

2010

Who's the Boss? The Need for Regulation of the Ticketing Industry

Zachary H. Klein

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjcfcl>

Recommended Citation

Zachary H. Klein, *Who's the Boss? The Need for Regulation of the Ticketing Industry*, 5 Brook. J. Corp. Fin. & Com. L. (2010).
Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol5/iss1/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of Corporate, Financial & Commercial Law by an authorized editor of BrooklynWorks.

WHO'S THE BOSS? THE NEED FOR REGULATION OF THE TICKETING INDUSTRY

INTRODUCTION

To many music fans, the chance to see their favorite performers live is a rare and special experience. Given the infrequency of such events, consumers are often willing to spend large sums of money to obtain tickets to attend these shows. However, these consumers may be unaware that they are regularly being misled by the largely unregulated ticketing industry into overpaying for their tickets.

On Monday, February 2, 2009, at 10 a.m., tickets to Bruce Springsteen and the E Street Band's "Working on a Dream" tour¹ went on sale to the public through Ticketmaster.com² for the May 21, 2009 and May 23, 2009, shows at the Izod Center at the New Jersey Meadowlands, in East Rutherford, New Jersey.³ Because Springsteen hails from New Jersey,⁴ "[h]undreds of thousands of local Springsteen fans were" seeking tickets to these shows.⁵ Within minutes of the commencement of the sale, consumers were met with error messages and were redirected⁶ to TicketsNow.com,⁷ a wholly-owned subsidiary of Ticketmaster, Inc. (Ticketmaster) and the second largest secondary ticketer in the world.⁸ There, some tickets were sold at prices four times greater than their actual face value.⁹ This was done despite the fact that original tickets to the shows were still available on Ticketmaster.com.¹⁰ Instead of offering tickets at face value on its primary

1. Daniel Kreps, *Bruce Springsteen Announces "Working on a Dream" Tour*, ROLLING STONE MUSIC (Jan. 27, 2009), <http://www.rollingstone.com/music/news/15765/91347> (announcing a 26-show U.S. concert tour that followed the band's late January 2009 release of their album *Working on a Dream*).

2. Ticketmaster is a leader in "e-commerce and ticketing sites online, operating in 18 global markets, and with 19 worldwide call centers." About Ticketmaster, http://www.ticketmaster.com/h/about_us.html?tm_link=tm_homeA_i_abouttm (last visited Sept. 20, 2010). "Ticketmaster has been connecting fans to live entertainment since 1976, and is a Live Nation Entertainment, Inc. company." *Id.*

3. Peggy McGlone, *Ticketmaster Reveals Details of Rapid Sales: There are 38,778 Tickets for Two N.J. Concerts by Bruce Springsteen. You're Chances of Getting One? ABOUT ZERO*, STAR-LEDGER (Newark, N.J.), May 21, 2009, at 1 [hereinafter McGlone, *Ticketmaster Springsteen Concert*].

4. DAVE MARSH, BRUCE SPRINGSTEEN: TWO HEARTS: THE DEFINITIVE BIOGRAPHY, 1972-2003, at 278 (2004).

5. McGlone, *Ticketmaster Springsteen Concert*, *supra* note 3.

6. *Id.*; see also Ben Sisario, *Ticketmaster Reaches Settlement on Complaints of Deceptive Sales*, N.Y. TIMES, Feb. 19, 2010, at B3 (describing the details of a settlement between the Federal Trade Commission and Ticketmaster stemming from complaints from "thousands of customers [that claimed that] Ticketmaster's Web site . . . pointed [them] to TicketNow.com . . . [and] offered similar tickets at inflated prices").

7. Ticketmaster purchased TicketNow in January 2008 for \$265 million. Jon Hood, *TicketsNow Once Again in Hot Water*, CONSUMER AFFAIRS (May 21, 2009), <http://www.consumeraffairs.com/news04/2009/05/ticketsnow.html>.

8. *Id.*

9. *Id.*

10. *Id.*

ticketing site, Ticketmaster blocked those primary sales and immediately sent consumers to its secondary ticketing Web site, TicketsNow.com, without warning, to purchase more expensive tickets.¹¹

Almost immediately, deceived consumers began filing complaints with the New Jersey Attorney General's (Attorney General) Office and the New Jersey Division of Consumer Affairs.¹² During the course of the investigation, Ticketmaster revealed that a software glitch was the official source of the problem.¹³ However, in response to an open letter posted by Springsteen to his fans on his Web site blaming Ticketmaster for the mishandling of his concert ticket sales,¹⁴ Ticketmaster CEO Irving Azoff acknowledged that in certain circumstances the company did intentionally direct consumers to TicketsNow.com.¹⁵ Ticketmaster and the Attorney General's Office eventually reached a settlement in which the company agreed to provide for consumers who overpaid for their tickets and to change its business practices in order to better protect and inform its customers.¹⁶

This incident is not an isolated occurrence, but exemplifies a much bigger problem in the largely unregulated ticketing industry.¹⁷ In both the primary¹⁸ and secondary¹⁹ ticketing markets, companies are engaging in predatory practices that adversely affect consumers.²⁰ In the primary

11. *See id.*

12. *See* Press Release, New Jersey Division of Consumer Affairs, Attorney General Announces Settlement with Ticketmaster on Sale of Springsteen Tickets (Feb. 26, 2009), <http://www.state.nj.us/lps/ca/press/brucefinal.htm> [hereinafter N.J. AG Settlement Press Release].

13. *Ticketmaster Changes Sales Practices After Springsteen Flap*, CBC NEWS (Feb. 23, 2009), <http://www.cbc.ca/consumer/story/2009/02/23/ticketmaster-settlement.html>.

14. *Bruce Springsteen Ticketmaster Controversy! Letters from the Boss, a Congressman & CEO + Live Nation, TicketsNow*, BROOKLYN VEGAN (Feb. 5, 2009, 11:13 AM), http://www.brooklynvegan.com/archives/2009/02/bruce_springste_17.html.

15. Ray Waddell, *Ticketmaster Responds to Springsteen, Fans*, BILLBOARD.COM (Feb. 5, 2009, 12:37 PM), <http://www.billboard.com/bbcom/news/ticketmaster-responds-to-springsteen-fans-1003938632.story#/bbcom/news/ticketmaster-responds-to-springsteen-fans-1003938632.story>. In Azoff's defense, he stated that "[t]his redirection only occurred as a choice when we could not satisfy fans' specific search request for primary ticket inventory." *Id.*

16. N.J. AG Settlement Press Release, *supra* note 12. The settlement terms included: a series of concessions towards consumers directly affected by the Springsteen ticket fiasco; "a wall between Ticketmaster and its ticket re-selling subsidiary TicketsNow.com for at least a year"; "approval from the [N.J.] Attorney General for any links between [Ticketmaster's] 'No Tickets Found' Internet page to its TicketsNow re-sale website"; no "paid Internet search advertising that would lead consumers searching for 'Ticketmaster' on Internet search engines to its TicketsNow re-sale site"; a guarantee that all tickets "it receives for sale to the general public will be sold on its primary market website"; and no sale or offer of sale of "any tickets on the TicketsNow.com re-selling website until the initial sale begins on its primary website." *Id.*

17. *See* Hood, *supra* note 7 (indicating online ticket market problems for recent Hannah Montana and Phish shows).

18. *See* discussion *infra* Part I.A.

19. *See* discussion *infra* Part I.B.

20. *See* *Competition in the Ticketing and Promotion Industry: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 5-7 (2009) (statement of N.J. Rep. Pascrell, Jr.).

ticketing market such predatory practices include diverting tickets to secondary ticket sellers,²¹ and having a limited, unknown number of tickets available for public sale,²² which are often the result of limited ticket pre-sale events.²³ In the secondary market, predatory practices include exorbitant markups on ticket prices,²⁴ the sale of tickets before the initial primary ticket release,²⁵ and the sale of “phantom tickets.”²⁶ Regulation is necessary to combat these predatory practices, protect the consumer, and rectify the ills that currently exist. Representative Bill Pascrell, Jr.²⁷ has proposed federal legislation; the Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009 (the BOSS ACT, or the Act),²⁸ which seeks to “overhaul the concert ticket industry and improve fans’ chances of scoring tickets to their favorite acts.”²⁹

This note explores the need for regulation of the primary and secondary ticketing markets and suggests that the passage of federal legislation is the solution. In light of the recent and repeated problems affecting the ticketing industry, and the prevalence of predatory practices adverse to consumer interests, congressional action is necessary. The BOSS ACT will protect consumers and rectify predatory practices throughout the primary and secondary ticketing markets; it will make the ticketing industry more reliable and transparent, and afford regular fans a fair chance to attend their favorite events.

Part I of this note presents an overview of the ticketing industry as a largely unregulated trade consisting of distinct primary and secondary markets, and identifies the major players in each segment of the industry. Part II examines the predatory practices currently being employed and the adverse effect such practices are having on consumers. Part III analyzes the proposed BOSS ACT and the effect it could have on the industry, and advocates that Congress swiftly pass this legislation. Finally, Part IV proposes additional rules the Federal Trade Commission (FTC) should

21. Hood, *supra* note 7.

22. See McGlone, *Ticketmaster Springsteen Concert*, *supra* note 3.

23. See Clark P. Kirkman, Note, *WHO NEEDS TICKETS? Examining Problems in the Growing Online Ticket Resale Industry*, 61 FED. COMM. L.J. 739, 751 (2009) (describing the anger of parents who received no ticket purchasing privileges despite paying membership fees to have access to ticket presales).

24. See, e.g., Ethan Smith, *Concert Tickets Get Set Aside, Marked Up by Artists, Managers*, WALL ST. J., Mar. 11, 2009, at B1.

25. See, e.g., Editorial, *Who Can Tame the Scalpers?*, N.Y. TIMES, June 1, 2009, at A20.

26. *Id.* (describing phantom tickets as the sale of tickets that do not exist).

27. Representative Pascrell, Jr. is a Democrat representing the 8th Congressional District of New Jersey. *Biography of Bill Pascrell, Jr.*, HOUSE.GOV, <http://pascrell.house.gov/news/biography.shtml> (last visited Sept. 24, 2010).

28. Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, H.R. 2669, 111th Cong. (2009).

29. Peggy McGlone, *The BOSS ACT Rewrites Rules on Ticket Sales*, STAR-LEDGER (Newark, N.J.), June 1, 2009, at 1 [hereinafter McGlone, *The BOSS ACT Rewrites*].

promulgate upon the passage of the BOSS ACT to facilitate the regulation of the ticketing industry.

