



The American Antitrust Institute

RESTRICTIVE PAPERLESS TICKETS
A White Paper by the American Antitrust Institute

By James D. Hurwitz

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Executive Summary

Paperless tickets are well established in fields such as the airline and hospitality industries. This ticketing format, however, was only recently adapted for use in the live entertainment industry. In 2007, the Cleveland Cavaliers basketball team introduced paperless tickets for its season ticket holders through the use of Flash Seats, now the proprietary product of Veritix ticketing.² In 2008, Ticketmaster presented its “Paperless Ticket” for Tom Waits’ “Glitter and Doom” tour.³ That same year, the rock group AC/DC sold several thousand paperless tickets for each performance in its North American tour, and Metallica used only paperless tickets for its London performance. In 2009, Ticketmaster relied entirely on paperless tickets for Miley Cyrus’ fall tour, which typically used arenas or other large venues.⁴ With such developments, paperless ticketing in the live entertainment industry has unquestionably arrived.

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² Joe Milicia, “Cavs Look to Lead Paperless Ticket Trend,” USA Today.com, (1/26/07), http://www.usatoday.com/sports/basketball/nba/cavaliers/2007-01-26-e-tickets_x.htm.

Flash Seats and Veritix are owned by Dan Gilbert, the owner of the Cleveland Cavaliers. In 2007, 15 major league baseball teams were offering digital ticketing methods similar to that of Flash Seats. Id.

³ News Release, PRN Newswire, “Ticketmaster Introduces Paperless Ticket,” 5/13/08. Although the product name, “Paperless Ticket,” is trademarked by Ticketmaster, the term “paperless tickets” is also commonly used in the press to describe various digital ticketing systems, and it is in this more generic sense that the phrase, without the TM symbol, is used in this paper.

⁴ Waddell, “Miley Cyrus Fights Scalpers with Paperless Tickets,” Reuters, Jun. 21, 2009, <http://www.reuters.com/article/2009/06/21/us-cyrus-idUSTRE55K0CX20090621?feedType=RSS>; Click on Detroit,

Ticketmaster adopted paperless ticketing as “an alternative delivery method to TicketFast, Mail, UPS, Will Call or in Store Pick Up.”⁵ Paper tickets provide the purchaser with a paper ducat, and e-tickets, such as TicketFast, provide the purchaser with an electronic ticket that the buyer can print out on his or her own printer. In contrast, Ticketmaster’s paperless tickets use the purchaser’s credit card as proof of purchase. To gain entry using a Ticketmaster paperless ticket, the original purchaser displays her credit card and a government-issued ID at the entry gate. Venue personnel swipe the credit card through a scanner to verify the purchase and then give the customer a receipt indicating the seat location for each ticket purchased. With these receipts, the attendees may proceed to their seats. An additional ticketing format, one that some may view as a form of paperless ticket, is mobile tickets. Rather than using the purchaser’s credit card as proof of purchase, the ticket issuer sends a bar code to the purchaser’s smartphone. At the entrance, venue personnel scan the bar code directly from the smartphone.

Paperless tickets account for only a small percentage of tickets sold to live entertainment events; their use, however, appears to be growing.⁶ The rationale most commonly offered for the move to restrictive paperless tickets is to prevent scalping,⁷ although other justifications are asserted as well. Critics, however, aver that the real reason is to enable primary ticket sellers, event promoters, and artists to eliminate competition from secondary market ticket sellers and to secure for themselves the substantial revenues than can be generated from the resale of tickets.⁸

Concerns regarding Ticketmaster’s and similar paperless ticketing methods are *not* that the tickets employ a paperless format. Rather, critics focus on the attendant limitations most commonly imposed on the gifting, re-sale, and use of these paperless tickets. Paperless tickets with stringent transferability restrictions are commonly called “restrictive paperless tickets.” Ticketmaster, which is by far the largest primary seller of event tickets, is also the seller that imposes the most stringent

“Ticketmaster Testing Paperless Tickets: Ticketmaster Looking to Go Paperless,” 6/13/09, <http://www.clickondetroit.com/print/19743873/detail.html>.

⁵ <http://www.ticketmaster.com/paperless>.

⁶ Shane McGlaun (Blog), Daily Tech, “Paperless Ticketing for Concerts and Events on the Rise,” 7/6/10, <http://dailytech.com/Paperless+ticketing+for++Concerts+and+Concerts+Events+on+the+Rise/article18943c.htm>.

⁷ Weisbaum, “Pros and cons of Ticketmaster’s paperless tickets,” 5/20/11, reporting that “Ticketmaster CEO Nathan Hubbard says it’s a way to prevent scalpers from buying up all the good seats and then reselling them for five to 10 times the face value.” <http://www.kval.com/news/consumertips/122264374.html>.

⁸ Id.

limitations on the transfer of its paperless tickets. Critics view these restraints as unreasonably, unnecessarily, and unfairly undermining free competition and consumer choice in the markets for selling, and reselling, tickets to live entertainment events. The most significant of these restraints include:

(a) Limitations on resale. A Ticketmaster paperless ticket cannot readily be resold. Any resale of that ticket – if one is permitted at all – must be processed by Ticketmaster’s own resale service, TicketExchange. Circumvention of this restraint, while possible, is cumbersome. Ticketmaster levies substantial fees on sellers and buyers to avail themselves of its resale service. The resale is commonly subject to limitations on the maximum price – ostensibly to curb scalping – and/or minimum price at which the transaction may occur.

(b) Limitations on gifts and donations. Most Ticketmaster paperless tickets cannot readily be given away or donated in advance of the event. Rather, the purchaser must also attend the event or meet the recipient at the venue to display her credit card and ID, obtain the seat locator slip, and give it to the actual attendee. Ticketmaster itself recommends that if a paperless ticket is intended as a gift, the giver should ask the recipient to purchase the tickets on her own credit card and then reimburse the recipient.⁹ Such a method, however, hardly allows for a gift that is either gracious or a surprise, nor does it facilitate donations of restrictive paperless tickets to a charity.

(c) Limitations on use. Restrictive paperless tickets can be cumbersome to use. If one person purchases paperless tickets for several people who plan to attend the event together, the entire group must be present before any of the group can enter. If one person is delayed, all are delayed; alternatively, if the early arrivers enter, the latecomers are refused admittance.

Purchases of Ticketmaster paperless tickets also must be made on credit cards; cash may not be used for these tickets even at the box office. If young fans or others without credit cards want to attend a concert, someone else must make the purchase and meet the attendees at the venue to collect the seat locator slips. Such a process can be inconvenient for everyone involved.

(d) Limitations on transferability deny purchasers the “insurance” provided by the options of easy gifting or resale. The transferability limitations deny purchasers the “insurance” that they

⁹ [Http://www.ticketmaster.com/paperless.](http://www.ticketmaster.com/paperless)

have with paper or e-tickets that if they become ill or unable to attend, they can easily dispose of the tickets through gift or resale. Without this “insurance,” some who would otherwise purchase tickets may not do so.

(e) Limitations violate most purchasers’ experience with paper or e-tickets that their tickets will be freely transferrable. The above restrictions on resale, gifts, and donations do not now apply, and never have applied, to paper or e-tickets. Consequently, these restrictions violate most purchasers’ long-held understanding that if a person buys a ticket, they own it and have the right to give it away or sell it as they see fit.

Broad transferability restrictions, such as those imposed by Ticketmaster, unreasonably limit consumer choice. By comparison with paper and e-tickets, the transferability restraints provide the ticket buyer with a significantly diminished product. In a fully competitive market, it is possible that restrictive paperless tickets would be rejected by consumers. The primary ticketing market for entertainment, however, is dominated by Ticketmaster. One outcome is that Ticketmaster may be able to extend its dominance into a growing segment of the secondary sales market by excluding rivals from competition for reselling its paperless tickets.

This paper examines concerns that transferability limitations on paperless tickets may injure competition and undermine consumer fairness. Different restraints, of course, raise different concerns, have different justifications, and embody different degrees of merit. The paper concludes that the concerns presented by broad transferability restraints on paperless tickets are of sufficient weight to merit governmental investigation, not only in consideration of possible enforcement action but also to assist legislative efforts to address problems resulting from the transferability restrictions.

INTRODUCTION

Like the Hundred Years’ War, the battle between promoters and venues on the one side and ticket resellers on the other has lasted more than a century. In 1906, the California Supreme Court ruled that reselling theater tickets at a profit was neither immoral nor harmful, reasoning:

The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or

convenience, than is the sale of any ordinary article merchandise at a profit. It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket and no greater right thereto, and having neglected that opportunity, or being unwilling to undergo the necessary inconvenience, and willing to pay a higher price than forego the privilege which the other by his greater diligence and effort had obtained, the transaction is just so far as he is concerned.

Ex Parte Quarg.¹⁰ In the intervening century, many more arguments have been made, and skirmishes engaged, in the courts, legislative halls, and the marketplace.¹¹

Notwithstanding the California Supreme Court's endorsement, promoters and venues have resented the resellers, pejoratively termed "scalpers,"¹² whom they viewed as opportunists that acquire significant groups of tickets at face price or below, and then block venue entrances and disturb event patrons as they try to resell their tickets at premium prices. States have recognized not only the problems with crowd control and customer annoyance, but also their lack of tax revenue from the resale transactions. Many state legislatures, therefore, adopted regulations requiring that on-the-street resellers sell only in designated areas or beyond a specified distance from the venue. In addition, state regulations typically required that ticket brokers register with the state, obtain licenses, and pay taxes in order to be permitted to charge more than the ticket's face price. Many state laws also imposed "anti-scalping" laws that prohibit ticket resellers from charging more than a modest amount over the ticket's face price. Since charging less than face price is not scalping, these regulations did not impose a price floor.

The battle lines and strategies shifted with the advent of computers and Internet sales. On-the-street entrepreneurs are no longer the main ticket resellers. Their primacy has been supplanted by Internet exchanges and brokers. Internet competition among secondary sellers now provides a

¹⁰ 149 Cal 79, 84 P.766 (1906) (holding that the resale of a ticket at a profit does not harm either the theater proprietor or the second buyer.). See also *Arlotta v. Bradley Center*, 349 F.3d 517 (7th Cir. 2003), and *United States v. Mount*, 996 F.2d 262, 263 (7th Cir. 1992).

¹¹ Cobb, "Validity of state or local regulation dealing with resale of tickets to theatrical or sporting events," 81 ALR 3d 655 (updated weekly) (noting cases dating from the late 19th century to the present). See also Halberg, "The Secondary Market for Tickets: A Look at Ticket Scalping through an Economic, Property Law, and Constitutional Framework," 6 DePaul J. Sports L. & Contemp. Probs. 173 (2010) (examining secondary ticketing from three important perspectives).

¹² In the 19th century, the term "scalpers" referred to brokers who acquired railroad tickets at low prices and resold them at less than the railroad's published fare. New York Times, "The Trunk Line Warfare," July 13, 1881.

means for both buyers and sellers to determine a fair market price. Many states have adopted comprehensive consumer protection laws, which can help address ticket sales fraud. Many resellers provide guarantees and other protections to ensure the legitimacy of what they sell. In this changed context, most states now accept online ticket resellers as part of a legitimate, useful and vibrant secondary sales market, especially if the resellers register with the state, provide consumer protections, and pay taxes as required.¹³ Increasingly, the states that imposed price ceilings are removing them. The New York Times reports that [o]ver the last decade many states have lifted scalping restrictions, allowing a robust secondary market to develop online.”¹⁴ Indeed, as of May, 2010, only about five states maintained broad prohibitions against sales over face value.¹⁵ Although states have maintained regulations regarding street sales near the venue, these rules are of little consequence to Internet exchanges and brokers or the prices they charge.

When tickets are in a paper or e-ticket format, the owner can easily resell them privately or through any secondary market seller because it is easy for the ticket owner to transfer the physical ticket to someone else. This allows resale prices to fluctuate freely with supply and demand. By contrast, the conditions and limitations attached to restrictive paperless tickets impede free and vigorous competition. Particularly with Ticketmaster’s paperless tickets, some purchasers are completely precluded from reselling or even giving away their tickets prior to the event. When purchasers are permitted to resell Ticketmaster’s restrictive paperless tickets, they may do so only through the seller’s resale service, TicketExchange, and subject to whatever fees, price ceilings, and price floors that may be applied. By this means, primary sellers and their clients not only limit consumer options but also effectively exclude other secondary sellers from the resale market for

¹³ Ticket News, TICKET RESALE LAWS: A 50 STATE COMPENDIUM (2ed. July 2009), (TicketNews.com 2009) (revised, 2011).

¹⁴ Sisario, “Scalping Battle Led by ‘Fans’ in Name Only,” The New York Times, A1, A3, July 20, 2011. According to eBay, “[f]ive states currently impose strict regulations on ticket resale prices. Thirty-nine states impose no restrictions, and six others are less restrictive.” [Http://www.ebaymainstreet.com/policy-papers/ticket-sales](http://www.ebaymainstreet.com/policy-papers/ticket-sales). See also, Phillip Leslie and Alan Sorensen, “The Welfare Effects of Ticket Resale,” 9, March, 2011, who similarly report a “clear trend of deregulation.” <http://www.stanford.edu/~pleslie/resale.pdf>.

¹⁵ StubHub reports that as of May 2010, Arkansas, Kentucky, and Michigan prohibit sales over face value; Rhode Island bans sales over face value plus the greater of 10 percent or \$3.00; and Massachusetts allows sales of up to the ticket’s face value plus \$2.00. In addition, five other states had more focused restrictions. New Mexico, North Carolina, and Mississippi place face value restrictions respectively for tickets to college athletic events, student tickets, and events either on state property or to University of Mississippi events. Florida limits resale of tickets to certain charitable events to face value plus \$1.00, and bans resale of multi-day and multi-events tickets that have already been used for admission at least one time. Finally, Georgia permits sales over face value only to the original purchaser, charities, or licensed brokers. [Http://www.StubHub.com/help/](http://www.StubHub.com/help/).

these tickets. Restrictive paperless tickets can also be cumbersome to use, especially when the purchaser wants to share a season ticket with friends or clients, becomes ill at the last minute, or has bought tickets for a group which cannot enter the venue because one member has been delayed in arriving. By comparison with paper and e-tickets, therefore, Ticketmaster's restrictive paperless tickets are a substantially degraded product.

This paper examines the impact that imposition of broad transferability restrictions on paperless tickets has on consumers and competition. Sandwiched between the paper's Introduction and Conclusion are five substantive parts. The first is foundational and comprised of five sections. These examine, respectively, the nature and operation of the ticketing market; the major ticket sellers; the various ticket formats; different types of paperless tickets; and new developments and technologies that are influencing the ticketing industry.

The second part looks closely at the problems that stringent transferability restrictions on paperless tickets impose on consumers. These constraints not only impede purchasers' ability to give, donate, or sell their tickets to others, but also impair consumers' convenient use of their tickets. Part III, a companion to Part II, looks at the impact that transferability restrictions may have on competition, particularly in the secondary sales market. Where broad transferability restrictions do not apply, the market can allocate tickets more efficiently; the ultimate consumers, however, may face more competition for tickets in the primary market or end up paying more to purchase their tickets in the secondary market.

Since the harm discussed in Parts II and III appears to be significant, Part IV turns to an issue integral to both consumer protection and competition law assessments – whether the various justifications proffered on behalf of the transferability restrictions are credible, legitimate, and substantial. The most commonly offered justifications appear to be weak or pretextual. In Part V, therefore, Sections A and B examine whether these situations might be amenable to consumer protection or antitrust law enforcement actions. Section C then considers the possibility of addressing the problems through legislation.

The paper concludes that some of the transferability restrictions – most particularly, total preclusion of resale or other transfers, and limitations on sale below face price – likely injure both consumers and competition significantly and without reasonable business justifications. Further factual and economic analysis may show that this is the case with other restraints as well. Too little

is known at this point, however, to warrant conclusions regarding the wisdom or prospects of legal challenges founded on consumer protection or antitrust causes of action. Nonetheless, the harm to consumers and competition appears sufficiently likely that this possibility merits further investigation and consideration. Such a step is important not only because it might lead to enforcement action regarding some or all of the restraints, but also because it might contribute to legislative efforts to address the problems caused by the transferability restrictions.

PART I – INDUSTRY STRUCTURE AND OPERATION

A. Overview of the Ticketing Industry.

1. *The Primary Market* -- The live entertainment events business is comprised of seven discrete markets: artists, managers, booking agents, promoters and producers, venues and venue operators, primary ticket sellers, and secondary ticket sellers.¹⁶ Other activities, such as recordings, management of fan clubs, and production of merchandise are intimately related.

At the market's foundation, or pinnacle depending on one's perspective, is the performer. Major artists and especially promising performers – those who draw the largest crowds, perform in the largest venues, and make the most money or have significant potential to do so – are represented by managers, who guide the artist's career and arrange for financial, legal, and other advice. Live Nation Entertainment's Front Line Management, which manages over 300 artists, is the largest talent management company in the industry.

¹⁶A good, concise description of the industry may be found in Live Nation Entertainment's 2010 Annual Report, included in its 10K filing with the SEC, <http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDExOTMxMjUtMTEtMDUwMjQzL3htbC9zdWJkb2N1bWVudC8xL3BhZ2UvNw%3d%3d>. Another helpful description, especially with respect to the primary and secondary ticketing markets, is Daniel A. Rascher and Andrew D. Schwartz, "Paperless Ticketing' and its Impact on the Secondary Market: An Economic Analysis," OSKR, LLC, 12/30/10, submitted to Harvard J. of Sport and Entertainment Law. See also, Silvenis, "Live Aid? Assessing the Ability of the Ticketmaster-Live Nation Consent Decree to Restore Competition Levels in the Primary Ticketing Market, AAI Working Paper No. 11-02, 4/14/11, http://antitrustinstitute.org/sites/default/files/AAI%20Working%20Paper11_02.pdf; and Hurwitz, "Commentary: Ticketmaster-Live Nation, An AAI White Paper," American Antitrust Institute, 4/28/09, http://antitrustinstitute.org/files/TICKETMASTER%20Revised.4.28.09_043020092221.pdf.

The process of creating a performance, tour or other live entertainment event typically commences when a booking agent contracts with an artist to provide representation for a limited period. The booking agent then contacts a promoter,¹⁷ who negotiates an agreement with the performer or booking agent to arrange the event, performance or tour. The promoter may also initiate this process.

Once on board, the promoter rents a venue from a venue operator for the performance dates, arranges for sets and local production services, secures transportation and lodging, acquires technical equipment, and is largely responsible for marketing the performance. For its part, the venue provides services such as concessions, parking, security, ushering, and ticket-taking. The venue operator not only receives rent for its facility, but also all or part of the revenue derived from concessions, parking, merchandise sales, sponsorships, and premium seats. The period between the initial contracts and the performance, or the first tour date, is generally between one and four months.

The market for the initial sale of tickets is known as the primary ticketing market. Venues typically enter into exclusive agreements with companies such as Ticketmaster to act as their agents for the initial, or primary, sale of tickets, and to provide associated services. Promoters, too, sometimes enter into agreements with primary ticket sellers. Typically, an exclusive agreement runs for a period of three to five years. Ticketmaster now has contracts with over 10,000 individual venues. Primary ticket sellers do not set the face price of the tickets; that decision rests in each instance with the artist, its manager, the booking agent, and the promoter, depending on the arrangements among the parties.

Rather than use a ticketing agency to handle ticket sales, some venues opt to manage their own ticket sales through their proprietary web sites by using “white label” software. By selling their own tickets rather than outsourcing these tasks to a company such as Ticketmaster, a venue and

¹⁷ The terms “promoter” and “producer” are often used interchangeably and will be used that way in this paper. In its 2010 Annual Report, for example, Live Nation Entertainment refers to itself as the producer (p2) and as the promoter (p.3) of shows for over 2300 artists. Technically, however, a producer funds the show or is the owner of the entertainment content, as Feld Entertainment is with the Ringling Brothers Circus. The producer works with venues and individual promoters to “promote” the event. Often the promoter provides a guarantee to the producer, and the promoter may have exclusive booking rights to a venue that the promoter does not own. Individual promoters are often locally based. An important part of Live Nation’s growth involved bringing many independent promoters, and venues, into the Live Nation fold.

promoter can reinforce their own connection with the event in the minds of the minds of ticket purchasers. In addition, use of white label software enables the venue and promoter to collect and control their own customer and ticketing data, often with “behind the scenes” technical assistance from the seller or leaser of the software.

