

The typical procompetitive effects,[290] however, of preventing free riding and encouraging dealers to more heavily promote suppliers' products are not implicated here.

Suppliers often use exclusive dealing to prevent free riding, which occurs when one retailer takes advantage of another's promotional activities and exploits the other's "facilities or goodwill."[291] For example, a firm that develops an expensive product would be less likely to employ showrooms and knowledgeable employees to demonstrate the product's features if it knew that another firm not making similar investments could piggyback on these services and sell its product at a lower price.[292]

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[284] *Id.* at 21. *See also id.* at 36 ("the fees that we charge are typically set by the client [the venue]").

[285] *Id.* at 217.

[286] XI Hovenkamp, *supra* note 249, ¶ 1822e, at 237 (defendant has burden "to provide sufficient evidence of a reasonable justification showing that the exclusive dealing in question reduces costs or risk or addresses significant problems of interbrand free riding").

[287] A point-of-sale (POS) terminal "is a hardware system for processing card payments at retail locations." Clay Halton, *Point-of-Sale Terminal: What it is and How It Works*, Investopedia (Aug. 23, 2021), https://www.investopedia.com/terms/p/point-of-sale-terminal.asp [https://perma.cc/2FV9-Q7D2].

[288] City of San Gabriel Staff Report from Mark Lazzaretto on Amendment to Ticketmaster User Agreement to Honorable Mayor and City Council (Feb. 4, 2020), https://www.sangabrielcity.com/DocumentCenter/View/12408/Item-4D---Ticketmaster-Agreement-for-Ticket-Services-for-the-Mission-Playhouse [https://perma.cc/4Q5U-6MGC].

[289] *Id.* at 13.

[290] *See supra* note 264 and accompanying text.

[291] Hovenkamp, *supra* note 56, § 10.9(d), at 593.

[292] XI Hovenkamp, *supra* note 249, ¶ 1812a, at 173.

Exclusive dealing arrangements addressing free riding are particularly important for "luxury brands, new products and services, [and] complex products and services that are difficult for customers to evaluate without the provision of technical or other information by the distributor."[293] In these cases, the concern is that without an exclusive dealing arrangement, "retailers would curtail these pre-sale efforts, the producer's brand goodwill would be diminished, and interbrand competition would decline."[294]

This is not the case here. The nature of the product demonstrates that the typical free riding concern is inapt. Ticketmaster is not spending money to promote its ticketing product, with rivals piggybacking on those efforts. Nor is it likely that ticketing rivals could offer tickets at lower cost because they do not pay to promote the event. As discussed above, ticketing fees have little connection with the services provided.[295] In fact, the company uses a loss-leader strategy that, as discussed above, involves *undercharging* in the promotion market, which is not consistent with needing to exploit investments in that market.[296] Finally, it is not likely that a venue would steer customers to a ticketer other than Ticketmaster to get a bigger revenue share. Venues initially flocked to—and have stayed with—Ticketmaster because it increased the fees, shared them with the venues, and took "the bruises from people who don't like the process."[297]

Considered expansively, Ticketmaster could claim that rivals could exploit equipment that is not customer-facing such as ticketing software and hardware. But the software and hardware are owned and licensed by Ticketmaster. For example, one contract provides that the "[h]ardware and [s]oftware is, and shall at all times be and remain, personal property which shall, at all times, remain the sole and exclusive property of Ticketmaster."[298]

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[293] *Free Riding*, Concurrences, https://www.concurrences.com/en/dictionary/Free-riding [https://perma.cc/RR9F-9T7C] (last visited Dec. 18, 2023).

[294] *Id.*

[295] *See supra* notes 161–162 and accompanying text.

[296] *See supra* notes 146–159 and accompanying text.

[297] *See supra* note 35 and accompanying text.

[298] Bill No. 2022-15, A Resolution of the City of West Plains, Missouri Authorizing the City Administrator to Execute an Agreement with Ticketmaster for a Three-Year Term, enclosing Ticketmaster User Agreement at 11, June 21, 2022, https://westplains.gov/wp-content/uploads/2022/10/Resolution-2022-15-Ticketmaster.pdf [https://perma.cc/LP7Y-R3WB]. *See also id.* at 5 ("This Agreement may be terminated by Ticketmaster in the event any act by Principal threatens to cause any infringement of any Ticketmaster (or Ticketmaster licensor) Intellectual Property or other property right").

As a result, venues would not be able to share Ticketmaster's software[299] or hardware with rival ticketing companies. Providing one example, the 2010 consent decree required Ticketmaster to make its software available to competitor AEG, allowing the rival to modify the software and providing a license with "a copy of the source code," which would not have been needed if rivals could use the software.[300]

There could be more plausible concerns if the company's hardware were shared with a competitor. But the hardware does not seem to be a significant cost. Even for small venues, POS terminals,[301] ticket printers,[302] routers,[303] and scanners[304] are not expensive, costing only thousands, or even hundreds,

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[299] The software links venues' systems with Ticketmaster's ticket selling operation, offering the functionality needed to operate online and offline ticket sales. *See* Elizabeth Pope, Laura Quinn, Chris Bernard, Kyle Henri Andrei, & Tyler Cummins, Understanding Software for Program Evaluation, Idealware 14 (2013), https://www.michiganfoundations.org/system/files/documents/2021-09/Understanding-Software-for-Program-Evaluation-Idealware.pdf [https://perma.cc/SL8Q-JZX7].

[300] [Proposed] Amended Final Judgment, United States v. Ticketmaster Entertainment, Inc., No. 1:10-cv-00139-RMC, at 8-9 (D.D.C. Jan. 8, 2010), https://www.justice.gov/atr/case-document/file/1233416/dl?inline [https://perma.cc/PUM9-WYJT]. AEG "never licensed" the software "because, it said, it did not view the technology as cutting edge." Sisario & Bowley, *supra* note 84.

[301] *See, e.g.,* David Rivera, *How Much Does a POS System Cost,* Fit Small Business (July 18, 2023), https://fitsmallbusiness.com/pos-system-cost/ [https://perma.cc/H9FJ-R33C] (stating that POS systems cost roughly $4,000 to $10,000 annually); Isobel O'Sullivan, *How Much Does a POS System Cost? Hardware, Software & More*, Tech.co (July 28, 2023), https://tech.co/pos-system/pos-system-cost [https://perma.cc/PRQ5-HB75] (finding that POS system "rang[es] from $1,200 to $6,500 for the first year, and $600 to $1200 for each subsequent year").

[302] *Ticket Printing*, TicketSource, https://www.ticketsource.us/features/ticket-printers [https://perma.cc/6RFS-5RLK] (last visited Jan. 15, 2024) (discussing printers); *Citizen America CL-S521-GRY CL-S521 Series Direct Thermal Barcode and Label Printer with USB/Serial Connection*, Amazon, https://www.amazon.com/Citizen-America-CL-S521-GRY-Connection-Resolution/dp/B01CLLPPN2 [https://perma.cc/GVR8-7PVN] (last visited Jan. 15, 2024); Boca Systems, https://www.bocasystems.com/config.html [https://perma.cc/HM74-HK4L] (last visited Jan. 15, 2024) (listing printer costs, with most expensive model costing $3,200).

[303] Ry Crist, *Best Wi-Fi Routers for 2024*, CNET (Jan. 3, 2024), https://www.cnet.com/home/internet/best-wi-fi-router/ [https://perma.cc/3D9Y-3EYB] (recommending "best" routers, which range between $75 and $500).

[304] The ticket scanners, which are similar in technology to a smartphone, often cost less than $1,000. San Antonio Stock Show & Rodeo, *Scanner Training – Ticketmaster Training*, YouTube, https://www.youtube.com/watch?v=jUv8jgu3-kU [https://perma.cc/K8CC-8PNS] (last visited Jan. 12, 2024); *see, e.g.*, *High-Quality*

of dollars, and not providing substantial value relative to the cost of the software. Ticket sales, for example, are dominated by the online market, which does not even use POS terminals or ticket printers.[305] In 2022, the company sold 98 percent of its primary tickets online, with only 2 percent sold through ticket outlets.[306]

Nor is the second primary justification present. Ticketmaster is not offering a product that the venue is directly promoting. In the typical case, "exclusive dealing leads dealers to promote each manufacturer's brand more vigorously," which could lower "the quality-adjusted price to the consumer (where quality includes the information and other services that dealers render to their customers)."[307] Here, in contrast, and as discussed above,[308] ticketing is not the focus. It is not like the venues are offering ticketing as their primary product and rivals are piggybacking on the venues' marketing of Ticketmaster's services. Rather, they are selling shows, with ticketing just serving as a means to attain this goal.

The fact that venues benefit from exclusive arrangements is not dispositive.[309] Ever since Ticketmaster turned the then-existing business model on

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Ticket Scanner, VBO Tickets, https://www.vbotickets.com/site/features/ticket-scanners [https://perma.cc/YCB3-HBVX] (last visited Jan. 12, 2024).

[305] Tickets purchased digitally do not need to be printed at the venue, nor is a point-of sale terminal required. Scanners are used to identify tickets on a mobile app. *See How Do I Use Mobile Entry Tickets?*, Ticketmaster, https://ticketmaster-us.zendesk.com/hc/en-us/articles/9786597785617-How-do-I-use-Mobile-Entry-tickets [https://perma.cc/KR7K-LHLZ] (last visited Jan. 12, 2024).

[306] Live Nation 10-K, *supra* note 19, at 5. The company sold 56 percent through mobile apps and 42 percent through websites. *Id. See also* Groetzinger testimony, *supra* note 102, at 9 (citing J.P. Morgan report that company's renewal rate over 100 percent "is explained by realizing that venue owners' desire to sign with Ticketmaster is less about hardware or software, and more about filling seats with Live Nation produced concerts") (emphasis omitted); *see also id.* (citing Barron's report that company's "contractual moat" is "compounded by Live Nation's frequent practice of installing its own hardware at the venue, using proprietary software to process tickets").

[307] Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984)

[308] *See supra* note 295 and accompanying text.

[309] *See, e.g.*, Ticketmaster Corp. v. Tickets.Com, Inc., No. CV99-7654-HLH(VBKX), 2003 WL 21397701, at *5 (C.D. Cal. Mar. 7, 2003) (finding that the venues "prefer long-term exclusive contracts" because of compatibility with computers, not needing to change retail outlets, "simplif[ying] . . . bookkeeping and reduc[ing] the cost of renegotiating the contracts every few years," fixing costs "for a longer, more predictable future," and "obtain[ing] cash up-front from the ticket servicer . . . at the cost of a long term contract, so that the ticket servicer may amortize the cost with the expected income over the years of the contract").

its head by increasing fees and sharing them with venues, awarding advances, signing bonuses, and rebates to venues and agreeing to "take the bruises from people who don't like the process,"[310] venues have benefitted from entering into exclusive agreements with the company.[311] At a minimum, it is plausible that exclusive arrangements are not needed to recover investments but instead entrench control of the market by sharing the spoils with the venues.[312]

Along these lines, the setting presents conduct analogous to what has taken place in the pharmaceutical industry. "Pay for delay" settlements involve a brand-name drug company settling patent litigation by paying a potential generic rival to drop its patent challenge and delay entering the market.[313] Such conduct benefits the brand firm by ensuring that it can maintain monopoly profits and the generic firm by providing the certainty of payment and entry before the end of the patent term.[314] The benefits for the settling parties, however, are not shared by consumers who suffer from the absence of generic drugs when potentially invalid patents[315] avoid scrutiny.[316]

Applying a monopolization-centered test that focuses on unnecessarily injuring rivals would lead to the same result. Exclusive contracts foreclosing 70 percent to 80 percent of venues prevent rivals from exercising a competitive restraint on Ticketmaster and more generally harm the market. And it would seem to be unnecessary harm. As discussed above, the typical procompetitive justifications of addressing free riding and encouraging dealer promotion are not implicated here.[317] The setting is different from the typical free riding scenario in which a manufacturer is seeking to protect its investment in a luxury, new, or complex product. Nor does an exclusive contract lasting five

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[310] Budnick & Baron, *supra* note 31, at 73. *See supra* note 35 and accompanying text.

[311] *See id.*

[312] *See* Melamed, *supra* note 262, at 405 (explaining that a manufacturer with market power can "share supracompetitive profits with the distributor" and then "retain the exclusive arrangement regardless of the duration of its contract" or "without entering into any cognizable agreement at all").

[313] *See, e.g.*, FTC v. Actavis, 570 U.S. 136 (2013).

[314] *Id.* at 154.

[315] *See* C. Scott Hemphill & Bhaven Sampat, *Drug Patents at the Supreme Court*, 339 Science 1386, 1387 (2013) (finding that 89 percent of patents in settled litigation are secondary patents covering ancillary aspects of drug innovation and that the brand firm is far less likely to win on these patents (32 percent) than it is on active ingredient patents (92 percent).

[316] *E.g.*, Michael A. Carrier, *Three Challenges for Pharmaceutical Antitrust*, 59 Santa Clara L. Rev. 615, 632 (2020).

[317] *See supra* notes 290–297 and accompanying text.

or ten years with the vast majority of U.S. venues seem necessary to recover expenditures on software or hardware.[318] Ticketmaster does not need to use exclusive dealing to prevent free riding or enhance dealer promotion.[319]

In short, the unnecessary harm to rivals, substantial foreclosure, entry barriers, and lack of a procompetitive justification would support a court's finding that Live Nation's exclusive contracts constitute monopolization.

VII. Tying Promotion and Tickets

A second action exacerbating the competitive harms of the first is tying. Venues not locked into multiyear exclusive deals could conceivably select their ticketing provider. But through tying, Live Nation forces venues who wish to book its artists to use Ticketmaster for ticketing.[320]

A. Law

The central element of a tying claim is that a customer who wishes to purchase one product (the "tying product") is forced to also purchase a second product (the "tied product").[321] As discussed above, the technical requirements of tying are "relax[ed]" in the monopolization setting, with the focus instead on whether rivals have been harmed unnecessarily.[322] For a full exposition, this Article analyzes all of the potentially relevant factors.

Some tying arrangements are treated as "per se" illegal. Such a label does not reflect the typical per se approach, for which the existence of the conduct

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[318] *See supra* note 306 and accompanying text.

[319] There would be liability under the approach proposed by the leading antitrust treatise as well. *See* XI Hovenkamp, *supra* note 249, ¶ 1822c, at 233 ("where entry barriers are significant and foreclosure percentages are substantial, the case for presumptive illegality is very strong, and the defendant can prevail only by offering proof of a truly significant defense").

[320] Artists promoted by Live Nation also could be harmed by the tie. Those with the largest following who want to perform in certain cities could be limited to one or a few venues, and even venues not locked into exclusive contracts have no choice but to use Ticketmaster for their ticketing services. *See supra* notes 125–126 and 133–135 and accompanying text.

[321] *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product").

[322] *See supra* notes 236–237 and accompanying text.

automatically leads to liability.[323] Nor does it reflect the more nuanced actual analysis, which resembles the comprehensive "Rule of Reason" approach.[324] Nonetheless, this Article applies such a framework, which offers elements that constitute a subset of those making up the related Rule-of-Reason approach.[325]

The per se tying approach requires four elements: (1) two separate products or services; (2) conditioning or coercion to purchase a second product; (3) sufficient market power in the tying product market to restrain trade in the market for the tied product; and (4) a "not insubstantial" amount of commerce in the tied product market.[326] As mentioned, courts also have applied a Rule-of-Reason analysis to tying arrangements. Although the content of this framework is "not well defined,"[327] the primary difference is the inclusion of a fifth element: an "actual effect . . . on competition" in the tied product market.[328]

The first requirement is the existence of two products. In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Supreme Court explained that the key inquiry in determining whether there are two products is "the character of the demand for the two items."[329] A tie requires the foreclosure of competition "in a product market distinct from the market for the tying item."[330]

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[323] *See* FTC, *The Antitrust Laws*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/3KDZ-6LX2] (last visited Dec. 27, 2023) (noting that "arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids . . . are 'per se' violations of the Sherman Act" for which "no defense or justification is allowed").

[324] *In re* Cox Enterprises, 871 F.3d 1093, 1097 (10th Cir. 2017) (per se tying rule is "dramatically more nuanced" than the typical per se rule).

[325] *See infra* notes 326–342 and accompanying text.

[326] *See, e.g.*, Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502–03 (11th Cir. 1985); Antitrust Law Developments *supra* note 57, at 176.

[327] Antitrust Law Developments, *supra* note 57, at 202.

[328] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29 (1984); tying can be challenged under Section 3 of the Clayton Act or Section 1 of the Sherman Act, but the test "has evolved so as to be largely the same." Hovenkamp, *supra* note 56, § 7.6(c), at 405.

[329] *Jefferson Parish*, 466 U.S. at 19.

[330] *Id.* at 21.

The second factor involves coercion, in other words, "[c]onditioning the availability of one product . . . on the purchase of another."[331] The Supreme Court has explained:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.[332]

The third requirement is market power in the tying product market.[333] The Court in *Jefferson Parish* stated that the seller has such power when it has a large market share or offers a unique product that rivals cannot provide.[334] Courts generally require a market share of at least 30 percent for a finding of market power.[335] One concern with the use of this power is that it could result in "a potentially inferior product" being "insulated from competitive pressures."[336]

Fourth, there must be a "not insubstantial" amount of commerce in the tied product.[337] This is typically not an onerous hurdle. The test analyzes "the absolute dollar amount of the commerce affected" rather than "whether it represents a substantial share of the market."[338] The standard is "whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie."[339] Courts have found dollar volumes as low as $1,500 and $6,000 to satisfy this standard.[340]

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[331] Antitrust Law Developments, *supra* note 57, at 182.

[332] *Jefferson Parish,* 466 U.S. at 12.

[333] Antitrust Law Developments, *supra* note 57, at 188 (discussing requirement of "sufficient economic power with respect to the tying product to produce an appreciable restraint in the market for the tied product").

[334] *See Jefferson Parish*, 466 U.S. at 17.

[335] Antitrust Law Developments, *supra* note 57, at 190. *See also* Hovenkamp, *FRAND and Antitrust*, *supra* note 235, at 1704 ("tying law usually finds competitive significance in market shares in the range of 30% to 40%").

[336] *Jefferson Parish*, 466 U.S. at 14.

[337] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 11 (1958).

[338] Antitrust Law Developments, *supra* note 57, at 196.

[339] Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 501 (1969).

[340] Antitrust Law Developments, *supra* note 57, at 197 (citing cases). *See also* Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia, 815 F.2d 1407, 1419–20 (11th Cir. 1987) ($10,091.07 sufficient); Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1578 (11th Cir. 1991) (range of $30,000 to $70,000 "is clearly substantial"); Bell v. Cherokee Aviation Corp., 660 F.2d 1123, 1130 n.8 (6th Cir. 1981) ("we are not prepared to say that $40,000 a year is insubstantial"); McAlpine v.

In addition, when applying the Rule of Reason to tying arrangements, courts have analyzed anticompetitive effects in the tied product market. Although there is not "a consensus on how much evidence the plaintiff must introduce to show the requisite level of foreclosure,"[341] at a minimum, there must be "some competition in the tied product" that "could be affected by imposition of the tie."[342]

One example of a tying case bearing some similarity to the facts at issue here is *Nobody in Particular Presents v. Clear Channel Communications, Inc.*[343] In that case, a music concert promoter sued Live Nation's predecessor, SFX, which (as Clear Channel Communications' national concert promotions division) was "the largest concert producer and entertainment promoter in the nation."[344] The plaintiff alleged that "Clear Channel uses its position in rock-format radio to intimidate and coerce rock artists and their record labels into signing with SFX/Clear Channel Entertainment and Clear Channel Radio Festivals for promotion of the artists' concerts."[345] In particular, it claimed that "rock artists and labels are afraid that Clear Channel radio stations will refuse to give artists' songs as many spins as Clear Channel would if the artist signed with SFX/Clear Channel Entertainment or Clear Channel Concerts/ Clear Channel Radio Festivals."[346]

The court first found that there were two separate products because the plaintiff showed that "the demand for rock radio air play and radio promotional support, as evidenced through the existence of 'indies,'[347] exists separately from the demand for concert promotional services."[348] Second, coercion was demonstrated by the "threat of losing the tying product" based on "evidence of at least four record labels and/or agents agreeing to the tying arrangement under threat of losing air play and/or promotional support."[349] Third, the plaintiff showed that "Clear Channel's share of the rock radio market is sufficiently high" to show market power.[350] And fourth, there was a

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AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1242 (E.D. Mich. 1978) (same).

[341] Antitrust Law Developments, *supra* note 57, at 199.

[342] *Id.*

[343] 311 F. Supp. 2d 1048 (D. Colo. 2004).

[344] *Id.* at 1056.

[345] *Id.* at 1061.

[346] *Id.*

[347] Indies are "independent record promoters that represent record labels." *Id.* at 1060.

[348] *Id.* at 1093–94.

[349] *Id.* at 1094.

[350] *Id.* at 1097.

"greater than a *de minimis*" amount of commerce in the market for concert promotions.[351]

The next five sections demonstrate how a plaintiff could bring a successful tying case against Live Nation Entertainment for its tying of promotion and ticketing services.[352]

B. Two Products

First, there are two products. As discussed above, promoters "market events, sell tickets, rent or otherwise provide venues[,] and arrange for local production services, such as stages and equipment."[353] In contrast, ticketing services "generally refers to the sale of tickets primarily through online and mobile channels" and "also includes sales through phone, outlet, and box office channels."[354] These differences are illustrated, for example, by the disparate services performed by promoter AEG and ticketing company StubHub.[355]

As the Court explained in *Jefferson Parish*, the "character of the demand" is the key to whether there are two products.[356] In this case, the demand for artist promotion is quite different from the demand for ticketing. Observers naturally would distinguish between putting on concerts and selling tickets, and none would reasonably believe they are the same.[357]

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[351] *Id.* The court found that the plaintiff did not introduce sufficient evidence to "prove a tying claim under rule of reason analysis." *Id.* at 1098.

[352] For a discussion of potential justifications for the tying arrangement, see *infra* notes 472–475 and accompanying text.

[353] *See supra* note 21 and accompanying text.

[354] *See supra* note 24 and accompanying text.

[355] For information on AEG, see *supra* note 103 and accompanying text; for information on StubHub, see *infra* notes 461–462 and accompanying text. The fact that StubHub primarily operates in the resale market is not material to the difference between the ticketing and promotion markets. *See also Joint Statement on Ticketmaster*, *supra* note 92 (explaining that ticketing rivals have focused on the secondary market because Ticketmaster "has the primary ticket marketplace mostly locked down").

[356] 466 U.S. 2, 19 (1984).

[357] *See, e.g.*, *id.* at 23 (noting that "[t]he record amply supports the conclusion that consumers differentiate between anesthesiology services and the other hospital services provided by petitioners"). Promotion and ticketing are, at a minimum, at least as dissimilar as anesthesiology and other hospital services.

C. Coercion

Second is coercion. Is a venue that wishes to book an artist that Live Nation promotes forced to take Ticketmaster's ticketing services?

In the typical case, a plaintiff alleges a lack of choice. It claims that it wants the tying product and is forced to take the tied product. The question is whether it really is forced to make this purchase. This case is different. For a plaintiff would have not just a *claim* of coercion but actual *evidence*. This evidence is front and center in the DOJ's motion to extend the 2010 consent decree.

Recognizing the potential harm from a merger between Ticketmaster and Live Nation, the decree "prohibited the merged company from retaliating against concert venues for using another ticketing company" or "conditioning or threatening to condition Live Nation's provision of concerts and other live events on a venue's purchase of Ticketmaster's ticketing service."[358]

In its motion to extend the decree in 2020, the DOJ pulled no punches, stating that the merging companies "failed to live up to their end of the bargain."[359] In particular, they "repeatedly conditioned and threatened to condition Live Nation's provision of live concerts on a venue's purchase of Ticketmaster ticketing services" and "retaliated against venues that opted to use competing ticketing services—all in violation of the plain language of the decree."[360] In fact, the companies' "well-earned reputation for threatening behavior and retaliation . . . has so permeated the industry that venues are afraid to leave Ticketmaster lest they risk losing Live Nation concerts,

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[358] Plaintiff United States' Mem. in Supp. of Mot. To Modify Final J. and Enter Am. Final J. 1 (hereinafter Memorandum in Support), Case 1:10-cv-0039-RMC, https://www.justice.gov/atr/case-document/file/1233396/download [https://perma.cc/XM6R-DJQ6]. For a discussion of other conditions of the decree, see *supra* note 50.

[359] Memorandum in Support, *supra* note 358, at 1. *See also Justice Department Moves to Modify and Extend Consent Decree*, *supra* note 16 (extending decree five-and-one-half years and including new provisions on, among other issues, threats, withholding concerts, an independent monitor, an antitrust compliance officer, and a penalty). For an argument that the terms of the extension were "tepid," see Katherine Van Dyck & Lee Hepner, *The Case Against Live Nation-Ticketmaster*, at 6, Am. Econ. Liberties Project (Jan. 2024), http://www.economicliberties.us/wp-content/uploads/2024/01/20240104-AELP-Livenation-Brief-FINAL.pdf [https://perma.cc/TD3S-ZRH2] (lamenting a "revised consent decree that did not strengthen or otherwise expand any of the behavioral remedies," that "assessed a paltry $3 million fine," and that "created opaque monitoring and compliance programs that do little to protect venues, artists, and fans").

[360] *Id.*

hindering effective competition for primary ticketing services."[361] The DOJ provided six examples in its motion to extend the decree.

In one, while evaluating ticketing services, a venue "informed Live Nation that it was planning to choose Ticketmaster's competitor."[362] At that point, a senior official at the company "threatened to withhold all Live Nation concerts . . . if it did not renew its contract with Ticketmaster," warning: "if you move in that direction, you won't see any Live Nation shows."[363] Despite these threats, the venue "selected a Ticketmaster competitor," at which point "Live Nation stopped contacting the arena about any possible concerts or booking shows."[364] When the venue agreed to contract with Ticketmaster a short time later, "Live Nation began to get 'geared back up' to bring concerts" because the venue was "back in the family."[365]

The other five examples are similar:

- A Live Nation promoter "explicitly threatened to withhold concerts from Venue A if it did not select Ticketmaster"[366];

- "[I]f Venue C went with a competing ticketer, Ticketmaster's response 'would be "nuclear"' and 'though [the official] would deny it . . . Live Nation would never do a show in our building . . . [and] would find other places for their content'"[367];

- A senior Ticketmaster executive "reiterated his threat that if Venue D went with another primary ticketing provider, Live Nation would pull concerts . . . and reduce the volume of shows"[368];

- Two Live Nation executives "threatened that Venue E would not get Live Nation shows unless it switched to Ticketmaster," and "[w]hen Venue E refused to switch . . . Live Nation followed

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[361] *Id.* at 1–2. *See also* Sisario & Bowley, *supra* note 84 (quoting former Ticketmaster executive who conceded: "We were not saying, certainly, 'If you don't go with us you are losing'" artists, but "'I would imagine that that is what [arenas] assumed to be the case.'"). *See also* Memorandum in Support, *supra* note 358, at 6 (venues "c[a]m[e] to expect that refusing to contract with Ticketmaster" would "result in the venue receiving fewer Live Nation concerts or none at all").

[362] *Id.* at 8.

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.* at 7.

[367] *Id.* at 8–9.

[368] *Id.* at 9.

through on its threats and retaliated . . . by reducing the number of concerts"[369]; and

- "Immediately after learning that Venue F had switched ticketers, Ticketmaster's President contacted the local Live Nation President responsible for placing concerts in the region to suggest that Live Nation book more shows at Venue F's nearby rival venue"; "[i]n the two years following . . . Live Nation significantly reduced the number of shows . . . in retaliation."[370]

Consistent with these instances are two examples discussed above: the Gwinnett Center and Barclays Center having their tours cut in half after deciding not to use Ticketmaster for ticketing.[371] In fact, SeatGeek, which lost its contract with the Barclays Center, structures some bids to address venues' concerns about losing top artists. In 2017, when the company "tried to unseat Ticketmaster from its contract at the TD Garden in Boston, it included in its bid a promise to pay the arena $250,000 for every show that Live Nation pulled."[372] Ticketmaster still won the contract, with SeatGeek explaining that when it "sell[s] to teams," it has "heard fears about losing concerts if they choose us."[373]

In the typical tying case, it may not be clear if there actually is coercion. This case is different because we have the receipts: numerous examples of Live Nation threatening, and following through on threats, not to have shows at venues that use a ticketing service other than Ticketmaster.

D. Market Power in Tying Product Market

As discussed above, Live Nation has market power in the market for the tying product: artist promotion. For starters, there is direct evidence of market power. The fact that Live Nation was able to coerce unwilling venues to deal with Ticketmaster in order to have access to Live Nation's artists shows its control of the market.

There also is compelling indirect evidence of market power. There are a limited number of artists capable of filling large arenas and amphitheaters, and Live Nation has roughly 60 percent to 80 percent of this promotion

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[369] *Id.* at 10.
[370] *Id.*
[371] *See supra* notes 136–143 and accompanying text.
[372] Sisario & Bowley, *supra* note 84.
[373] *Id.*

market.[374] In its own words: "We believe we are one of the world's leading artist management companies based on the number of artists represented."[375]

Live Nation "typically locks up much of the best talent by offering generous advances to artists and giving them a huge percentage of the ticket revenue from the door."[376] It "can afford to" because it "has so many other related revenue streams on which to draw: sponsorships for the tour, concessions at venues, and most of all, ticket fees," which "supply about half of Live Nation's earnings."[377] As discussed above, this is part of its "loss leader" strategy by which it is willing to lose money on promotion and make up for it with ticketing.[378]

One analyst explained that "[t]here's really no one that's been able to get the type of scale that Live Nation has. The closest comparable is [AEG] with their own kind of internal ticketing platform. But they made a statement that speaks to the market power of Ticketmaster, which is that they used Ticketmaster to ticket Taylor Swift."[379] It's "a business that a lot of people have looked at," but even though "[t]hey've spoken about wanting to get into it, . . . no one's really been able to grab enough market share to really be a meaningful player."[380] Given the significant quality issues with Ticketmaster's services,[381] rivals' inability to gain market share reflects "a potentially inferior product" being "insulated from competitive pressures."[382]

A final way of considering the company's power in the promotion market is to compare its size with that in the ticketing market. In the first three quarters of 2023, while Ticketmaster's ticketing revenue was $2.2 billion, Live Nation's concert business was $13.9 billion, more than six times larger.[383] In other words, the company's significant market share in the promotion market is buttressed by a staggering amount of revenue.

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374 *See supra* notes 100–102 and accompanying text.
375 *See supra* note 104.
376 Sisario & Bowley, *supra* note 84.
377 *Id.*
378 *See supra* notes 146–152 and accompanying text.
379 Lorsch, *supra* note 277.
380 *Id.*
381 *See* discussion *supra* Part IV.B.2.
382 *See supra* note 336 and accompanying text.
383 2023 Live Nation Entertainment Form 10-Q, *supra* note 153, at 20.

E. Commerce

Whether Ticketmaster's ticketing market offers a "not insubstantial" amount of commerce barely deserves discussion. Controlling the majority of ticket sales in the country obviously exceeds a threshold that courts have found to be satisfied by a few thousand dollars. Live Nation Entertainment's ticketing revenue in 2022 was $2.2 billion.[384]

F. Anticompetitive Effects in Tied Market

Considering the final factor—relevant to a Rule-of-Reason analysis—of anticompetitive effects in the tied market would not alter the analysis. Rival ticketing companies are injured by being deprived of the opportunity to compete for venues that wish to have access to Live Nation's many artists. And that injury weakens the competitive discipline they exercise against Ticketmaster. Venues that stick with, or switch back to, Ticketmaster show that the tying materially raises the obstacles facing competitors. The lack of effective rivals allows Ticketmaster to continue to harm competition.

The company has leveraged its significant market power (such as ticketing 80 percent of the top 100 arenas in the country[385]) to impose high prices and fees that have harmed artists, venues, and promoters.[386] Consumers have suffered anticompetitive effects in the form of high fees and inferior quality.

Just to repeat two examples,[387] ticketing prices "more than tripled" from the mid-1990s to 2022[388] and 99 percent of consumers believe Ticketmaster's fees are "too high."[389] Consumers have suffered by not being able to buy tickets, being denied entry to concerts, and suffering numerous other quality harms.[390] If Ticketmaster faced the additional competition from other

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[384] Live Nation 10-K, *supra* note 19, at 5. That figure is only increasing. *See* Dylan Smith, *Live Nation Touts "Biggest Quarter Ever" in Q3 Earnings Report As Revenue Tops $8 Billion*, Digital Music News (Nov. 3, 2023), https://www.digitalmusicnews.com/2023/11/03/live-nation-earnings-q3-2023/ [https://perma.cc/SU43-5TVB] (noting $832.6 million in revenue in third quarter of 2023, up 57 percent over the previous year).

[385] Sisario & Bowley, *supra* note 84.

[386] *See* discussion *supra* Part IV.

[387] *See* discussion *supra* Part IV.B.1.

[388] *See supra* note 166 and accompanying text.

[389] *See supra* note 163 and accompanying text.

[390] *See* discussion *supra* Part IV.B.2.

ticketers that it would face without the tying coercion, it would not be able to so aggressively increase price and neglect quality.

In short, each of the five requirements for a claim that Live Nation Entertainment tied promotion to ticketing is satisfied.

If the inquiry focuses more specifically on whether the conduct "injures competition unnecessarily,"[391] the company also would be liable. It is evident that competition from rival ticketing companies is injured. And this injury does not seem to be linked to any legitimate justification. The company, for example, has never shown that Ticketmaster's ticketing must be used because its rivals are unreliable or do not provide the level of services that Ticketmaster does. Even if there were concerns about bots and inferior quality with other companies (which, again, have not been shown), Ticketmaster's two-faced treatment, illustrated by the TradeDesk smoking gun,[392] shows that this is a pretense.

VIII. Deception

A third claim would target Ticketmaster's deception of consumers in various aspects of its ticketing services.

A. Law

A court could find that deception constitutes monopolization under one of two approaches.[393] The first, adapted from the leading antitrust treatise,[394]

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[391] *See supra* notes 236–237 and accompanying text.

[392] *See* discussion *supra* Part V.B.

[393] A third approach, applied in the Fifth and Seventh Circuits, does not apply liability in this setting. For a critique of such a hands-off analysis, *see* Michael A. Carrier, *Don't Die! How Biosimilar Disparagement Violates Antitrust Law*, 115 Nw. U.L. Rev. Online 119, 135 (2020) (a monopolist engaging in deception "could entrench its position in the market" with conduct that "could be viewed as 'tend[ing] to impair the opportunities of rivals' and 'not further[ing] competition on the merits,'" and that "resemble[s] more the 'willful acquisition or maintenance of [monopoly] power' than a 'superior product, business acumen, or historic accident'") (citing United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) and Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985)). *See also* Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 Iowa L. Rev. 1841, 1850–53 (2021) (providing additional critique).

[394] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application (5th ed. 2022).

applies a presumption that the exclusionary effects of disparagement are *de minimis*.[395] The plaintiff can rebut such a presumption by showing that the alleged anticompetitive conduct is (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible to neutralization or other offsets by rivals.[396]

A second approach applies a more general case-by-case analysis. Courts applying this approach have appreciated that anticompetitive conduct takes "too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties."[397] For example, the Sixth Circuit in *Conwood v. U.S. Tobacco* found that a company's providing misleading information, destroying a rival's display racks, and entering into exclusive agreements could support a finding of monopolization.[398]

One factor that courts have analyzed in this setting is the extent to which false statements lock in decision-making. In *United States v. Microsoft*, the D.C. Circuit found that Microsoft's deceptive statements to Java-based software developers about the interoperability of Windows-based systems with other platforms resulted in the inadvertent development of software compatible only with Windows and demonstrated anticompetitive conduct.[399]

B. Facts

An antitrust case could challenge several actions as potentially deceptive conduct that sustained its monopoly position.[400]

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[395] *See* Carrier, *supra* note 393, at 135 (citing cases from the Second, Sixth, Ninth, Tenth, and Eleventh Circuits).

[396] *E.g.*, Duty Free Americas, Inc. v. Estee Lauder Companies, Inc., 797 F.3d 1248, 1269 (11th Cir. 2015). *See generally* Carrier, *supra* note 393, at 136–37 (discussing illustrative case in which court found that plaintiff satisfied test).

[397] *E.g.*, Caribbean Broad Sys. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998).

[398] Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783, 788 (6th Cir. 2002).

[399] 253 F.3d 34, 76–77 (D.C. Cir. 2001).

[400] A challenge by the FTC to this behavior could rely on not only monopolization but also Section 5 of the FTC Act, which provides that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful." 15 U.S.C. § 45(a)(1) (2006). The FTC's Policy Statement on Deception defines deception as "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." Letter from James C. Miler, FTC Chairman, FTC Policy Statement on Deception (Oct. 14, 1983),

An example of one set of behaviors stems from a 2010 settlement with the FTC concerning "deceptive bait-and-switch tactics to sell event tickets to consumers."[401] In its statement accompanying the settlement, the FTC explained that consumers looking for tickets to concerts to Bruce Springsteen & The E Street Band received a "No Tickets Found" message that "indicate[d] that no tickets were available at that moment to fulfill their request."[402] Ticketmaster then deceptively "steer[ed] unknowing consumers" to its resale site TicketsNow, where "tickets were offered at much higher prices—in some cases double, triple, or quadruple the face value."[403] According to the FTC, Ticketmaster "displayed the same misleading Web page to consumers looking to buy tickets for many other events between October 2008 and February 2009."[404]

In addition to misrepresenting the existence of tickets, Ticketmaster "[c]ompound[ed] this deception" by "fail[ing] to tell buyers that many of the resale tickets advertised on TicketsNow.com were not 'in hand'—in other words, they were not actual tickets secured for sale at the time they were listed and bought."[405] Some of the tickets were "sold speculatively," which meant they were "merely offers to try to find tickets."[406] The FTC provided the example of consumers "hoping to go to a Springsteen concert at the Verizon Center in Washington, DC in May 2009" paying for tickets in February "that never materialized" while "Ticketmaster kept the sales proceeds for more than three months without a reasonable basis for believing it could fulfill the orders."[407]

Although the conduct is not recent, it provides an example of how deception-based tests could apply. Applying the treatise framework, given the availability of tickets, a representation that there are no tickets is clearly false. It is material as consumers wind up paying significantly more for tickets. Because fans must depend on Ticketmaster for information, they have no

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https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/ERZ3-YPPV].

[401] Press Release, Fed. Trade Comm'n, Ticketmaster and TicketsNow Settle FTC Charges of Deceptive Sales Tactics, Refunds for Springsteen Concertgoers Provided; FTC Warns Other Ticket Resellers (Feb. 18, 2010), https://www.ftc.gov/news-events/news/press-releases/2010/02/ticketmaster-ticketsnow-settle-ftc-charges-deceptive-sales-tactics-refunds-springsteen-concertgoers [https://perma.cc/6ZMZ-2SFZ].

[402] *Id.*

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.*

knowledge of which tickets are available and reasonably rely on Ticketmaster. Finally, the deception continued for a long period, with the opaque nature of the transactions preventing neutralization by rivals.

This behavior also would seem to result in liability under a case-by-case approach. Similar to the *Microsoft* case, false statements related to ticket availability lock in decision-making.[408] This is especially the case given the information asymmetry between the fans and Ticketmaster, materiality of ticket availability, and reasonable reliance on the company.

Another example is presented where buyers are not made aware of whether tickets are "eligible for transfer" until after purchase and where Ticketmaster could use the lack of notice to harm rival resale ticketers.[409] Consumers reasonably expect that they can resell their tickets, and when there is no notice to the contrary, it could be deceptive to prevent transfers.

One example is provided by a 2019 show in Los Angeles involving the Black Keys. For this concert, the "transferability feature [was] turned off completely,"[410] and the venue would not accept tickets issued by third-party ticketers.[411] Fans did not receive any "notice that their tickets were no good, even as they waited in line."[412] Employees of the resale vendors said that Ticketmaster never indicated that tickets would not be transferable.[413] And Pollstar, a leading provider of information on the concert industry, "was unable to find any mention that tickets purchased via the secondary market would be banned in any of the announcements regarding the presales and general onsale for the gig."[414] One employee of a resale site had "never seen something like this happen" and explained that it was "unfair . . . because everyone had a valid ticket."[415] Ticketmaster acknowledged its failings in the process, stating

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[408] *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); *see also supra* note 399 and accompanying text.

[409] *See How Do I Transfer Tickets?*, Ticketmaster, https://ticketmaster-us.zendesk.com/hc/en-us/articles/9612097694481 [https://perma.cc/FJ6C-LB5S] (last visited Nov. 24, 2023).

[410] Sarah Pittman, *The Black Keys' Wiltern Snafu Thrusts SafeTix Into Spotlight*, Pollstar (Sept. 26, 2019), https://news.pollstar.com/2019/09/26/the-black-keys-wiltern-snafu-thrusts-safetix-into-spotlight/ [https://perma.cc/8V6V-WZSL].

[411] *See* Alejandra Reyes-Velarde, *Why the Black Keys Shut Out Hundreds of Fans, Causing Chaos at the Wiltern*, L.A. Times (Sept. 20, 2019), https://www.latimes.com/california/story/2019-09-20/black-keys-wiltern-tickets-ticketmaster [https://perma.cc/8RVM-NQUY].

[412] *Id.*

[413] *Id.*

[414] Pittman, *supra* note 410.

[415] Reyes-Velarde, *supra* note 411.

that for future "communicat[ions about] the non-transferability process," it promised to "ensure that this messaging is more prominently and frequently communicated moving forward."[416]

Two episodes of deception were alleged in a complaint filed in 2018 in a case that ultimately settled.[417] Proof of these allegations would provide additional examples.

First, plaintiffs claimed that Ticketmaster harmed fans through its website, which "seamlessly integrate[d] its primary and secondary ticket exchange inventory in a single seating map."[418] The company "provide[d] no transparency to consumers about how and why tickets wind up on one or another exchange," and Ticketmaster and its suppliers "deceptively slip[ped] tickets between primary and secondary markets to manipulate consumer pricing and squelch competition."[419] In addition to the deception, whether fans use the primary or secondary market is material: the fees generally are higher in the secondary market, and the proceeds are kept by the ticketing company as opposed to being shared with the venues and promoters.[420]

Second, Ticketmaster allegedly "sabotage[d] its [former] Verified Fan program,[421] which it publicized as a means to provide special advance tickets to a special set of consumers with codes, by releasing the same tickets for sale simultaneously at the box office, without requiring any special code, and with full knowledge that ticket resellers will staff the box office to purchase the ticket immediately."[422] Similarly, fans trying to see a show at Madison Square

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[416] Pittman, *supra* note 410.

[417] Answer of Renaissance Ventures LLC and Prestige Entertainment West Inc. to Second Amended Complaint and Counterclaims, Ticketmaster LLC v. Prestige Entertainment West, Inc., No. 2:17-cv-07232-ODW-JC (C.D. Cal. June 25, 2018). For the settlement of the case, see Jeffrey D. Neuberger, *Ticketmaster Reaches Settlement with Ticket Broker over Unauthorized Use of Automated Bots*, Nat'l L. Rev. (July 24, 2019), https://www.natlawreview.com/article/ticketmaster-reaches-settlement-ticket-broker-over-unauthorized-use-automated-bots [https://perma.cc/4S5W-2KW9].

[418] Renaissance Answer, *supra* note 417, ¶ 4.

[419] *Id.*

[420] *See supra* note 175 and accompanying text.

