

5-1-2014

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Ticket Scalping in the Late 1800s and the early 2000s – Much has Changed, Much is the Same

James Devine

Overview

In the 1800s, theatergoers were frustrated by ticket speculators, who frequently purchased many if not all of the tickets in advance of a show, despite efforts to stop them. These tickets were later resold at inflated prices. There was little to no legislation at this time, so private parties tried to limit the problem through various measures. Scalpers in the 1800s were able to circumvent the physical lines and other rules using various measures, such as proxies. The situation facing concert-goers in the 2000s, is similar to that of the theater patron in the 1800s. The consumer today is frustrated by modern day scalpers, who circumvent the ‘virtual line’ using special software. Private measures are being used to address the issue, but not without criticism from consumers. Meanwhile, in the absence of on-point legislation, inappropriate federal law has been applied to the practice of ticket scalping, to varying degrees of success. Going forward, a uniform federal law is recommended as suited to clarify existing legislation, avoid the frustration inherent in varying state law, and address the modern day issues in the secondary resale market. However, given how long it took for early legislation to be adopted, it may take years, or may not happen at all given effectiveness of private remedies.

I. The 1800s

a. The Problem Then

“It is nevertheless true that gangs of hardened ticket-speculators [scalpers] exist and carry on their atrocious trade with perfect shamelessness.”¹

Ticket scalping is a practice Americans became familiar with as early as the 1800s, existing “since at least 1850, and probably well before that.”² During this time, the resale of tickets was widespread,³ and was perceived as a problem.⁴ Unsurprisingly, the major issues of the time were similar to those of today. Then, as now, it was not uncommon for the average consumer to search for tickets in the primary market to no avail, only to find them on the secondary market,⁵ often at inflated prices;⁶ venues often engaged in their own efforts to curb ticket scalping, and society was not altogether opposed to the practice of ticket scalping. Then, as now, the popularity of a show would bring about a corresponding demand and inflated price.

In an extreme example, tickets for Charles Dickens' second American tour in the 1860s, with an original face value of \$5, were available from speculators for \$50.⁷

The major actor in secondary sales in this time were individuals or networks of men known as "ticket speculators" who would purchase large amounts of tickets at once, only to resell them at inflated prices.⁸ Ticket speculators, described as "a pariah" in 1883,⁹ were also referred to as "sidewalk men", as this is where they would often be seen selling tickets.¹⁰ Scalping was a successful enterprise at this time,¹¹ and scalpers would invest large amounts of capital, buying up to 80% of tickets in advance.¹² Fierce rivalry for "speculating privileges" resulted in death.¹³ Scalpers would also engage the use of 'proxies', thereby bypassing long lines of regular theatergoers, often buying the whole lot of tickets before others got a chance.¹⁴ The use of proxies was a difficult practice to regulate.¹⁵

Some actors in the reselling chain are the same as today. Many believed, justifiably, that theater managers colluded with secondary sellers, withholding seats and passing them to scalpers.¹⁶ Others with occasional early access to tickets later resold them at a higher price.¹⁷ Artists themselves were known to withhold tickets and resell them.¹⁸ Hotels often received advanced tickets as a fringe for out-of-town guests—many resold at slight mark up.¹⁹ At the time, grocers received advanced tickets for posting an advertisement in their windows, with an implicit "understanding . . . that [they] would not be sold to scalpers . . . but of course, they were sold regularly."²⁰ Even students, such as those of Princeton and Yale, would resell tickets at inflated prices when given early access.²¹

During this time, law enforcement was involved, and there were arrests and prosecutions to varying degrees of success. Four men were charged with disorderly conduct in New York in

1868 (discharged),²² though a Boston man was convicted and fined successfully in 1873.²³ The presence of police was often enough to stop scalpers from selling tickets.²⁴

b. Legislation

Though the majority of complaints from the public targeted increased prices and the unavailability of tickets, the presence and prominence of ticket scalpers in the streets was also a bother to many citizens.²⁵

In these early years, there were several attempts to pass legislation, but such attempts were generally infrequent and unsuccessful during this period.²⁶ In New York, legislation failed to be passed in 1870,²⁷ 1884,²⁸ and 1908.²⁹ New York City took it upon itself to ratify and regulate the practice, passing an ordinance in 1880 that required ticket speculators to obtain a license and a badge for a fee.³⁰ Although there were numerous complaints levied against the legislation,³¹ and an official opinion of the Board of Alderman recommending its repeal four years later,³² the legislation stood.

However, ticket scalping legislation was eventually enacted in as early as the late 1800s and early 1900s.³³ The early legislation relates to the Sherman and Clayton Act's regulation on price fixing.³⁴ Legislation increased significantly in the post-World War II period, as increased leisure spending resulted in increased scalping and therefore increased legislation across the states.³⁵ The early legislation was "aimed to control the location, price, and nuisance effects."³⁶ In the early years, there were doubts as to the constitutionality of ticket scalping legislation,³⁷ but these have long been dismissed.³⁸

c. Themes

The effects of ticket scalping in the 1800s were similar to those today in three major ways. First, tickets were often unavailable in the primary market, leaving the average consumer to search for tickets in the secondary market. Second, the absence of legislation resulted in private efforts to curb the problem. Third, society was engaged in a philosophical debate—there were those of the belief that the speculators were not a problem, but served a valuable purpose.

Theaters tried to comply with the demand of their customers who were frustrated by ticket speculation.³⁹ The theaters engaged in several methods to satisfy the angry customers and curb ticket speculation. One of which was to use “spotters” who would note anyone who bought a ‘speculated’ ticket, and then prohibit their entrance at the door.⁴⁰ This was a common tactic in the 1870s, which inevitably “led to many angry confrontations between ticket holders and door staff.”⁴¹ Another is limits per person⁴² but these were often ineffective,⁴³ given the use of proxies.⁴⁴ Management for Eastern Park, Brooklyn, which hosted the Princeton-Yale game in November of 1890, employed both a limit per person (4 tickets), and waited until the last minute to add 1500 reserved seats for the face value of \$2, so as to combat scalpers.⁴⁵

Further measures included complicated registering systems,⁴⁶ and competing directly with theater employees go out on the sidewalk and compete with the scalper, offering the ticket at the lower (face) price.⁴⁷ Auction systems for ticket sales were used as a response to high demand in as early as 1860,⁴⁸ though they were of limited success when overrun by scalpers.⁴⁹

There were also debates about ticket scalping. Though an 1893 editorial described the practice of ticket scalping as a “species of petty extortion”,⁵⁰ others questioned if ticket scalping should be so vilified. Then, as now, there were those who viewed ticket scalpers as providing at least some benefit, such as making tickets available at a later time for the consumer who does not buy tickets in advance.⁵¹ An editorial for the 1875 theatrical season argued that venues should

seek to regulate scalpers, but not completely eliminate them, as some are useful.⁵² Some theatergoers preferred to pay a premium instead of standing in line.⁵³ Scalpers also made tickets available to those who chose to go last minute, or for out-of-town travelers who would not have been able to purchase them in advance.⁵⁴ When the Fifth Avenue Theater's private efforts at curbing scalping were so successful 1885, patrons complained of "the absence of speculators."⁵⁵

II. The 2000s

a. The Problem Now

*"Despicable scumbags. If there's a way to publicly shame them, we should."*⁵⁶

As in the 1800s, the current secondary ticket market is often a source of frustration for the average consumer.⁵⁷ Though we have progressed from the old image of the typical scalper⁵⁸ (outside of a venue) the scalping 'problem' still exists. Though these local re-sellers are still in play, and are worthy of legislation in and of themselves,⁵⁹ the bulk of scalping today occurs on the internet at great distance from the venue, via internet sites such as StubHub, TicketsNow, craigslist, eBay, and Facebook. Compounded with the prevalent online market, there is little transparency with respect to concert ticketing; artists withhold tickets to their own shows and resell them on secondary sales sites.⁶⁰ Further, ticket brokers, in the states that allow them, often sell tickets above face value and can be considered ticket scalpers,⁶¹ and they are often "lumped together [with unregistered scalpers] as a scalper or secondary market."⁶²

The internet has brought new challenges to scalpers, along with new protections for sellers.⁶³ Currently, one of the most significant problems in the ticket market lies in new-age software specifically designed to 'hack' ticket selling websites, thereby allowing scalpers to bypass the virtual line and buy many tickets at once.⁶⁴ As a result, the modern secondary ticket market results in an average price-market up of 36%, but this can be higher for super-star acts

such as U2 (145%) or Bruce Springsteen (240%).⁶⁵ There is a lot of money to be made in the business – one recently busted ticket ‘hacking’ and scalping network made \$25 million in profit before being shut down.⁶⁶ In the year 2000, a study estimated that ticket brokers and scalpers made a profit of over \$87 million.⁶⁷ The current U.S. secondary market represents a \$4 billion a year industry.⁶⁸

Modern-day scalpers are so unscrupulous that they will exploit any event—including charity benefit concerts. This was the case with the Hurricane Sandy Benefit Concert (12/12/12), featuring such acts as Paul McCartney, Bruce Springsteen, Bon Jovi, Eric Clapton, The Who, and Kanye West, which was subject to flagrant scalping in extreme amounts.⁶⁹ Seats available in primary sale for a maximum of \$2500 face value were seen on sale for as much as \$60,000.⁷⁰ Only a handful of sites were carrying the tickets, as some vendors “chose the high road”, such as Ticketmaster, which barred the sale of tickets in its secondary sites TicketsNow and TicketExchange.⁷¹ StubHub however, allowed the sales and pledged that they would give their share—25% of the sale—to the Robin Hood Foundation, operator of the concert.⁷² When all was said and done, they donated about \$1 million to the charity,⁷³ resulting in around \$3 million of profit going to scalpers.

i. Modern Venues and Actors in the resale market

1. Online sites

The major players in the ticket resale market are StubHub TicketLiquidator, Ticketsnetwork, and TicketsNow.⁷⁴ There are countless websites that a consumer can use. These websites provide a venue for individuals to sell and purchase tickets, but also are the cause of much disdain and conspiracy theorizing.

StubHub is the household name in ticket resale. The company was originally conceived by two Stanford university students, Jeff Fluhr and Eric Baker, for a business plan competition, but they developed such enthusiasm for the project that they decided to make it real.⁷⁵ As told by co-founder Jeff Fluhr, there were three characteristics of the secondary resale market that showed a great opportunity:

Number one: . . . it was a large market in the U.S., . . . we estimated that it could be as big as ten billion. . . The second characteristic . . . was the fact that it was a highly fragmented business, so there was no dominant national player that was addressing the secondary ticket market . . . the third thing . . . was the fact that it was really a stigmatized market that was leaving consumers with a lack of trust, and sort of a bit of concern around getting legitimate tickets.⁷⁶

StubHub launched in August 2000 with \$550,000 in early investment.⁷⁷ The first thing the entrepreneurs did with their start-up financing was investigate the legality of the enterprise, hiring a regulatory law firm to perform a nationwide survey of existing law.⁷⁸ They noted the lack of federal law,⁷⁹ and that “most states . . . did not have restrictive ticket resale laws”,⁸⁰ and went on to grow a business from a small investment to company that in 2006 had “400 million . . . of top-line gross ticket sales.”⁸¹ In 2005, it had revenue of about 50 million,⁸² and in 2006 around 100 million.⁸³ StubHub is also a major player in professional sports, as it is currently partnered with as many as sixty sports teams.⁸⁴ The founders ultimately sold the company to eBay in 2007, for \$310 million.⁸⁵

While many are probably pleased with the ease of use and reliability that StubHub provides, especially given that “almost 50 percent of the tickets [sell for] face value or below”,⁸⁶ others are extremely frustrated by its existence.⁸⁷ The purchase of StubHub by eBay spurred Ticketmaster into action, and it purchased TicketsNow in 2007 “as a defensive move.”⁸⁸

Many question the large online secondary resale operations. There are those that view Ticketmaster, and their associated secondary markets, as a monopoly that has no vested interest

in correcting these issues,⁸⁹ the combination being a simple conspiracy “to enrich Ticketmaster, venues, artists, and scalpers.”⁹⁰ Unsurprisingly, several years after the purchase there was a significant issue which drew a lot of attention in 2009.⁹¹ Consumers were told on Ticketmaster’s primary website that the show was sold out, only to be directed from Ticketmaster’s secondary site TicketsNow, where tickets were available.⁹²

Ticketmaster is also under attack for its attempts to regulate the secondary market using paperless tickets.⁹³ For example, the Fan Freedom project frequently attacks Ticketmaster, such as by asking for an investigatory probe into Ticketmaster when it refused to report to authorities known ticket sniping in event sales.⁹⁴ The Fan Freedom project argues that paperless tickets hurt the average consumer.⁹⁵ However, the Fan Freedom Project is funded by StubHub,⁹⁶ which has an obvious vested interest in a thriving secondary resale market, with the uninhibited transfer of tickets. Further, StubHub has successfully lobbied to protect their business, and changed “the laws in states like New York, Florida, and Pennsylvania.”⁹⁷

When the average consumer thinks of buying a ticket to a sold-out event, craigslist is likely not the first site that comes to mind. However, craigslist is a viable secondary market for music concerts and sporting events.⁹⁸ As with all craigslist categories, new listings are posted continually on a daily basis, though many of these postings simply direct consumers to other secondary ticket sites. A general search will list all tickets, both by owner and by dealer, though the user can narrow down the list based on these categories.⁹⁹ Tickets by dealer postings will typically contain links to direct the user to an outside secondary ticket selling website, while tickets by owner will take you to a nondescript craigslist posting.¹⁰⁰ Craigslist disclaims all liability for the transaction.¹⁰¹

Similarly, eBay is likely not the first choice of the average consumer, though it too offers tickets to a wide range of events.¹⁰² A note in 2009 commented that a search for “tickets” on eBay yielded 246,598 results.¹⁰³ The market has grown—a current search (late 2012) yields 652,978 results.¹⁰⁴ eBay places the onus of knowing applicable local law on the seller of the tickets.¹⁰⁵ Unlike craigslist, eBay offers its typical buyer protection, in the event that the tickets never arrive or if the tickets are not what were advertised.¹⁰⁶

Facebook is involved the ticket market. Facebook recently asserted influence in the primary market by integrating the ticket purchasing experience so the user never leaves the Facebook page, with such outlets as Ticketmaster, StubHub, Ticketfly.¹⁰⁷ Facebook also partnered with EventBrite,¹⁰⁸ a full-service website for anyone hosting an event, which allows the host to promote the event, create an event web page, and charge admission offering guests either printable and paperless tickets.¹⁰⁹ Eventbrite offers this service for a small fee per ticket.¹¹⁰ A similar service is available through ThunderTix, for bands to sell tickets to their shows through their Facebook pages.¹¹¹

Facebook is also in and of itself a secondary market. This is not surprising, given that the site is designed to connect people and provides an easy method to make an announcement that there are tickets for sale. For example, it was recently reported that students and graduates of Syracuse University, all members of a college-oriented student groups on Facebook, are using the site as a forum to buy and sell tickets.¹¹² Given the size of Facebook,¹¹³ there is no reason to believe this is an isolated incident.

