

# DRAFT

## Localism Paper

7/2/04  
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[I have material from the Charlotte and San Antonio public hearings. I do not have material from the Rapid City hearing (I am waiting for a written transcript). When I return from vacation, the FCC will have completed a fourth hearing in Monterey].

### Introduction

In 2000, Clear Channel Communications, the largest radio station owner, acquired SFX, the largest concert venue owner. Since radio airplay is often an input in the production of a concert, this new combination of radio stations and concert venues has been accused of

- Changing play lists to include more music by artists performing in concert
- Requiring artists to perform at Clear Channel's concert venues to obtain airplay on Clear Channel's stations)
- Excluding local artists from play lists and concert venues

Each of these complaints is associated with the downstream vertical ownership structure that combines radio stations and concert venues. Upstream vertical relationships between record labels and radio stations have been the source of additional complaints. Although none of the major record labels currently own radio stations,<sup>1</sup> the vertical relationships between these two stages of production have led to allegations of

- Pay-for-play
- Homogeneous play lists
- Excluding local musicians from play lists

Although some complaints are related to the exercise of market power, others are related to Clear Channel's business model. Since the early 1940s, national and local ownership restrictions limited the ability of radio stations to compete for national advertising dollars. Elimination of the national ownership restriction and the relaxation of the local ownership restriction in 1996 facilitated a new business model that enables radio to compete with other media for national advertising dollars. Clear Channel's new business model also changed the play list which affects both musicians and listeners. Local musicians now complain that they cannot get their music played because Clear Channel stations play only nationally known musicians. Listeners now complain that play lists lack variety. These complaints may be related to the economic efficiencies and new product associated with Clear Channel's new business model. This contrasts with the exercise of market power that is often associated with raising prices, lowering output, or lowering the quality of the old product. In the case of market power, all consumers of the product, and potentially many sellers of inputs, are harmed. To the extent that radio

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<sup>1</sup> In the early days of radio, radio networks (firms that produced live radio shows – and later recorded music) also owned radio stations. Concerns associated with this vertical structure led to the adoption of radio ownership limits in the early 1940s.

consolidation facilitates a new business model with a different product, some may prefer the old product. Others may prefer the new product. Some may be harmed. Others may benefit.

The complaints against Clear Channel and their connection to market structure and business models are the subjects of this paper. The issue is whether today's radio market structure and business models enrich or diminish localism.

### **Localism and the Public Hearings**

The FCC is holding a series of public hearings around the country regarding localism. Generally speaking, localism is the responsiveness of a broadcast station to the needs and interests of its community.<sup>2</sup> Localism is a rich term and may include:

- A commitment to local news and public affairs programming
- Making sure that the coverage reflects the makeup of the community
- Developing and promoting local performing artists and other local talent
- Making programming decisions that serve local needs<sup>3</sup>

In the past, the FCC has promoted localism by limiting the number of radio stations an entity can own and by requiring broadcasters to air certain kinds of programming believed to be in the public interest. Although the FCC still retains local radio ownership rules, the FCC now relies more on a free market to determine the programming listeners receive. The public hearings are designed, in part, to explore ways to encourage localism without relying on ownership restrictions. A number of people at the public hearings argue that localism has suffered following consolidation of the radio industry.

Mr. Goodmon, President and CEO of Capitol Broadcasting Company, states that "the single most important determinant of how a station operates is who owns it ... you can have all the rules you want to about what your stations are supposed to do ... but the stations reflect the owner. And the larger the owner gets ... the more the corporate welfare drives the bottom line, which means by definition that there will be less attention to localism."<sup>4</sup>

Some commenters argue that stations owned by national companies are still programmed locally. Robert McGann, President and General Manager of KENS-TV station in Charlotte, North Carolina, explains that the station is owned by Belo Corp. headquartered in Dallas, Texas, but the day-to-day decisions regarding programming are made locally.<sup>5</sup> Mr. McGann argues that the essence of localism is "local operators

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<sup>2</sup> Chairman Powell, Charlotte Hearing at 10.

<sup>3</sup> Commissioner Adelstein listed these five components of localism, Charlotte Hearing at 19 and San Antonio Hearing at 30-31.

