

## Trespass to Chattel Doctrine Applied to Cyberspace

### ANNOTATED PATHFINDER

#### I. Cases

##### *Major Recent Cases*

- eBay, Inc. v. Bidder's Edge, Inc., 100 F.Supp.2d 1058 (N.D.Cal., 2000) (5/24/2000) – Judge Whyte
  - eBay, Inc. v. Bidder's Edge, Inc., 2000 WL 1863564 (7/25/2000) – *eBay's motion to dismiss denied*
- Register.com v. Verio, Inc., 126 F.Supp.2d 238 (S.D.N.Y., 2000) (12/8/2000)
- Intel Corp. v. Hamidi, 1999 WL 450944, (Cal. Super. Apr. 28, 1999) – *not officially published* – Intel Corp. v. Hamidi, 15 I.E.R. Cases (BNA) 464 (Cal. Sup. Ct. 1999). See Tentative Ruling, <http://cyber.law.harvard.edu/msvh/hamidi/tentativesjruling.html>
- TicketMaster Corp. v. Tickets.Com, Inc., 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000), 2000 WL 1887522 (C.D.Cal.) (8/10/2000) – *discussing eBay, 100 F.Supp.2d 1058, agreeing with it, but distinguishing it from TicketMaster.*
  - Ticketmaster Corp. v. Tickets.Com Inc., 2001 WL 51509 (9th Cir.(Cal.) Jan 22, 2001) (Not selected for publication in the Federal Reporter, NO. 00-56574).
  - Ticketmaster Corp. v. Tickets.Com, Inc., 2000 WL 525390, 2000 Copr.L.Dec. P 28,059, 54 U.S.P.Q.2d 1344 (C.D.Cal. Mar 27, 2000) (NO. CV 99-7654 HLH(BQRX))

##### *Other Cyberspace Trespass to Chattel*

- CompuServe Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D.Ohio, 1997) (2/3/1997)
- Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559 (Cal.App.4.Dist., 1996) – *trespass to chattel in telecommunciations. In Thrifty-Tel, a child used a home computer to access a long-distance telephone company's confidential codes and make unauthorized calls. Thrifty-Tel, 54 Cal. Rptr. 2d at 471. The child's activity overburdened the system and denied subscribers access to phone lines. Id. The Court of Appeals held that the child's activity constituted trespass. Id. at 473 (holding electronic signals used to gain unauthorized access to a computer to be "sufficiently tangible to support a trespass cause of action")..*
- America Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444 (E.D.Va., 1998) (10/29/98)
- America Online, Inc. v. IMS, 24 F.Supp.2d 548 (E.D.Va., 1998) (10/29/98)
- Hotmail Corp. v. Van\$ Money Pie, Inc., 1998 WL 388389 (N.D.Cal., 1998) (4/16/98)
- America Online, Inc. v. National Health Care Discount, Inc., 121 F.Supp.2d 1255 (N.D.Iowa, 2000) – 9/29/2000

*Possible Cases – Dicta, Minor Cases, Precursors, Semi-Related*

- State v. McGraw, 480 N.E.2d 552 (Ind. 1985) “*Indiana Supreme Court recognizing in dicta that a hacker's unauthorized access to a computer was more in the nature of trespass than criminal conversion*”
- State v. Riley, 121 Wash.2d 22, 846 P.2d 1365 (1993) *computer hacking as the criminal offense of "computer trespass" under Washington law*
- U.S. v. LaMacchia, 871 F.Supp. 535, 63 USLW 2475, 1995 Copr.L.Dec. P 27,344, 33 U.S.P.Q.2d 1978 (D.Mass., Dec 28, 1994) *impetus for computer crime act*
- Cyber Promotions v. AOL, 948 F.Supp. 436 (1996) (11/4/1996) – *no trespass to chattels theory, but discussion of Marsh and trespass cases*
- Seidl v. Greentree Mortg. Co., 30 F.Supp.2d 1292 (D.Colo., Oct 18, 1998) – *alleged trespass to chattel*
- America Online, Inc., v. GreatDeals.Net, 49 F.Supp.2d 851 (E.D.Va., 5/4/1999)
- Dryden v. Cincinnati Bell Tel. Co., 734 N.E.2d 409 (Ohio App. 1st Dist., Aug. 20, 1999)
- Howard v. America Online, Inc., 208 F.3d 741 (9th Cir., 2000) (3/29/2000)
- Media3 Technologies, LLC v. Mail Abuse Prevention System, LLC, 2001 WL 92389 (D.Mass. 1/2/2001)
- State v. Heckel, 142 Wash.2d 824, 24 P.3d 404 (Wash. Jun. 07, 2001)
- Butcher Co., Inc. v. Bouthot, 124 F.Supp.2d 750 (D.Me., Jan 03, 2001)
- Internet Doorway, Inc. v. Parks, 138 F.Supp.2d 773 (S.D.Miss., Apr 09, 2001)
- Parisi v. Netlearning, Inc., 139 F.Supp.2d 745, 746, 59 U.S.P.Q.2d 1051, 1051 (E.D.Va. May 10, 2001)

