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A Fixed Game

THE FRUSTRATIONS OF TICKET SCALPING AND THE REALITIES OF ITS SOLUTIONS

“Ticketing, to put it bluntly, is a fixed game.”¹

INTRODUCTION

In the wake of Hurricane Sandy, renowned musicians including Billy Joel and Bruce Springsteen performed for free in order to raise funds for relief efforts.² Unfortunately, for many fans of these world-famous performers the closest they got to the stage was from the seat of their couch, as ticket scalpers quickly hijacked the ticket market through predatory purchasing and inflated prices.³ Although the show appeared to be sold out within minutes, days before the show hundreds of seats were available through the secondary ticket market at prices “rang[ing] from \$790 to \$6,500, many times their face value.”⁴ This was not the only time in recent history that New Yorkers

¹ N.Y. ATT’Y GEN., OBSTRUCTED VIEW: WHAT’S BLOCKING NEW YORKERS FROM GETTING TICKETS 3 (2016), https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf [<https://perma.cc/L47D-8MWW>] [hereinafter OBSTRUCTED VIEW]; see also 30A C.J.S. Ent. and Amusement § 155 (2017) (“‘Ticket scalping’ is the common name given to the practice of selling tickets to popular entertainment events at prices which greatly exceed the established price for those tickets”).

² Kara Warner, *12-12-12 Concert Raises \$30 Million for Sandy Relief*, MTV NEWS (Dec. 13, 2012), <http://www.mtv.com/news/1698922/12-12-12-concert-raised-30-million-sandy-relief/>. [<https://perma.cc/D55E-UK5P>] The concert was considered “one of the largest gatherings of major rock musicians in recent memory,” included performances from “Bruce Springsteen and the E Street Band, Dave Grohl, Eric Clapton, Billy Joel, Eddie Vedder, Roger Waters, the Who, Kanye West and Paul McCartney, among others.” James C. McKinley Jr., *Benefit’s Producers Condemn Scalpers*, N.Y. TIMES (Dec. 7, 2012), <https://www.nytimes.com/2012/12/08/arts/music/producers-of-12-12-12-benefit-concert-assail-scalpers.html?partner=rss&emc=rss>. [<https://perma.cc/9DLH-QPKM>].

³ McKinley, *supra* note 2. The 13,500 tickets sold out on Ticketmaster within minutes of being released and were being resold through StubHub on the same day. *Id.*

⁴ James C. McKinley Jr., *Bill Seeks to Make Resale of Tickets for Benefit Concerts Illegal*, N.Y. TIMES: ARTS BEAT BLOG (Dec. 12, 2012 2:35 PM), <https://artsbeat.blogs.nytimes.com/2012/12/12/bill-seeks-to-make-resale-of-tickets-for-benefit-concerts-illegal/> [<https://perma.cc/8NS5-BANB>]. Tickets for the floor were being resold for as much as \$48,000. McKinley, *supra* note 2.

were priced out of a charity event,⁵ but it certainly sparked the need for reform.⁶ Although ticket scalping itself is not illegal in New York, newer legislation aims to further criminalize the predatory means that scalpers use to buy tickets in high quantities during online sales.⁷

Ticket scalping is the practice of reselling tickets to popular events at a rate significantly above face value.⁸ The recent growth of the secondary ticket market is largely resulting from the use of ticket purchasing software or “bots” in online ticket sales.⁹ These “aggressive computer programs” allow users to bypass an internet ticket site’s security measures and then purchase a large quantity of tickets to an event, forcing fans to rely on the secondary market’s less regulated prices.¹⁰ While recently enacted legislation in New York and the 2016 Better Online Ticket Sales (BOTS) Act are “step[s] in the right direction,” these actions are not enough to ensure that consumers have a fair opportunity to get tickets at face value through online sales.¹¹ Demand for high profile shows like *Hamilton* is inevitable,¹² but there are greater concerns than the quantity of tickets for sale.¹³ The problem plaguing the entertainment industry for over two centuries is the lack of fair

⁵ See Nicole Spector, *Scalpers Ignore Outcry, Sell Their ‘Free’ Tickets to See the Pope*, NBC NEWS (Sept. 25, 2015, 11:11 AM), <https://www.nbcnews.com/storyline/pope-francis-visits-america/scalpers-ignore-outcry-sell-their-free-tickets-see-pope-n433676> [<https://perma.cc/WDP7-AAAYK>].

⁶ McKinley, *supra* note 4.

⁷ Gerald B. Silverman, *Ticket Industry Bracing for New York Law Expansion*, Electronic Com. & L.Rep. (BNA) (May 31, 2017), <https://www.bna.com/ticket-industry-bracing-n73014451490/> [<https://perma.cc/9H2A-UEYN>].

⁸ *Arlotta v. Bradley Ctr.*, 349 F.3d 517, 518 (7th Cir. 2003); Paul J. Criscuolo, Comment, *Reassessing the Ticket Scalping Dispute: The Application, Effects and Criticisms of Current Anti-Scalping Legislation*, 5 SETON HALL J. SPORT L. 189, 189 (1995).

⁹ Alexis Kramer, *Pushy Ticket-Buying Bots Feel Heat from Federal, State Officials*, 16 Computer Tech. L. Rep. (BNA) No. 7, at 184 (Apr. 3, 2015).

¹⁰ Robert J. McFadden, Note, *The BOTS Act: A Small Step for Fankind When a Giant Leap is Needed*, 55 WASHBURN L. J. 427, 428 (2016).

¹¹ Dana Jaskier, *Keep the Tickets with the Fans: A Proposal for a Federal Law to Protect Consumers Against Price Gouging and Counterfeit Tickets in the Secondary Ticketing Market*, 44 W. ST. U. L. REV. 83, 102 (2017); see *infra* Section I.B.2.

¹² See Ben Sisario, *Congress Moves to Curb Ticket Scalping Banning Bots Used Online*, N.Y. TIMES (Dec. 8, 2016), <https://www.nytimes.com/2016/12/08/business/media/ticket-scalping-bots-act.html> [<https://perma.cc/D3BA-GF5L>] (“Critics say bots feed a high-priced resale market that pushes tickets out of reach of ordinary consumers, particularly for hot events like ‘Hamilton.’”). Concertgoers, however, have had the opportunity to bid on *Hamilton* tickets through the show’s online digital lottery. Olivia Clement, *Broadway Hamilton Increasing Number of \$10 Lottery Tickets*, PLAYBILL (Jan. 29, 2017), <http://www.playbill.com/article/broadway-hamilton-increasing-number-of-10-lottery-tickets>. [<https://perma.cc/MRT2-Q8GL>]. Those who win the lottery have are given a sixty-minute window to purchase their tickets and then their “[s]eats are assigned at the discretion of the box office,” which prevents the tickets from being transferred. *Id.*

¹³ See OBSTRUCTED VIEW, *supra* note 1, at 3 (“The problem is not simply that the demand for prime seats exceeds supply, especially for the most in-demand events.”).

opportunity for consumers to purchase their tickets from the primary marketer at the primary marketer's original price.¹⁴

As consumers and performers have been outspoken about reforming ticket purchasing legislation, primary ticket marketers have also showed interest in changing the industry.¹⁵ One giant in the primary market, Ticketmaster, has taken the initiative by developing its own program to try and diminish the presence of scalpers.¹⁶ Similar to efforts made through legislation and independent efforts of artists, ticket scalpers have unfortunately found their way around these new solutions.¹⁷ The issue with much of the anti-ticket scalping legislation is that it aims to combat the problem after it has already happened.¹⁸ To ensure that consumers have a fair opportunity to purchase tickets at face value, primary ticket marketers must be held accountable for how their tickets are being purchased and place further restrictions on how these tickets can be transferred after the initial purchase.

This note will proceed in the following four parts. Part I of this note provides the history of ticket scalping and the legislation, both state and federal, that has been enacted to address it. This Part highlights the origins of ticket scalping and how the secondary ticket market has gained control over the entertainment industry. Additionally, this Part addresses the use of bots in the ticket scalping timeline and how the New York State legislature and the federal government have sought to diminish the impact of the growing secondary ticket market. Part II explains the predatory nature of the secondary ticket market and how it is often left as consumers' only option for buying tickets. Part III illustrates the concerns of artists and other players in the entertainment industry. This Part recognizes the initiatives taken by primary ticket marketers and the performers themselves, as well as how they are negatively impacted by ticket scalping. Lastly, Part IV advocates for a new

¹⁴ See KERRY SEGRAVE, *TICKET SCALPING: 1850–2005* at 3 (2007).

¹⁵ See *infra* Part III.

¹⁶ Robert Levine, *Taylor Swift is the Latest Superstar to Use Ticketmaster's Verified Fan Program—But Does it Work?*, *BILLBOARD* (Aug. 25, 2017), <http://www.billboard.com/articles/business/7942004/taylor-swift-ticketmaster-verified-fan-program-does-it-work> [<https://perma.cc/YQ29-5HD5>].

¹⁷ See Steve Knopper, *Is Ticketmaster's New Resale Program Helping or Hurting Fans?*, *ROLLING STONE* (May 27, 2014), <http://www.rollingstone.com/music/news/is-ticketmasters-new-resale-program-helping-or-hurting-fans-20140527> [<https://perma.cc/48V9-FVB>] (“Whether Ticketmaster does it or doesn't do it, it's out there on other sites.”).

¹⁸ New York law and the BOTS Act police the resale of tickets, rather than protecting consumers in the initial sale. Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401, 1401 (2016) (codified as amended at 15 U.S.C. § 45c (2012 & Supp. IV 2016)); N.Y. ARTS & CULT. AFF. § 25.24 (McKinney 2017).

direction in combating predatory ticket purchasing. This Part establishes proactive ticket scalping regulation, which would: (1) enjoin secondary marketers from allowing bot-using ticket scalpers to utilize their resale platforms; (2) hold primary marketers accountable for the rapid growth of the secondary ticket market; and (3) require primary marketers to adopt more secure purchasing mechanisms that restrict transferability without harming consumers.

I. FROM BROADWAY TO BOTS: A HISTORY OF TICKET SCALPING

“Ticket scalping is probably as old as tickets.”¹⁹

Ticket scalping has persisted and worsened, for over two centuries.²⁰ While there is evidence of the practice dating as far back as the Roman Empire, when tickets for the seats closest to the emperor were scalped outside the Roman forum,²¹ the practice is believed to have first emerged in the United States during the late nineteenth century, when scalpers sold unused portions of railroad tickets.²² Near the turn of the century, the practice evolved and claimed its first victim: Broadway.²³ “Sidewalk men,” selling high-priced tickets outside of Broadway theatres, were considered “[t]he greatest evil that theatergoers in [New York City] have to contend with.”²⁴ Through the twentieth century, the practice was defined by ticket scalpers standing outside a venue trying to sell tickets to people right before the show started.²⁵ Before online sales became the primary medium for purchasing tickets, “sidewalk men” avoided waiting on physical lines by using proxies and other means to evade the security measures put in place by primary ticket marketers.²⁶ While icing, a form of bribing the primary ticket distributor, and

¹⁹ John Seabrook, *The Price of the Ticket*, NEW YORKER, Aug. 10 & 19, 2009, <https://www.newyorker.com/magazine/2009/08/10/the-price-of-the-ticket> [<https://perma.cc/6LFR-XJNM>].

²⁰ See Jaskier, *supra* note 11, at 85.

²¹ Brad Parks, *Ticket Scalping Has a New Name and Image*, NJ.COM (Jan. 28, 2008, 6:00 AM), http://www.nj.com/giants/index.ssf/2008/01/ticket_scalping_has_new_name_a.html [<https://perma.cc/3M8E-7EV8>].

²² See McFadden, *supra* note 10, at 433–34.

²³ See Seabrook, *supra* note 19.

²⁴ *Id.* (“[A] local magistrate named Crane said in 1901,” that ticket speculators “are practically highwaymen and hold up everybody that goes to a place of amusement.”).

²⁵ See Andrew Kandel & Elizabeth Block, *The “De-Icing” of Ticket Prices: Proposal Addressing the Problem of Commercial Bribery in the New York Ticket Industry*, 5 J. L. & POL’Y 489, 494 (1997).

²⁶ James A. Devine, *Ticket Scalping in the Late 1800s and the Early 2000s—Much Has Changed, Much is the Same*, SETON HALL LAW STUDENT SCHOLARSHIP 1, 1 (2014).

other illicit means for purchasing tickets in bulk harmed fans greatly, it was not until advancements in online ticketing and resale that the ticket scalping industry grew exponentially.²⁷

In the twentieth century, ticket scalping became more innovative and technology-based, widening the gap between the price that the primary marketer set and what the consumer actually paid for the ticket.²⁸ The primary marketer is the agent that initiates the first transaction for the sale of the ticket—these are the Ticketmasters of the world.²⁹ A secondary marketer is a ticket resale platform, such as StubHub or SeatGeek, wherein scalpers sell the tickets obtained from primary marketers at unregulated prices.³⁰ Given that there are no legal limits on how much a ticket can be resold for, scalpers stand to make a large profit off of a ticket that they paid face value for from the primary marketer.³¹ The secondary marketer collects a fee from both the seller and the buyer, often a percentage of the ticket price and a predetermined but unspecified service fee, respectively.³² Since bot usage prevents average consumers from entering into the primary market for certain high-profile events, scalpers and secondary marketers stand to gain a tremendous profit from ticket resale, none of which will ever be seen by the artist performing the show.

²⁷ See Kandel & Block, *supra* note 25, at 489–90 (“‘Ice’ is money paid, in the form of a gratuity, premium or bribe, in excess of the printed box office price of a ticket, to an operator of any ‘place of entertainment’ or their agent, representative or employee. Box office employees and their supervisors who control the original sale and distribution of tickets are such agents.”(footnotes omitted)); *see also* Jaskier, *supra* note 11, at 86.

²⁸ See Jaskier, *supra* note 11, at 86 (“[B]oundless profits are possible because of the considerable difference between the low initial price of the tickets and the higher market value on the secondary market.”).

²⁹ *The Event Ticketing Industry is Broken and in Need of Disruption*, AVENTUS (May 19, 2017), <https://blog.aventus.io/the-event-ticketing-industry-is-broken-and-in-need-of-disruption-a60781c3c699> [<https://perma.cc/944Z-AHT7>].

³⁰ *Id.*; *see also* *What’s SeatGeek?*, SEATGEEK, <https://seatgeek.com/about> [<https://perma.cc/ECC7-T7Q6>]; *About Us*, STUBHUB, <https://www.stubhub.com/about-us> [<https://perma.cc/S8XB-G95H>].

³¹ Neither federal nor state law impose regulations on how much a ticket may be resold for. Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401, 1401 (2016) (codified as amended at 15 U.S.C. § 45c (2012 & Supp. IV 2016)); N.Y. ARTS & CULT. AFF. § 25.24 (McKinney 2017).

