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TRESPASS TO CHATTELS IN THE AGE OF THE INTERNET

I. INTRODUCTION

Bulk e-mailers¹ and “information aggregators”² cause havoc for Internet Service Providers³ (ISPs) and Web sites.⁴ Promoters and advertising companies send enormous amounts of unsolicited bulk email (spam)⁵ to ISPs and their users, much to their consternation. Spam can cause customer complaints, monopolize valuable server time, and create a slowdown for users.⁶ Internet sites send robotic spiders⁷ to other Web sites

1. Bulk e-mailers send massive amounts of e-mail to ISP subscribers. The e-mail is sent for the purpose of advertising, much like junk mail is sent to one’s house. *See* *CompuServ, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1018 (S.D. Ohio 1997).

2. Information aggregators scour the Internet for information and allow price comparison and Web site comparison to help educate consumers about choices in products. *See* *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp.2d 1058 (N.D. Cal. 2000) (discussing how information aggregation has been used for on-line auction buyers).

3. An Internet Service Provider (ISP) or access provider is

a company that provides its customers with access to the Internet, typically through dial-up networking. Major service providers in the United States include Microsoft, Netcom, and Mindspring. America Online, CompuServe, and Prodigy provide Internet access among their other services.

Typically, the customer pays a monthly fee, and the Internet Service Provider supplies software that enables the customer to connect to the Internet by modem.

DOUGLAS DOWNING ET AL., *DICTIONARY OF COMPUTER AND INTERNET TERMS* 240 (6th ed. 1998).

4. *See, e.g., eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d at 1070 (granting injunctive relief based on holding competing auction Web site likely liability for trespass to chattels for sending robotic search robots to eBay’s Web site without authorization); *CompuServe*, 962 F. Supp. at 1027 (finding that spam emailers inundation of CompuServe users with junk email was actionable trespass to chattels).

5. Spam is the term used to describe unsolicited bulk e-mail. “This term is derived from a skit performed on the British television show *Monty Python’s Flying Circus*, in which the word “spam” is repeated to the point of absurdity in a restaurant menu.” *CompuServe*, 962 F. Supp. at 1018 n.1. Spam creates a two-fold problem. First, users complain because their e-mail inboxes are full of messages in which they are not interested. *Id.* at 1023. Sometimes these messages are explicit in nature advertising pornographic sites, further compounding the anger of ISP users. Second, the large number of messages forces the ISPs’ servers to devote greater time to routing these messages and storing them on the server. *Id.* at 1022. This processing decreases bandwidth. The decrease in bandwidth causes the users of an ISP like CompuServe to experience slower transfer rates of data, making the Internet appear sluggish. *Id.* Consequently, users not only complain about unwanted messages (sometimes offensive in nature), but also slower transfer rates.

6. *CompuServe*, 962 F. Supp. at 1022.

7. A robotic spider, also referred to as a software robot, is “a computer program which operates across the Internet to perform searching, copying and retrieving functions on the Web sites of others.” *eBay*, 100 F. Supp. 2d at 1060. This program recursively queries other computers over the Internet to obtain significant amounts of information. *id.* By way of example, Bidder’s Edge (BE) used a robotic spider to aggregate Internet auctions from various Web sites including that of eBay. *Id.* at 1061. This

to collect massive amounts of information.⁸ These robotic spiders gather information recursively by bombarding sites with requests for information.⁹ ISPs dislike spam because it requires larger amounts of their server capacity and can slow down connection speeds. Furthermore, their users, who provide much of their revenue, dislike spam and will discontinue service if it cannot be stopped. Web sites complain about robotic spiders because they use system resources and can slow down user access to the site.

Web sites and ISPs have tried to remedy these problems with self-help measures such as filtering e-mail and data requests.¹⁰ However, rapid changes in technology, including the ease of concealing digital identity,¹¹ have rendered these self-help measures fruitless.¹² As a result, victims of spam and robotic spiders have attempted to use litigation to resolve the issues, invoking trespass to chattels as a cause of action.

Some courts have adopted trespass to chattels as a cause of action for spam and robotic spiders.¹³ This Note illustrates that applying trespass to chattels to the Internet is like driving a horse and buggy on the information superhighway. I propose a legislative solution to balance the competing interests of protecting information and bandwidth,¹⁴ while encouraging the growth and freedom of the Internet.

robotic spider would make requests to eBay up to 100,000 times per day for all of its auctions, to give Bidder's Edge users the capability to search multiple auctions on multiple auction Web sites for the best price on a particular item. *Id.* at 1061, 1063.

8. *Id.* at 1060. Robotic spiders can potentially make enormous numbers of requests to another Web site. *Id.* at 1060-61. Web sites responding to these requests must expend precious processing time. *Id.* at 1061. These requests reduce the system's capacity to its owner and users. *Id.* Consequently, the server can potentially become sluggish to its users, causing complaints and loss of customers. Of course the amount of data requested to a Web site would have to be enormous for there to be a noticeable effect. *Id.* at 1061, 1063.

9. *See supra* note 7.

10. *See CompuServe*, 962 F. Supp. at 1023. ISPs have used software to block messages with certain e-mail addresses in the header to combat spam. *See also eBay*, 100 F. Supp.2d at 1061 (discussing the use of "robotic exclusion headers" to prevent unauthorized robotic activity).

11. The main digital identity used is the Internet Protocol (IP) numbers. IP numbers are a string of numbers unique to the Web site or user on the Internet. When one requests such information from a Web site and enters the web address, such information is actually translated into a string of numbers. When a computer logs onto an ISP, or a network, it is given an IP address for other sites to recognize it. However, proxy servers can be used to conceal IP address from Web sites. *EBay*, 100 F. Supp.2d at 1061.

12. The defendants in the *CompuServe* case simply removed and changed the sender address in the header and configured "their servers to conceal their true domain name and appear on the Internet as another computer." *CompuServe*, 962 F. Supp. at 1019.

13. *See, e.g., supra* note 4.

14. Bandwidth is "the rate at which a communication system can transmit data; more technically, the range of frequencies that an electronic system can transmit. High bandwidth allows fast transmission or the transmission of many signals at once." DOWNING, *supra* note 3, at 41.

Part II of this Note addresses the historical roots of trespass to chattels and trespass to land because courts have drawn from both traditions.¹⁵ Part II also traces the emergence of a trespass to chattels claim in the context of the Internet.¹⁶ Finally, Part II discusses federal legislation introduced to protect database owners from harm.¹⁷ Part III criticizes the use of trespass to chattels to protect Web sites and ISPs and also discusses the strengths and weaknesses of proposed legislation addressing these problems.¹⁸ Part IV argues that a legislative solution is preferable to a judicial solution and details two legislative plans.¹⁹ Furthermore, Part IV suggests improvements on bills introduced in the 106th Congress.²⁰

II. RELEVANT CASE LAW AND PROPOSED LEGISLATION

This Part will discuss the history leading up to the *ebay* case and some proposed legislation intended to protect databases. Part II.A will discuss the history of trespass to chattels and trespass to land because courts have drawn from both causes of action in formulating electronic trespass to chattels.²¹ Part II.B discusses the expansion of trespass to chattels in the Internet context.²² Part II.C discusses legislative attempts at protecting database owners including two bills that would give *sui generis* protection to database owners.²³

A. *Trespass to Chattels and Trespass to Land: A Lesson in Ancient History*

The *Restatement (Second) of Torts* defines trespass to chattels as “intentionally dispossessing another of the chattel or using or intermeddling with a chattel in the possession of another.”²⁴ Common-law

15. Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 33 (2000) (discussing the development of trespass claims and the distinctions between trespass to land and trespass to chattels). Professor Burk’s article discusses the application of the trespass cause of action to the Internet. *See generally id.* His article argues for an application of the nuisance doctrine to the Internet instead of trespass to chattels because nuisance doctrine balances the needs of the property owner with the public interest. *Id.* at 53-54.

16. *See infra* Part II.

17. *See infra* Part II.C.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part IV.

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. *See supra* Part II.C.

24. RESTATEMENT (SECOND) OF TORTS § 217 (1965). Note that although many state trespass laws mirror the *Restatement*, the *Restatement* is not mandatory authority followed by courts. However,

trespass to chattels requires that actual harm occur, in contrast to trespass to land, which does not require harm.²⁵ The interference must also be intentional, not just accidental or negligent.²⁶ Additionally, the *Restatement* requires physical contact²⁷ and an absence of plaintiff's consent²⁸ to the contact.

Traditionally, courts applied trespass to chattels in cases of intentional intermeddling with another's personal property or in cases of dispossession short of conversion, such as the acts of beating another man's horse or cow or perhaps briefly taking possession of another man's watch.²⁹ The purpose of the trespass claim was to compensate for damages caused to personal property in the amount of the actual harm produced.³⁰

courts do find its analysis persuasive.

25. The *Restatement (Second)* describes the requirements of a trespass to chattels claim as follows:

One who commits a trespass to 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 a legally protected interest.

Id. § 218. Common law action for trespass to land does not require harm. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 13, at 67, 70 (5th ed. 1984). However, trespass to chattels requires actual harm, and does not give nominal damages. *Id.* § 14, at 87. For cases supporting this proposition, see *J. & C. Ornamental Iron Co. v. Watkins*, 152 S.E.2d 613, 615 (Ga. Ct. App. 1966) (finding no liability for trespass to chattels because plaintiff did "not allege that it was deprived of possession of its books and records or that the property was injured in any way"); *Koller v. Dugan*, 191 N.E.2d 475, 478 (Mass. 1963) (finding no trespass to chattels where person patted the dog, but alleged no injury to the dog).

