Simpson Thacher

Memorandum

You'll Be Back (in Court): Ticketmaster May Proceed with Copyright and Anti-Hacking Claims Against Automated "Bot" Scooping Up *Hamilton* Tickets

June 21, 2018

On May 29, 2018, the U.S. District Court for the Central District of California ruled in favor of Ticketmaster L.L.C., refusing to dismiss its complaint against an enterprise using "bots" (software running automated scripts) to buy huge quantities of *Hamilton* tickets for resale at a steep markup. Such practices exclude many would-be customers from the room where it happens.[1] This case adds to the growing jurisprudence in which website access in violation of posted terms of use may give rise to liability, including copyright and computer fraud claims. The case offers at least ten useful commandments, four of which are highlighted here:

Lessons from the Case

Number one, don't ignore a "cease and desist" letter. Violating a website's terms of use (TOU) alone does not create liability under U.S. anti-hacking laws, because, as courts have noted, it should not be a crime to breach a website's posted agreement, which may be vague and can be changed at will.[2] However, a cease and desist letter gets the job done: if the letter demands satisfaction that website access must cease, if you apologize, there's no need for further action. However, continued access to a website after receiving a cease and desist letter—which Ticketmaster sent to the defendants here—may violate the U.S. Computer Fraud & Abuse Act (CFAA), 18 U.S.C. § 1030 *et seq*.

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[1] *Ticketmaster v. Prestige West*, No. 2:17-cv-07232-ODW-JC, 2018 WL 2448115 (C.D. Cal. May 29, 2018). For *Hamilton* fans reading this memo, it must be nice to find the lyrical references—however, those phrases may seem strange to readers who have not seen the show. If you are the first reader to identify all of the *Hamilton* references, we will send you the famous Simpson Thacher cookies (and not the web browser kind).

[2] *See Ticketmaster*, 2018 WL 2448115, at *14 (citing *United States v. Nosal*, 676 F.3d 854, 863 (2012)).

Number two, a plaintiff has several weapons at its disposal to plead the required damages under the CFAA. The threshold amount for a claim is $5,000 and includes a wide array of the website owner's costs—legal, forensic, etc.—to respond to the defendant's conduct. Here, the court held that Ticketmaster's expenses to identify the bots and enhance its website security met that threshold.

Number three, both visible and underlying elements of a website—pages and code—may be protected by copyright. Accordingly, unauthorized copying from a website may constitute infringement. The defendants lost on their defense that Ticketmaster's TOU gave them a license to download content from its website—the court held that Ticketmaster can control who clicks, who buys, who sells its tickets.

Number four, not all access to websites without permission will result in viable copyright and CFAA claims; this case had egregious facts. The court noted that defendants' entire business model relied on violating Ticketmaster's TOU, distinguishing them from individual Internet users accessing third-party websites on an *ad hoc* basis, for which liability would not generally arise. So if your business is based on copying competitors' sites or using bots to access competitors' sites, history (or perhaps a U.S. court) may have its eyes on you.

Case Details

Ticketmaster, a well-known vendor of tickets to live events, uses several security measures to ensure that its buyers are humans making personal purchases, not automated bots buying for resale. Defendants, viewing *Hamilton* as their favorite subject, used their own technology to circumvent these measures and buy tickets like they're running out of time—at times scoring 40% of the seats for a show. That would be enough, but the defendants also bought tickets in bulk for a Mayweather-Pacquiao boxing match, after which Ticketmaster sent them a "cease and desist" letter demanding an end to their activities. The defendants, however, continued to access Ticketmaster's site more than "one last time" using bots.

What comes next? Ticketmaster sued for copyright infringement, violation of the CFAA and U.S. Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1201(a)(1) (unauthorized access to a copyrighted work), breach of contract and other state claims. The defendants moved to dismiss the federal claims.

As a threshold issue, the court affirmed that website code and pages contain copyright-protected content. The court then found that Ticketmaster had sufficiently pleaded its copyright claim based on circumstantial evidence that the defendants had downloaded protected content to program their customized bots. The court held that websites rise and defenses fall—the TOU did not grant a license to see the defendants through it all. Further, the court held that Ticketmaster stated a claim that the defendants had violated the DMCA, because it alleged they had circumvented security measures intended to block bots from accessing copyright-protected content.

Ticketmaster's CFAA claim likewise survived dismissal, by alleging unauthorized access to its website and a loss of more than $5,000, including security enhancement and response costs. The survival of the federal claims means that Ticketmaster's supplemental state-law claims will also stay alive in federal court. Ticketmaster has not thrown away its shot at recovery.

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