

1 **FILED MAY 24, 2000**

2 **NOTE: PAGINATION OF THIS PDF FILE MAY DIFFER FROM THE PAPER VERSION**
3 **FILED WITH THE CLERK.**

4
5
6
7
8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11
12 EBAY, INC.,

13 Plaintiff,

14 vs.

15 BIDDER'S EDGE, INC.,

16 Defendant.

NO. C-99-21200 RMW

ORDER GRANTING PRELIMINARY
INJUNCTION

[Docket Nos. 6, 12]

17
18 Plaintiff eBay, Inc.'s ("eBay") motion for preliminary injunction was heard by the court on
19 April 14, 2000. The court has read the moving and responding papers¹ and heard the argument of
20 counsel. For the reasons set forth below, the court preliminarily enjoins defendant Bidder's Edge, Inc.
21 ("BE") from accessing eBay's computer systems by use of any automated querying program without
22 eBay's written authorization.

23 ///

24
25 1. On April 21, 2000, defendant Bidder's Edge, Inc. filed an ex parte motion for leave to file a
26 supplemental declaration in order to respond to factual assertions in the reply. Although the court
27 suspects that with reasonable diligence BE could have prepared the declaration at least by the hearing
28 date, the declaration consists merely of the results of four searches performed on major Internet
search engines. eBay's opposition did not cite any prejudice that would result from its filing.
Accordingly, BE's motion is granted.

1 **I. BACKGROUND**

2 eBay is an Internet-based, person-to-person trading site. (Jordan Decl. ¶ 3.) eBay offers
3 sellers the ability to list items for sale and prospective buyers the ability to search those listings and
4 bid on items. (Id.) The seller can set the terms and conditions of the auction. (Id.) The item is sold
5 to the highest bidder. (Id.) The transaction is consummated directly between the buyer and seller
6 without eBay's involvement. (Id.) A potential purchaser looking for a particular item can access the
7 eBay site and perform a key word search for relevant auctions and bidding status. (Id.) eBay has
8 also created category listings which identify items in over 2500 categories, such as antiques,
9 computers, and dolls. (Id.) Users may browse these category listing pages to identify items of
10 interest. (Id.)

11 Users of the eBay site must register and agree to the eBay User Agreement. (Id. ¶ 4.) Users
12 agree to the seven page User Agreement by clicking on an "I Accept" button located at the end of the
13 User Agreement. (Id. Ex. D.) The current version of the User Agreement prohibits the use of "any
14 robot, spider, other automatic device, or manual process to monitor or copy our web pages or the
15 content contained herein without our prior expressed written permission." (Id.) It is not clear that the
16 version of the User Agreement in effect at the time BE began searching the eBay site prohibited such
17 activity, or that BE ever agreed to comply with the User Agreement.

18 eBay currently has over 7 million registered users. (Jordan Decl. ¶ 4.) Over 400,000 new
19 items are added to the site every day. (Id.) Every minute, 600 bids are placed on almost 3 million
20 items. (Id.) Users currently perform, on average, 10 million searches per day on eBay's database.
21 Bidding for and sales of items are continuously ongoing in millions of separate auctions. (Id.)

22 A software robot is a computer program which operates across the Internet to perform
23 searching, copying and retrieving functions on the web sites of others.² (Maynor Decl. ¶ 3; Johnson-
24 Laird Decl. ¶ 15.) A software robot is capable of executing thousands of instructions per minute, far
25 in excess of what a human can accomplish. (Maynor Decl. ¶ 3) Robots consume the processing and

26
27 2. Programs that recursively query other computers over the Internet in order to obtain a
28 significant amount of information are referred to in the pleadings by various names, including
software robots, robots, spiders and web crawlers.

1 storage resources of a system, making that portion of the system's capacity unavailable to the system
2 owner or other users. (Id.) Consumption of sufficient system resources will slow the processing of
3 the overall system and can overload the system such that it will malfunction or "crash." (Id.) A
4 severe malfunction can cause a loss of data and an interruption in services. (Id.)

5 The eBay site employs "robot exclusion headers." (Id. ¶ 5.) A robot exclusion header is a
6 message, sent to computers programmed to detect and respond to such headers, that eBay does not
7 permit unauthorized robotic activity. (Id.) Programmers who wish to comply with the Robot
8 Exclusion Standard design their robots to read a particular data file, "robots.txt," and to comply with
9 the control directives it contains. (Johnson-Laird Decl. ¶ 20.)

10 To enable computers to communicate with each other over the Internet, each is assigned a
11 unique Internet Protocol ("IP") address. (Maynor Decl. ¶ 6.) When a computer requests information
12 from another computer over the Internet, the requesting computer must offer its IP address to the
13 responding computer in order to allow a response to be sent. (Id.) These IP addresses allow the
14 identification of the source of incoming requests. (Id.) eBay identifies robotic activity on its site by
15 monitoring the number of incoming requests from each particular IP address. (Id. ¶ 7.) Once eBay
16 identifies an IP address believed to be involved in robotic activity, an investigation into the identity,
17 origin and owner of the IP address may be made in order to determine if the activity is legitimate or
18 authorized. (Id. ¶ 8.) If an investigation reveals unauthorized robotic activity, eBay may attempt to
19 ignore ("block") any further requests from that IP address. (Id.) Attempts to block requests from
20 particular IP addresses are not always successful. (Id. ¶ 9; Johnson-Laird Decl. ¶ 27.)

21 Organizations often install "proxy server" software on their computers. (Johnson-Laird Decl.
22 ¶ 12.) Proxy server software acts as a focal point for outgoing Internet requests. (Id.) Proxy servers
23 conserve system resources by directing all outgoing and incoming data traffic through a centralized
24 portal. (Id.) Typically, organizations limit the use of their proxy servers to local users. (Id.)
25 However, some organizations, either as a public service or because of a failure to properly protect
26 their proxy server through the use of a "firewall," allow their proxy servers to be accessed by remote
27 users. (Id. ¶ 13.) Outgoing requests from remote users can be routed through such unprotected
28

1 proxy servers and appear to originate from the proxy server. (Id.) Incoming responses are then
2 received by the proxy server and routed to the remote user. (Id.) Information requests sent through
3 such proxy servers cannot easily be traced back to the originating IP address and can be used to
4 circumvent attempts to block queries from the originating IP address. (Id. ¶ 14.) Blocking queries
5 from innocent third party proxy servers is both inefficient, because it creates an endless game of hide-
6 and-seek, and potentially counterproductive, as it runs a substantial risk of blocking requests from
7 legitimate, desirable users who use that proxy server. (Id. ¶ 22.)

