This is an abridged version of the Court's opinion (abridgement by Edward W. Felten). The full opinion is available at http://www.eff.org/Spam_cybersquatting_abuse/Spam/Intel_v_Hamidi/20011211_appellate_decision.html. This abridgment includes only the Court's discussion of the trespass to chattels issue. Hamidi also made a First Amendment argument, which the Court rejected.

Filed 12/10/01

CERTIFIED FOR PUBLICATION

C O P Y

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

INTEL CORPORATION, Plaintiff and Respondent, v. KOUROSH KENNETH HAMIDI, Defendant and Appellant.	C033076 (Super. Ct. No. 98AS05067)

APPEAL from a judgment of the Superior Court of Sacramento County. John R. Lewis, Judge. Affirmed.

After Kourosh Kenneth Hamidi was fired by Intel Corporation, he began to air grievances about the company. Hamidi repeatedly flooded Intel's e-mail system. When its security department was unable to block or otherwise end Hamidi's mass e-mails, Intel filed this action. The trial court issued a permanent injunction stopping the campaign, on a theory of trespass to chattels.

We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Intel submitted a set of undisputed facts which Hamidi did not dispute. They establish: Hamidi is the FACE-Intel webmaster and spokesperson. He sent e-mails to between 8,000 and 35,000 Intel employees on six specific occasions. He ignored Intel's request to stop and took steps to evade its security measures. Intel's employees "spend significant amounts of time attempting to block and remove HAMIDI's e-mail from the INTEL computer systems," which are governed by policies which "limit use of the e-mail system to company business."

Hamidi filed a declaration in opposition to summary judgment, explaining "FACE-INTEL was formed to provide a medium for INTEL employees to air their grievances and concerns over employment conditions at INTEL. FACE-INTEL provides an extremely important forum for employees within an international corporation to communicate via a web page on the Internet and via electronic mail, on common labor issues, that, due to geographical and other limitations, would not otherwise be possible." His six mass e-mailings "did not originate on INTEL property, nor were they sent to INTEL property. The electronic mails were sent over the internet to an internet server. [¶] With each of the electronic mailings [he] informed each recipient that [he] would remove them from the mailing list upon request. [He] only received 450 requests[.]"

The trial court granted summary judgment. It issued an injunction that "defendants, their agents, servants, assigns, employees, officers, directors, and all those acting in concert for or with defendants are hereby permanently restrained and enjoined from sending unsolicited e-mail to addresses on INTEL's computer systems." Hamidi timely appealed.

STANDARD OF REVIEW

We review the judgment *de novo*.

DISCUSSION

I. Intel Proved Hamidi Trespassed to its Chattels

The common law adapts to human endeavor. For example, if rules developed through judicial decisions for railroads prove nonsensical for automobiles, courts have the ability and duty to change them.

Trespass to chattels is somewhat arcane and suffers from desuetude. However, the tort has reemerged as an important rule of cyberspace.

Although there was litigation over who could bring suit and over formal pleading requirements, the shape of the tort is simple. A leading American court approved this definition: "1. To constitute a trespass, there must be a disturbance of the plaintiff's possession. 2. The disturbance may be by an actual taking, a physical seizing or taking hold of the goods, removing them from their owner, or by exercising a control or authority over them inconsistent with their owner's possession." (*Holmes*

v. Doane (1850) 69 Mass. 328, 329.) The most common application is for a physical taking, even if momentary. (See *Tubbs v. Delk* (Mo.Ct.App. 1996) 932 S.W.2d 454 [taking camera for five minutes, returning it with film intact].)

The Restatement of Torts also provides "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest [is harmed.] Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference. [¶] Illustration: [¶] 2. A, a child, climbs upon the back of B's large dog and pulls its ears. No harm is done to the dog, or to any other legally protected interest of B. A is not liable to B." (§ 218, com. e, pp. 421-422; see *Glidden v.*

Szybiak (1949) 95 N.H. 318, 320 [63 A.2d 233, 235].) This caveat speaks of "nominal damages." Intel does not seek damages, even nominal damages, to compensate for Hamidi's conduct; Intel wants to prevent him from repeating his conduct. In this case, the nature of the remedy sought colors the analysis.