<sup>4</sup> Mr. Goodmon, Charlotte Hearing at 147. See also Lydia Camarillo, San Antonio Hearing at 45. Ms. Camarillo contends "The bigger companies become, the less likely they will feature local talent..."

<sup>5</sup> Robert McGann, San Antonio Hearing at 60-61.

managing their stations and serving their communities with responsive programming and active community participation.”<sup>6</sup>

North Carolina musician Tift Merritt asserted that “any conversation about localism without regard to media ownership is absolutely avoiding the heart of this issue and certainly cannot render a sincere solution.”<sup>7</sup> She explained that many listeners called a local country station requesting her songs but the DJs informed them that management, not the DJs, decide programming. Tift contends that the real reason for not getting her songs on the station’s play list stems from her record company’s decision not to pay the station for playing her songs.<sup>8</sup> Tift asserts that “it is absolutely naïve to think that pay for play doesn’t go on.”<sup>9</sup> Tift argues that radio conglomerates claim that programming is localized cannot be true when stations disregard the preferences of local listeners.<sup>10</sup> Tift maintains that the fewer the radio station owners, the less concern about content, the more monotony on play lists, and the more she and thousands of other musicians will be locked out of radio air play.<sup>11</sup> Tift argues that FCC localism initiatives that refuse to recognize the role that concentrated media plays in stifling local musicians elevates window-dressing over true substance.<sup>12</sup> Although there are other ways for musicians to gain exposure including tours and magazines, Tift contends that the radio is the main media and access to radio air play is controlled by two or three large radio companies.

Although local musicians argue that they are having difficulty getting their songs on the play lists of radio stations owned by Clear Channel, this doesn’t necessarily mean that these musicians receive no air play. Representatives of smaller commercial radio groups, noncommercial stations, and some larger commercial radio groups appear more willing to include local artists in their play lists.<sup>13</sup> Local musicians, however, want access to Clear Channel’s stations and argue that:

- Listeners want to hear local artists
- Public policy should promote the airing of songs by local musicians
- A less concentrated radio industry would make it easier for local musicians to receive airplay and be included in play lists.

Some commenters complained that the songs placed on radio play lists were not based on local surveys or phone requests of local listeners. One commenter maintains that localism means local talent, local programming, and interactivity with listeners. When DJs and the program directors programmed stations, local bands would get air play and play list were based on popularity and quality. The current system, however, auctions spots in a play list to the highest bidder. We have moved from a diversity of

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<sup>6</sup> Id.

<sup>7</sup> Tift Merritt, Charlotte Hearing at 37-41.

<sup>8</sup> Id.

<sup>9</sup> Id. at 51.

<sup>10</sup> Id. at 37-41

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Debbie Kwei, Charlotte Hearing at 35-37; Ms. Rose, Charlotte Hearing at 42 and 52-53, and Terri Avery, Charlotte Hearing at 129.

music to a monotony of music. Whether a song makes into the play list depends on how it tests out on a fifteen-second sound byte on a phone poll in New York or Los Angeles. Radio stopped responding to the listening preferences of its local audiences.<sup>14</sup>

An audience participant associated with the record label named Policy Entertainment Group LLC also complained about the difficulty of local artists getting air play on local stations. He stated that the record label had done everything that was technically necessary and had made many efforts with local stations, with little success.<sup>15</sup> Jake DeLily, a COO of an independent music outlet, listed musicians from Charlotte, North Carolina who had to leave Charlotte to go to California or New York or New Jersey to get their records played on the radio.<sup>16</sup> Mr. DeLily also asserted that a musician's songs do not receive air play unless the musician pays the radio station.<sup>17</sup> Mr. Quintee, a musician, argues that local listeners should decide play lists but they cannot because local musicians do not have access to the local radio stations.<sup>18</sup> He asserts that payola does exist.<sup>19</sup>

[I am working on the material from the San Antonio hearing. It does not differ in substance from the Charlotte hearing, but it does bolster the position that musicians find it harder to get their music played and they blame it on consolidation of the radio industry. The San Antonio hearing also contains more comments from listeners asserting that the play lists of large national radio conglomerates do not reflect the song preferences of local listeners.]

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<sup>14</sup> Audience Participant, Charlotte Hearing at 85-86.

<sup>15</sup> An audience participant named Gus, Charlotte Hearing at 110-111.

