

Memorandum

To: CEO of Earth, Wind and Snow
From: Evan Dushman
Date: January 24, 2005
Re: Anytime Weather Enterprises' claim against Earth, Wind and Snow.

Discussion

Anytime Weather Enterprises (AWE) has presented three claims against Earth, Wind and Snow (EWS). None of the three claims are valid. AWE's first claim, that EWS has a contract with AWE, and that EWS violated the contract by not following AWE's license agreement, is not valid because EWS did not have proper notice of the license agreement, and, therefore, no legal contract was ever formed between AWE and EWS. AWE's second claim of trespass will fail because AWE cannot show that EWS was in violation of a regulation that forbids EWS from harvesting information from AWE's website despite the fact that damage to AWE's business, via EWS' actions, is likely. AWE's third claim of copyright violation will also fail because the information that EWS is procuring from AWE is public, factual information that is not protected by copyright law. EWS has not acted in violation of any statute or common law and will not be held accountable for any of the claims that AWE will present.

Contract Creation and Enforcement of License Agreement

EWS does not have to follow the terms of AWE's license agreement because there is no contract between AWE and EWS. In order to have a valid contract, there must be a manifestation of agreement between the parties. Netscape at 11. A crucial part of the aforementioned manifestation is that the party assenting to a contract has proper notice of the terms of the agreement. Proper notice of license agreements in cyberspace require that the assenting party has clear notice that they are agreeing to the terms of the website before allowing that party to continue with the act that the party is performing on the internet. Register.com at 9.

Clear notice will not be present if the terms are on another web page or not likely accessible by a reasonable person. Netscape at 12, 14.

In Netscape, the court stated that “clicking on a download button does not communicate assent to contractual terms if the other did not make clear to the consumer that clicking the download button would signify assent.” Netscape at 11. The court also stated that a reasonable consumer should not be expected to scroll down a page to reveal the terms of an agreement when the consumer was not required to do so in order to continue with his purchase. Netscape at 12. Due to the lack of notice and clarity, there was no contract formed. Netscape at 14. While the situation presented in Netscape did not show notice, the court ruled that there was notice in Register.com when the website stated that “by submitting this query, you agree to abide by these terms.” Register.com at 9. Here, the court ruled that “there can be no question that by proceeding to submit a WHOIS query, [the other party] manifested to be bound” Register.com displayed clear notice to the other party, that by continuing, the other party (if a reasonable person) would know that he was assenting to terms that Register.com had provided somewhere on its website.

AWE asserts that EWS has violated the license agreement for AWE’s website because EWS developed a webcrawler which robotically harvests information from the AWE website. According to the AWE license agreement, written permission is required to use information available on its website, and EWS has not asked for, nor received, such permission. License at 1; Problem/Hypo at 1. While the first lines of the license agreement state in bold, capital, and underlined letters, that “by using this site, you agree to these terms of use,” Netscape and Register.com state that if EWS does not have notice of these terms, then they cannot be said to have agreed to the terms and will not have a contract with AWE that requires them to follow the

terms.

AWE's website has access to its license agreement by clicking a blue, eight point Arial font link at the bottom of AWE's main page. Even though Netscape may deal with a consumer, the situation here is similar to that in Netscape. In both cases, whether it be the download of software or the use of a weather page, there is not clear notice of the terms of agreement. Just as in Netscape, the AWE website does not require one who uses its website to agree to any terms before the use of its site. Rather, AWE essentially hides the link to the terms of its license agreement on the bottom of its homepage in a small font. There is no attempt by AWE to make its website similar to the one in Register.com, which made very clear, that by continuing, the user was agreeing to certain terms. The AWE website allows any user to enter the site and do anything with the site without announcing the license agreement to any of its users. AWE provides no notice of its terms to EWS, which means that there is no contract between the parties and the terms of the license agreement are not enforceable.

One could argue that EWS did have notice of the license agreement. In fact, AWE sent a copy of its license agreement to EWS via certified mail. Problem/Hypo at 1. While this proves that someone at EWS received the license agreement, it does not matter. The license agreement would have to be sent directly to someone of authority at EWS along with a description of what EWS was violating. Simply sending the license agreement to EWS is essentially the same as placing a small link at the bottom of the website. The information may be attainable and present, but proper notice is not provided and one cannot be held responsible for not following a rule that they are not aware of or should not know of on their own. EWS has no notice of the license agreement, and, thus, is not contractually obligated to abide by the agreement.

Trespass

AWE will not have a trespass claim against EWS. In order to establish a trespass claim based on illegally accessing a computer system, the plaintiff must establish 1) that the defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system and 2) that the defendant's unauthorized use proximately resulted in damage to the plaintiff. eBay at 12. Intentional and unauthorized interference will occur when a party clearly violates a rule or expressly ignores a request from another party to discontinue whatever action the original party is undertaking. eBay at 12. Examples of damages are a potential decrease in advertising or an over usage of a company's web server, which could limit accessibility for others. eBay at 13; Register.com at 11.

