

ARTICLES

THE EIGHT PRINCIPLES OF THE MICROECONOMIC AND REGULATORY FUTURE OF TICKET SCALPING, TICKET BROKERS, AND SECONDARY TICKET MARKETS

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PART I: INTRODUCTION

“Ticket scalping” is a term akin to “loan sharking.” Both practices fill a market need, but both practices also bring the disdain of the consumer, the wrath of primary market competitors, and the microscopic attention of regulators. From the time of Shakespearean England, those who resell tickets have carried images of greedy speculators forcing innocents to pay unjust sums for event tickets, being fleeced of their hard-earned shekels in the process.¹

But these secondary ticket market activities are not the isolated activities of rain-coated clad tawdry entrepreneurs whose offices are street corners and the curbs near stadiums and theaters on event days. Nor are they to be trifled with, for history has shown that they are an inevitable economic presence in high-demand/limited markets.²

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1. Pascal Courty, *Some Economies of Ticket Resale*, 17 J. ECON. PERSP. 85, 90 (2003); KERRY SEGRAVE, *TICKET SCALPING: AN AMERICAN HISTORY, 1850–2005 passim* (2006).

2. SEGRAVE, *supra* note 1, at 9 (citing HENRY BARTON BAKER, *HISTORY OF THE LONDON STAGE AND ITS FAMOUS PLAYERS (1576–1903)*). There is nothing new under the sun. At the time of the Roman Empire, Roman citizens clamored for a seat close to the emperor at the Coliseum according to Ticketmaster co-founder Albert Leffler. Knowledge@W.P. Carey, *Scalping Goes Upscale: The Secondary Ticket*

From the time of Christopher Marlowe and William Shakespeare, the locals have battled for a seat at high-demand events. England's for-profit theaters provided an introduction to the ticket speculation and pricing issues we face today. The Internet may have changed ticket distribution, but the issues in secondary ticket sales have really not changed much since theater aficionados battled for Bard seats in the 1500s.³ At that time, England's theater houses, in the beginning of for-profit plays, were divided into sections of increasing exclusivity. The allocation was quite simple, akin to the remaining and current Las Vegas practice of tipping the maitre de. There are no tickets; one enters the theater and gains access to better seats by paying (in the case of Shakespearean England a penny and in Las Vegas, anywhere from a \$20 to a c-note) at each upgrade section for the right to move to a better location.⁴ Traffic flow issues not present in Vegas did, however, erupt in the Mother Country's theaters, something that resulted in the introduction of "checks," or round metal pieces that had predetermined seat sections on them.⁵ By paying upfront, English play attendees could go right to the section of their choice without the incremental penny-by-penny negotiations. However, there was the small matter of the wait for the play to begin.

The inconvenience of sitting around the theater for hours brought paper tickets, marked with price and seat. With this small step in simple access logistics, the English took a giant leap into the microeconomics of high-demand, limited-supply events. There was no turning back. Once those printed tickets were in hand, and physical presence in a line just prior to the event was no longer required, the economic imagination was launched: Could I sell this ticket? Could I get more than one ticket and resell one for a profit? Could I get others to stand in line and get tickets for me that I could then resell? Could someone in the theater get me more tickets? Better tickets? The limits on the number of new plays that could be written in timely fashion and the small size of the English theaters made the demand for Marlowe and Shakespeare akin to that clamoring we witness today for a Hannah Montana concert. When it comes to economic principles that govern these types of markets, the draw from the stage may be different, indeed, inexplicable, but there are still

Market's Online Revolution, June 20, 2007, <http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1439>. See also Courty, *supra* note 1, at n.2 (citing ALISON FUTRELL, *BLOOD IN THE ARENA: THE SPECTACLE OF ROMAN POWER* (1997)).

3. SEGRAVE, *supra* note 1, at 9.

4. Courty, *supra* note 1.

5. *Id.*

universal principles that govern the demand for Hannah, Hamlet, and half-backs in the Super Bowl.

Secondary ticket sellers have now existed for centuries and will continue to do so despite an equal number of centuries of efforts to eliminate them as a part of ticket distribution. Indeed, they will thrive because there is an economic need for secondary ticket markets.⁶ Despite this market reality of their survival as well as extensive documentation of a repeating historical pattern over the centuries of the sheer market force of secondary ticket sellers, the folly of regulation and market control continues. Trying to tame the prices and demand in the inevitable secondary markets for the sales of high-demand event tickets is a tall order. While we leave the loan-shark markets for others to dissect, we do offer some critical insights on ticket scalping, or in its more legal parlance “ticket brokering.” Secondary ticket sales, whether through neighbors, brokers, or street-corner vendors, result whenever there are high-demand events with limited seating availability for public events.

Primary and related secondary event-ticket markets raise important and still unresolved issues related to property rights, pricing, and nuisance effects. These issues, in turn, raise questions about the efficacy of and the voids in existing and proposed regulation. With recent technological changes (primarily via the Internet) that are serving to fundamentally alter the scope and character of secondary markets, questions about further regulation have become acute as consumers and primary and secondary ticket sellers grapple with access, sales, buyers’ and sellers’ rights, and the fraud that tends to accompany burgeoning markets. This article provides a historical, social, economic, legal, and regulatory perspective on the issues in and nature of secondary markets. An understanding of the evolution of ticket markets provides indispensable perspective and guidance for future market developments as well as regulatory directions.

Secondary ticket markets have universal and eternal characteristics because of microeconomic foundations. Attempts at regulation that do not take into account these characteristics result in unintended consequences that are often self-defeating and, more often, anticompetitive. The regulation of any aspect of secondary ticket markets cannot be done in isolation from market forces because the result may be little relief for the consumers the regulations are designed to protect.

6. The term secondary ticket markets will be used to refer to sales by those other than venue owners (such as theater owners and sports teams) and promoters, producers, and sponsors.

Well-intentioned regulations promulgated in order to increase access to tickets may actually limit supplies and increase prices. An understanding of the characteristics of ticket markets as well as their underlying economic foundations provides insights for market structure as well as means of effective regulatory supervision of ticket markets. Without a grasp of the historical and regulatory evolution of ticket markets along with an understanding of economic realities, future regulatory approaches to ticket markets are destined to repeat past mistakes even as they fail to address the important public policy issues that warrant regulatory intervention. Employing the lessons of the history of ticket markets and applicable economic principles, on the other hand, could produce a palatable regulatory framework with a utilitarian balance of costs and benefits.

This article presents a framework for addressing the issues in the secondary ticket market by providing insight into the irrefutable principles that control it. These principles are supported by an understanding of the historical development of ticket markets. Part II offers a discussion of the eight principles that govern the secondary ticket market, including a discussion of the microeconomics of ticket markets. These principles must be acknowledged and addressed as part of any reforms, whether those reforms are based on market structure or regulation. These principles provide insight into how markets function as well as a review of the physical and legal nature of tickets. Part III addresses the need for national law in primary and secondary ticket markets, law that recognizes the reality of an interstate ticket market and should be patterned after the development and adoption of the Uniform Commercial Code and its success in nationalizing the sales of goods and the transferability of commercial paper. Part III also includes proposals and recommendations for future structure, operation, and regulation of ticket markets, in all their forms. Part IV provides conclusions.

PART II: THE LONGSTANDING PRINCIPLES OF TICKET MARKETS⁷

The history of event-ticket sales and ticket trading in the United States is rich with colorful characters as well as shifting public and legal sentiments.

7. The discussion in this section draws upon Stephen K. Happel & Marianne M. Jennings, *Assessing the Economic Rationale and Legal Remedies for Ticket Scalping*, 16 J. LEGIS. 1 (1989) [hereinafter Happel & Jennings (1989)]; Stephen K. Happel & Marianne M. Jennings, *The Folly of Anti-Scalping Laws*, 15 CATO J. 65 (1995) [hereinafter Happel & Jennings (1995)]; Stephen K. Happel & Marianne M. Jennings, *Creating a Futures Market for Major Tickets: Problems and Prospects*, 21 CATO J. 443 (2002) [hereinafter Happel & Jennings (2002)]; and SEGRAVE, *supra* note 1.

The following eight principles serve as an overarching framework for discussions of regulations and as a tutorial to guide those who seek reforms in secondary ticket markets.

Principle One: Tickets for High-Demand and/or Limited-Supply Events Are Typically Underpriced in Primary Markets

In 1927, the editor of the *Saturday Evening Post* revealed a profound understanding of the nature of secondary ticket markets and who was playing what role in creating the high prices that produced public outcry and regulation:

The public which pays ten dollars for a three-dollar seat rather enjoys the experience. Indeed, there are those who brag of being overcharged and who seem to like being treated as suckers. The truth is that being charged outrageous prices is considered a sign that they know how to live in a metropolis. It signifies their smartness. . . . After all, the Government has more worthwhile things to do than to protect people from the consequences of the last word in gilded indolence. Besides, there is *just a little question whether even the Government can repeal the law of supply and demand*.⁸

Little has changed in the 81 years since this observation. Joe Freeman, President of Corporation Communications and Senior Vice President, Ticketmaster said, in 2008, in response to questions about his company's participation in the primary and secondary markets, "[y]ou can't regulate away the laws of supply and demand and, unfortunately for a lot of shows, particularly in the Internet era, demand just far exceeds supply."⁹

High-demand/low-supply goods and services unleash market forces that arise to provide efficient allocation of that limited supply.¹⁰ An example from Broadway illustrates how the demand exists just by the physical structure of the theater combined with the obligations of the promoter/owners:

For example, assume that a certain Broadway theater has a highly touted play which is debuting on the first Saturday of the following month. This theater has seating capacity for exactly 4,000 people; however 5,000 Broadway enthusiasts wish to attend opening

8. SATURDAY EVENING POST, Aug. 13, 1927 (cited in SEGRAVE, *supra* note 1, at 200) (emphasis added).

9. Alfred Branch Jr., *Ticketmaster at Heart of Canadian Ticket Controversy*, TICKETNEWS, July 11, 2008, <http://www.ticketnews.com/Ticketmaster-at-heart-of-Canadian-ticket-controversy78114561>. For more information on Ticketmaster's primary and secondary market involvement and vertical integration, see *infra* notes 149, 164–72.

10. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1481 (1998).

night. The theater has 200 season ticket subscribers and wishes to withhold an additional 800 for critics, families of the performers, and local politicians. Therefore, only 3,000 tickets can be sold to the public, meaning at least 2,000 of the enthusiasts will be unable to witness the opening night performance. The creation of the secondary market makes it possible for some of these people, the ones who have the strongest desire and are willing to pay a higher fee, to attend this event.¹¹

A key point of demand and supply theory is that persistent reoccurring lines (queues) for a product means the firm's money price is too low. There is a shortage. Microeconomists loathe shortages at existing money prices because the long lines impose significant opportunity costs on those with a high value of time (in general the more productive members of society) and because "black markets" inevitably arise that may involve fraud, deception, a general lack of transparency, and high enforcement costs.¹² The usual market response to high demand and limited supply is higher prices. In 1925, the journalist Morrow Mayo wrote an article in the *Los Angeles Times* on the state of ticket speculation and the role of ticket brokers across America. He noted that, "[e]verywhere the practice is looked upon with disfavor by the general public, and yet it exists and thrives with varying success in every large city in the United States."¹³ His research was thorough, complete with details on pricing in markets across the United States, in everything from Broadway plays to boxing. But, he was left flummoxed as to why something so maligned could thrive so ubiquitously. Mr. Morrow was not acquainted with the principles that drive markets, despite the disdain of those participating in these markets for such principles.

However, these forces are the result of the behaviors of event sponsors who do not price tickets in the primary market at the higher levels that those tickets may eventually bring once the secondary market opens.¹⁴ The puzzling economic question that springs from this longstanding practice is: Why would a primary seller knowingly under price high-demand goods? Underpricing in the primary markets is the driver for the allocation methods of the secondary market, i.e., higher prices, and is actually a deliberate strategy on the part of event sponsors because of any one or a combination of several factors that

11. Jonathan Bell, *Ticket Scalping: Same Old Problem with a Brand New Twist*, 18 *LOY. CONSUMER L. REV.* 435, 440–41 (2006).

12. See *infra* notes 46–47 and accompanying text for more discussion of fraud and deception related to underpricing.

13. Morrow Mayo, *Ticket Scalping Fine Art for Brokers, Worry for Owners—But Public Pays*, *L.A. TIMES*, May 29, 1925, at C1.

14. Happel & Jennings (1989), *supra* note 7, at 7–9.

have emerged over the centuries as we have developed a clearer understanding of ticket markets.

Uncertainty as a Cause of Underpricing

First, underpricing may simply be a function of the event sponsor's uncertainty about actual market demand for the event. Popularity of a particular performer has an ebb and flow. That ebb and flow of popularity, when coupled with the logistical reality that a venue for a concert, for example, must be booked months to years in advance, does force promoters to grapple with significant parameters coupled with basic unknowns.¹⁵ They are also faced with intransigent forces as they try to price event tickets.¹⁶ Even when demand far outstrips the supply for a particular event, a promoter normally does not have the ability to turn on a dime and switch the event to a different, larger forum, and can rarely change the location. Further, even the cost of adding an additional show can be prohibitive or impossible, depending upon the schedules of the artists, leagues, and other available forums. In other words, there are at least two factors that are out of the control of the promoter. There are few options for increasing supply, and even if increasing the supply is possible, it may carry prohibitive costs. Add into this mix the reality that economic conditions in the location of the forum can vary across the country and the world. In times of high unemployment, inflation, and recession,

15. The relative certainty on pricing in 1960s and 1970s musical acts (Paul McCartney, Rolling Stones, The Who, Crosby, Stills, Nash & Young) is a function of the bands being proven commodities as well as the fact that the Baby Boomers attending the shows are in their peak, albeit adolescent arrested, earning years. The average ticket price (primary) for Paul McCartney's 2002 tour was \$132.34, while the Rolling Stones' top-tier seats went for \$350 that same year, and The Who brought \$250. By contrast, the Dave Matthews Band average price was \$44.84, and Sheryl Crow, Alanis Morrissette, and Korn could bring only \$40–\$45 per ticket. Other acts that same year, such as Marc Anthony (pre-Lopez years) and Britney Spears (pre-Federline years) were unknowns in terms of draw, and still other acts were booking as opening acts in order to hedge against the problems of pricing too high and demand being lower than anticipated. Some artists are grouped together, ala 1950s rock-and-roll tours, to draw more fans, such as the pairing of David Lee Roth and Sammy Hagar (formerly part of Van Halen). Jennifer Ordenez, *How Much to Hear the Who—\$250? \$505?*, WALL ST. J., May 8, 2002, at B1.

16. Even in sporting events, we are seeing some of these unknowns. For example, the Yankees and the Mets both had new stadiums open in 2009. By the end of April, the Yankees had not sold 5,000 seats, including some of their high-price seats, in the season opening games. As the *New York Times* phrased it, “[t]he empty seats are a fresh sign that the teams might have miscalculated how much fans and corporations were willing to spend, particularly during a deep recession. Whatever the reason, the teams are scrambling to comb over their \$295 to \$2,625-a-seat bald spots.” Ken Belson, *Is This Seat Taken? In Front Rows of New Ballparks, Not Yet*, N.Y. TIMES, Apr. 22, 2009, at A1. The article also points out that the empty seats show up on television like a “big sore spot.”

attendance at live events is a budget item that most consumers can cut quite painlessly, even when the demand for a particular event or artist remains high. In short, promoters and owners face pricing and demand factors that are not plugged easily into Excel spread sheets for determining the real costs of the event and the resulting appropriate price for tickets.

Price, Once Set, Is Difficult to Change, and Introduces Greater Risk

For one-time, high-demand events, the price, once set, is tough to discount. If, for example, the price is set too high and the seats are not sold, not only is the venue not filled (resulting in the psychological issues of perceived lower demand, see *infra*), but cutting the price to the point where the tickets sell means that those who have already purchased the tickets will be alienated.¹⁷ The cost of that alienation is real. Over the long term, the figures for the spread sheet may become more clear to the promoter. In other words, with enough tours and enough concerts, put together using “goodwill” pricing, the promoter does make money despite the individual event underpricing.¹⁸

Placing too high of a price on a ticket for an event may reduce demand to a point where the dynamics of the market change to the point where the promoter/owner must make the acknowledgment of either overpricing or a lack of demand. Several economists have concluded that “sufficiently stochastic demand encourages lower ticket prices so that promoters ensure a certain level of ticket revenue while trading off potentially higher revenue associated with greater risk.”¹⁹ Lower cost/lower risk is the simple financial formula. For example, the Britney Spears 2009 European tour stunned the entertainment world with the event sponsor’s announcement that it was reducing ticket prices for the singer’s London concert from £100 (\$162.50) to £2 (\$3.25). The stunning price drop was a desperate move on the part of the promoters to avoid a “bare floor” at the concert and the resulting perception

17. Again, the Yankees had the blocks of empty seats. While reluctant to reduce ticket prices because of the backlash the management felt would come from fans who had paid the new seat prices, an increase of 76% over previous season prices, the Yankees were forced by the market to do so. *Id.* As of the end of the 2009 baseball season, available seats that were originally \$2,500 can be bought on the Yankee website for \$900 for individual games and original \$2,500 buyers have received comp tickets for no additional costs.

18. Economist John Tishler is a proponent of this long-term profits view. See John D. Tishler, *Ticket Scalping: An Economic Analysis and Proposed Solution*, 33 SANTA CLARA L. REV. 91, 101 (1993).

19. See Craig A. Depken II, Another Look at Anti-Scalping Laws: Theory and Evidence, <http://www.belkcollege.uncc.edu/cdepken/P/scalping.pdf> (unpublished paper, on file with the Belk College of Business) (last visited Mar. 14, 2010) (paraphrasing the work of W.F. Bernicke, *Questions and Answers*, 81 J. POL. ECON. 796 (1973)).

that the tour was not a success.²⁰ If an event sponsor sets the price for the event at too high a level or range, consumer resistance to paying these higher prices results in plentiful supplies of tickets.²¹ Indeed, one outcome can be the cancellation of the event because of a lack of demand.²²

The Loss of the Psychological Drive in Consumers

There is also a secondary risk associated with overpricing and a resulting abundant supply of tickets. With a glutted primary ticket market, perceived uniqueness, something of the mystique associated with these limited events, is lost.²³ Part of the secondary market is driven by the perception of being part of an event that was not easily accessible.²⁴ A sold-out primary market is but one step in the psychological frenzy over an event.²⁵ The very existence of scalpers/brokers is, in and of itself, evidence of this principle. Brokers and scalpers are a creation that springs from the primary market's inefficiency of

20. Tour organizers were "mystified" by the lack of demand. Jane Cohen & Bob Grossweiner, *Ticket Prices Slashed for Britney Spears Concerts at O2*, TICKETNEWS, June 10, 2009, <http://www.ticketnews.com/Ticket-prices-slashed-for-Britney-Spears-concerts-at-O2-Arena6910488>. Ms. Spears' popularity may be as unpredictable as the star's behavior, or perhaps the behavior is the underlying cause of the ebbs and flows in her popularity. These star dynamics illustrate the uncertainty of ticket markets and the resulting challenge of accurate pricing.

21. While revenues have increased, there has been a slight decline in the number of concert-goers. There is a point at which ticket purchasers balk, and the venue is unfilled. Ordonez, *supra* note 15, at B4.

22. An example of a canceled tour came in 2006 when the Dixie Chicks, because of a lack of consumer demand, were forced to cancel their U.S. portion of a world tour. The demand dropped not because of price but because of an alienated fan base that found the tickets plentiful but the buyers few because of politically charged comments from one of the group's singers. Lexi Feinberg, *Dixie Chicks Nix Concert Tour Dates* (Aug. 8, 2006), <http://cinemablend.com/music/Dixie-Chicks-Nix-Concert-Tour-Dates-731.html>. Lack of sales at certain levels means that the fixed costs for the event cannot be covered.

23. The psychology of high-demand events is beyond the scope of this work, but the authors' previous work as well as that of economist Gary Becker, document the intricate psychological components of these high-demand/must-see events. See Gary Becker, *A Note on Restaurant Pricing and Other Examples of Social Influences on Price*, 99 J. POL. ECON. 1109, 1109 (1991); Happel & Jennings (1989), *supra* note 7, at 66. There is also a line of work on "mob goods" that provides the economic and psychological analysis of high-demand/must have goods and experiences. See Allan DeSerpa, *To Err Is Rational: A Theory of Excess Demand for Tickets*, 15 MANAGERIAL & DECISION ECON. 511, 515 (1994).

24. Once the perception exists that there are plenty of seats, demand and prices drop. For example, the trustee for Bernie Madoff's (the mastermind behind a \$50-billion Ponzi scheme) assets placed Mr. Madoff's Mets season tickets on eBay for sale. The tickets brought \$38,100, a figure not even close to their face value of \$80,190. *Madoff's Mets Tickets on eBay*, N.Y. POST, Apr. 10, 2009, http://www.nypost.com/seven/04082009/sports/mets/madoffs_mets_tickets_on_ebay_163525.htm. The sports world referred to the low eBay bids as an "indignity" for the Mets. Belson, *supra* note 16, at A4.

25. In other words, the under pricing may actually help the promoter because the secondary market frenzy contributes to the sell-out and over pricing causes customers to not return. Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 738 (1986).

underpricing. Brokers and scalpers provide a form of resolution for the allocation problems created in the underpriced primary market for tickets. Their simple, market-based allocation solution involves selling tickets priced to reflect their true costs, including the time and effort involved in acquiring the ticket in the primary market, as well as the actual demand that the primary event sponsor may not have been able to predict accurately. The underpricing of event tickets in the primary market is part of what leads to the high demand in the secondary market, a high demand that is exacerbated by limited supply.

The Goodwill in Underpricing

Primary-market underpricing can lead to the preservation of goodwill with fans and customers.²⁶ The tightrope balancing act that event sponsors walk carries the risk, on the one end, of selling tickets at a price so low that the mystique disappears versus the risk, at the other end, which is selling the tickets at a price so high that the mystique turns to backlash.²⁷ With some artists, the underpriced tickets for their events are a critical part of their brand. They use the lower prices to market themselves as artists of the people. Recently, the promoters for mega teen star Miley Cyrus used extraordinary controls over primary market ticket sales in order to ensure that their “true” fans of modest means are able to buy tickets and attend the event.²⁸ Their goal was to keep tickets out of the secondary market because of complaints from parents about high ticket prices in that market for the young star’s previous tour. However, Principle Six provides additional information and analysis on how, in high-demand/limited-supply markets, even these good public relations intentions often backfire. Because of the realities of underpricing and its consequences, as well as the remaining seven principles that govern ticket markets, the effects of trying to impose artificial constraints by actually trying

26. A Broadway producer noted, “[e]ven though we could sell tickets at \$100, we’d be cutting our own throats because it would be a P.R. disaster for Broadway.” John Tierney, *Tickets: Supply Meets Demand on Sidewalk*, N.Y. TIMES, Dec. 26, 1992, at A1, A24, available at <http://www.nytimes.com/1992/12/26/nyregion/tickets-supply-meets-demand-on-sidewalk.html?scp=1&sq=&st=nyt>.

27. As one contentious example, when the Chicago Cubs created Wrigley Field Premium, Ticket Services in 2003 to sell VIP seats at what the market would bear, the public outcry was overwhelming through the print media and local radio. See *infra* notes 134–38 and accompanying text for more detail.

28. Alfred Branch, Jr., *Complaints Begin to Mount Over Paperless Ticketing for Miley Cyrus Tour*, TICKETNEWS, June 4, 2009, <http://www.ticketnews.com/Complaints-begin-to-mount-over-paperless-ticketing-for-the-Miley-Cyrus-tour609406>. The controls were paperless tickets and IDs, a new strategy for controlling primary markets discussed in the section on the nature of tickets.

to control pricing may be a market with higher prices rather than a market that maintains the face value of the tickets all in the name of goodwill.²⁹

Fairness and Underpricing

This public perception of “fairness” is a psychological complexity in the sale of tickets and the regulation of ticket markets. In an author interview with Ticketmaster’s former CEO Fred Rosen in 2003, Rosen explained why concert promoters and team owners in the 1950s, 1960s, and 1970s did not charge higher prices or engage in significant price discrimination or in scaling the house when they could see the market demand just in the physical manifestation of long lines. Rosen highlighted primary ticket sellers’ sensitivity to charges by the public of price gouging and their desire to be perceived as “fair” by the public. This notion of fairness is consistent with the earlier discussion of promoters and owners understanding their potential for long-run profit maximization, even with artificially restrained pricing because these price constraints create a perception of fairness, a very real, but binding constraint that public attitudes exert in event markets.

Gielissen *et al.* list five hypotheses regarding price and judgments about fairness.³⁰

- Reference prices. Actual price should be equal to what the consumer expects. Both market prices (from similar events) and prices from previous transactions can serve as reference prices. Individuals believe that they are entitled to the reference price because other consumers have recently paid this price, and sellers should not be allowed to exploit excess demand.
- Prices that reflect incorporation of production costs. Consumers are often willing to accept a cost-plus pricing approach as fair and recognize that increases in various costs are likely to lead to higher prices. At the same time, consumers also often overestimate the plus-side of the approach (the profit margin) and do not always act completely rationally.³¹ If consumers believe that a firm indeed is

29. For example, despite the Cyrus controls, the secondary ticket market opened for her tour with far fewer tickets and a starting price of \$999. *Id.*

30. Robert Gielissen et al., *Perceptions of Price Fairness: An Empirical Research*, 47 BUS. & SOC’Y 370 (2008).

31. Kahneman et al., *supra* note 25, at 731 (finding that judgments of fairness are susceptible to the way a situation is presented). For example, they show that a nominal wage cut of 7% in a situation of no inflation is perceived to be unfair, but that a 5% nominal wage increase in a situation of 12% inflation is not. *Id.* at 731–32.

making large profits, then those feelings of unfairness are more likely to occur in cases of price increases.

- Pursuit of social goals. High profitability is perceived as fairer if buyers think a seller has the intention of serving some social goal rather than just making a large profit. In the case of the sale of bottled water after a natural disaster, a price increase is perceived to be unfair if the sellers appear to simply be taking advantage of the situation. However, consumers view the price increases as more fair if the supplier announces the intention is to prevent a shortage by rationing the water. Also, other work in this area finds that consumers attach some value to prices that make the commodity affordable by everyone. Price increases are perceived to be even more unfair when they harm the average consumers.³²
- Self-interest effects. Consumers who are denied market access because of a price that is beyond their means perceives more unfairness than someone who has the ability to pay that price.
- Biases towards poorer and smaller parties. Consumers consider price increases to be fairer if they benefit poor agents rather than rich agents (small organizations rather than large organizations). Using survey questions from Gielissen, respondents indicated that: it is fairer for a single coffee-bean farmer to use market power over two large coffee-roaster buyers who want beans than for a single large coffee-roaster buyer to use market power over two small coffee-bean farmers; and, in the case of high demand for a certain software package that can detect and destroy some new computer virus, significant price increases by a small firm facing bankruptcy are considered to be much fairer than those same price increases would be by the highly profitable Microsoft.³³

The notion of unfairness is writ large in the primary and secondary ticket markets. Consumers have a particular desire to attend major events such as concerts and sporting events.³⁴ There is also a pervasive attitude among U.S. consumers that major entertainment events should be open to the general public and should not remain the exclusive domain of the rich and powerful.

32. Sarah Maxwell, *Rule-based Price Fairness and Its Effect on the Willingness to Purchase*, 23 J. ECON. PSYCHOL. 191 (2002); John W. Huppertz, Sidney J. Arenson & Richard Evans, *An Application of Equity Theory to Buyer-Seller Exchange Situations*, 15 J. MARKETING RES. 250 (1978); and Lisa Bolton, Luk Warlop & Joseph Alba, *Consumer Perceptions of Price (Un)fairness*, 29 J. CONSUMER RES. 471 (2003).

