

If This Copyright Law Post Mentions Hamilton, You're More Likely to Read It

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by Stefan Szpajda

The Ticketmaster logo is displayed in white, italicized lowercase letters against a solid blue background. The word "ticketmaster" is followed by a registered trademark symbol (®).

This post is about *Hamilton*. Well, sort of. It's actually about copyright law. But keep reading!

Most people who have attempted to buy a highly sought-after ticket—like, say, a ticket for *Hamilton*—have experienced the frustration of being beaten to the punch by armies of bots that purchase large quantities of tickets only to resell them at a profit on the secondary market. In fact, Ticketmaster estimates that for some shows 30-40% of all *Hamilton* tickets are purchased by such bots. Sellers have struggled with how best to

respond. *Ticketmaster L.L.C. v. Prestige Entm't, Inc.*, [a recent federal court decision](#) out of the Central District of California, suggests that the Copyright Act may prove to be a useful tool to curb the practice.

What'd I Miss?

Ticketmaster accused several companies, individuals, and unnamed “Doe” defendants of —among other things—copyright infringement. The district court considered defendants’ motion to dismiss four categories of claims brought by Ticketmaster in its [First Amended Complaint](#): (a) three claims under the Copyright Act, (b) Digital Millennium Copyright Act, (c) Computer Fraud and Abuse Act, and (d) California Computer Data Access and Fraud Act. We focus here only on Ticketmaster’s copyright claims.

In short, Ticketmaster alleged that two of the Doe defendants (the “Bot Developers”), in the course of developing the bots later used by the other named defendants to purchase tickets, downloaded and stored the pages and code associated with Ticketmaster’s website and mobile app. Per Ticketmaster, this use of its code violated the Copyright Act.

Taking a step back, this wasn’t Ticketmaster’s first attempt to use the Copyright Act to stop bots from purchasing tickets. The court had previously [granted defendants’ motion to dismiss](#) Ticketmaster’s copyright claims as pled in its [original Complaint](#).

Ticketmaster’s initial copyright infringement theory relied on its allegation that defendants’ use of bots to purchase tickets violated several enumerated conditions in Ticketmaster’s Terms of Use (“TOU”), and thus caused defendants’ continued use of Ticketmaster’s platform to infringe Ticketmaster’s copyrights.

Although rejected by the court, the copyright claims in Ticketmaster’s original Complaint had some support in law. In the Ninth Circuit, a copyright owner who grants a nonexclusive, limited license ordinarily waives the right to sue licensees for copyright infringement, and it may sue only for breach of contract. If the licensee acts outside the scope of the license, however, the licensor may sue for copyright infringement. A claim for copyright infringement can only be made where the licensee’s actions (1) exceed the license’s scope (2) in a manner that implicates one of the licensor’s exclusive statutory rights. For a licensee’s violation of a contract to constitute copyright infringement, there must also be a nexus between the breached condition and the licensor’s exclusive rights. Otherwise, a copyright holder could designate any disfavored conduct by the licensee as copyright infringement.

Ticketmaster’s original copyright claim thus hinged on the distinction between conditions and covenants—i.e., contractual terms that limit a license’s scope are conditions, while all other license terms are covenants. Because breaches of conditions can result in copyright infringement, while breaches of covenants are only actionable under contract law, the court’s finding that Ticketmaster’s terms were covenants and not conditions doomed its copyright claim. Indeed, the court Said No to Ticketmaster’s original Complaint by dismissing it without leave to amend to the extent that Ticketmaster’s copyright claim was based on defendants’ use of bots to exceed the TOU limitations on the number of page refreshes or ticket requests, or to place a large load on

Ticketmaster's servers.

Ticketmaster wasn't Helpless and found a way to Stay Alive by pleading its copyright claim in a way that went beyond merely alleging that defendants' unauthorized use of its platform violated its TOU.

Copyright Claims Will Be Back

The court dismissed Ticketmaster's original Complaint because it ultimately traced its copyright claims to defendants' alleged violations of Ticketmaster's TOU. In contrast, the First Amended Complaint relies on a more complex set of allegations. Namely, Ticketmaster alleges direct copyright infringement against the Bot Developers who built the programs used to purchase tickets, and secondary infringement against the other defendants who induced the Bot Developers' infringing actions.

