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Ticket Scalping: A New Look at an Old Problem

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Social, economic and legal factors have contributed to the success of ticket scalpers. Recently enacted unfair trade practices laws now provide courts with the means to regulate scalping and to provide effective redress for aggrieved consumers.

I. THE PRACTICE OF TICKET SCALPING

Ticket scalping—the reselling of tickets to popular entertainment or sporting events at whatever price the market will bear[1]—has had a fascinating relationship with the law. Despite the public antipathy reflected in the graphic images the term "scalping" connotes, the practice has flourished.

Efforts to curb the practice have been rare and exclusively statutory.[2] Statutes seeking to proscribe the activity limit redress to criminal sanctions, and provide no civil remedies.[3] Furthermore,

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1. Some state legislatures have defined the term "scalping" to encompass the resale of tickets at any price greater than that printed on their face. *See, e.g.*, GA. CODE § 10-1-310 (1981); MICH. COMP. LAWS § 750.465 (1979). As commonly understood, however, the term is more pejoratively construed. THE DICTIONARY OF AMERICAN SLANG (H. Wentworth & F. Flexner 2nd Supp. ed. 1975) defines "scalper" as "a ticket seller or agent who buys up many tickets to a popular entertainment or sporting event and then resells them at exorbitant prices; . . . one who is not satisfied with a fair profit, but takes advantage of the public to obtain as high a price for profit as he can." *Id.* at 445. *Accord* WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2024 (P. Gove ed. 1976).

2. *See infra* text accompanying notes 17-19.

3. *See infra* notes 17-19.

many courts, including the Supreme Court of the United States,[4] have attacked these statutes as unconstitutional.[5] The courts have failed to provide common law remedies for willing buyers who have overpaid or for those who have been priced out of the market by the scalper's activities.[6] The assumption that scalping is a sacrosanct component of the American system of free enterprise has prevailed.[7]

By direct or indirect methods,[8] the professional scalper ordinarily acquires tickets from the box office and holds them until other buyers have exhausted the box office supply.[9] The scalper then offers to resell his tickets[10] at prices that are substantially, and sometimes exorbitantly, higher than their original price.[11] Since those wishing to attend the event are no longer able to obtain tickets from the box office, they are compelled either to pay the scalper or to forego attendance. The event's popularity is the

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4. *See infra* text accompanying notes 21-24.

5. *See infra* text accompanying notes 21-24, 31-33 & note 35.

6. *See infra* text accompanying notes 65-69.

7. *See infra* text accompanying notes 36-39.

8. Indirect methods include: (1) hiring others to stand in line for him—this procedure is commonly used when the promoter has imposed limits upon the number of tickets any one person can purchase from the box office; (2) buying from others who bought from the box office and are seeking to make middleman scalpers' profits; and (3) obtaining tickets from box office personnel through illicit, under the counter, mutually profitable arrangements. *See* Blount, *Hey I Got the Ducks*, SPORTS ILLUSTRATED, Feb. 5, 1979, at 32, col. 1; Goldstein, *Rock Concerts: The Mystery of the Missing Tickets*, L.A. Times, Apr. 12, 1981, Calendar, at 1, col. 1; Nack & Sullivan, *Football's Little Bighorn?*, SPORTS ILLUSTRATED, Jan. 26, 1981, at 32, col. 1; Rayl, *Drive to Stop Ticket Scalping Under Way in California*, ROLLING STONE, May 31, 1979, at 10, col. 3; *Inside the Box Office: The Case of Level 16*, L.A. Times, Apr. 12, 1981, Calendar, at 71, col. 1.

9. The box office is not the sole source of tickets. Scalpers with connections may be able to purchase from performers and other favored individuals who have received a limited supply of free tickets. Promoters of the event also may choose to reap additional profits by surreptitiously selling a block of tickets at an inflated price to a scalper. Tyson & Bros. v. Banton, 273 U.S. 418, 442 (1927); People *ex rel.* Cort Theater Co. v. Thomspon, 283 Ill. 87, 89, 97, 119 N.E. 41, 42, 45 (1918); Goldstein, *supra* note 8; Keating, *Theater Tickets: Is There a Basis for Hope?*, N.Y. Times, Nov. 15, 1964, § 2, at 2, col. 1; Nack & Sullivan, *supra* note 8; Rayl, *supra* note 8.

10. Ticket brokers do not engage in scalping. The ticket broker charges a standard fee for making tickets available at locations other than the box office and for providing convenient hours for the purchase of tickets. *See Ticketron Struggles for a Profit*, BUS. WK., June 17, 1972, at 106, col. 1.

11. It is only a minor exaggeration to say that the sky is the limit. At special events such as professional playoff games and concerts by star performers, tickets commonly sell for sums in excess of $200. Prices range from six to fifteen times the original box office charge. *See, e.g.*, State v. Spann, 623 S.W.2d 272 (Tenn. 1981) (defendant convicted of offering $32 tickets to collegiate basketball tournament game for $250). *See also* Blount, *supra* note 8; Goldstein, *supra* note 8; Pond, *Bruce Springsteen Takes on Scalpers, Wins Bootleg Suit*, ROLLING STONE, Feb. 5, 1981, at 48, col. 1.

only ceiling on the scalper's charges. In one sense, he charges the "market" price; *i.e.*, some people are still willing to purchase the tickets despite their high price. However, in the scalper's absence, the tickets he purchased for resale would have been purchased for use by consumers at the original box office price. For those to whom cost is not a relevant factor, the scalper's manipulation of price may provide a welcomed source of tickets.[12] But those unwilling or unable to pay the higher price, as well as those who pay because the scalper has foreclosed their opportunity to obtain seats at a lower price, view with contempt his intrusion into the marketplace.[13]

Promoters have additional reasons for disliking the scalper's presence.[14] The unavailability of tickets at advertised prices often damages the goodwill that promoters and sponsors of events seek to engender in order to assure the success of future events. The sudden exhaustion of box office supply, coupled with the emergence of scalpers holding an apparently abundant supply, tends to induce accusations of fraud, complicity, and collusion against the promoter.[15]

Occasionally, scalping represents a reward for financing an event's production, rather than an exploitation of the event's popularity. For example, a promoter may be willing to stage an event for which the probability of success is unpredictable only because ticket brokers are willing to assume the risk of failure by purchasing large blocks of tickets in advance of production. The broker's incentive for underwriting the venture is the hope that the event will be successful and that he will profit handsomely by "scalping" the choice tickets he has purchased.[16]

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12. The scalper assures that the wealthy will not be denied admission. Therefore, it might be argued that a public service is performed. "Everyone who is at all realistic knows that the world is run on privilege. To say that a man who won't or can't pay as much as another for the same object isn't getting a fair shake, is nonsense." Keating, *supra* note 9 (quoting statement of theatrical attorney John F. Wharton).

13. *See* Keating, *supra* note 9; Pond, *supra* note 11; *Inside the Box Office: The Case of Level 16*, *supra* note 8.

