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# Will Ticket Scalpers Meet the Same Fate As Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets

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# **Will Ticket Scalpers Meet the Same Fate As Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets**

Gregory M. Stein\*

## *Abstract*

*When a concert or sporting event sells out, the performer appears popular and the venue enjoys the opportunity to maximize profits from the sale of parking, merchandise, food, and beverages. For these and other reasons, event sponsors often underprice tickets. This underpricing creates commercial opportunities for ticket resellers, who purchase in bulk at the lower price and resell the tickets at a profit, and also for intermediaries such as StubHub. Legal and technological efforts to squelch ticket resales have largely failed, leaving the secondary ticket market stronger than ever.*

*This secondary ticket market is economically efficient, but it also creates winners and losers. Ticket resales irritate artists, who believe that greedy scalpers are profiting from the artists' talent, and also trouble some fans, who resent the increasingly astronomical prices of resold tickets. Secondary purchasers, by contrast, benefit by obtaining tickets to events they might otherwise have missed. Legislatures have begun to join the discussion, though some recent bills have failed in the face of intense industry lobbying. These legislative proposals assume that consumers need protection without always recognizing that rules that protect some consumers may harm others.*

*This Article examines the transferability of event tickets. It attempts to answer several questions: What are the economics of the market in ticket*

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*sales and resales? What, exactly, is a “ticket”? What property and contract rights does the initial ticket holder acquire? Does the initial ticket holder have the legal power to transfer these rights to someone else? To what extent can the initial ticket seller limit that transferability? Does it matter whether the initial purchaser planned to sell at a profit all along? If there is a profit to be made, who is entitled to keep the resale premium?*

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I. INTRODUCTION

Many people who buy tickets to live performances and sporting events plan to attend those events. Others intend to give their tickets to someone else, as when a mother buys Justin Bieber tickets for her children or an executive gives New England Patriots box seats to a business contact. Still others, pejoratively known as scalpers, obtain tickets with the intention of reselling them at a profit.

Vendors often set initial ticket prices lower than many buyers would be willing to pay.<sup>1</sup> Sellers want the house to be full and may forego some ticket revenue at the outset with the hope of selling parking, food and beverages, and merchandise later.<sup>2</sup> The low initial price of these tickets often leads to a vigorous secondary resale market, with original purchasers reselling tickets at a profit and intermediaries receiving commissions for matching buyers

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1. See *infra* notes 24–29 and accompanying text.

2. See *infra* notes 21–23 and accompanying text.

with sellers.<sup>3</sup> Efforts by states and by vendors to prevent ticket resales are often overwhelmed by market forces.<sup>4</sup>

Participants in the entertainment industry have different views about this resale market. Some performers choose to keep ticket prices low so their less affluent enthusiasts can attend.<sup>5</sup> They are prepared to forego potential revenue, they dislike the idea of a house filled only with well-heeled fans, and they believe that ticket resellers should not profit from their own willingness to sacrifice some income.<sup>6</sup> Many fans disagree, are willing and able to pay higher prices, and believe that an efficient market should allocate tickets to those who pay the most.<sup>7</sup> Under this second view, initial purchasers are in a position to turn a profit by reselling their underpriced tickets.<sup>8</sup> Thus, the consumer protection issue has become clouded, with consumers on both sides of the argument.

Moreover, event tickets may not be as freely transferable as the initial purchaser thinks. Many sports teams, performing artists, promoters, venues, and ticket sellers such as Ticketmaster prefer for there to be limits on ticket transfers.<sup>9</sup> Resale agents such as StubHub disagree, believing that an original ticket purchaser should enjoy the right to convey her tickets to someone else, either gratuitously or for consideration, whether taking a loss or earning a profit.<sup>10</sup> Ticket consumers are divided on this important issue.<sup>11</sup> This Article examines the economics of ticket resale transactions<sup>12</sup> and the legal status of the original purchaser who wishes to re-convey her tickets to a third party.<sup>13</sup>

Part II begins by taking a global look at the economics of the market in sales and resales of tickets. Part III then asks what a ticket is, what legal rights it creates under property and contract law, whether those rights are transferable, and on what terms. Part IV examines and compares the roles of

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3. *See infra* Part II.

4. *See infra* Part IV.

5. *See infra* notes 28–29 and accompanying text.

6. *See infra* notes 28–29, 56 and accompanying text.

7. *See infra* note 49 and accompanying text.

8. *See infra* notes 49–52 and accompanying text.

9. *See infra* notes 46–48, 56 and accompanying text.

10. *See infra* notes 74–75 and accompanying text.

11. *See infra* notes 70–77 and accompanying text.

12. *See infra* Part II.

13. *See infra* Part III.

the private market and the government in transactions involving the sale and resale of event tickets. Finally, Part V looks to the future, suggesting some directions the ticket resale market may and should take as technology and the law evolve and as the political process continues to function.

This Article focuses primarily on tickets to sporting events and live artistic performances such as concerts and stage plays; it devotes less attention to other types of tickets, including tickets to movies or passenger tickets on commercial airlines and other common carriers.<sup>14</sup> Athletic events and live performances differ from movies in that athletes and live performers can deliver only a finite number of appearances per year, placing a natural limit on overall audience size.<sup>15</sup> Movies, by contrast, are easily reproducible and can be concurrently displayed at thousands of movie theaters and then redisplayed over and over again with little marginal cost. Thus, one patron's occupancy of a cinema seat does little to reduce access for other patrons. And airlines and other common carriers must grapple with security issues that provide valid reasons for at least some differences in transferability rules.<sup>16</sup> Nonetheless, portions of the discussion below may be applicable to those types of tickets as well.

## II. THE ECONOMICS OF TICKET RESELLING

This Part begins by taking an economic perspective and examines the financial interests of the issuer of a ticket, the initial purchaser of that ticket, and potential third-party transferees. The goal of this Part is to determine what the ideal transferability terms should be in the typical ticketing relationship from an economic perspective. If the parties turn out to be legally free to agree to whatever terms they desire, this Part seeks to ascertain what terms these parties will choose.<sup>17</sup>

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14. See *infra* notes 23, 58, 199–200, 209–10 and accompanying text.

15. See *infra* 18–20, 53 and accompanying text.

16. See, e.g., *infra* notes 65, 156 and accompanying text.

17. For a thorough review of some of the economic factors that affect the pricing of ticket resales, see generally Stephen Happel & Marianne M. Jennings, *The Eight Principles of the Microeconomic and Regulatory Future of Ticket Scalping, Ticket Brokers, and Secondary Ticket Markets*, 28 J.L. & COM. 115 (2010), which discusses the economics of the ticket resale market and recommends a cure at the national level. For a useful economic analysis of New York's previous anti-scalping law, see Scott D. Simon, *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 (2004), which examines New York's since-repealed anti-scalping law and argues against its

A ticket provides entry to a live event such as a Broadway show, a musical performance, or a basketball game, or to a common carrier such as a commercial airliner. As with other interests in real estate, much of the value of this revocable license is tied to its location, often a specific reserved seat within a venue or carrier. But in this setting, the fourth dimension of that location—time—takes on additional significance. The purchaser not only wants to be physically present at a specific latitude, longitude, and altitude (Madison Square Garden Section 107, Row 12, Seat 3), but also desires to be there at a precise time (when the puck drops). The slender occupancy right that the ticket conveys is limited to a short duration, often just a couple of hours.<sup>18</sup> A ticket to a live event is “the most perishable commodity on earth,”<sup>19</sup> and if a ticket holder fails to occupy the designated space at the designated time, the ticket’s only remaining value is as a collector’s item. Similarly, if the promoter or the venue fails to sell the ticket before the curtain rises, the potential sales revenue is gone forever.<sup>20</sup> Leases, of course, also expire quickly. But most lease terms are measured in months or years rather than hours. And the occupancy rights leases provide are often for more generalized residential or commercial purposes; event tickets, by contrast, limit the spectator to spectating and the passenger to passage.

Conversely, if the seat is occupied, the seller has the opportunity to generate further revenue from the occupant. Broadway theaters sell beverages at intermission; music amphitheaters sell T-shirts and CDs in the concourse; baseball stadiums sell hot dogs and beer or sushi and Sauvignon

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constitutionality.

18. My University of Tennessee football season tickets provide me with the right to occupy two specific seats seven or eight times each season. Even though the tickets are quite expensive, I spent several years on a waiting list before I was first eligible to purchase them. Neyland Stadium is used for little else during the year, and the occupancy value of those seats at all other times is essentially zero. See, e.g., *Facility Rentals*, TENN. ATHLETIC HOSPITALITY, <http://www.tennesseeathletichospitality.com/facility-rentals/> (last visited Oct. 4, 2014) (allowing the general public to rent only a limited number of spaces within Neyland Stadium—none of which include stadium seats—for banquets, receptions, and parties).

19. DEAN BUDNICK & JOSH BARON, *TICKET MASTERS: THE RISE OF THE CONCERT INDUSTRY AND HOW THE PUBLIC GOT SCALPED* 14 (2011) (quoting Computicket’s Nick Mayo) (internal quotation marks omitted); see also *id.* at 49 (“You can’t sell out a Thursday night ticket on a Saturday night, but you sure as hell can sell it ahead of time, and then you can add Wednesday.” (quoting Bay Area Seating Service’s Jerry Seltzer) (internal quotation marks omitted)).

20. Some tickets become worthless the moment the event commences, as when a flight attendant closes the cabin door. In other cases, the ticket’s value diminishes rapidly as the event progresses, as with a football ticket that is still available after kickoff for sale by the ticket office or resale outside the stadium gates.

Blanc; and airlines hawk stale peanuts, duty-free cigarettes, and seating upgrades. Sellers collect parking fees before the event, and the local community enjoys general economic benefits and increased sales tax revenues. Occupancy of the seat also builds brand allegiance, as the satisfied April baseball fan returns during the September pennant race or the airline passenger accrues loyalty miles and opportunities for upgrades on future flights.

In some cases, the original ticket may be little more than a loss-leader designed to facilitate this secondary consumer spending.<sup>21</sup> Jimmy Buffett routinely demands and receives an artist fee of 105% of net ticket prices, a fee justified by the extremely high alcohol sales generated by Buffett's loyal fans, the Parrot Heads.<sup>22</sup> Similarly, in the airline industry, "2012 revenue per passenger exceeded costs by a mere 37 cents, according to the Airlines for America trade group. Without \$8.49 per passenger in ancillary revenue last year, revenue would have been \$8.12 lower than per-passenger costs."<sup>23</sup>

Performers, promoters, and venues would rather their events sell out, preferably well in advance. For this reason and others, they often price their event tickets below the highest price the market will bear—in fact, Fred Rosen, the former Chief Executive Officer of Ticketmaster, has referred to concert tickets as "the most underpriced commodity in America."<sup>24</sup> Some performers simply want to rest easy and not have to worry about possible

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21. See, e.g., Annelena Lobb, *Why Does That Popcorn Cost So Much?*, CNNMONEY (Mar. 12, 2002, 2:07 PM), [http://money.cnn.com/2002/03/08/smbusiness/q\\_movies/](http://money.cnn.com/2002/03/08/smbusiness/q_movies/) (discussing movie theaters' dependence on concession sales, rather than sales of theater tickets, to generate profit).

22. BUDNICK & BARON, *supra* note 19, at 181. Other acts known for huge alcohol sales, including the Allman Brothers Band, Lynyrd Skynyrd, and Tom Petty, demand similar artist fees. *Id.*

23. Susan Carey, *Airline Fees Keep Climbing*, WALL ST. J., July 4, 2013, <http://online.wsj.com/article/SB10001424127887323689204578569653054627258.html>; see also Scott McCartney, *For Travelers, This Summer's New Fee on Airline Tickets*, WALL ST. J., July 2, 2014, [http://online.wsj.com/articles/for-travelers-this-summer-new-fee-on-airline-tickets-1404341606?mod=WSJ\\_hp\\_EditorsPicks](http://online.wsj.com/articles/for-travelers-this-summer-new-fee-on-airline-tickets-1404341606?mod=WSJ_hp_EditorsPicks) ("The airline strategy has been to move . . . costs out of the ticket price so travelers can be enticed with low fares and then hit with additional costs at the airport.").

24. BUDNICK & BARON, *supra* note 19, at 73 (internal quotation marks omitted); see also Pascal Courty, *Some Economics of Ticket Resale*, 17 J. ECON. PERSP. 85 (2003) (exploring some possible explanations for the initial underpricing of event tickets); Joe Nocera, *Internet Puts a Sugarcoat on Scalping*, N.Y. TIMES, Jan. 19, 2008, [http://www.nytimes.com/2008/01/19/technology/19nocera.html?\\_r=0&sq=nocera&adxnml=1&scp=3&pagewanted=all&adxnmlx=1415203419-S2/n8CyQ46buXh1Yue6YhA](http://www.nytimes.com/2008/01/19/technology/19nocera.html?_r=0&sq=nocera&adxnml=1&scp=3&pagewanted=all&adxnmlx=1415203419-S2/n8CyQ46buXh1Yue6YhA) ("If tickets for tomorrow's game are worth \$1,000 rather [than] \$100, what's to stop the N.F.L. from selling the ticket for that much in the first place? Economic rationality stinks, doesn't it?").

empty seats, even though they might have increased their total revenue by selling the tickets at a higher price, if more slowly. Others like to crow about how quickly their events sell out, with lower prices presumably leading to faster sales. Still others may wish to build a loyal fan base, underpricing tickets now in the hope that today's halfhearted fan will become hooked and willing to pay more for tickets later on.<sup>25</sup> Event planners may believe that those attending an event will enjoy it more if the house is full, to the point that they may even "paper the house" by giving away remaining unsold tickets at the last minute. The performer does not always see eye-to-eye with the promoter or the venue, and pricing is sometimes an issue that the parties must negotiate.<sup>26</sup> And proceeds from tickets sold in advance can be held and invested until those funds must be paid over to the artist, promoter, or venue.<sup>27</sup>

Some performers may be reluctant to be the first to raise ticket prices dramatically and thus depart from the prevalent pricing model, perhaps out of fear of being perceived as greedy.<sup>28</sup> Low ticket prices are sometimes a calculated public relations move, as when Kid Rock announced that nearly

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25. See Adam Davidson, *How Much Is Michael Bolton Worth to You?*, N.Y. TIMES MAG., June 4, 2013, [http://www.nytimes.com/2013/06/09/magazine/the-secret-science-of-scalping-tickets.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/09/magazine/the-secret-science-of-scalping-tickets.html?pagewanted=all&_r=0) (contrasting artists such as Michael Bolton and Barbra Streisand, who price their tickets near the equilibrium price, with Bruce Springsteen and Pearl Jam, who charge well below market value, and suggesting that performers in the latter group make up the difference in sales of ancillary merchandise while also fostering greater fan loyalty and repeat business).

26. An extreme example of this phenomenon is seen in the recent reunion tour of 1990s band Rocket from the Crypt. Ryan Dezimmer, *For Fans of Rocket from the Crypt, a Tattoo Was Once Just the Ticket*, WALL ST. J., Feb. 7, 2014, [http://online.wsj.com/news/article\\_email/SB10001424052702304181204579367061727935826-1MyQjAxMTA0MDAwODEwNDgyWj](http://online.wsj.com/news/article_email/SB10001424052702304181204579367061727935826-1MyQjAxMTA0MDAwODEwNDgyWj). During its heyday, the band announced that any fan sporting a tattoo of the band's logo would receive free admission to all future concerts. *Id.* On the current reunion tour, promoters have been reluctant to honor the band's twenty-year-old promise. *Id.* (referring to one band member as "both befuddled and flattered by the number of fans who have its tattoo," while noting how difficult it is to get venues to honor the band's earlier commitment).

27. See, e.g., Joe Vardon, *Legislator's Plan Links College Football Tickets, Food Banks*, COLUMBUS DISPATCH, Sept. 24, 2013, <http://www.dispatch.com/content/stories/local/2013/09/24/plan-links-football-food-banks.html> (discussing how annual season ticket sales for Ohio State football games earned interest of approximately \$25,000 in the five months between the last sale date and the first game).

28. See, e.g., Alan B. Krueger, Chairman, Council of Econ. Advisers, *Land of Hope and Dreams: Rock and Roll, Economics and Rebuilding the Middle Class* (June 12, 2013), available at [http://www.whitehouse.gov/sites/default/files/docs/hope\\_and\\_dreams\\_-\\_final.pdf](http://www.whitehouse.gov/sites/default/files/docs/hope_and_dreams_-_final.pdf) ("[M]any artists have been reluctant to raise prices to what the market will bear for fear of garnering a reputation of gouging their fans.").



all tickets for his recent tour would be priced at twenty dollars.<sup>29</sup> And in other cases, as just noted, the ticket price is set at a low level in the hope that the patron will spend additional money buying drinks or checking luggage. Headliners thus have a variety of reasons for selling their tickets at less than the equilibrium price that the laws of supply and demand would otherwise dictate. They intentionally underprice their tickets and choose to forego some potential ticket revenue, usually receiving some other benefit in return. Ticket resellers such as StubHub would not survive for long if this were not the case.

