

JAY M. COGGAN (BAR NO. 86107)
DAVID N. TARLOW (BAR NO. 214050)
JOSHUA G. BLUM (BAR NO. 249082)
COGGAN & TARLOW
1925 Century Park East, Suite 2320
Los Angeles, CA 90067
Telephone (310) 407-0922
Facsimile (310) 407-0923

No Fee Paid

Attorneys for Defendant RMG TECHNOLOGIES, INC.

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 07-2534 ABC (JWS)

TICKETMASTER L.L.C. a Virginia
limited liability company,

Case No.: ~~BC 378067~~

**NOTICE OF APPEAL TO THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH
CIRCUIT**

Plaintiff,

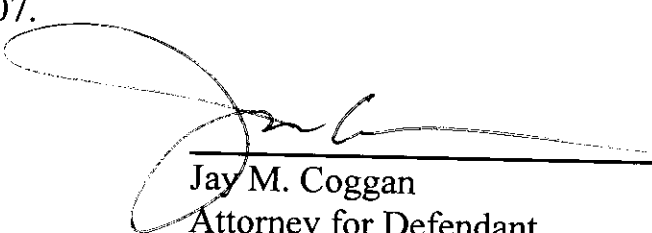
**PRELIMINARY INJUNCTION
APPEAL**

vs.

RMG TECHNOLOGIES, INC. a
Delaware corporation, and DOES 1
through 10 inclusive,
Defendants.

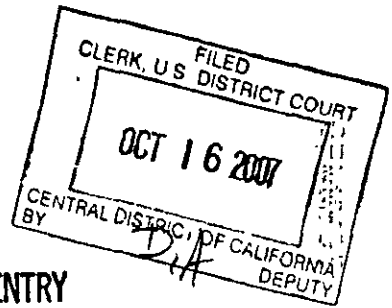
RMG Technologies, Inc., a Defendant herein, appeals to the United States
Court of Appeals for the Ninth Circuit the Order granting a Preliminary Injunction
entered in this case on October 16, 2007.

Dated: November 6, 2007


Jay M. Coggan
Attorney for Defendant
RMG Technologies, Inc.

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**THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).**

Priority Sent

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TICKETMASTER L.L.C., a Virginia
limited liability company,

Plaintiff,

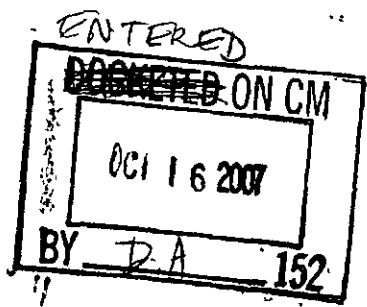
v.

RMG TECHNOLOGIES, INC., a
Delaware corporation, and DOES 1
through 10, inclusive,

Defendants.

CV 07-2534 ABC (JWJx)

ORDER GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION



Pending before the Court is Plaintiff Ticketmaster LLC's Motion
for Preliminary Injunction ("Motion"), filed on August 27, 2007.
Defendant RMG Technologies, Inc. ("Defendant" or "RMG") opposed on
September 17, 2007, and Plaintiff replied on September 24, 2007. On
October 5, 2007, Plaintiff submitted a Court-ordered supplemental
declaration of Kevin McLain, and on October 9, 2007, Defendant
submitted a supplemental declaration of Cipriano Garibay. The hearing
on this matter was held on October 15, 2007. Upon consideration of

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1 the parties' submissions, arguments of counsel, and the case file, the
2 Court hereby GRANTS the Motion.

3
4 **I. FACTUAL AND PROCEDURAL BACKGROUND**

5 In this action, Plaintiff Ticketmaster ("Plaintiff" or
6 "Ticketmaster") alleges that Defendant RMG ("Defendant" or "RMG") has
7 developed and marketed automated devices to access and navigate
8 through Ticketmaster's website, thereby infringing Ticketmaster's
9 copyrights and violating the website's Terms of Use and a number of
10 federal and state statutes.

11 Plaintiff Ticketmaster sells tickets for entertainment and sports
12 events on behalf of its clients to the general public through a
13 variety of means, including its copyrighted website ticketmaster.com
14 ("website"). (First Amended Complaint ("FAC") ¶ 3.) Recognizing that
15 competition to purchase tickets can be intense, Plaintiff contends
16 that it attempts to ensure a fair and equitable ticket buying process
17 on the website by contract and through technological means. (Id.)
18 First, visitors to ticketmaster.com are required to accept contractual
19 provisions set forth in the website's "Terms of Use." (FAC ¶¶ 16-20.)
20 These terms permit viewers to use ticketmaster.com for personal use
21 only, prohibit commercial use, prohibit the use of automatic devices,
22 prohibit users from accessing ticketing pages more than once during
23 any three second interval, and prohibit consumers from purchasing more
24 than a specific number of tickets in a single transaction. (FAC ¶¶
25 21-26; Pl.'s Exhs. 8, 9.)

26 Second, Plaintiff contends that it employs a number of
27 technological means to ensure that ticket buying over the website is
28 fair and equitable. One of these measures is a computer security

1 feature known as CAPTCHA that is designed to distinguish between human
2 users and computer programs, and thereby prevent purchasers from using
3 automated devices to purchase tickets. (FAC ¶ 14.)

4 Plaintiff contends that Defendant RMG markets and sells
5 applications that enable Defendant's clients to use automated devices
6 to enter and navigate through its website in violation of the Terms of
7 Use governing the website, thereby causing injury to Plaintiff. (FAC
8 ¶¶ 3-5, 17-27.) For example, Plaintiff contends that Defendant's
9 applications are prohibited "automatic devices," that the applications
10 circumvent Plaintiff's access control and copy protection systems,
11 including CAPTCHA, inundate Plaintiff's computers with thousands of
12 automatic requests thereby preventing ordinary consumers from
13 accessing the website, and enable Defendant's clients to purchase
14 large quantities of tickets. (FAC ¶¶ 28-30, 34.) Based on these
15 allegations, Plaintiff's FAC, filed on June 25, 2007, states eleven
16 causes of action against Defendant.

17 Plaintiff now moves for a preliminary injunction based on five of
18 its claims. Plaintiff's evidence in support of the Motion includes
19 declarations from its Senior Director of Applications Support, Kevin
20 McLain, wherein McLain testifies how he was able to trace ticket
21 requests and purchases made on ticketmaster.com back to individual
22 users and, ultimately, to Defendant. Based on his methodology, McLain
23 discovered, for example, that Chris Kovach, a ticket broker and one of
24 Defendant's clients, made over 9,500 ticket orders - or 24,000 tickets
25 - over the last several years. (McLain Decl. ¶ 24.) McLain also
26 explains that he identified Gary Charles Bonner and Thomas J. Prior as
27 Defendant's clients. Using IP addresses registered to Defendant,
28 Bonner made almost 13,000 ticket purchases over several years, and

1 made more than 425,000 ticket requests in a single day. (Id.) Using
2 IP addresses registered to Defendant, Prior made almost 22,000 ticket
3 orders over several years, and made more than 600,000 ticket requests
4 in a single day. (Id.)¹ Plaintiff also submitted declarations from
5 Kovach, one of Defendant's former clients; Adam Lieb, a computer and
6 internet consultant; Steven Obara, Plaintiff's Director of Customer
7 Service Operations; Mark Lee, an attorney representing Plaintiff in
8 this matter; and a number of exhibits.²

9 Defendant challenges the Motion on both legal and factual
10 grounds. Defendant states that the computer application Plaintiff
11 seeks to enjoin Defendant from using and selling is its Ticket Broker
12 Acquisition Tool ("TBAT"), and that this application is not an
13 "automated device" but, rather, is simply a type of internet browser,
14

15 ¹ McLain's Court-ordered Supplemental Declaration, filed on
16 October 5, 2007, explains in detail, to the Court's satisfaction, the
17 steps McLain took to trace ticket purchases to Defendant, using
purchases made by Prior as an example.

