

NO. 00-15995

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BIDDER'S EDGE, INC.,
Appellant,

v.

EBAY INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
THE HONORABLE RONALD M. WHYTE
NO. C-99-21200 RMW ENE

**BRIEF OF *AMICI CURIAE*
IN SUPPORT OF BIDDER'S EDGE, INC.,
APPELLANT, SUPPORTING REVERSAL**

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CERTIFICATE OF INTEREST AND AUTHORITY

The undersigned counsel of record for the signatories of this brief furnishes the following information in compliance with Fed. R. App. P. 29.

1. *Amici curiae* are professors of law at various law schools throughout the United States. They teach, write about, or have an interest in the proper resolution of Internet and technology law cases. To the best of their knowledge, they have no financial interest in the outcome of this case nor are they affiliated in any way with any of the parties to this case.
2. Bidder's Edge, Inc. consented to the filing of the attached *amici curiae* brief, but because eBay Inc. refused to grant its consent, this filing is made in accordance with Fed. R. App. P. 29(a) and is accompanied by a Motion for Leave to File.
3. While *amici* are employed by various law schools, they do not represent or speak for their institutions in this matter, and institutional affiliations are listed for identification purposes only.
4. Although some *amici* (including the undersigned) are of counsel to law firms, they have filed this brief in their individual capacity and without the involvement of those firms.

5. *Amici* are not included in the protective order that governs this case and have had no access to confidential information. This brief is based on the district court opinion, the pleadings, and the public record.

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SUMMARY OF ARGUMENT

This friend of the court brief is submitted on behalf of twenty-eight professors of law who write and teach in the fields of high technology law.¹ We submit this brief out of concern that the district court's decision represents an unwarranted and dangerous extension of the ancient doctrine of trespass to chattels to control the flow of information on the Internet. The doctrine of trespass to chattels is not designed to and should not be extended to give one company ownership of information about the price of a commercial product sold on the open market, as the district court's decision would effectively do. The public interest in

¹ Keith Aoki, University of Oregon School of Law; Ann Bartow, University of South Carolina School of Law; Yochai Benkler, New York University School of Law; Stuart Biegel, University of California at Los Angeles School of Law; Dan Burk, University of Minnesota Law School; Julie Cohen, Georgetown University Law Center; Stacey Dogan, Northeastern University School of Law; Rochelle Dreyfuss, New York University School of Law; William Fisher, Harvard Law School; A. Michael Froomkin, University of Miami School of Law; Stephanie Gore, Florida State University College of Law; Paul Heald, University of Georgia School of Law; Dennis Karjala, Arizona State University College of Law; David Lange, Duke University School of Law; Mark Lemley, University of California at Berkeley School of Law (Boalt Hall); Lawrence Lessig, Stanford Law School; Joseph Liu, University of California Hastings College of the Law; Lydia Loren, Northwestern School of Law of Lewis & Clark College; Michael Madison, University of Pittsburgh School of Law; Michael Meurer, Boston University School of Law; Maureen O'Rourke, Boston University School of Law; Malla Pollack, Northern Illinois University College of Law; David Post, Temple University Beasley School of Law; Arti Rai, University of San Diego School of Law; R. Anthony Reese, University of Texas at Austin School of Law; Pamela Samuelson, University of California at Berkeley School of Law (Boalt Hall); Jane Winn, Southern Methodist University School of Law; Jonathan Zittrain, Harvard Law School

this case weighs overwhelmingly against the grant of an injunction.

We argue first that the district court's ruling threatens the efficient exchange of price information on the Internet, and also that the court's rationale sweeps so broadly as to endanger many of the most fundamental activities on which the Internet and electronic commerce are based. Second, we argue that the district court erroneously substituted speculation about possible future harm for the evidence of actual harm that trespass to chattel law requires.

I. THE DISTRICT COURT'S INJUNCTION DISSERVES THE PUBLIC INTEREST

The district court effectively abdicated its duty to balance the public interest in considering eBay's motion for a preliminary injunction. The court noted that both parties loudly claimed the public interest was on their side, but concluded that

it is poorly suited to determine what balance between encouraging the exchange of information, and preserving economic incentives to create, will maximize the public good. Particularly on the limited record available at the preliminary injunction stage, the court is unable to determine whether the general public interest factors in favor of or against a preliminary injunction.