Note as well that not every artist who claims to be selling performance tickets at a discounted price is being completely candid. Some performers have maintained that they are pricing their tickets at a bargain rate while actually making only a small percentage of their tickets available to the public at that price. For example, some artists open ticket sales to members of their fan club before the less costly tickets officially go on sale, an approach that has had the odd side effect of causing many would-be scalpers to join the Justin Bieber fan club.<sup>30</sup> Others run pre-sale promotions with credit card companies or other sponsors, sometimes bundling their tickets with pricier add-ons such as backstage passes and opportunities to meet the performers.<sup>31</sup> These practices may leave few tickets available to the public on the day tickets officially become available at the discounted price.<sup>32</sup>

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29. Andy Greene, *Kid Rock on His \$20 Tour and 'Dumbass Republicans,'* ROLLING STONE, Apr. 10, 2013, <http://www.rollingstone.com/music/news/kid-rock-on-his-20-tour-and-dumbass-republicans-20130410> ("Shouldn't we all take less and pass some of that money onto others? Think about firefighters, teachers and policemen." (internal quotation marks omitted)). The artist also criticized Ticketmaster for charging a five-dollar service charge and announced that some Wal-Mart stores would sell the tickets without a service charge and would include parking. *Id.*; see also Ray Waddell, *Kid Rock Takes 'Pay Cut' With \$20 Tickets on Summer Tour,* BILLBOARD, Apr. 8, 2013, <http://www.billboard.com/articles/news/1556609/kid-rock-takes-pay-cut-with-20-tickets-on-summer-tour> (noting that beers would sell for four dollars, some merchandise would be available for twenty dollars, and 1,000 tickets per performance would be set aside to be sold at the higher market rate).

30. See, e.g., Jeffrey Lee Puckett, *Buying Concert Tickets for Louisville Shows Getting More Complicated,* COURIER-JOURNAL (Louisville, Ky.), Dec. 31, 2012, <http://www.courier-journal.com/article/20121231/SCENE04/312310044/Buying-concert-tickets-Louisville-shows-getting-more-complicated> (discussing practices of artists who offer special deals on concert tickets to members of their fan clubs, holders of certain credit cards, and other persons several days before the general public sale date).

31. *Id.*

32. See, e.g., Phil Williams, *Documents Show 'Bieber Is Scalping His Own Tickets,'* NEWSCHANNEL5.COM (Sept. 25, 2012), <http://www.jrn.com/newschannel5/news/newschannel-5-investigates/249382491.html> (explaining that only 1,001 of nearly 14,000 seats for a Justin Bieber

Some artists have even been accused of holding back some of their own low-priced tickets and then scalping those tickets themselves at the market rate.<sup>33</sup>

More recently, a few performers have seemed willing to charge what they believe to be a market-clearing price, even if that higher price means slower ticket sales and bad press. The Rolling Stones may have gone a bit too far in that direction on their recent “50 and Counting” tour,<sup>34</sup> with a top ticket price of six hundred dollars.<sup>35</sup> While some tickets had to be marked down as concert dates approached,<sup>36</sup> suggesting that the Stones may have

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concert in Nashville were available when tickets became generally available to the public; only 1,600 for a Taylor Swift concert three years earlier; only 389 for a Keith Urban concert that same year).

33. See, e.g., *id.* (noting that tickets reserved for Justin Bieber’s tour were later available at the website of ticket reseller TicketsNow); Puckett, *supra* note 30 (describing criticism of Lady Gaga and Justin Bieber for scalping their own tickets, while noting that the practice is not illegal). Alternatively, artists or primary sellers may illegally steer blocks of tickets directly to ticket resellers in exchange for a kickback. Happel & Jennings, *supra* note 17, at 155–56; Mesfin Fekadu, *Kid Rock & Rolling Stones on Scalping, Summer Tours*, HUFFINGTON POST (May 24, 2013, 10:24 AM), [http://www.huffingtonpost.com/2013/05/24/kid-rock-rolling-stones-scalping\\_n\\_3331427.html](http://www.huffingtonpost.com/2013/05/24/kid-rock-rolling-stones-scalping_n_3331427.html) (quoting Kid Rock as saying, “I’ve had people in the scalping business come at me already and try to make side deals like, ‘I can make you thousands of dollars, hundreds of thousands of dollars in cash if you’ll just flip a few of these tickets our way for certain shows,’” while acknowledging that he may have scalped his own tickets in the past (internal quotation marks omitted)).

34. Rafi Mohammed, *Ain’t Too Proud to Beg: Pricing Lessons from the Rolling Stones*, HARV. BUS. REV. HBR BLOG NETWORK (May 14, 2013, 12:00 PM), [http://blogs.hbr.org/cs/2013/05/ain\\_t\\_too\\_proud\\_to\\_beg\\_pricing.html](http://blogs.hbr.org/cs/2013/05/ain_t_too_proud_to_beg_pricing.html) (describing promoters as “on the verge of a ‘19th Nervous Breakdown’” and concluding, “[q]uite simply, sometimes you overshoot”).

35. Ray Waddell, *Rolling Stones Concert Promoter on ‘Flex Pricing’ Ticket Strategy: ‘I Want the Brokers Pissed Off.’* BILLBOARD, May 7, 2013, <http://www.billboard.com/biz/articles/news/touring/1560750/rolling-stones-concert-promoter-on-flex-pricing-ticket-strategy-i> (describing the Stones’ dynamic pricing strategy as designed to maximize profit while minimizing the premiums available to scalpers).

36. Mark Guarino, *Pricey Tickets for Rolling Stones Tour Test Limits of Live-Concert Market*, CHRISTIAN SCI. MONITOR, June 3, 2013, <http://www.csmonitor.com/USA/2013/0603/Pricey-tickets-for-Rolling-Stones-tour-test-limits-of-live-concert-market> (describing “last-minute price-cutting to fill the hall”); Sue Zeidler, *Rolling Stones Rock Packed House After Price Cuts in LA*, REUTERS, May 4, 2013, available at <http://www.reuters.com/article/2013/05/04/entertainment-us-rollingstones-idUSBRE94304H20130504> (“Days before the show, hundreds of seats were still available and secondary sellers scrambled to unload tickets by slashing prices from the original \$250 to \$600 price range which had irked many of even the most die-hard Stones fans.”). In an effort to render these last-minute seats as undesirable as possible and thereby placate those purchasers who had paid considerably more while making an earlier financial commitment, the promoter made fans seeking the less costly seats wait outside the arena and advised them that the seats they received at the discounted price might be located anywhere in the venue. Sue Zeidler, *Rolling Stones Tickets Slashed in Price for Los Angeles Show*, HUFFINGTON POST (May 4, 2013, 6:19 AM), [http://www.huffingtonpost.com/2013/05/04/rolling-stones-tickets-price-los-angeles\\_n\\_3213878.html](http://www.huffingtonpost.com/2013/05/04/rolling-stones-tickets-price-los-angeles_n_3213878.html)

aimed a bit too high, nearly all seats on the tour seem to have sold,<sup>37</sup> and the band's gross for its eighteen U.S. performances was expected to approach \$100 million.<sup>38</sup>

Rolling Stones fans may be older and more affluent than those who attend performances by other acts and thus not as price-sensitive, and these aging rockers may see less need than other, younger acts to preserve fans' good will for future tours.<sup>39</sup> But the Rolling Stones are not the only act to have increased ticket prices dramatically in recent years, with tickets for artists such as Justin Timberlake and Jay-Z (appearing together) and Kenny Chesney topping out at over two hundred dollars.<sup>40</sup> These artists seem to be willing to sweat out slow sales early in an effort to maximize total ticket revenue in the long run. For artists such as the Stones, the total revenue number seems to matter more than the speed with which they can sell out large arenas. As a result, the box-office price for tickets to their shows is higher. Indeed, ticket prices for concerts by the top artists have increased much faster than the inflation rate in recent years, and the most popular headliners are taking home a larger percentage of overall spending on concert tickets.<sup>41</sup>

The phenomenon of higher ticket prices reflects the changing nature of the music business. Twenty or thirty years ago, performers made much of their money from record or compact disc sales, with the tours serving as

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(quoting one fan as saying, "It's very thrilling. It's like gambling and the Stones all rolled into one." (internal quotation marks omitted)).

37. Guarino, *supra* note 36 (describing ticket sales as "robust").

38. Waddell, *supra* note 35. The final take was actually higher, as the eighteen performances to which the author refers do not include additional shows in Europe and Canada. *See generally* 14 *on Fire*, ROLLING STONES, <http://www.rollingstones.com/tickets/> (last visited Oct. 4, 2014) (listing "50 and Counting" tour locations in Canada, France, and the United Kingdom).

39. *But see* Mohammed, *supra* note 34 (discussing potential reputational damage to the Stones' well-established brand and concluding, "[i]t's a shame that due to poor pricing decisions, the Rolling Stones are closing out their career amidst allegations of greed, headlines reporting on poor sales, and the taint of desperation from employing tacky discounting methods").

40. Brian McCollum, *Kid Rock Announces Detroit Concert Dates for Summer Tour, Rolls Dice with New Pricing Scheme*, DETROIT FREE PRESS, Apr. 8, 2013, <http://www.freep.com/article/20130408/ENT04/130408008/Kid%20Rock%20announces%20Detroit%20concert%20dates,%20rolls%20dice%20with%20new%20pricing%20scheme> (contrasting Kid Rock's reduced prices with much higher fees charged by other artists).

41. Krueger, *supra* note 28, at 1 (noting that "[t]he price of the average concert ticket increased by nearly 400% from 1981 to 2012, much faster than the 150% rise in overall consumer price inflation" and that "[t]he top 5 percent [of performers] take home almost 90 percent of all concert revenues"). Krueger also presents this information in graphic form. *Id.* at 16–17.

raucous advertisements for the pre-recorded music.<sup>42</sup> Today, music sales have largely moved to online portals such as iTunes, and it is much easier for fans to acquire music illegally.<sup>43</sup> This means that performers today are more likely to see sales of songs as an opportunity to entice fans to attend concerts, where these fans will spend more than they used to on the price of admission, not to mention \$50 for T-shirts and \$12 for beers during the show.<sup>44</sup> Concerts also provide entertainers with their best chance to establish a personal rapport with their audience.<sup>45</sup>

Moreover, at least some artists—along with many venues and promoters—correctly recognize that higher initial ticket prices reduce the opportunities for scalpers to benefit from ticket resales.<sup>46</sup> Advances in technology have made it easier to resell event tickets, and some artists resent online ticket resellers such as StubHub more than they worried about traditional scalpers twenty years ago. Online ticket resellers can operate efficiently, rapidly, and in huge volume, and certainly more so than the grizzled scalper standing outside the arena barking, “Who needs tickets?” Moreover, that grizzled scalper had to take the legal and business gamble of actually buying the tickets—laying out the money and risking being unable to resell them—while StubHub merely functions as an intermediary.<sup>47</sup>

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42. See Adrian Covert, *A Decade of iTunes Singles Killed the Music Industry*, CNNMONEY (Apr. 25, 2013, 6:09 PM), <http://money.cnn.com/2013/04/25/technology/itunes-music-decline>.

43. See David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNNMONEY (Feb. 3, 2010, 9:52 AM), [http://money.cnn.com/2010/02/02/news/companies/napster\\_music\\_industry/](http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/).

44. See Krueger, *supra* note 28, at 3 (“While concerts used to be a loss leader to sell albums, today concerts are a profit center.”); Randy Lewis, *Bon Jovi Dominates Pollstar's Concert Tour List*, L.A. TIMES POP & HISS (Dec. 31, 2013, 7:00 AM), <http://www.latimes.com/entertainment/music/posts/la-et-ms-2013-top-concert-tours-bon-jovi-20131231,0,2366828.story#axzz2srjonJW4> (listing top ten artists ranked by worldwide concert ticket sales in 2013, and noting that “[t]he dip the concert business took in 2009—which caused concern that the live music business was following the record industry into the financial doldrums—appears to have been a short-term setback”).

45. X.M. FRASCOGNA, JR., SHAWNASSEY B. HOWELL & H. LEE HETHERINGTON, ENTERTAINMENT LAW FOR THE GENERAL PRACTITIONER 67 (2011) (“The magic of performing live is the backbone of an artist's career. Live performances give an artist and audience a chance to connect with each other.”).

46. See, e.g., Davidson, *supra* note 25.

47. See, e.g., Hill v. StubHub, Inc., 727 S.E.2d 550, 561 (N.C. Ct. App. 2012) (granting summary judgment in favor of StubHub in suit alleging that StubHub violated North Carolina's anti-scalping law, on the grounds that StubHub is immune under the federal Communications Decency Act, 47 U.S.C. § 230 (2006), because the ticket seller and not StubHub provided the published content that allegedly violated the statute); Weinstein v. eBay, Inc., 819 F. Supp. 2d 219 (S.D.N.Y. 2011) (similar result under New York state law). But see NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at \*12–13 (Mass. Super. Ct. Jan. 26, 2009) (denying ticket reseller's motion for

Those who wish to undercut this flourishing market may simply elect to set ticket prices higher at the outset.<sup>48</sup>

Even with some headliners moving toward market-priced tickets, it is apparent that tickets for many performances are still underpriced. In other words, some prospective patrons would willingly pay far more than the list price to attend many live events. This has always been true, which explains why scalpers have existed for generations, even when resales are prohibited by law or by the terms of the original license. But recent technological changes have made the process of reselling tickets easier, quicker, and safer. Unless there is some practical and effective method for limiting resales, a secondary market in performance tickets will persist. This resale market allows the initial ticket holder to profit by transferring the ticket to someone who values it more highly, it offers fans who could not obtain tickets from the box office another opportunity to gain admission to the show at a price they are willing to pay, and it provides arbitrageurs such as StubHub the occasion to charge fees for their matchmaking services.<sup>49</sup>

Price controls are notoriously ineffective in the long run, as markets develop in which the initial holder of a right transfers that right, sometimes illegally, to a secondary purchaser who values it more highly.<sup>50</sup> When this happens, part of the sales price that the ultimate purchaser pays accrues to the initial purchaser of the right (the first ticket holder), who is in a position to resell at a profit, rather than to the “creator” of the right (the artist or promoter). This phenomenon is seen in other controlled markets. When a

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partial summary judgment and rejecting its § 230 immunity defense because reseller also provided information content).

48. See, e.g., Davidson, *supra* note 25.

49. The resale transaction also raises knotty sales tax questions, as the second sale may be structured in a way that makes it difficult or impossible for a taxing jurisdiction to collect sales tax on the resale premium. See, e.g., *City of Chi. v. StubHub, Inc.*, 979 N.E.2d 844, 845, 857 (Ill. 2012) (holding, upon certification of question from Seventh Circuit to Illinois Supreme Court, that Illinois’s home rule provisions do not require StubHub to collect the City of Chicago’s sales taxes on ticket resale transactions). Thus, if the initial ticket price is set at the market rate, the city will collect sales tax on the entire price, but if the ticket is initially sold at a lower price and then resold at the market rate, the city will probably be able to collect sales tax on only the first of these two transactions. See *id.* at 855. Similarly, those who purchase tickets at face value and then resell them at a higher price on the secondary market may—inappropriately—fail to report their gains from the second transaction as income.

50. See, e.g., Eric Felten, *Don’t Blame a Scalper When You Think You’ve Been Fleeced*, WALL ST. J., Apr. 8, 2011, <http://online.wsj.com/articles/SB10001424052748704013604576248923513245308>.

rent-controlled tenant sublets his apartment illegally, for example, the subtenant is paying rent of at least the market rate.<sup>51</sup> But a portion of that higher sublease rent—the difference between the sublease rent and the leasehold rent, minus any transaction costs such as brokerage commissions or bribes—accrues to the initial tenant rather than to the landlord.<sup>52</sup> Similarly, the purchaser of a scalped ticket pays whatever price the laws of supply and demand dictate. But only the list price for the ticket accrues to the artist and promoter, with the resale profit flowing to the initial purchaser of the event ticket along with any intermediaries.

As a result, there are only two possible outcomes when initial ticket prices are set below the market price. One possibility is that the tickets are freely transferable both at law and by their own terms. Demand at the too-low price will exceed supply. Because supply is inherently limited in the case of a live performance—the performer can perform only so many times

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51. The term “market rate” is somewhat difficult to define if prices in the market are controlled. If the law artificially depresses prices, demand is higher than it otherwise would be. At the same time, the price control discourages investors from providing adequate supplies of the good. Demand increases while supply decreases and an artificial shortage develops, so it is difficult to ascertain what the price would have been in the absence of controls. New York City’s experience with rent control demonstrates that many existing landlords sought to convert their rental units to condominium or cooperative ownership, which was not subject to price controls, while potential new developers were discouraged from entering the residential rental market because of the cap on rentals. See, e.g., William Tucker, *How Rent Control Drives Out Affordable Housing*, CATO INST. (May 21, 1997), <http://www.cato.org/pubs/pas/pa-274.html>. This led to a significant shortage of rental units. *Id.* The principal beneficiary of this system was the initial tenant—in effect, an apartment scalper—who was in a position to sublet the apartment at a significant profit.

52. New York’s rent-control law tries to address this problem by placing limits on subleasing. See, e.g., N.Y. UNCONSOL. LAW § 8630-a (McKinney, Westlaw through 2014 legislation) (limiting sublease surcharges to ten percent and permitting even these only if the unit is rented furnished, limiting subleases to two years of every four, and imposing other restrictions). But market pressure is often more powerful than state law, with primary tenants seeking to evade these limits by charging “key money” and other illegal fees to their subtenants. See, e.g., *Fact Sheet: #7 Sublets, Assignments and Illusory Tenancies*, N.Y. STATE DIV. OF HOUS. & CMTY. RENEWAL 1, <http://www.nyshcr.org/Rent/FactSheets/orafac7.pdf> (last visited Oct. 5, 2014) (noting that “[t]he prime tenant may not demand ‘key money’ or overcharge the subtenant” and emphasizing that violations can lead to treble damages).

