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September 17, 2010

Did Iqbal/Twombly Raise the Bar for Browsewrap Claims?

Judge Leonie Brinkema of the Eastern District of Virginia issued an interesting opinion earlier this week in a case involving one company's multiple acts of datamining a competitor's website with a screen-scraping program. Among other things, the court held that the plaintiff had failed to allege a valid breach of contract claim, a claim based on data use restrictions in a browsewrap presentation. The court said that the plaintiff's unadorned allegations that "the terms of the TOUs [Terms of Use] are readily available for review" and that the defendants had an "opportunity to review" the terms fell short of the pleading standards set out in a pair of recent Supreme Court decisions.

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the high court said that allegations must be sufficient to nudge a claim from conceivable to plausible. Two years later, in *Ashcroft v. Iqbal*, 129 S. Ct.1937 (2009), the court stated that "if the well-pled facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not shown--that the pleader is entitled to relief."

The *Twombly/Iqbal* pleading standard was not met here, the court said. In order to allege a plausible contract claim based on a browsewrap agreement, the website user must have had either actual or constructive knowledge of the website terms and must also have manifested agreement to those terms.

The court, looking at screenshots submitted by the defendant, remarked that the terms were:

> *"buried at the bottom of the first page, in extremely fine print, [that] users must affirmatively scroll down to the bottom of the page to even see the link."*

Against the evidence of these screenshots, the court said that the plaintiff's allegations that the plaintiff's conclusory allegations about the defendant's knowledge of the website terms and assent to those terms merely by accessing the site "are plainly insufficient under the *Iqbal* and *Twombly* standard to state a plausible claim for relief."

So now I am wondering if the court's injection of *Iqbal/Twombly* into the browsewrap equation has made matters more difficult for sites seeking to protect their data with bottom-of-the-page, behind-a-hyperlink terms of use contracts. Obviously, *Iqbal/Twombly* set out a rule of pleading, not a rule of substantive contract law. However, it looks to me like the court is saying that conclusory pleadings about the existence of a browsewrap contract will not overcome a screenshot indicating only a modest effort to bring the contract to the user's attention. Practically speaking, websites will have to do more if they expect their terms of use to be enforced. At least in this district. Over at the plaintiff's website, you can see the terms of use link sitting there among other links, white text against a black background, at the bottom of the page. Not exactly conspicuous, but certainly no worse than many other website terms presentations.

I wonder if this ruling will lead Cvent to reconsider its strategy of leaving its events database wide open to any internet user, without a password or any sort of authentication, protected only by restrictions in a terms of use document accessible via a hyperlink at the bottom

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of the web page. Are browsewrap terms of use no longer a prudent strategy, or was Cvent's execution of browsewrap contracting a little bit off the mark?

The plaintiff vigorously argued in its brief that the question of the defendant's knowledge of the website terms and its assent to them by accessing the site data were factual matters that could not be resolved on a summary judgment motion--a losing argument in this case. Neither party raised *Iqbal/Twombly* in their briefs. The court brought it up on its own.

Along the way, the court rejected the plaintiff's argument that the browsewrap restrictions were enforceable in view of Virginia's adoption of the Uniform Computer Information Transactions Act (UCITA)--a uniform law that many believe put its thumb on the scale in favor of common browsewrap contracting practices.

There is a lot more worth reading in this opinion. Such as the court's rejection of the plaintiff's Computer Fraud and Abuse Act claim (which foundered largely on the court's conclusion that the CFAA prohibits unlawful access not unauthorized use). And the court's holding that the plaintiff could go forward with a "reverse passing off" trademark claim based on the defendant's alleged copying of the plaintiff's event data and passing it off as its own.

The case is Cvent Inc v. Eventbrite Inc., No. 10-cv-481 (E.D. Va. Sept. 14, 2010).

Judge Brinkema is no stranger to interesting cyberlaw disputes. She ruled in the *GEICO v. Google* lawsuit that the sale of a trademark as a search engine keyword is a commercial use of the mark but such use to trigger a competitor's advertisements is nevertheless not infringing due to lack of evidence of consumer confusion.

Posted by Thomas O'Toole on September 17, 2010 in Contracts | Permalink

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