26. RESTATEMENT (SECOND) OF TORTS § 218 (1965). At common law, trespass to land was initially strict liability; however courts later required an element of intent. KEETON, *supra* note 25, § 13, at 68-69. The only unintentional trespass to land cognizable under the *Restatement* is the situation where person *A* negligently crashes his car onto *B*'s land. See DAN B. DOBBS, THE LAW OF TORTS § 51, at 99 (2000) (discussing the requirement of intent to prove trespass to land, and that intent can be satisfied by "remain[ing] upon land after a privilege to be there has terminated"). Accidental entries might be actionable if caused through negligence or abnormally dangerous activities. KEETON, *supra* note 25, § 13, at 73.

27. According to the *Restatement*, there must be "[p]hysical contact with chattel. 'Intermeddling' means intentionally bringing about a physical contact with the chattel." RESTATEMENT (SECOND) OF TORTS § 217 cmt. (e) (1965). The physical contact can be a missile you fire at the chattel, or something thrown. *Id.*

28. KEETON, *supra* note 25, § 18, at 112.

29. RESTATEMENT (SECOND) OF TORTS § 217 cmt. (e) (1965). See also KEETON, *supra* note 25, § 14, at 85. In fact, much of traditional common law trespass to chattels developed into "conversion" as a cause of action. *Id.* Consequently, commentators often refer to trespass to chattels as the little brother of conversion because it consists of cases where dispossession does not rise to conversion or where intermeddling occurs. *Id.* § 14, at 85-86.

30. KEETON, *supra* note 25, § 14, at 88.

Although the physical contact fell short of the elements needed for conversion, the court felt some harm had occurred and the owner should receive compensation.³¹

B. Case Law Expansion of Trespass to Chattels

Case law over the last five years has significantly broadened the application of trespass to chattels from a tort involving physical contact to a tort involving the ephemeral touching of electrons. *Thrifty-Tel, Inc. v. Bezenek*³² laid the groundwork for future application of the doctrine of trespass to chattels to the Internet, even though this case was not in the Internet context. In *Thrifty-Tel*, the children of the defendants used computer technology to access phone card numbers from Thrifty-Tel, a phone service company.³³ The defendants' teenage sons used computer technology to "crack [the] plaintiff's access and authorization codes and make long distance phone calls without paying for them."³⁴ Thrifty-Tel never told the teenagers or the defendants to cease and desist; instead, the defendants first learned of the incident when Thrifty-Tel filed an action against them.³⁵

Thrifty-Tel sued the Bezeneks for conversion.³⁶ The California Court of Appeals refused to rule on the conversion³⁷ issue, finding sufficient basis for recovery on a theory of trespass to chattels.³⁸ The court believed that the 1,300 phone calls in a seven-hour period generated electronic

31. *Id.*

32. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

33. *Id.* at 471.

34. *Id.* The teenage children used computer software that called the telephone system numerous times attempting to gain long distance authorization codes. *Id.* The computers dialed automatically and entered random strings of codes in effort to gain phone card numbers. *Id.*

35. *Id.*

36. *Id.* at 471.

37. *Id.* at 472. The court expressly stated that it did not need to resolve whether intangible computer access codes can be the basis of a conversion suit. *Id.* Traditionally, the loss of an intangible property interest could only be a basis for a claim of conversion if that interest is tied to something tangible that could be physically taken. *Id.* (citing *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990)). For example, a tangible stock certificate represents an intangible property interest in a company. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472. *See also* *Payne v. Elliot*, 54 Cal. 339, 342 (Cal. 1880) (holding that the shares of stock are the property involved, and not the actual certificates). Courts generally do not recognize as conversion the unauthorized taking of intangible property not merged with something tangible. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472. The court decided not to rule on whether the storage of the intangible access numbers in something tangible, like a computer disk or a piece of paper, would be sufficient merger of the intangible with the tangible to give rise to a conversion claim. *Id.*

38. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472.

signals sufficiently tangible to support a verdict of trespass to chattels.³⁹

The court found that the physical contact of the electrons with the phone equipment satisfied the physical contact element of the tort.⁴⁰ “At early common law, trespass required a *physical touching* of another’s chattel or entry onto another’s land.”⁴¹ The court noted that courts have substantially loosened the physical touching requirement for trespass to chattels over the years to include indirect touching of dust particles from a cement plant that migrate onto real and personal property.⁴² The court in *Thrifty-Tel* relied on decisions finding sufficient physical contact in microscopic particles⁴³ or smoke⁴⁴ that touched real property.⁴⁵ The court concluded that the electronic signals sent over the computer and phone lines similarly satisfied the physical contact element of trespass to chattels under existing law.⁴⁶

39. The Bezenek’s sons made ninety calls, consuming twenty-four minutes of telephone time on the first two days, in an attempt to enter random telephone access numbers. *Id.* at 471. By using a computer program, they were able to generate 1300 phone calls entering random strings of numbers in a six to seven hour period. *Id.* Thrifty-Tel was a small carrier, so this “overburdened the system, denying some subscribers access to phone lines.” *Id.*

40. *Id.* at 473 n.6. See also RESTATEMENT (SECOND) OF TORTS § 217 cmt. (e) (1965). Additionally, California law requires physical contact as an element of trespass to chattels. *Id.* at 473 n.6.

41. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6 (emphasis added).

42. *Id.* See also *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924 (Cal. 1982) (holding that person could not recover on trespass theory for noise caused by steel plant, but could recover on nuisance theory); *Roberts v. Permanente Corp.*, 10 Cal. Rptr. 519, 522 (Cal. Ct. App. 1961) (allowing recovery on a trespass to land theory for dust particles produced by neighboring cement factory).

43. *Bradley v. American Smelting and Refining*, 709 P.2d 782, 790 (Wash. 1985) (holding that microscopic particles from copper smelter could give rise to trespass to land claim).

44. *Ream v. Keen*, 838 P.2d 1073, 1075 (Or. 1992) (holding that smoke from a neighboring field could give rise to trespass to land claim).

45. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6. The *Thrifty-Tel* court relied upon cases involving trespass to land, rather than chattels. *Id.* See Burk, *supra* note 15, at 33 (arguing that the court wrongly relied on trespass to land cases). In addition, courts faced with trespass from particulate matter and smoke generally relied on a theory of nuisance, rather than trespass, unless the smoke and particles were so severe to cause dispossession. KEETON, *supra* note 25, § 13, at 71. In fact, one academic has argued that a cyber nuisance doctrine might be a better theory than trespass. Burk, *supra* note 15, at 53. Burk prefers a nuisance claim because it balances the harm caused with the benefit from the activity in determining whether to impose liability. *Id.* Nuisance does not apply unless “the cost of the intrusive activity outweighs the benefit.” Burk, *supra* note 15, at 53. Compare this to trespass to chattels, which imposes liability regardless of the benefit derived from the trespass. Nuisance doctrine is better than trespass because it allows courts to balance the benefit of consumer education and choice against the interests of a company like eBay in protecting its database. The only reason that the trespass cases which have developed from smoke and dust allowed recovery under trespass rather than nuisance is the particles resulted in dispossession. *Id.* at 33-34 (arguing that particulate trespass requires dispossession or some greater intermeddling to satisfy the elements of trespass to land). The owners of the equipment in *Thrifty-Tel* and *CompuServe* were not dispossessed of their equipment. *Id.* at 34. So a nuisance cause of action would have been more in line with previous case law.

46. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6.

*CompuServe, Inc. v. Cyber Promotions*⁴⁷ further extended the doctrine of trespass to chattels into the area of unsolicited bulk e-mail. Cyber Promotions sent spam to CompuServe users.⁴⁸ CompuServe initially tried to stop the problem both by notifying Cyber Promotions that its e-mails were unauthorized and by filtering the messages using the headers and return address information.⁴⁹ However, Cyber Promotions ignored the notification and easily bypassed the filters.⁵⁰

CompuServe sued Cyber Promotions for trespass to chattels.⁵¹ The court in the Southern District of Ohio held that electronic signals sent as spam to CompuServe users were sufficient to satisfy the elements of a trespass to chattels claim.⁵² In doing so, the court relied on *Thrifty-Tel* and two criminal trespass actions.⁵³ The court determined that a plaintiff could sustain a trespass to chattels claim without showing a substantial interference with its right to possession.⁵⁴ Plaintiffs could predicate liability on harm to their personal property or diminution of its quality, condition, or value as a result of a defendant's use.⁵⁵ To the extent that Cyber Promotions' spam drained disk space and processing time, the *CompuServe* court decided that those resources were unavailable to CompuServe and to its customers.⁵⁶ "[T]he value of that equipment to CompuServe [was] diminished even though it [was] not physically damaged by defendants' conduct."⁵⁷

47. 962 F. Supp. 1015 (S.D. Ohio 1997).

48. *Id.* at 1017.

49. *Id.* at 1017, 1019.

50. CompuServe adjusted its software to try to filter out messages from the defendants. *Id.* at 1019. The defendants were able to circumvent these techniques. *Id.* They did so by "falsifying the point-of-origin information contained in the header" of the message, thus concealing their origin. *Id.*

51. *Id.* at 1017.

52. *Id.* at 1021.