³² STUBHUB HELP CENTER, <https://stubhub.custhelp.com/> (follow “fees”; then follow “What are StubHub’s fees to sell tickets?”) [<https://perma.cc/QTU4-47C8>]; *How Secondary Market Service Fees Work*, SEATGEEK (Mar. 1, 2017), <https://seatgeek.com/tba/articles/secondary-market-service-fees-work/> [<https://perma.cc/4VKG-LZ4P>] (noting that SeatGeek allows, but does not necessarily require sellers to include service fees in the listed ticket price); Taylor Mims, *StubHub Must Face Lawsuit Over Hidden Fee Drip Pricing Allegations*, *Judge Rules*, BILLBOARD (June 13, 2018), <https://www.billboard.com/articles/business/8460853/stubhub-lawsuit-hidden-fee-drip-pricing-allegations> [<https://perma.cc/3VMJ-ERU3>] (“Only at checkout does StubHub for the first time list a total amount that includes hidden fees—after consumers have already selected seats at a lower advertised price.”).

A. *Pre-Bot Legislation*

Being home to Broadway and celebrated venues like Madison Square Garden, it comes as no surprise that New York has been at the forefront of ticket scalping regulation. First, Governor Nathan Miller signed an anti-scalping law in 1922 that “capped the price of resale tickets at two dollars above face value.”³³ Governor Miller’s law, which continued to broaden throughout the twentieth century, sought to attack what he believed was “gross profiteering.”³⁴ Later, legislation was also enacted to regulate ticket scalping within a certain distance of the venue.³⁵ Additionally, New York State has sought “to police out-of-state actors [from scalping] tickets to events within New York.”³⁶ As of 2018, all legally operating ticket “resellers” in New York are required to have licenses and operate in accordance with the State’s ticket resale policies.³⁷

In 1999, then-Attorney General Elliot Spitzer released a report on ticket scalping and how to address the growing secondary market.³⁸ Even before bots became the dominant mechanism for purchasing tickets it was the Office of the Attorney General’s belief that, “the public has virtually no opportunity of securing good seats at face value.”³⁹ As of 2018, consumers still have to overcome the hurdles of any “illegal alliance[s] between [scalpers] and ticket brokers,” as well as penetrate the virtual wall in an online sale dominated largely by illegal purchasing software.⁴⁰

Less than a decade after the 1999 report, New York decriminalized ticket scalping with the expectation of being able to regulate it.⁴¹ The legislation enacted in 2007 sought to address

³³ See OBSTRUCTED VIEW, *supra* note 1, at 7.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ FAQ—*Ticket Reseller*, N.Y. DEP’T OF STATE DIV. OF LICENSING SERVS., https://www.dos.ny.gov/licensing/ticketresell/ticket_faq.html [<https://perma.cc/3WN6-AW3A>]. State-sanctioned ticket scalping is referred to as “reselling,” and is permissible with a license. N.Y. ARTS & CULT. AFF. § 25.13 (McKinney 2017).

³⁸ Press Release, N.Y. State Office of the Att’y Gen., Spitzer Issues Report on Ticket Sales (May 27, 1999) <https://ag.ny.gov/press-release/spitzer-issues-report-ticket-sales> [<https://perma.cc/NS2B-6Y3G>].

³⁹ *Id.*

⁴⁰ *Id.*; Rebecca Beitsch, *Despite Bans, Ticket-Buying Bots Still Snag the Best Seats*, PEW STATELINE (Feb. 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/02/despite-bans-ticketbuying-bots-still-snap-the-best-seats> [<https://perma.cc/ZN3C-28UB>].

⁴¹ Anthony J. Dreyer, *Hold All Tickets: New York Adopts (Yet Another) Ticket Resale Law*, 244 No. 19 N.Y. L. J. 1, 1 (July 28, 2010) (The 2007 law “reflected a shift toward a more open and expansive market for ticket resale.”); see OBSTRUCTED VIEW, *supra* note 1, at 7.

ticket scalping by legalizing the practice in order to create legislative oversight on ticket scalping practices.⁴² The law shifted the theme of ticket scalping legislation from criminalization of the activity as a whole, to regulation of its means.⁴³ Additionally, these laws had the consumer's interest in mind by providing a licensing system that required a licensing fee and disclosures of the tickets sold, which is still in effect today.⁴⁴ It was clear that the legislature had good faith intentions when legalizing ticket resale. While the hope driving its efforts was to lower ticket prices for fans, the effect was the opposite.

In 2010, the New York ticket scalping laws were amended to account for the rapid growth of the secondary market, which was addressed in the original legislation, and major changes to New York's stance on ticket scalping.⁴⁵ “[F]or the first time, the law banned the use of ticket-buying software . . . ‘used by unscrupulous speculators to purchase tickets at initial sale ahead of consumers intending to attend an event . . .’”⁴⁶ Since New York's ticket scalping laws contain sunset provisions, the laws are often subject to more developments by the legislature.⁴⁷

As of 2018, New York's ticket scalping legislation highlights that the state legislature has found that purchasing tickets to “places of entertainment are a matter of public interest.”⁴⁸ Therefore, preventing the general public from obtaining tickets through primary marketers would constitute a violation of that interest under federal law, since the BOTS Act provides for action when an interest of a state's residents is threatened by the usage of bots.⁴⁹ Akin to the federal law granting state attorney generals the power to bring civil action, the state legislature designates the New York Attorney General as the enforcement authority of

⁴² See OBSTRUCTED VIEW, *supra* note 1, at 8.

⁴³ *Id.* (“The operating premise of the 2007 law was not to completely deregulate ticket resale, but to legalize it pursuant to regulation and taxation.”).

⁴⁴ *Id.*; see also N.Y. ARTS & CULT. AFF. § 25.13 (McKinney 2017).

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting New York State Senate Introducer's Mem., SB No. 3840-A). The legislation that New York enacted in 2010 provided three major changes to legal ticket scalping practices in the State. Aside from banning the use of bots, the new legislation also mandated that any fees charged by the venue operator and ticket vendors for “special services” or convenience changers, must be reasonable. *Id.* Additionally, the law effectively “barred [the use of] non-transferable paperless tickets.” *Id.* (quoting New York State Senate Introducer's Mem., SB No. 3840-A).

⁴⁷ See OBSTRUCTED VIEW, *supra* note 1, at 8; David E. Harrington, *Uncapping Ticket Markets*, 33 REGULATION, no. 3, 2010, at 6, 6.

⁴⁸ N.Y. ARTS & CULT. AFF. § 25.01 (McKinney 2017).

⁴⁹ See Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, § 2(c)(1), 130 Stat. 1401, 1402 (2016); N.Y. ARTS & CULT. AFF. § 25.01 (McKinney 2017).

its ticket scalping laws.⁵⁰ Currently, Article 25 of New York's Arts and Cultural Affairs Law provides that any person or entity reselling tickets must refund the purchaser if "the event . . . is cancelled," "the ticket is counterfeit," or if "the ticket fails to conform to its description as advertised unless the buyer has pre-approved a substitution of tickets."⁵¹ Additionally, Article 25 provides that it is unlawful for any person to utilize automated ticket purchasing software, i.e., bots, to purchase tickets and that any person who knowingly does so will be subject to a civil penalty for each violation.⁵²

Since the decriminalization of ticket scalping in 2007, the focus of New York's legislation has been to ensure that consumers have a fair opportunity to purchase tickets at face value. Through purchasing means such as bots, however, ticket scalpers have continued to remain at least one step ahead of regulations.⁵³ As of June 2018, the state-enacted new legislation expanding New York's ticket scalping regulation.⁵⁴ The amendments require that resale sites post, "in a clear and conspicuous manner the total price of the ticket and the portion of the ticket price stated in dollars that represents a service charge."⁵⁵ Thereby, prohibiting ticket websites from deceiving customers by "us[ing] a . . . domain name in a ticket website's URL that contains . . . the name of the place of entertainment . . . [or] the name of the specific event," and mandates that online ticket scalpers post their license on the ticket resale platform that they are using.⁵⁶ While one proposed version of the bill required the

⁵⁰ Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, § 2(c)(1), 130 Stat. 1401, 1402 (2016).

⁵¹ N.Y. ARTS & CULT. AFF. § 25.07 (McKinney 2017).

⁵² N.Y. ARTS & CULT. AFF. § 25.24(3) (McKinney 2017).

Any person, firm, corporation or other entity who knowingly utilizes ticket purchasing software in order to purchase tickets shall be subject to a civil penalty in an amount of no less than five hundred dollars and no more than one thousand five hundred dollars for each such violation and shall forfeit all profits made from the sale of any such unlawfully obtained tickets.

⁵³ Leonid Bershidsky, *How to End Ticket Scalping*, BLOOMBERG (Dec. 9, 2016, 12:27 PM EST), <https://www.bloomberg.com/view/articles/2016-12-09/how-to-end-ticket-scalping> [https://perma.cc/LXT6-VJYZ].

⁵⁴ Alexis Kramer, *New York Cracks Down on Ticket Resale Sites* (1), BLOOMBERG L. (BNA) (June 20, 2018), <https://www.bna.com/new-york-cracks-n73014476725/> [https://perma.cc/C5SM-WYA3].

⁵⁵ 2018 McKinney's Session Law News of N.Y. Ch. 110 (S. 8501-B) (McKinney 2018); see also Kenneth Lovett, *New York Ticket Scalping Law Extended with Consumer Protections*, DAILY NEWS (July 2, 2018), <http://www.nydailynews.com/news/politics/ny-pol-cuomo-tickets-scalping-20180702-story.html>. [https://perma.cc/WD6A-B4HA].

⁵⁶ 2018 McKinney's Session Law News of N.Y. Ch. 110 (S. 8501-B) (McKinney 2018); N.Y. ARTS & CULT. AFF. § 25.07(4) (McKinney 2018) (requiring ticket resellers to disclose service charges "in a clear and conspicuous manner"); N.Y. ART & CULT. AFF. § 25.19 (McKinney 2018) (requiring ticket resellers to post their license "in a conspicuous

disclosure of the face value, this provision was not in the final version of the bill.⁵⁷ The passage of this legislation extends existing scalping laws through June 30, 2021.⁵⁸ Despite new anti-scalping legislation, the brokers who dominate the ticket scalping industry continue to do so in a highly sophisticated manner, such that it appears that through the use of ticket purchasing software, the secondary market has effectively gained control of the primary market.⁵⁹ While the State law has short sunset provisions, which are supposed to continue an ongoing dialogue about the issue, there has been over a decade's worth of legislation and fans are still forced to rely on the secondary market. An ongoing discussion about the subject is a step in the right direction, but the ticket brokers have progressed in their purchasing mechanisms considerably more than the legislation has in combatting them.

B. *The Emergence of Ticket Bots*

The increased secondary market is largely the result of ticket-buying bots employed by ticket brokers to circumvent the security measures used during online ticket sales.⁶⁰ "Ticket bots are software programs that simulate the action of a human being purchasing tickets from an online seller in order to evade control measures on the seller's website."⁶¹ Users of these programs often "gain[] unauthorized priority access" to online sales and avoid the seller's quantity limits, thereby purchasing more tickets than a consumer not using the software would be able to purchase.⁶² This workaround causes events to be sold out within minutes of an online sale, leaving the majority of fans with no option but to be victimized by outrageous costs in the secondary

manner"); N.Y. ART & CULT. AFF. § 25.23 (McKinney 2018) (requiring resale sites to post that their site is for the secondary sale of a ticket in a "clear and conspicuous" manner); N.Y. ART & CULT. AFF. § 25.34 (McKinney 2018) (prohibiting resellers from using domain names with the venue or event name in its URL).

⁵⁷ Kenneth Lovett, *State Lawmakers to Extend Expiring Ticket-Scalping Law with New Consumer Protections*, DAILY NEWS (June 17, 2018), <http://www.nydailynews.com/news/politics/ny-pol-ticket-scalping-paperless-stubhub-ticketmaster-springsteen-2018-0617-story.html> [<https://perma.cc/E9HK-YEH9>]; see Silverman, *supra* note 7.

⁵⁸ Lovett, *supra* note 57.

⁵⁹ See Silverman, *supra* note 7.

⁶⁰ See McFadden, *supra* note 10, at 428; Jason Koebler, *The Man Who Broke Ticketmaster*, MOTHERBOARD (VICE) (Feb. 10, 2017, 1:00 PM), https://motherboard.vice.com/en_us/article/mgxb8/the-man-who-broke-ticketmaster [<https://perma.cc/R99B-HQPB>]. ("Any discussion about ticket scalping starts with bots, a mysterious scourge that people blame for buying up tickets.")

⁶¹ See Kramer, *supra* note 9, at 184.

⁶² *Id.*

market.⁶³ For example, during U2's 2014 tour, "a single broker purchased 1,012 tickets to one show at Madison Square Garden in a *single minute*, despite the ticket vendor's claim of a '[four] ticket limit.'"⁶⁴ Within one day, that broker and another "had together amassed more than 15,000 tickets to U2's shows across North America."⁶⁵ At this rate, continued bot usage would render an online sale meaningless for the average consumer, as it is more likely than not that the secondary market will be their only chance of obtaining a seat to the show.

1. How Bots Access Tickets

Ticket bots allow brokers to automate searching for and buying tickets faster than the average consumer ever could.⁶⁶ The bot's functions are broken down into four parts to allow the broker to make up thousands of transactions within the first seconds of a venue's online sale.⁶⁷ The first functions are known as "spinner," or "drop checker" bots, which monitor sites in anticipation of "the release, or 'drop,' of tickets."⁶⁸ According to Ticketmaster, "spinner" bots contribute to nearly ninety percent of their site's traffic.⁶⁹ Then, the bots' second function is used to "automate the search for and reservation of tickets."⁷⁰ While even a "skilled human" can get through Ticketmaster's "dropdown prompts" in ten seconds, "spinner" bots enable brokers to complete the prompts "in a matter of milliseconds."⁷¹ Brokers exploit this delayed sale by making multiple near-instantaneous searches, providing them access to hundreds of "reserved" tickets and then allowing the broker to pick the best seats.⁷² Next, the Bot automates the actual purchase of tickets by using both real and false names, addresses and credit cards to

⁶³ *Id.*

⁶⁴ See OBSTRUCTED VIEW, *supra* note 1, at 3–4 (emphasis added); see also Ben Sisario, *Report Exposes Widespread Abuses in Ticketing Industry in New York*, N.Y. TIMES (Jan. 27, 2016), <https://www.nytimes.com/2016/01/28/business/media/report-exposes-widespread-abuses-in-ticketing-industry-in-new-york.html> [<https://perma.cc/QHU9-3WMZ>].

⁶⁵ See OBSTRUCTED VIEW, *supra* note 1, at 4.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Koebler, *supra* note 60.

