

TICKET SNIPING

AVI LOEWENSTEIN*

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INTRODUCTION

Disney star Hannah Montana, the stage persona of the young singer-actress Miley Cyrus, toured in 2007 with her “Best of Both Worlds Tour.”¹ The tour was a tremendous success, selling out all 54 of the shows.² Ticketmaster Entertainment (Ticketmaster),³ the exclusive

* J.D. Candidate, 2010, University of Colorado School of Law. I am grateful to Paul Ohm, Phil Weiser, Abe Alexander, and Jason Sharman for taking their precious time to provide extremely helpful comments and criticisms, to Linda Loewenstein for her impeccable proofreading, to Rachel Mentz for shepherding the article through the publication process, and, of course, to my professor, father, and best friend, Mark Loewenstein, for his support, encouragement, and wise counsel. Any errors are mine alone.

1. Randall Stross, *Hannah Montana Tickets on Sale! Oops, They're Gone*, N.Y. TIMES, Dec. 16, 2007, §3, at 4, available at <http://www.nytimes.com/2007/12/16/business/16digi.html>.

2. Craig Harris, *Scalpers Pushing Hannah Montana Tickets, Fans to the Limit*, SEATTLE POST-INTELLIGENCER, Oct. 2, 2007, http://www.seattlepi.com/pop/333927_

ticket seller for the tour, sold out numerous shows within minutes, leaving many Hannah Montana fans out in the cold. Yet, often, moments after the shows went on sale, the secondary market⁴ flourished with tickets to those shows. The tickets, whose face value ranged from \$21 to \$66, were resold on StubHub for an average of \$258, plus StubHub's 25% commission (10% paid by the buyer, 15% by the seller).⁵ StubHub reported that ticket sales for Hannah Montana accounted for \$10 million of its sales in 2007, the most for a single act in the company's history.⁶

Consumers were outraged at the entire debacle—they viewed the ticket prices on the secondary market as outrageous and suspected foul play as to why they couldn't buy the tickets directly from Ticketmaster. Their suspicions were well-founded. Ticket scalpers⁷ had developed software (sometimes called “bots”) to “snipe” tickets, meaning that the scalpers used software to inundate Ticketmaster's website with automated requests, which enabled the scalpers to purchase large quantities of Hannah Montana tickets before the general public.⁸ These tickets were then resold on the secondary market for a lucrative profit.

The ticket snipers essentially “cut in line.” The use of sniping software violates the first-come, first-served doctrine of a queue, which hinges on the notion that each individual is able to occupy one position

[hannahmontanatix02.html](#).

3. Ticketmaster is the world's largest live entertainment ticketing and marketing company. Ticketmaster operates in 20 global markets, providing ticket sales, ticket resale services, marketing and distribution through [www.ticketmaster.com](#), one of the largest e-commerce sites on the Internet, approximately 7,100 retail outlets, and 17 worldwide call centers. In 2008, Ticketmaster sold more than 141 million tickets valued at over \$8.9 billion on behalf of its clients. See About Ticketmaster Entertainment, Inc., [http://www.ticketmaster.com/h/about_us.html](#) (last visited Oct. 2, 2009) [hereinafter About Ticketmaster].

4. The secondary market is the Internet-driven business of ticket reselling. Several websites, including StubHub.com, TicketsNow.com, and TicketLiquidator.com, are marketplaces for tickets where consumers and brokers can buy and sell tickets, but the artist, promoter and original ticket seller (usually Ticketmaster) have no involvement. StubHub! Home Page, [http://www.stubhub.com](#) (last visited Oct. 2, 2009); Tickets Now Home Page, [http://www.ticketsnow.com](#) (last visited Oct. 26, 2009).

5. StubHub, 2007 StubHub Concert Ticket Annual Report 2 (2007).

6. *Id.*

7. For purposes of this analysis, a ticket scalper is a person or entity that purchases tickets with the intent of reselling them at a higher price. This definition is designed for analytical purposes only and does not necessarily correspond to any legal definition of this term.

8. The phrase “ticket sniping” originated in a blog post by Professor Eric Goldman. See Posting of Eric Goldman to Technology and Marketing Law Blog, Ticketmaster Wins Big Injunction in Hannah Montana Case, But Did the Public Interest Get Screwed?—Ticketmaster v. RMG, [http://blog.ericgoldman.org/archives/2007/10/ticketmaster_wi.htm](#) (Oct. 21, 2007, 3:45 PM) (“This case involves what I'll call ‘ticket sniping’—the practice of quickly snapping up highly-sought-after tickets when they first go on sale and then reselling them at higher prices.”).

in the queue. The ticket sniper's ability to pack the queue with hundreds or thousands of automated queue holders breaches that doctrine. The phenomenon of ticket sniping is pervasive throughout the entertainment industry.⁹ Individual consumers interested in attending big-name concerts and sporting events almost inevitably encounter the following situation: Tickets go on sale online at a specified time. The consumer desperately tries to purchase the tickets the moment they are available, but is unsuccessful because ticket snipers have packed the queue with automated requests at superhuman speed. Within a matter of minutes, the event is sold out. The consumer, frustrated and upset, turns to the secondary market to purchase tickets from ticket scalpers, typically paying well above face value.¹⁰

The public's outrage and the seemingly unfair buying practices of the scalpers have created a problem without an obvious solution. This Note will address the attempts to solve the problem of ticket sniping. Litigation has attempted to solve the problem but without much success; legislative solutions are emerging, but they, too, will fail. However, these failures are overshadowed by market solutions, which attack the problem with effectiveness and efficiency.

BACKGROUND

Sellers of tickets to sporting events, concerts and other live entertainment face unique challenges with respect to how they distribute their product. For reasons explained below, artists and promoters¹¹ price

9. Ellen Rosen, *In the Race to Buy Concert Tickets, Fans Keep Losing*, N.Y. TIMES, Oct. 6, 2007, at C6.

10. *Id.*

11. The pricing of tickets is a complex process. Contractual arrangements between artists and promoters are heterogeneous, but the typical contract resembles a book contract, with an advance and royalties if sales exceed a certain level. The typical contract is most easily illustrated with a hypothetical example. Suppose that an artist contracts with a promoter to perform a single concert. The artist receives a "guaranteed advance," for example, a sum equal to the first \$100,000 of ticket sales; then, before additional revenue is distributed, the promoter recovers his expenses and a "guaranteed profit," say \$50,000 for expenses and \$22,500 for profit. The expenses could include advertising, rent for the venue, costs of unloading the equipment, and so forth. The promoter and the artist then split any ticket revenue above the guarantee plus expenses and minimum profit (above \$172,500 in this case), usually with the artist receiving 85% and the promoter receiving 15% of these revenues. This arrangement probably describes approximately three-quarters of contracts. The artist's guaranteed advance and percent of revenue after expenses is higher for artists with greater bargaining power.

In the negotiation of the contracts, the artists (or their managers) negotiate the ticket prices, which naturally affect the amount of revenue collected. Fan perception is a critical component of such negotiation. The artist usually receives 100% of merchandise sales (e.g., T-shirts) that take place at the concert. The venue usually receives the concessions and parking revenue.

Tickets are then primarily distributed by a ticket seller (e.g., Ticketmaster), but occasionally the venue's box office, and, in some cases, directly by the band to its fan club. The

the tickets below the market clearing price.¹² Because of this discrepancy, demand for tickets exceeds supply, and some mechanism other than price must determine which consumers are permitted to purchase the tickets. Queuing is the traditional distribution mechanism for tickets to concerts and sporting events.¹³ There is an intuitive fairness of such a system; consumers view queuing as the fairest method of ticket distribution compared to lotteries or auctions.¹⁴ Consumers likely prefer queues because of a sense of democratic equality created by the queue. A queue is a great equalizer—position in the queue appears independent of social or economic status.¹⁵ Consumers who know that they can later purchase tickets on the secondary market can balance time potentially spent in line against money potentially saved by avoiding the higher priced secondary market.¹⁶ Further, some consumers may derive utility from the queue itself; there can be a crowd effect from waiting with a certain group of people, and anticipation may be heightened through the time spent in line.¹⁷

The traditional paradigm of ticket queuing has moved to the electronic world. Beginning in the mid 1990s, online ticket sellers, most notably Ticketmaster, began selling tickets on the Internet in addition to phone and in-person sales.¹⁸ Like almost all online ticket sellers, Ticketmaster's online allocation system is an electronic queue. At the prescribed date and time at which tickets for a given event go on sale,

ticket sellers do not participate in the pricing of the tickets. See Alan B. Krueger, *The Economics of Real Superstars: The Market for Rock Concerts in the Material World*, 23 J. OF LAB. ECON. 1, 4 (2005).

12. The market value or market clearing price for n identical tickets is the reservation price of the n th highest bidder in a hypothetical auction of those tickets. John D. Tishler, *Ticket Scalping: An Economic Analysis and Proposed Solution*, 33 SANTA CLARA L. REV. 91, 95 n.34 (1993).

13. Tishler, *supra* note 12, at 103.

14. *Id.*

15. See generally Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L.REV. 417, 432 (1985).

16. Stephen K. Happel & Marianne M. Jennings, *Folly of Anti-Scalping Laws*, 15 CATO J. 65, 67 (1995) [hereinafter Happel & Jennings, *Folly*].

