No. 067-194022-02

AMERICAN AIRLINES, INC.	§	IN THE DISTRICT COURT OF
	§	
v.	§	TARRANT COUNTY, TEXAS
	§	
FARECHASE, INC.	§	67TH JUDICIAL DISTRICT

REPLY BRIEF IN SUPPORT OF AMERICAN'S APPLICATION FOR TEMPORARY INJUNCTION

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In its opposition, defendant FareChase brushes off American's cause of action for trespass as an "ancient" tort. (FC Br. at 17) Likewise, it has scoffed at this State's Computer Crimes Statute as fundamentally misguided, even unconstitutional, because "the Internet knows no geographic boundaries." (PX213 at 20)

This attitude of being above the law, or beyond its reach, is not uncommon among certain so-called "e-commerce" companies. As one court recently observed:

> Some companies operating in the area of the Internet may have a misconception that, because their technology is somewhat novel, they are somehow immune from ordinary applications of the laws of the United States. . . . They need to understand that the law's domain knows no such limits.

UMG Recordings, Inc. v. MP3.com Inc., 2000 WL 1262568, * 6 (S.D.N.Y. 2000).

FareChase evidently suffers such a misconception concerning its own legal obligations, insisting stubbornly that it may trespass at will on the property of American for commercial gain, in breach of the posted Use Agreement and in clear violation of the Texas Computer Crimes Statute. By way of excuse for its actions, FareChase lamely says that the Use Agreement is not conspicuous (although it has actual knowledge of it), that Section 33.02 requires a showing of harm (on its face, it does not), that trespass to chattels requires a showing of actual damage (reflecting its poor understanding of the law and its failure to recognize that

American's efforts at self-help have been thwarted by FareChase's own deliberate masking), and that American's claims are preempted (an argument totally dispelled by applicable law). As a last resort, FareChase wrongfully argues that American is seeking a mandatory injunction.

A preliminary injunction prohibiting FareChase's targeting of AA.com will go far in reminding it, and its fellow scrapers, of the "need to understand" the "ordinary applications of the laws" of our State.

I. ADDITIONAL FACTUAL BACKGROUND

In response to the factual assertions in the FareChase and Sabre briefs, American respectfully submits to the Court this additional factual background.[1]

A. FareChase Masks Its True Intentions and Identity.

FareChase presents itself as a "small start-up company," "with limited funding," composed of a "group of individuals" who have "many years of experience" in "international travel marketing" and "high-end information systems." (FC Br. 6-7, 32) Based on this self-portrait as an entrepreneurial tech start-up, FareChase says it is simply trying to stop those who supposedly would seek to "eliminate" the many benefits of the Internet, including the "free flow of price and product information.". (*Id.* at 35)

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[1] The prefix "PX" refers to Plaintiff's Exhibits, which are provided to the Court in a separate binder. Deposition testimony cited herein is designated by the name of the deponent, followed by appropriate page and line references Excerpted testimony is provided to the Court in a separate binder and includes testimony from the following witnesses: (1) Tal Ariel, Vice President of Product Development for defendant FareChase (Exh. A); (2) Lior Delgo, President of defendant FareChase (Exh. B); (3) Ellen Keszler, Senior Vice President North America Travel Agency Solutions, for intervenor Sabre (Exh. C); (4) Krista Pappas, Senior Vice President, Strategic Development & Partnerships, for defendant FareChase (Exh. D); (5) William Rollings, former Marketing Manager for intervenor Sabre (Exh. E); (6) Eric J. Speck, Chief Marketing Officer for intervenor Sabre (Exh. F); (7) Ofer Shaked, Chief Technology Officer for defendant FareChase (Exh. G).

This posturing is just another form of masking. Like its "IP masking" feature that hides the identity of scrapers, FareChase's effort to re-write its past and to embrace lofty public policy goals is intended to disguise its true purposes. In fact, discovery has confirmed FareChase's substantial financial resources, its shifting business plan, and the precariousness of its technology. These factors highlight the risk that FareChase poses to American and its considerable investment in its AA.com® website ("AA.com") and the webfares offered there.

1. FareChase's ownership and funding reflect significant resources.

The image FareChase draws of itself as being financially weak -- forced to "ration" its resources "to cover overhead expenses" (FC Br. at 32) -- is not reality. Unlike most Internet companies seeking financing today, FareChase enjoys substantial backing from wealthy, sophisticated investors. These investors already have contributed over $7 million in equity and are in "serious discussions" to provide more (Delgo at 86:9-16):

- **Motti Kirschenbaum** is the owner of a billion-dollar real estate business in the Middle East and is currently chairman of the FareChase Board of Directors. (PX28 at 26-27) Along with Avremi Adamov, another foreign businessman, Mr. Kirschenbaum has contributed $1.4 million in equity financing to date. (Delgo at 48:4-11)

- **DB Capital Partners** is the private equity arm of Deutsche Bank AG, one of Germany's largest financial institutions. It provides "unparalleled flexibility" in structuring transactions and patience "in seeing a company through the evolution of its business." (PX214 at 1) DB made two equity contributions of $1.5 million each to FareChase in 2001 and participated in a third contribution of $3.1 million in 2002. (Delgo at 48:12-49:6)

- **Boston Capital Venture** manages venture capital funds for wealthy individuals and institutional investors. (PX215) It has participated, along with DB, in making an equity contribution of $3.1 million to FareChase last year. (Delgo at 48:12-49:6)

In other words, FareChase is not restricted to "very limited funding," as it represents (FC Br. at 32), but instead has ongoing access to significant financial resources.

2. FareChase's business plans have shifted.

FareChase also fails to disclose how it has modified its business plan in the face of hostility from target website owners, to give itself an excuse in court.

At first, FareChase intended its software to be used by individual consumers from its own website. According to an early interview with Mr. Delgo, in its first three months of operation in late 2000, the FareChase website attracted "close to a million users" who came to the site to test the technology. (PX120 at 2) The consumer-orientation of the site also attracted the attention of Ms. Pappas, who in a news column observed that travelers, "such as students and last-minute travelers," could use the website by giving a FareChase "shopping bot" directions to search airline websites. (PX117)

FareChase abandoned the strategy when it recognized that "hostility from supplier sites" posed a "critical risk" to its future success. (PX28 at 24) That hostility could be "managed" (*id.*) by placing the software in the hands of others who themselves would use the software on a large scale, such as CRSs and large travel agencies. In essence, FareChase sought plausible deniability: it no longer would be the scraper who uses high-tech "keys" to secretly enter target sites and take data, without permission; instead, it would license its keys to third parties that would commit the acts on their own, while FareChase denied responsibility.