18 ² Defendant objects to these declarations and the exhibits
19 attached thereto on numerous grounds. The Court finds Defendant's
20 objections meritless. Kovach, McLain, Obara, and Lee supplied
21 sufficient foundation that their testimony is based on their personal
22 knowledge and experience. To the extent they offered opinion
23 testimony, they did so in conformance with the Rules of Evidence. Nor
24 are Defendant's hearsay objections well-taken. Defendant also objects
25 to the Lieb Declaration. However, Lieb laid a foundation sufficient
26 to show that his testimony is based on personal knowledge, and that
27 the opinions he offers are not "speculative" because they are based on
28 his examination of Kovach's computer and his experience as a computer
consultant. Furthermore, in the preliminary injunction context, the
Court is not strictly bound by all rules of evidence. See, e.g.,
Flynt Distributing Co., Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir.
1984) ("The urgency of obtaining a preliminary injunction necessitates
a prompt determination . . . The trial court may give even
inadmissible evidence some weight, when to do so serves the purpose of
preventing irreparable harm before trial.") Thus, the Court has
discretion to consider the proffered evidence even if it might not be
admissible if presented in other settings.

1 akin to Internet Explorer, requiring human interaction. (Garibay
2 Decl. ¶¶ 3, 4) Defendant also urges that it should not be bound by the
3 Terms of Use and that, in any case, Plaintiff has presented no
4 evidence upon which it - as opposed to the persons using TBAT - can be
5 enjoined. Defendant also argues that Plaintiff's legal theories are
6 flawed in various ways.³

8 II. LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

9 To obtain a preliminary injunction, a plaintiff must show
10 "either: (1) a likelihood of success on the merits and the possibility
11 of irreparable injury; or (2) that serious questions going to the
12 merits were raised and the balance of hardships tips sharply in its
13 favor." Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir.
14 1999). "These two alternatives represent extremes of a single
15 continuum, rather than two separate tests." Id. (internal quotations
16 omitted). "Thus, the greater the relative hardship to [a plaintiff],
17 the less probability of success must be shown." Id.; see also
18 International Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822
19 (9th Cir. 1993). "The district court must also consider whether the
20 public interest favors issuance of the injunction." Southwest Voter
21 Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir.

22
23 ³ The Court rejects Defendant's argument that the Motion should
24 be denied as premature because it was brought prior to the Court's
25 ruling on Defendant's Motion to Dismiss. Defendant also appears to
26 argue, rather inconsistently, that the Motion is untimely because it
27 was filed approximately three months after Plaintiff obtained the
28 Kovach Declaration. None of the cases Defendant cites is persuasive.
In view of the facts and posture of this case, the Court finds that
the Motion is neither premature nor untimely. In any event, the Court
did consider the motion to dismiss together with the present Motion,
and issued an order on October 12, 2007 denying the motion to dismiss.

1 2003). A preliminary injunction is an "extraordinary remedy" for
2 which the need must be "clear and unequivocal." Shelton v. National
3 Collegiate Athletic Ass'n, 539 F.2d 1197, 1199 (9th Cir. 1976).
4

5 III. ANALYSIS

6 The five claims on which Plaintiff seeks a preliminary injunction
7 are its claims for violation of the United States Copyright Act, 17
8 U.S.C. § 501 et seq., the Digital Millenium Copyright Act ("DMCA") 17
9 U.S.C. § 1201, California Penal Code § 502, and the Computer Fraud and
10 Abuse Act ("CFAA") 18 U.S.C. § 1030(g), and on its breach of contract
11 claim.

12 A. Likelihood of Success on the Merits.

13 1. Plaintiff's Copyright Claim

14 To prevail on its claim for copyright infringement, Plaintiff
15 must (1) "show ownership of the allegedly infringed material and (2)
16 [it] must demonstrate that the alleged infringers violate[d] at least
17 one exclusive right granted to copyright holders under 17 U.S.C. §
18 106." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th
19 Cir. 2001). Plaintiff alleges that Defendant is violating its
20 copyright in the ticketmaster.com website.

21 Plaintiff has submitted evidence that it owns registered
22 copyrights in the website ticketmaster.com, and, separately, in
23 portions of the website. (Lee Decl. ¶ 2; McLain Decl. ¶ 5, Pl.'s Exh.
24 2.) "A website may constitute a work of authorship fixed in a
25 tangible medium of expression . . . Copyright protection for a website
26 may extend to both the screen displays and the computer code for the
27 website." Integrative Nutrition, Inc. v. Academy of Healing
28 Nutrition, 476 F.Supp. 2d 291, 296 (S.D.N.Y. 2007). Defendant does

1 not dispute Plaintiff's claim that its website is copyrighted.
2 Plaintiff has thus satisfied the first element of its copyright claim.

3 Plaintiff alleges that Defendant infringes its copyrights in
4 ticketmaster.com both directly and indirectly. First, Plaintiff
5 states that each time Defendant views a page from ticketmaster.com, a
6 copy of that page is necessarily downloaded or "cached" from
7 Plaintiff's computers onto the Defendant's computer's random access
8 memory ("RAM"), thus rendering Defendant directly liable for such
9 copying. (Mot. 13:9-12; McLain Decl. ¶ 4.) Plaintiff also argues
10 that Defendant directly participates in its clients' unauthorized
11 access of the website because its clients do not acquire physical
12 possession of the software. Rather, Defendant's devices are kept on
13 Defendant's own computer systems; in order to gain access to
14 Defendant's devices, its clients must log onto Defendant's website
15 ticketbrokertools.com, and use the devices hosted on
16 ticketbrokertools.com to improperly access ticketmaster.com. (Mot.
17 6:18-24; Kovach Decl. 2:18-25.) Thus, Defendant allows and, indeed,
18 requires its clients to go through its own infrastructure in order to
19 use the devices that access ticketmaster.com. Defendant denies this
20 factual allegation and states that "TBAT [has never been] operated
21 from RMG's computer system on behalf of any client, as it is not, nor
22 has it ever, been centrally run on behalf of any client." (Garibay
23 Decl. ¶ 5.)

24 Second, Plaintiff states that Defendant is indirectly liable for
25 contributory infringement, vicarious infringement, and inducing
26 copyright infringement because it provides its clients with bots and
27 other automated devices to infringe Plaintiff's copyright in its
28 website. (Mot. 15:9-14.) Both direct and indirect infringement occur

1 insofar as the person viewing the website does so in excess of the
2 authorization Plaintiff grants through the website's Terms of Use.

