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Internet Property Rights: E-Trespass.

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INTERNET PROPERTY RIGHTS: E-TRESPASS

JOHN D. SABA, JR.

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I. INTRODUCTION

While humanity has survived the “Y2K Bug,” the twenty-first century has introduced more than a science fiction author could have ever imagined. So far, the new millennium spacecraft has landed with an army of robots, spiders, deep links, and web crawlers. These science-fiction

creatures have already begun to run their course by plundering commercial websites for confidential information and then re-marketing that same information to the original website owner's detriment. Website owners, however, are not throwing their hands in the air and waving white flags. On the contrary, they are setting their phasers to kill, as they engage in the biggest battle yet concerning the new frontier: "property rights in the digital age."¹

The Internet is defined as a super network of computers grouped together to share a host of information.² However, while familiarity with the Internet is virtually universal, legal solutions dealing with Internet property rights are unclear.³ The recent majority of Internet legal issues are fueled by a lack of these Internet property rights.⁴ Website owners do not have effective means to exclude unwanted users and are therefore subject to a number of questionable and sometimes hostile Internet practices.⁵ Two of the more plaguing issues are the practice of deep linking and the intrusion of software robots.

1. See Carl S. Kaplan, *Treat eBay Listings As Property? Lawyers See a Threat*, CYBER L.J., at <http://www.nytimes.com/library/tech/00/07/cyber/cyberlaw/28law.html> (July 28, 2000) (identifying a polarized debate occurring in academia on the concept of Internet trespass); see also Adam H. Fleischer, *Internet Torts and Cyberspace Insurance: New Issues for the E-economy*, 88 ILL. B.J. 268, 268 (2000) (stating that Internet associated claims are developing at a rapid pace and can be categorized in two different categories: "publishing and performance torts").

2. See JOHN R. LEVINE ET AL., *THE INTERNET FOR DUMMIES* 10 (6th ed. 1999) (explaining that the Internet is the world's largest computer network, where information is freely exchangeable); "Ooh, they have the Internet on computers now!" See *The Simpsons: Das Bus* (FOX television broadcast, Feb. 15, 1998), available at <http://www.snpp.com/episodes/5F11> (quoting famed fictional character, Homer Simpson, and his cartoon use of "The Internet for Dummies Remedial Edition").

3. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347-350 (1967), reprinted in *FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW* 93-97 (Avery Wiener Katz ed., 1998) (discussing the emergence and evolution of property rights concerning new frontiers). Demsetz discusses how the efficient use of resources leads to the natural development of property rights, analogizing how Native American hunting rights were developed to support tribal hunting. See AVERY WIENER KATZ, *FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW* 90 (1998) (analyzing Demsetz's view of the economics of property rights).

4. See generally *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1071 (N.D. Cal. 2000) (inferring that website owners have the right to exclude some users through the concept of trespass to chattels). *But see Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *4 (C.D. Cal. Mar. 27, 2000) (denying Ticketmaster's trespass claim, inferring that commercial website owners may not have a property right in their systems, since websites are publicly available).

5. See *eBay*, 100 F. Supp. 2d at 1062-63 (noting eBay's battle to protect itself from software robots); *Ticketmaster*, 2000 WL 525390, at *1-4 (noting Ticketmaster's struggle to protect itself from deep linking).

The first method, deep linking, occurs when one website publishes a hypertext link deep in the interior of another website's home page.⁶ The concept of deep linking is not the same as general linking, where one website provides a general link to one's website.⁷ Deep linking bypasses a website's home page, which generally contains vital advertising,⁸ advertising banners⁹ and other important information, and provides a path deep into the interior of the website.¹⁰ Generally, commercial website owners subjected to unwanted deep links complain of significantly diminished advertising revenues due to their lack of control against the practice.¹¹

6. See Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking,'* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p1.html> (May 2000) (noting the dichotomy between those who think that linking promotes websites by drawing traffic to a site, and those who feel that it infringes on websites by violating the owner's control); Kurt A. Wimmer, *E-Litigation*, NAT'L L.J., May 29, 2000, at A17 (stating that "[d]eep linking involves providing a link not to the home page of the targeted site . . . but to a specific interior page on the site that provides a service"). This method can be very beneficial because it allows an Internet user to drill down to the exact information sought within a website without having to scour the whole site. *Id.* Typically, web owners subject to deep linking prefer the user to browse around the site, absorbing as many advertising banners as possible. *Id.*

7. See Mary Anne Bendotoff, Note, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.: Fair Use, the First Amendment, and the Freedom to Link*, 35 U.S.F. L. REV. 83, 87-88 (2000) (noting that the Internet, as a global computer network, encourages the creation of links as a method to build up the communications medium). Linking benefits a web surfer in suggesting a website that might be of proper interest. *Id.* However, proper "netetiquette" recommends obtaining permission of the website before publishing the link. *Id.* But see Tim Berners-Lee, *Links and Law: Myths*, AXIOMS OF WEB ARCHITECTURE: 4, at <http://www.w3.org/DesignIssues/LinkMyths.html> (Apr. 1997) (claiming that there is no need to ask before publishing another's web link). Mr. Berners-Lee is purportedly "the originator of the hyperlink." Mary Anne Bendotoff, Note, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.: Fair Use, the First Amendment, and the Freedom to Link*, 35 U.S.F. L. REV. 83, 88 (2000).

8. See Anita Rosen, *THE E-COMMERCE QUESTION AND ANSWER BOOK: A SURVIVAL GUIDE FOR BUSINESS MANAGERS* 171 (4th ed. 2000), available at http://emedia.netlibrary.com/nlreader/nlreader.dll?bookid=8545&filename=page_iii.html (stating that "the general rule for advertising is that the site needs over three million visitors a day").

9. See *id.* at 172 (noting the average revenue and value advertising banners bring for one's website). Website owners can charge between \$10,000 and \$45,000 to publish an advertising banner for a three month period. *Id.*

10. See Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking,'* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p1.html> (May 2000) (noting that some websites are opposed to deep linking because their website address might have changed, thereby leaving an unwary surfer confused and stranded).

11. See *id.* (noting further that commercial website owners are concerned that deep links will confuse surfers as to which site they are visiting); see also Maxine Lans Retsky, *Deep Linking Not Always Ticket for Web*, MARKETING NEWS, June 5, 2000, at 15 (stating that because deep linking circumvents typical user access, it in turn depletes the viewing of

The second practice generating problems concerning website property rights is the unauthorized use of Internet software robots. A software robot is a program used by one website to search, copy, and retrieve information from another website.¹² Essentially, a web spider is an automated program that communicates across the Internet to index or collect information about another site. These Internet robots operate at lightening speeds, retrieving large amounts of data in seconds, potentially clogging-up network connections to servers and even the server itself.¹³

Both unsolicited deep linking and the unauthorized use of software robots beckon the need to establish clear property rights for website owners to ensure that Internet sites are only accessed in the proper manner.¹⁴

advertising pages). An analogy can be made to the traditional method that one enters a retail store and absorbs products. For instance, you might enter Best Buy to purchase a computer, but by browsing through the retail store, notice a top ten CD on the end cap display. As an analogy, deep linking reduces net browsing by directing a user directly to the sought product, thereby by-passing other possible displays.

12. See *eBay*, 100 F. Supp. 2d at 1060 (stating that a robot is a software program that executes commands at 1,000 lines a minute when retrieving textual information on the Internet); see also David Kramer & Jay Monahan, *Panel Discussion: To Bot or Not to Bot: The Implications of Spidering*, 22 HASTINGS COMM. & ENT. L.J. 241, 242 (2000) (noting the variety of ways a malicious website owner can use a software robot). An individual can purchase a software robot for approximately nine dollars, program it to scour a website for email addresses, then send junk mail to those email addresses within a couple of hours. *Id.*; STEVE MORITSUGU ET AL., PRACTICAL UNIX 732 (Lisa Wilson et al. eds., 2000) (stating that search engines use robots in a beneficial way). Search engines often use web spiders, crawlers, or robots to seek out websites, catalog relevant information, repackage, and supply the information to Internet users. *Id.* Some examples of commercial directories using software robots are Yahoo!, AltaVista, and Lycos. *Id.* See also ALAN M. SCHLEIN, FIND IT ONLINE: THE COMPLETE GUIDE TO ONLINE RESEARCH 37-38 (James R. Flowers, Jr. et al. eds., 2d ed. 2000) (expounding that spiders, bots, and crawlers cannot penetrate hidden text that is "gated" without a password). For example, a software robot cannot index the New York Times online, which requires a user password for access. *Id.* Additionally, spiders typically cannot index all information on a commercial website; rather, the accessibility of the information depends on the types of files a website contains. *Id.* For instance, while a robot can retrieve ".txt" files, they usually cannot interpret ".pdf" files. *Id.* However, some search engines are now capable of circumventing some registration barriers. *Id.* Examples of such are Excite's News Tracker and Northern Light's Current News. ALAN M. SCHLEIN, FIND IT ONLINE: THE COMPLETE GUIDE TO ONLINE RESEARCH 37-38 (James R. Flowers, Jr. et al. eds., 2d ed. 2000).

13. See Troy Wolverton, *eBay, Bidder's Edge Face Off in Court*, CNET NEWS.COM, at <http://www.Canada.cnet.com/news/0-1007-200-1697820.html> (Apr. 14, 2000) (noting an example of the damage caused to websites by the robots). Robots can potentially overload websites to a point of "crashing." *eBay*, 100 F. Supp. 2d at 1061.

14. See Brief of Amicus Curiae *eBay, Inc. at 2*, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (indicating that treating a web server as property grants owners an exclusionary right, thereby increasing value); see also E-mail from Dr. Richard Saba, Professor of Economics, Auburn University, to the author (Aug. 28, 2000, 15:13:53 GMT) (on file with the *St. Mary's Law Journal*) (stating that "[I]n general an economist

With the creation of well-defined rights, web owners could essentially control the way their sites are accessed. In so doing, owners of websites and even computers could gain the ability to protect themselves against harmful and unfair Internet practices.¹⁵ However, website owners are not waiting for new legal mechanisms. Today, website companies are using any applicable law to battle the effects of deep linking and the unwanted use of software robots.¹⁶ For example, Internet website owners have recently resurrected the ancient law of trespass to chattels to protect their property rights.¹⁷ Although this may not be the precise legal mechanism to handle electronic claims, the use of the trespass to chattels theory may have at least summoned the need for a more thorough body of law to protect website owners' rights.¹⁸

This Comment discusses the need for specific Internet property rights to battle deep linking and software robots. Part II provides a brief background of the common law concept of trespass to chattels and a brief history of how the tort is utilized to battle electronic trespass. Part III of this Comment contains four subsections. The first subsection analyzes recent case law involving Internet companies' struggle to secure their websites from unauthorized users, thereby demonstrating how trespass to chattels is used to deter the use of unfair deep linking and software robots. The second subsection discusses the views of both proponents and opponents of Internet trespass. Subsection three gives an economic analysis of property rights in the Internet. The final subsection critiques the recent congressional developments purported to solve some of these Internet issues. After discussing the effects of common law theories, Part IV of the Comment proposes a new statute, the e-Trespass Act, which

would claim that any weakening of property rights lowers the value of an asset to its owner").

15. See Brief of Amicus Curiae eBay, Inc. at 9-10, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (stating that owners of websites would have leverage to negotiate licenses if a property right were granted to websites); see also Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 234 (1996) (stating that creating a private property regime is a way of internalizing the costs of business in cyberspace).

16. See Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 27-28 (2000) (discussing the modern application of trespass to chattels).

17. Carl S. Kaplan, *Treat eBay Listings As Property? Lawyers See a Threat*, CYBER L.J., at <http://www.nytimes.com/library/tech/00/07/cyber/cyberlaw/28law.html> (July 28, 2000); see Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 27 (2000) (discussing courts' application of the trespass to chattels cause of action to Internet property rights).

18. See Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 54 (2000) (stating that legal recourse may be necessary as long as it is not limited by the ill-fated common law trespass to chattels cause of action).

would grant limited property rights to commercial website owners without impeding upon the Internet market place.

II. BACKGROUND: FORMATION OF ELECTRONIC TRESPASS

A. *Trespass to Chattels: "I Haven't Seen You Since the 19th Century!"*

Ironically, at the nexus of recent high-technology Internet issues lies the nineteenth century claim of trespass to chattels.¹⁹ Trespass to chattels is a tort claim which protects a person's tangible property from being disposed, impaired, or deprived of use by another.²⁰ The trespass to chattels claim is also referred to as conversion's "little brother."²¹ Originally, trespass to chattels was used to protect one's property from tangible, physical interference.²² However, the tangible interference requirement has changed to allow for less tangible interferences encompassed by Internet technologies.²³

1. *Thrifty-Tel, Inc. v. Bezenek*

Prior to 1996, few courts engaged in Internet issues.²⁴ However, in 1996, the antiquated law of trespass to chattels was resurrected and introduced into the advancing world of technology.²⁵ In *Thrifty-Tel, Inc. v. Bezenek*,²⁶ a group of minors hacked into Thrifty-Tel's internal phone system to obtain long-distance access codes. This method of hacking, also known as "phreaking," occurs when an unauthorized individual steals and uses a company's long-distance access code, usually to make long-distance calls.²⁷ Thrifty-Tel immediately learned of the unauthorized

19. *See id.* at 28-29 (discussing the claim as it arose in e-mail disputes).

