The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYANAIR DAC, an Irish company, Plaintiff, vs. EXPEDIA INC., a Washington corporation, Defendant.	No. 2:17-cv-01789-RSL DEFENDANT EXPEDIA, INC.'S MOTION TO DISMISS NOTE ON MOTION CALENDAR: March 2, 2018 ORAL ARGUMENT REQUESTED

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INTRODUCTION

Plaintiff Ryanair DAC ("Ryanair"), an Irish airline company with its headquarters in Ireland, asserts a single cause of action under the Computer Fraud & Abuse Act ("CFAA") claiming that Expedia, Inc. ("Expedia") improperly accessed *publicly available* information on Ryanair's website and used that information to allow Expedia customers to search for information about and book Ryanair flights in Europe. Putting aside for the moment the question whether alleged access to public information is prohibited by the CFAA, Ryanair's claim fails as a matter of law, for the CFAA does not permit foreign plaintiffs to seek redress for alleged foreign injuries. Ryanair is a European airline; if it suffered any cognizable injury, it suffered it in Europe. Because Ryanair fails to allege the requisite domestic injury in the United States, its Complaint must be dismissed.

"It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). In light of this premise, courts apply a strong "presumption against extraterritoriality" when construing federal statutes. *Id.* at 2100. Under that presumption, unless Congress has *clearly* expressed an intention to apply domestic law to foreign conduct, the law is presumed to apply only domestically. And unless Congress has *clearly* expressed an intention to permit civil plaintiffs to sue for injuries incurred abroad, they cannot do so. The presumption applies to all laws enacted by Congress, including the CFAA.

Congress originally enacted the CFAA in the 1980s as a purely criminal statute aimed at protecting computers from acts of computer trespass, or "hacking." Congress later amended the statute to add a provision permitting private plaintiffs to sue for certain violations of the CFAA, subject to several limitations. But nothing about that authorization of a limited private right of action suggests, let alone clearly evidences, Congressional intent to permit private plaintiffs to sue under the CFAA for *foreign* injuries. Under *RJR Nabisco*, Ryanair therefore cannot state a claim based on alleged foreign injuries—and yet that is exactly what it seeks to do. Ryanair is based in Ireland and

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organized under Irish law. It runs flights within Europe. It earns profits, and suffers any potential losses, in Europe. It cannot sue to recover those alleged losses under the CFAA.

Moreover, according to Ryanair's own allegations, Irish law, not United States law, governs this dispute. According to Ryanair, written "Terms of Use" that Ryanair posts on its website govern disputes with parties that access its website. Those Terms of Use specify that Irish law applies, thus further undermining Ryanair's attempt to invoke the federal CFAA in its Complaint.

Although Ryanair has no right to avail itself of United States law in seeking relief for alleged injuries abroad, dismissing Ryanair's CFAA claim will not leave it without a remedy. To the contrary, Ryanair has already sued Expedia in Ireland—its home country—for the *same* alleged conduct at issue in this case, and that action is pending. Ryanair's Irish action alleges different claims because Ireland does not authorize civil actions claiming computer trespass. But that only highlights why the presumption against extraterritoriality exists, and why it applies in this case: Ryanair cannot seek redress under the laws of *this* country for injuries allegedly suffered abroad merely because its home country has not passed comparable laws. As the Supreme Court explained in *RJR Nabisco*, the need to apply the presumption against extraterritoriality is "at its apex" when a plaintiff seeks what Ryanair seeks here. 136 S. Ct. at 2107.

Because Ryanair has not alleged and cannot allege the requisite domestic injury under the CFAA, Expedia respectfully requests that the Court dismiss the Complaint with prejudice.

FACTUAL AND STATUTORY BACKGROUND

A. Plaintiff's Complaint

1. Ryanair

Plaintiff Ryanair is a company organized under the laws of Ireland with its principal place of business in Dublin, Ireland. Complaint ("Compl.") ¶ 1.[1] Established in 1985, Ryanair alleges that it was and is "Europe's first low-fare airline." *Id.* ¶ 10. Ryanair describes itself as "an EU air carrier" that offers flights "between Ireland, the U.K., Continental Europe, Morocco and Israel." Request for

[1] As required by the Rules, Expedia accepts Ryanair's allegations as true for purposes of this motion, and only for purposes of this motion.

