SOUTHWEST AIRLINES CO., Plaintiff, v. BOARDFIRST, L.L.C., Defendant.

CIVIL ACTION NO. 3: 06-CV-0891-B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2007 U.S. Dist. LEXIS 96230

September 12, 2007, Decided
September 12, 2007, Filed

JUDGES: JANE J. BOYLE, UNITED STATES DISTRICT JUDGE.

OPINION BY: JANE J. BOYLE

OPINION

MEMORANDUM ORDER

In this lawsuit Southwest Airlines Co. ("Southwest") seeks injunctive relief and money damages against BoardFirst, L.L.C. ("BoardFirst") for allegedly violating the terms and conditions of use governing Southwest's website. Presently before the Court is Southwest's Motion for Partial Summary Judgment (doc. 111), filed June 29, 2007. For the reasons that follow, the Court GRANTS the motion in part and DENIES it in part.

I. Background

Southwest, a major, Dallas-based domestic airline carrier, subscribes to a rather egalitarian philosophy when it comes to boarding its flights. There are no first-class cabins, and no fee-differentiated service class options are offered. (Pl.'s App. in Supp. Mot. Partial Summ. J. ["Pl. App."] 116). Instead Southwest maintains an "open **[*2]** seating" policy whereby its passengers are not assigned to specific seats but rather are divided into three distinct ("A", "B", and "C") boarding groups. (Pl.'s First Am. Compl. ["Compl."] P 25). Passengers in the "A" group are entitled to board the plane before those in the "B" group, and those in the "B" group take precedence over the unfortunates with a "C" pass, who board last. (*Id.* at PP 25-28). Boarding passes are awarded on a "first-come first served" basis -- Southwest does not charge customers an extra fee to obtain a pass in a higher priority boarding group. (Pl. App. 116).

Southwest customers who have purchased a ticket are able to check in for their flights via the Southwest website -- www.southwest.com -- within 24 hours of departure. (Compl. P 29). The earlier a customer checks in during this 24-hour period, the more likely it is that the customer will be awarded an "A" boarding pass, which are limited to the first 45 customers who check in.

(*Id.* at P 30; Pl. App. P 116). To check in online, a customer must go to southwest.com and click on a tab marked "Check in Online". (*Id.*). A window then opens in which the customer inputs his name and flight confirmation number. (*Id.*). **[*3]** The computer system then retrieves the customer's reservation and an image of the boarding pass appears. (*Id.*). The customer may opt to either print the pass, which may then be presented (along with appropriate identification) at the airport or the customer may wait to print the pass at the airport from a Southwest kiosk, ticket counter, or skycap. (*Id.*).

BoardFirst began operations in Fall 2005. (*Id.* at 61). Its sole reason for being is to assist, for a fee, Southwest customers secure the coveted "A" boarding passes. (*Id.* at 4, 7). The company operates through its website -- www.boardfirst.com -- in the following way. First, a Southwest customer who has previously purchased an electronic airline ticket from Southwest logs on to the BoardFirst site and requests assistance in obtaining an "A" pass. (App. to Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. ["Def. App."] 1-2). The customer must provide his name, flight confirmation number, and credit card information and authorize BoardFirst to act as his agent. (*Id.*). Once the customer's boarding pass becomes available for online download from southwest.com, BoardFirst employees log on to the "Check In and Print Boarding Pass" page of **[*4]** the Southwest site and check the customer in using his personal information. (*Id.* at 2). If all went well, an "A" boarding pass should appear on the screen. (Pl. App. 70). BoardFirst does not print the pass; it simply charges the customer's credit card (the fee is $ 5 per pass) [1] and e-mails the customer a receipt confirming that the pass was obtained and that it can be printed through southwest.com or at an airport kiosk. (Def. App. at 2-3). On average, BoardFirst procures fewer than 100 boarding passes for Southwest customers per day. (*Id.* at 3).

