

318 F.3d 58  
United States Court of Appeals,  
First Circuit.

EF CULTURAL TRAVEL BV, et al., Plaintiffs, Appellees,  
v.  
ZEFER CORPORATION, Defendant, Appellant, and Explorica, Inc., et al.,  
Defendants.

No. 01–2001. | Heard Oct. 9, 2002. | Decided Jan. 28, 2003.

\* \* \*

BOUDIN, Chief Judge.

Defendant Zefer Corporation (“Zefer”) seeks review of a preliminary injunction prohibiting it from using a “scraper tool” \*60 to collect pricing information from the website of plaintiff EF Cultural Travel BV (“EF”). This court earlier upheld the injunction against co-defendant Explorica, Inc. (“Explorica”). *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir.2001) (“*EF I*”). The validity of the injunction as applied to Zefer was not addressed because Zefer’s appeal was stayed when it filed for bankruptcy, but the stay has now been lifted.

\* \* \*

EF argues at the outset that our decision in *EF I* is decisive as to Zefer. But the ground we adopted there in upholding the injunction as to the other defendants was that they had apparently used confidential information to facilitate the obtaining of the EF data. Explorica was created by former EF employees, some of whom were subject to confidentiality agreements. Zefer’s position in that respect is quite different than that of Explorica or former EF employees. It signed no such agreement, and its prior knowledge as to the agreement is an open question.

EF suggests that Zefer must have known that information provided to it by Explorica had been improperly obtained. This is possible but not certain, and there are no express district court findings on this issue; indeed, given the district court’s much broader basis for its injunction, it had no reason to make any detailed findings as to the role of the confidentiality agreement. What can be gleaned from the record as to Zefer’s knowledge certainly does not permit us to make on appeal the finding urged by EF.

What appears to have happened is that Philip Gormley, Explorica’s Chief Information Officer and EF’s former Vice President of Information Strategy, e-mailed Zefer a description of how EF’s website was structured and identified the information that Explorica wanted to have copied; this may have facilitated Zefer’s development of the

scraper tool, but there is no indication that the structural information was unavailable from perusal of the website or that Zefer would have known that it was information subject to a confidentiality agreement.

EF also claims that Gormley e-mailed Zefer the “codes” identifying in computer shorthand the names of EF’s gateway and destination cities. These codes were used to direct the scraper tool to the specific pages on EF’s website that contained EF’s pricing information. But, again, it appears that the codes could be extracted more slowly by examining EF’s webpages manually,<sup>2</sup> so it is far from clear that Zefer \*62 would have had to know that they were confidential. The only information that Zefer received that was described as confidential (passwords for tour-leader access) apparently had no role in the scraper project.

EF’s alternative ground for affirmance is the rationale adopted by the district court for the preliminary injunction. That court relied on its “reasonable expectations” test as a gloss on the CFAA and then applied it to the facts of this case. Although we bypassed the issue in *EF I*, the district court’s rationale would embrace Zefer as readily as Explorica itself. But the gloss presents a pure question of law to be reviewed *de novo* and, on this issue, we differ with the district court.

\* \* \*

[The court briefly explains CFAA section (a)(4), and notes that the “intent to defraud” element has not been raised on appeal.]

The issue, then, is whether use of the scraper “exceed[ed] authorized access.” A lack of authorization could be established by an explicit statement on the website restricting access. (Whether public policy might in turn limit certain restrictions is a separate issue.) Many webpages contain lengthy limiting conditions, including limitations on the use of scrapers.<sup>3</sup> However, at the time of Zefer’s use of the scraper, EF had no such explicit prohibition in place, although it may well use one now.

The district court thought that a lack of authorization could also be inferred from the circumstances, using “reasonable expectations” as the test; and it said that three such circumstances comprised such a warning in this case: the copyright notice on EF’s homepage with a link directing users to contact the company with questions; EF’s provision to Zefer of confidential information obtained in breach of the employee confidentiality agreements; and the fact that the website was configured to allow ordinary visitors to the site to view only one page at a time.