2. *The Secondary Market* – The market for ticket resale is known as the secondary ticketing market. This market is comprised primarily of listing exchanges (also known as listing platforms) and brokers. Listing exchanges do not purchase their own inventory, but provide an online platform through which third party ticket owners can list their tickets for sale. When purchasers reply, the exchange processes the transaction, making sure that the seller gets her proceeds and the buyer gets her tickets.

By contrast with listing exchanges, ticket brokers purchase tickets and resell them, at a profit if the market price has increased beyond the ticket’s face price. In this sense, brokers are like investors or other businesses that acquire inventory and resell it. To market their tickets, brokers not only sell through their own websites but also list their tickets on exchanges. Brokers tend to be much smaller than the largest of the listing exchanges. Indeed, Professors Rascher and Schwartz describe the secondary market as “complex” and “highly fragmented,” “with as many as a thousand selling firms in the U.S. and no single firm with more than one percent of secondary sales.”¹⁸ Professors Krueger and Pray found in their 2006 survey study of the secondary market that, in general, scalpers, i.e., brokers, charge significantly *less* than do listing exchanges such as StubHub, RazorGator or TicketsNow.¹⁹ It is plausible, however, that consumers may have greater confidence in the larger, better-known resellers,²⁰ or believe that they have a greater chance of purchasing more desirable seats from those companies.

¹⁸ Daniel A. Rascher and Andrew D. Schwartz, “Paperless Ticketing’ and its Impact on the Secondary Market: An Economic Analysis,” OSKR, LLC, (December 30, 2010), (submitted to Harvard J. of Sport and Entertainment Law).at 7. Given the size of the largest listing exchanges, it is probable that the authors were referring only to brokers in stating that no firm has more than one percent of this market.

¹⁹ Krueger and Pray, “Evidence on the Secondary Market for Concert Tickets,” 5/29/08 (first draft), 9-10, http://www.er.uqam.ca/nobel/r36462/papers/Concert_TicketPrices_Nov_2009.pdf. A later draft of this paper was not available. Krueger and Pray’s results, however, are consistent with those found by Leslie and Sorensen, “The Welfare Effects of Ticket Resale,” 9, March, 2011, <http://www.stanford.edu/~pleslie/resale.pdf>.

²⁰ *Id.* at 10.

3. *Financial Relationships* – Financial arrangements in the entertainment industry reveal much about the relationships among the parties. Typically, the artist’s manager receives a percentage of the artist’s overall earnings. For an individual event, the artist receives a guaranteed advance. Whereas booking agents generally receive a fee from the performer, the promoter’s income derives primarily from the sale of tickets. It is the promoter, therefore, that bears the major risk of loss if a tour is unsuccessful.

After the performer receives its advance, the promoter recovers its expenses – including costs for renting the venue – plus a stipulated profit. The promoter and artist then divide the remaining ticket proceeds, with the artist typically receiving the lion’s share of this amount.

The primary ticket seller does not earn its payment and profits from the face price of the ticket. Exceptions to this rule do occur; Ticketmaster, for example, retains a portion of the face price from TicketExchange transactions, auctions, or when it provides special services such as “all-in pricing.”²¹ For the most part, however, the revenue that Ticketmaster earns from ticket sales derives from the various fees and service charges that are added to the face price. The most significant of these is the convenience or service charge intended to compensate Ticketmaster for its sales network and services. Ticketmaster does not determine these fees on its own, nor does it retain all of the proceeds; rather, by negotiated agreement, Ticketmaster sets and shares the fees with the venue, promoter, and perhaps the artist.

“Enough is enough,” [Ticketmaster CEO Nathan Hubbard] says about Ticketmaster being the sole heavy. Typically, sources say, Ticketmaster keeps about 50% of the fees, but larger venues can command up to 75% (promoters and artists then negotiate their cut with the venue or add an additional fee.) “Most of our major clients are making more on service fees than we are,” Hubbard claims.²²

A key reason why Ticketmaster agrees to share these fees and charges with venues is to induce their owner/managers to sign contracts making Ticketmaster their exclusive provider of primary ticket selling services. In addition to the convenience and processing fees, Ticketmaster sometimes charges customers a per order delivery fee, the amount of which is based on the method the

²¹ http://www.ticketmaster.com/h/help.html?tm_link=tm_homeA_q1_4, (discussing how Ticketmaster’s prices are determined).

²² Chuck Salter, “Ticketmaster: Rocking the Most Hated Brand in America,” FastCompany.com, July 22, 2001, <http://www.fastcompany.com/node/1761539/print>.

customer selects for ticket delivery. Although “facilities fees” are sometimes added to the ticket’s face price, these go exclusively to the venue.²³ The various supplemental fees and charges, plus taxes, significantly increase the amount a customer actually pays beyond the ticket’s designated face price.

4. *The Relationship Between Pricing in the Primary and Secondary Markets* – In their 2006 survey, Professors Krueger and Pray found that approximately 10% of surveyed concert attendees purchased their tickets in the secondary market, although the rate was near 30% for concerts by “superstars.”²⁴ The average price mark-up for the nationwide survey was 36%, although it was 145% for a U2 performance and 240% for a concert by Bruce Springsteen. These results are consistent with the finding that 12.3% of the best quality concert seats are resold, but only 3.3% of poorer quality seats. Allowing for price mark-ups, the survey authors estimated that the secondary market was approximately 15% the size of the primary market in 2006, or about \$600 million. More than half of those surveyed who purchased tickets on the secondary market, 51%, did so in order to get a better seat than they believed they could obtain otherwise. The second most commonly-offered reason, at a distant 14%, was that “Ticketmaster had sold out.”²⁵

Many have asserted that wide-spread underpricing of concert seats in the primary market has led to high mark-ups in the secondary market. This underpricing may have resulted in part from the difficulty in predicting market future market demand.

Promoters and artists set ticket prices, not Ticketmaster, and they too often rely on instinct. Face value is either too high, which contributes to unsold tickets, or too low, which helped build the \$4 billion legal secondary market.²⁶

Mark Perry, Professor of economics and finance at the University of Michigan, Flint Campus, has asserted that:

²³ *Id.*; Connolly and Krueger, “Rockonomics: The Economics of Popular Music,” NBER Working Paper No. 11282, p. 6-7, <http://irs.princeton.edu/pubs/pdfs/499.pdf>.

²⁴ Krueger and Pray, *supra* note 19, at 7. Ticketmaster estimates that approximately 20% of its tickets are resold in the secondary market. <http://blog.ticketmaster.com/category/latest-news/> 8/12/2011.

²⁵ *Id.* at 8.

²⁶ Salter, “Ticketmaster: Rocking the Most Hated Brand in America,” Fast Company.com July 22, 2011, <http://www.fastcompany.com/node/1761539/print>.

[g]reedy ticket brokers (“scalpers”) have taken all of the blame for the secondary ticket market, when the real blame should be directed towards the non-market-based, anti-fan behavior of bands and their promoters, who frequently under-supply the number of tickets their fans want to buy. They then play to sold-out shows, which creates the secondary market for tickets to those shows, but only because there is excess demand that the band failed to meet.²⁷

Greater reliance by primary market entities on economic forces governing supply, demand and price would lessen the opportunity for brokers to “buy low and sell high,” because tickets would be sold far closer to the market-clearing price in the first instance.

Underpricing in the primary market, however, may be intentional. Kruger and Pray suggest that many artists may feel social constraints not to appear as if they are gouging their fans, an impression that fans might receive if primary seats were sold at full market prices. By underpricing, artists might lose profits in the short term – Leslie and Sorensen estimate that it approximates, on average, \$150,000 per event²⁸ – but in return the artists might enjoy longer term goodwill that could translate into an expanded fan base, greater attendance at future events, and increased merchandise sales.²⁹

Relying on earlier work by Krueger, Kruger and Pray observe that underpricing of primary market tickets is diminishing,³⁰

While the underpricing of good seats is systematic, it is also starting to fade. Krueger (2005) documents that the price of tickets has been rising faster than the overall inflation, especially since the mid 1990s, and especially for the most expensive tickets. He argues that

²⁷ Perry, The Economics and Logic of Ticket Scalping, 2/16/11, The Trading Report, <http://www.thetradingreport.com/2011/02/16/the-economics-and-logic-of-ticket-scalping/> quoted in TicketNews 3/4/11 <http://www.ticketnews.com/features/Guest-Commentary-Artists-Promoters-use-ticket-resellers-as-scapegoats031104675>. See also Hogan, “Live Nation to Roll Out Dynamic Pricing, Everyone Else Just Rolls Eyes,” News Items, *quoting* Mark Perry, Professor of Economics and Finance, University of Michigan (Flint Campus), April 22, 2011, <http://www.authoritytickets.com/?page=266>.

²⁸ Leslie and Sorensen, *supra* note 14, at 36 -37. The authors reached this figure by taking the 10% most desirable seats for each event analyzed, repricing them to reflect the average resale price for those seats, thereby adding a fourth price level for every event. The authors found “that primary market revenue increases by 13% (an average of approximately \$150,000 per event.) This is a lower bound for how much money producers are leaving on the table by not scaling the house more finely.” *Id.* Ticketmaster CEO Nathan Hubbard also recognizes the inefficiency in having too few pricing points for events, and the opportunity in creating more price points. Rovell, “One-on-One With Ticketmaster CEO on Dynamic Pricing,” CNBC.com 4/21/11, <http://www.cnbc.com/id/42707776/print/1/displaymode/1098>.

²⁹ Krueger and Pray, *supra* note 19, at 2008, 4-5, 11. The authors also review other models attempting to explain underpricing in the primary market and other market data.

³⁰ *Id.* at 5.

technological change that has weakened the complementarity between concert attendance and record sales accounts for the rapid rise in concert tickets. As the concert industry moves from a provider of social events to a commodity market, we expect that the social constraint faced by the artists and promoters [not to be perceived as gouging their fans] will lose its power, enabling them to extract more of the high-value consumer surplus by raising the price of good seats.³¹

It is likely that Ticketmaster's recent implementation of dynamic pricing, by which it can repeatedly adjust face prices in response to market forces, and its creation of GrouponLive, through which it can sell distressed seats at a deep discount, constitute movement in this direction.

B. Major Ticket Sellers

1. *Primary Market Ticket Sellers* – Live Nation Entertainment deserves primacy of place in any review of major ticket sellers because it is the industry's dominant firm, not just in ticketing, but many other areas as well. Indeed, the most significant event in the industry's recent history was the company's creation in 2010 from the merger of Live Nation and Ticketmaster, a transaction that directly affected other important ticket sellers as well.

To its union with Ticketmaster, Live Nation brought its positions as the world's largest promoter of live entertainment events and the second largest owner/operator of venues. Ticketmaster's dowry included ownership of Front Line Management, the largest artist management firm, and its subsidiary, TicketsNow, the second largest company in the secondary ticketing market.³² More importantly, Ticketmaster itself was by far the world's largest provider of primary ticketing services. For its part, Live Nation was second in this market and the only competitor with the necessary size, vertical integration, customer confidence, and ticket selling capability to be a significant rival to Ticketmaster.

³¹ *Id.*, summarizing Kruger, Alan B., "The Economics of Real Superstars: The Market for Concerts in the Material World," *Journal of Labor Economics*, 23(1): 1-30 (2005).

³² The August, 2011 TicketNews rankings indicate that recently TicketLiquidator.com edged TicketsNow for second place, http://www.ticketnews.com/ticket_industry_rankings; the TicketLiquidator web site, however, describes itself as "the third largest ticket resale website in the United States and the second most visited one." <http://www.ticketliquidator.com/our-company.aspx>. In light of TicketLiquidator's description, this paper will refer to TicketsNow as the second largest ticket resale website.

TicketNews ranks primary sellers, secondary sellers, and primary and secondary sellers combined, according to its proprietary Power Score system. This system ranks the relative performance of ticket sellers by looking at the numbers of unique visitors, total visitors, and page views on the seller's website.

The Department of Justice focused its review of the proposed merger on the competitive impact of joining the top two firms in the primary ticket selling market. The Department concluded that Ticketmaster enjoyed market power that was shielded by high barriers to entry in the market for primary ticketing services for major concert venues.³³ The agency permitted the transaction to proceed, however, subject to several conditions designed to restore competition lost due to the merger.³⁴

First, the consent agreement required Ticketmaster to make its Host ticket selling platform available to Anschutz Entertainment Group (“AEG”) at a below standard royalty and to help AEG set up its own web site for selling tickets. After five years, Ticketmaster would have to offer AEG the option to acquire Host pursuant to a perpetual, fully-paid-up lease. AEG was the second largest event promoter (after Live Nation), the owner or operator of 30 venues, and the half-owner of a talent management company. Because of AEG’s significant capacity to offer both venues and content, the Department of Justice considered that firm to be the company best positioned to provide meaningful competition to Ticketmaster following the merger, once AEG became established in the primary ticketing market. The remedy’s second structural condition required Ticketmaster to divest its white label subsidiary, Paciolan, to Comcast-Spectacor, a vertically-integrated company that already possessed an established, albeit modest, place in the primary ticket sales market through its New Era Tickets subsidiary.

The consent agreement imposed behavioral restrictions on the Defendants as well. In particular, the consent remedy prohibited the Defendants

³³ When it was reviewing the then-proposed merger between Ticketmaster and Live Nation, the Department of Justice concluded that “[t]he resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents harm competition in the sale of tickets for events at major concert venues and reduce innovation in primary ticketing services.” *United States of America v. Ticketmaster Entertainment, Inc. and Live Nation*, Cast 1:10-cv-00139, Response to Public Comments, <http://www.justice.gov/atr/cases/f259900.259936.htm> at p 4, and Competitive Impact Statement, <http://www.justice.gov/atr/cases/f254500/254544.htm>.

³⁴ The facts, legal theory, and remedy are contained in: Final Judgment, *United States v. Ticketmaster Entm’t Inc., et al.*, No.1:10-cv- 00139 (D. D.C. Jul. 30, 2010) <http://www.justice.gov/atr/cases/ticket.htm>; Plaintiff United States’ Response To Public Comments, *United States v. Ticketmaster Entm’t Inc., et al.*, No.1:10-cv-00139-RMC (D. D.C. Jun. 21, 2010) [hereinafter Response to Public Comments], <http://www.justice.gov/atr/cases/f259900/259936.htm>; Competitive Impact Statement, *United States v. Ticketmaster Entm’t Inc., et al.* No.1:10-cv-00139-RMC (D.D.C. Jan. 25, 2010), <http://www.justice.gov/atr/cases/f254500/254544.htm>. See also Silvenis, supra, and Hurwitz, supra.

from explicitly or practically requiring venues to take their primary ticketing services if the venues only want to obtain concerts the Defendants promote or concerts by artists the Defendants manage, and it likewise prohibits Defendants from explicitly or practically requiring venues to take concerts they promote or concerts by artists they manage if those venues only want to obtain the Defendants' primary ticketing services.³⁵

The remedy also bars the Defendants from using clients' ticketing data in its non-ticketing business, sharing that data with other promoters or artists' managers, or refusing a client's request for its data when that client decides not to renew its contract.

As a result of the merger, Ticketmaster became the ticketing arm for the newly created Live Nation Entertainment, and it still dominates primary ticket sales. Although the remedy provided a means for boosting AEG into the primary ticket sales market, AEG opted for a different business plan shortly after the merger was consummated. Rather than rely on Ticketmaster's Host platform, AEG entered into an arrangement with Outbox Technology to compete with Ticketmaster by providing venues with white label ticketing software that would enable them to manage their own ticket sales.³⁶ As a result of this arrangement, Ticketmaster will lose the patronage of AEG, which was Ticketmaster's largest client in 2010, accounting for about 10% of Ticketmaster's primary ticket sales.

Many expected the merger to lead to increased dominance for Live Nation Entertainment, but this has not yet occurred. Between the time when AEG initiated its new white label site and the end of September 2011, Live Nation Entertainment lost about 25% of its market value.³⁷ Of course, this is only chapter one of the story. The entire stock market has suffered during this period. In addition, Ticketmaster is still working to implement many changes in an effort to be more responsive to consumer preferences. Although Live Nation Entertainment's current stock market losses are significant, the longer term impact of the merger is not yet clear.

³⁵ *Id.*, Final Judgment.

³⁶ Branch, "AEG teams with Outbox Technology to compete with Ticketmaster on Ticketing," TicketNews, 2/03/11, <http://www.ticketnews.com/news/AEG-teams-with-Outbox-Technology-to-compete-with-Ticketmaster-on-ticketing021103456>.

³⁷ Rob Cox and Agnes T. Crane, "Altering a Deal Without Blocking It," New York Times, 10/2/11, http://www.nytimes.com/2011/10/03/business/altering-a-deal-without-blocking-it.html?_r=1&scp=2&sq=Live%20Nation%20Entertainment&st=cse.

Notably, Ticketmaster also engages in white label selling, often as a supplement to its efforts as a ticketing agent for its clients.

“We think there are two business models when it comes to ticketing and we’re in both,” [Live Nation Entertainment President and CEO] Rapino said. “There’s the software to allow entities to sell tickets, and we’re the leader in that, and there’s aggregating to help them sell tickets through Ticketmaster.com, which is the fifth-largest e-commerce site in the world. We ‘white label’ Web sites for over 2,000 venues, but those venues like the added audience and eyeballs that Ticketmaster.com can provide.”³⁸

The largest primary ticket seller after Ticketmaster is Eventbrite. Whereas Ticketmaster dominates ticket selling for large events, Eventbrite focuses on small and medium-size events. Employing a white label approach, Eventbrite helps its clients develop a customized registration web page, promote the event, collect customer data, and manage ticket sales.³⁹ Paciolan, which Ticketmaster divested to Comcast-Spectacor pursuant to the merger consent agreement, is also a white label seller.⁴⁰ Other notable white label sellers are Tickets.com, ETix, and Telecharge. Tickets.com is owned primarily by Major League Baseball but is not confined to selling sports tickets; it both leases white label software and sells directly to consumers. Like other white label companies, Tickets.com boasts that its proprietary white label technology enables

venues to capture, retrieve and own their customer data. This unrestricted access to sales information, coupled with the ability to sell tickets to consumers under their own brands, gives Tickets.com a 360 degree view of buying habits and preferences, which help them improve marketing strategies and build long-term relationships with their customers.⁴¹

The software provided by some white label sellers also enables clients to impose fees and place price floors or ceilings on ticket resale transactions.

2. *Secondary Market Sellers* – As noted above, secondary market ticket sellers divide roughly into brokers and listing exchanges. Brokers tend to be relatively small entities, which is not

³⁸ Branch, “Live Nation plans dynamic pricing rollout in second quarter of eleven,” TicketNews.com, 2/28/11, <http://www.ticketnews.com/news/Live-Nation-plans-dynamic-pricing-rollout-in-second-quarter-of-eleven021128794>. Ticketmaster’s white label affiliate is TicketWeb, which ranks as 10th in the TicketNews August, 2011 rankings of primary ticket sellers. http://www.ticketnews.com/ticket_industry_rankings.

³⁹ <http://www.eventbrite.com/features>.

⁴⁰ New Era Tickets, also owned by Comcast-Spectacor and which counts Comcastix as one of its clients, is more a full service primary ticket seller.

⁴¹ <http://www.tickets.com>.

surprising since they must invest in their own inventory of tickets for resale. Listing exchanges provide a platform for ticket-owners to list their own tickets for sale. Some exchanges are price driven, in which the seller sets the price; others are offer-driven and operate like an online auction in which prospective purchasers submit bids. Exchanges commonly have mechanisms to facilitate the exchange of tickets for payment between the seller and purchaser and guarantee ticket replacements or refunds to mitigate concerns with seller fraud.

In the TicketNews rankings of the top secondary sellers, listing exchanges head the list.⁴² The largest secondary market seller by a large margin is StubHub, a division of eBay. TicketsNow, an exchange owned by Ticketmaster, and TicketLiquidator are StubHub's closest competitors. TicketNetwork, which follows in fourth,⁴³ has the largest inventory of tickets for resale on the Internet.⁴⁴ TicketLiquidator, which also aggregates thousands of offerings both from individuals and licensed brokers, also enjoys access to TicketNetwork's inventory.

