

NetChoice *Promoting free expression and free enterprise on the net*

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**NetChoice Response
to New York Joint Public Hearing
on Ticket Sales for Live Events in New York State**

April 20, 2021

NetChoice is a trade association whose mission is to make the internet safe for free expression and free enterprise. We work to promote the integrity and availability of the global internet and are significantly engaged in privacy issues in the states, in Washington, and in international internet governance organizations.

Overview

The ecosystem surrounding the sale and use of event tickets is more complex than most know. With most tickets held-back from public sale for many events, and one company controlling most primary tickets, the event ticket world is an area that New York state can and should engage to ensure transparency, choice, and competition.

The advent of online secondary ticket sales has made ticket purchases safer and more reliable. Consumers can now see and compare prices and availability with the click of a button. And the leading secondary ticket sellers have buyer protection programs to protect against fraud.

We want to acknowledge and thank New York for its aggressive enforcement against software 'bots' used by unscrupulous brokers to grab hundreds of tickets in first minutes they go on sale. And New York is a model for the entire country when it comes to pursuing fraudulent web domains designed to mislead consumers into paying more for tickets to their favorite events.

Now is the time for the New York legislature to reapprove Article 25 of the NYS Arts and Cultural Affairs Law to keep protections in place for New York fans, and for the New York AG to continue using its investigative and Section 5 authority to protect consumers buying event tickets.

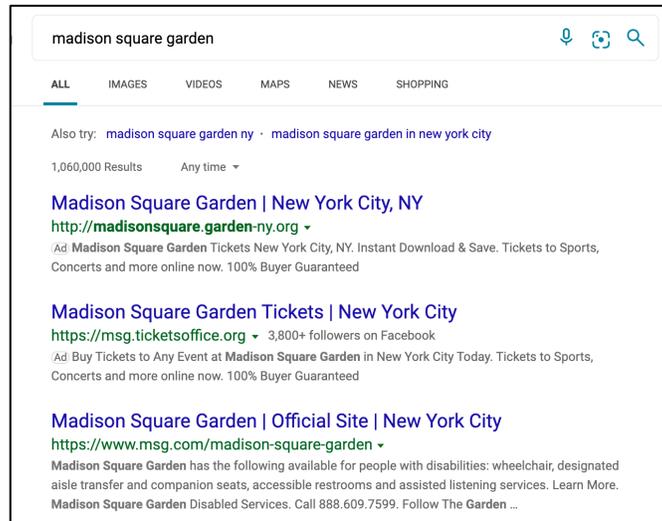
Transparency

New York should continue addressing issues of transparency in connection with deceptive website domains selling concert and sports tickets. This falls within the AG's Section 5 authority since such transparency issues constitute unfair and deceptive trade practices.

Misleading Consumers to Fake Sites

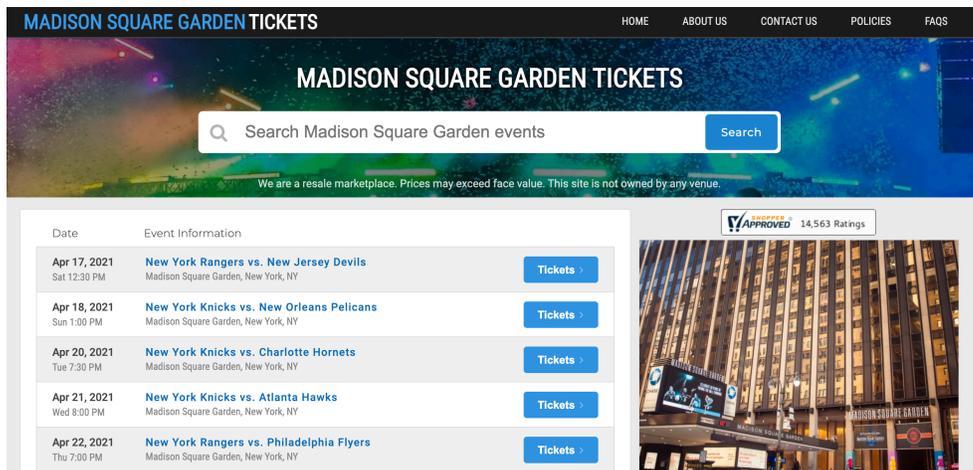
Fans across the country regularly search for tickets to their favorite concerts and shows. Unfortunately, many fans are misled by deceptive domain names in search results, which are designed to trick fans into thinking they are seeing unsold seats offered by the venue.