33. Gielissen et al., *supra* note 30, at 375.

34. Again the notion of "mob goods," *supra* note 23, is applicable.

Gielissen *et al.*'s theories on fairness, particularly with regard to reference prices, are manifest in consumer reaction to high ticket prices and lack of access to those tickets. Primary sellers who overprice tickets can experience serious negative consequences in the form of regulation. Consumers who have found the tickets to be beyond their means engage in public protests and outcry, are quoted by newspapers about the "unfairness of it all," and often turn to legislators for redress.³⁵ Museums that charge extra for special exhibits or offer special access through higher priced tickets have traditionally met consumer resistance because of public backlash. The public has strong feelings regarding universal access to art. Public acceptance of pricing differentials demands accompanying assurance that those who cannot afford the premium will still have access at a different time for a lesser price. That differential access is not available for one-time events, so pricing differentials are problematic. Hence, the primary underpricing approach is minimizing the effects of perceived unfairness of access and the resulting negative publicity as well as potential regulation (see discussion of Principle Four *infra*).

Underpricing and Cross-Subsidization

Still another reason for underpricing primary market tickets relates to event promoters' need for cross-subsidization for lower-demand events. One event could command significantly higher prices, but another event that features a less popular team or musical act cannot bring either the higher ticket price or the attendance. By underpricing a series, the promoter is able to generate greater revenues for the lower-demand events. The promoter may accomplish the cross-subsidization through an offer for a ticket series or the pairing of events, one high-demand and one low-demand.

Ancillary Items Pricing vs. Underpricing

Yet another explanation for the underpricing by event sponsors is the greater predictability, reliability, and margins on auxiliary items sold at the

35. For example, when Ralph S. Lauder put his \$135 million Klimt ("Portrait of Adele Bloch-Bauer I") on display in 2006 at his Neue Galerie in New York City, he charged \$50 per person on a Wednesday morning, when the gallery was normally open to the public without charge. The normal general admission charge was \$15 at other times. The public outcry over the perceived unfairness of the additional charge for access to a magnificent piece of art was so great that the gallery scrapped the idea. Similarly, Coca-Cola was hooted down when it tried to up the prices in its vending machines on hot days. Judith Dobrzynski, *Variable Pricing for Museums*, FORBES, Apr. 27, 2009, at 24, available at <http://www.forbes.com/forbes/2009/0427/024-opinions-museums-lifestyle-on-my-mind.html>.

event.³⁶ Economic research confirms that the stability of pricing is important to consumer for many reasons and is used by sellers for high-demand events, pricing that is uniform despite lower demand and cost levels across the events (movies) offered.³⁷ There is one additional reason under pricing or uniform pricing is used despite high demand. Referred to by the authors as the “get ’em in and fleece them on programs and t-shirts” business model, the perceived “fair” price charged for the event brings in a full house that is then quite taken by the opportunity of being there when so many others were seeking access. The psychology of the once-in-a-life-time event fuels these sales.³⁸ And promoters also make money from items such as parking and food, and when the number attending is down, these revenue sources, upon which the promoters are dependent, are down significantly even with a higher ticket price

36. “Team Marketing Report created the Fan’s Cost Index (FCI), which tracks the cost of attendance for a family of four. This calculation includes two adult average price tickets, two child average price tickets, four small soft drinks, two small beers, four hot dogs, two programs, parking, and two adult-size hats. Taking the additional items into consideration, the cost of attending a sporting event increases dramatically. For example, a family attending a baseball game can expect to pay over \$155, which is still the least expensive of the four major sports. Football, on the other hand, will cost a family of four \$321.62.” See generally Team Marketing Report Online: TMI’s Fan Cost Index, available at <http://www.teammarketing.com/fci.cfm>, as cited in Jonathan C. Benitah, *Forgetting Antiscalping Laws*, 6 TEX. REV. ENT. & SPORTS L. 55, 62 (2005).

37. Liran Einav & Barak Y. Orbach, *Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry* 27 INT’L REV. L. & ECON. 129 (2007) (Harvard Law School, Discussion Paper No. 337, 2001), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/337.pdf. This phenomenon is not unique to high-demand events. There is, again, a psychological component to the willingness to pay \$25 for a \$5 t-shirt. There are factors of enjoyment, uniqueness, and exclusivity that contribute to the willingness to pay an excessive price. Popcorn in a movie theater is another example. Again, the discussion of the full psychological components of this consumer behavior is beyond the scope of this piece, but more information can be found in the work of Steven Landsburg. Steven Landsburg, *Why Popcorn Costs More at the Movies and Why the Obvious Answer Is Wrong*, in THE ARMCHAIR ECONOMIST: ECONOMICS AND EVERYDAY LIFE 157 (1993). The fundamental point is that movie theaters are pricing a consumer package, i.e., entrance into the theater (the ticket price) and concessions (popcorn). Movie-theater owners have a variety of options: low ticket prices and high popcorn prices; very high ticket prices and all-the-popcorn-you-can-eat; or some combination in between. Landsburg concludes that, after taking into account consumer preferences, the reason for relatively high ticket prices and very high popcorn prices by theater owners is that they have come to recognize that many movie attendees also love popcorn. The goal is to maximize overall profits from the operation, not just profits from ticket sales. This example helps explain why event promoters resent secondary ticket sales. Brokers, in essence, strip the ticket from the overall entertainment package and so may adversely affect concession sales revenues.

38. See Pascal Courty, *An Economic Guide to Ticket Pricing in the Entertainment Industry*, 66 LOUVAIN ECON. REV. 167, 174 (2000). See also 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, 1173 n.14 (2004). Courty focuses on the feeling of exclusivity that comes from attending a sold-out event.

and few attendees.³⁹ The high demand for limited tickets only increases the desirability of the trinkets sold at the event. Indeed, the very presence of brokers and scalpers only adds to the dynamic of exclusivity and the drive for some token to take away as memorabilia.

Underpricing and Risk Transfer

There is also a logical business model explanation for the lower prices of event sponsors in the primary market. At lower prices, the tickets do sell out, particularly to brokers who are seeking to obtain the profits from the prices gauged to real demand. However, the end result is that the secondary market players assume the risk of not being able to sell the tickets.⁴⁰ In the event of shifting demand or even the unlikely event that the primary market was priced accurately, the event sponsor no longer carries the risk of an event not selling out to full capacity. This risk transference may be much more for formal Broadway productions where there is some evidence of interactions between producers and brokers with requests for their advance purchases of tickets for a show that has yet to be produced.⁴¹ The result is that the producer has transferred some of the risk of a flop to the brokers of the secondary market.⁴² Advance purchases by the secondary market provides the producers with interest-free financing and leaves the brokers with the risk if the play does not open or if it is not a success.⁴³

However, there is a converse side of these transfers. An example from the Chicago Cubs shows the effects and risk of hold-backs by the primary sellers. The Cubs once used a business model of holding back bleacher seat tickets for

39. See Ordonez, *supra* note 15, at B4.

40. Promoters have been known to admit that were it not for the sure sale of tickets to secondary market ticket brokers that there would be no way for them to be able to front the funds necessary for bringing in the biggest musical acts in the industry. Brokers serve as a co-investor for the promoters because they provide sure ticket sales. Thomas K. Arnold, *The Brokers Call it Public Service, Others See it as Just the Opposite*, L.A. TIMES, Oct. 11, 1988, Calendar, at 1; *Ticket Scalping: Hearing on S. 13 Before the Comm. on Crim. Justice*, 1991 Leg., 72d Sess. (Tex. 1991) (testimony of Houston Ticket Center) (cited in Sheree Rabe, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 63 n.59 (1991)).

41. One writer describes this interconnection as follows: "Scalpers also have a more complementary financial relationship with promoters than most people realize. Scalpers purchase blocks of tickets to concerts, enabling promoters to count on a certain percentage of up-front money to finance a show. Similarly, sports promoters rely on season ticket purchases for much of their revenue. Were it not for the market liquidity provided by scalpers (in the sense that scalpers purchase most of their inventory from season ticket holders who cannot attend a game and then resell to fans without tickets), consumers would purchase fewer season ticket packages, thereby lowering promoter revenues." Simon, *supra* note 38, at 1210.

42. Further discussion can be found at SEGRAVE, *supra* note 1, at 97, 102, 107.

43. See Simon, *supra* note 38, at 1210.

the day of the game with the hope of selling them on game day for a higher price. The intent was to offer a resolution for the market reality that there is a market for day-of-the-game sales, a reflection of the market reality that not all ticket sales for one-time and/or limited-access events are planned ahead. However, the team's fate in terms of its ongoing performance (i.e., wins and losses), resulting shifting consumer demand, and even the weather on game day made game-day sell-outs of these hold-back tickets less likely. The result was that the team itself absorbed the loss of unsold tickets instead of having the tickets sold in the primary market to secondary sellers who then absorbed the risks. The no-sales risk is thus transferred to the ticket brokers, a transfer that allows primary sellers to make money in the primary market even as they sell at a lower price.⁴⁴

Ticket brokers absorb another risk, that of insulating sports teams from the low ticket sales in the teams' off years. That is, ticket brokers invest in season tickets regardless of the team's standing or potential, continuing to hold those tickets even in years when the teams do not perform well, with the goal of a substantial return on investment (ROI) when the team does have post-season and/or championship play. Season-ticket investments in the lean years provide the brokers with needed access in the play-off years. In the early 1990s, for example, some ticket brokers in Texas held as many as 100 season tickets to the Dallas Cowboys, an investment that would not pay off well until the Cowboys' Super Bowl streak.⁴⁵ A more complete picture of the role of the secondary ticket market and ticket brokers in professional sports is one of unwritten partnership in risk. Through brokers, sports teams have ticket sales that would not otherwise exist in the lean years of the franchise.

Underpricing for Later Silent Entry into the Secondary Market

One final explanation for the underpricing of tickets in the primary market is the nefarious conduct of primary sellers operating incognito in the secondary market. Subject to the financial and perception concerns highlighted in the other explanations for underpricing, primary sellers are trapped with underpricing revenues unless they can participate in the secondary market profits from true-demand pricing without having to endure the consumer heat for that pricing. Primary sellers thus often make more money in secondary

44. Jasmin Yang, *A Whole Different Ballgame: Ticket Scalping Legislation and Behavioral Economics?*, 7 VAND. J. ENT. L. & PRAC. 111, 122-23 (2005).

45. *Ticket Scalping: Hearing on S. 13 Before the Comm. on Crim. Justice*, 1991 Leg., 72d Sess. (Tex. 1991) (testimony of Houston Ticket Center) (cited in Rabe, *supra* note 40).

markets anonymously.⁴⁶ A more complete discussion of the presence of primary ticket sellers in the secondary markets is found in other principles and Part III. However, primary sellers can enter the secondary market through hold-backs, by creating a subsidiary ticket broker, or by limiting resales to authorized brokers or sites that then provide the primary seller with fees from the resales.

The effects of Principle One are straightforward: a large secondary marketplace with high demand and limited supply means the opportunity for high profits. This potential attracts entrepreneurs, but also serves as a lure for fraudsters and tricksters trying to seize the moment. With or without the nefarious conduct of primary sellers, the market, because of its underpriced, high-demand nature, seeks a way around artificial constraints on price or access.⁴⁷

Principle Two: Underpriced High-Demand Events Produce Queues

The immediate results of too-low prices for high-demand goods are shortages, queues, and waiting lists. The law of supply and demand is irrefutable.⁴⁸ Underpricing in a high-demand market produces a scramble because of inefficient allocation of time costs. Secondary ticket markets are not unlike the secondary markets or solutions that have emerged at the U.S. Post Office, the DMV, Honey-Baked Ham Stores at Easter, parking offices at universities, and countries with socialized medicine. The demand is high, the supply is limited, the lines are long, and, as a result, alternative markets develop. The U.S. Post Office faces competition from the Internet, FedEx, UPS, and cell phones.⁴⁹ Sam's Club, Costco, Safeway, and others have developed their own forms of a spiral, brown sugar-coated ham with slightly changed names in order to compete with the brand name product, one that does

46. Indeed, artists may have promoters or firms like Ticketmaster sell their holds on secondary ticket websites without letting the public know. *See infra* notes 114–35 and accompanying text.

47. *Id.*

48. *See* GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11 (5th ed. 1998).

49. The United States Postal Service's strategic plan highlights the competition it faces, the decline in the use of the post office for services, and why it needed the expanded authority provided to it under the Postal Act of 2006, a regulatory reform that permitted the USPS to offer more services and expand the nature of its operations in response to increasing competition. Vision 2013 is the title of the USPS's five-year strategic plan, designed to address increasing competition documented in the plan and highlighting new approaches such as the availability of services via the Internet. U.S. POST OFFICE, *FIVE-YEAR STRATEGIC PLAN FOR 2009–2013*, at 1–4 (2008), available at http://www.usps.com/strategicplaning/_pdf/Vision2013FullDocument.pdf.

not demand the time investment of the original Honey-Baked Ham.⁵⁰ The lines at the university parking office and DMV differ slightly in that they are monopolies. However, the market even found ways around government's monopolistic controls. Citizens began getting their cars and licenses in those states with less dense populations, hence fewer people in lines if there were lines at all. Private sites on the Internet offered alternatives to waiting in line at the DMV.⁵¹ Private entrepreneurs began providing parking for students who were frustrated with the pricing and time commitments of obtaining university parking. As a result, states and universities, who once behaved as monopolists, created online service systems for everything from registration to licenses that are now available on nearly all campuses and in the 50 states.⁵² Even monopolies were forced to offer a convenient and less time-intensive activity than a physical visit to the monopolist's place of business or branch location. When health care services are limited and rationed, citizens head to other countries where the lines are not as long. The cost is somewhat higher, i.e., not free, but the drive for self-preservation finds them seeking away around a lower-cost, but inefficient system.⁵³

50. A quick Google search yields such alternatives as the Holiday Baked Ham, the Spiral Sliced Honey Gold Ham, the HoneyBaked Ham, Baked Honey Hams, Country Cured Hams, and Baked Honey Hams.

51. There remain private sites on the Internet that direct citizens on how to get their necessary DMV services without going into the DMV.

52. Now available online are state and private websites that provide direction and services for those who have DMV issues.

53. Indeed, the Italian and Canadian prime ministers both had necessary surgeries in the United States during the past three years. *Stronach Went to U.S. for Cancer Treatments: Report*, Sept. 14, 2007, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070914/belinda_Stronach_070914/20070914; *World Briefing: Berlusconi Has Heart Surgery in U.S.*, N.Y. TIMES, Dec. 19, 2006, at A6. For more generalized data, see Michael Tanner, *The Grass is Not Always Greener*, POLICY ANALYSIS, Mar. 18, 2008, at 5, available at <http://www.cato.org/pubs/pas/pa-613.pdf>. See also Michael Moran & Elizabeth Alexander, *American Democracy and Health Care*, 27 BRITISH J. POL. SCI. 573, 574 (1997). As quoted in and updated with the following,

[n]onetheless, the United States is not only a major consumer of health care services, but also the world's largest producer of medical technology. Investment in new medical technology is comparatively high, as is its rate of diffusion: "This is demonstrated by cross-national examinations of the comparative availability of selected medical technologies such as radiation therapy and open-heart surgery. Measured in units per million, the United States experiences levels of availability up to three times greater than in Canada and Germany."

Helen Evans, *Sixty Years On—Who Cares for the NHS?*, INST. OF ECON. AFFAIRS J., Dec. 30, 2008, at 26–54, available at <http://www.iea.org.uk/record/jsp?type=economicAffairs&ID=338>. See also June O'Neill & Dave M. O'Neill, *Health Status, Health Care and Inequality: Canada vs. the U.S.* (National Bureau of Economic Research, Working Paper No. 13429, Sept. 2007), available at <http://www.nber.org/papers/w13429>; Canadian Cancer Society, *Cancer Statistics*, http://www.cancer.ca/Canada-wide/About%20cancer/Cancer%20statistics.aspx?sc_lang=en (last visited Mar. 14, 2010); National Program of

To reiterate, beginning of commercial entertainment and modern ticketing can be traced to England's for-profit theaters in the sixteenth century.⁵⁴ Also since that time, the queues have been forming by patrons trying to gain access. The drive for good ham on holidays or great hams on stage produces the same effect: high demand results in long lines. Long lines require time commitments, a cost that becomes incorporated into the price paid in markets that evolve from sales of goods and services that are underpriced. Where there is demand and limited supply, all on a fixed price, there will be lines.

Principle Three: Time Is a Cost

Ticket acquisition involves both time and effort, but the primary market price does not incorporate the time cost of a ticket or good. Secondary sellers offer the ticket for its actual cost, one that incorporates the time component of the price. For example, brokers have stepped in to sell place-in-line tickets at New York City delis during the lunch hour. The place-in-line tickets are free; one need only walk into the deli and pull the number down from the machine at the entry to the deli. But having eventual access is not enough for some buyers because there is the time cost of waiting for that number to be called. Brokers stepped in, obtained the numbers and corresponding places in line, and for a fee, turned over that place at the optimum time for those who are willing to pay that cost to another for the time involved in the labor performed.⁵⁵

Primary ticket sales demand time, as when fans camp out the night before opening ticket sales in their quest for an early place in the queue when the box office opens. For those who have high time costs and/or low patience for lines (line rage), finding ways around the queues becomes their goal. This goal of saving time will lead to the impatient among us, in effect, hiring agents to

Cancer Registries, U.S. Cancer Statistics, <http://apps.nccd.cdc.gov/uscs/> (last visited Mar. 14, 2010).

54. Courty, *supra* note 1, at 90.

55. The deli "take and wait" system was described in *Weekend Eating Out Update: Meal Ticket for Ticket Scalpers*, THE INDEPENDENT, Feb. 10, 1990, at 38, cited in Rabe, *supra* note 40, at 58. The author noted the same phenomenon with S&H Green Stamps, the grocery store program from the 1960s that awarded the stamps to consumers as a bonus when they shopped. The stamps were a "free" store benefit, but consumers who did want to wait to earn those stamps with their purchases over time or who had stamps from different companies and sought to exchange them soon discovered a secondary market where they could buy the extra stamps they needed in order to reach the number of redemption points for desired items. *FTC v. Sperry & Hutchinson Co.*, 432 F.2d 146, 149 (5th Cir. 1972). While S&H tried to shut down the exchanges each time they emerged, the court held that these exchanges were not violating any laws and refused to issue an injunction prohibiting the exchanges. *Id.* at 148.

inhabit the queues for high-demand/limited-seating events. Lines and diggers⁵⁶ are not inventions that resulted from recent Broadway phenomenons such as *Cats*, *Mama Mia*, and *Spamalot*. Even those at the dawn of the Enlightenment had to find a way to get access to limited seats early. English theaters gave us the precursors to diggers, those willing to wait in line for tickets. Those who could afford the limited luxury boxes sent their servants to the box offices early to purchase checks, the tokens that allowed entrance to the theaters. The servants would then use the checks, take their seats, and hold those places for their employers.⁵⁷

However, the use of agents does produce one of the nuisance effects in secondary ticket market sales and one that has garnered the attention of regulators. As theater and other events evolved and not as many households had servants, the relationship between the line and seat place-holders and the actual ticket purchaser became more remote. Those who wanted tickets for themselves or for purposes of resale used agents, hired to spend time and compensated in colorful ways such as liquor and hard drugs. The use of such agents does produce one of the nuisance effects in secondary ticket market sales and one that has garnered the attention of regulators. When compensated diggers, the name given to agents who act on behalf of those who really want the tickets by doing their bidding, i.e., standing in line, entered as players in the ticket markets, they were not necessarily subject to the types of pre-employment testing requirements or screening that servants experienced. These proxies, often called “shabby boys and half-grown men” (frequently day-job messenger boys), often presented access issues for patrons.⁵⁸ That is, their somewhat ruffian appearance proved to deter patrons and even block sidewalks and streets. Indeed, those occupying the ticket queues have often been paid in alcohol and drugs.⁵⁹ Liquored-up diggers standing in line for Placido Domingo tickets are bound to produce some incongruous events.

Nuisance effects do result from the disinterested who are forced to stand in line or even from the sober who are simply in line seeking to maximize the number of tickets they can obtain. Too many diggers in line, varying degrees of investment and commitment, and the presence of drugs and alcohol are

56. “Diggers” is the name given to those who stand in ticket line for others, whether their wealthy employers or ticket brokers seeking to acquire more than the per-person allotted share.

57. Courty, *supra* note 1.

58. SEGRAVE, *supra* note 1, at 19, 103. The term “diggers” was derived from the description that they dig out the tickets for others. They have also been referred to as “droids.” And the access problem was that they were so aggressive, disorderly, or disheveled that standing in line became a test of one’s intestinal fortitude, not one’s patience.

59. Happel & Jennings (1989), *supra* note 7, at 11–12.

bound to produce eruptions of violence during the waiting and buying processes.⁶⁰ The straggled, unbathed or drunken appearance, and the conduct of diggers are the fairly typical social issues that arise from ticket lines, thus leading to Principle Four.

There is another form of “nuisance effects,” consequence that may not spring from the existence of long lines, but rather from public resistance to alternative methods of distribution of the limited supply of tickets. For example, an alternative strategy for managing ticket demand has been a lottery system of distribution. The San Francisco Giants, in pre-Internet times, used a lottery system for the 500 tickets the team made available for sale just before every home game. If there were more than 100 people in line at the marking point of four hours before the game, the Giants held a lottery for allocation of the tickets.⁶¹ The rebellion, the offense to justice, and resentment over fans’ time commitment becoming irrelevant in the allocation of the tickets resulted in rancor and disruption.

Principle Four: Where There Are Nuisances, There Is Noise, Followed by Regulation

Nuisance effects accompany the frenetic demand in the secondary ticket market. In 1856, a *New York Times* journalist complained about the presence of the barking brokers:

By the way, we would suggest to the management of the Academy of Music the actual necessity of driving the ticket speculators from the steps of their building. The pertinacity with which these gentlemen persist in thrusting reserved seats in your face is intolerable. The prosperity of the present season appears to have greatly increased their number, and if possible, added to their ugliness.⁶²

60. Fistfights were not uncommon among the Broadway diggers, and the New York Theater routinely had six police officers posted in the early 1900s for each night there was a performance. *Theatergoer’s Complaint*, N.Y. TIMES, May 26, 1901, at 19. For information on the correlation between drugs and diggers, see Lawrence Bershada & Richard J. Ensor, *Ticket Scalping Legislation—A New Jersey Case Study*, 9 SETON HALL LEGIS. J. 81, 97 (1985).

61. SFGiants.com, Ticket Policies, <http://mlb.com/sf/ticketing/policies.jsp> (last visited Mar. 14, 2010). The original policy appeared at The San Francisco Giants Ticket Policies, http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ticketing/sf_ticketing_policies.jsp. See also Daniel J. Glantz, Note, *For-bid Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L.J. 261, 278 (2005).

62. *Amusements*, N.Y. TIMES, Sept. 8, 1856, at 1.

The reporter acknowledged that while it may have been impossible to prevent these vociferous gentlemen from obtaining tickets, “it cannot be beyond the resources of the Academy to pick them out of the lobby and off the steps into the street.”⁶³

One of the prime reasons government regulation finds its way on a continual basis into the secondary ticket market is that a good ticket story always inspires the masses. Indeed, the masses are often the impetus for the good ticket story. The presence of the masses all in line, on phones, or on the Internet who are all seeking to obtain the same limited seats for the same one-time event are often the story. Those in the media seek to inspire the masses, or at least glean the advertising revenues from attracting their attention with a story. Those who regulate ticket markets and even those without jurisdiction to do so desire to be a part of any news story that dominates the news, particularly one that has the masses in a mode of fomenting high dudgeon.⁶⁴ For elected officials, the end result of self-injection into a ticket story is frequently positive name recognition.

Responsive politicians try to remedy nuisance effects with regulatory intervention. “Fairness” comes into play. Regulators see themselves as Old West sheriffs trying to keep the peace and make sure that those who stand in line are treated fairly and not victimized by the brutes of the town. However, others may see the regulators as being more like Old West cowboys who ride into town and fire shots, with the hope that one of these random shots holds some promise for righting the perceived injustices of pricing and supply. The regulation is let off in rounds of fire with the hope of stopping the conduct that produces the noise from consumers, the noise of emotionally charged issues.⁶⁵

That high emotion produces public backlash, which is part of another nuisance effect not related to the lines and chaos of barkers at events. This nuisance effect emerges when the primary market is sold out and the secondary ticket market prices are so high that artists or teams are the targets

63. *Id.*

64. *See infra* notes 71–72 and accompanying text.

65. For example, in 1993, when New York still prohibited ticket resales for more than \$5 above face value, *Barney—Live at Radio City* had 11 scheduled shows. Tickets for the March 1994 shows sold out within two hours of the opening of the box office, in December 1993. However, parents soon discovered that ticket brokers had plenty of tickets that were selling initially after the primary sell-out for \$200 (ticket face value was \$30). Hell hath no fury like a parent whose child has been deprived of the musical stylings of a large purple dinosaur. The parents flooded the Consumer Affairs Department with complaints. New York City officials rounded up the usual suspects and charged 10 brokers with operating without a license. The backlash was so furious that changes to New York’s law carried the emotional baggage for almost a decade following the Barney ticket scandal. SEGRAVE, *supra* note 1, at 185.

for the public outcry. While not the traditional sort of “noise” associated with public nuisance, the hue and cry over access to tickets, distribution of tickets, and prices of tickets reaches a fever pitch in the media, a sound that is akin to Greek Sirens for elected officials. Further, those involved in the hue and cry and those responding are enamored with a descriptive term that percolates in every post-primary market ticket sale. The public outcry usually includes some form of declaration that ticket sales or prices are not “fair.”⁶⁶ The notion of “fairness” is antithetical to efficiency-oriented economists, but it does represent a rallying cry for consumer outrage, legislative action, and judicial affirmation.⁶⁷ Economic principles, however eternal or universal, that govern ticket markets cannot and do not control emotional reactions of consumers and the resulting regulatory action of legislators and the judicial branch.⁶⁸

In 1907, New York City’s Mayor McClelland, noted in his annual “State of the City” address to the alderman that scalpers had become an “intolerable nuisance” and encouraged the group to take action. Following what was described as “rancorous” public hearings, a law prohibiting street sales of tickets above face value was passed, a law that would run through several iterations, challenges, and more emotionally-charged hearings.⁶⁹

66. It is difficult to describe the centuries of emotion that surround ticket markets and resulting regulation. For example, when the New York Supreme Court ruled against a 1927 state law that fixed ticket prices, one press report included the following summary of public involvement and reaction: “Few decisions of the Court have attracted so much attention as the five-to-four ruling.” SEGRAVE, *supra* 1, at 124. New York City Mayor, William O’Dwyer pledged the cooperation of every city agency in trying to remedy the problems that were plaguing consumers about Broadway ticket access in 1949. *Mayor Pledges Aid to City’s Theatres*, N.Y. TIMES, Sept. 2, 1949, at 14. The lobbying over New Jersey’s changes to its ticket scalping laws in 1995 was as intense as any other proposal before the legislature. (Interviews of authors with legislators and lobbyists during the course of observing the October 1995 hearings.)

67. Kahneman et al., *supra* note 25, at 728 (arguing that antiscalping regulation is the result of perceived notions of fairness on the part of consumers, and consumers may even understand the economics of the ticket markets but have a desire to remedy the unfairness and use their elected representatives to fix the disparate results).

68. For example, in upholding a New York statute that required ticket brokers to be licensed, the New York Supreme Court noted,

[t]he overwhelming evidence shows an abuse. It is the duty, therefore, of governmental agencies to meet the conditions and find a remedy. It is idle to say that the state and city are powerless to prevent fraud and extortion in the resale of theater tickets. The evils of theater ticket speculating are undisputed. The street speculator, in particular, has become a nuisance. His purpose is to prey on the people by selling his tickets at an extortionate price. A statute which requires a ticket speculator to obtain a license and thus protect the public is constitutional.

People v. Weller, 202 N.Y.S. 149, 153 (N.Y. App. Div. 1923). As a result, any market structure or regulation must take into account the consumer response to the ticket markets. Economic reasoning aside, consumers feel the way they feel about their events and access to tickets and their notions of fairness.

