


6-2009

WHO NEEDS TICKETS? Examining Problems in the Growing Online Ticket Resale Industry

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Recommended Citation

Kirkman, Clark P. (2009) "WHO NEEDS TICKETS? Examining Problems in the Growing Online Ticket Resale Industry," *Federal Communications Law Journal*: Vol. 61: Iss. 3, Article 8.

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WHO NEEDS TICKETS? Examining Problems in the Growing Online Ticket Resale Industry

Clark P. Kirkman*

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I. INTRODUCTION

In December 2007, I received two tickets to see the Detroit Pistons play the Washington Wizards at the Verizon Center in Washington, D.C. on January 2, 2008. The tickets were purchased using Craigslist.org, an online marketplace. The tickets themselves were premium seats, only ten rows behind the visiting bench, and they were purchased at a price below face value. The seller was not a career ticket broker, but merely someone trying to unload tickets to an event he could not attend.

* J.D., 2009, Indiana University Maurer School of Law – Bloomington; B.A., 2004, The University of Michigan – Ann Arbor. This Note is dedicated to my father, Dr. Clark P. Kirkman, whose selflessness has opened every door, and whose courage in the face of adversity inspires me on a daily basis. I would like to thank the FCLJ Executive Board, as well as my family and friends. In particular I would like to thank Anna, who has consistently challenged me to be my best.

While online transactions involving regular people are common, professional ticket brokers are increasingly dominating the online ticket resale market.¹ It is beyond dispute that this secondary market for event tickets based on supply and demand will continue to exist in the United States, at least absent some radical shift in policy by Congress and state legislatures. The online resale market is growing rapidly; estimates of annual sales over Web sites like StubHub, eBay, Craigslist, RazorGator, TicketsNow,² Ticket Liquidator, and others totaled about \$3 billion in 2006.³ That number is expected to rise to \$4.5 billion by 2012.⁴ This market success has compounded the enforcement problems currently experienced by states that wish to crack down on scalping. “Because of the consensual nature of purchasing a ticket . . . as well as the anonymity of Internet transactions, enforcing scalping laws across state borders may be too costly.”⁵ “Legal gray areas” in the personal jurisdiction and choice-of-law contexts also exist when bringing actions against these auction sites or the brokers themselves.⁶

Though the primary beneficiaries of this burgeoning market are the resellers—who routinely make profits on tickets that more than double their face value⁷—the substantial utility to the consumer that the market provides should not be lost in the fray. First and foremost, the supply and demand model in this situation works well enough so that, in most cases, those who value attendance at an event the most will be able to attend.⁸

1. See Bruce Mohl, *Multibillion-Dollar Industry Pressures States to Loosen Restrictions on Resales*, BOSTON GLOBE, Oct. 22, 2006, http://www.boston.com/business/globe/articles/2006/10/22/multibillion_dollar_industry_pressures_states_to_loosen_restrictions_on_resales/.

2. TicketsNow was purchased by Ticketmaster in January of 2008, and the merger has come under fire recently. See Alfred Branch, Jr., *Ticketmaster Buys TicketsNow*, TICKETNEWS.COM, Jan. 15, 2008, <http://www.ticketnews.com/Ticketmaster-Buys-Tickets-Now018155>. This merger, and what it means going forward, will be examined in Part V, *infra*.

3. Julie Gibson, *Hot Tickets: The Move from Streetside Scalping to Online Ticket Speculation*, THE LAWYERS WEEKLY, May 9, 2008, available at <http://www.lawyersweekly.ca/index.php?section=article&articleid=676>.

4. Press Release, MarketWatch.com, *Ticket Resale Industry Protects Consumers with Fair Market Prices and Secure Transactions* (Feb. 4, 2009) (available at <http://www.marketwatch.com/news/story/090204> (follow hyperlink “7:53 PM Ticket Resale Industry Protects Consumers With Fair Market Prices and Secure Transactions”)).

5. Daniel J. Glantz, Note, *For-Bid Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L.J. 261, 287 (2005).

6. See *id.* at 269.

7. See Hannah R. Short, Note, *Implications of Grokster for Online Ticket Sale Companies: Why Online Ticket Resale Sites Should Be Held Liable for Violating State Scalping Laws*, 7 N.C. J.L. & TECH. 181, 194-95 (2005).

8. 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, 1208 (2004).

Also, particularly for events that have not sold out, the secondary market provided by scalpers increases competition among *all* ticket sellers.⁹ In such cases, if ticket scalpers did not make a business of reselling tickets, it is possible that promoters might take the opportunity to charge a more exorbitant price. Fans can also take advantage of the market forces of supply and demand by waiting until the last minute to purchase a ticket that is about to entirely lose its value to the scalper.¹⁰ Finally, at least for those who can afford it, the secondary market alleviates the need to wait for hours, or even days, in line for highly sought-after tickets.¹¹

The ticket resale industry has taken on new attributes since transforming into an online business. While the Internet has helped many sectors of the economy grow in ways that were consistent with their pre-Internet model, the proliferation of online ticket resale markets has changed the dynamic of how tickets to events are distributed, especially for the most popular events. It can only be assumed that, if unchecked by public or private actors, the industry will grow to control more and more retail ticket purchases.

First, at least one software company, RMG Technologies, has been identified as having designed and distributed software specifically targeting Ticketmaster's (by far the biggest distributor of face-value tickets) Web site in order to procure large quantities of tickets for RMG's broker clients.¹² Although Ticketmaster won both preliminary and permanent injunctions against RMG,¹³ the case highlights an emerging issue of how tickets to events, nationwide, are susceptible to predatory practices by middlemen who compete with regular concert-goers for a promoter's ticket stock. To be sure, while the benefits of a ticket resale market have been highlighted above, it is hard to make a case for a system which allows middlemen to "cut in line" and corner the market on available tickets.

Another problem lies in actually enforcing laws against ticket resale. Indeed, the historical justifications for anti-scalping statutes, as discussed below, no longer seem to apply. As this Note will argue, the transformation of the industry into a cyber marketplace, national in scope, calls for Congress to act. Such a regulatory scheme, superseding regulation by the

9. *See id.*

10. *See id.*

11. *See id.* at 1187.

12. *See* Ticketmaster, L.L.C. v. RMG Technologies, Inc., 507 F. Supp. 2d 1096, 1102-03 (C.D. Cal. 2007).

13. Press Release, Ticketmaster, Default Judgment and Permanent Injunction Against RMG Technologies, Inc. Entered in U.S. District Court: Ruling a Major Win for Consumer Protection and Fan Access to Live Entertainment (June 25, 2008) (available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/06-25-2008/0004839021&EDATE=>) [hereinafter Ticketmaster Default Judgment Press Release].

individual states, will have the additional effect of remedying the personal jurisdiction and choice of law legal gray areas by transferring jurisdiction to the federal court system. Though some may argue that Congress, in this regard, could be meddling in an area historically reserved for the states, the interstate aspects endemic to the online ticket trade provide ample justification for such measures.

