



The EDVA Concludes that Webscraping Claims are Preempted by the Copyright Act and Dismisses them because the Terms of Use Were Not Clearly Displayed

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Cvent, Inc., a Virginia-based software company that licenses web-hosted software for large-scale event planning, recently filed an action and motion for preliminary injunction against competitor, Eventbrite, Inc. in *Cvent, Inc. v. Eventbrite, Inc.*, No. 1:10cv481 (E.D.Va. May 10, 2010) ([link to the opinion below](#)). Cvent alleged that defendants used a technique, known as “webscraping” to access Cvent’s website and copy thousands of its website pages, including various venue descriptions and a destination guide distributed to Cvent customers.

After expedited discovery, Eventbrite moved to dismiss some of Cvent’s claims that were based on the Virginia Computer Crimes Act (VCCA), the Lanham Act, unjust enrichment, the Computer Fraud and Abuse Act (CFAA), Breach of Contract, Business Conspiracy, and common law.

Judge Brinkema reviewed each of these claims, and ruled that only the Lanham Act and unjust enrichment claims could survive dismissal, along with the copyright claim that was not at issue. First, the court looked at whether Eventbrite had “exceeded authorized access” to Cvent’s electronic data under the CFAA, finding that the data that Eventbrite allegedly stripped from plaintiff’s website was publicly available on the Internet, with no login, password or other individualized grant of access. Although Cvent argued that its Terms of Use (TOU) prohibited competitors to access its site or information, the court found that the TOU were not displayed on its website in any way that a reasonable user could be expected to notice them. Thus, the mere allegation that defendant used such publicly available information in an inappropriate way

did not state a claim for relief under the CFAA.

In reviewing the VCCA claim, the court looked at whether the defendant had used a computer or computer network without authority to obtain property or services by false pretenses, or by embezzling, committing larceny, or converting plaintiff's property. The Court found that the cause of action was preempted by copyright law to the extent it was based on reproduction of the copyrighted computer program. Because Cvent had not alleged any facts with respect to false pretenses apart from its copyright claim, the VCCA claim was dismissed.

With respect to the Lanham Act and unjust enrichment claims, the court reviewed the Supreme Court case of *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), which limited the scope of reverse passing off claims based on copyrighted works created by another to "tangible goods offered for sale, and not to the author of any idea, concept, or communication embodied in those goods." Following *Dastar*, many courts have rejected reverse passing off claims based on copying the intellectual property of another. However, the Court found that plaintiff's claims under the Lanham Act and unjust enrichment claims were based on the assertion that Eventbrite had re-branded and re-packaged Cvent's product (the venue database) as its own, and that Eventbrite was deriving a commercial benefit from unauthorized scraping and repackaging of such products. Thus, the court denied the motion to dismiss the Lanham Act and unjust enrichment claims, because they were based on reverse passing off of goods or products, rather than ideas.

Turning to the breach of contract claim, the court again reviewed Cvent's website TOU to determine whether there was any contract between the parties. Placing the TOU into a "browsewrap agreement" category, the court asked whether the defendant had actual or constructive knowledge of the site's terms and conditions and manifested assent to them under common law. The Court found that Cvent had not pled sufficient facts to plausibly establish such assent. Although plaintiff argued that it stated a claim under the Uniform Computer Information Transactions Act (UCITA), the court found that the defendants did not have a reasonable opportunity to review the TOU under that act, because the terms were not "available in a manner that ought to call it to the attention of a reasonable person." Nor did the website "disclose the availability of the standard terms in a prominent place on the site" and not "take affirmative acts to prevent printing or storage of the standard terms for archival or review purposes" under UCITA.

Finally, the court granted Eventbrite's motion to strike certain relief requested for attorney's fees and statutory damages, based on unlawful acts of infringement that allegedly took place prior to

Cvent's copyright registration.

The Court's decision in this case could have an impact on how software and other e-commerce companies post their terms of use on their websites, as other courts discussing "browsewrap" agreements have not generally analyzed whether such conspicuous posting is necessary to manifest a party's assent to the terms.

Related People

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