2. Artists withholding

One current issue in the modern resale market is the lack of transparency in ticket withholding. Ticket withholding is frustrating to the average consumer, as it results in limited

available seats to the general public and inflated prices in the secondary market. Some of described the situation as “a clear consumer protection issue[, as] tickets supposedly being offered for sale are not available on publicly advertised websites, but are instantly available at jacked-up prices on resale websites.”¹¹⁴ However, others argue that artists are in control of their show, and can do what they please with their tickets.

There are many parties involved in ticket withholding, which results in fewer tickets on sale to the general public. Those involved in ticket withholding include artists, venues, record companies, talent agencies, radio stations, credit card companies (American Express), and sponsoring corporations.¹¹⁵ Ticketmaster itself is involved, as “the company routinely offers to list hundreds of the best tickets per concert on one of its two resale Web sites—and dives the extra revenue, which can amount to more than \$2 million on a major tour, with artists and promoters.”¹¹⁶ Ticketmaster does this with a range of artists, from Neil Diamond¹¹⁷ to Lady Gaga.¹¹⁸

Artists are some of the major culprits, as many are withholding tickets to their own shows for their own purposes, such as passing them along to friends or family. However, a significant amount end up on secondary resale sites generating a healthy profit.¹¹⁹ For example, Katy Pery includes ticket withholding and resale in her contract rider.¹²⁰ Justin Bieber engages in a similar practice.¹²¹ It is unlikely that this language is overly unique in the industry, as many artists are withholding tickets, such as Britney Spears, Celine Dion, Bon Jovi, Van Halen, Billy Joel, Elton John,¹²² and other artists stand to gain an additional two million in revenue on a tour.¹²³

Fan clubs present another source of ticket resale. Artist’s fan clubs take membership fees and in exchange give early access to tickets. This gives fans, but also scalpers who pay the membership fee, early access to tickets. In some extreme examples, Keith Urban charges \$25

(and retains) for fan club membership fees and saw twelve \$25 front-row seats for a Hall of Fame Benefit concert scalped at \$642 per ticket;¹²⁴ Taylor swift charges \$20 for dues and offers primary access to ticket presales to members, resulting in some seats allocated for fans at \$49.50 being available for \$1177 per ticket.¹²⁵ Similarly, tickets for a Britney Spears concert priced at \$39.50 were priced at \$1,188.60.¹²⁶

3. 'Bots' and 'Ticket sniping'

In the 1800s, people waited in long lines for tickets. Unfortunately for the average consumer, oftentimes many of those in line were proxies for ticket speculators. Today, people wait in “virtual lines” on a website when seeking tickets for shows. Unfortunately for the average consumer today, when your time arrives there are no more tickets available—they have all been purchased by scalpers using ‘ticket bots’ who use software to “essentially cut the line [violating] the first-come, first-served doctrine of a queue[.]”¹²⁷

With the advent of online ticket sales came new technologically advanced and enhanced tools for ticket scalping. ‘Bots’ are “automated program[s] that navigate[] website[s] faster and more efficiently than humans can . . . unscrupulous [programs that allow] ticket resellers to “cut the line” and grab as many [tickets] as possible for resale at higher prices.”¹²⁸ Ticket ‘bots’ pose one of the more serious problems in the modern ticket resale market, and their “prevalence . . . has already raised questions about the industry’s claims of fairness in online sales.”¹²⁹ ‘Bot’ use on Ticketmaster’s website is extremely prevalent, amounting to as much as 80% of ticket requests on certain days.¹³⁰

Sellers of the software boast that for only \$990, you can bypasses CAPTCHA technology, quantity limits, and queues, simultaneously “grab[bing] hundreds of tickets for

multiple event[s] . . . with just a single click.”¹³¹ ‘Bot’ use is sometimes referred to as ‘Ticketsniping.’¹³²

While ‘bot’ use is rampant, primary ticket sellers are doing their part to try to control them. Ticketmaster is targeting the creators of the software. Ticketmaster’s paperless ticketing system is viewed as a strong remedy to ‘bot’ usage and ticket scalping.¹³³ Ticketfly, another online seller, seeks to control ‘bots’ by using algorithms that recognize behavior that is impossible for humans to achieve, and then shutting down that computer address.¹³⁴ Another tactic is litigation, such as the 2007 case in which Ticketmaster sued RMG Technologies for developing software that circumvented their anti-scalping measures.¹³⁵ Ticketmaster emerged victorious with award of 18.2 million.¹³⁶ So far several states have enacted legislation to curb the use of ticket bots.¹³⁷ Colorado, Tennessee, Indiana, and Minnesota have criminalized ticket sniping, while North Carolina and Oregon have created for civil remedy.¹³⁸ New Jersey may soon join these states, as proposed legislation is making its way through the legislature.¹³⁹

b. Legislation

i. State

Currently, twenty-eight States regulate ticket resale in some form.¹⁴⁰ Seven states regulate weakly, 11 allow resale in same form.¹⁴¹ However, “most states now accept online ticket reseller as part of a legitimate, useful and vibrant secondary sales market, especially if the resellers register with the state, provide consumer protections, and pay taxes as required.”¹⁴²

The State of New Jersey is contemplating a ticket resale bill, S-875, sponsored by State Senators Raymond Lesniak (D-Union) and Robert Singer (R-Monmouth and Union), which would significantly alter the ticket market in in the state.¹⁴³ A review of this bill provides an example of the pros, cons, and complexities of legislating the current ticket resale market.

The bill proposes new additions to existing law, many of which are aimed at increasing transparency and accountability. The proposed bill would require that all tickets issued bear a traceable barcode identifying each ticket and its original sale, to be kept on record for five years.¹⁴⁴ Under the proposed legislation, ticket sellers would be required to provide advance notice to the public, within fifteen days of an event, the total number of tickets issued that are for public sale, those that are not for public sale, and those that are given to fan clubs, business, or other promotions.¹⁴⁵ The act would also forbid insiders¹⁴⁶, which includes the venue, agent, producer, and the artist, from selling tickets prior to general sale.¹⁴⁷

Lesniak and Singer's proposed bill stands to protect the consumer interests of New Jersey. The proposed legislation also directly targets limitations imposed on the consumers ability to resell a or exchange tickets, by forbidding such devices as restrictive e-tickets, conditioning entry on the presentation of a document, or requiring a 'will call' method for picking up tickets.¹⁴⁸ S-875 also ameliorates consumer concerns of monopolization of secondary ticketing by eliminating the ability for a primary seller to impose a restriction that requires a ticket be sold through a specific channel.¹⁴⁹

S-875 also targets the technological advancements that have made for widespread abuse in the secondary market—ticket bots. The proposed legislation forbids the use of technology to disguise identity so as to gain access to more tickets by circumventing the limitations imposed by the owner or operator of the event,¹⁵⁰ or to skip waiting queues or other limitations imposed by the primary seller.¹⁵¹

The proposal also adds serious penalties.¹⁵² S-875 proposes that “any person who violates [the law] shall be subject to all remedies and penalties available pursuant to the [Consumer Fraud Act,]” meaning \$10,000 for a first offense, \$20,000 for a repeat offense.¹⁵³ S-

875 also proposes that violators are guilty of a crime in the 4th degree,¹⁵⁴ a misdemeanor.¹⁵⁵ Classification as a crime of the 4th degree carries a sentence of imprisonment of up to 18 months.¹⁵⁶

While S-875 benefits the consumer in key ways, it simultaneously and unquestionably benefits the secondary sales market. Section 8 of the proposed Act forbids a ticket issuer from bringing legal action against secondary sellers for violation of their restrictions on secondary sale—be it the average person, “who facilitate[s] or provide[s] services for the resale of tickets[,]” or the online powerhouse StubHub, “[t]he operator of a physical or electronic marketplace in which a ticket is offered for resale[.]”¹⁵⁷

Further, the proposed legislation also removes key language from existing law. The Act repeals the existing special regulation of ticket brokers and would end the requirement that ticket brokers register with the division of Consumer Affairs. S-875 also removes the portion of existing law that places a ceiling price on ticket resale, by eliminating language that restricts the resale of a ticket by an average person in excess of 20% of the ticket price, or the registered ticket broker from purchasing a ticket with the intent of reselling the ticket in excess of 50% of price paid to acquire the ticket.¹⁵⁸

The bill is being met with both support and hesitation. There are those that support the ban on restrictive tickets.¹⁵⁹ However, many disagree. The CEO of the New Jersey Sports & Exposition Authority opined that while he understands the intent of the bill and does not oppose what it seeks to address, “there are practical consequences in what’s set forth right now.”¹⁶⁰ The CIO of the same organization believes the bill is unnecessary, as less than one percent of tickets are paperless.¹⁶¹ It is understandable that the concert industry would “balk” at the legislation’s restriction on venues withholding tickets for direct sale in the secondary market, as it “would

presumably [result in] a violation of . . . the Consumer Fraud Act, which can include minimum fines of \$10,000.”¹⁶² Further, some believe that the bill in its current form will make the state less attractive as a venue, and that artists will take their shows to other states.¹⁶³

ii. Federal

1. Incorrectly applied law

There is some federal legislation that is not directly aimed at ticket scalping and online resale, but attempts have been made to apply it. At least two federal acts have been inappropriately applied to ‘new-age’ ticket scalping; the Communications Decency Act (“CDA”) and the Computer Fraud and Abuse Act (“CFAA”).

The Communications Decency Act of 1996¹⁶⁴ is a federal act with numerous affects, one of which is the treatment of online resale operations under state law. It was enacted in direct response to court decisions that placed the risk of liability on service providers that regulated offensive material on their sites; the presumed effect of these holdings was that “service providers [would be deterred] from blocking and screening offensive material.”¹⁶⁵

The CDA was adopted to “remove disincentives” from service providers so as to allow them to regulate and filter the material on their sites.¹⁶⁶ The Act is designed to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹⁶⁷ One of the ways the Act achieves this end is to “immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.”¹⁶⁸ The result under § 230 is that much like online message boards,¹⁶⁹ eBay,¹⁷⁰ and Amazon.com,¹⁷¹ resale sites such as StubHub, TicketsNow, and Cheaptickets may not liable for the third party content on their websites—the tickets sold.¹⁷²

This was the result obtained in *Milgram v. Orbitz*, in which the State of New Jersey recently sued TicketsNetwork,¹⁷³ a large online ticket market that contains up to seven million tickets for sale from third party sellers at any time.¹⁷⁴ In response to the ticketing fiasco surrounding the 2009 Bruce Springsteen tour,¹⁷⁵ the State was targeting the sale of tickets prior to the general on-sale date and sellers failing to inform consumers that they did not physically possess and control the offered tickets at the time of sale.¹⁷⁶ Both of these actions are forbidden by TicketNetwork's terms of use.¹⁷⁷ Similarly, the state argued, these acts were in violation of New Jersey's Consumer Fraud Act.¹⁷⁸

Under § 230, immunity is given to 'interactive computer services' that act as publishers of third party information, as opposed to those that become 'information content providers,' transcending mere publishing into actual creation of content.¹⁷⁹ The Court in *Milgram* determined that TicketNetwork was an "interactive computer service,"¹⁸⁰ and imported the reasoning from two defamation cases, which were deemed applicable to ticket sales.¹⁸¹ Ultimately, the Court determined that TicketNetwork was not liable under the State's Consumer Fraud Act¹⁸², as § 230 "afforded . . . broad immunity."¹⁸³

The court in New Jersey noted that there is contrary, though non-binding authority in *NPS, LLC v. Stubhub*.¹⁸⁴ In *NPS*, the New England Patriots sued StubHub over the resale of season tickets on their site, and StubHub's motion for partial summary judgment on the count of intentional interference was denied.¹⁸⁵ The court determined that while StubHub would not lose immunity under § 230 for simply knowing of illegal activity on the site,¹⁸⁶ if it was proven that StubHub engaged in the level of knowing sufficient to constitute illegal ticket scalping, it would not receive section § 230 immunity.¹⁸⁷

It is debatable if the CDA should apply to ticket resellers or online auction houses. The Act's primary purpose "was to control the exposure of minors to indecent material."¹⁸⁸ Section 230 immunity is based on the actor's status as a publisher,¹⁸⁹ possibly as a distributor.¹⁹⁰ This is why most § 230 suits are about defamation.¹⁹¹

Given § 230's focus on contribution to speech website content, it could be said it is a stretch to apply the Act to an online resale sites.¹⁹² The Seventh Circuit has deemed the section does not in fact create immunity, and when StubHub sought to invoke § 230(c)(1) in the context of a tax lawsuit, the court dismissed the Act as irrelevant outside of the context of publishing information or speech.¹⁹³ Further, the Seventh the Circuit intimated that § 230 may operate as a definitional statute.¹⁹⁴

In any event, § 230 must not create a comprehensive immunity, as online music sharing services that enable copyright infringement "may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright."¹⁹⁵ Similarly, § 230 should does not protect online resale websites to the extent that knowingly and purposefully violate the law.¹⁹⁶

However, the argument for § 230 providing this 'immunity' is understandable. The same logic applies to eBay or StubHub as much as it applies to an online message board—the sites should be incentivized to regulate illegitimate content, and should not avoid doing so for fear of liability.¹⁹⁷ Further, the sites do not create the content (the tickets)—this is done by a third party, and which is the precise immunity the CDA provides.¹⁹⁸ However, the Act seems designed to protect speech and to insulate the websites that seek to regulating their content, thereby keeping robust political discourse but protecting children from offensive material.¹⁹⁹ Nonetheless, the CDA does not expressly state that § 230 immunity should not apply to these types of websites.²⁰⁰

Another Act applied to ticket scalping is the Computer Fraud and Abuse Act, which is directed at unauthorized computer access. While a thorough discussion addressing the nuances of the CFAA is outside the scope of this paper, it is notable that the Act has been raised in both civil and criminal courts as a potential weapon against abuse in the ticket market. However, use of the Act in the context of ticket reselling raises concern.