For the good of both the consumer and those who participate in hosting events nationwide, these public policy considerations must be taken into account. Of course, promoters could set ticket prices at whatever they deem fit, utilizing the market forces made possible by the Internet in order to increase their profits; indeed, some have done exactly this.¹⁴ However, it is far from acceptable for legislatures, particularly Congress itself, to sit idly by while “ticket brokers earn hundreds of thousands of dollars from an entertainment product that the [artists or] teams—not the brokers—create and develop.”¹⁵ Some promoters have already taken legal action against middlemen who have been able to make such a living.¹⁶

This Note seeks to provide insight into the rapidly developing online ticket resale industry. Though ticket scalping is a business much older than the Internet, opportunities online have allowed the market to redefine itself and proliferate in a relatively short period of time. This Note will argue that the growth of a secondary market based on supply and demand for ticket sales in the United States, as a result of utilizing tools provided by the Internet, has many advantages for the average consumer. Some consumers have taken advantage of the opportunities this new market provides including an increased ability to get tickets at the last minute, to get the best seats to a particular event, and to be able to sell tickets that they are not able to use themselves. Also, conducting these transactions online negates many of the classic, nuisance-related rationales for the historical criminalization of ticket scalping by states.

But, professional ticket brokers also have the opportunity and motivation to abuse these tools. Promoters, when setting ticket prices, take into account other factors besides simply how much they could charge for each ticket. They have long recognized goodwill interests and the promotion of a healthy fan base as legitimate reasons for making tickets affordable to the public.

14. See Simon, *supra* note 8, at 1171, 1198 (quoting James Klenk, Attorney for the Chicago Cubs and Wrigley Field Premium Ticket Services, who speculated: “I think that many more sports teams will be doing this.”).

15. Anthony J. Dreyer & Mitchell P. Schwartz, *Whose Game Is It Anyway: Sport Teams' Right to Restrict (and Control) Ticket Resale*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 753, 755 (2007).

16. See, e.g., *New England Patriots, L.P. v. Stubhub, Inc.*, 22 *Mass. L. Rptr.* 717, (Mass. Super. July 31, 2007).

When brokers purchase large blocks of tickets for resale at vastly inflated prices, thereby capitalizing on promoters' attempts to set ticket prices at affordable levels, the biggest loser is the consumer. Also, computer software programs are being developed that give ticket brokers unfair advantages. For events that are certain to be in high demand, entering the secondary market may be the only way for consumers to get their hands on a ticket. At the same time, many state legislatures—the bodies that have historically regulated the industry—have scrapped their anti-scalping statutes as “outmoded and largely ignored laws addressing a bygone, pre-Internet era.”¹⁷ These forces have some industry insiders predicting an endgame, perhaps in as little as a decade, placing all ticket sales at the mercy of supply and demand.¹⁸ Such an outcome would have a disenfranchising effect on the less affluent and their ability to see their favorite team or performer live.

Part II of this Note traces the history of the scalping industry, the rise of the online market, and responses by various state legislatures. Part III examines the circumstances surrounding the 2007 Hannah Montana: Best of Both Worlds Tour, which saw some of the problems associated with online ticket sales manifest themselves to a degree large enough to garner the attention of the Attorneys General of Missouri and Arkansas. Part IV examines the case of *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*,¹⁹ in which Ticketmaster alleged that the defendant software company was manufacturing, soliciting, and distributing software that allowed client ticket brokers to purchase large numbers of tickets while blocking average consumers.²⁰ Part V analyzes where the ticket resale market is heading, and asks questions about what can or should be done to ensure that the system is fair to all. Specifically, the Author contends that national regulatory action on the part of Congress is necessary to prevent the usurpation of primary market ticket sales by the ticket broker industry. Only federal action can adequately address problems ranging from ambiguities in personal jurisdiction to the financial and personnel constraints endemic in state attempts to regulate the online marketplace.

17. Dreyer & Schwartz, *supra* note 15, at 765.

18. See Mike Tierney, *Show Stoppers?*, ATLANTA J. & CONST., Aug. 20, 2006, at F-1 available at 2006 WLNR 14411280 (Westlaw).

19. 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

20. *Id.* at 1102-03.

II. HISTORY: FROM 'SCALPING' TO 'RESALE'

A. *Pre-Internet Scalping and Anti-Scalping Legislation*

At the heart of what it means to "be an American" is the idea that we live in a free society; no sector of our society reflects this notion more succinctly than our supply-and-demand, capitalistic economy. The U.S. Supreme Court reached its apex in laissez-faire thinking in the early twentieth century in the famous case of *Lochner v. New York*,²¹ which struck down a New York statute prohibiting bakers from working more than sixty hours in one week as an infringement upon one's due process "freedom of contract" right.²² Since the demise of *Lochner* and its progeny, it has been recognized that the legislatures of the United States have the authority to regulate sectors of the economy in need of regulation.²³

A threshold question in examining ticket resale arises: Why are those promoters and proprietors not taking advantage of the forces of supply and demand? Why allow for the creation of a secondary market benefiting neither those who perform nor those who own the facility? Indeed, the secondary market has proven to be very valuable; in 1988, tickets to the championship match at Great Britain's Wimbledon tennis tournament were reportedly scalped at more than 3,500% of face value.²⁴ Aside from focusing on the price for which tickets can be sold, event promoters take many other factors into account when setting ticket prices. They must figure out ways to drive demand for their product and create a "buzz" for the event, which is worth more in the end than charging higher prices for the tickets themselves. To generate high demand that outstrips supply for event tickets, promoters set prices at levels far lower than what the public is willing to pay.²⁵ Ticket prices may also be set at artificially low levels because it can be difficult to predict demand months in advance of when the tickets go on sale.²⁶ Also, promoters—as well as performers—do not discount the goodwill created by setting prices at reasonable levels.²⁷ The excitement generated by a performance selling out, as well as the value of concessions and merchandise sold at these events, are also factors in ticket

21. 198 U.S. 45 (1905).

22. *Id.*

23. *See, e.g.,* *Nebbia v. New York*, 291 U.S. 502, 510-11 (1934).

24. Sheree Rabe, Note, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 57-58 (1991). As we shall see, however, tools provided by the Internet have enticed some promoters of late to utilize supply and demand in selling its tickets.

25. *See* Jonathan C. Benitah, *Anti-Scalping Laws: Should They Be Forgotten?*, 6 TEX. REV. ENT. & SPORTS L. 55, 70 (2005).

26. *See id.* at 70-71.

27. *See id.* at 71.

pricing.²⁸ Particularly for performances aimed at lower-income demographics, promoters attempt to keep ticket prices at reasonable levels in order to reach their target market.²⁹

Evidence of state regulation of ticket resale can be traced back over a century.³⁰ Initially, such statutes did not survive constitutional challenges in *Lochner*-era courts.³¹ It was judged that “scalping was a private enterprise and therefore not ‘affected with a public interest.’”³² Later on, in the wake of *Nebbia v. New York*,³³ similar acts of state legislatures were scrutinized under rational basis review, and many were upheld as a valid exercise of the state’s police power.³⁴ Such statutes have been primarily based on two policy objectives: first, mitigating the nuisance effect scalpers present at venues, and second, protecting the profits of those who worked to put on the event by limiting the development of a secondary market.³⁵ One court in New York also cited “the preservation of public welfare and advancement of the arts and theater” as a reason to uphold such statutes.³⁶ As this Note will demonstrate, while the first concern is not applicable in the online context, the second policy objective is even more pronounced today.

All of this is not to say that anti-scalping laws were in place nationwide. In fact, in the early 1980s, “[l]ess than one-fourth of all states [had] statutes that regulate[d] the resale price of tickets to entertainment and sporting events.”³⁷ Lobbying efforts by ticket scalpers predated the

28. *See id.*

29. *See id.*

30. *See id.* at 58.