FareChase's 2002 Business Plan recognizes the attractiveness of this strategy. After all, CRSs did not have "a solution for gaining access to the variety of 'web-only' and negotiated fares available solely through the Internet." (*Id.*) Consequently, CRSs and large travel agents became target customers for FareChase. (Pappas at 93:21-94:7)

3. FareChase's technology is precarious and its management lacks expertise.

Although FareChase describes its software as "innovative" (FC Br. at 1, 3) and touts its technological expertise, it is silent about the vagaries of the technology. Its deficiencies, which are documented in communications among FareChase employees and with its licensees, appear significant.

Sabre has a history of difficulties with the technology. In January 2002, when Sabre's efforts at implementing the FareChase software had just begun, Mr. Ariel reported problems with "disappearing results," which occurred after reaching the results of a search, and then losing "all results when the page refreshes." (PX216) These problems persisted during initial testing of the product. In April 2002, Sabre reported that "beta customers" were "frustrated" -- "We have got to keep this tool up and running during the day!" (PX217 at 11) The problems continued even after this lawsuit was filed. On September 9, 2002, Sabre complained that a "lot of confusion" existed about how the product's filtering works. (PX218 at 1)[2]

To the extent FareChase software remains unreliable today, it endangers the target sites themselves.

In addition, American cannot be confident that FareChase's management has the experience and expertise needed to ensure that use of the FareChase software will not cause damage to American or AA.com.[3] Its President has no training in computer science or

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[2] Other licensees have reported their own problems. On July 24, 2002, Last Minute Travel forwarded an e-mail to FareChase regarding the "garbage on AA.com site via FareChase"; in an apparent reference to AA.com, the attached message read: "Here is some 'screen junk' we discussed." (PX219)

[3] Ironically, FareChase initially blamed the dearth of documents responsive to American's discovery requests on a "blow-up" of its entire e-mail system.

engineering (Delgo at 12:17-19); has no post-secondary education other than two years at the Fashion Institute of Technology (Delgo at 11:6-12:3; 12:8-12); and prior to his CEO position at FareChase, had worked only three years for travel agencies affiliated with Messrs. Kirschenbaum and Adamov. (Delgo at 12:20-18:6) The CTO, Mr. Shaked, Mr. Delgo's brother-in-law (Delgo at 23:10-12), has been unable to explain critical aspects of how the software functions. (Shaked at 33:13-34:7, 48:2-18, 58:16-23) Likewise, FareChase's top marketing officer received her degree in interior design (Pappas at 21:16-25) before working for only four years at a travel consultant firm. (Pappas at 20:23-21:7) Finally, the FareChase Vice President of Product Development was a jazz pianist (Ariel at 16:20-17:8), with a degree in jazz piano (Ariel at 17:19-23), before joining FareChase.

B. American Has Chosen Not to Partner With FareChase.

For two years, FareChase has unsuccessfully tried to do business with American.

On that basis, FareChase suggests that by bringing this lawsuit, after American became aware of the threat posed by the software, it has acted improperly. (FC Br. at 13-14) The truth is that FareChase concealed its intentions, misleading American about the true scope of the threat it faced. Once it became clear how FareChase intended to market and use its software, American realized the potential harm it posed to both AA.com and American's business strategy. In response, it promptly sought judicial relief.

American's limited dealings with FareChase have occurred on three occasions: (1) an initial referral fee proposal from FareChase; (2) a later FareChase sales pitch for its MarketView product; and (3) American's efforts to stop the scraping and avoid litigation.

1. FareChase's referral fee proposal was unacceptable.

The first contact was in early 2001. FareChase approached various airlines with a referral fee proposal for use of its software: its software would be licensed to either a third party website (like Orbitz) or search engine which would then use the software to direct traffic to the airline websites; in return, the airlines would pay a referral fee to the third party which would remit a portion of that payment to FareChase as a license fee. (Delgo at 54:11-55:17)[4]

American did not actively engage in discussions related to this approach because FareChase's proposal -- that a third party provide access to the fares and schedules contained on AA.com -- was already available to American through Orbitz.

2. FareChase's offer of MarketView software was rejected.

In early 2002, FareChase made a second attempt to market to American. These discussions concerned a product known as MarketView, which FareChase represented had the capability of gathering analytical information from other airline websites.

During the discussions, it was American's understanding that FareChase's access to the websites was in fact authorized. Over time, however, American learned that FareChase had no authorization from other airlines, but it nevertheless intended to access their sites even without consent. On that basis, American discontinued its discussions without ever having reached an agreement of any type. (Pappas at 198:9-13)

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[4] This proposal was consistent with FareChase's initial public statements that its software was to be made available to individual consumers. Indeed, the internal documents cited by FareChase reflect this same understanding by American of the strategy -- namely, that queries would be performed by the "consumer" who would be passed by FareChase "directly to [the] partner travel site's booking page." (PX220 at AA/FC 07449)

3. American's efforts to control FareChase's scraping were unsuccessful.

On April 29, 2002, FareChase announced that Sabre travel agents would be provided access to the scraping software. The announcement was vague in some respects, making no reference to any specific airline websites or to booking capabilities, describing the software as merely allowing travel agents to "retrieve and compare" webfares with published airfares available through the Sabre system. (PX221)

Because unauthorized access to AA.com violated the terms of its Use Agreement, American informed FareChase on May 15, 2002 that it was in violation of the agreement and requested that FareChase cease unauthorized use of the site. At the same time, based on previous discussions with FareChase, in which it represented that its primary marketing objective was to make its product available to individual consumers by means of its or a third party's website, American invited FareChase to discuss a potential settlement of their dispute, which might include a "mutually satisfactory arrangement" for access to AA.com. (PX146)

Settlement discussions then followed.[5] American again informed FareChase that its conduct violated the AA.com Use Agreement and demanded that it cease use of the site. In addition, based on FareChase's representation that it intended to market its software in a manner that provided direct access by individual consumers, American proposed that FareChase pay a fee for each booking made on AA.com and for each search.[6] Recognizing American's proprietary interest in its site and the webfares available there, FareChase did not dispute

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[5] Under Tex. R. Evid. 408, these talks are irrelevant. FareChase has chosen to ignore that rule, so American addresses the point here simply to correct the inaccurate spin that FareChase presents. These discussions are not evidence in this hearing.

[6] In addition, American would have required that any access to AA.com by FareChase licensees be available only under highly regulated circumstances, including both the timing and extent of the access.

American's right to compensation, but instead suggested a lower fee structure, plus a distribution of warrants or a similar equity position in FareChase. (PX150)

Efforts to resolve the dispute collapsed when American realized that FareChase had hid its true intentions all along. During the discussions, FareChase revealed for the first time that its real corporate strategy was a massive distribution of its software to travel industry professionals, including agents and CRSs. Rather than making its software directly available to consumers, FareChase actually intended to make CRSs their "target" customers. (Pappas at 93:21-94:7; PX28 at 24)

Based on these disclosures, coupled with FareChase's refusal to replace software distributed to its licensees, American had no choice but to file this lawsuit.