The CFAA was passed in 1984, and is designed to criminalize unauthorized access to computers.²⁰¹ The Act was “originally designed to criminalize only important federal interest computer crimes,” but has been expanded many times, making it “one of the most far-reaching criminal laws in the United States Code.”²⁰² Though a criminal statute, the CFAA allows for plaintiff’s “who suffer[] damage or loss . . . to maintain civil action[s] . . . to obtain compensatory damages and injunctive relief or other equitable relief.”²⁰³ The CFAA is mostly applied in civil actions and not criminal cases.²⁰⁴ It is because of these expansions that attempts have been made to apply the law against ticket scalpers.

In 2010, four men from California, working collectively as “Wiseguys Tickets,” were brought up on charges for their actions in the ticket market, which affected numerous sporting events and concerts.²⁰⁵ The Wiseguys cyber fraud enterprise manipulated the ticket market, growing to an estimated value of \$25 million.²⁰⁶ Essentially, the Wiseguys obtained tickets before the general public even got a chance, only to resell them to that public at inflated prices.

The resulting case was *United States v. Lowson* in the District of New Jersey, in which Attorney General Paul Fishman sued the four individuals alleging violations of the CFAA.²⁰⁷ The U.S. sought to hold the Wiseguys accountable for ‘hacking’ Ticketmaster’s website in “one of the largest [cases] in the history of the ticketing business.”²⁰⁸ Wiseguys recruited programmers from Bulgaria to circumvent CAPTCHA technology, and used ‘bots’ to circumvent

as virtual lines and limits per customer.²⁰⁹ The Wiseguys “allegedly created and managed hundreds of fake Internet domains and thousands of addresses to disguise their activities from online ticket sellers.”²¹⁰ Despite the seemingly deliberate fraud engaged in by the defendants in *Lowson*, and a potential sentence of five years in prison and a \$250,000 fine,²¹¹ a plea of “guilty to conspiracy to commit wire fraud and gain unauthorized access to protected computers”²¹² resulted in a mild sentence. In addition to rescission of profits and community service,²¹³ the Honorable Katherine Sweeney Hayden (D. N.J.) sentenced the defendants to two years’ probation and alcohol & drug treatment.²¹⁴

Though the Judge’s opinion was criticized by some as being too lenient,²¹⁵ there were those that were pleased with the outcome.²¹⁶ The potential implications that an expansive view of the Act may bring are worth pause. As Judge Hayden noted, though *Lowson* was a criminal case, it was about “e-commerce” and the “state of the law is very gray.”²¹⁷ If the CFAA is interpreted broadly, a user who engages in contractual violation of a website’s term of service could face criminal penalty. This would result in a potential sea change, in which private actors fundamentally create criminal law.

This is why a similar result was obtained in *U.S. v. Drew*, an earlier CFAA case in which a jury convicted the defendant of misdemeanor charges for violating the terms of use imposed by the Myspace website.²¹⁸ The defendant’s motion for acquittal was granted on appeal.²¹⁹ The Court had the same concern raised in *Lowson*—to criminalize the conduct of violating a website’s terms of use would result in many innocent Internet users being converted into misdemeanor criminals.²²⁰ Further, criminalizing the conduct on a websites term of service leads to vagueness problems,²²¹ and is an interpretation of the Act that must be rejected.²²²

Several articles have commented on the CFAA, address issues of vagueness and over breadth,²²³ and the potential of the act of criminalizing a broad range of conduct.²²⁴ Similarly, amicus briefs were submitted in both the *Lowson* and *Drew* cases, opining that the CFAA must not be so applied.²²⁵

2. Proposed Legislation

In 1998, Congressman Gary Ackerman of New York proposed the ‘Ticket Scalping Reduction Act.’²²⁶ It was a scant but imposing legislation. The proposed act defined scalping as the resale of a “ticket at a markup of more than \$5 or 10 percent of the face value[.]”²²⁷ The act provided that anyone in violation of the act—those who “scalped” 5 or more tickets in any single transaction—“shall be fined . . . or imprisoned not more than 2 years, or both.”²²⁸

Several years later, Representative Bill Pascrell of New Jersey achieved some modicum of fame from his proposed legislation that addresses issues in the secondary ticket market. Pascrell borrows the moniker of one of New Jersey’s most famous natives for the acronym of the BOSS Act, or Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act.

The proposed BOSS Act would utilize the FTC as the enforcement arm to offers consumers much need relief from abuse in the secondary ticket market.²²⁹ A violation of the Act is considered the equivalent of an unfair or deceptive act or practice.²³⁰ The Act would allow the Attorney General of any state to bring suit under the Act,²³¹ and the District Courts would have a wide array of remedies at their disposal.²³²

The BOSS Act would provide for transparency and accountability in the ticket market. The Act requires that ticket sellers be registered and provide viable contact information.²³³ Primary ticket sellers must disclose the total number of tickets offered for sale as well as the amount and distribution of tickets that are not available to the general public.²³⁴ They must also

include the face value and any other associated charges or fees.²³⁵ Secondary sellers must clearly state if they possess the ticket at the time of sale and provide procedures for refund if the ticket is not as advertised.²³⁶ Online resale marketplaces must disclose to the consumer if the secondary seller is a primary seller, venue, or artist.²³⁷

The BOSS Act also calls for some significant changes in to the market. These drastic and potentially efficacious changes include the prohibition on purchase of tickets by a secondary seller during the first 48 hours of primary sale²³⁸ and the prohibition on the resale of ticket by employees of the venue, primary ticket sellers, artists, online resale marketplaces, and box offices, if that resale is for a higher price than face value, or if made to a third party that intends to resell.²³⁹ A newest version of the Act, not yet formally introduced, includes the most needed regulation of all, directly targeting computer ‘bot’ software and paperless tickets transferability.²⁴⁰ As officially proposed, the BOSS Act has so far failed to gain any traction in the Senate. It is not without its critics.²⁴¹

c. Themes

As in the 1800s, the modern ticket market is similar in least three major ways. First, tickets are often unavailable in the primary market, leaving the average consumer to search for tickets in the secondary market, as discussed above. Second, the absence of legislation results in private efforts to curb the problem. Third, society is engaged in a philosophical debate—there are those of the belief that the scalpers are not a problem, but serve a valuable purpose.

i. Private Ordering

1. Ticketmaster’s measures

Ticketmaster is no stranger to playing the villain and is frequently lambasted. However, Ticketmaster does seek to control the ticket market and institute “a fair and equitable ticket

buying process.”²⁴² Ticketmaster employs several methods to achieve this goal. The first of these methods is contract. Ticketmaster’s website carries “Terms of Service” which prohibit the use of the site for commercial gain and using a computer program to navigate the site automatically.²⁴³ The agreement also limits the number of tickets available to each individual purchaser in a single transaction.²⁴⁴ Ticketmaster also “employs a number of technological means,” such as CAPTCHA technology, which aim to prevent the raiding of Ticketmaster’s website by ticket bots.²⁴⁵ Ticketmaster has also recently adopted the paperless ticket as the latest means against scalping.²⁴⁶

a. Paperless

The ticket resale industry, like so many other industries, has been changed by the internet. Tickets are readily available for sold out events on any number of websites. One aspect of live entertainment that had remained relatively consistent was the physical ticket itself as being transferrable from one person to another, be it as a gift or sold for a profit (prohibitive legislation aside). Indeed, there have been recent advances, such as the ability for the consumer to digitally download and print tickets at home before going to the venue,²⁴⁷ but these tickets may still be sold in the secondary market. A recent development designed to curb the secondary market is being heralded as a sea change—paperless ticketing.

Paperless ticketing is available in railroad travel,²⁴⁸ air travel,²⁴⁹ and recently, the entertainment industry;²⁵⁰ for concerts²⁵¹ and sporting events.²⁵² Paperless ticketing is purported to help the consumer as a means of preventing “fraud by eliminating a paper-based ticket and only using electronic information to verify a purchaser’s identity.”²⁵³ Paperless ticketing appears to be the future, as Apple is developing a paperless ticketing app for both concerts²⁵⁴ and travel.²⁵⁵ Ticketmaster, who recently adopted the paperless ticket,²⁵⁶ claims that the new ticket

offers fans “more convenience,” as the customer does not have to stand in line at a will-call window.²⁵⁷ With a paperless ticket, the user receives no physical paper ticket or digital file for print, but must bring the credit card used to purchase the ‘tickets’ online and present it at the door.²⁵⁸

By linking entrance to the venue with the credit card of purchase, paperless tickets seek to control the secondary market.²⁵⁹ By requiring the credit card of purchaser at the point of entry, paperless ticketing places a significant road block to large-scale ticket resale operations and at the same time curtails the possibility of resale for the average consumer.²⁶⁰ At this time, paperless tickets are a small part of the overall market.²⁶¹

Though Ticketmaster’s adoption of paperless tickets attempts to benefit fans by preventing this type of fraud, it has resulted in outrage.²⁶² The opponents argue that paperless ticketing in concerts and sporting events raise consumer protection and competition issues.²⁶³ Paperless tickets encumber the average consumer by limiting their ability to resell a ticket, and placing restriction on entrance to an event. The proponents of paperless tickets contend that paperless ticketing will limit abuse in the secondary market, though this may not be a total success.

Paperless tickets are designed to limit ticket resale by linking the ticket itself to the individual purchaser. Paperless ticketing finds its supporters in primary sellers such as Ticketmaster and LiveNation, but also in the artists themselves, like Bruce Springsteen.²⁶⁴ North America Ticketmaster spokesperson Jacqueline Peterson attests that it would be “very challenging” for scalpers to sell paperless tickets.²⁶⁵ Indeed, paperless tickets are an effective means of curbing the use of ticket bots.²⁶⁶ However, it is easy to conceive of ways to circumvent paperless ticketing restrictions. For example, the reseller could buy the paperless tickets with

multiple credit cards as before, then have an agent go to the venue with the purchasers and transfer the tickets at the door.

Opponents of paperless tickets feel that “[p]aperless tickets sound convenient . . . [b]ut in truth, they’re a nightmare for fans.”²⁶⁷ Paperless tickets are believed to infringe on the consumer by restricting gifting of tickets, restricting the resale of tickets, limiting availability of tickets to sold-out shows, causing delay at the venue as patrons have id and credit card checked, all while granting Ticketmaster a monopoly over the process.²⁶⁸ The paperless ticket system also causes a significant inconvenience in entering the venue. With Ticketmaster’s paperless ticketing, multiple patrons under one friend’s or family member’s credit card must all enter at the same time.²⁶⁹

Consumers can find solace in the possibility of reselling their tickets on Ticketmaster’s secondary ticket exchange site, TicketsExchange, if the venue and artist and promoter allow for this.²⁷⁰ However, there may be limitations placed on the resale, such as not being allowed to sell the ticket for below face value.²⁷¹ Again, this does not solve the problem, as a significant gripe lies with Ticketmaster’s control over the entire process.²⁷² Further, if Ticketmaster controls this process, they can charge fees, or implement minimum resale prices.²⁷³

Consumers in New York are so frustrated with paperless ticketing that a class action was recently filed in the District Court against LiveNation and Ticketmaster, alleging that the companies violated New York State law by only offering paperless tickets.²⁷⁴ The plaintiffs allege that the sellers violate state law by not allowing an option to transfer the ticket.²⁷⁵ However, consumers must decide which is more frustrating—the use of ticket bots resulting in increased prices, or the restrictions of paperless tickets.²⁷⁶

2. Variable Pricing, Auctions, and Aggregators

Another recent development in the ticket market for sporting events is variable pricing, a tactic borrowed from Broadway and Airline tickets,²⁷⁷ which is deemed a way to help combat scalping.²⁷⁸ Variable pricing describes the method of pricing based on an estimation of consumer demand; charging higher prices for more popular opponents or popular nights, such as weekend games.²⁷⁹ Many MLB baseball teams have instituted variable ticket pricing.²⁸⁰ The pricing mechanism helps ball clubs who would otherwise be absorbing the loss of unsold seats.²⁸¹ Fan reaction is mixed to variable ticket pricing, as some fans view it as price gouging, others may recognize the potential in subsidizing less popular games.²⁸²

Yet another innovation designed to curb ticket scalping is dynamic pricing, in which “promoters and artists [sell] the most desirable seats in an auction format.”²⁸³ Variable pricing allows the ticket seller to match prices to market fluctuation, and may in fact be the future of ticket pricing.²⁸⁴ Dynamic pricing is viewed as another tool against ticket scalping,²⁸⁵ and as the wave of the future.²⁸⁶

Yet another innovation is an aggregator website, such SeatGeek, which sorts tickets from dozens of websites and lists them in a single page.²⁸⁷ Basically, the website shows you the tickets in a rank order based on a predictive score, incorporating such factors as consumer preference and “the gap between the asking price and the predicted market value of the ticket.”²⁸⁸ Ticket aggregators can put pressure on the ticket market, possibly resulting in lower fees.²⁸⁹

3. Artists’ Own Actions

One solution lies in the control of the individual artist. As with many other aspects of show business, the artist can retain control over aspects of the performance, though their ability to do so depends on their bargaining power (popularity). If the artist wanted to exercise control

over the ticketing aspect of their show, they can. Artists can curb abuse through paperless tickets or other unique limitations on resale.