14. Amdur, *Off-Field Woes Plague N.F.L.*, N.Y. Times, Dec. 28, 1980, § S, at 4, col. 1; Rayl, *supra* note 8. Promoters' disquietude from scalping does not stem exclusively from loss of goodwill. In the words of one promoter, "It really galls me that scalpers make a great living off my business while I take all the risks." Goldstein, *supra* note 8.

15. Amdur, *supra* note 14; Nack & Sullivan, *supra* note 8. *See also* cases cited *supra* note 9.

16. For events where popularity is certain, the promoter has no need to engage in this form of hedging. When response to a particular event is not accurately predictable, such as a new play, the ticket broker may be an indispensable element in its promotion. Tyson & Bros. v. Banton, 273 U.S. 418, 450 (1927) (Stone, J., dissenting); Gold v. DiCarlo, 235 F.

It is apparent why brokers ask inflated prices for tickets to events that they underwrote at the pre-production stage. It is not as apparent, however, why the law often protects the scalper who did not underwrite the event and who seeks only to exploit its success.

II. JUDICIAL RESPONSE TO ANTI-SCALPING LEGISLATION

Less than one-fourth of all states currently have statutes that regulate the resale price of tickets to entertainment and sporting events.[17] These statutes either prohibit a resale price in excess of the original box office price[18] or establish a maximum profit for resales.[19]

The lack of more extensive legislative controls against scalping stems from a combination of forces and precedents. The lobbying efforts of organized ticket brokers have had some degree of success.[20] A more compelling force, however, has been the judicial response to legislation that regulates scalping.

Supp. 817, 821 (S.D.N.Y. 1964); Keating, *supra* note 9.

17. *See* FLA. STAT. § 817.36 (1981); ILL. ANN. STAT. ch. 121½, para. 157.32 § 1½ (Smith-Hurd Supp. 1982); LA. REV. STAT. ANN. § 4.1 (West 1973); MASS. GEN. LAWS ANN. ch. 140, § 185D (West Supp. 1982); MICH. COMP. LAWS ANN. § 750.465 (1968); MINN. STAT. ANN. § 609.805 (West Supp. 1982); N.Y. GEN. BUS. LAW § 169-c (McKinney Supp. 1981); N.C. GEN. STAT. § 14-344 (1981); 4 PA. CONS. STAT. § 211 (1981); TENN. CODE ANN. § 39-4041 (1975). A few additional states have anti-scalping statutes of limited ambit. For example, the Connecticut statute applies solely to events sponsored by educational institutions. *See* CONN. GEN. STAT. § 53-289 (1981). The Wisconsin statute only deals with events promoted by the University of Wisconsin. *See* WIS. STAT. ANN. § 36.50 (West 1966).

The laws of Georgia and South Carolina are restricted to athletic events. *See* GA. CODE ANN. § 10-1-310 (1981); S.C. CODE ANN. § 16-17-720 (Law. Co-op. 1976). In Arizona and California, the statutes limit prices for tickets to boxing or wrestling events. *See* ARIZ. REV. STAT. ANN. § 5-204 (1974); CAL BUS. & PROF. CODE § 18710 (West 1964). A separate California statute prohibits the resale of a ticket to any entertainment or athletic event for an amount in excess of the price stated on the face of the ticket, but this statute applies only to resales made on the premises where the event is held. CAL. PENAL CODE § 346 (West Supp. 1982).

18. *See* ILL. ANN. STAT. ch. 121½, para. 157.32, § 1½ (Smith-Hurd Supp. 1982); LA. REV. STAT. ANN. § 4:1 (West 1973); MICH. COMP. LAWS ANN. § 750.465 (1968); MINN. STAT. ANN. § 609.805 (Supp. 1982); TENN. CODE ANN. § 39-4101 (1974).

19. The Florida and North Carolina statutes prohibit profits exceeding one dollar per ticket on resale. *See* FLA. STAT. § 817.36 (1981); N.C. GEN. STAT. § 14-344 (1981).

New York and Pennsylvania statutes allow a two-dollar profit. *See* N.Y. GEN. BUS. LAW § 169-c (McKinney Supp. 1981); 4 PA. CONS. STAT. § 211 (1981). Massachusetts has a modified two-dollar maximum. One who charges in excess of that amount is in violation of the law unless he can prove that the excess is attributable solely to service charges. MASS. GEN. LAWS ANN. ch. 140, § 185D (West Supp. 1982).

20. The strength of the scalpers' lobby in California has been a primary force in that state's refusal to pass anti-scalping legislation. *See* Pond, *supra* note 11; Goldstein, *supra* note 8.

In 1927, the Supreme Court decided the case of *Tyson & Brother v. Banton*.[21] At issue was the constitutionality of a New York City ordinance that prohibited the resale of any ticket to a theater or place of amusement or entertainment at a price in excess of fifty cents beyond the price printed on the face of the ticket. The city enacted the ordinance to protect consumers from the extortionate prices demanded by ticket brokers who, having purchased the available box office supply, had a virtual monopoly on preferred tickets to popular theater events.

The Court determined that the ordinance was unconstitutional because it was a governmental attempt to regulate prices.[22] The Court stated that, absent an emergency, price regulation was permissible only when the business to be regulated was "affected with a public interest."[23] The entertainment industry, despite its importance to the public, did not satisfy this criterion;[24] therefore, the ordinance was held to be unconstitutional.

The rule established by *Tyson*, that price regulation is beyond the ordinary police power of the states, was short-lived. In 1934, the Supreme Court in *Nebbia v. New York*[25] upheld a state statute fixing the minimum and maximum retail prices of milk. The Court stated that "the expressions 'affected with a public interest,' and 'clothed with a public use,' . . . as the criteria of the validity of price control . . . are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices."[26] In *Olsen v. Nebraska ex rel. Western Reference & Bond Association*,[27] the Court once again rejected the *Tyson* rationale and upheld a state's regulation of fees that employment agencies could charge. The Court stated that "[t]he standard . . . used in [*Tyson*] . . . was that the constitutional validity of pricefixing legislation, at least in the absence of a so-called emergency, was dependent on whether or not the business in question 'was affected with a public interest' . . . . That test . . . was discarded in *Nebbia v. New York* . . . ."[28]

While the Supreme Court has not expressly overruled its holding in *Tyson*, it has affirmed per curiam a district court ruling that

21. 273 U.S. 418 (1927).
22. *Id.* at 440.
23. *Id.* at 430 (quoting Munn v. Illinois, 98 U.S. 113, 126 (1876)).
24. *Id.* at 434.
25. 291 U.S. 502 (1934).
26. *Id.* at 536.
27. 313 U.S. 236 (1941).
28. *Id.* at 245.

upheld the constitutionality of anti-scalping legislation. The case was *Gold v. DiCarlo*.[29] The statute in *Gold* prohibited the resale of tickets to public amusements at more than one dollar and fifty cents, plus lawful taxes, in excess of the price on the face of the tickets.[30] In upholding the statute, the district court noted, "[W]e would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words 'We hereby overrule *Tyson*' . . . before recognizing that the case is no longer binding precedent but simply a relic for the constitutional historians."[31]Several state courts in recent years also have upheld statutes regulating scalping.[32] However, the impact of *Tyson* and its "public interest" standard are still evident. As recently as 1973, in *Estell v. City of Birmingham*,[32] the Alabama Supreme Court applied the "affected with a public interest" test to invalidate an anti-scalping ordinance. The *Estell* court stated, "[W]e have yet to find in this state . . . where the business of the resale of tickets for admission to places of public entertainment has been held to involve the 'public interest.' "[33]

Although most of the challenged anti-scalping statutes have been upheld in the state courts,[34] *Estell* is a reminder that *Tyson* remains more than a "relic for the constitutional historian." *Tyson* continues to inspire some state courts to view legislatures as lacking the power to regulate the scalping of tickets for entertainment events,[35] which in turn thwarts and discourages legislative efforts

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29. 235 F. Supp. 817 (S.D.N.Y. 1964), *aff'd per curiam*, 380 U.S. 520 (1965).

