

Intel Corp. v. Hamidi: Trespass to Chattels, the Internet’s Greatest Antagonist?*

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I. INTRODUCTION

Trespass to chattels is a somewhat vague tort action that traditionally arises out of the intentional and unauthorized dispossession, use, or interference with the tangible chattel of another.¹ Claims predicated on this common law tort have always required the showing of some intentional physical damage to or, in the alternative, dispossession of the chattel.² However, in a recent California appellate decision,³ the court departed from the strict common law requirements and upheld a permanent injunction on the grounds of trespass to chattels,⁴ thereby enjoining conduct that would have traditionally fallen outside the purview of the established trespass doctrines. In doing so, the court created a new tort, formerly known as trespass to chattels, but no longer recognizable as such, and destroyed the very elements, reasons, and foundations upon which that tort had been established. The court's decision stands in opposition to all prior legal authority on point, is unjustified, creates absurd results, and has enormous adverse consequences. This Casenote addresses the court's erroneous and unjustified application of trespass to chattels in an area where it is completely inapplicable.

II. BACKGROUND

A. *Factual History*

Over a two-year period, Kourosh Kenneth Hamidi, a former Intel Corporation⁵ engineer and the principal spokesperson of Former and

1. See RESTATEMENT (SECOND) OF TORTS § 217 (1965).

2. See *infra* Part III.A–B.

3. Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244 (Ct. App. 2001), *review granted*, 43 P.3d 587 (Cal. 2002).

4. *Id.* at 246.

5. Intel Corporation was founded in 1968 and built the world's first microprocessor in 1971. Intel Corp., *About Intel*, at http://www.intel.com/intel/index.htm?iid=Corporate+Header_About& (last visited Dec. 19, 2002). Intel Corporation is one of the world's largest and most successful developers of computer chips, motherboards, systems, software, networking, and communications equipment. "Intel's mission is to be the preeminent building block supplier to the Internet economy." Intel Corp., *Corporate Overview*, at <http://www.intel.com/pressroom/CorpOverview.htm> (last visited Dec. 19, 2002). Intel currently employs over 80,000 employees, achieved over \$26.5 billion in revenues in 2001, and is ranked forty-first in the *Fortune* 500. Intel Corp., *About Intel*, at http://www.intel.com/intel/index.htm?iid=Corporate+Header_About& (last visited Dec. 19, 2002).

Current Employees of Intel (FACE Intel),⁶ sent six unsolicited e-mail messages⁷ targeting up to 35,000 Intel employees at their work e-mail addresses, which were maintained on Intel's privately owned computer system.⁸

These six messages expressed Hamidi's view that Intel was engaged in abusive and discriminatory employment practices.⁹ The e-mail messages did not originate on Intel's property nor were they sent to Intel's property. The e-mail messages were sent over the Internet and received by an Internet server.¹⁰ The recipients were given the opportunity to be removed from Hamidi's mailing list; however, only 450 availed themselves of that opportunity.¹¹

Perhaps disturbed by the content¹² of Hamidi's messages, Intel sent

6. FACE Intel describes itself as a California nonprofit organization consisting of both current and former Intel employees. See FACE Intel, *Intel's Lawsuit Against Ken Hamidi*, at <http://www.faceintel.com/intellawsuit.htm> (last visited Dec. 23, 2002). It was created to provide a discussion forum for Intel employees to express concerns and post allegations of Intel's discriminatory and oppressive human rights practices. FACE Intel, at <http://www.faceintel.com> (last visited Oct. 13, 2002). The organization's self-proclaimed mission is the dedication to "practicing and promoting *peaceful and non-violent* opposition to unjust Human Resources policies and practices of Intel" and further "to influence Intel to . . . stop age, disability, race, gender, and ethnicity discriminations." *Id.* FACE Intel is a defaulting party to the original action and has not appealed the court's decision. *Hamidi*, 114 Cal. Rptr. 2d at 246.

7. Hamidi's messages contained a brief description regarding the existence, purpose, and goals of FACE Intel and provided the recipients with the Internet address for the organization's Web site. See *E-mail Messages Sent to Intel Employees: Intel vs. Hamidi*, at <http://www.intelhamidi.com/emailmessages.htm> (last visited Dec. 19, 2002).