[421] In 2023, "[f]ollowing a tidal wave of bad press (and several lawsuits) stemming from the Taylor Swift Eras Tour pre-sale fiasco," Ticketmaster "quietly rebranded its 'Verified Fan' program as 'advance registration.'" Dylan Smith, *Ticketmaster Quietly Replaces Its "Verified Fan" Program With "Advance Registration" Following Taylor Swift Pre-Sale Disaster*, Digital Music News (June 20, 2023), https://www.digitalmusicnews.com/2023/06/20/ticketmaster-advance-registration/ [https://perma.cc/EU6P-ZNVU].

[422] Renaissance Answer, *supra* note 417, ¶ 9.

Garden in New York noticed that "[i]mmediately after the tickets went on sale" for a concert utilizing the program, "there were hundreds of tickets on StubHub."[423] This behavior could be deceptive in offering a program that it claimed was introduced to benefit fans[424] but actually is used to mask activity in the resale market.

At a minimum, behavior like that at the heart of the 2010 settlement with the FTC, as well as instances of a lack of notice in the years since, could demonstrate deception that maintains the company's monopoly position.

IX. Overall Course of Conduct

Finally, a court could consider the entirety of Live Nation Entertainment's conduct together. This includes not only the conduct discussed in the previous three Parts but also additional behavior discussed in Section IX.B below.

A. Law

Courts have considered defendants' conduct not only for its particular elements but also as part of an overall course of conduct.[425] The Supreme

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[423] Brando Rich, *Is TicketMaster's Verified Fan Program Working for Real Fans?*, CashorTrade (Sept. 19, 2017), https://cashortrade.org/blog/is-ticketmasters-verified-fan-program-working-for-real-fans [https://perma.cc/AWL5-XYXT]; *see id.* (stating that it was "hard to believe that hundreds of fans bought these tickets only to turn around and resell them immediately").

[424] *See* Anne Steele, *Ticketmaster Asks: Are You a Big Enough Fan?*, Wall St. J. (Sept. 5, 2017), https://www.wsj.com/articles/ticketmaster-asks-are-you-a-big-enough-fan-1504636200 [https://perma.cc/R8C8-CVW9] (senior official at Ticketmaster states: "[i]nstead of fighting an arms race, we decided we could take advantage of a deep database of info on ticket buyers and identify the behaviors that real fans exhibit").

[425] *See also, e.g.*, LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003) ("The relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together."); *In re* Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 13-MD-2445, 2017 WL 36371, at *8 (E.D. Pa. Jan. 4, 2017) ("in certain circumstances, a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable"); *In re* Gabapentin Pat. Litig., 649 F. Supp. 2d 340, 359 (D.N.J. 2009) ("If a plaintiff can allege that a series of actions, when viewed together, [was] taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability.");

Court has explained that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[426] In these cases, it is appropriate to consider the "overall combined effect" of individual acts as courts "are dealing with what has been called the 'synergistic effect' of the mixture of the elements."[427] Application of this theory makes particular sense when multiple behaviors "harm[] competition only slightly" but create a "cumulative effect" that "is significant enough to form an independent basis for liability."[428] Specific acts might not fully support a monopolization claim on their own but might in combination, especially when one compounds the effect of another so that the aggregate conduct crosses the line into monopolization.

To fully assess the competitive effects of this range of behavior, an overall course of conduct claim could be considered under the Rule-of-Reason framework. The D.C. Circuit in *United States v. Microsoft* articulated such an analysis. First, the plaintiff "must demonstrate that the monopolist's conduct . . . has the requisite anticompetitive effect."[429] Second, if this is shown, the defendant "may proffer a 'procompetitive justification' for its conduct."[430] The plaintiff then can rebut that justification, and failing that, can "demonstrate

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In re Neurontin Antitrust Litig., 2009 WL 2751029, at *15 (D.N.J. Aug. 28, 2009) (same); Abbott Labs. v. Teva Pharm. USA, Inc., 432 F. Supp. 2d 408, 428 (D. Del. 2006) ("Plaintiffs are entitled to claim that individual acts are antitrust violations, as well as claiming that those acts as a group have an anticompetitive effect even if the acts taken separately do not."). *But see* New York v. Facebook, Inc., 549 F. Supp. 3d 6, 46 (D.D.C. 2021) (doctrine does "not allow unilateral refusals to deal that are lawful . . . to be considered as part of a 'monopoly broth' or 'course of conduct' that violates Section 2").

[426] Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962); *see also* City of Mishawaka, Ind. v. Am. Elec. Power Co., 616 F.2d 976, 986 (7th Cir. 1980) ("It is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor."); CarePoint Health Sys. Inc. v. RWJ Barnabas Health, Inc., No. 22CV5421 EP CLW, 2023 WL 7986429, at *7 (D.N.J. Nov. 17, 2023) (plaintiff "alleges numerous instances of [defendant's] conduct that, evaluated together, plausibly coalesce into an alleged scheme").

[427] City of Anaheim v. S. California Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992).

[428] United States v. Microsoft Corp., 253 F.3d 34, 78 (D.C. Cir. 2001) ("the District Court did not point to any series of acts, each of which harms competition only slightly but the cumulative effect of which is significant enough to form an independent basis for liability").

[429] *Id.* at 58–59.

[430] *Id.* at 59.

that the anticompetitive harm . . . outweighs the procompetitive benefit."[431] Offering a variation, the Ninth Circuit in *Epic Games v. Apple* considered not only anticompetitive effects, procompetitive justifications, and balancing, but also whether there were "substantially less restrictive alternatives" that achieved the defendant's objectives.[432] And as one hornbook explains, "courts . . . typically ask whether the conduct, even if supported by a justification, hinders competition 'in an unnecessarily restrictive way.'"[433]

B. Application

In addition to the conduct discussed in the previous three Parts—(1) exclusive dealing with venues, (2) tying of promotion to ticketing, and (3) deception—a plaintiff could introduce four other forms of behavior. Each of these four types of conduct is anticompetitive, and each exacerbates the effects of other behavior.

The first is illegal conduct to harm a rival that the company viewed as a threat.[434] In one example, which culminated in Ticketmaster's payment of a $10 million criminal fine, the rival offered artists "the ability to sell presale tickets" and created "a password-protected app that provided real-time data about tickets sold through the . . . company."[435]

Ticketmaster engaged in an array of illegal behavior to harm this rival, including "repeatedly—and illegally—access[ing]" its computers "without authorization using stolen passwords" and "brazenly [holding] a division-wide

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[431] *Id.*

[432] Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 983–94 (9th Cir. 2023).

[433] Antitrust Law Developments, *supra* note 57, at 324; Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) ("it is relevant to consider" the "impact" of the defendant's conduct "on consumers and whether it has impaired competition in an unnecessarily restrictive way"); Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publications, Inc., 63 F.3d 1540, 1550 (10th Cir. 1995) ("Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition.").

[434] Press Release, U.S. Attorney's Office, E.D.N.Y., Ticketmaster Pays $10 Million Criminal Fine for Intrusions into Competitor's Computer Systems (Dec. 30, 2020), https://www.justice.gov/usao-edny/pr/ticketmaster-pays-10-million-criminal-fine-intrusions-competitor-s-computer-systems-0 [https://perma.cc/SQ7H-8CUM]. *See also* Brooks, *supra* note 7 (Songkick alleged in lawsuit that Ticketmaster (and former Songkick) employee "used old logins to access Songkick's systems in order to misappropriate information").

[435] *Id.*

'summit'" where the passwords "were used to access the victim company's computers."[436] One employee even kept a spreadsheet of every web page of the company so that Ticketmaster could identify the rival's clients and "attempt to dissuade them from selling tickets" through the rival.[437] A Ticketmaster executive conceded that the goal was to "choke off" the rival, and a senior employee promised that Ticketmaster "could 'cut [the victim company] off at the knees' if they could win back presale ticketing business" for an "artist that was a client of the victim company."[438]

A second type of conduct[439] involves "radius clauses" that "restrict[] acts from playing within a specified radius of a booked show for a specified period of time," which "prevent[s] competing venues from booking artists."[440] These provisions threaten to reduce the number of artists performing live, which increases the price of performances and "causes reductions in the quality and quantity of both music festivals and concert venues."[441] Radius clauses particularly threaten "[s]maller to mid-tier acts" that "need to be able to tour and make money out on the road," but "are literally having to travel 500 miles every night, which is dangerous and expensive . . . [i]f they can't play markets that are within reasonable drives."[442]

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[436] *Id.*

[437] *Id.*

[438] *Id.*

[439] *Artists to Take Pay Cuts with Live Nation's 2021 Plans*, SlipNSlide Records, https://www.slipnsliderecords.com/artists-to-take-pay-cuts-with-live-nations-2021-plans/ [https://perma.cc/4WSB-95LB] (last visited Dec. 17, 2023) (Live Nation memo provides consequences to artist violating radius clause).

[440] Jennifer Oliver, *DOJ: Event Powerhouse Live Nation Punished Concert Venues for Using Competing Ticketers Despite Bar*, Mogin Rubin (Mar. 19, 2020), https://blog.moginrubin.com/doj-event-powerhouse-live-nation-punished-concert-venues-for-using-competing-ticketers-despite-bar [https://perma.cc/8SW6-CXLY]. *See also* Mickelson QFR Responses, *supra* note 118, at 9 (radius clauses "limit[] the ability of artists to work with a different promoter in a geographic[] area").

[441] Trevor Lane, *Defining Unreasonable Radius Clauses for American Music Festivals*, 42 Seattle U. L. Rev. 1247, 1249 (2019).

[442] Katie Bain, *How the Music Industry Uses a Pervasive Secret Weapon To Keep Bands from Freely Touring*, LA Weekly (Apr. 18, 2017), https://www.laweekly.com/how-the-music-industry-uses-a-pervasive-secret-weapon-to-keep-bands-from-freely-touring/ [https://perma.cc/LZW9-H4YX]. *See also* Matt Pollock, *How One Insanely Popular Music Festival Is Keeping You From Seeing Your Favorite Bands*, Mic (June 16, 2014), https://www.mic.com/articles/91181/how-one-insanely-popular-music-festival-is-keeping-you-from-seeing-your-favorite-bands [https://perma.cc/AT9U-GAJ8] ("for every superstar who's dodged the clause, there's a midlevel band . . . whose summer tour schedule, mysteriously or not, skips over Detroit, St. Louis, Indianapolis,

Radius clauses also harm promoters, such as one who "lost hundreds of bookings" because of the clauses.[443] This harm is exacerbated by "consolidation," evidenced through Live Nation's acquisition of "myriad festival brands," which "makes it possible for talent buyers to offer artists multiple festival dates over the course of the touring season, effectively buying out talent and, in some cases, making it nearly impossible for other promoters to book them."[444] Smaller festivals have lamented the challenges they faced when trying to "book bigger artists and . . . bands," who "were all playing the bigger festivals" and were blocked from playing smaller festivals.[445]

A third behavior involves tying. In particular, the company has leveraged its control over the promotion market to gain exclusive venue operation contracts. In 2023, for example, Live Nation threatened a tie: if the city of Irvine, California wanted Live Nation artists to perform at a planned amphitheater, it was required to enter into an exclusive arrangement for the venue.[446] The city negotiated with the company, and in what one commenter called a "classic case of bait and switch," Live Nation requested revisions to the agreement approved by City Council that "would shift significantly increased costs . . . to the City" and 'introduce additional revenue streams for Live Nation."[447]

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and Milwaukee," which is "a huge blow" in an industry "increasingly dependent on live concerts as almost exclusive sources of revenue").

[443] Bain, *supra* note 442. *See id.* ("Radius clauses hurt all independent promoters").

[444] *Id. See also* Mickelson QFR Responses, *supra* note 118, at 10 ("radius clauses built into festival offers . . . limit[] the ability [of] artists to work with a different promoter in a geographical area").

[445] Bain, *supra* note 442.

[446] Doug Elliott, *Opinion*: *Funny Valentine? Say "No" to Live Nation Bait and Switch, "Yes" to a Smaller Amphitheater*, Irvine Watchdog (Feb. 12, 2023), https://irvinewatchdog.org/city-hall/city-council/opinion-funny-valentine-say-no-to-live-nation-bait-and-switch-yes-to-a-smaller-amphitheater/ [https://perma.cc/JEJ8-6SEB] (noting that Live Nation "demands an exclusive right to host all events with more than 5,000 attendance anywhere in the park").

[447] *Id.*; *see also Five Points Amphitheater is Gone*, Reddit, https://www.reddit.com/r/orangecounty/comments/17dn4cy/five_points_amphitheater_is_gone/ [https://perma.cc/W7DG-WV2E] (last visited Dec. 18, 2023) ("Live Nation continued to change the terms of the deal to get more and more of the revenue out of the new venue while the city had to cover more and more of the expenses. With every revision the deal was worse for the city and better for Live Nation."). For example, the company's changes would increase the city's construction costs; design costs; and furnishings, fittings, and equipment costs by $37 to $54 million; shift to the city liability for a possessory interest tax; and make the city liable for liquidated damages "if construction isn't timely completed." *Id. See also id.* ("The Council-approved deal provided for a $5 per ticket surcharge, with revenues to be split 50/50 between the

Live Nation indicated that the promotion of concerts was tied to its status as exclusive operator of the Irvine amphitheater. A city councilwoman said that Live Nation "suggested—behind closed doors—[that] they wouldn't come [and offer concerts] unless they controlled the venue."[448] Live Nation "absolutely discussed" this and said that "they simply won't throw acts our way."[449] The threats are reminiscent of the company's tying of promotion and ticketing, revealing coercion in a setting in which the company has power in the markets for both promotion and venues.[450]

A final type of conduct similarly extends the company's reach. A leading promoter has explained that Live Nation has "effectively eliminated the arena part" of the business by "[p]urchasing tours for their outdoor amphitheaters," "[l]everaging . . . outdoor amphitheater shows to procure indoor shows," "[l]everaging . . . summer festivals to procure indoor concerts," "[t]hreatening financial penalties . . . if artists wanted to work for [a rival promoter]," and "[p]aying a band 100% or more of the gross ticket sales."[451] To similar effect, one source noted industry experts' views that "Live Nation's squeeze on independent venues is getting tighter as the company rolls out its strategy to own or manage club-sized venues across the country."[452] Such behavior adds to the hurdles facing potential rival promoters.

This array of conduct, in combination with each other and with the collection of behavior discussed throughout the Article, has a cumulative effect. For example, ticketing rivals face an uphill climb as the vast majority of venues are out of reach because of exclusive deals, with many of the others subject to the tying of promotion and ticketing, and others subject to the criminal conduct discussed above.[453] Promoters are injured by radius clauses that operate as another form of exclusivity combined with the arena conduct described in the previous paragraph, and Live Nation's willingness to sustain losses in promotion that it makes up in ticketing.[454] Venues not affiliated with

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parties to cover maintenance costs. The surcharge was to be increased by 10 percent every three years; Live Nation now wants to drop those increases.").

[448] Noah Biesiada, *Irvine Kills Negotiations With Live Nation, Wants Amphitheater to Generate City Revenue*, Voice of OC (July 25, 2023), https://voiceofoc.org/2023/07/irvine-kills-negotiations-with-live-nation-wants-amphitheater-to-generate-city-revenue/ [https://perma.cc/XU2U-UTX2].

[449] *Id.*

[450] *See supra* Parts III.B. & III.C.

[451] Mickelson QFR Responses, *supra* note 118, at 10.

[452] The Capitol Forum, *supra* note 148, at 4.

[453] *See supra* notes 434–438 and accompanying text.

[454] *See supra* notes 145–159 and accompanying text.

Live Nation are harmed by conduct like what occurred in Irvine and also are forced to take Ticketmaster's ticketing services.

1. Anticompetitive Effects

As discussed throughout this Article, significant anticompetitive effects that harm the market as a whole have been suffered by consumers, artists, venues, and promoters. As shown above, consumers have suffered high fees and inferior quality, while (1) artists (particularly smaller and mid-tier ones) suffer from Live Nation's power, (2) venues not in exclusive contracts are required to take Ticketmaster's ticketing services, and (3) promoters work with fewer artists and are forced to use Ticketmaster.[455]

All of this evidence of market power has been entrenched and exacerbated by the conduct described in this Article. Exclusive dealing prevents rival ticketing companies from effectively competing with Ticketmaster by foreclosing the vast majority of U.S. venues and not enabling them to achieve the economies of scale needed to compete.[456] Tying promotion and ticketing forces venues that wish to book Live Nation artists to use Ticketmaster for ticketing.[457] Rival ticketing companies, again, are injured for reasons similar to those imposed by exclusive dealing. Deception leads to consumers suffering from misrepresentations like "bait and switch" tactics and a lack of notice on transferability that entrench Ticketmaster's monopoly power. And additional behavior considered as part of an overall course of conduct magnifies these effects: criminal misappropriation harms ticketing rivals; radius clauses injure promoters; and the tying of promotion to venues and leveraging of various markets to arenas harms other promoters and non-Ticketmaster-affiliated venues.

Harms are further revealed by considering potential advantages offered by other ticketing companies that would gain market share in a competitive marketplace. SeatGeek, for example, is preferred by customers, who give it a "Net Promoter Score" (a "customer loyalty metric that measures customers' willingness to return for another purchase as well as to make a recommendation to their family, friends, or colleagues"[458]) of 85, higher than Ticketmaster's

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[455] *See supra* Part IV.A.

[456] *See supra* Part VI.B.

[457] *See supra* Part VII.B.

[458] Net Promoter Score explained, Customer Guru, https://customer.guru/net-promoter-score [https://perma.cc/Y93F-LZP3] (last visited Nov. 11, 2023).

66.[459] One reason fans may prefer SeatGeek is that it has engaged in significant attempts "to eliminate bot traffic" by using "sophisticated algorithms and machine learning techniques to detect and block bots in real time," manually reviewing ticket purchases to "check[] for unusual behavior," and limiting ticket purchases.[460] Nor is the company alone in offering potential benefits over Ticketmaster's services.

StubHub offers a "FanProtect Guarantee" that guarantees that buyers "will get . . . tickets in time for the event," that the tickets "will be valid for entry," that they "will be the same as or comparable to those . . . ordered," and that "[i]f any of these things do not occur . . . we will find you comparable or better tickets to the event, or offer you a refund of what you paid for your purchase or credit of the same amount for use on a future purchase."[461] On the other side, the policy protects sellers by ensuring that they "will receive payment for all tickets you sell and deliver in accordance with our User Agreement and all policies," that "[i]n most cases, buyers or prospective buyers are not permitted to contact you," and that "[y]ou can adjust your ticket prices any time before they sell."[462]

Similarly, SeatGeek offers a Buyer Guarantee that "works to ensure that . . . [y]our tickets will be delivered in time for the event; . . . [y]our tickets will provide valid entry to the event; . . . [t]he tickets you receive will be the same as those you ordered; and . . . [i]f any of these things do not occur, we will work with you on a case-by-case basis to resolve any verified issue(s) covered by this Buyer Guarantee, by providing you with comparable or better tickets to the event, a refund, or, subject to applicable law, a credit."[463] SeatGeek also

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[459] SeatGeek.com Net Promoter Score 2023 Benchmarks, Customer Guru, https://netpromoterscore.guru/seatgeek-com [https://perma.cc/6BXT-7TYW] (last visited Nov. 11, 2023); Ticketmaster.IE Net Promoter Score 2023 Benchmarks, Customer Guru, https://netpromoterscore.guru/ticketmaster-ie [https://perma.cc/3X3J-US74] (last visited Nov. 11, 2023). *See also* Groetzinger testimony, *supra* note 102, at 2–3 (noting that SeatGeek has the "highest [score] of any major ticketing provider").

[460] *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 205 (2023) (responses of Jack Groetzinger, CEO, SeatGeek, to Questions for the Record), https://www.congress.gov/event/118th-congress/senate-event/333501/text?s=1&r=92 [https://perma.cc/8GB5-9BN3].

[461] FanProtect Guarantee, StubHub, https://www.stubhub.com/legal/?section=fp [https://perma.cc/W8EE-CDEE] (last visited Nov. 30, 2023).

[462] *Id.*

[463] *Buyer Guarantee*, SeatGeek, https://seatgeek.com/buyer-guarantee [https://perma.cc/QMB5-XB7E] (last updated Mar. 9, 2023). *See also* N.Y. Report,

protects sellers by making clear that it will "remit to [the] Seller" the appropriate payment after receiving it from the buyer.[464]

More generally, the head of one ticketing industry association testified that independent ticketing companies "have multiple platforms" that they "market [their] tickets from," in contrast to Ticketmaster, which "only sells exclusively."[465] As a result, a performer "would have a great benefit to selling their tickets through [other] exchanges," which could "give[] it more visibility" and offer "lower fees."[466] Similarly, another company stated that "100 percent of our sites allow consumers to see the total final cost of the ticket before they enter any personal identifiable information."[467]

Even more generally, Ticketmaster's power prevents innovation that could benefit the industry such as "greater transparency and analytics for artists" and "advancements in handling the problematic secondary ticketing market," such as "facilitating a safer and fairer system that keeps prices lower while allowing artists to benefit in the resale of their tickets."[468] One analyst explained that "Live Nation would be a shell of itself without Ticketmaster . . . because that's where they get all the data on consumers that powers the rest of their business."[469] Ticketmaster's combination of exclusive dealing and

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supra note 160, at 127, 153 (ticketing service Vivid Seats testified that it "definitely know[s] who [its] sellers are," that "if we don't know you, you can't sell tickets on our website," and that it has "a large antifraud team" and "carefully vet[s] our sellers before we put them on the site, . . . mak[ing] sure people are certain that they have what they need to get in").

[464] *Seller Terms*, SeatGeek, https://seatgeek.com/terms/seller [https://perma.cc/HW94-YYEV] (last updated Mar. 9, 2023).

[465] *Joint Public Hearing*, *supra* note 85, at 139.

[466] *Id.*

[467] *Id.* at 154. *See also* Letter from Amy Klobuchar, Sen. Minn., to Michael Rapino, CEO, Live Nation Entertainment, Inc. (Oct. 25, 2023), https://www.klobuchar.senate.gov/public/_cache/files/b/8/b874cd8f-b53b-4ed1-9440-92e35ea4588d/231BC5D578F16FCC56E141B11444646F.10.25.23-senator-klobuchar-letter-to-live-nation.pdf [https://perma.cc/HML9-ZAY7] (noting that "Live Nation-Ticketmaster . . . has not yet made the all-in ticket price—including fees—the default setting for its platform" and that "[f]or many events, including those for its own venues, it is still too difficult to see the all-in price before checkout").

[468] Lawrence testimony, *supra* note 168, at 3.

[469] Canal, *supra* note 149. The data can be expansive, including "[y]our personal phone number, your IP address, everything they can possibly do to track you, put things on your website, or on your browser, to track you." N.Y. hearing, *supra* note 85, at 133–34. *See also* Lawrence testimony, *supra* note 168, at 3 (musician lamented that "[w]hen fans buy tickets, all of their personal info goes exclusively to Ticketmaster, while none of it is shared with the artist").

tying of promotions deprives ticketing rivals of access to data that they would need to compete with the company.

A final vantage point on the harms is provided by the United Kingdom's English Premier League, an example of a competitive market. The venues that host these teams "do not rely on concerts for revenue" and thus "do not rely on Live Nation."[470] As a result, venues "choose a ticketing platform based on the merits of the technology," which would appear to have played a role in Ticketmaster providing ticketing for "only twenty percent" of the teams.[471]

2. Procompetitive Justifications

Once a plaintiff demonstrates anticompetitive effects, the burden shifts to the defendant to offer a procompetitive justification. The company could raise two primary justifications: (1) tying promotion and ticketing to enhance quality and (2) addressing free riding through exclusive contracts.[472]

Live Nation Entertainment's tying of promotion and ticketing would not implicate most of the justifications typically advanced for such arrangements such as: (1) protecting product quality (for example, where a company's product "works well only with particular supplies"); (2) "reduc[ing] costs or rais[ing] value"; (3) "increasing price competition through indirect or selective price cuts"; and (4) bringing "a guaranteed volume of patronage in the tied market that might aid its entry into that market."[473]

Considered expansively, the quality justification could be relevant. Live Nation Entertainment could claim that it requires its promoted concerts to use Ticketmaster ticketing because of the potential quality harms from using rivals. As discussed above, the company has explained that it has "expended significant capital and other resources to protect against and remedy . . . potential security breaches, incidents and their consequences" and "spend[s] an inordinate amount of time and money defending our site against bots; working with third parties, building our own software, using our new smart-key platform, and having teams in real-time at every on-sale, trying to identify bot traffic and defend against it."[474]

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[470] Groetzinger testimony, *supra* note 102, at 10.

[471] *Id.*

[472] The company likely would take issue with conduct being labeled deceptive as opposed to offering a justification for the behavior. It also would likely not admit to illegally accessing rivals' computers. *See supra* notes 434–438 and accompanying text.

[473] IX Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶1703g, at 54–56 (4th ed. 2018).

[474] *See supra* notes 206–207 and accompanying text*; see generally supra* Part V.

For a justification for exclusive dealing, the company could claim that exclusive contracts are needed to recoup investments in ticketing hardware and software and that venues prefer the contracts.[475]

These justifications are likely to be rebutted. For starters, rivals like StubHub and SeatGeek have implemented policies that reflect their reliability.[476] StubHub, for example, offers guarantees that buyers will obtain valid tickets and sellers will receive payment.[477]

More generally, for tying and any other behavior that relies on a defense based on security or quality, Ticketmaster's two-faced treatment of secondary ticketing reveals its lack of seriousness.[478] While it claims to be focused on the issues of rooting out bots and improving quality, its actions tell another story. In particular, undercover reporting revealed how the company has refused to take action against blatant violations of its policies on ticket limits.[479] Journalists found out that "despite the existence of a Ticketmaster 'buyer abuse' division that looks for suspicious online activity in ticket sales," the company "turns a blind eye to its TradeDesk users who grab lots of tickets," with a sales representative conceding that some brokers have "literally a couple of hundred accounts" on TradeDesk and it's "not something that we look at or report."[480]

In addition, Ticketmaster provides *incentives* for large reselling activity. TradeDesk "brings an immediate 3 percent discount on Ticketmaster's usual 7 per cent selling fee on a resale ticket."[481] Users who "hit $500,000 in sales" get "a percentage point . . . shaved off their fees," and "[a]t $1 million, another percentage point falls off."[482] An incentive scheme that promotes bots and higher sales in the secondary market belies the claim that Ticketmaster can offer a legitimate procompetitive justification based on addressing fraud and bots.

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[475] *See supra* note 309 and accompanying text (stating that venues "prefer long term exclusive contracts" because of the compatibility of computers, not needing to change retail outlets, "simplif[ying] . . . bookkeeping and reduc[ing] the cost of renegotiating the contracts every few years," fixing costs "for a longer, more predictable future," and "obtain[ing] cash up-front from the ticket servicer . . . at the cost of a long term contract, so that the ticket servicer may amortize the cost with the expected income over the years of the contract").

[476] *See supra* notes 458–467 and accompanying text.

[477] *See supra* note 461 and accompanying text.

[478] *See supra* Part V. Quality justifications also would not support a requirement to enter into exclusive venue contracts to obtain Live Nation's promoted acts. *See supra* notes 446–450 and accompanying text.

[479] *See supra* Part V.

[480] Wang, *supra* note 224. *See supra* note 225 and accompanying text.

[481] Cribb & Oved, *Undercover Ticket Scalpers*, *supra* note 202.

[482] *Id.*

The response to exclusive contracts, again, is that the typical explanations based on preventing free riding and encouraging dealer promotion do not apply here. As discussed above,[483] the nature of the product distinguishes this case from the typical free-riding scenario involving luxury, new, or complex products offered directly to consumers.[484] In addition, Ticketmaster is not spending money to promote its ticketing product, with rivals piggybacking on those efforts. Nor is it likely that ticketing rivals could offer tickets at lower cost because they do not pay to promote the event. Again, ticketing fees have little connection with the services provided.[485] In fact, the company uses a loss-leader strategy that, as discussed above, involves *undercharging* in the promotion market, which is not consistent with needing to exploit investments in that market.[486] Finally, it is not likely that a venue would steer customers to a ticketer other than Ticketmaster to get a bigger revenue share. Venues initially flocked to—and have stayed with—Ticketmaster because it increased the fees, shared them with the venues, and took "the bruises from people who don't like the process."[487]

For similar reasons, justifications based on dealer promotion are likely to be rebutted. And as discussed above, the fact that venues benefit from exclusive arrangements is not dispositive.[488]

In short, a plaintiff is likely to rebut any procompetitive justifications that the company offers.

3. Less Restrictive Alternatives

A court likely would not accept Live Nation Entertainment's justifications for tying and exclusive dealing. But even if it did, alternatives could achieve the company's objectives in a manner less restrictive of competition.

If the company claims that it needs to engage in tying of promotion to ticketing to ensure safety, there is an obvious less restrictive alternative: enforcing its rules. The smoking-gun evidence showed that it did not enforce

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[483] *See supra* notes 290–297 and accompanying text.

[484] *See supra* notes 293–294 and accompanying text.

[485] *See supra* note 295 and accompanying text.

[486] *See supra* note 296 and accompanying text.

[487] *See supra* note 297 and accompanying text. For a discussion of issues relating to hardware and software, see *supra* notes 298–306 and accompanying text.

[488] *See supra* note 313 and accompanying text. *See also* Melamed, *supra* note 262, at 405 (explaining that manufacturer with market power can "share supracompetitive profits with the distributor" and then "retain the exclusive arrangement regardless of the duration of its contract" or "without entering into any cognizable agreement at all").

rules on: the number of tickets allowed, not using multiple accounts to avoid ticket limits, not using automated computer programs, requesting no more than a certain number of pages within a two-hour period, and not refreshing a browser too quickly.[489] Simply enforcing these rules offers an alternative that is less restrictive than tying activity that harms ticketing rivals and entrenches the company's monopoly power. At the same time, the rules target automated bots that "crowd out human purchasers,"[490] thereby promoting objectives related to safety and quality.[491]

For exclusive dealing, given the nature of the product, justifications related to free riding are not central.[492] But even if the company sought to protect investments in its ticketing hardware or software, it could do so by protecting it with intellectual property—in particular, patents or copyrights—that would prevent rivals from using them.[493] Even the exclusive dealing contracts could be shortened significantly below the current five-to-ten-year periods to recoup any investments.[494]

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[489] *See supra* notes 209–233 and accompanying text.

[490] *See supra* notes 198–199 and accompanying text.

[491] Another potential less restrictive alternative is to allow other ticketing companies to provide their services for Live Nation concerts (as long as this is warranted by their reliability). As shown above, ticketing rivals like StubHub and SeatGeek have implemented measures to promote safety and quality. *See supra* notes 460–464 and accompanying text. Allowing such rivals to compete would foster competition in the ticketing market while providing venues with more choices.

[492] *See supra* notes 295–297 and accompanying text.

[493] Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, 34 Berkeley Tech. L.J. 219, 261 (2019); Copyright Registration of Computer Programs (Circular 61), U.S. Copyright Office, https://www.copyright.gov/circs/circ61.pdf [https://perma.cc/X3D3-TJ5L]; Hardware Technology Intellectual Property Law, Stanton IP Law Firm, P.A., https://stantoniplaw.com/industries/hardware-technology/ [https://perma.cc/8P8N-BPQR] (last visited Dec. 19, 2023).

[494] *See supra* note 306 and accompanying text (citing J.P. Morgan report that company's renewal rate over 100% "is explained by realizing that venue owners' desire to sign with Ticketmaster is less about hardware or software, and more about filling seats with Live Nation produced concerts") (emphasis omitted); *see also* Iris Dimmick, *San Antonio City Council Awards Contract to Ticketmaster over Tobin Center*, San Antonio Report (Sept. 19, 2019), https://sanantonioreport.org/san-antonio-city-council-awards-contract-to-ticketmaster-over-tobin-center/ [https://perma.cc/52YV-HLSZ] (in bidding over venues in San Antonio, Ticketmaster pledged to annually contribute $50,000 to a fund to support local arts and entertainment, in addition to a $250,000 signing bonus and one-time payments totaling $40,000 in a deal that was expected to bring in $2 million annually for the city).

4. Balancing

A court likely would not credit the company's justifications or find that there were no less restrictive alternatives. But if it did, the analysis would proceed to a balancing of anticompetitive and procompetitive effects. At this stage, Live Nation Entertainment most likely would lose.

As discussed throughout the Article, the significant anticompetitive effects range throughout the entire ecosystem, preventing ticketing companies from constraining the company's monopoly power, burdening fans with high fees and inferior quality, and harming artists, venues, and promoters by limiting choices and blocking markets. Again, the justification side of the ledger would not be robust. Any balancing of the two effects likely would lead to the anticompetitive effects emerging paramount.[495]

X. Remedy

The typical remedy for an antitrust violation is to stop the offending conduct or pay damages.[496] In this case, an injunction would mean ending the exclusive deals, not tying promotion to ticketing, not engaging in deceptive conduct, and not employing the other behavior that makes up an overall course of conduct.

This is not the typical case, however. We have evidence on a silver platter that the company cannot be trusted to follow a consent decree. For that is exactly what Live Nation and Ticketmaster did after entering into the 2010 agreement. As the DOJ stated: the merging companies "failed to live up to their end of the bargain" by "repeatedly condition[ing] and threaten[ing] to

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[495] Applying the analysis of unnecessarily harming rivals would support the results from balancing as rivals suffer significant harm that is not necessary to attain Live Nation Entertainment's objectives. *See supra* notes 317–319 & 391–392, and accompanying text. A similar analysis would apply to the conduct hindering competition "in an unnecessarily restrictive way." *See supra* note 433 and accompanying text.

[496] *See, e.g.*, Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. Corp. L. 65, 88 (2019) (explaining that when anticompetitive provisions "are identified and proven to be anticompetitive, the appropriate remedy for them would most likely be an injunction or treble damages in the case of private plaintiffs"). For a more comprehensive analysis of remedies, see A. Douglas Melamed, *Afterword: The Purposes of Antitrust Remedies*, 76 Antitrust L.J. 359, 359–68 (2009) (noting four purposes: (1) "[c]ompensation of victims of unlawful conduct"; (2) [p]unishment and deterrence of unlawful conduct"; (3) [t]erminating and preventing the recurrence of unlawful conduct"; and (4) "[r]estoring competitive conditions to the market harmed by the unlawful conduct").

condition Live Nation's provision of live concerts on a venue's purchase of Ticketmaster ticketing services" and "retaliat[ing] against venues that opted to use competing ticketing services—all in violation of the plain language of the decree."[497] In fact, the companies' "well-earned reputation for threatening behavior and retaliation . . . has so permeated the industry that venues are afraid to leave Ticketmaster lest they risk losing Live Nation concerts, hindering effective competition for primary ticketing services."[498]

The combination of promotion and ticketing is at the core of Live Nation Entertainment's anticompetitive behavior. The power the company amasses from having control of popular artists provides it with an asset that venues find indispensable. And any promises it makes not to retaliate against or threaten venues that do not use its ticketing services are not worth the paper they are written on. Even if the company could be trusted on the other conduct—exclusive dealing and not engaging in deception—its inability to follow the dictates of the agreement do not give comfort to those advocating for a more limited behavioral remedy. In fact, because it is difficult for a court to anticipate all of the ways in which the company could evade a behavioral remedy, a structural remedy offers advantages.

A structural remedy also is more promising in addressing the core harms threatened by the company. Divesting Ticketmaster would foster competition in the ticketing market and allow rivals to achieve the scale needed to challenge the company.[499] It would break the company's loss-leader model that prevents other promoters from effectively competing with Live Nation.[500] And it would not threaten the loss of any meaningful efficiencies.[501]

Divestiture also would promise to create competition in multiple markets. The vertically integrated Live Nation Entertainment has little interest in

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[497] *See supra* notes 359–360 and accompanying text.

[498] *See supra* note 361 and accompanying text. This evidence offers an example of the hazards of behavioral remedies. As John Kwoka & Diana Moss have explained: "The common feature of behavioral remedies is that they are in effect attempts to require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives," and "allowing the merger and then requiring the merged firm to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve." John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, at 4–5, Nov. 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959588 [https://perma.cc/EQK4-ULCT].

[499] This would be even more effective if action were taken to address the exclusive contracts with venues.

[500] *See supra* notes 145–159 and accompanying text.

[501] *See supra* Part IX.B.2.

allowing rivals at any level to compete, as this would threaten to reduce its profits. As Jonathan Baker has explained, "[a] dominant firm that sells complementary products can take customers away from an unintegrated rival, thereby reducing the rival's scale of operations and so raising its costs."[502]

Timothy Bresnahan and Shane Greenstein offer an example of the benefits of a decentralized structure in the computer industry, noting that "[s]hifts in [a] dominant platform" are rare and tend to arise in "situations of divided technical leadership" where "sellers of . . . various components" engage in "vertical competition for control of a platform."[503] Analyzing personal computer platforms in the 1980s, the authors explain that IBM, the "leading seller of microcomputer hardware," focused on "incremental technical progress."[504] But the company's loss of its dominant position, together with the rise of Microsoft's operating system, resulted in a division of technical leadership that resulted in rapid shifts in the platform.[505] A structural remedy promises similar benefits in the case of Live Nation Entertainment, harnessing competition in multiple markets to foster quality improvements and enhanced innovation.

Breaking up a company for a monopolization violation is rare.[506] Standard Oil in 1911, for example, controlled more than 90 percent of U.S. oil-related assets and its status as a holding company "made it easy for enforcers to break . . . up into subsidiaries."[507] And AT&T in 1982 "voluntarily entered into the settlement that divided it up and helped the government to determine how the breakup should occur."[508]

The typical challenge with breaking up a merged company is "unscrambl[ing] the eggs," in other words, separating the previously distinct companies after they have merged. Breakups in the monopolization setting are even harder, as it is unclear in the typical case where the lines of division

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[502] Jonathan B. Baker, *Exclusion As A Core Competition Concern*, 78 Antitrust L.J. 527, 540 (2013).

[503] Timothy F. Bresnahan & Shane Greenstein, *Technological Competition and the Structure of the Computer Industry*, 47 J. Indus. Econ. 1, 23 (1999).

[504] *Id.* at 26.

[505] *Id.* at 27–28.

[506] *See* Matthew Lane, *The Great Antitrust Breakup: Often Threatened, Rarely Executed*, DisCo (Mar. 13, 2018), https://www.project-disco.org/competition/031318-the-great-antitrust-breakup-often-threatened-rarely-executed/ [https://perma.cc/TDE4-YQ4W] (noting that it has only happened three times in non-merger cases).

[507] *Id.*

[508] *Id.* As Matthew Lane explains, the third case, *United States v. United Shoe Machinery*, 391 U.S. 244 (1968), "was an unusual case where the company was forced to sell off assets after a court-ordered conduct remedy failed." *Id.*

in a monopolization case lie.[509] In a case not involving a merger, "there are rarely clear lines between business units that allow an enforcer to break off a fully functioning company from the larger whole."[510]

In this case, however, none of this presents a stumbling block. As is evident from its most recent quarterly results, the company divides itself into various business lines: Live Nation Concerts, Venue Nation, Ticketmaster, and Live Nation Sponsorship.[511] Ticketmaster, in addition, is organizationally separate: a subsidiary of Live Nation Entertainment.[512] Observers have noted that Live Nation "appears to have kept Ticketmaster's operations mostly separate, with differing focuses on ticketing and venue management."[513] As one commentator explained: "They weren't direct competitors when DOJ approved the merger, and they're less closely tied to each other now then if they'd merged supply chains and workforces."[514] The business lines therefore can readily be separated.

If it were to bring a lawsuit, the DOJ would be justified in seeking a remedy that would split apart Ticketmaster from Live Nation.[515] Such a remedy would directly address the failing of the 2010 decree, which was not successful in stopping the tying of the promotion and the ticketing markets.[516] Because (1) the merger enabled anticompetitive conduct, (2) the parties have proven that they cannot be counted on to comply with behavioral restrictions, and (3) the company's post-remedy breaches have done significant

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[509] *Id.*

[510] *Id.*

[511] *Live Nation Entertainment Reports Third Quarter 2023 Results*, Live Nation Entertainment (Nov. 2, 2023), https://www.livenationentertainment.com/2023/11/live-nation-entertainment-reports-third-quarter-2023-results/ [https://perma.cc/C5JY-4QCA].

[512] Live Nation 10-K, *supra* note 19, at Exhibit 21.1, at 7.

[513] *Bad Blood: Swifties Start Wave of Ticketmaster Monopoly Scrutiny*, AELP (Nov. 18, 2022), https://www.economicliberties.us/media/bloomberg-law-bad-blood-swifties-start-wave-of-ticketmaster-monopoly-scrutiny/# [https://perma.cc/SWY4-FAYJ].

[514] *Id.*

[515] *Cf.* Mickelson QFR Responses, *supra* note 118, at 18 (promoter who testified before Congress states that Live Nation "should be forced to sell all of its venues (indoor and outdoor), divest themselves from Ticketmaster, stop managing artists, and cease block booking tours"). In addition, the remedy should prevent Live Nation from creating a new ticketing company.

[516] In the context of remedial theory, divestiture can be justified as necessary to prevent a recurrence of the anticompetitive conduct. In addition, it would restore competition in the market. *See* Melamed, *supra* note 496, at 362–64.

harm, undoing the merger is necessary to remove the company's ability to continue harming the market.

In addition to breaking up the company, a government plaintiff would be justified in pursuing additional remedies.[517] The most critical one would target the company's exclusive agreements with venues that deprive ticketing rivals of the ability to compete with Ticketmaster. An appropriate remedy would require the company to sell or divest ownership interest in venues, end the exclusive dealing arrangements, or both. Another would include injunctive relief against deceptive conduct. And the last would address behavior that is part of the overall course of conduct.

XI. Conclusion

Antitrust often is called upon to address complex issues. Has competition really been harmed? How should legitimate justifications be considered? Are there alternatives that would attain the defendant's objectives without imposing similar harm to competition?

This nuance is not present here. In fact, this is a straightforward antitrust case. The harms cannot be missed. Crashing websites. Ever-increasing unjustified fees. A range of deceptive conduct. Even the rare "smoking gun" evidence of Ticketmaster officials, on camera, conceding that they do not enforce the policies they so proudly trumpet.

All of this is buttressed by power throughout the industry. Live Nation is the largest promoter. Ticketmaster is the largest ticketer. Most of the large-scale venues are locked up for years.

Antitrust violations are typically met with a modest remedy. Antitrust tends not to skip over such remedies to impose extreme measures. But this is not the typical case. This is a case in which Live Nation and Ticketmaster agreed to not threaten tying promotion and ticketing in the 2010 consent decree. And they violated those obligations with flying colors. In fact, they did so in such an egregious manner that the decree was extended, which almost never happens.

Bringing another antitrust case but imposing similar behavioral remedies thus does not make sense. The company has proven that it will not follow the rules. As a result, breakup is the appropriate remedy. And because

[517] For a discussion of private plaintiffs' additional burden based on standing, see *supra* note 53 and accompanying text.

the company keeps its business lines separate, it would not be as hard as it usually is.

In the classic *Peanuts* cartoon, Lucy holds a football while Charlie Brown comes running up to kick it.[518] But every time he arrives at the ball, Lucy removes it, causing him to fly in the air.[519] Consumers, artists, venues, and promoters should not be forced to play the role of Charlie Brown while Live Nation Entertainment continues to yank away its promises.

Taylor Swift fans rightly were upset when Ticketmaster bungled the roll-out of tickets for her 2022 tour. We should all be upset. This Article highlights the strong antitrust case against the company and remedy that can fix this.

