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NOTE

FAN TO FAN, THEY'RE CHEATING YOU: AMERICAN FANS' COLLECTIVE NIGHTMARE AND THE NEED FOR UNIFORM REGULATION OF AMERICA'S SECONDARY TICKETING MARKET

I. INTRODUCTION

Live sports, music, and theatre fans are unified by a single frustration—online ticket sales.¹ Every ticket consumer has experienced the nightmare of discovering that their favorite artist, team, or theatre production is coming to their city and waiting weeks for the tickets to go on sale.² When the day comes, they endure the experience of nervously logging on to the primary sale website at the moment the tickets go on sale to purchase tickets for the event, waiting in the online queue as the public sale begins, and seeing the dreaded words “Sold Out” scrolled across the screen in front of them when they finally gain access to the purchase page—obliterating their hopes of gaining access to an event for which they were so excited.³ Typically, their desire to purchase a ticket

1. See Jim Zarroli, *Can't Buy a Ticket to That Concert You Want to See? Blame Bots*, NPR (Jan. 28, 2016, 1:38 PM), <https://www.npr.org/sections/thetwo-way/2016/01/28/464708137/cant-buy-a-ticket-to-that-concert-you-want-to-see-blame-bots> (discussing common frustrations faced by fans when purchasing tickets online, especially where ticket bots are used to purchase large quantities of tickets to prime events); Kana Ruhalter, *BTS Fans Torch Ticketmaster After Scalpers Buy Up Tickets*, DAILY BEAST (Oct. 9, 2021, 6:53 PM), <https://www.thedailybeast.com/bts-fans-torch-ticketmaster-with-accusations-of-price-gouging-and-rip-offs> (detailing one major fan group's frustrations with one of the most used primary ticket sales websites—Ticketmaster).

2. See Jobeth Devera, *Garth Brooks Concert Tickets Disappear Quickly, Prompting Frustration*, HAW. NEWS NOW (Oct. 23, 2016), <https://www.hawaiinewsnow.com/story/33453489/residents-experience-frustration-with-purchasing-garth-brooks-concert-tickets>.

3. *Id.* For example, fans attempting to purchase tickets for a highly anticipated Garth Brooks tour date in Hawaii were met with this exact frustration—logging into the ticketing platform hours before the tickets went on sale, waiting for the sale to begin, and discovering that the tickets had sold out in minutes, leaving them with no chance to attend the event. *Id.* No fan logged into the ticketing platform right when the tickets go on sale wants to see “Sold Out” only moments after the queue is opened, especially when the event is one that is a limited engagement or is in high demand. See *id.* This same frustration has occurred for fans of other big-ticket acts, such as BTS, Billy Joel, Eric Church, Paul McCartney, Beyonce, and Adele, when attempting to purchase tickets for their

and their curiosity will lead them to ticket resale websites, such as StubHub, Seat Geek, and even Ticketmaster's Verified Resale page, where they will discover, perhaps, that a ticket which sold for \$150 during regular on-sale is being scalped⁴ for over \$600.⁵

concert tours and residencies in the United States. See Tuba Waqar, *BTS Concert Tickets Sold Out in Presale, ARMY Lashes Out at Ticketmaster*, SKPOP (Oct. 10, 2021), <https://www.sportskeeda.com/pop-culture/news-bts-concert-tickets-sold-presale-army-lashes-ticketmaster> (discussing BTS fans' frustrations with encountering sold out tickets before receiving a chance to purchase them); Taylor Armerding, *Congress Joins Battle Against Ticket Bots*, CSO ONLINE (Dec. 3, 2015, 10:40 AM), <http://www.csoonline.com/article/3011847/data-protection/congress-joins-battle-against-ticket-bots.html> (discussing, generally, the phenomenon of tickets selling out and being placed for resale, and citing both Billy Joel and Paul McCartney as artists affected by this practice); Nate Rau, *Eric Church Declares War on Scalpers*, USA TODAY (Sept. 13, 2014), <http://www.usatoday.com/story/life/music/2014/09/13/eric-church-declares-war-on-scalpers/15613435> (discussing Eric Church's frustration with and zero-tolerance policy towards scalpers); Mark J. Perry, *Ticket Scalping: A Market That Only Exists Because Musicians Under-Supply and Under-Price Tickets to Their Concerts*, AEI IDEAS (July 4, 2016), <https://www.aei.org/carpe-diem/ticket-scalping-a-market-that-only-exists-because-musicians-under-supply-and-under-price-tickets-to-their-concerts> (quoting articles about Adele and Beyonce fans' struggle to purchase affordable tickets to their tours after the tickets went on sale and sold out).

4. *Scalping*, BLACK'S LAW DICTIONARY (11th ed. 2019). Scalping is the practice of selling a ticket for a high-demand event at a profit once quantities from initial sellers become scarce or sold out. *Id.* Scalping is not only a problem with tickets—it can even occur with commodities such as gaming systems, driving those who seek to purchase these items nearly insane. See, e.g., Mike Drucker, *Scalpers Can Burn in Hell*, THEGAMER.COM (Oct. 9, 2021), <https://www.thegamer.com/scalpers-can-burn-in-hell> (discussing frustrations with scalping of highly-sought-after video game consoles and accessories). Scalping occurs any time there is a high-demand item listed in limited quantities; however, the ticketing market is where scalping is often seen the most, both in frequency and in quantity, and where the most outrage is often directed; therefore, hereinafter in this Note, "scalping" will refer to this practice only in the event ticketing market. See, e.g., Ruhalter, *supra* note 1 (discussing this practice in ticketing).

5. See John Paul Titlow, *Can Ticketmaster's Anti-Bot Assault Fix Its Most Infuriating Problem?*, FAST CO. (May 16, 2017), <https://www.fastcompany.com/40416430/can-ticketmasters-anti-bot-assault-fix-its-most-infuriating-problem>. These secondary ticket purchasing websites are, unfortunately, all too familiar to fans of popular music acts and sports teams, and a price increase of \$450 on the secondary market may often be considered modest. See *id.*; Debra Parma, *At Ticketmaster, Scalpers Score and Fans Come Last*, 38 J.L. & COM. 463, 463 (2019); Sofia Gallus, *Ticketmaster Might as Well Be Bald: Fans vs. Ticket Scalpers*, CURRENT (Feb. 25, 2020), <https://nsucurrent.nova.edu/2020/02/25/ticketmaster-might-as-well-be-bald-fans-vs-ticket-scalpers>. StubHub, a major ticket reseller, has capitalized on that fact and, in the past, has advertised that "[s]old out just means get them at StubHub." Derek Beres, *The Secondary Ticketing Market Is Worth \$15 Billion. How Long Will Fans Have to Pay?*, BIGTHINK (Mar. 26, 2019), <https://bigthink.com/neuropsych/scalping>. One example of the upcharge often present when tickets are put up for resale is what occurred after tickets for a concert being given by the band Bikini Kill went on sale and sold out immediately. *Id.* As fans patiently and nervously waited in queue on the primary sale website to purchase the tickets which were priced at forty to forty-five dollars, many tickets were already being relisted on StubHub for up to \$900—an \$855 markup—which understandably caused outrage among fans. *Id.* Another popular example of the scalping epidemic was present during the first run of *Hamilton* on Broadway, which starred the writer of the musical, Lin-Manuel Miranda. Daniel Kreps, *Lin-Manuel Miranda, Chuck Schumer Seek Scalper Crackdown with New Bill*, ROLLING STONE (Aug. 14, 2016, 9:17 PM), <https://www.rollingstone.com/music/music-news/lin-manuel-miranda-chuck-schumer-look-for-scalper-crackdown>.

Gone are the days of finding scalpers in trench coats peddling tickets outside of venues on the day of the event.⁶ Instead, scalpers have taken to the internet through online websites such as Ticketmaster and StubHub and have turned scalping into a billion-dollar industry.⁷ These websites are widely regarded as legitimate, and consumers often trust purchasing tickets that are resold on these platforms.⁸ Each website charges a fee that is taken out of the resale price of the ticket sold, and the rest of the funds are given to the person reselling the ticket.⁹ This means that a profit is made both by the resale website and by the reseller¹⁰—a profit which does not at all benefit the original seller of the ticket.¹¹

crackdown-with-new-bill-249785. During Miranda's run in the title role on Broadway, scalpers used bots to purchase over 20,000 tickets for roughly 100 performances of the musical and sell them for a profit of over \$15.5 million. *Id.*

6. *Why Scalping Opponents Are Losing Their Heads*, R ST. (Nov. 6, 2013), <https://www.rstreet.org/2013/11/06/why-scalping-opponents-are-losing-their-heads> (describing the scalper stereotype—dodgy men in trench coats selling tickets to large and in-demand events outside of venues, usually in the parking lot, typically on the day those events are occurring).

7. Oisín Lunny, *Battle for \$15.19 Billion Secondary Ticket Market Heats Up with First Europe-Wide Anti Touting Law*, FORBES (June 24, 2019, 9:53 AM), <https://www.forbes.com/sites/oisinelunny/2019/06/24/the-battle-for-15-19b-secondary-ticket-market-heats-up-with-first-europe-wide-anti-touting-law/?sh=2a0b3722e029> (discussing the billions of dollars grossed in foreign secondary ticketing markets). The United States' online market has been estimated to reach \$68 billion by 2025. Beres, *supra* note 5.

8. See Eric Fuller, *Will 2021 Become StubHub's Nightmare Year?*, FORBES (Dec. 30, 2020, 1:28 PM), <https://www.forbes.com/sites/ericfuller/2021/12/31/will-2021-become-stubhubs-nightmare-year/?sh=1893fe25120b> (discussing, in part, how StubHub has made its mark in ticket resale and secured secondary ticket consumers' trust through its practices).

9. See, e.g., *StubHub Marketplace Global User Agreement*, STUBHUB (June 22, 2021), <https://www.stubhub.com/legal/?section=ua>. On both websites, the reseller of the ticket sets the ticket price. See *id.*; *Purchase Policy*, TICKETMASTER (Jan. 1, 2021), https://help.ticketmaster.com/s/article/Purchase-Policy?language=en_US. See *StubHub Marketplace Global User Agreement*, *supra*, for further information on StubHub's resale listing practices, including taking a set percentage of fees out of each ticket resold on the website. See *Purchase Policy*, *supra*, for further information on the resale process on Ticketmaster, which allows fans to resell verified tickets on the website in exchange for high fees.

10. See *Purchase Policy*, *supra* note 9; Beres, *supra* note 5. Resellers are often called scalpers—the two names are used interchangeably in this Note. See Dylan C. Porcello, *A Fixed Game: The Frustrations of Ticket Scalping and the Realities of Its Solutions*, 84 BROOK. L. REV. 259, 260 (2018).

11. See Beres, *supra* note 5 (discussing the profit that is made by ticket resellers—made up of exorbitant fees and charges passed onto the consumer—and not shared with the initial ticket seller); Lunny, *supra* note 7. The original seller could be a sports team, a musical artist, or a theatre company—usually the person or group the fans intend to benefit with their ticket purchase. See Beres, *supra* note 5.

There is an epidemic of ticket resellers gouging the consumer with the price of resale tickets to turn an often-exorbitant profit.¹² Tickets listed for resale are presented at prices that far exceed the face value of the ticket by hundreds, sometimes thousands, of dollars.¹³ The issue is that some states have attempted to regulate the online resale market, while others have chosen to remove all scalping regulations from their legislative materials, making the United States' legal landscape incredibly sparse in enforcement against internet ticket scalpers to the detriment of the consumer.¹⁴ The federal government attempted to regulate the secondary online ticket market by passing the Better Online Ticket Sales Act of 2016; however, this legislation regulates the bare minimum.¹⁵ Another Act, the Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, was introduced to Congress in 2019 as an attempt to regulate the secondary ticket sales market; however, this Act has yet to be passed and no action has been

12. See Byard Duncan, *How Is This Legal? Legions of Fans Say the Secondary Ticket Market Is Rigged Against Them*, REVEAL (Mar. 28, 2021), <https://revealnews.org/article/how-is-this-legal>, for a discussion of the exorbitant for-profit nature of the secondary ticketing market.

