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 TICKETMASTER L.L.C.

10 UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 vs.

15 PRESTIGE ENTERTAINMENT,
 16 INC., a New York corporation,
 PRESTIGE ENTERTAINMENT
 17 WEST, INC., a California
 corporation, RENAISSANCE
 18 VENTURES LLC, a Connecticut
 limited liability company,
 19 NICHOLAS LOMBARDI, STEVEN
 K. LICHTMAN, and DOES 1 through
 20 10, inclusive,

21 Defendants.

Case No. 17-cv-07232-ODW-JC

**PLAINTIFF'S OPPOSITION TO
 DEFENDANTS' MOTION TO
 DISMISS COMPLAINT PURSUANT
 TO FRCP 12**

[Filed concurrently with Proposed
 Order]

Judge: Hon. Otis D. Wright
 Date: February 5, 2018
 Time: 1:30 p.m.
 Place: Courtroom 5D

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. SUMMARY OF ALLEGATIONS	1
III. ARGUMENT	3
A. Ticketmaster States A Valid Claim For Copyright Infringement.....	4
1. Defendants Overstate The Pleading Requirements For A Copyright Infringement Claim	4
2. The Complaint Satisfies <i>MDY Indus.</i>	6
a. Defendants Exceeded The Scope Of Their License.....	6
b. The Claim Is Grounded In An Exclusive Right Of Copyright.....	8
3. Defendants’ Other Arguments Lack Merit.....	10
B. Ticketmaster States A Valid DMCA Claim	11
C. Ticketmaster States A Valid CFAA Claim.....	14
1. Defendants Accessed Ticketmaster’s System “Without Authorization” As Defined In The CFAA When They Ignored Ticketmaster’s Cease And Desist Letter.....	14
2. Defendants “Exceeded” Any Remaining Authorized Access To The Ticketmaster’s System As Defined In The CFAA.....	17
3. The CFAA Claim Is Not “Void For Vagueness.”	18
4. Ticketmaster Sufficiently Pleads Damages	19
D. Ticketmaster States A Valid CDAFA Claim	20
E. Ticketmaster States A Valid Claim For Breach Of Contract	22
1. The Liquidated Damages Provision Is Enforceable	22
2. Ticketmaster Sufficiently Pleads Compensatory Damages.....	25
F. Ticketmaster States A Valid Claim For Fraud.....	26
G. The Court Has Jurisdiction Over The State Law Claims	28
H. The Court Has Jurisdiction Over All Of The Defendants	28
IV. CONCLUSION	29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Alaska Stock, LLC v. Pearson Educ., Inc.,
975 F. Supp. 2d 1027 (D. Alaska 2013)..... 9

Auble v. Pac. Gas & Elec. Co.,
55 F. Supp. 2d 1019 (N.D. Cal. 1999)..... 28

Bayol v. Zipcar, Inc.,
78 F. Supp. 3d 1252 (N.D. Cal. 2015)..... 23

Bly-Magee v. California,
236 F.3d 1014 (9th Cir. 2001)..... 26

Building Permit Consultants, Inc. v. Mazur,
122 Cal. App. 4th 1400 (2004)..... 26

City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
68 Cal. App. 4th 445 (1998)..... 26

Cosmetic Ideas, Inc. v. IAC/InterActiveCorp,
606 F.3d 612 (9th Cir. 2010)..... 5

Craigslist Inc. v. 3Taps Inc.,
964 F. Supp. 2d 1178 (N.D. Cal. 2013)..... 16, 18

Craigslist, Inc. v. Kerbel,
2012 WL 3166798 (N.D. Cal. Aug. 2, 2012)..... 12

DocMagic, Inc. v. Ellie Mae, Inc.,
745 F. Supp. 2d 1119 (N.D. Cal. 2010)..... 21, 22

Effects Assocs. Inc. v. Cohen,
908 F.2d 555 (9th Cir.1990)..... 5

Facebook, Inc. v. Grunin,
77 F. Supp. 3d 965 (N.D. Cal. 2015)..... 14, 16, 21

Facebook, Inc. v. Power Ventures, Inc.,
2009 WL 1299698 (N.D. Cal. July 23, 2009)..... passim

Facebook, Inc. v. Power Ventures, Inc.,
2010 WL 3291750 (N.D. Cal. July 20, 2010)..... 21

Facebook, Inc. v. Power Ventures, Inc.,
844 F.3d 1058 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 313 (2017)..... passim

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
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23	
24	
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26	
27	
28	

<i>Field v. Google, Inc.</i> , 412 F. Supp. 2d 1106 (D. Nev. 2006)	5
<i>FT Travel-New York, LLC v. Your Travel Ctr., Inc.</i> , 112 F. Supp. 3d 1063 (C.D. Cal. 2015)	25
<i>Galbraith v. Cty. of Santa Clara</i> , 307 F.3d 1119 (9th Cir. 2002)	25
<i>Hale v. Atlantic Recording Corp.</i> , 2013 WL 12138708 (C.D. Cal. Sept. 3, 2013)	4
<i>I.A.E. v. Shaver</i> , 74 F.3d 768 (7th Cir. 1996)	5
<i>In re Cellphone Termination Fee Cases</i> , 193 Cal. App. 4th 298 (2011)	24
<i>In re Facebook Privacy Litig.</i> , 791 F. Supp. 2d 705 (N.D. Cal. 2011), <i>aff'd</i> , 572 F. App'x 494 (9th Cir. 2014)	21
<i>Incorp Servs. Inc. v. Incsmart.Biz Inc.</i> , 2012 WL 3685994 (N.D. Cal. Aug. 24, 2012)	18
<i>Jacobsen v. Katzer</i> , 535 F.3d 1373 (Fed. Cir. 2008)	10
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	19
<i>L.A. Printex Indus., Inc. v. Aeropostale, Inc.</i> , 676 F.3d 841 (9th Cir. 2012)	4
<i>Lasica v. Am. Online, Inc.</i> , 2015 WL 12791494 (C.D. Cal. Oct. 8, 2015)	9
<i>Lazar v. Superior Court</i> , 12 Cal. 4th 631 (1996)	28
<i>Lee v. City of Los Angeles</i> , 250 F.3d 668 (9th Cir. 2001)	25
<i>LGS Architects, Inc. v. Concordia Homes of Nev.</i> , 434 F.3d 1150 (9th Cir. 2006), <i>overruled on other grounds by</i> <i>Perfect 10, Inc. v. Google, Inc.</i> , 653 F.3d 976 (9th Cir. 2011)	8, 10

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
1 <i>Reinsdorf v. Skechers U.S.A.</i> ,	
2 922 F. Supp. 2d 866 (C.D. Cal. 2013).....	9
3 <i>Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.</i> ,	
4 421 F. 3d 1307 (Fed. Cir. 2005).....	9
5 <i>Ticketmaster L.L.C. v. RMG Techs., Inc.</i> ,	
6 507 F. Supp. 2d 1096 (C.D. Cal. 2007).....	passim
7 <i>U.S. v. Drew</i> ,	
8 259 F.R.D. 449 (C.D. Cal. 2009)	19, 21
9 <i>U.S. v. Lawson</i> ,	
10 2010 WL 9552416 (D.N.J. Oct. 12, 2010).....	17, 19
11 <i>U.S. v. Mazurie</i> ,	
12 419 U.S. 544 (1975)	19
13 <i>U.S. v. Nosal</i> ,	
14 676 F.3d 854 (9th Cir. 2012).....	16, 17, 18
15 <i>Utility Consumers’ Action Network, Inc. v. AT&T Broadband of S.</i>	
16 <i>Cal., Inc.</i> ,	
17 135 Cal. App. 4th 1023 (2006).....	22, 24
18 <i>Vess v. Ciba-Geigy Corp. USA</i> ,	
19 317 F.3d 1097 (9th Cir. 2003).....	27
20 <i>Warshaw v. Xoma Corp.</i> ,	
21 74 F.3d 955 (9th Cir. 1996).....	26
22 <i>Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme</i> ,	
23 433 F.3d 1199 (9th Cir. 2006).....	28

STATUTES

22 17 U.S.C. § 106.....	5
23 17 U.S.C. § 1201(a)(1)	12
24 17 U.S.C. § 1201(a)(2)	12
25 17 U.S.C. § 1201(a)(3)(A).....	12
26 17 U.S.C. § 1201(a)(3)(B).....	12
27 17 U.S.C. § 1201(b)(1)	12
28 18 U.S.C. § 1030(a)	14, 18

1
2
3
4
5
6
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19
20
21
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23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
18 U.S.C. § 1030(e)	14, 19
18 U.S.C. § 1030(g)	20
28 U.S.C. § 1367	28
California Penal Code § 502	20, 21, 22
Civ. Code § 1671(d)	22
Civ. Code § 1710(4)	26

RULES

Federal Rule of Civil Procedure 8	4, 6, 25
Federal Rule of Civil Procedure 9(b)	26, 27
Federal Rule of Civil Procedure 12(b)(6)	3, 25, 27

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Online commerce—and online ticketing especially—is under constant attack
4 from illicit bot use. Ticketmaster has spent years in a war of attrition with users of
5 bots, diverting substantial time, energy and resources in an often-vain effort to
6 maintain a level playing field for consumers who simply want a fair chance to buy a
7 ticket. California, New York, and the federal government have passed laws
8 expressly prohibiting the use of bots to buy tickets, but Defendants, addicted to
9 unseemly ticket-resale profits, remain undeterred. Ticketmaster therefore turns, as
10 it has successfully in the past, to litigation against major bot offenders.

