

Defining Unreasonable Radius Clauses for American Music Festivals

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ABSTRACT

Since 1969, the music festival remains a staple of American musical culture, and in order to meet consumer demands, today's music festival promoters rely on radius clauses ancillary to the performance agreements that they use with artists. These radius clauses limit artists' ability to perform at other music festivals and concerts within a specified temporal and geographic radius of the contracted music festival. Beginning in 2010, legal challenges have alleged that broadly defined radius clauses used by music festival promoters violate Section 1 of the Sherman Antitrust Act. This Note contends that radius clauses which limit artists from performing beyond the festival's geographic market and fail to distinguish between festivals and concert performances should be considered unreasonable restraints of trade in violation of the Sherman Antitrust Act, because such radius clauses restrict more competition than is necessary to protect the festival promoter's legitimate objectives.

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INTRODUCTION

The 1969 Woodstock Music and Arts Fair remains one of the most pivotal moments in American music history. Since Woodstock, the American music festival has transformed; today over eight hundred music festivals occur annually in the United States, attracting approximately thirty-two million festival-goers annually.¹ But today's music festivals are not just composed of fans, artists, and good times; rather, large-scale festival promoters, corporate sponsorships, and the subject of this Note—radius clauses—are all essential to the American music festival.²

In order to put on a large music festival, promoters must make large, up-front investments, taking great financial risks.³ In order to protect these investments, festival promoters rely on radius clauses⁴ ancillary to the performance agreements between promoters and artists.⁵ A radius clause

1. Ismini Tsakiris, *The Rise and Unfortunate Fall of Music Festivals*, GOODMUSICALLDAY, <https://vergecampus.com/2017/04/rise-fall-music-festivals/> [http://perma.cc/Y45U-KR2S]; *For Music Fans, the Summer Is All a Stage*, NIELSEN (Apr. 14, 2016), <http://www.nielsen.com/us/en/insights/news/2015/for-music-fans-the-summer-is-all-a-stage.html> [http://perma.cc/MTJ2-74QE].

2. See *infra* Part II.

3. See Katie Bain, *How the Music Industry Uses a Pervasive Secret Weapon to Keep Bands from Freely Touring*, LA WEEKLY (Apr. 18, 2017), <http://www.laweekly.com/music/how-music-festival-promoters-use-radius-clauses-to-keep-bands-from-freely-touring-8140333> [http://perma.cc/NWY9KR4Y]; Karen Gwee, *Music Festivals and the Pursuit of Exclusivity*, CONSEQUENCE OF SOUND (Sept. 15, 2016), <https://consequenceofsound.net/2016/09/music-festivals-and-the-pursuit-of-exclusivity/> [http://perma.cc/NS77-H7PF].

4. See Bain, *supra* note 3; Gwee, *supra* note 3.

5. This Note uses the term “radius clause” to refer to the restrictive covenant included in performance contracts between live music promoters and musical artists; these radius clauses are also known as “exclusivity clauses” and “blackout dates.” Additionally, this Note uses “artist” to refer to

is a type of restrictive covenant that prohibits an artist from performing, or advertising for, another music festival or concert within a specified temporal and geographic radius of the date and location of the music festival.⁶ Radius clauses are not unique to music festivals; nearly all live music promoters, including traditional concert promoters, regularly use them to protect their investments as well.⁷

However, as music festivals have grown in popularity and scale, the temporal and geographic restrictions specified in radius clauses have drawn criticism from commentators and legal challenges from music festival and concert promoters.⁸ Specifically, commentators and promoters allege that radius clauses with overbroad temporal and geographic restrictions unreasonably decrease the supply of live performance artists, which causes reductions in the quality and quantity of both music festivals and concert venues, in addition to raised prices for live music performances—all, these commentators and promoters allege, in violation of § 1 of the Sherman Antitrust Act (Section 1).⁹

Motivated to understand the validity of Section 1 claims against radius clauses used by large music festival promoters, this Note explores the nature of such radius clauses and the analysis that courts would likely employ to determine whether radius clauses violate Section 1. Part I will discuss radius clauses and their role in the live music industry. Part II will provide both a historical and present-day background understanding of the American music festival. Part III will cover Section 1, focusing on the rule of reason analysis by examining two legal challenges to radius clauses used by live music promoters. Finally, Part IV will argue that radius clauses used by large music festival promoters unreasonably restrain trade in violation of Section 1 when they specify geographical restrictions beyond the festival's relevant geographic market and fail to distinguish between concert performances and music festivals.

I. RADIUS CLAUSES

Radius clauses are a specific type of ancillary restraint and are not exclusive to the live music industry. More commonly, radius clauses describe commercial lease agreements that prohibit retail tenants from opening a branch store within a specified geographical area that would

any performance act that may be contracted to perform on stage at a music festival. “Artist” may include, but is not limited to, individual musicians and bands of all sizes.

6. See, e.g., *infra* Figure 1.

7. See Dylan Muhlberg, *Grateful Web Interview with Don Strasburg*, GRATEFUL WEB (Feb. 7, 2017), <http://www.gratefulweb.com/articles/grateful-web-interview-don-strasburg> [<http://perma.cc/G2BG-HXLU>].

8. See *infra* notes 26–32 and accompanying text.

9. See discussion *infra* Section III.B.2.

compete directly with the original store.¹⁰ Landlords use radius clauses to protect their investments, ensuring that the customer base of their property is protected from competition.¹¹ Radius clauses used in the live music industry and in commercial lease agreements are “ancillary restraints”¹² and can be considered specific types of “restrictive covenants.”¹³ Ancillary restraints are not the main purpose of an agreement or contract, but are perceived as “necessary to the protection of the covenantee in the carrying out of [the agreement’s] main purpose.”¹⁴ Non-compete clauses in employment agreements are another type of ancillary restraint.¹⁵ Employers rely on non-compete clauses to protect classified information and customer relationships from competitors,¹⁶ and typically these covenants prohibit the employee from competing with the employer for a “specified period of time in a designated geographical area.”¹⁷

In the live music industry, typically when an artist enters into a performance agreement, the artist additionally agrees to a radius clause ancillary to their performance agreement.¹⁸ The radius clause prohibits the artist from performing (and often from advertising for) another performance for a specific time period within a designated geographical radius.¹⁹ For example, a performance agreement for a music festival in Chicago, Illinois, may include a radius clause that prohibits an artist from performing and advertising for a different music festival or concert within a 500-mile radius of Chicago for 120 days prior to and following the date of the festival.²⁰ Most music festival and concert promoters rely on radius

10. Jeremy A. Gogel, *Antitrust Concerns with Respect to Music Festival Radius Clauses*, 38 LINCOLN L. REV. 87, 88 (2011) (citing Alan M. Disciullo, *Geographic and Product Markets for Radius Clauses Under the Rule of Reason*, 19 REAL EST. L.J. 121, 121 (1990)). Gogel’s article is a useful source for understanding the history of restrictive covenants and how the growth of American music festivals is burdening smaller artists and bands that sign contracts containing radius clauses in order to perform at large, well-attended festivals.

11. *See id.* at 89.

12. The idea of an ancillary restraint first appears in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898).

13. *See Gogel, supra* note 10, at 88–93.

14. *Addyston Pipe & Steel Co.*, 85 F. at 283.

15. *See Gogel, supra* note 10, at 89.

16. *Id.*

17. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960).

18. *See Bain, supra* note 3; Gwee, *supra* note 3.

19. *See id.*

20. This example is from *SFX React-Operating LLC v. Eagle Theatre Entertainment, LLC*, No. 16-13311, 2017 WL 3616562, at *2 (E.D. Mich. Aug. 23, 2017). React was a club, concert, and festival promotion company. Since 2008, React organized large EDM (electronic dance music) concerts and festivals in Chicago, Illinois, and used radius clauses in performance agreements with EDM artists; these “radius clauses prohibited artists from playing anywhere up to within a 500 mile radius of the location of React’s event for periods of 60, 90, or 120 days prior to and following the date of the event.” For additional examples of radius clauses in music festival performance agreements, see Scott

clauses to protect the large, up-front investments made to put on the performances.²¹ The radius clauses secure exclusive access to artists for the terms of the clause, shielding the promoter's ticket sales or recoupment of initial investment from competing promoters.²²

Radius clauses used in the live music industry include enforcement mechanisms. If an artist violates the terms of a radius clause by performing at or advertising for another music festival or concert, the promoter may reclaim a portion of the artist's performance fee,²³ prohibit the artist from performing at the music festival or concert,²⁴ or waive the radius clause, allowing another promoter to contract the artist in exchange for a percentage of the latter promoter's profits.²⁵

The restrictive terms of radius clauses that are used in the music festival industry have been subject to legal challenges and social criticism. For example, in 2010, the Illinois attorney general's office investigated Lollapalooza's (a music festival held annually in Chicago) use of radius clauses for antitrust violations.²⁶ In 2011, Jeremy A. Gogel argued in a law review article titled *Antitrust Concerns with Respect to Music Festival Radius Clauses* that music festival radius clauses violate Section 1.²⁷ In 2017, Eagle Theater Entertainment (a live music promoter) alleged in a counterclaim against SFX React-Operating (another live music promoter) that SFX's use of radius clauses violated both Section 1 and the Michigan Antitrust Reform Act.²⁸ Finally, in 2018, Soul'd Out Productions²⁹ (an Oregon-based live music promoter) filed a complaint with the U.S. District

Hiller, *Exclusive Dealings and Its Effects: The Impact of Large Music Festivals on Local Music Venues*, 45 REV. INDUS. ORG. 153, 170–71 (2014); Gwee, *supra* note 3.