8 BE is a company with 22 employees that was founded in 1997. (Carney Decl. ¶ 2.) The BE
9 web site debuted in November 1998. (Id. ¶ 3.) BE does not host auctions. (Id. ¶ 2.) BE is an
10 auction aggregation site designed to offer on-line auction buyers the ability to search for items across
11 numerous on-line auctions without having to search each host site individually. (Id.) As of March
12 2000, the BE web site contained information on more than five million items being auctioned on more
13 than one hundred auction sites. (Id. ¶ 3.) BE also provides its users with additional auction-related
14 services and information. (Id. ¶ 2.) The information available on the BE site is contained in a
15 database of information that BE compiles through access to various auction sites such as eBay. (Id. ¶
16 4.) When a user enters a search for a particular item at BE, BE searches its database and generates a
17 list of every item in the database responsive to the search, organized by auction closing date and time.
18 (Id. ¶ 5.) Rather than going to each host auction site one at a time, a user who goes to BE may
19 conduct a single search to obtain information about that item on every auction site tracked by BE.
20 (Id. ¶ 6.) It is important to include information regarding eBay auctions on the BE site because eBay
21 is by far the biggest consumer to consumer on-line auction site. (Id.)

22 On June 16, 1997, over a year before the BE web site debuted, Peter Leeds³ wrote an email in
23 response to an email from Kimbo Mundy, co-founder of BE. (Ritchey Decl. Ex 6.) Mundy's email
24 said, "I think the magazines may be overrating sites' ability to block. The early agent experiments,
25 like Arthur Anderson's BargainFinder were careful to check the robots.txt file on every site and desist

27 3. It is unclear who Peter Leeds is, except that his email address at the time was
28 <peter@biddersedge.com>.

1 if asked." (Id.) (underline in original). Mundy wrote back: "I believe well-behaved robots are still
2 expected to check the robots.txt file. . . . Our other concern was also legal. It is one thing for
3 customers to use a tool to check a site and quite another for a single commercial enterprise to do so
4 on a repeated basis and then to distribute that information for profit." (Id.)

5 In early 1998, eBay gave BE permission to include information regarding eBay-hosted
6 auctions for Beanie Babies and Furbies in the BE database. (Id. ¶ 7.) In early 1999, BE added to the
7 number of person-to-person auction sites it covered and started covering a broader range of items
8 hosted by those sites, including eBay. (Id. ¶ 8.) On April 24, 1999, eBay verbally approved BE
9 crawling the eBay web site for a period of 90 days. (Id.) The parties contemplated that during this
10 period they would reach a formal licensing agreement. (Id.) They were unable to do so.

11 It appears that the primary dispute was over the method BE uses to search the eBay database.
12 eBay wanted BE to conduct a search of the eBay system only when the BE system was queried by a
13 BE user. (Ploen Decl. Ex. 9.) This reduces the load on the eBay system and increases the accuracy
14 of the BE data. (Id.) BE wanted to recursively crawl the eBay system to compile its own auction
15 database. (Carney Decl. ¶ 18.) This increases the speed of BE searches and allows BE to track the
16 auctions generally and automatically update its users when activity occurs in particular auctions,
17 categories of auctions, or when new items are added. (Id.)

18 In late August or early September 1999, eBay requested by telephone that BE cease posting
19 eBay auction listings on its site. (Id. ¶ 9; Rock Decl. ¶ 5.) BE agreed to do so. (Rock Decl. ¶ 5.) In
20 October 1999, BE learned that other auction aggregations sites were including information regarding
21 eBay auctions. (Carney Decl. ¶ 12.) On November 2, 1999, BE issued a press release indicating that
22 it had resumed including eBay auction listings on its site. (Rock Decl. Ex. H.) On November 9,
23 1999, eBay sent BE a letter reasserting that BE's activities were unauthorized, insisting that BE cease
24 accessing the eBay site, alleging that BE's activities constituted a civil trespass and offering to license
25 BE's activities. (Id. Ex. I.) eBay and BE were again unable to agree on licensing terms. As a result,
26 eBay attempted to block BE from accessing the eBay site; by the end of November, 1999, eBay had
27 blocked a total of 169 IP addresses it believed BE was using to query eBay's system. (Maynor Decl.

28

¶ 12.) BE elected to continue crawling eBay's site by using proxy servers to evade eBay's IP blocks. (Mundy Depo. at 271:18-19 ("We eventually adopted the rotating proxy servers."))

Approximately 69% of the auction items contained in the BE database are from auctions hosted on eBay. (Carney Decl. ¶ 17.) BE estimates that it would lose one-third of its users if it ceased to cover the eBay auctions. (Id.)

The parties agree that BE accessed the eBay site approximate 100,000 times a day. (Felton Decl. ¶ 33.) eBay alleges that BE activity constituted up to 1.53% of the number of requests received by eBay, and up to 1.10% of the total data transferred by eBay during certain periods in October and November of 1999. (Johnson-Laird Decl. ¶ 64.) BE alleges that BE activity constituted no more than 1.11% of the requests received by eBay, and no more than 0.70% of the data transferred by eBay. (Felton Decl. ¶ 60.) eBay alleges that BE activity had fallen 27%, to 0.74% of requests and 0.61% of data, by February 20, 2000. (Johnson-Laird Decl. ¶¶ 70-71.) eBay alleges damages due to BE's activity totaling between \$45,323 and \$61,804 for a ten month period including seven months in 1999 and the first three months in 2000. (Meyer Decl. ¶ 28.) However, these calculations appear flawed in that they assume the maximal BE usage of eBay resources continued over all ten months. (Id.) Moreover, the calculations attribute a pro rata share of eBay expenditures to BE activity, rather than attempting to calculate the incremental cost to eBay due to BE activity. (Id.) eBay has not alleged any specific incremental damages due to BE activity. (See Rock Depo., 192:8-10.)⁴

It appears that major Internet search engines, such as Yahoo!, Google, Excite and AltaVista, respect the Robot Exclusion Standard. (Johnson-Laird Decl. ¶¶ 81-85.)⁵

eBay now moves for preliminary injunctive relief preventing BE from accessing the eBay

4. Q: Are you aware of any complaints from eBay users about slowdowns that were caused by aggregators?

A: No.