<sup>16</sup> Jake DeLily, Charlotte Hearing at 118-120.

<sup>17</sup> Id.

<sup>18</sup> Mr. Quintee, Charlotte Hearing at 120-121.

<sup>19</sup> Id.

[Much of the following material is a compilation of notes that require consolidation]

The music promotion industries of radio and concerts were significantly consolidated over the last decade. In 2000, the industries wed when Clear Channel, the dominant parent company in radio consolidation, purchased SFX, the largest concert promoter conglomerate. 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.

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 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.

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.

#### History of Federal Radio Regulation:

The 1938 chain broadcasting hearings created regulations that outlawed network business practices that hindered entry into the national broadcasting industry or that discouraged local programming. In 1943, the Supreme Court upheld the regulation, 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. 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.

The FCC repealed the chain broadcasting rules that applied to radio in 1977 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.

The Telecommunications Act of 1996 (1996 Act) dramatically deregulated radio ownership by directing the FCC to remove the national limits on station ownership. Under the 1996 Act, a parent company can own up to eight stations in some markets.

The June 2003 FCC media ownership rules measure markets differently but maintain limits on local station ownership.

The relevant product market in station mergers is radio advertising revenue. In the popular concert touring industry, the relevant market is revenue from promoting popular music concerts for a particular geographic market.

Vertical integration is the “combining of two or more vertically related production processes under the auspices of one ownership-and-control entity. This process occurred in the Clear Channel-SFX merger.

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.” The Chicago School suggests vertical integration enhances market efficiency and ultimately benefits the consumer. More guardedly, the post-Chicago School advocates monitoring vertical integration because under certain circumstances market leverage can harm competition.

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). 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.

Today, the per se illegal standard of review is applied only to tying arrangements in the presence of specific market conditions. 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.”

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.” Concentration in ownership mostly resulted from mergers involving the fifty largest owners. Notwithstanding the greater number of owners in metro markets, the “top three broadcasters control at least 60 percent of the stations in the top 100 markets in the U.S.” The sheer size of the biggest parent companies allows those owners to control radio’s content.

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

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. One survey suggests listeners are tired of hearing the same music.

In 2001, radio advertising generated \$16.7 billion in revenue.

Since deregulation, Clear Channel Communications has grown larger than any

other parent company of radio stations. In 1995, Clear Channel owned forty-three radio stations; by January 2003, Clear Channel owned or operated 1253 radio stations. Clear Channel has also reserved the right to purchase further stations in the event that local ownership caps are lifted. Clear Channel owns many popular top-market stations and is the largest owner of stations broadcasting a rock format.

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. For decades, record labels skirted the disclaimer requirement by using independent promoters to funnel cash into radio stations and ensure their songs are in the play rotation. Industry insiders estimate that, by the turn of the decade, record companies were spending \$150 million annually on independent promoters. Independent promoters allow stations to operate under the guise of listener preference while labels for airplay privately bankroll them.

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

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

The concert promotions industry began consolidating in 1996. The consolidation of the concert industry was the brainchild of radio station owner Robert F.X. Sillerman. Sillerman sold his radio stations to start SFX Entertainment, a conglomerate of concert promoters and venues. 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. By 1999, SFX had spent two billion dollars on consolidation, allowing it to "put on more than 25,000 events at 120 venues." To consolidate, SFX went deeply into debt. The debt, however, gave SFX control of the booming concert industry that generated \$1.6 billion in revenue in 2000.

SFX's national consolidation swallowed local promotions businesses and

reinvented the concert industry around national tour packages. Historically, artists negotiated shows in each city with local promoters who operated several venues in a region that varied in size. SFX, however, offered artists high guarantees under their new business model, and in an industry where revenue splits already favored the artists. Competitors allege that SFX, with its enormous financial backing, took losses on events to ensure long-term market control. Large payouts to artists necessitated that SFX and its competitors focus on generating ancillary revenue from parking, concessions, merchandise, venue restoration, and ticketing fees. 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.

In August 2000, Clear Channel's radio consolidation engulfed concert promotions. Clear Channel, while finalizing its AMFM merger, simultaneously purchased SFX. The SFX merger received standard Department of Justice attention. At the merger announcement, Clear Channel executives noted the similarity of the industries and the great opportunity for cross-promotions. SFX anticipated boosting event attendance by 15% through radio promotion.