17. *Id.*

18. Ticketmaster Company History, <http://www.ticketmaster.com/history/> (last visited Oct. 26, 2009); see also Bob Tedeschi, *A Surge in On-Line Ticket Sales, Too*, N.Y. TIMES, Apr. 18, 1999, at C13; Steven Pearlstein, *Internet Realigns Market for Tickets*, WASH. POST, Oct. 6, 2006, at D01 (noting that Ticketmaster is the exclusive selling agent for about 70% of the major sports teams, rock promoters and theater venues). Online ticket sales revolutionized ticketing and resulted in a range of benefits to the consumer and the promoter, including speed of booking, constant availability of booking facilities, and streamlining of the management of festivals and events. IAN YEOMAN ET AL., FESTIVAL AND EVENTS MANAGEMENT 191 (2004). Online sales have been tremendously successful with more than 200 million online tickets sold in 2007, with the leader in the industry, Ticketmaster, selling 141 million tickets worldwide. About Ticketmaster, *supra* note 3. Ticketmaster sells 67% of its inventory online. Brian Mansfield, *The Traps of Ticket Shopping*, USA TODAY, June 15, 2007, at E1.

consumers log onto Ticketmaster's website and attempt to purchase tickets.¹⁹ Due to the limited number of concurrent users supported by Ticketmaster's servers, only a limited number of consumers are able to purchase tickets at any one time; the remaining consumers are placed in a queue, and when server availability opens up, the consumer at the top of the queue is permitted to purchase tickets, if available.²⁰ Ticket sniping software has plagued the electronic queuing system. Ticket sellers use what is called a "CAPTCHA" (an acronym for "Completely Automated Turing Test to Tell Computers and Humans Apart"), to prevent bots from using their websites.²¹ CAPTCHAs are the little challenge-response tests (usually squiggly, distorted images) commonly seen when registering for Internet services such as free email accounts or blogging sites.²² The user has to correctly type the letters in the image before proceeding.²³ The sniping software, though, consistently solves the CAPTCHAs, despite the near constant improvement of the quality of CAPTCHAs by the ticket sellers. Some question whether CAPTCHAs can ever be effective.²⁴ On a fundamental level, it is exceedingly difficult to create a test which is implemented by a computer but which cannot be reverse engineered by another computer.²⁵

The sniping software's capabilities are astonishing. Ticket scalper Chris Kovach, using such software, made more than 600,000 ticket requests in a single day, and purchased 24,000 tickets over a several year period. Ticketmaster reports that on some days, 80% of its ticket requests are generated by bots.²⁶

After the Hannah Montana debacle, a variety of legal actions and technological advancements have attempted to solve the problem of ticket sniping. Ticketmaster sued RMG Technologies (RMG), a company that developed and marketed sniping software specifically aimed at Ticketmaster, and was granted a permanent injunction and

19. Scott D. Simon, *If You Can't Beat 'Em, Join 'Em: Implications For New York's Scalping Law in Light of Recent Development in the Ticket Business*, 72 *FORDHAM L. REV.* 1171, 1187 n.108 (2004); see also Travis Schluessler et al., *Is a Bot at the Controls?: Detecting Input Data Attacks*, *PROC. 6TH ACM SIGCOMM WORKSHOP NETWORK AND SYSTEM SUPPORT FOR GAMES* (2007), <http://caia.swin.edu.au/netgames2007/papers/1569050079.pdf>.

20. Simon, *supra* note 19, at 1187.

21. See generally Sara Robinson, *Human or Computer? Take This Test*, *N.Y. TIMES*, Dec. 10, 2002, at F1.

22. *Id.*

23. *Id.*

24. See Tim Anderson, *How Captcha Was Foiled: Are You a Man or a Mouse?*, *THE GUARDIAN*, Aug. 28, 2008, at 3; Posting of Robin Whittleton to Kyan Blog, *The Future of CAPTCHA*, http://blog.kyanmedia.com/archives/2008/7/23/the_future_of_captcha/ (July 23, 2008).

25. See Whittleton, *supra* note 24.

26. Stross, *supra* note 1.

damages.²⁷ Similarly, a consumer class action was filed against RMG and several ticket scalpers, but the case was voluntarily dismissed. Additionally, several states passed, and several more are considering, legislation targeting the use of sniping software. Lastly, Ticketmaster developed new ticket purchasing technology that attempts to solve the problem.

This Note will address the effectiveness and efficiency of each response. Part I will provide an economic background to the ticket sniping problem and the ticket industry. Part II will address the merits and implications of Ticketmaster's suit against RMG as well as address the class action suit against RMG and several ticket scalpers brought by consumers frustrated at their inability to purchase tickets. Part III will address recent legislation adopted in six states (and pending in several others)²⁸ specifically aimed at the manufacturers and users of sniping software. The legislation comes in two varieties: North Carolina and Oregon have made the use of sniping software a civil violation.²⁹ Minnesota, Colorado, Tennessee, and Indiana, on the other hand, have made the use of such software a crime, punishable by imprisonment and/or a fine.³⁰ Part IV will address the entertainment industry's business model changes and technological advances that disempower ticket snipers. I will conclude by arguing that the market has effectively and efficiently solved the problem, thus leaving a legal solution superfluous.

I. THE ECONOMICS OF TICKET SNIPING

The motivations of the ticket snipers and the economics of the ticket industry are a good starting point for understanding the problem. Large queues and seemingly insatiable demand typically seen at online ticket sales perplex an economist. In traditional competitive markets, interaction between buyers and sellers bring demand into balance with supply, so queues are quickly eliminated. Why such large queues?

The answer is relatively simple: Traditionally, the entertainment and sports industries have set their ticket prices far below market value.³¹ Many consumers are willing to pay much more than the face value of the

27. Ticketmaster L.L.C. v. RMG Techs., Inc., 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

28. See H.R.1044, 96th Gen. Assem., Reg. Sess. (Ill. 2009) (proposing criminal sanctions); H.R. 3801, 186th Leg., Reg. Sess. (Mass. 2009) (proposing civil penalties); Assem. B. 3723, 2009 Assem., Reg. Sess. (N.Y. 2009) (proposing civil penalties); H.R. 464, 2009 Gen. Assem., Reg. Sess. (Pa. 2009) (proposing criminal sanctions); H.R. 508, 127th Gen. Assem., Reg. Sess. (Ohio 2008) (proposing civil penalties).

29. N.C. GEN. STAT. § 14-344.2 (2008); OR. REV. STAT. § 646.632 (signed into law June 17, 2009).

30. MINN. STAT. § 609.125 (2007); COLO. REV. STAT. § 6-1-720 (2008); TENN. CODE ANN. § 39-17-1105 (2008); IND. CODE. § 35-43-2-3 (effective July 1, 2009).

31. Simon, *supra* note 19, at 1176.

ticket. The below market price creates a situation where more people are willing to buy tickets than there are tickets available, resulting in a sellout.³²

Those who are able to purchase tickets from the box office and pay only face value receive a “consumer surplus,” which is the positive difference between what they would have paid for the ticket and the price they actually paid.³³ The ticket sniper attempts to capture that consumer surplus by purchasing the ticket before the consumer has the opportunity, and then reselling that ticket to the consumer, with a markup that allows the ticket sniper to profit from the surplus.

The more difficult question is this: Why are the tickets priced well below what consumers are willing to pay (the market clearing price) in the first place? If tickets were sold at the market clearing price, the consumer surplus would be eliminated, and the scalpers’ motivation with it. Of course, a scalper may still purchase a ticket in anticipation of a price increase between the time of sale and the event, but pursuing that action does not require the use of sniping software, as there would theoretically be no queue.

Scholars have identified several possible explanations for artists’ and promoters’ pricing policies for events. Among these are long term revenue maximization, inability to price discriminate, promoter insider trading, partnership agreements, desires for sellouts, and altruism. These rationales are not mutually exclusive and a combination of these rationales can explain the below market pricing of tickets.

A. Long-term Revenue Maximization

Most importantly, tickets are underpriced to maximize long-term revenues. In order to build loyalty from a large fan base (who will attend concerts in the future and buy recorded music, paraphernalia, etc.), artists and promoters want to avoid the perception of gouging fans. Their strategy is based on their belief that consumers see price increases based on increased demand as unfair.³⁴ Kahneman, Knetsch and Thaler demonstrate such consumer sentiment in their often repeated behavioral economics studies, which found that 82% of survey respondents believed it “unfair” or “very unfair” for a hardware store to raise snow shovel prices

32. *Id.*

33. For example, suppose a consumer in Big Box Retailer sees a DVD on the rack. No price is indicated on the package, so the consumer brings it over to the register to check the price. As the consumer walks to the register, they think to themselves that \$20 is the highest price that they would be willing to pay. At the register, they find out that the price is actually \$12, so they buy the DVD. The consumer surplus in this example is \$8: the difference between the \$20 the consumer was willing to pay and the \$12 they actually paid. *See generally* GREGORY MANKIW, PRINCIPLES OF ECONOMICS 139 (5th ed. 2008).

34. Simon, *supra* note 19, at 1181.

by \$5 the morning after a snowstorm.³⁵ Charging the market clearing price in the short term can generate extremely adverse “moral effects” or “reputation effects” in the long term.³⁶ In the same sense, consumers would find it repugnant for a promoter to charge upwards of \$200 for a ticket to Hannah Montana, who has a family friendly appeal.³⁷

A promoter charging the market value might alienate and anger fans, who might then find other artists or sports teams to patronize. To build long-run popularity, the promoter might provide fans with a larger share of the consumer surplus than would be the case if the artist were simply maximizing short-run profit. Therefore, promoters may intentionally keep prices low to create consumer goodwill, which will in turn increase loyalty, attendance at future events, and purchases of the promoters’ related products.

B. *Inability to Price Discriminate*

Tickets may also be underpriced because promoters are unable to price discriminate in a beneficial way.³⁸ Venues are large and often circular in shape, thus making certain seats, such as front and center seats, far more desirable than high-up seats with obstructed or undesirable views. It would be impossible to properly estimate the market clearing price for each individual ticket to a reserved seat event. Therefore, promoters typically price discriminate in large, delineated seating sections. Scalping opportunities can arise from two potential pricing mistakes—mispricing of the entire seating section as well as mispricing within a seating section. For example, a promoter may misprice an entire seating section due to mistaken assumptions about the consumer’s perception of the view or the ability to hear. Additionally, within a seating section, the seats which provide better views may be underpriced relative to the rest of the area. In both situations, scalping opportunities arise from those mistakes.³⁹

While this may be true for some promoters and artists, given the promoters’ sophistication, it seems unlikely that promoters simply continue to misprice tickets year after year.⁴⁰ Live Nation, the largest

35. Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986).

36. Happel & Jennings, *Folly*, *supra* note 16 at 65.

37. Consumers mistakenly view the face value of a ticket as representative of promoters’ costs, an error implicitly endorsed by state statutes that require prices to be printed on tickets. In other words, if Hannah Montana tickets did not have a face value, consumers wouldn’t feel that they were subjected to opportunistic behavior by the sellers.

38. Tishler, *supra* note 12, at 99.

39. *Id.*

40. Stephen K. Happel & Marianne M. Jennings, *Assessing the Economic Rationale and Legal Remedies for Ticket Scalping*, 16 J. LEGIS. 1, 8 (1989) [hereinafter Happel & Jennings,

producer of live concerts in the world, annually produces more than 16,000 concerts for 1,500 artists in 57 countries and sells over 45 million tickets.⁴¹ Live Nation employs statisticians and analysts to analyze its extensive historical data of ticket pricing for each venue, and it seems unsatisfactory to say that promoters simply repeatedly err in their pricing.⁴² Presumably, they can tap this data and eliminate most, if not all, price discrimination mistakes based on venue layout.

