Panel Discussion - To Bot Or Not to Bot: The Implications of Spidering

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Panel Discussion
To Bot Or Not To Bot:
The Implications Of Spidering

by
DAVID KRAMER* AND JAY MONAHAN**

MODERATOR: I'm very happy to introduce this next panel. The title is: "To Bot or Not To Bot: The Implications of Spidering." Our two panelists are Jay Monahan, the Senior Intellectual Property Counsel for eBay, and David Kramer, an Internet attorney with Wilson, Sonsini, Goodrich & Rosati, both of whom are sponsors of this event.

JAY MONAHAN: This is an extremely timely topic. In fact, when I agreed to do this, there were some things that my company had been involved with that hadn't yet happened, and so it was kind of exciting for me to see, once today came, where we would be, and we'll be talking about some of those things.

We're going to do a panel discussion, and I get the impression that you're going to be disagreeing with a lot of what I say, just because you enjoy that.

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DAVID KRAMER: The truth of the matter is that Jay can take a principled position because he represents a single client on this issue. However, when you represent dozens of clients on this issue, it’s easy to go back and forth, depending on who has got your ear at that point. So, for purposes of this discussion, while I may be very sympathetic to Jay’s client’s view, I’m going to play “devil’s advocate” for a lot of it.

MONAHAN: What we’re going to do is talk about the technology, which I’ve actually learned a lot about recently because of some litigation we’re involved in. I’m going to go through it fairly quickly, more as background, and then we’re going to get into the heart of the issue, examples, some of the legal theories, and, of course, take questions.

To begin with, what is a bot? A lot of people throw that term around, but my understanding of the term is that it’s a software device which goes into a site and accesses information at super-human speeds. The high speeds of access are what distinguishes a bot from other types of access that can be made to a web site.

Here are some examples of bots, and some of the information that they’re going after. One that is quite well-known at this point is where people go in and harvest e-mail addresses off of a site. These can be the e-mail addresses of people who are, for example, your customers or the registrants on your site. Other people go in and collect that information and usually use it to spam people. I understand you have some experience in that area.

KRAMER: It’s astonishing what you can do with a piece of software that you can buy off the Internet for nine bucks. You can go out and, literally within a couple of hours, collect two-hundred and fifty-thousand e-mail addresses running this software, automatically gathering addresses, alphabetizing them, and then blasting out a message that invariably contains misspellings and a “get rich quick” offer.

That was the initial purpose of a bot on the Internet, other than for search engines, which I don’t see listed. But search engines are the quintessential example of a bot. They travel around the Internet, indexing web page after web page, following link after link, and gathering the data that’s set forth on the page, indexing it in the search engine’s database, so that you can later search for a term and query the database.
MONAHAN: Of course, the big difference here is that a traditional search engine, like Yahoo!, is normally taking you to the home page, so it's not really going into the site. It's not using the search technology of that site, if there is any.

These are examples of people who've gone to the site, and gone deeper into it. Sometimes, it involves going in for price information, which is increasingly popular. There are comparative shopping companies out there that are trying to put together data to enable people to price-shop, sometimes sending messages to people before they buy, telling them they can get it cheaper in another location. Auction listings, which I know a little bit about.

There was a recent case involving a company that went in and was taking thumbnail images appearing on other people's sites, and pulling them into their site for purposes of allowing people to do an image-based search.¹ And . . .

KRAMER: And they won.

MONAHAN: They won. It was held to be a fair use, which is a bad word at eBay.

The last two, I just threw in there. I'm not aware of any cases right now where this is happening, but if you are here representing a company, don't think this is not your problem. Now this is the advocate part of me. This is your problem, or it will be your client's problem.

If you have a job listing site, this is a perfect example. They're going to say, "Well, these are other people's resumes. You don't own the content." They're going to go and take that stuff and bring it to their site.

Movie and TV listings are contexts in which people spend millions of dollars collecting that information. We used to get it in the TV Guide. Increasingly, we're getting it on web sites.

There was a recent piece of litigation involving TicketMaster. They're now suing Tickets.com for going in and taking data regarding ticket sales.²

KRAMER: We've got a client that bills itself as the largest classifieds site on the Web. Well, there's another company that decided they wanted to be the largest classifieds site on


the Web. So they got one classified listing, and used a bot to
grab all of the classified listings on our client's site, plus one.
Now, they're the largest.

That's the kind of thing you can do with a bot. You can
use the technology to automatically grab tons of
uncopyrightable data from a competitor's site, repackage it,
and use it yourself. And that's what pretty much everybody is
using bots for nowadays.

MONAHAN: In that particular case they did not prevail, but
a case tomorrow could involve going over the line and will
invade copyrightable data.

Let's talk a little bit about technology. Now, this is sort of
a general statement about e-based technology, but I don't
think, in some ways, it's a lot different from what a lot of web
sites have. We happen to have a highly transactional, highly
interactive technology, which is different, in some ways, from
someplace like Yahoo!, that has predominantly static pages,
or a place like Schwab, where it is interactive, although not
as interactive as our site. But, at some point during the day,
it shuts down and they have time to make repairs, and you're
not getting that load on the site.