69. A magistrate dressed down an arrested scalper,

[y]ou men who sell tickets in front of theaters often charge \$1.00 or \$1.50 more than the ticket really

This pattern of large event sales, public outcry, and legislative/regulatory action repeated itself around the country for the next century. The law review literature through the early 1990's reflects a movement toward consumerism, legislation designed to protect consumers from extortion and market control by ticket sellers.⁷⁰ The specifics of regulation, in response to public outcry, included controlling traffic congestion, fraudulent sales, and misrepresentations about seat locations.⁷¹ The themes in the legislative histories of these laws and regulation are also the same. There were innocent consumers versus evil market manipulators in the form of brokers and scalpers so depicted because of a recent event in which scarcity, prices, and/or ticket fraud emerged as very prominent news stories.⁷²

Over a century later, the pattern has not changed. High-demand, limited-seating events for critical games or performances attract attention when tickets go on sale. Since seating is limited, those who do not obtain a slot are prime interview targets for media coverage. In their disappointment and the sticker shock of initial secondary market ticket prices, there comes the usual dressing down of ticket brokers by members of the public and others who seek reforms. For example, the promoters for Miley Cyrus's 2007 tour as well as the young star herself were the recipients of the wrath of parents who had been unable to get tickets for the Disney star's concert through the primary markets. The tickets were selling for as much as \$2,565 on StubHub's site and the outrage from parents resulted in an appearance of Ms. Cyrus on the *Ellen* show to explain that the parents did not cause the high demand and that it was the "scalpers" who did it.⁷³ True to the pattern, the Arkansas Attorney General began an investigation into the practices of those selling "Hannah

cost and if a poor man wants to take his wife and family to a theater he is compelled to accede to your demands if he cannot obtain suitable tickets from the box office I am opposed to this . . . and I think it is an imposition on the part of your men I am going to watch these cases closely, and others who come before me on a similar charge will probably be sent to the workhouse instead of being fined.

Magistrate Warns Ticket Speculators, N.Y. TIMES, June 6, 1911, at 2.

70. Happel & Jennings (2002), *supra* note 7, at 443–46.

71. *Id.*

72. The pattern of newsworthy events fraught with ticket problems, excessive prices, and public outrage also preceded the New York 1911 experience. In 1850, The "Swedish nightingale" herself, Jenny Lind, wrote to P.T. Barnum before her U.S. tour asking him to avoid ticket sales to speculators so as not to taint her concerts with the negative press coverage that would result. SEGRAVE, *supra* note 1, at 3.

73. The 54-show 2007 tour sold out within hours (with some locations for the concerts selling out in as little as four minutes), with a ticket in Charlotte, North Carolina being resold for \$2,565. When Ms. DeGeneres asked Ms. Cyrus about the high price, she responded, "Oh, gosh, it ain't worth that!" Scott Goldberg, *Miley Cyrus Tour Adds Seats to Accommodate Demand*, DIGITAL MEDIA WIRE, Oct. 11, 2007, <http://www.dmwmedia.com/news/2007/10/11/miley-cyrus-tour-adds-seats-to-accommodate-demand>.

Montana/Miley Cyrus” concert tickets in the secondary market.⁷⁴ The Cyrus backlash because of high broker prices resulted in a change to the young star’s 2009 ticket distribution system that involved controlled access to primary ticket sales, identification requirements, and limited ticket purchases. This form of self-regulation is also a result of the hue and cry from consumers who experience a “bad” ticket sale in the primary market.⁷⁵

There is little that is new in terms of the methods used to address the nuisance effects of secondary markets. The types of regulations have included outlawing secondary ticket sales (illegality),⁷⁶ prohibiting sales at certain times and in certain areas, creating disincentives through licensing requirements, and allowing primary-market participants to “help” solve the nuisance effects by changing the structure of the secondary marketplace. One final solution often attempted as a means for remedying the nuisance effects, whether in terms of lines or consumer noise, is a price control. Regulating the maximum mark-up from a ticket’s face value does cut down on the activity in the secondary market. Price controls are such that secondary market participants are unable to capture sufficient profits to make participation worth their time, line waiting and otherwise. However, price controls are the central focus of the next principle.

74. Stephen M. Silverman, *Possible Hannah Montana Ticket Scalping Probed*, PEOPLE, Oct. 4, 2007, <http://www.people.com/people/article/0,,20137827,00.html>.

75. Often artists or consumers or groups of both will file suit against promoters and others for antitrust violations as a means of responding to fans’ concerns about ticket distribution, ticket prices, and access. *Nobody in Particular Presents, Inc. v. Clear Channel Commc’ns, Inc.*, 311 F. Supp. 2d 1048 (D.C. Colo. 2004). In some situations, the artists rebel against the promoters’ market structures. A major dispute between TicketMaster (TM) and the band Pearl Jam erupted in 1994. Pearl Jam wanted TM to drop its service fee to \$1.80 a ticket for its summer tour, but TM refused to go below its existing \$2.50. Pearl Jam then tried to book its own venues, but that failed. Pearl Jam filed a complaint with the Justice Department over TM’s monopolistic practices. The Justice Department launched an investigation, and the Subcommittee on Information and Justice of the House Government Operations Committee also opened an inquiry, holding hearings in July and September. The Justice Department antitrust investigation ended abruptly in July, 1995. Following a year of charges and counter charges, cross firing of legal papers, and insults between Pearl Jam and TM, a meeting was set but then cancelled by the Government side the day before saying the inquiry was being dropped. Instead, the Government was going to continue “to monitor competitive developments.” Ralph Blumenthal, *Oddities Continue with Ticketmaster and Pearl Jam*, N.Y. TIMES, Aug. 23, 1995, Arts at 1.

76. Happel & Jennings (1995), *supra* note 7, at 72–74 (scalping prohibitions were labeled as the first generation of ticket market regulation. A full discussion of the history of the types of prohibitions, their penalties, and constitutionality can be found in the Happel & Jennings (1995) article).

Principle Five: Price Controls Do Not Bring Relief for Consumers

Elected officials cannot resist a good ticket story. So many cannot resist price controls. And the secondary ticket market attracts both species. Socialists (for want of a better term) resent profits, but embrace queues. Principle Five persists in secondary ticket markets because such individuals neither understand nor work within or with the flow of economic market forces. The effects are predictable: fraud (as with Medicare),⁷⁷ black markets,⁷⁸ and asymmetrical information (consumers not fully informed about available seats).⁷⁹ Price controls are not only attempted through regulation, but often by primary sellers, the event promoters and sponsors.

Price controls represent an effort to keep the secondary market at the same price levels as the primary market. As noted in the discussion of Principles One through Three, other irrefutable economic principles drive ticket prices in the secondary ticket market to higher levels. Dismissing these principles, including ignoring the real additional costs associated with obtaining tickets for resale in the secondary ticket market sales, imposes an artificial constraint that, while appeasing consumers enamored with “fairness” and bringing good-

77. The reimbursement rate for Medicare was, on average, 44% less than private insurers. Cristina Boccuti & Marilyn Moon, *Comparing Medicare and Private Insurers: Growth Rates in Spending Over Three Decades*, 22 HEALTH AFF. 230 (2003), available at <http://content.healthaffairs.org/cgi/content/full/22/2/230>. The reimbursement rates for hospitals vary. The result is the inability to recoup costs and creative behaviors to recover those costs. The U.S. government spent \$1.13 billion for what the Department of Justice (DOJ) calls “integrity activities” directed at detecting Medicare fraud. The focus of the program is overbilling and the program measures its success by what happens to the levels of billing in areas in which it has had significant enforcement activity and resulting fines and imprisonment. In the Miami area, for example, a DOJ series of cases resulting in billing reductions of over \$2 billion in durable medical equipment and treatment claims from doctors, hospitals, and providers for Medicare patients. *Criminal Prosecution as a Deterrent to Health Care Fraud: Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 2–3 (2009) (statement of Lanny A. Bruer, Assistant Attorney General, Criminal Division, U.S. Dep’t of Justice), available at <http://judiciary.senate.gov/pdf/09-05-20BruerTestimony.pdf>. The cases are primarily billing cases by health-care providers, i.e., cases in which the providers overbill the government. Medicare guidelines limit reimbursement and the providers use of upcoding, unnecessary medical equipment, and other ploys used to collect more in reimbursements.

78. The under-the-radar markets have existed in ticket sales since the mid-1800s in the United States. The only question was how visible the black market would be for tickets in any given area, a factor controlled by the level of enforcement of local and state antiscalping laws. Indeed, reports on events of the day often carried a description of the original ticket prices followed by what happened to those prices as the event approached. Colonel Ingersoll’s Sunday night May 14, 1880 lecture at the Booth Theater offered tickets for \$0.75. Demand was so great, with standing room only left, that tickets were selling for \$2.00 just before the Colonel’s lectures (on the folly of faith and religion) began. The price had climbed steadily from \$0.75 to \$1.00, to \$1.25 and so forth until it reached, in quite orderly fashion, its \$2.00 high. *Col. Ingersoll’s Lecture: Talking to a Crowd in Booth’s Theater*, N.Y. TIMES, May 17, 1880.

79. But see *infra* at note 107 and accompanying text.

intentioned or accolade-driven regulators their desired attention and re-election, will create other unintended but eternal-and-universal-in-nature consequences within that market. In other words, tweak or control the price, and the nuisance effects intended to be addressed by the price controls may go away initially only to re-emerge in a different form.

Statutory Price Controls

Price controls take various forms in the secondary ticket market. The original form of price control was the prohibition on ticket resales. In theory, these restrictions on resale are the ultimate price controls. If the act of reselling tickets is treated and prosecuted as a crime, then the presumed result because of the imposed illegality is either limited or no resales and, hence, prices maintained at the primary market selling price. However, that the price will remain at the primary market level assumes effective enforcement of these prohibition statutes. Such a presumption has always been flawed.

Prohibitions on resale in the United States can be traced to Pennsylvania's 1884 statute, one of the earliest state laws in the country.⁸⁰ Today, there are 39 states with some form of ticket sales or resales laws that vary in scope and purposes.⁸¹ Those states without any form of regulation tend to be states of low-density population, thus states least likely to have the nuisance effects of ticket selling from professional sports events or world tours.⁸² The types of

80. SEGRAVE, *supra* note 1, at 16 (indicating that Pennsylvania's statute prohibited resale on public streets, highways, in front of theaters, or amusement or entertainment centers).

81. Controls have been attempted at the federal level. Gary Ackerman, a Democrat Congressman from New York (currently in his 12th term), tried to introduce the Ticket Scalping Reduction Act in 1998, H.R. 3951, 105th Cong. (1998). It would have prohibited the sale of five or more tickets in a single transaction at a markup in excess of \$5.00 or 10 percent of face value (whichever is greater) throughout the country. The bill was referred to the Judiciary Committee but no cosponsors came forward and hearings were never held. This attempt at extensive national price controls died an early legislative death. The act would have amended 18 U.S.C. to include § 1822 with the described provisions.

82. Hannah Montana does not play Anchorage. However, there are some states with significant collegiate and professional sports presence as well as being locations for world tours that have moved from regulation to de-regulation such as, as noted in the list that follows, Oregon, Texas, and Tennessee. The states with no regulation of resales (with statutes affecting ticket sales noted for information purposes and to illustrate trends in the *laissez-faire* states) are Alaska, Hawaii (Hawaii does have a limited statute on boxing events, H.R.S. § 440-17), Idaho, Iowa, Kansas (Kansas does permit local antiscalping ordinances KAN. STAT. ANN. § 12-4104 (2009)); Maine (ME. REV. STAT. ANN. tit. 29, § 2187 (2009) (Maine repealed its statute prohibiting street scalping in 1995)); Montana, Nebraska, New Hampshire (N.H. REV. STAT. ANN. § 357:F4 (LexisNexis 2009) (requiring ticket agents to disclose on the ticket whether performance in a musical concert will involve prerecorded music)); North Dakota, Oklahoma, Oregon, Tennessee (TENN. CODE ANN. § 39-17-1105 (West 2008) (making it a crime to sell software to circumvent security measures on a ticket seller's website) and TENN. CODE ANN. § 68-115-208 (West 2008) (prohibiting event promoters

regulation encompassed in the laws include prohibitions on resale, price controls (i.e., maximum amounts above face value), time-and-place-for-sales limitations, limits on types of tickets that can be resold, as with no restrictions on charitable raffles of tickets, and other varying forms of controls on Internet sales and primary market hold-backs of tickets by promoters and owners.⁸³ As

from giving away more than 2% of the tickets for an event as complimentary admissions)); Texas (TEX. REV. CIV. STAT. ANN. § 9008 (2009) (prohibiting ticket resales above face value repealed in 1975, but local ordinances such as time and place restrictions permitted)); Utah, Vermont, Washington, West Virginia, and Wyoming.

83. See ALA. CODE § 40-12-167 (2009) (selling above face value requires a license); ARIZ. REV. STAT. § 13-3718 (2009) (resale above face value of ticket restricted to locations greater than 200 feet from event location); ARK. CODE ANN. § 5-63-201 (2009) (no resales above face value to high school and college sporting events; no resale of music event tickets above face value except for service fees); CAL. PENAL CODE § 346 (West 2009) (permitting no resale above purchase price on grounds of event without permission of the owner); S.B. 09-071, 67th Gen. Assem. (Colo. 2009) (postponed indefinitely) (limiting ticket resale amounts to percentage of face value; prohibiting a ticket broker from charging more than the face value of a ticket plus \$5 or 25%, whichever is greater; authorizing the attorney general or a district attorney to bring an action to forfeit the tickets or the proceeds of the tickets; prohibiting an event sponsor from charging fees greater than 10% of the face value of an event ticket; proposing amendment to COLO. REV. STAT. ANN. § 6-1-718 (West 2009) (permitting season ticket holders to resell their tickets without penalty)); COLO. REV. STAT. ANN. § 6-1-720 (West 2009) (prohibiting the use of devices, including software, designed to circumvent ticket acquisition limits in online sales); CONN. GEN. STAT. ANN. §§ 53-289a, 289b, 289c (West 2009) (regulating service fee disclosures, refund requirements, and time-and-place restrictions even though there is a proposed elimination of these); DEL. CODE ANN. tit. 11, § 918 (2009) (selling above ticket face value is prohibited at NASCAR events, certain campuses, and state and federal highways on the day of an event); FLA. STAT. § 817.36 (LexisNexis 2009) (limiting resale to \$1 for certain types of events); GA. CODE ANN. § 43-4B-25 to -30 (West 2009) (permitting original purchaser, charities, and brokers to resell tickets without limitation; unlawful for anyone else to resell tickets for more than \$3.00 above face value; extensive regulation of brokers); HAW. REV. STAT. ANN. § 440-17 (LexisNexis 2008) (prohibiting resale of boxing event tickets above face value); 720 ILL. COMP. STAT. § 375/1.5 (2005) (prohibiting resale above ticket face value except for sporting events, theater, musical performances, or place of public amusement); IND. CODE ANN. § 25-9-1-26 (LexisNexis 2009) (permitting no resales above amount printed on ticket and no sales of tickets beyond venue capacity); KAN. STAT. ANN. §§ 12-4104, 19-101a (2009) (permitting cities and towns to enact anti-scalping regulation pursuant to Op. Atty. Gen. No. 2002-48 (Oct. 18, 2002), 2002 WL 31373428); KY. REV. STAT. ANN. § 518.070 (LexisNexis 2009) (rendering resales above ticket face value unlawful unless such resale is authorized by the issuer); LA. REV. STAT. ANN. § 4:1 (2009) (prohibiting sale above face value with exceptions for college sports events, when done with authorization by school or through alumni events and sale above face value permitted via the Internet when the issuer permits such sales; full regulation of Website operators such as requirement of refunds for cancellations of events as well as clear statements about nonrefundable processing fees; no limits on college student ticket resales for college sports events and no limits on legislators; resales of tickets given to them for college sporting events); ME. REV. STAT. ANN. tit. 29, § 2187 (2009) (repealing its statute prohibiting street scalping in 1995); MD. CODE ANN., BUS. REG. § 4-318 (West 2008) (prohibiting resale of complimentary tickets for an amount above face value in regards to boxing); MASS. GEN. LAWS ANN. ch. 140, § 185A-G (West 2009) (prohibiting resale by anyone without a license, with the exception of charitable organizations; resale limited to \$2 above face value unless additional fees are for service charges with membership fees not counted in computation of above-face-value amount); MICH. COMP. LAWS § 750.465 (2007) (prohibiting resale without permission and resales must take place at location other than event/box office and some consumer

noted, only a handful of states place no limitations on resale of tickets, with recent legislation in some states opening up unlimited ticket resales for Internet sales.⁸⁴

Antiscalping laws that focus on price controls and other means of limiting sales, whatever their form, have been upheld by the courts. Statutory impositions on market pricing have made their way to the U.S. Supreme Court

disclosures required on surcharges; no resales of tickets issued at less than face value; complimentary tickets may only be used by original recipient); MINN. STAT ANN. § 609.806 (West 2009) (repealing its anti-scalping law in 2009 and enacted protective provisions for Internet sales and primary market fraud, which makes it a misdemeanor to interfere via software with equitable distribution of tickets); MINN. STAT ANN. § 609.807 (West 2009) (becoming effective August 1, 2009, it makes it a misdemeanor for event sponsor or forum owner to divert tickets from the initial public sale); MISS. CODE ANN. § 97-23-97 (West 2009) (prohibiting resale of college and university tickets for amount above face value unless done by an individual who purchases the ticket for personal use); MISS. CODE ANN. § 97-23-99 (West 2009) (prohibiting employees from giving away merchandise of value without full payment); MO. ANN. STAT. § 578.395 (West 2009) (prohibiting resale of ticket for above face value except for service charges, but was repealed in 2007); N.J. STAT. ANN. § 56:8-33 (West 2009) (prohibiting resales for more than 20% above face value or \$3.00, whichever is greater; no limits on resales amounts for anyone who is not a ticket broker); N.H. REV. STAT. ANN. § 357 (requires ticket agents to disclose on the ticket whether performance in a musical concert will involve prerecorded music); N.M. STAT. ANN. § 30-46-1 (West 2009) (prohibiting resales above face value except for service fees and if the seller has an arrangement with the promoter or owner for the fees and resale); N.Y. ARTS & CULT. AFF. LAW §§ 25.01, 25.03, 25.07 (McKinney Supp. 2010) (effective until June 2, 2009) (requiring licensing and provides consumer protections for refunds but not limiting resale price); N.C. GEN. STAT. ANN. § 14-344 (West 2009) (prohibiting service fee greater than \$3 per ticket); N.D. CENT. CODE § 40-05-01 (2009) (permitting municipalities to regulate); OHIO. REV. CODE ANN. § 715.48 (West 2009) (permitting municipalities to regulate ticket sales and resales); 4 PA. CONS. STAT. § 201-215 (2008) (requiring a license for resale above 25% over face value; extensive regulation of licensees; Internet sales exempted; applicable only to sales in Pennsylvania; charities exempted; state statute supersedes all municipal laws and regulations); R.I. GEN. LAWS § 5-22-26 (2008) (resale above face value limited to \$3.00 or 10% of ticket price, whichever is greater); S.C. CODE ANN. § 16-17-710 (2008) (resale limited to \$1.00 above face value except for “open market ticket events, defined to include Internet sales and predetermined physical locations); S.D. CODIFIED LAWS § 7-18-29 (2004); TENN. CODE ANN. § 39-17-1105 (2008) (making it a crime to sell software to circumvent security measures on a ticket seller’s website) and TENN. CODE ANN. § 68-115-208 (2008) (prohibiting event promoters from giving away more than 2% of the tickets for an event as complimentary admissions); TEX. TAX CODE ANN. § 151.432 (Vernon 2009) (prohibition on ticket resales above face value repealed in 1975, but local ordinances such as time and place restrictions permitted); VA. CODE ANN. § 15.2-969 (2009) (prohibits resale for profits except for charitable events and, under a 2009 amendment, for Internet sales); WIS. STAT. § 42.07 (2008) (no sale above face value and tickets are considered licenses). It is beyond the scope of this article to explore the municipality and county levels of regulation, but there are anti-scalping laws at all levels of government that vary significantly with the types of sports franchises available in those locales. States that do not have anti-scalping regulation, such as Texas, may have significant local regulation. *See, e.g.*, SAN ANTONIO, TEX. CODE.

84. S.C. CODE ANN. § 16-17-710 (2008) (exempting specifically Internet sales from the maximum-amount-above-face-value limitation it imposes on brick-and-mortar sales); TENN. CODE ANN. §§ 39-17-1105, 68-115-208 (2008) (regulating the circumvention of software to acquire tickets over the Internet as well as the give-aways by promoters); ALA. CODE § 40-12-167 (2009) (limiting ticket resales to ticket brokers who are licensed through the state); ALA. CODE § 40-12-167 (2009).

and are constitutional if the state or local government that has imposed the maximum price is able to show that there is some public interest served through the price limitations.⁸⁵ That barrier of establishing “public interest” has long been broken through with several decisions in both state and federal courts referring to the 1927 U.S. Supreme Court case that struck down a statute for the state’s failure to show public interest as an “antiquated” view of constitutional requirements for business regulation.⁸⁶ As a result, this basic form of control of secondary ticket markets through price remains a part of both state and local laws.

However, despite their legal validity, these attempts at price controls are ineffectual. Enforcement is limited to an occasional media splash for isolated arrests.⁸⁷ The statutes and ordinances also do not present much of a deterrent because the penalties are so low and local judges tend to reduce those penalties, such as a reduction to loitering, or dismiss the charges altogether.⁸⁸ Further, when resale laws are enforced on a catch-as-catch can basis, law enforcement officials risk challenges from ticket resellers of disparate or arbitrary enforcement. For example, the Seattle Mariners had requested help from local law enforcement officials in stopping its season ticket holders from selling their game tickets on eBay. The police department did random checks on eBay to find ticket holders who were trying to sell their tickets via the Internet, but a municipal judge concluded that such limited enforcement techniques directed at only certain sellers were arbitrary because the city did not enforce the antiscalping laws generally.⁸⁹

85. *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 447 (1927) (Holmes, J., dissenting) (indicating that Justice Holmes would have upheld the right of the people of New York to regulate what they believed to be a public nuisance, although, as Justice Holmes noted about the imposition of controls, “I am far from saying that I think this particular law a wise and rational provision”). This would implicate that there is, thus, a difference between laws that are valid and laws that are economically sound.

86. *Gold v. DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964).

87. Enforcement round-ups generally occur only upon public outcry. *See supra* note 70. Following the Barney broker round-up, however, tickets for the Rangers and Knicks playoffs were selling for 10 times the face value. Further, *see infra* notes 93–94 and accompanying text for the discussion of packages and an explanation as to why brokers are not charged with selling for an amount above the statutory maximum and why the arrests are for license violations, not resale.

88. The dates of the cases in which those who were prosecuted challenged the antiscalping laws indicate the few-and-far-between nature of full prosecution. *See generally* *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418 (1927); *Nebbia v. New York*, 291 U.S. 502 (1934); *Gold v. DiCarlo*, 235 F. Supp. 817, 820 (S.D.N.Y. 1964); *People v. Shepherd*, 141 Cal. Rptr. 379 (Cal. Ct. App. 1977); *New Jersey Assoc. of Ticket Brokers v. Ticketron*, 543 A.2d 997 (N.J. Super. Ct. App. Div. 1988); *State v. Spann*, 623 S.W.2d 272 (Tenn. 1981).

89. *Seattle v. Charlesworth*, No. 420709, 2004 WL 3670445 at *3–5 (2004) (noting that because

Even with heightened enforcement, antiscalping laws remain ineffectual in curbing secondary markets. Indeed, the effect of stepped-up enforcement is, particularly in population-dense areas, to transfer the ticket markets to cities, towns, and states in which there are no antiscalping laws.⁹⁰ Rocco Landesman, who was with Jujamcyn Theaters of New York, referred to the laws that New York then had that tried to contain secondary market ticket sales as “useless and stupid” because the end result of tight regulation of the secondary ticket market in New York was the migration of ticket sales to brokers who are headquartered out-of-state.⁹¹

But, apart from the limited enforcement, there are unintended consequences of state controls on the secondary ticket markets. Artificially imposed price constraints unleash the forces of the secondary market, a market that finds a different way.⁹² In 2009, New York City prohibited the reselling of the free tickets to its Shakespeare in the Park. The tickets still showed up on Craigslist for \$85, a fee imposed by the sellers as one for “waiting services.”⁹³

neither the Seattle Mariners nor the Seattle Police Department had attempted any enforcement of the city’s anti-scalping ordinance on the Ticket Marketplace site any enforcement of the ordinance against the fan with single sales was arbitrary). In 2004, Seattle’s anti-scalping ordinance was lifted. There was no chaos in the city or at Safeco field, a prediction from the Mariners if the scalpers were not controlled by the rule of law. See Peter Lewis, *Ticket Scalping Cases Tossed; Judge Cites Selective Police Enforcement, M’s Internet Sales*, SEATTLE TIMES, Jan. 31, 2004, at A1.

90. For more discussion of the interstate nature of the ticket markets and the issues of regulating ticket sales across state lines, see *infra* notes 189–94 and accompanying text.

91. Yael Schacher, *Ticket Scalping*, GOTHAM GAZETTE, June 6, 2001, at 1–2, available at <http://www.gothamgazette.com/article/issueoftheweek/20030112/200/165> (citing Jonah Benitah, *Anti-Scalping Laws: Should They Be Forgotten?*, 6 TEX. REV. ENT. & SPORTS L. 55, 56 (2005)). For more information on the migration of secondary ticket sales sellers to more favorable states, see *supra* note 90 and accompanying text.

92. Kahneman et al., *supra* note 25, at 735 (“[t]he profit-seeking adjustments that clear the market are as natural as water finding its level—and as ethically neutral”).

93. John Capone, *Scoring Shakespeare Tickets No Walk in the Park*, NBC N.Y., July 13, 2009, http://www.nbcnewyork.com/around_town/the_scene/Scoring-Shakespeare-Tickets-No-Walk-in-the-Park.html (“I am NOT selling tickets to Shakespeare in the Park. . . . The tickets are free! What you are purchasing are the services of my wife and I acquiring [sic] YOUR tickets. We were able to get tickets today and will be enjoying the show . . . however, as struggling college students, we have decided to do it all over again. We will wait in line from midnight until we have your tickets in hand. The breakdown is this:

Wait time—13.3 hours @ \$9/hr = \$119.70

Metro fare—\$2.25

Slurpie and Pretzel—\$3.05

TOTAL = \$125.00

X-2 tickets

Grand Total = \$250.00

Seeing Anne Hathaway in Central Park on the final weekend = Priceless.”).

The additional cost of tickets can be masked in similar ways by brokers. For example, brokers are able to circumvent the ticket price controls by working with hotels, airlines, and tourist sites to put together packages that allow them to sell the tickets as packages. The ticket, which is not part of a bundle of goods and services, is priced well within the price limits imposed by statute, but the package allows all of those involved, including the ticket broker, to profit. In addition, the consumers benefit because of the scope and components of the package. Four merchants working together benefit from increased competition of packaging even as the consumer who wanted a ticket is able to score a weekend package and extras to go along with attendance at the desired event. Tickets packaged with transportation, weekend getaways, and other incidentals are profitable for brokers and their partners and provide consumers with increased choices and options, i.e., competition. In effect, the price controls serve as an economic stimulus in states and local markets that control secondary ticket sale pricing. These packages allow the brokers to avoid prosecution for scalping because the additional benefits included with the ticket provide the necessary value required, a defense to selling a ticket at an above-face-value price. From autographed pictures to dinner after events to limo transportation to and from the events, brokers are able to pull together ticket amenities that provide a fairly large loophole to these above-face-value restrictions in order to prevent prosecution.

