
COMMENT

REVOKING THE REVOCABLE LICENSE RULE: A NEW LOOK AT RESALE RESTRICTIONS ON SPORTS TICKETS

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Most sports fans consistently rely on the secondary ticket market. After all, the secondary ticket market provides fans with numerous benefits, including the opportunity to obtain tickets to sold out, high-profile events and the ability to resell tickets to recoup the cost of a ticket for an event they cannot attend. But some key players—namely, primary ticket sellers like sports teams—have lamented the rise of the secondary market, complaining that resale exchanges unfairly profit from the teams’ labor and diminish the value of buying tickets directly from the teams. Consequently, teams have begun to develop new initiatives to curb the growth of the secondary market, including establishing official team resale exchanges to compete with sites like StubHub, prohibiting season ticket holders from selling tickets on unofficial resale exchanges, and implementing ticket delivery procedures that make it more difficult to resell tickets. Fortunately for teams, the law cuts squarely in their favor as courts, academics, and industry professionals alike adhere to the late nineteenth century notion of tickets as fully revocable licenses. As such, teams are free to impose resale restrictions as they see fit.

But in this Comment, I argue that lawmakers should reconsider the extent to which teams can continue to use the revocable license rule to restrict ticket holders’ resale rights. I show how the revocable license rule, though widely accepted today, was criticized and often rejected by early twentieth century courts and academics for seemingly allowing

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proprietors to unfairly and arbitrarily exclude innocent ticket-holding patrons. I then explain how business incentives nevertheless prevented proprietors from abusing the rule and how judges and lawmakers relied on the assumption that these incentives would prevent the rule from being abused. In doing so, I show that the rule was actually adopted for a very limited purpose—namely, to protect a proprietor’s right to exclude unruly patrons. Given that limited purpose, I argue that courts and scholars have gradually—but improperly—extended the rule of tickets as revocable licenses such that primary ticket vendors now wield a type of unilateral power over ticket holders that the original proponents of the rule never intended to establish. Therefore, I urge that lawmakers stop allowing the notion of tickets as revocable licenses to inform the industry’s discourse about ticket holders’ rights. Finally, I explore various practical legislative solutions to reform the secondary market, which are free from the rigid assumptions of the revocable license rule and which account for the legitimate concerns of both ticket holders and teams.

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INTRODUCTION

Sports in America make up a multibillion dollar industry, and teams generate money from various sources, including ticket sales, concessions, television contracts, licensing, and merchandise.¹ Major League Baseball (MLB), for example, earned \$9.5 billion in revenue during the 2015 baseball season, which marked the thirteenth consecutive year that MLB saw an increase in total revenue.² The New York Yankees, one of MLB's most high-profile franchises, earned \$516 million during the 2016 baseball season, of which \$259 million—over 50%—came from ticket sales.³ As revenue has grown, fans have literally paid the price. On average, a family of four spent \$337.20 to attend a 2016 New York Yankees baseball game.⁴ While Yankees tickets are the second-highest priced tickets in MLB, the average cost of attending an MLB game for a family of four still reaches an astonishing \$219.53.⁵

These prices naturally lead to two questions for sports fans. First, what happens when a ticket holder can no longer attend a game: is there a way for him to recoup the cost of the tickets? Second, and relatedly, are there any ways for fans on tighter budgets to purchase tickets at discounted prices? Fortunately, fans in both situations can turn to the secondary ticket market.⁶ One of the

¹ Danette R. Davis, Comment, *The Myth & Mystery of Personal Seat Licenses and Season Tickets: Licenses or More?*, 51 ST. LOUIS U. L.J. 241, 241 (2006).

² Maury Brown, *MLB Sees Record Revenues for 2015, Up \$500 Million and Approaching \$9.5 Billion*, FORBES (Dec. 4, 2015, 4:40 PM), <http://www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/print> [<https://perma.cc/UE9E-KBK6>].

³ *New York Yankees*, FORBES, <http://www.forbes.com/teams/new-york-yankees> [<https://perma.cc/G4CU-WHP5>].

⁴ See TEAM MKTG. REPORT, MLB 1 (2016), <https://www.teammarketing.com/public/uploaded/PDFs/MLB-FCI-2016.pdf> [<https://perma.cc/UZ9Y-BZ8M>] (providing the “Fan Cost Index” (FCI) of attending a New York Yankees game, which includes the cost of four “adult average-price tickets,” two “small draft beers,” four “small soft drinks,” four “regular-size hot dogs,” “parking for one . . . car,” and two “least expensive, adult-size adjustable caps”).

⁵ See *id.*

⁶ See Susan Johnston Taylor, *9 Ways to Save on Sports Tickets*, U.S. NEWS & WORLD REP. (Aug. 22, 2013, 12:10 PM), <http://money.usnews.com/money/personal-finance/articles/2013/08/22/9-ways-to-save-on-sports-tickets> [<https://perma.cc/8SM6-7FCB>] (noting that ticket holders who cannot attend games “often resell their tickets on [secondary resale] websites like StubHub.com, TicketCity.com, or eBay”). Fans can find tickets for prices below face value on the secondary market because ticket holders who can no longer attend games “simply want[] to get rid of” their tickets. *Id.* “Face value” refers to the price that is printed on the ticket and charged by a primary ticket vendor, such as a sports team.

more popular secondary market exchanges, StubHub.com, provides an online marketplace that connects fans seeking to sell tickets with fans seeking to purchase tickets to various kinds of entertainment events, including sports games, concerts, and theater performances.⁷

At first glance, the proliferation of secondary-ticket-market websites like StubHub seems financially beneficial for ticket holders trying to sell tickets, fans seeking to purchase tickets, and primary ticket sellers such as teams and sports leagues.⁸ Ticket holders can recoup some of their money for games they cannot attend, and some may even earn a profit when selling tickets to a particularly popular event.⁹ Likewise, fans searching for tickets sometimes save money on the face value price by using the secondary market instead of buying directly from the team.¹⁰ Moreover, fans that are unable to secure tickets during a venue's original public sale can use the secondary market to buy tickets for sold out events without having to worry about the risk of buying a fake ticket from a ticket scalper outside of the stadium.¹¹ Finally, many sports teams and leagues have formed mutually beneficial agreements with StubHub, which require those teams to direct ticket holders and ticket

⁷ *About Us*, STUBHUB, <http://www.stubhub.com/about-us/> [<https://perma.cc/C2GT-SEJR>]. StubHub generates revenue by charging fees to *both* the buyer and seller. James Geddes, *How to Sell Concert or Event Tickets on StubHub*, TECH TIMES (May 28, 2015, 8:55 AM), <http://www.techtimes.com/articles/55930/20150528/how-to-sell-concert-or-event-tickets-on-stubhub.htm> [<https://perma.cc/9Z9P-HHND>]. For the seller fee, StubHub collects 15% of the sale price. Brett Goldberg, *StubHub Fees | The Truth About Buyer and Seller Fees*, TICKPICKBLOG (Aug. 26, 2015), <https://blog.tickpick.com/stubhub-buyer-seller-fees> [<https://perma.cc/2WR8-6HDS>]. In addition, StubHub charges the buyer a fee that is between 2% and 20% of the sale price. *Id.* For example, on a \$100 sale, the buyer could pay up to \$120. In that case, the seller would collect \$85, and StubHub would retain the remaining \$35.

⁸ In this Comment, the “primary” ticket market refers to ticket sales by teams directly to fans who, upon purchase, become ticket holders. The “secondary” ticket market refers to transactions between ticket holders and fans seeking to purchase tickets.

⁹ As an example, tickets for one very high-demand game between the New York Yankees and their rival, the Boston Red Sox, sold on StubHub for over 300% of the face value price. Bill King & Eric Fisher, *Second Thoughts*, STREET & SMITH'S SPORTSBUSINESS J. (Oct. 24, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/10/24/In-Depth/Main.aspx> [<https://perma.cc/NA63-4L4D>].

¹⁰ See Matthew Feuerman, Note, *Court-Side Seats? The Communications Decency Act and the Potential Threat to StubHub and Peer-to-Peer Marketplaces*, 57 B.C. L. REV. 227, 229 (2016) (“[W]hen the supply of tickets greatly exceeds the demand, StubHub is home to ticket prices that are far below face value.”).

¹¹ For many high-profile, sold out events, such as the Super Bowl, demand for tickets “greatly exceeds supply.” *Id.* at 228. Tickets to the 2016 Super Bowl were sold on StubHub for an average price of \$4879, even though the face value prices ranged from \$500 to \$1800 for general admission and up to \$3000 for premium seating. Brent Schrottenboer, *Getting into Super Bowl 50 a Tricky Ticket*, USA TODAY (Feb. 7, 2016, 1:58 PM), <http://www.usatoday.com/story/sports/nfl/2016/02/04/super-bowl-50-tickets-secondary-market-stubhub/79820832> [<https://perma.cc/736K-N8EV>]. Secondary ticket market websites allow fans to purchase tickets for these kinds of events without having to worry about the risk of being duped into purchasing fake tickets. See, e.g., *The StubHub FanProtect Guarantee*, STUBHUB, <http://www.stubhub.com/legal/?section=fp> [<https://perma.cc/PXA9-4LXY>] (guaranteeing comparable tickets or a full refund to purchasers when tickets are fraudulent, not delivered in time, or deviate from those listed by the seller).

seekers to StubHub in exchange for a percentage of the transaction fees that StubHub charges to fans. For example, “StubHub is the [o]fficial [f]an to [f]an [t]icket [m]arketplace of MLB.com.”¹² Under its agreement with MLB, StubHub sends more than half of its commission fees for MLB tickets to MLB, which then distributes some of that money to all thirty MLB teams.¹³ In 2011, StubHub sent roughly \$60 million to MLB as part of the agreement.¹⁴ Thus, secondary ticket venues like StubHub seem beneficial for ticket holders, ticket seekers, and teams.

Nevertheless, some key players do not view the secondary market favorably—namely, many primary ticket vendors, such as sports teams. Derek Schiller, an Atlanta Braves marketing executive, has referred to the proliferation of secondary market ticket sales as the “bigge[st] threat to the professional team sports marketplace and industry as a whole.”¹⁵ In 2011, eight million MLB tickets were sold on StubHub.¹⁶ This figure amounts to an average of roughly 3000 tickets per MLB game or ten percent of the average per game attendance.¹⁷ These numbers trouble team executives, who believe that the secondary market has transformed from its original purpose—“a place where fans could pay a premium for great seats at hard-to-crack events”—to “a flea market where buyers have their pick from thousands of seats to many games, often at prices that compete with, or even beat, the prices offered by the teams.”¹⁸ For example, Robert Alvarado, Vice President of Marketing and Ticket Sales for the Los Angeles Angels, laments StubHub’s rise from a “small player” to a legitimate threat that is “killing us.”¹⁹ In other words, teams believe that secondary ticket exchanges like StubHub harm teams by drawing away fans who traditionally bought tickets for non-sold out games directly from teams.²⁰ The idea is that for every ticket bought on StubHub, there is one less ticket sale for a team.

¹² *StubHub Seller FAQ*, MLB.COM, http://mlb.mlb.com/ticketing/stubhub_faq_seller.jsp?c_id=mlb [https://perma.cc/PQ3R-VD7K].

¹³ King & Fisher, *supra* note 9.

¹⁴ *Id.* MLB and StubHub agreed to a five-year renewal of their partnership in late 2012, assuring that StubHub would continue to serve as the league’s official reseller through the 2017 baseball season. *MLB Renews Deal with StubHub*, ESPN (Dec. 10, 2012), http://www.espn.com/mlb/story/_/id/8732189/major-league-baseball-stubhub-renew-secondary-ticket-market-deal [https://perma.cc/25YL-CQMT].

¹⁵ King & Fisher, *supra* note 9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* Of course, not every team is critical of the secondary ticket market. *See, e.g., id.* (noting that Derrick Hall, President and CEO of the Arizona Diamondbacks, embraces StubHub because it helps the team reach their attendance goals).

²⁰ *See, e.g.,* Josh Kosman, *Yanks Rip StubHub for Not Great-Gate*, N.Y. POST (June 5, 2012), <http://nypost.com/2012/06/05/yanks-rip-stubhub-for-not-great-gate/#ixzzixitL5gth> [https://perma.cc/3LL5-YY8J] (“Yankee Stadium attendance is down 3.6 percent so far this year . . . and the team is blaming

Primary ticket sellers have responded accordingly, developing new initiatives that both curb the growth of the secondary market and capture a greater share of the profits that inevitably flow from secondary ticket sales. Some teams have established their own official secondary ticket exchanges and now prohibit season ticket holders from using unofficial exchanges.²¹ Others have implemented new ticket delivery mechanisms aimed at limiting opportunities for resale.²² These attempts to restrict ticket holders' resale opportunities have generated significant attention in the sports industry.²³ The issue is arguably the "most high-profile [topic that] the ticketing world has seen" because it involves the critical questions of "whether the fan or the team owns the right to the ticket and whether teams can legally restrict fans to venues for reselling their seats."²⁴

This question naturally raises another: what rights, if any, inhere in the possession of a ticket? A survey of contemporary scholarship and case law suggests a clear answer: not many. "[C]ourts have uniformly recognized that tickets are revocable licenses," subject to the will of the grantor, and that resale

StubHub for its gate woes."); see also Barry Petchesky, *The Market for Yankees Tickets Is Worse than We Thought*, DEADSPIN (June 7, 2012, 2:30 PM), <http://deadspin.com/5916635/the-market-for-yankees-tickets-is-worse-than-we-thought> [https://perma.cc/7HVN-XWRX] (referencing data showing that in 2012, 66.39% of Yankees tickets sold on the secondary market were sold for lower than face value prices and that tickets were, on average, sold at a 17% discount from the face value price). MLB's 2012 five-year renewal agreement with StubHub requires that all tickets be sold for at least \$6. *MLB Renews Deal with StubHub*, *supra* note 14. This measure is meant to assuage teams' concerns about seeing their tickets listed for "pocket change." *Id.* But it should not be interpreted as a price floor or a minimum amount at which a ticket may be listed for sale. See *infra* note 33. Instead, the \$6 minimum is purely an "optic[al]" measure since the \$6 includes users' commissions and delivery fees, which were previously only assessed to buyers at checkout time—after they selected their tickets. *MLB Renews Deal with StubHub*, *supra* note 14. In fact, under the previous agreement, all buyers, regardless of the selling price, were charged at least \$10.40 because of delivery and commission fees that were added to the total price. *Id.* The new deal also includes lower service and delivery fees for users. Wendy Thurm, *MLB Re-Ups with StubHub but Yankees, Others Opt Out*, FANGRAPHS (Dec. 12, 2012), <http://www.fangraphs.com/blogs/mlb-re-ups-with-stubhub-but-yankees-others-opt-out> [https://perma.cc/Q9JX-NR8N]. Thus, the 2012 agreement did not increase the ultimate price that baseball fans were paying to buy tickets on StubHub; rather, in some cases, the price actually decreased.

²¹ See *infra* Part I.

²² See *infra* Part I.