11 In their motion to dismiss Ticketmaster’s Complaint, Defendants have the
12 temerity to describe their prolific bot use as beneficial to Ticketmaster and its
13 consumers.¹ Such delusional posturing is no substitute for valid legal argument,
14 and as discussed below, Defendants’ motion, rife with citations to irrelevant cases
15 and *ipse dixit* assertions that contradict Ticketmaster’s express factual allegations,
16 should be denied in its entirety.

17 **II. SUMMARY OF ALLEGATIONS**

18 Ticketmaster makes tickets available on behalf of its venue, promoter and
19 entertainment clients for purchase through Ticketmaster’s website and mobile
20 applications (“mobile app” or “app”). (Compl. ¶¶ 3, 18.) The website and mobile
21 app clearly state, upon access, that use of those platforms is governed by the Terms
22 of Use (“TOU”), which can readily be reviewed through a simple hyperlink. (*Id.* ¶
23 25.) Moreover, users cannot create an account or consummate a ticket purchase
24 without expressly assenting to the TOU. (*Id.* ¶ 26-27.)

25
26 ¹ Defendants characterize the Complaint as an attack on the ticket resale industry. (Mot. 1:9-
27 15.) To be clear, this case is *not* about stopping resales of tickets that have been procured in
28 accordance with Ticketmaster’s Terms of Use and applicable law. Instead, this case is about
fairness, and Defendants’ unfair use of technical measures to give themselves an unfair advantage
over consumers in the ticket buying process.

1 The TOU expressly prohibits the use of bots on the website and the app.
 2 (Compl. ¶¶ 30, 32, Ex. A.) The TOU also prohibits the use of any method intended
 3 to circumvent security measures such as CAPTCHA (which, contrary to
 4 Defendants’ motion, is not a mere “field” for the entry of consumer information but
 5 rather a widely-used technological measure intended to detect and thwart the use of
 6 bots). (*Id.* ¶¶ 4, 21, 30, Ex. A.) In addition, the TOU prohibits purchases
 7 exceeding stated per-event ticket limits, attempts to hide or misrepresent the
 8 purchaser’s identity, and page requests, reserve requests and page recopying that
 9 exceed stated limits.² (*Id.* ¶ 30, 33, 34, Ex. A.) The prohibition on the use of bots
 10 and the limits on page and reserve requests and page recopying are part of an
 11 “Ownership of Content and Grant of Conditional License” (“License”), which
 12 authorizes users to “view this Site and its Content to purchase tickets as permitted
 13 by these TOU for non-commercial purposes only if, as a condition precedent,”
 14 users agree to and abide by listed restrictions. (*Id.* ¶ 30, Ex. A.)

15 The Complaint alleges in exhaustive detail the various methods Defendants
 16 use in violation of the TOU, the License, and Ticketmaster’s legal rights.
 17 Defendants use bots to (i) circumvent CAPTCHA (Compl. ¶ 51), (ii) request event
 18 pages and tickets at volumes far exceeding the TOU limits (*id.* ¶¶ 45-47), (iii)
 19 manipulate tickets in and out of temporary hold, rendering them unavailable for
 20 purchase by legitimate consumers (*id.* ¶ 45), and, ultimately, (iv) purchase
 21 substantial volumes of tickets (*id.* ¶¶ 47, 55). Defendants also use surreptitious
 22 methods to conceal their identity, including the use of colocation facilities to
 23 obscure computer IP addresses and thereby evade detection.³ (*Id.* ¶¶ 43, 53.)

24 ² The specific limits are 1000 page requests or 800 reserve requests in a 24-hour periods, and
 25 re-copying “transactional events or ticketing pages . . . more than once during applicable 3-second
 26 intervals.” (*Id.* ¶ 30, Ex. A.) As a practical matter, these limits can only be exceeded through the
 use of bots and, as such, they pose no realistic threat of liability to consumers who refrain from
 using bots to find and purchase tickets.

27 ³ Defendants note that Ticketmaster, like other companies, uses colocation facilities. (Mot.
 28 13:10-16.) But unlike a large online company with substantial bandwidth needs, a purchaser of
 tickets for a live entertainment event has no legitimate reason to rely on colocation facilities as

1 Through their systematic misconduct, Defendants commandeer significant portions
2 of available tickets for popular events, and, overall, have placed at least 313,528
3 ticket orders from 9,047 different accounts. (*Id.* ¶¶ 40, 47, 48, 55, 69, 88.)

4 Even assuming, *arguendo*, that Defendants pay stated ticket prices and fees
5 when purchasing tickets, they still inflict significant harm on Ticketmaster, its
6 clients, and legitimate consumers who simply want a fair chance to buy tickets
7 without resorting to extortionate resale prices. By using bots and other methods to
8 angle for an unfair advantage, Defendants interfere with the ability of Ticketmaster
9 and its clients to gauge and manage ticket demand, circumvent flows of commerce
10 on the website and mobile app, and require Ticketmaster to go to extraordinary
11 lengths and expense to try to detect and prevent the use of bots and to cancel
12 purchases where bot use is timely detected. (Compl. ¶¶ 45, 52, 53, 65, 71.) And, to
13 the extent these nefarious efforts succeed, it is Ticketmaster that bears the brunt of
14 consumer discontent for a perceived lack of fairness in the ticket market.

15 **III. ARGUMENT**

16 Defendants have moved under Federal Rule of Civil Procedure 12(b)(6) to
17 dismiss Ticketmaster’s claims for copyright infringement, violations of the Digital
18 Millennium Copyright Act, the federal Computer Fraud and Abuse Act,
19 California’s Computer Data Access and Fraud Act, breach of contract and fraud.⁴
20 Defendants also challenge the state law claims for lack of subject matter
21 jurisdiction and, with the exception of Prestige West, Inc., they challenge personal
22 jurisdiction in California even though Ticketmaster has been harmed in California
23 and the TOU designates California as the forum for disputes. (Compl. ¶ 2.)
24 Defendants’ arguments are all without merit.

25
26
27 part of that process.

28 ⁴ Some claims are asserted only against Doe defendants and are not at issue in this motion.

1 **A. Ticketmaster States A Valid Claim For Copyright Infringement.**

2 As summarized above, the TOU for Ticketmaster’s website and mobile app
3 includes a License, compliance with which is a condition precedent for accessing
4 and copying Ticketmaster’s website and mobile app pages. (Compl. ¶ 30, Ex. A.)
5 The TOU states, as a condition for use, that the user will not employ bots or exceed
6 various stated limits (which, practically speaking, can only be exceeded through the
7 use of bots). (*Id.*) Ticketmaster’s theory of copyright infringement—that the
8 License functions as a condition precedent to access Ticketmaster’s copyrighted
9 works—is consistent with Ninth Circuit law and has previously been upheld
10 specifically in the case of Ticketmaster itself. *See Ticketmaster L.L.C. v. RMG*
11 *Techs., Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007) (“RMG”) (use of bots in
12 violation of Ticketmaster’s TOU constituted copyright infringement).

13 In seeking dismissal of Ticketmaster’s copyright claim, Defendants argue
14 that Ticketmaster has not adequately identified the copyrighted works that
15 Defendants have infringed, and that Ticketmaster’s infringement theory is barred by
16 the Ninth Circuit’s holding in *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d
17 928 (9th Cir. 2011). (Mot. 4-10.) The analysis below proves otherwise.

18 **1. Defendants Overstate The Pleading Requirements For A**
19 **Copyright Infringement Claim.**

20 “[A]llegations of copyright infringement need only satisfy the minimal
21 notice-pleading requirements of Federal Rule of Civil Procedure 8.” *Hale v.*
22 *Atlantic Recording Corp.*, 2013 WL 12138708, *2 (C.D. Cal. Sept. 3, 2013). To
23 state a claim, Ticketmaster need only plead “(1) ownership of a valid copyright, and
24 (2) copying of constituent elements of the work that are original.” *See L.A. Printex*
25 *Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012).

26 The Complaint meets both of these requirements. Ticketmaster alleges
27 ownership of valid copyrights by alleging that its website and app “are works of
28 authorship protected by copyright law” (Compl. ¶ 28), that it “owns valid U.S.

1 Copyright registrations in its website and mobile app and specific portions thereof”
 2 (*id.* ¶ 87), and that it has applied for or registered 22 such works (*id.* ¶ 28).⁵ “A
 3 website may constitute a work of authorship fixed in a tangible medium of
 4 expression.” *RMG*, 507 F. Supp. 2d at 1104 (finding that “Ticketmaster has thus
 5 satisfied the first element of its copyright claim”).