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Judicial Notice ("RJN"), Ex. 1 (Ryanair Holdings plc, Form 20-F, July 25, 2017) at 20, 75.[2] All of Ryanair's "principal properties" and airport "bases" are located outside of the United States. *Id.* at 1, 24, 33. Ryanair operates a website, https://www.ryanair.com, that consumers can use to book Ryanair flights and purchase related services. Compl. ¶¶ 2, 10-13. The official registrant and other contact information for that website show that it is run out of Ireland. *See* Ex. 2 (ICANN WHOIS entry for http://www.ryanair.com).

Ryanair alleges that its website is governed by Terms of Use that Ryanair posts on the site (the "Website Terms"). *Id.* ¶¶ 17-32. The Website Terms claim that "[t]his website is the only website authorised to sell Ryanair flights, whether on their own or as part of a package." Compl. ¶ 18; *see also id.*, Ex. A, ¶ 2. The Website Terms also claim that users cannot use the website for commercial purposes and purport to prohibit "screen scraping," or the "[u]se of any automated system or software, whether operated by a third party or otherwise, to extract any data from this website for commercial purposes ('screen scraping')." Compl. ¶¶ 19, 22; *see also id.*, Ex. A, ¶ 3. The Website Terms state that those who use the Ryanair website "submit[] to the sole and exclusive jurisdiction of the Courts of the Republic of Ireland and to the application of the law in that jurisdiction . . . ." *Id.*, Ex. A, ¶ 7. In addition, the Website Terms state that, "[i]n the absolute and sole discretion of Ryanair, a legal action may be brought by Ryanair against any party in breach of these terms and conditions, at its election, in Ireland or the place of breach or the domicile of that party . . . ." *Id.*

2. Expedia

Defendant Expedia, an online travel company, is a Washington corporation with its principal place of business in Bellevue, Washington. Compl. ¶ 3. Expedia's customers book travel arrangements and purchase travel-related services through various Expedia websites. *Id.* ¶ 4. According to the Complaint, Expedia violates Ryanair's Website Terms by offering Ryanair flights for purchase on "the Expedia website." *Id.* ¶¶ 34-35; *id.* Ex. A, ¶ 2. In particular, Ryanair alleges that "Expedia and/or its agents" employ an automated "screen scraping" program that obtains

[2] Citations to this document are to the Form 20-F's page numbers.

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Ryanair's flight information and enables Expedia to book "Ryanair flights that are ultimately sold by Expedia to customers using the Expedia website." *Id.* ¶¶ 36, 39-42. This "screen scraping" allegedly allows "Expedia and/or its agents" to use the "Ryanair website and its content by mimicking an actual customer," in violation of the Website Terms. *Id.* ¶ 40. By allowing its customers to purchase Ryanair flights, Expedia allegedly has caused Ryanair to incur additional expenses and lose revenues, and damaged its goodwill. *Id.* ¶¶ 46, 53, 56, 82. Ryanair asserts a single cause of action against Expedia under the CFAA, 18 U.S.C. § 1030. *Id.* ¶¶ 77-83.

3. Absence of Allegations of Domestic Injury

Although Ryanair's Complaint includes allegations about screen scraping of its website and alleged consequent harm, it fails to specify any conduct or injury in the United States. Ryanair acknowledges that it operates out of and is organized under the laws of Ireland. Compl. ¶ 1. Ryanair also alleges that Expedia is a Washington corporation with its principal place of business in Washington. Compl. ¶ 3. But aside from a single conclusory assertion in the "Jurisdiction and Venue" section of the Complaint, Ryanair does not allege that any relevant conduct or injuries occurred in the United States.[3]