13. *Id.* Resale prices that far exceed the original on-sale prices of tickets outrage fans, who simply want to see their favorite artist perform without being priced out by non-fans seeking to make a profit. Waqar, *supra* note 3; Beres, *supra* note 5. Fans are not the only ones angry about exorbitant prices caused by ticket scalping, artists are just as frustrated—stars, such as multiple Country Music Award-winner, Eric Church, and Grammy, Tony, and Pulitzer Prize-winner, Lin-Manuel Miranda, have spoken out about their irritation with ticket scalpers. Kreps, *supra* note 5; Dan Hyman, *How Do You Stop Ticket Scalpers? Eric Church Has an Answer*, VICE (Sept. 27, 2016), <https://www.vice.com/en/article/7bxbq/how-do-you-stop-ticket-scalpers-eric-church-has-an-answer>. Eric Church, who is fed up with scalpers and calls scalping “organized crime,” went on a crusade prior to his “Holdin’ My Own” tour to try to prevent scalpers from taking tickets away from his fans. *Id.* He and his team worked to cancel tickets that had obviously been purchased by scalpers, create a membership scheme for fans who wanted to purchase pre-sale tickets for his concerts, and to ensure tickets were not released to fans until the few days leading up to his concerts. *Id.* Lin-Manuel Miranda was instrumental in advocating for the current federal legislation regulating the use of bots to purchase tickets which will later be sold at a profit for scalpers. Kreps, *supra*. In a spirited op-ed piece for *The New York Times*, Miranda highlighted the fact that scalping makes, “the price range [for live events]—even a special event price range—out of the range for most Americans.” *Id.*

14. See Chris Lane, *The Murky Business of Ticket Reselling*, HOUS. PRESS (Jan. 20, 2016, 6:00 AM), <https://www.houstonpress.com/arts/the-murky-business-of-ticket-reselling-80837289> (examining the variation in scalping laws across the United States and the issues presented by having such variation among the states).

15. See Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401 (codified at 15 U.S.C.A. § 45c (2016)); Robert J. McFadden, *The BOTS Act: A Small Step for Fankind When a Giant Leap Is Needed*, 55 WASHBURN L.J. 427, 445 (2016). This Act has hardly been enforced since its enactment, which has left fans relatively unprotected federally despite its existence. Duncan, *supra* note 12.

taken on its behalf since 2019.¹⁶ As a result, ticket consumers are left with a secondary online market, in which the consumer pays top dollar for a ticket whose proceeds in no way benefit the initial seller, that continues to grow almost completely unchecked in the United States.¹⁷

This Note will argue that in order to eliminate the scattered approach to regulating ticket scalping of both the states and the federal government, a broader piece of legislation should be adopted by the federal government to regulate the ever-growing secondary ticketing market.¹⁸ This Note will propose a more drastic federal regulation of online ticket resale.¹⁹ In Part II, this Note will discuss the history of ticket scalping laws in the several states, including laws regulating local

16. See Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, H.R. 3248, 116th Cong. (1st Sess. 2019), <https://www.congress.gov/bill/116th-congress/house-bill/3248/text>.

17. See Duncan, *supra* note 12 (discussing, in great detail, the woes of consumers who attempt to purchase tickets online and are bombarded by scalpers selling tickets that are marked far over face value, and the hardships faced by consumers in a ticketing market that benefits the secondary seller over the consumer and the initial seller).

18. See *infra* Part IV. The secondary ticketing market, originally associated with “intolerable” 19th century ticket speculators who engaged in the “atrocious” trade of purchasing seats to sell at a markup outside of venues on the day of much-anticipated events, has now found its home on the internet. Duncan, *supra* note 12. The secondary market, in today’s online landscape, is the market in which resellers, mainly ticket scalpers, whose business is to resell tickets at a profit, and some parties who are no longer able to attend an event, list tickets online at a higher price than that at which the tickets were purchased. *Id.* Tickets are first purchased from primary vendors, such as Ticketmaster, and in some cases, venues and arenas, themselves. *Id.* The tickets are then relisted on websites that are in the business of marketing tickets for resale, such as StubHub, SeatGeek, and, occasionally, Ticketmaster’s “Verified Resale” platform. *Id.* These websites allow individuals, be they scalpers in the business of reselling tickets or people who are no longer able or no longer desire to attend the event, to list their unwanted tickets for sale and market these tickets to new buyers in exchange for a portion of the resale price. See, e.g., *UNlitix: StubHub Seller FAQ*, UNIV. OF N. IOWA, <https://unitix.uni.edu/stubhub-seller-faq> (last visited July 25, 2022). For example, on StubHub, it is free to list a ticket for resale, but when a transaction is completed on the website, the buyer of the ticket pays a ten percent fee for using the service, and a fifteen percent fee is deducted from the payment to the seller of the ticket. *Id.* Therefore, if a ticket is listed for \$100, the buyer pays \$110 and the seller receives \$85, allowing StubHub to make a \$25 profit on the sale of the ticket at the expense of both the buyer and seller of the resale ticket. See *id.*; Duncan, *supra* note 12. A \$100 ticket price is rather rare on these websites though, as, often, the higher secondary price can be nearly triple the price paid to the primary ticket seller, if not more, and that extra profit is distributed between only the resale website and the reseller. Duncan, *supra* note 12. Scalpers who utilize bots to purchase large quantities of tickets from primary sellers and list them on secondary marketplaces, then, make a large profit from the sales of those tickets, even when taking into account the fees taken by the resale websites. See Kreps, *supra* note 5. In Lin-Manuel Miranda’s words, “[t]he extra money doesn’t provide a better concert or show experience for . . . the fan. Instead, it goes straight to the broker’s bottom line.” Jon Blistein, *Lin-Manuel Miranda Rips Scalpers, ‘Ticket Bots’*, ROLLING STONE (June 8, 2016, 2:17 AM), <https://www.rollingstone.com/culture/culture-news/lin-manuel-miranda-rips-scalpers-ticket-bots-32283>.

19. See *infra* Part IV.

scalping, specific types of scalping, and internet scalping.²⁰ This Part will also discuss states which do not have scalping laws and the recent federal approach to ticket scalping.²¹ Subsequently, Part II of this Note will discuss two laws recently enacted in Australia which provide compelling language to be included in an all-encompassing federal regulation of online ticket scalping.²² In Part III, this Note will detail why the lack in uniformity of state and federal legislation has left much to be desired as a culture of exorbitant ticket resale prevails in America.²³ Part IV of this Note will advocate for the enactment of federal legislation which borrows language from the Australian laws and allows for portions of the profits made through online ticket resale to be routed back to the initial seller of the tickets.²⁴ This legislation will impose sanctions on websites which do not encourage users to comply with this law and monitor users' compliance.²⁵ It will also propose an incentive for the websites to ensure their compliance with the law.²⁶ Finally, in Part V, this Note will conclude and reiterate the need for a nationwide regulation of the secondary ticketing market and the benefits that such regulation would provide for all involved parties.²⁷

II. A HISTORY OF TICKET SCALPING LAWS IN THE UNITED STATES AND RECENT ENACTMENTS IN AUSTRALIA

The secondary ticketing market has existed for as long as publicly attended events have been presented, and it has thrived based on people's innate desire to attend these highly-anticipated events.²⁸ This supply and demand driven market is only worsened by tickets' face

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* Part II.C.

23. See *infra* Part III.A.

24. See *infra* Part IV.

25. See *infra* Part IV.

26. See *infra* Part IV.

27. See *infra* Part V.

28. See Duncan, *supra* note 12. The practice of holding tickets and seats prior to an event began as early as the Enlightenment Era, if not earlier, and by the 19th century, ticket speculators were incredibly commonplace, to the point where they were being written about in the *New York Times* and were a class of people known by the general population. See *id.* People who are known for this practice are now commonly called "scalpers," and they have moved their murky business off the streets and onto the internet. See *id.* Their business is reselling as many of the limited tickets as possible at a much higher price than they were originally sold. See *Bad Bot Report 2021*, IMPERVA (2021), <https://www.exclusive-networks.com/se/wp-content/uploads/sites/25/2020/12/Imperva-Bad-Bot-Report-2021.pdf>. Some scalpers, prior to the advent of online ticket sales, engaged in practices which included paying homeless people some sum of money to wait in line overnight to buy tickets to highly anticipated shows, such as Bruce Springsteen. See Duncan, *supra* note 12.

values being set under market value, a practice experts believe is a tactic to sell out venues.²⁹ It has evolved over time into a billion-dollar business, in part, because of the transition to online ticket sales and online secondary markets.³⁰ As the practice of internet resale becomes more common, it seems the states' laws lag behind it, leaving a wide range of this reselling conduct completely unregulated.³¹ Subpart A will discuss the states' approaches to secondary market regulation.³² Subsequently, Subpart B will discuss the federal government's attempt at regulating scalping in the internet age.³³ Finally, Subpart C will discuss Australia's approach to regulating the secondary ticketing market as a whole, along with the drawbacks and benefits of this approach.³⁴

A. *The States' Scattered Approaches to Scalping*

Scalping regulatory approaches vary wildly state-by-state.³⁵ Some states have chosen localized prevention, others have chosen prevention in certain circumstances, a fair number have attempted internet regulation, and many have chosen no regulation at all.³⁶ This variety in regulations lends itself to a complex legal landscape throughout the United States that lacks continuity and makes enforcement of intrastate scalping legislation incredibly difficult, especially online.³⁷

29. Perry, *supra* note 3.

30. See Nevra Azerkan, *Sold Out: Why the Music Industry Needs to Urge Lawmakers to Regulate How Concert Tickets Are Distributed*, WHITTIER L. REV., 2018, at 132-33 (discussing the digitalization of the ticketing market and the profit that is generated through the growing online secondary market).

31. See Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, ENT. & SPORTS L., Nov. 2012, at 27-30 (providing a detailed list of state scalping laws, including a list of states that do not have scalping laws in place).

32. See *infra* Part II.A.

33. See *infra* Part II.B.

34. See *infra* Part II.C.

35. See Schroeder et al., *supra* note 31, at 27-30, for a discussion of the vast variation in ticket scalping laws state-by-state.

36. *Id.* (analyzing scalping laws state-by-state).

37. Zachary S. Sturman, *Where's the Consumer Harm? The BOTS Act: A Fruitless Boogeyman Hunt*, 22 VAND. J. ENT. & TECH. L. 951, 958 (2020). Not only is it difficult to regulate intrastate scalping, especially in states where regulation is left up to municipalities, it is even more difficult to regulate scalping online, as it becomes an interstate issue and often presents complex jurisdictional questions. See *infra* Part III.A; see also Sturman, *supra*, at 958-59.

1. Localized Prevention

Certain states have laws that provide for localized prevention of ticket scalping.³⁸ One such state is California where it is a misdemeanor to sell tickets purchased for the purpose of resale above their face value on the grounds of or within the event venue without the permission of the property owner or operator.³⁹ In Arizona, it is a petty offense to sell a ticket purchased for the purpose of resale, in excess of the original price, while within 200 feet of the entry to the venue at which the event is taking place or the venue's contiguous parking area.⁴⁰ In Connecticut, the law is even more pointed—it is a Class A misdemeanor to resell a ticket on the day of the event, within 1,500 feet of the venue if the resale is not authorized in writing by the owner or operator of the venue or its authorized agent.⁴¹ These states' laws are as locality-specific as laws can be in terms of scalping regulation, only targeting the area surrounding a venue at which an event is occurring, and they in no way apply to scalping which occurs entirely on the internet.⁴²

2. Prevention in Specific Circumstances

Some states have enacted laws which only apply to specific types of events, including college sports, wrestling, et cetera.⁴³ For instance, Indiana had a law prohibiting resale of tickets to boxing matches that was repealed in 2010.⁴⁴ After this law was repealed, Indiana was left with no scalping laws at all.⁴⁵ Both New Mexico and Mississippi have

38. *Secondary Ticket Marketplace: Guide to U.S. Ticket Resale Regulations, Third Edition*, SQUIRE PATTON BOGGS, <https://www.squirepattonboggs.com/-/media/files/insights/publications/2020/01/2020-secondary-ticket-marketplace/secondary-ticket-marketplace-guide-january-2020brochure-electronic.pdf> (last visited July 25, 2022) (listing the localized prevention states, alongside others).