20. RESTATEMENT (SECOND) OF TORTS § 218 (1965).

21. *See Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 (Cal. Ct. App. 1996) (noting that the trespass to chattels cause of action arises where the level of interference with the property does not reach the level required for conversion).

22. *See Dan L. Burk, The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 29-30 (2000) (acknowledging the Restatement's requirement of intentional physical contact).

23. *See id.* at 35 (discussing how trespass to chattels is contorted and compromised to fit claims involving the Internet).

24. Susan M. Ballantine, Note, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209, 221 (2000) (noting that Internet cases may have been resolved both differently and more consistently had the first courts distinguished developing Internet activity issues from issues in existing law).

25. *See Dan L. Burk, The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 27 (2000) (discussing the evolution of the antiquated trespass to chattels cause of action into one which can now be used by cyberspace lawyers).

26. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

27. *See Dan L. Burk, The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 29 (2000) (defining "phreaking" as the unauthorized use of telephone services, such as that

electronic intrusion and filed a civil suit against the hacker defendants to recover from their larcenous act.²⁸ Thrifty-Tel sued the defendants alleging three claims, one of which was conversion.²⁹ The lower court awarded Thrifty-Tel approximately \$50,000 in damages; the defendants appealed both the conversion cause of action and the amount of damages.³⁰ In a case of first impression, the California Court of Appeals upheld the trial court's ruling for Thrifty-Tel, but substituted the conversion claim with a trespass to chattels claim.³¹

The *Thrifty-Tel* court was one of the first to uphold the theory of "electronic trespass" using the trespass to chattels doctrine.³² In the appellate court's analysis, the prevailing issue was determining which doctrine was more applicable for recovery under a trespass claim: conversion or trespass to chattels.³³ Conversion requires that (1) a person own property, (2) the defendant dispossess the owner of that property, and (3) the act results in damage.³⁴ Although Thrifty-Tel originally filed suit against the defendant hackers under conversion, the appellate court recognized a

accomplished by defendants' use of software to search for access codes in *Thrifty-Tel, Inc. v. Bezenek*; *DragNet 2000*, PC TODAY MAG., <http://www.htcn.org/pctoday.htm> (June 1993) (noting the different types of hackers). "Phreakers" use credit card numbers and access information (calling card numbers, home and work phone numbers, etc.) to steal long distance services. *Id.* The hackers in *Thrifty-Tel* were identified because they spent three days calling the plaintiff's telephone switch trying to manually break the six digit access code. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 471.

28. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 471.

29. *See id.* (stating that Thrifty-Tel was "seeking damages for conversion, fraud, and reasonable value of services").

30. *See id.* at 472 (combining the award of \$33,720 in damages and \$14,000 in attorney fees and costs to equal the \$50,000 figure). The financial rationale of awarding damages included "the average cost of identifying computer hackers and lost revenues when customers switch to another long distance system because hacking impeded their phone use." *Id.* at 472 n.3.

31. *See* Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 29-31 (2000) (citing *Thrifty-Tel*, 54 Cal. Rptr. 2d at 471). The California Court of Appeals for the Fourth Appellate District upheld the case but remanded the case to the Superior Court for re-calculation of damages. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 477.

32. *See* Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 29 (2000) (showing that the 1996 California *Thrifty-Tel* case is the basis of the analogy between invasions of computer systems and trespass to chattels); Susan M. Ballantine, Note, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209, 235 (2000) (noting that the analogy originated in *Thrifty-Tel*).

33. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472 (stating that it was not necessary to address the issue of whether or not conversion occurred because a trespass had occurred).

34. *See* Daniel J. Caffarelli, Note, *Crossing Virtual Lines: Trespass on the Internet*, 5 B.U. J. SCI. & TECH. L. 6, 21 (1999) (stating the elements for a claim of conversion of property).

problem with the claim due to the element of tangibility.³⁵ The problem with Thrifty-Tel's original claim concerned the issue of whether telephone access codes are tangible property under the definition of conversion.³⁶ Instead of engaging in a debate of tangibility, the court substituted its own trespass to chattels claim for the original conversion claim.³⁷

To support the trespass to chattels claim, the court reasoned that although trespass once required strict proof of physical interference, proving such elements is not as strict in the modern trespass doctrine.³⁸ The court reasoned that electronic signals "were sufficiently tangible to support a trespass cause of action."³⁹ The court also relied on other jurisdictions' use of "computer trespass" to battle unauthorized electronic access.⁴⁰ As a result of the court's amended claim, the defendant was found liable under the trespass to chattels claim.⁴¹

Thrifty-Tel opened the door for trespass to chattels as a cause of action for electronic trespass.⁴² Although the hackers in *Thrifty-Tel* used a telephone to dial into plaintiff's internal phone system to obtain restricted access codes, the decision defined the elements of trespass to chattels broadly enough to encompass indirect interference as a form of electronic trespass.⁴³ One need not be a rocket scientist to calculate how fast electronic trespass to chattels will soar to reach planet Internet.

35. See *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472 (declaring that "[c]ourts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in, something tangible").

36. See Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 33 (2000) (noting the court's quick conclusion that telephone access codes are tangible enough to support a trespass to chattels claim).

37. See *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472 (expressing that the question of conversion need not be addressed since the evidence supports a trespass to chattels claim); Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 33 (2000) (criticizing the court's substitution of claims).

38. See *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6 (stating that indirect touching from such items as dust particles and sound waves are enough to support a claim of trespass under indirect interference).

39. *Id.*

40. *Id.* at 473 n.7 (indicating that Indiana classifies hacking under trespass and not conversion, and that Washington has a "computer trespass" offense aimed at prosecuting hackers).

41. *Id.* at 473.

42. See Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 29-32 (2000) (illustrating how the trespass to chattels claim was subsequently used in other cases).

43. See Daniel J. Caffarelli, Note, *Crossing Virtual Lines: Trespass on the Internet*, 5 B.U. J. SCI. & TECH. L. 6, 26-27 (1999) (indicating that visiting and copying data from another's website could potentially qualify as trespass).

2. *CompuServe v. Cyber Promotions*

Soon it landed with a bang. The next successful milestone for the trespass to chattels claim surfaced in *CompuServe Inc. v. Cyber Promotions, Inc.*,⁴⁴ which was decided less than one year after *Thrifty-Tel*. However, *CompuServe* involved a small twist: the concept of electronic trespass applied to e-mail.⁴⁵ CompuServe, an Internet service provider and proprietary network, sells Internet access and other services to consumers.⁴⁶ Cyber Promotions, Inc., an Internet business marketer, used CompuServe's Internet service to send out mass e-mails, affectionately known as "spam," to a list of CompuServe subscribers.⁴⁷ The defendant, Cyber Promotions, Inc., continued sending unsolicited bulk e-mail advertisements to CompuServe customers despite warnings.⁴⁸ Not only did CompuServe warn Cyber Promotions about violating its policy on spamming, but CompuServe also exhausted technical resources trying to prohibit the defendant's transgressions.⁴⁹ Finally, CompuServe filed a preliminary injunction against Cyber Promotions in federal district court under a trespass to chattels cause of action.⁵⁰ The federal court granted the injunction and thereby restricted the defendant from electronically using CompuServe's network to send spam to CompuServe customers.⁵¹

The court in *CompuServe* began its analysis by discussing the interrelation between conversion and trespass to chattels.⁵² The court stated that while conversion involves interference with the possession of property, a smaller derivative of the claim exists under the trespass to chattels.⁵³ Moreover, the court provided a more indepth analysis of both the definition and application of the tort claim than the *Thrifty-Tel* court.⁵⁴ First,

44. 962 F. Supp. 1015 (S.D. Ohio 1997).

45. *See* *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (concerning "the right of an online computer service to prevent a commercial enterprise from sending unsolicited electronic mail advertising to its subscribers").

46. *See id.* (explaining that CompuServe subscribers may also link to other Internet resources).

47. *See id.* at 1018-19 (discussing the distribution of unsolicited advertisements via electronic mail).

48. *Id.* at 1019 (stating that CompuServe gave notification that users are prohibited from using the CompuServe network for distributing unsolicited e-mail).

49. *Id.* (stating that CompuServe designed software programs to filter the bulk e-mail messages).

50. *CompuServe*, 962 F. Supp. at 1017.

51. *See id.* (stating that the elements of trespass to chattels were met and thus an injunction can ensue).

52. *See id.* at 1020-21 (defining trespass to chattels and conversion).

53. *See id.* at 1021 (stating that trespass to chattels is "a little brother of conversion").

54. *Compare* *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 472 (Cal. Ct. App. 1996) (analyzing the issue on whether electronic data is considered to be tangible property

the court used the Restatement (Second) of Torts section 217 to define trespass to chattels as the physical intermeddling or using of another's personal property.⁵⁵ Next, the court turned to the Restatement (Second) of Torts section 218 to determine when trespass to chattels may be invoked.⁵⁶ Ensuring that it did not depart from the specific language of section 218, the court acknowledged that to sustain an action for trespass to chattels, one's property must be dispossessed or devalued.⁵⁷

Applying CompuServe's trespass to chattels claim to the facts of the case was a legal leap for the court. The court extinguished any arguments surrounding the physical contact requirement of the claim by addressing the holding in *Thrifty-Tel*.⁵⁸ Accordingly, the court held that electronic signals constitute sufficient physical contacts under a trespass claim; therefore, the defendant's use of e-mail was no different than the indirect

and whether a conversion claim or trespass doctrine would better support plaintiff's action), *with CompuServe*, 962 F. Supp. at 1021-22 (giving a detailed definition and application of trespass to chattels, by first adopting the holding in *Thrifty-Tel*, and then comparing trespass to chattels with the Restatement (Second) §§ 217-218).

55. *See CompuServe*, 962 F. Supp. at 1021 (looking to the RESTATEMENT (SECOND) OF TORTS § 217 Comment e). The definition of trespass to chattels as defined by Restatement (Second) § 217 reads: "A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." RESTATEMENT (SECOND) OF TORTS § 217 (1965). Comment e of the Restatement (Second) § 217 states that the "intermeddling" component of trespass to chattels requires some sort of physical contact. *See CompuServe*, 962 F. Supp. at 1021 (quoting RESTATEMENT (SECOND) OF TORTS § 217 cmt. e (1965)). However, the court also considered Comment h of the Restatement, which states that some cases involving trespass to chattels may cause plaintiff a loss of value without physical interference. *See id.* at 1022 (applying RESTATEMENT (SECOND) OF TORTS § 217 cmt. h (1965)).

56. *See CompuServe*, 962 F. Supp. at 1021 (applying the black letter law of the Restatement (Second) of Torts § 218, which discusses when the tort is actionable to address defendants' claim that they did not physically disposes or interfere with plaintiff's property).

57. *See id.* at 1022-23 (looking to the Restatement to evaluate whether electronic trespass can be imposed). The Restatement (Second) of Torts § 218 reads:

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

- (a) he dispossesses the other of the chattel, or
- (b) the chattel is impaired as to its condition quality, or value, or
- (c) the possessor is deprived of the use of the chattel for a substantial time, or
- (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has legally protected interest.

RESTATEMENT (SECOND) OF TORTS § 218 (1965).

58. *See CompuServe*, 962 F. Supp. at 1021 (stating that computer generated electronic signals are physically tangible enough to support a trespass claim, as held in *Thrifty-Tel*).

electronic interference in *Thrifty-Tel*.⁵⁹ Thus, the physical contact requirement was met.⁶⁰

The defendant in *CompuServe* asserted, however, that a trespass to chattels claim was not supported because the defendant's e-mail actions did not dispossess CompuServe of its property.⁶¹ Furthermore, the defendant cited case law mandating the requirement of substantial interference in a trespass to chattels claim.⁶² Although the court seemingly agreed with defendant's argument, it stated that other means exist under the restatement to sustain a trespass claim.⁶³ The court turned to section 218(b), which allows action for "[h]arm to the personal property or diminution of its quality, condition, or value."⁶⁴ The court determined that the defendant's harmful effects sufficiently devalued the CompuServe network systems to warrant an injunction on the cause of trespass to chattels.⁶⁵ Additionally, the court reasoned that defendant's actions tarnished CompuServe's goodwill and business reputation.⁶⁶ Making it clear

59. See *id.* (inferring that the concept of e-mail qualifies as electronic interference, as per *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 n.6 (Cal. Ct. App. 1996)).