8. *Hamidi*, 114 Cal. Rptr. 2d at 246-47.

9. For the content of Hamidi's messages, see *E-mail Messages Sent to Intel Employees: Intel vs. Hamidi*, at <http://www.intelhamidi.com/emailmessages.htm> (last visited Dec. 19, 2002). Hamidi's efforts to bring public recognition to the alleged discriminatory practices of Intel earned him *Disgruntled Magazine's* title of "1997 Disgruntled Employee of the Year." See FACE Intel, *Disgruntled Names Former Intel Engineer Ken Hamidi the 1997 Disgruntled Employee of the Year*, at <http://www.faceintel.com/articlesarchives.htm#DISGRUNTLED> (last visited Oct. 13, 2002).

10. *Hamidi*, 114 Cal. Rptr. 2d at 247. Intel's e-mail system is connected to the Internet and is used for "communications between Intel employees and its customers and vendors." See *Intel Corp. v. Hamidi*, No. 98AS05067, 1999 WL 450944, at *1 (Cal. App. Dep't Super. Ct. Apr. 28, 1999) (unpublished opinion). Intel, however, does permit its employees "reasonable personal use of Intel's equipment for sending and receiving personal e-mail." *Hamidi*, 114 Cal. Rptr. 2d at 250.

11. *Hamidi*, 114 Cal. Rptr. 2d at 247. Given the ability of the employees to easily remove themselves from Hamidi's mailing list, the significance of any alleged trespass is questionable.

12. Arguably, if Hamidi had been praising Intel's employment practices and procedures, Intel would never have argued trespass because there was no physical harm to Intel's system. Therefore, perhaps it is not the trespass that Intel is complaining about,

Hamidi a demand letter directing that he stop e-mailing Intel employees. Hamidi refused. Intel attempted to prevent Hamidi's messages from reaching its employees' electronic mailboxes by various technological means, but Hamidi was able to evade their security measures and continued to e-mail Intel's employees.¹³ Having failed to block Hamidi's messages or to persuade him to refrain from sending them, Intel filed suit against Hamidi, alleging trespass to chattels and seeking a permanent injunction.¹⁴

B. Procedural History

1. The Trial Court

The Superior Court of California, Sacramento County, granted Intel summary judgment on the trespass to chattels claim and issued a permanent injunction against Hamidi, enjoining him from sending electronic messages to Intel employees at their place of work.¹⁵ The court found that Intel (1) had asked Hamidi not to e-mail its employees, (2) had no effective self-help option, and (3) had suffered injury because it had devoted employee time in attempts to block the e-mail messages. The court thus held that Intel was entitled to summary judgment as a matter of law on the trespass to chattels claim.¹⁶

but the content of Hamidi's messages. If that is the case, Intel would then be attempting to turn a libel claim into a trespass claim in an effort to silence Hamidi's speech.

13. *Hamidi*, 114 Cal. Rptr. 2d at 246-47.

14. *Hamidi*, 1999 WL 450944, at *3. Originally, Intel had also filed a nuisance claim for damages but withdrew it voluntarily and waived its claim for damages. *Id.* at *1. The California Supreme Court has held that all intangible intrusions that do not cause physical damage to property must be dealt with as nuisance rather than trespass. See *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924 (Cal. 1982). Electromagnetic waves have been held to be such intangible intrusions, covered under nuisance law and not trespass. *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 695-96 (Cal. 1996). Electronic signals, such as Internet e-mail messages, that travel over phone lines or cable transmission lines into a private computer system consist of nothing more than the same electromagnetic waves discussed in *San Diego Gas & Electric Co.* See, e.g., HOWARD GEORGI, *THE PHYSICS OF WAVES* 187-92 (1993); 2 DAVID HALLIDAY & ROBERT RESNICK, *PHYSICS* § 41-4 (3d ed. 1986); 18 MCGRAW-HILL *ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY* 555-62 (8th ed. 1997).

15. *Hamidi*, 1999 WL 450944, at *3.

