2004

Clear Control: An Antitrust Analysis of Clear Channel's Radio and Concert Empire

Adam J. van Alstyne

Note

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No, you are not imagining it; the same mediocre song *is* on every radio station. The music promotion industries of radio and concerts were significantly consolidated over the last decade.[1] In 2000, the industries wed when Clear Channel, the dominant parent company in radio consolidation, purchased SFX, the largest concert promoter conglomerate.[2] Today, a few large corporations control most commercial radio and concert promotion firms. Concentration in these industries, however, is not just about what songs you hear on the radio and what concerts come to your town. Advertising in these media-driven industries generates billions of dollars annually.[3]

Consolidation in the music promotion industries allows firms to rapidly change operations to realize economic efficiencies. These efficiencies, however, are not always in the long-term interests of the industries. This Note applies a rule of reason antitrust analysis to the consolidation of radio broadcasting and concert promotions, and the vertical integration of the two industries. This Note contends that federal regulation of radio

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1. *See* discussion *infra* Part III. Record labels are also consolidated but that is not discussed here. For a brief discussion of record label consolidation, see Andrew Marton, *Requiem for the Record: The Grammy Win by the* O Brother *Soundtrack Is Another Sign that the Original Concept of the Rock Album Is Dying*, FORT WORTH STAR-TELEGRAM, June 23, 2002, at D1.

2. CLEAR CHANNEL COMMUNICATIONS, INC., 2001 10-K 35 (2001).

3. Another major concern arising out of the consolidation of media industries is the issue of editorial control and distribution of thought. *See generally* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

station ownership fails to address vertical integration in the music promotion industry, and that agency tendency toward deregulation reduces competition and diversity to the detriment of the public. Additionally, this Note addresses the shortcomings of proposed legislation addressing vertical integration in the music promotion industries and offers groundwork for potential solutions. Part I provides a brief overview of the history of federal radio regulation. Part II introduces a few antitrust principles applicable to an analysis of the music promotions industries' consolidations. Part III traces the sources and extent of consolidation in the radio and concert industries, including the 2000 Clear Channel–SFX merger. Part III also provides an overview of the Competition in Radio and Concert Industries Act,[4] Congress's recent attempt to regulate the consolidation and anticompetitive practices in the concert promotion and radio industries. Part IV analyzes the competitive efficiencies and harms of consolidation in radio, concert promotions, and the vertical integration of the two concentrated industries. Part V analyzes the role of government intervention and proposes a framework to regulate the vertical integration of radio and concert promotions.

The conclusions this paper draws are not limited in applicability to the merger of radio stations. With the June 2003 Federal Communications Commission (FCC) media ownership regulations[5] currently under an emergency stay, and close scrutiny, when lawmakers and courts evaluate the proposed rules, they should consider the impact that media conglomeration has on closely related industries. As the Third Circuit acknowledged in justifying the court's September 3, 2003, order staying

4. Competition in Radio and Concert Industries Act, S. 221, 108th Cong. (2003); H.R. 1763, 108th Cong. (2003); S. 2691, 107th Cong. (2002).

5. The new media ownership rulings allow one parent company to control the television signal of up to forty-five percent of television's total national audience. *See* Jim Landers, *FCC Votes Along Party Lines to Relax Most Media Ownership Rules*, DALLAS MORNING NEWS, June 3, 2003, at A1, 2003 WL 56750600. The rulings also allow media conglomerates in the largest cities to own media across platforms, i.e., radio, newspaper, and television, by loosening cross-ownership bans, a policy rejected by Congress under the 1996 Telecommunications Act. *See id.* Overall, the new rulings promote greater integration across industries and greater editorial control in conglomerates' hands. *See id.* The proposed rules are located in the Commission's 2002 biennial review of its broadcast ownership rules. Broadcast Ownership Rules, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73). For a discussion of the impact of the proposed rules on radio see *infra* notes 39–42 and accompanying text.

the new media ownership rules, the "alleged harms from industry consolidation [are argued to] be widespread and irreversible if they occurred."[6]

With the potential for irreparable harm, examining the impact media consolidation has on closely related industries is important to insure ownership regulations will operate soundly. As Senator John McCain stated to the Senate Committee on Commerce, Science, and Transportation, "the broadcast radio industry was the 'miner's canary' . . . [i]t alerted [the committee] to the growing consolidation and vertical integration in media."[7] As a result of the 1996 Telecommunications Act, the radio broadcast industry operates without any national limits on ownership.[8] The experiences within the radio and concert promotions industries can serve as an example for the regulation of other industries by illustrating the flaws in failing to account for how one industry's consolidation affects other closely related industries.

I. HISTORY OF FEDERAL RADIO REGULATION

A. BIRTH OF RADIO REGULATION

The public owns radio bandwidth; thus, the radio industry has been government regulated since its inception.[9] The government must limit the number of stations that operate within the confines of the bandwidth to prevent signal interference.[10] The Radio Act of 1927[11] created an administrative board to

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6. Prometheus Radio Project v. FCC, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (per curiam) (granting motion to stay the effective date of the FCC's new ownership rules pending judicial review).

7. *Media Ownership (Radio Consolidation): Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2003) (statement of Sen. McCain, Chairman, S. Comm. on Commerce, Sci., and Transp.).

8. Telecommunications Act of 1996, Pub. L. No 104-104, § 202(a), 110 Stat. 56, 110.

9. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 210–11 (1943); *see also* Carl J. Friedrich & Evelyn Steinberg, *Congress and the Control of Radio-Broadcasting, I*, 37 AM. POL. SCI. REV. 797, 797 (1943); Michael Ortner, Note, *Serving a Different Master—The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139, 141–42 (2000) (discussing how early radio regulations were promulgated to reduce conflicting signals).

10. *See Nat'l Broad. Co.*, 319 U.S. at 213 (citing JOHN H. MORECROFT, PRINCIPLES OF RADIO COMMUNICATION 355–402 (3d ed. 1933); FREDERICK EMMONS TERMAN, RADIO ENGINEERING 593–645 (2d ed. 1937)).

11. Radio Act of 1927, ch. 169, 44 Stat. 1162 (current version at 47 U.S.C.

oversee radio stations' operations by promoting access to the airwaves and reducing interference on the dial.[12] The Communications Act of 1934[13] established the FCC and granted the FCC oversight of licensing radio stations.[14] The FCC's purpose is to ensure radio operations meet the public interest.[15] In particular, the FCC will grant a license if it finds that "public interest, convenience, and necessity would be served."[16]

In 1938, the FCC limited station ownership to promote the public interest and encourage diversity and competition.[17] The Supreme Court's position on this action has been to note that while the FCC "does not have power to enforce the antitrust laws as such, it [was] permitted to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard."[18] The FCC's decision to limit concentration of ownership was consistent with the Court's declaration that the "[First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[19]

B. FCC's Early Attempt to Deal with Vertical Integration: Chain Broadcasting

Also in 1938, the FCC began the chain broadcasting hearings[20] to investigate network monopolization of radio program-

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§ 151 (2000)).

12. Ortner, *supra* note 9, at 142–43.

13. Communications Act of 1934, ch. 652, 48 Stat. 1064 (current version at 47 U.S.C. § 151 (2000)).

14. *Id.*

15. *See id.* § 303 (commanding the FCC to do several acts as "public convenience, interest, or necessity requires").

16. *Id.* § 309(a); *see also id.* § 310(d) (governing license transfers under the same "public interest, convenience, and necessity" standard) (amended 2002). Congress's extensive regulatory guidelines in the 1934 Act suggest that the public interest in radio operations needs protection from market forces. The Court noted in 1953, "[E]ncouragement of competition [is not] considered the single or controlling reliance for safeguarding the public interest." FCC v. RCA Comm., Inc., 346 U.S. 86, 93 (1953).

17. Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 66 Fed. Reg. 63,986, 63,986 (Dec. 11, 2001) (to be codified at 47 C.F.R. pt. 73) [hereinafter Rules and Policies].

18. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795–96 (1978) (citing United States v. Radio Corp. Am., 358 U.S. 334, 351 (1959); Nat'l Broad. Co. v. United States, 319 U.S. 190, 222–24 (1943)).

19. Associated Press v. United States, 326 U.S. 1, 20 (1945).

20. *Nat'l Broad. Co.*, 319 U.S. at 193–94. Chain broadcasting is the "si-

ming.[21] The chain broadcasting hearings created regulations that outlawed network business practices that hindered entry into the national broadcasting industry or that discouraged local programming.[22] In 1943, the Supreme Court upheld the regulations,[23] allowing the FCC to limit network ownership to one affiliate station in a market and even to prevent network ownership in markets where it would foreclose competition.[24] The Court recognized that Congress granted the FCC broad powers to respond to evolving problems in the industry, which included the power to regulate vertical market issues.[25]

The FCC repealed the chain broadcasting rules that applied to radio in 1977,[26] and began relaxing ownership restrictions. By 1992, one parent company could own up to four stations (two AM and two FM) in a market; however, a parent company with over a quarter of the market share was presumed against the public interest.[27]

C. RADIO DEREGULATION AND THE 1996 TELECOMMUNICATIONS ACT

At Congress's cue, the FCC has begun to favor the open market. The Telecommunications Act of 1996 (1996 Act)[28] dramatically deregulated radio ownership by directing the FCC to

multaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(9) (2000).

21. The FCC wanted to ensure that local owners could broadcast programs besides the network feed. *Nat'l Broad. Co.*, 319 U.S. at 198–99. The FCC recognized that networks offered better services to a wider audience, but determined that this alone did not entitle network policies to blanket commission approval. *Id.* at 198.

22. For example, the networks could not enforce penalty clauses against station owners broadcasting a competing product. *Id.* at 200. The rules also outlawed territorial exclusivity clauses that prevented networks from selling programs to other stations in the same area. *Id.* These clauses could prevent a program's broadcast in an entire region if an affiliate declined to broadcast the program. *Id.* The commission also modified the use of network option times—clauses giving the national network control of a local station's broadcast for up to twenty-four hours, under advance notification. *Id.* at 202–03.

23. *Id.* at 224–25.

24. *Id.* at 208.

25. *See id.* at 219.

26. Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, 63 F.C.C. 2d 674 (1977).

27. *See* Rules and Policies, *supra* note 17, at 63,987.

28. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

remove the national limits on station ownership.[29] Under the 1996 Act, a parent company can own up to eight stations in some markets.[30] Congress removed the limit on national radio ownership to promote competition by enabling centralized broadcasters to offer better content and enhancing radio's ability to compete with new media.[31]

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29. *Id.* § 202(a). The purpose of the 1996 Act was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Id.* at pmbl.

30. *Id.* § 202(b)(1)(A). The size of the market dictates the limits on local ownership. *Id.* § 202(b)(1)(A)–(D). The FCC has discretion to allow an owner to exceed the limit, however, if it "will result in an increase in the number of radio broadcast stations in operation." *Id.* § 202(b)(2).