6 Ticketmaster also alleges that Defendants copied hundreds of thousands of
 7 pages from those copyrighted works without permission. (Compl. ¶¶ 40, 47, 48,
 8 55, 69, 88.) The Ninth Circuit and this District in particular have long recognized
 9 that “viewing” a page on a website or app causes a copy of that page to be
 10 downloaded onto the viewer’s computer or device, an action that violates the
 11 exclusive reproduction right granted in 17 U.S.C. section 106 if unauthorized. *See*
 12 *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517-18 (9th Cir. 1993);
 13 *RMG*, 507 F. Supp. 2d at 1105-06.⁶ Defendants’ downloading of pages from
 14 Ticketmaster’s website and mobile app was unauthorized: Defendants used bots to
 15 repeatedly view and copy pages from the website and app far in excess of stated
 16 limits, and they purchased tickets in quantities in excess of stated limits for
 17 unauthorized commercial purposes. (Compl. ¶¶ 40-55.) Such allegations satisfy the
 18 “minimal” pleading requirements for copyright infringement claims, as this Court
 19 has previously affirmed.

20 Furthermore, Ticketmaster need not identify each and every image that was
 21 infringed in order to state a viable claim. In *Perfect 10, Inc. v. Cybernet Ventures*,

22 ⁵ At the time it filed the Complaint, Ticketmaster had applied for registrations to several
 23 copyrighted elements. (Compl. ¶ 28.) Ticketmaster anticipates receiving the registrations
 24 shortly, but in either event, the mere applications themselves support a copyright infringement
 claim. *See Cosmetic Ideas, Inc. v. IAC/InterActiveCorp*, 606 F.3d 612, 618 (9th Cir. 2010).

25 ⁶ Defendants argue that viewing a web or app page cannot create an infringing copy because
 26 websites and apps are made so others can view them. (Mot. 8:18-28.) But such pages may only
 27 be viewed without infringement if they are viewed in a manner consistent with the copyright
 28 owner’s terms, as only then does the owner expressly or impliedly grant a nonexclusive license to
 do so. *See Effects Assocs. Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990); *I.A.E. v. Shaver*, 74
 F.3d 768, 775 (7th Cir. 1996); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1115-16 (D. Nev.
 2006). When the implied license is exceeded, infringement occurs. *See Oddo v. Ries*, 743 F.2d
 630, 634 (9th Cir. 1984); *I.A.E.*, 74 F.3d at 775.

1 *Inc.* 167 F. Supp. 2d 1114 (C.D. Cal. 2001), for example, this District expressly
 2 rejected an argument that a plaintiff must “state, in its complaint, every copyright
 3 relied on, every individual image in the magazines that is being infringed, every
 4 image on specific web pages that does infringe, or the dates of any infringement.”
 5 *Id.* at 1120. In denying a motion to dismiss for lack of specificity, the Court
 6 explained as follows:

7 The purpose of modern rules of civil procedure is to
 8 avoid a regime of heightened pleading . . . Here
 9 [Plaintiff] Perfect 10 alleges the existence of hundreds,
 10 even thousands of infringing photographs within the
 11 various websites that Adult Check has placed within its
 12 ‘family.’ . . . Requiring a statement of each and every
 13 example would defeat the regime established by Rule 8.

14 167 F. Supp. 2d at 1120. The Complaint is specific enough to support a copyright
 15 infringement claim under this standard. *See RMG*, 507 F. Supp. 2d at 1106-10.

16 **2. The Complaint Satisfies *MDY Indus. v. Blizzard Entm’t*.**

17 Under *MDY*, “for copyright infringement [to be] based on breach of a license
 18 agreement, (1) the copyright must exceed the scope of the defendant’s license and
 19 (2) the copyright owner’s complaint must be grounded in an exclusive right of
 20 copyright (e.g., unlawful reproduction or distribution).” 629 F.3d at 940. The
 21 Complaint readily satisfies those requirements.

22 **a. Defendants Exceeded The Scope Of Their License.**

23 Ticketmaster’s TOU includes a License to “view this Site and its Content to
 24 purchase tickets as permitted by these TOU for non-commercial purposes only if, as
 25 a condition precedent,” users agree to listed restrictions.⁷ (Compl. ¶ 30, Ex. A.)
 26 This non-commercial License “is expressly conditioned on your preexisting
 27 agreement to comply with, and your actual compliance with, each of the

28 ⁷ “Site” as defined includes “applications” and, thus, the mobile app. (Compl. ¶ 30, Ex. A.)

1 provisions” described in the License. (*Id.* ¶ 31, Ex. A.) The License requires users
2 to honor the following restrictions and protocols, among others:

- 3 • Copying from the Site or Apps for “non-
4 commercial purposes”;
- 5 • Copying fewer than 1,000 pages of the Site in any
6 24-hour period;
- 7 • Making fewer than 800 reserve requests on the
8 Site in any 24-hour period;
- 9 • Copying transactional event or ticketing pages no
10 more than once during any three-second interval;
- 11 • Reproducing tickets in the same format or medium
12 as provided by the Site;
- 13 • Not modifying any portion of the Site to create
14 derivative works;
- 15 • Not using any robot, spider, or other device,
16 tool, or process to reproduce the Site or its
17 Content, and thereby violate the reproduction
18 limits of the license;
- 19 • Not using any automated software or computer
20 system to obtain tickets or other items available on
21 the Site for the same reasons,
- 22 • Not taking any action that may impose an
unreasonably large load on Ticketmaster’s
computer infrastructure;
- Not decoding or reverse engineering any tickets or
underlying algorithms or barcodes used on or in
the production of tickets on the Site; and
- Not trying to circumvent any technological
measure that effectively controls access to, or the
rights in, the Site or Content.

23 (*Id.* ¶ 30-31, Ex. A.)

24 By “condition[ing] . . . [its] grant of a limited license on . . . compliance with
25 . . . [the Grant’s] restrictions,” Ticketmaster’s TOU created conditions precedent
26 that limit the scope of its License and render users liable for copyright infringement
27 if they exceed that scope.⁸ Defendants have done exactly that by robotically

28 ⁸ By contrast, in *MDY*, the Ninth Circuit noted that “nothing . . . conditions [video game

1 copying too many web and app pages, copying them too quickly, and buying too
 2 many tickets, all for a commercial purpose. (Compl. ¶¶ 40-55.) Defendants are
 3 therefore liable for copyright infringement under Ninth Circuit law. *See, e.g., LGS*
 4 *Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1156 (9th Cir. 2006)
 5 (“When the licensee exceeds the scope of the license granted by the copyright
 6 holder, the licensee is liable for infringement.”), *overruled on other grounds by*
 7 *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011); *Rano v. Sipa Press,*
 8 *Inc.*, 987 F.2d 580, 586 (9th Cir. 1993) (use of copyrighted work in excess of
 9 license establishes copyright infringement liability); *RMG*, 507 F. Supp. 2d at 1106-
 10 10 (breach of Ticketmaster’s TOU exceeded scope of license and rendered
 11 defendant liable for copyright infringement).

12 **b. The Claim Is Grounded In An Exclusive Right Of**
 13 **Copyright.**

14 Ticketmaster’s copyright infringement claim is grounded in “an exclusive
 15 right of copyright,” namely the right to control the reproduction and creation of
 16 derivative works from its website and mobile app. Numerous cases affirm that
 17 terms of use like those at issue here can support a copyright infringement when the
 18 terms are violated:

- 19 • The same TOU restrictions at issue here previously supported a copyright
 20 infringement claim in *RMG*. In that case, *RMG* copied pages from the
 21 Ticketmaster website in order to create bots that would exceed the scope
 22 of Ticketmaster’s License, infringing Ticketmaster’s copyrights in its site
 23 by “using automated devices, making excessive requests, and interfering
 24 with the proper working of the website when it used and/or designed
 25 applications that access ticketmaster.com...”⁹ 507 F. Supp. 2d at 1110.

26 company] Blizzard’s grant of a limited license on players’ compliance with TOU §4’s
 27 restrictions.” 629 F.3d at 940.