[518] *Football gag*, Peanuts Wiki, https://peanuts.fandom.com/wiki/Football_gag [https://perma.cc/68TH-G8CZ] (last visited Oct. 28, 2023).
[519] *Id.*

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Shapley Values—A Cautionary Tale

Doug Lichtman*

Abstract

The federal government requires certain music copyright holders to license their work to qualifying streaming services at government-set rates. Those rates are determined in adversarial hearings before an administrative entity called the Copyright Royalty Board (CRB). The CRB for many years made the necessary determinations by, among other things, studying evidence from analogous markets. For the past ten years, however, the CRB has relied in addition on a game-theoretic concept known as the Shapley Value, which was first proposed in 1953 by Nobel Prize winner Lloyd Shapley. Shapley's algorithm allocates economic surplus in instances where some number of distinct entities jointly produce a shared profit. The approach purports to achieve a "fair" division of that profit as between the relevant parties, accounting for each party's unique costs and each party's unique contributions.

This new point of emphasis has had jarring impact, with billions of dollars today changing hands under either Shapley-influenced government rates or private-party deals negotiated in their shadow. In this Article, I argue that the experts who convinced the CRB to adopt Shapley analysis got their economics wrong. Shapley analysis, it turns out, does not even purport to reflect baseline market outcomes that a regulator might then beneficially adjust. Nor does it offer any built-in levers by which regulators might quantify market power or measure other market imperfections. Most problematically, Shapley

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analysis is an unapologetically static framework that neglects both strategic play and long-run incentives—limitations that make it wholly inappropriate for copyright law, a set of rules fundamentally designed to inspire strategic responses and shape long-run decision-making.

Introduction

In the United States, an administrative agency called the Copyright Royalty Board (CRB) sets rates for various compulsory licenses. Under those licenses, qualified parties can pay a government-set fee and then use implicated work without obtaining direct permission from the relevant copyright holders. Some of the licenses allow cable television systems to retransmit, at regulated rates, copyrighted content originally aired on broadcast television.[1] Others authorize companies like Pandora and Spotify to stream copyrighted music on their technology platforms, again without the need for direct negotiation.[2] The CRB has traditionally used a range of tools to set prices for these obligatory licenses. For instance, the CRB's three Judges[3] have historically used simulations to identify plausible rates, and they have also used, as benchmarks, privately negotiated deals involving similar rights and similar parties.[4]

In 2006, the economist Michael Pelcovits submitted to the CRB an expert report urging that, in addition to those other approaches, the Judges should rely on a game-theoretic construct known as the Shapley value.[5] Named for the Nobel Prize winning economist Lloyd Shapley, the Shapley value was already at that time a well-regarded algorithm for allocating economic returns in instances where some number of distinct entities together

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[1] *See* 17 U.S.C. §§ 111, 119, 122.

[2] *See* 17 U.S.C. §§ 112, 114.

[3] I use the capitalized word "Judges" to refer to the three CRB judges, reserving the uncapitalized version for instances where I am referring to other judges, such as the judges who decided various cases I cite.

[4] *See, e.g.,* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13026, 13028 (Copyright Royalty Bd. Jan. 5, 2011) (considering a simulation proposed by a testifying economist); *id.* at 13031 (considering benchmark agreements involving "similar buyers and sellers" and "a similar set of rights").

[5] *See* Testimony of Michael Pelcovits, Adjustment of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, (Copyright Royalty Bd. Oct. 27, 2006) [hereinafter Pelcovits].

generate a shared profit or together incur a shared cost.[6] Pelcovits proposed that this approach be used by the CRB to set rates for a license relevant to satellite radio. "The Shapley solution," he argued, has "a strong normative claim to being the best and 'fairest'" mechanism by which "to calculate the division of economic surplus."[7] He described it as "a fair solution"[8] and promised that it can "represent results that would be observed in the marketplace."[9] The CRB ultimately disagreed, according Pelcovits' Shapley model "little weight" because, among other problems, Shapley analysis wrongly ignores each stakeholder's incentive to "make its decisions independently" and thereby "to maximize their own profits."[10]

Case closed? Hardly. Nine years later, the CRB needed to decide the proper allocation of roughly $1 million in fees that had been collected from various cable companies and was ready to be distributed to two implicated copyright owners. The Judges did not cite their own prior discussion of Shapley analysis. They did not cite the old Pelcovits report either. Instead, they issued a written decision where they explicitly and without explanation complained that the parties to the proceeding had "neither applied nor approximated" what they characterized as "the optimal measure . . . of relative value in a distribution proceeding": the Shapley value, the very construct that the CRB had unequivocally rejected just a few years prior.[11]

Message heard. That next year, University of Toronto economist Joshua Gans filed a report with the CRB, applying Shapley analysis in the context of a proceeding related to online music streaming.[12] Next came a report from

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[6] I discuss Shapley analysis at length *infra* Part II.

[7] Pelcovits, *supra* note 5, at 23–24. Pelcovits does not much defend this assertion, explaining only that the Shapley approach "does not give any particular player any bargaining advantage over the others, because it averages situations where each player is at a bargaining advantage and a bargaining disadvantage." *Id.* at 23. This comment refers to a very specific detail in how the model works, even though it sounds like a more sweeping claim. *See infra* note 48 and accompanying text.

[8] *Id.* at 22. For support here, Pelcovits writes that the Shapley solution is "the most widely used model for allocating benefits in this manner and is widely endorsed by economists" and then cites an entry in New Palgrave Dictionary of Economics. *Id.* at 22–23.

[9] *Id.* at 24.

[10] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4092 (Copyright Royalty Bd. Jan. 24, 2008).

[11] Distribution of 1998 and 1999 Cable Royalty Funds, 80 Fed. Reg. 13423, 13442 (Copyright Royalty Bd. Mar. 13, 2015) [hereinafter *Original Shapley Order*].

[12] Expert Report of Joshua Gans, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), (Copyright Royalty Bd. Oct. 31, 2016) [hereinafter *Gans 2016*].

Duke University economist Leslie Marx,[13] then the University of Canterbury's Richard Watt,[14] and then one from Princeton University's Robert Willig,[15] all applying Shapley analysis to compulsory licenses under the CRB's regulatory purview. The CRB, meanwhile, continued to endorse the approach. In rate decisions published in 2019 and 2023, for instance, the CRB explicitly relied on Shapley analysis to derive "reasonable rates and terms" for a specific license that governs the use of a song's words and notes.[16] And, in an intervening appellate case, the Judges defended their approach before the D.C. Circuit, convincing a unanimous appellate panel that this approach to pricing fell "well within the Board's discretion."[17]

But the CRB, the testifying economists, and the D.C. Circuit have it wrong. Shapley analysis is not remotely an appropriate framework by which to set rates for compulsory copyright licenses. The purpose of a compulsory license is to address some sort of market failure.[18] Perhaps transaction costs mean that private deals cannot be efficiently consummated without government intervention. Perhaps market power on the side of licensors threatens prices that are inefficiently high. Shapley analysis, however, helps with none of this. It does not purport to reflect baseline market outcomes from which

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[13] Written Direct Testimony of Leslie M. Marx, PhD, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), (Copyright Royalty Bd. Nov. 1, 2016) [hereinafter *Marx 2016*].

[14] Written Rebuttal Testimony of Richard Watt (PhD), Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), (Copyright Royalty Bd. Feb. 13, 2017) [hereinafter *Watt 2017*].

[15] Written Direct Testimony of Robert Willig, Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (Web V), (Copyright Royalty Bd. Sept. 23, 2019) [hereinafter *Willig 2019*].

[16] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1919 (Copyright Royalty Bd. Feb. 5, 2019) [hereinafter *Phono III Order*] (defining the scope of the proceeding); Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 88 Fed. Reg. 54406, 54406 (Copyright Royalty Bd. Aug. 10, 2023) [hereinafter *Phono III Remand*] (same).

[17] Johnson v. Copyright Royalty Board, 969 F.3d 363, 385 (D.C. Cir. 2020).

[18] *See*, among many others, Stanley M. Besen et al., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & Econ. 67 (1978) (explaining how compulsory licensing addresses various market failures); Ralph Oman, *The Compulsory License Redux: Will It Survive in a Changing Marketplace?*, 5 Cardozo Arts & Ent. L. Rev. 37 (1986) (same); Robert P. Merges, *Comment, Of Property Rules, Coase, and Intellectual Property*, 94 Colum. L. Rev. 2655, 2661–62 (1994) (same).

a regulator might then adjust. It does not offer any built-in levers by which regulators might quantify market power or account for other market imperfections. Moreover, even if compulsory licenses are meant to serve some other policy goal in this context—not merely mitigating the harms associated with transaction costs and market power, but affirmatively implementing some sui generis balancing of interests as between singers, songwriters, performers, producers, record labels, music publishers, streaming services, technology companies, and listeners[19]—there, too, Shapley analysis has no purchase, among other reasons because Shapley is a static framework that neglects both strategic play and long-run incentives. That makes it an unworkable mismatch for copyright law, a set of rules fundamentally designed to inspire strategic responses, create long-run incentives, and ultimately encourage the creation, distribution, and meaningful consumption of eligible work.[20]

Shapley analysis, in short, should never have been embraced by the CRB. I write here to articulate the case against it.

My argument proceeds as follows. In the first section, I offer some necessary background on copyright law. Specifically, I explain the rights relevant

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[19] There are hints along these lines in the statute. For instance, before it was amended in 2018, section 801(b) required that the CRB set rates that were "reasonable" in light of four statutory objectives: "maximize the availability of creative works to the public"; "afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions"; "reflect the relative roles of the copyright owner and the copyright user in the product made available to the public"; and "minimize any disruptive impact on the structure of the industries involved." Those words might simply have been Congress's way of articulating what a well-functioning market would naturally achieve. But it is possible that Congress here meant to introduce policy considerations beyond those that would be addressed by conventional market forces. Similarly, while section 115 requires the CRB to set rates that represent what "a willing buyer and a willing seller" would negotiate in the marketplace, that statutory provision goes on to require that the CRB consider "whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works" and "the relative roles of the copyright owner and the compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk." Again, Congress here might simply be explaining what a market would naturally achieve if transaction costs were eliminated and market power was constrained. But it is also possible that Congress meant to suggest yet further policy interventions. For an argument that compulsory licenses are best understood as implementing a sui generis balancing of interests, *see* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 Stan. L. Rev. 915 (2020).

[20] *See infra* note 157 and accompanying text.

to music streaming, and I introduce the compulsory licenses that federal law makes available to streamers like Pandora, Spotify, iHeart, Amazon Music, and Apple Music. I focus this discussion on music streaming because, while the CRB has considered Shapley analysis in other contexts, to date the CRB has only applied Shapley analysis to streaming licenses. Next, I introduce Shapley analysis, sketching a numeric example, explaining the algorithm, and highlighting its admittedly appealing properties. As I explain, in appropriate settings, Shapley is a powerful mechanism by which to thoughtfully allocate both benefits and burdens.

My third section traces the adoption of Shapley analysis at the CRB. I start with the 2015 decision where the Judges first characterized it as the "optimal" framework and end with a June 2023 order that again endorsed the approach. I focus primarily on expert reports filed by various testifying economists, and I use them to document two critical realities: Shapley values have been held out as if they are reliable proxies for the rates that would obtain in a real-world competitive market; and Shapley analysis has likewise been explained as if it is a framework that can be used to reliably adjust for market power and account for other market imperfections. I disagree with these points, but the words and examples I highlight were all directly submitted to the CRB and thus surely influenced the Judges' perception of the Shapley approach.

The fourth section then makes my argument: that Shapley analysis is not descriptive of the real-world markets into which the CRB intervenes; that Shapley analysis does not offer any levers that regulators can use to reliably quantify market power or account for other market imperfections; that Shapley models are dangerously sensitive to the details of what turn out to be highly stylized, highly simplified inputs; and that Shapley analysis overall is a complete mismatch for copyright law regardless because Shapley analysis neglects both strategic play and long-run incentives, whereas copyright law is a set of rules designed to inspire strategic responses and shape long-run decision-making. In the fifth section, I briefly conclude.

I. The Licensing Landscape

Recorded music is protected by two types of copyrights.[21] The first, the "sound recording" copyright, applies to the output produced by singers,

[21] 17 U.S.C. §102(a) ("Works of authorship include . . . (2) musical works, including any accompanying words; … [and] (7) sound recordings").

musicians and other artists as they perform a musical work. Anything a listener ultimately hears can in theory be protected by the sound recording copyright. The second, the "musical work" copyright, applies to the underlying musical composition and thus protects the words, notes, and other non-auditory details that might be memorialized on physical sheet music. Typically, the rights to the musical work will initially vest in the songwriter, and the rights to the sound recording will initially vest in the performers. Because copyrights can be divided and transferred, however, a party that seeks to license a musical work and/or to license a sound recording often ends up needing permission from multiple intermediaries, each of whom might have authority to license some, but not all, of the necessary musical work and/or sound recording rights.[22]

While sound recording and musical work rights are intertwined in the sense that the use of a recorded song will often require permission from both the sound recording copyright holder and the musical work copyright holder, that relationship is not one-to-one. For instance, a songwriter can write a song, copyright the musical work, and then authorize a dozen performers to each record their own versions, thereby generating a dozen sound recording copyrights all associated with the same single musical work copyright. Similarly, a performer will sometimes record a musical work for which the copyright has expired, thereby creating a situation where the recorded performance is subject to only one copyright, namely the one that protects the sounds themselves.

Different licenses are then required for different uses. A radio station, for example, needs the right to publicly perform the musical work, but federal law does not obligate a radio station to acquire any license at all with respect to the sound recording, as long as the radio station has legitimate access to a CD, album, or other physical embodiment.[23] By contrast, a radio-like "non-interactive" streaming service—for example, a customized station offered by

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[22] *See, e.g.,* Dana A. Scherer, Cong. Rsch. Serv., R43984, Money for Something: Music Licensing in the 21st Century (2021) (explaining the typical business relationships and licensing patterns); The United States Copyright Office, *How Songwriters, Composers, and Performers Get Paid*, United States Copyright Office (Nov. 2020), https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf [https://perma.cc/W98J-9SVE] (also explaining the typical relationships and patterns).

[23] *Compare* 17 U.S.C. §106(4) (recognizing a general right to authorize public performances of musical work) *with* 17 U.S.C. §106(6) (recognizing for sound recordings a performance right only by means of "digital audio transmission").

Pandora[24]—needs a different pattern of permissions. Noninteractive streaming services are offerings where a listener can specify a song, an artist, a theme, or otherwise offer an indication as to their musical preferences, but then the technology picks which songs are actually played.[25] Providers of noninteractive streaming need three licenses: like a radio station, these streamers must license the right to publicly perform the musical work; unlike a radio station, they also need the right to publicly perform the sound recording and the right to make temporary "ephemeral" copies of the sound recording to facilitate streaming.[26] Interactive streaming services, meanwhile—Spotify, Amazon Music, Apple Music—allow listeners to pick specific songs on demand.[27] For those, federal law requires five types of permission: like noninteractive streamers, interactive streamers need permission to publicly perform the sound recording, to reproduce ephemeral copies of the sound recording, and to publicly perform the musical work; then, in addition, interactive streamers also need what insiders call the "mechanical license," which is functionally a right to reproduce and distribute musical work.[28]

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[24] *See* In re Pandora Media, Inc., 6 F.Supp.3d 317, 327 (S.D.N.Y. 2014) ("A Pandora customer creates a station by 'seeding' it with a song, artist, genre, or composer. That seed serves as a starting point to which Pandora then applies the information in its [proprietary] database to match that seed with other songs that Pandora's algorithms predict that the listener is likely to enjoy.").

[25] My definition in the text is a simplified version of the definition that actually applies when the Copyright Royalty Board is policing the relevant copyright rights. For the fuller articulation, see 17 U.S.C. §114(d)(2)(C).

[26] *See* Joseph Dimont, *Royalty Inequity: Why Music Streaming Services Should Switch to a Per-Subscriber Model*, 69 Hastings L.J. 675, 682 (2018) (explaining the obligation to pay musical work copyright holders for public performance); Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26316 (Copyright Royalty Bd. May 2, 2016) [hereinafter *Web IV Order*] (noninteractive webcasters must pay for both the performance of the sound recordings and for the ephemeral copies needed to transmit them).

[27] Again here I use a simplified definition. A more formal definition is codified at 17 U.S.C. §114(j)(7), but even that definition is incomplete, in that it fails to address countless critical details, including the proper characterization of a service that offers both interactive and noninteractive options, and the proper characterization of a service that does not allow user choice but does announce its playlists in advance. None of this matters for my analysis, however, and so, for my purposes, I adopt the colloquial, accessible definition offered in the text.

[28] *See* Daniel Abowd, *Something Old, Something New: Forecasting Willing Buyer/Willing Seller's Impact on Songwriter Royalties*, 31 Fordham Intell. Prop. Media & Ent. L.J. 574, 593 (2021) (discussing the required licenses); Brian T. Yeh, Cong. Rsch. Serv., RL33631, Copyright Licensing in Music Distribution,

There are policy, historical, and political explanations for all of these distinctions. By some accounts, for example, radio stations are not required to pay for sound recording rights because, even without a further payment, radio is thought to benefit singers, generating interest in their music that later translates into album sales and concert attendance.[29] Other accounts credit these inconsistencies to the sausage-making of politics, and to the challenges of balancing the public's interest in supporting creativity against its interest in promoting the development of new technologies.[30] For current purposes, the critical fact is only that a variety of rights must be licensed, and the details vary based on which delivery system is at issue.

The rates and terms for these various licenses are sometimes determined by way of unregulated marketplace negotiations. Spotify, for instance, has directly licensed sound recording rights from Sony Music Entertainment, Warner Music Group, and Universal Music Group, in deals that gave the rightsholders not only royalty payments but also equity interests in Spotify itself.[31] Often, however, rates and terms are either determined by government-defined rules or subject to specific types of governmental oversight. For example, the Copyright Royalty Board sets terms for several compulsory licenses, including a license that allows noninteractive streamers to perform copyrighted sound recordings,[32] a license that allows noninteractive streamers to reproduce copyrighted sound recordings,[33] and a license that

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Reproduction, and Public Performance Appendix A (2015) (listing the licenses); 17 U.S.C. §115 (creating a compulsory license that covers the reproduction and distribution of a nondramatic musical work in the context of interactive streaming).

[29] *See, e.g.*, Amanda M. Whorton, *The Complexities of Music Licensing and the Need for a Revised Legal Regime*, 52 Wake Forest L. Rev. 267, 272 (2017) ("Broadcasters have argued, and Congress has agreed, that the advertising and promotional value of airplay on broadcast radio far outweigh the revenue lost in royalties by the holders of the sound recording copyright.").

[30] *See*, among many others, Tim Wu, *Copyright's Communications Policy*, 103 Mich. L. Rev. 278 (2004) (discussing some of these explanations); Jessica Littman, Digital Copyright 56 (2006) (same).

[31] *See* Micah Singleton, *This was Sony Music's contract with Spotify*, The Verge (May 19, 2005) (discussing some of the financial terms of the license), https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract [https://perma.cc/DC7B-ASLQ]; Jem Aswad, *Warner Music Group Sells Its Entire Stake in Spotify*, Variety (Aug. 7, 2018) (reporting the then-current status of each firm's stake in Spotify), https://variety.com/2018/biz/news/warner-music-group-sells-entire-stake-in-spotify-1202897605/ [https://perma.cc/95YC-47S7].

[32] 17 U.S.C. § 114(d)(2).

[33] 17 U.S.C. § 112(e).

allows interactive streamers to reproduce and distribute copyrighted musical works.[34] Meanwhile, the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) are the two largest "performing rights organizations" in the United States, and, while they offer various licenses associated with musical works in the United States, both organizations are subject to antitrust consent decrees, negotiated with the Department of Justice, under which specific federal courts have the power to review and, under certain conditions affirmatively set, their licensing rates.[35]

These government-defined and government-influenced rates then influence more than just the specific transactions where they are invoked; they cast "shadows" over a wide variety of negotiations that are technically unregulated. Three distinct shadows are plausibly at play. First, government rates influence private deals that cover the same rights between the same parties, such as a consensual license that displaces a compulsory one and gives both licensor and licensee an outcome they perceive as advantageous as compared to the governmental default. Warner Music, for instance, struck a direct deal with iHeart Media covering rights that iHeart could have acquired by way of a compulsory license but offering an even lower rate in exchange for iHeart's commitment to favor Warner's artists in iHeart's programmed streams.[36] Second, government rates influence private deals that cover rights sufficiently similar to the regulated ones that either the licensor or the licensee believes that their private deal might later be used by the government as a benchmark for a related government license.[37] For instance, if a streamer believes that a consensual deal struck today will be used to justify higher compulsory rates tomorrow, the streamer might abandon the deal, or at least fight harder for a lower contractual number. Third, because government licenses are typically invoked in the context of more complicated transactions that involve both compulsory and unregulated licenses, the amount owed under the

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[34] 17 U.S.C. § 115.

[35] *See* Press Release, U.S. Dep't of Just. Office of Public Affairs, Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019) (discussing the consent decrees and explaining the 'rate court' provisions); Xiyin Tang, *Copyright's Techno-Pessimist Creep*, 90 Fordham L. Rev. 1151, 1160–64 (2021) (same).

[36] *See Web IV Order*, *supra* note 26, at 26331 (explaining that Warner "voluntarily agreed to rates below the applicable statutory rates" in order to incentivize iHeart to "steer" more plays to Warner artists). *But see id.* at 26329 (expressing skepticism that the then-existing rates "meaningfully affect[ed] the steered rates" in the agreement).

[37] *See, e.g.*, *id.* at 26330 ("The record is replete with evidence that the parties entered into various transactions with the knowledge, if not the intent, that such agreements could be used as evidentiary benchmarks in this proceeding.").

government default can be a constraint on each parties' reservation price with respect to those intertwined but unregulated fees.[38] Put simply, if a streamer is willing to pay up to $1 for the use of a particular song, and the relevant compulsory license already requires an investment of 60 cents, that leaves only 40 cents to offer toward other rights, regardless of whether those rights are explicitly capped at 40 cents or not.

All this plays out in many different venues; but, for the purposes of this Article, the most important forum is the CRB. CRB proceedings are litigation-like interactions where interested parties present evidence, sponsor testimony, and submit economic, policy, and legal arguments in favor of their preferred rates and terms. Proceedings can play out over the course of multiple years, and the resulting rates typically apply for five-year periods before being adjusted based on new evidence presented in new proceedings.[39] CRB decisions are subject to judicial review, but only to confirm that the Judges neither acted in ways that were arbitrary or capricious nor otherwise disobeyed binding procedural rules.[40]

Because of the large number of proceedings, industry insiders use shorthand to make clear which rights, and which years, are at issue in any given proceeding. Three of those labels are useful here: *Phono III* considered rates and terms for the mechanical license relevant to interactive streaming for the years 2018 to 2022;[41] *Phono IV* addressed those same rates but for years 2023

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[38] *See, e.g.*, *Phono III Remand, supra* note 16, at 54420 (considering whether an increase in the regulated rate applicable to musical works would be offset nearly dollar-for-dollar by a decrease in the unregulated sound recording royalty charged to the same party—the supposed "seesaw" effect).

[39] For more detailed introductions to the CRB, its founding, and its practices, *see* Paul Musser, *The Internet Radio Equality Act: A Needed Substantive Cure for Webcasting Royalty Standards and Congressional Bargaining Chip*, 8 Loyola Law & Tech Ann. 1, 18–21 (2008); Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 Fordham Intell. Prop. Media & Ent. L.J. 257, 283–84.

[40] This is the standard generally used when a court reviews a decision made by an administrative agency under the Administrative Procedure Act. *See* Johnson v. Copyright Royalty Board, 969 F.3d 363, 375 (D.C. Cir. 2020) (explaining that a CRB decision, like most other decisions from an administrative agency, can be set aside only if it is shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the facts relied upon by the agency have no basis in the record").

[41] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 81 Fed. Reg. 255, 255 (Copyright Royalty Bd. Jan. 5, 2016) ("The Copyright Royalty Judges announce commencement of a proceeding

to 2027;[42] and *Web V* addressed rates and terms for the ephemeral copying and public performance sound recording licenses applicable to noninteractive streaming from 2021 to 2025.[43] In this Article, I refer to those three proceedings using these shorthand monikers.

II. Shapley Values

In 1953, the mathematician and economist Lloyd Shapley proposed what has since become known as the Shapley value.[44] The proposal is in essence an algorithm for dividing economic returns in instances where some number of distinct entities together generate a shared profit or together incur a shared cost. It is said to achieve a "fair" allocation of that benefit or burden as between the relevant parties, specifically by accounting for each party's marginal contribution to the whole. Shapley would win the Nobel Prize in Economic Sciences in part for this work,[45] and over the decades his idea has been expanded and dissected in numerous academic papers, book chapters, and textbooks.[46]

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to determine reasonable rates and terms for making and distributing phonorecords for the period beginning January 1, 2018, and ending December 31, 2022.").

[42] *See* Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 86 Fed. Reg. 325, 325 (Copyright Royalty Bd. Jan. 5, 2021) ("The Copyright Royalty Judges announce commencement of a proceeding to determine reasonable rates and terms for making and distributing phonorecords for the period beginning January 1, 2023, and ending December 31, 2027.").

[43] *See* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (Web V), 84 Fed. Reg. 359, 359 (Copyright Royalty Bd. Jan. 24, 2019) ("The Copyright Royalty Judges (Judges) announce commencement of a proceeding to determine reasonable rates and terms for two statutory licenses permitting the digital performance of sound recordings over the internet and the making of ephemeral recordings to facilitate those performances for the period beginning January 1, 2021, and ending December 31, 2025.").

[44] Lloyd S. Shapley, *A Value for n-Person Games, in Contributions to the Theory of Games, reprinted in* The Shapley Value: Essays in Honor of Lloyd S. Shapley 31, 31–40 (Alvin E. Roth ed., 1988) [hereinafter *The Shapley Reprint*].

[45] *See* Barry Meier, *Lloyd S. Shapley, 92, Nobel Laureate and a Father of Game Theory, Is Dead*, The New York Times, March 14, 2016 (a warm remembrance honoring Professor Shapley, his work, and his Nobel Prize win).

[46] *See, e.g., The Shapley Reprint*, *supra* note 44; Edward Rosenthal, *The Complete Idiot's Guide to Game Theory* 161–74 (2011) (explaining the concept by way of simple examples); Howard Raiffa, *The Art and Science of Negotiation* 257–74 (1982) (explaining the concept through a more formal presentation); Martin J. Osborne &

Shapley's algorithm is typically expressed in mathematically sophisticated ways, but the concept is more accessibly introduced by way of a simple example. Imagine that three friends are leaving a restaurant to travel to their respective homes.[47] They can each take their own taxi, but, because their paths overlap, they decide to hire one taxi and share the cost. The most efficient, straight-line route is to drop Ann first, then Bob, then Chris, and the friends expect that the meter will show $30 when arriving at Ann's home, $44 when arriving at Bob's, and $54 when arriving at Chris's. The question for the friends is how to divide the total $54 fare among them, given their various partial overlaps.

One option would be to focus on the actual order in which the friends arrive at their respective homes. Under this approach, Ann would pay the initial $30 because that is the fare associated with her part of the trip. Bob would pay the next $14, which is the additional cost required to travel from Ann's house to Bob's. Chris would then pay the final $10, as he at that point is riding alone. This allocation has the virtue of being administratively simple, in that riders simply pay the residual amounts due whenever they exit the cab, but the allocation disproportionately favors Chris. After all, Chris literally enjoys a free ride for the entire shared portion of the trip; he contributes only to the final portion, a portion that exclusively benefits him anyway.

Consider, then, an alternative "arrival" sequence, such as Bob, then Chris, then Ann. Under this pattern, Bob would pay $44, which is the total cost for his part of the ride; Chris would pay $10 when he exits; and Ann this time would be the lucky one, because in this pattern the full fare is covered without her paying a dime. Note that the "arrival" concept here is conceptual. The taxi in this variation takes the same path it did in the prior one; only the payment obligations change based on the newly proposed theoretical order.

Shapley's algorithm balances these various scenarios by cataloging every possible permutation, calculating the resulting payment patterns, and

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Ariel Rubinstein, *A Course in Game Theory* 289–98 (1994) (explaining the concept through a full mathematical presentation); Michael Maschler et al., *Game Theory: Second Edition* 796–822 (2013) (same); Roger B. Myerson, *Game Theory: Analysis of Conflict* 417–77 (1991) (same).

[47] My example here is based on an example from Rosenthal, *supra* note 46. I changed the numbers so as to avoid decimals, but I otherwise followed his lead in terms of using a shared taxi ride to demonstrate the workings of Shapley's model. I am apparently not the only one to think well of this particular example. Indeed, as of this writing, the Wikipedia entry for "Shapley value" includes a link to a YouTube video entitled "Calculating a Taxi Fare using the Shapley Value." *See* https://en.wikipedia.org/wiki/Shapley_value [https://perma.cc/V6S5-52XJ] (last visited Sept. 4, 2023).

ultimately averaging the payments to determine each person's "fair" share.[48] In this example, there are six possible sequences to consider: using first initials, ABC, ACB, BAC, BCA, CAB, and CBA. Those options, the fares, and the resulting averages are shown in the table. The upshot is that, out of the total $54 owed, Shapley would have Ann pay $10, Bob $17 and Chris $27. And, as promised, that result *does* align with an intuitively "fair" outcome. The first leg of the trip benefits all three riders, so they each pay one third of the $30 cost. The second leg benefits just Bob and Chris, so they in addition pick up half of that next $14. The final leg benefits only Chris and so Chris pays the additional $10 himself. Ann ends up paying a total of $10, Bob a total of $10 + $7 or $17, and Chris $10 + $7 + $10, or $27.

Conceptual Payment Order	Amount Paid A	B	C
A, then B, then C	30	14	10
A, then C, then B	30	0	24
B, then A, then C	0	44	10
B, then C, then A	0	44	10
C, then A, then B	0	0	54
C, then B, then A	0	0	54
Averages:	10	17	27

Again, Shapley's paper introduced all of this more formally, and with none of the public policy overlay. He defined his model mathematically, and, instead of offering a concrete example like individual riders sharing portions of a journey, he articulated the formation of abstract "coalitions" where "players" team up to generate unspecified economic returns.[49] As to the policy overtones, Shapley in this paper did not articulate any specific notion of fair play nor did he champion any specific applications for the algorithm. Instead, perhaps because he was writing at a time when game theory was still

[48] This process of averaging the permutations is what the economist Michael Pelcovits was referring to when he asserted that the Shapley approach "does not give any particular player any bargaining advantage over the others, because it averages situations where each player is at a bargaining advantage and a bargaining disadvantage." Pelcovits, *supra* note 5, at 23.

[49] *The Shapley Reprint*, *supra* note 44, at 32.

a relatively new field of inquiry, his focus was on the nuts and bolts of the modeling. Indeed, the bulk of his paper was invested in proving certain axioms about his approach, including that the sum of the payments add up to no more, and no less, than the actual total (confusingly, he called this there-is-no-waste property "efficiency"[50]) and that his approach yields consistent results if, instead of considering the full interaction in the context of a single model, a modeler were to break the interaction into smaller subgames, analyze those, and then combine the payoffs.[51]

The next year, Shapley did publish a co-authored paper applying his eponymous construct to a real-world situation, specifically using it to measure the influence that various voting systems accord to each marginal voter.[52] Interestingly, in that paper, Shapley very explicitly warns that his model does "not take into account any of the sociological or political superstructure that almost invariably exists," is "not intended to be a representation of present day 'reality,'" and suffers "many other practical difficulties" that might limit its explanatory power.[53]

III. Shapley Values at the CRB

In 2015, the Copyright Royalty Board took the first step in what would become a critical change to the Board's decision-making processes. At issue was the final distribution of monies that had been deposited by cable system operators as legally required payment for the right to retransmit certain television programs that had already been broadcast on regular, over-the-air television. The CRB was responsible for distributing this money, and, although the Judges had already distributed approximately $127 million to relevant parties, a residual $1 million remained to be allocated as between two final copyright claimants.[54] The controlling statute did not dictate any particular standard for rendering this allocation. The Judges, however, had previously committed to distribute funds according to the "relative marketplace value"

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[50] *Id.* at 41 ("The second axiom ('efficiency') states that the value represents a distribution of the full yield of the game.").

[51] *See id.* (explaining the "law of aggregation").

[52] *See* Lloyd S. Shapley & Martin Shubik, *A method for evaluating the distribution of power in a committee system*, 48 American Political Science 787, 787–92 (1954), *reprinted in The Shapley Reprint*, *supra* note 44, at 41–48.

[53] *Id.* at 46.

[54] *Original Shapley Order*, *supra* note 11, at 13423 n.2.

of the respective claimants' programs, consistent with the "hypothetical market that would exist but for the compulsory license regime."[55]

The Judges focused their analysis on transaction costs. Indeed, as the Judges explained, the motivation for government regulation in this particular instance was the worry that "prohibitively high transaction costs" would be incurred were cable providers forced to negotiate directly with every relevant copyright holder.[56] The Judges thus set out to imagine a hypothetical friction-free transaction between "a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts."[57]

This could have led to very traditional types of economic analysis. The Judges could have considered evidence from analogous markets, for instance, or they could have relied on simulations, all the while asking conventional questions about marginal cost and competitive entry.[58] But the Judges instead turned to Shapley analysis. Their final written determination included a section entitled "The Optimal Economic Approach to Determining Relative Market Value," and, in it, they cited Shapley's foundational paper and explained the basic workings of his pioneering approach.[59] "The Shapley value gives each player his average marginal contribution to the players that precede him," wrote the Judges, "where averages are taken with respect to all potential orders of the players."[60] The Judges even offered a simple three-party example, with one player representing the first copyright claimant, one representing the second copyright claimant, and one representing a generic cable operator. The decision as published in the Federal Register included a chart showing the six conceptual permutations and some sample numeric calculations.[61]

The modeling was flawless. It cited and accurately reflected Shapley's original work. It cited and accurately reflected an academic paper from 2010 by University of Canterbury Professor Richard Watt that had championed Shapley analysis as a "way in which the surplus that is generated by the music

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[55] *Id.* at 13428 (emphasis removed).

[56] *Id.*

[57] *Id.*

[58] To be fair, the Judges might well have preferred to use these conventional approaches, had the parties offered the requisite evidence. *See id.* at 13428 n.22 (complaining that "the parties to this proceeding did not proffer evidence of any simulations" and "did not provide evidence or testimony from sellers/licensors and buyers/licensees in 'analogous' markets").

[59] *Id.* at 13429.

[60] *Id.* (internal quotations omitted).

[61] *Id.* at 13430.

radio industry can be shared, in a fair and equitable manner, between the broadcasters and the suppliers of music content."[62] But the text that followed characterized the approach in ways that seem impossible to defend. Quoting from a paper by economists Sergiu Hart and Andreu Mas-Colell, the Judges asserted that "Shapley valuations constitute the unique efficient solution, because they value each player's direct marginal contribution to a grand coalition."[63] That quote is literally correct, but Hart and Mas-Colell had used the word "efficient" in the same way that Shapley had, not meaning that the algorithm achieves ideal productivity given available resources, but instead meaning that the algorithm allocates all the available money.[64] A few paragraphs later, the Judges went further, describing Shapley analysis as "the optimal theoretical manner" by which to "establish . . . relative marketplace values."[65] The Judges offered no explanation for this claim, nor did they provide supportive citations to the academic literature beyond their citations to Shapley's original work, Watt's 2010 paper, and the possibly mischaracterized Hart/Mas-Colell piece. Missing, too, was any citation to or discussion of the CRB's own written decision from seven years earlier, where the Judges had rejected Shapley analysis in another context.[66] And there they stopped, because the parties to this particular proceeding had not themselves applied Shapley analysis to the facts at hand and thus had not submitted any of the necessary evidence or testimony. After considering "whether they could decline to make any distribution determination in light of the imperfections of the parties' evidence,"[67] the Judges begrudgingly allocated the disputed $1 million using "viewership" as a proxy for relative program value.[68] But the CRB's message was clear, and stakeholders immediately answered the call.

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[62] Richard Watt, *Fair Copyright Remuneration: The Case of Music Radio*, 7 Rev. of Econ. Rsch. on Copyright Issues 21, 35 (2010).

[63] *Original Shapley Order*, *supra* note 11, at 13430 (internal punctuation omitted).

[64] *See* Sergiu Hart & Andreu Mas-Colell, *The Potential of the Shapley Value*, *in* The Shapley Value: Essays in Honor of Lloyd S. Shapley, *supra* note 46, at 127 (explaining that "the resulting payoff vector [would] be 'efficient' (i.e., that the payoffs add up to the worth of the grand coalition)").

[65] *Original Shapley Order*, *supra* note 11, at 13432.

[66] *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, *supra* note 10.

[67] *Original Shapley Order*, *supra* note 11, at 13433 n.35.

[68] *Id.* at 13442.

A. Gans Endorses Shapley Analysis

The first economic expert to respond was University of Toronto Professor Joshua Gans, who at the time was serving as a testifying expert on behalf of a coalition of copyright holders in *Phono III*.[69] At issue was the "mechanical license" that allows interactive streaming services to pay a regulated rate for the right to reproduce and distribute copyrighted musical works. The statute at the time required that the CRB set rates that were "reasonable" in light of four statutory objectives: (1) "maximize the availability of creative works to the public"; (2) "afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions"; (3) "reflect the relative roles of the copyright owner and the copyright user in the product made available to the public"; and (4) "minimize any disruptive impact on the structure of the industries involved."[70]

Professor Gans endorsed Shapley analysis for this purpose. Pointing to the CRB's decision from the year before, Gans took the position that "bargaining among interactive streaming services and multiple music rightsholders is exactly the type of bargaining problem that Shapley's solution is best suited to address."[71] He then cited the two primary papers that the CRB had itself cited: Shapley's original piece from 1953 and Professor Watt's paper from 2010. From there, Gans explained Shapley analysis in the familiar way. He noted that it "involves considering all the possible permutations of agreements to participate . . . that could result between the parties" and turns on "how the addition of a particular participant, in each particular sequence, adds to the combined surplus in each case."[72] He explained that those additions "represent the contributions made by each party in each permutation" and that the ultimate Shapley value for a party is that party's "average contribution made across all of the possible coalition permutations."[73]

Professor Gans proposed to evaluate rates by studying a four-player representation of the market, with one "[record] label" conceptualized as holding all the necessary rights to perform audio music, one "[music] publisher" conceptualized as holding all the necessary rights associated with words and notes, and two "services" conceptualized as competing providers of identical

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[69] *See Gans 2016*, *supra* note 12. Experts who file reports at the CRB are typically paid by the stakeholder who engaged them to do so. These relationships are typically disclosed explicitly in the relevant reports, for obvious reasons.

[70] *See* 17 U.S.C. § 801(b)(1) (prior to 2018 amendments).

[71] *Gans 2016*, *supra* note 12, at 32.

[72] *Id.* at 33.

[73] *Id.*

streaming technologies. Gans did not formally implement that model, however. For instance, he did not offer a chart showing the now-twenty-four possible Shapley permutations, nor did he calculate relative contributions under each of those theoretical alternatives. Instead, Gans simply pointed out that the Shapley value accorded to the publisher in his model would be identical to the Shapley value accorded to the label in his model, because, for the purposes of the model, there were no relevant differences between the two. Both copyright holders offered licenses that were essential; in the absence of either, streaming was simply not possible. "Ultimately," summarized Gans, "what we learn from this analysis is that in a hypothetical market where . . . royalties [are] negotiated with the aim of establishing a fair and efficient division of the surplus generated from music delivery via interactive streaming, publishers and labels would have the same ability to capture surplus. Their equal Shapley values would result in negotiated royalty rates that delivered equal profits to each."[74]

B. Marx Offers a Competing Shapley Model

One month later, Duke University Professor Leslie Marx filed an expert report in the same *Phono III* proceeding but on behalf of the streaming company Spotify.[75] Marx opened the relevant portion of her report with an anecdote reminiscent of my taxi example, hers about a "personal experience with the Shapley value."[76] While on a then-recent vacation, Marx and her family had apparently joined another family for a boat ride, and the group overall was able to save money by purchasing their tickets together. "There were four people in my family," wrote Marx, "five in the other family," and trips were priced such that the cost for Marx's family alone would have been $500, the other family alone would have been $600, but the nine people together was just $900.[77] "My family's contribution to cost [was] $500 if we go first and $300 if we go second, for an average of $400. The other family's contribution to cost [was] $600 if they go first and $400 if they go second, for an average of $500."[78] Thus, rather than splitting the bill 50/50, the two families followed the Shapley approach: Marx's family paid $400 and the other family paid $500. This solution, Marx explained, "embodies a notion

[74] *Id.* at 37.
[75] *See Marx 2016*, *supra* note 13.
[76] *Id.* at 51.
[77] *Id.*
[78] *Id.*

of fairness" and exemplifies the idea that "each party should pay according to its average contribution to cost or be paid according to its average contribution to value."[79]

Professor Marx then applied Shapley analysis to the questions at hand. Like Professor Gans, she acknowledged that the Judges themselves had suggested the use of Shapley analysis in a prior proceeding.[80] She also agreed that Shapley analysis was relevant, highlighting the second statutory factor, which aimed to offer "fair returns" to all parties, and the third factor, which focused on the "relative roles" of the parties in bringing the product to fruition.[81] She then offered a Shapley model with three players: a representative streaming service capable of offering the interactive type of streaming at issue in the proceeding; a generic "music distributor" capable of offering competing services like broadcast radio, satellite radio, and also noninteractive streaming services; and a representative copyright holder capable of licensing whatever rights those various streaming services and music distributors might need. Marx estimated Shapley values using this model and available data, and, in an appendix, she presented an alternative model where, instead of having one player represent all copyright holders, she used one player to represent all record labels and another player to represent all music publishers.

C. Rebuttals from Katz & Watt

Rebuttal reports followed a few months later. UC Berkeley Professor Michael Katz filed a responsive report on behalf of the streaming service Pandora.[82] He criticized Professor Gans's Shapley analysis, arguing that Gans made "unrealistic assumptions about the structure of the Shapley bargaining situation" in that Gans's model included two streaming services but only one of each type of copyright holder.[83] "[T]his structure tends to favor the hypothetical record company and publisher at the expense of the hypothetical streaming services," warned Katz, because the model's two streaming services "compete" whereas the two copyright holders both act as monopolistic

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[79] *Id.*

[80] *Id.* at 50 ("Following the Judges' suggestion, I use the Shapley value . . . .").

[81] *Id.* at 40 (explicitly linking Shapley analysis to the second and third 801(b) factors); *id.* at 50 (citing the 801(b) factors calling for "fair" allocations).

[82] *See* Corrected Written Rebuttal Testimony of Michael L. Katz, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), (Copyright Royalty Bd. Feb. 15, 2017) [hereinafter *Katz 2017*].