5. BE appears to argue that this cannot be the case because searches performed on each of these search engines will return results that include eBay web pages. (Supp. Ploen Decl. ¶¶ 1-9.) However, this does not establish that these sites do not respect robot exclusion headers. There are numerous ways in which search engines can obtain information in compliance with exclusion headers, including; obtaining consent, abiding by the robot.txt file guidelines, or manually searching the sites. BE did not present any evidence of any site ever complaining about the activities of any of these search engines.

1 computer system based on nine causes of action: trespass, false advertising, federal and state
2 trademark dilution, computer fraud and abuse, unfair competition, misappropriation, interference with
3 prospective economic advantage and unjust enrichment. However, eBay does not move, either
4 independently or alternatively, for injunctive relief that is limited to restricting how BE can use data
5 taken from the eBay site.⁶

7 II. LEGAL STANDARD

8 To obtain preliminary injunctive relief, a movant must demonstrate "either a likelihood of
9 success on the merits and the possibility of irreparable injury, or that serious questions going to the
10 merits were raised and the balance of hardships tips sharply in its favor." Sega Enterprises Ltd. v.
11 Accolade, Inc., 977 F.2d 1510, 1517 (9th Cir. 1992) (citations omitted). The alternatives in the
12 above standard represent "extremes of a single continuum," rather than two separate tests. Benda v.
13 Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978).
14 "The critical element in determining the test to be applied is the relative hardship to the parties. If the
15 balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a
16 likelihood of success on the merits as when the balance tips less decidedly." Alaska v. Native Village
17 of Venetie, 856 F.2d 1384, 1389 (9th Cir. 1988). A "serious question" is one on which the movant
18 has a "fair chance of success on the merits." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d
19 1415, 1421 (9th Cir. 1984). Generally, the "balance of harm" evaluation should precede the
20 "likelihood of success analysis" because until the balance of harm has been evaluated the court cannot
21 know how strong and substantial the plaintiff's showing of the likelihood of success must be. See
22 Village of Venetie, 856 F.2d at 1389.

23
24 6. The bulk of eBay's moving papers and declarations address the alleged misuse of the eBay
25 mark and the information BE obtains from the eBay computers. The court does not address the facts
26 specific to these claims, nor the merits of these claims. Even if eBay were able to establish a
27 likelihood of success on the merits as to these causes of action, such a showing would only support
28 injunctive relief addressing BE's use of the eBay mark and BE's use of the eBay auction listings (the
appropriate relief for which would appear to be a disclaimer regarding the lack of affiliation between
eBay and BE and explicitly alerting customers to the limited scope of BE's information). Such a
showing would not be sufficient to enjoin BE from accessing eBay's computer systems, which is the
only relief eBay appears to request.

1 **III. ANALYSIS**

2 **A. Balance of Harm**

3 eBay asserts that it will suffer four types of irreparable harm if preliminary injunctive relief is
4 not granted: (1) lost capacity of its computer systems resulting from to BE's use of automated agents;
5 (2) damage to eBay's reputation and goodwill caused by BE's misleading postings; (3) dilution of the
6 eBay mark; and (4) BE's unjust enrichment.⁷ (Mot. at 23:18-25.) The harm eBay alleges it will suffer
7 can be divided into two categories. The first type of harm is harm that eBay alleges it will suffer as a
8 result of BE's automated query programs burdening eBay's computer system ("system harm"). The
9 second type of harm is harm that eBay alleges it will suffer as a result of BE's misrepresentations
10 regarding the information that BE obtains through the use of these automated query programs
11 ("reputational harm").

12 As noted above, eBay does not seek an injunction that is tailored to independently address the
13 manner in which BE uses the information it obtains from eBay.⁸ Even without accessing eBay's
14 computer systems by robot, BE could inflict reputational harm by misrepresenting the contents of
15 eBay's auction database or by misusing eBay's trademark. Moreover, allowing frequent and complete
16 recursive searching of eBay's database (which would presumably exacerbate the system harm),
17 requiring appropriate disclaimers regarding the accuracy of BE's listings, or limiting BE's use of the
18 eBay mark would all reduce or eliminate the possibility of reputational harm, without requiring the
19 drastic remedy of enjoining BE from accessing eBay's database.⁹ Since eBay does not move
20 independently or alternatively for injunctive relief tailored toward the alleged reputational harm, the
21 court does not include the alleged reputational harm in the balance of harm analysis, nor does the
22

23 7. eBay does not appear to offer any support for the proposition that unjust enrichment is an
24 independent cause of action, let alone an independently adequate basis for preliminary injunctive
25 relief.

26 8. Although, as a practical matter, enjoining BE from accessing eBay's computers or searching
27 eBay's auction database may result in BE's inability to make effective use of information from eBay's
28 auction site.

9. Thus, eBay's motion appears to be, in part, a tactical effort to increase the strength of its
license negotiating position and not just a genuine effort to prevent irreparable harm.

1 court address the merits of the causes of action based on the alleged reputational harm in the
2 likelihood of success analysis.