28 ⁹ *MDY* did not, as Defendants suggest, reverse, overrule, or criticize *RMG*, despite the fact that
RMG was repeatedly cited to the *MDY* court in appellate briefing. *Cf.* Response Brief of

- 1 • A “commercial purpose” restriction on copying like Ticketmaster’s has
2 been held a condition precedent that supports a copyright infringement
3 claim under *MDY*. See *Lasica v. Am. Online, Inc.*, 2015 WL 12791494
4 (C.D. Cal. Oct. 8, 2015) (denying motion to dismiss copyright
5 infringement claim on that basis).
- 6 • A numerical limitation on copying like Ticketmaster’s supported a
7 copyright infringement claim in *MDY* itself. See 629 F.3d at 940, quoting
8 with approval *Storage Tech. Corp. v. Custom Hardware Eng’g &*
9 *Consulting, Inc.*, 421 F. 3d 1307, 1315-16 (Fed. Cir. 2005). Subsequent
10 cases have denied motions to dismiss copyright infringement claims based
11 on *MDY*’s approval of numerical copying conditions. See *Alaska Stock,*
12 *LLC v. Pearson Educ., Inc.*, 975 F. Supp. 2d 1027, 1043 (D. Alaska
13 2013); *Pac. Stock, Inc. v. Pearson Educ., Inc.*, 927 F. Supp. 2d 991, 998
14 (D. Haw. 2013).
- 15 • Temporal, geographic, equipment, and media restrictions on copying like
16 Ticketmaster’s have been held conditions precedent that support copyright
17 infringement liability under *MDY*. See *Phoenix Techs. Ltd. v. VMware*
18 *Inc.*, 2017 WL 2001981, *6 (N.D. Cal May 11, 2017) (equipment and site
19 restrictions on copying were conditions that supported copyright
20 infringement claims); *Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d 866,
21 876-77 (C.D. Cal. 2013) (temporal, geographic and media restriction on
22 copying were conditions that supported copyright infringement claim).
23 Restrictions on copying that could impose unreasonable or large loads on
24 Ticketmaster’s computer systems, including restrictions on bots or other
25 software programs that create those loads, qualify as conditions precedent
26 under this authority.

27
28 Appellees and Opening Brief of Cross-Appellants in *MDY Indus., LLC v. Blizzard Entm’t, Inc.*,
2009 WL 5538914 (9th Cir. Oct. 28, 2009) (Appellate Brief).

- 1 • Use restrictions on copyrighted works like Ticketmaster’s were held
2 conditions precedent that supported a copyright infringement claim. *See*
3 *LGS Architects*, 434 F.3d at 1156-57. Ticketmaster’s prohibitions against
4 the use of computer software “bots,” “spiders,” and other devices to copy
5 the Site, as well as its prohibition against using automated software or
6 computer systems to obtain large numbers of tickets from the Site, qualify
7 as conditions precedent under this authority.

8 All of the restrictions in Ticketmaster’s License qualify as conditions
9 precedent because they all limit the scope of the License, they all condition the
10 License on the user’s compliance with those restrictions, and they all are “are vital
11 to enable the copyright holder to retain the ability to benefit from the work[s]”
12 Ticketmaster has created. *See Jacobsen v. Katzer*, 535 F.3d 1373, 1380 (Fed. Cir.
13 2008). All of these restrictions support a copyright infringement claim against
14 Defendants consistent with *MDY*.

15 **3. Defendants’ Other Arguments Lack Merit.**

16 The other miscellaneous arguments proffered by Defendants also fail.
17 Defendants argue, for example, that the TOU does not create a condition precedent
18 because “a user cannot even access the TOU until after accessing the TM site.”
19 (Mot. 7:18-19.) But Defendants’ copyright infringement is based, not on the mere
20 accessing of the homepage or the TOU itself, but on breaches of the TOU through
21 the use of prohibited technology to copy excessive pages at an excessive speed in
22 order to purchase an excessive quantity of tickets for the purposes of reselling them,
23 all in excess of the “non-commercial” scope of Ticketmaster’s License. It is
24 Defendants’ conduct *after* accessing Ticketmaster’s homepage and TOU that
25 exceeds the scope of the License and infringes Ticketmaster’s copyright in its
26 website and mobile app.

27 Defendants also argue that the TOU is unenforceable because it makes
28 “every single TM user” liable for copyright infringement. (Mot. 8:8.) This is

1 another straw-man argument. Ticketmaster expressly permits consumers to “view
2 [and therefore, necessarily copy] this Site and its Content to purchase tickets as
3 permitted by these terms for non-commercial purposes” (Compl. ¶ 30, Ex. A), and
4 millions of consumers do exactly that without fear of copyright infringement
5 liability because they honor the restrictions in the License.

6 As a last resort, Defendants characterize the License restrictions they violate
7 as “gobbledygook.” (Mot. 9:13.) Restrictions on “non-commercial use” or the use
8 of bots are not “gobbledygook,” nor are warnings not to copy more than 1000 pages
9 per day, make more than 800 page requests per day, or copy transactional pages
10 faster than once every three seconds. But even assuming, *arguendo*, that some
11 consumers do not fully comprehend these terms, they are at no risk of violating the
12 terms unless they are using bots, without which no reasonable consumer could
13 generate enough system activity to violate the License. Thus, Defendants are not
14 like “every single TM user” who uses a computer or phone to purchase tickets for
15 personal use. In fact, Defendants victimize “every single TM user” who wants a
16 fair chance to buy tickets at the face price.

17 **B. Ticketmaster States A Valid DMCA Claim.**

18 Defendants challenge Ticketmaster’s claim under the Digital Millennium
19 Copyright Act (“DMCA”), arguing that the Complaint does not sufficiently identify
20 the “works that were allegedly accessed” or “plead facts showing circumvention of
21 a technological measure.” (Mot. 10-13.) These arguments are also without merit.

22 To begin with, Defendants overstate the requirements for pleading a DMCA
23 claim. “As with a copyright infringement claim, there is no heightened pleading
24 requirement that mandates detailed allegations” for DMCA claims. *Facebook, Inc.*
25 *v. Power Ventures, Inc.*, 2009 WL 1299698, *5 (N.D. Cal. July 23, 2009), citing
26 *RMG*, 507 F. Supp. 2d at 1112. Ticketmaster need only allege facts showing that
27 Defendants “circumvent[] a technological measure that effectively controls access
28

1 to a work protected” by copyright law in order to state a DMCA claim. 17 U.S.C.
2 §1201(a)(1).¹⁰

3 Ticketmaster meets the governing standard by alleging that it created
4 “substantial measures intended to prevent the use of . . . bots ” on its copyrighted
5 website and mobile app. (Compl. ¶¶ 21, 51, 103.) Ticketmaster deploys a security
6 program called CAPTCHA that is designed to distinguish between human users and
7 bots and to halt further progress if, as can occur with bots, the CAPTCHA cannot
8 be solved. (*Id.* ¶¶ 21, 51-52.) Defendants, in turn, use bots (possibly assisted by
9 “CAPTCHA farm” laborers) to circumvent CAPTCHA and gain access to
10 copyrighted material. (*Id.* ¶¶ 21, 51-53, 103.)

11 Furthermore, the “works” to which CAPTCHA effectively controls access—
12 the website and mobile app—are protected by copyright law as described above.
13 (*See Id.* ¶ 28; Opp. 4-10, *supra.*) Under the DMCA, “a technological measure
14 ‘effectively controls access to a work’ if the measure . . . requires the application of
15 information, or a process...with the authority of the copyright owner, to gain access
16 to the work.” 17 U.S.C. § 1201(a)(3)(B). CAPTCHA qualifies as a “technological
17 measure” under that definition, as it controls access to Ticketmaster’s website and
18 mobile app by requiring the application of information, or a process, with
19 Ticketmaster’s permission. Similarly, “‘circumvent a technological measure’
20 means...to avoid, bypass...or impair a technological measure, without the authority
21 of the copyright owner.” *Id.* § 1201(a)(3)(A). Defendants’ use of bots and other
22 measures “to avoid, bypass or impair” CAPTCHA constitutes “circumvention” of
23 that technological measure under the DMCA. *See RMG*, 507 F. Supp. 2d at 1111
24 (“Plaintiff employs ‘technological measures’ such as CAPTCHA to block
25 automated access to its copyrighted ticket purchase pages”); *Craigslist, Inc. v.*
26 *Kerbel*, 2012 WL 3166798, *9 (N.D. Cal. Aug. 2, 2012) (CAPTCHA is a

27 ¹⁰ The DMCA also prohibits trafficking in devices that circumvent technological measures
28 pursuant to 17 U.S.C. sections 1201(a)(2) and 1201(b)(1). Discovery might yield evidence to
support a DMCA claim under that theory as well.

1 technological measure under DMCA because it “protects Plaintiff’s rights in its
2 website—a protected work” under copyright law); *ProSolutions Software, Inc. v.*
3 *DemandForce, Inc.*, 2013 WL 12139120, *2 (C.D. Cal. Mar. 7, 2013)
4 (“ProSolutions has sufficiently alleged that DemandForce violated ProSolutions’
5 copyright rights by circumventing those technological barriers via use of a ‘bot’[;]”
6 motion to dismiss denied); *Facebook v. Power Ventures*, 2009 WL 1299698, *5
7 (complaint alleging use of automated programs to circumvent technological
8 measures to block access stated a DMCA claim; motion to dismiss denied).