## II. Law Review & Academic Articles

Ballantine, Susan M. Note, “Computer Network Trespasses: Solving New Problems with Old Solutions,” 57 Wash. & Lee L. Rev. 209-255, 234 (2000) (*summarizing the trespass to chattels cause of action*).

\* Burk, Dan L. “The Trouble With Trespass (as applied to computer network access disputes)” 4 J. Small & Emerging Bus. L. 27 (Spring 2000).

Elkin-Koren, Niva. “Let The Crawlers Crawl: On Virtual Gatekeepers And The Right To Exclude Indexing,” 26 U. Dayton L. Rev. 179 (2001)

Fellmeth, Aaron Xavier. “Cyber Trespass Comes Of Age,” 19 NO. 2 Intell. Prop. L. Newsl. 8, 11+ (2001)

Hardy, I. Trotter. “The Ancient Doctrine of Trespass to Web Sites,” 1996 J. Online L. art. 7, § § 10, 13 (*explaining preemption under the Copyright Act, the technical details of linking, and noting that if RAM copies are considered "copies" within the meaning of the Act, "then quite possibl[y] a trespass action would be preempted"*).

Keller, Bruce P. "Condemned To Repeat The Past: The Reemergence Of Misappropriation And Other Common Law Theories Of Protection For Intellectual Property" 11 Harv. J.L. & Tech. 401 (Winter 1998)

Kramer, David, and Jay Monahan. "Panel Discussion To Bot Or Not To Bot: The Implications Of Spidering," 22 Hastings Comm/Ent L.J. 241, 263+ (2000)

Lee, Richard C. Cyber Promotions, Inc. v. America Online, Inc., 13 Berkeley Tech. L.J. 417, 424 (1998).

Middlebrook, Stephen T., and John Muller. "Thoughts on Bots: The Emerging Law of Electronic Agents," 56 Bus. Law. 341 (2000)

\* O'Rourke, Maureen. "Property Rights and Competition on the Internet: In Search of an Appropriate Analogy" 16 Berkeley Tech. L.J. 561 (2001)

#### **IV. General Press, Trade, & News Articles / Blurbs**

eBay, Inc. v. Bidder's Edge, Inc. Berkeley Technology Law Journal, Winter 2001 v. 16, n. 1, p. 515.

Bick, Jonathan. Trespass theory poses threat to Internet. (New York). New York Law Journal, August 21, 2000 v224 i35 pS7 col 1 (50 col in).

Bick, Jonathan and Steve R. Kamen. The Internet is no place for trespass. (automated search programs). New Jersey Law Journal, August 7, 2000 v161 i6 p29 col 1 (50 col in.) Cases: eBay v. Bidder's Edge - No. C-99 21200 (N.D. Cal. 2000)

Bonisteel, Steven. Bidder's Edge Searches eBay Again, Newsbytes, available at <http://www.newsbytes.com/pubNews/00/150308.html> (June 8, 2000)

Carlinsky, Michael B. and Jeffrey A. Conciatori. Posting 'no trespassing' signs on the Internet. New York Law Journal, Jan 16, 2001 v225 i10 s0 p1 col 1 (50 col in).

Cisneros, Oscar. eBay Fights Spiders on the Web, WIRED News, July 31, 2000, <http://www.wired.com/news/politics/0,1283,37643,00.html>

Ferri, Lisa M., and Robert G. Gibbons. Forgive us our virtual trespasses: the 'eBay' ruling. (California). New York Law Journal, June 27, 2000 v223 i123 p1 col 1 (50 col in).

