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# Nominative Fair Use and Internet Aggregators: Copyright and Trademark Challenges Posed By Bots, Web Crawlers and Screen-Scraping Technologies

By Sean O'Reilly\*

## I. Introduction

Technology has undoubtedly changed the face of commerce, allowing for new business models and unique interactions between vendor and consumers. Hyper-growth of the Internet has confronted the law with new challenges and, in many cases, forced a reexamination of traditional legal principles. One of the areas most challenged by the growth of technology and the Internet is intellectual property—more specifically copyright and trademark infringement.

While these areas have received great scrutiny as they apply to file-sharing and music “pirating,” a less publicized issue concerns the actions of “internet aggregators” or meta-search services. Kayak.com, a popular travel aggregator, for example, is a mega-search engine that “scans[s] the Web for bargains on airfares, hotels, car rentals and other travel services.”<sup>1</sup> Secure Commerce Services, another popular Internet aggregator, amasses financial account information, providing consumers with a top-down view of their personal financial information captured from multiple financial institutions’ websites.<sup>2</sup> What was once a small niche Internet service

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<sup>1</sup> Gary Lee, *Aggregator Sites: One Stop Shopping*, WASH. POST, Nov. 14, 2004, at P1.

<sup>2</sup> Jane Kaufman Winn & James R. Wrathall, *Who Owns the Customer? The Emerging Law of Commercial Transactions in Electronic Customer Data*, 56 BUS.

has come under increased legal scrutiny as usage numbers have surged and consumers have recognized the power of these tools. A recent survey from Bizrate.com, a comparison shopping provider, showed that 47% of online shoppers start their online shopping experiences at shopping aggregator sites.<sup>3</sup> These aggregators generally search other web pages on the Internet, retrieve information from those sites and present the aggregated information to the end user.

Many aggregators, including popular travel aggregators like Orbitz and Travelocity, have contractual relationships with airlines, travel agents or third-party providers of travel information to provide the comprehensive information needed to power their services. Other aggregators, however, utilize technologies that allow them access to this information without any contractual relationship or agreement between the parties. This technology goes by many names, including “bots” (short for robots), “intelligent agents,” “smart software,” “web crawlers” or “screen scrapers.”<sup>4</sup> These programs “operate across the Internet to perform searching, copying and retrieving functions on the websites of others.”<sup>5</sup> They are capable of making thousands of database searches per minute, far exceeding what a human user of a website could accomplish. These “crawlers” or “screen scrapers” gain access to, and copy information from, vendors’ inventory and pricing or users’ account information and return that information to their own database. Web vendors have a difficult time detecting a difference between consumers accessing this information for their own benefit, and aggregators accessing the information to return to their own databases. The following discussion of the nominative fair use doctrine as it relates to Internet aggregators will assume some usage of “screen scraping” technology, as aggregators that rely on contractual relationships with data providers will not have to rely on a nominative fair use defense.

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LAW. 213, 224 (2000).

<sup>3</sup> Kurt Peters, *Growth in Online Shopping Slows, But Channel Shift Continues*, Internetretailer.com, Aug. 2003, <http://www.internetretailer.com/internet/marketing-conference/99510-state-industry.html> (last visited Jan. 16, 2007).

<sup>4</sup> See Ian C. Ballon, *Bots, Screen Scraping, Content Aggregation and the Evolving Doctrine of Database Trespass*, GLASSER LEGALWORKS Sept. 2001, at 103.

<sup>5</sup> Stephen Middlebrook & John Muller, *Thoughts on Bots: The Emerging Law of Electronic Agents*, 56 BUS. LAW 341, 362 (2000).

While a number of lawsuits dealing with unsolicited “web crawling” or “screen scraping” have been resolved in favor of the host website that was being scraped<sup>6</sup>, courts have largely eschewed copyright and trademark violations in favor of other legal arguments (such as trespass to chattels). Scholars, however, have argued that in some situations these account aggregators have violated trademark and copyright protections, such as where the scraped information was combined with corporate logos or led to increased confusion on the part of the consumer as to the affiliation or relationship between the parties.<sup>7</sup> These conversations have highlighted the increased importance of copyright and trademark laws in the Internet age. As such, it is important to evaluate the varying interpretations of the nominative fair use doctrine and understand the impact of these interpretations.