1 There is no charge if for some reason BoardFirst fails to obtain an "A" pass. (Def. App. 2).

Southwest complains that BoardFirst's use of the Southwest website violates the terms and conditions of use (the "Terms") posted on the site. Southwest's homepage states in small black print at the bottom of the page that "[u]se of the Southwest websites . . . constitutes acceptance of our Terms and Conditions." (Pl. App. 116). Clicking on the words "Terms and Conditions", which are distinguished in blue print, sends the user to the Terms page. (*Id.* at 117). **[*5]** From December 20, 2005 through February 1, 2006, the Terms read in pertinent part as follows:

> Southwest's web sites and any Company Information is available to you only to learn about, evaluate, or purchase Southwest's services and products. **Unless you are an approved Southwest travel agent, you may use the Southwest web sites and any Company Information only for personal, non-commercial purposes.**
>
> . . .
>
> As a condition of your use of the Southwest web sites, you promise that you will not use the Southwest web sites or Company Information for any purpose that is unlawful or prohibited by these terms and conditions.

(*Id.* at 117, 124) (emphasis added). Effective February 1, 2006, and continuing to today, the Terms were modified to include the following additional language, indicated in bold:

> Southwest's web sites and any Company Information is available to you only to learn about, evaluate, or purchase Southwest's services and products. Unless you are an approved Southwest travel agent, you may use the Southwest web sites and any Company Information only for personal, non-commercial purposes. **For example, third parties may not use the Southwest web sites for the purpose of checking Customers [*6] in online or attempting to obtain for them a boarding pass in any certain boarding group.**

(*Id.* at 117, 120) (emphasis added). Southwest expressly added this language so as to leave no doubt that BoardFirst's use of southwest.com was prohibited by the Terms. (*Id.* at 118).

On December 20, 2005, Southwest sent a cease-and-desist letter to Kate Bell, BoardFirst's founder, President, and Chief Executive Officer. (Pl. App. 4, 118, 128-129). Among other things, the letter apprised Bell that Southwest's Terms prohibited the use of southwest.com for commercial purposes and that BoardFirst's activities breached the Terms. (*Id.* at 129). When BoardFirst's use of the Southwest site did not stop in response to the letter, Southwest sent a second cease-and-desist letter on February 16, 2006. (*Id.* at 118, 132-34). Still, BoardFirst continued operations. Southwest responded with this lawsuit, filed on May 17, 2006. Southwest seeks to enjoin BoardFirst from using its site for commercial purposes and to recover damages for BoardFirst's past use of the site. Southwest asserts (among others) claims against BoardFirst for breach of contract, for violations of the Computer Fraud and Abuse Act, *18 U.S.C. § 1030*, **[*7]** and for Harmful Access By Computer under Chapter 143 of the Texas Civil Practice and Remedies Code. On June 29, 2007, Southwest filed a motion for partial summary judgment on these claims and on BoardFirst's counterclaims for tortious interference.

On July 30, 2007, BoardFirst filed its response to Southwest's motion for partial summary judgment, and, in the same instrument, purported to file its own cross-motion for partial summary judgment. [2] Southwest filed its summary judgment reply on August 14, 2007. Southwest's motion, being fully briefed, is now ripe for adjudication.

II. Analysis

A. Summary Judgment Legal Standard

Under *Rule 56(c) of the Federal Rules of Civil Procedure*, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)*. "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Only disputes about material facts will preclude the granting of summary judgment. *Id.* . . .

C. Breach of Contract

1. Have the Parties Formed a Valid Contract?

To establish a breach of contract claim under Texas law, a plaintiff must prove: (1) the existence of a valid contract; (2) the plaintiff's performance or tendered performance; (3) the defendant's breach of the agreement; and (4) the plaintiff's resulting damages. *See Dorsett v. Cross, 106 S.W.3d 213, 217* (Tex. App. -- Houston [1 Dist.] 2003, pet. denied). For a contract to exist, st **[*12]** the parties must manifest their mutual assent to be bound by it. *See Alliance Milling Co. v. Eaton, 86 Tex. 401, 25 S.W.614, 616 (1894)*. The law is not concerned with the particular manner in which an offeree makes his assent known to the offeror provided that it is effectively communicated. *See Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 210 (5th Cir. 1998)*. Assent may be manifested directly, as by the written or spoken word, or indirectly, through one's actions or conduct. *See R.R. Mgmt. Co., L.L.C. v. CFS Louisiana Midstream Co., 428 F.3d 214, 222 (5th Cir. 2005)*; *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co., 480 S.W.2d 607, 609 (Tex. 1972)*. "To manifest tacit assent to a contract through conduct, one must '[intend] to engage in the conduct and know [] or ha[ve] reason to know that the other party may infer from his conduct that he assents.'" *Karl Rove & Co. v. Thornburgh, 39 F.3d 1273, 1291 (5th Cir. 1994)* (quoting the *RESTATEMENT (SECOND) OF CONTRACTS § 19(2)*).

