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"When is a Monopoly not a Monopolist? A Case-Study on Ticketmaster"

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Abstract

Mainstream monopoly theory and as related to anti-trust measures evaluates the concentration of an industry to determine if a firm has monopoly power within an industry (Cabral 2000 [2017]). If a firm is dominant within an industry, then it is presumed that consumer surplus is being reduced at the expense of producer surplus and that the industry requires competition regulation by the state. Our research presents a critique of this mainstream thought using the classical liberalism of robust (and open) political economy (Pennington 2011). We find, following Vassallo (2017), that analytical measures of industries can be arbitrary – and therefore that anti-trust regulation can be arbitrary, and, following Rogers (2018), that only markets with barriers-to-entry are monopolistic markets. The case of Ticketmaster is a good example; by some conventional measures the firm has a monopoly in venues and ticketing for live events. However, these results are arbitrary in that the aggregation necessary to measure Ticketmaster's market is arbitrary, and by using more robust market competition theory we find that there are no barriers to competition in the hosting of live events. Therefore, Ticketmaster is not a monopolist. One of our conclusions and recommendations is that using scarce resources to police erroneously-conceived monopolists is a mistake and regulatory capture describes how such mistakes limit the creative destruction necessary for economic growth and inclusive prosperity (Tanner 2018, Lindsey and Teles 2017).

Key words: monopoly, regulation, Ticketmaster, applied microeconomics, knowledge problem.

JEL codes: B4, L1, L4, O3, Z1

“When is a Monopoly not a Monopolist? A Case-Study on Ticketmaster”

I. Introduction: Research Question, Approach, Method and Why Important

In this research we introduce novel methods to understand and evaluate the way the economics of regulation is practiced. We take as our starting point two recent works relating to industrial organization. The first is the piece by Rogers in *Law & Liberty* (2019) who finds that only those sectors which have legal (statutes and regulations) barriers-to-entry can be considered monopolists, as only these protected sectors can gain sustained above-normal profits.[1] The second is Vassallo in *Journal of Competition Law & Economics* (2017) who finds that using regulatory guidelines, the results as to if there are monopolistic conditions is highly dependent upon how the market aggregation is structured (defined) by the analyst who is following these guidelines.

We use the case of Ticketmaster, as one of the most commonly-accepted examples of a ‘monopolist’ today[2] in a regulatory-defined market (in this case for the staging of live music concerts), to discuss and explain our novel approach to advancing monopoly theory and practice. Although the Ticketmaster (Live Nation[3]) situation is unique, we hope that some of the analysis

[1] Rothwell (2017), Armentano (1978), Nutter and Einhorn (1969).

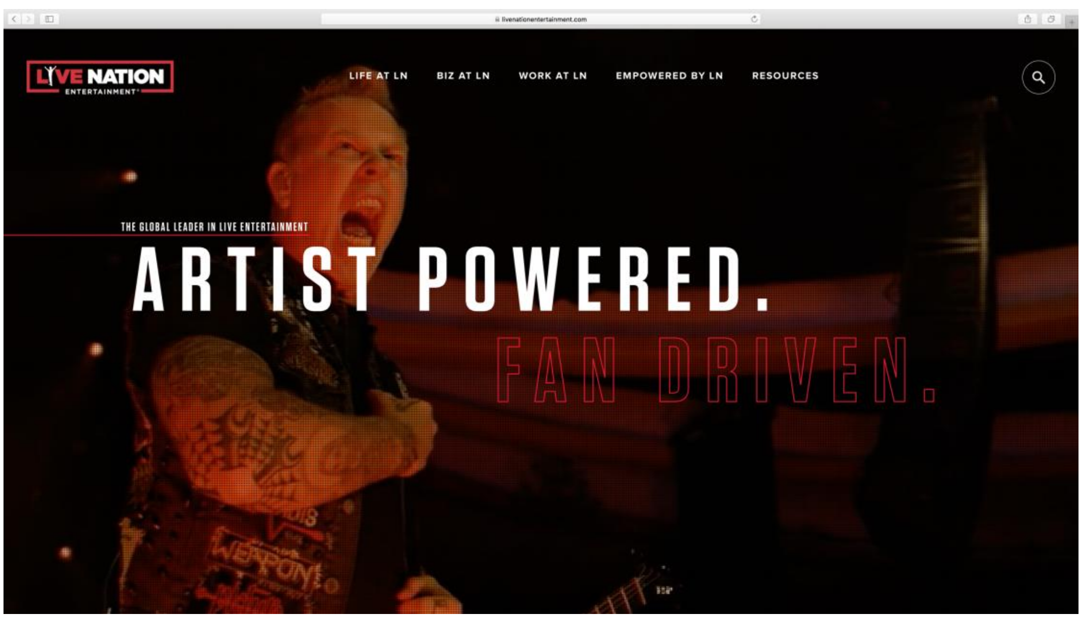
[2] There were Congressional hearings, Department of Justice rule-makings and court proceedings before, during and after the merger between Ticketmaster and Live Nation in 2009. Around this time a university colleague, who is also a live music impresario, said that Ticketmaster had a lock on the live music industry. Today he feels differently and believes the industry “ripe for disruption”.

[3] Live Nation has no compunction against showing they are very competitive. This is from their website where the firm announces they are “The Global Leader in Live Entertainment”:

here is applicable more broadly to industrial-organizational theory writ-large. Our primary research question then, is 'what makes a monopolist'? In that we already recognize Rogers (2017) as our starting point then we must research and explain other economists' findings as to monopoly theory and antitrust application, and then explain how our approach differs from, and improves upon, this conventional wisdom and practice.[4]

A note on method

In the first instance we follow the (Austrian school) method that theory is more important than empirics (cf, Vassallo 2017), although statistics are important we do not advance industrial-organizational empirical research here. We do however in our literature review, use and discuss empirical research by others to help advance our argument as found in Rogers (2019). Other methodological foundations of our research include the regulatory-capture theory based on Hayek (1945) on the cognitive limits of both 'market' participants and, regulators[5]. We also employ the Austrian capital | stages-of-production theory to help explain the investment structure in an economy both in terms of historical development (including asset-specificity[6]), market structure[7], and the limits to both regulatory knowledge and therefore the (subjective) use of empirics by 'experts' in the regulatory field. We also advance the findings in Krueger (1974), that extended interventions into the market through rent-seeking eventually limits the 'market' (human cooperation as opposed to state-mandate) from distributing society's scarce resources,



[4] The canonical work in mainstream thought on the industrial-organization of live music is Krueger 2005.

[5] See Lindsey and Teles (2017) for an in-depth study on regulatory capture in many if not most industries in the USA. Live music is not part of their study.

[6] Williamson (1985)

[7] Posner (2001)

and as witnessed by today's lower economic growth since the massive interventions after the 2008 financial crises.