16. *Id.* at *1-2. The permanent injunction permanently restrained and enjoined "defendants, their agents, servants, assigns, employees, officers, directors, and all those acting in concert for or with defendants . . . from sending unsolicited e-mail to addresses on INTEL's computer systems." *Id.* at *3; see also *Hamidi*, 114 Cal. Rptr. 2d at 247. After the court enjoined Hamidi from sending any further e-mail messages to Intel, Hamidi dressed himself in a "Pony Express rider outfit" and hand delivered two more e-mail messages to Intel's headquarters, one on a floppy disk (which Intel said was too expensive to deliver to its employees) and one printed out on 40,000 sheets of paper. *First Pony E-mail Express Delivery: Intel vs. Hamidi*, at <http://www.intelhamidi.com/firstdelivery.htm> (last visited Oct. 11, 2002); *Second Pony E-mail Express Delivery:*

2. *The Court of Appeal*

A divided three-judge panel of the court of appeal, giving more deference to the trial court's ruling than to all other legal authority on point, affirmed the trial court's ruling and upheld the permanent injunction¹⁷ over Justice Kolkey's dissent.¹⁸ In short, the court held that although Intel was unable to demonstrate any harm to its chattels necessary to trigger a damage award, the act of disrupting Intel's business by unauthorized use of Intel's computers amounted to trespass.¹⁹ The court inappropriately applied the definition of trespass to chattels as given in the *Restatement (Second) of Torts* as occurring when someone intentionally meddles with another's chattel in a way that is harmful to the owner's materially valuable interest in the chattel.²⁰ The court held that even if Intel could not demonstrate any actual harm or loss sufficient to support an award of nominal damages, it was nevertheless entitled to injunctive relief.²¹ Intel proved to the court's satisfaction that it—not the chattel—was hurt by the loss of productivity of distracted workers and by the time and effort its security department expended trying to stop the e-mail messages.²² The court concluded that Intel proved Hamidi was “disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of trespass to chattels.”²³ In so holding, the court radically departed from the existing California common law requirements and created a new tort where harm to the plaintiff's allegedly trespassed chattels need not be proven.

Intel vs. Hamidi, at <http://www.intelhamidi.com/seconddelivery.htm> (last visited Oct. 11, 2002).

17. *Hamidi*, 114 Cal. Rptr. 2d at 258.

18. *Id.* at 258–65 (Kolkey, J., dissenting)

19. *Id.* at 249. Asking for an injunction instead of damages does not free the plaintiff from the burden of showing any injury. An injunction is granted only after an injury has been established and where that injury is so irreparable that a damage award would be insufficient. *See infra* note 36.

20. *Hamidi*, 114 Cal. Rptr. 2d at 248.

21. *Id.* at 249.

22. *Id.* at 249–50. The dissent opined: “[I]t 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.” *Id.* at 258 (Kolkey, J., dissenting).

23. *Id.* at 249.

III. DEPARTURE FROM EXISTING CALIFORNIA COMMON LAW

A. *The Actual Injury Requirement*

In its decision, the court applied the doctrine of trespass to chattels without any finding of actual harm to the chattel involved or, alternately, without any finding of interference with the owner's ability to use that chattel. The court abandoned the distinction between trespass to real property and trespass to chattels, effectually merging the two and radically rewriting the trespass to chattels doctrine under California law.²⁴

The common law has always distinguished trespass to real property from trespass to chattels. In order for a plaintiff to maintain a trespass to real property action, there is no requirement that the plaintiff prove actual injury to the property.²⁵ In contrast, the tort of trespass to chattels has always required that the plaintiff prove sufficient actual injury to the chattel in question or, alternatively, some injury to the owner's ability to use or possess that chattel.²⁶ Accordingly, in order for a plaintiff to

24. The defendant and legal commentators, such as Amici Electronic Frontier Foundation and the ACLU, have also attacked this decision on first amendment free speech grounds. *Id.* at 252–53. As noted in the majority opinion: “[The United States Supreme Court has held that] the First Amendment trumps a state’s power to make and enforce defamation torts.” *Id.* at 253 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964)). The scope of this Casenote’s focus is not to analyze the first amendment issues. For a complete and detailed analysis on these claims and the trial court’s ruling on the first amendment issues, see *The Long Arm of Cyber-Reach*, 112 HARV. L. REV. 1610, 1623–25 (1999) (arguing that “the judicial enforcement of trespass laws in order to censor Internet speech constitutes state action”).