²³ See, e.g., ANTHONY J. DREYER & KAREN HOFFMAN LENT, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, KEY TAKEAWAYS: THE EMERGING LEGAL LANDSCAPE REGARDING TICKET SALES: WHAT EVERY SPORTS/EVENT ORGANIZER OR VENUE NEEDS TO KNOW 3-5 (2016), https://www.skadden.com/sites/default/files/publications/NY_Emerging_Legal_Landscape_Webinar_Takeaway_030716.pdf [https://perma.cc/M48G-ND6W] (discussing the antitrust implications of team policies that limit the extent to which ticket holders can resell their tickets on the secondary market); Shepard Goldfein & James Keyte, *Sports Tickets: Revocable Licenses or Rights to Resale?*, N.Y. L.J. (Apr. 12, 2016), <http://www.newyorklawjournal.com/id=1202754628324/Sports-Tickets-Revocable-Licenses-or-Rights-to-Resale?slreturn=20160405234921#ixzz46DHH5mgG> [https://perma.cc/5MAH-E42V] (discussing various types of resale restrictions that teams impose on ticket holders).

²⁴ Darren Rovell, *StubHub's Antitrust Lawsuit Against Warriors, Ticketmaster Dismissed*, ESPN (Nov. 6, 2015), http://espn.go.com/nba/story/_/id/14063815/stubhub-antitrust-lawsuit-golden-state-warriors-ticketmaster-dismissed [https://perma.cc/R6TV-YV9V].

limitations and other team-imposed conditions “generally are fully enforceable.”²⁵ Stephen Happel and Marianne M. Jennings explain,

[O]wners of professional sports teams state that consumers actually purchase a “license” to a seat and the license is subject to certain rules. If the ticket is treated as a license, owners use their right of revocation of these licenses of those season ticket holders who try to resell tickets at above face-value to games they cannot or do not want to attend.²⁶

The revocable license characterization provides teams with a very potent weapon since, as a matter of property law, revocable licenses can be terminated by the grantor at any time and for any reason.²⁷

The notion of sports tickets as revocable licenses has led courts to uphold various team-imposed restrictions on ticket holders, including resale restrictions.²⁸ Not surprisingly, teams have begun to use the revocable license language in their season ticket holder policies and agreements.²⁹ Thus, both common law property doctrines and standard contemporary contractual agreements between season ticket holders and teams support primary sellers’ efforts to restrict ticket resellers. StubHub and other resale sites do not seem to stand much of a chance.

But in this Comment, I argue that lawmakers should reconsider the extent to which they allow teams to continue to use the revocable license rule to restrict ticket holders’ resale rights. In Part I, I provide an overview of the measures that teams have implemented to restrict the resale of tickets. In Part II, I explain how the concept of tickets as revocable licenses has played a key role in establishing and perpetuating an industry-wide norm that favors teams’ rights over those of their fans—especially in the resale context—and I show how teams continue to rely on that concept to defend resale restrictions.

²⁵ Anthony J. Dreyer & Mitchell P. Schwartz, *Whose Game Is It Anyway: Sport Teams’ Right to Restrict (and Control) Ticket Resale*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 753, 766 (2007).

²⁶ Stephen Happel & Marianne M. Jennings, *The Eight Principles of the Microeconomic and Regulatory Future of Ticket Scalping, Ticket Brokers, and Secondary Ticket Markets*, 28 *J.L. & COM.* 115, 180-81 (2010). The notion of tickets as licenses has been applied to both season ticket subscriptions and individual game tickets. But in the resale context, the concept has been more influential in disputes concerning season ticket agreements. Teams have more leverage to impose restrictions on season ticket holders than on fans who merely purchase single-game tickets. For example, teams have threatened to revoke a fan’s season tickets or refused to renew a fan’s tickets the following season. *See, e.g., infra* text accompanying notes 30–31.

²⁷ *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 636-37 (1913).

²⁸ *See infra* text accompanying notes 64–74.

²⁹ *See, e.g., Season Ticket Holder Terms and Conditions*, PHILA. FLYERS, http://flyers.nhl.com/v2/ext/160418STH_TandC_1617FINAL.pdf [<https://perma.cc/B8Q2-J6MA>] (“Each ticket purchased as part of your Season Ticket Plan . . . constitutes a revocable license. As a revocable license, each Ticket may be revoked at any time . . . for any reason”); *Terms & Conditions Relating to Golden State Warriors Ticket Plans*, WARRIORS.COM, http://www.nba.com/warriors/tickets/ticket_terms_and_conditions.html [<https://perma.cc/P9VH-LCPA>] (“Ticket plans and all rights attendant thereto are owned by the Warriors. Ticket plans are revocable licenses”).

In Part III, I illustrate how the revocable license rule, though widely accepted today, has always rested on questionable grounds. Indeed, the characterization of tickets as revocable licenses was criticized and often rejected by early twentieth century courts and academics for seemingly providing a legal justification to proprietors who wished to arbitrarily exclude innocent ticket-holding patrons. But business incentives generally prevented early twentieth century proprietors from abusing the rule to the detriment of innocent patrons. In turn, I argue that early proponents of the rule had reason to ignore its dangerously wide scope and that the rule was originally adopted for a very limited purpose—namely, to protect a proprietor’s right to exclude unruly patrons by ensuring that no jury could ever find against a proprietor in that situation.

In Part IV, I contend that courts and scholars have gradually—but improperly—extended the rule of tickets as revocable licenses such that primary ticket vendors now wield a kind of unilateral power over ticket holders that the original proponents of the rule never intended to establish. This is especially concerning in the current secondary resale market because teams are now confronted with significant financial incentives to exploit the revocable license rule to the fullest extent possible. Thus, the modern ticket market is missing one of the critical assumptions that supported the rule’s original adoption: the belief that proprietors would not use the rule to legitimize unjust practices. Therefore, I argue that lawmakers should stop allowing the notion of tickets as revocable licenses to inform the industry’s conception of ticket holders’ rights. Finally, freed from the rigid and outdated assumptions of the revocable license rule, I explore what can be done going forward to account for the legitimate concerns of both ticket holders and teams, and I propose various legislative solutions. Most importantly, my goal is to inspire lawmakers to reconsider the continued viability of the revocable license rule. This early twentieth century characterization should not dictate our approach to twenty-first century issues.

I. CURRENT TEAM-IMPOSED RESALE RESTRICTIONS

As teams’ concerns with secondary resales have grown, some have begun to implement initiatives to address the secondary market’s effect on their businesses. These efforts have ranged from establishing separate team-managed resale exchanges—while prohibiting ticket holders from using other sites—to adopting ticket delivery policies that functionally limit fans’ ability to transact on the secondary market. By restricting ticket holders’ resale rights and capabilities, teams hope to both curb the proliferation of the secondary ticket market and capture a greater portion of secondary resale revenues.

For example, the Golden State Warriors of the National Basketball Association (NBA) formed an official secondary ticket exchange through a partnership with Ticketmaster, and the team prohibits season ticket holders from selling tickets on unofficial exchanges like StubHub. Fans have alleged that the team “contractually require[s] that the resale of Warriors tickets be effectuated only through Ticketmaster’s Secondary Ticket Exchange” and enforces this requirement by cancelling the ticket subscriptions of fans who resell their Warriors tickets through a nonaffiliated secondary ticket exchange.³⁰ Likewise, the New Jersey Devils of the National Hockey League (NHL) have allegedly refused to renew season ticket subscriptions of fans whom they catch selling tickets on secondary market websites.³¹ These policies pressure fans into using team-managed ticket exchanges.

Relatedly, the Minnesota Timberwolves—also of the NBA—have used the Flash Seats ticket platform to implement a paperless ticket policy that requires ticket holders to use a smart phone or present a driver’s license or credit card to gain entry to the arena.³² The team requires that all resales be conducted through its official Flash Seats platform, which maintains a 75% price floor.³³ Moreover, like fans who purchase through Flash Seats, season ticket holders who buy directly from the team do not actually receive tickets; they simply enter the arena by presenting their credit card or identification.³⁴ Because Timberwolves fans do not have access to any type of physical or digital ticket that can be transferred to someone else, season ticket holders cannot sell tickets on sites like StubHub and are forced to use the team’s Flash Seats platform.

Other teams, stopping short of entirely restricting ticket sales on secondary market sites, have implemented policies that functionally limit a ticket holder’s ability to resell tickets. For example, before the 2015 season, the San Francisco 49ers of the National Football League (NFL) transitioned away from issuing traditional hard stock tickets to season ticket holders by implementing an

³⁰ StubHub, Inc. v. Golden State Warriors, LLC, No. 15-1436, 2015 WL 6755594, at *1 (N.D. Cal. Nov. 5, 2015).

³¹ Zachary Zaggar, *NJ Devils Sued for Restricting Season Ticket Resales*, LAW360 (Apr. 23, 2015, 7:26 PM), <http://www.law360.com/articles/646523/nj-devils-sued-for-restricting-season-ticket-resales> [<https://perma.cc/YP3N-M5L6>].

³² *Timberwolves Season-Ticket Holders Sue Team over Ticket Policy*, SPORTS ILLUSTRATED (Mar. 4, 2016), <http://www.si.com/nba/2016/03/04/minnesota-timberwolves-ticket-policy-fans-lawsuit> [<https://perma.cc/5JKP-J3TJ>].

³³ *Id.* A price floor, a minimum dollar amount for which a ticket can be listed, sometimes precludes sellers from choosing a price level that buyers find appropriate for a low-demand game and, as a result, limits the extent to which secondary sales detract from the team’s primary ticket selling efforts. *Id.*

³⁴ *Id.*

exclusive electronic delivery method.³⁵ In addition, the team refuses to release tickets to ticket holders until seventy-two hours before each game,³⁶ severely limiting the amount of time ticket holders have to freely resell their tickets. The 49ers do allow fans to resell tickets in advance of the seventy-two hour window through the team's official resale exchange, but the team does not actually release the tickets until three days before each game.³⁷ As a result, before the three-day window, ticket holders cannot use unofficial exchanges like StubHub because they do not have access to their tickets and are therefore unable to post them for sale.

Similarly, for more than three years,³⁸ the New York Yankees ran their own team-managed secondary ticket exchange that competed with secondary resale sites like StubHub. In 2012, both the Yankees and the Los Angeles Angels opted out of MLB's new agreement with StubHub.³⁹ A spokesperson for the Yankees defended the move by predicting that the team would be able to lift attendance by 5000 fans per game by disaffiliating from StubHub.⁴⁰ In addition, the Yankees were reportedly upset that tickets for Yankees games were often available on StubHub for less than \$5.00, which is significantly below the team's lowest face value price.⁴¹ Months later, the Yankees announced a new partnership with Ticketmaster and the launch of the Yankees Ticket Exchange, "the only official online resale marketplace for Yankees fans to purchase and resell tickets to Yankees games."⁴² Unlike StubHub, the Yankees Ticket Exchange set a price floor for every game.⁴³ By preventing tickets from being listed for bargain basement price levels, the price floor limited the extent to which secondary sales undercut primary ticket sales. Moreover, the arrangement

35 Chris Nguyen, *Many Unhappy San Francisco 49ers Fans Selling Season Ticket Licenses*, ABC7 NEWS (Sept. 29, 2015), <http://abc7news.com/sports/many-unhappy-49ers-fans-selling-season-ticket-licenses/1009042> [https://perma.cc/WGU2-LMJP].

36 *Id.*

37 Jeff Zalesin, *49ers Fans Say Season Ticket Resale Rule Harms Competition*, LAW360 (Aug. 6, 2015, 1:07 PM), <http://www.law360.com/articles/688070/49ers-fans-say-season-ticket-resale-rule-harms-competition> [https://perma.cc/WGU2-LMJP].

38 In June 2016, the Yankees and StubHub announced a six-year agreement to make StubHub the team's official reseller once again. *See infra* text accompanying notes 52–54. The agreement includes a 50% price floor. *See infra* text accompanying note 54. Evidence suggests that the price floor will result in hundreds of tickets per game being listed for prices that exceed their true market value. *See infra* text accompanying note 163.

39 *Yankees Close to Deal with Ticketmaster After Opting Out of StubHub Contract*, STREET & SMITH'S SPORTSBUSINESS DAILY (Dec. 11, 2012), <http://m.sportsbusinessdaily.com/Daily/Issues/2012/12/11/Franchises/Yankees.aspx> [https://perma.cc/KMT7-LQGK].

40 *Id.*

41 Thurm, *supra* note 20.

42 Press Release, N.Y. Yankees, Yankees Announce Launch of Official Yankees Ticket Exchange for Fans (Feb. 11, 2013), <http://m.mlb.com/news/article/41540894/yankees-announce-launch-of-official-yankees-ticket-exchange-for-fans> [https://perma.cc/U9Z3-VN4G].

43 Jared Diamond, *A Pitched Battle over Yankees' Ticket Policy*, WALL ST. J., Feb. 22, 2016, at A15.

was beneficial to the Yankees because the team kept all of the transaction fees charged to fans buying and selling tickets on the Exchange rather than sharing the revenue with StubHub. While fans could still buy and sell Yankees tickets on StubHub, the Exchange made doing so a much less convenient option.⁴⁴

Relatedly, starting with the 2016 season, the Yankees further undercut secondary sales on nonaffiliated exchanges by refusing to accept print-at-home tickets.⁴⁵ This new policy was a “huge blow” to StubHub since StubHub “primarily uses print-at-home tickets.”⁴⁶ In other words, the Yankees eliminated one of StubHub’s best features—namely, the ability to simply print out a ticket rather than waiting for it in the mail or picking it up in person. The new policy required fans to use traditional hard stock tickets or mobile tickets through a smartphone.⁴⁷ But the mobile ticket option was only available to fans who purchased directly from the Yankees or through the Yankees Ticket Exchange.⁴⁸ Thus, the sale of Yankees tickets on StubHub was limited to old-fashioned hard stock tickets. Sellers would have to physically mail their tickets, an inconvenience that fans “lamented” since they could “no longer do what they had done for years—print out tickets at home.”⁴⁹ The team attributed the new policy to

44 The Exchange used an exclusive barcode transfer system, which allowed a seller to simply type in the ticket’s barcode and a buyer to download the tickets or pick them up at the stadium. Patrick Wall, *Yankees Balk at New StubHub Ticket Pick-Up Center Outside Stadium*, DNAINFO (Feb. 28, 2013, 6:57 AM), <https://www.dnainfo.com/new-york/20130228/concourse/yankees-balk-at-new-stubhub-ticket-pick-up-center-outside-stadium> [<https://perma.cc/UC6M-YS7A>]. These benefits were exclusive to the Exchange and were meant to “lure fans from StubHub”: Yankees tickets could not be electronically delivered through StubHub unless the seller already had an electronic version of the ticket that could be directly uploaded to the site, in contrast to indirectly uploading the ticket by typing in the barcode found on both electronic tickets and physical, hard stock tickets. *See id.* The Exchange’s electronic transfer system mirrored StubHub’s agreement with MLB, which allows StubHub to perform a similar electronic delivery service for the tickets of teams that have not opted out of the deal. *StubHub Seller FAQ*, *supra* note 12.

45 Press Release, N.Y. Yankees, *Yankees Announce On-Sale Dates for 2016 Regular Season Individual Game Tickets* (Feb. 15, 2016), <http://m.yankees.mlb.com/news/article/164530958> [<https://perma.cc/U9Z3-VN4G>].

46 *You’re Outta Here: Yankees Discontinue Print-at-Home Tickets*, CBS N.Y. (Feb. 17, 2016, 10:30 PM), <http://newyork.cbslocal.com/2016/02/17/youre-outta-here-new-york-yankees-discontinue-print-at-home-tickets> [<https://perma.cc/W79Y-628K>].