53. *Id.* The court relied on *State v. McGraw*, 480 N.E.2d 552, 554 (Ind. 1985) (recognizing in dicta that a hacker's unauthorized access to a computer was more analogous to trespass than criminal conversion), and *State v. Riley*, 846 P.2d 1365, 1373 (Wash. 1993) (hacking rose to the level of computer trespass under Washington law). Reliance on criminal trespass statutes provides a shaky foundation for common law trespass to chattels. The *McGraw* case was not really on point, and it provides support only in dictum. The *Riley* court relied on a criminal statute prohibiting hacking, as opposed to a civil case of trespass based on common law. These two cases provide questionable support for *CompuServe*'s conclusion.

54. *CompuServe*, 962 F. Supp. at 1022 (citing *Thrifty-Tel*, 54 Cal. Rptr. 2d 468 (quoting *Zaslow v. Kroenert*, 29 Cal. 2d 541 (Cal. 1946))).

55. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 218). The other potential predicate for liability is dispossession. Keeton, *supra* note 25, § 14, at 87. If no dispossession, then there is a greater requirement of harm as a result of the intermeddling. *Id.* at 88. See also THE RESTATEMENT (SECOND) OF TORTS § 218.

56. *CompuServe*, 962 F. Supp. at 1022.

57. *Id.*

The court also determined that CompuServe could recover for loss of reputation and customers under the trespass to chattels claim.⁵⁸ The court based its conclusion, in part, on section 218(d) of the *Restatement* that allows recovery for “bodily harm . . . caused to the possessor, or harm . . . caused to some person or thing in which the possessor has a legally protected interest.”⁵⁹ By allowing recovery, the court implicitly found that CompuServe had a legally protected interest in its servers that the spammers were bombarding with junk e-mail.

Trespass to chattels for spamming has since taken hold in a number of jurisdictions, which have extended the potential basis for a claim in several ways.⁶⁰ *Intel v. Hamidi* extended the notion of trespass to chattels by finding liability when the trespass caused loss of employee time.⁶¹ In contrast to the court in *CompuServe* that allowed recovery when the spammers caused harm to the value of CompuServe’s servers, the *Hamidi* court found the loss of employee time recoverable, something wholly distinct from the chattels themselves.⁶² The viability of this extension of the theory will be tested as the California Supreme Court has granted review.⁶³

Recently, in *eBay v. Bidder’s Edge*, eBay brought a trespass to chattels claim when robotic spiders caused a high volume of web traffic.⁶⁴ Bidder’s Edge (BE) used a software robot,⁶⁵ or spider, to collect information from

58. *Id.* at 1023.

59. RESTATEMENT (SECOND) OF TORTS § 218(d).

60. *See, e.g.,* America Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 452, 453 (E.D. Va. 1998) (relying on previous decisions and CompuServe found spam email to be trespass to chattels); Hotmail Corp. v. Van\$ Money Pie, Inc., 47 U.S.P.Q.2d 1020, 1024 (N.D. Cal. 1998) (granting preliminary injunction because of likelihood of success on trespass to chattels claim based on spamming); *Intel v. Hamidi*, No. 98AS05067, 1999 WL 450944 (Cal. App. Dep’t Super. Ct. 1999), *aff’d* 114 Cal. Rptr. 2d 244 (Cal. Ct. App. 2001), *rev. granted* No. S103781, 2002 WL 554737 (Cal. Mar. 27, 2002) (finding that former employees’ emails to current employees, which disparaged Intel, constituted trespass to chattels); *America Online v. IMS*, 24 F. Supp. 2d 548, 550-51 (E.D. Va. 1998) (finding spammers committed trespass to chattels at summary judgment stage); *Vines v. Branch*, 418 S.E.2d 890, 894 (Va. 1992).

61. *Hamidi*, 1999 WL 450944, at *2.

62. *Hamidi*, 1999 WL 450944, at *2. The court did not explain how “diminished employee productivity” can be recovered on a trespass to chattels claim. The court cites *Thrifty-Tel* and *CompuServe*, but does not offer case law support for the proposition that loss of employee productivity serves as impairment for a trespass to chattels claim. *Id.* The *Restatement* allows recovery if there is bodily harm to the possessor or harm to some person or thing in which the possessor has a legally protected interest. RESTATEMENT (SECOND) OF TORTS § 218 (d). Perhaps the court is alluding to that section as a basis for its conclusion.

63. *Intel v. Hamidi*, No. S103781, 2002 WL 554737 (Cal. Mar. 27, 2002).

64. *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (granting preliminary injunction on the basis of the likelihood of success that eBay will succeed on the merits of a trespass to chattels claim for accessing its Web site).

65. For a description of a software robot, see *supra* note 7.

on-line auction houses (including eBay), aggregated the information, and gave BE users access to the auction information.⁶⁶ The aggregation allowed BE users to search all auction Web sites, instead of individually accessing each one. However, according to eBay's User Agreement, BE could not use a robotic spider on eBay's site without eBay's permission.⁶⁷ eBay and BE had entered into a temporary agreement authorizing BE to search the eBay Web site for auction information using a robotic spider until they reached a formal licensing agreement.⁶⁸ BE and eBay were unable to reach a final agreement, and eBay informed BE that it was no longer welcome to search the eBay site for auction information.⁶⁹ However, BE continued to search the eBay site without authorization.⁷⁰ These searches occupied between 1.11% and 1.53% of all requests received by eBay and between 0.7% and 1.10% of all data transferred during October and November of 1999.⁷¹

66. *Ebay*, 100 F. Supp.2d at 1061-62. One might have expected eBay to have brought a claim of copyright infringement because BE was taking its information. eBay unsuccessfully brought a copyright infringement claim against BE. *Id.* at 1072. The information taken did not contain copyrightable expression. *Id.* The information did not have sufficient originality for copyright protection. *Id.* Courts have taken a stricter view of the originality requirement in copyright since the Supreme Court's holding in *Feist Publ'n v. Rural Tel. Serv.*, 499 U.S. 340 (1991). The Supreme Court held in *Feist* that a telephone book was not copyrightable material because it did not have sufficient originality. *Id.* at 364. The court reaffirmed the well-established rule of law that facts are not copyrightable, but compilations of facts are copyrightable if they contain sufficient originality. *Id.*

67. *Ebay*, 100 F. Supp. 2d at 1060. eBay users must agree to a User Agreement when they access eBay's Web site users agree by clicking on "I accept" at the end of the User Agreement when they register with eBay. *Id.* The User Agreement prohibits the use of any robot, spider, other automatic device, or manual process to monitor or copy eBay web pages or the content without the written permission of eBay. *Id.*

68. On April 24, 1999, eBay verbally approved BE to crawl its Web site for ninety days. *Id.* at 1062. The parties planned to reach a formal licensing agreement during that time. *Id.*

69. *Id.* They were unable to reach an agreement because of a dispute over the method BE uses to search the eBay database. *Id.* "[E]Bay wanted BE to conduct a search of the eBay system only when the BE system was queried by a BE user." *Id.* This method would reduce the overall load on the eBay system. *Id.* BE wanted to recursively crawl the eBay system. *Id.* A recursive crawl would have increased the speed of BE searches for its users and automatically update its users. *Id.*

70. *Id.* In September of 1999, eBay requested that BE cease posting eBay auction listings on the BE site and BE agreed to do so. *Id.* BE learned that competing auction aggregation sites were posting eBay auction information, so they began searching the eBay site once again. *Id.* eBay attempted to use self-help methods by blocking 169 IP addresses it believed BE was using to query its site. *Id.* IP addresses identify the source of communication signals on the Internet. However, BE began using proxy servers to evade eBay's IP block. *Id.* at 1063.

71. *Id.* The parties agreed that BE accessed the eBay site approximately 100,000 times a day. *Id.* eBay alleged that BE activity constituted up to 1.53% of the number of requests received and up to 1.10% of the total data transferred by eBay during certain periods in October and November of 1999. *Id.* BE alleged that its activity constituted no more than 1.11% of all requests received by eBay, and no more than 0.7% of the data transferred by eBay. *Id.*

Relying on the *CompuServe* ruling, eBay sued BE for trespass to chattels.⁷² The court of the Northern District of California issued a preliminary injunction barring BE from using its software program to access eBay.⁷³ The court held that BE's activities diminished the quality and value of eBay's computer systems.⁷⁴ The court decided that "BE's activities consume at least a portion of the plaintiff's bandwidth and server capacity."⁷⁵ The *eBay* precedent brings trespass to chattels further into the Internet context by including access to Web sites, not just spam producers, under its umbrella.⁷⁶

C. Congressional Action

Congress has begun making its own moves to protect databases.⁷⁷ The 106th Congress considered two bills that offer *sui generis*⁷⁸ protection of

72. *Id.*

73. *Id.* at 1072.

74. *Id.* at 1071.

75. *Id.*

76. A number of academics filed an amicus brief in support of BE in appeal of the district court decision. Carl S. Kaplan, *Treat eBay Listings as Property? Lawyers See a Threat*, N.Y. TIMES, July 28, 2000, at B10 (discussing the *eBay* case and the outcry from academics against the application of the trespass application to the Internet). This appeal was withdrawn and the parties settled. Claire Saliba, *eBay Settles Suit with Auction Search Site*, E-COMMERCE TIMES, March 2, 2001, available at <http://www.ecommercetimes.com/perl/story/7883.html> (reporting BE's decision to settle and withdraw its appeal, despite BE's continued belief that eBay does not own the auction information).