60. *Id.* (relying on *State v. McGraw*, 480 N.E.2d 552 (Ind. 1985)). Defendant in *State v. McGraw* was a criminal hacker charged with trespass. *McGraw*, 480 N.E.2d at 554. The Indiana Supreme Court found in dicta that hacking was a crime better prosecuted under trespass than conversion. *Id.* The court in *CompuServe* found that if the State of Indiana could successfully charge a hacker under trespass, then the defendant's electronic acts in this case could also constitute trespass. *CompuServe*, 962 F. Supp. at 1021.

61. See *CompuServe*, 962 F. Supp. at 1022 (stating that substantial interference with the chattel is required for trespass to chattels to be actionable).

62. See *id.* (citing to *Glidden v. Szybiak* and *Koepnick v. Sears Roebuck & Co.* in support of the substantial interference requirement); see generally *Glidden v. Szybiak*, 63 A.2d 233, 235 (N.H. 1949) (stating that because plaintiff did not contend any harm done by defendant pulling on her pet's ears, no tortious action could be brought); *Koepnick v. Sears Roebuck & Co.*, 762 P.2d 609, 619 (Ariz. Ct. App. 1988) (stating a vehicular search amounting to two minutes is not sufficient dispossession).

63. *CompuServe*, 962 F. Supp. at 1022 (indicating other grounds for liability available under Restatement (Second) of Torts § 218(b)).

64. *Id.* at 1022 (quoting the RESTATEMENT (SECOND) OF TORTS § 218(b) (1965)).

65. See *id.* (acknowledging that although there was no physical harm done to the equipment, its value was nonetheless diminished).

66. *Id.* at 1022-23 (citing RESTATEMENT (SECOND) OF TORTS § 218(d) (1965)). Since CompuServe users pay incrementally to access the Internet, defendant's spam essentially represents cost to the users who must spend extra time reading and discarding the e-mails. *Id.* In November of 1996 alone, over 9,500 users complained of defendant's spamming, the effects of which placed CompuServe in a negative light. *CompuServe*, 962 F. Supp. at 1023. Furthermore, a number of those complaints mentioned the cost associated with managing spam and how it is not cost justified for the user to pay. *Id.* Finally, many CompuServe users canceled their accounts as a result of defendant's actions. *Id.*

that the element of damage under a trespass claim may not be limited to physical harm, the court granted CompuServe's preliminary injunction.⁶⁷

In less than one year, trespass to chattels was armed and launched at the Internet hostiles. What the court in *Thrifty-Tel* initialized, *CompuServe* fine-tuned. Since technological changes occur rapidly, new forms of technology would soon challenge the new defense.⁶⁸ As technology evolved, so too would trespass to chattels evolve from "Electronic trespass" to "Internet trespass."

III. 21ST CENTURY ADAPTATION: INTERNET TRESPASS

A. Common Law Internet Trespass

The years in which *Thrifty-Tel* and *CompuServe* were decided, 1996 and 1997, are now, from a technological standpoint, considered medieval. The effects of Internet trespass and trespass to chattels, as applied to the more modern practices of deep linking and Internet robots, can be analyzed through two recent cases surrounding Internet trespass. The first case involves a ticket retailing company, Ticketmaster, and its battle against various deep linkers. The second case involves an Internet auction giant, eBay, and its struggle to free itself against the claws of software robots.

1. *Ticketmaster v. Microsoft* – The Brewing Battle

A limited number of lawsuits involve the practice of deep linking, primarily due to a lack of a clear cause of action for dot-coms.⁶⁹ Lack of modern law, however, did not restrain one company from trying to prevent the deep links against it.⁷⁰ Ticketmaster, a well known ticket distrib-

67. See *id.* at 1027 (noting that a preliminary injunction is not appropriate where monetary damages will suffice). However, the court noted an exception where monetary damage is hard to calculate. *Id.* Because plaintiff's good will and business reputation are difficult to calculate, a preliminary injunction was appropriate. *CompuServe*, 962 F. Supp. at 1027.

68. See *id.* at 1018 (indicating the court acknowledged the rapid growth of the Internet before beginning its analysis); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1062 (N.D. Cal. 2000) (introducing the complexities of software robots or web crawlers).

69. See *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *1 (C.D. Cal. Mar. 27, 2000) (indicating that Ticketmaster brought ten different causes of action against Tickets.Com in order to protect itself from deep linking).

70. See Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking,'* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p1.html> (May 2000) (stating that Ticketmaster sued Tickets.Com for deep linking); Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/library/weekly/aa022399.htm?once=true&> (Feb. 3, 1999) (stating that "Internet lawyers and Webmasters had been closely watching the case in the expectation that it might set

utor, struggled to protect itself from the whimsical “anything goes” Internet attitude of one competitor’s behavior.⁷¹ The first major dispute involving deep linking occurred in April of 1997 when Ticketmaster filed suit against Microsoft.⁷² The dispute arose when Microsoft’s “Sidewalk,” an informational website spotlighting specific upcoming events, provided deep links to the interior pages of Ticketmaster’s website.⁷³ Microsoft’s deep links devalued Ticketmaster’s site and harmed the company by bypassing advertisements and lowering ad page hits, resulting in a reduction of consumers’ impulse purchases.⁷⁴ Ticketmaster, at the time, had a paid agreement with a similar web guide service called CitySearch allowing the deep links.⁷⁵ What CitySearch was paying for, Microsoft was taking for free.⁷⁶ Ticketmaster filed suit against Microsoft in federal dis-

some legal limits in the ability of any Website to link to any page of any other site that is publicly available”).

71. See Margaret Smith Kubiszyn, *Emerging Legal Guidance on ‘Deep Linking,’* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p1.html> (May 2000) (acknowledging the clash between profit-oriented companies and the Internet cyber-culture).

72. *Id.*; see Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/library/weekly/aa022399.htm?once=true&> (Feb. 3, 1999) (stating that “Ticketmaster alleged violations of its trademarks, false and deceptive practices, and unfair competition and business practices”).

73. Margaret Smith Kubiszyn, *Emerging Legal Guidance on ‘Deep Linking,’* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p3.html> (May 2000); see Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/library/weekly/aa022399.htm?once=true&> (Feb. 3, 1999) (stating that after Ticketmaster discovered the links, it took technical measures to try to block the links).

74. Margaret Smith Kubiszyn, *Emerging Legal Guidance on ‘Deep Linking,’* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p3.html> (May 2000); see Maxine Lans Retsky, *Deep Linking Not Always Ticket for Web*, *MARKETING NEWS*, June 5, 2000, at 15 (noting three types of revenue loss suffered by Ticketmaster as a result of deep linking). The first type of harm from deep linking occurs when consumers, routed from the Ticketmaster home page, do not have the chance to point and click on Ticketmaster’s advertisements. *Id.* The second type of revenue loss occurs when Ticketmaster’s “traffic may appear artificially low as a result of its home page regularly being circumvented.” *Id.* The third type of harm is loss of revenue from forgone impulse buys. *Id.* “It is quite likely that a visitor shopping for tickets for the upcoming Dave Matthews Band concert also may have noticed an offer for the upcoming REM show and opted to purchase tickets for that show as well—if that visitor had started at the home page.” *Id.*

75. Margaret Smith Kubiszyn, *Emerging Legal Guidance on ‘Deep Linking,’* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p3.html> (May 2000).

76. See *id.* (stating that while “Ticketmaster had . . . an agreement to provide event information and ticket-ordering links to . . . CitySearch,” Microsoft was taking the same information without paying); Jim Conley, *You Surf, They Pay*, *PC COMPUTING*, May 1, 2000, 2000 WL 2000314 (demonstrating popular methods of charging for deep linking, such as “pay per click” agreements).

strict court.⁷⁷ According to Microsoft, deep links were not a violation and were fair in cyberspace, a medium where information is free.⁷⁸ The case, which was closely watched for legal guidance on deep linking, was settled in February 1999.⁷⁹ The settlement agreement restricted Microsoft from deep linking to the interior of Ticketmaster's website.⁸⁰ However, Microsoft could legitimately link to Ticketmaster's initial homepage.⁸¹

77. Bob Tedeschi, *Ticketmaster and Microsoft Settle Linking Dispute*, CYBERTIMES, at <http://www.nytimes.com/library/tech/99/02/cyber/articles/15tick.html> (Feb. 15, 1999); see Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/library/weekly/aa022399.htm?once=true&> (Feb. 3, 1999) (stating that the suit came only after Ticketmaster gave Microsoft sufficient warning to stop deep linking).

78. See Jim Conley, *You Surf, They Pay*, PC COMPUTING, May 1, 2000, 2000 WL 2000314 (stating that initially with news of the lawsuit, Microsoft issued a statement: "All Microsoft does is provide viewers of its own Web pages with the URLs for other Web pages on the Internet"); see also Elizabeth Gardner, *Lawsuit Settled, But Linking Debate Lives On*, INTERNET WORLD, Feb. 22, 1999, 1999 WL 15787623 (stating one of Microsoft's agreements purported that deep linking actually brought traffic to Ticketmaster's site as well as provided some free advertising); Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/library/weekly/aa022399.htm?once=true&> (Feb. 3, 1999) (noting that Microsoft refuted Ticketmaster's allegations and "affirmatively asserted a freedom of expression and association defense as applied to the unique nature of the Internet, as well as defenses of assumption of risk, estoppel, fair use, 'unclean hands,' free speech, and others").

79. See Elizabeth Gardner, *Lawsuit Settled, But Linking Debate Lives On*, INTERNET WORLD, Feb. 22, 1999, 1999 WL 15787623 (noting that intellectual property lawyers were disappointed with the undeveloped outcome of the case). The *Ticketmaster v. Microsoft* case was a disappointment because Microsoft didn't put up a fight—they ceased the linking as soon as they were sued. See *id.* (interviewing Jeffrey Kuester, an intellectual property attorney based in Atlanta); Bob Tedeschi, *Ticketmaster and Microsoft Settle Linking Dispute*, CYBERTIMES, at <http://www.nytimes.com/library/tech/99/02/cyber/articles/15tick.html> (Feb. 15, 1999) (proclaiming that the Internet is without legal guidance on deep linking since the *Ticketmaster v. Microsoft* dispute was settled).

80. See Jim Conley, *You Surf, They Pay*, PC COMPUTING, May 1, 2000, 2000 WL 2000314 (stating that after the revised deep linking settlement agreement, Ticketmaster purchased Microsoft's Sidewalk division); see also Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/library/weekly/aa022399.htm?once=true&> (Feb. 3, 1999) (noting that the interest of both parties changed with the impending law suit and the terms of the settlement are confidential).

81. See Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/library/weekly/aa022399.htm?once=true&> (noting that "if you click on a ticketing link for Ticketmaster Northwest, on the Seattle Sidewalk site, you go to another Sidewalk page that describes the ticket purchasing options"). The Ticketmaster website is included on the Sidewalk page, where the user is offered a connecting link to Ticketmaster homepage. *Id.*; see Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking'*, GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p3.html> (May 2000) (noting that because of the agreement, there are no longer deep links to the Ticketmaster site, only links to Ticketmaster's home page).

2. *Ticketmaster v. Tickets.Com* – Every e-Man for Himself

No sooner had Ticketmaster resolved one deep linking dispute than it found itself in another predicament. This time, the predator was Tickets.Com, a rival online ticket distributor. In the battle of *Ticketmaster v. Tickets.Com*, Ticketmaster filed suit in federal district court in California against Tickets.Com for using unsolicited hyperlinks to the interior of Ticketmaster's home page.⁸² The facts of the case were similar to the dispute involving Microsoft's Sidewalk.⁸³ Tickets.Com provided tickets to specific events via a website.⁸⁴ In the event that Tickets.Com was not able to provide tickets for a specific event, Tickets.Com posted a link to the interior of Ticketmaster's event page, thereby bypassing the homepage.⁸⁵

To prevent Tickets.Com from allowing customers to deep link through its backdoor, Ticketmaster sued Tickets.Com under ten different causes of action, including the claim of trespass.⁸⁶ The court, however, dismissed the bulk of those claims, including the trespass action.⁸⁷ The court stated that "it is hard to see how entering a publicly available website could be called a trespass. . . ."⁸⁸ The court was obviously not ready to ban deep linking on a trespass claim.

82. *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *2 (C.D. Cal. Mar. 27, 2000); see also Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking,'* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p4.html> (May 2000) (stating that initially Tickets.Com was copying all of the information from Ticketmaster and then simply republishing it); *Ruling Allows Rival Access to Ticketing Site*, L.A. BUS. J., Aug. 21, 2000, 2000 WL 27194408 (noting that in addition to deep linking, Tickets.Com also used a web spider to gain access to ticketing information).