I think most sites have engineering behind them that
relies on some level of predictability that they can only take
so much load, and they build their technology to allow
themselves to handle that without being shut down. We're
going to talk in a minute about our problems with that, but
there have been lots of sites, including some of the on-line
stock-trading sites, that have had shut-down problems.

The bottom line is that, if you are not able to have some
predictability in what you're doing, at some point, you could
exceed that predictability and that leads to bad things. It
leads to slow-down of your performance, and, in a worst-case
scenario, an actual shut-down. And, no question, that's bad
for business.

If you were on the outside, not working for a particular
company, you would not be privy to what they do as a
company in terms of managing their data and managing their
system. If you're on the outside, you have no idea when the
company is experiencing a high load on their network. So, if a
company can freely come in and access your site whenever it
wants – it could well be doing it – they can always say, "Oh,
we're doing it during your off-peak hours." Well, there may
not be off-peak hours, or the off-peak hours may not be the ones that they think they are.

A human being interacts with a database, interacts with our site, in a manner that's very different from the robotic access. We know from years of experience that a user spends a certain amount of time on a page. They look at a page, and they wait as much as thirty-nine seconds – I think, on average, thirty-nine seconds – before they go to another page.

When you're talking about a robot, a robot isn't there to look at content. A robot is just there to steal, to put it nicely. They're spending, maybe, two seconds at most on each piece of data. Our system and most systems are not designed to anticipate, or to accommodate, that sort of massive robotic access. Robots can access twenty times the amount of data as a human being in the same amount of time. It's unpredictable, and the load it puts on the site is higher. In order to realistically accommodate it, people are going to have to go in there and build technology specifically to accommodate robotic access.

This states what we've already stated earlier. When the load is in excess, bad things can happen. Simply, it can steal capacity on their server. It can slow down that site, which can have a direct impact on the profitability of a site. And, of course, in the worst-case scenario, an excess load can actually shut the site down.

There are really four categories of weapons that are available to fight against the problem of unauthorized access. The first is technology.

**KRAMER:** Basically, the way bots work is, they're launched from a particular IP address. That is, there's a computer that the competing company is running, that identifies itself to the site to be spidered as a prospective visitor. It says, "I'm coming from IP address 205.174.65.9, and I would like to access the following pages."

If you are the recipient of that request for a transaction to take place, you can say, "Wait a second. I'm not going to allow you access. I'm not going to allow access to the IP address." And, in that manner, you can, for at least a limited period of time, stop the bot from accessing your site. When your server sees where the request for data is coming from it says, "No, thank you. I'm going to deny you the ability to access the site." That effectively blocks the spider – for a little
while.

The reason the IP address doesn't stay blocked is because IP addresses can change. Tomorrow, you could be coming from IP address 205-dot-so-and-so-plus-one. And if the filter that's been configured by the spidered site is configured only to block you from the IP address you were using yesterday, the bot gets back in and starts spidering your site all over again. You can place broad IP blocks, that is, block a range of IP addresses. However, the broader your block, the greater the risk of blocking people that you don't want blocked.

For example, the way people are getting around blocks now, if they're running spiders or bots, is to sign up with ISPs who give them dynamic IP addresses, so that tomorrow, or at any time, they can sign off, and sign back on and get a brand new IP address. When the spidering company has signed off and somebody else is assigned that IP address, that new person cannot access eBay's site. So, blocking technology has only limited effectiveness. It only works for a little while and it carries a risk of blocking people you want to serve.

MONAHAN: We have a case now where we have an objection to part of the access they are making to our site, but they have other types of access for photo-hosting, and counters, and other things that are perfectly lawful, as far as we know, and we have no desire to interfere with those. In fact, if I were to block the IP address for the photo-hosting, guess who their customers are for photo-hosting? The people that are users of our site.

So, in those cases, the way we've dealt with it is, when we have engaged in the practice of blocking, we have gone to the bad guys and said, "We're giving you an opportunity to tell us all the IP addresses that relate to the particular function that we object to, and we want to exclude anything that it not a part of this." One of them actually participated and actually gave us the IP addresses.

KRAMER: One more little piece on IP blocking is that the origins of the legal fight that's now being played out in the bot arena can be traced to the spamming wars that took place a couple of years ago. And, in the spamming wars, precisely the same technology battle played out.

CyberPromotions, for example, was trying to send unsolicited e-mail messages to a variety of Internet service providers. The Internet service providers could see where
those messages were coming from, and they put up a block saying, "I'm not going to accept any e-mail from that IP address." The next hour, or the next minute, the spammer would find a new IP address and circumvent the technological block that ISP had tried to put into place. That same drama, if you will, is being played out right now with bots and established e-commerce sites.

