

# FOR-BID SCALPING ONLINE?: ANTI-SCALPING LEGISLATION IN AN INTERNET SOCIETY

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## INTRODUCTION

“Who needs tickets?” “Got two tickets!” “Second row seats!” These are all familiar shouts from ticket scalpers outside a major sporting event, Broadway show, or concert where tickets are tough to obtain.<sup>1</sup>

The root of the word “scalping” derives from “scalp.” In its verb form, one of its definitions is to buy and sell (securities or commodities) in order to make small, quick profits.<sup>2</sup> In the entertainment culture, the term “scalping” is often associated with the practice of reselling tickets at a price above the original advertised price or printed face value of a ticket.<sup>3</sup> This activity has traditionally taken place in front of or near the venue where an event will occur due to the relevant market opportunity and purchaser demand. However, such “street scalpers” are now the smallest part of an immense ticket resale industry.<sup>4</sup> Associating the term “ticket scalping” with the traditional sidewalk scalper is becoming less obvious as it meets its “digital future,” i.e., the Internet.<sup>5</sup>

With the advent of Internet auctions,<sup>6</sup> various online secon-

<sup>1</sup> See Gary Mihoces, *Cyber-scalpers Hit Net: Online Sites the Ticket for New Generation of Cyber-Scalpers*, USA TODAY, Mar. 6, 2000, available at [http://www.allsoldout.net/company\\_press\\_media030600.cfm](http://www.allsoldout.net/company_press_media030600.cfm).

<sup>2</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2024 (P. Gove ed. 1976). In the 1880s stock and grain speculators who bought with the intention of making profits on resale were called scalpers. See Yael Shacher, *Ticket Scalping*, GOTHAM GAZETTE, Jan. 12, 2003, available at <http://www.gothamgazette.com/itw/tickets>. In addition, street scalpers selling counterfeit train tickets were a menace to the railroad companies and their passengers over 100 years ago. *Id.*; see also *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 F. 65, 67 (C.C.M.D. Tenn. 1897) (noting that a number of persons, known as “ticket brokers” or “ticket scalpers” engaged in the business of buying and selling the return portion of a special contracted exposition train ticket).

<sup>3</sup> See Stephen K. Happel & Marianne M. Jennings, *The Folly of Anti-Scalping Laws*, 15 CATO J. 65, 71 (Spring/Summer 1995). See also *TIXFAQ*, available at <http://www.tixtickets.com/tixfaq3.htm> (last visited Nov. 3, 2004). It has been noted:

There is no such thing as face “value” unless the event is cancelled . . . [b]ecause you can't take it back to the box office and obtain a refund, i.e., redeem it for cash unless the event is cancelled without rescheduling. . . [and] there is no way to get your money back without reselling it on the secondary market. Therefore, the *only* value is the *market* value . . . the correct term should be “*face price*.”

*Id.* The face price is the price at which tickets will be refunded by the authorized ticketing agent in case of a cancellation of that particular event. *Id.*

<sup>4</sup> “Scalping is no longer merely the province of individuals who . . . sell tickets for a huge profit on the sidewalk” but also of “ticket wholesalers [who] buy up huge blocks of tickets and resell them at illegally high prices.” Editorial, *Broadway Robbery*, N.Y. TIMES, Mar. 25, 1995, at 22. See also OFFICE OF NEW YORK STATE ATTORNEY GENERAL ELIOT SPITZER, WHY CAN'T I GET TICKETS?: REPORT ON TICKET DISTRIBUTION PRACTICES 7 (1999) [hereinafter REPORT ON TICKET DISTRIBUTION PRACTICES].

<sup>5</sup> See Troy Wolverton, *Ticket Market Meets its Digital Future*, CNET News.com, at <http://news.com.com/2100-1017-918746.html> (May 21, 2002).

<sup>6</sup> See eBay, About eBay, at <http://pages.ebay.com/aboutebay/thecompany/company-overview.html> (last visited Nov. 3, 2004). The “About eBay” section states:

eBay is The World's Online Marketplace® for the sale of goods and services by

dary marketplaces, sports teams,<sup>7</sup> and concert promoters<sup>8</sup> are eager to provide websites to let fans sell tickets they have purchased but are unable to use.<sup>9</sup> The convenience and profit opportunities of these offerings are obvious to ticket vendors and consumers, but the process of getting tickets from the original issuer to the ulti-

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a diverse community of individuals and businesses. . . . On any given day, there are more than 16 million items listed on eBay across 27,000 categories. In 2002, eBay members transacted \$14.87 billion in annualized gross merchandise sales . . . . People come to the eBay marketplace to buy and sell items across multiple categories, including antiques and art, books, business & industrial, cars & other vehicles, clothing & accessories, coins, collectibles, crafts, dolls & bears, electronics & computers, home furnishings, jewelry & watches, movies & DVDs, music, musical instruments, pottery & glass, real estate, sporting goods & memorabilia, stamps, tickets, toys & hobbies and travel. eBay offers a wide variety of features and services that enable members to buy and sell on the site quickly and conveniently. Buyers have the option to purchase items in auction-style format or items can be purchased at fixed price through a feature called Buy-It-Now.

*Id.*; see also eBay, Ticket Resale Policy, at <http://pages.ebay.com/help/policies/event-tickets.html> (last visited Nov. 3, 2004). The policy states, "eBay permits resale of tickets to entertainment events (including sporting events, concerts, and plays) to the fullest extent permitted by law." *Id.* For the states and provinces that limit event ticket resale prices, eBay limits trading by users who are residents of the regulated event location to the amounts described by specific legislation, and eBay inserts an automated disclaimer in the item description explaining the applicable restriction to potential bidders. eBay will determine the location of the seller and the buyer via eBay registration and billing information. *Id.* In addition, "for resale of tickets with a face value of \$300 or more per ticket (only if the event occurs in one of the regulated locations), sellers must include proof of the ticket face value in the item description in the form of a partial scan of the actual ticket - clearly showing the face value and the event date." *Id.*

<sup>7</sup> See Julia Angwin, *Ticketmaster Takes on Scalpers, eBay with Online Reseller System*, WALL ST. J., Apr. 5, 2002, available at <http://www.southcoasttoday.com/daily/04-02/04-21-02/d05bu160.htm>. Ticketmaster set up a marketplace for the Columbus Blue Jackets of the National Hockey League that allows season ticket holders to resell excess game tickets through the Blue Jackets' website. *Id.* The Ticketmaster system works by allowing "the ticket holder who wants to sell their ticket on the team or event's website, which is run by Ticketmaster. Each team or event decides whether to allow tickets to be resold for more than their face value — something that is against the law or otherwise regulated in certain states." *Id.*; see also Tom DiNome, *Hot Tickets, Hawked Legitimately Online*, N.Y. TIMES, July 3, 2003, at G8 (noting that the San Francisco Giants created an online secondary market ticket exchange operated by Tickets.com, and that Ticketmaster's TeamExchange, its version of an online secondary market forum, is used by seventeen professional and collegiate teams), available at <http://www.liquidseatsinc.com/sites/corpsite/?gSec=news&gAct=news&article=070303>; see also *Using the Knicks Account Manager*, at <http://www.nba.com/knicks/seasonsubs/demo.html> (last visited Nov. 3, 2004).

<sup>8</sup> See Susan Ault, *Last-Minute Buyers are Vital for Touring Biz*, Billboard.com, June 7, 2003, (stating that "Christina Aguilera has hooked into the Web through the site stubhub.com to hike ticket sales in the final days before her shows") at <http://www.stubhub.com/sites/corpsite/?gSec=news&gAct=news&article=060703>; see also Mark Lewis, *Backstreet Boys Management Seeks Removal of 700 eBay Ticket Auctions*, Angelfire.com (noting that Backstreet Boys Management announced that approximately 500 premium seats from many shows for the group's early 2000 tour would be auctioned off on the Tickets.com website), at <http://www.angelfire.com/hi3/klaris3/articles/ebay.html> (Dec. 16, 1999).

<sup>9</sup> See *Ticket System Helps Scalp the Scalpers*, INFO. WK., available at <http://www.stubhub-tickets.com/sites/corpsite/?gSec=news&gAct=news&article=040901> (last visited Nov. 3, 2004).

mate consumer is complex and often illegal.<sup>10</sup>

When John Doe decided that he would attend a Seattle Mariners baseball game in September, he was not near Safeco Field,<sup>11</sup> nor was he on the telephone with an authorized ticket agent<sup>12</sup> or broker.<sup>13</sup> Instead, in today's technologically advanced society, Mr.

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<sup>10</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 7; see also Randy Lewis, *Will Bidding Raise Prices?; Benefits Show Ticket Auctions Work, but the Practice has its Toll*, L.A. TIMES, Nov. 15, 2003, at 1 (noting that by using online ticket auctions, there is an economic upside for venues selling every seat because of extra revenue from parking, merchandising, and concession sales).

<sup>11</sup> See *Safeco Field Background*, at <http://www.ballparks.com/baseball/american/seabpk.htm> (last visited Nov. 3, 2004). "The Washington State Major League Baseball Public Facilities District ("PFD") is the public body responsible for actual construction of the ballpark" Safeco Field. *Id.* The owner of the ballpark is Washington-King County Stadium Authority. The cost as of July 1999 was \$517.6 million. Public financing for the ballpark constituted \$340 million, which consisted of state contributions in the form of a "[s]tate authorized, county imposed, 0.017% sales tax, which is offset against the sales tax now collected by the state in King County. (This results in no sales tax increase to the general public)." *Id.* In addition, local contributions consisted of a "special stadium sales tax of .5% on restaurants, bars and taverns in King County," a "special stadium sales tax of 2% on rental cars," and an admissions tax that allowed King County to impose two admissions taxes on the new stadium of up to 5% each. *Id.* The Mariners' contribution was \$75 million and cost overruns of over \$100 million are still being settled. *Id.*

<sup>12</sup> A ticketing agency is contracted by the promoter (generally through the venue) to sell tickets on behalf of the event promoters. . . . Each venue has a contract with a ticketing agency to provide ticketing and some advertising, and the venue must use that ticketing agency for all events at that venue. This "authorized" ticketing agent is contracted to sell and distribute tickets for the event to the general public on behalf of the promoter and the venue. They include agencies like Ticketmaster, which is the largest by far. These agents will sell you a ticket in compliance with the promoter's guidelines and in accordance with their own guidelines at the price as stated on the ticket, plus a fee, which may or may not be stated as well. . . . The venue box office agents, although not employees of the authorized ticketing agent (e.g., Ticketmaster, Next, etc.), will execute the order on a computer which is linked with the authorized agent. This is done to keep track of all sales, but no convenience fee is added to the ticket price.

*TIXFAQ*, *supra* note 3 at 2.

<sup>13</sup> Unlike "authorized" ticket agents who work for the venue and/or the promoter, a ticket broker is an independent agency that is not affiliated with the artist, venue or the promoter, and is not endorsed by any of them, but although that may mean technically that they are "unauthorized," that should carry no weight with you, as it doesn't affect the ability for you to use a ticket purchased from a broker [sic]. A ticket broker is part of the secondary market for tickets, but to say that they are only "resellers" is like saying that Michael Jordan just "played a little basketball." A normal regional or national retail broker carries a large inventory of tickets, sometimes with a value way into 6 figures, with a wide selection of concert, sporting events, theater & special events tickets.

*Id.* at 3. *But see* Greg Couch, *A Runaway Win Cubs Fans Won't Appreciate*, CHI. SUN TIMES, Nov. 25, 2003, available at <http://www.suntimes.com/output/couch/cst-spt-greg25.html>. Although a ticket broker is considered an independent agency that is not affiliated with the artist, venue or the promoter, and is not endorsed by any of them, the Chicago Cubs Major League Baseball team recently set up its own brokerage, Wrigley Field Premium Ticket Services, as a separate company, to evade Illinois scalping laws and profit from the secondary ticket resale market. *Id.*; Rebecca Traister, *If Leo Bloom Sold \$480 Tickets, What Would He Do With Profits?*, N.Y. OBSERVER, Dec. 3, 2001 (discussing the creation of the ticket brokerage company Broadway Inner Circle by the general partners of the Broadway show

Doe, sitting in front of his personal computer, was able to legally purchase two box seat tickets at many times their face value on the Seattle Mariners' website.<sup>14</sup> Meanwhile, a typical "street-corner scalper" was accused by off-duty police officers of illegally selling baseball tickets, above face value, to a less avid fan who was not near a computer.<sup>15</sup> As in many cities and states, this type of street-scalping is illegal in Seattle.<sup>16</sup> Although this situation represents a hypothetical case, by failing to regulate ticket resellers evenhandedly, the city of Seattle has engaged in selective enforcement of the city's scalping law, that is unless ticket scalping is somehow legal when it is accomplished on the Internet.<sup>17</sup>

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*The Producers*, who broker tickets by charging high service fees), available at [http://www.findarticles.com/cf\\_dls/m0ICQ/2001\\_Dec\\_3/81232307/p1/article.jhtml](http://www.findarticles.com/cf_dls/m0ICQ/2001_Dec_3/81232307/p1/article.jhtml).

<sup>14</sup> See *infra* Part I.C.

<sup>15</sup> See Brief for Defendant, *Seattle v. Charlesworth*, No. 420709 (Seattle Mun. Ct. Jan. 30, 2004).

<sup>16</sup> See SEATTLE MUN. CODE § 5.40.060 (2002) which states:

A. Ticket Information.

2. It shall be unlawful for anyone to sell an admission ticket or card on which the name of the person conducting the event and the price is not so printed, stamped or written, or to sell or offer to sell an admission ticket or card at a price in excess of the price printed, stamped or written thereon. The admission tax due shall be based on the total sum of the established price plus any service charge printed on the ticket. When a charge is made for admission, a sign must be posted in a conspicuous place on the entrance or ticket office which breaks down the admission charge as follows:

Established Price. . . . .

Service Charge

(if any). . . . .

City Tax. . . . .

Total Price. . . . .

It is unlawful to charge a service charge on admission tickets unless the purchaser is fully informed of the purpose of such charge by published or posted notice in advance of the ticket sale.

3. The Director of Finance or his/her designee, who has been commissioned as a Special Police Officer, is authorized to confiscate, seize or otherwise remove from sale, or offered sale, any ticket in violation of or offered for sale or sold in violation of SMC subsections 5.40.060 A1 or 2.

<sup>17</sup> See Brief for Defendant at 3, *Seattle v. Charlesworth*, No. 420709. The brief argues that the Seattle Mariners is acting under color of law in its role as facilitator of the Seattle Police Department's selective enforcement of SMC § 5.40.060. *Id.* The Seattle Mariners is not the only team playing this game; at least eight Major League Baseball teams, and a number of professional football, hockey and basketball teams, now facilitate online sales of tickets they have already sold. See Michael Hiestand, *Online Sales Allow Leagues to Gain Money, Ticketholder Information*, USA TODAY, May 1, 2003, available at <http://www.liquidseats.com/sites/corpsite/?gSec=news&gAct=news&article=050103>. "StubHub, a San Francisco-based company, oversees online ticket resales for four MLB teams, as well as the NFL's New York Jets, the NBA's Los Angeles Clippers and Stanford University." *Id.*; see also Howard Bryant, *Boston Uncommon: Change in NBA's World*, BOSTON HERALD, June 30, 2003 at 103 (discussing the "Boston Red Sox's SmartFan program, where season ticket holders can manage their accounts online and put unused tickets up for sale. Those who do not have season tickets must pay a \$49.95 membership fee to join SmartFan and have access to those tickets"), available at [http://pqasb.pqarchiver.com/bostonherald/353261551.html? did=](http://pqasb.pqarchiver.com/bostonherald/353261551.html?did=)

This Note examines the use of online ticket auctions to facilitate ticket sales and how ticket scalping legislation applies to web transactions. Section I describes the growing trend of sports teams generating revenue from reselling their own tickets, both tickets that have been previously sold and those that have been newly issued.<sup>18</sup> This practice may present unfair trade practice abuses, bias, and violations of local ticket scalping legislation. Section II of this Note will analyze why anti-scalping legislation has been ineffective at preventing the recent online ticket scalping problem. Finally, Section III concludes that local ticket scalping legislation is, in fact, a failed experiment and alternatively, proposes the adoption of a federal uniform ticket resale act ("FUTRA"). This proposed act is to be applied to both the traditional and online secondary ticket resale markets,<sup>19</sup> taking into consideration a number of important public policy and economic concerns.

#### I. APPLICATION OF TICKET SCALPING LEGISLATION TO WEB TRANSACTIONS

Currently, twenty-nine states have statutes regulating the resale of entertainment tickets.<sup>20</sup> Three of these states have only minor location restrictions, and four states have enabling statutes that confer regulatory authority over the issue to local governments.<sup>21</sup> There are twenty-two states that adhere to legal price controls, requiring many to be wary.<sup>22</sup> This wariness exists because

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353261551&FMT=ABS& FMTS=FT&date=Jun+30,+2003&author=Howard+Bryant&desc=BOSTON+UNCOMMON%3b+Change+in+NBA%27s+world. See also Illinois General Assembly – Bill Status for HB0873 (discussing the recently proposed [HB 0873] by Rep. Angelo Saviano to amend 720 ILL. COMP. STAT. 375/1.5 that would allow a ticket holder to sell a ticket for a price more than the price printed on the face of the ticket if the sale is made through an Internet website), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=hb&DocNum=873&GAID=8&SessionID=50&LegID=15481> (last visited Apr. 19, 2005).

