

That's the Ticket . . .

What's Next for the Ticketing Industry After Ticketmaster v. RMG Techs., Inc.

BY CARLA VARRIALE

This article examines the federal district court's back-to-back decisions in *Ticketmaster L.L.C. v. RMG Techs., Inc.*¹ The decisions captured the ticketing industry's attention and underscored the tension within an industry that is already under increasing scrutiny by the media and, in some instances, law enforcement agencies.²

The ticketing industry is, by its nature, highly competitive, and that competition has intensified with the proliferation of the Internet and e-commerce sites offering tickets for sale. Ticketmaster L.L.C. ("Ticketmaster") is a well-known purveyor of tickets for entertainment and sports events on behalf of its clients to the general public through a variety of means, including its copyrighted Web site, www.ticketmaster.com (the "Web site"). Ticketmaster faces increasing challenges from resale competition in the secondary market and the establishment of "in-house" online ticketing by organizations such as Major League Baseball. Recognizing the competition and the changing nature of the market, Ticketmaster has pursued legal action to protect its market share.

In its lawsuit, Ticketmaster posited that it attempts to ensure a fair and equitable ticket-buying process on the Web site by contract and through technological means. Customers must accept contractual provisions set forth in the Web site's "Terms of Use."³ The Terms of Use permit viewers to use the Web site for personal use only, prohibit commercial use, prohibit the use of "automatic devices" to purchase tickets, and prohibit customers from making mass ticket purchases.

Ticketmaster also contended that it employs technological means to ensure that ticket buying through the Web site is fair and equitable. The Web site is armed with access control and copy protection systems, including a computer security feature known as a "CAPTCHA" (an acronym for "Completely Automated Turing Test to Tell Computers and Humans Apart").⁴ A CAPTCHA is designed to distinguish between human users and computer programs, and thereby prevents the use of automated devices to purchase tickets online.

RMG Technologies, Inc. ("RMG") developed and marketed automated devices to access and navigate the Ticketmaster Web site. In a high-tech version of "cat and mouse," the automated devices purportedly circumvented Ticketmaster's access control and copy protection systems, inundating Ticketmaster's Web site with automated requests that prevented ordinary customers from accessing the Ticketmaster Web site and enabled RMG's clients to purchase large quantities of tickets.

Ticketmaster sued RMG for infringing on its copyrights and violating its Terms of Use as well as a number of federal and state statutes. Ticketmaster asserted 11 causes of

action in its First Amended Complaint ("FAC"), including copyright infringement, violation of the Digital Millennium Copyright Act ("DMCA") and the Computer Fraud & Abuse Act ("CFAA"), breach of contract, and fraud. Ticketmaster claimed that RMG markets and sells applications that enable its clients to use automated devices to enter and navigate through the Web site in violation of the Terms of Use, thereby damaging Ticketmaster. Ticketmaster contended that RMG's applications or "bots" constitute prohibited "automatic devices" and that the applications circumvent the Web site's access control and copy protection systems and inundate Ticketmaster's computers with thousands of automatic requests, thereby preventing ordinary consumers from accessing the Web site, and enabling RMG's clients to purchase large quantities of tickets. This conduct, in turn, purportedly impaired Ticketmaster's goodwill and harmed the public because RMG's ticket broker clients could unfairly purchase numerous tickets for resale. Ordinary consumers were, therefore, unable to purchase tickets or were forced to pay ticket brokers an inflated price for resold tickets.

THE DENIAL OF RMG'S MOTION TO DISMISS THE FAC

RMG moved to dismiss Ticketmaster's FAC because it was legally insufficient. The court denied RMG's motion.

The court found that Ticketmaster's claims were well pleaded because they were based on cognizable legal theories and supported by factual allegations sufficient to state claims for relief. The court also rejected RMG's arguments that Ticketmaster's fraud-based claims did not comply with the specificity requirements of the Federal Rules of Civil Procedure. The court held that Ticketmaster satisfied the Federal Rules of Civil Procedure requirement that the allegations set forth in the pleading be specific enough to give RMG notice of the particular misconduct alleged against it. Since the FAC stated that RMG made a false promise to abide by the Terms of Use each time it used the Web site, aided and abetted its customers' commission of the same false promise, and that the same misrepresentation has been made thousands of times since 2004, the court held that the FAC satisfied the specificity requirements with regard to the putative fraud claims.

The court further rejected RMG's argument that Ticketmaster could plead either breach of contract or fraud causes of action, but not both, in its FAC. The court also adopted Ticketmaster's reasoning that the theories underlying its copyright claims, claims for inducing breach of contract and intentional interference with contract, and its claims under the CFAA and DMCA are legally cognizable. Therefore, the court denied RMG's motion to dismiss the FAC.

TICKETMASTER'S PRELIMINARY INJUNCTION IS GRANTED

Ticketmaster moved for a preliminary injunction based on five claims set forth in its FAC. The court granted the motion for a preliminary injunction and enjoined RMG and all persons acting for its benefit or on its behalf from, inter alia, purchasing or facilitating the purchase of tickets from the Web site for the commercial purpose of reselling them.

Initially, the court determined that Ticketmaster satisfied the legal standard to obtain a preliminary injunction. Ticketmaster demonstrated its likelihood of success on the merits of its copyright claims, its DMCA claims, and its

breach of contract claim. However, the court determined that the CFAA claim does not provide a basis for a preliminary injunction. The court did not need to address Ticketmaster's likelihood of success on the claims brought under the California Penal Code.

