LEGAL ASPECTS OF TRAVEL META SEARCH ENGINES

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Introduction

Internet use has pervaded a staggering percentage of the world's population. As one would expect, this advent of new technology and commerce has brought with it problems as internet use continues to run ahead of internet regulation. I was recently involved in a case which dealt with an airline bringing suit against a smaller airline fare aggregator website with claims of trespass and breach of contract. In this essay, I will discuss the legal aspects of travel meta search engines, including who arguably has rights to the public information available on websites.

What exactly does constitute a 'trespass' when someone is sitting in their own home, surfing the internet? Is it possible to inadvertently be entering into contracts (and possibly then breaching them) by browsing various websites? The answers are not wholly clear, but in an attempt to explain where internet law is currently at, I will highlight a few important cases that have recently been decided.

Travel Distribution

Someone with an eye for a vacation used to call up his/her travel agent, who would access information only available to other travel agents when looking for the best prices for airline tickets, hotels, etc. Nowadays, internet-savvy consumers access one of the many, many "discount" travel sites in search of the best bargain.[1] Proponents of the change to travel distribution with internet technology hail the ability to aggregate and provide information to consumers as "changing the experience of travel by improving

[1] For examples of discount travel websites, *see* www.travelocity.com, www.expedia.com, www.orbitz.com, www.cheaptickets.com, www.priceline.com, or www.hotfares.com.

systems, making processes more efficient and employing a more customer-focused approach".[2] One travel distribution company describes itself as being "dedicated to identifying, qualifying and delivering maximum value to its customers".[3]

Those opposed to travel distribution technology are most often the companies competing for business. For example, even though e-commerce has reduced costs related to booking tickets (such as e-tickets), some major airlines find that online fare aggregators are making it harder to stay afloat in today's competitive market as consumers may be more likely to go with the lowest fare rather than be loyal to certain airlines. From my experience, the airline, in an attempt to decrease such competition, claims that certain fare aggregator sites (that they have not entered into operating agreements with) are trespassing upon their servers by accessing their sites for the latest fare and route information. In addition, they claim that the access of their websites constituted entering into a contract, whereupon a breach occurred when the fare and route information was not being used for merely personal use.

The following is a short discussion of some recent internet cases affecting the meta search travel industry.

Specht v. Netscape Communication Corporation

The Court in *Specht v. Netscape Commun. Corp.*, 306 F.3d 17 (2d Cir. 2002) examined the issue of whether or not a party accessing a website could effectively enter into a legal, binding contract. Many websites have some form of user agreement, but the legal effect of such 'agreements' is dependent on their form.

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[2] Cendant: Travel Distribution, *at* http://www.cendant.com/about-cendant/travel-distribution/ (last visited May 1, 2006).
[3] *Id.*

One type of agreement is known as a "shrinkwrap" or "clickwrap" agreement. These agreements require some act or acknowledgment of assent by the user in order to proceed past the agreement screen. A shrinkwrap or clickwrap screen will prevent a user from proceeding into the website until such user manifests assent to the terms and conditions by clicking on a button acknowledging the user has read and agrees to the terms and conditions. Because they require demonstrations of assent, shrinkwrap and clickwrap agreements have been found to be valid and enforceable in many jurisdictions.

In contrast, many websites contain a hyperlink to terms and conditions, known as a "browsewrap" agreement. A browsewrap agreement does not require a website user to review or demonstrate agreement to terms and conditions before the user uses or downloads information from the website. Browsewrap agreements are generally located on pages accessible only through a hyperlink from another page on a website. In many situations, browsewrap agreements are not conspicuous; reasonable users may not be aware of the existence of the terms in the browsewrap agreement. Even users who are aware of the existence of a browsewrap terms and conditions page are generally not required to demonstrate their awareness of terms or manifestation of assent. Without clicking on the hyperlink, which is typically located at the bottom of the main web page, the user has no notice of the terms and conditions of website use. Without such knowledge of or assent to terms and conditions, no enforceable agreement exists. *Komet v. Graves*, 40 S.W.3d at 601.