MONAHAN: There are companies now who are dedicating themselves to selling software specifically designed to evade any kind of defensive techniques that can be made by a company such as eBay. One statement I saw recently was unbelievable. One of the company representatives stated that it was perfectly legal for us to try to block him, and yet, at the same time, it was perfectly legal for him to take whatever efforts he could to get around us technically, which, to me, sounds like, "It's perfectly legal for me to put a lock on my door, but if he can find a way to break in, that's OK." To me, it's a non sequitur.

Now, there's a second category that relates to contract, and some of it relates to notice. One of the fundamental theories that we have in our litigation is that, at a threshold level, this sort of access is trespassing, Common Law ordinary trespassing to private property.

One of the first things that we do, that I'd liken to a "No Trespassing" sign, is that we have messages, electronic messages, on our site that basically tell incoming bots who are programmed to respect them, that, "Robotic access to this site is not permitted. Please go away." Now, unfortunately, it's a totally voluntary thing. So those people who are doing robotic access who wish to comply with the law, and not access sites that don't want to be visited, will respect that. So that only takes you so far. Second, which we call "terms of use," really is the concept that, if somebody is browsing your site, you know you're going to have a pretty tough time arguing that the mere act of browsing, in and of itself, puts them in privity of contract with you. But, certainly, you have a right to put up policies about the use of your site, including different types of warnings. We actually say on our site that use of the site constitutes acceptance of the user agreement and privacy policy.³ Now, we may not ever be able to bind

³ See eBay Corporation, User Agreement (visited October 15, 2000)
somebody into a contract, but I would say that, at a minimum, that constitutes a very detailed "No Trespassing" about what is allowed and what is not allowed. And one of the things that's in there is a specific statement that robotic access copying is not allowed. Spamming is not allowed.

And the last is the user agreement itself. There are scenarios where, in order to get what they need, they actually have to register as a user of your site, basically disguising themselves as having legitimate purposes, and go in and access it robotically. The example that we'll talk about in a minute involved a company that accessed e-mail addresses, but in order to get to the e-mail addresses, to get beyond the user IDs, they had to register, sign the privacy policy, sign the user agreement, and then go robotically and steal all those e-mail addresses, which resulted in a major spamming incident.

KRAMER: A couple of years ago we did a case for CompuServe against CyberPromotions. And, at the time, the landscape was such that CompuServe had been trying to block CyberPromotions from sending unsolicited commercial e-mail to CompuServe subscribers, and CompuServe was unable to effectively block the spam.

Compuserve went to court and said, "This is a trespass. Cyber Promotions continues to send unsolicited commercial e-mail to my computer system, putting a strain on the computers, angering all of my customers, using up my customer service representatives who have to respond, and risking an outage if lots of this stuff comes in at any given time." In fact, CompuServe had experienced several outages that it could directly trace to CyberPromotions.

So, Compuserve went into federal court in Ohio and said, "I know there's never been a reported trespass to chattels claim in the history of Ohio jurisprudence, but the Restatement says that this is a trespass to chattels. Well, now there is a trespass to chattels case reported in Ohio, Eastern District." Judge Graham said, "Yup. This is a trespass to

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5. See id.
6. See id.
7. See id.
chattels, because they’re making unauthorized use of CompuServe’s property, even after CompuServe has specifically told them to stop. CompuServe had taken efforts to block the trespass, and they continued to make use of that property and they caused harm to CompuServe’s legally protected interest.

We advanced a couple of affected interests in that case. The first that we advanced was, “Hey! This is taking up bandwidth and processing power. We own that stuff, we sell that stuff, and it costs us money. You’re using it – that’s harm; and you’re also annoying our users. Our users are basically all we have, and people are leaving in droves because they think that we should be doing something about this spam problem, and we can’t stop it. So, again, you’re harming us in a legally protected interest.”

And that, basically, sets the stage for the principal legal theory that sites can use today to scare off bots. “You, bot are causing us harm. You are using processing power that doesn’t belong to you. You’re degrading the performance of our site. And you’re costing us money, basically.” And if you can walk into court and show those things, you’ve probably got a trespass claim.

MONAHAN: I agree.

KRAMER: There are going to be some real issues in these cases as to whether or not a bot is actually causing harm. And, I think, when Jay starts talking about the eBay cases, you’ll see that where the site has excess capacity, and a bot comes on, and doesn’t consume that capacity, and doesn’t affect any noticeable change to the performance of the site to anyone, there’s a real question as to whether or not the bot is causing any harm.

The CompuServe Court was very clear to say, “It’s not any use of property that doesn’t belong to you – even any unauthorized use – that constitutes a trespass to chattels.” I think the word the CompuServe Court used was mere “intermeddling” with your property is not a trespass to

8. See id.
9. See id.
10. See id. at 1019.
11. See id.
12. See id. at 1020.
chattels. It has to cause you damage.\textsuperscript{13}

Admittedly, creative lawyers can come up with all kinds of theories as to why there really is damage. But that’s a fact question, in some cases, and it’s going to be a tough one, I think, for Jay to establish in his litigation.