⁷² See OBSTRUCTED VIEW, *supra* note 1, at 15. When the tickets are released on the primary marketer's site, "sophisticated bots" are used to make thousands of requests on the site's server, which reserve the tickets for the bot user, thereby preventing anyone else from purchasing them. Koebler, *supra* note 60.

avoid a promoter's purchasing limits.⁷³ Scalpers then employ the bot to evade and defeat the site's security measures.⁷⁴ Additionally, some brokers have used "armies of 'typers,'" which are human workers often outsourced from countries with inexpensive labor.⁷⁵

Using a ticket bot provides brokers with two ways of obtaining tickets that are unavailable to the ordinary consumer: avoiding the ticketing site's security measures and purchasing more tickets than the website permits.⁷⁶ To circumvent the site's security measures, brokers purchase thousands of proxy Internet Protocol addresses, which are used to separate each "connection attempt" or purchase to give the illusion that these connections are being made by multiple users.⁷⁷ While scalping has been customary in the United States for over two hundred years and appears to be inevitably impacting any kind of ticketed event, bot usage and the ability to quickly buy tickets in mass quantities have created a distant gap between the secondary ticket market and the state's ability to regulate ticket scalping.⁷⁸

⁷³ Stephen L. Betts, *Eric Church Ups War Against Scalpers, Cancels 25,000 Tickets*, ROLLING STONE (Feb. 21, 2017), <https://www.rollingstone.com/country/news/eric-church-ups-war-against-scalpers-cancels-25000-tickets-w468077> [<https://perma.cc/944N-U27T>]. (Upon canceling ticket purchases country artist Eric Church stated, "[Scalpers] buy thousands of tickets across the U.S., not just mine, and then end up making a fortune. They use fake credit cards, fake IDs. All of this is fraud."); Koebler, *supra* note 60. (Ticket scalpers evade ticket purchasing limits "by using multiple credit cards with multiple addresses").

⁷⁴ See OBSTRUCTED VIEW, *supra* note 1, at 16–17 (Brokers have been able to effectively "train" their software to "read" CAPTCHA ["Completely Automated Public Turing test to tell Computer and Humans Apart"] tests at a faster rate than a human user could.)

⁷⁵ *Id.* at 17.

⁷⁶ As addressed by the New York State Attorney General, the limits on number of tickets purchased applies only per transaction as opposed to per person. *Id.* at 22. For example, in 2015, one bot purchased "520 tickets in [three] minutes" to Beyoncé's concert at the Barclays Center in 2013 and one bot bought "522 tickets in [five] minutes" to a One Direction concert at Jones Beach in 2012. *Id.* at 18. Even after the passage of the BOTS Act, fans are still being shut out of high-profile events. See Steven J. Horowitz, *The Concert Ticket Industry is Still Broken*, VULTURE (May 2, 2017), <http://www.vulture.com/2017/05/everyone-wants-concert-tickets-but-no-one-is-getting-them.html> [<https://perma.cc/H8RJ-2Q7N>].

⁷⁷ See OBSTRUCTED VIEW, *supra* note 1, at 18. Additionally, bot users register thousands of e-mail addresses to falsely make individual purchases that appear to be within the site's purchasing limit. *Id.* Further, because the bot user is making thousands of connections to the ticketing site within a few minutes, the virtual congestion on the site prevents actual people from penetrating the server, forcing them out of online sale. *Id.* at 15. ("Ticketmaster has stated that spinners can account for as much as 90% of the traffic to its website.")

⁷⁸ See Lolly Bowean, *Chicago's Hottest Ticket? It's Michelle Obama's Book Tour*, CHI. TRIB. (Sept. 28, 2018, 5:00 AM), <http://www.chicagotribune.com/news/obamacenter/ct-met-michelle-obama-book-tickets-20180924-story.html> [<https://perma.cc/62BB-66PJ>] (stating that one woman paid \$607 on a resale site for two tickets to Michelle Obama's Book Tour in Chicago); *Yosemite Battling Pest Problem: Ticket-scalpers*, CBS NEWS (Apr. 18, 2011, 5:31 PM), <https://www.cbsnews.com/news/yosemite-battling-pest-problem-ticket-scalpers/> [<https://perma.cc/GAP6-RWYF>] (noting that ticket scalpers were selling Yosemite National Parks' "limited camping reservations at exorbitant prices"); see also Parks,

The growth of the secondary market has grown out of control and the initiatives to combat it have been ineffective against evolving ticket purchasing practices. Anti-bot legislation is a step toward helping the consumer, but without a proactive approach from primary marketers, consumers will continue to be subject to unpredictable prices.

2. Anti-Bot Legislation

In 2016, President Barack Obama signed the Better Online Ticket Sales (BOTS) Act into law by establishing a federally backed foundation for regulating ticket scalping.⁷⁹ “This [law] attempts to regulate the use of bots to bypass security measures on primary ticket marketplace websites.”⁸⁰ The Act intends to “prohibit, as an unfair and deceptive act or practice in commerce, the sale or use of certain software to circumvent control measures used by Internet ticket sellers to ensure equitable consumer access to tickets for any given event, and to provide criminal penalties for such acts.”⁸¹ Specifically, the BOTS Act prohibits scalpers from “circumvent[ing] a security measure, access[ing] control system, or other technological control or measure on an Internet website or online service that is used by the ticket issuer to enforce posted event ticket purchasing limits or to maintain the integrity of posted online purchasing order rules.”⁸² Under Section two of the Act, it is also unlawful “to sell or offer to sell any event ticket” obtained through the above stated means.⁸³ Therefore, secondary marketers like StubHub would be held liable for allowing brokers to sell tickets purchased through ticket bots.⁸⁴ StubHub and other secondary marketers, however, continue to resell tickets without

supra note 21 (“Whenever you sell tickets to an event that are printed ahead of time, scalping is going to be inevitable.”).

⁷⁹ Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401, 1402 (2016) (codified as amended at 15 U.S.C. § 45c (2012 & Supp. IV 2016)); *see also* Lesley Fair, *BOTS ACT: That’s the Ticket!*, FED. TRADE COMM’N (Apr. 7, 2017, 12:40 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/bots-act-thats-ticket> [<https://perma.cc/M3U7-CJ97>].

⁸⁰ *See* McFadden, *supra* note 10, at 443.

⁸¹ McFadden, *supra* note 10, at 443 n.118; *see also* Better Online Ticket Sales Act § 2(a)(1)(A).

⁸² Better Online Ticket Sales Act § 2(a)(1)(A).

⁸³ *Id.* §§ 2(a)(1)(A)–(B).

⁸⁴ The BOTS Act provides a scienter requirement for those that sell tickets through the use of bots. *Id.* at §§ 2(a)(1)(B)(i)–(ii).

interruption and generally, federal legislation has yet to deter the practices the federal government seeks to penalize.⁸⁵

Additionally, New York State criminalized the use of bots in 2016.⁸⁶ This legislation defines “ticket purchasing software,” as

[A]ny machine, device, computer program or computer software that, on its own or with human assistance, bypasses security measures or access control systems on a retail ticket purchasing platform, or other controls or measures on a retail ticket purchasing platform that assist in implementing a limit on the number of tickets that can be purchased, to purchase tickets.⁸⁷

Pursuant to this law, it is unlawful to sell tickets using automated ticket purchasing software and any such sale is subjected to a fine.⁸⁸ Similar to the BOTS Act, the state law criminalizes reselling tickets with knowledge that they were obtained using ticket purchasing software.⁸⁹ The new penalties that can be administered to bot users and ticket resale sites are intended to condemn and deter the use of “manipulat[ive] systems designed to limit the number of tickets to an event that a person can buy.”⁹⁰ While this legislation appears to be one step of many for the New York State legislature,⁹¹ the Attorney General has been outspoken on working towards remedying the ticketing industry for consumers and identifying the industry’s perpetrators.

⁸⁵ Koebler, *supra* note 60. (“Ticketmaster agrees that anti-bot legislation isn’t likely to greatly change bot activity. The company said it blocked [five] billion bot attempts in 2015, and that bot activity increased 10[%] between 2015 and 2016.”).

⁸⁶ N.Y. ARTS & CULT. AFF. § 25.24 (McKinney 2016). Upon signing the new legislation Governor Andrew Cuomo stated, “These unscrupulous speculators and their underhanded tactics have manipulated the marketplace and often leave New Yorkers and visitors alike with little choice but to buy tickets on the secondary market at an exorbitant mark-up.” Press Release, N.Y. Governor’s Press Office, Governor Cuomo Signs Legislation Combating Unfair Ticket Purchasing and Reselling Practices (Nov. 28, 2016), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-combating-unfair-ticket-purchasing-and-reselling-practices> [<https://perma.cc/QA7J-T4RZ>].

⁸⁷ N.Y. ARTS & CULT. AFF. § 25.24(1) (McKinney 2017).

⁸⁸ *Id.* § 25.24(3)(a).

Any person, firm, corporation or other entity who knowingly utilizes [automated] ticket purchasing software in order to [bypass security measures] to purchase tickets shall be subject to a civil penalty in an amount of no less than five hundred dollars and no more than one thousand five hundred dollars for each such violation and shall forfeit all profits made from the sale of any such unlawfully obtained tickets.

⁸⁹ *Compare* Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, § 2(a)(1)(A), 130 Stat. 1401, 1401 (2016) (codified as amended at 15 U.S.C. § 45c (2012 & Supp. IV 2016)) *with* N.Y. ARTS & CULT. AFF. § 25.24(5) (McKinney 2017) (“Any person, firm, corporation or other entity who knowingly resells or offers to resell a ticket that such person, firm, corporation or other entity knows was obtained using ticket purchasing software and was not obtained for their own use or the use of their invitees, employees, or agents shall be subjected to a civil penalty . . .”).

⁹⁰ N.Y. Governor’s Press Office, *supra* note 86.

⁹¹ *See* Silverman, *supra* note 7.

Consistent with the actions of his predecessors and other state leaders, the New York Attorney General published a report on the effects of ticket scalping and bot usage in 2016.⁹² The Attorney General found “three brokers using Ticket Bots collectively purchased more than 140,000 tickets to events in New York over a three-year period between 2012 and 2014.”⁹³ One issue is that the broker and the resale sites used for resale profited from New York venues despite not being licensed scalpers under New York law.⁹⁴ According to the report, “[e]vident in the ban on Bots and the legislature’s commentary [to the recent amendments] is the idea that ticket buying, when presented to the public as a fair contest, should in fact be fair, and not subject to manipulation by software or similar techniques.”⁹⁵ Furthermore, if “the [state] legislature prefers” that purchasing tickets “be based on [controllable] factors like showing up at the right time or simple luck of the draw, as opposed to” predatory software, then it must ensure that this goal is possible.⁹⁶ The Attorney General provided recommendations that included ensuring compliance from ticket resale platforms, increasing transparency in ticket allocations and limits, responsibility from primary ticket vendors, and legislative action.⁹⁷ Five months after the report’s release, the Attorney General announced settlements with six ticket brokers that had dominated the secondary market for tickets to events in New York.⁹⁸ These settlement agreements are a step in the right

⁹² See OBSTRUCTED VIEW, *supra* note 1, at 11. This report addresses that the majority of tickets to events are not reserved for the general public at the outset. *See id.* at 15. While this is certainly a problem in this industry, it is a separate legal issue and will not be addressed in this note. Additionally, in highlighting the unfair practices of ticket brokers the Attorney General addressed that a part of the problem is that ticket brokers exploit their connections within industry itself to get access to tickets. *See id.* at 15; see also Dave Brooks, *Scalper Lobbying Group Fires Shot at Ticketmaster in Wake of FTC Workshop Announcement*, BILLBOARD (Oct. 4, 2018), <https://www.billboard.com/articles/business/8478380/scalper-lobbying-group-ticketmaster-ftc-workshop> [<https://perma.cc/PC6N-BKTX>]. This too is a separate, although important, issue that will not be addressed in this note. OBSTRUCTED VIEW, *supra* note 1 at 11, 15.

⁹³ OBSTRUCTED VIEW, *supra* note 1, at 19.

⁹⁴ N.Y. ARTS & CULT. AFF. LAW § 25.01 (McKinney 2017) (“The legislature objects to any claim that businesses domiciled outside New York state are exempted from this statute when selling tickets to events occurring in New York state . . .”).

⁹⁵ See OBSTRUCTED VIEW, *supra* note 1, at 8.

⁹⁶ *Id.*

⁹⁷ *See id.* at 34–37.

⁹⁸ *See infra* Section I.B. The companies included Renaissance Ventures, Ebrani Corp., Concert Specials Inc., Fanfetch Inc., BMC Capital Partners Inc., and JAL Enterprises. Additionally, a seventh company, Componica, LLC was also part of the settlement. The company had “developed software libraries used by ticket bots to try to get around . . . ‘CAPTCHA’ tests.” In accordance with the settlement, “Componica has agreed to not develop or use software to bypass security measures on ticketing websites.” Press Release, N.Y. State Office of the Att’y Gen., A.G. Schneiderman Announces a \$4.19

direction toward enforcing and regulating ticket scalping as the settlements required that the companies keep their licenses “if they [intended] to resell tickets [in] New York . . . abstain from using ticket bots, and pay penalties for having operated illegally,” which amounted to “\$4.19 million in disgorged profits and penalties to the State.”⁹⁹ Since releasing the report, the Attorney General’s office has entered into settlement agreements with “[fifteen] businesses involved in the illegal ticket trade, including resellers, facilitators, and software developers, for a total of \$7.1 million.”¹⁰⁰ The settlements were a response to the Attorney General’s call to action against predatory ticket scalping, but were made before New York’s amended ticket scalping laws took effect.¹⁰¹

Although the efforts of the state government have yielded effective results, these results have only positively impacted the state as a whole, while consumers remain subject to high secondary prices.¹⁰² Similarly, Ticketmaster seeks the same injunctive relief and compensatory damages against bot users for purchasing thousands of tickets to its events in violation of New York law.¹⁰³ The recent legal actions by the State of New York and Ticketmaster demonstrate an interest in repairing the

Million in Settlements With Six Companies That Illegally Purchased and Resold Hundreds of Thousands of Tickets to Concerts and Other NY Events (May 11, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-announces-419-million-settlements-six-companies-illegally-purchased> [<https://perma.cc/2735-N52H>]. One of these brokers, Prestige Entertainment, was the broker that had purchased 1,012 tickets in one minute, to the 2014 U2 concert at Madison Square Garden. *Id.*

⁹⁹ See N.Y. State Office of the Att’y Gen., *supra* note 98.

¹⁰⁰ *Id.*

¹⁰¹ See Kathleen McGee & Aaron Chase, *Why It’s So Hard to Get a Concert Ticket—And What We Can Do About It*, MEDIUM: NEW YORK STATE ATTORNEY GENERAL (May 11, 2017), <https://medium.com/new-york-state-attorney-general/unrigging-ticketing-224a5794e6eb> [<https://perma.cc/248G-249N>] (“New York’s legislature enacted new legislation . . . adding criminal penalties for bot use to the existing civil penalties. The law took effect in February 2017.”).

¹⁰² See N.Y. State Office of the Att’y Gen., *supra* note 98.

