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Review of consumer protection measures applying to ticket resale

1 message

20 November 2015 at 13:39

To: "ticketing@culture.gov.uk" <ticketing@culture.gov.uk>

Dear Mr Jenkins,

Please find attached a response to your current Consultation on ticket resale.

Best wishes,

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11/23/2015

Department for Culture Media & Sport Mail - Review of consumer protection measures applying to ticket resale

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Review of consumer protection measures applying to ticket resale |

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Review of consumer protection measures applying to ticket resale

Response to Call for Evidence by Prof [redacted] (Northumbria Law School,
from 1 January 2016, Manchester Law School) and [redacted]
(Westminster Law School)

Our response to this Consultation is split into two parts. The first section challenges some of the key underpinning assumptions of the Consultation and recent Parliamentary discussions on the subject of ticket touting. The second focuses on the three main areas on which the Consultation has sought specific answers: the impact of the Consumer Rights Act 2015 on consumers; the impact of ticket touting on event organisers; and the legality of conditions preventing resale and transfer of tickets. Our response is based on our previous research findings, which focused on two key issues concerning ticket touting. First, we examined the efficacy of the football-specific legislation,¹ focusing in particular on its impact on the consumer and the problems faced by them concerning what we later termed innocent face value resales.² Our work then proceeded to examine the application of anti-touting legislation at sporting mega events, particularly the Olympic and Commonwealth Games. In particular, we examined associated ticketing policies³ and the power exerted by bodies such as the International Olympic Committee to force national governments to create specific anti-touting legislation.⁴ Throughout our work, we have remained cognisant of the impact upon both the consumer and other stakeholders in sport who can be affected by the regulation of, or failure to regulate, ticket touting and the secondary ticketing market, whether through legislative or other means.

Challenging the underpinning assumptions

Should there be a secondary market in tickets to sport, entertainment and cultural events?

There is an assumption throughout the Consultation that consumers need protecting from the excesses and risks associated with engaging with the secondary market. What it does not do explicitly, however, is question the existence and legitimacy of the secondary market itself. This is a key policy issue that needs addressing before any framework that considers the regulation of these transactions can be proposed and analysed.

¹ S Greenfield, G Osborn and S Roberts 'Contradictions within the criminalization of ticket touting: what should be the role of the law?' [2008] 3 Web J.C.L.I.

² M James and G Osborn, 'Criminalising Contract: does ticket touting warrant the protection of the criminal law?' [2016] Criminal Law Review pp.1-16.

³ M James and G Osborn, 'Tickets, policy and social inclusion: can the European white paper on sport deliver?' [2009] 1/2 The International Sports Law Journal, pp. 61-64.

⁴ M James and G Osborn (2011) London 2012 and the impact of the UK's Olympic and Paralympic legislation: protecting commerce or preserving culture? 74(3) The Modern Law Review pp. 410-429 and M James and G Osborn, 'The Olympics, transnational law and legal transplants: the International Olympic Committee, ambush marketing and ticket touting,' [2016] Legal Studies, forthcoming, DOI: 10.1111/lest.12095.

The assumption that the secondary market is a valid one is epitomised by the comments of the former Secretary of State for Culture, Media and Sport, Sajid Javed MP, who described ticket touts as 'classic entrepreneurs', an opinion that is reflective of broader approaches to the issue dating back to at least the early 1990s.⁵ Further, in three recent Parliamentary debates the assumption that breaches of contract committed by ticket touts are legitimate has gone unchallenged: Sharon Hodgson's Sale of Tickets (Sporting and Cultural Events) Bill 2010-12, sought to limit unauthorised vendors from reselling tickets at more than 10 per cent of their original face value; cl.23 of Lord Moynihan's Governance of Sport Bill 2014-15 sought to extend s.166 Criminal Justice and Public Order Act 1994 to sports other than football only where the 'need for a free market in tickets' had been taken into account; and finally, the s.90 Consumer Rights Act 2015 imposes a duty on anyone reselling a ticket to a sporting event, including the host online ticketing marketplace if used, to provide all relevant information about the ticket prior to the completion of the transaction.

This state of affairs facilitates breaches of contract that would without question be unlawful in other contexts. Thus, it is essential that a clear policy direction is adopted before further regulation is considered: *Is ticket touting a legitimate free market activity that should be lawful, regardless of the degree of profiteering that takes place? Or is ticket touting so offensive to the primary market that it should be criminalised? Or is some form of regulation required that protects both consumers and event organisers from excessive profiteering?* In order to conclude on this point, a fully reasoned justification needs to be provided so that it is clear who is being protected (or not) and from what kinds of behaviour.