3 According to eBay, the load on its servers resulting from BE's web crawlers represents
4 between 1.11% and 1.53% of the total load on eBay's listing servers. eBay alleges both economic
5 loss from BE's current activities and potential harm resulting from the total crawling of BE and
6 others. In alleging economic harm, eBay's argument is that eBay has expended considerable time,
7 effort and money to create its computer system, and that BE should have to pay for the portion of
8 eBay's system BE uses. eBay attributes a pro rata portion of the costs of maintaining its entire system
9 to the BE activity. However, eBay does not indicate that these expenses are incrementally incurred
10 because of BE's activities, nor that any particular service disruption can be attributed to BE's
11 activities.¹⁰ eBay provides no support for the proposition that the pro rata costs of obtaining an item
12 represent the appropriate measure of damages for unauthorized use. In contrast, California law
13 appears settled that the appropriate measure of damages is the actual harm inflicted by the conduct:

14 Where the conduct complained of does not amount to a substantial interference with
15 possession or the right thereto, but consists of intermeddling with or use of or
16 damages to the personal property, the owner has a cause of action for trespass or case,
and may recover only the actual damages suffered by reason of the impairment of the
property or the loss of its use.

17 Zaslow v. Kroenert, 29 Cal. 2d 541, 551 (1946). Moreover, even if BE is inflicting incremental
18 maintenance costs on eBay, potentially calculable monetary damages are not generally a proper
19 foundation for a preliminary injunction. See e.g., Sampson v. Murray, 415 U.S. 61, 90 (1974). Nor
20 does eBay appear to have made the required showing that this is the type of extraordinary case in
21 which monetary damages may support equitable relief. See In re Estate of Ferdinand Marcos, Human

22 _____
23 10. This case was filed on December 10, 1999. BE decommissioned a number of its servers in
24 mid-December 1999. (See Mundy Depo. at 75:12-14.) Reformatting the hard drives resulted in the
25 destruction of the server logs that may have indicated the actual duration of access to eBay's system.
26 (See id. at 74:17-24.) eBay argues this should support an adverse inference against BE because eBay
27 is unable to correlate BE's access to eBay's system with service disruptions. BE responds that these
28 actions were a result of hardware failures unrelated to the litigation. The court agrees that these
actions may support an inference that the information BE destroyed was prejudicial. However, final
resolution of the fact-dependent questions regarding the circumstances under which this information
was destroyed requires a more complete record. Accordingly, eBay is not entitled to a conclusive
presumption of harm at this juncture in the proceedings, and eBay's motion to strike all evidence
submitted by BE relating to a lack of harm is denied.

1 Rights Litigation, 25 F.3d 1467, 1480 (9th Cir. 1994) ("a district court has authority to issue a
2 preliminary injunction where the plaintiffs can establish that money damages will be an inadequate
3 remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of
4 secreting or dissipating assets to avoid judgment.").

5 eBay's allegations of harm are based, in part, on the argument that BE's activities should be
6 thought of as equivalent to sending in an army of 100,000 robots a day to check the prices in a
7 competitor's store. This analogy, while graphic, appears inappropriate. Although an admittedly
8 formalistic distinction, unauthorized robot intruders into a "brick and mortar"¹¹ store would be
9 committing a trespass to real property. There does not appear to be any doubt that the appropriate
10 remedy for an ongoing trespass to business premises would be a preliminary injunction. See e.g.,
11 State v. Carriker, 214 N.E.2d 809, 811-12 (Ohio App. 1964) (interpreting Ohio criminal trespass law
12 to cover a business invitee who, with no intention of making a purchase, uses the business premises of
13 another for his own gain after his invitation has been revoked); General Petroleum Corp. v. Beilby,
14 213 Cal. 601, 605 (1931). More importantly, for the analogy to be accurate, the robots would have
15 to make up less than two out of every one-hundred customers in the store, the robots would not
16 interfere with the customers' shopping experience, nor would the robots even be seen by the
17 customers. Under such circumstances, there is a legitimate claim that the robots would not pose any
18 threat of irreparable harm. However, eBay's right to injunctive relief is also based upon a much
19 stronger argument.

20 If BE's activity is allowed to continue unchecked, it would encourage other auction
21 aggregators to engage in similar recursive searching of the eBay system such that eBay would suffer
22 irreparable harm from reduced system performance, system unavailability, or data losses. (See

23
24
25
26 11. The phrase "brick and mortar" is often used to designate a traditional business when
27 contrasting it with a predominantly, or entirely, on-line business. The phrase appears to refer to the
28 historical reliance on conducting commerce within the context of a physical space made from
materials such as brick and mortar, as opposed to the modern trend toward conducting commerce in
a cyberspace made from computers programs.

1 Spafford Decl. ¶ 32;¹² Parker Decl. ¶ 19;¹³ Johnson-Laird Decl. ¶ 85.¹⁴) BE does not appear to
2 seriously contest that reduced system performance, system unavailability or data loss would inflict
3 irreparable harm on eBay consisting of lost profits and lost customer goodwill. Harm resulting from
4 lost profits and lost customer goodwill is irreparable because it is neither easily calculable, nor easily
5 compensable and is therefore an appropriate basis for injunctive relief. See, e.g., People of State of
6 California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1316, 1319 (9th Cir.
7 1985). Where, as here, the denial of preliminary injunctive relief would encourage an increase in the
8 complained of activity, and such an increase would present a strong likelihood of irreparable harm,
9 the plaintiff has at least established a possibility of irreparable harm.¹⁵

10 In the patent infringement context, the Federal Circuit has held that a preliminary injunction
11 may be based, at least in part, on the harm that would occur if a preliminary injunction were denied
12 and infringers were thereby encouraged to infringe a patent during the course of the litigation. See
13 Atlas Powder Co. v. Ireco Chems, 773 F.2d 1230, 1233 (Fed. Cir. 1985). In the absence of
14 preliminary injunctive relief, "infringers could become compulsory licensees for as long as the
15 litigation lasts." Id. The Federal Circuit's reasoning is persuasive. "The very nature of the patent
16 right is the right to exclude others. . . . We hold that where validity and continuing infringement have
17 been clearly established, as in this case, immediate irreparable harm is presumed. To hold otherwise
18 would be contrary to the public policy underlying the patent laws." Smith Intern., Inc. v. Hughes

20 12. "If 30 or 40 companies spring into existence using similar business models, what will be the
21 total load and impact on eBay's servers?"