Order at 21.

As an initial matter, we think the district court has neglected its responsibility to give exacting scrutiny to public interest concerns before creating a new cause of action. The public interest analysis is a critical part of the standard for granting a preliminary injunction, and it should not be dismissed so easily.

This is particularly true in a case like this one, where the district court applied an old cause of action to a totally new set of circumstances. We believe that such a case of first impression is precisely when the public interest becomes most important.

In our considered opinion, the public interest in this case dramatically and overwhelmingly cuts against the grant of an injunction. Application of the doctrine of trespass to give companies the right to control information about their prices and products sold on the open market threatens key benefits of electronic commerce. Further, the court's sweeping pronouncements about ownership and injury may have disastrous implications for basic types of behavior fundamental to the Internet.

A. The Sort of Information At Issue Here is Necessary to Foster Competition in All Markets

In a publication aimed at educating consumers and businesses about the importance of competition, the Federal Trade Commission states:

Consumers and business owners can help keep markets competitive. Here's how: Do your homework. Competition is fostered both by sellers vying for your business and shoppers seeking the best deal. Take the time to think about what you really need or want, research the alternatives, and know the prices and product offerings of different retailers and manufacturers. An informed shopper is in the best

position to detect a suspicious lack of competition for no apparent reason.²

Although this publication is aimed at consumers and businesses participating in ‘real world’ commerce, its message is equally applicable to consumers and businesses seeking to buy and sell on the Internet. Without information about products and prices, there can be little, if any, competition. Without information about alternatives, consumers must choose to either purchase a particular good on a particular seller’s terms, or not to purchase at all.

Electronic commerce promises to improve social welfare by giving consumers more information at a lower cost, and by allowing them to comparison-shop without traveling from store to store. The U.S. government has recognized for some time that the Internet has immense potential to increase competition and benefit consumers, and that this potential is dependent upon the special structure of the medium: “Official decision makers must respect the unique nature of the medium and recognize that widespread competition and increased consumer choice should be the defining features of the new digital marketplace.”³

There are at least four ways in which the Internet enhances both competition and efficiency: by reducing search costs for the buyer, by reducing set-up costs for the

² Federal Trade Commission, Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws (1999), <<http://www.ftc.gov/bc/compguide/keep.htm>> (Emphases added.)

seller, by reducing advertising costs for the seller, and by increasing choice for the buyer. The Internet has the potential to approximate a perfectly efficient information medium because it can allow buyers to cheaply, easily and quickly search for items they want. The role of product comparison sites is critical to the benefits of e-commerce. Aggregators of product and price information, “shop-bots” that automate the price comparison process, and comparative product evaluators like Consumer Reports and its online equivalents all reduce transaction costs and improve competition by helping consumers get fast, cheap and accurate information about products and prices. Because search technology and so-called “shop bots” allow consumers to automatically identify goods in which they are interested, the match between sellers and buyers can approach perfect efficiency. In addition, because there is no practical limit to the number of servers that can be connected to the Internet, there is virtually no upper limit to the number of sellers that can participate in what promises to be near-perfect competition.

The district court’s injunction threatens to wipe these benefits away with a single stroke of the pen. On the district court’s theory, every e-commerce site in the country can prevent shop bots, price comparison sites, or critical review sites like Consumer Reports from accessing their Web pages or using the information

³ William J. Clinton & Albert Gore, Jr., A Global Framework for Electronic Commerce (July 1, 1997), <<http://www.ecommerce.gov/framework.htm>>.

they find there.

Established online merchants have a substantial incentive to use the doctrine of trespass to interfere with the flow of price and product information on the Internet. The district court's decision places the flow of information within their control, as it allows them to circumscribe the use of tools that gather information and present the results in a usable format. These tools are essential to make the process of gathering information both feasible and useful to the average consumer. Without information about online alternatives, competition on the Internet will be reduced. Like eBay, many sites may have a motive to prevent such competition. eBay would rather not have a site like Bidder's Edge tell consumers that they can get the same product cheaper at a competing auction site. Similarly, online sellers of music, books, videos, toys and countless other sites that don't have the lowest prices won't want to participate in a price-comparison service. This is especially true of companies like eBay with large market shares, because they may believe that they could shut down a data aggregator altogether by choosing not to participate. Such companies will instead rely on their strong brand name to keep consumers coming to their site – and ignorant of the cheaper prices or better service that may be available elsewhere. The district court's opinion gives these companies the power to block such a price-comparison service altogether. While the promise of e-commerce is to improve consumer information and lower

transaction costs, under a trespass theory many of those benefits will disappear.⁴