77. Congress probably introduced the bills in response to the complaints of unprotected database owners in the United States. In fact, Europe already offers intellectual property protection for databases. J.H. Reichman, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997) (discussing database protection generally, including the EU's protection of databases). In addition, the European Union has already enacted legislation protecting databases like eBay's in its Directive on Databases Council Directive 96/9/EC, 1996 O.J. (L 077) 20. See also Reichman, *supra*. Database makers are given an exclusive "right to prevent extraction and reutilization of the whole or of a substantial part" of the database. *Id.* at 84 (quoting 1996 O.J. (L 077), *supra*, at 25). The *sui generis* right is not conferred in terms of unfair or unauthorized acts, but as an intellectual property right. *Id.* at 85. The protection extends not only to electronic databases, but to nonelectronic ones as well. *Id.* Thus, although trespass to chattels only protects electronic databases (to the extent the company is harmed by extensive searching), the European Union's solution goes well beyond that by protecting electronic and nonelectronic databases. The protection lasts for fifteen years, with the perpetual right to renew for infinite fifteen-year periods, if the database owner has made substantial investments in the database. *Id.* U.S. copyright requires some originality in the work for protection; however, the European protection of databases only requires the database maker to prove some substantial investment in the obtaining, verification, or presentation of the contents. *Id.* The prohibition in House Bill 354 is distinct from the European Union's protection in that the House Bill 354 prohibition reads more like a tort action, rather than an intellectual property right. However, the prohibition protects interests similar to the ones protected by the European Union. Also, both documents have a fifteen-year length of protection.

78. "Of its own kind or class; i.e., the *only one* of its own kind; peculiar." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990). Database or information protection is generally referred to as a *sui generis* form of intellectual property.

databases.⁷⁹ Analysis of these bills provides insight into the future direction of Internet law. The two bills are the Collections of Information Antipiracy Act, House Bill 354,⁸⁰ and the Consumer and Investor Access to Information Act of 1999, House Bill 1858.⁸¹

The Collections of Information Antipiracy Act, House Bill 354, provides *sui generis* intellectual property protection for the “collection of information.”⁸² This means Web sites such as eBay can protect their information from being copied and redistributed as if it were a property right. The bill broadly defines “collections of information” as information collected for people to access.⁸³ The bill prohibits efforts that make available or extract substantial parts of a collection of information gathered by another through substantial investments of money if material harm is caused to the primary market or a related market.⁸⁴ The bill defines the primary market as the market in which the database is offered and the market where the person seeking to protect its database expects to derive revenue.⁸⁵ The prohibition provides both civil and criminal penalties for violations.⁸⁶ Additionally, the duration of the database protection is fifteen years.⁸⁷ The bill contains a number of exclusions

79. In fact two versions of each of these bills were proposed. For House Bill 354, one version is dated January 19, 1999, and another, October 8, 1999. For House Bill 1858, one version is dated October 8, 1999, and another, May 19, 1999. This Note will analyze the later versions of each exclusively.

80. H.R. 354, 106th Cong. (1999).

81. H.R. 1858, 106th Cong. (1999).

82. H.R. 354, 106th Cong. § 1402 (1999).

83. Section 1401 (1) defines Collection of Information as

information that has been collected and has been organized for the purpose of bringing discrete items of information together in one place or through one source so that persons may access them.

The term does not include an individual work which, taken as a whole, is a work of narrative literary process, but may include a collection of such works.

H.R. 354. The qualification at the end of the definition excluding narrative literary process is an attempt to demarcate database protection from traditional copyright.

84. *Id.* § 1402(B). For full text of the prohibition, see *infra* note 165. By requiring harm to the primary or related market, the bill limits its own application to incidents of economic harm.

85. The definitions of both primary and related market includes, in part: “[any market] in which a person . . . derives or reasonably expects to derive revenue, directly or indirectly.” *Id.* § 1401(3)(B) and § 1401(4)(A)(ii).

86. Section 1406 provides for Civil remedies. The remedies provide for temporary and permanent injunction (§ 1406(b)) and monetary relief including actual damages, attorneys’ fees, and discretionary damages not to exceed three times the actual damages. *Id.* § 1406(d). Section 1407 provides for criminal punishments for willful violations that exceed \$100,000 in damages during any one-year period or \$50,000 in damages in any one-year period. *Id.* § 1407. The penalties call for fines and potential imprisonment. *Id.*

87. Section 1409 provides that “[n]o criminal or civil action shall be maintained under this chapter for making available or extracting all or a substantial part of a collection of information that occurs more than 15 years after the portion of the collection that is made available or extracted was

including reasonable uses, nonprofit uses, educational uses, scientific and research uses, individual items of information, gathering the information through other means, news reporting, and protection of Internet Service Providers.⁸⁸

The Consumer and Inventor Access to Information Act of 1999, House Bill 1858, exemplifies another approach for creating a new *sui generis* form of intellectual property protection for databases.⁸⁹ This bill prohibits selling or distributing a database to the public that duplicates another database competing in the market.⁹⁰

Two features distinguish the two bills. First, House Bill 1858 requires distribution or sale before liability attaches,⁹¹ whereas House Bill 354 prohibits extraction, regardless of whether information is distributed.⁹² Second, House Bill 1858 does not require material harm to the database owner's business or profits, in contrast to House Bill 354, which does.⁹³

House Bill 1858, like House Bill 354, contains a number of exclusions and permitted acts.⁹⁴ The bill permits collecting or using identical information if gathered through other means.⁹⁵ Furthermore, the bill permits news reporting, law enforcement, scientific, educational, and research uses subject to qualifications.⁹⁶ Finally, House Bill 1858

first offered in commerce." *Id.* § 1409(c).

88. *Id.* §§ 1403-1404. Though the statute does not specifically say ISPs are protected, the purpose of section 1404(c) exclusion of digital online communications seems directed towards the protection of ISPs. House Bill 354 provides for a number of permitted acts and exclusions, further narrowing its scope. There are nine permitted acts not actionable under the statute. Permitted acts are provided for in section 1403. *Id.* § 1403. The first permitted acts are "reasonable uses," which include making available information "for purposes such as illustration, explanation, example, comment, criticism, teaching, research, or analysis . . . if it is reasonable under the circumstances." *Id.* § 1403(a). In determining if the uses are reasonable, five factors are to be considered: (1) whether the extraction is commercial or nonprofit; (2) whether the amount of information made available or extracted is appropriate and for the purpose; (3) the good faith of the person making available the information; (4) whether the portion made available is incorporated into an independent work, and degree of difference between them; (5) the effect of making available or extraction on the primary or related market. *Id.* § 1403(a)(1)-(5). These permitted acts allow the protection of gathering the information for editorial or instructional purposes. For example, groups like the Better Business Bureau and other consumer advocate groups would be able to continue their job of protecting consumers and informing them of potential fraud.

89. H.R. 1858, 106th Cong. (1999).

90. *Id.* § 102.

91. *Id.* § 102(2).

92. H.R. 354, 106th Cong. § 1402(b) (1999).

93. House Bill 354 requires material harm to the database owner's primary or related market. *Id.* § 1402.

94. The permitted acts are contained in section 103 of House Bill 1858, and the exclusions are contained in section 104. H.R. 1858, 106th Cong. §§ 103-104.

95. *Id.* § 103(a).

96. The news reporting permission does not extend to news or sports information that is time-

expressly exempts Internet Service Providers from liability, so long as they do not initially place the database that is the subject of the violation on a system or network controlled by the ISP.⁹⁷

To enforce House Bill 1858, Congress would delegate enforcement and rulemaking power to the Federal Trade Commission (FTC), without providing the FTC with any specific guidance on penalties.⁹⁸ This bill would not expressly give citizens a civil remedy.⁹⁹

III. ANALYSIS

This Part critically analyzes both judicial attempts¹⁰⁰ at applying trespass to chattels in the Internet context and legislative attempts¹⁰¹ at providing protection to database owners. Part III.A.1 argues that most electronic trespass does not cause harm, and thus courts have mistakenly applied trespass to chattels to the Internet.¹⁰² Part III.A.2 suggests degrees of contact that do rise to the level of harm cognizable under a trespass to chattels action.¹⁰³ Part III.A.3 argues that courts should consider the extent to which Web site operators consent to these contacts, thus negating a trespass claim.¹⁰⁴ Part III.A.4 discusses the extent to which federal copyright law preempts a trespass to chattels claim based on taking data from a Web site.¹⁰⁵ Finally, Part III.B discusses what pending congressional bills could accomplish.¹⁰⁶

A. *Trespass to Chattels Case Law Analysis*

1. *Does Particulate Matter Cause Harm?*

Thrifty-Tel began as an innocent solution to a problem of attempted unauthorized access to long distance phone card numbers, but resulted in a

sensitive and has been collected by a competing news organization. *Id.* § 103(b). Scientific, educational, and research uses are protected only if data is not collected for the purpose of competition with the owner of the database. *Id.* § 103(d).

97. *Id.* § 106(a). This exemption is made more clearly than in House Bill 354.

98. *Id.* § 107.

99. *Id.*

100. *See infra* Part III.A.

101. *See infra* Part III.B.

102. *See infra* Part III.A.1.

103. *See supra* Part III.A.2.

104. *See infra* Part III.A.3.

105. *See infra* Part III.A.4.

106. *See infra* Part III.B.

misapplication of existing law.¹⁰⁷ Most importantly, the court cursorily accepted the digital signals as sufficient physical contact to serve as the *sine qua non* of the trespass to chattels claim.