In addition to this economic loophole, there is a procedural issue in prosecution of secondary ticket sellers. The very basic constitutional question of who has jurisdiction over the secondary ticket sellers has developed into a critical one as ticket markets for even local events have expanded to national and international markets of buyers. Internet sales, relatively cheaper airfares, and travel packages have opened up ticket event sales to a geographically disbursed market.⁹⁴ For example, ticket sales on eBay often involve a buyer and a seller from two different states, and the law of the state of the venue for the event is inapplicable when the two parties are from different states. A broker can simply establish a host of eBay accounts with billing addresses located in various states that provide the broker with a virtual ticket resale forum that exists in a regulatory nether land. The simple act of registering

94. Buyers who cannot obtain tickets for a concert in Las Vegas because of a limited forum size can try to obtain tickets in Los Angeles, San Francisco, and even farther concert sites. Upon factoring in airfares and available discounts, the price of a ticket in other markets than Las Vegas may actually be less, even when transportation costs are incorporated. Further, forum sizes are larger and major cities may have second offerings over two days, something that increases the supply and brings down the price in those markets.

different eBay names affords brokers a way around the antiscalping laws.⁹⁵ Technology and its national and international ubiquity has exacerbated the elusive task of trying to prosecute scalpers for violations of laws that attempt to control pricing in the secondary ticket markets.

Price controls imposed on the secondary ticket market also have an unintended consequence that affects sellers in the primary market. At least one study concludes that in those cities and/or states where there are antiscalping laws, the season ticket prices for NFL teams are lower.⁹⁶ That is, the primary ticket sellers are able to command fewer profits when the regulatory climate inhibits the secondary market. The findings are consistent with the notions related to underpricing. The prices in the primary market can be higher once the secondary market has shown a tolerance for that higher level. The conclusion of the study was the promoters and owners should join with secondary market participants in vigorously opposing any attempts to control the secondary market or its prices. Artificial constraints on secondary market pricing result in artificial constraints in primary ticket markets.⁹⁷

Private Price Controls

Another method of price control is an indirect one that is not statutory but, rather, comes through primary sellers (promoters, owners,) who seek to put primary market limitations on the number of tickets that one individual or credit card number can purchase during the primary sale phase.⁹⁸ The idea behind these private limitations was that if restrictions worked, they would shut out the ticket brokers from the market. If there were no brokers who were supplied with tickets, there could be no secondary market, and without the secondary market, prices, in theory, would fall to their printed value levels.

95. Jurisdiction over Internet companies has been litigated in other industries with the law reduced to fairly straightforward standards.

96. Andrew T. Williams, *Do Anti-Ticket Scalping Laws Make a Difference?*, 15 *MANAGERIAL & DECISION ECON.* 503 (1994).

97. *Id.*; Sherwin Rosen & Andrew Rosenfield, *Ticket Pricing*, 40 *J.L. & ECON.* 351 (1997). *See also* Depken, *supra* note 19 (concluding the same, i.e., higher prices for tickets, but recommended that primary ticket sellers in those NFL markets support antiscalping regulation).

98. Some may fancy these limitations as an invention of today's concert promoters, but it all has been tried. *See* SEGRAVE, *supra* note 1, at 92. *See also* *World Series Opens in New York Oct. 8*, *N.Y. TIMES*, Sept. 26, 1912, at 9 (indicating that for the 1912 World Series between the New York Giants and Boston Red Sox no seats for the games at the Polo Grounds in New York were sold by mail. Additionally, for the entire lower section of 15,400 non-reserved seats, tickets were only sold on the day of the game. All applicants had to queue in line, could only buy one seat each, and had to go directly into the stadium as soon as the ticket was bought.).

Again, attempts to control a high-demand, low-supply good prove to be largely futile as the market capitalizes on everything from weak security in ticket sellers' web pages to employing a form of cyber digger to thwart the primary seller's limitation. As usual, the market finds a way around an artificial constraint on demand for a price set at less than equilibrium. These ticket limitations have resulted in the opposite effect intended (or as stated as intended) by the primary seller, which was halting the concentration of tickets and ensuring that the supply of tickets is spread more broadly and thinly during the primary sale phase.

While a motivation for these acquisition-limitation policies is to keep the tickets out of the hands of secondary sellers, and, in theory, keep the prices of the tickets at face value, the result has been secondary market sellers developing the means to circumvent the limitations, means that came so easily that they were able to corner the primary market. For example, one of the controls on ticket acquisition imposed by musical acts has been that members of fan clubs receive first crack at the concert tickets.⁹⁹ Brokers responded by joining every fan club available. Indeed, some have speculated that the speculators themselves began the fan clubs for purposes of achieving queue-free tickets to concerts. Another evasive tactic emerged among fans. Rather than pay \$29.99 to join a fan club for Kelly Clarkson, one fan posted an ad offering to pay \$4 to any member of the fan club who would disclose the password that permitted access to the fan-club tickets.¹⁰⁰ Building on this idea, Ultimatepresales.com sells memberships to fan clubs through its site so that users can exchange prices for membership.¹⁰¹ Fan clubs have premium memberships and other tiers that offer varying concert ticket benefits. Ticketmaster indicates that it polices the sites to determine who is selling codes, but describes its efforts as "Whac-a-Mole." Primary sellers can only end memberships of those they catch because fan club membership terms make the rights non-transferable and the sale of codes a violation of the contract for the membership, a breach that allows the fan club to terminate the membership.¹⁰²

Primary sellers who try to contain the tiger by holding the tail find innovation, technology, and combinations of both thwart the allocation mechanisms. Indeed, they may simply be making the secondary market more

99. Mireya Navarro, *Pout and Shout*, N.Y. TIMES, Dec. 2, 2007, at SS1.

100. Joseph De Avila, *A Controversial Way To Score Concert Tickets*, WALL ST. J., Sept. 20, 2007, at A3.

101. *Id.*

102. *Id.*

profitable.¹⁰³ Principles One through Four establish that attempts to contain secondary sales in a market with these irrefutable principles results in a market with far fewer opportunities for competition.

Responses by Brokers to Primary Seller Limits on Number of Tickets

When primary sellers placed limitations on the number of tickets that could be acquired in the primary sale market, the secondary market turned to innovation and the use of the primary seller's own technology to acquire more tickets than they ever would have been able to acquire through the queue/digger situations of yesteryear. Companies have developed software programs that permit accumulation of large blocks of tickets by secondary sellers. These software application programs are called "Ticket Broker Acquisition Tools" or "TBATs."¹⁰⁴ They have proven to be very effective tools that secondary market participants can use during the primary market ticket sales for purposes of acquisition. The 2007 Hannah Montana tour found its primary-sale tickets very quickly in the hands of brokers, and a face-value ticket of \$64.75 was being sold for \$600 in the secondary market.¹⁰⁵ In one case, a federal court granted an injunction against a company in which it was prohibited from marketing the software.¹⁰⁶ However, even without the

103. For the 1912 Series the day-of-the-game approach to ticket sales to the Polo Grounds meant that the only reserved seats were those in the upper tier. For the sale of these seats the National Baseball Commission, which had injected itself into the market in an attempt to stop scalping, established a priority list for the remaining seats, and following the priority seats, sales to the general public of those non-queue seats were limited to a maximum of two seats per person. Secondary market prices jumped significantly in this year of control from the previous year's sales—from a "usual" price of \$6.25 for a \$3.00 face-value seat to a "usual" price of \$12.50 and going as high as \$60.00. The National Baseball Commission essentially threw up its hands at this point, leaving it to the teams in the following World Series (from 1913–1917) to fend for themselves in their ongoing efforts in quash scalping. See SEGRAVE, *supra* note 1, at 93–94.

104. Ethan Smith, *Hannah Montana: Are Websellers Cutting in Line?*, WALL ST. J., Oct. 5, 2007, at B1.

105. See Randall Stross, *Hannah Montana Tickets On Sale! Oops, They're Gone*, N.Y. TIMES, Dec. 16, 2007, available at http://www.nytimes.com/2007/12/16/business/16digi.html?_r=1&scp=1&sq=hannah+montana+oops&st=nyt; see also Bruce Mohl, *Cases Could Have Ticket Reseller Facing the Music*, BOSTON GLOBE, Oct. 21, 2007, at http://www.boston.com/business/technology/articles/2007/10/21/case_could_have_ticket_reseller_facing_the_music/; Ethan Smith, *Hannah Montana Battles the Bots*, WALL ST. J., Oct. 5, 2007.

106. See *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007). However, the decision was one based on copyright infringement by the software developer of software related to Ticketmaster's website and software. Specifically, the court found that the automatic use by the software company of automatically-made cache copies of Ticketmaster's webpages could not be considered fair use under the U.S. copyright laws. Also, because Ticketmaster's terms of use limited requests to no more than one every three seconds, the software program resulted in the user's violation of the terms of use for the site

software, secondary market sellers find a way around encryption devices and other obstacles designed to limit ticket access to humans who are typing in information.¹⁰⁷ For example, one company indicated, “[w]e pay guys in India \$2 an hour to sit and type in letters,” referring to the visual puzzles of distorted letters that web customers must type in to authenticate themselves as humans.¹⁰⁸ However, these circumvention methods may be short lived. In early 2010, four individuals from the company Wise Guys, Inc. were indicted for wire fraud as well as gaining unauthorized access to computers for their cornering of the ticket markets for the 2006 Rose Bowl, the 2007 MLB playoffs, the play “Wicked,” and concerts for Bruce Springsteen and Hannah Montana.¹⁰⁹ The four had hired Bulgarian programmers to circumvent the controls placed on ticket sites to require entry of data prior to being able to purchase tickets. The result was that the four cornered the primary and, consequently, secondary ticket markets and prices, for the events noted. Underpriced goods in a high-demand market spawn innovation, in everything from sophisticated programs to the simple act of hiring a new form of “digger” for Internet sales. Ironically, the secondary ticket market returns to the practices that began as early as English theater: spend the time or pay someone to spend the time to gain access to high-demand, underpriced events.

In addition to the simple digger strategy for typing letter recognition and the sophisticated software circumvention is another relatively simple solution that smaller brokers employ to work around limitations: they apply for and use different credit cards and e-mail addresses to buy their ticket limits under several different names.¹¹⁰

and, ergo, allowed Ticketmaster to banish the user from use. The decision is not one grounded in laws or the economic structure of markets except to place the constraint on software developers that prohibits them from using a webpage’s software as part of their program for circumventing ticket limitations. Although the decision has been used in litigation by primary ticket sellers to support the notion that injunctive relief is appropriate to halt ticket purchases that violate antiscaling laws or as inherently illegal activity, its use in that context is misplaced. *See, e.g.,* Herman v. Admit One Ticket Agency, L.L.C., 2009 WL 1247266 (Mass.) (Appellate Brief). The decision is limited to terms of use of primary market ticket websites and the development of software and when there is infringement in that development that can be enjoined from use or sale.

107. *See supra* notes 82–84 (noting in the discussion of the state laws on secondary ticket sales that some states have passed or are in the process of passing laws that make it a crime to use software to circumvent ticket limitation programs in primary ticket sellers’ sites. With these statutes, the private and expensive litigation of infringement and other theories to obtain an injunction are complemented by state enforcement of these anti-circumvention laws.).

108. Stross, *supra* note 105.

109. Joel Stonington, *Four Charged in Bid to Buy, Resell Tickets*, WALL ST. J., Mar. 2, 2010, <http://online.wsj.com/article/SB10001424052748703943504575095622582020594.html>.

110. The authors obtained this information from ticket brokers in a panel discussion at the NATB

Primary Seller Limitations on Internet Site Usage

There is, however, for each strategy employed by secondary ticket market participants to get more tickets, a defensive response by sponsors and promoters in the primary market. For example, recognizing that they may not be able to keep up with the technical programs that will allow the purchase of more tickets via the Internet, primary sellers are now creating terms and conditions of use on their websites. For example, the terms of use limitations imposed on users of ticketmaster.com are quite detailed in nature, designed to cover every possible circumvention by brokers and are in place with the idea of limiting broker access:

These Terms give you a non-exclusive license to copy the Site for your own personal use only so long as you comply with all of the terms and conditions set forth herein. Any violation of these Terms exceeds the scope of that license.

You agree that you will only use credit cards belonging to you, friends or immediate family members who expressly authorize such use, for the purpose of purchasing tickets. You further agree that you will not attempt to conceal your identity by using multiple Internet Protocol ("IP") addresses or email addresses to use or to purchase tickets on the Site.

You [the viewer] agree that you are only authorized to visit, view and to retain a copy of pages of this site for your own personal use, and that you shall not duplicate, download, [or] modify . . . the material on this Site for any purpose other than to review event and promotions information, for personal use

Commercial Use

No bulletin board, chat or other areas of this Site may be used by our visitors for any commercial purposes such as to conduct sales of tickets, merchandise or services of any kind, except that TicketExchange can be used to resell tickets to the extent compliant with law.

Access and Interference

You agree that you will not use any robot, spider or other automatic device, process or means to access the Site. You agree that you will not use any robot, spider or other automatic or manual device, process or means to give yourself or others acting for your benefit or on your behalf the ability to navigate the Site or purchase tickets on the Site faster than users of the Site who use a standard commercial browser and manually enter on their computers all information needed to navigate the Site and purchase tickets. You agree that you will use no robot, spider, program or other automatic or manual device, process or means to circumvent, avoid or defeat any security measures or systems used on the Site, including but not limited to the "CAPTCHA" system used as part of the Site's ticket purchasing process. The CAPTCHA system requires the retyping of characters on your computer screen. You agree that the retyping will only be done manually by you on the keyboard for the computer that you are using to access the Site. Nor shall you use any manual

process to monitor or copy our web pages or the content contained thereon or for any other unauthorized purpose without our prior expressed written permission. You agree that you will not use any device, software or routine that interferes with the proper working of the Site nor shall you attempt to interfere with the proper working of the Site. You agree that you will not take any action that imposes an unreasonable or disproportionately large load on our infrastructure. You agree that you will not access, reload or “refresh” transactional event or ticketing pages, or make any other request to transactional servers, more than once during any three second interval. You agree that you will not copy, reproduce, alter, modify, create derivative works, or publicly display any content (except for your own personal, non-commercial use) from the Site without the prior, express written permission of Ticketmaster.

You do not have permission to access this Site in any way that violates . . . these terms of use.

You understand and agree that . . . Ticketmaster may terminate your access to this Site, cancel your ticket order or tickets acquired through your ticket order . . . if Ticketmaster believes that your conduct or the conduct of any person with whom Ticketmaster believes you act in concert . . . violates or is inconsistent with these Terms or the law, or violates the rights of Ticketmaster, a client of Ticketmaster or another user of the Site.¹¹¹

With limits on purchase, controls on use of the web page materials, rights of termination, and non-commercial use, primary sellers have established some level of contractual restrictions that present brokers with challenges in obtaining more than the predetermined per-person allocation of tickets. However, there are two end results. One is that, as repeatedly emphasized, the market finds a way around what seems, in the planning and initial stages of ticket sales, to be foolproof.¹¹² The second effect is that access to and the supply of tickets is more limited, with no possibility of the broker competitive packaging discussed *infra* in Principle Five. Further, the limitations on supply serve to drive the available information about ticket supplies into the black-market type of atmosphere in which consumers cannot gauge how many tickets are available and whether there is or will be competitive pricing for those tickets. Because the primary controls drive the secondary market underground, the less-than-transparent market creates a market of asymmetrical information. Consumers do not know who has tickets, how many tickets are available, and this perception of limited supply drives the secondary ticket market prices higher.¹¹³

111. Ticketmaster Terms of Use, http://www.ticketmaster.com/h/terms.html?tm_link=tm_homeA+i+terms (last visited Mar. 14, 2010).

112. See *supra* notes 90–109 and accompanying text.

113. For example, the experience with the 2007 Hannah Montana concerts could actually be perceived as a function of the primary market frenzy. With so many tickets sold so quickly, the secondary market brokers actually benefit from a perceived false demand. The controls placed on the primary market created the driving force behind the numbers-control-circumvention software, a circumvention that worked so well

Primary Seller Control of Price and Access Through Dutch Auctions

Periodically, sellers do recognize the true price of tickets to high-demand events and have tried to establish different price levels in a way that they believe allows the market to do the valuations. As noted in the discussion of Principle One, however, the problems with fairness perception may be exacerbated. For example, the Dutch auction has been tried by primary market sellers as a means of allowing real-time demand to determine accurate market pricing and provide a way for the public to enter the market at a price level they find comfortable. In a Dutch auction the initial price is set very high and then comes down over time.¹¹⁴

In general, the auction system is not new to 20th century concerts. For instance, in 1860, the New York entertainment venue Niblo's Garden auctioned 250 of its most desired seats (all the remaining seats were sold at the box office) for an upcoming performance. However, without restrictions on number of tickets, speculators penetrated the auctions and were able to capitalize on what was perceived as substantial demand at high prices. Theater managers were forced back to controlling the number of tickets per buyer or placing restrictions on acquisition of certain types of seats, such as those seats on the aisle or other highly desirable locations.¹¹⁵

There is another unintended consequence of auctions, one that affects access and skews demand. The 2007 Hannah Montana concert tour attempted an auction form of pricing.¹¹⁶ However, the auctions begin with high prices, a level that effectively squeezes brokers and other secondary sellers from the market. Secondary sellers will labor mightily to acquire a \$50.00 ticket for a good seat at an event, knowing that the ticket can be resold at a substantially higher price. But, brokers would not enter the auction early and pay an

that the quick sell-out made the secondary market more intense in terms of demand and higher priced because of a lack of transparency in the primary and secondary market.

114. This form of auction has been used in online bidding and is referred to as "reverse bidding," wherein contractors can all see the bids submitted and are free to go lower. In theory, the result is lower prices. However, one of the concerns that has emerged is the quality of the contractors submitting the lower and lowest bids as well as the concern about whether the work can actually be done at the bid price. Some see "reverse bidding" as a means of keeping prices low whereas some document instances of higher costs resulting from the need to substitute performance for low bidders or repair lower quality work (in the case of construction contracts).

115. SEGRAVE, *supra* note 1, at 24.

116. Rich Philips, *Brokers Snatch Joy from Hannah Montana Auction*, CNN, Oct. 12, 2007, <http://www.cnn.com/2007/SHOWBIZ/TV/10/12/montana.tickets/>.

opening high price of \$500 for a ticket because buying at the highest price means that the ticket, absent some unforeseen event or change in artist popularity, cannot be resold at a higher price.

During a Dutch or reverse auction, the prices are descending, and with descending prices, the two phenomena of perceived unfairness as well as the loss of the psychological draw of high-demand, moderately-priced events often leave the primary sellers with either an event that is not a sell-out or demands from early buyers for refunds. The initial stages of the auction, in effect, control the price, and not necessarily at a level that an open market would reach. The participation of secondary market sellers, in effect, provides the market with an opportunity to settle on a price that reflects actual value, not, as auctions create, a value based on the ability of a few consumers to pay a much higher price. In auctions, most, if not all, of the profits are now going to the owners or promoters, but perceptions of unfairness are more pronounced under this system.¹¹⁷

As noted in the discussion of primary market pricing under Principle One, those profits may be artificial because the promoters and primary sellers may only be able to capitalize on the initial high prices in an auction on a one-time basis before the backlash arises, forcing change, decreasing demand for future events, or having opening bids in the next auction that reflect the lowest bids in the last auction. The bidding process in the primary market does not provide the market real-time pricing that secondary sales offer. That real-time adjustment serves to bring prices down, but according to supply and demand, not according to isolated buyers' perceptions about value. For example, when the 2001 World Series teams were determined, the Yankees and the Diamondbacks, initial ticket sales in the secondary market for the first game of the series brought prices as high as \$3000.¹¹⁸ By the day of the first game in Phoenix, those prices had dropped considerably as the market was better able to place supply, demand, and pricing in equilibrium with full information about ticket availability and actual demand.¹¹⁹ Auction sales conducted in the

117. In fact, because of the public backlash from the Hannah Montana auction, the Miley Cyrus 2009 tour changed to the limited-tickets-per-person and ID format. *See* Branch, *supra* note 28.

118. The authors observed these prices in the classified section of the *Arizona Republic* at the time of the 2001 series.

119. Indeed, for game six in Phoenix, prices on the street just before the first pitch were down to face value. In 1995 the City of Phoenix passed an ordinance just before the NBA All-Star Game requiring all resale ticket trading in the downtown area to take place in a particular location (a trading pit). As with the 2001 World Series, ticket prices came down as game time approached. *See* Stephen K. Happel & Marianne M. Jennings, *Herd Them Together and Scalp Them*, WALL ST. J., Feb. 23, 1995, at A14.

primary market do not provide sufficient time or information for that equilibrium to be achieved.

Primary Market Controls Through Secondary Market Participation

Artificial controls on ticket prices and supply in high-demand markets result in overwhelming temptation at all levels of the market. No matter how effective the controls, the market finds a way (see Principle Seven for more discussion of this market force), and the artificial controls find insiders recognizing the profit potential and then finding the means for participating in the higher profit margins of the secondary markets. In the late 1800s in New York City, theater owners were not blind to the profits in the secondary market.¹²⁰ Even as they lobbied for regulation of that market, the owners hired their own “brokers,” called “lobby men,” who sold tickets above face value in the lobby of theaters at the time of the performances. The owners were participants in the secondary market they were trying to curb through regulation. These lobby men gave a substantial percentage of their revenues to the theater managers. The result was a near complete vertical monopoly by the theater managers/owners of both the profits of the primary markets and a substantial portion the secondary markets through their lobby men. These types of sales were also “under-the-table” when it came to the owners’ and managers’ profit-sharing clauses with the lobby men as well as with artists and producers that were paid when their tickets awarded in the primary market were sold in the secondary market.¹²¹

A sub-principle emerges with this example: primary sellers have always participated in the secondary market with the degree of participation expanding even as some of the participation by owners’ and managers’ agents remains an unknown. For example, in a 1925 investigation journalist Morrow

120. See *infra* note 121 for more information on this awareness.

121. In *People ex rel. Cort Theater Co. v. Thompson*, 119 N.E. 41 (Ill. 1918), a theater owner entered into a secret ticket sale scheme with a ticket scalper. The uniqueness of this arrangement was that the box office and the scalper worked hand-in-glove. There was no physical hand-off of tickets until the consumer approached the scalper with a need for a ticket. Consumers were told that tickets at the theater box office were sold out, so consumers were directed by the box office to the ticket scalper that Cort Theater had its arrangement with for the sale of tickets in the secondary market. Consumers were permitted to select seats and the ticket scalper then called the theater to provide the desired tickets to the consumers at a price higher than the advertised price. The theater owner shared in the profits with the ticket scalper. The scalper was selling directly from the theater’s inventory. The court found that there was a violation of the ticket scalping act through this circumvention. *Id.*

Mayo concluded, “[u]nder the system of speculation which is found in most large cities the theaters give as many as half their orchestra seats to brokers.”¹²²

U.S. Attorney Charles Tuttle found, during the course of investigation between 1927–1929, that the “box-office men” were skimming off tickets and getting payola, also called “ice,” as a reward.¹²³ Those who worked for the primary ticket sellers were quick to see the profit potential in the secondary market as they witnessed, first-hand, not just the demand but also the secondary market unfolding just outside their ticket booths.

What exists in theater has found its way into the modern concert tour. Joseph Nekola, the box office manager at the Jones Beach Theater in New York, entered a guilty plea in 1998 to charges of second-degree grand larceny and third-degree computer tampering in the theft of tickets from the Wantagh, N.Y. venue. A routine audit, following a Hootie & the Blowfish concert, uncovered the fact that the first 10 rows of tickets, a total of 534 prime location seats, were taken off the computer before the primary sale began. The best seats anyone buying in the primary market could obtain would be in Row 11. Once the primary ticket sales were over, Nekola, the employee, went back into the computer and freed up the seats and sold them to brokers. Nekola repeated the scam over the course of years and many concerts, selling 8,000 seats in total to brokers using the same process.¹²⁴

Sports have not been immune from “ice.” Late in 1980, Al Davis, CEO of the Oakland Raiders, brought an antitrust action against the NFL, a suit that resulted from the NFL’s refusal to allow him to move his team to Los Angeles. Included in the suit were allegations that Georgia Frontiere, owner of the L.A. Rams, had scalped tickets to the January 1980 Super Bowl.¹²⁵ Moreover, Mr. Davis also alleged in the suit that NFL Commissioner Pete Rozelle may also have profited from these sales.

Davis’ suit painted an insider trading scenario that involved Mrs. Frontiere confessing to Rozelle that her late husband, Carroll Rosenbloom, had promised to sell 1000 Super Bowl tickets to former

122. Mayo, *supra* note 13.

123. See SEGRAVE, *supra* note 1, at 142–43, 174–76; see also Andrew Kandel & Elizabeth Block, *The “De-Icing” of Ticket Prices: A Proposal Addressing the Problem of Commercial Bribery in the New York Ticket Industry*, 5 J.L. & POL’Y 489 (1997).

124. Enforcement has not been a crackerjack effort; Nikola got 60 days. See Melinda Newman, *Joseph Nekola Pleads Guilty in Jones Beach Tix Theft Case*, BILLBOARD, June 27, 1998, <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4630364-1.html>.

125. Frontiere, in turn, inherited the team in April 1979 from her deceased husband Carroll Rosenbloom, who also faced separate accusations of scalping. In 1980 Georgia married Dominic Frontiere, an Emmy Award-winning composer.

executive Harold Guiver of the L.A. Rams.¹²⁶ Although Mr. Rozelle objected to this ticket distribution, he felt a moral and ethical obligation to follow through on the arrangement. The suit alleged that Mrs. Frontiere charged the former executive a price of \$100 a seat rather than the \$30 printed face value of the Super Bowl ticket. According to Mr. Guiver, Mrs. Frontiere said the \$100,000 was to cover a \$48,000 loan from the late Mr. Rosenbloom (which Guiver claimed had already been forgiven), \$22,000 as payment for a football-club-owned Mercedes car Guiver had been driving, and \$30,000 to cover face value of the seats. Mr. Rozelle said subsequently he knew only about the \$30,000 to cover printed face value.¹²⁷

This NFL scandal and the resulting publicity caught the attention of various law enforcement agencies including the IRS, which was probing tax issues for tickets sold in the underground economy. Unreported scalping revenue for this Super Bowl was estimated to be as high as \$7 million. Mr. Rozelle commented, “[t]here is a sickness about this whole thing. You feel a sickness in your stomach. There hasn’t been anything like this in my 21 years as commissioner.”¹²⁸ Mr. Rozelle acknowledged he knew of NFL owners and broker ads in newspapers offering to buy and sell tickets, but he continued to insist that he was not aware of the volume of premium sales by owners. Mr. Rozelle’s reaction is fairly typical of primary ticket sellers, but may or may not have been forthright. Getting one’s arms around the scope of primary market participants in the secondary market is difficult because of its under-the-table nature. However, there is information about its pervasiveness and profit levels that emerges anecdotally.

In some cases, the promoters and owners find their ways into the secondary ticket market and also express a form of vengeance born of their self-perceived unalienable right to the profits of the secondary market. In 2001, the producers of the hit Broadway show, *The Producers*, began a new, more public strategy of primary-market involvement by withholding approximately fifty seats from sale to the public and then selling them on the day of the performance. The producers of *The Producers* were able to command \$400 per ticket by selling them to their self-created ticket brokerage firm, a gross profit of \$300 per ticket on the tickets that had a printed value of \$100. However, their brokerage firm was then able to add 20% to the \$400 before selling them to the public for \$480, yet another \$80 in gross profit to

126. *Id.*

127. SEGRAVE, *supra* note 1, at 200–01.

128. *Id.*

the primary seller.¹²⁹ Such profit margins have brought other theater owners and producers to the secondary market, and all with the protective cover of the public service aspect of these sales. The theater owners maintain a public posture of goodwill by repeating a theme: they are providing tickets for individuals who come into New York City for business and need to acquire tickets for the time they are in town. This withholding of tickets has been called a “war on scalpers.”¹³⁰

This new open structure of primary market sellers in the secondary market ran nearly parallel in time in its evolution in sports and is perhaps most evident today in the secondary market for tickets for sporting events. The move to integration of professional sports teams into the secondary market began in 2000, when the San Francisco Giants’ Double Play Ticket Window began.¹³¹ At the Ticket Window, a season ticket holder who did not want to go to a particular game could log onto this official team website, put the ticket up for sale (in the Giants’ case at face value or *above*), with service fees (10–15 percent) charged to both the seller and buyer. The ticket, made available at the will-call window, meant buyers purchased free of concerns about counterfeit or stolen tickets. In exchange, the Giants received a percentage of the service fees.