Another pillar of our pre-analytical vision[8] towards this research is that of 'creative destruction' being a necessary condition for the 'capitalistic' system to work (Schumpeter 2008). If there are bailouts to be expected (either implicitly or explicitly), or legal barriers-to-competition preventing creative-destruction, then entrepreneurs (wealth-creators taking risk) go elsewhere as view the 'system' as being rigged over the long-term.[9] We understand that positive net investment is important towards alleviating poverty and improving standards of living.

Why this research is important (or, so what?)

The more that we assign experts to manage social-relations, the less that there is egalitarian democracy (Levy and Peart 2017), or 'consumer sovereignty', or individual self-determination. This is especially true in the opaque nature of the regulation theory and practice of industrial organization. Through our critique of actually-existing thought towards monopoly we can move towards a more equitable, fair and equal competitive environment[10], which favors the value-creating entrepreneur over vested interests. We can address regulatory-capture and over-burdensome (and cost-ineffective and efficiency-negative) regulation through the lens of our revisionist political economy.

In addition, the study of the *supply-side* of music concerts is understudied relative to that of the *demand-side* in the cultural economics literature (Cameron 2016). Our research fills-in this gap through a systemic and comprehensive theoretical approach towards the understanding of the value-chain (stages-of-production) in the supply-side of concerts, through the advancement of discernable categories and definitions in the vertical and horizontal supply of live music. This 'stages-of-production' analysis can be applied then more broadly towards other sectors of interest. Importantly, as far as we know, this is the first applied use of Hayekian-Austrian capital structure in the industrial organization literature.

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[8] See Schumpeter (1954) on how vision precedes analysis. We also follow Schumpeter that any model may be useful, it depends upon which problem we are trying to solve.

[9] This is Robert Higgs' 'regime uncertainty' (Higgs 1987).

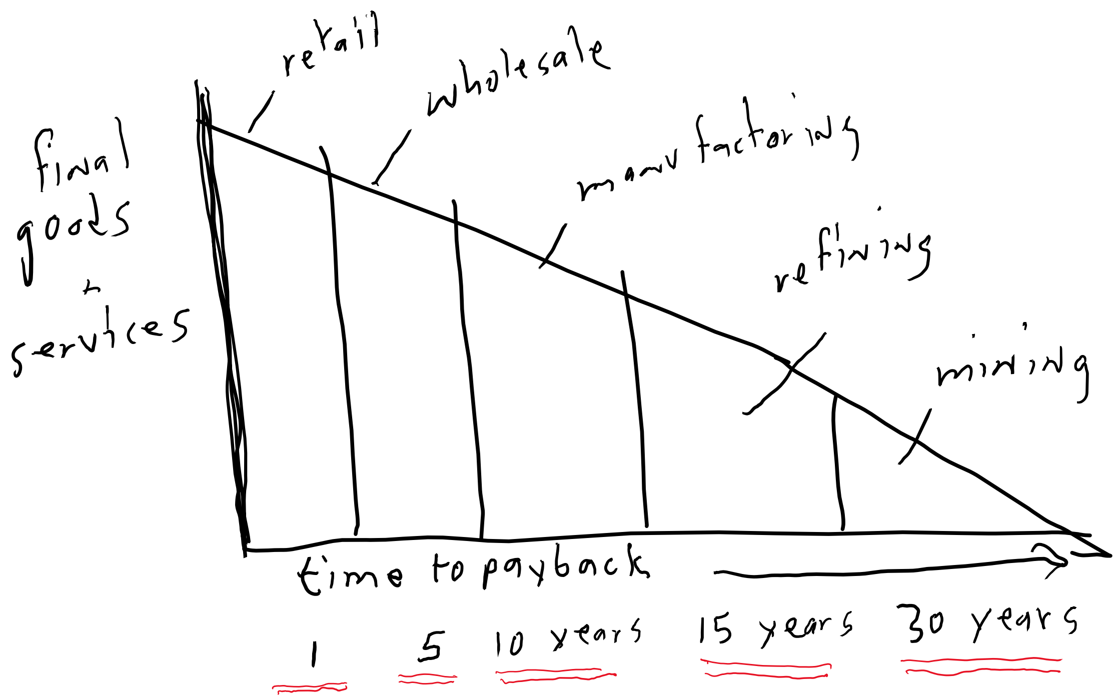
[10] See Tanner (2018) on how current regulatory practice is regressive.

II. Review and Critique of Orthodox Thought on Monopoly Theory, Through the Lens of the Market for Live Music Concerts

A. Economy, industry and firm capital structure

We begin analysis by introducing the (Hayekian) stages-of-production in an ideal-type, where we find the capital structure emerged in a society given social institutions and individual time-preferences.[11] A capital-structure emerges ordering specialization of labor and investment-preference.

Figure One: Stylized-Fact Capital Structure in an Economy



In Figure One we can observe an emerged (ideal-type) capital structure in an economy. Mining takes the longest to payback (is the most 'roundabout' stage of production), whereas retail pays-back the quickest. We assume that entrepreneurs (or firms) investing in each in stage receive 'normal' profits, similar to the perfect competition assumptions of neo-classical economics, only that we would expect these 'normal' profits to be greater for more roundabout stages as return for patient capital (time-preference theory). This capital theory can be applied to the economy-

[11] Note that the 'Hayekian triangles' used here differ from those in Garrison (2001). We use time outward along the X-axis to proxy current (t = 0) entrepreneurial decision-making, as opposed to an historical aggregation of capital structure (they are the same theoretically under 'equilibrium'). Our theoretical approach is related to that of Robert Higgs who evaluates the forward-looking investment climate as a proxy for sound institutions.

as-a-whole, for a specific industry (however measured by whom and with what subjective or imitative knowledge-assumptions), and/or when applied to a specific firm.[12] The stages-of-production all lead toward the market for the final goods and services in the economy or industry under analysis.

The disaggregated interconnectedness of the value-chain as visualized with the Hayekian triangles helps to show the weakness in relying on 'concentration indexes' such as the HHI as directed under the Justice Department Merger Guidelines (Krueger 2005, 22-25) as a proxy for market power in that there can be ambiguities in strict measurement of each stage of production in relation to the value-chain both upstream and downstream. It is difficult to pin-point a 'market' for analysis, and marginal analytical decisions about market measurement can alter the results (Vassallo 2017). This makes regulatory analysis arbitrary by definition.