The *Thrifty-Tel* court found that the digital signals from phone calls were sufficient to establish physical contact by analogizing to cases where dust particles and sound waves established a trespass claim.¹⁰⁸ However, the cases the *Thrifty-Tel* court relied upon were trespass to land cases, not trespass to chattels cases.¹⁰⁹ Although the land-chattels distinction may seem minor, it “reverses several hundred years of legal evolution, collapsing the separate doctrines of trespass to land and trespass to chattels back into their single common law progenitor, the action for trespass.”¹¹⁰ Trespass to land and trespass to chattels protect two different interests.¹¹¹ Traditionally, courts used the nuisance doctrine rather than trespass in cases involving smoke or intangibles like sound or light.¹¹² Only in cases of dispossession resulting from particulate trespass did courts allow a trespass claim.¹¹³ Case law provides no support for trespass from particulate matter contaminating personal, as opposed to real, property.¹¹⁴

107. *Thrifty-Tel*, 54 Cal. Rptr. 2d 468, 472-73 (Cal. Ct. App. 1996).

108. *Id.* See also *Wilson v. Interlake Steel Co.*, 649 P.2d 922 (Cal. 1982); (stating in dicta that sound waves may result in trespass, provided they do not simply impede an owner’s use or enjoyment of property, but cause damage.); *Roberts v. Permanente Corp.*, 10 Cal. Rptr. 519, 521-22 (Cal. Ct. App. 1961) (holding that dust particles can give rise to trespass of real property); *Ream v. Keen* 838 P.2d 1073, 1074 (Or. 1992) (holding that smoke can give rise to trespass of real property).

109. Burk, *supra* note 15, at 33 (expressing disagreement with the court for its reliance on trespass to land cases when resolving a trespass to chattels issue). For an explanation of Burk’s argument in favor of the application of nuisance doctrine, see *supra* note 45. For an in depth discussion of the distinctions between trespass to chattels and trespass to land, see *supra* Part II.A.

110. Burk, *supra* note 15, at 33 (analyzing historical justifications for trespass to land and trespass to chattels and arguing that the policy reasons behind the causes of action militate towards keeping them separate).

111. *Id.* (explaining that the gravamen of both conversion and its “little brother” trespass to chattels, is dispossession, but the gravamen in trespass to land is something far short of dispossession). Trespass to land requires a far lesser degree of contact than trespass to chattels to give rise to liability. Perhaps this distinction indicates courts’ willingness to grant a greater degree of protection to land. By extending trespass to chattels in a similar fashion as trespass to land, courts appear to ignore the policy justifications underlying each. See *id.*

112. *Id.* See also *supra* note 45. This argument further buttresses Burk’s position that nuisance doctrine would be more appropriate for an *eBay* situation. If even in the context of trespass to land (something that requires a lesser degree of contact to give rise to trespass) courts prefer to apply nuisance doctrine, then in the context of trespass to chattels (something that requires a greater degree of contact to give rise to trespass) courts will be even more likely to apply nuisance doctrine.

113. Burk, *supra* note 15, at 33 (explaining that courts generally used nuisance claims to resolve particulate trespass, but in only extreme cases did they allow a trespass to land claim).

114. *Id.* (arguing that the *CompuServe* court created a new cause of action for trespass, without distinction between land and chattels). The case law supports trespass to property by particulate matter, but not trespass to chattels by particulate matter. *Id.*

Unlike trespass to chattels, which requires economic or physical harm, trespass to land does not require harm¹¹⁵ and allows for nominal damages.¹¹⁶ Because a showing of harm is unnecessary to satisfy the elements of a trespass to land claim,¹¹⁷ it may make sense to allow smoke and particulate matter to satisfy the harm requirement in a trespass to land claim. However, the same logic does not hold true for the trespass to chattels claim, which does require harm.¹¹⁸ It seems unlikely that particulate matter could cause the harm necessary to satisfy a trespass to chattels claim. Furthermore, the “trespassers” in these cases did not dispossess the owners of the equipment or their property in any way.¹¹⁹ One scholar points out, “The equipment was contacted by electrons, not touched, not damaged, not removed, not rendered inoperable.”¹²⁰ To conclude that electronic signals can constitute trespass leads to absurd results. For example, trespass to fax machine, trespass by unwanted telephone solicitors, trespass by unwanted television and radio broadcasts, and trespass to household appliances attached to an outlet.¹²¹ Such claims seem too tenuous to satisfy the physical contact element of an intentional tort like trespass to chattels. Electrons seem entirely too ethereal and metaphysical to justify a cause of action at law.

Furthermore, manufacturers designed computer servers to be bombarded by electronic signals, some of which are bound to be unwelcome.¹²² If courts determine that the electronic signals are sufficient

115. *Id.* at 35-36 (arguing that the *CompuServe* court changed the requirements of a trespass claim from “damage” to a vague notion of “impairment”). See also KEETON, *supra* note 25, § 13, at 75; § 14, at 85. Burk argues that this vague “impairment” requirement would be subject to broad definitions including a large range of trespass well beyond the historical roots of the cause of action. Burk, *supra* note 15, at 35-36.

116. Burk, *supra* note 15, at 34. See also KEETON, *supra* note 25, § 13, at 75. Courts particularly require some degree of harm in a strict intermeddling case. Keeton, *supra* note 25, § 14, 87-88. In the case of actual dispossession, courts relax the harm requirement. *Id.* But when the basis of a suit is more tenuously based on intermeddling, the common law requires a greater degree of actual harm. *Id.*

117. Keeton, *supra* note 25, § 13, at 75.

118. As stated earlier, trespass to land allows for nominal damages, while trespass to chattels does not. Keeton, *supra* note 25, § 13, at 75; § 14, at 88. Consequently, recognizing trespass for something as illusory as particulate matter may be more acceptable.

119. Burk, *supra* note 15, at 34 (“It is nearly impossible to recognize trespass to chattels in Thrifty-Tel or *CompuServe*, since the owners of the equipment were not in any way dispossessed of its use by the passage of electrons through the equipment in exactly the way the equipment was designed to carry them.”).

120. *Id.* (expressing concern over where the “limits might lie” for this new breed of trespass). Tort actions are designed to make victims whole and to punish wrongdoing. One of the key elements of a tort is proof of damages. *CompuServe*, and certainly *eBay*, had little proof of damages.

121. *Id.* (describing the potential broad reach of the trespass to chattels claim laid out in *CompuServe*).

122. The fact that certain devices are designed to receive digital input makes them distinguishable

to establish the physical contact element in a trespass claim, then a serious problem will arise regarding how much control a server has over emitting these “liability” signals to other servers. Consider all of the intermediary servers involved in an Internet transaction.¹²³ If a user sends a robotic spider to eBay, numerous servers and relays along the way carry the signal. Trespass to chattels exposes many ISPs and intermediaries to liability. For these reasons, the case law that developed in trespass to chattels before *Thrifty-Tel* did not allow for particulate trespass.

Finally, as the theory of trespass to chattels developed, courts did not contemplate protecting intangible interests unless they were in a tangible form, like a book.¹²⁴ The intangible interests in the databases cannot be justified simply because the data are contained in the tangible form of a server. Similarly, the policy goals behind trespass to land are inapplicable to the cyber landscape.

2. *What Is the Level of Interference Required by a Trespass to Chattels Claim*

The *Restatement* clearly requires: (1) dispossession, or (2) impairment to the chattel’s condition, quality, or value, or (3) deprivation of the use of the chattel for substantial time, or (4) bodily harm to the possessor or to some person or thing in which the possessor has a legally protected interest.¹²⁵ Does spam e-mail really amount to a physical seizure of chattel, or similar deprivation of use?¹²⁶ In *CompuServe*, CompuServe could still

from other personal property. A car is designed to be operated by human beings. However, one has an expectation that people will not drive it without the owner’s permission. Servers, on the other hand, are designed to accept instructions from other computers and send data packets back. They are designed to be continually “touched” by electronic signals. One cannot cry foul when servers simply receive a few more requests than desired.

123. Thus, an ISP executing the requests of a user like BE to search eBay’s site would be vulnerable to suit under this theory. Even though ISPs are simply intermediaries, they are intentionally sending large packets electronic signals to eBay’s Web site, and thus by the logic of *eBay* trespassing.

124. The court in *Thrifty-Tel* pointed out that intangible interests in the form of tangible property can be the basis for conversion and trespass to chattels. *Thrifty-Tel*, 54 Cal. Rptr. 2d 468, 472 (Cal. Ct. App. 1996).

For example, the value of a stock certificate is not the cost of the paper, but the intangible interest it represents. When the certificate is stolen or placed in another’s name without the owner’s permission, the value of the loss is not the cost of the paper—a tangible—but the worth of the stock, an intangible.

Id. (citing *Payne v. Elliot* 54 Cal. 339, 342 (Cal. 1880)).

125. RESTATEMENT (SECOND) OF TORTS § 218. The language referring to harm to some person in which the possessor has a legally protected interest is the basis for claiming damages for increased employee time. However, the employee-employer relationship does not create the kind of legally protected interest necessary for this cause of action. It would have to be some harm to one’s own self.

