

The Internet: Place, Property, or Thing—All or None of the Above?

October 30, 2003

Afternoon Session

PROFESSOR HRICIK: For those of you who were here this morning, welcome back. For the people who are joining us for the first time, you really missed an amazing discussion about some very cutting edge issues, and we are about to take that even further. We will look at scraping, and we will learn what scraping means in a few moments, but it is a kind of trespass for those of you who remember trespass from property class.

We have three speakers this afternoon. One is running a little late getting back from the luncheon. Our first speaker will be George Fibbe, who is an associate with the Houston law firm of Yetter and Warden. I actually know George personally. He has the phone number that I used to have when I was at Yetter and Warden. He took over my phone number.

Mr. Fibbe has been involved in a lot of complex commercial litigation, including a recent case styled *FareChase, Inc. v. American Airlines, Inc.*,¹ in which he represented American Airlines. In that case, a Texas Court issued a temporary injunction against a scraper. I am sure we will hear more about that later.

Our second speaker is going to be E. Alan Arnold. He is a senior attorney with Delta Airlines Legal Department. He is responsible at Delta for intellectual property, technology, E-commerce, and other complex transactions.

1. 2003 Tex. App. LEXIS 5448 (Tex. App. June 26, 2003) (mem.).

Finally, our last speaker is Jennifer Granick, who joins us all the way from Palo Alto, California. She is a lecturer in law and Executive Director of the Center for Internet in Society. She is nationally recognized for her expertise in Internet issues, including computer crime, national security, constitutional rights, and electronic surveillance.

I will get out of the way. Thank you for coming.

MR. FIBBE: Good afternoon. First I would like to thank the Mercer Law Review for inviting me and for the Symposium.

When I first heard the title of the Symposium, "The Internet: Place, Property or Thing, All or None of the Above?," I was reminded of the scene from the movie *Field of Dreams* in which Shoeless Joe Jackson looks out over the cornfield and says, "Is this heaven?," and the response is, "No, it's Iowa." I think the debate over cyberspace is similar to that. If we think about it broadly in terms of, "Is this cyberspace?" as opposed to if we think of it narrowly, "No, it is just a bunch of computers networked together," then there are important legal consequences, important consequences for the law. And nowhere are these consequences more important right now than with the issue of trespass, and, in particular, the issue of what is called screen scraping.

A number of commentators have argued that this cyberspace-as-place metaphor has driven courts down the wrong path to bad results. A lot of the criticisms focus on the public policy implications of these decisions and of the metaphor itself. It is unlikely though that courts are following this metaphor, letting this cyberspace-as-place metaphor drive them to results dramatically different from where they would arrive otherwise. There is still a lot of room both in the unsettled law of trespass and trespass-to-chattels and in the different metaphors and analogies that are available for courts to reach differing results. So it may be more likely that judicial decisions are driven by a much more commonplace balancing of the interests involved in individual cases. Specifically, it seems that courts are much more willing to enjoin cybertrespass when there is evidence that the trespass creates a very serious commercial harm.

I think the recent California Supreme Court case of *Intel Corp. v. Hamidi*² is an example of this. *Intel* went against this willingness to enjoin cybertrespasses. In fact, the *Intel* majority criticized the dissent for using certain analogies. Some may argue that the *Intel* court just avoided the confusion of metaphor, but in terms of the interests that were at stake in that case, *Intel* was very different from most screen

2. 71 P.3d 296 (Cal. 2003).

scraping cases. In particular, *Intel* did not pose the type of serious business harm, serious commercial harm, that typically leads courts to enjoin cybertrespasses.

First I plan on giving a little background on screen scraping as an issue. Generally website owners invite broad access to their websites, and this is especially true of E-commerce businesses that invest millions of dollars in their computer infrastructure, in doing business on the Internet, and particularly in distributing their products on the Internet. However, in some circumstances certain access can be harmful. It can be harmful to the computer infrastructure or it can be harmful to the company's business purposes, its business strategy, or how it wants to distribute its product. So some website owners object to the use of robotic devices in general, or any access to their website for the commercial purposes of someone else.

Disputes over screen scraping, which is also called data aggregation or indexing, tend to be between business actors, and they tend to involve commercial access of a website for profit and to the commercial detriment of the website owner.

So website owners try many different ways to protect their websites from this aggregation or screen scraping. They can post essentially electronic "No Trespassing" signs (or robot exclusion headers), or they can try to block the access of the screen scrapers to the website. That method is usually ineffective because the screen scrapers can mask their IP addresses and get around the blocking that is available right now. Also, website owners often will post website use agreements. We have all seen these on websites—the terms and conditions or user agreements that would prohibit robotic access or access for commercial purposes.

I think the basic issue in these cases is whether the website owner should have the right to exclude the unauthorized access. The various interests that are usually involved are these: Broadly speaking, the website owners argue that the courts should protect their private property interests, and the screen scrapers contend that barring their access tends to stifle the free flow of information over the Internet. Website owners have a variety of causes of action at their disposal, but the one that has really gotten the most attention in the literature has been trespass-to-chattels.

Jennifer spoke in the previous session about the history of where this trespass tort came from, or the recent history of it in particular, so I will skim through these cases. The first resurrection of the trespass-to-chattels tort occurred in the California case of *Thrifty-Tel, Inc. v.*

Bezenek.³ That case concerned phone phreakers who were trying to get authorization codes to make long distance calls for free. The next application of trespass-to-chattels was a case called *CompuServe, Inc. v. Cyber Promotions, Inc.*,⁴ which concerned an Internet service provider suing a spammer. Pete talked at great length about Internet service providers earlier so I will not dwell on that case so much.

PROFESSOR HRICIK: It was not the length, it was the passion.

MR. FIBBE: The passion, exactly. If you missed it, you missed a very passionate presentation.

When we get to the screen scraping, there are a handful of cases out there. The first major screen scraping case was called *EF Cultural Travel BV v. Explorica, Inc.*⁵ That case was not decided based on trespass; it was actually based on the Federal Computer Fraud and Abuse Act.⁶ The court found that the screen scraper's access was unauthorized and enjoined that activity. Explorica had set up a program to scrape EF's tour prices from its website, and then Explorica would systematically undercut EF's prices.

The first major application of trespass was the case that Jennifer spoke about earlier called *eBay, Inc. v. Bidder's Edge, Inc.*⁷ That case concerned the famous auction site, eBay, that we all know. eBay could not come to terms with a screen scraper, data aggregator, called Bidder's Edge, as to the licensing agreement that would allow Bidder's Edge to list eBay's auctions on its site. There was some experimentation, and when that broke down, the dispute arose because Bidder's Edge continued, or they stopped for a while, and then they came back and started to take and scrape eBay's website again.