30. *Id.* at 819.

31. *Id.* The district court concluded that protection from excessive prices for public amusement was a constitutionally permissible legislative objective to which the statute bore a rational relation. *Id.* at 820.

32. *See, e.g.*, State v. Major, 243 Ga. 255, 253 S.E.2d 724 (1979); People v. Patton, 57 Ill. 2d 43, 309 N.E.2d 572 (1974); State v. Youker, 36 Or. App. 609, 585 P.2d 43 (1978) (challenge of municipal ordinance rather than state law); State v. Spann, 623 S.W.2d 272 (Tenn. 1981). With the exception of *Youker*, each of the above cases referred specifically to *DiCarlo* and *Gold*.

32. 291 Ala. 680, 286 So. 2d 872 (1973).

33. *Id.* at 682, 286 So. 2d at 874. The challenged ordinance declared it "unlawful for any person to sell or dispose of a ticket to a theatrical performance, show, exhibition or entertainment . . . at a higher price for admission than that advertised by the proprietor or manager." *Id.* at 681, 286 So. 2d at 873.

34. *See supra* note 32.

35. Another state case that discussed *Tyson* in striking down an anti-scalping statute was Kutley v. State, 227 Ind. 175, 84 N.E.2d 712 (1949). Some states declared their anti-scalping statutes unconstitutional prior to *Tyson*. In People v. Steele, 231 Ill. 340, 83 N.E. 236 (1907), the Supreme Court of Illinois declared a statute, which prohibited the resale of tickets for a price in excess of that printed on the face thereof, to be unconstitutional. The court applied reasoning similar to that employed in *Tyson*. The statute was never repealed,

to regulate the field.

III. Is Scalping Reflective of the Free Enterprise System?

Another reason that scalpers have escaped extensive governmental regulation is the underlying belief that scalpers reflect the American spirit of free enterprise.[36] The public may view scalping as a "kind of wildcat grass-roots capitalism"[37] that is no more deserving of condemnation or governmental regulation than are traditional forms of speculation and merchandising. As the California Supreme Court explained:[38]

> The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of any ordinary article of merchandise at a profit. It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto, and having neglected that opportunity, or being unwilling to undergo the necessary inconvenience, and willing to pay a higher price than forego the privilege which the other by his greater diligence and effort had obtained, the transaction is just so far as he is concerned.[39]

As long as this argument finds acceptance, legislative and judicial reluctance to inhibit the activities of scalpers will continue.

A. *Equating the Scalper with the Retail Merchant*

In ordinary commercial transactions, the merchant is an essential component of the marketing process; he provides the consumer

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however. In People v. Patton, 57 Ill. 2d 43, 309 N.E.2d 572 (1974), the court overruled *Steele* and declared the same statute to be constitutional, citing authority declaring the *Tyson* approach to price regulation to be no longer relevant. In *Ex parte* Quarg, 149 Cal. 79, 84 P. 766 (1906), the California Supreme Court declared a statute substantially identical to the Illinois statute to be unconstitutional. Thereafter, the legislature repealed the law, so that its rebirth in a situation similar to *Patton* would be impossible.

36. *See, e.g.*, Estell v. City of Birmingham, 291 Ala. 680, 683, 286 So. 2d 872, 875 (1973); *Ex parte* Quarg, 149 Cal. 79, 81, 82, 84 P. 766, 767 (1906).

37. Blount, *supra* note 8.

38. *Ex parte* Quarg, 149 Cal. 79, 84 P. 766 (1906) (holding California anti-scalping act constitutionally invalid).

39. *Id.* at 81-82, 84 P. at 767; *see also Estell*, 291 Ala. at 683, 286 So. 2d at 875.

with the conveniences of accessibility and centrality.[40] Additionally, he provides the manufacturer with the ability to concentrate his activities on manufacturing, thereby promoting efficiency and productivity.[41] The merchant possesses an unquestioned right to make a profit for the vital services he performs. There is generally no need to regulate his prices even though they may be excessive; if consumers adjudge his prices to be unreasonable, they have the freedom to purchase the desired goods or services from less expensive merchants.[42]

The scalper's activities stand in stark contrast to those of the merchant. Instead of providing a recognized and essential service in the marketing process, the scalper deprives consumers of a valuable, previously existing service—the availability of tickets through the box office. As the scalper depletes the box office supply of tickets,[43] he lessens the consumer's opportunity to purchase at the lowest price. The scalper eliminates the lower-priced competition, thus creating his own market.[44] No alternative source exists at the original price.[45] Although people who want to obtain tickets can choose among scalpers (provided there is more than one), they cannot avoid the exorbitant prices. The decision to attend the event compels the courting of the scalper. The scalper obtains the higher price as a result of his intrusion into the market. Equating the scalper's activities with those of ordinary retail merchants is untenable.

B. *Equating Scalper's Price with Free Market Price*

The elimination of constitutional impediments to price regulation has not dampened the widely held conviction that the market-

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40. W. BOLEN, CONTEMPORARY RETAILING 6-7 (1978); D. DUNCAN & C. PHILLIPS, RETAILING PRINCIPLES & METHODS 4 (7th ed. 1967); W. WENTZ, MARKETING 208 (1979).

41. W. BOLEN, *supra* note 40; W. WENTZ, *supra* note 40, at 209.

42. W. BOLEN, *supra* note 40, at 205-06; D. DUNCAN & C. PHILLIPS, RETAILING PRINCIPLES & METHODS 402-04 (9th ed. 1977); R. HOLLOWAY & R. HANCOCK, MARKETING IN A CHANGING ENVIRONMENT 448-61 (2d ed. 1973).

43. *See supra* text accompanying notes 8-9 & note 8.

44. When tickets to all choice seats have been sold, the scalper may have a market even though the box office continues to have a supply of tickets for less favorable seats. The effect remains the same. "A virtual monopoly of the best seats . . . is thus acquired and the brokers are enabled to demand extortionate prices . . . ." Tyson & Bros. v. Banton, 273 U.S. 418, 450 (1927) (Stone, J., dissenting).