C. Promoter Insider Trading

Artists and promoters retain tickets to distribute above face value (essentially enter the scalping business themselves), largely as a response to scalpers and ticket snipers. Some artists feel taken advantage of after seeing the scalpers' tremendous profit, but want to avoid the appearance of gouging fans by offering the tickets at market value.⁴³ Ticketmaster's "fan-to-fan" marketplace, TicketExchange.com, is often flooded with tickets shortly after Ticketmaster begins selling face value tickets.⁴⁴ A vast majority of these tickets are actually owned by the artist or promoter.⁴⁵ If the tickets do not sell at the inflated price on TicketExchange.com, the tickets may be moved between TicketExchange and Ticketmaster's lower-priced main inventory, without any signal to consumers that the ticket's status has been changed.⁴⁶ For example, an artist such as Elton John may request that certain desirable seats not be sold at face value but rather on TicketExchange.com for five times face value, but, of course, without indicating that the seller of the ticket is Elton John. If the tickets do not sell within a specified period, say five or six hours, the tickets would then be moved back to Ticketmaster to be sold for their face value. This phenomenon allows artists to underprice tickets but still capture the true value without the appearance of gouging fans.

Additionally, the below market pricing allows for promoters to provide tickets to favored parties, a phenomenon that is much more widespread than the public realizes.⁴⁷ A striking example is Bruce Springsteen's May 21 and May 23, 2009 shows at East Rutherford, New

Assessing the Economic Rationale].

41. Live Nation Investor Information, <http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-irhome> (last visited Feb. 3, 2009).

42. Live Nation Careers, <http://www.livenationcareers.com/cgi-bin/htmls.cgi/001156.4.991477868616394014> (last visited Oct. 3, 2009).

43. For a further discussion of this phenomenon, see *supra* Part I.A.

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

45. *Id.*

46. *Id.*

47. Simon, *supra* note 19, at 1180.

Jersey's Izod Center.⁴⁸ Courtesy of an Open Public Records Act request from the Newark Star-Ledger, some 90% of the most desirable seats in the venue were reserved for friends and family of the band, venue employees, record-label executives, and their guests.⁴⁹ Of the total 20,000 seats at the May 21 show, 2,262, or 12%, were withheld from public sale by various interested parties, including the public agency that runs the venue (hence the public-records act request).⁵⁰ Of those, 1,450 were held for friends and family of Springsteen and his band, plus radio-station executives and the like; 812 were held by the New Jersey Sports and Exhibition Authority.⁵¹ The withheld tickets were also some of the most highly sought after. Of the 1,126 seats closest to the stage, only 108 were officially listed for sale to the public.⁵²

In 2003, the New York Yankees were investigated by a New York State lobbying commission for distributing free tickets to public officials without disclosing the nature and amount of the gifts, and later paid a fine of \$75,000.⁵³ For the 2009 NFL Super Bowl held in Tampa, Florida, 25% of the tickets were held back by the NFL and distributed to the broadcast network, corporate sponsors, media, VIPs, and charities.⁵⁴

D. Partnership Agreements

Another possible reason for the underpricing of tickets is that promoters enter into partnership agreements with secondary market resellers, such as StubHub or Ticketmaster's TicketsNow, which give the promoters a portion of the ticket price in exchange for being identified as the "official" reseller for the event. The "official" reseller is not the exclusive reseller, but by being labeled as such, the official reseller hopes consumers will search its website for tickets before looking elsewhere. Such agreements create a disincentive to overprice tickets because underpricing tickets will result in capturing a portion of that mistake from the partnership agreements. If, on the other hand, a promoter overprices tickets, it bears the full weight of its mistake through decreased revenue because the tickets will not be resold on the secondary

48. Posting of Ethan Smith to SpeakEasy Wall Street Journal Arts and Media Blog, Springsteen Concerts: Who Gets the Best Seats? (Hint: Not You), <http://blogs.wsj.com/speakeasy/2009/06/14/springsteen-concerts-who-gets-the-best-seats-hint-not-you/> (June 14, 2009, 19:28).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See Michelle O'Donnell, *Yankees and Lobbying Panel Settle Case*, N.Y. TIMES, Jan. 1, 2004, at B4.

54. Super Bowl 43 Ticket Information, <http://www.ticketsolutions.com/superbowl-info.asp> (last visited Feb. 3, 2009) (also noting that "less than 1%" are available to the general public).

market.

All four major professional sport leagues—MLB, NBA, NFL, and NHL—entered into agreements with secondary ticket sellers in 2007, providing that ticket resellers such as StubHub become the “official” ticket resellers for those leagues, and, in return, the leagues receive a portion of the revenue from such sales.⁵⁵ In early 2008, Madonna and her promoter, Live Nation, entered into an agreement with StubHub to serve as the “official fan-to-fan ticket marketplace;” for each ticket sold, Madonna received a flat fee and a percentage of the revenue, the exact amount of which has not been disclosed.⁵⁶

E. Desire for Sellouts

Promoters desire sellouts for their events and could possibly be willing to forgo some ticket revenue to ensure such a sellout. One reason promoters desire sellouts is for the dynamics associated with the crowd effect. The perception that an event will be a sellout attracts consumers into the ticket market who would not otherwise attend, and the ambiance from a sellout may intensify the demand by consumers for future events.⁵⁷ Additionally, sellouts make the concert experience better for the musician and audience alike. But perhaps most importantly, promoters desire sellouts to maximize complementary revenues from parking, refreshment, and souvenir sales at the stadium or concert hall.⁵⁸ Lastly, because the marginal costs associated with additional attendees are low until capacity is reached, promoters do not like to see seats unsold.⁵⁹

F. Altruistic Pricing Schemes

It is also possible that promoters intentionally underprice their tickets not for long-term revenue maximization, but rather to be “fair” to their fans, allowing those fans who cannot afford market priced tickets (the “blue collar” fan), to attend the performance.⁶⁰ Profits may become secondary to fairness. For example, Bruce Springsteen apparently wants his “true fans” to be able to attend his concerts, and intentionally sets ticket prices below market value.⁶¹ His great success and wealth seem to

55. John Helyar, *In Change of Heart, Leagues Embrace Secondary Ticket Sellers*, ESPN.COM, Dec. 21, 2007, <http://sports.espn.go.com/espn/news/story?id=3165059>.

56. Ethan Smith, *StubHub Enlisted in Resale Of Madonna Concert Tickets*, WALL ST. J., May 9, 2008, at B6.

57. Happel & Jennings, *Folly*, *supra* note 16, at 67.

58. *Id.*

59. *Id.* at 70.

60. Happel & Jennings, *Assessing the Economic Rationale*, *supra* note 40, at 9.

61. *Id.*; see John Seabrook, *The Price of the Ticket*, THE NEW YORKER, Aug. 10, 2009, at

have given him the ability to trade profits for other objectives, but of course, few other artists and promoters are willing and able to forgo this revenue.⁶²

* * *

These reasons may explain the conditions leading to below market value ticket prices. This underpricing gives rise to scalping and the use of sniping software.

II. THE LITIGATION RESPONSE

A. *The Litigation Impetus*

The Hannah Montana debacle was the driving force behind two important cases. First, in June 2007, Ticketmaster sued RMG, a company that developed and marketed sniping software specifically aimed at Ticketmaster.⁶³ Ticketmaster prevailed, obtaining a permanent injunction and a large judgment against RMG.⁶⁴ Second, in December 2007, Boaz Lissauer, a consumer unable to purchase a ticket to see the rock band The Police from Ticketmaster, brought a class action suit against RMG and several brokers who employed RMG's software.⁶⁵ Lissauer's suit, however, was eventually voluntarily dismissed, and the court never addressed the merits of his claims.⁶⁶ Each case will be addressed in turn.

B. *Ticketmaster's Litigation*

Ticketmaster sued RMG Technologies for copyright infringement, Terms of Use violations, and violating a number of federal and state statutes.⁶⁷ Ticketmaster asserted eleven claims in its First Amended Complaint (FAC), including copyright infringement, violation of the Digital Millennium Copyright Act (DMCA) and the Computer Fraud and Abuse Act (CFAA), breach of contract, and fraud.⁶⁸ After surviving a motion to dismiss, Ticketmaster moved for a preliminary injunction

35.

62. Happel & Jennings, *Assessing the Economic Rationale*, *supra* note 40, at 9.

63. *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

64. *Id.*

65. Class Action Complaint, *Boaz Lissauer v. RMG Techs., Inc.*, No. 2107CV1278 (S.D. Ohio Dec. 19, 2007).

66. Notice of Voluntary Dismissal by Plaintiff Boaz Lissauer, *Boaz Lissauer v. RMG Techs., Inc.*, No. 2:07-CV-01278 (S.D. Ohio Jan. 11, 2008).

67. *Ticketmaster*, 507 F. Supp. 2d at 1096.

68. First Amended Complaint, *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007) (No. CV 07-2534-ABC (JCx)).

based on five of the claims set forth in its FAC: Violation of the Copyright Act, the DMCA, the California Penal Code, the CFAA, and breach of contract.⁶⁹ To obtain a preliminary injunction, Ticketmaster needed to show a threat of irreparable harm and a likelihood of success on the merits.⁷⁰

1. Direct and Indirect Copyright Infringement Claim

Ticketmaster's creative claim of copyright infringement was twofold: RMG infringed Ticketmaster's copyright in its website, first, directly by violating the Terms of Use when it tested its software, and second, indirectly when it intentionally induced others to view the website in contravention of the Terms of Use.⁷¹

Ticketmaster owns a copyright in its website, Ticketmaster.com.⁷² When RMG viewed Ticketmaster's website to test its software, a copy of each page was necessarily downloaded or "cached" from Ticketmaster's computers onto RMG's computer's random access memory.⁷³ The court held this copy falls within the Copyright Act's definition of "copy."⁷⁴ Typically, an individual surfing a website would not be liable for copyright infringement because there is either an express or implied license to create those copies. Ticketmaster's express license was located in its homepage, which displayed the following warning: "Use of this website is subject to express *Terms of Use* which prohibit commercial use of this site. By continuing past this page, you agree to abide by these terms."⁷⁵ The underlined phrase "Terms of Use" was a hyperlink to the full Terms of Use, thus putting RMG on notice of the Terms of Use.⁷⁶ The full Terms of Use contained the following restrictions:

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

No . . . areas of this Site may be used by our visitors for any commercial purposes

69. *Ticketmaster*, 507 F. Supp. 2d at 1104.

70. *Id.* at 1104–1112 (citing *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999)).

71. *Id.* at 1104–5.

72. *Id.* at 1104.

73. *Id.*

74. *Id.* at 1105.

75. *Id.* at 1107.

76. *Id.*

You agree that you will not use any robot, spider or other automated device, process, or means to access the Site You agree that you will not use any device, software or routine that interferes with the proper working of the Site nor shall you attempt to interfere with the proper working of the Site.