25. As the court in *Thrifty-Tel, Inc. v. Bezenek* explained:

[A]t early common law, trespass required a physical touching of another’s chattel or entry onto another’s land. The modern rule recognizes an indirect touching or entry; e.g., dust particles from a cement plant that migrate onto another’s real and personal property may give rise to trespass. But the requirement of a tangible has been relaxed almost to the point of being discarded. Thus, some courts have held that microscopic particles or smoke may give rise to trespass. And the California Supreme Court has intimated migrating intangibles (e.g., sound waves) may result in a trespass, provided they do not simply impede an owner’s use or enjoyment of property, but cause damage.

Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 473 n.6 (1996) (citations omitted).

26. RESTATEMENT (SECOND) OF TORTS § 218 (1965).

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

Id. The rule that trespass to chattels requires some actual damage, while actual damage is assumed in a trespass to real property case, is based on the fact that there is no legal recovery for harmless intermeddlings to a chattel. *Hamidi*, 114 Cal. Rptr. 2d at 64.

succeed on grounds of trespass to chattels, it must prove either actual physical injury to the chattel itself or a dispossession or disruption of that chattel.²⁷

California cases faithfully follow the common law and also require actual injury to the chattel as an element of the tort.²⁸ In fact, a California court of appeal recently reaffirmed this requirement stating: “Trespass 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.”²⁹

As pointed out in the dissenting opinion, Prosser and Keeton’s treatise also confirms the notion that:

trespass to chattel requires actual damage before the trespass is actionable:

Another departure from the original rule of the old writ of trespass concerns the necessity of some actual damage to the chattel before the action can be maintained. Where the defendant merely interferes without doing any harm—as where, for example, he merely lays hands upon the plaintiff’s horse, or sits in his car—there has been a division of opinion among the writers, and a surprising dearth of authority. . . . Such scanty authority as there is, however, has considered that the dignitary interest in the

(Kolkey, J., dissenting) (citing *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1023 (S.D. Ohio 1999)). Intentional intermeddling

with another’s chattel is subject to liability only [when that] 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.

Id. (quoting *CompuServe Inc.*, 962 F. Supp. at 1023 (quoting RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965))). An owner of a chattel is awarded “sufficient legal protection” from harmless intermeddlings based on the ability to use “reasonable force to protect” the chattel against harmless interference. *Id.*

27. Recall that the California Supreme Court has held that all intangible intrusions that do not cause physical damage to the plaintiff’s property must be dealt with as a nuisance and not a trespass. *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 695–96 (Cal. 1996); *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924–25 (Cal. 1982); see *supra* note 14.

28. See, e.g., *Zaslow v. Kroenert*, 176 P.2d 1, 7 (Cal. 1946); *Thrifty-Tel, Inc.*, 54 Cal. Rptr. 2d at 473; *Itano v. Colonial Yacht Anchorage*, 72 Cal. Rptr. 823, 827 (Ct. App. 1968).

29. *Thrifty-Tel, Inc.*, 54 Cal. Rptr. 2d at 473. As noted by the dissent, *Thrifty-Tel* derived this definition from *Itano*, 72 Cal. Rptr. at 827, “which, in turn, relied on Prosser’s treatise on torts and the California Supreme Court’s decisions in *Jordan v. Talbot*, 361 P.2d 20, 27–28 (Cal. 1961), and *Zaslow*, 176 P.2d at 7, which themselves relied on Prosser.” *Hamidi*, 114 Cal. Rptr. at 259 (Kolkey, J., dissenting). Also note that intent is an element of the tort, see *Thrifty-Tel, Inc.*, 54 Cal. Rptr. 2d at 473, but is not at issue here. It is undisputed that Hamidi intended his actions.

inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly it has been held that nominal damages will not be awarded, and that in the absence of any actual damage the action will not lie. This must be qualified, however, to the extent that any loss of possession by the plaintiff is regarded as necessarily a loss of something of value, even if only for a brief interval—so that wherever there is found to be dispossession, as in the case of seizure of goods on execution, the requirement of actual damage is satisfied.³⁰

Finally, the dissent went on to point out that the *Restatement (Second) of Torts* echoes the need for the plaintiff to prove actual damage to the chattel for the tort to lie:

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 of the possessor is affected as stated in Clause (c).³¹

Thus, the authority in California, whether by case law, the *Restatement (Second) of Torts*, or legal commentator, unambiguously requires the showing of actual injury to the chattel.