The case is a fascinating case with a number of very interesting facts, but briefly, from the angle of commercial harm, the court recognized that eBay had a property interest in its server capacity. The court also recognized that the scraping threatened eBay's business reputation. One of the most interesting parts of the case is that the court issued an injunction based not only on the scraping that Bidder's Edge was doing, but the court determined that without an injunction there was a threat that many other scrapers would join the threat and would also scrape

3. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

4. 962 F. Supp. 1015 (S.D. Ohio 1997).

5. 274 F.3d 577 (1st Cir. 2001).

6. 18 U.S.C. § 1001 (1996).

7. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

eBay's website. That discussion was one of the more controversial portions of that opinion.

Shortly after *eBay* was a case called *Ticketmaster Corp. v. Tickets.com, Inc.*,⁸ in which the court refused to grant a temporary injunction against Tickets.com. Tickets.com would scrape data from Ticketmaster and then it would route Tickets.com users to particular Ticketmaster event pages if Tickets.com did not sell tickets to that event.

The court in that case was much more concerned about the information itself than it was about the way Tickets.com accessed the information. Ticketmaster did not really provide evidence of a threat to its computer system or that there was the danger that without an injunction, a lot more scrapers would join in the party. Essentially, I believe that the court did not see an immediate and substantial commercial threat to Ticketmaster by what Tickets.com was doing.

Very quickly, the next case is *Register.com, Inc. v. Verio, Inc.*,⁹ which concerned a company, Register.com, that would register domain names. When someone registered for a particular domain name, Register.com would give them a chance to opt in to receive some commercial solicitations. If they did not opt in, they would not receive them. Register.com also would sell its list of registrants to third-party companies that might solicit the registrants, I think for about \$10,000 a month, a significant amount of money, but only if the person who registered the domain name agreed to receive those solicitations. Verio had what it called Project Henhouse. In Project Henhouse, Verio would scrape the registrants' contact information from Register.com's website, and then it would start soliciting the registrant's business and calling the registrants even if they had not opted into the program.

The next case is *Oyster Software, Inc. v. Forms Processing, Inc.*,¹⁰ and the main point about that case was that the court followed *eBay*, but the court also said that to state a trespass claim plaintiff did not have to show any harm to the computer system; possessory interference in some circumstances was enough.

And, again, *Ticketmaster* came back and there was another decision in that case. I will not get into that here.

Then the case that I was involved in came the day after the second *Ticketmaster* decision, and it was *American Airlines, Inc. v. FareChase*,

8. 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000).

9. 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

10. 2001 U.S. Dist. LEXIS 22520 (N.D. Cal. Dec. 6, 2001).

*Inc.*¹¹ In that case, which was in Texas state court, the court enjoined a screen scraper from accessing American Airlines's AA.com website. FareChase would scrape the fare and schedule data from the website, including American's Web fares. FareChase did this by compromising American Airlines's program that was designed to help American lower its distribution costs. Distribution costs are very important and a very large cost to airlines. In fact, I believe American was spending hundreds of millions of dollars each year in distribution costs. It was something that was very important to the company.

The *American Airlines* court found that FareChase's screen scraping caused a variety of types of harm to the company. It occupied the server capacity, and it harmed a program that American was using to try to lower its distribution costs. The court also found that just like in *eBay*, if there was not an injunction, the other screen scrapers would join in and also start taking American's Web fares.

Now the academic literature on these cases is surprisingly negative. A few scholars have actually argued for applying trespass-to-land rules to websites, to consider websites real property, but most of the academic writers have argued quite the opposite.

The complaints about the trespass-to-chattels theory in this context include that it is just too old to really capture the technical nuances of the Internet and the technology at issue, and also that it does not really take into account the public interest in the free flow of information on the Internet. The arguments are very interesting, including that if we allow individual websites to assert their private property rights on the Internet, it will essentially, over time, shut the Internet down because it will create what some have called an anti-commons, where everyone has the right to exclude and the whole system breaks down. Also there is some discussion that private companies should not be allowed to assert or protect their private property interests in what really should be a very public space.

There are a few scholars, however, who have supported the trespass theory. And they argue, many of them related to the law and economics arguments, that allocating property rights in a clear way will allow an efficient outcome and will help the bargaining process. Also within the trespass theory, some argue that there is plenty of room for balancing of development interests. I think a lot of what has been going on already, based on what the courts have done, is the balancing of

11. No. 067-194022-02 (67th Dist. Ct., Tarrant County, Texas, Mar. 8, 2003) (order granting temporary injunction), available at http://www.eff.org/Cases/AA_v_FareChase/20030310_prelim.inj.pdf.

interests. The courts are balancing a number of different interests that are involved in these cases.

Another common theme in the literature is that we should not worry about setting up special laws for the Internet because common law adapts quite well to new technology. It always has and it always will. One of the more colorful phrases is that we do not need a law of the Internet just like we do not need a law of the horse or anything else.

The latest decision in this whole debate is *Intel Corp. v. Hamidi*,¹² which is a fascinating case from the California Supreme Court. Jennifer and Pete spoke about the facts of the case a little bit earlier, but basically Hamidi was a former Intel employee who aired his grievances with the company by sending mass e-mailings to the internal e-mail addresses at the company. The e-mails of course were very critical. After Hamidi refused to stop sending the messages and after Intel was unable to block his messages, the company sued him and won an injunction based on trespass-to-chattels. But, the California Supreme Court decided that Intel should not be granted an injunction. The court implied that Hamidi may have committed a technical trespass, but without any evidence that the e-mails threatened the integrity of Intel's computer system, the company was really limited to just self-help, and no injunction should be issued. The majority did not rule on Hamidi's claim that the injunction would violate his First Amendment rights. I will come back to that.

There were also two very lengthy and vehement dissents in the case, and the dissenters argued, among other things, that when self-help is futile—and I suppose this is the example that Pete Wellborn was using earlier—a property owner should be able to enjoin even a harmless trespass, a continued, repetitive, harmless trespass. Intel might be an important case because of its in-depth examination of trespass-to-chattels, and there are some very interesting arguments that are voiced throughout the opinion and the dissents.

I believe that screen scraping cases are very different from *Intel* because the screen scraping cases are predominantly commercial. That is really the key aspect of screen scraping cases. The screen scraping disputes involve a commercial entity scraping another website for its own commercial benefit and to the commercial detriment of the website owner. And, in fact, the founder of Bidder's Edge, the defendant in the *eBay* case, said that it is one thing for customers to use a tool to check a site but quite another for a single commercial enterprise to do so on a repeated basis and then distribute that information for profit. These

12. 71 P.3d 296 (Cal. 2003).

website owners in all these cases invested millions of dollars in their distribution plan, in their websites, in their computer infrastructure, and in their plans for using that. The screen scrapers tend to undermine that with essentially a free ridership issue.

In *Intel* Hamidi's actions may have been annoying to Intel, but they were not the sort of thing that threatened a very massive commercial harm to the core of Intel's business the way some screen scraping disputes can. In fact, the court in *Intel* was not convinced that Intel had suffered any sort of irreparable harm, and it said so.