Consider, for example, search results for recent ticketed events in New York. A fan looking to see the Rangers at the Madison Square Garden “**Madison Square Garden**” in her search engine would have seen:



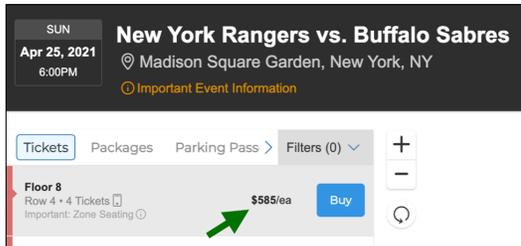
Despite the domain names, **madisonSquare.Garden-ny.org** and **MSG.ticketoffice.org**, these sites have *no affiliation* with Madison Square Garden or the Rangers. In fact, these websites are run by ticket resale outfits that show only tickets offered by brokers – at significant markups over regular seats still available at MSG.

The website madisonSquare.Garden-ny.org makes it appear they are the official site for the Rangers, and displays four Floor seats for the Apr-25 game against the Sabers show at over \$585 (see image below). But



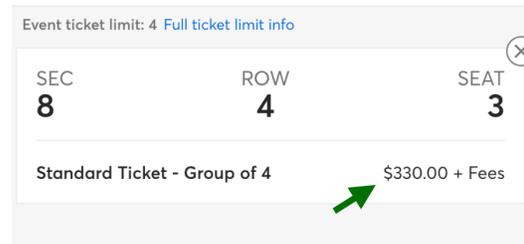
over at MSG's official ticket website, **there were still many of unsold seats in Section 8, including 4 for \$330.**

MadisonSquare.Garden-ny.org



VS

Official Box Office



These deceptive domains add no value for consumers when unsold seats are still available at the venue/promoter website. And when a show is actually sold-out, fans can turn to trusted secondary market websites where they can see a larger selection of resale seats.

As you can see, there is little to alert New York fans that this site has no affiliation with a team, artist, tour, or venue. These deceptive sites may have fine-print disclosures about their lack of affiliation with the artist or venue, but such disclosures are rarely noticeable to fans.

New York might consider legislation passed in Maryland¹ and New Jersey² that expressly makes these “unfair or deceptive trade practices” and subjects deceptive domain owners to enforcement and penalty provisions.

Deceptive domains like **madisonSquare.Garden-ny.org** and **MSG.ticketoffice.org** are luring fans into over-paying for a small selection of resale seats offered by professional ticket brokers. Those fans are not aware that unsold tickets are actually available at the venue website. The Better Business Bureau has logged hundreds of complaints against these tactics.

A good way to stop this deception is to prohibit artist or venue names from being used in domain names. Other states have taken action to stop these deceptive domains. Nevada recently enacted a law criminalizing these deceptive domain names.³ The Connecticut Attorney General and the FTC settled with two notorious deceptive domain operators, resulting in a permanent injunction and \$1.4 million in fines.⁴

These types of deceptive domain names fall directly within the purview of the AG's Section 5 enforcement authority which is enforceable to the New York State Attorney General. Consumers are harmed when they are unwittingly duped into spending their

¹ MD. CODE ANN., COM. LAW § 14-4003 to -4004 (West 2018).

² [Cite]

³ Nev. Rev. Stat. § 598.3978 (2017).

⁴ Federal Trade Commission, *TicketNetwork and Marketing Partners Ryadd and Secure Box Office Settle Charges of Deceptively Marketing Resale Tickets* (July 24, 2014).

money with companies who are (1) unaffiliated with the actual venue or event and (2) taking advantage of consumers by offering these tickets at significant markup. If New York is to protect consumers from these types of blatantly unfair and deceptive trade practices, it should focus efforts on exercising its power to enforce against deceptive ticket sale domain names.