[83] *Id.* at 105.

suppliers.[84] Katz also warned that, by treating all songwriters as a single "publisher" in the model, Gans had failed to account for the reality that "songwriters clearly have widely varying talent levels" and thus likely would, in a traditional market, be accorded varying shares of any available profits.[85]

Professor Katz's most significant criticisms, however, targeted an inconsistency between the scope of the CRB proceeding and the scope of the Gans model. In the model, the allocation of streaming revenues was fully up for debate. Gans was free to calculate the amount allocated to the streamers, the amount awarded to the record labels for sound recording rights, and the amount assigned to the music publishers for musical work rights. The CRB proceeding, by contrast, was exclusively about fees that would be paid to the music publishers: the CRB's job was to set the rates that interactive streamers would pay to music publishers for a specific government-authorized compulsory license. So what happens, Katz wondered, when the Gans model is premised on a given distribution of money as between the streamers, the record labels, and the music publishers, but in the real world some of those participants receive more, or less? As Katz made clear, the CRB lacked the power to actually rebalance cash flows by taking money away from the record labels and giving it to either the streamers or the music publishers. Instead, the CRB only had the power to impose one Shapley value (for the music publishers) and then hope that market forces would somehow deliver the remaining two.[86]

University of Canterbury Professor Richard Watt also filed a rebuttal report, building on his own prior paper, writing on behalf of a coalition of copyright holders, and responding to Professor Marx's filing.[87] Watt's academic paper had endorsed Shapley analysis as a "fair and equitable" approach to revenue allocation;[88] and, consistent with that view, his report described Shapley analysis as a "very appropriate methodology" that is "ultimately designed to model the outcome in a hypothetical fair market environment."[89] Watt nevertheless objected to nearly all of Professor Marx's modeling choices. For example, he complained that her model inappropriately included only one streaming service, thereby failing to account for the competition that takes place as streamers jockey for subscribers and compete for negotiated

[84] *Id.* at 107–08.
[85] *Id.* at 111.
[86] *Id.* at 118–25.
[87] *See Watt 2017*, *supra* note 14, at 13.
[88] Watt, *supra* note 62, at 35.
[89] *Watt 2017*, *supra* note 14, at 11–12.

copyright relationships.[90] At the same time, he characterized as "irrelevant" the radio stations, satellite radio providers, and other music distributors that Marx had included in her model, arguing without much explanation that it was "illegitimate" to include in the Shapley construct distributors other than the specific ones whose rates were actually at issue in the proceeding.[91]

D. The CRB Accepts Shapley Analysis

Hearings, additional reports, and other briefing finally culminated in 2019 with a "final determination"[92] that the D.C. Circuit would later describe as "relying primarily"[93] on Shapley analysis. The Judges took Professor Marx's upper estimate of the rate that ought be paid for the mechanical license under a Shapley approach and used it as the lower bound for their final range.[94] They took the lowest estimate from Professor Watt's Shapley analysis and used that as their upper bound.[95] And they explicitly adopted Professor Gans's "assumption of equal Shapley values" between record labels and music publishers, which they described as "informative" and "reasonable."[96] Nearly every party involved in the proceeding appealed the decision to the D.C. Circuit, with the main objection being that the CRB arguably had failed to provide adequate notice of the rate structure it ultimately adopted.[97] No party, however, meaningfully challenged the relevance or reliability of Shapley analysis

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[90] *Id.* at 12–13 ("Therefore the appropriate modelling assumption for correctly capturing the reality of the interactive streaming industry, and the essence of the standard Shapley model itself, is to separate the interactive streaming companies out as different individual players.").

[91] *Id.* at 13–14 ("Another methodological flaw in the way Dr. Marx has carried out her analysis is in the inclusion of irrelevant players . . . [that] will in turn condition and distort the Shapley values of the other players who should legitimately be in the model.").

[92] *See Phono III Order*, *supra* note 16.

[93] Johnson v. Copyright Royalty Board, 969 F.3d 363, 372 (D.C. Cir. 2020).

[94] *Phono III Order*, *supra* note 16, at 1954 ("Consequently, the Judges view Professor Marx's top value for total royalties . . . to constitute a lower bound for total royalties in computing a royalty rate.").

[95] *Id.* ("The Judges give [Professor Watt's royalty figures] weight only to the extent of viewing his lowest figure . . . as an upper bound for total royalties in computing a royalty rate.").

[96] *Id.* at 1951.

[97] *See Johnson,* 969 F.3d at 363 (evaluating the various parties' appellate contentions).

per se, as nearly every stakeholder had sponsored an economic expert who had endorsed or at least used it.

E. Shapley Introduced in New Proceedings

Shapley analysis meanwhile continued to gain traction at the CRB. In 2019, the CRB opened a proceeding—*Web V*—to set rates for the compulsory license that allows noninteractive streaming services to reproduce and perform copyrighted sound recordings.[98] The applicable legal standard this time required that the Judges set the rates and terms that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," with special emphasis on the "relative roles of the copyright owner and the transmitting entity . . . with respect to relative creative contribution, technological contribution, capital investment, cost and risk."[99] Yet, even under this standard—one that did not explicitly call for "fair" rates and hence could easily have been read to require other sorts of analysis and evidence—Shapley analysis again took center stage. The central report this time was filed by Princeton University Professor Robert Willig on behalf of a coalition of copyright holders.[100] Acknowledging the CRB's prior reliance on Shapley analysis, Willig declared that "Shapley Values are an appropriate tool for assessing rates that would be negotiated in the hypothetical marketplace for noninteractive webcasting."[101]

Willig explained Shapley analysis in the now-familiar way. "Shapley Values are a generalized solution to the problem of how to apportion among the members of a multi-party bargaining group the surplus created by their productive cooperation with each other," he wrote, citing Shapley's original paper, a 2002 summary of that paper, and a few pages from a microeconomics textbook.[102] "This solution divides up the surplus according to each party's

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[98] *See* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), *supra* note 43. As the name implies, this one proceeding considered rates for two licenses that noninteractive streamers need: the right to publicly perform copyrighted sound recordings, and the right to make temporary "ephemeral" copies of those sound recordings in support of the licensed performances. *See supra* notes 24–26 and accompanying text.

[99] 17 U.S.C. § 114(f)(1)(B).

[100] *See Willig 2019*, *supra* note 15.

[101] *Id.* at 37.

[102] *Id.* at 6.

incremental contributions to the total amount of value created."[103] In Willig's model, there were six players. Three represented the "Big Three" record labels, companies that together control nearly all of the recorded music that listeners expect to hear on a streaming service.[104] Willig modeled those players as essential to viable streaming; in the model, until a streamer had licenses with all three, the streamer could not offer service. A fourth player represented "independent" record labels, modeled as record labels that add value but are not essential to and cannot alone support a viable service. The last two players were a representative ad-supported noninteractive streaming service and a representative subscription noninteractive streaming service.

Three months later—and before the CRB could evaluate Willig's proposals—the D.C. Circuit remanded *Phono III* for further proceedings, holding that the Judges had "failed to provide fair notice of the rate structure" adopted in their "final" order, a rate structure that had not been explicitly advanced by any party.[105] The CRB thus reopened the *Phono III* record. In parallel, the CRB opened yet another rate-making proceeding, *Phono IV*, this one meant to set rates for the same license that was at issue in *Phono III* but applied to the years 2023 through 2027.[106] Adding complexity, an intervening act of Congress had changed the legal standard applicable to *Phono IV*, replacing the four factors that were central to *Phono III*[107] with a "willing buyer, willing seller" standard akin to the one already in place for *Web V*.[108]

These overlapping proceedings led to a flood of additional economic testimony, with Shapley analysis still pervasive. Professor Watt, for example, filed new reports in both the *Phono III* remand[109] and the new *Phono IV*

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[103] *Id.*

[104] Universal Music Group, Warner Music Group, and Sony Music Entertainment have long been the three largest record labels operating in the United States. Universal controls roughly 30% of the market, Warner roughly 20%, and Sony roughly 15%. *See* Amended Corrected Written Direct Testimony of Joseph Farrell, D.Phil., Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) at 27 (Copyright Royalty Bd. Mar. 8, 2022) [hereinafter *Farrell*] (reporting market shares based on data from 2017 and 2019).

[105] Johnson v. Copyright Royalty Board, 969 F.3d 363, 380–83 (D.C. Cir. 2020).

[106] *See* Phonorecords IV, *supra* note 42.

[107] *See supra* note 70 and accompanying text (citing and quoting the prior standard).

[108] 17 U.S.C. § 115(c)(1)(F). For discussion of the change, *see* Abowd, *supra* note 28.

[109] *See, e.g.*, Remand Written Rebuttal Testimony of Richard Watt (Ph.D.), Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) (Copyright Royalty Bd. July 2, 2021).

proceeding,[110] again on behalf of a coalition of copyright holders. He continued to champion Shapley analysis even under the new, no-mention-of-fairness-this-time *Phono IV* standard. The Shapley approach, he wrote in a *Phono IV* filing, is "once again . . . a natural choice, both for setting a rate that is acceptable under a mantra of willing buyer/willing seller, and for setting a rate that reflects effective competition."[111] "There is no other economic tool that delivers a sharing rule that captures relative contribution and costs as aptly as Shapley modelling."[112] While a range of rates would "satisfy the criteria of enticing the players to voluntarily participate"[113] in the transactions at hand, he argued, Shapley values are "perhaps the most appropriate result"[114] because they "reflect the values that economists believe generally underlie fair marketplace transactions for all market participants."[115] According to Watt, the Shapley "sharing rule more clearly represents a willing buyer/willing seller outcome than other approaches" because it "removes" any opportunity for "strategic play" and other types of market abuse.[116] "There is simply no space in the Shapley model for any player to manipulate the payoffs to their advantage in any way that is not fully representative of their own (and only their own) contribution to the shareable surplus. Therefore, it is quite evident that the model is perhaps the purest representation of what we might understand by effective competition."[117]

Professor Marx returned in both *Phono IV* and the *Phono III* remand as well, testifying for Spotify in the *Phono III* remand[118] and for Amazon in *Phono IV*.[119] Although her model had been relied upon by the Judges in their

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[110] *See, e.g.*, Written Direct Testimony of Richard Watt (Ph.D.), Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) (Copyright Royalty Bd. Oct. 13, 2021) [hereinafter *Watt 2021*].

[111] *Id.* at 9.

[112] *Id.* at 12.

[113] *Id.* at 9.

[114] *Id.*

[115] *Id.* at 11.

[116] *Id.* at 11–12.

[117] *Id.* at 14.

[118] *See, e.g.*, Written Second Supplemental Remand Testimony of Leslie M. Marx, PhD, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), (Copyright Royalty Bd. Jan. 24, 2022) [hereinafter *Marx Jan 2022*]; Written Supplemental Rebuttal Remand Testimony of Leslie M. Marx, PhD, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), (Copyright Royalty Bd. Feb. 24, 2022) [hereinafter *Marx Feb 2022*].

[119] *See, e.g.*, Amended Written Direct Testimony of Leslie M. Marx, PhD, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) (Copyright Royalty Bd. March 8, 2022).

pre-remand *Phono III* calculations, Marx on remand clarified that she did not mean for her model to be used in that way: "As I discussed in my original testimony," she wrote, "the Shapley model, when appropriately implemented, can provide insights about the directional change for fair royalty rates relative to current values," but "the rates that emerge from a Shapley analysis are not market rates, competitive or otherwise."[120] In another filing, she emphasized that the "fundamental problem"[121] with the original *Phono III* determination was the one that Professor Katz had also highlighted:[122] "record labels earn far more in the real world than the [Judges'] Shapley value analysis would allocate to them," resulting in a situation where, because there is only so much money to go around, music publishers and streaming services "will necessarily earn less" than their Shapley values.[123]

Yet another expert who filed a report speaking to these issues was Professor Katz, who submitted on behalf of Pandora in the *Phono III* remand[124] testimony that was designated for use in *Phono IV* as well.[125] Katz warned that "the outcome of a Shapley analysis can starkly fail to correspond to the outcome of an effectively competitive market."[126] Katz also complained that Professor Watt in particular had cited "no economic literature in support of his claim" that Shapley analysis can be used to mitigate the effects of market power.[127] UC Berkeley Professor Joseph Farrell, meanwhile, submitted testimony in *Phono IV* on behalf of Spotify.[128] He cautioned that the *Phono III* Shapley methodology "would not be appropriate" for determining rates under *Phono IV*'s "standard of effective competition."[129] The economist Gregory Leonard,

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[120] *Marx Jan 2022*, *supra* note 118, at 4.

[121] *Marx Feb 2022*, *supra* note 118, at 6.

[122] *See Katz 2017*, *supra* note 82 and accompanying text.

[123] *Marx Feb 2022*, *supra* note 118, at 6–7.

[124] *See, e.g.*, Written Direct Remand Testimony of Michael L. Katz, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) (Copyright Royalty Bd. Apr. 1, 2021) [hereinafter *Katz 2021*]; Written Supplemental Rebuttal Remand Testimony of Michael L. Katz, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) (Copyright Royalty Bd. Feb. 24, 2022) [hereinafter *Katz 2022*].

[125] *See* Introductory Memorandum to the Written Rebuttal Statement of Pandora Media LLC, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) at 2 (Copyright Royalty Bd. Apr. 26, 2022) (designating the earlier testimony).

[126] *Katz 2021*, *supra* note 124, at 26.

[127] *Katz 2022*, *supra* note 124, at 5.

[128] *See, e.g.*, *Ferrell*, *supra* note 104.

[129] *Id.* at 87.

too, urged caution. Writing for Google in *Phono IV*, he documented a range of concerns with the Shapley approach, concluding in the end that "replacing the Shapley construct with an entirely different model of competition . . . may be needed to appropriately model effective competition."[130]

The CRB never had the chance to address these issues in *Phono IV*; in 2022, the parties announced an industry-wide settlement.[131] *Web V* did result in an issued rate determination, but the Judges there largely rejected Professor Willig's analysis, finding that his approach—modeling each of the Big Three record labels as absolutely essential to any viable streaming service—did not "reflect effective competition" because it accorded significant market power to those three rightsholders.[132] In June 2023, however, the Judges released their final decision in the *Phono III* remand, and there they again endorsed Shapley analysis, at least as to the four-factor test still applicable to the *Phono III* remand.[133] The Judges interpreted the D.C. Circuit's decision as narrowly authorizing them to reconsider only a handful of specific issues.[134] That said, when evaluating the streaming services' argument that the *Phono III* Shapley analysis needed further refinement, the Judges wrote that "even if" the appellate court decision were "construed as permitting the Judges to revisit" the question of whether Shapley values comport with the *Phono III* requirements that the statutory rate accord "fair returns" to all parties and account for their "relative roles" in bringing about the final consumer product, the Judges "would not adjust" their conclusions because doing so would be "substantively unwarranted."[135] Thus, the Judges again used the models presented by Professors Watt and Marx to establish a potential royalty range; and, as for Professor Gans, the Judges in the post-remand *Phono III* decision did "not

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[130] Written Rebuttal Testimony of Dr. Gregory K. Leonard, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) at 96 n.246 (Copyright Royalty Bd. Apr. 22, 2022).

[131] *See* Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 87 Fed. Reg. 80448, 80448–53 (Copyright Royalty Bd. Dec. 30, 2022) (summarizing and approving proposed settlement).

[132] Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), 86 Fed. Reg. 59452, 59539 (Copyright Royalty Bd. Oct. 27, 2021) ("Thus, because the royalty rates derived from Professor Willig's Shapley Value Model reflect complementary oligopoly power . . . they must be discounted to reflect effective competition.").

[133] *Phono III Remand*, *supra* note 16, at 54410–48 (repeatedly finding no reason to adjust the Board's original Shapley analysis on remand).

[134] *See, e.g.*, *id.* at 54414 (noting that the remand "unambiguously affirmed" and "did not disturb" various critical findings).

[135] *Phono III Remand*, *supra* note 16, at 54414.

find cause to reconsider [the prior decision's] adoption of Professor Gans's Shapley-inspired analysis," specifically including his "assumption of equal Shapley values" for the two necessary copyright rights.[136]

IV. Rejecting Shapley Analysis

Copyright licensing could have been left entirely to the unregulated market. Records labels and music publishers would, in that scenario, have negotiated directly with interactive and noninteractive streamers.[137] Traditional market forces would have defined the necessary terms and shaped the necessary rates. Congress created a system of compulsory licenses, however, and from that the economists who filed expert reports in *Phono III*, *Phono IV*, and *Web V* all seemed to reasonably infer that the CRB is supposed to do something more than simply recreate market outcomes. The economists did look to the market for information about plausible rates, incentives, and behavior. But they each urged the CRB to deviate from those actual or hypothetical market results in order to address one or another specific market imperfection.

Some of the economists worried about market power. Professor Marx, for instance, championed adjustments to offset what she perceived to be the undue leverage enjoyed by copyright holders due to concentration in the music industry.[138] Others worried about imperfect information. Professor Watt, in this spirit, argued that copyright holders face a considerable challenge when negotiating with firms like Apple or Amazon because, to an unknown degree, these firms use streaming to drive business to other products and services.[139] The economists also picked up on a related issue that Congress had flagged: streaming simultaneously promotes and substitutes for other types of music consumption, which poses a problem given how little

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[136] *Id.* at 54417, 54417 n.53.

[137] In truth, I suspect that, in a truly well-functioning market, record labels and music publishers would first negotiate with one another, and then together offer streamers the one permission streamers truly need: the integrated right to include a song's words, notes, and sounds in their relevant music catalog. The current system is much more stilted in that it artificially separates negotiation over the musical work from negotiation over the sound recording.

[138] *See Phono III Order*, *supra* note 16, at 2022 (explaining this portion of Marx's analysis).

[139] *See Watt 2021*, *supra* note 110, at 7–8, 60–61 (discussing technology companies' alleged market power and the "information asymmetry" presented by the interrelationships between their music and non-music offerings).

data is available by which to quantify either the benefits or the harms for (say) concert revenue and direct CD sales.[140]

These are all valid concerns, in my view, each warranting thoughtful exploration. But Shapley analysis does not speak to any of them. Start with the claim that Shapley analysis can be used to model "market" interactions. This is a foundational, explicit, descriptive claim for Professors Gans, Watt, and Willig, and they each use it to justify Shapley analysis as a framework for answering all of the other open questions. Professor Gans, for instance, asserted in his original 2016 filing that Shapley analysis can be used to estimate the royalties "that would prevail in an unconstrained *market*."[141] Professor Watt wrote in 2017 that Shapley analysis "mimics what a free and unrestricted *market negotiation* would yield"[142] and followed up in 2021 with the assertion that that the Shapley methodology "reflects effective *competition*."[143] Professor Willig similarly assured the Judges in 2019 that "Shapley Values are an appropriate approach for assessing rates that would be negotiated in the hypothetical *marketplace* . . . ."[144]

But how can these descriptions possibly be true? Consider Professor Gans's first filing. Gans was the first economist to take seriously the CRB's suggestion that Shapley analysis be used as a framework for rate-setting at the CRB, so he understandably opened the relevant portion of his report with an example designed to teach the basic operation of Shapley mathematics. His example involved three firms selling gloves.[145] Two each produced a single right glove, and one produced a single left glove. The surplus generated from matching left with right was defined to be $1, and there was no value associated with an unpaired glove. Professor Gans articulated the familiar Shapley process where all possible coalitions of glove providers "arrive" in all possible orders. And he concluded that each provider of a right glove should be assigned a Shapley value of one-sixth of a dollar, whereas the lone provider

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[140] *See* 17 U.S.C. § 114(f)(1)(B)(i)(I) (requiring the Judges to consider "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from the copyright owner's sound recordings"). Omitted from the list but surely also relevant: music streaming likely benefits copyright holders by obviating some of the incentive to engage in music piracy. Measuring that effect, of course, would be tricky, too.

[141] *Gans 2016*, *supra* note 12, at 31 (emphasis added).

[142] Watt 2017, *supra* note 14, at 15 (emphasis added).

[143] Watt 2021, *supra* note 110, at 9 (emphasis added).

[144] *Willig 2019*, *supra* note 15, at 12 (emphasis added).

[145] *Gans 2016*, *supra* note 12, at 35–36.

of the left glove should be accorded a higher Shapley value of two-thirds of a dollar. Gans explained that the provider of the lone left glove "commands a higher share of the surplus because she is the only player to own a left glove," whereas the two providers of potential right gloves "are substitutes for one another" and hence compete away some of the value that a lone right glove owner would otherwise receive.[146]

This model bears no resemblance to any real-world market. In any plausible market, after all, one of the two right glove proprietors would consummate the deal and earn a return, while the other would be left with no deal and earn nothing. That risk would in turn play a critical role in the real interaction, in that it would motivate competition between the two companies, with each trying to undercut the other's price for fear of otherwise ending the interaction (sorry) empty-handed. But there is no real-world market where, after one transaction, both right glove sellers are nevertheless paid. And there is certainly no real-world market where the successful seller and the unsuccessful competitor both earn the exact same return.

Professor Gans nevertheless leapt from that implausible example to the real issue that was then before the CRB. He acknowledged that the "usual intuition" is that competing parties "can be played off against one another to effectively be pushed to receiving payments close to their costs, earning no surplus"; but he asserted that the Shapley value approach instead "predicts" (predicts?) instead an outcome where all competitors are paid.[147] Gans then offered a just-so story that could have been used to justify almost any values he might have proposed. His story focused on the potential for "left glove" copyright holders to pit "right glove" technology companies against one another in a bidding war. He announced that copyright holders would do no such thing. Because streaming services "have a role in providing competition against one another," he explained, copyright holders "will not push these streamers to their limits in negotiation" but will instead leave precisely the Shapley value on the table, using that exact amount to strategically keep one streamer "waiting in the wings" as a competitive check on the other.[148]

Professor Marx filed the next report to seriously consider Shapley analysis, and she similarly implied that Shapley analysis can do much more than identify a "fair" allocation of some specific shared gain or loss. Marx was concerned that copyright holders might have "concentrated market power" given industry consolidation. She knew that a simple Shapley model would

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[146] *Id.* at 35.
[147] *Id.* at 36.
[148] *Id.*

do nothing to mitigate that distortion, so she presented a model where she "intentionally elevated the market power of the [streaming] services"[149] by using a single player to represent all interactive streamers rather than modeling each existing streamer separately. As she explained in live testimony, her intent was to offset copyright holders' market power by introducing market power on the other side of the transaction. But that was another just-so adjustment, one that shifted the numbers in the desired direction, sure, but did so to a completely arbitrary degree. Shapley mathematics offered no insight into the extent of the original market distortion. The Shapley dynamic neither suggested nor validated Marx's attempt to offset it. And of course it didn't, because Shapley models are not models of market behavior.

A. Model Ambiguity and Stakeholder Incentives

The taxi example makes these problems even more plain. Admittedly, that example is a significant simplification of Lloyd Shapley's original, sophisticated model, and it pales in comparison to the mathematical extensions that have been developed since. But simplicity lays bare the actual workings of a model, and, here, two fundamental elements make Shapley analysis plainly inappropriate for the CRB's purposes. First, Shapley's structure leaves no room for ambiguity as to how many and which specific parties ought to be considered legitimate stakeholders. Three riders are relevant to the taxi example. There is no mechanism by which to explore whether Ann and Bob should be counted as a single passenger because they are dating, or whether Chris should count double because he is bringing along heavy luggage. There are three riders; that fact leads to a chart with six possible payment orders; and the addition or subtraction of even one rider would significantly alter every calculation. Second, Shapley analysis is unapologetically static, with no room for players to engage in strategic behavior and no accounting for the long-run incentives created by the model's proposed allocations.[150] Chris in the taxi example cannot negotiate a better deal by credibly threatening to ride alone. Alice and Bob cannot tweak their allocations even if they realize that, at these numbers, Chris will next time choose a restaurant closer to his home or opt to drive his own car.

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[149] *Phono III Order*, *supra* note 16, at 2022 (explaining Professor Marx's testimony).

[150] Presumably this is what the Judges were meaning to criticize when they rejected Shapley analysis in their 2006 Order. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, *supra* note 10 and accompanying text.

Note that these are not criticisms of the Shapley approach per se. Quite the opposite, Shapley analysis largely resonates in the taxi example, in that friends often find themselves in interactions where the number and identity of the participants is given and where strategic play is unlikely because it would violate powerful social norms. That is, when friends share a taxi, split a restaurant bill, or—Professor Marx's intuitive example[151]—share a boat ride, they very plausibly are looking for a static "fair" outcome by which they will then non-strategically abide. In rate-setting, by contrast, none of that holds true.

Consider, in this light, the definitional questions about who the relevant stakeholders are, how many of them will share in any allocation, and thus implicitly what monies ought be deemed eligible for division. Again, those questions all have obvious answers in the taxi example. Amy, Bob, and Chris are the only riders. The total taxi fare is the only number in play. In *Phono III*, *Phono IV*, and *Web V*, by contrast, these same questions were the subject of real and plausible dispute. Professors Gans, Watt, Marx, Katz, and Willig vigorously disagreed about whether copyright holders should be represented in the various models as a single unified rightsholder; as one representative record label and one representative music publisher; or as some larger number of separate players each representing a real-world record label, a real-world music publisher, and possibly even a real-world singer, musician, producer, or songwriter. Professors Gans, Watt, Marx, Katz, and Willig disagreed, too, on the question of how best to represent the streaming services. Professor Marx, for instance, argued that an appropriate Shapley model would include not just some number of players representing the streaming services but also some number of additional players standing in for other types of distribution partners who also contribute to the overall market for music.[152] Her intuitive point was that a "fair" allocation of copyright royalties can only be made by considering all the ways the implicated copyrights and the implicated streaming technologies interrelate. Professor Watt thought this approach flawed, agreeing that other types of music monetization are relevant but asserting that substitution and promotion across platforms should be measured in other ways.[153]

Whatever the right answer, these are critical inputs to Shapley analysis in that they significantly impact Shapley math. Consider a Shapley model where

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[151] See *supra* note 75 (discussing this aspect of the Marx report).

[152] *See Marx 2016*, *supra* note 13, at 54–55.

[153] *See supra* note 90 and accompanying text (discussing this aspect of the Watt report).

a painter, a decorator, and a furniture maker can potentially team together to modernize an apartment. For simplicity, ignore costs. If modernization generates $120 in value but can only be accomplished through the combined efforts of all three players, the Shapley procedure will allocate $40 in value to each. Redefine the model so as to require a fourth necessary player, such as a real estate agent to market the finished apartment, and in response the Shapley algorithm will reduce payments to $30 per player. Redefine the model again such that the painter is newly conceptualized as a lead painter and two assistant painters, all necessary, and now the Shapley values drop to $20 for each painter, $20 for the decorator, $20 for the real estate agent, and $20 for the furniture maker. Make another change—for example, frame the model such that any one of the three painters can do the entire job alone—and the Shapley values again shift considerably, this time with each painter being accorded $10 while every other skilled contributor earns $30. Shapley models, in short, are extremely sensitive to the assumed number and types of players included. And at the CRB, in sharp contrast to the taxi example, those values are significantly vulnerable to both strategic advocacy and genuine dispute.

Just to be clear, my concern here is neither the generic concern that a model's inputs drive its outputs nor the generic concern that models inevitably must approximate reality, rather than completely capture it. My concern is that Shapley models are particularly sensitive to their inputs, and hence this modeling approach is unreliable when those inputs are disputed, significantly stylized simplifications. So, while a Shapley model might have much to teach when the parties being modeled are the members of Professor Marx's family[154] or voting members of a governmental institution like a court or legislature—remember, that was the first practical application Lloyd Shapley himself pursued[155]—the Shapley approach is significantly less reliable where, as here, the real-world cast is much larger, much more diverse, and in countless ways intertwined.[156]

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[154] *See supra* notes 77–79 and accompanying text (discussing this aspect of the Marx report).

[155] *See* Shapley & Shubik, *supra* note 52.

[156] Worse, in these markets, the real-world cast is itself not stable, nor is it exogenous to CRB decision-making. The music industry regularly experiences changes relevant to the CRB's models, with parties entering and exiting the market as music publishers merge, new technologies offer new paths from artist to consumer, and so on. Moreover, as CRB rates change, those changes can themselves drive further industry restructuring, perhaps pressuring smaller rightsholders to consolidate or encouraging more meaningful integration between streamers and rightsholders. Again, none of that is even considered in the various Shapley models that have been

Turn next to the even more problematic point, that Shapley's model is completely static. Copyright law is an incentive system, recognizing in authors certain exclusive rights in order "to promote the progress of Science and useful Arts."[157] That process is intentionally dynamic. The whole idea is to inspire strategic responses from (say) singers, songwriters, musicians, producers, record labels, music publishers, and, yes, streaming services, technology companies, and listeners, too. All of these stakeholders are supposed to calibrate their actions in response to the returns they expect to receive, the fees they expect to incur, and the rights and privileges they otherwise expect to enjoy. To use an allocation mechanism that fully ignores dynamic implications is to study movement using a single photograph. Allocations cannot plausibly meet the statutory requirements of being "fair" and "reasonable"—let alone efficient or consistent with any plausible legislative purpose—if they are being made while blind to the bigger dynamics that are core to the underlying legal rule.

Further, even if it were somehow appropriate to allocate copyright monies without regard to long-run incentives, static analysis would still be inappropriate in this context because, while CRB analysis might be static, the copyright marketplace is not. In *Phono III*, for example, the Judges used Shapley analysis to establish what was intended to be a "fair" allocation of monies as between the interactive streaming services, the record labels, and the music publishers. The CRB's ruling was based on its view as to how much money each stakeholder ought to in fairness retain. But the proceeding itself established only the rate due to music publishers for the mechanical right. The ruling did not constrain what record labels could charge for the performance right, for instance, and indeed the CRB had no power to do so,

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presented to the CRB, each of which adopted an idiosyncratic simplified representation of the industry as it existed at the time that particular model was proposed.

[157] These words come directly from Art. 1, § 8, cl. 8 of the U.S. Constitution, which is the clause that empowers Congress to create both the copyright and the patent regimes. Courts interpret this language in the broad way I summarize, emphasizing that the goal is not merely to reward authors, but more richly to incentivize authors, users, and all the other stakeholders who collectively create, enjoy, distribute, learn from, and otherwise use creative work. Thus, for instance, the Supreme Court has explained that copyright must not only "assure[] authors the right to their original expression" but must also "encourage[] others to build freely upon the ideas and information" contained therein. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991). And the Court has likewise explained that "copyright law is an exercise in managing the tradeoff" between protecting artistic accomplishments and encouraging technological innovation. MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005).

even had it tried. The record labels were thus immediately free to react to the CRB's rate by charging whatever license fees the market would bear, even if that number was higher than the CRB's calculated amount, and even if paying it meant that streamers would end up with less money than the CRB intended.[158] For this reason, too, Shapley analysis falters in this application. If the Shapley value assigned to music publishers is appropriate at all, it is appropriate conditional on record labels and streaming services also being accorded their Shapley values. In the real world, however—because the CRB has power over only a subset of the relevant rights and a subset of the relevant parties—those Shapley values exist on paper only.

B. The Equivalence Assumption

That so many testifying experts urged the CRB to adopt Shapley analysis despite these many shortcomings is jarring. More jarring, still, is the way the analysis was actually implemented in those economic reports. Remember, in *Phono III*, Professor Gans championed a particular ratio of royalties, concluding that "what we learn" from Shapley analysis "is that in a hypothetical market where licensing of composition and sound recording rights were equally unconstrained" and "royalties were negotiated with the aim of establishing a fair and efficient division of the surplus generated from music delivery via interactive streaming," record labels and music publishers would earn the same profit.[159] Professor Marx developed a competing and more detailed model where she endeavored to "equalize market power as between Copyright Owners and the streaming services" and then she, too, used Shapley analysis to calculate a royalty ratio.[160] Professor Watt, meanwhile, filed a rebuttal report, criticizing Professor Marx's analysis, adjusting various estimates, but presenting his own Shapley ratio. The Judges in both their pre-remand and post-remand determinations amalgamated the three approaches, endorsing Professor Gans's ratio as "informative" and then defining a "zone

[158] This problem led the CRB to reject part of its own *Phono III* decision when it revisited these issues in light of the court-ordered remand. *See Phono III Remand*, *supra* note 16, at 54431 (acknowledging that, in the original decision, "the Majority [wrongly] took comfort in what it understood to be Professor Watt's 'prediction' that increases in mechanical royalties would be offset almost dollar-for-dollar by reductions in the sound recording royalty").

[159] *Gans 2016*, *supra* note 12, at 37.

[160] *See Phono III Order*, *supra* note 16, at 1950 (describing the Marx approach).

of reasonable rates" that used Professor Marx's highest estimate as the lower bound and Professor Watt's lowest estimate as the upper bound.[161]

Driving all of that analysis, however, was what turns out to be an indefensible assumption. Professor Gans's version was the most explicit. When defining his Shapley model, Gans explained that "while players may vary widely in the value they contribute to the coalition, they can be divided into one of two general categories, veto players and non-veto players."[162] Veto players, in his vernacular, were the essential participants to any deal, such that "coalitions to which the veto player is not a member necessarily have no value."[163] Gans had one record label and one music publisher in his Shapley model, and, because "both the record company and the publisher must agree to any negotiated deal" in order for any music to be streamed, Gans modeled both as veto players.[164] In the math, this meant that the two types of copyright holders were almost indistinguishable. They each had the same binary effect on every calculation; until both had licensed a given streaming service, that streaming service could not operate. Gans thus determined, directly because of this assumption, that the two would have "equal Shapley values" and hence should be awarded "royalty rates that delivered equal profits to each."[165]

Professor Marx imposed an equivalence assumption, too, although in her case perhaps inadvertently. In her most relevant model, there was one music publisher, one record label, one interactive streaming service, and one stand-in for every other type of music distributor. Marx articulated the Shapley interaction mathematically,[166] and that math quietly built in what Gans had explicitly stated: no value could be created unless both the one record label and the one music publisher licensed their rights. Record labels and music publishers were therefore indistinguishable to Marx just like they were

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[161] *See id.* at 1951 (characterizing Gans's analysis as "informative"); *id.* at 1954 (using Marx's and Watt's analysis to define a "zone of reasonable rates"); *Phono III Remand*, *supra* note 16, at 54417 (reaffirming the prior conclusion with respect to Professor Gans); *id.* at 54412 (reaffirming the prior analysis with respect to the zone of reasonable rates).

[162] *Gans 2016*, *supra* note 12, at 34.

[163] *Id.* at 34.

[164] *Id.* at 36.

[165] *Id.* at 37.

[166] *See Marx 2016*, *supra* note 13, at Appendix B-7. Marx labelled the music publisher U1, the record label U2, the interactive streamer I, and the catch-all distributor O. She then implicitly modeled the copyright holders as veto players, writing that "the only combinations that create positive values are {U1, U2, I, O}, {U1, U2, I}, and {U1, U2, O}."

indistinguishable to Gans. Sound recording copyright holders and musical work copyright holders were accorded the same share of profit because there was no basis on which to do anything else.

Professor Watt's rebuttal report followed suit. He had significant objections to what he perceived as the "important methodological and data flaws" in Professor Marx's report.[167] And he emphasized that the "very essence of the Shapley methodology is to bring to the forefront what each player contributes to the total net surplus."[168] But, when it came to crafting his own model, he joined Professors Gans and Marx in the view that music publishers and record labels are in this context equally crucial. As he wrote, "Each of the two groups of copyright holders supplies an essential input to the market" and those "inputs are perfectly complementary."[169] "It is therefore acceptable that the copyright holders be modelled as a single player," he concluded, a modeling decision that obviously would in no way challenge the equivalence built into the Gans model and the Marx math.[170]

But music publishers and record labels do not plausibly contribute the same value. Yes, once a song is recorded, the only way to legally stream it is to license both the audio itself and the underlying words and notes. From that perspective, the sound recording copyrights held by record labels on behalf of performing artists are indistinguishable from the musical work copyrights held by music publishers on behalf of songwriters. Both rights are necessary. Both rightsholders in that framing understandably earn identical Shapley payoffs.

Shift perspective to consider how songs come into existence, however, and binary equivalence falls apart. Before a song is recorded, songwriters and their representatives negotiate with singers and their representatives to decide whether any given song will be recorded in the first place, by whom, and how any resulting royalties and rights will be shared.[171] This is perhaps the most competitive part of the music ecosystem. After all, if a given singer demands too much money or too much control, the songwriter can bring the song at issue to some other singer. Likewise, if the songwriter demands too much money or too much control, the singer can opt to record some other song or even write their own.

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[167] *Watt 2017*, *supra* note 14, at 2.
[168] *Id.* at 12.
[169] *Id.*
[170] *Id.*
[171] *See* Jason Blume, Six Steps to Songwriting Success (2nd ed. 2008); Jason Blume, This Business of Songwriting (2nd ed. 2013).

This push-and-pull not only defines the universe of songs that are ultimately available for streaming, but also defines the relative value of the implicated musical work and sound recording copyrights. The more a given songwriter values a given singer as compared to the next-best option, the more generous the songwriter will be in assigning value to the sound recording during this critical negotiation. The more a singer values a given song as compared to the next-best option, the more generous the singer will be in assigning value to the musical work during this same conversation.

The CRB, however, was presented with a set of models where singers and songwriters were assumed to make equal contributions to the creation of recorded music. Each model shares the same core conceit: that record labels and music publishers bring the same value to the table because they both waive a potential legal veto. But that is a remarkably incomplete way of conceptualizing the very differentiated work of singers and songwriters who, in their direct negotiations, have both the incentive and the flexibility to calibrate their comparative ownership, control and payoffs in light of their actual comparative contributions.

Again, the implication is that the relative value brought by singers and songwriters is complicated and variegated, which is emphatically not consistent with an assumption under which value is equal because, after a song is recorded, singers and their intermediaries own one necessary legal right whereas songwriters and their intermediaries own the other. The error, put simply, is an error of omission: the models presented to the CRB reflect what is, at best, the second half of the process by which music is licensed for streaming. The models start at a moment when music has already been recorded, and yet they assume that there are no then-existing contracts allocating money as between singers and songwriters, no then-existing constraints on the next round of negotiation, and indeed no then-existing relationships at all between singers and songwriters, or labels and publishers. The models instead implausibly assume that singers are completely free to arrogate to themselves whatever returns their intermediaries can collect, and songwriters are similarly completely free to arrogate to themselves whatever returns their intermediaries can collect.

Starting there, the models unsurprisingly conclude that record labels and music publishers should share equally in any profits. To them, singer Toni Braxton is just some nondescript owner of the veto right inherent in the sound recording copyright associated with each of her songs, and songwriter Diane Warren is just another completely interchangeable owner of the veto right inherent in the musical work rights associated with her songs. All variation—differences in relative talent, differences in next-best options,

differences in risk aversion, everything—and all ex ante negotiation is, without comment, abstracted away.[172]

And note that Shapley analysis does not suggest, justify, test, or endorse this conclusion. Equivalence was an input to, not an output from, the experts' analyses. The various Shapley models simply added a veneer of complexity to a flawed but enormously influential assumption: that, in a "fair" world, music publishers and record labels should earn the same profit.

V. Conclusion

Rate-making proceedings at the CRB are anything but welcoming. The evidentiary record in *Phono III*, *Phono IV* and *Web V* clocks in at well over 10,000 printed pages. The expert economists regularly speak in tongues. Even the Judges from time to time complain that years into a given proceeding they are unsure as to what certain stakeholders are arguing or what

[172] This problem threatens to undermine the entire set of compulsory licenses currently authorized by Congress. Because singers and songwriters can negotiate prior to creating recorded music, they are free to allocate monies between them according to whatever metrics they deem appropriate. Thus, while compulsory licenses to some degree determine how much money moves from streamers to copyright holders, the allocation from there is fully controlled by private deals. The CRB might order that certain monies be paid to the owner of the relevant musical work right, for instance, but the CRB has no power to stop that copyright owner from then either honoring or negotiating a contract under which some of those proceeds are transferred to the singer, record label, or some other party. Combine this with the reality that the CRB regulates some but not all of the licenses that streamers must acquire—*see supra* notes 31–35 and accompanying text—and a difficult question is framed as to the degree to which the CRB can plausibly accomplish any of its policy goals. After all, the CRB has limited power to determine the amount of money actually paid by streamers, because the total bill is determined by the combination of government-influenced rates and other rates that are privately negotiated in parallel, in response, and in their shadow. And the CRB at the same time has little power to determine the split of royalties as between singers and songwriters, because singers, songwriters, and their representatives directly negotiate. To actually control either flow, the government would need to offer a full set of compulsory licenses, thereby effectively capping the total amount that streamers pay, and the government would need to preempt private agreements between singers and songwriters, thereby ensuring that monies paid to (say) the sound recording copyright holders actually stay with those performers and their representatives. Short of that, the CRB has influence—contracts and workarounds are inevitably sticky, time-lagged, and the like—but the Judges, to at least some degree, are boxing with Jell-O. I wrote about these challenges in a forthcoming paper, Doug Lichtman, *The Seesaw Effect*, 47 Col. J. L. & Arts (forthcoming 2024).

assumptions are being made in support of competing rate proposals.[173] Combine that with a seventy-plus-year-old mathematical construct and there is a very powerful case to be made for ambivalence. The show is not worth the price of admission. The arcane details of Shapley analysis and the minutiae of CRB rate-making are best left to insiders alone.

But the rates at issue in these proceedings matter. The trends in the music industry are clear: CD sales have plummeted over the years, with consumers spending $13.2 billion on the format in the year 2000 but only $483 million twenty-two years later.[174] Direct sales of digital singles and albums do not come close to filling the gap, amounting to barely $456 million in 2022.[175] And, while the biggest stars might be able to earn substantial sums by touring or by licensing their music for use on television and in movies, those options are unavailable to the overwhelming majority of singers and songwriters who cannot fill stadiums and whose songs will never be picked for those types of use.

Billions of dollars, by contrast, are at stake every year in transactions governed by the CRB,[176] with Amazon, Apple, Spotify, Google, Pandora, and iHeart each either paying the CRB's rates or negotiating private licenses in their shadow. This is the money that will drive the music industry in the foreseeable future, and the money that will similarly drive the development of streaming and other technological advancements. And, while there is no easy formula for allocating those funds, my point is simply that Shapley analysis—the current darling of the ball—offers no helpful insight. Shapley models do not describe real-world markets. Shapley models offer no tools by which to measure market imperfections. The outputs of a Shapley model are incredibly sensitive to the relevant model's highly stylized inputs. And, worst of all,

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[173] *See, e.g., Phono III Remand*, *supra* note 16, at 54424 ("Regardless of whether economists invariably identify the existence of implicit assumptions lurking in each other's models, Professor Watt overlooked a cardinal rule of communication: Know your audience. Here, his audience is comprised of three Judges, only one of whom is also an economist."); *id.* at 54426 ("Similarly, when the Judges inquired of Copyright Owners' counsel whether he would be addressing the modeling 'dust-up' between Professors Watt and Katz, counsel demurred, stating that although he would 'love to engage on it but . . . there would be too many slides . . . .'").

[174] *See* U.S. Music Revenue Database at https://www.riaa.com/u-s-sales-database/ [https://perma.cc/K49J-JHYQ] (summarizing industry data from 1973 through 2022).

[175] *See id.* (showing revenue for album downloads in 2022 at $241.9 million, and single downloads at $214.1 million).

[176] *See id.* (showing streaming revenue combining to generate over $13 billion in 2022).

Shapley modeling is completely static, a troubling reality given that copyright law is by design a dynamic incentive system.

I recognize and appreciate that considerable time and thought has been invested here by stakeholders, experts, and the Judges themselves. And I am not writing to fault the process, which has been intense, and has remarkably brought together a veritable who's-who of expert economists and industry leaders. But this application of Shapley analysis is nevertheless a mistake, and it is time for the CRB to abandon the approach.

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Betting on Addiction Money: Can Sports Betting Advertising be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?

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Abstract

Over half a decade ago, the Supreme Court opened a world of state-sanctioned sports betting after it invalidated a federal statute that prohibited the practice. Since its ruling in *Murphy v. NCAA,* about three dozen states have legalized sports gambling, creating regulatory schemes to allow licensed betting firms to operate in their states. These companies have engaged in heavy advertising and promotions in all forms of media to attract potential bettors. As a result, billions of dollars have been wagered. At the same time, evidence of an increase in problem gambling and gambling addiction has been reported. While most states have enacted some modest advertising restrictions prohibiting "false" advertising, requiring warnings, and disclosing contact information for problem bettors, these attempts are inadequate to prevent the rise in problem betting and gambling addiction. I argue that a broader ban is needed. This article will discuss the constitutional challenges of regulating gambling advertising and promotions, focusing on the broadcast media. It will also compare approaches to regulate sports gambling advertising in other countries. I conclude that a complete media ban on such advertising would likely violate First Amendment protection of commercial

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speech under the *Central Hudson* standard crafted by the Supreme Court over four decades ago. However, reasonable alternatives exist. This article will propose broader restrictions that could pass constitutional muster under *Central Hudson* and, also could be upheld based on the government's power to regulate content under the broadcast laws and Federal Communications Commission's ("FCC") regulations. It will discuss restrictions that are national in scope, such as limiting advertising, sponsorship notice, and betting odds during time periods when underage viewers are watching.