I also think it is not surprising that in balancing the different interests that are involved in these cases that courts that see this commercial harm are willing to issue injunctions in screen scraping cases because when you look at the balancing of interests, the courts are very accustomed to protecting property rights. The courts are accustomed to disputes over property rights, whereas the larger arguments about the free flow of information on the Internet and things like that seem a bit farther out and more like the kind of thing the legislature should be looking out for.

I have a couple of other points on the *Intel* case in relation to screen scraping. There was some indication at Intel that Intel had not done all of the self-help that it should have done. Intel, had it wanted to, could have instructed its employees to tell Hamidi, "We don't want your messages," or "I don't want your messages." And according to Hamidi, he would have stopped, and in fact he did stop sending messages to the people who requested that he not send them anything. So if you take Hamidi at his word, Intel could have just told its employees to respond to this person, or people like this, and tell them that they do not want such messages. That goes to a much larger issue of whether Intel would have wanted to do that or not, but there is some indication that maybe Intel did not do all of the self-help that it should have.

Last, very briefly, even though the court did not rule on the First Amendment issues in the case, I think it is clear when you read the opinion that the court was somewhat concerned about them. Both the majority and the dissent had some focus on the free speech issue in this case. The majority went out of its way to address the argument over whether there was enough state action for an injunction even though it did not rule on that basis. And the majority repeatedly objected to the idea that Intel was out to get Hamidi because of the content of his messages. There is very much the sense of the free speech undertones in the opinion. I think it was important to the court even though it did not rule on that basis.

So *Intel* was a very different case than most of your screen scraping cases. My opinion is that the screen scraping cases will, including those

based on trespass, survive what the *Intel* majority has said because when the interests are placed in the balance, which I believe courts are doing, the balance is very different in most screen scraping cases.

To relate it back to the metaphor issue, I once attended a lecture where the professor said that certain conservatives on the Supreme Court wanted a particular type of constitutional interpretation to be like a straightjacket on judges to constrain their discretion. But it turned out that it was more like a big bulky sweater that did not really constrain anything, but it did disguise what was going on underneath. It did not really do what it was supposed to do. In fact, it was even worse. However, I think that the metaphor in this context may be exerting a somewhat similar influence in these cases because I think it is important, particularly as a practitioner, in what is going on underneath and to look at what the interests are in these cases. Looking at the commercial harm interests in particular helps explain what some of the cases are doing.

I apologize. I have run over my time. But thank you very much.

MR. ARNOLD: Good afternoon. I would also like to thank the Mercer Law Review and Liz and her team for putting on a truly representative panel. I have been very impressed with what I have heard so far. I am Alan Arnold, an attorney in the Law Department at Delta Airlines, up the road in Atlanta.

First, I would like to say that this is probably the first seminar that I have ever been to where the after-lunch crowd was bigger than the pre-lunch crowd. The first thing you can learn when you actually go out and become a practitioner is leave after lunch. That, I think, is probably the most valuable thing I can tell you.

I am here because if you look at the Internet, and you look at the thing that any good capitalist society will do, which is turn anything into something you can make money on, the Internet has been a remarkable tool for airlines. But, it has been a tool with unintended consequences.

The Internet started off, as the previous speaker said, as a way for airlines to reduce their distribution costs. Traditionally, airlines distributed their tickets through travel agents and corporate-owned call centers. Travel agents took a fee or a commission. We have recently, as an airline, reduced the commission that we are willing to pay our travel agents to zero, which is one way to handle it. But as an interim measure, we saw that the Internet was a wonderful distribution mechanism that could reduce the cost of distributing a ticket by two-thirds to three-quarters.

The unintended consequence was that the Internet destroyed price opacity. And you are all, as consumers, enjoying prices for tickets that

are, in actual, not-adjusted-for-inflation dollars, lower than they were fifteen years ago. So maybe I will not be here next year. But that is the biggest unintended consequence of the Web for airlines.

Even today, the sheer size of, or the sheer value of, transactions on the Web for airlines is staggering. In 2002 Delta tickets sold on delta.com alone represented 1.6 percent of all business-to-consumer E-commerce in the world. If you look at delta.com plus all other online channels, Delta tickets represented about 4.9 percent of all business-to-consumer E-commerce. And finally, if you look at all online transactions in dollar terms, airline tickets in general make up 21 percent of all business-to-consumer E-commerce.

So obviously the airlines and the Internet are inextricably linked. A lot of the impressive percentages are a function of the price of what we sell. Each thing is not a book. It is not a five dollar item. It is more of a two-to-four hundred dollar item. Still, the Internet and the way we distribute our product go hand in hand. To buy a ticket, you have to choose what city you want to go to, and you have to choose what time you want to go, you have to choose what fare class you want. When these inputs are spread over dozens of choices for each destination, you have the kind of data-rich environment that the Web is made for. All of this data can be put onto a website that the consumer can manipulate and do a lot of the work that our reservations agents and travel agents used to do. So obviously the Internet is critically important to airlines.

Now, of course, having a website has opened us up to the kind of screen scraping attacks that you have already heard about today. But, I think "screen scraping," as it relates to an airline website, is probably a bit of a misleading term. We are not talking about an automatic program that came in and asked, "What, delta.com, are you displaying and let me scrape that?" What we see in our space is that people have written programs not just to screen scrape, but to shop delta.com thousands of times an hour looking for city pairs and fares. That is not just asking "Delta, what are you displaying, let me make a copy of it?" It is saying to Delta, "I want you to go to your database, and I want you to price what you are charging to fly from Atlanta to Birmingham at all of the sixteen times a day that you go there for today, tomorrow, next week, and a month from now." All of those particular choices have consequences, and they require a database search, exercising our pricing engine, manipulation of our computers, the spitting out of a result, and the copying of that result. That kind of access and use is very disruptive and a very costly thing for Delta, and every other airline that has a Web presence.

Recently, we determined that we were getting hit at a clip of about 9000 city pair shoppings per hour from a particular IP address, so we

blocked the IP address. This entity actually wrote us an e-mail saying, "Hey, we do not understand this. You blocked our IP address. We are just trying to sell your inventory (notwithstanding the fact that they had not sold any inventory for us). That should be a really good thing for you. And by the way, we are an ethical spider (despite the fact that they were not spidering, but were doing a fairly deep scrape of our infrastructure)." We found out that in the midst of going back and forth in this e-mail discussion with them, they were hitting us from thirty-six additional IP addresses all around the world—so much for "ethical spidering."

In September of this year, we had at delta.com our busiest day of the year. We set a record for delta.com. Our engineers tell us that had we been being shopped by this, or any other outfit at a rate of 9000 shopping sessions per hour, we would not have had the physical capacity to serve that record day. So, this is, to us, not a debate as to whether or not there is harm or potential harm, because for us, in the real world, there is.