3 a. Defendant's Direct Liability for Copyright
4 Infringement

5 Defendant's direct liability for copyright infringement is based
6 on the automatically-created copies of ticketmaster.com webpages that
7 are stored on Defendant's computer each time Defendant accesses
8 ticketmaster.com. (Lieb Decl. ¶ 9.) Defendant does not contest that,
9 as a technological question, whenever a webpage is viewed on a
10 computer, a copy of the viewed page is made and stored on the viewer's
11 computer. However, Defendant contends that such "cached" copies are
12 not "copies" within the meaning of the Copyright Act, that such copies
13 could not give rise to copyright liability because their creation
14 constitutes fair use, and that Plaintiff has not shown that any pages
15 from ticketmaster.com were ever downloaded or stored on Defendant's
16 computer.

17 Section 101 of the Copyright Act defines "copies" as "material
18 objects, other than phonorecords, in which a work is fixed by any
19 method now known or later developed, and from which the work can be
20 perceived, reproduced, or otherwise communicated, either directly or
21 with the aid of a machine or device." 17 U.S.C. § 101. The Copyright
22 Act also provides that "[a] work is 'fixed' in a tangible medium of
23 expression when its embodiment in a copy or phonorecord, by or under
24 the authority of the author, is sufficiently permanent or stable to
25 permit it to be perceived, reproduced, or otherwise communicated for a
26 period of more than transitory duration." Id.

27 The copies of webpages stored automatically in a computer's cache
28 or random access memory ("RAM") upon a viewing of the webpage fall

1 within the Copyright Act's definition of "copy." See, e.g., MAI
2 Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir.
3 1993) ("We recognize that these authorities are somewhat troubling
4 since they do not specify that a copy is created regardless of whether
5 the software is loaded into the RAM, the hard disk or the read only
6 memory ('ROM'). However, since we find that the copy created in the
7 RAM can be 'perceived, reproduced, or otherwise communicated,' we hold
8 that the loading of software into the RAM creates a copy under the
9 Copyright Act.") See also Twentieth Century Fox Film Corp. v.
10 Cablevision Systems Corp., 478 F.Supp. 2d 607, 621 (S.D.N.Y. 2007)
11 (agreeing with the "numerous courts [that] have held that the
12 transmission of information through a computer's random access memory
13 or RAM . . . creates a 'copy' for purposes of the Copyright Act," and
14 citing cases.) Thus, copies of ticketmaster.com webpages
15 automatically stored on a viewer's computer are "copies" within the
16 meaning of the Copyright Act.

17 The Court must next determine whether Plaintiff has shown by a
18 preponderance of the evidence that Defendant did in fact view the
19 website, thereby copying its webpages. Although Plaintiff does not
20 present direct evidence of such viewing, the logic from which such an
21 inference may be drawn is compelling. Plaintiff presents expert
22 testimony that Defendant necessarily had to view ticketmaster.com in
23 order to create the applications that enable Defendant's clients to
24 enter and navigate through the website. (Lieb Decl. ¶ 9.) Indeed, in
25 order to test the applications to determine whether they worked as
26 intended, Defendant would have had to actually use the applications to
27 purchase tickets from the website. (Id.) By Defendant's own
28 description, TBAT is "a browser geared for the purchase of tickets

1 from a variety of websites including . . . ticketmaster.com."
2 (Garibay Decl. ¶ 5.) It also follows that Defendant's clients would
3 have had to visit the website, and thus copy pages, in order to use
4 Defendant's applications to make ticket purchases through
5 ticketmaster.com. The Court thus finds that Plaintiff is indeed
6 likely to prove that Defendant visited (and used) ticketmaster.com and
7 necessarily made copies of pages from the copyrighted website.

8 Plaintiff also argues that Defendant is directly liable for
9 infringement because Defendant requires and/or allows its clients to
10 work through its website and computer system in order to use its
11 ticket purchasing software to access ticketmaster.com. Defendant
12 disputes this allegation. However, the Court finds it unnecessary to
13 address Plaintiff's likelihood of showing that Defendant acts as an
14 intermediary for its clients' unauthorized use of ticketmaster.com.
15 As discussed above, Plaintiff will likely succeed in its claim for
16 direct liability by showing that Defendant itself viewed and/or used
17 the website.⁴

18 Next, the Court will consider whether Plaintiff is likely to
19 demonstrate that such copying constitutes copyright infringement.
20 Plaintiff contends that Defendant infringed its copyrights by
21 accessing and using the copyrighted website in excess of the
22 authorization granted in the website's Terms of Use, which Plaintiff
23 contends creates a non-exclusive license to view (and thus copy) pages
24 from the website. Defendant presents a number of legal and factual

25
26 ⁴ In addition, even accepting Defendant's version of the facts -
27 that its clients download TBAT onto their own computers and operate it
28 independent of Defendant - Defendant would still be liable for
contributory infringement, discussed infra.

1 arguments against this theory, but none of them is meritorious.

2 First, the Court agrees that the Terms of Use presented on
3 ticketmaster.com create a non-exclusive license to copy the website.
4 "The word 'license,' means permission, or authority; and a license to
5 do any particular thing, is a permission or authority to do that
6 thing." Federal Land Bank of Wichita v. Board of County Com'rs, 368
7 U.S. 146, 154 (1961). "No magic words must be included in a document"
8 to create a copyright license. Radio Television Espanola S.A. v. New
9 World Entertainment, Ltd., 183 F.3d 922, 927 (9th Cir. 1999).
10 Furthermore, nonexclusive licenses can be implied from conduct. See
11 Effects Associates, Inc. v. Cohen, 908 F.2d 555, 558-559 (9th Cir.
12 1990) (holding that by creating a work at defendant's request and
13 handing it over to defendant to copy and distribute, plaintiff granted
14 defendant an implied nonexclusive license to the work.) Use of a work
15 in excess of a license gives rise to liability for copyright
16 infringement. LGS Architects, Inc. v. Concordia Homes of Nevada, 434
17 F.3d 1150, 1156 (9th Cir. 2006) ("When a licensee exceeds the scope of
18 the license granted by the copyright holder, the licensee is liable
19 for infringement.")

20 Plaintiff has presented evidence showing that access to the
21 website is governed by specific Terms of Use, and that any person
22 viewing the website is put on notice of the Terms of Use. For
23 example, the ticketmaster.com homepage displays the following warning:
24 "Use of this website is subject to express Terms of Use which prohibit
25 commercial use of this site. By continuing past this page, you agree
26 to abide by these terms." (McLain Decl. ¶ 10; Pl.'s Exh. 4.) The
27 underlined phrase "Terms of Use" is a hyperlink to the full Terms of
28 Use; the same phrase appears on almost every page of ticketmaster.com.

1 (Id. ¶¶ 10-11; Pl.'s Exhs. 4-5.) In addition, since 2003, users of
2 ticketmaster.com have had to affirmatively agree to the Terms of Use
3 as part of the procedure to set up an account, and since mid-2006
4 users have had to affirmatively agree to the Terms of Use for every
5 ticket purchase. (Id. ¶¶ 12, 13; Pl.'s Exhs. 6, 7.)

