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Follmer & Frailey 497 F.SUPP.2D 627 (E.D. PA.
2007)

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HEALTHCARE ADVOCATES, INC., V. HARDING, EARLEY, FOLLMER & FRAILEY

497 F. SUPP. 2D 627 (E.D. PA. 2007)

I. INTRODUCTION

In *Healthcare Advocates, Inc., v. Harding, Earley, Follmer & Frailey*, Healthcare Advocates (“Healthcare”) filed suit against Harding, Earley, Follmer & Frailey, (“Harding”) in the United States District Court, Eastern District of Pennsylvania, claiming that Harding (1) infringed on Healthcare’s copyright by viewing and printing Healthcare’s copyrighted material, (2) violated the Digital Millennium Copyright Act (“DMCA”) by circumventing Healthcare’s security measures, (3) violated the Computer Fraud and Abuse Act (“CFAA”) by exceeding its authorized access to a protected computer, and (4) is liable under Pennsylvania common law for conversion and trespass to chattel.¹

The District Court held that Harding did not infringe upon Healthcare’s copyright because Harding’s viewing and printing of Healthcare’s copyrighted material fell under the fair use doctrine.² Moreover, the court held that Harding did not violate the DMCA by circumventing Healthcare’s technology measure because a server malfunction allowed Harding access to Healthcare’s material.³ The court also held that Harding did not intentionally exceed its authorized access to a protected computer in violation of the CFAA.⁴ The court reasoned that Harding viewed Healthcare’s material by using a public website in the manner the site was intended to be used.⁵ The court also held that Healthcare could not bring state law claims for conversion and trespass to chattel

1. *Healthcare Advocates, Inc., v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 633 (E.D. Pa. 2007).

2. *Id.* at 642.

3. *Id.* at 646.

4. *Id.* at 649.

5. *Id.* at 648.

because federal copyright law preempted these claims.⁶

II. BACKGROUND

Healthcare is an organization that assists patients in dealing with their healthcare providers.⁷ In June 2003, Healthcare filed suit against a competitor for trademark infringement.⁸ Defendant, Harding, is a law firm that specializes in intellectual property cases and represented Healthcare's competitor in the 2003 suit.⁹

During the pre-discovery phase, Harding used a website called the Wayback Machine to view what Healthcare's website looked like prior to the 2003 suit.¹⁰ The Wayback Machine would scan websites on a daily basis, take screenshots of those websites, and archive the screenshots into a database.¹¹ Users of the Wayback Machine entered a website's address, and the Wayback Machine would return a list of dates with each date linking to a screenshot of how the website appeared on the specified date.¹² Harding viewed and printed archived screenshots of Healthcare's websites and used these images to defend its client in the 2003 suit.¹³

Healthcare implemented a security measure called a robots.txt protocol to prevent website applications like the Wayback Machine from archiving Healthcare's websites.¹⁴ The protocol is enabled by configuring a website to include a robots.txt file.¹⁵ When website applications like the Wayback Machine scan a website, the robots.txt file informs the application to deny the public from viewing any existing archived files.¹⁶

After implementing the robots.txt protocol, Healthcare assumed that archived images of its websites would be unavailable to the

6. *Id.* at 650.

7. *Healthcare*, 497 F. Supp. 2d at 630.

8. *Id.*

9. *Id.*

10. *Id.* The Wayback Machine is a tool operated by the Internet Archive. See Internet Archive, <http://www.archive.org> (last visited January 31, 2008).

11. *Healthcare*, 497 F. Supp. 2d at 631.

12. *Id.*

13. *Id.* at 630.

14. *Id.* at 631.