83. See Nicos L. Tsilas, *Minimizing Potential Liability Associated with Linking and Framing on the World Wide Web*, 8 COMM.LAW CONSPECTUS 85, 96 (2000) (stating that Ticketmaster had filed a similar suit against Tickets.Com, as it did with Microsoft).

84. *Ticketmaster*, 2000 WL 525390, at *2; see also Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking,'* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p1.html> (May 2000) (noting that Tickets.Com was essentially a competitor of Ticketmaster).

85. See *Ticketmaster*, 2000 WL 525390, at *1-2 (stating that initially Tickets.Com copied Ticketmaster's website information, but then Tickets.Com ceased the direct copying and just provided deep links).

86. See *id.* at *1 (inferring that due to the uncertainty in battling deep linking, plaintiff attempted to use various legal claims to stop defendant from deep linking).

87. *Id.* at *4; see also Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking,'* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p5.html> (May 2000) (noting that after the court evaluated all of the causes of action, the issues of copyright infringement and unfair competition were left somewhat unresolved).

88. *Ticketmaster*, 2000 WL 525390, at *4 (quoting Judge Hupp's opinion dismissing the plaintiff's trespass claim).

While some tout the *Ticketmaster* decision as the end of the deep linking dilemma, the controversy is far from over.⁸⁹ In fact, the *Ticketmaster* decision may indeed catalyze the deep linking dilemma.⁹⁰ Web masters are still advised to deep link with caution and be especially cautious with their reasons and motives for doing so.⁹¹ The decision appears to not have halted Ticketmaster's efforts to control adversarial deep linkers,⁹² as the company is expected to post its new linking policies on its website.⁹³ Conversely, several international and domestic cases, although through slightly different legal claims, have granted injunctions against deep link-

89. See Maxine Lans Retsky, *Deep Linking Not Always Ticket for Web*, *MARKETING NEWS*, June 5, 2000, at 15 (stating that the "decision should not be viewed as an unqualified acceptance of deep linking" and additionally noting that a few surviving claims may still prevent commercial websites from deep linking). *Id.*; see also Eric J. Sinrod, *To Link or Not to Link?*, *UPSIDE TODAY*, Sept. 5, 2000, 2000 WL 4725670 (stating the *Ticketmaster* ruling "does not present a bright-line rule protecting those who seek to link or use spiders").

90. See Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking.'* *GIGALAW.COM*, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p5.html> (May 2000) (asserting that the legal implications are far from over because "[i]t is highly unlikely that a single, short opinion on a motion to dismiss will conclusively determine the issues involved in deep linking"); see also Paul S. Reed, *Ticketmaster v. Microsoft: Lawsuit Fails to Define Limits for Webmasters*, at <http://www.law.about.com/newsissues/law/library/weekly/aa022399.htm?once=true&> (Feb. 3, 1999) (noting that despite the large philosophical debate over whether deep linking is legitimate "perhaps the fast-moving world of Internet commerce and technology will always outpace any efforts to create a common-law structure defining it"); Eric J. Sinrod, *To Link or Not to Link?*, *UPSIDE TODAY*, Sept. 5, 2000, 2000 WL 4725670 (stating that because the *Ticketmaster* ruling is unclear, the best guidance for questionably harmful deep linking is to evaluate it on a case-by-case basis).

91. See Susan P. Butler, *SOHO: Links and the Laws*, *TECHTV*, at <http://www.techtv.com/print/story/0,23102,2316817,00.html> (Aug. 18, 1999) (noting that webmasters are encouraged to ask permission before providing a link to another page). Additionally, commercial website users should obtain the consent in writing. *Id.* But see Tim Berners-Lee, *Links and Law: Myths, Axioms of Web Architecture: 4*, at <http://www.w3.org/DesignIssues/LinkMyths.html> (Apr. 1997) (stating that when someone sent an e-mail to the author requesting his consent to link, the author sent a reply refusing to answer because no consent is needed – the information is free).

92. See Jim Conley, *You Surf, They Pay*, *PC COMPUTING*, May 1, 2000, 2000 WL 2000314 (inferring that Ticketmaster is threatening to sue another website, GoTo.com, for its continued deep linking).

93. See Laura Rich, *Ticketmaster: Think Before You Link*, *INDUS. STANDARD MAG.*, at <http://www.thestandard.com/article/display/0,1151,7007,00.html> (Oct. 15, 1999) (discussing Ticketmaster's new manifesto which states "which types of links are acceptable and which are not"). Consensual linking is permitted, but only after Ticketmaster and the party wanting to provide the link have a formal agreement. *Id.* Ticketmaster still maintains that flank links used solely for commercial purposes are still forbidden. *Id.*

ers.⁹⁴ This inconsistency only exacerbates the deep linking dilemma, as doubts still plague website owners.

3. *eBay v. Bidder's Edge* – “Remember the e-Alamo”

Perhaps *Ticketmaster* was the Internet's Battle of the Alamo. No more than sixty days after Ticketmaster's defeat, commercial website owners rallied for a huge victory in a battle over the unauthorized use of software robots.⁹⁵ The Northern Californian showdown involved online auction giant eBay against Bidder's Edge (BE), an online auction aggregator and semi-web crawler, for the unauthorized referencing of eBay's auction offerings.⁹⁶

94. See *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1295 (D. Utah 1999) (upholding plaintiff's injunction against deep linking due to contributory copyright infringement). In *Intellectual Reserve*, plaintiff sued the defendants for providing a link to another website that violated plaintiff's copyrighted material. *Id.* at 1292. Instead of a trespass cause of action, however, the court granted an injunction based on defendant's contributory infringement. *Id.* at 1294-95. Nevertheless, the court in *Intellectual Reserve* used an analysis similar to the *eBay* court. *Id.* at 1291; see *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 339 (S.D.N.Y. 2000) (holding that defendant's hyperlink pointing to a website that reveals the DVD encryption code violates the Digital Millennium Copyright Act and must therefore, be taken down). In its analysis, the court concluded that posting material violating the DMCA is no different than providing a link to another site containing the material. *Id.* at 339. Therefore, plaintiff prevented defendant from posting hyperlinks based on copyright infringement. *Id.* at 332; see also Elise Nimmo, *Deep Links That Could Just Connect to Trouble*, THE SCOTSMAN, Nov. 30, 2000, 2000 WL 30382289 (involving a European deep linking suit, which lead to the court granting an injunction against defendant, the Shetland News, for deep linking into plaintiff's news server, thereby bypassing advertising). The United Kingdom appears to follow the trend toward banning commercial deep linking. *But see Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) (holding that a visual search engine company's linking did not weigh into the balance of copyright infringement and fair use); Eric J. Sinrod, *To Link or Not to Link?*, UPSIDE TODAY, Sept. 5, 2000, 2000 WL 4725670 (discussing a recent Dutch case denying injunctive relief from a news aggregator's deep links). PCM, a Dutch news corporation, sued Kranten.com, a news aggregator, for providing deep links to plaintiff's news dailies. *Id.* The Rotterdam court denied plaintiff's injunction because the court claimed that plaintiff could still reconstruct its website to provide advertising banners. *Id.*

95. See Margaret Kane, *Judge Protects eBay from Rival Searches*, ZDNET NEWS, May 25, 2000, 2000 WL 4020549 (noting how eBay won an injunction against another website for the unauthorized use of software crawlers). The injunction granted in favor of eBay has enormous legal ramifications that could possibly transform the nature of the Internet. See also Daniel Roth, *Meet eBay's Worst Nightmare*, FORTUNE MAG., June 26, 2000, at 200 (showing that eBay was awarded an injunction prohibiting the cite from being trolled by Bidder's Edge).

96. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1062 (N.D. Cal. 2000) (indicating that Bidder's Edge is an auction aggregator). An auction aggregator is a auction clearing house, providing real time information on auction products and prices throughout the Internet. *Id.* Theoretically, if a person desired to purchase a T.V. at an

The facts of *eBay v. Bidder's Edge*⁹⁷ are an example of the classic deal gone bad.⁹⁸ Initially, eBay entered into an agreement with Bidder's Edge to allow BE's software robot to "crawl" through eBay's website for ninety days.⁹⁹ BE's software robot was designed to automatically poll the eBay website and index most of eBay's auction products and pricing.¹⁰⁰ After the ninety day contract ended, however, eBay and BE failed to reach a licensing agreement.¹⁰¹ eBay gave sufficient notice to BE that further use of any software robot constituted trespass and would not be tolerated.¹⁰² At first BE abided by eBay's instructions, but when BE learned that other companies were continuing to loot eBay's website information with their own software robots, BE resumed the crawling.¹⁰³ In an effort to refute BE's practice, eBay attempted to physically block the defendant from their website, but to no avail.¹⁰⁴ After eBay had exhausted all its options, eBay brought action against BE under a claim of trespass to chattels.¹⁰⁵

eBay sought a preliminary injunction against BE in federal district court.¹⁰⁶ The court recognized that the genuine issue of law was whether eBay's preliminary injunction could ensue under the concept of trespass to chattels.¹⁰⁷ In a most provocative opinion, District Judge Whyte found that BE had committed trespass to chattels.¹⁰⁸ As a result of this trespass, BE was restricted from using bots to access the eBay site.¹⁰⁹

auction, instead of going to eBay to research the product, they could go to Bidder's Edge and find a list of similar products at all of the online auction sites.

97. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

98. *See eBay v. Bidder's Edge*, 100 F. Supp. 2d 1058, 1061-63 (N.D. Cal. 2000) (noting the history leading up to the Internet dispute).

99. *See id.* (stating that eBay entered an oral agreement with Bidder's Edge).

100. *See id.* (discussing BE's automatic tracking of auction activity).

101. *eBay*, 100 F. Supp. 2d at 1062.

102. *See id.* (stating that a license agreement was still needed for BE's continued use of the software robot).

103. *See id.* (stating that BE issued a press release informing consumers that the company would continue listing eBay items).

104. *See id.* at 1062-63 (stating that eBay attempted to block defendant's network addresses from their web server, which would prevent defendant's access to the eBay site). However, BE countered by using a proxy server to cloak their network addresses and thus bypass eBay's Internet block. *Id.*

105. *See eBay*, 100 F. Supp. 2d at 1069 (stating that eBay sought a preliminary injunction alleging nine causes of action, the main thrust of which was the trespass to chattels claim).

106. *eBay*, 100 F. Supp. 2d at 1060.

107. *Id.* at 1063.

108. *Id.* at 1070.

109. *See id.* at 1073 (stating that Bidder's Edge was enjoined "from using any automated query program, robot, web crawler or other similar device, without written authorization, to access eBay's computer systems . . .").

In its analysis, the court first discussed the parameters of granting preliminary injunctive relief by administering a two-part test.¹¹⁰ The first test is the “balance of harm” evaluation.¹¹¹ This evaluation weighs the relative hardships to the parties based on several factors of harm.¹¹² Following this balancing test, the court took the initiative to categorize eBay’s alleged factors of harm into two different types: “system harm” and “reputation harm.”¹¹³ System harm is the type of harm eBay might endure from a defendant’s unauthorized use of the software robot.¹¹⁴ Reputational harm is the alleged result of a defendant’s actions from misrepresentation of information.¹¹⁵ Shortly after defining reputational harm, however, the court declined to include it in the balance of harm analysis due to eBay’s failure to consider it as an underlying claim.¹¹⁶ In doing so, the court calibrated the scales of justice by preparing to weigh eBay’s amount of system harm.¹¹⁷

The court sifted through a detailed list of asserted system harms in proceeding with the balance of harm evaluation. First, eBay argued that the defendant’s constant web crawling greatly reduced the network throughput of eBay’s servers and network.¹¹⁸ However, eBay’s network traffic costs were unsubstantiated, so the court denied the argument.¹¹⁹

110. *Id.* at 1063-64 (relying on *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992)). In *Sega*, plaintiff, a video game manufacturer, sued defendant, a competitor game maker, under copyright and trademark infringement claims, alleging that defendant unlawfully copied and marketed plaintiff’s property. *Sega*, 977 F.2d at 1510-17. The court used the balance of harm test and the likelihood of success analysis to evaluate whether to grant a preliminary injunction against the defendant. *Id.* at 1517. The balance of harm test and the likelihood of success test, however, have their origins in prior software infringement cases. *Id.* See generally *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.* 886 F.2d 1173, 1174 (9th Cir. 1989) (involving plaintiff’s injunction against defendant for copyright and trademark violations).

111. See *eBay*, 100 F. Supp. 2d at 1063 (quoting *Alaska ex rel. Ukon Flats Sch. Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988)).