31. *See, e.g.,* *Tyson & Bros.—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418 (1927); *but see* *People ex rel. Cort Theater Co. v. Thompson*, 119 N.E. 41 (Ill. 1918) (holding that the city of Chicago, through its license agreement with promoters, could prohibit relationships between promoters and scalpers).

32. Phyllis L. Zankel, Comment, *Wanted: Tickets—A Reassessment of Current Ticket Scalping Legislation and the Controversy Surrounding Its Enforcement*, 2 SETON HALL J. SPORT L. 129, 129 (1992) (quoting *Tyson & Bros.*, 273 U.S. at 430.).

33. 291 U.S. 502 (1934).

34. *See* Benitah, *supra* note 25, at 58-59.

35. *See* Robert E. Freeman & Daniel Gati, *Internet Ticket Scalping: If You Can’t Beat ‘Em, Join ‘Em*, ENT. & SPORTS LAW., Fall 2003, at 6.

36. 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, 199 (1995) (citing *People v. Johnson*, 278 N.Y.S.2d 80 (N.Y. Crim. Ct. 1967)).

37. Thomas A. Diamond, *Ticket Scalping: A New Look at an Old Problem*, 37 U. MIAMI L. REV. 71, 74 (1982). At the time, Florida, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New York, North Carolina, Pennsylvania, and Tennessee were the only states that had blanket statutory regulations in place. *Id.* at 74 n.17. A few other states, Arizona, California, Connecticut, Georgia, South Carolina, and Wisconsin, had narrower statutes that regulated certain spectacles such as boxing or wrestling events. *Id.*

Internet era of ticket resale, and such efforts had their effect on state legislatures.³⁸ By 2000, however, with the advent of the online resale industry, twenty-six states had laws that regulated the resale of tickets.³⁹

Another major concern that historically occupied the minds of lawmakers is a phenomenon known as "ice." "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 employee⁴⁰ (i.e., a box office ticket salesperson). As explained above, promoters do not discount the goodwill gained by setting ticket prices low;⁴¹ ice allows them to reap some of the benefits of the secondary market without losing most of this goodwill.

While the secondary market dresses up as a genuine supply-and-demand-based free market, the concept of ice shows that the market is instead based on bribery.⁴² "Free markets, in order to function effectively and competitively, cannot be built on the basis of fraud, deception and manipulation. When 'private-market actors' engage in abuses of market power, 'drive out competitors, or use monopoly power, the usual market forms of discipline cease to operate.'"⁴³ Although this Note will not examine in depth the icing of ticket sales, parallels can be drawn between the problems caused in the secondary ticket market by icing ticket sales and problems due to the proliferation of the online ticket broker industry. This serves as an instructive comparison which reiterates why state legislatures, as well as Congress, should actively regulate the industry. When market forces break down and give way to corruption, there is a disproportionate ratio of winners to losers. Whereas benefits exist in injecting market forces into the industry for both buyers and sellers, those benefits, at least for buyers, greatly diminish when that market is blemished by illegality. In both cases, the obvious byproduct is an unjust price increase.⁴⁴ Absent meaningful regulation, both problems will only proliferate over time.

38. See *id.* at 74.

39. See Jon Michael Gibbs, Comment, *Cyberscalping: On-line Ticket Sales*, 31 U. TOL. L. REV. 471, 475 n.46 (2000) (listing all twenty-six states' relevant provisions).

40. Andrew Kandel & Elizabeth Block, *The "De-Icing" of Ticket Prices: A Proposal Addressing the Problem of Commercial Bribery in the New York Ticket Industry*, 5 J. L. & POL'Y 489, 489-90 (1997).

41. See Benitah, *supra* note 25, at 71-72.

42. See Kandel & Block, *supra* note 40, at 490 (quoting ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 225 (1997)).

43. *Id.* at 492-93.

44. See *id.* at 497.

B. *Growth of the Online Resale Industry*

The history of Internet auction sites is still very much in its infancy. The most notable Web site, eBay.com, was only founded in 1995.⁴⁵ In 2007, though, eBay transactions totaled nearly \$60 billion.⁴⁶ Similarly, the movement of ticket resale to the Internet venue has grown exponentially. As noted above, StubHub, now a subsidiary of eBay,⁴⁷ predicted in 2007 that their profits for that year would exceed their total profits for the company's entire history. As more enterprises, such as sports teams, contract with Web sites like StubHub to officially resell tickets, the industry will continue to grow.⁴⁸

Also increasing in complexity are the mechanisms by which the government can regulate this burgeoning industry. As detailed above, states have long regulated traditional ticket scalping; online transactions, however, are commonly interstate in nature. This is especially true in the case of professional brokers, who purchase large blocks of tickets—without regard for where the particular venue is located—for distribution nationwide. Indeed, “[t]he transaction can be deemed to occur in one of several jurisdictions – where the seller or the buyer is located, the city where the financial transaction is processed, or even the location of the auction site’s servers.”⁴⁹ In such transactions, personal jurisdiction issues abound. While a protracted discussion of personal jurisdiction issues in the online context is beyond the scope of this Note, it is one of the legal gray areas that make regulation of the online industry at the state level inadequate.

Ticket brokers have done their best to establish themselves as agents in a reputable business, indispensable to the public, rather than as parasitic ticket scalpers long viewed as illegal in various jurisdictions. In 1994, the National Association of Ticket Brokers (NATB) was established, launching a national lobbying effort.⁵⁰ Its stated mission is “to establish an industry-

45. eBay Media Center: About eBay, <http://news.ebay.com/about.cfm> (last visited Apr. 9, 2009).

46. *Id.*

47. See *Ebay Buying StubHub for \$310M in Cash* (Business [sic] Week), <http://www.natb.org/news/index.cfm?pg=newsdetail.cfm&newsID=67> (last visited Apr. 9, 2009).

48. See generally *Tickets at StubHub! Where Fans Buy and Sell Tickets*, <http://www.stubhub.com/partners/> (last visited Apr. 9, 2009) (showing that in addition to being the official reseller for Major League Baseball, StubHub.com also has contracts with the NHL’s Phoenix Coyotes, and Buffalo Sabres, the NBA’s Dallas Mavericks, New Jersey Nets, Washington Wizards, and the NFL’s Chicago Bears, Washington Redskins, Houston Texans, Cincinnati Bengals, Tampa Bay Buccaneers, and Atlanta Falcons).