Some confusion in the cases and treatises disappears when the nature of the remedy is considered. We accept that "The plaintiff, in order to recover more than nominal damages, must prove the value of the property taken, or that he has sustained some special damage." (1 Waterman, Trespass (1875) Remedy for Wrongful Taking of Property, § 596, p. 617; see *Lay v. Bayless* (1867) 44 Tenn. 246, 247; *Warner v. Capps* (1881) 37 Ark. 32.) Intel seeks no damages.

Hamidi's conduct was trespassory. Even assuming Intel has not demonstrated sufficient "harm" to trigger entitlement to nominal damages for past breaches of decorum by Hamidi, it showed he was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of trespass to chattels. Hamidi acknowledges Intel's right to self help and urges Intel could take further steps to fend off his e-mails. He has shown he will try to evade Intel's security. We conceive of no public benefit from this wasteful cat-and-mouse game which justifies depriving Intel of an injunction. (Cf. *America Online, Inc. v. Nat. Health Care Discount, Inc.* (N.D. Iowa 2000) 121 F.Supp.2d 1255, 1259-1260 [detailing ongoing

technological struggle between spammers and system operators].) Even where a company cannot precisely measure the harm caused by an unwelcome intrusion, the fact the intrusion occurs supports a claim for trespass to chattels. (See *Register.com, Inc. v. Verio, Inc.* (S.D.N.Y. 2000) 126 F.Supp.2d 238, 249-250 [applying New York law, based on the Restatement, "evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels"].)

Amicus ACLU urges "Harm flowing from the content of the communication may not form the basis for an action for trespass to chattel." But Intel proved more than its displeasure with Hamidi's message, it showed it was hurt by the loss of productivity caused by the thousands of employees distracted from their work and by the time its security department spent trying to halt the distractions after Hamidi refused to respect Intel's request to stop invading its internal, proprietary e-mail system by sending unwanted e-mails to thousands of Intel's employees on the system.

"'Intermeddling' means intentionally bringing about a physical contact with the chattel." (Rest.2d Torts, § 217, com. e, p. 419.) "Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action. Although electronic messages may travel through the Internet over various routes, the messages are

affirmatively directed to their destination." (*CompuServe Inc. v. Cyber Promotions Inc.* (S.D. Ohio 1997) 962 F.Supp. 1015, 1021 (*CompuServe*).) "To the extent that defendants' multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff's computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct." (*Id.* at p. 1022.)

Amicus ACLU seeks to distinguish *CompuServe* on the ground the conduct "placed 'a tremendous burden' on *CompuServe's* equipment thus depriving CompuServe of the full use of its equipment." Amici discount disruption to Intel's business system, inasmuch as the thousands of employees had to confront, read, and delete the messages even if only to tell Hamidi to send them no more, as several hundred did.

EFF states if such loss of productivity "is the applicable standard [of harm], then every personal e-mail that an employee reads at work could constitute a trespass." The answer is, where the employer has told the sender the entry is unwanted and the sender persists, the employer's petition for redress is proper.

CompuServe relied in part on *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559 (*Thrifty-Tel*). *Thrifty-Tel* held the unauthorized use of telephone access numbers, which "overburdened the system, denying some subscribers access," (p. 1564) was

sufficient to support liability *for actual monetary damages*. The case did not state or imply that such an extreme effect was required to establish the tort.

Hamidi and EFF ask, if unwanted e-mail can constitute a trespass, why isn't unwanted first-class mail a trespass? "'[T]he short, though regular journey from mailbox to trash can . . . is an acceptable burden, at least as far as the Constitution is concerned.'" (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 72 [77 L.Ed.2d 469, 481] [held, law against use of mail for advertising contraceptives invalid].) The issue is one of degree. As Hamidi impliedly concedes, he could not lawfully cause Intel's computers to crash, or overwhelm the system so that Intel's employees were unable to use the computer system. Nor could a person send thousands of unwanted letters to a company, nor make thousands of unwelcome telephone calls. (See *Rowan v. United States Post Office* (1970) 397 U.S. 728, 736-737 [25 L.Ed.2d 736, 743] [upholding statute allowing blocking of mail, "Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know"; "To hold less would tend to license a form of trespass"].)