9 Defendants make the *ipse dixit* assertion that CAPTCHA is not a
10 technological measure (Mot. 11-12), but for purposes of this motion, Defendants
11 are bound by Ticketmaster’s allegation that CAPTCHA *is* a technological
12 measure—an allegation that is reinforced by the above-referenced cases which
13 agree that CAPTCHA is a technological measure that supports a DMCA claim.¹¹
14 Defendants also assert that Ticketmaster “has not even alleged that Defendants used
15 bots to complete CAPTCHA requests” (Mot. 12), yet the Complaint alleges that
16 Defendants *do* in fact use bots to complete CAPTCHA requests and overcome
17 Ticketmaster’s efforts to block bot use. (Compl. ¶¶ 52-53, 103.) In addition,
18 Defendants argue that their use of colocation facilities and their deletion of cookies
19 should be disregarded because such activity could theoretically have an innocent
20 purpose. (Mot. 12-13.) But Ticketmaster alleges that Defendants’ use of colocation
21 facilities and their deleting of cookies does *not* have an innocent purpose, but rather
22 is used to circumvent Ticketmaster’s technological measures, breach its contract,
23 infringe its copyrights, defraud Ticketmaster, and deny the public a fair chance to
24 purchase the best tickets at the best price. (Compl. ¶¶ 18-55.) That a given
25 technology might have legitimate purposes does not immunize Defendants from
26 liability for using them for an improper purpose, to the detriment of Ticketmaster,

27
28 ¹¹ Defendants also argue that splunk does not qualify as a technological measure under the
DMCA, but Ticketmaster’s DMCA claim is based on CAPTCHA, not splunk.

1 its clients, and its customers. In short, Ticketmaster has stated a valid claim under
2 the DMCA.

3 **C. Ticketmaster States a Valid CFAA Claim.**

4 Defendants next argue that Ticketmaster fails to state a valid claim under the
5 federal Computer Fraud and Abuse Act (“CFAA”) because the Complaint (i)
6 alleges only violations of contractual terms, (ii) does not adequately allege a “loss
7 of authority” by Defendants, and (iii) fails to properly plead damages or loss. (Mot.
8 13-18.) Defendants also argue that the claim is “void for vagueness.” None of
9 these arguments has merit.

10 **1. Defendants Accessed Ticketmaster’s System “Without
11 Authorization” As Defined In The CFAA When They
12 Ignored Ticketmaster’s Cease And Desist Letter.**

13 The CFAA prohibits intentionally accessing a computer system “without
14 authorization” or in excess of authorized access. 18 U.S.C. § 1030(a)(2).¹² A
15 defendant accesses a computer system without authorization “when he or she has
16 no permission to access a computer or when such permission has been revoked
17 explicitly. Once permission has been revoked, technological gamesmanship or the
18 enlisting of a third party to aid in access will not excuse liability.” *Facebook, Inc.*
19 *v. Power Ventures, Inc.*, 844 F.3d 1058, 1067 (9th Cir. 2016), *cert. denied*, 138 S.
20 Ct. 313 (2017) (“*Power Ventures*”).

21 Ticketmaster revoked permission for Defendants to access its website and
22 mobile app except through authorized means by sending a cease and desist letter
23 that explained Defendants’ unauthorized conduct in exhaustive detail—including
24 the use of bots, overloading Ticketmaster’s system, and exceeding ticket purchase

25 ¹² More specifically, a defendant violates Section 1030(a)(2) by “(1) intentionally access[ing] a
26 computer, (2) without authorization or exceeding authorized access, [] (3) thereby obtain[ing]
27 information (4) from any protected computer (if the conduct involved an interstate or foreign
28 communication) . . . (5) [resulting in] loss to one or more persons during any one-year period
aggregating at least \$5,000 in value.” *Facebook, Inc. v. Grunin*, 77 F. Supp. 3d 965, 971 (N.D.
Cal. 2015). Defendants do not deny that they intentionally accessed a computer and obtained
information, nor that Ticketmaster’s systems are a “protected computer” under Section
1030(e)(2).

1 limits—and expressly demanded that Defendants refrain from these activities.
2 (Compl. Ex. E.) Furthermore, Ticketmaster erected technological barriers to block
3 Defendants from engaging in them. (*Id.* ¶¶ 4, 21-23, 51, 61.) Defendants, however,
4 persisted in circumventing those barriers by deploying bots from different
5 application servers, colocation facilities, and/or IP addresses to reserve thousands of
6 tickets through disguised accounts, which strained the Ticketmaster system and
7 deprived consumers of fairly priced tickets. (*Id.* ¶¶ 5-6, 8, 21-23, 43, 45-46, 48, 50,
8 53, 55.) That establishes CFAA liability under Ninth Circuit law.

9 In *Power Ventures*, the Ninth Circuit explained why a defendant that used
10 bots to disseminate messages to Facebook users after receiving a cease and desist
11 letter violated the CFAA:

12 Power deliberately disregarded the cease and desist letter
13 and accessed Facebook’s computers without
14 authorization to do so. It circumvented IP barriers that
15 further demonstrated that Facebook had rescinded
16 permission for Power to access Facebook’s computers.
17 We therefore hold that, after receiving written
18 notification from Facebook on December 1, 2008, Power
19 accessed Facebook’s computers ‘without authorization’
20 within the meaning of the CFAA and is liable under that
21 statute.

22 844 F.3d at 1068. Access that violates a cease and desist letter is “without
23 authorization” under the CFAA.¹³

24
25 ¹³ A cease and desist letter need not use specific statutory language to inform a defendant that
26 further access of the computer system is “without authorization.” In *Power Ventures*, Facebook
27 sent a cease and desist letter stating that defendant had violated Facebook’s terms of use and
28 demanded that Power stop using Facebook’s content “or otherwise interacting with Facebook
through automated scripts [i.e., bots].” 844 F.3d at 1067. Ticketmaster’s cease and desist letter
contained a similar sentiment by listing provisions of the TOU and demanding that Defendants
cease such activity. (Compl., Ex. E.) Thus, Defendants’ argument that Ticketmaster’s letter did
not revoke access for purposes of the CFAA (Mot. 14 n.6) is without merit.

1 The *Power Ventures* holding is not unique. District courts in California
2 repeatedly uphold CFAA claims based on the revocation of access conveyed in a
3 cease and desist letter. See, e.g., *Craigslist Inc. v. 3Taps Inc.*, 964 F. Supp. 2d
4 1178, 1184 (N.D. Cal. 2013) (denying motion to dismiss CFAA claim and holding
5 that defendant accessed website “without authorization” after plaintiff sent cease
6 and desist letter and erected technological barriers to block continued access);
7 *Grunin*, 77 F. Supp. 3d at 972 (plaintiff sufficiently pled CFAA claim by alleging
8 access was “without authorization” after sending two cease and desist letters and
9 implementing technological blocks). In contrast, no court in any federal circuit has
10 held that access after explicit revocation fails to meet the definition of “without
11 authorization” under the CFAA.

12 Defendants try to overcome these authorities by citing a criminal case, *U.S. v.*
13 *Nosal*, 676 F.3d 854 (9th Cir. 2012), and asserting an argument the Ninth Circuit
14 has already rejected. (See Mot. 14-15.) As *Power Ventures* explained:

15 *Nosal I* is materially distinguishable. First, *Nosal I*
16 involved employees of a company who arguably
17 exceeded the limits of their authorization. Here, by
18 contrast, Facebook explicitly revoked authorization for
19 any access, and this case does not present the more
20 nuanced question of exceeding authorization.

21 844 F.3d at 1068. Similarly, here, Ticketmaster explicitly revoked permission
22 through its cease and desist letter and subsequent technological barriers. (See
23 Compl. ¶ 53, Ex. E.)

24 The Ninth Circuit also rejected the argument, made here by Defendants, that
25 unsuspecting Internet users would be subject to CFAA liability for ordinary Internet
26 use:

27 Facebook clearly notified Power of the revocation of
28 access, and Power intentionally and admittedly refused to

1 comply. *Nosal*'s concerns about overreaching or an
2 absence of culpable intent simply do not apply here,
3 where an individualized cease-and-desist letter is a far
4 cry from the permission skirmishes that ordinary Internet
5 users may face.

6 *Power Ventures*, 844 F.3d at 1069. *Nosal*'s policy concerns do not apply here.

7 **2. Defendants "Exceeded" Any Remaining Authorized Access**
8 **To The Ticketmaster's System As Defined In The CFAA.**

9 To the extent Defendants ever had a right to access Ticketmaster's website,
10 they exceeded that right. Defendants did not merely violate Ticketmaster's TOU;
11 their massive volume of activity strained Ticketmaster's infrastructure and forced
12 Ticketmaster to create new technical countermeasures at significant expense. (*See*
13 *generally* Compl.) It may be true in other circumstances that a mere terms of use
14 violation, without more, does not violate the CFAA, but the circumstances here
15 involve far more, considering the strain Defendants' actions placed on
16 Ticketmaster's computers.