¹⁰³ See Cara Bayles, *Ticketmaster Sues Scalpers For Using Bots To Mass-Buy Tix*, LAW 360 (Oct. 2, 2017, 8:43 PM EDT), <https://www.law360.com/articles/970307/ticketmaster-sues-scalpers-for-using-bots-to-mass-buy-tix> [<https://perma.cc/RB8B-BCTM>] (“Ticketmaster seeks injunctive relief, compensatory damages, punitive damages, liquidated damages, disgorgement and attorney’s fees and costs.”). Ticketmaster specifically alleged “violations of the federal Computer Fraud and Abuse Act, California’s Computer Data Access and Fraud Act, and New York’s Anti-scalping Law.” Complaint at 4, *Ticketmaster LLC v. Prestige Entertainment Inc.*, 2:17-cv-07232 (C.D. Cal. Oct. 2, 2017), ECF No. 1. The presiding judge has since noted that “[t]he bots’ effectiveness is circumstantial evidence that . . . the bot developers copied protected portions of the Ticketmaster website and mobile app onto its own servers, in order to develop bots that could successfully circumvent Ticketmaster’s myriad security measures.” Sophia Morris, *Alleged Scalpers Must Face Ticketmaster’s Infringement Suit*, LAW 360 (May 30, 2018, 5:47 PM EDT), <https://www.law360.com/articles/1048261> [<https://perma.cc/BL39-Q9DU>].

wrongdoings of scalping in the context of the primary marketer and the state venues, but there has yet to be any relief for the consumer. Because tickets are a unique good, once they are purchased illegally, and then sold for outrageously high prices, there is no way to undo the damage.¹⁰⁴ The show is over, fans have either missed out on an event that they never had a chance to attend or overpaid a broker for a ticket with no guarantee that it was not counterfeit or duplicated for multiple people. Despite the Attorney General's settlements, the same brokers have continued to use illegal ticket purchasing practices.¹⁰⁵ Recently, Ticketmaster canceled purchases to events when it was known that a large portion of the tickets released were purchased using bots, and then "put[] the tickets back in the system so fans would have a better crack at them."¹⁰⁶ While these isolated actions acknowledged the realities of the regular consumer's place in the ticketing industry, it would be impractical for artists and primary markets to make it common practice to cancel shows each time tickets are purchased using bots.¹⁰⁷

¹⁰⁴ As of 2016, tickets to the Broadway play *Hamilton* were being sold on the resale market "for as much as \$30,000" per ticket, despite the fact that "the highest [price] charged for a Broadway show" is \$849 for orchestra seats. See Joanna S. Kao & Anna Nicolaou, *'Hamilton' Raises Broadway Ticket Prices to Foil Scalpers*, FIN. TIMES (Feb. 1, 2017), <https://www.ft.com/content/81e13906-e43b-11e6-8405-9e5580d6e5fb> [<https://perma.cc/3QCF-PYEZ>]; see also Gene Maddaus, *Ticketmaster Says Bot Army Bought 30,000 'Hamilton' Tickets*, VARIETY (Oct. 2, 2017, 3:55 PM PT), <http://variety.com/2017/digital/news/ticketmaster-hamilton-prestige-entertainment-renaissance-ventures-1202578292/> [<https://perma.cc/2YFJ-9VZA>] (According to a complaint filed by Ticketmaster, Prestige Entertainment and its affiliates made 313,528 ticket orders for *Hamilton* using 9,047 separate accounts. During the twenty-month time period used to acquire these tickets, Prestige purchased "30–40% of the 'Hamilton' tickets available through Ticketmaster.").

¹⁰⁵ See Bayles, *supra* note 103. ("In May [2016] . . . Prestige Entertainment, agreed to a \$3.35 million settlement with the New York Attorney General's Office to end claims it ran 'one of the largest ticket purchasing and reselling operations in the United States' The terms of the settlement included an agreement to stop using bots to buy tickets, but [Ticketmaster's] suit alleges Prestige has since breached that agreement.").

¹⁰⁶ Kenneth Lovett, *Ticketmaster Claims Scalper Used Illegal Bots to Buy Thousands of High-Demand Tickets in new \$10M Suit*, N.Y. DAILY NEWS (Oct. 2, 2017, 12:00 PM) <http://www.nydailynews.com/news/national/ticketmaster-sues-big-time-scalper-10m-article-1.3536405> [<https://perma.cc/XH2Y-6D8M>]; see also Michael Paulson & Ben Sisario, *'Hamilton' and 'Harry Potter' Productions Try to Outwit Scalpers*, N.Y. TIMES (Feb. 12, 2017), <https://www.nytimes.com/2017/02/12/theater/hamilton-harry-potter-scalping-broadway.html> [<https://perma.cc/A2YL-AC3Q>] ("Hamilton" has tried to reduce scalping by "canceling suspect purchases."). These cancellations included purchases from persons that exceeded the recently implemented purchasing limits and purchases from people hired to stand in line for box office tickets. Michael Paulson, *'Hamilton' Takes Steps to Limit the Resale of Its Tickets*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/theater/hamilton-takes-steps-to-limit-the-resale-of-its-tickets.html?smid=pl-share> [<https://perma.cc/PR3D-VS3B>]. In response, however, some claim to be unfairly subject to the cancellations and lost their tickets. *Id.*

¹⁰⁷ In February 2017, country singer Eric Church canceled the sale of more than 25,000 tickets to his *Holdin' My Own* tour, in response to identifying the purchasers of those tickets as scalpers. See Betts, *supra* note 73. Similarly, in 2016 Chance the Rapper purchased nearly two thousand floor-seat tickets from scalpers to the *Magnificent*

As the methods of ticket scalping have advanced since the early days of Broadway, so have the measures taken in attempt to regulate it. With the advent of ticket bots, however, the gap between scalpers and lawmakers has grown, and will continue to plague consumer interests if left unobstructed. While federal and state legislative and enforcement actions have shown a great interest in regulating ticket scalping,¹⁰⁸ there has yet to be relief for the consumers that continue to miss shows due to a lack of opportunity. Continued injunctions against brokerage firms using illegal means of obtaining tickets will yield positive results for the industry, but at a slower rate, and the impact of these settlements have failed to instill any deterrence.¹⁰⁹ To expedite the regulation of ticket scalping, primary marketers must change the way they allow their tickets to be sold in order to regain control of the expanding secondary ticket market. Without further regulation, artists will continue to have large profits made off of their work and consumers will become further removed from a fair opportunity to purchase tickets at face value.

II. CONTROLLING THE MARKET THROUGH UNREGULATED SECONDARY PRICING

“The company [Wiseguy] fundamentally broke Ticketmaster . . .”¹¹⁰

The unfortunate reality is that ticket scalpers can charge tremendous rates for high profile shows because someone will always be willing to pay for them.¹¹¹ An example of industry dominance of this nature was revealed in 2010, when three principle owners of Wiseguy Tickets, Inc. (Wiseguy), a ticket

Coloring Day festival and then sold them back to fans at a more reasonable price. *See* Mary J. DeMeglio, *Chance the Rapper Fights Scalpers, Fans Win*, BILLBOARD (Sept. 12, 2016), <https://www.billboard.com/articles/news/7503657/chance-rapper-fights-ticket-scalpers-festival> [<https://perma.cc/5ER7-A88M>]. While the independent efforts of these artists show pushback against scalping from the music industry, this is not a sustainable solution.

¹⁰⁸ *See* Press Release, N.Y. State Office of the Att’y Gen., A.G. Schneiderman Proposes Bill to Address Widespread Illegal Use of Software to Purchase Tickets to Concerts and Other Events (Apr. 28, 2016), <https://ag.ny.gov/press-release/ag-schneiderman-proposes-bill-address-widespread-illegal-use-software-purchase-tickets> [<https://perma.cc/5QPW-2U9H>] (The New York Attorney General declared, “[B]y strengthening New York’s anti-ticket bot law, this bill will give fans a fairer shot at purchasing tickets to see their favorite performers.”); Dan Rys, *President Obama Signs Anti-Scalping Bill into Law*, BILLBOARD (Dec. 15, 2016), <https://www.billboard.com/articles/business/7625257/president-obama-signs-bots-act-law> [<https://perma.cc/W2SX-PMPM>].

¹⁰⁹ *See* Bayles, *supra* note 103.

¹¹⁰ Koebler, *supra* note 60.

¹¹¹ *See* OBSTRUCTED VIEW, *supra* note 1, at 4 (“In at least one circumstance, a ticket was *resold* at 7,000% of face value.”) (emphasis added).

scalping broker that obtained and resold millions of dollars-worth of premium tickets, plead guilty to conspiracy to commit wire fraud and for violating the Computer Fraud and Abuse Act by “exceeding authorized access to computers engaged in interstate commerce.”¹¹²

The charges against Wiseguy stated that the company contributed to a scheme that targeted major primary marketers, including Ticketmaster and LiveNation, to “fraudulently obtain[] prime tickets to performances by” high-profile artists, sporting events, live theatre shows, and special events across the United States, including New York.¹¹³ Wiseguy’s success has been categorized as “straight domination” of the ticketing industry,¹¹⁴ by penetrating ticketing sites’ security measures and extending its grasp on the market to almost any type of ticketed event.¹¹⁵ When U2 had a second sale for tickets to their upcoming tour in 2005 because Wiseguy had purchased “nearly all of the . . . general admission tickets” during the original sale, Wiseguy then “took all the good tickets in that second round, too.”¹¹⁶ Wiseguy was not alone in their endeavors in the ticketing industry and without proper regulations, fans will continue to be “left] . . . out in the cold.”¹¹⁷

Aside from evading online security measures, brokers have exploited the public’s interest in wanting to attend high-profile events. Fans looking to attend these events often “buy early in case it will not be available later, and pay a premium to

¹¹² Press Release, U.S. Att’y’s Office, Dist. of N.J., Three Plead Guilty in “Wiseguys” Scheme to Purchase 1.5 Million Premium Tickets to Events Through Computer Hacking and Fraud (Nov. 18, 2010), <https://archives.fbi.gov/archives/newark/press-releases/2010/nk111810.htm> [<https://perma.cc/775P-TBFW>]; see also Computer Fraud and Abuse Act, Pub. L. No. 99-474, 100 Stat. 1213 (1986) (codified as amended at 18 U.S.C. § 1030 (2012)).

¹¹³ U.S. Att’y’s Office, Dist. of N.J., *supra* note 112. (“The defendants engaged in a scheme in which they and their company, Wiseguy Tickets, Inc. (‘Wiseguys’), targeted Ticketmaster, Telecharge, Tickets.com, MLB.com, MusicToday, LiveNation, and other online ticket vendors. The defendants fraudulently obtained prime tickets to performances by, among others: Bruce Springsteen, Hannah Montana, Bon Jovi, Barbara Streisand, Billy Joel, and Kenny Chesney. The criminal scheme also targeted tickets to live theater, including productions of ‘Wicked’ and ‘The Producers’; sporting events, including the 2006 Rose Bowl and 2007 Major League Baseball playoff games at Yankee Stadium; and special events—including tapings of the television show *Dancing with the Stars*.”).

¹¹⁴ For example, in 2005 Ken Lawson, Wiseguy’s former CEO, “bought nearly all of the . . . general admission tickets” available through U2’s fan club for many of their shows. Lawson noted, “When the sale dropped, we took 496 in New York, 492 in Boston, 496 in LA.” Koebler, *supra* note 60.

¹¹⁵ See U.S. Att’y’s Office, Dist. of N.J., *supra* note 112.

¹¹⁶ Koebler, *supra* note 60 (According to Lawson, Wiseguy bought nearly all of the 500 general admission tickets during the original sale, and then bought all of the “good tickets” during the second sale.).

¹¹⁷ See Bayles, *supra* note 103.

avoid the risk.”¹¹⁸ As a result fans pay well over the ticket’s face value because the only tickets available are through the resale market when the initial general public sale has sold out.¹¹⁹ The New York Attorney General noted that “[i]n at least one circumstance, a ticket was resold at 7,000% of face value.”¹²⁰ Scalpers have used their ticket purchasing practices to take advantage of free or low-priced concerts for charity and to deceive fans by selling them tickets that have not actually been purchased yet.¹²¹

A. *Speculative Ticket Listings*

The secondary market has become the primary medium for buying tickets after they are released. As a result of this industry dominance, the secondary market has also advertised tickets before the primary market has. Fans making these purchases, however, were not buying the actual tickets as they had not been released yet; instead, these purchases were for “speculative tickets.” Speculative listing occurs when secondary marketers list tickets for sale before possessing the tickets,¹²² or have a right to sell them.¹²³ In using this practice, ticket scalpers “are betting (or *speculating*) that they will be able to get tickets and then resell them.”¹²⁴ The New York Attorney General has pressured secondary resale sites to remove speculative ticket

¹¹⁸ Alan B. Krueger, *Economic Scene; Seven Lessons About Super Bowl Ticket Prices*, N.Y. TIMES (Feb. 1, 2001), <http://www.nytimes.com/2001/02/01/business/economic-scene-seven-lessons-about-super-bowl-ticket-prices.html> [<https://perma.cc/E83G-4758>].

¹¹⁹ See Jaskier, *supra* note 11, at 86 (“Fans can see the drastic price differences on secondary market ticketing websites, observing posts for tickets that are selling for hundreds of dollars over face value and just went on sale that day.”); see also Sammi Elephant, *Beyond the Bots: Ticked-Off over Ticket Prices or the Eternal Scamnation?*, 25 UCLA ENT. L. REV. 1, 5 (2018) (“[T]he ticket bots leave the average consumer with no other option but to purchase tickets on the secondary market for potentially up to ten times face value.”).

¹²⁰ See OBSTRUCTED VIEW, *supra* note 1, at 4.

¹²¹ See Stephen Rex Brown, *Chuck Schumer, Sandy Victims Rip Shameless Scalpers Charging up to \$60,000 for Tickets to the 12-12-12 Benefit Concert*, N.Y. DAILY NEWS (Dec. 6, 2012, 2:27 PM), <http://www.nydailynews.com/new-york/chuck-stop-sandy-scalping-article-1.1214866> [<https://perma.cc/SW7R-P2NH>]; Rob Davies, *Viagogo Condemned over Ed Sheeran Cancer Benefit Concert Tickets*, GUARDIAN (Feb. 17, 2017, 12:37 PM EST), <https://www.theguardian.com/money/2017/feb/17/viagogo-condemned-ed-sheeran-cancer-benefit-concert-tickets-teenage-cancer-trust> [<https://perma.cc/M2DG-GN47>], (Viagogo was advertising tickets for Ed Sheeran’s charity gig “for Teenage Cancer Trust for up to £1,750,” when the face value of the tickets was only £75); see Sisario, *supra* note 64.

¹²² *What is “Speculative” Ticket Listing?*, TICKETMASTER INSIDER (Aug. 15, 2017), <http://insider.ticketmaster.com/spec-ticketing/> [<http://perma.cc/7NPS-D3XX>].

¹²³ David McCabe, *TicketMaster, StubHub Enlisted Ticket Reseller Crackdown*, THE HILL (May 3, 2016, 11:01 AM EDT), <http://thehill.com/policy/technology/278506-ticketmaster-stubhub-enlisted-to-address-ticket-resellers> [<http://perma.cc/MHN5-LWWJ>].