C. Sabre's Strategy to Maintain Its Market Dominance.

Sabre's decision to partner with FareChase is simply another way to maintain its dominant position in the market for distributing airline tickets. That dominance allows Sabre to extract above-market fees for each airline ticket it processes, inflating the prices for the traveling public. Now, through a carefully planned strategy, Sabre seeks to entrench its dominance by forcing webfares to be distributed through its high-cost distribution system, depriving the public and airlines of the cost savings offered by the Internet and webfares.

1. Sabre understood the liability risks associated with FareChase.

Almost two years ago, Sabre began laying the groundwork for a multi-pronged strategy to obtain webfares. The process included a study of a number of legal issues concerning its ability to offer webfares to its subscribers. Once armed with an understanding of its legal risks, Sabre structured its business strategy to try to minimize the liabilities it faced.

- In mid 2001, Sabre observed that "cheaper, non-published fares" could be provided to travelers through "fare aggregators" (like FareChase) that

"scanned" multiple airline web sites and provided fares sorted by price. (PX10 at S/AA 000179) Legal liability arising from booking webfares could be mitigated, concluded Sabre, by completing the booking process on the airline website through such an aggregator, as opposed to performing the booking itself. (PX10 at S/AA 000194)

- In August 2001, Sabre confronted the necessity of hiding its own identity when obtaining webfares. According to a Sabre manual, "*for legal reasons*" a webfare query "must appear to be coming from the [user] and not from Sabre"; disguising its identity would "mitigate any legal risk to Sabre." (PX9 at S/AA 000205) (emph. added)[7]

- Finally, in December 2001, Sabre recognized the need to eliminate any "legal exposure" from the possible perception of customers that the FareChase product "is part of the Sabre line." (PX222 at S/AA 001841) Consequently, "legal" needed to be consulted "to determine the amount of disclaimer required for eVoya Website." (*Id.*)

Resolving to accept the liability risks associated with screen scrapers paved the way for Sabre to enter the FareChase partnership. According to a 2001 presentation, Sabre identified four options to obtain webfares. Finding a preferred course was intended to insure Sabre's goal of being "the preferred distributor of airline content and services." (PX16 at 3)

In considering its options, there were "discussions that talked about friendlier versus potentially unfriendlier ways to get webfares" from the airlines. (Keszler at 164:12-22) Of the four options, three were identified as airline-"friendly" options: an "Airline Partner Program," in which airlines would exchange webfares for "marketing tools" from Sabre; a new "Fare Management Systems," representing "new technology" to manage existing fares; and an "Enhanced ATPCO Subscription," which would make webfares viewable to computer system subscribers. Sabre rejected each of these options. (Keszler at 161:20-164:11; PX16 at 5-6)

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[7] Sabre later would emphasize to FareChase the need to activate the masking feature in the WebFares by FareChase product. (PX19)

Instead, Sabre chose the fourth, most expedient option. It decided to take webfares through "web bots" (i.e., automated robots, like FareChase's software) -- an option that it knew the airlines would view as "non-collaborative" or "unfriendly." (Keszler at 165:13-19; PX16 at 8) Although it realized that the "web bot" strategy for obtaining webfares "threatens existing airline relationships," and risks "legal action against Sabre or web bot," Sabre already had assessed those risks and was steeled to proceed with its strategy. (PX16 at 12)

2. Even now, Sabre is hedging its risky bet on FareChase.

Sabre has not been content to pursue its FareChase web bot option alone, as a means to commandeer webfares. In recent months, it has pursued other avenues as well.

a. Travelocity Affiliate Program

In July 2002, American and Travelocity, a wholly-owned Sabre subsidiary, reached an agreement by which American provides all of its fares, including webfares, to Travelocity in exchange for a substantial discount on the cost of distributing all fares. (Keszler at 279:17-22; 282:5-10; PX223) The agreement restricts Travelocity's ability to offer webfares to unauthorized users, including travel agents. (PX224)

Sabre later disclosed plans to end-run these restrictions by making webfares available to its travel agent subscribers through the Travelocity Affiliate Program. Traditionally directed at entities that are loosely affiliated with the travel industry (such as convention bureaus), the Affiliate Program will be expanded to include Sabre travel agencies. (Keszler at 290:21-291:4; 293:1-5) Under the terms of the revised program, participating agents would book American webfares on Travelocity. (*Id.* at 301:3-11; 308:5-10) Given that access to webfares is a "component" of the program (*id.* at 312:9-11), it has "a high degree of visibility and importance" within Sabre. (*Id.* at 297:23-298:1)

Not only does the revised program breach the contractual duties of Sabre's subsidiary, it thwarts American's efforts to reduce its distribution costs through the EveryFare program. If Sabre travel agents can receive webfares through Travelocity, they will have no incentive to agree to reduce booking fees on all fares in exchange for access to webfares. As such, Sabre's intention through this plan-B strategy is to perpetuate its market dominance.

b. Direct Connect Availability Agreement

A third approach by Sabre to obtain webfares is Direct Connect Availability ("DCA"), a three-year agreement with an airline. Under the terms of DCA, Sabre discounts its booking fees by ten percent, or roughly forty cents per flight segment, in exchange for access to the airline's webfares. (Keszler 42:17-44:8) Only bankrupt USAir has signed up.

Tellingly, at the time Sabre and USAir entered into their DCA, announced on October 21, 2002, Sabre was in the final stages of launching Webfares by FareChase.

c. Participating Carrier Agreement

As a fourth strategy to obtain webfares, Sabre recently brought a counterclaim against American here. Sabre claims a contractual right to webfares under the terms of its Participating Carrier Agreement ("PCA") with American. While Sabre's counterclaim lacks merit for many reasons, it bears noting here that its decision to sue American for the same type of webfares for which Sabre now pays USAir, and for which Travelocity now pays American, demonstrates Sabre's determination to gain access to webfares regardless of consistency or cost.

Sabre is not a reluctant litigant, as it now presents itself. Rather, its presence in the case is the result of a four-pronged strategy that presumed litigation with the airlines.

II. AMERICAN HAS SATISFIED THE REQUIREMENTS FOR A TEMPORARY INJUNCTION

A. American Is Not Seeking Mandatory Injunctive Relief.

FareChase wrongly contends that American is seeking a mandatory injunction. (FC Br. at 15-16)

"A mandatory injunction requires conduct from a party, whereas a prohibitive injunction forbids conduct." *Universal Health Servs., Inc. v. Thomas*, 24 S.W.3d 570, 576 (Tex. App.--Austin 2000, no pet.). Here, American seeks to prohibit FareChase, without American's written consent, from:

- accessing, using, or scraping AA.com;
- accessing, using, or scraping AA.com for any commercial purpose, including for the purpose of updating FareChase software;
- accessing, using, or scraping AA.com by use of any automatic, electronic device or means, including electronic devices or means commonly known in the industry as robots or spiders; and
- selling, licensing, or otherwise providing to any person or entity any software, including updates to existing software, which is capable of accessing AA.com.