49. Glantz, *supra* note 5, at 269.

50. National Association of Ticket Brokers, <http://www.natb.org> (last visited Apr. 9, 2009).

wide standard of conduct and to create ethical rules and procedures to protect the public and foster a positive perception of the industry.”⁵¹ The NATB’s platform further states:

[O]ur primary goal is to represent the interests of legitimate ticket brokers by promoting consumer protection and educating the public about our industry. This is done by assuring the public that when dealing with an NATB member, they are working with an honest, reliable broker that will deliver what is promised

Through self-governance, the NATB has provided enhanced protections for ticket-buying consumers. NATB has worked with law enforcement agencies, state and federal legislators and professional sports leagues and teams

In choosing from the myriad resellers of tickets on the Internet and elsewhere, keep in mind the standards and procedures that are applicable if you deal with an NATB member.⁵²

The NATB posts news stories on its Web site that reflect the association’s views.⁵³ For instance, a July 2007 article appearing in *USA Today* tells the story of Amy Stephens, a stay-at-home mom who started Amy’s Tickets, a licensed brokerage in Atlanta, in order to provide supplemental income to keep her family’s finances afloat.⁵⁴

According to Gary Adler, counsel for the NATB, “in free markets the prices come down.”⁵⁵ For example, “40% of tickets resold on the secondary market are sold below face value.”⁵⁶ By the NATB’s and *USA Today*’s count, “47 states [have] laws either in place or in discussion that deregulate the resale of tickets to some degree.”⁵⁷ Adler reasons that “[b]ecause the business of ticket brokering is demand orientated, . . . anti-ticket reselling legislation is useless.”⁵⁸

Russ Haven of the New York Public Interest Research Group argues that “[i]t’s a bad deal for consumers It will raise the price of tickets further and make it harder for average fans to get good seats to popular events.”⁵⁹ He argues that it is wrong to view tickets as commodities, since many venues are public (built with taxpayer dollars), and that examinations

51. *Id.*

52. *Id.*

53. NATB News Archives, http://www.natb.org/news/index.cfm?pg=news_archive.cfm (last visited Apr. 9, 2009).

54. Heather Collura, *Movement to Deregulate Ticket Resale is Spreading*, USA TODAY, July 6, 2007, http://www.usatoday.com/sports/2007-07-04-ticket-resale-deregulation_N.htm.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

of deregulation have not demonstrated that prices have come down.⁶⁰ Haven cites a New Jersey study done when a moratorium on its ticket-scalping law was enacted; it showed that there was “no benefit to consumers and data provided by ticket brokers was ‘unreliable and self-serving.’”⁶¹ The industry response, delivered by Sean Pate of StubHub, was that “this is happening with or without legislation against it.”⁶² Either a workable regulatory framework must be enacted, or else it will be left to the inmates to run the asylum.

Somewhat ironically, Ticketmaster also believes that anti-scalping legislation hurts its business. Joseph Freeman, vice president and assistant general counsel of Ticketmaster, explains that “[w]hen a state maintains a price cap on tickets being resold, Ticketmaster cannot sell for more than face value plus fees.”⁶³ Thus, while brokers may decide to break the law and sell tickets above face value, Ticketmaster, as a reputable national business, is put at a disadvantage by being forced to sell at face value.⁶⁴ Freeman suggests that ideal legislation would have “consumer protections in place, create[] a level playing field for everyone in the reselling market and strive[] to maximize the opportunities for consumers to get a shot at tickets in the primary market at face price.”⁶⁵

As mentioned above, the proliferation of the online ticket resale industry has coincided with many states either easing or eliminating their regulations of it.⁶⁶ In 1982, less than a quarter of the states had anti-scalping legislation in place.⁶⁷ That number ballooned to twenty-nine states by 2005.⁶⁸ Since then, however, many state legislatures have decided to roll back their regulations.⁶⁹ This is no doubt due to both the propagation of the online industry (which has enjoyed wide acceptance by the public) and lobbying efforts by groups like the NATB. These lobbying efforts are being waged both by Ticketmaster and resale sites like eBay and StubHub.⁷⁰ This effort is still very much in its infancy; as noted above, *USA Today* reported in July 2007 that forty-seven states either already have laws in place or have discussions progressing in the state legislatures to deregulate the

60. *Id.*

61. *Id.* (quoting a New Jersey study on the benefit to the consumers of deregulating the resale of tickets).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Dreyer & Schwartz, *supra* note 15, at 765 n.74.

67. See Diamond, *supra* note 37, at 74.

68. Jonathan Bell, Student Article, *Ticket Scalping: Same Old Problem with a Brand New Twist*, 18 LOY. CONSUMER L. REV. 435, 439 (2005).

69. Dreyer & Schwartz, *supra* note 15, at 765 n.74.

70. *Id.* at 765.

industry.⁷¹ Whether based on legislatures kowtowing to this emerging industry and its lobbyists, or simply the realization for many legislators that it is financially infeasible for police to spend time and resources scouring the Internet for ticket scalpers in their jurisdiction, there is no doubt that the current trend is toward deregulation.⁷²

III. 2007 HANNAH MONTANA TOUR: THE TICKET RESALE MARKET COMES OF AGE

To date, the most pointed example of potential Internet misuse by ticket brokers occurred in 2007. The hugely popular “teenie bopper” and Disney star Miley Cyrus/Hannah Montana, launched her “Best of Both Worlds Tour,” a fifty-four-date, nationwide concert tour beginning on October 18, 2007 in St. Louis, Missouri, and culminating in Albany, New York, on January 9, 2008.⁷³ Tickets to these performances “follow[ed] a distressingly consistent pattern: At 10 a.m. on a Saturday, tickets [went] on sale, and by 10:05 a.m., all tickets [were] sold. Yet by 10:05, StubHub and other ticket exchanges already ha[d] a plenitude of tickets listed for the sold-out event.”⁷⁴ Tickets had face values of \$21 to \$66,⁷⁵ but parents who had the opportunity to pay that face value price were few and far between. Instead, most were forced to go to Web sites like StubHub and pay, on average, a price of \$258 per ticket, not to mention a twenty-five percent markup comprising StubHub’s take.⁷⁶ Of course, it was ticket brokers that pocketed these exorbitant profits, many times the tickets’ face value, not the venues or Miley Cyrus.

This story was not unique to the Hannah Montana tour; fans attempting to purchase tickets to 2007 tours of Bruce Springsteen, The Police, and Van Halen experienced similar problems.⁷⁷ The combination of sheer demand for tickets, pervasive predatory practices by the brokers, and the most affected demographic—young children and their parents—caused “[a]ll hell [to break] loose.”⁷⁸ In the end, the Hannah Montana Best of Both

71. Collura, *supra* note 55.

72. See Benitah, *supra* note 25, at 67.

73. Press Release, Walt Disney Records, Singer, Songwriter and Actress Miley Cyrus Launches 54-Date “Best of Both Worlds Tour” on October 18 (Aug. 8, 2007) (available at http://www.businesswire.com/portal/site/google/?ndmViewId=news_view&newsId=20070808005287&newsLang=en).

74. Randall Stross, *Hannah Montana Tickets on Sale! Oops, They’re Gone*, N.Y. TIMES, Dec. 16, 2007, at 34.

75. *Id.*

76. *Id.*

77. Ellen Rosen, *In the Race to Buy Concert Tickets, Fans Keep Losing*, N.Y. TIMES, Oct. 6, 2007, at C6.

78. *Id.*

Worlds Tour accounted for about ten percent of StubHub's total concert ticket profits.⁷⁹

In fact, the frustration over parents' inability to garner affordably-priced tickets for their children led to a class action lawsuit filed in November 2007 in the U.S. District Court for the Middle District of Tennessee, against Smiley Miley, Inc. and Interactive Media Marketing, Inc., Hannah Montana's fan club and the company that runs it, respectively.⁸⁰ Many parents paid \$29.95 to have access to pre-sale tickets that would be unavailable to the online brokers.⁸¹ Because demand outstripped supply, the plaintiffs alleged that the fan club "deceptively lured thousands of individuals into purchasing memberships."⁸² Their complaint further alleges that "the vast majority of the members have expended \$29.95 without receiving any appreciable benefit."⁸³

It is against this backdrop that various state attorneys general, as well as Ticketmaster itself, which was losing some of its goodwill, began to notice and take action. On October 4, 2007, Missouri Attorney General Jay Nixon responded to the irregularities surrounding the Hannah Montana ticket sale.⁸⁴ Nixon brought suit against three online brokers for allegedly scalping tickets in violation of a Kansas City municipal ordinance to the Kansas City concert: GoTickets, Inc.; Tickets Now Entertainment Group, Inc.; and Ticket Solutions, Inc.⁸⁵ "Investigators from Nixon's office purchased tickets from these online brokers to the pop star's upcoming Kansas City concert. They paid \$254, \$257, and \$305 for tickets that had a face value of either \$26 or \$56."⁸⁶ Nixon explained his reasons for getting involved:

"These companies . . . employ inappropriate means, using sophisticated software, to hoard all the tickets to high-demand events and then turn around and sell them at grossly inflated prices . . . It's a blatant rip-off of consumers who attempt to purchase tickets . . . and are met with nothing but frustration."⁸⁷

79. Cf. Stross, *supra* note 74 (stating that StubHub's 2007 annual ticket sales had surpassed \$100 million, of which \$10 million was attributed to the Hannah Montana tour).

