

CITY OF BALTIMORE

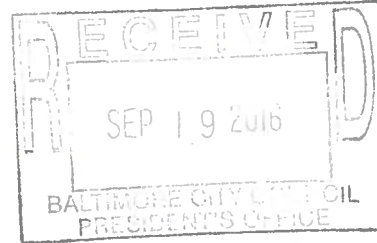
STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

September 19, 2016



The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 16-0718 –Ticket Sales– Ticket Purchasing Software

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 16-0718 for form and legal sufficiency. The bill would make it illegal to use, resell or maintain any interest in any machine, device, computer software or program to bypass the security measures or access control systems in a retail ticket purchasing system that regulates the number of tickets that can be purchased to entertainment venues in the City. Enforcement could be by citation or by prosecution for a misdemeanor. This bill is consistent with the Mayor and City Council’s general police and welfare power. *See* City Charter, Art. II, §§(27), (47) (48).

The law and the proposed amendments will likely withstand any challenge under the Commerce Clause of the United State Constitution. U.S. Const., art. I, §8, cl. 3. Opponents may argue that the Clause prohibits the application of a local ordinance to transactions that take place out of the enacting jurisdiction; in this case, sales of tickets to events in the City sold over the Internet. *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004)(invalidating a Virginia law that criminalized disseminating material harmful to minors over the internet because the law regulated conduct occurring outside of state borders). However, the City seeks to regulate sales to an event that takes place within its jurisdiction. Since the transaction at issue here has a definite relationship to the jurisdiction that seeks to regulate it, the law should withstand a challenge under the Commerce Clause based on extraterritorial regulation. *See, e.g., MaryCLE v. First Choice Internet, Inc.*, 166 Md. App. 481 (2006)(holding a law that impacts internet transactions with a connection to the regulating jurisdiction did not violate the commerce clause when the benefits of the law clearly outweighed the burdens and there were no burdens if the actor was not deceptive); *accord Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Moreover, other City laws regulating internet activity that have a clear nexus with Baltimore City have been upheld as not violating the Commerce Clause. *See, e.g., Mayor and City Council of Baltimore v. Priceline.com Inc. et. al.*, 2012 WL 3043062, *6 (D. Md. 2012)(“retail rental of a hotel room, whether facilitated online using interstate or international computer servers or in person at the hotel reception desk, is most sensibly viewed as a discrete event facilitated by the laws and amenities of the place of the hotel.”); *accord Mayor & City Council v. Vonage Am. Inc.*, 569 F. Supp. 2d 535, 538-39 (D. Md. 2008). Thus, a court will

Fau w/ comments

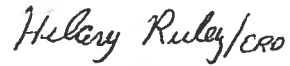
likely conclude that the purchase of a ticket to an event in Baltimore City, whether facilitated online using interstate or international computer servers or in person at the ticket counter, are sales that have a local connection and can be regulated by the City without violation of the Commerce Clause.

It must be noted, however, that the federal Communications Decency Act of 1996 (the “CDA”), codified in 47 U.S.C. § 230, prevents any government (federal, state or local) from treating any interactive computer service (defined, essentially, as the common “ISP”) “as the publisher or speaker of any information provided by” another. This law has been interpreted to prevent governments from holding ISPs or others liable for the conduct of their users. *See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *Beyond Systems Inc., v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D.Md. 2006)(“Case law clearly establishes that CDA immunity applies even where an ISP knew of its customers’ potentially illegal activity.”); *Hill v. Stubhub, Inc.*, 727 S.E.2d 550, 563-64 (N.C. Ct. App. 2012). Cases interpreting this federal law in the ticket context prevent this bill from being applied to any internet service provider or ticket selling forums or bulletin boards such as Stub Hub, even if those companies may know that their users are reselling tickets that were procured through the use of the prohibited software. The Fourth Circuit has written that “by its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with the third party user of the service.” *Zeran v. America Online, Inc.*, 129 F. 3d 327, 330 (4th Cir. 1997)(cited with approval in *Beyond Systems, Inc.*, 422 F. Supp. 2d at 537)); *but see, e.g., Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 696, 669 (7th Cir. 2008)(detailing circuit split on the issue of CDA immunity); *see also Gucci America, Inc. v. Hall & Associates*, 135 F. Supp. 2d 409, 415-16 (S.D.N.Y. 2001)(holding Fourth Circuit’s pronouncement on federal immunity in *Zeran* only applies in the speech context), and cases cited therein. Therefore, in this Circuit, the “resell or offer to resell” language in Section 17-7 (lines 5 through 7 on page 4) will likely be read to apply only to the actual reseller that has the requisite knowledge, and not to an on-line forum that facilitates the sale, or the internet service provider used by that reseller, even if it has the same knowledge. This serves only as a warning to those seeking to enforce the law against such third parties.

Finally, the Law Department notes that most of the language in this bill duplicates language already contained in Section 16-1, *et. seq.* of Article 2 of the City Code, including the definitions and the enforcement provisions. The bill could be amended to add the language in Part 2 (lines 3 through 11 of page 4) to be placed in Sections 16-8 through 16-10 of Article 2 of the City Code. Additionally, the language in Section 17-12(a)(2) and (3) could be placed into Section 16-12 of that same article. Conforming changes could be made to sections 40-14 and 41-14 of Article 1 of the City Code to reflect this consolidation. Although this is NOT legally required, it would allow this recently edited section on tickets to retain its current section numbering and simply add additional sections. *See* Ordinance No. 13-0157.

As there are no legal impediments to this bill, the Law Department approves it for form and legal sufficiency.

Very truly yours,

Handwritten signature of Hilary Ruley in cursive script.

Hilary Ruley
Chief Solicitor

cc: David Ralph, Acting City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Jennifer Landis, Assistant Solicitor