The injunctive relief sought by American is preventative in nature and does not purport to direct that FareChase take any specific action.

FareChase argues that the proposed injunction is mandatory because it would require it to modify its software to remove the feature that accesses American's system. However, the requested relief does not mandate that FareChase modify its software; instead, it only prevents FareChase from providing to others software, including updates, capable of accessing AA.com -- that is, the specific data retriever for AA.com. The fact such a prohibition will require some action to modify FareChase's software is "only incidental to the order's

primary function of preventing" FareChase from providing software to scrape AA.com. *Universal Health*, 24 S.W.3d at 576.

B. Mandatory Injunctive Relief Would Be Proper, in any Event.

A mandatory temporary injunction is proper if a party is engaging in illegal conduct. *Clear Lake City Water Auth. v. Winograd*, 695 S.W.2d 632, 642 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Zelios v. City of Dallas*, 568 S.W.2d 173, 175 (Tex. Civ. App.--Dallas 1978, writ ref'd n.r.e.). In fact, because the law is being violated, "it is the duty of the court to restrain it," and "a temporary injunction is an appropriate remedy." *T&R Assoc., Inc. v. City of Amarillo*, 601 S.W.2d 178, 180 (Tex. App.--Amarillo 1980, no writ). Here, the evidence shows that FareChase has violated, and continues to violate, the Texas Penal Code, and it also is responsible for its licensees' violations of this criminal statute.[8]

Moreover, a mandatory temporary injunction is proper if it is necessary to prevent irreparable injury or extreme hardship. *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981); *see also LeFaucheur v. Williams*, 807 S.W.2d 20, 22 (Tex. App.--Austin 1991, no writ). The evidence will show that American will suffer irreparable injury if a temporary injunction is not granted. Thus, even if the requested injunction were mandatory, it would be proper.

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[8] *See Texas Dep't of Mental Health & Mental Retardation v. Wade*, 651 S.W.2d 927, 930 (Tex. App.--Dallas 1983, no writ)(holding that a mandatory temporary injunction was proper to enjoin acts of a public official that facilitate another's repeated violations of criminal statutes). FareChase facilitates its licensees' violations of § 33.02 by providing them with the software. In fact, the default setting of the software is that "[a]ll of the data retrievers are activated unless a licensee chooses something different." (FC Br. at 8).

C. FareChase Has Trespassed American's Property.

1. American has alleged and provided evidence of actual harm.

FareChase argues that injunctive relief on the basis of the trespass claim must be denied because American has not proved actual harm to its website. (FC Br. at 4, 18) The argument misconstrues both relevant case law authority and the harm American has suffered.

Texas has adopted the Restatement view of trespass to chattels, which imposes liability where, among other things, the trespasser has impaired the "condition, quality, or value" of the property. Restatement (Second) of Torts § 218(b). As in *Zapata v. Ford Motor Co.*, 615 S.W.2d 198 (Tex. 1981), the court in *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000), looked to the Restatement for guidance in analyzing a similar trespass to chattels action.[9]

Contrary to the assertion that *eBay* "ignored the harm requirement, finding instead that a potential harm was sufficiently substantial to meet the requirements for trespass to chattels" (Sabre Br. at 12), the *eBay* court upheld the Restatement's harm requirement. Thus, the court stated that the "interest of a possessor of a chattel in its inviolability . . . is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel." 100 F. Supp. 2d at 1071. It found that eBay likely would demonstrate that the conduct of Bidder's Edge "diminished the quality or value of eBay's computer systems" by consuming a portion of its bandwidth and server capacity and by depriving it of the ability to use a portion of its personal property for its own purposes. *Id.* The court concluded, "BE's actions appear to have caused injury to eBay and appear likely to cause injury to eBay." *Id.*

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[9] Contrary to Sabre's and FareChases's arguments, *Zapata* does not require "substantial" injury to property. Instead, *Zapata* states that liability for damages arises if there is actual damage to the property **or** a substantial deprivation of use. 615 S.W.2d at 201.

American has suffered this same type of harm to prove trespass under the Restatement. By accessing AA.com, FareChase's software consumes capacity and requires American to take steps to block unauthorized access, which in turn occupies additional system capacity, hinders system performance, slows down response time, and damages AA.com's customer goodwill. Because the value of AA.com is derived from the extent to which its system can serve its customers, and the goodwill developed therefrom, any impairment to the system necessarily impairs the value of American's property. This is consistent with the Restatement's harm requirement of impairment in "condition, quality or value" of American's property.[10] As a matter of law, the harm alleged by American is sufficient to impose liability for trespass to chattels.

2. Even without actual harm, the trespass warrants relief.

Even if American had not demonstrated actual damages resulting from the conduct of FareChase, such a conclusion does not preclude the injunctive relief sought here. While FareChase goes to great lengths to argue that Texas law bars any relief without proof of actual damage to the property, Texas courts have never adopted any standard that would prohibit the injunctive relief American seeks. Both *Omnibus Int'l, Inv. v. AT&T, Inc.*, 2002 WL 31618413 (Tex. App.--Dallas Nov. 21, 2002, no pet.), and *Zapata*, relied on by FareChase, are notably distinguishable from the case before this Court. There, the plaintiffs sought only *monetary* damages on the basis of trespass to chattels.

American seeks *injunctive* relief, not damages, and "the nature of the remedy sought colors the analysis." *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 248 (Cal. App. 2001)

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[10] *See CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (relying on Restatement view of trespass to chattels and recognizing harm of diminished value in equipment, even where no physical damage to property occurs).

(granting preliminary injunction on basis of trespass to chattels and recognizing distinction between injunctive relief and monetary relief in conducting analysis), *rev. granted*, 118 Cal. Rptr. 2d 546 (Cal. Mar. 27, 2002).[11] Likewise, although the *Zapata* court noted that a trespass does not always entitle the property owner to recovery of money damages, it specifically recognized that "[e]ven in the absence of damages, *a trespass has occurred* which is important in determining the legal relations between the parties." 615 S.W.2d at 201 (emph. added).

There can be no doubt that a trespass has occurred here. Even if American were unable to show actual damage, it is entitled to prevent future trespasses against its property. Any other rule would allow trespassers to use another's property at their whim so long as they do not inflict physical damage. This would effectively render property rights meaningless.[12] It simply cannot be the law that third parties can access and use American's property without its consent, simply because they have not "damaged" it.