47 Mark Emery, *By Banning Print-at-Home Tickets, Yankees Hurt Fans Served by StubHub’s Open Market*, N.Y. DAILY NEWS (Feb. 23, 2016, 2:36 PM), <http://www.nydailynews.com/sports/baseball/yankees/banning-print-at-home-tickets-yankees-hurt-fans-stubhub-article-1.2541220> [<https://perma.cc/PW68-3S28>].

48 *Id.*

49 Seth Berkman, *StubHub Will Serve as Yankees’ Ticket Reseller*, N.Y. TIMES (June 27, 2016), <http://www.nytimes.com/2016/06/28/sports/baseball/yankees-and-stubhub-announce-a-ticket-partnership.html> [<https://perma.cc/KW33-ZXXD>]. In response, StubHub established a last-minute ticket center close to Yankee Stadium in time for the 2016 season. *See* Nate Schweber, *Some Yankees Tickets Require a Long Walk*, N.Y. TIMES (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/sports/baseball/some-yankees-tickets-require-a-long-walk.html> [<https://perma.cc/BV3U-YFQT>]. This allowed sellers to ship the tickets to StubHub before a secondary buyer even decided to purchase them. *See id.* Fans could then purchase tickets very close to the time of the event and pick them up just before the

consumer protection concerns, insisting that the use of print-at-home tickets inevitably leads to fraud,⁵⁰ but many believed that the Yankees actually implemented the policy to deter sales on StubHub.⁵¹ The idea was that the Yankees were making it more difficult for fans to use StubHub so that they would move their business to the Yankees Ticket Exchange.

Finally, in June 2016, after “years of feuding” with StubHub, the Yankees announced that they reached an agreement with StubHub for the reseller to become their official secondary ticket exchange.⁵² Both sides have agreed to split the profits from the resale of tickets, and the Yankees are guaranteed at least \$50 million over the course of the six-year agreement.⁵³ Most importantly, the agreement includes a price floor of 50% of the face value of each ticket, a departure from StubHub’s tradition of promoting “an open marketplace [without price floors], where the public [demand] sets the price.”⁵⁴ In other words, despite re-affiliating with StubHub, the Yankees are maintaining extensive control over the resale of their tickets and, in doing so, significantly detracting from their fans’ ability to buy and sell tickets at market-level prices.⁵⁵

II. HOW TEAMS GET AWAY WITH THIS: THE REVOCABLE LICENSE RULE

Fortunately for teams, the law appears to support their efforts to restrict ticket holders’ resale rights. In this Part, I explore the legal justifications that teams use to defend these restrictions. I begin by discussing what is widely considered the uncontroversial black letter law of ticket holder rights—namely, the revocable license rule—and I explain how courts consistently apply this

game. *See id.* But many Yankees fans were frustrated by this arrangement. *See id.* (explaining fans’ frustration with their inability to print their tickets from the StubHub website and describing the unpleasantly long and “frigid walk” from the 161st Street Yankee Stadium subway stop to the StubHub ticket office).

⁵⁰ Press Release, N.Y. Yankees, *supra* note 45.

⁵¹ *See, e.g.*, Matt Bonesteel, *Here’s Why the Yankees Are Getting Rid of Print-at-Home Tickets*, WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/02/17/heres-why-the-yankees-are-getting-rid-of-print-at-home-tickets> [<https://perma.cc/E5B2-63VC>] (“[T]he Yankees probably have an ulterior motive for this, namely that they’ve been at war with StubHub for years now.”); *see also* Berkman, *supra* note 49 (“[M]any perceived the new policy as a way to exclude StubHub from a good chunk of the Yankees’ ticket market because StubHub did not have the means to distribute Yankees tickets through mobile devices.”). Even scholars are generally skeptical of primary ticket sellers’ stated consumer protection justifications for resale restrictions. *See, e.g.*, Happel & Jennings, *supra* note 26, at 180 (explaining that while primary ticket sellers’ efforts to limit the operations of the secondary market “are ostensibly made in the name of consumer protection,” the “ultimate effects are limited consumer options through reduced competition”).

⁵² Berkman, *supra* note 49.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See infra* note 163 and accompanying text for an explanation of how the price floor will negatively affect fans.

rule in favor of teams and to the detriment of fans. I then discuss recent litigation concerning the types of resale restrictions described in Part I, showing how teams continue to rely on the revocable license rule to justify these restrictions. Likewise, I explain how industry insiders widely accept the revocable license rule as the governing principle of ticket holder rights.

A. *The Revocable License Rule Today*

The current black letter law of ticket holder rights is that tickets are mere licenses, revocable at the will of the proprietor. The rule can be traced to the Supreme Court's decision in *Marrone v. Washington Jockey Club*.⁵⁶ In *Marrone*, the Court held that the defendant-proprietor was free to exclude the plaintiff from a racetrack despite the plaintiff's lawfully purchased ticket.⁵⁷ The plaintiff was not entitled to specific performance, and the Court strictly limited any damages to the face value price of the ticket.⁵⁸ The Court reached this conclusion because the "ticket was not a conveyance of an interest in the race track."⁵⁹ Instead, the ticket was a mere license to enter someone else's property for a limited period of time.⁶⁰ The ticket could be revoked at any time because the ticket holder did not actually have a property-based right to attend the event.⁶¹

This notion of tickets as fully revocable licenses is now widely accepted by academics and industry professionals as the governing rule for property rights in tickets.⁶² As such, the rule provides teams with valuable legal ammunition in their efforts to restrict ticket holders' resale rights. As Shepard Goldfein and James Keyte—two prominent sports attorneys—explain, "Historically, courts have viewed an event ticket as a revocable license to attend an event, with no absolute right to sell or transfer that license."⁶³ Thus, courts have consistently invoked the revocable license rule to uphold team-imposed resale restrictions. For instance, in *Soderholm v. Chicago National League Ball Club, Inc.*, the court upheld the Chicago Cubs' decision to refuse to renew the plaintiff's season tickets.⁶⁴ The Cubs made the decision after learning that the plaintiff resold some of his tickets for higher than face value prices, a violation of the team's

⁵⁶ 227 U.S. 633 (1913).

⁵⁷ *Id.* at 636-37.

⁵⁸ *Id.*

⁵⁹ *Id.* at 636.

⁶⁰ *Id.* at 637.

⁶¹ *Id.* at 636-37.

⁶² See, e.g., Dreyer & Schwartz, *supra* note 25, at 766 ("Since at least as far back as 1886, courts have held that an admission ticket to an entertainment venue is a license of a personal nature, and is freely revocable . . ."); see also Davis, *supra* note 1, at 246 & n.37 (citing *Marrone* for the "commonly accepted rule" that a ticket is nothing more than a license to witness a specific performance, which the proprietor may revoke at will for any reason).

⁶³ Goldfein & Keyte, *supra* note 23.

⁶⁴ 587 N.E.2d 517, 521 (Ill. App. Ct. 1992).

resale policy.⁶⁵ The court rejected the plaintiff's characterization of the season ticket plan as a lease or option contract and denied his action for specific performance to compel renewal.⁶⁶ Instead, the court held that a season ticket plan constitutes nothing more than a "series of [revocable] licenses" that permit an individual to attend a specific game in a specific seat.⁶⁷

Similarly, *People v. Waisvisz* upheld the constitutionality of a ticket scalping law and dismissed the defendant's objection that the law unconstitutionally granted event sponsors "the power to determine who will be allowed to engage in the business of ticket brokering."⁶⁸ The court explained that the Illinois statute, which prohibited ticket resales for higher than face value prices, merely "g[ave] effect to the[] common law rights" of ticket holders: "A ticket to a sporting or entertainment event is a license which may be revoked at the will of its issuer."⁶⁹ Consequently, "an event sponsor may impose restrictions on the transferability of tickets which it issues."⁷⁰

Likewise, in *In re Harrell*, the Ninth Circuit held that under Arizona law, a trustee could not sell a debtor's opportunity to renew Phoenix Suns season tickets because "the debtor's revocable opportunity to renew season tickets is not a property right."⁷¹ Furthermore, in *Kully v. Goldman*, the Supreme Court of Nebraska refused to enforce an agreement between fans for the permanent sale of an option to renew football season tickets because the current ticket holder's expectation that he would be offered the same seats each year "was not . . . a property right which he could enforce."⁷² Most recently, in *Fragger v. Indianapolis Colts, Inc.*, the Southern District of Indiana cited the revocable license rule in granting the Colts' motion to dismiss a lawsuit brought by a former season ticket holder after the team declined to renew his ninety-four season tickets.⁷³ These examples show that courts have consistently applied the revocable license rule beyond the resale context to resolve other disputes

⁶⁵ *Id.* at 518.

⁶⁶ *Id.* at 520-21.

⁶⁷ *Id.*

⁶⁸ 582 N.E.2d 1383, 1386 (Ill. App. Ct. 1991).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 73 F.3d 218, 220 (9th Cir. 1996).

⁷² 305 N.W.2d 800, 802 (Neb. 1981).

⁷³ No. 1:16-cv-632, 2016 WL 6610854, at *1-3 (S.D. Ind. Nov. 9, 2016), *appeal docketed*, No. 16 CV 632 (7th Cir. Dec. 21, 2016); *see also* Zachary Zaggar, *Colts Accused of Not Renewing Broker's Season Tickets*, LAW360 (Mar. 22, 2016, 6:14 PM), <https://www.law360.com/articles/774704/colts-accused-of-not-renewing-broker-s-season-tickets> [<https://perma.cc/YJ9Y-SBGX>] ("An Indianapolis Colts season ticket broker sued the football team in Indiana federal court . . . , alleging the Colts have refused to renew his 94 season tickets for the upcoming season"). The plaintiff subsequently appealed the decision to the Seventh Circuit. Zachary Zaggar, *Broker Takes Colts Season Ticket Fight to 7th Circ.*, LAW360 (Dec. 21, 2016, 6:07 PM), <https://www.law360.com/articles/875567/broker-takes-colts-season-ticket-fight-to-7th-circ> [<https://perma.cc/NT8H-UZS8>].

between fans and teams in favor of the latter.⁷⁴ Thus, notwithstanding a few exceptions,⁷⁵ courts have routinely applied the rule in favor of teams and to the detriment of ticket holders and fans.

⁷⁴ See *Pollock v. Nat'l Football League*, 553 F. App'x 270, 270 (3d Cir. 2014) (affirming dismissal of the Super Bowl ticket-purchasing plaintiffs' negligent misrepresentation claim, which stemmed from the NFL's failure to provide the specifically purchased seats, and requiring the plaintiffs to sue under contract for the face value of the tickets because "the entire suit [wa]s grounded in the purchase of tickets, commonly regarded as revocable licenses"); *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1329 (11th Cir. 2008) (reversing lower court decision finding that a mandatory pat-down policy for entry to a stadium violated the Fourth Amendment because, under the totality of the circumstances, the ticket holder consented to the pat-down, and tickets to NFL games grant the holder "at most a revocable license to a seat," meaning the team "retained the right to exclude him from the Stadium for any reason"); *Yarde Metals, Inc. v. New England Patriots Ltd. P'ship*, 834 N.E.2d 1233, 1235-36, 1238 (Mass. App. Ct. 2005) (observing that the "purchase of a ticket to a sports or entertainment event typically creates nothing more than a revocable license" and affirming dismissal of season ticket holder's suit against the New England Patriots for revoking season tickets after plaintiff's friend, while using plaintiff's tickets, misbehaved by throwing bottles); *Bickett v. Buffalo Bills, Inc.*, 472 N.Y.S.2d 245, 246-47 (N.Y. Sup. Ct. 1983) (holding that since admission tickets are revocable licenses, the Buffalo Bills could cancel games during a player's strike without breaching any contractual duties to its ticket holders); cf. *Williams v. Nat'l Football League*, No. 14-1089, 2014 WL 5514378, at *4 (W.D. Wash. Oct. 31, 2014) (finding that the Clayton Act does not apply to football tickets since they are revocable licenses and dismissing visiting team fan's antitrust claims against the team for its policy of limiting playoff ticket purchases to fans who reside in the home team's area).

⁷⁵ Davis highlights two cases in which bankruptcy courts have found a property-based interest in season tickets to argue that "courts have begun to look beyond the contract terms to the policies of the teams" and "find weight in the intangible expectation of renewal created by season ticket holder status." Davis, *supra* note 1, at 251. For example, in *In re I.D. Craig Service Corp.*, the court looked beyond the language on each ticket, which indicated that the ticket was a revocable license, because the team's policies and actions contradicted such an approach and instead "created an expectancy interest in the renewal rights of season ticket holders." *Id.* at 250 (citing *In re I.D. Craig Service Corp.*, 138 B.R. 490, 495 (Bankr. W.D. Pa. 1992)). Specifically, the team's ticket holder handbook referred to a season ticket holder as an "owner" and stated that the ticket holder could transfer his ownership to others. *In re I.D. Craig Service Corp.*, 138 B.R. at 498 n.15. Thus, the court found that the ticket holder's renewal rights were "valuable assets" that could be sold in bankruptcy. *Id.* at 495.

While encouraging for ticket holders and fans, these decisions should not be interpreted as a departure from the longstanding tradition of viewing tickets as revocable licenses. Instead, these decisions only amount to interpretations of contractual agreements between ticket holders and teams. Therefore, a ruling regarding the contractually agreed upon relationship between the Pittsburgh Steelers and their season ticket holders, for example, has no bearing on the relationship between other teams and their fans. Indeed, in *In re Liebman*, the United States Bankruptcy Court for the Northern District of Illinois found in favor of the Chicago Bulls and against a bankruptcy trustee seeking to sell a debtor's season ticket renewal option. 208 B.R. 38, 41 (Bankr. N.D. Ill. 1997). In doing so, the court noted that "[t]he key factor that distinguishes . . . the cases relied upon by the trustee [such as *In re I.D. Craig Service Corp.*] is how [the Bulls] treat[] the renewal rights of season ticket holders." *Id.* at 40. The court proceeded to detail how the Bulls maintained a clear and consistent policy of treating season tickets as fully revocable licenses. *Id.* Still, while these cases may not demonstrate a break with the traditional notion of tickets as revocable licenses, they are helpful insofar as they explore the continued vitality of the revocable license rule in the context of contractual season ticket agreements between fans and teams. This issue will become more important as more teams begin to incorporate the revocable license rule in their contractual agreements with fans. See *infra* subsection IV.C.2 for a more in-depth discussion of this issue and my proposed solutions.

B. *The Revocable License Rule Applied to Current Resale Restrictions and Recent Litigation*

Teams continue to use the rule of tickets as revocable licenses to support their attempts to restrict ticket holders' rights. Furthermore, industry insiders, including sports lawyers, continue to believe in the rule's vitality and its relevance to team-imposed resale restrictions. Indeed, teams have relied on the rule to defend against recent litigation challenging such restrictions.