Getting to the question of whether the Web is animal, vegetable or mineral, the Web has gone a bit to ruin from where it had been going and where it could have gone. During the .com bubble of the late 1990s we, as consumers, became obsessed with the idea that we could get really cool stuff for free. But that "stuff" was not free. It was paid for by venture capital. It was fueled by people's use of venture capital dollars for marketing to get people to come to their site, view things, use them, get used to them, with the idea that they were going to "capture your eyeballs" and capitalize on you in some way. Well, those days are just over.

I became addicted to Vindigo, an application for my palm pilot that would give you all of this really cool information about the city you were in, like city maps, restaurant reviews, what's playing at the movies, who's at what club, and all of that. I had it for about two years and then, boom, it cost \$19.99 a month. I was addicted to it, and I had to pay for it. The Internet is becoming a "pay as you go" product. It was never meant to be a place to "get cool stuff for free." That was just marketing. We all have to understand that we were all sucked in.

The web is a place to make money. Everything that we have talked about today are commercial websites, and they are there to make money. The sites are there, not as a truly public space, but as a store where consumers can go to buy the goods and services of the people that want to sell things there. Now, I just said the word "store," and I just said "there." But I'm going to disavow that very quickly as I move to the next part of my discussion because I decidedly do not think the Web is

a “place.” But, nevertheless, the Web is there for consumers to buy things from people.

You cannot go into Wal-Mart and start a fire on aisle three because that is what you feel like doing. You obviously cannot. So, to me, there is no question as to some of the things that you should or should not be able to do on someone’s website. The idea of a user’s free speech right as it relates to use of commercial websites is a fairly misplaced concept to me because, again, you would never imagine that you could walk into Wal-Mart and hold up a placard on aisle three and start yelling about any particular concept that you wanted to yell about. That is not what you are there for and that is not allowed.

But when you look at *Hamidi*, I think that the *Hamidi* case had to do as much with free speech as with anything. I think that case was probably rightly decided, which is my own personal opinion, because I think that Intel certainly could have done what any employer has a right to do. Intel could have told its employees that they were not allowed to do anything other than to tell the person sending the e-mails that they did not want to hear from that person again, but Intel did not do that. So *Hamidi*, to me, is a hard case making bad law.

So, where I come down on the issue of what the Internet is, is it a place, is it a thing, is it something else, is it both: To me, there can be little debate that the Internet is a thing. I could show you at least Delta’s part of the Internet, and it is servers, it is routers, it is computers, it is storage devices, it is wires, and it is electricity; and even electricity has mass because energy equals mass times velocity squared. So, energy is a thing as well.

It is not surprising to me that website owners ought to be able to access common law theories to be able to stop people from doing things with their websites that they do not think are in their commercial interests. I think that trespass-to-chattels, certainly an old chestnut as people say, is probably the most relevant. I do not think we need Internet law, just as I do not think we need horse law or car law, because the Internet is a thing and it exists.

I will close with one quick example of why I think that the Internet is a thing. I have a friend in Atlanta, Jim Cain, who is a long-time computer and Internet aficionado. He put together, just for his own personal amusement, a website he called “Cranecam.” When you accessed the website, there was a camera that was focused on a table, and on the table was a mechanical toy crane. And you could manipulate the crane with the cursor on your own computer. You could move blocks and other things around with the crane. He finally gave up running the website when people figured out that they could grab the edge of the

table with the crane and pull the crane off the table and crash the crane on the floor.

To me, that is just the perfect example of the Internet. The Internet is nothing more than physical boxes being manipulated to do things that we want them to do, even down to the issue of storage. You can say that storage is ones and zeros. It is not ones and zeros; it is bits of matter on a disk that move from one place to the other to create what is read as ones and zeros. It is physical movement. It is a real thing and it cost somebody somewhere some amount of money to put it there. So from my standpoint, the Internet is definitely a thing.

Thank you.

PROFESSOR HRICIK: And now Ms. Granick.

MS. GRANICK: Thank you. New technology has changed the way we think about property. Property, which used to be something tangible, is now something more difficult to define. Technology has created new property interests, and it has changed the economics of things that previously we did not even think of as property. Things like brand names, like ones and zeros, and like electrons.

So how then, now that we have this new digital technology, are we thinking about property? Well, we are developing a theory of property through the cases that George talked about, which is a theory that if a company suffers harm, it has a property right and that that property right should not be deprived. Before the Computer Fraud and Abuse Act,¹³ which is the Federal anti-computer attacking law, early computer crime cases had to address the issue of what theft is. At that point in time, there was a question of whether I have stolen another's software if I copied the software on another's server I have not deprived anyone of the use of that software, I simply have a copy. Maybe that is copyright infringement, although at a certain point in the 1970s, we did not even know whether software was copyrightable. The law had not decided that issue then. So if I take that copy of the software, have I stolen something? What about if I used your computer without your permission, have I stolen something from you? What have I taken?

The courts began to answer this issue by using the concept of harm to the owner of the computer server as a proxy for this question of what property really is. Instead of saying, well, yes, there is a property interest here, they said, well, if there is harm, then there is theft. And the statutes, the Computer Fraud and Abuse Act and the state statutes

13. 18 U.S.C. § 1001 (1996).

that address unauthorized use of computers, have not resolved that kind of problem, that sort of sleight of hand that if you have suffered harm then you have lost property. The Computer Fraud and Abuse Act says that unauthorized access to computers is illegal. Depending upon the intent and the damage caused, it can be a misdemeanor or it can be a felony or it can be a very serious felony, but it is the unauthorized nature of the access that makes that use illegal.

We have come to a situation that if the company does not like the use that is made of their servers, they can make a claim. So in the cases George discussed, if I do not like that somebody is sending me spam, I can make a claim under the Computer Fraud and Abuse Act. If I do not like that Hamidi is sending e-mails to my employees, I can make a claim under the Computer Fraud and Abuse Act. If I do not like that this person is telling my customers that my product stinks, I can make a claim under the Computer Fraud and Abuse Act.

But what I am here to tell you, ladies and gentlemen, is that the law is not about preventing all sorts of commercial harm. The law allows, and in some cases even encourages, certain kinds of harm. For example, in defamation law we allow harm to reputation that occurs as the result of the publication of truthful information. In intellectual property law, we allow certain types of harm to enable speech, like parody under the Fair Use Doctrine. We do not protect ideas under intellectual property law. We do not protect data, raw data, under intellectual property law or under copyright law. There may be some protection for ideas under patent law if an idea satisfies the requirement for patent, but copyright law protects expression; it does not protect ideas and it does not protect raw data, like your telephone number, or how much something costs, or how much something is being sold for.

