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CALIFORNIA HIGH COURT COMPLICATES CONTROL OF UNWANTED E-MAILS

by

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Take one disgruntled former employee, add an Internet connection, access to employee e-mail addresses, and a modicum of sophistication in evading mail blocking software and what do you have? — potentially enough disruptive power to bring a computer network, and thus a business as a whole, to its knees. A little determination and negligible cost are all that is needed to unleash a flood of uninvited e-mail upon a single computer or a corporate network. The owner of a system so targeted might then undertake a series of costly measures to stem the unwelcome tide, and ultimately seek assistance from the courts.

However, where in the physical world one would expect the legal system to preclude an intruder from opening locked doors and traversing the corridors of one's home or office to deliver an unwanted message, in the world of electronic communications a similar outcome is far from certain.

In the wake of the California Supreme Court's recent decision in *Intel v. Hamidi*, 30 Cal. 4th 1342 (2003), several considerations might deprive a computer equipment owner of relief under the trespass to chattels doctrine, including the scope of the damage inflicted or the nature of the unwanted message delivered. This case also is significant because it came from a sharply divided court, and makes a potential distinction between Internet-connected computers and other personal property. After *Intel v. Hamidi*, an injunction against high-volume, unsolicited e-mail may yet be available — but only if legal counsel pays careful attention to several factors in presenting the case.

The Problem of Trespass to Personal Property, or "Chattels". The trespass to chattels doctrine began as a species of conversion, requiring the "asportation" (*i.e.*, removal or theft) of goods from their rightful owner. The tort since has become more concerned with intrusion than theft, like the analogous real property trespass: "Its chief importance now, is that there may be recovery ... for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion." Prosser & Keeton, PROSSER & KEETON ON TORTS, § 14, 85-86 (1984). The doctrine thus provides redress for conduct that does not

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dispossess an owner of property, but instead involves unauthorized interference with or use, so long as actual injury results: “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 of the possessor is affected . . .” RESTATEMENT 2D TORTS § 218, comment e; *see also id.* at § 217(b) (including intentional use or “intermeddling” with another’s chattel in the definition of the tort).

In *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (1997), CompuServe, an online communications and services company, successfully availed itself of the trespass to chattels doctrine to obtain a preliminary injunction against unsolicited commercial e-mail to its subscribers. The physical and non-physical economic harm caused by the network intrusion were critical to the outcome. In addition to the “tremendous burden” placed on the system by the mass mailings, “injury aside from the physical impact of defendants’ messages,” such as harm to business reputation and goodwill, was an equally viable basis for a claim. *Id.* at 1022-23.

Courts Have Acknowledged the Advantages of Preemptive Relief Under the Trespass to Chattels Doctrine in the Context of Computer Equipment. More recently, courts have recognized it may be “too little, too late” to force computer equipment owners to wait for relief until an intrusion becomes a system crisis. In *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000), the network interference consisted not of e-mail, but of software routines (robots or “bots”) designed to access the eBay Web server thousands of times a day and gather information about the status of auctions. Although the bots had no appreciable effect on the function of eBay’s Web site, an injunction nevertheless was appropriate:

Even if, as BE argues, its searches use only a small amount of eBay’s computer system capacity, BE has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes. The law recognizes no such right to use another’s personal property. . . . If preliminary injunctive relief were denied, and other aggregators began to crawl the eBay site, there appears to be little doubt that the load on eBay’s computer system would amount to a substantial impairment of condition or value. California law does not require eBay to wait for such a disaster before applying to this Court for relief. *Id.* at 1071-72.

The court in *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) reached a similar conclusion. The risk of a malfunction or crash was sufficient to support such relief, even though one had not yet occurred. *Id.* at 250. In allowing the plaintiff to halt offending conduct before the harm has escalated, decisions such as *eBay* and *Register.com* acknowledge both the heightened burden on personal property owners to use “reasonable force” to deflect interference, and the plaintiff’s interest in obtaining relief when preventative measures prove ineffective.

The Divided Intel v. Hamidi Decision. Until *Intel v. Hamidi*, courts determining trespass to chattels claims examined not only whether the chattel had suffered physical damage, but also whether there had been a subjective impairment to the chattel’s value or quality. *See* RESTATEMENT 2D. TORTS § 218(b) and comment h. A computer or network that cannot effectively handle and discard unwanted e-mails might have the same physical specifications and market value as one that can, but the latter is incomparably more valuable to the owner. According to a bare majority of the California Supreme Court in *Hamidi*, however, the subjective value of the targeted personal property may no longer play a role in the analysis, despite the presence of this factor in the Restatement framework, and in the analyses of other courts.

In *Hamidi*, the Court reversed decisions that computer chip maker Intel could enjoin mass mailings to employees from former Intel engineer, Kourosh Kenneth Hamidi. Hamidi’s animosity toward Intel began in 1990, when he was injured in a post-conference car accident, and a worker’s compensation

battle ensued.¹ Hamidi ultimately was fired, and, feeling betrayed, retaliated in a number of ways. To begin with, he and other angry former employees formed an organization and Web site called FACE-Intel (short for Former and Current Employees of Intel).