<sup>18</sup> See Peter Lewis, *M's Put Prime Seats Up for Online Bids Team Says Method Not Same as Scalping*, SEATTLE TIMES, June 28, 2003, at A1:

[The Seattle Mariners'] [t]eam officials say the club is operating within the bounds of a Seattle ordinance that forbids selling tickets above face value. That's because thousands of tickets the Mariners are marketing on the club's Web site as many 111 per game available at up to \$125 each involve never-before-sold charter seats. That means they have no established price and represent primary sales, the team says . . . In explaining why what the Mariners do does not amount to scalping, Randy Adamack, the M's vice president for communications, said, "There is no face value on them."

*Id.*

<sup>19</sup> See Jon Michael Gibbs, Comment, *Cyberscalping: On-Line Ticket Sales*, 31 U. TOL. L. REV. 471, 475 (2000).

<sup>20</sup> See Stephen K. Happel & Marianne M. Jennings, *Creating A Futures Market for Major Event Tickets: Problems and Prospects*, 21 CATO J. 443 (2002).

<sup>21</sup> See *id.*

<sup>22</sup> *Id.* See also Gibbs, *supra* note 19, at 475 n.46. Currently, [twenty-nine] states, Puerto

“[c]onventional economic analyses assume as a matter of course that excess demand for a good creates an opportunity for suppliers to raise prices.”<sup>23</sup> Online auctions and websites in general that facilitate the sale of tickets above face value make enforcement of state or local ordinance regulations problematic.<sup>24</sup> Because websites often rely on the trustworthiness<sup>25</sup> of registered users and use only minor identity verification tools, abuse of anti-scalping laws is rampant.<sup>26</sup> To understand how such abuse occurs, a general understanding of online auctions and team marketplaces that offer tickets for resale in the secondary market is necessary.

### A. *Online Auctions*

By definition, an “auctioneer” is a person “legally authorized to sell goods or lands of other persons at public auction for a commission or fee.”<sup>27</sup> Furthermore, an auction is the “sale of property to the highest bidder.”<sup>28</sup> “Online auctions, in many respects, operate like traditional auctions.”<sup>29</sup> sellers list their goods on a website, “bidders offer successively higher amounts for an item placed at auction by a seller, and the online auction site administers the bidding process and announces the highest bidder and price at the conclusion of the auction.”<sup>30</sup> Despite the fact that the seller and the buyer have to finalize the sale outside the purview of the auction site, the site nevertheless is often guaranteed commission

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Rico, and the Virgin Islands have some form of regulation. *Id.* See ALA. CODE § 40-12-167 (2005); ARIZ. REV. STAT. § 13-3718 (2004); ARK. CODE ANN. § 5-63-201 (Michie 2004); CAL. PENAL CODE § 346 (2005); CONN. GEN. STAT. ANN. § 53-289 (2001); DEL. CODE ANN. tit. 11, § 918 (2005); FLA. STAT. ANN. §§ 817.36, 817.361 (2004); GA. CODE ANN. § 10-1-310 (2004); HAW. REV. STAT. ANN. § 440-17 (2004); 720 ILL. COMP. STAT. 375/1-4 (2004); IND. CODE ANN. § 25-9-1-26 (Michie 2004); KY. REV. STAT. ANN. § 518.070 (Michie 2004); LA. REV. STAT. § 4:1 (2004); MD. CODE ANN., BUS. REG. § 4-318 (2005); MASS. GEN. LAWS ANN. ch. 140, §§ 185A, 185D (2005); MICH. COMP. LAWS ANN. § 750.465 (2004); MINN. STAT. ANN. § 609.805 (2004); MISS. CODE ANN. § 97-23-97 (2004); MO. ANN. STAT. § 578.395 (2004); N.J. STAT. ANN. §§ 56:8-33, 56:8-34, 56:8-38 (2005); N.M. STAT. ANN. § 30-46-1 (Michie 2005); N.Y. ARTS & CULT. AFF. LAW §§ 25.03, 25.05 (2003); N.C. GEN. STAT. § 14-344 (2004); OHIO REV. CODE ANN. § 715.48 (2005); PA. STAT. ANN. tit. 18, § 6910 (2004); R.I. GEN. LAWS § 5-22-26 (2004); S.C. CODE ANN. § 16-17-710 (2004); VA. CODE ANN. § 15.2-969 (Michie 2004); WIS. STAT. ANN. § 42.07 (2004); 15 P.R. LAWS ANN. § 15 (2004); 32 V.I. CODE ANN. § 162 (2004).

<sup>23</sup> Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986); see also John Tierney, *Tickets? Supply Meets Demand on Sidewalk*, N.Y. TIMES, Dec. 26, 1992, at A1 (criticizing laws against ticket scalping).

<sup>24</sup> See *infra* text accompanying notes 125-127.

<sup>25</sup> See *infra* text accompanying note 58.

<sup>26</sup> *Id.*

<sup>27</sup> BLACK'S LAW DICTIONARY 126 (7th ed. 1999).

<sup>28</sup> *Id.* at 125.

<sup>29</sup> David E. Sorokin, *Payment Methods for Consumer-to-Consumer Online Transactions*, 35 AKRON L. REV. 1, 2 (2001).

<sup>30</sup> *Id.*

through an automated charge to the seller's credit card based on the auction-winning price, the item being sold, as well as general listing fees.<sup>31</sup>

An online auction site plays a somewhat less significant role in completing the transaction than does a traditional auctioneer, because the online auction never takes possession of either the goods or the payment, and also because there is no opportunity to hear the aphorism "going once, going twice, sold!"<sup>32</sup> Online auction sites thereby characterize themselves as a mere "venue," rather than an auctioneer, and disclaim any responsibility for ensuring that the transaction is consummated properly once the auction has been completed.<sup>33</sup>

As a result of this "venue" classification, online auction sites, such as eBay, state in their user agreements that they have no control over the quality, safety, or legality of the items advertised, the truth or accuracy of the listings, or the ability of sellers to sell items or the ability of buyers to buy items.<sup>34</sup>

Although online auction sites vary by type and volume of merchandise sold as well as associated transaction fees, they do share some commonalities. For example, most online auction sites oblige users to complete some form of user registration, verification of user-provided information, and seller authentication.<sup>35</sup>

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<sup>31</sup> See Shawn T. Hynes, Comment, *Stopping Another Phantom Menace: Using the Commerce Clause to Force States to Police Online Auction Shill Bidding or Face Congressional Mandates*, 5 U. PA. J. CONST. L. 763, 774 (2003).

<sup>32</sup> See *id.* at 775. But see Seattle Mariners Ticket Marketplace, User Agreement, at [http://mariners.stubhub.com/?gSec=help&gAct=general&helpSec=user\\_agreement](http://mariners.stubhub.com/?gSec=help&gAct=general&helpSec=user_agreement) (last visited Nov. 10, 2004).

<sup>33</sup> See Sorkin, *supra* note 29, at 3 n.8, (citing eBay, User Agreement, available at <http://pages.ebay.com/help/community/png-user.html>) (last visited Nov. 3, 2004). The Agreement states:

Although we are commonly referred to as an online auction website, it is important to realize that we are not a traditional "auctioneer." Instead, our site acts as a venue to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of formats, including a fixed price format and an auction-style format commonly referred to as an "online auction". We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items. We cannot ensure that a buyer or seller will actually complete a transaction.

*Id.* But see Angwin, *supra* note 7. Ticketmaster's online reseller system involves printing a new ticket once a ticket is sold, a departure from the typical online venue because it now has control over the quality and legality of the item. *Id.* Additionally, customers are allowed to receive tickets by e-mail and even forward the tickets to their friends through e-mail. *Id.*

<sup>34</sup> See eBay, User Agreement, *supra* note 33.

<sup>35</sup> See Hynes, *supra* note 31, at 775. For instance, eBay requires sellers to register with a credit or debit card before they can list an item for sale. This process guarantees that eBay



These verification and authentication tools are especially necessary to online ticket sellers because of anti-scalping legislation.

### B. *Application of the Law in Online Auctions*

When a sale of an event ticket takes place over the Internet, at a price above face value, the transaction occupies many legal gray areas.<sup>36</sup> In fact, a number of online auction sites classify an event ticket as a problematic or questionable item requiring a seller's auction listing to meet certain conditions.<sup>37</sup> The transaction can be deemed to occur in one of several jurisdictions – where the seller or the buyer is located, the city where the financial transaction is processed, or even the location of the auction site's servers – there exists confusion<sup>38</sup> as to which city's or state's scalping legislation applies.<sup>39</sup>

How does the law apply to John Doe, who purchased two box

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collects its associated listing fee and any commission generated when the specific auction's bidding window closes. *Id.*

<sup>36</sup> See Jennifer Mulrean, *Ticket Scalping Goes Mainstream*, MSN Money, at <http://moneycentral.msn.com/content/Savinganddebt/Finddealsonline/P58727.asp> (last visited Nov. 10, 2004).

<sup>37</sup> See Yahoo! Auctions Help: Can I Sell Event Tickets?, at <http://help.yahoo.com/help/us/auct/asell/asell-61.html> (last visited Nov. 10, 2004). For instance, Yahoo! Auctions permits the resale of event tickets, as long as sellers abide by the applicable state and local laws where the event is located. *Id.* In an effort to help users conduct lawful ticket sales, Yahoo! requires that auctions for event tickets meet, at minimum, the following requirements:

All Yahoo! Auctions listings for event tickets must include in the description: the location of the event (venue, city, and state). The date of the event. The face value of the ticket(s). And, if the location of the event is in Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, or Wisconsin, the seller must: Restrict sale to the face value of the ticket(s). Enter the face value of the ticket(s) as the Buy Price during the auction submission process. Event ticket auctions which don't comply with this policy, the Terms of Service, the Yahoo! Auctions Additional Terms, and all applicable laws and regulations are subject to removal at Yahoo!'s sole discretion.

*Id.*; see also eBay, Ticket Resale Policy, *supra* note 6 (noting that eBay's ticket policy is that it follows the law of the venue's state).

<sup>38</sup> Besides the confusion on the part of courts as to what law applies to the sale of a ticket above its face value, confusion is exacerbated by eBay itself in its rules and regulations Web page, describing how one can tell if her tickets might be affected by state regulations. See eBay, Buy & Sell Tickets: Rules and State Regulations, at <http://pages.ebay.com/buyselltickets/rules.html> (last visited Nov. 10, 2004). eBay, though correct in its legal analysis, provides the example: "[I]f you have tickets to a California event, there are no state restrictions that limit the resale value of those tickets on eBay." *Id.* Nevertheless, a seller may assume that there is no such ticket scalping regulation in Los Angeles, which there is, even with a warning that there may be additional laws to follow. See generally LOS ANGELES, CA., MUNICIPAL CODE § 42.03 (2005).

<sup>39</sup> See generally Gibbs, *supra* note 19, at 485 (discussing intrastate and interstate ticket scalping transactions which require analysis into what law is applicable); see also Mihoces, *supra* note 1 (stating that eBay says its policy about whether to allow auctions on certain event tickets is based on the location of the event).

seat tickets at many times their face value on the Seattle Mariners' online Ticket Marketplace?<sup>40</sup> In order to determine the applicable law, an analysis of the Ticket Marketplace, including background, policies and procedures, is crucial.<sup>41</sup>

### 1. Background: Seattle Mariners Ticket Marketplace

Operating since 2001, the Seattle Mariners' Ticket Marketplace ("Ticket Marketplace") allows season ticket holders to resell their tickets online in an auction, either in a fixed-price<sup>42</sup> or a declining-price<sup>43</sup> format.<sup>44</sup> In addition, through the Ticket Marketplace, the Mariners may offer a limited number of choice seats for primary sale (tickets not previously sold) on a game-by-game basis.<sup>45</sup> Primary sale tickets are sold directly between the Seattle Mariners and buyers, and the tickets' face values are the agreed-upon sale price.<sup>46</sup> To participate in the Ticket Marketplace, buyers and sellers of Seattle Mariners tickets must reside in Washington, Idaho, or Oregon; additionally, sellers must be season ticket holders.<sup>47</sup> Buyers and sellers must register their name, address, phone number, e-mail address, and valid credit card information.<sup>48</sup> Furthermore, buyers and sellers must comply with all applicable laws regarding the resale of tickets via the Ticket Marketplace. The Ticket Marketplace does not directly provide any access to or state-

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<sup>40</sup> The Ticket Marketplace utilizes copyrighted software developed and owned by Liquid Seats, Inc., which uses the consumer brand name StubHub (Liquid Seats, Inc. has recently changed its corporate name to StubHub, Inc.).

<sup>41</sup> See *Connecticut v. Cardwell*, 718 A.2d 954, 958 (Conn. 1998).

<sup>42</sup> See StubHub, Inc., User Agreement, available at [http://www.stubhub.com/?gSec=help&gAct=general&helpSec=user\\_agreement](http://www.stubhub.com/?gSec=help&gAct=general&helpSec=user_agreement) (last visited Nov. 10, 2004). This format option allows the seller to set a definite price at which the ticket will sell immediately if a member clicks "Buy Now." *Id.*

<sup>43</sup> See *id.* This format option allows a seller to select both a maximum and minimum price for the ticket. The ticket will first appear at this maximum price and, unless purchased, the price will decrease linearly every day until the minimum price is reached. *Id.*

<sup>44</sup> StubHub, Inc., User Agreement, *supra* note 42.

<sup>45</sup> *Id.*

<sup>46</sup> See Lewis, *supra* note 18. The Mariners has marketed thousands of tickets on the club's Ticket Marketplace website, as many as 111 per game available at up to \$125 each for never-before-sold seats. *Id.* In explaining why what the Mariners do is not scalping, Randy Adamack, the Mariners' Vice President for Communications, said, "there is no face value on them." *Id.*; but cf. N.Y. ARTS & CULT. AFF. LAW § 25.03 (2003) (Stating that current New York law requires that a ticket must have its established price printed on its face).

<sup>47</sup> Seattle Mariners Ticket Marketplace, User Agreement, *supra* note 32; but see StubHub, Inc., About Us, *supra* note 42 (noting that when a season ticket holder places his ticket online for auction, the ticket is available on any StubHub Network partner website and can be purchased from <http://www.stubhub.com>. This way the ticket can be viewed by millions of interested buyers and sell at the best price possible.). There is no such restriction on eBay or other online auction sites that limit the seller of an event ticket to be a season ticket holder. *Id.*

<sup>48</sup> StubHub, Inc., About Us, *supra* note 44.

ment of the relevant laws.<sup>49</sup> This transaction process makes buying tickets “fast, safe and easy.”<sup>50</sup>

When purchasing a ticket through the Ticket Marketplace, the buyer’s credit card is charged for the ticket price, shipping costs, transaction fees, and any applicable taxes.<sup>51</sup> Buyers make all payments directly to Major League Baseball Advanced Media (“MLBAM”).<sup>52</sup> The seller is then compensated for the sale.<sup>53</sup> The Seattle Mariners profits from such transactions, taking in 15% from the seller and 10% from the buyer.<sup>54</sup> In 2002, the Seattle Mariners estimated that it earned between \$150,000 to \$200,000 from these

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<sup>49</sup> *Id.* See also eBay, Ticket Resale Policy, *supra* note 6. Although eBay inserts an automated disclaimer in the item description of an event ticket explaining the applicable law to potential bidders, eBay’s policy only discusses pricing limitations and not other restrictions for regulated locations. *Id.*

<sup>50</sup> See StubHub, Inc., User Agreement, *supra* note 44. Because the Seattle Mariners verify that the season ticket holder information is accurate on its Ticket Marketplace, and upon approval allows for the simple implementation of a user name and password, access to the website is fast and secure, limiting the risk of fraud and misrepresentation that may often occur with street-corner scalping practices.

<sup>51</sup> See StubHub, Inc., Selling Tickets: Are There Fees For Using This Service?, at [http://mariners.stubhub.com/?gSec=help&gAct=other&helpSec=sell#fees\\_general](http://mariners.stubhub.com/?gSec=help&gAct=other&helpSec=sell#fees_general) (last visited Nov. 10, 2004).

<sup>52</sup> See Press Release, Paciolan Becomes an Authorized Provider of Ticketing Solutions for Major League Baseball Advanced Media, Nov. 5, 2003, at [http://www.eventu.net\\_news&events.htm#](http://www.eventu.net_news&events.htm#).

Established in June 2000 following a unanimous vote by the 30 Major League Baseball club owners to centralize all of Baseball’s Internet operations, MLB Advanced Media L.P. (MLBAM) is the interactive media and Internet company of Major League Baseball. MLBAM manages the official league site, [www.MLB.com](http://www.MLB.com), and each of the 30 individual Club sites to create the most comprehensive Major League Baseball resource on the Internet. MLB.com offers fans the most complete baseball information on the web, including up-to-date statistics, game summaries, extensive historical information, and exclusive features about Major League Baseball events and programs, including on-line ticket sales, baseball merchandise, authenticated memorabilia and collectibles, fantasy games, radio broadcast of games, pitch-by-pitch enactment of games, plus live extensive archived video.