\textsc{Monahan:} To me, “mere intermeddling” is walking onto somebody’s lawn, and maybe not leaving footprints. There’s a concept in, at least in our database management, of “headroom.” It is very much a red herring to talk about “excess capacity.” First of all, capacity costs money – forty million dollars for us in the last year alone – for all the technology necessary to run our site. If we ran everything right at capacity, it would be suicidal. So, necessarily, we have to put money into our technology in order to make sure that there is some margin of safety.

Now, if I were to tell you, just hypothetically, let’s say, that seven percent of the total usage of the total capacity of our search function is being taken up by unauthorized, intrusive searches, what that means is, that in order to have enough capacity for my real, approved users, using lawful uses, I need to build an extra seven percent and pay for an extra seven percent, in order to accommodate that. So, to say that, “Oh, you’ve got some extra space, it really didn’t cause you any harm,” is a real red herring, and the fact of the matter is that when you’ve got a lot of bots coming in, there is a synergistic effect of all of those. The cumulative effect of unauthorized intrusions can lead to degradation of site performance and even shutdown. And I underscore, when there is any degradation in site performance, when there is even the slightest slow-down in what users expect, fewer users put bids up, users get frustrated. Even the slightest slow-down can directly affect trading, and that directly affects the income made by my company and other companies similarly situated, and that’s what I call damage.

\textsc{Kramer:} I want to talk about the other two legal theories that you might use in a case involving the unauthorized use of a bot on your site. The first is the Computer Fraud and Abuse Act.\textsuperscript{14} It is a detailed but somewhat anachronistic law, dealing with unauthorized access to computers. It was

\textsuperscript{13} See id.

written, really, to deal with hacking. But in a variety of spamming cases, and now, more increasingly, in these bot cases, you’ll see a claim made under that Act. The argument goes, bots are gaining unauthorized access to my site, just like a hacker, and the laws should treat them the same way. The Computer Fraud and Abuse Act imposes a damage floor.\textsuperscript{15} You must establish, as a plaintiff suing under the Computer Fraud and Abuse Act, that you’ve been damaged in an amount greater than five thousand dollars in a year before you can sue. That’s a standing requirement, an element of your cause of action.\textsuperscript{16}

California Penal Code section 502(C) is another vehicle for asserting a claim based on unauthorized access. It does not have any sort of damage requirement.\textsuperscript{17} It simply states that if you make unauthorized access to someone’s computer, then you’re liable, and you’ve committed a crime in California.\textsuperscript{18} However, since this is a penal code section, a prosecutor is the only person who can prosecute a claim for violation of that statute. The statute does afford a private cause of action to victims after the prosecutor has obtained a conviction.\textsuperscript{19} So you, as a victim of an unauthorized access under section 502, have to wait until the prosecutor decides to act – which they never will – and gets a conviction, before you can take affirmative action to recover damages under that statute.

Actually, there is a way for you to go out and get injunctive relief, by boot-strapping section 502(C) into an unfair competition claim. Under the California Business and Professions Code section 17200, you can sue if somebody sneezes under this statute.\textsuperscript{20} And what it allows you to do is say, “Well, they’re doing something bad. See, they’re violating this law, Penal Code section 502(C), and because they’re violating this law, I want you, Judge, to enjoin them.” You can’t get any money, you can’t seek damages under that statute, but you can enjoin violations of the law. So, those are two other bases for you to go in and seek some sort of relief in

\begin{itemize}
  \item[15.] See id.
  \item[16.] See id.
  \item[17.] See \textit{CAL. PEN. CODE} § 502 (1999).
  \item[18.] See id.
  \item[19.] See id.
  \item[20.] \textit{CAL. BUS AND PROF. CODE} § 17200 (1992).
\end{itemize}
the event that somebody's gaining unauthorized access to your site.

MONAHAN: Of course, there are some theories that go beyond trespassing. These are all going to be very fact-specific, but my view is, I have a right to stop you at the front door. If you get in through the front door, there are lots of other bad things that people do, which, in my mind, just adds insult to injury. We can talk about these individually.

Basically, when they're taking your data, you're going to have possible misappropriation claims, depending on the nature of the data and the immediacy of the information. You might actually have a hot news claim under the hot news doctrine, which has not been used successfully recently, but a court has said is still good law. The unfair business practices claim is so broad that any bad thing that they're doing, somebody can probably put it into a section 17200 claim. Under trademark dilution, often times, when they take the data and bring it back to their site, they do things that may give rise to an entirely new set of claims. If they're using your trademark in connection with the display of the information, that could raise dilution claims.

We have a case where they are taking parts of our listings and bringing them into their site. You go to their site, you run a search, and they've actually copied the data. When you search the data and put in the f-word, it pulls up all of the listings in our adult area – which is a protected, closed area on our site, not all of the descriptions, but all of the titles, in the adult area – and displays them, followed by the words, "at eBay."