Introduction

In 2018, the U.S. Supreme Court invalidated the Professional and Amateur Sports Protection Act ("PASPA")[1] which prohibited states from enacting sports betting laws.[2] After this ruling, states were permitted to enact legalized sports betting laws, and, as of the fall of 2023, over three dozen states have done so.[3] These laws and regulations vary: individual states have legalized various types of betting, including mobile betting. Some states created new administrative commissions[4] to issue rules and regulations, while

[1] *See* Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 et seq.

[2] *See* Murphy v. NCAA, 138 S. Ct. 1461 (2018). The court invalidated the statute on the grounds that it prohibited state authorization of sports gambling and therefore "violated the anticommandeering rule" as it improperly issued a "direct order" to the governments of the States forbidding them to enact sports betting laws." *Id.* at 1478.

[3] *See* Matthew Waters, *Legislative Tracker: Sports Betting*, Legal Sports Report (Nov. 3, 2023), https://www.legalsportsreport.com/sportsbetting-bill-tracker/ [https://perma.cc/ZW9J-MTXP]. As of May 2023, 33 states and the District of Columbia have some form of legalized sports betting. They include Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Washington, D.C., Washington, West Virginia, Wyoming. And to a more limited extent, North Carolina, New Mexico and Wisconsin. Kentucky joined that list in September 2023. *See* Rob Fletcher, *Kentucky to Launch Legal Sports Betting*, IGB (July 11, 2023), https://www.igbnorthamerica.com/kentucky-to-launch-legal-sports-betting-on-september-7 [https://perma.cc/RWG6-MM8U].

[4] *See, e.g.*, Ohio Rev. Code § 3772.02(A) ("There is hereby created the Ohio casino control commission described in Section 6(C)(4) of Article XV, Ohio Constitution."); *see also* 2013 N.Y. LAWS 174 (creating a state Gaming Commission).

others expanded existing agencies.[5] These bodies have since crafted standards for the licensing of sports betting companies, costs of a license, taxes to be paid by winners, and rules regarding advertising.[6]

Not surprisingly, sports gambling companies (known as "sportsbooks") aggressively began to advertise and promote their services after legalization. In larger states such as New York, which permitted sports gambling as of January 2022, such advertising and promotions have been particularly ubiquitous,[7] and it may well be worth the cost. The advertising has been found on traditional linear media (radio, broadcast television, and cable) as well as online sites and social media.[8] It is estimated that these companies spent over $2 billion on various advertisements in 2022.[9]

Commercial sports betting revenue hit a new all-time high of $7.5 billion in 2022. According to the American Gaming Association, the trade organization for the industry, this is a 72.7 percent increase from the year before.[10] Legal sportsbooks handled $93.2 billion in bets that year—another record and a 61.1 percent increase over 2021's amount, known as the "handle" (in 2023, that amount increased by an additional 30 percent to just over $120 billion).[11] The largest sports betting companies also had banner years,

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[5] For example, New Jersey added powers to regulate sports betting to its previously-established Casino Control Commission. *See, e.g.*, N.J. Sports Wagering Law, P.L. 2018, c. 33 [https://perma.cc/X4DH-LHBZ], C.5:12A-10.

[6] *See* N.Y. Comp. Codes R. & Regs. Tit. 9 § 5325.6 ("Advertisements shall contain a problem gambling assistance message.").

[7] *See* Christopher Dale, *New York's Gambling Trap: Ads are Luring People with Highly Dicey Promises*, N.Y. Daily News (May 6, 2021), https://www.nydailynews.com/opinion/ny-oped-new-yorks-gambling-trap-20210506-f3d72m6qvve4fmkz6qtgdocmre-story.html [https://perma.cc/8FYP-M74Z].

[8] *See* Joe Hernandez, *Sports Betting Ads Are Everywhere. Some Worry Gamblers Will Pay a Steep Price*, NPR (June 18, 2022), https://www.npr.org/2022/06/18/1104952410/sports-betting-ads-sports-gambling [https://perma.cc/9MTU-3GK5].

[9] Sports betting companies spent $1.2 billion on acquiring new U.S. customers in 2021. With more states and leagues expanding sports betting capabilities, that figure is expected to reach $2.1 billion in 2022. *See* Owen Poindexter, *Sports Betting Companies Spending Billions on U.S. Market*, Front Office Sports (Dec. 27, 2021), https://frontofficesports.com/sports-betting-companies-spending-billions-on-u-s-market/[https://perma.cc/GE5C-3JE5].

[10] *See* Doug Greenberg, *Expanded Legal Betting Access Leads to Record Year*, Front Office Sports (Feb. 16, 2023), https://frontofficesports.com/sports-betting-industry-record-7-5b-2022-revenue [https://perma.cc/V72M-SFLX]. The 2022 amount shattered the prior record of $4.3 billion in 2021.

[11] *Id.* Since PASPA was struck down in May 2018, American bettors have placed $190.3 billion in wagers, creating $14.6 billion in sports betting revenue and

with FanDuel and DraftKings garnering about sixty percent of the total nationwide handle.[12] All told, in the five years since the Supreme Court's invalidation of PASPA, the total betting handle has topped $220 billion.[13]

While a traditional casino-based betting structure exists, the bulk of sports betting has been digital, resulting in ninety percent of bets being placed on mobile devices since 2022.[14] According to the President of Sportradar North America, a leading sportsbook data analysis company, in five years, the integration of betting widgets into mobile streams and a maturing sports betting marketplace will normalize in-play, wherever-you-watch, on-the-go betting—accelerating growth and increasing the resulting handle.[15]

While sports leagues have traditionally opposed gambling because of the fear (based on past history) that games could be compromised, they have recently changed their attitude and have profited as well. In 2022, the NFL sports betting revenue increased forty percent from a year earlier.[16] Sports betting sponsorships between sports leagues, teams, and betting companies have quadrupled from 2019 to 2022. As of February 2023, more than twenty-five NFL teams now have at least one sports betting sponsor, including notable

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$3 billion in state and federal taxes. *See also* Bill King, *SBJ Betting: U.S. Handle Jumped 30% in 2023*, Sports Bus. J. (Mar. 1, 2024), https://www.sportsbusinessjournal.com/SB-Blogs/Newsletter-Betting/2024/03/01.aspx#:~:text=Handle%20in%20the%2030%20legalized,2023%2C%20handle%20rose%208%25 [https://perma.cc/8AES-598P] (2023 statistics).

[12] In 2022, the breakdown was as follows: FanDuel's handle was $18,893,174,716 or 34 percent of the total; DraftKings was $15,820,234,899 or 29 percent; BetMGM was $5,671,094,176 (10 percent); Caesar's was $5,638,602,485 (10 percent); BetRivers, $2,928,698,955 (5 percent); PointsBet, $1,695,293,573 (3 percent); and Barstool, $2,355,264,509 (4 percent). *See* Bill King, *SPJ Betting: MLB Adds New Pitches to its Arsenal*, Sports Bus. J. (Mar. 31, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/Newsletter-Betting/2023/03/31 [https://perma.cc/4YZ6-QFF9].

[13] *See Americans Have Bet $220 Billion on Sports in 5 Years Since Legalization*, Indianapolis Bus. J. (May 8, 2023), https://www.ibj.com/articles/americans-have-bet-220b-on-sports-in-5-years-since-legalization [https://perma.cc/Z25F-A98A].

[14] *See* Andrew Bimson, *Sports Betting's Next Five Years Offers a Tech-Driven Boom*, Sportico (May 11, 2023), https://www.sportico.com/business/sports-betting/2023/sports-betting-next-five-years-tech-boom-1234721976/?cx_testId=9&cx_testVariant=cx_1&cx_artPos=1&cx_experienceId=EXAKGDTXOYL0#cxrecs_s [https://perma.cc/QKA8-VX82].

[15] *Id.*

[16] *See NFL Sports Betting Revenue Skyrocketed 40% from 2022*, Cision PR Newswire (Feb. 7, 2023), https://www.prnewswire.com/news-releases/nfl-sports-betting-revenue-skyrocketed-40-in-2022-301739994.html [https://perma.cc/XN8Y-8DMN].

brands like FanDuel, BetMGM, Bally's, Betfred, and Bet365.[17] Additionally, sports broadcasts often post gambling information,[18] including point spreads, prop bets, and even secondary screen broadcasts (often on mobile devices) catering to betters with more detailed information.[19] Of the major leagues, the NFL is the most restrictive as it requires its broadcast partners to limit advertising and information during its broadcasts.[20]

To a considerable degree, this strategy has worked: one in five Americans placed sports bets in 2022.[21] Digital betting has been spearheading this growth, as 86 percent of bets were online or on mobile the year before.[22]

Because of the heavy promotions and the ease of betting, some public health experts have pointed to a rise in problem gambling, which could lead to gambling addiction.[23] The definition of the term "problem gambling"

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[17] *Id.*

[18] *See* Hernandez, *supra* note 8, at 2 ("And in some cases, made their own sports books, which are promoted during broadcasts. In the fall of 2023, ESPN signed a 10-year, $2 billion deal with the gaming company Penn Entertainment to launch its own digital sportsbook, ESPN Bet."); *see also* Amanda Mull, *Sports Betting Won*, The Atlantic (Aug. 9, 2023), https://www.theatlantic.com/technology/archive/2023/08/espn-sports-betting-mobile-gambling/674967/ [https://perma.cc/W3NJ-UT5C].

[19] *See* Cole Rush, *On Screen Action: How Broadcasting and Betting Intersect*, IGB (Jan. 12, 2022), https://igamingbusiness.com/marketing-affiliates/onscreen-action-how-broadcasting-and-betting-intersect/ [https://perma.cc/EAK8-WEQN].

[20] *See* Adam Kilgore, *Inside the NFL's Careful, Complicated, Embrace of Sports Gambling*, Wash. Post (Oct. 4, 2023), https://www.washingtonpost.com/sports/2023/10/04/gambling-las-vegas-super-bowl/ [https://perma.cc/GAL8-LV5J].

[21] *See* Rebecca Ruiz, *Betting Apps Can Make Anyone a Sports Fan: Even Me*, N.Y. Times (Dec. 26, 2022), https://www.nytimes.com/2022/12/24/business/sports-betting-apps.html [https://perma.cc/ZZ7B-EEM4].

[22] *See* Mike Reynolds, *Online Wagering, Engaged Fans, Key to Sports Betting Growth*, S&P Glob. Mkt. Intel. (Oct. 20, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/online-wagering-engaged-fans-key-to-sports-betting-growth-66575074 [https://perma.cc/B3PC-VWEU].

[23] *See* 60 Minutes, *Sports Betting Fuels Concerns Over Problem Gambling | 60 Minutes*, YouTube (Feb. 5, 2024), https://www.youtube.com/watch?v=vDsLu0CWcgk [https://perma.cc/E9KC-SFMP]; Katherine Sayre, *A Psychiatrist Tried to Quit Gambling. Betting Apps Kept Her Hooked.*, Wall St. J. (Feb. 18, 2024), https://www.wsj.com/business/hospitality/gambling-addiction-sports-betting-apps-4463cde0?mod=hp_lead_pos7 [https://perma.cc/6ZLT-48GS]. Problem Gambling—or gambling addiction—includes all gambling behavior patterns that compromise, disrupt or damage personal, family or vocational pursuits. According to the DSM-5, an individual must have four of more of the following symptoms within the last year: needs to gamble with increasing amounts of money in order to achieve the desired excitement; is restless or irritable when attempting to cut down or stop gambling; has made repeated unsuccessful efforts

"includes all gambling behavior patterns that compromise, disrupt, or damage personal, family or vocational pursuits."[24] "In extreme cases, problem gambling can result in financial ruin, legal problems, loss of career and family, or even suicide."[25] In other words, it is an addiction to gambling.[26] Warning signs and symptoms of problem gambling include denying or minimizing

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to control, cut back, or stop gambling; is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble); often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed); after losing money gambling, often returns another day to get even ("chasing" one's losses); lies to conceal the extent of involvement with gambling; has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling; relies on others to provide money to relieve desperate financial situations caused by gambling, *see What is Problem Gambling*, Virginia Council on Problem Gambling, https://vcpg.net/about/what-is-problem-gambling/ [https://perma.cc/RL6Z-6TKM] (last retrieved June 9, 2023); *see also* Daryn Austin, *The Legalization of Sports Wagering and the Increase in Problem Gambling,* Deseret News (July 19, 2022), https://www.deseret.com/sports/2022/7/19/23195839/the-legalization-of-sports-wagering-and-the-increase-in-problem-gambling [https://perma.cc/24V5-WKXJ]

[24] *Id.*; *see also FAQs: What is Problem Gambling? National Council on Problem Gambling*, Nat'l Council on Problem Gambling, https://www.ncpgambling.org/help-treatment/faq/ [https://perma.cc/QVB8-3Y8P] (last retrieved June 9, 2023). The symptoms include increasing preoccupation with gambling, a need to bet more money more frequently, restlessness or irritability when attempting to stop, "chasing" losses, and loss of control manifested by continuation of the gambling behavior in spite of mounting, serious, negative consequences. The Virginia Council on Problem Gambling agrees with this definition. *See* Virginia Council on Problem Gambling, *supra* note 23, at 4.

[25] *Id.*

[26] *See Diagnostic Criteria: Gambling Disorder*, Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders § 312.31, at 585–89 (5th ed. 2013), https://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20(%20PDFDrive.com%20).pdf [https://perma.cc/LQW2-U6BG]. The definition of problem gambling is somewhat elastic. According to the New York Council on Problem Gambling, "The term problem gambling has been used in different ways by the research community, ranging from individuals who fall short of the diagnostic criteria for pathological gambling to persons whose gambling behavior compromises, disrupts or damages personal, family or vocational pursuits. According to the National Council on Problem Gambling, this term is also used as a more inclusive category that encompasses a continuum of gambling difficulties, with pathological gambling at one end of the spectrum. A problem gambler dedicates more time, thought and money towards gambling." *See What is Problem Gambling*?, N.Y. Council on Problem Gambling, https://nyproblemgambling.org/resources/what-is-problem-gambling/[https://perma.cc/YPG8-3BPJ] (last retrieved June 9, 2023).

the problem, betting "in secret" or lying about gambling, feeling others will not understand or that the gambler will surprise them with a big win, having difficulty controlling the urge to gamble, continuing to gamble even if one lacks the funds to do so, and borrowing, selling, or even stealing for gambling money.[27] The American Psychiatric Association lists "gambling disorder" as a recognized diagnosis in its Diagnostic and Statistical Manual of Mental Disorders ("DSM").[28]

Early research shows that those who bet using mobile devices have higher rates of problem gambling.[29] In addition, the live "In-Play" betting options—which give today's sports gamblers the ability to bet on many more outcomes than just the winner of a game—are additional contributing

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[27] *See Gambling Addiction and Problem Gambling*, HelpGuide.org, https://www.helpguide.org/articles/addictions/gambling-addiction-and-problem-gambling.htm [https://perma.cc/3C5G-XSDE] (last retrieved June 10, 2023).

[28] *See Diagnostic Criteria: Gambling Disorder*, *supra* note 26, at 4 ("A. Persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12 month period: a. Needs to gamble with increasing amounts of money in order to achieve the desired excitement[;] b. Is restless or irritable when attempting to cut down or stop gambling[;] c. Has made repeated unsuccessful efforts to control, cut back, or stop gambling[;] d. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble)[;] e. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed)[;] f. After losing money gambling, often returns another day to get even ("chasing" one's losses)[;] g. Lies to conceal the extent of involvement with gambling[;] h. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling[;] i. Relies on others to provide money to relieve desperate financial situations caused by gambling. B. The gambling behavior is not better explained by a manic episode. *Specify* if: **Episodic**: Meeting diagnostic criteria at more than one time point, with symptoms subsiding between periods of gambling disorder for at least several months[;] **Persistent**: Experiencing continuous symptoms, to meet diagnostic criteria for multiple years. *Specify* if: **In early remission**: After full criteria for gambling disorder were previously met, none of the criteria for gambling disorder have been met for at least 3 months but for less than 12 months. In sustained remission: After full criteria for gambling disorder were previously met, none of the criteria for gambling disorder have been met during a period of 12 months or longer. *Specify* current severity: **Mild**: 4–5 criteria met[;] **Moderate**: 6–7 criteria met[;] **Severe**: 8–9 criteria met.") (emphasis in original).

[29] *See* Ken C. Winters & Jeffrey L. Derevensky, *A Review of Sports Wagering: Prevalence, Characteristics of Sports Bettors, and Association with Problem Gambling*, 43 J. of Gambling Issues 102, 109–10 (2019), https://www.ncpgambling.org/wp-content/uploads/2020/01/sports-gambling_NCPGLitRvw.pdf [https://perma.cc/H7MB-HLMX].

factors. Examples are "prop bets," or side wagers on components other than the outcome of a game, like a player's total assists in basketball.[30] In addition, "parlay bets" have allowed gamblers to bet not just on the result of one game, but on several different games or on several variables within a single contest and tie them together in a single bet. This permits betting at almost any time during a match on hundreds and potentially thousands of discrete events. This shortens the lag between bet and reward, increasing the speed and frequency of gambling, which increases the risk of problematic behavior.[31]

In an attempt to prevent excessive or problem gambling, most states have enacted some regulations involving sports betting advertising. However, they tend to be quite limited—focusing on restricting "false and deceptive" ads, mandating information about helpful websites and phone numbers for problem bettors, and implementing some limitations on ads presented to children.[32] But these regulations are inadequate to curb the potential for more gambling addictions or children being enticed to bet. Therefore, a broader approach is needed to restrict advertising, preferably on the national level and centering on the broadcast media, to complement the state-by-state patchwork found in the current legal regimen. However, any broader advertising regulations must comport with the increasing sympathy for commercial speech protection granted by the courts over the last three decades.

This article posits that greater restrictions on sports betting promotions and advertising are needed and these restrictions can pass constitutional muster. The article (I) outlines the issue of problem gambling; (II) surveys restrictions that other countries enacted to limit betting advertising; (III) discusses the approaches for advertising regulation in the states where sports betting has been legalized; (IV) analyzes the constitutional basis for commercial speech protection of "sin product advertising" in the United States; (V) compares the *Central Hudson* standard with the approach in other countries; (VI) relates why present industry recommendations are inadequate to address the problem gambling issues; (VII) proposes broader government regulations in the broadcast media based on the regulatory power of the Federal Communications Commission ("FCC") and justifiable under First Amendment Commercial Speech.

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[30] *Id.* at 110–11.

[31] *See* Randall Smith, *Online Sports Bettors Lose Money as Parlays Gain Popularity*, Wall St. J. (May 7, 2023), https://www.wsj.com/articles/sports-better-win-lose-ddcaae24 [https://perma.cc/2973-NCR9]; *see also* Winters & Derevensky, *supra* note 29, at 109–10.

[32] *See infra* Section III.

The article concludes that, based on precedents in the regulation of indecent speech, restrictions that limit advertising to hours where children are less likely to watch can pass constitutional muster from either a commercial speech and or broadcast law standard. Other restriction proposals are also examined, from a total ban on sports betting to mandatory counter-advertising. It also examines voluntary advertising standards promulgated by industry associations and why they are inadequate to successfully limit exposure for problem gamblers. A more federalized system of regulation—especially involving broadcasting and other electronic media—is the best way to regulate advertisements while remaining sensitive to the constitutional rights of advertisers.[33]

I. The Issue of 'Problem Gambling' and Addiction

It is estimated that eight million U.S. adults are problem gamblers.[34] With the advent of sports betting, especially online and mobile betting, the

[33] Except for a short general discussion, this article will not detail the enforcement of bans on "false and deceptive advertising," as that could well be the subject of a future article or articles. It also will not delve into print media, which is not subject to the same free speech limitations as broadcast. Given that sports betting will likely be adopted in an increasing number of states the issue of potentially banning or severely restricting advertisements will be of greater concern. For an update on the number of states that legalized sports gambling, see Chris Bengel & Shanna McCarriston, *U.S. Sports Betting: Here's Where All 50 States Stand on Legalizing Sports Gambling, Player Sites*, CBS Sports (Oct. 13, 2023, 2:13 PM), https://www.cbssports.com/general/news/u-s-sports-betting-heres-where-all-50-states-stand-on-legalizing-sports-gambling-player-sites/ [https://perma.cc/9S54-VMBS]. As of this writing, major states like Texas, Florida, and California have not legalized sports betting, although there are proposals to do so in Texas. In California, there were two major propositions on the November 2022 ballot that could have legalized sports betting in California, one to legalize in-person sports betting and the other to legalize online sports betting. Both were heavily voted down by Californians. It is not known at this time if the topic of legal California sports betting will be reconsidered in 2024. *Id.* More recently, North Carolina and Vermont legalized sports betting and should begin offering sportsbooks in 2024. *See* Rob Fletcher, *Vermont Governor Signs Sports Betting Bill into Law*, IGB North America (June 15, 1023), https://www.igbnorthamerica.com/vermont-governor-signs-sports-betting-bill-into-law/?utm_source=feedotter&utm_medium=email&utm_campaign=igbna_weekly&utm_content=httpswwwigbnorthamericacomvermontgovernorsignssportsbettingbillintolaw [https://perma.cc/V52M-B4PJ].

[34] *See Diagnostic Criteria*, *supra* note 28. *See also FAQs: What is Problem Gambling? National Council on Problem Gambling*, Nat'l Council on Problem Gambling,

problem may well be more acute. In a 2019 study, the National Council of Problem Gambling reported that the rate of problem gambling among sports bettors is at least twice as high as among gamblers in general.[35] Even before sports betting was legalized and gambling was centered on live, in-casino environments, studies have shown that exposure to advertising was a "precipitator for relapse" and could counteract educational anti-gambling messages.[36]

Indeed, there is evidence of increases in helpline calls nationwide since sports betting was legalized. For example, in the first year that sports betting was legalized in Colorado, the number of calls and texts to Colorado's Gambling addiction helpline increased by 45 percent.[37] There is also evidence of increased betting by those under the legal age. One survey, conducted by

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https://www.ncpgambling.org/help-treatment/faq/ [https://perma.cc/QVB8-3Y8P] (last retrieved June 9, 2023) ("One percent of U.S. adults are estimated to meet the criteria for severe gambling problems in a given year. . . Two to three percent would be considered to have mild or moderate gambling problems; that is, they do not meet the full diagnostic criteria for gambling addiction but meet one or more of the criteria and are experiencing problems due to their gambling behavior. Research also indicates that most adults who choose to gamble are able to do it responsibly.").

[35] *See A Review of Sports Wagering & Gambling Addiction Studies, Executive Summary*, Nat'l Council on Problem Gambling, https://www.ncpgambling.org/wp-content/uploads/2020/01/Sports-gambling_NCPGLitRvwExecSummary.pdf [https://perma.cc/4JXP-4NFY] (last retrieved June 2, 2023).

[36] *See* Per Binde, *Exploring the Impact of Gambling Advertising: An Interview Study of Problem Gamblers*, 7 Int'l J. of Mental Health & Addiction, 541, 552 (2009); Per Binde, *Gambling Advertising: A Critical Research Review*, Responsible Gambling Trust (2014); *see also* Adrian Parke, Andrew Harris, Jonathan Parke, Jane Rigbye, & Alex Blaszczynski, *Responsible Marketing and Advertising in Gambling: A Critical Review*. 8 J. of Gambling Bus. & Econ., 21, 23–24 (2014); Simon Planzer & Heather Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, Responsible Gambling Fund (2011) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045052 [https://perma.cc/5Y3J-S679]. These studies were the basis for recommendations of advertising restrictions on casino gambling in Massachusetts. *See* Robert J. Williams, Rachel A. Volberg, Martha Zorn, Edward J. Stanek, & Valerie Evans, A Six-Year Longitudinal Study of Gambling and Problem Gambling in Massachusetts 71–72 (2021), https://massgaming.com/wp-content/uploads/MAGIC-Six-Year-Longitudinal-Study-of-Gambling-and-Problem-Gambling-in-Massachusetts_Report-4.16.21.pdf [https://perma.cc/RJ4P-TFAA]

[37] See Wayne Parry, *As Legal Gambling Surges, Some States Want to Teach Teens about the Risks*, Associated Press, (June 2, 2023), https://apnews.com/article/underage-gambling-education-schools-sports-betting-addiction-a0fe6ccb32119a3021e-273af5356ea28 [https://perma.cc/4EXT-NUWU?type=standard].

the National Council on Problem Gambling, concluded that between 60 to 80 percent of high school students have gambled for money.[38]

In 2021, calls to the helpline run by the National Council on Problem Gambling, a gaming industry-supported group, rose 43 percent, while texts increased 59 percent and chats jumped 84 percent.[39] In Connecticut, helpline calls jumped 91 percent in the first year after legalization.[40] In Ohio, which also legalized sports betting in early 2023, calls to the state's problem gambling hotline tripled in the first month alone compared to the same period the year before.[41] In the first year after Virginia legalized sports gambling, calls to the hotline climbed 387 percent.[42] In Illinois, calls rose 425 percent between 2020 and 2022.[43]

There is evidence that the problem is growing. Calls to the National Council of Problem Gambling helpline increased by 124 percent to over 30,000 between March 2020 and March 2023.[44] When sports gambling is conducted online, the rate of addiction is even higher, with one study of online sports gamblers indicating that 16 percent met clinical criteria for gambling disorder and another 13 percent showed some signs of gambling problems.[45] The study noted that those under 18 are at an even higher risk of addiction. Data from 2018 showed that more than 75 percent of students gambled and more than 13 percent of adolescents wagered money on sports teams.[46] Being male and young are considered risk factors for problem gambling.[47]

Despite the overwhelming evidence of increased helpline calls, some have questioned a causal connection between advertising and problem betting. One U.K. common paper indicated skepticism of any causal connection

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[38] *Id.*

[39] *See* Meghan Gunn, *These Are the Real Dangers of the Sports Betting Boom for Young Men*, Newsweek (Mar. 22, 2023), https://www.newsweek.com/2023/04/07/sports-betting-boom-linked-rising-gambling-addiction-anxiety-suicide-1789055.html [https://perma.cc/2JT5-24XM].

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* Daniel Kaplan, *Sports Gambling Ads are Everywhere. Should They Be Restricted or Even Banned?,* The Athletic (May 12, 2023), https://theathletic.com/4496847/2023/05/12/sports-gambling-ads-restrictions/?source=targeted_email&campaign=6978149 [https://perma.cc/L4EN-2BC9].

[45] *Id.*

[46] *Id.*

[47] *See* Winters & Derevensky, *supra* note 29, at 107.

between advertising and greater problem betting despite concluding that more advertising regulations should be adopted.[48] Nonetheless, the paper did note that advertising, regardless of form, can have "much stronger, and adverse, impacts on those who are already experiencing problems with gambling."[49]

II. Laws Restricting Sports Betting Advertising in Other Countries

Before discussing the question of regulating advertising in the U.S., it is worth discussing various approaches taken in other countries. Presently, over twenty countries have legalized sports betting in different forms.[50] Many, if not most of these countries, regulate advertising through statutory, regulatory, or voluntary industry standards and some restrict such content more broadly than currently found in state regulations.[51] While freedom of speech is guaranteed in many countries, the scope of freedom for commercial speech has generally been more limited outside the United States. [52] As such, some

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[48] *See* Lucy Frazer, *Policy Paper: High Stakes: Gambling Reform for the Digital Age,* Dep't for Culture, Media & Sport (Apr. 27, 2023), https://www.gov.uk/government/publications/high-stakes-gambling-reform-for-the-digital-age/high-stakes-gambling-reform-for-the-digital-age#chap2 [https://perma.cc/93TU-Q28M] ("Overall, the call for evidence submissions showed a lack of conclusive evidence on the relationship between advertising and harm. The limited high-quality evidence we received shows a link between exposure to advertising and gambling participation, but there was little evidence of a causal link with gambling harms or the development of gambling disorder. . . . We want customers to have further protections quickly. We will work with industry and all stakeholders in the sector to create an ombudsman that is fully operationally independent and is credible with customers.").

[49] *Id.* (citing study by Per Binde & Ulla Romild, *Self-Reported Negative Influence of Gambling Advertising in a Swedish Population-Based Sample*, 35 J. of Gambling Stud. 709 (2018)).

[50] *See Global Online Betting Regulations,* Online Betting, https://onlinebetting.com/countries [https://perma.cc/TXH7-V3CM] (last visited June 19, 2023).

[51] *Id. See also* Winter & Derevensky, *supra* note 29; Frazer, *supra* note 48; Otis, *infra* note 60; Betting & Gaming Council, *infra* note 64; Thomas-Akoo, *infra* note 76; Strauss, *infra* note 79, Ruedas, *infra* note 93.

[52] *See, e.g.,* Canadian Charter on Rights and Freedoms, Part I of the Constitution Act, 1982, § 2(b) ("2. Everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."); The Constitutional Act of 1853, § 77 (Den.) https://www.thedanishparliament.dk/-/media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/the_constitutional_act_of_denmark_2018_uk_web.pdf [https://perma.cc/8RUJ-3RUB] ("Any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law.

regulations enacted in those nations would likely be unconstitutional in the United States.[53]

A. Canada

Federal legislation allowing sports betting was enacted in Canada in 2021, allowing provinces to operate "single game" betting operations.[54] Since this legalization, Ontario has been the only province to license sports books operated by third parties (like in the United States), while the other provinces have operated lottery-run platforms for their single-game betting.[55]

In Ontario, sports betting falls under the jurisdiction of its Alcohol and Gaming Commission of Ontario (AGCO), which in 2022 enacted a series of regulations that include restricting advertising and sponsorship.[56] Most

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Censorship and other preventive measures shall never again be introduced"); The Constitution of the Italian Republic, art. 21, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [https://perma.cc/GT4T-TWAX] ("Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication").

[53] *See* United States v. Wenger, 427 F.3d 840, 847 (10th Cir. 2005) (holding commercial speech is protected by the First Amendment, requiring state regulations to pass a form of intermediate scrutiny).

[54] *See* Pat Evans, *Single-Game Sports Betting in Canada Will Launch in Just Two Weeks*, Legal Sports Rep. https://www.legalsportsreport.com/55410/launch-date-canada-sports-betting [https://perma.cc/FRH2-FFFH] (last updated Aug. 12, 2021).

[55] *See* Jeff Watters, *Legal Online Sports Betting in 2023*, Covers (June 1, 2023), https://www.covers.com/betting/canada/legal-sports-betting [https://perma.cc/E88D-3UTF]. Note that as of early 2023, Ontario is the only province with dedicated retail sportsbooks. *Id.*

[56] *See Marketing and Advertising*, Alcohol & Gaming Comm'n of Ontario, https://www.agco.ca/marketing-and-advertising [https://perma.cc/WR6C-VHK2] (last visited June 7, 2023) [hereinafter Ontario Marketing and Advertising Regulations] (indicating sports betting advertising cannot be directed at children or young people, advertising must not make false or misleading claims about the odds of winning, and sports betting companies must comply with social media guidelines, which require disclosure of the risks of gambling and the age restrictions); *see also Know Your Limit, Play Within It*, Mississauga News (Mar. 21, 2015), https://www.mississauga.com/life/know-your-limit-play-within-it/article_334c4cd3-7ba5-5af5-9b1a-a2cf978dd7fb.html [https://perma.cc/7Q2X-WSFA] (explaining advertising must promote responsible gambling practices and provide resources for individuals who may have gambling addictions with prescriptive messages such as such as "Know Your Limit, Play Within It"); *Sport and Event Betting in Ontario—Player Information,* Alcohol & Gaming Comm'n of Ontario, https://www.agco.ca/sport-and-event-betting-ontario-player-information [https://perma.cc/A2ZY-A5J8] (providing

relevant are advertising restrictions or prohibitions in certain locations, such as near schools or places of worship and the restrictions on certain types of sponsorships.[57] One example is the prohibition of sponsorships between a betting firm and a sports team if the team's primary audience is under the age of 18.[58] In addition, the AGCO announced a strengthening of these regulations that takes effect in 2024. This will prohibit celebrity and athlete endorsements of sports betting firms.[59] In the other provinces, advertising restrictions are minimal, possibly because the lottery schemes are provincial and not funded or sponsored by private companies.[60]

B. United Kingdom

Laws and regulations for sports betting advertising are established and enforced by the U.K. Gambling Commission, the Advertising Standards Authority ("ASA"), and the Committee of Advertising Practice ("CAP").[61] More specifically, there are separate regulations for "non-broadcast" and "broadcast" advertising of gambling (not just limited to sports), both of which are geared towards protecting those under the age of 18.[62] Advertising that is "likely to be of strong appeal to children or young persons, especially

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specific "safe sites" for sports and event betting as well as regulations to protect the integrity of the game itself).

[57] *See* Ontario Marketing and Advertising Regulations, *supra* note 56, § 2.03.

[58] *Id.*

[59] *See AGCO to Ban Athletes in Ontario's iGaming Advertising to Protect Minors*, Alcohol & Gaming Comm'n of Ontario (Aug. 29, 2023) https://www.agco.ca/blog/lottery-and-gaming/aug-2023/agco-ban-athletes-ontarios-igaming-advertising-protect-minors [https://perma.cc/W788-ZU7D].

[60] *See generally* Daniel Otis, *Are Sports Betting Ads Getting Out of Control in Canada? Experts Weigh In,* CTV News, https://www.ctvnews.ca/sports/are-sports-betting-ads-getting-out-of-control-in-canada-experts-weigh-in-1.6399493 [https://perma.cc/AGU4-8GGZ] (last updated May 15, 2023, 6:01 PM); *Gambling Ads are Ruining Sports*, Ban Ads for Gambling, https://www.banadsforgambling.ca/ [https://perma.cc/8CGX-XXSR].

[61] *See* CAP Code, art. 16.3.12 (2010), https://www.asa.org.uk/static/b324a7dd-94d6-4fb2-979365d66acb2e36/8ae8e940-6cb2-4445-a7c595ae48d4702d/The-CAP-Code-Gambling.pdf [https://perma.cc/WH8J-SKYE].

[62] *See* Advert. Standards Auth., Comms. of Advert. Prac., UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing, art. 16 (non-broadcast advertising), https://www.asa.org.uk/static/699c12ab-3a81-4175-9a22f8b900997394/99342a83-3b3e-4ce2-a36606bc80904e4d/The-BCAP-Code-Gambling.pdf [https://perma.cc/R7P5-YGTC].

by reflecting or being associated with youth culture" are restricted.[63] With regard to broadcasting, the rules were stricter in part because U.K industry associations have pushed for a prohibition of advertising before 9:00 P.M., which has significantly reduced the number of ads in live sports events.[64]

Early in 2023, the U.K.'s department of Culture, Media & Sport issued a white paper regarding the status of gambling in the country.[65] Despite the report's admission that "[t]here is good evidence that [advertising] can have a disproportionate impact on those who are already experiencing problems with their gambling," and "some forms of online advertising have a strong appeal to children (under 18) and young adults (aged 18 to 24),"[66] the white paper does not recommend new regulations that directly restrict advertising. Rather, it calls on the Gambling Commission and gambling operators to "make the advertisements safer" through tougher rules on marketing and direct advertising[67] and asks that sports organizations engage in more voluntary measures.[68]

Despite the conclusion by the country's Gambling Commission that gambling advertising and marketing "does lead to some people starting gambling who weren't gambling before," there was criticism about the lack of a

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[63] *See id.* at art. 16.3.12. That section also prohibits gambling ads that "include a person or character whose example is likely to be followed by those aged under 18 years or who has a strong appeal to those aged under 18," but exempts advertising of gambling products associated with activities that are themselves of strong appeal to under-18s (for instance, certain sports or playing video games). *Id* at 4.

[64] *See* Betting & Gaming Council, *Children Unable to See Betting Ads Before 9pm Watershed as New English Football Season Kicks Off*, PoliticsHome (Sept. 11, 2020), https://www.politicshome.com/members/article/children-unable-to-see-tv-betting-ads-before-9pm-watershed-as-new-english-football-season-kicks-off [https://perma.cc/CS6L-X9CP] ("overall, the amount of gambling ads viewed by youngsters has fallen by 70 per cent over the full duration of live sport programmes").

[65] *See* Frazer, *supra* note 48.

[66] *Id.* § 2 (marketing and advertising).

[67] *Id.*

[68] *Id.* For example, the Premiere League followed that recommendation and banned gambling ads on the front of team jerseys, some that has been done by other European soccer leagues. *See* David Steele, *Premiere League will Boot Gambling Ads from Jersey Fronts*, Law360 (Apr. 13, 2023), https://www.law360.com/sports-and-betting/articles/1596638?nl_pk=6ada3079-4db3-4c29-8042-be5ea277a863&utm_source=newsletter&utm_medium=email&utm_campaign=sports-and-betting&utm_content=2023-04-14&read_more=1&nlsidx=0&nlaidx=4 [https://perma.cc/9X46-UJBW].

broader proposal to restrict the terms or amount of gambling advertising permitted.[69]

C. The European Union

The regulatory approaches of individual E.U. nations vary considerably. Most have enacted significant restrictions on advertising, because commercial speech has a lesser scope of protection under the European Convention on Human Rights.[70] It permits restrictions on objective and truthful advertisements "in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions."[71] As can be seen in the examples described below, most of the restrictions center on broadcasting.

In 2019, the Italian government fully banned commercial gambling advertising via television, radio, and the Internet.[72] The rules also prohibit betting companies from sponsoring sports events or clubs.[73]

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[69] *See* Zak Thomas-Akoo, *Concerns Remain Over a Lack of Action on Ads in Gambling White Paper*, iGB (Apr. 27, 2023), https://igamingbusiness.com/legal-compliance/politicans-critise-gambling-white-paper/ [https://perma.cc/SHT8-6W43] (One Member of Parliament criticized the proposal as lacking in restrictions in the amount of gambling advertising. Another argued that the white paper did not "contain enough measures sufficiently to tackle advertising.").

[70] *See* Council of Europe, *Guide on Article 10 of the European Convention on Human Rights*, European Court of Human Rights (last updated Aug. 31, 2022), https://www.echr.coe.int/documents/d/echr/guide_art_10_eng [https://perma.cc/LPY5-5SL9]. Like the multi-part *Central Hudson* test, discussed *infra* Section IV, the standard of protection for commercial speech in the EU is also a multi-part test, but with more deference to government's justifications. The EU Convention sets out a four-part analysis for whether a State under the EU is authorized to restrict commercial speech under Article 10: (1) whether there was an interference by a public authority; (2) whether the restriction is prescribed by law; (3) whether the aim of the restriction is legitimate; and (4) whether the restriction is necessary in a democratic society.

[71] *See* Casado Coca v. Spain, 18 Eur. Ct. H.R. (ser. A), 15–16 (1994); Barthold v. Germany, 90 Eur. Ct. H.R. (ser. A), 19 (1985).

[72] *See* Erik Gibbs, *Gambling Advertising in Italy Officially Dead*, Calvin Ayre (Aug. 10, 2018), https://calvinayre.com/2018/08/10/business/gambling-advertising-italy-officially-dead/ [https://perma.cc/R4PA-HFWT].

[73] *See* Raffaello Rossi, Agnees Nairm, Ben Ford, & Jamie Wheaton, *Online Gambling Ads Need to be Regulated. The European Union is Showing How to Do It.* Scroll.in (Feb. 18, 2023), https://scroll.in/article/1043956/

In France, time restrictions on sports betting advertising also exist, but are not as encompassing. Such advertisements are not allowed during broadcasts of live sports events or in the 30 minutes before and after these broadcasts.[74] This rule aims to reduce the exposure of minors to sports betting advertising. Spain has similar restrictions regarding live events, and its gambling authority also enacted rules to prohibit ads on television, radio, and online media outside of 1:00 A.M. to 5:00 A.M.[75] In the Netherlands, gambling ads through most media channels—including on television, in radio, and in print—were banned in the summer of 2023.[76] The new rules also prohibit advertising in public places, which extends to billboards, bus shelters and cafes, as well as within gaming venues themselves such as casinos and slot parlors.[77] In Germany, ads are also banned, but sponsorships are permitted.[78]

In 2023, Belgium banned gambling advertising across multiple platforms to crack down on "addiction and debt," with a further prohibition on ads in stadiums and sports sponsorships coming at a future date.[79] As this

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online-gambling-ads-need-to-be-regulated-the-european-union-is-showing-how-to-do-it [https://perma.cc/4V7D-PM3Z].

[74] *See* Nick Mwangi, *France: Successful Betting Ad Restrictions for ANJ*, Nairobi Wire (Feb. 22, 2023), https://nairobiwire.com/2023/02/ireac-successful-betting-ad-restrictions-by-anj.html [https://perma.cc/8U2M-YGWB] (The ANJ is responsible for regulating all forms of gambling in France, including sports betting. "This includes banning gambling ads during live sports broadcasts and curtailing the amount of advertising that can be broadcast during certain time intervals on any TV channel.").

[75] *See* Albert Agustinoy, Alicia Costas & Clara Sánchez, *Royal Decree on Gambling Advertising Published in the Official State Gazette*, Cautrecasas (Nov. 5, 2020), https://www.cuatrecasas.com/en/global/art/royal-decree-on-gambling-advertising-published-in-the-official-state-gazette-1 [https://perma.cc/BGW5-N9XP] (detailing Royal Decree 958/2020).

[76] *See* Zak Thomas-Akoo, *Netherlands Bans Gambling Ads*, IGB (July 3, 2023), https://igamingbusiness.com/marketing-affiliates/marketing/netherlands-ban-gambling-ads/ [https://perma.cc/9SNF-WDHA].

[77] *See* Robert Fletcher, *Dutch Government Confirms 1 July Start for Gambling Ad Ban,* iGB (Apr. 23, 2023), https://igamingbusiness.com/marketing-affiliates/dutch-gambling-ad-ban/?utm_source=feedotter&utm_medium=email&utm_campaign=igb_daily&utm_content=httpsigamingbusinesscommarketingaffiliatesdutchgamblingadban [https://perma.cc/9FLL-KFVS].

[78] *Id.*

[79] *See* Marine Strauss, *Belgium Bans Gambling Advertising from July 1*, Reuters (Mar. 9, 2023), https://www.reuters.com/world/europe/belgium-bans-gambling-advertising-july-1-2023-03-09/ [https://perma.cc/8JHZ-ECP8].

article is being written, Ireland is considering a ban on advertising between 5:30 A.M. and 9:00 P.M.[80]

D. Africa

A number of African countries have legalized sports betting and have employed some general restrictions on advertising. In Ghana, for example, regulations stipulate that ads cannot be false or misleading and bar the use of celebrities.[81] Warnings are required that must take up a stipulated percentage of the ads or run as "crawls" on television or radio.[82] Additionally, betting ads cannot be aired on radio and television during "prime time."[83]

E. Australia

In Australia, the Interactive Gaming Act makes it an offense to offer or advertise "real money" online interactive gambling services to Australian residents.[84] Ads for betting products in certain areas of Australia are not

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[80] *See* Irish Parliament, Gambling Regulation Bill 2022, § 141.(1), at 109, https://data.oireachtas.ie/ie/oireachtas/bill/2022/114/eng/initiated/b11422d.pdf [https://perma.cc/ZZ9D-SWSG]. ("A person shall not knowingly advertise, or cause another person to advertise, a relevant gambling activity on television, radio or an on-demand audio-visual media service between the hours of 5:30 a.m. and 9:00 p.m.")