\*63 <sup>12]</sup> We agree with the district court that lack of authorization may be implicit, rather than explicit. After all, password protection itself normally limits authorization by implication (and technology), even without express terms. But we think that in general a

reasonable expectations test is not the proper gloss on subsection (a)(4) and we reject it. However useful a reasonable expectations test might be in other contexts where there may be a common understanding underpinning the notion, *cf. Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (Fourth Amendment), its use in this context is neither prescribed by the statute nor prudentially sound.

Our basis for this view is not, as some have urged, that there is a “presumption” of open access to Internet information. The CFAA, after all, is primarily a statute imposing limits on access and enhancing control by information providers. Instead, we think that the public website provider can easily spell out explicitly what is forbidden and, consonantly, that nothing justifies putting users at the mercy of a highly imprecise, litigation-spawning standard like “reasonable expectations.” If EF wants to ban scrapers, let it say so on the webpage or a link clearly marked as containing restrictions.

This case itself illustrates the flaws in the “reasonable expectations” standard. Why should the copyright symbol, which arguably does not protect the substantive information anyway, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991), or the provision of page-by-page access for that matter, be taken to suggest that downloading information at higher speed is forbidden. EF could easily include—indeed, by now probably has included—a sentence on its home page or in its terms of use stating that “no scrapers may be used,” giving fair warning and avoiding time-consuming litigation about its private, albeit “reasonable,” intentions.

Needless to say, Zefer can have been in no doubt that EF would dislike the use of the scraper to construct a database for Explorica to undercut EF’s prices; but EF would equally have disliked the compilation of such a database manually without the use of a scraper tool. EF did not purport to exclude competitors from looking at its website and any such limitation would raise serious public policy concerns. *Cf. Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516–18 (4th Cir.1999); *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351 (7th Cir.1995).

Although we conclude that the district court’s rationale does not support an independent preliminary injunction against Zefer, there is no apparent reason to vacate the present injunction “as against Zefer.” Despite being a party to the case, Zefer is not named in the ordering language of the injunction; it is merely precluded, like anyone else with notice, from acting in concert with, on behalf of, or at the direction of Explorica to use the scraper to access EF’s information.

Under the applicable rules and case law, an injunction properly issued against a named party means that anyone else with notice is precluded from acting to assist the enjoined party from violating the decree or from doing so on behalf of that party. *See Fed.R.Civ.P.* 65(d); *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 34–35 (1st Cir.1980). There is no reason why Zefer should be freer than any other third party who

was never in this litigation to assist EF to violate the injunction against it or to do so on EF's behalf or at its direction. As we read the injunction, that is all that is forbidden.

**\*64** It may still be of practical importance to Zefer to have clarified the limited basis on which we uphold the injunction. And nothing we have said would prevent EF, if it matters in continued litigation, from seeking to show that Zefer did use confidential information, aware that it was being supplied in violation of agreements made by former EF employees. It is also of some use for future litigation among other litigants in this circuit to indicate that, with rare exceptions, public website providers ought to say just what non-password protected access they purport to forbid.

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The preliminary injunction is *affirmed* on the limited basis set forth above and as construed by this court. Each side shall bear its own costs on this appeal.

#### **Footnotes**

- <sup>2</sup> As an example, the website address for an EF Tour to Paris and Geneva leaving from Boston is [http://www.eftours.com/public/browse/browse\\_detail.asp?CTID=PTGV & GW=BOS](http://www.eftours.com/public/browse/browse_detail.asp?CTID=PTGV&GW=BOS). Looking closely at the website address, one can determine that the destination code for the Paris and Geneva tour is PTG, while the gateway code for Boston is BOS.
- <sup>3</sup> For example, the “legal notices” on one familiar website state that “you may print or download one copy of the materials or content on this site on any single computer for your personal, non-commercial use, provided you keep intact all copyright and other proprietary notices. Systematic retrieval of data or other content from this site to create or compile, directly or indirectly, a collection, compilation, database or directory without written permission from America Online is prohibited.” AOL Anywhere Terms and Conditions of Use, *at* [http:// www.aol.com/copyright.html](http://www.aol.com/copyright.html) (last visited Jan. 14, 2003).