

Trespass to Chattel Doctrine Applied to Cyberspace

Two recent cases have extended a property metaphor, and property doctrine, to cyberspace. In both EBay, Inc. v. Bidder's Edge, Inc. and Register.com, Inc. v. Verio, Inc., courts held that aggregating data from publicly accessible websites could constitute trespass to chattels.¹

I. EBay, Inc. v. Bidder's Edge, Inc.

In EBay, Inc. v. Bidder's Edge, Inc., an online auction company asked for and received a temporary injunction preventing an auction data aggregator from using a robot to gather data from the company's website. The court granted a temporary injunction on the trespass to chattels claim without analyzing the other eight claims.

A. Background Information

EBay was the leading online auction website. Bidder's Edge aggregated data from EBay and other online auction websites, and presented that data for comparison shopping. Although EBay permitted aggregators to search its databases, it had denied permission to Bidder's Edge to do so.

B. Complaints

The court weighed only the trespass to chattel claim, just one of EBay's nine separate causes of action against Bidder's Edge. The court found that Bidder's Edge's use

of EBay's systems burdened EBay's computer systems, and that any interference, no matter how small, could constitute infringement. The court also found that permitting Bidder's Edge to continue recursively searching EBay's website could encourage other auction aggregators to do likewise, and could result in the infliction of "irreparable harm from reduced system performance, system unavailability, or data losses."² Again, such harm need not be significant.

C. Trespass to Chattel

California requires the plaintiff to establish (1) intentional and non-permissive interference with plaintiff's use of its computer system; and (2) that such use proximately resulted in damage to plaintiff.

The court found that even though the website was publicly accessible, Bidder's Edge's use was non-permissive. Bidder's Edge violated EBay's terms of use and ignored EBay's requests to stop using robots on EBay's system. The court also found that although the interference was not substantial, "any intermeddling with or use of another's personal property" is sufficient to establish possessory interference on a claim of trespass to chattel.³

The court held that Bidder's Edge's use of EBay's bandwidth and system resources, even though small, constitutes harm to EBay. The court also found that not enjoining such use could encourage other aggregators to crawl EBay's website, resulting in even greater harm to EBay's interests.

¹ EBay, Inc. v. Bidder's Edge, Inc., 100 F.Supp.2d 1058 (N.D.Cal., 2000). Register.com, Inc. v. Verio, Inc., 126 F.Supp.2d 238 (S.D.N.Y., 2000).

² Id at 1066.

³ Id at 1070.

D. The Temporary Injunction

The court found that EBay was likely to prevail at trial on its trespass to chattels claim, and granted the injunction on those grounds. The court also found that no public interest, including pending antitrust actions against EBay, weighed against granting the injunction. The injunction forbids Bidder's Edge "from using any automated query program, robot, web crawler or other similar device, without written authorization, to access eBay's computer systems or networks, for the purpose of copying any part of eBay's auction database."⁴⁵

II. Register.com, Inc., v. Verio, Inc.

In Register.com, Inc., v. Verio, Inc., the domain name registrar Register.com asked for and received a temporary injunction on four separate grounds. The injunction prohibits Verio from using robots to gather data from Register.com, or from using any data gathered from Register.com for mass marketing purposes.

A. Background: Register.com, Verio, and the ICANN

Register.com provides domain name registration services for a fee, and provides additional internet hosting and related services. All domain name registration services are provided under agreement with the Internet Corporation for Assigning Names and Numbers (ICANN), which is a private corporation created by the United States to administer certain aspects of Internet administration. In order to be a domain name registrar, Register.com is required by the Internet Corporation for Assigning Names and

⁴ Id at 1073.

⁵ Id at 1073.

Numbers (ICANN) to maintain a publicly-accessible database of registrant information, the WHOIS database. ICANN's Accreditation Agreement forbids use of the registrant information for mass email (spam), but does not forbid other marketing uses of the registrant information. Register.com expanded the restrictions to also restrict use of registrant information for mass marketing by direct mail or telephone.

Register.com, in addition to providing domain name registration services, also provides internet hosting and related services. Verio and Register.com compete for the same customers for their respective internet hosting services.

Beginning in late 1999, Verio developed direct-marketing databases by developing lists of recently-registered domain names, and then using a robot to download the relevant identification information from WHOIS databases, including the WHOIS database maintained by Register.com. Shortly thereafter, Register.com began receiving complaints from customers who had been solicited by Verio.

B. Complaints

Register.com petitioned to have Verio enjoined from searching Register.com's WHOIS database with robots, and from using information gained from Register.com for mass marketing. Register.com alleged (1) that Verio was in breach of contract; (2) that Verio trespassed on Register.com's property; (3) that Verio violated two sections of the Computer Fraud and Security Act; and (4) that Verio infringed upon Register.com's trademark in violation of the Lanham Act.

C. Trespass to Chattel

Register.com alleged trespass to chattel on the grounds that Verio used robots to flood Register.com's computer system with traffic in violation of Register.com's posted policies and terms of use. In New York, trespass to chattels requires (1) use of chattel without consent; and (2) harm to the chattel. Restatement 2d of Torts. The court found that Verio was on notice that its use was non-permissive. Citing EBay v. Bidder's Edge, the court found that even a negligible use of property, if non-permissive, constituted harm.⁶ The court found several actual or potential harms in Verio's use of Register.com's system: (a) Verio's use of system resources deprived Register.com of those system resources; (b) Verio's use of system resources could cause Register.com's systems to crash; (c) and finally, Verio's competitors may also begin to search Register.com's database, draining system resources.

D. The Temporary Injunction

The court determined that Register.com was likely to prevail at trial and that monetary damages were incalculable, and that therefore injunctive relief was appropriate. The temporary injunction was based on all four of Register.com's claims, and enjoined Verio from "accessing Register.com's computers and computer networks in any manner, including, but not limited to, by software programs performing multiple, automated, successive queries" and from "[u]sing any data ... obtained from Register.com ... [for] unsolicited commercial electronic mail, telephone calls, or direct mail"⁷

⁶ Id at —.

⁷ Id at 255.