Southwest contends that the Terms listed on the home page to its website bound BoardFirst to a contractual obligation once BoardFirst began using the site with knowledge of the Terms. The home page explicitly **[*13]** states that "[u]se of the Southwest websites . . . constitutes acceptance of our Terms and Conditions." (Pl. App. 116-17). From December 20, 2005 through February 1, 2006, those Terms admonished users that "[u]nless you are an approved Southwest travel agent, you may use the Southwest web sites . . . only for personal, non-commercial purposes." (*Id.* at 124). Since February 1, 2006, the Terms elaborated that "third parties may not use the Southwest web sites for the purpose of checking Customers in online or attempting to obtain for them a boarding pass in any certain boarding group." (*Id.* at 120).

The evidence shows that BoardFirst has had knowledge of the Terms as early as when Kate Bell, BoardFirst's founder, received the December 20, 2005 cease-and-desist letter from Southwest. (*Id.* at 93-94). Southwest argues that, in continuing to use the Southwest site despite having actual knowledge of the Terms, BoardFirst effectively manifested its acceptance of Southwest's "offer" to use the site subject to the Terms, thus forming a binding contract between the parties. Courts and commentators have labeled the type of agreement that Southwest seeks to enforce a "browsewrap" agreement. Browsewraps **[*14]** may take various forms but typically they involve a situation where a notice on a website conditions use of the site upon compliance with certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink. *See e.g.,* Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up to Be?, 9 TUL. J. TECH. & INTELL. PROP. 173, 174 (Spring 2007)* ("[A] browsewrap agreement is typically presented at the bottom of the Web site where acceptance is based on the 'use' of the site."); Melissa Robertson, Note, *Is Assent Still A Prerequisite for Contract Formation in Today's E-conomy?, 78 WASH. L. REV. 265, 266 (Feb. 2003)* ("Web sites with browsewrap agreements usually display a notice on the site that states that using the Web site binds us-

ers to the terms and conditions of the site."). A defining feature of a browsewrap license is that it does not require the user to manifest assent to the terms and conditions expressly -- the user need not sign a document or click on an "accept" or "I agree" button. [4] A party instead gives his assent simply by using the website. *See Pollstar v. Gigmania, Ltd., 170 F.Supp.2d 974, 981 (E.D. Cal. 2000)* **[*15]** ("[A] browse wrap license is part of the web site and the user assents to the contract when the user visits the web site.").

4 In this sense browsewraps are distinguishable from so-called "clickwrap" agreements. *Compare Am. Eyewear, Inc., v. Peeper's Sunglasses & Accessories, Inc., 106 F.Supp.2d 895, 905 n. 15 (N.D. Tex. 2000)* ("A 'clickwrap agreement' allows a consumer to assent to the terms of a contract by selecting an 'accept' button on the web site.") *with* Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, 59 BUS. LAW. 279, 280 (Nov. 2003)* (using "the term 'browse-wrap' to mean terms and conditions, posted on a Web site or accessible on the screen to the user of a CD-ROM, that do not require the user to expressly manifest assent, such as by clicking 'yes' or 'I agree.'").

As browsewraps have become more prevalent in today's increasingly e-driven commercial landscape, the courts have been called upon to determine their enforceability. Though the outcomes in these cases are mixed, one general principle that emerges is that the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge **[*16]** of a site's terms and conditions prior to using the site. . . .

Where a website fails to provide adequate notice of the terms, and there is no showing of actual or constructive knowledge, browsewraps have been found unenforceable. The Second Circuit's decision in *Specht v. Netscape Communications Corp., 306 F.3d 17 (2nd Cir. 2002)*, illustrates the point. In *Specht,* users of Netscape's web site were urged to download free software available on the site by clicking on a tinted button labeled "Download". *Id. at 22*. Only if a user scrolled down the page to the next screen did he come upon an invitation to review the full terms of the program's license agreement, available by hyperlink. **[*17]** *Id. at 23*. The full terms, which included an arbitration clause, warned users that they should not download the software if they did not agree to be bound by the terms. *Id. at 24*. The plaintiffs, not seeing the terms, downloaded the software and later sued for violations of federal privacy and computer fraud statutes arising from the use of the software. *Id. at 23-25*. Netscape sought to enforce the arbitration clause contained in the license agreement.