17 In *U.S. v. Lawson*, for example, the government was allowed to proceed with
18 a CFAA claim against a ticket broker who accessed Ticketmaster's website in
19 violation of the TOU *and* "code based restrictions" (*i.e.*, technological barriers).
20 2010 WL 9552416, at *1 (D.N.J. Oct. 12, 2010). The court reasoned that "breaches
21 of both contract- and code-based restrictions," such as circumventing CAPTCHA,
22 can form the basis of a CFAA claim. *Id.* at *6. Such contract- and code-based
23 violations wreak havoc on Ticketmaster's systems, profits, and goodwill, which is
24 why Ticketmaster implemented such TOU provisions in the first instance. Thus, to
25 the extent Defendants retain any right to access Ticketmaster's systems, they
26 exceeded that authorized access by jumping Ticketmaster's anti-circumvention
27
28

1 fences and damaging Ticketmaster’s website, mobile app, and computer systems,
2 thereby violating the CFAA.¹⁴

3 3. The CFAA Claim Is Not “Void For Vagueness.”

4 Defendants next argue that Ticketmaster’s CFAA claim is “void for
5 vagueness” because imposing CFAA liability would “convert every single TM user
6 into a criminal.” (Mot. 17:19 (emphasis in original).) *Craigslist Inc. v. 3Taps Inc.*,
7 964 F. Supp. 2d 1178, rejected a similar argument. In that case, the defendants
8 continued to scrape Craigslist’s website after Craigslist sent a cease and desist letter
9 and erected technological barriers. Rejecting the argument that, under Craigslist’s
10 rationale, every user would be in violation of the law, the court explained that “the
11 average person does not use ‘anonymous proxies’ to bypass an IP block set up to
12 enforce a banning communicated via personally-addressed cease-and-desist letter.”
13 *Id.* at 1184 (denying motion to dismiss CFAA claim). The court also emphasized
14 the importance of allowing websites, even websites that initially grant access to the
15 public, the right to exclude or limit access to its site, analogizing the CFAA to
16 trespass laws: “Store owners open their doors to the public, but occasionally find it
17 necessary to ban disruptive individuals from the premises.” *Id.* at 1187.

18 Here, Defendants bombard Ticketmaster’s website and mobile app with
19 millions of automated, bot-generated ticket requests and circumvent Ticketmaster’s
20 technological blocks. “Every single TM user” does not engage in this misconduct,
21 does not damage Ticketmaster’s computer systems, and is not liable under the
22 CFAA as Defendants are.

23 But an even simpler answer to Defendants’ argument is that the “void for
24 vagueness” doctrine does not apply in a civil action, as it is instead a criminal law

25
26 ¹⁴ Defendants cite no cases to the contrary. They cite *Incorp Servs. Inc. v. Incsmart.Biz Inc.*,
27 2012 WL 3685994, at *1 (N.D. Cal. Aug. 24, 2012), as an application of *Nosal* to “use
28 restrictions,” but *Incorp* did not involve a “terms of use” agreement or any other contractual
relationship. Rather, the plaintiff in *Incorp* alleged that defendants violated the CFAA by using
search engines like Google to fraudulently display false ads under 1030(a)(4). *Incorp* does not
apply to this case.

1 doctrine designed to ensure that criminal statutes give actual notice or “fair
 2 warning” of prohibited conduct. *McBoyle v. U.S.*, 283 U.S. 25, 27 (1931).¹⁵
 3 Moreover, “the more important aspect of vagueness doctrine is not actual notice,
 4 but the other principal element of the doctrine—the requirement that a legislature
 5 establish minimal guidelines to govern law enforcement.” *Kolender v. Lawson*, 461
 6 U.S. 352, 358 (1983). The case Defendants cite, *U.S. v. Drew*, focused on whether
 7 MySpace’s terms of use sufficiently guided law enforcement, and ultimately held
 8 that the terms of use did not do so. 259 F.R.D. 449, 464 (C.D. Cal. 2009). These
 9 policy concerns are irrelevant in this civil matter. Also, *Drew* made clear that terms
 10 of use violations do not per se foreclose a CFAA claim: “[T]his Court concludes
 11 that an intentional breach of the [MySpace Terms of Service] can potentially
 12 constitute accessing the MySpace computer/server without authorization and/or in
 13 excess of authorization under the statute.” *Id.* at 462. Here, Defendants
 14 intentionally, repeatedly, and fraudulently violated Ticketmaster’s TOU to gain
 15 access and ultimately purchase tickets on Ticketmaster’s website and mobile app,
 16 which is punishable under the CFAA.

17 **4. Ticketmaster Sufficiently Pleads Damages.**

18 “Damage” and “loss” are broadly defined in the CFAA. Loss includes “any
 19 reasonable cost to any victim, including the cost of responding to an offense,
 20 conducting a damage assessment, and restoring the data, program, system, or
 21 information to its condition prior to the offense, and any revenue lost, cost incurred,
 22 or other consequential damages incurred because of interruption of service.” 18
 23 U.S.C. § 1030(e)(11). Damage means “any impairment to the integrity or
 24 availability of data, a program, a system, or information.” *Id.* § 1030(e)(8).

25
 26 ¹⁵ Also, a vagueness challenge cannot be decided on a motion to dismiss. “It is well established
 27 that vagueness challenges to statutes which do not involve First Amendment freedoms must be
 28 examined in the light of the facts of the case at hand.” *U.S. v. Mazurie*, 419 U.S. 544, 550 (1975).
 The factual record here remains undeveloped, rendering a determination on a motion to dismiss
 inappropriate. *See Lowson*, 2010 WL 9552416, at *7.

1 Ticketmaster alleges that bots cause technological interference that increases
2 operational costs. (Compl. ¶ 8.) Ticketmaster spends money to operate CAPTCHA
3 and splunk (*id.* ¶ 23) and to expand security to identify and block bots (*id.* ¶ 57).
4 Also, bots deprive Ticketmaster of revenue streams by bypassing ads and other
5 services (*id.* ¶ 67), and when bots are timely detected, Ticketmaster incurs
6 additional costs and delayed profits when it cancels the bot-related purchases (*id.* ¶
7 71). Ticketmaster need not provide an invoice of its expenses related to these and
8 other costs resulting from Defendants’ CFAA violations to sufficiently plead
9 damages in excess of \$5000.

10 Moreover, these costs were incurred within a one-year period of time and
11 will continue every year until Defendants cease their activities. While an action
12 must be commenced “within two years of the date of the act complained of or the
13 date of the discovery of the damage,” 18 U.S.C. § 1030(g), the plain language of
14 this statute reflects that *damage or loss*—not the revocation of access—starts the
15 clock on the statute of limitations. Defendants’ contention that Ticketmaster’s
16 CFAA claim is barred because Ticketmaster sued more two years after sending its
17 cease and desist letter contradicts the plain language of the statute. (Mot. 19:3-5.)
18 Ticketmaster sufficiently pleads that Defendants’ conduct occurred in the past two
19 years. (*See, e.g.*, Compl. ¶ 59.)

20 **D. Ticketmaster States A Valid CDAFA Claim.**

21 Ticketmaster sufficiently pleads violations of California Penal Code section
22 502, also known as the Computer Data Access and Fraud Act (“CDAFA”). The
23 CDAFA targets the knowing *use* of data from a computer system without
24 permission, as opposed to the *access* of a computer system, which is addressed by
25 the CFAA. (*See* Mot. 11:2-12.) Defendants concede, however, that “‘use’ and
26 ‘access’ are the same in this context . . . and there is no meaningful way of
27 distinguishing an act taken in the process of buying tickets on the TM site as being
28 one of ‘access’ as opposed to ‘use’ or *vice versa*.” (*Id.* 21:12-17.) Ticketmaster

1 agrees: access and use are the same where, as here, a cease and desist letter barred
2 further improper access or use of the website. *See Power Ventures*, 844 F.3d at
3 1069 (CFAA and CDAFA analyses are “similar” because Facebook sent cease and
4 desist letter); *see also Grunin*, 77 F. Supp. 3d at 972 (same).

5 The similarity here between access and use dooms Defendants’ motion.
6 Ticketmaster’s letter contained a detailed list of infractions (Compl. Ex. E), leaving
7 no doubt that Defendants knew that continuing to use the website and the app in the
8 manner described by the letter was expressly unauthorized. By continuing to access
9 and use the website and app without permission, Defendants violated the CDAFA.¹⁶

10 Further, Defendants did more than improperly use the Ticketmaster website
11 and mobile app (in violation of the TOU) after receiving the cease and desist letter.
12 They also circumvented technological barriers on Ticketmaster’s platforms to
13 purchase hundreds of thousands of tickets and resell them at immense profit. *See*
14 *Oracle USA, Inc. v. Rimini St., Inc.*, 191 F. Supp. 3d 1134, 1143 (D. Nev. 2016)
15 (subsequent use of data obtained by bots in violation of terms of use violated
16 CDAFA). Circumventing “technical or code-based barriers” constitutes improper
17 use. *See In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 715 (N.D. Cal. 2011),
18 *aff’d*, 572 F. App’x 494 (9th Cir. 2014).