In terms of creativity, look no further than comedian Louis C.K. When recently frustrated with ticket resale abuse of his shows and its effect on his fans, the comedian adopted his own ticket policy in an experiment.²⁹⁰ The policy placed limitations on the person's ability to make profit off a ticket, and was designed to directly curb the type of digital scalping we are growing familiar with.

You'll see that if you try to sell the ticket anywhere for anything above the original price, we have the right to cancel your ticket (and refund your money). This is something I intend to enforce. There are some other rules you may find annoying but they are meant to prevent someone who has no intention of seeing the show from buying the ticket and just flipping it for twice the price from a thousand miles away.²⁹¹

The policy resulted in a 96% decrease in scalping, and still resulted in over 6 million in tickets sold.²⁹²

The British rock band Radiohead has been known as progressive for most of its career. They achieved some notoriety in 2007 when they conduct an experiment, selling their album "In Rainbows" online for a pay-what-you-want price.²⁹³ They are no less pragmatic when it comes to their concerts. In response to the woes of many fans paying inflated prices for tickets, Radiohead recently partnered with Ticket Trust, so that members of the band's fan club who are no able to attend the concert can resell their tickets through their website at face value.²⁹⁴ The band is also known to use paperless ticketing to control inflated prices in the secondary market, though this is not well received by fans.²⁹⁵ They also go as far as to limit the number of tickets sold to each individual purchaser; some of the band's recent shows in the New York City area were sold digitally on a two-person per household basis.²⁹⁶

ii. Attitude and philosophy

As in the 1800s, ticket scalping today is disliked,²⁹⁷ but also subject to debate.²⁹⁸ Some want legislation,²⁹⁹ and others wanting a free market without restriction.³⁰⁰ Opinions vary from those that are not upset about inflated prices and are willing to pay more for a second chance,³⁰¹ to those that lament the way that base prices for concert tickets are currently being set and its resemblance to “the health insurance industry or the bank industry—they see an opportunity for a lot of money and they exploit it.”³⁰²

Modern day ticket prices are based on “a perceived notion of fairness—that the face value of a ticket is actually the ‘fair value.’”³⁰³ Ticket scalping legislation is based on the public perception that resale of tickets above market value is unfair, “despite making economic sense.”³⁰⁴ However, some assert that the secondary market is natural, given the underpricing of concert seats.³⁰⁵ The face value of a ticket is typically below the market value, which leaves a “consumer surplus”—“the positive difference between what they would have paid for the ticket and the price they actually paid.”³⁰⁶ As in the 1800s, modern day online ticket scalpers attempt to capture this “consumer surplus” by buying the tickets in bulk before the consumer has a chance, and then reselling them to the consumer, often at an inflated price.³⁰⁷

Ticket scalping is not without its proponents,³⁰⁸ as ticket scalpers are not without their benefits.³⁰⁹ It gives those who could not (or chose not) to wait in line an opportunity to purchase tickets.³¹⁰ Some people are not upset about inflated prices, and are willing to pay more for a second chance.³¹¹ Some believe that the market simply controls and corrects itself.³¹² Some argue that market corrections the most prevalent problems, such as ticket sniping, with schemes like variable pricing and paperless ticketing, makes legislation unnecessary.³¹³

Society reacts to problems it perceives as worthy. As in the 1800s, many are frustrated by the way the ticket resale market is seemingly allowed to operate as it does, allowing those

who purchased a bulk of tickets or withheld tickets to resale them at significantly increased profit. Though this frustrates many who complain about the unavailability of tickets, inflated prices, and the use of ticket bots, there is little legislation addressing the sources of the problem. However, when scalpers were selling tickets to the Hurricane Sandy Benefit Concert, the legislature was quick to react to what was deemed truly appalling, and quickly proposed law outlawing the resale of tickets to charity events for higher than face value.³¹⁴ Until society deems the scalping of a wide array of concerts on a daily basis as worthy, there can be no significant legislative change. Given that the scalping legislation started on a significant basis well into the 1900s, we may have to wait some time. By that time, private ordering may have addressed the problem to the satisfaction of the consumer through such methods as increased security, variable pricing and paperless technology.³¹⁵

III. Proposal: Federal legislation or a uniform code on the regulation of secondary sales

The issues we face in the modern ticket market are similar to those caused by ticket scalpers in the 1800s, albeit with different actors in a different form and in a different time. Time has proven that the problem of ticket speculation is not an easy one to fix,³¹⁶ and that widespread legislation may be some years if it comes at all. Some argue that legislation is ill-equipped to address modern-day ticket scalping, and therefore not needed as the market successfully responded on its own by implementing variable pricing and paperless tickets.³¹⁷

Before any legal solution can be developed, society must decide that the current ticket market is so unfair that it in fact requires regulation. As of yet, our society does not yet appear so displeased, or the legislature does not perceive it to be. When ticket scalpers targeted the Sandy Benefit Concert, the legislature was quick to respond with restrictions targeting the resale of *charity* concert tickets.³¹⁸ Presumably, everyone agrees that scalping for a charity benefit

concert is and should be impermissible. The everyday concert, however, produces strong views both in favor of secondary sale, and in favor of regulating or prohibiting secondary sale.

There are different perspectives of fairness—fairness of the public’s access to what is perceived to be a fair price of a ticket in face value, and fairness in allowing the price of a ticket to be dictated by the free market. If society deems it important enough, legislation should address the major issues and consumer concerns in the market: these include ticket ‘bots and ticket sniping, disclosure, price ceiling, ambiguity in applicable law, and paperless restrictions.

Given the strong foundation present in the Bill Pascrall’s proposed BOSS Act, I would propose a BOSS Act “Plus.” While the BOSS Act is not a perfect piece of legislation, it is a promising and viable option which will do exactly what it aims to do—namely, provide better oversight of secondary sales and accountability in concert ticketing. In its current proposed forms, the BOSS Act does not address ticket bots or paperless tickets.³¹⁹ However, the next iteration of the Act will contain regulation targeting both ticket bots and paperless tickets. That being the case, the only “Plus” I would recommend would be to include a clarification of the applicability of the CDA and CFAA to internet related scalping issues.

National legislation is a viable option and should be encouraged. Without uniformity, individual states will comprise an uneven playing field of ticket resale legality, and registration and disclosure requirements. Given the prevalence of technology and the ease of operating from a distance, prohibitive legislation on a local scale is of limited value. Online websites make statewide or local legislation difficult to enforce.³²⁰ Federal legislation “may create more uniform enforcement and ease jurisdictional problems.”³²¹ Further, individual states that decide to regulate ticket resale, in both transparency of ticket withholding and prohibition on resale, may suffer the loss of talent in its venues, as artists take their act across the border.³²²

If Congress is reluctant to address ticket scalping on a federal level, the states could seek to adopt a uniform legislation; a Uniform Ticket Resale Act. Uniform legislation would serve to address the problems of scalpers moving across state lines or operating from a distance. It would also remedy, to the extent adopted, issues of one state being ‘less attractive’ than another based on its local law and potentially stricter ticket resale law.

CONCLUSION

Many of the same problems that faced the consumer in the 1800s face the consumer today. The ‘virtual line’ is cut by a modern day scalper with computer software, are then listed with secondary sellers. As in the 1800s, legislation is sparse and ill-equipped to address the issue. States seem to allow the practice. The current ticket market has responded with its own measures to address scalping problems, which come with their own issues. Incorrect federal law has been applied. A uniform ticket resale law is recommended to clarify this ambiguity and remedy ticket resale issues across the several states, and address the modern day problems of ticket bots and remedy of paperless tickets. It may be some time before this occurs, if ever.

¹ KERRY SEVGRAVE, TICKET SCALPING – AN AMERICAN HISTORY, 1850-2005 at 5 (2007) (citing *A Carnival of Crime*, N.Y. TIMES, Nov. 20, 1876, p4).

² *Id.* at 1.

³ *Id.* at 3–4. (“During [the period of 1850-1899] ticket scalping was a widespread practice both in the entertainment business and the railroad business.”).

⁴ *Id.* at 4 (citing *Amusements*, N.Y. TIMES, Sept. 8, 1856, p. 1. (“The pertinacity with which the [ticket speculators] persist in thrusting reserved seats in your face is intolerable.”)).

⁵ *Id.* at 20, (citing an account from 1881, *Ticket Speculators and the opera*, N.Y. TIMES, Oct. 2, 1881, p. 2, which explained that “no good seats were available even days prior to the performance, and one was then chagrined to be referred to the speculators by the box office staff. All those things . . . [were common.]”).

⁶ *Id.* at 6. (“complaints by play-goers [in the 1883-84 season] were heard anew that they were unable to obtain seats to a successful play unless they purchased them from sidewalk speculators. . . at a premium”).

⁷ *Id.* at 4.

⁸ *See, e.g., id.* at 8 (citing *Mr. Sullivan’s failure*, N.Y. TIMES, Feb. 1893, p. 12. (“Ticket speculators were in force [at a July 1882 boxing match], and they had no difficulty in disposing of tickets at from \$3 to \$5”, which had a face value of \$1 to \$2)).

⁹ *Id.* at 36 (citing *The ticket speculators*, N.Y. TIMES, Dec. 21, 1883, p. 3).

¹⁰ *See generally id.* at 1–9

¹¹ *Id.* at 18 (citing *The ticket speculators*, N.Y. TIMES, Aug. 22, 1870, p. 8, describing one Mr. Brown in 1870, said to have amassed over \$10,000 in the business of ticket scalping); *see also id.* at 20 (citing *The ticket speculators will not redeem*, N.Y. TIMES, Jan. 9, 1883, p. 4, describing a concert in 1883, where it was “estimated that [the scalper’s] aggregate profits reached from \$5000 to \$8000”).

¹² *Id.* at 21, citing “Seats for the Irving season”, *New York Times*, October 4, 1883, p. 8, describing the performances of British actor Henry Irving in 1883, for which 80% of tickets, “a gross of \$30,660” allegedly went to scalpers.

¹³ *Id.* at 22 (citing *William Turnbull killed*, N.Y. TIMES, Mar. 23, 1890, p.1 & *A coroner’s jury exonerates Hyde*, N.Y. TIMES, Mar. 28, 1890, p.3 (describing James Hyde, notorious and well-liked scalper, who shot competitor William Turnbull, who had “an ugly and quarrelsome disposition”).

¹⁴ *Id.* at 18 (citing *Amusements*, N.Y. TIMES, Nov. 9, 1869, p. 5 (describing ticket speculators ahead of a person in line, some of whom taking “some twenty boxes” of tickets)); *see also, id.* at 19 (citing *The Bernhardt tickets sold*,

N.Y. TIMES, Oct.2, 1880, p. 10. (“Line-ups by scalpers at box offices for tickets soon developed a tactic where the more ambitious speculators employed an increasing number of proxies to stand in line for them.”)).

¹⁵ *Id.* at 6 (citing *No Title*, N.Y. TIMES, Sept. 11, 1883, p.4. (“[M]anagers could not effective refrain from selling tickets to speculators, because of their use of proxies, and so on[.]”)).

¹⁶ *Id.* at 35 (citing *Dividing the pudding*, N.Y. TIMES, Dec. 14, 1883, p.5. (“I don’t mean to say that it is customary for managers to take our nearly the whole of their orchestra and give it to the speculator in the lobby, but I has been done on several occasions.”)).

¹⁷ *See, e.g.*, students in Princeton-Yale match up, *infra* note 21, and modern-day students in Syracuse on Facebook, *infra* note 113

¹⁸ *Id.* at 7 (citing *Ticket scalpers in Paris*, N.Y. TIMES, Feb. 18, 1900, p. 9. (“the existence of this evil in Paris is mainly due to the number of tickets allotted authors nightly, who sell them to the agents[.]”)).

¹⁹ *Id.* at 22–23 (“large hotels were furnished with seats to sell as an accommodation to the traveling public, and of course they charged a “small advance” over the box office price.”).

²⁰ *Id.* at 8.

²¹ *Id.* at 9 (citing *Student ticket speculators*, N.Y. TIMES, Nov. 24, 1893, p.9 (“students sold their tickets directly to others they charged 8\$ for the uncovered stands and \$10 for the covered stands” when the tickets were originally \$1.50 for uncovered stands, and \$2 for covered stands.))

²² *Id.* at 10 (citing *War upon the ticket speculator*, N.Y. TIMES, Aug. 20, 1870, p. 4).

²³ *Id.* at 10 (citing *A ticket speculator fined in Boston*, N.Y. TIMES, Apr. 19, 1873, p. 1).

²⁴ *Id.* at 10 (citing *War upon the ticket speculator*, N.Y. TIMES, Aug. 20, 1870, p. 4).

²⁵ *Id.* at 14 (citing *Ticket speculators*, N.Y. TIMES, Sept. 22, 1883, p. 4. (“[ticket scalpers] are impudent beyond endurance and press their wares upon each new arrival with an audacity and a perseverance...”)).

²⁶ *Id.* at 10–17.

²⁷ *Id.* at 12.

²⁸ *Id.* at 12.

²⁹ *Id.* at 16 (citing *Ticket speculators win*, N.Y. TIMES, Oct. 7, 1899, p. 7).

³⁰ *Id.* at 15 (citing *The ticket speculator evil*, N.Y. TIMES, Apr. 12 1884, p. 8).