112. See *id.* at 1064 (stating that eBay originally claimed four types of harm each of which the court divided into two categories and addressed briefly).

113. *Id.*

114. See *id.* (using the term “automated query programs” instead of software robot).

115. See *id.* (noting that eBay’s action against defendant was not conditioned on a particular means of accessing plaintiff’s website information).

116. See *eBay*, 100 F. Supp. 2d at 1064 (stating that “[s]ince eBay does not move independently or alternatively for injunctive relief tailored toward the alleged reputational harm, the court does not include the alleged reputational harm in the balance of harm analysis”).

117. *eBay*, 100 F. Supp. 2d at 1064.

118. See *id.* (claiming that because of BE’s web crawler, eBay suffered an increased load between 1.11% and 1.53% on its listing servers).

119. See *id.* at 1065 (noting that eBay’s assertions were unfounded as there is no method of proving that BE was solely responsible for the increase in network traffic).

The court did find weight in eBay's argument focusing not an actual harm, but on the potential harm that might occur as a result of defendant's actions.¹²⁰ The court reasoned that if BE was allowed to continue its hostile practices of web crawling, other companies might join in the foray and eventually cause harm to eBay.¹²¹ In such a scenario, eBay would suffer irreparable harm from lost profits and customer goodwill.¹²² Therefore, in considering the balance of harm analysis, the court found that "BE's ongoing violation of eBay's fundamental property right to exclude others from its computer system potentially causes sufficient irreparable harm to support a preliminary injunction."¹²³

Once the court decided the balance of harm test, the court then turned to the second prong—the likelihood of success analysis.¹²⁴ The likelihood of success analysis evaluates the strength and substance of a plaintiff's claims.¹²⁵ The court focused specifically on eBay's trespass to chattels claim in this second prong.¹²⁶ The court summoned *Thrifty-Tel*, easily adopting its similarities in defining eBay's claim.¹²⁷ For eBay to prevail on a trespass to chattels claim, eBay had to establish that BE intentionally, and without authorization, interfered with eBay's computer system, and as a result, damaged their computer system.¹²⁸ Not surprisingly, BE disagreed with the claim.

120. *See id.* at 1064-65 (including harm resulting from not only defendant, but also other potential action aggregators).

121. *See id.* at 1066 (stating that "eBay would suffer irreparable harm from reduced system performance, system unavailability, or data losses" if subjected to a foray of software robot attacks).

122. *See eBay*, 100 F. Supp. 2d at 1066 (noting that Bidder's Edge did not contest the likelihood that eBay would suffer from such irreparable harm).

123. *Id.* at 1067 (noting that such a claim is rebuttal by defendant). However, BE claimed that it too would suffer irreparable harm if such an injunction was granted. *Id.* at 1069. The court immediately dismissed BE's rebuttal stating that defendant did not "appear to have suffered any irreparable harm during the period it voluntarily ceased crawling the eBay site." *Id.* at 1068.

124. *Id.* at 1064.

125. *See eBay*, 100 F. Supp. 2d at 1064 (relying on *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988) (showing that the balance of the harm test should be followed by the likelihood of success test). Once the balance of harm test permits a preliminary injunction, the likelihood of success analysis supports such an injunction. *Yukon Flats Sch. Dist.*, 856 F.2d at 1389.

126. *See eBay*, 100 F. Supp. 2d at 1069 (declining to address the merits of eBay's other eight claims).

127. *Id.* at 1069 (citing *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 472-73 (Cal. Ct. App. 1996)).

128. *Id.* at 1069-70 (citing *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473).

In its defense, BE argued that the elements of trespass to chattels could not be met.¹²⁹ Because the Internet is a publicly accessible medium, BE argued, authorization is not needed to use web crawlers freely without permission.¹³⁰ Furthermore, BE argued that even if its software robots interfered with a plaintiff's computer systems, the use was minimal, if at all damaging.¹³¹

Nevertheless, the court found the defendant's arguments unconvincing.¹³² On BE's first claim, the court noted that "eBay's servers are private property" and that plaintiff generally does not permit software crawling.¹³³ Furthermore, the court noted that a trespass claim could be entertained if the defendant exceeded the scope of such consent, as illustrated by the hostile robot queries.¹³⁴ In this instance, the court reasoned that despite eBay's general prohibition against web crawling, "BE's web crawlers exceeded the scope of any such consent when they began acting like robots by making repeated queries."¹³⁵

In a provocative conclusion, Judge Whyte held that BE committed a trespass to eBay's property.¹³⁶ Judge Whyte concluded that BE caused damage to eBay's personal property, despite the amount of damage actually caused.¹³⁷ In light of eBay's deprivation, the court held that BE should not be licensed to continue to cause such harm.¹³⁸ The court noted that to hold otherwise would inadvertently encourage this type of competitive business practice, which collectively could deny eBay use of its own personal property.¹³⁹

129. *Id.* at 1070 (stating that defendant did not dispute that it continued to crawl eBay's site despite plaintiff's expressed objections).

130. *Id.* at 1070.

131. *eBay*, 100 F. Supp. 2d at 1071 (stating that "BE's activities have diminished the quality or value of eBay's computer systems" to a sufficient extent).

132. *Id.*

133. *Id.* at 1060, 1070 (acknowledging that eBay has a web policy explicitly restricting unauthorized robot use).

134. *Id.* (quoting *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756 (N.D. Cal. 1993)).

135. *Id.* (relying on *City of Amsterdam v. Daniel Goldreyer, Ltd.*, 882 F. Supp. 1273, 1281 (E.D.N.Y. 1995). If consent is given to use a chattel, a person is still liable for any harm which occurs from exceeding the scope of such consent. *Daniel Goldreyer, Ltd.*, 882 F. Supp. at 1281.

136. *eBay*, 100 F. Supp. 2d at 1071-72.

137. *Id.* at 1071.

138. *Id.* at 1072.

139. *See id.* (stating that "California law does not require eBay to wait for such a disaster before applying to this court for relief").

In *eBay*, Judge Whyte put one of the first barbed wire fences around a Website plantation.¹⁴⁰ This decision only remedies, perhaps temporarily, the stressful build-up of thousands of cyber-cries for help regarding the issue of Internet property rights and the right to exclude unauthorized access.¹⁴¹

4. *Register.com, Inc. v. Verio, Inc.* – Codename: “Project Henhouse”

In late 1999, during the course of the great eBay battle, clear across the country, another battle ensued.¹⁴² One deceptively clever Internet company, Verio, Inc., launched an attack codenamed “Project Henhouse” to deploy a software robot designed to access an Internet competitor’s user database.¹⁴³ The unfortunate target of Verio’s unfair behavior was Register.com, an Internet domain registrar and Internet service provider.¹⁴⁴ Verio gained access to valuable customer information contained in a seemingly secure database. The database compiled domain names bought through Register.com and also included personal contact information.¹⁴⁵ To penetrate Register.com’s valuable database, Verio programmed a software robot to extract all of the new Internet name registrants. Verio then used the results of automated queries to solicit Register.com’s customers with email messages and telephone calls purporting to provide them further Internet services.¹⁴⁶ Register.com sued Verio using the tres-

140. See Daniel Roth, *Meet eBay's Worst Nightmare*, FORTUNE MAG., June 26, 2000, at 199-200 (predicting the consequences of Judge Whyte’s ruling and declaring that “the openness of the Web and the freedom of users to navigate it” was at stake).

141. See Maureen A. O’Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 597 (2001) (commenting on the “broad rule” which would protect website owners from unwanted visitors).

142. See *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 241 (S.D.N.Y. 2000) (indicating that Register.com was seeking an injunction against Verio, Inc.).

143. See *id.* at 243 (explaining that Verio developed the robot to benefit their marketing efforts and reach potential customers more quickly).

144. *Id.* at 241 (defining the Internet domain name registrar as a company which provides a service to enlist an Internet user’s own unique name so such a user may establish a unique website). Furthermore, Register.com also provides other services such as “(i) website creation tools; (ii) website hosting; (iii) electronic mail; (iv) domain name hosting; (v) domain name forwarding, and (vi) real-time domain name management.” *Id.*

145. See *id.* at 241-42 (providing contact information for every registered domain name helps resolve Internet disputes including trademark infringement and cybersquatting).

146. See *Register.com*, 126 F. Supp. 2d at 243-44 (stating that Verio sent misleading solicitations to Register.com’s customers suggesting that they had really registered with Verio).

pass to chattels cause of action to save itself from Verio's electronic claws.¹⁴⁷

The Federal District Court for the Southern District of New York was ready to listen to Register.com's assertions. In its analysis, the court used the elements of trespass to chattels, as directed by the Restatement (Second) of Torts, and pieced together by existing case law.¹⁴⁸ The federal court essentially made Register.com's fight an easy one. First, the court reasoned that Verio had notice that use of its software robot was unauthorized by Register.com.¹⁴⁹ Second, the court ascertained the harm caused by Verio by following other courts' opinions.¹⁵⁰ The *Register.com* court was not reluctant to satisfy the trespass to chattels elements based on very minimum levels of harm, as well as any other potential harm occurring from additional software robots.¹⁵¹ Finally, after sustaining Register.com's claims of trespass to chattels, the court enjoined Verio, determining that Register.com had easily demonstrated the existence of irreparable harm and a likelihood of success on a trespass claim.¹⁵² Given the swiftness in granting Register.com's claim, the court demonstrated no reservation in using Internet trespass to protect Internet users.

147. *See id.* at 248-49 (noting that the suit was brought after unsuccessful negotiations).

148. *Id.* at 249 (citing a definition to trespass to chattels based on the Restatement (Second) of Torts, as interpreted by *City of Amsterdam v. Goldreyer, Ltd.*, 822 F. Supp. 1273 (E.D.N.Y. 1995)).

149. *See id.* at 249 (disagreeing that Register.com's posted terms of use were sufficient to prevent others from combing its site with software robots). "However, despite the fact that Register.com's terms of use may not specifically forbid this use of a search robot by Verio . . . it is clear since at least the date this lawsuit was filed that Register.com does not consent to Verio's use of a search robot. . . ." *Id.*

150. *See Register.com*, 126 F. Supp. 2d at 249 (indicating that the burden of proof is on Register.com to demonstrate the harm caused to its computer system).

151. *Id.* at 241 (stating that although Register.com estimated the amount of harm to a 2.3% diminishment of network resources, the court noted that this amount, although minimal, amounted to "some" harm, thus meeting the elements of trespass to chattels). Similar to the *eBay* court, the *Register.com* court weighed the potential harm resulting from other software robots, if Verio's bot was not stopped. *Id.* at 250-51.

152. *See id.* at 251 (citing much of the *eBay* court's analysis in issuing an injunction). However, the *Register.com* court issued an injunction in a slightly different manner, based upon the finding of irreparable harm and the likelihood that Register.com will succeed with their cause of action. *Id.* at 245; *cf. eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000) (basing its injunction on the finding of irreparable harm and the plaintiff's balance of hardships).

B. A Closer Look at Each Camp

The Internet community came to a near screeching halt after Judge Whyte handed eBay the keys to a fortress.¹⁵³ But how does the Internet community view trespass to chattels and its by-product, which grants a personal property right in web servers? Without a doubt, the *eBay*, *Register.com*, and *Ticketmaster* decisions polarized the community.¹⁵⁴ People quickly rushed to support their preferred side, either accepting or rejecting the concept of Internet property rights.¹⁵⁵ Thus, the common law action of trespass divides the Internet community into three distinct camps: those opposed to trespass to chattels, those in favor of trespass to chattels, and those who believe that trespass to chattels does not go far enough.¹⁵⁶

1. Those Opposed to Internet Trespass

The first of these camps is populated by those opposed to common law trespass to chattels.¹⁵⁷ They carry a haunting message that trespass to

153. See generally Daniel Roth, *Meet eBay's Worst Nightmare*, FORTUNE MAG., June 26, 2000, at 200-02 (discussing the legal ramifications of the injunction and implying that a coalition was formed against the decision).

154. See Carl S. Kaplan, *Treat eBay Listings As Property? Lawyers See a Threat*, CYBER L.J., at <http://www.nytimes.com/library/tech/00/07/cyber/cyberlaw/28law.html> (July 28, 2000) (stating that scholars petitioned the Ninth Circuit on behalf of Bidder's Edge). Twenty-eight professors in the field of technology law wrote a brief against the *eBay* ruling. Brief of Amici Curiae Bidder's Edge, Inc. at eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000). But see Brief of Amicus Curiae eBay, Inc. at 1, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (supporting eBay and the concept of property rights in websites).