The idea soon spread. In 2001, the Seattle Mariners, in conjunction with LiquidSeats and Major League Baseball, created a website called Ticket Marketplace, a site promoted through letters and e-mails to season ticket holders. Like the Giants’ Double Play Ticket Window, Mariners season-ticket holders could resell their tickets to particular games, and in 2002 the Mariners received about \$100,000 to \$120,000 as its share of the profits from these secondary sales.¹³²

One of the fascinating studies in the involvement of owners and promoters in the secondary markets for their own tickets is the intricate effort to avoid violating state and local antiscalping laws. For example, at the time of the LiquidSeats venture, a Seattle ordinance made it a misdemeanor to sell tickets to sporting and entertainment events for more than face value. While the Mariners website included a warning about the ordinance and the illegality of selling tickets for more than face value in Seattle, the team, as market participants in high-demand, low-supply events tend to do, found a clever loophole or evasive tactic for the local law. Sellers who lived in the city could

129. Simon, *supra* note 38, at 1176.

130. *Id.* at 1171.

131. *E-Scalping*, SPORTS ILLUSTRATED, Aug. 28, 2000, at 64.

132. Lewis, *supra* note 89.

enter addresses outside the city to circumvent the law. In a local challenge to the regulation that existed at the time that prohibited resale above face value, a court concluded that those who were selling on the site were permitted to handle delivery of tickets and payment within the city.¹³³

There was another tactic used to insulate the team owners from running afoul of antiscalping laws. The Mariners were also using the website to sell never-before-sold charter seats, similar in nature to the Chicago Cubs Premium Seats secondary sales conducted through its wholly owned subsidiary. To avoid local ticket scalping laws, the Mariners' never-before-sold seats had no established price (printed face value). A ticket with no pre-printed face value could not violate the ordinance because the sales of these types of tickets were primary, not secondary, ticket sales.¹³⁴

The Chicago Cubs had a more intricate mambo to dance in circumventing both antiscalping and consumer fraud laws when its Premium seat subsidiary began selling tickets in the secondary market. In *Cavoto v. Chicago National League Ball Club, Inc.*,¹³⁵ the Chicago Cubs' intimate involvement in the secondary market was revealed through litigation brought by a fan who sought to halt the secondary market activities through either a finding that the Cubs' system violated the antiscalping laws or that it resulted in violation of Illinois consumer protection provisions. The Cubs had incorporated Wrigley Field Premium Ticket Services, Inc., a ticket broker that had as its officers some of the same officers who ran the Cubs organization. The Cubs, prior to the start of the baseball season, allocated high-demand VIP seats to Premium, with an actual sales transaction taking place between the Cubs and Premium.¹³⁶ Premium, with ads placed by the Cubs, then began selling seats as a secondary ticket market participant with the Cubs eventually earning the profits from Premium's sales because of the subsidiary relationship.

133. See Glantz, *supra* note 61, at 272 n.60; see also *Seattle v. Charlesworth*, No. 420709, 2004 WL 3670445 at *2-3 (Wash. Mun. Ct. Jan. 30, 2004).

134. First offered in 1999 before the new stadium (Safeco Field) opened, the 966 designated charter seats required a deposit/license fee, of \$12,000 to \$25,000 per seat. This practice, becoming more and more common among major sports franchises, entitled the buyer to own them for 19.5 years in the Mariners case, with the buyer then required to pay additionally the going face value for the seats each year. At the end of the 2002 season the team, unable to sell out all of the charter seats, chose to take 111 seats unsold for all games and offer them solely on Ticket Marketplace. Because the team argued these were primary sales, it felt the antiscalping law was not being broken. See Peter Lewis, *M's Put Prime Seats up for Online Bids*, SEATTLE TIMES, June 28, 2003, at C1.

135. *Cavoto v. Chi. Nat'l League Ball Club, Inc.*, No. 02 CH 18372, 2003 WL 25777926, *aff'd*, 2006 WL 2291181 (Ill. App. Ct. 2003), *appeal denied*, 861 N.E.2d 653 (Ill. 2006).

136. However, the initial sale in 2002 was done on credit, with Premium indebted to the Cubs for \$1,047. *Id.*

The consumer fraud claim was based on the failure of the Cubs to disclose its relationship with Premium, a disclosure that had conflicting evidence in the record. The antiscaling claim rested on the fact that the Cubs were participating in the secondary market without a brokers' license because there was no actual sale between the parent and subsidiary. The court held that a sale on credit was still a sale and a transfer between a parent and subsidiary can still be an arms' length transaction.¹³⁷ Although the evidence on how much was disclosed about the relationship was not clear, the court concluded that there was no bait-and-switch tactic that would have violated the consumer protections afforded in Illinois. The effect of the Illinois decision was to open up the secondary market for sports teams in a way that guaranteed them unfettered access to the secondary market without the requirements of disclosure of total number of primary market tickets as well as the number and types of tickets to be transferred to team-sponsored brokers.

The open participation of primary sellers in the secondary market is now pervasive through companies like StubHub. And while not fully transparent in terms of numbers of tickets, the presence of these companies provides a different involvement from primary sellers' nefarious and undisclosed participation in the secondary ticket market or participation by primary sellers' agents without permission or even the knowledge of the event promoters or owners. A longstanding presence in ticket markets has been the corruptibility on the part of insiders. Some market observers have labeled the achievement of a free market in the sale of high-demand, limited-seat events as an illusion as long as insiders are controlling or affecting the market with their pricing or the withholding of information from buyers who are assessing optimum prices: "There cannot be a free market when the price of a product is controlled at the original point of distribution by a conspiracy based on bribe-giving and bribe-taking (i.e., payments of and receipt of "ice")."¹³⁸

Ticketmaster recently acknowledged to the *Wall Street Journal* that its online secondary marketplace, Ticketexchange.com, has been used by performing artists and their managers to sell their own concert tickets.¹³⁹ The site is touted as one for fans only to be able to resell their tickets, but

137. *Id.* (The plaintiffs in the case even argued pierce-the-corporate veil principles in attempting to establish a violation of antiscaling law. They used the close-connection doctrine, i.e., that the subsidiaries were just shell companies operating for the Cubs and the Cubs controlled them. They also tried to use the fact that no money changed hand in the transfer of the tickets as proof that the shell corporation had no independence. However, as the court noted, a sale on credit is still a sale.)

138. Kandel & Block, *supra* note 123, at 493.

139. Ethan Smith, *AEG Accuses Ticket Agent of Scalping Jackson Show*, WALL ST. J., Mar. 16, 2009, at B1.

Ticketmaster disclosed that the site, in fact, sells tickets withheld from the primary market and then sold at a premium. In fact, the site has operated in advance of even the opening of the primary market. The interconnections between primary and secondary market sellers have become increasingly entangled, regardless of whether each is aware of the others' activities. For example, AEG won a court injunction against its own agent for the sale of tickets to the ill-fated 2009 Michael Jackson tour. AEG's agent, Viagogo Ltd., was using its StubHub-like website to sell 1,700 (or about 10% of the tickets) on the site as premium seats.¹⁴⁰ An email from Viagogo that offered bulk rates to brokers and resale services was a significant part of the evidence offered by AEG in obtaining the injunction against its own agent that it had hired to handle primary ticket sales from selling in the secondary market in violation of its fiduciary duties as an agent.¹⁴¹

The phenomenon of end-run secondary market sales preceding primary market ticket sales is not limited to Michael Jackson concerts. Again, as Principles One through Four establish, the high-demand, limited-supply events command a price that is not charged in the primary ticket market sales (see Principle One) and is, therefore, reaped in the secondary market. Those doing the reaping, however, also happen to be involved and repaying or repairing in the primary market. For example, before the primary market ticket sales had begun for a February 2, 2009 Bruce Springsteen concert, the Ticketmaster online site already had 2,000 tickets posted for sale at premium prices, the secondary market prices.¹⁴² However, the secondary market being open for business before the primary market caught the attention of both consumers and regulators. In a settlement with the New Jersey Attorney General, Ticketmaster agreed to pay \$350,000 for investigation charges and promised not to put any tickets on its online site for sale until the primary market ticket sales were complete.¹⁴³

The practice of "hold-backs" runs across events and industries. These "hold-backs" are tickets that are held back from the primary market by event

140. *Id.*

141. *Id.*

142. Chad Bray, *Ticketmaster Settles Complaint Over Reseller*, WALL ST. J., Feb. 24, 2009, at D2.

143. *Id.* (Mr. Springsteen was not pleased with the practice, "[t]hey did this when other seats remained available at face value. We condemn this practice."); see also Ethan Smith & Evan Perry, *Springsteen Slams Ticket-Vendor Merger*, WALL ST. J., Feb. 6, 2009, at B8 (Mr. Springsteen would later publicly oppose the merger between primary and secondary ticket sellers because of his experience with the insider trading for his concert); see also Mitchell Peters, *Ticketmaster Settles Springsteen-Sparked Attorney General Probe*, BILLBOARD, Feb. 23, 2009, <http://www.billboard.com/news/ticketmaster-settles-springsteen-sparked-1003944146.story#/news/ticketmaster-settles-springsteen-sparked-1003944146.story>.

promoters and owners and then distributed to artists, staff, radio stations, politicians, and others who can provide owners and promoters with something in exchange, whether it be promotional press from their sheer presence, radio play time, legislative or regulatory favors, or just loyalty.¹⁴⁴ For example, the NFL holds back about 25% of its tickets.¹⁴⁵ These tickets are then used to get the movers and shakers to the Super Bowl and other critical games. However, the hold-backs do make their way into secondary markets and those in the secondary markets have no way to determine the scope of the supply in a ticket market when the event promoter or owner is holding back tickets for later release, either directly or through donees seeking to make a profit on a generous gift from a promoter or owner.

Principle Six: Allowing Market Participants to Structure Government Regulation of Their Market Adds Vertical Integration and/or Monopolies

The undisclosed, unspoken, open, and/or nefarious entry of promoters and owners into the secondary market is perhaps the most compelling evidence that the regulatory control of that market is not possible. Their participation is a classic example of the if-you-can't-beat-'em phenomenon.¹⁴⁶ It is difficult to argue effectively against apparent efficiency, and the secondary market does provide the efficient function of matching buyers with sellers at a price level that finds them meeting at an equilibrium point that the primary market is not able to reach because of the artificial constraints Principle One imposes on these high-demand, limited-supply events. Primary sellers' participation in the secondary market, whether transparently or under the radar, shows the legal recognition that market prices, no matter how high they go and no matter the hypocritical actions by the teams that greatly anger the general public, are the best solution in the resale marketplace. Efficiency to many economists takes precedence over perceived inequity.

However, the entry of primary market participants into the secondary ticket markets produces additional economic concerns. Since 2005, there have been extensive movements in the primary and secondary ticket markets

144. At one point the New York Lobbying Commission investigated the longstanding practice of elected officials receiving tickets as gifts because the tickets were not reported by the officials or were underreported using only their face value. See *Yankees, Lobbying Commission Settle Case*, SPORTS ILLUSTRATED, Dec. 31, 2003, <http://sportsillustrated.cnn.com/2003/baseball/mlb/12/31/bc.bba.yankees.subpoenas.ap>.

145. Simon, *supra* note 38, at 1181.

146. *Id.* (the literature titles reflect the pervasive nature of the surrender to market forces by simply participating in the market).

through mergers, acquisitions, and the selling activities highlighted by the Cubs and Mariners examples, leading to vertical integration.¹⁴⁷ In the *Cavoto* case, the attorney representing the plaintiffs explained presciently what would happen with the court's conclusion that what the Cubs accomplished was neither a violation of Illinois antiscalping laws nor deceptive under consumer protection laws: "I expect a lot more teams are going to jump on the bandwagon. Why not do it, if they can restrict the supply, drive up prices and sell them for more."¹⁴⁸ Vertical mergers create the possibility of extensive market controls on ticket distribution that may result in less information for consumers in terms of how many tickets are available, what true demand is, and whether the supply is dominated by demand or the strength of vertical controls. In addition to the vertical mergers, there have been horizontal mergers as well with the result being shifts in the secondary market to fewer companies that have ties to or are owned by primary sellers. The present and historical structure of the primary and secondary ticket market is summarized below in Table I.

Table I: The Evolving Structure of the Primary and Secondary Ticket Markets

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
Ticketron	Primary market ticket sales; eliminated the need for physical inventory of tickets; the first "electronic box office"		Began business in 1969; seat selection was not perfected; consumer complaints undercapitalized and run like a public utility in the 1980s	Acquired by Ticketmaster in 1991

147. *Cavoto v. Chi. Nat'l League Ball Club, Inc.*, No. 02 CH 18372, 2003 WL 25777926, *aff'd*, 2006 WL 2291181 (Ill. App. Ct. 2003), *appeal denied*, 861 N.E.2d 653 (Ill. 2006); *see also supra* notes 89, 132-37 and *infra* notes 165-68 and accompanying text.

148. *See E-Scalping, supra* note 131.

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
Select-a-Seat	Primary market ticket sales		Started in the early 1970s; never really got off the ground; filled the market void that Ticketron created with its cumbersome seat selection process	Original company defunct (although new schemes with same name here has arisen)
TicketAmerica	Organize all ticket brokers nationally onto one site		Never really got started in 1990s	Defunct

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
Ticketmaster ¹⁴⁹	National ticket seller in primary markets; began charging service fees that were shared with promoters as a means of increasing their margins; allowed opportunity to acquire Ticketron's market with innovative pricing that benefited underpriced primary sellers ¹⁵⁰	\$500 million annually by end of the 1980s; topped \$1 billion by 1991. In 2007, sold more than 140 million tickets and controlled 70% of the market for major concerts; revenue \$1.45 billion in 2008 and \$373.8 million in 1st quarter of 2009	Founded in 1976 by two Arizona State University students who had experience in seat selection programs; ¹⁵¹ acquired in 1982 (when it held 1% of the amount of business done by Ticketron) for \$4 million; purchased by Paul Allen in 1993 for \$300 million; in 1998 Barry Diller acquired Allen's major interest; company signs first exclusive contract with SFX Entertainment ¹⁵²	Merger activities; Live Nation acquisition 2010; Paperless Ticket® debuts in U.S. in 2008. Acquires Front Line Management in 2008 which becomes Ticketmaster Entertainment, Inc.

149. The authors are grateful to Mr. Fred Rosen (legal counsel for Jay Pritzker, who purchased Ticketmaster in 1982 for \$4 million, making Mr. Rosen its CEO), for his March 2003 interview (along with Peter Gadwa) with the authors that provided the history of Ticketmaster as well as insights about the primary and secondary ticket markets.

150. Interview with Fred Rosen and Peter Gadwa (Mar. 2003). Running parallel to the Ticketmaster model for selling was the evolution of the musical/concert acts from being grateful for whatever the promoter gave them to demands from the artists of 75% of concert revenues. Profit margins for promoters changed dramatically from the 1960s multi-artist tours to single-act concerts with sell-out power who used that power to negotiate better percentages with promoters. In effect, Ticketmaster was wearing the "black hat" promoters were afraid to wear and that resulted in their underpricing of the tickets in the primary market. Ticketmaster understood the price the tickets could command, charged that amount, and rebated a portion back to the promoters who still appeared to the public to have clean hands.

151. Interview with Al Leffler (Mar. 2003). The authors are grateful to Al Leffler, one of the founding students who remains a Vice President at Ticketmaster, for graciously taking the time to discuss the history of the company in March 2003.

152. The acquisition was challenged as monopolistic, but in *Campos v. Ticketmaster Corp.*, 140 F.3d 1136 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), a federal court ruled that those who had purchased tickets from Ticketmaster had standing to proceed with a Clayton Act suit against Ticketmaster.

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
Tickets.com	A leading global live event ticketing service provider; under its ProVenne® Ticketing Solutions Brand, offers a range of software products to increase ticket sales and build customer relationships for thousands of top entertainment and sports venues; second largest seller in the primary ticket market	Not disclosed (72% of revenue derived from non-baseball clients)	Founded in 1995	A separate and wholly owned subsidiary company of Major League Baseball Advanced Media. One of First live event ticketing solutions providers to enable ticket printing from home computers and are now the first to deliver tickets to mobile phones via an MMS or picture message
OpenSeats.com			Formed in 1999	
TicketsNow	Resale market place for broker	Has had grosses in excess of \$100 million every year recently	Started in 1992 as VIP Tour Company. Company turned towards the Internet and launched as TicketsNow.com in 1999. In 2001 developed the event inventory. Web store plug-in and became world's largest online marketplace for premium event tickets (largest online database for brokers to list and sell their tickets on)	Acquired by TM in 2008
TeamExchange and TicketExchange	Resale market place		TeamExchange in 2002, superseded by TicketExchange in 2006	Owned by Ticketmaster

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
EBay	Participates through StubHub subsidiary		Acquired StubHub in 2007 for \$310 million	
StubHub	Online equivalent of the classified section; does not sell tickets; brings buyers and sellers together for 15% cut on the sale; ¹⁵³ a NASDAQ for tickets. More than \$100 million in revenues in 2006		Formed in 2000 by two Stanford business students; operated by Liquid Seats; partnered with professional sports teams; signed with MLB in 2007; acquired by eBay in 2007 for \$310 million in cash	Fan Protection Guarantee and fraud issues; claims exemption from local laws, leaving compliance to sellers who list tickets; ¹⁵⁴ introduced "PriceMapper" in 2008, a live way to track ticket availability and prices

153. Initially, the fee was 10%. The process for StubHub is described as follows: "Sellers register their tickets on the site. When a buyer is found, the seller receives an e-mail requiring them to schedule a FedEx pickup time and location. FedEx shows up with a pre-printed label with the buyer's address and your return address. The return package is sent to the seller with the buyer's money. StubHub makes its money by charging the seller a 10 percent fee." Jeff Houck, *Get Your Tickets Here: New Site Helps Fans Sell Unused Season Tickets*, Feb. 9, 2001, www.FoxBizSports.com (last visited July 2, 2009).

154. The stated immunity the company feels it has may be shifting. With the so-called "Craigslist killer" developments, Craigslist has undertaken a new policy of more extensive policing of areas of its site. A potential legal shift in liability for activities of users of online sites could result in additional responsibilities for compliance by online ticket exchanges. Brad Stone, *Under Pressure, Craigslist to Remove 'Erotic' Ads*, N.Y. TIMES, May 13, 2009, at B1, available at http://www.nytimes.com/2009/05/14/technology/companies/14craigslist.html?_r=2&scp=2&sq=Craigslist&st=cse.

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
LiveNation	Producing, marketing, and selling live concerts (promoter)	\$4 billion for 2008; ticketing revenue is \$22 million for 2008	Formed in 1997 as a live entertainment business; acquired by Clear Channel in 2000; ¹⁵⁵ spun off from Clear Channel in 2005 ¹⁵⁶	2010 merger with Ticketmaster approved; ¹⁵⁷ Acquired 9 regional live entertainment companies in 2008 ¹⁵⁸
LiquidSeats	First sports team partnerships; agreement reached in 2001; matching buyers and sellers of tickets; initially focused on sports team partnerships		Formed in 2000 by two Stanford business students; precursor to StubHub online ticket service	
Razorgator	Fan-to-fan exchange. Third largest player in online ticket reselling behind StubHub and TicketsNow	Privately held company	Founded in 2001; grew out of the ticket outlet (founded 1977) and special events company (1985); specializes in sold-out and hard to get tickets to sporting events, concerts and theater	Aims to be the largest football/soccer social media on the web

155. During the time of Clear Channel's ownership there were a series of antitrust actions against the company. See *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048 (D. Colo. 2004) (a case that survived summary judgment and was later settled); *Jam Sports and Entm't, LLC v. Paradama Prods., Inc.*, 382 F. Supp. 2d 1056 (N.D. Ill. 2004) (Clear Channel was sued for tortious interference of contract and prospective advantage, as well as Sherman Anti-Trust violations); *Clear Channel Settles Case Brought by Denver Rock Concert Promoter*, 26 ENT. L. REP. 17 (2004).

156. Live Nation, Inc., Annual Report (Form 10-K), at 3 (Mar. 5, 2009). Merger was approved on January 10, 2010. See Dawn C. Chmielewski, Ben Fritz & Randy Lewis, *Ticketmaster-Live Nation Merger Gets Justice Department's Approval*, L.A. TIMES, Jan. 26, 2010, available at <http://articles.latimes.com/2010/jan/26/business/la-fi-ct-ticketmaster26-2010jan26>.

157. Live Nation, Inc., Annual Report (Form 10-K), at 1.

158. The companies, as listed in the 10-K, include: *Heineken Music Hall*, January 2008; *AMD*, January 2008; *DF Concerts*, April 2008; *Mirage*, May 2008; *Fantasma*, 2008; *Luger and Moondog*, June 2008; *Main Square Festival*, July 2008; *De-Lux*, October 2008; and *Emerge*, October 2008.

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
Craigslist	Online classified ads; includes ticket section		Started in 1995 as a hobby by Craig Newmark; incorporated in 1999	
Paciolan	Software support for events and ticketing websites	Clients hold 25% of all ticket sales for live events in yearly revenues in recent years 10 million-20 million	Formed in 1980; as a privately held company; by 2007 had 190 North American Clients, often associated with college and university athletic venues; in 2006 launched ticket marketplace blueprint program to enable colleges to reap the benefits of secondary ticketing such as retaining ticket holders, reducing no-shows, and gathering data on future ticket buyers	Acquired by Ticketmaster in 2008; Becomes Ticketmaster Irvine
Various team subsidiaries	Provide sites for fans to sell tickets; operated in partnership with other online companies	Unknown	2001 with Seattle Mariners and San Francisco Giants; followed by Chicago Cubs	
YooNew	Operates a futures market; sells options to Super Bowl tickets the NCAA Final Four, and other major sporting events		Formed in 2004 ¹⁵⁹	Are these options securities that should be regulated?

159. Two MIT Sloan School MBA students, Gerry Wilson and Hags Mehreteab, developed a business plan for creating organized futures market for major based on the work of the authors. Happel & Jennings (2002), *supra* note 7 (The authors have spoken with the two founders and offered insight into their company and processes but have not accepted compensation from them for the consultation.).

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
TicketReserve; now FirstDibz.com ¹⁶⁰	Operates a futures market; sells FanForward interests; charges 7% transaction fee		Formed in 2001; bills itself as a lower-priced options site to others	Owned in part by CBS; plans to expand in offering hotel room futures for play-off and Super Bowl city sites
Vertical Alliance/Flash Seats/Veritix	Vertical Alliance billed as ticketing services industry's leading provider of state-of-the-art ticketing, patron management, and digital marketing/promotional application; Flash Seats provides electronic ticketing systems to teams and fans to sell, buy, and transfer tickets online	Privately held company	Founded in 2001; Flash Seats in 2006 (now Veritix)	Aims to be the largest football/soccer social media on the web; Legal battles with Ticketmaster over arrangements with the Cleveland Cavaliers
Viagogo	Heavy emphasis on working with professional soccer teams in Europe	\$10 million in 2007	Launched by Eric Baker, co-founder of StubHub in 2006, applying his proven business model to European events and subsequently in North America	Company was the premium ticketing partner for Michael Jackson's cancelled concert series at London's arena

160. TTR, Inc., Get Dibz and Get Out of Line, <http://www.FirstDibz.com> (last visited Mar. 18, 2010).

Company	Role in Ticket Market	Approximate Revenues	History	Pending Issues
FirstDibz (formerly Ticket Reserve)	A futures market concept; pioneered the Pre-primary or forward market for sporting events	Unknown	Founded in 2001	Expanding scope to include other than sporting events; forced to cancel 250 Super Bowl "dibz" orders in 2009 after two rogue sellers allegedly scammed the system and were faced with legal threats
SuperBowlOption	Unknown	Unknown	Unknown	Unknown
Total Secondary Market Revenue		\$10–\$12 billion estimated ¹⁶¹		
Total online ticket sales revenue		\$2.6 billion ¹⁶²		

The merger and acquisition activity is not complete. For example, the merger between Ticketmaster and LiveNation attracted significant regulatory, congressional, and market attention because of the sheer market share, in both primary and secondary markets, that such a combination would create.¹⁶³ The following is an excerpt from testimony offered before the Senate Judiciary Committee in its hearings on the proposed merger, the nature of the primary and secondary ticket markets, and the impact of consolidation, something that seems to be ongoing, as noted in Table I:

Ticketmaster operates in 20 global markets, providing ticket sales, ticket resale services, marketing and distribution through www.ticketmaster.com, one of the largest

161. The authors arrived at these estimates by examining revenues of the various companies and ticket sales reports. Much of the information is in the hands of privately held and small firms, but the volume of ticket sales on StubHub and the ticket sales at LiveNation provide some indication of the level of activity. With eBay's acquisition of StubHub, its revenues are now consolidated and that integration makes estimates more difficult.

162. These estimates are the authors. Ticketmaster's 2008 revenue was \$1.45 billion. *See* Ticketmaster Entm't LLC, Annual Report (Form 10-K), at 30 (Mar. 31, 2009). Again, sites such as StubHub no longer have public information available so the estimates are based on activity, pricing, and demand.

163. Ethan Smith, *Big Ticket Seller Tried Deal with Scalpers*, WALL ST. J., Aug. 28, 2009, at B1.

e-commerce sites on the Internet; approximately 6,700 retail outlets; and 19 worldwide call centers. Ticketmaster controls the sales of tickets for over 80% of the venues in the United States. In 2008, Ticketmaster entered into the entertainment promotion business by acquiring a controlling interest in the Front Line Management Group. Front Line is the world's leading artist management company, with nearly 200 clients and more than 80 executive managers. Front Line represents a wide range of major artists, including the Eagles, Jimmy Buffett, Neil Diamond, Van Halen, Fleetwood Mac, Christina Aguilera, Stevie Nicks, Aerosmith, Steely Dan, Chicago, Journey, and Guns N' Roses. Ticketmaster also offers resale ticket services through its acquisition of TicketsNow in 2008.

LiveNation is the world's No. 1 concert promoter, owns 140-plus venues. Live Nation is the world's largest live music company. Globally, it owns, operates, has booking rights for and/or has an equity interest in more than 155 venues. In addition, LiveNation owns multiyear comprehensive rights deals covering the tours of Madonna, Jay-Z, U2, Nickelback and Shakira. In 2008, LiveNation entered into an agreement with SGM, one of the world's largest venue management company and Ticketmaster's largest client. In 2008, *Live Nation ended a long-term contract to sell its concert tickets through Ticketmaster, and launched its own ticketing service for its venues in January 2009.* That termination resulted in a loss of at least 15% of Ticketmaster's revenue and set the two companies up for a head-to-head fight to win ticketing contracts.