6 Having determined that Plaintiff is highly likely to succeed in
7 showing that Defendants viewed and navigated through ticketmaster.com,
8 the Court further concludes that Plaintiff is highly likely to succeed
9 in showing that Defendant received notice of the Terms of Use and
10 assented to them by actually using the website. See, e.g.,
11 Register.com, Inc. v. Verio, Inc., 126 F.Supp. 2d 238, 248 (S.D.N.Y.
12 2000) (where website's terms of use stated "by submitting this query,
13 you agree to abide by these terms," court held "there can be no
14 question that [the user of website] manifested its assent to be bound"
15 by the terms of use when it electronically submitted queries to the
16 database); Hotmail Corp. v. Van\$ Money Pie Inc., 1998 WL 388389, 2, 6
17 (N.D. Cal. 1998) (granting preliminary injunction based in part on
18 breach of "Terms of Service" agreement, to which defendants had
19 assented.) Indeed, Defendant does not seriously contest that it was
20 on notice of the Terms of Use; rather, Defendant argues that the Terms
21 of Use do not amount to an agreement or a license, and that the Terms
22 are too uncertain to be enforced. The Court finds no merit in these
23 arguments.

24 The Terms of Use governing ticketmaster.com include the following
25 terms:

26 "You [the viewer] agree that you are only authorized to
27 visit, view and to retain a copy of pages of this Site for
28 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

1 information, for personal use . . ." (Pl.'s Exh. 8 at 70.)

2 "No . . . areas of this Site may be used by our visitors for
3 any commercial purposes . . ." (Id. at 71.)

4 "You agree that you will not use any robot, spider or other
5 automated device, process, or means to access the Site . . .
6 You agree that you will not use any device, software or
7 routine that interferes with the proper working of the Site
8 nor shall you attempt to interfere with the proper working
9 of the Site." (Id. at 71.)

10 "You agree that you will not take any action that imposes an
11 unreasonable or disproportionately large load on our
12 infrastructure." (Id. at 71-72.)

13 "You agree that you will not access, reload or 'refresh'
14 transactional event or ticketing pages, or make any other
15 request to transactional servers, more than once during any
16 three second interval." (Id. at 72.)

17 "You do not have permission to access this Site in any way
18 that violates . . . these terms of use." (Id. at 72.)

19 "You understand and agree that . . . Ticketmaster may
20 terminate your access to this Site, cancel your ticket order
21 or tickets acquired through your ticket order . . . if
22 Ticketmaster believes that your conduct or the conduct of
23 any person with whom Ticketmaster believes you act in
24 concert . . . violates or is inconsistent with these Terms
25 or the law, or violates the rights of Ticketmaster, a client
26 of Ticketmaster or another user of the Site." (Id. at 72.)

27 Viewers are thus authorized to view - and thereby copy - pages of
28 the website when they do so in accordance with the Terms of Use. In
addition, Plaintiff reserves the right to terminate any person's
access to the website if it believes that person violated the Terms of
Use. Thus, by the Terms of Use, Plaintiff grants a nonexclusive
license to visitors to copy pages from the website in compliance with
those Terms. Inasmuch as Defendant used the website, Defendant
assented to the terms.

Nor are the terms so vague as to be unenforceable. The above
terms permit access for personal use only, prohibit commercial use,
prohibit the use of bots and automated devices, limit the frequency

1 with which users can make requests through the website, and require
2 the user to agree not to interfere with the proper working of the
3 website. Defendant argues, however, that the term "automated device"
4 is confusing. Specifically, Defendant's President, Cipriano Garibay,
5 a software designer, testifies in his declaration that TBAT - which he
6 appears to claim is the only product in issue in this case - is just a
7 web browser and is not an "automated device" because it requires human
8 interaction to function. (Garibay Decl. ¶ 4.) Garibay further claims
9 that he does not know what Plaintiff is referring to by the term
10 "automated device" because "every computer in the world, as well as
11 all computer programs and web browsers, have [sic] a large degree of
12 automation built in since they are not run manually. Clearly,
13 Ticketmaster is not seeking to prohibit all computers and browsers
14 from accessing its website, otherwise the website would be useless.
15 However, as Ticketmaster has not defined 'automated device' in its
16 'Terms of Use,' I can only speculate as to what it means by same."
17 (Id.)

18 This claim is specious. First, the term "automated device"
19 appears in the provision in which website viewers agree to "not use
20 any robot, spider or other automated device, process, or means to
21 access the Site." (emphasis added). Although the terms of use include
22 no additional definition of "automated device," they identify robots
23 and spiders as examples of such devices, which Garibay states are
24 "programs which by their very nature run without interfacing with
25 humans." (Garibay Decl. ¶ 4.) Plaintiff has submitted credible
26 testimony showing that Defendant's applications are, in fact,
27 automated devices. For example, Adam Lieb, a computer consultant who
28 studied a directory Defendant placed on Kovach's computer, testifies

1 that "the term 'automated device' is easy to understand in the context
2 of computer programming" - a field in which Garibay claims 10 years of
3 experience - and that Defendant's programs are automated devices.
4 (Lieb Reply Decl. ¶ 2; Garibay Decl. ¶ 1.) Lieb distinguishes
5 Defendant's programs from conventional internet browsers - which he
6 agrees are not automated devices - and explains that even though
7 Defendant's programs may require human initialization or set up, they
8 generate automated requests thereafter. Based on his examination of
9 the "super proxy" log files on Kovach's computer, Lieb states that
10 "several webpage requests per second were made to Ticketmaster, via
11 the proxy, from the same source IP address. Thousands of requests
12 were made per day. No human would be able to generate that many
13 requests during manual, non-automated web browsing. These were
14 automated request[s] made by an 'automated device.'" (Lieb Reply
15 Decl. ¶ 4.)

16 Based on his personal experience, Kovach describes Defendant's
17 software as "including automated devices that RMG calls 'workers' that
18 can automatically navigate the Ticketmaster website . . . [M]y level
19 of service enabled me to use multiple workers - sometimes over one
20 hundred of them - simultaneously to search for and request tickets."
21 (Kovach Decl. ¶ 5.) Kovach further describes how he could command the
22 workers to search for tickets according to parameters that he would
23 set, and that the workers would search for tickets automatically and
24 alert him when they found tickets matching his parameters. (Kovach
25 Decl. ¶¶ 6-7, 9.) Indeed, Defendant's own website advertises its
26 products as "let[ting] you do the work of a dozen people at once.
27 Just enter the event information . . . and the moment the event goes
28 on sale, PurchaseMaster goes into action." (Pl.'s Exh. 1.) In view

1 of all of the evidence, Plaintiff is highly likely to succeed on its
2 claim that Defendant's applications are automated devices that violate
3 the Terms of Use.