19 Defendants’ reliance on *U.S. v. Drew* in support of their CDAFA argument is
20 misplaced. *Drew* addressed the CFAA rather than the CDAFA, which is broader
21 and should not be conflated with the CFAA for pleading purposes. *See NetApp,*
22 *Inc. v. Nimble Storage, Inc.*, 41 F. Supp. 3d 816, 832 (N.D. Cal. 2014) (“[section]
23 502 is an entirely different statute than the CFAA, and Nimble identifies no
24 authorities holding that the two laws must be co-extensive”); *DocMagic, Inc.*

25 ¹⁶ Defendants cite an interim order in the *Power Ventures* case to argue that use of a website
26 after receiving a cease and desist letter does not impose liability under Section 502. (Mot, 21:17-
27 26 (discussing *Facebook, Inc. v. Power Ventures, Inc.*, 2010 WL 3291750, at *11 (N.D. Cal. July
28 20, 2010)).) However, the Ninth Circuit subsequently held in *Power Ventures* that “when
Facebook sent the cease and desist letter, Power . . . knowingly accessed and without permission
took, copied, and made use of Facebook’s data . . . [and] violated section 502.” The Ninth
Circuit’s holding is what binds this Court.

1 *v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1150 (N.D. Cal. 2010) (CDAFA
2 “prohibits a wider range of conduct” than CFAA and “contains no loss requirement
3 in order to support a private right of action.”). Defendants also cite *Perkins v.*
4 *LinkedIn Corp.*, 53 F. Supp. 3d 1190 (N.D. Cal. 2014), where *individuals* sued a
5 professional networking website, LinkedIn, and failed to plead that they erected
6 technological barriers to prevent LinkedIn’s access of their individual computers.
7 But unlike the individual plaintiffs in *Perkins*, Ticketmaster is a major company
8 that erected elaborate technological barriers to prevent the access and use of its
9 website and mobile app through the use of bots.

10 Considering the range of conduct prohibited by Section 502(c)(1)-(7),
11 Ticketmaster more than sufficiently pleads use of its site without permission, by
12 detailing Defendants’ improper use in a cease and desist letter and Defendants’
13 circumvention of code-based barriers.

14 **E. Ticketmaster States A Valid Claim For Breach Of Contract.**

15 The liquidated damages provision in Ticketmaster’s TOU provides for
16 damages of 25 cents for each page or reserve request in a 24-hour period that
17 exceeds limits of 1000 or 800, respectively. (Compl. ¶ 81, Ex. A.) Defendants
18 challenge Ticketmaster’s claim for breach of the TOU, arguing that the liquidated
19 damages provision is unenforceable and that there are no compensatory damages.
20 Both arguments are without merit.

21 **1. The Liquidated Damages Provision Is Enforceable.**

22 “Decisions interpreting [California Civil Code section 1671(d)] have created
23 a two-part test for determining whether a liquidated damages provision is valid: (1)
24 fixing the amount of actual damages must be impracticable or extremely difficult,
25 and (2) the amount selected must represent a reasonable endeavor to estimate fair
26 compensation for the loss sustained.” *Utility Consumers’ Action Network, Inc. v.*
27 *AT&T Broadband of S. Cal., Inc.*, 135 Cal. App. 4th 1023, 1029 (2006).

1 Defendants argue that Ticketmaster fails to allege facts reflecting an attempt
 2 to reasonably calculate damages caused by abusive use of the website and mobile
 3 app. (Mot. 27:2-3.) Defendants also argue that damages are not impracticable or
 4 extremely difficult to assess and do not reflect a reasonable endeavor to estimate
 5 fair compensation for the loss sustained. (*Id.* 25:11-14;20-24.) In addition, they
 6 argue that the liquidated damages provision cannot be “unilaterally” set by
 7 Ticketmaster. (*Id.* 25:20-24; 26:21.)

8 To the contrary, Ticketmaster expressly alleges that at the time the liquidated
 9 damages were set, it would have been impracticable and extremely difficult to fix
 10 the actual damages suffered, and that the stated damages are based on a reasonable
 11 endeavor to estimate fair compensation for the harm Ticketmaster would suffer
 12 from a violation of the TOU. (Compl. ¶¶ 21, 23, 65, 71, 81.) Such allegations are
 13 sufficient for pleading purposes.¹⁷ *See, e.g., Bayol v. Zipcar, Inc.*, 78 F. Supp. 3d
 14 1252, 1259 (N.D. Cal. 2015).

15 Also, the liquidated damages provision is limited in scope and represents a
 16 valid attempt to apply only where the full extent of harm is obviously difficult to
 17 quantity. In *MySpace, Inc. v. The Globe.com, Inc.*, this District held that breach of
 18 a website’s terms of use by making bulk requests through automated devices causes
 19 harm that is impracticable or extremely difficult to determine:

20 Defendant breached the TOS Agreement by bulk
 21 transmission of unapproved, unsolicited commercial e-
 22 messages. The costs associated with this activity include
 23 not only infrastructure costs, such as additional
 24 bandwidth, and monitoring costs, they are also rife with
 25 large hidden costs. Such hidden costs include those
 26 associated with deterrence (legal fees, software, etc.),
 27 depletion of customer goodwill, . . . Therefore, the

28 ¹⁷ If more facts are required, Ticketmaster requests leave to amend accordingly.

1 damages related to Defendant’s breach are, in fact,
2 *impracticable or extremely difficult to determine.*
3 2007 WL 1686966, at *1 (C.D. Cal. Feb. 27, 2007) (emphasis added).
4 Ticketmaster pleads similar costs and damage to its infrastructure, in addition to the
5 expense of bringing the present lawsuit. (Compl. ¶¶ 21, 23, 65, 71, 81.)

6 In addition, the liquidated damages are based on Ticketmaster’s reasonable
7 endeavor to estimate fair compensation, the second element required for a valid
8 liquidated damages provision. The liquidated damages provision only applies when
9 users exceed 1000 page requests and/or over 800 reserve requests in a 24-hour
10 period. (Compl. ¶¶ 81, Ex. A.) Normal, human interaction with the website and
11 mobile app is extremely unlikely to implicate these numbers. Thus, the liquidated
12 damages provision is unlikely ever to apply to consumers who are not abusing the
13 Ticketmaster system.

14 The parties need not negotiate the liquidated damages provision at arm’s
15 length to satisfy the “reasonable endeavor” element. *See Utility Consumers*, 135
16 Cal App. 4th at 1038 (“In the context of mass consumer transactions involving
17 standardized form contracts, those standards are not necessarily undermined by
18 non-negotiated liquidated damages provisions.”); *see also In re Cellphone*
19 *Termination Fee Cases*, 193 Cal. App. 4th 298, 322 (2011). Liquidated damages in
20 consumer contracts remove uncertainty for both parties and reduce litigation.
21 *Utility Consumers*, 135 Cal App. 4th at 1038. Defendants inveigh about the
22 importance of advance negotiation “by the parties,” but Ticketmaster need not
23 negotiate a liquidated damages provision with each of its (millions of) customers in
24 order to have a valid liquidated damages provision.

25 Defendants’ other arguments—that Ticketmaster did not specify which TOU
26 version applied to each instance of breach, and that the liquidated damages
27 provision varied from version to version (Mot. 27:2-22)—are also without merit.
28 Ticketmaster alleges that a liquidated damages provision applied at the time of each

1 and every breach (Compl. ¶ 82), which must be accepted as true for the purposes of
 2 this motion. Ticketmaster need not specifically plead each violation and the TOU
 3 in effect at the time in order to satisfy Rule 8. Moreover, Ticketmaster’s allegation
 4 that the liquidated damages provisions has remained substantially the same over the
 5 course of revisions is validated by a comparison of the two most recent versions
 6 (see Compl. ¶¶ 81, 82), which, despite some language changes, apply to the same
 7 scope of conduct. As to earlier versions, the allegation that they were also similar
 8 must be accepted as true for purposes of this motion.¹⁸

9 2. Ticketmaster Sufficiently Pleads Compensatory Damages.

10 Without citing a single case, Defendants claim that Ticketmaster’s harm is
 11 “speculative” because Defendants paid full price for their illegally procured tickets.
 12 (Mot. 28:3-5.) It is well-established, however, that loss of goodwill, customer
 13 loyalty, and trust in business are valid forms of damages. *RMG*, 507 F. Supp. 2d at
 14 1115 (loss of goodwill); *Openwave Messaging, Inc. v. Open-Xchange, Inc.*, 2016
 15 WL 6393503 (N.D. Cal. Oct. 28, 2016) (loss of goodwill and reputation); *FT*
 16 *Travel-New York, LLC v. Your Travel Ctr., Inc.*, 112 F. Supp. 3d 1063 (C.D. Cal.
 17 2015) (loss of standing, goodwill, and reputation sufficient under New York law to
 18 survive motion to dismiss). Ticketmaster suffered a loss of customer goodwill and
 19 tangible damages to its website and app infrastructure (Compl. ¶¶ 6, 8, 21, 65, 67,
 20 70, 71, 149), which is more than sufficient to allege compensatory damages.¹⁹

21
 22 ¹⁸ Defendants note that a liquidated damages provision in effect a decade ago—beyond the
 23 statute of limitations for any claims at issue here—specified \$10 per violation as opposed to
 24 current assessment of 25 cents. That Ticketmaster has altered the amount of its liquidated
 25 damages with the passage of time does not render the more recent versions unenforceable. Nor,
 in any event, was the former version anywhere close to the limit that has been permitted by courts
 in this District. See *MySpace, Inc.*, 2007 WL 1686966, at *10 (C.D. Cal. Feb. 27, 2007)
 (upholding liquidated damages provision of \$50 per message sent with bot).

