COMMENTS ON LIVE NATION/TICKETMASTER MERGER

By Michael A. Einhorn, Ph.D.

The merger is economically efficient for three reasons related to the parties. First, LN and TM will eliminate duplication in administration and staffing, appreciate scale economies in physical resources, and better integrate data mining and information transfer from buyer to promoter and touring agent. On the buyer side, music fans may benefit from one-stop shopping, integrated ticketing and artist merchandising, and "versioning" or promotional pricing that considers a buyer's online history.

Opposing parties have expressed a number of concerns, some subset of which may be covered by American antitrust statutes that now compose the legal framework behind the DOJ's review of this matter (the Sherman Act, Clayton Act and Federal Trade Commission Act). From their inception, these acts were enacted to protect against competitive harm. Competitive harm necessarily means *ultimate harm to the buyer*, and not alone to the interests of either a performing artist or another competitor. Opponents of the merger must then be prepared ultimately to present verifiable evidence to the DOJ (and possibly to a U.S. District Court) on why consumers may be worse off under a merger.

Behind the ticketing decision, major artists (or their agents) set the prices of concert tickets. As antitrust economist Luke Froeb details, artist managers, concert promoters, performance venues, and ticket agencies take a negotiated percentage from concert revenues or ticket prices, so constituting a "wedge" between buyer price and artist take. Ticket prices have increased substantially in the past decade because more artists rely upon costly mega-tours to bring in income. Music fans outraged at the current events in the concert business should then direct their primary attention as economic advocates to the live acts and touring agents whom they have patronized.

As a merged entity, TM and LN will actually have more incentive to *reduce* their respective revenue share of concert takings if integrated with one another. The rationale behind this apparent *antitrust paradox* has long been recognized by professional economists and lawyers particularly those of the Chicago School such as Circuit Court Justice Robert Bork. If TM, for example, were to press successfully for a higher component in the wedge, LN would lose revenues as concert attendance declines. Whatever the harm to LN, TM may nonetheless go for the gold since LN is an *entirely separate corporate entity*. By contrast, if LN and TM were integrated with one another, the very same price increase would be more daunting to company management, as LN/TM would be reducing attendance at its *own concert event.* Instead, as an integrated entity, LN/TM would have a stronger incentive to reduce prices in order to increase attendance at the concert. Froeb's testimony before the House made a similar point about "eliminating the middleman"

As a primary concern, antitrust enforcers will challenge a vertical merger if the combination has a chance of raising barriers to entry after the merger is complete. While barriers to entry in ticketing or concert promotion now and for the foreseeable future may be high in the national market, post-merger *changes* in the national sector are secondary. That is, a prospective new primary ticketing agent before the merger would face the daunting problem, as a national player, of competing against both TM and LN's new (as of January, 2009) ticketing agency, CTS. After the merger, the same entrant would face the daunting problem of competing against TM integrated with LN. In either case, the entrant would face what Seth Hurwitz has described as a "steep painful learning curve". Nobody would rush to get in either ring, which explains why *entry against a separate TM and LN* so far has been limited.

On the concert side, Jerry Mickelson of JAM Productions expressed his concerns that the merger would suppress or eliminate competition in rival concert promotion, artist management, touring agencies, venue management, record companies, artist merchandising and apparel, and licensing and sponsorship. Mickelson would be correct to identify present barriers to entry in each of these sectors as high, largely as a consequence of the *existing* Live Nation, which has integrated promotion, venues, and merchandising. But the height of such barriers will not vary much, if at all, if LN and TM walk the aisle.

But there is another point to be considered. While LN may be the only big national player, it only controls 38% of the overall concert attendance. This is because much of competition in concert promotion (like radio broadcasting) is local in nature. Entry still may persist in these local promotion markets, as entities can and do come to the fore. Touring agentslike national integration at LN because it provides one stop booking for concert venues nationwide; one phone call can line up a sequence of shows in every LN arena.