39. CAL. PENAL CODE § 346 (West 2021). This law only regulates a small geographic area, leaving the internet and all locations not within that geographic area completely without scalping regulation. *See, e.g., id.* (declining to cover any location other than the venue at which an event is being held).

40. ARIZ. REV. STAT. ANN. § 13-3718 (2021) (containing regulatory language which only applies to a small geographic area).

41. CONN. GEN. STAT. ANN. § 53-289c (West 2020) (regulating only a small geographic area in which scalping may occur).

42. *Secondary Ticket Marketplace*, *supra* note 38 (detailing all state scalping laws, or lack thereof).

43. Lane, *supra* note 14. Many states only regulate scalping of tickets for certain specific sports or for entry into certain specific state or local venues. *See id.*

44. IND. CODE § 25-9-1-26 (repealed 2010).

45. *Id.*

laws which make it a misdemeanor to scalp tickets, but these laws only apply to college sporting events.⁴⁶

Delaware has created an intricate law which prohibits the resale or exchange of tickets to an event at a higher price than the original price of the ticket on the day before or the day of an event that is being held at the Bob Carpenter Sports/Convocation Center on the South Campus of the University of Delaware or of a NASCAR race at Dover Downs, or on a state or federal highway within the state.⁴⁷ The first offense is a Class B misdemeanor, and any subsequent offense is a Class A misdemeanor.⁴⁸ Delaware's law is detailed in that it only covers three venues, leaving so much scalping activity within the state, including internet activity, completely unregulated.⁴⁹

Similarly, Wisconsin makes it unlawful to sell a ticket to an event given specifically by or under the auspices of the state fair park for more than the ticket's face value; however, this offense is punishable by a small fine between \$10 and \$100 or imprisonment for less than sixty days.⁵⁰ Mississippi makes it a misdemeanor to sell a ticket to any Mississippi collegiate or university athletic event or any event held on state property for more than the face value of the ticket.⁵¹ More pointedly, North Dakota has a law which requires any tickets to mixed fighting style events being sold or resold to clearly display the purchase price of the ticket.⁵² These tickets may not be sold for more than that

46. N.M. STAT. ANN. § 30-46-1 (West 2021); MISS. CODE ANN. § 97-23-97 (1972). These laws leave completely unregulated events such as professional sporting events, live concerts, festivals, and other commonly attended and popularly demanded events. *See* § 30-46-1; § 97-23-97 (lacking language prohibiting scalping for any of the earlier-listed events).

47. DEL. CODE ANN. tit. 11, § 918 (1995). This law is so incredibly specific, it excludes all events that are not at a single university, are not NASCAR events specifically held at Dover Downs, and are not on a state or federal highway in the state. *See id.* (regulating only the specific conduct highlighted in this paragraph). This law would not prohibit the resale of tickets to an event being held at, for example, the Grand Opera House in Wilmington, Delaware, which hosts events ranging from large symphony and individual concerts to touring musicals and comedians. THE GRAND, <https://www.thegrandwilmington.org> (last visited July 25, 2022).

48. § 918.

49. *See id.* (lacking language which regulates online ticket scalping).

50. WIS. STAT. ANN. § 42.07 (West 2021). This law is even less regulatory than the Delaware law, only targeting the scalping of tickets to events given by the state fair park and only penalizing those who do violate the law with a small fine or a short stint in prison. *Id.* This leaves completely unregulated large venues, such as the Fiserv Forum in Milwaukee, which welcome large sporting events and highly in-demand concerts. *See Events, FISERV FORUM*, <https://www.fiservforum.com/events> (last visited July 25, 2022).

51. § 97-23-97. Again, this law excludes regulation of scalping tickets for any event not collegiate athletics related or held on state property, leaving a lot of potential scalping activity completely unchecked. *See id.*

52. N.D. ADMIN. CODE § 72-02.2-02-11 (2020).

purchase price which is printed on the ticket.⁵³ Hawaii has a similar law to North Dakota's which only applies to reselling tickets for mixed martial arts contests in the state.⁵⁴ Likewise, Maryland, has a law specifically regulating the sale of martial arts' event tickets, and providing that a promoter may not allow the sale or exchange of a ticket for an amount which exceeds the box office price.⁵⁵ Finally, Ohio outlaws selling tickets to public boxing or wrestling matches or exhibitions from any place other than the box office where the match or exhibition is to be held or any other location which the Ohio Athletic Commission authorizes in writing.⁵⁶ Each of these laws is event- or venue-specific; none seek to regulate the secondary ticketing market on the internet or as a whole.⁵⁷

3. Attempts at Internet Regulation

Some states have taken on the burden of attempting to protect consumers in their states from online scalping.⁵⁸ A few of these states, including New York,⁵⁹ have enacted laws that attempt to regulate internet resellers either by imposing fines, levying taxes, or requiring reseller registration with the state in order to resell within the state.⁶⁰ In addition to New York, Florida, Colorado, Maryland, New Jersey, Nevada, Oregon, Minnesota, Pennsylvania, Tennessee, and Vermont all have laws in place which prohibit the use of internet robots and circumvention software to purchase tickets in large quantities from primary online ticket sellers and prohibit the resale of tickets, at any

53. *Id.*

54. HAW. REV. STAT. ANN. § 440E-13 (West 2021).

55. MD. CODE ANN., BUS. REG. § 4-318 (West 2021). This law is incredibly specific in that it does not even apply to scalpers as a whole; it applies to promoters. *Id.* If a promoter does not know a ticket is being resold at an amount higher than the face value, he cannot be considered to have allowed it to happen. *Id.* Likewise, the law truly does specifically apply to promoters, as the word "promoter" was substituted for the former words "person, club, corporation, or association," according to the legislative notes appended to the law on Westlaw. *Id.* This law is incredibly targeted; however, Maryland has included further legislation which attempts to regulate internet scalping. *See infra* Part II.A.

56. OHIO REV. CODE ANN. § 3773.49 (1996).

57. *See Secondary Ticket Marketplace*, *supra* note 38 (laying out the laws of each of these states as compared to the laws of other states that regulate the scalping market more broadly).

58. *See id.* (discussing the laws of each state and highlighting those states which have attempted online regulation of ticket scalping).

59. N.Y. ARTS & CULT. AFF. LAW §§ 25.01-.35 (McKinney 2021).

60. Schroeder et al., *supra* note 31, at 29 (discussing New York's law requiring ticket brokers to register within the state); *Ticket Reseller License*, CITY OF N.Y., <https://www1.nyc.gov/nycbusiness/description/ticket-reseller-license> (last visited July 25, 2022) (discussing the New York requirement for ticket reseller licenses).

price, purchased using such circumvention software.⁶¹ These state attempts at prohibiting the purchase of tickets using bots somewhat mirror the federal regulation that is currently in place for circumvention software, except that a violation of these laws is supposed to result in conviction of a misdemeanor or a petty crime, generally, whereas the federal regulation makes circumvention a federally punishable offense.⁶²

4. No Regulation at All

There are a shocking number of states that do not have any laws which regulate scalping at all.⁶³ One state, Ohio, has left regulation of scalping, other than for boxing matches, up to municipalities within the state.⁶⁴ This leaves even consumers within the state with a lack of uniformity.⁶⁵ What is legal in one municipality could carry heavy fines in another, which makes enforcement of regulations on scalping in a state like this incredibly confusing.⁶⁶

Two other states which lack scalping laws are Iowa and Kansas, where not even the municipalities have attempted to regulate scalping.⁶⁷ A few more states which have no laws substantially regulating the secondary ticket resale market include: Nebraska, New Hampshire, South Dakota, Texas, Utah, and West Virginia.⁶⁸ In some of these states, certain municipalities have chosen to pass scalping laws, despite the lack of state law, but overall, the state legislatures have not.⁶⁹

61. ARTS & CULT. AFF. § 25.24; FLA. STAT. ANN. § 817.357 (West 2021); COLO. REV. STAT. ANN. § 6-1-720 (West 2021); MD. CODE ANN., COM. LAW § 14-4002 (West 2021); N.J. STAT. ANN. § 56:8-34 (West 2021); NEV. REV. STAT. ANN. § 598.398 (West 2021); OR. REV. STAT. ANN. § 646A.115 (West 2021); MINN. STAT. ANN. § 609.806 (West 2021); 4 PA. STAT. ANN. § 212.1 (West 2020); TENN. CODE ANN. § 39-17-1104 (2008); VT. STAT. ANN. tit. 9, § 4190 (West 2021).

62. See, e.g., Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401 (codified at 15 U.S.C.A. § 45c (2016)); ARTS & CULT. AFF. § 25.24; § 817.357.

63. See *Secondary Ticket Marketplace*, *supra* note 38 (discussing all state laws and listing states which do not have scalping laws or leave scalping regulation up to the various municipalities within the state).

64. OHIO REV. CODE § 505.95 (1999), <https://codes.ohio.gov/ohio-revised-code/section-505.95> (giving municipalities discretion as to whether or not scalping regulations should be put into place).

65. *Is Scalping Event Tickets Illegal?*, LIMA NEWS (June 28, 2015), https://www.limaohio.com/archive/14707/news-business-opinion_columns-50934662-is-scalping-event-tickets-legal. Consumers are left questioning whether or not scalping is legal in their own specific municipality. *Id.*

66. *Id.* (discussing the varied scalping laws enacted by municipalities in Ohio and confirming the lack of laws in place in Lima, Ohio).

67. See *Secondary Ticket Marketplace*, *supra* note 38 (detailing only local laws in Kansas and leaving out Iowa completely due to its lack of laws). In these states, scalping may be considered perfectly legal, due to the lack of regulation. See Schroeder et al., *supra* note 31, at 28.

68. *Secondary Ticket Marketplace*, *supra* note 38.

69. *Id.*

Alabama actually has a law which permits admission tickets to be resold for any amount in excess of the price printed on the face of the ticket, and it requires a scalper to pay a license tax of \$100, unless they are an electronic reseller.⁷⁰ Electronic resellers are exempt from the licensing requirement, leaving scalping on the internet entirely unregulated by the state and, actually, making it easier for scalpers to flourish in Alabama.⁷¹ Likewise, Virginia defers all scalping regulation to local authorities, but expressly allows internet resale by prohibiting localities from declaring unlawful any resale of a ticket which occurs on the internet.⁷² This law essentially makes Virginia a safe haven for online scalpers.⁷³ Laws in states like Alabama and Virginia which expressly choose not to regulate the secondary ticketing market on the internet are antithetical to laws in other states which have attempted to curb the practice which has added to the lack of uniform regulation among the states.⁷⁴

B. *The Federal Government's Attempt to Curb Scalping*

Before 2016, the federal government was silent on scalping.⁷⁵ Prior to that year, the states' laws, if any, controlled and regulated scalpers' practices.⁷⁶ In general, beyond federal circumvention software regulation, the states' laws still control.⁷⁷

70. ALA. CODE §§ 40-12-167, 8-19E-2, -4 (2021).

71. *Id.* § 8-19E-4.

72. VA. CODE ANN. § 15.2-969 (2021).

73. *See id.* (prohibiting localities from making resale occurring on the internet unlawful, despite endowing the power to regulate all other forms of ticket resale on the localities).

74. *See Secondary Ticket Marketplace*, *supra* note 38 (discussing the laws of those states which expressly do not prohibit internet resale, alongside the laws of those states which attempt to regulate the practice).

75. *See* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., *Justice Department and FTC Announce First Enforcement Actions for Violations of the Better Online Ticket Sales Act*, U.S. DEP'T OF JUST. (Jan. 22, 2021), <https://www.justice.gov/opa/pr/justice-department-and-ftc-announce-first-enforcement-actions-violations-better-online-ticket> (highlighting the Better Online Ticket Sales Act, the Federal Trade Commission's first venture into the realm of online ticket resale regulation).

76. *See* Schroeder et al., *supra* note 31, at 26; *Secondary Ticket Marketplace*, *supra* note 38. Both articles discuss the state laws in place to regulate scalping, and the second is current up to 2021. *See* Schroeder et al., *supra* note 31, at 26; *Secondary Ticket Marketplace*, *supra* note 38.

