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# Legal Technology Bytes™

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## NEW "LEGAL" BORDERS ON THE INTERNET: *eBay, Inc. v. Bidder's Edge, Inc.*

The Internet, which was started by the U.S. Department of Defense in the 1960s, developed through the 1970s and 1980s as an open network known as Advanced Research Projects Agency Network (ARPANET). The users of the ARPANET nurtured it by allowing a free exchange of information. As ARPANET matured, the government allowed the commercial exploitation of its federally funded research project. As businesses began to utilize the technology developed for ARPANET, the Internet was born.

In the early 1990s, the commercial exploitation of the Internet exploded. In this new frontier, anyone who was technologically savvy could be king, at least for a day. Teenagers were the quickest to adapt to the Internet and transacted business online according to the maxim "the quick and the dead." As businesses realized the potential of the Internet and committed resources, they also saw that the maxim "the quick and the dead" did not resonate well at board or shareholder meetings as a reason for a business failure. Although many of the users, operators and founders of the Internet believed that its purpose was to have a realm with virtually no borders, the legislatures and courts have disagreed.

### *The eBay Case*

One of the more interesting cases that tries to establish what borders should exist on the traditionally open Internet is *eBay, Inc. v. Bidder's Edge, Inc.*<sup>1</sup> eBay is one of several well-established, person-to-person auction sites. It has nearly 3 million items for auction. It is significantly larger than all of its competitors. Bidder's Edge is an auction aggregation site designed to allow bidders to search for items across numerous online auctions without having to search each host site individually. It scans over

100 auction sites and contains information on more than 5 million items. Although Bidder's Edge originally had permission to search for items on eBay and post the results, the parties disagreed on the method to be used. As a result, eBay demanded that Bidder's Edge stop searching the eBay web site. After a short period of compliance, Bidder's Edge started to search the eBay web site because other auction aggregation sites were allowed to continue. In response to these unauthorized searches, eBay attempted to block Bidder's Edge from searching eBay's web site; however, Bidder's Edge quickly developed and employed technology to evade eBay's blocks.

On December 10, 1999, eBay filed a law suit against Bidder's Edge in the United States District Court for the Northern District of California based on nine causes of action: trespass, false advertising, federal and state trademark dilution, computer fraud and abuse, unfair competition, misappropriation, interference with prospective economic advantage and unjust enrichment. The causes of action were based on Bidder's Edge's continued searching of the eBay web site for auction information and then employing and displaying it on its own web site.

While the suit was pending, Bidder's Edge continued to search the eBay web site and allegedly damaged eBay by occupying 1% of eBay's resources. eBay filed for preliminary injunction to stop Bidder's Edge from searching the web site, alleging that it would suffer four types of irreparable harm if the preliminary injunction were not granted: (1) lost capacity of its computer systems resulting from Bidder's Edge's use of automated searching agents; (2) damage to eBay's reputation and goodwill caused by the misleading postings of Bidder's Edge; (3) dilution of the eBay mark; and (4) unjust enrichment of Bidder's Edge. The gravamen of the alleged irreparable harm was that if Bidder's Edge were allowed to continue to search the eBay web site, it would encourage frequent and unregulated searching of the web site to the point that eBay's system would be irreparably harmed from reduced system performance, system unavailability or data losses. Bidder's Edge argued that there was no proof that any harm was actually done.

The court decided that eBay, contrary to the assertions of Bidder's Edge, did not indiscriminately license or allow all auction aggregation sites to search the eBay web site.

Rather, eBay carefully selected a limited number of auction aggregation sites that paid the appropriate licensing fee and agreed to abide by the terms of eBay's licensing agreement. eBay limited the auction aggregators' search techniques so as not to overburden its systems. The court agreed that "simple arithmetic and economics reveal how only a few more such companies [searching eBay] would be required before eBay would be brought to its knees by what would be then a debilitating load."<sup>2</sup>

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In allowing the preliminary injunction, the judge suggested new limits for the Internet. Under the action for trespass based on accessing computer systems, the court noted that eBay must establish that: (1) Bidder's Edge intentionally and without authorization interfered with eBay's possessory interest in the computer system; and (2) Bidder's Edge's unauthorized use proximately resulted in damage to eBay. Although Bidder's Edge argued that it cannot trespass on eBay's web site because eBay's web site is publicly available, the court disagreed because Bidder's Edge could not exceed the scope of eBay's consent. The court determined that eBay would be likely to succeed on the merits because eBay showed that Bidder's Edge intermeddled with eBay's personal property in the form of its Internet servers and that eBay is likely to be able to demonstrate that Bidder's Edge's activities have diminished the quality or value of eBay's computer systems.

Bidder's Edge tried to argue that the trespass claim, along with eBay's other state law causes of action, was preempted by the now dismissed copyright claim based on *Ticketmaster Corp., et al. v. Tickets.Com, Inc.*<sup>3</sup> The court determined that eBay has the right to exclude others from using eBay's physical personal property, and that a trespass on that right is qualitatively different from a copyright infringement claim.

This case has broad ramifications for Internet-based businesses. The court sent a message that companies that have worked to compile data have a proprietary interest in the data on the web sites. Those who take this data without permission just because it is on the Internet are now on notice that this conduct may be actionable.

<sup>1</sup>*eBay, Inc. v. Bidder's Edge, Inc.*, No. C-99-21200 RMW, (N.D. Cal. 1999).

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[Return to Text of Article](#)

<sup>2</sup>*eBay, Inc. v. Bidder's Edge, Inc.*, No. C-99-21200 RMW (N.D. Cal. 1999), Order Granting Preliminary Injunction, fn. 14.

[Return to Text of Article](#)

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<sup>3</sup>*Ticketmaster Corp., et al. v. Tickets.Com, Inc.*, No. CV 99-7654, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. minute order filed Mar. 27, 2000). Ticketmaster sued Tickets.Com for publishing basic facts about events contained on its web site and deep linking to the Ticketmaster web site. The court ruled that deep linking by itself (without confusion as to source) does not necessarily involve unfair competition, and that taking "basic facts" such as concert dates and times does not constitute copyright infringement. In *Ticketmaster*, the claim was preempted by federal copyright law (which did not protect the publishing of "basic facts").

[Return to Text of Article](#)

- ⌘ [Return to the Legal Technology Bytes Index.](#)
- ⌘ [Return to the Vedder Price Publications Page.](#)
- ⌘ [Return to: Top of Page.](#)

---

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