What is the legal status of a ticket?

There is a general failure to understand the legal status of a ticket and a misuse of the associated terminology. Event tickets provide evidence of the existence of a licence to enter property for the purpose of watching an event; they are not necessarily tradable property in their own right. Clarification is needed of the legal attributes of tickets and what can and cannot be done with them as at present, in many cases, their unauthorised resale is illegal; it is an unlawful breach of contract. A detailed contemporary study of consumer understanding of the meaning of, and the rights embedded in,⁶ a ticket would be illuminating here as, professional football matches aside, such breaches of contract are not criminal.

There needs to be a clearer distinction made, and approaches taken to, the different forms of touting

Engaging with the secondary market through ticket touts covers a wide range of activity and varied modes of transacting. First, there needs to be a clear

⁵ For further detail, see above n.2.

⁶ This issue was previously touched on in an earlier report for DCMS, Campbell Keegan Ltd 'The Secondary Market for Tickets (Music and Sport). Qualitative Research Report' (online, 2007) available at: http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/research/secondarymkt_tickets_qrr.pdf

disambiguation between fraudulent transactions and those entered into with a speculative view to making a profit from interest in an event. The former are covered generally by the Fraud Act 2006, various pieces of consumer protection legislation and are the target of the s.90 Consumer Rights Act 2015. Speculative transactions are much more conceptually difficult to regulate as they are consensual, requiring only that the purchaser is prepared to pay the market value of the ticket, whether that is higher or lower than its original face value, and require a determination of the validity of the secondary market itself. The resale of tickets at face value or below (where that includes the cost of any fees associated with the original purchase) is generally considered to be acceptable to most event organisers and should, where possible, be exempt from further regulation.

An additional issue is the changing mode of the touting transaction. Although on-street touting near the venue continues at almost all high profile sport, entertainment and cultural events, it is no longer the sole or even the most prevalent form of touting. As touting has moved online, and the range of people engaging as touts has expanded, alternative approaches to the regulation of the secondary market need to be considered. For example, increased regulation of any aspect of touting can be subverted by the seller simply relocating out of the jurisdiction. This has enabled Viagogo to continue its business unaffected by the decision of the Supreme Court in proceedings brought against it by the Rugby Football Union by relocating to Switzerland.⁷ Similar concerns have underpinned recent deregulation of the law in New York State.⁸

The voice of the event organiser needs to be heard, not just that of the consumer

The assumption here is that the only identifiable 'victim' of ticket touts is the consumer. There is a further inference that the conditions included by event organisers in tickets that restrict their resale and transfer are somehow unnecessary, unfair and legally questionable. Event organisers rarely charge market value for their tickets, for a variety of reasons, and have to act in the best interests of all prospective attendees. Their ticket pricing policies and distribution mechanisms are undermined by the unauthorised secondary market and must be taken into account alongside of the impact on the consumer.

Conclusion

The key to any future regulatory framework for the secondary ticketing market is that it is designed around robust, evidence-based justifications. It must balance the interests of both consumers and event organisers from the outset, define precisely and distinguish between the different transactions that are included under the umbrella of touting and provide appropriate responses to each of these different interactions with the secondary market.

⁷ Rugby Football Union v Viagogo Ltd. [2012] UKSC 55.

⁸ See further, Commonwealth Consumer Affairs Advisory Council, Consumers and the Ticket Market: Ticket Onselling in the Australian Market, for The Treasury of the Australian Government, p32.

Specific responses to the Consultation

Consumers

What has been the impact of the Consumer Rights Act 2015 protections on consumers buying tickets via online secondary ticketing marketplaces?

In short, not as much as was originally hoped for or envisaged. Touts appear to have realised that if they publish all of the information that the Act requires of them, then the ticket can be voided by the event organiser where such a sale is a breach of contract.⁹ Further, as the tout/original purchaser can be identified from the information provided, event organisers are more easily able to take legal or regulatory action against them, again providing a disincentive to providing the required information. See in particular the recent report from Which?¹⁰

Are the 2015 Act rules known and understood, being applied properly and perceived to be fair?

From media reports around major sport and entertainment events that have taken place since their introduction, it would appear that touts are aware of the rules and are actively subverting them, whilst consumers are either unaware of or ambivalent about them.

How can prospective purchasers verify tickets as genuine?

Apart from only purchasing tickets from an authorised seller, it is very difficult for a subsequent purchaser to conduct a meaningful verification of a ticket's provenance. To a significant extent, the secondary market operates on trust.