31. Anna Wilde Mathews, *Over the Borderline: In San Diego, Legal Quirks Help a Radio Empire: Clear Channel Blankets Market with a Mix of Stations in the U.S. and Mexico: Using Leverage with Ad Buyers*, WALL ST. J., Oct. 4, 2002, at A1. Drafts of the 1996 Act included a media ownership provision that also removed television ownership limits and allowed for extensive cross-media ownership. *See* Communications Act of 1995, H.R. 1555, 104th Cong. (1995). Many legislators feared a centralized media monopoly. *See* 141 CONG. REC, E1571, E1571–72 (1995) (statement of Rep. Markey) (stating that a draft of the bill's "drastic and indiscriminate elimination of mass media ownership rules proposed . . . would eviscerate the public interest principles of diversity and localism . . . . It allows for the concentration of television, radio, cable and newspaper properties in a way that will make Citizen Kane look like an underachiever . . . ."). Representative Markey attacked the deregulation of television as against the public interest and proposed amendments. *Id.* at E1571–73. *See also* 141 CONG. REC. H8269, H8272–73 (1995) (statement of Rep. Beilenson) (supporting Markey's television amendments, and mentioning that the "bill would remove all limits on the number of radio stations a single company could own"); *id.* at H8276 (statement of Rep. Slaughter) ("Under the bill, a single company can own a network station, a cable station, unlimited numbers of radio stations, and a daily newspaper, all in the same town."); *id.* at H8291 (statement of Rep. Kaptur) ("I welcome some deregulation to create competition and diversity in these monopolistic industries. However, deregulation is fine. No regulation is anti-competitive and anti-democratic."). Thus, as a political compromise, Congress revised most ownership provisions to prevent concentration of ownership across media formats, but retained the permissive radio ownership provisions. *See* Eric Boehlert, *One Big Happy Channel?*, SALON.COM, June 28, 2001, *at* http://archive.salon.com/tech/feature/2001/06/28/telecom_dereg/print.htm (stating that the amendments were "to appease the White House's objections about unfair media concentration"); *see also* President's Remarks on Signing the Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 215, 216 (Feb. 8, 1996) (signing the bill into law, President Clinton remarked, "This law also recognizes that with freedom comes responsibility. Any truly competitive market requires rules. This bill protects consumers against monopolies. It guarantees the diversity of voices our democracy depends upon . . . .").

D. FCC RADIO OWNERSHIP REGULATION SINCE THE TELECOMMUNICATIONS ACT OF 1996

The current FCC policy on media ownership is quixotic in its struggle between encouraging open markets to generate efficiencies and regulating ownership to insure diverse media. Pursuant to the 1996 Act, the FCC reviews the media ownership laws biennially to determine if they still serve the public interest.[32] This review includes an evaluation of local radio ownership regulations. In 1998, the FCC introduced an interim system that flagged mergers, which if approved, would create a particularly high concentration in a market's advertising revenue.[33] The system backlogged mergers.[34] The FCC's 2001 interim *Local Radio Ownership Policy* goal was to "develop a new framework that will be more responsive to current marketplace realities while continuing to address [the FCC's] core public interest concerns of promoting diversity and competition."[35]

As part of this new framework, the FCC debated whether section 202(b) of the 1996 Act simplified the review process of the impact that radio mergers have on local markets.[36] Section 202(b) removed language in local ownership regulations referring to audience share calculations that were "prima facie inconsistent with the public interest."[37] The 1996 Act, however, did not amend the public interest language in the 1934 provisions that regulated station licenses and transfers.[38] Did Congress intend to forbid use of audience share calculations in ownership regulations or simply strike the presumption that an owner's high audience share was not in the public interest?

The June 2003 FCC media ownership rules address several aspects of the local-level radio ownership regulations.[39] Impor-

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32. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12.

33. Rules and Policies, *supra* note 17, at 63,988.

34. *Id.*

35. *Id.* ("[The FCC's current] framework for analyzing proposed radio combinations particularly has led to unfortunate delays that do not serve well the interests of the agency, the parties, or the public.").

36. *Id.* For a discussion of the Act's effect on local ownership limits, see *supra* note 30 and accompanying text.

37. Rules and Policies, *supra* note 17, at 63,987; *see also supra* note 27 and accompanying text.

38. *See* Rules and Policies, *supra* note 17, at 63,988; *see also supra* notes 15–16 and accompanying text (discussing the 1934 provisions).

39. *See generally* Broadcast Ownership Rules, Cross-Ownership of Broad-

tantly, the rules maintained the limits on local station ownership.[40] As part of the new FCC media ownership rulings, local radio markets are measured differently.[41] If implemented, the rule will slow parent companies' ability to further concentrate radio ownership in major cities.[42]

II. ANTITRUST CONCEPTS APPLICABLE TO RADIO AND CONCERT PROMOTION CONSOLIDATION

An antitrust analysis often requires determining if a firm has or would have market power, and thus, the ability to create anticompetitive harms.[43] This Part addresses the relevant legal concepts as applied to the radio and concert promotions industries. First, this Part pinpoints the relevant market for radio and concert promotion. Second, this Part examines the level of judicial scrutiny that courts apply in antitrust cases. Third, this Part explains the concepts of vertical integration and tying. Finally, this Part briefly outlines the rise and fall of vertical integration in the courts.

A. THE RELEVANT MARKET FOR RADIO AND CONCERT PROMOTIONS

Antitrust laws promote market competition and prevent monopolistic harms.[44] The FCC,[45] the Department of Justice,[46]

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cast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286, 46,304–12 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73).

40. *Id.* at 46,304 (restricting both "the number of commercial radio stations in a service (AM or FM) that a party may own in a local market and the number of stations overall"). For a discussion of these numerical limits on local station ownership, see *supra* note 30 and accompanying text.

41. Arbitron Metro markets will now be used to define local markets because they represent a reasonable geographic market and are an industry standard. *Id.* at 46,307 para. 190.

42. Jim Landers, *FCC Votes Along Party Lines to Relax Most Media Ownership Rules*, DALLAS MORNING NEWS, June 3, 2003, *available at* 2003 WL 56750600.

43. Market power is a concept important under the Sherman Act section 1 (agreements), section 2 (monopolization and actual monopolization), and the Clayton Act section 3 (tying), and section 7 (mergers). Market power is "the power to control prices or exclude competition." E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 27 (3d ed. 1998) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391–92 (1956)).

44. Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).

45. *See* discussion *supra* notes 17–18 and accompanying text.

46. The Department of Justice's antitrust enforcement branch can force

and the Federal Trade Commission apply antitrust principles in their oversight of radio.[47] A proper antitrust analysis must account for the business intricacies of the particular market[48] by defining the relevant product and geographic markets.[49] Market share does not always define the relevant product market. The relevant product market could include several products that, because of cross-elasticity of demand, are reasonable substitutes.[50] Alternatively, the relevant product market can be a defined submarket.[51]

The relevant product market in station mergers is radio advertising revenue.[52] Station owners argue the relevant market should include revenue from all forms of media advertising,[53] because a broad definition decreases an owner's market share, allowing ownership of more stations before raising antitrust concerns.[54] The antitrust agencies, however, have rejected this proposal.[55] In the popular concert touring industry, the relevant market is revenue from promoting popular music concerts for a particular geographic market.[56]

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the sale of stations to decrease ownership concentration in a market by conditioning a merger's approval on a consent decree. *See, e.g.*, Final Judgment of Consent Decree, United States v. Clear Channel Communications, Inc., *at* http://www.usdoj.gov/atr/cases/f6300/6354.pdf (last visited Oct. 5, 2003).

47. Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 477 (2002) (explaining the FTC's role in granting antitrust clearance for the sale of a radio station).

48. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 321–22 (1962) (noting that Congress desired mergers to be viewed in the context of the particular industry); *see also* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957) (stating that the "[d]etermination of the relevant market is a necessary predicate to finding a violation of the Clayton Act").

49. Under section 2 of the Sherman Act, both attempted and actual monopolization requires showing market power in a relevant market. *See* United States v. Grinnell Corp., 384 U.S. 563, 571–76 (1966) (analyzing the factors that determine a relevant market for antitrust matters).

50. Cross-elasticity of demand is a measure of products that are reasonable substitutes and interchangeable with the product, and accordingly the substitutes' demand should go up if the product's price rises or output decreases. *See Brown Shoe Co.*, 370 U.S. at 325.

51. *Id.* (citing *E.I. du Pont*, 353 U.S. at 593–95 (1957)).

52. Stucke & Grunes, *supra* note 3, at 257.

53. This argument rests on principles of cross-elasticity of demand and suggests that other media are adequate advertising substitutes. *See supra* note 50 and accompanying text.

54. Leeper, *supra* note 47, at 482.

55. *Id.* at 483.

56. *See* New Park Entm't LLC v. Elec. Factory Concerts, Inc., No. 98-775, 2000 WL 62315, at *6 (E.D. Pa. Jan. 13, 2000); Compl. ¶ 37, Nobody in Par-

B. THE RELEVANT STANDARD OF REVIEW

Typically, courts reviewing alleged antitrust violations require the plaintiff to prove anticompetitive effects under either a rule of reason or a per se illegality standard.[57] The rule of reason standard applies to most allegations[58] and requires a case-by-case examination of the facts to weigh the procompetitive efficiencies against the anticompetitive harms.[59] Per se illegality, the less common standard, applies only to conduct that is "manifestly anticompetitive."[60] A plaintiff prefers the per se standard because the court will presume that the defendant's conduct is anticompetitive.[61] Conduct warrants per se review if "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[62]

C. VERTICAL INTEGRATION AND TYING

Vertical integration is the "combining of two or more vertically related production processes under the auspices of one ownership-and-control entity."[63] This process occurred in the

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ticular Presents, Inc. v. Clear Channel Communications, Inc. (D. Colo. Aug. 6, 2001) (No. 01-N-1523) [hereinafter Clear Channel Complaint].

57. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 103 (1984) ("Both per se rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.'") (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)). A third standard, the "quick-look rule of reason," emerged in the 1980s. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999). The "quick-look rule of reason" applies to antitrust allegations so likely to produce an anticompetitive effect on customers and markets (in the form of obvious price or output restraints) that it only requires a cursory review of the facts. *Id.* at 770–71.

58. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (noting that under the rule of reason analysis, the fact finder examines whether the practice "imposes an unreasonable restraint on competition").

59. *See* Am. Ad Mgmt. v. GTE Corp., 92 F.3d 781, 789 (9th Cir. 1996) (citing Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988)).

60. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988). Per se review is warranted only when the behavior has a "pernicious effect on competition and lack of any redeeming virtue." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

61. *See N. Pac. Ry. Co.*, 356 U.S. at 5 (stating that such agreements are presumed to be unreasonable without inquiry into the resulting harm).

62. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979).

63. THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 328–29 (John E. Kwoka, Jr. & Lawrence J. White eds., 1999) [hereinafter THE ANTITRUST REVOLUTION].

Clear Channel–SFX merger.[64]

Academics, initially led by the "Harvard School," believed vertical integration was likely to produce anticompetitive effects.[65] The Harvard School is now widely rejected.[66] Today there are two leading, but divergent schools of thought regarding the economic impact of vertical integration: the "Chicago School" and the "post-Chicago School."[67] The Chicago School suggests vertical integration enhances market efficiency and ultimately benefits the consumer.[68] More guardedly, the post-Chicago School advocates monitoring vertical integration because under certain circumstances market leverage can harm competition.[69]

Tying is a business practice that occurs in vertically integrated companies. Tying occurs when one product (tying product) is sold on the condition that the buyer will purchase (or agree not to purchase from a competitor) another product from the seller (tied product).[70] Tying is harmful to the market when it allows a firm to leverage its market power in one industry to foreclose competition in another industry.[71]

Traditionally, like most forms of vertical integration, tying arrangements were illegal.[72] Now, however, the courts recog-

64. *See infra* note 150 and accompanying text (discussing the AMFM merger and the simultaneous purchase of SFX).

65. Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 186–87 (2002) (noting that the Harvard School believed even as little as five percent of market power was enough to leverage power—and this influenced the strict 1968 Merger Guidelines).