It's just a disaster for them. But that's because they've gone in and taken it outside the normal channels. I wish I could show you some of the titles. Next to my trademark name, it's a classic dilution argument, and it's one of many arguments. In most of these cases, what you're going to see is a collection of various wrongs, beginning with the original invasion and followed by all kinds of other things.

I'm sure you're going to want to chime in on the copyright one.

KRAMER: It's a good one. Basically, the entitlement that we all have to make copies of web pages...when we go and visit a site, clearly a copy is being made in RAM on your computer. It's also being made in the visual memory of your
monitor. A copy of the HTML that's copyrighted — maybe not registered, but it is copyrighted — is being made on your personal computer. And the authorization for that copy, I've heard various theories for, but presumably, the content owner or the site owner has given an implied license to make the copy that's being displayed.

OK. You now have an implied license to make that copy. But an implied license can be expressly revoked. So, if I tell you, "You may not copy this page," which is what all these bots are doing, if I expressly revoke the license to do that, then when you make that copy, you're committing a copyright infringement — perhaps.

There's a counter-argument to that, and it stems from the Sega-Accolade case here in the Ninth Circuit.21 Under that case, arguably, you're entitled to a copy of a protected work for purposes of extracting from that work the unprotectable elements. If Sega is the law, and you're allowed to make a copy — regardless of what the copyright owner says — if all you're after is the unprotectable elements, then simply revoking someone's license to make a copy of your site isn't going to be enough because what that person is doing with that one copy that they make is extracting from it the unprotectable data, like how much Joe Beanie Baby sold for yesterday. That's a fact, and it's not protected by copyright law. In order to get access to it, in order to remove it from its site and repackage it, you need to make one copy of the site, and maybe, under Sega-Accolade, that's a legitimate, fair use of the copyrighted work.

MONAHAN: Fortunately, for me, this Sega case didn't say you could take the unprotectable data, display it in a confusing manner, mislead consumers, or falsely advertise it.

There are a couple of cases that I'm involved with, and I know David's involved with some. It's hard to talk about these without talking about specific cases, and obviously I'm somewhat limited, in that I can only talk about what is already public.

The first case was actually a spamming case involving a company that came in, disguised itself as a user (and we know that they did it as opposed to having a third party do

it), registered for the site, sent in a robot, collected what we believe to be a very large number of e-mail addresses, user IDs, and feedback ratings off our site, then sent a spam e-mail, which the FTC, who recently sued them, concluded was a deceptive message. The re: line basically said, “Your ID” – in the fill-in-the-blank, your eBay ID – “about to expire (exclamation point).”

People opened it up, of course, thought that their account was going to close, or that something had happened to their ID. The first paragraph talks about eBay, and it’s not until you get two-thirds of the way down, you realize that it’s from a company called “ReverseAuction.” ReverseAuction runs an auction site in a declining price model and directly spammed users and in it, invited them to come over using their same ID as on eBay.

The FTC learned of the incident, actually sued them, and simultaneously, announced a consent decree because the spam was both unfair and deceptive (although there was some debate as to which it was more of), then they actually went after them and settled it with some pretty serious injunctive relief, which included a requirement that anyone who signed up for the service be sent a special e-mail advising them of the lawsuit and the settlement, and that anyone who didn’t sign up, to the extent that their data was still at ReverseAuction, it all had to be purged from the company.

The same afternoon the FTC announced its action, we filed our action, because the FTC’s jurisdiction is limited to the FTC Act, so there were lots of issues, like the access issue, which was not before the FTC, and which we’re hoping will be litigated favorably for us, but it is a classic case of access followed by bad things happening.

KRAMER: In this case, the principal claim that eBay has is a breach of contract claim, and perhaps a fraud claim, because, in order to do what ReverseAuction did, that is, in order to gather all of the e-mail addresses of the eBay users, they actually had to sign up and click, “I agree to the eBay terms of service agreement.” And, as part of that terms of service agreement, are provisions that say things like, I assume, “You can’t harvest e-mail addresses while you’re on eBay, and you can’t spam.”

MONAHAN: And you can’t robotically access the site.
KRAMER: They did all of those things, all of which were in breach of a contract that they had to agree to in order to gain access to this site. Now, beyond that contract claim, there's probably a fraud claim. That is, they never intended, when they signed up as a user on eBay, to abide by the provisions of the contract. When you make a promise without the intention of performing it, in California, that's fraud. I don't know if you've got a fraud claim. Did you assert one?

MONAHAN: We do have a fraud claim.

KRAMER: Perfect. I mean, this, what ReverseAuction did, I can't defend. They lied, they breached a contract, and then they spammed.

But, when we get to the next one, we'll debate it a little more.

MONAHAN: We've received literally thousands of complaints about this one spamming incident, and the overwhelming number of people experienced some level of confusion as to whether it was either from us, or we allowed it to happen, or things of that nature.