In July 2001, the concerts division was renamed Clear Channel Entertainment. Clear Channel Entertainment generated approximately 70% of U.S. concert ticket revenue in 2001. In 2001, concert attendance per show declined from 2000, and revenue only increased 3%. By 2002, concert ticket revenue for major touring acts increased 20% from 2001 to \$2.1 billion.

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. In the 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. Specifically, the complaint claims that Clear Channel's radio and concert practices constitute an unlawful tying arrangement under Sherman Act section 2. Additionally, NIPP alleges that Clear Channel forces musicians to select its concert promotions through threats of losing radio airplay. NIPP also alleges Clear Channel's radio infrastructure allows the company to employ unfair market leverage in concert promotions. The problem is not only in Denver, either, but exists throughout the country.

Vertical integration occurred when station owners acquired other music promotion outlets. [Radio play and concerts are both music promotion outlets]. Both vertical and horizontal consolidations create competitive harms, but both forms of consolidations also promote efficiencies. In particular, vertical integration facilitates structural synergies to advance new business strategies across operations.

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 harem: market oligopolies, coercive behavior, redundancy in on-air content, and



alienation of radio's listener marketbase.

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. Centralization allow for dramatic cuts in transactional and overhead costs. Clear Channel's ability to broadcast simulcasts brings bigger radio talent to smaller markets with a leaner payroll. Although streamlining broadcasts does not increase diversity of programming, it does use payroll dollars more efficiently.

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. 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.

Theorists have suggested consolidation encourages format diversification. A recent study suggests, however, that many parent companies are redundant in their formatting to corner a market. 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.

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 clauses, a disproportionate focus on arena touring, the loss of local content and attention to market uniqueness, and higher ticket prices for the consumers.

SFX recognized the concert industry's fragmented nature as an opportunity to consolidate, and exploited economies of scale by refocusing the industry on a national tour model. This model produced efficiencies by reducing transactional costs in crating tours.

Part of SFX's heightened profitability is the product of acquiring promoters with exclusive rights to, or ownership of, certain venues. 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.

SFX improved commercial concert revenue by recognizing audiences were captive consumers. This revenue came from venue endorsements and commercially

sponsored tours. The ability to attract wealthy corporations' promotional campaigns came from SFX's national touring model, which guaranteed that popular artists would play for large audiences in venues where the advertising would be displayed.

Some of the same things that produced the greatest efficiencies 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. These covenants not to compete removed the most established and knowledgeable promoters from the industry.

In the past promoters helped to develop an artist's local fan base. 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 they cannot match Clear Channel's guarantees, or because physically they cannot book a Clear Channel exclusive venue.

The new business model fails to invest in the industry's future. Postconsolidation concerts are priced to discourage attendance at multiple concerts yearly.

#### 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. 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 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.

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. Clear Channel's outdoor and radio network could promote concerts; concerts, in turn, would enhance radio station visibility and increase listener loyalty. Clear Channel broadcasts also include unique live content provided from Clear Channel Entertainment-promoted concerts. Clear Channel furthered internal cross-promotions by renaming SFX to Clear Channel Entertainment, which allowed it to advertise its radio on competing stations, labeling live events with a "Clear Channel presents" tag.

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. 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.

Clear Channel reduced 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. Additionally, Clear Channel maintains all of the efficiencies SFX gained through exclusive relationships with venues.

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

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. Upstart touring bands have difficulty attracting audiences outside their hometown because they do not get airplay.

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.

#### Illegal Tying Offense:

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. [Why is there so little vertical integration between content providers and content distributors (e.g., radio and concert venues)?] 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.

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. This appears to be easy one-stop shopping for some artists and their labels, 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.

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. Radio station airplay and concert promotions are two separate markets. 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. The relevant market in radio mergers is the market share of radio advertising revenue, 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. 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.

Clear Channel controls the content of radio; this matters 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 – 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 for formats of touring acts – rock and pop.

Still the relevant market (or submarket) must also align geographically, 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 stations' format at any time. 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. 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. Therefore, NIPP's predictions of format concentration in other geographic markets besides Denver are plausible and likely if local ownership limits are removed.