This is not just an idle academic concern. eBay has done precisely this by suing Bidder's Edge. Moreover, mySimon, itself an aggregator collecting price and shopping information, has sued to block Priceman.com from collecting data about products and prices from the mySimon site, and Ticketmaster, the country's largest ticket agency, has sued both Microsoft and Tickets.com in an effort to prevent those companies from collecting information on entertainment events for which Ticketmaster is the exclusive provider.⁵ In addition, a number of online music sellers have used technical means in an attempt to block access by

⁴ Consumers can obtain price information in the physical world by reading advertisements and catalogs, or using existing comparison-shopping products like Consumer Reports. While in theory a store might be legally justified in excluding anyone who works for Consumer Reports from entering their store or buying their products, as a practical matter it would be difficult for them to do so. eBay, by contrast, has found in its trespass theory a perfect mechanism for preventing information-gathering.

⁵ Fortunately, the district court in Ticketmaster Corp. v. Tickets.Com Inc., 54 U.S.P.Q.2d 1344, 1347 (C.D. Cal. 2000), rejected the very theory that eBay presses here. That court held that the trespass claim was preempted by the copyright law because the essence of the claim "is the invasion and taking of factual information compiled by Ticketmaster. To the extent that state law would allow protection of factual data (not clear at all), this cannot be equated with the Copyright Act (citing Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)). In addition, it is hard to see how entering a publicly available web site could be called a trespass, since all are invited to enter."

comparison shoppers.⁶ The district court's opinion, if allowed to stand, will give all these companies the legal power to prevent consumers from obtaining product and price information efficiently.

**B. The District Court's Theory Threatens
To Make Search Engines and Linking Illegal**

The district court's decision also raises troubling issues concerning the legality of search engines, one of the fundamental building blocks of the Internet,⁷ which generally rely on precisely the same "spiders" that the district court made illegal. Under the district court's decision, most search engines would seem to be engaged in illegal activity. At best, they now exist only at the collective sufferance

⁶ See, e.g., A. Michael Froomkin and J. Bradford DeLong, Speculative Microeconomics for Tomorrow's Economy, (last modified Nov. 22, 1999) <<http://www.personal.law.miami.edu/~froomkin/articles/spec.htm>>, discussing the blocking of BargainFinder, an online shopping agent, by various online music retailers.

⁷ Search engines are critical to the effective use of the Internet. The Internet has multiple sources of information at the back end (hundreds of millions of Web pages), but only one means of accessing that information at the front end (the consumer's computer screen). Further, the Internet is a medium where information transmission is predominantly of the 'pull' type: servers on the Internet are passive and do not deliver information to a consumer's computer unless that information is requested. Unless consumers have reliable means to search through the immense number of passive servers quickly, easily and independently, many consumers will not be able to find the information that would be most useful to them. To provide impartial, accurate and timely information, search engines, shop bots, and other data tools must access and centralize information that already exists on other web servers, but which is too distributed to be of practical use to the consumer who may be not sophisticated enough to locate all of the information herself.

of millions of Web pages. Any of those pages can prevent indexing, or (more likely) control the terms of that indexing. While many companies will want their public pages to appear in search engines, others may not. Alternatively, and more likely, sites may insist upon selective or preferential indexing. Web sites might cut exclusive deals with one search engine, and refuse access to the rest. They may demand preferential treatment from search engines, so that their pages appear above anyone else's. They may want their pages to appear to certain individuals but not others. If the law gives owners of publicly accessible Web sites the power to control searches, it will help create a world in which the price any given consumer finds when she searches for a book or other commodity is a function of what the searched site knows about her age, income, prior buying habits, and the like.⁸ This form of sophisticated price discrimination isn't possible if information about prices is freely available. But it is possible if every company on the Web can control the circumstances under which people can search for it.

