

Memorandum

To: CEO of Earth Wind and Snow
From: Benjamin Tietgen
Subject: Legal Implications of Data Usage at Anytime Weather Enterprises

Statement of Facts

Earth Wind and Snow (EWS) and Anytime Weather Enterprises (AWE) both operate websites that feature current weather data and forecasts, available free of charge to any web surfer. Both generate revenue by selling advertising on their websites. EWS collects its weather data by using automated scouring programs, called robots, to extract data from many electronic sources, including AWE. The data is compiled, formatted, and displayed on the website.

AWE has filed a lawsuit against EWS, claiming that EWS violated the AWE License Agreement (the “agreement”) by extracting and using the weather information at AWE. The agreement is found on the website “by clicking a link labeled: ‘Legal,’ which is at the bottom of the main page in blue, 8-point Arial font.” Problem at 1. The link is listed third among a horizontal list of six links; the others are labeled “Privacy Information,” “Contact Us,” “Subscribe to Anytime Weather,” “Careers,” and “Add this page to Favorites.” The agreement states, at the top of the first page, “**BY USING THIS SITE, YOU AGREE TO THESE TERMS OF USE.**” License at 1. The agreement also states that use of any material on the site is not permitted without express written consent from AWE. EWS does not have that consent. It is not known whether anyone at EWS is aware of the agreement, although AWE asserts that it sent a copy of the agreement to EWS via certified mail one year before filing suit.

Analysis of AWE’s possible claims

Forming a Contract

Assuming that EWS had no prior notice of the terms of the agreement, a court will likely

not find a contract. In order to form a contract, the offeror must provide reasonable notice of the terms of the offer. Netscape at 20. “[T]he offeror may specify that a certain action in connection with his offer is deemed acceptance, and ripens into a contract when the action is taken.” Ticketmaster at 9. But, if a “reasonably prudent” internet user would not have discovered the terms before acting in a way that accepts them, the terms do not bind the user. Netscape at 20. There must also be an objective manifestation of assent from the offeree. Id at 28. Terms of the contract, especially one containing an arbitration clause, must be clear and conspicuous to be properly accepted. Id at 32.

In Netscape, the plaintiffs, visitors to defendant Netscape’s website, were invited to download the Netscape Communicator internet browser software. To facilitate the download, the plaintiffs could elect to download the SmartDownload utility, which sped up the download process. The software was free, but a license agreement was packaged with both programs. However, “[t]he sole reference to SmartDownload’s license terms... was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen.” Id at 23. Most plaintiffs claimed that they never even saw this opportunity to decide whether to agree to the formation of a contract. Id. The court held that the placement did not constitute proper notice and precluded the plaintiffs from assenting to the terms of the agreement. Id at 28.

In Ticketmaster, the court stated that although it would prefer a rule requiring website users to accept contract terms by clicking on a button marked “I Agree,” the law had not developed that way. Ticketmaster at 9. Instead, the law states that if the user is aware of the terms and the action required to accept them, the contract forms when that action is taken. Id. The court dismissed defendant Tickets.com’s motion for summary judgment on the issue of contract formation, citing evidence that defendant Tickets.com had plenty of notice of the

contract terms, including a letter the defendant received from plaintiff Ticketmaster that quoted the terms, and the defendant's reply to that letter. Id at 7, 10.

Like the agreement in Netscape, the AWE License Agreement is not readily accessible, buried at the bottom of the front page of the website and hidden behind an inconspicuous link labeled "Legal." It is certainly feasible that regular users of the website have never read the agreement. A "reasonably prudent" visitor should expect such an important document to be prominently displayed on the site, with clear notice that use of the site forms assent to the terms.

One could argue that EWS should have known of the existence of the agreement. The link, listed with other important site resources such as contact and subscription information, is not inconspicuous merely because it is at the bottom of the screen. The practice of listing important site resources in such a manner is a common formatting style among websites. Additionally, AWE claims it sent a letter to EWS that is similar to the letter in Ticketmaster. But without proof that the letter was received this argument is weak. It is the duty of the offeror to make clear the terms of the offer and the manner of acceptance. If a license agreement is to exist on a separate web page, access to it must be prominently displayed in the area of heaviest traffic in order to ensure knowledge of it. It is not the duty of the offeree to actively seek out such information. Unless it is revealed that EWS had prior knowledge of the agreement, a court will likely find that proper notice was not given, and EWS is therefore not bound to the terms.

Trespass on the Computer System

It is unlikely that the use of webcrawlers by EWS on AWE's computer system constitutes a trespass to chattels (one's personal property). The tort of trespass to chattels is an old doctrine that applies to tangible goods and physical or economic harm, and its adoption into the cyber realm is controversial. Some case law supporting it and some in opposition has developed. "In

order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff." eBay at 1069. Even if a defendant's conduct does not significantly interfere with the plaintiff's possession of the chattel, the conduct supports a cause of action if it interferes with the plaintiff's use of his own property. Id at 1070, Register.com at 404. But, the use of a robot on another's computer system is insufficient evidence of trespass: evidence of the robot's adverse effect on the system is required. Ticketmaster at 12.

In Register.com, defendant Verio, Inc., used scouring robots to extract customer registration data from plaintiff Register.com's computers. The court found that the defendant's robots were not authorized by the plaintiff and "consumed a significant portion of the capacity of [the plaintiff's] computer systems." Register.com at 404. The court stated that, although the defendant's robots alone were not "hungry" enough to cause damage to the system on their own, if they were allowed to persist, other companies would deploy similar programs and eventually overwhelm the system, causing crashes and potential data loss. Id.