4 However, even setting aside Plaintiff's prohibition of automated
5 devices, the application as described would violate other provisions
6 of the Terms of Use. For example, using an application that enables a
7 person to make several requests per second would violate the provision
8 limiting the frequency of requests to no more than one every three
9 seconds. Furthermore, use of an application designed to thwart
10 Plaintiff's access control by, in Defendant's own description,
11 "stealth technology [that] lets you hide your IP address, so you **never**
12 **get blocked by Ticketmaster,**" (Pl.'s Exh. 1) (original emphasis) would
13 breach the user's agreement to "not use any device, software or
14 routine that interferes with the proper working of the Site nor shall
15 you attempt to interfere with the proper working of the Site." See
16 also Kovach Decl. ¶ 8 (explaining his understanding that the "workers
17 are specifically designed to navigate or otherwise avoid various
18 security measures on Ticketmaster's website.").

19 Finally, Defendant argues in summary fashion that to the extent
20 Plaintiff's claim is predicated on automatically-made cache copies of
21 Plaintiff's webpages, such cache copies constitute fair use as a
22 matter of law under Perfect 10, Inc., v. Amazon.com, Inc., 487 F.3d
23 701, 716 (9th Cir. 2007). This argument is unavailing for several
24 reasons. First, "[b]ecause the defendant in an infringement action
25 has the burden of proving fair use, the defendant is responsible for
26 introducing evidence of fair use in responding to a motion for
27 preliminary relief." Perfect 10, 487 F.3d at 714. Here, Defendant
28 has come forward with no evidence of fair use. Nor did Defendant

1 attempt to explain how its use satisfies any of the four fair use
2 factors set forth in 17 U.S.C. § 107. Accordingly, the fair use
3 defense fails to defeat Plaintiff's Motion on these grounds alone.

4 Second, Perfect 10 does not stand for the absolute principle of
5 law that Defendant attributes to it. Rather, Perfect 10 addressed,
6 among other questions, whether users who link to infringing websites
7 and thus make automatic cache copies of those infringing websites
8 themselves commit copyright infringement. The Ninth Circuit agreed
9 with the district court that such conduct was "fair use in this
10 context" because the caching was "noncommercial, transformative . . .
11 and has a minimal impact on the potential market for the original
12 work." Perfect 10, 487 F.3d at 726 (emphasis added) (quoting district
13 court). Significantly, the Court also noted that "a cache copies no
14 more than necessary to assist the user in Internet use," and, in the
15 case before it, the "background copying has no more than a minimal
16 effect" on the plaintiff's rights. Id. In this context, by contrast,
17 Defendant is not an "innocent" third-party visitor to another person's
18 infringing site. Instead, the purpose of Defendant's viewing
19 ticketmaster.com and the copying that necessarily entails is to engage
20 in conduct that violates the Terms of Use in the ways described above.
21 In addition, Defendant's use of the website is to further its own
22 commercial objectives, that is, to create and sell ticket purchasing
23 applications that can gain unauthorized access to ticketmaster.com.
24 Furthermore, in this case, such copying has a significant, as opposed
25 to minimal, effect on Plaintiff's rights because Defendant's conduct
26 empowers its clients to also violate the Terms of Use, infringe on
27 Plaintiff's rights, and collectively cause Plaintiff the harm
28 described below. For all of these reasons, Defendant's fair use

1 defense fails.

2 Because the Court finds that Plaintiff has a strong likelihood of
3 proving that Defendant violated ticketmaster.com's Terms of Use by
4 using automated devices, making excessive requests, and interfering
5 with the proper working of the website when it used and/or designed
6 applications that access ticketmaster.com, the Court finds that
7 Plaintiff has a strong likelihood of succeeding on the merits of its
8 claim for direct copyright infringement.

9 b. Defendant's Indirect Liability for Copyright
10 Infringement

11 Plaintiff also argues that it has a strong likelihood of success
12 on its claim for indirect copyright infringement. The Court agrees.

13 "One infringes contributorily by intentionally inducing or
14 encouraging direct infringement, and infringes vicariously by
15 profiting from direct infringement while declining to exercise a right
16 to stop or limit it." Metro-Goldwyn-Mayer Studios Inc. v. Grokster,
17 Ltd., 545 U.S. 913, 930-931 (2005) (citations omitted). Although
18 "[t]he Copyright Act does not expressly render anyone liable for
19 infringement committed by another, these doctrines of secondary
20 liability emerged from common law principles and are well-established
21 in the law." Id. In Grokster, the Supreme Court held that "one who
22 distributes a device with the object of promoting its use to infringe
23 copyright, as shown by clear expression or other affirmative steps
24 taken to foster infringement, is liable for the resulting acts of
25 infringement by third parties." Id. at 936-937. Evidence to support
26 an inducement theory includes, for example "advertisement[s] or
27 solicitation[s] that broadcast[] a message designed to stimulate
28 others to commit violations." Id. at 937. Here, as described above,

1 there is substantial evidence that Defendant designed its application
2 for the purpose of giving its clients unauthorized access to
3 ticketmaster.com; Defendant even advertises its product as "stealth
4 technology [that] lets you hide your IP address, so you **never get**
5 **blocked by Ticketmaster**" (Pl.'s Exh. 1.) (original emphasis.)
6 Designing and marketing a device whose purpose is to allow
7 unauthorized access to, and thus to infringe on, a copyrighted website
8 is sufficient to trigger contributory liability for infringement
9 committed by the device's immediate users. See, e.g., Fonovisa, Inc.
10 v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (stating
11 that providing the site and facilities for known infringing activity
12 is sufficient to establish contributory liability, and quoting with
13 approval 2 William F. Patry, Copyright Law & Practice 1147, "[m]erely
14 providing the means for infringement may be sufficient" to incur
15 contributory copyright liability.).

16 As discussed in the Background section, Plaintiff has presented
17 examples of Defendant's clients making numerous ticket purchases and
18 ticket requests using Defendant's applications and resources,
19 including the examples of Bonner making more than 425,000 requests in
20 a single day, and Prior making more than 600,000 requests in a single
21 day, both through IP addresses registered to Defendant. (McLain Decl.
22 ¶ 24.) Requests so numerous cannot be made other than with automated
23 devices. (See Lieb Reply Decl. ¶ 4.) Kovach testified how he used
24 Defendant's applications to make automated ticket requests, and that
25 Defendant made representatives available to help him use its
26 applications, circumvent Plaintiff's security measures, and set up his
27 hardware for optimal use. (Kovach Decl. ¶¶ 6-11.) Such uses infringe
28 on Plaintiff's copyrights for the reasons stated above with regard to

1 Defendant's direct infringement.

2 Based on this evidence, the Court finds that Plaintiff is highly
3 likely to prove that Defendant induced or encouraged its clients'
4 direct infringement by providing them with devices that gain them
5 unauthorized access to and use of ticketmaster.com. Plaintiff is
6 therefore highly likely to succeed in its claim against Defendant for
7 contributory infringement.

8 2. Plaintiff's Claim Under the Digital Millenium
9 Copyright Act

10 Plaintiff alleges that Defendant has violated the Digital
11 Millenium Copyright Act ("DMCA"), 17 U.S.C. § 1201 et seq., by
12 trafficking in technological products, services, devices, or
13 components that are primarily designed to circumvent Plaintiff's
14 access control and copy protection systems. (FAC ¶¶ 51-55.)
15 Plaintiff's Motion relies on two provisions of the DMCA.