126. The court in *CompuServe* made this conclusion based on the *Thrifty-Tel* decision.

use its equipment quite effectively to run its Internet service.¹²⁷ Its servers still allowed CompuServe subscribers to access the Internet and read e-mail.¹²⁸ CompuServe alleged no lost revenue.¹²⁹ Similarly, in *eBay*, the court stretched to find extracting information from the eBay Web site using one percent of the processing time was equivalent to a physical seizure or similar deprivation of use.¹³⁰ The court acknowledged that eBay users could still access the Web site and search various auctions for items on which to bid.¹³¹ The record held no reports of any complaints from eBay's users that the system was sluggish.¹³² In other words, in neither *CompuServe* nor *eBay* did the interference rise to the level that the *Restatement* requires.

While this Note argues that applying trespass to chattels to the Internet is misconceived, if courts insist upon doing so, they should require a greater degree of impairment before imposing liability. Instead of allowing simply one or two percent processing time to qualify for impairment, courts should, at a minimum, require some measure of: (1) a showing of damage to the servers and (2) increased customer complaints. Courts should also demand evidence that the activity of the trespasser caused these server problems and expert evidence proving such causation. Thus, when a "trespasser" uses one percent of a server's processing time, courts

CompuServe, 962 F. Supp. 1015, 1018 (S.D. Ohio 1997).

127. *Id.*

128. *Id.*

129. *Id.* In contrast, *eBay* "plaintiff did believe that it may have experienced system failures and a decrease in system performance during the times that defendant was searching its system, however, it is unable to produce any correlation between its outages and defendant's activities." *EBay*, 100 F. Supp. 2d at 1071 n.18. The plaintiff contended that it could have proven a correlation, but the defendant destroyed the logs that recorded the details of the robotic search activities. *Id.*

130. A greater threshold to trespass to chattels is necessary for the cause of action to be viable in the context of the Internet. At least in the *CompuServe* and *Thrifty-Tel* cases plaintiffs presented some evidence of customer complaints and lost employee time expended by service engineers. *CompuServe*, 962 F. Supp. at 1018-1019 (describing customer complaints and sluggish response time from servers); *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 471 (Cal. Ct. App. 1996) (describing that the Bezenek children making over 1300 phone calls, overburdened the system, and prevented paying customers from making phone calls). In contrast, impairment analysis seemed particularly lacking in the *eBay* case.

131. *EBay*, 100 F. Supp. 2d at 1060.

132. "[E]Bay [did] not claim that this consumption [had] led to any physical damage to eBay's computer system, nor [did] eBay provide any evidence to support the claim that it may have lost revenues or customers based on this use." *Id.* at 1071. eBay was unable to prove a correlation between its outages and BE's activities. *Id.* However, even with eBay's admission the court found sufficient damage to impose liability. *Id.* at 1071-72. eBay argued that BE's use of eBay's property by using valuable bandwidth and capacity necessarily compromised eBay's ability to use that capacity for its own purposes. *Id.*

should require a noticeable impairment on the performance of their equipment to satisfy the trespass to chattels claim.

In the *eBay* case, the court decided that because BE used some of eBay's computer system capacity, regardless of how negligible, BE deprived eBay of the ability to use that portion of its personal property for its own purposes.¹³³ Because the eBay servers could still operate without any apparent degradation in performance, the court essentially ignored traditional trespass to chattels impairment requirements and replaced them with something more akin to trespass to land, which requires no harm at all.¹³⁴ As for *CompuServe*, spam e-mail presented a greater case for impairment sufficient for trespass to chattels. However, having extra e-mail in user inboxes and using a minute amount server-processing time does not approach substantial impairment. While spam caused some annoyance to CompuServe subscribers, they could still e-mail friends and family and surf the web. CompuServe's system will be forced to devote time and space to the junk e-mail, but can still continue to serve its subscribers with only de minimis loss in performance.¹³⁵

Likewise, the *Hamidi* court went astray when it found the loss of employee time caused by spam to be sufficient interference to make out a trespass to chattels claim.¹³⁶ *The Restatement (Second) of Torts* clearly provides damages for substantial interference amounting to some kind of impairment to chattel,¹³⁷ but employees are not considered chattel in the twenty-first century. Viewing people as chattel ended with the enactment of the Thirteenth Amendment to the Constitution.¹³⁸ Obviously, the court did not think the employees were chattel, but by forcing trespass to

133. *Id.*

134. See RESTATEMENT (SECOND) OF TORTS § 218; KEETON, *supra* note 25 § 13, at 75. The allowance of nominal damages for a trespass to land claim is further proof that courts grant greater protection to land for various policy reasons. Extending trespass to chattels claims based on trespass to land claims without evaluating those policy reasons is a poorly thought out endeavor.

135. Spam email or web spiders could reach the level of impairment required for a trespass to chattels claim in theory. For example, in the robotic spider context, if the repeated requests for information required twenty percent or higher of processing time a day, and users began to complain of sluggish connections, then a trespass claim would be more reasonable. In the context of spam, if the spam required twenty percent of processing time and made connections to the ISP noticeably slower, then the claim for trespass to chattels would be much stronger.

136. *Intel v. Hamidi*, No. 98AS05067, 1999 WL 450944 (Cal. App. Dep't Super. Ct. 1994), *aff'd* 114 Cal.Rptr. 2d 244 (Cal. Ct. App. 2001), *rev. granted* No. S103781, 2002 WL 554737 (Cal. Mar. 27, 2002). Restatement (Second) of Torts, § 218(b).

137. *See id.*

138. The Thirteenth Amendment to the United States declares, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIV, § 1.

chattels on to the actions of the defendant, the *Hamidi* court unintentionally treated the employees as chattel.

3. *Is Consent as a Defense to a Trespass to Chattels Claim in the Internet Context*

Arguably, eBay consented to the trespass by opening a Web site accessible to millions of users.¹³⁹ Given this open public access, it seems reasonable for a Web site to expect undesirable traffic to take up some of its bandwidth. It is reasonable to expect competing Web sites to search each other's Web sites for marketing data. Competition gives the public the benefit of lower prices and increased information. Opening a Web site to the public is an indication that a company has availed itself to competitors searching its site to compete.¹⁴⁰

However, one could argue that eBay explicitly told BE not to access its site with a robotic spider after the two parties were unable to reach a licensing agreement.¹⁴¹ In addition, eBay's user agreement informed users that they could not use a robotic spider to gather information from their site.¹⁴² Whatever implied consent eBay might have given initially seems expressly altered by the user agreement and eBay's subsequent statements to BE.

But imagine if eBay were to place on their Web site a statement that said no consumer advocacy groups could search their site. eBay would have withdrawn its implied consent and little would prevent a trespass suit against such organizations as the Better Business Bureau. A plaintiff would still need to satisfy the impairment test, but the *eBay* case allowed one percent of processing time to serve as the requisite impairment necessary to satisfy a trespass to chattels claim. Courts might even allow a lower minimum impairment requirement. Creating this kind of liability by

139. In fact, eBay benefits from the users that access their Web site and post items for auction. Web surfers build eBay's market share and increase advertising revenue. eBay actually gains additional benefits from having its auctions advertised on other sites such as BE's.

140. Having a Web site advertise products seems no different than advertising products in a newspaper. One certainly cannot expect competitors to ignore the ads, and one can have no legal basis for preventing competitors from doing so.

141. *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d at 1058, 1062 (N.D. Cal. 2000).

142. *Id.* at 1060. Additionally, eBay employs "robot exclusion headers," which is a message "sent to computers programmed to detect and respond to such headers, that eBay does not permit unauthorized robotic activity." *Id.* at 1061. The way the robot exclusion header works is that "[p]rogrammers who wish to comply with the Robot Exclusion Standard design their robots to read a particular data file, 'robots.txt,' and to comply with the control directives it contains." *Id.* eBay detects robotic activity on its site monitoring the number of incoming requests coming each IP address (the a unique address enabling computers to communicate with one another). *Id.*

respecting Web sites' user agreements will turn a trespass to chattels claim into a real property right on the Internet. Therefore, consent should be an allowable defense to a trespass to chattels claim on the Internet, irrespective of attempts to negate that consent.

In an amicus curiae brief to the United States Court of Appeals for the Ninth Circuit in the *eBay* appeal, a number of scholars took the district court to task for its application of the trespass to chattels claim in the Internet context.¹⁴³ These scholars contended that the court ignored its duty to weigh the public's interest in free competition when making its determination that BE's actions rose to the level of trespass.¹⁴⁴ The expansion of the cause of action of trespass to chattels to the Internet context places search engines at great risk for liability because they use methods similar to the robotic spiders to search the content of Web sites.¹⁴⁵ Should *eBay* stand, the doctrine would place search engines at the mercy and will of individual Web sites.¹⁴⁶ Admittedly most companies will want their public pages to appear in search engines.¹⁴⁷ However, "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."¹⁴⁸ Advertising links to other Web sites would similarly be actionable because a web user who followed one of these links would be trespassing.¹⁴⁹

143. Brief of Amici Curiae Mark A. Lemley et al., *Bidder's Edge Inc. v. eBay* (9th Cir. 2000) (No. 00-15995). The authors of the brief feared that the *eBay* decision will be extended to search engines, which rely on precisely the same "spiders," and linking.

144. *Id.* at 2. (citing *eBay*, 100 F. Supp. 2d at 1072.) This issue is particularly important because this was an order for a preliminary injunction. According to the court, "the traditional equitable criteria for determining whether an injunction should issue include whether the public interest favors granting the injunction." *Id.* (citing *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983)). Additionally the court stated,

Although the court suspects that the Internet will not only survive, but continue to grow and develop regardless of the outcome of this litigation, the court also recognizes 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.

eBay, 100 F. Supp. 2d at 1072.