77. *See* Schroeder et al., *supra* note 31, at 27-30. For a discussion of the state laws that are in place and control as of 2021, *see Secondary Ticket Marketplace*, *supra* note 38. The federal circumvention software regulation is the Better Online Ticket Sales Act. Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401 (codified at 15 U.S.C.A. § 45c (2016)); *see infra* Part II.B.

1. The Better Online Ticket Sales Act

The Better Online Ticket Sales Act (“BOTS Act”)⁷⁸ was signed into federal law in 2016 in an attempt to prevent large-scale online ticket scalpers from circumventing the measures taken by ticket sales websites to prevent mass-purchasing of tickets.⁷⁹ Scalpers often use software known as “bots” to purchase large quantities of event tickets, especially for highly-sought-after events, and resell them for a profit to consumers.⁸⁰ Sports has actually been named as number three of the top five industries affected by “bad bot”⁸¹ traffic in 2020, with over thirty-three percent of sporting event ticketing website traffic coming from bots.⁸² While many ticketing websites have attempted to regulate bot traffic by incorporating Completely Automated Public Turing test to tell Computers and Humans Apart (“CAPTCHA”)⁸³ technology into

78. § 114-274, 130 Stat. at 1401. The Better Online Ticket Sales Act of 2016 (“BOTS Act”) is more commonly known as the BOTS Act. See Lesley Fair, *FTC's First BOTS Act Cases: Just the Ticket to Help Protect Consumers from Ticket Bots*, FED. TRADE COMM’N (Jan. 22, 2021, 12:09 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2021/01/ftcs-first-bots-act-cases-just-ticket-help-protect-consumers>.

79. § 114-274, 130 Stat. at 1401 (regulating the use of ticket bots and allowing the Federal Trade Commission to prosecute users as using deceptive and unfair trade practices); Fair, *supra* note 78 (discussing the motivations behind the enactment of the BOTS Act, including the desire to prevent circumvention measures used by online ticket scalpers to mass-purchase tickets).

80. See *Everything You Need to Know About Ticket Bots*, QUEUE IT (May 20, 2020), <https://queue-it.com/blog/ticket-bots>. A ticket bot is an automated program that runs over the internet to perform tasks related to ticket scalping, including purchasing large quantities of tickets by overriding ticket sale website software. See *id.* In 2013, Ticketmaster reported that ticket bots were responsible for about sixty percent of sales of the most desirable tickets to popular events. Duncan, *supra* note 12.

81. *Bad Bot Report 2021*, *supra* note 28. “Bad bots” are internet software applications that maliciously run automated tasks over the internet and are often used for scalping. *Id.* One bot operator used over ten thousand IP addresses and over four hundred credit cards to disguise itself and purchase tickets. Duncan, *supra* note 12. That operator earned over forty million dollars in profit from sales of the bot-purchased tickets in 2013. *Id.* Imperva, a cybersecurity company specializing in data protection, has reported that these “bad bot” operators accounted for almost forty percent of the traffic to over one hundred ticketing websites in 2018. *Id.*

82. *Bad Bot Report 2021*, *supra* note 28.

83. *What Is Captcha?*, GOOGLE WORKSPACE ADMIN. HELP, <https://support.google.com/a/answer/1217728?hl=en> (last visited July 25, 2022). Completely Automated Public Turing test to tell Computers and Humans Apart (“CAPTCHA”), is a security measure designed as a challenge-response mechanism to tell humans apart from computers. *Id.* The goal of incorporating CAPTCHA technology into ticketing websites is to limit the number of bots that are able to access tickets and snatch them away from fans. See Duncan, *supra* note 12. The issue with bots is that some are highly sophisticated and can mimic human behavior in a way that may evade this type of blocking software. *Bad Bot Report 2021*, *supra* note 28. Some bots’ operators have become even smarter. See Eric T. Schneiderman, *Obstructed View: What’s Blocking New Yorkers from Getting Tickets*, STATE OF N.Y. ATT’Y GEN., http://www.ag.ny.gov/pdfs/Ticket_Sales_Report.pdf (last visited July 25, 2022). Many have either done research to train their bot software to read CAPTCHAs through character recognition or, in

their sale platforms, bots are still a problem that grows larger every year as technology becomes more advanced.⁸⁴

This problem with bots became the reason why Marsha Blackburn, a Republican from Tennessee, introduced the BOTS Act in the House of Representatives during February of 2015.⁸⁵ The hope for, and purpose of, the law was to prohibit the “unfair and deceptive” use of ticketing bot software to circumvent the security measures, such as CAPTCHAs, taken by internet ticket sellers in order to purchase large quantities of tickets and resell them at a significantly higher price.⁸⁶ Any violation of this legislation is to be considered an unfair and deceptive trade practice under § 18(a)(1)(B) of the Federal Trade Commission Act.⁸⁷ The legislation was intended to ensure equitable consumer access to much-desired tickets and create a private cause of action for parties to sue in federal court to recover damages.⁸⁸ Whether it has succeeded is addressed later in this Note.⁸⁹

2. The Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019

The Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act is another attempt by Congress at regulating the secondary ticketing market online.⁹⁰ This Act would create a

some cases, they have the bots transmit photos of the CAPTCHAs to humans who decipher them and type them out in real-time. *Id.* at 17. This has made stopping bots’ operators incredibly difficult. *Id.*

84. See *Bad Bot Report 2021*, *supra* note 28 (highlighting the significant increase in bot traffic across the internet in 2020 as compared to prior years).

85. See Armerding, *supra* note 3. New York senator Chuck Schumer pushed heavily for the passage of this Act, enlisting the aid of stars such as Lin-Manuel Miranda, after the publication of a report by the Office of the New York State Attorney General Eric Schneiderman which detailed the plights of New Yorkers when it comes to ticket scalping. Kreps, *supra* note 5; Schneiderman, *supra* note 83, at 4. In support of the passage of the BOTS Act, Lin-Manuel Miranda expressed anger and disappointment in the scalping epidemic in a *New York Times* op-ed, writing, “[y]ou shouldn’t have to fight robots just to see something you love.” Kreps, *supra* note 5.

86. See Armerding, *supra* note 3 (discussing the congressional members’ goals for the BOTS Act when the legislation was introduced and subsequently enacted).

87. Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401 (codified at 15 U.S.C.A. § 45c (2016)) (including language deeming the use of bots an “unfair and deceptive” trade practice). Under the Federal Trade Commission Act, anything determined by the Commission as an unfair or deceptive act or practice will be met with a cease and desist. 15 U.S.C. § 45 (2006). After which, a violation of the cease and desist by the actor (a person, partnership, or corporation) shall be liable for a civil penalty of not more than \$10,000 for each violation. *Id.*

88. See Armerding, *supra* note 3 (discussing the legislation’s purpose).

89. See *infra* Part III.B.

90. See Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, H.R. 3248, 116th Cong. (1st Sess. 2019), <https://www.congress.gov/bills/116th-congress/house-bill/3248/text>.

requirement for primary ticket sellers to disclose and display on the website and at the box office the total number of tickets available for sale to the general public by that seller no less than seven days before the primary sale date.⁹¹ The Act would also require primary sellers to disclose all ancillary charges clearly and conspicuously to purchasers at the beginning of the transaction (and to return the total cost of these charges when a refund is given), to disclose all of these charges in the advertised costs and price quotes, and to not change the price of the ticket during the purchase process.⁹² The Act would place a burden on secondary sales websites to disclose whether or not they currently possess the tickets at the time of sale, an explanation of how to obtain a refund from the secondary sales website if the proffered ticket does not match the website's description of the ticket, to disclose the precise location of the seat or space the ticket would entitle to the bearer, to disclose the ticket distribution method, and to disclose all ancillary charges to purchasers at the beginning of the transaction and in all advertisements and price quotes.⁹³

The Act, like the BOTS Act, does not stipulate a maximum price which may be charged for a ticket in the secondary market, and rather, only regulates the manner in which the tickets are advertised, sold, and distributed.⁹⁴ A violation of this Act would be treated as a violation of the rule defining unfair or deceptive acts or practices as prescribed in the Federal Trade Commission Act.⁹⁵ Under the Act, the states would be entitled to bring civil action on behalf of state residents to enjoin any practice violative of the Act, enforce compliance with the rule, obtain damages, restitution or other compensation on behalf of residents of the state, and obtain any other such relief that the court may deem appropriate.⁹⁶ The Federal Trade Commission would also be entitled to intervene in such civil action that is brought by the states.⁹⁷ This Act, with these penalties in place, would likely make secondary ticketing practices more transparent; however, it still would not address the price gouging epidemic in the secondary ticketing market.⁹⁸

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* (lacking language regulating the maximum price for which a ticket may be listed in the secondary market).

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* (calling for more transparent ticketing trade practices, but not at all addressing price gouging in the secondary market).

C. *The Solution Abroad: Australia*

The governments in Australia noticed an issue with the secondary ticketing market and took preventative measures to protect Australian consumers.⁹⁹ There have been laws enacted in both Western Australia and New South Wales which regulate ticket scalping, both generally and online.¹⁰⁰ These Australian laws provide compelling language and a compelling model for a U.S. federal scalping regulation.¹⁰¹

1. The Law in Two Australian Jurisdictions

The Ticket Scalping Bill in Western Australia, enacted in September 2021, which mirrors a law enacted in 2018 in New South Wales, makes it an offense to resell a ticket for more than the original retail price, plus transaction costs¹⁰² up to a maximum of ten percent of the original ticket price.¹⁰³ In 2018, the Western Australian Commerce and Industrial Relations Minister, Bill Johnston, stated that the Ticket Scalping Bill was intended to protect consumers from being “ripped off by ‘organised ticket scalpers.’”¹⁰⁴ This law applies to a broad number of events, including the Australian Football League finals series that was to be held in Western Australia for the first time in September 2021.¹⁰⁵ In

99. See Joe Spagnolo, *Ticket Scalping to Be Made Illegal in WA Under Proposed New Laws*, PERTHNOW (Nov. 24, 2018, 11:00 AM), <https://www.perthnow.com.au/politics/state-politics/ticket-scalping-to-be-made-illegal-in-wa-under-proposed-new-laws-ng-b881031129z> (discussing the Western Australian’s governmental interests in regulating ticket resale and the steps taken by the government to pass the legislation).

100. See *New Laws on Ticket Reselling*, N.S.W. GOV’T (May 31, 2018), <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-laws-on-ticket-reselling>; Ticket Scalping Bill 2021 (WA) (Austl.).

101. See *New Laws on Ticket Reselling*, *supra* note 100; Ticket Scalping Bill 2021 (WA) (Austl.) (including legislative language which may be used by the United States to draft a comprehensive scalping regulation).

102. *New Laws on Ticket Reselling*, *supra* note 100. Transaction costs include booking fees, ticket delivery fees, and credit card surcharges. *Id.*

103. See Rachel Clun, *New Laws to Stop ‘Dodgy’ Ticket Scalping Labelled ‘A Waste of Time’*, SYDNEY MORNING HERALD (June 1, 2018, 3:05 PM), <https://www.smh.com.au/politics/nsw/new-laws-to-stop-dodgy-ticket-scalping-labelled-a-waste-of-time-20180601-p4zixd.html> (discussing the language of the New South Wales law); *New Laws on Ticket Reselling*, *supra* note 100 (explaining the technicalities of the New South Wales law and its enforcement); Ticket Scalping Bill 2021 (WA) (Austl.) (regulating ticket scalping in Western Australia).