B. The Computer Fraud & Abuse Act

The CFAA is a criminal statute that prohibits various acts of computer trespass, *see* 18 U.S.C. § 1030(a), and permits private enforcement actions in limited circumstances, 18 U.S.C. § 1030(g). Ryanair invokes five substantive provisions of the CFAA in its Complaint—18 U.S.C. §§ 1030(a)(2)(C), 1030(a)(4), and 1030(a)(5)(A-C). *See* Compl. ¶¶ 79-82. Section 1030(a)(2)(C) prohibits "intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] . . . information from any protected computer." The other cited Sections similarly prohibit various acts of tampering with a "protected computer," subject to specific

[3] Ryanair's Complaint includes a conclusory assertion that "[v]enue is proper in this District under 28 U.S.C. § 1391(b) because Expedia resides in this judicial district, is subject to personal jurisdiction in this District, and because, on information and belief, a substantial part of the actions giving rise to the claim occurred in this District." Compl. ¶ 8. Ryanair's assertion that "a substantial part of the actions giving rise to the claim occurred in this District" is unsupported by any allegations of fact, and need not be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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terms and limitations. As the Ninth Circuit has recognized, the purpose of the CFAA is to proscribe illicit access to a "protected computer," or "hacking." *United States v. Nosal*, 676 F.3d 854, 858 (9th Cir. 2012).

C. Concurrent Proceeding

This lawsuit is not Ryanair's first relating to the conduct alleged in its Complaint. In February 2017, Ryanair sued Expedia over the *same* alleged conduct in Ireland, asserting claims, as here, based on Expedia's (or "its agent's") alleged use of "software . . . to extract data including flight information from Plaintiff's Website for the use and/or re-utilisation on the Defendant's website for commercial purposes." RJN, Ex. 3 (Feb. 27, 2017 Notice of Plenary Summons and General Indorsement of Claim) ¶ 6. While that case is based on substantially the same allegations as Ryanair's Complaint, it asserts different theories of liability, including claims alleging breach of contract and intellectual property infringement, *id.* ¶¶ 3-25, because there is no civil cause of action in Ireland comparable to the CFAA, *see* Declaration of Michael M. Collins ("Collins Decl.") ¶ 7.[4] Ryanair's action in Ireland remains pending. Collins Decl. ¶ 4.

LEGAL STANDARD

Issues of extraterritoriality are analyzed under Federal Rule of Civil Procedure 12(b)(6). *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010). Under Rule 12(b)(6), "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Del Vecchio v. Amazon.com, Inc.*, No. C11-366RSL, 2012 WL 1997697, at *2 (W.D. Wash. June 1, 2012) (quoting *Iqbal*, 556 U.S. at 678) (quotation marks omitted). "[A] plaintiff must plead sufficient factual content to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

[4] Expedia properly may offer evidence of foreign law through a declaration under Rule 44.1. *See* Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."); *de Fontbrune v. Wofsy*, 838 F.3d 992, 994 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Nov. 14, 2016) ("[U]nder Rule 44.1's broad mandate, foreign legal materials—including expert declarations on foreign law—can be considered in ruling on a motion to dismiss where foreign law provides the basis for the claim.").

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ARGUMENT

I. RYANAIR'S COMPLAINT SHOULD BE DISMISSED BECAUSE IT IMPERMISSIBLY SEEKS RELIEF FOR ALLEGED INJURIES ABROAD

A. There Is a Strong Presumption Against Extraterritorial Application of United States Law

"It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." *RJR Nabisco,* 136 S. Ct. at 2100 (quotation omitted). "This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *Id.* (citing *Morrison*, 561 U.S. at 255). The presumption against extraterritoriality applies "in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S. at 261. The Supreme Court has reaffirmed and strengthened this presumption in recent years, holding that a range of claims involving foreign conduct or injuries cannot proceed. *See*, *e.g.*, *RJR Nabisco*, 136 S. Ct. at 2111 (civil RICO statute "does not allow recovery for foreign injuries"); *Morrison*, 561 U.S. at 265 (section 10(b) of the Securities Exchange Act does not apply to misrepresentations made in connection with foreign securities); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115, 124 (2013) (Alien Tort Statute does not apply to "conduct occurring in the territory of another sovereign").