80. Compl. of Plaintiff, *Inman v. Interactive Media Marketing, Inc.*, No. 3:07-cv-01109 (M.D. Tenn. Nov. 13, 2007), available at <http://online.wsj.com/public/resources/documents/hannahmontana.pdf>.

81. See *id.* at para. 22-23.

82. *Id.* at para. 27.

83. *Id.* at para. 26.

84. Rosen, *supra* note 77.

85. Lisa Wade McCormick, *Missouri Scalping Crackdown Gets Results: Online Scalpers Buy Out Entire Concerts in Some Cases*, CONSUMERAFFAIRS.COM, Oct. 22, 2007, http://www.consumeraffairs.com/news04/2007/10/mo_scalpers2.html.

86. *Id.*

87. *Id.* (quoting Missouri Attorney General Jay Nixon).

Concurrently with the lawsuits against the ticket brokers, the Missouri Attorney General negotiated an agreement with Ticketmaster to release an additional one thousand tickets which were being held by the artist's promotion company.⁸⁸ "Under the agreement, fans could only purchase two tickets to the concerts through Ticketmaster's Web site or over the phone. To prevent scalping, fans [had to] pick up their tickets at the venue's box office . . . and present photo identification and the credit card they used for payment."⁸⁹ Such measures rendered the scalpers unable to "hijack the system, [and] real fans [got] the tickets at the prices set by the artists."⁹⁰

The Arkansas Attorney General made similar moves in his state. At almost the same time as Missouri Attorney General Nixon was taking action, Arkansas Attorney General Dustin McDaniel launched an investigation of his own to see whether online brokers were violating Arkansas' anti-scalping law.⁹¹ Though McDaniel learned of the lawsuit being brought by Ticketmaster against RMG (discussed in depth in Part IV), and of Ticketmaster's allegations that brokers could use software to "cut in line" and block access to tickets for the average consumer, no formal charges were brought in Arkansas.⁹²

What was incredible, and perhaps most indicative of the current political climate, was the Missouri legislature's actions in the wake of Attorney General Nixon's lawsuit. The legislature passed a law that officially repealed their anti-scalping provision,⁹³ effectively decriminalizing ticket scalping.⁹⁴ The law went into effect on November 28, 2007,⁹⁵ not even two months after Attorney General Nixon brought his lawsuit against the three online brokers. Whether coincidental or not, it was a disappointment to Nixon. His spokesman, Scott Holste, lamented, "[u]nfortunately, the elimination of this consumer-protection tool has come at a time when the ability to take unfair advantage of consumers has grown significantly through the Internet."⁹⁶ Indeed, moves by legislatures like the one in Missouri seem ironic to the observer; proponents of the legislation, however, will argue that it's not the ticket scalping itself that is the

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. MO. REV. STAT. § 578.395 (2006) (repealed in 2007).

94. See Posting of Phil Miller to The Sports Economist, <http://thesportseconomist.com/2007/11/in-missouri-ticket-scalping-at-prices.htm> (Nov. 28, 2007, 07:08 EST) [hereinafter Sports Economist Posting of Phil Miller].

95. See Posting of Chris to Missouri Attorney General Consumer Blog, <http://ago.mo.gov/ConsumerCorner/blog/month/9/year/2007/> (Sept. 11, 2007 11:47 EST).

96. Sports Economist Posting of Phil Miller, *supra* note 94.

problem, but rather the ability of some to use technology such as that developed by RMG Technologies, discussed below, to shirk the system.⁹⁷

IV. TICKETMASTER, LLC V. RMG TECHNOLOGIES, INC.

On April 17, 2007, Ticketmaster filed a complaint (amended on June 25, 2007) against a small software company, RMG Technologies, as well as individual brokers whose names are unknown, in California federal district court.⁹⁸ The complaint alleged claims of copyright infringement,⁹⁹ violation of the Digital Millennium Copyright Act (DMCA),¹⁰⁰ violation of the Computer Fraud and Abuse Act,¹⁰¹ violation of state statutes,¹⁰² violation of Racketeer Influenced and Corrupt Organizations Act,¹⁰³ and breach of contract—inducing breach of contract,¹⁰⁴ intentional interference with contractual relations,¹⁰⁵ fraud,¹⁰⁶ and aiding and abetting fraud.¹⁰⁷ Based primarily on Ticketmaster's copyright infringement, DMCA, and breach of contract claims, the court granted Ticketmaster a preliminary injunction on October 15, 2007.¹⁰⁸ The case was set to go to trial in October 2008.¹⁰⁹ However, in June of that year, a permanent injunction was entered after a default judgment in favor of Ticketmaster.¹¹⁰

The facts and allegations of the case illustrate a major pitfall in opening up the ticket industry to market forces. Ticketmaster has achieved a virtual monopoly in primary ticket distribution in the United States, owning exclusive ticket distribution rights with hundreds of popular venues; it sold 119 million tickets worldwide, totaling \$6 billion, in 2005.¹¹¹ One of the main ways Ticketmaster sells its tickets is through its copyrighted Web site, ticketmaster.com.¹¹² In part to stave off ticket brokers from purchasing large blocks of tickets at once, Ticketmaster

97. *Id.*

98. Plaintiff's First Am. Compl. at para. 8, *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007), available at 2007 WL 3084480 [hereinafter Plaintiff's First Amended Complaint].

99. *Id.* at para. 48.

100. *Id.* at para. 52.

101. *Id.* at para. 58.

102. *Id.* at paras. 64-68.

103. *Id.* at paras. 73-74, 81.

104. *Id.* at paras. 84, 95.

105. *Id.* at para. 106.

106. *Id.* at para. 116.

107. *Id.* at para. 126.

108. *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1116 (C.D. Cal. 2007).

109. See Stross, *supra* note 74.

110. Ticketmaster Default Judgment Press Release, *supra* note 13.

111. Benitah, *supra* note 25, at 72-73.

112. *Ticketmaster*, 507 F. Supp. 2d at 1102.

utilizes contractual terms and technological devices “to ensure a fair and equitable ticket buying process.”¹¹³

First, users of Ticketmaster’s Web site must agree to abide by its Terms of Use not only for ticket purchases, but also when navigating the Web site itself.¹¹⁴ The Terms of Use include provisions such as:

Permitted Use

You agree that you are only authorized to visit, view and to retain a copy of pages of this Site for your own personal use, and that you shall not duplicate, download, publish, modify or otherwise distribute the material on this Site for any purpose other than to review event and promotional information, for personal use, or to purchase tickets or merchandise, unless otherwise specifically authorized by Ticketmaster to do so

. . . .