*Id.*

<sup>53</sup> See StubHub, Inc., Selling Tickets: Are There Fees For Using This Service, *supra* note 51.

<sup>54</sup> *Id.* With StubHub charging sellers 15% of the transaction amount and buyers 10%, for a \$100 ticket, a buyer pays \$110, and a seller gets \$85. *Id.*; see also Bryant, *supra* note 17, at 103 (discussing the Boston Red Sox’s new SmartFan program, where season-ticket holders can manage their accounts online and put unused tickets up for sale. Those who do not have season tickets must pay a \$49.95 membership fee to join SmartFan to have access to those tickets). In addition to the membership fee, SmartFan charges a 20% transaction fee on each purchase, as well as a \$3.00 per ticket delivery charge to pick up the tickets. *Id.* Howard Bryant goes on to say that “[c]harging fans a ‘delivery’ fee when the tickets aren’t delivered anywhere is like ordering a pizza and being told you have to pay to go pick it up.” *Id.* Similarly, the NHL’s Vancouver Canucks, in conjunction with Ticketmaster, allows season ticket holders to post unused tickets on the team’s website for free. Brad Ziemer, *Canucks “Scalp” a Little Off the Top*, VANCOUVER SUN, Oct. 16, 2003. Tickets cannot be sold for less than their face value, but users are permitted to post prices above their face value since Vancouver does not have an anti-scalping law. If the tickets are sold at a premium, the Canucks and Ticketmaster split 45% of that premium, while the season ticket holder receives 55%. *Id.*

secondary sales.<sup>55</sup> Total revenue derived from the secondary sales for the three corporate participants – Seattle Mariners, StubHub, Inc., and MLBAM – approximated \$600,000.<sup>56</sup>

Attorneys for the Seattle Mariners concluded that by knowing the ticket holders' addresses, the Mariners could prevent ticket holders living in Seattle from accessing its Ticket Marketplace and selling its tickets above face value.<sup>57</sup> However, it is uncertain whether this blocking technique effectively prevents violations of Seattle's ticket scalping ordinance.<sup>58</sup> For instance, a sale that takes place on the Ticket Marketplace allows a ticket sales offer to occur anywhere there is a computer with Internet access.<sup>59</sup> Furthermore, the sale can take place within the city of Seattle so long as the address indicated for the season ticket holder is not located within the prohibited zip code area.<sup>60</sup> Therefore, whether the filed address for a given ticket holder is that person's business address or his residence does not factor in the Mariners' Ticket Marketplace selling requirements.<sup>61</sup>

Seattle Municipal Code ("SMC") section 5.40.060 governs the process by which a ticket is offered for sale on the Ticket Marketplace.<sup>62</sup> Notably, this ordinance does not restrict the location of the purchaser.<sup>63</sup> Even though the User Agreement requires that a

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<sup>55</sup> See Brief for Defendant at 2, *Seattle v. Charlesworth*, No. 420709 (Seattle Mun. Ct. Jan. 30, 2004). *But see* Judge Jean Rietschel's Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 2, *Seattle v. Charlesworth*, No. 420709 (noting that in 2002, the Seattle Mariners received approximately \$100,000 to \$120,000).

<sup>56</sup> See Brief for Defendant at 2, *Seattle v. Charlesworth*, No. 420709.

<sup>57</sup> *Id.* See also Peter Lewis, *Ticket Sellers Say M's Don't Play Fair*, SEATTLE TIMES, available at [http://www.archives.seattletimes.nwsourc.com/cgi-bin/texis/web/vortex/display?slub=scalping06m&date=20030606query=ticketsellers\\$ay+M](http://www.archives.seattletimes.nwsourc.com/cgi-bin/texis/web/vortex/display?slub=scalping06m&date=20030606query=ticketsellers$ay+M) (last visited Nov. 10, 2004).

<sup>58</sup> Brief for Defendant at 6-7, *Seattle v. Charlesworth*, No. 420709. See also Troy Wolverton, *Online Ticket Market Pressures Scalpers*, CNET News.com, available at [http://news.zdnet.com/2100-9595\\_22-918772.html](http://news.zdnet.com/2100-9595_22-918772.html) (May 21, 2002) (noting that although eBay has a system to prevent members from breaking scalping laws by examining a member's billing address, members may be able to circumvent it by falsifying their addresses); Allen Drury, *When it Comes to Ticket Scalping, the Net's the Wild West*, GANNETT NEWS SERVICE, available at [http://www.usatoday.com/tech/webguide/internetlife/2002-10-07-e-scalping\\_x.htm](http://www.usatoday.com/tech/webguide/internetlife/2002-10-07-e-scalping_x.htm) (last visited Nov. 10, 2004) (stating that eBay does its part to see that sellers follow the law by providing links to the rules in each state. However, a spokesman for eBay conceded enforcement is nearly impossible and the company depends on sellers to abide by an honor system).

<sup>59</sup> See Seattle Mariners Ticket Marketplace, User Agreement, *supra* note 32.

<sup>60</sup> See Judge Jean Rietschel's Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 2, 3, *Seattle v. Charlesworth*, No. 420709 (noting that the Ticket Marketplace allows an individual to enter another address when selling event tickets on its web site); see also Wolverton, *supra* note 58 (noting that "eBay put in place a system to try to prevent members from breaking local laws. . . . [T]he system works by examining a member's billing address . . .").

<sup>61</sup> See Hynes, *supra* note 31, at 776.

<sup>62</sup> See *supra* note 16.

<sup>63</sup> *Id.*

buyer participating in the Ticket Marketplace reside in Washington, Idaho, or Oregon, a sale can occur within the city of Seattle to any purchaser who lives in the city.<sup>64</sup> The pickup and delivery, unlike other online auction sites, is arranged by the Ticket Marketplace website.<sup>65</sup>

It seems that the Seattle Mariners is suggesting that because the offer to sell takes place in cyberspace, no crime has occurred within Seattle regardless of where the tickets are delivered and/or where the offeror was when the offer was made.<sup>66</sup> A question remains whether the fulfillment of the sale constitutes a portion of the crime.<sup>67</sup>

In *Connecticut v. Cardwell*,<sup>68</sup> the Connecticut Supreme Court determined that the defendant's company, "Ticketworld," which had an office located in Massachusetts that "offered" for sale tickets to sporting events in Connecticut, was not in violation of General Statutes section 53-289 for selling tickets at a price in excess of the statutory maximum.<sup>69</sup> Connecticut's General Statutes section 53-289 contains similar language to that of SMC section 5.40.060 in regard to the restriction of an individual from either selling or offering to sell a ticket above its face value.<sup>70</sup>

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<sup>64</sup> See Seattle Mariners Ticket Marketplace, User Agreement Buyer's Handbook, available at [http://mariners.stubhub.com/?gSec=help&gAct=buyers\\_handbook](http://mariners.stubhub.com/?gSec=help&gAct=buyers_handbook) (last visited Nov. 10, 2004).

<sup>65</sup> See Seattle Mariners Ticket Marketplace, User Agreement, *supra* note 32.

<sup>66</sup> See Brief for Defendant at 7, *Seattle v. Charlesworth*, No. 420709 (Seattle Mun. Ct. Jan. 30, 2004).

<sup>67</sup> See Terrence Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 BYU L. REV. 1305, 1351 n.187 (2000):

*Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261 (N.D. Ala. 2000) (granting the defendant's motion to dismiss in civil action based on a lack of minimum contacts where the Alabama plaintiff's son, a minor, ordered and received beer over the Internet). In addition to finding no minimum contacts because the website did not anticipate the regular exchange of information across the Internet, and other contacts with the forum were slight, the district court in *Butler* also found that, under both states' versions of the Uniform Commercial Code ("UCC"), the "sale" of the beer actually occurred in Illinois. *Id.* at 1267-68. For this reason, the *Butler* court found that jurisdiction did lie in the home state of Beer Across America and transferred the case to Illinois. *Id.* at 1261.

<sup>68</sup> 718 A.2d 954 (Conn. 1998).

<sup>69</sup> *Id.*

<sup>70</sup> CONN. GEN. STAT. ANN. 53-289 (2001) reads as follows:

No person shall sell, offer for sale or attempt to sell any ticket, privilege or license of admission to an entertainment event, including, but not limited to, any place of amusement, arena, stadium, theater, performance, sport, exhibition or athletic contest given in this state, at a price greater than the price, including tax, printed thereon, or at a price greater than the price fixed for admission, including tax, and a reasonable service charge for services actually rendered not to exceed three dollars. The owner or operator of the property on which such entertainment event is to be held or is being held may authorize, in writing, any person to sell such ticket, privilege or license of admission at a price in excess of that authorized under this section. Such writing shall spec-

By following *Cardwell's* framework to determine whether the defendant's conduct violated section 53-289, a court in Seattle would likely need to determine "the nature and situs of the defendant's activities insofar as those activities involve the sale, offering for sale or attempt to sell tickets for a price in excess of three dollars over the fixed price of the tickets."<sup>71</sup> Next, if the court determines that the defendant sold, offers to sell, or attempts to sell tickets to Seattle residents for a price above the local ordinance's maximum outside of Seattle, the court must determine whether SMC section 5.40.060 was intended to apply to activities that take place out-of-state, specifically tickets that appear on Internet auctions.<sup>72</sup>

This type of judicial analysis goes well beyond any anti-scalping legislation text and therefore requires further analysis into a state's commercial sales code as to what constitutes a "sale," an "offer," a "transaction in goods," and the difference between "shipment" and "destination" contracts.<sup>73</sup> Furthermore, additional analysis must seek to interpret the statute and attain the intention of the legislature in enacting such a law.<sup>74</sup>

In discerning legislative intent, courts often "look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter."<sup>75</sup> This means that a court must determine whether anti-scalping legislation was enacted to prevent the nuisance and harassment often associated with street-corner scalpers around venues or, rather, to protect fans from paying exorbitant prices to see their local sports team play.<sup>76</sup> Furthermore, a court may have to analyze whether a

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ify the price for which such ticket privilege or license of admission is to be sold. Any person violating any provision of this section shall be guilty of ticket scalping. Ticket scalping is a class C misdemeanor for a first offense, a class A misdemeanor for a second offense and a class D felony for any subsequent offense. The sale of each ticket, privilege or license of admission in violation of any provision of this section shall constitute a separate offense.

*Id.*

<sup>71</sup> See *Cardwell*, 718 A.2d at 958.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 959.

<sup>74</sup> See *id.* at 962-64 (noting that the determination of whether § 53-289 had an extraterritorial effect requires an analysis of legislative intent); see generally *Lainer v. City of Boston*, 95 F. Supp. 2d 17 (D. Mass. 2000).

<sup>75</sup> *Cardwell*, 718 A.2d at 962-63.

<sup>76</sup> See *People v. Shepherd*, 74 Cal. App. 3d 334, 383 (Cal. App. 2d 1977) (noting that the subject and purpose of CAL. PENAL CODE § 346, which prohibits ticket scalping, is not to regulate ticket sales as such, but to limit business activities on public property dedicated to recreational use. Furthermore, the unregulated use of that area by peddlers of tickets or

ticket was resold as a business venture, which would further determine the illegality of the transaction.<sup>77</sup> Finally, if a state anti-scalping statute allows for ticket brokers and individual licensees to sell event tickets above their face value, regardless of state residency, another question arises as to whether the law is deeming ticket resale acceptable.<sup>78</sup>

Despite all of these open issues, one thing is certain: Internet auctions, team marketplaces, like that of the Seattle Mariners, as well as team ticket exchanges, seem to turn a selective, often discriminatory, and perhaps illicit blind eye to state and local anti-scalping legislation, depending on their level of participation.<sup>79</sup> Although the Seattle Mariners declare on its Ticket Marketplace website that it is not “reselling” event tickets, obviously seeking to disassociate itself from the auction transaction, it is indeed a participant in the transaction, due to the plain meaning definition of “participant.”<sup>80</sup> The Mariners sign and send out letters to season

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other property would add to congestion, annoyance, and inconvenience in areas where crowds must be moved rapidly and safely).

<sup>77</sup> See *Lainer*, 95 F. Supp. 2d at 19. Massachusetts’s ticket scalping statute states, “no person shall engage in the business of reselling any ticket or tickets of admission or other evidence of right of entry to any theatrical exhibition, public show or public amusement or exhibition . . . without being licensed therefore by the commissioner of public safety.” MASS. GEN. LAWS ch. 140, § 185A (1924); *Lainer*, 95 F. Supp. 2d at 19. As a result of the Massachusetts ticket scalping statute, the Court identified the determinative issue as whether the circumstances of the sale of two Boston Red Sox tickets suggested that the defendant was doing business. *Id.* The court concluded that Massachusetts’s law plainly precludes the resale of tickets only where done in the course of business, without a license. *Id.* at 20.

<sup>78</sup> See N.J. STAT. § 56:8-27 (2005); 720 ILL. COMP. STAT. 375/1-4 (2004) and accompanying text.

This Act is a special law because it applies only to a certain segment of the state population, namely entities which sell tickets to sporting and entertainment events at more than the face amount without consent of the event sponsor. However, there is a rational basis for not extending the applicability of this law to persons who resell tickets with the permission of event sponsors. The legislature could reasonably have concluded permitting the sale of tickets at more than their face value by entities authorized to do so by event sponsors does not result in the same evil or harm to the public as permitting unrestricted sale of tickets at more than their face value by “ticket scalpers.” *People v. Waisvisz*, 582 N.E.2d 1383 (Ill. App. 4d 1991).

*Compare Cardwell*, 718 A.2d at 963 (noting that the only reference in § 53-289 to geography is the reference to events to be held in Connecticut and that the statute does not contain any express indication that the legislature intended it to have an extraterritorial effect), *with People v. Concert Connection, Ltd.*, 211 A.D.2d 310, 315 (N.Y. App. Div., 2d Dep’t, 1995) (stating New York’s long-arm statute explicitly provides that New York courts may “exercise personal jurisdiction over a nondomiciliary who ‘contracts anywhere to supply goods or services in [New York].’”).

<sup>79</sup> See *People v. Van Wong*, 165 Cal. App. 2d Supp. 821 (Cal. App. Dep’t Super. Ct. 1958); see also *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 715 (Cal. Ct. App. 2002) (finding eBay immune from liability for posting information by third parties that resulted in fraudulent sales of sports memorabilia, because the sales were conducted by third parties).

<sup>80</sup> See Seattle Mariners Ticket Marketplace Homepage, at <http://mariners.stubhub-tickets.com> (last visited Nov. 10, 2004); BALLENTINE’S LAW DICTIONARY 917 (3d ed. 1969) (de-

ticket holders promoting the Ticket Marketplace, and promote it through its website, e-mails to its ticket holders, and loudspeaker announcements at Mariners' games.<sup>81</sup> Additionally, the Mariners cannot escape the fact that it receives a percentage of each transaction through its Ticket Marketplace.<sup>82</sup> Even though the Mariners have taken precautionary steps to prevent violation of SMC section 5.40.060 by its online Ticket Marketplace users, it may nonetheless be facilitating the Seattle Police Department's selective enforcement of street-corner scalpers.<sup>83</sup> Simply stated, the Seattle Mariners utilize police officers to enforce the Seattle scalping law against its competitors, i.e., street-corner scalpers, so it can generate more revenue through its Ticket Marketplace.

## 2. Are the Chicago Cubs and San Francisco Giants Playing Fair?

Unlike Washington (SMC section 5.40.060), Illinois and California permit the resale of event tickets above their face value. However, in order to authorize ticket sales, Illinois requires specific licensing for resellers, and California requires written permission of the owner or operator of the property on which an entertainment event is to be held.<sup>84</sup> To the dismay of many sports fans, while not an exclusive list, the Chicago Cubs and the San Francisco Giants have found loopholes in their respective state's laws to better position themselves in quelling competition by the growing ticket-resale industry.

### a. Chicago Cubs: Wrigley Field Premium Ticket Services

Less than a block away from Wrigley Field, home of the fa-

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fining "participate" as "[one who] receive[s] or ha[s] a part or share of; to partake of; to experience in common with others; to have or enjoy a part or share in common with others; to partake; as to participate in a discussion; to take part in; as to participate in joys and sorrows."); see also JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 464 (3d ed. 2001). An interesting analogy can be made to that of facilitating the sale of a ticket above its face value to the "participates in an underwriting" language of section 2(11) of the Federal Securities Act of 1933. *Id.* In *Haden v. Raffensperger*, 65 F.3d 1392 (7th Cir. 1995), the court held that the defendant "fell within the 'participates' and 'has a participation' language of Section 2(11), reasoning that Section 2(11) is broad enough to encompass all persons who engage in steps necessary to the distribution of securities." *Id.* at 1401. Therefore, an argument can be made that a website that facilitates the sale of tickets above face value illegally, may be held contributorily liable.

<sup>81</sup> Judge Jean Rietschel's Findings of Fact and Conclusions of Law, *The Municipal Court for the City of Seattle at 2, Seattle v. Charlesworth*, No. 420709 (Seattle Mun. Ct. Jan. 30, 2004).

<sup>82</sup> See Seattle Mariners Ticket Marketplace, Other Help: Buying Tickets, at [http://mariners.stubhub-tickets.com/?gSec=help&gAct=other&helpSec=buy#fees\\_general](http://mariners.stubhub-tickets.com/?gSec=help&gAct=other&helpSec=buy#fees_general) (last visited Nov. 10, 2004).