The classic text in the theory and application of antitrust regulation is Robert Bork's *The Antitrust Paradox* (1993 [1978]).[13] In Borkian analysis, vertical firm integration can improve efficiency and therefore can improve consumer welfare. However, for Bork, horizontal firm integration can create monopoly-power, and this can subtract from consumer welfare. (It should be noted that in our triangles, counter-intuitively, the X-axis stages represent 'vertical' value-added towards the final consumption of goods and services[14].) In order to determine which horizontal 'market' should be analyzed for antitrust complaints, the analyst must determine into which vertical stage the horizontal market under-study belongs. Again, as stated, this is an arbitrary process.

Stages-of-production and knowledge-errors in the 'new' economy

In Figure Two we update these original stages-of-production to take into consideration our 'new' digital economy. Smart-phone apps have become increasingly important as platforms linking buyers-and-sellers in specific markets, giving 'long-tail' distributions (Anderson 2006) in many market categories.[15]

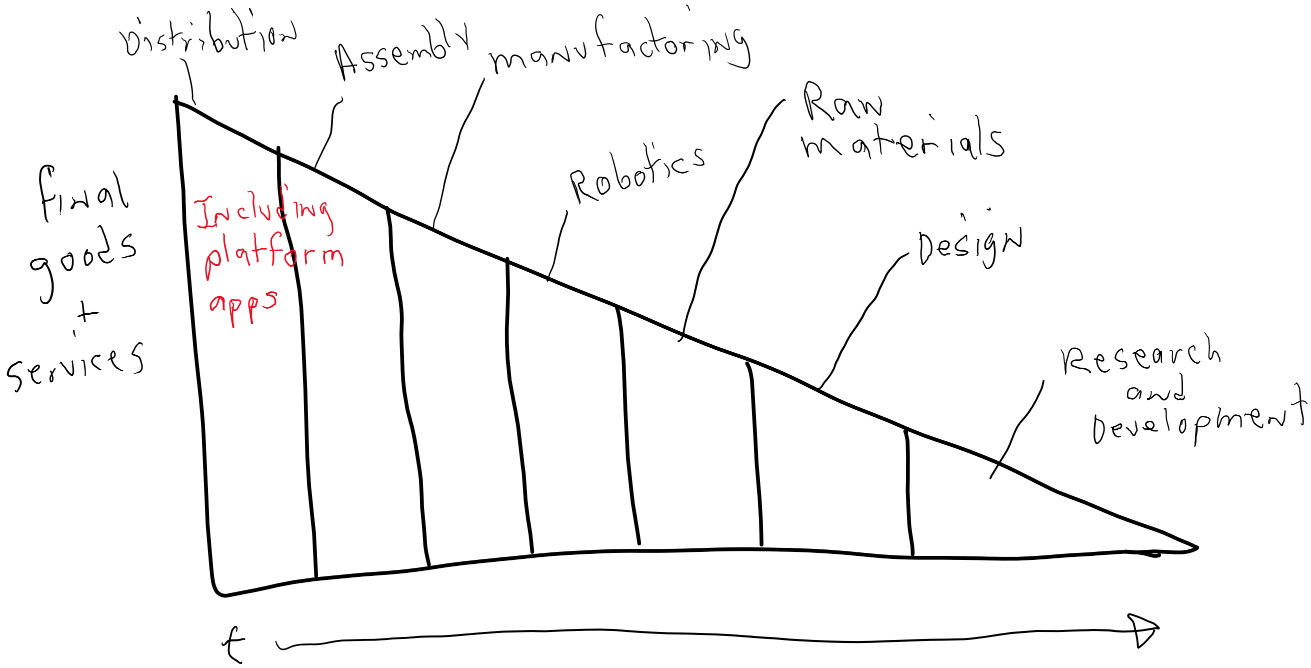
[12] This is known as a 'capital-based theory of the firm' (Langlois 2013).

[13] According to wiki, *Paradox* is one of the most cited texts in academia regarding antitrust and is cited in more than 100 court cases, including SCOTUS. Bork's work was instrumental in aiding the deregulation occurring during the time of the first edition of *Paradox*.

[14] We find it more robust to illustrate vertical value-added along the X-axis in that our *a priori* concern is modeling entrepreneurial investment decision-making and value-creation across time.

[15] In addition, platform apps are not of course limited to the distribution stage-of-production.

Figure Two: Updated Stages-of-Production for the 'New Economy'



Platforms are decentralized and not easily-identifiable by regulators. It is for this reason that regulators and unions are seeking to declare platforms as "service-providers" making ICT (information and communications technology) firms legally-responsible for regulatory compliance for the upstream stages of production (Langlois 2013). The 'new' economy has reduced transactions costs (information costs) and has increased entrepreneurial awareness in many markets bringing economic efficiency, consumer surplus and improving standards of living. To make a platform firm responsible for fraud or other commercial crime, instead of the direct parties to the transactions facilitated by the platform, would effectively limit the potential of our 'new' economy in reducing transactions costs and increasing economic efficiency.[16]

We can use the recently-settled Apple–Qualcomm case (*Economist* 2019) to help understand the Austrian-based capital structure presented here. Apple and other smartphone makers use Qualcomm's intellectual property (patents) in their phones. The stages-of-production for Apple and other makers of mobile phones might be assembly and distribution. Then, depending on how vertically-integrated a specific firm is, the firm's capital structure might extend out to R&D. We know in the specific case of Apple that of course R&D and design[17] are part of the firm's

[16] This is not to condone the sharing of user-data without explicit authorization, something which is already illegal.

[17] See Weber (2017) on the importance of design in firm strategic planning. This article also addresses the rent-seeking and asset-specificity leading to the politically-convenient bailout of General Motors after the 2008 financial crisis.

competitive advantage. Some parts of a firm value-chain may be outsourced depending on the transactions costs facing the firm (entrepreneur)[18] along its stages-of-production, its own subjective and tacit asset-specificity. Again in the case of Apple they find it worthwhile to outsource some of its assembly. Qualcomm's IP might be considered in the R&D stage, and is selling (leasing) its IP downstream, through the chips-component manufacturers (raw materials, design, robotics) who then sell downstream to phone-makers.[19]

Regulators for example interested in evaluating market concentration and market power in the smartphone industry would then have to make a subjective decision as to which stage(s)-of-production does this industry belong. Apple sued Qualcomm in a California court because Qualcomm was seeking payment directly from the phone-makers (around 5% of the retail price of a phone), instead of seeking payment directly from the component-makers who use the IP directly. There was an out-of-court settlement. We can reasonably debate if IP enforcement is a form of monopolist-creation under the definition in Rogers (2019), though if we do then we leave ourselves open to the ambiguities of applied structural regulation and not always out-of-court settlements.

