

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARLA GARLEY (SF); BROCK GOWDY (SF);
DANIEL HARRIS (PA); JEANINE YOO SAND
(PA); JONATHAN BAKER (PA); MARK
MCKEEN (SF)

CIVIL MINUTES — GENERAL

Case No. CV 99-7654 HLH (BQRx)

Date March 27, 2000

Title TICKETMASTER CORP., et al. v. TICKETS.COM, INC.

DOCKET ENTRY

PRESENT

HON. HARRY L. HUPP, JUDGE

Jim Holmies
Deputy Clerk

Cynthia L. Mizell
Court Recorder

ATTORNEYS PRESENT FOR PLAINTIFFS:

Robert H. Platt
Mark S. Lee
Matthew P. Kanny

ATTORNEYS PRESENT FOR DEFENDANTS:

Daniel R. Harris
Neil L. Shapiro

PROCEEDINGS: DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

ORDER (also, if applicable, findings and memorandum opinion):

The motions to dismiss the First Amended Complaint (FAC) made by defendant Tickets.Com., Inc., (hereafter Tickets) is granted with 10 days leave to amend as to claims 2 (breach of contract), 6 (misappropriation), 8 (trespass), and 9 (unjust enrichment). The motion is denied as to claims 1 (copyright infringement), 3 (federal unfair competition and reverse passing off), 4 (false advertising), 5 (state unfair business practices) and 10 (interference with business advantage). Defendant need not answer the claims not dismissed until either 10 days after a Second Amended Complaint has been filed or notice is given that such will not be filed.

Both parties have made reference to declarations filed in connection with the forthcoming motion for preliminary injunction. Such matters may not be properly considered on an FRCP 12(b)(6)

motion to dismiss the complaint, which limits consideration to matters in the complaint and items of which the court may take judicial notice (none here). However, where an amended complaint has been filed, items pleaded or attached as exhibits to the original complaint may be considered to the extent they contradict assertions in the amended complaint.

The web site of plaintiffs Ticketmaster Corporation and Ticketmaster Online-CitySearch, Inc. (hereafter collectively in the singular Ticketmaster) operates to allow customers to purchase tickets to various events (concerts, ball games, etc.) through an internet connection with its customers. On the Ticketmaster home page, there are instructions and a directory to subsequent pages (one per event). The event pages provide basic information (short description of the event, date, time, place, and price) and a description of how to order tickets by either internet response, telephone, mail, or in person. Each of these subsequent pages is identifiable with an electronic address. The home page further contains (if a customer scrolls to the bottom) "terms and conditions" which proscribe, among other things, copying for commercial use. However, the customer need not view the terms and conditions to proceed straight to the event page which interests him. Ticketmaster has exclusive agreements with the events it carries on its web pages so that tickets are not generally available to those events except through Ticketmaster (or reserved for sale by the event itself, or available from premium ticket brokers who generally charge higher than face value).

Tickets also operates a web site (Tickets.Com) which performs a somewhat different ticketing service. While Tickets does sell some tickets to certain events on its own, it also provides information as to where and how tickets which it does not sell may be purchased. A short factual description as to event, time, date, place and price is listed. Where Tickets does not itself sell the tickets, a place is given the customers to click for a reference to another ticket broker, or to another on-line ticket seller. Here is where the unique feature of this case--hyperlinks or deep linking--comes in. Where the exclusive ticket broker is Ticketmaster, and the customer clicks on "Buy this ticket from another on-line ticketing company", the customer is instantly transferred to the interior web page of Ticketmaster (bypassing the home page) for the

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the particular event in question, where the customer may buy the tickets (from Ticketmaster, not Tickets) on-line. An explanation is generally given by Tickets as follows: "These tickets are sold by another ticketing company. Although we can't sell them to you, the link above will take you directly to the other company's web site where you can purchase them." The interior web page contains the Ticketmaster logo and the customer must know he is dealing with Ticketmaster, not Tickets.

In order to obtain the basic information on Ticketmaster events, Tickets is alleged to copy the interior web pages and extract the basic information (event, place, time, date, and price) from them. That information is then placed in Tickets format on its own interior web pages. Tickets no longer (if it once did as alleged) merely copies the Ticketmaster event page on its own event page. However, by the use of hyper-linking (i.e.: electronic transfer to the particularly numbered interior web page of Ticketmaster), the customer is transferred directly to the Ticketmaster interior event page.

The motion to dismiss the first claim (copyright infringement) is denied because the complaint alleges actual copying. Plaintiff claims that the copying includes printing the factual information derived from the Ticketmaster interior web pages. The court does not accept this argument. A copyright may not be claimed to protect factual data (Feist Publications '91 499 US 340, 113 LEd2d 358). While the expression, organization, placement, etc., of the factual data may be protected, Tickets is not alleged to have copied the method of presentation, but rather to have extracted the factual data and presented it in its own format. Where Tickets is alleged to have copied (¶ 35 of FAC) is in the making of thousands of copies taken from Ticketmaster's interior web pages for the purpose of extracting the factual data carried thereon and using it to publish its own version containing the factual data. Thus, copying is alleged (albeit not republication of protected material). Thus, the court rejects Ticketmaster's basic contention that it is copyright infringement to take basic facts from its publicly available web pages and use those facts (if the expression and method of presentation is not copied). Copying is alleged by transferring the event pages to Ticket's own computer to facilitate extraction of the facts. This is a very different case from merely

copying for its customers the Ticketmaster event pages. This falls in the same category of taking historical facts from a work of reference and printing them in different expression. By a similar analogy, the hyperlink to the interior web page (whatever it may do for the unfair competition or interference claims) does not allege copying.