Under the “nominative fair use” test adopted by the Court of Appeals for the Ninth Circuit, a defendant must prove: (1) that the product or service in question is one not readily identifiable without use of the trademark; (2) that only so much of the mark or marks is used as is reasonably necessary to identify the product or service; and (3) that the user did nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.<sup>8</sup> In the Ninth Circuit, if these elements are proven, the use is “fair” and defendant will prevail.<sup>9</sup>

Recently, the Third Circuit broke from the Ninth Circuit test, deciding that a more appropriate test would focus initially on consumer confusion. The Third Circuit first determines whether the plaintiff can show that confusion is likely due to the defendant’s use of plaintiff’s mark/information (in which case, the burden shifts to the defendant to show that its nominative use of plaintiff’s mark, information, or both is nonetheless fair). If this confusion test is satisfied, the court then asks (1) whether the use of the plaintiff’s mark is necessary to describe (A) the plaintiff’s product or service and (B) the defendant’s product or service; (2) whether only so much of the plaintiff’s mark is used as is necessary to describe plaintiff’s products or services; and (3) whether the defendant’s conduct or language reflect the true and accurate relationship between the plaintiff and de-

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<sup>6</sup> See *eBay, Inc. v. Bidder’s Edge*, 100 F. Supp.2d 1058 (N.D.Cal. 2000).

<sup>7</sup> See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

<sup>8</sup> *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

<sup>9</sup> *Id.*

defendant's products or services.<sup>10</sup>

As the Internet economy continues to expand and aggregators become an increasingly embedded part of the online experience, the "nominative fair use" test for trademark infringement offered by the Third Circuit is more likely than the traditional test adopted by the Ninth Circuit to benefit consumers, without having an adverse impact on businesses.

This note will discuss the development of intellectual property law as it pertains to the Internet, and how that law has been applied to Internet aggregators, particularly those that employ "screen-scraping" technology. Section II will provide a brief overview of the technology of Internet aggregation, the application of intellectual property law in an Internet context, the impact of "screen-scraping" technology on intellectual property law, and trademark infringement resulting from Internet aggregation. Section III will explain the varying approaches developed by the Ninth and Third Circuit Courts of Appeals to evaluate nominative fair use on the Internet. Section IV will analyze the impact to the consumer of the varying nominative fair use doctrine tests. Lastly, Section V will discuss the preferred impact of the Third Circuit's common sense approach to the nominative fair use doctrine.

## **II. Background**

### **A. The Mechanics of the Internet Aggregators**

Shopping and financial aggregators have grown in complexity, capability and popularity over the last ten years. Today, more than 5 million consumers visit aggregators like SideStep.com each month where they can search more than 150 websites for the Web's best travel bargains.<sup>11</sup> Services like SideStep.com are popular with consumers because they provide a comprehensive snapshot of any number of potential deals, and have the perceived advantage of neutrality. As one aggregator President put it, "[Internet travel vendors] are trying to get you to book a ticket, a room or a car through them . . . we're neutral sources that search out all the information and present it so you can make the choice of which option best suits your

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<sup>10</sup> *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 222 (3d Cir. 2005).

<sup>11</sup> Sidestep.com, About Sidestep, [http://www.sidestep.com/html/about\\_side-step/index.html](http://www.sidestep.com/html/about_side-step/index.html) (last visited Jan. 18, 2007).

needs.”<sup>12</sup> This perception has apparently taken root with consumers: a Bizrate.com survey indicated that 54% of consumers say they are more focused on finding deals when it comes to shopping on the Internet than in prior years, and only 4% of respondents say that they never comparison shop when they shop online.<sup>13</sup>