66. *Id.* at 187.

67. *Id.* at 202.

68. The Chicago School "was especially influential on antitrust policy in the late 1970s and the 1980s." THE ANTITRUST REVOLUTION, *supra* note 63, at 328.

69. Yoo, *supra* note 65, at 186–87.

70. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958). A footnote clarifies that tying does not apply to a situation where the buyer is "free to take either product by itself." *Id.* at n.4. According to the Court,

> 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.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

71. Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611 (1953) (stating "the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next").

72. *See supra* note 65 and accompanying text (discussing the Harvard

nize that some tying arrangements can promote efficiency.[73] Today, the per se illegal standard of review is applied only to tying arrangements in the presence of specific market conditions.[74] The courts have identified four elements to a per se tying agreement: "(1) the tying and the tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce."[75]

D. VERTICAL INTEGRATION AS APPLIED BY THE COURTS

Courts have applied many antitrust statutes to vertically integrated companies: sections 1 and 2 of the Sherman Act, and sections 3 and 7 of the Clayton Act.[76] The legality of a vertically integrated company turns on "(1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent."[77] The Court has identified several factors to determine whether vertical integration creates a harmful monopoly, including the size and nature of the markets involved and the likelihood of market power leverage, which would foreclose competition.[78]

The vagueness of the Sherman Act's "monopoly" and "restraint of trade" concepts[79] spurred Congress to pass the Clayton Act. The Clayton Act's amendments sought to ensure courts would find certain specific behavior to be an antitrust viola-

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School's approach to vertical integration).

73. *See* United States v. Microsoft Corp., 253 F.3d 34, 96–97 (D.C. Cir. 2001) (finding that the rule of reason analysis is applicable to software tying arrangements and noting that evidence of efficiencies can be "direct and indirect"). In some cases, tying generates desired efficiencies. JULIAN VON RALINOWSHKI ET AL., 1 ANTITRUST LAWS AND TRADE REGULATION § 22.01 [2] (2d ed. 2003) (positing a hypothetical where the buyer is interested in products being shipped together or is interested in how products work together).

74. This is necessary because tying "not coerced by the heavy hand of market power can serve the procompetitive functions of facilitating new entry into certain markets." Eastman Kodak Co. v. Image Technical Serv., 504 U.S. 451, 488–89 (1992) (Scalia, J., dissenting) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962)).

75. *Microsoft Corp.*, 253 F.3d at 85 (citing *Eastman Kodak Co.*, 504 at 461–62; *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 12–18).

76. 15 U.S.C. §§ 1, 2, 14, 18 (2002); THE ANTITRUST REVOLUTION, *supra* note 63, at 332.

77. United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948).

78. *Id.*

79. 15 U.S.C. §§ 1, 2 (2002).

tion.[80] Section 3 of the Clayton Act specifically addressed tying: it condemns contracts conditioned on the hindrance of competition.[81] Section 7 of the Clayton Act regulates mergers that involve vertical integration,[82] although the Court has qualified the provision by recognizing that it "does not render unlawful all such vertical arrangements."[83]

Antitrust merger regulations require agencies to predict anticompetitive harms in their incipiency.[84] The Department of Justice in the 1980s, however, was not concerned with vertical integration, and thus the subject is absent from the agency's *Merger Guidelines*.[85]

III. RADIO AND CONCERT PROMOTION CONSOLIDATION

A. RADIO OWNERSHIP CONSOLIDATION

Radio ownership drastically concentrated in 1997, one year after the passage of the Telecommunications Act, as over "4,000 of the country's 11,000 radio stations changed hands."[86] Con-

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80. *See* Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922) ("The Clayton Act, as its title and the history of its enactment discloses, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890."). Furthermore, "[t]he Clayton Act sought to reach the agreements embraced within [the Sherman Act's] sphere in their incipiency." *Id.* at 356.

81. Section 3 of the Clayton Act states the following:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale . . . or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition . . . that the lessee or purchaser thereof shall not use . . . commodities of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14 (2002).

82. *See id.* § 18.

83. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962). Section 7 "forbids only those [mergers] whose effect may be substantially to lessen competition, or to tend to create a monopoly, 'in any line of commerce in any section of the country.'" *Id.*

84. *See id.* at 317 (discussing Congress's aim to provide authority to stop mergers early).

85. THE ANTITRUST REVOLUTION, *supra* note 63, at 334; *see also supra* note 68 and accompanying text (discussing the role of vertical integration as a theory in the 1980s).

86. Jeff Leeds, *Clear Channel's Dominance Obscures Promotions Conduit*, L.A. TIMES, Aug. 3, 2001, at C4. From March 1996 to March 2001 the total number of station owners declined 25%. MASS MEDIA BUREAU, FEDERAL

centration in ownership mostly resulted from mergers involving the fifty largest owners.[87] Notwithstanding the greater number of owners in metro markets,[88] the "top three broadcasters control at least 60[%] of the stations in the top 100 markets in the U.S."[89] The sheer size of the biggest parent companies allows those owners to control radio's content.[90]

Content control gives parent companies better access to radio's main product: advertising airtime.[91] Stations generate revenue from direct sales to advertisers who buy commercial airtime during programming.[92] Station owners use demographic data to build music formats to appeal to target audiences,[93] and then market those audiences as tailored advertising options.[94] Not surprisingly, revenue share was highly concentrated in 2001; in 60% of metro markets, one company earned over 40% of the market's revenue.[95]

COMMUNICATIONS COMM., REVIEW OF THE RADIO INDUSTRY, at 3 (Sept. 2001) [hereinafter MASS MEDIA BUREAU] (noting a decrease in owners from 5133 to 3836), *at* http://www.fcc.gov/mb/policy/docs/radio01.pdf.

87. MASS MEDIA BUREAU, *supra* note 86, at 3–4.

88. A parallel decline in ownership existed at the metro market level. *Id.* at 7. In March 1996, a metro market averaged 13.5 owners; in March 2001, the average fell to 10.3. *Id.* The top ten metro markets, however, averaged 25.4 owners in March 2001. *Id.*

89. Eric Boehlert, *Pay for Play*, SALON.COM, Mar. 14, 2001, *at* http://dir.salon.com/ent/feature/2001/03/14/payola/index.html. As of March 2001, the largest five owners each held, in decreasing order, 972, 257, 210, 185, and 97 stations. MASS MEDIA BUREAU, *supra* note 86, at 4. These numbers do not include pending mergers. *Id.* at n.6.

90. According to one estimate "66.6 percent of people who listen to news [on the radio] listen to stations that are owned by four companies." Alexandra Marks, *Media Future: Risk of Monopoly*, CHRISTIAN SCI. MONITOR, Sept. 19, 2002, at 3.

91. *See* Gene Epstein, *A Happier Tune: A Stronger Economy Means More Radio Advertising—Good News for Clear Channel's Shares*, BARRON'S, May 13, 2002, at 27.

92. *See id.* (analyzing the effect of advertising dollars on Clear Channel's earnings).

93. Mathews, *supra* note 31, at A1; *see* Duane Sprague, *How To Use Radio Better*, http://www.dunningsprague.com/articles/radio.htm ("Radio is a targeted medium because each radio station attracts a specific demographic group based on the station format.").

94. Mathews, *supra* note 31, at A1 (illustrating how a male-targeted radio station is a more attractive market to sell automobiles).

95. Across all metro markets, the top two owners in a market averaged 72.8% of the market share and the top four averaged 92.8%. MASS MEDIA BUREAU, *supra* note 86, at 9 chart 1. It should be noted that the national analysis of local concentration is high because many small markets have few stations each with very high market share. *See id.* at 6. Even in the fifty larg-

There are signs radio's audience is eroding. In 2001, the average listener had a radio on for twenty hours a week, whereas in 1993, the average listener had a radio on for twenty-two hours.[96] One survey suggests listeners are tired of hearing the same music.[97] The National Association of Broadcasters, possibly as a response to nervous owners concerned about dwindling audiences, recently launched a quarter-million-dollar promotional campaign touting broadcast radio's diversity.[98]

Radio industry profits are increasing despite fewer listeners.[99] Owners use their stations' national infrastructure to exploit economies of scale and centralize operations.[100] In the process radio has become "one of the biggest profit margin-focused businesses in the eyes of Wall Street."[101] To remain highly profitable some stations have replaced a live local disc

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est Arbitron markets, the average largest market share of a station is 36%, the top two stations have 51%, and the top four stations collectively have 87%. *Id.* Format diversity is another indicator of market concentration. *Id.* Format diversity measures the distinct types of music that are played on a radio station. BIA, a company that provides data to the FCC, sorts these music types into eighteen broad different formats. *Id.* at 7 n.14. In the aggregate, the smallest metro markets have slightly increased the diversity of formats available to their listeners, while the largest markets have slightly decreased the number of formats. *Id.* The top ten markets have maintained around sixteen different formats. *Id.* Research suggests, however, that the formats actually differ little in musical content. *See* Peter DiCola & Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians?*, FUTURE OF MUSIC COALITION, Nov. 18, 2002, at 53–60, *at* http://www.futureofmusic.com/images/FMCradiostudy.pdf.

96. Damon Cline, *Critics Say Radio Industry Drives Listeners Away*, AUGUSTA CHRON., Aug. 25, 2002, 2002 WL 26062145.

97. *Id.* (citing a Future of Music study where 76% of those surveyed would prefer DJs to select songs, 52% prefer new music over repetition, and 75% would like to see more low-power alternative radio stations for diverse sources); *see also* Eric Boehlert, *Radio's Big Bully*, SALON.COM, Apr. 30, 2001 (discussing Arbitron studies that show a 15% decline over a seven-year period and that many young listeners tune in to less radio because of "commercial overload"), *at* http://dir.salon.com/ent/feature/2001/04/30/clear_channel/index.html.

98. David Hinckley, *"Free" Radio Launches 250G Satellite Killer*, N.Y. DAILY NEWS, Sept. 24, 2002, http://www.nydailynews.com/entertainment/ent_radio/story/21186p-20105c.html.

99. *See* Boehlert, *supra* note 31.

100. Corporate owners pool their advertising staff, package clustered marketing programs, and run their operations out of a single regional office. *See* Mathews, *supra* note 31, at A1.

101. Katy Bachman, *Rock Jocks Fighting to Not Fade Away*, MEDIAWEEK, Sept. 30, 2002, at 9.

jockey with a prerecorded announcer.[102] Commercial airtime in some markets fills twenty minutes of an hour.[103] Radio advertising rates dramatically increased throughout the late 1990s.[104] In 2001, radio advertising generated $16.7 billion in revenue.[105]

1. Clear Channel's Role in Consolidation

Since deregulation, Clear Channel Communications has grown larger than any other parent company of radio stations.[106] In 1995, Clear Channel owned forty-three radio stations;[107] by January 2003, Clear Channel owned or operated 1253 radio stations.[108] Clear Channel has also reserved the right to purchase further stations in the event that local ownership caps are lifted.[109] Clear Channel owns many popular top-

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102. Under Clear Channel's "Prophet" system, radio disc jockeys prerecord their broadcasts and edit segues between songs to play in several markets. Randy Dotinga, *"Good Mornin' (Your Town Here),"* WIREDNEWS, Aug. 6, 2002, *at* http://www.wired.com/news/print/0,1294,54037,00.html.

103. Boehlert, *supra* note 97.

104. Leslie P. Norton, *Fading Signal? After Nine Years of Stunning Growth, Clear Channel May Be Facing Static*, BARRON'S, Mar. 6, 2000, at 34.