104. Spagnolo, *supra* note 99.

105. *Id.* The Australian Football League’s Grand Final, which is typically held in Victoria, was moved to Perth’s Optus Stadium in 2021 due to Victoria’s COVID-19 lockdown. Caleb Triscari, *Western Australia Introduces Anti-Ticket Scalping Legislation*, NME (Sept. 6, 2021), https://www.nme.com/en_au/news/music/western-australia-introduces-anti-ticket-scalping-legislation-3037827. In a statement by the Western Australian commerce minister, Amber-Jade Sanderson, it was asserted that part of the motivation behind pushing for the bill’s enactment in

2021, the law was enacted, and the current commerce minister, Amber-Jade Sanderson, expressed a goal similar to Johnston's for the enactment of the legislation—to protect West Australian consumers from “unscrupulous practices that inflate prices and make events unaffordable or render tickets invalid.”¹⁰⁶

Both the New South Wales and Western Australia laws state that ticket resale advertisements must not provide an amount for the sale of an event ticket which exceeds 110% of the original ticket cost, and must specify the cost of the original ticket and the details of the location of the corresponding seat, bay, or row number for the ticket.¹⁰⁷ The legislation in New South Wales and Western Australia expects the owner of an advertising publication to ensure no prohibited advertisement is published in their publication and imposes a \$20,000 penalty on those publishers who do not comply.¹⁰⁸ The Western Australia law also issues a fine of \$100,000 against any person who uses software to circumvent any security measure of a website to purchase tickets in contravention to the published terms of use for the website.¹⁰⁹ The laws create a grand scheme which seeks to protect consumers through a complete regulation of the resale price of tickets to events being held in Australia which comprehensively covers all resellers and provides penalties for a lack of complicity.¹¹⁰

2. Australian Law: Benefits and Drawbacks

In practice, the Australian legislation allows for resale of tickets, so it is not a completely preventative measure; however, its goal is to keep the cost of a ticket being resold from being drastically inflated by the seller.¹¹¹ The drawback to the New South Wales law is that it is not exactly enforced by the government, rather, it allows event venues to

2021 was the government's desire for as many West Australians as possible to be able to attend the 2021 AFL Grand Final. *Id.*

106. Triscari, *supra* note 105 (discussing the West Australian law's enactment and motivations, including statements from commerce minister, Amber-Jade Sanderson, about the legislators' goals for the legislation).

107. *New Laws on Ticket Reselling*, *supra* note 100; Ticket Scalping Bill 2021 (WA) (Austl.). This is a strict regulation which benefits consumers in that it promotes transparency in ticket resale by requiring the original price of the ticket to be disclosed, along with its location within the stadium. *See New Laws on Ticket Reselling*, *supra*; Ticket Scalping Bill 2021 (WA) (Austl.).

108. *New Laws on Ticket Reselling*, *supra* note 100; Ticket Scalping Bill 2021 (WA) (Austl.).

109. Ticket Scalping Bill 2021 (WA) (Austl.).

110. *See id.*; *New Laws on Ticket Reselling*, *supra* note 100. Each of these laws' imposition of penalties serves as a deterrent to those seeking to engage in practices in violation of the laws. *New Laws on Ticket Reselling*, *supra* note 100.; Triscari, *supra* note 105.

111. Ticket Scalping Bill 2021 (WA) (Austl.) (“A person must not sell a ticket for admission to an event for an amount which exceeds the original ticket price by more than [ten percent].”).

deny entry to the event if they believe a ticket was purchased through resale for more than ten percent above its face value, which may be difficult to discern in most cases.¹¹² The Western Australia Law provides for government regulation, rather than venue enforcement, and allows for government-imposed penalties for noncompliance.¹¹³ This law makes no mention of whether or not the ten percent above face value which is allowed to be charged is pure profit or transaction costs; while the New South Wales law makes clear that it encompasses transaction costs only.¹¹⁴ Because the New South Wales law only allows for the ten percent¹¹⁵ to encompass fees paid initially, it does not promote resale at all, as it effectively outlaws resale over face value completely.¹¹⁶ Likewise, the law in no way benefits the initial ticket seller.¹¹⁷ The bones of the Australian legislation are good, but it has the potential to be expanded upon and made more targeted, which this Note proposes the federal government should do.¹¹⁸

III. SO, WHAT EXACTLY IS THE AMERICAN PROBLEM?

This Part will address the legal issues with America's scalping laws as they exist today—namely, that they do not completely protect interstate consumers from being taken advantage of by online ticket resellers who seek to make a profit through exorbitant increases in ticket prices.¹¹⁹ Subpart A will address the states' laws' general failure to create a regulatory scheme for online ticket scalping.¹²⁰ Subpart B will

112. *Tickets, Parties, and Events*, N.S.W. GOV'T, <https://www.fairtrading.nsw.gov.au/buying-products-and-services/buying-services/buying-tickets-and-ticket-reselling> (last visited July 25, 2022) (discussing the enforcement of the New South Wales legislation).

113. Ticket Scalping Bill 2021 (WA) (Austl.) (giving the West Australian government jurisdiction over such cases and the ability to impose sanctions upon those who do not comply with the law).

114. *Id.* (lacking a clear description of what makes up the ten percent above face value that is allowed to be charged by a ticket reseller pursuant to the law); *Tickets, Parties, and Events*, *supra* note 112 (discussing the New South Wales law's strict application and the fact that the ten percent allowed to be charged above the ticket's initial value is merely in place to allow for transaction costs to be passed on and charged to the secondary consumer).

115. *Ticket Reselling*, AUSTRALIAN CONSUMER L., <https://consumer.gov.au/consumers-and-acl/tips/ticket-reselling> (last visited July 25, 2022).

116. *New Laws on Ticket Reselling*, *supra* note 100. In this Note's proposed legislation, these transaction fees shall be included in the initial price, or "face value" of the ticket, so the ten percent increase in price will be pure profit to be shared among the reseller, ticketing website, and initial seller. *See infra* Part IV.

117. *See* Ticket Scalping Bill 2021 (WA) (Austl.), which lacks language benefitting the initial seller of a ticket being resold in a secondary market.

118. *See infra* Part IV.

119. *See infra* Part III.A–B.

120. *See infra* Part III.A.

address exactly why the federal government's attempts at online scalping regulation are not alone able to rectify the overall scalping issue that the United States faces today.¹²¹

A. *The States' Laws Leave Much to Be Desired*

The states' scattered approach to scalping regulation leaves consumers in the several states vulnerable to the all-too-common phenomenon of overpriced ticket resale on the internet.¹²² The lack of uniformity in state scalping laws gives rise to a legal landscape where consumers in one state may be afforded better protection than consumers in another state.¹²³ Conversely, consumers in one state may not be as well-protected as consumers in another state.¹²⁴

In states where regulation is left up to the municipalities within the state, such as Ohio, there is a huge problem with intrastate scalping regulation.¹²⁵ If a reseller buys tickets in bulk in a municipality where that is perfectly legal and chooses to resell those same tickets in a municipality where that bulk-purchasing practice is illegal, which municipality's law will prevail?¹²⁶ Meanwhile, in states where only certain kinds of event ticket scalping are regulated, such as Hawaii and Delaware, scalping activity for every other type of event proceeds completely unchecked, leaving scores of consumers unprotected.¹²⁷

The lack of state law uniformity makes it difficult for states which have laws designed to regulate online ticket scalping to enforce these internet-specific laws because the internet does not always make it clear-cut where a scalper or a purchaser is located and whether they are

121. See *infra* Part III.B.

122. Duncan, *supra* note 12.

123. See generally Schroeder et al., *supra* note 31, at 26-30 (discussing the lack of state-to-state uniformity in scalping laws).

124. See *id.* at 27-31. For more examples of how wildly state laws differ, see *id.*, which evidences the disproportionate effect the laws have on scalping in each state—a direct cause of the disproportionate effect on consumers.

125. See *Is Scalping Event Tickets Illegal?*, *supra* note 65 (discussing Ohio's municipality-specific approach).

126. See, e.g., *id.* (highlighting the municipality approach).

127. See HAW. REV. STAT. ANN. § 440E-13 (West 2021) (regulating scalping for only martial arts events); DEL. CODE ANN. tit. 11, § 918 (1995) (regulating only events held at the Bob Carpenter Sports/Convocation Center or NASCAR races held at Dover Downs). These laws leave all other forms of scalping unchecked, and, in effect, makes them perfectly legal. See *Secondary Ticket Marketplace*, *supra* note 38 (highlighting those states whose laws do not extend to a significant amount of scalping activity); Phil Miller, *Ticket Scalping in Missouri—Now It's Legal*, SPORTS ECONOMIST (Dec. 18, 2019), <https://thesportseconomist.com/ticket-scalping-in-missouri-now-its-legal> (discussing one state, Missouri, that repealed its scalping regulations, thus leaving the activity completely unregulated).

violating the law of the state within the state.¹²⁸ For example, if the scalper using a scalping bot is located in Delaware, where there is no regulation of online scalping, but they are purchasing and reselling tickets in bulk for an event happening in Tennessee, where bots are prohibited, there becomes a question as to where the action occurred, and which state has jurisdiction over the action.¹²⁹ Plus, before the jurisdictional question even comes into effect, a bot user must be found.¹³⁰ Often, tracking down the people who anonymously use bots to purchase tickets is both impracticable and time-consuming for individual states.¹³¹ The sheer difficulty and frustrations that come with pinpointing and identifying an anonymous bot-using scalper and then determining complex jurisdictional issues, including which state has personal jurisdiction over the potential defendant, often leads to deferred or no prosecution by the state whose law prohibits the internet scalping behavior.¹³² This phenomenon is best represented by the state of Tennessee, where a law has been enacted intending to prevent the use of software to circumvent security measures on ticketing websites, but there have been no actions brought under the law.¹³³ With state regulatory measures being thwarted by so many contravening jurisdictional issues, the online secondary ticketing market is left almost completely unregulated, despite some of the states' well-meaning attempts at regulation.¹³⁴

128. See Sturman, *supra* note 37, at 958 (discussing the jurisdictional issues arising from state laws which regulate online scalping).

129. *Id.* See tit. 11, § 918 and TENN. CODE ANN. § 39-17-1104 (2008), for context regarding the kinds of scalping Delaware and Tennessee, the states used as an example in this Part, regulate.

130. Sturman, *supra* note 37, at 958. Some of these ticket-purchasing bots are highly sophisticated, which makes it difficult for those monitoring the sales websites to detect that there is even a bot being used, let alone from where it is being used. See *Bad Bot Report 2021*, *supra* note 28. The question of where a bot user is located is incredibly relevant to the enforcement of state laws regulating online scalping, especially when deciding which jurisdiction should have the power over prosecuting an offender. Sturman, *supra*, at 958-59.

131. Sturman, *supra* note 37, at 958. This impracticability has frustrated even attempts by the Federal Trade Commission, which has limited resources to exploit in prosecuting online cases such as these, to regulate ticket-purchasing bad bots through the BOTS Act. Duncan, *supra* note 12.

132. See Sturman, *supra* note 37, at 958.

133. Armerding, *supra* note 3 ("Despite the apparent prevalence of the practice, no one has been prosecuted for this hard-to-prove crime in Davidson County."); § 39-17-1104.

134. See Sturman, *supra* note 37, at 958; and Armerding, *supra* note 3, for a variety of discussions about some of the states' attempts at regulation and their subsequent failures.

B. *The Federal Law Is Lacking*

The BOTS Act has not done enough on its own to prevent online scalping.¹³⁵ The BOTS Act, since its enactment in 2016, has only been enforced in three actions thus far.¹³⁶ Three defendants, Just in Time Tickets, Inc., Concert Specials, Inc., and Cartisim Corp., along with their owners, were alleged to have violated the BOTS Act in purchasing and reselling for profit thousands of tickets from Ticketmaster by using ticket bots to avoid Ticketmaster's restrictions on the use of multiple accounts by a single owner.¹³⁷ Each of these enforcement actions was settled in early 2021.¹³⁸ Three enforcement actions pale in comparison to the reality of a ticketing market where Ticketmaster, alone, sells an average of fifteen tickets per second, and, every year, sells nearly 500 million tickets.¹³⁹ Is the American public to believe that only three

135. See McFadden, *supra* note 15, at 427-48; Duncan, *supra* note 12; and Rebecca Beitsch, *Despite Bans, Ticket-Buying Bots Still Snag the Best Seats*, PEW CHARITABLE TRS. (Feb. 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/02/despite-bans-ticketbuying-bots-still-snap-the-best-seats>, for compelling discussions of the apparent failures of the BOTS Act and its sparse enforcement since its enactment. Even private attempts at thwarting scalpers have proven inadequate, including singer Adele's attempt to only allow fans access to pre-sale tickets through the website, Songkick. Kreps, *supra* note 5. Despite this change in access intended to benefit the fans, tickets to her sold-out shows were listed extremely over their initial sales prices on resale websites, much to the artist's and her fans' chagrin. *Id.* Adele once again attempted to strongarm scalpers out of purchasing tickets for her 2022 Las Vegas Residency at Caesars Palace by using the Ticketmaster Verified Fan Program. Dave Brooks, *Adele's Las Vegas Residency Is Her Most Exclusive and (Likely) Expensive Outing Yet*, BILLBOARD (Dec. 6, 2021), <https://www.billboard.com/pro/adele-2022-residency-ticket-pricing-scalpers-vegas>. However, her attempts proved unsuccessful, as scalpers listed residency tickets at exorbitant prices moments after they went on sale. Rangi Hirini, *Scalpers Selling Adele Tickets for Up to \$75K for Las Vegas Shows*, PERTHNOW (Dec. 9, 2021, 11:38 PM), <https://www.perthnow.com.au/entertainment/scalpers-selling-adele-tickets-for-up-to-75k-for-las-vegas-shows-c-4893329>. Fans were quick to voice their frustrations online, with one commenter writing "A big F**CK YOU to all the people who . . . bought \$680 front seat Adele presale tickets just to re[sell] for \$4K+." *Id.* With private attempts at thwarting scalpers resulting in few results, many, including Eric Church, believe there must be action taken on the federal level to correct the frustrating problem. Hyman, *supra* note 13.