Mr. Mickelson calls the merger "vertical integration on steroids". Whatever this means, there are other more limited enforcement tactics possible beside total denial, a point finally recognized by former antitrust enforcer David Balto at the conclusion of his testimony. As a precondition to any merger approval, the DOJ and the merging parties have the ability to negotiate a Consent Decree, which can specify conduct restrictions to which the parties must assent if the merger is to be approved. As in the *U.S. v. Microsoft* and *U.S. v. ASCAP*, a party's failure to honor the terms of a Consent Decree may lead to more antitrust enforcement by the DOJ.

Indeed, such a limiting Consent Decree was a precondition to the government's approval of the merger in 1995 between Time Warner and Turner Broadcasting System as well as the XM-Sirius combo of 2008. The first deal, which principally joined the cable networks of two directly competing entities as well as the regional landline operations of TW, was a more ponderous combination than the present LN/TM hookup. Yet Time Warner and Turner were allowed to merge, and the preconditioning Consent Decree was never breached afterward. If DOJ finds an actual competitive problem with TM and LN, look for a Consent Decree to wrap it up.

Three prospective tactics for a Consent Decree are considerable as pro-competitive. First, the entity may reasonably be divested of the secondary reseller TicketsNow and so enjoined from further entry in the secondary market. Second, TM may be enjoined from entering into exclusive ticket deals with independent concert venues. Third, Chinese walls may be erected to present the anticompetitive transfer of competitor information to certain parts of the concert entity.

The much-vaunted concern regarding recent processing errors and secondary resellers (e.g., Phish and Springsteen) is simply not an antitrust issue. Disregarding the option of possible divestiture of TicketsNow as a ballistic solution, the real or imagined misbehaviors of LN and TM can be properly investigated by the FTCs Bureau of Consumer Protection — a point recognized by David Balto. Alternatively, state government authorities or legislatures can handle these non-antitrust issues; see Senator Klobuchar's citation to Minnesota's "Hannah Montana" law, which is now designed to handle ticketing abuses. In a similar manner, problematic fiduciary relationships between an artist and her agencies are the province of state law, not federal antitrust statues. There is simply no reason to stop an otherwise efficient merger of two firms because of either issue.

Truth is, the merger has a very real potential to revitalize the music industry, now battered in the past decade by a 50 percent drop in CD sales and a 40 percent vacancy rate at concerts. The labels were indisposed to lower record prices because they shared nothing of the additional concert and merchandising revenues that free downloads would purportedly have stimulated.

Instead of braving a dim future in Never Land with disjointed label entities, "soon-to-bankrupt" stores, and a no-video MTV, artists in a real brave new world can more readily negotiate comprehensive deals (called 360 degree deals), where performance, recording, advertising, publishing, and merchandising royalties can be shared in some defined proportion. Parties in 360 deals can have balanced interests, and thus coalesce more readily on integrated strategy. This would increase the importance of the download in promoting a new act or album release, and the related merchandising, advertising, and social networking that goes with it. Under such circumstances, record prices may indeed decline and social networking may finally monetize.

At present, Live Nation, now integrated with SFX Entertainment, is evidently one integrated institution that can begin to make it possible to take the financial pressure off the music download and integrate other revenue streams so mentioned above. This is exactly what new independent bands should hope for – an integrated opportunity to find the fans and pack them in a string of medium size concert venues, such as LN's House of Blues. New independent experimentation by entrepreneurs may actually, yes, increase if these market magicians come to sense that LN/TM can be a new Cisco, a powerful central network open to complementary relationships and ready to buy up the best. This means that venture capitalists may find a new "treasure trove" in Music Land. In the end, the music industry may yet have its answer on how to "compete with free," add more sizzle to the pot, and bring Dionysus back to earth.

*Michael A. Einhorn teaches Corporate Entrepreneurship at the Silberman School of Business and is a former member of the Antitrust Division at the U.S. Department of Justice. He is the author of Media Technology and Copyright: Integrating Law and Economics. He is also an independent consultant in intellectual property and antitrust to parties in the art and entertainment sector. email: mae@mediatechcopy.com, http://www.linkedin.com/in/mediatechcopy.*