A typical aggregator service, such as SideStep, scours online travel agencies, consolidators and airline sites to aggregate pricing and availability information on airline tickets, hotel deals, vacation packages, and rental car deals, and accomplishes this through a combination of direct data feeds and complex “screen scraping” programs.<sup>14</sup> “Screen scraping” refers to a process whereby content can be pulled off a “website/commerce engine on the [I]nternet using robot/crawler scripts.”<sup>15</sup> Many aggregators like SideStep “screen scrape” websites that have never agreed to have their data harvested by SideStep, and it is often difficult for these sites to determine when their information is being accessed by a user or by a “screen scraper” or “web crawler.”<sup>16</sup> Scholars and business owners have questioned the degree to which intellectual property rights of the information provider may be compromised by the aggregator’s activities. While facts and raw data, such as airline fares, are not trade secrets or copyrighted,<sup>17</sup> aggregators’ sites present information from various sites and may also include other corporations’ logos, which might suggest a relationship between the two entities where none exists. Further, presenting the information provider’s data and logo on an aggregator’s site could potentially cause confusion among customers as to where the online presence of the information provider ends and that of the aggregator begins. Similarly, information may be falsely attributed to the aggregator by having the information provider’s logo on the aggregator’s site. In short, there are potential infringement concerns.

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<sup>12</sup> Lee, *supra* note 2, at P1.

<sup>13</sup> Peters, *supra* note 4.

<sup>14</sup> Lee, *supra* note 2, at P1.

<sup>15</sup> Google Answers, Q: Screen-scraping laws in India, July 16, 2006, <http://answers.google.com/answers/threadview?id=746810> (last visited Jan. 15, 2007).

<sup>16</sup> See Julia Alpert Gladstone, *Data Mines and Battlefields: Looking at Financial Aggregators To Understand the Legal Boundaries and Ownership Rights in the Use of Personal Data*, 19 J. MARSHALL J. COMPUTER & INFO L. 313 (2001).

<sup>17</sup> Symposium, *The Internet: Place, Property, or Thing—All or None of the Above?* 55 MERCER L. REV. 919, 934 (2004).

## B. Intellectual Property, the Internet, and eBay.

The evolution of intellectual property jurisprudence regarding the Internet is highlighted in several recent court decisions. Perhaps the most important and well known case regarding this issue is *eBay v. Bidder's Edge*.<sup>18</sup> Bidder's Edge was an auction aggregator site that utilized "screen scrapers" to aggregate information about common item auctions across the Internet and allowed its users to search for items across more than 100 auction sites including eBay.<sup>19</sup> In an effort to ensure that its database reflected the most up-to-date auction information, Bidder's Edge accessed eBay's listings approximately 100,000 times a day.<sup>20</sup> eBay moved for injunctive relief preventing Bidder's Edge from accessing eBay's computer system, arguing that Bidder's Edge's action constituted trespass, false advertising, federal and state trademark dilution, computer fraud and abuse, unfair competition, misappropriation, interference with prospective economic advantage and unjust enrichment.<sup>21</sup> eBay argued that Bidder's Edge gathered its information by periodically "invad[ing] the eBay site (and presumably the sites of others) and mak[ing] a verbatim copy of eBay's auction listing pages across numerous categories of items."<sup>22</sup> In their complaint, eBay warned that if they were not able to defend their personal and intellectual property, other sites might find their personal and intellectual property on the Web at risk also.<sup>23</sup>

The court granted eBay's injunction, finding that Bidder's Edge's repeated "screen scraping" was a daily tax on eBay's system with the potential to impact performance for other users.<sup>24</sup> The court reasoned that where a "defendant was intentionally and without authorization interfering with a plaintiff's possessory interest in a computer system, and a defendant's unauthorized use proximately resulted in damage to the plaintiff, then the defendant's actions represented trespass to chattels."<sup>25</sup> And while eBay did not rely on

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<sup>18</sup> *eBay, Inc. v. Bidder's Edge*, 100 F. Supp.2d 1058 (N.D.Cal. 2000).

<sup>19</sup> *Id.* at 1061.

<sup>20</sup> *Id.* at 1071.

<sup>21</sup> *Id.* at 1063.