We conclude the summary judgment moving papers demonstrated Intel's entitlement to an injunction based on a theory of trespass to chattels.

DISPOSITION

The judgment is affirmed.

(*CERTIFIED FOR PUBLICATION*.)

MORRISON, J.

I concur:

SCOTLAND, P.J.

Dissenting Opinion of KOLKEY, J.

I respectfully dissent. The majority would apply the tort of trespass to chattel to the transmittal of unsolicited electronic mail that causes no harm to the private computer system that receives it by modifying the tort to dispense with any need for injury, or by deeming the mere reading of an unsolicited e-mail to constitute the requisite injury. (Maj. opn. at pp. 9-10.)

While common law doctrines do evolve to adapt to new circumstances, it is not too much to ask that trespass to chattel continue to require some injury to the chattel (or at least to the possessory interest in the chattel) in order to maintain the action. The only injury claimed here -- the *time* spent reading an e-mail -- goes beyond any injury associated with the chattel or within the tort's zone of protection. Although I understand Intel's desire to end what it deems harassment by a disgruntled former employee, "[w]e must not throw to the winds the advantages of consistency and uniformity to do justice in the instance. We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through centuries of the common law have set to judge-made innovations." (Cardozo, The Nature of the Judicial Process (1921), p. 103, fn. omitted.)

The other appellate decisions that have applied trespass to chattel to computer systems have done so only where the transmittal of the unsolicited bulk e-mail burdened the computer equipment, thereby interfering with its operation and diminishing the chattel's value (e.g., *America Online, Inc. v. IMS* (E.D. Va. 1998) 24 F.Supp.2d 548, 550-551; *America Online, Inc. v. LCGM, Inc.* (E.D. Va. 1998) 46 F.Supp.2d 444, 449; *CompuServe, Inc. v. Cyber Promotions, Inc.* (S.D. Ohio 1997) 962 F.Supp. 1015), or where the unauthorized search of, and retrieval of information from, another party's database reduced the computer system's capacity, slowing response times and reducing system performance (*Register.com, Inc. v. Verio, Inc.* (S.D.N.Y. 2000) 126 F.Supp.2d 238, 250; *eBay, Inc. v. Bidder's Edge, Inc.* (N.D. Cal. 2000) 100 F.Supp.2d 1058, 1066, 1071). But no case has held that the requisite injury for trespass to chattel can consist of the mere receipt of an e-mail, the only damage from which consists of the time consumed to read it -- assuming the recipient chooses to do so. To apply this tort to electronic signals that do not damage or interfere with the value or operation of the chattel would expand the tort of trespass to chattel in untold ways and to unanticipated circumstances.

A

California cases have consistently required actual injury as an element of the tort of trespass to chattel. (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551; *Thrift-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566; *Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84, 90.)

As most recently defined by the Court of Appeal in *Thrift-Tel, Inc. v. Bezenek, supra,* "[t]respass to chattel, although seldom employed as a tort theory in California . . . , lies where an intentional interference with the possession of personal property has proximately caused injury." (*Thrift-Tel, Inc. v. Bezenek, supra,* 46 Cal.App.4th at p. 1566, fn. omitted.)

For that reason, where a child climbs on the back of another's dog and pulls its ears, but no harm is done to the dog or to the legally protected interest of the owner, the child is not liable. (*Glidden v. Szybiak* (1949) 63 A.2d 233, 95 N.H. 318; Rest.2d Torts, § 218, com. e, illus. 2, p.

422.) On the other hand, the intermeddling is actionable where the trespass impairs the value of the chattel, even if its physical condition is unaffected. (Rest.2d Torts, § 218, com. h, p. 422.) For instance, "the use of a toothbrush by someone else . . . lead[s] a person of ordinary sensibilities to regard the article as utterly incapable of further use by him." (*Ibid.*)

The only possible exception to the requirement of actual injury is where there has been a loss of possession, which is viewed as a loss of something of value and thus actual damage: According to comment d of section 218 of the Restatement Second of Torts, "[w]here the trespass to the chattel is a dispossession, the action will lie although there has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor." (Rest.2d Torts, § 218, com. d, p. 421.)