Access and Interference

You agree that you will not use any robot, spider or other automatic device, process or means to access the Site. Nor shall you use any manual process to monitor or copy our web pages or the content contained thereon or for any other unauthorized purpose without our prior expressed written permission. You agree that you will not use any device, software or routine that interferes with the proper working of the Site nor shall you attempt to interfere with the proper working of the Site. You agree that you will not take any action that imposes an unreasonable or disproportionately large load on our infrastructure

Unauthorized Use of the Site

Any Illegal or unauthorized use of the Site shall constitute a violation of these Terms of Use. You do not have permission to access the Site in any way that violates, directly or indirectly, these Terms of Use. Illegal or unauthorized use of the Site includes, but is not limited to, using the site to facilitate illegal ticket sales, unauthorized framing of or linking to the Site, or unauthorized use of any robot, spider or other automated process on the Site.¹¹⁵

Other provisions prohibit using “areas of this site . . . for any commercial purposes” and limit the number of tickets one can purchase per transaction.¹¹⁶

Ticketmaster contended that RMG’s actions violated these terms in a number of ways. Their complaint alleged that RMG and its customers routinely made purchases for a commercial purpose and that they purchased tickets in quantities “in excess of per-customer ticket limits.”¹¹⁷ Also, the defendants “requested more than 1000 pages of the website in

113. *Id.*

114. *Id.*

115. Ticketmaster Terms of Use, <https://www.ticketmaster.com/h/terms.html> (last visited Apr. 9, 2009).

116. *Id.*

117. Plaintiff’s First Amended Complaint, *supra* note 98, at para. 34.

applicable twenty-four hour periods, and have accessed, reloaded or refreshed . . . pages and made other requests . . . more than once during applicable three-second intervals.”¹¹⁸

In addition to the contractual provisions with which Ticketmaster forces customers to comply, Ticketmaster uses technological devices to protect its Web site from misuse.¹¹⁹ Ticketmaster claims that it “attempts to regulate the speed with which users may copy the web pages . . . [and] limits the number of tickets that may be purchased in any single transaction.”¹²⁰ Furthermore, to protect against “software robots or ‘bots’—which can give users of such devices an unfair advantage over human consumers,”¹²¹ Ticketmaster employs a security device “commonly known as CAPTCHA (‘Completely Automated Public Turing test to tell Computers and Humans Apart’).”¹²² CAPTCHA devices use a text box containing random letters that are obscured by hash marks to distinguish between human users and automated bots that “cannot decipher and retype the random characters.”¹²³ Ticketmaster alleged that RMG’s software is “designed to . . . circumvent CAPTCHA and other security measures on Ticketmaster’s website.”¹²⁴

The facts laid out in the complaint detail the methodology used in how RMG interacted with its clients in aiding the brokers’ ticket procurement. Chris Kovach, allegedly one of RMG’s clients, “agreed to cooperate and led investigators to RMG and its Web site, ticketbrokertools.com, which was open only to its clients.”¹²⁵ It was alleged that a broker must log on to the Web site in order to run “PurchaseMaster,” and that therefore RMG was actively involved with each use of the software itself.¹²⁶ Further, the complaint explained that “[t]o design automated devices that can circumvent Ticketmaster’s security measures . . . it is necessary for Defendants to regularly visit Ticketmaster’s website. . . . [RMG] would see repeated reminders of the Terms of Use and would be instructed to review them.”¹²⁷ In a sense, RMG would have had to knowingly violate the Terms of Use in order to conduct its business.

118. *Id.*

119. *See id.* at paras. 13-14.

120. *Id.* at para. 13.

121. *Id.* at para. 14.

122. *Id.*

123. *Id.*

124. *Id.* at para. 28.

125. *See Stross, supra* note 74.

126. Plaintiff’s First Am. Compl., *supra* note 98, at para. 29.

127. *Id.* at para. 33.

In response, RMG claimed that Ticketmaster's complaint amounts to nothing more than "conclusory assertion[s] of entitlement to relief,"¹²⁸ and as such Ticketmaster did not state a claim upon which relief may be granted.¹²⁹ RMG also made a variety of arguments based on law and policy. They argued that there cannot be fraud because there was no detrimental reliance.¹³⁰ Specifically, RMG points out that "Ticketmaster was paid, and received, full price for any and all tickets allegedly purchased by Defendants and RMG's customers."¹³¹ Also, RMG stated that "(1) [] purchas[ing] tickets for events at retail prices for the purpose of reselling them; (2) [] access[ing] public websites, or; (3) [] us[ing] software or automated devices in order to navigate websites at a quicker pace than other users" are "not against social policy."¹³² Buried deep in RMG's motion to dismiss, however, were the inadequate responses to the claims that ultimately resulted in granting Ticketmaster's request for a preliminary injunction: copyright infringement and violations of the DMCA.¹³³

Not surprisingly, Ticketmaster prevailed in its suit.¹³⁴ On June 19, 2008, the District Court entered a default judgment and permanent injunction against RMG, and Ticketmaster was awarded \$18,237,000 "for profits RMG wrongfully earned through infringement of Ticketmaster's copyrights, inducement to breach contract and intentional interference with contractual relations."¹³⁵ For its part, RMG's President Cipriano Garibay maintained that Ticketmaster won only because they could outspend RMG, stating that "[t]hey won on a technicality because the other team couldn't afford to show up."¹³⁶ He said that Ticketmaster's view of the facts are wrong; Garibay stuck to arguments—made in RMG's motion to dismiss—that its services were executed by humans in India entering CAPTCHAs manually, rather than by automatic bots circumventing electronic

128. Defendant RMG Technologies, Inc.'s Notice of Motion and Motion to Dismiss the First Amended Complaint Pursuant to Rule 12(b)(6) at 5, *Ticketmaster v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007) (quoting *Gen Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996)), available at 2007 WL 3084484.

129. *Id.*

130. *Id.* at 7.

131. *Id.*

132. *Id.* at 8-9.

133. *Id.* at 24.

134. Ticketmaster Default Judgment Press Release, *supra* note 13.

135. *Id.*

136. Alfred Branch Jr., *Ticketmaster Wins \$18.2 Million Judgment Against RMG Technologies*, TICKETNEWS.COM, June 25, 2008, <http://www.ticketnews.com/Ticketmaster-wins-millions-judgment-against-RMG-Technologies6825761>.

safeguards.¹³⁷ Finally, this decision may also subject individual brokers who used RMG's software to lawsuits.¹³⁸

V. THE FUTURE OF TICKET SALES IN THE UNITED STATES

The current trend toward deregulation of the online ticket industry is understandable; it is a burgeoning industry armed with an effective lobbying effort, and even its biggest competitor, Ticketmaster, is in general agreement that deregulation is the best approach. Unless the political climate changes, one can only expect the industry to expand over time, gaining a more pervasive presence in our society.