I. OVERVIEW OF THE MARKETS FOR TICKETS

The ticketing industry emerged out of necessity for commercial entertainment.³⁰ According to several historians, “commercial entertainment began in sixteenth century England with the introduction of for-profit theatres.”³¹ At that time, theaters were divided into sections and consumers were charged incrementally differing amounts to access more exclusive sections.³² From what was once a simple ticketless process, ticketing has developed into a thriving, multi-billion dollar industry consisting of many buyers and many sellers in two distinct markets: the primary ticketing market and the secondary ticketing market.³³

A. PRIMARY TICKETING MARKET

A ticket,³⁴ which entitles the bearer the right to enter a particular event, is first sold in a primary sale³⁵ in the primary market.³⁶ To understand how the primary market works, consider the typical organization of a concert. A promoter will hire an act, book a venue, and all parties involved will negotiate a plan to divide potential profits.³⁷ The promoter will generally set the ticket price and determine when the “advertising and selling” of the tickets should begin.³⁸ The venue will make some tickets available “through the box office³⁹ where the event will be held and the promoter (or the venue) [will] also contract[] with a ticketing agency,” such as Ticketmaster, to facilitate the majority of the ticket sales.⁴⁰ Tickets issued by the venue are placed on the market, and the venue is considered the “primary ticket

30. See Pascal Courty, *Some Economics of Ticket Resale*, 17(2) J. ECON. PERSP. 85, 90 (2003).

31. *Id.*

32. *Id.*

33. See *id.* at 87–89.

34. “The term ‘ticket’ means a ticket of admission to a sporting event, theater, musical performance, or place of public amusement of any kind.” Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, H.R. 2669, 111th Cong. § 6(10) (2009). The definitions adopted throughout this note are the definitions utilized in the pending BOSS ACT legislation.

35. See Courty, *supra* note 30, at 87 (describing the general mechanics of a primary sale). Additionally, “[t]he term ‘primary sale,’ with regards to a ticket, means the initial sale of a ticket that has not been sold previous to such sale, by a primary ticket seller to the general public on or after the date advertised such sale.” H.R. 2669 § 6(7).

36. OFFICE OF N.Y. ATTORNEY GEN., “WHY CAN’T I GET TICKETS?”: REPORT ON TICKET DISTRIBUTION PRACTICES 16 (1999) [hereinafter SPITZER REPORT].

37. Courty, *supra* note 30, at 87.

38. *Id.*

39. “The term ‘box office’ means a physical location where tickets are offered for primary sale.” H.R. 2669 § 6(3).

40. Courty, *supra* note 30, at 87.

seller”⁴¹ or “original ticket seller.”⁴² The “face value”⁴³ of the ticket is printed on the ticket and is comprised of the “base price”⁴⁴ as well as some of the “ancillary charges”⁴⁵ the ticketing agency, and sometimes the box office, adds on.⁴⁶ Despite the fact that ticketing agencies charge additional fees on top of the base price, most tickets are typically sold through them because agencies can reach a significantly larger audience than the box office.⁴⁷

Estimates of the total value of tickets sold per year vary greatly. In 2008, Ticketmaster sold nearly 142 million tickets valued at over \$8.9 billion.⁴⁸ According to Forrester Research, the primary ticketing sales market in the U.S. for live music and sporting events approximates \$22 billion per year.⁴⁹ Other studies, from the late 1990s to the early 2000s, “estimate[] [that the] total primary market tickets vary in range from \$7 to \$60 billion, with that range depending on the set of events” that were considered.⁵⁰ Although Ticketmaster dominates the primary ticket market,

41. H.R. 2669 § 6(8).

The term ‘primary ticket seller’ means an owner or operator of a venue or a sports team, a manager or provider of an event, or a provider of ticketing services (or an agent of such owner, operator, manager, or provider) that engages in the primary sale of tickets for an event or retains the authority to otherwise distribute tickets.

Id.

42. SPITZER REPORT, *supra* note 36, at 16.

43. “The term ‘face value’ means the total price of a ticket including both the base price and any ancillary charges.” H.R. 2669 § 6(6).

44. “The term ‘base price’ means the price charged for a ticket other than any ancillary charges.” *Id.* § 6(2).

45. “The term ‘ancillary charges’ means service fees, convenience charges, parking fees, and other charges associated with the purchase of a ticket and not included in the base price of the ticket.” *Id.* § 6(1).

46. Courty, *supra* note 30, at 87.

47. *Id.*

48. Press Release, Sen. Kohl, Kohl Urges Department of Justice to Closely Scrutinize Ticketmaster/Live Nation Merger (July 27, 2009), http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2986.

49. Press Release, TicketNetwork.com, Ticket Resale Industry Protects Consumers With Fair Market Prices and Secure Transactions (Feb. 4, 2009) (on file with author) [hereinafter Consumer Protection Press Release].

50. Courty, *supra* note 30, at 87; Stephen K. Happel & Marianne M. Jennings, *Creating A Futures Market for Major Event Tickets: Problems and Prospects*, 21 CATO J. 443, 448–49 (2002), available at <http://www.cato.org/pubs/journal/cj21n3/cj21n3-6.pdf>.

Using data from *U.S. Statistical Abstracts*, *Variety*, *Newsday*, *Amusement Business*, *Team Marketing Report*, and the League of American Theaters and Productions, TicketAmerica (1998) derived an estimate of \$7.2 billion spent through primary ticket channels in 1997. The Kelsey Group (1999) gives estimates and forecasts of total ticket sales from 1999 to 2004 as \$14.5 billion, \$16.25 billion, \$18.1 billion, \$19.9 billion, \$21.9 billion, and \$24.4 billion, respectively. LiquidSeats (2001) estimates the face value of all tickets sold in the United States for live events and attractions in 1999 to be \$16.7 billion. In contrast, TickAuction.com (2000) finds the primary ticket market to be over \$41 billion in 2002, and EventTixx finds the “Tier 1 Event Marketplace” (major

Live Nation,⁵¹ TeleCharge,⁵² and TicketWeb⁵³ are other significant players.⁵⁴

B. SECONDARY TICKETING MARKET

Once a ticket has been sold in the primary ticket market a ticket “resale” or “secondary sale”⁵⁵ by a secondary ticket seller⁵⁶ can occur in the secondary market.⁵⁷ This process is generally referred to as “ticket

league sports, college football and basketball, concerts, Broadway theater, select golf and tennis tournaments, etc.) to have ticket sales in excess of \$60 billion in 2000.

Happell & Jennings, *supra* at 448–49.

51. Live Nation About Us, <http://www.livenation.com/company/getCompanyInfo> (last visited Sept. 24, 2010).

Live Nation Entertainment (NYSE-LYV) is the largest live entertainment company in the world, consisting of five businesses: concert promotion and venue operations, sponsorship, ticketing solutions, e-commerce and artist management. Live Nation seeks to innovate and enhance the live entertainment experience for artists and fans: before, during and after the show.

In 2009, Live Nation sold 140 million tickets, promoted 21,000 concerts, partnered with 850 sponsors and averaged 25 million unique monthly users of its e-commerce sites.

Id.

Merger talks between Live Nation and Ticketmaster became public in February 2009. See Ethan Smith, *Ticketmaster, Live Nation Near Merger*, WALL ST. J., Feb 4, 2009, at A1. The merger was completed in January 2010, after the Justice Department announced conditions that had to be met before they would accept the merger. Ben Sisario, *Justice Dept. Clears Ticketmaster Deal*, N.Y. TIMES, Jan. 26, 2010, at B4. Both parties agreed to the conditions which included Ticketmaster selling off one of its ticketing divisions and licensing its software to a competitor, as well as 10 years of “tough antiretaliation provisions” to prevent monopolistic control of the industry. *Id.*

52. About Telecharge.com, <http://www.telecharge.com/aboutUs.aspx> (last visited Dec. 21, 2009) (describing Telecharge.com as the “official ticketing agency for most of New York City’s theatres” and as a division of The Shubert Organization Inc.).

53. About TicketWeb, <http://event.ticketweb.com/about/index.html> (last visited Dec. 21, 2009).

TicketWeb is a self-service online ticketing and event marketing application operated by Ticketmaster, the world’s leading ticketing company. The proprietary system allows venues and event providers of any size to manage the full range of box office operations on the Web, with the added value of integration and distribution through Ticketmaster.com.

Id.

54. Press Release, Ticket News, Ticket News Announces Top Ticket Sellers for Week Ending October 10, 2009 (Oct. 16, 2009), <http://www.ticketnews.com/Ticket-News-Announces-Top-Ticket-Sellers-for-Week-Ending-October-10-2009>.

55. “The terms ‘resale’ or ‘secondary sale,’ with regards to a ticket, mean any sale of a ticket that occurs after the initial sale of the ticket.” Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, H.R. 2669, 111th Cong. § 6(9) (2009).

56. “The term ‘secondary ticket seller’ means a person engaged in reselling tickets for an event and who charges a premium in excess of the face value. Such term does not include an individual who resells fewer than 25 tickets during any 1-year period.” *Id.* § 6(12).

57. SPITZER REPORT, *supra* note 36, at 17.

scalping.”⁵⁸ Institutional secondary ticket sellers are considered either ticket scalpers or ticket brokers.⁵⁹

Ticket scalpers first emerged in the late nineteenth and early twentieth century as unauthorized sellers of the unused portions of long-distance railroad tickets.⁶⁰ Today, ticket speculators are more generally known as scalpers; a ticket speculator is “[a] person who buys tickets and then resells them for more than their face value; in slang, a [ticket] scalper.”⁶¹ Ticket scalping is broadly defined as the reselling of tickets to entertainment or sporting events at a price that is dictated by the marketplace.⁶² The more popular the event, the more likely it is that ticket scalping will occur and the higher the price at which the tickets will be sold.⁶³ However, scalping, at face value or even for below face value, will often still occur when an event “is in low demand or not sold out.”⁶⁴

In contrast to ticket scalpers, ticket brokers are formal businesses that engage in the buying and selling of tickets.⁶⁵ Ticket brokers have been around since the turn of the twentieth century, at which time they served as “remote sales outlets for theatres and ballparks,” where customers could purchase tickets without having to travel long distances.⁶⁶ Today, companies such as Ticketmaster have replaced that primary ticketing function, relegating ticket brokers into the secondary ticketing market.⁶⁷

58. See Jonathan C. Benitah, Note, *Anti-Scalping Laws: Should They Be Forgotten?*, 6 TEX. REV. ENT. & SPORTS L. 55, 57 (2005).

59. See *id.* at 57–59 (describing the history of ticket scalpers and ticket brokers).

60. See generally *Burdick v. People*, 36 N.E. 948 (Ill. 1894); *Fry v. State*, 63 Ind. 552 (Ind. 1878). The railroad would offer discounts on round trip tickets, so scalpers would purchase these “deals” and resell the unused portions to other customers. See *Ill. Cent. R.R. Co. v. Caffrey*, 128 F. 770, 770–71 (C.C.E.D. Mo. 1904). Soon thereafter, similar scalping enterprises sprang up with regards to theater tickets, in which “ticket speculators,” as they were known, would buy large batches of tickets from the box office and attempt to sell them outside of the venue above face value. See William O. Logan, *Ticket Scalpers Arrested*, THE BUFFALONIAN, <http://www.buffalonian.com/history/articles/1851-1900/1899TICKETSCALPERS.html> (last visited Sept. 9, 2010) (quoting *Ticket Speculators*, BUFFALO EXPRESS, Dec. 26, 1899).