45. "It is true that individuals are not forced to buy tickets from scalpers, and are acting upon their own volition, but they are making their choice between paying the higher price and not witnessing the performance to which the public are invited." People *ex rel* Cort Theater Co. v. Thompson, 283 Ill. 87, 98, 119 N.E. 41, 45 (1918).

place remains the soundest determinant of price and that imposed limits are, in the long run, antithetical to a healthy economy.[46] Although lawmakers have been reluctant to set ceilings on market price, they have regulated private attempts to unfairly influence that price. Laws restricting agreements in restraint of trade[47] and monopolistic business practices[48] are two obvious examples of governmental efforts to protect the market from unfair private manipulation. These laws, to the extent that they are effective, necessarily affect market price because they inhibit the distortions that would otherwise occur. Nevertheless, they are perceived as protectors, not regulators, of market price.

The scalper manipulates price. Through the tactic of removing a supply of tickets from the original intended marketplace,[49] the scalper has deprived consumers of the ability to purchase at the established market price. Having eliminated the original market, the scalper is now freed of previously existing restraints and has empowered himself to set new, substantially higher, prices.[50]

Resistance to anti-scalping controls, for the most part, results from a failure to recognize that such controls are imposed not to thwart the market process but to prevent unfair manipulation of that process. Limiting opportunities to manipulate prices is an integral part of the free enterprise system.

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46. *See* Cheung, *A Theory of Price Control*, 17 J. LAW & ECON. 53 (1974); Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Price Controls in the Regulated Industries*, 65 CORNELL L. REV. 303 (1980); Markovits, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare* (pt. 2), 26 STAN. L. REV. 717 (1974).

47. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ." *See generally* Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis*, 16 HOUS. L. REV. 761 (1970); Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); Comment, *Applying the Rule of Reason: A Survey of Recent Cases and Comment*, 17 SAN DIEGO L. REV. 335 (1980); Casenote, *Tying Arrangements in the Sale of Season Tickets*, 47 TEMP. L.Q. 761 (1974).

48. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States . . . , shall be deemed guilty of a felony . . . ." *See generally* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 375 (1974); Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125 (1980).

49. *But see supra* note 9.

50. Oil refiners used this method of manipulating prices in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

C. *Equating the Scalper with the Speculator*

Finally, it has been suggested that the scalper should be equated not to a merchant but rather to a speculator. This view creates an entitlement in the scalper to the same high profits that the speculator receives for incurring risks.[51] However, speculation is not totally free from legal attack. Speculative ventures that unduly exploit others are illegal.[52] Ordinarily, speculation furthers certain justifiable and acknowledged economic ends.[53] But there are significant differences between scalping and recognized forms of speculation.

Speculators often have a negligible impact on the market price and merely profit from market changes they expect, but do not create.[54] When they do affect market price, the extent of the impact is uncertain.[55] Scalpers, however, have a direct, immediate and calculable effect on prices. Without the scalper, tickets would be sold at uniform prices.

Additionally, the speculator ordinarily profits not by controlling price but rather by accurately predicting future price. He seldom manipulates the price, and if he does, his actions are likely to be illegal.[56] Scalpers, however, do manipulate price by making tickets at box office prices unavailable, thereby compelling purchasers to pay the scalpers' new, artificially high price.

When goods have a market price that fluctuates widely over time, the risk that those goods might not be sold at a profit may dissuade manufacturers from incurring the substantial costs of production. Speculators willing to commit themselves to purchase at a specified price prior to delivery, by assuming the risk them-

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51. W. BAUMOL & A. BLINDER, ECONOMICS PRINCIPLES AND POLICY 466 (1979).

52. *See* Bianco, *The Mechanics of Futures Trading: Speculation and Manipulation*, 6 HOFSTRA L. REV. 27 (1977); Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. CORP. L. 217 (1976); Purcell & Valdez, *The Commodity Futures Trading Commission Act of 1974: Regulatory Legislation for Commodity Futures Trading in a Market-Oriented Economy*, 21 S.D.L. REV. 555 (1976).

53. C. ALLEN, J. BUCHANAN & M. COLBERA, PRICES, INCOME, AND PUBLIC POLICY 356-59 (1959); W. BAUMOL & A. BLINDER, *supra* note 51, at 465-66; H. BROWN, BASIC PRINCIPLES OF ECONOMICS AND THEIR SIGNIFICANCE FOR PUBLIC POLICY 242-43 (1947); D. FUSFELD, ECONOMICS 728 (1972); M. MAYER, THE BUILDERS 313 (1978); M. ROTHBARD, MAN, ECONOMY AND STATE 513 (1970); W. SMITH, HOUSING: THE SOCIAL AND ECONOMIC ELEMENTS 131-32 (1970).

54. H. BROWN, *supra* note 53, at 242; G. SHACKLE, EPISTEMICS & ECONOMICS, A CRITIQUE OF ECONOMIC DOCTRINES 158, 225 (1972); Bianco, *supra* note 52, at 37-38; Hudson, *Customer Protection in the Commodity Futures Market*, 58 B.U.L. REV. 1, 4 (1978).

55. C. ALLEN, *supra* note 53, at 358; H. BROWN, *supra* note 53, at 242; G. SHACKLE, *supra* note 54, at 412.

56. *See supra* note 52.

selves, provide the manufacturer with the economic stability necessary to encourage continued production.[57] The ticket broker who has agreed to purchase a block of tickets from the promoter in advance of production falls within this category. By assuming the risk of failure that the promoter is not willing to incur, the broker is entitled to profit from that risk by selling his tickets at a higher price should the event prove profitable. Scalpers who merely seek to capitalize on a previously financed and publicized event, where popularity is assured, assume no such risk.

IV. Scalping as an Unfair Trade Practice

Until now, legal efforts to curtail scalping have involved governmental prosecutions of those charged with violating anti-scalping statutes or ordinances.[58] Clearly, the dearth of civil litigation in this field is not the product of public indifference. Rather, it is reflective of a glaring gap in the common law. Traditionally, consumers aggrieved by unfair, but not deceptive, business practices have had no effective judicial recourse to redress their grievances.[59] Merchants injured by unfair business practices of competitors have had available relief,[60] but consumers have not. Efforts to create a new tort of unconscionability,[61] or to include unfair business practices within established torts such as public nuisance[62] have not succeeded.[63]

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57. C. Allen, *supra* note 53, at 358-59; J. Baer & O. Saxon, Commodity Exchanges and Futures Trading 27-28 (1949); H. Brown, *supra* note 53, at 465; Bromberg, *supra* note 52.

58. *See* Annot., 81 A.L.R. 3d 655 (1977).

59. *See* Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. Rev. 559, 578 (1968); Wade & Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective through Suit by Governmental Agency*, 37 Geo. Wash. L. Rev. 1031, 1064 (1969).

60. Callmann, *What is Unfair Competition*, 28 Geo. L.J. 585 (1940); Chafee, *Unfair Competition*, 53 Harv. L. Rev. 1289 (1940); Handler, *Unfair Competition*, 21 Iowa L. Rev. 175 (1936); Comment, *Unfair Competition: A Comparative Study of Its Role in Common and Civil Law Systems*, 53 Tul. L. Rev. 163 (1978).