You agree that you will not take any action that imposes an unreasonable or disproportionately large load on our infrastructure.⁷⁷

The court held that Ticketmaster was highly likely to demonstrate that RMG's applications are automated devices that violated the Terms of Use.⁷⁸ The decision focused upon the definition of "automated device" and the battle between Ticketmaster's CAPTCHA and RMG's sniping software.⁷⁹ RMG countered that its "Ticket Broker Acquisition Tool" (TBAT) was not an "automated device," but rather an Internet browser, like Internet Explorer, that requires human interaction.⁸⁰ The court disagreed.⁸¹ The court cited expert testimony that noted that the term "automated device" is well understood in the context of computer programming, and RMG's TBAT is such a device.⁸² Additionally, Ticketmaster submitted evidence, including declarations from RMG's former clients and the results of Ticketmaster's sleuthing, that traced ticket requests and purchases made on Ticketmaster.com to individual users and, ultimately, to RMG.⁸³ Ticketmaster identified one individual who used an IP address registered to RMG and purchased almost 13,000 tickets over several years and made more than 425,000 ticket requests in a single day, far more than any human would be able to manually generate.⁸⁴

The court rejected the defendant's arguments that, under *Perfect 10, Inc. v. Amazon.com*, cached copies of the plaintiff's website were a permitted fair use.⁸⁵ In *Perfect 10*, the Ninth Circuit held that Google's creation and display of lower resolution "thumbnail" copies of infringing images in search results was a fair use.⁸⁶ In reaching this result, the Ninth Circuit relied largely on the transformative nature of the thumbnails Google created, which, by facilitating the public's ability to search the

77. *Id.*

78. *Id.* at 1109.

79. *Id.* at 1108.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1103, 1111.

85. *Id.* at 1109 (declining to apply *Perfect 10, Inc. v. Amazon.com*, 487 F.3d 701 (9th Cir. 2007)).

86. *Perfect 10*, 487 F.3d at 717.

web for images, serve a different purpose than the original images, which are designed to entertain.⁸⁷ Although RMG's use of copyrighted content was incidental to its main purpose of facilitating bulk ticket purchases, the court found that RMG's program did not utilize copyright material in a "transformative" manner and was explicitly commercial in nature.⁸⁸ The court also noted that *Perfect 10* applied to "innocent" third-party visitors who intended to comply with the terms of use.⁸⁹ RMG was neither an innocent third-party, nor did it intend to comply with Ticketmaster's Terms of Use.⁹⁰ Thus, RMG was liable for direct infringement of Ticketmaster's copyright in the website.⁹¹

The court went on to find that RMG was additionally liable as an indirect infringer under *MGM Studios Inc. v. Grokster, Ltd.*⁹² *Grokster*, a landmark 2005 United States Supreme Court case, held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."⁹³ The court found that there was substantial evidence that RMG designed its application for the purpose of giving its clients unauthorized access to Ticketmaster.com.⁹⁴ The court relied heavily on evidence that RMG advertised its product as "stealth technology [that] lets you hide your IP address, so you never get blocked by Ticketmaster."⁹⁵ However, according to one commentator, this is a fairly expansive interpretation of copyright inducement, because RMG seemed to merely promote the ability to hide a user's IP address from Ticketmaster, not infringe on its copyright.⁹⁶ Nevertheless, the court noted that there was substantial evidence that RMG's customers engaged in numerous acts in violation of the Terms of Use, and that such evidence makes it highly likely that Ticketmaster would succeed in its claim against RMG for indirect infringement.⁹⁷

2. DMCA Claim

The DMCA, a federal statute passed in 1998, prohibits production and dissemination of technology, devices, or services intended to

87. *Id.* at 718.

88. *Ticketmaster*, 507 F. Supp. 2d at 1110.

89. *Id.*

90. *Id.*

91. *Id.*

92. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930–931 (2005).

93. *Id.* at 918.

94. *Ticketmaster*, 507 F. Supp. 2d at 1110.

95. *Id.*

96. *See* Goldman, *supra* note 8.

97. *Ticketmaster*, 507 F. Supp. 2d at 1110.

circumvent measures that control access to copyrighted works.⁹⁸ Additionally, it prohibits circumventing an access control, whether or not there is actual infringement of a copyright.⁹⁹ Ticketmaster alleged that RMG's software violated § 1201(a)(2), which prohibits trafficking in devices designed to circumvent "technological measure[s] that effectively control[] access to a work protected under this title."¹⁰⁰ The court laid out the requisite elements of a violation of § 1201(a)(2):

A plaintiff alleging a violation of § 1201(a)(2) must prove: (1) ownership of a valid copyright on a work, (2) effectively controlled by a technological measure, which has been circumvented, (3) that third parties can now access (4) without authorization, in a manner that (5) infringes or facilitates infringing a right protected by the Copyright Act, because of a product that (6) the defendant either (i) designed or produced primarily for circumvention; (ii) made available despite only limited commercial significance other than circumvention; or (iii) marketed for use in circumvention of the controlling technological measure.¹⁰¹

Relying on the previous discussion of Ticketmaster's copyright claim, the court concluded that Ticketmaster was likely to prevail.¹⁰²

It is not clear, though, to what extent the software "circumvented" the CAPTCHA. Cipriano Garibay, president of RMG Technologies, stated in an interview with the New York Times that the company employed humans in India at \$2 an hour to type in the answer to the CAPTCHA.¹⁰³ If the purpose of the CAPTCHA is to distinguish between humans and computers, the software only circumvented the CAPTCHA in a very attenuated sense; the purpose of the CAPTCHA would need to be characterized as a test to distinguish the ultimate purchaser of the ticket from another human hired only complete the CAPTCHA. But it appears that RMG did not assert this fact in its

98. See 17 U.S.C. §§ 512, 1201–05, 1301–32 (2006); 28 U.S.C. § 4001 (2006).

99. See 28 U.S.C. § 4001.

100. 17 U.S.C. § 1201(a)(2)(A).

101. *Ticketmaster*, 507 F. Supp. 2d at 1111 (citing *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004)).

102. *Id.*

103. Stross, *supra* note 1. This "low-tech" approach is also achieved through porn sites: For a person to gain access to a porn site, the person must solve what appears to be the porn site's CAPTCHA. The person provides the solution to the CAPTCHA, and is given entrance to the porn site. However, the person has actually solved a CAPTCHA on an unrelated site that the bot is trying to gain access to. The bot has simply duplicated the CAPTCHA picture from the target site to the porn site. When the person inputs the correct CAPTCHA, the bot snatches the answer and inputs it into the target site. E-mail from Allan Caine, Ph.D. Candidate, David R. Cheriton School of Computer Science, University of Waterloo, to author (Feb. 25, 2009, 14:40:46 MST) (on file with the Journal on Telecommunications and High Technology Law).

defense. It is unclear whether Garibay's assertion to the New York Times was completely true.

3. Breach of Contract Claim

Perhaps the most straightforward and simplistic claim Ticketmaster asserted was that RMG violated its Terms of Use on its website and was thus liable for breach of contract.¹⁰⁴ The court, relying heavily on the discussion of the Terms of Use in the copyright claim, found that RMG was on notice of, and assented to, the Terms of Use and that its violation of those terms constituted a breach of contract.¹⁰⁵

4. CFAA Claim

The CFAA, a federal anti-hacker statute passed in 1986, permits “[a]ny person who suffers damage or loss” through a violation of its provisions to “maintain a civil action . . . to obtain compensatory damages and injunctive relief or other equitable relief.”¹⁰⁶ To prevail on its CFAA claim, a plaintiff must demonstrate that a defendant “intentionally access[ed] a computer without authorization or exceed[ed] authorized access, and thereby obtain[ed] . . . information from any protected computer,”¹⁰⁷ or a defendant “knowingly cause[d] the transmission of a program . . . and . . . cause[d] damage without authorization, to a protected computer.”¹⁰⁸ A plaintiff must also demonstrate that a defendant's unauthorized access caused \$5,000 in loss during a one-year period.¹⁰⁹

The court summarily concluded that “[i]t appears likely that Plaintiff will be able to prove that Defendant gained unauthorized access to, and/or exceeded authorized access to, Plaintiff's protected computers, and caused damage thereby.”¹¹⁰ However, the court went on to find that because Ticketmaster “ha[d] not quantified its harm as required by the statute or even attempted to show what portion of the harm [was]

104. Perhaps a weakness of this claim is that RMG only tested—and never actually used—the software to purchase tickets. Nonetheless, the testing of the software violated the Terms of Use.

105. *Ticketmaster*, 507 F. Supp. 2d at 1113. In past decisions, courts have favored enforcement of online agreements where there has been clear notice of the terms of an agreement, and there has been some mechanism for users to assent to those terms. For further discussion of notice requirements, see generally Lothar Determann & Irene Gutierrez, *Copyright Violations in Caching Of Website Content and Online Contract Formation*, 3 J. OF INTELL. PROP. L. & PRAC. 548 (2008).

106. 18 U.S.C. § 1030(g).

107. 18 U.S.C. § 1030(a)(2)(C).

108. 18 U.S.C. § 1030(a)(5)(A).

109. 18 U.S.C. § 1030(a)(5)(B)(i).

110. *Ticketmaster*, 507 F. Supp. 2d at 1113.

attributable to Defendant,” the CFAA claim did not provide a basis for a preliminary injunction.¹¹¹

5. California Penal Code Claim

The Court, satisfied that Ticketmaster would likely prevail on its copyright, DMCA and breach of contract claims, declined to address the fifth claim.¹¹²

6. Irreparable Injury

Lastly, the court addressed whether Ticketmaster had shown “the possibility of irreparable injury.”¹¹³ The posture of the two companies was a bit unusual in that Ticketmaster was, in a sense, suing its best customer: RMG’s software permitted its users to purchase as much of Ticketmaster’s product as they could, as rapidly as possible. As Jay M. Coggan, RMG’s lawyer, noted, “This may be the only time in the history of litigation that any seller sued its customers for paying them too much money.”¹¹⁴ Ticketmaster argued that it would suffer “a loss of goodwill with the buying public in that there is a growing public perception that [Ticketmaster] does not provide the public with a fair opportunity to buy tickets due to automated purchases.”¹¹⁵ Ticketmaster cited “numerous complaints” from customers, news stories, and blog posts that discussed the unavailability of tickets to the most desirable events, including Hannah Montana’s “Best of Both Worlds Tour.” The court agreed with Ticketmaster’s argument, and in its injunction noted that it was in the public interest because consumers could not buy tickets at their face value, and were forced to pay brokers “inflated prices for resold tickets.”^{116, 117}

On October 16, 2007 the court granted Ticketmaster’s motion for a preliminary injunction, and enjoined RMG and all persons acting for its benefit or on its behalf from, *inter alia*, purchasing or facilitating the purchase of tickets from Ticketmaster’s website for the commercial

111. *Id.*

112. *Id.*

113. *Id.* at 1113–1115.