A deceptive websites with no affiliation to the band

Another example of deceptive domain names that should be prohibited is **FooFightersTour.com** – which has no affiliation with the Foo Fighters, a website offering only resale tickets for the Foo Fighters concert.

Require disclosure of ticket holdbacks

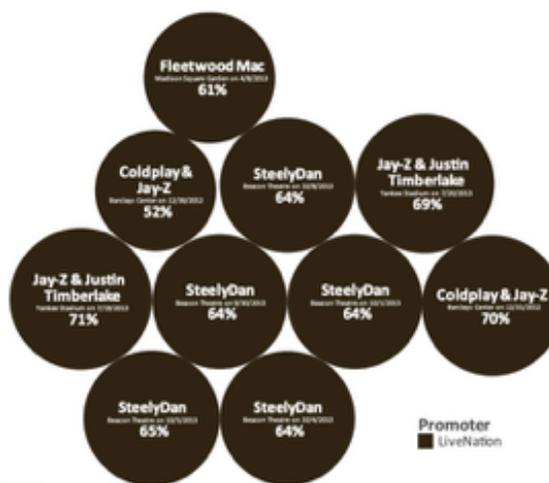
New York should help “shine the light” and require venues to disclose how many tickets are withheld from public purchase and to whom they are going.

A report by the New York Attorney General⁵ showed that nearly half of all tickets are never made available for public purchase. The report shows that around 54% of tickets are withheld from public purchase—with most going to VIPs and fan club insiders.

“For example, just over 1,600 tickets (12% of all tickets) were released to the public during the initial public on-sale for a July 24, 2014 Katy Perry concert at Barclays Center. Similarly, for two Justin Bieber concerts at Madison Square Garden, on November 28, 2012 and November 29, 2012, fewer than 2,000 tickets (15% of all tickets) to each show were released to the public during the initial public on-sale.”⁶

The result is fans are forced to fight over a very small pool of tickets. This drives up the costs of tickets on the

Figure 3. Ten Popular Shows Reserved Over 50% of Tickets Through Pre-Sales Events, None Explicitly Earmarked for Fan Clubs.
Source: Live Nation/Ticketmaster (2012 – 2013)²⁴



⁵ New York State Attorney General Eric T. Schneiderman, *Obstructed View: What’s Blocking New Yorkers from Getting Tickets*, http://www.ag.ny.gov/pdfs/Ticket_Sales_Report.pdf.

⁶ *Id.* at 15.

secondary market, and the more limited supply results in higher prices.

This reality is often hidden from the public. The NY AG said, “the industry must provide greater transparency into the allocation of tickets, to increase accountability and enable the public to make informed choices.”⁷ We suggest New York embrace and require transparency in number of tickets available for public purchase.

The fundamental problem leading to New York fans to paying higher prices is due to activities like these holdbacks. As the price of tickets is contingent on supply and demand, these holdbacks create artificially inflated prices by limiting supply. Some artists have been known to engage in holdbacks to intentionally drive up ticket prices on the secondary market – just so the artist can dump these tickets at the artificially inflated prices.

Barriers to Competition

Another area that merits attention from the New York AG is the limiting of ticket transferability by legitimate ticket sellers like Ticketmaster. This practice creates a barrier to competition that restricts consumers’ choice in what to do with the tickets they purchase. This can push costs higher for consumer as they are forced into a locked market where transactions are controlled by one entity—the entity that controls ticket sales. This can result in yet another convenience fee for consumers and reduced competition in the market for secondary tickets.

Today consumers enjoy robust competition in reselling their tickets. They can choose from multiple of platforms that compete on price, convenience, and reliability. However, under restricted tickets, consumers are forced into one marketplace and competition is eliminated.

New York should reapprove Article 25 of the NYS Arts and Cultural Affairs Law to keep these protections in place for New York fans.