In addressing the validity of the license agreement, the Second Circuit noted that an essential ingredient to contract formation is the mutual manifestation of assent. *Id. at 28-29*. It found, however, that "a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms[.]" *Id. at 29-30*. Because notice of Netscape's license terms was not reasonably conspicuous to an average user, the Court concluded that the plaintiffs were not placed even on constructive notice of the existence of such terms, and thus were not bound by them. *Id. at 30-32*; *see also Ticketmaster Corp. v. Tickets.com, Inc., 2000 U.S. Dist. LEXIS 4553, 2000 WL 525390, at *3 (C.D. Cal. March 27, 2000)* **[*18]** (dismissing Ticketmas-

ter's breach of contract claim where the terms and conditions were situated at the bottom of the home page in "small print" but allowing leave to re-plead if there were facts showing that the defendant had knowledge of the terms and impliedly agreed to them).

The Second Circuit reached the opposite result in *Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2nd Cir. 2004)*, where it was undisputed that the users of a website had actual knowledge of the terms and conditions posted on the site. In that case Register.com, a registrar of internet domain names, was contractually required to make its customers' contact information available free of charge to the public for any lawful purpose. *Id. at 396*. Register included a restrictive legend on its website stating that recipients of data from the website agreed not to use such data to transmit "mass unsolicited, commercial advertising or solicitation via email." *Id.* Notwithstanding the terms of the legend, Verio, Register's competitor, devised an automated robot to retrieve the contact information of new registrants on Register's site and then used that information to send marketing solicitations to the registrants by **[*19]** e-mail, telemarketing, and direct mail. *Id.* Register sued Verio for breach of contract and sought entry of a preliminary injunction, which the district court granted.

On appeal, Verio had conceded that it was aware of the restrictions Register placed on the use of the contact information and that by using such information for its own marketing opportunities it was violating those restrictions. *Id. at 398*. Nevertheless Verio argued that it never became contractually bound to the conditions imposed by the legend because the legend did not appear on the screen until after Verio had made a query and received the desired information from Register's site -- in other words, Verio claimed that it did not receive legally enforceable notice of the terms of use. *Id. at 401*. This argument held little purchase with the Second Circuit given the fact that Verio submitted queries on a daily basis and admitted that it had actual knowledge of the terms on which Register offered access to its data. *Id.* As the Court put it: "It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the **[*20]** offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree." *Id. at 403*. The Court made a point to distinguish the facts at issue there from those in *Specht.* The two cases were "crucially different", the Court found, because in *Specht,* "[t]here was no basis for imputing to the downloaders of Netscape's software knowledge of the terms on which the software was offered", whereas Verio had "admitted that, in entering Register's computers to get the data, it was fully aware of the terms on which Register offered the access." *Id. at 402*; *see also Cairo, Inc. v. Crossmedia Servs., Inc., 2005 U.S. Dist. LEXIS 8450, 2005 WL 756610, at *5 (N.D. Cal. April 1, 2005)* (finding that company's use of a website with knowledge of terms of use posted on the site constituted an acceptance of the terms); *Ticketmaster Corp. v. Tickets.com, Inc., 2003 U.S. Dist. LEXIS 6483, 2003 WL 21406289, at *2 (C.D. Cal. March 7, 2003)* ("[A] contract can be formed by proceeding into the interior web pages after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so.").

This case resembles *Verio* more than *Specht.* There is no dispute that BoardFirst has had actual knowledge of Southwest's **[*21]** Terms at least since Kate Bell received from Southwest the December 20, 2005 cease-and-desist letter in which Southwest informed Bell that the Terms forbid the use of the Southwest website for commercial purposes. (Pl. App. 14, 94, 106-07). Despite

having actual knowledge of the Terms, BoardFirst has continued to use the Southwest site in connection with its business. In so doing BoardFirst bound itself to the contractual obligations imposed by the Terms.