26 ¹⁹ Defendants also cite allegations of their own regarding Ticketmaster’s purchase cancellation
 27 practices. These allegations are not only irrelevant, but may not be considered in support of a
 28 12(b)(6) motion. See *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), *overruled on other*
grounds by Galbraith v. Cty. of Santa Clara, 307 F.3d 1119, 1125-26 (9th Cir. 2002).

1 **F. Ticketmaster States A Valid Claim For Fraud.**

2 Ticketmaster alleges that Defendants falsely promised to honor the TOU
3 (promissory fraud) and misrepresented their identities on the website and mobile
4 app (misrepresentation). “The well-established common law elements of fraud
5 which give rise to the tort action for deceit are: (1) misrepresentation of a material
6 fact (consisting of false representation, concealment or nondisclosure); (2)
7 knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4)
8 justifiable reliance on the misrepresentation; and (5) resulting damage. [Citations.]”
9 *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th
10 445, 481 (1998). A promise made without any intent of performing constitutes
11 fraud. *See* Civ. Code § 1710(4) (defining deceit); *Building Permit Consultants, Inc.*
12 *v. Mazur*, 122 Cal. App. 4th 1400, 1414 (2004).²⁰

13 Defendants argue that Ticketmaster’s fraud claim lacks particularity under
14 Federal Rule of Civil Procedure 9(b) (*see* Mot. 29:5-27; 30:1-10), but Rule 9(b)
15 requires only that allegations of fraud be “specific enough to give defendants notice
16 of the particular misconduct which is alleged to constitute the fraud charged so that
17 they can defend against the charge and not just deny that they have done anything
18 wrong.” *See Meinhold v. Spectrum*, 2007 WL 1456141, at *2 (E.D. Cal. May 16,
19 2007) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)); *see*
20 *also Warsaw v. Xoma Corp.*, 74 F.3d 955, 960 (9th Cir. 1996) (“[A] pleading is
21 sufficient under Rule 9(b) if it identifies the circumstances of the alleged fraud so
22 that the defendant can prepare an adequate answer.”) (internal citations omitted).

23 Ticketmaster satisfies Rule 9(b) by alleging that Defendants (who) falsely
24 promised to honor the TOU (what) every time they assented to the TOU (when)
25 through the website and mobile app (how and where).²¹ (Compl. ¶¶ 113-128.)

26 ²⁰ In arguing that Ticketmaster has only attempted to plead promissory fraud (Mot. 30:16-21),
27 Defendants ignore Ticketmaster’s other fraud theory (misrepresentation of fact regarding
28 Defendants’ identities).

²¹ According to Defendants, Ticketmaster “has failed to plead that a promissory fraud claim

1 Ticketmaster also alleges that Defendants misrepresented and hid their identities
 2 when interacting with the website and mobile app. (*Id.* ¶ 117.) In addition,
 3 Ticketmaster alleges that it relied on these promises and misrepresentations (*id.* ¶¶
 4 119-121) and suffered damage as a result in the form of, *inter alia*, reputational and
 5 infrastructural harm (*id.* ¶¶ 8, 21, 23, 65, 67, 70, 71).²²

6 Defendants next argue that promissory fraud requires more than a mere
 7 allegation that a promise wasn't performed. (Mot. 31:11-16.) Ticketmaster meets
 8 this requirement as well, by alleging that Defendants harbored an intent not to
 9 perform—i.e., that Defendants intended to use bots and exceed stated limits in the
 10 License to search for and acquire tickets—every time they assented to the TOU,
 11 whether such assent occurred at the time they created a Ticketmaster account or
 12 consummated a ticket purchase or any other method of assenting to the TOU.²³

13 In addition, Defendants conflate the separate claims of fraud and breach of
 14 contract by arguing that Ticketmaster's fraud claim does not specify when
 15 Defendants entered into contracts with Ticketmaster. (Mot. 32:1-33:16.)
 16 Ticketmaster need only plead when the false promises occurred (which
 17 Ticketmaster did); Ticketmaster need not plead when (or whether) Defendants

18
 19 exists under the laws of a jurisdiction that recognizes such a claim.” To the contrary,
 20 Ticketmaster included a provision from the *California* Civil Code in its fraud claim for relief
 21 (Compl. ¶ 123) and pleaded the elements required under California law. Insofar as Defendants
 22 suggest that Ticketmaster must specify their physical location each time they or their bots misled
 23 Ticketmaster, Rule 9(b) does not require such particularity where, as here, the fraud was effected
 through devices untethered to physical locations. Nor, given the scope and volume of
 Defendants' fraudulent conduct—which resulted in 313,528 orders from 9,047 different accounts
 in a nine month period of time (*id.* ¶ 55)—would it be fair to require specific detail for each and
 every instance of fraud, as such a requirement would, perversely, reward Defendants for the sheer
 size and scope of their fraud.

24 ²² If the Court nonetheless believes more detail is necessary, leave to amend would be
 25 appropriate. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003) (dismissals
 26 under Rule 9(b) are “functional[ly] equivalent” to dismissals under Rule 12(b)(6) and should be
 without prejudice if defects are curable).

27 ²³ Defendants devolve into *reductio ad absurdum* by suggesting that, under Ticketmaster's
 28 theory, a new contract is formed every time a user accesses a webpage. (*See* Mot. 32:9-10.) That
 is not what Ticketmaster is asserting. Ticketmaster asserts that each time Defendants assented to
 the TOU, they had no intention of honoring the terms, which constitutes promissory fraud.

1 entered into a contract with Ticketmaster, as that is not a required element of fraud.
 2 *See Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) (“[P]laintiff’s [fraud]
 3 claim does not depend upon whether the defendant’s promise is ultimately
 4 enforceable as a contract. [Citations] If it is enforceable, the [plaintiff] . . . has a
 5 cause of action in tort as an alternative at least, and perhaps in some instances in
 6 addition to his cause of action on the contract.”); *see also Auble v. Pac. Gas & Elec.*
 7 *Co.*, 55 F. Supp. 2d 1019, 1023 (N.D. Cal. 1999) (discussing *Lazar* as support for
 8 separate fraud and breach of contract claims).²⁴

9 **G. The Court Has Jurisdiction Over The State Law Claims.**

10 Ticketmaster sufficiently pleads federal claims under the Copyright Act, the
 11 DMCA, and the CFAA. Each of the state law claims arises out of the same case or
 12 controversy as those claims, and therefore the Court has supplemental jurisdiction
 13 over the state law claims pursuant to 28 U.S.C. section 1367.

14 **H. The Court Has Jurisdiction Over All Of The Defendants.**

15 Renaissance Ventures LLC, Nicholas Lombardi, and Steven K. Lichtman
 16 (the so-called “Foreign Defendants”) are subject to the Court’s specific jurisdiction
 17 because they availed themselves of the privileges of this forum through their use of
 18 the Ticketmaster website and mobile app. Specific jurisdiction is analyzed using a
 19 three-prong test: (1) the non-resident defendant must purposefully direct its
 20 activities or consummate some transaction with the forum or a resident thereof; or
 21 perform some act by which it purposefully avails itself of the privilege of
 22 conducting activities in the forum, thereby invoking the benefits and protections of
 23 its laws; (2) the claim must arise out of or result from the defendant’s forum-related
 24 activities; and (3) the exercise of jurisdiction must be reasonable. *See Yahoo! Inc.*
 25 *v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1205-06 (9th
 26 Cir. 2006).

27
 28 ²⁴ Nor, in any event, do Defendants challenge the existence of a contract in their Motion—they only argue the issue of damages. (*See Mot. 24-29.*)

1 The first two factors are clearly met here, and the Foreign Defendants do not
2 contest the third. The Foreign Defendants purposefully availed themselves of the
3 privileges of conducting activities and business in California by buying tickets
4 through Ticketmaster, which is headquartered in Los Angeles. (Compl. ¶ 10.) And
5 Defendants agreed to, and are bound by, a venue clause in the TOU that requires
6 parties to file disputes related to the TOU in state or federal court in Los Angeles,
7 California. (*Id.*, Ex. A, p. 55.)

8 Furthermore, this controversy arises out of the Foreign Defendants’ bad acts,
9 including violations of the Copyright Act, fraud, breach of contract, and hacking,
10 all directed towards Ticketmaster, a California resident. But insofar as there is any
11 legitimate question regarding the sufficiency of the Foreign Defendants’ contacts
12 with California, Ticketmaster respectfully requests the opportunity to conduct
13 discovery to ascertain the extent of those contacts.

14 **IV. CONCLUSION**

15 Ticketmaster respectfully requests that the Court deny Defendants’ motion in
16 its entirety.

17 Dated: January 8, 2018

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