136. Fair, *supra* note 78 (discussing the recent, first enforcements of the BOTS Act).

137. *Scalpers Handed \$31M in Penalties in First U.S. BOTS Act Case*, TICKETING BUS. NEWS (Jan. 25, 2021), <https://www.theticketingbusiness.com/2021/01/25/resellers-fined-3-7m-in-first-case-under-us-bots-act> (detailing the three actions taken under the BOTS Act that were settled in early 2021).

138. Press Release, U.S. DEP'T OF JUST., *supra* note 75 (announcing the settlement of the Federal Trade Commission's first BOTS Act enforcement action targeting companies utilizing ticket bots to purchase and sell large quantities of tickets in the secondary market).

139. *Ticketmaster Makes the World a Stage with Salesforce*, SALESFORCE, <https://www.salesforce.com/customer-success-stories/ticketmaster> (last visited July 25, 2022) (discussing Ticketmaster's success as an online ticketing platform); Press Release, U.S. DEP'T OF JUST., *supra* note 75 (discussing the first three settlements which arose in 2021 out of BOTS Act enforcement actions).

scalping companies have purchased tickets by circumventing security measures using bot software from a single major platform, which sells tickets to a wide variety of concerts, events, and sports games, in the last five years since the enactment of the BOTS Act?¹⁴⁰ It seems rather unlikely, considering the drastic amount of tickets sold by Ticketmaster, alone—not to mention that other primary sales websites, such as Telecharge for Broadway shows, exist and sell numerous tickets daily.¹⁴¹

In fact, the current acting Federal Trade Commission Chair, Rebecca Kelly Slaughter, confirmed that the Act has not worked as well as intended, in a statement, saying “[i]f we see the same kinds of violations from the same kinds of companies again and again, that tells me that what we have done so far isn’t working.”¹⁴² Likewise, in 2020, the then-Chief Operations Officer of Ticketmaster, Amy Howe, stated in congressional testimony that, despite the enactment of the BOTS Act, the number of bots Ticketmaster has blocked from its site has grown exponentially, making the site attempt to employ other tools, including purchase limits, digital queues, and waiting rooms to curb the problem.¹⁴³

Many concertgoers and performing artists continue to feel as though the system is not working, and complaints about resale practices have continued to be lodged with over twenty states and the Federal Trade Commission since the Act’s enactment.¹⁴⁴ All of the complaints

140. Press Release, U.S. DEP’T OF JUST., *supra* note 75; *Ticketmaster Makes the World a Stage with Salesforce*, *supra* note 139. The answer to the question posed is no, in many respects. See generally Duncan, *supra* note 12 (discussing consumer gripes with the secondary ticketing market); *Bad Bot Report 2021*, *supra* note 28 (discussing the frequency with which bots’ users infiltrate ticketing websites). It would be irresponsible to answer the question in any other way, especially since there is proof of bot traffic being astronomical in 2020 alone and there have been hundreds of complaints lodged with both state governments and the Federal Trade Commission regarding the online ticket market. See Duncan, *supra* note 12; *Bad Bot Report 2021*, *supra* note 28.

141. Press Release, U.S. DEP’T OF JUST., *supra* note 75 (highlighting the first enforcement actions taken using the BOTS Act); *Ticketmaster Makes the World a Stage with Salesforce*, *supra* note 139 (discussing Ticketmaster’s success as a company, selling millions of tickets per year); TELECHARGE, <https://www.telecharge.com> (last visited July 25, 2022) (advertising for Broadway shows and selling tickets to fans seeking to attend Broadway shows daily).

142. Duncan, *supra* note 12. For the acting Chair of the Federal Trade Commission to admit to believing that the legislation has not served its purpose, it must have significantly failed. See *id.*

143. *Id.* (quoting Ms. Howe’s February 2020 congressional testimony—“in spite of the passage of the BOTS Act (of which Ticketmaster was a staunch supporter), the number of bots Ticketmaster has blocked from our site [since 2016] has continued to grow exponentially.”). The authors of a previous Imperva study said it best: “[n]o matter what preventative measures ticketing platforms adopt to provide fair access to tickets, there are economically motivated adversaries actively looking to escalate the arms race.” *Id.*

144. *Id.* Consumer frustration is a hallmark of the need for this legislation and was one of the main reasons it was proposed and enacted. *Id.*; Fair, *supra* note 78. Consumers continuing to be frustrated despite its enactment seems antithetical to its desired effect. Duncan, *supra* note 12.

included some form of the question: “How is this legal?”¹⁴⁵ These resale practices truly should not be legal, and, by only being enforceable against resellers that use circumvention software to purchase tickets for resale, the BOTS Act has not entirely remedied the issue.¹⁴⁶

Having not been passed, The Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act has in no way helped the problem; nor would punishment under the Act be enough to curb the practices of these secondary sellers.¹⁴⁷ Even if this proposed legislation were signed into law, it still would not provide the stringent protection to consumers of creating a cap on the amount which a ticket may be marked up when placed on the secondary market.¹⁴⁸ It would keep secondary sales actors from deceiving the consumer with tickets that are not in its possession or fake tickets, but it would allow them to continue selling valid tickets at an exorbitant profit, completely unregulated.¹⁴⁹

Some argue that scalping is par for the course, saying it is a “free enterprise” and that is “what America is based on.”¹⁵⁰ Others argue that because consumer demand is what drives the market, the prices on the secondary market are not unreasonable and are instead a reflection of the basic concept of supply and demand.¹⁵¹ Many resale website gurus, such as the director of public policy at Vivid Seats, another resale giant, argue that bots are not necessarily the reason tickets sell out fast and wind up priced higher on the secondary market.¹⁵² Instead, they believe that venues, which save portions of their ticket inventory for media, high-profile guests, or friends, create “an illusion of scarcity and

145. Duncan, *supra* note 12.

146. See *id.* In fact, complaints lodged with state attorneys general and the Federal Trade Commission suggest that bots have continued to reign post-BOTS Act enactment. *Id.* This reign can be seen in complaints where consumers stated they watched tickets sell out in moments and found them minutes later on StubHub for triple their face value. *Id.* Of course, sites like StubHub say they require sellers on their websites to comply with all state and federal laws, but their directors decline to comment on how many sellers the sites have actually disciplined for posting tickets that were obviously purchased using bots. *Id.* This is likely because resale sites earn high fees from the resale of tickets on their platforms. *Id.*

147. See H.R. 3248-Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/3248/all-actions> (last visited July 25, 2022) (discussing the last action which has been taken on this proposed legislation).

148. H.R. 3248 (declining to regulate the maximum price at which a ticket may be sold on the secondary market). Without a cap, ticket resellers may continue to sell tickets at an exorbitant profit. See Duncan, *supra* note 12 (discussing the eagerness of resellers to turn a profit on secondary tickets).

149. See H.R. 3248.

150. Duncan, *supra* note 12 (quoting scalpers in defense of their practices which were objected to by the public).

151. Sturman, *supra* note 37, at 966 (making the supply and demand argument).

152. Duncan, *supra* note 12 (quoting the VividSeats director of public policy).

[manufacture] artificially higher [ticket] prices” through engagement in that practice.¹⁵³ Finally, it has been argued that a consumer being unable to purchase a ticket to a highly-desired event is not a “cognizable harm” and, therefore, cannot be remedied at law.¹⁵⁴ These attitudes favor the reseller rather than the consumer that the BOTS Act was intended to protect, and they are flawed in that they do not at all take into account the interests of the countless performing artists and consumers who desperately seek some form of regulation for this market.¹⁵⁵ As well-said by journalist Derek Beres, “[t]he connection between a musician and a fan is sacred” and, with these resale practices in place, “the capitalistic inclinations of the few undermine a human ritual.”¹⁵⁶

A more recent bout with bots occurred in October 2021, after tickets to a much-anticipated four-show BTS¹⁵⁷ residency at the SoFi Stadium in Los Angeles almost immediately sold out in the fan presale and were not made available in a public on-sale.¹⁵⁸ Fans of the incredibly popular Korean boy band were livid when, after the tickets sold out, online scalpers began listing them on forums and other resale outlets for as high as \$50,000.¹⁵⁹ This kind of activity occurs every day, to the point

153. *Id.* (continuing the VividSeats director quote).

154. Sturman, *supra* note 37, at 966-68. While not a harm per se, a consumer’s inability to purchase a ticket to an event often either prevents them from attending the event or pushes them to enter into the secondary market where harms not even directly addressed in this Note, such as false advertising, fake websites, and scammers, often befall them. Duncan, *supra* note 12. Another abstract harm is simply the loss of the experience—the loss of the camaraderie and community that is created at a concert. Beres, *supra* note 5. While this may seem small, often, concerts are considered “once-in-a-lifetime” experiences that, if missed, will not be repeated. *See, e.g.,* Bobby Welber, *Star-Studded ‘Once-In-A-Lifetime Concert’ Planned for New York*, HUDSON VALLEY POST (June 8, 2021), <https://hudsonvalleypost.com/star-studded-once-in-a-lifetime-concert-planned-for-new-york> (describing an upcoming concert as “once-in-a-lifetime”).

155. *See* Duncan, *supra* note 12 (citing a myriad of complaints filed by consumers to state and federal entities about resale practices that seem like they should be illegal and discussing the Federal Trade Commission’s own admission that, because its resources are scarce, its enforcement actions for the BOTS Act have been even scarcer).

156. Beres, *supra* note 5. Fans and artists alike want this issue to be remedied, yet it simply has not yet been, prompting frustration from all parties involved, except the scalpers who profit from the lack of regulation. *Id.*; Rau, *supra* note 3.

157. Park Jun-hee, *From Music to Fashion, BTS Is the Music Style Icon*, KOREA HERALD (Oct. 19, 2021, 1:25 PM), <http://www.koreaherald.com/view.php?ud=20211018000915>. BTS is a Korean boy band that debuted in 2013 and became a globetrotting, international pop culture sensation with multiple megahits. *Id.*

158. Waqar, *supra* note 3; Ruhalter, *supra* note 1. For fans of a foreign band such as BTS, this ticketing issue can be incredibly frustrating, as these bands visit the United States for only short periods of time prior to returning home. *See* Waqar, *supra* note 3.