For example, StubHub sued to challenge the Warriors' policy of cancelling season ticket subscriptions of fans who resell tickets through unofficial exchanges.⁷⁶ StubHub claimed that the Warriors and Ticketmaster had monopolized the ticket resale market in violation of federal and state antitrust law by excluding all other secondary ticket exchange options.⁷⁷ In their initial motion to dismiss, the Warriors argued that any agreement between the Warriors and their fans regarding resale restrictions does not constitute an anticompetitive agreement in restraint of trade because "[a] ticket to a sporting event is a revocable license, and a licensor has long been permitted to impose restrictions on its licensees, including a complete restriction on transferability."⁷⁸ In a subsequent motion to dismiss, the Warriors argued that StubHub could not even allege that the Warriors and their fans made any kind of agreement since "[a]s the issuer of a revocable license, the Warriors can unilaterally impose ticket limitations, including resale restrictions" and "[s]uch unilateral conduct does not constitute an agreement under Section 1 of the Sherman Act."⁷⁹ The district court dismissed the lawsuit, and after StubHub appealed to the Ninth Circuit,⁸⁰ the parties settled.⁸¹

⁷⁶ See *supra* text accompanying note 30.

⁷⁷ Vin Gurrieri, *Warriors, Ticketmaster Teamed to Block Resales: StubHub*, LAW360 (Mar. 30, 2015, 1:06 PM), <http://www.law360.com/articles/636952/warriors-ticketmaster-teamed-to-block-resales-stubhub> [<https://perma.cc/UY74-NJP6>].

⁷⁸ Defendant Golden State Warriors LLC's Motion to Dismiss the Complaint and Memorandum of Points and Authorities in Support of the Motion to Dismiss at 23, *StubHub, Inc. v. Golden State Warriors, LLC*, No. 15-1436, 2015 WL 6755594 (N.D. Cal. Nov. 5, 2015).

⁷⁹ Defendant Golden State Warriors, LLC's Motion to Dismiss the First Amended Complaint and Memorandum of Points and Authorities in Support of the Motion to Dismiss at 24, *StubHub, Inc. v. Golden State Warriors, LLC*, No. 15-1436, 2015 WL 6755594 (N.D. Cal. Nov. 5, 2015) (citing *Soderholm v. Chi. Nat'l League Ball Club, Inc.*, 587 N.E.2d 517, 520 (Ill. App. Ct. 1992)).

⁸⁰ Kali Hays, *StubHub Takes Warriors Ticket Antitrust Suit to 9th Circ.*, LAW360 (Dec. 2, 2015, 1:29 PM), <https://www.law360.com/articles/732958/stubhub-takes-warriors-ticket-antitrust-suit-to-9th-circ> [<https://perma.cc/64RX-XXZ6>]. The district court did not discuss the revocable license rule in its opinion. Instead, the court found that StubHub's federal antitrust claims failed because StubHub could not allege a sufficient product market as required by the Sherman Act. *StubHub*, 2015 WL 6755594, at *3. Since the court found that StubHub failed to adequately allege this threshold matter of antitrust liability, the court did not reach the revocable license issue. *Id.* at *4.

⁸¹ See Order at 1, *StubHub, Inc. v. Ticketmaster, LLC*, No. 15-17362 (9th Cir. July 22, 2016) ("Pursuant to the parties' stipulated agreement . . . , this appeal is voluntarily dismissed.").

Similarly, in their motion to dismiss a season ticket holder class action suit, the New Jersey Devils defended their right to refuse to renew season ticket subscriptions, noting that season ticket holders receive nothing more than a “revocable license to each game.”⁸² The breach of contract suit was brought by fans who alleged that the Devils refused to renew their ticket plans after discovering that they had resold many of their tickets on unofficial resale exchanges. Likewise, in their motion to dismiss a class action suit brought by season ticket holders upset with the team’s seventy-two-hour ticket release policy,⁸³ the San Francisco 49ers countered the plaintiffs’ trespass to chattels claim by arguing that a ticket holder “has no property in a game ticket” since a ticket grants its holder nothing more than a revocable license to sit in a particular seat.⁸⁴ The plaintiffs have since dropped the lawsuit.⁸⁵ Finally, in *Fragger*, the Colts successfully defended their decision to revoke ninety-four season tickets of a Pennsylvania-based ticket broker, arguing that “[t]he majority of courts to face the issue . . . [have held] that a season ticket holder does not enjoy any property rights beyond that of a traditional revocable license.”⁸⁶

These teams’ reliance on the revocable license rule underscores the rule’s continued vitality in the ongoing resale rights battles between teams and ticket holders.⁸⁷ Indeed, Goldfein and Keyte, reflecting on these recent cases, explain,

82 Memorandum of Law in Support of Defendant New Jersey Devils, LLC’s Motion to Dismiss at 11, *Olsen v. N.J. Devils, LLC*, No. 15-02807 (D.N.J. June 3, 2015), ECF No. 8-1. The Devils also cited to *Soderholm* for the proposition that season tickets constitute nothing more than a “series of revocable licenses.” *Id.* at 22 (quoting *Soderholm*, 587 N.E.2d at 521). In June 2016, the parties settled the lawsuit; the terms of the agreement were not disclosed. Matthew Perlman, *NJ Devils Settle Resale Suit with Ticket Holders*, LAW360 (June 10, 2016, 5:32 PM), <http://www.law360.com/articles/806030> [<https://perma.cc/4AZN-U7PX>].

83 See *supra* text accompanying notes 35–37.

84 Notice of Motion and Motion of Defendant Forty Niners Football Company LLC to Dismiss; Memorandum of Points and Authorities in Support Thereof at 16, *Kazemzadeh v. S.F. 49ers*, No. 5-03593 (N.D. Cal. Jan. 11, 2016) (case dismissed).

85 Jeff Zalesin, *Ticket Holder Drops Resale Suit Against 49ers, Ticketmaster*, LAW360 (Jan. 14, 2016, 7:13 PM), <http://www.law360.com/articles/746878/ticket-holder-drops-resale-suit-against-49ers-ticket-master> [<https://perma.cc/NY29-MKRQ>]. Other teams, without specifically citing the revocable license rule, have defended efforts to restrict secondary market sales by pointing to the underlying spirit of the rule, arguing that proprietors have complete control over the sale of tickets. For example, Yankees President Randy Levine justified the decision to eliminate paper tickets by noting, “This is our product and our inventory We have the ultimate right to protect the value of our inventory” *Diamond*, *supra* note 43.

86 Memorandum in Support of Defendant Indianapolis Colts, Inc.’s Motion to Dismiss Plaintiff’s Complaint at 6-7, *Fragger v. Indianapolis Colts, Inc.*, No. 1:16-cv-632, 2016 WL 6610854 (S.D. Ind. Nov. 9, 2016). In granting the Colts’ motion to dismiss, the court relied on both general property law conceptions of tickets and a specific analysis of the Colts’ season ticket policies. See *Fragger v. Indianapolis Colts, Inc.*, No. 1:16-cv-632, 2016 WL 6610854, at *2-3 (S.D. Ind. Nov. 9, 2016) (granting the Colts’ motion to dismiss because “the multitude of cases cited by the [Colts] have found that a season ticket holder does not have a right to renew” and specifically observing that the “clear and unambiguous language of the invoice makes clear that the Colts have retained the right to reject any renewal”), *appeal docketed*, No. 16 CV 632 (7th Cir. Dec. 21, 2016).

87 Two recently filed lawsuits also merit a brief discussion. In late March 2016, Minnesota Timberwolves season ticket holders brought a lawsuit against the team’s newly implemented paperless

“[C]hallenges to resale restrictions have resulted in court opinions confirming the historical view that tickets are mere licenses to attend rather than property to resell,” showing that “the long held view that tickets do not include a right of resale may still be applicable today.”⁸⁸ Similarly, Joseph C. Sullivan, a commercial litigator at Taylor English Duma LLP, notes,

[T]he problem for disgruntled ticket holders [seeking to challenge current resale restrictions] is that courts have generally viewed an event ticket as a license . . . that can be taken away at any time for almost any reason and that doesn’t give the holder an absolute right to transfer or resell that license.⁸⁹

ticket policy. See *supra* text accompanying notes 32–34. The fans alleged that the policy amounts to a breach of contract and a violation of various Minnesota laws. Nick Halter, *Ticket Holders Sue Timberwolves over New Paperless Ticket Policy*, MINNEAPOLIS/ST. PAUL BUS. J. (Mar. 3, 2016, 1:16 PM), <http://www.bizjournals.com/twincities/news/2016/03/03/ticket-holders-sue-timberwolves-over-new-paperless.html> [https://perma.cc/5TEB-WGD5]. They argued that they would not have purchased the season tickets if they had known in advance about the policy. *Id.* Specifically, they contended that the combination of the team’s restriction on unofficial resale exchanges and the official exchange’s use of price floors prevented them from reselling their tickets to most games, especially given the team’s poor performance and the market’s unwillingness to purchase tickets at close to face value prices. *Id.* The Timberwolves moved to dismiss the suit. Andy Greder, *Fan Lawsuit Argues “Bait and Switch” over Timberwolves Flash Seats*, TWINCITIES.COM PIONEER PRESS (June 15, 2016, 8:34 AM), <http://www.twincities.com/2016/06/13/fraud-case-against-timberwolves-heads-to-court> [https://perma.cc/JP4V-4FXQ]. In the end, the team was successful in having the case sent to arbitration. Andy Greder, *Timberwolves Earn Victory in Ticketing Lawsuit*, TWINCITIES.COM PIONEER PRESS (Oct. 14, 2016, 3:48 PM), <http://www.twincities.com/2016/10/14/timberwolves-earn-victory-in-ticketing-lawsuit> [https://perma.cc/68CS-WG9R].

Additionally, in August 2016, football fans filed a class action in the Northern District of Ohio against the NFL and the Pro Football Hall of Fame following the League’s abrupt decision to cancel the annual Hall of Fame exhibition game based on poor field conditions. *Lawsuit Seeks \$5M from NFL over Hall of Fame Game Cancellation*, ESPN (Aug. 11, 2016), http://www.espn.com/nfl/story/_/id/17276634/class-action-lawsuit-seeks-5-million-damages-nfl-hall-fame-game-cancellation [https://perma.cc/6RA8-5EZZ]. Specifically, the plaintiffs alleged that the NFL and Pro Football Hall of Fame caused the field to be unplayable through their last-minute attempts to paint logos on the field and that they knew the field was unplayable hours before making an official announcement, leaving fans to travel to the stadium and purchase concessions and souvenirs. Zachary Zaggar, *NFL, Hall of Fame Ignoring Bid to Stop ‘Improper’ Offers*, LAW360 (Sept. 16, 2016, 6:24 PM), <http://www.law360.com/articles/840938> [https://perma.cc/47JY-D36H]. While the league offered to refund the face value price of each ticket and reimburse fans for one night of hotel accommodations, the suit seeks additional damages, including the actual price paid for each ticket, travel expenses, and the full cost of lodging. *Id.* Shortly after filing, the plaintiff’s counsel dropped the suit and brought “an essentially identical” suit against the NFL and the Hall of Fame in the Central District of California. Memorandum of Points and Authorities in Support of Defendant National Football League’s Joinder in Defendant National Football Museum, Inc.’s Motion to Dismiss or Transfer Based upon Improper Venue and National Football League’s Separate Motion to Dismiss for Failure to State a Claim at 4, *Herrick v. Nat’l Football League*, No. 2:16-cv-06324-TJH (C.D. Cal. Oct. 17, 2016). The NFL has moved to dismiss the suit for improper venue or, alternatively, to transfer the suit to the Northern District of Ohio, or if the court decides to reach the merits, to find that the NFL is not a proper party to the suit. *Id.* at 10.

⁸⁸ Goldfein & Keyte, *supra* note 23.

⁸⁹ Zachary Zaggar, *New Ticket Restrictions Could Be Risky for Teams*, LAW360 (Mar. 25, 2016, 5:26 PM), <http://www.law360.com/articles/776139/new-ticket-restrictions-could-be-risky-for-teams> [https://perma.cc/DQ8K-JMRL].

III. THE ORIGIN OF THE REVOCABLE LICENSE RULE AND ITS LIMITED INITIAL SCOPE

At first glance, the plethora of case law and scholarship supporting the rule of tickets as revocable licenses appears to weigh strongly in favor of teams and against individual ticket holders. But a closer look at the origin of the revocable license rule demonstrates that teams should not have as much of an advantage as they have been given. In this Part, I outline the history of the rule of tickets as revocable licenses, beginning with the common law of England and continuing through the doctrine's acceptance in the United States. I describe the intense early criticism of and departures from the rule to show that it did not originally enjoy the same kind of unquestioned acceptance that it does today. Similarly, I outline the ways in which courts initially avoided strict applications of the rule when a straightforward application would have led to an unjust outcome. Given this background, I argue that the rule's original proponents never meant for it to be blindly applied in favor of proprietors. Instead, the rule served the very narrow purpose of protecting a proprietor's right to exclude unruly patrons. Thus, lawmakers should reconsider the rule's applicability in the current ticket resale context.

A. *The Foundational Cases*

The rule of tickets as revocable licenses begins with *Wood v. Leadbitter*, a mid-nineteenth-century English case.⁹⁰ Scholars have cited *Wood* as representative of the black letter English law of its time regarding admission tickets.⁹¹ In *Wood*, the court upheld a horsetrack owner's right to eject a patron who had purchased a valid ticket to watch a race, holding that the ticket was a mere license, revocable at any time, as opposed to a license coupled with a grant that entitled the ticket holder to a property interest in the land.⁹² The court reached that conclusion after noting that an incorporeal inheritance in land could only be granted by deed and observing that there was no deed in that particular case.⁹³ In turn, the court explained that the ejected patron's only

⁹⁰ (1845) 153 Eng. Rep. (Exch.) 351; 13 M. & W. 838.

⁹¹ See, e.g., J.A.R., *Licenses-Liability of Theater Proprietor for Ejection of Patron*, 8 TEX. L. REV. 601, 601 (1930) (citing *Wood* for the "early English view [that] favored absolute revocability of the license to be upon the premises and allowed only a recovery of damages for the breach of the contract measured by the price paid for admission"); S.F.D., Comment, *The Right of an Ejected Ticket-Holder to Recover in Tort*, 26 YALE L.J. 395, 397 & n.5 (1917) (citing *Wood* as indicative of the nineteenth century English view that a ticket holder possessed a revocable license and that an ejected patron's only remedy was an action for breach of contract).

⁹² (1845) 153 Eng. Rep. (Exch.) at 358-59; 13 M. & W. at 854-55.

⁹³ *Id.*; see also Bennett Liebman, *The Supreme Court and Exclusions by Racetracks*, 17 VILL. SPORTS & ENT. L.J. 421, 436 (2010) (explaining *Wood*'s reasoning that "an admission ticket to the racetrack was a mere license uncoupled with any other rights to the property").

remedy was to bring a breach of contract suit against the proprietor, through which the patron could only recover the price of the admission ticket.⁹⁴

Over fifty years later, in *Marrone*, the United States Supreme Court cited *Wood* for the “rule commonly accepted in this country from the English cases . . . that such tickets do not create a right *in rem*.”⁹⁵ The Court ruled in favor of the defendant-racetrack, which had denied admission to the plaintiff despite his valid entry ticket.⁹⁶ According to the Court, the ticket holder possessed nothing more than a license to enter, which was freely revocable by the proprietor for any reason; therefore, he was not entitled to specific performance, and his only remedy was to sue for breach of contract.⁹⁷ The ticket holder did not have an “irrevocable right of entry,” and his ticket was “subject to be revoked” at any time and for any reason.⁹⁸

Nevertheless, the Court went further than *Wood*'s reasoning by discussing important policy considerations in support of the revocable license rule. The Court noted that the ticket “was not a conveyance of an interest in the racetrack, not only because it was not under seal but because by common understanding it did not purport to have that effect.”⁹⁹ Thus, the Court moved beyond *Wood*'s analytical justification, the lack of a sealed deed. Similarly, the Court explained that “[t]here would be obvious inconveniences” if the ticket holder were held to possess a right *in rem* against the proprietor.¹⁰⁰ This suggested that the Court's decision was driven more by policy considerations than by fundamental property law concepts. Still, the *Marrone* Court's adoption of the rule that tickets are revocable licenses shortly became recognized as the governing American law regarding property rights in tickets.¹⁰¹

B. *Early Criticisms of the Rule and Departures from It*

A closer look at the case law and legal scholarship from the period immediately following *Marrone* demonstrates that the revocable license rule was not as well-received in its own time as we might expect given its wide acceptance as the governing rule today. Courts and academic commentary

⁹⁴ *Wood*, (1845) 153 Eng. Rep. (Exch.) at 359; 13 M. & W. at 855.