Commercial landlords have devised numerous ways of recapturing some of the profit that may arise when the rent they charge their tenants turns out to have been too low, such as by including provisions in the lease that permit the landlord to recapture a portion of any sublease profit. This approach has not historically been feasible in the market for event tickets, although technological developments may be changing that. For example, Ticketmaster’s purchase of reseller TicketsNow suggests that the former may be seeking to jump on the StubHub bandwagon. See *infra* notes 76–77 and accompanying text.

per year, and each venue can hold only so many people—the price for the ticket will rise until demand is equal to that supply. Initial purchasers who value their tickets less will transfer their tickets to others who value them more until the price reaches equilibrium.<sup>53</sup> The ultimate attendee will pay a price that is higher than the list price, and intermediaries who facilitate the exchange will earn commissions for their services.

The other possibility is that the tickets are not freely transferable, due to legal or technological restrictions or the terms of the ticket itself. The government, the artist, or the venue, in effect, imposes price controls. Demand will continue to outstrip supply at the initial, low price, but the initial purchaser will be unable to transfer her license.<sup>54</sup> If this limit on transfers is effective in practice, the lucky few who obtain tickets at the low price will enjoy the performance, while others will be unable to attend even though they were willing to pay more for the ticket than the actual attendees paid. This result is inefficient, in that some of the attendees would have preferred to give up the experience in exchange for the profit a resale would have generated, while some frustrated fans were willing to pay more than list price to attend an event that they ended up missing. Conversely, if this limit cannot be enforced in practice, then a black market will develop: The tickets will be transferred, even though such transfers were not supposed to occur, and the discussion in the prior paragraph will apply. Now, though, some of the profit that might otherwise accrue to the reseller will need to be spent to circumvent the legal, technological, and contractual restrictions on transfer.<sup>55</sup>

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53. For an interesting study ranking the strength of Southeastern Conference football rivalries based on the prices fans are willing to pay for tickets on the secondary market, see Ken Sanford & Frank Scott, *Assessing the Intensity of Sports Rivalries Using Data from Secondary Market Transactions* (Jan. 29, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2387622&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387622&download=yes).

54. See *infra* Part III. Prohibitions on transfer need not be established by laws and regulations. For selected shows, Ticketmaster sells “paperless tickets” that can be used only by their initial purchasers. See *infra* notes 145–161 and accompanying text. Thus, technological advances may succeed in limiting the ticket resale market in settings where legal restrictions have been difficult to enforce.

55. See, e.g., HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 152–72 (1989). If the restriction is a legal one, the transferor and any intermediaries may need to spend some of the ticket premium to avoid detection or circumvent the legal rules, such as by paying bribes, fines, and retainers to defense lawyers. These expenses become costs of doing business. See, e.g., *id.* (describing losses caused by the illegality of informal economic activity in Peru). If the restriction is a practical or technological one, as with paperless tickets, then money must be spent on eluding whatever limitations the initial seller has imposed, perhaps by developing software that frustrates the original seller’s resale prohibitions. See, e.g., *infra* notes 169, 178 and



Many artists and promoters are disturbed by the thought that scalpers are making money they believe to be rightfully their own. In their view, ticket proceeds should accrue to the talented artist who is toiling on stage and not to a shady-looking character standing outside the arena with a fistful of tickets and a large wad of cash.<sup>56</sup> The most effective solution to this problem is for the artists to charge higher prices, as noted above. If the ticket is priced at the market rate, then only those who value the ticket at this price will purchase it, total box-office sales revenues will be higher, all of the sale proceeds will flow to the artist and promoter rather than to intermediaries, and resales will occur only for convenience and not for profit. Some transfers will still occur, such as by those ticket holders who discover that they cannot attend the event, but the transfer price will not exceed the list price. Some artists are unwilling to price their tickets this high out of concern that they will be perceived as avaricious, as discussed above. But there are other sensible economic reasons why some artists, venues, and promoters still may elect to set initial ticket prices below the market price.

To begin with, at the time artists or sports teams set their prices, they may not know for sure what the market price actually will be when the event occurs. They may overestimate their own popularity, or, in the words of Spinal Tap's manager, Ian Faith, "their appeal [may become] more selective."<sup>57</sup> Saturday tickets may sell more vigorously than Tuesday tickets, and games against the Red Sox may be easier to sell than games against the Brewers. Some performances may conflict with other popular events, including events that are scheduled after their own tickets go on sale. Floor seats will be more desirable than seats in the second concourse, and the artist

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accompanying text (discussing ticket bots that allow scalpers to purchase more tickets than the seller intended to permit).

56. See, e.g., Happel & Jennings, *supra* note 17, at 180 (discussing the resentment those in the live theater industry feel toward scalpers, who make no artistic contribution to the performance); see also Felten, *supra* note 50 ("So why does the stigma persist? Perhaps it is just a visceral reaction—buzzards and hyenas, after all, are an essential part of the food chain, but that doesn't make them any more attractive to us.").

57. THIS IS SPINAL TAP (Spinal Tap Prods. 1984). In fact, legalized reselling provides initial sellers with additional information that allows them to set the initial price at a level closer to what the market is willing to pay. Brett Goldberg, *Guest Commentary: The Future of Ticket Scalping Laws*, TICKETNEWS (Apr. 17, 2013, 2:36 PM), <http://www.ticketnews.com/features/Guest-Commentary-The-Future-of-Ticket-Scalping-Laws-4-17-13-098> ("[T]he legalization of for-profit reselling has actually benefitted primary sellers, by allowing them to see what fans are willing to pay and to price accordingly.").



may have difficulty assessing the relative prices of these tickets in advance. Good or bad reviews in the press or on social media early in a tour, or good or bad play by an athletic team early in a season, may affect demand for later dates.

Airlines (and, to a lesser extent, hotels) have learned to address these uncertainties by pricing their seats dynamically, developing sophisticated computer algorithms that continuously re-set fares as new information becomes available.<sup>58</sup> Dynamic pricing has appeared in other, less expected settings. The City of San Francisco prices on-street parking dynamically.<sup>59</sup> This has led several software developers to create smartphone apps that allow for the resale of parking spaces at a profit—essentially, the scalping of public parking spots—a practice that San Francisco is challenging.<sup>60</sup> The high-end Chicago restaurant Alinea presells seats through its webpage, with prices varying by date and time.<sup>61</sup> This model allows the restaurant to reduce revenue uncertainty by collecting the cost of the prix fixe meal, sales tax, and a 20% service charge at the time of the advance booking.<sup>62</sup> The restaurant enjoys the float on these prepaid amounts, while the patron is more likely to have forgotten her high sunk costs for the food when she is presented with the beverage menu on the night of the meal. These prepaid tickets can be resold, but the restaurant encourages resales through its own website and discourages resales at greater than face value.<sup>63</sup> And food prices

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58. See, e.g., Suemedha Sood, *How Airline Pricing Works*, BBC.COM (Apr. 5, 2013), <http://www.bbc.com/travel/blog/20130405-how-airline-pricing-works> (discussing airline pricing strategies); Gabor Forgacs, *Revenue Management: Dynamic Pricing*, HOSPITALITY NET (Jan. 19, 2010), <http://www.hospitalitynet.org/news/4045046.html> (describing dynamic pricing for hotels).

59. *Pricing*, SFPARK, <http://sfpark.org/how-it-works/pricing/> (last visited Oct. 6, 2014) (describing the city's "demand-responsive pricing [which aims] to open up parking spaces on each block and reduce circling and double-parking").

60. Laura Entis, *San Francisco Says Enough Monkey Business: Tells Parking Spot App to Shut Down*, ENTREPRENEUR, July 11, 2014, <http://www.entrepreneur.com/article/235575> (describing how "MonkeyParking, an app that allows drivers to post their soon-to-be-vacated spots online and auction them off to the highest bidder," ceased operations after San Francisco served it with a cease-and-desist letter).

61. *Reservations*, ALINEA RESTAURANT, <https://tickets.alinearestaurant.com/slots/find> (last visited Oct. 6, 2014) ("Pricing varies by time and day of week, just as a ticket would for different seats in a theater or sporting event.").

62. *Frequently Asked Questions*, ALINEA RESTAURANT, <https://tickets.alinearestaurant.com/web/site/faq> (last visited Oct. 6, 2014).

63. *Id.* At one point, Alinea and its sister restaurant, Next, threatened to void scalped restaurant tickets. *Prepaid Dinner Reservations: Meet the Scalpers*, RESTAURANT HOSPITALITY (July 22, 2011), <http://restaurant-hospitality.com/trends/meet-the-scalpers-0711>. This placed the owners in

in the Goldman Sachs cafeteria are discounted by 25% before 11:30 a.m. and after 1:30 p.m.,<sup>64</sup> a practice that differs little from creating a discounted happy hour, early-bird dinner, or pre-theater menu. Performers and sports teams, however, have been slow to adopt this model.<sup>65</sup>

Even if artists can accurately assess the value of their own tickets ahead of time, advance sales operate like a futures market, reducing risk, reducing overall revenue, and providing greater certainty. The purchaser pays a lower price today for the right to attend an event weeks or months in the future, giving up cash immediately without knowing how the value of that ticket will fluctuate between the purchase date and the event date. The artist that

the enforcement business, facing questions such as whether to cancel Alinea tickets that had been traded for hockey or football seats. *Id.* (referring to “the Wild West ticket aftermarket their system ha[d] inadvertently created”). Nonetheless, seating requests regularly outstrip supply, and the restaurant’s website sometimes crashes under high patron demand. *Id.*; see also Jesse McKinley, *Bidding Frenzy for Tickets to Eat at Next in Chicago*, N.Y. TIMES, Apr. 8, 2011, [http://www.nytimes.com/2011/04/09/us/09next.html?\\_r=0](http://www.nytimes.com/2011/04/09/us/09next.html?_r=0) (“Prices also vary by night, and demand, something . . . [chef and co-owner Grant] Achatz likens to airline pricing (though certainly not to airline food.)”); Marty Lariviere, *The Next Big Thing: Scalping Restaurant Seats*, OPERATIONS ROOM (Apr. 13, 2011), <http://operationsroom.wordpress.com/2011/04/13/scalping-restaurant-seats/> (discussing online ticket sales for Next). See generally *Should Restaurant Reservations Be for Sale?*, N.Y. TIMES ROOM FOR DEBATE (June 18, 2014), [http://www.nytimes.com/roomfordebate/2014/06/18/should-restaurant-reservations-be-for-sale?WT.mc\\_id=NYT-E-I-NYT-E-AT-0625-L11&\\_r=0&n=el&nid=572313](http://www.nytimes.com/roomfordebate/2014/06/18/should-restaurant-reservations-be-for-sale?WT.mc_id=NYT-E-I-NYT-E-AT-0625-L11&_r=0&n=el&nid=572313) (collecting columns from authors with differing views).

64. Neil Irwin, *All Restaurants Should Copy the Goldman Sachs Cafeteria’s Genius Pricing Plan*, WASH. POST WONKBLOG (Oct. 18, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/18/all-restaurants-should-copy-the-goldman-sachs-cafeterias-genius-pricing-plan/> (noting that “[r]estaurateurs tend to see success when their place is so full that nobody else can get in the door. In fact, that’s a massive market failure,” and suggesting that restaurants should raise prices at peak hours).

65. This reluctance to adopt dynamic pricing may reflect the fact that airline tickets are nontransferable while most event tickets can easily be resold. Thus the box office, unlike the airlines, faces unpredictable amounts of competition from early purchasers who are reselling their own seats. For that matter, traditional scalpers generally price their tickets dynamically, with charges fluctuating based on evolving supply and demand information right up until the event begins, and sometimes for a short time afterwards.

To be sure, there are some well-established examples of dynamic pricing by performance venues, notably the TKTS booth in New York’s Times Square that sells reduced-price same-day tickets to Broadway and Off-Broadway shows. See *TKTS Discount Booths*, TDF, <https://www.tdf.org/nyc/7/TKTS-ticket-booths> (last visited Oct. 6, 2014). These tickets, though, are sold at a steep discount just before they are about to go unused. See *id.*; Goldberg, *supra* note 57 (discussing the TKTS booth and asking, “If the law allows for the market to accept a decrease in prices, why not an increase? If primary ticket sellers are allowed to profit from tickets that are initially overpriced, why can’t secondary sellers profit from tickets that are initially underpriced?”). Airline tickets, by contrast, fluctuate wildly in price, and these changes occur many times over a period of several months.

underprices her tickets can relax and enjoy more enthusiastic sales without having to worry about the slower sales that higher prices would have caused, even though total revenues may be lower than they otherwise could have been. This is particularly important if the performer's contract with the venue requires her to meet certain sales milestones as the event date approaches, as she is more likely to hit these targets the lower she prices her tickets. In return for setting the price below the market maximum, the artist, the promoter, and the venue can all enjoy the comfort of knowing early on that the tickets are moving. The initial sale of the tickets is, in effect, an IPO that is fully subscribed, with the initial purchasers then able to resell their "shares" to willing buyers.

Selling tickets below the equilibrium price thus functions as a form of insurance, one that leads to higher early ticket sales but at a relatively low price. This approach may be particularly important for sports teams, which can sell more tickets to fans when preseason hopes are high, fully aware that those fans may become less excited about purchasing tickets once the reality of another mediocre season sets in.<sup>66</sup> Some artists appear to be happy to boast about how quickly they sell out their dates, even though speedy sales are indicative of setting the charge too low. This type of underpricing also buttresses fan loyalty, while the fact that the event sold out and tickets are available only on the resale market amplifies the buzz surrounding the event.

To the extent that ticket prices are initially set too low, ticket resales are economically efficient. In a setting in which underpriced tickets are resold once or more, the artist is not the only person who deserves to be compensated. Unlike the artist or the promoter, the initial purchaser is willing to assume the risk that prices will drop in exchange for the prospect that prices will rise. That, in fact, is the scalper's business model. Moreover, if an intermediary such as StubHub helps to ensure that the event ticket ends up in the hands of the fan who is willing to pay the most for it, that middleman plays an important role and is entitled to compensation

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66. In fact, some athletic teams strongly support ticket resales and encourage these secondary transfers directly from their webpage. See, e.g., *Tennessee Athletics Ticket Office*, UTSports.com, <http://www.utsports.com/tickets/> (last visited Oct. 6, 2014) (noting that "StubHub is the exclusive fan-to-fan ticket marketplace of [University of] Tennessee Athletics" and including a link). These teams presumably believe fans are more likely to take the plunge on season tickets if they know from the outset that they will easily be able to transfer tickets to the games they cannot attend. See generally Danielle Moore, Note, *The Times They Are A Changing: Secondary Ticket Market Moves from Taboo to Mainstream*, 11 TEX. REV. ENT. & SPORTS L. 295, 301-02 (2010) (examining the active participation of sports teams in the secondary ticket market).

every bit as much as a real estate agent or a travel agent.<sup>67</sup> Ticket prices are set too low at the outset in return for the security of knowing early on that tickets sales will be more robust. The original purchaser bears financial risk—precisely the risk the artist was happy to relinquish by underpricing the ticket initially—in return for possible financial reward. The intermediary serves as a repository of information and helps to ensure that the ticket ultimately finds its way to the spectator who values it most. The first purchaser and the intermediary combine to provide a type of insurance to the artist and split the resale differential as a premium.

The initial purchaser and any middlemen are not the only service providers to be compensated during the course of producing an artistic or athletic event. Other parties perform various roles in the production process, offering different goods and services and shouldering different risks, and all of them deserve payment for their work. The overall ticket price to a live performance or a sporting event includes components that ultimately flow to the artist or athlete, her agent, the promoter, the venue, the ticket sales company, various insurance and bonding companies, and others.<sup>68</sup> Each of these participants facilitates the staging of the event and, while it is certainly fair to question whether some of these parties are overpaid relative to their contribution, each deserves to be compensated. These parties are in the business of providing particular goods or services, they know the costs and risks that their roles present, and they price their products and labor accordingly. Of course, different participants have different leverage in pricing their services: The headliner is a one-of-a-kind act who may succeed

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67. It is important here to distinguish between the owner of the ticket and the agent who facilitates the sale of that ticket. Scalpers (and initial ticket purchasers) actually take more risk than real estate agents, since most scalpers buy and own tickets that they may be unable to resell at a profit. They must lay out the purchase price in advance with no assurance that they will recoup their investment. StubHub, by contrast, receives commissions from both the buyer and the seller but never takes the risk of owning the commodity. See *Buyer Q and A*, STUBHUB, <https://www.stubhub.com/help/> (follow “See all help topics...” hyperlink; then follow “Buying tickets” hyperlink; then follow “Buyer Q and A” hyperlink; then follow “Where do these tickets come from?” hyperlink) (last visited Oct. 6, 2014) (“StubHub is a marketplace, which means we give people a safe, convenient place to buy and sell tickets. We don’t buy or sell the tickets you purchase on our site.”). StubHub, of course, has higher overhead costs than traditional scalpers and also provides certain warranties of authenticity to its customers. See *The StubHub FanProtect™ Guarantee*, STUBHUB, <https://www.stubhub.com/guarantee/> (last visited Oct. 6, 2014).