61. King, *The Tort of Unconscionability: A New Tort for New Times*, 23 St. Louis U.L.J. 97 (1979).

62. Comment, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. Chi. L. Rev. 590 (1966).

63. *See generally* Rice, *supra* note 59, at 578; Wade & Kamenshine, *supra* note 59, at 1064. Restrictions of substance and standing encompassed within the tort of public nuisance have precluded its usage by consumers to redress unfair business practices. Most courts have taken the position that to constitute a public nuisance, conduct must unreasonably interfere "with a right common to the general public." Conduct which unreasonably injures a substantial number of individuals, but not the public at large, is insufficient to present a cause of action. Restatement (Second) of Torts § 821B comment g (1977). *See* W. Pros-

In response to expanded consumer consciousness,[64] many states recently have enacted legislation declaring unfair trade practices to be unlawful.[65] The great majority of these statutes are similar to section 5 of the Federal Trade Commission (FTC) Act.[66] The FTC Act permits only governmental prosecution and denies private standing to rectify alleged violations;[67] however, state laws

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SER, HANDBOOK OF THE LAW OF TORTS 585 (4th ed. 1971); Reynolds, *Public Nuisance: A Crime in Tort Law*, 31 OKLA. L. REV. 318, 320-21 (1978). Because the injuries stemming from an unfair business practice are ordinarily limited to aggrieved consumers, rather than the public at large, an action for monetary or injunctive relief based on a public nuisance theory would ordinarily fail. A plaintiff capable of proving injury to the public at large would then have to establish that his injuries were unique, different not only in degree but in kind from that suffered by the general populace. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 587 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 821C comment b (1977); Estey, *Public Nuisance and Standing to Sue*, 10 OSGOODE HALL L.J. 563 (1972); Comment, *Public Nuisance: Standing to Sue Without Showing "Special Injury"*, 26 U. FLA. L. REV. 360, 361, 366 (1974). It is readily apparent why private litigation to redress or prohibit scalping through public nuisance suits has not occurred. If a plaintiff was capable of establishing that injuries from scalping are to the public at large, he would be unable to enjoin such conduct in the future since proof of special injuries to as yet unproduced events would be impossible. And since his damages would be significantly less than costs and fees of suit, there would be no financial incentive to seek monetary relief even if he could foresee success on the merits.

64. Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170, 174 (1979); Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693, 322 N.E.2d 768, 772 (1975); Kugler v. Romain, 58 N.J. 522, 537-38, 279 A.2d 640, 653 (1971). *See generally* Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?*, 33 S.C.L. REV. 479 (1982); Leaffer & Lipson, *Consumer Actions against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980) [hereinafter cited as Leaffer & Lipson].

65. ALASKA STAT. § 45.50.471 (1980); CAL. BUS. & PROF. CODE § 1720 (West Supp. 1982); CONN. GEN. STAT. § 42-110b (1981); FLA. STAT. ANN. § 501.204(1) (1981); GA. CODE § 10-1-393(a) (1981); HAWAII REV. STAT. § 480-2 (1976); ILL. ANN. STAT ch. 121½, para. 262, § 2 (Smith-Hurd Cum. Supp. 1983-1984); KAN. STAT. ANN. § 50-627(a) (1976); KY. REV. STAT. § 367.170(1) (Supp. 1982); LA. REV. STAT. ANN. § 51:1405A (West Supp. 1982); ME. REV. STAT. ANN. tit. 5, § 207 (1979); MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 1972); MONT. CODE ANN. § 30-14-103 (1981); NEB. REV. STAT. § 87-303.01(1) (1981); N.H. REV. STAT. ANN. § 358-A:2 (Supp. 1981); N.J. REV. STAT. § 56.8-2 (Supp. 1982-1983); N.M. STAT. ANN. § 57-12-3 (1978); N.C. GEN. STAT. § 75-1.1(a) (1981); OHIO REV. CODE ANN. § 1345.02 (Page 1979); OR. REV. STAT. § 646.608(u) (1981); R.I. GEN. LAWS § 6-13.1-2 (1969); S.C. ANN. § 39-5-20(a); (Law Co-op. 1976); TENN. CODE ANN. § 47-18-104(u) (1979); TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1982); UTAH CODE ANN. § 13-11-5 (Supp. 1981); VT. STAT. ANN. tit. 9, § 2453(a) (1970); WASH. REV. CODE § 19.86.020 (1981).

66. "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1976).

In a few states *unconscionable*, rather than *unfair*, business practices are declared unlawful. KAN. STAT. ANN. § 50-627(a) (1976); NEB. REV. STAT. § 87-303.01(1) (1981); TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1982); UTAH CODE ANN. § 13-11-5 (Supp. 1981).

67. Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973); Holloway v. Bristol-Myers

entitle aggrieved persons, including consumers, to obtain monetary and injunctive relief.[68] Whether these statutes provide a new basis for private redress of scalping is dependent, *inter alia*, on whether scalping can be viewed as an unfair trade practice.

A. *Defining "Unfair Trade Practices"*

The statutes do not define the term "unfair trade practices"; nor do they specifically enumerate all forms of illegal conduct.[69] The courts have determined the scope of each statute, guided by FTC interpretations of section 5 of the Act.[70] However, the FTC has offered little effective guidance.[71] The most frequently quoted FTC standard, approvingly cited by the United States Supreme Court in the case of *FTC v. Sperry & Hutchinson Co.*,[72] declared that whether a business practice was unfair depended upon:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been

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Corp., 485 F.2d 986 (D.C. Cir. 1973). *See generally* Leaffer & Lipson, *supra* note 64, at 523-24.

68. ALASKA STAT. § 45.50.531 (1980); CAL. BUS. & PROF. CODE § 17070 (West Supp. 1982); CONN. GEN. STAT. § 42-110g (1981); FLA. STAT. § 501.211 (1981); GA. CODE § 10-1-399 (1981); HAWAII REV. STAT. § 480-13 (1976); ILL. ANN. STAT. ch. 121½, para. 270a, § 10a (Smith-Hurd Cum. Supp. 1983-1984); KAN. STAT. ANN. § 50-634 (1976); KY. REV. STAT. § 367.220 (Supp. 1982); LA. REV. STAT. ANN. § 51:1409A (West Supp. 1982); ME. REV. STAT. ANN. tit. 5, § 213 (1979); MASS. GEN. LAWS ANN. ch. 93A, § 9 (West 1972); MONT. CODE ANN. § 30-14-133 (1981); NEB. REV. STAT. § 87-303 (1981); N.H. REV. STAT. ANN. § 358-A:10 (Supp. 1981); N.J. REV. STAT. § 56:8-19 (Supp. 1982-1983); N.M. STAT. ANN. § 57-12-10 (1978); N.C. GEN. STAT. § 75-16 (1981); OHIO REV. CODE ANN. § 1345.09 (Page 1979); OR. REV. STAT. § 646.638 (1981); R.I. GEN. LAWS § 6-13.1-5.2 (Supp. 1982); S.C. CODE ANN. § 39-5-140 (Law Co-op. 1976); TENN. CODE ANN. § 47-18-109 (1979); TEX. BUS & COM. CODE ANN. § 17.50B (Vernon Supp. 1982); UTAH CODE ANN. § 13-11-19 (Supp. 1981); VT. STAT. ANN. tit. 9, § 2461 (1970); WASH. REV. CODE ANN. § 19.86.090 (1981).

