

Copyright Preemption in the Internet Age

By Mark V.B. Partridge

The problem of preemption has been the subject of increased discussion as litigators reconsider traditional legal theories to confront new problems in the Internet age. See "Factual Databases: Applying Traditional Legal Theories to Contemporary Internet-Related Issues," *IP Litigator* (July/August 2000). Two recent decisions are useful guides for evaluating the application of preemption to new technology. See *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000) and *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.Supp.2d 1058 (N.D. Cal. 2000).

The statutory authority for copyright preemption is found in Section 301 of the Copyright Act, 17 U.S.C. §301, which states, in relevant part:

[A]ll legal or equitable rights that are the equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come with the subject matter of copyright . . . are governed exclusively by this title. . . . [N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Ticketmaster operates an Internet web site that allows customers to purchase tickets to concerts, ball games and other events. Tickets.Com operates a web site that provides information on where tickets can be purchased. Its web site displays a short factual description for the event, including time, date, place and price. One of the issues in the Ticketmaster case arose from the defendant's use of computer technology to gather factual information about events from the Ticketmaster site. Ticketmaster alleged, inter alia, that the defendant's conduct was an unlawful trespass under California state law.

To prevail on a trespass claim based on accessing a computer system, a plaintiff must establish (1) the defendant intentionally and without authorization interfered with a possessory interest in the computer system; and (2) the defendant's unauthorized use proximately resulted in damage to plaintiff. See Thrifty-Tel v. Bezenek, 46 Cal. App. 4th 1959 (1996).

On the defendant's motion to dismiss, the Court considered the scope of preemption, stating that a surviving state claim must have an "extra element" which changes the nature of the claim. Also, if copying is permitted by the Copyright Act, a contrary state law could not be enforced. In other words, a state law that prevents the taking of facts from a copyrighted work could not be enforced unless there was something extra beyond mere copying involved.

The Court held that the trespass claim was preempted, stating:

"The essence of [the] 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. . . . In addition, it is hard to see how entering a publically available web site could be called a trespass, since all are invited to enter."

A different result was reached in the eBay case, decided two months later. eBay operates an Internet auction site. Bidder's Edge operates a site that consolidates auction information from various sites including eBay and others. It gathers its auction information using a software robot, also known as a spider, robot or web crawler, to search, copy and retrieve information from the web sites of others. Bidder's Edge initially approached eBay to negotiate a license for access to the eBay site, but proceeded without a license when the parties failed to agree on terms. eBay moved for preliminary injunction, claiming, inter alia, that the invasion of its site by Bidder's Edge was an unlawful trespass on chattles under California law.

The court found a sufficient likelihood of prevailing on the trespass claim to grant a preliminary injunction. The court noted that trespass to chattles was recently applied in California to prevent the unauthorized use of long distance telephone lines. Thrifty-Tel v. Bezenek, 46 Cal. App. 4th 1559, 1566 (1996). Following that decision, it appears that electronic signals over the Internet are sufficiently tangible to support a trespass claim.

The trespass involved the use of the automated program to enter eBay's databases, not the unauthorized use of of eBay's information. Bidder's Edge had continued the intrusion even when asked by eBay to stop. The fact that the site was publicly accessible did not justify the intrusion. The eBay servers were private property, and eBay explicitly notified automated visitors that their access was not permitted. Thus, Bidder's Edge exceeded the scope of consent granted to persons using the eBay site. The damage to eBay arose from the loss of available bandwidth and server capacity. Although the intrusion may be negligible, if permitted, it could encourage intrusions by others resulting in a substantial impairment.

The Court concluded that the trespass claim was not preempted because the rights involved were not the same as those addressed by a copyright claim.

"Here, eBay asserts a right not to have [Bidder's Edge] use its computer systems without authorization. The right to exclude others from using physical personal property is no equivalent to any rights protected by copyright and therefore constitutes an extra element that makes trespass qualitatively different from a copyright infringement claim."

The claim is distinguishable from the claim in the Ticketmaster decision where the Court focused on the unauthorized use of information, rather than on the intrusion into a computer system.

While the former appears to involve rights equivalent to copyright, the later does not.

Most recently, a second, unpublished order on a motion for preliminary judgment was issued in the Ticketmaster case. Citing the eBay decision with approval, the Ticketmaster Court concluded that the trespass theory might be applicable to use of spiders and robots to gather online facts from web sites, but denied preliminary relief based on the facts of the case before him.

"The comparative use by [defendant] appears very small and there is no showing that the use interferes to any extent with the regular business of [plaintiff]. If it did, an injunction might well issue . . . Nor here is the spectre of dozens or more parasites joining the fray, the cumulative total of which could affect the operation of TM's business."

These decisions provide a useful point of comparison for drafting trespass claims involving electronic intrusion into computer systems.

P.S. There should be a note included with the article stating that Pattishall, McAuliffe represents Ticketmaster.