15. *Id.*

16. See *id.* at 632.

public.¹⁷ However, on the dates that Harding used the Wayback Machine, the Wayback Machine servers malfunctioned and failed to recognize the robots.txt command.¹⁸ Thus, some archived screenshots of Healthcare's website were not denied from public viewing, enabling Harding to view and print copies of Healthcare's past websites.¹⁹

Healthcare filed suit in the United States District Court, Eastern District of Pennsylvania claiming that (1) Harding infringed on Healthcare's copyright by viewing and printing the screenshots of Healthcare's website, (2) Harding violated the Digital Millennium Copyright Act ("DMCA") by circumventing Healthcare's robots.txt protocol, (3) Harding violated the Computer Fraud and Abuse Act ("CFAA") by intentionally exceeding its authorized access to the Wayback Machine, and (4) Harding is liable under Pennsylvania common law for conversion and trespass to chattel.²⁰

III. LEGAL ANALYSIS

The United States District Court, Eastern District of Pennsylvania addressed Healthcare's suit in four parts: (1) whether Harding's viewing and printing of Healthcare's past websites fell under the fair use doctrine, (2) whether Harding circumvented Healthcare's technology measure, (3) whether Harding intentionally exceeded their authorized access when using the Wayback Machine, and (4) whether Healthcare's state law claims for conversion and trespass to chattels are preempted by federal copyright law.²¹

A. Harding's Viewing and Printing of Healthcare's Copyrighted Material Was Fair Use

First, the court held that Healthcare possessed a valid copyright and that Harding's viewing and printing of Healthcare's material

17. *Healthcare*, 497 F. Supp. 2d at 632.

18. *Id.*

19. *Id.*

20. *Id.* at 633.

21. *See id.*

fell under the fair use doctrine.²²

The court began by holding that Harding infringed on Healthcare's copyright.²³ To determine infringement, the court looked to (1) whether Healthcare had ownership of a valid copyright and (2) whether Harding copied, displayed, or distributed material that was protected by Healthcare's copyright.²⁴ The court found that Healthcare had a valid copyright to its website because Healthcare had registered the website with the Copyright Office.²⁵ The court ruled that public display of a copyrighted work involved showing a copy of the work "either directly or by means of a film, slide, television image, or any other device"²⁶ The court reasoned that Harding infringed on Healthcare's right of public display because Harding employees, while using the Wayback Machine, displayed archived images of Healthcare's website on their office computers.²⁷ Moreover, because Harding employees printed copies of the images, Harding infringed upon Healthcare's right to reproduce its copyrighted material.²⁸

After determining that Harding infringed on Healthcare's copyright, the court held that Harding's viewing and printing of Healthcare's protected material was fair use.²⁹ To determine fair use, the court applied a four factor test that examined (1) "the purpose and character of the use," (2) "the nature of the copyrighted work," (3) "the amount and substantiality of the portion of the copyrighted work used," and (4) the effect of Harding's use "upon the potential market for or value of the copyrighted work."³⁰

Under the first fair use factor, the "purpose and character of the infringing use," the court found that Harding's public display and reproduction of Healthcare's material favored a finding of fair

22. *Id.* at 635, 639.

23. *Healthcare*, 497 F. Supp. 2d at 635-36.

24. *Id.* at 635.

25. *Id.*

26. *Id.* (citing 17 U.S.C. § 101 (2006)).

27. *Id.* at 635.

28. *Id.* at 636.

29. *Healthcare*, 497 F. Supp. 2d at 639.

30. *Id.* at 634-35.

use.³¹ The court looked to whether Harding's use was commercial or educational in nature.³² Moreover, the court ruled that a finding of commercial use is less favorable than an educational use.³³ The court found that Harding's viewing and printing of Healthcare's copyrighted material was primarily to represent its clients.³⁴ The court reasoned that because Harding profits from representing clients in litigation, Harding's use was commercial.³⁵

Despite Harding's commercial use, the court characterized Harding's public display of Healthcare's material as fair use.³⁶ The court looked to whether Harding had shown the images to a group outside the "family circle."³⁷ For example, website owners infringe a copyright owner's display rights when copyrighted material is made available on a public website without the copyright owner's consent.³⁸ Thus, the copyrighted material is shown to the public, a group that is outside of the website owner's family or acquaintances.³⁹ Unlike the website owner, Harding displayed Healthcare's material inside Harding's office and was shown only to a small group of other Harding employees.⁴⁰ The court reasoned that Harding's use was not a showing to a group outside a "family circle" and thus favored a finding of fair use.⁴¹

In addition to Harding's public display, the court also found that Harding had a legitimate purpose to print Healthcare's material.⁴² Harding's reproduction of the copyrighted material was used to defend its client in a trademark and copyright infringement suit.⁴³ The court reasoned that it would be an "absurd result" if an attorney representing a client in an infringement case would be

31. *Id.* at 637.