61. BLACK’S LAW DICTIONARY 1520 (8th ed. 2004).

62. Thomas A. Diamond, *Ticket Scalping: A New Look at an Old Problem*, 37 U. MIAMI L. REV. 71, 71 (1982).

63. Jonathan Bell, Note, *Ticket Scalping: Same Old Problem with a Brand New Twist*, 18 LOY. CONSUMER L. REV. 435, 438 (2006). Additionally, the unique quality of each event makes tickets desirable whether the ticket price is high or low. See Stephen K. Happel & Marianne M. Jennings, *The Folly of Anti-Scalping Laws*, 15 CATO. J. 65, 66–67 (1995), available at <http://www.cato.org/pubs/journal/cj15n1-4.html>.

64. Bell, *supra* note 63, at 438 n.16.

65. TicketLiquidator Glossary Page, TICKETLIQUIDATOR, <http://www.ticketliquidator.com/dictionary.aspx> (last visited Dec. 21, 2009).

66. 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, 1172 (2004).

67. *Id.* at 1172–73. Furthermore, ticket brokers are typically small firms with only a few employees and \$3–4 million in revenue per year. Happel & Jennings, *supra* note 50, at 449. For the purposes of this article, ticket scalping will be used to reference both ticket scalpers and ticket brokers.

The ticket scalping process typically begins with the purchase of tickets from the promoter, venue, or ticketing agency of the event, usually in bulk, and then waiting for the ticket supply to sell out.⁶⁸ The scalper then offers the tickets to consumers at the marketplace price.⁶⁹ This process of consumers purchasing tickets from the scalper, a secondary seller, rather than the venue or ticketing agency, the primary seller, creates the secondary market for tickets.⁷⁰

Ticket scalping is derived, in part, by the common practice of promoters selling tickets at below market prices.⁷¹ The rules of supply and demand justify this practice as lower prices will create a higher demand,⁷² resulting in more tickets sold, and the higher probability of a sellout, the promoters' ultimate goal.⁷³ This practice creates an ideal situation for ticket scalpers, but also for the average ticket holder who either cannot or no longer wants to attend the event.⁷⁴ Because many consumers are willing to pay more than the advertised prices in the primary market for high demand tickets, scalpers can purchase premium tickets at face value and sell them to the highest bidder, confident that they will not be stuck with the tickets.⁷⁵

The Internet has revolutionized the ticketing industry. A process that once required going in person to purchase tickets or speaking with a ticketing agent on the phone can now be completed almost instantaneously, twenty-four hours a day, in the comfort of one's own home.⁷⁶ This has been especially beneficial to the secondary ticketing market.⁷⁷ Scalpers may—through the use of an “online resale marketplace,”⁷⁸ such as StubHub,⁷⁹

68. Diamond, *supra* note 62, at 72.

69. *See id.*

70. *See* Jasmin Yang, Note, *A Whole Different Ballgame: Ticket Scalping Legislation and Behavioral Economics?*, 7 VAND. J. ENT. L. & PRAC. 111, 111 (2004).

71. Phyllis L. Zankel, *Wanted: Tickets—A Reassessment of Current Ticket Scalping Legislation and the Controversy Surrounding Its Enforcement*, 2 SETON HALL J. SPORT L. 129, 144 (1992). Promoters engage in this practice to promote good will among their followers, which they hope will yield greater long-term profits. *Id.*

72. Simon, *supra* note 66, at 1176.

73. *See id.* By pricing tickets below what the average consumer would spend for the ticket, the likelihood of shortage of tickets is increased. *See id.*

74. *See id.* The ticket scalper can step in as a middleman and purchase the tickets from the original ticket holder who no longer desires to attend above face value at a profit to that individual and then turn around and sell them at still a higher price to another consumer who desires entry into the event, creating a profit for both. *Id.*

75. *See* Robert E. Freeman & Daniel Gati, *Internet Ticket Scalping: If You Can't Beat 'em, Join 'em*, 21 ENT. & SPORTS LAW. 6, 6 (2003).

76. *See* Benitah, *supra* note 58, at 74–75; *see also* Bruce Orwall, *Online: Ticket Scalpers Find a Home on the Web*, WALL ST. J., Feb. 4, 1999, at B1.

77. *See* Kirkman, *supra* note 23, at 741.

78. “The term ‘online resale marketplace’ means an Internet website—(A) that facilitates or enables the resale of tickets by secondary ticket sellers; or (B) on which secondary ticket sellers offer tickets for resale.” Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, H.R. 2669, 111th Cong. § 6(11) (2009).

79. “StubHub is the world's largest ticket resale marketplace, enabling fans to buy and sell tickets to tens of thousands of sports, concert, theater and other live entertainment events.”

eBay,⁸⁰ Craigslist,⁸¹ RazorGator,⁸² and TicketsNow—be able to offer their inventory to the widest array of consumers and collect substantial returns.⁸³

The estimate of the value of tickets sold in the secondary market varies. While scalping was once an illicit, cash-only practice that took place outside of event venues, secondary ticket reselling over the Internet can provide a more readily analyzable source of industry activity data.⁸⁴ Forrester Research estimates that “U.S. online secondary ticket sales will grow at a 12% [rate] over the next five years, reaching \$4.5 billion by 2012.”⁸⁵ Other sources indicate that the U.S. resale market is a \$10 billion business, with online sales accounting for \$3 billion per year, and rising.⁸⁶ Another figure cited estimates of secondary ticketing sales to be between \$2 and \$14 billion.⁸⁷ Regardless of the most precise number, the secondary market now comprises a substantial portion of the ticket industry.

II. PREDATORY PRACTICES OF THE TICKETING INDUSTRY

The primary and secondary ticketing markets have been actively working together for several years. The first time two major primary and secondary ticketing companies worked together to cross-promote and sell tickets was in 2007.⁸⁸ By blurring the line between primary and secondary

StubHub is the Fan’s Ticket Marketplace, STUBHUB!, <http://www.stubhub.com/about-us/> (last visited Sept. 29, 2010). StubHub was acquired by eBay in January 2007. eBay Inc., Current Report (Form 8-K) (Jan. 10, 2007).

80. “With more than 90 million active users globally, eBay is the world’s largest online marketplace, where practically anyone can buy and sell practically anything.” *Who We Are—eBay Inc.*, <http://www.ebayinc.com/who> (last visited Dec. 21, 2009).

81. Craigslist is a centralized network of online communities, featuring free online classified advertisements—with sections devoted to jobs, housing, personals, for sale, services, community, and discussion forums. See Craigslist Factsheet, CRAIGSLIST.ORG, <http://www.craigslist.org/about/factsheet> (last visited Sept. 29, 2010).

82. RazorGator is a ticket resale marketplace that empowers its clients by providing them a connection to buy or sell “Hard-to-Get®” tickets to any event on the planet. RazorGator—About Us, <http://www.razorgator.com/tickets/about-us> (last visited Sept. 29, 2010).

83. See Kirkman, *supra* note 23, at 740 (describing industry returns of \$3 billion in 2006).

84. See, e.g., Courty, *supra* note 30, at 88 (citing the total number of tickets available for sale, for a certain number of events, along with the auction prices, for a given day in August 2002 on eBay).

85. Consumer Protection Press Release, *supra* note 49.

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

87. Happel & Jennings, *supra* note 50, at 448–49 (citing estimates that made different assumptions as to the percentage of primary sale tickets brokers would resell in the secondary market).

88. Alfred Branch Jr., *Tickets.com and RazorGator: Blurring the Lines Between Primary and Secondary*, TICKETNEWS.COM (Jun. 26, 2007), <http://www.ticketnews.com/Tickets.com-and-RazorGator-Blurring-the-Lines-Between-Primary-and-Secondary27266>. RazorGator and Major League Baseball’s Tickets.com used “Tickets.com customer database to promote events where Tickets.com [was] not the primary seller.” *Id.* Tickets.com decided to send a RazorGator newsletter to the Tickets.com customer database advertising an upcoming Dave Matthews Band

markets, primary ticket sellers are able to evade public scrutiny and appear to “distance themselves from the secondary market,” while maintaining significant control of that market.⁸⁹ Although the outsourcing of tickets by primary ticketing companies to the secondary ticketing market may appear to be an innocent practice,⁹⁰ such cooperation between the two ticketing markets fosters rampant predatory practices that deceive the public.⁹¹

Predatory practices are widespread in both the primary and secondary ticketing markets. In the primary market, such practices include diverting tickets to secondary ticketing market sellers,⁹² having a limited, unknown number of tickets available for public sale,⁹³ and ticket presale events that are available to only a select group of consumers thereby limiting the number of tickets available to the public at large.⁹⁴ Predatory practices in the secondary market include the use of exorbitant ticket price markups,⁹⁵ the sale of tickets before the initial primary release,⁹⁶ and the sale of “phantom tickets.”⁹⁷ All of these practices adversely affect the consumers who are forced to pay higher prices for fewer available tickets, resulting in an economic loss to consumers.⁹⁸ The predatory practices and their effect on consumers will be analyzed in turn.

A. BAIT-AND-SWITCH: DIVERTING TICKETS TO AFFILIATED SECONDARY MARKET SELLERS

Although the primary ticketing market is considerably larger than the secondary market in terms of the number of ticket sales and value of the industry as a whole,⁹⁹ primary sellers face a limitation that does not affect their secondary market counterparts: primary ticketers are limited in what they may charge per ticket to the base value plus ancillary charges.¹⁰⁰ In an

tour, in which Tickets.com was not the primary seller, and RazorGator was selling tickets only as a secondary seller. *Id.*

89. *Id.*

90. *Id.* (noting legitimate aspects of the cooperation between the primary and secondary markets, such as the reality that “it’s more profitable to outsource secondary marketing sales than [sic] do it internally”).

91. *See, e.g., Hood, supra* note 7 (citing several examples of predatory practices when the primary and secondary ticket markets work together).

92. *Id.*

93. *See, e.g., McGlone, Ticketmaster Springsteen Concert, supra* note 3.

94. *See id.*

95. *See, e.g., Smith, supra* note 24.

96. *See, e.g., Who Can Tame the Scalpers?, supra* note 25.

97. *Id.* Phantom tickets refer to the sale of tickets that do not exist, including sales for non-existent sections. *See id.*

98. *See Simon, supra* note 66, at 1176–77 (discussing the economic transfer that occurs as a result of ticket purchaser’s willingness to pay higher amounts than charged by the box office, thereby allowing the “consumer surplus” to be transferred to secondary sellers).

99. *See discussion supra* Part I.A–B.