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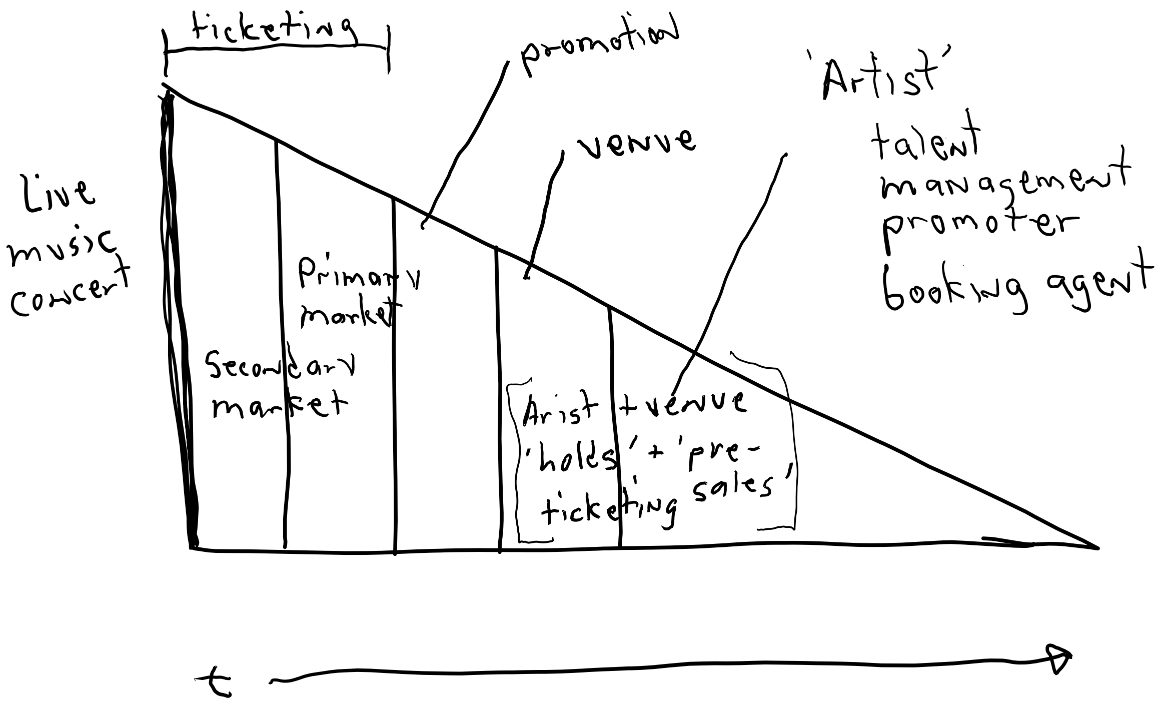
[18] Sobel et al (2007) find that entrepreneurial-led firms as they become established become less innovative once a professional CEO is engaged.

[19] The reader may disagree with some of the stages into which I classify specific industries, this illustrates the subjectivity of applied industrial organization.

B. Stages-of-Production in the Live Music Industry

Next we describe the categories used in recent research on the industrial organization of live music in terms of Austrian-based capital theory, in under to better understand and critique recent regulatory findings regarding the concert industry.[20]

Figure Three: Orthodox Stages-of-Production in Live Music Industry



The original source of value in live music concerts is the artist.[21] For our purposes here (and again this is subjective, but seems consistent with the literature), we can classify the talent, as well as the talent's management, promoter and booking-agent, into the artist stage-of-production. Downstream from the artist, and upstream from the concert itself we have, in descending order of roundaboutness, the venue, promotion, and ticketing.[22]

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[20] The nomenclature used here is drawn primarily from Tschmuck (2017b) and GAO (2018).

[21] A&R is the R&D of record labels.

[22] We cannot assume in all cases that management has incentive-compatibility with talent. Union monopoly-power (a vestige of the 1935 Wagner Act, and a source of 'monopolistic' power) creates asset-specificity and inefficiency. An example is the recent (Koblin 2019) dispute between the Writers Guild of America, who represents TV and film writers (we assume writers are in the talent stage-of-production for this industry) and the Association of Talent Agents.

In that a predominant 'industry' of concern to regulators is ticketing, we need to detail categories. The major market in ticketing is the primary market (i.e., the 'list price' of a concert).[23] Downstream from the primary market is the secondary-market. In negotiation along the stages-of-production value-chain there are also 'hold' and 'pre-sale' ticketing. These tickets can take many forms. Negotiations can include setting-aside tickets for distribution by the venues or the artists (including passing these holds downstream in lieu of monetary compensation, something we can take as a form of risk-sharing).

As the term implies, 'pre-sales' occur before the primary market (however measured by whom and with what subjective or imitative knowledge-assumptions). These tickets are sold to artist fan clubs, or crowd-sourcers, or participants in special promotions, including priorities for certain payment methods.[24] The negotiations along the value-chain are dependent upon the plans made by the cooperating entrepreneurs to bring the best value to the consumer given competition, meaning the absence of state-set barriers to competition (Rogers 2019). Competition means the best quality product and most economic efficiency through consumer sovereignty.

In a *reductio ad absurdum* argument which may ring truer than most, we can state that every artist is a differentiated (unique) product. As mainstream theory predicts, a differentiated product can bring monopoly power and above-normal profits. Unlike the scare tactics and (non) economic-reasoning implicit in the New York State Attorney General's Office "Obstructed

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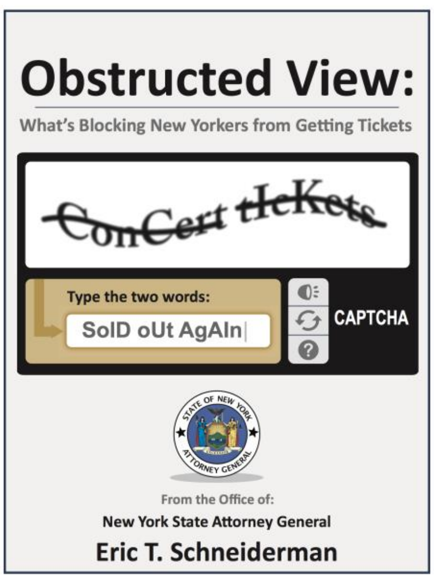
> But Latham & Watkins, the law firm working for the agents, sent a letter to the W.G.A. on Friday saying that, if managers or lawyers' function as agents, they would be breaking the law. The firm pointed to the California Talent Agency Act and New York's General Business Law. No one may assume agenting duties [sic] without having a license, Latham & Watkins said in the letter, which went on to threaten that the agents would "take appropriate action as needed, against any person engaged in unfair competition [sic]".

[23] We agree with Armentano (1978) that is impossible to determine in advance what the final stage-of-production market-process price will be, this can be especially true in the capricious nature of the music industry, as discussed below.

[24] There are well-defined legal barriers-to-entry in financial services markets, analysis of these are beyond our scope here (see Lindsey and Teles 2017).