[81] *See* Gaming Comm'n of Ghana, *Guidelines on Advertisement, General and Specific Guidelines*, https://gamingcommission.gov.gh/images/images/pdf/ADVERTISING percent20GUIDELINES percent20OF percent20THE percent20GAMING percent20COMMISSION.pdf [https://perma.cc/SQR9-AZYK] (retrieved June 9, 2023). The power of the Gaming Commission derives from § 3(2)(g) of the Gaming Act of 2006 (Act 721), https://www.bcp.gov.gh/new/reg_details.php?id=MTc= - :~:text=AN percent20ACT percent20to percent20revise percent20and,matters percent20concerning percent20the percent20gaming percent20industry [https://perma.cc/XK45-86DX] (retrieved June 9, 2023).

[82] *Guidelines on Advertisement*, § 3(2)(g) of The Gaming Act 2006 (Act 271) (Austl.), at 2 ("Warnings and acknowledgements must be placed at the bottom of the advertisement and must not be less than thirty percent (30%) of the biggest font size in case of billboards or flyers. Run as crawls for Television and Social Media advertisements. Run for the entire duration of the TV and Social Media advertisements. Where warnings are read on TV and Radio, it shall be clear, audible and well-paced. All operators' premises shall display warnings on its premises.") (emphasis omitted).

[83] *Id.*

[84] *See Interactive Gambling Act 2001*, No. 84 (Austl.), https://www.legislation.gov.au/Details/C2022C00063 [https://perma.cc/FLZ4-SYXB] (last visited, Jun. 9, 2023).

permitted during TV programs during certain periods of the day, in programs directed at children, and during broadcasts of live sporting events.[85] Gambling ads during live sport on TV, radio, and online are not allowed to contain content that targets children, makes exaggerated claims, suggests that gambling is a way to achieve success, or makes a connection between betting or gambling and alcohol.[86] However, a recent report issued by the committee from the Australian Parliament advocated more "phased restrictions" leading to a total ban on broadcast and online advertising.[87]

III. The United States: Present Regulations on Advertising

In the United States, the over three dozen states that have legalized sports betting have enacted rules and regulations restricting "false and deceptive advertising"[88] and advertising directed at venues and times where significant numbers of children are viewing.[89] Regulations are geared towards preventing those under the legal age (under 21 in the majority of states)[90] from being

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[85] *See Gambling Ads During Children's Programs*, Australian Commc'ns & Media Auth., https://www.acma.gov.au/gambling-ads-during-childrens-programs [https://perma.cc/2WQB-QYUJ]; *see also* Parliament of Australia House of Representatives, Standing Committee on Social Policy and Legal Affairs, You Win Some, You Lose More: Inquiry into Online Gambling and Its Impacts on Those Experiencing Harm §§ 5.35, 5.36 (2023), https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Onlinegamblingimpacts/Report/Chapter_5_-_Gambling_advertising#_ftnref16 (retrieved June 29, 2023) [https://perma.cc/FD7C-EJ6S] (hereinafter Australia House Report).

[86] *See Misleading or Socially Irresponsible Gambling Ads*, Australian Commc'ns & Media Auth. (June 9, 2023, 5:30 AM), https://www.acma.gov.au/misleading-or-socially-irresponsible-gambling-ads [https://perma.cc/2FKK-KVDD].

[87] *See* Australia House Report, *supra* note 85, §§ 5.139–5.147.

[88] *See, e.g.*, 58 Pa. Code § 1401a.9(e) (2021) ("A sports wagering certificate holder or sports wagering operator shall include signage in the sports wagering area that displays 'If you or someone you know has a gambling problem, call 1-800-GAMBLER,' or comparable language approved by the Board, including in print advertisements or other media advertising the sports wagering operations of the sports wagering certificate holder or sports wagering operator.").

[89] *See* Marcia Mercer, *States Tackle Teenage Problem Gambling as Sports Betting Grows*, Educ. Wk. (July 13, 2022), https://www.edweek.org/leadership/states-tackle-teenage-gambling-as-sports-betting-grows/2022/07 [https://perma.cc/LY8G-SZ8T].

[90] The following states allowed adults 18 and older to bet in the following formats: Kentucky (Online/Mobile/In-Person); Montana (Mobile/Online); New Hampshire

enticed to gamble and legal gamblers from becoming problem or addicted gamblers.[91] At this time, there has not been any enforcement action by the Federal Trade Commission, the agency in charge prohibiting advertisers from disseminating false, unfair, or deceptive advertising in interstate commerce.[92] However, many states have adopted standards similar to the FTC's standards for "false or materially misleading" advertising.[93]

In addition, state regulations also mandate the posting of phone numbers and websites directed to help problem gamblers. For example, New York's regulations require the posting of a phone hotline[94] and also prescribes font size requirements for signs, direct mail, billboards, and in the case of television, two percent of any image presented. For websites, these warnings should be the same size of the "majority of the text" used in the webpage.[95]

The question then becomes whether these limited regulations are effective in averting children from gambling or warning gamblers about the harm of addiction and where to go for help. Based on the reports of increased numbers of those identified as problem gamblers,[96] should regulations go further? The answer should be yes. As will be discussed, a more comprehensive series of broadcast restrictions could be more effective in stemming the increase in problem gambling.

After a one-year investigation, the *New York Times* concluded that states have required few protections for consumers, dedicated minimal funds to combating addiction, and often turned to the gambling industry to help shape regulations and police its own compliance with them.[97]

(Online/Mobile/In-Person); New Mexico (In-Person); Rhode Island (Online/Mobile/In-Person); Tennessee (Online/Mobile); Washington, D.C. (Online/Mobile/In-Person); Wyoming (Online/Mobile). *See Legal Sports Betting Age by State in 2023*, https://sportsbetting.legal/states/age/ [https://perma.cc/58FY-4GGD] (last accessed Oct. 7, 2023).

[91] *See* Mercer, *supra* note 89.

[92] *See* 15 U.S.C.A. § 52(a).

[93] *See* Serena T. Ruedas, *Sports Betting Blitz: Advertising Inundation in the U.S. Market Post-PASPA and Steps Operators Can Take to Avoid Further Regulation and Legislation*, 13 UNLV Gaming L.J. 79, 97 nn.167–68. (citing Nev. Gaming Comm. § 5.011(1)(d) (2019); N.J. Admin. Code § 13:69C-14.2(d)).

[94] *See* N.Y. Comp. Codes, *supra* note 6.

[95] *Id.*

[96] *See* Winters & Derevensky, *supra* note 29.

[97] *See* Rebecca R. Ruiz, Kenneth P. Vogel & Joe Drapt, *Why States Were Unprepared for the Sports-Betting Onslaught*, N.Y. Times (Nov. 20, 2022), https://www.nytimes.com/2022/11/20/business/sports-betting-laws-states.html?searchResultPosition=5 [https://perma.cc/KB4N-L8QG].

A series of articles noted the intense lobbying by the gaming industry to legalize sports betting, including selling potential tax revenues for states once the practice is legalized. "[States] collect taxes on gambling, and the more people bet, the more governments get. One result is that states have, in many ways, given gambling companies free rein."[98] Even pro-gambling legislators questioned the lack of greater regulation to prevent addiction.[99] However, more recently, certain states have begun to ramp up enforcement and the media has become more focused on the perils of legalized betting regimens.[100] But the enforcement is based on the regulations in place. More extensive restrictions—and bans—would face constitutional attack, making it more challenging to craft rules that would pass constitutional muster. The following sections explain why.

IV. The Constitutional Basis for Commercial Speech Protection of "Sin Product Advertising" in the United States

There is no exact definition of commercial speech,[101] but many courts (including the U.S. Supreme Court) have interpreted commercial speech as "the 'common-sense' distinction between speech proposing a commercial transaction and other varieties of speech."[102] Admittedly, the task of finding the right balance between free speech protection and regulation of commercial speech (which certainly includes sports betting advertising) is not an easy one. Part of the problem stems from the fact that for much of the 20th century, commercial speech was not given any constitutional protection because courts did not consider it within the scope of First Amendment rights.[103] The

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[98] *Id*.

[99] *Id*. ("'The issue of addiction really got lost,' said Ralph Caputo, a former casino executive and New Jersey legislator who was instrumental in legalizing sports betting admitted. 'We didn't think very seriously about it.'").

[100] *See* Eric Lipton & Kevin Draper, *First Came the Sports Betting Boom. Now Comes the Backlash*, N.Y. Times (May 12, 2023), https://www.nytimes.com/2023/05/13/sports/online-sports-gambling-regulations.html [https://perma.cc/K668-FTCK].

[101] *See* Tamara R. Piety, *Against Freedom of Commercial Expression*, 2 Cardozo L. Rev. 2583, 2591–92 (2008).

[102] *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 637 (1985) (quoting Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455–56). For a more detailed discussion, *see* Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. of Health Care & Pol. 159 (2009).

[103] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (upholding a New York City law which prohibited the distribution of handbills for commercial business and advertising).

Supreme Court dismissed any idea of protection for commercial speech in a 1942 ruling.[104] In later years, the Court would gradually take steps to include more advertising within the First Amendment sphere until formally accepting it over 30 years later.[105]

This exclusion was not a fluke—commercial speech was often restricted without much constitutional debate in various jurisdictions.[106] Justifications for restrictions or bans involved the need to protect the public from aggressive solicitation.[107] Courts rationalized restrictions on commercial speech as part of the state's power to regulate economic interests and therefore utilized the far easier constitutional standard of requiring only a "rational connection between the remedy provided and the evil to be curbed," or rational-basis review.[108]

Suffice it to say, cases that involved sin product advertising, such as restrictions on tobacco advertising, were upheld as part of the power to regulate health and safety.[109] In *Packer Corp. v. Utah*,[110] the Supreme Court upheld a state ban on cigarette advertisements on billboards.[111] In upholding this

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[104] *Id.*

[105] *See infra* notes 117–19 and accompanying text.

[106] *See*, *e.g.*, Schneider v. State of New Jersey, 308 U.S. 147, 165 (1939) (while the Court rejected ordinances against commercial handbill and leaflet distribution in Los Angeles, Milwaukee, Worcester, M.A., and Irvington, N.J. as unconstitutionally broad, the opinion noted: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires.").

[107] *Id.*

[108] *See* Thomas v. Collins, 323 U.S. 516, 530 (1945). For a thorough discussion, *see* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. Chi. L. Rev. 205, 206, n. 22 (1975).

[109] *See* D. Kirk Davidson, *Selling Sin: The Marketing of Socially Unacceptable Products*, Quorum Books (1996) ("Sin Product Advertising involves advertising and marketing of social unacceptable products, such as cigarettes, alcoholic beverages, firearms, gambling and pornography").

[110] 285 U.S. 105 (1932).

[111] *Id.* at 107. The Packer Corporation, a Delaware corporation engaged in billboard advertising and authorized to do business in Utah, was prosecuted under this statute for displaying a large poster advertising Chesterfield cigarettes on a billboard owned by it and located in Salt Lake City, thereby violating a Utah statute. The statute provided: "It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such

ban, which was violated by the petitioner (an advertising agency engaged in billboard advertising), the Court's view of commercial speech restrictions as part of a state's police power was definitive to the point that a First Amendment claim was not even alleged.[112] Other courts echoed this approach[113] and even when these laws were nullified, courts focused on property rights more than free speech rights.[114]

This approach similarly found academic support. Limited protection of commercial speech was advocated by several prominent commentators and scholars[115] who thought that the First Amendment should focus on speech that is not for commercial gain. One commentator summarized the basis of regulating commercial speech regulations because of its connection with

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articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah." *Id*.

[112] *Id.* at 108 ("It is not denied that the state may, under the police power, regulate the business of selling tobacco products, [citations omitted] and the advertising connected therewith [citations omitted."). The Court's swift disposal of the First Amendment argument was so complete that the Court focused more on other constitutional claims (which were also ultimately rejected). Those arguments included alleged Equal Protection (because the law did not apply to newspapers and magazines), liberty of contract, and Commerce Clause violations. *Id.* at 108–10.

[113] *See, e.g.*, Ry. Exp. Agency v. People of State of New York, 336 U.S. 106, 110–11 (1949) (ban on advertising on trucks survives Equal Protection challenge).

[114] *See. e.g.*, People v. Green, 83 N.Y.S 460, 463–64 (N.Y. App. Div. 1903) (law authorizing the park department of a city to regulate and control the exhibition of advertising, structures intended for advertisements, and the exhibition of advertisements upon any lands fronting upon public parks, squares, and places in a city was held unconstitutional as violating the federal constitution's provision against the taking of property for public use without compensation); *see also* Haller Sign Works v. Physical Culture Training Sch., 249 Ill. 436 (1911) (holding that the right to the use of property was unconstitutionally interfered with by a statute forbidding the erection and maintenance of any structure for advertising purposes within 500 feet of a public park or boulevard) (cited in *Constitutional Power to Regulate Outdoor and Street Car Advertising*, 79 A.L.R. 551 (1932)).

[115] *See generally* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449 (1985) (arguing that protecting commercial speech ultimately depreciates the true purpose of the First Amendment); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 Ind. L.J. 98 (2009) (presenting three arguments against protecting commercial speech); George Wright, Selling Words: Free Speech in a Commercial Culture (1997) (warning against dangers of affording commercial speech First Amendment rights).

"a separate sector of social activity involving the system of property rights rather than free expression."[116]

Beginning in the 1960s, the Supreme Court began to expand the constitutional protection of certain forms of commercial speech, if such speech included political, non-commercial elements.[117] While purely commercial speech was not yet constitutionalized,[118] the Court further narrowed the scope of the prior Supreme Court rulings, noting that any non-commercial information in an advertisement may constitutionalize the speech.[119] In 1975, commercial speech was given First Amendment protection, and since 1980, the guideline for constitutional justification must satisfy a four-part test to pass constitutional muster. This standard—known as the *Central Hudson* test[120]—has been subject to considerable interpretation because of its intricacy[121] and elasticity. For the purposes of this paper, we will focus on

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[116] *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 949 n.93 (1963); *see also* Note, *supra* note 108, at 208.

[117] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (detailing a libel action involving a paid advertisement by a number of civil rights leaders denouncing repressive police conduct against black Americans in Alabama, *id.* at 256–57). The Court held that a communication which conveyed "information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" is not deemed to be commercial in nature. *Id.* at 266. The Court ultimately concluded that defamation involving public officials was privileged, unless the plaintiff shows actual malice and reckless disregard for the truth on the part of the defendant. *Id.* at 280.). For more detail, see Mark Conrad, *Board of Trustees of the State University of New York v. Fox – the Dawn of a New Age of Commercial Speech Regulation*, 9 Cardozo. Arts & Ent. L.J. 61 (1990).

[118] *See* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963) (affirming an injunction against newspapers and radio stations carrying optometrists' advertising in violation of a state statute prohibiting such action); *see also* SEC v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir. 1970), cert. denied, 398 U.S. 958 (1970) (application of First Amendment to Investment Advisers Act of 1940, ch. 686, 54 Stat. 847), *cited in* Conrad, *supra* note 117, at 63.

[119] *See* Bigelow v. Virginia, 421 U.S. 809, 825–26 (1975) (Virginia statute making it a misdemeanor to encourage abortions ruled unconstitutional. The court ruled that the "commercial aspects" of the advertisement promoting abortions did not negate its first amendment protection since it did more than propose a commercial transaction, and that the Virginia court therefore erred in failing to balance the constitutional interests with the state's interest in regulating such speech).

[120] *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (showing where test was first conceived).

[121] *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 631 (1990) ("[J]udges and Justices have filled quite a bit of space in

the application of *Central Hudson* to gambling, alcohol and tobacco, the "sin product" industries.

Central Hudson allows restrictions against false and deceptive advertising, concluding that such advertising is outside the scope of *any* constitutional protection.[122] Based on that requirement, many states have already implemented that guideline in their regulations of sports betting advertising.[123] However, if ads are "truthful," a state's burden becomes more onerous, as *Central Hudson* imposes the following standards to justify the restriction: the government must show that the restriction had a substantial government interest; the restriction directly advances the state's interest; and the restriction is not "more restrictive than necessary" to advance that interest.[124] On its face, it seems like an intermediate scrutiny test found in content-neutral restrictions on general speech, but it is knottier, especially when it comes to "sin product" advertising. Some scholars have posited that it is really an "intermediate-plus" scrutiny standard.[125]

Difficulties in applying this intricate test is evidenced by the fact that, since 1980, the Supreme Court has heard about two dozen cases where *Central Hudson* was applied to laws that restrict or limit advertising.[126] Some of

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the case reporters trying to figure out precisely what forms of regulation the [*Central Hudson*] test permits. . . . [T]he cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not."); *see also* Lora E. Barnhart Driscoll, Citizens United *v.* Central Hudson*: A Rationale for Simplifying and Clarifying the First Amendment's Protections for Nonpolitical Advertisements,* 19 Geo. Mason L. Rev. 213 (2011).

[122] *See Cent. Hudson*, 447 U.S. at 563 ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity").

[123] *See* Conn. Gen. Stat. § 12-862(b)(5) (2023).

[124] *See Cent. Hudson,* 447 U.S. at 563.

[125] *See* Daniel J. Croxall, *Cheers to Central Hudson: How Traditional Intermediate Scrutiny Helps Keep Independent Craft Beer Viable,* 13 Nw. L. Rev. Online 1 (2016).

[126] *See, e.g.,* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (holding that the Food and Drug Administration Modernization Act's (FDAMA) provisions were unconstitutional restrictions of commercial speech); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553–56 (2001) (Massachusetts regulations of promoting cigarettes and other tobacco products violated manufacturers' and sellers' First Amendment rights); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 183–93 (1999) (holding that a prohibition on broadcasting lottery information was not applicable to the advertisements of lawful private casinos where such gambling was legal); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499–500 (1996) (Rhode Island statutes prohibiting the advertisement of liquor prices abridged speech in violation of the First Amendment); Fla. Bar v. Went For

the most significant cases involved restrictions on sin product advertising such as liquor, tobacco, and gambling.[127] And for the last 30 years, the Court has been increasingly skeptical of government rationales for state restrictions of such advertising.[128]

After its ruling in *Central Hudson,* the Supreme Court initially was sympathetic to government restrictions on sin product advertising. In one early case, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,*[129] the Court upheld a Puerto Rican statute prohibiting gambling casino advertisements aimed at residents of Puerto Rico,[130] even though gambling has been legal on the island since 1948. In its 5-4 ruling, the *Posadas* court applied the *Central Hudson* test in a highly deferential manner, affording great weight to the Commonwealth's justifications: that gambling by residents "would

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It, Inc., 515 U.S. 618, 623–35 (1995) (Florida Bar rules prohibiting lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident withstood First Amendment scrutiny); Rubin v. Coors Brewing Co., 514 U.S. 476, 483–87 (1995) (holding the Federal Alcohol Administration Act (FAAA) labeling band on displaying alcohol content on beer labels violated the First Amendment); United States v. Edge Broad. Co., 509 U.S. 418, 424–30 (1993) (holding federal statutes prohibiting radio broadcasting of lottery advertisements in states where it is illegal did not violate the First Amendment); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993) (there was not a legitimate interest for the city to prohibit the distribution of commercial handbills on public property, nor were there valid time, place, and manner restrictions for the prohibition); Edenfield v. Fane, 507 U.S. 761, 767–72 (1993) (Florida's ban on in-person solicitation by CPAs violated the First Amendment); Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 475–79 (1989) (universities and officials could not prevent corporations to conduct product demonstrations in campus dormitory rooms); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340–45 (1986) (Puerto Rican statute restricting casino gambling advertisements to residents of the territory was facially constitutional); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68–69 (1983) (federal statute prohibiting the unsolicited mailing of contraceptive advertisements was an unconstitutional restriction of commercial speech); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–12 (1981) (San Diego's enforcement of billboard ordinances were substantial government goals and facially constitutional); In re R.M.J., 455 U.S. 191, 203-07 (1982) (holding that provisions in the Missouri Supreme Court rule regulating attorney advertising violated the First Amendment); Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct., 512 U.S. 136, 142–43 (1994) (Florida Board of Accountancy's decision censuring an attorney was incompatible with First Amendment restraints on official action).

[127] *See* text accompanying *infra* notes 128–53.

[128] *See 44 Liquormart,* 517 U.S. at 484.

[129] *See* 478 U.S. 328 (1986).

[130] *See* P.R. Laws Ann. tit. 15, § 77 (1972), *quoted in Posadas,* 478 U.S. at 332–33.

produce serious harmful effects on the health, safety and welfare" of the citizenry including "the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime."[131] Therefore, the governmental interests at stake were "substantial, and directly advanced the government's interest in reducing gambling among residents."[132]

More recently, however, the Court has applied the three elements of the test in a more exacting manner, thereby exercising greater skepticism about the constitutionality of governmental restrictions on sin product advertising, especially liquor. In *Rubin v. Coors Brewing Co.*, the Court nullified a federal ban on listing the alcohol level of beer, because the restriction failed to "directly advance" the government's interest in preventing the advertising of the potency of the beer to avoid "strength wars" by the industry.[133] One year later, in *44 Liquormart v. Rhode Island,* the Court unanimously concluded that a state ban on liquor price advertising was an unconstitutional infringement of the liquor sellers' First Amendment speech rights.[134] In that case, a plurality of the justices expressed particular skepticism about a "vice exception" to the constitutional protection of advertising of a legal product.[135] In that plurality opinion, Justice Stevens specifically rejected any notion of deference to restrictions on "vice advertising" and would have overruled *Posadas.*[136]

During the 1990s, the Supreme Court also addressed the issue of gambling advertising, producing two seemingly conflicting rulings. The first, *United States v. Edge Broadcasting Co.*,[137] upheld a federal law prohibiting

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[131] *See Posadas*, 478 U.S. at 332, *cited in* Conrad, *supra* note 117, at 80.

[132] *Posadas*, 478 U.S. at 342.

[133] Rubin v. Coors Brewing Co., 514 U.S. 476, 486–91 (1995).

[134] *See 44 Liquormart*, 517 U.S. 484, 516 (1996).

[135] *See id.* at 514 (". . . [T]he scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.' Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities. . . . For these reasons, a 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.").

[136] *Id.* at 509 ("We are now persuaded that *Posadas* erroneously performed the First Amendment analysis").

[137] 509 U.S. 418 (1993).

the broadcasting of advertisements for state-run lotteries by broadcasters in non-lottery states,[138] concluding that it satisfied the final two requirements of the *Central Hudson* test.[139] *Edge Broadcasting* could be considered the last in the line of cases that gave deference to the government's interests under the *Central Hudson* test and noted that the "regulation need not be perfect, only reasonable" to accomplish the state's goals of protecting non-lottery states.[140] In a throwback to a pre-*Virginia Pharmacy* time, Justice White noted that gambling advertising did not implicate a "constitutionally protected right; rather it falls into a category of 'vice' activity that could be, and frequently has been banned altogether."[141] After finding that the restriction "directly advanced" the state's interest, the Court, citing *Posadas,* concluded that the law passed was not more restrictive than necessary.[142] Notably, *Edge Broadcasting* was decided before *44 Liquormart.*

The reliance on the older generation of post-*Central Hudson* cases—deferring to the government restriction in vice advertising—essentially ended with the second "gambling" case, *Greater New Orleans Broadcasting Association v. United States*,[143] decided six years after *Edge Broadcasting* and three years after *44 Liquormart.* Here, the Court concluded that a federal statute prohibiting radio and TV broadcasters from advertising privately operated commercial casino gambling—even in areas where casinos are legal, just because these ads could be seen and heard by some viewers in states (such as neighboring Texas) where such gambling is illegal—was unconstitutional.[144]

Utilizing a higher degree of scrutiny, the Court in *Greater New Orleans Broadcasting* concluded that the government's claims were far less than convincing. In particular, the Court was skeptical of the argument that restricting

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[138] The statute, 18 U.S.C. § 1304 ("Broadcasting lottery information"), prohibits radio and television broadcasting, by any station for which a license is required, of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes."

[139] *See Edge Broad. Co.,* 509 U.S. at 418–19.

[140] *Id.* at 428–29.

[141] *Id.* at 426. For more analysis, *see* Steven G. Brody & Bruce E.H. Johnson, *Advertising and Commercial Speech – A First Amendment Guide*, 14-175 (2d Ed), Practicing Law Inst. 2004, 2023.

[142] *Edge Broad. Co.,* 509 U.S. at 426.

[143] Greater New Orleans Broad. Ass'n v. United States*,* 527 U.S. 173 (1999).

[144] *Id.* at 195. In so deciding, the court invalidated the statute, 18 U.S.C. § 1304.

advertising undercuts demand.[145] Just as damning, the Court, in concluding that the final requirement of *Central Hudson* failed, noted that there were non-speech methods to control problem gambling.[146] The ruling was a resounding affirmation of the approach began in *Rubin* and *44 Liquormart*.

What could be an even more restrictive reading of *Central Hudson* came in 2001. The Court, in *Lorillard Tobacco v. Reilly*,[147] addressed a series of Massachusetts tobacco advertising regulations that banned outdoor advertising for tobacco products within a 1,000-foot radius of a public playground, elementary school or secondary school.[148] The Court concluded that the state's prohibitions on outdoor tobacco advertising were overbroad under the last prong of *Central Hudson*.[149] The Court considered but did not address the issue of whether *Central Hudson* should be replaced by a strict scrutiny standard,[150] because the regulations failed the last prong of the test regarding the billboard restrictions as a de facto ban on such advertising in large cities.[151]

The majority in *Lorillard* concluded that the government did present scientific studies to support its argument that limiting such advertising would reduce demand for tobacco products.[152] As demonstrated in *Lorillard,* under

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[145] *Id.* at 189 ("While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another. . . . And, . . . the Government fails to 'connect casino gambling and compulsive gambling with broadcast advertising for casinos" – let alone broadcast advertising for non-Indian commercial casinos.'").

[146] *Id*. at 192 ("There are surely practical and nonspeech-related forms of regulation – including a prohibition or supervision of gambling on credit, controls on admissions; pot or betting limits; location restrictions; and licensing requirements – that could more directly and effectively alleviate some of the social costs of casino gambling.").

[147] 533 U.S. 525 (2001).

[148] *See* 940 Mass. Code Regs. §§ 21.01–21.07, 22.01–22.09 (2000). The restrictions also included point-of-sale regulations that required indoor advertising to be placed no lower than five feet from the floor of a retail establishment. There, the Court found that those regulations failed the third and fourth prongs of *Central Hudson* as they did not directly advance the government's interest because not all children are less than five feet tall and those who can look up above the five-foot limit. *See Lorillard Tobacco Co.,* 533 U.S. at 565.

[149] *See Lorillard Tobacco Co.,* 533 U.S. at 528 (noting the 1,000-foot regulation would have effectively banned all outdoor advertising in major cities in the state).

[150] *See id.* at 554–55; However, Justice Thomas, in a concurring opinion, stated that he was in favor of replacing *Central Hudson* with a strict scrutiny test. *See id.* at 525, 572–74 (Thomas, J., concurring).

[151] *See id.* at 528.

[152] *See id.* at 558–59.

the *Central Hudson* standard, the Court has looked sympathetically at the causal connection between advertising and increased betting among vulnerable populations to justify restrictions. In so ruling, the majority "acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect."[153] It added that children (a vulnerable population) smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing.[154]

Federal appeals courts have also weighed in on sin product advertising. One noteworthy case that could be an outlier is *Coyote Publishing Co., Inc. v. Miller.*[155] The case involved a challenge to Nevada's considerable restrictions on the advertisement of brothels, which are legal in certain counties of the state.[156] In reversing the lower court rulings, the Ninth Circuit concluded that these restrictions satisfied all the requirements of the *Central Hudson* test, noting that the scope was not broader than necessary to accomplish the strong state interest in limiting the "commodification of sex."[157]

Other cases are more in line with the increasingly prevailing view that broad restrictions may be of questionable constitutionality. The Eighth

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[153] *See id.* at 557 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995); United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993); Central Hudson Gas & Elec. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 568–69 (1980)).

[154] *See id.* at 558 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41314, 41332 (1995). It noted that after the introduction of "Joe Camel," a cartoon figure used in advertisements, Camel cigarettes' share of the youth market rose from 4 percent to 13 percent. *See id.* at 41330).

[155] Coyote Pub., Inc. v. Miller, 598 F.3d 592 (9th Cir. 2010).

[156] Nev. Rev. Stat. § 201.430(1)(1995) ("Unlawful advertising of prostitution; penalties. 1. It is unlawful for any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030 [prohibiting prostitution solicited on the street], or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise the unlawful conduct or any house of prostitution: (a) In any public theater, on the public streets of any city or town, or on any public highway; . . . .").

[157] *See Coyote Pub., Inc.,* 598 F.3d at 603 ("By keeping brothel advertising out of public places, . . . where it would reach residents who do not seek it out but permitting other forms of advertising likely to reach those already interested in patronizing the brothels, Nevada strikes a balance between its interest in maintaining economically viable, legal, regulated brothels and its interest in severely limiting the commodification of sex.").

Circuit, in *Missouri Broadcasters Association v. Schmitt,*[158] concluded that a series of liquor advertising restrictions violated *Central Hudson*'s last two prongs.[159] These restrictions, which prohibited retail advertising by liquor producers and distributors and barred alcohol retailers from advertising discounted prices for "intoxicating liquor" outside of their establishments were "riddled with exceptions," thus making the law more difficult to sustain."[160] Similarly, a blanket advertising ban on alcoholic beverages under a town ordinance was addressed by the Georgia Supreme Court in *Folsom v. City of Jaspar.*[161] Not surprisingly, the court invalidated it as failing both the last two requirements of the standard. The decision noted that not only did the ordinance fail to directly advance the government's interest of temperance, but it also was overbroad, as more limited approaches, such as educational programs, could accomplish this result.[162]

In a challenge to a state law banning advertisements for machine video gambling, the South Carolina Supreme Court in *Video Gaming Consultants, Inc. v. South Carolina Department of Revenue*,[163] concluded that the ban was unconstitutional.[164] In holding that the regulation failed the final two

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[158] Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453 (8th Cir. 2020). The state also barred retailers from taking out advertisements in a newspaper that stated "$5 Margarita Mondays," "Buy One, Get One Free," "Half Price," or "Free Drinks for Ladies." *Id.* at 457–58.

[159] *See id*. at 462. The case involved a successful First Amendment challenge to the advertising restrictions by a state broadcasting group. The court concluded that "Missouri fails to show how the Statute, as applied, alleviates to a significant degree the harm of undue influence. . . . Missouri provides no evidence that the Statute as applied is not more extensive than necessary to further its alleged interest of preventing undue influence. Instead, Missouri argues that the Statute does not target speech at all, but instead 'preserves all avenues of speech' and simply 'regulates what activities licensed manufacturers and distributors can engage in with a retail licensee.' *Id.* at 460.

[160] *Id.* at 457–58 (explaining various prohibitions on advertising while also noting two different exceptions).

[161] Folsom v. City of Jasper*,* 612 S.E.2d 287 (Ga. 2005).

[162] *See id.*; *see also* Brody & Johnson*, supra* note 141, §§ 14-42.

[163] Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 342 S.C. 34, 535 S.E.2d 642 (S.C. 2000).

[164] *Id.* at 644 (The state's Department of Revenue (DOR) issued citations to Video Gaming for violating §12-21-2804(b) of the South Carolina Code, which stated: "No person who maintains a place or premises for the operation of machines licensed under Section 12-21-2720(A)(3) may advertise in any manner for the playing of the machines." Video Gaming had displayed a large sign reading: "STOP HERE TRY OUR POKER VIDEO GAMES" and two signs stating "JACKPOT VIDEO GAMES." *Id.*).

requirements of *Central Hudson,* the opinion noted that the agency "presented no evidence that the advertising ban would significantly reduce gambling."[165]

While this ruling reflects the caution that courts express over complete bans, its facts are distinct from issues involving sports betting, especially online or mobile sports betting. The dispute in *Video Gaming* involved machine betting in casinos, not a broader and more encompassing sports betting law. Still, the difficulty to scale the final two prongs of *Central Hudson* is apparent.

In sum, in the years since *Central Hudson*, courts have become increasingly skeptical of advertising bans, and an attempt to enact an industry-wide prohibition on sports betting companies is likely to suffer a constitutional defeat. The courts have put governments on notice that they will look at the constitutionality of bans with a considerable degree of skepticism. As noted earlier, this differs from the standards in other countries, which, in most cases, have utilized standards to limit or even ban gambling advertising that would likely be unconstitutional in the United States.

V. Commercial Speech Rights and Restrictions on Gambling Advertising in Other Countries

As noted in Part II, commercial speech rights are more limited in other common law countries than in the United States. Therefore, significant restrictions on sports gambling advertising are easier to justify. For example, the Supreme Court of Canada has established that commercial speech is protected under the Canadian Charter of Rights and Freedoms[166] (in effect, the country's bill of rights), but their standard is more of a balancing approach between the right to advertise and the government's interest in restricting it when the interest is to protect the public from exploitation.[167] A key difference is that the balancing test employed applies to other types of speech,

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[165] *Id.* at 642.

[166] *See* The Canadian Charter of Rights and Freedom, § 2(b) ("Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; c) freedom of peaceful assembly; and d) freedom of association.").

[167] *See* Margherita M. Cinà & Francesca E. Nardi, *Balancing the Scales: The Role of the Canadian Supreme Court in Weighing Commercial Speech and Public Health,* 50 J.L., Med. & Ethics 276 (2022), https://www.cambridge.org/core/journals/journal-of-law-medicine-and-ethics/article/balancing-the-scales-the-role-of-the-canadian-supreme-court-in-weighing-commercial-speech-and-public-health/AD18CA55BFBB9FEDC71CB78E31CDB586 [https://perma.cc/EE5C-8K3U].

not just commercial speech, influenced by an earlier section of the Charter which permits limitations of speech based on "proportionality."[168] For example, restrictions in advertising in English were upheld in Quebec, with the court looking at a provincial exception to the Charter.[169] Yet that opinion did recognize that such speech has validity as it provides consumers with information necessary to make "informed economic choices, an important aspect of individual self-fulfillment and personal autonomy."[170]

The United Kingdom treats commercial speech in a similar vein, giving the government some level of discretion in crafting advertising restrictions to courts. Specifically, the Advertising Standards Authority ("ASA") and the Committees of Advertising Practice ("CAP") have expanded their reach on commercial speech through the lens of protecting the public's health and safety interests.[171] Looking at "sin product" advertising, the U.K. has upheld commercial speech restrictions concerning serious or widespread offenses against generally accepted moral, social, or cultural standards.[172] One

[168] To uphold limits under Section 1 of the Charter, the government must demonstrate that the objective of the rights-infringing measure is "pressing and substantial," and that it meets all prongs of the proportionality test, which include (1) a rational connection between the infringement and the objectives being sought, (2) the infringement minimally impairs the right in question, and (3) the effects of the infringement are proportional to the purpose of the objectives. Additionally, Parliament is given a certain amount of deference depending on the complexity of the social issue in question. Lastly, when there is a vulnerable group involved (i.e. people under 18), the court gives Parliament an even wider margin of deference. The proportionality analysis presents a model where the fundamental tension between commercial expression rights and public policy regulation of commerce can be addressed by recognizing the pivotal importance of seeking balanced outcomes. For more information, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. Toronto L.J. 383, 383 (2007) ("It is true that some of the language in [R. v.] Oakes resembles the U.S. Supreme Court opinion in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, a commercial speech case decided in 1980. But Central Hudson was not a trend-setting decision that gained much influence outside commercial speech problems. . .").

[169] *See* Ford v. Quebec (Attorney General), [1988] 2 SCR 712.

[170] *Id.* at 59.

[171] J.R. Shackleton, *AD BREAK: Why Curbs on Advertising Harm Free Speech*, Inst. Econ. Affs. 19–32 (2021) ("A ban on gambling sponsorship, currently worth hundreds of millions of pounds to UK sports organisations, is under consideration. The list of potential 'harms' which could be claimed to justify advertising restrictions can be extended indefinitely," *id*. at 23–24.).

[172] *Id.* at 24–29.

commentator called the British standards "inherently more subjective" than commercial speech restrictions in the United States and Canada.[173]

Other countries have also utilized this "proportionality" system for balancing commercial speech rights and the rights of government to protect society. Proportionality has been incorporated into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights. Such popularity gives rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication.[174] All these countries use a proportionality basis[175] as opposed to the intermediate scrutiny and four-part test used in the United States for commercial speech.[176]

The European Convention on Human Rights has not categorized commercial speech as a unique category with a specific test, like *Central Hudson,* but rather has included it in the general standard of speech protection under Article 10.[177] Significantly, that provision states that the freedom of expression is subject to restrictions to further "public safety, […] the protection of health or morals."[178] While commercial speech is subject to considerable protection and one could argue that the proportionality standard is akin to *Central Hudson*, the trend of greater protections in the U.S. since the 1990s indicates that protections for commercial speech have become stronger in the U.S. than in Europe.

VI. Private Industry Alternatives to Government Regulation

One alternative to addressing the problems associated with contemporary sports betting is the creation of voluntary advertising standards through

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[173] *See* Cinà & Nardi, *supra* note 167, at 278–81.

[174] *See* Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, Am. J. Comp. L. 463, 464–67 (2011).

[175] *Id.* at 464–74.

[176] *See* Richard Cullen & Kevin Tso, *Commercial Free Speech – A Critical Reconsideration*, 17 Austl. J. Asian L. 237, 242–43 (2016). *See also supra* notes 84–87 (outlining the contours of the standard).

[177] *See* Bruce E.H. Johnson & Kyu Ho Youm, *Commercial Speech and Free Expression: The United States and Europe Compared*, 2 J. Int'l Media & Ent. L. 159, 180 (2009).

[178] *See* Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 10(2) (1950) https://rm.coe.int/1680a2353d [https://perma.cc/9LHA-XPKR].

private industry groups or trade associations. While not the central focus of this paper, it is worth examining attempts by these associations to control sports betting advertising. The American Gaming Association ("AGA") has recommended certain standards which are found in the AGA's Responsible Marketing Code for Sports Wagering ("Code").[179] The Code recommends that sports wagering advertising and marketing should be placed in broadcast, cable, radio, print, or digital communications only where at least 73.6 percent of the audience is reasonably expected to be of legal gambling age (determined by using reliable, up-to-date audience composition data).[180] That standard is based on data from the 2020 Census, but still hard to quantify based on location, broadcast market, and online usage. The recommendations also support a ban on promotions and advertising for sports betting on college campuses or on college-owned news organizations.[181]

To encourage "responsible betting," advertisements should include a "responsible gaming message," along with a toll-free help line number "where practical" (though what is "practical" goes undefined) and "messages should adhere to contemporary standards of good taste that apply to all commercial messaging, as suits the medium or context of the message."[182] The AGA standards regarding digital media cover websites, e-mails, and social media.[183] These platforms must contain a link to a website that provides information about responsible gaming. Additionally, responsible gaming services must be provided, along with a reminder of the legal age to bet, geolocation mechanisms to show where people can bet, and disclosure of privacy practices.[184]

All members of the AGA must adhere to the code, and there is a compliance review process and a board established to hear complaints from individuals.[185] There are no fines or penalties for the entity that has violated these standards except a requirement to withdraw the ad.[186]

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[179] *See Responsible Marketing Code for Sports Wagering*, Am. Gaming Ass'n (Mar. 28, 2023), https://www.americangaming.org/responsible-marketing-code-for-sports-wagering/ [https://perma.cc/5TT3-5KVQ] (hereinafter *Responsible Marketing Code*).

[180] *See id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* (Digital media includes "third party internet and mobile sites, commercial marketing emails or text messages, social media sites, and downloadable content).

[184] *See id.*

[185] *See id.*

[186] *See id.*

While these guidelines establish a certain minimum level of responsibility for the content of advertising and promotional material, this approach suffers from two inherent problems: (1) the standards are not a legal requirement and (2) the penalties are minimal.

Although the NFL has capped the number of gambling ads during its games in 2021, two years later, a group representing the NFL, Major League Baseball, MLS, NASCAR, NBA, WNBA, NHL, NBCUniversal, and FOX[187] sought voluntary standards to "protect consumers" from false and deceptive advertising based on six underlying principles, which include: marketing sports betting only to adults of legal betting age; not promoting "irresponsible or excessive gambling;" ensuring ads are in "good taste;" and publishers conducting "appropriate internal reviews of sports betting advertising."[188]

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[187] *See* Jenny Vrentas, *NFL's Rapid Embrance of Gambling Creates Mixed Signals*, N.Y. Times (Feb. 4, 2024), https://www.nytimes.com/2024/02/04/business/nfl-gambling-super-bowl.html [https://perma.cc/N6R5-93EA]; David Purdom, *Sports Leagues Form Coalition to Promote Limits on Betting Ads*, ESPN (April 19, 2023, 8:05 AM), https://www.espn.com/chalk/story/_/id/36232587/sports-league-form-coalition-promote-limits-betting-ads [https://perma.cc/AS7Z-5BT7].

[188] *See Formation of Coalition for Responsible Sports Betting Advertising Announced,* NFL Commc'ns (April 19, 2023), https://nflcommunications.com/Pages/FORMATION-OF-COALITION-FOR-RESPONSIBLE-SPORTS-BETTING-ADVERTISING-ANNOUNCED.aspx [https://perma.cc/346G-6SV7]. The six goals are: "***1. Sports Betting Should be Marketed Only to Adults of Legal Betting Age***. The content of sports betting advertising, marketing and promotion should primarily appeal to individuals of legal betting age, and sports betting should never be endorsed or otherwise promoted by any person who is, or appears to be, below such legal age. Sports betting promotional materials should (i) only appear in media where a significant majority of the audience is reasonably expected to be of legal betting age and (ii) never primarily appeal to children in content or theme[;] ***2. Sports Betting Advertising Should Not Promote Irresponsible or Excessive Gambling or Degrade the Consumer Experience***. Sports betting advertisements should always contain a clear, prominent responsible gaming message, including information on responsible gambling resources, and never be directed to individuals known by the advertiser to be self-excluded. Gambling advertising, promotion and other integrations that encourage irresponsible gambling or degrade the consumer experience (e.g., by appearing excessively) should also be avoided[;] ***3. Sports Betting Advertisements Should Not Be Misleading***. Sports betting advertisements should never be false, deceptive or misleading. For example, sports betting advertisements and marketing should not promote unrealistic expectations of financial gain, or suggest that social, financial or personal success is guaranteed by engaging in sports betting. Nor should any such messaging state or imply that a bet is without risk if the customer must incur any loss, or risk the customer's own money, to use or withdraw winnings from such bet[;] ***4. Sports Betting Advertisements Should Be In Good Taste***. Sports betting advertisements should (i) adhere to contemporary standards of good taste applicable to all

Although lofty, these recommendations mirror many of the state regulations already in place. They do not address the broader questions of exposure to ads that are broadcast, and, while not targeted at children, are, for example, played during NFL games on Sunday afternoons when it is likely that a fair number of those underage would be watching. While voluntary regulations may be helpful, their scope and enforcement (or lack thereof) would not be an adequate substitute for legislative or administrative-based regulation.

VII. The Need for Advertising Restrictions Through Government Regulation: What Can Be Done?

As an alternative, governments could consider a variety of proposals to regulate online sports betting. In this section, a number of proposals for restrictions will be examined and discussed. As will be seen, some are more likely to be constitutionally justified and those will be highlighted.