So if we do not want spiders coming on our websites and collecting information there because there is some kind of commercial use being made of it that we disagree with and we do not like that kind of competition, well, the law does not protect commercial entities against harm from competition. Competition is what capitalism is based on. So those of you who were here this morning will remember that I said this idea of the Internet as a thing or a place was a proxy for stopping unwanted content, for stopping messages that the company did not like. I am here to tell you that this concept of the Internet as a place or the Internet as property is a proxy to stop competition—to stop commercial use of the website for some kind of competition that the company does not like.

Let us look at this *FareChase* case a bit closer. Does anybody here understand how exactly FareChase harms American Airlines by collecting information about how much American Airlines is selling

tickets for? This “deep scraping” argument is a great example of a very persuasive kind of legal writing. But what does that really mean? American Airlines put a database on the Web with a Web interface by which consumers can search that database to find out how much American is selling tickets for. There is nothing deep about that. That is the information that American publishes on the Internet to consumers so consumers will buy their tickets. And why have they done that? Because it is good for American Airlines and Delta Airlines to sell tickets over the Internet as opposed to selling them through a travel agent—the distribution costs are much cheaper.

What FareChase’s software did was, if the user of the software wanted to know how much it costs to fly from San Francisco to Atlanta, the user could use this software to search all of the airline websites at the same time and then compare prices to see which fare and which times are best for the user. That is shopping. It is a “shopping bot.” Without that software, the user would have to go to all twenty websites and see what the fares might be.

And, if it is true that the distribution through the website reduces the airlines’ costs, you would think that American Airlines and FareChase would be the best of friends because the software drives people away from travel agents and directly to the website. But, there is something else that is more complicated here, and that is what American Airlines objected to: FareChase would sell its software to travel agents.

I want to make a distinction between the facts of this case and the situations that Alan was talking about. In *American Airlines* the software worked when the user asked for the Web fare information. There are other types of software that repeatedly query the database for the information and collect information many times a minute or many times an hour, and that kind of software can produce a load on the system which may interfere with other people’s access to the system. That was the evidence in the case involving Register.com, I think. Was that in *Register.com*?

MR. FIBBE: (Indicates affirmatively).

MS. GRANICK: In the *Register.com* case, all of the searching was not user directed. That may make a difference if we are talking about harm to the server or use of the server that prohibits other people from having access to it. In *American Airlines* we did not have that. There is a user who really wants to know how much it is going to cost to get from San Francisco to Atlanta, but American Airlines had a different plan. Its plan was, even though it published its Web fares on the Internet for anyone to see and search, it decided that it was not going to allow travel

agents to see this information or to use it. A user could only buy a ticket for himself and maybe for his boss. But the boss could not buy a ticket for the user and the user could not buy a ticket for a friend. There were all sorts of rules that American decided on to try to prevent people from looking at these fares on the website and telling someone else, "I am your travel agent and I am helping you get the lowest fare." And how would American prevent this? American just put it in the user agreement, which was tucked into a dark little shady corner of the website. I will talk about user agreements a little more in a moment.

So American published these Web fares on the Internet and said, "Travel agents, don't look, you need to pay us for these fares we publish. When you pay us, we will sell you these fares." The idea was to shift the cost. The travel agents would pay by increasingly taking on more of the distribution costs that American Airlines was paying to groups that aggregate and computerize the price of airline tickets overall. All of this cost that the airlines bore was going to go shift over to the travel agents. So, it was tough on the airlines, yes, but now it is going to be tough on the travel agents.

This was American's business model. It was called the "Every Fare Program." Its business model was to sell the published fares. The harm was that FareChase made it easier for travel agents, who American did not want to have seeing these fares, to find out what the Web fares were and to use them and sell them to their clients.

Is this business model of selling something that is already published a property interest that the law ought to protect? Well, the fare data is not protected under intellectual property law. It is not a trade secret; it is published on the Internet. It is not copyrighted because it is fare data. So if you publish something, can you then also sell it and should the law protect that? I think the answer to that is clearly no. There is certainly no legal support for protecting that business model. So instead the airline said, "Well, you are using our servers in a way we do not like." The complaint about the use of the servers was a proxy to protect this novel business idea that was unprotectable legally by any other existing legal doctrine.

When looking at these claims in which the plaintiff uses an alleged property right in the server to gain control over information in a way that is not allowed in intellectual property law, just like when that alleged property interest is used to gain control over what somebody is allowed to say, we have to take a step back and be really careful. Intellectual property law has developed over time to balance the interests of the public with the interests of the producer of the intellectual property. Here, there is no balance.

If American Airlines's position was adopted generally by the courts as a whole, companies would have the right to control how users can use price data for comparison shopping. It would be similar to a situation in which Robin's dad posted how much he sells his wooden ducks for in the window of his store but said, "You cannot look if you are a competitor duck seller. You cannot learn how much I sell my ducks for. You just set your prices and I will set mine. Or you can only look if you are going to definitely buy." What is the harm, really, of having "travelers" come and search your website for fares and then end up not buying? Is there alleged commercial harm from having people shopping and not buying? If I walk into Macy's—and I am from New Jersey so I spend an immense amount of time at Macy's—and I do not buy anything, Macy's cannot tell me, "Well, you have harmed us by coming in here without actually buying." I can comparison shop. That is what capitalism is about.

This is not a kind of harm that is cognizable under the law, and I would say nor should it be. I think it would be extremely dangerous to capitalism. Capitalism is competition and it is the consumer's right to try to get what he wants at the best possible price that he can find it for by using the power and the promise of the Internet as a communications tool. So these allegations of some kind of business harm that is not cognizable under any legal theory that we have heard of before is not about a harm to the servers. It is about harm to the business model.

Let me say a little about the user agreement and then I will sum up. The user agreements are really interesting because there is a lot of user but there is really not a lot of agreement in there. It is one thing perhaps to have a website where, when you go to use it, the user agreement comes up, you have to read through the whole thing, and then click that you accept. It is another thing when the terms of service are tucked away under a little link at the bottom that says "legal" and there are "terms of service" with all sorts of conditions that the user never actually has to see, read, or manifest any kind of agreement to before he uses the website. And the people here who have already had contract law, know that one of the hallmarks of a contract is agreement. Without agreement, there is no contract.

There is an issue other than this formation issue about whether these terms of service ought to be enforceable. Should these contracts be enforceable if the terms have negative social consequences, negative social externalities? Here is an example: In software licenses I may agree that I am not allowed to criticize Microsoft's software. This is actually a common term in Microsoft's licensing agreements. So I agree that I cannot criticize Microsoft's software because I need to use Microsoft Office, and it is not worth it to me to stand up and say, "No,

I will not agree to this limitation on my speech. It is not worth it to me to negotiate a higher price for that, or if Microsoft will not negotiate a higher price for that, maybe I am just going to agree.” But the public externality is that there is this world of people out there who are not allowed to say anything bad about Microsoft.