2. Has BoardFirst Breached the Terms?

Having formed a binding contract, the Court next addresses whether BoardFirst breached it. BoardFirst maintains that its activities do not breach the Terms for several reasons. First, it argues that when it uses the Southwest website to retrieve boarding passes for its customers, it does so on behalf of and as the authorized agent of its customers, who, having purchased Southwest tickets, are unquestionably entitled to use southwest.com to print their passes. BoardFirst believes that because it acts as an authorized agent of its and Southwest's customers, it is in effect using the Southwest site as a Southwest customer, not as a prohibited "third party". Southwest's Terms, however, plainly place **[*22]** restrictions on the *use* of the Southwest web site without regard to the user's status. The Terms clearly state that the site may only be used for "personal, non-commercial purposes." As of February 1, 2006, they go on to explain that one example of a prohibited commercial use is where a third party uses the site "for the purpose of checking Customers in online or attempting to obtain for them a boarding pass in any certain boarding group." BoardFirst's activities fall within the heart of this proscription -- it uses the site for the purpose of checking in Southwest customers in an attempt to obtain for them the prized "A" passes. That BoardFirst is authorized to do so by their customers does not make its conduct any less of a violation of the Terms.

BoardFirst suggests that the term "third party" as used in the Terms is ambiguous because it is undefined and because Southwest has admitted that certain persons who are not the flying passenger, such as a spouse or employee of the passenger, may log on to southwest.com to obtain a boarding pass for the flying passenger. BoardFirst has pointed to no record evidence to support any such admissions on Southwest's part, however. (Def. Resp. **[*23]** Brief 7). And even if it did, the hypotheticals presented by BoardFirst seemingly would not run afoul of the Terms, the evident overriding aim of which is to prevent the Southwest site from being used for *commercial purposes.* Only as an example of what would constitute a prohibited commercial purpose do the Terms forbid a third party from using the site to check in a Southwest customer with a view to obtaining a boarding pass in a particular boarding group. While a spouse may very well be a "third party" using the site for the purpose of checking in a Southwest customer, one would presume that the spouse is not profiting from the deal, and hence his or her use would not be for a *commercial* purpose. Contrast that scenario with BoardFirst's use of the Southwest site, which is *always* intended as a money-making proposition. And regardless, the scenarios imagined by BoardFirst are simply not presented to the Court in this case -- the straightforward task before this Court is to decide whether *BoardFirst's* use of southwest.com violates the Terms as a matter of law. Plainly it does. . . .

3. Has Southwest Sustained Damages By Reason of BoardFirst's Conduct?

As support for its claim of damages flowing from BoardFirst's breach of the Terms, Southwest submits the testimony of its designated expert, Wendy Moe, Ph.D., an expert in online consumer behavior and currently an Associate Professor of Marketing at the University of Maryland.

(Pl. App. 43). Moe states that the nature of the service offered by BoardFirst -- where BoardFirst logs onto the Southwest site to check in Southwest passengers for flights -- necessarily diverts Southwest's customers from visiting the Southwest site themselves. (*Id.*). The decreased traffic flow to southwest.com by Southwest customers, Moe concludes, deprives Southwest of valuable selling and advertising opportunities. (*Id.* at 44-46). She also posits that **[*27]** the existence of companies like BoardFirst negatively impacts the Southwest brand. (*Id.* at 45). . . .

Finally, Moe states that the nature of BoardFirst's business interferes with Southwest's brand-building efforts. (*Id.* at 46-47). She states that the fact that Southwest does not divide cabins on its planes into classes is not by accident -- the company intends to project a sense of equality among passengers. (*Id.*). Moe suggests that the services provided by companies like BoardFirst create a de facto "first class" for Southwest flights because they allow for Southwest customers to pay extra money in **[*29]** return for guaranteed priority seating. (*Id.*). This practice, says Moe, serves to undermine the egalitarian service philosophy that Southwest has sought to promote for so many years, which in turn negatively impacts the Southwest brand. (*Id.*). . . .

Realistically speaking, in a world without BoardFirst, a Southwest customer with any hopes of obtaining an "A" pass *must* visit southwest.com to check in for a flight, whereas with Board-First, the same customer could sidestep the Southwest site completely by paying BoardFirst to check in for him or her and picking up the boarding pass at the airport. . . .

D. Computer Fraud and Abuse Act ("CFAA")

The CFAA criminalizes various fraudulent and related activities in connection with the use, or misuse, or computers. *See Fiber Sys. Int'l, Inc. v. Roehrs, 470 F.3d 1150, 1156 (5th Cir. 2006)*; P.C. *Yonkers, Inc. v. Celebrations The Party and Seasonal Superstore, LLC, 428 F.3d 504, 510 (3rd Cir. 2005)*. The statute also provides for a civil cause of action under *§ 1030(g)* . . .