³¹ *Id.* at 13 (citing *The steam-heating job*, N.Y. TIMES, Dec.15, 1880, p. 3).

³² *Id.* at 13–14.

³³ *Id.* at 16 (citing *No Title*, N.Y. TIMES, Jan. 23, 1884, p. 4 (noting that Pennsylvania adopted legislation in 1884. Others account that the earliest scalping legislation began around 1918)); *see* Cianefrone et al., *Legal Issues Associated With Ticket Scalping*, SMART Online Journal, Fall 2004, Volume 1, Issue 1 at 21, *available at* <http://www.thesmartjournal.com/SMART-ticket%20scalping.pdf>

(citing Happel, S. K. & Jennings, M. M. (1995), *The folly of anti-scalping laws*, 15(1) THE CATO J. 65–99.

³⁴ Cianefrone et al, at 21.

³⁵ *Id.* at 21–22.

³⁶ *Id.* at 22.

³⁷ Segrave at 17 (citing *The Booth-Barrett season*, N.Y. TIMES, Sept. 29, 1888, p. 1. (“there is a doubt about the constitutionality of the law”)); *see also* Segrave at 12. (“it was generally thought that such a proposal would not have been constitutional.”)

³⁸ *See generally*, Cianefrone et al at 23–24.

³⁹ Segrave at 20 (citing *Ticket speculators and the opera*, N.Y. TIMES, Mar. 4, 1881, p. 2. (“Ever since I have had the direction of the Academy of Music, I have used my utmost endeavors to put down ticket speculators,” said J.H. Maplewood, director of the Academy of Music, in response to an 1881 editorial complaining of ticket scalping.)

⁴⁰ *Id.* at 7 (citing *Gossip of the theaters*, N.Y. TIMES, Sept. 25, 1885, p. 5 (regarding theater manager Augustin Daly, who would “keep two or three men posted in front of his house at all times, to watch the speculators. As soon as one of them disposed of a ticket Daly’s spotter followed the purchaser to the venue entrance [and were] stopped at the door”)).

⁴¹ *Id.* at 25 (citing *The ticket speculators*, N.Y. TIMES, Aug. 22, 1870, p. 8).

⁴² *Id.* at 17 (citing *The Booth-Barrett season*, N.Y. TIMES, Sept. 29, 1887, p.1. (“Despite what were described as “strenuous efforts” to keep tickets out of the hands of speculators, including imposing a purchase limit of four seats per person.”)).

⁴³ *Id.* at 6. (“[M]anagers could not effective refrain from selling tickets to speculators, because of their use of proxies, and so on[.]”)

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- ⁴⁴ *Id.* at 20 (citing *Night waiting at Wallack's*, N.Y. TIMES, Nov. 13, 1882, p. 5. (“because no one was allowed to purchase more than four seats, [ticket scalpers] employed . . . messenger boys, at 30 cents an hour, to line up all night long.”)).
- ⁴⁵ *Id.* at 8–9 (citing *Seats for the big game*, N.Y. TIMES, Nov. 24, 1893, p. 9).
- ⁴⁶ *Id.* at 27. In 1885, the Fifth Avenue Theater, “instituted a complicated system of writing down a purchaser’s name and seat number on the ticket in a book.”
- ⁴⁷ *Id.* at 26.
- ⁴⁸ *Id.* at 24–5.
- ⁴⁹ *Id.* at 25 (citing *Low prices the rule*, N.Y. TIMES, Aug. 20, 1882, p. 5).
- ⁵⁰ *Id.* at 7.
- ⁵¹ *Id.* (citing *Gossip of the theatres*, N.Y. TIMES, Sept. 25, 1885, p. 5. (“There are a great many people in New York who never think of buying seats in advance, and who in point of fact, do not know they are going to the theatre until the last moment before starting.”)).
- ⁵² *Id.* at 5 (“for there are times when one or two such men, known to be of good character, might prove useful.”).
- ⁵³ *Id.* at 6.
- ⁵⁴ See note 51, *supra*
- ⁵⁵ Segrave at 27 (citing *Gossip of the Theatres*, N.Y. TIMES, Oct. 22, 1885, p. 3).
- ⁵⁶ Stephen Rex Brown, *Ticket scalpers making big bucks off 12/12/12 concert to benefit Hurricane Sandy victims*, NEW YORK DAILY NEWS (Dec. 12, 2012, 12:40 PM), <http://www.nydailynews.com/new-york/scalpers-making-concert-article-1.1218497> (Statement of Bill Hind).
- ⁵⁷ Compare Note 1, *supra*, with note 56, *supra*.
- ⁵⁸ Daniel J. Glantz, *For-Bid Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L. J. 261, 262 (“Associating the term “ticket scalping” with the traditional sidewalk scalper is becoming less obvious as it meets its “digital future,” i.e., the internet.”).
- ⁵⁹ Cianefrone et al, note 33, *infra* at 20 (“[Ticket scalping outside a venue] can be disruptive as it often creates commotion and possible safety concerns around the venue, which is a major reason for anti-scalping legislation.”) (citing Jon Michael Gibbs, *Cyberscalping: On-line ticket sales*. 31 U. TOL. L. REV. 471, 495)).
- ⁶⁰ See *supra* notes 74–114.
- ⁶¹ “Cianefrone et al, *supra* note 33, at 20 (“Ticket brokers are another avenue for ticket scalping. Brokers are legal in some stakes and permitted to sell tickets for prices higher than face value.”)
- ⁶² Marie Connolly & Martin B. Krueger, *Rockonomics: The Economics of Popular Music* 25 (Industrial Relations, Working paper No. 499), accessible at: <http://dataspace.princeton.edu/jspui/handle/88435/dsp01xs55mc05g>
- ⁶³ See, generally, notes 242-282 *infra*
- ⁶⁴ Avi Lowenstien, *Ticket Sniping*, J. ON TELECOMMS. & HIGH TECH. L. 243, 244–45. (“Ticket snipers essentially “cut in line.”).
- ⁶⁵ Kurwitz, *infra* note 142, at 12
- ⁶⁶ Fabiano, *infra* note 205.
- ⁶⁷ Cianefrone et al, *supra* note 33, at 20.
- ⁶⁸ *Industry Profile: Chris Tsakalakis*, CELEBRITYACCESS.COM, <http://celebrityaccess.com/members/profile.html?id=492&PHPSESSID=n923vj5mtt61odeijl0mvu2ta3> (“The U.S. secondary market is a volatile, \$4 billion-per-year marketplace.”).
- ⁶⁹ Mark Holthaus, *Scalpers Profit Big on '12-12-12' Benefit Concert for Sandy Victims*, NEWSMAX.COM, (Dec. 7, 2012, 9:51 AM), <http://www.newsmax.com/TheWire/concert-sandy-benefit-scalpers/2012/12/07/id/466856>
- ⁷⁰ Jackie Bischof, *StubHub Under Fire for Sandy Concert Scalpers*, WALLSTREETJOURNAL – METROPOLIS BLOG, (Dec. 6, 2012, 10:01 PM), <http://blogs.wsj.com/metropolis/2012/12/06/stubhub-under-fire-for-sandy-concert-scalpers/>
- ⁷¹ Stephen Rex Brown, *Chuck Schumer, Sandy victims rip shameless scalpers charging up to \$60,000 for tickets to the 12-12-12 benefit concert*, NEW YORK DAILY NEWS (Dec. 6, 2012, 2:27 PM), <http://www.nydailynews.com/new-york/chuck-stop-sandy-scalping-article-1.1214866>
- ⁷² *Id.*
- ⁷³ James C. McKinley, *12-12-12 Producers Say Concert Brought in \$50 Million*, THE NEW YORK TIMES.COM – ARTSBEAT BLOG, (Dec. 19, 2012, 11:00 AM), <http://artsbeat.blogs.nytimes.com/2012/12/19/12-12-12-producers-say-concert-brought-in-50-million/>
- ⁷⁴ Ranking 1, 2, 3, and 4, respectively. *Top Sellers Rankings*, TICKETNEWS.COM, http://www.ticketnews.com/ticket_industry_rankings (Last visited Dec. 20, 2012).

⁷⁵ *How Questioning Basic Assumptions Made StubHub A \$310 Million Company – With Jeffrey Fluhr*, MIXERGY.COM, <http://mixergy.com/jeffrey-fluhr-stubhub/> (last visited Dec. 28, 2012) (interview of co-founder of StubHub, Jeff Fluhr).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* Statement of Jeff Fluhr (“there are no federal laws regarding the resale of tickets. So as far as the federal government is concerned, you can do whatever you want with your tickets.”).

⁸⁰ *Id.*

⁸¹ *StubHub: Anatomy of a game-changing idea*, CNNMONEY, (Jul. 23, 2012, 12:23 PM), <http://money.cnn.com/2012/07/20/smallbusiness/stubhub-spreecast-fluhr.fortune/index.htm> (originally published in Fortune magazine)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See Industry Profile*, *supra* note 68, (“The firm’s partners include nearly 60 sports teams, and it is also aligned with media companies AOL, and ESPN”).

⁸⁵ *See StubHub: Anatomy of a game-changing idea*, *supra* note 80.

⁸⁶ Eliot Van Buskirk, *StubHub Says Artists, Venues Fans – Not Scalpers – Inflate Ticket Prices*, EVOLVER.FM, (Apr. 4, 2011, 4:45 PM), <http://evolver.fm/2011/04/04/stubhub-says-artists-promoters-venues-and-fans-not-scalpers-cause-price-inflation-and-ticket-shortages/> (Statement of Glenn Lehrman, Stubhub head of communications)

⁸⁷ *See, e.g., Stubhub Hate*, AMPLICATE.COM, <http://amplicate.com/hate/stubhub> (last visited Jan 2, 2012).

⁸⁸ Dean Budnick & Josh Baron, *TICKETMASTERS: THE RISE OF THE CONCERT INDUSTRY AND HOW THE PUBLIC GOT SCALPED* 296 (2011).

⁸⁹ *See, e.g., Phil Williams, DA: No Ticketmaster Complaint, No Scalping Probe*, NEWSCHANNEL5.COM, (Nov. 13, 2012, 8:14 PM), <http://www.newschannel5.com/story/20089386/da-no-ticketmaster-complaint-no-scalping-probe> (“Prosecutors will not open an investigation into ticket scalpers - - and their use of illegal computer software to grab tickets before fans - - because Ticketmaster is not complaining.”).

⁹⁰ Mario Aguilar, *Fees. Scalpers. Scams. Why Buying Concert Tickets Sucks So Hard.*, GIZMODO.COM, <http://gizmodo.com/5848580/fees-scalpers-scams-why-buying-concert-tickets-sucks-so-hard> (last visited Jan. 4, 2012).

⁹¹ *Sen. Schumer Takes on Ticketmaster*, POLLSTAR.COM, (Feb. 9, 2009, 3:01 PM), http://www.pollstar.com/news_article.aspx?ID=647806

⁹² *Id.*

⁹³ *See infra* notes 248–77.

⁹⁴ Phil Williams, *‘Fan Freedom’ Group Requests Ticket Scalping Investigation*, NEWSCHANNEL5.COM, (May 30, 2012, 3:26 PM), <http://www.newschannel5.com/story/18660336/fan-freedom-group-requests-ticket-scalping-investigation>

⁹⁵ *See Fan Freedom Project*, *infra* note 260.

⁹⁶ Williams, *supra* note 94.

⁹⁷ *See StubHub – Anatomy of a game-changing idea*, *supra* note 80.

⁹⁸ As a resident of New Jersey, I visited the “North Jersey” regional site and ‘Tickets’ under the ‘For Sale’ category. There were tickets to New York Giants, New York Jets, Rutgers Football, Dave Matthews, Lady Gaga, Carrie Underwood, Justin Beiber, to name a few. North jersey tickets – all classifieds – craigslist (Oct. 21, 2012, 11:56 AM), <http://newjersey.craigslist.org/tia/>

⁹⁹ The default setting will list both; tickets for sale by owner and tickets for sale by dealer.

The user can chose to look at tickets for sale by owner only,

North jersey tickets – all classifieds – craigslist, CRAIGSLIST.COM Oct. 21, 2012, 11:56 AM),

<http://newjersey.craigslist.org/tix/> or tickets for sale by dealer only,

North jersey tickets – all classifieds – craigslist, CRAIGSLIST.COM (Oct. 21, 2012, 11:56 AM),

<http://newjersey.craigslist.org/tid/>

¹⁰⁰ For example, one I viewed stated nothing but: “Lady Gaga. Trusted Seller. Get your Tickets Here[link]”. The post is a way of advertising and directing traffic to the secondary site. This simultaneously provides the public access to these tickets, if they were unaware of that particular secondary seller. *Lady Gaga: Lady Gaga Concert*

Tickets, 2012-12-21, 11:16AM EDT, CRAIGSLIST.ORG, <http://newjersey.craigslist.org/tid/3313005652.html> (last visited Oct. 21, 2012), which directs the user to

Lady Gaga Tickets, CUTTINGEDGETICKETS.COM, <http://cuttingedgetickets.com/Lady-Gaga> (last visited Oct. 21, 2012)

This was also the case for Carrie Underwood, Justin Bieber, and P!nk, to name a few.

¹⁰¹ “GRAIGSLIST IS NOT INVOLVED IN ANY TRANSACTION, and does not handle payments, guarantee transactions, provide escrow services, or offer “buyer protection” or “seller certification”

Craigslist | about > scams, CRAIGSLIST.COM, <http://newjersey.craigslist.org/about/scams> (last visited Oct. 21, 2012)

¹⁰² *Buy Tickets*, EBAY.COM, <http://www.ebay.com/tickets> (last accessed Oct. 29, 2012).

¹⁰³ DePaul Law Review, 697, 697 n.1

¹⁰⁴ eBay.com, <http://ebay.com> (last visited Nov. 18, 2012) (enter “tickets” into the “search” field).