And the next case shares some similar issues, but raises an entirely new set. This is the Auction Abrogator case. There are companies who do not themselves operate on-line trading sites like eBay, but rather have developed search engines, which go out to a number of sites, sometimes as many as three hundred sites, and go in and take data.

The specific thing that this company does is notable, because they're not actually going in and doing real-time searches. They go in robotically, to the best of our knowledge, and make a wholesale copy of the entire database down to a certain level, the category listing level. So they only take certain data, because they only want to use and display certain data. They copy all of that, and when you do a search on their site, you're not searching a copy of our data, you're searching their copy of our data. And, what that means is, that in many cases, or certainly a sufficient number of cases, the results are not up-to-date. Stale information. The price will say ninety-nine cents on theirs, and $13.50 if you had done a comparable search on eBay. They're also taking the information, and co-mingling it with the search results of other on-line trading sites with our eBay name used very, very prominently.

We actually had an instance with one company whose IP
addresses we were able to block. A second company was doing the same thing. We engaged in discussions with them, license discussions. It’s public now that we have actually licensed three companies, two of which actually access our listings, not copy, not display them in a confusing manner. They display complete data, not incomplete, not telling consumers that these are eBay’s listings when they’re not. This was a very minimal request, and we’ve licensed them.

One company wasn’t willing to play along, and so we’ve reluctantly filed an action against them. That’s the company that, among other things, when you pull up, search for the f-word, you get listings of the titles from our adult category.

KRAMER: Jay and I have debated this issue for a couple of hours, over the last several days, just talking about how this was going to play out. I can’t defend the act, I can’t defend what they do with the data after they gather it. That is, if they’re engaging in some deceptive practice, if they’re engaging in some act that constitutes trademark infringement or trademark dilution, that’s indefensible, or at least that’s beyond the scope of what we’re here to talk about.

In terms of accessing the data using an automated bot when eBay has said, “We don’t want you to do that,” the question is whether that access is legitimate, or whether it constitutes some form of trespass. There is no contract in this case, because visitors don’t need to register with eBay in order to start trolling the site to see what’s being made available for sale. They can browse, just like I can browse, without being registered eBay users. So there isn’t any contractual prohibition on Bidder’s Edge to come to the eBay site, like any other user, and look to see what’s around. Just like I could go to that site and copy down numbers, Bidder’s Edge can do it. They can do it a lot faster than I could, and that’s the gripe that eBay has with what Bidder’s Edge is doing. Bidder’s Edge is much better and more efficient at gathering up this information, this unprotectable information, than I could be. The question is whether or not that efficient mechanism of gathering this data ought to be considered a trespass.

The argument is, does it damage eBay for Bidder’s Edge

to intermeddle with eBay's chattel. It's using eBay's property to gather up this information, because it's drawing on the servers that eBay uses to run its site. The question is, whether that's mere intermeddling, or whether it rises to the level of harming some legally protected interest. And you heard Jay talk about how it is harming eBay's protected interest.

MONAHAN: When you analyze this type of claim in the context of this type of technology, it's going to have to be done on a case-by-case basis. The fact of the matter is, unlike walking on somebody's lawn, space on servers costs money. Accommodating certain levels of traffic costs money. Accommodating peaks in traffic during certain times costs money. Engineers cost money. If courts aren't able to accept those as legitimate forms of damage and costs to a company, I fear it will mean that anybody can go in at any time.

It's like the store owner: "No shirt, no shoes, no entrance." As long as the limitation on access is not otherwise unlawful, which is a standard concept, meaning it's not for religious grounds, or not violating some anti-trust ground, or any other ground like that, I have a fundamental right to prevent the access to my site. It's my property. I don't need to pay extra money, extra time, or extra resources to accommodate an unwanted intermeddler. Once you add in all the other bad things that they do (which I think are horrific in this case that we picked), it adds insult to injury, and there are more than sufficient grounds for a court to say, "This has gone way too far."

The counter-argument is that the people who are on the other side of these arguments say, "This is bad for the Internet. You're choking competition." But the fact of the matter is that the free market works, that we allow people in when it makes sense for us and for them. There may be a license involved, although it's probably a pretty small license.

In fact, Eric was talking about going into deals and not realizing, not knowing in advance, who was paying whom. And, in fact, when there was speculation, we did our deal, no one really knew if we were allowing access for an aggregator, who was paying whom. And I think what dictates that is the market. People evaluate the value that they're getting. If it's in our best interest, if it's in our users' best interest, we will find a way to allow it. We will do it under a way that allows us to
protect our site and to protect the way in which it's displayed. And the people who have seen the light have signed licenses. The people who choose not to see the light have seen summonses and complaints.

KRAMER: I think maybe we didn’t give you enough background on exactly what Bidder’s Edge does. Bidder’s Edge goes around, not only to eBay, but to many auction sites, and it basically provides a resource to a consumer who’s looking for that hard-to-find G. I. Joe Doll. It says, “There are ten auctions going on, or that have gone on in the last couple of days, and here’s what that G. I. Joe doll sold for. It sold for this on eBay, it sold for this on Yahoo, it sold for this on Amazon, it sold for this on OnSale.