100. *See Courty, supra* note 30, at 87. Secondary ticket sellers face no such price limitation since they exist in a market of supply and demand in which the sale will occur at whatever price the market will bear. *See Simon, supra* note 66, at 1177.

effort to capitalize on marked-up prices, primary ticket sellers—particularly Ticketmaster¹⁰¹—who have close connections with secondary sellers, are engaging in a bait-and-switch practice with consumers.¹⁰² Often without the consumers' knowledge, the primary sellers direct consumers to their affiliated secondary sellers to complete the transactions, thereby causing consumers to purchase tickets at higher prices than the face value offered directly by the primary seller.¹⁰³ At other times, this bait-and-switch happens after face value tickets are no longer available, but still without a clear indication to the consumer that she has been redirected from a primary ticket seller to a secondary one.¹⁰⁴

While this practice came to light out of the Ticketmaster sale of Bruce Springsteen tickets for the “Working on a Dream” tour,¹⁰⁵ it is hardly the only reported instance of such conduct. Allegations of bait-and-switch practices have also been claimed with ticket sales for Britney Spears,¹⁰⁶ The Dead,¹⁰⁷ Fleetwood Mac,¹⁰⁸ Phish,¹⁰⁹ and the Wizard of Oz Broadway performance.¹¹⁰ A class action lawsuit filed in the United States District Court in Trenton, N.J., states that consumers seeking tickets to the aforementioned shows as well as those for “Radiohead . . . Hannah Montana and numerous others” have been subjected to bait-and-switch practice by being redirected from Ticketmaster to its subsidiary resellers.¹¹¹

101. See *supra* Introduction and accompanying Bruce Springsteen discussion.

102. See, e.g., Hood, *supra* note 7.

103. *Id.* Such conduct is occurring even while tickets still exist through the primary ticket seller at face value. *Id.*

104. See Waddell, *supra* note 15 and accompanying text.

105. See discussion *supra* Introduction.

106. On Jan. 25, 2009, purchaser bought Britney Spears tickets for \$150 after Ticketmaster automatically redirected them to TicketsNow. Elise Young, *Lawsuit Challenges Ticket Site's Markups: Class-Action Filing Takes on Ticketmaster*, STAR-LEDGER (Newark, N.J.), May 7, 2009, at 13. It was not until the tickets were delivered that purchaser realized the seats only had a face value of \$30. *Id.*

107. Purchaser bought tickets to the April 22, 2009 concert of The Dead from TicketsNow, spending \$348.50 without ever knowing that TicketsNow was a ticket reseller, or how TicketsNow obtained her credit card information that she had saved into her Ticketmaster account. Peggy McGlone, *More Music Fans Claim Scalpings by Ticketmaster*, STAR-LEDGER (Newark, N.J.), Feb. 9, 2009, at 1 [hereinafter McGlone, *Scalping by Ticketmaster*].

108. Purchaser bought two tickets to the March 21, 2009 Fleetwood Mac concert for \$606.50 from what they thought was Ticketmaster. *Id.* However, the transaction was processed through TicketsNow only hours after the tickets went on sale, with “thousands of unsold tickets to the Fleetwood Mac show” still available at their face value. *Id.*

109. A lawsuit was filed in Federal Court in Massachusetts claiming that when a purchaser logged in to Ticketmaster seeking tickets to a Phish show, he was immediately told tickets were sold out and “immediately rerouted to TicketsNow,” where he bought nine tickets for \$2,064, although the face value was only \$60 per ticket. Hood, *supra* note 7.

110. On Feb. 18, 2009, purchaser bought four “Wizard of Oz” performance tickets for about \$65 each, when the face value was only \$35, after being automatically redirected from Ticketmaster to TicketsNow. Young, *supra* note 106.

111. Class Action Complaint and Jury Demand at 10, *Vining v. Ticketmaster Entm't, Inc.*, No. 09-cv-02096 (D. N.J. filed May 5, 2009), 2009 WL 1344722.

There have been additional reports of the same tactics being used for AC/DC and 3 Doors Down shows.¹¹² Such predatory conduct extends to sales outside the United States as well.¹¹³

Although many consumers may have been unaware that they were deceived until reports surfaced regarding the Bruce Springsteen show, ticket diversion adversely affects consumer interests.¹¹⁴ Consumers are directed to a secondary ticket seller without warning.¹¹⁵ This leads them to believe they are paying the face value of tickets when, in fact, they are paying much higher prices that are dictated by the marketplace, rather than the show's management.¹¹⁶ Consumers are therefore purchasing tickets from secondary sellers at marked-up prices, even while face value tickets remain available from primary sellers.¹¹⁷

The settlement reached in February 2009 between Ticketmaster and the Attorney General's Office resulting from the Bruce Springsteen investigation sought to remedy this practice, in addition to compensating the aggrieved parties;¹¹⁸ however, further regulation is needed. Diversionary redirection is detrimental to consumers who are tricked into purchasing tickets in the secondary market,¹¹⁹ while primary ticket sellers who are affiliated with these secondary market sellers collect consumer surplus.¹²⁰

B. UNKNOWN NUMBER OF TICKETS AVAILABLE FOR PUBLIC SALE

The number of tickets that will be available for public sale depends on several factors. The size of the venue will determine the maximum number

112. McGlone, *Scalping by Ticketmaster*, *supra* note 107.

113. *Ticketmaster Changes Sales Practices After Springsteen Flap*, *supra* note 13. In Canada, a class action lawsuit was filed against Ticketmaster resulting from a purchaser attempting to buy Toby Keith tickets for the Oct. 8, 2008 performance at the Rexall Place in Edmonton, Alberta. Press Release, Sutts, Strosberg LLP, Class Action Lawsuit Commenced in Alberta Against Ticketmaster Entertainment, Inc., Ticketmaster Canada Ltd., TNOW Entertainment Group, Inc. and Premium Inventory, Inc. (Feb. 23, 2009), <http://www.newswire.ca/en/releases/archive/February2009/23/c3133.html>. After accessing Ticketmaster Canada's Web site, the purchaser was automatically redirected to TicketsNow, where she purchased one ticket for \$219.15 and was never told the face value of the ticket before the transaction was completed. *Id.* When she received her ticket, she discovered the face value of the ticket was only \$79.95. *Id.*

114. See McGlone, *Scalping by Ticketmaster*, *supra* note 107.

115. See, e.g., *id.* (noting that this automatic redirection misleads consumers to believe they are buying from the primary seller, when they are actually purchasing tickets in the secondary market).

116. See, e.g., *id.*

117. See *id.* (describing how thousands of unsold tickets, both better and cheaper, to the Fleetwood Mac show were still available at time of purchaser's purchase from TicketsNow); Hood, *supra* note 7 (describing how tickets were still available for purchase to the Bruce Springsteen shows on Ticketmaster when consumers were directed to TicketsNow to purchase tickets in the secondary market).

118. N.J. AG Settlement Press Release, *supra* note 12 and accompanying text.

119. See Hood, *supra* note 7.

120. See Simon, *supra* note 66, at 1202 (discussing a 20% markup that is collected in large part by secondary market sellers).

of tickets that could be made available for sale.¹²¹ However, most consumers are unaware that the “house” holds back many of those potentially available tickets.¹²² Furthermore, instead of returning unused house tickets to public sale, these tickets often find their way to the scalpers and ticket brokers who sell them in the secondary ticket market.¹²³ Moreover, tickets that are held for performers and managers are often sold directly by them in the secondary market to consumers.¹²⁴ An additional subset of tickets is sold through various pre-sale events, such as fan clubs and other groups, further limiting the number of tickets available for public sale.¹²⁵ With such practices largely unknown to the public, consumers often have unrealistic expectations of their chances of obtaining their desired tickets through a general public sale.¹²⁶

The two Bruce Springsteen shows at the center of the Ticketmaster controversy demonstrate the false perceptions eager fans may have regarding their chances of getting tickets to a show. The total capacity for both shows was 38,778; however, only 28,284 tickets were made available for public sale—a little more than 14,000 per show.¹²⁷ Tickets were held back for a variety of groups that included the media, the sponsors, the record label, and the band, among others.¹²⁸ “In total, about 5,200 seats were excluded from the Ticketmaster sale for each show.”¹²⁹ Had the public been made aware of the number of tickets being withheld, perhaps

121. See McGlone, *Ticketmaster Springsteen Concert*, *supra* note 3.

122. SPITZER REPORT, *supra* note 36, at 5. The house consists of “the producer, the promoter, the record company, the performer or other such individuals.” *Id.*

123. *Id.* at 42.

124. Smith, *supra* note 24.

125. SPITZER REPORT, *supra* note 36, at 46–47.

126. See *id.* at 5.

127. McGlone, *Ticketmaster Springsteen Concert*, *supra* note 3.

128. *Id.*

The Izod Center held back more than 1,600 tickets for each concert for sponsors, media members and prospective sponsors, arena suite owners and the disabled. In addition, 1,098 tickets were held back because of technical demands: the size of the stage and its exact sound and lighting equipment hadn’t been decided before the sale, so the tour kept back seats that may have limited sightlines.

Just under 2,000 tickets for each concert—almost 10 percent—were held back for Springsteen and the [New Jersey Sports and Exposition Authority], which sponsored the show. . .

. . .

An additional 550 tickets for each show were reserved for the band’s record label, Sony, and the booking agent, Creative Arts Agency.

Id.

129. *Id.* For an exact breakdown of tickets sold to the May 21, 2009 and May 23, 2009 shows and to see what happened to the withheld tickets, see links provided in Peggy McGlone, *Getting Into a N.J. Bruce Springsteen Concert is Harder Than Imagined*, NJ.COM (May 20, 2009, 9:40 PM), http://www.nj.com/news/index.ssf/2009/05/getting_into_a_nj_bruce_spring.html.

customers could have appropriately adjusted their expectations of obtaining tickets.¹³⁰

A large number of tickets are often held back by the house.¹³¹ Generally, house seats that are not sold or used within forty-eight hours of the show are supposed to be returned to the box office for public sale.¹³² However, experienced box office employees who have become familiar with this release schedule often sell these premium seats to ticket brokers just before the scheduled release,¹³³ resulting in a loss to the general consumer of a chance to purchase the best seats at face value.¹³⁴ Ticketing employees also take tickets that are intended for public sale “out of the system just prior to public sale,” decreasing the public’s allotment, and instead sell those tickets to secondary market outlets.¹³⁵ Improperly regulated and supervised, house tickets often feed directly into the secondary ticketing market.

Tickets that have been withheld from public sale frequently make their way into the secondary market through the conduct of performers and management themselves. Although most consumers believe the primary sellers in the secondary market are ticket brokers or fans who are unable to use their tickets, the premium tickets offered for sale on Ticketmaster’s TicketExchange¹³⁶ are not being sold by typical fans, but by the artists themselves.¹³⁷ In fact, the transactions that occur in the TicketExchange

130. SPITZER REPORT, *supra* note 36, at 5.

131. *Id.* These “tickets are almost always the best seats in the house,” further depriving the public of a fair chance for the quality seats. *Id.* The sheer number of tickets withheld from public sale creates the opportunity for manipulation and abuse. *See id.* The release of house seats is actually on a “time-release” schedule such that some tickets “are released 72 hours before the performance, 48 hours before the performance, and 24 hours before the performance,” with some tickets held for last minute emergencies and VIPs. *Id.* at 43 n.46.