¹²⁴ *What is “Speculative” Ticket Listing?*, *supra* note 122.

listings for concerts, however the illicit practice still continues.¹²⁵ In a press release related to the 2016 report, the Attorney General stated that speculative listing is the “kind of predatory behavior [that] drives up prices, hurts consumers, and sows distrust in the ticket industry.”¹²⁶ For example, tickets for Bruce Springsteen’s 2016 tour were listed for more than \$5,000 “on StubHub and other resale sites” before even going on sale through the primary marketer.¹²⁷ Ticket scalpers use speculative ticket postings so that they have the “greatest flexibility” to find the most sought after tickets that potential buyers want.¹²⁸ While this practice is readily detectable, as it is obvious when tickets are being sold on the resale market before being released by the primary marketer, it still remains a factor in the secondary ticket market.¹²⁹ Like other scalping practices, “[s]peculative ticket[ing] harm[s] both consumers and the ticket industry.”¹³⁰ For fans, speculative ticket purchases prevent them from receiving the seats that they actually paid for, or in the worst cases from receiving any tickets at all.¹³¹

By posting speculative ticket listings, many brokers will often sell more tickets than the venue has.¹³² The result is, once again, that the consumer must purchase tickets at an outrageous price, but without a guarantee of authenticity. Although StubHub and other secondary marketers complied with the Attorney General’s request to take down speculative ticket listings for the 2016 Bruce Springsteen tour, the practice continues to plague the

¹²⁵ See Sisario, *supra* note 64.

¹²⁶ Press Release, N.Y. State Office of the Att’y Gen., Statement From A.G. Schneiderman On Third-Party Ticket Sellers Removing Speculative Concert Ticket Listings (Dec. 9, 2015) <https://ag.ny.gov/press-release/statement-ag-schneiderman-third-party-ticket-sellers-removing-speculative-concert> [<https://perma.cc/GQ9G-5656>]; see also Ray Waddell, *Confessions of a Ticket Scalper: Billboard’s Candid Q&A*, BILLBOARD (Mar. 2, 2012), <http://www.billboard.com/articles/news/502937/confessions-of-a-ticket-scalper-billboards-candid-qa> [<https://perma.cc/XFU6-9H8X>] (Speculative selling “hurts the guy who actually owns the inventory, but it’s just like shorting on the stock market—as long as they cover, who really cares?”).

¹²⁷ Ben Sisario, *New York Looks into ‘Speculative’ Ticket Resellers*, N.Y. TIMES (Dec. 8, 2015), <https://www.nytimes.com/2015/12/09/business/media/new-york-looks-into-speculative-ticket-resellers.html> [<https://perma.cc/XMR5-KJTL>]. In 2015, secondary marketers listed tickets to Bruce Springsteen’s 2016 tour for prices up to \$5,800. See OBSTRUCTED VIEW, *supra* note 1, at 26. Since the tickets had not been released yet, consumers were buying tickets that the brokers “planned, or hoped, to buy later,” with no guarantee of receiving what they paid for. *Id.*

¹²⁸ *Here’s How to Identify Counterfeit Tickets*, TICKETMASTER INSIDER (Mar. 17, 2014), <http://insider.ticketmaster.com/concert-counterfeit-tickets/> [<https://perma.cc/U7CC-ZY6F>].

¹²⁹ See OBSTRUCTED VIEW, *supra* note 1, at 26.

¹³⁰ *Id.*

¹³¹ *Id.*; see also Waddell, *supra* note 126 (Selling speculative tickets is “just like shorting the stock market—as long as [the seller] cover[s], who really cares?”).

¹³² *Id.*

ticketing industry.¹³³ Additionally, New York State has sought to criminalize ticket speculation, but current law permits speculative listings provided that the purchaser is informed “in a clear and conspicuous manner . . . [that the] ticket reseller does not have possession of the ticket.”¹³⁴ A criminal penalty for ticket speculation would continue to support the State’s trend toward condemning the predatory practices used by brokers, but would still be a reactive measure. Based on the responses to other criminal penalties and civil liability imposed on brokers for certain scalping practices, it is likely that a criminal penalty for ticket speculation would deter brokers from employing the practice. Unlike traditional bot purchases and other scalping practices, ticket speculation is easier to detect because resale sites can see when ticket purchases are made for events that the primary marketer has yet to release.¹³⁵

B. *Profiting from Charity*

Even events that sought to replace profit goals with charitable intent or public benefit have had their best wishes thwarted by ticket scalpers.¹³⁶ “[T]he 12-12-12 benefit concert for Hurricane Sandy” drew national appeal as some of the world’s most recognized performers gathered at Madison Square Garden to raise funds for the cause.¹³⁷ While the 13,500 tickets to the show sold out within minutes, days before the show hundreds of tickets were being sold through the secondary market.¹³⁸ Tickets were listed on StubHub for up to \$48,000 despite “the highest face value price of a ticket reaching \$2,500.”¹³⁹ This was not the only time that scalpers have taken advantage of a charity event, but it certainly caused a reaction

¹³³ Sarah N. Lynch, *New York Probes Sale of ‘Speculative’ Bruce Springsteen Tickets on StubHub*, REUTERS (Dec. 8, 2015, 9:12 PM), <https://www.reuters.com/article/us-new-york-probe-springsteen-idUSKBN0TS06W20151209> [<https://perma.cc/J74R-9888>]; see also Horowitz *supra* note 76 (showing that despite state law, ticket speculation continues to be a way of obtaining tickets to events in New York).

¹³⁴ N.Y. ARTS & CULT. AFF. § 25.10 (McKinley 2018).

¹³⁵ *Here’s How to Identify Counterfeit Tickets*, TICKETMASTER INSIDER (Mar. 17, 2014), <http://insider.ticketmaster.com/concert-counterfeit-tickets/> [<https://perma.cc/2H82-MWPL>] (“If an event has not gone on sale yet to the general public, but seats are already being sold, that is a good indication that they are ‘spec’ [speculative] tickets.”).

¹³⁶ See OBSTRUCTED VIEW, *supra* note 1, at 4.

¹³⁷ See McKinley, *supra* note 2.

¹³⁸ *Id.*

¹³⁹ Madeline Boardman, *12-12-12 Scalpers: Benefit Concert Fights Against Reselling of Tickets*, HUFFINGTON POST (Dec. 8, 2012), http://www.huffingtonpost.com/2012/12/08/12-12-12-scalpers-benefit-concert-reselling-tickets_n_2263799.html [<https://perma.cc/UE7K-AY39>].

that woke up the New York State legislature.¹⁴⁰ When Pope Francis visited New York in 2015, the tickets, which were free at face value, rose to thousands of dollars.¹⁴¹ “Even those who intend their events to be free . . . find their good intent defeated by those who resell tickets for hundreds or even thousands of dollars,” demonstrating scalping’s viral effect on the ticketing industry, impacting both fans and artists.¹⁴²

III. THE INDUSTRY STRIKES BACK—PRIMARY SELLERS AND ARTISTS COMBAT BOT USAGE

“I think [ticket scalping is] extortionate and I think it’s disgraceful.”—Sir Elton John¹⁴³

The pricing scheme for selling tickets in the primary market is calculated unlike that of other goods because the value of tickets is dependent on a variety of factors including the artist’s popularity, venue size, and seat location, thereby making tickets a “heterogeneous commodit[y].”¹⁴⁴ Ticket sales are unique in that they are driven by the intent to build a relationship between the consumer, the artists, and the venue.¹⁴⁵ As a result, tickets are often sold at a face value “for less than the highest price the market can stand.”¹⁴⁶ While some have suggested that

¹⁴⁰ See Press Release, N.Y. State Sen. Daniel L. Squadron, Squadron Legislation Would Protect Consumers, Make Illegal Reselling Charity Event Tickets For More Than Face Value (Dec. 12, 2012), <https://www.nysenate.gov/newsroom/press-releases/daniel-l-squadron/squadron-announces-legislation-ban-resale-charity-tickets> [<https://perma.cc/5UPC-59WK>].

¹⁴¹ See Spector, *supra* note 5.

¹⁴² See OBSTRUCTED VIEW, *supra* note 1, at 4.

¹⁴³ *Id.* at 3 (citing Mark Savage, *Sir Elton John: Secondary Ticket Prices Disgraceful*, BBC NEWS (Dec. 16, 2015) <http://www.bbc.com/news/entertainment-arts-35091230> [<https://perma.cc/93DB-JB3Z>]).

¹⁴⁴ Scott D. Simon, Note, *If You Can’t Beat ‘Em, Join ‘Em: Implications for New York’s Scalping Law in Light of Recent Developments in the Ticket Business*, 72 FORDHAM L. REV. 1171, 1177 (2004); see also Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, 30 ENT. & SPORTS LAW. 1, 1 (2012); OBSTRUCTED VIEW, *supra* note 1, at 4. (“Whereas many areas of the economy the arrival of the Internet and online sales has yielded lower prices and greater transparency, event ticketing is the great exception.”).

¹⁴⁵ Jacob Goldstein, *Ticketmaster to Scalp its Own Tickets*, NPR (Apr. 20, 2011, 11:54 AM ET), <http://www.npr.org/sections/money/2011/04/20/135568378/ticketmaster-to-scalp-its-own-tickets> [<https://perma.cc/9K5T-6E5R>]. (“A concert ticket isn’t a cold, calculated exchange between two people who are never going to interact again. It’s one transaction in what is typically [a] long-term commercial relationship between the musician and the fan.”).

¹⁴⁶ Schroeder et al., *supra* note 144; Goldstein, *supra* note 145 (“[I]n the long-term, it may be in the musician’s economic interest to sell tickets at a price that’s lower than the absolute maximum the market will bear That way, fans still have warm, fuzzy feelings about the musician—and keep coming back for more.”).

this arrangement is the very cause of the resale industry,¹⁴⁷ primary marketers continue to do this in order “to have consistent sellouts [and] develop a sustainable fan base.”¹⁴⁸ The entertainment industry is unique in that promoters are not reliant on single-event sales, but rather look to encourage regular *customers*, i.e., a consistent fan base, willing to return to the venue for future shows.¹⁴⁹ Promoters and venues keep prices at a more reasonable rate for consumers in order sell to as many people as possible, expecting to profit again from the venue’s food and drink vendors.¹⁵⁰ Additionally, a sold out show reflects well on artists and allows them to elevate their credibility.¹⁵¹ If ticket scalpers continue to purchase tickets to these events in large quantities and sell them at an inflated rate, the likelihood of sold out shows decreases and chances of a consistent fan base disappear. While support from lawmakers has been helpful in gaining traction against the secondary market, artists and primary ticket sellers have also united to condemn the activity through independent means.¹⁵²

A. *Ticketmaster’s Initiatives and Shortcomings*

In response to the use of bots and the growing secondary market, Ticketmaster has tried several alternative means for selling their tickets in an attempt to ensure that fans have an opportunity to buy tickets at face value. In 2011, Ticketmaster introduced “dynamic pricing,” which came a year after ticket sales drastically declined.¹⁵³ The program allowed prices to drop for events that had many unpurchased tickets, thereby creating

¹⁴⁷ Goldstein, *supra* note 145 (“When scalpers are re-selling tickets at inflated prices, it means the initial price is too low.”).

¹⁴⁸ Schroeder et al., *supra* note 144; *see also* See Jaskier, *supra* note 11, at 85 (“Numerous parties are involved in setting ticket prices for concerts, but promoters and artists have good reasons for setting them low.”); Simon, *supra* note 144. (“Basic microeconomic theory posits that when sellers offer goods at lower prices, demand will be higher and more goods will be sold.”).

¹⁴⁹ Simon, *supra* note 144.

¹⁵⁰ *See* Jaskier, *supra* note 11, at 85; Simon, *supra* note 144 (“[P]romoters’ ancillary revenue streams, such as souvenirs, concessions, broadcast rights and parking should also be considered part of the ticket-pricing equation. For instance, promoters earn more from expensive soda, hot dogs, and beer than they do from tickets.” (footnotes omitted)).

¹⁵¹ *See* Jaskier, *supra* note 11, at 85.

¹⁵² Summer 2017 Litigation Update, *ASCAP and BMI Consent Decrees—Update*, 33 ENT. & SPORTS L. 29, 40 (“Without the help of technological defenses, artists and vendors have had to come up with other solutions to stem the tide of bots and scalpers.”).

¹⁵³ Alex Pham, *Ticketmaster Moving to Flexible Ticket Pricing*, L.A. TIMES: COMPANY TOWN BLOG (Apr. 18, 2011, 2:55 PM), <http://latimesblogs.latimes.com/entertainmentnews/buzz/2011/04/ticketmaster-moves-to-flexible-pricing.html> [<https://perma.cc/B26B-CK6G>]. “Ticketmaster is not the first company to explore dynamic ticket pricing.” *Id.* Scorebig, an online market place for ticket sales, also launched a similar initiative. *Id.*

more opportunities for fans to see shows at affordable rates and for artists to develop a larger fan base.¹⁵⁴ In 2018, Ticketmaster seemed to have brought back a dynamic pricing platform, labeling it as “Official Platinum Seats.”¹⁵⁵ Though viewed as a way to combat scalpers, the initiative received mixed reviews from artists and “left . . . fans confused,” wondering why “they’re asked to pay hundreds of dollars more than [the ticket’s] face value.”¹⁵⁶ While this may have been a step in the right direction, it was a small one at best as the secondary market has continued to grow exponentially into an \$8 billion industry.¹⁵⁷

Another measure that Ticketmaster tried was “TM+,” an internal resale site that allowed “fans [to] mak[e] deals with each other, with Ticketmaster as the middleman.”¹⁵⁸ While some bands like Depeche Mode supported this initiative and believed it to be a safer way of selling tickets, others refused to subscribe as they saw the TM+ initiative as a way for Ticketmaster to profit off of the secondary market rather than helping fans.¹⁵⁹ Ticketmaster has since implemented this system in the United Kingdom in August 2018, with its “fan-to-fan ticket exchange.”¹⁶⁰ Ticketmaster’s entry into the secondary market is by no means a solution because there is no requirement that its tickets can only be sold through its resale platform.¹⁶¹ “Whether Ticketmaster does it or doesn’t do it, it’s out there on other sites,” and scalpers will have other platforms that they can sell their tickets on without being subjected Ticketmaster’s regulations.¹⁶²

¹⁵⁴ *Id.* (According to Ticketmaster Chief Executive Nathan Hubbard, “By utilizing MarketShare and Ticketmaster’s technology, our clients will be able to retain economic value that is normally siphoned off by the secondary market, and to sell more of their tickets that go unsold today. Meanwhile, more fans will have more opportunities to enjoy live entertainment events because tickets will be more accessible and pricing options will broaden.”).

¹⁵⁵ Steve Knopper, *Taylor Swift’s Ticket Strategy: Brilliant Business or Slowing Demand?*, ROLLING STONE (Apr. 9, 2018, 2:59 PM), <https://www.rollingstone.com/music/music-news/taylor-swifts-ticket-strategy-brilliant-business-or-slowing-demand-630218/> [https://perma.cc/48V9-FVB].

¹⁵⁶ *Id.* (“Basically, Ticketmaster is operating as StubHub.”).

¹⁵⁷ Roger Tomlinson, *Ticketmaster Adopts Dynamic Pricing*, TICKETING INST. (Apr. 23, 2011), <http://theticketinginstitute.com/ticketmaster-adopts-dynamic-pricing/> [https://perma.cc/Y8XB-G6UG]; see Sisario, *supra* note 12.