View: What's Blocking New Yorkers from Getting Tickets" (Schneiderman 2016)[25], a sold-out concert is a signal of consumer sovereignty and of "the democracy of the market" (Armentano 1978, quoting Murray Rothbard, 99). When tickets in the secondary market sell higher than the list price in the primary market this signals a "high demand" concert (GAO 2018), or a successful entrepreneurial venture which meets the demands of consumers.[26]

Schneiderman (2016) also finds that ticket-sellers may engage in deceptive advertising by hiding the fees associated with ticket-purchase in an on-line setting. As expected this concern is being addressed through the entrepreneurial market-process. We find later in the paper how image and reputation are important in the live music business (not least due to the experience-goods nature of the industry). Live Nation is addressing this 'hidden cost' concern through its (re)-introduction



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[26] Schneiderman (2016) seems to blame in part 'holds' and 'pre-sales' as creating artificial shortages without taking into consideration the transactions costs negotiations amongst the entrepreneurs staging the concert(s) in unique times and places, which remain elusive towards aggregate measurement. These non-primary market tickets are part of value-creation along the stages-of-production, and are simply part of non-monetary contractual negotiations. If you think your favorite concert is expensive (and 'sold-out') now, wait until the state makes it free.

of “all-in” single-pricing for concerts.[27] (Live Nation is improving its “image and reputation” by pricing ‘all-in’ – Kruger 2005, 3) In addition, “unfair and deceptive acts” in ticketing are already prohibited by law (GAO 2018, 5).

Another important thing to keep in mind when it comes to the industrial organization of the music (and sports) industry is the well-known Superstar effect,[28] where “the return to star quality” brings increasing returns to a select few over time (Krueger 2005, 23). This effect can help explain increased consolidation in large venue concerts, sold-out concerts for superstars and rising prices for these concerts. This phenomenon is something we model later in the paper when looking at the ‘wide-tail distribution’ made possible by the reduced transactions costs in the ‘new’ internet economy, which also disaggregates and broadens consumer choice and consumer-surplus creation, absent legal barriers-to-entry. The Superstar effect is also part-and-parcel to the ambiguity inherent in the ‘industry’ measurements of applied microeconomics in regulation. Star power is the result of serendipity.

> Serendipity is problematic in an organized market. It is difficult to see how we can guarantee or induce its supply. Authenticity is an interesting element in economic terms as it would, again, seem paradoxical to try to learn or manufacture it. (Cameron 2016, 6).

We can understand further the capital structure approach, by placing the (orthodox) method found in Krueger (2005) in an Austrian-based capital structure context. At the time Krueger is writing, Clear Channel Communications (CCC) is the popular *bete-noire* in the music industry, much as Ticketmaster (Live Nation) is today.[29] Krueger states how the Telecommunications Act of 1996 (the 1996 Act) “relaxed constraints on radio ownership” (22), and allows Clear Channel to own more than 1,200 radio stations in various locations (firm geographical horizontal-

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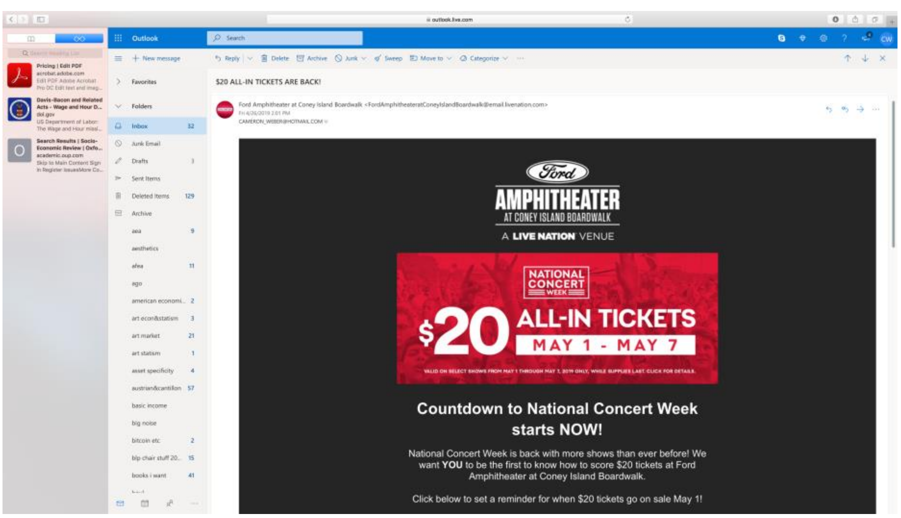
27 

[28] “All three [econometric] models indicate large and increasing superstar effects” (Krueger 2005, 21).

[29] CCC’s concert promotion business, as opposed to their ownership of TV and radio stations, proved unprofitable (creative destruction), so they spun it off as Live Nation, which later merged, with the obligatory virtue-signaling rent-seeking regulatory concessions, with Ticketmaster, after realizing the transaction costs savings of such a vertical integration. Again, Tschmuck (2017b) tells this story.

integration and firm geographical risk-diversification). CCC as well stages concerts in many of these same geographic markets (vertical integration). [30]

In Krueger's analysis (with apparently a non-Borkian pre-analytical vision) he begins by assuming that CCC has monopoly power over certain markets due to vertical integration. Because CCC has large market-share in radio (the promotion stage-of-production), he thought that then CCC would control the market for live concerts (the ticketing and final stages, downstream from promotion) in the same geographic area, because they have vertical integration, market-share and thus control along these stages-of-production.[31] However, after defining his market firm-share and industry-definition segments, he finds,

> The unweighted correlation between Clear Channel's concert share and radio share across the 98 markets was essentially zero (r = .01). When the data were weighted by the size of population in each market, the correlation was positive but statistically insignificant (Krueger 2005, 23).

Krueger surprises himself (and the readers of the labor journal) and realizes Bork's paradox. What is interesting to note is that CCC owns radio stations in 98 cities and that that does not buy them any market power across stages-of-production in those cities when aggregated. We should also notice that, per Vassallo (2017), Krueger's findings might be different had he made slightly different industry-analytical measurement decisions. This again illustrates the thesis in this paper, which is that we should be wary of giving too much discretion and autonomy to regulators with state-sponsored monopoly on coercion who by definition make arbitrary decisions and who are prone to capture by those they regulate.

In Krueger's pre-analytical vision, the 1996 Act appears to be a significant event or structural break or intervention effect in applied economic analysis. He finds that local markets were in states of monopoly for live music concerts prior to the Act, but the USA as a market was not. He then finds that, in contrast to his *a priori* assumptions, an increase in national monopoly (CCC) after the Act (as he has measured the USA concert industry with his analytical-assumptions) actually leads to *more competition* in the previously *more monopolized* decentralized geographic regions of measurement for live concerts (24-25). This helps confirm our corollary thesis that the removal of state-prescribed barriers-to-entry increases competition and consumer sovereignty, in whatever market however subjectively-determined. And of course, CCC concert promotion itself was to experience creative destruction just five years later as merged with Ticketmaster for concert promotion. Thus any regulatory measurement at any time is as well anachronistic (arbitrary and temporary).