21. See Bain, *supra* note 3; Gwee, *supra* note 3.

22. Gogel, *supra* note 10, at 104; see also Bain, *supra* note 3; Gwee, *supra* note 3; Muhlberg, *supra* note 7.

23. See Bain, *supra* note 3.

24. *Id.*

25. *E.g.*, SFX, 2017 WL 3616562, at *2 (React agreed to waive some artists' radius clause restriction so that the artists could perform for a different promoter in exchange for fifty percent of that promoter's profits.).

26. Steve Knopper, *Attorney General Investigates Lollapalooza*, ROLLING STONE (June 25, 2010, 7:45 PM), <https://www.rollingstone.com/music/music-news/attorney-general-investigates-lolla-palooza-233557/> [<https://perma.cc/AS3U-H29L>]. The 2010 restrictions in Lollapalooza's radius clauses prohibited artists from performing at competing music festivals or concerts that were located within a 300-mile radius of the festival for 180 days before and 90 days after the music festival. *Id.*

27. See generally Gogel, *supra* note 10.

28. SFX, 2017 WL 3616562, at *1–2 (React's radius clauses "prohibited artists from playing anywhere up to within a 500 mile radius of the location of React's event for periods of 60, 90, or 120 days prior to and following the date of the event.").

29. See generally SOUL'D OUT MUSIC FESTIVAL, <http://www.souldoutfestival.com> [<https://perma.cc/HY3C-ZA4P>].

Court in Oregon against five defendants³⁰ (all live music promoters) alleging that the defendants' use of radius clauses (see Figure 1 below) for the 2018 Coachella Valley Music and Arts Festival (Coachella)³¹ in Indio, California, violated Section 1 as well as Oregon and California antitrust laws.³²

Figure 1 – 2018 Radius Clause in Coachella's Contracts³³

<p>Exclusivity:</p> <p>Artist shall not perform:</p> <p>a) On any North American Festival from December 15, 2017 until May 1, 2018.</p> <p>b) In Los Angeles, Orange, Riverside, San Bernardino, Santa Barbara, Ventura or San Diego Counties from December 15, 2017 until May 1, 2018.</p> <p>Artist shall not advertise, publicize or leak*:</p> <p>a) Any performance in Los Angeles, Orange, Riverside, San Bernardino, Santa Barbara, Ventura or San Diego Counties from the date of this offer until May 7, 2018</p> <p>b) Any Festival** or Themed Event*** in the states of California, Nevada, Oregon, Washington or Arizona from December 15, 2017 until May 7, 2018</p> <p>c) Any Festival** or Themed Event*** in the US (not included in B above) until after the Coachella announcement (this does not apply to SXSW in Austin, Ultra in Miami or Jazzfest)</p> <p>d) Any tour dates in the states of California, Arizona, Washington and Oregon until January 10, 2018 or when festival is announced, whichever is sooner</p> <p>e) Casino dates in Las Vegas are approved, festivals are prohibited</p> <p>*This includes record company, promoter, ticket company, artist website, social media or internet releases</p> <p>**Festival is defined as any engagement with 4 or more artists</p> <p>***Themed Event is defined as a titled, sponsored or promotional show with 3 or more artists</p>	<p>Coachella shall be the 1st 2018 North American Festival announcement.</p>
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The challenges and criticism described above allege that the radius clauses used by music festival promoters have anticompetitive effects that violate Section 1. Specifically, the radius clauses unreasonably restrain and cause harm to (1) smaller or less well-known artists,³⁴ (2) smaller-scale music festival and concert promoters who are located within the

30. Second Amended Complaint at 2, *Soul'd Out Prod., LLC v. Anschutz Entm't Grp., Inc.*, No. 3:18-cv-00598-MO (D. Or. Oct. 25, 2018) [hereinafter Second Am. Compl.].

31. See generally COACHELLA, <https://www.coachella.com> [<https://perma.cc/R7L6-KNBZ>].

32. See generally Second Am. Compl., *supra* note 30.

33. *Id.* at 3 (from a "portion of an email received from AEG's counsel").

34. See Gogel, *supra* note 10, at 88.

geographical area of a large music festival's radius clause,³⁵ and (3) consumers.³⁶

In order to fully understand how courts will likely examine legal challenges to radius clauses, one must appreciate the history and characteristics of today's American music festival market.

II. THE AMERICAN MUSIC FESTIVAL AND LARGE-SCALE CONCERT PROMOTERS

Although the American music festival has evolved substantially since its inception, today's music festivals share important characteristics with their pioneering predecessors. And yet, with the surge of millennial consumer demand comes corporate sponsorships and large-scale promoters that, together, fuel intensifying radius clauses.³⁷

For many, the American music festival narrative begins with the 1969 Woodstock Music and Art Fair (Woodstock).³⁸ However, one of the first large American music festivals to attract nationally known artists was the three-day Newport Jazz Festival in 1954, which featured, among other legendary artists, Ray Charles, John Coltrane, Miles Davis, and Duke Ellington.³⁹ And in 1967, two years before Woodstock, Jimi Hendrix set his guitar ablaze while performing at the Monterey Pop Festival.⁴⁰ Although Woodstock was not the first music festival, its mark on American culture creates an important context for understanding today's music festivals.

In spite of its fame, Woodstock was not a complete success. Woodstock's promoters (Artie Kornfield, Michael Lang, John Roberts, and Joel Rosenman) set out to create more than a music festival; they wanted a "proper festival with arts and crafts, and a literal sense of youth community."⁴¹ Woodstock's promoters originally anticipated no more

35. See *SFX React-Operating LLC v. Eagle Theatre Entm't, LLC*, No. 16-13311, 2017 WL 3616562, at *11 (E.D. Mich. Aug. 23, 2017); Second Am. Compl., *supra* note 30, at 4; Bain, *supra* note 3.

36. See *SFX*, 2017 WL 3616562, at *9–10. See generally Second Am. Compl., *supra* note 30.

37. For an example of intensifying radius clauses compare Knopper, *supra* note 26 (explaining that the 2010 restrictions in Lollapalooza's radius clauses prohibited artists from performing at competing music festivals or concerts for 180 days before and 90 days after the music festival within a 300-mile radius) with *supra* Figure 1, which shows a radius clause that covers all of North America.

38. *About*, WOODSTOCK, www.woodstock.com/about [<https://perma.cc/SRZ8-LKDP>].

39. MARLEY BRANT, JOIN TOGETHER! FORTY YEARS OF THE ROCK FESTIVAL 3 (2008). Additionally, the Newport Jazz festival inspired the Newport Folk Festival, which in 1959 introduced "artists such as Bob Dylan and Joan Baez." *Id.*

40. Ben Sisaro, *Monterey Pop, the Festival That Sparked It All, Returns*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/arts/music/monterey-pop-festival-50th-anniversary.html> [<https://perma.cc/U37H-46W7>].

41. BRANT, *supra* note 39, at 60, 62. Michael Lang, at age seventy-four, is one of the promoters of "Woodstock 50," the fifty-year anniversary of the 1969 Woodstock. Ben Sisario, *Woodstock*

than fifty thousand attendees;⁴² however, nearly four hundred thousand arrived.⁴³ Spending between \$135,000⁴⁴ and \$180,000⁴⁵ on talent, Woodstock's promoters charged attendees \$7 for a day pass and \$21 to attend the festival for the whole weekend.⁴⁶ The total production cost of Woodstock "ran around \$2 million," and Woodstock's promoters did not profit or break even—in the words of promoter Artie Kornfield, Woodstock was a "financial disaster."⁴⁷ Woodstock's lack of financial success set the stage for today's music festival promoters' justification for using radius clauses: to protect initial investments.⁴⁸

Despite the financial shortfalls of Woodstock, the American music festival has grown into a large corporate industry. Today, over eight hundred music festivals exist in the United States,⁴⁹ attracting over thirty-two million music fans annually.⁵⁰ For the millennial generation, which comprise nearly half of American music festival attendees,⁵¹ attending a multi-day music festival is a "rite of passage."⁵² And a profitable one at that; for example, "Coachella's 2017 revenues were record setting: the festival was attended by 250,000 people and grossed \$114.6 million."⁵³ Additionally, today's music festivals are increasingly controlled by "large scale promoters," or "music industry corporations," which control the promotion of multiple music festivals and concerts.⁵⁴ For example, large-scale promoter Live Nation Entertainment controls Lollapalooza, Austin City Limits, Electric Daisy Carnival, and Bonnaroo.⁵⁵ Moreover, large-

Returns Again on the Festival's 50th Anniversary, N.Y. TIMES (Jan. 9, 2019), <https://www.nytimes.com/2019/01/09/arts/music/woodstock-50th-anniversary-festival.html?action=click&module=Features&pgtype=Homepage> [<https://perma.cc/WKQ7-JFRR>].

42. BRANT, *supra* note 39, at 63.

43. Sisaro, *supra* note 40.

44. *Id.*

45. BRANT, *supra* note 39, at 63.

46. *Id.* at 83. Although, at some point during the festival, the promoters decided to stop charging for admission, letting anyone who wanted to attend. *See* WOODSTOCK (Warner Bros. 1970).

47. BRANT, *supra* note 39, at 82. In Michael Wadleigh's 1970 Academy Award-winning documentary film, *Woodstock*, Michael Lang is interviewed during the festival and asked if the festival needs to make two million dollars to break even. Lang replies, "Well, if we are going to break even, you know. [The] point is that it's happened and its working, you know. That's enough for now." WOODSTOCK, *supra* note 41.