Here, as elsewhere, labels live more on spectra than in isolated boxes. Thus, some exchanges include in their listings tickets that the exchange itself owns or tickets that were not previously sold but rather were initially withheld for personal sale by the artist or promoter. Brokers often list tickets they own on listing exchanges. In addition to transactions by brokers and listing exchanges, venues and teams sometimes process the resale transactions, often using capabilities provided by white label software. Although it is unlikely that any individual venue or team accounts for more than a miniscule portion of all secondary market activity, venues and teams in aggregate might process a notable percentage of ticket resales. Companies such as eBay and Craigslist also process a substantial number of resale transactions; these companies are omitted from the TicketNews rankings, however, presumably because they do not focus primarily on selling tickets but rather offer a great variety of items.

Ticketmaster's TicketExchange is devoted to listing Ticketmaster's paperless tickets, as well as to selling VIP seats, premium seats, and tickets previously withheld from sale to the general public by artists and promoters. This exchange is not on the list of top secondary sellers, however,

⁴² [Http://www.ticketnews.com/ticket_industry_rankings](http://www.ticketnews.com/ticket_industry_rankings).

⁴³ [Http://www.ticketnews.com/ticket_industry_rankings](http://www.ticketnews.com/ticket_industry_rankings).

⁴⁴ <http://www.ticketliquidator.com/our-company.aspx>.

probably because paperless tickets still represent less than 1% of all tickets sold.⁴⁵ When the focus is narrowed to the resale of paperless tickets, however, TicketExchange is probably at the top, because Ticketmaster is the major seller of paperless tickets.

C. Ticket Formats

Ticket formats vary in definition depending on who is writing the glossary. For purposes of this paper, four categories provide adequate specificity and distinction.⁴⁶

1. *Paper Tickets* – This category includes hard tickets, which are printed on cardboard stock and mailed to the purchaser or sold at a venue box office or retail outlet. This category also includes e-tickets once they have been printed out.

2. *E-Tickets* – These are digital tickets that can be e-mailed to the purchaser, who then prints them on her home computer. Sometimes they are printed by the seller, who then ships the paper copy to the purchaser, a security measure that helps prevent over-printing and fraud. Ticketmaster refers to its print-at-home e-ticket as “TicketFast.” E-ticket printouts typically include a bar code that can be read by scanners at the venue.

3. *Paperless Tickets* – Paperless ticketing is a format for which no paper or e-mail ticket is sent to the purchaser. Rather, the buyer’s credit card or other electronic identification is used as proof of the sale. For this purpose, Ticketmaster uses only the purchaser’s credit card, which the purchaser must display at the venue along with a government issued ID. After verification, the purchaser receives a seat locator slip – ironically, converting that process into one that is not entirely paperless – and proceeds to her seat.

Ticketmaster CEO Nathan Hubbard does not see paperless tickets as “right for all events or usually even all inventory in a given event.”⁴⁷ As he explained in a recent interview,

The future of paperless ticketing is going to be determined by the artists, managers, venues and sports teams who choose to use the technology, not by us. Paperless tickets are most

⁴⁵ Darren Rovell, “One-on-One with Ticketmaster CEO on Dynamic Pricing,” CNBC.com, April 21, 2011, <http://www.cnbc.com/id/42707776/print/1/displaymode1098/>.

⁴⁶ See, e.g., <http://www.ticketliquidator.com/dictionary.aspx#type>.

⁴⁷ Darren Rovell, “One-on-One with Ticketmaster CEO on Dynamic Pricing,” CNBC.com, April 21, 2011, <http://www.cnbc.com/id/42707776/print/1/displaymode1098/>.

commonly used for really high-demand events – and always by request – to ensure that fans can get an affordable ticket. Last year, they made up just 0.01 percent of all the tickets we processed.⁴⁸

Veritix has its own form of paperless tickets, FlashSeats. To purchase FlashSeats, the buyer first registers with Veritix, without cost. She then chooses her event and tickets, pays for them with her credit card, and selects the electronic ID she wants to use as identification. In addition to a credit card, the purchaser might use, for example, her student ID or driver’s license.⁴⁹ When she arrives at the venue, the ID is scanned and the purchaser enters.

4. *Mobile Tickets* -- If e-tickets and paperless tickets had a child, it would be mobile tickets. This ticket format warrants special mention because its popularity mirrors the burgeoning popularity of smartphones. Indeed, Ticketmaster’s CEO Nathan Hubbard stated “I’m not worried about the other ticketing companies. The Googles and Apples of the world are our competition.”⁵⁰ Although these companies are not yet direct rivals of Ticketmaster in event ticketing, Hubbard recognizes the clear potential for them to become so.

A ticketing company or venue provides the purchaser with a mobile ticket by sending a unique bar code to the purchaser’s smartphone. To gain entry, the purchaser simply displays the bar code, which can be scanned directly from the smartphone by venue personnel. One particular advantage of mobile tickets is that, where permitted by the ticketing system, they are easy to transfer by e-mail to friends, relatives and others. In addition, when a purchaser of several mobile tickets anticipates that a member of her group will be late, she can, where permitted, call the ticket issuer to send a duplicate bar code to the late arriver’s smartphone. Ticketmaster has provided this benefit in

⁴⁸ Id.

⁴⁹ In the U.K, Live Nation is experimenting with the use of wristbands that have a magnetic chip keyed to the purchaser and that perhaps might be used not only for entry to the venue but also to prepay for concessions, merchandise or other items. The wristband would make counterfeiting more difficult but also, unlike a paperless ticket, would give the purchaser something that could be lost or stolen. Branch, “Live Nation Entertainment to experiment with digital wristbands at UK festivals” TicketNews.com, March, 25, 2010, <http://www.ticketnews.com/news/Live-Nation-Entertainment-to-experiment-with-digital-wristbands-at-UK-festivals3102571>.

⁵⁰ Chuck Salter, “Ticketmaster: Rocking the Most Hated Brand in America,” FastCompany.com, July 22, 2001, <http://www.fastcompany.com/node/1761539/print>. Although Hubbard was talking generally about making his company more responsive and innovative, his reference to Apple in particular reflects his awareness of the importance of mobile ticketing.

countries such as Australia and Ireland⁵¹ but does not appear currently to offer this feature in the United States.

Estimates indicate that mobile ticket sales, for items ranging from concerts to movies to airline travel, will increase from 2 billion delivered tickets in 2009 to 15 billion by 2014.⁵² eBay anticipates that in 2011 it will generate \$4 billion in gross merchandise volume through mobile commerce, double what it generated in 2010.⁵³ eBay's subsidiary, StubHub, recently launched a mobile ticketing application for Microsoft Windows Phone,⁵⁴ which adds to StubHub's existing applications for Android, iPhone, and iPod devices. StubHub also entered into a partnership with Major League Baseball's San Francisco Giants to provide mobile ticketing.⁵⁵ For its part, Ticketmaster updated its Ticketmaster for Blackberry application in 2010 so that it will be supported by all devices for all carriers.⁵⁶ Another mobile ticketing firm, Twicketer, has a service charge of only \$0.99, far less than is charged by Ticketmaster and similar ticket sellers.⁵⁷

D. Categories of Paperless Tickets

There are three basic categories of paperless tickets, based on how easy they are to transfer.

1. *Non-Transferable Paperless Tickets* – With these paperless tickets, resale, gift, and donation of the tickets prior to the event is prohibited. Since ownership of these tickets is tied to the purchaser's credit card, when the seller refuses to permit modification of this connection – e.g., exchange a ticket owner's identifying information for that of a gift recipient or new purchaser – it nearly impossible to give, donate, or sell the tickets to others before the event date.

⁵¹ <http://www.ticketmaster.com.au/mobileticket/index.html#Q4>; <http://www.ticketmaster.ie/mobileticket#Q4>.

⁵² Perez, "Mobile Ticketing Taking Off: 15 Billion Sold by 2014," ReadWriteWeb, 2/3/2010, http://www.readwriteweb.com/archives/mobile_ticketing_taking_off_15_billion_sold_by_2010.php.

⁵³ StubHub Press Release, "StubHub Launches Ticketing Application for Microsoft Windows® Phone," July 6, 2011, <http://finance.yahoo.com/news/StubHub-Launches-Ticketg-bw-2908261889.html?x=0&v=1>.

⁵⁴ *Id.*

⁵⁵ Johnson, "eBay's StubHub, San Francisco Giants take in-stadium experience paperless via mobile ticketing service," Mobile Commerce Daily, 8/26/2011, <http://www.mobilecommercedaily.com/2011/08/26/stubhub-san-francisco-giants-take-in-stadium-experience-paperless-via-mobile-ticketing-service>.

⁵⁶ Zeis, "Ticketmaster App Updated – Now Available for All Devices," Crackberry.com, April 19, 2010, <http://crackberry.com/ticketmaster-app-updated-now-available-all-devices>.

⁵⁷ Smith, "Twicketer: The First Truly Paperless Ticketing Option?" Triplepundit.com 7/30/2010, <http://www.triplepundit.com/2010/07/twicketer-the-first-truly-paperless-ticketing-option>.

2. *Restrictive Paperless Tickets* (“closed loop system”) – These paperless tickets, like paperless tickets for which transfers are prohibited, are tied to the original purchaser’s credit card and ID. These tickets may be resold, but not given away or donated in advance. The resale transaction, however, can be processed only by Ticketmaster’s ticket reselling service, TicketExchange, and only subject to whatever fees, price caps, price floors, and other conditions that may be imposed. When one person buys tickets for a group, the tickets cannot be distributed in advance. The entire group, therefore, must wait to enter the venue until all members are present; otherwise, the latecomer will not be permitted to enter.

Ticketmaster’s paperless tickets either prohibit transfers or are restrictive paperless tickets. Original ticket purchasers, whether individuals or brokers, sometimes try to circumvent the restrictions by arranging a gift or resale, and then meeting the recipient or buyer at the venue where the original purchaser can then claim and distribute the seat locator slips. Another method is to purchase the ticket with a gift card, such as VISA, that contains the purchaser’s information, and then mail that gift card to the new purchaser or gift recipient.⁵⁸ While sometimes serviceable, these stratagems do increase the transaction costs borne by the parties.

Despite these circumventions, Ticketmaster has successfully used its transferability restraints to wrest control of resale transactions for its paperless tickets from the competitive secondary market. In so doing, Ticketmaster has been able to generate substantial fees for itself while denying that revenue to its secondary market rivals. These fees and profits are greater per ticket than those derived from primary ticket sales.⁵⁹ For example, when TicketNews checked the fees for an August 5, 2010 concert by Kings of Leon in Camden, New Jersey, it discovered that

[p]aperless tickets for that concert carried a face value of \$61.50 per seat, and with a \$15 convenience fee the total cost was \$76.50. ...

⁵⁸ The TicketLiquidator web site notes both of these methods as means for managing the resale of restrictive paperless tickets. <http://TicketLiquidator.com/faq.aspx>. Vividseats.com, among others, sometimes uses the first of these methods to manage resale transactions for paperless tickets. <http://www.vividseats.com/faq.html#seating8>.

⁵⁹ Nakashima, “Ticketmaster introduces system to trade its ‘paperless’ tickets, cutting out scalpers,” 9/17/09, observing that for a Penn State football opener, fees on the initial sale were “a little more than \$4 per ticket, but on resales the buyer was required to pay \$1.95 and a 15 percent transaction fee—up to \$10.95 a pop.” <http://www.startribune.com/templates/fdcp?unique=130107268`228>.

As is stipulated when a fan decides to resell the ticket, the maximum price they can list the ticket for on TicketExchange is \$73.80, which is below the \$76.50 they originally paid for it. With fees, the new buyer would pay a total of \$86.20.

The reseller is also on the hook for a seller's fee of \$10.40, which brings the final proceeds of the sale to \$63.50, or about 83% of what the fan originally paid for the paperless ticket.⁶⁰

On this resale transaction, therefore, the buyer's fee was 16.8% and the seller's fee was an additional 14.1%, totaling \$22.70 in fees, or more than 30 percent of the new purchase price.

It is important to note that it is not clear how frequently minimum and maximum resale prices are imposed. Absent survey evidence, an assessment of the extent of the problems caused by resale price floors and ceilings would be very difficult. Relying on reports such as the one discussed above, this paper will assume that the imposition of resale price restraints is not rare and that the problems flowing from them are not negligible. These definitely are issues worthy of investigation, however. Of course, Ticketmaster, Veritix and other sellers of paperless tickets may change their resale policies, transferability rules and restraints, price limits, and fees from time to time and in accordance with the wishes of different artists, promoters and venues. Even when there are changes, examination of patterns regarding these topics should be enlightening.

Where ticket resale is not permitted, the benefit comes along a different road. Anyone wanting a ticket to the event would not be able to obtain it through the secondary market and would need to purchase it in the primary market for face price from Ticketmaster, with fees attached of course. Ticketmaster, therefore, will have sold two primary tickets, rather than a single ticket that was then resold. By taking control of the secondary market for its restrictive paperless tickets, Ticketmaster wins either way.

3. *Easily Transferable Paperless Tickets* – Paperless tickets sold by some companies are relatively easy to give away, donate, or sell in advance of the event. These tickets are not completely free of restrictions, however. Often, for example, the transfer must be processed by the ticket seller or ticket issuer, and some ticket issuers may impose fees for this service. Although these paperless tickets may be resold for any price, some ticket issuers may decline to list tickets on their exchanges where the offering price is lower than some floor price.

⁶⁰ Branch, "Ticketmaster allows resale of paperless tickets only through its Web site," TicketNews, 4/1/2010, <http://www.ticketnews.com/news/ticketmaster-allows-resale-of-paperless-tickets-only-through-its-Web-site4101019>.

For example, Veritix FlashSeats are relatively easy to transfer or resell.⁶¹ A purchaser can give Veritix FlashSeats to another person prior to the event by signing in to the Veritix web site, identifying the tickets she wants to transfer, and providing the recipient's name and e-mail address. Veritix then sends the recipient an e-mail explaining how to claim the ticket, a process that requires the recipient to register (without cost) with Veritix and indicate the ID she wants to use. At the venue, the recipient displays her chosen ID, venue personnel verify her ownership of the tickets, and she enters. If the original purchaser prefers to resell her seats, as opposed to giving them away, she signs into the Veritix site and identifies the tickets she wants to sell. Veritix causes the tickets to be listed for sale at the seller's specified price on the venue's or ticket issuer's website. Although Veritix charges no fee for this service and imposes no price conditions, the team or ticket issuer sometimes does so.⁶²

Some ticket issuers, including some major league baseball teams, integrate their ticketing systems with those of independent, reputable, secondary ticket sellers, such as StubHub, to enable those secondary sellers to process resale transactions for the issuers' paperless tickets. The Houston Astros baseball team initially offers its customers the option of purchasing a paper ticket, e-ticket, or paperless ticket, and it offers purchasers of paperless tickets the option of subsequently transferring those tickets to others, without charge and without application of price minimums or maximums.⁶³ Of course, where paperless tickets may be readily transferred in advance, only the new ticket owner needs to appear at the venue with her ID and credit card; the original purchaser is free to enjoy her evening.

E. New Developments

The ticketing industry is dynamic, not static. In addition to paperless tickets and mobile tickets, other technological changes, marketing innovations and strategic partnerships may influence competition and consumer choice in both the primary and secondary markets. Although it is

⁶¹ http://www.veritix.com/solutions/digital_ticketing_solutions.aspx; <http://www.flashseats.com/>.

⁶² Branch, "Veritix supports legislation aimed at ensuring paperless ticket transferability," TicketNews.com 3/25/11, <http://www.ticketnews.com/news/Veritix-supports-legislation-aimed-at-ensuring-paperless-ticket-transferability031125876>. Although the Cleveland Cavaliers currently will not permit sellers to list tickets at prices lower than 80% of face price, the sellers may sell the tickets on their own for whatever price they choose.

⁶³ http://houston.astros.mlb.com/hou/sth/paperless_faq.jsp.

possible only to speculate on the effects of these developments, it is important to factor into any analysis the possible market impact of these and similar changes.

1. *Dynamic Pricing* – Ticketmaster is in the process of rolling out what it calls “dynamic pricing,” which Ticketmaster developed in partnership with MarketShare, a company that provides strategic advice on ticket pricing. Dynamic pricing enables Ticketmaster to use market supply and demand data to periodically re-calibrate and revise ticket prices for an event. Some sports teams already have adopted a dynamic pricing approach, allowing the price of the ticket to vary depending, for example, on the team’s quality, the chance that it might participate in post-season games, the opponent’s quality, the weather, and other factors. Whereas airlines adjust their ticket prices frequently, Ticketmaster does not plan to make price changes so often.⁶⁴ Nonetheless, by generally selling tickets at closer to market price, Ticketmaster hopes to frustrate brokers who look for profit opportunities by acquiring tickets at a face price that is often far below the prevailing market price and then reselling them at a premium. Thus, Ticketmaster’s CEO Nathan Hubbard claims that dynamic pricing

will lower arbitrage opportunity and make it less likely tickets get snapped up because they’re being sold below their market value. Most scalpers buy those tickets and make huge spreads and a big business out of that. ...⁶⁵

Hubbard observes that on average, concerts at venues with 20,000 have only three price points. In his view, this is far too few. Moreover, he notes that 40 percent of tickets go unsold, in many cases because they were incorrectly priced to begin with. With dynamic pricing, it is possible to distinguish among tickets for which there are differences in demand, and to correct inefficiencies caused by initially setting the face price too high or too low. In this sense, Hubbard claims, Ticketmaster “is re-imagining the concept of face value,” and attempting “to create more price

⁶⁴ Gustin, “Young CEO Seeks to Reset Ticketmaster with Tech and Transparency,” *Wired.com* 3/17/11, <http://wired.com/epicenter/2011/03/ticketmaster/>; Branch, *TicketNews.com*, “Live Nation plans dynamic pricing rollout in second quarter of eleven,” <http://www.ticketnews.com/news/Live-Nation-plans-dynamic-pricing-rollout-in-second-quarter-of-eleven021128794>.

⁶⁵ Hogan, “Live Nation to Roll Out Dynamic Pricing, Everyone Else Just Rolls Eyes,” *News Items*, http://www.authoritytickets.com/?page_id=4.

points and more options for fans.”⁶⁶ Leslie and Sorensen estimate that the addition of one additional price point for an event can, on average, yield an additional \$150,000 in revenue.⁶⁷

Dynamic pricing may have some problems of its own, however, especially when ticketholders who paid different prices for similar seats begin talking with one another. It is possible, however, that customers will accept this situation with respect to event tickets as they now do with airline tickets. Some believe that Ticketmaster “hopes their new pricing format will adversely affect the secondary market, an entity they’ve been targeting all year.”⁶⁸ In essence, Ticketmaster intends dynamic pricing to enable it and its clients to sell more seats, fill more venues, and secure for themselves some of the arbitrage profits now enjoyed by secondary market firms. Professor Joris Drayer sounds a note of skepticism, however, because “as demand changes over time and consumers’ plans change, the need to transfer tickets will always remain, meaning that dynamic pricing may not reduce the presence of resellers.”⁶⁹

2. *White Label Competition and the OEG-Outbox Technology Partnership* – Ticketmaster enjoys an overwhelmingly dominant share of the primary ticket sales market.⁷⁰ Most of Ticketmaster’s sales employ the ticket agency approach, by which Ticketmaster sells tickets for its venue or promoter clients through a centralized hub, Ticketmaster.com. For those who don’t want to purchase online, Ticketmaster operates retail outlets and makes telephone sales. Venues, however, are increasingly realizing that they can manage their own sales through their own branded web sites by leasing the appropriate software from a white label supplier. As noted previously, many of Ticketmaster’s leading competitors employ this white label approach. If venues continue to adopt, or even view, the white label option as a reasonable alternative to outsourcing the primary ticket sales task to

⁶⁶ Rovell, “One-on-One with Ticketmaster CEO on Dynamic Pricing,” CNBC.Com, April 21, 2011, <http://www.cnbc.com/id/42707776/print/1/displaymode/1098/>.

⁶⁷ Leslie and Sorensen, *supra* note 14, at 37.