Courts apply a "two-step framework" for considering extraterritoriality. *RJR Nabisco*, 136 S. Ct. at 2101. At the first step, a court considers whether the statute "gives a clear, affirmative indication that it applies extraterritorially." *Id.* "The question is not whether we think 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmatively and unmistakably instructed that the statute will do so." *Id.* at 2100 (quoting *Morrison,* 561 U.S. at 255, 261). "'When a statute gives no clear indication of an extraterritorial application, it has none.'" *Id.* If the presumption against extraterritoriality is not rebutted under this standard, then at step two a court considers whether the plaintiff's claim involves an impermissible extraterritorial, or permitted domestic, application of the

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statute. If the case involves an extraterritorial application of the statute, then the claim cannot proceed. *Id.* A plaintiff bears the burden of pleading facts showing that it seeks to apply a statute domestically. *See, e.g., Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 66, 69-70 (2d Cir. 2012).

Crucially in this case, when a private plaintiff seeks to enforce a criminal statute that also provides a private right of action, this extraterritoriality test must be satisfied as to *both* the relevant substantive criminal provisions of the statute *and* the provisions authorizing private civil enforcement. As the Supreme Court explained in *RJR Nabisco*, the question of extraterritoriality in such a case "really involves two questions": first, do the statute's "*substantive prohibitions* . . . apply to *conduct* that occurs in foreign countries," and second, does the statute's "*private right of action* . . . apply to *injuries* that are suffered in foreign countries?" 136 S. Ct. at 2099 (emphasis added). The government can prosecute claims based on *conduct* occurring abroad so long as the statute's substantive provisions apply extraterritorially, but a private plaintiff cannot bring a civil claim based on foreign *injuries*, regardless of the alleged situs of the relevant conduct, unless the private right of action also applies extraterritorially. *Id.* at 2106-11.

As shown below, the provisions of the CFAA authorizing private enforcement do not apply extraterritorially. Because Ryanair alleges only foreign injuries, its Complaint must be dismissed.

B. The CFAA's Private Right of Action Does Not Apply Extraterritorially

The first question is whether the CFAA "affirmatively and unmistakably" authorizes a foreign plaintiff to sue for a foreign injury, thus rebutting the presumption against extraterritoriality. *Id.* at 2100. The statute does not do so.

The Supreme Court's analysis in *RJR Nabisco* is on point and controlling. The European Union and 26 of its member states brought civil RICO claims against United States company RJR Nabisco and others alleging a complex scheme in which sales of cigarettes were used to launder profits from sales of narcotics by drug traffickers in Europe. 136 S. Ct. at 2098. Some of the alleged conduct occurred in Europe, while some occurred in the United States. *Id.* at 2099. RJR Nabisco moved to dismiss on the grounds that RICO does not apply to foreign conduct and injuries. *Id.* The

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district court granted the motion; the Second Circuit reversed; and the Supreme Court then reversed again, ordering the complaint dismissed. *Id.* at 2111.

After canvassing authorities applying the presumption against extraterritoriality, *id.* at 2099-2101, the Supreme Court first considered whether the *substantive* criminal provisions of the RICO statute apply extraterritorially, and found that they *do*, *id.* at 2101-06. The Court noted that certain RICO predicate acts, including several allegedly committed by RJR Nabisco, "manifest[] an unmistakable congressional intent to apply extraterritorially." *Id.* at 2102 (quotation omitted). Because the presumption against extraterritoriality *was* rebutted as to the relevant RICO substantive prohibitions, the Court concluded that the plaintiffs' "allegations that [RJR Nabisco] violated §§ 1962(b) and (c) do not involve an impermissibly extraterritorial application of RICO." *Id.* at 2106.