¹⁵⁸ Steve Knopper, *Inside Ticketmaster’s New Scalping Plan*, ROLLING STONE (Sept. 13, 2013), <http://www.rollingstone.com/music/news/inside-ticketmasters-new-scalping-plan-20130913> [https://perma.cc/48V9-FVB].

¹⁵⁹ *Id.*; Knopper, *supra* note 17.

¹⁶⁰ Marc Schneider, *Ticketmaster Shutting Down Controversial Resale Sites GET ME IN! and Seatwave*, BILLBOARD (Aug. 13, 2018), <https://www.billboard.com/articles/business/8469785/ticketmaster-shutting-get-me-in-seatwave-secondary-ticketing> [https://perma.cc/6FJ8-6GTS]

¹⁶¹ See Knopper, *supra* note 17.

¹⁶² *Id.*

Introduced in 2017, Ticketmaster has used its “Verified Fan” Program as a means of controlling who can buy its tickets during online sales.¹⁶³ This program allows fans to register with the program before tickets are released and then those who Ticketmaster deems “verified,” receive a code that enables them the seemingly exclusive opportunity to purchase tickets to the event.¹⁶⁴ According to Ticketmaster, “[t]he system aims to thwart bad actors who are in the business of taking away tickets from fans just so they can resell them.”¹⁶⁵ As a result of its success, Ticketmaster used the Verified Fan Program for the first time on an arena tour for U2’s 2018 tour.¹⁶⁶ Ticketmaster claims that this program is successful because fans register with the program “two to three weeks before tickets go on sale,” giving Ticketmaster an opportunity “to weed out any bad actors and know exactly how many people want to buy tickets.”¹⁶⁷ This program, however, has still not completely insulated Ticketmaster from scalpers. In response to the Verified Fan program, scalpers are now buying and selling the codes that allow fans to access tickets through Ticketmaster’s program, at tremendous costs.¹⁶⁸

Despite its efforts, part of Ticketmaster’s ticket purchasing system have been subject to abuse by brokers and bot users. While Ticketmaster and other primary marketers have levied limits on the number of tickets purchased per-transaction, there has been no limit placed on the number of transactions that individual can make.¹⁶⁹ By the current standards, one person could purchase the maximum number of tickets within the limit, and then make continuous transactions technically still within the limit.¹⁷⁰ Although holding ticketing websites accountable will not outlaw bot usage, it will at least add an extra hurdle.¹⁷¹ Ticketmaster’s initiatives to combat scalping may portray it as wanting fans to buy tickets at face value, yet there remains a lack of transparency between the number of tickets “listed” and those

¹⁶³ *Verified Fan*, TICKETMASTER, <http://help.ticketmaster.com/verified-fan/> [<https://perma.cc/77SQ-QGWP>].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Dave Brooks, *U2 Becomes First Band to Use ‘Verified Fan’ for All Tickets on an Arena Tour*, BILLBOARD (Nov. 2, 2017), <http://www.billboard.com/articles/business/8022362/u2-ticketmaster-verified-fan-all-tickets-arena-tour> [<https://perma.cc/9DLW-64NS>].

¹⁶⁷ *Id.*

¹⁶⁸ Anne Steele, *Ticketmaster Tries to Weed Out Scalpers, and a New Market is Born*, WALL ST. J. (Sept. 16, 2017, 8:00 AM ET), <https://www.wsj.com/articles/ticketmaster-tries-to-weed-out-scalpers-and-a-new-market-is-born-1505563201> [<https://perma.cc/8SKH-VELY>].

¹⁶⁹ See OBSTRUCTED VIEW, *supra* note 1, at 22.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 5–6 (listing mandatory compliance as only one recommendation among several).

tickets that are *actually* available.¹⁷² Further, Ticketmaster has been found to be working *with* the ticket scalpers in some capacity.¹⁷³ According to Ticketmaster's own representatives, the company "turns a blind eye to scalpers who use ticket-buying bots and fake identities to snatch up tickets."¹⁷⁴ While company executives have since dismissed these claims,¹⁷⁵ there is now an even greater need for transparency. As the Attorney General noted, if there is any chance of regaining control of the resale market, primary sellers must be upfront about their practices.¹⁷⁶

B. Artists Respond to Ticket Scalping and Bot Usage

It has been readily apparent that scalping has a devastating effect on artists, as well as their fans. During a Grammy award speech in 2005, rather than promoting his band's upcoming tour, U2 drummer Larry Mullen, Jr. delivered an apology.¹⁷⁷ Beside himself, Mullen addressed the crowd stating: "Due to circumstances beyond our control, a lot of our long-suffering fans didn't get tickets [to U2's upcoming *Vertigo* tour]. And I'd like to take this opportunity on behalf of the band to apologize for that."¹⁷⁸ For an upcoming artist, their success can be contingent on establishing a recurring fan base, while more established performers seek to maintain that fan base through the duration of their career. Even established indie artists, "like Father John Misty [are] very ticket-price-conscious."¹⁷⁹ As Mullen later noted in an interview, "when something like tickets go astray, and people wait online for hours, and they don't get the seats they, or they don't get seats at all, it's hard for us . . . it's personal."¹⁸⁰ If an artist's die-hard fans are priced out of attending shows due to illegal ticket scalping, however, the

¹⁷² See McFadden, *supra* note 10, at 433 ("[N]ot all tickets will be open for sale to the general public. Some of the best seats are withheld for certain parties." (footnotes omitted)) Promoters determine what tickets are available to the general public at the online sale, and which tickets are held back for certain groups. *Id.* at 433 n.40.

¹⁷³ Dave Seglins, et al., 'A Public Relations Nightmare': Ticketmaster Recruits Pros for Secret Scalper Program, CBC (Sept. 19, 2018, 4:00 AM ET), <https://www.cbc.ca/news/business/ticketmaster-resellers-las-vegas-1.4828535> [<https://perma.cc/7Q6V-52MT>].

¹⁷⁴ *Id.*

¹⁷⁵ Dave Brooks, *Ticket Master President Talks TradeDesk Scandal*, BILLBOARD (Sept. 24, 2018), <https://www.billboard.com/articles/business/8476697/ticketmaster-president-tradedesk-scandal-exclusive-interview> [<https://perma.cc/GNP7-BRDC>].

¹⁷⁶ See OBSTRUCTED VIEW, *supra* note 1, at 5.

¹⁷⁷ Koebler, *supra* note 60.

¹⁷⁸ *Id.*

¹⁷⁹ See Knopper, *supra* note 155.

¹⁸⁰ MTV News Staff, *U2 Working on How to Dismantle A Ticket-Scalping Bomb*, MTV NEWS (Feb. 16, 2005), <http://www.mtv.com/news/1497040/u2-working-on-how-to-dismantle-a-ticket-scalping-bomb/> [<https://perma.cc/BN5D-98FF>].

artist loses the opportunity to build-upon or maintain the loyalty of those fans.¹⁸¹

In 2011, the U.K. Association of Independent Festivals and Sandbag—a merchandise and e-commerce company—established the Ticket Trust to provide a secure and ethical ticketing option for fans.¹⁸² During their 2012 United Kingdom tour, Radiohead “pledged that any tickets sold through” an online site of theirs would only be “exchangeable for face value via the Ticket Trust.”¹⁸³ Radiohead’s announcement brought hope for the music industry following the release of a documentary detailing the secondary ticket market and how major tour promoters like Live Nation “automatically place large numbers of tickets directly onto [resale] sites.”¹⁸⁴ In 2016, the FanFair Alliance was founded by music managers and businesses in 2016, to unite artists and take a stand against ticket scalping.¹⁸⁵ The organization aims to bring artists, entrepreneurs, consumers and lawmakers together “to curb[] industry-scale touting in the secondary ticketing market.”¹⁸⁶ The FanFair Alliance outlined tips for artists and businesses to use to beat scalpers that included: printing the name of the original buyer on tickets, limiting the number of tickets sold per person, working with an ethical ticket exchange, and informing fans.¹⁸⁷

¹⁸¹ Artist responding to ticket scalping themselves is nothing new. At one point, the Grateful Dead “required fans to express their interest in a ticket via a postcard, which the band then selected in a lottery.” Anna Nicolaou & Fan Fei, *Taylor Swift Hits High Note in Battle Against Ticket Touts*, FIN. TIMES (Oct. 12, 2018), <https://www.ft.com/content/138fb9fa-cc1a-11e8-b276-b9069bde0956> [<https://perma.cc/S6KR-GWS9>].

¹⁸² Richard Smirke, *Radiohead Sidesteps Secondary Ticket Market, Partners With Fan-to-Fan Ticket Trust for U.K. Tour*, BILLBOARD (Feb. 29, 2012, 7:00 PM EST), <http://www.billboard.com/biz/articles/news/touring/1098645/radiohead-sidesteps-secondary-ticket-market-partners-with-fan-to> [<https://perma.cc/Y9RQ-4WHJ>].

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *About the FanFair Alliance*, FANFAIR ALLIANCE, <http://fanfairalliance.org/about/> [<https://perma.cc/D794-RKJT>].

¹⁸⁶ *Id.*

¹⁸⁷ MUSIC MANAGERS FORUM & FANFAIR ALLIANCE, #TOUTSOUT—A GUIDE FOR MUSIC MANAGERS AND ARTISTS TO TACKLE ONLINE TICKET TOUTING 6–7 (2016) http://fanfairalliance.org/wp-content/uploads/2016/09/FanFair_Toutsout_A-Guide-to-fighting-ticket-touting-MMF.pdf [<https://perma.cc/D794-RKJT>]. SongKick is another “independent artist-ticketing service” that allows artists “to take control of their ticket [sales]” and is “used by [popular] artists like Adele, Jack Johnson and Metallica.” Summer 2017 Litigation Update, *supra* note 152. In 2015, through Songkick, Adele successfully blocked “approximately 53,000 [ticket] sales to [purchasers] who were determined ‘known or likely’ scalpers (possibly determined by the quantity of tickets people were trying to buy).” Adrienne Green, *Adele Versus the Scalpers*, ATLANTIC (Dec. 21, 2015), <https://www.theatlantic.com/business/archive/2015/12/adele-scalpers/421362/> [<https://perma.cc/KZW4-SBG6>]. It is estimated that by using Songkick Adele’s fans have been spared roughly “\$6.5 million in elevated resale ticket prices.” *Id.* Recently, the European ticket platform, Twickets has partnered with Naill Horan of One Direction, and other musicians during their United States tour. Associated Press, *Twickets*

These initiatives are steps in the right direction, but greater transparency is needed from other industry actors. The three major actors in the primary ticket market—the artist, the primary seller, and the state legislature—need to be on the same page on how to address ticket scalping if there is going to be any chance of controlling the secondary market.¹⁸⁸

C. *The Paperless Ticket Problem*

Tickets are on their way to becoming an entirely non-tangible good. One of the Attorney General’s recommendations was to put an end to New York State’s “*de facto* ban on [non-transferrable] paperless tickets.”¹⁸⁹ Ticketmaster developed its Paperless Ticket system to “ensure[] that only fans can purchase tickets and attend the event.”¹⁹⁰ Instead of presenting a traditional paper or electronic ticket, fans simply “show up at the [event] with an ID and the credit card they used for purchase,” thereby, requiring the original purchaser to be present for the event.¹⁹¹ New York law prohibits primary marketers from “employ[ing] a paperless ticketing system unless the consumer is given an option to purchase paperless tickets that the consumer

Launches Face Value-Based Ticket Platform in US, BILLBOARD (Oct. 11, 2017), <https://www.billboard.com/articles/business/7997447/tickets-tickets-resale-us-launch> [<https://perma.cc/AHH9-TPVB>]. According to its founder, the platform is looking to expand into sporting events and has already saved fans over \$20 million in ticket prices in the United Kingdom. *Id.*

¹⁸⁸ In 2016, Chance the Rapper “purchased nearly two thousand tickets” to the [Magnificent Coloring Day] [F]estival to give to fans, in response to seeing high resale prices for his performance. John Lynch, *Chance the Rapper Bought Almost 2,000 Scalper to His Own Festival to Re-sell to Fans*, BUSINESS INSIDER (Sept. 9, 2016, 11:59 AM), <http://www.businessinsider.com/chance-the-rapper-buys-scalper-tickets-to-his-festival-sells-to-fans-2016-9> [<https://perma.cc/5ER7-A88M>]. LCD Soundsystem also took action against ticket scalpers, by adding more shows to what was to be their final tour in 2011. Will Caiger-Smith, *How New Scalping Technology is Keeping You Out of Concerts*, VICE (June 9, 2016, 6:20 PM), https://thump.vice.com/en_us/article/ae8j4z/ticket-scalping-new-technology [<https://perma.cc/CU6Z-DKGD>]; Devon Ivie, *LCD Soundsystem Is Investigating How Many Bots Bought Tickets to Their Sold-out NYC Shows*, VULTURE (Mar. 30, 2017), <http://www.vulture.com/2017/03/lcd-soundsystem-is-investigating-concert-ticket-bot-problem.html> [<https://perma.cc/8B7Z-JYJW>]. Further, Pearl Jam’s unavailing feud with Ticketmaster is a prime example that an artist trying to work without it selling their tickets is untenable. Eric Boehlert, *Pearl Jam: Taking on Ticketmaster*, ROLLING STONE (Dec. 28, 1995, 5:00 PM ET), <https://www.rollingstone.com/music/music-news/pearl-jam-taking-on-ticketmaster-67440/> [<https://perma.cc/A5ET-7UCH>]; see also Dave Brooks, *Is Pearl Jam’s Beef with Ticketmaster Officially Squashed?*, BILLBOARD (Jan. 26, 2018), <https://www.billboard.com/articles/business/8096339/pearl-jam-feud-ticket-master-over-verified-fan-platform-tour> [<https://perma.cc/A7TT-CEZC>].

¹⁸⁹ See OBSTRUCTED VIEW, *supra* note 1, at 6.

¹⁹⁰ “Paperless Ticket” FAQs, TICKETMASTER, <http://www.ticketmaster.com/miley-cyrus/faq.html> [<https://perma.cc/NF67-DJ3A>].