In eBay, the court ruled that crawling a website for information is not authorized simply because the website is publicly accessible. While the court noted that using robots to gather information in itself exceeds the scope of any consent to search a website, the court noted that "eBay explicitly notifies automated visitors that their access is not permitted." eBay at 12. The court further noted that eBay repeatedly and explicitly notified the company performing the robotic activity that such crawling of eBay's system was unauthorized. In another case, Register.com, the court stated that even though the terms of use may not specifically forbid a robotic activity, the notice provided by Register.com to the other company made it clear that such activity was unauthorized. Register.com at 11.

The trespassing claims, in both eBay and Register.com, were valid because the claims included damages along with unauthorized activity. "A trespasser [causes damages] when the trespass diminishes the condition, quality, or value of personal property." eBay at 12. In eBay, damages were found because the robotic activity consumed bandwidth and server capacity, which compromised eBay's ability to use that capacity for its own purposes. eBay at 13. In

Register.com, the fact that the robotic queries could slow down Register.com's database was sufficient to demonstrate damages. Register.com at 11. However, in Ticketmaster, no harm was found by taking information off of another website because in order to utilize the information, the customer would have to refer back to the website where the information originally came from. Ticketmaster at 6. The court considered this to be beneficial, and found no harm, because web traffic was directed back to the original website. Ticketmaster at 6.

Just like the parties in eBay and Register.com, EWS was not aware that they were performing an unauthorized act. Unlike eBay, there is no indication of any notice provided to EWS that its robotic activities were frowned upon until this lawsuit was brought. The situation EWS now finds itself in is similar to the situation in Register.com. As in Register.com, there is no express indication or notice that the crawling is unauthorized (such as in eBay), but after the lawsuit is presented, it is quite clear that discontinuing the robotic activity should be considered. So, up to the point of the lawsuit, EWS does not have notice that their activity is unauthorized and AWE does not have a trespass claim against EWS.

One may argue that notice of unauthorized activity is not necessary because the eBay court stated that robotic activity is out of the scope of consent anyway. The problem with this argument is that notice of an unauthorized activity is given more weight than consent in both eBay and Register.com. EWS did, in fact, receive a copy of the license agreement from AWE, which could be interpreted as providing notice. While the license does not say anything about robotic activity on the AWE website, EWS should know that when a license agreement is sent to them, that they are likely performing a questionable activity. This argument is weak, however, because AWE neither notifies EWS directly or indirectly (through a general statement on their website, perhaps) that crawling is improper. EWS did not perform an unauthorized act by

crawling AWE's website.

Assuming that EWS was found to have had notice that they were performing an unauthorized activity or that they continued to perform the crawling after the lawsuit was commenced, EWS would be found to have caused damage to AWE, and, thus, would be susceptible to a trespass claim having satisfied both prongs of a trespass claim. There is no similarity between the situation in Ticketmaster and EWS because EWS is not directing any web traffic back to AWE's web page. Furthermore, taking information off the AWE website would create a situation similar to eBay and Register.com where server capacity could be diminished. Also, because EWS is the third most visited weather site, behind second place AWE, the strain placed on AWE's servers could slow down the website, frustrate users, and have AWE receive less hits per day on their website. Problem/Hypo at 1. Less hits will lead to less advertising revenue which will certainly be considered damages.

One could attempt to argue that EWS has to get its weather information from somewhere and it may as well use robotic crawlers in order to get the information efficiently. This argument is weak, though, because AWE likely incurs great expense in order to gather its weather information. EWS likely spends a fraction of that cost through the use of their crawlers but receives the same benefit as AWE. EWS is causing damage to AWE, however, since it is not clear that EWS will be found to have performed an unauthorized act, it is not likely AWE will have a valid trespass claim against EWS.

Copyright

AWE does not have a copyright claim against EWS. Exclusive rights in copyrighted works and the limitations of such rights are outlined in Title 17 of the United States Code. 17 U.S.C. § 106; § 107. The publishing of basic facts, even if gathered from another source,

however, cannot be protected from copying. Ticketmaster at 4. “The manner of expression and format of presenting those facts is protectable,” though. Ticketmaster at 4-5. In Ticketmaster, another website crawled the Ticketmaster website and received information such as time, place, venue, and price of public events. Ticketmaster at 4. This information was considered public, and because the information was also presented in a different format than Ticketmaster, there was no copyright claim to be had for Ticketmaster. Ticketmaster at 4.

The facts copied in Ticketmaster are similar to the facts copied by EWS. The weather is public information just like the time and place of a public event is public information. One could argue that the means used by EWS to gather weather information from AWE warrants AWE some protection because EWS is essentially stealing the information from AWE. The problem with this argument is that there is no logical way to argue that the weather is not public information because it has rarely, if ever, been withheld from anyone. As long as the weather continues to be public information, EWS can harvest their weather information from AWE.

A more crucial issue is whether or not EWS uses the same format as AWE to present the harvested weather information. Both sites operate similarly in that the main page contains ads, maps, links to weather information, and a place to input zip codes to retrieve specific weather news. Problem/Hypo at 1. This format is similar, but it is also quite common. There is no indication of a proprietary format on the AWE website that EWS has copied. All of the similarities listed are aspects that should be on a weather web page. If all of the aspects of the two web pages were laid out the exact same way, then there would be a copyright issue. Without such information as to the lay out and because copying basic, public facts is allowed, AWE does not have a copyright claim against EWS.

AWE neither has a contract with EWS nor a trespass or copyright claim against them.