<sup>22</sup> See Middlebrook and Muller, *supra* note 6, at 361.

<sup>23</sup> See Troy Wolverton, *Judge Bars Bidder's Edge Web Crawler on Ebay*, [http://news.com.com/Judge+bars+Bidders+Edge+Web+crawler+on+eBay/2100-1017\\_3-241083.html](http://news.com.com/Judge+bars+Bidders+Edge+Web+crawler+on+eBay/2100-1017_3-241083.html) (last visited Jan. 18, 2007).

<sup>24</sup> See *eBay, Inc.*, 100 F. Supp.2d at 1072.

<sup>25</sup> *Id.*

trademark or patent infringement causes of action to get their injunction, this decision was important in that it reflected the court's first recognition of "screen scrapers" and other bots and their potential impact on the Internet:

A software robot is a computer program which operates across the Internet to perform searching, copying, and retrieving functions on the websites of others. A software robot is capable of executing thousands of instructions per minute, far in excess of what a human can accomplish. Robots consume the processing and storage resources of a system, making that portion of the system's capacity unavailable to the system owner or other users. Consumption of sufficient system resources will slow the processing of the overall system and can overload the system such that it will malfunction or "crash." A severe malfunction can cause a loss of data and an interruption in service.<sup>26</sup>

The eBay case was also important as it included several amicus briefs from law professors, all self-described "Internet experts" who supported a reversal of the District Court's decision. These professors argued that the court's decision did not adequately factor in the public interest that would be served by supporting the free flow of information, including pricing information, over the Internet, and thus hampered electronic commerce. Further, they argued that the application of trespass to chattels was a poor fit in a case such as this. While their argument did not convince the Appellate Court to overturn the decision, their warning regarding the harmful impact an inflexible legal framework could have on Internet commerce remains a common judicial consideration.

### C. Screen Scraping and Intellectual Property

The United States District Court of the Central District of California considered "screen scraping" in an intellectual property context in *Ticketmaster v. Tickets.com*.<sup>27</sup> Ticketmaster, the nation's largest vendor of tickets to events, offers their tickets through venue box offices, retail outlets, by telephone, and over the Internet.<sup>28</sup>

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<sup>26</sup> See Middlebrook and Muller, *supra* note 6, at 12.

<sup>27</sup> *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 WL 21406289 (C.D.Cal. 2003).

<sup>28</sup> *Id.* at 1.

Tickets.com is also a ticket seller, offering their tickets primarily over the Internet.<sup>29</sup> Tickets.com, however, employed an electronic “web crawler” that reviewed Ticketmaster’s website and extracted the information on events for which Ticketmaster, but not Tickets.com, offered tickets.<sup>30</sup> As a result, visitors to Tickets.com were able to see tickets available to Ticketmaster events with no indication that the tickets were not available through Tickets.com or were available via a competitor.<sup>31</sup> If Tickets.com users attempted to purchase these Ticketmaster tickets, they were linked directly to the relevant Ticketmaster website.<sup>32</sup>

Ticketmaster claimed this constituted a violation of its intellectual property under a contract theory, a copyright theory, and a trespass to chattels theory.<sup>33</sup> The court reasoned that Ticketmaster’s ticket information was not copyrighted information; the manner or mode of expression of those facts was, however, subject to copyright protection.<sup>34</sup> The court held that the momentary resting of the “scraped” Ticketmaster website pages and information in Tickets.com’s databases for the purpose of culling out raw data about Ticketmaster tickets and events was fair use and not actionable.<sup>35</sup> The court held that, “[t]he primary star in the copyright sky . . . is that purely factual information may not be copyrighted . . . . Thus, unfair as it may seem . . . the basic facts [Tickets.com] gathers and publishes cannot be protected from copying.”<sup>36</sup>

#### D. Aggregation as Trademark Infringement

The Second Circuit United States Court of Appeals has, in other situations, however, found that an aggregator’s actions to retrieve and use data from an information provider were actually a trademark infringement.<sup>37</sup> In *Register.com v. Verio, Inc.*, Verio, an aggregator, used bots to access and copy website registration infor-

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.*

<sup>32</sup> Ticketmaster Corp., 2003 WL 21406289.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 4.