48. *See* Bain, *supra* note 3; Gwee, *supra* note 3; Muhlberg, *supra* note 7.

49. Tsakiris, *supra* note 1.

50. *For Music Fans, the Summer is All a Stage*, *supra* note 1.

51. *Id.*

52. Tsakiris, *supra* note 1.

53. Second Am. Compl., *supra* note 30, at 2.

54. *See* Pete Mason, *The Commercialization of Music Festivals and the Rise of Super Concerts*, HUFFINGTON POST (July 27, 2015), https://www.huffingtonpost.com/petemason/the-commercialization-of-1_b_7873236.html [<http://perma.cc/MVV3-AT5G>]; *see also* Sisario, *supra* note 41.

55. *See* Ben Sisario, *The Music Festival Business: Who Owns What*, N.Y. TIMES (Apr. 28, 2015), <https://www.nytimes.com/interactive/2015/04/28/business/media/The-Music-Festival-Business->

scale promoters have the ability and resources to engage in vertical integration, controlling the land, talent, infrastructure, and festival vending.⁵⁶

Large-scale promoters have immense resources and thus the ability to offer consumers more than their independent counterparts. Today's music festivals offer a plethora of artists spanning multiple music genres.⁵⁷ For example, Coachella's 2019 artist line-up features headlining artists in the musical genres of rap (Childish Gambino), psychedelic alternative (Tame Impala), and pop (Ariana Grande), in addition to featuring Latin trap (Bad Bunny), country (Kasey Musgraves), K-pop (BLACK PINK), EDM (Zedd), and DJ sets (Driis).⁵⁸ And, in the spirit of Woodstock, today's music festivals offer consumers more than just music:

Festivals offer their customers a different experience from single concerts. Many festivals try to provide a festival or carnival-like vacation experience for their clients. These large festivals provide a weekend's worth of entertainment, beyond just music. Many festivals have multiple stages, with music performed on each of the stages. Many festivals have art installations. Festivals also try to ensure that festival-goers get to enjoy a large selection of food and beverage options from a diverse selection of restaurants, breweries, wineries, food trucks, and other providers. This experience can be thought of as a bundle of individual concerts to which the consumer purchases access with so many performances the consumer cannot possibly see them all, as well as the other experiences referenced herein.⁵⁹

By offering consumers multiple artists across genres and a wide selection of entertainment, today's music festivals attract consumers with unique characteristics.

Consumers of today's music festivals are primarily millennials⁶⁰ and are willing to travel further and pay more for the music festival experience;

Who-Owns-What.html [https://perma.cc/UBZ2-E7WF] (providing other examples of large-scale promoters, including AEG Live, which controls Coachella and Stagecoach, and SFX, which controls Tomorrowworld, Electric Zoo, and Mysteryland, USA).

56. See Mason, *supra* note 54.

57. See Second Am. Compl., *supra* note 30, at 9. See generally BONNAROO MUSIC AND ARTS FESTIVAL, <https://www.bonnaroo.com/lineup/> [https://perma.cc/VG22-WY48]; COACHELLA, <https://www.coachella.com> [https://perma.cc/R7L6-KNBZ]; LOLLAPALOOZA, <https://www.lollapalooza.com> [https://perma.cc/WW5M-F6GW].

58. See COACHELLA, *supra* note 57; see also Marc Hogan & Michelle Kim, *6 Takeaways from the 2019 Coachella Lineup*, PITCHFORK (Jan. 3, 2019), <https://pitchfork.com/thepitch/6-takeaways-from-the-2019-coachella-lineup/> [https://perma.cc/LL35-HJWC].

59. Second Am. Compl., *supra* note 30, at 9–10. See generally BONNAROO MUSIC AND ARTS FESTIVAL, *supra* note 57; COACHELLA, *supra* note 57; LOLLAPALOOZA, *supra* note 57.

60. In 2015, nearly half of all music festival attendees were between the ages of eighteen and thirty-four (i.e., millennials). For Music Fans, *the Summer Is All a Stage*, *supra* note 1; Trips Reddy, *Six Factors Driving the Growth of Music Festivals*, UMBEL (Oct. 7, 2015), <https://www.umbel.com>.

these characteristics attract lucrative corporate sponsors.⁶¹ Multi-day music festival admissions cost hundreds of dollars⁶² and the cost to camp at the festival for the weekend is not included.⁶³ Additionally, the cost of traveling to music festivals must be considered. While the average attendee of a traditional concert will travel forty-three miles (and ten percent will travel over 100 miles),⁶⁴ the average attendee of music festivals will travel 903 miles.⁶⁵ Moreover, tickets to multi-day music festivals typically sell out within hours—before the artists to perform are announced. For example, the 2017⁶⁶ and 2018⁶⁷ Coachella sold out of festival passes within hours of going on sale—and before the lists of artists to perform were announced.⁶⁸ Given the demographics and spending habits of music festival consumers, it is not surprising music festivals also attract corporate sponsors. Attracted by the opportunity to reach a large and captive audience for several days, corporate sponsors offer large-scale promoters significant compensation.⁶⁹

With corporate sponsorship and sold-out crowds that pay hundreds and thousands of dollars to attend a multi-day music festival, large-scale

com/blog/entertainment/6-factors-driving-massive-growth-of-music-festivals/ [http://perma.cc/TY25-8A6Q]. And in 2018, millennials are between the age of twenty-two and thirty-seven. Michael Dimock, *Defining Generations: Where Millennials End and Post-Millennials Begin*, PEW RES. CTR. (Mar. 1, 2018), <http://www.pewresearch.org/fact-tank/2018/03/01/defining-generations-where-millennials-end-and-post-millennials-begin/> [https://perma.cc/GU6D-J6EC].

61. See *infra* note 69 and accompanying text.

62. COACHELLA, <https://www.coachella.com/passes> [https://perma.cc/7MZC-9E94] (Admission to Coachella's 2019 festival is \$429 for general admission and \$999 for a VIP pass.).

63. *Id.* (Camping packages for Coachella's 2019 festival range from \$125 to \$9,500.).

64. *How Far Have Fans Traveled to See the Artists They Love?*, TICKETMASTER (Oct. 20, 2015) [hereinafter *How Far Have Fans Traveled*], <https://blog.ticketmaster.com/concert-road-trips/> [https://perma.cc/Q7TX-F83E]; see also Second Am. Compl., *supra* note 30, at 10.

65. Megan Leonhardt, *What It Really Costs to Attend Coachella*, MONEY (Apr. 9, 2018, 1:37 PM), <http://time.com/money/4294043/cost-of-coachella/> [https://perma.cc/4HYT-G8K5]; see also Second Am. Compl., *supra* note 30, at 10.

66. Andy Hermann, *Coachella Is Already Sold Out*, LA WEEKLY (Jan. 4, 2017, 2:56 PM), <https://www.laweekly.com/music/coachella-is-already-sold-out-7784292> [https://perma.cc/PWB8-NUVC].

67. Ryan Castillo, *Coachella 2018 Sells out Both Weekends in Record Time*, DANCING ASTRONAUT (Jan. 6, 2018), <https://dancingastronaut.com/2018/01/coachella-2018-sells-weekends/> [https://perma.cc/48YW-BSBX].

68. Second Am. Compl., *supra* note 30, at 16.

69. See Reddy, *supra* note 60.

Today, the popular festivals are able to sell out just hours after they start selling tickets. Sponsors and advertisers are willing to spend millions of dollars to target what they know is a truly captive audience, for a whole weekend. Music festival sponsorship spending has been growing exponentially over the last couple of years. According to IEG, LLC, North American-based companies spent more than \$1.5 billion sponsoring music venues, festivals and tours in 2014, a 4.4% increase from 2013. The biggest sponsor, beer-manufacturer Anheuser-Busch, is partnered with 31% of U.S. music festivals followed by PepsiCo, Coca-Cola, Heineken and Red Bull.

Id.

promoters are able to: (1) afford bigger, more popular artists; (2) compensate these artists in exchange for agreeing to increasingly restrictive radius clauses;⁷⁰ (3) which attract sold out crowds;⁷¹ (4) that attract lucrative corporate sponsorships;⁷² (5) which increases the large-scale promoter's ability to expand. Further, because large-scale promoters control multiple festivals and concerts, a large-scale promoter may waive their radius clauses, allowing an artist to perform without penalty at a different festival or concert that the promoter also controls.⁷³ This pervasive cycle feeds the intensification of radius clauses, leading to more legal challenges, and criticisms that radius clauses used by music festivals violate Section 1.⁷⁴ Advocates attempting to bring a successful Section 1 challenge to radius clauses used by large music festivals must be familiar with how present-day courts analyze Section 1 claims; specifically, advocates must be prepared to apply the live music industry to the rule of reason analysis.

III. HOW COURTS ANALYZE RADIUS CLAUSES FOR SECTION ONE OF THE SHERMAN ANTITRUST ACT CLAIMS

A. Section One of the Sherman Antitrust Act

In 1890, the Sherman Antitrust Act was passed “to protect the public from the failure[s] of the market . . . not against conduct which is competitive . . . but against conduct which unfairly tends to destroy competition itself.”⁷⁵ Under Section 1, every contract that restrains interstate trade or commerce is deemed unlawful.⁷⁶ And, in general, American courts disfavor restraints on trade, like radius clauses, because society values competition more than an ability to contract.⁷⁷ Therefore, a

70. See Bain, *supra* note 3.

71. See Hermann, *supra* note 66; Castillo, *supra* note 67.

72. *Id.*

73. See Second Am. Compl., *supra* note 30, at 21–24; Bain, *supra* note 3.

74. See *supra* notes 26–32 and accompanying text.

75. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

76. See Sherman Antitrust Act, 15 U.S.C. § 1 (2012). Section 1 of the Sherman Antitrust Act: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id.