Hamidi also obtained a copy of the confidential Intel employee directory from an anonymous benefactor, and began sending FACE-Intel related information to Intel employees. Over a 21-month period, Hamidi sent six separate mailings to the Intel e-mail list. Each mailing targeted between 8,000 and 35,000 individuals, which means that Hamidi forced Intel's servers to process between 48,000 and 210,000 pieces of e-mail. Hamidi ignored Intel's express written demand that he stop. In fact, when Hamidi realized Intel was taking technological measures, he "adopt[ed] a series of different origination addresses and encoding strategies to elude Intel's blocking efforts." 30 Cal. 4th at 1387 (Mosk, J., dissenting). And while Hamidi's mailings included an offer to remove individual recipients from the distribution list on future mailings, this required employees to take affirmative responsive steps, and to ignore prevailing advice that replying to an unsolicited e-mail is one of the best ways to ensure receipt of yet more mail from that sender. *Id.* at 1371, n.2 (Brown, J., dissenting).

In principle, the majority did not disagree with an important dissenting observation by Justice Mosk:

Before the computer, a person could not easily cause disruption to another's business or personal affairs through methods of communication without significant cost. With the computer, by a mass mailing, one person can at no cost disrupt, damage, and interfere with another's property, business, and personal interests. 30 Cal. 4th at 1393.

Instead, it found that in the absence of a direct injury to the possession or monetary value of Intel's network, and in light of the fact the affected equipment facilitated communication between Intel employees and the outside world, injunctive relief under the trespass to chattels doctrine was not available.

The Harm Must Be to the Chattel Itself, and Not Merely to a Related Interest. The primary rationale behind the California Supreme Court's reversal was the fact that while Intel demonstrated economic harm related to Hamidi's conduct, it failed to adequately tie that harm to the computer equipment that was forced to process Hamidi's e-mails. The Court accepted that Intel may have suffered real economic harm in the form of infrastructure expenditures and lost productivity. However, distinguishing *CompuServe*, the court concluded the harm suffered was too far removed from any actual impairment of Intel's computer equipment to trigger the trespass to chattels doctrine:

CompuServe's customers' complaint, which allegedly led some to cancel their CompuServe service, was about *the functioning of CompuServe's electronic mail service*. Intel's complaint is about *the contents of the messages* rather than the functioning of the company's e-mail system. 30 Cal. 4th at 1358 (citation omitted).

Thus, the *Hamidi* majority remained unconvinced under *CompuServe* and the Restatement that injury divorced from the physical impact could form the basis for a trespass to chattels claim, and concluded the tort must rest on some quantifiable showing of system impairment — regardless of any other considerations of lost productivity or value.

If the Chattel Consists of a Communications Device Connected to the Internet, the Owner Bears the Risk and Expense of Unsolicited Communications. The majority in *Hamidi* also drew a novel distinction between personal property that manages e-mail or other Internet activity, and that which does not, for purposes of applying the trespass to chattels doctrine:

Intel connected its e-mail system to the Internet and permitted its employees to make use

¹Supplemental factual background supplied by Harriet Chiang, *Intel e-mail case heads to state high court*. S.F. CHRON., Apr. 2, 2003.

of this connection both for business and, to a reasonable extent, for their own purposes. In doing so, the company necessarily contemplated the employees' receipt of unsolicited as well as solicited communications from other companies and individuals. That some communications would, because of their contents, be unwelcome to Intel management was virtually inevitable. Hamidi did nothing but use the e-mail system for its intended purpose – to communicate with employees. The system worked as designed, delivering the messages without any physical or functional harm or disruption. These occasional transmissions cannot reasonably be viewed as impairing the quality or value of Intel's computer system.³⁰ Cal. 4th at 1359-60.

Owners of Internet-connected computer equipment may have an inherently reduced ability to prevent others from engaging in its unauthorized and disadvantageous use.

Chattels Trespass to in the Post-Hamidi World. Although *Hamidi* took a more restrictive approach to trespass to chattels, it also telegraphed the conditions to be satisfied if the doctrine is to be invoked. The message is that an injunction may not withstand appellate review unless the court is assured the relief is necessary to preserve a possessory interest in personal property. Harm to economic or other interests only tangentially related to the affected chattel may not suffice, and an even higher hurdle may exist for equipment managing e-mail or other Internet traffic. Thus, a plaintiff should be ready to demonstrate several factors in support of the claim.

Before *Hamidi*, it already was well established that a party seeking an injunction under the trespass to chattels doctrine should be prepared to show:

- The interference was intentional.
- The interference was unauthorized.
- The interference must proximately cause an injury.

After *Hamidi*, it is clear that a trespass to chattels plaintiff also should be prepared to show:

- The chattel itself suffered quantifiable harm, or is likely to suffer such harm if the conduct continues unchecked.
- The owner has undertaken expenditures and measures designed to prevent the conduct and preserve the chattel's functionality.
- The harm to the chattel is content neutral.

Conclusion. The process of operating a functional and efficient computer, server, or network can be difficult and expensive. So too can efforts to reduce or eliminate unwanted e-mails from outsiders. Although the trespass to chattels doctrine remains a viable means of enjoining certain e-mail or other electronic traffic, it is available only when the harm is quantifiable, and preferably directly linked to the chattel itself. To provide the strongest possible basis for obtaining an injunction against electronic intrusions under the trespass to chattels doctrine, the record should demonstrate that one or more pieces of computer equipment have been palpably impaired through the intentional act of another. It should specify that affirmative steps have been taken to block the unwelcome activity, which nevertheless cannot be prevented or redressed through self-help measures alone. The request likewise should be accompanied wherever possible by other applicable tort claims — *e.g.*, interference with prospective economic relations; interference with contract; intentional infliction of emotional distress; defamation; and/or nuisance — to provide the broadest possible basis for relief. Such an approach is necessary in light of the limited nature of the trespass to chattels remedy, and to assist courts in balancing the interests of computer equipment owners against those who would profit or benefit from unauthorized use.