That, however, was only the beginning of the inquiry because *private plaintiffs* were suing civilly in *RJR Nabisco*—and the "presumption against extraterritoriality must be applied separately to both RICO's substantive prohibitions and its private right of action." *Id.* at 2108; *see id.* at 2106 (courts must "separately apply the presumption against extraterritoriality" to statutory provisions authorizing a "private right of action"). As the Court explained, "a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* at 2106 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)). Further, "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *Id.* at 2106. For example, foreign nations have noted that it would "upset[] a balance of competing considerations that their own domestic . . . laws embody" if foreign citizens could "bypass their own less generous remedial schemes" in favor of U.S. law. *Id.* (quotation omitted). "Although 'a risk of conflict between the American statute and a foreign law' is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex." *Id.* (citing *Morrison*, 561 U.S. at 255).

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Accordingly, after determining that the presumption against extraterritoriality was rebutted as to certain of RICO's substantive prohibitions, the Supreme Court went on to examine whether the presumption was rebutted as to the RICO statutory provision creating a private right of action—and found that it was *not*. Section 1964(c), the private right of action provision at issue in *RJR Nabisco*, provides as follows, in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

18 U.S.C. § 1964(c). "Nothing in § 1964(c)," the Court concluded, "provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.* at 2108. The statute provides that "[a]ny person" may sue, and "[t]he word 'any' ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality." *Id.* Moreover, "by cabining RICO's private cause of action to particular kinds of injury—excluding, for example, personal injuries—Congress signaled that the civil remedy is not coextensive with § 1962's substantive prohibitions." *Id.* "The rest of § 1964(c) places a limit on RICO plaintiffs' ability to rely on securities fraud to make out a claim. This too suggests that § 1964(c) is narrower in its application than § 1962, and in any event does not support extraterritoriality." *Id.*

This Supreme Court holding is on all fours in this case and requires dismissal of the Complaint. The CFAA is a criminal statute that prohibits several enumerated acts of computer trespass. *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1131 (9th Cir. 2009); 18 U.S.C. § 1030(a)(1)-(7). Ryanair's Complaint asserts violations of five subsections of the CFAA, all of which prohibit accessing or obtaining information from a "protected computer" without, or in excess of, authorization. Compl. ¶¶ 78-81; *see* 18 U.S.C. §§ 1030(a)(2), (a)(4), (a)(5)(A)-(C). The CFAA defines "protected computer" to include a computer "which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States."

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Id. § 1030(e)(2). Assuming, for the sake of argument, that this reference to "a computer located outside the United States" is sufficient to demonstrate that the CFAA's *substantive* prohibitions can apply extraterritorially, all that follows is that some *conduct* abroad could be relevant *in the context of a criminal prosecution*.

But for Ryanair, a private plaintiff, to be permitted to sue civilly for that conduct, it must show that the presumption against extraterritoriality is rebutted *specifically as to the CFAA's private right of action*. It cannot do so, for the relevant statute, 18 U.S.C. § 1030(g), contains no language even suggesting, let alone "affirmatively and unmistakably" instructing, that foreign plaintiffs may sue for foreign injuries. In its entirety, Section 1030(g) provides as follows:

> Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

Nothing in this text instructs that a foreign plaintiff who has suffered a foreign injury may sue under the CFAA. The statute provides that "[a]ny person" may sue, but the Supreme Court has specifically held that such language "is insufficient to displace the presumption against extraterritoriality." *RJR Nabisco*, 136 S. Ct. at 2108 (addressing the "[a]ny person" language in Section 1964(c)). And nothing else in Section 1030(g) provides any suggestion of extraterritorial intent. *See id.* ("It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries . . . . Something more is needed . . . ."); *Morrison*, 561 U.S. at 255 ("When a statute gives no clear indication of an extraterritorial application, it has none.").