68. See, e.g., Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music* 5–7 (Nat’l Bureau of Econ. Research, Working Paper No. 11282, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=711924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=711924).

in obtaining an astronomical appearance fee, while the roadie may be working for union scale. But each of these contributors to the final product is likely to be a repeat player who develops experience over time and can decide whether to continue to play that role or to exit the market. In settings where underpriced tickets are resold for a profit, the scalper and any intermediaries are among the many market participants commanding—and earning—fees for their services.<sup>69</sup>

Can the same industry knowledge be attributed to the ultimate ticket purchaser? Consumers who purchase event tickets, whether or not they are the original buyers, often are the least knowledgeable parties involved in the process of staging an event. For this reason, consumers may merit some form of legal or contractual protection.<sup>70</sup> Of course, different consumers are situated differently, and the long-time holder of a luxury box at Madison Square Garden probably has more market clout than the minimum-wage worker who pops her popcorn. Consumers also develop expertise over time, and it would be misguided to treat every ticket purchaser as a gull in need of protection. Moreover, some initial purchasers are experienced scalpers who intend from the outset to resell their tickets at a profit. But even if we assume that the typical purchaser of Hannah Montana tickets is relatively new to the world of concert-going and that consumers such as these need to be shielded from the various swindlers who might take advantage of them, the problem remains that there are different consumers involved in different parts of a ticket-resale transaction, and protecting the interests of one often impairs the interests of another.

For example, when the first purchaser of a ticket sells it to a second buyer, the interests of these two consumers are almost completely in opposition. One view of the ticket resale market is that the person who values the ticket most should enjoy the opportunity to attend the event. If an actual attendee would willingly have sold the ticket to someone who wanted to attend but could not procure a ticket, then the actual attendee valued the resale proceeds more than the right to attend the event while the disappointed fan valued the ability to attend the event more than the true market price for the ticket, an outcome that economists view as inefficient. Under this view, scalping should be both legal and encouraged, and there should be a healthy market in ticket resales, nurtured by ticket

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69. *Id.* at 25–29.

70. *See infra* Part IV.

intermediaries. The law should protect the first purchaser's legal right to transfer her tickets, should encourage commerce in tickets, and should keep information and transaction costs low by reducing legal and practical impediments to ticket resales. After all, "[i]f you buy a Honda, should Honda tell you where you should be able to resell your car?"<sup>71</sup>

An opposing view is that ticket prices are too high, predatory market specialists are taking advantage of inexperienced spectators, and fans of modest means are being priced out of the market. Under this view, those artists who are willing to accept lower appearance fees so that their less affluent enthusiasts can afford to attend should not be undercut by a resale market that ensures that many of the tickets end up in the hands of the highest bidder. If this belief prevails, artists and venues, and perhaps state legislatures, must come up with market structures that prevent initial purchasers from reselling event tickets, particularly at a profit, and anti-scalping prohibitions should be strictly enforced.<sup>72</sup> Businesses located near venues may support these efforts, worrying that fans who pay top dollar for a ticket are less likely to indulge in dinner and drinks before the show or return for other events later on.

Thus, any discussion of protecting "the consumer" must focus on precisely which consumer needs protecting.<sup>73</sup> Are we more concerned about the lifelong fan dying to see Bruce Springsteen for the fortieth time, willing to pay whatever a ticket costs, but hampered by artificial resale restrictions

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71. Bill Shaikin, *Battle Between Angels, StubHub Picks Up Steam*, L.A. TIMES, Apr. 21, 2013, <http://articles.latimes.com/2013/apr/21/sports/la-sp-0421-dodgers-angels-tickets-20130421> (quoting StubHub spokesman Glenn Lehrman) (internal quotation marks omitted). Enmity between the Los Angeles Angels and StubHub ultimately led the Angels to instruct ESPN Radio not to sell airtime during Angels games to StubHub. Bill Shaikin, *Petco Park Changes Haven't Helped Padres*, L.A. TIMES, Apr. 27, 2013, <http://articles.latimes.com/2013/apr/27/sports/la-sp-0428-down-the-line-20130428> (concluding that "[t]he Angels have banished StubHub from their airwaves").

72. At least one ticket intermediary follows this business model. Scarlet Mist, an English online ticket exchange platform, bills itself as an "Ethical Ticket Exchange." See *How It Works and Other FAQ*, SCARLET MIST, <http://www.scarletmist.com/index.php/info/> (last visited Oct. 7, 2014). It does not charge a fee but does request donations. *Id.* And "[t]ickets change hands here at face value or less. If you want to sell a ticket for more than that, please do not use our service." *Id.*

73. Individual patrons may fall into one category at one event and the other category at a different event, leading them to hold views on the issue that are inconsistent, if not hypocritical. One regular event patron states, with no apparent irony, "If I have two Raiders tickets, that's \$150. . . . Those are my tickets and I should be able to do what I want. But, I agree that when I want to buy concert tickets, people buy 25 tickets and they sell out quickly. It drives up the price." Melody Gutierrez, *Ticket Turf War Heats Up in Sacramento*, CONSUMER FED'N CAL. (Apr. 9, 2013) (internal quotation marks omitted), <http://consumercal.org/ticket-turf-war-heats-up-in-sacramento/>.

imposed by the artist, the venue, the legislature, or Ticketmaster? Or should we be more worried about the twelve-year-old girl hungering to see Justin Bieber but priced out of the market by wily scalpers who snap up most of the tickets the instant they go on sale?

StubHub is more concerned with the Springsteen fan, though its motives are hardly altruistic. As an entity that makes as much as twenty-five percent on every ticket resale,<sup>74</sup> StubHub plainly profits most from a lively market in the resale of tickets. Those who support a hearty resale market argue that the laws of supply and demand should rule the market and that any ticket purchaser should be free to resell her ticket for any reason at whatever price the market will bear. They argue that a ticket is the property of the person who buys it and that any holder of a Honda should be free to alienate that Honda.<sup>75</sup> To the artist who argues that she, rather than an intermediary, should be profiting fully from all ticket revenues, StubHub's response presumably is, "Then set your initial prices higher!" In a ticket world run by StubHub, tickets will always be available to the consumer who wants to buy them at the going price, but they will be expensive.

Ticketmaster is more concerned with Justin Bieber's young fans. Its motives are a bit harder to discern, because it earns its commissions only on the initial ticket sale and might actually earn more if the initial price were higher. Moreover, Ticketmaster has itself entered the resale market, acquiring TicketsNow as a resale agent.<sup>76</sup> Ticketmaster claims to be

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74. StubHub may charge a fifteen percent commission to the seller, *see Selling Basics*, STUBHUB, *supra* note 67 (follow "See all help topics..." hyperlink; then follow "Selling tickets" hyperlink; then follow "Selling basics" hyperlink; then follow "Selling fees" hyperlink) (last visited Oct. 7, 2014), and a commission of up to ten percent to the buyer, *see Buying Basics*, STUBHUB, *supra* note 67 (follow "See all help topics..." hyperlink; then follow "Buying tickets" hyperlink; then follow "Buying basics" hyperlink; then follow "Fees for buying tickets" hyperlink) (last visited Oct. 7, 2014).

75. *See* Shaikin, *Battle Between Angels, StubHub Picks Up Steam*, *supra* note 71. "When fans buy tickets, we own them. . . . We have the right to buy, give away or sell our tickets however we choose, anytime we choose, in any way we choose, at any price we choose." *About Us*, FAN FREEDOM, <http://www.fanfreedom.org/about-fan-freedom/> (last visited Oct. 7, 2014). The webpage proceeds to note StubHub's support for FanFreedom. *Id.*

76. Ethan Smith, *Ticketmaster Buys Major Reseller*, WALL ST. J., Jan. 15, 2008, <http://online.wsj.com/articles/SB120036522352890281>; *see also* *When I Search for Tickets on Ticketmaster, I am Sometimes Offered the Option to Go to TicketsNow. Why is This?*, TICKETMASTER, [https://ticketmasterus.custhelp.com/app/answers/detail/a\\_id/1511](https://ticketmasterus.custhelp.com/app/answers/detail/a_id/1511) (last visited Oct. 7, 2014) ("These fan-friendly links between pages on Ticketmaster and TicketsNow give consumers the option to shop for resale tickets sold by fans and other sellers, without having to [worry] about the security of the transaction or the authenticity of the tickets."). Some critics have charged that Ticketmaster



protecting the sanctity of the market, ensuring that all tickets in the marketplace are legitimate and all buyers are shielded from fraud, counterfeiting, and shady resellers hoping to take advantage of novices.<sup>77</sup> It also defends the interests of an artist such as Kid Rock, who seeks to ensure that his less well-heeled fans can obtain concert tickets at reasonable prices, and the venue, which wants attendees to have disposable cash left over and available for ancillary purchases at the event. In short, Ticketmaster argues that a ticket is a mere license, that the transferability of licenses is subject to limitations under property and contract law, and that restrictions on many of the tickets it sells prevent initial purchasers from further transferring their very limited legal rights. In a ticket world run by Ticketmaster, tickets will be cheaper, but they will be hard to obtain and even harder to divest.

### III. WHAT RIGHTS DOES A TICKET CREATE UNDER PROPERTY AND CONTRACT LAW, AND ARE THOSE RIGHTS TRANSFERRABLE?

Part II viewed the ticket resale market through an economic lens. Part III, by contrast, will establish the legal nature of the relationship between the party that sells an event ticket and the initial purchaser of that ticket. Part III will also examine the restrictions these parties may place on the purchaser's legal capacity to transfer her rights. It turns out that the ticket holder obtains

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funnels some unsold tickets directly to TicketsNow without ever making them publicly available, thus allowing TicketsNow to garner the resale premium that Ticketmaster has criticized its competitor StubHub for earning. See, e.g., Adam Satariano & Greg Bensinger, *Springsteen Sellout Leads to Call for Probe of Ticketmaster*, BLOOMBERG.COM (Feb. 4, 2009, 8:35 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayD73kINfON4&refer=muse> ("Fans who couldn't buy tickets [through Ticketmaster] for the Springsteen shows in New York and New Jersey were instead steered to the reseller's [TicketsNow's] Web site, where prices were hundreds of dollars above face value.").

With TicketsNow apparently struggling, Ticketmaster is beta-testing a new website, TM+, that combines ticket sales and resales in one location. *Introducing TM+*, TICKETMASTER, <http://www.ticketmaster.com/tmplus> (last visited Oct. 7, 2014); Hannah Karp, *Ticketmaster Wants in on the Scalping Act*, WALL ST. J., Aug. 11, 2013, <http://online.wsj.com/news/articles/SB10001424127887323838204578654220372996886> (describing TM+ as "blurring the line" between primary and secondary ticket sales and predicting that it will encourage some artists to sell their tickets immediately on the secondary market and thereby reap higher profits at the expense of consumers); 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> ("Even anti-scalping artists see that the resale market, if it has to exist, might as well play out via Ticketmaster.").

77. See *When I Search for Tickets on Ticketmaster, I am Sometimes Offered the Option to Go to TicketsNow. Why is This?*, *supra* note 76.



fairly flimsy rights under both property and contract law, and the issuer often retains the legal right to revoke the ticket. Restrictions on further transfers are legally permissible and frequently are incorporated into the legal relationship between the two parties.

### A. *The Law of Property*

An event ticket is a revocable license under the law of property. The ticket holder enjoys the right to temporary possession of space at the venue with the permission of the property owner. As a licensee, the holder's property rights are extremely limited: The license gives the holder the right not to be considered a trespasser while she occupies the space. Moreover, she holds even this very limited right only until the property owner decides otherwise.<sup>78</sup> One property treatise refers to licenses as "the least important of the rights in the land of another" and "elusive."<sup>79</sup> The legal term "license" is commonly modified by the adjective "mere."<sup>80</sup> In most circumstances, these mere licenses are revocable at the will of the licensor.<sup>81</sup>

Licenses are to be distinguished from other more expansive property interests.<sup>82</sup> At the far extreme of the ownership spectrum, the holder of a parcel in fee simple absolute has the most extensive property rights available under the common law and may occupy the property for any purpose and exclude all others.<sup>83</sup> While a ticket to a concert or sporting event bears

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78. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 380 (3d ed. 1989) (noting that termination at the licensor's will is the feature that distinguishes a license from an easement). I am assuming that the issuer of the ticket is the owner of the property. In the case of a performance, however, the issuer may be the owner, a promoter, or the company retained to market the tickets. For purposes of this Article, this distinction usually will not matter: If the issuer of the ticket is not the owner of the venue, then it is presumably acting as the owner's agent.

79. *Id.* at 379.

80. *See, e.g.,* *Boswell v. Barnum & Bailey*, 185 S.W. 692, 692 (Tenn. 1916) ("[T]he right of the purchaser of a ticket to enter and remain at a theater, circus, race track, or private park is a mere revocable license.").

81. HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 337 (6th ed. 2005) (noting that licenses are also revocable at the will of the licensee).

82. *See, e.g., id.* (distinguishing licenses from easements).

83. *See, e.g.,* *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) (describing the citizen's conception of property rights as "vulgar and untechnical" and contrasting this inexperienced view with the "more accurate sense [of] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

almost no resemblance to this very expansive fee simple ownership,<sup>84</sup> it is somewhat more similar to a leasehold.<sup>85</sup> The ticket holder, like a tenant, is entitled to occupy space owned by another for a defined period of time.<sup>86</sup>

Leases are distinguished from licenses primarily by the level of exclusivity of possession.<sup>87</sup> Thus, a ticket reserving a specific seat might seem more lease-like than a general admission ticket.<sup>88</sup> Nonetheless, both of these types of tickets are probably considered licenses, given that neither interest allows the holder to exclude the owner of the underlying premises.<sup>89</sup> Tenants, by contrast, can exclude their landlord in most instances.<sup>90</sup> In fact, hotel occupants and dormitory residents, who hold broader property interests than baseball or Bonnaroo attendees, have been held not to be lessees.<sup>91</sup> The short duration of possession granted by an event ticket—typically just a few hours—also suggests that it is a license rather than a lease. Thus, while an event ticket displays characteristics of both a license and a lease, tickets are almost universally viewed as licenses.<sup>92</sup>

What little doubt might remain about the property rights a ticket creates is usually resolved by the ticket itself. For example, even if you hold season tickets to the New York Yankees, granting you the legal right to occupy the same seat on at least eighty-one different occasions over a six-month period—more total occupancy time than a weekly beach rental—the ticket to each game is a license that is “revocable at the sole and absolute discretion

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84. Some arenas have sold personal seat licenses (PSLs) that afford holders first-priority rights to purchase tickets to certain events at the venue. See, e.g., Rochelle Olson, *Personal Seat Licenses Will Raise \$100 Million for New Vikings Stadium*, STAR TRIBUNE (Minneapolis), Feb. 8, 2014, <http://www.startribune.com/politics/statelocal/244270481.html> (“Of the 65,400 seats in the Vikings’ new stadium, 75 percent will require game-goers to purchase seat licenses before they buy tickets. . . . Once paid, the license holder will retain seat rights throughout the team’s 30-year lease—provided they keep buying season tickets.”). To the extent that PSLs create more expansive rights for their holders than mere licenses, these additional rights are most likely enforceable under contract law. See discussion *infra* Part III.B.

85. See *State Block, Inc. v. Poche*, 444 So. 2d 680, 684 (La. Ct. App. 1984).

86. See HOVENKAMP & KURTZ, *supra* note 81, at 265.

87. See *id.* at 337.

88. See *id.* at 389 (observing that the resolution of this issue is fact-specific).

89. See *id.* at 337.

90. See *id.* (noting that the rights of a lessee are exclusive even as against the lessor).

91. CRIBBET & JOHNSON, *supra* note 78, at 240 (distinguishing leases from licenses and citing cases, while conceding that some of these issues are not completely settled).

92. See, e.g., *Soderholm v. Chi. Nat’l League Ball Club, Inc.*, 587 N.E.2d 517, 520 (Ill. App. Ct. 1992) (holding that a season ticket is a revocable license).

of the Yankees, with or without cause,” and the Yankees “reserve the right at anytime [sic], and without prior notice, to modify, amend or supplement the terms and conditions of this License.”<sup>93</sup> If the relationship the parties had created under property law were, in fact, a lease or something even more extensive, this ticket language could not transform that legal relationship into a revocable license.<sup>94</sup> But given that the property holder’s interest already bears so many of the attributes of a license, this language resolves any lingering uncertainty and confirms the intent of the parties to create a revocable license.<sup>95</sup> Case law dating back to the 1880s supports the view that an event ticket is a license.<sup>96</sup>

Interests in property are generally freely transferable.<sup>97</sup> In fact, the law protects the right to transfer property interests quite zealously, placing strict limits on restrictions on the alienability of land.<sup>98</sup> The law of property has long rejected restrictions on the transferability of a fee simple interest as violations of public policy.<sup>99</sup> This longstanding tenet quite properly views land as a limited natural resource that should be enjoyed by the party most willing to use it, and attempts by grantors or lenders to limit the power of current property owners to convey their property rights are strongly frowned upon.<sup>100</sup>

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93. 2011 Ticket License Plan—Invoice Terms & Conditions, YANKEES.COM, [http://newyork.yankees.mlb.com/nyy/ticketing/sth\\_terms\\_and\\_conditions.jsp](http://newyork.yankees.mlb.com/nyy/ticketing/sth_terms_and_conditions.jsp) (last visited Oct. 7, 2014). Note that this webpage includes information for the 2011 season; a search for more recent information suggests that it is available to prospective purchasers only by telephone or email inquiry. See 2013 Season Tickets, YANKEES.COM, [http://newyork.yankees.mlb.com/nyy/ticketing/season\\_dep\\_osit\\_faqs.jsp](http://newyork.yankees.mlb.com/nyy/ticketing/season_dep_osit_faqs.jsp) (last visited Oct. 7, 2014).