The substantive provision under which Southwest sues is *18 U.S.C. § 1030(a)(2)(C)*, which makes liable a person who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains [] information from any protected computer if the conduct involved an interstate or foreign communication." . . .

The Court begins by examining whether it can be said that BoardFirst "intentionally access[ed]" Southwest's computer. The CFAA does not define the term "access". . . .

Here, BoardFirst's use of Southwest's website easily falls within any reasonable construction of the word "access". There is no dispute that, in conducting its business, BoardFirst logs on to southwest.com and enters the flight confirmation numbers and names of its customers and clicks on the appropriate boxes in order to obtain an "A" boarding pass. (Pl. App. 8-9). Upon inputting this information, BoardFirst immediately learns from the Southwest site what type of boarding pass has been received. (*Id.* at 9). Thus, in its operations BoardFirst makes free use of southwest.com and exchanges information with it. By any interpretation, BoardFirst "intentionally accesses" the Southwest site.

The more vexing question is whether BoardFirst has proved as a matter of law that BoardFirst's access of southwest.com was "without authorization" or "exceed[ed] authorized access" within the **[*38]** meaning of the CFAA. . . .

[T]he question remains whether BoardFirst violated the CFAA simply by virtue of its breach of the Terms. Congress did not define the phrase "without authorization", *see Phillips, 477 F.3d at 219*, but it did include a definition of the phrase "exceeds authorized access", which "means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." *18 U.S.C. § 1030(e)(6)*. A number of courts in other jurisdictions have indicated, consistent with Southwest's theory, that a computer use which violates the terms of a contract made between a user and the computer owner is unauthorized or "exceeds authorized access", and hence violates the CFAA. *See e.g., EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 62 (1st Cir. 2003)* (noting that "[a] lack of authorization could be established by an explicit statement on the website restricting access," giving rise to a CFAA violation if a website user thereafter violated the terms of use); *EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577, 582-82 (1st Cir. 2001)* **[*40]** (finding that defendant's use of a computerized "scraper" to glean information from plaintiff's website likely exceeded authorized access where such use at least implicitly violated a confidentiality agreement); *Southwest Airlines v. Farechase, Inc., 318 F.Supp.2d 435, 439-40 (N.D. Tex. 2004)* (finding that Southwest sufficiently stated CFAA claim where Southwest had directly informed the defendant that its scraping of southwest.com was unauthorized); *Register.com, Inc. v. Verio, Inc., 126 F.Supp.2d 238, 251 (S.D.N.Y. 2000)* (finding that plaintiff successfully established that defendant's use of its website was unauthorized within the meaning of the CFAA simply by virtue of the fact that plaintiff objected to the defendant's use); *Am. Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444, 450 (E.D. Va. 1998)* (concluding that defendants' use of AOL membership to harvest e-mail addresses of AOL users was unauthorized because such actions violated AOL's terms of service). These cases, however, have received their share of criticism from commentators. *See e.g.* Christine D. Galbraith, *Access Denied: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet* **[*41]** *Websites, 63 MD. L. REV. 320, 368 (2004)* (arguing that the CFAA was designed to prevent computer hacking and "was never intended to afford website owners with a method for obtaining absolute control over access to and use of information they have chosen to post on their publicly available Internet sites); Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes, 78 N.Y.U. L. REV. 1596, 1600 (Nov. 2003)* (proposing "that courts should reject contract-based notions of authorization, and instead limit the scope of unauthorized access statutes to cases involving the circumvention of code-based restrictions."); Mark A. Lemley, *Place and Cyberspace, 91 CAL. L. REV. 521, 528 (March 2003)* ("An even more serious problem is the judicial application of the [CFAA], which was designed to punish malicious hackers, to make it illegal -- indeed, criminal -- to seek information from a publicly available website if doing so would violate the terms of a 'browsewrap' license."). . . .

[I]t is at least arguable here that BoardFirst's access of the Southwest website is not at odds with the site's intended function; after all, the site is designed to allow users to obtain boarding passes for Southwest flights via the computer. In no sense can BoardFirst be considered an "out-

side hacker[] who break[s] into a computer" given that southwest.com is a publicly available website that anyone can access and use. True, the Terms posted on southwest.com do not give sanction to the particular *manner* in which BoardFirst uses the site -- to check in Southwest customers for financial gain. But then again *§ 1030(a)(2)(C)* does not forbid the *use* of a protected computer for any prohibited *purpose*; instead it prohibits one from intentionally **[*44]** *accessing* a computer "without authorization". As previously explained, the term "access", while not defined by the CFAA, ordinarily means the "freedom or ability to . . . make use of" something. Here BoardFirst or any other computer user obviously has the *ability* to make use of southwest.com given the fact that it is a publicly available website the access to which is not protected by any sort of code or password. *Cf. Am. Online, 121 F.Supp.2d at 1273* (remarking that it is unclear whether an AOL member's violation of the AOL membership agreement results in "unauthorized access").