One question we have to ask is should these types of terms and conditions in licensing agreements be enforceable, even when there is assent, and in these screen data aggregators there is no assent, even though they impose this social cost that is far greater than the individual costs to each user. I was really struck with this by something our lunchtime speaker said about an international or a universal regulation of the Internet through contract. Mr. Klein said that there would be uniform rules and regulations because each user would be contracting with ICANN or with an ICANN-type body. I do not know what those of you who were at lunch thought about that, but it gives me a horrible little chill because my understanding of contract is that it is a bargained for exchange, a mutual, arm’s length transaction. But in a regime in which there is a company with a total monopoly over the domain names that can reach out and say to me, “You agree to my terms and conditions or you get nothing,” then I think we have to ask ourselves if that is really a contract. Is that a contract that the law should enforce or is it some kind of monopoly imposition of regulation upon us as Internet users without any kind of democratic check or balance at all?

Let us go back then to the idea of property. This is a quote from a law review article, “Place and Cyberspace,”¹⁴ by Mark Lemley, a precautionary note with which I would like to end my comments. He says, “Property is a doctrinal tool that we use to create a just society. To reify it, to make it a talisman whose very implication renders us incapable of thinking through the optimal social result, is to exalt form over substance.”¹⁵ Let us not do that.

PROFESSOR HRICIK: I think some of the first year students are going to have to leave. If any of you have any questions for the panel, go ahead and ask now before you have to take off, and then we will open it up for rebuttal and questions and comment. I will point out that I think that the Pete Wellborn passion meter was pegged a few times there.

MS. GRANICK: I do not like to be beaten.

14. Mark A. Lemly, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003).

15. *Id.* at 542.

PROFESSOR HRICIK: Are there any questions from the audience first before we throw it open for rebuttal because I know many of you have to go? Let us hear some. You can go ahead and take off if you have to. Way in the back, Professor Lewis.

PROFESSOR LEWIS: I am not familiar with the *Hamidi* case. Was Intel free after denial of the preliminary injunction to seek damages against Hamidi for the indirect commercial loss, the loss of employee productivity resulting from the time involved in having to read the spam, delete it, or emotional distress?

MS. GRANICK: The court held that there was no action for trespass. Intel moved for the preliminary injunction, but because the tort for trespass-to-chattels was not met, Intel did not have a cause of action so it could not recover damages of the sort you mention. I am not sure that under the First Amendment Intel would have been allowed to seek damages for employee distress or something of that nature. Some of it may have been in the way Intel decided to litigate the case and the way Intel framed its causes of action in the first place. My recollection is that initially there was a nuisance cause of action in the lawsuit that for some reason was left behind and dropped. But based on how the case eventually was being litigated, no, Intel did not have a claim so it could not have sought that type of remedy.

MR. ARNOLD: I would like to follow up on one thing that Jennifer just said. I think it is an important point, and I do not mean to sound like I am quibbling. The First Amendment did not apply in *Intel*. The First Amendment does not apply to anything other than governmental entities. We are talking about commercial sites, and there might be some issues about commercial speech or other things like that. But the bottom line is that the First Amendment does not prevent Intel from recovering damages from any private individual.

MS. GRANICK: It does because the order for damages is a court order by the government. The First Amendment would not prevent Intel from, say, firing one of its employees, one of its at-will employees for reading these messages. But the court could not impose damages for speech even in a civil context. The First Amendment would prevent that.

MR. ARNOLD: Well, the content of the speech. The question was whether the interruption itself to the business was actionable for reducing the productivity of the workers. There was no element in Professor Lewis's question about whether the content of the speech

damaged Intel. It had to do with the fact that the speech happened at all, and that disruption is not protected by the First Amendment.

MS. GRANICK: Professor Lewis mentioned emotional damage and I misinterpreted that as the psychic damage to the employees from the content of the messages about Intel being a crappy place to work. What you are saying is right if you are talking about the volume of e-mails or something like that, then definitely. But if your question was about the content of his message, then . . .

PROFESSOR HRICIK: With respect to the scrapers in businesses, I understand. I do not pretend to understand the *American Airlines* facts very well, but it sounds like American Airlines figured out a business model that worked and provided cheaper fares to consumers. You are letting a free rider come along and take away what American was going to offer in savings. Aren't you going to end up with businesses not offering innovative products and innovative pricing to consumers and end up hurting consumers?

MS. GRANICK: No. No. What FareChase actually did was drive consumers to the cheaper, low-cost alternative that American Airlines had invested in setting up. Once the user got the FareChase information and American Airlines had the fare the user wanted, the user would click on the fare and be taken to the American Airlines website and the user would buy the ticket directly from American Airlines. To American Airlines it was the same as if the user had shopped at the website directly. It just saved the consumer time. The part that American Airlines did not like was that it did not want travel agents using that because it wanted the travel agents to pay to see the Web fares that were published to the rest of the world.

MR. FIBBE: I would like to respond to that. I think that Professor Hricik's point is a good one. If American was deprived of the opportunity by FareChase and its software of being able to lower its distribution costs through this program, then it definitely would no longer be able to offer such low fares. That is simple, basic economics. FareChase essentially wrecked American's plan to lower its distribution costs and those costs will be passed on to the extent that businesses—and I think the same argument was made earlier in the ISP context—can save costs by passing those along to consumers. And the FareChase product was not being used by consumers; it was being used by travel agents.

MR. ARNOLD: Well, hooray for FareChase because it is definitely not a 501(c)(3). It is not there to protect the consumer, to get the lowest price available. It is there to sell a product to the travel agents. The travel agents are there to try to get consumers to book tickets through them so they can charge a fee and the consumers have an ultimately higher cost for an airline ticket because travel agents are also in business to make money.

We are in business to make money, too. Let us not kid ourselves. But, what you have to remember about the *FareChase* case is that FareChase's business model was to sell software programs not to you, or to me, or to Jennifer, but to travel agents, as a commercial business, a travel business, to allow travel agents to say, "Hey, look, we are not irrelevant. We can offer the same low fare that Delta can directly, but we want our little cut as well."

It is all about making money in little pockets. I want to disabuse you of any notion that people are out on the Web trying to do good for society when it comes to the buying or selling of products. We are there to get the product to consumers in a way that will make us money. FareChase was trying to create a program that it could sell to people to make money. Travel agents are there to try to get consumers to come to them to buy tickets through them so they can make money. It is not about who can do the best thing for society because obviously, Delta thinks that the best thing for society is for us to be able to make money, for us to be able to employ people, and for us to be able to provide consumers with the lowest price we can so that we can compete.

We are not on the Internet to sell consumers a low-priced ticket because we want to sell consumers a low-priced ticket. We are there because if we do not sell low-priced tickets, consumers will fly AirTran. And if AirTran cannot sell low-priced tickets, consumers will fly Jet Blue. And if Jet Blue cannot do it, then Southwest can. It is all about competition in its truest form. And to have something disrupt that competition in its truest form means that consumers will not, at the end of the day, be paying the least they can for a ticket.