16 First, Plaintiff claims that Defendant is liable under section
17 1201(a)(2), which prohibits trafficking in devices designed to
18 circumvent "technological measure[s] that effectively control[] access
19 to a work protected under this title." 17 U.S.C. § 1201(a)(2). "A
20 plaintiff alleging a violation of § 1201(a)(2) must prove: (1)
21 ownership of a valid copyright on a work, (2) effectively controlled
22 by a technological measure, which has been circumvented, (3) that
23 third parties can now access (4) without authorization, in a manner
24 that (5) infringes or facilitates infringing a right protected by the
25 Copyright Act, because of a product that (6) the defendant either (i)
26 designed or produced primarily for circumvention; (ii) made available
27 despite only limited commercial significance other than circumvention;
28 or (iii) marketed for use in circumvention of the controlling

1 technological measure." Chamberlain Group, Inc. v. Skylink
2 Technologies, Inc., 381 F.3d 1178, 1203 (Fed. Cir. 2004).

3 The Court finds that Plaintiff is likely to prevail on its
4 section 1201(a)(2) claim. Specifically, as stated above, Plaintiff is
5 likely to prove that (1) Plaintiff owns copyrights to ticketmaster.com
6 and specific portions thereof; (2) Plaintiff employs "technological
7 measures" such as CAPTCHA to block automated access to its copyrighted
8 ticket purchase pages; (3) Defendant's clients are third parties who
9 can now access those copyrighted pages; (4) these parties access those
10 pages without Plaintiff's authorization; (5) that this access infringes
11 Plaintiff's rights because it entails copying those pages in excess of
12 the third parties' license to do so; and (6) (i), (iii) these third
13 parties have such access because of Defendant's products designed
14 primarily for circumvention, and marketed for use in circumvention, of
15 the controlling technological measure.

16 The majority of Defendant's challenges to Plaintiff's Motion on
17 the DMCA claim are repetitive of its arguments with regard to the
18 copyright claim, and are unavailing for the same reasons. Defendant's
19 only unique arguments as to the DMCA claim are that CAPTCHA is not a
20 system or a program, but is simply an image (Def.'s Opp'n 17:7-8;
21 Garibay Decl. ¶ 6), and that CAPTCHA is designed to regulate ticket
22 sales, not to regulate access to a copyrighted work. (Def.'s Opp'n
23 17:9-20.)

24 First, the Court notes that the DMCA does not equate its use of
25 the term "technological measure" with Defendant's terms "system" or
26 "program." In any case, Plaintiff has submitted evidence that CAPTCHA
27 is a technological measure that regulates access to a copyrighted
28 work. Although the DMCA does not appear to include a definition of

1 the term, it states that "a technological measure 'effectively
2 controls access to a work' if the measure, in the ordinary course of
3 its operation, requires the application of information, or a process
4 or a treatment, with the authority of the copyright owner, to gain
5 access to the work." 17 U.S.C.A. § 1201(a)(3)(B). When the user makes
6 a ticket request on ticketmaster.com, CAPTCHA presents "a box with
7 stylized random characters partially obscured behind hash marks."
8 (McLain Decl. ¶ 9.) The user is required to type the characters into
9 an entry on the screen in order to proceed with the request. (*Id.*)
10 Most automated devices cannot decipher and type the random characters
11 and thus cannot proceed to the copyrighted ticket purchase pages.
12 Thus, because CAPTCHA "in the ordinary course of its operation,
13 requires the application of information . . . to gain access to the
14 work," it is a technological measure that regulates access to a
15 copyrighted work. Plaintiff is therefore likely to prevail on its
16 DMCA § 1201(a)(2) claim.

17 Section 1201(b)(1) similarly prohibits trafficking in devices
18 primarily designed or produced for the purpose of circumventing
19 "protection afforded by a technological measure that effectively
20 protects a right of a copyright owner under this title in a work or a
21 portion thereof." See Sony Computer Entertainment America, Inc. v.
22 Divineo, Inc., 457 F.Supp. 2d 957, 964 (N.D. Cal. 2006). Sections
23 1201(a)(2) and 1201(b)(1) differ only in that 1201(a)(2) makes it
24 wrongful to traffic in devices that circumvent technological measures
25 that control access to protected works, while 1201(b)(1) makes it
26 wrongful to traffic in devices that circumvent technological measures
27 that protect rights of a copyright owner in a work. Here, CAPTCHA
28 both controls access to a protected work because a user cannot proceed

1 to copyright-protected webpages without solving CAPTCHA, and protects
2 rights of a copyright owner because, by preventing automated access to
3 the ticket purchase webpage, CAPTCHA prevents users from copying those
4 pages. For the foregoing reasons, the Court finds that Plaintiff is
5 likely to prevail on its DMCA §§ 1201(a)(2) and 1201(b)(1) claims.

6 **3. Plaintiff's Breach of Contract Claim**

7 Plaintiff argues that Defendant is breaching the ticketmaster.com
8 Terms of Use in numerous ways, and is therefore liable for breach of
9 contract. (FAC ¶¶ 84-93.) The facts and issues that this claim
10 raises are the same as those raised by Plaintiff's contention, in
11 connection with its copyright claims, that Defendant breached the
12 Terms of Use. The Court addressed the merits of that claim in its
13 discussion of Plaintiff's claim for copyright infringement, and
14 concluded that Plaintiff is highly likely to prove that use of
15 ticketmaster.com is governed by the Terms of Use; that Defendant was
16 on notice of, and assented to, the Terms of Use; and that Defendant
17 violated the Terms of Use by using automated devices to access the
18 website, using an application that makes several requests per second
19 (in violation of the provision limiting the frequency of requests to
20 no more than one every three seconds), and by using an application
21 designed to thwart Plaintiff's access controls (which breaches the
22 user's agreement to "not use any device, software or routine that
23 interferes with the proper working of the Site nor shall you attempt
24 to interfere with the proper working of the Site."). The Court
25 therefore finds that Plaintiff is likely to prevail on its breach of
26 contract claim.

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1 4. Plaintiff's Computer Fraud and Abuse Act Claim

2 Plaintiff also argues that it is likely to prevail on its claim
3 under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030
4 Although the CFAA is a criminal statute, it permits "any person who
5 suffers damage or loss" through a violation of its provisions "to
6 maintain a civil action . . . to obtain compensatory damages and
7 injunctive relief or other equitable relief." 18 U.S.C. § 1030(g).
8 To prevail on its CFAA claim, Plaintiff must demonstrate that
9 Defendant "intentionally access[ed] a computer without authorization
10 or exceed[ed] authorized access, and thereby obtain[ed] information
11 from any protected computer," 18 U.S.C. § 1030(a)(2)(C), or that
12 Defendant "knowingly cause[d] the transmission of a program . . . and
13 . . . cause[d] damage without authorization to a protected computer."
14 18 U.S.C. § 1030(a)(5)(A)(i). Plaintiff must also demonstrate that
15 Defendant's unauthorized access caused \$5,000 in loss or damage during
16 a one year period. 18 U.S.C. § 1030(a)(5)(B)(i).