If Ticketmaster is permitted to acquire LiveNation a single firm will: (1) sell most of the concert tickets in this country through its contracts with venues (11,000 venue clients across 20 countries); (2) manage a significant number of the marquee performers in the world or controls their tours (e.g., Madonna, U2, Jay Z, Shakira, Nickelback, Eagles, Christina Aguilera, Aerosmith, Jimmy Buffett, Guns N' Roses, Steely Dan and more than 200 others); (3) own touring, recording, merchandise, fan clubs, etc. rights to many relevant performers; (4) own most of the amphitheaters in the US and also owns more 'club' venues as well as controlling, thru owning/leasing a large amount of other clubs and theatres; (5) purchase tours for its own amphitheaters and venues as well as other buildings they don't own or control; (6) own a merchandise company that sells the performers' shirts, hats, etc.; (7) own a company that provides 'fan club' services to performers; (8) own all the data to track ticket sales to provides a huge competitive advantage; (9) own the data to all competing promoters fan bases; (10) and own all data generated through the sale of tickets to provide their newly formed company with the best and largest Internet system to offer their fan base more services and products beyond live performances such as the bundling performers' products for sale on-line as well as sponsorship opportunities¹⁶⁴

In short, such a merger, approved by the Justice Department after one year of investigation in January 2010, and other combinations that are reflected in Table I bring primary and secondary sellers into joined entities. In fact, as the LiveNation situation illustrates, the primary and secondary markets are now merging with the artists and promoters with a resulting creation of three levels of integration. Limited competition in primary and secondary markets means

164. *The Ticketmaster/Live Nation Merger: What Does It Mean for Consumers and the Future of the Concert Business? Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of David A Balto), at 2009 WL 459002.

higher prices and poorer quality service. Market dominance for Ticketmaster, for example, has resulted in service charges, something that is unique to entertainment and sports events in terms of consumers' purchases online.¹⁶⁵

Ticketmaster has also attempted vertical control through legislative efforts. Ticketmaster, a behemoth in the primary market, has been trying to work legislatively to reach the same stature in the secondary market. During 2006, Ticketmaster backed legislation in four states—Florida, Louisiana, South Carolina, and California—that would have allowed the primary seller in those states to designate the legal resellers of its tickets.¹⁶⁶ That is, no one apart from the primary-designated secondary seller would be able to resell tickets. The legislative strategy was brilliant. After having attained open and competitive secondary ticket markets in these states, the primary sellers then moved to limit competition in the secondary market to sellers they could control and/or hold an interest in or have a profit-sharing agreement with. If such legislation had passed, there would have been only one seller in the secondary market, no independent brokers, and ultimately, fewer options and higher prices for consumers. Vertical integration represents regression, not progress in ticket markets.¹⁶⁷ Vertical integration also impedes the international market place that the Internet has served to provide.¹⁶⁸ Simply understanding who favors such mergers and legislative proposals provides the groundwork for raising questions as to whether the integration will increase or decrease competition.

Even without the merger activity, Mr. Diller's response reflects either a naïveté about the ticket markets or a spin to deflect attention from the reality of under-pricing and the available profits in the secondary markets. Principle One contradicts Mr. Diller's statements. In fact, Mr. Diller misunderstands or masks the root of the problem in ticket markets that will always exist: It is the pricing by the artists that creates the secondary market. Mr. Diller's merger of his company, a primary and secondary market player, with the artists, produces

165. The authors compared the purchasing terms for online ticket services and found that Ticketmaster and team-sponsored resale sites (generally handled by Ticketmaster) were charging the service fees. Other sites have package prices and total prices. In shopping for tickets, consumers will need to be cautious in purchasing because the service charges are not reflected in the pricing comparisons available on the Ticketmaster sites. Service fees do not emerge until the checkout point on the sites.

166. Sarah Lacey, *The Hot Ticket Isn't Ticketmaster*, BUSINESSWEEK, Sept. 4, 2006, at 36.

167. Ethan Smith & Sara Silver, *To Protect Its Box-Office Turf, Ticketmaster Plays Its Rivals' Tune*, WALL ST. J., Sept. 12, 2006, at A1, A17 (a study found that as Ticketmaster entered the secondary market, including going after other secondary sellers with claims of fraud, its revenue increased, not because of more sales but because ticket prices went up with its presence in the secondary market).

168. *Id.*

a dominance of the vertical chain of distribution that will reduce the opportunity for competition and market entry at all levels of that chain.

These types of mergers are antithetical to competition because they do not actually result in growth through the acquisition of new customers; they are, in effect, treaties with competitors to limit competition.¹⁶⁹ Growth in this manner does, however, result in the ability to raise prices and exclude competition, the essential terms of the antitrust laws. The effect of mergers such as this one is the ability of Ticketmaster to do on a regular basis what happened with the Bruce Springsteen tour: primary market tickets can be diverted over to the company's TicketsNow site and sold for the secondary market levels, not the primary market face value. Artists and primary sellers have the same market interests, which will be, by the merger, now linked to the secondary market. The wheres and whens of ticket distribution will be controlled by an entity that represents interests in all levels of the market, all of whom have the same goal of profit maximization.¹⁷⁰ That maximization can be achieved, however, without alienating the fan base by keeping the primary market price low even as the supply of tickets is diverted to the secondary market to command higher prices and profits. Moreover, Ticketmaster has exclusive arrangements with certain owners and promoters that prevent them from using other ticket services for different types of ticket sales. For example, in *Cavaliers Operating Company, LLC v. Ticketmaster*, Ticketmaster filed suit against the Cleveland Cavaliers for breach of its exclusive contract as ticket agent when the Cavaliers entered into an agreement with Flash Seats to handle the secondary ticket sales for the Cleveland Cavaliers.¹⁷¹ The court granted summary judgment to Ticketmaster because a clear provision in the contract between the two required exclusivity. However, the court also had to deal with

169. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 116 (1975).

170. Ticketmaster already exercises control over artists. In 1994, the grunge rock group Pearl Jam, at the height of its market splash, wanted Ticketmaster to drop its service fee to \$1.80 a ticket for its summer tour, but Ticketmaster refused to go below \$2.50 per ticket. Pearl Jam tried to book its own venues, but that failed. So the band filed a complaint with the Justice Department over TM's monopolistic practices. The Justice Department launched an investigation, and the Subcommittee on Information and Justice of the House Government Operations Committee also opened an inquiry, holding hearings in July and September.

The Justice Department antitrust investigation ended abruptly in July, 1995. Following a year of charges and counter charges, cross firing of legal papers and insults between Pearl Jam and TM, a meeting was set but then cancelled by the Government side the day before saying the inquiry was being dropped. Instead, it was going to continue "to monitor competitive developments." Ralph Blumenthal, *Oddities Continue with Ticketmaster and Pearl Jam*, N.Y. TIMES, Aug. 23, 1995, available at <http://www.nytimes.com/1995/08/23/arts/oddities-continue-with-ticketmaster-and-pearl-jam.html?pagewanted=all>.

171. *Cavaliers Operating Co. v. Ticketmaster*, Nos. 07CV2317, 08CV240, 2008 WL 4449466 (N.D. Ohio 2008).

the Cavaliers' counterclaim for violations of federal antitrust law by Ticketmaster in its demand for exclusivity of the secondary ticket market sales as well as the primary ticket market sales. In effect, the contract issue was clear-cut, but the antitrust implications of Ticketmaster's vertical control of the ticket market for the Cavaliers presented a more challenging legal issue that has not yet been resolved.¹⁷²

Economic theory offers support for the decrease in competition that results from vertical integration. The buyer of a Ford product is not prohibited by the Ford Motor Company from reselling the car and, likewise, Ford does not have the authority, right, or power to dictate the car's resale price or even prevent it from being advertised as a Ford. With the exception of selected copyrighted items such as computer software programs or airline tickets, almost all products become bearer instruments upon original sale in the primary market.¹⁷³ Principles One through Five and the support provided demonstrate that owners and promoters want to control prices, restrict sales, and dominate their secondary ticket markets. However, microeconomic theory reveals long-run harm for consumers in a market structured with such vertical integration.

Microeconomic Models and Insights

Primary Ticket Sellers as Pure Competition

One way to model the market for primary ticket sellers (owners/promoters) is as a case of pure competition. Strictly speaking, this pure competition model is the only approach in which both market demand and supply curves can be drawn (microeconomic theory does not draw supply curves for any other market structure). When the ticket market is broadly defined as the entertainment industry, there are "many" sellers, and there are

172. The essence of Cavaliers/Flash Seats' antitrust allegations is that Ticketmaster dominates the market for primary ticketing and is intentionally engaging in anticompetitive behavior in an effort to establish monopoly power in the secondary ticketing market. Ticketmaster has just transferred exclusive ticketing rights at Quicken Loans Arena (home of the Cavaliers) to Veritix, which owns Flash Seats. The district court ruled that the use of Flash Seats as an online venue for season ticket holders to unload seats violated the club's contract with Ticketmaster. The details of the settlement between Flash Seats and Ticketmaster were not made public. See Peter Krouse, *Veritix Gets Exclusive Ticketing Rights at the Q, Replacing Ticketmaster*, CLEVELAND PLAIN DEALER, July 20, 2009, at 1.

173. A bearer instrument, as defined under U.C.C. Article III, is one that is made payable to bearer or cash does not state a payee or is indorsed in blank. U.C.C. § 3-109 (2002). A bearer instrument can be transferred by delivery only. See U.C.C. § 3-203 (2002).

“many” buyers, all of whom take price as given. However, there are four problems in trying to apply this model to ticket markets. First, tickets are not homogeneous if desired seat locations exist. Second, sellers may engage in market-power pricing rather than take price as given. Third, certain buyers may have the ability to negotiate prices. Finally, when the market is broken down into more select segments, there may be substantial barriers to entry.¹⁷⁴

The Models of Monopolistic Competition and Pure Monopoly

The model of monopolistic competition may be adapted to characterize primary sellers. In this case barriers to entry are few, many buyers exist, and firms have many rivals just as in pure competition. However, an individual firm does have slight monopoly power, i.e., a downward sloping demand curve, in which higher prices do not result in a loss of all seats because of brand loyalty. This model has a certain appeal because of the product differentiation. Generally, microeconomic competition in this model is characterized by ongoing price wars as firms try to capture rivals’ markets.¹⁷⁵ However, this is not the case for many primary ticket market sellers.

Another alternative for modeling is to classify primary ticket sellers for particular events being a form of a pure monopoly. For purposes of modeling, assume that tickets are sold only on the day of the event, an assumption that results in no significant secondary market. If seat locations are viewed as essentially homogenous by consumers, and if concessions are ignored, then the finding is straightforward for a profit maximizing firm faced with a seating constraint. The firm sets marginal revenue equal to marginal cost, where marginal cost for each additional seat occupied becomes quite low (but still positive) after some point, meaning the incentive is to achieve a sell-out while operating in the elastic region of the demand curve.

However, if substantial demand exists for certain seat locations over others, the primary ticket seller can become a price discriminating monopolist and “scale the house.”¹⁷⁶ Similarly, concessions turn a profit-maximizing

174. Localized monopoly power is the result. Even so, there may be more of a national market for tickets now than in the past because of the ability to travel (at relatively low costs) and the fact that the same event is offered in cities around the country, thus creating events that are more homogeneous from seller to seller.

175. MARTIN FARIS & STEPHEN HAPPEL, *MODERN MANAGERIAL ECONOMICS* 232–36 (1987).

176. Phillip Leslie, *Price Discrimination in Broadway Theatre*, 35-3 *RAND J. Econ.* 520, 524 (2004), available at <http://www.stanford.edu/~pleslie/broadway.pdf> (Leslie formulates a model that includes both second- and third-degree price discrimination when analyzing the Broadway play “Seven Guitars.” The marginal cost of every ticket sold for a given performance is assumed to be effectively zero, so the goal of

monopolist into a multiproduct seller, with its pricing required to separate substitute goods from complementary goods.¹⁷⁷ Lastly, if a profit-maximizing monopolist competes against itself over time by offering repeat (season long) performances, it has to engage in dynamic pricing by taking into account the present value of future costs and revenues and avoiding “spoiling the market.”¹⁷⁸

Primary Ticket Market Sellers as an Oligopoly

In contrast, if there are a “few” primary sellers who are close rivals selling similar products and are keeping careful watch on each other, oligopoly models can be applied. One such model that can be used is the kinked demand curve.¹⁷⁹ In this case there are many buyers and a few firms able to sell close substitutes. A particular firm is afraid to raise prices for fear that rivals will not match the price increase and so cause the firm to lose significant sales, and the firm is afraid to lower price because rivals will immediately match the price

the firm is to maximize revenues from ticket sales. Because there are no subscriptions, ticket bundling, or the sale of a series of different shows, then is eliminated. Leslie distinguished between full-price sales and discount sales. To obtain discount tickets, consumers must be at the discount booth on the day of the performance, and the number of discount tickets sold varies and is inversely related to ticket demand in the full-price category.) *But see* Rosen & Rosenfield, *supra* note 97, at 353 (Rosen & Rosenfield assume sellers are extremely selfish, do not want resellers to profit, and so preclude secondary markets. They then use the theory of classes-of-service price discrimination in looking at situations where two kinds of seats exist: high-quality and low-quality. All customers prefer high-quality seats, but their willingness to pay is not the same.)

177. *See, e.g.*, Daniel Marburger, *Optimal Ticket Pricing for Performance Goods*, 18 *MANAGERIAL & DECISION ECON.* 375 (1997). Marburger uses concessions to explain why estimates of point elasticity of demand in the 1970s, 80s and 90s were in the inelastic range. The fixed number of seats means that the variable (marginal) costs associated with the number of tickets is essentially zero. This means, in the absence of complementary products, profit maximization occurs where marginal revenue is zero (elasticity of demand equals one).

178. DeSerpa, *supra* note 23, at 512–13 (taking the property rights of ticket holders into account when examining the pricing decision by monopoly sellers. For professional sports leagues he argued that team expectation of many sellouts, combined with the possibility of playoff games, led to the primary seller promoting season ticket sales and an active secondary market. With a perfect resale market, the same price is charged for all games even though high-demand game will be overpriced. For the playoffs, the primary seller does not “exploit” season ticket holders by charging very high prices because the end result would be fewer season ticket sales thereafter.); Courty, *supra* note 38, at 167 (considering the case of a monopoly ticket agency who sells tickets to consumers who learn new information about their valuations over time. The monopolist can sell early to uninformed customers and/or late to informed over, or it can ration tickets and strategically allow some ticket holders to resell. He argues that in his generic setting the selling date, the ticket supply, and the decision to allow resale are complementary pricing instruments that should be chosen jointly for overall pricing coherence.)

179. Paul Sweezy, *Demand Under Conditions of Uncertainty*, 47 *J. POL. ECON.* 568 (1939).

decrease causing expected profits to decline. A kink in the demand curve develops at the going market price. Substantial shifts in marginal cost conditions can occur and still marginal revenue equals marginal cost at the same price and output levels. This expectational theory of price stability may be applied to situations such as Broadway theaters in New York City where narrow ticket price ranges have existed over extended periods of time.

Adding Secondary Sellers Into the Modeling

Once secondary ticket trading is introduced, the economic modeling becomes more complex.¹⁸⁰ Here the primary ticket sellers must think beyond direct rivals and consider what scalpers and ticket brokers will do.¹⁸¹ Some secondary market participation may prove useful in helping to maximize profits for the primary seller (as was discussed with lobby men or brokers buying up any excess seats).¹⁸² Secondary sellers who are independent of the primary sellers change market dynamics. Because of the economic uncertainty secondary sellers introduce, there is economic incentive for primary sellers to try take over the secondary markets for their tickets, thereby eliminating all immediate rivals, and becoming a vertical monopoly (as Ticketmaster has tried to do in selected states).¹⁸³

If the secondary ticket trading firms are small and highly competitive, then the dominant firm theory of oligopoly appears to have some application.

180. DEIDRE McCLOSKEY, *THE APPLIED THEORY OF PRICE* (2d ed. 1985), presented the “typical” textbook analysis of ticket scalping. Scalpers simply resell tickets that are offered at set prices in the primary market on a first-come-first-served basis. They charge the highest prices the market will bear, in the extreme being first degree price discriminators getting everyone to pay their reservation price. Economic efficiency is enhanced, but consumer surplus is eliminated.

181. See James Swofford, *Arbitrage, Speculation, and Public Policy Toward Ticket Scalping*, 27 PUB. FIN. REV. 531 (1999) (relying on McCloskey’s model, *supra* note 180, but turns to the issue of why a profit-maximizing firm allows the purchase of its product (tickets) for speculation and arbitrage. One reason Swofford offers is uncertainty and risk, illustrated by primary market sellers’ use of ticket resellers as partial underwriters. Another reason is that trying to prevent the secondary market may be quite costly to the primary seller. A final reason is that the revenue functions are different; either the reseller may be a far superior price discriminator or the primary seller is looking at dynamic (long-run) profits rather than static (short-run) profits). See *supra* notes 15–47 and accompanying text for a discussion of why primary market sellers underprice.

182. For example, Ticketmaster and its secondary ticket company, TicketsNow, face several lawsuits for allegedly redirecting buyers to more expensive tickets. Despite denying the allegations, the two firms have taken steps to make changes in the way their systems operate. Alfred Branch, Jr., *Ticketmaster and TicketsNow Sued Again Over Their Business Practices*, TICKETNEWS, July 10, 2009, <http://www.ticketnews.com/Ticketmaster-and-TicketsNow-sued-again-over-their-business-practices7091091>.

183. See Lacey, *supra* note 166, and accompanying text.

In this case, a dominant firm like Ticketmaster is surrounded by a competitive fringe. When the dominant firm cannot eliminate the fringe, it determines price and quantity by taking into account the cost conditions of the fringe. Once the dominant firm sets price, the fringe immediately responds and uses that price as a starting point. The microeconomic conclusion is that the dominant firm will ultimately face major rivals since it provides an umbrella under which the fringe survives. Certainly this market structure has some relevance for Ticketmaster in secondary ticket markets. At the same time, an important issue with the dominant price leadership model when applied to ticket trading is that the basic model assumes the fringe firms are purely competitive selling identical products and taking price as given. Yet ticket scalpers and brokers do not have identical costs, do not sell completely homogenous goods, provide varying levels of service, advertise differently, and do not take as a given the printed face value (the price set by the dominant firm).

Further, secondary sellers are not always small. Some are quite powerful and bargain with the primary seller over price (for instance a large broker buying up seats for a Broadway play with just moderate demand). In the extreme, a single primary seller (a pure monopoly) confronts a single buyer (a pure monopoly) and the model of a bilateral monopoly becomes relevant, a model in which the selling price depends upon the relative bargaining skills of the buyer and seller.

Microeconomic Conclusions

No single market model in microeconomic theory can apply to all event ticket sales. The application of antitrust law is, as a result, difficult at times, because there are, at times, many primary sellers offering a (relatively) homogeneous product. However, at other times there are many primary sellers offering highly differentiated products. At other times there may be only a few sellers or in the extreme a pure (local) monopoly.

Consumers who wish to attend events are typically price takers. But some consumers may possess buying power and not accept price as a given in the ticket market. However, other buyers beyond the consumer in the primary market include brokers and scalpers, who then become sellers in the general ticket sales market by competing with the primary firm(s). In fact, one idea that is gaining traction among consumer advocates is prohibiting firms such as Ticketmaster, who sell in the primary market, from owning operational subsidiaries in the secondary ticket market.

Attempts at Restrictions by Primary Sellers

In addition to the ongoing combinations among and between primary and secondary market participants, there is a parallel effort to structure markets through statutory protections. That is, primary sellers are active in lobbying efforts that use concerns about fairness, nuisance effects, and fraud to convince government regulators to adopt laws and regulations that will “clean up the secondary marketplace.”¹⁸⁴ The emotional tug that primary market sellers have is the public’s perception of fairness, the above-face-value ticket prices, and the argument that the brokers are earning profits without the attendant risk that the event sponsors and promoters have. After investigating insider trading in and among box office employees in New York theaters, the *New York Times* reported that “[a]mong theater people, ticket scalping is resented not necessarily on moral grounds, but because the brokers, who have neither an artistic nor a financial connection with a show, are making money from the labors of others.”¹⁸⁵

All of the market controls discussed in Principle Five are the result of extensive efforts by primary market participants to obtain legal protections that limit the operations of the secondary market. The efforts are ostensibly made in the name of consumer protection. However, the ultimate effects are limited consumer options through reduced competition, no bundling/packaging to capture the best of several markets, and regulation without full information. For example, legislators grapple with the issue of how extensive ticket hold-backs are and the impact of the insider activities, including resale of free tickets in the secondary market. In other words, the questions focus on market activities that are inevitable given the underpricing in the primary markets.

One of the recent developments in primary market controls has not involved legal restrictions on resales per se, but rather involves the exercise of primary market sellers’ controls over ticket holders. Vertical integration does not result from mergers and acquisitions; rather, it results through the imposition of controls over transfers once the tickets have had the initial primary sale. For example, owners of professional sports teams state that consumers actually purchase a “license” to a seat and the license is subject to certain rules. If the ticket is treated as a license, owners use their right of revocation of these licenses of those season ticket holders who try to resell

184. Kandel & Block, *supra* note 123 (“The issue of the proper role of the law in regulating ticket resales has been a source of much debate and rhetoric.”).

185. John Corry, *Some Theater People Say that Skimming Profits and the Scalping of Tickets Persist on Broadway*, N.Y. TIMES, Nov. 23, 1980, at B6.

tickets at above face-value to games they cannot or do not want to attend.¹⁸⁶ The teams enforce their restrictions either through spot-checking websites for ticket sales and, upon finding a season ticket holder in violation, revoking the rights, or by using bar codes that require the name that appears electronically with the ticket purchase is the name on the identification presented for entrance. With barcode technology, tickets become like airplane tickets that require re-barcoding each time it changes hands, along with an accompanying form of identification in order to be able to use the barcoded ticket.¹⁸⁷

There is some push-back from the states on the controls primary market sellers are placing on secondary sales as some promoters and owners have been denying entrance to those who have purchased their tickets from non-team sources or who have purchased tickets to one game from a season ticket holder.¹⁸⁸ These restrictions on resale shut down the secondary market except for the market controlled by the owners and promoters. Season ticket holders are able to sell their tickets to a single game and those who wish to sell event

186. *Herman v. Admit One Ticket Agency*, 2009 WL 1247266 (Mass.) (Appellate Brief) (challenging the revocation of a season ticket on the grounds of it being a revocable license only).

187. Owners and promoters that prohibit re-barcoding are also emerging. For example, the 2009 Miley Cyrus tour requires the presentation of a credit card and ID of the ticket purchaser for access to the venue. The original purchaser must be in attendance. In effect, the tickets cannot be transferred. *See Branch, supra* note 28.

188. For example, Colorado passed legislation in 2008 that provides for the following:

(3)(a) It is void as against public policy to apply a term or condition to the original sale to the purchaser to limit the terms or conditions of resale, including, but not limited to, a term or condition:

(I) That restricts resale in a subscription or season ticket package agreement as a condition of purchase;

(II) That a purchaser must comply with to retain a ticket for the duration of a subscription or season ticket package agreement that limits the rights of the purchaser to resell the ticket;

(III) That a purchaser must comply with to retain any contractually agreed-upon rights to purchase future subscriptions or season ticket package agreements; or

(IV) That imposes a sanction on the purchaser if the sale of the ticket is not through a reseller approved by the operator.

(b) Nothing in this section shall be deemed to prohibit an operator from prohibiting the resale of a contractual right in a season ticket package agreement that gives the original purchaser a priority or other preference to enter into a subsequent season ticket package agreement with the operator.

(4) A person or entity, including an operator, that regulates admission to an event shall not deny access to the event to a person in possession of a valid ticket to the event, regardless of whether the ticket is subject to a subscription or season ticket package agreement, based solely on the ground that such ticket was resold through a reseller that was not approved by the operator.

(5) Nothing in this section shall be construed to prohibit an operator from maintaining and enforcing policies regarding conduct or behavior at or in connection with the operator's venue. An operator may revoke or restrict season tickets for reasons relating to a violation of venue policies and to the extent the operator may deem necessary for the protection of the safety of patrons or to address fraud or misconduct.

Colorado Consumer Protection Act, COLO. REV. STAT. ANN. § 6-1-718 (West 2008).

tickets after their primary market purchase are still able to do so, but only through the team's site or an authorized ticket broker for the promoter or owner. These authorized sites may place price controls on resale except for the premium seats offered by the promoter or owner. The effect is monopoly pricing because the promoters and owners control the ticket source, the primary market price, and the secondary market price. Consumers are left with few alternatives, including fewer choices in terms of the quality of the seats as well as the loss of the bundling and package that brokers use in their secondary market sales.

Principle Seven: Regulation Without Recognition of Market Forces Will Thwart a National Ticket Market

The assumption many regulators make when attempting to control secondary tickets markets is that they are still grappling with the annoying street-corner scalpers or the local broker who takes advantage of high-demand situations by "price gouging." Ironically, those limited types of behaviors that they are trying to address may actually be exacerbated by the controls they place (whether price or sale restrictions) on ticket sales. Table I shows the extent of the national ticket market, a market that makes ticket prices and ticket market supply data readily available online. At least one site provides a sort of electronic ticker-tape on prices and updated access to real-time availability of tickets to various events and for concert locales for a particular artist or tour. The ticket markets, the nature of ticket buyers, and the availability of relatively cheap transportation (including that offered as part of a bundling or package by brokers) means that consumers need not buy tickets on street corners or even rely on a local broker who may appear to have a monopoly.

State and local statutes and regulations that prevent secondary market activities for profit will inhibit the ability of all consumers to secure tickets to desired events. Regulation or legislation that affects ticket markets should be undertaken only after a complete examination of three factors: the nature of tickets; the potential for tax revenues from allowing secondary markets to operate efficiently; and the nature of interstate commerce and constraints on state regulation of ticket markets.

The Nature of Tickets

Tickets purchased online were at first simple bearer instruments.¹⁸⁹ A bearer instrument is one that is freely transferrable and can be used by anyone in possession of it.¹⁹⁰ Historically, event tickets have typically been “hards” (also known as “flats” or “pasteboards”) with a printed face value. Printed face value was a function of having a value attached for purposes of a refund purposes if the event was cancelled or if an expelled fan had to be compensated.¹⁹¹ The significance of face value has been given more meaning in ticket markets than in, for example, the bearer bonds market or even in the sale of securities. The printed face value is simply what could be known as the instrument’s par value. Its actual value is determined by the market, not what is preprinted.

Bearer instruments are easily transferrable with no signature or identification required. Under Articles 3 and 4 of the Uniform Commercial Code (U.C.C.), adopted in some form in all of the states, a bearer instrument’s title is transferred by mere delivery.¹⁹² Also, under the U.C.C., because of the no-identity-required-no-signature-required nature of bearer instruments, even a thief can pass good title to a bearer instrument.¹⁹³ So, as ticket markets existed in their early stages, prior to the involvement of regulators, whoever had the ticket in hand at the entry point had the right to a seat in a particular location (as marked on the ticket or via general admission) at the time of the event. Given their paper nature and bearer quality, hard tickets do carry counterfeiting opportunities and temptations, especially for high-priced tickets. However, restricting market transferability because of the potential for shenanigans is antithetical to open markets as well as the existing regulatory frameworks across subject matters in the United States. Fraudulent shares of

189. A bearer instrument is one that has no specific payee; that is, it is transferred from party to party simply by delivery. There are no restrictions on its transfer. U.C.C. § 3-109 (2002).

190. The Uniform Commercial Code (U.C.C.) thus provides one of the few exceptions in law that allows a thief in a chain of valid title without affecting the quality of title that is passed. U.C.C. § 3-201 (2002).

191. Printed face value, however, introduces those transferring the bearer paper to others to the antiscalping laws that prohibit resale for profit or for an amount over a statutory maximum markup over this offer price if a ticket is resold in the secondary market.

192. The process of transferring title to any form of commercial paper is known as “negotiation,” and under the U.C.C., “[i]f an instrument is payable to bearer, it may be negotiated by transfer of possession alone.” U.C.C. § 3-201 (2002).

193. The nature of commercial instruments and the need for protection of the flow of funds was such that bearer instrument theft was a risk that drawers of the instruments, transferors and transferees assumed in the interest of nationalizing and internationalizing the flow of funds through commercial paper.

stock, counterfeited bonds and money, and even fake Rolexes do not result in controls of prices or restrictions that prohibit transfer of these items of personal property in secondary markets. Markets can be vibrant even as they co-exist with complex mazes of registration, authentication, and records without interfering with transferability. But, there are no open markets that exist with restrictions on transfer of the goods in that market.

The types of controls that can prevent fraud, at least as well as the stock markets have done ala Madoff, are now easily attainable because of technology that is accessible even by consumers in their homes. The airline industry, one that faces security issues in terms of matching passenger IDs to tickets, allows consumers to print airline boarding passes at home, complete with their identifying barcodes. There are various means for controlling fraud, a concern that should not be used to eliminate or hamper free transferability.