132. *Id.* at 43.

133. *Id.*

134. *See id.* at 5. Between April 1994 and July 1994, almost 1,000 house seats for the “Beauty and the Beast” and “Grease” shows were sold to ticket brokers just before their scheduled release for public sale. *Id.* at 43–44.

135. *Id.* at 45. For six concerts held at Madison Square Garden in 1998, 452 seats that were supposed to be designated for public sale were withheld last minute in a “management hold status,” and sold at the box office by box office employees. *Id.* Engaging in a similar scheme, for the Hootie and the Blowfish shows at Jones Beach Marine Theater in 1996, the box office treasurer and assistant treasurer withheld tickets valued at \$300,000 to the first ten rows for 37 shows, selling them to ticket brokers instead. *Id.* at 46. Consequently, the treasurer pled guilty to a series of felony charges. *Id.*

136. TicketExchange is Ticketmaster’s online service that supposedly enables “fan-to-fan transactions,” by serving as the middleman between buyer and seller, authenticating tickets when fans are connected to Ticketmaster’s ticketing systems. About TicketExchange, <http://www.ticketmaster.com/h/te/about.html> (last visited Oct. 1, 2010).

137. Smith, *supra* note 24. In an effort to recapture the profits lost when tickets are sold by ticket brokers, Ticketmaster works with artists and managers to list “hundreds of the best tickets per concert” with its affiliated secondary sellers and divides the extra revenue, “which can amount to more than \$2 million on a major tour,” with artists and management. *Id.* Ticketmaster CEO Azoff argued “that when ticket brokers resell tickets without permission from artists or promoters,

“Marketplace” pages rarely list tickets offered by fans, and whenever Ticketmaster lists so-called “platinum seats,” the marketplace is selling only artist-sanctioned seats.¹³⁸ Reports claim that almost every major concert tour today involves the sale of withheld tickets being sold by artists and promoters in the secondary market.¹³⁹ Professional sports teams have been selling their own tickets in the secondary market as well.¹⁴⁰ Because artists and management profit from the secondary market, ticket brokers should not take all of the blame; regulation is needed to limit and protect all parties involved.

The sale of tickets to the public is further limited by the existence of various presales such as those for fan clubs and certain credit card holders.¹⁴¹ However, even these fan club members have also been the victims of predatory practices of the ticketing industry.¹⁴² The existence of these presales can severely limit the number of tickets available for public sale, further distorting the public’s perception of total ticket availability.¹⁴³

The predatory practice of very limited disclosure regarding the number of tickets available for public sale for any given event impairs the general consumer by diverting a large number of tickets away from public sale and creating an unrealistic expectation of her chance of acquiring her desired ticket.¹⁴⁴ Should more information be made available—as regulation of the

it ‘drives up prices to fans, without putting any money in the pockets of artists or rights holders.’”
Id.

138. *Id.* Tickets for a Britney Spears concert in March 2009 had a link from Ticketmaster to TicketExchange accompanied by the message “[b]rowse premium seats plus tickets posted by fans.” *Id.* However, after inquiry by The Wall Street Journal, the “tickets posted by fans” part of the message was removed. *Id.*

139. *Id.* (listing as examples recent tours by Bon Jovi, Celine Dion, Van Halen and Billy Joel).

140. *See, e.g.,* Benitah, *supra* note 58, at 75–77. For example, the Chicago Cubs set up a ticket brokerage called Wrigley Field Premium Ticket Services and the Seattle Mariners established the Ticket Marketplace to serve as a middleman between buyers and sellers and collect a commission for completed transactions. *Id.* at 75.

141. Event presales refer to special offerings of tickets available to select groups before the tickets are made available for public sale. *TicketLiquidator Glossary Page, supra* note 65. Fan clubs provide unrivaled access to their favorite artists and often club members are able to secure tickets to an event before those tickets are made available to the public by virtue of their participation, often a paid subscription, to the fan club. *See Hood, supra* note 7 (describing a Hannah Montana fan club). Additionally, presales often occur as a bonus for being a member of a certain group. SPITZER REPORT, *supra* note 36, at 41 (describing special ticketing benefits available to a member of a theater party or of a large group); Ellen Rosen, *In the Race to Buy Concert Tickets, Fans Keep Losing*, N.Y. TIMES, Oct. 6, 2007, at C6 (discussing ticket purchasing advantages provided for being an American Express or Visa card holder).

142. Hood, *supra* note 7. A Hannah Montana—the persona of child star Miley Cyrus—Web site offered \$30 memberships to its fan club that included early access to concert tickets; however, the “website failed to inform club members that the sales went public within fifteen minutes of first being offered to members.” *Id.* Additionally, the site offered early access “pre-sale codes” after the shows had already been sold out. *Id.*

143. Rosen, *supra* note 141. Of 11,000 seats available for a Hannah Montana concert, Ticketmaster was allocated 8,400 tickets by the promoter, with half going to the fan club and the other half going to the general public. *Id.*

144. *See* McGlone, *Ticketmaster Springsteen Concert, supra* note 3.

industry would require—the consumer would be better equipped to assess her chance of acquiring tickets; she would also better understand that additional tickets may be made available closer to show time,¹⁴⁵ and could therefore avoid overpaying for tickets in the secondary market.

C. EXORBITANT MARKUPS

In the secondary market, the marketplace often dictates ticket resale prices.¹⁴⁶ However, the price of tickets in the secondary market is also distorted by the below-market price maintained in the primary market¹⁴⁷ as well as the excessive mark-ups that some ticket resellers add to the ticket price.¹⁴⁸ One primary reason for this large mark-up is that ticket resellers often have to recover the costs of illegal payments that are used to acquire the tickets.¹⁴⁹

This practice, known as “‘ice’ is money paid, in the form of a gratuity, premium or bribe, in excess of the printed box office price of a ticket, to an operator of any ‘place of entertainment’ or their agent, representative or employee” for withholding the best seats from the public.¹⁵⁰ By selling tickets at below the market-clearing price, the primary market participants enable this illegal practice because brokers and other individuals are willing to bribe the ticketing agents knowing they will be able to recoup their costs in the secondary market.¹⁵¹ Thus, the predatory practice of marking-up tickets to exorbitant prices that often occurs in the secondary market is the direct result of the illegal—and often clandestine—relationship between ticket resellers and ticket agents through which the secondary market sellers acquire their tickets.¹⁵² Regulation of this practice is necessary to protect consumers from excessive prices and rectify the illegal ticket exchanges that exist between ticket agents and secondary sellers.

145. SPITZER REPORT, *supra* note 36, at 56–57.

146. *See* Diamond, *supra* note 62, at 73.

147. *See* Benitah, *supra* note 58, at 71–72; *see also* discussion *supra* Part I.B.

148. *See* Kirkman, *supra* note 23, at 746 (describing the common practice employed by promoters where they charge lower face value rates because of the awareness that extra fees will be generated through the secondary market). For example, an average seat to a Broadway musical in New York City during the 1990s costing \$75 or \$80 would be sold for between \$100 and \$175 and sometimes more. *See* SPITZER REPORT, *supra* note 36, at 14.

149. *See* Simon, *supra* note 66, at 1180.

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

151. Simon, *supra* note 66, at 1180.

152. *See* SPITZER REPORT, *supra* note 36, at 19 (concluding that “one of the primary reasons for the inflated prices on the resale market is that certain brokers have to cover the cost of payments of ice”).

**D. SECONDARY SALE OF TICKETS AT OR BEFORE INITIAL PRIMARY
TICKET RELEASE**

Typically, a show's promoter determines when the sale of tickets is to begin.¹⁵³ However, since the Internet has taken over the secondary market,¹⁵⁴ ticket resellers often engage in the predatory practice of listing tickets for sale before or at roughly the same moment of the primary market's initial ticket release.¹⁵⁵ Because secondary retailers should not have the actual tickets before the original sale, some consumers believe the system constitutes a scam.¹⁵⁶

The 2007 Hannah Montana "Best of Both Worlds Tour," is illustrative of this systemic problem. Tickets to this fifty-four-date, nationwide concert tour went on sale at 10 a.m., and were sold out by 10:05 a.m.¹⁵⁷ However, by 10:05 a.m. several secondary ticketing sites already had many tickets available, but at much higher prices.¹⁵⁸ Similarly, tickets for the final Bruce Springsteen shows at Giants Stadium for September 30, 2009 and October 2 and 3, 2009—officially priced between \$33 to \$98¹⁵⁹—appeared on Web sites such as ebay.com, cheaptickets.com,¹⁶⁰ and selectaticket.com¹⁶¹ up to a week before the official ticket release,¹⁶² with prices up to \$1,300 a ticket.¹⁶³ The same phenomenon plagued the 2007 reunion tours of The Police and Van Halen.¹⁶⁴

The sale of tickets in the secondary market before or at the same time as an original ticket release is a predatory practice that hurts the consumer. It limits the number of consumers who are able to purchase tickets in the primary market,¹⁶⁵ and is indicative of the dubious means by which

153. Courty, *supra* note 30, at 87.

154. See Kirkman, *supra* note 23, at 741.

155. See *id.* at 750.

156. See Peggy McGlone, 'Banned' Ticket Sale Practice Persists: Jacked-up Prices for the Boss' Shows, STAR-LEDGER (Newark, N.J.), May 27, 2009, at 1 [hereinafter McGlone, *Jacked-up Prices for the Boss' Shows*]. Certain consumers are convinced that secondary brokers are either promised tickets beforehand, purchase tickets from individuals who had access to an event presale, or engage in other dubious conduct to acquire tickets. *Id.*

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

158. *Id.* Tickets that had a face value of between \$21 and \$66 were listed almost instantaneously on Web sites like StubHub, for many times the face value. See *id.*

159. McGlone, *Jacked-up Prices for the Boss' Shows*, *supra* note 156.

160. CheapTickets.com is a secondary market ticket reseller affiliated with Orbitz.com. About Orbitz Worldwide, <http://corp.orbitz.com/about> (last visited Oct. 2, 2010). "Orbitz Worldwide is a leading global online travel company that uses innovative technology to enable leisure and business travelers to research, plan and book a broad range of travel products." *Id.*

161. Select-A-Ticket is a New Jersey ticket broker that has been buying and selling tickets to and from customers for over 30 years. About Select-A-Ticket, <http://www.selectaticket.com/About-Us> (last visited July 28, 2010).

162. McGlone, *Jacked-up Prices for the Boss' Shows*, *supra* note 156.

163. *Who Can Tame the Scalpers?*, *supra* note 25.