In granting an injunction prohibiting similar conduct, the *eBay* court stated that "The law recognizes no such right to use another's personal property." *eBay*, 100 F. Supp. 2d at 1071 (rejecting defense argument that small amount of system capacity used does not rise to level of trespass because use was negligible). To be sure, the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). American's property ownership necessarily includes the right to keep others from using its property without permission, regardless of whether damage occurs from that unlawful use. That right is the basis

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[11] Because review of the *Hamidi* decision has been granted by the California Supreme Court, it is not certified for publication in that state's Official Reports and is therefore not binding authority. *Cal. Rules of Court, Rules 976, 977, 979.* For that reason, plaintiff does not cite *Hamidi* for its precedential value, but rather for its comprehensive review of the law of trespass to chattels.

[12] *See Spann v. City of Dallas*, 235 SW 513, 515 (Tex. 1921) ("If the right of use be denied, the value of property is annihilated and ownership is rendered a barren right").

for the relief that American seeks. As in *Zapata*, the actions of FareChase constitute a *trespass,* whether or not actual damage results. Accordingly, American is entitled to prevent future unlawful activity against its property.

The basis of the Restatement's requirement of harm is because the owner generally can exercise self-help remedies to prevent continued trespass to personalty. *See* Restatement (Second) of Torts § 217. American has diligently engaged in self-help to protect its property, by attempting to block access to AA.com by FareChase's software. However, FareChase thwarts American's self-help by its masking feature, and it will continue doing so without court intervention. Thus, the rationale behind the harm requirement does not apply in this case. American finds itself in the position where, without injunctive relief, it must continue to engage in a costly "cat-and-mouse game" of developing methods to block FareChase's surreptitious access to its website. There is no benefit to be derived from this wasteful game, and this Court properly can bring it to an end with an injunction preventing further unlawful conduct by FareChase. *See Intel*, 114 Cal. Rptr. 2d at 249 (court dismissed defendant's argument that, in lieu of court action, plaintiff should engage in self-help, finding "no public benefit from this wasteful cat-and-mouse game which justifies depriving [plaintiff] of an injunction.

3. FareChase's searches pose significant danger.

FareChase contends that since *eBay* was concerned with "recursive" searching (done on a regular basis), instead of "real time" searching (done *ad hoc* by the user), American cannot rely on *eBay* to establish imminent and irreparable harm. This argument misreads *eBay* and ignores the significant risks that FareChase searches pose to AA.com.

In *eBay,* the harm associated with recursive searching arose from the fact that it deprived users of Bidder's Edge software of current eBay prices. Hence, for business reasons,

eBay refused to authorize recursive searches of its website. But the type of search conducted -- whether recursive or real-time -- had no relevance to whether occupying capacity on the website constituted a trespass. Here, a trespass claim is established because the scraping of AA.com by FareChase software, regardless of whether done in real time or recursively or both, is not authorized by American and occupies valuable system capacity.

In addition, FareChase searches pose significant risks to AA.com. American plans for use of its site on the basis of predicted patterns of use. In particular, it plans for the site to be used by individuals, who have typical patterns of use, such as the times they visit, what parts of the site they visit, and what types of searches they perform. A widespread deployment of FareChase software would render that type of planning impossible, however, as tens of thousands of automated users could scrape AA.com at any time.

4. The trespass claim is not preempted.

As a last resort, FareChase alleges that American's trespass to chattels claim is preempted by federal law under the Intellectual Property Clause of the U.S. Constitution. (FC Br. at 23-25) This argument is readily disposed of.

The Intellectual Property Clause requires that Congress act only when extending an exclusive right that promotes "innovation, advancement, and. . . add[s] to the sum of useful knowledge" and not recognize exclusive rights "whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966).

FareChase's preemption argument fails because it wrongly assumes that the trespass claim centers on the reproduction or distribution of information obtained from AA.com. Contrary to FareChase's assertions, the trespass claim focuses on the access or use of, and

intermeddling with, American's personal physical property -- namely, its computer system. Thus, the trespass is not preempted under the Intellectual Property Clause.[13]

Thus, because the personal property that American seeks to protect in its trespass claim is its computer system, and its proprietary fare data is not "existent knowledge in the public domain," the trespass claim is not preempted.

D. FareChase's Conduct Constitutes a Breach of Contract.

FareChase goes to great lengths to argue (incorrectly) that the terms and conditions of AA.com's User Agreement are not enforceable because they are not conspicuous.

Markedly absent from FareChase's brief is any contention that it is not aware of those terms.[14] In short, the argument that the terms of use are not conspicuous "is immaterial" because FareChase "has actual knowledge" of the agreement. *Cate v. Dover Corp.*, 790 S.W.2d 559, 561-62 (Tex. 1990). *See also Allied Finance Co. v. Rodriguez*, 869 S.W.2d 567, 572 (Tex. App.--Corpus Christi 1993, no writ) ("if the borrower has actual knowledge . . ., whether the language in the contract is conspicuous is of no moment").

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[13] Even if the interference with personal property underlying the trespass claim were fare information on AA.com, this information is not "existent knowledge in the public domain." *Graham*, 383 U.S. at 6. Rather, it is generated by American and subject to the terms and conditions of its website agreement, so that the information is not of the type Congress may protect under the Intellectual Property Clause. Consequently, even assuming that American asserted a trespass to protect its interest in the fare data contained on its website, there could be no conflict with the federal intellectual property system and thus no preemption. *See Bonita Boats, Inc. v. Thunder Crafts, Inc.*, 489 U.S. 141, 165 (1989) (where Congress determines that neither federal protection nor freedom from restraint is required by the national interest, the states remain free to promote originality and creativity in their own domains and no preemption exists under the Intellectual Property Clause).

[14] Any denial would not be credible. In fact, as one court recently observed, a link on a webpage to another page clearly marked as containing restrictions is effective to ban scrapers, recognizing that a company's website "could easily include . . . a sentence on its home page or in its terms of use stating that 'no scrapers may be used,' giving fair warning and avoiding time-consuming litigation." *EF Cultural Travel v. Zefer Corp.*, 2003 WL 174756 (1st Cir. Jan. 28, 2003) (affirming preliminary injunction as to creator of scraper software).

In that regard, the case upon which FareChase puts so much significance, *Specht v. Netscape Comm. Corp.* 306 F.3d 17 (2d Cir. 2002), is easily distinguished, as shown in American's original brief. The plaintiffs in *Specht* had no actual or inquiry knowledge of the terms of use before downloading and using software at issue in the case. In fact, the court specifically distinguished the facts of the case from *Register.com v. Verio,* 126 F. Supp.2d 238 (S.D.N.Y. 2000), noting that there "the plaintiff's terms of use of its information were well known to the defendant." *Id.* at 32 n.16.