<sup>83</sup> See Brief for Defendant at, *Seattle v. Charlesworth*, No. 420709.

<sup>84</sup> See generally 720 ILL. COMP. STAT. 375/1-4 (2004); CAL. PENAL CODE § 346 (2004).



mous Chicago Cubs, the Wrigley Field Premium Ticket Services, Inc. ("Premium"), a licensed ticket broker in Chicago, resells baseball tickets from its 3717 N. Clark Street office.<sup>85</sup> Premium meets the requirements of the Illinois Ticket Scalping Act allowing a licensed ticket broker to operate legally in Illinois.<sup>86</sup> For instance, Premium operates from a fixed location, displays a ticket broker registration, lists names and addresses of its employees, pays its annual registration fee, and has a toll-free number, a refund policy, as well as a consumer protection code.<sup>87</sup> However, Premium also has a sign posted outside its office that states, "[T]he Cubs and Premium are both owned by Tribune Company."<sup>88</sup>

On November 24, 2003 the court in *Cavoto, Jr. v. Chicago National League Ball Club, Inc.*,<sup>89</sup> found that the Chicago Cubs was not in violation of title 720, section 375/1 et seq. of the Illinois Compiled Statutes ("ICS"), or the Illinois Consumer Fraud and Deceptive Business Practices Act, for selling tickets to its sister subsidiary, Premium, a licensed ticket broker, which in turn resold the tickets above their face value to the general public.<sup>90</sup> Although the "sale" of its discretionary reserve tickets to Premium met the necessary legal requirements, the Chicago Cubs was limiting the availability for primary ticket purchases to consumers and fans alike by giving ticket distribution preference to Premium.<sup>91</sup> Nevertheless, the Illinois Ticket Scalping Act permits licensed brokers to resell tickets to sporting and entertainment events at more than their face value, and does not prohibit common ownership between a team and a ticket broker.<sup>92</sup>

While the court acknowledged that the public may have a concern about "the common ownership of an amusement and a licensed ticket broker," the court was correct in not addressing whether the Chicago Cubs and the Tribune Company were immoral for creating Premium, because of how the law was enacted.<sup>93</sup> Yet, despite the correct ruling, the outcome trounces the stated purpose behind the enactment of title 720, section 375/1 of the ICS, which is "to prevent ticket scalpers from purchasing large blocks of tickets for the best seats at sporting and entertainment

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<sup>85</sup> See *Cavoto v. Chi. Nat'l League Ball Club, Inc.*, No. 02 CH 18372, 9 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>86</sup> *Id.* at 10.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See *Cavoto*, No. 02 CH 18372 at 8, 18-19.

<sup>92</sup> See 720 ILL. COMP. STAT. 375/1.5 (2004).

<sup>93</sup> See *Cavoto*, No. 02 CH 18372 at 40.

events and then reselling those tickets to the public at exorbitant prices.”<sup>94</sup> Although the Chicago Cubs has opposed the practice of ticket brokering and scalping in the past, its view of these practices obviously changed due to its own self-interests.<sup>95</sup>

b. San Francisco Giants: The Double Play Ticket Window

The San Francisco Giants’ ticket policy strictly prohibits “[t]he unauthorized resale of tickets in, on or around SBC Park property . . . .”<sup>96</sup> Furthermore, the Giants’ ticket policy states, “[p]eople caught selling tickets in violation of the law may have their tickets and their right to future tickets to SBC Park revoked.”<sup>97</sup> Appropriately, the San Francisco Giants cites California Penal Code section 346 with regard to these violations and emphasizes that the San Francisco Police Department will enforce the law.<sup>98</sup> The threat to a ticket reseller of prosecution and latent prohibition of a right to future tickets may very well be enough to intimidate and discourage street-corner scalping, but this legal scheme seems patently discriminatory in a state that permits ticket resale.<sup>99</sup> While the San Francisco Giants makes no express statement as to the reason behind its restriction of ticket resales on its stadium grounds, California Penal Code section 346 nevertheless gives the owner of the property the authority to do so.<sup>100</sup> However, to satisfy all the requirements of California Penal Code section 346, an individual

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<sup>94</sup> See 720 ILL. COMP. STAT. 375/1 (2004) (citing *People v. Waisvisz*, 582 N.E.2d 1383 (Ill. App. 4d 1991), *appeal denied*, 591 N.E.2d 30 (Ill. 1992)).

<sup>95</sup> See Mathew Siporin, Comment, *Cavoto v. Chicago National League Ball Club, Inc.: Chicago Cubs Ticket Scalping Scandal and the Relationship Between Separate Corporate Entities Owned by a Common Parent*, 2 DEPAUL BUS. L.J. 723, 739 (2004).

<sup>96</sup> The San Francisco Giants Ticket Policies, at [http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ticketing/sf\\_ticketing\\_policies.jsp](http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ticketing/sf_ticketing_policies.jsp) (last visited Nov. 10, 2004).

<sup>97</sup> *Id.*

<sup>98</sup> See *id.*

<sup>99</sup> See Jay Paris, *Scalpers May be Caught in a Pickle at Petco*, THE NORTH COUNTY TIMES, at [http://www.nctimes.com/articles/2004/04/08/sports/professional/4\\_7\\_0421\\_54\\_46.html](http://www.nctimes.com/articles/2004/04/08/sports/professional/4_7_0421_54_46.html) (April 7, 2004) (noting that the San Diego Padres prohibit ticket resales at Petco Park but allows season ticket holders to unload their tickets through its website). See SAN DIEGO, CAL. MUN. CODE § 57.14(b) (2000)

(a) prohibits the unauthorized sale or resale for profit of admission tickets to places of public amusement or entertainment including, but not limited to, stadiums, auditoriums, theatres and arenas, and (b) no person shall sell, or resell for profit or offer to sell or resell for profit any tickets of admission to a place, or in or upon any place which is open to the public, except as otherwise provided herein.

<sup>100</sup> See CAL. PENAL CODE § 346 (2004). The legislative intent of the ticket scalping law should address whether the restriction of ticket resales is limited to a publicly financed stadium, or also applies to a privately financed stadium. See *People v. Van Wong*, 165 Cal. App. 2d Supp. 821 (Cal. App. Dep’t Super. Ct. 1958); SBC Park, at [http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ballpark/sf\\_ballpark\\_ballpark.jsp](http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ballpark/sf_ballpark_ballpark.jsp) (last visited Nov. 10, 2004). Unusual in today’s stadium financing state of affairs, the San Francisco Giants’ SBC Park was the first privately financed ballpark in Major League Baseball since

must have also “obtained [the ticket for admission to the entertainment event] for the purpose of resale.”<sup>101</sup> Arguably, the San Francisco Giants’ ticket policy attempts to eliminate all ticket resales, which constitutes a rather sweeping interpretation of California Penal Code section 346.

In the context of the San Francisco Giants’ ticket policy and enforcement measures, the team itself promotes its own online service, Double Play Ticket Window, which helps season ticket holders to resell their tickets.<sup>102</sup> Tickets posted for sale on this service can be offered at any price above the face value of the ticket.<sup>103</sup> Also, when an individual purchases a ticket through Double Play Ticket Window, the buyer is charged an additional convenience fee of 10% of the sale price, which goes to the San Francisco Giants.<sup>104</sup> Even if the San Francisco Giants promotes its Double Play Ticket Window as a hassle-free exchange that protects the public against fraud, the team is “manipulat[ing] the law for purely private purposes.”<sup>105</sup> While there is no stated purpose for the enactment of California Penal Code section 346, courts have construed such ordinances and statutes prohibiting ticket scalping as responding to public concerns about “congestion, annoyance and inconvenience in areas where crowds must be moved rapidly and safely.”<sup>106</sup> The San Francisco Giants’ ticket resale policy might follow past justifications for anti-scalping legislation: prevention of fraud and harassment. The law, however, does not seem to be rationally related to these harms. Street-corner scalpers are a “tiny presence among thousands of vendors, tailgaters, and fans at most events.”<sup>107</sup>

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Dodger Stadium in 1962. *Id.* Therefore, application of California’s ticket scalping statute should not give absolute discretion of applying its law to the owner or operator of a venue.

<sup>101</sup> See CAL. PENAL CODE § 346 (2004).

<sup>102</sup> See Double Play Ticket Window, available at [http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ticketing/sf\\_dptw\\_main.jsp](http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ticketing/sf_dptw_main.jsp) (last visited Nov. 10, 2004).

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *Playtogs Factory Outlet, Inc. v. Orange County*, 379 N.Y.S.2d 859, 867 (App. Div. 1976). See generally *Padres Ticket Marketplace and Ticket Transfer Terms and Conditions*, at [https://exchange.paciolanats.com/docs/mlb/padres/padres\\_terms.html](https://exchange.paciolanats.com/docs/mlb/padres/padres_terms.html) (last visited Nov. 10, 2004); cf. *SAN DIEGO, CAL., MUN. CODE § 57.14(b)*, *supra* note 99.

<sup>106</sup> See *People v. Shepherd*, 74 Cal. App. 3d 334, 338 (Cal. App. 2d 1977).

<sup>107</sup> Scott D. Simon, Note, *If You Can’t Beat ’em, Join ’em: Implications for New York’s Scalping Law in Light of Recent Developments in the Ticket Business*, 72 *FORDHAM L. REV.* 1171, 1212 (2004). The Note goes on to argue “that [the New York] scalping law is meant to protect consumers from alleged fraud and extortion, not a crowd in front of a stadium.” *Id.* Simon’s Note does an outstanding job of introducing current problems and developments within the ticketing industry and with ticket scalping laws. Nevertheless, Simon suggests the scalping law in New York, *ARTS & CULT. AFF. LAW § 25* (1999-2000), should be struck down because “the ticket business will not devolve into chaos.” *Id.* at 1213. While in agreement with the possibility of repealing section 25, this action does not address the lack of uniformity problem with state scalping laws and local ordinances across the country and other countries – consumers and promoters would still be able to effectively tweak the law

Since California authorizes the resale of tickets with location restrictions, the San Francisco Giants' actions, for fans who want to avoid buying counterfeit and stolen tickets may be legal and desirable; yet, it is not necessarily fair.<sup>108</sup> Even if there is "no crying in baseball,"<sup>109</sup> the San Francisco Giants is capable, although unwilling, to enforce its ticket policy with less discriminatory measures, at least until California amends California Penal Code section 346.<sup>110</sup> The city of Phoenix, for example, has adopted a less discriminatory method: an ordinance mandating that all street-corner scalpers must sell in one location – creating a "no scalping zone."<sup>111</sup> While it has been argued that "promoters are unlikely to give up their own scalping in favor of prosecuting street scalpers . . . [since] promoters have appropriated such a high percentage of street scalper's revenue streams,"<sup>112</sup> there is no rationale for promoters to

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for their own benefit and competitive gain because of online auctions and marketplaces. See *infra* Part I.C.

<sup>108</sup> See Simon, *supra* note 107, at 1214, 1218 (noting that the *Charlesworth* court found that street scalping is not dangerous to consumers based on testimony that scalpers do not engage in theft and that a bond can be secured by licensed brokers). While a court's finding may be different for a particular location and venue regarding the practice of using counterfeit and stolen tickets, legislation can specifically address these issues. See *generally* N.J. STAT. § 56:8-30 (2004) (stating that a bond is required to engage in the business of reselling tickets as a ticket broker to pay for misstatement, misrepresentation, fraud or deceit). See also FLA. STAT. § 817.355 (2003) (stating the fraudulent creation or possession of an admission ticket with the intent to defraud is guilty of a misdemeanor).

<sup>109</sup> A LEAGUE OF THEIR OWN (Columbia/Tristar Studios 1992).

<sup>110</sup> But see Simon, *supra* note 107, at 1218 (suggesting that promoters' rationale for advocating the enforcement of scalping laws will be eliminated because they are generating revenue streams that formerly were collected by street-corner scalpers). With the current status of CAL. PENAL CODE § 346, promoters would likely continue to advocate scalping laws that limit the location of ticket resale, specifically on the property of the owner or operator of a venue, in addition to public property. Similarly, advocacy for maintaining such laws would exist in most states with similar legislation until a uniform law is in place. Despite this assumption, it is important to note that the San Francisco Giants is a leader in implementing new methods for ticket purchasing and exchanges. For instance, the San Francisco Giants has recently unveiled the "Just Arrive" program, which allows season ticket holders to pass unused tickets to friends without having to physically deliver the tickets. See Eric Young, *Giants Help Friends Catch Leftover Seats with E-Tickets*, SAN FRANCISCO BUS. TIMES, Mar. 14, 2003. "This program sends the name of the ticket recipient to the Giants via the web. When arriving at Pac Bell Park [recently renamed SBC Park], the fan swipes a driver's license or credit card through an electronic will-call machine, which spits out a ticket for entrance to the park." *Id.* Additionally, the San Francisco Giants offers 500 tickets available for sale before every home game, and if there are more than 100 people in line four hours prior to game time, the Giants holds a wristband lottery for tickets. See *The San Francisco Giants Ticket Policies*, *supra* note 96. These new methods certainly offer new benefits to fans, but nevertheless contribute to congestion.

<sup>111</sup> See Happel & Jennings, *supra* note 21, at 447. See also Steve Bailey, *Red Sox Crack Down on Scalping*, THE BOSTON GLOBE, Sept. 22, 2004, available at [http://www.boston.com/business/articles/2004/09/22/red\\_sox\\_crack\\_down\\_on\\_scalping/](http://www.boston.com/business/articles/2004/09/22/red_sox_crack_down_on_scalping/) (discussing how the Red Sox will experiment with a scalp-free zone outside Fenway Park for the 2004 Major League Baseball playoffs and require fans using this service to enter the stadium immediately to prevent the ticket from winding back on the streets) (last visited Nov. 10, 2004).

<sup>112</sup> Simon, *supra* note 107, at 1218.

advocate the elimination of an anti-street scalping law in California.<sup>113</sup>

C. *The Impact of the Charlesworth Case: A New Problem for the Prosecution of Street-Corner Scalpers*

In the recent case *Seattle v. Charlesworth*,<sup>114</sup> the defendant, a resident of Portland, Oregon who earned additional income by selling Seattle Mariners tickets on the secondary market, was arrested on three separate occasions for attempting to sell tickets above their face value in violation of SMC section 5.40.060.<sup>115</sup> In the defendant's brief, Allen M. Ressler, attorney for defendant Mark Charlesworth, argued that the Seattle Mariners violated as well as aided and abetted a violation of SMC section 5.40.060. Moreover, they did so while acting under the color of law to enforce this ordinance against competitors, including Mark Charlesworth.<sup>116</sup> Furthermore, the defendant's brief suggests that regardless of where the offer to sell occurs, if the purchase occurs within the city of Seattle, a crime has been committed inside the city.<sup>117</sup> Under this theory, MLBAM and StubHub are accomplices in the crime, as well as participants in the transaction.<sup>118</sup> Although this argument may be accurate when a seller offers to sell a ticket above its face value in Seattle, "case law and scholarly literature focus almost exclusively on the place of formation of contracts and, to a certain extent, also consider the place where acceptance or other last requisite formality of the contract occurs as a means of determining where the contract was formed."<sup>119</sup> Regardless of the medium, contractual doctrines regarding offer and acceptance of proposed terms remain questions of state law.<sup>120</sup>

Currently, the Ticket Marketplace has only limited restrictions on who or where the purchaser of a ticket can be located.<sup>121</sup> The

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<sup>113</sup> *Id.*

<sup>114</sup> No. 420709, 430650, 428837, slip op. (Seattle Mun. Ct. Jan. 30, 2004).

<sup>115</sup> *Id.*

<sup>116</sup> See Brief for Defendant at 9, *Seattle v. Charlesworth*, No. 420709.

<sup>117</sup> See *id.* at 7 (noting that "since the ticket scalping ordinance prohibits the actual selling of tickets above face value as well as merely offering, the fulfillment of the sale (via delivery) constitutes a portion of the crime as well.>").

<sup>118</sup> See *id.* at 11; see also Robert E. Freeman & Daniel Gati, *Internet Ticket Scalping: If You Can't Beat 'em, Join 'em*, 21 ENT. & SPORTS L. 6 (2003) (noting that despite the precautionary steps taken by the Seattle Mariners to ensure that the scalping law is not violated, an inability to block users from infringing uses on its website may trigger future liability by case law analogy).

<sup>119</sup> See *Connecticut v. Cardwell*, 718 A.2d 954, 960 (Conn. 1998) (citing 2 S. WILLISTON, CONTRACTS §§ 6:34, 6:61 (4th ed. Lord 1991)).

<sup>120</sup> See Hynes, *supra* note 31, at 788.