B

In this case, however, Intel was not dispossessed, even temporarily, of its e-mail system by reason of receipt of e-mails; the e-mail system was not impaired as to its condition, quality, or value; and no actual harm was caused to a person or thing in which Intel had a legally protected interest.

The majority nonetheless suggests that "[e]ven assuming Intel has not demonstrated sufficient 'harm' to trigger entitlement to nominal damages . . . it showed [the defendant] was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of trespass to chattels." (Maj. opn. at p. 9.)

However, if the defendant's earlier transmittals of e-mail did not constitute harm, it is hard to understand what cognizable injury the injunction is designed to avoid. The fact the relief sought is injunctive does not excuse a showing of injury, whether actual or threatened. After all, injunctive relief requires a "showing that the defendant's wrongful act constitutes an actual or threatened injury to property or personal rights that cannot be compensated by an ordinary damage award." (5 Witkin, California Procedure (4th ed. 1997) Pleading § 782, p. 239.) The majority therefore cannot avoid the element of injury by relying on the fact that injunctive relief is sought here.

Alternatively, the majority suggests that injury resulted from defendant's e-mails, because Intel "was hurt by the loss of productivity caused by the thousands of employees distracted from their work [by the e-mails] and by the time its security department spent trying to halt the distractions after [defendant] refused to respect Intel's request to stop sending unwanted e-mails." (Maj. opn. at p. 10.)

But considering first Intel's efforts to stop the e-mails, it is circular to premise the damage element of a tort solely upon the steps taken to prevent the damage. Injury can only be established by the completed tort's consequences, not by the cost of the steps taken to avoid the injury and prevent the tort; otherwise, we can create injury for every supposed tort.

Nor can a loss of employees' productivity (by having to read an unwanted e-mail on six different occasions over a nearly two-year period) qualify as injury of the type that gives rise to a trespass to chattel. If that is injury, then every unsolicited communication that does not further the business's objectives (including telephone calls) interferes with the chattel to which the communication is directed simply because it must be read or heard, distracting the recipient.

"Damage" of this nature -- the distraction of reading or listening to an unsolicited communication -- is not within the scope of the injury against which the trespass-to-chattel tort protects, and indeed trivializes it. After all, "[t]he property interest protected by the old action of trespass was that of possession; and this has continued to affect the character of the action." (Prosser and Keeton on Torts, *supra,* § 14, p. 87.) Reading an e-mail transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment.

Indeed, if a chattel's receipt of an electronic communication constitutes a trespass to that chattel, then not only are unsolicited telephone calls and faxes trespasses to chattel, but unwelcome radio waves and television signals also constitute a trespass to chattel every time the viewer inadvertently sees or hears the unwanted program.

At oral argument, Intel's counsel argued that the latter cases can be distinguished because Intel gave defendant notice of its objection before his final set of e-mails in September 1998. But such a notice could also be given to television and radio stations, telephone callers, and correspondents. Under Intel's theory, even lovers' quarrels could turn into trespass suits by reason of the receipt of unsolicited letters or calls from the jilted lover. Imagine what happens after the angry lover tells her fiancé not to call again and violently hangs up the phone. Fifteen minutes later the phone rings. Her fiancé wishing to make up? No, trespass to chattel.

No case goes so far as to hold that reading an unsolicited message transmitted to a computer screen constitutes an injury that forms the basis for trespass to chattel. This case can be distinguished from cases like *CompuServe Incorporated v. Cyber Promotions, Inc., supra,* 962 F.Supp. at page 1022, *America Online, Inc. v. IMS, supra,* 24 F.Supp.2d 548, and *America Online, Inc. v. LCGM, Inc., supra,* 46 F.Supp.2d at page 449, where the district court found that unauthorized bulk e-mail advertisements (spam) to subscribers of an online service constituted trespass to chattels because the massive mailings "burdened [its] equipment" and diminished its good will and its possessory interest in its computer network. (*America Online, Inc. v. IMS, supra,* 24 F.Supp.2d at p. 550-551.) In *CompuServe Incorporated v. Cyber Promotions, Inc., supra,* 962 F.Supp. at page 1022, for instance, the court found that the defendants' "multitudinous electronic mailings demand[ed] the disk space and drain[ed] the processing power of plaintiff's computer equipment, [making] those resources . . . not available to serve CompuServe subscribers" and led subscribers to terminate their accounts, harming CompuServe's business reputation and good will with its customers. (962 F.Supp. at pp. 1022, 1023.) Clearly, the defendants' bulk mailings injured the operation and value of the system.