Both the radio broadcast and concert promotions industries have significant

barriers of entry. Radio stations are limited to a finite number. Promoting large concerts depends on radio publicity and access to appropriate venues to host events. Clear Channel operates most venues under exclusive contracts. 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. 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 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.

#### Government Intervention and Proposal for Improvement:

Radio and touring have undergone massive changes in their business models since the passage of the 1996 Act.

In the past, the FCC actively regulated vertical integration in radio; early on, concerns revolved around the network's production of programming. The concert and radio industries similarly promote artists to generate advertising revenue; the industries' activities intersect at several points.

Common-sense reasoning: combining two highly concentrated industries central to music promotion greatly increases the potential for harmful restraints of 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?

With eight stations in the largest markets, Clear Channel can easily concentrate radio formats to best match the touring industry.

Another possibility is to split the merger of SFX and Clear Channel and return the two industries to their separate but consolidated forms.

Another possibility is to allow a company with a certain percentage of the radio share to only have a limited share of concert promotions. [The larger the horizontal ownership the lower the vertical ownership].

#### 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 and dampens innovation.

Government intervention in the concert promotions industry to correct anticompetitive harms is appropriate because concert promotion is not a dynamic technology-driven industry. Government intervention in concerts requires addressing the industry's unique relationship with the radio industry. Regulators must account for these structural factors to best meet the FCC's public interest standard.

Describe the growth of Clear Channel using the antitrust settlement reached in Denver with "Nobody in Particular" concert venue.

Describe the horizontal business model – efficiently producing a new product, national advertising, cutting costs by duplication (scale economies).

In Fortune magazine the president of Clear Channel, Lowery Mays, asserted that his company is not interested in music, in songs, in DJs; they sell advertising.<sup>20</sup>

Describe the vertical business model. Use bundling and tie-in material from Nalebuff

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<sup>20</sup> From comments of Tift Merritt, Charlotte Hearing at 37-41.

[This paper may benefit from a section that describes the differences between radio and television.]

Television programs attract audiences which are then delivered to advertisers. Similarly, radio music also attracts audiences which are then delivered to advertisers. Although the two types of programming serve the same purpose, direct payments between program producers and broadcasters is accepted in television and illegal in radio.

Video programs aired on television may help sell DVD and video rentals but this is a relatively new market for most programs. In contrast, music aired on radio does help sell CDs. Indeed, getting songs on radio play lists is an essential input in the sale of CDs. As such, record labels have an economic incentive to pay-for-play.

Television broadcasters often pay video program producers large sums for the exclusive right to air programming. Video producers also receive income from television advertisers. Radio broadcasters pay royalties for music programming available to every radio station, and the public, but do not pay large sums of money for the exclusive right to air songs. Record labels do not receive income from radio advertisers.

In summary, radio audiences and television audiences are valued by advertisers who pay radio stations and television stations for access to these audiences. Television program producers derive the bulk of their income from selling video programs to television stations and from television advertisers. Radio music producers (record labels) derive the bulk of their income from selling CDs. They typically pay radio stations to play songs. They do not receive income from radio advertisers. Stated differently, television program producers see television airing as a final stage of production. In contrast, record labels see radio airing as an input (an advertisement) for the sale of CDs. Much of the difference between radio and television stems from the exclusivity associated with television programs in contrast with the general availability associated with radio music. These distinctions provide insights into the financial incentives behind payola, and how a large radio group would be able to exercise market power against record labels (i.e., extract higher payments from record labels for airplay).



[There is some material on what has happened to concert ticket prices written by Alan B. Krueger, PhD Princeton University. This is part of the Clear Channel's vertical integration. We are looking into downstream vertical integration from the perspective of the musician, so we may wish to also look at concert venues from the traditional antitrust perspective and look at what has happened to price. The horizontal concentration of concert venues appears to have changed the product. In short, just as concentration of radio stations appears to have changed the product from local advertising to national advertising and from local music preferences to national music preferences, the concentration of concert venues appears to have changed the product from local artists to national artists. I believe Commission Copps referred to the "McDonaldization" of radio. McDonalds may be a good example. A national chain serves basically the same food at all its outlets. In contrast, if each of these outlets were separately owned we would expect each to serve food designed to appeal to the tastes of local customers. If local music preferences are an important component of localism, consolidation of radio, and the business model that follows, may harm localism.]