<sup>121</sup> See Seattle Mariners Ticket Marketplace, User Agreement, *supra* note 32 (noting that

pickup and delivery of the tickets are arranged automatically by the Ticket Marketplace website.<sup>122</sup> Additionally, there are no restrictions on the delivery of tickets to any area of the city.<sup>123</sup> Because SMC section 5.40.060 does not set forth restrictions on buyers, even if the offer is made on a computer located outside of Seattle, the sale can occur within Seattle to any person who purchases the ticket and lives in the city.<sup>124</sup>

In *Charlesworth*, the defendant argued that the security measures and the techniques used by the Ticket Marketplace, as well as other auction sites, were not effective in preventing violations of SMC section 5.40.060 and other local and state laws regulating ticket scalping.<sup>125</sup> But the determination becomes a factual inquiry into whether an online auction site's participation and facilitation in the sale of an event ticket above its face value (where it may or may not be legal) makes the site contributorily liable, like StubHub and Major League Baseball.<sup>126</sup> Notably, the Seattle Mariners notifies season ticket holders when they register for its Ticket Marketplace with an online message, instructing them to enter an address outside the city limits of Seattle, thus suggesting participation in the execution of a crime.<sup>127</sup> With this particular scenario setup by the Seattle Mariners, a season ticket holder residing in Seattle is unable to participate in the selling of his ticket(s) via the Ticket Marketplace. In contrast, a neighbor living just outside the city boundaries can profit using this technique.<sup>128</sup>

Additionally, other Internet ticket auctions, like eBay, which do not limit sales to season ticket holders, victimize local populations by encouraging people to purchase tickets with the sole inten-

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buyers at the Seattle Mariners Ticket Marketplace must reside in Washington, Idaho or Oregon).

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> See Judge Jean Rietschel's Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 2, *Seattle v. Charlesworth*, No. 420709 (Seattle Mun. Ct. Jan. 30, 2004).

<sup>125</sup> See Brief for Defendant, *Seattle v. Charlesworth*, No. 420709.

<sup>126</sup> See Freeman & Gati, *supra* note 118, at 8 (noting that in the case *In re: Aimster Copyright Litigation*, 2003 U.S. App. LEXIS 13229 (7th Cir. 2003), the court held that despite legal file-sharing uses of its software, Aimster was enjoined from further operation because of the prevalence of infringing uses; therefore, a case against the Seattle Mariners, StubHub, and MLBAM could be analyzed in the context of *Aimster*).

<sup>127</sup> See Judge Jean Rietschel's Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 3, *Seattle v. Charlesworth*, No. 420709. See also Padres Ticket Marketplace and Ticket Transfer Terms and Conditions, *supra* note 105 (discussing how only the San Diego Padres are providing the Ticket Marketplace service that will facilitate a sale). Although California allows for the resale of event tickets with location restrictions, the Marketplace's service is inherently similar to that of the Seattle Mariners'; however, the Seattle Mariners is claiming no such participation in its ticket marketplace.

<sup>128</sup> See Seattle Mariners Ticket Marketplace, User Agreement, *supra* note 32.

tion of reselling them,<sup>129</sup> either online or through the use of diggers.<sup>130</sup> Furthermore, states that do not have ticket scalping legislation but invite cities within its boundaries to adopt local ordinances, like that of SMC section 5.40.060, prevent local populations from recouping expenses previously paid for tickets.<sup>131</sup>

In addition, local populations, typically consisting of season ticket holders for sporting events who are restricted from selling tickets for an amount greater than a ticket's face value, are unable to recover money paid in the form of taxes or other fees, and sometimes used for construction of event facilities through public financing measures.<sup>132</sup> It is questionable whether such a discriminatory scheme (through the likes of the Ticket Marketplace), allowing individuals who reside in a neighboring city or state to sell tickets above their face value when a local resident of Seattle benefits financially, can actually be constitutional or legal.<sup>133</sup> New Jersey, through its anti-scalping statute, has recognized the discriminatory nature of preventing individuals from recouping expenses for previously purchased tickets and as a result

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<sup>129</sup> See Karen Rauen, *Green Bay Looks to Loosen Packers Ticket Rules*, GREEN BAY PRESS-GAZETTE, Sept. 11, 2003, available at <http://www.stubhub.com/sites/corpsite/?gSec=news&gAct=news&article=111803>.

<sup>130</sup> See N.J. STAT. § 56:8-26 (2005) (defining "digger" as a person temporarily hired for the purpose of securing tickets by intimidating a purchaser waiting in line to procure event tickets); see also REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 18-20 (noting that the "use of diggers is one method ticket brokers/scalpers use to monopolize the supply of tickets to particular events. Brokers even have their own groups of diggers or crews.").

<sup>131</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 18-20. Nevertheless, fans have become creative when selling tickets for events using online auction sites. See Andy Gardiner, *Michigan-Ohio State: Sellers Duck Anti-Scalping Law for Clash*, USA TODAY, available at [http://www.usatoday.com/sports/college/football/bigten/2003-11-18-scalping-sellers\\_x.htm](http://www.usatoday.com/sports/college/football/bigten/2003-11-18-scalping-sellers_x.htm) (last visited Nov. 10, 2004) (noting that sellers on eBay were skirting the Michigan scalping law by selling beer coasters, key chains, and pencils along with their Michigan-Ohio State tickets).

<sup>132</sup> See Rauen, *supra* note 129; see also Kenneth Lovett & Jennifer Fermino, *Boo Birds Bash Gov Over Sports Tax*, N.Y. POST, Jan. 29, 2004 (discussing New York Governor Pataki's proposed ticket surcharge tax for college and professional games to pay for improved emergency cell phone service and other security measures). Although online auction sites allow for individuals to include taxes paid and surcharges to be considered as face value, as long as this is allowed, auction site technology will likely be unable to improve its restriction technology in terms of what can be inputted when posting tickets for sale. Nevertheless, the application of new taxes to tickets is not reflected in eBay's price restrictions, and often these additional fees attached to ticket prices are unrecoverable since they are frequently considered to be fees not associated with the face value of a ticket. Therefore, cities that rely on public financing measures for newly built stadiums, e.g., the Seattle Mariners' Safeco Field, are prevented from recouping previously paid taxes by selling their tickets above face value, while the team itself benefits financially. See Safeco Field Background, *supra* note 11; see also PETCO Park Project Information, available at [http://sandiego.padres.mlb.com/NASApp/mlb/sd/ballpark/sdballpark\\_project\\_info\\_facts\\_figures.jsp](http://sandiego.padres.mlb.com/NASApp/mlb/sd/ballpark/sdballpark_project_info_facts_figures.jsp) (mentioning that stadium financing included a City of San Diego transient occupancy tax in the amount of \$205.9 million) (last visited Nov. 10, 2004).

<sup>133</sup> See *infra* text accompanying notes 161-163.

adopted New Jersey Statutes section 56:8-26.<sup>134</sup> The New Jersey law requires a director and places of entertainment to create a lawful method for season ticket holders and other ticket holders to sell back tickets to the venue for events they will not be able to attend.<sup>135</sup> However, New Jersey Statute section 56:8-35.3 does not address whether a director or place of entertainment is to receive a fee for providing such a service, clearly creating a loophole and potential bias for enforcement of this law.<sup>136</sup>

#### D. *Gibbs' Internet Cyber-Scalping Models*

In Jon Gibbs' Comment, *Cyberscalping On-line Ticket Sales*, he presents two Internet scalping models that describe the typical relationship between a vendor of an event ticket and a buyer.<sup>137</sup> The first model discusses an intrastate transaction that is comparable to the typical street-corner scalping transaction.<sup>138</sup> In this situation, a vendor in state or city X, which prohibits ticket scalping, sells a ticket to a person in state or city X by way of online auction, for an event occurring in state or city X.<sup>139</sup> This particular model is identical to the type of transaction allowed by the Ticket Marketplace, which SMC section 5.40.060 attempts to prevent from occurring in Seattle.<sup>140</sup> Regardless of the discriminatory nature of this form of regulation, the majority of ticket resellers, specifically ticket brokers, are knowledgeable enough to fall through the cracks.<sup>141</sup>

Because an individual can purchase tickets through mail order, telephone, and, most significantly, the Internet, someone in Washington, D.C. can purchase New York Knicks' tickets and sell them through eBay above their face value to someone in New Jersey, who then attends the game in New York.<sup>142</sup> This scheme, which was also addressed in Gibbs' fourth cyberscalping interstate transaction model, is the "crack" that allows scalpers to escape liability for reselling tickets above their face value in violation of a

<sup>134</sup> See N.J. STAT. § 56:8-26 (2005).

<sup>135</sup> See N.J. STAT. § 56:8-35.3 (2005); see also Happel & Jennings, *supra* note 21, at 447 (noting that the City of Phoenix adopted an ordinance mandating that all street scalpers assemble in one location where tickets can be resold, creating a no-scalping zone).

<sup>136</sup> See *infra* text accompanying note 156.

<sup>137</sup> See Gibbs, *supra* note 19, at 485.

<sup>138</sup> *Id.* at 486.

<sup>139</sup> *Id.*

<sup>140</sup> See Seattle Mariners Ticket Marketplace, User Agreement, *supra* note 32.

<sup>141</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 12. The report mentions, "New Jersey's ticket resale law covers only tickets to New Jersey events. That is why ticket brokers who sell tickets to New York events to New York purchasers operate their businesses in out-of-state places such as Fort Lee, New Jersey [sic]." *Id.*

<sup>142</sup> See Elliot Zaret, *Will the Net End Ticket Scalping?*, MSNBC, Sept. 3, 1999, available at <http://zdnet.com.com/2100-11-501311.html>.



specific anti-scalping statute or ordinance.<sup>143</sup> Such a transaction involves a vendor or resident in state X selling a ticket to a customer in state Y for an event in state Z. Based on modern day business practice and case law, ticket brokers legally incorporate their business in a jurisdiction where ticket resale is legal or requires some form of license.<sup>144</sup> Furthermore, individuals can partake in the ticket resale industry by purchasing tickets directly online, through agents like Ticketmaster, for events taking place in multiple jurisdictions; all one needs is a computer, Internet access, and a credit card.

## II. ANTI-SCALPING LEGISLATION

Most state anti-scalping legislation restricts the location, the price for reselling tickets, and the nuisance effects created by ticket scalpers.<sup>145</sup> For example, under New York Arts and Cultural Affairs Law section 25.11, it is illegal to resell tickets “within one thousand five hundred feet of a place of entertainment having a permanent seating capacity in excess of five thousand persons.”<sup>146</sup> Connecticut’s General Statutes section 53-289 allows a seller to charge a reasonable service charge for services actually rendered, which cannot exceed three dollars above the face value of a ticket.<sup>147</sup> Furthermore, recently enacted scalping laws distinguish scalpers on the street from ticket brokers or agents operating on the behalf of producers.<sup>148</sup>

Due to the notable differences between state scalping laws,

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<sup>143</sup> See Gibbs, *supra* note 19, at 488.

<sup>144</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 7.

<sup>145</sup> See National Conference of State Legislatures, *Ticket Resale Laws*, at <http://www.ncsl.org/programs/lis/ticketscalplaws.htm> (last visited Nov. 10, 2004) (presenting a chart comparing various state laws on ticket scalping); SPORT AND RECREATION VICTORIA, CONTROLLING TICKET SCALPING AND IMPROVING MAJOR EVENT TICKETING PRACTICES: A DISCUSSION PAPER 23 (2001), available at <http://www.ausport.gov.au/fulltext/2001/vic/scalpingfinalpaper.pdf>.

<sup>146</sup> N.Y. ARTS & CULT. AFF. LAW § 25.11 (2003).

<sup>147</sup> See *supra* note 70.

<sup>148</sup> See National Conference of State Legislatures, *supra* note 145. Specifically, Alabama, Illinois, Massachusetts, New York, and New Jersey permit licensed brokers to operate and to charge a price that reflects their cost of acquiring tickets. See *id.*; Kevin G. DeMarras, *Ticket Scalping Law is a Sham*, NorthJersey.com (June 8, 2003), at <http://www.northjersey.com/page.php?qr=EXJpcnk3ZjczN2Y3dnFIZUVFeXkyNzgmZmdiZWw3Zjd2cWVIRUV5eTYzODgzOTImeXJpcnk3ZjcxN2Y3dnFIZUVFeXk5>. New Jersey’s anti-scalping law states that “no registered ticket broker or season-ticket holder shall resell or purchase with the intent to resell a ticket for admission to a place of entertainment at a premium in excess of 50% of the price paid to acquire the ticket, plus lawful taxes,” creating “a loophole big enough to drive a Zamboni through.” *Id.* Therefore, this anti-scalping law allows Broker A who buys a ticket for \$150 to legally resell his ticket for \$225. See *id.* However, “if Broker B is the buyer, his limit becomes \$337.50.” *Id.* After this, Broker B can sell to another broker and the price is over \$500, suggesting that the more middlemen involved, the higher the price. *Id.*

scalpers must do their homework to keep up to date with legislation before unloading a ticket for a price greater than its face value.<sup>149</sup> Typically, the penalties associated with violating state or local scalping laws usually consist of fines.<sup>150</sup> Some laws also characterize the transaction as a misdemeanor or felony, with the possibility of jail time.<sup>151</sup> While the harsh penalties associated with ticket scalping in many states may be necessary as a prophylactic measure, there remains an uncertain risk that the same sheriff walking the sidewalks is also surfing the Internet.<sup>152</sup>

#### A. *Applying Anti-Scalping Legislation to Online Transactions*

As Internet ticket auctions increasingly become the convenient and practical medium for selling an event ticket above its face value, state and local enforcement authorities, often the parties responsible for dealing with citizen complaints of Internet crimes, must take on a much larger role.<sup>153</sup> Based on Gibbs' interstate transaction model where a vendor in state X is selling a ticket to a customer in state Y for an event in state Z, law enforcement

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<sup>149</sup> See National Conference of State Legislatures, *supra* note 145.

<sup>150</sup> *Id.*; see also The San Francisco Giants Ticket Policies, *supra* note 96 (stating that people caught selling tickets in violation of the law may have their tickets or right to future tickets to SBC Park revoked).

<sup>151</sup> See CONN. GEN. STAT. ANN. § 53-289 (2001) (noting that "ticket scalping is a class C misdemeanor for a first offense, a class A misdemeanor for a second offense and a class D felony for any subsequent offense. The sale of each ticket, privilege or license of admission in violation of any provision of this section shall constitute a separate offense.").

<sup>152</sup> See Peter Lewis, *Ticket Scalping Cases Tossed*, SEATTLE TIMES, Jan. 31, 2004 ("[I]ssues involv[ed] in investigating and prosecuting even one Internet sale are confoundingly complex . . . to prove. Simply detecting an 'illegal' sale would likely involve half a dozen subpoenas."), available at [http://seattletimes.nwsources.com/html/mariners/2001348018\\_mariners310.html](http://seattletimes.nwsources.com/html/mariners/2001348018_mariners310.html); see also Hynes, *supra* note 31, at 796 ("[A] person who wants to execute fraudulent transactions over the Internet is overwhelmingly likely to escape any type of legal penalty by committing a 'complex crime below \$100,000' because it is too difficult for the local police and below the federal government's interest threshold.") (citing Chris Farnsworth & Chris Knap, *Net Fraud is Tangled Web for Victims and Police*, ORANGE COUNTY REG., Mar. 26, 2002, at 1D); Drury, *supra* note 58. NFL teams are aware of the thriving online market, and some are doing all they can to crush it. *Id.* The New England Patriots' "cybersnoopers" were able to identify a season ticket holder illegally selling his tickets above their face value on eBay because the posting listed his name and address. *Id.* In addition, the New York Jets monitor eBay and other online sites and if it is able to identify a season ticket holder looking to sell, it writes the fan a warning letter. *Id.* But see generally Judge Jean Rietschel's Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle, *Seattle v. Charlesworth*, No. 420709 (Seattle Mun. Ct. Jan. 30, 2004) (noting that the Seattle Police Department's legal advisor had stated he found no reason why the department could not find out where such ticket sales originated. The department's vice division and intelligence units possess the skill and training necessary to use sophisticated computer forensics to investigate scalping over the Internet.).

<sup>153</sup> Judge Jean Rietschel's Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 6, *Seattle v. Charlesworth*, No. 420709 (noting that neither the Seattle Mariners nor the Seattle Police Department attempts any enforcement of the scalping ordinance on the Ticket Marketplace site; and therefore, the enforcement of the ordinance is arbitrary).

authorities will find themselves confronted with crimes perpetrated by individuals who are not located within their jurisdiction.<sup>154</sup> Because of the consensual nature of purchasing a ticket above its face value, as well as the anonymity<sup>155</sup> of Internet transactions, enforcing scalping laws across state borders may be too costly, indicating that the costs to enforce the law do not fit the fine.<sup>156</sup> Furthermore, as more venue operators and professional sports teams host their own online ticket marketplaces, exchanges, and auctions, in addition to paying for the necessary police enforcement for “street-corner” scalping, anti-scalping legislation must now overcome a presumption that selective enforcement of the law has occurred.<sup>157</sup> In *Playtogs Factory Outlet, Inc. v. Orange County*,<sup>158</sup> the court noted that where there exists “no independent effort of the law enforcement officials . . . to initiate complaints or informations,”<sup>159</sup> it is imperative that “neither the agencies enforcing our criminal laws nor the courts should allow themselves to be thus used as cat’s-paws by those who seek to utilize [a statute] for their selfish competitive advantage.”<sup>160</sup>

Despite scalpers’ past unsuccessful challenges to states’ anti-scalping legislation, and having argued violations of due process, equal protection, as well as the Commerce Clause, the viability of their challenges may change because of the evolution taking place in today’s ticket resale industry.<sup>161</sup> Now that private entities, such

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<sup>154</sup> See Gibbs, *supra* note 19, at 488. In addition to this fourth interstate scalping model, Gibbs discusses two other models describing interstate scalping where perpetrators are often residents of different states from that of the venue. See *id.*

<sup>155</sup> See Hynes, *supra* note 31, at 767 n.18 (reporting that “eBay’s rules do not prevent users from using more than one screen-name . . . .”); *id.* at 767 (noting that “[n]othing prevents suspended users [from eBay] from re-registering with a new e-mail address and user name.”).