Whether such use is "without authorization", for now, shall remain an open question, particularly given the relative inattention the parties have paid to the issue in their summary judgment papers (Southwest cites to only one case interpreting the meaning of unauthorized access under the CFAA while BoardFirst has cited none at all) and the lack of clarity as to whether Southwest is proceeding under the "without authorization" or "exceeds authorized access" prong of *§ 1030(a)(2)(C)*. The Court will allow the parties to submit trial briefs on these issues no later than October 1, 2007. In their briefs the parties **[*45]** may also wish to address whether the "rule of lenity" -- which counsels courts to construe ambiguities in a criminal statute, even when applied in a civil setting, in a narrow way -- should apply to this Court's interpretation of the CFAA. *See e.g. Lockheed Martin Corp. v. Speed, 2006 U.S. Dist. LEXIS 53108, 2006 WL 2683058, at *7 (M.D. Fl. Aug. 1, 2006)* ("To the extent 'without authorization' or 'exceeds authorized access' can be considered ambiguous terms, the rule of lenity, a rule of statutory construction for criminal statutes, requires a restrained, narrow interpretation.").

Even assuming that Southwest is able to prove unauthorized access, it still must show that, by virtue of such access, BoardFirst obtained information from a "protected computer" and that "the conduct involved an interstate or foreign communication." *18 U.S.C. § 1030(a)(2)(C)*. Under the CFAA a "protected computer" may be one "which is used in interstate or foreign commerce or communication[.]" *18 U.S.C. § 1030(e)(2)(B)*. Southwest has submitted evidence showing that its website is hosted on Southwest's computer system located in Dallas, Texas and that the system engages in interstate commerce and communication on a daily basis. (Pl. App. **[*46]** 115-16). But for purposes of a *§ 1030(a)(2)(C)* violation, Southwest must do more; it must also establish that BoardFirst obtained "information" from its protected computer as a result of the unauthorized use. Southwest points to no evidence on that score. Nor has it shown that BoardFirst's use of its computer itself "involved an interstate or foreign communication" as required by the statute. For these reasons, and construing the available evidence in a light favorable to BoardFirst, the Court finds that Southwest has failed to establish its entitlement to summary judgment on its CFAA claim.

Nor has Southwest proved as a matter of law that it has satisfied the requisite amount of "damage" or "loss" required by the CFAA. In its summary judgment brief Southwest suggests that BoardFirst's conduct has caused Southwest damage in excess of the statute's requisite $

5,000 threshold. (Pl. MSJ Brief 21). Under the CFAA, the term "damage" means "any impairment to the integrity or availability of data, a program, a system, or information." *18 U.S.C. § 1030(e)(8)(A)*. There is no evidence in this case that BoardFirst has impaired the integrity of Southwest's computer system in any way.

Southwest **[*47]** may still maintain a civil cause of action, however, if it shows that it suffered a "loss" of more than $ 5,000 during any one-year period. Under the CFAA "loss" means "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *18 U.S.C. § 1030(e)(11)*. As evidence of "loss", Southwest cites to the declaration of Jill Howard Allen, Southwest's corporate representative on damages, who states only that "Southwest spent at least $ 6,500 within a single one year period in investigating and responding to BoardFirst's unauthorized access to Southwest's computer system." (Pl. App. 118). [5] While investigative and responsive costs fit within the concept of "loss" as used in the CFAA, *see e.g. Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F. Supp. 2d 627, 2007 WL 2085358, at *18 (E.D. Pa. July 20, 2007)* and *P.C. of Yonkers, Inc. v. Celebrations! The Party and Seasonal Superstore, L.L.C., 2007 U.S. Dist. LEXIS 15216, 2007 WL 708978, at *5 (D.N.J. March 5, 2007)*, **[*48]** the Court finds that Allen's fairly conclusory testimony, taken alone, is insufficient to prove as a matter of law that Southwest has proven "loss" under *§ 1030(a)(5)(B)(i)*. Allen fails to identify the precise steps taken by Southwest in "investigating and responding to" BoardFirst's unauthorized access. There is thus no basis upon which the Court may determine whether Southwest's responsive efforts constitute "reasonable" costs incurred by the company due to BoardFirst's purported unauthorized access of the Southwest computer system. *18 U.S.C. § 1030(e)(11)* (stating that "loss" means "any *reasonable* cost to any victim . . ..)" (emphasis added). For all of the reasons just discussed, the Court finds that Southwest is not entitled to summary judgment on its claim under the CFAA.