⁹⁵ *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 636 (1913).

⁹⁶ *Id.* at 636-37.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 636.

¹⁰⁰ *Id.*

¹⁰¹ See Ralph W. Aigler, *Revocability of Licenses – The Rule of Wood v. Leadbitter*, MICH. L. REV. 401, 401 (1915) (citing *Marrone* to show that “[t]he rule of *Wood v. Leadbitter* has been almost uniformly followed by the American courts”); Charles E. Clark, *Licenses in Real Property Law*, 21 COLUM. L. REV. 757, 770 (1921) (citing *Marrone* for the proposition that American courts have followed *Wood*'s lead in holding that “a ticket-holder might be ejected by the proprietor at will”).

immediately criticized the decision, focusing on the unjust outcomes that the rule plainly appeared to support. Moreover, courts shied away from the rule in its purest form by rarely applying it in favor of proprietors when the ticket holder did nothing wrong. Instead, courts often found ways to find in favor of innocent ticket holders despite the rule's obvious slant in favor of proprietors. Finally, shortly after *Marrone*, English courts exhibited their displeasure with the revocable license rule by invalidating *Wood*.

1. Policy Arguments Raised Against the Revocable License Rule

First, *Marrone* was criticized for basing its holding on the public's common understanding of tickets. In 1942, Alfred Conard argued,

Ticket cases are not to be confused with social entertainment, domestic employment and retail merchandising, where the licensees understand very well that they enter the land and remain upon it by the proprietor's favor. In ticket cases the parties do intend, to the extent that they think about it at all, to create an interest which has all the characteristics of an easement except for its relatively brief duration.¹⁰²

In other words, the common understanding of admission tickets at the time actually weighed in favor of finding that tickets grant the holder something closer to an irrevocable right of entry.

Additionally, academic commentary criticized the *Marrone* rule for its potential to lead to unjust outcomes for ticket holders. For example, in 1915, Ralph W. Aigler noted, "It does strike one as unjust . . . that after one has purchased a ticket to attend a theatre and has taken his seat he should be subject to expulsion at any time for a bad reason or no reason at all and then be limited to an action merely for the breach of the contract . . ." ¹⁰³ Likewise, the dissenting judge in *Bouknight v. Lester* explicitly rejected the revocable license rule, explaining his "conviction that it does not appeal or conform to my common sense, conscience, or conception of the law."¹⁰⁴ Many condemned the rule because it could be used to deprive an innocent ticket holder of the opportunity to experience the event that he purchased a ticket to view.¹⁰⁵

¹⁰² Alfred F. Conard, *An Analysis of Licenses in Land*, 42 COLUM. L. REV. 809, 825 (1942). An easement is defined as an "interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)." *Easement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁰³ Aigler, *supra* note 101, at 403.

¹⁰⁴ 112 S.E. 274, 276 (S.C. 1921) (Cothran, J., dissenting).

¹⁰⁵ See, e.g., Clark, *supra* note 101, at 757 ("Causes arise, however, in which the application of the rule would violate principles of the plainest justice . . ."); Alfred F. Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U. PA. L. REV. 809, 810 (1942) (criticizing the rule for the "shock

2. Courts' Limited Applications of *Marrone*

Most early twentieth century courts that purported to follow the revocable license rule still did not allow proprietors to take advantage of the rule's seemingly broad scope. Instead, courts very rarely used the *Marrone* rule to permit a proprietor to eject or exclude a patron that paid for an admission ticket and behaved appropriately.¹⁰⁶ Even *Shubert v. Nixon Amusement Co.*,¹⁰⁷ a case that has been cited as an example of the revocable license rule being used to sanction the arbitrary expulsion of a law-abiding customer,¹⁰⁸ is not as straightforward as it may first appear. In *Shubert*, the expelled patron, Lee Shubert, was a theater producer who decided to attend a show produced by his competitor—an individual with whom he had been engaged in a “trade war.”¹⁰⁹ One aspect of these competitive relationships involved efforts by producers to spot attractive performers for other companies and make them better offers.¹¹⁰ Thus, it is “doubtful” that Shubert truly believed he was a “welcome guest.”¹¹¹ Mr. Shubert, consequently, should not be described as an innocent patron who was arbitrarily excluded.¹¹²

Likewise, cases in which courts applied the revocable license rule in favor of proprietors usually involved unruly patrons who deserved to be excluded. For example, the *Marrone* rule was used to eject patrons who were violating the proprietor's rules regarding proper behavior.¹¹³ Indeed, even *Wood* and *Marrone* did not involve factual situations in which the excluded patrons were completely innocent. As Conard explains, the plaintiff in *Wood* was ejected “in consequence

which it gives to many people's sense of justice” and noting that “an amusement patron who is put out of his seat has been abused in the same sense that a citizen who is driven off the street has been abused”).

¹⁰⁶ See, e.g., *Kelly v. Dent Theaters, Inc.*, 21 S.W.2d 592, 593 (Tex. Civ. App. 1929) (“We have examined practically all the cases [cited by the parties that apply the *Marrone* rule], and find that . . . [only one] of them involved the arbitrary and wholly unwarranted ejection of a ticket holding patron who had been duly received, accepted, and assigned a seat and was conducting himself in a proper and lawful manner”); Conard, *supra* note 105, at 812 (analyzing twenty-one cases that are cited in the American Lawyer's Reports in support of the *Marrone* rule that tickets are revocable licenses and finding that none of the cases involved a factual situation in which a patron was arbitrarily ejected after purchasing a proper ticket and behaving properly).

¹⁰⁷ See 83 A. 369, 371 (N.J. 1912) (adopting the revocable license rule as the governing law in New Jersey and holding that a theater patron could be ejected without any reason, even after the patron paid for a ticket and took his seat).

¹⁰⁸ See *Kelly*, 21 S.W.2d at 593 (citing *Shubert* as the only example of a case that applied the rule in such a way).

¹⁰⁹ Conard, *supra* note 105, at 814.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Interestingly, the court's opinion fails to mention Mr. Shubert's occupation or the rivalry between the parties.

¹¹³ Conard, *supra* note 105, at 813-14 (noting that four of the twenty-one cases cited for the revocable license rule involved patrons who were admittedly violating the establishment's rules and that an additional three involved patrons who had broken rules in the past).

of some alleged malpractices of his on a former occasion, connected with the turf,” and Mr. Marrone was ejected “on the charge of having ‘doped’ or drugged a horse entered by him for a race a few days before.”¹¹⁴ In short, applications of the revocable license rule in favor of proprietors were confined to cases in which the patron deserved to be expelled.

3. Courts’ Avoidance of *Marrone’s* Unjust Applications

Furthermore, courts creatively skirted the revocable license rule when a plain application of it would have been unjust by using alternate grounds of recovery for plaintiffs. For example, in *Planchard v. Klaw & Erlanger New Orleans Theater Co.*, the Supreme Court of Louisiana acknowledged the rule that tickets are revocable licenses but nevertheless awarded \$500 in damages to an expelled patron for insult and maltreatment.¹¹⁵ Similarly, in *Boswell v. Barnum & Bailey*, the Supreme Court of Tennessee referred to a ticket as a “mere revocable license” but ultimately affirmed \$500 jury verdicts in favor of expelled patrons because the ushers used “insulting and profane” language toward the patrons in the presence of a large crowd.¹¹⁶ And, in *Saenger Theatres Corp. v. Herndon*, the Supreme Court of Mississippi noted the proprietor’s right “to revoke the license to enter which is conferred by the purchase of a ticket of admission,” but it ultimately affirmed an award for the excluded patron based on “shame and humiliation.”¹¹⁷ The court explained, “Ordinarily, it is true, damages for mental pain and suffering not accompanied by a distinct physical injury are not allowable; but this rule does not include cases of wanton or shamefully gross wrong, such as the case now before us.”¹¹⁸ In all of these cases, the court could have simply cited *Marrone* to deny the plaintiffs any relief beyond the price of their tickets. Thus, courts’ reluctance to apply *Marrone*—and their use of alternate theories of recovery—underscores the low regard in which they held the revocable license rule. Indeed, Conard characterized these decisions as indicative of “a new tort of insult” that amounts to “a practical evasion of the rule that an amusement patron’s license is revocable.”¹¹⁹

Finally, some courts avoided the rule by creatively interpreting the facts such that the rule would be inapplicable. For instance, in *Metts v. Charleston Theater Co.*, the Supreme Court of South Carolina allowed a plaintiff to recover punitive damages after being excluded from a theater when the proprietor realized that

¹¹⁴ *Id.* at 813 (footnotes omitted) (internal quotation marks omitted) (first quoting *Wood v. Leadbitter*, (1845) 153 Eng. Rep. (Exch.) 351; 13 M. & W. 838; then quoting *Marrone v. Wash. Jockey Club*, 227 U.S. 633 (1913)).

¹¹⁵ 117 So. 132, 133-34 (La. 1928).

¹¹⁶ 185 S.W. 692, 692-93 (Tenn. 1916).

¹¹⁷ 178 So. 86, 87 (Miss. 1938).

¹¹⁸ *Id.*

¹¹⁹ Conard, *supra* note 105, at 811.

the plaintiff had accidentally been given a ticket to the previous performance.¹²⁰ The court acknowledged the revocable license rule but ultimately avoided its application by finding that the defendant never actually revoked the plaintiff's ticket, despite "abundant evidence to support the defendant's contention that there was a revocation."¹²¹ This led one commentator to argue that the court was convinced of the "justice of the plaintiff's cause of action," and that the court "adopted this convenient solution" to "free itself from the firmly-embedded notion that a 'license' not coupled with a grant under seal is revocable at the will of the licensor."¹²² Another described how courts, "apparently realizing the practical injustice worked by a true application of the rule of the *Wood* case, . . . conveniently evade its consequences" while "purporting to follow it."¹²³

4. England's Abandonment of the Revocable License Rule Due to Its Inequitable Implications

Meanwhile across the pond, English courts viewed the *Wood* rule with even more disdain and ultimately decided to formally abandon the doctrine that tickets are revocable licenses. *Wood* was effectively nullified in 1915 by *Hurst v. Picture Theatres, Ltd.*, an expelled theater patron case.¹²⁴ In *Hurst*, the court explained that given the merger of law and equity, *Wood* was no longer good law and could not be "applied in its integrity in a Court which is bound to give effect to equitable considerations."¹²⁵ In addition, the court rejected *Wood* on policy grounds, explaining that to hold "it is competent to the proprietors of the theatre, merely because they choose so to do, to call upon [a behaving patron] to withdraw before he has seen the performance" is "contrary to good sense" and likely to bring about "startling results."¹²⁶ Thus, the court affirmed a judgment against the theater in tort, noting that the patron had purchased a right to remain in the theater for the duration of the show, as opposed to a revocable license.¹²⁷ Shortly thereafter, English courts confirmed that *Wood*

¹²⁰ 89 S.E. 389, 390 (S.C. 1916).

¹²¹ S.F.D., *supra* note 91, at 396.

¹²² *Id.*

¹²³ J.A.R., *supra* note 91, at 602.

¹²⁴ [1915] 1 KB 1 at 1.

¹²⁵ *Id.* at 9.

¹²⁶ *Id.* at 5.

¹²⁷ *Id.* at 11. The court explained that the theater committed a tort by removing the patron and that the removal constituted "an assault upon him in law." *Id.* Consequently, the court affirmed a jury verdict granting a higher award than the price of the ticket. *Id.* It is important to note that the patron left peacefully after being asked to leave and that the theater did not have him forcibly removed. *Id.* at 11. Thus, the holding in favor of the patron was not based on the manner in which he was removed. Instead, the holding was based on the court's characterization of an admission ticket as something more than a revocable license. In other words, *Hurst* went beyond merely finding a way to creatively avoid applying the revocable license rule.

was no longer good law, relying on the merger of law and equity as evidence of *Wood's* inapplicability.¹²⁸

C. *Reconsidering the Revocable License Rule's Intended Purpose and Scope*

All of these criticisms of and departures from the rule raise a question: what purpose, if any, did the revocable license rule originally serve? Conard suggested an answer:

I conclude that the proprietor's privilege of arbitrary expulsion serves a somewhat useful purpose, for the strange reason that practically no arbitrary expulsions occur. It protects a proprietor from liability to a patron whom he has expelled with a reasonable, or at least an honest, belief that he constituted a present threat to order in the theater, by giving the jury no chance to find erroneously that the manager was arbitrary.¹²⁹

In other words, the rule may have been adopted to ensure that honest proprietors were not subjected to liability for ejecting and excluding patrons who actually deserved to be excluded. This calls to mind *Marrone's* warning that "there would be obvious inconveniences" if the ticket holder was held to possess a right in rem against the proprietor.¹³⁰ Those "obvious inconveniences" may refer to opportunities for juries to find against proprietors who "act reasonably or in good faith" and the resulting impediment to the "proprietor's duty to keep his premises safe for others."¹³¹ Indeed, courts and commentators in the period immediately following *Marrone* firmly believed in a proprietor's duty to maintain order in his venue.¹³²

Likewise, *Marrone* may have dismissed any concerns about the rule's seemingly wide scope and potential for unjust applications on the assumption that proprietors generally did not exclude ticket-bearing patrons. Indeed, academics in the period immediately following *Marrone* believed that economic pressure would prevent proprietors from arbitrarily expelling

¹²⁸ Liebman, *supra* note 93, at 437; *see also* Winter Garden Theatre (London) Ltd. v. Millennium Prods. Ltd. [1948] AC 173 (HL) at 191 ("[S]ince the fusion of law and equity, . . . Wood[] . . . should no longer be regarded as an authority."); *Errington v. Errington* [1952] 1 KB 290 at 298-299 ("Law and equity have been fused for nearly 80 years, and since 1948 it has been clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain.").

¹²⁹ Conard, *supra* note 105, at 822.

¹³⁰ *See supra* text accompanying note 100; *see also* *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 636 (1913).

¹³¹ Conard, *supra* note 105, at 823.