<sup>156</sup> See Lewis, *supra* note 57. Seattle City Attorney Tom Carr said, “he has more important things to worry about, such as drunken-driving and domestic-violence cases, than Seattle’s scalping law.” *Id.* See also REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 7 (noting that as a matter of how New York spends its resources, New York Attorney General Eliot Spitzer is not as interested in targeting the average eBay user selling his ticket for whatever he can get, but as a matter of priority, is more interested in targeting the people in the venues); WIS. STAT. § 42.07 (2004) (stating that any person reselling a ticket “for more than said price shall be fined not less than \$10 nor more than \$100 . . . .”).

<sup>157</sup> See generally Judge Jean Rietschel’s Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 6, *Seattle v. Charlesworth*, No. 420709 (noting that the disparate treatment of street scalpers and online scalpers is “intentional, purposeful and deliberate . . . [and the] Mariners hire and direct off duty Seattle police officers to buy tickets from scalpers for the purpose of initiating prosecutions).

<sup>158</sup> 379 N.Y.S.2d 859 (1976).

<sup>159</sup> *Id.* at 867. See Brief for Defendant at 5, *Seattle v. Charlesworth*, No. 420709.

<sup>160</sup> *Id.*

<sup>161</sup> See *Gold v. DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964), *aff’d* 380 U.S. 520 (1965) (the Supreme Court affirmed the decision of a three-judge district court which upheld a New York statute making it unlawful to sell a ticket in excess of \$1.50 more than the price printed on the ticket); *Olsen v. Nebraska ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236

as the Seattle Mariners and San Francisco Giants, are utilizing police to enforce a particular law for competitive gain, the equal protection clause of the Fourteenth Amendment may be violated because it protects citizens against selective enforcement from state actors.<sup>162</sup>

This selective enforcement from state actors was the exact finding by Judge Jean Rietschel of the Seattle Municipal Court in *Seattle v. Charlesworth*. There, Judge Rietschel suggested that until the law is enforced fairly against everyone who violates it, a state or city cannot successfully prosecute.<sup>163</sup>

### 1. Selective Enforcement Claim

A defendant must satisfy a three-prong test to prevail in a case based on selective enforcement.<sup>164</sup> According to *United States v. Armstrong*,<sup>165</sup> the first element to be established is that persons who are similarly situated are not similarly prosecuted.<sup>166</sup> The second element is that the method of enforcement must demonstrate a discriminatory intent. Third, the method of enforcement must be based on an arbitrary or invidious classification.<sup>167</sup>

*Charlesworth* held that for a court to find the first element satisfied, it must determine whether the groups treated differently by law enforcement are similarly situated.<sup>168</sup> The court held that groups do not need to be identical in order to be similarly situated; the court is to consider all relevant factors identifying the groups.<sup>169</sup> In applying these factors to SMC section 5.40.060, the *Charlesworth* court determined that there does not appear to be a difference in legislative intent between online scalpers and street level scalpers, and that these groups are similarly situated.<sup>170</sup> Furthermore, because the “Mariners hire and direct off-duty Seattle police officers to buy tickets from scalpers for the purpose of initiating prosecutions . . . [and] [n]either the Mariners nor Seattle Police Department attempt any enforcement of the scalping ordi-

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(1941); *State v. Sobieck*, 701 So. 2d 96 (Fla. Dist. Ct. App. 1997); *State v. Spann*, 623 S.W.2d 272 (Tenn. 1981).

<sup>162</sup> See Judge Jean Rietschel’s Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 6, 7, *Seattle v. Charlesworth*, No. 420709.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 6.

<sup>165</sup> 517 U.S. 456 (1996).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See Judge Jean Rietschel’s Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 6, *Seattle v. Charlesworth*, No. 420709.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

nance on [the] web site,” the disparate treatment is intentional, purposeful, and deliberate, which establishes the second element in a claim of selective enforcement.<sup>171</sup> Finally, *Charlesworth* held that “the enforcement is based upon an arbitrary classification, not rationally related to legitimate state interest, given the legislative purpose in enforcement [sic][is the] collection of tax revenue.”<sup>172</sup> Thus, where a private party receives income from the group who is not being prosecuted for a violation of the same ordinance, a state may have difficulty prosecuting street-corner scalpers.<sup>173</sup> Because of the *Charlesworth* decision, sports teams and venue operators participating in online ticket auctions, team marketplaces, and exchanges may still have to compete with what can now be “legal” street-corner scalping within states that regulate ticket resale.<sup>174</sup>

## 2. Commerce Clause Analysis

The court’s determination in *People v. Concert Connection, Ltd.*,<sup>175</sup> that the New York ticket scalping statute<sup>176</sup> did not violate the Commerce Clause because the “legitimate local public interest of preventing ticket pricing abuse outweighed any incidental effect on interstate commerce,” may now require a second look.<sup>177</sup> Because of the growing usage of online ticket auctions transacted across state borders, where ticket pricing abuse is not necessarily affecting citizens of the state from attending a local event, the Commerce Clause analysis in *People v. Concert Connection, Ltd.* is less powerful.<sup>178</sup>

In *People v. Concert Connection, Ltd.*, the court stated that the general rule for determining the constitutionality of a state statute against a Commerce Clause challenge was clearly spelled out in

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 7.

<sup>174</sup> See Judge Jean Rietschel’s Findings of Fact and Conclusions of Law, The Municipal Court for the City of Seattle at 7, *Seattle v. Charlesworth*, No. 420709.

<sup>175</sup> 211 A.D.2d 310 (1995).

<sup>176</sup> See N.Y. ARTS & CULT. AFF. LAW §§ 25.03, 25.05 (2003).

<sup>177</sup> See *People v. Concert Connection, Ltd.*, 211 A.D.2d 310 (1995).

<sup>178</sup> In *Am. Libraries Ass’n v. Pataki*, 969 F. Supp 160 (S.D.N.Y 1997), a case involving the dormant commerce clause, the court decided that Internet commerce may not be regulated by individual state laws. In *ACLU v. Johnson*, 194 F.3d 1149, 1160-61 (10th Cir. 1999), the court invalidated a New Mexico law regulating Internet content potentially harmful to minors, finding that the statute: (1) regulated conduct occurring entirely outside the state; (2) was not reasonable; (3) was an undue burden on interstate and foreign commerce; and (4) subjected Internet use to inconsistent state laws. *Id.* As a result of this holding, one can argue that the application of an individual state’s ticket scalping law which attempts to regulate conduct of an individual extraterritorially, discriminates against non-citizens of a state or residents that fall within a local ordinance (i.e., Seattle), and clearly prevents individuals from generating revenue because of disparate laws.

*Pike v. Bruce Church, Inc.*<sup>179</sup> According to this rule, “[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, [the statute] will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>180</sup>

Unlike the result in *New Jersey Association of Ticket Brokers v. Ticketron*,<sup>181</sup> where the court was unpersuaded that the resale of tickets had such an impact on interstate commerce, currently a ticket broker or fan looking to resell his season ticket may be discriminated against in practical effect because of his inability to participate “fully” in the secondary market.<sup>182</sup> If the *Ticketron* court was to view today’s anti-scalping legislation along with ticket resale policies of team marketplaces or online auctions, the persuasive effect that was missing in 1988 would be replaced by the realities of today’s e-commerce environment and the limitations anti-scalping laws place on certain geographically dispersed citizens.<sup>183</sup> Nevertheless, if the state can demonstrate both that the anti-scalping statute or regulation serves a legitimate local purpose, and that this purpose could not be served equally well by available nondiscriminatory means, the state’s justification for the law is permissible.<sup>184</sup>

States and municipalities will continue to defend anti-scalping regulations as a necessary device to curb fraud, public nuisance, and exorbitant price manipulations, creating a tolerable burden on interstate commerce.<sup>185</sup> However, when tickets are predominantly bought online from anywhere in the world via an Internet connection, the disguised protectionist effect of the local law is ricocheted back to the local fan.<sup>186</sup> By prohibiting or restricting a ticket purchaser from reselling his ticket at or above face value, the

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<sup>179</sup> 397 U.S. 137 (1970).

<sup>180</sup> *Id.*

<sup>181</sup> 226 N.J. Super. 155 (Super. Ct. 1988).

<sup>182</sup> See *Seattle v. Charlesworth*, No. 420709 (Seattle Mun. Ct. Jan. 30, 2004) (discussing the exclusion of Seattle residents); see also Rauen, *supra* note 129.

<sup>183</sup> See *Seattle Mariners Ticket Marketplace, User Agreement*, *supra* note 32; see also *Happel & Jennings*, *supra* note 21, at 445.

<sup>184</sup> See *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

<sup>185</sup> See *People v. Concert Connection, Ltd.*, 211 A.D.2d 310 (1995).

<sup>186</sup> See Scott Van Voorhis, *Ticket Sellers Go For Nothing But Net*, BOSTON HERALD, Feb. 7, 2005, available at <http://business.bostonherald.com/businessNews/view.bg?articleid=67233&format=text> (discussing how “the ticket office is poised to go the way of the rotary phone as sales of ducats to concerts and games move increasingly to the internet” and how the Boston Celtics sells 80% of its single-game tickets online); see also Simon, *supra* note 107, at 1212 (acknowledging that while fraud and public nuisance still are public interests, there are nevertheless means for a state to adopt less restrictive and discriminatory methods to control the resale of tickets around venues).

secondary market is limiting consumer choice and thus raising ticket prices because of varying anti-scalping laws.<sup>187</sup> If the goal of anti-scalping legislation is state protection of citizens from paying astronomical prices to attend a concert, Broadway show, or sporting event, then these laws are not accomplishing their intended effect.<sup>188</sup> Jurisdictions that endorse ticket scalping legislation, or at least refrain from regulating this activity, are forcing eager fans to pay the out-of-state resellers' market-determined price.

The restrictions that keep a majority of citizens from selling their purchased tickets on the secondary market create excess demand and profit opportunities for those who hold tickets in states that permit unrestrained ticket resale.<sup>189</sup> According to Daniel Elfenbein, a faculty member at the University of California Berkeley Haas School of Business, in the absence of ticket resellers colluding to set high prices in the secondary market, "it is not possible to make a case that banning ticket resale or regulating its price is economically efficient."<sup>190</sup> He goes on to state that "[p]rohibiting trade between a willing buyer and a willing seller results in a strict loss of surplus."<sup>191</sup> Because venue operators are still utilizing ticket box offices, season ticket packages and stand-in-line ticket purchases, local citizens are still likely to control the market share of available tickets for an event. Nevertheless, anti-scalping laws that place no disclosure requirements for venue operators to report the makeup and distribution of primary ticket sales encourages these same venue operators to restrict the sale of tickets to the general public and establish their own ticket broker services in states that allow a natural secondary market.<sup>192</sup>

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<sup>187</sup> Cf. Derek E. Empie, *The Dormant Internet: Are State Regulations of Motor Vehicle Sales by Manufacturers on the Information Superhighway Obstructing Interstate and Internet Commerce?*, 18 GA. ST. U. L. REV. 827, 853 (2002) (describing the opponent's arguments against state regulation of franchise laws as harmful to local consumers because of the laws' creation of a restrictive marketplace.). See also Scott Van Voorhis, *Tix Scalping Heads to Hearing: Weak Laws Seen Benefiting No One but Criminals*, BOSTON HERALD, Nov. 16, 2004, available at <http://business.bostonherald.com/businessNews/view.bg?articleid=54264&format=text> (noting that Massachusetts residents who want to buy Red Sox tickets on eBay are at a disadvantage because they are competing against fans from other states that are not under a state law prohibiting resales for more than \$2 above a ticket's face value).

<sup>188</sup> See N.Y. ARTS & CULT. AFF. LAW § 25.01 (2003) (the legislative findings declare that the price of or charge for admission to places of entertainment is a matter of public interest to safeguard the public against fraud, extortion, exorbitant rates and similar abuses).

<sup>189</sup> See 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, on file with author).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 7. See Jim DeRogatis, *Brokering the Biggest Deal of Them All*, CHI. SUN TIMES, Sept. 14, 2003, available at <http://suntimes.com/output/derogatis/sho-sunday-dero14.html>.

Elfenbein's empirical evidence of ticket transactions on eBay for the 2002 and 2003 NFL regular season games, along with prices listed on the Internet-based ticket reseller Ticketsnow.com, suggests that:

In states with resale regulations, competition in the resale market is reduced and is pushed toward out-of-state buyers whose costs of ticket acquisition are likely to be higher and are passed on to consumers in the resale market. The end result of this reduction in supply is higher ticket prices in the secondary market.<sup>193</sup>

According to Elfenbein, this evidence indicates, "that, rather than reducing rent-seeking, regulations may create significant opportunities for rent-seeking behavior."<sup>194</sup>

While current anti-scalping laws incidentally regulate Internet activities, a court may no longer tolerate this economic discrimination even where a legitimate local interest is at stake.<sup>195</sup> In line with *Pike v. Bruce Church, Inc.*, where a legitimate local purpose was found, the question then becomes one of degree and whether, under strict scrutiny analysis, "the regulation adequately serves the interest and whether the local interest can be served equally well by an available nondiscriminatory measure."<sup>196</sup> As a result, courts must engage in a fact gathering process and require states to "meet the following three criteria to rationalize any discriminatory effect: (1) that the regulation serves a legitimate interest; (2) that the legislation substantially reaches the interest; and (3) that alternative measures are unavailable to reduce the discriminatory effect."<sup>197</sup>

The economic interest underlying an anti-scalping regulation that addresses limitations on the amount for which a ticket can be resold above its face value is no longer "substantial" – Elfenbein's

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<sup>193</sup> See Elfenbein, *supra* note 189, at 24.

<sup>194</sup> See *id.* Elfenbein further notes that the evidence suggests, "stricter regulations were associated with fewer online transactions, a greater frequency of transactions that crossed state borders, and higher prices and markups." *Id.*

<sup>195</sup> See *e.g.*, *Ford Motor Co. v. Texas Dep't of Trans.*, 264 F.3d 493, 512 (5th Cir. 2001) (Jones, J., concurring) (noting that "since th[e] Texas statute appears to reflect a genre of state laws favoring local automobile dealers over out-of-state manufacturers, perhaps the Supreme Court will give us further guidance."). See also *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) (holding that New York's prohibition of out-of-state wineries from shipping directly to consumers in New York while allowing in-state wineries to do so with less oversight, did not discriminate against interstate commerce because it fell within the ambit of the twenty-first amendment). *But see Sante Fe Natural Tobacco Co. v. Spitzer*, 320 F.3d 200 (2d Cir. 2003) (holding that a statute prohibiting cigarette sellers and common and contract carriers from shipping and transporting cigarettes directly to New York consumers did not discriminate against interstate commerce and therefore was not subject to strict scrutiny).

<sup>196</sup> 397 U.S. 137, 142 (1970).

<sup>197</sup> See *Empie*, *supra* note 187, at 831.



empirical evidence, in addition to sound economic theory, suggests that the Internet marketplace created by divergent state and municipality law is not “substantially” reaching the law’s economic protectionist interest.<sup>198</sup> While this information suggests that legislatures amend minimum-maximum price restrictions on the reselling of tickets, *all* jurisdictions must participate to prevent the discriminatory effect on the local market.<sup>199</sup>

The loss of profit opportunity is clearly affecting citizens of states whose laws restrict ticket selling at or above a certain percent of the face value of a ticket. Nevertheless, an anti-scalping statute discriminates against interstate commerce when there is “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>200</sup> While out-of-state ticket resellers may not be hurt by this distinction when selling tickets to events not within their jurisdictions, policies adopted by eBay and the Seattle Mariners suggest otherwise.<sup>201</sup> According to eBay’s ticket resale policy, an individual who lives in an unregulated state or municipality but resells tickets to an event whose *venue* is located in a state that has ticket resale restrictions, is technically prohibited from doing so.<sup>202</sup> Notwithstanding that these intermediary website policies are easy to evade, the restrictions undeniably discriminate against interstate commerce.<sup>203</sup>

Even though venue operators and states themselves have addressed alternative measures to reduce the discriminatory effect of anti-scalping laws, the primary purchasing and reselling of tickets has greatly changed.<sup>204</sup> By allowing third parties like Ticketmaster to directly sell to all ticket purchasers online, the composition and

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<sup>198</sup> See Elfenbein, *supra* note 189, at 33-38; Simon, *supra* note 107, at 1179 (discussing Tishler’s theory on promoters’ underpricing of tickets); *Ford Motor Co.*, 264 F.3d at 512 (noting that “[i]t should be obvious that the flow of interstate goods is diminished when barriers to entry totally prevent fair competition by a class of potential distributors . . .”).

<sup>199</sup> See Van Voorhis, *supra* note 187.

<sup>200</sup> See *Ford Motor Co.*, 264 F.3d at 499 (citing *Or. Waste Sys., Inc. v. Dep’t. of Env’tl. Quality*, 511 U.S. 93, 99 (1994)). *But see* eBay, Ticket Resale Policy, *supra* note 6.