159. Waqar, *supra* note 3 (highlighting screenshots of tweets from fans of BTS, livid about the resale of tickets to the shows they so desperately wanted to attend); Jacob Smith, *BTS Concert: Resale Price of Tickets for Permission to Dance on Stage*, MINDLIFE TV (Nov. 26, 2021), <https://mindlifetv.com/musicians/bts-concert-resale-price-of-tickets-for-permission-to-dance-on->

where, as this Note is written, news of scalpers dominating the secondary market for tickets to a much-anticipated event is spreading, yet, somehow, only three companies have been faced with an enforcement of the BOTS Act, and all three have settled.¹⁶⁰ This may, in part, be because the BOTS Act only applies to the knowing resale of tickets purchased using circumvention software—it does not prevent individual mass-purchasing or resale of tickets at prices far exceeding the prices at which the tickets were initially listed.¹⁶¹ Therefore, even if the BOTS Act were applied to some of these scalpers, many others (perhaps even many involved in the BTS situation) would continue to operate completely unregulated, making the BOTS Act insufficient to curb this practice.¹⁶² For the BOTS Act to have been enacted in 2016, and only enforced in 2021¹⁶³ against a mere three companies, is alone an indication of the unfortunate fact that this attempted federal regulation of ticket scalping is simply not doing enough to protect the interests of consumers or regulate the resale market.¹⁶⁴ The law is clearly not living up to lawmakers' expectations for it, and it is in need of another piece of legislation that will work alongside it to make it more effective at combatting this multi-million dollar problem, both with bots and greedy resellers as a whole.¹⁶⁵

IV. LET'S TALK SOLUTION

A more detailed piece of legislation should be enacted by Congress, to be enforced by the Federal Trade Commission, providing for resale of

stage (discussing the drastic increase in price between the BTS tickets initially sold through the Ticketmaster presale and the tickets being listed on the secondary market).

160. See Press Release, U.S. DEP'T OF JUST., *supra* note 75; and Alvaro Puig, *Cracking Down on Ticket Bots That Leave You Out in the Cold*, FED. TRADE COMM'N (Jan. 22, 2021), <https://www.consumer.ftc.gov/blog/2021/01/cracking-down-ticket-bots-leave-you-out-cold>, for a discussion of the only enforcement actions taken under the BOTS Act. See generally Waqar, *supra* note 3 (discussing an October 2021 issue with bots dominating a ticket sale).

161. See Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401 (codified at 15 U.S.C.A. § 45c (2016)) (regulating only the use of circumvention software in purchasing and reselling tickets and lacking language regulating any other scalping activity).

162. See *id.*

163. Press Release, U.S. DEP'T OF JUST., *supra* note 75 (discussing the 2021 enforcement).

164. See *id.*

165. See *id.* It is estimated that a single ticket bot can purchase up to 1,012 tickets to a single concert within the first minute of general ticket on sale, and bad bots make up over thirty-nine percent of ticketing websites' web traffic. See *Everything You Need to Know About Ticket Bots*, *supra* note 80. While the BOTS Act has been enforced, it has not by any stretch corrected the secondary ticket market issue, let alone the ticket bot issue. See Press Release, U.S. DEP'T OF JUST., *supra* note 75; McFadden, *supra* note 15, at 459-60. Another piece of legislation regulating the ticketing market alongside the BOTS Act is long overdue. See *infra* Part IV.

event tickets at no more than ten percent of their face value.¹⁶⁶ This legislation, which should borrow from the legislation which was recently enacted in parts of Australia, should provide that five percent of the inflated cost be routed back to the primary seller of the tickets, and should hold the online resale websites, such as Ticketmaster¹⁶⁷ and StubHub, which encourage and profit from this resale practice liable to regulate this rerouting of the funds and the ten percent above face value requirement.¹⁶⁸ Such liability should be enforced by imposing sanctions on those resale websites which do not regulate and reroute funds,¹⁶⁹ should allow for a one percent incentive for these resale websites to ensure they comply with the regulations, and should allow states to continue regulating local resale, such as distance from the venue requirements, and online resale as they see fit, so long as their individual laws comport with the federal regulation.¹⁷⁰

Subpart A will discuss in more detail the legislation's application to secondary ticketing websites.¹⁷¹ Subsequently, Subpart B will discuss the legislation's application to individuals, companies, and corporations who list tickets for sale on these websites.¹⁷² Finally, Subpart C will

166. Ticket Scalping Bill 2021 (WA) (Austl.). This portion of the language will be taken from Ticket Scalping Bill 2021 (WA) (Austl.). See *infra* Part II.C. However, face value in this legislation will be defined as the price of the ticket plus service fees paid at the time of the ticket purchase, which makes this legislation's definition different from the typical definition of face value, *Face Value*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/face%20value> (last visited July 25, 2022), which would be the value actually indicated on the face of the ticket.

167. See Porcello, *supra* note 10, at 281-84 (defining Ticketmaster as a "primary marketer," despite its participation in the resale market).

168. See *id.* at 259-98 (discussing the resale websites and inspiring this portion of the proposed legislation).

169. See Ticket Scalping Bill 2021 (WA) (Austl.). This Bill imposes a penalty on publications which allow advertisements of tickets priced over 110% of the initial ticket value. *Id.* The American legislation should mirror this penalty and impose a fine on ticketing websites which do not comply with the 110% cap placed on the ticket resale price by the federal legislation. See *id.*

170. See *id.* This legislation was inspired by the Western Australian law; however, the percentage provisions dividing up the ten percent were inspired by the fact that tickets put up for resale are often sold at a profit, and the original sellers of tickets do not benefit from those tickets being resold for a profit. Kreps, *supra* note 5 (pointing out that artists do not profit from the resale of tickets to their events). Because this law will apply to the resale of tickets in the online secondary market, state and local scalping legislation continuing to remain in effect will provide for holistic regulation of the entire secondary market. See Lane, *supra* note 14 (discussing the states' local approaches to non-internet resale which shall be allowed to remain in effect even if the proposed legislation is passed so long as they do not expressly contradict the language of the proposed legislation).

171. See *infra* Part IV.A.

172. See *infra* Part IV.B.

explain why the proposed course of conduct would be a solution to the problem.¹⁷³

A. *Secondary Ticketing Website Liability and Incentive*

Secondary ticketing websites, which advertise, encourage, and profit from the practice of reselling tickets, should be required to have a database through which they reroute five percent of the inflated cost to the initial seller of the tickets—be it an artist, sports team, or theatre production.¹⁷⁴ The law should borrow from the language presented in the Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act and call for the permitted ten percent markup to be clearly displayed on the website for consumers to view prior to purchasing tickets, including a breakdown of the percentages and where they will be going, so the consumer will know exactly what they are paying for the ticket and where that money is going.¹⁷⁵ This will allow for consumers to confidently make their purchase, will make it easier for the ticketing websites to monitor activity, and will allow the government to enforce the law.¹⁷⁶

These websites should also be required to have the percentage policy posted on their website conspicuously, in a pop-up screen that cannot be passed without the party listing the tickets agreeing to abide by the policy.¹⁷⁷ In accordance with the posted policy, these websites should also be required to monitor the listings on their websites to ensure that the third parties selling tickets on their platforms are not

173. See *infra* Part IV.C.

174. See generally Porcello, *supra* note 10, at 263-67 (discussing the resale websites and inspiring this portion of the proposed legislation). The primary seller of a ticket typically does not receive any profit from the resale of the same ticket on the secondary market, and this provision is intended to remedy that situation. See Duncan, *supra* note 12.

175. See Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, H.R. 3248, 116th Cong. (1st Sess. 2019), <https://www.congress.gov/bill/116th-congress/house-bill/3248/text> (imposing a requirement that the secondary ticket seller include, with any listing of the price of a ticket on the secondary ticket seller's website or in any promotional material where the ticket price is listed, all ancillary charges related to the purchase of a ticket). This requirement should be imposed upon the secondary ticketing website when marking up a resale ticket in order to maintain transparency for the purchaser. See Duncan, *supra* note 12 (discussing fans' desire for clarity and transparency in purchasing tickets in the secondary market).

176. See generally Duncan, *supra* note 12 (discussing consumers' trepidation when purchasing tickets through the secondary market); *infra* Part IV.A (discussing the requirement for websites to monitor listings); *infra* Part IV.A (discussing the requirement for a clear way to disclose violations of the law to the Federal Trade Commission).

177. See H.R. 3248 (requiring any online secondary ticket sales marketplace to post a clear and conspicuous notice that the website is engaged in secondary ticket sales which purchasers must confirm that they have read prior to starting a transaction and inspiring this portion of the proposed legislation).

listing tickets at prices which exceed the maximum proscribed limit.¹⁷⁸ Likewise, these websites should be required to have a pop-up for purchasers which informs them of this policy and gives them information on how to report any alleged noncompliance with the policy.¹⁷⁹ Consumers who encounter violations of the law should have the ability to report the violation to both the secondary ticketing website and the Federal Trade Commission through their online fraud reporting system, which should be modified to include a section for reports of this nature.¹⁸⁰ Under this legislation, secondary ticketing websites should be required to log the IP addresses of all sellers who list tickets through their website, along with all purchasers.¹⁸¹

Because the listings on these websites are made by third parties, the law should also include a provision excepting secondary ticketing websites from protection under the Communications Decency Act (“CDA”).¹⁸² If a secondary ticketing website is turning a profit based upon the third party’s resale ticket listing, it should be considered directly involved with the third party’s transaction under this legislation and should not be able to claim exemption from liability under the CDA.¹⁸³ Any actor who profits from a violation of this proposed

178. See *infra* Part IV.A (allowing secondary ticketing marketplaces to impose a service charge on the sale of tickets using their platform in order to cover all costs of website monitoring to remain in compliance with the law).

179. See *supra* note 177 and accompanying text.

180. See *Report Fraud*, FED. TRADE COMM’N, <https://reportfraud.ftc.gov> (last visited July 25, 2022). This online reporting system allows the Federal Trade Commission to “investigate and bring cases against fraud, scams, and bad business practices.” *Id.*

181. See *infra* Part IV.B. In order to determine to which jurisdiction an alleged violator will be subject, it is important for the secondary ticketing website to maintain records of the location of the IP addresses associated with resellers on their platform. See Sturman, *supra* note 37, at 958 (discussing jurisdictional issues in scalping law enforcement).

182. See Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. §§ 223, 230 (1996)) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). There is an exception in the Communications Decency Act which provides that a website is not liable for third party posts on its platform because it is simply providing a platform for the third party. See § 230(c)(1), 110 Stat. at 133. See generally *Marshall’s Locksmith Serv. v. Google, L.L.C.*, 925 F.3d 1263 (D.C. Cir. 2019) (discussing the Communications Decency Act’s applicability to content providers which host platforms for third party content providers to use). This portion of the Act should not be allowed to be invoked by secondary ticketing websites charged with violating the proposed legislation because these websites make a significant profit from the posting, advertising, and sale of tickets which third parties list through their platform. See *UNItix: StubHub Seller FAQ*, *supra* note 18.

183. See § 230(c)(1), 110 Stat. at 133. In the case of ticketing resale websites, they do not merely provide a platform for a third party to sell event tickets—they are making a profit from the third-party sale. See *StubHub Marketplace Global User Agreement*, *supra* note 9; *Purchase Policy*, *supra* note 9; *UNItix: StubHub Seller FAQ*, *supra* note 18. Therefore, they should not be deemed to meet the exception provided in the CDA, as they may be considered, in part, the publisher or

legislation will face a penalty for the violation, regardless of their status as a provider of an “interactive computer service.”¹⁸⁴

As an incentive for compliance with this regulation, the secondary ticketing websites should receive one percent of the inflated cost of the tickets being listed on their websites.¹⁸⁵ They should also be permitted to charge a small service fee on the tickets, not to exceed twenty dollars which may aid them in covering the costs associated with compliance with this regulation.¹⁸⁶ Any violation of this law by a secondary ticketing website should be treated as a violation of the Federal Trade Commission Act, specifically, under the rule defining an unfair or deceptive act or practice.¹⁸⁷ Likewise, any website which is found to have allowed individual resellers to list obviously scalped tickets, at an amount in excess of the proscribed maximum, to an event being held in the United States should be required to either restrict or completely remove these users' access to the website as a portion of the website's penalty (and the resellers' penalty) for violating the law.¹⁸⁸

speaker of the information provided by the other information content provider (i.e., the secondary ticket seller who is listing their tickets for sale on these websites). See § 230(c)(1), 110 Stat. at 133.

184. See § 230(c)(1), 110 Stat. at 133 (exempting information content providers from penalty); *supra* note 179 and accompanying text.