22 13. "One crawler may currently use 1% of eBay's resources. What if hundred of users used
23 similar crawlers?"

24 14. "Given that Bidder's Edge can be seen to have imposed a load of 1.53 % on eBay's listing
25 servers, simple arithmetic and economics reveal how only a few more such companies deploying rude
26 robots [that do not respect the Robot Exclusion Standard] would be required before eBay would be
27 brought to its knees by what would be then a debilitating load."

28 15. As discussed below, eBay has established a strong likelihood of success on the merits of the
trespass claim, and is therefore entitled to preliminary injunctive relief because it has established the
possibility of irreparable harm. Accordingly, the court does not reach the issue of whether the threat
of increased activity would be sufficient to support preliminary injunctive relief where the plaintiff has
not made as strong of a showing of likelihood of success on the merits.

1 Tool Co., 718 F.2d 1573, 1581 (Fed. Cir. 1983) (footnotes omitted). Similarly fundamental to the
2 concept of ownership of personal property is the right to exclude others. See Kaiser Aetna v. United
3 States, 444 U.S. 164, 176 (1979) (characterizing "the right to exclude others" as "one of the most
4 essential sticks in the bundle of rights that are commonly characterized as property"). If preliminary
5 injunctive relief against an ongoing trespass to chattels were unavailable, a trespasser could take a
6 compulsory license to use another's personal property for as long as the trespasser could perpetuate
7 the litigation.

8 BE correctly observes that there is a dearth of authority supporting a preliminary injunction
9 based on an ongoing trespass to chattels. In contrast, it is black letter law in California that an
10 injunction is an appropriate remedy for a continuing trespass to real property. See Allred v. Harris, 14
11 Cal. App. 4th 1386, 1390 (1993) (citing 5 B.E. Witkin, Summary of California Law, Torts § 605 (9th
12 ed. 1988)). If eBay were a brick and mortar auction house with limited seating capacity, eBay would
13 appear to be entitled to reserve those seats for potential bidders, to refuse entrance to individuals (or
14 robots) with no intention of bidding on any of the items, and to seek preliminary injunctive relief
15 against non-customer trespassers eBay was physically unable to exclude. The analytic difficulty is
16 that a wrongdoer can commit an ongoing trespass of a computer system that is more akin to the
17 traditional notion of a trespass to real property, than the traditional notion of a trespass to chattels,
18 because even though it is ongoing, it will probably never amount to a conversion.¹⁶ The court
19 concludes that under the circumstances present here, BE's ongoing violation of eBay's fundamental
20 property right to exclude others from its computer system potentially causes sufficient irreparable
21 harm to support a preliminary injunction.

22
23 BE argues that even if eBay is entitled to a presumption of irreparable harm, the presumption

24
25 16. As other courts have noted, applying traditional legal principles to the Internet can be
26 troublesome. See ImOn, Inc. v. ImaginOn, Inc., — F. Supp. 2d —, —, 2000 WL 310373, at *1
27 (S.D.N.Y. Mar. 27, 2000) ("Both parties are suppliers of 'services or products' on the Internet which,
28 as I recognize and grapple with hereafter, is one of the most fluid, rapidly developing, and virtually
daily changing areas of commerce that the law has had to focus upon and endeavor to apply
established principles to.")

1 may be rebutted. The presumption may be rebutted by evidence that a party has engaged in a pattern
2 of granting licenses to engage in the complained of activity such that it may be reasonable to expect
3 that invasion of the right can be recompensed with a royalty rather than with an injunction, or by
4 evidence that a party has unduly delayed in bringing suit, thereby negating the idea of irreparability.
5 See Polymer Technologies, Inc. v. Bridwell, 103 F.3d 970, 974 (Fed. Cir. 1996) (discussing
6 presumption of irreparable harm in patent infringement context). BE alleges that eBay has both
7 engaged in a pattern of licensing aggregators to crawl its site as well as delayed in seeking relief. For
8 the reasons set forth below, the court finds that neither eBay's limited licensing activities nor its delay
9 in seeking injunctive relief while it attempted to resolve the matter without judicial intervention are
10 sufficient to rebut the possibility of irreparable harm.

11 If eBay's irreparable harm claim were premised solely on the potential harm caused by BE's
12 current crawling activities, evidence that eBay had licensed others to crawl the eBay site would
13 suggest that BE's activity would not result in irreparable harm to eBay. However, the gravamen of
14 the alleged irreparable harm is that if eBay is allowed to continue to crawl the eBay site, it may
15 encourage frequent and unregulated crawling to the point that eBay's system will be irreparably
16 harmed. There is no evidence that eBay has indiscriminately licensed all comers. Rather, it appears
17 that eBay has carefully chosen to permit crawling by a limited number of aggregation sites that agree
18 to abide by the terms of eBay's licensing agreement. "The existence of such a [limited] license, unlike
19 a general license offered to all comers, does not demonstrate a decision to relinquish all control over
20 the distribution of the product in exchange for a readily computable fee." Ty, Inc. v. GMA
21 Accessories, Inc., 132 F.3d 1167, 1173 (7th Cir. 1997) (discussing presumption of irreparable harm
22 in copyright infringement context). eBay's licensing activities appear directed toward limiting the
23 amount and nature of crawling activity on the eBay site. Such licensing does not support the
24 inference that carte blanche crawling of the eBay site would pose no threat of irreparable harm.

25 eBay first learned of BE in late 1997 or early 1998 when BE sought to retain the same public
26 relations firm used by eBay. (See Ploen Decl. Ex. 1.) This motion was filed on January 18, 2000.
27 An unexplained delay of two years would certainly raise serious doubts as the irreparability of any
28

1 alleged harm. See Playboy Enters., Inc. v. Netscape Communications Corp., 55 F. Supp. 2d 1070,
2 1090 (C.D. Cal. 1999) (noting that delay of as little as 60 days to three months has been held
3 sufficient to rebut the presumption of irreparable harm). Here, the circumstances establish that any
4 delay resulted from eBay's good faith efforts to resolve this dispute without judicial intervention and
5 do not rebut a finding of the possibility of irreparable harm.