¹³² *See, e.g.,* *Russo v. Orpheum Theatre & Realty Co.*, 66 So. 385, 386 (La. 1914) (explaining a theater superintendent's duty to maintain order during a performance); *Licenses—Revocation—Liability of Theatre Owner for Unwarranted Ejection of Patron*, 42 HARV. L. REV. 834, 835 (1929) ("In the interest of maintaining order, a proprietor must be permitted to eject a patron if there is reasonable cause to believe that he has violated the implied conditions of his contract, and is creating a disturbance.").

patrons.¹³³ Similarly, lawyers of that era who represented theater proprietors called it “ridiculous” to suggest that “management would order or tolerate arbitrary expulsions,” suggesting that such expulsions would be bad for business.¹³⁴ In one extreme example, Alexander Woollcott, a *New York Times* theater critic, described the aftermath of *Woollcott v. Shubert*, in which the court affirmed the dismissal of his lawsuit against a theater for excluding him:¹³⁵

Within ten minutes the Times had excluded all Shubert advertising from its columns and also all allusion to any actor playing in a Shubert theater . . . [H]aving won the decision in the courts, the Shuberts were no better off than before. Their plays, their players and their advertising were ignored. Under this treatment they soon came begging for my return.¹³⁶

The *Marrone* Court may have assumed that ticket holders did not need the law to protect them from unethical proprietors. Proprietors who chose to behave in such a manner would face other consequences for their actions. Thus, the revocable license rule likely was not meant to supply proprietors with an unlimited power to exclude. Instead, the rule was designed to supply proprietors with a reliable legal basis for dealing with unruly patrons. The revocable license rule merely “masks judicial belief that theater proprietors can be trusted not to expel their patrons unjustifiably” and that “juries cannot be trusted to determine fairly whether an expulsion is justified.”¹³⁷ In other words, the rule simply protected ethical proprietors from the possibility of a jury deciding factual questions in favor of unruly patrons.

IV. THE REVOCABLE LICENSE RULE’S CONTINUED VITALITY IN THE MODERN SECONDARY TICKET MARKET

Given the revocable license rule’s troubled background and limited scope, lawmakers must reconsider the extent to which it continues to inform our view of the ticket market today. Specifically, lawmakers should be concerned with the rule’s applicability in the modern online resale market for sporting tickets. In this Part, I explain how the current economic landscape for sports tickets actually incentivizes teams to exploit the revocable license rule to the detriment of ticket holders, making the rule a more dangerous weapon in the hands of teams today than it was for theater owners in the early twentieth

¹³³ See, e.g., Conard, *supra* note 105, at 820 (“[P]roprietors will act with decent caution, regardless of legal sanctions.”).

¹³⁴ *Id.* at 817. Conard concluded, “[T]he conception of a proprietor arbitrarily expelling a patron is a legal fiction. Proprietors very rarely *expel* patrons who are not violating established rules, or suspected of it, despite their legal privilege to do so.” *Id.* at 816.

¹³⁵ 111 N.E. 829, 829 (N.Y. 1916).

¹³⁶ Conard, *supra* note 105, at 821 (quoting Letter from Alexander Woollcott, *N.Y. Times* (June 5, 1938)).

¹³⁷ Conard, *supra* note 102, at 823.

century. I then argue that policy and fairness considerations should spur lawmakers to question the rule's continued relevance in the modern ticket resale context. Finally, I propose suggestions that lawmakers and the industry can implement to reach a fair solution for all sides. Most importantly, my goal is to ensure that lawmakers no longer allow teams to take advantage of an outdated rule that was designed in another context and for a different and limited purpose.

A. *The Modern Secondary Ticket Market and Teams' Strong Incentives to Exploit the Revocable License Rule*

While economic incentives for early twentieth century proprietors aligned with the interests of patrons, the proliferation of the contemporary secondary ticket market has created lucrative opportunities for proprietors to take full advantage of the revocable license rule to the detriment of ticket holders. The economic context has changed, and proprietors, such as sports teams, can now generate more money by controlling the secondary market by using the *Marrone* rule to impose non-negotiable resale restrictions on ticket holders.

The contemporary secondary market presents three principal concerns for teams. First, exchanges like StubHub compete with teams' efforts to sell tickets directly to fans on a game-by-game basis. Second, the availability of discounted tickets on the secondary market can undercut teams' efforts to sell season ticket subscriptions to fans. Finally, the current secondary market presents more opportunities for high-volume ticket scalping since there are now a myriad of platforms for ticket holders to sell tickets to fans for a profit. All of these concerns incentivize teams to use the revocable license rule to control the secondary market. Thus, unlike early twentieth century proprietors, modern teams have strong economic incentives to utilize the revocable license rule in ways that are detrimental to their customers' interests. In short, taking full advantage of the revocable license rule is now good for business.

First, team executives lament StubHub's ability to cut into their business.¹³⁸ For example, on one particular night, for roughly two-thirds of MLB teams, 69% of tickets sold through StubHub were bought for lower than face value prices.¹³⁹ When fans buy tickets from the secondary market instead of from the team, the team loses a sale that it would otherwise ordinarily make.¹⁴⁰ Similarly, teams are concerned that the presence of discounted tickets on the secondary market undercuts the value of being a season ticket holder and that fans who buy directly from the team may stop doing so if they decide that it would be cheaper to wait to purchase tickets on sites like StubHub closer to

¹³⁸ See *supra* text accompanying notes 15–20.

¹³⁹ See King & Fisher, *supra* note 9.

¹⁴⁰ Of course, one counterargument to this point is that some ticket purchasers may only decide to purchase tickets because of the discount provided by the secondary market.

the day of the game. For instance, one Yankees executive defended the team's decision to eliminate paper tickets by noting,

The problem below market at a certain point is that if you buy a ticket in a very premium location and pay a substantial amount of money. It's not that we don't want that fan to sell it, but that fan is sitting there having paid a substantial amount of money for a ticket and [another] fan picks it up for a buck-and-a-half and sits there, and it's frustrating to the purchaser of the full amount. And quite frankly, the fan may be someone who has never sat in a premium location. So that's a frustration to our existing fan base.¹⁴¹

While the last two sentences of the Yankees executive's statement were criticized for being unnecessary and offensive,¹⁴² his earlier point is reasonable: fans who pay full price would not be happy to learn that other fans are consistently purchasing discounted tickets—for the same seat—on the secondary market.

Additionally, the modern secondary market presents new opportunities for high-volume ticket scalping: individuals can now purchase large quantities of season tickets directly from a team with the sole intention of selling tickets to actual fans for a profit.¹⁴³ A simple Craigslist search for New York Mets tickets reveals multiple postings in which sellers are offering tickets available for multiple Mets home games.¹⁴⁴ StubHub even allows fans to sell an entire season ticket subscription in one transaction.¹⁴⁵ Alternatively, scalpers can easily list their tickets online for every game individually and adjust prices according to the expected demand for each game.

Understandably, teams are concerned with these practices. In their motion to dismiss the season ticket holder class action suit discussed above,¹⁴⁶ the New Jersey Devils accused the plaintiffs of having intentions to scalp tickets:

¹⁴¹ Dayn Perry, *Yankees Exec Doesn't Want Value Shoppers Buying 'Premium' Tickets*, CBSSPORTS.COM (Feb. 18, 2016, 5:34 PM), <http://www.cbssports.com/mlb/news/yankees-exec-doesnt-want-value-shoppers-buying-premium-tickets> [<https://perma.cc/XAR5-QY3U>].

¹⁴² See, e.g., *id.* (“[I]t sounds a lot like the Yankees are trying to keep the ‘undesirables’ out of the good seats.”).

¹⁴³ Ticket scalping is certainly not a new phenomenon. In *Collister v. Hayman*, the Court of Appeals of New York enforced a proprietor's policy to prohibit entry to ticket holders who purchased their tickets on the sidewalk from a local ticket scalper. 76 N.E. 20, 20-21 (N.Y. 1905). In doing so, the court characterized the policy as a regulation that “tends to protect patrons from extortionate prices” and therefore found it to be a “reasonable” restriction. *Id.* at 21. Still, the modern ticket market, which allows both primary and secondary transactions to take place over the internet, presents far greater opportunities for these kinds of practices.

¹⁴⁴ See, e.g., *Tickets for All Mets Games! Make Me an Offer: 1\$*, CRAIGSLIST, <https://newyork.craigslist.org/brk/tix/5770873623.html> [<https://perma.cc/YR46-FRJE>] (“I have an assortment of tickets from various Mets games over the course of the season.”).

¹⁴⁵ See e.g., *2016 New York Knicks Season Tickets – Season Package (Includes Tickets for All Regular Season Home Games)*, STUBHUB, <http://www.stubhub.com/new-york-knicks-tickets-new-york-knicks-new-york-madison-square-garden-10-24-2016/event/9583759> [<https://perma.cc/Z8DM-8UBF>].

¹⁴⁶ See *supra* text accompanying note 82.

“Plaintiffs have their own separate agenda and their interests do not align with fans who have bought season tickets. They are, at bottom, ticket brokers masking as ‘fans’ who are most interested in buying and reselling large numbers of tickets for their own benefit.”¹⁴⁷ Thus, primary ticket vendors resent resellers who are able to earn profits from the resale of tickets without contributing to the event or assuming the risk that comes with planning and hosting the event.¹⁴⁸ Given these concerns, it is not surprising that teams are implementing new initiatives to curb the influence of the secondary market¹⁴⁹ and that teams are relying on the revocable license rule to defend these measures.¹⁵⁰

B. *The Need to Curb Teams’ Use of the Revocable License Rule
in the Modern Resale Context*

Teams seeking to defend resale restrictions should not be able to make use of a doctrine that was likely designed for a very specific purpose—protecting proprietors’ right to exclude unruly patrons—and that rested on the now-outdated assumption that economic incentives would prevent proprietors from applying the rule to the detriment of their patrons. Policy and fairness considerations ultimately weigh in favor of limiting teams’ ability to impose restrictions on ticket holders’ resale rights. Though teams possess some legitimate concerns about the growth of the secondary market, they should not be granted free reign to impose resale restrictions as they see fit. Such freedom has resulted in very unfair outcomes for fans as teams have been able to push the risk of an unsuccessful season onto season ticket holders while maintaining the right to capture the additional financial benefit of a potential strong season. Moreover, current resale restrictions artificially inflate ticket prices on the secondary market, which makes it more difficult for less wealthy fans to attend games and more difficult for ticket holders to recoup some of their investment.

Teams’ concerns about ordinary (non-high-volume scalper) ticket holders who earn profits through resales must be discounted. After all, issuers in the securities markets face the same situation when broker-dealers profit through resales of an issuer’s securities, yet this practice is acceptable. Happel and Jennings explain, “[W]e [do not] decide that investment firms that deal in secondary trading are making far too much money from the increase in value in the stocks and should be, therefore, cut out of the markets with their economic rents going back to the company.”¹⁵¹ In addition, while teams and primary ticket

¹⁴⁷ Memorandum of Law in Support of Defendant New Jersey Devils, LLC’s Motion to Dismiss at 7, *Olsen v. N.J. Devils*, No. 2:15-02807 (D.N.J. June 3, 2015).

¹⁴⁸ Happel & Jennings, *supra* note 26, at 180.

¹⁴⁹ *See supra* Part I.

¹⁵⁰ *See supra* Section II.B.

¹⁵¹ Happel & Jennings, *supra* note 26, at 197.

vendors might lose money when already-sold tickets subsequently increase in value, the reverse is just as true—ticket holders suffer when the value of their already-purchased tickets decreases. This can be due to a variety of circumstances, including a team having an unsuccessful season or even bad weather on a particular evening. Put another way, teams often achieve financial gains in relation to their customers by selling tickets in advance and eliminating the risk of the ticket later declining in value. Teams should not be able to simultaneously hedge the other way by retaining the right to direct potential resale profits their way. This is exactly the kind of situation that prompted the Timberwolves season ticket holders to sue.¹⁵² In their complaint, the fans explained, “Because the Timberwolves have performed so poorly, Plaintiffs and class members have been left holding the bag, since reasonable market purchasers have no interest in paying premium prices for a team mired at the bottom of the conference standings with no hopes of making the NBA playoffs.”¹⁵³ If we do not expect the Timberwolves to offer a refund to season ticket holders during a bad season, why should we allow them to capture all of the upside during a better season?

Finally, resale restrictions are troubling in that they artificially inflate market prices so that fewer fans can afford tickets. A February 2016 report prepared by the Office of the Attorney General for the State of New York describes the state’s concern with “the setting of price floors on ticket resale, the practices that impede consumer access to alternative ticket resale platforms, and . . . the combined effect of such conduct on consumers.”¹⁵⁴ The report specifically highlights the NFL Ticket Exchange and the now-defunct Yankees Ticket Exchange as examples of team-managed resale exchanges that incorporate price floors.¹⁵⁵ These price floors in turn deprive the public of the “chief benefit of the market-driven approach[.] . . . lower prices.”¹⁵⁶ Similarly, the report discusses other examples of measures teams use to restrict resales, including delayed ticket delivery mechanisms as well as cancelling the season subscriptions of fans who sell their tickets on sites like StubHub.¹⁵⁷

The New York Attorney General is rightfully troubled by these practices because the New York Legislature, in an attempt to benefit consumers, decided to eliminate resale restrictions in 2007.¹⁵⁸ The rationale behind the decision was

¹⁵² See *supra* note 87.

¹⁵³ Class Action Complaint & Demand for Jury Trial at 2, *GLS Cos. v. Minn. Timberwolves Basketball LP*, No. 27-CV-16-2816 (Minn. Dist. Ct. Mar. 3, 2016).

¹⁵⁴ ERIC T. SCHNEIDERMAN, OFFICE OF N.Y. STATE ATT’Y GEN., OBSTRUCTED VIEW: WHAT’S BLOCKING NEW YORKERS FROM GETTING TICKETS 32 (2016), http://www.ag.ny.gov/pdfs/Ticket_Sales_Report.pdf [<https://perma.cc/BFF3-4EQK>].

¹⁵⁵ *Id.* Since the Yankees’ agreement with StubHub includes a price floor, the Attorney General’s concerns with price floors still apply to the New York Yankees. See *supra* text accompanying note 54.

¹⁵⁶ SCHNEIDERMAN, *supra* note 154.

¹⁵⁷ *Id.* at 33.

¹⁵⁸ *Id.* at 7.

that an increase in supply on the secondary market would lead to lower prices.¹⁵⁹ For example, proponents hoped that prices of late-season tickets to watch teams not destined for the playoffs would decline in an open secondary market, “allowing fans who otherwise might not be able to afford to see a [game] to buy tickets for far less money.”¹⁶⁰ Price floors on team-mandated exchanges, however, eliminate this possibility, “expos[ing] the public to the full costs of the new ticket economy, while depriving the public of the benefits.”¹⁶¹ Constraints on ticket resales result in “monopoly power and higher ticket prices controlled by the promoter or owner,” an unfavorable outcome for fans.¹⁶² For example, Timberwolves fans who cannot afford season tickets are deprived of opportunities to see their team play at a reduced rate. Likewise, Timberwolves season ticket holders are being deprived of opportunities to recoup some of their costs since other fans will not pay to see the team at the price floor’s artificially inflated price. Similarly, an analysis of Yankees ticket prices listed on StubHub for a game prior to the effective date of the parties’ new resale agreement suggests that the deal’s 50% price floor will result in hundreds of tickets being listed for prices in excess of their true market value.¹⁶³

At the very least, given the revocable license rule’s original criticisms and very limited purpose, it is troubling that the sports industry now seems to blindly accept the rule’s force in the ticket resale space.¹⁶⁴ From the early twentieth century to the present day, courts, scholars, and industry insiders have seen the revocable license rule gradually transform from a harshly criticized doctrine that was applied in very narrow circumstances to an uncontroversial principle that can be applied in all contexts. Therefore, regardless of whether we ultimately allow teams to impose restrictions on ticket resales, we should be troubled by the industry’s reliance on the revocable license rule. The continued prominence of the view that tickets are revocable licenses allows teams to “rely on common law property principles . . . to achieve a form of antiscalping regulation that has not been subjected to the rigors of the democratic process that previous and existing antiscalping laws endured to become law.”¹⁶⁵

¹⁵⁹ *Id.* at 32.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Happel & Jennings, *supra* note 26, at 206.