A. Banning False and Deceptive Advertising and Practices –The Dominant Approach in Sports Gambling-Friendly States

Betting companies have utilized various promotions to entice potential betters. For example, at various points, DraftKings has offered promotions for "Deposit Bonuses," "Bonus Bets," referrals, "no-sweat bets," Super Bowl deals, "profit boosts," and "hole in one prop bets."[189]

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commercial messaging, taking into consideration the applicable medium and advertising context and (ii) never undermine public perception of sports or their integrity[;] ***5. Publishers Should Have Appropriate Internal Reviews of Sports Betting Advertising***. Publishers showing sports betting advertising should (i) provide appropriate training to their relevant employees regarding responsible sports betting advertising policies and (ii) implement internal processes to ensure compliance with such policies. To the extent possible, such processes should include a separate review of advertising and marketing materials by company employees outside the marketing and sponsorship departments[;] ***6. Publishers Should Review Consumer Complaints Pertaining to Sports Betting Advertising***. Publishers showing sports betting advertising should develop and implement a process to review consumer complaints pertaining to that advertising" (emphasis in original).

[189] *See* DraftKings Sportsbooks, https://sportsbook.draftkings.com/promos?referrer=singular_click_id percent3d5a190160-d65d-4a10-9f78-538e1dec4665&wpcid=255175&wpcn=FrontOfficeSports&wpcrid=xx&wpcrn=Static&wpscid=Bet5Get200Instantly&wpscn=Email&wpsrc=2198 [https://perma.cc/6JGJ-HKQC] (last retrieved Feb. 8, 2023); *see also* DraftKings Super Bowl Promos, The

As noted earlier, the *Central Hudson* opinion concluded that false, misleading, and deceptive ads are not subject to the intermediate scrutiny standards of *Central Hudson*.[190] States should, and have, increasingly sanctioned firms engaged in such advertising, but the challenge will be defining what "false, misleading and deceptive" means in the online sports betting context. For example, Ohio, the thirty-second state to legalize sports betting, issued regulations that clarify the use of the terms "free, risk-free or any variant thereof"[191] in an advertisement, for example, and explicitly prohibits the use of the phrase "$100 free bet once you bet $100" in a promotion.[192] These results show that the $100 bet is not "free," but can result in significant losses.[193]

Game Day, https://thegameday.com/news/draftkings-super-bowl-promos/ [https://perma.cc/T4DS-9AWK?type=image] (last retrieved Dec. 2, 2023); DraftKings Sportsbooks, *How Do I Place a 'No Sweat' Bet?*, DraftKings Help Ctr., https://help.draftkings.com/hc/en-us/articles/18020647261587-How-do-I-place-a-No-Sweat-bet-US-#01H7JQS6SY0PE78474QE3B14N6 [https://perma.cc/9QQU-MEQX] (last accessed Jan. 13, 2024); Grace McDermott, *Best Hole-in-One Prop Bets for 2023 Masters Tournament*, DraftKings Network (Apr. 4, 2023), https://dknetwork.draftkings.com/2023/4/4/23668717/masters-2023-predictions-picks-hole-in-one-odds-chances-prop-bets-justin-thomas-brooks-koepka [https://perma.cc/5AQC-49TL]; *Refer-a-Friend*, DraftKings, https://www.draftkings.com/draftkings-refer-a-friend?wpsrc=Organic%20Search&wpaffn=Google&wpkw=https%3A%2F%2Fwww.draftkings.com%2Fdraftkings-refer-a-friend&wpcn=draftkings-refer-a-friend [https://perma.cc/S3LG-LQX4] (last accessed Jan. 13, 2024).

[190] *See* Central Hudson Gas & Elec. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563–64 (1980).

[191] *See* Ohio Admin. Code § 3775-16-09(C) ("Promotions or bonuses described as free or risk-free must not require the patron to incur any loss or risk their own money to use or withdraw winnings from the free wager.").

[192] *See Sports Gaming License Overview, Frequency Asked Questions, Advertising, Marketing and User Recruitment,* Ohio Casino Control Comm'n, https://casinocontrol.ohio.gov/licensing-renewal/02-sports-gaming/01-licensing-overview/01-licensing-overview [https://perma.cc/T9A6-E8KK] (last updated July 31, 2023) ("***Q: Can my advertisement or user recruitment campaign include terms such as '$100 free bet once you bet $100?'*** A: No. This is false, misleading, and explicitly against Ohio Adm. Code 3775-16-09(C). The $100 'free' bet described above would not be free, as it would have cost the patron $100 to obtain. Proprietors or services providers may offer promotions that require betting activity by a patron, but they may not describe them as free, risk-free or any variant thereof. Instead, any promotion or bonus described as free or risk-free must not require the patron to incur any loss or risk their own money to be used or to withdraw winnings. To be clear, operators can continue to promote using terms like 'bet $100, get $100,' so long as these are not described as the $100 'get' being free.") (emphasis in original).

[193] *See* Danny Funt, *Sportsbooks Call Them Risk-Free Bets. Just Don't Read the Fine Print,* Wash. Post (Dec. 26, 2022), https://www.washingtonpost.com/

Ohio's Casino Control Commission has sought fines against BetMGM, Caesars and DraftKings for violating the regulations against "risk-free" bets and not having a message about problem gambling.[194] However, such promotions have been allowed in other states, like Michigan. These are often presented as can't-miss cash giveaways by betting companies to entice new betters. Some sports books, sensing that state regulators may find this "risk free" bet approach questionable, have altered the language of the promotions. Two firms use the term "no sweat" betting to describe this promotion,[195] but

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sports/2022/12/26/risk-free-bets-mgm-draft-kings-fanduel-caesars/ [https://perma.cc/48SR-ARM2] ("BetMGM offers Michigan customers a 'risk-free first bet' of up to $1,000. Barstool promises Maryland bettors a $1,000 'bonus' for wagering their first buck. In many states, Caesars offers the most generous-sounding deal: a 'free bet' worth up to $1,250 if a customer's first bet loses. When legal sports betting launched in Colorado last year, the operator affiliated with Sports Illustrated briefly advertised a $7,500 'risk-free' first bet."). According to Rutgers University statistics professor Harry Crane it works like this: "Say someone places a $1,000 'risk-free' first bet at a sportsbook, which requires depositing and wagering $1,000 in real dollars. If the bet is successful, the winnings are paid out as usual, with no additional bonus. If it loses, the customer is credited with five $200 'free bets,' which expire after a week. The stake of a free bet isn't paid out with any winnings, meaning a successful $200 free bet at even odds returns roughly $190, accounting for the sportsbook's built-in advantage, or vigorish. In other words, a new customer who loses his "risk-free" bet but then manages to win all five free bets at even odds, a 1-in-32 feat, would fail to break even. Lose them all, and that customer comes away down $1,000. . . . By nobody's definition, that is risk free." *Id*. And by no state's definition, it should be allowed. Crane is Professor of Statistics and Affiliated Faculty in the Graduate Program in Philosophy at Rutgers University. *See Harry Crane*, http://www.harrycrane.com/ [https://perma.cc/PW3A-L42G] (last retrieved Dec. 26, 2022).

[194] *See* Katarina Vojvodic, *BetMGM, Caesars and DraftKings Could Face Fines for Ohio Sports Betting Ads*, PlayUSA (Jan. 6, 2023), https://www.playusa.com/betmgm-caesars-draftkings-ohio-sports-betting-fines/ [https://perma.cc/FGM4-HUDG]. The Commission noted that this action came after "repeated warnings" and proposed fines of at least $150,00 against each of the firms for violating the aforementioned regulations. It also proposed sanctions against one firm for sending out ads promoting its app to people under 21 (who are not legally allowed to gamble in that state).

[195] *See* sources cited *supra* note 189. Specifically, sports betting websites FanDuel and DraftKings have used the term. For example, *see How do I place a 'No-Sweat' Bet (US)*, DraftKings, https://help.draftkings.com/hc/en-us/articles/18020647261587-How-do-I-place-a-No-Sweat-bet-US#01H7JQRF3H6VH5GGFN3YTDPRHT [https://perma.cc/63Z2-2CAW] (last accessed Jan. 13, 2024); *see also FanDuel No Sweat Bet Promo*, The Game Day, https://thegameday.com/news/fanduel-no-sweat-bet-promo/ [https://perma.cc/3CGR-LJY4] (last accessed Jan. 13, 2024); *Top Michigan Sports Betting Sign-Up Bonuses, Jan. 2024*, Props, https://props.com/7-best-michigan-sportsbook-bonus-offers/ [https://perma.cc/2Q9Y-B6CL] (last visited

query whether this is another way of saying "risk-free" and whether this kind of enticement should be banned as well.

Another type of problematic promotion is the "deposit bonus," which could suggest that the bet is risk-free. As described in an article in the *Washington Post*, it works like this:

> DraftKings advertises a 20 percent deposit bonus for new customers, worth up to $1,000. On its face, that suggests a $5,000 deposit will earn a $1,000 bonus. But the fine print clarifies that after depositing $5,000, each dollar of bonus money can only be accessed by betting $25 on odds longer than -300. Factoring in the vigorish, (a surcharge for taking and processing the bet),[196] a bettor who wagers $25,000 at even odds within the required 90 days would be expected to come away down about $135, even after claiming the $1,000 bonus.[197]

The above example does not pose significant constitutional issues. The far bigger question occurs if a state or federal government decides to take broader actions to restrict or ban certain types of betting advertisements. Analyzing these attempts is the crux of this article.

In 2023, New Jersey's attorney general adopted what may become a template for "best practices" standards in betting advertising. They include requiring that New Jersey's 1-800-GAMBLER hotline be prominently displayed in their ads, prohibiting promises of "guaranteed wins" or "risk-free" bets if the patron will not be fully compensated for the loss of their funds and requiring the use of "responsible gaming" language. Out-of-state ads "targeting New Jersey consumers" must comply with these requirements including banning "unrealistic promotions," providing opt-outs for customers to stop direct advertising and barring advertisements placements where the primary demographic is underage viewers.[198]

Feb. 4, 2024) (Michigan example) ("Many MI sportsbooks offer a bonus type that's sometimes called a 'risk-free bet.' The term 'losing bet rebate' is more accurate, however, as you do have to incur some risk to take advantage of the bonus.").

[196] The concept is also known as "Vig." or "Juice" and that surcharge is how the sports book makes money. *See* Cole Rush and Brian Pempus, *What is the Vig in Betting?,* Forbes (Oct. 31, 2023), https://www.forbes.com/betting/guide/vig/#:~:text=The%20vig%20(short%20for%20vigorish,how%20a%20sportsbook%20makes%20money [https://perma.cc/P4MT-CAET].

[197] *See* Funt, *supra* note 193.

[198] *See Advertising Standards*, N.J. Div. of Gaming Enf't, https://www.nj.gov/oag/ge/docs/BestPractices/AdvertisingBestPractices.pdf [https://perma.cc/VZ2X-K9Z3] (last retrieved June 24, 2023); *see also* Wayne Parry, *New Jersey Acts to Help Problem Gamblers, Sets Ad Standards*, Associated Press (Apr. 23, 2023), https://

B. Requiring Mandatory Warnings—Make Them More Ubiquitous

Laws mandating or requiring content-based speech are presumed to be unconstitutional in a non-commercial setting, because the right to refrain from "coerced speech" is within the scope of the First Amendment.[199] However, when it comes to commercial speech, the government's power to mandate speech is broader. In fact, the Supreme Court crafted a relaxed standard of constitutional review for such compelled speech in *Zauderer v. Office of Disciplinary Counsel*.[200] Professor Adler described it as a less rigorous test than *Central Hudson*.[201] And the opinion clearly distinguishes these commercial requirements from the standards in non-commercial cases.[202] At first glance, the issue of "compelled" speech—speech that is required in advertisements by law or regulation, such as health warnings for tobacco products and calorie counts for soft drinks—[203] can be a legally straightforward one. Many of the

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apnews.com/article/new-jersey-gambling-sports-betting-advertising-5ee7504cd-263c1596a011d53db51dd7f [https://perma.cc/PP8Z-QJJ8].

[199] *See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (state law requiring public school children to participate in a compulsory flag salute and pledge of allegiance unconstitutional); *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (court struck down N.H. law requiring license plates to have to state motto "Live Free or Die.")

[200] 471 U.S. 626 (1985).

[201] *See* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 Ariz. L. Rev. 421, 435–36 (2016), https://arizonalawreview.org/pdf/58-2/58arizlrev421.pdf [https://perma.cc/ZE4Q-XCGU] ("Some courts and commentators have read *Zauderer* to establish that the compelled disclosure of factual information is subject to a lesser degree of scrutiny than is provided by *Central Hudson*.").

[202] According to the opinion in *Zauderer*: "The interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." 471 U.S. at 651.

[203] *See e.g.*, David Hammond, *Health Warning Messages on Tobacco Products: A Review*, 20 Tobacco Control 327 (2011) (concluding that "whereas obscure text-only warnings appear to have little impact, prominent health warnings on the face of packages serve as a prominent source of health information for smokers and non-smokers, can increase health knowledge and perceptions of risk and can promote smoking cessation" as cited in Micah Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 Wash. U. J. L. & Pol'y 53 (2016)).

present state regulations mandate certain requirements in gambling ads, like phone numbers to call for problem gamblers.[204]

Most states have enacted such regulations for gambling. Although these requirements are modest at best, and are not as common as found with tobacco products, they do exist. For example, Connecticut's regulations require a message that lists a phone number or website to contact if one is or one knows of another who has a "gambling problem."[205] Similar requirements are found in the laws and regulations in Pennsylvania as well as a number of other states.[206] As noted earlier, evidence shows that these limited warnings and information are not sufficient to limit the growing issue of problem gambling.[207]

A simple way to improve the visibility of these warnings would be to enact stiffer requirements for sports betting ads in all types of media. At the very least, states should consider warnings and contact information to take up maybe 25–50 percent of the space of these print and online ads and a certain percentage of the time of a broadcast ad. For example, for a 30-second television spot, 10 seconds should be devoted to the problem gambling warnings and organizations to contact, rather than a quick, end-of-ad announcement that will not attract much attention. The FCC could assert jurisdiction for broadcasts, giving national uniformity to regulations as opposed to a state-by-state approach. Alternatively, industry associations like the AGA could enact voluntary codes that could suffice.

However, the most interesting question is what kinds of restrictions may be enacted under the current interpretation of *Central Hudson* when the advertising is not misleading. Here, we can look to tobacco regulation cases for guidance. Since the mid-1960s, warnings, often graphic, have been

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[204] *See* Austin, *supra* note 23; Kevin Simpson, *Colorado's Problem Gamblers Could Find Help on the Way after Decades of Indifference*, Colorado Sun (May 4, 2022), https://coloradosun.com/2022/05/04/colorado-gambling-problem-grant-funds/ [https://perma.cc/BGZ8-M89K?type=image].

[205] *See* Conn. Agencies Regs. § 12-865-25(e)(1) (2023) ("Marketing and Advertising Standards").

[206] *See* 58 Pa. Code § 1401a.9(e) (2023) ("A sports wagering certificate holder or sports wagering operator shall include signage in the sports wagering area that displays 'If you or someone you know has a gambling problem, call 1-800-GAMBLER,' or comparable language approved by the Board, including in print advertisements or other media advertising the sports wagering operations of the sports wagering certificate holder or sports wagering operator.").

[207] *See* sources accompanying *supra* notes 29–31, 34, 48–49.

required on all cigarette products[208] and there have been no judicial challenges to those warnings under the compelled speech doctrine. Yet, there is a question about the scope of *Zauderer*.[209] The decision's lenient standard for compelled speech (such as tobacco product warnings) focused on an ambiguous and confusing standard: a government interest in "preventing deception" and that the disclosures be factual and uncontroversial (added later),[210] which seemed to be outdated given the generally greater level of protection for commercial speech given by the Court in the last two decades. However, this has led courts to debate the applicability of the case to particular types of compelled warnings. In fact, it set up a circuit split on proposals for more explicit warnings made after passage of the Family Smoking Prevention and Tobacco Control Act (the "Act") of 2009, the first comprehensive national legislation regulating tobacco.[211] Challenges were made to the proposals for "graphic warnings" on tobacco.[212] A divided ruling from the Sixth Circuit concluded that required warnings on tobacco products were "factual" subject

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[208] *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89–92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–40) (mandating warning labels on cigarettes). Subsequent updates to these laws made the warnings more direct. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87, 88 (1970), which, in addition to banning television and radio ads of tobacco products, strengthened the standard warning to read: "Warning: The Surgeon General Has Determined That Smoking Is Dangerous to Your Health." In 1984, Congress again modified tobacco warning labels pursuant to the Comprehensive Smoking Education Act, Pub. L. No. 98–474, 98 Stat. 2200 (1984). For a general overview, *see generally* Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment?,* 64 Hastings L. Rev. 1467 (2013).

[209] For recent examples of the invocation of *Zauderer* by the Court, *see, e.g.*, Expressions Hair Design v. Schneiderman, 581 U.S. 37, 48 (2017) ("whether the law can be upheld as a valid disclosure requirement under Zauderer); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–50 (2010); United States v. United Foods, Inc., 533 U.S. 405, 416 (2001); Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct., 512 U.S. 136, 146–47 (1994); Peel v. Att'y Registration & Disciplinary Comm'n, 496 U.S. 91, 116–17 (1990) (Marshall, J., concurring in judgment), as cited in Note, *Repackaging Zauderer,* 130 Harv. L. Rev. 972, 973 n.10 (2017).

[210] *Zauderer*, 471 U.S. at 650.

[211] *See* Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. §§ 387–87u (2009)).

[212] *See* Cigarette Package and Advertising Warnings, 21 C.F.R. § 1141 (2012). One of those warnings consisted of the statement "Cigarettes are addictive" (showing a man holding a cigarette and exhaling smoke from a tracheostomy hole in his throat).

to the lenient *Zauderer* standard.[213] However, a panel of the D.C. Circuit concluded that the rules are unconstitutional and did not apply *Zauderer.* Two years later, however, an en banc panel of that court upheld the government's regulation in a separate case.[214]

This doctrinal inconsistency about what is factual and what is not could temper the broader concern of addressing gambling addiction if it could be conclusively proven that these advertisements exacerbate problem gambling or addiction. Even if so, if the advertisements are "creative" or "imaginative," they may not render the lenient *Zauderer* standard applicable and be subject to a higher level of scrutiny.

C. The Broadcast Sphere—A Unique Constitutional Marketplace and the Best Way to Reconcile Constitutional Protection

While compelled speech issues in commercial settings pose interpretation issues, a saving grace for sports gambling regulation comes from the broadcast sector. Radio and television broadcasters are licensed by the Federal Communications Commission ("FCC"), a federal agency, and as a condition of that license, they are subject to greater content oversight than other media.[215] As a requirement of receiving a license to broadcast in a specified frequency range, these over-the-air broadcasts must operate "in the public interest, convenience and necessity" under the 1934 Communications Act.[216]

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[213] Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 559, 569 (6th Cir. 2012) (invoking *Zauderer*). The appeals court upheld the bans on event sponsorship, branding non-tobacco merchandise and free sampling; and the requirement that tobacco manufacturers reserve significant packaging space for textual health warnings. However, the panel declared unconstitutional the statute's restrictions on color text. *Id*. at 548.

[214] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012). The court noted that the image of a man exhaling smoke through the tracheostomy hole in his throat portrays a "common consequence of smoking," but it may not symbolize "the addictive nature." *Id.* at 1216, which was overruled in Am. Meat Inst. v. USDA, 760 F.3d 18, 22–23 (D.C. Cir. 2014).

[215] *See, e.g.*, Red Lion Broad. v. FCC, 378 U.S. 391, 400 (1969) (FCC had the right to regulate broadcast content "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views."); *see also* Note, *The Awareness Doctrine*, 135 Harv. L. Rev. 1907 (2022).

[216] *See* 47 U.S.C. § 309(a) (broadcast licensees must operate in the "public interest").

As part of that mandate, the courts have upheld the FCC's powers to regulate content on the airwaves.[217]

Although changes in technology and market dominance have resulted in more deregulatory policies,[218] the FCC has retained certain powers involving content and ownership limitations. For example, there are rules involving "Equal Time" requirements for candidates for public office,[219] the amounts broadcasters can charge for political advertisements,[220] and the numbers of radio stations owned by a single entity in a given market.[221] Significantly, the

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[217] *See* Mark Conrad, *The Demise of the Fairness Doctrine – A Blow for Citizen Access*, 41. Fed. Comm. L.J. 61 (1989).

[218] *See* Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. Times (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html [https://perma.cc/HGF5-ARMW]; Robert D. Hershey Jr., *F.C.C. Votes Down Fairness Doctrine In a 4-0 Decision*, N.Y. Times (Aug. 5, 1987), https://www.nytimes.com/1987/08/05/arts/fcc-votes-down-fairness-doctrine-in-a-4-0-decision.html [https://perma.cc/9WAX-VV9K]; FCC v. Prometheus Radio Project ("Prometheus IV"), 592 U.S. 414, 427–28 (2021) (justifying FCC's attempts to deregulating certain broadcast ownership rules).

[219] *See* 47 U.S.C. § 315; *see also FACT SHEET: FCC Political Programming Rules*, FCC (Aug. 18, 2022), https://www.fcc.gov/sites/default/files/political_programming_fact_sheet.pdf [https://perma.cc/5UG6-J5R9] ("FCC rules seek to ensure that no legally qualified candidate for office is unfairly given less access to the airwaves – outside of bona fide news exemptions – than their opponent. Equal opportunities generally means providing comparable time and placement to opposing candidates; it does not require a station to provide opposing candidates with programs identical to the initiating candidate. Equal opportunities and other political-related benefits are available only to individuals who have attained the status of 'legally qualified candidate.' These rules do not apply to cable channels or web-based video or audio such as streamed video content, podcasts, or social media.").

[220] *See* 47 U.S.C. § 312(a)(7); *see also FACT SHEET*, *supra* note 219 ("Timeframe – During the 45-day period preceding a primary, caucus or runoff election; and the 60-day period preceding a general or special election (commonly referred to as 'lowest unit charge windows'), broadcast stations and other regulates may not charge legally qualified federal, state and local candidates who purchase time for campaign ads more than the lowest unit amount that their best commercial customer has paid for ads that are of the same class, length, and time of day.").

[221] *See* 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Report and Order, 31 FCC Rcd. 9864 (2016) ("2016 Order") (retaining the bulk of the media ownership rules and reinstating decision to consider television JSAs "attributable"), *vacated in part,* Prometheus Radio Project v. F.C.C., 939 F.3d 567, 587, 589 (3d Cir. 2019). The caps establish varying limits on the number of co-located radio stations a single entity may own, based on market size. In markets with 45 or more radio stations, a company may own

FCC also has the power to limit broadcasts deemed "indecent" to certain hours of the day.[222]

Traditionally, the courts have upheld the FCC's power to regulate content, based on a standard of "scarcity" and, in the case of broadcast indecency, "pervasiveness" of the medium, making it difficult for parents to limit exposure to youngsters.[223] The scarcity basis for restricting broadcasting has been criticized[224] and at least one member of the Supreme Court has called for a

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eight stations, only five of which may be in one class—AM or FM; in markets with 30–44 radio stations, a company may own seven stations, only four of which may be in one class—AM or FM; in markets with 15–29 radio stations, a company may own six stations, only four of which may be in one class—AM or FM; and in markets with 14 or fewer radio stations, a company may own five stations, only three of which may be in one class—AM or FM.

[222] 18 U.S.C. § 1464 (1948) provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both." The F.C.C. has been instructed by Congress to enforce § 1464 between the hours of 6 a.m. and 10 p.m." Although the Commission has had the authority to regulate indecent broadcasts under §1464 since 1948 . . . it did not begin to enforce § 1464 until the 1970's. *See* Angel J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 Fed. Com. L.J. 195, 198 (2010), cited in FCC v. Fox Television Stations, 567 U.S. 239, 243 (2012). Presently, FCC regulations prohibits indecent broadcasts, defined as one that includes language or "material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." Deciding whether material is "patently offensive" requires a further three-pronged inquiry. To make this determination, the Commission weighs: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander, is used to titillate, or seems to have been presented for its shock value. Violators can be fined up to $325,000 per infraction. *See* In re Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999 (2001), cited in *Fox*, 567 U.S. at 246.

[223] *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

[224] *See e.g.,* Thomas W. Hazlet, Sarah Oh, & Drew Clark, *The Overly Active Corpse of Red Lion,* 9 Nw. J. Tech. & Intel. Prop. 50, 94 (2010) ("The logic . . . was never valid and was merely a thinly veiled political excuse to regulate communications while skirting the First Amendment. There is no basis for distinguishing media content by the roads it travels. Today that exercise has become a fool's errand.").

reexamination of this approach.[225] The *Red Lion* ruling—a case involving a right of reply by a person attacked in a broadcast—affirmed the principle that broadcasting is inherently scarce due to limited wavelength and is therefore subject to more content regulation than print media.[226] It remains good law, despite the major technological changes in the broadcast media since the ruling. The same applies to the restrictions on certain programming to protect children. This could be an important basis in legally justifying the proposals that follow.

D. Banning or Severing Restricting Sports Betting Advertising on Broadcast Media—Far More Difficult, but is it Possible?

1. The Case for a Total Ban on Sports Betting Advertising on Radio and Television, the Tobacco Ad Ban as a Precedent

In early 2023, a bill introduced by Representative Paul Tonko (NY–20) would ban all electronic advertising of sportsbooks "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[227] It would, in effect, replicate the half-century ban on tobacco advertising in the broadcast media.[228]

The greater constitutional protection of sin product advertising, based on the Court's rulings in *44 Liquormart, Greater New Orleans Broadcasting*, and *Lorillard* will undoubtedly make the constitutional prospects of a total ban

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[225] *See Fox*, 567 U.S. at 259 (Ginsburg, J., concurring) ("In my view, the Court's decision in *FCC v. Pacifica Foundation* . . . was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration"); *cf.* FCC v. Fox Television Stations, 556 U.S. 502, 532–35 (2009) (Thomas, J., concurring).

[226] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400–01 (1969) ("[I]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.").

[227] *See* Betting on Our Future Act, H.R. 967, 118th Cong. (2023).

[228] The representative who sponsored this bill argued that a similar ban on tobacco advertising, enacted over half a century ago, would be a precedent for a similar ban on sports gambling. *See* Press Release, *Tonko Introduces Legislation to Ban Predatory Sports Betting Advertising* (Feb. 9, 2023), https://tonko.house.gov/news/documentsingle.aspx?DocumentID=3800 [https://perma.cc/5M9H-CNPQ].

difficult to say the least under the current constitutional regime.[229] Assuming that such a law could be justified under the "substantial governmental interest" requirement of *Central Hudson* (a standard I believe could be done with relative ease) and could be determined to "directly advance" that interest (which, though more difficult, I think would pass muster as well), it would be the last prong (the regulation being "not more restrictive than necessary") that would be exceedingly difficult to uphold based on the rationale of *44 Liquormart*. First, there would have to be more a conclusive causal connection between the rise of problem gambling and the exposure to advertisements. While the studies note the rise of problem betting since the legalization of sports betting, a direct connection would have to be shown to convince a court. That may well be possible. However, the potential overbreadth of a total ban and the precedent of *44 Liquormart* eschews total bans of legal products. Representative Tonko's bill fails to take these issues into account.

It is true that a ban on the advertising of tobacco products on broadcast radio and television has existed since 1971.[230] However, the rationale for doing so would not pass muster today due to the constitutionalization and expansion of the commercial speech right since that time.

The background of how the ban came into effect is peculiar. In 1967, the FCC, in an aggressive application of the Fairness Doctrine (a rule that required opposing viewpoints to be aired on issues of public importance) mandated that a broadcast station carrying cigarette commercials had to provide "a significant amount of time for the other viewpoint" (meaning anti-smoking educational ads).[231] Could the FCC enact such a requirement today regarding betting advertisements? It certainly would raise interesting legal questions of access and First Amendment rights. Two issues would be in play: the first is the constitutionality of the counter-speech requirement at a time when the FCC's rationale for broadcast regulation has come under more

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[229] The Court's plurality opinion in *44 Liquormart,* in particular, sounded a note of caution: "special care" should attend the review of such blanket bans, and it pointedly remarked that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 44 Liquormart v. Rhode Island, 517 U.S. 484, 507 (1996) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565–66 (1980)).

[230] *See* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331–1338 (1969).

[231] *See* In re Complaint Directed to Station WCBS-TV, New York, N.Y., Concerning Fairness Doctrine., 8 F.C.C.2d 381, 381–82 (1967) (interpreting the Fairness Doctrine to apply to cigarette advertising).

criticism,[232] and the second is whether such a requirement would pass muster under *Central Hudson.*[233]

Ironically, in response to the FCC's counter-ad requirement, the tobacco industry stopped opposing a bill in Congress to ban all cigarette ads on radio and television, reasoning that it would free up money for advertising in other media and would eliminate or at least reduce the anti-smoking public service advertisements.[234] That withdrawal of opposition, along with the stronger support of public health advocates, helped persuade Congress to pass the broadcast ban and President Richard Nixon to sign the bill.[235]

While the tobacco industry supported the ban, broadcasters did not. The ban was challenged by a broadcast group on constitutional grounds. However, the Court upheld a lower court's judgment on the ban,[236] which noted that there were no First Amendment rights at issue, but rather the loss of an ability to collect revenue.[237] This ruling is inconsistent with the Court's current approach to commercial speech, because it was handed down four years before commercial speech was constitutionalized.[238] Using what was in effect a rationality standard, the majority upheld the ban due to the ease in which the broadcast media can reach a large audience, including young people.[239] Courts upheld the law, noting that *"[t]he unique characteristics of*

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[232] *See* notes 217–218. In its 1987 report, the FCC concluded that the Fairness Doctrine violated the First Amendment, effectively rejecting a right of reply requirement. *See* In re Complaint of Syracuse Peace Council, 2 FCC Rcd. 5043 (1987).

[233] *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 643–44, 652–53 (1985) (failure to disclose mandatory information on attorney advertisement could render it false, hence subject to the mere rationality test as it failed the first part of the *Central Hudson* standard).

[234] *See* Andrew Glass, *Congress Bans Cigarette Ads on the Air, April 1, 1970*, Politico (April 1, 2009), https://www.politico.com/story/2009/04/congress-bans-cigarette-ads-on-the-air-april-1-1970-020715 [https://perma.cc/A6ES-T5PU].

[235] *Id.*

[236] *See* Capitol Broad. Co. v. Mitchell, 333. F. Supp. 582, 585–86 (D.D.C. 1971), *aff'd sub nom* Cap. Broad Co. v. Kleindienst, 405 U.S. 1000 (1972), *and aff'd sub nom.* Nat'l Ass'n of Broads. V. Kleindienst, 405 U.S. 1000 (1972).

[237] *Id. at* 584 ("Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak; they have only lost an ability to collect revenue from others for broadcasting their commercial messages.").

[238] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (constitutionalized commercial speech by concluding that a state ban on listing prices for prescriptions drugs violated the First Amendment).

[239] *See* n. 236.

electronic communication make it especially subject to regulation in the public interest" (emphasis added).[240]

While issuing a total ban may not be a viable solution, however, there are other ways that advertising restrictions would pass constitutional muster under broadcast law's content standards, such as limiting the time of the advertisements to reflect the make-up of the audience.

2. A Better Bet: Restricting Ads to 'Safe Harbor' Periods Where Few Underage Viewers are Watching or Hearing such Content

Many states have enacted restrictions on gambling ads aimed at minors. An example of such restrictions is found in Massachusetts' Gaming Commission regulations, which limit ads aimed at those under twenty-one, prohibit the use of images and endorsements or language appealing primarily to those under that age, and limit ads in various media outlets where 25 percent of the audience is "reasonably expected" to be under twenty-one. The regulations also bar ads in primary and secondary schools and on college radio and television broadcasts aimed at a college audience.[241]

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[240] See *Mitchell*, 333 F. Supp. at 584.

[241] *See Sports Wagering Advertising*, 205 Mass. Reg. § 256.05, https://massgaming.com/wp-content/uploads/205-CMR-256-3.27.23-clean-copy.pdf [https://perma.cc/RHE6-V3DL] (retrieved June 14, 2023). The complete regulation is as follows:

> (1) Advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator shall state that patrons must be twenty-one years of age or older to participate.
>
> (2) No Sports Wagering Operator shall allow, conduct, or participate in any advertising, marketing, or branding for Sports Wagering that is aimed at individuals under twenty-one years of age.
>
> (3) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall contain images, symbols, celebrity or entertainer endorsements or language designed to appeal primarily to individuals younger than twenty-one years of age.
>
> (4) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall be published, aired, displayed, disseminated, or distributed:
>
> (a) in media outlets, including social media, video and television platforms, where 25 percent of the audience is reasonably expected to be under twenty-one years of age, unless adequate controls are in place to prevent the display,

In New York, the state's gambling commission approved similar rules which would bar sports betting marketing to underage individuals and prevent ads from being shown "where there is a reasonably foreseeable percentage of the composition of the audience that is persons under the minimum wagering age."[242] Of course, an operator might not specifically gear an advertisement toward children, but it could still be seen by a significant number of minors. The New York regulations attempt to address this problem by stating that an ad cannot be shown in outlets "where there is a reasonably foreseeable

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dissemination or distribution of such advertising, marketing, branding or other promotional materials to individuals under twenty-one years of age including by use of age category exclusions and similar mechanisms;

(b) in other media outlets, including social media, video and television platforms, unless the Operator utilizes all available targeted controls to exclude all individuals under twenty-one years of age from viewing such advertising, marketing, branding, and other promotional materials

(c) at events aimed at minors or where 25 percent or more of the audience is reasonably expected to be under twenty-one years of age;

(d) at any elementary, middle, and high school, or at any sports venue exclusively used for such schools;

(e) on any college or university campus, or in college or university news outlets such as school newspapers and college or university radio or television broadcasts, except for advertising, including television, radio, and digital advertising that is generally available, and primarily directed at an audience, outside of college and university campuses as well; or

(f) to any other audience where 25 percent or more of the audience is presumed to be under twenty-one years of age.

(5) No Sports Wagering advertisements, including logos, trademarks, or brands, shall be used, or licensed for use, on products, clothing, toys, games, or game equipment designed or intended for persons under twenty-one years of age.

(6) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall depict an individual who is, or appears to be, under twenty-one years of age, except live footage or images of professional athletes during sporting events on which sports wagering is permitted. Any individual under the age of twenty-one may not be depicted in any way that may be construed as the underage individual participating in or endorsing sports gaming.

(7) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall depict students, schools or colleges, or school or college settings.

[242] *See* Dan Katz, *New York Regulator Approves Rules Restricting Sports Betting Advertising*, Poker News Daily (Feb. 28, 2023), https://www.pokernewsdaily.com/new-york-regulator-approves-rules-restricting-sports-betting-advertising-38022/ [https://perma.cc/LG6M-BVCK].

percentage of the composition of the audience that is persons under the minimum wagering age."[243]

Maine went one step further by adopting legislation that restricts operators from using celebrities and entertainers to appeal to those under twenty-one years of age in their television advertising. Restricting celebrities from endorsing sports betting advertising, it is argued, would prevent influencing the younger generation when they become of age. The rules also require sports wagering operators to keep records of their advertising and marketing materials for a five-year period.[244]

As of the writing of this article, there have not been any constitutional challenges to these or other regulations addressing restrictions to minors. Given that sports betting remains illegal for minors, it is unlikely that there would be any constitutional infirmities. But this basis can and should be expanded to restrictions in the broadcast media that include: channeling advertising to certain times of the day or night to limit viewership by minors (as presently used to regulate broadcast indecency), limiting gambling promotions to the same times for the same reasons, and utilizing a gradual series of limitations of advertising—a more imaginative but less constitutionally secure idea. Of the three, the first two should pass constitutional muster under broadcast content standards and possibly under *Central Hudson.*

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[243] *Id.*

[244] S*ee* Maine Department of Public Safety Gambling Control Unit, Rules for Advertising and Promotion, 16-634-64 Me. Code R. § 3(D) (2024), https://www.maine.gov/dps/sites/maine.gov.dps/files/inline-files/Chapter%2064%20Advertising.pdf [https://perma.cc/V72R-BDKJ] ("All advertising and promotions by a sports wagering operators shall comply with the following standards: . . . D. The use of . . . , celebrities, entertainers . . . designed to appeal specifically to those under 21 years old is prohibited"). The Maine regulations also feature several record-keeping and disclosure requirements surrounding advertising:

> Each Sports Wagering Operator shall retain a copy of all advertising, marketing, branding and other promotional materials promoting or intended to promote any Sports Wagering, including a log of when, how, and with whom, those materials have been published, aired, displayed, or disseminated, for five (5) years. Each Sports Wagering Operator shall provide a complete copy of any sports wagering advertising or marketing materials to the Director, or their designee, upon request. Sports Wagering Operators shall disclose to the Director all social media platforms on which they advertise, or market sports wagering and will provide clear identification of every account the Operator, or someone on the Operator's behalf, uses to advertise or market sports wagering on each social media platform. For all directed or targeted advertising and marketing, a Sports Wagering Operator shall maintain records sufficient to describe all targeting parameters used.

Id. § 1.

i. Limiting Gambling Advertising to Certain Times of the Day or Night on Broadcast or Cable Television Using the Indecency Standards as a Guide

To protect younger viewers, the FCC restricts "indecent" broadcast content to late-night hours.[245] Similar restrictions could ban ads during the times when children are likely to view programs in relatively large numbers, such as between 6:00 A.M. and 10:00 P.M. A ban on gambling ads during those hours would be within the FCC's established powers, and the courts have upheld the indecency ban due to the enhanced regulation of broadcasting and the fact that broadcasting is uniquely accessible to children in the audience.[246] While the FCC's powers are distinctive due to the unique nature of broadcasting, I would also argue that time restrictions on gambling ads would also satisfy the *Central Hudson* test given the strong governmental interest in avoiding those under legal age to bet. This "channeling" would directly advance the government's interest to avoid youngsters from being enticed to bet, and it is not more restrictive than necessary to accomplish that goal.

As noted earlier, there has been criticism of the "scarcity" rationale as a basis to regulate broadcast content more than in other media.[247] So, a court may eschew the *Red Lion* and *Pacifica* approaches and prefer to utilize a *Central Hudson* analysis. Hence, it may be possible to argue that a time limitation would pass the *Central Hudson* test if it takes place in the daytime and early evening hours. If the restrictions limited ads from, say, 6:00 A.M. to 10:00 P.M., based on the broadcast indecency law or *Central Hudson*, they could pass constitutional muster, but for differing reasons.

Such a restriction would be met with considerable resistance from industry groups because it would mean that there would be no advertising during most NFL games (played on Sunday afternoons) and other sports, such as baseball, which often has day games. However, such a restriction may pass constitutional muster based on the Supreme Court's 1978 ruling

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[245] *See* 18 U.S.C. § 1464 (unlawful to utter "any obscene, indecent, or profane language by means of radio communication"); Enforcement of 18 U.S.C. § 1464 (restrictions on the transmission of obscene and indecent material), 47 C.F.R. 73.3999(b) (1995); *see also* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 10 F.C.C. Rcd. 10558 (1995).

[246] *See* F.C.C. v. Pacifica Found., 438 U.S. 726, 749 (1978); *see also* F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 258–59 (2012) (Court declined to reconsider *Pacifica*).

[247] *See, e.g.*, Hazlet, Oh, & Clark, *supra* note 224.

in *F.C.C. v. Pacifica Foundation,* which upheld indecency restrictions during the daytime hours on radio and television due to their "pervasive presence."[248]

However, *Red Lion's* "scarcity" rationale, which serves as the basis for radio and television licensing and content regulation, does not extend to cable television, which (as a medium) lacks the "scarcity" of radio and television technology. Nor does the *Red Lion* rationale apply to the Internet, because the Supreme Court has ruled that the online universe is entitled to the same high level of First Amendment protection as the print media.[249] However, cable television is subject to some forms of content regulation. For example, cable programmers have been subject to state and FCC regulations that required the airing of certain public interest programming[250] and also required over-the-air channels to be aired under what was known as "must-carry" rules.[251] But a content-based advertising restriction on cable programming would not have the same kind of judicial deference, so a more straightforward *Central Hudson* analysis would likely be employed. Consequently, such an approach would require, in effect, an intermediate-plus scrutiny standard that requires the regulation to not be broader than necessary.

ii. Limiting Betting Promotions and Listing of Betting Odds during Certain Times of the Day or Night on Broadcast or Cable Television

Sponsorship agreements between betting companies and sports leagues have become ubiquitous. All the major sports leagues in the United States now have partnerships with multiple sportsbooks and technology companies,[252] and these leagues, coupled with other sports organizations, allow for sports

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[248] *See Pacifica Found.*, 438 U.S. at 748–50.

[249] *See* Reno v. A.C.L.U., 521 U.S. 844, 885 (1997) (concluding that Internet speech was distinguishable from broadcast speech).

[250] *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 531(b) ("A franchising authority . . . *may require* as part of a cable operator's proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use.") (emphasis added).

[251] *See* United States v. Southwestern Cable Co., 392 U.S. 157, 172–73 (1968); *see also* 47 U.S.C. § 534; *Cable Carriage of Broadcast Stations*, Fed. Commc'ns Comm'n, https://www.fcc.gov/media/cable-carriage-broadcast-stations [https://perma.cc/D93J-723C].

[252] *See* Kyle Hightower, *As NFL Cracks Down on Players Gambling, What Events are Pro Athletes Allowed to Bet On?*, Associated Press (June 29, 2023), https://apnews.com/article/nfl-gambling-suspensions-nba-mlb-nhl-a46958a64d87086a0c37118bd457f72f [https://perma.cc/6A8E-K5FW].

betting advertisements during their broadcasts.[253] In addition, they often show betting odds during the actual broadcasts. Besides communicating betting information from analysts, ESPN and ABC list money line, over/under, prop bets, and live lines on the "score bug" on the bottom of the television screen throughout the sporting event.[254] Fox Sports also includes betting lines, although they are typically shown during lead-ins and outros after teams score.[255] In addition, networks have partnered with betting companies to supply information during the course of a game in an attempt to "retain and engage their audience."[256]

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[253] *See* Doug Greenberg, *NFL, NBA Among Pro Leagues Uniting to Limit Betting Ads*, Front Off. Sports (Apr. 19, 2023), https://frontofficesports.com/nfl-nba-pro-leagues-uniting-limit-sports-betting-ads-coalition/ [https://perma.cc/UE3G-J9M4] (NASCAR, WNBA, MLS, and the PGA Tour allow for sports betting advertisements).

[254] *See* Chris Bumbaca, *XFL Broadcasts will Include Betting Lines, With Announcers Allowed to Discuss Gambling*, USA Today (Feb. 6, 2020), https://www.usatoday.com/story/sports/xfl/2020/02/06/xfl-odds-espn-fox-show-betting-lines-gambling-broadcast/4676998002/ [https://perma.cc/X8AE-JCRR]. *See also* Andrew Cohen, *DraftKings Partners With NHL and Turner Sports for Betting Integrations Across TNT, Bleacher Report*, Sports Bus. J. (Oct. 13, 2021), https://www.sportsbusinessjournal.com/Daily/Issues/2021/10/13/Technology/draftkings-partners-with-nhl-and-turner-sports-for-betting-integrations-across-tnt-bleacher-report.aspx [https://perma.cc/N4W3-CAM9] (last accessed Jan. 15, 2024); *NBA Game Betting Broadcasts to Debut on ESPN+, ESPN2*, Sports Bus. J. (Apr. 3, 2021), https://www.sportsbusinessjournal.com/Daily/Issues/2021/04/13/Technology/nba-game-betting-broadcasts-to-debut-on-espn-espn2.aspx [https://perma.cc/24QW-CWGH].