[30] CCC has 41% of the ticket revenue of "the biggest four promotors" in 2003 (Krueger 2205, 23, Fig. 7).

[31] Krueger (2005) tells the story in a footnote on page 22 about how his Princeton colleague Paul Krugman thought that CCC dropped the Dixie Chicks for criticizing President Bush II for invading Iraq.

III. An Alternative Approach to the Industrial Organization of Live Music

You'd better be prepared for doing a lot of touring because that's really the only unique situation that's going to be left - David Bowie (2002)[32]

Krueger (2005) is one of the first to recognize how the epochal innovation of the internet (since 1996) is changing the market for both recorded and live music, with digital media reducing recorded music costs and that artists are now making their living more through live performances than recorded media. [33] Cameron (2016) finds the same. Therefore, on the demand-side, a given consumer preference-bundle for music now means substitution away from ('free") recorded music towards live music. This can explain the disparate inflation for concerts found in Krueger (2005) relative to the rest of the economy, something Krueger calls the *Bowie Theory*. However of course because there is more profit to be made in the concert industry there is more regulatory interest in this industry.

What is unique in the concert industry, and as found in our literature, is the capricious nature of the demand for music. The music industry is a high-risk industry, one which experiences high-levels of creative destruction.

> Historical data also cannot necessarily be treated as representing a market that is in equilibrium prior to impact of the disruptive innovation. Musical markets have always been subject to profound swings in both aggregate sales and subsectoral (format such as long and short play and by genre) performance (Cameron 2016, 3)

The immediate message here is that narrowing-down any market-structure at a given time and place in order to measure monopoly for regulatory justification is prone to fallacy in that dynamic change and creative destruction is always occurring, especially in the music industry. Thus, any regulatory action by definition is anachronistic. It is consumer taste, given endogenous technological change, that is driving market dynamics. Any regulatory body created with protecting the consumer as its declared-purpose might keep this creative destruction in mind and try not to damper the arts with the 'fatal conceit' of a regulatory burden. [34] Consumer sovereignty

[32] From Montero-Pons and Cuadrado-Garcia (2011), 24fn7.

[33] Krueger (2005) also helps to clarify our preference for deductive over empirical economic method (although they can work well together). In his analysis of CCC's 'monopoly' he states that he eventually chooses to measure as CCC's venue | concert market, those "with a capacity of at least 2,000 seats – because smaller concerts are unlikely to be promoted on the radio….". (24). Thus in order to create more justifiable data (and a better chance for publication and thus tenure, and then on to the President's Council of Economic Advisors?), we are altering assumptions away from more comprehensive theoretical categories, and thus more robust analytical conclusions (Pennington 2011). This publications practice is 'imitative scientism'.

[34] DiLorenzo (1985) explains how the origins of antitrust regulation in the USA, beginning with the Sherman Act of 1890, is the result of special-interest groups lobbying (rent-seeking) Congress for protection from competition. We can find this today where Mark Zuckerberg of Facebook is now seeking 'regulation' in the social-media industry to entrench his firm's dominant position. "While entrepreneurs benefit from unrestricted free entry into markets, they have a time-inconsistent incentive to lobby for government entry restrictions once they become successful" (Sobel et

in the music business (indeed in all sectors, Rogers 2019) is the most equitable and efficient distribution.

> Tickets should be priced to maximize profits over the relevant time horizon, taking into account any effects on the sale of complimentary goods, such as merchandise and record sales (see Rosen and Rosenfeld 1997). A concert is an “experience good,” as consumers do not know the utility they would derive from a concert unless they go to it. As a result, image and reputation are very important (Kruger 2005, 3)

We can follow-on a heterodox conclusion from Krueger’s finding that live music is an ‘experience good’. This means that the common assumptions under mainstream applied-microeconomics in the field of antitrust is now called into question. Conventional economics assumes known and knowable and unchanging consumer preferences, therefore past behavior as measured in statistical aggregates then can be used to measure industry concentration as projected into the future by regulators. With experience goods, especially within the capricious demand for the live music industry (however measured by whom and with what subjective or imitative knowledge-assumptions), means therefore then that these consumer-preference analytical assumptions as the basis for regulatory-action no longer hold.

Vertical and horizontal integration and diversity in the concert industry stages-of-production

We now explore our heterodox approach to the analysis of the live music ‘industry’ in the USA. We can view our alternative capital structure approach, viz. Ticketmaster as a monopoly requiring antitrust regulatory oversight, through a look at the, then and now, publicly-controversial take-over of SABMiller by AB InBev, and ‘allowed’ by the US Justice Department in July 2016.[35] SABMiller was the largest beer distributor in the world (per DoJ regulatory measurement) and AB InBev the second.

AB InBev agreed to certain terms with US DoJ on conditions for the merger (Merced 2016), conditions which we can evaluate with a stages-of-production analysis (revisiting Figure One in this paper). For example, the combined firm agreed to not vertically-integrate (purchase) a ‘distributor’ which would give the new consolidated firm more than 10% of the firm’s sales volume in the USA to wholly-owned subsidiaries. Also the newly-consolidated firm agreed that it would not stop doing business with any of its existing (non-vertically integrated) ‘wholesalers’. In the first instance we ask how are these categories determined (measured by whom and with what subjective or imitative knowledge-assumptions[36])?

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al. 2007). Lindsey and Teles (2017) describe the harm that this rent-seeking has rendered for our economy through today in terms of inequality, elitism and lower levels of economic growth and creative-dynamism.

[35] Why private business-transactions need to be approved in advance by public officials (regulators working for politicians) is of course one of our primary concerns here in questioning the current premises of antitrust regulatory practice. The AB InBev – SABMiller merger was approved in advance by the stockholders of both firms.

[36] When we speak of “imitative” knowledge-assumptions, we mean the practice of imitative scientism where it is best to imitate the method of previously-published works.

We can assume that (mass-produced) beer belongs to the final stage of production | distribution (and as well, maybe, given specific-firm vertical integration, more roundabout stages such as manufacturing, refining and mining (raw materials)), but is a 'distributor' part of the wholesale or retail stage-of-production in terms of regulatory measurement? Why did DoJ regulators single-out distribution as requiring special regulatory attention?[37] What if one of the new firm's existing regulatory-required outsourced wholesalers becomes inefficient in terms of transactions costs along the stages-of-production? For how long must the new firm support this liability? How does this regulatory result create consumer value, the alleged reason for antitrust regulation? Does not Borkian analysis, as accepted by the courts, find that vertical-integration, in this case consolidating along the beer distribution value-chain upstream and downstream, bring efficiency-gains in terms of consumer surplus? How are these merger requirements enforced in an objective way? We know from Vassallo (2019) that this is not possible.