<sup>35</sup> *Id.*

<sup>36</sup> See Ballon, *supra* note 5, at 107.

<sup>37</sup> *Id.*

mation from Register.com, an Internet registry.<sup>38</sup> While the court did not believe that the use of bots to acquire registration data was a copyright infringement, Verio's use of this information to send emails to registered owners of websites offering them Verio's services was an infringement. Verio provided misleading information which had the potential to lead these registrants to believe that the email solicitations came from a company affiliated with Register.com.<sup>39</sup> Thus, even text alone, without the use of trademarked logos, can create sufficient confusion for a customer to compromise a copyright or trademark infringement.

The court has held that uses of data could be actionable under the Lanham Act if the copied content or data was aggregated in a way that harmed an owner's reputation or confused consumers. This issue was examined further, and the defense of nominative fair use re-evaluated, by the Third Circuit Court of Appeals in *Century 21 Real Estate Corp. v. Lendingtree, Inc.*<sup>40</sup> Before considering this case, however, a brief discussion of the Ninth Circuit's seminal nominative fair use doctrine case is required.

### III. Discussion

#### A. The Ninth Circuit and the Nominative Fair Use Doctrine

The Ninth Circuit first definitively addressed the nominative fair use doctrine in *New Kids on the Block v. News America Publishing, Inc.*<sup>41</sup> The plaintiff in this case, the successful "boy band" from the 1990's, brought suit against newspapers alleging trademark infringement.<sup>42</sup> During their time of great popularity, the plaintiffs earned significant income from endorsements and the use of their name, likeness and image on posters, t-shirts, action figures, coffee mugs, and other products; ultimately, the plaintiffs earned income from over 500 products or services bearing their trademark.<sup>43</sup> One service in particular allowed fans of the plaintiffs to call a 900-

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<sup>38</sup> *Id.*

<sup>39</sup> Register.com v. Verio, Inc., 356 F.3d 393, 405 (2d Cir. 2004).

<sup>40</sup> Century 21 Real Estate Corp. v. Lendingtree, Inc., 425 F.3d 211, 222 (3d Cir. 2005).

<sup>41</sup> See *New Kids on the Block v. News. Am. Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992).

<sup>42</sup> *Id.* at 304.

<sup>43</sup> *Id.*

number and, for a fee, listen to the plaintiffs talk about themselves.<sup>44</sup> The defendants, two national newspapers, established separate 900-numbers that allowed fans of the plaintiffs to participate in telephonic polls on questions such as which member of the New Kids was the most popular, or which member a fan would most like to see move in next door to them.<sup>45</sup> The plaintiffs filed suit, alleging that the newspaper phone polls infringed on their trademarks and interfered with their relationship with their fans.<sup>46</sup> They claimed (1) common law trademark infringement; (2) Lanham Act false advertising; (3) Lanham Act false designation of origin; (4) Lanham Act unfair competition; (5) state trade name infringement; (6) state false advertising; (7) state unfair competition; (8) commercial misappropriation; (9) common-law misappropriation; and (10) intentional interference with prospective economic advantage.<sup>47</sup>

The court's reasoning in this case required an evaluation of the role of trademarks and defenses to trademark infringement in a modern economy. Traditionally, trademarks have served to "identify the source of goods and services, 'to facilitate the tracing of "false" or defective wares and the punishment of the offending craftsman.'"<sup>48</sup> The primary role of trademark infringement enforcement has been to prevent misappropriation of another's mark or products. A trademark is a "limited property right in a particular word, phrase or symbol."<sup>49</sup> Trademark law does, however, recognize a defense to the use of another's trademark "where the mark is used only to 'describe the goods or services of [a] party, or their geographic origin.'"<sup>50</sup> This "fair use" doctrine prevents a party from appropriating a descriptive term for his own exclusive use and thus preventing others from accurately describing their own product or service.<sup>51</sup> Courts have consistently recognized that in some cases, there is no descriptive substitute for certain trademarks (such as Kleenex, Jello or Scotch tape — terms that have gained a broad usage as a category, as well as a brand), and that not every usage of these terms is an in-

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *New Kids on the Block*, 971 F.2d at 304.