114. Ethan Smith, *Hannah Montana Battles the Bots*, WALL ST. J., Oct. 5, 2007, at B1, available at http://online.wsj.com/public/article_print/SB119153995723149557.html.

115. *Ticketmaster*, 507 F. Supp. 2d at 1114.

116. *Id.* at 1116.

117. The court’s agreement with this perceived harm is premature to the extent that Ticketmaster did not provide evidence that this loss of goodwill will result in consumers or promoters refusing to use the Ticketmaster website. If consumers and promoters continue to use Ticketmaster but simply hold some belief that there was some possibility of unfairness, it doesn’t seem that Ticketmaster has suffered any measurable harm.

purpose of reselling them.¹¹⁸ This essentially shut down RMG's business.¹¹⁹ RMG appealed to the Ninth Circuit, and oral arguments were held in May 2008.¹²⁰ Subsequent to oral argument, though, RMG relieved its counsel and failed to appoint new counsel, causing Ticketmaster to move for default judgment and a permanent injunction.¹²¹ The failure to appoint a new counsel and continue to litigate the case was due to RMG's financial difficulties.¹²² RMG had spent approximately \$200,000 on legal fees, according to its president, Cipriano Garibay, and "couldn't afford attorneys anymore."¹²³ On June 19, 2008, the district court entered a default judgment of \$18,237,200 and permanent injunction against RMG, nullifying the Ninth Circuit appeal.¹²⁴

While Ticketmaster's success against RMG creates the appearance that litigation can solve the problem, the appearance is misleading. First, it is questionable whether Ticketmaster possesses the motivation to pursue further litigation. Many assert that Ticketmaster used its suit against RMG for public relations purposes¹²⁵ to cover up its own activities in the secondary market, and does not plan to pursue further litigation.¹²⁶ In February 2008, Ticketmaster paid \$265 million to

118. Professor Goldman has questioned the quality of the court's analysis, particularly the implicit holding that browsing is copyright infringement as well as the upholding of Ticketmaster's browsewrap. *See* Goldman, *supra* note 8. His criticisms are primarily based on the fact that RMG was only a manufacturer and not a user of the software. *Id.* According to his view, the court strained the doctrines and the facts to grant Ticketmaster a win, likely with the equities in mind. *Id.* Arguably, Ticketmaster would have a much stronger case if it litigated the same causes of action against a user of RMG's software. Professor Goldman's criticisms are beyond the scope of this Note.

119. Alfred Branch Jr., *Ticketmaster wins \$18.2 million judgment against RMG Technologies*, TICKETNEWS.COM, June 25, 2008, <http://www.ticketnews.com/Ticketmaster-wins-millions-judgment-against-RMG-Technologies6825761>.

120. Oral Argument, *Ticketmaster LLC v. RMG Techs., Inc.*, No. 07-56666 (9th Cir. May 7, 2008).

121. Application for Default Judgment against Defendant RMG Technologies, Inc., *Ticketmaster v. RMG Techs., Inc.*, No. 2:07-cv-02534-ABC-JC (C.D. Cal. June 3, 2008).

122. Vinnee Tong, *Federal Court Fines RMG \$18M in Ticketmaster Case*, WATODAY.COM, June 26, 2008, <http://www.watoday.com.au/technology/federal-court-fines-rmg-18m-in-ticketmaster-case-20080626-2x0u.html>; *see also* Branch, *supra* note 119.

123. Tong, *supra* note 122.

124. Default Judgment and Permanent Injunction, *Ticketmaster v. RMG Techs., Inc.*, No. 2:07-cv-02534-ABC-JC (C.D. Cal. June 19, 2008).

125. Ticketmaster issued two press releases announcing its victories in the RMG case: Press Release, Ticketmaster Entertainment, Federal Court Grants Ticketmaster's Request For Preliminary Injunction Barring RMG Technologies From Facilitating Access to Ticketmaster's Ticketing System (Oct. 15, 2007), *available at* <http://mediacenter.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=5024>; Press Release, Ticketmaster Entertainment, Default Judgment and Permanent Injunction Against RMG Technologies, Inc. Entered in U.S. District Court (June 25, 2008), *available at* <http://mediacenter.ticketmaster.com/Extranet/TMPRArticlePressReleases.aspx?id=6356>.

126. Brian Thompson, *RMG Technologies Claims They Are Not the Bad Guys*,

purchase TicketsNow.com (TicketsNow), a reseller of tickets that competes with StubHub and TicketLiquidator.¹²⁷ In doing so, Ticketmaster set itself up for a potential conflict of interest. There appears to be a strong *incentive* for Ticketmaster to get tickets into the hands of brokers who operate on TicketsNow, and to reap hefty commissions. In fact, when a consumer attempts to purchase a ticket to a sold out event through Ticketmaster, the consumer is sometimes automatically rerouted to TicketsNow and offered the tickets at increased prices, creating an attractive selling method for snipers.¹²⁸ But this theory might be more conspiracy than fact. Ticketmaster seems to continue to invest in technology designed to thwart ticket scalping,¹²⁹ and incurred the costs to implement Paperless Ticketing, as discussed in Section IV.

Second, even if Ticketmaster does want to pursue the problem, the litigation will be prohibitively expensive. While RMG was forced into bankruptcy, dozens of other manufacturers of sniping software have already replaced RMG.¹³⁰ Concerts continue to sell out in minutes.¹³¹

Allan Caine, a computer science researcher at the University of Waterloo, Canada, explains that from a technical point of view, the

TICKETNEWS.COM, Mar. 26, 2008, <http://www.ticketnews.com/RMG-Technologies-claims-not-the-bad-guys38251321>.

127. Posting to DealBook, IAC's Ticketmaster Pays \$265 Million for TicketsNow, <http://dealbook.blogs.nytimes.com/2008/01/16/iacs-ticketmaster-pays-265-million-for-ticketsnow/> (Jan. 16, 2008, 18:36 EST).

128. Interestingly, in February 2009, Ticketmaster agreed to pay the state of New Jersey \$350,000 to settle charges by the Attorney General of New Jersey that the practice of automatically redirecting consumers to TicketsNow may have violated the state's Consumer Fraud Act. A similar settlement was reached with the Illinois Attorney General in June 2009. Kerry Grace Benn, *Ticketmaster Unit to Pay \$50,000 Over Deceptive Practices*, WALL ST. J., July 1, 2009, <http://online.wsj.com/article/SB124637740774473993.html>; Samantha Henry, *Ticketmaster to Change Online Sales System*, USA TODAY, Feb. 23, 2008, http://www.usatoday.com/money/media/2009-02-23-ticketmaster_N.htm.

129. Ethan Smith, *Big Ticket Seller Tried Deal With Scalpers*, WALL ST. J., Aug. 28, 2009, at B1 (noting that "Ticketmaster . . . initiat[ed] a new technology that blocks any computer that attempts to access the company's Web site 1,000 times or more in a day").

130. Posting of admin to PreferredSeat.com, RMG is Gone, But the Bots Live On, <http://blog.preferredseat.com/2009/02/18/rmg-is-gone-but-the-bots-live-on/> (Feb. 18, 2009) (noting that "[n]ot only is the same [sniping] software still in use, but dozens of software companies have come forth with their own versions and have been hawking them to ticket brokers nationwide").

131. Ben Sisario, *Online Sales Make Hot Tickets Harder to Get*, N.Y. TIMES, Mar. 31, 2009, at A1. ("U2's show on Sept. 24 at Giants Stadium in East Rutherford, N.J., was an 'instantaneous sellout' through Ticketmaster on Monday morning, according to the promoter, Live Nation. Just as quickly, however, thousands of listings flooded any-price-goes sites like TicketsNow.com, a Ticketmaster subsidiary where fans and brokers flip tickets, often at prices far above face value. One seller was asking \$10,000 for a \$253 seat near the stage."); *see also*, Steve Haruch, *The Music City Star*, NASHVILLE SCENE, Feb. 25, 2009, <http://www.nashvillescene.com/2009-02-26/news/the-music-city-star/> (explaining that musical artist Taylor Swift sold out the L.A. Staples Center in two minutes).

software is relatively unsophisticated.¹³² In a little under a week, he was able to develop sniping software that successfully targeted Tickets.com, and he published an academic article that explained in detail how he did it.¹³³ To solve the sniping problem through litigation, Ticketmaster would need to incur tremendous discovery costs involving computer forensic experts to even identify possible defendants, which could number in the hundreds. Complicating the litigation, the sniping software manufacturers may use shell entities to conduct their business, forcing Ticketmaster to litigate with the entities and hope for some form of veil piercing to make the judgment applicable to the individuals. Further, while Ticketmaster did prevail against RMG, it prevailed on a preliminary injunction from a district court, which fails to provide needed precedential value for future cases. Lastly, even if Ticketmaster were able to get a personal judgment, the manufacturers are likely judgment-proof and almost surely don't have any type of insurance to cover this type of judgment.

Thus, it appears that Ticketmaster is unlikely to solve the problems of ticket sniping through litigation. Ticketmaster may lack the motivation to pursue such litigation, but even if it had the motivation, the costs would be prohibitively expensive. What about the consumers in this situation? Do they have any legal recourse?

C. *Boaz Lissauer's Class Action Suit*

In February 2007, Boaz Lissauer, a New Jersey plastic surgeon, attempted to purchase tickets to an August 1, 2007 Madison Square Garden concert of the rock band The Police.¹³⁴ Mr. Lissauer was unable to purchase tickets through Ticketmaster, so he turned to the secondary market and purchased seats from TicketLiquidator.com.¹³⁵ Mr. Lissauer paid \$195 for each of four "nosebleed" seats, which carried a face value of \$63 each.¹³⁶ Upset at the situation, he filed a suit against RMG, two brokers who allegedly used RMG's software, and 100 John Does—unknown brokers who used RMG's software.¹³⁷

The suit was filed as a class action, with the class consisting of "all persons who . . . purchased tickets from any Broker Defendant at artificially inflated prices for events from January 1, 2004 through

132. Caine, *supra* note 103.

133. Allan Caine & Urs Hengartner, *The AI Hardness of CAPTCHAs Does Not Imply Robust Network Security*, in TRUST MANAGEMENT 367 (Sandro Etalle & Stephen Marsh eds., 2007); Caine, *supra* note 103.

134. Class Action Complaint, *Boaz Lissauer v. RMG Techs., Inc.*, No. 2107CV1278 (S.D. Ohio Dec. 19, 2007).

135. *Id.* at 4.

136. *Id.*

137. *Id.* at 1.