Changing the character of tickets from bearer to a type of order instrument that requires promoter or owner approval for transfer has been tried in the past. Historically, scalpers were solo operators who purchased tickets from the box office, tickets that were a form of a bearer instrument. However, at the height of New York's statutory control of pricing and transfers of tickets, confusion and higher prices reigned.¹⁹⁴ Theater managers, irked by the profiteering and the nuisance presence of the scalpers, tried to change the bearer character of the tickets. Their tactics included efforts to prevent those who had not purchased tickets from either the box office or authorized agents from entering the theater. The effect of these constraints was that the bearer character of the ticket instrument was changed to one of order paper, a type of instrument that requires signature and transfer from the original drawer of the instrument, i.e., the theater owner or event sponsor. The problem with this change of instrument character was that the tickets did not include, as would an order

194. For example, in a 1956 edition, *Good Housekeeping* published a consumer guide to obtaining tickets in New York. It suggested that the best approach was to start early, order through the mail, not be overly demanding on location requests, but be more specific than asking for any seats for any performance. It also pointed out that it is virtually impossible to get tickets at the box office for that night's performance. So you could either go to ticket brokers (who at the time in New York could legally charge a premium of \$1.00 per seat when printed face values ranged from \$1.75 to \$5.75 for dramatic plays and \$2.00 to \$8.05 for musicals), or you could go to ticket scalpers whose telephone numbers could be obtained at most first-class restaurants, hotels, or ticket agencies in New York. Their premiums ranged from \$5.00 to \$50.00 a ticket.

The article noted that among the "chislers" in the marketplace were crooked box-office treasurers. While it attempted to distinguish brokers from scalpers, the article concluded, "[a]nd even among the licensed ticket brokers, there are some who evade legal restriction on what they are allowed to charge by adding a service fee to the monthly bill of favored customers." *Is It True That You Can't Get Tickets for the New York Theaters?*, 143 *GOOD HOUSEKEEPING* 52-53 (1956).

instrument, the transfer restrictions or requirements that order instruments have. The lack of uniformity left consumers without an understanding of the expectations of theater owners for transfers of the instruments.¹⁹⁵

Unlike the standard transfer requirements provided for commercial paper under the U.C.C., there was no national set of laws on negotiation, transfer, and title for tickets. When primary market sellers place controls on secondary market transfers, the secondary market becomes limited, and consumers are left to seek tickets from promoters and owners who can charge more because of the secondary market demand created by the very restrictions those owners had imposed.

The bearer nature of tickets is critical for a national market as well as for the commodities markets that are now developing that permit consumers to buy ticket futures. If the tickets cannot be transferred as bearer instruments, even with some form of bar code registration of the transfer, the national market cannot continue to develop. Regulation of transfers (i.e., preventing transfers by prohibiting scalping) or even promoters and owners requiring ID matches with bar codes for admissions limits the size of the ticket market, thereby reducing the supply of tickets, something, as Principle One notes, drives prices higher. State and local laws and regulations and promoter restrictions on transfer effectively change the bearer character of tickets, a necessary element for a national market.

As pointed out earlier, another legal issue has re-emerged to prevent ease of transfer: the characterization of the ticket as a license. A license is a temporary right to use another's property for a limited time.¹⁹⁶ A license is, under the law, granted at the discretion of the owner and can be revoked at any time, with appropriate notice. This antiquated notion of property law has re-emerged among promoters and owners as a means of controlling the flow of tickets to the secondary market. The types of license revocations that have begun to appear on tickets address the right of revocation and cover everything from transfers of the tickets to nuisance effects. For example, Major League Baseball tickets have long had the following license restrictions:

The Office of the Commissioner of Baseball reserves the right, without refund of any portion of the purchase price to revoke the license granted by this ticket and refuse admission or eject any person who appears intoxicated or whose conduct is deemed by

195. *Id.*

196. DAVID P. TWOMEY & MARIANNE M. JENNINGS, *ANDERSON'S BUSINESS LAW* 1166 (21st ed. 2010).

the Office of the Commissioner of Baseball to be disorderly or unbecoming or who uses vulgar or abusive language.¹⁹⁷

A typical college football game ticket provides: “Throwing of items or smoking is prohibited. Unauthorized field access before, during, and after the contest/game is prohibited, and violators are subject to arrest.”¹⁹⁸ Tickets also cover other legal topics that are typical of a license:

Liability for personal injury.

The holder assumes all risk, danger, and injury incident to attendance at the event, whether occurring prior to or at any time during or after a baseball game (including, but not limited to, the danger of batted balls or thrown bats, balls or other items; agrees that no persons or entities (including, but limited to, Major League Baseball, the National League, its member Clubs, the American League, its member Clubs, management of the Leagues and Clubs, their Agents and Players) are liable for any injury to the holder resulting from such causes and releases and holds harmless such persons and entities.¹⁹⁹

Similarly, for the Super Bowl there is the following disclaimer: “Ticket holder assumes all risk incident to the game or related events, including the risk of lost, stolen or damaged property or personal injury.”²⁰⁰ The search and seizure rights appeared on tickets universally after September 11, 2001:

You and your belongings may be searched upon entry into the stadium, and prohibited items may be confiscated. By tendering this ticket and entering the stadium, you consent to such searches and waive any related claims that you might have against the NFL, its Member Clubs, its affiliates, or its agents. If you elect not to consent to these searches, you will be denied entry to the stadium.²⁰¹

Today technological capabilities have introduced yet additional license restrictions on tickets. For example:

The holder of this ticket is admitted on condition and by using this ticket agrees he/she will not transmit or aid in transmitting any description, account, picture or reproduction of the event to which this ticket admits him/her. The ticket may not be used for advertising, promotions (including contests and sweepstakes) or other trade purposes without the expressed written consent of the Tostitos Fiesta Bowl. Breach of the foregoing will automatically terminate this license. The holder grants permission to the Tostitos Fiesta Bowl and Fox Sports and their agents to utilize the holder’s image or

197. St. Louis Cardinals World Series Game 5 Ticket (2007).

198. University of Missouri Football Ticket, Oct. 28, 2006.

199. Arizona Diamondbacks Ticket, May 7, 2007.

200. Super Bowl XLII Ticket, Feb. 3, 2008.

201. *Id.*

likeness in any live or recorded video display or other transmission or reproduction, in whole or in part, of the event to which this admits him/her.²⁰²

Despite making the argument for control purposes that the ticket is a license, most tickets do contain warnings about their bearer nature, i.e., the natural risks of bearer instruments. The following disclaimer is an interesting one that combines the law of commercial paper and bearer instruments with the law on revocable licenses, a disclaimer that reflects the current confusion about the form of property or right is contained within a ticket. The following statement is found on almost all event tickets today in bold print:

NO REFUNDS, EXCHANGES OR CANCELLATIONS.

This statement is quickly followed by, “[The Tostitos Fiesta Bowl] is not responsible for lost, stolen, or damaged tickets, or tickets obtained from sources other than representatives of the Tostitos Fiesta Bowl.”²⁰³

If a ticket is a license, and not a bearer instrument, it is simply a basic property right granted temporarily to another with title remaining with the original seller: “This ticket is a revocable license that may be withdrawn and admission refused anytime upon refunding the printed purchase price. Resale or attempted resale at a price higher than that printed herein is grounds for seizure or cancellation without refund or other compensation.”²⁰⁴

The emergence of Ticketmaster into licensed secondary trading through the formation of its TeamExchange in 2002 followed by its TicketExchange in 2006 brought the issue of the nature of tickets to the legal forefront. Ticketmaster realized the potential character-changing nature of an identifying barcode. If a ticket is a license, accomplished by requiring identification of the licensee through barcode controls, then the ticket/license is revocable at any time by those who grant the license, thereby allowing primary market control of transferability. In addition, the very characterization of a ticket as a license makes the antiquated personal property law the dominant legal force in ticket markets, a source of law that gives the owner/promoter control over transfers because a license is personal in nature. A license cannot be transferred unilaterally because it is based on privity in the relationship: the owner/promoter grants the license to the individual who is identified by the barcode.²⁰⁵ Obviously such limited transferability, obtained through the

202. Tostitos Fiesta Bowl Ticket, Jan. 1, 2007.

203. *Id.*

204. *Id.* (emphasis in original).

205. Simon, *supra* note 38, at 1213. *See also* boxofficetickets.com for a description of the handheld

application of common law, means that national and international markets are limited, a further constraint on supply.

Sports teams have also realized the value of classifying tickets, particularly season tickets, as a license. In its litigation against StubHub, Inc. over StubHub's listing of tickets for resale, the New England Patriots alleged that StubHub was engaged in intentional interference with advantageous relations through StubHub's knowing solicitation of ticket holders to violate the terms on which their tickets for access to Patriots home football games are granted (i.e., the license restrictions on transfer of the tickets).²⁰⁶ During the course of that litigation, there was another case before the Massachusetts Supreme Court that focused on the question of whether a ticket is a license or simply a transferable bearer instrument. The Patriots filed a brief in the case an *amici* that included the following analysis of the team's rights:

Under long-standing Massachusetts law, tickets to entertainment events are revocable licenses, which a venue owner may revoke at any time and for any reason. See, e.g., *Yarde Metals, Inc. v. New England Patriots, L.P.*, 64 Mass. App. Ct. 656, 658 (2005). The Patriots make substantial investments in the team and the stadium, take the entrepreneurial risks in making those investments, and assume certain liabilities as property owners. In doing so, the Patriots rely on, inter alia, the protections afforded property owners under the laws of the Commonwealth of Massachusetts, including the status of tickets they issue as revocable licenses, the ability of a venue owner to adopt rules for granting access to private property, and the freedom to revoke revocable tickets at any time for any reason.²⁰⁷

scanner technology sold to event sponsors to facilitate access.

206. At the time the suit was brought against StubHub, the Patriots' tickets contained the following warning:

ANY NON-LICENSED INDIVIDUAL RESELLING THIS TICKET BY ANY METHOD INCLUDING WITHOUT LIMITATION, IN PERSON, ON AN AUCTION WEB SITE, OR OTHERWISE OVER THE INTERNET AND ANY LICENSED INDIVIDUAL OR ENTITY RESELLING THIS TICKET IN VIOLATION OF APPLICABLE LAW, IS SUBJECT TO ARREST, LEGAL ACTION AND LOSS OF SEASON TICKET PRIVILEGES.

See *NPS, LLC v. StubHub, Inc.*, No. 06-4874BLS1, 2009 WL 995483, *1 (Mass. Sup. Ct. Jan. 26, 2009).

The language was changed in 2007 to the following:

This ticket is a non-transferable revocable license. . . .

ANY PERSON NOT LICENSED PURSUANT TO M.G.L. c. 140, § 185A RESELLING THIS TICKET BY ANY METHOD INCLUDING WITHOUT LIMITATION IN PERSON, ON AN AUCTION WEB SITE, OR OTHERWISE OVER THE INTERNET, AND ANY PERSON OR ENTITY SO LICENSED RESELLING THIS TICKET ON AN AUCTION WEB SITE OR IN VIOLATION OF APPLICABLE LAW, IS SUBJECT TO ARREST, LEGAL ACTION AND LOSS OF SEASON TICKET PRIVILEGES.

Id. at n.5.

207. Brief of Amici Curiae, New England Patriots, L.P. and NPS LLC, *Herman v. Admit One Ticket Agency*, 912 N.E.2d 450 (Mass. 2009) (No. SJC-10326).

Ninety-five percent of the tickets sold by the Patriots are season tickets, with the remaining 5 percent being Premium seats sold through the team's official site.²⁰⁸ With the season tickets being classified as a license, the effect is a shut-out of the secondary market for Patriots' games because the secondary market will be limited to the 5 percent of tickets sold for single games.²⁰⁹ Other teams follow a similar approach that controls the market. For example, the Green Bay Packers do not sell single-game tickets, with fans who placed their names on the season ticket waiting list managing to earn the right to purchase those tickets about 37 years after they added their name to the list (1970).²¹⁰ If you added your name to the list in 2007, you were 74,659th in line. The control of the teams is unlike that in any other good or market.²¹¹

In a memorandum decision in which the court denied StubHub's motion for summary judgment, the court described the reason behind and process for the Patriots' enforcement of its ticket revocation policy:

In an effort to maintain what the Patriots describe as a safe, secure, and family-friendly environment for home games, they have exercised their right to revoke season tickets when ticket holders, either the ticket owners themselves or their guests, have engaged in what the Patriots consider to be unsafe or unacceptable conduct. See *Yarde Metals, Inc. v. New England Patriots, LP*, 64 Mass. App. Ct. 656, 660 (2005). Thus, for example, should a season ticket holder give his or her tickets to another person for any single home game, and should the Patriots eject that person for unacceptable conduct, the Patriots may revoke the season tickets, regardless of the fact that the original holder was not present at the game. Upon learning that a ticket holder has impermissibly transferred a ticket or tickets, the Patriots have revoked that holder's season tickets and refunded the full face value. In this way, all season ticket holders are responsible for the behavior of their guests. In order to effectuate this policy, each ticket bears a unique bar code that is electronically scanned upon entrance. Should the Patriots cancel a ticket, the bar code is voided, and the ticket is useless.²¹²

208. Ticketmaster and TicketExchange are the authorized sellers for the Patriots. *StubHub*, 2009 WL 995483, at *2 (Revoked season tickets are also sold through this arrangement. The Patriots keep a wait list for tickets for a fee of \$100 per fan, a fee that goes toward the purchase of season tickets should the fan make it to the top of the lengthy list).

209. *Id.*

210. Rick Reilly, *Be the 74,659th In Line*, SPORTS ILLUSTRATED, Oct. 15, 2007, at 72.

211. *Id.* The Packers permit interfamily transfers of season tickets, so you are behind brothers, sisters, aunts, uncles, and all the way down the family tree to first cousins. The secondary market for single-game tickets is critical. Packers' control of transfer rights creates a sort of intergenerational fiefdom. Odd that fee tails and Austenesque property rights should re-emerge in the 21st century in sports.

212. *Stubhub*, 2009 WL 995483, at *1-3 (The litigation began when many fans began to show up at games with tickets purchased through StubHub and found that they had been voided. StubHub provides its fan protection guarantee, but the Patriots filed suit for StubHub's intentional interference with its relations with its fans and ticket holders.).

The court went completely with license and property rights in its decision: the Patriots have the right to control who attends their games.²¹³ The result of this decision is that the question of the character of event tickets becomes one for legislatures because of the ticket-market issues that the iron-hand policies of teams create with their resulting lack of competition in or availability of tickets for the games of a popular team. In addition, the Massachusetts interpretation of the nature of a ticket precludes consumers from participating in several layers of the ticket market, including the futures market, and costs Massachusetts the potential tax revenues that accompany the presence of an active secondary market.

The most compelling result of the Massachusetts case is that primary sellers are able to rely on common law property principles (rights of property owners to revoke licenses) to achieve a form of antiscalping regulation that has not been subjected to the rigors of the democratic process that previous and existing antiscalping laws endured to become law. Nonetheless, the effect is the same. Whether achieved by labeling, character, or judicial decision, a ticket that is a revocable license precludes resales or limits mark-ups. The result is a secondary market that is smaller with ticket prices, as a result, higher.²¹⁴ The resurrection of property law is a means of achieving a vertical monopoly.

The Potential for Tax Revenues From Allowing Secondary Markets to Operate Efficiently

Economists have noted that the irony of restrictive regulation such as that imposed by the basic property notion of license is that the states deprive themselves of tax-producing activities through such market controls.²¹⁵ Assemblyman Joseph Pillittere, a Democrat who sponsored a bill to lift ticket resale restrictions at a time when New York was controlling secondary markets

213. However, the authors have serious trouble understanding how a season ticket holder who sells his or her seat to one Patriots game somehow affects the ambience of Gillette Field and the rowdy pre-game behavior of selling a ticket to another somehow affects the family atmosphere of the games unless the Patriots are interviewing and screening season ticket holders for comportment. Further, if the StubHub ticket buyers prove to be rowdy, the right to expel for conduct can still be a part of any ticketholder relationship and the riff-raff from the secondary market can be weeded out on a game-by-game basis as their conduct and the Patriots' moral authority requires.

214. The research that concluded the end result of regulation is higher ticket prices is found in Daniel W. Elfenbein, *Do Anti-Ticket Scalping Laws Make a Difference Online? Evidence from Internet Sales of NFL Tickets*, 23–24 (Sept. 24, 2004) (unpublished manuscript), *quoted in* Glantz, *supra* note 61, at 291–92.

215. The loss-of-revenue potential in secondary ticket sales has resulted in litigation between state revenue departments and secondary ticket sellers. *See, e.g., Ticketmaster, LLC v. Comm'r of Revenue*, 2008 WL 650294 (Minn. Tax).

and, in effect, prohibiting resale above face value, explained the New York loss of a pool of tax funds, “[m]y concern is that we have driven ticket brokers out of state. We have given up a lot of tax revenue, and I believe that we will have to do something to get the brokers back.”²¹⁶ The secondary ticket market is a source of tax revenues for state and local governments, but the Patriots’ control of the secondary market, accomplished through statutes and similar license protections in other states, results in limitations in the size of the secondary ticket market as well as the number of transactions. In addition, the secondary ticket market in states with extensive controls necessarily slips below the primary seller’s and regulators’ radar, thereby resulting in issues about consumer protection as well as off-the-books transactions that do not bring tax revenues.

The Nature of Interstate Commerce Constraints on State Regulation of the Ticket Market

The use of state laws and even state common-law-property-principles accomplish little more than protection for the primary ticket sellers in the state. However, there is some level of economic discrimination at work through the impact of these local laws that discriminate against out-of-state ticket sellers and favor in-state businesses. That is, ticket sellers are unable to compete in Massachusetts as long as the protections for the Patriots and their ticket agent(s) are in place. The regulation is incidental and does not affect direct competitors of the Patriots, but it does prevent secondary ticket market participants from doing business in Massachusetts as well as serve to preclude Massachusetts residents from participating in interstate ticket markets.

Cases that address state laws that affect interstate commerce negatively while favoring in-state businesses, prohibit such out-of-state discrimination unless the laws/regulation: (1) serves a legitimate interest; (2) substantially reaches the interest; and (3) is the only method available for reducing the discriminatory effect between in-state and out-of-state businesses.²¹⁷ State courts in Massachusetts have ruled that the Patriots’s need to control the type of fan in Gillette Stadium is a legitimate exercise of its license rights.²¹⁸

216. SEGRAVE, *supra* note 1, at 187.

217. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142–43 (1970) (state law requiring that cantaloupes grown in the state be packed for shipment in the state before being shipped in interstate commerce was a burden on that commerce and could not be justified on the basis of the state’s interest in preserving the reputation of the fruit grown in the state).

218. *NPS, LLC v. StubHub, Inc.*, No. 06-4874BLS1, 2009 WL 995483 (Mass. Sup. Ct. Jan. 26, 2009).

However, the effect of that license protection is that Massachusetts residents cannot use any interstate companies for trading or selling their tickets. In order to meet the constitutional test for favoring in-state businesses over out-of-state businesses, Massachusetts must be able to establish, beyond the Patriots arguments related to the quality of fans, that this restriction on ticket transfers reaches that interest and that it is the only method available for doing so. As discussed earlier, it is not clear how a transfer restriction helps to control the behavior of fans in the stadium unless the Patriots are conducting some type of prescreening in awarding season tickets to fans. The Patriots's offer to individuals to be on the waiting list for season tickets is available to anyone who can plunk down \$100. The same comportment of fans in the stadium can be achieved by security during the games. Revoking the ticket license of a season ticket holder who sells his or her single-game tickets on StubHub does not address the ambience issue the Patriots claimed in state court as the justification for the restrictions on ticket sales by fans on sites other than that of the Patriots. The effect of the controls is the exclusion of all secondary ticket market services and sellers from Massachusetts and a limitation on the people of Massachusetts to one ticket broker, that belonging to a Massachusetts entity.

In *Consolidated Cigar Corp. v. Reilly*,²¹⁹ the court held that a Massachusetts statute that required specific ad content for tobacco ads in magazines and on product labels (20 percent of the ad had to be devoted to warnings about the harms of tobacco use) placed an undue burden on interstate commerce because it would have required companies to alter ad content and publication of magazines specifically for Massachusetts or not advertise within the state.²²⁰ The alternative for the tobacco companies would be not doing business in Massachusetts, with the result being that local companies were favored, and Massachusetts residents were deprived of access to the products of interstate firms.

219. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000).

220. "The plain language of the regulations, which makes it unlawful to 'cause to be advertised' cigar products in Massachusetts, imposes liability on manufacturers for advertising in national magazines that are distributed in the Commonwealth, as well as for advertising on the Internet which can be viewed from a terminal in Massachusetts. As the district court recognized, this 'would place a great burden on interstate commerce since it would require the Massachusetts Warning to be carried by a national magazine in order to ensure that any copies ending up in Massachusetts carry the Warning.' *Lorillard II*, 84 F. Supp. 2d at 203. The court also concluded that 'the Commonwealth's local interest in capturing national magazines [and Internet media] is outweighed by the burden it would place on interstate commerce.' *Id.* We agree with this evaluation of the burden imposed by the regulations, and we similarly conclude that in this respect § 22.05 runs afoul of the *Pike* analysis." *Id.*

The use of the license restrictions under state property laws presents an arguable constitutional issue. Eliminating a line of interstate businesses from revenue-generating activity within a state for a purpose that can be accomplished in a less restrictive way (i.e., the Patriots can control the stadium participants without shutting out national ticket sales) would have difficulty passing constitutional muster.

Principle Eight: Schumpeter's Forces of Creative Destruction Are Always at Work for Ticket Markets.

Schumpeter's theory of creative destruction is descriptive of American capitalism.²²¹ Existing market constraints and structures are dissolved through innovation in what seem to be chaotic movements, but the result is a different structure that resolves the issues that gave rise to the chaos. In the context of this article, primary market ticket sellers find new ways of marketing and distributing tickets in an effort to control secondary sales, but secondary sellers find ways around those new methods that were implemented with the very goal of thwarting or curbing secondary market activities. As computer technology has evolved over the past three decades, ticket-market activity has evolved in tandem. Internet sales, along with a host of companies employing this new technology, have produced new methods for selling tickets, new ways for doing business, and a broader marketplace that addresses the limited access to tickets in the primary market.²²² These technological changes, coupled with ease of movement across state lines, have resulted in a shift from the limitations and price controls of local ticket markets to a national one with more options and availability for buyers. The following chart illustrates what the creation of a national ticket trading market for events such as play-offs and championship games has done. FirstDIBZ is an online ticket futures trading market. Its national customer base allows those who might never have access to Super Bowl tickets to use this trading option to obtain tickets in a manner that would not be possible if they were restricted to the traditional local markets at the time of the actual game. The chart also shows the savings that come from such an opportunity for ticket buyers.

221. JOSEPH SCHUMPETER, BUSINESS CYCLES (1939); CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).

222. Table I presents a host of firms that drew upon the changing technology.

Event	Team	DIBZ Price	Face Value	FirstDIBZ Total Cost	Secondary Market Price	SAVINGS
2007–2008 NBA Finals Game 1	Boston Celtics	\$79	\$135	\$214	\$500	\$286
2008 Final Four & Nat Champ—Club Level	Kansas	\$175	\$189	\$364	\$1,400	\$1,036
2008 BCS National Championship	Ohio State	\$5	\$225	\$230	\$1,800	\$1,570
Super Bowl XLII	NY Giants	\$30	\$700	\$730	\$3,000	\$2,270

Source: www.FirstDibz.com.²²³

Schumpeter's theory is best understood with a simple summary emphasized previously: The market finds a way and has been doing so since the time tickets were used as a means of access. An example from the 1800s illustrates the Schumpeter chaos that produces reform. A *New York Times* article from 1882 pointed to successful brokers who had been in business for 30 years.²²⁴ In particular, the article discusses the activities of speculators for railroad tickets that were the result of customer demand for purchasing portions of tickets that the railroad was not making available for sale.²²⁵ The market structure void that these railroad speculators filled is nearly identical to the void ticket brokers fill with regard to season ticket holders. Some fans want one or two games, not a full season ticket pass. The speculators break down the larger portion into smaller, marketable component parts. The particular product may change, but the market needs are similar, and market

223. Again, the listed prices do not reflect service charges added at the check-out phase of the ticket transaction.

224. However, the *New York Times*, in a bit of a commentary that was also a precursor to the world of ticket resales today, referred to them as scalpers and noted, "[t]he offices of the brokers, as they are pleased to title themselves, are unpretentious places, but at all seasons of the year are scenes of bustling activity." *Scalpers and Scalping: A Business Which Has Reached Vast Proportions*, N.Y. TIMES, May 19, 1882, at 5.

225. *Id.* (This article on the entrepreneurial spirit of the "scalpers"/brokers refers to the risks of buying fraudulent tickets. At that time brokers were required to report any attempted sales in bulk under suspicious circumstances as when a railroad lineman offers a bundle of tickets for sale. The brokers had a sort of code of ethics that required them to refuse the tickets and report the culprit.). See *infra* notes 238–45 and accompanying text for more discussion of brokers, self-regulation, and related issues such as fraud. Also, interestingly, one of the largest ticket broker agents in New York City had revenues of \$1,000,000 in 1881. SEGRAVE, *supra* note 1, at 5.

participants find a way to deliver a product that consumers want. The railroad brokers were selling unused portions of long-distance railway tickets.²²⁶ What the railroads were selling, in terms of mandatory routes, was not what the public wanted. Through the brokers, the market found a way to address the pricing and access issues that mandatory route tickets imposed. The result was travel that was more convenient and less expensive.

A century later, the NFL provided a similar example—same story, different era, but same result thanks to Schumpeter. As a result of the 1980 Davis Super Bowl allegations,²²⁷ the tickets for the 1981 Super Bowl were distributed according to written guidelines that Rozelle developed to contain the distribution and resale of tickets. The Rozelle guidelines suggested that Super Bowl teams should establish a “firm policy” regarding the number of seats that would be made available to players, coaches, and staff members, with a maximum of 15 per individual.²²⁸ Reporters did their research on the impact of Rozelle’s rules. Of the 75,000 attending the 1981 Super Bowl, an estimated 50,000 paid the single-price face-value of \$40 with the remaining 25,000 attendees buying their tickets on the secondary market, paying between \$150 and \$500 per seat.²²⁹

The eight principles guide ticket markets and their would-be regulators to one inescapable conclusion, one that was reached in 1893 by Daniel Frohman, manager at that time of the famed Lyceum Theater in New York: “The abuse can never be cured wholly until the people refuse ever to buy seats from

226. True to the pattern of general ticket scalping regulation, the railroads attempted city-by-city controls of the practice of scalping. Cincinnati had success in minimizing scalper activity while other cities admitted that they were “busily engaged” in ticket sales elsewhere. *Railroad Notes*, N.Y. TIMES, May 22, 1875, at 10. The practice was so pervasive that by 1879, the General Passenger Agents group had proposed rules for termination of employment of agents who cut tickets or reduced rates on unused tickets and did so to earn commissions from brokers. The group also decided to impose rules that prohibited the use of partial fares beyond certain westerly points, such as Indianapolis and Cincinnati. *A Plan Adopted to Prevent Cutting and Scalping*, N.Y. TIMES, Oct. 3, 1879.

227. See *supra* notes 125–27 and accompanying text.

228. For the game in New Orleans, the 75,000 seat distribution included 16,425 tickets to each competing team, of which the Philadelphia Eagles allocated 12,000 to season ticket holders and the Oakland Raiders allocated 10,000. Both the Raiders and Eagles ignored Rozelle’s guidelines and allocated 30 and 20 tickets respectively to each player at face value. The rest of the distribution included: 7,300 for the host New Orleans Saints; 876 to each of the other teams (each NFL player could purchase a minimum of two tickets at face value); 2,500 to luxury box owners in the stadium; and 10,950 to the NFL Commissioner’s office.