Moreover, as with Section 1964(c), the structure of Section 1030(g) shows that Congress did *not* intend the CFAA's private right of action to be coextensive with its substantive provisions. Section 1030(g) contains a number of limitations specific to the CFAA's private right of action, including (1) a requirement that "the conduct involves 1 of the factors set forth in subclauses (I), (II),

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(III), (IV), or (V) of subsection (c)(4)(A)(i)"; (2) a limitation on damages to "economic damages"; (3) a two-year statute of limitations; and (4) a prohibition on claims based on computer design or manufacture. By including these additional limitations, "Congress signaled that the civil remedy is not coextensive with [the statute's] substantive prohibitions." *RJR Nabisco,* 136 S. Ct. at 2108 (addressing limitations on damages in Section 1964(c)). Thus, for the same reasons as in *RJR Nabisco*, the CFAA's private right of action does not apply extraterritorially. *See Adhikari v. KBR Inc.*, No. 4:16-CV-2478, 2017 WL 4237923, at *5 (S.D. Tex. Sept. 25, 2017) (dismissing claims under Trafficking Victims Protection Reauthorization Act ("TVPRA") because "*RJR Nabisco*'s general rule is clear: a civil remedy that lacks clear indications of extraterritorial reach will redress only injuries experienced domestically, no matter the substantive provisions' scope").[5]

Finally, while this need not be established for the presumption against extraterritoriality to apply, it is clear that allowing Ryanair to pursue claims based on foreign injuries would create "'a risk of conflict between the American statute and a foreign law.'" *RJR Nabisco,* 136 S. Ct. at 2107 (quoting *Morrison,* 561 U.S. at 255). Ryanair sued Expedia in Ireland last year based on the same facts at issue in this case, invoking Irish law, and that case remains pending. *See* RJN, Ex. 3; Collins Decl. ¶ 4. Ryanair did not bring any claims alleging computer misuse, however, because Ireland's computer misuse statute does not provide a civil remedy. *See* Collins Decl. ¶ 6. By its CFAA claim in this case, Ryanair thus seeks to bypass its own country's ostensibly "less generous remedial

[5] If all this were not enough, the history of amendments to the CFAA further confirms that the presumption against extraterritoriality is not rebutted as to the CFAA's private right of action. Congress first provided for a private right of action under the CFAA in 1994. *See* Violent Crime Control And Law Enforcement Act Of 1994, Pub. L. 103-322, § 290001(d), 108 Stat. 1796 (1994). At that time, the terms of the CFAA indisputably did not apply outside the United States. *See* 18 U.S.C. § 1030(e) (1994). It was not until 1996, two years later, that the CFAA was amended to incorporate the concept and definition of a "protected computer," defined then as one "which is used in interstate or foreign commerce or communication." Economic Espionage Act Of 1996, Pub. L. 104-294, § 201(4), 110 Stat. 3488 (1996). And it was not until 2001 that the definition of "protected computer" was amended to reference "a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States." *See* Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA PATRIOT ACT) Act Of 2001, Pub. L. 107-56, § 814(d), 115 Stat. 272 (2001). Those same 2001 amendments added additional *limitations* on the CFAA private right of action, but did not add any language specifying that private plaintiffs could bring claims based on foreign injuries. *See* Pub. L. 107–56, § 814(e) (2001).

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schemes, thereby upsetting a balance of competing considerations" that its own country's laws embody. *RJR Nabisco*, 136 S. Ct. at 2106-07 (quotation omitted). This is precisely what the presumption against extraterritoriality guards against, and as the Supreme Court explained, the "need to enforce the presumption is at its apex" in a circumstance such as here. *Id.*

C. Ryanair Has Not Alleged the Requisite Domestic Injuries

Because the presumption against extraterritoriality has not been rebutted as to Section 1030(g), Ryanair "must allege and prove a *domestic* injury," *RJR Nabisco*, 136 S. Ct. at 2106 (emphasis in original), and cannot obtain any "recovery for foreign injuries," *id.* at 2111. But as explained above, Ryanair does not allege domestic injury in its Complaint, and it is clear that Ryanair's alleged injury is a foreign one. Ryanair is an Irish corporation with its principal place of business in Ireland that runs an airline in Europe. Compl. ¶¶ 1, 10; RJN, Ex. 1, at 20, 75. It earns revenues and suffers any potential losses in Europe. RJN, Ex. 1, at 8-9, 83. Ryanair's claim is plainly based on injuries allegedly suffered abroad—and because no amendment can cure such a defect, its claim may be dismissed with prejudice. *See*, *e.g.*, *Adhikari*, 2017 WL 4237923, at *5 (alleged civil TVPRA injuries were impermissibly foreign because "it is the location where the injury was suffered, not where it was caused, that determines its character").