MONAHAN: Or, it’s not that it sold, but it's available on those sites in an auction-style format. What you're describing would be the price-comparison model.

KRAMER: OK. It could similarly be used for reporting closed auctions. Apparently, Bidder's Edge is reporting active auctions. There’s a legitimate public interest here. That is, the Internet is so vast, there is no way for an individual to find G. I. Joe dolls, a human being searching manually. A human being simply can’t find that ten auction sites are making that G. I. Joe doll available, and the prices that they’re available at. It could take you days, or at least, hours.

Now we have an automated means of doing that. And isn’t that wonderful? This is a First Amendment issue. “We’re serving the public interest as Bidder’s Edge.”

MONAHAN: You’re not serious here.

KRAMER: I’m telling you what Bidder’s Edge is going to say. I’m telling you what they’re going to say when it comes time to enjoin them.

MONAHAN: Where’s the statute that says that my commercial enterprise has a duty to the public to make its property available? From a consumer point of view isn’t this a great idea? Well, you know what? Go to AuctionRover.com, one of the companies we licensed. You can do exactly what he

23. See EBay, Inc. v. Bidder’s Edge. 2000 U.S. Dist LEXIS 7287 (finding that “BE’s [Bidder's Edge’s] ongoing violation of eBay’s fundamental property right to exclude others from its computer system potentially causes sufficient irreparable harm to support a preliminary injunction,” a decision which Bidder's Edge plans to appeal at a trial date in early 2001).
just described. You can pull them up. You're going to get a real-time search, it's going to be complete, it's even going to have a little eBay logo on it, and it will be done in such a way that it's not confusing, or limiting, or misrepresenting.

KRAMER: Yes, it will have an eBay logo on it.

MONAHAN: Most of the people who implement, including AuctionRover, are based on this copying model.

When I said, you know, "We're happy to do business with you for nothing in terms of a license, but you just can't do this copying thing." And so they had to basically go back, and all these companies are figuring out how they can do this without doing copying. Not an unreasonable demand on our part. As soon as they figure it out, we have permitted the companies we've licensed to provide it in an integrated format, a co-mingled format, if you will. I'm not really thrilled about that personally, but given all the other protections that are built in, I think it's something that we can live with.

The fact that somebody has chosen to implement it in the way they have... they didn't even need to take our logo, they asked us for it, and we said, "Fine. You can use the logo. Its probably a good thing for us." Some of them also have banner ads. Guess who pays them for the banner ads? We pay them for banner ads. And that's the market at work.

KRAMER: The Bidder's Edge response would be, "We want to be an unbiased, un-influenced site, where people can see for themselves, without anybody paying us, or without us being beholden to anyone else, what items are selling for on the Web. We want to provide a resource to end-users, so that they can come and see for themselves what price goods are being sold at."

MONAHAN: We didn't talk about how they make money. They're not altruistic. How do you think they're making money? They're selling banner ads, which means that when those people come to access eBay, or Yahoo!, or somebody's listings through their site, they're getting paid for. They're selling banner ads, and the more people that look, the more money they make, not on their data, but off the content that's on the eBay site and all these other sites.

Now, if you're one of these other sites, you might say, you know, "This is a great thing. I can't wait to be included in their aggregation." I say, "Great. That's the free market." But when my company says, "You know, for our own reasons, we
choose not to. Stop!” And when they don’t stop, you know, this is where it ends up.

And I think there needs to be a balance here. And if the market dictates this is a good thing for consumers, it’s a good thing for eBay, so if it’s a good thing for our users, it happens. And it did happen.

This case that we sued on is very different. Horrific facts, and we felt that they had gone way over the line.

KRAMER: I don’t hear you saying, though, Jay, that there’s not some legitimate public interest in allowing me to find out that the G. I. Joe doll that’s for sale for fourteen bucks on eBay is for sale for eight bucks on Yahoo!

MONAHAN: There is a public benefit. “Public interest” sounds like some sort of standard that the FCC uses for allocating spectrum on the radio. That’s a term that they love to talk about, because it’s government coming in and telling you when you have to do something for the consumer good. The “public interest” you’re talking about arises naturally out of the marketplace at work. If the public interest is served, or if the consumer benefit is there, and it’s in the benefit of the companies, it will happen.

KRAMER: But here’s the problem. Transaction costs will prevent that from happening, because a consumer can’t find all of this information, these companies spring up overnight to say, “I’ll grab it from here, and I’ll grab from here, and I’ll grab it from here.” Now, keep in mind, they’re not grabbing copyrighted information, they’re not grabbing trademarks, they’re grabbing facts. That is, Barnes and Noble is selling a book for six bucks, Amazon is selling it for four.