94. CRIBBET & JOHNSON, *supra* note 78, at 240; cf. *Garner v. Gerrish*, 473 N.E.2d 223, 225 (N.Y. 1984) (finding that a document denominated as a lease actually demonstrates more of the attributes of a life estate because of the legal relationship it creates).

95. The website of the New York Yankees agrees: “Payment by the Licensee to the Yankees for the Tickets constitutes Licensees [sic] acceptance of the License pursuant to the terms and conditions set forth in the Ticket Booklet and the terms and conditions set forth below.” 2011 Ticket License Plan—Invoice Terms & Conditions, YANKEES.COM, *supra* note 93.

96. See generally 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, 766–68 (2007) (citing cases).

97. See GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 273 (4th ed. 2013).

98. See CRIBBET & JOHNSON, *supra* note 78, at 84.

99. *Id.* “[A] conveyance ‘to A and his heirs, provided he never sells, mortgages, or otherwise transfers the land’ is a direct restraint on alienation and hence void.” *Id.*

100. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 41–42, 95 (8th ed. 2011). While mortgage lenders may not prohibit the mortgagor from transferring the property, they can make the

This black-letter property rule is relaxed considerably in the case of leasehold interests.<sup>101</sup> When property is leased, two different parties now have rights in that property: The tenant holds present possessory rights and the landlord holds a future interest in the nature of a reversion.<sup>102</sup> When the term of the lease expires, the tenant's possessory rights end and the landlord once again enjoys the same present possessory rights he held before the lease commenced.<sup>103</sup> Unlike the seller of a fee simple, who plans to sever all ties to the property forever, the landlord will regain possession at the end of the lease term. Thus, the landlord has a greater interest in limiting the tenant's ability to transfer possessory rights by assignment of the lease or subletting of the premises. The common law, therefore, is more receptive to the landlord's desire to restrict subleases or assignments than it is to the former fee owner's desire to control title after conveying the property in fee to someone else.<sup>104</sup> While restrictions of this type constrain the use and productivity of a finite resource, the limitations on transfer are relatively short in duration, and the reasons for permitting them outweigh this concern.<sup>105</sup>

Restrictions on subletting and assigning are both permissible and common. Leases may prohibit subleases and assignments outright; they may condition them on landlord consent, with or without an agreement that the landlord must be reasonable in granting that consent; they may require the tenant to remit a portion of any rent premium that it receives to the landlord; and they even may permit the landlord to terminate the lease if the tenant requests permission to sublet or assign. To the extent that a tenant hopes to

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debt due upon transfer. This rule makes sense, given that the mortgagee's decision to lend was based in part on the identity and creditworthiness of the mortgagor. Thus, the mortgagor is free to transfer the property, but that transfer may accelerate the borrower's obligation to repay the loan. See 12 U.S.C. § 1701j-3(b)(1) (2012) ("Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may . . . enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan.").

101. See NELSON, *supra* note 97, at 275.

102. See HOVENKAMP & KURTZ, *supra* note 81, at 266.

103. See *id.*

104. Former holders of a fee simple absolute can still exercise considerable control over the property. Owners can transfer property in fee simple determinable or fee simple subject to condition subsequent, each of which can cause the new possessor of the property to lose possession to the original owner or its transferee upon breach of a stated condition. See *id.* at 136–37. Owners can also create a wide variety of limited consecutive interests by granting a life estate followed by a series of contingent remainders. See *id.* at 130, 138.

105. See *id.* at 276.

profit by transferring her possessory rights to another party after the rental value of the property has increased, this last option allows the landlord to retain the entire rent premium by terminating the original lease and negotiating a new lease directly with the prospective occupant at the current market rate.

The law is much more willing to allow restraints on alienation in the leasehold context for two reasons. First, as just noted, the landlord holds a reversionary interest in the property and will retake possession of the property at the end of the lease term, unlike the fee simple seller that parts with all rights in the property forever. The landlord thus has more reason than the seller to care about the future condition of the property and the identity of the occupant. Second, at least in the case of an assignment, the landlord nearly always receives the periodic rent directly from the new occupant of the property and is concerned about the particular occupant's ability to pay. Even in the case of a sublease, the primary tenant's ability to pay her rent to the landlord is likely to be impaired if she is not receiving the sublease rent from the subtenant. The seller of a fee simple, by contrast, is normally paid in full at the time of the sale and need not worry any further about the credit of the buyer or any subsequent occupant. To the extent that the seller provides purchase money financing to the buyer, the seller enjoys adequate remedies under mortgage law and typically insists on having the right to make that financing due immediately if the buyer resells the property. This protects the first seller if the buyer resells to someone with poorer credit.

For these reasons—particularly the first one—the law should be even more willing to allow licensors to place restrictions on the rights of licensees to transfer their property rights to third parties.<sup>106</sup> This appears to be the

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106. There are other reasons why the identity of a licensee may lead to restrictions on the transferability of a license, particularly when the licensor is a public entity. For example, liquor licenses and gaming licenses ordinarily may not be transferred, and the purchaser of a tavern or casino must apply for a new license. See, e.g., *Frequently Asked Questions*, CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, [http://www.abc.ca.gov/questions/transfers\\_faq.html#Q\\_24](http://www.abc.ca.gov/questions/transfers_faq.html#Q_24), (last visited Oct. 7, 2014). In instances such as these, the licensor's concerns are not only the identity of the transferee and the ability of that transferee to meet its obligations, but also the suitability of the transferee as a license holder and the capacity of that transferee to secure a new license. See, e.g., *Mission Statement*, CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, <http://www.abc.ca.gov/mission.html> (last visited Oct. 7, 2014). Of course, these types of licenses differ in significant ways from licenses permitting the occupancy of real property.

case, although case law on the issue is sparse.<sup>107</sup> After all, a licensee's rights are so limited that it is rarely worth the cost to any of the three parties to litigate this issue.<sup>108</sup> But the licensor's ability to limit sublicenses or assignments seems self-evident, given the fact that most licenses are completely revocable at the will of the licensor. If the licensor nearly always has the right to terminate the license at any time and for any reason, there is little point in raising the issue of sublicensing or assignment: Even if the licensor has agreed to accept sublicensees, the licensor with objections to a new third-party occupant can always be rid of them by terminating the license immediately after the sublicense is effective.

The reasons courts allow landlords to limit subletting and assigning apply even more strongly in the license context. The owner's possessory rights to the space are expansive—fee simple ownership minus a few hours—while the ticket holder's rights are minimal and short-lived. Weighing against this concern is the law's desire to avoid the waste of a limited resource, and restrictions on transferring event tickets might lead to tickets going unused. On balance, the law seems to provide strong support for the licensor's legal right to prohibit the licensee from transferring an event ticket, and the licensee's rights are sufficiently transitory that the issue will rarely lead to litigation.

To summarize, a ticket to an artistic performance or athletic event is almost certainly a license under the law of property. The rights of a licensee are ephemeral. The licensor can readily revoke these rights, and the worst outcome the revoking party may face is a requirement that it refund the ticket price. Moreover, restrictions on the transfer of a licensee's rights appear to be at least as enforceable as restrictions on the transfer of a tenant's rights. Event tickets commonly include unambiguous limitations of this type. Thus, the holder of the typical event ticket probably has little or no right under the law of property to transfer that ticket to someone else.

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107. See generally Dreyer & Schwartz, *supra* note 96, at 769–72 (discussing the validity of restrictions on resales).

108. For sources providing some support for the view that a licensor may revoke a ticket license, see *NPS LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 WL 995483, at \*1 (Mass. Super. Ct. Jan. 26, 2009) (denying StubHub's motion for partial summary judgment and allowing a suit by the New England Patriots and the owners of Gillette Stadium—alleging the commission of several torts and unfair trade practices—to proceed), and Jeffrey R. Doty, Comment, *Inducement or Solicitation? Competing Interpretations of the "Underlying Illegality" Test in the Wake of Roommates.com*, 6 WASH. J.L. TECH. & ARTS 125, 136–39 (2010) (discussing the NPS case).

*B. The Law of Contracts*

Event tickets also create rights in the holder under the law of contracts.<sup>109</sup> The athlete or performer agrees to perform—often with many escape hatches<sup>110</sup>—and the holder of the ticket is entitled to attend the performance.<sup>111</sup> Most contract rights, including the right of a ticket holder to enjoy the performance or athletic event for which she has purchased her ticket, are freely assignable.<sup>112</sup> “In most cases, contractually acquired rights are fairly impersonal and ordinarily do not depend on the identity of the person who will *receive* the promised performance.”<sup>113</sup> There is no particular form the assignment of a contractual right must take, as long as the intention is clear.<sup>114</sup> The transfer of a ticket from the initial ticket holder to a subsequent holder, gratuitously or for consideration, would seem to transfer the holder’s rights effectively.<sup>115</sup> While an assignment changes the counterparty’s obligations to a minimal extent—now she must perform for someone else—the law of contracts generally regards a change this trivial as

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109. See, e.g., Joseph H. Beale, Jr., *Tickets*, 1 HARV. L. REV. 17, 23 (1887). “It seems to be settled, therefore, that railroad tickets, like other kinds of tickets, are now recognized as contracts.” *Id.* “A theatre ticket is a contract securing the right of admission to a place of amusement.” *Id.* at 24.

110. Events may be cancelled or rescheduled for any number of reasons without the performer breaching the contract. Sporting events may be postponed due to inclement weather, while concerts may be rescheduled if the performer becomes ill. Under the terms of the contract the parties have reached, these events ordinarily are not deemed to be breaches but usually entitle the ticket holder to attend the rescheduled event or to receive a refund. In fact, the event may not be firmly scheduled at the time the ticket is sold, as, for instance, in the case of sporting events for which the start time is to be determined later by the television network broadcasting the event.

Once again, the performer herself is not likely to be the party that enters into a contract with the spectator. Rather, the issuer may be a promoter or the venue itself, which in turn has contracted separately with the performer. This distinction, while important for other purposes, should be immaterial to the discussion that follows.

111. Note that the ticket holder ordinarily purchases her ticket from a performance venue or from a ticketing company, such as Ticketmaster, rather than from the performer. In these cases, the contractual obligor most likely will be that counterparty, rather than the performer. The performer, in turn, is contractually obligated to the venue. This distinction is important, but will rarely affect the contract law outcomes discussed here: The party seeking to limit the holder’s right to assign may be Ticketmaster, acting at the behest of the venue, rather than Miley Cyrus. See BUDNICK & BARON, *supra* note 19, at 260.

112. E. ALLAN FARNSWORTH, *CONTRACTS* 682 (4th ed. 2004).

113. JEFF FERRIELL, *UNDERSTANDING CONTRACTS* § 19.02(A) (2d ed. 2009).

114. FARNSWORTH, *supra* note 112, at 687.

115. *Id.* (noting that “the transfer of a contract right extinguishes the assignor’s right to performance by the obligor and gives the assignee a right to that performance”).

immaterial unless the identity of the initial ticket holder is of sufficient importance to the performing party.<sup>116</sup> It seems highly unlikely that a singer's promise to perform a concert is materially changed if one ticket holder in the arena is substituted for another.<sup>117</sup>

There are limits on the assignability of contract rights.<sup>118</sup> In some cases, the assignability of a contract may be limited by statute or on public policy grounds.<sup>119</sup> Many states limit the capacity of employees to assign their wages, for example, or of tort victims to assign the rights they have received under structured settlements.<sup>120</sup> The assignability of other contracts may be restricted because an assignment places greater risk on the counterparty.<sup>121</sup> The classic example is insurance contracts, in which the insurer agrees to insure one party, who then seeks to assign the insurance contract to a second party who presents greater risks to the insurer.<sup>122</sup>

Most importantly for present purposes, the contract parties can agree to limits on assignability.<sup>123</sup> While provisions of this type unquestionably place restraints on alienation, which courts disfavor under the law of property, restrictions on the assignability of a contract are generally upheld.<sup>124</sup> In these cases, the parties' freedom of contract apparently trumps the property rule that disallows limits on transferability.<sup>125</sup> Sometimes the parties make

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116. *Id.* at 692–94.

117. The reverse, of course, is often not true. If the performer is unable to perform and delegates his duty to a substitute, the ticket holder may legitimately claim that she is not receiving what she bargained for. Understudies may sometimes fill in for lead performers in Broadway shows, but a ticket holder will likely be extremely dissatisfied if headliner Barry Manilow designates Ozzy Osbourne as a substitute performer by delegating his contractual obligations to Mr. Osbourne, or vice versa. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 630 (6th ed. 2009) (“A duty is non-delegable where performance by the delegate would vary materially from performance by the obligor.”); *id.* (“[I]f the contract is premised on the artistic skill or unique abilities of a party, the duties are not delegable.”); *cf.* *Munchak Corp. v. Cunningham*, 457 F.2d 721, 725 (4th Cir. 1972) (holding that an NBA player was required to continue to perform after his team was sold, noting that “it is inconceivable that the rendition of services by a professional basketball player to a professional basketball club could be affected by the personalities of successive corporate owners”).

118. FARNSWORTH, *supra* note 112, at 691.

119. *Id.*

120. PERILLO, *supra* note 117, at 614–15.

121. See FARNSWORTH, *supra* note 112, at 691–92.

122. *Id.* at 694.

123. *Id.*

124. *Id.*

125. *Id.* at 694–95; PERILLO, *supra* note 117, at 615. This is not a new rule. See Beale, *supra*



any purported assignment absolutely void.<sup>126</sup> If this is so, the ticket holder simply lacks the power to transfer her right to another.<sup>127</sup> In other cases, the parties agree that any assignment is prohibited.<sup>128</sup> Courts often treat this latter type of limitation as a contractual promise, the remedy for which is damages rather than specific performance.<sup>129</sup> It is difficult to imagine what damages a performer suffers if one concert attendee is substituted for another, so a restriction of this weaker type is likely to impose little practical limitation on assignability.<sup>130</sup> Moreover, generalized prohibitions on assignment may be construed to prohibit the delegation of duties but not the assignment of rights.<sup>131</sup>

In short, contract rights such as those created by event tickets are freely assignable in most cases, but the parties may agree to place limits on the ticket holder's right to assign. These types of limitations are enforceable, although courts construe them strictly. However, a carefully worded limitation on assignment may make any attempt to transfer the ticket legally ineffective. Event tickets that include strong language making any effort to assign the ticket void would seem to bar transfers. In these cases, contract law appears to afford the initial holder of the ticket little legal ability to transfer that ticket to someone else.

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note 109, at 27 ("The ticket is transferable as a contract, by the custom. Tickets are often made to run to the bearer; but even without such words the ticket is generally transferable, unless it is in terms limited to the original holder.").

Comedian Louis C.K. has taken steps to prevent the scalping of tickets to his shows, threatening to invalidate tickets that have been resold at a profit and refund the original price. Dylan P. Gadino, *Louis C.K. Addresses Ticket Scalpers: 'It's a Tremendous Risk' (Exclusive)*, LAUGHSPIN (July 3, 2013, 12:35 PM), <http://www.laughspin.com/2012/07/03/louis-c-k-addresses-ticket-scalpers-its-a-tremendous-risk-exclusive/>. The comedian acknowledges that the practice is legal at many of the venues at which he performs. *Id.* "We're not treating it as a crime or even a wrong-doing. We are just competing with them [the scalpers], on behalf of my fans, to enforce the terms and conditions of our ticket sales and to keep the prices down." *Id.*

126. FARNSWORTH, *supra* note 112, at 694.

127. RICHARD A. LORD, 29 WILLISTON ON CONTRACTS § 74:22 (4th ed. 2003) ("To be effective, the antiassignment clause should contain a specific prohibition on the power to make an assignment and specifically state that any attempted assignments will be void or invalid.").

128. *See* FARNSWORTH, *supra* note 112, at 694.

129. *Id.* at 694–95; PERILLO, *supra* note 117, at 615–16.

130. PERILLO, *supra* note 117, at 615–16.

131. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 920 (5th ed. 2011).

### C. Harmonizing Property and Contract Law

The fact that a ticket gives its issuer and its holder legal rights and remedies under both the law of property and the law of contracts is neither inconsistent nor unusual, even in cases where those two bodies of law are not entirely in accord with one another. The two parties' privileges and obligations under property law and contract law may complement each other without being entirely consistent. For example, a property owner may be acting within her property rights when she asks a licensee to leave without cause, but she also may be breaching a contract with that occupant and thus required to refund the admission charge.<sup>132</sup> In this case, the parties would have created a revocable license under property law, but would concurrently have agreed by contract that the licensor would not revoke that license in the absence of bad conduct by the licensee.