5 BoardFirst contends that Allen's deposition testimony, given two days before Allen made her declaration, "demonstrates that her Declaration is not accurate." (Def. Resp. Brief at 9). BoardFirst fails to cite to any evidence to support any such discrepancy, however. *See* LOC. R. N.D. TEX. 56.5(c).

E. Harmful Access to Computer Claim Under Texas Law

Southwest also seeks to hold BoardFirst liable for violating Chapter **[*49]** 143 of the Texas Civil Practices and Remedies Code, which allows a civil cause of action by "a person who is injured or whose property has been injured as a result of a violation under Chapter 33, Penal Code, . . . if the conduct constituting the violation was committed knowingly or intentionally." *TEX. CIV. PRAC. & REM. CODE § 143.001(a)*. Southwest claims that BoardFirst's intentional use of its website for improper commercial purposes constitutes a violation of *§ 33.02(a) of the Texas Penal Code*, which makes it an offense for a person to "knowingly access[] a computer, computer network, or computer system without the effective consent of the owner."

There is no dispute here that in conducting its business BoardFirst knowingly accesses Southwest's computer system, located in Dallas. Nor can there be any real dispute whether that access was "without the effective consent of the owner." *Section 33.01 of the Texas Penal Code* defines the phrase "effective consent" negatively by providing that "[c]onsent is not effective if . . . used for a purpose other than that for which the consent was given." *TEX. PENAL CODE § 33.01(12)(E)*. Because southwest.com is a publicly available website, in **[*50]** a sense it may be said that Southwest invites or gives consent to virtually anyone to use it. Southwest conditions such use, however, on compliance with the Terms, which, as discussed at length above, forbid the site from being used for commercial purposes and expressly prohibit third parties from using the site to check in Southwest passengers for flights. BoardFirst's use of the Southwest site falls squarely within these prohibitions, and Bell has admitted that BoardFirst does not have Southwest's authorization to use the site in the manner in which it does. (Pl. App. 98). Because the undisputed summary judgment evidence shows that BoardFirst uses Southwest's computer "for a purpose other than that for which the consent was given", BoardFirst lacks Southwest's effective consent in using the site. By knowingly accessing Southwest's computer without Southwest's effective consent, the Court finds that BoardFirst has violated *§ 33.02 of the Texas Penal Code* as a matter of law.

Having established a *§ 33.02* violation, Southwest may maintain a civil cause of action against BoardFirst under *§ 143.001 of the Texas Civil Practice and Remedies Code* provided that it can show that it has been "injured" **[*51]** by reason of BoardFirst's *§ 33.02* violation. To support its claim of injury, Southwest refers the Court to its discussion of its claim for "damage" or "loss" with respect to its CFAA claim. (Pl. MSJ Brief at 23). "Damage" and "loss", however, are defined terms that carry specialized meanings under the CFAA, whereas *§ 143.001* speaks in terms of a person who is "injured". Southwest has failed to demonstrate that its discussion of "damage" or "loss" in connection with its CFAA claim is translatable to its *§ 143.001* claim. For instance, while certain investigative and responsive costs may be recoverable as a "loss" under the CFAA, Southwest provides no authority that the same types of costs constitute an "injury" within the meaning of *§ 143.001*. The Court finds that Southwest's *§ 143.001* claim shall therefore remain for trial.

F. Southwest Has Demonstrated its Entitlement to a Permanent Injunction

Southwest seeks to permanently enjoin BoardFirst from using the Southwest site in violation of the Terms. . . . Southwest has demonstrated each of the necessary requirements for the issuance of a permanent injunction. Accordingly, the Court **[*57]** finds that BoardFirst should be permanently enjoined from using southwest.com in a way that breaches the Terms posted on the site. . . .