<sup>47</sup> *Id.* at 304-5.

<sup>48</sup> *Id.* at 305 (quoting Frank Schechter, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADEMARKS* 47 (Columbia University Press 1925)).

<sup>49</sup> *New Kids on the Block*, 971 F.2d at 306.

<sup>50</sup> *Id.* (quoting 15 U.S.C. § 1115(b)(4)).

<sup>51</sup> *New Kids on the Block*, 971 F.2d at 306.

fringement. For this reason, under the Lanham Act competitors may rely on a rival's trademark in advertising if that usage is not misleading to consumers.<sup>52</sup> This defense is often referred to as the nominative fair use doctrine — if a defendant uses a trademark to describe a plaintiff's product, rather than its own product, they are entitled to this defense if the product or service is not really identifiable without use of the trademark. Nominative fair use of a mark, the Ninth Circuit reasoned, was allowed only to the extent that is reasonably necessary to identify the product or service, and the user must do nothing that would come in conjunction with the mark, suggesting sponsorship or endorsement of the trademark holder.<sup>53</sup>

In this case, the court held that the newspapers were entitled to use the plaintiffs' name and trademark while conducting their telephone polls about the group's members because there was no false or misleading usage of the mark. Additionally, the papers referred to the trademark only as necessary to identify the group as the subject of the polls, and nothing suggested that there was any relationship between, sponsorship of, or endorsement by the musical group.<sup>54</sup> The court held that, moving forward, to rebut a charge of trademark infringement under the nominative fair use doctrine, (1) the product or service referred to by the defendant may use only so much of the trademark as is reasonably necessary to identify the product or service to which it refers; (2) the defendant may use only so much of the trademark as is reasonably necessary to identify the product or service to which it refers; and finally (3) the defendant must not use the trademark in such a way that would imply sponsorship or endorsement by the trademark holder.<sup>55</sup>

## B. The Third Circuit's Nominative Fair Use Departure

The Third Circuit Court of Appeals explored the nominative fair use doctrine and reevaluated the Ninth Circuit's approach in *Century 21 Real Estate Corp. v. Lendingtree, Inc.* In this case, Lendingtree, an online real estate portal, referenced Century 21's trademarked

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<sup>52</sup> Lanham Trade-Mark Act, § § 1-45, 15 U.S.C. § § 1051-1127 (2002).

<sup>53</sup> *New Kids on the Block*, 971 F.2d at 308; Lanham Trade-Mark Act, § 33(b)(4), 15 U.S.C. § 1115(b)(4) (2002).

<sup>54</sup> *New Kids on the Block*, 971 F.2d at 309-10.

<sup>55</sup> Sara Johnson, *Century 21 Real Estate Corp. v. Lendingtree, Inc.: Making a Big Deal Out of Nominative Use*, 8 TUL. J. OF TECH. & INTELL. PROP. 207, 209 (2006).

services improperly in an effort to market their own services.<sup>56</sup> At issue was Lendingtree's usage of (1) a Coldwell Banker (a subsidiary of Century 21) trademarked "For Sale" sign featuring the company logo and Lendingtree's phone number at the bottom, (2) a statement by Lendingtree on its "Find a Realtor" page that their service allowed users access to Century 21 realtors, (3) Lendingtree's statement on its website that Lendingtree is "represented" by Century 21, and (4) Lendingtree's use of marketing materials claiming they were "affiliated with" Century 21 brokers.<sup>57</sup> The district court held that Lendingtree's use of Century 21's name was "likely to cause consumer confusion, and that the nominative use defense did not shield [Lendingtree]," and granted Century 21's motion for preliminary injunction.<sup>58</sup>