164. Rosen, *supra* note 141.

165. See *id.*

secondary sellers obtain their tickets through illegal practices.¹⁶⁶ Increased regulation is necessary not only to prevent the secondary sale of tickets before the primary ticket release and to prevent secondary sellers from obtaining the tickets before the original sale, but also to maximize the number of tickets in the primary market and thereby increase the chances for regular consumers to obtain them.¹⁶⁷

E. SALE OF “PHANTOM TICKETS”

Another practice plaguing the secondary market is the sale of tickets that do not actually exist.¹⁶⁸ In yet another Bruce Springsteen tour ticketing gaffe, TicketsNow oversold the May 18, 2009 Washington D.C. show by selling “phantom tickets”¹⁶⁹ to several hundreds of consumers.¹⁷⁰ This practice has been called “plain fraud” by New Jersey Attorney General Anne Milgram,¹⁷¹ and despite the efforts to rectify the problem for those 300 consumers who purchased the phantom tickets, regulation is required to prevent similar occurrences in the future.¹⁷² Greater transparency is necessary so that such frauds may be spotted more easily by consumers who can then find legitimate sources for tickets.

III. PROPOSED REGULATION OF THE TICKETING INDUSTRY

In response to the predatory practices currently plaguing the primary and secondary ticket markets, the federal government has taken the first steps towards rectifying this largely unregulated industry. On June 2, 2009, Representative Bill Pascrell, Jr. introduced a bill in the House of Representatives—the Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009¹⁷³—“to direct the Federal Trade Commission [FTC] to prescribe rules to protect consumers from unfair and deceptive acts and practices in connection with primary and

166. See, e.g., Kandel & Block, *supra* note 150, at 489–90 (discussing secondary ticket brokers obtaining tickets through illegal payments to ticketing agents).

167. See McGlone, *Jacked-up Prices for the Boss’ Shows*, *supra* note 156; see also SPITZER REPORT, *supra* note 36, at 56 (“Any amendment to the current law should control the supply of tickets in the secondary or resale market.”).

168. See Hood, *supra* note 7.

169. *Who Can Tame the Scalpers?*, *supra* note 25. Phantom tickets refer to the sale of tickets that do not exist, including sales for non-existent sections. See *id.*

170. Mark Mueller, *Ticketmaster Takes Heat For Another Springsteen Snag: Pascrell Promises a New Law After Finding Subsidiary Sold Nonexistent Tickets*, STAR-LEDGER (Newark, N.J.), May 14, 2009, at 13.

171. Peggy McGlone, *AG Sues Resellers on Boss Tickets They Don’t Have*, STAR-LEDGER (Newark, N.J.), May 28, 2009, at 1.

172. Hood, *supra* note 7.

173. The title of the bill is in reference to Bruce Springsteen, whose shows were at the center of the ticketing controversy described throughout this note. McGlone, *The BOSS ACT Rewrites*, *supra* note 29.

secondary ticket sales.”¹⁷⁴ The bill is currently stalled in the House Committee on Energy and Commerce, where it has been referred.¹⁷⁵

However, the BOSS ACT effectively combats many of the deceptive practices in the industry and its immediate passage is necessary to protect consumers. The Act is substantively divided into four sections: 1) Rules on Transparency of Ticket Marketing, Distribution, and Pricing by Primary Ticket Sellers; 2) Rules for Secondary Ticket Sellers; 3) Registration of Secondary Ticket Sellers and Online Retail Marketplaces; and 4) Enforcement.¹⁷⁶ Each of these sections will be analyzed.

A. RULES ON TRANSPARENCY OF TICKET MARKETING, DISTRIBUTION, AND PRICING BY PRIMARY TICKET SELLERS

With regard to the primary sale, distribution, and pricing of tickets, the BOSS ACT instructs the FTC to promulgate rules that require the disclosure of general information to the public before tickets go on sale.¹⁷⁷ First, the Act requires primary sellers disclose the total number of tickets that a seller has available for public sale.¹⁷⁸ Next, primary sellers must disclose the “total number and the distribution method of all tickets” that are not available for public sale.¹⁷⁹ Additionally, the Act requires the “distribution method and the date and time of the primary sale be printed on each such ticket.”¹⁸⁰ Furthermore, the Act calls for primary sellers to list, in addition to the total cost, all of the ancillary charges associated with the ticket in all advertising or ticket listings.¹⁸¹ Finally, the Act mandates that a ticket refund include all ancillary charges.¹⁸²

The BOSS ACT requires primary sellers to disclose the total number of tickets they will have available for primary sale for each show or event.¹⁸³ This provision combats the well-documented predatory practice of withholding the number of tickets that are actually available for public sale.¹⁸⁴ While consumers attempting to obtain tickets to performances and

174. Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, H.R. 2669, 111th Cong. (2009). The bill is co-sponsored by 17 other representatives. H.R. 2669 Cosponsors, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02669:@@P> (last visited July 10, 2010).

175. H.R. 2669 CRS Summary, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02669:@@D&summ2=m&> (last visited July 10, 2010).

176. H.R. 2669.

177. *Id.* § 2.

178. *Id.* § 2(1).

179. *Id.* § 2(2).

180. *Id.* § 2(3).

181. *Id.* § 2(4).

182. *Id.* § 2(5).

183. *Id.* § 2(1) (including “[a] requirement that a primary ticket seller disclose and display on the Web site of such primary ticket seller the total number of tickets offered for sale by such primary ticket seller not less than 7 days before the date on which tickets shall be available for primary sale”).

184. See SPITZER REPORT, *supra* note 36, at 5.

events frequently understand that not every ticket is available for public sale, they often do not know whether it is 500 tickets being withheld or 5,000.¹⁸⁵ Accordingly, consumers are unable to develop appropriate expectations with regard to their chances of acquiring tickets.¹⁸⁶ By mandating the release of this information to the public, the BOSS ACT will help consumers to accurately assess their chances of getting tickets, thus rectifying a deceptive practice and major source of malcontent among consumers.

This legislation also requires primary ticket sellers to make known the number of tickets and method of distribution for tickets they are responsible for that are not available for general sale.¹⁸⁷ The disclosure of this information to the public will serve two main functions. First, in conjunction with the disclosure of the number of tickets that are available for public sale, consumers will be better equipped to have realistic expectations with regard to their ability to obtain tickets.¹⁸⁸ Second, consumers who particularly desire tickets to a given show will be aware of presale events available only to certain groups of people and may be afforded the opportunity to join these groups in anticipation of the presales.¹⁸⁹ The ultimate effect will provide greater transparency so members of the public who covet tickets can more effectively strategize and navigate the market than they can under the current system.

The BOSS ACT will require that the “distribution method . . . and date and time of the primary sale be printed on each [] ticket.”¹⁹⁰ This will combat several predatory practices. First, it will deter primary ticket sellers from diverting tickets to their wholly owned subsidiaries, as the source of the tickets will be more easily discernable.¹⁹¹ Second, it will diminish the sale of tickets in the secondary market before the primary ticket sale because it will make it more obvious when tickets were obtained through illicit means.¹⁹² Finally, the existence of these identification marks on the

185. See McGlone, *Ticketmaster Springsteen Concert*, *supra* note 3.

186. SPITZER REPORT, *supra* note 36, at 5.

187. H.R. 2669 § 2(2). The bill has:

A requirement that a primary ticket seller make publicly available, not less than 7 days before the day on which tickets shall be available for primary sale, the total number and distribution method of all tickets not made available for sale to the general public, the distribution of which is the responsibility of that primary ticket seller.

Id.

188. See Rosen, *supra* note 141.

189. See TicketLiquidator Glossary Page, *supra* note 65.

190. H.R. 2669 § 2(3).

191. See Hood, *supra* note 7 (requiring tickets to contain the distribution method and the date and time will deter primary sellers like Ticketmaster because any improper transfer to secondary sellers will be transparent to consumers when they receive their tickets).

192. *Id.*; see also McGlone, *Jacked-up Prices for the Boss' Shows*, *supra* note 156 (discussing how consumers purchasing a ticket in the secondary market prior to the printed date of the

tickets will ease the enforcement costs for the FTC, as, barring fraud, it will be immediately apparent the route the tickets have taken through the market. This information will better protect consumers and deter the dubious business practices that currently run rampant throughout the ticketing industry.

To ensure that consumers are aware of the full price of the tickets they purchase, the BOSS ACT will also require that primary sellers list the final face value of the ticket, including all ancillary charges, on both the ticket itself and in any advertising or marketing.¹⁹³ This provision serves to protect consumers from being deceived with regard to the ticket price, as many purchasers do not factor in or notice the ancillary charges—which can reach up to 50%—that primary ticket sellers add on as convenience or service fees.¹⁹⁴ Additionally, this will allow secondary purchasers to understand the true cost of the ticket and to accurately compare the prices offered between the primary and secondary ticket sellers.¹⁹⁵ The requirement that the face value of the ticket, including ancillary charges, not only be on the ticket, but in all advertising and listings as well, will ensure that consumers are not “accidentally” charged more than they expect when they complete their transactions.

The BOSS ACT will change the refund policy of many primary sellers by requiring that they “include all ancillary charges in any refund of a ticket” that is subject to a refund.¹⁹⁶ Most refund policies currently offer to refund the base ticket price plus some of the ancillary charges.¹⁹⁷ However, this regulation will broadly define ancillary charges to include charges associated with a ticket “not included in the base price.”¹⁹⁸ While it may be argued that a delivery fee is a charge associated with the purchase of a

primary sale will be better equipped to expose any improper diversions by primary sellers to secondary sellers).

193. H.R. 2669 § 2(4). The bill requires that:

[T]he primary ticket seller include, with any listing of the price of a ticket on the primary ticket seller’s website or in any promotional material where the ticket price is listed, all ancillary charges related to the purchase of a ticket, and include such charges and the total cost to the consumer on each individual ticket.

Id.

194. Don Oldenburg, *The Ticketmaster Fee-nomenon*, WASH. POST, June 29, 2004, at C10.

195. See Kirkman, *supra* note 23, at 746 (announcing the difference between primary and secondary prices will shine light on the common practice of “the secondary market dress[ing] up as a genuine supply-and-demand-based free market, [and will expose] . . . that the market is instead based on bribery”).

196. H.R. 2669 § 2(5).

197. See, e.g., Ticketmaster Purchase Policy, http://www.ticketmaster.com/h/purchase.html?tm_link=help_nav_4_purchase (last visited Oct. 23, 2010) (noting that Ticketmaster “will issue a refund of the ticket’s face value paid (or, if a discounted ticket, then instead the discounted ticket price paid), all service fees and any convenience charge” but “[i]n no event will delivery charges or any other amounts [including processing fee] be refunded”).

198. H.R. 2669 § 6(1).

ticket, delivery fees are explicitly exempted from many primary ticket seller refund policies.¹⁹⁹ The Act will require that primary ticket sellers change their refund policies, affording consumers a refund of the full amount they spend on tickets, rather than just the portion of the ticket price the primary ticket seller is willing to return.