Are Websites Protectable Under the Copyright Act?

A threshold question addressed by the court was whether Ticketmaster's website is protectable under the Copyright Act. The court found it is, because—like computer software generally—websites contain three distinct layers of content: literal elements (e.g., source code), individual non-literal elements (e.g., screen displays), and dynamic non-literal elements (e.g., interactive elements generated specifically for a user in real-time). Each content layer is subject to the Copyright Act.

Direct Infringement

The act of downloading and storing the pages and code of a website qualifies as making a "copy" under the Copyright Act. In its First Amended Complaint, Ticketmaster alleges that the Bot Developers have directly infringed Ticketmaster's reproduction rights by doing just that. The court found Ticketmaster met its burden despite failing to allege with particularity details related to defendants' actual copying of its code.

Typically, in the absence of direct evidence it is sufficient for a copyright plaintiff to allege that (1) the defendant had access to the plaintiff's work prior to the alleged copying and (2) the defendant's work and the plaintiff's work are substantially similar. The twist in Ticketmaster's complaint is a similar but distinct formulation: Ticketmaster alleges that (1) the Bot Developers developed bots adept at purchasing large quantities of tickets, and (2) Ticketmaster's website and mobile app are complex platforms that each contain several layers of protection and security measures. Ticketmaster's claim, at the pleading stage, thus depended on its assertion that developing such capable bots would necessarily require deep study of Ticketmaster's website and source code, which in turn means that the Bot Developers must have downloaded and stored literal or non-literal elements of Ticketmaster's website and mobile app. The court found Ticketmaster's theory about the compatibility of defendants' bots with its platforms to be a "compelling variation" on the substantial similarity test for circumstantial proof of copyright infringement.

Secondary Infringement

To bring a copyright claim against the remaining defendants, Ticketmaster accuses them of secondary copyright infringement by inducing, causing, or materially contributing to the Bot Developers' creation of bots, with knowledge that the Bot Developers would have to infringe Ticketmaster's copyrights to create the bots. Ticketmaster alleges that the Bot Developers created the bots, and that the other defendants then used those bots to purchase large quantities of tickets. The court found these facts sufficient to indicate a relationship between defendants and the Bot Developers of mutual benefit to both parties, and found it reasonable to infer that defendants contributed to the Bot Developers' infringement as part of this relationship. The court found that Ticketmaster has stated a claim for defendants' contributory infringement based on the Bot Developers' direct infringement.

License Defense

The court rejected defendants' license defense based on the argument that Ticketmaster's TOU provides users a license to copy Ticketmaster's website. This reinforces the value of Ticketmaster's creative approach to its copyright claim.

Recall that in granting defendants' motion to dismiss Ticketmaster's original Complaint, the court devoted considerable attention to whether the provisions of Ticketmaster's TOU were conditions or covenants. In seeking to dismiss the First Amended Complaint, defendants reiterated that, under the court's first order, the provisions of the TOU are covenants and that the violation of a covenant gives rise only to a contract claim. The court found that this renewed argument misconstrued the court's earlier order, the relevant Ninth Circuit authority, and the underlying copyright laws—i.e., a violation of a provision of a TOU is copyright infringement if the violation implicates one of the copyright holder's exclusive rights, regardless of whether the violated provision is a covenant or a condition.

Satisfied

One reason Ticketmaster's First Amended Complaint survived is that it avoided the public policy concerns raised in its original Complaint. The court explained that grounding copyright claims in simple breaches of contract could allow software copyright holders to designate any disfavored conduct during software use as copyright infringement. But the court found this concern is not implicated by Ticketmaster's First Amended Complaint because Ticketmaster alleges direct infringement by a small number of sophisticated software developers and marketers and thus "will not expose masses of Ticketmaster users to copyright liability merely because they violated Ticketmaster's own house rules."

What Comes Next?

Ticketmaster L.L.C. v. Prestige Entm't, Inc. shows the Copyright Act's potential to combat bot-driven online purchases of tickets. More generally, it affirms that—especially in unsettled areas of law—a thoughtfully pled complaint can overcome unfavorable

precedent.

The TMCA will continue to monitor the case and will report again on significant developments.