The same phenomenon is seen in landlord-tenant law, where courts in recent decades have imported principles from the law of contracts to supplement strict common law property rules. Leases have gradually evolved from pure conveyances under property law into an awkward hybrid of the law of property and the law of contracts. Courts in many states have, for instance, found an implied warranty of habitability in residential leases, even though implied warranties of this type were not a feature of common law leases.<sup>133</sup> Similarly, courts have long enforced real covenants against successor owners under property law, thereby allowing parcels of property to be bound by contractual rights that run with the land in accordance with property principles.<sup>134</sup> In these settings, two neighboring property owners

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132. See, e.g., *Ticketmaster Purchase Policy*, TICKETMASTER, <http://www.ticketmaster.com/h/purchase.html> (last visited Nov. 30, 2014) ("A ticket is a revocable license and admission may be refused upon refunding the ticket's face amount."); *Boswell v. Barnum & Bailey*, 185 S.W. 692, 692-93 (Tenn. 1916) ("If the license to enter be revoked by the proprietor and the ticket holder ejected without unnecessary force, the only remedy of the holder of the ticket is an action for breach of the contract, and his damages are limited to the price of the ticket and any expenses incident to the purchase of the ticket and attending the place of amusement."); cf. HOVENKAMP & KURTZ, *supra* note 81, at 389 (discussing inconsistent judicial treatment of this issue).

133. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1076-77 (D.C. Cir. 1970) ("In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability." (footnotes omitted)); *Hilder v. St. Peter*, 478 A.2d 202, 208 (Vt. 1984) (adopting the implied warranty of habitability while acknowledging that this doctrine is derived from contract law).

134. See, e.g., *Gallagher v. Bell*, 516 A.2d 1028 (Md. Ct. Spec. App. 1986) (discussing when

may be bound to one another because prior owners of their respective lots entered into a contractual agreement decades earlier.

What we see, then, is that under both property law and contract law default rules, license rights are readily assignable, but the original parties frequently agree to limit that assignability under one or both bodies of law. Because tickets to cultural and athletic events are classified as revocable licenses under property law, the licensor may revoke the ticket or may limit the holder's legal capacity to assign her ticket to a third party without the consent of the licensor. The rule under the law of contracts depends on the terms of the individual contract, but as just noted, event tickets may include muscular restrictions on transfer. Thus, the result under contract law focuses on the particular terms of the contract in question but will often correspond to the rule under property law: A ticket holder cannot transfer a ticket without the issuer's permission.

#### IV. THE ROLE OF THE PRIVATE MARKET AND THE ROLE OF THE GOVERNMENT

Part II focused on the economics of the market in ticket sales and resales. Part III discussed what an event ticket is, what legal rights a ticket creates, whether the first purchaser of a ticket can transfer it, and legal and practical limits on these transfer rights. Part IV will examine the roles that private parties and the government can and should play in the market for event tickets.

The private market—using the mechanism of common law rules—has largely answered the question of whom it will protect. Event tickets are licenses under the law of property and contracts under contract law. Parties to a license are free under property law to restrict the ability of the licensee to transfer her limited property rights to someone else; for that matter, the licensor may revoke the license entirely. Parties to a contract are free to invalidate or restrict attempted transfers of the rights the contract creates. The issuer of an event ticket often restricts the transferability of the ticket in these ways. There is little reason for the licensor not to take these precautions, since it is always free to waive these restrictions expressly or simply look the other way if a ticket holder violates them. Thus, property law and contract law already supply a default rule—free transferability—

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promises by one property owner are binding on successor owners).

along with straightforward ways for the parties to sidestep that default rule. Artists, sports teams, and venues frequently take advantage of their legal ability to prohibit or limit secondary market transfers of tickets by placing transferability restrictions on their websites and on the tickets themselves. Ticket issuers enjoy the legal capacity to limit ticket resales and commonly do so, subject only to the more practical question of how they will enforce these restrictions.

That answers the transferability question legally but not economically or morally. Part II described the economics of the ticket resale market and set forth the opposing positions that artists can adopt. Some, such as Kid Rock, wish to limit resales strictly, with the goal of keeping list prices low and enabling fans of lesser means to attend concerts. Others, such as the Rolling Stones, have set list prices extremely high in the belief that this will maximize their overall revenue while eradicating the resale market, even though this pricing strategy may limit attendance to only the most affluent enthusiasts. Many others have set list prices lower than the market will bear seemingly without concern as to whether initial purchasers resell their tickets or not. These artists are willing to accept less revenue than they might otherwise command while letting the marketplace determine precisely who attends and at what price.<sup>135</sup> Economically, the inquiry becomes whether the act decides to keep prices affordable for all fans, even those who would willingly pay more; to reward the most loyal (and well off) fans who are willing to pay top dollar for tickets; or to refrain from weighing in on the question, perhaps because the artist simply does not care much one way or the other as long as there is a backside in every seat. Morally, there is no correct answer to this question. Different entertainers feel differently, and property and contract law allow them to respond however they choose, which they have done.<sup>136</sup>

This divergence of opinion is not surprising and is displayed in other areas of the entertainment industry as well. Some artists are notorious for

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135. As previously discussed, some artists apparently enter this free marketplace themselves, obtaining tickets at the box office price and then scalping them and keeping the price differential. See *supra* note 33 and accompanying text.

136. While there may not be any morally correct answer to this question, it does strike me as troublesome that one ticketholder recently offered a ticket to see the Dalai Lama in Santa Clara, California, at a price of \$2,370. *Dalai Lama Tickets*, STUBHUB (Feb. 24, 2014) (screenshot) (on file with author). StubHub apparently agrees, as a pop-up window on the page noted that, as this was a charitable event, StubHub was donating its commissions from the event. *Id.*

policing fan recording of live events. They may believe that bootleg recordings diminish sales of official ones and thus reduce overall royalty income to the performer. Or they may favor the quality control that the studio setting provides, preferring to keep lower quality works out of circulation.<sup>137</sup> These artists have the legal right to prevent fans from recording their shows, and some artists exercise that right zealously, though with considerably more difficulty in today's world of smartphones and YouTube. Frank Zappa went so far as to release official recordings of some popular concerts in a "Beat the Boots" series designed to compete with unauthorized sales by bootleggers.<sup>138</sup> The first track on one of these albums, entitled "That Makes Me Mad (Live)," is an interview of the artist discussing bootlegging in which he complains that bootleggers have released live versions of new songs before he could release the studio version.<sup>139</sup> Other performers, such as the Grateful Dead and Phish, encourage and enable the practice of fan recordings, apparently believing that widespread trading and sharing of live recordings enhances the aura surrounding the band and intensifies fan loyalty. Live recordings are widely available for streaming online, with the artists' blessings, and live concerts regularly include designated taper sections.<sup>140</sup> The answer to this question is a matter of personal preference. Different approaches may suit different types of acts, and the law provides flexibility here.<sup>141</sup>

The discussion above assumes that the power to determine the terms of the ticket resides exclusively with one of the parties, as it historically has. Although a ticket is a license and a contract, initial ticket purchasers have historically had no leverage in negotiating its terms: Artists and venues made

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137. See FRASCOGNA, HOWELL & HETHERINGTON, *supra* note 45, at 59 ("An artist's concert performance is one of the most crucial components of his or her career. . . . With so much riding on the success of the performance, it is critical that the performance be carefully planned from its inception until the final note is played.")

138. See, e.g., FRANK ZAPPA, BEAT THE BOOTS: AS AN AM (LIVE) (Rhino Entertainment 1991), available at <https://itunes.apple.com/us/album/beat-the-boots-as-an-am-live/id284982445> (last visited Nov. 26, 2014).

139. FRANK ZAPPA, *That Makes Me Mad (Live)*, on BEAT THE BOOTS: AS AN AM (LIVE) (Rhino Entertainment 1991), available at <https://itunes.apple.com/us/album/beat-the-boots-as-an-am-live/id284982445> (last visited Nov. 26, 2014).

140. See *Taping Policy*, PHISH.COM, <http://www.phish.com/faq/> (follow "Taping Policy" hyperlink) (last visited Oct. 9, 2014) (including a thorough discussion of the band's taping policy).

141. See, e.g., 17 U.S.C. § 1101 (2012) (prohibiting recording of a live musical performance without the performer's consent).

tickets available to fans, and the fans could choose whether or not to purchase these tickets but could not alter their terms.<sup>142</sup> Unless fan dissatisfaction became widespread and intense, there was little likelihood that artists and venues would modify the provisions of their licenses, and they generally did not do so. The resale market, by contrast, creates a setting in which the two parties have more equal leverage. It may be too late to renegotiate the terms of the license, but the price can rise or fall based on the desirability of the ticket, including its legal terms.<sup>143</sup>

With the rapid recent growth of social media, fans now have quicker and more effective avenues for expressing their irritation with Ticketmaster and other initial sellers than they formerly had, exercising the “voice” option so clearly described by Albert O. Hirschman.<sup>144</sup> This fan displeasure has become particularly intense in response to Ticketmaster’s introduction of paperless ticketing, which it recently renamed “Credit Card Entry.”<sup>145</sup> In an effort to prevent unauthorized ticket resales (which, in the case of paperless ticketing, often means virtually *any* ticket resales), purchasers of paperless tickets do not receive a ticket.<sup>146</sup> Rather, the purchaser must present both a photo identification card and the credit card used to purchase the tickets in order to gain entry to the venue.<sup>147</sup> Some sports teams employ a variation of

142. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 598–600 (1991) (Stevens, J., dissenting) (discussing the weak bargaining position of most ticket purchasers).

143. Cf. David E. Harrington, *Lessons from a Scalper*, REGULATION, Spring 2009, at 16, 19, available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2009/2/v32n1-2.pdf> (examining the resale market for tickets to an Ohio State-Penn State football game and concluding that “the secondary market for ticket sales appears to penalize sellers who set prices well above predicted prices by reducing the probability that they will find buyers for their tickets”).

144. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970):

[D]issatisfied consumers . . . rather than just go over to the competition, can ‘kick up a fuss’ and thereby force improved quality or service upon delinquent management. . . .

. . . Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion.

See generally GLENN REYNOLDS, AN ARMY OF DAVIDS (2006) (describing how recent changes in technology have empowered ordinary citizens).

145. See *Ticketmaster Credit Card Entry*, TICKETMASTER, <http://www.ticketmaster.com/creditcardentry> (last visited Oct. 10, 2014).

146. *Id.* (follow “How does Credit Card Entry work” hyperlink) (“[T]he card you used to buy your ticket is your ticket.”).

147. *Id.* (follow “Why is Credit Card Entry the only option for some events, or some sections?”



Paperless ticketing seems like a cumbersome approach, a throwback to the days when hard copies of credentials were necessary to establish one's identity.<sup>155</sup> Purchasers must present two physical documents that are supposedly unique in order to gain the admission for which they have already paid, which is one more than is required for entry to the secure area of a commercial airport.<sup>156</sup> Ticket transfers, including gifts from non-attendees, are impossible in many cases.<sup>157</sup> In an era in which people pay bills, banks clear checks, and even the Internal Revenue Service accepts tax filings without any documents physically changing hands, the so-called paperless ticketing system seems like an idea that was obsolete long before it was developed. Moreover, paperless ticketing leads to more empty seats, as initial purchasers whose plans change are stuck with their non-transferable licenses.<sup>158</sup> Empty seats embarrass the performer or team, look bad to television viewers and those who attend the event, and deprive venues of opportunities to sell parking, merchandise, and concessions.<sup>159</sup> Yet some top artists and events, including Miley Cyrus, Bruce Springsteen, Justin Bieber,

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ticketing may permit ticket transfers. *Id.* (follow "Can I sell Credit Card Entry tickets?" hyperlink).

155. By way of comparison, note that Article 3 of the Uniform Commercial Code requires a holder in due course of a negotiable instrument to be in possession of the original document executed by its maker. U.C.C. § 3-302(a) (West, Westlaw through 2013 Ann. Meetings) (stating that a "holder in due course" must be a "holder"). Negotiation of an instrument requires physical delivery of the original. *Id.* § 3-201(a) ("'Negotiation' means a transfer of possession . . . to a person who thereby becomes its holder."). This requirement, perhaps sensible and in accord with prevailing business practice when the UCC first was adopted, makes far less sense in today's world of electronic transfers. Lost original notes have caused huge headaches in recent years for lenders seeking to foreclose home mortgage loans. *See, e.g.,* *Verizzo v. Bank of New York*, 28 So. 3d 976, 978 (Fla. Dist. Ct. App. 2010) (holding that a bank's loss of a promissory note created "a genuine issue of material fact as to whether the Bank of New York owns and holds the note and has standing to foreclose the mortgage").

156. Paperless ticketing requires production of the credit card used to purchase the ticket and a valid government-issued photo ID. TICKETMASTER, *supra* note 145 (follow "How does Credit Card Entry work" hyperlink). Processing through airport security requires presentation of a boarding pass and photo ID, but the boarding pass is not a unique, original document—in fact, the passenger can print numerous copies if she so desires.

157. *Id.* (follow "What if I bought the tickets but I'm not going to the event?" hyperlink) (allowing free transfers for some tickets).

158. *See, e.g.,* Bachelor, *supra* note 149.

159. Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, 30 ENT. & SPORTS L. 1, 31 (Nov. 2012). On the other hand, if initial purchasers are permitted to resell their tickets—perhaps at a loss, under these circumstances—those fans who paid full price will justifiably resent neighbors who obtained last-minute tickets at a steep discount and may hold the team and the venue responsible for this perceived unfairness. *Id.* at 32.



and the NCAA Men's Final Four, have insisted on using paperless tickets, and Ticketmaster has been more than happy to accommodate this desire.<sup>160</sup>

Paperless ticketing is still too new for industry professionals to ascertain whether the initial consumer outrage will blow over, as it seems to have done for airline add-on fees such as checked-baggage charges. Alternatively, fan backlash might intensify and lead artists and ticket sellers to adjust or abandon this approach, as may yet happen with the excessive resort fees that continue to raise the ire of hotel guests.<sup>161</sup> Consumers are recognizing yet again that Twitter and Facebook give them newfound power to object to the terms of one-sided licenses that might formerly have seemed non-negotiable. While there still may be no direct negotiations between the ticket issuer and the first purchaser, issuers may modify their practices going forward in response to consumer criticism and revenue decreases.

Fan dissatisfaction that is strong enough can also foster industry competition and catalyze changes in ticketing policies. Promoters can take their business from a state that permits paperless ticketing to a neighboring state that strictly limits it. Or new entities that provide more popular services can enter the market and, perhaps, succeed. Given the number of large arenas over which Ticketmaster holds exclusive ticketing rights, it will be difficult for competition to arise in some segments of the entertainment market.<sup>162</sup> At the same time, the ultimate monopolist in many of these transactions is the performer:

There is only one Dave Matthews Band; there is only one Madonna—meaning that a promoter doesn't have the option

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160. Sonya Stinson, *Paperless Ticket Trend Leaves Unbanked Outside the Gate*, CREDITCARDS.COM (Oct. 4, 2013), <http://www.creditcards.com/credit-card-news/paperless-tickets-unbanked-1273.php> (listing some of the headliners switching to paperless ticketing, emphasizing that consumers who lack credit or debit cards are thereby excluded from attending, and noting opposition to the practice from groups including the National Consumers League and the American Antitrust Institute).

161. See, e.g., Christopher Elliott, *Travelers Want 'Resort' Fees to Check Out—Permanently*, USA TODAY, Jan. 13, 2013, <http://www.usatoday.com/story/travel/hotels/2014/01/12/hotel-resort-fee-service-charge/4441287/> (observing how individual hotel owners benefit from these fees at the expense of both guests and the hotel chains and noting the possibility of intervention by the Federal Trade Commission).

162. Albert A. Foer, Op-Ed., *Who Owns My Ticket?*, N.Y. TIMES, Jan. 20, 2013, at A27 (“[R]estrictive paperless-ticket practices depart from bedrock market principles by unjustifiably limiting consumer choice and suppressing free competition. They also might violate federal and state antitrust and consumer-protection laws.”).

between this Rolling Stones and that Rolling Stones. If they want to promote a Stones concert, they have to deal with the one and only Rolling Stones. The reality is not several Rolling Stones bidding against each other to secure a promoter. As such, the artist, based on their guarantee and deal with the promoter, wields tremendous power over the ticket price.<sup>163</sup>

Negative fan response to problems with the ticketing process has had another predictable consequence: the introduction of legislation that would regulate ticketing practices in various ways. Proposed federal legislation, the Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009—yes, the BOSS ACT—died in committee.<sup>164</sup> New York became the first state to limit paperless ticketing, in 2010, while concurrently reaffirming previously enacted provisions repealing restrictions on scalping.<sup>165</sup> The New York law confirms that a ticket is a license but also places limits on the ability of the ticket issuer to restrict the transfer of that license.<sup>166</sup> The law prohibits the issuer from restricting sales of tickets that are part of a subscription or season ticket package or barring the initial or secondary market purchaser of any such ticket from attending the event.<sup>167</sup>

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163. BUDNICK & BARON, *supra* note 19, at 195–96.

164. Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, H.R. 2669, 111th Cong. (2009), 2009 CONG US HR 2669 (Westlaw), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr2669ih/pdf/BILLS-111hr2669ih.pdf>; see also Zachary H. Klein, *Who's the BOSS? The Need for Regulation of the Ticketing Industry*, 5 BROOK. J. CORP. FIN. & COM. L. 185 (2010) (discussing the BOSS ACT and underscoring the need for federal legislation to address improper behavior in the ticketing market). Another federal bill, the “Ticket Act,” also died in committee. Ticket Act, H.R. 4795, 111th Cong. (2010), 2009 CONG US HR 4795 (Westlaw), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4795ih/pdf/BILLS-111hr4795ih.pdf>.