¹⁰⁵ *Event ticket resale policy*, EBAY.COM, <http://pages.ebay.com/help/policies/event-tickets.html#policy> (Last accessed Oct. 28, 2012) (“You can resell tickets to entertainment events, including sporting events, concerts, and plays. However, when you list a ticket on eBay, you’re responsible for making sure that selling your item doesn’t violate any applicable laws.”).

¹⁰⁶ The consumer could, theoretically be reimbursed for fraudulent tickets through the eBay buyer protection program. *What to do if you don’t receive an item or it doesn’t match the seller’s description*, EBAY.COM, <http://pages.ebay.com/help/buy/item-not-received.html> (last accessed Oct. 28, 2012).

¹⁰⁷ *Facebook offering tickets with Ticketmaster, ScoreBig, others*, L.A. TIMES | BUSINESS (Jan. 18, 2012, 6:00 PM) <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/01/ticketmaster-concert-tickets-facebook.html> *Ticketfly Doesn’t Make You Leave Facebook to Buy Tickets*, THE NEXT WEB, <http://thenextweb.com/facebook/2011/12/16/buy-concert-tickets-without-leaving-facebook-thanks-to-ticketfly/> (last accessed Oct. 21, 2012)

¹⁰⁸ Mike Melanson, *Facebook to Sell Tickets With Eventbrite*, READWRITE SOCIAL, (Mar. 9, 2012),

http://readwrite.com/2010/03/09/facebook_and_eventbrite_just_makes_sense

See also, Mitch, *Sell Tickets Through Facebook: Version Two of Eventbrite for Pages Launches*, BRITBLOG (NOV. 22, 2011),

<http://blog.eventbrite.com/sell-tickets-through-facebook-version-two-of-eventbrite-for-pages-launches/>

¹⁰⁹ EVENTBRITE FEATURES AND BENEFITS, <http://www.eventbrite.com/features/> (last visited Oct. 28, 2012).

¹¹⁰ The event organizer pays 2.5% plus .99 per ticket for online sales, (capped at 9.95 per ticket), and a second fee for payment processing, which varies based on payment method, but is close to 3%. WHAT DOES IT COST TO USE EVENTBRITE?, <http://www.eventbrite.com/fees/> (last visited Oct. 28, 2012).

¹¹¹ *Selling Event Tickets through Facebook*, THUNDERTIX.COM, <http://www.thundertix.com/features/sell-event-tickets-through-facebook/> (last visited Oct. 28, 2012).

¹¹² Gabriella Riccardi, *To the highest bidder: From the streets to computer screens, ticket scalping adapts to digital age*, THE DAILY ORANGE, (Oct. 9, 2012) <http://dailyorange.com/2012/10/to-the-highest-bidder-from-the-streets-to-computer-screens-ticket-scalping-adapts-to-digital-age/>

¹¹³ *Facebook Key Facts*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last accessed Oct. 28, 2012) (“Statistics - One billion monthly active users as of October, 2012 . . . 552 million daily active users on average in June, 2012.”).

¹¹⁴ Leroy Comrie, *Transparency – that’s the ticket*, NEW YORK DAILY NEWS.COM, (Oct. 19, 2012, 4:43 AM), http://articles.nydailynews.com/2012-10-19/news/34590397_1_tickets-justin-bieber-lady-gaga

¹¹⁵ *Scalpers, Wealthy Get Great Seats for Taylor Swift*, NEWSCHANNEL5.COM, (Nov. 10, 2009, 7:51 PM), <http://www.newschannel5.com/story/11481431/scalpers-wealthy-get-great-seats-for-taylor-swift>.

(Taylor Swift’s tour was advertised as an American Express event. What that meant was that, during a presale period, American Express customers had first dibs on some 5,000 seats.)

¹¹⁶ Ethan Smith, *Concert Tickets Get Set Aside, Marked Up by Artists, Managers*, WALLSTREETJOURNAL.COM, (Mar. 11, 2009), <http://online.wsj.com/article/SB123672740386088613.html>.

¹¹⁷ *Id.*

¹¹⁸ Jean Henegan, *Ticketmaster facing ticket scalping allegations*, TICKETNEWS.COM, (NOV. 14, 2012 11:56 AM), <http://www.ticketnews.com/news/ticketmaster-facing-ticket-scalping-allegations111214852>.

¹¹⁹ Ryan Hogan, *Senator Schumer’s Tickets Legislation Not Quite as Advertised*, BHARATBHASHA.NET, (Apr. 30, 2009), <http://www.bharatbhasha.net/legal.php/130830>.

¹²⁰ *Drivers Beware: Don’t Stare At Katy Perry*, THESMOKINGGUN.COM, <http://www.thesmokinggun.com/file/katy-perry-rider?page=5> (Katy Perry’s contract rider states: “(iii)if Company elects to use “Resellers”, Promoters shall

hold tickets for each Performance, in quantities and in locations as designated by the Personal Manager, for distribution to the public through “Resellers”. “Resellers” shall mean any ticket agency, ticket re-seller or other so-called “secondary market” seller of tickets (such as, by way of example only, StubHub in the United states [sic]) who sell tickets to the general public. Promoter expressly acknowledges and agrees that Company shall be entitled to retain, for Company’s sole account, such portion of the proceeds from sales made by Resellers as Company and Resellers may agree, and Promoter shall have no entitlement to any monies from such sales by Resellers, whether from Company or from any Reseller, provided that Company shall pay to promoter for inclusion in the Gross the face value of all tickets sold by Resellers on Company’s behalf pursuant to this paragraph 4.9 (d)(iii).”

¹²¹ Phil Williams, *Congressman Renews Call for Federal Scalping Law*, NEWSCHANNEL5.COM, (Sept. 26, 2012, 7:31 PM) <http://www.newschannel5.com/story/19649708/congressman-renews-call-for-federal-scalping-law> (A Channel 5 News, Nashville Tennessee investigation revealed that few tickets were left to the general public, and that Bieber’s own tour withheld tickets that were later listed on scalping websites across the country).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *False Hopes Fuel Keith Urban’s Ticket Frenzy*, NEWSCHANNEL5.COM, (Nov. 9, 2009, 10:48 AM), <http://www.newschannel5.com/story/Global/story.asp?S=11469165> (“Urban pockets \$25 for each membership, giving fans -- and scalpers - early access to some tickets.”).

¹²⁵ See *supra* note 116.

¹²⁶ *Id.*

¹²⁷ See Lowenstein, *supra* note 63, at 244.

¹²⁸ See Comrie, *supra* note 114.

¹²⁹ Peggy McGlone, *Online ticket buyers find themselves outgunned by high-tech bots*, NJ.COM, (Mar. 19, 2010, 5:15 AM), http://www.nj.com/news/index.ssf/2010/03/online_ticket_companies_strugg.html

¹³⁰ See Lowenstein, *supra* note 63, at 247.

¹³¹ *TicketMaster Spinner/Drop Checker Bot*, TICKETBOTS.NET, <http://www.ticketbots.net/products.asp?page=TicketMaster%20Spinner%20Bot> (With “CAPTCHA” Bypass \$1800 \$990 only”); Software also available here: <http://www.ticketsdropchecker.com/bots-application>.

¹³² See Lowenstein, *supra* note 63, at 244, n.8. (“The phrase “ticket sniping” originated in a blog post by Professor Eric Goldman.”).

¹³³ *Id.*, at 274–76.

¹³⁴ See McGlone, *supra* note 129.

¹³⁵ *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1116 (C.D. Cal. 2007).

¹³⁶ See McGlone, *supra* note 129.

¹³⁷ See Lowenstein, *supra* note 63, at 248. (“North Carolina and Oregon have made the use of sniping software a civil violation. Minnesota, Colorado, Tennessee, and Indiana . . . have made the use of such software a crime, punishable by imprisonment and/or a fine.”).

¹³⁸ *Id.* at 269.

¹³⁹ See *infra* notes 144–160.

¹⁴⁰ Steven C. Highfield, *How Modern Trends and Markets Economics Have Rendered Anti-ticket Scalping Legislation Obsolete*, 59 DEPAUL L. REV. 697, 699, n.23 (2010).

See also, Myles Kaufman, *The Curious Case of US Ticket Resale Laws*, SEATGEEK.COM, (Apr. 30, 2012), <http://seatgeek.com/blog/ticket-industry/ticket-resale-laws>

¹⁴¹ Kaufman, note 140, *supra*

¹⁴² James D. Kurwitz, *Restrictive Paperless Tickets*, THE AMERICAN ANTITRUST INSTITUTE 6 (2011).

Available at: http://www.antitrustinstitute.org/~antitrust/sites/default/files/Tickets_paperless_Final.1.17.11.pdf

¹⁴³ See Parker-McClain, *supra* note 16.

¹⁴⁴ S-875, § 8

¹⁴⁵ S-875, § 7 (a) 2, 5, and (b)

¹⁴⁶ S-875, § 1 (n)

¹⁴⁷ S-875, § 9, (d)

¹⁴⁸ S-875, § 7, (d)

¹⁴⁹ S-875, § 8 (a)2

¹⁵⁰ S-875, § 10 (c)

¹⁵¹ S-875, § 10 (d)

¹⁵² S-875, § 12

¹⁵³ S-875, § 12 references P.L. 1960, c.39 (C.56:8-1 et seq)

56-8:13, the penalty provision of the Consumer Fraud Act, states:

Any person who violates any of the provisions of the act to which this act is a supplement shall, in addition to any other penalty provided by law, be liable to a penalty of not more than \$ 10,000 for the first offense and not more than \$ 20,000 for the second and each subsequent offense. The penalty shall be exclusive of and in addition to any moneys or property ordered to be paid or restored to any person in interest pursuant to section 2 of P.L. 1966, c. 39 (C. 56:8-14) or section 3 of P.L. 1971, c. 247 (C. 56:8-15).

¹⁵⁴ S-875, §12

¹⁵⁵ N.J. Stat. § 2C:43-1 b. (2012). (“[crimes] designated as a misdemeanor shall constitute for the purpose of sentence a crime of the fourth degree.”).

¹⁵⁶ “Intake” <http://www.judiciary.state.nj.us/criminal/crproc.htm> (“Fourth degree crimes carry a potential penalty of up to 18 months in jail.”)

¹⁵⁷ S-875, § 8 (b) (2) (3)

¹⁵⁸ S-8-75, § 8 of P.L. 1983, c. 135 (C. 56:8-33)

¹⁵⁹ Katie Eder, *Minimum wage, paperless ticketing bills go before Senate committees*, NJBIZ.COM, (Oct. 15, 2012, 2:04 PM), <http://www.njbiz.com/article/20121015/NJBIZ01/121019897/0/tappsbrriy/Minimum-wage-paperless-ticketing-bills-go-before-Senate-committees> (Diane Walsh, Vice President of Government Affairs and Communications for Commerce & Industry Association of New Jersey supports the measure because “a restricted paperless ticketing system would increase ticket prices and reduce business for companies like restaurants and bars that rely on traffic from sports and entertainment events.”).

¹⁶⁰ *Id.* (Statement of Wayne Hasenbalg).

¹⁶¹ Andrew Kitckenman, *Bill would regulate paperless tickets to shredder*, NJBIZ.COM, (Jul. 23, 2012, 3:00 AM), <http://www.njbiz.com/article/20120723/NJBIZ01/120729978/0/SEARCH>.

¹⁶² *NJ Ticket Bill Advances*, POLLSTAR.COM, (Oct. 16, 2012, 3:01 PM), http://www.pollstar.com/news_article.aspx?ID=803039.

¹⁶³ Anthony Campisi, *Nj Senate panel OKs sports, concert tickets’ bill*, NORTHJERSEY.COM, (Oct. 15, 2012, 8:02 PM), http://www.northjersey.com/news/NJ_Senate_panel_OKs_sports_concert_tickets_bill.html?page=all.

¹⁶⁴ 47 U.S.C.S. § 230.

¹⁶⁵ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (referencing *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 25, 1995)).

¹⁶⁶ *Id.* at 331.

¹⁶⁷ *Milgram v. Orbitz*, 419 N.J. Super. 305, 315-16 (N.J. Super. Ct. Law Div. 2010).

¹⁶⁸ *Id.*, at 320 (citing *Donato v. Moldow*, 374 N.J. Super., 475, 492 (App. Div. 2005)).

¹⁶⁹ *Id.*, at 315; *see also Donato, infra* note 80, at 488–89; *see also, Zerán, supra* note 165, (Subject of death threats seeks to hold AOL accountable for actions of third parties, “AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230’s immunity.”).

¹⁷⁰ *Gentry v. eBay*, 121 Cal. Rptr. 2d 703, 715–16 (Cal. Dist. Ct. App.) (online auction house not responsible for seller’s failure to furnish certificate of authenticity, “under section 230, eBay cannot be “treated as a publisher or speaker” of content supplied by other content providers. . . We therefore conclude enforcement of appellant’s [state-law] cause of action is inconsistent with section 230.”)

¹⁷¹ *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 43 (Wash. Ct. App. 2001) (“Because all three elements for § 230 immunity are satisfied, the trial court properly concluded § 230 bars [plaintiff’s] claims against Amazon.”).

¹⁷² *See, e.g., Milgram, infra* note 167 (finding § 230 pre-empted state consumer fraud act; made site immune from suit).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 312.

¹⁷⁵ *Id.* at 310. *See also* Peggy McGlone, *Bruce Springsteen fans settle Ticketmaster lawsuit for \$16.5M*, NJ.COM (Oct. 21, 2011, 5:42 PM), http://www.nj.com/news/index.ssf/2011/10/bruce_springsteen_fans_settle.html

¹⁷⁶ *Id.* at 310.

¹⁷⁷ *Id.* at 313. (“TicketNetwork provided a number of consumer protection measures . . . The first of these safeguards prohibited sellers from listing “speculative” tickets, i.e., tickets the seller does not have in hand, proof-of-purchase, or legal right to such tickets. . . Ticketnetwork’s policy [also] prohibited listing tickets before an event’s on-sale date.”).