B. RULES FOR SECONDARY TICKET SELLERS

The BOSS ACT mandates that the FTC adopt regulations affecting the secondary ticket market to protect consumers and eliminate the deceptive practices that currently exist.²⁰⁰ When secondary ticket sellers do not have possession of the ticket at the time of the sale, the Act requires such sellers to clearly state they do not currently possess the ticket, and outline the procedure for a refund if the ticket received does match what was advertised.²⁰¹ Next, the Act prohibits the purchase of tickets by secondary ticket sellers in the primary market during the first forty-eight hours of the sale.²⁰² The legislation also requires secondary ticket sellers to disclose “the distribution method and face value of each ticket,” the seat location, the date and time of purchase if acquired through primary sale, and “the number or identifier assigned to them.”²⁰³ Furthermore, the BOSS ACT requires that online resale marketplaces clearly post on their Web sites a disclaimer that they are secondary ticket sellers and users must confirm seeing the disclaimer.²⁰⁴ The Act also prohibits employees of any entity involved with the sale of primary tickets to resell tickets for higher than face value or to resell them to any person who the employees know or should reasonably know intends to sell the ticket for more than face value.²⁰⁵ Finally, online resale marketplaces are required to disclose when the seller is the “primary ticket seller, venue, or artist associated with the event to which the ticket relates.”²⁰⁶

The BOSS ACT requires full disclosure of secondary ticket sellers when they do not possess a ticket at the time of the ticket resale and the procedures by which purchasers may obtain a refund if the tickets they receive do not match what was advertised.²⁰⁷ Initially, such disclosure will

199. *See, e.g.*, Ticketmaster Purchase Policy, *supra* note 197.

200. *See* H.R. 2669 § 3.

201. *Id.* § 3(1).

202. *Id.* § 3(2).

203. *Id.* § 3(3).

204. *Id.* § 3(4).

205. *Id.* § 3(5).

206. *Id.* § 3(6).

207. *Id.* § 3(1). The bill states the following:

A requirement that if the secondary ticket seller does not possess the ticket at the time of the sale that such secondary ticket seller provide—

- (A) a clear statement that the secondary ticket seller does not possess the ticket; and

make consumers more aware of the potential risks associated with transacting business with a particular secondary ticket seller.²⁰⁸ This allows consumers to weigh the risks and gives them the information they need to decide to purchase their tickets from a party who actually has them in hand. Additionally, the overall risk of dealing with these secondary ticket sellers will be reduced because, in the event there is a ticket discrepancy, the refund policy will have been disclosed. Thus, the disclosure of this information to the public will help to give fans a better chance of obtaining tickets to their favorite performances and events by increasing their knowledge of the ticket resale situation and lessen the risks associated with dealing with secondary ticket sellers.²⁰⁹

The Act will prohibit a secondary ticket seller from purchasing tickets in the primary ticket market within forty-eight hours of the primary ticket sale.²¹⁰ This provision will both limit the initial stock of tickets that brokers have available for resale and maximize the number of tickets that are available for primary sale to eager fans. It will limit the use of automated and computerized programs that secondary ticket sellers employ to beat the security mechanisms in place on ticket Web sites that are designed to prevent the sale of large blocks of tickets at once.²¹¹ Furthermore, the prohibition will lessen the bait-and-switch practice employed throughout the industry during the first forty-eight hours of a primary sale—at least with respect to in-hand ticket transactions—as secondary ticket sellers will be unable to instantaneously offer tickets to sold-out events and performances.²¹² Accordingly, the ultimate goal of this legislation will be

(B) an explanation of procedures to be followed by the purchaser to obtain a refund from the secondary ticket seller if the ticket the purchaser ultimately receives does not match the description of the ticket by the secondary ticket seller.

Id.

208. *See Hood, supra* note 7 (discussing the future prevention of predatory practices that were orchestrated by Ticketmaster during the Bruce Springsteen primary ticket offering). Some of the warnings may include a disclaimer that the tickets received may be different than what is advertised or what they purchased, the seller may be unable to deliver on the sale if the seller's ticket source does not come through, or these tickets might not exist at all. *See id.* For example, this could have possibly prevented TicketsNow's practice of overselling the Bruce Springsteen show when they sold tickets that did not exist to over 300 consumers. *See id.*

209. Press Release, Rep. Pascrell, Jr., Pascrell Unveils "BOSS ACT" to Make Ticket Sales Transparent; Reel in Secondary Ticket Market (June 1, 2009), http://www.house.gov/apps/list/press/nj08_pascrell/pr612009.shtml [hereinafter Pascrell BOSS ACT Press Release].

210. H.R. 2669 § 3(2). An exception exists making this provision inapplicable with respect to the sale of "season tickets or bundled series tickets." *Id.*

211. *See Kirkman, supra* note 23, at 753–57. The practice of ticket brokers purchasing large ticket volumes during primary offerings was the issue at the heart of the lawsuit between Ticketmaster and RMG Technologies in 2007. *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

212. *See Hood, supra* note 7.

achieved by giving the regular fan a better opportunity to purchase reasonably priced tickets in the primary market.²¹³

The BOSS ACT imposes a series of additional disclosure requirements on secondary ticket sellers. First, they must disclose “the distribution method and face value of each ticket.”²¹⁴ This combats predatory bait-and-switch practices by ensuring that purchasers are aware of the primary sale face value of the ticket, and are thus informed about the markup they are paying for tickets in the secondary market.²¹⁵ Secondary ticket sellers must also make known the seat locations of the tickets they offer for sale.²¹⁶ This disclosure will enable purchasers to accurately assess the worth of the tickets, and prevent advertisers from deceptively drawing in consumers with claims of “premium” tickets that are actually located in the least desirable sections.²¹⁷ Additionally, if secondary sellers acquired their tickets through primary sales, the date and time of the purchases must be disclosed.²¹⁸ This should help combat the illegal practices by which secondary sellers acquire their tickets as most tickets are released through public sale, and there are only limited legal means by which to get tickets through presale events.²¹⁹ Thus, the failure of a secondary ticket seller to list the date and time of purchase could be a sign that illegal conduct is occurring. Finally, the Act requires that secondary ticket sellers disclose the “number or identifier assigned to them” as part of a system of mandated federal registration.²²⁰ Collectively, these disclosures will increase the available information to the public about ticket resale and about the secondary ticket sellers themselves, and provide some protection to consumers from deceptive market practices.

The BOSS ACT requires that online resale marketplaces post a “clear and conspicuous notice” on their Web sites that they are secondary ticket sellers and requires that the “user confirm having read such notice before starting any transaction.”²²¹ This provision was drafted to ensure that

213. See Pascrell BOSS ACT Press Release, *supra* note 209.

214. H.R. 2669 § 3(3)(A).

215. See, e.g., Young, *supra* note 106 (purchaser who bought Britney Spears tickets did not know the face value of the ticket they purchased for \$150 was only \$30 until the tickets arrived in the mail). See also discussion *supra* Part II.A.

216. H.R. 2669 § 3(3)(B). The bill requires disclosure of the following:

the precise location of the seat or space to which the ticket would entitle the bearer, or, . . . descriptive information about the location of the seat or space, such as a description of a section or other area within the venue where the seat or space is located

Id.

217. See Help—Contact Us—Why Aren’t Seat Numbers Provided?, STUBHUB!, <http://www.stubhub.com/help/?searchKeyword=top-questions-buyer> (last visited Oct. 2, 2010) (describing the current policy of StubHub with regards to disclosing seat information).

218. H.R. 2669 § 3(3)(C).

219. SPITZER REPORT, *supra* note 36, at 47.

220. H.R. 2669 § 3(3)(D). See also discussion *infra* Part III.C.

221. H.R. 2669 § 3(4).

consumers are aware of when they are exploring the secondary marketplace for tickets.²²² It is designed to combat the bait-and-switch practices that led to the outcry for regulation of the ticketing industry in February 2009.²²³ The regulation will make it more difficult to trick consumers into purchasing tickets in the secondary market when under a false belief that they are buying from a primary seller.

The Act also endeavors to combat the illegal procedures by which secondary ticket sellers acquire their inventory of tickets. Specifically, it prohibits any employee of a group that is involved with the event to resell a ticket for more than face value or to resell to any other party who will sell the ticket for more than face value.²²⁴ This provision serves to eliminate illegal payments in two ways. First, it makes it unlawful for someone to make a payment of “ice”²²⁵ or any money above the face value of a ticket to a person involved in the event or performance in some way.²²⁶ Second, it prohibits the sale of tickets to a person who intends to sell the tickets for a profit in the secondary market. This will effectively eliminate the principal source of tickets for secondary ticket sellers.²²⁷ Accordingly, by making this conduct illegal, the BOSS ACT will ensure that tickets are sold in the primary market rather than illegally diverted into the secondary market.

The BOSS ACT also requires that online resale marketplaces disclose those instances when the “secondary ticket seller of a ticket is the primary ticket seller, venue, or artist associated with the event to which the ticket relates.”²²⁸ This provision uses disclosure requirements to inform consumers when the insiders of a given performance or event are diverting tickets away from the primary market and into the secondary market to collect higher profits.²²⁹ In doing so, the Act both discourages this practice

222. See Hood, *supra* note 7 (unlike during the Springsteen primary ticket offering, where consumers had no idea they were transferred to a secondary seller).

223. See *id.*

224. H.R. 2669 § 3(5). The bill states the following:

[a] prohibition on the resale of a ticket by an individual employee of any venue, primary ticket seller, artist, online resale marketplace, or box office that is involved in hosting, promoting, performing in, or selling tickets if such resale—

(A) is for a higher price than face value of the ticket; or

(B) is made to any third party and the employee has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that the third party intends to sell the ticket for a higher price than face value of the ticket.

Id.

225. See discussion *supra* Part II.C.

226. See Simon, *supra* note 66, at 1180.

227. See *id.* (since primary ticket sellers will no longer be provided with a bribe, they will no longer be willing to favor secondary ticket brokers in selling their allotments).

228. H.R. 2669 § 3(6).

229. See Smith, *supra* note 24; see also discussion *supra* Part II.B.

by artists and management,²³⁰ and gives consumers the choice whether to reward such behavior by purchasing those tickets. This provision, like the others, is intended to maximize the number of tickets available for public sale in the primary market to provide regular fans with a fair chance to attend their desired performances and events.²³¹

C. REGISTRATION OF SECONDARY TICKET SELLERS AND ONLINE RETAIL MARKETPLACES

In an effort to provide better oversight of the secondary ticketing market, the BOSS ACT would require the FTC to implement registration requirements for all secondary ticket sellers and online resale marketplaces.²³² First, this legislation calls for every secondary ticket seller and online resale marketplace to register with the FTC.²³³ The registration must include a “viable street address, telephone number, and email address . . . ,” and this information must be verified annually.²³⁴ Additionally, the FTC will assign a unique “identification number or other identifier” to each registered secondary ticket seller or online resale marketplace; this information must be disclosed upon offering any tickets for sale.²³⁵ Collectively, these requirements will provide greater oversight of the secondary market.