¹⁹¹ Gordon Cox, ‘Hamilton,’ Broadway and the Duel Over Paperless Tickets, VARIETY (Jan. 2, 2018, 4:00 AM PT), <https://variety.com/2018/voices/columns/hamilton-tickets-west-end-broadway-1202650191/>. [<https://perma.cc/P5H3-L89V>].

can transfer at any price, at any time, and without additional fees.”¹⁹² While opponents of nontransferable paperless tickets argue that it allows for consumer choice and encourages open market, this law does nothing to combat scalping because the easily transferable paperless tickets can be used, they just cannot be the only ticket option.¹⁹³

Ticketmaster has used its non-transferable paperless tickets system to prevent brokers from selling multiple copies of the same electronic PDF ticket or “reissued tickets with new barcodes.”¹⁹⁴ Under the current New York law, however, brokers can still request transferable tickets, thereby making Ticketmaster’s intentions futile.¹⁹⁵ While the Attorney General has sought to repeal the “*de facto* ban” for this reason, the paperless ticket system is still not impervious to ticket scalping.¹⁹⁶ For example, Ken Lawson of Wiseguy adapted to Ticketmaster’s paperless initiative by asking for its customers’ credit card information so that the paperless ticket would be bought “directly on [their] credit cards.”¹⁹⁷

The paperless ticket system may actually create more ticket scalping because while smaller level scalpers are unable to circumvent the credit card requirement, larger brokers are able to capitalize on the diminished competition.¹⁹⁸ For instance, Lawson also admitted that he “considered opening a bank in the Cayman Island to issue his own disposable credit cards.”¹⁹⁹ Therefore, while Ticketmaster and some of the prominent artists that use its paperless ticket system believe it to be effective because of the mere inconvenience created for brokers, the reality is that non-transferable paperless tickets create further headaches for fans who may not be able to use a ticket that they originally purchased. Additionally, by only using this system for high-profile events, Ticketmaster further inflates the value of these tickets, thereby creating an incentive for brokers to purchase them for resale.²⁰⁰

¹⁹² N.Y. ARTS & CULT. AFF. § 25.30(1)(c) (McKinney 2017).

¹⁹³ See *Elefant*, *supra* note 119.

¹⁹⁴ See *Here’s How to Identify Counterfeit Tickets*, TICKETMASTER INSIDER (Mar. 17, 2014), <http://insider.ticketmaster.com/concert-counterfeit-tickets/> [https://perma.cc/U7CC-ZY6F]; *OBSTRUCTED VIEW*, *supra* note 1, at 36.

¹⁹⁵ See *OBSTRUCTED VIEW*, *supra* note 1, at 36.

¹⁹⁶ Koebler, *supra* note 60. (Paperless tickets “make[] scalpers’ lives much harder but [are] regularly circumvented by the most serious operations.”).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See *OBSTRUCTED VIEW*, *supra* note 1, at 36.

IV. CHANGING THE DIRECTION OF THE TICKET INDUSTRY'S REGULATORY CLIMATE

“Many tickets on secondary sites are being sold by touts who are simply in the business of ripping off the fan by charging an extortionate amount for sold out shows.”—Mumford & Sons²⁰¹

The reactive nature of anti-scalping laws has been the common theme of nearly two centuries of regulation. The laws set forth at the state and federal level have ineffectively aimed at restricting ticket scalping, condemning third-party vendors, and criminalizing the use of bots, though enforcement of these laws appears to be limited.²⁰² Even in the cases where bot users have been brought to justice, the damage has already been done.²⁰³ In order to protect consumers from losing tickets to bots and artists having scalpers wrongfully profit off their performances, proactive measures must be put in place. To ensure these protections, the primary ticket marketers must be held accountable for whose hands its tickets are in.

Existing ticket scalping regulations are problematic because they address how tickets are resold, instead of the initial ticket sale.²⁰⁴ Preventing the scalper from committing the acts that the federal government and state legislature have already found to be illegal requires action before the ticket leaves the primary marketer. While it has been argued that the absence of a secondary resale market would still leave many fans unable to purchase tickets, these arguments lack perspective on the current state of the secondary ticket market.²⁰⁵ The supply versus demand narrative will always exist for fans and “[t]he problem is

²⁰¹ *Mumford & Sons Join the Fight Against the Ticket Touts*, GUARDIAN (Dec. 16, 2015, 5:16 AM EST), <https://www.theguardian.com/music/2015/dec/16/mumford-sons-join-the-fight-against-the-ticket-touts> [<https://perma.cc/2CFX-7YUP>].

²⁰² Hayley C. Cuccinello, *Brokers, Bots And Insiders: Why The Average Fan Has No Chance to Buy Tickets At Face Value* (Jan. 29, 2016, 2:53 PM), <https://www.forbes.com/sites/hayleycuccinello/2016/01/29/brokers-bots-insiders-why-the-average-fan-has-no-chance-to-buy-tickets-at-face-value/#6bab03356be6> [<https://perma.cc/76NJ-PU55>]. (“Brokers have technology and lax enforcement on their side.”); Seabrook, *supra* note 19 (“[E]ventually laws were put in place that prohibited scalping within a certain distance of a venue. But, as anyone who has been to a big game or a show at Madison Square Garden knows, such laws are rarely enforced.”).

²⁰³ See U.S. Att’y’s Office, Dist. of N.J., *supra* note 112.

²⁰⁴ Both the federal and New York law aim to police ticket scalping and impose penalties for certain tactics, but neither address protecting fans in the initial sale. See Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401, 1401 (2016) (codified as amended at 15 U.S.C. § 45c (2012 & Supp. IV 2016)); N.Y. ARTS & CULT. AFF. § 25.24 (McKinney 2017).

²⁰⁵ See Simon, *supra* note 144, at 1175 (arguing that “far from posing a threat to society, the existence of the secondary ticket market benefits consumers.”).

not simply that demand for prime seats exceeds supply.”²⁰⁶ The issue for consumers, artists, and primary marketers is the gap between how scalpers sell and obtain tickets and the legislature’s ability to regulate those transactions, once the primary marketer has released the tickets. This is not to say that ticket resale should be prohibited all together. Such a solution would be unrealistic and subject venues and promoters to the same issues that they face with the current secondary market.

A. *Addressing the Secondary Market*

The BOTS Act grants state attorneys general the power to bring civil actions when there is “reason to believe that an interest of the residents of the State ha[ve] been . . . threatened or adversely affected by . . . a practice that violates” the Act.²⁰⁷ While the Attorney General has successfully obtained some form of compliance from secondary marketers in the past, even multimillion dollar settlements against them do not seem to be enough to thwart ticket scalping brokers.²⁰⁸ The secondary marketers’ compliance, however, was narrowly applied and quickly disregarded.²⁰⁹ In order to fully protect consumers and artists, New York State must take action to prevent secondary marketers from providing scalpers with a reliable platform to sell illicitly obtained tickets. This would require the Attorney General to seek to enjoin secondary marketers from allowing bot users to exploit their services as a resale platform.

The Attorney General must use this enforcement power on secondary marketers, in accordance with the BOTS Act and New York Arts and Cultural Affairs Law, to subject ticket resale companies to a civil penalty for allowing scalpers to sell tickets that were “obtained using ticket purchasing software.”²¹⁰ This action would incentivize secondary marketers to vet the

²⁰⁶ See OBSTRUCTED VIEW, *supra* note 1, at 3.

²⁰⁷ Section 2(c)(1) of the Bots Act of 2016 provides,

In any case in which the attorney general of a State has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected by the engagement of any person subject to subsection (a) in a practice that violates such subsection, the attorney general of the State may, as *parens patriae*, bring a civil action on behalf of the residents of the State in an appropriate district Court of the United States.

Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, § 2(c)(1), 130 Stat. 1401, 1402 (2016) (codified as amended at 15 U.S.C. § 45c (2012 & Supp. IV 2016)).

²⁰⁸ See N.Y. State Office of the Att’y Gen., *supra* note 98.

²⁰⁹ See Section II.A.

²¹⁰ Better Online Ticket Sales Act § 2 (c)(1); N.Y. ARTS & CULT. AFF. § 25.24(5) (McKinney 2017).

companies that use their services to ensure compliance with state and federal law. Since the Act provides that the “attorney general of a state” may bring civil action to enjoin the aforementioned corporation from further violation, as well as to compel compliance and obtain damages, there is an opportunity to deter secondary marketers from providing their services to in-compliant ticket scalpers.²¹¹ While it could be argued that scalpers will work their way around this initiative, just as they have done with other failed initiatives, holding the secondary marketer legally accountable for those who use its website would incentivize companies like StubHub to remove themselves from any association they may have with ticket brokers that are known or likely to use bots when purchasing tickets.²¹²

This secondary marketer accountability would benefit consumers because it would diminish the scalper’s opportunities to sell their illegally obtained product, thereby making the practice less profitable. The primary ticketing market would benefit because there would be greater control over reselling tickets, promoting the use of the primary marketer’s own resale site.²¹³ Additionally, the artist would benefit because millions of dollars in profit that only the broker and resale site gained, would no longer be generated off of their work.

While consumers lose the opportunity to see their favorite artists perform or at least pay face value for the tickets, secondary marketers respond by endorsing their notion of an open market.²¹⁴ Since “[t]ickets hold a certain market value [which] may be above the amount listed at the box office,” resellers advocate for an unfettered opportunity to send this unique commodity to the highest bidder.²¹⁵ For example, StubHub currently does not place any limits on ticket prices and

²¹¹ Better Online Ticket Sales Act § 2(c)(1)(A)-(C).

²¹² Investigations Team, *Paradise Papers: Ticket Tout Julien Lavallee Set up Business in Tax Haven*, BBC NEWS (Nov. 10, 2017), <http://www.bbc.com/news/uk-scotland-41940205> [<https://perma.cc/GY77-4CRA>]. The authors note that the Paradise Papers revealed that one of the United Kingdom’s biggest “ticket touts,” Julien Lavallee had made thousands of pounds through selling concert tickets on StubHub. *See id.* The documents showed that given the speed of his purchases, which were within seconds of one another, it was likely that Lavallee was using bots to buy the tickets that he scalped. *Id.* Despite being warned of this behavior, not only did StubHub continue to allow Lavallee to use its website but the company “treat[ed] him as one of its ‘top sellers’” and provided him “discounts on fees.” *Id.*

²¹³ *See supra* Section III.A.

²¹⁴ Carmen Reinicke, *What to Consider Before Buying a Concert Ticket from a Stranger*, CNBC (Aug. 3, 2018, 10:07 AM ET), <https://www.cnbc.com/2018/07/31/what-to-consider-before-buying-a-concert-ticket-from-a-stranger.html> [<https://perma.cc/4A8E-98G6>].

²¹⁵ Talib Visram, *Ahead of the World Cup, FIFA Goes After the Ticket Resale Industry*, CNN MONEY (June 8, 2018, 1:53 PM), <https://money.cnn.com/2018/06/08/news/companies/world-cup-fifa-ticket-resales/index.html> [<https://perma.cc/W8AB-6NBH>].

given that it collects a fee equal to 10% of the total transaction listing, in addition to the service fee it also collects from the buyer, so of course it supports an open market.²¹⁶ The only actors who benefit from a *laissez faire* ticketing industry are the primary marketers, who can sell their product to consumers or scalpers; the scalpers, who have a limitless platform to sell their product to anyone willing to settle for greater than face value prices; and the secondary marketers, who profit twice off a ticket resale.²¹⁷ The problem here: none of these actors are the ones performing or attending the show. The balance of interests between consumer opportunities and allowing a free market resale industry should weigh undeniably in the consumer's favor. As the New York Attorney General noted, "Ticket buying, when presented to the public as a fair contest, should in fact be fair."²¹⁸ It is evident that primary marketers have an incentive to encourage scalping and more can be done to prevent it.²¹⁹

Current New York Arts and Cultural Affairs law provides that "[a]ny . . . website [serving] as a platform to facilitate resale . . . solely between third parties and [that] does not in any other manner engage in resales of tickets to places of entertainment shall be exempt from the licensing requirements."²²⁰ Essentially, this law allows secondary resale sites to legally serve as a platform for selling illegally obtained tickets in New York. Permitting this activity provides bots with a legal vehicle to profit off of their illegal activity and discourages the use of a primary marketer's resale sites. In turn, this exposes consumers to exceedingly high-ticket profits and potentially counterfeit tickets.

A similar issue was raised in the North Carolina Court of Appeals when a class of similarly situated plaintiffs brought a civil action against StubHub for allowing users to sell tickets for

²¹⁶ Paul Moderator, Comment to *Re: Total Fees Information*, STUBHUB COMMUNITY, <https://stubhub.community/t5/Selling-Tickets/Total-Fees-Information/td-p/2935> [<https://perma.cc/78L4-VDKU>]; Reinicke, *supra* note 214. In June 2018, StubHub hailed the passing of New York legislation, stating that the bill "takes comprehensive steps to protect New York fans and ensure they benefit from having choice in a free and open market." See Kramer, *supra* note 54. It is no surprise that StubHub favored the legislation, given that the state has still not imposed price limits on ticket resales or imposed criminal penalties for ticket speculation.

²¹⁷ Reinicke, *supra* note 214 (noting that StubHub "will not place caps on ticket prices").

²¹⁸ See OBSTRUCTED VIEW, *supra* note 1, at 8.

²¹⁹ Dave Seglins, et al., *I'm Getting Ripped Off: A Look Inside Ticketmaster's Price-Hiking Bag of Tricks*, CBC (Sept. 18, 2018, 4:00 AM ET), <https://www.cbc.ca/news/business/ticketmaster-prices-scalpers-bruno-mars-1.4826914> [<https://perma.cc/4P2K-BJ5J>].

²²⁰ N.Y. ART & CULT. AFF. § 25.13 (McKinney 2009); *FAQ—Ticket Reseller*, *supra* note 37; see also *Ticket Reseller License*, NYC BUSINESS, <https://www1.nyc.gov/nycbusiness/description/ticket-reseller-license> [<https://perma.cc/H6E6-H3JT>] ("Auction websites do not need licenses.").

more than twice their face value in violation of North Carolina state laws.²²¹ In response to StubHub's defense of complete immunity under federal law, the court, finding that Section 230 of the Communications Decency Act (CDA) applied to StubHub, held that the company did not violate the state ticket sales law.²²² Section 230 provides that, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."²²³ The majority noted that while the Supreme Court is silent as to the scope of the Act's immunity, the United States Court of Appeals for the Fourth Circuit established that "Congress carved out a sphere of immunity from state lawsuits for providers of interactive computer services."²²⁴ Further, the *Hill* court declined to adopt the Massachusetts Superior Court's holding in *NPC LLC v. StubHub, Inc.*, wherein StubHub was found to have "materially contributed to the illegal 'ticket scalping' of its sellers," which would place StubHub outside the scope of the CDA's immunity.²²⁵

In *Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, the Fourth Circuit held that Consumeraffairs.com, a business review website, was entitled to complete immunity under the CDA because it simply provided a platform for the defamatory statements that injured the plaintiff, rather than creating them.²²⁶ This ruling should not apply to StubHub because though it is a third party in the ticket scalping industry, it is not merely a "publisher" of ticket listing since it benefits from the transaction.²²⁷ A website like Consumeraffairs.com operates to create a public forum for business reviews and, in some instances, the platform is used to display defamatory content.²²⁸ Whereas StubHub relies on, and profits from, illegal ticket transactions, a percentage of the transaction between the scalper and the final

²²¹ See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 552–53 (N.C. Ct. App. 2012). The state laws at issue were N.C. Gen. Stat. § 14-344, a statute making it unlawful to sell a ticket for more than \$3.00 over its face value and North Carolina's unfair and deceptive trade practice statute. *Id.* at 553.

²²² *Id.* at 553, 564.

²²³ 47 U.S.C. § 230(c)(1) (1998).