155. See generally Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 27-28 (2000) (arguing that trespass to chattels should not rule the Internet). Dan Burk also supported defendant in *eBay*. Brief of Amici Curiae Bidder's Edge, Inc. at 1, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

156. See Brief of Amici Curiae Bidder's Edge, Inc. at 1, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (profiling those opposed to the eBay decision); Brief of Amicus Curiae eBay, Inc. at vi, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (profiling those supporting the eBay decision and trespass to chattels); Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 4 (suggesting that perhaps a solution to Internet trespass maybe inherent in existing copyright law).

157. See generally Brief of Amici Curiae Bidder's Edge, Inc. at 1, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (profiling the frontrunners of those opposed to the alleged over sweeping concept of Internet trespass); Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 54 (2000) (stating that "the long-term effects of the trespass theory are likely to be pernicious . . ."); see also Jonathan Bick, *Trespass Theory Poses Threat to Internet*, N.Y. L.J., Aug. 21, 2000, at S7 (stating that "[c]lose scrutiny of the application of trespass to the Internet to resolve a site access dispute demonstrates that such application clearly fails to properly address the relevant com-

chattels, as an Internet cause of action, compromises the Internet and its sacred free flow of information.¹⁵⁸ As this camp proclaims, the very essence of the Internet is that it allows companies to host and share a wealth of information without barriers, as compared to the more traditional means of commerce.¹⁵⁹ The advocates against an Internet trespass claim assert that the threat of trespass to chattels will unnecessarily burden website owners by stifling the net's free information.¹⁶⁰ They claim that because of this privatization, value-add Internet website services will suffer from these restrictions, making the consumer worse off.¹⁶¹ These

peting interests, and imposes an unnecessarily great restriction on speech"); E-mail from Doctor Howard Anawalt, Intellectual Property Law Professor, Santa Clara University School of Law, to the author (Sept. 11, 2000, 10:00:52 CST) (on file with the *St. Mary's Law Journal*) (favoring "the freedom [of] access camp" due to the modern trend to separate everything into property rights).

158. See Daniel Roth, *Meet eBay's Worst Nightmare*, FORTUNE MAG., June 26, 2000, at 202 (claiming that "[c]ompanies that rely on free Web information . . . could be stymied" by trespass to chattels claims). The free flow of information allows for innovation in the Internet environment. *Id.* The Internet enhances competition and efficiency by reducing transactions costs, costs of entry, advertising costs and by increasing consumer choice. Brief of Amici Curiae Bidder's Edge, Inc. at 4-5, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000). The eBay decision "threatens to wipe these benefits away with a single stroke of the pen." *Id.* at 5.

159. See Debra Baker, *Bid for Fair Practice: Online Auctioneer Gains Business from Link Site but Doesn't Want E-Shoppers Using the Back Door*, A.B.A. J., Apr. 2000, at 22 (discussing the Internet's apparent business efficiencies, particularly its means of "conduct[ing] faster and more efficient searches of information accessible to all"). Bidder's Edge Vice President of Marketing praises the Internet's new business paradigm and comments that if the *eBay* decision is upheld, it will sacrifice the newfound freedom of the Internet. *Id.* Moreover, social welfare will greatly be enhanced by providing more information to consumers at a much lower cost. Brief of Amici Curiae Bidder's Edge, Inc. at 4, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

160. See Brief of Amici Curiae Bidder's Edge, Inc. at 6-7, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (asserting that the *eBay* decision detrimentally affects consumers by allowing website owners to control price competition information through an Internet trespass theory); Carl S. Kaplan, *Treat eBay Listings As Property? Lawyers See a Threat*, CYBER L. J., at <http://www.nytimes.com/library/tech/00/07/cyber/cyberlaw/28law.html> (July 28, 2000) (supporting the argument that the trespass theory prohibits consumers from reaching information that should be available to them).

161. See Brief of Amici Curiae Bidder's Edge, Inc. at 5-7, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (stating that Internet trespass prevents auction aggregators from providing consumers with price comparisons that make the e-commerce marketplace efficient). "Without information about online alternatives, competition on the Internet will be reduced" as consumers no longer have the benefits of accessing the lowest price for a product. *Id.* at 6; see also Linda Rosencrance, *DOJ Investigates eBay Efforts to Block Shop Bots*, INFOWORLD DAILY NEWS, Feb. 4, 2000, 2000 WL 22974835 (stating that the U.S. Department of Justice is investigating eBay's claim against Bidder's Edge for possible anti-competitive behavior).

prophecies warn against smothering Internet users with lawsuits, destroying e-commerce, and transforming cyberspace into an e-wasteland.¹⁶²

2. Those Who Support Internet Trespass

Countering the opponents of Internet trespass are those in favor of Internet trespass claims and the creation of property rights.¹⁶³ This camp believes that protection is overdue for website owners who are tired of the unfair competition that accompanies the Internet.¹⁶⁴ They claim that since a traditional “brick and mortar” business has every right to prevent a competitor from entering their website and obtaining vital pricing information, so too should the “click and mortar” online business.¹⁶⁵ Thus,

162. See Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 54 (2000) (arguing that common law trespass to chattels inspires segregation called “anti-commons” where property rights are so divided it prevents efficient use of the Internet). The anti-commons, inadvertently created from resulting trespass to chattels torts, exacerbates ownership disputes. *Id.* at 49. The use of trespass to chattels will not only affect electronic commerce, but free speech as well. See Brief of Amici Curiae Bidder's Edge, Inc. at 10, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 1058 (N.D. Cal. 2000) (stating that if Internet trespass becomes a prevalent cause of action “[p]arodied sites might sue suck.com for unauthorized linking because they don't like the content of the linking page”); see also *Intel Corp. v. Hamidi*, No. 98AS05067, 1999 WL 450944 (Cal. App. Dep't Super. Ct. Apr. 28, 1999) (relying on trespass to chattels claims to deter employee email). In *Intel Corp. v. Hamidi*, Intel successfully enjoined a disgruntled employee from sending email, claiming harm from diminished employee productivity and use of company resources to block the emails. *Id.*

163. See Brief of Amicus Curiae eBay, Inc. at 19, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (representing supporters of eBay including Reed Elsevier, owner of LEXIS-NEXIS, the e-commerce Coalition and the National Association of Realtors); Daniel Roth, *Meet eBay's Worst Nightmare*, FORTUNE MAG., June 26, 2000, at 200 (stating that online retailers support the eBay injunction as a means of preventing competitors from intruding on their websites); E-mail from Dr. Richard Saba, Professor of Economics, Auburn University, to the author (Aug. 28, 2000, 15:13:53 CST) (on file with the *St. Mary's Law Journal*) (indicating that Internet trespass as applied to Bidder's Edge is warranted since harm was caused to eBay). The question remaining concerns the amount of damages. *Id.*

164. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1062 (N.D. Cal. 2000) (upholding eBay's argument that “[i]t is one thing for customers to use a tool to check a site and quite another for a single commercial enterprise to do so on a repeated basis and then to distribute that information for profit”); see also Carl S. Kaplan, *Treat eBay Listings As Property? Lawyers See a Threat*, CYBER L.J., at <http://www.nytimes.com/library/tech/00/07/cyber/cyberlaw/28law.html> (July 28, 2000) (presenting eBay's in-house attorney's argument that Internet trespass prevents competitors from handling and misusing eBay's personal property—the web servers); Debra Baker, *Bid for Fair Practice: Online Auctioneer Gains Business from Link Site but Doesn't Want E-Shoppers Using the Back Door*, A.B.A. J., Apr. 2000, at 22 (stating eBay's argument that it is unfair for a competitor to profit from eBay's million dollar investment through the use of a software robot).

165. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1065 (N.D. Cal. 2000) (discussing eBay's argument that defendant's use of software robots is the “equivalent to

the concept of Internet trespass fits neatly into the world of cyberspace.¹⁶⁶

3. Those Who Really Support Internet Trespass – The Internet Libertarian

The camp in favor of a cyber trespass to chattels claim also includes an extreme right faction. These property advocates¹⁶⁷ feel the trespass to chattels claim does not go far enough, and argue that courts should honor trespass (proper) claims, thereby treating websites as real property.¹⁶⁸

sending in an army of 100,000 robots a day to check the prices in a competitor's store"); *see also* Brief of Amicus Curiae eBay, Inc. at 2, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (stating that the owner of a traditional retail facility has the right to decide who enters the premise, excepting exclusion based on discriminatory reasons). "Each owner of the private land has unquestioned access to the highway network, but each person using the network does not have the unlimited right to enter and interfere with any private property beside the highway network." *Id.* Websites like eBay should be treated no differently than other commercial establishments like Sotherby's and Christie's, giving the owner of such websites the ability to exclude based upon certain policies. *See id.* at 3; Daniel Roth, *Meet eBay's Worst Nightmare*, FORTUNE MAG., June 26, 2000, at 202 (stating eBay's senior intellectual property attorney's humorous argument that allowing the use of software robots is the equivalent of having 100 competitors rush in a store and interfere with regular customers to take pictures of the inventory).

166. *See* Brief of Amicus Curiae eBay, Inc. et al. at 4, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (indicating that web servers and online auction sites should not be treated any different than laws governing property, making Internet trespass a very viable defense in cyberspace); *see also* Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 66 (1998) (understanding that the Internet represents an evolution in technology, but stating that "[i]t is premature to suggest that America scrap the legal doctrines" when a host of working legal rules will suffice); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208 (1996) (stating that the "laws of cyberspace" are about as substantial as the "laws of horse"). Easterbrook's famous analogy means that any new legal body of law created for cyberspace only clouds the cyber issues rather than provide legal order. Andrew L. Shapiro, *The Disappearance of Cyberspace and the Rise of Code*, 8 SEATON HALL CONST. L.J. 703, 716 (1998); *see also* Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 104 (1999) (stating the author's skepticism regarding "the proposition that new developments in technology imply the need for new laws or rules").

167. *See* Carl S. Kaplan, *Treat eBay Listings As Property? Lawyers See a Threat*, CYBER L.J., at <http://www.nytimes.com/library/tech/00/07/cyber/cyberlaw/28law.html> (July 28, 2000) (mentioning Dr. Richard Epstein of the University of Chicago School of Law as a renown advocate for treating websites as real property). Dr. Epstein is an extremely respected libertarian professor in the field of economics and law. *See* Scott Ryan, *The Truth About Anti-Trust*, THE DAILY OBJECTIVIST, Dec. 6, 1999, at <http://dailyobjectivist.com/Extro/truthaboutantitrust.asp> (last visited Dec. 30, 2000) (discussing Epstein's criticism of the Microsoft case).

168. *See* Carl S. Kaplan, *Treat eBay Listings As Property? Lawyers See a Threat*, CYBER L.J., at <http://www.nytimes.com/library/tech/00/07/cyber/cyberlaw/28law.html> (July 28, 2000) (clarifying advocates' views that courts should not only include the website

They argue that if websites were treated as real property, web owners could better manage and enforce the terms of visiting their site, thus making it even easier to exclude unwanted surfers under a claim of trespass.¹⁶⁹ With the boldness of these three camps, there appears to be no middle ground.

C. *Economics and the Internet: The Cyber-Coase Theorem*

For decades, economists have highly regarded the concept of property rights.¹⁷⁰ The Internet should be treated no differently than any other economic study concerning property rights.¹⁷¹ Important economic theories used to study the dynamics of traditional "brick and mortar" businesses should also apply to "click and mortar" businesses.

Perhaps the most important and popular¹⁷² of such economic theories concerning property rights and bargaining was founded by Ronald Coase in 1960.¹⁷³ The theory is better known as the Coase Theorem.¹⁷⁴ Coase's

server, but any accompanying servers that a company might own); *see also* Brief of Amicus Curiae eBay, Inc. at 2, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (discussing real property rights and their application to cyberspace). Website owners could "grant leases, easements, and licenses to other individuals, often in exchange for fees" *Id.*

169. *See* Brief of Amicus Curiae eBay, Inc. at 6, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (noting that the holder of a website could obtain an injunction against an unwanted intruder, without actual harm). Because repeated entries onto plaintiff's land happens often in real estate properties, and it is harder for a plaintiff to prove exactly when an intruder has trespassed, injunctions are used to allow the owner to forbid entry. *See generally* Pardee v. Camden Lumber Co., 73 S.E. 82, 84 (W. Va. 1911) (noting that property owners have a right to possess, exert dominion over the property, and to its immunity from injury).

170. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-2 (1960) (discussing Ronald Coase's Nobel Prize winning theory on bargaining and property rights); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 13 (1967), *reprinted in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 93-97 (Avery Wiener Katz ed., 1998) (discussing the economic behavior of Native American tribes towards defining property rights).

171. *See* Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 236 (1996) (applying the economic theories of Calabresi and Melamed to defend the concept of intellectual property rights in cyberspace); Daniel J. Caffarelli, Note, *Crossing Virtual Lines: Trespass on the Internet*, 5 B.U. J. SCI. & TECH. L. 6, 18 (1999) (stating that economic theories support modern American common law and should also be extended to define the laws of cyberspace).