The Third Circuit decided to break from the test developed by the Ninth Circuit in *New Kids on the Block* and establish its own bifurcated nominative fair use doctrine test.<sup>59</sup> According to the court, in nominative fair use cases, the plaintiff has the initial burden of demonstrating that confusion is likely due to the defendant's use of plaintiff's mark. In this case, the court reasoned that even the defendant's nominative fair use of the plaintiff's mark had the potential to confuse the consumer, particularly with respect to its products or services.<sup>60</sup> For this reason, the court held that "likelihood of confusion" is an essential factor in determining whether or not infringement has occurred.<sup>61</sup> If the plaintiff has met their burden of showing that confusion is likely, then the defendant has the burden of showing that their usage of the plaintiff's trademark is fair under the nominative fair use doctrine.<sup>62</sup> Similar to the Ninth Circuit's test, under the Third Circuit's fairness test: "the defendant must show: (1) that the use of plaintiff's mark is necessary to describe both the plaintiff's product or service and the defendant's product or service; (2) that the defendant uses only so much of the plaintiff's mark as is necessary to describe plaintiff's product; and (3) that the defendant's conduct or language reflect the true and accurate relationship between plaintiff and defen-

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<sup>56</sup> Century 21 Real Estate v. Lendingtree, Inc., 425 F.3d 211, 214 (3d Cir. 2005).

<sup>57</sup> *Id.* at 215.

<sup>58</sup> *Id.* at 216.

<sup>59</sup> *Id.* at 222.

<sup>60</sup> *Id.* at 221.

<sup>61</sup> Century 21 Real Estate Corp., 425 F.3d at 221.

<sup>62</sup> *Id.* at 222.

dant's product or services."<sup>63</sup> The second aspect of the Third Circuit's nominative fair use doctrine test is very similar to that of the Ninth Circuit, however the Third Circuit rejected the Ninth Circuit's view that the likelihood of consumer confusion has no role in any nominative fair use examination.

The *Century 21 Real Estate* case represents an important development because it was the seminal case in which the Third Circuit considered trademark, copyright or dual infringement regarding the use of traditionally unprotected data on the basis that this infringement caused consumer confusion. The defendant's reliance on the fair use doctrine, and the court's ultimate failure to recognize that defense in this case, reflect the importance of reaching a consensus on a nominative fair use as it pertains to Internet aggregators.

#### IV. Analysis

It is likely that the Third Circuit's reinterpretation of the nominative fair use doctrine will prove beneficial to the continued growth of aggregation-based Internet business models. While the second prong of the Third Circuit's test largely resembles the Ninth Circuit's test, the important distinction between the two tests lies in the preliminary question as to whether or not the usage of the plaintiff's mark causes consumer confusion. Ultimately, usage that causes no confusion among consumers can find protection in the Third Circuit's nominative fair use doctrine test. This reflects the common-sense flexibility that the law requires if it is to avoid hindering the development of new businesses and business models in today's Internet economy. As more consumers grow comfortable with Internet commerce and continue moving traditionally brick-and-mortar businesses like financial services online, new opportunities arise for entrepreneurs to harness the sheer enormity of information available online to provide new services to consumers. Today's aggregators are a small example of these possibilities, and their apparent consumer acceptance and popularity reflects the demand for such services. A collection of law professors, led by Mark Lemley, professor and co-director of the Berkeley Center for Law and Technology, warned in their amicus brief in the *eBay* case against decisions that "threaten[] the efficient exchange of price information on the Internet [and other actions that] endanger many of the most fundamental activities on which the Internet and electronic commerce are based."<sup>64</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> Steven Bonisteel, *Law Profs Oppose Court's Ban on Ebay Spidering*, Newsbytes News Network, July 18, 2000, <http://www.findarticles.com/p/articles/>

For these professors and many critics of further legal restrictions on Internet commerce, aggregators serve an important and valid purpose:

Without information about alternatives, consumers must choose to either purchase a particular good on a particular seller's terms, or not to purchase at all. Because search technology and so called "shop-bots" allow consumers to automatically identify goods in which they are interested, the match between sellers and buyers can approach perfect efficiency.<sup>65</sup>

It is this reason why the Third Circuit's common-sense approach to the nominative fair use doctrine is preferable — the ability to aggregate valuable information, be it price and availability data or individual financial records, empowers the consumer in a way that was not possible prior to the growth of the Internet. With the inevitable growth in technology in the coming years, new opportunities will arise and legal standards in the area of intellectual property must be flexible to allow this important development.