Attempts by the government to crack down on similar online industries have proven ineffective, and there is little reason to believe that attempts to regulate online ticket scalping would fare any better. Probably the most famous recent attempt by both private and public actors to protect an industry from online predation was the recent U.S. Supreme Court case dealing with online file-sharing, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*¹³⁹ In *Grokster*, Justice Souter,¹⁴⁰ writing for a unanimous Court, wrote "one who distributes a device with the object of promoting its use to *infringe copyright*, as shown by clear expression or other *affirmative steps taken to foster infringement*, is liable for the resulting acts of infringement by *third parties*."¹⁴¹

As a threshold observation, it's important to point out that the defendant, Grokster, was not itself the innovator of so-called file-sharing Web sites. In fact, the name Grokster itself was a spin-off of the original widely used file-sharing software, Napster. "After the notorious file-sharing service, Napster, was sued by copyright holders for facilitation of copyright infringement, StreamCast gave away a software program . . . compatible with the Napster program . . . StreamCast planned to be the next Napster."¹⁴²

137. *Id.*

138. *See id.*

139. 545 U.S. 913 (2005).

140. Justice Souter is known as an eccentric in his aversion for all things technological. Some stories about Souter's disdain for technology include how he once received a television as a gift, but, has "never plugged it in." JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 5 (2007). His views impact his functioning as a Supreme Court Justice. *Id.* at 43. Souter does all of his writing with a fountain pen. *Id.* Further, he is famous in his opposition to television cameras in the Supreme Court hearing room, once stating before Congress that "the day you see a camera come into our courtroom it's going to roll over my dead body." C-Span.org, *Cameras in the Court*, <http://www.c-span.org/camerasinthecourt/> (last visited Apr. 9, 2009). Nevertheless, he demonstrates a breadth of understanding of the issues in his opinion.

141. *Grokster, Ltd.*, 545 U.S. at 919 (emphasis added).

142. *Id.* at 924 (internal citation omitted).

The copyright violations from *Grokster* and those present in the context of the online ticket resale market have differences, but Justice Souter's language from *Grokster* should prove to bear on cases such as *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*¹⁴³ In *Grokster*, Metro-Goldwin-Mayer Studios framed its suit as "copyright infringements, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act."¹⁴⁴ Ticketmaster's claim against RMG, as explained in Part IV, was substantially similar. As noted before, the substance of Ticketmaster's claim against RMG was that RMG knowingly and intentionally distributed its software. The software was developed by examining Ticketmaster's copyrighted work (its website) in violation of its license, the software enabled users to violate Ticketmaster's Terms of Use, which also constituted a copyright violation.

Just as *Grokster* did not prevent file-sharing Web sites from popping up worldwide, it seems reasonable to infer that a similar pattern (albeit on a smaller scale) will be seen in the context of online ticket scalping. The same incentives exist: profitability and the ability on the part of software designers to create reliable programs. The difference, of course, is that while governmental regulation of file-sharing is constrained to copyright protections, there are additional tools available to the government in regulating ticket resale. Historically, the industry has been regulated at the state level, but it should not be a stretch for Congress to find a sufficient basis to regulate the online resale industry as a function of its Commerce Clause power.

So, where does this leave Ticketmaster, the company with a near-monopoly on face-value ticket selling?¹⁴⁵ As noted above, Ticketmaster itself has supported deregulation of ticket resale. Indeed, over the past two years, Ticketmaster has positioned itself as a key player in the secondary market. First, they launched TicketExchange in 2007, a forum designed to

143. *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1102-03 (C.D. Cal. 2007).

144. *Grokster, Ltd.*, 545 U.S. at 920-21.

145. In fact, Ticketmaster is currently in negotiations to merge with Live Nation, its principal competitor for primary ticket selling. David Colker, Tiffany Hsu & Randy Lewis, *Concert Fans Boo Possible Duet of Ticketmaster, Live Nation*, L.A. TIMES, Feb. 5, 2009, at 1, available at <http://www.latimes.com/business/la-fi-tickemaster52009feb05,0,1222255.story>. These talks began about a month after Live Nation, whose primary business has always been event promotion, dropped Ticketmaster as its vendor and sought to build its own ticket-selling operation. *Id.* This merger is currently being resisted on antitrust grounds. *Id.*; see also Press Release, Congressman Bill Pascrell, Jr., In Light of Springsteen Ticket Flap, Pascrell Urges Judiciary Committee to Examine Proposed Ticketmaster/Live Nation Merger (Feb. 5, 2009) (available at http://pascrell.house.gov/apps/list/press/nj08_pascrell/pr252009.shtml).

facilitate peer-to-peer ticket transactions.¹⁴⁶ Because of Ticketmaster's unique abilities, TicketExchange provides features that other online forums like Craigslist have not been able to duplicate. Many tickets that are purchased at face value on Ticketmaster can be printed out right on a person's home printer; a bar code is used as a means of authentication.¹⁴⁷ When someone decides to sell their previously purchased tickets, that ticket is posted on TicketExchange, and when it is repurchased, the new buyer prints off a new ticket with a different bar code (invalidating the former).¹⁴⁸ Using these tools, Ticketmaster can monitor IP addresses to make sure an individual is not doing an inordinate amount of business.

Ticketmaster has not stopped there, however, and its recent business practices have come under fire by a member of Congress. In January 2008, Ticketmaster purchased TicketsNow for \$265 million.¹⁴⁹ TicketsNow was the second-largest ticket broker Web site, behind only StubHub,¹⁵⁰ which had been purchased by eBay a year earlier.¹⁵¹ As opposed to TicketExchange, TicketsNow is a broker-driven Web site.¹⁵² Although Ticketmaster claims that TicketsNow brokers receive no preferred treatment regarding ticket availability,¹⁵³ Ticketmaster had been directing those on its site who fail to purchase tickets at face value to TicketsNow.¹⁵⁴ This practice was recently halted after New Jersey Attorney General Anne Milgram took an interest.¹⁵⁵ Bruce Springsteen, whose tour's ticket sales prompted the investigation, was similarly very upset with Ticketmaster's actions.¹⁵⁶ Springsteen echoed themes examined in Part II about an artist's interest in promoting fanbase goodwill: "We perceive this as a pure conflict of interest . . . Ticketmaster is there to ensure that we have a good, fair sale of our tickets at their face value plus normal ticketing charges."¹⁵⁷

146. About Ticket Exchange, Ticketmaster.com, <http://www.ticketmaster.com/h/te/about.html#Q1> (last visited Apr. 9, 2009).

147. *Id.*

148. *Id.*

149. Branch, *supra* note 2 (noting that "financial terms were not disclosed, but reported estimates place the acquisition as high as \$265 million").

150. *Id.*

151. *eBay Buying StubHub for \$310M in Cash*(Business [sic] *Week*), *supra* note 47.

152. TicketsNow – Questions & Answers, <http://www.ticketmaster.com/ticketsnow> (last visited Apr. 9, 2009).

153. *See id.*

154. *See* Beth Defalco, *Ticketmaster Stops Ticket Sale Redirection*, PETERSBOROUGH EXAMINER (Ont.), Feb. 6, 2009, <http://thepeterboroughexaminer.com/ArticleDisplay.aspx?e=1423182&auth=BETH%DEFALCO,%20THE%20ASSOCIATED%20PRESS>.

155. *See id.*

156. Beth Defalco, *Springsteen Says He's 'Furious' with Ticketmaster*, WTPO.COM, Feb. 4, 2009, <http://www.wtop.com/index.php?nid=111&sid=1593288>.