Like the defendant in *Register.com*, FareChase has actual knowledge of the AA.com terms of use, and *Specht* is not on point or persuasive here. Thus, by accessing the website, FareChase is bound by the terms of the User Agreement and is breaching those terms. For that reason, a temporary injunction is appropriate to prevent further breaches. [15]

E. FareChase Has Violated Tex. Penal Code § 33.02.

In Texas, a person commits an offense if he "knowingly accesses a computer, computer network, or computer system without the effective consent of the owner." TEX. PENAL CODE ANN. § 33.02(a)(Vernon Supp. 2003). FareChase responds that § 33.02 applies to "hacking or other unauthorized access." (FC Br. at 28) FareChase *is* a hacker. Its employees knowingly access American's computer system without consent. [16]

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[15] Even if FareChase could have claimed *in the past* that it was unaware of the AA.com terms of use, it certainly cannot make such a claim now. And regardless of whether FareChase was aware of the Use Agreement upon its first or any subsequent trespass on AA.com, American seeks to enjoin *further entry* by FareChase.

[16] "A 'hacker' is an individual who accesses another's computer system without authority." *Steve Jackson Games, Inc. v. United States Secret Service*, 816 F. Supp. 432, 435 n.2 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994). Sabre's Marketing Manager until recently, William Rollings, who managed and executed the implementation of the FareChase software, testified that a hacker is someone who enters another's computer or website without permission. (Rollings at 13:20-25; 104:5-7) Moreover, each FareChase scraper who accesses American's computer system without consent is a hacker.

FareChase unlawfully accesses AA.com. It has to do so regularly in order to update its software. (Shaked at 43:5-19) As American has previously shown, FareChase is responsible for violations of § 33.02 committed by its licensees. *See* TEX. PENAL CODE ANN. §§ 7.01(a)-(b), 7.02(a)(Vernon 1994). Sections 7.01 and 7.02 make short work of FareChase's argument that "it is the end-user that accesses the website, not FareChase." (FC Br. at 29) The law simply does not allow FareChase to provide (for profit) software that is designed for the very purpose of hacking, and then shirk responsibility when the software is used for its intended purpose.[17]

FareChase also wrongly argues that § 33.02 is not violated unless the hacking results in "deletion or corruption of the data contained therein." (FC Br. at 28) By its terms, a violation of § 33.02(a) does not require damage to the system illegally accessed. A violation is a Class B misdemeanor, unless the actor alters, damages, or deletes property. TEX. PENAL CODE ANN. § 33.02(b).[18] FareChase ignores the plain wording of § 33.02(a) and reads the Class B misdemeanor offense right out of the statute, in violation of settled rules of statutory construction. Of course, courts "generally presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997).

Section 33.02 is similar to the criminal trespass statute which makes it a crime to enter onto real property without consent. TEX. PENAL CODE ANN. § 30.05(a)(Vernon Supp.

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17 Consider a bank heist in which a teller provides the robbers with a key to the bank in exchange for a cut of the loot. Clearly, the teller is as guilty of the crime as those who actually steal the money. FareChase's conduct is no different than the teller's conduct: it provides the key (software) that allows the user to engage in illegal hacking of American's computer system.

18 If the actor engages in aggravated conduct (such as FareChase's suggested "deletion or corruption of the data contained therein"), the classification of the offense is raised anywhere from a Class A misdemeanor to a first degree felony, depending on the amount involved. *Id.*

2003).[19] The purpose of the criminal trespass statute is the "protection of the privacy interests of the occupier." *McCuller v. State*, 999 S.W.2d 801, 804 (Tex. App.--Tyler 1999, pet. ref'd). The purpose of Section 33.02(a) also is to protect the privacy interests and ownership rights of the owner of the computer system. If the owner does not consent to another's access, it is a crime for the other person to access the system, whether there is any harm to the system or not.[20]

F. FareChase Has Misappropriated American's Property.

1. American has established the elements of misappropriation.

FareChase contends that American has "no evidence that FareChase uses software in 'competition' with AA" and thus cannot satisfy its burden of proving it will succeed on the merits of its misappropriation claim. (FC Br. at 28) Ironically, FareChase's opening statement in its brief contradicts that very argument. Specifically, it says "what this case is really about, however, is competition -- FareChase's attempt to foster and American's attempt to stifle it." (FC Br. at 2)

Elsewhere, FareChase says its software "fosters competition among suppliers of travel and travel related products, including airfare, by making competitive prices on comparable products readily available to the consumer." (FC Br. at 2-3) How FareChase can argue that it is not "in competition" with American, when it is redistributing American's webfares -- in competition with AA.com -- is never explained.

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[19] Like § 33.02(a), a trespass onto real property does not require harm to the property. TEX. PENAL CODE ANN. § 30.05(d) (Vernon Supp. 2003). The criminal trespass statute also is similar in that the classification of the offense is raised if the trespass is accompanied by aggravated facts. *Id.*

[20] The case cited by FareChase does not support its misinterpretation of the statute. In *Mitchell v. State*, 12 S.W.3d 158, 159 (Tex. App.--Dallas 2000, no pet.), the defendant was convicted of knowingly accessing the fire department's computer system without consent and corrupting several files. Contrary to FareChase's interpretation, proof of alteration (or corruption) of files was necessary because Mitchell was convicted of a Class A misdemeanor, which requires such proof. *Id.* *Mitchell* does not stand for the proposition that all violations of § 33.02(a) require harm or damage to the property.

2. The misappropriation claim is not preempted.

FareChase wrongly asserts that this claim is preempted by the federal Copyright Act because the fare and schedule information contained on AA.com is public data. Its argument fails for two reasons: American's webfares are time-sensitive information that is exempt from federal copyright preemption; and the misappropriation of capacity on American's computer system does not constitute a form of public data and is therefore immune from preemption under the federal copyright laws.

a. Hot news exception

The test for evaluating whether a state law claim is preempted is the "extra element" test. *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396, 404 (5th Cir. 2000). If one or more qualitatively different elements are required to constitute the state-created cause of action being asserted, then the right granted under state law does not lie "within the general scope of copyright," and preemption does not occur. *Id.*

The "hot news" exception originated with the decision in *International News Serv. v. Associated Press,* 248 U.S. 215 (1918). In that case, International News "pirated" the AP's news reports and transmitted them to others on the West Coast where the reports were not yet published. *Id.* at 231-32. The news articles were copyrightable, although the underlying facts were not. Nevertheless, the Court held that it would be improper for International News to benefit from the AP's labor, and that the AP would have no incentive to invest the effort and expense necessary to obtain and prepare the stories if International News could freely take the information.[21] *Id.* at 240-41.