⁷ *Id. at 5.*

Recently, Utah,⁸ and Virginia⁹ enacted laws similar to those in New York,¹⁰ Connecticut,¹¹ and Colorado.¹² These legislators protected their state's fans' ability to freely transfer, resell, and give away their tickets. New York should reapprove Article 25 of the NYS Arts and Cultural Affairs Law to keep these protections in place for New York fans.

It is important to note that Ticketmaster's presence in the ticket sales market represents both horizontal and vertical integration. Ticketmaster operates ticket sales for music events at most of the major concert venues across the country.¹³ Live Nation, the leading concert promoter, owns Ticketmaster.¹⁴ This means that a single entity controls a vast proportion of the ticket sales market—leaving eventgoers with no choice but to yield to any policies the company chooses to attach to its ticket sales.

While Ticketmaster sometimes gives the option to transfer a ticket, it requires a complex interaction with Ticketmaster and may require payment of yet another “convenience fee.”

This approach is not only anti-competition, it is anti-consumer. Take for example polling of Utah citizens¹⁵ that found:

- 79% support legislation that guaranteed their right to give away, resell, or donate their tickets however they choose.

⁸ UT Code §§ 13-54-102 (2019). “(1) Except as provided in Subsection (2), each ticket issued for an event shall be a transferrable ticket.”

⁹ VA Stat. §§ 59.1-466.5-7. “No person that issues tickets for admission to an event shall issue any such ticket solely through a delivery method that substantially prevents the purchaser of the ticket from lawfully reselling the ticket on the Internet ticketing platform of the ticket purchaser's choice... No person shall be discriminated against or denied admission to an event solely on the basis that the person resold a ticket, or purchased a resold ticket, on a specific Internet ticketing platform.”

¹⁰ NY Arts & Cult Aff L § 25.30 “[I]t shall be *prohibited* for any operator of a place of entertainment, or operator's agent, to: (a) restrict by any means the resale of any tickets...(b) deny access to a ticket holder who possesses a resold subscription or season ticket to a performance based solely on the grounds that such ticket has been resold...(c) employ a paperless ticketing system unless the consumer is given an option to purchase paperless tickets that the consumer can transfer at any price, and at any time, and without additional fees, independent of the operator or operator's agent.” (emphasis added).

¹¹ CT Pub Act. 17-28 (2017). “No person shall employ an entertainment event ticketing sales system that fails to give the purchaser an option to purchase tickets that the purchaser may transfer to any party, at any price and at any time, without additional fees and without the consent of the person employing such ticketing system.”

¹² Colorado Rev. Stat. § 6-1-718(3) “It is void as against public policy to apply a term or condition to the original sale to the purchaser to limit the terms or conditions of resale... A person or entity, including an operator, that regulates admission to an event shall not deny access to the event to a person in possession of a valid ticket to the event...based solely on the ground that such ticket was resold through a reseller that was not approved by the operator.” (emphasis added).

¹³ See, e.g., Ben Sisario & Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

¹⁴ See *id.*

¹⁵ Frequencies available at NetChoice.org/UtahPoll.

- 88% say the ticket purchaser should choose what to do with their tickets (resell them, give them away, donate them) rather than allowing the event organizer to prevent sharing or reselling tickets.
- 71% said that when they buy their ticket, it is their personal property and they have full control over what they can do with their ticket.

These consumer preferences run counter to the notion of restricted tickets.

When a company dominates the landscape as comprehensively as Live Nation and Ticketmaster, such restrictions are a problem. According to the New York Times:

“Live Nation empire, still tickets 80 of the top 100 arenas in the country. No other company has more than a handful. No competitor has risen to challenge its pre-eminence. Now Department of Justice officials are looking into serious accusations about Live Nation’s behavior in the marketplace.”¹⁶

We’re already seeing restricted tickets. Garth Brooks used restricted tickets for his several of his 2016 performances. Fans who gave their tickets to family or friends still had to escort them to the venue doors. And a ticketholder who couldn’t attend could not easily sell or even give away his tickets.