In the *Netscape* case, considered the seminal case in the area of browsewrap agreements, a user of the Netscape company website accessed and downloaded information in a way that Netscape claimed violated its terms and conditions. The

terms and conditions were not displayed on the page from which users used and downloaded information. Users of the Netscape web site could, but were not required to, access the terms and conditions page by clicking on a small hyperlink at the bottom of the web page. Because Netscape did not require its website users to acknowledge, agree to, or even to view, its terms and conditions page, the court found that Netscape's browsewrap agreement did not create an enforceable contract between Netscape and the users of its website. The court explained the difference between Netscape's browsewrap agreement and clickwrap or shrinkwrap agreements as follows:

> Cases in which courts have found contracts arising from Internet use do not assist defendants, because in those circumstances there was much clearer notice than in the present case that a user's act would manifest assent to contract terms. *See, e.g., Hotmail Corp. v. Van Money Pie Inc., 1998 U.S. Dist. LEXIS 10729, 47 U.S.P.Q.2D (BNA) 1020, 1025 (N.D. Cal. 1998)* (granting preliminary injunction based in part on breach of "Terms of Service" agreement, to which defendants had assented); *America Online, Inc. v. Booker, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001)* (upholding forum selection clause in "freely negotiated agreement" contained in online terms of service); *Caspi v. Microsoft Network, L.L.C., 323 N.J. Super. 118, 732 A.2d 528, 530, 532-33 (N.J. Super. Ct. App. Div. 1999)* (upholding forum selection clause where subscribers to online software were required to review license terms in scrollable window and to click "I Agree" or "I Don't Agree"); *Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 203-04 (Tex. App. 2001)* (upholding forum selection clause in online contract for registering Internet domain names that required users to scroll through terms before accepting or rejecting them).

Netscape, supra, 306 F.3d at 42.

> In *Netscape*, the U.S. Court of Appeals also stated:
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> It is true that "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." *Marin Storage & Trucking*, 107 Cal. Rptr. 2d at 651. But courts are quick to add: "An exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term." *Id.*

Id. at 33.

Another Second Circuit case applied the *Netscape* analysis, but found the existence of a contract only because the terms and conditions were displayed to the defendant each time it accessed the plaintiff's website. The court distinguished its ruling from *Netscape* by noting,

> Netscape's posting of its terms did not compel the conclusion that its downloaders took the software subject to those terms because there was no way to determine that any downloader had seen the terms of the offer. There was no basis for imputing to the downloaders of Netscape's software knowledge of the terms on which the software was offered.

Register.com v. Verio, Inc., 356 F.3d 393, 402 (2d Cir. 2004).

The Rhode Island Superior Court found that a hyperlink to terms and conditions placed inconspicuously at the bottom of the webpage "was not sufficient to put Plaintiffs on notice of the terms and conditions of the sale of the computer. As a result, the browsewrap agreement found on [Plaintiff's] webpage cannot bind the parties . . ." *DeFontes v. Dell Computer Corp.*, 2004 R.I. Super. LEXIS 32 (2004).

eBay, Inc. v. Bidder's Edge, Incorporated

The Court in *eBay, Inc. v. Bidder's Edge, Incorporated* (N.D. Cal. May 25, 2000) examined a trespass to chattels theory asserted by eBay against Bidder's Edge, an auction aggregation site. There, Bidder's Edge refused to cease posting eBay auction listings on its site after repeated requests from Ebay that it comply with its user agreement, which prohibits the use of any robot, spider, other automatic device, or manual process to monitor or copy their web pages.

The *eBay* court granted the auction giant's motion for a preliminary injunction preventing Bidder's Edge from accessing eBay's computer system. The court held that Bidder's Edge intentionally and without authorization interfered with eBay's possessory

interest in its computer system and that Bidder's Edge's unauthorized use proximately resulted in damage to eBay.

Conclusion

The outcome of disputes currently in court could have broad-reaching implications for Internet commerce. Comparison shopping websites are quickly gaining popularity, as computer-savvy consumers search for airline tickets, hotel reservations, computer equipment, consumer electronics, and books. In theory, Internet search engines could be found to 'trespass' on every site they search.

Trespass aside, the logistics and implications of imposing contractual relationships on every website user are overwhelming. Were a contract found to exist between a website and every user of its website, each company that had a website would subject itself to the possibility of contractual claims from thousands of site visitors per day. Courts could be overrun by myriad contract disputes between parties that never communicated with each other or demonstrated mutual assent to their agreements.

Although there is no clear body of law on this issue, the regulation of the Internet has begun, with companies putting up their fences and staking their claims in various ways. Just as the U.S. frontier was an open range, people began claiming ownership by putting up fences. This is likely to be the case on the Internet frontier, with cowboys in the form of companies claiming ownership to what once was vast, uncharted territory. How the courts regulate this "fencing" remains to be seen, but some regulation is necessary for the future of internet commerce.