32. *Id.* at 636.

33. *Id.*

34. *Id.*

35. *Healthcare*, 497 F. Supp. 2d at 636.

36. *Id.* at 636-37.

37. *Id.* at 637.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Healthcare*, 497 F. Supp. 2d at 637.

42. *Id.*

43. *Id.*

denied access from using material that was publicly available.⁴⁴

Under the second fair use factor, the court found that the nature of Healthcare’s copyrighted material also favored a finding of fair use.⁴⁵ The court found that Healthcare’s material was informational in nature because the website was used to promote and market Healthcare’s services.⁴⁶ The court reasoned that the purpose of Healthcare’s copyright was to prevent competitors from copying Healthcare’s website in order to make free use of Healthcare’s marketing tools.⁴⁷ Because the “ultimate goal of copyright law is to increase [the public’s] fund of information” and because Healthcare’s material is informational in nature, the court found that the second factor favored a finding of fair use.⁴⁸

Under the third fair use factor, the court found that the amount and substantiality of Healthcare’s material that Harding viewed and printed was justified under the fair use doctrine.⁴⁹ Harding viewed and copied all of Healthcare’s material that was produced by the Wayback Machine.⁵⁰ The court looked to whether Harding “copied more than was necessary and justifiable under the fair use doctrine.”⁵¹ Thus, even though Harding printed everything that was viewed on the Wayback Machine, the circumstances required Harding to do so because it needed the printed copies as evidence to defend its clients in court. Therefore, the court found that under the circumstances, the amount and substantiality of Healthcare’s material that Harding copied was “necessary” and “justifiable” under the fair use doctrine.⁵² The court reasoned that Harding’s printing of the material was necessary to preserve evidence while representing its client.⁵³

Under the fourth fair use factor, the court found that the impact of Harding’s viewing and copying had little impact upon the

44. *Id.*

45. *Id.* at 638.

46. *Id.*

47. *Healthcare*, 497 F. Supp. 2d at 638.

48. *Id.* (quoting Marshall Leaffer, UNDERSTANDING COPYRIGHT LAW 436 (3d ed. 1999)).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Healthcare*, 497 F. Supp. 2d at 638.

“potential market for or value of” Healthcare’s copyrighted work.⁵⁴ The court reasoned that because Healthcare’s website is used to promote and market Healthcare’s services, the value of Healthcare’s website is based on the number of customers who choose Healthcare’s services as a result of viewing the website.⁵⁵ The court ruled that Harding used the screen shots in a lawsuit and not as a competitor to Healthcare.⁵⁶ Thus, the court found that Harding’s use of Healthcare’s material favored a finding of fair use.⁵⁷

Ultimately, the court held that Harding’s viewing and printing of Healthcare’s copyrighted material fell under the fair use doctrine because all four of the fair use factors favored Harding.⁵⁸

B. Healthcare Was Not Entitled to a Spoliation Inference Despite Harding’s Failure to Preserve Temporary Computer Files

The court held that Healthcare was not entitled to a spoliation inference at trial.⁵⁹ Healthcare claimed that when Harding viewed the screenshots, copies of the screenshots may have been automatically saved into temporary cache files on Harding’s computers.⁶⁰ Healthcare claimed that Harding had a duty to preserve the cache files and that Healthcare was prejudiced because Healthcare was not able to use the cache files as evidence.⁶¹ The court ruled that a litigant is “under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, [or] is reasonably likely to be requested during discovery”⁶² Moreover, a spoliation inference may be imposed when a party “has notice that evidence is relevant to

54. *Id.*

55. *Id.*

56. *Id.* at 639.

57. *Id.*

58. *Id.*

59. *Healthcare*, 497 F. Supp. 2d at 642.

60. *Id.* at 640.

61. *Id.* at 639.