6 In April 1999, eBay agreed to allow BE to crawl the eBay site for 90 days while the parties
7 negotiated a license. In late August or early September 1999, after the parties had failed to negotiate
8 a license, eBay requested that BE stop crawling the eBay site, and BE complied. It was not until
9 November 2, 1999, that BE issued a press release indicating that it had resumed including eBay
10 auction listings on its site. In response, on November 9, 1999, eBay sent BE a letter again informing
11 BE that its activities were unauthorized and again offering to license BE's activities.¹⁷ After eBay and
12 BE were again unable to agree on licensing terms, eBay attempted to block BE from accessing the
13 eBay site. By the end of November 1999, despite blocking more than 150 IP addresses, it became
14 apparent that eBay was unable to prevent BE's crawling of the eBay system via rotating proxy
15 servers. Having failed in its attempt at self-help, eBay filed this suit on December 10, 1999, and filed
16 this motion five weeks later. The fact that eBay's primary concern is the threat from the likely
17 increase in crawling activity that would result if BE is allowed to continue its unauthorized conduct,
18 combined with eBay's repeated attempts to resolve this dispute without judicial intervention, and BE's
19 continuing attempts to thwart eBay's protection of its property, convinces the court that eBay's delay
20 in seeking preliminary relief was justified.

21 BE argues that even if eBay will be irreparably harmed if a preliminary injunction is not
22 granted, BE will suffer greater irreparable harm if an injunction is granted. According to BE, lack of
23 access to eBay's database will result in a two-thirds decrease in the items listed on BE, and a one-
24 eighth reduction in the value of BE, from \$80 million to \$70 million. (Sweeny Decl. ¶¶ 42, 43.)
25 Although the potential harm to BE does not appear insignificant, BE does not appear to have suffered
26

27 17. Because BE was expressly notified that its conduct was unauthorized, it does not matter
28 whether BE ever agreed to a version of the eBay User Agreement that prohibited robotic activity.

1 any irreparable harm during the period it voluntarily ceased crawling the eBay site. Barring BE from
2 automatically querying eBay's site does not prevents BE from maintaining an aggregation site
3 including information from eBay's site. Any potential economic harm is appropriately addressed
4 through the posting of an adequate bond.

5 Moreover, it appears that any harm alleged to result from being forced to cease an ongoing
6 trespass may not be legally cognizable. In the copyright infringement context, once a plaintiff has
7 established a strong likelihood of success on the merits, any harm to the defendant that results from
8 the defendant being preliminarily enjoined from continuing to infringe is legally irrelevant. See Triad
9 Sys. Corp. v. Southeastern Exp. Co., 64 F.3d 1330, 1338 (9th Cir. 1995) (defendant "cannot
10 complain of the harm that will befall it when properly forced to desist from its infringing activities.").
11 The Ninth Circuit has held it to be reversible error for a district court to even consider "the fact that
12 an injunction would be devastating to [defendant's] business" once the plaintiff has made a strong
13 showing of likely success on the merits of a copyright infringement claim. Cadence Design Sys., Inc.
14 v. Avant! Corp., 125 F.3d 824, 830 (9th Cir. 1997). The reasoning in these cases appears to be that a
15 defendant who builds a business model based upon a clear violation of the property rights of the
16 plaintiff cannot defeat a preliminary injunction by claiming the business will be harmed if the
17 defendant is forced to respect those property rights. See Concrete Mach. Co., Inc. v. Classic Lawn
18 Ornaments, Inc., 843 F.2d 600, 613 (1st Cir. 1988) ("If a strong likelihood of success is
19 demonstrated, then the court should issue the injunction even if the defendant will incur the relatively
20 greater burden; a probable infringer simply should not be allowed to continue to profit from its
21 continuing illegality at the copyright owner's expense."). The Federal Circuit has crafted a similar rule
22 with respect to patent infringement. See Windsurfing Int'l Inc. v. AMF, Inc., 782 F.2d 995, 1003
23 n.12 (Fed. Cir. 1986) ("One who elects to build a business on a product found to infringe cannot be
24 heard to complain if an injunction against continuing infringement destroys the business so elected.").
25 Accordingly, the court concludes that eBay has demonstrated at least a possibility of suffering
26 irreparable system harm and that BE has not established a balance of hardships weighing in its favor.

27

28

1 **B. Likelihood of Success**

2 As noted above, eBay moves for a preliminary injunction on all nine of its causes of action.
3 These nine causes of action correspond to eight legal theories: (1) trespass to chattels, (2) false
4 advertising under the Lanham Act, 15 U.S.C. § 1125(a), (3) federal and state trademark dilution, (4)
5 violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, (5) unfair competition, (6)
6 misappropriation, (7) interference with prospective economic advantage and (8) unjust enrichment.
7 The court finds that eBay has established a sufficient likelihood of prevailing on the trespass claim to
8 support the requested injunctive relief. Since the court finds eBay is entitled to the relief requested
9 based on its trespass claim, the court does not address the merits of the remaining claims or BE's
10 arguments that many of these other state law causes of action are preempted by federal copyright law.
11 The court first addresses the merits of the trespass claim, then BE's arguments regarding copyright
12 preemption of the trespass claim, and finally the public interest.

13
14 1. Trespass

15 Trespass to chattels "lies where an intentional interference with the possession of personal
16 property has proximately cause injury." Thrifty-Tel v. Beznik, 46 Cal. App. 4th 1559, 1566 (1996).
17 Trespass to chattels "although seldom employed as a tort theory in California" was recently applied to
18 cover the unauthorized use of long distance telephone lines. Id. Specifically, the court noted "the
19 electronic signals generated by the [defendants'] activities were sufficiently tangible to support a
20 trespass cause of action." Id. at n.6. Thus, it appears likely that the electronic signals sent by BE to
21 retrieve information from eBay's computer system are also sufficiently tangible to support a trespass
22 cause of action.