October 15, 2007 for events in which Ticketmaster was the exclusive primary seller for the event.”¹³⁸ The complaint asserted eight claims for relief. First, the plaintiffs alleged violation of 17 U.S.C § 1201, the same DMCA section that Ticketmaster relied on in its own suit against RMG.¹³⁹ The plaintiffs alleged that they suffered damages as a result of RMG’s violation of the statute due to being forced to pay an increased price for tickets.¹⁴⁰ Second, the plaintiffs alleged violation of the CFAA, 18 U.S.C. § 1030, again, the identical section that Ticketmaster litigated against RMG.¹⁴¹ The damages alleged by the plaintiffs as result of RMG’s violation included, *inter alia*, “diminishing the inventory of tickets available through Ticketmaster to Class members, causing artificially high levels of tickets to be placed on reserve and thereby interfering with the transmission of real time sales information to Class members.”¹⁴²

The third and fourth claims alleged “racketeering activity” as defined in 18 U.S.C. § 1961(1), through the defendants’ violations of 18 U.S.C. § 1029, which prohibits fraud and related activity in connection with access devices.¹⁴³ Fifth, the plaintiffs alleged that they were third-party beneficiaries of the contract between Ticketmaster and the defendants insofar as Ticketmaster’s stated policies and Terms of Use are explicitly designed to protect consumers against unfair ticket buying practices.¹⁴⁴ Sixth, the plaintiffs alleged intentional interference with contractual relations, and their seventh and eighth claims alleged unjust enrichment and requested an accounting.¹⁴⁵

The plaintiffs’ claims were facially quite strong, particularly because several of the claims were identical to Ticketmaster’s claims in its successful suit against RMG. Additionally, the Ticketmaster litigation against RMG was replete with moral condemnation of RMG. If a court were to perceive similar equities, RMG and the other ticket scalpers would have a very tough obstacle to overcome. But the validity of the plaintiffs’ claims remains untested. Shortly after filing the complaint, the suit was voluntarily dismissed.¹⁴⁶ According to a source close to the case, the suit was dropped because even if the plaintiffs won a large judgment, it would likely go unsatisfied.¹⁴⁷ Ticketmaster already won an \$18 million

138. *Id.* at 6.

139. *Id.* at 22.

140. *Id.* at 24.

141. *Id.*

142. *Id.* at 23–24.

143. *Id.*

144. *Id.* at 26.

145. *Id.* at 28–30.

146. Notice of Voluntary Dismissal by Plaintiff Boaz Lissauer, *Boaz Lissauer v. RMG Techs., Inc.*, No. 2:07-CV-01278 (S.D. Ohio Jan. 11, 2008).

147. Notes on file with Author.

judgment against RMG, possibly putting them into bankruptcy.¹⁴⁸ The plaintiffs' attorneys viewed a judgment against the other scalpers as virtually worthless. As discussed above with respect to Ticketmaster's litigation problems against snipers, there would have been tremendous discovery costs, veil piercing problems, and judgment proof defendants. The fruits of ticket sniping are not concentrated but are rather disbursed among hundreds of parties. All potential plaintiffs would encounter these problems, making the possibility of consumers solving the ticket sniping problem through private litigation quite impractical.

* * *

In sum, litigation isn't the solution to ticket sniping. The primary reason is that the profits from ticket sniping are widely dispersed among many scalpers. This wide dispersion makes litigation prohibitively expensive due to discovery costs and the inability to collect on potential judgments. Further, it isn't clear that some potential plaintiffs, such as ticket sellers, have the motivation to litigate ticket snipers as they are not being harmed. Can legislation, then, provide a solution?

III. THE LEGISLATIVE RESPONSE

Largely in response to the Hannah Montana debacle, consumers contacted their state legislatures demanding a solution. Beginning in mid-2007, several states proposed legislation aimed at sniping software users. Six states have enacted such legislation so far, and several more are considering legislation.

A. The Nature of the Consumers' Harm

Prior to addressing the legislation, it is important to understand the nature of the consumers' harm. Minnesota State Senator Ron Latz, in connection with the anti-sniping legislation he helped pass in Minnesota, argued, "Professional ticket brokers used special computer software to cut to the front of the line and snatch up most of the tickets, beating out the average fans who simply wanted to go enjoy the concert. That's not fair—that's cheating, and this bill will make that illegal."¹⁴⁹ Minnesota State Representative Joe Atkins added that "Hannah Montana fans were robbed last summer, literally . . . Robbed out of hundreds of dollars and robbed of the chance to see their favorite star on

148. Branch, *supra* note 119; Tong, *supra* note 122.

149. Press Release, Minnesota State Senator Ron Latz, 'Hannah Montana' Bill Passes State Senate (Apr. 10, 2008), *available at* http://www.senate.leg.state.mn.us/members/member_pr_display.php?ls=80&id=1618.

stage.”¹⁵⁰

Representative Atkins’ characterization of the voluntary transactions entered into by fans of Hannah Montana as “robbery” is inaccurate. Paying the market price for a luxury good is voluntary transaction. No one is coerced into buying these tickets, and it is certainly not robbery. But the characterization of the use of sniping software as electronic “cutting in line” is accurate. The use of sniping software violates the first-come, first-served doctrine, which hinges on the notion that each individual is able to occupy one position in the queue. The ticket sniper’s ability to pack the queue with hundreds or thousands of automated queue holders breaches that doctrine.¹⁵¹ As evidenced by the legislators’ comments, this electronic version of line intrusion causes the same psychological responses as line intrusion in the physical world. What is the source of those feelings of unfairness or unjustness? Psychologists posit two explanations as to why individuals show resistance to line intruders.¹⁵² The first, known as the “individual costs” explanation, hypothesizes that individuals respond to intrusions because they fear loss of their queue position, thereby incurring additional waiting time, or, in the case of tickets, increased costs.¹⁵³ The individual costs position explains queuers’ reactions purely in terms of personal interests.¹⁵⁴ Individuals want to be guaranteed their due access to a resource with minimal costs.¹⁵⁵

The alternative explanation, known as the “moral outrage” explanation, is intrinsically social in nature.¹⁵⁶ According to this view, a queue constitutes a rudimentary social system. Individuals do not react purely in terms of personal wishes but by reference to a consensually shared social norm. Individuals feel outraged at the intruder’s violation of

150. Press Release, Minnesota State Representative Joe Atkins, Measure to Outlaw Online Ticket Bullying Clears Legislature (Apr. 23, 2008), available at <http://www.house.leg.state.mn.us/members/pressrelease.asp?party=1&pressid=3561&memid=10753>.

151. In physical queues, scalpers will often employ “diggers” or “droids” to stand in line or to make repeated phone calls to acquire tickets. See Mike Goodman, *The Droids vs. The Straights*, L.A. TIMES, Feb. 10, 1991, Magazine at 14; see also Brian Montopoli, *The Queue Crew*, LEGAL AFF., Jan.–Feb. 2004 at 6. Sniping software is more akin to line cutting than employing “diggers” or “droids” because a single broker can only employ so many “diggers,” but can employ thousands of bots in their sniping software. Additionally, there is a perceived fairness of hiring someone to stand in line for you; there is a sense that that person is still incurring the costs that everyone else is. Sniping software, on the other hand, does not carry the same perception that the scalper is employing legitimate means to “hold” places in the line.

152. See Stanley Milgram et al., *Response to Intrusion Into Waiting Lines*, 51 J. OF PERSONALITY AND SOC. PSYCHOL. 683, 683–89 (1986).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

the norms and values on which the queue is based. The indignation aroused by the encroachment derives, in part, from “the perceived disrespect the intruder has shown the system of social rules under which all members of the moral community are expected to live.”¹⁵⁷ The intruder seems to show disrespect for important cultural values including egalitarianism, orderliness, and principles of fairness and justice.¹⁵⁸ Intruders violate the social norm that everyone should be treated equally and served on a first-come, first-serve basis.

It is a combination of these two positions that explain Minnesota’s legislators’ and the public’s frustration with ticket snipers. But prior to current sniping legislation, no state had ever criminalized cutting in line in the physical world, and only extremely rarely imposed civil penalties.¹⁵⁹ Queues in the physical world are *not* regulated and enforced by the law but rather by the private actors who create them or by the participants in the queue themselves. For example, Marie Helweg-Larsen and Barbara LoMonaco describe the queuing norms for fans of the rock band U2:

At shows held in U.S. arenas, fans with [general admission] tickets form very long, overnight queues, which typically number over 300 by the time the queue goes into the venue at around 6 p.m. for that evening’s concert. The queue is managed largely by fans themselves who organize a system in which the first fans in line keep a list with names and numbers assigned to people as they arrive. The *line Nazi* or *fan with the Sharpie* (as they are informally called) also writes the line number on the fan’s hand. Neither venue staff in the U.S. nor U2 staff generally impose queuing rules or regulations, and tend to support the fans’ self-organized system (e.g., when a fan arrives at a venue and asks a venue security guard what to do, she is likely to tell the fan to go to the front of the line to get on the list and receive a number). The U2 queues tend to function remarkably similarly from

157. Kevin Gray, *Legal Order of the Queue*, LONDON SCH. ECON., CONF. TECHNIQUES OF OWNERSHIP: ARTIFACTS, INSCRIPTIONS, PRACTICES 1, 27 (2007), <http://www.lse.ac.uk/collections/law/projects/techniquesofownership/tech-gray.pdf>.

158. Milgram et al., *supra* note 152.

159. The state of Washington enacted legislation in 2007 that made it a traffic violation to “move in front of another vehicle in a queue already waiting to board” one of the several state ferries which shuttle cars and passengers across Puget Sound. WASH. REV. CODE § 46.61.735 (2007) (Violators were subject to a fine of \$101 and “directed to immediately move the motor vehicle to the end of the queue of vehicles waiting to board the ferry.”); see William Yardley, *No Cutting in Line for Puget Sound Ferries, Under Penalty of Law*, N.Y. TIMES, Apr. 11, 2007, at A13. It is important to note that these were state funded and run ferries, and were not private. Occasionally, cutting in line results in other criminal activity. See Rick Yencer, *Cut to Front and Go to Jail*, STAR PRESS, Jan. 13, 2009, at 1A (Reporting how a father and son cut into a customer service line at a Wal-Mart in Muncie, Indiana. An off-duty police officer was in the line and instructed the men to wait their turn. The father and son confronted the off duty officer and threatened him. The son was preliminarily charged with battery on a police officer, while the father was preliminarily charged with criminal recklessness with a vehicle and intimidation.).