⁶⁸ *Id.*

⁶⁹ Drayer, Guest Commentary, “Dynamic Pricing, paperless tickets emerge as key issues in ticketing,” TicketNews.com 4/5/10, <http://www.ticketnews.com/features/Guest-Commentary-Dynamic-Pricing-paperless-tickets-emerge-as-key-issues-in-ticketing4105991>.

⁷⁰ In the TicketNews August, 2011 ranking of primary ticket sellers, Ticketmaster ranks first with a “Power Score” of 42.65, and its sibling Live Nation ranks second with a score of 15.50. Their combined Power Scores are more than 6 times the next largest primary ticket seller and more than double the aggregate power scores of the next six leading companies. The only other firms with scores above 4.00 are Tickets.com, with a score of 10.76 and Eventbrite.com with a score of 9.77. These rankings of primary sellers include some firms that market white label software. http://www.ticketnews.com/ticket_industry_rankings.

Ticketmaster.com, then Ticketmaster's raw market share may imply that it has more market power than it actually enjoys. This is the conclusion that Professors Meese and Richmond drew in their examination of the then-proposed merger between Live Nation and Ticketmaster.⁷¹ This conclusion, may be blunted, however, by the fact that Ticketmaster itself owns a significant white label affiliate, TicketWeb, which can pick up some venues that want to try a different approach.

This trend toward venues and teams using white label methods was recently bolstered by the recent partnership between AEG and Outbox Technology. This agreement dealt a significant blow to Ticketmaster, since it deprived that company of its largest client, accounting for 10% of Ticketmaster's 2010 sales.⁷² Ticketmaster, of course, still dominates the primary sales market, and has exclusive, long-term contracts with thousands of venues. Still, venues not currently bound to Ticketmaster, or those whose contracts will expire soon, have an option.

White label sales by venues may affect the use of restrictive paperless tickets. If venues do not like the transferability restrictions that Ticketmaster places on its paperless tickets,⁷³ or if venues or promoters believe that consumers resent the restrictions, the venue can use Veritix or another white label seller whose software does not involve the imposition of these restrictions.

3. *Social Media* – Ticketmaster has been working intensively to develop its presence in social networking sites. Confirming this strategy, Facebook executive Dan Rose stated that Ticketmaster received a benefit of \$5.30 in sales every time a Facebook user mentioned on the site a concert or event that they planned to attend. Recognizing these benefits, Ticketmaster incorporated links to Facebook on its own site, including Facebook's proprietary "Like" button. Facebook welcomed this direct link in anticipation of receiving additional Ticketmaster advertising.⁷⁴

⁷¹ Meese, Alan J. and Richman, Barak D., A Careful Examination of the Live Nation-Ticketmaster Merger (November 25, 2009). William & Mary Law School Research Paper No. 09-41. Available at SSRN: <http://ssrn.com/abstract=154626>.

⁷² Branch, Ticketnews.com "AEG teams with Outbox Technology to compete with Ticketmaster on ticketing," 3/3/11, <http://www.ticketnews.com/news/AEG-teams-with-Outbox-Technology-to-compete-with-Ticketmaster-on-ticketing021102456>.

⁷³ CEO Hubbard claims that the choice to use paperless tickets rests with artists, managers, venues, and sports teams, not with Ticketmaster. Rovell, "One-on-One with Ticketmaster CEO on Dynamic Pricing," CNBC.com, April 21, 2011, <http://www.cnbc.com/id/42707776/print/1/displaymode/1098/>. It is not clear, however, who actually decides to make the tickets restrictive, rather than readily transferable by gift, donation, and resale.

⁷⁴ Branch, "Ticketmaster's e-commerce efforts get boost from Facebook," TicketNews.com, 4/7/11, <http://www.ticketnews.com/news/Ticketmasters-e-commerce-efforts-get-boost-from-Facebook041107936>.

Ticketmaster also entered an agreement with Apple to integrate links in Apple's updated iTunes 10 to a social network called Ping. This service works much like Facebook, but it is centered on the users' musical tastes. Ping also contains links that enable Ticketmaster and Live Nation help sell tickets, promote concerts, and provide information to Ping's users about artists and performances.⁷⁵ As of September 1, 2010, Ping was accessible on computers, iPods, and iPhones and available immediately to 160,000,000 people worldwide.⁷⁶

The full significance of social media networking is not yet clear, but the trends toward its use are unmistakable. Many credit social media with having had substantial influence both in recent domestic and international political events. News and entertainment personalities regularly communicate with listeners through sites such as Twitter and Facebook. One way in which social media might influence the nature and use of restrictive paperless tickets stems from the massive reach of Facebook, Twitter, and iTunes. Facebook itself is reputed to have in excess of 750,000,000 users. If many consumers object to restrictions on paperless tickets, these concert-goers may share their opinions with an audience that is far larger than has ever before been possible. This audience may be expected to include not just concert-goers but artists, promoters, venue operators, and politicians. With any broad dissent by concert-goers, there would be substantial pressure on the ticket seller to change its policy.

4. *Discount Sellers* – Many consumers object to the cost of selling or buying tickets. Although a company's prices and fees are always subject to change, Ticketmaster's resale charges for the seller and buyer can total more than 30% of the selling price. StubHub charges a 15% fee to the seller plus a 10% fee to the buyer, plus delivery fees.⁷⁷ TicketsNow charges fees of 15% to sellers and 18.5% to buyers plus \$14.95 delivery and handling.⁷⁸ TicketLiquidator charges sellers a 10%

⁷⁵ Branch, "Live Nation strikes deal with Apple to sell concert tickets," TicketNews.com, 9/1/2010, <http://www.ticketnews.com/news/Live-Nation-strikes-deal-with-Apple-to-sell-concert-tickets091001723>.

⁷⁶ Albanesius, "Apple Goes Social with 'Ping' Inside iTunes 10," PCMag.com, September 1, 2010, <http://pcmag.com/article/print/254167>; Muchmore, "Apple iTunes Ping: Hands On," PCMag.com, September 2, 2010, <http://pcmag.com/article/pring/254229>.

⁷⁷ <http://www.stubhub.com/help>.

⁷⁸ <http://www.ticketsnow.com/SellYourTicketsNow/GettingStarted.aspx>.

commission on completed sales and levies an 18.5% service fee on buyers.⁷⁹ TicketNetwork charges sellers 10% on actual sales and buyers 18.5%, plus a \$15.00 delivery fee.⁸⁰

By contrast, some independent companies operate as discount ticket sellers. Brown Bag Tickets sells tickets both in the primary market and secondary market. There is no charge to the seller, and the charge to the buyer is \$0.99 plus 3.5% of the face price; most delivery methods are free.⁸¹ Ace Tickets in Boston, a secondary market seller, purchases tickets from sellers and charges a 7% fee to buyers.

Approximately 40% of tickets offered by Ticketmaster go unsold.⁸² Primary ticket-sellers would like to sell more of their distressed or hard-to-sell tickets but are reluctant to offer discounts because doing so might undermine the seller's reputation. Nonetheless, to hedge its bets and develop a greater presence in social networks, Live Nation Entertainment entered into an agreement with Groupon, a free social media web site that sends members daily e-mails offering locally-available deals at highly discounted prices. The two companies created a new web site, GrouponLive, to sell deeply discounted concert and other event tickets provided by Ticketmaster and its clients. The tickets are generally not for the most desirable seats in the house. Rather, they are more likely to be tickets that would be hard to sell in any other manner.⁸³ Ticketmaster and its clients believe they can recoup the revenue lost from the discounts through extra parking fees and sales of concessions and merchandise. The larger audience also provides additional, albeit more intangible, benefits that range from a more exciting concert experience for the audience and performers to the public relations "buzz" of playing to a full house.

One commentator, TicketNews, has suggested that Live Nation's arrangement with Groupon was in response to competitive pressure from the partnership between AEG and Outbox

⁷⁹ [Http://www.ticketliquidator.com/faq.aspx](http://www.ticketliquidator.com/faq.aspx).

⁸⁰ <http://www.ticketnetwork.com/default.aspx>.

⁸¹ <http://www.brownpapertickets.com/pricing.html>.

⁸² Darren Rovell, "One-on-One with Ticketmaster CEO on Dynamic Pricing," CNBC.com, April 21, 2011, <http://www.cnbc.com/id/42707776/print/1/displaymode1098/>; Press Release, "TicketBiscuit and ScoreBig sign partnership agreement," 2/3/11, <http://www.ticketnews.com/features/TicketBiscuit-and-ScoreBig-sign-partnership-agreement021103674>.

⁸³ Branch, "Groupon, Live Nation team up for new ticketing site," TicketNews.com, 5/9/11, <http://www.ticketnews.com/features/Groupon-Live-Nation-team-up-for-new-ticketing-site051109274>; Hogan, "Live Nation Entertainment Partners With Groupon in Effort to Sell Distressed Tickets," News Items 5/10/11, <http://www.authoritytickets.com/?p=270>.

Technology.⁸⁴ GrouponLive and other discount sellers can serve as sources of discounted tickets that are distinct from traditional secondary market companies. Some discount sellers might also provide outlets for brokers to dispose of tickets that they have been unable to resell.

Given its partners, GrouponLive may become an important channel for Ticketmaster to market its hard-to-sell tickets. The use of a web site for selling discounted tickets, however, is neither new nor unique. Goldstar.com, which ranks fifth on the TicketNews.com list of leading primary ticket sellers, has developed relationships with over 4,000 venues to supply tickets that Goldstar sells for half price.⁸⁵ Similarly, TicketBiscuit, a leading white label supplier of ticketing software, recently entered into an agreement with ScoreBig, a company that works with venues to sell tickets on its web site that otherwise would probably remain unsold. Purchasers use the site to list price offers for more one-half million tickets, at discounts of at least 70 percent. Under the agreement, ScoreBig will include in its inventory tickets provided by TicketBiscuit's clients.⁸⁶

5. *Other Technological and Marketing Changes.* – Future technological innovations are too difficult to predict with a high level of probability. Smartphones can already be used to promote, sell, transfer, and verify tickets. Methods for discovering and frustrating the use of bots (jargon for “robots”), other automated purchasing software, or fraudulent tickets may become more effective, thereby undermining the efforts of scalpers and the asserted rationale for adopting transferability restrictions. Where the artists consent, Ticketmaster has responded to consumer pressure to reveal earlier in the purchasing process the total amount (face price plus fees and charges) that consumers will pay for the ticket, adopt a more liberal refund policy, and eliminate the \$2.50 delivery charge on print-at-home tickets.⁸⁷

⁸⁴ Branch, “Groupon Live Nation team up for new ticketing site,” TicketNews.com, 5/9/11, <http://www.ticketnews.com/features/Groupon-Live-Nation-team-up-for-new-ticketing-site051109274>.

⁸⁵ <http://www.goldstar.com>.

⁸⁶ Branch, “TicketBiscuit and ScoreBig sign partnership agreement,” TicketNews.com, 2/3/11, <http://ticketnews.com/features/TicketBiscuit-and-ScoreBig-sign-partnership-agreement021103674>.

⁸⁷ http://blog.ticketmaster.com/page/2/?tm_link=tm_home&i_ticketology. Under its new policy, Ticketmaster will offer a 3 day return period for tickets for events in Live Nation venues, until one week before the event. It is not clear whether or not this policy applies to paperless tickets. The policy to inform customers earlier in the ticket-purchasing processing of the total cost – face price plus fees – of the ticket is discussed in <http://blog.ticketmaster.com/category/new-release-8/23/2011>. CEO Hubbard also notes that Ticketmaster has gotten about one-third of its clients to eliminate the \$2.50 delivery fee for its TicketFast e-mail/print-at-home tickets. Chuck Salter, “Ticketmaster: rocking the Most Hated Brand in America,” FastCompany.com, July 22, 2001, <http://www.fasccompany.com/node/1761539/print>.

Additional marketing and technological changes are possible, although not announced, with respect to paperless tickets. Ticketmaster might, for example, search for ways to make gifts and donations both convenient and costless, or to facilitate a group's division of tickets in advance of an event so that group members don't all have to wait for the last person to arrive. It might even adopt some version of the suggestion that Facebook users be allowed to sell or give away tickets to those that have been the ticket owner's Facebook friends for more than 30 days.⁸⁸ This suggestion is not as facetious as it might seem, since Ticketmaster notes that 75% of Ticketmaster.com users also use Facebook, and Ticketmaster has already implemented a method whereby a concertgoer can share her seat location with her Facebook friends.⁸⁹

It is hard to predict how legislative and legal changes might interact with these marketing and technological developments. Organizations opposing or favoring transferability restrictions for paperless tickets have also sought to use Internet web sites to influence legislators, organizations, companies, and individuals about the merits of their respective positions. The Fan Freedom Project asserts that those who purchase tickets own them and have the right to freely sell them or give them away to anyone, and to do so using their choice of method or market place.⁹⁰ The Fans First Coalition expresses concern with scalping (which arguably can be limited through the use of restrictive paperless tickets), fraudulent selling practices, and maintaining the availability of reasonably priced seats for fans.⁹¹ Although the New York Times reports that these organizations were initially funded respectively by StubHub (the leading secondary seller) and Live Nation Entertainment (the leading seller of primary tickets),⁹² the issue presented with respect to transferability restrictions on paperless tickets remains a real one: whether the restrictions are desirable on the ground that they allegedly make more tickets available for fans at lower prices or undesirable because they undermine the free market for tickets, deny consumers the ease of using

⁸⁸ Van Buskirk, "How Facebook Could Save Ticketmaster from Scalpers," Gizmodo.com, 3/30/11, <http://gizmodo.com/5787266/how-facebook-could-save-ticketmaster-from-scalpers>.

⁸⁹ http://blog.ticketmaster.com/page/2/?tm_link=tm_home&i_ticketology. To make this policy work, Ticketmaster would have to find some deal with brokers that became Facebook members themselves.

⁹⁰ The website for this organization is <http://www.fanfreedom.org>. The position regarding transferability restrictions taken by the Fan Freedom Project has been supported by the American Antitrust Institute and the National Consumers League.

⁹¹ The website for this organization is <http://www.standwithfans.org>. A site established by brokers is <http://betterticketing.org>. It contains links to academic studies and other useful information.

⁹² Sisario, "Scalping Battle led by 'Fans' in Name Only," The New York Times, A1, 7/20/11.

independent secondary sellers, and greatly limit consumer choice. Notably, *both* organizations have taken the position that bots and various fraudulent ticket-selling practices should be banned.

How use of these technological capabilities will mesh with the increased attention to social media and development of new marketing arrangements is unknown. All that is certain is that technological capabilities are increasing almost monthly. In connection with other innovations, these developments will change the context for primary ticket sales and, derivatively, for secondary market sales as well. In this ferment, Ticketmaster may find that its restrictions on gifts, donations and resale of paperless tickets have become outmoded or in need of revision. It is very difficult, at present, to predict with any certainty whether market developments will precipitate changes in the restrictions and, if so, what they will be.

PART II – INJURY TO CONSUMERS

The imposition of transferability restrictions on paperless tickets raises three key issues. The first, examined in this Part, concerns the harm these restrictions cause consumers. The second, addressed in Part III, considers the injury that these restraints inflict on competition. The third issue, reserved until Part IV, is whether legitimate business reasons justify the restraints.

Transferability restrictions on paperless tickets inflict three distinct kinds of injury on consumers. First, they reduce consumer choice, one of the most important attributes of a competitive market. This loss affects all aspects of the ticketing industry: the product the purchaser buys; the purchaser's latitude to sell, donate, or give away the tickets; other fans' ability to purchase or receive those tickets; and the initial purchaser's ability to select the company that offers the best combination of price and service to process the ticket transfer.

The second type of injury is that the restrictions materially and substantially degrade the product that consumers purchase, namely, the ticket to attend the concert or sporting event. This loss is particularly acute when restrictive paperless tickets are compared with paper and e-tickets, the formats still used for more than 99% of event tickets.

The third type of injury derives from the harm caused to competition, which forces consumers to pay higher prices, accept less value, or be denied the opportunity to make a sale or purchase even when willing buyers and sellers are available.

These injuries arise in several ways. Each is significant in its own right; together, they constitute an important devaluation of the tickets that purchasers buy.

A. Limitations on the Resale of Tickets

The purchaser of a restrictive paperless ticket cannot readily resell it. In some instances, she cannot resell it at all. Ticketmaster claims the artists, promoters or venue owners control this decision,⁹³ although it is easy to imagine that Ticketmaster plays a significant role in this process. Regardless, the decision-makers frequently appear to make inconsistent choices, especially when some of the tickets to a concert are sold are in a non-transferable or restricted paperless format (usually for the best seats) and the rest in other, more transferable formats. Consumer injury from limitations on the resale of tickets arises in five ways.

1. *Prohibition of Ticket Transfers* – Transferability prohibitions on paperless tickets create problems in several common circumstances. Sometimes the original ticket buyer will become ill or otherwise unable to attend the event. Such situations are neither predictable nor rare, especially since many people purchase their tickets months in advance of the event. When the proverbial lightning does strike, the purchaser may be stuck with a useless paperless ticket, one for which she can get neither a refund nor the proceeds from a resale. Of course, non-refundable, non-transferable discount tickets are sold for airline travel and hotel stays. The entertainment industry is distinguishable, however, because the restricted paperless tickets are neither sold at a discount nor, if they can't be used, are they applicable to future events.

2. *Requirement to resell only through TicketExchange* – An owner of a paper ticket or print-at-home e-ticket can resell it by listing it with several exchanges, perhaps selecting those exchanges on the basis of reliability, low fees, size, reputation, or other factors. An owner of a Ticketmaster paperless ticket can resell it, if at all, only through Ticketmaster's resale service, TicketExchange. Thus, the ticket-owner is deprived of the opportunity to choose who processes the ticket resale and

⁹³ Nakashima, "Ticketmaster introduces system to trade its 'paperless' tickets, cutting out scalpers," StarTribune.com, 9/17/09, <http://www.startribune.com/templates/fdcp?unique=1301072681228>.

rely on competitive factors that generally foster a more efficient market and better deals for consumers. Instead, consumers are thrown into a “one party election” by a seller that faces no rivalry when the paperless ticket purchaser seeks to resell her ticket.

Requiring purchasers of paperless tickets to process resale transactions through the seller may not present such a serious problem when the seller is not dominant. Although in other respects Veritix’s transferability restraints are less onerous than those imposed by Ticketmaster, Veritix does require that ticket owners go through the Veritix platform to resell their FlashSeats.⁹⁴ In that event, the consumer may have more choices if she prefers to seek tickets to other desirable events from other vendors. When the ticket-seller is dominant, however, as Ticketmaster is, a consumer has far fewer alternatives, far fewer places she can reasonably go if she dislikes the restraints imposed by the seller for the event she most wants to attend.

Sellers of paperless tickets might seek to justify such requirements because they arguably promote quality control; in essence, keeping the process “in house” is more reliable than when an independent company is involved. This argument is undermined, however, by the fact that sellers can and do forge arrangements with proven, independent firms, whereby the independent firm will transmit to the original ticket seller the new purchaser’s credit card or other identification information, and the original seller will process the change. Such relationships should be possible, and quality control standards maintained, without the initial ticket-seller divulging the original purchaser’s private information or making other undue errors. Indeed, some issuers or sellers of paperless tickets already have such relationships with event venues or independent listing exchanges that help process fan-to-fan resale transactions.

3. *Price Floors* – Even where the restricted paperless ticket can be resold, the purchaser is often precluded from selling the ticket at less than its face price. This is a curious restraint, because it has nothing to do with scalping. Traditionally, the laws and regulations against ticket scalping prevented sellers only from charging significantly *more* than the ticket’s face value, not from charging less. This “price floor” restraint is a more modern twist. Its ostensible rationale is to prevent low-priced resale offerings from undermining primary ticket sales at face price. Thus, it is not intended

⁹⁴ It is possible, for example, that consumers can arrange a private sale of their tickets and then have Veritix process the transfer as a gift, thereby avoiding any limitations or fees imposed on sales by Veritix or its clients. This is not possible with Ticketmaster, which does not permit transfers by gift.

to protect consumers from perceived overcharging, but rather to shield primary ticket sellers and venues *from* consumers who are overcharging no one.

