

# Federal probe of eBay may turn on quest for rival's 'secret sauce'

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With eBay Inc. and Craigslist entrenched in a scorching legal feud last year, a Delaware judge observed that eBay's "curious" decision to partner with the San Francisco online classified ad power back in 2004 was "an opportunity to learn the 'secret sauce' of Craigslist's success."

Now the question of whether eBay illegally used Craigslist's corporate recipe to establish an online competitor is at the center of a [federal grand jury](#) investigation into the San Jose-based auction giant, puzzling some experts who wonder why the government is intervening in a civil case between quarreling Internet companies.

Based on a Sept. 7 grand jury subpoena obtained by the San Jose Mercury News, federal prosecutors are taking a close look at allegations that have emerged in a three-year showdown between eBay and Craigslist that has unfolded in courts in San Francisco and Delaware. In that spat, Craigslist claims eBay exploited its role as a Craigslist shareholder to use inside information to establish a rival online classified site, Kijiji.

The Craigslist allegations stretch back to the tenure of former eBay CEO [Meg Whitman](#) and directly implicate founder Pierre Omidyar. Whitman, who just took over as Hewlett-Packard's CEO, does not appear to be a target of the grand jury probe, but the subpoena does seek documents connected to other top executives, including Omidyar. And if there is ever a criminal case pressed, Whitman no doubt would find herself a potential witness, as she was in the civil case in Delaware.

eBay has called the allegations "without merit," and one of its lawyers recently accused Craigslist in a court hearing of "lobbying" for a [criminal probe](#). Craigslist officials declined to comment but have depicted eBay's conduct as [corporate espionage](#).

The nature of the grand jury probe is a mystery and could range from a serious review of [criminal charges](#) to, as one top former Justice Department official describes it, "poking around" as a result of the lengthy lawsuit between the two companies.

U.S. Attorney Melinda Haag declined to comment.

But legal experts say Craigslist's complex allegations could be tough to transform into criminal charges and are somewhat surprised the Justice Department has weighed in, particularly because prosecutors ordinarily stay out of the all-too-common battles between tech titans in the civil courts. There are exceptions, including the recent guilty plea by a defunct arm of German software giant SAP, which faced federal criminal charges here arising from the firm's long-running legal fight with Oracle.

Still, criminal charges against eBay or its executives would test the boundaries of white-collar crime statutes, according to experts.

"When you're the prosecution and somebody comes in and says, 'I've got a good case for you,' you get a little nervous that you are being used to get a leg up on the other side," said David Shapiro, a former San Francisco U.S. attorney. "Civil fraud cases get filed every single day. That doesn't mean the defendant ought to go to prison."

Added Peter Henning, a Wayne State University law professor, "Usually, the Justice Department is going to steer clear of these kinds of disputes. But if one side can get in there and make a case, they'll take a look at it."

The grand jury subpoena lists nine specific "incidents" that suggest the FBI and U.S. attorney's office are taking a look at the gist of Craigslist's lawsuit against eBay. That lawsuit alleges that as eBay was securing a significant but minority stake in Craigslist, providing assurances that Craigslist would be eBay's "play" in online classifieds, executives were using Craigslist's most crucial inside information to develop a competitor.

For example, the subpoena asks for any documents related to Omidyar's 2005 request for information about Craigslist's approach to adding new cities, as well as instructions from him to other eBay executives to use Craigslist's "metrics" to compare its growth rate to Kijiji. Federal investigators are seeking documents generally related to "incidents where eBay employees engaged in alleged criminal activities and misconduct focused around the misappropriation of ... confidential information from Craigslist."

Documents unearthed in the Delaware case indicate eBay officials freely distributed Craigslist's inside corporate strategies around the company, using it to devise competing business, particularly overseas.

But eBay, which still retains more than a 25 percent stake in Craigslist, fought back on this issue in the Delaware case. Lawyers for eBay maintain the shareholder agreement specifically envisioned that eBay would become a competitor and that it had a right to use Craigslist's nonpublic information, although for limited purposes. To eBay, [Craigslist](#) simply has "seller's remorse" for its deal with eBay.

A key question now is whether eBay crossed the line in its use of that information. For example, the grand jury is reviewing documents that show an eBay corporate lawyer forwarded Craigslist's confidential financial information from 2004 to 2007 to the eBay officials working on the Kijiji launch, according to the subpoena.

To experts in such cases, the larger question is whether there is proof that [eBay](#) essentially stole Craigslist's information for its own use. For now, that question has been left to secrecy of a grand jury.

"It seems like an extreme stretch to imagine criminal acts here if there wasn't physical theft," said Robert Weisberg, a Stanford University law professor. "But ([federal prosecutors](#)) are not going to do this just to be nice to some party in a civil case. Somebody suspects something."

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