105. Sean Piccoli, *Radio Static: Clear Channel's Dominance of Both Broadcasts and Live Concerts Has Some Music Industry Players in an Uproar*, S. FLA. SUN-SENTINEL, Sept. 29, 2002, at 1G, 2002 WL 100403071 (citing DUNCAN'S RADIO MARKET GUIDE). Clear Channel earned nearly one-fifth of the total market share at $3.5 billion. *Id.*

106. Clear Channel owns more than 10% of all radio stations and has merged with more than seventy companies. Paul Farhi, *Mega Hurts: Clear Channel's Big Radio Ways Are Getting a Lot of Static These Days*, WASH. POST, May 29, 2002, at C1, http://www.washingtonpost.com/ac2/wp-dyn/A23996-2002May28. Clear Channel is also a global leader in outdoor advertising. *See* Diane Eicher, *The Growing Reach of King Kong: How Clear Channel Created a Radio, Concert Behemoth*, DENV. POST, Nov. 11, 2001, at IO1, 2001 WL 27671485. The outdoor advertising unit claims its strategic locations reach over 50% of Americans and over 75% of Hispanic Americans. Clear Channel Outdoor, *Why Clear Channel Outdoor?*, *at* http://www.clearchanneloutdoor.com/corp/default.asp (last visited Oct. 12, 2003).

107. Clear Channel Communications, *Our History*, *at* http://www.clearchannel.com/company_history.php (last visited Oct. 12, 2003).

108. Clear Channel Communications, *Radio*, *at* http://www.clearchannel.com/rad_index.php (last visited Oct. 12, 2003). A major Clear Channel acquisition was 460-station AMFM for $24 billion in 2000. Boehlert, *supra* note 97. In some American markets, Clear Channel broadcasts from international transmitters outside FCC ownership regulations. Mathews, *supra* note 31. In San Diego, Clear Channel has "exclusive licensing agreements" with Mexican radio stations allowing Clear Channel to make all program and sales decisions. The FCC has no control over transmitters located in Mexico. *Id.*

109. Eric Boehlert, *Is Clear Channel Playing a "Shell Game"?*, SALON.COM,

market stations and is the largest owner of stations broadcasting a rock format.[110]

Critics argue Clear Channel has reduced programming diversity.[111] An important factor in evaluating programming diversity is the presence of minority owners.[112] To Clear Channel's credit, they agreed to sell off forty radio stations to minority owners to comply with a major merger agreement.[113] There are doubts, however, that the sales will produce diverse broadcasts because Clear Channel retains control of many of the *sold* stations' broadcasts and ad revenue.[114]

2. Radio Revenue

While radio generates a majority of its revenue from advertising, airplay decisions constitute another, more controversial source of revenue. A broadcaster can be paid to play particular material, but only if a disclaimer is aired.[115] For decades, record labels skirted the disclaimer requirement by using independent promoters to funnel cash into radio stations and ensure their

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Nov. 20, 2001, *at* http://archive.salon.com/ent/clear_channel/2001/11/20/fcc_complaint/.

110. Boehlert, *supra* note 97. Clear Channel also owns the Premiere Radio Network (Premiere). *Id.* Premiere produces concert and music specials and syndicates popular radio shows by Rush Limbaugh, Dr. Laura Schlessinger, Jim Rome, and Casey Kasem. *Id.* Clear Channel withdrew syndication in markets where Premiere programs ran on non-Clear Channel stations and placed them on newly purchased Clear Channel stations. *Id.*

111. *See* Cline, *supra* note 96 (stating stations pursuing efficiencies have created "cookie-cutter formats, predictable song schedules, and a reduction in local on-air talent"). *But cf.*, Piccoli, *supra* note 105, at 1G.

> [T]he radio practices that critics dislike most pre-date Clear Channel's rise: segregating music by genre or target audience; operating tight playlists that give DJs little or no freedom to experiment with song selection; relying on research in which test audiences choose songs based on seven-second snippets; hyping radio festivals; working with consultants who take fees from record companies to shop songs to individual stations.

Id.

112. Statement of Chairman William E. Kennard, Chairman of the Federal Communications Commission, In the Matter of the Applications of Shareholders of AMFM, Inc. and Clear Channel Communications, Inv. for Consent to Transfer of Control of AMFM Texas Licenses Limited Partnership, et al. (2000), http://ftp.fcc.gov/speeches/kennard/statements/2000/stwek070.html (last visited Oct. 12, 2003).

113. Brad Kava, *Biggest Radio Mogul Bending Rules to Get Bigger?*, SAN JOSE MERCURY NEWS, May 8, 2001, http://www.nrcdxas.org/articles/ccjs.html.

114. For instance, one Walnut Creek station *sold* to minority owners simply simulcasts a San Jose Clear Channel station. *Id.*

115. 47 U.S.C. §§ 317, 508 (2000).

songs are in the play rotation.[116] Industry insiders estimate that, by the turn of the decade, record companies were spending $150 million annually on independent promoters.[117] Independent promoters allow stations to operate under the guise of listener preference[118] while labels for airplay privately bankroll them.[119]

Consolidation tipped the playing field in the pay-for-play relationship in favor of station owners.[120] In the summer of 2002, Clear Channel and Radio One began using exclusive promoters[121] that required labels to pay higher fees.[122] In October 2002, Cox Radio stopped using promoters and some labels began to resist paying promoters.[123] In April 2003, in response

116. Boehlert, *supra* note 89. Promoters monitor stations' weekly rotations. Pretextually, promoters' payments to stations give them access to the stations' research and playlists. If the stations add songs, the promoters collect set fees from the record labels. *Id.* Stations, however, add very few songs into their rotation. *See* Eric Boehlert, *Fighting Pay for Play*, SALON.COM, Apr. 3, 2001 (stating "most current music-based stations add roughly 150 new songs each year to their playlist"), *at* http:/dir.salon.com/ent/music/feature/2001/04/03/payola2/index.html; *see also* Marc Schiffman & Sean Ross, *Does Radio Consolidation Equal Less New Music?*, BILLBOARD, Sept. 14, 2002, at 79, (finding the mean number of added songs on a station were three per week, but no station averaged over six new songs per week). Labels recognize that "the radio conglomerates . . . have the clout to launch a song simultaneously in scores of markets across the country—or to consign it to oblivion." Chuck Philips, *Music Industry to Call for a Federal Probe of Radio Payola*, L.A. TIMES, May 23, 2002, at C11.

117. Philips, *supra* note 116.

118. Boehlert, *supra* note 89 (noting "stations want to maintain the illusion that they sift through stacks of records and pick out only the best ones for their listeners").

119. One Clear Channel promoter comments, "It's product placement . . . . At the grocery store, it's common for companies to pay to have their products placed on the shelf. So why is it that what is a common business practice anywhere else is looked at like taking an Uzi out at a McDonald's?" Cline, *supra* note 96. Eric Boehlert responds to a similarly posed hypothetical: "[R]adio isn't really retail—that's what the record stores are. Radio is an entity unique to the music industry. It's an independent force that, much to the industry's chagrin, represents the one tried-and-true way record companies know to sell their product." Boehlert, *supra* note 89.

120. Chuck Philips, *Clear Channel's Radio Pacts Irk Labels*, L.A. TIMES, Sept. 5, 2002, at C1.

121. *Id.* Radio One owns a large share of the urban music formats. *Id.* Rock and pop format promoters pay up to $250,000 annually to be a station's exclusive promoter. *Id.*

122. *Id.* at C11 (noting that promotion price increases in markets range from 25% to 100% depending on the urban market).

123. *Marketplace Morning Rep.: Some Radio Chains Severing Ties to Record Business Middlemen*, (Minn. Pub. Radio broadcast, Oct. 23, 2002), 2002

to congressional scrutiny, Clear Channel did an about-face from its exclusive contracts and announced that it would no longer use independent promoters, but would forge relationships directly with the labels like Cox.[124] Critics believe that Clear Channel's decision to forego independent promoters is little more than a public relations move that will allow a new more direct form of pay-for-play to emerge.[125]

Station owners also exert pressure on labels, and in turn the label's artists, through listener appreciation concerts.[126] Listener appreciation concerts showcase the station rather than a particular band. The concerts usually involve several play-list acts, each performing only a few songs.[127] Stations expect musicians to perform for free or below market rates.[128] In 1998, there were approximately 200 radio-sponsored concerts.[129] Even before the Clear Channel–SFX merger, critics believed radio-sponsored concerts involved coercive business practices.[130] Now that the industries are vertically integrated, conditioning airplay on concert performances can be a regular leverage tactic of station owners.[131]

WL 4431364; *see also* Marc Schiffman, *Indie Promotion Relationships Shifting*, BILLBOARD, Nov. 2, 2002, at 3, 2002 WL 102117771. Cox, as a smaller parent company, hoped not using independent promoters would encourage labels to "forg[e] even stronger ties directly with [their] stations." Fair Disclosure Wire, Cox Radio, Q3 Earnings Conference Call (Oct. 30, 2002), 2002 WL 100546648.

124. *See* Press Release, Clear Channel Communications, Clear Channel Cuts Ties with Independent Promoters (Apr. 9, 2003), http://www.clearchannel.com/documents/press_releases/20030409_corp_indies.pdf.

125. Greg Kot, *Clear Channel's Communications Decision Doesn't Necessarily End Pay-for-Play*, KNIGHT RIDDER TRIB. BUS. NEWS, Apr. 14, 2003, 2003 WL 1882488.

126. Ray Waddell, *Country Acts Rely on Radio Concerts: Shows Seen As Useful, But Approach "Pay for Play" Scenario*, BILLBOARD, Dec. 2, 2000, at 5. The listener appreciation concert, as a marketing concept, had its genesis at a 1989 charity show sponsored by Los Angeles FM station KROQ. *See* Chuck Philips, *Radio Pushes Bands for Freebies*, L.A. TIMES, Nov. 5, 1998, at A1.

127. Kelly Barbieri, *Radio Concerts—Friend or Foe?*, AMUSEMENT BUS., June 18, 2001, at 6, 2001 WL 21586784.

128. Waddell, *supra* note 126, at 5; *see also*, Barbieri, *supra* note 127, at 6 ("When creating a festival event, the talent is usually the most cost-consuming aspect. This is often not the case with radio concerts because of the airtime leverage built into the offer."). One promoter notes, "[S]ometimes it is implied that if the record company provides the act for free or at a greatly reduced rate, they will receive an add or airplay." Waddell, *supra* note 126, at 21.

129. *See* Philips, *supra* note 126.

130. *See id.*

131. *See infra* Part III.C.

B. CONCERT CONSOLIDATION

The concert promotions industry was born in the 1960s and began consolidating in 1996.[132] The consolidation of the concert industry was the brainchild of radio station owner Robert F.X. Sillerman.[133] The similarities to the radio industry made concerts an ideal business venture.[134] Sillerman sold his radio stations to start SFX Entertainment, a conglomerate of concert promoters and venues.[135] During its first eighteen months, SFX spent nearly one billion dollars to acquire concert promotional firms that owned or had exclusive rights to venues in nearly thirty states.[136] By 1999, SFX had spent two billion dollars on consolidation,[137] allowing it to "put on more than 25,000 events at 120 venues."[138] To consolidate, SFX went deeply into debt.[139] The debt, however, gave SFX control of the booming concert industry that generated $1.6 billion in revenue in 2000.[140]

SFX's national consolidation swallowed local promotions

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132. *See* Richard Harrington, *A Concert Promoter Out to Steal the Show?*, WASH. POST, Aug. 28, 1998, at B1.