B. Dispossession

The California courts, *Prosser and Keeton on the Law of Torts*, and the *Restatement (Second) of Torts* provide one very narrow exception to the actual injury requirement. This exception is applicable only when there has been a loss of the possession of the chattel. This loss of possession is viewed as the loss of something of value and in this way is constructively interpreted as actual damage.³²

30. *Hamidi*, 114 Cal. Rptr. 2d at 259–60 (Kolkey, J., dissenting) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 87 (W. Page Keeton general ed., 5th ed. 1984)) (footnotes omitted).

31. *Id.* at 260 (Kolkey, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965)).

32. As noted by the dissent, comment (d) of section 218 provides that: “Where 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.” *Id.* (Kolkey, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 218 cmt. d (1965)). The dissent then went on to note that this exception is confirmed by Prosser and Keeton’s treatise, which states: “[L]oss of possession by the plaintiff is regarded as necessarily a loss of something of value, even if only for a brief interval—so that wherever there is found to be dispossession . . . the requirement of actual damage is satisfied.” *Id.* (Kolkey, J., dissenting) (quoting W. PAGE KEETON ET

Therefore, in order to maintain a cause of action for the tort of trespass to chattels in California, a plaintiff must prove either (1) actual injury to the chattel or (2) loss of possession.³³

C. *Departure from the Legal Standard*

1. *Discarding the Actual Injury and Dispossession Requirements*

Despite authority to the contrary, the court applied trespass to chattels to the transmittal of Hamidi's unsolicited e-mail where Intel was unable to show any actual injury to the chattel or any loss of possession that the court could deem actual damage.

Intel's computer equipment (the chattel) indisputably was not physically harmed by Hamidi's e-mail messages. Further, there was no dispossession of or disruption to the computer equipment.³⁴ Intel was not even dispossessed momentarily of its servers, and at no time was the system ever injured in its condition, quality, or value. The chattel was never rendered unavailable; thus, there was no actual harm caused to any legally protected interest held by Intel.³⁵ The complete failure to allege or to support a showing of actual harm or actual dispossession should have precluded the application of the trespass to chattels doctrine, and the court should have denied Intel's prayer for injunctive relief. Nevertheless, the court stated: "Even assuming Intel has not demonstrated sufficient 'harm' needed in order to trigger entitlement to nominal

AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 87 (W. Page Keeton general ed., 5th ed. 1984)).

33. The court in *Hamidi* cited an English treatise that states: "[T]respass to chattels is actionable *per se* without any proof of actual damage." *Id.* at 249 (quoting R.F.V. HEUSTON, SALMOND AND HEUSTON ON THE LAW OF TORTS § 6.2 (21st ed. 1996)). The treatise the court cited gives examples such as the snatching of a customer's handbag for a few moments or the showing of a private letter to an unauthorized person that amount to trespass. *Id.* However, as the dissent suggested, the court overlooked that this authority supports the alternative requirement to actual damages—"complete dispossession." *Id.* at 263 (Kolkey, J., dissenting); see also *supra* note 32. The majority also cited an additional English treatise that it believed supported its holding. *Hamidi*, 114 Cal. Rptr. 2d at 249 (citing J.F. CLERK, CLERK & LINDSELL ON TORTS § 13-159 (17th ed. 1995)). However, the dissent responded that "that treatise acknowledges that '[i]t has been judicially asserted that even an intentional interference without asportation is not actionable unless some harm ensues' and simply states that textbook writers argue to the contrary." *Id.* at 263 (Kolkey, J., dissenting) (quoting J.F. CLERK, CLERK & LINDSELL ON TORTS § 13-159, at 703 (17th ed. 1995) (alteration in original)). Therefore, the court's English authorities clearly agree with California law.

34. *Hamidi*, 114 Cal. Rptr. 2d at 260-61 (Kolkey, J., dissenting).