## V. Impact

To understand the growth and importance of Internet aggregators, one need only look to Orbitz, the self-described "leading online travel company."<sup>66</sup> Before Orbitz went online in mid-2001, two travel agencies controlled over 70% of the Internet travel market.<sup>67</sup> These agencies allowed consumers to interface over the web with their legacy mainframe reservation systems, most of which could only handle 7 or 8 searches at a time, and were much more costly to access.<sup>68</sup> This cost was generally added to ticket fees as service charges. Orbitz quickly changed the competitive landscape — they offered travelers the first web platform that connected directly with an airline's reservation system, cutting out unnecessary middlemen and passing that cost savings on to the customer.<sup>69</sup> Whereas other web travel sites might offer travelers 10 to 30 fare and flight choices,

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<sup>65</sup> *Id.*

<sup>66</sup> Orbitz.com, About Orbitz, <http://www.orbitz.com/App/AboutUs?OSC=FvOE6gPJ9!930530730!183181346!7001!-1&z=e74c&r=11> (last visited Jan. 18, 2007).

<sup>67</sup> Orbitz.com, Orbitz Search Engine Fact Sheet, [http://pressroom.orbitz.com/technology\\_techbg.cfm](http://pressroom.orbitz.com/technology_techbg.cfm) (last visited Jan. 18, 2007).

<sup>68</sup> *Id.*

<sup>69</sup> *See Id.*

Orbitz enabled travelers to search more than 2 billion fares and flights in a matter of seconds, offering hundreds of travel options.<sup>70</sup> Users flock to aggregator sites like Orbitz because they meet their demand for cost-effective one-stop shopping that enables them to view virtually all of their travel options and make decisions immediately.

Orbitz is simply one of hundreds of existing aggregators that help consumers find everything from travel deals, to collectibles, to their own financial information. Aggregators have become an example of a successful marriage of technology and information, and reflect the empowerment made possible by this convergence. Further, as history has shown, there are few technological limits; what once seemed like a practical impossibility can be easily attainable as technology improves and creative minds find ways to address common consumer problems. It is for this reason that the pressure is on the legal community to adapt and remain flexible in the face of technological advancement. The Third Circuit's nominative fair use doctrine, grounded in common sense, with its overarching emphasis on consumer confusion, is the proper response to this pressure. Aggregators are just one product of consumer demand in the Internet age; there will be others in the future, and the Third Circuit's approach to the issue of nominative fair use ensures that technologists have a clear understanding of what steps they can legally take to meet this consumer demand.

## VI. Conclusion

In summary, the Third Circuit Court of Appeals has adopted a preferred nominative fair use test in light of the growth of the Internet and the corresponding introduction of new business models enabled by greater access to information. Aggregators, whether aggregating consumer shopping information or personal financial information, are powerful instruments that have become a trusted tool for today's consumer. As such, the courts should adopt the most flexible nominative fair use test to allow new and emerging companies to leverage the wealth of information available on the Internet and further empower the consumer. A test that begins with a fundamental question of fairness in the form of consumer confusion is more flexible and better equipped to develop alongside the Internet economy. The Third Circuit test provides the same level of protection to the data provider as the traditional Ninth Circuit test, but further creates an overarching "common sense" test in the form of a "consumer confusion" check.

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<sup>70</sup> *Id.*

And while many aggregator business models in today's economy do not merely rely on "web crawling" or "screen scraping" technologies, it is clear that reliance on the Ninth Circuit test is more likely to stifle future business models that might make use of the increased breadth and depth of shopping and financial information available on the Internet. The Third Circuit test minimizes this risk, and in turn benefits the growing number of individuals who have come to rely on Internet aggregators.