62. *Id.* (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).

litigation and [that party] proceeds to destroy evidence.”⁶³ Thus, destruction of evidence infers that a party was “more likely to have been threatened by that evidence than [a] party in the same position who does not destroy the evidence.”⁶⁴ To determine whether sanctions should be imposed on Harding the court considered three factors: (1) “the degree of fault” attributable to Harding, (2) “the degree of prejudice suffered” by Healthcare, and (3) “whether there is a lesser sanction that will avoid substantial unfairness to [Healthcare.]”⁶⁵

Under the first factor, the court held that Harding was not at fault for the loss of the temporary cache files.⁶⁶ Healthcare claimed that Harding immediately knew of its duty to preserve the cache files when Harding saw that certain screenshots were blocked and were unauthorized for viewing.⁶⁷ The court ruled that it was unreasonable for Harding to anticipate that using a public website would subject them to a civil lawsuit.⁶⁸ Moreover, Harding did not affirmatively destroy the temporary cache files because these files were automatically deleted by the computer.⁶⁹

Under the second factor, the court also held that Healthcare had not suffered significant prejudice from the loss of the temporary cache files.⁷⁰ Healthcare claimed that its investigation into Harding’s conduct was limited because the cache files were unavailable.⁷¹ Because experts were able to reconstruct Harding’s conduct from available evidence, the court reasoned that Healthcare had suffered little prejudice resulting from the lost cache files.⁷²

Under the third factor, the court held that sanctions against Harding were unnecessary.⁷³ The court found that Harding had

63. *Id.* (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994)).

64. *Id.* (quoting *Schmid*, 13 F.3d at 78).

65. *Healthcare*, 497 F. Supp. 2d at 639-40 (citing *Schmid*, 13 F.3d at 79).

66. *Id.* at 641.

67. *Id.* at 640.

68. *Id.*

69. *Id.* at 641.

70. *Id.*

71. *Healthcare*, 497 F. Supp. 2d at 641.

72. *Id.*

73. *Id.* at 642.

provided Healthcare forensic images of Harding's computer hard drives.⁷⁴ The court reasoned that Healthcare was able to obtain the information it needed from these images.⁷⁵ Moreover, the court found it unreasonable to penalize Harding for failing to preserve cache files that may have been immediately deleted once another website was visited on that computer.⁷⁶

C. Harding Did Not Violate the Digital Millennium Copyright Act by Circumventing Healthcare's Technology Measure

The court held that Harding did not circumvent Healthcare's technology measure in violation of the DMCA.⁷⁷ The DMCA states that it is a violation of copyright if a person tries to circumvent a "technology measure" that controls access to a copyrighted work.⁷⁸ A "technology measure" controls access to a copyrighted work if, in order to gain access to the work, the measure requires an "application of information, or a process or a treatment" that is authorized by the copyright owner.⁷⁹

The court held that Healthcare's robots.txt protocol was a technology measure under the DMCA.⁸⁰ The court reasoned that although the protocol is unlike a password or encryption security measure, the protocol does block users from accessing archived screenshots of Healthcare's website.⁸¹ The court ruled that the protocol qualified as a technology measure because the only way to gain access to Healthcare's copyrighted material would be for Healthcare to remove the protocol.⁸²

The court also held that Harding did not circumvent Healthcare's robots.txt protocol.⁸³ The court looked to whether Harding "descramble[d], decrypt[ed], avoid[ed], bypass[ed], remove[d], deactivate[d], or impair[ed]" Healthcare's robots.txt

74. *Id.* at 641.

75. *Id.* at 642.

76. *Id.* at 641-42.

77. *Healthcare*, 497 F. Supp. 2d at 646.

78. *Id.* at 642-43 (quoting 17 U.S.C. § 1201(a)(1)(A) (2006)).

79. *Id.* at 643 (quoting 17 U.S.C. § 1201(a)(3)B)).

80. *Id.* at 644.

81. *Id.* at 643.

82. *Id.* at 644.