Now, obviously there are certain laws in place today that we cannot violate, like antitrust laws, unfair competition laws, and those kinds of things. But, if it is American's business model to say we only want consumers to get this fare right here on the website, then I cannot think of a good reason why they should not be able to follow through with that business plan and say that consumers can only get this fare right here on this website.

MS. GRANICK: Because American does not have the right to control public information. Once it puts that data on the Internet, American

does not have the right to control where the data are published. The data are not copyrighted so there is no prohibition against copying it. It is not a trade secret, so there is no reason one cannot disclose it. It is like saying that I cannot read it on the website and tell somebody else; I cannot read it on the website and I cannot tell the travel agent.

What really interferes with competition is this effort to use these new property rights to control public distribution of fare data so that consumers cannot efficiently shop for the lowest fare. Delta does not want consumers to find the lowest fare; Delta wants consumers to buy its fare. But what the consumers wants is want to find the lowest fare. And the consumer can take the time to go to twenty different websites and find that low fare, or he can go to a travel agent who can find those low fares for him. That kind of consumer collection of data about what services are out there and at what price is competition. It is anti-competitive to say that because we control our website we can pick and choose who is allowed to read the fare data there. Travel agents cannot. Business travelers cannot. People who are buying tickets for their friends cannot. They put all kinds of restrictions on it, because it is just not as efficient for the overall business model. If you publish fares on the Internet, consumers should be able to see them, and there is no legal right to say if I publish it, no one else can talk about it. No one else can see it. There is no other forum in which you have the right to look at this data. That right did not exist up until now.

MR. ARNOLD: That grossly simplifies and somewhat mischaracterizes what is going on because the question with *FareChase* is not whether someone has the right to “look at the fare” because obviously anybody in the world can go to delta.com and see what that fare is. The question involves how they are doing it, with what intent they are doing it, and how disruptive the manner in which they are accessing that data is to our business.

If a consumer wants a lower fare and cannot get it at delta.com, then there are dozens of other alternatives with different airlines. That is why we have to meet the competition at the competition’s price point. That is the free market at its purest and finest. To throw Internet regulation on top of that would manipulate the way airlines choose to sell their fares and that, in and of itself, is anti-competitive and takes away the ability to have the one-on-one competition that has caused fares to be so dramatically lower today than they ever have been.

MR. FIBBE: Let me jump in and make a couple of points. First of all, this proposed rule essentially of “come one, come all,” if you invest in property and put up a website you cannot put any restrictions on it; it

is done, it is out of your hands. The cost of doing business on the Internet just went up and to the extent that you as a consumer will incur some of the costs that just went up, it is not good for you. Second of all, I would say on this issue of website use agreements, in the screen scraper cases, *FareChase v. American*, make no mistake, the scrapers have actual knowledge of the user agreement. It is not so much that the agreement was tucked away in the corner of a website; there was no dispute that the scrapers knew the terms and conditions that were placed on the website and continued to access the website in violation of those terms and conditions. And that is an enforceable contract. The question of assent goes away with actual knowledge. Actual knowledge of the terms and conditions combined with an assent manifested by using the website, which is what is granted, takes that issue away. To the extent that an individual consumer surfing the Web can say, "Gosh, that was not conspicuous enough, I did not really see it or assent to it," is a more difficult question than it is in these cases because in these cases the screen scraping companies know darn well what those terms and conditions say and they violate them intentionally.

In addition, I would say that the notion that once you connect your private property to the Internet, you have basically forfeited its private character is in the long run not a good thing. The analogy in *Hamidi* (and again we're dealing with metaphors), is that just because your private driveway is connected to a public street does not mean anyone who wants to can park there. These are some of the property issues that are going on. But I guess we have been going without any questions for some time.

PROFESSOR HRICIK: That passion meter, the Pete Wellborn passion meter —

AUDIENCE: I know you do not like analogies much but is there not an apt analogy here to get back to the property issue with the law of invitees? I do not know the law of invitees, but it seems to me that it would handle a lot of this scraping business. What is the law when somebody from Wal-Mart says to the employees, "Go over to Target and see what they are charging for all of this merchandise?" Can they do that lawfully? Can Wal-Mart send its employees over to Target, without the intent to buy anything, just to get the information that they are publishing on prices?

MR. FIBBE: My understanding is that the courts have upheld the right of the property owner that was the subject of the trespass. I

cannot remember which was Wal-Mart and which was Target, but to exclude people —

AUDIENCE: Well, if that is the law, have people not cited those cases? It seems to me that there are a lot of cases dealing with that.

MS. GRANICK: If you want to analogize it, that is a real property analogy. But could the law prevent the Wal-Mart employees from reading the Target prices in the newspaper? The interest there is that, if you trespass on property, on real property, you have an absolute right to exclude.

AUDIENCE: But that is what gets to the issue of place, which is where this is all going. Is the Internet a place? When you access the website, is it the equivalent of walking into a store or is it the equivalent of seeing the advertisement in the newspaper?

MR. ARNOLD: I think that is the difficulty with the *eBay* case and that is what the court struggled with. The court said in effect, we are not going to find that the Internet is real property. It would be an obvious trespass to real property, and eBay would have the absolute right to exclude Bidder's Edge from coming onto the website if it were real property. The court refused to find that because that would not make sense.

I do not think there is a case out there that has resolved one of these cases on pure real property law because, again, analogies are one thing, but real property law applies to real property. Trespass to chattels applies to tangible personal property, and as between the two, to me it is fairly clear that the Web is just not real property.

The court was looking for some harm. That is why Wal-Mart would have a difficult time excluding a Target employee from just walking on the premises to price shop. And, similarly, I think if we were just talking about somebody coming onto delta.com and simply asking, "delta.com, what does it cost to go from Birmingham to Atlanta?" we would have a difficult time, (a) ever detecting that, but, (b) even if we knew about it, it would be very difficult to get a court to find that there is any harm there to justify an interference, a taking, or any harm whatsoever. What we are really talking about here are actions that are truly destructive, practically and legally. We, Delta, are not going to, and this may be used against me someday, but we are not going to go after one individual for making one shop. It just does not make sense.

PROFESSOR HRICIK: Professor Lewis in the back.

PROFESSOR LEWIS: Question. Is another way of looking at what American is doing is engaging in a form of price discrimination in that it will only sell at the price on the Web to particular buyers at a particular time? If so, and if that particular type of price discrimination does not violate the statutes that regulate price discrimination, is it a judicial function to essentially apply a common law claim to supplement the statute?

MS. GRANICK: A claim that would promote the price discrimination or to prohibit it?

PROFESSOR LEWIS: To prohibit it.