145. Brief of Amici Curiae Mark A. Lemley et al., *Bidder's Edge Inc. v. eBay* (9th Cir. 2000) (No. 00-15995) at 8. The importance of search engines to the continued vitality, freedom, and competitiveness of the Internet cannot be understated. They provide an invaluable catalog of Web sites. Without them, it would be like searching a library without a card catalog.

146. *Id.*

147. *Id.* at 9.

148. *Id.*

149. *Id.*

The amicus brief also noted that the sort of data accumulated by BE serves important functions by keeping consumers informed and fostering competition.¹⁵⁰ BE promotes competition and consumer education by giving consumers information about auctions on many Web sites in one place.¹⁵¹ Search engines serve a similar purpose, but for a wider array of goods and services.¹⁵² If Web sites can use trespass to chattels as a tool to prevent the spread of information to consumers, then it is a tool encouraging the monopolization of the Internet by a few powerful businesses driving competition away.¹⁵³

150. *Id.* at 3.

151. This service saves people the time of manually going to every Web site with an auction to compare prices. The Federal Trade Commission informs consumers and business owners that they can help keep markets competitive by researching alternatives. FEDERAL TRADE COMMISSION, PROMOTING COMPETITION, PROTECTING CONSUMERS: A PLAIN ENGLISH GUIDE TO ANTITRUST LAW (1999), available at <http://www.ftc.gov/bc/compguide/keep.htm> (last visited February 5, 2001) [hereinafter FTC, PROMOTING COMPETITION]. According to a publication aimed at educating consumers and businesses,

Consumers and business owners can help keep markets competitive. Here's how: Do your homework. Competition fostered both by seller's 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.

Id. (citing FTC, PROMOTING COMPETITION, *supra*). Information about products and prices allows buyers to make informed choices, and forces competition amongst competing businesses. Brief of Amici Curiae Mark A. Lemley et al., *Bidder's Edge, Inc. v. eBay*, at 4 (9th Cir. 2000) (No. 00-15995). Competition and consumer choice are paramount policy goals of antitrust law. Part of consumer choice is knowing what alternatives are available. Companies like BE provide this knowledge. Actions like trespass to chattels suppress this information, thwarting important goals of the FTC and our antitrust laws.

152. Search engines are the embodiment of keeping consumers informed about competing products and prices on the Internet. They allow users to search for particular products and services using key words. In addition they serve a much more important purpose of filtering and organizing the immense amount of information available on the web. To analogize to a traditional store, a shopkeeper could exclude someone from his shop or sue them for trespass if they were taking an inventory of prices and products, but that is unlikely to happen. Brief of Amici Curiae Mark A. Lemley et al., *Bidder's Edge, Inc. v. eBay*, at 7 (9th Cir. 2000) (No. 00-15995). This practice serves the same goals of keeping consumers educated, and is an allowable practice by business standards.

153. Imagine giving Web sites complete ownership of all the information on their database, preventing other Web sites from accessing it. Users would then be forced to go from Web site to Web site to find the best deals. But without search engines and Web sites like eBay, users are, in practice, limited to established companies that advertise, have brand name recognition, or have a reputation spread through word of mouth. Companies like eBay and Amazon, which are widely recognized as leaders in the on-line auction industry, would greatly benefit from a system that protects their auction information. The public would be punished because Amazon and eBay could charge higher rates and restrict their users to a greater degree.

4. *Should Federal Copyright Laws Preempt a Trespass to Chattels Claim on the Internet?*

eBay originally brought its action against BE under copyright laws, but the court dismissed eBay's copyright claims,¹⁵⁴ following *Feist Publications v. Rural Telephone Service*, which held that telephone directories were not copyrightable because they did not contain sufficient originality.¹⁵⁵ Thus, in eBay's trespass to chattels action, eBay's briefs primarily focused on trespass to its information, not its servers.¹⁵⁶ In response, however, BE argued that federal copyright laws preempt trespass to chattels.¹⁵⁷ The court dismissed this argument because eBay asserted a right to exclude others from using its physical computer systems, as opposed to the data.¹⁵⁸

The *eBay* decision is inconsistent with federal copyright laws. Consider that the *Feist* decision does not allow the protection of databases; databases are generally not copyrightable expression.¹⁵⁹ Web sites like eBay really want to prevent competitors from using their databases, not their computer systems. Businesses and Web sites make substantial investments to build databases of information that they can market. They do not want to see competitors using their databases without having similarly invested in their own Web site. *Feist* made clear that ideas and compilations of ideas without sufficient originality cannot be copyrighted.¹⁶⁰ However, the court in *eBay* allowed protection under state common law for information that cannot be copyrighted under federal

154. *EBay, Inc. v. Bidders Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000).

155. *Feist Publ's v. Rural Tel. Serv.*, 499 U.S. 340, 364 (1991). This shift in the law left much previously copyrightable subject matter unprotected and made it clear that courts would not protect databases. In *Feist*, the Court restated the cornerstone of copyright law that facts are not copyrightable, but compilations of facts are copyrightable. *Id.* at 345. The Supreme Court raised the requirement of originality to leave out "sweat of the brow" types of works like telephone directories and databases because they did not have sufficient originality. *Id.* at 359-60. The problem is essentially the idea/expression dichotomy: ideas are not copyrightable; expression is copyrightable. See *id.* at 345. Auction databases, such as eBay's, compile the facts of each auction, but possess little, if any, originality. Of course, had BE copied the exact HTML designs of eBay's Web site, along with the auction information, and displayed the such designs, it would have had a stronger case for a copyright violation. For a discussion of database protection after *Feist*, see Jane C. Ginsburg, *No "Sweat"?: Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992). Ginsburg's article discusses the Supreme Court's decision in *Feist*, which left databases unprotected. The article also discusses database protection generally, including state law protection for misappropriation. See generally Ginsburg, *supra*.

156. *EBay*, 100 F. Supp. 2d at 1072.

157. *Id.*

158. *Id.*

159. *Feist*, 499 U.S. at 349.

160. *Id.* at 351.

laws.¹⁶¹ This end-run around the laws of copyright is inconsistent with the federal copyright laws as interpreted in *Feist* and, under the Supremacy Clause, should be preempted.

B. What Can the Current Legislative Bills Accomplish?

The *eBay* case sets out a form of intellectual property protection not authorized by the law.¹⁶² A decision to create new intellectual property categories should be made by Congress. The court itself admitted that it was “poorly suited to determine what balance between encouraging the exchange of information, and preserving economic incentives to create, will maximize the public good.”¹⁶³ It should have heeded its own advice and left these decisions to governing bodies.¹⁶⁴

Neither of the two bills analyzed here is perfect and both lean towards protecting database owners’ interests, rather than the public’s interest. However, they do narrow the scope of the protection for database producers and allow for important exclusions for nonprofits, for-profits, and news gatherers, unlike the trespass to chattels action.

First, House Bill 354 makes clear what it prohibits and, in so doing, prevents the absurd potential applications of trespass to chattels.¹⁶⁵ The bill forecloses the possibility of trespass to fax, phone, or television.¹⁶⁶ In addition, it recognizes a number of important exclusions and exemptions. First, the bill permits certain nonprofit educational, scientific, or research uses in a manner that does not materially harm the primary market.¹⁶⁷ However, the bill only permits these uses if the related market is not

161. *eBay*, 100 F. Supp. 2d at 1072-73.

162. *See supra* notes 126-38 and accompanying text.

163. *Id.*

164. Recall that the judge in *eBay* himself indicated that the public interest in this case would better be weighed by the legislature. *Id.* at 1072.

165. The full text of Section 1402(a) prohibits:

Making Available or Extracting To Make Available—Any person who makes available to others, or extracts to make available to others, all or a substantial part of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to cause material harm to the primary market or a related market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1406.

H.R. 354, 106th Cong. § 1402(a) (1999). Subsection (b) also prohibits the extraction of data, independent of making it available. *Id.* § 1042(b).

166. *See supra* text accompanying note 121.

167. H.R. 354 § 1403(b).

materially harmed.¹⁶⁸ This very limited permitted use does not sufficiently protect the public interest. Nonprofit educational, scientific, or research uses should be allowed unfettered access regardless of material affect on the primary market. These studies could help educate consumers, which might lead them to avoid a particular Web site for goods. Additionally, allowing scientific and research work would promote academic studies on the Internet and facilitate scholarly work. Of course, these academic and nonprofit studies might cause a material effect to their primary market through their effort to educate consumers and the public, but only in an indirect way. Their effect on the market would be similar to a movie critic giving a movie a bad review and causing moviegoers to avoid it. Such a review would not be actionable and nor should academic and nonprofit studies that serve a similar purpose.

Second, House Bill 354 permits extraction of individual items of information or insubstantial portions of the database.¹⁶⁹ However, it does not allow “repeated or systematic making available or extracting of individual items or insubstantial parts of a collection of information so as to circumvent the prohibition contained in section 1402.”¹⁷⁰ Drafters wisely included this critical exception. A blanket trespass to chattels theory would find liability even for the most insubstantial of “intermeddling.” This exception makes it clear that another Web site or individual could gather insubstantial amounts of information and distribute them to the public.