However, fans don’t suffer these restrictions when Garth Brooks performs in states like New York or Colorado. These states have laws with the same protections that maintain consumer choice, convenience, and market competition, so New York¹⁷ and Colorado¹⁸ fans can freely transfer, resell, and give away their tickets. Big-name acts like Garth Brooks regularly perform in states with laws ensuring these protections, so enforcing against this competition-limiting practice will not impede concerts and other ticketed events from continuing to take place.

The Rationale for Restricted Tickets Doesn’t Match Reality

Ticketmaster’s own website explains why it requires restrictions—to stop software ‘bots’ used by unscrupulous brokers to grab hundreds of tickets in first minutes they go on sale:

¹⁶ Sisario & Bowley, *supra* note 13, <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

¹⁷ NY Arts & Cult Aff L § 25.30. “[I]t shall be *prohibited* for any operator of a place of entertainment, or operator’s agent, to: (a) *restrict by any means the resale of any tickets...*(b) deny access to a ticket holder who possesses a resold subscription or season ticket to a performance based solely on the grounds that such ticket has been resold...(c) employ a paperless ticketing system unless the consumer is given an option to purchase paperless tickets that the consumer can transfer at any price, and at any time, and without additional fees, independent of the operator or operator’s agent.” *Id.* (emphasis added).

¹⁸ Colorado Rev. Stat. § 6-1-718(3). “It is *void as against public policy to apply a term or condition to the original sale to the purchaser to limit the terms or conditions of resale...* A person or entity, including an operator, that regulates admission to an event shall not deny access to the event to a person in possession of a valid ticket to the event...based solely on the ground that such ticket was resold through a reseller that was not approved by the operator.” *Id.* (emphasis added).

Why is Credit Card Entry the only option for some events, or some sections?

When Credit Card Entry is the only option it's probably because the tickets are in high demand, and the artist, team, or venue wants true fans like you to get the seats you want at face value by eliminating unfair competition from professional scalpers. Without the ability to resell tickets at steep prices, scalpers have no reason to snatch them up when they go on sale using automated software, or "bots".

Fortunately, Congress recently passed the Better Online Ticket Sales, or BOTS Act, making it illegal for brokers to circumvent ticket purchase limits on sites like Ticketmaster.¹⁹ The bill empowers the AG and state Attorneys General to stop ticket scalpers from buying-up tickets by bypassing online controls that limit the number of tickets a person can buy. Even Ticketmaster supported the BOTS Act, saying "Ticketmaster worked closely with legislators to develop the BOTS Act and we believe its passage is a critical step in raising awareness and regulating the unauthorized use of Bots."²⁰

With BOTS now a federal crime, there's no justification for Ticketmaster to offer only restricted tickets.

Moreover, as reported: "Ticketmaster is profiting off of scalpers *who they allegedly work with to help game the system over consumers hoping to purchase tickets at face value.*"²¹



Abuse of market power by Ticketmaster and its parent, Live Nation

While private contracts are a private matter, governments step in when contracts threaten property rights, constrain consumer choice, or force unfair agreements on consumers. Event tickets are another area vulnerable to anti-competitive practices that harm consumers and competitive businesses.

Today's antitrust law looks for three things:

1. Market power – often defined as market share above 75%
2. Abuse of market power – through things like tying or activity to exclude competitors
3. Consumer harm resulting from such abuse – often in the form of increased prices

Live Nation and Ticketmaster represent a prime opportunity for antitrust scrutiny – either for its restricted tickets practice or its efforts to exclude competitors from the primary ticket sale market.

¹⁹ BOTS Act of 2016, 15 U.S.C. § 45c (2012).

²⁰ *Obama signs law to combat ticket bots*, ENTERTAINMENT WEEKLY (Dec. 16, 2018) <http://ew.com/article/2016/12/16/obama-law-ticket-bots/>.