The court analyzed RMG's potential liability for direct and indirect or vicarious infringement of Ticketmaster's copyrights and determined that Ticketmaster had a strong likelihood of succeeding on the merits of both of these claims. The court determined that Ticketmaster was highly likely to demonstrate that RMG viewed and navigated through the Web site and that pursuant to the Terms of Use, viewers are thus authorized to view and thereby copy pages of the Web site—an important component of the copyright claims. The court also determined that Ticketmaster was likely to demonstrate that RMG received notice of the Terms of Use and assented to them by

THE COURT HELD THAT RMG'S CONDUCT HARMS THE PUBLIC BECAUSE IT "DENIES CONSUMERS THE OPPORTUNITY TO PURCHASE TICKETS AT THEIR FACE PRICE."

actually using the Web site. The court further noted that Ticketmaster reserved the right to terminate any person's access to the Web site if it believed that person violated the Terms of Use. Under the circumstances, the court held that Ticketmaster was highly likely to demonstrate that RMG's applications are automated devices that violated the Terms of Use.

The decision focused upon the battle between CAPTCHA and TBAT. In its opposition, RMG averred that the computer application that Ticketmaster sought to enjoin it from using and selling, "TBAT" (an acronym for "Ticket Broker Acquisition Tool"), is not an "automated device." Rather, it is an Internet browser, like Internet Explorer, that requires human interaction. RMG further argued that it should not be bound by the Terms of Use and that Ticketmaster provided no evidence that RMG, as opposed to the person using TBAT, should be enjoined. The court disagreed.

The court cited Ticketmaster's evidence, including declarations from RMG's former clients and the results of Ticketmaster's sleuthing that traced ticket requests and purchases made on the Web site to individual users and, ultimately, to RMG. Ticketmaster identified one individual who used an IP address registered to RMG and purchased almost 13,000 tickets over several years and made more than 425,000 ticket requests in a single day.⁵ The court highlighted RMG's own description of "stealth technology" that touted it "never get blocked by Ticketmaster" in its analysis.⁶

For similar reasons, the court determined that Ticketmaster was likely to prevail on its claims pursuant to the DMCA and its breach of contract claim. The court held that the puta-

tive CFAA claim does not provide a basis for a preliminary injunction and that it did not, under the circumstances, need to address whether Ticketmaster was likely to succeed on its claims pursuant to the California Penal Code.

Turning to the element of "irreparable harm," the court noted that RMG did nothing to rebut the presumption that Ticketmaster would suffer irreparable harm with regard to its copyright claims. The court also credited Ticketmaster's "extensive" evidence that it is suffering a loss of goodwill with the ticket-buying public and that it is subject to investigations into its ticket-selling practices.

In balancing the relative hardships upon the parties if a preliminary injunction was granted, the court found in Ticketmaster's favor. Notwithstanding RMG's contention that it would go out of business if it could not sell TBAT to its customers, the court remained unpersuaded. The court found that this contention was irrelevant, given Ticketmaster's strong likelihood of success on the merits of its copyright infringement claims.

Lastly, the court found that based on Ticketmaster's evidence of consumer complaints and news reports of misconduct associated with ticket sales, the public interest favored the issuance of a preliminary injunction.

CONCLUSION

Although subject to an appeal, the court's decisions are likely to increase the turbulence in the ticketing industry. The ticket brokering industry, or a segment of it, was dealt a decisive blow in terms of precedent and public relations. In granting the motion for a preliminary injunction, the court emphasized its finding that RMG's conduct caused, and would continue to cause, some portion of Ticketmaster's loss of goodwill and loss of business from its clients. The court further held that RMG's conduct harms the public because it "denies consumers the opportunity to purchase tickets at their face price."⁷ While it is difficult to predict the ripple effect the court's decisions may have, particularly the decision that granted Ticketmaster's motion for a preliminary injunction against RMG, one thing may be predicted: more litigation is likely in the industry's future. ❖

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1. Ticketmaster L.L.C. v. RMG Techs., 2007 U.S. Dist. LEXIS 81573 (C.D. Cal. 2007); Ticketmaster L.L.C. v. RMG Techs., 507 F. Supp. 2d 1096 (C.D. Cal. 2007).

2. See *Brokers Snatch Joy from Hannah Montana Fans*, CNN.COM, <http://www.cnn.com> (Oct. 12, 2007). This article also noted that the regulation of ticket brokering varies by state.

3. The Terms of Use include the following:

You [the viewer] agree that you are only authorized to visit, view and to retain a copy of pages of the Site for your own personal use, and that you shall not duplicate, download, [or] modify . . . the material on this Site for any purpose other than to review event and promotions information, for personal use...

No . . . areas of this Site may be used by our visitors for any commercial purposes . . .

You agree that you will not use any robot, spider or other automated device, process, or means to access the Site . . . You agree that you will not use any device, software or routine that inter-

feres with the proper working of the Site nor shall you attempt to interfere with the proper working of the Site.

You agree that you will not take any action that imposes an unreasonable or disproportionately large load on our infrastructure.

You agree that you will not access, reload or “refresh” transactional event or ticketing pages, or make any other request to transactional servers, more than once during any three second interval.

You do not have permission to access this Site in any way that [violates] . . . these Terms of Use.

You understand and agree that . . . Ticketmaster may ter-

minate your access to the Site, cancel your ticket order or tickets acquired through your ticket order . . . if Ticketmaster believes that your conduct or the conduct of any person with whom Ticketmaster believes you act in concert . . . violates the rights of Ticketmaster, a client of Ticketmaster or another user of the Site.

See Ticketmaster, 507 F. Supp. 2d at 1107.

4. A CAPTCHA is a program that protects Web sites against “bots” by generating and grading tests that humans can respond to but computer programs cannot. <http://www.captcha.net>.

5. *Ticketmaster*, 507 F. Supp. 2d at 1103.

6. *Id.* at 1109.

7. *Id.* at 1116.