MS. GRANICK: To prohibit it. I think that assuming that the price discrimination was not otherwise illegal for some kind of price fixing or antitrust or some kind of reason like that, then what I would see is that it is American Airlines's business who they sell the tickets to absent any kind of other consideration. But when we are talking about the distribution of the information on how much those tickets are being sold for, my point is that American Airlines cannot and should not be able to use this ownership of the servers as a proxy to control information that is otherwise published and publicly available.

AUDIENCE: How does American Airlines publish (inaudible) the FareChase versus a company like Orbitz and Travelocity which has (inaudible).

MR. FIBBE: That's an excellent question. It is because they have a business relationship with those other places. Orbitz and Travelocity are essentially online travel agents who, by what they do, help reduce American's distribution costs. It is consistent with American's distribution on the Net and they have a business relationship with these people. The screen scrapers are positioning themselves as unauthorized and unlicensed distributors of their target website's products, and I think it's easy to see how a company can have a very serious and very protectable interest in determining who distributes its products. That is essentially what these folks are doing, and they are doing it in a way that harms Americans in any number of ways.

MS. GRANICK: Well, one thing I think you have to be really aware of is that, whatever kind of crisis the airline industry is in, the rules made in *FareChase* apply to other industries as well. We are not just talking about helping the airlines give us lower fares. We are talking

about cases like *eBay, Inc. v. Bidder's Edge, Inc.* or any kind of shopping bot. For example, Yahoo has a shopping bot, which basically makes it easy for consumers to find out what products are being sold for. I want to buy a new car. What are those being sold for on car websites? Is the consumer going to be able to use the power of the technology to shop and find out information about prices. That is mostly where these screen scraper cases come in, though, it certainly can deal with any other kind of data that might be published on the Internet. Or are we going to say, or allow websites and companies to say, "You are not allowed to use tools that make it easier for you to cost compare and for you to shop. We are going to say that any data that we store on our servers is something that we can gain full legal protection for beyond copyright or trade secret laws would allow, simply by saying, 'it is on our server and you are not allowed to look at it.'" These cases go beyond just the issue of airline tickets. There is all sorts of data registered on servers; who gets to control that data?

MR. ARNOLD: I have two quick things to say about that. One is, and this is a fairly cut and dried difference between this side of the table and that side of the table, I do not know why a court should not protect my ability to prevent anybody that I want from manipulating my servers, period. That is number one. Number two is we at Delta would say "more power to you" if you as an individual have FareChase and you use FareChase to go out and find the lowest fares available from any number of airlines so you can then compare and choose whether or not Delta is offering the lowest fare on that particular city pair and then, buy that ticket or not buy that ticket. The example that American Airlines and Delta Airlines are concerned about is people shopping those fares for their businesses. It is their business to use FareChase so they can make money by selling tickets to consumers. They are not using FareChase to buy their own tickets. That is a fundamental difference.

We are not talking about Delta versus you or Mom and apple pie. It is Delta versus other businesses trying to figure out who is going to make money off of consumers buying Delta's product. That is a fundamental difference, and I think it cannot get lost in the mix. We do not care that you use FareChase to comparison shop and come up with the best ticket price for you. We do care if you as a business are using a bot to shop me, hundreds of times, thousands of times, I do not care how many times, so that you then can make money off of my product. That is the fundamental difference.

AUDIENCE: So if a 501(c)(3) is hammering your website, you would not object, but if a for-profit website is hammering your website you do

object because it looks like these services are increasing the efficiency of the market and increasing the flow of information? It looks like it would be beneficial to the consumer and that these property right claims are meant to reduce competitiveness in the market. But you are saying it is not the information that you object to, it is whether somebody makes money or does not make money because the costs to you are the same if you are getting 9000 hits an hour whether it's a 501(c)(3) or an entrepreneur. Your costs are the same, so why do you care so much between one case and the other case?

MR. ARNOLD: That is a very interesting way to look at it because I have not ever considered whether or not a 501(c)(3) would invest its money to, for the good of the people, disseminate low fare information. I guess what I would say there is that you have to look again at the motivation and what they are doing it for. I would have to say, at least for the sake of argument, that I would treat the 501(c)(3) and the for-profit company as basically doing the same thing for the same motivation. You know, it is tough to compete with altruism. I do not know the answer to that question quite frankly.

AUDIENCE: Jennifer, I've got a question for you. I agree with what you are saying pretty much here. But let us say Delta or American Airlines wanted to charge one dollar a year for membership and the consumer gets a password to get into this website. How would that change what you are saying? What is your thinking about that?

MS. GRANICK: If companies put up websites and they want to restrict access to those websites by some technological means like having a subscription or you have to have a membership and sign up, then that is totally different because you are not publishing the information publicly to the world, you are publishing it to your select members. You have a subscription-based service. I would say people who do not have that subscription are not legally allowed to access that website. The problem I certainly would have would be, let us say I am a subscriber and I pay my dollar and I find out that American is flying from San Francisco to Atlanta for \$340, and then I want to tell George who is not a subscriber. I feel that I need to be allowed to tell him. That is the free flow of information that is not legally protected. But in terms of accessing the Web server, I think the company, to a large extent, has a right to control who accesses its server it puts on the Internet that way.

But, the airlines want to have their cake and eat it too. They want to make the user experience really seamless and easy, so they just publish everything on the Web and then they want to put the burden on the user

to find the terms of service or comply with the terms of service and say you cannot use it. I believe that when somebody puts a computer on the Internet and takes security measures to exclude certain people, those security measures need to be respected.

MR. FIBBE: I think this is one of the perverse incentives out there for a sort of “come one, come all, you can’t protect your computer server” world, and that is that companies that invest a lot of money in computer servers are going to erect technological barriers more so than they already have. I disagree with the notion that they have not tried to erect technological barriers. They try to protect their websites both by blocking access to screen scrapers and by putting up the user agreements that we have been talking about. And in terms of individual users, they tend to play by the rules. Again, in the screen scraping cases, these are intentional violations of the website user agreements by entities that have actual knowledge of those terms. I think that the ease of use of a website is no small thing at all. A rule that you could not protect your website and your computer server will only encourage companies to build larger, more inconvenient fences that are, I think, problematic, or at least inconvenient for consumers, and I think a bad incentive is created by that sort of thing.

PROFESSOR HRICIK: I think we are out of time. I was trying to come up with some very profound words to wrap things up. And I think I am where I was last night about 9:00 when I was giving my speech, which is, these are important questions and there are no easy answers to them. I mean, is the battleground that we are into now that a business can protect unprotectable information by pointing to its server slowdown? Is that where we are or are we using that as a shield to gain more commercial advantage than the intellectual property laws otherwise would allow? Or are we in a situation where a person has strolled into a store and is subject to real property laws because they have strolled into a store by going across the server, by accessing the server. We do not know, and I think we are going to have to stay tuned as to what develops in this area.

I would love to continue this afterwards. Thank you all very much and thanks to our panelists.