II. RYANAIR'S OWN CHOICE OF LAW CLAUSE SELECTING IRISH LAW ALSO BARS ITS CFAA CLAIM

Ryanair's CFAA claim also fails for another reason: a choice of law clause that Ryanair drafted, and that Ryanair alleges is applicable, requires the application of Irish and not U.S. law.

According to Ryanair's Complaint, the Website Terms (or "TOU") that Ryanair posts on its website create a contract between the parties. Compl. ¶¶ 28-32, 58, 61-62. Ryanair alleges that "[u]sers of the Ryanair Website, including Expedia and/or its agents, are put on notice of and subject to the TOU," *id.* ¶ 28; "[a]t all material times, admission to and use of Ryanair's Website have been subject to the Ryanair TOU," *id.* ¶ 31; and "Expedia enters and uses the Ryanair Website by engaging in and/or directing, controlling, or procuring an activity commonly referred to as 'screen

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scraping,'" *id.* ¶ 39, which, Ryanair claims, "is subject to and breaches the terms of the Ryanair TOU," *id.* ¶ 58.

Ryanair fails to acknowledge, however, that its own Website Terms provide that Irish law governs disputes regarding the use of the Ryanair website: "It is a condition precedent to the use of the Ryanair website, including access to information relating to flight details, costs, etc., that any such party submits to the sole and exclusive jurisdiction of the Courts of the Republic of Ireland *and to the application of the law in that jurisdiction*, including any party accessing such information or facilities on their own behalf or on behalf of others." Compl., Ex. A, ¶ 7 (emphasis added). The Website Terms go on to say that, "[i]n the absolute and sole discretion of Ryanair, a legal action may be brought by Ryanair against any party in breach of these terms and conditions, at its election, in Ireland or the place of breach or the domicile of that party," thus purporting to create discretion as to jurisdiction. *Id.* But the Website Terms do not provide, or even suggest, that any law other than the law of the "Republic of Ireland" can apply to a dispute regarding use of the Ryanair website.

The Ninth Circuit "routinely enforce[s]" contractual choice of law clauses selecting foreign law. *Batchelder v. Kawamoto*, 147 F.3d 915, 918 (9th Cir. 1998) (dismissing securities claims based on choice of law clause selecting Japanese law); *see Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (dismissing securities and civil RICO claims based on choice of law and forum clauses selecting English law); *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987) (similarly dismissing federal-law claims based on choice of law clause selecting foreign law); *Abat v. Chase Bank USA, N.A.*, 738 F. Supp. 2d 1093, 1096 (C.D. Cal. 2010) ("The choice of law provision should be enforced, and its selection of Delaware law bars Plaintiff's California statutory claims as a matter of law."). And here, Ryanair itself drafted the choice of law clause in its own Website Terms, making the need for enforcement even clearer. *See*, *e.g.*, *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992) (recognizing that courts readily enforce choice of law clauses where "nondrafting party [] seeks enforcement of the choice-of-law provision"); *see also Chan v. Society Expeditions*, *Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997) (any "ambiguous language" in choice of law provision is construed "against the interest of the party that drafted it").

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Thus, accepting Ryanair's allegations as true as required on this motion, Ryanair's CFAA claim must be dismissed because Irish law, and not United States law, governs the parties' dispute.

CONCLUSION

For the foregoing reasons, Expedia respectfully requests that the Court dismiss Ryanair's Complaint with prejudice.

Dated: February 5, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I caused a true and correct copy of the foregoing Motion to Dismiss to be filed in this Court's CM/ECF system, which will send notification of such filing to all parties who have appeared in this matter.

DATED this 5th day of February, 2018.

s/ Thomas C. Rubin
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