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## Web Site Spidering May Constitute

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Operators of Internet sites may have a new weapon in their battle against unwanted visitors (including competitive sites) that use automated "spiders," "bots" and other means to derive information from their publicly-accessible web sites: the new tort of "cybertrespass."

For many months, online auction leader eBay has been waging a battle against a number of auction "meta-sites" that aggregate auction information from eBay and other auction sites through automated "spidering" and other techniques. eBay has pursued these aggregators on such legal theories as violation of intellectual property rights, breach of contractual terms of use, and unfair competition (see our [October 22, 1999 Internet Alert](#) discussing this issue). eBay's legal actions have persuaded most of the major auction meta-sites, including AuctionWatch.com, to enter into license agreements with eBay expressly permitting "spidering" and aggregating its content.

One notable holdout in these disputes has been Biddersedge.com, which has refused to enter into a license agreement with eBay. Last month, however, eBay successfully obtained a preliminary injunction from a federal court in California prohibiting Bidder's Edge from using any automated query program, robot, web crawler or any similar device for the purpose of aggregating or collecting auction data from eBay ( [eBay, Inc. v. Bidder's Edge, Inc.](#), (N.D. Cal. May 25, 2000). The court's order does not prevent Bidder's Edge from using information collected from eBay by other means. Bidder's Edge has announced it will appeal the court's order.

According to the court, eBay's servers are private property, conditional access to which eBay grants the public. The court reasoned that Bidder's Edge's ongoing violation of eBay's fundamental property right to exclude others from its computer systems potentially causes sufficient irreparable harm to support a preliminary injunction. eBay had sued Bidder's Edge in December, 1999 to stop Bidder's Edge from accessing eBay's web site and then posting eBay product and price information on the Bidder's Edge site.

The eBay case is reminiscent of another recent case in which cybertrespass was used to prevent the distribution of unsolicited e-mail, or spam. Last year, a California state court enjoined a former Intel employee from spamming Intel's internal e-mail servers on a trespass theory. That case was discussed in our [July 26, 1999 Internet Alert](#)

The eBay case is not without controversy, however. Unlike Intel's internal company e-mail servers, eBay's web pages were always accessible to the public. At least one court has stated that: "It is hard to see how entering a publicly available web site could be called a trespass, since all are invited to enter." See [Ticketmaster Corp. v. Tickets.com, Inc.](#) No. CV99-7654 HLH (BQRx) (C.D. Cal. March 27, 2000). See also our [June 7, 2000 Internet Alert](#)

Further, although eBay's user agreement prohibits the use of any robot, spider, other automatic device, or manual process to monitor or copy our web pages, the Ticketmaster court also reasoned that web site terms of use agreements do not necessarily create a contract with any one using the web site, absent a clear indication of the user's assent to those terms.

Finally, in holding that deep-linking to a publicly-available web site, without more, does not constitute copyright infringement, the Ticketmaster court reasoned that linking is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently. Some commentators have asked: If manually linking to a web site is permissible, why should using automated bots or crawlers to achieve the same result be treated differently?

Suing competitors for trespassing on a publicly-available web site may also attract the attention of the U.S. federal government. In February, 2000, eBay confirmed that the U.S. Department of Justice was investigating eBay's technological efforts to block its competitors bots and crawlers from its site.

The outcome of this dispute could have far-reaching implications for Internet commerce. Comparison shopping meta-sites are gaining increased popularity in areas including airline tickets, hotel reservations, computer equipment, consumer electronics, and books. In addition, Internet search engines could be held to "trespass" on every site they search. Although there have been no serious challenges to search engine indexing, an argument could be made that search engines perform functions very similar to content aggregators. Of course, indexing by search engines is considered beneficial to indexed sites, whereas auction aggregators are perceived as competitive threats by the sites they target.

Online companies should always be mindful of how their business practices and litigation strategies might conflict with the mercurial state of Internet law and with the nature of the Internet itself. Online companies must also be especially careful that their business practices do not constitute unfair competition or create an anti-competitive effect. Accordingly, although the tort of cybertrespass may be a useful new weapon in disputes between online companies, it is a weapon that must be handled with care.

Jeffrey Morgan

[Jeffrey.Morgan@haledorr.com](mailto:Jeffrey.Morgan@haledorr.com)

Jorge Contreras, Jr.

[Jorge.Contreras@haledorr.com](mailto:Jorge.Contreras@haledorr.com)