172. *See* DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 45 (2000) (stating that Coase's argument is "the most cited article in the economic analysis of law" and in economics).

173. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1 (1960) (developing a theory to solve "those actions of business firms which have harmful effects on others").

revolutionary theory deals with the conflicts arising between two competing businesses and the costs imposed on one another.¹⁷⁵ The Coase Theorem is defined in situations where: “if . . . any agreement that is in the mutual benefit of the parties concerned gets made, then any initial definition of property rights leads to an efficient outcome.”¹⁷⁶ The Coase Theorem is best explained by the most simplistic form of conflicting business practices—pollution. To give a non-Internet example: for every hour Factory A produces steel, it also produces 1000 blobs of pollution, which ultimately damages Rancher B’s water supply located on B’s property. Naturally, Rancher B is not happy about his polluted water and wants Factory A to pay for it. Coase asserts that given this inherent conflict, the two businesses will bargain to the most efficient outcome, assuming low transaction costs.¹⁷⁷ Thus, one possible efficient solution to the above

174. See DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 36 (2000) (commenting that after Coase founded the famed “Coase Theorem,” he informally gathered thirteen of his friends, the world’s leading economist, and introduced his concept in the course of one evening). After that evening, the economic institution was literally transformed overnight. *Id.*

175. See *id.* at 46 (explaining that Coase based his theory on real property dilemmas, specifically whether an economic efficient outcome was reached at the conclusion of a property dispute concerning luxury hotels in Florida). In *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, the owner of plaintiff-appellee Eden Roc Hotel sued the owner of the Fontainebleau Hotel for threatening to add several stories to the Fontainebleau, thereby blocking the sunlight of the Eden Roc Hotel. *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 358 (Fla. Dist. Ct. App. 1959). The court did not grant the injunction, thereby inferring that property rights do not encompass the right to sunlight. *Id.* at 361.

176. DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 39 (2000) (assuming transaction costs are close to zero). See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-2 (1960) (illustrating the nature of his theory by asking: What is a cost of What?). Coase uses simple variables to illustrate the logistics of the concept of reciprocity:

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?

Id. at 2. See also DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 46 (2000) (explaining that economists call such harms “externalities”). eBay claims Bidder’s Edge subjects it to these externalities when Bidder’s Edge uses eBay’s information to draw eBay’s customer’s away. See *id.* at 14 (using Friedman’s definition of externality to infer that Bidder’s Edge imposed a cost on eBay).

177. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-2 (1960) (illustrating that even if courts incorrectly assign property rights, the parties will still bargain to the most efficient economic outcome); see also DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 39 (2000) (explaining

example suggests that if the rancher threatens to enjoin the steel mill from continuing to pollute, the steel mill will respond with an offer to pay the rancher for the continued cost of pollution in producing steel. In short, if one conflicting business partner is allocated a property right, it could lead to natural economic efficiency.

Each of the aforementioned cyber-cases in this Comment have at least one common theme: they all involve conflicting Internet business interests.¹⁷⁸ Both Ticketmaster and eBay claim that another company harmed them in the course of business dealings.¹⁷⁹ These scenarios are exactly what the Coase Theorem purports to explain.¹⁸⁰ If the Coase Theorem is applied to cyberspace, assuming transaction costs are low, either granting a property right in web server, or not, has an overall effect on efficiency.¹⁸¹ Furthermore, if the Coase Theorem application is correct,

that “[W]hat people own are not things but rights with regard to things”). For instance, if a farmer raises crops next to a railroad, and the railroad engine continually throws sparks that light the farmer’s crops afire, the farmer will most likely sue the railroad. *Id.* at 47-53. The court, faced with deciding who has more of a legal right to business production, will either grant the farmer’s injunction against the railroad, or deny it. *Id.* Coase claims that either way the parties will bargain to the most efficient solution. *See id.* (explaining the Coase Theorem with a more simplified example). If the court grants the farmer’s injunction, then the railroad will offer to buy out the farmer’s injunction, essentially paying the farmer for the damage done. *Id.* However, if the court denies the injunction, then the farmer will pay to have a spark arrestor on the engine installed. *See* DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH IT AND WHY IT MATTERS* 47-53 (2000) (inferring that although the solution might at first be difficult to understand, economist rate efficiency on the net benefit).

178. *See, e.g.,* Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 471 (Cal. Ct. App. 1996) (illustrating one telephone company’s struggle against a hacker); eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d 1058, 1062 (N.D. Cal 2000) (illustrating one online auction house’s struggle against an auction aggregator); Ticketmaster Corp. v. Tickets.Com., No. CV 99-7654 HLH (BQRX), 2000 WL 525390, at *2 (C.D. Cal. Mar. 27, 2000) (illustrating one online ticket retailer’s struggle against another); CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (illustrating one Internet Service provider’s struggle against a spamming company).

179. *See eBay*, 100 F. Supp. 2d at 1064 (indicating the four types of irreparable harm claimed by eBay); *Ticketmaster Corp.*, 2000 WL 525390, at *4 (indicating Ticketmaster’s claim of “tortious interference with prospective business advantage”).

180. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-2 (1960) (noting that Coase’s “standard example” includes a polluting factory operating next to an annoyed neighbor); *see also* DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 47 (2000) (explaining the Coase Theorem using an antiquated railroad example).

181. *See* Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 236 (1996) (applying Demsetz’s extension of the Coase Theorem and concluding that cyberspace deserves the same treatment of economic laws as more traditional environments). Demsetz argues that people will privatize property when property exceeds a certain value. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347,

courts can assign a right to whichever website owner they see fit, and still maintain efficiency.¹⁸²

To better understand the application of the Coase Theorem, consider the agreement following the *eBay* case.¹⁸³ After the court granted eBay an injunction against Bidder's Edge, ultimately granting a property right in favor of eBay, the two disputing parties actually entered into an agreement for Bidder's Edge to continue to list eBay's auction products on its site, subject to eBay's terms.¹⁸⁴ Bidder's Edge got exactly what it had demanded, but only after an agreement with eBay where, although the terms of the agreement are not disclosed, one could reasonably assume that Bidder's Edge would pay a kick-back or small software crawling fee to eBay.¹⁸⁵ The Coase Theorem predicts that even though the court gave eBay a property right, the companies still bargained to arrive at the most efficient solution.

If legal rules, such as Internet trespass, are sculpted to grant property rights in websites, the cyberspace market can still reach efficiency,¹⁸⁶ as-

350 (1967), *reprinted in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 94 (Avery Wiener Katz ed., 1998). “[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.” *Id.* See also Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 112 (1999) (analyzing the effects of Coase Theorem in cyberspace, specifically advocating the ease of bargaining if property rights are more well defined).

182. See DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 39 (2000) (explaining that ownership rights ultimately go to the party for which the right has the greatest value, thus leading to an efficient outcome); see also Brief of Amicus Curiae eBay, Inc. at 15, *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (arguing in favor of the *eBay* decision because it is economically efficient and legally just to prevent defendant, Bidder's Edge, from inflicting harm on eBay, since the harm is not reciprocal).

183. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1073 (N.D. Cal. 2000) (holding that eBay was granted an injunction to prevent Bidder's Edge from using its software robots).

184. See Margaret Kane, *Bidder's Edge Relaunches eBay Search*, ZDNET NEWS, at <http://www.zdnet.com/zdnn/stories/news/0,4586,2584356,00.html> (June 8, 2000) (explaining that Bidder's Edge new search technique, which displays eBay auction products in an exclusive window, was acceptable to eBay).

185. See *id.* (indicating that Bidder's Edge search technique is similar to those techniques required by eBay's licensing policies).

186. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347-50 (1967), *reprinted in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 94-97 (Avery Wiener Katz ed., 1998) (discussing how establishing a private property regime is a way of internalizing externalities, as well as protecting the value of property); Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 112 (1999) (supporting the notion of creating property rights in cyberspace to make bargaining more efficient).

suming low transaction costs.¹⁸⁷ In other words, the law can create legal rules to protect website owners' property rights with no cost to economic efficiency!

D. *Purposed Congressional Solutions*

The common law disputes involving Internet trespass exemplify the need for Congress to take the initiative and address the problems of Internet trespass before the firestorm matures. The common law concept of Internet trespass developing from the battlefields of Northern California should serve as an incentive for Congress to enact a solution to the problem of harmful Internet practices. This solution would entail a federal statute protecting the interests of commercial and private website and computer users.¹⁸⁸ Would such a solution be so far fetched?

1. Copyright Protection and Database Misappropriation

Congress has already initiated two bills which aim to solve the problems of Internet trespass, but through a different legal aspect—copyright law.¹⁸⁹ Both the Collections of Information Antipiracy Act (CIAA), H.R. 354, and the Consumer and Investor Access to Information Act (CIAIA), H.R. 1858, essentially prevent the pirating of existing

187. See DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 39-40 (2000) (emphasizing that the Coase Theorem hinges on the concept of transaction costs). Transaction costs are defined as the costs associated with bargaining to efficiency. *Id.* High transaction costs naturally occur when a large number of people are involved. *Id.* at 39. For example, it is more difficult for a community of people to agree to pay for a polluting steel mill to prevent the pollution, than it is for the community to put up with the pollution. *Id.* Conversely, low transaction costs occur when the parties involved are few in number. See Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 231 (1996). Therefore, it is not difficult to contract to sell a car, house, etc., because usually only two parties are involved. *Id.* But, also note that perhaps the biggest problem with applying Coase's Theorem is that even the most renowned economists have inadequate knowledge of transaction costs. DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 317 (2000). But see Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 231 (1996) (stating that because the Internet reduces the cost of obtaining information, it also fosters low transaction costs).

188. See U.S. CONST. art I, § 8, cl. 3 (stating that Congress has the power "to regulate Commerce with foreign Nations, and among the several States"); Greg Y. Sato, Note, *Should Congress Regulate Cyberspace?*, 20 HASTINGS COMM. & ENT. L.J. 699, 714-15 (1998) (indicating that Congress should regulate the Internet under its commerce power).

189. See Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 6. (indicating that Congress seeks to remedy the lack of copyright protection for databases, which would provide protection for eBay-type claims).

online databases.¹⁹⁰ However, the bills are somewhat at issue with existing copyright law in attempting to protect that which is not copyright protectable.¹⁹¹ Even if Congress successfully passes the proposals, they would only grant a very narrow sliver of protection for online databases.

Nevertheless, the suggested bills do not go without merit. The fact that legislative committees are working on a federal solution is a very proactive method of providing some recourse for website owners.¹⁹² But even more significant are recent scholars, like Maureen O'Rourke, who dedicate time and effort into making suggestions as to how to amend or even reword the proposed bills to encompass recent spidering issues.¹⁹³ Specifically, O'Rourke suggests that legislatures add a balancing test to the Consumer and Investor Access to Information Act to provide more spe-

190. See *id.* (citing both the J., Collections of Information Antipiracy Act (CIAA), H.R. 354) and the Consumer and Investor Access to Information Act (CIAIA), H.R. 1858). The CIAA "would create a private right of action against anyone who misappropriates all or a 'substantial part' of information collect[ed,] created[,] or maintained by another through the investment of substantial financial or other resources, causing 'material harm' to the database owner's 'primary market.'" *Id.* Criminal penalties are recoverable under the Act. *Id.* The CIAIA "would prohibit the wholesale duplication of a database collected and organized by another person and then reselling or distributing in commerce the duplicate in competition with the original provider." *Id.* This Act does not provide for a private cause of action or criminal penalties, but instead makes the Federal Trade Commission responsible for enforcing the provisions. Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 6; see Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 627-28 (2001) (commenting that House Bill 1858 might not be specific enough to include the unauthorized use of software robots).

191. See Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 6 (asserting that both pending bills aim to overrule the Supreme Court decision in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*). Under *Feist*, the "sweat and brow" compilation of raw data, such as names and numbers found in a phone book, are not copyrightable due to lack of the "minimal degree of creativity" required to fulfill the Constitution and the Copyright Act's originality requirement. See generally, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (holding that telephone book white pages did not meet constitutional or statutory requirements for copyright protection).

192. See Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 6 (illustrating the Congressional effort to provide some Internet regulation, by both the Commerce Committee and the Subcommittee on Courts and Intellectual Property).