Consumer injury arises because ticket owners often need to resell their paperless tickets, even if the price is low. Sometimes, the ticket holder just cannot get more, especially when ticket demand is modest. Perhaps the promoter has set the face price too high or selected too large a venue; in either event, unsold tickets will be plentiful, and the prevailing market price will sink below the face price. This situation is not rare; approximately 40% of ticket resales occur at prices at or below the ticket's face price.⁹⁵ In instances where paperless tickets can be resold, some ticket holders may be willing to accept whatever the market provides, especially as the event date draws close and prices typically drop. Price floor restrictions, however, prevent these transactions from occurring, notwithstanding that there is a willing seller and an eager buyer.

4. *Price Ceilings* – In other instances, a purchaser might discover that she is holding tickets to a “hot” event. This is her good fortune if she plans to attend. Sometimes, however, she might welcome the opportunity to receive the ticket's elevated market value rather than attend herself. If the artist, ticket issuer, or primary seller of the restrictive paperless ticket refuses to permit a resale, or a resale above a specified price ceiling, the initial purchaser will be denied access to a competitive market and be unable to receive what her ticket is worth. This situation also constitutes a loss from the perspective of a buyer willing to pay a premium price. Like the ticket owner, that buyer has been denied the opportunity to rely on prevailing conditions of supply and demand to set the ticket's price. In essence, the secondary market entity that limits maximum resale prices for paperless tickets is using private fiat to impose on sellers and buyers the restraint that so many states now have abandoned in their repeal of anti-scalping laws.

5. *Restraints on Season or Series Tickets* – Sales of season tickets and performance series are important to athletic teams and providers of musical or dramatic events. Purchasers of ticket packages frequently recoup part of the cost by selling tickets to individual games or performances on exchanges such as StubHub, TicketsNow, TicketNetwork, and RazorGator, or in resale markets

⁹⁵ Testimony of Michael Rapino, President and Chief Executive Officer, Live Nation, before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Senate Committee on the Judiciary, on the then-proposed merger of Live Nation and Ticketmaster, Inc., 2/24/2009, <http://judiciary.senate.gov/pdf/09-02-24Rapinotestimony.pdf>; Lorraine Cortes-Vasquez, Secretary of State, Report on Ticket Reselling and Article 25 of the Arts and Cultural Affairs Law,” 2/1/10, p.25, http://www.betterticketing.com/articles/Ticket_Reseller_Report.pdf.

such as eBay or Craigslist. Where these tickets are paperless, prohibitions or price restrictions on their resale can chill these market transactions and, derivatively, could also inhibit the initial purchases of these ticket packages.

B. Limitations on Gifts and Donations of Restrictive Paperless Tickets.

A second context in which transferability restrictions can injure consumers arises when the purchaser wants to give a ticket to a friend or relative or donate the ticket to a charity. To make such gifts, the initial purchaser of the restrictive paperless ticket must appear personally at the venue, display her credit card and ID, obtain the seat locator slip, and pass it on to the actual attendee. This can be more than just inconvenient; it is often impossible. Sometimes the initial purchaser is ill, cannot travel to the venue, or does not know the ultimate attendee. A parent may want to purchase a ticket for a child but not attend the concert herself. A grandparent might like to give a concert ticket as a birthday present to a grandchild in another city. People frequently want to give tickets to friends or neighbors, perhaps to express appreciation or return a favor. Season ticket holders may want to share tickets with customers, employees, or business associates. Ticket purchasers often donate tickets to a charity to be auctioned or raffled off in a fund-raising event. In each of these instances, and others, transferability restrictions imposed by Ticketmaster – by far the largest seller of paperless tickets – prevent or impede these generous or promotional efforts. By contrast, other paperless ticket sellers, such as Veritix, and some ticket issuers, such as the Houston Astros, facilitate such transfers.

One might ask why Ticketmaster would adopt such an anti-consumer policy. Part of the answer might stem from the fact that the ticketing industry is unlike the retail automobile industry, where a consumer can purchase the desired car from many different dealers and can select the seller that offers the best combination of price, service and convenience. Rather, for many concertgoers, Ticketmaster will be the only primary seller of tickets for the event that the consumer wants to attend. With its market dominance, it might also be the primary ticket seller for any second choice events that the consumer might consider. The consumer's main hope, therefore, is that for the desired event, venue, date, and seating section, the tickets will not be paperless and restrictive.

By impeding transfers of paperless tickets, Ticketmaster will probably sell more tickets at the face price. Where ticket resale is permitted, however, Ticketmaster assumes control over that transaction and reaps the larger fees that secondary market transactions usually generate. If

consumers cannot list their tickets with several exchanges, there is no competitive market pressure among resellers to attract buyers by offering lower fees or better service. In essence, Ticketmaster's market power plus its insistence on being the only reseller of its paperless tickets leave consumers scant other places to turn. This leaves Ticketmaster free to adopt the most remunerative policies it can devise.

C. Limitations on the Purchase and Use of Restrictive Paperless Tickets

The purchasing process for paperless tickets is similar to that for other online or telephone purchases in that the ticket buyer must have a credit card. Entertainment events differ from airline tickets and hotel reservations, for example, because the former often cater to teens and pre-teens, who may be too young to obtain credit cards. Other prospective attendees might not qualify for credit cards or may object to using them for privacy, money management or other reasons.⁹⁶ Cash purchases at venues or retail outlets are typically not offered if the event uses only restrictive paperless tickets. If an attendee lacks a credit card, someone who possesses one must make the initial purchase and then go to the venue to obtain entrance for the attendee.

More serious problems arise when the purchaser buys tickets for a group. Unless the tickets have previously been transferred to the names of individual group members – a step that Ticketmaster does not permit, but Veritix does – all members of the group must be present with the ticket purchaser for anyone to enter. If one group member gets caught in traffic, has an emergency, or for other reasons is delayed, it makes no difference. If the ticket purchaser and early-arriving members do enter, late arrivers will not be admitted.⁹⁷ Additionally, if the group is sharing tickets for a season or performance series, it will likely be greatly inconvenienced when it tries to distribute the various individual tickets if they are in a restrictive paperless format.

⁹⁶ According to a 2006 study by the Brennan Center for Justice at the New York University School of Law, 11 % of Americans do not have current and valid photo ID's. Letter to the New York Times, from Michael Waldman, Executive Director, Brennan Center for Justice, The New York Times, p A14, 7/18/2011.

⁹⁷ Some critics have asserted that purchasers of paperless tickets do not learn of their precise seat location until they arrive at the venue, have their credit card swiped, and receive their seat locator slips. Ticketmaster customer care representatives have made clear, however, that these ticket purchasers can learn their precise seat location at the time they buy their tickets. In addition, purchasers of paperless tickets can take advantage of the interactive seat maps that Ticketmaster recently inaugurated, as well as of the feature that allows those purchasers that are also Facebook users to let their Facebook friends know where they will be sitting. E-mail messages from Ticketmaster Customer Service to James D. Hurwitz, 9/19/11, 9/20/11, 9/23/11 and 9/29/11.

Without doubt, paperless tickets offer some conveniences for some purchasers. Jeff Kline, president of Veritix, refers to them as the “ultimate convenience,” if you are a consumer.⁹⁸ For example, some view it as an advantage that there is no paper ticket to be lost or stolen. Paperless ticketing technology also permits ticket issuers to manage season ticket inventory. If the issuer chooses, it can permit ticket holders to transfer tickets to anyone with Internet access, even close to the time of the event. These conveniences, however, derive from the fact that the ticket is paperless, not that the seller has imposed transferability or other restrictions. Thus, the Houston Astros baseball team offers customers their choice of ticket format, and the revised New York State law requires either that paperless tickets be fully, freely, and independently transferable or that the issuer also offer tickets in transferable formats in addition to the restricted paperless format.⁹⁹ In contrast, Ticketmaster does not offer such alternatives.

D. Increased Risk for Purchasers of Restrictive Paperless Tickets

When a purchaser has a convenient option to resell or transfer her ticket, she possesses a measure of “insurance” that she will not completely lose her investment if she can’t use her ticket. This insurance is important since the purchaser seldom knows whether she will be ill or faced with an unavoidable conflict on the day of the event. Moreover, paperless tickets can often cost hundreds of dollars, sometimes thousands for premium or VIP tickets. Although purchasers are sometimes permitted to resell their restrictive paperless tickets through TicketExchange, this option provides only limited protection, because ticket owners can run afoul of price floors or price ceilings and will still be unable to easily give away or donate their Ticketmaster paperless tickets. This increased, “uninsured” risk borne by consumers translates into decreased value.

Significantly, confidence in being able to give away, donate or resell a ticket is an integral feature not only of paper and e-tickets, but also of paperless tickets from sellers that do not restrict transferability. Where this protection is lacking, however, some, and perhaps many, potential customers may opt not to buy tickets to the events they most want to attend.

⁹⁸ Fahri, “Paperless ticketing’ aims to thwart scalping at concerts, sports events,” Washington Post, 7/5/10, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/04/AR2010070404180.html>.

⁹⁹ Ch. 151, Laws of 2010 (renewed in 2011) §8; Arts and Cultural Affairs Law, §25.30.1(c); http://houston.astros.mlb.com/hou/sth/paperless_faq.jsp.

E. Violation of Reasonable Purchaser Expectations.

Confusion and resentment can grow when expectations are not met. Most purchasers' experience is that when they buy tickets, they can keep them, give them away, or resell them as they choose and for whatever price they can get. Consumers have developed this understanding reasonably. It reflects not only purchasers' long experience as ticket buyers, but also the options they continue to enjoy for the more than 99% of tickets that use a paper or electronic format.¹⁰⁰ Even some sellers of paperless tickets other than Ticketmaster will facilitate easy ticket transfer.

Consumer experience with other goods bolsters this experience. A person who buys a new car does not expect the new car dealer to require the buyer to resell the car only through the dealer, limit the price at which the car may be resold, or impede the owner's efforts to give the car to a family member or charity. Any car dealer that tries to enforce such limitations would quickly lose patronage to its many rival dealers. Similarly, the ticket buyer views the ticket as just another item she buys and does not expect such impediments to limit her lawful disposition of the ticket. With its market power, however, Ticketmaster is better placed than any car seller to impose its will on ticket buyers, reasonable consumer expectations notwithstanding.

This description of consumer expectations is confirmed by a recent survey of 1,000 general ticket users by Penn Schoen Berland Research. Eighty-nine percent believe that once they purchase a ticket, it is their property, they enjoy full control over it, and they may give it away or resell it as they prefer. Eighty-six percent believe that a ticket is comparable to any other commodity they purchase, and that they may use it as they wish. Ninety percent believe that they should have the right to resell or transfer the ticket to anyone. And eighty-seven percent believe they should have the right to transfer the ticket freely to anyone and use any resale market they prefer.¹⁰¹

¹⁰⁰ Interestingly, as other industries have adopted paperless tickets, they have not changed the essential character of the ticket by adding restrictive new conditions eroding the ticket's value to the purchaser. In the live entertainment events market, however, Ticketmaster has accompanied its switch to paperless tickets with the imposition of broad restrictions that undermine, if not totally eliminate, the paper ticket's transferability.

¹⁰¹ This survey was commissioned by the Fan Freedom project and may be found on their web site, <http://www.scribd.com/fullscreen/60020276>.

PART III – HARM TO COMPETITION

Ticketmaster’s artificial restraints on transferring paperless tickets undermine rather than rely on market forces. This practice results in several kinds of potential injury to the competitive process and consumer welfare.

A. Capture of Additional Monopoly Profits

Economists Daniel A. Rascher and Andrew D. Schwartz performed a recent analysis of the impact of paperless ticketing on the secondary market. In their conclusion, they write:

“Paperless Ticketing” is an explicit attempt by Ticketmaster to provide to the first selling artists and sports teams the ability to impose a very large cost on the resale of tickets to their events.

“Paperless Ticketing” is also an attempt by an upstream firm with exclusive control over the first-sale of tickets to channel all resale of those tickets on to its wholly owned resale outlet. Here, the classical prediction is that because consumers will already face the monopoly price in the primary market, that vertical integration of the downstream market won’t make consumers any worse. But, *as we show, when the initial pricing power of the exclusive seller is constrained, it is again a rather straightforward economic conclusion that allowing the upstream firm [i.e., Ticketmaster] to monopolize an otherwise competitive secondary market will result in lower quantity sold and higher prices.*¹⁰²

In essence, Ticketmaster has an incentive to confine any transfers of paperless tickets that it initially sold to its own reselling service. According to Rascher and Schwartz, this strategy enables Ticketmaster to capture monopoly profits that it could not fully reap in the first, i.e. primary, sale of those tickets.

If artists and promoters are able to keep primary market prices below monopoly levels, one might reasonably ask why they don’t take steps to keep secondary market prices low as well. For tickets with resale price ceilings, it is possible that they do, since price ceilings often keep resale prices lower than they would otherwise be. Not all paperless tickets listed on TicketExchange have price ceiling restrictions, however, or ceilings so close to the ticket’s face price that Ticketmaster

¹⁰² Daniel A. Rascher and Andrew D. Schwartz, “Paperless Ticketing’ and its Impact on the Secondary Market: An Economic Analysis,” OSKR, LLC, (December 30, 2010), (submitted to Harvard J. of Sports and Entertainment Law), at p.55.

cannot garner some of the monopoly profits that previously it could not obtain.¹⁰³ For tickets without stringent price ceiling restrictions, three additional reasons may explain why artists and promoters might allow the competitive market to control the upward bound of ticket resale prices. First, fans may blame artists less for high secondary market prices than for high primary market prices, particularly since the main reason fans go to the secondary market is to get better seats than they believe they can obtain in the primary market.¹⁰⁴ Second, artists and promoters may want to take advantage of high secondary market prices themselves by reselling tickets that they have withheld from the primary market. Third, Ticketmaster shares revenues from TicketExchange resale transactions with artists, promoters, and venues.

B. Increased Prices and Reduced Sales

Ticketmaster's limitation of resale transactions for its paperless tickets to its TicketExchange service leads to reduced competition and increased prices for consumers. At the same time, Ticketmaster's companion imposition of price floors and ceilings will forestall many ticket resale transactions where the price would be outside the permissible range. Even for transactions that are consummated, the restraints may cause the price to differ markedly from that which would obtain in a more freely competitive secondary ticketing market. As a result, buyers and sellers are frustrated and the market itself is rendered less efficient.

C. Increased Power in the Secondary Market.

As Ticketmaster arrogates to itself control over any resale of its restrictive paperless tickets, rival secondary sellers are excluded from this commerce. Returning to the example of the car purchaser, if new car dealers require car purchasers to return to their original dealer to resell the car, independent used car dealers will progressively be excluded from the market. This might not be so bad from a competition policy perspective if there are many new car dealers and substantial competition. This is not the situation that prevails in the event ticketing market, however. There, Ticketmaster is by far the largest seller of paperless tickets and can assert hegemony over the resale of its restrictive paperless tickets. As a consequence, an important source of inventory that is vital to

¹⁰³ As noted earlier, it is unknown, but worthy of investigation, what percentage of the paperless tickets listed for resale on TicketExchange have either price floor or price ceiling restrictions.

¹⁰⁴ Kruger and Pray, *supra* note 19, at 8. Their survey revealed that 51% of their respondents went to the secondary market for the purpose of acquiring better seats.

rival secondary market sellers dries up. Over time, therefore, these sellers may be impaired in, or even forced to exit, the market niche for the resale of paperless tickets.

As Ticketmaster's use of restrictive paperless tickets expands, and as its secondary market rivals curtail their efforts to resell paperless tickets, Ticketmaster is likely to gain further power in the secondary market to accompany the strong position it already holds through its TicketsNow subsidiary. Some might argue that the decisions regarding the use of and restrictions on paperless tickets are made largely by the artists or promoters. Ticketmaster, however, decides what options to offer and is no doubt an influential participant in the decision making process, particularly given the power that it and its corporate siblings hold in most aspects of the live entertainment event industry. Regardless, the restrictions imposed on Ticketmaster's paperless tickets are not only likely to reduce competition, elevate prices, and diminish supply in the secondary market for paperless tickets, but also to afford consumers less choice among companies that can process resale transactions for their restrictive paperless tickets.

D. Less Competition to Innovate.

Experience teaches that innovation tends to flourish when more than a few active rivals are competing and they do not all follow the same strategic model. A critical aspect of this competition is innovation to improve service and reduce prices. Dependence on a single firm to establish the policies and prices for transferring event tickets may prove unwise, since it will diminish competition and impoverish the constellation of perspectives and ideas that so often yields improved methods of developing, marketing, selling, and protecting products and services. For example, Veritix permits owners of paperless tickets to freely give their tickets to someone else; Ticketmaster does not. Although Veritix and Ticketmaster might compete for the primary market sales patronage of venues and promoters, they do not compete for the patronage of consumers in processing transfers of tickets that have already been purchased. Such competition could stimulate innovation in facilitating the transfer of paperless tickets by resale, gift or donation.

E. Secondary Market Success Less Dependent on Competitor Efficiency.

Unlike markets where rivalry is the rule of the day, consumers are generally locked in to using the primary ticket seller or its clients to process any permissible, subsequent transfers of

restrictive paperless tickets. Ticketmaster's rivals, therefore, are denied the opportunities of competing fairly with it on the merits and succeeding if they are more efficient.

F. Loss of Allocative Efficiency.

Ticketmaster's restraints on the transferability of its paperless tickets prevent those who most want a ticket from buying it from someone who would rather have the extra money than use the ticket herself. Even when the restraints do permit ticket resale, they may prevent transactions where the price is below or above artificially imposed price floors or ceilings. These deviations from outcomes that would occur in a competitive market lead to allocative inefficiency that, absent offsetting business justifications, hurts companies and consumers alike.

PART IV -- JUSTIFICATIONS

Whether or not Ticketmaster has credible, legitimate business justifications for the broad transferability limitations on its paperless tickets is critical to determining if those restraints warrant challenge in courts and/or legislatures. If the proposed justifications are real, substantial, and procompetitive, it will be difficult to demonstrate a violation of either consumer protection or antitrust laws. If not, the purported justifications may simply be bald excuses or thin explanations. As the Ninth Circuit held on remand in *Kodak*, a "presumptively legitimate justification" may be rejected when the evidence demonstrates that the challenged conduct "does not legitimately promote competition or that the justification is 'pretextual.'"¹⁰⁵

A review of the most commonly asserted justifications reveals that some may support the use of paperless tickets, but not necessarily of *restrictive* paperless tickets. Others appear to be weak or pretextual. The discussion below examines five prominently claimed justifications.

¹⁰⁵ *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997). But see, *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000). Professor Bauer believes that the approach taken by the Ninth Circuit on this point is superior to that of the Federal Circuit, and that therefore a "justification" may not be pretextual but rather must promote competition. Bauer, "The Antitrust Implications of Aftermarkets," *supra*, p 50. See also Bauer, "Refusals to Deal with Competitors by Owners of Patents and Copyrights: Reflections on the Image Technical and Xerox Decisions," 55 DePaul L. Rev. 1211 (2006).

A. Prevention of Scalping

Those supporting restrictive paperless tickets assert most frequently that the restraints are needed to discourage scalping. This contention rests primarily on two assertions: (a) prevention of scalping removes the incentives of unscrupulous brokers to use bots and other software to acquire large quantities of tickets before consumers can make their own purchases; and (b) prevention of scalping helps maintain fan goodwill by preserving for fans the primary market availability of tickets to be sold at face price, which is often below competitive market levels.

Preliminarily, whether or not efforts to curb scalping are justified depends critically on how “scalping” is defined. When that term is defined narrowly, efforts to prevent it cannot justify broad measures that unreasonably chill activity far outside that definition’s boundaries.

Colloquially, “scalping” is a pejorative term used to describe the resale of tickets at higher than their original face value.¹⁰⁶ Many artists, promoters and others use the term, at least informally, in this broad sense. The New York State Report on Ticket Reselling however, offers a more precise view, defining ticket speculation as the “resale of tickets above their face price by an unlicensed reseller.”¹⁰⁷

For its part, Ticketmaster claims not to take a hostile stance against all ticket resellers, or against all those who resell for a profit, or even against all those who make a business of reselling tickets for a profit. In a recent interview, Ticketmaster CEO Nathan Hubbard stated that there is “absolutely a role for a vibrant secondary market”¹⁰⁸ and emphasized his view that the secondary market and paperless ticketing are “not mutually exclusive concepts.” Rather, “[t]hey should co-exist. They need to co-exist.”¹⁰⁹ Of course, Ticketmaster owns the second largest participant in the

¹⁰⁶ As Chief Judge Easterbrook recently observed, “Resale at a premium is called scalping, and rules that forbid it even when the events’ promoters are content to allow the resale have puzzled economists.” *City of Chicago v. StubHub, Inc.*, 624 F.3d 363, 364 (7th Cir. 2010).