17 It appears likely that Plaintiff will be able to prove that
18 Defendant gained unauthorized access to, and/or exceeded authorized
19 access to, Plaintiff's protected computers, and caused damage thereby.
20 Based on the statute and the cases Plaintiff cites, the Court also
21 agrees that the required \$5,000 of harm may consist of harm to a
22 computer system, and need not be suffered by just one computer during
23 one particular intrusion. See, e.g., Creative Computing v.
24 Getloaded.com LLC, 386 F.3d 930, 934-935 (9th Cir. 2004) (interpreting
25 the CFAA). However, because Plaintiff has not quantified its harm as
26 required by the statute or even attempted to show what portion of the
27 harm is attributable to Defendant, the Court cannot find that
28 Plaintiff has affirmatively shown that its harm caused by Defendant

1 exceeds the \$5,000 minimum. Thus, the CFAA claim does not provide a
2 basis for a preliminary injunction.

3 In light of the Court's rulings on Plaintiff's copyright, DMCA,
4 and breach of contract claims, the Court need not address whether
5 Plaintiff is likely to succeed on its claims under California Penal
6 Code § 502, the fifth basis asserted for the preliminary injunction.

7 **B. Irreparable Harm**

8 Having determined that Plaintiff has a strong likelihood of
9 success on the merits of its copyright, DMCA, and breach of contract
10 claims, the Court now addresses whether Plaintiff has shown "the
11 possibility of irreparable injury." Walczak, 148 F.3d at 731.

12 For Plaintiff's copyright claim, "a showing of a reasonable
13 likelihood of success on the merits raises a presumption of
14 irreparable harm." LGS Architects, Inc. v. Concordia Homes of Nevada,
15 434 F.3d 1150, 1155 (9th Cir. 2006) (citing Johnson Controls, Inc. v.
16 Phoenix Control Sys., Inc., 886 F.2d 1173, 1174 (9th Cir. 1989). "A
17 copyright holder seeking a preliminary injunction is therefore not
18 required to make an independent demonstration of irreparable harm."
19 LGS Architects, 434 F.3d at 1155-56. Here, because Plaintiff has
20 shown a strong likelihood of success on the merits of its copyright
21 claim, the Court presumes irreparable harm. Defendant has done
22 nothing to rebut that presumption.

23 The Court also finds that Plaintiff has otherwise shown the
24 possibility of irreparable harm required to support the issuance of a
25 preliminary injunction on its DMCA and breach of contract claims.
26 Specifically, Plaintiff has submitted extensive evidence demonstrating
27 that it is suffering a loss of goodwill with the buying public in that
28 there is a growing public perception that Plaintiff does not provide

1 the public with a fair opportunity to buy tickets due to automated
2 purchases. (Obara Decl. ¶¶ 4-5.) Such evidence includes numerous
3 complaints from consumers about the unavailability of tickets, some of
4 which manifest extreme dissatisfaction with Plaintiff and voice
5 suspicions that Plaintiff is colluding with ticket brokers to deny
6 consumers tickets. (Id.; Pl.'s Exh. 19.)⁵ Plaintiff has also
7 submitted consumer comments posted on blogs expressing similar
8 sentiments (Pl.'s Exh. 20)⁶ and numerous news stories discussing the
9 unavailability of tickets. (See Pl.'s Exh. 24.) For example, many of
10 the news stories concern the unavailability of tickets to concerts in
11 Hannah Montana's "Best of Both Worlds" tour. Based on the reports,
12 many parents expressed disappointment and outrage at Plaintiff because
13 tickets to many Hannah Montana concerts throughout the nation (Bossier
14 City, Louisiana; Miami, Florida; Atlanta, Georgia; and Kansas City,
15 Missouri, for example) were snapped up within several hours - and
16 sometimes within minutes - of their release for sale. It also appears
17 that the public's difficulty obtaining tickets to the Hannah Montana
18 concerts was so severe and created such an outcry that the Attorneys

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20 ⁵ Plaintiff's brief quotes several of the complaints compiled in
21 Exhibit 19. (See Mot. 10, fn. 8.) One such complaint states: "I
22 would like to know how within 20 seconds of a show going on sale I
23 could not find ANY seats together at ANY price at this event.
24 However, there are gobs of them for sale on many different scalper
25 sites. How is this possible and why is this tolerated. The only
26 explanation for this is that people inside TM are in cahoots with
27 these criminals. I would just like to know if there are any plans
28 whatsoever to address this situation."

25 ⁶ For example, the following is a comment posted by someone who
26 could not obtain tickets to a performance of the rock group "Rush": "I
27 am absolutely irate about TicketBxxxxxd and its practices. As has
28 been mentioned on this site already, the whole process of getting
tickets to concerts has gotten completely out of control with
scalpers, brokers, and God-knows-who-else trying to make a buck at the
expense of fans." (Mot. 11, fn. 9.)

1 General of Missouri and Arkansas initiated investigations into
2 Plaintiff's ticket selling practices. (See Pl.'s Exhs. 26, 27.)

3 Such evidence demonstrating public dissatisfaction with Plaintiff
4 is properly before the Court as non-hearsay evidence. See, e.g.,
5 Academy of Motion Picture Arts and Sciences v. Creative House
6 Promotions, Inc., 944 F.2d 1446, 1456 (9th Cir. 1991) (error for the
7 district court not to consider newspaper articles and telephone calls
8 as evidence of actual confusion). In addition, to the extent some of
9 the newspaper articles may be offered for a hearsay purpose, the Court
10 has wide latitude to consider such evidence in the preliminary
11 injunction context. Republic of the Phillipines v. Marcos, 862 F.2d
12 1355, 1363 (9th Cir. 1988) (stating that it "was within the discretion
13 of the district court to accept this hearsay for purposes of deciding
14 whether to issue the preliminary injunction.")

15 Although the extent of Defendant's culpability for such harm to
16 Plaintiff's goodwill cannot yet be ascertained, it is likely that some
17 of Defendant's clients were able to obtain tickets to such concerts by
18 using Defendant's applications. (See Suppl. Decl. McLain ¶¶ 4-5;
19 Suppl. Lee Decl. ¶¶ 1-3; Pl.'s Exh. 23.) Given the alleged extent of
20 Defendant's participation in the hundreds of thousands of automated
21 ticket requests wrongfully made of Plaintiff's website, it is likely
22 that Defendant's conduct has caused, and will continue to cause, some
23 portion of Plaintiff's loss of goodwill unless Defendant's conduct is
24 enjoined. As a consequence of Plaintiff's loss of consumer goodwill,
25 Plaintiff also faces the possibility of loss of goodwill and loss of
26 business from its clients. (McLain Reply Decl. ¶ 7.)