23 In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff
24 must establish: (1) defendant intentionally and without authorization interfered with plaintiff's
25 possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted
26 in damage to plaintiff. See Thrifty-Tel, 46 Cal. App. 4th at 1566; see also Itano v. Colonial Yacht
27 Anchorage, 267 Cal. App. 2d 84, 90 (1968) ("When conduct complained of consists of intermeddling
28

1 with personal property 'the owner has a cause of action for trespass or case, and may recover only the
2 actual damages suffered by reason of the impairment of the property or the loss of its use.')

3 Zaslow v. Kroenert, 29 Cal. 2d 541, 550 (1946)). Here, eBay has presented evidence sufficient to
4 establish a strong likelihood of proving both prongs and ultimately prevailing on the merits of its
5 trespass claim.

6 a. BE's Unauthorized Interference

7 eBay argues that BE's use was unauthorized and intentional. eBay is correct. BE does not
8 dispute that it employed an automated computer program to connect with and search eBay's
9 electronic database. BE admits that, because other auction aggregators were including eBay's
10 auctions in their listing, it continued to "crawl" eBay's web site even after eBay demanded BE
11 terminate such activity.

12 BE argues that it cannot trespass eBay's web site because the site is publicly accessible. BE's
13 argument is unconvincing. eBay's servers are private property, conditional access to which eBay
14 grants the public. eBay does not generally permit the type of automated access made by BE. In fact,
15 eBay explicitly notifies automated visitors that their access is not permitted. "In general, California
16 does recognize a trespass claim where the defendant exceeds the scope of the consent." Baugh v.
17 CBS, Inc., 828 F.Supp. 745, 756 (N.D. Cal. 1993).

18 Even if BE's web crawlers were authorized to make individual queries of eBay's system, BE's
19 web crawlers exceeded the scope of any such consent when they began acting like robots by making
20 repeated queries. See City of Amsterdam v. Daniel Goldreyer, Ltd., 882 F. Supp. 1273, 1281
21 (E.D.N.Y. 1995) ("One who uses a chattel with the consent of another is subject to liability in
22 trespass for any harm to the chattel which is caused by or occurs in the course of any use exceeding
23 the consent, even though such use is not a conversion."). Moreover, eBay repeatedly and explicitly
24 notified BE that its use of eBay's computer system was unauthorized. The entire reason BE directed
25 its queries through proxy servers was to evade eBay's attempts to stop this unauthorized access. The
26 court concludes that BE's activity is sufficiently outside of the scope of the use permitted by eBay that
27 it is unauthorized for the purposes of establishing a trespass. See Civic Western Corp. v. Zila

1 Industries, Inc., 66 Cal. App. 3d 1, 17 (1977) ("It seems clear, however, that a trespass may occur if
2 the party, entering pursuant to a limited consent, . . . proceeds to exceed those limits . . .") (discussing
3 trespass to real property).

4 eBay argues that BE interfered with eBay's possessory interest in its computer system.
5 Although eBay appears unlikely to be able to show a substantial interference at this time, such a
6 showing is not required. Conduct that does not amount to a substantial interference with possession,
7 but which consists of intermeddling with or use of another's personal property, is sufficient to
8 establish a cause of action for trespass to chattel. See Thrifty-Tel, 46 Cal. App. 4th at 1567
9 (distinguishing the tort from conversion). Although the court admits some uncertainty as to the
10 precise level of possessory interference required to constitute an intermeddling, there does not appear
11 to be any dispute that eBay can show that BE's conduct amounts to use of eBay's computer systems.
12 Accordingly, eBay has made a strong showing that it is likely to prevail on the merits of its assertion
13 that BE's use of eBay's computer system was an unauthorized and intentional interference with eBay's
14 possessory interest.

15 b. Damage to eBay's Computer System

16 A trespasser is liable when the trespass diminishes the condition, quality or value of personal
17 property. See Compuserve, Inc. v. Cyber Promotions, 962 F. Supp. 1015 (S.D. Ohio 1997). The
18 quality or value of personal property may be "diminished even though it is not physically damaged by
19 defendant's conduct." Id. at 1022. The Restatement offers the following explanation for the harm
20 requirement:

21 The interest of a possessor of a chattel in its inviolability, unlike the similar interest of
22 a possessor of land, is not given legal protection by an action for nominal damages for
23 harmless intermeddlings with the chattel. In order that an actor who interferes with
24 another's chattel may be liable, his conduct must affect some other and more important
25 interest of the possessor. Therefore, one who intentionally intermeddles with another's
26 chattel is subject to liability only if his intermeddling is harmful to the possessor's
27 materially valuable interest in the physical condition, quality, or value of the chattel, or
28 if the possessor is deprived of the use of the chattel for a substantial time, or some
other legally protected interest of the possessor is affected . . . Sufficient legal
protection of the possessor's interest in the mere inviolability of his chattel is afforded
by his privilege to use reasonable force to protect his possession against even harmless
interference.

1 Restatement (Second) of Torts § 218 cmt. e (1977) .

2 eBay is likely to be able to demonstrate that BE's activities have diminished the quality or
3 value of eBay's computer systems. BE's activities consume at least a portion of plaintiff's bandwidth
4 and server capacity. Although there is some dispute as to the percentage of queries on eBay's site for
5 which BE is responsible, BE admits that it sends some 80,000 to 100,000 requests to plaintiff's
6 computer systems per day. (Ritchey Decl. Ex. 3 at 391:11-12.) Although eBay does not claim that
7 this consumption has led to any physical damage to eBay's computer system, nor does eBay provide
8 any evidence to support the claim that it may have lost revenues or customers based on this use,¹⁸
9 eBay's claim is that BE's use is appropriating eBay's personal property by using valuable bandwidth
10 and capacity, and necessarily compromising eBay's ability to use that capacity for its own purposes.
11 See CompuServe, 962 F.Supp. at 1022 ("any value [plaintiff] realizes from its computer equipment is
12 wholly derived from the extent to which that equipment can serve its subscriber base.").