What evidence is there that the transparency requirements of the 2015 Act are making a difference?

As a result of the avoidance tactics of many touts, the hoped for transparency is not yet being achieved.

Event Organisers

What is the range of perceived impacts, both positive and negative, for the events and event organisers of the secondary market?

The secondary market as used for speculative resales aiming at making a profit has the direct effect of undermining the event organisers' pricing and distribution policies. Event organisers regularly sell tickets below their market/clearing value for a variety of reasons including increasing the range of purchasers who can afford to attend, rewarding loyalty, attracting new audiences and guaranteeing a sell-out crowd that will create an atmosphere. To ensure a fair opportunity to secure tickets, event organisers may sell them on a first-come-first-served basis, through an online ballot or application process. The secondary market undermines these approaches by selling to those who are willing and able to pay inflated prices and enabling 'queue jumping' in front of those who abided by the rules of the original distribution mechanism.

⁹ See for example, B Rumsby, '[Rugby World Cup 2015: Fans refused entry to Twickenham in ticket clampdown](#)' The Daily Telegraph, 21 September 2015.

¹⁰ '[Which? probes ticket resale rip-off](#)'.

There is a further argument that indirect loss is caused to the event organiser through a reduction in attendees' spending power at the event. If an attendee has spent more than face value on their ticket, then they will have less money available to spend on merchandise, food and drink at the event, thereby reducing its overall profitability. This provides further explanation for why tickets are not sold at market value and the harm that might be caused to event organisers by the operation of the secondary market.

How well are event organisers minimising illegal activity?

Some, such as the Rugby Football Union, are taking proactive steps to monitor websites and cancel tickets that are sold in breach of its terms and conditions. This approach can be seen both at England test matches and games in the recent Rugby World Cup 2015.¹¹ Others are being innovative in terms of ticketing, for example, by posting tickets to purchasers shortly before the event takes place to reduce the timeframe during which the tickets can be transferred through the secondary market, incorporating personal identifying information, such as date of birth credit card number and/or photographs, into the tickets, and the use of e- and smartphone tickets. If event organisers are encouraged to embrace a variety of distribution and security techniques to protect their ticketing policies from touting, the secondary ticketing market could be affected dramatically as fewer tickets will filter through to it, without the need for recourse to the law or specific regulatory frameworks.

Legal Issues

Are ticket conditions that seek to prevent resale and/or transfer valid, reasonable and lawful?

Yes. Provided that they are sufficiently clear and brought to the notice of the initial purchaser before the transaction is concluded, then an occupier of premises is entitled to impose conditions on those who are granted licences to be there.

The position of the event organiser would be significantly improved if robust justifications were provided, and brought clearly to attention of wider public, for the imposition of conditions preventing the resale and transfer of their tickets. For example, a public education campaign, stressing that tickets are sold for less than market/clearing values to enable a wider cross-section of society to attend the event, could both explain the intentions behind an event organiser's policy, and be a valuable public relations tool that stresses their inclusionary approach to sport. By enabling touts to sell to the highest bidder, this improving of access is undermined. Further, tickets are generally distributed on what are considered to be culturally 'fair' grounds, for example, on a first-come-first-served basis or through public ballot. Touting enables 'unfair queue-jumping' that undermines the event organiser's chosen distribution process. If ticketing was only about profit, then the event organisers could price many touts out of the market but at the expense of a wider demographic amongst attendees.

¹¹ Above, n.2 and 9.

Likewise, it should be established why purchasers want and/or need to engage with the secondary market in order to sell their tickets. If it is because the initial purchaser can no longer attend and wants their money back, regulation of official buy-back schemes could ensure that little or no loss is incurred where unwanted tickets are returned to the event organiser or their authorised ticketing agent. This would ensure that both pricing and distribution policies were upheld. Alternatively, if the initial purchaser always intended to sell for a profit, or later decided to take advantage of market conditions to turn a profit, then a justification for why they should be allowed to unilaterally breach their contract with the event organiser and undermine their pricing and distribution policies should be provided. The Australian reports make this distinction clear by referring to 'ticket resale' as the legitimate 'onselling' of a ticket at face value and 'ticket scalping' as the purchase of tickets with the intention of selling them on at higher than face value.¹²

Examples of regulation from other jurisdictions

There are many examples of statutory interventions in the secondary market, however, there is no consistency of rationale for doing so. In the UK, s.166 Criminal Justice and Public Order Act 1994 bans the resale of tickets at most professional football matches on the grounds of preventing disorder. Similar provisions were in place for the London Olympic and Glasgow Commonwealth Games, on the basis that the image of these worldwide events needed protecting (s.31 London Olympic Games and Paralympic Games Act 2006 and s.17 Glasgow Commonwealth Games Act 2008 respectively).