<sup>201</sup> See eBay, Ticket Resale Policy, *supra* note 6; *see also* Seattle Mariners Ticket Marketplace, User Agreement, *supra* note 32.

<sup>202</sup> See eBay, *Frequently Asked Questions about eBay’s Ticket Sales Policy*, at <http://pages.ebay.com/help/community/png-tickets-faq.html> (last visited Nov. 10, 2004).

<sup>203</sup> See *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) (noting that New York’s prohibition of out-of-state wineries from shipping directly to consumers in New York while allowing in-state wineries to do so with less oversight could, in fact, discriminate against interstate commerce but fell within the ambit of the twenty-first amendment and was “saved”). *But see Ford Motor Co.*, 264 F.3d at 493 (upholding a law that prevented automobile manufacturers from “directly or indirectly owning an interest in a dealer or dealership, operating or controlling a dealer or dealership, or acting in the capacity of a dealer” therefore preventing Ford from selling vehicles directly or indirectly to consumers via the Internet).

<sup>204</sup> See Van Voorhis, *supra* note 187.

jurisdictional diversity of today's primary ticket sale purchasers makes them more adept at buying tickets as an investment opportunity for future resale. There is still merit in having price controls on the reselling of tickets for entertainment events, but states must confront the underlying fact that the true purpose and goals for their anti-scalping laws are no longer being fully achieved.<sup>205</sup> The current perplexity of anti-scalping legislation encourages venue operators, and others within restricted states or municipalities, to skirt legislation and participate in the resale market in out-of-state jurisdictions for greater profit margins. This fact indicates that today, states may be willing to persuade Congress to adopt "regulation on a national level," creating consistent treatment of ticket resellers across the country.<sup>206</sup>

### 3. Determining Criminal Jurisdiction

Enforcement of anti-scalping legislation when applied to online transactions confronts other obstacles in addition to not being a priority for law enforcement officials, one being the application of criminal jurisdiction over acts committed outside of a state.<sup>207</sup>

In *Strassheim v. Daily*,<sup>208</sup> a case often cited as authority for the proposition that a state may exercise criminal jurisdiction over acts committed outside its territorial boundaries, the Supreme Court stated, "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."<sup>209</sup> To satisfy the minimum requirements for an exercise of criminal jurisdiction over out-of-state conduct, which constitutes the sale of an event ticket in violation of a particular anti-scalping law, there must be (1) an act occurring outside the state, which is (2) intended to produce detrimental effects within the state, and (3) is the cause of detrimental effects within the state.<sup>210</sup>

Does selling a ticket above its face value online cause detrimental effects within the state? Although no case exists on point, this Note argues that for states that have enacted anti-scalping legis-

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<sup>205</sup> See Van Voorhis, *supra* note 186. See also Elfenbein, *supra* note 189, at 8 (observing that past and potential future subsidies for stadium construction provide an additional rationale for why team owners price tickets below a market maximization price).

<sup>206</sup> See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp 160 (S.D.N.Y. 1997).

<sup>207</sup> See Terrence Berg, *State Criminal Jurisdiction in Cyberspace: Is There a Sheriff on the Electronic Frontier?*, 79 MICH. B.J. 659 (2000).

<sup>208</sup> 221 U.S. 280 (1911).

<sup>209</sup> *Id.* See Berg, *supra* note 207.

<sup>210</sup> See Berg, *supra* note 207.

lation to mitigate the nuisance effect of scalpers, online ticket scalping, which can take place in a person's home by way of an Internet connection and a computer or handheld device, does not cause a detrimental effect within the state – there is no harassment of the public.<sup>211</sup> Furthermore, according to the Office of the New York State Attorney General, the haziness surrounding ticket distribution practices by venue operators and promoters, and the lack of disclosure as to the availability of tickets, may prevent one from placing the blame on scalpers as the “cause of the detrimental effects” within the state.<sup>212</sup>

Another plausible explanation for why advancing technology has left anti-scalping legislation lagging behind is that in general, concert promoters, venue operators, and professional sports teams may no longer find the scalping legislation they once so ardently lobbied for a necessary means to protect their lost revenue. Appreciably, these parties are now participants in the secondary ticket market.<sup>213</sup> In addition, despite the ticket resale policies and policing mechanisms of eBay and other online auction sites, it seems that there is little incentive to discourage the scalping of tickets on their websites, especially when they receive a percentage of the transaction.<sup>214</sup> Furthermore, many sports teams are now incorpo-

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<sup>211</sup> *But see* N.Y. ARTS & CULT. AFF. LAW § 25.01 (2003) (the legislative findings declare that the price of or charge for admission to places of entertainment is a matter of public interest to safeguard the public against fraud, extortion, exorbitant rates and similar abuses). *See* Connecticut v. Cardwell, 718 A.2d 954, 963 (Conn. 1998). In Connecticut a criminal statute that does not indicate an extraterritorial effect “will be operative only within the boundaries of this state.” *Id.* Furthermore, the court noted that its function was to “decide whether, in enacting [the statute], the legislature manifested its intention to give extraterritorial effect to the [statute] . . .” *Id.*

<sup>212</sup> *See generally* REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 28-29 (noting that any amendment to the current scalping law should control the supply of tickets in the secondary resale market as well as public disclosure of general ticket availability). *But see* Simon, *supra* note 107, at 1210 (stating “despite the illegality of commercial bribery, there has been only one prosecution under section 25.23 of NY ACAL in the last 35 years.”). There is a clear difference between the New York and California ticket scalping law – both states have location restrictions for ticket resale; however, New York also incorporates a maximum premium price restriction for resale. *Id.*

<sup>213</sup> *See* REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 11 (discussing a bill supported by the East Coast Ticket Brokers Association (“ECTBA”) and how ECTBA’s members would move back to New York if the maximum premium price were repealed and pay taxes in New York). *See also* *Ticket Scalping Would Be Legal*, ST. PETERSBURG TIMES, Mar. 9, 2004, available at [http://www.sptimes.com/2004/03/09/news\\_pf/State/Ticket\\_scalping\\_would.shtml](http://www.sptimes.com/2004/03/09/news_pf/State/Ticket_scalping_would.shtml) (discussing recent sponsorship of a bill to allow scalpers to sell event tickets for more than their face value after being approached by online auction site eBay). In addition to ticket broker associations lobbying against the enactment of ticket scalping laws, sports leagues like the National Football League participate in this practice by influencing state representatives to put in place legislation outlawing resale of tickets. *See* Bob Young, *Scalpers Bathe in NCAA Tickets*, THE ARIZ. REPUBLIC, March 25, 2004, at 4C (In order for Phoenix to get a Super Bowl, the NFL insisted on a ticket scalping law in Arizona).

<sup>214</sup> *See, e.g.*, Hynes, *supra* note 31, at 782 (discussing how self-regulation of auction sites

rating variable ticket pricing, the practice of selling different prices for the same seat based on the team's opponent, day of the week, or month of the year, so that they can better predict the market demand for their price gouging.<sup>215</sup>

In addition to variable pricing, the "virtual wrist band," a new product in development for use by ticket promoters and vendors, purports to help assess and price ticket demand fittingly.<sup>216</sup> The "virtual wrist band" allows fans to go online before an event goes on sale to state how many tickets they want to purchase and at what price.<sup>217</sup> Since proprietors are better at balancing supply and demand through practices such as variable ticket pricing, it can be argued that anti-scalping legislation is obsolete since fans will ultimately have to pay exorbitant prices for a "hot" ticket.

In general, many anti-scalping statutes seek to protect the proprietor of events to ensure that any profits made belong to them.<sup>218</sup> However, a comprehensive investigation by the Bureau of Investor Protection and Securities division of the Office of the New York State Attorney General in 1999 challenged the notion that ticket scalping is simply the result of the law of supply and demand and places the blame of scalping on the venue operators themselves and their ticket distribution methods.<sup>219</sup>

Since the Office of the New York State Attorney General Report in 1999, venue operators have experimented with new techniques to control their ticket distribution and the excessive abuses by individuals and organizations from speculating and taking advantage of the excess demand in the system.<sup>220</sup> Examples of such attempts to regulate this misconduct include ticket purchase limitations per customer, Ticketmaster's use of technology that prevents limitless purchases per unique credit card, word verification technology, and strict enforcement by teams of their policy against reselling their own tickets, specifically against season ticket holders.<sup>221</sup>

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has not worked because of online auctioneers' economic disincentive to do so until they see fraud as deterring large numbers of users from coming to their site).

<sup>215</sup> See Darren Rovell, *Sports Fans Feel Pinch in Seat (Prices)*, ESPN.com, June 21, 2002, available at <http://msn.espn.go.com/sportsbusiness/s/2002/0621/1397693.html>.

<sup>216</sup> See Julie Herrick, *Selling Tickets at the Speed of Light*, at <http://www.ticketlife.com/feature09b.html> (last visited Jan. 26, 2005).

<sup>217</sup> *Id.*

<sup>218</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 28.

<sup>219</sup> *Id.*

<sup>220</sup> See generally Pascal Courty, *Some Economics of Ticket Resale*, 17 J. ECON. PERSP. 85 (2003).

<sup>221</sup> See *id.* For example, "[T]icketmaster stipulates in its contract with independent outlets that physically deliver tickets (e.g. video stores) that the providing of tickets to third party scalpers or brokers through preferential sale or otherwise . . . will be consider[ed] a material breach of this Agreement." *Id.* at 88-89. Courty goes on to say that "some concert

### III. A SERIOUS PROPOSAL: THE FEDERAL UNIFORM TICKET RESALE ACT

The often-debated question, "is anyone really getting hurt by ticket scalping?" has taken on new meaning with the advent of cyberscalping.<sup>222</sup> Laws regulating ticket scalping may be an attempt to ensure the collection of taxes, and that profits derived from the sale of tickets rightfully belong to investors and creators, but only anti-scalping legislation that requires licenses for resale and certification of brokers attempts to control the necessary reporting of income tax revenues.<sup>223</sup> Circumvention of anti-scalping laws by use of Internet auctions, team marketplaces, and ticket exchanges becomes possible because of the lack of uniformity in state and local laws as well as the neglect on the part of legislators to address issues that create the secondary marketplace for event tickets in the first place, i.e., venue operators and promoters.<sup>224</sup>

On May 5, 1998, United States Representative Gary Ackerman (D-New York) proposed federal legislation to combat ticket scalping.<sup>225</sup> His proposal imposed criminal penalties on individuals such as ticket brokers who resell tickets at very high prices.<sup>226</sup> Ad-

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promoters have gone as far as issuing bracelets, rather than tickets, that are distributed in advance and that cannot be removed without obvious sign of manipulation." *Id.*; see also Ticketmaster, Help: Buying Tickets, at [http://www.ticketmaster.com/h/buying\\_tickets.html](http://www.ticketmaster.com/h/buying_tickets.html) (last visited Nov. 17, 2004). Word verification requires one to enter the word shown in an image box on one's computer monitor. According to Ticketmaster.com "[t]his step helps prevent unfair use of automated programs" to purchase a large quantity of tickets for an event. *Id.*

<sup>222</sup> See, e.g., *Power Poll: Should Scalping Be Legal?*, CNBC, at <http://moneycentral.msn.com/content/CNBCTV/Promos/P63118.asp> (last visited Nov. 17, 2004). In a recent power poll on CNBC, online voters were asked whether scalping should be legal, and based on total votes of 1239, 60% said yes while 40% said no. *Id.*

<sup>223</sup> See N.J. STAT. § 56:8-27 (2005); 720 ILL. COMP. STAT. 375/1-4 (2004) and accompanying text.

<sup>224</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 3 (discussing the corrupt and unfair practices of venue operators and promoters as to the supply and distribution of tickets). See, e.g., *New York Announces Ticket Scalping Indictments*, in NATIONAL ASSOCIATION OF ATTORNEYS GENERAL CONSUMER PROTECTION REPORT (2000) (noting the indictment of sixteen people who diverted tickets from the ticket office to brokers and scalpers). See also Simon, *supra* note 107, at 1180 (noting that the New York Yankees recently "distribut[ed] free tickets to public officials without disclosing the nature and amount of the gifts . . .").

<sup>225</sup> See H.R. 3951, 105th Cong. (1998).

<sup>226</sup> The following is an act that was introduced by Rep. Ackerman of New York on May 22, 1998:

Title(s): Short Title(s) as Introduced: Ticket Scalping Reduction Act of 1998  
Official Title as Introduced: A bill to amend title 18, United States Code, to prohibit ticket scalping. H.R. 3951 105th Congress 2d Session H.R. 3951. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Section 1. Short Title. This Act may be cited as the 'Ticket Scalping Reduction Act of 1998.' Sec. 2. Ticket Scalping Prohibited. (a) IN GENERAL- Chapter 89 of title 18, United States Code, is amended by adding at the end the following: Sec. 1822. Ticket scalping (a) Whoever

ditionally, Ackerman's bill would make it illegal to resell tickets in any state, hoping to force scalping brokers everywhere out of business.<sup>227</sup> Unfortunately, this legislation measure, the first federal legislation of its kind, failed to generate the necessary interest for its successful passage.<sup>228</sup> Perhaps this failure was the result of poor draftsmanship or because the secondary ticket market is, in fact, a big business for states.<sup>229</sup>

States continuously reassess their ticket scalping legislation and often incorporate an automatic repeal date. However, there is no statute on the books that addresses the growing trend of individuals profiting from using online auctions, team marketplaces, and ticket exchanges for reselling their event tickets.<sup>230</sup> The inconsistencies among states regarding the regulation of this industry foster discriminatory practices that allow protected individuals to profit at the expense of unprotected state citizens.<sup>231</sup> It has been suggested before that proponents of greater regulation fight for national *federal* legislation because scalpers can simply set up mail-order operations in states that do not have statutes prohibiting ticket scalping.<sup>232</sup> A new uniform federal law would be a clear solution because the majority of state anti-scalping statutes fail to incorporate reference to sections that acknowledge illegal distribution practices of ticket vendors, as well as the collection of tax revenue, necessary license requirements for ticket brokers or resellers in general, and the growing use of online auctions and marketplaces in facilitating the secondary resale market for tickets.<sup>233</sup>

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uses the mails or any facility of interstate or foreign commerce to scalp 5 or more tickets in a single transaction shall be fined under this title or imprisoned not more than 2 years, or both. (b) As used in this section—(1) the term 'scalp', used with respect to a ticket, means resell that ticket, or offer to resell that ticket, at a markup of more than \$5 or 10 percent of the face value of the ticket; and (2) the term 'ticket' means a coupon or similar device used to admit patrons to a public exhibition, show, or other event.

H.R. 3951, 105th Cong. (1998).

<sup>227</sup> *Id.*

<sup>228</sup> See Happel & Jennings, *supra* note 21, at 445.

<sup>229</sup> See National Conference of State Legislatures, *supra* note 145. The differences among states' anti-scalping legislation suggests that limitations on a maximum premium price as well as on the number of tickets allowed for resale ignore many reasons why states have adopted their laws in the first place. *Id.* See also Hiestand, *supra* note 17. "StubHub estimates about \$10 billion worth of sports tickets are sold annually, with 15%-20% of tickets resold . . . ." *Id.*

<sup>230</sup> See National Conference of State Legislatures, *supra* note 145. Furthermore, N.Y. ARTS & CULT. AFF. LAW § 25.01 (2003) has in place an automatic repeal date of June 1, 2005. *Id.*

<sup>231</sup> See *supra* notes 133-135 and accompanying text.

<sup>232</sup> Paul J. Criscuolo, Comment, *Reassessing the Ticket Scalping Dispute: The Application, Effects and Criticisms of Current Anti-Scalping Legislation*, 5 SETON HALL J. SPORTS L. 189 (1995).

<sup>233</sup> See Gibbs, *supra* note 19. See also Illinois General Assembly – Bill Status for HB0873, *supra* note 17. While HB0873 has yet to be adopted by Illinois, this amendment will be the

A new uniform federal law combating ticket scalping would attempt to prevent the abuses and discriminatory practices occurring in the current ticket resale market. State and local regulation will still be available for matters related to health and safety, such as, the provisions in many existing anti-scalping laws that concern nuisance and harassment prevention.<sup>234</sup>

### A. *Suggested Provisions*

Taking into consideration a number of legislative recommendations presented in the 1999 Office of the New York State Attorney General Report, a uniform federal law combating ticket scalping must address the discriminatory practices taking place in the secondary resale market.<sup>235</sup> However, in doing so, the law must acknowledge the consensual nature of this “nonviolent” transaction as a service filling a temporary consumer need.<sup>236</sup> Therefore, the FUTRA should not limit resale activities to ticket brokers, but allow casual entrepreneurs to make profits as well.<sup>237</sup>

#### 1. Licensing Requirement

All that would be required of sellers participating in the secondary ticket resale market is the satisfaction of a licensing requirement and the payment of annual service and processing fees.<sup>238</sup> By

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first law expressly permitting Internet ticket resale under certain qualifications. *Id.* But see Happel & Jennings, *supra* note 3, at 76 (noting that market efficiency is sacrificed by regulation and consumers will be reluctant to sell at a certain price for fear of legal reprisal, and as a result, sell their tickets at a market discount).