229. William Nack & Robert Sullivan, *Football’s Little Bighorn?*, SPORTS ILLUSTRATED, Jan. 26, 1981, at 33. See SEGRAVE, *supra* note 1, at 201–02.

speculators, and it is not reasonable to suppose that such a heavenly state of things will ever come to pass.”²³⁰

The quibble arises with his use of the term “abuse.” One man’s “abuse” is another man’s chaotic adjustment to an inefficient market. Perhaps curing the “abuse” is not the correct approach. Rather, the eight principles suggest that an efficient market exists, one that provides consumers with what they along with necessary protections for them even as it delivers the profits to sellers without the nuisance effects that plague regulators.

PART III: A PROPOSAL FOR STRUCTURING THE LAW FOR A NATIONAL TICKET MARKET

The eight principles provide the insight on key components of ticket markets that cannot be controlled, but they also warn of the perils of the various forms of regulation applicable to those markets. In simplest terms, the principles offer some overarching themes for regulatory structure: (1) fraud happens; and (2) ticket markets must be transparent and national to provide full benefits for consumers.²³¹ When fraud happens, the tendency for regulators is to pass territorial types of reforms that hamper the transparency of national markets. A national regulatory scheme for primary and secondary ticket markets must address fraud before there can be acceptance on a state-by-state basis of national regulation that will allow the free flow of tickets and, as an incidental benefit, provide the states with all the revenue that will result from above-the-table ticket transactions.

Too much of the existing state regulation has focused on price restriction and resale as a means of controlling fraud, a focus that has proved ineffectual. The desired goal of consumer protection is better achieved through meaningful anti-fraud provisions as opposed to ineffectual market controls (see Principle Five). Eliot Spitzer, the short-lived governor of New York, who had made efforts as New York’s Attorney General to enforce New York’s then-antiscaiping laws, finally came to understand the market dynamics in high-demand events and reached the correct conclusion about how tickets markets should be regulated:

Consumers will be better off if we deregulate scalping, let the market function, and get rid of the corruption in the box office. You have people who are being paid bribes to

230. *Fighting the Speculators*, N.Y. TIMES, Jan. 3, 1893, at 8.

231. In reality, the Internet already makes the ticket market international, but this article is confined to addressing the need for a regulatory scheme that allows free trade of tickets across state borders.

secrete tickets out without the general public ever getting a chance to buy them. What we need to do is focus on theft. That is where the fraud is.²³²

Fraud Happens: How to Minimize It

There is not a period in the 400 years of ticket sales to high-demand events that there have not been shenanigans that cost consumers. However, there also has not been a period in the sale of any type of good or service where there has not been fraud. Because there is fraud in the sale of securities does not mean that the way to eradicate fraud is by placing caps on the resale price of those securities, preventing the transfer of those securities without authorization from the issuer, or requiring sellers and buyers to go through an exchange run by the issuer of the shares. Nor do we decide that investment firms that deal in secondary trading are making far too much money from the increase in value in the stocks and should be, therefore, cut out of the markets with their economic rents going back to the company.²³³

Such suggestions seem ludicrous when we know that the stock market has functioned for a very long time with substantial rewards for participants despite the economic cycles. So it is with ticket markets. Limitations on transparent trading through price controls and purchasing prohibitions will not address the fraud. Indeed, with the eight principles always fueling secondary trading, what will happen with such curbs is more fraud as the transactions are driven underground in a manner that does not allow consumer remedies or regulatory oversight. If fraud happens, the best regulatory schemes will target the fraud, not curb the markets that offer returns that do tend to attract fraud. Regulations require methods that get at the actions of a few and do not eliminate the temptation for fraud, something all markets have in common when they are successful. The secondary ticket market is a successful, growing, and continually evolving one. It attracts entrepreneurs who will continue its expansion, but the purpose of any ticket market regulation should be to foster growth even as it curbs deception.

There are several ways to limit the proposition that “fraud happens” in markets. The goals in all of the proposals for regulatory change in the ticket markets are: (1) to draw on what has worked in open markets in other fields;

232. Jayson Blair, *Attorney General Favors Elimination of State Anti-Scalping Law*, N.Y. TIMES, Apr. 22, 2001, at 38.

233. The authors recognize that recent actions by the Obama administration could be interpreted as accomplishing the same thing, but the authors prefer to think of the actions of this one presidential administration as an anomaly born of fear in an economic downturn and hold great faith that the markets will be permitted to return to transparent and independent operations, profits and all.

(2) to provide a regulatory framework that relies as much as possible on universally applicable laws and regulations, that is, to avoid ticket-specific statutes or regulations when a general statute or regulation serves to address the concern;²³⁴ and (3) to provide a simple framework that allows national operations even as it allows states the opportunity to police fraud by those who are involved in selling tickets to residents in the state, whether through physical presence or online reach.

Others have proposed sweeping national reform for the ticket markets. For example, one proposal is The Federal Uniform Ticket Resale Act (FUTRA).²³⁵ The proposal consists of licensing, extensive recordkeeping requirements, lawful sell-backs, a central enforcement authority (akin to the SEC for securities), limitations on the use of diggers, and a maximum premium price. There are two significant problems with the proposal. The first is that many of its provisions attempt to kick against the pricks,²³⁶ that is, the provisions in FUTRA exacerbate the problems that exist because regulatory controls run contra to the Eight Principles. The fact that a price is a premium price above existing permissible levels does not make it any less of a price control. The second problem is that presently the patchwork of existing statutes and regulations is wide and deep and equally as rich in political issues that resulted in their passage. A sweeping national reform would meet resistance because of those vested local interests.

234. Commercial bribery is commercial bribery, whether the recipient of the bribe is a box-office employee or a purchasing agent for a contractor. Reliance on the more general statutes facilitates a national ticket market in the sense that all businesses function with slight differences in state law on these types of issues and ticket sellers should not be required to adhere to a state-by-state standard that is unknown when more general statutes can address the issues adequately.

235. See antiscalping proposal by Congressman Gary Ackerman, *supra* note 81; see also Glantz, *supra* note 61, at 297. The proposal incorporates many of the recommendations of the 1999 New York Attorney General Report on ticket scalping. OFFICE OF N.Y. STATE ATTORNEY GEN. ELIOT SPITZER, WHY CAN'T I GET TICKETS? (1999).

236. "Kicking against the pricks" is a Biblical phrase. *Acts* 9:1–5 (King James). Verses four and five represent the final steps in Saul's conversion (who would become Paul the Apostle). "And he fell to the earth, and heard a voice saying unto him, Saul, Saul, why persecutest thou me? And he said, Who art thou, Lord? And the Lord said, I am Jesus whom thou persecutest: it is hard for thee to kick against the pricks." This is mentioned again in *Acts* 26:14. This refers to the oxen responding to the tillers of soil who used a pointed spike (prick) to goad the oxen into going in the direction the tiller desired. However, oxen being stubborn would often kick out at the prick. The more the oxen kicked, the more the tiller drove the prick into the flesh of the animal. These were pre-PETA times of yester year. The more the oxen kicked, the more the suffering. Most of the regulation that has been passed in order to rein in secondary markets (continuing with the animal husbandry theme) has simply resulted in more creativity and expanding secondary markets. Regulation is, of course, the stubborn oxen in this metaphor and the tiller and his stick are free market forces.

Further, there is room in a national ticket market for local regulatory eccentricities. There are state and local forms of regulation in every market that work consistently for goals for a national market that allow uniform trading. IBM stock still trades in Arizona even though Arizona is a merit review state when it comes to approving securities offerings. IBM simply needs to file the specific Arizona information, information that is provided in a uniform form used by all the states as they review stock registrations. Each state has its own standards for review, but the process is national. Once approved, the sales sally forth. In other words, the proposals offered below will, in effect, allow for simplicity and nationalization in terms of licensing but still allow local controls and even application of state-specific statutes. Rather than attempt centralized control, the following proposals for reform allow for state eccentricities even as they serve to allow the creation of a national and transparent market for tickets.

Foster and Expand Self-Regulation

Where there is fraud, there is consumer unrest, and where there is consumer unrest, there is regulation (see Principle Four). If ticket markets are to continue their growth and foster creativity in making tickets more widely available at lower prices, those who sell products in ticket markets must take steps to rein in fellow participants. A constant theme running through the development of the secondary ticket market has been the presence of consumer unrest, most of it justified because of the conduct of sellers.

The 1994 Rose Bowl provided an example of how self-regulation can keep an open market going and out of the hands of price-controlling regulators. The University of Wisconsin was one of the teams in the 1994 Rose Bowl, playing in it for the first time since 1963. Brokers had put together extensive travel packages for Badger fans, who were many and motivated.²³⁷ However, in a page borrowed from the hedging activities of Wall Street, some of the brokers offering the packages were selling short. The brokers did not physically have the tickets to the Rose Bowl. They were offering the packages based on their assumptions about markets and consumer behavior that led them

237. Wisconsin had played in the Rose Bowl three times prior to the 1994 game: 1953 (USC 7, Wisconsin 0), 1960 (Washington 44, Wisconsin 8), and 1963 (USC 42, Wisconsin 37). After winning the 1994 game (Wisconsin 21, UCLA 16), the school played again in 1999 (Wisconsin 38, UCLA 31), and 2000 (Wisconsin 17, Stanford 9). Tournament of Roses, Past Game Scores, <http://www.tournamentofroses.com/history/gamescores.asp> (last visited Feb. 16, 2010).

to conclude that they would be able to buy the tickets at “reasonable prices” sometime before the game.²³⁸

Though rare, the brokers were wrong in their economic forecasts. Intense demand that continued through the pre-game period resulted in ticket prices that were so high that some of the brokers concluded that it was better to refund than to cover their short positions. The signed contracts between the brokers and the fans indicated that ticket buyers would be reimbursed monetarily (perhaps with a premium) if the seller could not provide the actual ticket. Refunds meant little to the Wisconsin fans who had already journeyed to California and were sitting in their Pasadena hotel rooms waiting for ticket delivery. The media commentary was scathing, and all the “scalper” backlash from centuries of mark-ups reared its ugly head with heart-string-tugging stories of defrauded Badger fans.²³⁹ Regulation seemed a certainty.

Markets function on self-interest, not selfishness. It is in no one’s best interest to have dissatisfied consumers, and certainly not consumers who happen to be jilted Badger fans. Recognizing the implications for their industry, a group of brokers, concerned about the Pasadena missteps and the harmed consumers, as well as the public perception of their profession as a result of these events, formed the National Association of Ticket Brokers (NATB).²⁴⁰ There had been previous forms of voluntary organizations and codes, but this effort was unique in that it was a national group that reflected the national nature of ticket markets.²⁴¹ Since its inception, NATB has continued to lobby extensively for free markets, but perhaps more importantly it established industry standards, a code of ethics, and enforcement mechanisms.²⁴²

NATB’s Code of Ethics establishes 17 conditions of membership, including the five critical elements that focus on the prevention of fraud and

238. *Wisconsin Official to Pursue Rose Bowl*, SPOKESMAN-R., Jan. 12, 1994, at 1.

239. Gary Adler, lead counsel for the National Association of Ticket Brokers (NATB), conveyed the intensity of the media commentary to the authors when the formation of the NATB was first broached.

240. National Association of Ticket Brokers, <http://www.natb.org> (last visited July 3, 2009).

241. Previously there had been regional and event-specific associations such as the Theater Ticket Brokers Association of Greater New York, which was organized in 1920 to oppose legislation that limited ticket premiums to 50 cents. SEGRAVE, *supra* note 1, at 114. Interviews with members of the broker industry indicate that there was, for a fleeting time, also the East Coast Ticket Brokers Association, a forerunner to the NATB.

242. The authors work with NATB in a variety of ways: discussing current legal trends with NATB legal counsel, making presentations at the annual convention, and testifying before various state committees. With the exception of travel expenses, all of the work has been *pro bono*.

provisions for consumer remedies when things go wrong in terms of ticket purchase and delivery:

- (1) maintaining a good character and reputation in the community;
- (2) not deceiving, misleading, misinforming or otherwise misrepresent seat location information;
- (3) maintaining complete and accurate records;
- (4) maintaining a refund and cancellation policy, something that must be conspicuously posted at each location where the member does business;
- (5) agreeing to arbitration by the American Arbitration Association to resolve any disputes with another Association member or purchases.²⁴³

In addition to trade groups, individual ticket-market participants, whether sellers or ticket-sales facilitators, have developed their own sets of visions, standards, and ethics that are disclosed to consumers prior to their use of the sellers' services or online site. For example, StubHub provides a description of the ticket market and what it does to prevent fraud and how it seeks to operate in a manner that is consistent with the principles of the U.S. stock market:

Sporting and live music events in this country have been main entertainment options for the public for decades. But prior to Y2K the common fan was not being adequately served by the existing options for purchasing tickets to these events. The best tickets were never even available because season ticket holders, corporate sponsors and newly created fan clubs were securing all the tickets in advance. For the very hottest events, even the remaining less desirable seat locations were selling out in mere minutes. For years the only option fans were left with was hoping to find a street scalper outside of the event and take their chances. Counterfeit tickets were a concern and without knowing all the pricing options there were risks of scams and unfair ticket values.

These imperfect options left fans without a trusted source of getting access to the live events they wanted. Fans were confused and had many unanswered questions. Where to go? What's a fair price? How does the buyer actually get the tickets? Will they get them in time? How do they know they are legitimate tickets?

Contrast this dynamic with that of the U.S. Stock Market for instance. The situation is very different when an investor makes a decision to buy or sell a share of stock; they have clear expectations and systematic processes are in place to provide:

- *Fair and open visibility to pricing*
- *Timely execution*
- *Guaranteed performance for a specified fee*

243. NATB's enforcement/compliance mechanism is governed by NATB's Ethical Complaint Procedures document, which contains seven sections: Committee for Standards and Ethics; Member Responsibility; Receipt of Complaint; CSE Committee Determination; A Board of Appeals; Sanctions; and Miscellaneous. These conditions and procedures provide protections for ticket customers when dealing with one of the now 200 current NATB members. National Association of Ticket Brokers, Complaint Information, <http://www.natb.org/complaints> (Follow the "Complaint Procedures" hyperlink) (last visited Feb. 16, 2010).

StubHub's innovative approach solves the problems that existed previously:

- *Pricing is transparent and reflects fair market conditions. StubHub is a true trading platform with fair market prices that are driven by supply and demand (i.e., the buyers and sellers).*
- *The process is 100% guaranteed. Tickets arrive in time. StubHub utilizes overnight delivery as well as local will call centers for "last minute" transactions, so that buyers receive their tickets in time to attend the event and sellers receive timely confirmation of their funds.*
- *The costs are clear and consistent. StubHub charges a minimal transaction fee to both buyers and sellers, so that everyone involved in the transaction knows exactly what the total costs will be.*²⁴⁴

This self-imposed regulation focuses on the importance of transparency but also provides a remedy for those buyers who are harmed because of fraud, as with counterfeit tickets. Fraud happens, but providing buyers with a remedy is the appropriate response, not the elimination of the marketplace that StubHub provides.

There are evolving issues in the marketplace of ideas that will require NATB to be vigilant in its standards and self-regulation. For example, the practice of so-called "spec seats" has now developed. When a broker sells "spec seats," the broker simply commits to a customer to obtain tickets to an event; the broker makes no representation about the location or quality of the seats, but the broker does not have tickets to the event yet in hand. Self-regulation here requires careful and full disclosure to consumers. In addition, there are brokers who are promising seat locations as part of their spec seats sales. That is, the brokers are promising certain rows and sections to the buyers. The opportunity for misunderstanding in such guaranteed spec seats is great and self-restraint may be necessary for this competitive tool.²⁴⁵

Licensing

One control that inhibits fraud but does not curb open markets is requiring market participants to be licensed. From ticket brokers to state registration of online traders, any statute or regulation that is designed to provide full information about sellers, how to reach them, and ensure that they have appropriate resources for refunds is welcome. These forms of registration and

244. Stubhub.com, *StubHub Story*, <http://stubhub.com> (last visited Apr. 26, 2010).

245. The authors attended the NATB meeting in Las Vegas in July 2009 and had the opportunity to interview members and vendors about the spec ticket process. There was disagreement among the members about the nature of spec seat sales and whether there should be provisions in the NATB code on promises about specific seats sold prior to the broker's acquisition of those tickets.

licensing should parallel the stock market where participants are required to pay fees, file annual disclosure statements that update information, and even mandate contributions to state funds that are used to compensate those who are defrauded. These forms of licensing serve to pare market participants to those who are willing to enter markets in a transparent manner, providing background information and a means for consumers and regulators to hold them accountable for their business practices.

In fact, the ticket market may be of a sufficient size now that there could be a standardized licensing form and process. The states could join together for a central filing process in which ticket market participants could file one form that is then accompanied by the payment of each state's licensing fee. With so much of state government business now done online, this process could be one in which ticket brokers, for example, could file only in those states in which they will be doing business. The benefit is the same achieved by the mechanisms now in place for state securities registration: one form is filed in each of the states in which the company wishes to sell securities with the appropriate fees being paid via Internet to the states chosen for doing business.²⁴⁶

This national licensing approach would eliminate the current areas of jurisdictional confusion over ticket brokers and whether they are doing business in a particular state for purposes of being subject to that state's jurisdiction for enforcement purposes. Currently, online sellers, exchanges, and brokers are posting warnings about users' responsibilities for compliance with state and local regulation.

Stringent Penalties and Strict Enforcement of Laws Against Insider Trading

Fraud occurs in the shadows—in the ticket markets many of those shadows exist because of the undisclosed involvement of primary market insiders in secondary market ticket sales. Their undisclosed involvement means that market transparency suffers because neither the supply nor market price adjustments to reflect that supply are available to buyers. Their undisclosed involvement also means that buyers do not have the remedies available from licensed participants. Their undisclosed involvement also means that a source of state tax revenues is lost because these transactions are not reported.

246. Blueskylinks.com contains the uniform forms used for registration of securities.

Because of these three factors states should have legislation that addresses specifically the activities of those who work for promoters and owners. The legislation should have a commercial bribery component and a penalty for secondary sales by insiders that exceed a fixed percentage of the total number of seats available for the venue. For example, the legislation could require primary sellers to disclose publicly the number of venue seats that will be withheld from the initial public offering of the tickets. Such regulation would be designed to more accurately mirror an IPO in the stock market. That is, those who purchase shares in an initial primary offering are fully aware of how many shares will be sold and are not subject to the dilution losses that would occur if the primary offering were released in spurts of shares, the number of which is not known for each incremental release, or in toto.

The regulation should not focus on eliminating the hold-backs; hold-backs are the right of event promoters and owners. However, the disclosure of the hold-backs allows the markets to better gauge pricing as well as the involvement of the primary sellers in the secondary market. Regardless of how the antitrust concerns about primary sellers' acquisitions and activities in the secondary market, there remains the issue of their participation after they have skewed the price or plan to use the release of tickets as a means of increasing their profits in a manner that deceives buyers about the true size of the market's supply of tickets. An example from a high-demand good can illustrate how primary sellers' undisclosed involvement in secondary markets can allow the control of price. Suppose that Apple released a new iPhone for a price of \$50, with a very limited supply. The queues would be long, and a secondary market would emerge. Suppose further than Apple continued to control the primary market supply even as it participated in the secondary market sales. With complete access to the market goods and control over their release, the primary seller is able to manipulate price in the secondary market. Primary market sellers should not be denied secondary market profit participation (corporations do buy and sell their own shares in the secondary market), but primary seller participation should not result in vertical monopolies or disguised monopolistic profits made because of a lack of transparency in the initial stages of ticket sales or their controlled release as the market price adjust to perceived supplies.

Time-and-Place Restrictions on Resales at State and Local Levels

The Eight Principles necessarily mean that there will be casual traders who, on the day of an event, simply choose not to or cannot attend an event. These proposals for a national market are not intended to eliminate the ability

of a casual ticket trader to show up on game day and sell. State and local laws that are time and place restrictions on day-of-event sales do not inhibit the national ticket market. Indeed, sales until the last minute are a key element in accurate pricing for event tickets. Nothing in this proposal would eliminate the right of state and local governments to limit the location for such day-of-event ticket sales or require a one-day license for the sales. These types of statutes and regulations address the nuisance effects that are a legitimate concern of event promoters and site owners as well as local law enforcement officials. However, it could be possible for a uniform code to exist that covers these time-and-place restrictions.

For example, such a code could follow that place in effect when the Super Bowl was held in Glendale, Arizona. In 2003, the City of Glendale, home of both the Arizona Cardinals' University of Phoenix Stadium and the Coyotes' Jobing.com Arena, adopted an ordinance like that passed by the City of Phoenix, in 1995.²⁴⁷ All ticket trading before events was free of antiscalping laws so long as it took place in a designated area. This ordinance had a major effect on the 2008 Super Bowl. One of the authors observed ticket prices markedly falling ultimately to face value the final two hours before the start of the game.

The Arizona model has moved to other NFL cities. In 2005, the Pittsburgh City Council designated a "resell zone" for Pirates and Steelers home games where anyone can conduct unofficial ticket transactions, no license needed. But, the Pittsburgh leap to a free market structure was not as large as the ones taken in Arizona. There were strings attached to the free-trade zone. Inside the resell zone sellers could earn no more profit than \$5, or 25 percent of the value of the ticket, whichever is greater, or they would violate existing state laws.²⁴⁸ However, the national approach would eliminate such state statute maximum-price limitations because the principles dictate the effects of such limitations actually increase ticket prices and foster fraud as below-the-radar transactions increase.²⁴⁹

247. *See supra* note 119 and accompanying discussion.

248. In the later 1990s, the Baltimore Orioles designated an area behind center field for their new Camden Yards ballpark where all legal trading was to take place. However, prices above face value were prohibited, and as the authors told officials, no trading would occur there for important games (like when Cal Ripken was setting the record for consecutive games played).

249. The authors have noted some states that have specific types of event and game limitations. For example, in some states college football and basketball games between rivals seem to bring out the need for regulation of price. The authors recognize the political nature of these specific statutes, but would encourage state legislators and regulators to rethink these specific limitations in the interest of alumni who are in locations around the country and who could benefit from the tickets to the rivals' annual game being

The Rights of Owners and Promoters on Ticket Limitations and Access

Circumvention statutes have already begun to appear.²⁵⁰ Circumvention statutes exist generally in criminal codes. That is, those involved in the ticket markets should be subject to the general criminal statutes that exist at both state and federal level that prohibit trespass, circumvention of controls, and other tactics designed to work around the software controls of those who operate a site, whether the site is a blog or that of a ticket seller. Ticket sellers are free to revoke the rights of such users and states are free to pursue prosecution of those who violate the property rights of those who operate the sites. It is not the ticket limits themselves that produce perverse market effects. It is the ticket limitations coupled with hold-backs and the nondisclosure of the actual number of available tickets that affect the ability of the secondary market to reach equilibrium.

Clarification of the Nature of Tickets

A national ticket market cannot exist if those who grant tickets as licenses, something that owners and promoters can do, are entitled to revoke those licenses if the licensee sells the ticket (or a portion thereof) in the secondary market. Such license restrictions have the effect they have had in Massachusetts with the Patriots: the secondary market is severely constrained and ticket buyers have only one source for primary and secondary ticket purchases. The use of the ticket license to control secondary sales is a form of vertical integration that results in monopoly power and higher ticket prices controlled by the promoter or owner. The ability to purchase tickets to individual games is not only restricted but risky because the buyers may not know until they arrive at the game whether the license has been revoked because of the monitoring activities of the team in online sales forums. The barcode allows the owner to prevent transfer even without revocation of the license because those who present their tickets for admission must have ID that matches the team's records for the name associated with that barcode.

available on national exchanges, including participations in futures options in the event of play-offs between the rivals.

250. *See supra* notes 81–83 and accompanying text for example of state laws that make it a crime for buyers to circumvent ticket sellers' software that limits the number of tickets sold per credit card or individual or screen name.

Presently it is not clear that states are ready to adopt a national standard that a ticket is a bearer instrument that is fully transferrable. The push-back may come from a legitimate need to have some of the legal rights, notices, and restrictions that are necessary for orderly events that require hard tickets for admissions. Because the time for the leap to bearer paper may not yet be here, states should be permitted to retain their basic license laws that permit owner revocation for misconduct that is related to the ticket holder's activities at the game. The liability and safety issues that arise on the part of the owner for licensees require this clarification. However, a national ticket market cannot function in a piecemeal state law environment where statutory protection prohibits revocation of a license for attempting to sell the ticket that granted that license.²⁵¹ This statutory clarification may, as discussed earlier, be constitutionally necessary because the Massachusetts structure is perhaps economic discrimination against interstate trade.

The promulgation of the Uniform Commercial Code and its adoption in 49 states was the result of frustration among businesses as they tried to ship goods nationally into states that had varying laws and regulations on price, shipment requirements, and even contract terms. In some situations, sellers surrendered and did not do business in certain states. When there were disputes on the contracts underlying the sale of goods, there was lengthy litigation over which state's laws governed the transaction and what happened when state laws produced inconsistent results on the interpretation of the contract. The U.C.C. provided the means for a national market with clarity on terms, jurisdiction, and disputes and opened the door to national trade. Presently, ticket market participants operate in an environment in which each legislative session and state court decision brings and new and different obstacle to operating nationally. The legal environment for ticket markets is restrictive and, sadly, unstable. Neither characteristic is conducive to efficient markets. Stability and property rights are critical to efficient economic systems.

Continuing Antitrust Monitoring and Enforcement

The structure of this national ticket market continues to evolve with ongoing combinations, mergers, and acquisitions that will continue as participants begin to fully understand the market and its potential. However, as the earlier discussion of Principle Six noted, these combinations are often not conducive to market efficiencies or superior skill, foresight, and industry,

251. Colorado has already passed such a statute. *See supra* note 81.

but are, rather, undertaken to attain the ability to set prices and exclude competition. Again, a national ticket market does not require change to existing antitrust laws. A national ticket market, however, cannot operate transparently and efficiently when horizontal and vertical combinations serve to create monopolists that set prices in the primary market and then through vertical integration control prices in the secondary market. Antitrust laws do not prohibit mergers that serve to create efficiencies and a better ability to compete. At the same time, where the effect of the merger, whether in ticket markets or any other area of business, is to reduce options for consumers in pricing, bundling, or service, they should be carefully reviewed and monitored.

PART IV: CONCLUSIONS

An examination of the Eight Principles, with the history of the ticket markets interwoven, is evidence of the adage that the more things change, the more they remain the same. Regulators and market participants have long attempted the same forms of controls to stop the secondary ticket market. The concepts of fairness, gouging, fraud, and risk are the emotional terms that have emerged to provide support for legislative actions that attempted to do everything from making ticket resales a crime to placing price controls to requiring licensing. The common thread in all of these various attempts has been they have not contained the market but instead have introduced circuitous activities that have only served to expand the market, not constrain it.

The time has come for the recognition of the truth of two basics: secondary ticket markets are inevitable and they are expanding. Accepting these truths and applying the eight principles leads to the reforms suggested here. These reforms differ from previous forms of regulatory control in that they work with the eight principles, not against them. That choice remains the only option for ensuring that the ever-present notion of fairness is achieved. Ray Blount, Jr. wrote a widely-read article on ticket scalping that appeared in *Sports Illustrated* in 1979.²⁵² Blount reflected the general emotional and initial reaction most who do not understand the Eight Principles have to the secondary ticket markets. He acknowledged that dealing with a scalper does tend to leave a bad taste. However, Blount also understood something that market participants and regulators need to understand as the foundation for the Eight Principles. These secondary ticket market sales represent a sale that is,

252. *Hey, I Got the Ducks*, SPORTS ILLUSTRATED, Feb. 5, 1979, at 32.

“the transaction is a kind of wildcat grassroots capitalism.”²⁵³ You can’t cap a wildcat well. A groundswell exists on its own, and it finds a way to make its point. So it is with ticket markets. Run with the force, keeping it within legal boundaries, and it thrives and consumers benefit. Our suggested reforms are designed to do just that.

253. *Id.*