¹⁷⁸ *Id.* at 311. (Count 1; N.J.S.A. 56:8-2, employing unconscionable commercial practices / fraud by not possessing offered tickets at timed of sale; Count 2, N.J.A.C.13:45A-9.1 to 9.8, violating advertising regulations by implying possession of tickets and advertising tickets for sale before general public sale date).

¹⁷⁹ *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (“This grant of immunity applies only if the interactive computer service provider is not also an “information content provider,” which is defined as someone who is “responsible, in whole or in part, for the creation or development of” the offending content.”), citing 47 U.S.C.S. § 230(c), (f)(3).

¹⁸⁰ *See, e.g., Milgram, supra* note 167, at 317. (“There is no issue that defendants qualify as an “interactive computer service” as defined by the CDA”).

¹⁸¹ *Id.* at 323. (“Although the *Donato* [*v. Moldow*, 374 N.J. Super. 475, 486 (N.J. App. Div. 2005) note 77, *infra*] and *Carafano* [*v. Metrosplash.com, Inc.*, 339 F.3d 119 (9th Cir. 2003)] cases dealt with website operators faced with claims of defamation, and the instant case deals with ticket sales, the reasoning in those cases is equally applicable here.”)

In *Donato*, the Superior Court in Bergen County found that § 230 immunity applied to a community message board website, shielding defendant from liability for defamation, harassment, and intentional infliction of emotional distress. 374 N.J. Super. at 488–89.

In *Carafano*, Matchmaker.com, a dating website, was sued by an actress for numerous counts, including defamation and invasion of privacy. 339 F.3d at 1122. A dating profile was made on the site of her, featuring her name, home address and telephone number; as a result, she received numerous threatening calls. *Id.* at 1121–22. The trial court held that § 230 did not apply, *Carafano v. Metrosplash, Inc.*, 207 F. Supp. 2d 1055, 1068 (C.D. Cal. 2002), finding that Matchmaker.com’s involvement was sufficient as to rise to “information content provider.” The Ninth Circuit disagreed, finding that it was the intent of congress for sites like Matchmaker.com to be afforded this immunity. *Carafano*, 339 F.3d at 1125.

¹⁸² *Id.* at 327. (“plaintiffs state law claims are barred by the CDA. It therefore becomes unnecessary to address the parties’ arguments regarding the CFA.”).

¹⁸³ *Id.* at 325.

¹⁸⁴ *Id.* at 326 (“As a trial level decision from another jurisdiction, it is not binding . . . it is in contradiction with the spirit of *Donato* and cannot be relied upon by this court.”).

¹⁸⁵ *NPS, LLC v. StubHub, Inc.*, 25 *Mass L. Rep.* 478 (Mass. Super. Ct. 2009); 2009 Mass. Super LEXIS 97, *41–42.

¹⁸⁶ *Id.* at *36. (“StubHub does not lose the immunity provided by the CDA if it simply knew that its sellers were potentially in violation of [G.L.c. 140, §185A](#) or [§185D](#). See *Universal Communications Sys., Inc. v. Lycos*, 478 F.3d 413, 420 (1st Cir. 2007) (“Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content”).”)

¹⁸⁷ *Id.* at *36-7. (“Here, as discussed earlier, there is evidence in the record that StubHub materially contributed to the illegal “ticket scalping” of its sellers. In effect, the same evidence of knowing participation in illegal “ticket scalping” that is sufficient, if proven, to establish improper means is also sufficient to place StubHub outside the immunity provided by the CDA.”)

¹⁸⁸ *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. Cal. 2003)

¹⁸⁹ *Id.* at 1026-27.

¹⁹⁰ *Id.* at n. 10. (“We therefore need not decide whether § 230(c)(1) encompasses both publishers and distributors. We do note that, so far, ever court to reach the issue has decided that Congress intended to immunize both distributors and publishers.”)

See Zeran, 129 F. 3d 217 at 334. (“Interpreting § 230 to leave distributor liability in effect would defeat the two primary purposes of the statute and would certainly “lessen the scope plainly intended” by Congress’ use of the term “publisher.”)

But see Zeran v. AOL and the Effect of Section 230 on Communications Decency Act Upon Liability For Defamation On the Internet, 61 Alb. L. Rev. 147, 168 (“[T]he text of the CDA and its meager legislative history support the conclusion that when Congress said “publisher” it meant “publisher,” and not “distributor. . . . “It would be reasonable to surmise that Congress would say “distributor” in addition to “publisher” if it meant “distributor” in addition to “publisher.”)

It is likely that a site such as StubHub would qualify as a ‘publisher,’ and would thus be immune if the if the Act was being entertained as a defense. C.f. *Zeran*, 129 F.3d at 332. (“Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and

information available to others as to be regarded as publishers”) citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* at 803.

¹⁹¹ *Milgram*, 419 N.J. Super at 317.

¹⁹² The language of § 230 is directed at websites providing speech type content: “§ 230. Protection for private blocking and screening of offensive material”; (a)(3) “The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”; b(3) “to encourage the development of technologies which maximize user control over what information is received by individuals”; (b)(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material”

¹⁹³ *City of Chicago v. Stubhub*, 624 F.3d 363, 366 (7th Cir. 2010). (“Stubhub! relies on *subsection (c)(1)*. As earlier decisions in [the 7th Circuit] establish, *subsection (c)(1)* does not create an “immunity” of any kind. It limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement. But Chicago’s amusement tax does not depend on who “publishes” any information or is a “speaker”. *Section 230(c)* is irrelevant.”).

¹⁹⁴ *Chi. Lawyers’ Comm. For Civ. Rights Under Law, Inc. v. Craigslist*, 519 F.3d 666, 670 (7th Cir. 2008) (citing *Doe v. GTE Corp.*, 347 F.3d 655, 659–60 (7th Cir. 2003)).

¹⁹⁵ *Id.* at 670 (citing / referencing *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (U.S. 2005)).

“The 7th Circuit views *Grokster*, in which the Supreme Court held that, as being “incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party.”

¹⁹⁶ *Id.* See also *NPS, LLC v. StubHub*, *supra* note 185.

¹⁹⁷ See 47 USCS §230 (b)(3), (4); see also *Carafano*, 339 f.3d 119 at 1123-24 (citing *Zeran*, 129 F.3d at 330–31).

¹⁹⁸ See *Milgram*, 419 N.J. Super 305 at 326–27 (“[D]efendants’ services are consistent with Congress’ intent to encourage commerce over the Internet and ensure interactive computer services are not held responsible for how third parties use their services.”).

¹⁹⁹ § 230 (a)(3)-(5).

²⁰⁰ The Act contains language, which could be argued to apply to ticket resale websites, in 230(a)(5): [i]ncreasingly Americans are relying on interactive media for a variety of political educational, cultural, and entertainment services.” However, it could be said that this was not the sort of ‘entertainment service’ Congress had in mind.

²⁰¹ Orin Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1561 (2010).

²⁰² *Id.*

²⁰³ *Tickmaster LLC v. RMG Techs, Inc.*, note 135.

²⁰⁴ *United States v. Drew*, 259 F.R.D. 449, 464, n.24. (C.D. Cal. 2009). (“Also, it is noted here that virtually all of the decisions which have found a breach of a website’s terms of service to be a sufficient basis to establish a section 1030(a)(2)(C) violation have been in civil actions, not criminal cases.”).

²⁰⁵ Giovanna Fabiano, *Authorities charge for California men in ticket reselling scheme that affected Springsteen ticket sales*, NORTHJERSEY.COM, (Mar. 2, 2010, 8:36 AM),

http://www.northjersey.com/news/crime_courts/030110_Authorities_charge_four_California_men_in_ticket_reselling_scheme_that_affected_Bruce_Springsteen_ticket_sales.html?c=y&page=3

²⁰⁶ *Id.*

²⁰⁷ PACER Summary February 3, 2010, 2:10-cr 00114-KSH

Violations:

18:1030(a)(4) and 10(c)(3)(a)

18:1030(a)(2)(C) and 1030(c)(2)(B)(i)

18:1030(a)(5)(A) and (c)(4)(B)(i)

²⁰⁸ Ben Sisario, *Probation, Not Prison, for Scalpers*, THE NEW YORK TIMES.COM, (Jun. 9, 2011),

http://www.nytimes.com/2011/06/10/business/media/10wiseguys.html?_r=0.

²⁰⁹ David Voreacos, *‘Wiseguy’ Owners Avoid U.S. Prison in Ticket-Scalping Case*, BUSINESSWEEK.COM, (Jun. 9, 2011), <http://www.businessweek.com/news/2011-06-09/-wiseguy-owners-avoid-u-s-prison-in-ticket-scalping-case.html>.

²¹⁰ Jason Grant, *‘Wiseguy’ operators in ticket-scalping case get probation*, (The Star Ledger) via NJ.COM, (Jun 9, 2011, 9:30 PM), http://www.nj.com/news/index.ssf/2011/06/wiseguy_ticket_operators_get_p.html.

²¹¹ Sisario, *supra* note 208.

²¹² Voreacos, *supra*, note 209

²¹³ Grant, note 210, *supra*

²¹⁴ Minute Entry for Proceedings held before Judge Katherine S. Hayden, Sentencing held on June 9, 2011. 2:10-cr 00114-KSH (“Defendant sentenced to 2 years probation; Alcohol & drug treatment; Mental health Evaluation and treatment; Cooperate with IRS; Special assessment \$100.00.”).

²¹⁵ Sisario, *supra* note 208. (“This is a slap on the wrist for sophisticated crooks who have ripped consumers off and driven up ticket prices for the average working person.”) Statement of Sally J. Greenberg, executive director National Consumers League.

²¹⁶ Voreacos, *supra*, note 209.

²¹⁷ Grant, *supra*, note 210.

²¹⁸ See *U.S. v. Drew*, *infra* note 204, *infra*, at 453 (“The jury did find Defendant “guilty of . . . accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information in violation of . . . § 1030(a)(2)(C) and (c)(2)(A), a misdemeanor.”).

²¹⁹ *Id.* at 468.

²²⁰ *Id.* at 466

²²¹ *Id.* at 458, 465–56.

²²² Kerr, *supra* note 201, at 1562.

²²³ Orin S. Kerr, *Cybercrime’s Scope: Interpreting ‘Access’ and ‘Authorization’ in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1658-59. (2010).

²²⁴ *Id.* at 1600–01. (“Courts and commentators alike often speak of “access” and “authorization” as if the terms were self-defining. But they are not. Blithely unaware . . . courts have begun to create a body of precedent that threatens to criminalize a remarkably broad range of conduct.”).

²²⁵ Brief of Amici Curia Electronic Frontier Foundation, Association of Criminal Defense Lawyers of New Jersey, et al. in support of Defendant’s motion to dismiss the Indictment (2010), *available at*: https://www.eff.org/files/filenode/us_v_lowson/LowsonAmicusBriefFinal.pdf

Brief of Amici Curiae Electronic Frontier Foundation, et al., in support of Defendant’s motion to Dismiss indictment for Failure to State an Offense and For Vagueness (2008), *available at*: <https://www.eff.org/cases/united-states-v-drew>.

²²⁶ Ticket Scalping Reduction Act of 1998, H.R. 3951, 105th Cong. (1998).

available at: <http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.3951>:

²²⁷ *Id.*, at § 1822 (b) (1)

²²⁸ *Id.*, at (a)

²²⁹ 2009 H.R. 2669, 111 H.R. 2669, Section 3, Section 5 (6)

²³⁰ *Id.* § 5, (a).

²³¹ *Id.* § 5, (b).

²³² District court can issue injunctions, enforce compliance; obtain damages, penalties, and other appropriate relief. (section 5, (b)(a)(1)).

²³³ *Id.* § 4.

²³⁴ *Id.* § 2, (1), and (2)

²³⁵ *Id.* § 2, (4)

²³⁶ *Id.* § 3, (1), (A) and (B).

²³⁷ *Id.* § 3, (6).

²³⁸ *Id.* § 3, (2).

²³⁹ *Id.* § 3, (5).

²⁴⁰ John Breyault, *Early thoughts on return of BOSS ACT*, NCL’s SAVVY CONSUMER BLOG, (May 10, 2012), <http://savvyconsumer.wordpress.com/2012/05/10/early-thoughts-on-return-of-boss-act/>

²⁴¹ See, e.g., David E. Harrington & Emma K. Harrington, *Scalping Scalpers – or Consumers?* REGULATION, 18, 20 (2012) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155031 (“The danger of the BOSS Act is that it’s a wrecking ball that swings too wildly, harming consumers by knocking down structures that have evolved to make secondary ticket markets more competitive.”).

²⁴² *Ticketmaster L.L.C. v. RMG*, *infra* note 135, at 1102.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* (“CAPTCHA . . . I designed to distinguish between human users and computer programs . . . thereby prevent[ing] purchasers from using automated devices to purchase tickets.”).

²⁴⁶ *Supra* note 250.