27 Defendant argues that Plaintiff is not harmed when its inventory
28 of tickets is bought up immediately upon release because Plaintiff is

1 paid full price for each ticket, and receives the same service fees
2 and profits, whether the tickets are purchased by Defendant's clients
3 or by other consumers. (Def.'s Opp'n 11:11-21.) However, that
4 argument ignores the harm to goodwill that Plaintiff is suffering. In
5 this Circuit, intangible injuries, such as damage to goodwill, can
6 constitute irreparable harm. See Rent-A-Center, Inc. v. Canyon
7 Television and Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir.
8 1991); see also, Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush
9 and Co., Inc., 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of
10 threatened loss of prospective customers or goodwill certainly
11 supports a finding of the possibility of irreparable harm."); eBay,
12 Inc. v. Bidder's Edge, Inc., 100 F.Supp.2d 1058, 1066 (N.D. Cal. 2000)
13 ("Harm resulting from lost profits and lost customer goodwill is
14 irreparable because it is neither easily calculable, nor easily
15 compensable and is therefore an appropriate basis for injunctive
16 relief.") Plaintiff has also submitted evidence that it has attempted
17 to use technological countermeasures to prevent automated ticket
18 requests, but that such efforts had only limited success and, in each
19 instance, were quickly thwarted. (McLain Decl. ¶¶ 23-24, 26-27, 31-
20 33.) Thus, the Court is not persuaded by Defendant's argument that
21 Plaintiff's self-help measures (such as "blacklisting" IP addresses)
22 are enough to prevent irreparable harm and thus obviate the need for
23 injunctive relief. In addition to the countermeasures being
24 ultimately ineffective, the cost to Plaintiff of developing and
25 implementing them is not easily calculable. (Id.) For the foregoing
26 reasons, the Court finds that Plaintiff has demonstrated the
27 possibility of irreparable harm.

28 //

1 **C. Balance of Hardships**

2 Defendant contends that the balance of hardships tips sharply in
3 its favor because it would go out of business if forced to stop
4 selling TBAT. (Garibay Decl. ¶¶ 3-4.) However, in the copyright
5 infringement context, once a plaintiff has established a strong
6 likelihood of success on the merits, any harm to the defendant that
7 results from being preliminarily enjoined from continuing to infringe
8 is legally irrelevant. See Triad Sys. Corp. v. Southeastern Exp. Co.,
9 64 F.3d 1330, 1338 (9th Cir. 1995) (defendant "cannot complain of the
10 harm that will befall it when properly forced to desist from its
11 infringing activities."); Cadence Design Sys., Inc. v. Avant! Corp.,
12 125 F.3d 824, 830 (9th Cir. 1997) (holding that it was reversible
13 error for a district court to even consider "the fact that an
14 injunction would be devastating to [defendant's] business," because
15 "where the only hardship that the defendant will suffer is lost
16 profits from an activity which has been shown likely to be infringing,
17 such an argument in defense merits little equitable consideration.")
18 Thus, the possibility that Defendant will lose all of its profits from
19 the sale of infringing applications does not tip the balance of
20 hardships in Defendant's favor. Moreover, because Plaintiff has
21 persuasively demonstrated likelihood of success on the merits of
22 several of its claims, the balance of hardships becomes less
23 significant to the Court's analysis. See id. at 830 ("The balance of
24 hardships factor may assume significance in cases where the plaintiff
25 has not established a strong likelihood of success on the merits, but
26 here [the plaintiff] established that it was likely to succeed on the
27 merits of its copyright claim."). Therefore, to the extent to which

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1 the balance of hardships is significant in the instant case, it tips
2 in Plaintiff's favor.

3 **D. Public Interest**

4 The Court finds that the public interest favors the issuance of a
5 preliminary injunction. Based on the consumer complaints and news
6 reports referenced above (see Pl.'s Exhs. 19, 20, 24), it is evident
7 that Defendant's conduct not only harms Plaintiff, but also harms the
8 public because it denies consumers the opportunity to purchase tickets
9 at their face price. Thus, insofar as Defendant's misconduct allows
10 its ticket broker clients to unfairly purchase numerous tickets for
11 resale resulting in immediately sold-out events, ordinary consumers
12 must either forego the event or pay ticket brokers inflated prices for
13 resold tickets. The public interest therefore weighs in favor of an
14 injunction.

15
16 **IV. BOND**

17 Federal Rule of Civil Procedure 65(c) requires Plaintiff to post
18 a bond, in a sum that the Court deems appropriate, for the payment of
19 costs and damages that Defendant may suffer if it is later found to
20 have been wrongfully enjoined. A bond may not be required, or may be
21 minimal, when the harm to the enjoined party is slight or where the
22 movant has demonstrated a likelihood of success. See, e.g., Jorgensen
23 v. Cassidy, 320 F.3d 906, 919 (9th Cir. 2003); Walczak, 198 F.3d at
24 733. However, the Court retains discretion to require a bond when the
25 party seeking the injunction has not offered evidence of its own harm
26 in posting a bond, see Barahona-Gomez v. Reno, 167 F.3d 1228, 1237
27 (9th Cir. 1999).

28 Plaintiff asks the Court to require only a nominal bond of \$1,000

1 | because it has shown a likelihood of success. Defendant, by contrast,
2 | argues that a substantial bond of at least \$10 million should be
3 | required because the injunction will put it out of business. Having
4 | considered these arguments, the Court ORDERS Plaintiff to post a bond
5 | of \$300,000, an amount that is reasonable under the facts of this
6 | case, within ten (10) days of the date of this Order. Plaintiff is
7 | also ORDERED to prepare a proposed order consistent with this Order,
8 | including findings of fact and conclusions of law, within ten (10)
9 | days of the date of this Order.

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V. CONCLUSION

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Plaintiff has persuasively demonstrated that it will likely succeed on the merits of its claims that Defendant has infringed Plaintiff's copyrights in the ticketmaster.com website, violated the Digital Millenium Copyright Act, and breached a contract (the website's Terms of Use). Plaintiff has also shown the likelihood of irreparable harm. Furthermore, the balance of hardships tips in Plaintiff's favor, not Defendant's. The public interest also favors the issuance of a preliminary injunction. Therefore, the Court hereby **GRANTS** Plaintiff's Motion for Preliminary Injunction and **ENJOINS** Defendant RMG Technologies, Inc., and all persons acting for its benefit or on its behalf, from:

1. Creating, trafficking in, facilitating the use of or using computer programs or other automatic devices to circumvent the technological copy protection systems in Ticketmaster's website;

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2. Using information gained from access of Ticketmaster's website to create computer programs to circumvent Ticketmaster's copy protection and website regulation systems;
3. Copying or facilitating the copying of portions of Ticketmaster's website in excess of any license Ticketmaster has granted;
4. Purchasing or facilitating the purchase of tickets from Ticketmaster's website for the commercial purpose of reselling them; and
5. Otherwise accessing and using Ticketmaster's website in excess of the license granted by the Terms of Use posted thereon.

DATED: Oct 16, 2007

Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **1925 Century Park East, #2320, Los Angeles, California 90067.**

On November 7, 2007, I served the foregoing document described as **NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT: PRELIMINARY INJUNCTION APPEAL** on all interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, and addressed as follows:

Robert H. Platt, Esq.
Donald Brown Esq.
Mannatt, Phelps & Phillips, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064-1614

(X) BY MAIL. I caused such envelopes to be deposited in the mail. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on the same day with postage thereon, fully prepaid, at Los Angeles, California in the ordinary course of business.

I declare under penalty of penalty of perjury under the laws of the State of California and the United States that the above is true and correct.