In order to do that, they need to engage in this practice. No human being could do this. They could hire a hundred thousand human beings to go out and do exactly what they’re doing with an automated device. But they’re doing it with a device to save an extraordinary waste of resources. There is this efficiency created to do it, and they’re serving a public benefit.

Now, that will have to be taken into consideration when a court is deciding whether or not to enjoin what these companies are doing. In the Ninth Circuit, one of the factors for injunctive relief is whether the injunction would serve the public interest. When Jay and I were talking about this, we talked about how Jay could demonstrate that this was
imposing a marginal cost on eBay. Each time a bot came on, each time it looked at thousands of pages in a couple of minutes, that was imposing a calculable cost on eBay.

If it's imposing a calculable cost on eBay, there isn't irreparable harm. And there is a public benefit. So maybe the solution here – and I'm being radical – is to impose some sort of compulsory license scheme to say, "If you want access to my listings, this is what it costs, because here's my cost. You've got to pay the cost of your access."

But there's another part of this that we haven't talked about. Ebay makes money, when it sells advertising, based on page views. Here's this bot, trolling around the Internet, giving eBay thousands of page views in a minute, or two minutes, or three minutes. And eBay, then, when the Mediametrics ratings comes out, it soaring to the top of the charts because all these bots are using its site! And it got lots more juice to present to advertisers, and it's getting lots more money when the advertisers come to eBay and say, "I want to advertise on your site."

MONAHAN: You know, it would be a great argument if only it were true. The fact of the matter is that we have very little advertising of the nature you're describing, and the advertising that we run never runs on the item pages. If there is, there is some form of advertising, although it's rare, there are lots of other features and services, like our SafeHarbor program, or iEscrow, eStamp, or the O-Rama theme pages. There is a lot of content and many services that are offered which are completely bypassed by this consumer-oriented pro-consumer thing that he's describing.

I actually was with a group of what we call "power sellers" recently, who didn't really know much about the issue, and had heard about it in the paper, and I said, "Look. OK. I'm going to describe this to you. They're pulling up your listings. Now, if I told you that some of your listings won't even appear in their site because the prices they're showing are out of date, that the number of bids are out of date, that the icons and the other enhancement features that you pay money for on eBay gets stripped away, now how do you feel about this? Now, how do you feel about having hundreds of other sites offering items and sellers competing with the items that you're putting up?" Not eBay, we don't put up the items, our sellers put up items, they're the business. And when I
described the facts to them, they were very troubled by it. They said, "You know, this isn't as great as I thought it was. It's not as simple as 'Boy, I can go and look at all the G. I. Joe's in the universe.' There's a lot more to this."

I think the market will dictate. And, the bottom line, again, is what you described is happening. There are companies that have taken a modest license to people to compare. They're just doing it in a way that doesn't violate our intellectual property, and is done in a way in which we know when they're coming in, and how they're coming in, so that we can protect our system from harm.

KRAMER: Last point. One of the arguments that Bidder's Edge is going to make in this case, beyond some of the ones that I've thrown out, is that they actually benefit eBay because they refer traffic to eBay, and that they refer traffic to the sellers on eBay. Somebody who's out looking for the G. I. Joe doll, rather than going to eBay, maybe shows up at this site, Bidder's Edge, searches for the G. I. Joe doll, finds it on eBay, and says, "Wow, I'm going to go to eBay." That user may never have gone to eBay in the first place. They might have gone to Yahoo!, they might have gone to Amazon, but because they find out that it's for sale cheaper on eBay, they're going to go to eBay, and therefore, "My site, Bidder's Edge, is actually generating traffic for you, and benefitting your sellers. Why are you opposed to what I'm doing?"

MONAHAN: First of all, how many people out there looking at on-line auctions have not heard of eBay? How many people using Bidder's Edge as an active auction site do you think are not already registered for eBay? There may be a handful of people that are not registered with eBay. I'll concede that, but I think that there are not going to be that many, and the fact of the matter is, when we decide how we're going to treat these situations, we evaluate what the mutual benefit is, just like every agreement that Eric talked about in the last segment.

That's what the Internet is about, and who's paying whom is changing. It's certainly true in this area, and I think that you can't stop progress in one sense, but that doesn't mean that all the fundamental principles that I learned here twelve years ago about trespass, and violations of intellectual property, get thrown out the window. That's all that we're doing in this lawsuit.
KRAMER: The bottom line in this lawsuit is that the question of whether what Bidder's Edge is doing amounts to a mere intermeddling, or is actually causing harm to eBay in some legally protected way, isn't clear cut. It's not mere unauthorized access to the eBay site, that's not enough. Ebay's going to have to walk into court and prove as a matter of fact that what's going on here is causing damage. And the arguments I've been throwing out are arguments that Bidder's Edge is going to make to a jury about why eBay is not being damaged, and why eBay is in fact suing for other reasons, and that's going to decide this case. So, in this particular instance, the question of whether there's a trespass to chattels is not clear cut.