¹⁰⁷ Lorraine Cortes-Vasquez, Secretary of State, Report on Ticket Reselling and Article 25 of the Arts and Cultural Affairs Law,” 2/1/10, p.5, http://www.betterticketing.com/articles/Ticket_Reseller_Report.pdf. Article 25.13 of New York’s Arts and Cultural Affairs Law requires those in the business of reselling tickets to be licensed by the state, although it provides an exception for listing exchanges.

¹⁰⁸ Gustin, “Young CEO Seeks to Reset Ticketmaster With Tech and Transparency,” *Wired.com*, 3/17/11, <http://www.wired.com/epicenter/2011/03/ticketmaster/2/>. Hubbard went further and stated that the primary and secondary markets would eventually merge. He doesn’t “think the industry is ready for that yet, but we’re building for the day when it will be.” *Id.*

¹⁰⁹ *Id.*

secondary market, TicketsNow, and that exchange, like others, often carries tickets listed by brokers. Thus, if Ticketmaster were to criticize scalping in the broad sense, it would be criticizing all secondary market sellers, including itself.

Not surprisingly, the Fans First Coalition, financed largely by Ticketmaster's parent, Live Nation Entertainment, defines "scalpers" quite narrowly. To this organization, scalpers are not simply entrepreneurs or speculators, whether licensed or not, who buy tickets and hope to resell them at a premium. Rather, they are "individuals and/or companies who scoop up vast quantities of tickets using sophisticated tools, and then engage in deceptive or unscrupulous marketing practices to sell those tickets to the public."¹¹⁰ Under this definition, scalpers are a small, but predatory, subset of secondary sellers. If this is the extent of the concern, transferability restraints aimed at all brokers and customers are far too inclusive.

1. *Prevention of Bots* – The use of bots is a concern that falls within even the narrowest definition of scalpers. Whether the problem's current severity is major, minimal, or somewhere in between is unknown but warrants investigation. Assuming that the problem is significant, the need for private restrictions is still not manifest since the use of bots already transgresses existing federal and state computer security and consumer protection laws.¹¹¹ Many states have laws outlawing computer fraud, and some specifically prohibit the use of bots or other automated ticket purchasing software.¹¹² Although some observers might contend that it is difficult to discover and apprehend those who use bots, restraints that prohibit all transfers of paperless tickets or impose price floors and ceilings create a serious issue of over breadth when they extract a large price from most consumers just to prevent some brokers from using bots.

¹¹⁰ [Http://www.standwithfans.org](http://www.standwithfans.org).

¹¹¹ On the federal level, the use of bots and other software to purchase event tickets or participate robotically in computer games requiring human involvement, and the like can violate, e.g., the Copyright Act, 17 U.S.C. 101 et. seq., the Digital Millennium Copyright Act, 17 U.S.C. 1201 et seq, the Computer Fraud and Abuse Act, 18, U.S.C. 1030, the Trademark (Lanham) Act, 15 U.S.C. 1114 and 1125. See *Ticketmaster v. RMG Technologies*, 507 F.Supp 2d 1096 (C.D. Cal 2007) (granting injunction against defendant's use of bots), *MDY Indus, LLC v. Blizzard Entertainment, Inc.*, 2008 WL 2757357 (D.C. Ariz. 6/14/08) (granting summary judgment in part); and *Jagex, Ltd v. Impulse Software*, 750 F.Supp 2d 228 (D. Mass 2010) (denying injunction).

¹¹² 4 P.S. §201(12) and 212.1 (Pennsylvania), N.C.G.S.A §14-344.2 (North Carolina), and New York Arts and Cultural Affairs §25.24 (New York) prohibit the use of unlawful ticket purchasing software. Also on the state level, the use of bots can violate, inter alia, state consumer protection statutes, laws for enforcing the terms of use of the infringed website, and legal proscriptions on tortious interference with contract.

It is not impossible to apprehend those who use or sell automated ticket purchasing software. Primary market vendors try to frustrate the use of bots by limiting ticket purchases to individuals, trying to discover heavy online purchasing, and capping the number of tickets that a single customer may buy.¹¹³ In 2008, Ticketmaster won an \$18.2 million judgment against RMG Technologies, a company notorious for its use of bots.¹¹⁴ In a more recent, prominent example, a Federal court sentenced two principal operators of Wiseguys Tickets, Inc. as felons for conspiracy to commit wire fraud and for exceeding the authorized access to computers engaged in interstate commerce. A third defendant pled guilty to a misdemeanor. The defendants had created automated programs to defeat the ticket sellers' protections, including the establishment of a nationwide computer network to impersonate individuals. The defendants also established hundreds of aliases and thousands of false e-mail addresses for purchasing and receiving tickets, plus shell corporations from which they could sell the tickets. Special agents from the FBI and U.S. Postal Inspection Service, and attorneys from the U.S. Attorney's Economic Crimes Unit, were involved in the investigation and prosecution.¹¹⁵

Imposition of far reaching transferability restrictions to prevent the use of bots is like firing the proverbial cannon to kill a fly. These transferability restraints do more than inhibit the ticket resale efforts of those who use bots to acquire "vast quantities of tickets." The restrictions also curb the efforts of legitimate brokers who acquire tickets through fair means and of consumers who lawfully want to sell their tickets or give them to others. Furthermore, the restrictions curb the efforts of exchanges, which do not buy tickets at all, but serve the market facilitating function of placing prospective purchasers in contact with ticket owners, whether individuals or brokers. In a large sense, the cannon ball misses the fly completely, since the transferability restrictions for paperless tickets do not apply to the 99% of tickets in other formats. Consequently, the restraints largely fail to frustrate the ambitions of brokers that use bots to acquire tickets of all kinds.

¹¹³ Branch, "Ticketmaster Admits Blocking IP Addresses of Brokers, Others," Ticketnews.com, 6/30/11, <http://www.ticketnews.com/news/Ticketmaster-admits-blocking-IPs-of-brokers-others061130752>. Ticketmaster CEO Hubbard explained that the conduct was part of a strategy to uncover the use of bots and apologized for inadvertently blocking the addresses of legitimate fans.

¹¹⁴ Branch, "Ticketmaster wins \$18.2 million judgment against RMG Technologies," TicketNews.com, 6/25/08, <http://www.ticketnews.com/news/Ticketmaster-wins-millions-judgment-against-RMG-Technologies6825761>.

¹¹⁵<http://www.justice.gov/usao/nj/Press/files/Lowson,%20Kenneth%20et%20al%20News%20Release.html>.

In sum, although the concern with scalpers' use of bots is real, the concern provides only a weak, if not pretextual, justification for imposing broad transferability restrictions on paperless tickets. This is particularly evident in light of how the transferability restrictions are overly broad with respect to the array of conduct chilled, insufficiently focused with respect to the types of tickets affected, and unnecessarily restrictive of competitive market forces.

2. *Preservation of Face Price Tickets for "Real Fans"* – The imposition of transferability restrictions reduces brokers' incentives to purchase face price paperless tickets in the primary market because they cannot easily and profitably resell them. By curtailing the ticket acquisition efforts of brokers, both those who use bots and those who do not, more face price tickets are left available for purchase by "real fans," presumably meaning those who want to attend the events. Arguably, this impact also induces fans to believe that the artists are not gouging them with high prices, enhances fan goodwill, and translates into increased concert attendance and more merchandise sales. It may also benefit less affluent fans, who might be hard pressed to pay higher secondary market prices. The effort to curry fan favor may fail, however, if, as often happens, artists set face prices too high and many tickets remain unsold.

The concern with brokers' participation in the primary market is not without merit. By competing with fans, brokers do divert some potential customers to the secondary market where they will often pay higher prices, especially for high-demand events or seat locations. At risk from the transferability restraints, however, is a vibrant secondary market in which tickets are often more easily obtainable, the task of purchasing simpler, and the quality of available seats superior than in the primary market. Brokers' participation in the primary market also increases the customer base and therefore reduces the risks taken by venues and promoters that their event tickets will not sell well. Overall, the benefits of regulations to curb scalping usually do not outweigh the increased allocative efficiency that derives from maintaining a competitive market.¹¹⁶ Moreover, the benefits of imposing *private* transferability restrictions solely on paperless tickets – as opposed to anti-scalping regulations that apply to all tickets – are far less.

The contention that using transferability restraints and price ceilings to undermine brokers' incentives will leave more tickets available for "real fans" is further eroded by several additional

¹¹⁶ Leslie and Sorensen, *supra* note 14, at 36, 37-38.

points, and its sincerity is belied by the practices of artists and promoters. First, as mentioned above, adoption of transferability restraints frustrates the ticket purchasing efforts of brokers who do not use bots and therefore (in all but the broadest view) are not “scalpers,” as well as that smaller group who do. Thus, this “anti-bot,” anti-scalping effort, undertaken under the banner of protecting “real fans,” is overly broad. Indeed, these private restraints impair the legitimate efforts of *any* person or business that wants to obtain tickets that they might later wish to resell.

Second, transferability restrictions on paperless tickets do not necessarily ensure that fans who buy face price tickets will be less, rather than more, affluent. Face price tickets are bought by millionaires as well as those of modest means. A vibrant secondary market arguably does favor more affluent buyers, because they are willing to pay the generally higher secondary market prices in order to enjoy greater ease in acquiring tickets and perhaps obtain better quality seats. This, however, is more an issue of how individuals choose to allocate their available time and resources, not who is the more desirable fan. It is also doubtful that less affluent fans make a more sustainable fan base than wealthier ones. Indeed, wealthier ones might be preferable, since they can spend more on merchandise, recordings, concessions, and future concerts.

Third, those who make purchases from secondary sellers and pay substantially more than the ticket's face price might, by that fact, be demonstrating that they are more passionate fans than those who are not willing to pay the prevailing market price. Passionate fans typically want the best seats, and acquiring better seats is the main reason for turning to the secondary market. A fan's willingness to pay more than face price, however, may reveal more about her pocketbook or priorities than her passion.

Fourth, Ticketmaster often does not permit ticket holders to resell their tickets for *less* than face value, even if personal circumstances or market conditions impel them to do so. This restraint has nothing to do with scalpers, who overcharge consumers. Rather, the apparent reason is that Ticketmaster and its clients do not want lower-priced tickets listed for resale competing with its unsold but more expensive face price tickets. When ticket issuers and their selling agents refuse to

permit resale at less than face value, they invite questions regarding the genuineness of their expressed goal of protecting “real fans” with limited resources.¹¹⁷

Fifth, as noted previously, Ticketmaster is deeply involved in the secondary market. TicketsNow is a large listing exchange, and TicketExchange not only processes resale transactions for paperless tickets but also sells Ticketmaster’s premium tickets. Both entities frequently sell tickets at more than face price. If Ticketmaster takes the broad view of scalping and unreservedly condemns those who resell tickets at elevated prices, its complicity in this resale effort warrants a fair amount of self-loathing.

Sixth, artists, promoters, and venues often withhold large numbers of tickets in order to sell them at premium prices. The Wall Street Journal has reported on this practice in detail.

Selling premium-priced tickets on TicketExchange, priced and presented as resales by fans, is a practice used by many other top performers [in addition to Neil Diamond], according to people in the industry. Joseph Freeman, Ticketmaster’s senior vice president for legal affairs, says that the company’s “Marketplace” pages only rarely list tickets offered by fans.

The vast majority of tickets are sold by the artists and their promoters with the cooperation of Ticketmaster. In fact, he says that for any concert to which Ticketmaster carries so-called platinum seats, the Marketplace sells only artist-sanctioned tickets, not those resold by fans.¹¹⁸

Although Ticketmaster and artists often blame ticket shortages on brokers’ use of bots and other automated ticketed purchasing software to acquire large blocks of tickets, artists’ withholding of tickets is likely a major factor contributing to ticket shortages in the primary market. Indeed,

[a]rtists such as Neil Diamond, Bon Jovi, Van Halen, Celine Dion, Billy Joel, Elton John, Britney Spears, and Miley Cyrus have all withheld premium tickets and then sold them on the secondary ticket market. This practice certainly helps explain why fans can’t easily get tickets from the primary seller.¹¹⁹

¹¹⁷ Some issuers of paperless tickets reportedly now will post tickets for resale at 80% of face price. Although this improves the situation, it does not cure it, since it still interferes with the operation of competitive market forces that can lead the market prices for tickets for some unpopular events to drop to well below that level.

¹¹⁸ Smith, “Concert Tickets Get Set Aside, Marked Up by Artists, Managers,” Wall Street Journal, 3/11/09 <http://online.wsj.com/article/SB1236727403860886613.htm>.

¹¹⁹ Hogan, “Guest Commentary: Artists, promoters use ticket resellers as scapegoats,” TicketNews 3/4/11, <http://www.ticketnews.com/features/Guest-Commentary-Artists-promoters-use-ticket-resellers-as->

The New York State Report on Ticket Reselling bolsters this view, identifying concert “holds” of tickets for the benefit of artists, promoters, celebrities, critics, and VIP’s as a factor that “diminishes the likelihood of obtaining a quality ticket at the initial box office price.”¹²⁰ That report also notes that the diversion of tickets from general sale by those who have advance access to them creates similar problems and invites speculation.¹²¹ Significantly, it is the most desirable tickets that artists, promoters, and venues withhold. The price for these seats often exceeds \$1,000. Artists and promoters would not engage in this private scalping if they were genuinely concerned with shielding fans from grossly inflated prices.

B. Protection Against Counterfeit, Stolen, or Lost Tickets

Both Ticketmaster and Veritix aver that paperless tickets help protect consumers against counterfeit, stolen, or lost tickets. Accepting, without proof but for the sake of argument, that these are substantial problems and that it is harder to counterfeit paperless tickets than paper or e-tickets, the issue here is not whether paperless tickets offer safety advantages over tickets in other formats. Rather, the issue is whether those paperless tickets should be made subject to broad, and sometimes prohibitive, transferability limitations. The case has not been made either that these restrictions make a paperless ticket markedly more difficult to counterfeit or steal than one that is freely transferable, or if so, that the constraints are, on balance, beneficial to competition.

Fake internet sites can sell tickets in any format. There appear to be few, if any intractable security problems associated particularly with transfers of paperless tickets. Thus, primary sellers can, and sometimes do, coordinate with legitimate secondary sellers to change the name and credit card information associated with a paperless ticket from that of the original buyer to that of the new purchaser or gift recipient. This transfer can be accomplished using protections comparable to those used in making the original online purchase. The original purchaser’s information remains with the primary ticket seller, and the new owner would still have to display her own credit card and

[scapegoats031104675](#). The rock star Kid Rock reportedly leveled an impassioned tirade against scalpers while, at the same time, his own website was referring visitors in late November 2010 to a secondary selling site. Curiously, his site made these referrals several weeks *before* the concert’s ticket presale period. Moreover, Ticketmaster’s listed prices ranged from \$33.10 to \$102.90, including fees, whereas the secondary site priced some seats at nearly \$200. “Kid Rock’s Scalper Rant,” Pollstar.com, November 30, 2010. <http://pollstar.com/blogs/news/archive/2010/11/30/748810.aspx>.

¹²⁰ Lorraine Cortes-Vasquez, Secretary of State, Report on Ticket Reselling and Article 25 of the Arts and Cultural Affairs Law,” 2/1/10, p.14, http://www.betterticketing.com/articles/Ticket_Reseller_Report.pdf

¹²¹ *Id.* at 16.

ID at the venue. In addition, many secondary sellers guarantee that if the ticket they sell is counterfeit or otherwise defective, they will refund the purchaser's money and/or try to secure replacement tickets.

C. Artists Choose to Use Paperless Tickets

Ticketmaster has emphasized that when restrictive paperless tickets are used, it is the artists and promoters that have made the choice to use them. Ticketmaster portrays itself as merely the ticket selling agent of the venues or promoters, and that it sells the kinds of tickets the artists and promoters select. This description, however, does not convey the whole story. Ticketmaster is far from powerless in the chain of relationships and events, and the other parties are not entirely independent principals. First, it is Ticketmaster that develops and offers artists and promoters the options associated with using paperless tickets. Clearly this includes the option to use paperless tickets that can't be transferred except subject to strict limitations. It is not clear whether Ticketmaster also offers the option of using easily-transferable paperless tickets.

Second, Ticketmaster is the dominant primary ticket seller. Tens of thousands of venues, promoters and artists perceive a need for its services. Ticketmaster's parent, LNE, also owns Front Line, the leading talent management company, as well as Live Nation, the world's largest producer of live entertainment events and the nation's second leading owner/operator of live event venues. When Ticketmaster offers the option of using paperless tickets, therefore, it may be perceived as "suggesting" this option to those with which it already has an ongoing contractual relationship. Suggestions from such a powerhouse bear close attention.

Artists, promoters, and venues can readily see that the imposition of transferability restrictions carries a sweetener for them as well as Ticketmaster. As a result of these restrictions, Ticketmaster's TicketExchange service is the only entity that can process the resale of a Ticketmaster paperless ticket, and TicketExchange charges substantial fees for this service. These are fees that Ticketmaster would not receive if the sales were processed by another company. By sharing these fees with artists, promoters and/or venues, all parties have financial incentives to impose the restrictions. Further investigation is needed, however, to understand fully the nature of the financial and other relationships among these actors and the degree of Ticketmaster's influence.

D. The Ticket is a License

Some people contend that a ticket for a live entertainment event constitutes a broad right that permits the ticket-owner to attend the event or to sell or give away the ticket to whomever she pleases, for whatever price she can get, and using any company she likes to process that transfer. Others view the ticket as a narrower instrument, a “license” to attend the event that the seller or its client may condition as it chooses. The matter is not so simple, however.

The concept of “license” covers a broad range; where a given license falls on this spectrum depends on the facts of the specific situation. The vast bulk of event tickets – which still use paper tickets and e-ticket formats – are readily transferable, however, even though those, like paperless tickets, are ostensibly licenses. Therefore, by past experience as well as prevailing practice, consumers expect their tickets to be fully alienable, by gift, donation, or sale.

Whether by laxity or policy, Ticketmaster has created and reinforced this expectation. A fundamental question for determining the applicable law toward paperless tickets, therefore, is whether Ticketmaster may be considered bound by it. Even if Ticketmaster were to print the transferability restrictions in large, bold type, Ticketmaster, and the clients for which it acts, arguably have waived the right to enforce them. Moreover, there is no evident reason why the transferability conditions attached to paperless tickets should differ from those that apply to tickets in other formats. The events are similar, the venues are similar, ticket prices are similar, and security concerns are similar; transfer restrictions should be similar as well.

Strikingly, Ticketmaster CEO Nathan Hubbard has backed away from taking a position on this question. When asked, “Does the fan lease the right to the ticket or own it?” he replied:

We think about it this way: Teams and bands know what is best for their fans. It is their business. They should be able to connect directly with their fans on the terms they see fit.¹²²

Arguably, of course, the fans themselves, rather than the teams and bands, know what is best.

Fuller evaluation of whether or not a ticket is indeed a “license,” and if so, what the lawful, effective and enforceable limits of that license are, are topics for more extended treatment than is

¹²² Darren Rovell, “One-on-One with Ticketmaster CEO on Dynamic Pricing,” CNBC.com, 4/21/11, <http://www.cnbc.com/id/42707776/print/1/displaymode1098/>.

appropriate for this paper. Professors Happel and Jennings have long held the view that tickets should be viewed as “call options” that can be freely traded in a nationwide “futures market” for tickets. In essence, they may be bought or sold at the fan’s option in the secondary market.¹²³ The great majority of states now take the complementary view that ticket resale is lawful and that the resellers are not evil scalpers but important participants in a free and competitive market for event tickets.¹²⁴

Even though some states may categorize tickets as “licenses,” those states may limit by statute the boundaries of such licenses. Thus, in its recent statutory revision, New York maintained its characterization of tickets as licenses, but nonetheless prohibits use of

a paperless ticketing system unless the consumer is given an option to purchase paperless tickets that the consumer can transfer at any price, and at any time, and without additional fees, independent of the operator or operator’s agent.