77. Richard A. Kaye, *Cause of Action to Enforce Noncompetition Covenant in Employment Contract*, in 36 CAUSES OF ACTION 2d 103, § 6 (2008), available at Westlaw 36 COA2d 103 (through Mar. 2019) (citing Genzyme Corp. v. Bishop, 460 F. Supp. 2d. 939 (W.D. Wis. 2006)).

strict reading of Section 1 would exact that any restrictive covenants—like the radius clauses used by music festival promoters—are, on their face, a violation of Section 1 because the temporal and geographical restrictions specified in the radius clauses prohibit an artist from performing in several states, restricting the supply of artists across those states. For example, Lollapalooza music festival in Chicago, Illinois, used radius clauses that prohibited artists from performing for up to 270 days within a 300-mile radius of Chicago,⁷⁸ preventing artists from performing at festivals and concerts in Kentucky, Michigan, Minnesota, Missouri, Ohio, and Wisconsin.⁷⁹

However, the intent of the Sherman Antitrust Act was to provide guiding principles for facilitating competitive activities and leave room for courts to determine the legality of particular conduct.⁸⁰ Indeed, in the 1897 case *United States v. Trans-Missouri Freight Ass'n*, the Supreme Court discussed the Sherman Antitrust Act, indicating that it may only prohibit *unreasonable* restraints of trade.⁸¹

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not

78. Gwee, *supra* note 3.

79. *Id.*

80. See *Standard Oil Co. v. United States*, 221 U.S. 1, 59–60 (1911). In discussing Section 1, the Court wrote:

And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

Id. at 60. Additionally, the Supreme Court, since as early as 1871, has recognized legitimate objectives for imposing restrictive covenants and began upholding such covenants when the restrictions did not pose an oppressive burden and when reasonable grounds existed for imposing the restriction. Or. Steam Navigation Co. v. Winsor, 87 U.S. 64, 68 (1874) (holding that a non-compete contract is valid when the public is not deprived of the restricted party's industry, when the party restricted is not prevented from pursuing their occupation, and when reasonable grounds of benefit exists to the other party); see also Gogel, *supra* note 10, at 91.

81. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327–28 (1897). And in 1911, the Court held the Sherman Antitrust Act only prohibits unreasonable restraints on trade. *Standard Oil Co.*, 221 U.S. at 59–60.

mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade . . . the common-law meaning of the term “contract in restraint of trade” includes only such contracts as are in unreasonable restraint of trade⁸²

Today, in order to establish a Section 1 violation, three elements must be met: (1) an agreement must exist (2) that affects interstate commerce and (3) that *unreasonably* restrains trade.⁸³ Therefore, radius clauses used in the live music industry violate Section 1 when a court finds their restraint on trade unreasonable.

Further, in 1918, in *Chicago Board of Trade v. United States*, the Court upheld a restraint on trade,⁸⁴ and in doing so, provided guidance for determining when a restraint is unreasonable. Delivering the opinion for the Court, Justice Brandeis articulates one of the earliest formulations of what is commonly referred to today as the “rule of reason” analysis:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.⁸⁵

Therefore, according to Justice Brandeis, radius clauses used in the live music industry will not violate Section 1 when they merely regulate, “and perhaps thereby promote[] competition,” rather than “suppress or even destroy competition.”⁸⁶ But how will today’s courts analyze radius clauses to determine if they are reasonable or unreasonable restraints on trade?

Today, courts analyze Section 1 claims and, depending on the circumstances of the case, determine the reasonableness of a restraint after applying one of the following: a per se rule, a “quick-look” analysis, or a rule of reason analysis.⁸⁷ Generally, courts find that a restraint on trade is a per se violation of Section 1 when the restraint has “such predictable and

82. *Id.*

83. *SFX React-Operating LLC v. Eagle Theatre Entm’t, LLC*, No. 16-13311, 2017 WL 3616562, at *6 (E.D. Mich. Aug. 23, 2017) (citing *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983)).

84. *See generally* *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918).

85. *Id.* at 238.

86. *Id.*

87. *See SFX*, 2017 WL 3616562, at *7–11.

pernicious anticompetitive effects and such limited potential for procompetitive benefit”⁸⁸ that the restraint “would always or almost always tend to restrict competition and decrease output,”⁸⁹ and when the court can predict—with confidence—that a rule of reason analysis would condemn the restraint as unreasonable⁹⁰ (e.g., when a court previously reviewed the same restraint using a rule of reason analysis and found that the restraint unreasonably suppressed competition⁹¹). Overall, a court need not engage in an elaborate industry analysis to demonstrate the restraint’s anticompetitive character when it finds a restraint per se unreasonable.⁹² Therefore, it is unlikely that a court, in the near future, will find a promoter’s radius clauses per se unreasonable (1) because justifications, or procompetitive benefits, exist for using radius clauses (i.e., to protect large, up-front investments made by promoters),⁹³ and (2) because a court has not yet reviewed, and found illegal, radius clauses using a rule of reason analysis.⁹⁴

Similar to the per se rule, a quick-look analysis does not require an elaborate industry analysis; however, a court will take a “quick-look” at the defendant’s procompetitive justification before finding a restraint unreasonable.⁹⁵ Indeed, a quick-look analysis is appropriate when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive

88. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *see also SFX*, 2017 WL 3616562, at *6.

89. *See In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003); *see also Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 103–04 (1984) (“Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *SFX*, 2017 WL 3616562, at *6.

90. *See Khan*, 522 U.S. at 10; *see also SFX*, 2017 WL 3616562, at *6.

91. *See SFX*, 2017 WL 3616562, at *6 (citing *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 271 (6th Cir. 2014)).

92. *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (drawing a distinction between restraints that are per se illegal and restraints requiring a rule of reason analysis, the Court finds that “agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality” are illegal per se).

93. *See Motion to Dismiss at 26–27, Soul’d Out Prods., LLC v. Anschutz Entm’t Grp., Inc.*, No. 3:18-cv-00598-MO (D. Or. June 25, 2018) [hereinafter *Mot. Dismiss*]; *Bain*, *supra* note 3; *Gwee*, *supra* note 3; *Muhlberg*, *supra* note 7.

94. Indeed, only two claims have been brought before a court alleging that a live music promoter’s use of a radius clause is a violation of Section 1: in one case, the court held “that Defendants have not alleged facts that would place this case into one of the limited categories that have been collectively deemed per se anticompetitive,” *SFX*, 2017 WL 3616562, at *7 (engaging, on a motion for summary judgment, a rule of reason to analyze the radius clauses used by a music promoter and finding that the plaintiff established a prima facie antitrust case; however, the motion to dismiss was granted on successor liability and bankruptcy reorganization grounds), and in the other, the plaintiff did not allege a per se violation, Second Am. Compl., *supra* note 30 (this case is currently in the pleading stage).

95. *See SFX*, 2017 WL 3616562, at *7.

effect on customers and markets.”⁹⁶ But when the defendant’s justification for a restraint is “not easily rejected” by the court, the court will not find the restraint unreasonable under a quick-look analysis, but will proceed to the more elaborate rule of reason analysis.⁹⁷ Like the per se rule above, courts are unlikely to find radius clauses used in the live music industry unreasonable under a quick-look analysis because live music promoters can offer at least two justifications that are not easily rejected: (1) “to protect attendance at [the promoter’s festival or concert] . . . from being diminished by fans attending another performance of a featured artist elsewhere around the same date” and location;⁹⁸ and (2) “to protect [the promoter] from competitors unfairly free-riding on its creative choices in selecting its artist lineup and its investment in ensuring those artists will come to” a specific geographical location at a specific time.⁹⁹ Therefore, it is likely that before a court determines whether radius clauses are unreasonable restraints on trade—and, if so, under what circumstances—it will apply a rule of reason analysis.¹⁰⁰

Unlike the per se rule and the quick-look analysis, the rule of reason analysis “utilizes a burden-shifting framework that allows the court to ‘analyze the history of the restraint and the restraint’s effect on competition.’”¹⁰¹ This burden-shifting framework consists of three stages. First, the “plaintiff has the initial burden to prove” the restraint on trade

96. *Id.* (citing examples first from *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 99–100 (1984) (“[T]he league’s television plan expressly limited output . . . and fixed a minimum price.”); then citing *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 692 (“[T]he restraint was ‘an absolute ban on competitive bidding.’”); and then citing *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (“[T]he restraint was ‘a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire[d].’”)).

97. *Id.* (“[T]he procompetitive justification proffered by [defendant] . . . is not as easily rejected. The Court next turns to the rule of reason analysis.”).

98. *Id.* at *2.

99. Mot. Dismiss, *supra* note 93, at 26–27.

100. Indeed, in *SFX*, this is exactly what the court determined. *See SFX*, 2017 WL 3616562, at *7. And interestingly, in the pending case against AEG’s use of radius clauses for the 2018 Coachella, plaintiff Soul’d Out alleged that AEG violated Section 1 under a quick-look analysis because the radius clauses placed a “naked restraint” on the supply of artists, which limited output, decreasing the quality of both music festivals and concerts within the scope of the radius. *See* Second Am. Compl., *supra* note 30, at 35–36. However, Soul’d Out additionally alleged that AEG had no justification that could offset the anticompetitive effects of its radius clauses. *Id.* But Soul’d Out’s allegation will not likely be accepted by a court for the simple reason that AEG did offer a justification, and AEG’s justification likely requires examination under a rule of reason analysis before its offsetting potential can be credibly determined. For AEG’s justification, see *supra* note 99 and accompanying text.

101. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 271–72 (6th Cir. 2014) (quoting *Nat’l Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)); *see also SFX*, 2017 WL 3616562, at *7. Notice the similarity between the language employed in *National Hockey League Players’ Ass’n* and Justice Brandeis’ articulation of the rule of reason in 1918. *See supra* note 85 and accompanying text.

“has a substantial anticompetitive effect that harms consumers in the relevant” product and geographic market.¹⁰² Second, if the plaintiff meets its burden, the burden then shifts to the defendant to show that the restraint’s procompetitive effects sufficiently justify the anticompetitive injuries of the restraint.¹⁰³ And third, if the defendant provides a sufficient justification, the plaintiff may prevail by showing that the defendant’s legitimate objectives, achieved by the restraint on trade, can be similarly achieved by less restrictive means.¹⁰⁴ At bottom, a rule of reason analysis should reveal whether radius clauses merely regulate and “promote competition,” or whether they “suppress or even destroy competition.”¹⁰⁵

As discussed above, it is unlikely that a court would apply a *per se* rule or quick-look analysis to determine whether radius clauses used in the live music industry unreasonably restrain competition; therefore, a court will likely subject a Section 1 challenge of a music festival’s radius clause to a rule of reason analysis. A court’s determination on whether a radius clause is, on balance, unreasonable will likely hinge on the advocacy and findings in three areas: (1) the definition of relevant product and geographic markets, (2) the showing of anticompetitive effects, and (3) the viability of promoter justifications. By examining two radius-clause cases,

102. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *see also In re Se. Milk Antitrust Litig.*, 739 F.3d at 272 (citing *Expert Masonry, Inc. v. Boone Cty.*, 440 F.3d 336, 343 (6th Cir. 2006)); *SFX*, 2017 WL 3616562, at *7.

103. *In re Se. Milk Antitrust Litig.*, 739 F.3d at 272 (citing *Expert Masonry*, 440 F.3d at 343); *see also Ohio*, 138 S. Ct. at 2284; *SFX*, 2017 WL 3616562, at *7.

104. *In re Se. Milk Antitrust Litig.*, 739 F.3d at 272 (citing *Expert Masonry*, 440 F.3d at 343); *see also Ohio*, 138 S. Ct. at 2284; *SFX*, 2017 WL 3616562, at *7. To illustrate how the rule of reason’s burden shifting framework would be applied to a music festival’s radius clause, imagine the following hypothetical: Bigfoot Music Festival (Bigfoot), located in Washington State, contracted with artists; as part of these contracts, artists were prohibited from performing at any festival or concert anywhere in Washington for ninety days before and after their performance at Bigfoot. The Soundbox is a concert venue located in Washington. Imagine that Bigfoot is a wild success and contracts with many popular artists, and further imagine that The Soundbox is struggling to attract popular artists to perform. Therefore, The Soundbox files a Section 1 claim alleging Bigfoot’s radius clauses restrict the supply of artists in the market for live music in Washington, and as a result, The Soundbox is no longer able to obtain artists who are sufficiently popular to sustain business, thus harming consumers of live music in Washington (because consumers now have one less venue to see live performances). If The Soundbox demonstrates that Bigfoot’s radius clauses have a substantial anticompetitive effect that harms consumers in the relevant product and geographic market, *see supra* note 102 and accompanying text, the burden shifts to Bigfoot to demonstrate its justification for using radius clauses. Bigfoot will argue that without radius clauses, The Soundbox—and every other festival and concert venue in Washington—would take advantage of the fact that Bigfoot already invests for most of the popular artists to travel to Washington because other festivals and concert venues will contract those same artists to perform in the days immediately before and after Bigfoot, thus diminishing consumer demand for Bigfoot. Unless The Soundbox can undermine Bigfoot’s justification or demonstrate that a less restrictive alternative exists for Bigfoot to protect its initial investment, Bigfoot’s radius clauses will not be considered a Section 1 violation.

105. *See SFX*, 2017 WL 3616562, at *7 (citing *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 n.10 (2010)) (internal citations omitted).

SFX React-Operating LLC v. Eagle Theatre Entertainment, LLC (SFX) and *Soul'd Out Productions, LLC v. Anschutz Entertainment Group, Inc. (Soul'd Out)*, insights into how attorneys and courts are currently thinking and analyzing these issues can be gained.

B. *SFX and Soul'd Out*

SFX and *Soul'd Out* are the only two examples of Section 1 challenges of radius clauses in the live music industry; as such, it is worth summarizing the facts and issues of each case.

In *SFX*, SFX React-Operating LLC (React) was a music festival, club, and concert promoter, and Eagle Theater Entertainment, LLC (Eagle) was a similar live music promoter.¹⁰⁶ As a counterclaim, Eagle alleged that the radius clauses used by React, when React entered into agreements with electronic dance music (EDM) artists to perform at React's EDM music festivals, were unreasonable and in violation of Section 1.¹⁰⁷ React specialized in promoting large EDM festivals and concerts in Chicago¹⁰⁸ and it used radius clauses in its agreements with approximately one hundred EDM artists. These radius clauses prohibited the EDM artists from playing anywhere within a 500-mile radius of React's events for periods of sixty, ninety, or 120 days prior to and following the date of React's events.¹⁰⁹ The U.S. Eastern District Court in Michigan applied a rule of reason analysis, finding that Eagle established a prima facie Section 1 case before it granted React's motion to dismiss Eagle's Section 1 antitrust counterclaim on successor liability and bankruptcy reorganization grounds.¹¹⁰

While *Soul'd Out* is still in the pleading stages, *Soul'd Out Productions*'¹¹¹ second amended complaint¹¹² builds a compelling case and is therefore worth discussing. *Soul'd Out Productions* is a live music promoter that promotes the annual *Soul'd Out Music Festival*.¹¹³ *Soul'd Out Music Festival* is a "multi-venue live music event in Portland, Oregon featuring a narrow set of genres, primarily those associated with 'soul music' such as jazz, reggae, hip-hop, funk, and blues."¹¹⁴

106. *SFX*, 2017 WL 3616562, at *1.

107. *Id.*

108. *Id.* at *2.

109. *Id.*

110. *Id.* at *11–12.

111. See generally *SOUL'D OUT MUSIC FESTIVAL*, *supra* note 29.

112. See generally *Second Am. Compl.*, *supra* note 30.

113. See *SOUL'D OUT MUSIC FESTIVAL*, *supra* note 29.

114. *Second Am. Compl.*, *supra* note 30, at 12.

In 2018, Soul'd Out Productions filed a complaint with the U.S. District Court in Oregon against five defendants (AEG)¹¹⁵ (the large-scale live music promoters responsible for promoting Coachella)¹¹⁶ alleging that Coachella's use of radius clauses (shown in Figure 1)¹¹⁷ violated Section 1.¹¹⁸ Specifically, Soul'd Out Productions alleges that AEG, as the second largest concert promoter in the United States, has the power to remove artists from the concert promoter market in the Pacific Northwest with its radius clauses that prohibit the performance and advertisement of festivals, themed events, and concerts in North America.¹¹⁹ Soul'd Out Productions alleges that Coachella's radius clauses harm it and other Pacific Northwest concert promoters, making them "unable to retain talent from the limited pool of artists on tour in their geographic market during the relevant season, driving up costs, and reducing the quality of their offerings to the public."¹²⁰

The district court's summary judgment analysis in *SFX* and the pleadings from *Soul'd Out* provide useful context for explaining and understanding the three most complex and likely contentious elements of determining whether specific radius clauses are unreasonable restraints of trade in violation of Section 1: defining relevant product and geographic markets, showing anticompetitive effects, and promoter justifications.

1. Defining Relevant Product and Geographic Markets

As part of demonstrating a Section 1 violation, plaintiffs generally must show that the defendant enjoyed market power in the relevant product and geographic markets.¹²¹ Market power is normally inferred when an entity possesses a substantial percentage of the relevant product and geographic markets.¹²² The more broadly a product or geographic market is defined, the more difficult it is to show that an entity possesses

115. *See id.* at 1.

116. *Coachella Valley Music & Arts Festival*, AEG, <https://www.aegworldwide.com/divisions/music/coachella-valley-music-arts-festival> [<https://perma.cc/PY9W-Z8XE>].

117. *See supra* Figure 1.

118. Second Am. Compl., *supra* note 30, at 38–67. Soul'd Out Productions also alleged that Coachella's use of radius clauses violated Oregon and California antitrust laws. *Id.*

119. *See id.* at 30–31. Soul'd out productions also alleges "Tying," "Quick Look," "Horizontal Restraint Among Festivals," a similar Section 1 claim alleging the "West Coast Market" in the alternative, and "Hub and Spoke" theories of Section 1 antitrust claims. *See id.* at 32–38. However, such theories are outside the focus of this Note.

120. *Id.* at 38.

121. *See SFX React-Operating LLC v. Eagle Theatre Entm't, LLC*, No. 16-13311, 2017 WL 3616562, at *10 (E.D. Mich. Aug. 23, 2017) (citing Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 530–31 (6th Cir. 2001)).