83. *Healthcare*, 497 F. Supp. 2d at 645.

protocol.⁸⁴ In addition, the court looked to whether Harding “affirmatively perform[ed] an action that disable[d] or void[ed]” the robots.txt protocol.⁸⁵ The court found that on the dates Harding used the Wayback Machine, the Wayback Machine servers were malfunctioning.⁸⁶ According to expert testimony, the Wayback Machine servers failed to recognize the robots.txt protocol and delivered Healthcare’s protected work as if no technology measure was in place.⁸⁷ Thus, the court reasoned that Harding could not have circumvented a protective measure because nothing stood in the way of Harding from viewing Healthcare’s copyrighted work.⁸⁸

The court also held that Harding did not circumvent Healthcare’s measure even though Harding may have known that it was not authorized to view Healthcare’s copyrighted work.⁸⁹ According to Harding employees, some of Healthcare’s screenshots were blocked when they used the Wayback Machine.⁹⁰ The Wayback Machine also returned a message to the Harding employees stating that the website owner had blocked the images.⁹¹ Harding employees submitted further requests to view the Healthcare images and ultimately viewed and printed Healthcare images that were not blocked.⁹² Healthcare claimed that Harding had circumvented Healthcare’s technology measure because Harding continued to request for Healthcare’s images despite knowing that certain images were not authorized for viewing.⁹³ The court reasoned that lack of Healthcare’s authorization is not considered as circumvention under the DMCA even if Harding knew that Healthcare had not authorized access to Healthcare’s screenshots.⁹⁴ According to the court, making requests to view archived screenshots, even if some requests are

84. *Id.* at 644 (quoting 17 U.S.C. § 1201(a)(3)(A)).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Healthcare*, 497 F. Supp. 2d at 646.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 645.

94. *Id.* at 646.

denied, was not avoiding or bypassing a technology measure.⁹⁵

D. Harding Did Not Violate the Computer Fraud and Abuse Act by Intentionally Exceeding Their Authorized Access

The court held that Harding did not intentionally exceed their authorized access when Harding viewed Healthcare's copyrighted material through the Wayback Machine.⁹⁶ The CFAA makes it a crime to "intentionally access a computer without authorization, or exceed authorization, and thereby obtain information from any protected computer if the conduct involved interstate or foreign communication."⁹⁷ A user exceeds their authorization when they use their authorized access to obtain information stored in the computer that they are not entitled to.⁹⁸ A civil action may be brought if the computer, which was used to cause the victim harm, was used in interstate commerce.⁹⁹ Moreover, the victim must show that they suffered an aggregate loss of at least \$5000¹⁰⁰ that was spent towards "responding to the 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 damage incurred because of interruption of service."¹⁰¹

The court held that Healthcare could bring a CFAA claim against Harding because Harding accessed a computer that was used in interstate commerce and because Healthcare suffered at least \$5000 in harm.¹⁰² Even though Healthcare's computers were not directly accessed by Harding, the court reasoned that Harding accessed computers used in interstate commerce and that access caused Healthcare harm.¹⁰³ The court held that the Wayback Machine servers were used in interstate commerce because Harding, located in Pennsylvania, accessed the Wayback Machine

95. *Healthcare*, 497 F. Supp. 2d at 646.

96. *Id.* at 649.

97. *Id.* at 646 (quoting 18 U.S.C. § 1030(a)(2)(C) (2006)).

98. *Id.* (citing 18 U.S.C. § 1030(e)(6)).

99. *Id.* (citing 18 U.S.C. § 1030(e)(2)(B)).

100. *Id.* (citing 18 U.S.C. § 1030(a)(5)(B)(i)).

101. *Healthcare*, 497 F. Supp. 2d at 647 (quoting 18 U.S.C. § 1030(e)(11)).

102. *Id.* at 647-48.