133. *Id.*

134. *Id.* Sillerman recognized the concert industry, like radio before consolidation, was composed of many small regional groups. *Id.* Sillerman believed that regional concert promoters never maximized their advertising revenue. *Id.*

135. Jim DeRogatis, *SFX Shakes Up the Music Scene*, CHI. SUN-TIMES, Feb. 4, 1999, at 6, 1999 WL 6524158. "Anticipating the radio industry deregulation that followed the Telecommunications Act of 1996, SFX went on a massive buying spree, acquiring 71 stations. In 1997, it sold them for a staggering $2.1 billion." *Id.* SFX's entry into concert promotion began in October 1996. *Id.*

136. Matthew Goldstein, *Event Promoter Upstages Its Rivals with Rapid Growth: SFX's Tactics Raise Antitrust Questions*, CRAIN'S N.Y. BUS., Nov. 23, 1998, at 4, 1998 WL 8018404. Sillerman focused on buying regional promoters who "owned ampitheaters or had long-term leases with arenas and theaters." G. Brown, *Promoter Packs Punch in Metro-Area Market*, DENV. POST, Nov. 11, 2001, at 4I.

137. Brown, *supra* note 136.

138. Seth Sutel, *Companies to Work in Concert*, HOUS. CHRON., Mar. 1, 2000, at 1, 2000 WL 4283367. In 1999, 60 million people attended SFX events. Joan Harrison, *Clear Channel Exploits the Synergies Between Radio and Live Events*, MERGERS & ACQUISITIONS, May 1, 2000, at 20. In 2000, SFX controlled thirty-one venues in the top fifty markets. Norton, *supra* note 104, at 31.

139. *Consolidation Conundrum: Is Bigger Necessarily Better?*, MUSIC BUS. INT'L, Apr. 1, 2000, at 9, 2000 WL 22205135 (noting SFX losses in "1999 had declined marginally from $68.7m in 1998 to $63.9m, while its revenue had jumped from $889.9m to $1.68bn").

140. Ray Waddell, *Concert Biz Is on the Road to Success*, BILLBOARD, May 19, 2001, at 22. The revenue from 2000 was 25% higher than the previous year. *Id.*

businesses and reinvented the concert industry around national tour packages.[141] Historically, artists negotiated shows in each city with local promoters[142] who operated several venues in a region that varied in size.[143] SFX, however, offered artists high guarantees under their new business model,[144] and in an industry where revenue splits already favored the artists.[145] Competitors allege that SFX, with its enormous financial backing, took losses on events to ensure long-term market control.[146] Large payouts to artists necessitated that SFX and its competitors focus on generating ancillary revenue from parking, concessions, merchandise, venue restoration, and ticketing fees.[147] Between the promoter's ancillary revenue streams and the artist's high guarantees, concerts have become expensive to the detriment of the concert-going public.[148]

C. THE CLEAR CHANNEL–SFX MERGER

In August 2000, Clear Channel's radio consolidation engulfed concert promotions. Clear Channel, while finalizing its

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141. Clifford Pugh, *All the World's His Stage: Brian Becker Has Helped Turn His Father's Company into a Global Megastar of Live Entertainment*, HOUS. CHRON., Sept. 2, 2001, at 8, 2001 WL 23625598. *But see* Ray Waddell, *Concert Outlook Bright as Biz Weighs Mega-Merger*, BILLBOARD, Mar. 11, 2000, at 1 (noting national tours have been around since the 1970s but no company has had SFX's resources).

142. *See* Harrison, *supra* note 138, at 20.

143. *See* Harrington, *supra* note 132.

144. Guarantees are the minimum amount of money a promoter will pay an act per show, with most deals offering a percentage of gross if ticket sales surpass a predetermined level. Waddell, *supra* note 141. Guarantees in the early 1990s were "in the $100,000–$300,000 range, but beginning [in 1999,] $400,000–$500,000 per show guarantees from SFX and other national tour producers became commonplace, and talk of $1 million-plus per show has even surfaced." *Id.*

145. *See* Harrington, *supra* note 132 (noting that 60/40 revenue splits (artist/promoter) grew to 95/5).

146. Waddell, *supra* note 141 (reporting that a competing promoter at Jam Entertainment says in some markets SFX makes a high bid as a loss leader).

147. *See* Harrison, *supra* note 138, at 21–22. For a discussion of venue restoration fees, see Ray Waddell, *Mounting Concert Ticket Surcharges Provoke Dissent*, BILLBOARD, May 26, 2001, at 1, 2001 WL 10795390. For a discussion of SFX's exclusive agreement with Ticketmaster, see Dean Johnson, *Industry Mulls SFX's Next Move*, BOSTON HERALD, Nov. 20, 1998, at S25, 1998 WL 7361465.

148. From 1996 to 2001, concert ticket prices rose 73%. *See* Maureen Dezell, *Is Bigger Better?: In the Entertainment Business Clear Channel Is Everywhere, and Critics Say that Is the Problem*, BOSTON GLOBE, Jan. 27, 2002, at L1, 2002 WL 4108248.

AMFM merger,[149] simultaneously purchased SFX.[150] The SFX merger received standard Department of Justice attention and drew concern from only a few senators.[151] At the merger announcement, Clear Channel executives noted the similarity of the industries and the great opportunity for cross-promotions.[152] SFX anticipated boosting event attendance by 15% through radio promotion.[153]

In July 2001, the concerts division was renamed Clear Channel Entertainment.[154] Clear Channel Entertainment generated approximately 70% of U.S. concert ticket revenue in 2001.[155] In 2001, concert attendance per show declined from 2000, and revenue only increased 3%, but threats of terrorism in the final quarter particularly hurt live events.[156] By 2002, concert ticket revenue for major touring acts increased 20% from 2001 to $2.1 billion.[157] In late 2002, during a period of particularly poor concert revenue, rumors briefly circulated that Clear Channel was considering selling its entertainment division.[158] This was at the same time Clear Channel was rumored to be considering aggressively entering the British radio mar-

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149. *See* discussion *supra* note 108.

150. Clear Channel bought SFX for $3.3 billion and assumed $1.1 billion in debt. Epstein, *supra* note 91, at 27.

151. *See* Paige Albiniak & Bill McConnell, *Senators Query Clear Channel/SFX Merger*, BROAD. & CABLE, Mar. 20, 2000, at 19, 2000 WL 12309543.

152. *See* Norton, *supra* note 104, at 31. Randy Palmer, Vice President of Investor Relations at Clear Channel, stated, "They'll be going from a $3 billion marketing cap to a $30 billion-plus marketing cap with the combined [companies]." Ray Waddell, *SFX, Clear Channel Resculpting*, BILLBOARD, Aug. 12, 2000, at 1 (alteration in original) (quoting Randy Palmer), 2000 WL 24844929.

153. *Consolidation Conundrum: Is Bigger Necessarily Better?*, *supra* note 139, at 9.

154. Ray Waddell, *Clear Channel Retiring SFX Brand Name*, BILLBOARD, July 21, 2001, at 4, 2001 WL 31109053.

155. Clear Channel, http://www.clearchannel.com/ent_div_music.php (last visited Oct. 6, 2003). According to Clear Channel's Web site, "The Music Group currently owns, operates and/or exclusively books 135 live entertainment venues, including 41 amphitheaters in the U.S. and 30 venues in Europe." *Id.*

156. Ray Waddell, *Global Touring Sees Gains in Grim Year: 2001 in Review*, BILLBOARD, Dec. 29, 2001, at 5, 2001 WL 31109163.

157. Jennifer Ordonez, *U.S. Music Sales Fall Again*, WALL ST. J., Jan. 3, 2003, at A8.

158. Tim Arango, *Clear Sale-ing: Media Giant May Dump Its Entertainment Unit*, N.Y. POST, Nov. 11, 2002, at 29, 2002 WL 102527026. Even if Clear Channel were to sell its entertainment division, antitrust concerns would remain because the division's share of the industry is so large. Additionally, the rumored interested buyers already have an interest in the industry. *See id.*

ket.[159] Clear Channel has denied the rumors of plans to sell its entertainment division,[160] and in late December 2002 the entertainment division's second in command left the firm.[161] Clear Channel's leadership restructuring was made amidst industry-wide decreases in gross revenue and attendance at the per-show level.[162] By the second quarter of 2003, however, the entertainment division was again rising as revenue increased by 9.2% to $675.9 million.[163]

Since the merger, Clear Channel Entertainment, like its sibling radio operation, is under legal scrutiny. Clear Channel Entertainment currently faces antitrust litigation in the United States District Court of Colorado.[164] In that suit, Denver promoter Nobody in Particular Presents (NIPP) alleges that Clear Channel's three Denver rock stations create a monopoly over rock radio airplay in the region.[165] Specifically, the complaint claims that Clear Channel's radio and concert practices constitute an unlawful tying arrangement under Sherman Act section 2.[166] Additionally, NIPP alleges that Clear Channel forces musicians to select its concert promotions through threats of losing radio airplay.[167] NIPP also alleges Clear Channel's radio infrastructure allows the company to employ unfair market leverage in concert promotions.[168] The problem is not only in

159. *See* Dominic O'Connell, *U.S. Media Giants Fight to Buy Capital Radio*, SUNDAY TIMES (London), Nov. 17, 2002, at 16, *available at* 2002 WL 102105916.

160. Ray Waddell, *Touring Strong, but Some Numbers Cause Concern: 2002 in Review*, BILLBOARD, Dec. 28, 2002, at 1, 2002 WL 102118965.

161. Jeff Leeds, *California Exec Leaving Clear Channel Entertainment Unit*, L.A. TIMES, Dec. 25, 2002, at C2, 2002 WL 103227032.

162. *See* Waddell, *supra* note 160 (noting that in 2002, the average per-show revenue gross decreased 8.5% and that the average per-show attendance decreased 10.6% in the past year, and was down an ominous 25% in the past three years).

163. Jesse Hiestand, *Clear Channel Boosts 2nd-Qtr Profit*, HOLLYWOOD REP., July 30, 2003, at 8, 2003 WL 57154446.

164. *Concert Promoter Sues Clear Channel for Antitrust Violations*, ANTITRUST LITIG. REP. 22, Dec. 2001, at 22.

165. *See* Clear Channel Complaint, *supra* note 56, ¶¶ 29, 30, 42. The suit also alleges that Clear Channel buried NIPP advertising for a popular rock concert and that instead of running a ticket promotion, the prize tickets were given to the station employees. *Id.* ¶¶ 51–52; *see also* Eric Boehlert, *Suit: Clear Channel Is an Illegal Monopoly*, SALON.COM, Aug. 8, 2001, *at* http://archive.salon.com/ent/clear_channel/2001/08/08/antitrust/.

166. Clear Channel Complaint, *supra* note 56, ¶¶ 59–82.

167. *Id.* ¶ 44.

168. *Id.* ¶ 45; *see also* Boehlert, *supra* note 97 ("Record company executives

Denver, either, but exists throughout the country.[169]

D. PROPOSED LEGISLATIVE RESPONSE TO RADIO AND CONCERT CONSOLIDATION: COMPETITION IN RADIO AND CONCERT INDUSTRIES ACT OF 2002

Recently, the vertical integration of the radio and concert industries has received attention from Congress. In June 2002, Wisconsin Senator Russ Feingold introduced the Competition in Radio and Concert Industries Act of 2002.[170] The bill died in

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are particularly resentful about how Clear Channel stations leverage their playlists to make sure its SFX concert-promotion division lands certain tours."). The NIPP complaint alleges that part of Clear Channel's strategy is to offer artists exorbitant guarantees, greater than 100% of the gate revenue, to ensure artists sign on with Clear Channel. Clear Channel Complaint, *supra* note 56, ¶ 49. Then, when competing promoters are completely eliminated, Clear Channel will make profits by paying less to artists who at that point would have no other option. *Id.* A competing promoter told *Billboard*, "It's not just [offering] the extra airplay and extra promotion, it's also the inverse of that—less airplay and less promotion if they don't sell their tours to Clear Channel." Ray Waddell, *Touring Industry Faces Turbulent Times*, BILLBOARD, Sept. 8, 2001, at 5, 2001 WL 24691834.