Through today this 'beer industry' horizontal merger has been not unquestioned. In August 2018, a lawsuit by a consumer group against the merger was rejected by an Oregon court (Reuters 2018).[38] One of the attorneys for the plaintiffs ("an antitrust challenge by 23 beer drinkers"), conducted an interview after the dismissal,

> The court overlooked the elephant in the room: that the 72 percent of the market that was occupied by ABI, SAB and Molson is now occupied by two," Alioto said. "Is the elimination of the second-largest brewer in the world from the U.S. market a lessening of competition? I don't think there is any doubt (Reuters 2018).

Alioto's comments reiterate the fallacy of aggregation we discovered earlier in Krueger's (2005) findings about Clear Channel's alleged monopoly: vertical and horizontal firm-level integration does not mean monopolist control over economy-wide stages-of-production. This is exemplified by the recent Foundation for Economic Education (FEE) story about microbreweries in the USA (Perry 2019). In 2010 there were around 2,000 microbrewers competing with the alleged AB InBev's monopoly of the beer industry. Today there are more than 7,400 microbrewers competing with AB InBev, with an average of 50 independent brewers competing against the 'monopoly' in all 50 states.

With an understanding of 'wide-tail distribution' serving consumer preference in dynamic markets, the measuring of markets is again made-obvious as a subjective choice given the pre-analytical visions of regulators, regulators who need to regulate in order to ensure job-security. If we open-up industry measurements to include wide-tail competition, it is hard to justify that any regulatory-measured 'monopoly' is a 'monopolist' in that entrepreneurial-creativity, absent trade-barriers, ensures that consumer-choice prevents a monopoly from becoming a monopolist. We can now apply this economic reasoning to the live music industry.

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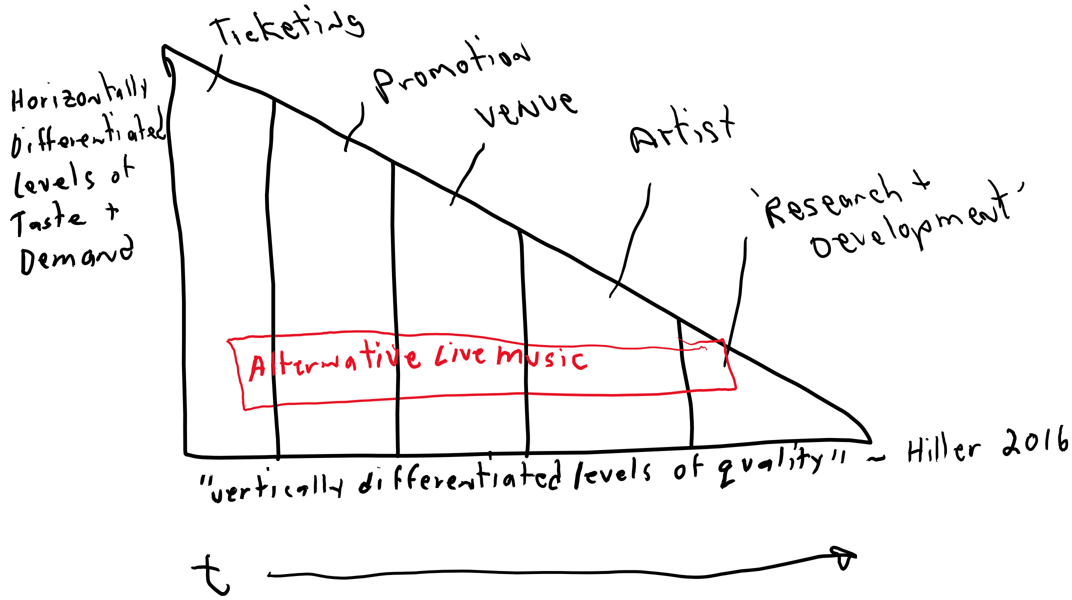
[37] What are the local and state-wide rent-seeking special-interests at play here in forming this regulatory policy? Which monopolists (Rogers 2019), not monopolies, are being protected from competition with this DoJ negotiation?

[38] This then historically has turned-out to be a frivolous lawsuit, unfortunately rent-seeking by the multiple bar associations in the USA has prevented reform of the legal environment to prevent this welfare-reducing activity, such as 'loser-pays' laws.

Figure Four: Heterodox Approach to Concert Stages-of-Production



In the first instance if we include alternative live music along the vertical stages-of-production (per Krueger 2005 we can label 'alternative' those venues which house less than 2,000 in audience number and/or those venues which do not report their results to *Pollstar*), we immediately find that Live Nation's market dominance aggregates are over-reported. Capturing these alternative consumer choices along the capital structure is a better theoretical and practical alternative than fitting theory to data. "Any measure of overall quality of music must capture this heterogeneity in preferences" (Hiller 2016, 310).

Further on market-definition under a more classically-liberal antitrust policy

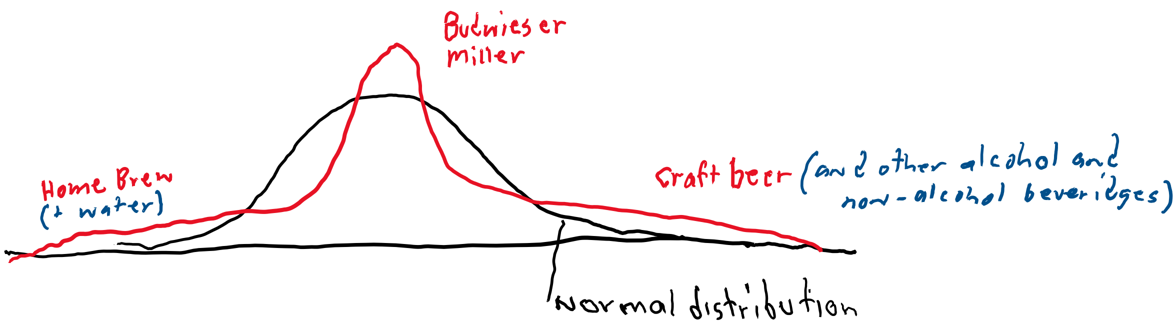
Note that in our alternative live music stages-of-production in Figure Four we find the source of value in music-origination, in the R&D stage-of-production. New music can include experimental and avant-garde music, forms of supply-side expression which can create novelty-value[39] and increase experience-good utility-creation on the demand-side in the final stage-of-production for live music when supply and demand meet through the market-process over time. These expressions are absent in orthodox economics theory and application in regulation.