69. These statutes are to be distinguished from those that are codifications of the Uniform Deceptive Trade Practices Act, 9 U.L.A. (Supp. 1965), whose coverage, as the appellation suggests, is limited to designated acts of deception. *See generally* Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967).

70. Courts have refused to find these statutes void for vagueness, holding that interpretations by the federal courts and the FTC of the similarly worded FTC Act provision have sufficiently revealed the fuzzy parameters of the term "unfair trade practices" to overcome such constitutional objections. *See, e.g.*, State v. O'Neill Investigations, Inc., 609 P.2d 520, 530-34 (Alaska 1980); Fitzgerald v. Chicago Title & Trust Co., 72 Ill. 2d 179, 187, 380 N.E.2d 790, 793-94 (1978); State v. Reader's Digest Ass'n, 81 Wash. 2d 259, 274-75, 501 P.2d 290, 299-302 (1972). *See also* Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980).

71. *See generally* Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981); Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107; Leaffer & Lipson, *supra* note 64.

72. 405 U.S. 233 (1972).

> established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[73]

This standard is ambiguous because it fails to indicate "whether one or all of these factors must be present . . . ."[74] Moreover, courts are divided as to how to resolve that ambiguity. But whether the standard is construed to require all, a combination,[75] or only one of the stated elements,[76] it remains little more than a vagary substituting one indefinite term for another. The dilemma of seeking clarity in a term whose value lies in its elusiveness has, on occasion, been conceded: "[w]hat is unfair is a definitional problem of long standing, which statutory draftsmen have prudently avoided. 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.' "[77]

A California appellate court appears to have succeeded in breaking through the circuitous path, offering a workable standard for evaluation.

> [T]he determination of whether a particular business practice is unfair necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim—a weighing process quite similar to the one enjoined on us by the law of nuisance.[78]

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73. *Id.* at 244 n.5.

74. Christie v. Dalmig, Inc., 136 Vt. 597, 601, 396 A.2d 1385, 1388 (1979). *Accord* Perrin v. Pioneer Nat'l Title Ins. Co., 83 Ill. App. 3d 664, 671, 404 N.E.2d 508, 514 (1980).

75. Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, 491 F. Supp. 1199, 1227 (D. Hawaii 1980); Levings v. Forbes & Wallace, Inc., 8 Mass. App. 498, 396 N.E.2d 149, 153 (1979).

76. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." Johnson v. Phoenix Mutual Life Ins. Co., 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980). In State v. O'Neill Investigation, Inc., 609 P.2d 520, 535 (Alaska 1980), the court concluded that the *Sperry & Hutchinson* test was nothing more than an enumeration of relevant, but not exclusive, factors for consideration.

77. Levings v. Forbes & Wallace, Inc., 8 Mass. App. 498, 503, 396 N.E.2d 149, 153 (1979).

78. Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740, 162 Cal. Rptr. 543, 546 (1980).

The California approach describes more artfully what the FTC and other jurisdictions have failed to reflect. Determining whether conduct is unfair necessarily requires a balancing of opposing interests. A business practice with utility that outweighs its injuries is in furtherance of the public interest and should not be regarded as unfair. On the other hand, a practice with injuries that outweigh its utility is unreasonable, unjustifiable, inconsistent with public policy and, therefore, unfair.

Through deliberate manipulation, scalping subverts the established market price. Nonetheless, the practice is not devoid of benefits. The manipulation, which prices the majority of prospective consumers out of the market, assures a ready supply of tickets for those willing to pay scalpers' prices. Ordinarily, a practice that results in offering a privilege only to the privileged is not condemnable.[79] The injustice of scalping, however, is not its ultimate effect, but the means employed to achieve that effect. By obtaining tickets for the purpose of resale, the scalper prevents members of the general public from purchasing those tickets at their original, intended and advertised prices. Thus, an essentially democratic process becomes basically classist. If a court finds, as does the author, that the injuries to actual and potential consumers caused by the scalpers' artificial, manipulative and often exorbitant prices outweighs the utility of affording a ready source of tickets for those with the means and the inclination to pay those inflated prices, then it will also conclude that scalping—in addition to being immoral, unethical, oppressive and unscrupulous—is unfair.[80]

In response to a congressional inquiry, the FTC in 1980 issued a detailed policy report allegedly clarifying its interpretation of section 5 of the FTC Act.[81] The report stated that unless conduct

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79. *See supra* note 12.

80. There is both case and statutory authority for the proposition that "[c]harging the consumer a price which is grossly in excess of the price at which similar property or services are sold . . ." is an unfair, unconscionable trade practice. *See, e.g.*, MICH. COMP. LAWS ANN. § 445.903(1)(z) (Supp. 1982-1983). *Accord* Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170, 176-77 (1979); Kugler v. Romain, 58 N.J. 522, 545, 279 A.2d 640, 652 (1971); Jones v. Star Credit Corp., 59 Misc. 2d 189, 191, 298 N.Y.S.2d 264, 266 (N.Y. Sup. Ct. 1969). If a court were otherwise inclined to find that scalping is antithetical to societal interests, it could outlaw the activity on this ground by finding the scalper's price to be grossly in excess of the box office price. A court not so inclined, however, by comparing the scalper's price to that extant at the time of sale, i.e., to that of other scalpers, could conclude that his prices were not excessive. Consequently, utilization of this approach would be helpful only in a state such as Michigan, which does not have an all-encompassing unfair trade practices act.

81. Letter from FTC to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* Averitt, *supra* note 71, at 288-95.

caused unjustified consumer injury, it ordinarily could not be regarded as unfair.[82] Conversely, if it caused such injury, the conduct would, by that fact alone, ordinarily be considered an unfair trade practice.[83] The FTC stated that unjustified consumer injury will be found when the injury: (1) either individually or collectively is substantial; (2) outweighs the benefits to consumers or society; and (3) is one that consumers could not reasonably have avoided.[84] Therefore, the FTC now regards the additional factors contained in the *Sperry & Hutchinson* test[85] as essentially duplicative and to be treated primarily as aids in determining whether there has been unjustified consumer injury.[86]

The extent to which the FTC's modification of its earlier rule will influence state courts cannot be known. However, if state courts perceive the FTC's action more as a response to intense political pressure than as a true indicator of what is "unfair,"[87] they may choose to disregard the new rule. Assuming that some jurisdictions will adopt this new approach to unfair trade practices, it is necessary to explore the application of the new FTC standard to ticket scalping.

Scalping satisfies the first element for an unfair trade practice: that the injury be substantial. A significant number of potential consumers fail to gain admission to public events each year because of scalpers' practices. Many more, who choose to attend and who would otherwise have been able to purchase tickets at the box office, must pay a price greater than they would have paid but for the scalpers' acquisition of tickets.[88]

The second element, that the injury outweighs the benefits to

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82. *Id.* at 291.

83. *Id.*

84. *Id.*

85. *See supra* text accompanying note 73.

86. *Id.* at 293, 295.