103. *Id.* at 647.

servers that were located in California.¹⁰⁴ Moreover, the court found that Healthcare showed that it had suffered at least \$5000 towards assessing the integrity of their website and in determining how Harding obtained the protected materials.¹⁰⁵

The court held that Harding did not intentionally exceed their authorized access in order to obtain Healthcare's copyrighted material.¹⁰⁶ To determine whether Harding violated the CFAA, the court looked to whether Harding accessed a computer with authorization and used their access to obtain information that they were not entitled to see.¹⁰⁷ Because the CFAA focuses on criminal conduct, the court also ruled that Harding must have intentionally viewed Healthcare's screenshots that Harding was not entitled to view.¹⁰⁸

The court found that Harding viewed Healthcare's protected material by submitting requests to the Wayback Machine.¹⁰⁹ The Wayback Machine would return a list of dates with each date serving as a link to a Healthcare screenshot.¹¹⁰ At times, a link would take the Harding employee to a web page showing a blocked screenshot and the user would be informed that they were unauthorized to view the screenshot.¹¹¹ When a blocked screenshot was presented, the Harding employee would go back to the list of dates and would continue searching for a screenshot that was not blocked.¹¹² The court reasoned that Harding did not exceed their authorized use because the Wayback Machine was a public website and Harding used the website in the "manner it was intended to be used."¹¹³ Unlike a person that steals information off a public website with special software,¹¹⁴ or a person that transmits

104. *Id.*

105. *Id.*

106. *Id.* at 649.

107. *Healthcare*, 497 F. Supp. 2d at 648 (quoting 18 U.S.C. § 1030(e)(6) (2006)).

108. *Id.* (citing *United States v. Morris*, 928 F.2d 504, 508 (2d Cir. 1991)).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Healthcare*, 497 F. Supp. 2d at 648.

114. *Id.* at 649 (citing *Southwest Airlines v. Farechase, Inc.*, 318 F. Supp. 2d 435, 439-40 (N.D. Tex. 2004) (holding valid claim under CFAA against person

a worm into a computer system,¹¹⁵ Harding had not used any special tools to view Healthcare's screenshots.¹¹⁶ The court found that Harding submitted requests using an ordinary web browser and viewed information the Wayback Machine provided.¹¹⁷ Even though Harding viewed Healthcare's material without Healthcare's permission, Harding did not intentionally exceed their authorization to view the material.¹¹⁸ Harding was able to view Healthcare's material only because the Wayback Machine servers had malfunctioned.¹¹⁹

E. Healthcare's State Law Claims for Conversion and Trespass to Chattels Were Preempted by Federal Copyright Law

The court held that Healthcare's common law conversion and trespass to chattels claims were preempted by federal copyright law.¹²⁰ To determine preemption the court looked to whether the "state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display . . ." ¹²¹ If an extra element is found, the federal law does not preempt the state action.¹²² Thus, "all common law or state law rights that are equivalent to the rights available under copyright protections are preempted."¹²³ The court found that both a trespass to chattel and conversion claim under Pennsylvania law required an "intermeddling" or "interference" with another person's chattel.¹²⁴ The court reasoned that the rights available under these state laws were equivalent to rights under federal copyright law.¹²⁵ Thus, to establish a trespass to chattel or

who used scraping software to steal website information)).

115. *Id.* (citing *United States v. Morris*, 928 F.2d 504, 508 (2d Cir. 1991)).

116. *See id.* at 648.

117. *Id.* at 649.

118. *Id.*

119. *Healthcare*, 497 F. Supp. 2d at 649.

120. *Id.* at 650.

121. *Id.* (quoting *Dun & Bradstreet Software Servs., Inc., v. Grace Consulting, Inc.*, 307 F.3d 197, 217 (3d Cir. 2002)).

122. *Id.*

123. *Id.* (citing 17 U.S.C. § 301(a) (2006)).

124. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 217 (1965)).

125. *Healthcare*, 497 F. Supp. 2d at 650.

a conversion claim required “nothing more than what is required under copyright law to establish infringement.”¹²⁶

IV. CONCLUSION

The court held that (1) Harding’s viewing and printing of Healthcare’s past websites fell under the fair use doctrine,¹²⁷ (2) Harding did not circumvent Healthcare’s technology measure,¹²⁸ (3) Harding did not intentionally exceed their authorized access when using the Wayback Machine,¹²⁹ and (4) Healthcare’s state law claims for conversion and trespass to chattels were preempted by federal copyright law.¹³⁰

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126. *Id.*

127. *Id.* at 639.

128. *Id.* at 646.

129. *Id.* at 649.

130. *Id.* at 650.