We should also consider "horizontal differentiation between genres" (Hiller 2016, 310.) in our analysis of consumer preference (or as of yet unknown-preferences in terms of concerts as experience goods). Schneiderman (2016) uses a small sample of popular music concerts in

[39] See Scitovsky (1976) on the value of experience goods over other forms of consumption.

making determinations of monopoly-power in the NY market.[40] The cultural economics literature can help us to improve-upon this conventional wisdom as to consumer-choice preference-creation. Some people may prefer ‘high-brow’ live music such as symphonic and chamber music, jazz, and experimental music. Others may prefer ‘popular’ live music such as rock, pop, hip-hop, R&B and soul. Even others are cultural ‘omnivores’ who prefer the option of being able to choose among genres, given capricious tastes at a given time and place.

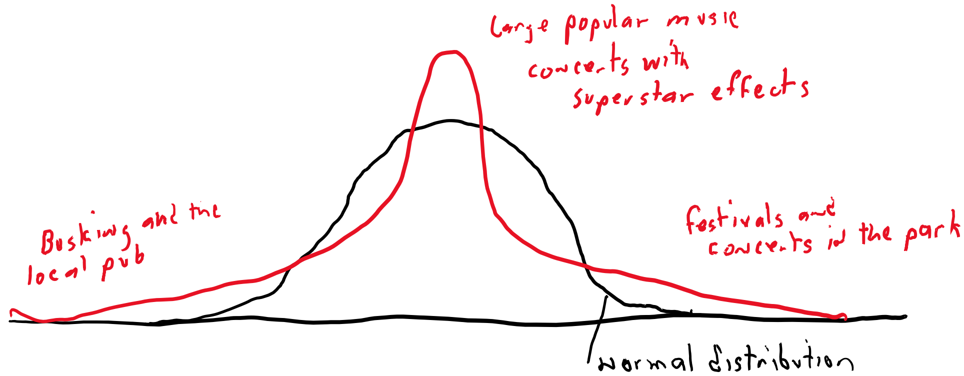
Figure 5a: Wide-Tail in the Beer Market



For example if we re-evaluate the market for ‘beer’ in light of the AB InBev case (Figure 5a), we can see that if wide-tail distribution was considered in the aggregates used for decision-making by regulators in antitrust determinations (however *reductio ab absurdum* our own subjective illustrative categories might be), then there would be an even weaker case made for any pre-emptive (and costly) antitrust regulation, and additionally any follow-on (and costly) regulatory-created legal disputes.

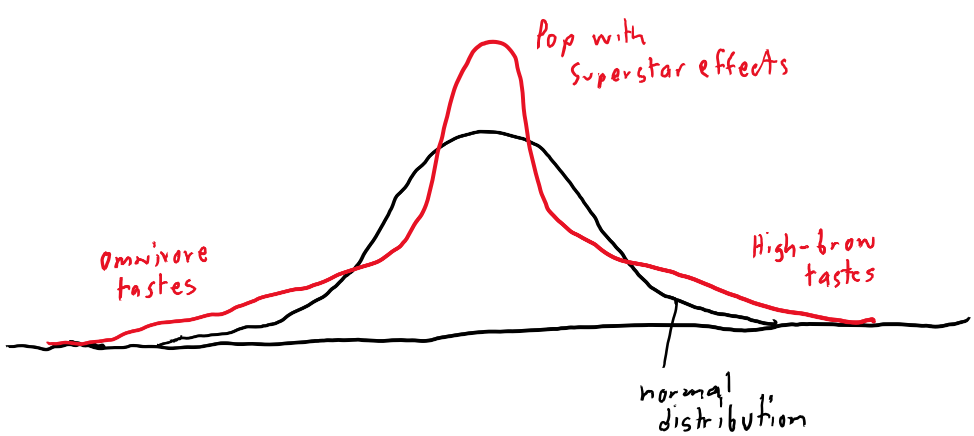
[40] The Schneiderman sample includes concerts between 2012 and 2014 by Fleetwood Mac, Coldplay & Jay-Z, Steely Dan, Jay-Z & Timberlake, Justin Bieber, Drake, Trey Songz, Keith Urban, The Voice, Ricardo Arjona, Fresh Beat Band, Kanye West, Luke Bryan, and Farm Aid, all part of the ‘popular taste’ regime in consumer-demand for live music, with attendant Superstar effects.

Figure 5b: Wide-Tail in the Vertical Stages-of-Production for Live Music



We find the same analytical-measurement bias result in the live music industry, especially relating to continued scrutiny of Live Nation as a straw-person villain. How measurement is made of markets to be regulated, or even as an object of analysis, is a highly subjective (and political) process, and marginal changes in measurement can effect regulatory results (Vassallo 2017). There is a large and growing music festival movement in part due to the substitution away from the purchase of recorded music to live music, which directly competes, in many if not most cases, with Live Nation venues. “The live music sector and especially festivals have expanded rapidly…[during these times of ‘new’ economy technical change],” (Cameron 2016, 6). To not include wide-tail music demand in regulatory rulings and analysis is a category error.

Figure 5c: Wide-Tail in Horizontal Tastes for Music



In looking at (horizontal) taste-diversification in music, it is hard to see how any one firm can gain a monopolist's power (however defined by whom and with what knowledge-assumptions), given the multitude of consumer-choice in the new economy along horizontal supply value-creation. This is especially true in the music business, given the industry's capricious and serendipitous, and therefore economically-dynamic, demand and supply. There are countless firm and entrepreneurial, asset-specific, vertical stages-of-production providing for horizontal demand. Measurement is apparently (axiomatically) arbitrary.

If and when regulators presume to know more than individuals about how their music consumption-bundles should be allocated, and use these judgements to curtail competition through regulation, we then limit the creative destruction necessary for improving standards of living through the many and diverse and unknown and unknowable possibilities out into the future.

IV. Conclusion

We have attempted to present alternative methods for analysis as applied towards the theory and practice of regulatory economics. The main thesis of this paper has been that we should be wary of giving too much discretionary-power and autonomy to regulators with state-sponsored monopoly on coercion because this social construct reduces possibilities for subjective well-being. Regulators by definition make arbitrary decisions (Hayek 1945, Vassallo 2017) and are prone to capture by those they regulate (Krueger 1973, Lindsey and Teles 2017). Therefore, our main finding (following Levey and Peart 2017) is that we should be wary of giving too much control in society to 'experts', as society degenerates from democratic egalitarianism into one of a planned-utilitarian hierarchy (Phelps 2105). This destroys not only wealth-creation and improving standards-of-living for everyone through economic progress, but individual self-determination and the sense of a unified social fabric.

In answer to the research question posed in our paper title, "When is a Monopoly not a Monopolist?", we hope that we have made the case that these decisions are best left to cooperation and not coercion.

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