In the USA, ticket touting, or scalping, is regulated at state or sub-state levels. The majority of states have legislation in place that regulates some aspect of ticket resales, however, there is no consistency of approach or underpinning rationale for these various positions.¹³ Regulation of touting/scalping in American legislation includes: imposing no-sale zones around event venues to prevent public nuisances; limiting the amount above face value that can be charged for a ticket to prevent excessive profiteering; prohibiting resales unless conducted by a licensed ticket broker to ensure that the business is reputable and pays relevant taxes; and complete prohibition.

A more extreme version of this last approach was until recently the position in Ontario, Canada. Under s.2 Ticket Speculation Act 1990, it is an offence: to sell or attempt to sell a ticket at above face value; purchase or attempt to purchase a ticket with the intent to sell it at a profit; and to purchase or attempt to purchase a ticket at a price higher than its original sale price. Unusually, this legislation captures both touts and the people buying from them in an attempt to completely eradicate the secondary market. In 2015, two exceptions were introduced into the Act. First, where the tout offered a complete refund to the purchaser in cases where the event was cancelled, the purchaser was denied

¹² Above, n.8.

¹³ For reviews of some of this legislation and recent trends, see for example A. Dreyer and M. Schwartz, 'Whose game is it anyway: sport teams' right to restrict (and control) ticket resale' 17 Fordham Intellectual Property, Media and Entertainment Law Journal 753-788 and 'Consumers and the Ticket Market' appendix I (above n.8).

entry to the event, the ticket was a counterfeit or did not match its original description. Secondly, no offence is committed where the tout can supply confirmation from the event organiser that the ticket is valid.

In Australia and New Zealand, touting is generally prohibited only where an event has been declared to be a 'major event' of national or international importance under specific legislation. Each of these Acts replicates the approach of the UK legislation introduced for the Olympic and Commonwealth Games. The justifications for the legislation are also replicated: to protect the image of the event and, from a pragmatic perspective, because event organisers often demand such legislation as part of the hosting agreement.

Where statutory restrictions are imposed on the unauthorised resale of event tickets, there is little agreement on why such transactions should be restricted. In the US, a pragmatic response to internet touting has seen unauthorised resales becoming increasingly deregulated. This is a particular problem in the US as touts can simply relocate to a less regulated state and carry on their business as before. Perhaps in the light of recent events in Paris, the most compelling reason for regulating the secondary ticketing market more directly is security. Further, the protection of event organisers' pricing and distribution policies is increasingly important if sport is to continue its socially and culturally beneficial role. Without a clear and robust justification, regulatory intervention in the secondary market is likely to continue to be on an ad hoc and ill-defined basis.

Conclusions

In terms of the narrow focus of the Consultation, it would appear that the current formulation of the provisions of the Consumer Relations Act are not protecting event attendees in the ways hoped for. Equally, they are not protecting event organisers that are seeking to promote their own ticket pricing and distribution policies.

On a wider view, the need, scope for an operation of the secondary market needs to be interrogated more directly before any further regulatory interventions are considered. This will require a distinction to be made between fraudulent, speculative and face value resales and will need to take into account the increasing role of the internet in completing these transactions. In developing a regulatory framework, the needs of the event organiser as well as the consumer must be taken into account; without one or the other, there is no event to attend or no fans to attend it.

Respondents' publications

M James and G Osborn (2016) *The Olympics, transnational law and legal transplants: the International Olympic Committee, ambush marketing and ticket touting*. Legal Studies, forthcoming, DOI: 10.1111/lest.12095.

M James and G Osborn (2016) *Criminalising Contract: does ticket touting warrant the protection of the criminal law?* [2016] Criminal Law Review pp.1-16.

M James and G Osborn (2012) *Consuming the Olympics: the fan, the rights holder and the law*. British Library: Sport and Society, online.

M James and G Osborn (2011) *London 2012 and the impact of the UK's Olympic and Paralympic legislation: protecting commerce or preserving culture?* 74(3) The Modern Law Review pp. 410-429.

M James and G Osborn (2009) *Tickets, policy and social inclusion: can the European white paper on sport deliver?* [2009] 1/2 The International Sports Law Journal, pp. 61-64.

S Greenfield, G Osborn and S Roberts (2008) 'Contradictions within the criminalization of ticket touting: what should be the role of the law?' [2008] 3 Web Journal of Current Legal Issues, online.

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