185. See Duncan, *supra* note 12 (discussing the for-profit nature of the secondary ticketing market). Of course, these websites seek to turn a profit, and, indeed, must make a profit in order to remain in business. See Julia Glum, *Why Ticket Service Fees Are So Annoyingly High—and How to Avoid Them*, MONEY (June 24, 2021), <https://money.com/why-are-ticket-service-fees-so-high> (discussing how secondary ticketing companies make a profit from charging fees); *UNltx: StubHub Seller FAQ*, *supra* note 18 (breaking down the current percentages of ticket sales taken by a popular secondary ticketing market, StubHub). This legislation does not seek to remove all profits from this business, rather it seeks to keep costs down for consumers who find themselves purchasing tickets on the secondary market because the primary market no longer has stock to be sold. See generally Duncan, *supra* note 12 (highlighting the predicament in which consumers are placed when they seek to purchase tickets to an event which has already sold out on the primary market and inspiring this solution).

186. See Glum, *supra* note 185. These websites charge service fees in order to cover operating costs and service the technology that powers their systems. *Id.* In order to implement more technology to comply with this law, these companies should be permitted to charge a small fee in order to “actually keep [their] lights on.” *Id.*

187. Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, H.R. 3248, 116th Cong. (1st Sess. 2019), <https://www.congress.gov/bills/116/congress/house-bill/3248/text> (“A violation of a rule . . . shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under [§] 18(a)(1)(B) of the Federal Trade Commission Act.”).

188. See *infra* Part IV.B (discussing individual penalties for violation of the law). In order for these websites to not violate the law multiple times, they should restrict or remove individuals who violate the law using their platform. See *infra* Part IV.B.

B. Individual Reseller Penalty

The proposed legislation should impose a high penalty on parties who list tickets for resale on the internet above the 110% maximum proscribed by the law.¹⁸⁹ Each individual party that violates the law should be subject to disgorgement¹⁹⁰ of all profits made in excess of the specified limit and pay a fine of no less than \$20,000.¹⁹¹ This portion of the legislation would stray from the Australian model, which provides only for a \$20,000 fine for people who resell tickets over the legal limit, and would instead, incorporate that fine as a penalty along with the disgorgement provision.¹⁹² Resellers who profit from the business of overmarking tickets in the secondary online market make millions of dollars a year, sometimes netting over a million for sales of tickets to a single engagement.¹⁹³ If the proposed legislation adopts the \$20,000 limit, without more, these resellers may consider that a small price to write off their bottom line and continue to violate the law.¹⁹⁴ Instead, the law should be a punishment for the violation, not merely a small inconvenience.¹⁹⁵ Should a violator that is selling tickets to events located in the United States in excess of the proscribed price cap be found to be located outside of the United States, they should be subject to the jurisdiction of the federal government and be fined according to the same federal scheme as violators within the United States.¹⁹⁶

189. See Ticket Scalping Bill 2021 (WA) (Austl.) (proscribing the 110% maximum, providing for penalties for violating this maximum, and inspiring this portion of the law).

190. *Disgorgement*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/disgorgement> (last visited July 25, 2022) (“A remedy requiring a party who profits from illegal or wrongful acts to give up any profits he or she made as a result of his or her illegal or wrongful conduct.”).

191. See Ticket Scalping Bill 2021 (WA) (Austl.) (containing a provision requiring a \$20,000 fine for violation of the law and inspiring this portion of the legislation).

192. See *id.*

193. See Kreps, *supra* note 5. Scalpers selling tickets for Broadway performances of the hit musical *Hamilton* at one point were profiting roughly \$250,000 per week off of fans desperate to see the show. *Id.* A single scalping operator, utilizing bots to purchase tickets from primary sales websites, earned \$42 million in 2013. Duncan, *supra* note 12. A \$20,000 fine pales in comparison to this kind of profit. See *id.*; Ticket Scalping Bill 2021 (WA) (Austl.).

194. See McFadden, *supra* note 15, at 460 (detailing why the BOTS Act would not be effective—“[t]he civil and criminal penalties are low enough to leave scalpers with enough profit to justify continuing it”).

195. See generally Kreps, *supra* note 5 (discussing the exorbitant profits made by scalpers); Duncan, *supra* note 12 (echoing the Kreps article).

196. See 15 U.S.C. § 45 (2006) (“This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless such methods of competition have a direct, substantial, and reasonably foreseeable effect on commerce which is not commerce with foreign nations.”). See also Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, H.R. 3248, 116th Cong. (1st Sess. 2019), <https://www.congress.gov/bill/116th-congress/house-bill/3248/text> (including a provision for federal jurisdiction over foreign violators under this section of the U.S. Code).

Those who violate the law and are found to have used bots to purchase the tickets being sold above the 110% cap should also be subject to penalty under the BOTS Act, which should remain in effect alongside this legislation.¹⁹⁷ Those who do not commit offenses online should continue to be subject to state and local scalping regulations, so long as those regulations do not conflict with the federal legislation.¹⁹⁸ With online scalping being more heavily regulated, the states will be able to concentrate their legislative efforts on offline scalping and scalpers located in their state, and consumers in states which do not regulate scalping at all will remain protected regardless of their states' lack of laws regulating scalping on the internet.¹⁹⁹

C. *Why Is This a Solution?*

This legislation, enforced together with the BOTS Act, will make the internet a safer place for consumers who seek to purchase event tickets.²⁰⁰ Studies have shown that regulation of ticket scalping, specifically resale of tickets above face value, and implementation of a licensing system for resellers, stimulates event attendance.²⁰¹ This can be attributed to fans' desires to attend events without being price gouged by scalpers who buy up the tickets before fans have a chance to purchase them, and consumers' valuation of regulatory measures which protect them overall.²⁰²

Consumer protection was the goal of the BOTS Act when it was enacted in 2016, and this proposed legislation will up the BOTS Act's ante.²⁰³ Rather than merely prohibiting resale of event tickets purchased using circumvention software, this legislation will completely regulate

197. See Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401 (codified at 15 U.S.C.A. § 45c (2016)) (penalizing those who utilize bots to circumvent security measures on primary ticket sales websites in order to purchase large quantities of tickets and resell them on the secondary market).

198. See *supra* Part II.A (discussing the states' regulation of scalping); *Secondary Ticket Marketplace*, *supra* note 38 (detailing state laws which regulate scalping).

199. See *supra* Part II.A (discussing the states' scattered approaches to scalping regulation which left citizens of different states subject to different protections regarding online scalping).

200. See generally Duncan, *supra* note 12 (discussing consumers' frustrations with the secondary ticket sales market and the way consumers have continually been exploited by this internet market which has gone relatively unregulated since its inception).

201. Melissa Boyle & Lesley Chiou, *The Effect of Ticket Resale Laws on Consumption and Production in Performing Arts Markets*, 38 E. ECON. J. 210, 212-217 (2012).

202. See, e.g., Ruhalter, *supra* note 1 (detailing one group of fans' battle to purchase tickets before scalpers bought them out and their subsequent outrage at the scalpers' resale prices); Boyle & Chiou, *supra* note 201, at 212, 220 (discussing consumers' valuation of a regulatory scheme affecting ticket resale).

203. See Armerding, *supra* note 3 (discussing the goals of the BOTS Act which were motivated by a desire to provide more comprehensive consumer protection).

the resale market, criminalizing bad bot users and simple profit-seekers alike, and broadly protecting the American ticket consumer.²⁰⁴ Together, this legislation and the BOTS Act will provide a legal landscape in which consumers' interests will be protected, while still allowing for the resale market to exist.²⁰⁵

V. CONCLUSION

The proposed legislation would be much more drastic than the BOTS Act in that it would affect all ticket resale on the internet, rather than just the resale of tickets which have been purchased through bot software designed to circumvent ticketing regulation measures taken by ticket sale websites.²⁰⁶ Likewise, it would level the regulatory scheme of the United States against internet scalping overall, making it more difficult for a scalper in one state to evade another state's scalping laws.²⁰⁷ With this law in place, alongside the BOTS Act, a significantly higher amount of scalping activity could be regulated.²⁰⁸

The legislation proposed in this Note would continue to allow all involved in the online resale market to profit in some way.²⁰⁹ The initial seller of the tickets would make a profit by receiving a percentage of the price of the resold ticket—something it does not currently receive.²¹⁰ Likewise, the resale website would make a profit by continuing to receive a small percentage of the ticket sales price, along with the small fee it would be permitted to charge on each ticket to continue to cover operating costs and expenses.²¹¹ Perhaps most importantly to those involved in reselling tickets on the internet, the reseller would continue to make a profit from reselling tickets; however, this profit would be

204. See Ticket Scalping Bill 2021 (WA) (Austl.), for context regarding the broad regulation of ticket scalping, not only regulating bots' users but also general profit-seekers.

205. See Ticket Scalping Bill 2021 (WA) (Austl.); and Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401 (codified at 15 U.S.C.A. § 45c (2016)), to understand how these laws will work together to not only penalize those who utilize circumvention software to acquire tickets, but also to completely regulate the online resale market, whether or not those tickets being resold have been purchased using bots.

206. See *supra* Part IV, § 114-274, 130 Stat. 1401.

207. See *supra* Part III.A (discussing the issues created by differing laws regarding internet resale in each of the several states).

208. See *supra* Part IV.

209. See *supra* Part IV.

210. See *supra* Part IV. Theatre productions, artists, and sports teams do not currently make a cent from the resale of tickets originally listed by them to attend their events. See generally Kreps, *supra* note 5 (discussing the secondary market resale of tickets to the musical, *Hamilton*, from which "scalpers were profiting . . . ripping off both the musical and its fans").

211. See *supra* Part IV (discussing the one percent profit to be made by resale websites and the allowance for them to charge a small fee on top of the resale price of a ticket sold on their platform).

four percent of the original ticket price, rather than the exorbitant amount that is being made in the current system.²¹² Lastly, and most importantly to the writer of this Note, artists, sports teams, theatre productions, and ticket buyers across the country, with this legislation in place, consumers would be afforded the opportunity to purchase tickets to much desired events without being priced out by greedy resellers who seek to turn a major profit.²¹³

The goal of this legislation is similar to the goal of the legislators who proposed and passed the BOTS Act and the laws in Australia and the artists who have tried so hard to combat the problem of scalping—to protect consumers from shady business practices and keep the tickets in the hands of those who want them most, the fans.²¹⁴ The effect of this legislation would be to disincentivize price gouging by internet ticket resellers, encourage transparency on secondary ticketing marketplaces, make tickets accessible to those for whom they are intended (the fans),²¹⁵ and continue to allow the secondary market to flourish, albeit regulated.²¹⁶

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212. See *supra* Part IV (allowing for a profit to be made on the resale of the ticket, capped at 110% of the original price of the ticket).

213. See Duncan, *supra* note 12. Thus, avoiding the issues highlighted by previously cited articles: fans being priced out of events the moment they go on sale and original ticket sellers not profiting on the resale of tickets. See *id.*; Devera, *supra* note 2; Kreps, *supra* note 5. This legislation will also continue to provide an outlet for resellers to sell tickets. See *supra* Part IV.

214. Spagnolo, *supra* note 99 (discussing the Australian lawmakers' goals in implementing the 2021 Ticket Scalping Bill); Armerding, *supra* note 3 (discussing American legislators' goals in passing the BOTS Act); Kreps, *supra* note 5 (discussing one artist's plea for online scalping regulation); Hyman, *supra* note 13 (discussing an artist's private attempt at combatting scalping).

215. See, e.g., Devera, *supra* note 2; Hirini, *supra* note 135; Waqar, *supra* note 3. Artists, more than anyone, want their fans to have access to tickets to their shows. Blistein, *supra* note 18 (quoting Lin-Manuel Miranda, writing, "[m]ost of all, I want you to be there when the curtain goes up"). Fans (like those in Hawaii who just wanted to see country icon Garth Brooks perform in their home state, those in Las Vegas and around the globe who sought to see Adele perform during her first-ever residency in Sin City, and those in Los Angeles and beyond who sought to see BTS perform during their historic LA residency) are frustrated and want to be there when the curtain goes up, as much as, if not more than, the artists want them there. Devera, *supra* note 2; Hirini, *supra* note 135; Waqar, *supra* note 3.

216. See *supra* Part IV.

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