There are other, still broader implications of a right to control access to a "public" site without regard to actual injury to that site. The single most basic characteristic of the World Wide Web is one Web site's ability to link to another, and users' ability to follow those links. Under the district court's rationale,

⁸ See, e.g., Michael Meurer, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works, 45 Buffalo L. Rev. 845 (1997) and William Fisher, Property and Contract on the Internet, 73 Chi.-Kent. L. Rev. 1203 (1998).

linking, like search engines, would now seem to exist at the sufferance of the linked-to party, because a Web user who followed a “disapproved” link would be trespassing on the plaintiff’s server just as Bidder’s Edge was.⁹

Requiring permission to link has dire implications for free speech as well as electronic commerce. Parodied sites might sue suck.com for unauthorized linking because they don’t like the content of the linking page. These concerns too are not farfetched. Intel has already used a trespass theory in an attempt to suppress the speech of a former employee who sent email to current Intel employees. See Intel Corp. v. Hamidi, No. 98AS05067, 1999 WL 450944 (Cal. Super. April 28, 1999) (not citable as precedent; ordered not certified for publication by the California Supreme Court, see Cal. Rules of Court, Rules 976, 977). Sites such as Ticketmaster have already sued Microsoft and Tickets.com claiming linking is illegal. The district court’s decision gives these ill-considered claims powerful new ammunition¹⁰ and threatens to stifle the free and robust exchange of

⁹ The district court’s order extended only to the use of spiders by Bidder’s Edge, and purported not to bar access to eBay’s site using other technologies. In fact, however, the court’s trespass theory reaches far more broadly than its injunction, and cannot plausibly be limited to cases in which a spider is used.

¹⁰ The implications even transcend the Internet: it is hard to come up with any reason why Judge Whyte’s rationale would not apply to a claim of “trespass-to-television-set” brought by a television viewer who did not enjoy the programs being transmitted to her receiver and who notified the TV stations that their signal was unwanted.

information that has become the celebrated hallmark of the Internet.¹¹

C. The District Court’s Decision Effectively Creates a New Intellectual Property Right

Finally, it is worth bearing in mind that eBay is, in effect, seeking an intellectual property right in price information.¹² After abandoning its initial strategy to charge Bidder’s Edge with copyright infringement, eBay filed claims for trademark dilution, unfair competition, misappropriation and trespass, and in its briefs below focused primarily on the use of “its” information by Bidder’s Edge. See Plaintiff’s First Amended Complaint, at 4 (BE displays eBay auction listings and BE displays listings using eBay’s category headings), 5 (BE displays eBay auction listings), and 6 (BE lists eBay auctions alongside auctions from other houses and BE does not display all eBay auctions each time a search is run). The trespass to chattels theory adopted by the district court effectively creates an intellectual property right of unprecedented breadth, without legislative sanction and without any of the balances or limits that characterize existing intellectual

¹¹ See, e.g., Reno v. ACLU, 521 U.S. 844, 853 (1997): “[The Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.”

¹² See, e.g., Dan L. Burk, The Trouble with Trespass, 4 J. Small and Emerging Bus. L. 27, 39-54 (2000).

property rights. Rights to control "trespass to chattels" were carefully circumscribed at common law to prevent them from morphing into a broader form of property right. But the district court ignored those safeguards – most notably the injury requirement¹³ – and created a new kind of property right that protects every piece of information on the plaintiff's Web site, whether or not it is copyrighted, patented, or secret. It gives eBay absolute control over both access and use of that information: eBay need only state unilaterally that a use is prohibited, or that a particular person cannot see or use the information, and the law will enforce that assertion. And as interpreted by Judge Whyte, that right is not limited by any requirement that the plaintiff demonstrate injury other than the fact of access to the server itself.

It is troubling that the district court's opinion cites repeatedly to copyright, patent and trademark cases to establish precedent for what it is doing. See, e.g., Order at 7, 11, 13, 14, 15, and 21. The court borrows from intellectual property law irreparable harm and public interest rules that have historically favored rights holders. But eBay has no intellectual property interest here. The law does not and should not create new intellectual property rights without serious consideration of the effect a grant of rights will have on the public. It is, moreover, the legislature, not the courts, that should create new intellectual property rights, in a forum open

¹³See infra Part II.

to public discussion and accountable to the public. Perhaps eBay could persuade Congress to create a new exclusive property right in networked computer information, but it should not do so in this forum.¹⁴

II. THE DISTRICT COURT IMPROPERLY ALLOWED A THEORY OF POTENTIAL FUTURE HARM TO SUBSTITUTE FOR THE ACTUAL HARM REQUIRED BY TRESPASS DOCTRINE

Even were the court of appeals to condone the expansion of the trespass to chattels tort to electronic commerce, the district court erred in this case by presuming away one of the key elements of the cause of action. Trespass to chattels “lies where an intentional interference with the possession of personal property has proximately caused injury.” Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1566 (1996).