193. See Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 628 (2001) (stating that "[c]ongress should consider expanding House Bill 1858 to include more explicit guidance on what constitutes permissible access"). The author further suggests amending House Bill 1858 and inserting the balancing test used by courts in Internet trespass rulings. *Id.*

cific guidance on what is and what is not database misappropriation.¹⁹⁴ Although modifications to legislative proposals will provide a reasonable solution to prevent parties from plundering compiled databases, such changes only provide limited protection potentially at the expense of copyright law.¹⁹⁵

Because the Internet war is exploding at a rapid pace with exponentially expanding technologies, constructing or even adopting a statute limited to solely protecting databases provides only a short term solution.¹⁹⁶ As personal computers get faster and more efficient, and as personal broadband Internet access fills the users' homes, one could reasonably infer that personal computers will play an even greater role in the next generation of Internet technologies.¹⁹⁷ Computer owners will expose even more of their personal assets to the world wide web and will need extra protection from the malicious Internet practices mentioned, as well as those being developed.¹⁹⁸ When a person's home personal computer is wrongfully accessed, that person will likely demand recourse.¹⁹⁹ Thus, a statute encompassing relief from a form of unwanted trespass, access, or even intrusion needs to stand on its own.

194. See *id.* at 629 (stating that defining more specific rights would give parties a better understanding of their contractual bounds and rights).

195. See Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 6 (asserting New York University School of Law Professor Benkler's view that "H.R. 1858 'is attempting to clamp down on a very narrow set of practices' and 'creates a relatively narrow right . . .'").

196. See Greg Y. Sato, Note, *Should Congress Regulate Cyberspace?*, 20 HASTINGS COMM. & ENT. L.J. 699, 706 (1998) (noting "that '[i]n this age of cyberspace . . . reliance on statutes and stare decisis simply cannot keep up with a rapidly evolving technological environment'"). Consequently, cyberspace regulations may always be obsolete. *Id.*

197. See Carol Wilson, *Broadband: Get Ready For the Gale*, ZDNET NEWS, <http://www.zdnet.com/zdnn/stories/comment/0,4586,2281301,00.html> (June 26, 1999) (indicating that broadband will change the Internet and provide for greater links between workers, family and friends).

198. See Robert J. Bagnall, *Battling the Internet Parasites*, ZDNET NEWS, <http://www.zdnet.com/zdnn/stories/comment/0,5859,2694882,00.html> (Mar. 12, 2001) (warning against computer parasites and viruses and their effects on the increased bandwidth and connectivity).

199. See Alfred Hermida, *Web Bugs Spying on Net Users*, BBC NEWS ONLINE, http://news.bbc.co.uk/hi/english/sci/tech/newsid_1493000/1493152.stm (Aug. 16, 2001) (noting that the unauthorized collection of information from websites will generate more controversy as public awareness levels rise). A study of one million web pages between 1998-2001 by Internet tracking firm Cyveillance also indicates that the most prevalent use of web bugs is on personal pages, with bugs found on 18% of those sampled. *Id.*

2. The Next Wave of Intrusions? Knock, Knock, We're Already Here: Trojan Horse and Spy Ware

The possibilities of unlawful access to another's computer web server are endless. To illustrate the demand for a statute aimed at protecting one's right of access, consider the following two examples. The first is based on the assumption that almost every Internet user is familiar with computer viruses, specifically the Trojan horse. One recent Trojan horse, called SubSeven, is a computer program deviously placed on one's computer that gives another hacker complete and total access to one's machine.²⁰⁰ If the SubSeven virus is detected on the computer, it was most likely placed there by means of unlawful access.²⁰¹ Due to its nature, it is indeed intrusive; thus, one can see the need for civil protection based on an Internet trespass theory.²⁰²

Second, consider another, perhaps equally intrusive, program called spy ware. Spy ware is a computer program placed on a computer to upload specific and unique information about the files and information on a personal computer.²⁰³ It too is subtly placed on one's computer, usually by an unsuspecting user.²⁰⁴ Such an intrusion is likely fought best with the trespass to chattels approach. An even better solution, however, is a body of law sculpted to protect against such intrusions.

200. See *SubSeven Virus: Beware of Those Mutations*, ZDNET NEWS, <http://www.zdnet.com/zdnn/stories/news/0,4586,5079583,00.html> (Mar. 15, 2001) (explaining that the SubSeven virus attacks computers by posing as an email attachment, which then allows for password retrieval, registry setting modifications, and file manipulation from a remote system).

201. See *Virus Profile: BackDoor-G*, McAfee.COM, at http://vil.mcafee.com/dispVirus.asp?virus_k=10171& (last visited Sept. 25, 2001) (explaining how the virus infects the computer system and warns that virus scanners may not detect the virus).

202. *But see* 18 U.S.C. § 1030 (1996 & Supp. 2001) (outlining the federal action against hacking, but noting that the federal statute is a criminal statute and allows for recovery of damages over \$5,000). A specific federal civil statute, however, would be more appropriate for governing private causes of action for Internet trespass.

203. See Steve Gibson, *Definition: What is Spyware?*, SPYWARE WATCH, at <http://www.spyware.co.uk/whatis.shtml> (last visited Sept. 27, 2001) (stating that "spyware is any software which employs a user's Internet connection in the background without their knowledge or permission"). A complete disclosure of proposed background usage and an informed consent must be given prior to background use. *Id.* Any software operating on the Internet which does not disclose intended use and has not received explicit consent is guilty of information theft. *Id.*

204. See Alfred Hermida, *Web Bugs Spying on Net Users*, BBC NEWS ONLINE, http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_1493000/1493152.stm (Aug. 16, 2001) (asserting that owners of web pages are not likely to be aware of the Spyware, which was probably placed on their pages by ads or the company hosting the site).

IV. CONCLUSION: THE E-TRESPASS ACT

Understanding the debates surrounding Internet trespass requires two important realizations. First, the Internet frontier deserves some allocation of rights, as demonstrated by the recent increase in Internet property disputes. As noted above, it appears that congressional solutions to aid in seemingly unfair business practices are already being developed. However, it is doubtful that copyright law holds the key to the entire solution.

The second important realization is that the Internet trespass cause of action, although not a bad interim solution, may not, in its pure form, be the best solution. Although those supporting Internet trespass have made convincing public policy arguments for granting property rights, those opposing Internet trespass have also pointed out its problems. Internet trespass, while granting well deserved rights to many website owners, garners too much firepower. Thus, it is up to the legislature to refine this power so that the law is used selectively. Surely the Internet community does not want small family feuds, where e-mail receiver Bob sues e-mail forwarder Jane for sending inappropriate Internet humor under a theory of Internet trespass.²⁰⁵ Internet trespass, therefore, is too broad a claim.

A federal statutory model should be constructed separately from Internet trespass to protect all community users from the real threat of wrongful access. After considering the problems and benefits of using trespass to chattels as a remedy, and noting the problem with property rights, perhaps a better solution is to initially define a liability rule under federal law, as opposed to using a property rule. This would shift the focus from a violation of one's property, to a violation of how that property is accessed.²⁰⁶ The new "e-Trespass Act" would grant recourse for those

205. See Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 53 (2000) (suggesting that nuisance law, not trespass to chattels, is a better mechanism for battling harassing emails).

206. See DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 57-58 (2000) (distinguishing between when to use property law and when to invoke a rule of liability). Property law, which is very similar to liability law, is most effective when parties voluntarily enter into an agreement based on subjective pricing. See *id.* at 58 (using a car as the property asset to explain that "the transaction cost of selling you the car is . . . less than the transaction cost of your stealing the car and . . . my suing you and collecting"). Conversely, liability law is best used when parties are in a more involuntary position and usually requires a more objective means of establishing value. See *id.* (illustrating the liability rule that "if I injure someone under circumstances in which the court finds me at fault, I must compensate him"). The conclusion drawn is that "[p]roperty rules are attractive when the cost of allocating rights by market transactions is low. Liability rules are attractive when the cost of allocating rights by litigation is low." *Id.*

computers and systems which are improperly accessed.²⁰⁷ The new Act could read as follows:

A person or business entity rightfully in possession of an Internet entity shall have a cause of action against another person or business entity who improperly or covertly accesses and who causes sufficient, harmful electronic network access without proper consent to such access.

“Access” in this manner shall include the unauthorized use of software robots (*e.g.*, spiders, robots, and the like), the unauthorized defiance of a normal network web interface (*e.g.*, harmful deep linking), and unauthorized intentional or knowing, breach or attempted breach, of a reasonable security measure (*e.g.*, hacking and breach of access to transmit spy ware). This shall not include harmless, superficial, directory indexing (*e.g.*, search engines using automated software), traditional web tracking methods (*e.g.*, cookies, and other similarly accepted methods), e-mail transmissions, or traditional linking.

“Sufficient” precludes manual extraction of public information. “Harmful” means any significantly imposed financial burden in commercial dealing, or any security breach which intends to penetrate a non-public region of any network entity.

The e-Trespass Act should also contain some exemptions for maintaining superficial links. The purpose of the exception is to protect traditional search engines such as Yahoo!,²⁰⁸ because search engines are typically no threat to commercial websites.²⁰⁹ Furthermore, superficial links would also include links that place an Internet user at the top of the

207. See Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 6 (identifying Congressional ideals that would grant a cause of action to protect against misappropriation of websites). Although the suggested proposed bills codify the dangers against certain web practices, webmasters are many times instructed to approach linking with extreme caution. See Maxine Lans Retsky, *Deep Linking Not Always Ticket for Web*, MARKETING NEWS, June 5, 2000, at 15 (indicating that even after the *Ticketmaster* decision, webmasters are still warned that web linking contains a moderate amount of risk).

208. Lisa M. Ferri & Robert G. Gibbons, *Forgive Us Our Virtual Trespasses: The 'eBay' Ruling*, N.Y. L.J., June 27, 2000, at 6 (noting concerns that Internet giants Yahoo! and America Online have regarding the codification of Bliley and Coble bill). Although search engines are at the forefront of link-related law suits, they do not impose liability on any website and should not be subject to the e-Trespass statute.

209. See Daniel Roth, *Meet eBay's Worst Nightmare*, FORTUNE MAG., June 26, 2000, at 200-02 (discussing the benefits of search engines, which gather information from websites, making web navigation more efficient). Search engines differ from auction aggregators, in that their fundamental purpose is not product to price comparisons. *Id.*

homepage, far less threatening than deep linking.²¹⁰ This liability law by no means grants an absolute property right, but rather grants a sliver of a right to protect computers against improper access.²¹¹ Notably, the statute hinges on existing case law regarding trespass to chattels and encompasses existing case law surrounding the "harmful" variable.²¹² For instance, *CompuServe* has already established the scope of sufficient harm to include tarnishing good will and reputation.²¹³ Likewise, the *eBay* decision has also increased the breadth of sufficient harm to include any "potential" for harm occurring from harmful Internet practices.²¹⁴ Although in *Ticketmaster*, the court was not ready to resolve the issue of deep linking interference,²¹⁵ the new e-Trespass Act addresses the industry's doubts on linking in general, and protects private users exposing their computers on the Internet, without threatening the basic free flow of information.²¹⁶

210. See Jim Conley, *You Surf, They Pay*, PC COMPUTING, May 1, 2000, 2000 WL 2000314 (inferring websites must benefit from traditional search engine listings since some commercial sites actually pay the search engines for a listing); see also Margaret Smith Kubiszyn, *Emerging Legal Guidance on 'Deep Linking,'* GIGALAW.COM, at <http://www.gigalaw.com/articles/kubiszyn-2000-05b-p3.html> (May 2000) (stating that after *Ticketmaster*, search engines such as Knight-Ridder and Yahoo! were allowed to deep link to Ticketmaster's site, but only after entering into an agreement). *Id.*

211. The focus of the e-Trespass Act is not on the content of the information scavenged, but rather whether that information was fairly accessed.

212. See generally *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1027-28 (S.D. Ohio 1997) (inferring that legal recourse is available to prevent hostile spamming); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1073 (N.D. Cal. 2000) (inferring that legal recourse is available for hostile acts such as the use of unauthorized software robots); *Ticketmaster Corp. v. Tickets.Com.*, No. CV 99-7654 HLH (BQRX), 2000 WL 525390, at *1 (inferring that defendant's actions were not hostile enough to summon legal recourse).

213. See *CompuServe*, 962 F. Supp. at 1023 (distinguishing sufficient harm from nominal harm inferred from the trespass to land).

214. See *eBay*, 100 F. Supp. 2d at 1064-65 (recognizing that a potential for harm exists if the frequent searching of eBay's database is allowed, because it encourages other entities to engage in the same behavior, thereby producing a much more hostile effect).

215. See *Ticketmaster*, 2000 WL 525390, at *1 (inferring through the dismissal of eight of plaintiff's claims that not enough harm occurred).

216. See Susan P. Butler, *SOHO: Links and the Law*, TECHTV, at <http://www.techtv.com/print/story/0,23102,2316817,00.html> (Aug. 18, 1999) (cautioning webmasters to link for good faith reasons and not to exploit famous status or other's hard work). Webmaster's are urged to gain consent in writing in order to practice safe linking. *Id.*