Third, House Bill 354 provides an exception for making information available or extracting it for the purpose of verifying the accuracy of information independently gathered.¹⁷¹ However, the bill greatly qualifies this exception with a requirement that the extraction not harm the primary market or a related market.¹⁷² In essence, this exemption merely repeats the prohibition against extraction of data that causes harm to the primary or related market.¹⁷³ The final version, however, may provide a clearer permitted use. Allowing extraction to ensure the accuracy of information independently gathered would keep Web sites honest. The Internet already lacks reliability as a source of factual information, and any protection from testing a Web site’s validity would hamper attempts to make the Internet

168. The Bill allows the use “in a manner that does not materially harm the primary market.” *Id.*

169. *Id.* § 1403.

170. *Id.* § 1403(c).

171. *Id.* § 1403(e).

172. *Id.*

173. *Id.* § 1402(a)-(b).

more credible.

House Bill 354 also permits extracting and making available information for news reporting purposes.¹⁷⁴ This critical protection shields news agencies' abilities' to report information to the public. Obviously this protection is extremely important and invokes important First Amendment considerations. The laws should not prevent the press from extracting information from a Web site. The press serves a critical role in keeping consumers informed and in ensuring that Web sites do not defraud the public.¹⁷⁵

House Bill 1858 makes a broader prohibition in not allowing the sale or distribution of the duplication of another database sold or distributed in competition with it.¹⁷⁶ This prohibition is broader than House Bill 354 in that it does not require a showing of material harm to the owner of the database.¹⁷⁷ However House Bill 1858 is also narrower, in that it requires distribution or sale.¹⁷⁸

IV. PROPOSAL

Instead of trying to put the square peg of cyberspace into the round hole of trespass law, Congress should develop a legislative solution. A legislative solution can balance the interests of protecting database producers against the public's interest in having competition and lower prices.¹⁷⁹ On the one hand, Web sites like BE are great tools for consumers to comparison shop different Web sites without having to go to each

174. *Id.* § 1043(f).

175. In addition to these permitted uses some additional ones are not relevant to the discussion. Gathering or use of information obtained through means other than extracting from a collection of information gathered is allowed. *Id.* § 1403(d). A person with a lawfully made copy can sell or dispose of that possession. *Id.* § 1403(g). Genealogical information can be extracted for nonprofit purposes. *Id.* § 1403(h). An officer of the government, or a person acting under contract with the government, can make available or extract information. *Id.* § 1402(i).

176. House Bill 1858 specifically provides the following prohibition:

It is unlawful for any person or entity, by any means or instrumentality of interstate or foreign commerce or communications, to sell or distribute to the public a database that (1) is a duplicate of another database that was collected and organized by another person or entity; and (2) is sold or distributed in commerce in competition with that other database.

H.R. 1858, 106th Cong. § 102 (1999).

177. *See* H.R. 354, § 1402(a) (1999). House Bill 354 requires that the information gathering or making available cause material harm to the primary or related market. *Id.* § 1402

178. Recall that House Bill 354 prohibits extraction and extraction to distribute or sell. H.R. 354 (1999). So simply extracting information, and not displaying it, is prohibited under House Bill 354.

179. The lack of a public role deeply hampers courts in their adjudications. Looking at the *eBay* case, the only advocates involved were BE and eBay, both representing industry. No advocate aggressively voiced the interests of the public. The judge serves that function to some extent, but also plays the role of impartial adjudicator.

individual Web site.¹⁸⁰ This comparison-shopping fosters competition amongst the Web sites, forcing them to provide their products at the lowest price.¹⁸¹ On the other hand, Web sites with large name recognition have built their reputation and market share at great expense and are therefore entitled to some protection.¹⁸²

As discussed in Part III, Congress has considered two versions of two separate bills that would offer some protection to Web sites such as eBay.¹⁸³ However, these two legislative proposals lack the necessary clarity and breadth of exemptions. Furthermore, they fail to give sufficient weight to the public's interest in the free flow of information on the Internet.¹⁸⁴ This Note proposes that Congress amend these two bills to offer greater and clearer protection to (1) nonprofit organizations and for-profit organizations that serve the public in educating consumers, (2) database producers in the form of defined limits for those accessing their databases, and (3) news gathering purposes.

A. Legislation for Nonprofits

Nonprofit groups like the Better Business Bureau Consumer Reports should be given free reign to collect information from other Web sites.¹⁸⁵ A responsible bill protecting databases should, at the least, provide protection for nonprofit organizations that search databases to educate consumers. House Bill 1858 has no exception for nonprofit groups.¹⁸⁶ House Bill 354 provides an exception for nonprofit educational, scientific, or research uses, so long as they do not harm the primary market.¹⁸⁷ Providing consumers with information about a company like eBay might

180. Brief of Amici Curiae Mark A. Lemley et al. *Bidder's Edge Inc. v. eBay* (9th Cir. 2000) (No. 00-15995) at 4.

181. *Id.* See also FTC, PROMOTING COMPETITION, *supra* note 151.

182. eBay is the household name for on-line auctions. Through great expense, innovative ideas, and hard work they have become the preeminent site for on-line auctions. This Note does not suggest that they should be wholly unprotected from competing companies hoping to capitalize from their work.

183. See *supra* notes 77-99 and accompanying text discussing the Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999); and The Consumer and Investor Access to Information Act of 1999, H.R. 1858, 106th Cong. (1999).

184. Indeed, the law looks like the product of industry capture, and I infer that the failure of this bill to move forward probably has something to do with this one-sidedness.

185. The online version of the Better Business Bureau has already become a great consumer advocate and tool in informing consumers of which businesses have a poor record in their dealings with customers. Extracting information from Web sites and distributing it to the public would seem to be one of the main purposes of nonprofit organizations seeking to protect consumers.

186. H.R. 1858.

187. H.R. 354.

encourage them to frequent a competing Web site because it is cheaper or has better services. This consumer shift would cause harm to the material market, but would satisfy the fundamental goals of free market competition.

B. Legislation for For-Profits

In addition, some for-profit organizations serve the public's interest by keeping the public informed of the comparative value and prices of leading Web sites. Purchasers use Web sites like CNET, which aggregates prices of computers and peripherals from different Web sites. CNET allows the public to purchase computer equipment at the lowest price, often saving hundreds of dollars. CNET is a for-profit Web site that serves the public interest by keeping the public aware of competing prices. In addition, search engines provide a necessary service to consumers allowing them to search Web sites for the best price or the information they need. The World Wide Web is a vast expanse of poorly organized information. Search engines aid the public in finding information they need. Clear protection of search engines must be part in any legislation designed to protect Web sites.

These bills examined in this Note should provide some protection to these for-profit groups at least to the extent that they are (1) not competing in the same market, and (2) do not significantly disrupt web traffic on database owners' sites. Search engines undoubtedly do not compete in the same market as the sites they search and thus would be protected under this rule. However, because companies such as BE might be viewed as in competition with the database owner, the bill should expressly protect price comparison sites like BE and CNET. To prevent information aggregators from disrupting web traffic, legislation should provide a cap on the amount of system resources a search engine can use during a given time period. The one percent in eBay was rather low, but somewhere around ten percent would not be unreasonable. To determine the best number would require testimony from experts in the scientific community, from industry leaders, and from the FTC.

C. Legislation for Database Producers

Protection for database producers should place limits or quotas on the amount of information that aggregators can gather or on the percentage of resources that other services can use. This requirement would protect database owners like eBay from getting complaints from their customers

and lower maintenance costs in keeping their systems running.¹⁸⁸ This quota would also balance the needs of the database owners with the needs of information aggregators.¹⁸⁹

Furthermore, legislation should not allow competitors to blatantly reproduce all the information of one Web site and substitute it as their own.¹⁹⁰ An explicit prohibition of copying Web sites in such a manner is probably unnecessary because copyright or unfair competition laws currently on the books would protect against such activities.

D. Legislation for News-Gathering Purposes

The bill should entirely exempt extraction or copying of data for news gathering. The bill should not place news agencies at the whim of the database owners.¹⁹¹ Both bills wisely qualified the exception by disallowing the taking of time-sensitive information when the two companies are in direct competition. If two companies were in direct competition, like AP and Reuters, allowing them to take each other's time sensitive information without compensation would be unfair.

IV. CONCLUSION

Ad hoc application of a vague trespass to chattels theory to the Internet presents a danger to the Internet's continued growth. This trend is potentially the beginning of monopolizing information and taking away choices from consumers. This Note argues that Congress is better suited to weigh the policy issues and to bring all of the interested parties together to create better-informed public policy. Legislation should balance the

188. The basis of the trespass to chattels is the claim that companies like BE are intermeddled with the servers of Web sites like eBay. To protect this interest, the law should be based more on protecting that personal property interest and not the intellectual property interest. The law should be crafted to avoid the absurd result in *eBay v. Bidder's Edge*, where even the most de minimis intermeddling is grounds for protection and liability.

189. Such a balance could be drawn by experts testifying in congressional committees. The court in *eBay* did not carefully consider what percentage of contact with eBay's servers was necessary to rise to the level of trespass. The court did not specify what percentage would rise to the level of trespass, and what would fall short. Congress could and should do this if it were to draft legislation to protect database owners.

190. However, this copying would probably fall within the subject matter of copyright. Copyright would probably protect the layout and design of a web page that is integrated with the data. It just does not protect the data.

191. This would prevent the danger of conditional access to Web sites. Application of the current trespass to chattels cause of action would allow database owners to inform news agencies or public interest groups that their access is unwelcome. The First Amendment might bar Web sites from blocking media access to their sites, but this has not been tested in the courts yet.

interests of those who have invested heavily into gaining market penetration against those who serve the role of informing the public of their choices when buying on the Internet.

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