Fried, Lisa I. "FTC and the Web: some hail its eBay move, others fear restrictions." New York Law Journal, Jan 13, 2000 v223 i9 p5 col 2 (35 col in).

Katsh, Ethan, Janet Rifkin and Alan Gaitenby. "E-commerce, e-disputes, and e-dispute resolution: the shadow of 'eBay law'." *Ohio State Journal on Dispute Resolution*, Spring 2000 v15 i3 p705-734.

Nemeroff, Michael A. and Matthew P. Pasulka. 'No trespassing': Internet spin on an old doctrine; the 'eBay' court maintained legal borders on the Net with traditional property concepts instead of using IP protection.(E-commerce). *The National Law Journal*, Nov 13, 2000 v23 i12 s0 pB17 col 2 (50 col in).

*Abstract: Issues regarding business method patents are discussed and the inability of traditional patent law to establish high enough borders to protect electronic commerce companies is claimed. Case law discussed starts with the landmark 1998 State Street case and includes a detailed discussion of eBay, Inc. v. Bidder's Edge, Inc., decided in 2000 by a federal district court. Cases: eBay, Inc. v. Bidder's Edge, Inc. - 100 F.Supp.2d 1098 (S.D. Cal. 1998)*

Nuara, Leonard T. and Cherilyn C. Guido. Trespass theory may protect databases. (Intellectual Property Law). *New York Law Journal*, May 7, 2001 v225 i87 pS-7 col 1 (35 col in).

Robins, Mark D. Electronic trespass: an old theory in a new context. *The Computer Lawyer*, July 1998 v15 n7 p1(7). (*discusses Thrifty-Tel, Inc. v. Bezenek - 46 Cal. App. 4th 1559 (1996)*)

Slind-Flor, Victoria. eBay's behind-the-scenes move; are they now dissing the profs they failed to woo to their side? *The National Law Journal*, August 7, 2000 v22 i50 pB7 col 2 (5 col in).

Slind-Flor, Victoria. e-Bay eyes copycats, reexamines old law. *New York Law Journal*, April 18, 2000 v223 i74 s0 p5 col 1 (35 col in).

Slind-Flor, Victoria. "Deep linking' links e-auctioneers in copyright dispute." *New York Law Journal*, Nov 23, 1999 v222 i101 p5 col 4 (35 col in).

Valsamis, Liz. "Don't Trespass; eBay uses a novel legal concept in claiming that its competitor is clogging the server and impairing congestions" *The Los Angeles Daily Journal*, Feb. 20, 2001, v. 114, no. 34, pp. S14, col. 3.

## **V. Books & Treatises**

### Restatement (Second) of Torts (2001)

§217 Ways of Committing Trespass to Chattel, Comments f and g,

§ 218 Liability to Person in Possession

§ 221 Dispossession

§ 252 Consent of Person Seeking Recovery

§ 256 Use Exceeding Consent  
§ 259 Privilege to Use Facilities of Public Utility  
§ 892(A) Effect of Consent

## **VI. Other Materials – Amicus Briefs, Organizations, Websites**

Amicus Brief in Support of Bidder's Edge by 28 Law Professors, Bidder's Edge, Inc. v. eBay, Inc., 100 F.Supp. 2d 1058 (N.D. Cal. 2000) (No. 00-15995) (9th Cir. filed June 22, 2000) <http://www.gseis.ucla.edu/iclp/ebay-ml>

Electronic Frontier Foundation's amicus brief raising First Amendment questions in the appeal of Intel Corp. v. Hamidi,  
<http://www.intelhamidi.com/amicusbrief.htm>

Former and Current Employees (FACE) of Intel website.  
<http://www.faceintel.com/>

Intel v. Hamidi website from Berkman Center for Internet and Society. Includes appeal briefs and commentary.  
<http://eon.law.harvard.edu/openlaw/intelvhmidi/documents.html>  
<http://www.intelhamidi.com/>

## **VII. Unsorted – Other Potential Materials**

“Law And New Technology: The Virtues Of Muddling Through,” 19 Yale L. & Pol'y Rev. 443, 461 (2001) - *maybe*

“Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment,” 12 Harv. J.L. & Tech. 149, 240+ (1998)