122. *See id.* at *10 (citing *Mfrs. Supply Co. v. Minn. Mining & Mfg. Co.*, 688 F. Supp. 303, 307 (W.D. Mich. 1988)).

market power.¹²³ And without market power, an entity cannot have an anticompetitive effect in violation of Section 1.¹²⁴ Therefore, carefully defined relevant product and geographic markets are critical to show a Section 1 violation.

A relevant geographic market can be defined as the “area of effective competition” in which the defendant competes.¹²⁵ For example, the *SFX* court considered the nature of the EDM concert industry, finding that since concerts are a service industry, convenience is an important driver. Thus, the court concluded that it can be reasonably inferred that most concertgoers are from areas within Metro Detroit (the area in which both React and Eagle promoted the festivals and concerts that were the subject of Eagle’s Section 1 claims).¹²⁶ While the radius clauses that React used specified a 500-mile geographic radius, the court found the relative geographic market to be Metro Detroit, a significantly smaller geographic range, because Metro Detroit was the geographic range in which both React and Eagle competed for concertgoers.¹²⁷ In *Soul’d Out*, Soul’d Out Productions alleges that the Pacific Northwest (i.e., Washington and Oregon) is the relevant geographical market:

Ticket revenues from Soul’d Out Productions’ concerts establish that hard-ticket concert consumers in Washington and Oregon are willing to commute approximately 3–5 hours to see concerts—roughly the distance from Seattle to Portland. Hard-tickets sold for the Soul’d Out Music Festival’s individual concerts are mostly purchased from customers throughout Washington and Oregon. TicketMaster’s study showed that the average concert attendee travels 43 miles to see a

123. See, e.g., *Int’l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 249–52 (1959) (finding that the defendant’s market power would diminish as the relevant product market is broadened to include more boxing matches).

124. *Davis-Watkins Co. v. Serv. Merch.*, 686 F.2d 1190, 1202 (6th Cir. 1982).

125. See *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 299 n.5 (1949). Justice Frankfurter discussed in a footnote the purpose and methodology for defining relevant geographic markets:

It is clear, of course, that the ‘line of commerce’ affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area. Although the effect on competition will be quantitatively the same if a given volume of the industry’s business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area’s competitors. Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition.

Id.

126. See *SFX*, 2017 WL 3616562, at *10.

127. See *id.* at *10–11.

concert, and 10% of buyers have traveled more than 100 miles to see a show.¹²⁸

Similar to *SFX*, Soul'd Out Productions alleges a geographic market substantially smaller than the scope specified in Coachella's radius clauses, which cover California, Nevada, Oregon, Washington, and Arizona.¹²⁹ From *SFX* and *Soul'd Out*, it appears that relevant geographic markets in the live music industry are defined by the average distance that festivalgoers or concertgoers are willing to travel to attend the music festival or concert.

A relevant product market exists when products have reasonable interchangeability.¹³⁰ Therefore, relevant product markets turn on the availability of substitutes.¹³¹ And the availability of substitutes involves an analysis of the cross-elasticity of market demand (e.g., as the prices of a weekend music festival pass for festival X increases, festivalgoers will readily switch to purchasing a similar pass to music festival Y).¹³² Moreover, different markets can exist with a distinction between products in degree, as opposed to a distinction between products in kind; for antitrust challenges, this distinction means that a submarket may be considered a separate market.¹³³ For example, in *SFX*, the court found that "nationally recognized EDM artists" are a submarket with distinct qualities because nationally recognized EDM artists require specific venues, attract a specific crowd that seeks EDM music, and often work with certain EDM promoters.¹³⁴ Citing *Nobody In Particular Presents, Inc. v. Clear Channel Communications, Inc.*, the *SFX* court compared EDM concerts to rock concerts, asserting that rock concerts have a distinct customer base, and non-rock concerts are not substitutes for rock concertgoers.¹³⁵

128. Second Am. Compl., *supra* note 30, at 30 (citing *How Far Have Fans Traveled*, *supra* note 64).

129. *See supra* Figure 1.

130. *See SFX*, 2017 WL 3616562, at *9 (citing *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 933 (6th Cir. 2005)); *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 467 (1992); *Todd v. Exxon Corp.*, 275 F.3d 191, 199–200 (2d Cir. 2001)).

131. *See id.* (citing *Nobody In Particular Presents, Inc. v. Clear Channel Comm'ns, Inc.*, 311 F. Supp. 2d 1048, 1075 (D. Colo. 2004)).

132. *Id.*

133. In finding a submarket, boundaries do exist when: (1) the industry and public recognition of the submarket as a separate economic entity exists and (2) when products with unique and distinct uses, qualities, processes, price sensitivities, production facilities, consumers, and vendors exist. *Id.* (citing *Nobody In Particular Presents*, 311 F. Supp. 2d at 1081).

134. *See id.* at 10–11.

135. *Id.* at 10 (citing *Nobody In Particular Presents*, 311 F. Supp. 2d at 1084).

However, in *Soul'd Out*, Soul'd Out Productions distinguishes between “the concert tour market” and “the concert festival market.”¹³⁶ The concert tour market is comprised of the live performances that artists book with concert venue promoters as part of their concert tour.¹³⁷ Each performance (or concert) features the artist, and ticket sales are directly traceable to the artist (i.e., “hard-ticket sales”).¹³⁸ Further, concert promoters seek to enter into contracts with artists from any and all music genres.¹³⁹ However, the concert festival market is comprised of “large open-air events hosted over a few days or weeks in a single outdoor venue[, t]ypically, these large, outdoor festivals feature artists that span a variety of music genres.”¹⁴⁰ Outdoor festivals offer a consumer experience different from single concerts.¹⁴¹ Customers will pay more and travel greater distances to experience such festivals than they would for a single concert.¹⁴² And, because these large music festivals often can sell out before the artists to perform are announced, ticket sales are not traceable to any single artist but, rather, to the music festival itself (i.e., “soft-ticket” sales).¹⁴³ According to Soul'd Out Productions, hard-ticket concerts do not generally compete with soft-ticket festivals.¹⁴⁴

Once the relevant product and geographic markets are defined, the court can determine whether the defendant enjoys market power, which is normally inferred when an entity possesses a substantial percentage of the relevant markets.¹⁴⁵ In *SFX*, once the court defined the relevant market as nationally recognized EDM artists performing in Metro Detroit, the court found that given the vast number of EDM artists who React contracts with and given the scope of its radius clauses, React had substantial control of the relevant market (finding that React controlled where and when nationally recognized EDM artists could perform and whether it would waive radius clauses).¹⁴⁶ In *Soul'd Out*, Soul'd Out alleges that AEG, “the second largest presenter of live music and entertainment events in the world,” wields “substantial power in the music concert markets in the

136. See Second Am. Compl., *supra* note 30, at 8–11.

137. See *id.* at 8.

138. See *id.* at 8–9.

139. See *id.* at 9.

140. *Id.*

141. *Id.*; see also *supra* notes 58–60 and accompanying text.

142. See Second Am. Compl., *supra* note 30, at 10; see also *supra* notes 62–65 and accompanying text.

143. See Second Am. Compl., *supra* note 30, at 10–11; see also *supra* notes 67–69 and accompanying text.

144. See Second Am. Compl., *supra* note 30, at 11.

145. See *SFX React-Operating LLC v. Eagle Theatre Entertainment, LLC*, No. 16-13311, 2017 WL 3616562, at *10 (E.D. Mich. Aug. 23, 2017) (citing *Mfrs. Supply Co. v. Minn. Mining & Mfg. Co.*, 688 F. Supp. 303, 307 (W.D. Mich. 1988)).

146. See *SFX*, 2017 WL 3616562, at *11.

Pacific Northwest.”¹⁴⁷ Primarily, AEG’s market power is attributed to its ownership of many concert venues, its ownership of many music festivals, its ability to operate a ticketing company, and its ability to be the exclusive promoter for several artists.¹⁴⁸

It is important to note that “market definition is a deeply fact-intensive inquiry,”¹⁴⁹ requiring “inquiry into the commercial realities faced by the consumers.”¹⁵⁰ So while the market definitions and subsequent market power findings in both *SFX* and *Soul’d Out* may seem logical, a plaintiff would need to verify the existence of such markets before either definition would be accepted by a court—a task easier said than done.

Specific, relevant market definitions are not only essential to framing market power analysis but are equally critical to show anticompetitive effects.

2. Showing Anticompetitive Effects

Additionally, to demonstrate a Section 1 violation, the plaintiff must also show that the restraint on trade had adverse or anticompetitive effects in the relevant market.¹⁵¹

The court in *SFX* found it plausible that the radius clauses used by React had anticompetitive effects in the market for nationally recognized EDM artists in Metro Detroit.¹⁵² In *SFX*, Eagle argued that when React contracted with hundreds of EDM artists, using radius clauses that prohibited the artists from performing (and advertising for) festivals and concerts within a 500-mile radius, those restrictions placed other concert promoters in the 500-mile radius in an unfair position.¹⁵³ Specifically, other concert promoters were forced to either forgo contracting with many EDM artists or they had to agree to React’s harsh co-promotion agreements.¹⁵⁴ Therefore, the effects of React’s radius clauses (1)

147. Second Am. Compl., *supra* note 30, at 13.

148. *Id.* at 13–16; *see also* AEG, <https://www.aegworldwide.com/divisions/music> [<https://perma.cc/9DTT-GD33>].

149. *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001).

150. *SFX*, 2017 WL 3616562, at *9.