87. Prior to the issuance of its policy statement, Congress passed the Federal Trade Commission Improvements Act of 1980. 15 U.S.C. § 57a-1, 57b-1 to -4 (Supp. V 1981) (amending 15 U.S.C. § 57a), which substantially diluted the FTC's rulemaking power. The Act was a political response to congressional discontent with the activist role played by the FTC in recent years in protecting its perceptions of consumer interests. *See* Leaffer & Lipson, *supra* note 64, at 530. Subsequent to the passage of the Act and prior to the FTC's policy statement, a former New York Regional Director of the FTC commented, "In choosing how to employ its resources, and seeking to avoid repetition of the legislative results of 1980, the Commission might take into account the areas of greatest concern to the general public, the support of which is essential to its activities and indeed, in the end, its continued existence." Givens, *FTC Amendments of 1980*, 183 N.Y.L.J. 1 (1980). The Commission may have taken heed.

88. *See generally supra* text accompanying notes 44-45 & note 11.

consumers or society, is a restatement of the California test.[89] Resolution of this question necessitates a value judgment. In this author's opinion, for reasons previously addressed, the harm outweighs the utility.

The third element, that the injury could not reasonably have been avoided, represents a significant departure from the FTC's previous position. The presence of this element depends upon the definition of injury. If the injury caused by scalping is deemed to be simply the payment of the scalper's price, the injury could have been avoided if prospective purchasers simply refused to pay. But the injuries attributable to scalping are more severe; the scalper deprives consumers of a previously existing reasonable alternative, compelling them either to pay his price or to forego attendance. Thus, every person who would have purchased tickets at the box office but for the scalper's acquisition of those tickets has suffered an injury that was not reasonably avoidable.

Therefore, under the new FTC test, whose relevance to state laws is as yet unclear, scalping should constitute an unfair trade practice.

B. *Defining the Tortious Scalper*

Since not all ticket brokerage constitutes scalping and not all scalping is unfair, courts need a workable rule to guide them in distinguishing between permitted and prohibited scalping. Although legislative efforts to make the distinction have tended to be overly inclusive, there is no inherent obstacle to the creation of a workable test. The author proposes the following: A person who purchases tickets for the purpose of resale rather than use *and* who thereafter attempts to sell those tickets for an amount in excess of their box office price and a reasonable service charge is, absent good cause, engaged in an unfair trade practice.

This test would exclude those who purchased for the purpose of use and, being unable to attend the event, sold the tickets at the going rate.[90] It would also exclude those who purchase for the pur-

89. *See supra* note 78.

90. Absurd consequences could result in the absence of such an exclusion. In the case of People v. Johnson, 52 Misc. 2d 1087, 278 N.Y.S.2d 80 (1967), defendant purchased from the box office two $20 tickets to a New York Metropolitan Opera showing of "Die Fledermaus", hoping to induce her estranged husband to accompany her and then, perchance, to reconcile. Sadly, her husband refused. She then placed an ad in a local newspaper offering the tickets for sale. Plainclothes police officers purchased the tickets for $40 each and then arrested her for illegal scalping. The court put an end to the unfortunate matter by holding

pose of resale but limit their profits to a reasonable service charge. While the term "reasonable" is not precise and cannot be quantitatively defined, that is its strength, not its weakness. It bypasses the pitfalls of anti-scalping statutes that arbitrarily impose a limit on the service fees ticket brokers may charge.[91] Reasonableness would be decided on a case-by-case basis. Factors such as industry standards, overhead, profit percentage, and initial outlay for acquisition of tickets would be determinative.

Moreover, the "good cause" exception would provide scalpers an opportunity to justify their practices. For example, a buyer might be able to prove that he purchased tickets prior to the event's production and had assumed the risks that the promoter was unwilling to assume[92] or to prove he did not purchase from the box office but legally obtained his tickets elsewhere. Those facts would establish that his lawful acquisition of tickets did not diminish the box office supply. Since the premise of this article is that scalping should be prohibited because it denies consumers a preexisting alternative, it is appropriate to exempt conduct that did not affect that alternative.

Additionally, the defendant might be allowed to prove that he was not in the "practice" of scalping and that the particular occasion on which he was found to have so engaged represented an isolated occurrence.[93]

V. Remedies Available to Consumers

States' unfair trade practices acts generally permit consumers who have suffered ascertainable losses of money or property to commence private litigation and obtain actual damages, punitive damages and attorney's fees.[94] The provision for attorney's fees af-

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that New York's anti-scalping law was not intended to include those who purchased for use rather than resale. Application of the test herein proposed would produce the same outcome.

91. *See supra* notes 18-19.

92. *See supra* Part II.

93. *See, e.g.*, Barquis v. Merchants Collection Ass'n, 7 Cal. 3d 94, 108-09, 496 P.2d 817, 831, 101 Cal. Rptr. 745, 755 (1972).

94. The California Supreme Court has held that California's unfair trade practices act does not entitle an aggrieved consumer to recover damages, although restitution of money or property is allowed. Chern v. Bank of Am., 15 Cal. 3d 866, 875, 544 P.2d 1310, 1315, 127 Cal. Rptr. 110, 115 (1976). Nor does the California act provide for attorney's fees. A separate statutory provision, however, permits the recovery of such fees in successful public interest lawsuits. *See* Cal. Civ. Code § 1021.5 (West 1980). *See generally* McDermott & Rothschild, *Foreword: Private Attorney General Rule and Public Interest Litigation in California*, 66 Calif. L. Rev. 138 (1978).

fords victimized consumers, for whom the monetary losses may not be a significant incentive, to rectify those losses without fear that the costs of the suit will exceed the recovery.[95]

Three separate categories of individuals can claim to have been damaged from scalping: (1) those who paid the scalper but would have acquired tickets at the box office had scalpers not diminished box office supply; (2) those who paid the scalper because they could not obtain box office tickets for reasons other than the scalper's acquisition of those tickets; and (3) those who chose not to pay the scalper but would have acquired tickets at the box office had scalpers not diminished box office supply. Members of the first category have suffered the most ascertainable damage—the difference between what they did pay (the scalper's price) and what they would have paid (the box office price).

The injury is not as apparent with respect to the members of the second category. This is because for them the scalper created an otherwise unavailable opportunity to attend an event, and they chose to avail themselves of that opportunity. Since the amount they paid for their tickets represented the prevailing, albeit manipulated, market price, it could be argued that they have suffered no monetary losses since the amount they paid reflects the value of what they received. Nevertheless, the scalper has profited from an unfair trade practice in his transaction with these individuals. The underlying purpose of the liberal remedial provisions of the unfair trade practices acts was to discourage the continuation of prohibited activities.[96] Courts may conclude that, in order to effectuate that purpose, the scalper should disgorge his profits. The scalper would return the overcharge irrespective of whether purchasers were victimized by his practice. As one court recently stated:

> To permit the [retention of even] a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement [of the law] is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom.[97]

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95. *See* Ford Motor Co. v. Mayes, 575 S.W.2d 480, 488 (Ky. Ct. App. 1978).