²¹ Justin Boggs, *Report: Ticketmaster recruits scalpers to sell marked-up tickets*, Arizona abc15 (Sep 20, 2018)

Ticketmaster has market power

When reviewing the Ticketmaster-Live Nation transaction in 2010, President Obama's Department of Justice raised concerns that "This loss of competition likely would result in higher prices for and less innovation in primary ticketing services."²² The DOJ was prescient: in the decade since that merger, Ticketmaster continues to maintain a market share of 70-80% in primary ticket sales.²³

Since 2010, Ticketmaster-Live Nation have continued to grow their size and scale, indicating they poses market power.

Ticketmaster is abusing its market power to exclude competition

Restricted Tickets

Ticketmaster's *primary* ticket sales platform has previously required customers to resell only through Ticketmaster's own secondary market service. Failing to stick with Ticketmaster has resulted in voided tickets and threats to cancel patrons' season tickets.²⁴

Ticketmaster is aggressively expanding its restricted tickets ticket program -- at the same time Ticketmaster is expanding its resale network. Remember that these restrictions are not about stopping resale; they are more about ensuring that such transactions occur *only* through the Ticketmaster system.

Using market power to prevent other primary ticket sellers

In addition to using terms and conditions, technology, and business conditions with their partners to restrict transferability of tickets amongst consumers,²⁵ Ticketmaster-Live Nation also uses threats of retaliation to dominate the ticket market and impede competition.²⁶

As Live Nation is one of the leading promoters for artists and also owner of venues, it may be using its size and power to ensure that artists only sell tickets through its child-corporation Ticketmaster. This is a clear violation of Section 2 of the Sherman Act.

²² *Id.*

²³ *Id.*

²⁴ See *Stubhub, Inc. v. Golden State Warriors, LLC*, No. C 15-1436 MMC, 2015 WL 6755594 (N.D. Cal. Nov. 5, 2015), *appeal dismissed* (July 22, 2016).

²⁵ See Ticketmaster Credit Card Entry, *available at* <https://www.ticketmaster.com/h/credit-card-entry.html> ("Can I sell Credit Card Entry tickets? That's up to the artist, team, or venue! If they give the green light you'll see a Sell button when you click the order number under Order History in My Account.").

²⁶ See, e.g., Jem Aswad, *Department of Justice 'Looking Into Accusations' Against Live Nation, Report Claims*, VARIETY (Apr. 1, 2018) ("They have been reviewing complaints that Live Nation, which manages 500 artists, including U2 and Miley Cyrus, has used its control over concert tours to pressure venues into contracting with").

Ticketmaster's abuse of market power in tickets is harming New York consumers

Restricted Tickets

These new limits of fan choice and control over their tickets make it harder to transfer tickets and have included a new battery of "convenience fees" just to give a ticket to a friend. This is clearly a harm to consumers. Moreover, by shutting out third-party platforms from resale this ensure an elimination of competition and increasing prices for consumers.

Using market power to prevent other primary ticket sellers

Despite their increasing efficiency and size, fans should be seeing a decrease in service fees. However, we are not seeing this and there are stories that fans in the US pay a lower service fee than those in other parts of the world where there is more competition.

There is a strong case for a robust antitrust investigation into Ticketmaster – Live Nation. Now is the time for the New York AG to crack down on this barrier to competition and help consumers enjoy the choice and convenience of an open tickets marketplace.

This is especially important since the Trump Department of Justice reapproved the Ticketmaster – Live Nation consent decree, despite acknowledging several violations.²⁷ This approved vertical merger allowed the dominant ticketing platform to merge with the largest promoter of concerts.

An objective review of Ticketmaster-Live Nation would conclude that the consent decree *is not working*. This is a prime example of where oversight agencies should use their merger review powers to maintain a competitive marketplace that serves consumer interests and institute remedies that will ensure competition in the ticket industry.

Again, we thank you for your efforts to maintain a safe and competitive market for tickets in New York.

Sincerely,

Carl M. Szabo
Vice-President & General Counsel, NetChoice

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²⁷ *United States v. Ticketmaster Entertainment, Inc.*, Case: 1:10-cv-00139 (U.S.D.C. 2010).