²²⁴ *StubHub, Inc.*, 727 S.E.2d at 556 (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009)). The Fourth Circuit stated, "Congress carved out a sphere of immunity from state lawsuits for providers of interactive computer services to preserve the 'vibrant and competitive free market' of ideas on the Internet." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting 47 U.S.C. § 230(b)(2) (2012)).

²²⁵ *NPS LLC v. StubHub, Inc.*, 2009 WL 995483, at *13 (Mass. Sup. Ct. Jan. 26, 2009).

²²⁶ See *Consumeraffairs.com*, 591 F.3d 250, 252, 254, 260 (4th Cir. 2009).

²²⁷ See *StubHub*, 727 S.E.2d at 560–61.

²²⁸ *Consumeraffairs.com, Inc.*, 591 F.3d at 254.

buyer goes directly to StubHub as a fee for the website's service.²²⁹ Therefore, StubHub should not be labeled as an "information content provider," because rather than providing simply a platform for illegal conduct, the purpose of the website itself is to incentivize illegal ticket scalping.²³⁰ Thus, the New York State Attorney General may use his enforcement power to enjoin secondary marketers, like StubHub, from allowing illegally obtained tickets to be sold on their website.

It may be argued that StubHub is beyond the scope of the current New York laws because the language in Section 25.24(5) of the New York Arts and Cultural Affairs Law provides that only corporations "who *knowingly* resell[] or offer[] to resell . . . shall be subject to [civil liability]."²³¹ StubHub can, however, be held accountable on grounds that the company had constructive knowledge that tickets being sold on its website were obtained illegally.²³² Therefore, given its role in the ticketing industry, Section 25.24(5) would apply to StubHub under a theory of constructive knowledge. At the outset, secondary marketers can be held liable for allowing speculative listings on their sites, as it is easy to detect when tickets have been released by the primary marketer.²³³

Additionally, in order to prevent the argument against the constructive knowledge theory, the New York State legislature could amend the language of Section 25.24(4) to ensure that ticket resale sites are addressed. Since the law already provides liability for corporations who "resell[] or offer[] to resell a ticket that such . . . corporation . . . knows was obtained using ticket purchasing software," the language of the law could be amended to include corporations that *knows or should have known* the ticket was obtained using ticket purchasing software.²³⁴ Amending the language of the law would expand the scope of the state's regulation on ticket resellers to ensure that all parties reselling tickets that are obtained illegally are held liable.

The caveat to this solution is that it is still a reactive measure, akin to the general trend of legislative and independent actions taken to address ticket scalping. Also, with many of the

²²⁹ Katy Osborn, *Why StubHub Is Tacking on Ticket Fees Again*, TIME (Sept. 1, 2015), <http://time.com/money/4018864/stubhub-fees-all-in-ticket-prices/> [<https://perma.cc/ML3D-VHPP>].

²³⁰ *Contra StubHub*, 727 S.E.2d at 560.

²³¹ N.Y. ARTS & CULT. AFF. LAW § 25.24(5) (McKinney 2017) (emphasis added).

²³² Constructive knowledge is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Knowledge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²³³ See *supra* Section II.A.

²³⁴ N.Y. ARTS & CULT. AFF. § 25.24(5) (McKinney 2017).

attempts to regulate the secondary market, it is likely that bot users will adapt to this hurdle and may find other means of selling illicitly obtained tickets. Therefore, the New York State legislature must act further.

B. Primary Marketer Accountability

In order to fully establish regulatory control over the secondary market the problem must be addressed at its source. Since the primary marketer releases its tickets to the public through the initial sale, it therefore controls how tickets are distributed at the outset.²³⁵ The New York State legislature should then hold the primary marketers liable for how their tickets are distributed and who is able to buy them. While Ticketmaster claims to be a victim of the secondary market and its recent initiatives are indicative of its intentions to aid consumers, whether scalpers or consumers are buying the tickets, the demand for concert tickets still exists.

For example, if an event has five hundred general admission tickets, Ticketmaster's profit from ticket sales does not change whether five hundred fans or one broker buys the tickets. Ticketmaster's pricing schematic is set up so that it can profit from a recurring fan base and additional sales made during the concert, like food, beverages, and merchandise.²³⁶ When the primary marketer is still making its expected profit from the original ticket sale, however, consumers and artists are the real victims in the industry. Since merging with Live Nation in 2010, Ticketmaster is now one of few primary ticket marketers.²³⁷ Therefore, a diminished recurring fan base hurts the artists more than the primary marketer because fans do not have many alternatives to Ticketmaster for primary ticket purchases.

Given the primary marketer's role in the ticketing industry, the only way to prevent the secondary market from continuing to grow out of control would be to regulate the original transaction, as opposed to trying to recover from activity

²³⁵ See OBSTRUCTED VIEW, *supra* note 1, at 10.

²³⁶ See Jaskier, *supra* note 11, at 85; see also Simon, *supra* note 144.

²³⁷ See Jeremy Pelofsky & Yinka Adegoke, *Live Nation, Ticketmaster Merge; Agree to U.S. Terms*, REUTERS (Jan. 25, 2010, 7:52 PM), <https://www.reuters.com/article/us-ticketmaster-livenation/live-nation-ticketmaster-merge-agree-to-u-s-terms-idUSTRE6004E520100126> [<https://perma.cc/QU5T-DVEQ>]; see also Rob Davies, *Well Done Ticketmaster for Closing Resale Sites—But it Ain't Over Yet*, GUARDIAN (Aug. 17, 2018, 10:10 AM), <https://www.theguardian.com/money/2018/aug/17/well-done-ticketmaster-for-closing-resale-sites-but-it-aint-over-yet> [<https://perma.cc/9LAG-N7QN>] (“A leading market share in ticketing—coupled with parent company Live Nation’s global sway as a promoter and venue operator—gives Ticketmaster significant pricing power.”).

that has already occurred. This would mean that the primary marketer should be held liable for their tickets being purchased illegally, in a similar way that secondary marketers would be liable for allowing illegally purchased tickets to be sold and purchased on their websites. Imposing liability on the primary marketer would incentivize companies like Ticketmaster to ensure that the original purchaser of the tickets is more likely to be the person attending the event, but also providing exceptions for gifts and similar purchases for another person.

While the Attorney General has suggested that primary marketers should take action to reduce bot use, these measures are still reactive.²³⁸ The Attorney General's recommendations to primary marketers include: "preemptively enforcing ticket limits, analyzing purchase data to identify ongoing Bot operations, and investigating resellers regularly offering large numbers of tickets to popular shows."²³⁹ Currently, ticket limits are inconsistently enforced because while there may be a ticket limit per purchase, there is no purchase limit.²⁴⁰ Even if these ticket limits are enforced so that the number of purchases is limited per person, scalpers have already found ways around this.²⁴¹ These recommendations ultimately fail to incentivize primary marketers to reform their purchasing mechanisms because there is no accountability. The Attorney General has simply recommended that the primary marketers make a change, without seeking to enforce that they do so. Moreover, rather trying to divide the primary and secondary ticket markets, primary marketers have instead started to market themselves as secondary market players too.²⁴²

²³⁸ See OBSTRUCTED VIEW, *supra* note 1, at 35.

²³⁹ *Id.*

²⁴⁰ Cuccinello, *supra* note 202 ("As for ticket limits, they are inconsistently enforced by ticketing platforms and have an easy loophole. For instance, Ticketmaster's ticket limit only applies to single transactions.").

²⁴¹ See Koebler, *supra*, note 60.

²⁴² See *supra* Section III.A. While Ticketmaster shut down its European resale sites, Seatwave and Get Me In in August 2018 due to negative customer feedback, they have been replaced by Ticketmaster's new fan-to-fan ticket exchange, which is due to launch throughout Europe in 2019. Sean Keane, *Ticketmaster Shuts Down UK Ticket Resale Sites, Launches 'Fan-to-Fan' Exchange*, CNET (Aug. 13, 2018, 4:10 AM PDT), <https://www.cnet.com/news/ticketmaster-shuts-down-uk-ticket-resale-sites-launches-fan-to-fan-ticket-exchange/> [<https://perma.cc/H2VM-Q555>]. Though the program is designed to allow fans to buy or sell tickets at the original price or less, "some . . . believe that Ticketmaster will charge higher prices for all of the other extras that come with buying tickets," thereby "filling the role of the 'tout.'" Jonathan Yates, *How Ticketmaster Fan-to-Fan Exchange Will Work and Getting Cheaper Tickets*, MANCHESTER EVENING NEWS (Aug. 16, 2018, 12:42 PM), <https://www.manchestereveningnews.co.uk/whats-on/whats-on-news/how-ticketmaster-fan-fan-exchange-15023421> [<https://perma.cc/M57V-R9DC>].

Current federal and New York state legislation penalizes ticket scalpers who have already caused harm to the consumer, rather than preventing the primary marketer from letting a scalper illegally obtain tickets. New York law aims to deter scalping through penalties for bot usage,²⁴³ but there is still no way to actually prevent them from using bots to buy tickets. While Ticketmaster has put forth their own initiatives through the Verified Fan Program and “slow ticketing,” the secondary ticket market has continued to grow, thereby calling for a wholesale change in the ticket purchasing process.²⁴⁴

C. *Securing Primary Ticket Purchases*

If primary marketers are incentivized to make a change, they could implement purchasing systems similar to those used by airlines.²⁴⁵ Unlike concert tickets, airline tickets are traditionally non-transferable.²⁴⁶ While concert tickets should still remain transferable, the transfer must only be approved by the primary marketers as the ticket should include the purchaser’s information. That purchaser must then be present for the show, but an additional document could be provided by the primary marketer if the ticket is purchased as a gift for a show that the purchaser is not attending. If the ticket is a gift, the primary marketer could then require that the recipient’s name be put on the ticket during the purchase. This would prevent scalpers from simply making every purchase a gift, because they would not know who their clients are until after they have purchased the tickets from the primary marketer. Similar to the secure nature of an airline ticket, the primary marketer could require secure information, such as a driver’s license number that could be more difficult to falsify than a name or email address.²⁴⁷ To add

²⁴³ N.Y. ARTS & CULT. AFF. § 25.24 (McKinney 2017).

²⁴⁴ Dave Brooks, *Shake It Off: Despite Negative Press, Taylor Swift’s Reputation Tour Could Be One of the Biggest of All Time*, BILLBOARD (Jan. 2, 2018), <https://www.billboard.com/articles/business/8085856/taylor-swift-reputation-tour-sales-could-be-biggest-all-time> [<https://perma.cc/9DLW-64NS>].

²⁴⁵ Bershidsky, *supra* note 53.

²⁴⁶ Christopher Elliot, *Why Can’t Airline Tickets Be Transferable?*, USA TODAY (Dec. 23, 2013, 8:56 AM ET), <https://www.usatoday.com/story/travel/flights/2013/12/23/airline-ticket-transfer-name-change/4174145/> [<https://perma.cc/ER7R-YEK7>]; see also Eric Jordan, *What’s in a Name? The Truth About Name Changes on Airline Tickets*, CONDÉ NAST TRAVELER (Nov. 7, 2014), <https://www.cntraveler.com/stories/2014-11-07/whats-in-a-name-the-truth-about-name-changes-on-airline-tickets> [<https://perma.cc/SF9M-2UTA>].

²⁴⁷ *REAL ID*, DEP’T. OF HOMELAND SECURITY, <https://www.dhs.gov/real-id> [<https://perma.cc/RQ9Z-7PGK>]; see also Benjamin Din, et al., *New Driver’s License Requirements Are Coming to U.S. Airports. Is Your State Ready?*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/graphics/2017/national/real-ids/?noredirect=on&utm_term=.70b33aa52b0c [<https://perma.cc/X9HF-UR4A>].

an extra step in the transfer process, primary marketers could also add a certain time period that the tickets could be transferred during, that way there is not a last-minute rush for scalpers to sell their unpurchased tickets right before the show.

It has been suggested that primary marketers could adopt a dynamic pricing system similar to that of most airlines.²⁴⁸ This system, however, would inevitably inflate the market for *last minute* ticket sales, thereby forcing the primary marketer to charge a higher price than was originally intended for tickets during their initial release.²⁴⁹ Additionally, a ticket to an event is unlike an airline ticket because there are many airline, flight, and timing options to destinations at around the same place, whereas a concert ticket is a unique commodity that is only available for a single occasion. While primary marketers should not adopt the same dynamic pricing schematic that airlines use, if similar security measures used in airline tickets are applied to event tickets sales, it will be harder or even impossible for scalpers to transfer them, causing a potentially fatal roadblock for ticket scalping operations. Requiring consumers to provide their passport information may be an overzealous precaution, but requiring a government-issued driver's license number could be a sufficient way to attach the purchaser to the concert attendee as it would be less likely to falsify than a credit card number or email address.²⁵⁰

CONCLUSION

There are two ends to a ticket sale: the consumer who uses the ticket for his or her own enjoyment or that of another, and the scalper who purchases the ticket for resale with the expectation of a worthy profit. Once the ticket leaves the primary marketer's control there are limited ways to regulate the future transactions related to that ticket and ensure that the final purchaser is able to attend the event. While it seems that ticket scalping has existed for as long as tickets themselves, today's dominant scalping practices have created a gap between the sale of tickets and how those sales can be regulated.²⁵¹ As has been the case with other industries' struggles with malicious technology, the ticketing industry has become "a cops and

²⁴⁸ Bershidsky, *supra* note 53 ("A combination of identity checks and airline-like dynamic pricing . . . would ensure people get tickets according to how early they order.").

²⁴⁹ Bershidsky, *supra* note 53.

²⁵⁰ *New York's New Driver License*, N.Y. STATE DEPT OF MOTOR VEHICLES, <https://dmv.ny.gov/driver-license/nys-new-driver-license> [<https://perma.cc/2JAR-YM6H>].

²⁵¹ Seabrook, *supra* note 19.

robbers game in which malware developers are a step ahead.”²⁵² Although the New York State legislature has taken steps toward regulating the secondary market and the Attorney General has prevented large brokers from continuing their illegal practices, the secondary ticket market has continued to grow exponentially with few hiccups. While a lack of transparency from primary marketers regarding the number of tickets that are actually available is part of the problem, another flaw in regulating the ticketing industry has been that current legislation seeks to deter future illegal ticket purchases rather than prevent them.

To effectively control the secondary ticket market and allow consumers a fair opportunity to purchase tickets at face value, primary ticket marketers must be held accountable for how tickets are purchased at the outset. Primary marketer accountability will stop the secondary ticket market from controlling what class of people are able to attend events. By cutting off the issue at its source, the need for reactive legislation and enforcement against ticket scalpers will be unnecessary, as the tickets will have, if at all, reached scalpers in a way that allows regular consumers the opportunity to purchase their tickets at face value. Regulation of this nature will allow the artists to profit off of the sale of every ticket sold to their events, as the tickets would be transferred and sold through the primary marketer’s control, allowing the same pricing and compensation schematic to be re-applied. Therefore, unlike previous legislation, imposing liability on the primary market for how its tickets enter the market will be a proactive measure toward a preventative solution rather than another reactive penalty.

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²⁵² Bershidsky, *supra* note 53.

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