<sup>234</sup> Any federal legislation regulating the secondary ticket resale market will acknowledge states' interests in fostering a safe environment for its citizens attending entertainment events. In addition, this new law will recognize that particular venues experience different invectives based on the type of fans who attend events, therefore encouraging local regulation to address this issue. However, other adopted provisions will help foster unbiased competition. See *infra* Part III.A.4 and accompanying text; see also Simon, *supra* note 107 and accompanying text.

<sup>235</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 28-29.

<sup>236</sup> Because twenty-one states have no statutes regulating the resale of entertainment tickets, a law that allows for limited restrictions on the sale of tickets above their face value would garner support from more states for the law's passage. See Happel & Jennings, *supra* note 21, at 445.

<sup>237</sup> To eliminate discrimination in the application of the FUTRA, a provision will allow for individuals and ticket brokers to participate in the resale of tickets above their face value. See ALA. CODE § 40-12-167 (2003) (stating that any person who sells a ticket above its face value must pay a licensing fee of \$100).

<sup>238</sup> The fees associated with this licensing requirement for sales or offers for sale of tickets priced above their face value will be used for security and enforcement authorities. See *infra* Part III.A.5 and accompanying text; see also *infra* Part III.A.4 (discussing how licensing requirements will not be necessary for individuals or season ticket-holders who resell their tickets via the no-scalping zone provision). A corresponding provision to this licensing requirement must address a potential abuse concern that individuals and brokers can register for numerous licenses to manipulate the secondary market. Therefore, ticket resellers must verify registration information with a credit card or similar device, as well as list

having a centralized registration system in place, as proposed in the 1999 Office of the New York State Attorney General Report, ticket resellers can be identified to ensure the payment of necessary taxes.<sup>239</sup> Although specific ticket identification methods can be utilized, through serial numbering, bar codes on tickets, or requiring identification to match the bar code on the ticket, these intrusions pay no heed to the fact that individuals often cannot attend events or purchase tickets for individuals other than themselves.<sup>240</sup>

Furthermore, the FUTRA would require ticket resellers to include their license number when posting or offering for sale a ticket(s), in any medium, so that authorities can better identify violations of the law.<sup>241</sup> This provision will thwart abuse by anonymous Internet users who are trying to avoid criminal liability for violations of the FUTRA.<sup>242</sup> Application of this provision requiring an individual's license number to be posted with any ticket offered for resale will demand online service providers as well as ticket agents, such as StubHub, eBay, and Ticketmaster, to incorporate newly-required input fields for sellers.<sup>243</sup> When a seller posts for sale an event ticket or purchases a ticket online that is to be printed at home or exchanged via e-mail for resale, a license num-

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the names of employees if dealing with a ticket brokerage firm. Furthermore, promoters and vendors may be encouraged to provide the necessary licensing forms when individuals or season ticket holders purchase tickets – they are now participants in the secondary market. *See also* Happel & Jennings, *supra* note 3, at 77-78 (discussing other possible suggestions for ticket resale licensing requirements).

<sup>239</sup> *See* REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 28-29; Hynes, *supra* note 31, at 767 n.17. In addition to a centralized database listing the license numbers for ticket resellers, the incorporation of a user-feedback system, as eBay does with its buyers, would allow ticket purchasers to rate their experiences, thus giving "future buyers and sellers prospective information regarding trustworthiness." *Id.*

<sup>240</sup> *See* REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 29; *see also* Young, *supra* note 110 and accompanying text.

<sup>241</sup> By requiring a seller to include a license number when offering a ticket for sale online, enforcement officials will be able to monitor ticket resale abuses, such as licensees exceeding the maximum premium price and the number of tickets allowed for resale for a single event. If a licensee or non-licensee intentionally violates this provision, he may be criminally and civilly liable. *See infra* text accompanying notes 186, 188.

<sup>242</sup> *See supra* note 155 and accompanying text.

<sup>243</sup> Currently, online ticket auctions, team marketplaces, and team exchanges utilize an array of required fields for the sale of tickets, such as the name of event, date of event, and time. However, requiring a seller to input a license number when selling a ticket above its face value will encourage participation on the part of venue operators and sports teams in policing and helping to enforce the law. In addition to online service providers and ticket agents, companies offering general print or online classified advertisements will require such disclosure of their customers. *See* Freeman & Gati, *supra* note 118, at 8 (discussing *In re: Aimster Copyright Litigation*, 2003 U.S. App. LEXIS 13229 at \*33 (7th Cir. 2003), and how "the service provider must do what it can reasonably be asked to do to prevent the use of its service by 'repeat infringers.'").



ber as well as seat location must be disclosed.<sup>244</sup> This requirement should not prevent companies from providing new and enhanced technology to better serve the consumer, such as Print-at-Home ticketing or smart cards.<sup>245</sup> However, these requirements are a compromise so that the necessary reporting and security mechanisms are in place for the collection of taxes, private enforcement, and prevention of misrepresentations and fraud.<sup>246</sup>

## 2. Record Keeping Requirement

Coinciding with the theme of enhancing the identification and reporting methods of secondary ticket sales, providers offering services that facilitate the resale of tickets must also maintain records of user activity, similar to New Jersey Statutes section 56:8-27(d), where licensed brokers must maintain records of ticket sales, deposits, and refunds for a period not less than two years.<sup>247</sup> Similar to a number of current anti-scalping statutes, exceptions within the FUTRA would exist to address charity ticket auctions, non-for-profits, group sales, and the new phenomenon of websites (specifically ticket agents and vendors) that reserve tickets in order to auction them off online to the highest bidder, with no printed face value.<sup>248</sup>

## 3. Public Interest Provisions

A number of states have passed anti-scalping legislation in response to a public interest in safeguarding against exorbitant ticket prices. Therefore, a FUTRA provision limiting the number of tickets resold per licensee would open up the marketplace to more

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<sup>244</sup> *Id.* See also Angwin, *supra* note 7. Because print-at-home technology allows individuals to e-mail tickets to individuals who can then print the ticket from their personal printer, the ticket is not technically being resold and not currently covered by anti-scalping laws in most states. *Id.* Therefore, the FUTRA will address this potential abuse by requiring individuals who select this ticket-delivery method, through agents like Ticketmaster, to input a license number in a specific field so that authorities maintain records on what can be undetected illegal transactions. Although abuse will likely occur by individuals doing private deals outside the purview of authorities, criminal and civil liabilities associated with the new federal law would create a disincentive to do so.

<sup>245</sup> See *Japan Gets Digital Ticket System*, RFID J., (Aug. 21, 2002) (smart card technology allows individuals to obtain proof-of-purchase codes for specific events by downloading information from a computer and swiping the device at a reader for entrance), available at <http://www.rfidjournal.com/article/articleprint/57/-1/1/>.

<sup>246</sup> See, e.g., Gardiner, *supra* note 131; Hynes, *supra* note 31, at 767 (discussing how users who “shill bid”, a practice of bidding on their own goods, have little incentive not to do so, as the cost for winning their own auction is insignificant).

<sup>247</sup> See N.J. STAT. § 56:8-27(d) (2005); MASS. GEN. LAWS ANN. ch. 140, § 185E (2004).

<sup>248</sup> See DeRogatis, *supra* note 192; Lewis, *supra* note 18. The FUTRA must address services that allow promoters and venue operators to offer for sale tickets that do not incorporate a face price because of the inconsistencies amongst states and municipalities requiring a printed price on the face of a ticket. See *supra* note 46 and accompanying text.

individuals, while making the price of tickets better reflect their natural ticket price level where supply meets demand.<sup>249</sup> Although it remains uncertain why Gary Ackerman's Ticket Scalping Reduction Act of 1998 did not gain fervor within Congress, ignoring the fact that the secondary ticket resale market is a big business that caters to many willing consumers could not have helped.<sup>250</sup> Therefore, a provision increasing the maximum premium price of tickets for resale should encourage individuals, brokers, and this time, Congress, to possibly sign on.<sup>251</sup> Additionally, as suggested before, ticket brokers would not have to incorporate their business in a particular state to avoid anti-scalping legislation, which would create greater parity in the industry as well as in all states (and not just a handful) generating additional fees associated with incorporating a business.<sup>252</sup>

Although this provision that increases the maximum premium price of tickets dispenses with state legislation that was enacted to prevent buyers from paying exorbitant fees, additional provisions in the FUTRA would limit the use by ticket resellers of hiring or using "diggers" to stand on line to buy tickets for resellers to sell, as set out in New Jersey Statutes section 56:8-26, as well as address ticket purchase limitations.<sup>253</sup> Therefore, combining these provisions would provide a means for individuals, as well as ticket brokers, to be on equal footing as to primary ticket purchasing.<sup>254</sup> Accordingly, improving the fairness among the public in buying tickets, as well as a promoter's desire for a sellout with a preference

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<sup>249</sup> See N.Y. ARTS & CULT. AFF. LAW § 25.01 (2003). Furthermore, because individuals and ticket brokers would be restricted in the number of tickets available for resale per event, there would be a disincentive to purchase more tickets than necessary, opening the market to more resale participants; see also Happel & Jennings, *supra* note 21, at 458-60 (noting that the Internet has given brokers and customers greater comparative pricing opportunities and the adoption of an organized ticket futures market would allow ticket prices to more accurately reflect the market); *Ticket Scalping Would Be Legal*, *supra* note 213 (discussing the recently proposed Florida bill (HB 339) by Rep. Anna Benson that would allow individuals, not businesses, to sell up to ten tickets for an event where the tickets were purchased by credit card).

<sup>250</sup> See *supra* note 229 and accompanying text.

<sup>251</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 29. See also CONN. GEN. STAT. § 53-289 (2001) (stating that a seller is limited to what they are able to charge as reasonable service fees); Criscuolo, *supra* note 232, at 215 (discussing that poor draftsmanship in anti-scalping statutes has created loopholes for ticket brokers and scalpers to attach excessive fees to the purchase price of a ticket). By incorporating limitations on what can be charged as a service fee, the FUTRA will thwart exploitation by ticket brokers and scalpers.

<sup>252</sup> See *supra* note 141 and accompanying text; see also Happel & Jennings, *supra* note 21, at 449 (noting that estimates for the number of recognized U.S. ticket brokers range from 800 to over 1000).

<sup>253</sup> See N.J. STAT. § 56:8-26 (2005); *Ticket Scalping Would Be Legal*, *supra* note 213.

<sup>254</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 9.

about the mix of consumers, will likely take place.<sup>255</sup>

#### 4. Lawful Sell-Back: A No-Scalping and Scalping Zone Provision

The FUTRA would also provide a provision that requires vendors to offer street-corner scalpers, as well as cyberscalpers, a method for season ticket holders and other ticket holders to lawfully sell back tickets to the venue for events they will not be able to attend, without the necessary licensing requirement.<sup>256</sup> Allowing this sell-back feature, which can be equated to a refund policy, may stamp out the nuisance effects surrounding traditional ticket scalping practices.<sup>257</sup> Furthermore, a provision allowing street-corner scalping in a designated area near a venue will eradicate some of the discriminatory practices occurring with team marketplaces and ticket exchanges.<sup>258</sup> Moreover, lawful ticket scalping will no longer be the province of Internet-savvy individuals; and, as addressed earlier, state and local regulation will still be available for matters related to health and safety. Nevertheless, the FUTRA would exhibit a “clear and manifest purpose” to prevent unreasonable legislation by states to eradicate street-corner scalping, such as imposing a maximum distance limitation for reselling near a venue as addressed in New York Arts and Cultural Affairs Law section 25.11.<sup>259</sup>

#### 5. Enforcement, Empowerment and Central Authority

An additional provision establishing a department within the SEC or similar organization, which focuses on the secondary ticket resale industry, would serve as the supervising body in enforcing the FUTRA.<sup>260</sup> This department will be responsible for hiring and

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<sup>255</sup> See Lewis, *supra* note 10. In the past, benefit shows auctioning tickets have worked and concert industry officials say “that auctions will get more fans into seats at a time when almost half of all concert tickets go unsold nationwide.” *Id.* David Goldberg, senior vice president of strategic marketing and development of Ticketmaster, states that “[t]here’s a lot of value from the artist’s perspective that, in trying to develop and expand your audience, playing in front of more people is a good thing . . . .” *Id.*

<sup>256</sup> See N.J. STAT. § 56:8-35.3 (2005).

<sup>257</sup> See SPORT AND RECREATION VICTORIA, *supra* note 145.

<sup>258</sup> See Happel & Jennings, *supra* note 3, at 77 (discussing the Australian race track market clearing scheme and how scalpers designated in an area can be arrested more easily).

<sup>259</sup> The purpose of limiting the distance where one can resell tickets is to prevent states from enacting unreasonably restrictive laws; venues will now be required to provide a method for resale that combats the nuisance effect caused by street-corner scalping. Furthermore, limiting a state’s power to adopt these laws would prevent the potential bias created by venue operators participating in the secondary resale market and lobbying legislatures in order to remove their competition. See also U.S. Const. art. VI, cl. 2, which invalidates state laws that interfere with, or are contrary to, federal law.

<sup>260</sup> Because of the similarities between the secondary ticket resale market and the secondary securities markets, in addition to the disclosure and registration laws existing in the Federal Securities Act of 1933 and 1934, enforcement of the FUTRA by a division within the SEC is fitting. The SEC is very active in pursuing enforcement activities in Internet

paying for security around venues so that a “presumption that selective enforcement of the law has occurred” will diminish.<sup>261</sup> Fees generated by license registrations, renewals, and the collection of taxes that in the past have gone unrecognized, will sustain the daily activities of this new department as well as pay for the necessary security measures.<sup>262</sup>

For all these proposed provisions to be effective in safeguarding the public against fraud, extortion, exorbitant rates, and discriminatory abuses, an increase in criminal and civil liability is compulsory.<sup>263</sup> Therefore, the FUTRA will include higher penalties than found in today’s state anti-scalping legislation, while criminalizing illegal transactions as a misdemeanor as well as a felony for habitual abuse.<sup>264</sup> Therefore, the authorities who are now responsible for enforcing the FUTRA would be encouraged to find violators, making the fine finally fit the crime.<sup>265</sup> The inclusion of a provision making specific violations of the FUTRA susceptible to civil damage liability will also encourage obedience on the part of resellers.<sup>266</sup>

## 6. Other Considerations

While the FUTRA incorporates a number of provisions found in today’s anti-scalping legislation, along with addressing discriminatory practices taking place in the secondary ticket resale market, other legislation recommendations presented in the 1999 Office of the New York State Attorney General Report suggest mechanisms that will thwart abuse in the industry. Such suggestions include provisions discouraging venue operators and ticket agents from receiving bribes<sup>267</sup> for special arrangements with resellers, disclosing the number of tickets available for sale to the primary market, and granting the Attorney General the authority to obtain injunctive

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matters. See LAW OF THE INTERNET § 11.09 (Matthew Bender 2004). The SEC has formed the Office of Internet Enforcement (“OIE”) to go after online securities fraud and coordinate investigations nationwide by its own surveillance team and investigators. *Id.*

<sup>261</sup> See *supra* note 157 and accompanying text.

<sup>262</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 28. In order for federal and state governments to collect the associated sales tax involved in a ticket resale, the FUTRA might be required to adopt a broader definition of “admission charge” for a state to adopt in its tax law, so that an applicable service fee imposed by a subsequent seller will be recognized. *Id.*

<sup>263</sup> See N.Y. ARTS & CULT. AFF. LAW § 25.01 (2003).

<sup>264</sup> See *supra* note 70 and accompanying text; WIS. STAT. § 42.07 (2004).

<sup>265</sup> See *supra* note 156 and accompanying text.

<sup>266</sup> See 720 ILL. COMP. STAT. 375/3 (2004). See also Criscuolo, *supra* note 232, at 218 (suggesting to allow ticket purchasers to sue scalpers for violations of the scalping law not only for the price difference but for additional penalties).

<sup>267</sup> See 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).

relief and court-ordered disclosure of records – a recommendation that would greatly expand the enforcement of FUTRA.<sup>268</sup>

#### CONCLUSION

Recently, it has become increasingly clear that existing anti-scalping legislation has failed to provide necessary protection to consumers, while favoring venue operators and promoters, who are now participants in the secondary ticket market. Because local legislation must continually balance the competing interests of a primary ticket sale purchaser, venue operator and ticket reseller, a federal uniform ticket resale act is needed to prevent discriminatory practices by one participant in the secondary market over another. While a new federal uniform law with a maximum mark-up provision would eliminate reasons for having a truly dynamic auction for event tickets—which may be ill-received by operators of Internet auctions, team marketplaces and ticket exchanges—venue operators and promoters will be encouraged to better predict the price and demand for their primary ticket sale offerings. Nevertheless, allowing greater access to these intermediary services by *all* resellers could encourage more postings of tickets and additional service fees being generated because of the augmented number of legal resellers. Since countless individuals today are prohibited from offering their tickets for resale, either because of anti-scalping laws or policies adopted by team marketplaces and exchanges preventing non-season ticket holders from participating in its service offerings, a federal uniform ticket resale act will allow greater access for all geographically dispersed citizens to partake in a more natural and fair secondary market.

*Daniel J. Glantz\**

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<sup>268</sup> See REPORT ON TICKET DISTRIBUTION PRACTICES, *supra* note 4, at 28-29.

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