Notwithstanding the foregoing, an operator or operator’s agent may employ a paperless ticketing system that does not allow for independent transferability of paperless tickets only if the consumer is offered an option at the time of initial sale to purchase the same tickets in some other form that is transferable independent of the operator or operator’s agent including, but not limited to, paper tickets or e-tickets.¹²⁵

No one doubts, of course, that once patrons enter the venue property, security personnel may eject those who engage in unruly or unlawful conduct. Ticket license provisions are fully appropriate for these purposes, and the New York revision expressly allows such authority.¹²⁶

Paper and e-tickets appear to all concerned to be fully alienable up to the time a person enters the venue property. Prior to that time, issuers of paper and e-tickets and their selling agents

¹²³ Happel and Jennings, “That Futures Market Thing is Here,” Secondary Ticket News, 1/26/08, <http://www.authoritytickets.com/?p=52>. Stephen K Happel is a professor of Economics, and Marianne M. Jennings is a professor of legal and ethical studies in the College of Business, Arizona State University, Tempe, Arizona.

¹²⁴ <http://www.StubHub.com/help/>.

¹²⁵ Ch. 151, Laws of 2010 (renewed in 2011) §8; Arts and Cultural Affairs Law, §25.30.1 and 1(c). Exceptions are available for tickets originally provided free or at a discount as part of a targeted promotion. Liebman “Reselling Tickets in New York:2010,” The Entertainment, Arts, and Sports Law Blog, July 2010, http://nysbar.com/blogs/EASL/2010/07/reselling_tickets_in_new_york.html; Branch, “New York Legislature renews paperless ticketing bill,” TicketNews.com, 5/11/2011, <http://www.ticketnews.com/news/New-York-legislature-renews-paperless-ticketing-bill05111783>; Branch, “New York Legislature assures consumer choice by overwhelmingly passing ticket resale bill,” TicketNews.com, 7/1/2010, as revised 7/2/2010, <http://www.ticketnews.com/news/New-York-Senate-assures-consumer-choice-by-overwhelmingly-passing-ticket-resale-bill7101547>.

¹²⁶ §8 Arts and Cultural Affairs Law, §25.29.

seldom display much interest (except to gather marketing data) in who owns the tickets, who gives them away or resells them, who acquires the tickets, or what the transaction terms might be. Ticket buyers, therefore, have good reason to view their paperless tickets – whether or not characterized as a license – as similarly transferable. If so, a seller’s use of technological impediments to restrict transfers of paperless tickets may be inappropriate.

E. Protection of Innovation

Insofar as paperless tickets in general are a product of innovation, courts, regulators and legislatures should be hesitant to intervene. Certainly, a critical concern of antitrust enforcement is to protect incentives to innovate, since frequently it is innovation that enables existing markets to develop and new markets to emerge.¹²⁷ At its best, innovation fosters improved products, enhanced services, and lower costs. Innovative efforts are not always successful, of course. But without shielding good faith innovative efforts, beneficial developments will be chilled along with those offering less promise. Excessive scrutiny of innovative efforts also risks placing courts and enforcement agencies in the role of second-guessing the decisions of business managers, an invasive task that courts and agencies rightly prefer to avoid.¹²⁸

Companies, however, sometimes change their product designs to exclude competitors rather than to benefit consumers. As applied to restrictive paperless tickets, the key question is not whether paperless tickets are a valuable innovation – they probably are – but whether transferability prohibitions and restraints, including price floors and price ceilings, are a valuable or anticompetitive supplement to this innovation.

The anticompetitive characterization appears to be more apt, especially in the absence of persuasive justifications. It seems unlikely that consumers would welcome Ticketmaster’s transferability restrictions, given that these limitations degrade the ticket that consumers purchase, especially in comparison with paper and e-tickets. It is also doubtful that the transferability restrictions improve the product from the standpoint of artists and venues. Arguments that the restrictions are an improvement because they foreclose scalping seem disingenuous, especially since

¹²⁷ *Verizon Communs. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

¹²⁸ For an excellent review of the antitrust policies and cases regarding design change and innovation, see ABA Section of Antitrust Law, *ANTITRUST LAW DEVELOPMENTS* (6th ed. 2007), 267 ff, and the supplements thereto, 2008 Annual Review of Antitrust Developments and 2009 Annual Review of Antitrust Developments.

the restraints' impact is excessively broad; artists, promoters and venues often withhold the best seats themselves in order to sell them at premium prices; and it is TicketExchange that frequently markets these withheld or diverted tickets.¹²⁹ Moreover, few states still see a need to regulate scalping, and federal and state laws are in place to address the use of bots. The imposition of private transferability restraints solely on paperless tickets also makes claims that they are an improvement seem hollow and unpersuasive.

In addition, the transferability restrictions eliminate, rather than enlarge, consumer choice, an effect opposite to that of most bona fide innovation.¹³⁰ This situation is distinct from that of a company marketing, for example, a redesigned computer and hoping that consumers will prefer it to others on the market. If consumers retain the choice of whether or not to accept the redesigned computer and opt purchase the new model rather than a competing one, the change is presumably an improvement. With restrictive paperless tickets, however, the consumer's only choice is whether or not to buy the tickets as offered, replete with transferability restrictions, to stay home, or to attend some less desirable event. This "take it or leave it" option is quite unlike the choice required by the revised New York law. Under that law, if ticket issuers use non-transferable paperless tickets, then buyers must also be offered at the time of purchase the alternative of buying a ticket in a transferable format. Contrary to consumers' long experience with tickets in other formats, those who buy restrictive paperless tickets are denied (outside of New York) the choice among ticket formats for events they want to attend.

In general, courts are more likely to view a product "modification" as violating the antitrust laws where, as here, the "innovation" does not involve technical issues. For technical matters, such as redesigning a computer program or an electrical interface, a court or agency will be reluctant to second-guess a business' unilateral engineering and management decisions. By contrast, the imposition of transferability restrictions on the sale of paperless tickets is more akin to a marketing change and therefore is much easier to assess and confidently challenge.

¹²⁹ Smith, "Concert Tickets Get Set Aside, Marked Up by Artists, Managers," The Wall Street Journal, WSJ.com, 3/11/09, <http://online.wsj.com/article/SB123672740386088613.html>; Opinion L.A.: Observations and Provocations from the [L.A.]Times' Opinion Staff, "Who Really Benefits from Paperless Concert Tickets?" 6/8/09, <http://opinion.latimes.com/opinionla/2009/06/paperless-concert-tickets.html>.

¹³⁰ Teva Pharmaceuticals, USA v. Abbott Laboratories, 2008U.S. Dist. LEXIS 63333 (D.Del, 2008).

Summary. There seems to be scant justification for preventing the resale, gift or donation of restrictive paperless tickets. By comparison with paper and e-tickets, these restraints diminish the paperless ticket and limit the consumer's choice. The asserted anti-scalping justification seems weak, since similar restraints are not applied to tickets in other formats. Refusal to permit groups to enter until all group members are present derives from the prohibition against transferring restrictive paperless tickets in advance of the event. There seem to be easy solutions for this problem, however. These include sending an e-ticket or mobile ticket to an anticipated late arriver; providing her with a separate paperless ticket and modifying the original ticket to permit one less entrant; or adopting ticket transferability policies nationwide similar to those already required in New York.

Price floors are a significant restraint, since they interfere with the operation of the competitive market by preventing people from selling their tickets at less than face price. They do nothing to curb scalping, which, under any definition, involves reselling tickets at an excessive price. This restraint, in combination with the requirement that the ticket owner use only the primary market seller to process any ticket resale transaction, effectively prevents the ticket owner from reselling the ticket at less than the established price floor. In contrast, price ceilings arguably might be justified as an attempt to preserve both goodwill and fan access to tickets in the primary market. Even when demonstrable, however, these benefits usually do not outbalance the costs of chilling secondary market transactions. Moreover, if this were a bona fide justification, artists and promoters would not themselves withhold some of the best tickets to sell at greatly inflated prices, nor would they permit owners of paper and e-tickets to freely give, sell, or donate their tickets to others.

PART V – LEGAL AND LEGISLATIVE REMEDIES

The potential injury to both consumers and competition caused by the transferability restraints appears to be substantial, and the likely justifications seem mostly to be unavailing. Before one can conclude that imposition of these restraints constitutes a legal violation, however, other legal elements of a cause of action must be satisfied. The analyses in this Part's first two sections, therefore, consider respectively whether the transferability restrictions might constitute a violation of consumer protection or antitrust laws. Section C then explores the additional prospect of using legislation to address the problems caused by broad transferability restrictions.

A. Enforcement under Consumer Protection Laws

In light of the harm that transferability restraints inflict on consumers, assessment is warranted whether the imposition of these restraints constitutes an “unfair or deceptive act or practice” in violation of section 5 of the Federal Trade Commission Act.¹³¹ Although not reviewed here, this conduct might also violate the consumer protection laws of individual states.

Conduct does not need to be both “unfair” *and* “deceptive” to violate Section 5; either, by itself, is sufficient. Turning first to deception, plausible arguments exist that the restrictions have deceptive elements. To fall within this aspect of the FTC’s consumer protection jurisdiction, three elements are required:

1. There must be a “misrepresentation, omission or practice;”
2. The misconduct must be “likely to mislead the consumer acting reasonably in the circumstances;” and
3. The misleading “misrepresentation, omission or practice” must operate “to the consumer’s detriment.”¹³²

Ticketmaster does not appear to have made any affirmatively false or intentionally misleading statements regarding the transferability of their paperless tickets. Selling paperless tickets with strict transferability restrictions, however, likely violates reasonably held consumer expectations, especially since tickets in other formats do not have such restrictions attached, even when they are sold for other seats at the same event to which the paperless tickets are sold. Whether this violation of consumer expectations results from a misleading practice or omission is an open question, but one that deserves inquiry.

Stronger arguments may center on the “unfairness” aspect of the FTC’s consumer protection jurisdiction because it has a broader substantive reach. In 1980, the FTC issued a policy

¹³¹ Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, states, in pertinent part, that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” The “unfair methods of competition” clause is generally applied to address competition policy concerns, whereas the “unfair or deceptive acts or practices” clause is generally applied to consumer protection matters. Sometimes conduct can violate both clauses.

¹³² FTC Policy Statement on Deception, Appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), 10/14/83 at p.2 of the Statement.

statement defining “unfairness,”¹³³ and the FTC Act Amendments of 1994 codified the approach taken in that statement.¹³⁴ Under that statute, conduct is an “unfair act or practice” if the following three attributes are present:

1. The practice causes substantial consumer harm;
2. Consumers cannot reasonably protect themselves from that harm; and
3. There is no substantial, legitimate justification for the practice.

Deception may “properly be viewed as a subset of unfairness.”¹³⁵ Whereas deception analysis does not look at the conduct’s offsetting benefits – it is assumed that a misleading “representation, omission, or practice” has no offsetting benefits – “unfairness” is not confined to specifically misleading conduct. The gravamen of both, however, is the presence of substantial, and not reasonably avoidable, injury to consumers.

For reasons previously discussed in Parts II and IV, discussing harm to consumers and possible justifications, the first and third of the unfairness elements appear to be satisfied. This conclusion seems most persuasive with respect to prohibitions on reselling, giving or donating Ticketmaster paperless tickets to others, and restraints on selling them for less than face price. Significantly, this conduct transgresses important consumer protection policies. By constricting consumer choice, chilling consumer freedom to transact freely with others, and violating reasonable consumer expectations, the adoption of these practices undermines a free, fair, informed, and competitive market. Although the collective harm suffered by consumers is now significant, as the use of paperless tickets increases, it will become even more substantial.

Some might argue that since tickets in unrestricted formats comprise more than 99% of the tickets sold by Ticketmaster, the harm from restricted paperless tickets is not sufficiently substantial to satisfy the requirements of a consumer protection cause of action. In 2010, however,

¹³³ Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, attached to the Commission letter to Senators Ford and Danforth (December 17, 1980), *reprinted in* H. REP. No 98-156 at 33 and 4 Trade Reg. Rep. (CCH) ¶13,203.

¹³⁴ 15 U.S.C. §45(n).

¹³⁵ Howard Beales, III, Director of FTC Bureau of Consumer Protection, “The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection,” Speech to Marketing and Public Policy Conference, Washington, DC, May 30, 2003, p.4.

Ticketmaster sold nearly 120 million tickets, apart from venue box office and season ticket sales.¹³⁶ Ticketmaster's sales of restricted paperless tickets, therefore, still constitute a substantial number, even though small in percentage terms. This is particularly true with respect to a venue's most desirable seats and concerts by top rank performers such as AC/DC, Justin Bieber, Miley Cyrus, Nine Inch Nails, Paul Simon, Bruce Springsteen, Tom Waits, and Metallica, all of whom, plus others of equal stature, have used restrictive paperless tickets.

The second element is also satisfied. Consumers have no control over whether the ticket format for an event will be paperless and greatly restrictive, or paper or electronic and freely transferable. Although consumers might possibly purchase tickets to other events or for other seating sections where the restrictive paperless tickets might not be used, imposition of this constrained option hardly eliminates the injury to consumers. Even if the purchaser is willing to consider an alternative seating section or event, these remain second choices and possibly ones that may also be covered by restrictive paperless tickets.

Important questions remain, however. First, it is not clear whether Ticketmaster, the artists, promoters, venues, or some combination of these are responsible for the consumer injury attendant on the use of restrictive paperless tickets. If, for example, the artists or promoters are the major perpetrators because they are the ones that choose to use the paperless tickets, then they can be faulted only with respect to injury associated with their own concerts. In this situation, Ticketmaster may be able to assert that its responsibility is, at most, scant. If, however, Ticketmaster is seen to play the major role, possibly by designing and offering the restrictive options, implementing the artists' choices, and benefiting substantially from the restrictions, then its responsibility for the harm to consumers will be all the more clear and direct.

Second, a concern might arise whether restrictive paperless tickets are best characterized as a new product (paperless tickets) that incorporates features that unnecessarily harm consumers or as a degradation of an existing product (entertainment event tickets). The selection of a label in this instance is arbitrary and unimportant for current purposes, however, as long as consumers are injured by the unjustifiable imposition of transferability restraints from which they are not reasonably able to protect themselves.

¹³⁶ Live Nation Entertainment, Inc. SEC Form 10-K, 2010 Annual Report, p.6.

Some might counter that consumer expectations are not violated and that consumers can protect themselves because they can find out about the transferability restrictions prior to purchasing the tickets. The restraints may indeed be disclosed on Ticketmaster’s website, but open questions remain – ones worthy of significant investigation – whether even careful consumers are likely to find, read, understand, and rely on the import of the website disclosures. These questions have even greater force given that purchasing tickets in unrestricted formats comprises the bulk of consumers’ experience and provides the foundation for their expectations.

B. Enforcement under Competition Laws.

Ticketmaster’s imposition of broad transferability limitations may violate Section 5 of the Federal Trade Commission Act or Section 2 of the Sherman Act if it constitutes an attempt to monopolize all, or a discrete submarket within, the secondary ticket sales market.¹³⁷ To this end, Ticketmaster’s conduct might be characterized as an effort to use its market power within the primary ticket market to lock consumers into using its, and only its, resale service in the aftermarket, i.e., the secondary ticket sales market.¹³⁸

The same showing that demonstrates a violation of Section 2 will also establish an “unfair method of competition,” since a violation of the Sherman Act also constitutes a violation of the FTC Act. Section 5 is actually the broader statute, because, among other reasons, it can address “incipient” as well as completed antitrust violations. In a case brought by the FTC, therefore, the savviest way to proceed might be to allege a violation of Section 5, interpreted broadly, or violations of both statutes. The degree to which Section 5 can, and ought to, reach beyond the boundaries of Section 2 remains a matter of long-running controversy, however, and will not be addressed here.¹³⁹

¹³⁷ Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, proscribes, inter alia, “unfair methods of competition in or affecting commerce.” Only the FTC may bring actions to enforce the FTC Act. Section 2 of the Sherman Act, 15 U.S.C. §2, states in pertinent part that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .”

¹³⁸ Other theories of potential illegality are available. For example, Ticketmaster might have adopted restrictive transferability conditions in an attempt to entrench or expand its market power in the primary ticketing market, or it might have engaged in a web of hub and spoke conspiracies with its clients to exclude its secondary ticketing market rivals. These options, however, do not appear to be as consistent with the available facts as an attempt to monopolize a discrete and growing niche within the secondary market. Consequently, this paper will examine only this latter theory.

¹³⁹ See, e.g., ABA Section of Antitrust Law, *ANTITRUST LAW DEVELOPMENTS* (6th ed. 2007) at 652-656, and *Rambus, Inc.*, 2006 FTC LEXIS 60 (FTC 2006), Leibowitz, Comm’r, concurring. See also FTC Workshop on Section 5 as a Competition Statute, 10/17/08, <http://www.ftc.gov/bc/workshops/section5/index.shtml>, including, among other

Rather, this paper's antitrust analysis will confine itself to the possibility that imposing the transferability restrictions on paperless tickets violates Section 2 of the Sherman Act.¹⁴⁰

Professor Bauer describes the legal requirements for a Section 2 case involving attempted monopolization of a secondary market as follows:

To make out a case of unlawful attempt to monopolize, the plaintiff must prove that the defendant has engaged in certain exclusionary or predatory practices, with both an intent to achieve monopoly power in that secondary market, and a dangerous probability of success of achieving that monopoly position—which of course requires, among other things, proof that the secondary market in question is a “relevant market” for antitrust purposes. In the aftermarket setting, proof of the necessary “exclusionary practices” could include either the leveraging incidental to the contractual requirement that buyers purchase the secondary product only from a source approved by the seller of the primary product or a refusal to sell the secondary product to others.¹⁴¹

As applied to ticketing, one might argue that Ticketmaster has made it either virtually impossible for their customers to resell their paperless tickets, or possible only through Ticketmaster's own service; in so doing, the argument proceeds, Ticketmaster may be engaging in an unlawful, exclusionary effort to gain market power in the secondary ticketing market.

In *Kodak*,¹⁴² the Supreme Court held that the petitioner (Kodak) may have violated Section 2 when it refused to sell replacement parts for its copying machines (technically, micrographic reproduction machines) either to independent service companies or to the purchasers of the machines. These restrictions locked the purchasers into seeking service from Kodak, excluded rival independent service companies from this market, and enabled Kodak to raise prices above competitive levels. Although there was substantial competition in the upstream, primary market for

excellent presentations, Foer, “Section 5 as a Bridge toward Convergence,” Lande, “How to Have a Distinctive and Useful Role for Section 5 of the FTC Act,” Liebowitz, “Tales from the Crypt: Episodes '08 and '09: The Return of Section 5 (Unfair Methods of Competition are Hereby Declared Illegal),” Leary, “A Suggestion for the Revival of Section 5,” and, more cautiously, Creighton and Krattenmaker, “Some Thoughts about the Use of Section 5.” These authorities present the key issues, literature, and case law.

¹⁴⁰ This paper also does not examine whether the transferability restraints might violate state antitrust laws.

¹⁴¹ Bauer, “Antitrust Implications of Aftermarkets,” 57:1 *The Antitrust Bulletin* 31, 49 (Spring, 2007), citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). This paper was presented at an American Antitrust Institute Invitation Symposium, “The Future of Aftermarkets in systems Competition,” June 20, 2006, National Press Club, Washington, D.C.

¹⁴² *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). Although still valid law, the post-Supreme Court history of *Kodak* leaves it somewhat open as to how much authority it will carry in future cases.

copiers, the Court held that the fact that consumers were locked in to using Kodak service after they purchased the Kodak machines would be a sufficient basis for finding that Kodak exercised monopoly power in the secondary market. Professor Bauer interprets this as implying that “where there is an absence of vigorous competition in the primary market, the seller will be even more likely to be able to engage in supracompetitive pricing with respect to the secondary products.”¹⁴³

It is debatable how tightly *Kodak* governs this situation. On the one hand, both cases involve attempted monopolization of aftermarkets, and Ticketmaster enjoys far more dominance in the primary market than Kodak did. On the other hand, purchasers of Kodak machines were faced with an unpredictable change in Kodak policy regarding aftermarket servicing. Purchasers of Ticketmaster paperless tickets were not faced with a comparable change of policy. One might assert, however, that consumers indeed faced a change of policy, or at least suffered imperfect information, when Ticketmaster abandoned the long-established and expected ticket transferability policy that applied to all its other tickets. Still, there has been no explicit, after-the-purchase policy change.