¹⁶³ See Daniel Roberts, *StubHub and the Yankees May Be Misleading Fans About New Ticket Policy*, YAHOO! FINANCE (June 30, 2016), <http://finance.yahoo.com/news/stubhub-new-york-yankees-misleading-fans-on-ticket-price-floor-202113927.html> [<https://perma.cc/QM52-JCNH>] (noting that over 500 tickets were available for one game at prices below what the lowest possible price could be once the agreement and price floor took effect); see also Jason Notte, *Opinion: The Yankees-StubHub Deal Is a Loss For Fans*, MARKETWATCH (June 30, 2016, 2:26 PM), <http://www.marketwatch.com/story/the-yankees-stubhub-deal-is-a-loss-for-fans-2016-06-30> [<https://perma.cc/574K-KN86>] (“Despite a market that’s repeatedly told the Yankees that their tickets aren’t worth even that 50% resale value, the Yankees keep ignoring the fans . . .”).

¹⁶⁴ See *supra* text accompanying note 88.

¹⁶⁵ Happel & Jennings, *supra* note 26, at 190.

C. Going Forward

In this Section, I provide two principal recommendations to protect fans from the harms of the revocable license rule. First, courts should refuse to blindly apply the rule in favor of teams and should—instead—follow the example set by the early twentieth century courts to limit the rule’s application to situations in which the balance of equities favor the proprietor. Second, lawmakers should devise a new comprehensive legislative scheme that accounts for the concerns of both teams and ticket holders. The scheme must allow for a relatively open secondary market that benefits both ticket holders and ticket seekers and that also protects teams from high-volume ticket scalpers who unfairly exploit primary seller’s below-market prices. The common thread uniting both of these proposals is my hope that lawmakers, courts, and sports lawyers will no longer assume that the law of tickets should continue to be governed by the outdated revocable license rule. Instead, lawmakers must begin to develop and implement practical solutions to these modern problems.

1. Avoiding Rote Application of the Revocable License Rule

Courts addressing the secondary ticket market should follow the example of early twentieth century courts and avoid applying the revocable license rule when doing so will lead to unjust outcomes.¹⁶⁶ Some contemporary courts have done just that and should be looked to as modern examples. For instance, in *Brotherson v. Professional Basketball Club, L.L.C.*, former Seattle Supersonics season ticket holders sued the team after their three-year season-ticket agreements were revoked when the franchise abruptly moved to Oklahoma City.¹⁶⁷ Noting that the agreement with fans was “conspicuously silent regarding the revocation of tickets,” the court ultimately rejected the team’s attempt to use the revocable license rule.¹⁶⁸ Ultimately, the court chided the Supersonics for attempting to revoke the agreements “solely because it sold equivalent tickets at a higher price to Oklahoma [City] Thunder fans, and it desires to curry the favor of those fans rather than Sonics fans.”¹⁶⁹

¹⁶⁶ See *supra* subsection III.B.3.

¹⁶⁷ 604 F. Supp. 2d. 1276, 1282 (W.D. Wash. 2009).

¹⁶⁸ *Id.* at 1289.

¹⁶⁹ *Id.* at 1288 n.9. The court also distinguished the facts of the case at hand from the cases the defendant cited in support of the *Marrone* rule by explaining that in each of those cases, “the issuer revoked the ticket because of the holder’s conduct.” *Id.* Moreover, the court noted that no decision had ever applied the *Marrone* rule to an issuer who revoked a ticket “not because of the holder’s conduct, but because of the issuer’s profit motive.” *Id.* This observation is very similar to the early twentieth century scholars who recognized that *Marrone* was only being applied in favor of proprietors when used to exclude an unruly patron. See *supra* subsection III.B.2.

As a result, the plaintiffs were not limited to a mere refund of the purchase price, and they could seek additional expectation damages.¹⁷⁰ The court acknowledged that one such potential “expectation was that Plaintiffs would be able to sell tickets for games that they did not want to see” and that “[d]epending on factors . . . such as the team’s performance, star quality of the team’s players, or the quality of the opponent’s team or players, tickets might be more valuable than the price Plaintiffs paid.”¹⁷¹ Thus, the court recognized that the plaintiffs’ tickets entitled them to something beyond the mere revocable right to attend a series of games. The lawsuit ultimately settled in July 2010 when the team agreed to pay the plaintiffs \$1.6 million.¹⁷²

Similarly, in *Ibe v. NFL*, the court rejected the NFL’s argument that its liability should be limited to the face value ticket price when the plaintiffs purchased Super Bowl tickets and spent thousands of dollars traveling to the host city only to be denied entrance to the game.¹⁷³ While “recogniz[ing] that, generally, a ticket to an entertainment venue is a revocable license, terminable at the will of the proprietor,” the court found the revocable license rule “to be inapplicable here . . . to the extent the NFL relies on it to limit Plaintiffs’ recovery.”¹⁷⁴ The court explained that since “this is a situation where fans foreseeably travel long distances and incur substantial expenses to attend a Super Bowl, a right to revoke the license should be denied on equitable grounds.”¹⁷⁵ In sum, the court refused to blindly apply the revocable license rule in the league’s favor because doing so would have led to an unjust outcome for the plaintiffs. This case is factually analogous to that of the disgruntled fans suing the NFL for its cancellation of the annual summer Hall of Fame game,¹⁷⁶ and the court presiding over that suit should look to *Ibe* as persuasive authority.

Relatedly, *Mayer v. Belichick*, even when deciding in favor of the team, refused to blindly apply the revocable license rule without considering the fairness concerns on both sides of the issue. The court ultimately affirmed the dismissal of a fan’s “unusual” claim against the New England Patriots and the NFL for tortious interference with contractual relations, which stemmed from the visiting team’s allegedly improper taping of the home team’s sidelines during the game.¹⁷⁷ However, the court’s reasoning did not rely on a blind application of *Marrone*; rather, the court observed that it need not decide the

¹⁷⁰ *Brotherson*, 604 F. Supp. 2d at 1292.

¹⁷¹ *Id.*

¹⁷² *Bennett to Pay \$1.6 Million in Lawsuit Settlement*, FOX SPORTS (Jan. 22, 2010, 12:21 AM), <http://www.foxsports.com/nba/story/thunder-owner-bennett-agrees-to-pay-former-sonics-fans-012210> [https://perma.cc/57VT-TK38].

¹⁷³ No. 11-248, 2014 WL 4906886, at *1-2, *4 (N.D. Tex. Sept. 30, 2014).

¹⁷⁴ *Id.* at *5.

¹⁷⁵ *Id.*

¹⁷⁶ *See supra* note 87.

¹⁷⁷ 605 F.3d 223, 225 (3d Cir. 2010).

full scope of a ticket holder's rights because the fan received exactly what he paid for—namely, a seat to see the Jets play the Patriots.¹⁷⁸ But the court did not stop there and instead went on to discuss the potential implications of siding with the fan.¹⁷⁹ Specifically, the court worried that allowing such a suit would encourage disappointed fans to sue in response to routine occurrences like poor calls by referees, based on claims that they did not see the fair game for which they had paid.¹⁸⁰

When confronted with the revocable license rule, courts should follow these examples and consider the policy implications of their decisions instead of blindly applying the rule regardless of the consequences. This approach will prevent the rule from being carelessly extended to new contexts that are far removed from its original purpose, which was to protect proprietors seeking to exclude unruly patrons.¹⁸¹ Likewise, this approach will help ticket holders and fans by preventing teams from abusing a rule that was designed for different purposes in another context.

2. Recommendations for Legislative Reform that Balances Unfair Resale Restrictions with Unfair Ticket Scalping Profits

Nevertheless, a focus on policy-driven applications of the rule in litigation will not entirely solve the problem. In addition, legislative reform should tackle the growing trend of teams crafting policies and ticket holder agreements that classify tickets—especially season tickets—as revocable licenses.¹⁸² To that end, I propose various legislative measures that lawmakers should embrace to develop a fair solution to the issue that accounts for the concerns of both teams and ticket holders. Specifically, the legislation must provide for a more open resale market that nonetheless deters high-volume ticket scalpers.

Clear contracts and policies that classify tickets as revocable licenses and use that classification to limit resale rights may constrain even courts that doubt the appropriateness of the revocable license approach. For instance, in the bankruptcy context, courts often resolve disputes over resale rights based on the actual contractual arrangements between the team and the fan.¹⁸³ As more teams begin to use *Marrone's* revocable license language directly in their own agreements with fans, courts will be forced to honor such terms, and the

¹⁷⁸ *Id.* at 231.

¹⁷⁹ *Id.* at 236.

¹⁸⁰ *Id.*

¹⁸¹ See *supra* Section III.C.

¹⁸² See Happel & Jennings, *supra* note 26, at 188 (discussing the trend); see also *supra* note 29 and accompanying text.

¹⁸³ See *supra* note 75.

rest of the industry will likely follow suit.¹⁸⁴ Indeed, in *Frager*, the Southern District of Indiana noted that “a season ticket holder may be permitted to transfer any rights he may have [but] those rights are created by the contract.”¹⁸⁵ Consequently, courts’ ability to creatively evade the revocable license rule for policy reasons will be limited to cases in which a team has not established a clear resale policy.

Therefore, lawmakers should pass legislation that restricts the extent to which teams can impose resale restrictions on ticket holders. Such legislation, however, must account for fairness concerns on both sides and should not leave teams without any protections. Specifically, it must account for teams’ legitimate concerns about scalpers who exploit their industry knowledge and connections to acquire large quantities of high-demand tickets with the sole intention of selling them to generate a profit.¹⁸⁶

These concerns are not unfounded. For example, in December 2014, a single broker was able to purchase 1012 tickets in the first minute of the primary online public sale for a U2 concert at Madison Square Garden.¹⁸⁷ Another broker used 149 different American Express cards to bypass ticket-purchasing limits and made more than 38,000 purchases from 2013 to 2015.¹⁸⁸ Similarly, as explained above, many season ticket holders are actually ticket brokers who simply sell all of their tickets in the hope of earning a profit.¹⁸⁹ This is all very troubling to teams because brokers end up selling the tickets at substantial markups over face value. One study of six ticket brokers found that their average profit was 49%.¹⁹⁰ Brokers sometimes even resell tickets at prices over 1000% of the face

¹⁸⁴ Of course, courts will not have to honor such agreements if they are found to violate antitrust law. This was the precise legal question at issue in StubHub’s suit against the Warriors for requiring ticket holders to sell tickets through the official team-managed exchange. *See supra* text accompanying notes 76–80. While the district court’s opinion dismissing the suit did not discuss the revocable license rule, the Warriors did rely on the *Marrone* rule in their briefs. In response to StubHub’s claim that the Warriors’ ticket policies constitute an agreement that unreasonably restrains trade in violation of federal antitrust law, the Warriors argued that since “a ticket to a sporting event is a revocable license, and licensors are generally permitted to impose restrictions on revocable licenses,” it follows that the Warriors’ policy of revoking the tickets of those who use unauthorized resale exchanges constitutes unilateral conduct. Defendant Golden State Warriors, LLC’s Motion to Dismiss the First Amended Complaint and Memorandum of Points and Authorities in Support of the Motion to Dismiss at 23–24, *StubHub, Inc. v. Golden State Warriors, LLC*, No. 15-1436, 2015 WL 6755594 (N.D. Cal. Nov. 5, 2015). In turn, the nature of tickets as revocable licenses obviates the need for the Warriors and their ticket holders to reach any agreement regarding restrictions on resale. *See id.*

¹⁸⁵ *Frager v. Indianapolis Colts, Inc.*, No. 1:16-cv-632, 2016 WL 6610854, at *3 (S.D. Ind. Nov. 9, 2016).

¹⁸⁶ *See* SCHNEIDERMAN, *supra* note 154, at 21 (explaining how brokers have “significant advantages over the average fan” in accessing tickets because of their industry knowledge, resources, and relationships).

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *Id.* at 23.

¹⁸⁹ *See supra* text accompanying notes 144–145.

¹⁹⁰ SCHNEIDERMAN, *supra* note 154, at 4.

value.¹⁹¹ For example, \$200 face value bleacher-seat tickets for Game 3 of the 2016 World Series at Wrigley Field were on average listed for \$3253 on the secondary market.¹⁹² It is unfair for these scalpers to easily profit from the labor and efforts of the teams and promoters that actually sponsor and run these high-demand events. This is especially concerning given that many teams and event promoters intentionally sell tickets to high-demand events at prices far below the level they anticipate the market will pay. Primary sellers do this to make tickets accessible to more fans and to generate goodwill.¹⁹³ Scalpers thwart these efforts by “tak[ing] the benefits intended for the consumer.”¹⁹⁴ Consequently, many believe that “the average fan has no chance to buy tickets at face-value” to popular events.¹⁹⁵

Thus, a prohibition on all resale restrictions would be unfair to both teams and fans and would merely amount to an unjust windfall for ticket scalpers. Even early twentieth century courts upheld a proprietor’s right to protect patrons from the exorbitant markups that scalpers charged for popular events.¹⁹⁶ Therefore, lawmakers must devise a plan that accounts for these abuses while also facilitating a relatively open secondary market for fans seeking to buy tickets from real fans who simply cannot attend particular games.

A Colorado statute addressing the secondary ticket market serves as a good starting point. In 2008, Colorado passed legislation that prohibited primary ticket sellers from conditioning the purchase of season tickets on the ticket holder’s consent to resale restrictions.¹⁹⁷ Likewise, the law bans the use of sanctions to penalize ticket holders who resell tickets through unofficial resale exchanges.¹⁹⁸ But, the statute is careful to point out that a proprietor may revoke the season tickets of patrons who violate the venue’s policies and pose a threat to the safety of other patrons.¹⁹⁹ Such legislation represents a more equitable solution to the issue because it protects both fans and primary ticket vendors. The statute shields fans from the unjust effects of the revocable license rule while protecting proprietors’ rights to exclude unruly patrons, which was arguably the *Marrone* Court’s sole purpose in adopting the rule.²⁰⁰ But the

¹⁹¹ *Id.*

¹⁹² Danny Ecker, *Here’s What People Are Paying for Cubs World Series Tickets*, CRAIN’S CHI. BUS. (Oct. 28, 2016), <http://www.chicagobusiness.com/article/20161028/BLOGSo4/161029836/heres-what-people-are-paying-for-cubs-world-series-tickets> [<https://perma.cc/6JXN-LLJ6>].

¹⁹³ *Id.* at 27.

¹⁹⁴ *Id.*

¹⁹⁵ *See, e.g., id.* at 3 (quoting a consumer complaint received by the New York Attorney General’s office).

¹⁹⁶ *See supra* note 143.