[255] *Id.*

[256] For example, until recently, ESPN had partnered with Caesars Sports and Sportradar to format tickers and graphics that promote betting information. ESPN also has dedicated certain shows to speaking about sports betting predictions and takes, such as Get Up and First Take, which also feature tickers and graphics throughout their broadcasts. *Daily Wager* is an ESPN show specifically targeted towards sports gambling, giving insights into each game and the analysts' predictions. ESPN has publicly said they believe sports gambling information allows them to retain and engage their audience, and this betting spans even to college sports and league drafts. NBC has a partnership with PointsBet, which produces streaming content that spans from cable coverage to NBC apps. Fox Sports bought a 4.9 percent stake in Stars Group for $236 million to create their own gambling platform called Fox Bet. Additionally, like the cable networks above, they promote gambling lines before and during games through tickers and graphics to engage their fan base. More recently, ESPN announced it will partner with Penn National to rebrand its Barstool Sportsbook as ESPN Bet, which will launch in the 16 states where Penn is licensed later in 2023. *See* Eben Novy-Williams & Jacob Feldman, *ESPN to Launch Branded Sports Book as Penn Unloads Barstool*, Sportico (Aug, 8, 2023), https://www.sportico.

To avoid exposure to younger viewers, these activities should either be banned outright or limited to sports events taking place after certain times of the evening. A complete ban would be difficult to justify under *Central Hudson* and may be beyond the scope of the FCC's power. However, limiting the time of such activities to later night hours would be justified for the same reasons as other time-based restrictions.

There is precedent for restricting sponsorships of a legal product, even in the non-broadcast media. The Family Smoking Prevention and Tobacco Control Act in 2009 ("Tobacco Act of 2009"), expands the ability of both the state and federal government to regulate tobacco product advertisements in non-broadcast media.[257] It places restrictions on marketing tobacco products to children and gives the FDA authority to take further action in the future to protect public health. For example, the FDA can limit vending machine sales, ban tobacco-brand sponsorships of sports and entertainment events or other social or cultural events, and ban free giveaways of sample cigarettes and brand-name non-tobacco promotional items.[258]

The statute was challenged on constitutional grounds, and both the federal trial and appeals court upheld most of the provisions of the statute, which included the graphic warning requirement and the limitation on promotions.[259] This outcome gives proposed limitations of sports betting sponsorships a strong chance of passing constitutional muster. The appeals court applied commercial speech standards and found that most of the statute passed muster under the *Central Hudson* standard. The reasoning and justifications for the tobacco restrictions on sponsorships and samples bode well for substantial regulation of advertising for sports betting.

With these tobacco statutes and cases in mind, a number of restrictions on sports betting advertising and promotions can be enacted, either on the federal or state level. A total ban on tobacco brand sponsorship of tobacco products in sports and entertainment found in the Family Smoking

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com/business/sports-betting/2023/espn-sportsbook-espn-bet-penn-1234733621/ [https://perma.cc/M4K5-VNK6].

[257] Pub. L. No. 111–31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. §§ 1333–34 and 21 U.S.C.A. § 301 et seq. (2010)).

[258] *See Family Smoking Prevention and Tobacco Control Act – An Overview*, U.S. Food & Drug Admin., https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview [https://perma.cc/J5SC-GUWC] (last retrieved December 6, 2022).

[259] *See* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012).

Prevention and Tobacco Control Act[260] would be difficult to sustain under the final "more extensive than necessary" requirement of the *Central Hudson* test. However, restrictions on broadcasting the promotions during sporting events, especially during the daytime hours, based on broadcast indecency standards would not only be a reasonable step in limiting exposure to the betting companies, but also restrictions on posting odds could be effective in preventing more enticement for problem gamblers. The use of the broadcast indecency rules could serve as a guide.

As noted earlier, the bill introduced in Congress in 2023 that would essentially ban betting advertising on the airways is constitutionally deficient because it takes a policy enacted before the advent of commercial speech rights and transports it to a world of strong, if not increasing, commercial speech protection under the First Amendment. Anti-gambling advocates would have to settle with a more incremental approach, but one that could work.

iii. A Slow-Go Approach: Australia's Proposed "Phased Ban" on Legalized Online Betting—Could It Work in the United States?

A novel and intriguing idea to regulate sports betting advertisements in the broadcast media comes from a recent proposal mentioned in a report from the Australian Parliament's report noted in Section II(E).[261] The adaptation of a phased plan leading to a comprehensive or near comprehensive ban on broadcast advertising can be viable in the United States.

The Australian report proposes a four-step sequence leading to a "comprehensive ban" on all forms of broadcast and online advertising for online gambling over a three-year period.[262] The first phase would bar advertisements in news and current affairs broadcasts and in commercial radio between 8:30–9:00 A.M. and 3:30–4:00 P.M.[263] In the beginning of 2025, phase two would give "major sports and broadcasters appropriate time to begin making alternative sponsorship deals and find replacements for the revenue they

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[260] *See* Israel T. Agaku, Satomi Odani, Stephanie Sturgis, Charles Harless, & Rebecca Glover-Kudon, *Tobacco Advertising and Promotional Expenditures in Sports and Sporting Events – United States, 1992-2013*, 65 Morbidity & Mortality Weekly Rep. 821 (Aug. 19, 2016); *see also* Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111–31, § 102(a)(2) (codified, in relevant part, at 21 U.S.C. § 387a–1).

[261] *See* Australia House Report, *supra* note 85.

[262] *Id.* § 5.140.

[263] *Id.* § 5.141 (noting that these times "have the highest risk of harm and influence on children and should be banned immediately").

receive from gambling advertising."[264] In addition, online gambling advertising would be banned an hour before to an hour after the broadcast of a live sports event. In-stadium gambling advertising and logos on player uniforms would be prohibited.[265]

The third phase takes place by the end of 2025, and at that point, online gambling advertising would be banned on broadcasts between the hours of 6:00 A.M. and 10:00 P.M.[266] Finally, in phase four, all online gambling advertising should cease by the end of 2026.[267] The restrictions for such advertising on social media and online platforms would mirror the approach for broadcasters.[268]

Instead of the broadcast ban proposed in Congress,[269] which is of dubious constitutionality, the first three phases of this approach could reflect the more nuanced "safe harbor" restrictions found in the broadcast indecency rules, but with a twist. Each phase may be dependent on whether there are reports of increased numbers of problem gambling or gambling addiction. In many ways, this phased approach serves as a useful social experiment. It uses a gradually tightened series of regulations to achieve results, but can be stopped if either the regulations adopted do not work well or work too well. For example, a database of calls and treatment of problem gamblers could be created where all queries and enrollees in treatment programs would be tracked. If, after the first phase, calls and treatments decrease, the legislation could give the FCC the option to table subsequent regulations. The FCC could launch an administrative rulemaking outlining its specific standards.

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[264] *Id.* § 5.142.

[265] *Id.*

[266] *Id.* § 5.143

[267] *Id.* § 5.144

[268] *See id.* § 5.148 (outlining the four phases, with the following requirements:

- Phase One: prohibition of all online gambling inducements and inducement advertising, and all advertising of online gambling on social media and online platforms. Removal of the exemption for advertising online gambling during news and current affairs broadcasts. Prohibition of advertising online gambling on commercial radio between 8.30-9.00am and 3.30-4.00pm (school drop off and pick up).
- Phase Two: prohibition of all online gambling advertising and commentary on odds, during and an hour either side of a sports broadcast. Prohibition on all in-stadia advertising, including logos on players' uniforms.
- Phase Three: prohibition of all broadcast online gambling advertising between the hours of 6.00am and 10.00pm.
- Phase Four: by the end of year three, prohibition on all online gambling advertising and sponsorship.)

[269] Betting on Our Future Act, *supra* note 227, and accompanying text.

With the exception of the final phase, such a policy could be constitutionally palatable under both *Central Hudson* and the FCC broadcast powers. The incremental approach may ensure a degree of fairness to the industry and to broadcasters that have already signed sponsorship agreements, providing them with time to modify or discharge said agreements due to operation of law.

VIII. Conclusion

Legalized sports betting is a fact of life in many U.S. states. It has spawned a dynamic industry which has appealed to various stakeholders—leagues, teams, fans, betting companies, broadcasters, and, not insignificantly, state governments. Sports leagues and teams—which traditionally objected to legalized betting—now reap millions in sponsorship agreements.[270] States receive up to hundreds of millions of dollars annually in tax revenues.[271] Billions of dollars are wagered by bettors,[272] and billions are spent on advertising.

Reports of problem betting and gambling addiction are increasing. While states have issued some regulations curbing "false and deceptive" sports betting advertising, little has been done to halt "truthful" advertisements. While excessive betting warnings, hotlines, and websites to help problem gamblers are found, these requirements are too curt, too scattershot, and too diffused to prevent increases in problem gambling.

While an outright advertising ban is of dubious constitutionality, curtailing advertising and promotions on the broadcast media may be a more

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[270] *See generally US Sportsbook and Casino Team Sponsorship Tracker*, Legal Sports Rep., https://www.legalsportsreport.com/sports-betting-deals/ (last visited Aug. 7, 2023); *see also NFL Sports Betting Revenue Skyrocketed 40 percent In 2022*, Cision (Feb. 7, 2023, 10:00 AM), https://www.prnewswire.com/news-releases/nfl-sports-betting-revenue-skyrocketed-40-in-2022-301739994.html [https://perma.cc/C5PZ-PSXX]. Sponsorship revenue totaled $2.05 billion across the 32 NFL teams in the 2022-2023 season–a new league record, and a 14 percent increase year-over-year. When combined with the league as a whole, total sponsorship revenue was $2.7 billion. *See* Jabari Young, *Tech, Gambling and Alcohol Helped the NFL Earn Almost $2 Billion in Sponsorships This Season,* CNBC (Jan. 26, 2022, 5:00 AM), https://www.cnbc.com/2022/01/26/tech-gambling-alcohol-helped-nfl-earn-almost-2-billion-in-sponsorships.html [https://perma.cc/JW2C-WY8J].

[271] *See* Eric Ramsey, *U.S. Sports Betting Revenue & Handle*, Legal Sports Rep. (Aug. 2, 2023), https://www.legalsportsreport.com/sports-betting/revenue/ [https://perma.cc/Z8E7-8ZST].

[272] *Id.*

effective way to control problem gambling and gambling addiction. Because the United States, unlike other countries, has an increasingly robust First Amendment protection for commercial speech, outright bans will likely be unconstitutional. However, due to the unique constitutional position found in broadcast law, approaches—such as channeling ads to the nighttime hours and limiting sponsorship notices and betting lines to hours where children are not in the audience—will make these marketing methods less ubiquitous (even for adults with gambling issues) given the times of most sports events. These restrictions make legal and public health sense and are coherent with restrictions found in many other countries. They should also be implemented in the United States.

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Sharing Broadcast and Streaming Revenues with College Athletes

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Abstract

This Article examines the prospect of college athletes being paid for their appearances on television, streaming video, and related services. It explores the different vehicles of payment, including litigation, collective bargaining, and representation by SAG-AFTRA. The Article recommends the NCAA and member institutions collaborate with athletes on solutions instead of waiting for a judicial order that would command a change.

College sports generate billions of dollars a year through television broadcasts and streaming content.[1] The money is distributed to conferences

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[1] *See* Alan Blinder, *College Football Playoff Will Expand to 12 Teams*, N.Y. Times, Sept. 2, 2023, at B11 (noting the NCAA's annual basketball tournament alone is expected to generate $1.1 billion in the coming years); *see also* Timothy Davis, *Assessing the Racial Implications of NCAA Academic Measures*, 29 Wm. & Mary J. Race, Gender & Soc. Just. 1, 39 (2022) (discussing television contracts for conferences); Eben Novy-Williams, *March Madness 2023: Can The NCAA Diversify Beyond Its Cash Cow?*, Sportico (Mar. 14, 2023), https://www.sportico.com/leagues/college-sports/2023/march-madness-2023-ncaa-tournament-revenue-1234715794/

and their member schools[2] and is used to fund assorted expenses related to college athletics.[3] The athletes who appear on fans' television screens, laptops, computers, tablets, and other devices are not paid for their appearances. The National Collegiate Athletic Association ("NCAA"), which represents about 1,100 colleges and universities,[4] forbids such payments.[5] It does so on account of "amateurism," a set of rules that attempts to distinguish college athletes as amateurs by denying them opportunities for compensation.[6] In recent years, judges, politicians, and scholars have sharply rebuked amateurism, characterizing it as circular in definition and exploitative of labor.[7]

At the same time, no court, federal law, or state law has compelled colleges, conferences, the NCAA, television networks, or streaming services to pay college athletes for their appearances, or for their labor.[8] In fact, some state statutes expressly deny right-of-publicity claims, which protect against the misappropriation of a person's identifying traits, for sports broadcasts on grounds that those broadcasts are protected by First Amendment principles protecting news and related content.[9] In Tennessee, for example, it is

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[https://perma.cc/52CS-F7AP] (detailing how the annual men's basketball tournament generates more than 85% of the NCAA's $1.1 billion annual revenue).

[2] David Ingold & Adam Pearce, *March Madness Makers and Takers*, Bloomberg (Mar. 18, 2015), https://www.bloomberg.com/graphics/2015-march-madness-basketball-fund/ [https://perma.cc/U3S2-79BF].

[3] *Where Does the Money Go?*, NCAA (May 13, 2016), https://www.ncaa.org/sports/2016/5/13/where-does-the-money-go.aspx [https://perma.cc/CJ7J-VHG4].

[4] Andrew Zimbalist, *Analysis: Who Is Winning In The High-Revenue World Of College Sports?*, PBS NewsHour (Mar. 18, 2023), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports [https://perma.cc/AQ5M-Y8DT].

[5] *See* John T. Holden, Marc Edelman & Michael A. McCann, *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier*, 57 Ga. L. Rev. 1, 44 (2022); *see also* Warren K. Zola, *College Athletics: The Growing Tension Between Amateurism and Commercialism*, *in* The Oxford Handbook Of American Sports Law 209 (Michael A. McCann ed., 2018) (supplying a broader and historical context on commercial issues in amateurism).

[6] *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1249 (9th Cir. 2020), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021)).

[7] *See generally* Michael A. McCann, *New Amateurism*, 11 Texas A&M L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4603249 [https://perma.cc/29L7-8QFK].

[8] *Id.* (this statement is subject to change due to multiple legal efforts involving the compensation of college athletes).

[9] Frank Ryan & Matt Ganas, *Rights of Publicity in Sports-Media*, 67 Syracuse L. Rev. 421, 422–23 (2020).

"fair use" and "no violation of an individual's rights" to be depicted in "any news, public affairs, or sports broadcast."[10] Similarly, in Ohio, the use of an individual's person "in connection with any news, public affairs [or] sports broadcast" does "not constitute a use for which consent is required."[11]

Furthermore, in *Marshall v. ESPN*, where college athletes sued TV networks over alleged violations of their right of publicity, the U.S. Court of Appeals for the Sixth Circuit affirmed the complaint's dismissal.[12] In 2014, former Vanderbilt safety Javon Marshall and other players accused ESPN, ABC, CBS, NBC, Fox, and conferences of misappropriating a property interest the players held in their names and images appearing in television game broadcasts.[13] Judge Raymond Kethledge shelved the players' argument as "meritless" and found no legal support for what he portrayed as an unwieldy proposition—that "broadcasts are illegal unless licensed by every player on each team."[14] Kethledge also suggested that if players should be paid for appearing on games, it's unclear where the limiting principle ought to lay.[15] To that end, the judge wondered if "referees, assistant coaches and perhaps even spectators have the same rights."[16]

But for the NCAA and the various companies that profit from college sports, 2014 was emblematic of a far more deferential era of jurisprudence. Back then, the NCAA often invoked Justice John Paul Stevens' opinion in *NCAA v. Board of Regents*, wherein he expressed that because the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism in college sports . . . there can be no question but that it needs ample latitude to play that role."[17] Although that sentimentalized language didn't furnish the NCAA with an exemption from antitrust law or from other laws, the NCAA would treat it as a shield from ordinary legal scrutiny.[18] Conferences

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[10] Tenn. Code Ann. § 47-25-1107(a) (2023).

[11] Ohio Rev. Code Ann. § 2741.02(D)(1) (2023).

[12] 111 F. Supp. 3d 815, 826 (M.D. Tenn. 2015), *aff'd,* 668 Fed. Appx. 155, 157 (6th Cir. 2016).

[13] *Id.*

[14] Marshall v. ESPN, 668 Fed. Appx. 155, 156 (6th Cir. 2016).

[15] *Id.* at 156 ("Whether referees, assistant coaches, and perhaps even spectators have the same rights as putative licensors is unclear from the plaintiffs' briefs (and, by all appearances, to the plaintiffs themselves).").

[16] *Id.*

[17] 468 U.S. 85, 120 (1984).

[18] Sam C. Ehrlich, *A Three-Tiered Circuit Split: Why the Supreme Court Was Right to Hear* NCAA v. Alston, 32 J. Legal Aspects Sport 1, 9–17 (2022).

and colleges also utilized *Board of Regents* to negotiate higher-value TV and other media rights deals that contemplated players appearing in games.[19]

The legal status of amateurism would change dramatically in 2021, and the fallout continues to be felt. In *NCAA v. Alston*,[20] the U.S. Supreme Court unanimously held against the NCAA in an antitrust case concerning how member schools restrain each school's capacity to compensate college athletes for their education-related expenses.[21] Although *Alston* was not about paying athletes for their athletic contributions or for their name, image, and likeness ("NIL"), it ended the deference provided by *Board of Regents* and clarified that ordinary antitrust scrutiny applies to amateurism rules.[22] That same year the NCAA adopted an interim NIL policy allowing college athletes to earn money from endorsements, sponsorships, influencing, and related commercial arrangements with third parties.[23] The NCAA took this step only after states adopted NIL statutes that made it illegal for the NCAA, conferences, and schools to deny athletic eligibility for an athlete using their right of publicity.[24]

The exclusion of college athletes from revenues generated through telecast, media, and other licensing rights arrangements is central to the ongoing antitrust class action, *In re College Athlete NIL Litigation*.[25] The case is brought by Arizona State swimmer Grant House, former Oregon and current TCU basketball player Sedona Prince, and former Illinois football player Tymir Oliver, a trio who now lead a case on behalf of roughly 14,500 current and former college athletes.[26] They insist that the NCAA and Power Five

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[19] Andrew Zimbalist, *Reforming College Sports and a Constrained, Conditional Antitrust Exemption*, 38 Manage. Decis. Econ. 634, 634–35 (2016).

[20] 141 S. Ct. 2141, 2166 (2021).

[21] John T. Holden, Marc Edelman, Thomas A. Baker III & Andrew G. Shuman, *Reimagining the Governance of College Sports After* Alston, 74 Fla. L. Rev. 427, 463 (2022).

[22] 141 S. Ct. at 2156.

[23] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/UR45-JBEF].

[24] Michael McCann, Eben Novy-Williams & Emily Caron, *Name, Image and Likeness: A Guide to College Athlete NIL Deals, Compensation*, Sportico (Mar. 7, 2023), https://www.sportico.com/feature/college-athletes-paid-name-image-likeness-deals-nils-1234616329/ [https://perma.cc/9CMA-P73F].

[25] Amended Complaint & Demand for Jury Trial Consol. at 35–38, *In re* College Athlete NIL Litig., No. 4:20-cv-03919 (N.D. Cal. July 26, 2021).

[26] Michael McCann, *Athletes Get Class Status as NCAA Faces Billions in Damages*, Sportico (Nov. 4, 2023), https://www.sportico.com/law/analysis/2023/

conferences, which are the most prominent and lucrative conferences and collectively include sixty-nine member colleges,[27] have unlawfully conspired under Section 1 of the Sherman Act to deny football, men's basketball, and women's basketball players of NIL opportunities until 2021. The defendants are also accused of unlawfully denying players of broadcast NIL or "BNIL" compensation.[28] As defined by the plaintiffs, BNIL contemplates broadcast revenue for televised college games and forgone appearances in college sports video games that were never made.[29]

If successful, *In re College Athlete NIL Litigation* would compel the NCAA to allow the Power Five conferences to share broadcast, video game, and other licensing revenue with college athletes and pay them monetary damages for past and current appearances.[30] Indeed, in a court filing in November 2023, the NCAA and Power Five estimated their potential damages could exceed $4 billion, a figure so large it represents a "death knell situation" that may necessitate a settlement.[31]

The prospect of conferences and colleges paying college athletes for appearing on television or streamed games is not limited to Power Five members. Other conferences' athletes could similarly demand payment and pursue their own litigation.

Take athletes in the Ivy League Conference, where the eight member schools have a combined endowment worth more than $170 billion.[32] While they attract less fanfare than athletes in more renowned athletic conferences and usually have limited prospects for joining a professional league, Ivy League athletes, along with their games and brands, still draw considerable

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college-athletes-get-class-status-as-ncaa-faces-billions-in-damage-1234744655/ [https://perma.cc/56CJ-3FVZ] [hereinafter McCann, *Class Status*].

[27] The Power Five conferences are the Atlantic Coast Conference ("ACC"), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference ("SEC").

[28] Michael McCann & Daniel Libit, *NCAA NIL Arguments in Key Athlete Pay Hearing Grilled by Judge*, Sportico (Sept. 21, 2023), https://www.sportico.com/law/analysis/2023/judge-unpersuaded-ncaa-legal-class-certification-1234739397/ [https://perma.cc/R2KD-VN7Z].

[29] *Id.*

[30] McCann, *Class Status*, *supra* note 26.

[31] Michael McCann, *NCAA Warns of $4B 'Death Knell' in NIL Class Action Appeal*, Sportico (Nov. 27, 2023), https://www.sportico.com/law/analysis/2023/ncaa-nil-class-action-appeal-1234747910/ [https://perma.cc/WSQ5-TFAW] [hereinafter McCann, *NCAA Warns*].

[32] *See* Class Action Complaint & Demand for Jury Trial Compl. at 3, Choh & Kirk v. Brown Univ., No. 3:23-cv-003050030 (D. Conn. Mar. 7, 2023).

interest.[33] That is anecdotally apparent through the famed Harvard-Yale football game, which is played annually and broadcast nationally.[34] It is more systematically detectable by lucrative business arrangements tied to Ivy League schools and the conference. In 2016, Yale University signed a 10-year, $16.5 million branding rights deal with Under Armour.[35] Two years later, ESPN signed the Ivy League to a 10-year contract.[36] Ivy League athletes are also routinely used to fundraise for their schools, such as Dartmouth men's basketball players assisting in securing a $50 million donation to improve their gymnasium.[37] The rise of legalized sports betting in thirty-seven states and the District of Columbia[38] has also been associated with increased viewership and interest in college sports.[39] The larger point is that if the Power Five must pay college athletes for their BNIL, the same principle would likely apply for other conferences and their athletes.

The potential distribution of revenue generated by telecast and media rights to college athletes begs the question of *how* such distribution would

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[33] Craig Lambert, *The Professionalization of Ivy League Sports*, Harv. Mag. (June 28, 2019), https://www.harvardmagazine.com/2019/06/professionalism-ivy-league-sports [https://perma.cc/68UY-U7QQ].

[34] Jon Lewis, *Ratings Roundup: CFB on ESPN, Harvard/Yale, EPL on NBC*, Sports Media Watch (Nov. 2014), https://www.sportsmediawatch.com/2014/11/sports-tv-ratings-college-football-espn-big-ten-sec-harvard-yale-nbcsn-epl-nbc/ [https://perma.cc/FZ2C-GSZ4]; Elizabeth Roosevelt, *A Quick History of "The Game,"* Harv. Crimson (Nov. 17, 2022), https://www.thecrimson.com/flyby/article/2022/11/17/history-of-hy/ [https://perma.cc/CMJ9-KX5E].

[35] Daniela Brighenti, *Under Armour Deal Historic for Ivy League*, Yale Daily News (Jan. 20, 2016), https://yaledailynews.com/blog/2016/01/20/under-armour-deal-historic-for-ivy-league/ [https://perma.cc/5D3J-M435].

[36] *ESPN, Ivy League Announce 10-Year Deal to Air Games on New ESPN+,* ESPN (Apr. 4, 2018), https://www.espn.com/college-sports/story/_/id/23030560/ivy-league-espn-announce-10-year-deal-network-air-sporting-events-espn+ [https://perma.cc/3ZSY-K97X]. The Ivy League on TV has had historical significance as well. In 1939, Columbia University and Princeton Universities played the first athletic event to be shown on TV. *See* Stuart J. Riemer, *Albert Pujols: Major League Baseball Salary Arbitration from a Unique Perspective*, 22 Cardozo Arts & Ent L.J. 219, 219 n.4 (2004).

[37] Michael McCann, *Dartmouth Men's Basketball Makes Employment Case at NLRB*, Sportico (Oct. 5, 2023), https://www.sportico.com/law/analysis/2023/dartmouth-mens-basketball-employees-nlrb-1234741295/ [https://perma.cc/695F-SMG8].

[38] *Interactive U.S. Map: Sports Betting*, Am. Gaming Ass'n, https://www.americangaming.org/research/state-gaming-map/ [https://perma.cc/QZU9-P6CW] (last visited Jan. 7, 2024).

[39] John Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & Bus. 31, 73 (2019).

occur. As of this writing, college athletes are not recognized as employees of their school, conference, or the NCAA.[40] That means, unlike athletes in the major professional leagues, college athletes cannot form a union under the National Labor Relations Act ("NLRA")[41] that, in turn, could negotiate a collective bargaining agreement ("CBA") with a respective professional league.[42] In major professional leagues, unions negotiate a share of income, which includes revenue from television broadcasts, apparel sales, arena signage, and products and services that generate revenue.[43] Management, which consists of the teams and the owners, also receive a share.[44] Although the categories of shareable and calculation methods vary by league, players in the National Football League ("NFL"), National Basketball Association ("NBA"), Major League Baseball ("MLB"), and the National Hockey League ("NHL") receive approximately 48 to 50 percent of their league revenues.[45]

Players in those professional leagues are not paid individually for their BNIL, as their appearances on game broadcasts and other media are governed by contractual arrangements in their employment contracts and in group licensing procedures determined by their union and league. A model NFL player's contract, for example, expresses the player grants to his club and league the capacity to use his right of publicity as part of an NFL-NFL Player Association group licensing program.[46] As a result, even though Los Angeles Dodgers pitcher/designated hitter Shohei Ohtani, Milwaukee Bucks forward Giannis Antetokounmpo, and other global superstars drive viewership ratings more than their teammates and opponents, their disproportionate

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[40] *See, e.g.*, Marc Edelman, Michael A. McCann & John Holden, *The Collegiate Employee-Athlet*e, 2024 Univ. Ill. L. Rev. 1 (2024).

[41] *See* 29 U.S.C. § 157 (collective bargaining right).

[42] Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 Duke L.J. 727, 728–729 (2007).

[43] Michael McCann, *Biggest Takeaways: The NBA's New CBA Deal,* Sports Illustrated (Dec. 15, 2016), https://www.si.com/nba/2016/12/15/nba-cba-details-takeaways-adam-silver-michele-roberts [https://perma.cc/K6Y5-C4AL] [hereinafter McCann, *Biggest Takeaways*].

[44] *See* Christopher C. Kendall, *Circumventing the NBA's Salary Cap: The "Summer of Dwight"*, 15 U. Denv. Sports & Ent. Law J. 73, 74 (2013).

[45] Michael McCann, *UFC Fighters Land a Blow with Judge's Order in Class Action Pay Fight*, Sportico (Aug. 14, 2023), https://www.sportico.com/law/analysis/2023/ufc-class-action-antitrust-1234734126/ [https://perma.cc/9PH4-LCX4].

[46] NFL Collective Bargaining Agreement, App. A, § 4 (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [https://perma.cc/9XQB-5XPC] (last visited Feb. 3, 2024).

contributions are not reflected in them receiving in a larger cut of telecast money.[47]

As players' attorney Jeffrey Kessler recently stated in a hearing for *In re College Athlete NIL Litigation*, "[y]ou can be Tom Brady or the lowest player in the NFL" and that player will still get an "equal share."[48] Brady, in other words, was not paid more for appearing in New England Patriots broadcasts than his teammates whose on-field contributions and fame were comparatively meager. Instead of pay-to-individual-player, the more money generated via game broadcasts, licensing, and other revenue inputs that draw from players' labor or appearances, the more money teams can spend on players.[49] Salary floors and salary caps, which together reflect the least and most a team can spend on players' collective salaries, are generally a function of revenue.[50] In other words, as revenue for games rises or falls, the amount of revenue collectively pocketed by players and owners rises and falls.

Such an arrangement, like other bargained terms impacting the hours, wages, and other working conditions of players, is exempt from relevant antitrust scrutiny.[51] Under the non-statutory labor exemption, which reflects a series of Supreme Court decisions that incentivized management and labor working together,[52] a bargained rule that primarily affects the owners and players and concerns a mandatory subject of bargaining is not subject to Section 1 of the Sherman Act.[53] Such an arrangement is also compatible with athletes enjoying individualized opportunities to promote their brand, endorse products, and influence broader social and cultural issues. Athletes, like other Americans, enjoy a right of publicity, which varies by state in terms of which aspects of one's identity it covers,[54] but generally forbids the

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[47] Rory Carroll, *NBA: European Talent Powers Overseas Ratings Boom*, Reuters (Feb. 19, 2021), https://www.reuters.com/article/us-basketball-nba/nba-european-talent-powers-overseas-ratings-boom-idUSKBN2AJ2LA/ [https://perma.cc/9MRY-DBHR] (noting how superstar players drive television ratings).

[48] McCann, *NCAA Warns*, *supra* note 31.

[49] McCann, *Biggest Takeaways*, *supra* note 43.

[50] Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. Ill. L. Rev. 519, 521 n.4 (1997).

[51] Alan C. Milstein, *The Maurice Clarett Story: A Justice System Failure*, 20 Roger Williams U. L. Rev. 221–22 (2015).

[52] *See* Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965); United Mine Workers v. Pennington, 381 U.S. 657, 664–65 (1965).

[53] *See* Mackey v. Nat'l Football League, 543 F.2d 606, 623 (8th Cir. 1976).

[54] Wesley Burrow, *I Am He as You Are He as You Are Me: Being Able To Be Yourself, Protecting the Integrity of Identity Online*, 44 Loy. L.A. L. Rev. 705, 714 (2011).

commercial use of another person's identity without their consent.[55] This right is the foundation of NIL and protects and celebrates from the wrongful exploitation of their fame.[56]

The NCAA and colleges are firmly against the recognition of college athletes as employees, be they minimum wage workers who are paid like work-study classmates, at-will employees, contracted employees, or unionized employees. This opposition has been apparent in the bevy of legal initiatives that would lead to employee recognition, such as in *Johnson v. NCAA*,[57] National Labor Relations Board petitions regarding football and basketball players at the University of Southern California and men's basketball players at Dartmouth College, and in legislative debates at federal and state levels.[58] Advocacy groups on behalf of colleges have insisted only about two percent of NCAA member schools feature athletic departments generating "enough revenue to cover operating costs."[59] Schools that are unable to afford paying their athletes as employees could eliminate varsity teams and replace them with club or intramurals.[60]

Meanwhile, colleges that pay athletes on men's teams more than athletes on women's teams as employees could run afoul of Title IX, a federal law that commands gender equity in collegiate athletics and other components of higher education,[61] though some commentators are skeptical of that prospect.[62] Interestingly, *In re College Athlete NIL Litigation* contemplates the

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[55] *See* Holden, Edelman & McCann, *supra* note 5, at 8–16 (explaining the right of publicity and its role in sports law).

[56] *Id.* at 18–22.

[57] Johnson v. Nat'l Collegiate Athletic Ass'n, 561 F. Supp. 3d 490, 507–08 (E.D. Pa. 2021).

[58] *See generally* McCann, *New Amateurism*, *supra* note 7.

[59] Michael McCann, *SEC Fears of* Johnson v. NCAA *Labor Case Laid Out in Amicus Brief*, Sportico (June 20, 2022), https://www.sportico.com/law/analysis/2022/southeastern-conference-amicus-1234679127/ [https://perma.cc/V52J-GUYQ] (quoting and discussing amicus brief filed in Johnson v. NCAA).

[60] *See* Darren A. Heitner, *Economic Realities of Being an Athlete*, 8 DePaul J. Sports L. Contemp. Probs. 161, 167 (2012).

[61] *See* 20 U.S.C. §§ 1681–1688*; see also* Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 Harv. J. Sports & Ent. L. 175, 192 (2021) (discussing the application of Title IX in higher education).

[62] *See, e.g.*, Marc Edelman, *When It Comes to Paying College Athletes, Title IX Is Just a Red Herring*, Forbes (Feb. 4, 2014), https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/?sh=7c13f5cb1bde/ [https://perma.cc/DP67-64N2] (discussing how Title IX's application to college athletes who are also

conference, not a member school, paying the athletes. Conferences are not subject to Title IX obligations.[63] The NCAA argues the conference as the payer is a nonsensical design given "abundant evidence that schools within a conference would never cede such authority to a conference."[64] Regardless, colleges must figure out how to comply with all laws, and suggesting they must violate employment and labor laws to comply with Title IX and other equity laws is unlikely to persuade courts.[65]

While the NCAA, conferences, and colleges have assorted reasons to oppose college athletes' recognition as employees and unionization, this opposition comes with a cost. It deprives college athletes of capitalizing on the collective bargaining structure, through which the non-statutory labor exemption would eliminate the risk of antitrust claims over methods for distributing pay as well as any maximum salaries, salary caps, and other restraints on trade.[66] A lack of a collective bargaining relationship also denies them a chance to draw from decades of successful bargaining between leagues and players' associations where orderly negotiations have contributed to economic growth for both players and owners.[67]

By resisting voluntary change, the NCAA and colleges could see change thrust upon them in a court order. If the plaintiffs prevail, *In re College Athlete NIL Litigation* would necessitate the NCAA alter its rules to allow Power Five conferences to pay the players for their broadcasting rights without running afoul of amateurism requirements. Whether the NCAA would allow conferences discretion in determining allowable levels of payments is uncertain, but any restrictions would be subject to antitrust scrutiny. Remember, there is no union for conferences to negotiate rules that would be exempt from antitrust scrutiny under the non-statutory labor exemption devised by the Supreme Court.

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employees is a multifaceted issue and how Title IX may not be a barrier to paying those athletes).

[63] McCann, *Class Status*, *supra* note 26.

[64] Petition for Permission to Appeal Class Certification Decision at 17, C.A. No. 23-3607 (9th Cir. Nov. 17, 2023).

[65] Michael McCann, *An Open Letter to Incoming NCAA President Charlie Baker*, Sportico (Feb. 23, 2023), https://www.sportico.com/law/analysis/2023/charlie-baker-ncaa-president-open-letter-1234710521/ [https://perma.cc/C4L9-DJ6Q].

[66] *See* Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 Wash & Lee L. Rev. 397, 409–10 (1996).

[67] *See, e.g.*, Krystle Dodge, *Sports Salary Inflation: What Decades of Data Reveal*, Expensivity (Dec. 22, 2023), https://www.expensivity.com/sports-salary-inflation-what-decades-of-data-reveal/ [https://perma.cc/Q7GW-ZY6L] (discussing rise in professional athletes' salaries).

Yet the application of antitrust scrutiny to a rule doesn't mean a rule will be deemed unlawful. According to Professor Maurice Stucke, "most (and in some surveys nearly all) antitrust plaintiffs lose."[68] In one empirical study cited by Stucke, antitrust defendants won 97 percent of the time.[69] NCAA rules restricting how conferences (and/or schools) pay would satisfy legal scrutiny if they satisfied the antitrust Rule of Reason, where the court evaluates the facts and balances the pro-competitive and anti-competitive aspects of a restraint.[70] Although the NCAA decisively lost *Alston*, Justice Neil Gorsuch carefully cautioned the NCAA and members can still adopt reasonable restrictions on athlete compensation. He wrote that a "no Lamborghini rule" would be reasonable since it would be consistent with the larger educational goals of member institutions.[71] Gorsuch also stressed that "individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still."[72] Taken together, while *Alston* is sometimes portrayed as preventing the NCAA and its members from restricting athlete compensation, the reality is quite different. The case concerned compensation for education—not athletics or NIL—and the Court repeatedly signaled the NCAA and its members adopting reasonable rules would easily satisfy legal scrutiny.

In addition to the litigations and NLRB matters discussed above, there remains another vehicle that could lead to college athletes gaining a right to be paid for their appearances. In 2023, Michael Hsu, a management consultant who leads the College Basketball Players Association and who has filed NLRB charges seeking to establish college athlete employment rights, organized an effort to persuade the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) to represent college athletes who appear on game broadcasts and video games.[73] SAG-AFTRA is a labor union that represents approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers,

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[68] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375, 1425 (2009).

[69] *Id.* at 1423–44.

[70] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 829 (2009) (detailing and explaining Rule of Reason).

[71] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2142, 2164 (2021).

[72] *Id.*

[73] Michael McCann, *College Athlete Pay Push Looks to SAG-AFTRA Reality TV Rules*, Sportico (Sept. 18, 2023), https://www.sportico.com/law/analysis/2023/college-athlete-union-reality-tv-1234738888/ [https://perma.cc/2TLZ-36P8].

recording artists, singers, stunt performers, voiceover artists, and other media professionals.[74]

Hsu said he was inspired by reality TV star Bethenny Frankel, who starred on *The Real Housewives of New York City*, after she advocated for the unionization of reality TV contestants.[75] Frankel, who was paid $7,250 to appear in Season One of the show, contends that studios and streamers exploit the labor performing on reality shows by not offering residuals when their appearances become hits and when those appearances are replayed across platforms.[76] SAG-AFTRA, which in November 2023 resolved a labor dispute with the Alliance of Motion Picture and Television Producers that will carry pay increases and protections for actors against artificial intelligence,[77] represents the hosts on reality TV shows but not the contestants.[78] Those hosts are covered by the National Code of Fair Practice for Network Television Broadcasting ("Network Code"), a contract regarding variety shows, soap operas, talk shows, game shows, and unscripted reality/competition shows.[79]

SAG-AFTRA publicly indicated in August 2023 that it seeks to "engage in a new path to union coverage" for reality TV performers and that it is "tired of studios and production companies trying to circumvent the union in order to exploit the talent that they rely upon to make their product."[80] The details of that "new path" remain to be seen. A memorandum of agreement between SAG-AFTRA and the Alliance of Motion Picture and Television Producers

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[74] *See About*, SAG-AFTRA, https://www.sagaftra.org/about [https://perma.cc/M43J-BDAR] (last visited Dec. 1, 2023).

[75] Marc Malkin, *Bethenny Frankel Calls for Reality Stars Union: 'Networks and Streamers Have Been Exploiting People for Too Long,'* Variety (July 20, 2023), https://variety.com/2023/tv/news/bethenny-frankel-reality-union-strike-1235674531/ [https://perma.cc/SUL6-KZSD].

[76] *Id.*

[77] Gene Maddaus, *SAG-AFTRA Approves Deal to End Historic Strike*, Variety (Nov. 8, 2023), https://variety.com/2023/biz/news/sag-aftra-tentative-deal-historic-strike-1235771894/ [https://perma.cc/B6T8-AWKE].

[78] David Robb, *SAG-AFTRA Takes Up Bethenny Frankel's Fight To Unionize Reality Show Contestants & End "Exploitative Practices,"* Deadline (Aug. 10, 2023), https://deadline.com/2023/08/sag-aftra-bethenny-frankel-reality-tv-contestants-union-1235459562/ [https://perma.cc/3CAK-N2RQ]; *see also* Henna Choi, *White Men Still Dominate Reality Television: Discriminatory Casting and the Need for Regulation*, 37 Hastings Comm. & Ent. L.J. 163, 171–72 (2015) (explaining how as contestants, reality TV performers are classified as independent contractors and denied legal protections).

[79] *Id.*

[80] Robb, *supra* note 78.

from December 2023 did not address reality TV performers.[81] However, the Network Code is set to expire in June 2024 and related negotiations could provide a chance to draw new policies regarding those performers.[82]

As SAG-AFTRA engages in discussions with studios and streamers, it's possible that reality TV performers would be included in the bargaining unit. If so, college athletes could argue that they, like reality TV stars, partake in live and unscripted performances and thus ought to be included as well. Even then, there would be obstacles for college athletes joining the union. SAG-AFTRA eligibility requires paycheck stubs as proof of employment, a performer contract, or payroll printout—items college athletes would presumably not have unless they are recognized as employees.[83] SAG-AFTRA also charges a national initiation fee of $3,000, a substantial figure that would likely dissuade many college students.[84]

When considering the different paths to paying college players for appearing on television broadcasts and streaming content, the most likely approach to succeed is one akin to that used by the professional leagues and their players' associations: a partnership borne through bargaining. This would allow athletes to have a seat at the table in negotiating broadcasts deals. Negotiations in which athletes have a say would show them the respect they have earned and acknowledge *they* are the talent—the main stars—of the broadcast. Labor law scholars have stressed the importance "voice" or direct communication channels for employees to express their views on desired employment conditions.[85] A credible voice can serve as an incentive for workers to not quit or take other actions adverse to an employer. Given the myriad and tectonic legal challenges facing the NCAA and its member schools, a

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[81] 2023 Memorandum of Agreement Between the Screen Actors Guild-American Federation of Television And Radio Artists and the Alliance Of Motion Picture and Television Producers (Dec. 6, 2023), https://www.sagaftra.org/files/2023_Theatrical_Television_MOA.pdf [https://perma.cc/592J-N5K8?type=standard].

[82] Rick Porter, *SAG-AFTRA Strike: What Actors Can Still Work on Without Violating Union Rules*, Hollywood Reporter (July 17, 2023), https://www.hollywoodreporter.com/business/business-news/sag-aftra-strike-what-actors-can-still-do-1235538181/ [https://perma.cc/V6ZQ-XJQN].

[83] *See Steps to Join*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/steps-join [https://perma.cc/2DV7-X3ZL] (last visited Dec. 1, 2023).

[84] *Id.*

[85] *See, e.g.,* Richard B. Freeman & James L. Medoff, What Do Unions Do? 7–9 (1984).

pathway towards cooperation with athletes on broadcasts could go a long way in building goodwill.[86]

There are, of course, practical barriers to implementing such a model. Formal bargaining between management and a union that produces a group licensing distribution might not be possible in college sports for several years, if ever. It will depend on the outcomes of legal efforts for the recognition of college athletes as employees and the potential unionization of collegiate-employee athletes. That is, ironically, problematic for the NCAA and member institutions since while they oppose employee recognition (and unionization) of college athletes, they would benefit by being able to draw on the non-statutory labor exemption to evade antitrust scrutiny.

Alternatively, the NCAA and members could negotiate with trade associations and advocacy groups to determine sensible distribution rules for revenue. Even if college athletes are not recognized as employees or members of a union, they could hire an association to advocate for their interests and stress they are stakeholders. Several entities, including the College Athletes Players Association, the National College Players Association, and the College Football Players Association already have formed and could play that role. Those rules would not be bargained with a labor organization and could thus be challenged under antitrust law, but reasonable restrictions usually pass such scrutiny. The more input athletes could provide, either directly or through advocacy organizations, the more likely the distributions would seem acceptable to courts, too. If the last fifteen years have taught the NCAA nothing else, it's that the legal system is no longer a fan. The organization and its members would be wise to strike deals with players and their advocates before judges redesign college sports for them.

[86] Michael McCann, *Year In Sports Law: The NCAA Amateurism Meltdown*, Sportico (Dec. 27, 2023), https://www.sportico.com/law/analysis/2023/biggest-sports-law-controversies-2023-ncaa-amateurism-1234760591/ [https://perma.cc/WE4C-XG4X].