151. *Id.* at 11 (quoting *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1014 (6th Cir. 2005) (“[B]ecause the Sherman Act was intended to protect competition and the market as a whole, not individual competitors . . .”).

152. *See id.* at 9.

153. *Id.* at 8–9.

154. React offered to allow EDM artists to perform at concerts and festivals that would otherwise be in violation of React’s radius clauses *if* the promoters and owners of these concerts and festivals entered into a co-promotion agreement with Eagle. *Id.* In the co-promotion agreements, React waived an artist’s radius clause in exchange for fifty percent of the profit made at the concert or festival the artist performed at. *Id.*

increased the price and cost of competition among EDM concert venues;¹⁵⁵ (2) limited entry of new competitors into the EDM market and limited the ability of current competitors to expand; and (3) raised concert ticket prices for consumers as a natural response to increased costs for promoters.¹⁵⁶

Similarly, in *Soul'd Out*, Soul'd Out Productions alleges that "AEG is reducing the supply of artists, which increases the costs for other festivals, limits consumer choice, and reduces artist, promoter, venue, and agent income."¹⁵⁷ In support, Soul'd Out Productions cites three large music festivals (Langerado, Monolith, and Sasquatch!) within Coachella's geographic and temporal radius clause restrictions that have shut down in response to decreases in ticket sales and festival attendance.¹⁵⁸ Additionally, Soul'd Out Production cites to a 2017 *LA Weekly* article that discusses how radius clauses used by the largest music festival decrease the quality of other music festivals and harm smaller, less well-known artists that perform at music festivals after agreeing to the radius clauses in their performance contracts.¹⁵⁹ Further, Soul'd Out Productions cited the published findings of Scott Hiller's study of the economic effects that large festival radius clauses have on concert venues located within the radius clauses' specific geographical restraints.¹⁶⁰

By comparing concert venues located within the geographical radius specified in the radius clauses of four American music festivals against concert venues located outside the same geographical radiuses, Hiller's study revealed that concert venues located within the geographical radiuses were 7% to 28% more likely to shut down than concert venues located outside of the geographical radiuses.¹⁶¹ Because one of the four music festivals¹⁶² included in Hiller's study was Coachella, Hiller's study offers strong support that Coachella's radius clauses have anticompetitive effects on concert venue promoters.¹⁶³ Further, Hiller's study offers strong support for the assertion that radius clauses with broad temporal and

155. *Id.*

156. *Id.*

157. Second Am. Compl., *supra* note 30, at 18.

158. *Id.*

159. *Id.* at 19–21 (quoting from Bain, *supra* note 3).

160. *Id.* (citing Hiller, *supra* note 20).

161. Hiller, *supra* note 20, at 154.

162. The four largest music festivals from Hiller's study are: Coachella (Indio, CA), Austin City Limits (Austin, TX), Bonnaroo (Manchester, TN), and Lollapalooza (Chicago, IL). *Id.* at 155. All four of the festivals that Hiller studied are controlled by large-scale festival promoters: Live Nation Entertainment controls Lollapalooza, Austin City Limits, and Bonnaroo; and AEG Live controls Coachella. See Sisario, *supra* note 55.

163. Hiller, *supra* note 20, at 172.

geographic restrictions have anticompetitive effects on the concert tour market.

From both *SFX* and *Soul'd Out*, it seems possible that large music festivals that use radius clauses with broad geographic and temporal restrictions could cause a decrease in the supply of artists available to other music festival and concert venue promoters. This could cause both a decrease in the quantity and quality of live music performances available to consumers and an increase in consumer prices (a natural response to a decrease in supply). However, similar to defining a relevant market, a plaintiff must verify such allegations at trial; no doubt this would be a burdensome undertaking.

Assuming a plaintiff successfully shows that a radius clause used by a large music festival has an anticompetitive effect in the relevant market, in addition to showing the other four elements of a prima facie Section 1 case, the rule of reason analysis burden-shifting framework would then place the burden on the defendant to demonstrate that any anticompetitive effects of the radius clauses are justified, and thus not unreasonable restraints.¹⁶⁴

3. Promoter Justifications

If a large music festival promoter can show that radius clauses promote rather than suppress competition, the anticompetitive effects of the radius clauses will be justified—and therefore not a Section 1 violation.¹⁶⁵ Unfortunately in *SFX*, because the court was deciding a motion for summary judgment, the court never discussed the viability of React's justification for its use of radius clauses.¹⁶⁶ However, in its quick-look analysis, the *SFX* court acknowledges React's justification: “[T]o protect attendance at React's events from being diminished by fans attending another performance of a featured artist elsewhere near the same date and location.”¹⁶⁷ The court adds that this justification “is not as easily rejected.”¹⁶⁸

In *Soul'd Out*, AEG justifies its use of radius clauses for its 2018 Coachella music festival¹⁶⁹:

While Plaintiff asserts that the clause is “unreasonable,” this allegation is conclusory, and undercut by Plaintiff's own allegations,

164. See *SFX React-Operating LLC v. Eagle Theatre Entm't, LLC*, No. 16-13311, 2017 WL 3616562, at *7 (E.D. Mich. Aug. 23, 2017).

165. Hiller, *supra* note 20, at 158.

166. See *generally SFX*, 2017 WL 3616562.

167. *Id.* at 7.

168. *Id.*

169. See *supra* Figure 1.

which show that the clause affords fair protection to AEG's interests. The entire purpose of the radius clause is to protect AEG from competitors unfairly free-riding on its creative choices in selecting its artist lineup and its investment in ensuring those artists will come to the West Coast to play at the Coachella festival. As more festivals proliferate, maintaining a unique festival lineup is crucial for Coachella to remain competitive. And, as Plaintiff alleged, promoters incur substantial costs to compensate artists from all over the world for their travel and other expenses to perform at festivals. Plaintiff's initial Complaint conceded the reasonableness of the radius clause by explaining that the radius clause prevented Plaintiff from free riding on AEG's investment, requiring Plaintiff to "pay more money to bring artists in who are not already scheduled to be on the West Coast during Plaintiff's festival." Because the Soul'd Out Festival overlaps with Coachella, Plaintiffs are uniquely situated to profit off of AEG's investment in Coachella by saving the costs AEG expended to bring artists to the West Coast. As the allegations in the Complaint show, the radius clause is tailored to protect these interests. It is restricted to performances at festivals or themed events—not all concerts—for less than five months surrounding the time of Coachella. The clause only restricts non-festival or themed performances in the counties immediately surrounding Coachella.¹⁷⁰

AEG not only justifies its use of radius clauses,¹⁷¹ it also anticipates the rule of reason's burden-shifting framework¹⁷² and argues its radius clauses are appropriately tailored to restrict artists from performing only at festivals and themed events.¹⁷³ However, while the radius clauses AEG used for the 2018 Coachella do not prohibit "all concerts,"¹⁷⁴ they do prohibit artists from advertising, publicizing, or leaking "[a]ny tour dates in the states of California, Arizona, Washington and Oregon until January 10, 2018 or when festival is announced, whichever is sooner."¹⁷⁵ According to AEG, a concert promoter in Seattle, Washington, is free to contract an artist for a performance within weeks of the 2018 Coachella, but that promoter is restricted in their ability to advertise or publicize the performance—one must ask why a promoter would contract an artist that they cannot tell their customers about.

In both *SFX* and *Soul'd Out*, the justifications for the restraints on trade that radius clauses create seem credible. As illustrated by the

170. Mot. Dismiss, *supra* note 93, at 26–27 (citations omitted).

171. I.e., to protect against competitor free-riding.

172. I.e., that Soul'd Out Productions would have an opportunity to argue Coachella's radius clauses are more restrictive than necessary to protect its legitimate objectives.

173. See Mot. Dismiss, *supra* note 93, at 26–27.

174. *Id.*

175. See *supra* Figure 1.

promoters of Woodstock, putting on a large music festival is a risky endeavor, requiring large, up-front investments.¹⁷⁶ If other music festival and concert promoters in the relevant geographic market were free to take advantage of an investing music festival's efforts and, simultaneously, diminish the investing festival's customer base, then eventually the investing music festival would either shut down or lose incentive to invest in future music festivals.

Once a defendant offers viable justifications for otherwise anticompetitive effects of the restraint on trade, the rule of reason analysis shifts one last time to the plaintiff to show that any legitimate objectives the defendant has for utilizing the restraint on trade can be achieved by substantially less restrictive means.¹⁷⁷ Part IV below offers insight into how a plaintiff could show substantially less restrictive means by defining two specific ways that a large music festival promoter's radius clauses may restrict more competition than is necessary to protect its legitimate objectives.

IV. DEFINING UNREASONABLE RADIUS CLAUSES

As large music festivals continue to grow,¹⁷⁸ the radius clauses that they employ will likely continue to intensify, both in their temporal and geographical restrictions. Therefore, it seems inevitable that a court will subject radius clauses used by large music festivals to a rule of reason analysis. When courts review radius clauses, they should find that some radius clauses used by large music festivals, like the ones used by the 2018 Coachella,¹⁷⁹ are overbroad and therefore violate Section 1. Radius clauses used by large music festivals violate Section 1 when they: (1) prohibit artist performances beyond the music festival's geographic market and (2) do not effectively distinguish between concert performances and festival performances, which should, in most cases, be distinguished as different product markets. In both instances, the radius clauses restrict more than is necessary to protect large music festivals' legitimate objectives.