169. In Ohio, a concert promoter told *Salon* the following: "Clear Channel comes into markets and says to record companies, 'Don't give that station a concert or band promotion or there will be no business with us across our platform of stations.'" Boehlert, *supra* note 97. Apparently on more than one occasion bands not agreeing to promote concerts with Clear Channel have been pulled off Clear Channel stations over several states. *Id.* In Cincinnati, Clear Channel Entertainment promoted a Blink-182 concert through a competing radio station, since Clear Channel had no rock station in the market. Eric Boehlert, *Rock 'n' Radio Rumble*, SALON.COM, Aug. 8, 2001, *at* http://archive.salon.com/ent/clear_channel/2001/08/08/riverbend/. At the concert, the competitor's employees disparaged Clear Channel stations while on stage. *Id.* In response, Clear Channel allegedly stated it would never promote a concert with that station again and threatened to nationally pull Blink-182's music from Clear Channel's stations. *See id.* Clear Channel was also involved in concert litigation even before the SFX merger. In 1996, a Texas promoter accused Clear Channel of tortious interference with prospective economic advantage. *See* Small Business Assistance Corp. v. Clear Channel Broad., Inc., 210 F.3d 278, 279 (5th Cir. 2000). Allegedly, a Clear Channel DJ contacted the Def Jam music label and threatened to not play Montell Jordan or any other Def Jam artist if Jordan performed at a competing radio station's festival. *Id.* at 280 n.2. Jordan performed, but the competing promoter claimed Clear Channel interfered with the event's success. *See id.* at 280 nn.3–4. The Fifth Circuit reversed a lower court decision because the promoter did not prove Clear Channel's actions caused damages. *Id.* at 280–81. The incident, however, demonstrates the potential power Clear Channel wields as a gatekeeper of radio even though the court did not address whether Jordan's radio airplay decreased following the incident.

170. Competition in Radio and Concert Industries Act of 2002, S. 2691, 107th Cong. (2002).

2002, but was reintroduced in both the Senate and the House in 2003, where it remains in committee.[171] The bill addresses several problems with the consolidation of the radio and concert industries[172] and seeks to "facilitate an increase in programming and content on radio that is locally and independently produced, to facilitate competition in radio programming, radio advertising, and concerts, and for other purposes."[173]

Although the bill addresses issues throughout the industry, its primary target is Clear Channel.[174] The bill prevents radio stations that own concert promotion firms from leveraging power across both industries to reduce diversity of content.[175] The legislation also limits a parent company's market advertising share to 35%.[176] Concerning local regulation, the bill proposes to freeze the current limits.[177] The bill also proposes new oversight of the radio industry's audience measures and determination of local markets.[178] Additionally, the bill prevents radio stations formally licensed to one company to be operated by a different company.[179] It also addresses pay-for-play issues by requiring that radio stations disclose *indirect* payments for song airplay over the air.[180] To enforce its provisions the bill authorizes the FCC to revoke the licenses of stations that violate

171. Competition in Radio and Concert Industries Act, S. 221, 108th Cong. (2003); H.R. 1763, 108th Cong. (2003).

172. Introducing the bill, Feingold noted, "The Telecommunications Act of 1996 opened the floodgates for concentration in the radio and concert industry .... We need to repair the damage that has been done through this anti-competitive behavior." Press Release, Senator Russ Feingold, Feingold Introduces "Competition in Radio and Concert Industries Act": Promotes Legislation to Help Independent Radio Station Owners, Promoters and Consumers (June 27, 2002), *available at* http://feingold.senate.gov/releases/02/06/062702medcon.html.

173. Competition in Radio and Concert Industries Act of 2002, S. 2691.

174. Piccoli, *supra* note 105 ("In June, Clear Channel became the unnamed but obvious target of a bill in Congress.").

175. Competition in Radio and Concert Industries Act of 2002, S. 2691, § 3(e)(3)A–D.

176. *Id.* § 4(b)(1)–(2). For a discussion of the current local radio ownership limits, see *supra* note 30 and accompanying text.

177. Competition in Radio and Concert Industries Act of 2002, S. 2691, § 4(c)(1).

178. *Id.* § 5.

179. *See id.* § 6.

180. *Id.* § 7. Although Clear Channel has stopped using independent promoters, the issue of payments is still relevant if a direct relationship with the labels is formed. *See supra* note 125 and accompanying text.

antitrust laws.[181]

IV. ANALYSIS OF INDUSTRIES' CONSOLIDATION AND VERTICAL INTEGRATION

Analyzing consolidation in the concert and radio industries involves both horizontal and vertical market concerns. Each industry consolidated under a series of horizontal mergers.[182] Vertical integration occurred when station owners acquired other music promotion outlets.[183] Both vertical and horizontal consolidations create competitive harms, but both forms of consolidation also promote efficiencies. In particular, vertical integration facilitates structural synergies to advance new business strategies across operations.

A. ANALYSIS OF RADIO CONSOLIDATION

Congress passed the Telecommunications Act of 1996 to facilitate competition.[184] Lifting the national ownership limit allows large parent companies to form and provide better content to a wider audience, which makes radio more competitive vis-à-vis other forms of media.[185] Thus, because it can produce several efficiencies, radio consolidation does not warrant per se illegality review of its competitive effects.[186] Instead, an evaluation of the competitive significance of ownership concentration requires a rule of reason analysis, i.e., balancing procompetitive efficiencies against anticompetitive harms.[187] The radio industry consolidation produced much competitive efficiency: enhanced use of economies of scale, heightened ability to tailor marketing campaigns, and more efficient use of on-air time. Consolidation also produced many anticompetitive harms: market oligopolies, coercive behavior, redundancy in on-air content, and alienation of radio's listener marketbase. This subsection outlines these efficiencies and harms in more detail.

181. Competition in Radio and Concert Industries Act of 2002, S. 2691, § 3.

182. *See supra* Parts III.A, III.B.

183. The following are examples of such music promotion outlets: concert venues, concert promoters, tour production teams, and radio-program syndication companies. *See supra* Part III.C.

184. *See supra* note 29.

185. *See supra* note 31; *see also supra* notes 86–90 and accompanying text (discussing growth in the size of parent companies).

186. *See supra* notes 60, 62 and accompanying text.

187. *See supra* note 59 and accompanying text.

1. Competitive Efficiencies Produced by the Radio Industry Consolidation

An efficiency produced by the radio mergers is the parent companies' ability to exploit economies of scale in the strategic use of employees, offices, marketing, and promotional campaigns.[188] Centralization allows for dramatic cuts in transactional and overhead costs.[189] Clear Channel's ability to broadcast simulcasts brings bigger radio talent to smaller markets with a leaner payroll.[190] Although streamlining broadcasts does not increase diversity of programming,[191] it does use payroll dollars more efficiently.

2. Anticompetitive Harms Produced by the Radio Industry Consolidation

Consolidation, however, also generates anticompetitive harms. The degree of concentration of advertising revenue is particularly startling; each regional market is controlled by an oligopoly of parent companies.[192] Companies purchase advertising from a small group of owners, and musicians must forge relationships with this same small group to gain airplay. Thus, radio consolidation facilitates more coercive behavior by parent companies against labels and artists. Parent companies recognize they can leverage their access to the airwaves to coerce labels and artists in the form of pay-for-play and play-for-play because they have no comparable means to promote their material.[193]

Theorists have suggested consolidation encourages format

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188. *See supra* note 100 and accompanying text.

189. *See supra* note 100 and accompanying text.

190. *See supra* note 102 and accompanying text.

191. Some theorists suggest that diversity of broadcasts would naturally occur as a product of consolidation. *See, e.g.*, DiCola & Thomson, *supra* note 95, 8–9. These theorists argue that a parent company that owns several stations in a market would not duplicate formats; this would allow each station it owns to grab the largest audience in its demographic. *Id.* A station with a well-defined share of an audience demographic is attractive to advertisers. *See supra* notes 93–94 and accompanying text.

192. *See supra* note 95 and accompanying text. Oligopolies also exist within station formats. DiCola & Thomson, *supra* note 95, at 38 tbls. 3–9 (noting that seventeen of nineteen BIA formats are controlled by oligopolies and listing Clear Channel as a part of fifteen of those oligopolies). The study finds oligopolies exist in every format measured three different ways. *Id.* at 39.

193. *See supra* notes 115–23 and accompanying text.

diversification.[194] A recent study suggests, however, that many parent companies are redundant in their formatting to corner a market.[195] This move makes logical business sense: some formats target a demographic that buys more expensive items, whereas other formats target a larger percentage of the radio listening population. For instance, many commuters listen to the radio while driving to work. Thus, it is likely that auto-related advertising will be more effective and certain demographics are more likely to buy cars than others. Format diversity is also not likely because unique content cuts against benefits realized from economies of scale, i.e., sharing research and on-air talent.

In conclusion, it appears that radio consolidation's greatest benefits are gained from economies of scale. Currently, only the largest parent companies reap these benefits, but they could spawn further efficiencies industrywide. In contrast, the many new broadcast formats do not actually offer diverse content.[196] The aggressive business practices consolidating parent companies do not encourage market competition, but instead actually cause a detriment to the public. Consolidation allows a few parent companies to generate significant advertising revenue, but these profits do not justify the inflated costs borne by advertisers and the public uproar over radio content.[197] If radio's audience continues to erode, consolidation's efficiencies will be nonexistent and irrelevant.

B. ANALYSIS OF CONCERT PROMOTION CONSOLIDATION

Concert consolidation requires a rule of reason analysis rather than a per se illegality analysis because, like radio consolidation, it has also generated some market efficiencies.[198] The consolidation of the concert promotion industry produced several efficiencies: the use of economies of scale in national tours, the exploitation of venues with exclusive booking rights, and the ability to market products to large captive audiences at concerts. The consolidation of the concert promotions industry also produced several anticompetitive harms: the loss of knowledgeable concert promoters from the industry to noncompete

194. *See supra* note 191.

195. *See* DiCola & Thomson, *supra* note 95, at 50–51.

196. *See id.* at 54–55 (noting that at three different points in time there was an "[o]verlap of almost half of the songs being played between formats").

197. *See supra* notes 96–97 and accompanying text.

198. *See supra* note 62 and accompanying text.

clauses, a disproportionate focus on arena touring, the loss of local content and attention to market uniqueness, and higher ticket prices for the consumer. This subsection outlines these efficiencies and harms in more detail.