96. Fletcher v. Security Pac. Nat'l Bank, 23 Cal. 3d 442, 451, 591 P.2d 51, 57, 153 Cal. Rptr. 28, 33 (1979); Ford Motor Co. v. Mayes, 575 S.W.2d 480, 488 (Ky. Ct. App. 1978); Brown v. Deacon's Chrysler Plymouth, Inc., 14 Ohio Op. 3d 436, 438 (1979); Hockley v. Hargitt, 82 Wash. 2d 337, 350, 510 P.2d 1123, 1132 (1973).

97. Fletcher v. Security Pac. Nat'l Bank, 23 Cal. 3d 442, 451, 591 P.2d 51, 57, 153 Cal.

As for individuals falling within the third category, some states will deny recovery because damages are limited specifically to those who acquired goods or services from one engaged in prohibited conduct.[98] In jurisdictions that do not so limit recovery, the fact remains that no direct monetary loss has been sustained since no tickets were purchased. However, tickets would have been purchased if available at the box office price. Since the scalper has proved the tickets' value by selling them at the inflated prices he demanded, a court could fairly hold that these individuals have also suffered a loss that equals the difference between the value of what they would have received (the scalper's ticket) and what they would have paid (the box office ticket).

Theoretically, if a court allowed members of all three categories to recover damages, the scalper could be liable for more than he gained. As the unfair trade practices acts specifically provide for punitive damages,[99] the fact that a scalper's liability may exceed his profits does not seem inconsistent with the acts' basic premises. Furthermore, that theoretical possibility will seldom occur because members of the first and third categories will have difficulty proving that they would have acquired tickets from the box office but for the scalpers' depletion of box office supply, and the right to recover damages depends on that proof.

A member of the first or third category faces another obstacle of proving which of several scalpers was the particular one who acquired the tickets the plaintiff would have purchased. But that dilemma could be resolved by utilizing the approach applied in the landmark case of *Summers v. Tice*.[100] That case, accepted as law in most jurisdictions,[101] holds that when more than one defendant has engaged in tortious conduct, and the plaintiff is unable to prove which defendant was the cause of his injuries, the burden of proof shifts to the defendants, resulting in liability to each defendant who is unable to prove that he was not the cause. This approach

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Rptr. 28, 33 (1979) (quoting SEC v. Golconda Mining Co., 327 F. Supp. 257, 259-60 (S.D.N.Y. 1971)).

98. *See* KY. REV. STAT. § 367.220 (Supp. 1982); ME. REV. STAT. ANN. tit. 5, § 213 (1979); MONT. CODE ANN. § 30-14-133 (1981); OHIO REV. CODE ANN. § 1345.09 (Page 1979).

99. *See supra* text accompanying note 94.

100. 33 Cal. 2d 80, 199 P.2d 1 (1948).

101. *See, e.g.*, Bowman v. Redding & Co., 449 F.2d 956, 967 (D.C. Cir. 1971); Michel v. State Farm Mut. Auto Ins. Co., 314 So. 2d 535, 538 (La. Ct. App. 1975); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 73-74, 289 N.W.2d 20, 25 (1980); Anderson v. Samberg, 67 N.J. 291, 302, 338 A.2d 1, 6-7 (1975); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 243 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

would require all who are found to have engaged in the unfair trade practice of scalping at the event in issue to share liability with their unfair brethren.

An effective deterrent against the proliferation of scalping would be an injunctive decree prohibiting those previously found to have engaged in the proscribed activity from so engaging in the future. Applying traditional principles of equity, however, no potential victim would have standing to obtain such a decree since he would be unable to demonstrate that a prohibition against scalping to an as yet unproduced event was necessary to prevent imminent, irreparable harm.[102]

Most unfair trade practices acts expressly authorize aggrieved persons to seek equitable relief to enjoin the prohibited conduct.[103] Some of these statutes are unequivocally clear that traditional limitations upon equitable relief—showing that the plaintiff will suffer irreparable injury and has no adequate remedy at law—are not applicable.[104] A person previously aggrieved by one engaged in an unfair trade practice is thus entitled to obtain a decree enjoining that activity in the future, without having to show personal need for such relief. He is, in essence, given standing as a private attorney general to protect the public interest.[105] A continuation of that practice against anyone, not just against plaintiff, would constitute a violation of the decree, entitling commencement of appropriate contempt proceedings.

Among the courts interpreting statutes not expressly eliminating traditional equitable barriers, there is a split of opinion. While some courts have insisted that these statutes have not expanded equitable jurisdiction,[106] the trend appears to be otherwise. The ex-

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102. Zeeman v. Black, 156 Ga. App. 82, 84, 273 S.E.2d 910, 914 (1980); Brooks v. Midas-International Corp., 47 Ill. App. 3d 266, 275-76, 361 N.E.2d 815, 821-22 (1977); Brown v. Deacon's Chrysler Plymouth, Inc., 14 Ohio Op. 3d 436, 438 (1979); Hockley v. Hargitt, 82 Wash. 2d 337, 351, 510 P.2d 1123, 1132 (1973).

103. *See supra* note 68.

104. "Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an illegal violation of this act may bring an action to . . . enjoin . . . a supplier who has violated, is violating or is likely to violate this act." KAN. STAT. ANN. § 50-634(a) (2) (1976). "Actions for injunctions pursuant to this chapter may be prosecuted . . . upon the complaint of any board, officer, person, corporation or by any person acting for the interests of itself, its members or the general public." CAL. BUS. & PROF. CODE § 17204 (West Supp. 1982).

105. Hernandez v. Atlantic Finance Co., 105 Cal. App. 3d 65, 72, 164 Cal. Rptr. 279, 284 (1980).

106. Brooks v. Midas-International Corp., 47 Ill. App. 3d 266, 275-76, 361 N.E.2d 815, 821-22 (1977); Reed v. Allison & Perrone, 376 So. 2d 1067, 1069 (La. Ct. App. 1979).

press provision in these statutes for equitable relief, coupled with their purpose of promoting private protection of the public interest, has led to the conclusion that they implicitly dispensed with the traditional barriers.[107] In these jurisdictions, a person aggrieved by a scalper's unfair trade practices could enjoin the scalper from continuing those practices. Furthermore, if the plaintiff is a member of the first or third category of aggrieved persons, the fact that he could not prove which of several scalpers was the direct cause of his inability to obtain a ticket at the box office, would entitle him, through utilization of *Summers v. Tice*,[108] to enjoin all who engaged in the practice and could not prove they did not cause injury to plaintiff.

VI. CONCLUSION

Scalping has had a privileged past. The justifications for that privilege are not presently supportable. Existing laws can adequately deal with this unfair trade practice, if states will only use them.

107. Slaney v. Westwood Auto Inc., 366 Mass. 688, 693, 322 N.E.2d 768, 772 (1975); Brown v. Deacon's Chrylser Plymouth, Inc., 14 Ohio Op. 3d 436, 438 (1979); Hockley v. Hargitt, 82 Wash. 2d 337, 351, 510 P.2d 1123, 1132 (1973). *See also* Zeeman v. Black, 156 Ga. App. 82, 84, 273 S.E.2d 910, 914 (1980).

108. 33 Cal. 2d 80, 199 P.2d 1 (1948).