157. *Id.*

This dustup has also drawn New Jersey Congressman Bill Pascrell into the fray. He has called upon the U.S. Department of Justice Antitrust Division and the Federal Trade Commission (FTC) to investigate the relationship between Ticketmaster and TicketsNow.¹⁵⁸ In a letter to FTC Chairman William E. Kovacic, Pascrell wrote that:

I am concerned that the business affiliation between Ticketmaster and TicketsNow may represent a conflict of interest that is detrimental to the average fan. There is a significant potential for abuse when one company is able to monopolize the primary market for a product and also directly manipulate, and profit from, the secondary market. Additionally, the speed with which tickets were made available on Ticketmaster's official resale affiliate site raises questions about whether TicketsNow brokers were given preferential treatment instead of competing on a level playing field with average consumers to purchase the tickets.

. . . I am outraged by how expensive tickets to ball games, concerts and other shows have become. I understand the economic principles that have driven up the cost of entertainment, but will not tolerate unjust business practices that put regular Americans at a disadvantage.¹⁵⁹

This represents the first time a member of Congress has directly involved themselves with investigating the online secondary ticket market. Although the concern here is with the overlap between Ticketmaster's hand in both the primary and secondary markets, it will be interesting to watch whether Congress uses this opportunity to take a harder look at the burgeoning secondary market in general.

What, then, should the regulations look like? The goal should be to construct a regulatory framework that promotes person-to-person resale while at the same time discriminating against professional online brokers. First, the government could make it illegal to host a Web site specifically tailored to marketing a ticket resale business. Such a regulation would not have a bearing on transactions done on Web sites like Craigslist. Even a Web site like StubHub, which does much of its business as a middleman between two non-professionals, would still be allowed to operate. What would be regulated, though, would be Web sites like GoTickets.com. While the brokers would adapt, this seems like a plausible first step.

Second, simply having the federal government get involved would go far in promoting enforcement of any regulations (perhaps, regulations that mirror what some states have in place), since federal resources are more plentiful. If the government does not wish to fully crack down on the online

158. Press Release, Congressman Bill Pascrell, Jr., Pascrell Seeks Investigation into Ticketmaster Business Practice (Feb. 3, 2009) (available at http://pascrell.house.gov/apps/list/press/nj08_pascrell/pr2320092.shtml).

159. *Id.*

ticket brokers, they should at least pass some sort of meaningful national regulation that protects Web sites like Ticketmaster from being hacked by criminal computer programmers. Such regulations should extend liability to the brokers themselves, rather than limiting liability to the software designers for copyright infringement (or, perhaps, a Computer Fraud and Abuse Act claim¹⁶⁰); that would create necessary disincentives for such brokers to use this technology. After all, as this Note hopes to have explained, it is the “cutting in line” that is at the root of the problem.

Similar to what Ticketmaster has done with TicketExchange, some professional sports teams have launched Web sites of their own that allow fans to unload tickets that would otherwise have gone unused. The service is most useful for the season-ticket holder who cannot make it to some of the games. Major League Baseball’s Seattle Mariners and San Francisco Giants have had Web sites to facilitate such transactions as long ago as 2003¹⁶¹ and 2000,¹⁶² respectively. At least in the context of sporting events, such Web sites can go far in privately regulating the secondary market.

VI. CONCLUSION

The ticket resale industry has grown exponentially with the advent of the Internet. The profits made by online ticket brokers dwarf those of the ticket giant Ticketmaster because online brokers can sell their tickets for what people are willing to pay for them, rather than what the artist or promoter elects to charge. This online industry has of late enjoyed vindication in some of states’ legislatures—most recently in Missouri, where legislators have taken action to abolish prohibitions on ticket scalping, viewing the policies as outmoded in this modern age.¹⁶³ Indeed, such arguments are not without merit. States have historically regulated ticket scalping as a function of their police powers, arguing that ticket scalpers are nuisances intimidating the event-goers, many times selling counterfeit tickets to unsuspecting consumers. While still subject to fraud by counterfeit, when such transactions are done online the nuisance argument is displaced.

Decisions at the state level to decriminalize ticket resale, however, could have disastrous consequences for the event-going public as online brokers purchase increasing percentages of event tickets with the specific purpose of reselling them at a vastly inflated price. And, as Missouri

160. 18 U.S.C. § 1030(a)(2)(c) (2008).

161. Freeman & Gati, *supra* note 35, at 7-8.

162. Press Release, San Francisco Giants & Tickets.com, San Francisco Giants Launch Double Play Ticket Window; First-of-Its-Kind Service Enables Charter . . . (June 22, 2000) (available at <http://www.allbusiness.com/technology/software-services-applications-electronic/6460234-1.html>).

163. MO. REV. STAT. § 578.395 (2006) (repealed in 2007).

Attorney General Jay Nixon's Spokesman Scott Holste recently observed, "the elimination of this consumer-protection tool has come at a time when the ability to take unfair advantage of consumers has grown significantly through the Internet."¹⁶⁴ Indeed, this problem is exacerbated greatly by considerations unique to e-business. Software designers are creating programs that allow the brokers to cut in line and purchase large quantities of tickets while simultaneously blocking the average consumer from doing the same.

Proponents of the online industry argue that linking bad apples, like the software designer RMG Technologies, with the industry in general conflates the issue. They argue that while using computer programs to gain an advantage when the tickets go on sale is clearly illegal, simply opening up the industry to a secondary market geared toward putting tickets in the hands of those that most value them is a desired service. The latter is certainly true; the fact that the industry pulled in as much as \$10 billion is a dispositive indicator of its value. However, simply relying on copyright infringement claims to regulate the industry is inadequate. If the Internet file-sharing phenomenon has taught us anything, it is that there is always another software designer ready to fill a void.

Unless the government deems it acceptable to let the brokers succeed in changing the industry dynamic thereby subjecting every ticket to market forces, it should take meaningful action to protect the public's right to purchase a ticket at the price set by the promoter. Similarly, the promoter's right to sell its tickets for a price it deems fit—a price that takes into account not only what the ticket garners on the open market, but also factors that are not fungible such as promoting goodwill or, in the case of a sports team, promoting a wide fan base that covers the entire spectrum of demographics it is targeting—must also be protected. Such regulations should emphasize promoting equitable, desirous transactions between two people: one with a ticket who is not able to attend, and one who desires to attend. Such regulations should fight the forces of a growing multi-billion dollar industry that lines the pockets of middlemen rather than those who work to put on the production.

This can be accomplished best at the national level with an act of Congress. Congress' taking charge would solve many of the ambiguities that exist in the current regulatory framework, and a federal regulatory scheme might do more to encourage people to follow the law. In a country where a ticket seller in Arizona can easily purchase and resell tickets to a concertgoer in Rhode Island, it is appropriate for Congress, pursuant to its Commerce Clause power, to take action to put consumers first. Perhaps the

164. Sports Economist Posting of Phil Miller, *supra* note 94.

recent actions by Congressman Pascrell signal a shift in thinking toward such national regulation. Indeed, as more incidents such as the recent one between Ticketmaster and Bruce Springsteen emerge, they will be tougher for Congress to ignore.

Of course, the promoters themselves can implement tools provided by the Internet, and it is predictable that many of the sports teams and tours in the United States will soon utilize market forces in their ticket selling practices, particularly for the most desirable seats. At least in this context, the additional income goes to those who deserve it and the predictable losses in goodwill fall similarly at the responsible party's feet. Such actions are certainly legal and beyond reproach. However, when the government allows a parasitic industry to fester, serving neither the public nor the promoters, turning profits sometimes in excess of the per-ticket value, it is failing to live up to its duty to protect both the public and legitimate enterprise.