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[21] Since *International News,* courts consistently have held that misappropriation claims based on the hot-news exception survive preemption. *See, e.g., Financial Info., Inc. v. Moody's Investors Serv., Inc.*, 808 F.2d 204, 208-09 (2d Cir. 1986); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 186

In circumstances where a defendant misappropriates time-sensitive information that the plaintiff has generated at a cost, and the copying of that information reduces the incentive to produce the product or service, there is an exception to copyright preemption. As the court in *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d. 841, 853 (2d Cir. 1997), noted:

> We therefore find the extra elements -- those in addition to the elements of copyright infringement -- that allow a "hot news" claim to survive preemption are: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.

This exception applies here.

American's webfares, as well as its published fares, are time-sensitive information that is subject to change and to availability. Fares are not stagnate. In fact, American provides new fare data three times per day, adjusting fares according to demand, availability, and competition.[22] American generates this fare information and updates its website at its sole expense, which FareChase then misappropriates for its own benefit. Finally, by providing American's webfares to distribution channels that do not provide low costs for all fares, FareChase threatens American's ability to offer webfares.

Accordingly, FareChase's misappropriation of these fares -- the "hot news" -- is excluded from preemption. As Congress intended, state law has the flexibility to afford a

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F. Supp. 2d 592, 595 (D. Md. 2002); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 979-80 (E.D. Cal. 2000).

[22] FareChase has acknowledged the time-sensitive nature of fare information, such as that provided on AA.com, and touted its ability to pirate this information in real time. Specifically, Mr. Delgo has stated that "*prices are changing by the second* so there is no way really to keep this information and then provide it to the user. It has to be in real time and this is what we provide." (PX120 at 3) FareChase recognizes the value of these time-sensitive fares, as it holds out its software as "the only technology that [it] is aware of that is capable of automating in *real-time*." FareChase Am. Answer ¶ 10 (emph. added).

remedy against a consistent pattern of unauthorized appropriation of information constituting "hot news." Therefore, because American's webfares are time-sensitive and valuable data that is being taken by FareChase, the misappropriation claim is exempt from preemption.

b. Misappropriation of Capacity

Nor is American's claim for misappropriation of its computer capacity preempted, because it does not fall within the scope of the Copyright Act. This computer capacity is personal property belonging to American. The Copyright Act provides protection to original works of authorship fixed in a tangible medium of expression. 17 U.S.C. § 102(a). Thus, the property American seeks to protect under its misappropriation claim is different in kind from the subject matter contemplated by federal copyright preemption.

III. AMERICAN HAS SHOWN A PROBABLE, IMMINENT, AND IRREPARABLE INJURY.

A. American Has Established that the Threat of Harm Is Imminent.

In its opening brief, American established that it faces imminent harm based on the ongoing use of FareChase software to access and scrape AA.com. In addition, based on FareChase's own projections, use of its software will grow exponentially in the months to come, increasing the threat of harm to American. (Am. Br. at 45-46) In fact, FareChase has boasted in its brief that is "has successfully marketed its products and has licensed its software to some of the largest players in the travel industry." (FC Br. at 6-7)

American is not required to seek injunctive relief only *after* a disaster strikes, as FareChase asserts. (FC Br. at 29-30) FareChase admits that in the near future it intends to distribute its software to as many licensees as possible. (Delgo at 176:7-24) Those licensees could be performing over 215,000 daily searches by year-end. (PX141) Added to this, FareChase's many competitors are poised to join the assault on AA.com. (*Id.* at 17) Injunctive

relief is proper when there is "the threat of imminent harm, or another's demonstrable intent to do that for which injunctive relief is sought." *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 716-17 (Tex. App.-Corpus Christi 2001, no pet.)

The law does not require American to stand by idly and delay its request for injunctive relief until is computer system is overrun and business plans are in tatters. The *eBay* court granted injunctive relief under these exact circumstances, recognizing that otherwise the threat of harm to eBay's computer systems would grow, as other scrapers began to assault the eBay website. 100 F. Supp. 2d at 1071-72. Texas courts are in accord with this result, barring injunctive relief only where the commission of a threatened act is "speculative" and the injury "purely conjectural." *Dallas Gen. Drivers v. Wamix, Inc.*, 295 S.W.2d 873, 879 (Tex. 1956). By FareChase's own projections, the harm to American is imminent today and inevitable.

B. American Has Established Irreparable Harm.

American has demonstrated that in the absence of injunctive relief it will suffer irreparable harm in at least three ways: lost system capacity on AA.com, leading to potential delays and crashes; diminished customer goodwill; and significant interference with its efforts to lower distribution costs, including the EveryFare program. (Am. Br. at 46-48)

The harm to American is beyond dispute. By occupying capacity on AA.com, FareChase and its licensees deprive American and legitimate users of the use of that capacity. As a result of that unlawful interference, the value of AA.com is impaired. In addition, by making American's webfares available to high-cost distribution channels that have not agreed to provide lower distribution costs for *all* fares, FareChase deprives American of an invaluable opportunity to fix the current business model for airfare distribution.

To answer that FareChase software could bring more visitors to AA.com, and that American does not pay fees when FareChase software is used, ignores the nature of the harm. Restricting access to webfares to those who have agreed to lower their distribution costs for all fares is an important incentive American uses to lower its overall costs. If webfares are made available to those who have not agreed to lower their distribution costs for all fares (as FareChase software does), then American's ability to reduce its costs is impaired.[23] For that reason, increased use of FareChase software damages American's business plans. In addition, increased scraping activity hurts American's efforts to build customer loyalty and goodwill for AA.com.

Finally, none of the parties believe FareChase's argument that scraping cannot harm a website. Although Sabre now claims that a better term for scraping would be "mirroring" or "repeating" (Sabre Br. at 16), and FareChase contends that scraping "has different meanings depending on the context in which it is used" (FC Br. at 9), their own websites prohibit "spiders" and "robots." (Am. Br. at 14-15) In fact, Sabre prohibits FareChase-type software from the Travelocity website under the terms of its user agreement. (Keszler at 344:9-345:23) Quite simply, unauthorized scraping is harmful and dangerous to targeted websites.

C. American Lacks an Adequate Remedy at Law.

FareChase argues that American has an adequate remedy at law based solely on its settlement proposal that FareChase pay search and booking fees, supposedly an admission that the harm caused by FareChase is compensable in money damages. The argument is

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[23] FareChase's contention that its software bolsters competition is wrong as it ignores the fact that American participates in Orbitz, a website that legitimately provides the "efficient" comparative shopping endorsed by FareChase. Indeed, the logical conclusion is that if webfares are permitted to be depleted without providing the benefit they were invented to deliver, there will be no business reason for continuing to offer webfares, a result that hurts consumers. Ironically, Sabre would welcome this result. (Keszler at 107:7-12).

misleading and wrong. American's past proposal incorrectly assumed that FareChase business strategy was directed to individual consumers. Any past proposal simply is immaterial to the harm at issue in this case resulting from FareChase's wrongful distribution of the software to commercial travel industry professionals, such as CRSs and travel agents.