In this case, the district court effectively vitiated the requirement of injury proximately caused by a trespass. The court rejected every single claim of actual harm that eBay alleged. Order at 9 (no proof that BE’s activity caused service interruptions or imposed other incremental costs on eBay), and 10 (trespass to

¹⁴ In fact, Congress has already made several attempts to pass a law that would grant such a right to database owners. These efforts have been met with such controversy, however, that several versions of legislation have been introduced but none have yet passed. There are two current versions of such proposed bills: Collections of Information Antipiracy Act, H.R. Rep. No. 106-354 (1999); and Consumer and Investor Access to Information Act of 1999, H.R. Rep. No. 106-1858 (1999).

business premises analogy inappropriate because BE's activity did not interfere with other people's access to eBay's servers, or otherwise affect their experience of the eBay site). In place of evidence of actual injury, the court relied upon its theory of possible future harm should dozens of companies like Bidder's Edge attempt to do the same thing it is doing. Alternatively, the court suggested that merely accessing a computer connected to the Internet for a purpose not specifically authorized by the computer necessarily injures eBay by "depriving" it of the right to use that server as it sees fit. Neither theory has merit.

The possibility of future harm on which the district court relied in granting the injunction is too speculative to warrant equitable relief. The court's opinion cites expert declarations that appear to offer opinions as to what might occur if "30 or 40" or "hundreds" of other companies were to exert similar loads upon eBay's servers. Yet the trial judge cites no evidence that such companies exist or are likely to spring into existence so as to bring about this hypothetical result. Indeed, the economics of electronic commerce are such that it is doubtful that a horde of such auction aggregation services are likely to arise.¹⁵ Given that such Internet sites are dependent on the advertising revenues generated by attracting users to their web sites, a plethora of auction aggregator sites would dilute the

¹⁵ It is possible, of course, that other types of sites may use robots to collect information from eBay. Depending on the information collected and the purpose, however, eBay may have non-trespass causes of action against those other sites.

number of users viewing each site, and so make it difficult to find the advertising sponsors necessary to support their existence. The e-commerce market instead seems to be one in which a few sites end up dominating any given market niche.

Further, should a multiplicity of such companies arise, it is reasonable to suppose that the market would develop mechanisms to deal with them without shutting down eBay's site. After all, auction aggregators depend on the information they get from eBay and other auction sites. They have no incentive to do anything that would jeopardize the integrity of those sites. Aggregators could share information collected from a site, or meta-aggregators could collect data from the aggregators themselves, rather than from eBay.¹⁶ More likely, many different aggregators could employ a single proxy search company to avoid needless duplication. Such proxy searching has analogies in the proxy "caching" of data many large sites use to fulfill demand for their Web pages without overloading their servers.

Without considering the likelihood that such a horde of aggregator sites would come into being, the district court compounds its error by building

¹⁶ Indeed, such meta-aggregation of price comparison sites already exists, and was at issue in the recent dispute between Priceman.com and mySimon.com. See Mysimon, Inc. v. Priceman, L.L.C., No. 5:99cv20939 (N.D. Cal. Feb. 29, 2000). See, e.g., Carl S. Kaplan, A Search Site for Search Sites Is Accused of Trespassing, B10 New York Times Cyber L. J., (Sept. 24, 1999) <<http://www.nytimes.com/library/tech/99/09/cyber/cyberlaw/24law.html>>.

supposition upon supposition, postulating that such putative “reduced system performance, system unavailability, or data loss would inflict irreparable harm on eBay consisting of lost profits and consumer goodwill. Harm resulting from lost profits and lost consumer goodwill is irreparable . . . and is therefore an appropriate basis for injunctive relief.” Order at 11. The chain of inferences is long: if 30, 40, or hundreds of Bidder’s Edge competitors were to begin accessing the eBay site, and if such usage were to impair the operation of the eBay servers, if nothing could be done to mitigate that damage, and if that impairment were to cause eBay to lose profits and customer goodwill, then eBay would suffer harm worthy of an injunction. Such a chain of “what ifs” is simply too speculative to support a claim to equitable relief.¹⁷ See, e.g., Associated Gen. Contractors, Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991) (“A plaintiff must do more than merely allege imminent harm sufficient to establish standing, he or she must