1. Competitive Efficiencies Produced by the Concert Industry Consolidation

SFX recognized the concert industry's fragmented nature as an opportunity to consolidate,[199] and exploited economies of scale by refocusing the industry on a national tour model.[200] This model produced efficiencies by reducing transactional costs in creating tours. The impact of these efficiencies in concerts, however, is not as palpable as those created in radio. Many costs remain following consolidation, e.g., staffing local venues, promotional work for each performance, and of course, the artist's live performance cannot be voice-tracked.[201]

Part of SFX's heightened profitability is the product of acquiring promoters with exclusive rights to, or ownership of, certain venues.[202] This meant SFX never had to negotiate the costs of booking a venue. This also allowed SFX to offer artists full face value of tickets as a guarantee, a technique that allowed SFX to outbid competing promoters.[203]

SFX improved commercial concert revenue by recognizing audiences were captive consumers.[204] This revenue came from venue endorsements and commercially sponsored tours.[205] The ability to attract wealthy corporations' promotional campaigns came from SFX's national touring model,[206] which guaranteed that popular artists would play for large audiences in venues where the advertising would be displayed.

2. Anticompetitive Harms Produced by the Concert Industry Consolidation

Some of the same things that produced the greatest effi-

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199. *See supra* note 134.

200. *See supra* note 141 and accompanying text.

201. Unless the artist is lip-syncing, but of course the artist still must *be* there to perform.

202. *See supra* note 136 and accompanying text.

203. *See supra* note 144 and accompanying text.

204. *See* Harrington, *supra* note 132 (noting that audiences at concerts are "demographically self-selecting groups" ideal for marketing).

205. *Id.*

206. *See supra* note 141 and accompanying text.

ciencies in the concert promotions industry also generated the greatest harms. A long-lasting harm was SFX's use of noncompete provisions in the agreements made with promoters who sold their operations to SFX.[207] These covenants not to compete removed the most established and knowledgeable promoters from the industry, and replaced them with profit-focused, but shortsighted, businesspeople who were unfamiliar with the intricacies of the national and local music industry.

Another harm to competition came from SFX's primary focus on securing arenas.[208] These larger venues are appropriate to book established artists in the prime of their careers, those artists likely to bring in the highest ticket prices. Although this model provides a clear incentive (i.e., to get the most people paying the highest ticket price), it does not account for developing artists.

In the past promoters helped to develop an artist's local fan base.[209] Promoters would bankroll the less profitable shows of developing artists with the profits from more popular shows. Now, however, small promoters usually cannot promote the most popular shows—either because fiscally they cannot match Clear Channel's guarantees, or because physically they cannot book a Clear Channel exclusive venue. Without bands developing along traditional lines (i.e., through the touring circuit, beginning with small venues), a false sense of limited new touring talent is created.

The consumer pays higher ticket prices because of concert promotions consolidation. One of the biggest harms from consolidation has come in the form of lower concert attendance.[210] The national tour model focuses on very large arenas. Thus, only a few artists secure very high guarantees.[211] The cost of these guarantees is then passed on to the consumer, as the most popular artists receive nearly the entire face value of a ticket.[212] The public associates concerts with high price tags, and thus is less likely to attend, especially the concerts of unknown artists.

207. Ray Waddell, *New Players Emerge in Unstable Touring Biz*, BILLBOARD, Apr. 27, 2002, at 1, *available at* 2002 WL 10067232 (noting that many SFX/Clear Channel Entertainment noncompetes will soon expire).

208. *See supra* note 136 and accompanying text.

209. *See supra* notes 132, 138 and accompanying text.

210. *See supra* note 162.

211. *See supra* note 144 and accompanying text.

212. *See supra* notes 147–48 and accompanying text.

In conclusion, the long-term harms outweigh the benefits of the concert industry's consolidation because the new business model fails to invest in the industry's future. Postconsolidation concerts are priced to discourage attendance at multiple concerts yearly, while simultaneously encouraging a false sense of limited available talent.

C. ANALYSIS OF THE VERTICAL INTEGRATION OF THE RADIO AND CONCERT INDUSTRIES

Consolidation and cross-ownership have vertically integrated the music promotion industries of radio and concert. The merger of these closely related industries generated several procompetitive efficiencies, but also created several anticompetitive harms. A rule of reason antitrust analysis of the Clear Channel–SFX merger requires balancing the efficiencies against the harms. There are several touted efficiencies in the vertical integration of the industries: cross-promotion, enhanced national product marketing, simplified tour management for artists, decreased transactional costs, concentrated knowledge within the industries, and streamlined market operations. There are also several anticompetitive harms of vertical integration: the dramatic concentration of ticket revenue going to Clear Channel, price discrimination in advertising, a decrease in the quality of the knowledge base, a shift away from long-term market development, and most importantly, the emergence of coercive cross-industry tying. This subsection outlines these efficiencies and harms in more detail.

1. Competitive Efficiencies from the Vertical Integration of the Concert and Radio Industries

A widely publicized claim in Clear Channel's merger with SFX was the tremendous possibility of cross-promotion to enhance economic efficiencies in both operations.[213] Clear Channel's outdoor[214] and radio network[215] could promote concerts; concerts, in turn, would enhance radio station visibility and increase listener loyalty.[216] Clear Channel broadcasts also include

213. *See supra* note 152 and accompanying text.

214. *See supra* note 106.

215. "'In many cases event promoters work with radio stations . . . buying advertising and organizing ticket giveaways.'" Epstein, *supra* note 91, at 27 (quoting an unidentified Clear Channel spokeswoman).

216. "'Our radio stations have always sponsored concerts and other live events because it helps build listener loyalty.'" *Id.* (quoting an unidentified

unique live content provided from Clear Channel Entertainment–promoted concerts. Clear Channel furthered internal cross-promotions by renaming SFX to Clear Channel Entertainment,[217] which allowed it to advertise its radio on competing stations, labeling live events with a "Clear Channel presents" tag.

There are, however, strong arguments against the benefits of cross-promotion. Clear Channel has limited advertising time (although it is rising) to sell on its stations.[218] Assuming Clear Channel is offering Clear Channel Entertainment a better deal on advertising rates than competitors, there are opportunity costs. For example, some advertisers want to buy time on Clear Channel radio and are willing to pay market rates. Instead, Clear Channel takes a smaller payment from its internal division.

Besides cross-promotional benefits, Clear Channel's control over popular artists' national tours allows for new advertising opportunities. Clear Channel can package billboards, radio, and live events for its clients. This integration also reduces the transactional costs.

Clear Channel elevates SFX's "one-stop shopping model" not only for advertisers, but also for the artists by packaging advertising and promotional opportunities across platforms.[219] A Clear Channel–affiliated artist can book his whole tour along with the publicity events (on-air appearances, contests, and ticket giveaways) at one time. This enhances the artist's profile, reduces costs, and quickly focuses an artist's promotional campaign at a national level. Clear Channel will have an investment in that artist's radio airplay in every city where his tour stops.[220]

Clear Channel reduces its payrolls by pooling the talent of both industries. By crossing platforms, Clear Channel employees in both concert and radio can share relevant industry research data more easily, make more informed decisions, and do this at lower transactional costs. Consolidation by centralizing operations also eliminates middlemen in the promotion's industry, e.g., booking agents.[221] Additionally, Clear Channel main-

Clear Channel spokeswoman).

217. *See supra* note 154 and accompanying text.

218. *See supra* notes 103–04 and accompanying text.

219. *See* Pugh, *supra* note 141.

220. *See supra* note 169.

221. *See* Barbieri, *supra* note 127.

tains all of the efficiencies SFX gained through exclusive relationships with venues.[222]

2. Anticompetitive Harms from the Vertical Integration of the Concert and Radio Industries

The fact that Clear Channel generates a 70% share of ticket revenue raises monopolistic concerns.[223] In addition, there are price signs suggesting monopolistic harms: radio advertising rates are increasing despite no corresponding increase in advertising audience,[224] and price discrimination is occurring with stations popular with males.[225]

Mismanagement is another sign of market power abuse. It is particularly apparent in Clear Channel's concert operations. Concerts continue to draw smaller crowds while turning profits that rely on higher ancillary revenue streams.[226] At some Clear Channel events, the number of passengers in a car determines the parking fee.[227] Clear Channel recognized, as SFX previously had, that the arena market could withstand price inflation because there was little competition. This integrated business model not only is responsible for costly tickets, but also reflects the shortsightedness of its managers.

Consolidation in the music promotion industries also hurts artist development. Clear Channel's business model focuses on short-term gains in the touring industry. With few open spots for new music on tightly controlled play lists, it is increasingly difficult for new artists to enter the airwaves.[228] Upstart touring bands have difficulty attracting audiences outside their hometown because they do not get airplay. Since there are so few emerging bands, the touring industry must rely on older established acts to play the largest venues. Occasionally, several bands (that may each only have one song on the air) play a concert together in the form of a radio festival.[229]

The introduction of several music formats actually con-

222. *See supra* note 136 and accompanying text.

223. *See supra* note 155 and accompanying text.

224. Norton, *supra* note 104, at 31, 34–35.

225. Mathews, *supra* note 31 (noting higher advertising rates for auto deals on male-oriented stations as compared to female-oriented stations in San Diego).

226. *See supra* note 147 and accompanying text.

227. *See* Dezell, *supra* note 148.

228. *See supra* note 116.

229. *See supra* note 127 and accompanying text.

stricts the public's exposure to new music and more experimental music. This counterintuitive result occurs because, rather than viewing music content as an end in itself, the music format views it as a means to maximize ad revenue by appealing to a particular demographic.[230] Consolidation enhances a station's ability to control what the public hears on the radio or at a live concert. If one owner holds most of the stations in a particular music format for a region, it is safer for the station to remain consistent in its play list. By only adding a few new songs, the station does not risk offending an advertiser or losing a regular listener who likes to hear familiar artists and songs. While this makes sense to a certain point, the public, or a portion of it, may want to hear new artists too.[231]

Clear Channel's massive layoffs cut their knowledge base of the music industry. Many disc jockeys and promoters who understood local tastes and intricacies were released, or signed noncompete agreements and left the industry.[232] It is no surprise that advertising takes precedent over content given this loss of valuable history. Moreover, allegations suggest Clear Channel also places advertising revenue before the law.[233]

a. Illegal Tying Offense

The decline in radio audience and concert attendance increases the attractiveness of exploiting artists and labels to enhance profitability.[234] Some of the greatest anticompetitive harms from consolidation are the strategic arrangements that exploit preexisting problems, such as arrangements that bring the label closer to, and make it more dependent on, the radio owner: pay-for-play and play-for-play.[235] The independent promoter never was a good thing for the diversity of music on the radio, but exclusive arrangements running to particular radio stations make the potential harm even greater. Record labels are coerced into paying for airplay, and are also coerced into playing at the same radio station's concert. These payments suggest that the labels view access to radio and touring not just as a desired product, but as an essential product.

230. *See supra* notes 93–94 and accompanying text.

231. *See supra* note 97 and accompanying text.

232. *See supra* notes 102, 207 and accompanying text.

233. *See supra* note 164 and accompanying text (discussing the pending antitrust litigation against Clear Channel).

234. *See supra* notes 96, 162 and accompanying text.

235. *See supra* notes 115–31 and accompanying text.

Clear Channel's concentrated radio ownership allows it to employ anticompetitive tactics, such as leveraging radio airplay to foreclose competition in concert promotions. The allegations suggest Clear Channel promises an artist radio airplay on the condition that she tours with Clear Channel.[236] This appears to be easy one-stop shopping for some artists and their labels,[237] but it can become a coercive unfair business practice for others, including artists that do not wish to tour with Clear Channel, new talent without enough visibility to tour with Clear Channel, and the few remaining regional concert promoters.

b. Per Se Tying

In order for Clear Channel to commit a per se tying offense, it must control two separate products, have market power in the tying product, and offer artists no choice but to work with Clear Channel tours (or not tour), so as to have a substantial impact on commerce in the touring industry.[238] Radio station airplay and concert promotions are two separate markets.[239] Clear Channel's tying product is radio airplay; the tied product is concert promotions.