13 BE argues that its searches represent a negligible load on plaintiff's computer systems, and do
14 not rise to the level of impairment to the condition or value of eBay's computer system required to
15 constitute a trespass. However, it is undisputed that eBay's server and its capacity are personal
16 property, and that BE's searches use a portion of this property. Even if, as BE argues, its searches use
17 only a small amount of eBay's computer system capacity, BE has nonetheless deprived eBay of the
18 ability to use that portion of its personal property for its own purposes. The law recognizes no such
19 right to use another's personal property. Accordingly, BE's actions appear to have caused injury to
20 eBay and appear likely to continue to cause injury to eBay. If the court were to hold otherwise, it
21 would likely encourage other auction aggregators to crawl the eBay site, potentially to the point of
22 denying effective access to eBay's customers. If preliminary injunctive relief were denied, and other
23 aggregators began to crawl the eBay site, there appears to be little doubt that the load on eBay's
24 computer system would qualify as a substantial impairment of condition or value. California law does

25
26 18. Plaintiff believes that it may have experienced system failures and a decrease in system
27 performance during the times that defendant was searching its system, however, it is unable to
28 produce any correlation between its outages and defendant's activities. Plaintiff contends that it
would likely be able to produce such a correlation but for defendant's alleged destruction of logs that
recorded the details of its robotic search activities.

1 not require eBay to wait for such a disaster before applying to this court for relief. The court
2 concludes that eBay has made a strong showing that it is likely to prevail on the merits of its trespass
3 claim, and that there is at least a possibility that it will suffer irreparable harm if preliminary injunctive
4 relief is not granted. eBay is therefore entitled to preliminary injunctive relief.

5
6 2. Copyright Preemption

7 BE argues that the trespass claim, along with eBay's other state law causes of action, "is
8 similar to eBay's originally filed but now dismissed copyright infringement claim, and each is based on
9 eBay's assertion that Bidder's Edge copies eBay's auction listings, a right within federal copyright
10 law." Opp'n at 8:10-12. BE is factually incorrect to the extent it argues that the trespass claim arises
11 out of what BE does with the information it gathers by accessing eBay's computer system, rather than
12 the mere fact that BE accesses and uses that system without authorization.

13 A state law cause of action is preempted by the Copyright Act if, (1) the rights asserted under
14 state law are "equivalent" to those protected by the Copyright Act, and (2) the work involved falls
15 within the "subject matter" of the Copyright Act as set forth in 17 U.S.C. §§ 102 and 103. Kodadek
16 v. MTV Networks, Inc., 152 F.3d 1209, 1212 (9th Cir. 1998). "In order not to be equivalent, the
17 right under state law must have an extra element that changes the nature of the action so that it is
18 qualitatively different from a copyright infringement claim." Xerox Corp. v. Apple Computer, Inc.,
19 734 F. Supp. 1542, 1550 (N.D. Cal. 1990). Here, eBay asserts a right not to have BE use its
20 computer systems without authorization. The right to exclude others from using physical personal
21 property is not equivalent to any rights protected by copyright and therefore constitutes an extra
22 element that makes trespass qualitatively different from a copyright infringement claim. But see,
23 Ticketmaster Corp. v. Tickets.com, Inc., No. CV-99-7654 (C.D. Cal. minute order filed Mar. 27,
24 2000) (dismissing trespass claim based on unauthorized Internet information aggregation as
25 preempted by copyright law).

26 ///

27 ///

28

1 3. Public Interest

2 The traditional equitable criteria for determining whether an injunction should issue include
3 whether the public interest favors granting the injunction. American Motorcyclist Ass'n v. Watt, 714
4 F.2d 962, 965 (9th Cir. 1983). The parties submit a variety of declarations asserting that the Internet
5 will cease to function if, according to eBay, personal and intellectual property rights are not
6 respected, or, according to BE, if information published on the Internet cannot be universally
7 accessed and used. Although the court suspects that the Internet will not only survive, but continue
8 to grow and develop regardless of the outcome of this litigation, the court also recognizes that it is
9 poorly suited to determine what balance between encouraging the exchange of information, and
10 preserving economic incentives to create, will maximize the public good. Particularly on the limited
11 record available at the preliminary injunction stage, the court is unable to determine whether the
12 general public interest factors in favor of or against a preliminary injunction.

13 BE makes the more specific allegation that granting a preliminary injunction in favor of eBay
14 will harm the public interest because eBay is alleged to have engaged in anticompetitive behavior in
15 violation of federal antitrust law. The Ninth Circuit has noted that in evaluating whether to issue a
16 preliminary injunction, the district court is under no obligation to consider the merits of any antitrust
17 counterclaims once the plaintiff has demonstrated a likelihood of success on the merits. See Triad
18 Sys. Corp. v. Southeastern Exp. Co., 64 F.3d 1330, 1336 n.13 (9th Cir. 1995) (discussing claim of
19 copyright infringement). Although anticompetitive behavior may be appropriately considered in the
20 context of a preliminary injunction based on trademark infringement, where misuse is an affirmative
21 defense, see Helene Curtis Indus. v. Church & Dwight Co., 560 F.2d 1325 (7th Cir. 1977), it does
22 not appear to be appropriately considered here, because there is no equivalent affirmative defense to
23 trespass to chattels. Accordingly, the court concludes the public interest does not weigh against
24 granting a preliminary injunction.

25 ///

26 ///

27 ///

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. ORDER

Bidder's Edge, its officers, agents, servants, employees, attorneys and those in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined pending the trial of this matter, from using any automated query program, robot, web crawler or other similar device, without written authorization, to access eBay's computer systems or networks, for the purpose of copying any part of eBay's auction database. As a condition of the preliminary injunction, eBay is ordered to post a bond in the amount of \$2,000,000 to secure payment of any damages sustained by defendant if it is later found to have been wrongfully enjoined. This order shall take effect 10 days from the date on which it is filed.

Nothing in this order precludes BE from utilizing information obtained from eBay's site other than by automated query program, robot, web crawler or similar device. The court denies eBay's request for a preliminary injunction barring access to its site based upon BE's alleged trademark infringement, trademark dilution and other claims. This denial is without prejudice to an application for an injunction limiting or conditioning the use of any information obtained on the theory that BE's use violates some protected right of eBay.