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- ²⁴⁷ Ticketfast®, TICKETMASTER HELP, <http://www.ticketmaster.com/h/ticketfast.html> (last visited Oct. 20, 2012). <http://www.ticketmaster.com/h/ticketfast.html#Q1>.
- ²⁴⁸ See *eTicketing Available on All Train Routes – Your Ride Is Just a Barcode Away*, AMTRAK.COM, <http://www.amtrak.com/eticketing-your-ride-is-just-a-barcode-away> (last accessed Oct. 20, 2012) (“simply present the barcode on the screen to the conductor”).
- ²⁴⁹ *United Airlines – Mobile Boarding Pass – Mobile Check-in*, UNITEDAIRLINES.COM <https://www.united.com/web/en-US/content/travel/wireless/default.aspx> (last accessed Oct. 20, 2012) (“simply scan the barcode on the screen at airport security checkpoints and at the gate during boarding.”).
- ²⁵⁰ Petrina Crockford, *Ticketmaster goes “paperless”*, TICKETNEWS, (May 16, 2008, 5:21 PM); *TICKETMASTER INTRODUCES PAPERLESS TICKET™*, /PRNEWSWIRE/, (May 13, 2008), <http://multivu.prnewswire.com/mnr/ticketmaster/33099/>
- ²⁵¹ E.g., *Miley Cyrus – Paperless Tickets and Tour Info*, OFFICIAL TICKETMASTER SITE, <http://www.ticketmaster.com/mileycyrus> (last visited Oct. 21, 2012).
- ²⁵² E.g., *Buccaneers first in NFL to use paperless ticketing app* – TAMPAY BAY BUSINESS JOURNAL, <http://www.bizjournals.com/tampabay/news/2012/10/12/buccaneers-first-in-nfl-to-use.html> (last accessed Oct 20, 2012)
- ²⁵³ *How do paperless tickets work?* EXPERTS123.COM, <http://www.experts123.com/q/how-do-paperless-tickets-work.html> (last visited Jan 2., 2013).
- ²⁵⁴ *Apple Introduces us to a New iTunes “Concert Ticket +” System*, PATENTLY APPLE (Apr. 15, 2010), <http://www.patentlyapple.com/patently-apple/2010/04/apple-introduces-us-to-a-new-itunes-concert-ticket-system.html> (last accessed Oct. 28, 2012).
- ²⁵⁵ *iTravel: Apple’s Future Travel Centric App for the iPhone*, PATENTLY APPLE (Apr. 21, 2010), <http://www.patentlyapple.com/patently-apple/2010/04/itravel-apples-future-travel-centric-app-for-the-iphone.html> (last accessed Oct. 28, 2012).
- ²⁵⁶ TICKETMASTER PAPERLESS TICKETING – INFORMATION AND FAQs. OFFICIAL TICKETMASTER SITE, <http://www.ticketmaster.com/paperless> (last visited Oct. 20, 2012).
- ²⁵⁷ See Crockford, *supra* note 250 (quoting David Marcus, Ticketmaster Senior Vice President
- ²⁵⁸ “Paperless Ticket”, TICKETMASTER – HELP, http://www.ticketmaster.com/h/help.html?tm_link=tm_ql_4 (search by keyword for “paperless ticket”, then follow second link) (last visited Oct 20, 2012)).
- ²⁵⁹ Dana Parker-McClain, *NJ Ticket Bill Advances*, (Oct.16, 2012, 3:01 PM), http://www.pollstar.com/news_article.aspx?ID=803039, quoting Senator Raymond Lesniak. (“Restrictive paperless ticketing is a way for ticket issuers to control the secondary ticketing market.”)
- ²⁶⁰ *What are Restrictive Paperless Tickets?* FAN FREEDOM PROJECT, <http://www.fanfreedom.org/the-issue/>
- ²⁶¹ See *supra* note 263.
- ²⁶² Katie Rogers, *Ticketmaster Taking Heat For Paperless Tickets*, FOX BUSINESS.COM, (Jan. 30, 2012), <http://www.foxbusiness.com/personal-finance/2012/01/30/ticketmaster-taking-heat-for-paperless-tickets/> (last visited Oct 21, 2012).
- ²⁶³ *Id.*, Statement of Bert Foer, President of American Antitrust Institute.
- ²⁶⁴ Allison Reitz, *Bruce Springsteen tour employees paperless ticketing for select U.S. concerts*, TICKETNEWS.COM, (Jul. 24, 2009, 11:55 AM), <http://www.ticketnews.com/news/Bruce-Springsteen-tour-employs-paperless-ticketing-for-select-US-concerts7924582>.
- ²⁶⁵ Mike Ross, *VERY A-MUSE-ING: Scalpers thwarted by paperless tickets*, GIG CITY (Oct. 13, 2012), , <http://www.gigcity.ca/2012/10/13/very-a-muse-ing-scalpers-thwarted-by-paperless-tickets/> (quoting Jaqueline Peterson).
- ²⁶⁶ See generally Lowenstein,*supra* note 63, at 274–76.
- ²⁶⁷ See Fan Freedom Project, note 260 *supra*
- ²⁶⁸ *Id.* (“With restrictive paperless tickets, Ticketmaster could dominate ticketing even more than it does already. Are you ready for higher prices, more fees and poorer service?”).
- ²⁶⁹ “What’s the deal with paperless tickets?”, TICKETMASTER – HELP, http://www.ticketmaster.com/h/help.html?tm_link=tm_ql_4 (search by keyword for “paperless ticket”, then follow first link) (last visited Oct 20, 2012) (“your entire party must enter at the same time once the credit card used to purchase the tickets is swiped. Encourage your friends to arrive on time!”)
- ²⁷⁰ “May I sell my Paperless Tickets via TicketExchange?”, TICKETMASTER – HELP, http://www.ticketmaster.com/h/help.html?tm_link=tm_ql_4 (search by keyword for “paperless ticket”, then follow

third link) (last visited Oct 20, 2012) ([whether or not a paperless ticket can be sold on TicketsExchange] is determined by the venue, artist, and promoters.”).

²⁷¹ Rogers, *supra* note 260 *supra* (quoting Jon Patter, President of Fan Freedom Project).

²⁷² *Id.* (“In essence, instead of a ticket that is yours, you have one that is still controlled by Ticketmaster.”).

²⁷³ See Fan Freedom Project, *supra* note 260. (“If fans are allowed to resell their tickets, teams, venues, and ticket companies often set a minimum resale price that is close to or at face-value.”).

²⁷⁴ TicketNews Staff, ‘Paperless Ticketing’ class action suit filed against Ticketmaster, *Livenation*, TICKETNEWS.COM, (Sep. 17, 2012 5:14 PM), <http://www.ticketnews.com/news/paperless-ticketing-class-action-suit-filed-against-ticketmaster-live-nation091217569>

See also, *Fogel v. Live Nation Entertainment, Inc.*, Case No. 12-cv-6816, U.S. District Court, Southern District of New York.

²⁷⁵ *Id.*

²⁷⁶ Lowenstein, *supra* note 63, at 275. (“While [there are valid arguments that paperless tickets are burdensome], the burdens imposed on the consumers do not outweigh the potential windfall of consumer surplus they are not able to capture.”).

²⁷⁷ Jasmin Yang, *a Whole Different Ballgame: Ticket Scalping Legislation and Behavioral Economics?*, 7 VAND. J. ENT. L & PRAC. 110, 123 (2004).

²⁷⁸ *Id.* at 122 (“In response to scalpers’ profit, many sports clubs have instituted pricing strategies that attempt to more accurately reflect the market demand for tickets while taking into account the concern for public accessibility”).

²⁷⁹ *Id.* at 123.

²⁸⁰ *Id.* n.132. (“Nearly half of MLB’s teams currently institute some form of variable ticket pricing.”).

²⁸¹ *Id.* at 122-23.

²⁸² *Id.* at 123.

²⁸³ Lowenstein, *supra* note 63, at 274.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Colloney & Krueger, *supra* note 62, at 25. (“Ticketmaster and other distributors have recently begun experimenting with using auctions to sell tickets, however. We suspect that ticket auctions will be more prevalent in the future, and a worthy topic for research.”).

²⁸⁷ LEARN MORE ABOUT US | SEATGEEK.COM, <http://seatgeek.com/about/> (last visited Jan. 2, 2013)

“Every ticket out there, in here. SeatGeek is a ticket search engine that makes finding tickets to live entertainment a cinch. We search dozens of the web’s biggest ticket sites and present the results all in one place, with a simple interface designed for speed and savings. It’s 100% free, now and forever.”

²⁸⁸ Harrington & Harrington, note 241, *supra*, at 20.

²⁸⁹ *Id.* at 21.

²⁹⁰ Dylan P. Gadino, *Louis C.K. addresses ticket scalpers: ‘It’s a tremendous risk’ (Exclusive)*, LAUGHSPIN.COM (Jul. 3, 2012, 12:35 PM) <http://www.laughspin.com/2012/07/03/louis-c-k-addresses-ticket-scalpers-its-a-tremendous-risk-exclusive/>.

²⁹¹ Alex Wilhelm, *Louis C.K. sees ticket scalping drop over 96% by switching to selling tickets himself*, THENEXTWEB.COM, (Jul. 3, 2012) <http://thenextweb.com/media/2012/07/03/louis-c-k-sees-ticket-scalping-drop-over-96-by-switching-to-selling-tickets-himself/>.

²⁹² *Id.*

²⁹³ Josh Tryangiel, *Radiohead Says: Pay What You Want*, TIME.COM (Oct. 1, 2007)

<http://www.time.com/time/arts/article/0,8599,1666973,00.html> (last accessed Oct 28, 2012;

Nicole Martin, *Radiohead album experiment ‘paying off’*, THE TELEGRAPH (Oct. 9, 2007, 3:18 PM)

<http://www.telegraph.co.uk/culture/music/rockandjazzmusic/3668437/Radiohead-album-experiment-paying-off.html> (last accessed Oct. 28, 2012).

The experiment resulted in an average price per download of £3.99, about \$8 in 2007. *What Price did you Choose? Survey Results* RECORD OF THE DAY, http://www.whatpricedidyouchoose.com/survey_results (last accessed Oct. 28, 2012).

²⁹⁴ *Radiohead Signs on With New Anti-Ticket Scalping Company*, STARPULSES.COM (Mar. 4, 2012, 11:30 AM) http://www.starpulse.com/news/index.php/2012/03/04/radiohead_signs_on_with_new_antiticket.

²⁹⁵ Al Newstead, *Radiohead Slammed After Anti-Scalping Measures Burn Fans*, TONEDEAF.COM.AU (Oct. 1, 2012) <http://www.tonedead.com.au/news/international-news/207278/radiohead-slammed-after-anti-scalping-measures-burn-fans.htm>.

²⁹⁶ Adriaan Pels, *Radiohead announce 2 New York shows: September 28 & 29 [update]* RADIOHEAD AT EASE (Sep. 19, 2011) <http://www.ateaseweb.com/2011/09/19/radiohead-announce-2-new-york-shows-september-28-29/>.

²⁹⁷ See, e.g., “1500 for a single ticket? F--- you, scalpers. You are parasites. I HATE you.” Statement of band LCD Soundsystem in response to ticket scalping for their final show. <http://www.spinner.com/2011/02/11/lcd-soundsystem-ticket-touts-twitter/>.

²⁹⁸ “Anti-scalping remains a debated topic whenever new legislation is proposed.” SMART article p 22

²⁹⁹ See, e.g., BOSS Act, 2009 H.R. 2669, 111 H.R. 2669

³⁰⁰ Highfield, note 140, *supra*, at 732. (“an unregulated market is preferred to a statutorily-controlled market.”)

³⁰¹ *Is Ticket Scalping Illegal?* WISEGEEK.COM, <http://www.wisegeek.com/is-ticket-scalping-illegal.htm> (Last accessed Oct. 29, 2012).

³⁰² <http://rockandrollguru.blogspot.com/2010/03/who-sets-prices-for-concert-tickets.html>

³⁰³ Yang, *supra* note 277, at 112, n.12.

³⁰⁴ *Id.* at 120.

³⁰⁵ Kurtwitz, *supra* note 142, at 12 (“Many have asserted that wide-spread underpricing of concert seats in the primary market has led to high mark-ups in the secondary market.”).

³⁰⁶ Lowenstein, *supra* note 63, at 249.

³⁰⁷ *Id.*

³⁰⁸ Cianefrone, *supra* note 33 *supra*, at 22 (“Many people think scalpers are simply taking advantage of America’s free enterprise attitude.”) (citing Diamond, T. A. (1982). A new look at an old problem. University of Miami Law Review, 37 (1), 71–92)

³⁰⁹ *Id.* (“there are benefits to having ticket scalpers.”)

³¹⁰ *Id.*

³¹¹ *Is Ticket Scalping Illegal?* WISEGEEK.COM, <http://www.wisegeek.com/is-ticket-scalping-illegal.htm> (Last accessed Oct. 29, 2012).

³¹² Yang, *supra* note 277, at 119. (“Proponents of scalping assert that there is no need to regulate a scalper’s prices, even if they seem excessive, because the readjustment process would be left to the market correction mechanism.”).

³¹³ Lowenstein, *supra* note 63, at 276.

³¹⁴ <http://windsorterrace.patch.com/articles/squadron-to-ban-scalpers-from-making-a-buck-on-sandy>
“State Senator Daniel Squadron announced legislation that would ban the resale of charity event tickets for more than their face value”

³¹⁵ This would vindicate Avi Lowenstein, *supra* note 63, at 276: (“Fortunately, private actors have created far more efficient and effective solutions to the problem. The only issue remaining is whether the private responses—the increased use of auctions and Paperless Tickets—will be used by artists and promoters. [They are.] To that end, the most effective way consumers solve this problem is not by relying on the law through litigation and legislation, but rather by pressuring their favorite artist and sports teams to use effective market solutions.”).

³¹⁶ See, e.g., Lowenstein, *supra* note 63 (“The ticket sniping problem is unique in that there is tremendous social outcry, yet the law simply is not equipped to address it.”).

³¹⁷ Lowenstein, *supra* note 63.

³¹⁸ <http://windsorterrace.patch.com/articles/squadron-to-ban-scalpers-from-making-a-buck-on-sandy>

³¹⁹ Harrington & Harrington, *supra* note 241, at 18 (“One of its new provisions would explicitly outlaw “computer software” designed to buy up tickets as soon as they go on sale.”).

³²⁰ Glantz, *supra* note 58, at 267 (“Online auctions and websites in general that facilitate the sale of tickets above face value make enforcement of state or local ordinance regulations problematic.”).

³²¹ Happel & Jennings, *supra* note 33, at 24.

³²² *C.f.*, Campisi, *supra* note 163 (Viewpoint of some regarding bill S-875 in New Jersey. “We will lose events if this bill becomes law.” Ron VanDeVeen, Senior VP of Events for MetLife Stadium.)