¹⁹⁷ Colorado Consumer Protection Act, COLO. REV. STAT. ANN. § 6-1-718(3)(a)(I) (2008).

¹⁹⁸ *Id.* § 6-1-718(3)(a)(IV).

¹⁹⁹ *Id.* § 6-1-718(3)(b).

²⁰⁰ *See supra* Section III.C.

statute is not ideal because it fails to address teams' legitimate concerns about high-volume ticket scalping.

In the interest of devising a scheme that will protect the interests of both fans and ticket holders, I propose five specific recommendations. First, states should prohibit teams from implementing price floors on their official secondary ticket exchanges. Such measures do not deter ticket scalping abuses since price floors are only relevant when tickets are not in high demand. Instead, these policies prevent ticket holders from lowering their asking prices to the level that the market is willing to pay, which means that ticket holders often cannot recoup any of their investment. At the same time, fans who cannot afford face value prices are potentially deprived of their only chances to attend games. These problems are severely exacerbated when price floors are combined with team policies that prevent fans from using other exchanges that do not have price floors.²⁰¹ In a promising development, the New York Attorney General recently announced a multistate settlement with the NFL—following an investigation into the league's ticket resale policies—that bars the NFL from requiring that teams utilize price floors on their official resale websites.²⁰²

Second, lawmakers should set and enforce strict caps on allowable markups for resale transactions. Resale caps would deter high-volume scalping by diminishing potential returns and, in doing so, ensure that more face value tickets make their way to actual fans. Similarly, resale caps would encourage teams to continue to sell tickets at lower than market value prices to generate goodwill. And, these caps will not prevent ticket holders from selling their tickets when they cannot attend games. Furthermore, while the caps could diminish the potential resale returns that a casual ticket holder might earn for selling tickets to high-demand games, ticket holders in this legislative scheme will still be better off based on the elimination of price floors on official resale exchanges. Moreover, any ticket holder who is primarily concerned with resale profits is the kind of scalper about whom teams have a right to be upset. Of course, the caps must not be so low as to eliminate any incentive for secondary exchange sites to operate. Instead, legislators must find an appropriate level that “would still allow brokers a role in the market but would also ensure that any price markups [are] reasonable.”²⁰³

Third, and relatedly, lawmakers should provide that teams may establish per-customer season ticket holder seat limitations that prevent high-volume

²⁰¹ SCHNEIDERMAN, *supra* note 154, at 5.

²⁰² Press Release, N.Y. Office of the Attorney Gen., A.G. Schniederman Announces Multi-State Settlement with NFL Permanently Barring League-Wide Mandatory Ticket Price Floor (Nov. 15, 2016), <https://ag.ny.gov/press-release/ag-schneiderman-announces-multi-state-settlement-nfl-permanently-barring-league-wide> [https://perma.cc/4U33-5DY8].

²⁰³ *Id.* at 37. The New York Attorney General's report also recommends setting caps on allowable resale markups. *Id.*

scalpers from buying season tickets in bulk. By extension, teams should be able to revoke the season tickets of current ticket holders whose quantity of tickets evinces an intent to engage in high-volume scalping. For example, beginning with the 2016–2017 basketball and hockey seasons, Madison Square Garden has decided to limit New York Knicks and New York Rangers season ticket purchasers to eight season tickets per licensee.²⁰⁴ In response, three ticket resale firms sued, claiming that the policy violated the venue's ongoing commitment to always renew their season tickets.²⁰⁵ Both this policy and the Colts' refusal to renew the ninety-four season tickets of a Pennsylvania-based ticket broker²⁰⁶ were clearly geared toward preventing high-volume ticket scalping: a Pennsylvania resident is obviously not planning to use ninety-four tickets for personal use each Sunday. These policies should be encouraged because they will only affect those who buy season tickets for high-volume scalping purposes: season ticket holders who

²⁰⁴ Barbara Ross, *3 Ticket Resellers Sue Madison Square Garden for Canceling Season Tickets*, N.Y. DAILY NEWS (May 6, 2016, 7:14 AM), <http://www.nydailynews.com/new-york/manhattan/3-ticket-resellers-sue-msg-canceling-season-tickets-article-1.2627166> [<https://perma.cc/MG7P-D5P8>].

²⁰⁵ *Id.* The plaintiff firms, for over fifteen years, have each purchased more than the now-maximum eight season tickets. *Id.* One of the plaintiff resale firms has attempted to portray Madison Square Garden as selfish and money-hungry, arguing that “the result will be higher prices because while resellers can sell a \$50 ticket for \$10 when demand is low, [Madison Square Garden] won't sell it for less than \$50.” *Id.* This argument is flawed for two reasons. First, it is doubtful that any firm specializing in ticket resales would decide to buy a bulk of inventory that it expected to decrease in value. Second, and more importantly, the Knicks and Rangers have consistently sold out all of their games: without these resellers, the Knicks and Rangers will still have no problem selling all of their available tickets at face value prices. See Marc Berman, *Knicks Had 11 Percent of Ticket Holders Withdraw - Before Roster Splash*, N.Y. POST (Sept. 9, 2016 5:14 PM), <http://nypost.com/2016/09/09/knicks-had-11-percent-of-ticket-holders-bail-before-roster-splash> [<https://perma.cc/FH5H-AH78>] (“The Garden expects to continue its regular season/playoff [Knicks game] sell-out streak that stands at 237 games.”); *Rangers Snap a Couple of Slumps in Rare Win over Sens*, FOX SPORTS (Dec. 7, 2015, 1:51 AM), <http://www.foxsports.com/nhl/story/new-york-rangers-beat-ottawa-senators-end-mini-slump-with-rare-win-120615> [<https://perma.cc/QX57-22GU>] (“[The] New York [Rangers] ha[ve] a 199-game sellout streak, including the playoffs.”). The Supreme Court of New York sided with Madison Square Garden and denied the plaintiffs' request for a temporary restraining order. Dareh Gregorian, *Madison Square Garden Can Put a Cap on Rangers, Knicks, Season Ticket Holders' Seats, Judge Rules*, N.Y. DAILY NEWS (May 20, 2016, 7:29 PM), <http://www.nydailynews.com/new-york/manhattan/madison-square-garden-put-cap-season-tickets-judge-article-1.2644487> [<https://perma.cc/P89V-W3ST>]. Shortly thereafter, the parties agreed to settle the case. See Consent Judgement at 1, *Smile For Kids, Inc. v. Madison Square Garden Co.*, No. 652146/2016 (N.Y. Sup. Ct. July 1, 2016) (noting that all claims asserted by the plaintiffs had been withdrawn and dismissing the case with prejudice).

²⁰⁶ See *supra* text accompanying notes 73 and 86.

merely wish to resell some tickets will not be adversely affected.²⁰⁷ In fact, these kinds of policies are likely to inhere to the benefit of fans.²⁰⁸

Fourth, lawmakers should prevent teams from implementing non-transferable paperless ticket entry policies in conjunction with requiring that all resales be conducted through the team's official exchange. This is precisely what the Timberwolves have done.²⁰⁹ These tickets resemble airline tickets, "requiring the presentation of identification and the credit card used to buy the ticket at the entrance to the venue."²¹⁰ Currently, New York is the only state that has prohibited ticket vendors from using a paperless ticket method as the

²⁰⁷ It is important to distinguish per-customer seat limitations from team policies that prevent season ticket holders from reselling a set number of games. For example, the Tampa Bay Lightning have barred season ticket holders from reselling tickets to more than half of the team's games. Steve Contorno, *Florida Legislation Wades into Ticketmaster vs. StubHub Fight*, TAMPA BAY TIMES (Jan. 31, 2016, 8:11 PM), <http://www.tampabay.com/news/politics/stateroundup/florida-legislation-wades-into-ticketmaster-vs-stubhub-fight/2263557> [<https://perma.cc/E69N-9T9M>].

The team put the plan in place to "keep outsiders from profiting off of the team and ensure more tickets ended up in the hands of real fans." *Id.* Still, such policies should be prohibited because unlike reasonable per-customer caps, any cutoff point with respect to number of games resold will inevitably affect actual fans, not just high-volume scalpers. While a ticket licensee from a faraway state who purchases ninety-four season tickets is clearly a scalper, someone who resells roughly half of their tickets during a particular season may not be. Factors like a temporary drop in income, sickness, or an especially busy schedule one year might force a fan to resell more tickets than he or she is accustomed to selling. No bright-line rule could ever account for such contingencies.

Interestingly, Florida lawmakers considered a bill that would have prevented the Lightning from implementing this and similar policies. *Id.* According to Representative Jared Moskowitz, the bill's sponsor, the inspiration behind the proposed legislation was that "[t]ickets are expensive" and that "people [who] want to sell a portion of their season tickets to recoup some of those costs . . . should be able to do so without restrictions from the team or fear of having their seats revoked." *Id.* The bill ultimately died in the House of Representative's Regulatory Affairs Committee. *FL – HB1127, Resale of Tickets*, TRACKBILL, <https://trackbill.com/bill/fl-hb1127-resale-of-tickets/1220309> [<https://perma.cc/58S7-XDHR>].

²⁰⁸ See, e.g., Lora, Comment to *Broker Sues After Colts Cancel Season Ticket Renewal*, INDIANAPOLIS BUS. J. (Apr. 2, 2016), <http://www.ijb.com/articles/57910-broker-sues-after-colts-cancel-season-ticket-renewal> [<https://perma.cc/28Y9-M5QX>] ("As a person who has been on the Colts Season Ticket Waiting List for YEARS and am still number 500-something, I am appalled that an out of town ticket broker can have 94 of these season tickets just to make money! Kudos to the Colts for NOT renewing them so maybe some of us who actually want them and are waiting may be getting.").

²⁰⁹ See *supra* text accompanying notes 32–34. In addition, while the San Francisco 49ers' ticket delivery policies are not entirely analogous to those of the Timberwolves, any legislative action taken on this point should nonetheless account for and prohibit what they have done: refusing to issue copies of tickets until three days before the game, while requiring and ensuring that any resales prior to that window are conducted on a paperless basis through the team's official exchange. See *supra* text accompanying notes 35–37. Although this measure does not entirely foreclose resale opportunities outside of the team's official exchange, it makes doing so extremely difficult since sales can only happen within the three-day window prior to the game. Thus, teams should also be prohibited from restricting resale opportunities on unaffiliated exchanges to short, impractical timeframes that render the policy to be functionally equivalent to the Timberwolves' more straightforward paperless ticket entry policy.

²¹⁰ SCHNEIDERMAN, *supra* note 154, at 36.

exclusive delivery option.²¹¹ The New York Attorney General has proposed to lift the ban on paperless tickets, arguing that “[a]llowing these types of tickets would . . . make it more difficult for brokers to continue hoarding tickets and demanding exorbitant markups from fans.”²¹² While true, the resale caps discussed above will already serve to curb scalping. Meanwhile, allowing teams to exclusively use paperless tickets ultimately harms ticket holders by severely restricting their ability to resell tickets. For example, the Timberwolves season ticket holders note that the team’s new paperless ticket policy makes it “impossible for ticket holders to list the tickets on a secondary marketplace or platform such as StubHub or Ticketmaster, or even to physically sell or transfer them in a hand-to-hand transaction.”²¹³ The result is a diminished market for fans, which will ultimately lead to greater financial losses for ticket holders.

Finally, teams should not be allowed to punish ticket holders who choose to resell their tickets on unofficial resale exchanges. The Warriors should not be able to prevent fans from using StubHub instead of the Warriors’ official Ticketmaster-managed exchange. Such practices impose severe harms on both season ticket holders and fans seeking to purchase tickets for sold out individual games. Sellers are forced to deal with a more limited pool of potential buyers because specific team-managed exchanges often generate less traffic than widely known national exchanges like StubHub.²¹⁴ Likewise, buyers are restricted to using just one resale exchange instead of having the opportunity to compare prices, fees, and delivery options across multiple competing venues. With no other exchanges to compete with, team-mandated exchanges are then free to impose any conditions they choose, including higher transaction fees and decreased delivery options. In short, less competition will translate to less incentive for teams to make their resale exchanges fan-friendly.

That said, teams should still feel free to develop their own resale exchanges and compete with other sites like StubHub. Teams may attempt to drive traffic to their own site by offering special rewards to season ticket holders who choose to resell on their exchange. This kind of competition will lead to more favorable results for ticket holders and ticket seekers. Indeed, according to Wes Brodsky, chief executive of Contender.com, another resale site, “[A]n open industry with multiple sellers and marketplaces competing

²¹¹ *Id.*

²¹² *Id.*

²¹³ Mary Beth Quirk, *Timberwolves Fans Suing over Team’s New Paperless Ticketing System*, CONSUMERIST (Mar. 4, 2016), <https://consumerist.com/2016/03/04/timberwolves-fans-suing-over-teams-new-paperless-ticketing-system> [<https://perma.cc/7Z4M-AKEZ>].

²¹⁴ *See, e.g.*, StubHub’s Consolidated Opposition to Defendants’ Motion to Dismiss at 17, StubHub, Inc. v. Golden State Warriors, LLC, No. 15-1436, 2015 WL 6755594 (N.D. Cal. Nov. 5, 2015) (describing how the Warriors’ policy results in lost sales for resellers because the official team exchange attracts far fewer potential buyers than StubHub).

on price gives consumers the best chance of getting a fair deal.”²¹⁵ In short, these five measures represent a fair compromise for teams and ticket holders. They allow ticket holders and ticket seekers to benefit from a relatively unrestricted secondary market while addressing teams’ legitimate concerns with high-volume ticket scalping abuses.

CONCLUSION

My goal in this Comment has been to inspire lawmakers to reconsider the revocable license rule’s continued vitality in the ticket market. I have demonstrated that the rule was originally devised for a limited purpose in a context in which proprietors had little reason to exploit it. The rule was not meant to provide a proprietor with an unbeatable weapon to be used against patrons whenever it serves the proprietor’s interests. Unfortunately, criticism of the rule has faded, and it now enjoys wide acceptance across the industry. This is particularly troublesome in the current secondary ticket market, in which teams have strong financial incentives to utilize the rule to the fullest extent possible, often to the detriment of their own fans. The result is a secondary ticket market that artificially inflates prices to low-demand games, hurting both fans trying to sell tickets and fans seeking to buy tickets.

Of course, teams’ concerns about the proliferation of the secondary market are not entirely unfounded. For example, teams have legitimate concerns about ticket scalpers who buy large quantities of face value tickets to popular events only to sell them for higher prices on the secondary market. However, abandoning the revocable license rule does not require the industry to eliminate all primary seller protections. Instead, lawmakers must devise pragmatic solutions that account for the legitimate concerns of both fans and teams. To that end, I have advanced five proposals that I believe will result in a more equitable solution for all. Nevertheless, the substantive content of my proposals is less important than my overall message, which is that we will only be able to find a workable solution to these difficult problems by first abandoning the revocable license rule. The rule was developed for a very limited purpose and is based on outdated assumptions. The ticket market should not continue to be guided by an early twentieth century rule that the modern market has substantially outgrown.

²¹⁵ Hannah Karp, *Sports Teams Score a Piece of the Ticket-Scalping Business*, WALL ST. J. (June 15, 2016, 12:24 AM), <http://www.wsj.com/articles/sports-teams-score-a-piece-of-the-ticket-scalping-business-1465931185> [<https://perma.cc/238N-RL93>].

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