The court in eBay reached a similar conclusion. In eBay, defendant Bidder's Edge, Inc. (BE), proprietor of an internet auction aggregation house, deployed robots to extract auction information from plaintiff eBay's online auction house. eBay at 1060. The plaintiff, unable to reach a formal agreement with the defendant to allow their action to continue, contacted the defendant and requested it terminate its activity. Id at 1062. The plaintiff later brought suit. The court held that the defendant's usage was unauthorized and intentional. Id at 1070. Although the website is public, the plaintiff's computer systems are private property and subject to restriction by their owner. Id. The court also held that the defendant "deprived [the plaintiff] of the ability

to use [a] portion of its personal property for its own purposes.” Id at 1071. Further, the court held that if the defendant were allowed to continue its unauthorized activity, other robots would join the fray and eventually cause significant damage to the plaintiff’s systems. Id.

The Ticketmaster court disagreed with the two previous holdings, claiming that “scholars and practitioners alike have criticized the expansion of trespass to chattels to the internet context” because the doctrine is based in real and tangible property. Ticketmaster at 11. In Ticketmaster, defendant Tickets.com had deployed robots on plaintiff Ticketmaster’s website in order to extract event information that could be displayed on its own site. Id at 5. The court held that “some tangible interference with the use or operation of the computer being invaded” was required to support a trespass action. Id at 12. The plaintiff could not demonstrate any actual harm to its system caused by the defendant’s robots, so the court dismissed the trespass to chattels claim. Id at 13.

EWS, like the defendants in all three of these cases, can certainly be shown to have engaged in extended and unauthorized use of AWE’s computer systems through its data extraction process. However, it would be difficult for AWE to show any actual, tangible harm perpetrated by EWS against its computer systems. Therefore, a court that follows the trend expected by the Ticketmaster court would not find a trespass to chattels.

One could argue that the danger of additional robots unleashed by other companies should EWS be allowed to continue probing AWE satisfies the requirement of harm to the plaintiff’s computer system. This finding would align with the holdings from Register.com and eBay. However, this interpretation is inconsistent with the plain meaning behind a trespass to chattels, which requires an obvious, tangible harm inflicted by the defendant. Because such harm would be difficult to show in most intellectual property cases, it is unlikely that trespass to

chattels will survive in this context. There is no reason to anticipate its support in this case.

Copyright Claims

AWE cannot succeed on a copyright claim. The owner of any copyright has exclusive rights to authorize the reproduction of that material and the preparation of derivative works based upon that material. 17 U.S.C. § 106. “[T]he fair use of a copyrighted work... for purposes such as... news reporting... is not an infringement of copyright.” 17 U.S.C. § 107. Among other factors, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes” is considered when determining fair use of a copyrighted work. Id. “Facts, as such, are not subject to copyright protection. What is subject to copyright protection is the manner or mode of expression of those facts.” Ticketmaster at 14.

In Ticketmaster, the plaintiff claimed that the defendant violated copyright law by sending its robots into the plaintiff’s website, creating a temporary copy of certain web pages that contained the factual information (dates, locations, times, and prices of events to which the plaintiff sold tickets) the defendant sought, extracting that information, and then deleting the copy of the web page. Id. at 5. The replica of the plaintiff’s digital property existed on the defendant’s computer system for 10-15 seconds, and was used solely to extract the facts. Id. The defendant reformatted the information extracted and displayed it on its own site. Id. at 6. The court made three important rulings: first, the information extracted was purely factual data of the type that is not subject to copyright law, Id. at 15; second, although the copying of the plaintiff’s proprietary data was not the only way to acquire the information sought, the “temporary copy” was fair use because the defendant’s final product did not contain any infringing material, Id. at 18; third, the commercial nature of the defendant’s business, though it weighs against the application of fair use, does not defeat fair use of the protected material. Id.

EWS, like the defendant in Ticketmaster, is a commercial enterprise that has appropriated factual data from one of its competitors. Although AWE may have expended time and other resources collecting weather data, it cannot protect that data under the maxims of copyright law. Had EWS attempted to copy the format with which AWE displays its data, there may be a case for infringement. But EWS's actions are even less infringing than those of the defendant in Ticketmaster, because EWS has not directly copied any representations of format from AWE, even to extract the factual data. Because the data extracted from AWE is not copyrightable, AWE will not likely succeed in an infringement claim.

The contrary argument could be made by asserting that determining fair use relies heavily on the purpose of the use of copyrighted material. EWS is a commercial enterprise that gets its weather data from nonprofit as well as for-profit sources. AWE could contend that it is not necessary for EWS to abuse a competitor's computer system in this way. This argument ultimately will fail. The fair use statute specifically allows for use of copyrighted material in news reporting. 17 U.S.C. § 107. The material ultimately used by EWS cannot be copyrighted, so any copyright violated in the meantime is temporary and for the sake of efficiency. As a result, a court will likely find EWS fairly used AWE's resources.

Conclusion

EWS will likely not be held to have assented to the AWE License Agreement because its location on the AWE website hindered discovery. Any trespass to chattel claim will likely not succeed, because AWE cannot show EWS caused tangible harm to its computer systems. Copyright infringement claims will also not succeed, because factual material is not copyrightable, fair use allows for use of copyrighted material to report the news, and EWS products do not contain copyrighted information.