Further, hyperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved. The customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently.

There is an ambiguity in the FAC which yet needs to be cleared up, although not involving a failure to state a claim. A federal court does not have jurisdiction of a copyright infringement claim until the copyright is registered (or refused registration). (In at least one circuit, application for registration is sufficient to confer jurisdiction.) In ¶ 26 of the FAC, it is alleged that the "Ticketmaster Web Site, including the Ticketmaster Event Pages, is subject to copyright owned by Ticketmaster Corp. The copyright of the Ticketmaster Web Site has been registered with the United States Copyright Office...." Exhibit F to the FAC shows that the title of the work copyrighted is "Ticketmaster.com Web Site II" and (later) "Ticketmaster.com Web site III" and that the nature of the authorship is "underlying source code." The event pages change from day to day as old events are dropped out and new ones are added. There is a possible ambiguity as to whether the copyright as registered covers not only the home page but also each of the event pages. Since the alleged copying is only of the event pages, there is still the question for further proceedings as to the court's jurisdiction over the claim of copyright infringement of the event pages.

The motion to dismiss the second claim (breach of contract) is founded on the "terms and conditions" set forth on the home page of the Ticketmaster site. This provides that anyone going beyond the home page agrees to the terms and conditions set forth, which include that the information is for personal use only, may not be

used for commercial purposes, and no deep linking to the site is permitted. In defending this claim, Ticketmaster makes reference to the "shrink-wrap license" cases, where the packing on the outside of the CD stated that opening the package constitutes adherence to the license agreement (restricting republication) contained therein. This has been held to be enforceable. That is not the same as this case because the "shrink-wrap license agreement" is open and obvious and in fact hard to miss. Many web sites make you click on "agree" to the terms and conditions before going on, but Ticketmaster does not. Further, the terms and conditions are set forth so that the customer needs to scroll down the home page to find and read them. Many customers instead are likely to proceed to the event page of interest rather than reading the "small print." It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one using the web site. The motion is granted with leave to amend in case there are facts showing Tickets' knowledge of them plus facts showing implied agreement to them.

The motion is denied as to the 3d, 4th, and 5th claims (passing off, reverse passing off, and false advertising). These claims state federal (Lanham Act) claims. As defendants point out, the exhibits attached to the original complaint and the FAC do not appear to support the claims, but they are not necessarily intended to. The body of the FAC alleges that Tickets falsely suggested or implied an association with Ticketmaster, the giving of misleading information about phone numbers, and the unauthorized control over event pages of Ticketmaster. The complaint also alleges deep linking as an example of unfair competition, but the court concludes that deep linking by itself (i.e., without confusion of source) does not necessarily involve unfair competition. The false advertising claim is supported by allegations that Tickets has falsified information about the availability of tickets through Ticketmaster and that tickets are available only through premium ticket brokers. Tickets acknowledge that there may have been some accidental errors, which were corrected, but this issue is for later proceedings. Commercial advertising (i.e., publication by a business competitor) is sufficiently alleged to state a claim.

The next topic is Copyright Act preemption of state law claims. State law claims which come "within the general scope of

copyright" are preempted (17 USC § 301(a); see Dielei CDCA'96 916 FSupp 985, 991). This means that matters within the scope of copyright law are preempted when the state law rights are equivalent to rights under the general scope of copyright. To survive, the state law claims must have an "extra element" which changes the nature of the claim (Del Madera Properties 9Cir'87 820 F2d 973, 976). Further, where copying is permitted by the Copyright Act, a contrary state law could not be enforced. Applying these principles to this case:

1. The contract claim is not preempted. Aside from copying (which is preempted), the contract claim alleges adherence by Tickets to a contract not to use for commercial purposes (possibly not preempted) and not to deep link (not preempted). (See, e.g., Trenton Infinity CDCA'94 865 FSupp 1416, 1429.)

2. The 6th and 8th claims (misappropriation and trespass) are preempted and the motion is granted as to these claims. The essence of each claim is the invasion and taking of factual information compiled by Ticketmaster. To the extent that state law would allow protection of factual data (not clear at all), this cannot be squared with the Copyright Act (see Feist, *supra*). In addition, it is hard to see how entering a publicly available web site could be called a trespass, since all are invited to enter.

3. The 7th claim (state unfair business practices) is preempted insofar as it alleges the taking and publication of factual data. However, the claim also alleges the use of false advertising, supplying the "extra element" over and above copyright law. Accordingly, the motion is denied as to this claim.

4. The 9th claim (unjust enrichment) is preempted and the motion to dismiss is granted since the allegation is that defendant enriched themselves by taking the factual material from Ticketmaster's web site. It is hard to see how this could be since Tickets is not selling the tickets or participating in the proceeds. Whether that is correct or not, copyright preemption covers the subject of taking factual data without taking the mode of expression of same.