165. The New York law is found at N.Y. ARTS & CULT. AFF. LAW §§ 25.01–25.35 (McKinney, Westlaw through 2014 legislation) and is also available through the New York State Department of State, Division of Licensing Services website. See *Licensing of Ticket Resellers (Sept. 2014)*, N.Y. DEP’T ST., <http://www.dos.ny.gov/licensing/lawbooks/TicketReseller.pdf> (last visited Oct. 10, 2014). The law was scheduled to sunset but has since been extended through May 14, 2015. State Assemb. A8727A-2013, 2014 Leg., Reg. Sess. (N.Y. 2014), NY LEGIS LEG. MEMO 21 (2014) (Westlaw), available at <http://open.nysenate.gov/legislation/bill/A8727A-2013>.

For a thorough and fascinating discussion of the political compromises leading up to the New York law’s passage, see Bennett Liebman, *Reselling Tickets in New York: 2010*, N.Y. ST. B. ASS’N ENT., ARTS & SPORTS L. BLOG (July 13, 2010, 2:53 PM), [http://nysbar.com/blogs/EASL/2010/07/reselling\\_tickets\\_in\\_new\\_york.html](http://nysbar.com/blogs/EASL/2010/07/reselling_tickets_in_new_york.html).

166. ARTS & CULT. AFF. § 25.30(1) (Westlaw).

167. *Id.* § 25.30(1)(A)–(B). This provision aims to prevent teams that issue season tickets from

In addition, the New York legislation prevents ticket issuers from selling tickets to secondary market resellers that they own or control.<sup>168</sup> It prohibits purchasers from using “automated ticket purchasing software” designed to circumvent seller limits on ticket purchases.<sup>169</sup> And while the New York law does not completely bar the use of paperless ticketing, it does require the issuer of the ticket to offer every purchaser the option of purchasing a ticket—paperless or otherwise—that is transferable without restriction or additional charge.<sup>170</sup>

Two other states with huge sports and entertainment industries, Tennessee and California, have not yet succeeded in adopting legislation addressing these issues. Interestingly, the bills introduced in these two states were in complete opposition to one another. Yet in each case, strong lobbying by parties adverse to the bill defeated the proposal, at least for now.

The “Fairness in Ticketing Act,” introduced in the Tennessee legislature in 2013 but not enacted, was relatively modest in its reach.<sup>171</sup> The bill’s

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punishing holders who resell tickets to some of the games or the purchasers of those tickets. *See id.* Note how the standard language on the website of the New York Yankees addressing the transferability of season tickets appears to conflict with this law. *See supra* note 93 and accompanying text.

168. ARTS & CULT. AFF. § 25.30(3) (Westlaw).

169. *Id.* § 25.24(2). This provision is aimed at “bots” that enable scalpers to flood ticketing websites with purchase requests as soon as tickets become available, thereby shutting out most consumers and cornering the market on tickets to that event. *See, e.g.,* Ben Sisario, *Ticketmaster Accuses 21 of Fraudulent Ticket Buying*, N.Y. TIMES, May 2, 2013, at B8 (describing suit by Ticketmaster against members of a ticket-buying ring that allegedly purchased as many as 200,000 tickets per day ahead of the public). Ticketmaster’s own website also prohibits the use of bots. *See Terms of Use*, TICKETMASTER, [http://www.ticketmaster.com/h/terms.html?tm\\_link=help\\_nav\\_5\\_terms](http://www.ticketmaster.com/h/terms.html?tm_link=help_nav_5_terms) (last visited Oct. 10, 2014) (“[A]s a condition precedent [to using this site], you agree that you will not: . . . [u]se any automated software or computer system to search for, reserve, buy or otherwise obtain tickets . . . ; [or] [a]ccess, reload or refresh transactional event or ticketing pages, or make any other request to transactional servers, more than once during any three-second interval . . . .”); *see also* Ticketmaster L.L.C. v. RMG Techs., Inc., 507 F. Supp. 2d 1096, 1116–17 (C.D. Cal. 2007) (granting Ticketmaster’s motion for preliminary injunction against a company that allegedly operated and sold bot software in violation of Ticketmaster’s terms of use).

Nonetheless, ticket scalpers have been quite creative in finding ways around these restrictions, including outsourcing to India the labor-intensive task of typing in the random distorted letters generated by some online ticketing software. *See Happel & Jennings, supra* note 17, at 150 & n.108.

170. ARTS & CULT. AFF. § 25.30(1)(C) (Westlaw). Some tickets are excepted from this requirement, including promotional tickets offered to members of certain groups, such as “persons with disabilities, students, religious or civic organizations, or persons demonstrating economic hardship.” *Id.* § 25.30(2).

171. H.R. 1000, 108th Gen. Assemb., 1st Reg. Sess. (Tenn. 2013), 2013 TN H.B. 1000 (NS)

stated findings noted the prevalence of “bad actors in the ticket resale market who prey on fans of live entertainment”<sup>172</sup> and claimed that the legislature needed to act “to ensure a free market for tickets whereby consumers know what they are buying, artists and teams have the ability to ensure that fans have access to great seats at fair prices, and deceptive, anonymous resale and deceptive Internet marketing practices are prohibited.”<sup>173</sup>

The bill confirmed that tickets are revocable licenses valid for only a limited time.<sup>174</sup> It would have required ticket brokers, as defined in the Act,<sup>175</sup> to register with the state and to disclose to prospective purchasers “the difference between the face value of the ticket and the amount the ticket broker is charging the purchaser for such ticket.”<sup>176</sup> Similar restrictions would have applied to “resale web sites.”<sup>177</sup>

Without expressly mentioning paperless ticketing, language in the bill would apparently have permitted it:

To preserve the rights of consumers to secure tickets to entertainment events through safe and reliable means and to protect freedom of enterprise, nothing in this chapter shall prevent operators of places of entertainment, event presenters or their agents from utilizing any ticketing methods for the initial sale of tickets, through any medium, whether existing now or in the future.<sup>178</sup>

The bill would not have prohibited the “resale or offering for resale of any ticket . . . in any area where such resale or offering for resale is authorized in writing by the organizer of the entertainment event, and the

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(Westlaw), available at <http://www.capitol.tn.gov/Bills/108/Bill/HB1000.pdf>. For more on the legislative birth and death of this bill, see *Bill Information for HB1000*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1000> (last visited Oct. 10, 2014).

172. Tenn. H.R. 1000 § 62-45-102(2), 2013 TN H.B. 1000 (NS) (Westlaw).

173. *Id.* § 62-45-102(5).

174. *Id.* § 62-45-110.

175. *Id.* § 62-45-103(24).

176. *Id.* § 62-45-105(a)(3).

177. *Id.* § 62-45-106(a)–(b).

178. *Id.* § 62-45-107(2). Tennessee law already prohibits the use of ticketing “bots” that allow resellers to “circumvent[] any security measures on the ticket seller’s web site, circumvent[] any access control systems of the ticket seller’s web site, or circumvent[] any controls or measures that are instituted by the ticket seller on its web site to ensure an equitable ticket buying process.” Tenn. Code Ann. § 39-17-1105 (West, Westlaw through 2014 2d Reg. Sess.) (effective July 1, 2008).

owner or operator of the place of entertainment where such contest or event is held.”<sup>179</sup> While the implication of this language is that ticket resale—including, perhaps, online transactions—are otherwise prohibited, no language elsewhere in the bill expressly prohibited other types of ticket resale. Violations of the proposed law would have constituted a Class B misdemeanor.<sup>180</sup> The bill died in April 2013 in the face of strong opposition by StubHub and others in the ticket resale industry, along with a broad range of concerned citizens and groups ranging from Change.org to the Tennessee Tea Party.<sup>181</sup>

Ironically, an entirely divergent bill, aggressively supported by StubHub,<sup>182</sup> failed in California at almost the exact same time in the face of strong lobbying by its opponents.<sup>183</sup> As originally proposed, the California bill would have protected a far different group of consumers than those safeguarded under the failed Tennessee legislation. Rather than demanding an affirmative writing before a ticket could be transferred, as the Tennessee proposal seemingly sought to require, the initial draft of the California legislation would have placed strong restrictions on the ability of the initial issuer of that license to limit its further transfer. The California proposal would have made it unlawful to “[p]rohibit or restrict the resale or offering

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179. Tenn. H.R. 1000 § 62-45-107(1), 2013 TN H.B. 1000 (NS) (Westlaw).

180. *Id.* § 62-45-108 (noting that such offenses are “punishable only by fine”).

181. Tom Humphrey, *Fairness in Ticketing Act Proponents: Maybe Next Year*, KNOXVILLE NEWS-SENTINEL KNOXBLOGS (Apr. 7, 2013), [http://knoxblogs.com/humphreyhill/2013/04/07/fairness\\_in\\_ticketing\\_act\\_prop/](http://knoxblogs.com/humphreyhill/2013/04/07/fairness_in_ticketing_act_prop/); *Protect Tennessee Sports and Music Fans*, CHANGE.ORG, <http://www.change.org/petitions/protect-tennessee-sports-and-music-fans> (last visited Oct. 10, 2014) (opposing Act; sponsored by StubHub affiliate Fan Freedom); *Conservative Activists Join Fight Against Fairness in Ticketing Act*, BUSINESSWIRE.COM (Mar. 24, 2013, 4:25 PM), [http://www.businesswire.com/news/home/20130324005026/en/Conservative-Activists-Join-Fight-Fairness-Ticketing-Act#.VDjRN\\_ldXos](http://www.businesswire.com/news/home/20130324005026/en/Conservative-Activists-Join-Fight-Fairness-Ticketing-Act#.VDjRN_ldXos) (opposing Act; press release from Fan Freedom); Ken Marrero, *TicketMaster and States are Stealing Your Property Rights*, REDSTATE (Apr. 5, 2013, 12:59 PM), [http://www.redstate.com/blue\\_collar\\_muse/2013/04/05/ticketmaster-and-states-are-stealing-your-property-rights/](http://www.redstate.com/blue_collar_muse/2013/04/05/ticketmaster-and-states-are-stealing-your-property-rights/) (“This isn’t preventing scalping. This is government picking and choosing winners in the market.”).

182. See Hannah Karp, *Scalpers Beware: New Laws Redefine What Is a Ticket*, WALL ST. J., Apr. 26, 2013, <http://online.wsj.com/news/articles/SB10001424127887323551004578441132136821420>.

183. State Assemb. 329, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2013), 2013 CA A.B. 329 (NS) (Westlaw) (version of Mar. 21, 2013), available at [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0301-0350/ab\\_329\\_bill\\_20130321\\_amended\\_asm\\_v98.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0301-0350/ab_329_bill_20130321_amended_asm_v98.pdf). For more on the legislative history of this bill, see *AB-329 Ticket Sellers: Equitable Online Ticket Buying Process: Sale or Use of Circumventing Software.*, CAL. LEGIS. INFO., [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB329](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB329) (last visited Oct. 10, 2014), and Karp, *supra* note 182.

for resale” of event tickets;<sup>184</sup> to “[p]urport to impose license or contractual terms” prohibiting the resale or limiting the resale price of the ticket;<sup>185</sup> to require the initial purchaser “to agree not to resell the event ticket, or to resell the event ticket only through a specific means approved by the ticket issuer”;<sup>186</sup> to bring certain legal actions based on unlawful prohibitions;<sup>187</sup> to impose penalties on resales without the issuer’s permission;<sup>188</sup> or to attempt to cap resale prices.<sup>189</sup> Perhaps most notably, the bill would have expressly prohibited paperless ticketing.<sup>190</sup> The original version of the California bill failed after intense lobbying on both sides.<sup>191</sup> A vastly watered-down version of this legislation—one sentence in length—was ultimately signed into law. This final iteration merely prevents the use or sale of sophisticated “bot” software to circumvent computerized limits on initial ticket sales.<sup>192</sup>

## V. WHAT HAPPENS NEXT?

It is worth recapping the current state of the market in ticket sales and resales. To begin with, an event ticket is a revocable license under the law

184. Cal. State Assemb. 329 § 22501(a)(1), 2013 CA A.B. 329 (NS) (Westlaw).

185. *Id.* § 22501(a)(2). Note how this language addresses both the property law and contract law characteristics of the ticket.

186. *Id.* § 22501(a)(3).

187. *Id.* § 22501(a)(4).

188. *Id.* [sic]. Note that two consecutive subsections are numbered (4) and that this second subsection (4) should probably be numbered (5).

189. *Id.* § 22501(a)(6) [sic]. This subsection (6) should probably be numbered (7).

190. *Id.* § 22501(a)(5) [sic] (prohibiting technologies that would restrict ticket resales, including “issuing event tickets in an electronic form that is not readily transferrable to a subsequent purchaser or conditioning entry into the venue on presentation of a token, like the original purchaser’s credit card or state-issued identification card, that cannot be readily transferred to a subsequent purchaser”). This subsection (5) should probably be numbered (6).

191. See Karp, *supra* note 182 (describing “an industry in turmoil,” a “philosophical debate over the question of ticket ‘ownership,’” and “dueling companies [that] have been at war since 2010”).

192. CAL. BUS. & PROF. CODE § 22505.5 (West, Westlaw through 2013 portion of 2013–2014 Legis. Sess.), available at [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?jsessionid=69eff6fd253cc85459120c61e4c0?bill\\_id=201320140AB329&search\\_keywords=ticket](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?jsessionid=69eff6fd253cc85459120c61e4c0?bill_id=201320140AB329&search_keywords=ticket). This 2013 version of the bill, which became effective on January 1, 2014, was amended and expanded modestly in July 2014. State Assemb. 1832, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014), 2014 Cal. Legis. Serv. Ch. 158 (A.B. 1832) (Westlaw), available at [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?jsessionid=69eff6fd253cc85459120c61e4c0?bill\\_id=201320140AB1832&search\\_keywords=ticket](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?jsessionid=69eff6fd253cc85459120c61e4c0?bill_id=201320140AB1832&search_keywords=ticket) (modestly expanding scope of statute to prevent use of bots to circumvent any security measures, not just those of Internet ticket sellers). For a discussion of bots, see *supra* notes 169, 178 and accompanying text.

of property and a contract under the law of contracts. As licensors, ticket issuers are free under property law to revoke the license or to place extensive restrictions on the rights of their licensees to transfer ticket rights to third parties. Similarly, ticket contracts can include prohibitions or restrictions on transfer and frequently do so. Thus, the issuer of a ticket can and often does seek to prevent initial ticket purchasers from reselling their tickets under both property law and contract law.

From an economic point of view, it is fair to ask why the secondary ticket market is as vast as it is. Performers, promoters, and venues complain vociferously about ticket resellers earning money on ticket resales that the former parties believe is rightfully theirs. The fact that initial purchasers are in a position to resell event tickets at a large profit plainly indicates that the initial ticket price is lower than purchasers are willing to pay. Bruce Springsteen can almost completely destroy the market in scalped Bruce Springsteen tickets by raising the box office price for tickets, thereby shifting any profit to be made on the resale of underpriced tickets from ticket scalpers to himself. Bruce might prefer to keep tickets affordable for the Rosalitas, Wendys, and Weak-Kneed Willies who are unwilling or unable to pay the equilibrium price, but his selflessness is no match for the vibrant market in resold tickets.<sup>193</sup>

The growth of the Internet has made it possible for companies such as StubHub to accomplish easily what scores of on-site scalpers used to struggle to achieve with greater effort out on the sidewalk on the night of each performance.<sup>194</sup> Potential buyers and sellers now have far more information than they had in the past, a convenient electronic meeting-place with relatively low transactions costs, and greater confidence in the smooth

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193. The same rationale applies to sporting events. Before Super Bowl XLVIII, the NFL decided that ticket prices at the box office would run as high as \$2,600 and noted its interest “in capturing some of the value it has been yielding to fans and brokers who resell their tickets at a markup.” Matthew Futterman, *NFL to Charge New York Prices*, WALL ST. J., Sept. 17, 2013, [http://online.wsj.com/article/SB10001424127887324665604579079424146436620.html?mod=wsj\\_valetbottom\\_email](http://online.wsj.com/article/SB10001424127887324665604579079424146436620.html?mod=wsj_valetbottom_email). The article notes that of five hundred lottery winners who were able to purchase poor seats the prior year for \$600, sixty percent resold the tickets within 24 hours, many for as much as \$2,000. *Id.*

194. Aditya Bhawe & Eric Budish, *Primary-Market Auctions for Event Tickets: Eliminating the Rents of “Bob the Broker”* 6–7 (Univ. of Chi. Booth Sch. of Bus., Working Paper No. 13-36, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2237451](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2237451) (attributing recent huge increases in secondary ticket sales to greater ease in purchasing primary sale tickets online, lower cost of reselling tickets online, and increased ease of skirting state anti-scalping laws).



and honest functioning of this online market.<sup>195</sup> If Bruce sets his initial ticket price too low, buyers willing to pay the market rate can easily find willing sellers of tickets they purchased from the box office, with this market facilitated by an efficient electronic middleman. The Rolling Stones seem to have thrown in the towel on this issue, intentionally pricing tickets extremely high in an effort to put scalpers out of business while maximizing their own take. With revenues of \$5.5 million per show on their most recent tour, they appear to have succeeded, even as they risked raising the ire of their fans.

Consumers are relatively lacking in power in the market for tickets. Event tickets may be licenses and contracts, but they have never been negotiable on a case-by-case basis. The growth of social media has increased the voice of consumers, however, allowing disgruntled fans to express their concerns and frustrations rapidly and effectively. Whether this “union” of consumers is a match for the larger players in a very concentrated industry, including artists, ticket sellers such as Ticketmaster, and ticket resale clearinghouses such as StubHub, still remains to be seen.