U.S. city to U.S. city, despite a lack of formal rules and little official enforcement.¹⁶⁰

Violations of queuing norms are typically policed by the queue participants themselves. There is tremendous disapproval towards an intruder into a queue. The expression of this disapproval ranges all the way from polite reminders of the existence of the queue (“Um . . . are you waiting to buy a ticket?” or “No Way! The line’s back here.”) to hostile stares and gestures, even outright acts of physical violence aimed at ejecting the trespasser.¹⁶¹ In a classic study by Milgram, Liberty, Toledo, and Wackenhut, researchers cut into 129 lines at train station counters, betting parlors, and other locations in New York City.¹⁶² Results showed that objections to line intrusions were much more frequent when intruders cut ahead, as opposed to behind, the subject in line; when there were two intruders instead of one; and when there was less distance (fewer people) between the subject and the line intruder.¹⁶³ Overall, the percentage of subjects who reacted (by verbal, nonverbal, or physical action) varied considerably from a high of 91% when there were two intruders cutting in line right in front of the subject, to a low of 5% when there was one intruder who cut in line three places in front of the subject.¹⁶⁴ Additionally, studies have found that as the stakes go higher, the more likely queue intruders will be sanctioned.¹⁶⁵ For example, in his study of fanatical Melbourne soccer fans, Leon Mann recounted that five individuals were hospitalized after four different brawls broke out over queue-jumping in ticket lines that had a limited number of tickets for sale.¹⁶⁶ In a queue for gasoline in Nigeria during the gasoline shortages of the 1970s, drivers who intruded into the queue “were dragged from their vehicles, which were then pushed out into the road (and on a couple of occasions into ditches) by numerous willing hands.”¹⁶⁷

The law has largely stayed out of queue enforcement because of this self-regulation.¹⁶⁸ But there are two critical differences between electronic

160. Marie Helweg-Larsen & Barbara L. LoMonaco, *Queuing Among U2 Fans: Reactions to Social Norm Violations*, 38 J. OF APPLIED SOC. PSYCHOL. 2378, 2380 (2008).

161. Milgram et al., *supra* note 152, at 684–85.

162. *Id.* at 684.

163. *Id.* at 685.

164. *Id.*

165. *Id.* at 688.

166. Leon Mann, *Queue Culture: The Waiting Line As a Social System*, 75 AM. J. OF SOC. 340, 347 (1969).

167. John A. Wiseman, *Aspects of Social Organisation in a Nigerian Petrol Queue*, 17 J. OF MODERN AFR. STUD. 317, 319 (1979).

168. An old common-law maxim reads *De minimis lex non curat*—the law does not care about trifles. Shawn J. Bayern, *Explaining the American Norm Against Litigation*, 93 CAL. L. REV. 1697, 1707 (2005). Another possible explanation for the inaction by legislatures is that the public viewed the relatively *de minimis* harm that results from most line intruders as

queues and physical queues that might justify legal intervention. First, enforcement by others in the queue is impractical in an electronic queue because it is impossible to detect whether there has been an intrusion and by whom, and impossible to express disapproval in a meaningful way.

Second, internal restraints against intruding into lines are reduced due to the anonymity of the Internet. That is, people may not intrude into physical lines because they feel it is wrong and fear the awkwardness and negative emotions they will feel as a result. In fact, the researchers in one study who were tasked with intruding into a line often procrastinated at length, pacing nervously near the queue, spending as much as a half an hour working up the “nerve” to intrude.¹⁶⁹ For some researchers, the anticipation of intruding was so unpleasant that they reported feeling nauseated during and after the experiments.¹⁷⁰ But the awkwardness and negative emotions are not present in an electronic queue intrusion—the Internet and computer provide a shield of anonymity between the ticket sniper and the other persons in the queue. As Patricia Wallace noted, “[w]hen people believe their actions cannot be attributed directly to them personally, they tend to become less inhibited by social conventions and restraints.”¹⁷¹

Thus, the enforcement mechanisms that regulate in-person queues don’t work online. Can criminal legislation provide a solution to the problem?

B. The Legislation

The legislation varies from state to state. Of the six states that have enacted anti-sniping legislation, four have criminalized it (Colorado, Tennessee, Indiana, and Minnesota), and two have created a civil cause of action (North Carolina and Oregon).¹⁷²

The Tennessee statute is typical of the anti-scalping legislation. It reads:

It is an offense for any person to knowingly sell, give, transfer, use, distribute or possess with the intent to sell, give or distribute software that is primarily designed or produced for the purpose of interfering

insufficient to justify a legislative response.

169. Milgram et al., *supra* note 152, at 686.

170. *Id.*

171. PATRICIA M. WALLACE, *THE PSYCHOLOGY OF THE INTERNET* 124–125 (1999).

172. North Carolina has included the legislation under its Consumer Protection and Unfair Competition statutes and has provided standing to bring a civil action against the ticket sellers and the venues hosting the ticketed event. As discussed above, the ticket sellers already have legal recourse to stop ticket snipers; this legislation for ticket sellers is simply duplicative. Oregon law is similar. *See* OR. REV. STAT. §§ 646.632, .639 (2009).

with the operations of any ticket seller that sells, over the Internet, tickets of admission to a sporting event, theater, musical performance, or place of public entertainment or amusement of any kind by circumventing any security measures on the ticket seller's website, circumventing any access control systems of the ticket seller's website, or circumventing any controls or measures that are instituted by the ticket seller on its website to ensure an equitable ticket buying process.¹⁷³

The statute goes on to define a "ticket seller" as "a person who has executed a written agreement with the management of any venue for a sporting event, theater, musical performance, or public entertainment or amusement of any kind, to sell tickets to such an event over the Internet."¹⁷⁴

The criminal sanctions can be harsh. For example, Colorado provides that a violation of its statute is a Class 1 misdemeanor, the highest class of misdemeanor.¹⁷⁵ A Class 1 misdemeanor carries a presumptive sentence of six months imprisonment, a \$500 fine, or both, and a maximum punishment of eighteen months imprisonment, or a \$5,000 fine, or both.¹⁷⁶ Additionally, civil penalties can be imposed under Colorado's Consumer Protection Act of up to \$2,000 for each ticket purchased with sniping software. Tennessee, on the other hand, takes a more lenient approach. A violation of its statute is a Class B misdemeanor, punishable by "fine only of not more than five hundred dollars (\$500), or any profits made or tickets acquired in the course of the violation of this section, whichever amount is greater."¹⁷⁷

C. Enforcement Problems

Regardless of the legislation's merits, it will have formidable enforcement problems. Online ticket sniping will likely join the long list

173. TENN. CODE ANN. § 39-17-1105(b) (2008).

174. *Id.* Ohio's pending legislation takes a different approach by prohibiting ticket brokers from purchasing tickets from the original ticket sellers altogether. *See* H.R. 508, 127th Gen. Assem., Reg. Sess. (Ohio 2008). In addition, the bill sets up a licensing process for ticket brokers similar to those in the insurance and real estate industry, requiring brokers to register with the Ohio Department of Commerce. *See id.* The statute is problematic because it defines a ticket broker as a person "with intent to resell, resell or engage in or continue in the business of reselling, any ticket of admission, or any other evidence of the right of entry, for any entertainment, sporting, or amusement event . . ." *Id.* The statute's broad definition would surely encompass unwanted individuals. Under this definition, a consumer who purchased a ticket, subsequently decided not to go, and chose to sell his or her ticket on the secondary market would violate the statute unless he or she registered as a broker. This is undoubtedly not the intent of the legislature.

175. COLO. REV. STAT. § 6-1-720 (2008).

176. *Id.* § 18-1.3-502.

177. TENN. CODE ANN. § 39-17-1105 (2008).

of cybercrimes that are rarely enforced.¹⁷⁸ Cybercrimes, which are largely state as opposed to federal crimes, are unenforced because of jurisdictional problems, the lack of information sharing among enforcement agencies, lack of technological resources and experience among local enforcement agencies, and resistance to devote time and resources to a problem in which most of the victims are outside any one jurisdiction.¹⁷⁹ Jurisdictional problems will be particularly acute for the anti-scalping legislation, and will prevent significant enforcement.

Cybercrime jurisdiction is full of uncertainty and little case law has addressed the issues. The foundation for criminal jurisdiction is that the criminal acts occur within the jurisdiction. State statutes generally define what it means for a cybercrime to occur in its jurisdiction.¹⁸⁰ The jurisdictional provision that was included in North Carolina's computer crime legislation, for example, states that any computer crime "may be deemed to have been committed where the electronic communication was originally sent or where it was originally received in this State."¹⁸¹ The jurisdictional provision included in Connecticut's computer crimes code declares that if "any act performed in furtherance of the offenses . . . occurs in this state or if any computer system or part thereof . . . is located in this state, the offense shall be deemed to have occurred in this state."¹⁸² Other states such as Ohio and Utah rely on statutes defining general criminal jurisdiction to establish jurisdiction in cybercrime cases.¹⁸³

The most expansive state provision for jurisdiction is found in West Virginia's Computer Crimes and Abuse Act, which added the following

178. See Peter Swire, *No Cop on the Beat: Underenforcement in E-Commerce and Cybercrime*, 7 J. ON TELECOMM. & HIGH TECH. L. 107, 123 (2009).

179. *Id.* at 108.

180. Susan W. Brenner & Bert-Jaap Koops, *Approaches to Cybercrime Jurisdiction*, 4 J. OF HIGH TECH. L. 1 (2004).

181. N.C. GEN. STAT. § 14-453.2 (2008).

182. CONN. GEN. STAT. ANN. § 53a-261 (2008).

183. See OH. REV. CODE ANN. § 2901.11 (LexisNexis 2009); UTAH CODE ANN. § 76-1-201 (2009). The Utah statute, for example, provides as follows:

(1) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if: (a) the offense is committed either wholly or partly within the state; (b) the conduct outside the state constitutes an attempt to commit an offense within the state; (c) the conduct outside the state constitutes a conspiracy to commit an offense within the state and an act in furtherance of the conspiracy occurs in the state; or (d) the conduct within the state constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense under the laws of both this state and the other jurisdiction.

(2) An offense is committed partly within this state if either the conduct which is any element of the offense, or the result which is such an element, occurs within this state.

UTAH CODE ANN. § 76-1-201 (2009).

section to the criminal code:

Any person who violates any provision of this . . . [computer crimes code] and, in doing so, accesses, permits access to, causes access to or attempts to access a computer, computer network, computer data, computer resources, computer software or computer program which is located, in whole or in part, within this state, or passes through this state in transit, shall be subject to criminal prosecution and punishment in this state and to the civil jurisdiction of the courts of this state.¹⁸⁴

But even this extremely broad provision might prove powerless against ticket snipers. Because so few states have passed the legislation, ticket snipers will simply relocate away from the few states that do have the legislation. The most common delivery methods for tickets are to ship the actual ticket via FedEx or other overnight carrier, or for certain events, eDelivery, which allows tickets to be sent to buyers electronically. Simply relocating to another state will not prove a significant financial obstacle for the ticket snipers. Thus ticket snipers might use sniping software in Wyoming, a state without anti-scalping legislation, to purchase tickets to an event in Colorado, and ship the tickets via FedEx or eDelivery to Colorado residents prior to the event.¹⁸⁵ Even though Colorado has anti-sniping legislation, Colorado would be powerless to prosecute the ticket snipers because they did not violate any Colorado statute. The Colorado anti-sniping statutes only address the use and possession of the sniping *software*, not the goods resulting from the use of such software. Given that so few states have passed legislation (and it will be years before a critical mass of states pass such legislation, if ever), ticket sniping will continue to be prevalent despite legislation that criminalizes it in a few states.