Likewise, in *Register.com, Inc. v. Verio, Inc., supra,* 126 F.Supp.2d 238, and *eBay, Inc. v. Bidder's Edge, Inc., supra,* 100 F.Supp.2d 1058, the unauthorized search of, and retrieval of information from, another party's database was deemed to constitute trespass to chattel because the actions reduced the computer's capacity, slowing response times and reducing system performance.

Similarly, in *Thrifty-Tel, Inc. v. Bezenek, supra,* 46 Cal.App.4th at pages 1564-1566, the Court of Appeal found trespass to chattel where the perpetrators' computer program cracked the plaintiff telephone carrier's access and authorization codes, allowing long distance phone calls to be made without paying for them. That, too, impaired the operation and the value of the owner's possessory interest in the chattel.

In each of these cases, the chattel, or the possessory interest therein, was impaired as to its condition or value.[1]

In contrast, here, the record does not suggest any impairment of the chattel's condition or value, or of the possessory interest therein.

Indeed, the extension of the tort of trespass to chattel to the circumstances here has been condemned by the academic literature. (Burk, *The Trouble with Trespass* (2000) 4 J. Small & Emerging Bus. L. 27, 39 ["the elements of common law trespass to chattels fit poorly in the context of cyberspace, and so the courts have been able to apply this claim to the problem of spam only by virtue of creative tailoring"]; Ballantine, *Computer Network Trespasses: Solving New Problems with Old Solutions* (2000) 57 Wash. & Lee L.Rev. 209, 248 ["Ultimately, failure to allege or to support a showing of actual harm should have precluded Intel from prevailing on a trespass to chattels theory"].)

C

The injury claimed here -- the *time* spent reading an e-mail -- goes beyond anything associated with the chattel or within the tort's zone of protection. Extension of the tort to protect against undesired communications, where neither the chattel nor the possessory interest therein is injured, transforms a tort meant to protect possessory interests into one that merely attacks speech. Regardless of whether restraining e-mails to a private company implicates First Amendment rights, such a metamorphosis of the tort is better suited for deliberate legislative action than judicial policymaking.

Indeed, the Legislature has enacted two statutes that restrict the e-mailing of unsolicited *advertising* materials (Bus. & Prof. Code, §§ 17538.4, 17538.45) and another that affords a civil remedy to those who suffer *damage or loss* from, inter alia, the unauthorized access to a computer system (Pen. Code, § 502, subd. (e)(1)). These statutory provisions and the Legislature's failure to extend these remedies to unsolicited e-mails in general suggests a deliberate decision by the Legislature not to reach the circumstances here. To be sure, common law claims can coexist with statutory enactments. Our Supreme Court has admonished that "statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject" (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 80; accord, *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1156.) But here Intel seeks not merely to *invoke* the common law, but to *modify* it in a way that alters the doctrine's very character in order to extend it where the Legislature has not yet gone. Modification of the tort doctrine in this way, which would affect the free flow of communication on the internet, is better addressed by the legislative branch, or at the very least by a more suitable tort doctrine that can distinguish between reasonable and unreasonable burdens.

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[1] Nor is *America Online, Inc. v. National Health Care Discount* (N.D. Iowa 2000) 121 F.Supp.2d 1255, 1278, cited by the majority, to the contrary since there, the defendant *conceded* that a prima facie case of trespass to chattel had been established. The only issue there was whether the defendant was liable for a third party's actions.

As Learned Hand cautioned -- and this certainly applies when a court construes a common law doctrine that is embedded within a subsequent legislative enactment -- "the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern." (Hand, How Far is a Judge Free in Rendering a Decision? CBS radio broadcast, May 14, 1933, collected in Aldisert, The Spirit of Liberty, Papers and Addresses of Learned Hand (1952) p. 109.)

KOLKEY, J.