First, radius clauses used by large music festivals are unreasonable restraints on trade when they specify a geographical radius that exceeds the distance that consumers travel to attend a music festival or concert. Courts should be critical of a music festival radius clause that arbitrarily extends far beyond the average distance that a consumer will travel, because such restrictions cannot be justified by the promoter's need to

176. See *supra* note 47 and accompanying text.

177. See *SFX React-Operating LLC v. Eagle Theatre Entm't, LLC*, No. 16-13311, 2017 WL 3616562, at *7 (E.D. Mich. Aug. 23, 2017).

178. See generally *supra* notes 49–56 and accompanying text.

179. See *supra* Figure 1.

protect ticket sales. Indeed, it seems that current music festival radius clauses specify broad geographic radiuses without careful, data-driven consideration for the area of effective competition that they need to protect.

For example, the 2018 Coachella radius clauses specify broad and far-reaching geographical restrictions that restrict beyond the distance that consumers are likely to travel. The 2018 Coachella radius clauses state that artists shall not perform “[o]n any North American Festival” or advertise, publicize, or leak any festival, themed event, or tour date in California, Arizona, Washington, and Oregon.¹⁸⁰ Coachella, located in Indio, California, is over 1,200 miles from Seattle, Washington.¹⁸¹ Yet according to Ticketmaster, a ticket sales and distribution company, the average festival attendee will travel only 903 miles to attend a large music festival,¹⁸² and the average attendee of a concert will travel only 43 miles.¹⁸³ Therefore, the 2018 Coachella radius clauses’ prohibitions that impact artists contracted to perform a concert in Seattle extend beyond the legitimate objectives for Coachella’s radius clauses. And although Coachella may feel the need to protect ticket sales from consumers outside the 903-mile distance the average consumer will travel, the prohibition on performing “any North American Festival” certainly reaches far beyond 903 miles or any radius of effective competition. Therefore, courts should be critical of the specific geographical restrictions that large music festival radius clauses specify, asking whether the geographical restrictions unjustifiably exceed the geographical distance that consumers are likely to travel to attend the festival.

Second, radius clauses used by large music festivals unreasonably restrain trade when they do not effectively distinguish between concert performances and festival performances, which should, in most cases, be distinguished as different product markets. Therefore, when a large music festival radius clause prohibits artists from performing or advertising for a concert, this restriction should be considered overbroad because it seeks to restrain trade in a product market that does not compete for its ticket sales. A relevant product market exists when products have reasonable interchangeability,¹⁸⁴ which involves an analysis of the cross-elasticity of market demand.¹⁸⁵ For example, a consumer shopping for a European

180. *See supra* Figure 1.

181. Driving Directions from Indio, California to Seattle, Washington, GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search starting point field for “Indio, California” and search destination field for “Seattle, Washington”).

182. Leonhardt, *supra* note 65.

183. *Id.*

184. *See supra* notes 130–35 and accompanying text.

185. *See supra* notes 130–35 and accompanying text.

sports car is unlikely to view an American pick-up truck as a reasonable substitute. Likewise, in *Soul'd Out*, Soul'd Out Productions made a compelling case that concert performances are not a reasonable substitute for music festivals.¹⁸⁶ At bottom, Soul'd Out Productions argues that although both music festivals and concerts feature live performances from musical artists, today's large music festival promoters have created a new product—the large American music festival—that offers consumers a distinct experience from a concert performance.¹⁸⁷ As such, prohibiting artists from performing in a different product market, i.e., concert performances, is outside the scope of a music festival's relevant product market (or the market it expects competition from) and therefore should be deemed an overbroad and unreasonable restraint on trade in violation of Section 1.

Indeed, Soul'd Out Productions' argument is rooted in relevant antitrust law. For example, in *International Boxing Club of New York, Inc. v. United States*, the Supreme Court found that “championship boxing contests” constituted a separate relevant market from “all professional boxing events,” noting that, while both products share physical identities likely to place them in the same market, (1) the average revenue that championship boxing contests generate are significantly greater than other professional boxing events and (2) those in the business verified that a special, greater demand existed for viewing championship boxing contests.¹⁸⁸ Similarly, there can be no question that large music festivals like Coachella generate gross revenues far exceeding even the most successful concert performance venues.¹⁸⁹ Further, as discussed above, large music festivals additionally attract revenue from corporate sponsors eager to tap into a captive millennial audience.¹⁹⁰ And the demand for large music festivals is unique from concert performances because customers are willing to pay more and travel farther to attend large music festivals than concert performances.¹⁹¹ Moreover, large music festivals sell out before the artists to perform are announced,¹⁹² which strongly supports the argument that music festival customers demand the festival experience

186. See generally Second Am. Compl., *supra* note 30.

187. *Id.*

188. See *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 249–52 (1959); see also *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 111–12 (1984) (finding that broadcasting college football games on television constitutes a separate product market from other broadcasting and professional football).

189. See *supra* note 53 and accompanying text.

190. See *supra* note 69 and accompanying text.

191. See *supra* notes 62–65 and accompanying text.

192. See *supra* notes 66–68 and accompanying text.

itself—unlike concert performances, where customers demand performances from a specific artist.

Additionally, based on the precedent established in *International Boxing Club of New York*, potential exists to find separate relevant product markets amongst music festivals. Large music festivals also generate revenues and demand that is distinct from smaller music festivals, justifying a distinction between the two. For example, the 2017 Coachella grossed \$114.6 million, and the 2018 Coachella festival passes cost between \$429 and \$999,¹⁹³ whereas Soul'd Out Music Festival¹⁹⁴ has grossed under \$2 million in the festival's total history and 2017 tickets ranged from \$25 to \$95.¹⁹⁵

However, in drawing a distinction between concert performances and music festivals, an exception for headlining artists is likely needed. Large music festival promoters' legitimate objectives for using radius clauses must be considered (i.e., music festival promoters use radius clauses to protect their large, up-front investments to attract popular artists from other music festivals and concert promoters that may seek to free-ride and thus diminish the investing promoters' customer base).¹⁹⁶ For example, large music festivals contract with "headlining" artists (or widely popular artists likely to attract huge crowds) to increase the chance of a large or sold-out crowd that will help guarantee a return on the promoter's investment.¹⁹⁷ For example, the 2018 Coachella contracted for artist Beyoncé to headline one of the days of the festival; Beyoncé's popularity and performance are so pronounced the 2018 Coachella is commonly referred to as "Beychella."¹⁹⁸ If a concert promoter were not prohibited from contracting a headlining artist like Beyoncé, because the radius clause would be barred from including a prohibition on concert performances, then that concert promoter may possess the ability to diminish the large music festival's customer base for at least one day of the festival. This example reveals the need to consider music festival promoters' legitimate objectives, balancing them against the anticompetitive effects of radius clauses, creating an exception to the

193. Second Am. Compl., *supra* note 30, at 2.

194. Ironically, Soul'd Out Music Festival does not consider itself a music festival. *Id.* at 12 ("[T]he Soul'd Out Music Festival hosts simultaneous hard-ticket concerts across several indoor venues, and it presents artists from a narrow set of genres. It promotes this concert series as a 'festival' in order to co-market the artists and increase awareness.").

195. *Id.* at 5.

196. *See supra* Section III.B.3.

197. *See generally* Gwee, *supra* note 3.

198. *See* Suzy Exposito, *From Coachella to #Beychella: Beyonce Schools Festivalgoers in Her Triumphant Return*, ROLLING STONE (Apr. 15, 2018, 5:29 PM), <https://www.rollingstone.com/music/music-live-reviews/from-coachella-to-beychella-beyonce-schools-festivalgoers-in-her-triumphant-return-627815/> [<https://perma.cc/R9RB-4RK2>].

general proposal that radius clauses should be considered unreasonable when they fail to distinguish between concert performances and music festivals: a music festival radius clause may restrict a headlining artist from performing a concert within a reasonable geographic and temporal radius.¹⁹⁹

Therefore, when radius clauses used by large music festivals: (1) prohibit artist performances beyond the music festival's geographic market and (2) do not effectively distinguish between concert performances and music festival as different product markets (except in the case of headlining artists), such radius clauses should be found to be overbroad and, therefore, an unreasonable restraint on trade in violation of Section 1.

CONCLUSION

In the wake of Woodstock, today's music festival promoters have successfully created a consumer experience for festival-goers distinct from the traditional concert experience. But creating the large music festival experience is a difficult task requiring large, up-front investments from music festival promoters. In order to protect their return on these investments, music festival promoters use radius clauses. On their face, these radius clauses restrain trade by prohibiting the artist from performing or advertising for another music festival or concert for a specified temporal and geographical radius. Section 1 of the Sherman Antitrust Act only prohibits unreasonable restraints on trade that suppress competition and the market as a whole. To determine whether a music festival's radius clauses are unreasonable, a court will likely subject the radius clauses to the fact-intensive, burden-shifting rule of reason analysis. Demonstrating to a court that radius clauses are causing harm to competition and the market as a whole will be an arduous task for any advocate; however, the data currently available—as sparse as it is—suggests competition and the market as a whole are, on balance, harmed by the most restrictive of radius clauses. Therefore, radius clauses used by music festival promoters that (1) prohibit artists from performing in a geographical radius beyond the festival's relevant geographic market and (2) fail to distinguish between concert performances and music festivals should be found to be unreasonable restraints in violation of Section 1 of the Sherman Antitrust Act.

199. A further exception to this exception may be required to address large music festivals that sell out before the artist line-up is announced because those music festivals demonstrate that they have created a product—the festival itself—that does not rely on specific artist performances to protect their legitimate objectives.