Further, while federal legislation may be effective, it does not appear that Congress will pursue such legislation. In April 2009, New York senator Charles Schumer introduced legislation in the Senate aimed at quelling the secondary market.¹⁸⁶ The proposed legislation imposes a

184. W. VA. CODE ANN. § 61-3C-20 (LexisNexis 2009).

185. One objection to this analysis is to argue that the use of sniping software implicates the state law of the location of the servers for the ticket sellers. Ticketmaster is obviously secretive about the location of the servers for security purposes, but its home offices are in the state of California, and it is probable that the servers are located there. If California were to pass anti-scalping legislation, the act might be deemed to have been committed in California, and would be in violation of the laws there. Of course, California would need to decide whether to prosecute the ticket snipers, perhaps creating intrastate conflicts about decisions to enforce anti-scalping legislation.

186. Press Release, Senator Charles E. Schumer, Schumer Unveils New Legislation to Crack Down on Ticket Resellers and Dramatically Bring Down Prices for Fans—New Two-Day Waiting Period Will Allow Fans to Get First Crack at Originally Priced Tickets (Apr. 6,

two-day waiting period from when tickets go on sale through an authorized sales channel before a ticket reseller can buy those tickets to put on the secondary market.¹⁸⁷ The bill will also require ticket resellers to register with the Federal Trade Commission and disclose their registration number on all tickets they sell on the secondary market.¹⁸⁸ While Schumer's legislation may be effective against ticket snipers, the changes are so drastic and radical that it is difficult to predict the legislation's effect on the ticket market. Regardless, ticket scalpers will undoubtedly find ways to circumvent the bill, creating new problems and need for ever further regulation. But the bill appears to have virtually no momentum since announced in April.

In June 2009, New Jersey congressman Bill Pascrell, Jr. introduced to Congress the BOSS Act—Better Oversight of Secondary Sales and Accountability in Concert Ticketing.¹⁸⁹ The legislation would direct the Federal Trade Commission to prescribe rules to make the murky world of ticket selling more transparent (both on the primary and secondary markets), but it does not address sniping software.

Thus, it does not appear that Congress will solve the ticket sniping problem anytime soon. Of course, even if federal legislation were enacted, ticket snipers may relocate their operations to foreign jurisdictions, posing difficult international jurisdictional and political issues.¹⁹⁰

D. The Law's Failure

We have seen why litigation by Ticketmaster is not a solution, and likewise why litigation by consumers will never adequately address the problem. Further, criminal legislation is likely not the solution due to enforcement problems. This result is not surprising since the ticket sniping problem is exactly the kind of problem the law is ill-suited to address due to the nature of the harm—an intrinsically social harm in the form of a violation of queuing norms. The law is “expensive machinery” to address a violation of a social norm: Lawsuits take time, involve judges and high-paid lawyers, incur other administrative costs, can result in adjudicative errors, and in the case of criminal legislation, use the valuable time and resources of taxpayer funded law enforcement agencies.¹⁹¹ This is why litigation and legislation have failed to address the problem.

2009), available at http://schumer.senate.gov/new_website/record.cfm?id=311230.

187. *Id.*

188. *Id.*

189. H.R. 2669, 111th Cong. (2009).

190. See generally Brenner & Koops, *supra* note 180.

191. Bayern, *supra* note 168.

That is not to say that all violations of social norms and other small wrongs should not be addressed by the law. Small wrongs can still decrease social utility and ideally call for redress. The law's limitations result from practical incapacities, not from theoretical limitations. These wrongs are systematically redressed more efficiently by market forces and private actors because private actors are decentralized. Professor Robert Cooter makes the following observation: "As society diversifies and businesses specialize, state officials struggle to keep informed about the changing practices of people, and people struggle to make lawmakers respond to changing practices. To loosen these constraints on information and motivation, law must decentralize."¹⁹² An example of the efficiency of private actors, as discussed below, can be found to address the ticket sniping problem.

IV. THE MARKET RESPONSES

Ticketmaster, along with the entertainment industry, has addressed the problem with two recent innovations to the allocation of tickets that may soon revolutionize the industry. First, promoters and artists have been using auctions with much more frequency, thus eliminating the consumer surplus created by underpricing their tickets.¹⁹³ Using what Ticketmaster calls "dynamic pricing," in 2003, promoters and artists began selling the most desirable seats in an auction format. In early 2008, the Chicago Cubs, in a partnership between the team and the Chicago Board Options Exchange, auctioned off 71 new season ticket packages that included season tickets located adjacent to the Cubs' dugout on the third-base line and the right to purchase 2008 postseason tickets if the Cubs made the playoffs, which they did. The proceeds from the auction topped \$1 million, and individual seats ranged from \$197 to \$400 per seat, per game.¹⁹⁴ Irving Azoff, Chairman and CEO of Ticketmaster, has acknowledged that ticket prices that fluctuate with market demand might be the future of concert ticketing.¹⁹⁵

Second, in May 2008, Ticketmaster introduced new technology called "Paperless Ticket."¹⁹⁶ Instead of receiving paper tickets ahead of

192. Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 948 (1997).

193. Timothy Finn, *Music Industry on Alert as Ticketmaster-Live Nation Merger Looms*, KANSAS CITY STAR, Feb. 14, 2009, at A1 ("Some analysts expect more VIP packaging and more 'dynamic pricing' of concert tickets—an auction, essentially, where the best seats go to the highest bidder."); Pearlstein, *supra* note 18.

194. Carrie Muskat, *CBOE Single-Game Seats Auction on Tap*, MLB.COM, Mar. 13, 2008, http://mlb.mlb.com/news/article.jsp?ymd=20080313&content_id=2425556.

195. Seabrook, *supra* note 61, at 42.

196. Press Release, Ticketmaster Entertainment, Ticketmaster Introduces Paperless Ticket (May 13, 2008), *available at* <http://www.prnewswire.com/mnr/ticketmaster/33099>.

the event, the credit card used to make the purchase essentially serves as the customer's ticket.¹⁹⁷ To attend the show, the customer presents the credit card used to purchase the tickets and a valid photo ID.¹⁹⁸ The gate attendant swipes the credit card and a seat locator slip is printed for each seat in the order.¹⁹⁹ Because there is no opportunity to resell the ticket, there will be no interest from ticket snipers in tickets to the event.

The technology, of course, is not perfect. Tickets cannot be purchased for minors that plan on attending a show without the purchaser, and all members of the same party must enter at the same time. The tickets cannot be purchased with cash or gift cards, and the ability to gift the tickets to someone else is currently unavailable, although Ticketmaster reports that it is currently addressing that problem.²⁰⁰ Fans who enjoy collecting ticket stubs as mementos from the concerts they attend are out of luck. Further, some consumers might not want to bring a credit card to a concert out of fear of theft. Lastly, some consumers may object to the notion that the system is an unreasonable restriction on alienation. Consumers bought the tickets, the argument goes, and they should be able to dispose of them at their discretion.

While these arguments are valid, the costs and burdens imposed on the consumers do not outweigh the potential windfall of consumer surplus they are now able to capture. Put differently, consumers are in a far superior position paying the face value of tickets and incurring some of the relatively minor inconveniences than potentially paying several times the face value of the tickets on the secondary market. Further, the elimination of the ticket snipers will reduce the consumers' frustration with the ticket buying process and their suspicions of foul play.

Regardless of the merits of Paperless Ticketing, there are early indications that the system works, and will soon become the industry norm. In the summer of 2008, Tom Waits became the first touring artist to use Ticketmaster's Paperless Tickets during his 13-date U.S. tour.²⁰¹ Stuart Ross, Waits' booking agent, cited the desire to "take the secondary market out of the mix" as motivation to use the technology, and ensure that the tickets are sold to the end user at face value.²⁰² The band AC/DC employed a combination of Paperless Tickets and standard paper tickets for its North America tour, which began in October 2008.²⁰³ Metallica's September 2008 show in London was entirely

197. *Id.*

198. *Id.*

199. *Id.*

200. Dane Stickney & Kevin Coffey, *Take That, Scalpers: Paperless Tickets Debut*, OMAHA WORLD-HERALD, Jan. 18, 2009, at 06E.

201. Ray Waddell, *The Ticket that Exploded*, BILLBOARD, Nov. 22, 2008, at 33.

202. *Id.*

203. Ray Waddell, *Miley Strikes Back: Can Tween Star Thwart Scalpers With Paperless*

paperless, and the logistics appears to have been successful for these shows, with “lines r[unning] at roughly the same speed as a normal night.”²⁰⁴ Interestingly, Miley Cyrus will exclusively use Paperless Tickets for her 45-show North American tour in 2009, which began selling in mid-2009.²⁰⁵

The problem of ticket sniping is thus potentially solved. The combination of Paperless Ticketing and dynamic pricing, both of which yield the ticket snipers powerless, provides promoters and artists with valuable tools for selling their product. If they desire to ensure that their “true” fans are able to attend their events, they can employ Paperless Ticketing and forgo the potential capture of the consumer surplus. If, on the other hand, the artists desire to maximize their profits and capture that consumer surplus themselves, they can auction the tickets. Finally, they can use some mixture of the two allocation systems for any given event, ensuring that at least some portion of the tickets are sold to fans while still maximizing their profits from a portion of the seats. Either way, the problem of ticket sniping will quickly disappear.

CONCLUSION

The ticket sniping problem is unique in that there is tremendous social outcry, yet the law simply is not equipped to address it. Fortunately, private actors have created far more efficient and effective solutions to the problem. The only issue remaining is whether the private responses—the increased use of auctions and Paperless Tickets—will be used by artists and promoters. To that end, the most effective way consumers can solve this problem is not by relying on the law through litigation and legislation, but rather by pressuring their favorite artists and sports teams to use effective market solutions. The problem of ticket sniping is indeed searching for a remedy, and consumers can lead their artists to the solution.

Ticketing?, BILLBOARD.BIZ, June 27, 2009, http://www.billboard.biz/bbbiz/content_display/magazine/upfront/e3i6c3a49109c5609b6ee2129d0bf0db61f.

204. *Id.*

205. Ethan Smith, *Going 'Paperless' to Thwart Scalpers*, WALL ST. J., June 8, 2009, at B1.