

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

TICKETMASTER ENTERTAINMENT,
INC., *et al.*,

Defendants.

Case: 1:10-cv-00139

Assigned to: Collyer, Rosemary M.

Assign. Date: 1/25/2010

Description: Antitrust

**UNITED STATES' UNOPPOSED MOTION AND SUPPORTING MEMORANDUM TO
EXCUSE FEDERAL REGISTER PUBLICATION OF THE ATTACHMENTS TO THE
COMMENTS**

The United States hereby moves this Court, pursuant to 15 U.S.C. § 16(d)(2), for leave from *Federal Register* publication of the attachments to the comments received in this case. Counsel for the United States has discussed this Motion with counsel for the States and the Defendants, and this Motion is not opposed.

The United States asks for relief from publishing in the *Federal Register* the voluminous appendices and exhibits to the comments it received. The United States proposes an alternative publication procedure that will provide significantly more convenient public access to the appendices and exhibits at a fraction of the cost of publishing them in the *Federal Register*: publication of all comments *without* appendices and exhibits in the *Federal Register* and publication of all comments *with* appendices and exhibits on the website of the Antitrust Division of the United States Department of Justice. The United States respectfully requests that the Court enter the attached Proposed Order permitting the United States to satisfy its statutory public comment publication obligations through use of that alternative procedure.

I. Background

A. Cost of Publication

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the “Tunney Act”), the United States published in the *Federal Register* on February 10, 2010, and *The Washington Post* from February 26, 2010, through March 4, 2010, a summary of the terms of the proposed Final Judgment and Competitive Impact Statement filed in this case, together with directions for the submission of written comments relating to the proposed Final Judgment. The United States received twelve public comments during the 60-day statutory waiting period, which ended on May 3, 2010. Under the Tunney Act, the United States is required to publish the comments and its Response to Comments (“Response”) in the *Federal Register*, unless this Court authorizes an alternative method of public dissemination. *See* 15 U.S.C. § 16(d)(2). The United States will file with the Court complete copies of the comments and their appendices and exhibits with its Response; thus, in addition to the publication methods outlined in this Motion, they will be available via the Court’s docket.

The twelve comments included 283 pages of appendices and exhibits. The exhibits and appendices are comprised primarily of newspaper articles; Live Nation public financial statements, presentations, and website printouts; a patent application; declarations and court pleadings in other cases; a letter to the United States Patent and Trademark Office; emails; copies of checks; and, other miscellaneous documents. The appendices and exhibits do not materially illuminate the substance of the comments. Publication of these appendices and exhibits would be inordinately expensive. Because the commenters produced the appendices and exhibits as images, and not in a native file format, the *Federal Register* must individually

photograph each page, at a cost to the United States of \$522 per page. *See* Circular Letter No. 609, *Changes in the Cost to Publish in the Federal Register and Code of Federal Regulations* (Mar. 17, 2006). Accordingly, publication of the appendices and exhibits alone would cost almost \$150,000.

B. Alternative Method of Publication

Because of the high cost of publishing the appendices and exhibits, the United States respectfully requests that this Court authorize an alternative publication method. The United States proposes to publish in the *Federal Register* only its Response and the comments, without the comments' appendices and exhibits, but with a statement stating a web address where the appendices and exhibits can be viewed or downloaded. The United States would disseminate the Response and a complete copy of the comments with their appendices and exhibits via the website of the Antitrust Division of United States Department of Justice.

II. Alternative Method of Publication Increases Access to Public Comments While Avoiding Unnecessary Cost

In 2004, Congress passed an amendment to the Tunney Act allowing an “alternative method of public dissemination” of comments where “good cause” is shown. 15 U.S.C. § 16(d)(2). Specifically, the district court must find that “the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication.” *Id.* The alternative publication method proposed by the United States meets this standard. Publication of the appendices and exhibits would cost almost \$150,000, an excessive amount. The proposed alternative method would increase distribution of the substantive information contained in the comments because they would be published in both the *Federal Register* and the Antitrust Division website. Further, making the appendices and exhibits available on the

Antitrust Division website will likely increase public availability compared to publication only in the *Federal Register*.

Congress' overriding objective in passing the Tunney Act was to inject "sunlight" into the process of settling antitrust cases, enabling the public to have confidence in the manner in which an antitrust case is resolved. 119 CONG. REC. 24,599 (1973) (Statement of Senator Tunney). In 1974, when the Tunney Act was passed and before current electronic means of dissemination were available, Congress chose publication in the *Federal Register* as the method that it felt balanced increased public access with the most reasonable cost.¹

Thirty years later, after the United States bore considerable expense in publishing comments associated with the Microsoft consent decree because the Tunney Act did not provide for alternative means of publication, Congress amended the Tunney Act to allow the Court to authorize alternative means of publication. In passing the amendment to the Tunney Act, Congress recognized that electronic publication could increase dissemination, while reducing costs. At the Senate hearing on the legislation, Senator Leahy noted in supporting the legislation that publication in the *Federal Register* "can be very expensive . . . with little benefit, because

¹ See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 2, 88 Stat. 1708 (1974) (current version at 15 U.S.C. § 16(b)-(h)). Commentators at the hearings on the Tunney Act questioned the wisdom of using the *Federal Register* for publication of Tunney Act notices, calling it "an expensive, unneeded procedure in view of the minimal attention which the average citizen devotes to the daily contents of that publication" and asked whether "media distribution constitutes the better means to inform the public of a consent judgment." *The Antitrust Procedures and Penalties Act: Hearings on S. 782 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93rd Cong. 421 at 423, 430-431 (1973). In response, members of the Senate staff noted that "we have to make an assessment now, considering the fact that some costs are involved, as to whether or not the additional costs that are involved in publication in these newspapers are justified. . . ." *Id.* at 190 (statement of Meldon Levine, legislative assistant to Senator Tunney).

those materials are, if anything, more accessible on the Web than in a library.” 150 CONG. REC. 6,328 (2004). Senator Kohl echoed his comments stating, “[t]his provision is intended to avoid unnecessary expense in publishing proposed consent decrees if alternate means are available, such as, for example, posting the proposed decrees electronically, which are sufficient to inform interested persons of the proposed consent decree.” 150 CONG. REC. 6,332 (2004).

In this case, the cost of publication of the appendices and exhibits in the *Federal Register* outweighs any public benefit. The alternative publication procedure the United States proposes in this Motion increases the dissemination of the substantive information contained in the comments.

III. Conclusion

For the foregoing reasons, the United States requests that the Court order the proposed alternative publication procedure as set forth herein.

Dated: June 14, 2010

Respectfully submitted
FOR PLAINTIFF UNITED STATES:

_____/s/
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