¹⁷ Indeed, Judge Whyte himself admitted that “BE correctly observes that there is a dearth of authority [in California] supporting a preliminary injunction based on an ongoing trespass to chattels.” Order at 12. Instead, Judge Whyte’s opinion relied upon cases involving trespass to land, a very different tort. Even were the instant intangible invasion claim one of trespass to land rather than of trespass to chattels, in those rare cases where trespass to land has been recognized for such an intangible invasion -- for example, by airborne particulates -- courts have rejected an absolute right to exclude in favor of a balancing test, similar to nuisance, that weighs both public interest and private harm. See, e.g., Martin v. Reynolds Metals Co., 221 Or. 86 (1959) and Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178 (D. Or. 1959). Cf., Thrifty-Tel, 46 Cal. App. 4th at 1567 n. 6 (relying on particulate balancing cases in finding trespass by electrons).

demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief."); Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury [for the purposes of granting a preliminary injunction]."); and Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (same). The district court substituted a chain of inferences about possible future harm to substitute for what the law plainly requires: proof of actual injury proximately caused by the trespass.

To support issuance of an injunction for harm that has not yet occurred, the trial court cites Federal Circuit patent decisions holding that "The very nature of the patent right is the right to exclude others.... We hold that where validity and continuing infringement have been clearly established... irreparable harm is presumed. To hold otherwise would be contrary to the public policy underlying the patent laws." Order at 11. But this very language vividly illustrates how misplaced the district court's reliance on such an analogy is. A patent is an extraordinary statutory right to exclude others from making, using, or selling an invention that has been carefully scrutinized in an administrative process to determine whether the applicant meets the high standards necessary to acquire the right and has circumscribed his claims adequately to satisfy the public interest and qualify for a presumption of validity. Comparing eBay's claim to a patent begs the question of whether eBay has or deserves any such right to burden the public

interest. Congress has established no such policy of granting extraordinary exclusory rights against the use of publicly available information on Internet web sites.

The district court's alternative reasoning is even more expansive. It reasons that:

it is undisputed that eBay's server and its capacity are personal property . . . Even if, as BE argues, its searches use only a small amount of eBay's computer system capacity, BE has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes. . . . Accordingly, BE's actions appear to have caused injury to eBay.

Order at 19. This reasoning appears to misapprehend either the nature of a computer system or the nature of injury. The court accepts Bidder's Edge's argument that eBay did not suffer any physical, economic, or other loss by virtue of Bidder's Edge's conduct. Its servers did not crash. They were not rendered unavailable to other eBay customers. eBay did not have to employ more people or repair them more frequently as a result of this use.

The court's alternate reasoning relies on a principle of "inviolability" of property that has never been the rule for personal property and certainly not for information. As the Restatement (Second) of Torts makes clear,

[t]he interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important

interest of the possessor . . . in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time.

Restatement (Second) of Torts, § 218 cmt. e (1965). No such harm has been found in this case.

CONCLUSION

The public interest in allowing consumers and information aggregators to obtain price and product information is clear. The district court's ruling threatens the very foundations of the Web. And it does so in a case in which the plaintiff has been unable to articulate a legitimate interest. The public interest cries out for reversal in this case.

Dated June 22, 2000

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**CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1 FOR CASE NUMBER 00-15995**

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached *Amici Curiae* brief is proportionally spaced, has a typeface of 14 points or more, and contains 4,845 words.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of June, 2000, served two copies of: **Motion for Leave to File Brief of *Amici Curiae*** and **Brief of *Amici Curiae*** **In Support of Bidder's Edge, Inc., Appellant** upon all counsel of record by overnight mail to:

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I further certify that the above documents were filed with the clerk pursuant to Fed. R. App. P. 25(a)(2)(B) on June 22, 2000, by dispatch to a third-party commercial carrier for delivery to the clerk on June 23, 2000.

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