FareChase admits that an inadequate remedy at law exists for injuries such as "customer loss" and "loss of goodwill." (FC Br. at 31) The evidence establishes that American has suffered, and will continue to suffer, lost business opportunities and diminished goodwill if the injunction is not granted. Thus, American does not have an adequate remedy at law.

IV. THE EQUITIES AND PUBLIC INTEREST ARE IN AMERICAN'S FAVOR.

FareChase argues that a temporary injunction would be inequitable because if it were not allowed to continue its wrongful conduct, it may cause it to breach agreements[24] and would injure its business. That argument does not balance the equities in FareChase's favor. "Equity never aids in the commission of a wrong." *Zelios*, 568 S.W.2d at 175. "Consequently, the doctrine of balancing the equities cannot be invoked by a party guilty of intentional wrong." *Id.* There is no public interest in allowing the continuation of criminal conduct.

When balancing the threat of injury to the plaintiff against the risk of injury to the defendant that might be caused by a temporary injunction, "the proper result is to protect the plaintiff's legal right." *Picker Int'l v. Blanton*, 756 F. Supp. 971, 983 (N.D. Tex. 1990).

> [W]hen . . . a choice must be made between the possible punitive operation of the writ and the failure to provide adequate protection of a recognized legal right, the latter course seems indicated and *the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world.*

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[24] FareChase apparently believes that simply by entering into a contract which is based on unauthorized and unlawful behavior, it can thereafter hold up such a contract as a "shield" to protect it from being barred from engaging in such behavior.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 773 (Tex. 1958)(emph. added).

American seeks to protect its legal rights by a temporary injunction in this case. It is not trying to stop FareChase from doing business. Instead, American is only seeking narrow relief that prevents FareChase from accessing and scraping AA.com without American's consent and from providing software to others which accesses AA.com. If the injunction is granted, FareChase software can still be used to search other airline websites and sites for hotel and transportation services.

FareChase's argument that the requested injunctive relief will cause it to breach agreements or injure its business does not preclude the injunction. It is not inequitable to enjoin a defendant from engaging in conduct that is illegal and wrongful. *See T&R Assoc.*, 601 S.W.2d at 180 (holding that the court had a duty to temporarily enjoin a violation of the law).[25]

Moreover, the public interest in this case favors the granting of the injunction. FareChase contends that American has no right to "limit the free flow" of information by restricting access to AA.com.[26] FareChase seems to argue that the mere existence of the Internet somehow trumps long-held policy interests in protecting property rights. "In Texas, property rights are considered 'sacred and fundamental.'" *Barber v. Texas Dep't of Transp.*, 49 S.W.3d 12, 17 (Tex. App.--Austin 2001, pet. granted), *quoting State v. Texas City*, 295 S.W.2d 697, 704 (Tex. Civ. App.--Galveston 1956), *aff'd*, 303 S.W.2d 780 (Tex. 1957).

> The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them.

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[25] Even assuming that harm to Sabre from FareChase being enjoined were relevant, Sabre's subsidiary, Travelocity, still will be able to legitimately obtain webfares pursuant to its agreement with American. (PX223) The only effect to Sabre from an injunction is that its ability to obtain the webfares by illegitimate means may be impaired -- a result that certainly is equitable.

[26] Notwithstanding FareChase's arguments, its own website agreement contains provisions similar to American's that "limit the free flow" of information.

Spann v. City of Dallas, 235 S.W. 513, 515 (Tex. 1921).

An owner of personal property has the fundamental right to exclude others from access or use of property. *Loretto*, 458 U.S. at 435; *eBay,* 100 F. Supp. 2d at 1066. American has a fundamental right to limit access to its computer system, website, and the information contained in it. The mere existence and popularity of the Internet does not trump these fundamental rights, and it is in the public interest to protect those rights.

FareChase argues that the injunction would prevent "travelers" from using its software. (FC Br. at 3) But FareChase does not market its software to travelers and consumers; it licenses to commercial users who sell tickets in direct competition with American to consumers and travelers. On the other hand, American's website -- and Orbitz, Travelocity, and others -- is designed for, and access is expressly made available to, individual travelers and consumers who seek information for personal, non-commercial purposes.

At its core, FareChase's argument is that the ends (the free flow of data on the Internet) justify any means to obtain the information. In its quest to access American's property and take it without consent, FareChase has engaged in wrongful and illegal conduct. Public policy in Texas "requires an individual not be permitted to derive financial gain stemming, whether directly or indirectly, from an illegal act committed by that person." *Peeler v. Hughes & Luce*, 868 S.W.2d 823, 835 (Tex. App.--Dallas 1993), *aff'd*, 909 S.W.2d 494 (Tex. 1995). FareChase's argument simply is contrary to the public interest and public policy.

V. SABRE'S CLAIM TO A CONTRACT RIGHT TO AMERICAN'S WEBFARES OFFERS NO SHELTER TO FARECHASE.

Sabre's claim that it has a contractual right to webfares under the terms of the PCA has no relevance to the injunctive relief American seeks against FareChase. As a result, Sabre's PCA arguments should not be addressed at this time.

First, Sabre does not seek injunctive relief or any other kind of relief at this hearing. Consequently, its PCA arguments, which are not ripe for adjudication, are a red-herring.

Second, FareChase's conduct is wrongful and illegal, regardless of whether Sabre has any separate right to American's webfares.

Third, American faces imminent and irreparable harm even Sabre were to prevail on its claim. FareChase is on the verge of a widescale deployment of its software to licensees *other than Sabre*, including American Express, Outtask, e-Travel, and I:FAO. (PX136 at FC 01825) Moreover, FareChase intends to market its software aggressively, beyond its current licensees, to "as many potential licensees" as physically possible. (Delgo at 176:19-24) Finally, in the absence of injunctive relief, other scrapers will descend on AA.com and join the fray.

For these reasons, there is no need to determine at this time whether Sabre has a separate contract right to American's webfares.[27]

CONCLUSION

American is likely to prevail on the merits of its claims. Moreover, the injury American will suffer -- loss of capacity, potential delays, loss of goodwill, and interference with its business plans -- is probable, imminent, and irreparable. Finally, the equities and public interest are decidedly in American's favor. For these reasons, The Court should grant American's application for temporary injunctive relief.

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[27] In the event the Court desires additional information concerning the many reasons Sabre's claim under the PCA is without merit, American is prepared to present those arguments at the hearing.

Dated: February __, 2003

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was furnished by facsimile, hand-delivery, and/or overnight mail to all counsel of record on this ___ of February, 2003.

Bill F. Bogle

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