Applying an “aftermarkets” analysis to event ticketing, Ticketmaster probably has violated Section 2 of the Sherman Act if the following elements are demonstrable:

- (1) It is using its continuing market/monopoly power in the primary ticket sales market to orchestrate a shift to paperless tickets for which transferability by sale or gift is prohibited or greatly restricted;
- (2) Its conduct undercuts its secondary market competition in processing transfers of these paperless tickets;
- (3) The conduct creates a dangerous probability that Ticketmaster will acquire, entrench or expand its market power in the secondary market or a discrete submarket within it; and
- (4) Ticketmaster lacks a credible and legitimate business justification for its actions.¹⁴⁴

¹⁴³ Bauer, *supra* at p 44, note 39.

¹⁴⁴ I am indebted to Robert Skitol of Drinker, Biddle and Reath, LLP, Washington DC for suggesting this formulation.

At present, it is not possible to offer a confident opinion whether Ticketmaster's conduct is unlawful or not without access to proprietary data and detailed economic analysis. Nonetheless, the available information on each point is sufficiently scant or suggestive that additional investigation is warranted.

1. *Shift Toward Restrictive Paperless Tickets.* Ticketmaster may be orchestrating a shift, or collaborating with its venues and artists to promote a shift, toward the use of restrictive paperless tickets that, if transferrable at all, may be transferred only through Ticketmaster's own service, TicketExchange. Promoting a shift to the use of paperless tickets would not be harmful, in and of itself. This is quite distinct, however, from efforts to prohibit or greatly restrict the transferability of those tickets.

It is similarly important to distinguish between legitimate marketing – even by a firm with market power – to induce a shift toward the use of a new product, namely, *restrictive* paperless tickets, and the application of economic coercion on venues, promoters and artists to impose the transferability restraints on retail purchasers. In the latter situation, the pressure to accept such a shift would be strengthened by the awareness of all who deal with Ticketmaster that its parent, Live Nation Entertainment, also owns Front Line Management, the largest manager of artists, and Live Nation, the world's largest promoter/producer of live entertainment events and the country's second largest owner/operator of venues. When the possible consequences of resistance to an integrated dominant industry leader are obvious and drastic, no explicit threat is necessary.

Notwithstanding these factors, Ticketmaster's CEO, Nathan Hubbard, asserts that the decision to use paperless tickets does not rest with Ticketmaster, but rather is always the decision of the artists, managers, promoters, and venues.¹⁴⁵ Thus, Hubbard would argue, if there is some shift toward the use of restrictive paperless tickets, the responsibility for promoting that shift does not rest on Ticketmaster's shoulders. It is Ticketmaster, however, that chooses what options it will offer to its clients, and what specific restrictions each option will incorporate. Ticketmaster also shares in the benefits. The relationships between Ticketmaster and the other parties, of course, may vary depending on the artist, promoter, and venue involved.

¹⁴⁵ Rovell, "One-on-One With Ticketmaster CEO on Dynamic Pricing," CNBC.com, 4/21/11, <http://www.cnbc.com/id/42707776/print/1/displaymode/1098/>.

The available evidence does not clearly demonstrate that Ticketmaster is (or is not) coercing or coordinating a collective shift among its clients toward the use of restrictive paperless tickets. Although many observers suspect such conduct, more investigation is needed – and merited – before this element confidently may be said to be satisfied.

2. *Exclusion of Rival Secondary Sellers.* Ticketmaster’s exclusionary conduct is comparable to Kodak’s, with the possible exception of imposing its restrictions subsequent to the ticket purchase. In particular, the restraints prevent independent secondary sellers from reselling restrictive paperless tickets except by resort to cumbersome procedures. The restrictions, therefore, effectively deny secondary market sellers access to a key input for their businesses, namely, paperless tickets they can resell. This denial is significant since Ticketmaster is the largest seller of paperless tickets. It is all the more striking given that Ticketmaster has not, and does not, substantially interfere with the legitimate acquisition or resale of its other tickets.

At present, resellers are not totally excluded from the overall secondary market, just the market niche represented by Ticketmaster’s restrictive paperless tickets. They can still resell paper tickets and e-tickets, and possibly non-restrictive paperless tickets sold by other primary ticket sellers. But with its dominance in the primary ticket sales market, Ticketmaster may be in a position to move the overall market toward increasing use of its restrictive paperless tickets. If so, then the difficulties faced and foreseen by independent secondary firms are likely to increase.

3. *Dangerous Probability of Success.* The imposition of stringent restraints on the alienability of its paperless tickets might create a dangerous probability that Ticketmaster will gain market power within the secondary ticket sales market. Ticketmaster already owns TicketsNow, the second largest participant in that market as well as TicketExchange. Ticketmaster also controls more than 2/3 of the primary ticket sales market, even after the divestiture of Paciolan required by the Department of Justice and AEG’s decision to join with Outbox Technology to manage its ticket sales.¹⁴⁶ Moreover, a very large percentage of Ticketmaster’s client-venues renew their contracts, bolstering the likelihood that its market dominance will be persistent.¹⁴⁷ The concern arises, therefore, that

¹⁴⁶ Silvenis, “Live Aid? Assessing the Ability of the Ticketmaster-Live Nation Consent Decree to Restore Competition Levels in the Primary Ticketing Market,” American Antitrust Institute Working Paper No. 11-02, April 14, 2011, pp17, 24-25, http://antitrustinstitute.org/sites/default/files/AAT%20Working%20Paper11_02.pdf.

¹⁴⁷ In its First Quarter 2011 Supplemental Operational and Financial Information, Live Nation Entertainment reported that “[t]he company’s North America ticketing renewal rate was 94%, and the company successfully renewed all of its

Ticketmaster may be able to use this dominance to gain market power in the secondary sales market or, more likely, a paperless ticket submarket within it.¹⁴⁸

Several factors bear on this possibility. First, a shift toward restrictive paperless tickets could impair or eliminate competitive efforts by Ticketmaster's secondary market rivals. Washington Post writer Paul Fahri summarized two contrasting views on this prospect:

Without a re-sale option, resellers worry that Ticketmaster could impose its will on the concert industry. Earlier this year, the company completed a merger with Live Nation, the world's biggest concert promoter and a major artist manager, giving the combined company a stake in every step of concert production and management.

With the Live Nation merger, Ticketmaster is "now in a position to control both the primary and the secondary levels of the market" says Marianne Jennings, a business professor at Arizona State University who has studied the ticket market. Innovations like paperless tickets "are often touted as being in the best interest of consumers, but in reality, primary (ticket) sellers have been trying to get rid of brokers and maximize their profits for 30 years."

But Joris Drayer, an assistant professor of sports marketing at the University of Memphis, says that the concert and sports businesses are too large and decentralized for one company to dominate. He says paperless tickets may become an option but conventional tickets aren't about to disappear. Not only do sports fans still like them, but "the sports industry is notoriously slow to adopt new technology."¹⁴⁹

A second important factor is the degree to which Ticketmaster's power in the primary ticketing market is constrained by venues, promoters and artists whose interests might not match its own. If these entities often can persuade Ticketmaster to charge lower fees on the primary tickets and consequently not garner all of potential monopoly profits in that market, then Ticketmaster will

top 25 accounts." p.2. <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTI0OTR8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1>. Some of these may be "evergreen" contracts that are renewed automatically unless the venue affirmatively "opts out." Ticketmaster has also sought specific performance of its Licensed User Agreements with venues. *Cavaliers Operating Co., v. Ticketmaster*, 2008 WL 4449466 (N.D. Ohio 2008) (granting specific performance and deferring resolution of antitrust issues).

¹⁴⁸ *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*, 536 F.Supp.2d 1191, 1198 (C.D. Cal. 2008) (dismissing RMG's antitrust counterclaims, holding *inter alia* that RMG failed to allege facts demonstrating a "dangerous probability of success" in a properly defined market, and noting that many of Ticketmaster's arguments on the issue appeared to be "well-founded").

¹⁴⁹ Fahri, "Concerts Go Way of Airlines – No Tickets Needed," (7/20/2010), <http://www.chron.com/business/article/Concerts-go-way-of-airlines-no-tickets-needed-1710695.php#page-1>.

have an incentive to seek the foregone monopoly profits by taking control of and exploiting the paperless ticket niche within the secondary market.¹⁵⁰

Further analysis is warranted, however, to determine whether artists, promoters or venues also want to limit Ticketmaster's efforts to fully exploit the sale of its restrictive paperless tickets in the secondary market. These firms, however, may be more concerned with the primary market and avoiding criticism from consumers for setting excessive face prices; consumers may more readily accept high prices in the secondary market as an artifact of a competitive market pressures and the promise of obtaining better seats. Artists and promoters might actually welcome an unrestrained secondary market that they can exploit when selling tickets that they have withheld. Moreover, venues, artists and promoters can share some of the revenues that Ticketmaster reaps from resale transactions of its restrictive paperless tickets.

Technological or marketing developments might also bear significantly on whether Ticketmaster will be able to acquire market power within the secondary market. For example, Ticketmaster's implementation of dynamic pricing will enable Ticketmaster to reset face prices to respond to changing market conditions. This may lessen the perceived need to restrict ticket transfers, because dynamic pricing, if successful, will trim brokers' potential profits by limiting the availability of primary market seats priced substantially below competitive market levels. The on-going modernization of Ticketmaster's computer system might also ease the tasks of processing gift and resale transactions and coordinating with independent secondary sellers, possibly while also enhancing Ticketmaster's ability to gather valuable marketing data.

It is difficult to predict with confidence whether Ticketmaster's imposition of transferability restrictions for its paperless tickets creates a dangerous probability that Ticketmaster will acquire market power, without first defining more precisely the market in which this development is likely to occur. One lesson of *Kodak*, albeit a controversial one, is that it may not be necessary to show monopoly in the fore-market; rather it may be sufficient to show that from the consumer's reasonable post-sale perspective, he or she is locked in. Certainly, this was the situation in *Kodak* itself where the primary market was competitive but, once consumers bought a Kodak machine, they were locked into using Kodak service. The Ticketmaster situation may be somewhat easier,

¹⁵⁰ Daniel A. Rascher and Andrew D. Schwartz, "Paperless Ticketing' and its Impact on the Secondary Market: An Economic Analysis," OSKR, at p. 54 (December 30, 2010).

however, because the fore-market – primary ticketing – is not very competitive. For any particular event or venue seating area covered by Ticketmaster’s restrictive paperless tickets, Ticketmaster will be the exclusive seller. Of course, once the restrictive paperless tickets are purchased – just as once Kodak machines are purchased – buyers are wedded to their seller for the provision of aftermarket services. This focus on the transfer of Ticketmaster’s (or perhaps all) restrictive paperless tickets may sufficiently delineate the market of concern.

Kodak notwithstanding, many authorities require a more precise market definition and analysis in a Section 2 aftermarkets case.¹⁵¹ This task requires assessment of questions for which the answers are not yet known. For example, is the product of concern all tickets sold in the secondary market? Or, is the product market confined to the paperless ticket submarket, an important distinction since it does not appear likely that Ticketmaster will dislodge StubHub from the entire secondary market any time soon? Should the analysis distinguish between the provision of ticket sale services and the tickets that are sold, or between the activities of listing exchanges, which facilitate fan-to-fan transactions, and brokers, who acquire and sell tickets on their own account? Is there a separate market for each event? Do restrictive paperless tickets compete significantly with e-tickets, paper tickets, or even non-restrictive paperless tickets, and thus belong in the same product market? Is the market confined to events only at major concert venues? Are the market’s geographic boundaries congruent with the entire United States or confined to some smaller region? The answers to these and related questions depend on economic analysis that is not only complex but necessarily relies on proprietary information. Accordingly, it is possible at this time only to recommend further investigation of whether Ticketmaster’s imposition of broad transferability restrictions for its paperless tickets raises a dangerous probability that Ticketmaster will gain market power in all, or a cognizable submarket of, the secondary ticket sales market.

C. Legislative Options

Any consumer protection or antitrust case challenging the transferability restrictions would face factual, legal and economic hurdles. Consequently, Federal or state legislatures might find that legislation offers a quicker and more focused remedy.

¹⁵¹ *Ticketmaster, L.L.C. v. RMG Technologies, Inc.*, 536 F.Supp.2d 1191 (C.D. Cal. 2008) (dismissing RMG’s antitrust counterclaims, holding that RMG failed to delineate properly bounded geographic or product markets, and in particular did not distinguish between ticket distribution services and the tickets themselves.).

As discussed above, New York State passed legislation in 2010 revising its existing laws to ensure that consumers can resell, give away, or donate their tickets to others, whether those tickets are non-restrictive paperless tickets or offered in another freely, independently and readily transferable format as an alternative to restrictive paperless tickets.¹⁵² The State renewed this legislation in 2011. This revision has set a model on which bills in other states have been based.

The revision's other provisions also seek to protect consumers in ways that do not unduly burden primary sellers, venue operators, and licensed secondary sellers. Thus, among other changes, the revision:

Prohibits the use of software "bots" to acquire large groups of tickets over the Internet and establishes significant penalties for the use of automated ticket purchasing software;

Requires sellers to disclose when seats have obstructed views;

Permits a venue operator or its agent to charge a "reasonable" service charge for special services;

Requires licensed ticket resellers to make twice yearly reports to the department of state regarding the total number and average resale price of tickets sold; and

Prohibits primary ticket sellers from distributing tickets to secondary ticket sellers owned or controlled by that primary seller or its agent.¹⁵³

The law also continues to require those in the business of reselling tickets, but not listing exchanges, to acquire state licenses and post a bond. Similarly, it retains requirements that mandate on-the-street resellers to remain a specified distance from the venue. As with the 2010 law, the 2011 renewal legislation will stay in effect for 1 year. It will require further renewal in 2012.

¹⁵² See note 125, *supra*, and associated text.

¹⁵³ Ch. 151, Laws of 2010 (renewed in 2011) §8; Arts and Cultural Affairs Law, 25.30. Good summaries of the law may be found in Branch, "New York Legislature assures consumer choice by overwhelmingly passing ticket resale bill," TicketNews.com, 7/1/10, <http://www.ticketnews.com/news/New-York-Senate-assures-consumer-choice-by-overwhelmingly-passing-ticket-resale-bill7101547>; Branch, "New York legislature renews paperless ticketing bill," TicketNews.com, 5/11/11, <http://www.ticketnews.com/news/New-York-legislature-renews-paperless-ticketing-bill051111783>; Liebman "Reselling Tickets in New York:2010," The Entertainment, Arts, and Sports Law Blog, July 2010, http://nysbar.com/blogs/EASL/2010/07/reselling_tickets_in_new_york.html.

As of this writing, bills addressing problems associated with restrictive paperless tickets were introduced and seriously considered in 2011 in Minnesota, Connecticut, North Carolina, and New Jersey.¹⁵⁴ A comparable bill has also been introduced in the U.S. Congress.¹⁵⁵ No bill other than for the renewal of the 2010 New York law has yet passed.

State and federal legislation each has its respective advantages. A federal law covers more territory. Ticket sales, including secondary sales, are now a national enterprise, so arguably a national legal standard is preferable for governing this activity. Bots and other automated ticket purchasing software are a problem of nationwide concern, since they can be deployed from anywhere. The Wiseguys conspiracy, for example, was national in scope, with aliases established all over the country. Even with help from primary market sellers who employ their own software to detect and deter scalping, the broad-scale investigation and prosecution of such practices can be expensive, possibly beyond the resources that an individual state or company is able to spend.

Regulation of ticket sales, however, has traditionally been left to the individual states. Even if only a few more large states, such as California or New Jersey, adopted rules like New York's, primary sellers might find it more convenient to abandon transferability restrictions nationwide. If states have their own rules against the use of bots or fraudulent web sites, they can join together, or with Federal agencies, to coordinate investigative efforts and collectively bring enforcement actions. Cooperation between the Federal and state enforcement officials is now common, and it invites the conclusion that legislation at both levels would be useful.

Although the New York law provides the template, provisions in addition to the ones in that statute might also be desirable. Among those worth considering is a requirement that venues disclose the number of seats for sale to the general public as well as the total number of seats available. This will give consumers an idea of how many tickets have been withheld by promoters and artists, sold to fan clubs, and given away in promotions. This information could be useful to investigators and consumers because, when tickets are in short supply, it could shed light on whether the scarcity is due to scalpers or ticket withholding by insiders. This information might be

¹⁵⁴ State of Minnesota, SF 425 (2010) (sponsors Gerlach, Scheid, Sparks, Metzen, Jungbauer) and companion bill HF 657; State of Connecticut General Assembly, 2011, Raised Bill H.B. 6298 (Fair Sales of Tickets to Entertainment Events); General Assembly of North Carolina, Session 2011, House DRH11066-SV-2 (09/07) (Admission Ticket Reform); State of New Jersey, S2910 (sponsors Lesniac, Union, and Singer).

¹⁵⁵ U.S. House of Representatives HR950 (Ticket Act of 2011); New Jersey Assembly Bill A373 (2010).

all the more valuable if it were broken down by ticket type, since it is usually tickets for the most desirable seats -- for example, those in the first 20 rows -- that are withheld or diverted from sale to the general public.

Specific laws against the use of bots would be helpful, where the states do not already have them. Provisions increasing the penalties for the use of bots not only might deter misconduct but also would further undercut contentions that restrictions are necessary to prevent this conduct.

Similarly, specific provisions banning the establishment of fake web sites, such as those claiming or implying a relationship to a specific artist or venue, might be useful. Of course, most states do have laws against fraudulent, misleading, or deceptive practices, often in the form of “baby FTC” acts. Nonetheless, a law specifying that such conduct in the context of event ticketing is unlawful, and imposing appropriate penalties, could be helpful.

CONCLUSION

Transferability restrictions unjustifiably limit consumer choice and depart from bedrock competitive market principles. The result is that restrictive paperless tickets give the consumer a degraded product, one that the purchaser cannot readily resell, give, or donate to others. The restraints, often replete with price floors or ceilings, can deny ticket holders the opportunity to resell their tickets even if willing buyers want to purchase them. Tickets bought for a group cannot be distributed in advance, thereby forcing the group to enter as one. When the dominant seller of primary market tickets, Ticketmaster, engineers the increased use of restrictive paperless tickets for which only it can process resale transactions, competition within the secondary market will be dampened, independent resellers will be impeded or excluded, and Ticketmaster will likely enhance its existing power in that submarket. With the loss of secondary market competition, prices can increase, output decrease, and incentives for innovation diminish.

Solid arguments are available that both consumer and competitive injury result from the imposition of broad transferability restraints on paperless tickets. For many of these, the likely justifications appear to be weak or pretextual. This is particularly true for restraints that, absent cumbersome circumventions, completely prevent ticket resales, gifts and donations, or impose price floors.

Important questions still need to be addressed, however. Among others, the relationships among Ticketmaster and the artists, promoters and venues are unclear and leave open issues regarding who might bear responsibility for any consumer or competitive injury. Assertions that price and transfer restraints are needed to limit scalping and protect artist goodwill seem weak, but more investigation is necessary. In the antitrust realm, the issues of market definition and dangerous probability of success require further evaluation to bring clarity to the legal picture.

The transferability restraints might provide the target for a consumer protection or antitrust case, and this possibility merits on-going consideration and investigation. Of the two, a consumer protection action currently appears to be the more promising. Legislative remedies may offer quicker and more focused benefits, and, based on the available evidence, appear to be warranted. Factual investigation and economic analysis conducted by enforcement agencies may develop valuable information and guidance that not only can reveal whether litigation is needed but also assist legislatures in their consideration of possible statutory remedies.

Finally, agency analysis, especially if embodied in an authoritative report, can directly and usefully inform the public, which now has many questions regarding such matters as transferability restrictions, scalping, bots, ticket fees, and ticket withholding, just to name a few. Even companies within the industry might welcome confirmation or correction regarding their assumptions about the industry's dynamics and their choice of ticketing policies. With such information, companies will have the foundation for making ticketing a more consumer-friendly process.

The live entertainment industry touches every state in the country, and it directly affects thousands of consumers within each of those states. An authoritative report that informs legislatures, companies, concert-goers, and sports fans about the ticketing industry will do the double service of protecting consumers and promoting competition.