For per se analysis to apply, Clear Channel must have market power in radio.[240] The relevant market in radio mergers is the market share of radio advertising revenue,[241] making it tempting to rely exclusively on a market share analysis. That is shortsighted, however, because concert promotion has interchangeable substitutes and radio content is unique.[242] There are other sources for promoting a concert—newspapers, fliers, direct mailings, and the Internet. These forms are not nearly as efficient as radio, although proper use of the Internet and e-mail may someday be the ideal method of promotion. The real issue is not advertising, but airplay. Could artists with no history of radio airplay be able to draw profitable crowds? No.[243]

Clear Channel controls the content of radio; this matters

236. *See supra* Part III.C.

237. *See* Pugh, *supra* note 141.

238. *See supra* note 75 and accompanying text.

239. *See supra* notes 52, 56 and accompanying text.

240. *See supra* note 75 and accompanying text.

241. *See supra* note 52 and accompanying text.

242. *See supra* note 50 and accompanying text.

243. There are artists no longer receiving airplay, however, who can sell out tours from an established fan base. Susanne Ault, *Web Is a Windfall for Touring Biz*, BILLBOARD, Dec. 21, 2002, at 1, *available at* 2002 WL 102118677.

because concerts, like radio, have target audiences. Promoters advertise on stations reaching an interested audience, i.e., stations already playing the artist or similar music. Thus, a promoter does not advertise a hard rock concert on the easy listening, beautiful music, or talk radio formats. This type of tying requires looking at the appropriate submarket[244]—stations that play an appropriate music format and advertise to an appropriate audience demographic. Currently Clear Channel owns a majority of the stations that play the formats of touring acts—rock and pop.[245]

Still the relevant market (or submarket) must also align geographically,[246] i.e., Clear Channel must have the market power of the radio stations in the area where airplay is conditioned on concert promotions. Clear Channel can change a station's format at any time.[247] A profit-maximizing firm would not consolidate a cluster around a single format, however, because owners would be pitting their stations against each other and not achieving the greatest advertising share.[248] Notwithstanding the merits of having several formats, Clear Channel's ideal business model should incorporate only touring music formats in markets where it owns venues.[249] Therefore, NIPP's predictions of format concentration in other geographic markets besides Denver[250] are plausible and likely if local ownership limits are removed.[251]

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244. *See supra* note 51 and accompanying text.

245. Piccoli, *supra* note 105 ("Clear Channel controls a majority of the radio channels in America playing the two genres that have long dominated the concert circuit: Top 40 and rock.").

246. *See supra* note 49 and accompanying text.

247. FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (holding that the FCC does not have to consider format changes in renewing licenses).

248. Clear Channel's use of particularized formats strengthens their business model in three ways. First, formatization makes it very easy to package sales to retailers interested in reaching the core demographic of the radio station and increase advertising revenue. *See supra* notes 93–94 and accompanying text. Second, once a format proves financially successful it can quickly be recreated in a different geographic market—from the jingles and nicknames right down to the disc jockeys. *See supra* note 102. Third, the creation of several narrow formats allows the conglomerate a tool to fight off allegations that radio content is less diverse.

249. Of course since local ownership rules divide radio by FMAM caps, the use of AM radio in talk formats is an appropriate substitute because few touring bands are played on AM radio.

250. *See* Carlye Adler, *Backstage Brawl*, FORTUNE SMALL BUS., Mar. 4, 2002, at 170(C).

251. In fact, FCC data already suggests a slight downward trend in the

Both the radio broadcast and concert promotions industries have significant barriers of entry. Radio stations are limited to a finite number.[252] Promoting large concerts depends on radio publicity and access to appropriate venues to host events. Clear Channel operates most venues under exclusive contracts.[253] Thus, upstart competing promoters must make expensive investments in new venues. Even if a competitor builds a venue in a Clear Channel–dominated radio market, he relies on Clear Channel airplay of artists on their tours. Clear Channel Communication's broadcasts of these advertisements, and its airplay of the same artists, establish the only viable shows apt to fill concert seats.

The final element of a per se tying analysis requires evaluating how susceptible concert promotions are to monopolization.[254] Concert promotions' dramatic consolidation under SFX, Clear Channel's outstanding promotional market share, and the industry's high barriers to entry demonstrate how close the concert industry is to being a monopoly.

Thus, a per se analysis is warranted in regions where Clear Channel exclusively controls venues, is the predominant station owner of relevant formats, and requires touring with Clear Channel (if a band is touring) in order to get airplay. If a per se analysis applies, then the tie is illegal. Even in those areas where these conditions do not exist, under a rule of reason analysis there appear to be no efficiencies that Clear Channel could realize from this tie other than foreclosing competition in the promotions industry.

Even if Clear Channel were to refrain from the tying behavior, the degrees of concentration and their closely related nature suggest that a nationwide integration of the two industries, as is, threatens competition. The enormous power that Clear Channel controls in radio airplay will remain until radios are uncommon in cars. Indeed, there is a possibility that soon satellite feeds and wireless Internet will be the preferred method for music distribution and promotion. As the industry

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number of formats in larger markets and a slight upward trend in format number in small markets. *See supra* note 95.

252. *See supra* note 10 and accompanying text.

253. *See* Brown, *supra* note 136, at 4I (stating that Clear Channel Entertainment owns and operates approximately 135 live entertainment venues).

254. The court must determine whether the tying condition has a substantial impact on the tied industry. *See supra* note 75 and accompanying text.

stands now, radio and concerts are the primary forms of music promotion. Therefore, any co-owner of a predominant market share in both industries occupies a uniquely powerful position. Despite the numerous economic efficiencies that the merger creates, the anticompetitive harms (particularly in the long-term outlook of the industry's inability to offer new music) speak against allowing such a merger to stand.

V. GOVERNMENT INTERVENTION AND PROPOSALS FOR IMPROVEMENT

In technologically dynamic industries, it is often suggested that antitrust intervention is too late and past the point where it will have any positive effect on the industry. Radio and touring have undergone massive changes in their business models since the passage of the 1996 Act, but they are not so different as to prevent any effective regulation.

In the past, the FCC actively regulated vertical integration in radio; early on, concerns revolved around the networks' production of programming.[255] Under today's Department of Justice and FCC standards, vertical integration is not afforded the same attention.[256] The concert industry developed well after radio, thereby foreclosing any explicit references to it under original FCC guidelines.[257] The Court, however, recognized that the FCC's purpose was to manage evolving problems in the industry.[258] The concert and radio industries similarly promote artists to generate advertising revenue; the industries' activities intersect at several points. Some advocates of greater regulation of vertical cross-industry ownership argue reform must be tailored to each industry and the specific activities that restrain trade.[259]

In part, agency oversight needs to be more predictive in analyzing radio/concert mergers. The FCC already examines radio content using format analysis and audience measures.[260] It should be able to recognize the unique capabilities of radio airplay and analyze the impact of radio ownership's interaction

255. *See supra* notes 20–25 and accompanying text.

256. *See supra* note 85 and accompanying text.

257. *See supra* note 132 and accompanying text.

258. *See supra* note 25 and accompanying text.

259. Robert Weissman, *Divide and Conquer: Restraining Vertical Integration and Cross-Industry Ownership*, MULTINAT'L MONITOR, Oct./Nov. 2002, at 16.

260. *See, e.g.*, MASS MEDIA BUREAU, *supra* note 86.

with closely related industries. Of course, the Harvard School illuminates the danger of overprediction.[261] This danger, though, does not warrant turning away from common sense reasoning: combining two highly concentrated industries central to music promotion greatly increases the potential for harmful restraints on trade. The post-Chicago approach to vertical integration merger analysis suggests the same. How much coercive behavior is occurring and how difficult is it for a new competitor to enter the industry? These questions address how far a company can grow and whether it can create monopoly prices.

The Feingold bill is an important piece of legislation because it brings attention to the most pervasive problems in radio and concert promotions. The bill's enforcement provisions, which authorize the revocation of licenses[262] and the freezing of local radio ownership limits,[263] are particularly attractive. The problem with freezing local ownership to current levels is that the largest markets are already clustered.[264] With eight stations in the largest markets, Clear Channel can easily concentrate radio formats to best match the touring industry. The bill also could go further in developing methods for guaranteed local access and increasing diversity on the radio. The bill's proposed stiffening of FCC regulations regarding pay-for-play[265] and clearly limiting station ownership[266] are favorable signs, nevertheless. The dangers of vertical integration are real, which makes the Feingold bill more relevant now than ever, as the FCC rulemakers continue to loosen the grips on vertical integration in the media.[267]

There are several drastic solutions. We could eliminate commercial radio altogether, but this is unrealistic and inefficient. Another possibility is to split the merger of SFX and Clear Channel and return the two industries to their separate but consolidated forms. That proposal is also unrealistic and inefficient. Clearly, there are several economic efficiencies that encourage changing business strategies to advance productivity. Another less drastic, but still potentially chilling solution is

261. *See supra* notes 65–66 and accompanying text.
262. *See supra* note 181 and accompanying text.
263. *See supra* note 177 and accompanying text.
264. *See supra* note 192 and accompanying text.
265. *See supra* note 180 and accompanying text.
266. *See supra* notes 178–79 and accompanying text.
267. *See supra* note 5 and accompanying text.

to divide the national structure into a series of competing regional companies. That solution, however, might just create a series of new monopolistic firms, each with greater power than the smaller fragmented regional competition.

A workable proposal is to adopt the Feingold bill while developing a calculation of other relevant music media outlets into local ownership concentration. Thus, if a company has a certain percentage of the radio share, it can only have a limited corresponding share of concert promotions. This regulation would open up both the concert promotion and radio businesses to new entrepreneurs. It could be overseen by FCC regulations for license issuing and renewal. The regulation might also encourage venue owners and station owners to pursue other forms of music and potentially include more local content.

CONCLUSION

The Telecommunications Act of 1996 allowed a handful of companies to acquire most of the profitable commercial radio bandwidth. Concentration of station ownership in rock and top-40 formats gave Clear Channel enormous control over the content of popular music broadcasts. While radio underwent massive consolidation, so did the concert promotion industry. Clear Channel's vertical integration of these two now-concentrated industries concerns competitors in radio and concert promotions, on-air broadcast talent, record labels, musicians, and fans alike.

Radio airplay and live concerts are the primary means to promote commercial music. The lax monitoring of the vertical integration of these closely related industries has fostered a business model that encourages aggressive business practices and ultimately harms competition in both industries, dampens innovation, and hurts the profitability of the music industry as a whole.

Government intervention in the concert promotions industry to correct anticompetitive harms is appropriate because concert promotions is not a dynamic technology-driven industry. Even though SFX changed industry operations, the changes are not irreversible. Government intervention in concerts requires addressing the industry's unique relationship with the radio industry. This can be done by carefully evaluating particular radio formats, geographic metro-markets, and the availability of alternatives to station-owned (or station-controlled) venues. Regulators must account for these structural factors to best meet the FCC's public interest standard, to insure the health of the arts, and to provide the public access to diverse and antagonistic media sources.

Antitrust enforcement agencies must stifle anticompetitive behaviors now to protect the long-term health of the music industry. The lessons from Clear Channel can be applied broadly to the current media ownership rules debate. Thus, in future highly concentrated vertically integrated media-industry mergers, courts must employ some predictive analysis to prevent destructive behavior that is highly foreseeable. After all, catching a monopoly at its incipiency prevents social harms before they occur.