Meanwhile, legislatures are beginning to join the conversation amid heavy lobbying from powerful interests in the ticket marketplace. Bills in Tennessee and California were stopped in their tracks for very different reasons in each state. Future legislation, however, seems inevitable there and elsewhere.

From a legal perspective, there is no correct answer to the question of whether or how the market in ticket sales and resales would benefit from regulation. Consumers want free transferability and lower prices, but the more they get of one, the less they are likely to receive of the other. Tickets to live events are a limited and highly desired commodity, and when box offices set initial sales prices too low, as they traditionally have, demand greatly exceeds supply. Either a secondary market will develop, leading to higher prices, or that market will be squelched legally or technologically, resulting in limits on the ability of first purchasers to resell their tickets. Thus, for example, a state that prohibits the resale of tickets at a premium could attempt to enforce its scalping ban aggressively.<sup>196</sup> Those who object

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195. *Id.*

196. Bans on scalping are difficult to enforce. One recent study empirically examined the prices of hockey tickets for seven NHL teams in four states that had recently repealed their anti-scalping laws, comparing resale prices before and after the repeal. David E. Harrington, *Uncapping Ticket Markets*, REGULATION, Fall 2010, at 6, available at <http://object.cato.org/sites/cato.org/files/serials/>



either will violate the law and transact on the black market, perhaps by employing technological workarounds that make the law difficult to enforce, or will work to have the law changed.

Nearly all parties in this marketplace are acting well within their rights under existing law—with a few obvious exceptions<sup>197</sup>—and some are lobbying for legislation that will advance their own interests still further.<sup>198</sup> Ticketing technology will continue to evolve, as it has been doing since the advent of computerized ticketing, and different groups of industry actors and consumers will seek passage of new laws that protect their own interests. For example, if some artists want to maintain low prices for their tickets while limiting the ability of initial purchasers to resell their tickets at a profit, it seems probable that the ticket market will develop technological solutions that are considerably more elegant than the current version of

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files/regulation/2010/10/regv33n3-6.pdf. This study found no significant change in prices of resold tickets after the bans were lifted, suggesting that tickets were being resold illegally before the repeal, but did find an increase in the number of tickets available for resale. *Id.* at 6 (“[I]f buyers and sellers ignore price ceilings because they are unenforceable, then repealing them should have no effect on prices at all.”).

197. There are at least three obvious exceptions to this general statement. The first is the behavior of those ticket resellers who illegally employ computer programs to circumvent issuers’ preset limits on ticket sales, a practice that some states have already banned. *See supra* notes 169, 178 and accompanying text. Thus, the question with regard to this issue is not whether the practice should be prohibited, but rather how existing legal prohibitions can be enforced in light of current technology.

The second exception is the fact that some states still retain outright prohibitions on ticket scalping. *See, e.g.*, Ark. Code Ann. § 5-63-201(a)(1) (West, Westlaw through 2014 2d Extraordinary Sess.) (prohibiting resales of tickets to “[a]ny music entertainment event at a greater price than that printed on the ticket or the box office sale price plus any reasonable charge for handling or credit card use, whichever is the greater”); *McMillan v. Live Nation Entm’t, Inc.*, 401 S.W.3d 473, 476 (Ark. 2012) (applying statute and noting, “[h]ere, the language employed by the General Assembly is so plain and unambiguous that judicial construction is limited to what was said”); Rachel A. Orr, *Recent Developments*, 65 ARK. L. REV. 517, 525–26 (2012) (discussing the case). Note that tickets to events in Arkansas are available on StubHub, with some of them apparently being resold at a price in excess of the initial sale price. *See, e.g.*, *Arkansas Razorbacks Football Tickets*, STUBHUB, <http://www.stubhub.com/arkansas-razorbacks-football-tickets/> (last visited Oct. 10, 2014).

Finally, the market in event promotion and ticket sales has become highly concentrated in recent years, raising questions as to whether parties such as Ticketmaster are violating antitrust laws. *See Ben Sisario, Justice Dept. Clears Ticketmaster Deal*, N.Y. TIMES, Jan. 26, 2010, at B4, available at [http://www.nytimes.com/2010/01/26/business/26ticket.html?\\_r=0](http://www.nytimes.com/2010/01/26/business/26ticket.html?_r=0) (describing tough conditions Department of Justice imposed before it would allow Ticketmaster and Live Nation to merge). *But see* BUDNICK & BARON, *supra* note 19, at 114–53 (discussing Pearl Jam’s unsuccessful earlier attempt to persuade Ticketmaster to reduce its ticket commissions).

198. *See, e.g.*, Karp, *supra* note 182.

paperless ticketing.

If any industry participant goes too far in protecting itself to the detriment of other participants, the harmed parties likely will respond by protecting themselves in some fashion. State legislatures are likely to feel ongoing pressure from their constituents to act. Consumers, who traditionally had the weakest bargaining position in the market for tickets, have found new strength in social media. They have been aided by organizations such as Fan Freedom, which is partially funded by StubHub. In short, various interest groups in the ticket market have been using their influence to push for outcomes that will benefit themselves. Legal and political institutions seem to be operating precisely as they should, and any temporary bad outcomes will presumably be resolved over time as the market and existing technologies continue to mature.

The last question this Article will examine is whether there are additional ways to confront some of the issues discussed in the prior Parts, beyond the healthy interest group give-and-take just described. It is likely that industry actors will continue to tinker with the standard form language in the ticket contract and that different groups will press to enact legislation that advances their interests at the expense of other groups' interests. But there are several other, more creative possibilities.

One possibility is for venues to increase their use of the dynamic pricing systems that airlines currently employ.<sup>199</sup> It is evident that commercial airlines in the United States have dramatically improved their ability to raise and lower ticket prices in the months and weeks before a flight to ensure that they sell the largest possible number of seats and earn the highest possible revenue.<sup>200</sup> Few people view America's commercial air carriers as models of consumer service. But it is quite obvious that flights are fuller and prices have increased in recent years. Airlines now can sell seats at the ever-

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199. See Ben Cohen, *While Football Ticket Prices Soar, Auburn Struggles to Profit*, WALL ST. J., Nov. 11, 2014, <http://online.wsj.com/articles/while-football-ticket-prices-soar-auburn-struggles-to-profit-1415750933> (highlighting the potentially huge profits Auburn University missed out on enjoying by selling football tickets at a flat price rather than a dynamic price); *supra* notes 58–65 and accompanying text. Airlines may soon carry dynamic pricing even further, tailoring fares to the specific passenger, including individualized knowledge about the particular consumer and his need to fly a given route at a given time. Christopher Elliott, *Custom Airfares: Pro-Passenger, or Pro-Airline?*, WASH. POST, July 3, 2014, [http://www.washingtonpost.com/lifestyle/travel/custom-airfares-pro-passenger-or-pro-airline/2014/07/03/1af5f4aa-fe35-11e3-8176-f2c941cf35f1\\_story.html](http://www.washingtonpost.com/lifestyle/travel/custom-airfares-pro-passenger-or-pro-airline/2014/07/03/1af5f4aa-fe35-11e3-8176-f2c941cf35f1_story.html).

200. See Elliott, *supra* note 199.

changing market price, and their customers continue to patronize them, however grudgingly.

In fact, some sports teams have taken tentative steps in this direction.<sup>201</sup> Teams have always charged different prices for different seats based on seat location. But more recently, some teams have begun to charge different prices for games on different days of the week or at different times of day, and also different prices for different opponents.<sup>202</sup> Their goal is to charge the maximum amount for each seat that some consumer is willing to pay for that seat, and they are slowly discovering that each seat to each event is a unique commodity that may merit a unique price at each moment in time leading up to the event.<sup>203</sup> Rather than worrying that the initial, permanently fixed price will prove to be too low, leading to foregone revenue, or too high, leading to empty seats, the ticket seller can tinker with the price as new information becomes available.<sup>204</sup> Some fans may not like the price they end up paying, and holders of neighboring seats may end up shelling out dramatically different prices for their tickets, but each prospective attendee can develop his or her own unique purchase-timing strategy, just as many airline passengers do.<sup>205</sup>

A related approach would be for venues to auction event tickets.<sup>206</sup>

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201. See, e.g., D.R., *Sports Ticketing: The Price is Right*, *ECONOMIST*, Jan. 9, 2012, <http://www.economist.com/blogs/gametheory/2012/01/sports-ticketing> (observing that Major League Baseball teams face high variation in demand from game to game because of a lengthy season, a small proportion of season ticket holders compared to other sports, relatively few sellouts, and variability in weather, and thus have been particularly eager to embrace dynamic pricing). As of 2012, more than half of Major League Baseball teams had adopted dynamic pricing, and these teams saw a 15% increase in full-price attendance and a 30% increase in overall ticket revenue. *Id.*

202. *Id.* One pair of researchers notes that, as game day approaches, dynamic ticket prices for baseball games can even reflect the popularity of the likely starting pitchers. Bhavé & Budish, *supra* note 194, at 25.

203. See, e.g., Jacob Goldstein, *Baseball Teams Are Acting Like Airlines*, *NAT'L PUB. RADIO* (Mar. 6, 2012, 9:17 AM), <http://www.npr.org/blogs/money/2012/03/05/147982995/at-the-ballpark-ticket-prices-change-as-fast-as-the-weather>.

204. *Id.*

205. See Patrick Dunne, *Dynamic Pricing Trend Sweeps Across Major League Baseball*, *TICKETNEWS* (Feb. 22, 2012, 11:05 AM), <http://www.ticketnews.com/news/Dynamic-pricing-trend-sweeps-across-Major-League-Baseball021222303> (quoting the President and Chief Operating Officer of the San Diego Padres as saying, “[o]ver time, as the game gets closer, ticket prices will normalize, but generally, fans who buy early will save money” (internal quotation marks omitted)).

206. See, e.g., Bhavé & Budish, *supra* note 194, at 24 (concluding that greater use of auctions in the primary ticket market would nearly eliminate the profits to be made on ticket resales and thus greatly reduce scalping).

eBay, which owns StubHub, has been extremely successful in allowing its users to sell items in this way, and consumers have become more accustomed in recent years to the auction method of buying and selling various goods.<sup>207</sup> Ticketmaster has already begun to dip its toe in these waters,<sup>208</sup> and auctions are becoming more prevalent in other settings. I recently checked in for a flight on Delta Air Lines only to discover that the flight was overbooked. The check-in webpage contained a new question: Would I be willing to be rebooked on a specified later flight for (a) \$25, (b) \$50, (c) \$75, (d) \$100, or (e) “name your price”? Rather than announcing a bump fee at the gate that might prove to be higher than the carrier needed to pay, the airline was seeking to ascertain the absolute lowest amount it could offer to bump the requisite number of people, determining by reverse auction the minimum premium it would have to pony up to deny a seat to a ticketed passenger.<sup>209</sup> Airlines use similar auctions to issue upgrades to business class and first class seats.<sup>210</sup>

Even before the advent of the Internet, some discount retailers employed similar methods. Filene’s Basement discount stores, for instance, would publicize in advance the dates on which goods would be progressively marked down.<sup>211</sup> Consumers would be forced to decide whether to pay the current sticker price, knowing exactly how much that price was scheduled to drop on specified future dates, or to wait in the hope that they could purchase the item for a lower price, with the risk that the item would be gone by then.<sup>212</sup>

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207. My own law school, like many others, uses an online auction system for allocating seats in courses with limited enrollment. Students are assigned a fixed number of points, which they use to bid for places in popular classes. Our Office of Student Affairs and Records provides historical data on the number of points that were necessary to gain entry to each oversubscribed course in recent years.

208. See *Ticketmaster Auctions*, TICKETMASTER, <http://www.ticketmaster.com/ticketauctions> (last visited Oct. 10, 2014).

209. See G.F., *Oversold Flights: How Low Can You Go?*, ECONOMIST, Jan. 10, 2011, [http://www.economist.com/blogs/gulliver/2011/01/oversold\\_flights#](http://www.economist.com/blogs/gulliver/2011/01/oversold_flights#).

210. Daisy Carrington, *Place Your Bids for Business Class: Airline Upgrades Now Up for Auction*, CNN.COM (Sept. 3, 2013, 11:35 PM), <http://www.cnn.com/2013/09/03/travel/place-your-bid-for-business-class/>.

211. See *Our Story*, FILENE’S BASEMENT, [www.filenesbasement.net/our\\_story.php](http://www.filenesbasement.net/our_story.php) (last visited Oct. 10, 2014).

212. Filene’s Basement was ultimately acquired by discount retailer Syms. Television advertisements for Syms stores included founder Sy Syms stating that “[a]n educated consumer is our best customer.” Stephen Miller, *Remembrances: Sy Syms: 1926–2009: For an ‘Educated*

One group of researchers has suggested that ticket sellers would benefit by selling relatively low-priced ticket options, which would afford the option holder the right, but not the obligation, to purchase tickets later at a pre-established price.<sup>213</sup> Their work demonstrates that the use of options both increases the total revenues that an event organizer can earn and reduces secondary ticket sales.<sup>214</sup> In addition, because purchasers of options can initially lose only the smaller option price and not the larger retail price of the ticket, consumers object less to non-transferability when the issuer employs the option approach than they do when the issuer adopts paperless ticketing.<sup>215</sup>

Another possibility is that, in an effort to circumvent current limits on the transferability of paperless tickets, StubHub or one of its competitors might reconstitute itself as a cooperative that is owned by its sellers and buyers. Rather than individual consumers purchasing tickets in their own names and then reselling them to other individual consumers—a process that is severely hampered by current paperless ticketing rules—the buyer would designate StubHub as its representative to purchase event tickets on the buyer's behalf. If this initial buyer then wanted to resell tickets to a secondary buyer who is also a member of the StubHub cooperative, then the name of the owner would not change: StubHub would continue to own the tickets, but now on behalf of the secondary buyer. The agent, StubHub, would now be acting on behalf of a new principal, who would transfer the resale price of the tickets to the former principal.<sup>216</sup> A properly established

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*Consumer, 'He Discounted Designer Suits*, WALL ST. J., Nov. 19, 2009, <http://online.wsj.com/news/articles/SB125859990358854959>.

213. See Yao Cui, Izak Duenyas & Ozge Sahin, *Should Event Organizers Prevent Resale of Tickets?* 4 (Univ. of Mich. Ross. Sch. of Bus., Working Paper No. 1191, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2280141&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280141&download=yes) (observing that “the revenue gains from switching to selling options can be very significant for event capacity providers”). United Airlines, for example, offers FareLock as a way for prospective passengers to pay a modest fee to lock in a flight itinerary for a short time at a fixed fare, with no obligation to purchase the itinerary. *FareLock*, UNITED.COM, <http://www.united.com/CMS/en-US/products/travel/products/Pages/FareLock.aspx> (last visited Nov. 10, 2014).

214. Cui, Duenyas & Sahin, *supra* note 213, at 25.

215. *Id.*

216. This process would be analogous in some ways to the mechanism currently in place for many home mortgage loans, known as the Mortgage Electronic Registration System, or MERS. “MERS acts as mortgagee in the county land records for the lender and servicer. Any loan—where MERS is the mortgagee—registered on the MERS® System is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded.” *About Us*, MERS,

cooperative might be able to circumvent restrictions on the transfer of paperless tickets. Alternatively, StubHub might be designated as the trustee of a trust for the benefit of the initial ticket purchaser. In this capacity, StubHub would be the legal owner of the tickets, acting on behalf of the individual beneficiary who first acquires the tickets. If that beneficiary later wishes to transfer the tickets, it can designate a new beneficiary without changing legal ownership of the tickets.

## VI. CONCLUSION

Although I am a regular ticket consumer with strong personal feelings about whether event tickets should be transferable and at what prices, my goal in this Article has not been to lobby for changes from which I might personally benefit. Rather, my aim here has been to examine the market in ticket sales and resales, to describe the legal status of an event ticket, to discuss whether and how issuers may limit the transferability of tickets, to review some recent legislative efforts in this area of the law, and to suggest some other possible ways of addressing a conflict that is growing and evolving.

As I have already noted, there is no inherently correct answer to these questions. Assuming that the government enforces antitrust laws appropriately, it is entirely possible for the market to work out suitable solutions that will change as the ticketing industry continues to move forward. These solutions will vary over time as the market develops and as industry players devise new technologies. Concerned parties are always free to lobby their state legislatures to protect them appropriately, and different industry and consumer groups will press for and against these changes as their interests dictate. These are not merely predictions or guesses but rather are a description of events that are already happening. Similar behavior is likely to persist as this important and enduring segment of the entertainment marketplace matures further.

The twentieth century witnessed the birth and death of the record store. But artists have been giving live performances and athletes have been competing in front of audiences since before recorded history. That seems

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<http://www.mersinc.org/about-us/about-us> (last visited Oct. 10, 2014). As of January 2014, MERS had registered over 81 million mortgages, including more than 26 million active mortgages. *Quick Facts (May 2014)*, MERS, [http://www.mersinc.org/component/docman/doc\\_download/804-final-quick-facts-comm-2014-05?Itemid=](http://www.mersinc.org/component/docman/doc_download/804-final-quick-facts-comm-2014-05?Itemid=) (last visited Oct. 10, 2014).

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unlikely to change in the future. The most significant open questions are who will be attending these events, how they will obtain their legal rights to attend, and how much will they have to pay for those rights.