Without this legislation, the secondary ticket market will continue to function as a largely unregulated industry. Ticket brokers have attempted self-regulation in an effort to appear as reputable businesses²³⁶ rather than unscrupulous ticket hoarders—an image currently shared by many.²³⁷ In 1994, the National Association of Ticket Brokers (NATB) was formed as a voluntary trade organization for ticket brokers.²³⁸ Although the NATB includes a code of ethics and uniform complaint procedures by which every member must abide,²³⁹ voluntary membership prevents the organization from binding the actions of all secondary market sellers on the national

230. See Smith, *supra* note 24.

231. See Pascrell BOSS ACT Press Release, *supra* note 209.

232. H.R. 2669 § 4.

233. *Id.* § 4(a)(1).

234. *Id.* § 4(a)(2)–(3).

235. *Id.* § 4(b).

236. See National Association of Ticket Brokers, <http://www.natb.org/> (last visited Oct. 2, 2010).

237. See generally Daniel McGinn, *The Biggest Game in Town: A Single Seat for \$35,000? How Does This Happen, and Does It Hurt the Fan? Inside the High-stakes, High-stress World of Ticket Brokers*, BOS. GLOBE SUNDAY MAG., Sept. 21, 2008, at 22.

238. National Association of Ticket Brokers, *supra* note 236. The NATB’s stated mission is “to establish an industry-wide standard of conduct and to create ethical rules and procedures to protect the public and foster a positive perception of the industry.” *Id.*

239. *Id.*

scale.²⁴⁰ Thus, the BOSS ACT is necessary to require uniform oversight over all secondary market sellers, not just those choosing to abide by established trade association rules.

The mandatory registration requirement will allow the FTC to track secondary ticket sellers and ensure that they operate in accordance with FTC guidelines.²⁴¹ As it will be unlawful for secondary ticket sellers to operate without registering with the FTC, the BOSS ACT will enable consumers to assess the reputability of their operations.²⁴² By maintaining contact information for secondary ticket sellers on file, the FTC will be better able to locate and enforce regulations, rather than wasting resources searching for entities that exist solely on the Internet without a fixed location.²⁴³ Additionally, the existence of “centralized registration” will help ensure that secondary ticket sellers can be identified for the payment of appropriate taxes.²⁴⁴ Furthermore, requiring secondary ticket sellers to post their identification number when engaging in the resale of tickets will provide consumers a viable avenue of recourse against those who do not transact business according to federal regulations; it will enable consumers to file complaints with the FTC or obtain the seller’s contact information from the FTC in order to seek private legal remedies.²⁴⁵ The BOSS ACT will build upon the mission of the NATB, elevating its optional standards to industry-wide requirements by which all secondary ticket sellers and online resale marketplaces must abide.

D. ENFORCEMENT

The BOSS ACT contains a strong enforcement clause that gives some teeth to the substantive regulations and oversight encompassed in the legislation. The enforcement provision states that a violation will be treated as an unfair or deceptive act and that the FTC will enforce the Act.²⁴⁶ In

240. Membership in the NATB is not required for ticket brokers. *See id.* (listing no mandatory requirement that a secondary market ticket seller be a member of NATB).

241. *See* Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, H.R. 2669, 111th Cong. § 4(a) (2009).

242. By requiring that secondary ticket sellers disclose their unique registration number assigned by the FTC when offering tickets for sale, the absence of such a registration number will signal to consumers that something is not right with this secondary seller. *See id.* § 3(3)(D).

243. *See id.* § 4(a)(2).

244. Daniel J. Glantz, Note, *For-Bid Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L.J. 261, 299–300 (2005).

245. *See id.* at 301 (describing centralized identification as the “necessary reporting and security mechanism . . . in place for the collection of taxes [and] private enforcement”).

246. H.R. 2669 § 5(a). The bill states the following:

A violation of a rule prescribed pursuant to section 2 or 3 or a violation of section 4(a)(1) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)). The Federal Trade Commission shall enforce this Act in the same manner, by the same means, and with the same jurisdiction as though all applicable

addition, the Act provides State Attorneys General the power to bring civil actions on behalf of the residents of that State for violations of the rules.²⁴⁷ Furthermore, the FTC, upon receiving appropriate notice of civil action brought by a State on matters related to the BOSS ACT, may intervene and “be heard on all matters arising in such civil action.”²⁴⁸ Additionally, should the FTC file a civil or administrative action, a State may not pursue a civil suit until the completion of the FTC’s action.²⁴⁹ Finally, a State may “recover reasonable costs and attorney fees from the lender or related party” if it prevails in a civil action.²⁵⁰

An established enforcement mechanism will provide this federal legislation with the muscle to effectively regulate the ticketing industry. The problem facing voluntary associations and other forms of self-regulation, such as the NATB, is that there is little effective enforcement, besides being removed from the group.²⁵¹ However, voluntary self-regulation is often an insufficient deterrent to predatory practices affecting an industry.²⁵² The BOSS ACT, conversely, provides strong means to enforce its provisions. It allows for enforcement by both the FTC, under its general enforcement powers, and the respective State Attorneys General, who are charged with protecting the residents of their state.²⁵³ The opportunity for these groups to seek both injunctive and monetary relief—in addition to individual consumers’ ability to pursue independent legal action²⁵⁴—will effectively enforce the BOSS ACT and ensure appropriate compliance throughout the ticketing industry.

terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act.

Id.

247. *Id.* § 5(b)(1).

248. *Id.* § 5(b)(3).

249. *Id.* § 5(b)(6).

250. *Id.* § 5(b)(7).

251. National Association of Ticket Brokers Code of Ethics, <http://www.natb.org/consumer/index.cfm?pg=code.cfm> (last visited Oct. 2, 2010).

252. Since the NATB is a voluntary organization, and many consumers are probably unaware of its existence to begin with, membership in the organization may be of little concern to many potential members, especially those engaging in predatory practices. See Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 LAW & POL. 363, 366–70 (1997) (describing self-regulation as “a cynical attempt by self-interested parties to give the appearance of regulation (thereby warding off more direct and effective government intervention) while serving private interests at the expense of the public.”).

253. H.R. 2669 §§ 5(a), 5(b).

254. Although individuals can pursue remedies under standard state fraud theories, there is no private cause of action for violations of the FTC Act. *E.g.*, *R.T. Vanderbilt Co. v. Occ. Saf. & H. Rev. Com'n*, 708 F.2d 570, 574–75 n. 5 (11th Cir. 1983); *Fulton v. Hecht*, 580 F.2d 1243, 1248–49 n. 2 (5th Cir. 1978); *Alfred Dunhill Ltd. v. Interstate Cigar Co., Inc.*, 499 F.2d 232 (2d Cir. 1974); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973). Additionally, at least one circuit has said a state common law fraud claim is not supportable by a knowing violation of the FTC Act. *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184 (8th Cir. 1996).

IV. RECOMMENDATION OF RULES FOR THE FTC TO PROMULGATE IN ACCORDANCE WITH THE BOSS ACT

The BOSS ACT requires that the FTC promulgate rules in accordance with the provisions that appear throughout the Act.²⁵⁵ However, it does not limit the FTC to only adopting rules in accordance with those provisions. Rather, the FTC is free to adopt, as part of its rulemaking authority, more exhaustive rules or even include rules that have not been explicitly contemplated by the BOSS ACT.²⁵⁶ While the Act seeks to remedy many of the problems that exist throughout the ticketing industry, some additional regulations should be established to further protect consumers and to better regulate the industry.

The FTC should adopt a rule that protects primary ticket seller Web sites from being hacked by professional computer programmers and computer software.²⁵⁷ Although the forty-eight-hour prohibition on the purchase of tickets in the primary market by ticket brokers may reduce the incentive to obtain tickets in this manner,²⁵⁸ the FTC should prohibit the conduct explicitly and at all times. Computer programs or other automated devices that are designed to circumvent copy protection systems of ticketing Web sites and to access many tickets at once—practices which the courts have held constitutes copyright infringement and are considered an illicit industry practice—will be more directly regulated through such a rule.²⁵⁹ Furthermore, the explicit prohibition of this practice will provide regulators with more avenues by which to pursue violators, and will hopefully make more tickets available to the general public through initial public sales.

The FTC should also require that online resale marketplaces maintain records of user activity for at least two years.²⁶⁰ This rule can be modeled after New Jersey Statute 56:8:27(d) that requires licensed brokers to “maintain[] records of ticket sales, deposits and refunds for a period of not less than two years.”²⁶¹ Such a rule will ensure that if consumer problems arise there will be ample records to appropriately resolve the matter. Additionally, the FTC could utilize the records during investigations, most likely through subpoenas, into alleged illegal sales that may be occurring throughout the online resale marketplaces from secondary ticket sellers who

255. See generally H.R. 2669.

256. Under Section 18 of the Federal Trade Commission Act, 15 U.S.C. § 57a (2006), the FTC is authorized to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 57a(a)(1)(B).

257. See Kirkman, *supra* note 23, at 761–63.

258. See H.R. 2669 § 3(2).

259. Press Release, Ticketmaster, Default Judgment and Permanent Injunction Against RMG Technologies, Inc. Entered in U.S. District Court (June 25, 2008), <http://iac.mediaroom.com/index.php?s=43&item=1542>.

260. See Glantz, *supra* note 244, at 301.

261. *Id.* (citing N.J. STAT. ANN. § 56:8:27(d) (2005)).

are not complying with the FTC regulations.²⁶² This recording requirement would further serve to protect consumers in the secondary ticket market and facilitate complete compliance with the regulations that govern the ticketing industry.

CONCLUSION

Recently, it has become clear that the continued operation of the primary and secondary ticketing markets as a largely unregulated industry is adversely affecting consumers. Because regular fans deserve the maximum opportunity to purchase tickets to events at face value in the primary market or through controlled means in the secondary market, federal legislation is necessary to protect consumers and prevent predatory practices from continuing to occur. The BOSS ACT, currently pending in Congress, is precisely the type of legislation that is necessary to combat the problems that exist throughout the industry to ensure that consumers receive the protection they deserve. The Act will effectively maximize the number of tickets for public sale to consumers in the primary market, equip consumers with more information about the numbers of tickets available and from whom they are purchasing tickets, and establish uniform procedures for the secondary market. The BOSS ACT will make the ticketing industry a more reliable and honest practice and will afford regular fans a fair chance to attend their favorite events.

*Zachary H. Klein**

262. See H.R. 2669 § 4(a).

* B.A., New York University, 2008; J.D. candidate, Brooklyn Law School, 2011. I would like to thank my parents and family for all of their love and support, and for the story that led to selecting this topic. I am also grateful for the work of Steven Bentsianov, Robert Marko, Christopher Vidiksis, and the entire staff of the Brooklyn Journal of Corporate, Financial & Commercial Law for their hard work and editing. Finally, to Hila, thank you for your encouragement, patience, and support.