35. *Id.*

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.”³⁶

2. *Grasping for Harm: Attenuated or Indirect Harms*

The court of appeal based its injunction on an attenuated harm theory by stating that the injury to Intel was “the loss of productivity caused by the thousands of employees distracted from their work [by the e-mail messages] and by the time its security department spent trying to halt the distractions after [the defendant] refused to respect Intel’s request to stop . . . sending unwanted e-mails.”³⁷

Evidence that Intel employees paid attention to Hamidi’s e-mail messages and were thereby distracted from their tasks cannot be viewed, as this court seems to have viewed it, as amounting to the requisite actual injury. Such distraction and loss of productivity is not an injury to the server itself or even to its ability to properly function. It is undisputed that Intel’s computers were in no way damaged or even slowed down by the minuscule amount of data that Hamidi sent to Intel.³⁸ Reading an e-mail message transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment. Intel’s alleged loss of productivity of those employees who either read or took the time to delete the e-mail messages sent on six different occasions over a nearly two-year period cannot qualify as an injury of the type that gives rise to a trespass to chattels. “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.”³⁹ As noted by the dissent, attenuated harms of this nature are outside the scope of the injury against

36. *Id.* at 249. As the dissent noted, if the transmittal of an unsolicited e-mail causes no injury to the condition, value, or operation of the chattel (or to the possessory interest therein) then it is unclear just what harm the injunction is designed to avoid. *Id.* at 261 (Kolkey, J., dissenting). Just because an injunction was sought instead of actual damages does not mean the plaintiff is free from the burden of proving any injury. *Id.* (Kolkey, J., dissenting). In fact, an injunction is granted where damages are insufficient, not nonexistent. 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.” *Id.* (Kolkey, J., dissenting) (quoting 5 B. E. WITKIN, CALIFORNIA PROCEDURE § 782 (4th ed. 1997)). Thus, the plaintiff must still prove harm to the chattel even though an injunction was sought.

37. *Id.* at 250.

38. *Id.* (dismissing the amicus argument that the receipt of the six e-mail messages over a two-year period does not disrupt or harm Intel’s computer systems by finding the loss of productivity to be the harm to Intel).

39. *Id.* at 261 (Kolkey, J., dissenting).

which the trespass to chattels tort is designed to protect.⁴⁰

Intel's efforts and the costs it expended trying to prevent the alleged trespass also cannot amount to the required injury. As the dissent noted: "[I]t is circular [reasoning] to premise the required 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, [a plaintiff could] create an injury for every supposed tort."⁴¹

In granting the injunction, the court trivialized the necessity of actual injury to the chattel. Intel had not proved any actual damage. The alleged employee distraction or loss of employee productivity could not masquerade as actual injury to its servers. Consider the following illustrative example given in Hamidi's review petition to the Supreme Court of California,⁴² emphasizing the importance of the common law requirements:

Historically, cows have been identified as "chattel," and a trespass to chattel claim could lie for chasing or physically interfering with an owner's cows or cattle. Imagine that a farmer owns a number of cows, and employs several people to milk them. The farmer's neighbor, however, believes that the farmer mistreats his employees and that they should quit their jobs or demand higher wages. The neighbor approaches the farmer's property and stands just outside the fence dividing the farmer's property from his own, and within earshot of the employees (who are busily milking cows), the neighbor begins shouting to the employees that they should quit their jobs and demand higher wages. The farmer pauses from his work and demands that his neighbor stop shouting; the neighbor persists. Meanwhile, the employees pause from their work—clearly reducing their productivity—in order to listen to the neighbor's impassioned message. The cows, for their part, are unaffected, staring vacantly forward in a bovine trance.

Should the farmer sue his neighbor for trespass to chattel? It is safe to assume that prior to *Intel Corp. v. Hamidi*, nobody would have suggested such a thing, but now the farmer can clearly make out every element of the tort. The neighbor's behavior is intentional; he persisted in this behavior despite the farmer's demand that he stop; the sound waves emanating from the neighbor's mouth and impinging on the cows are every bit as tangible as electrons (indeed, much *more* tangible, as sound waves can be perceived by the senses, while electrons cannot); and the employees have clearly suffered a loss of productivity. The only thing preventing a trespass action here is

40. *Id.*

41. *Id.*

42. Petition for Review, *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Ct. App. 2002) (No. C033076), available at <http://www.intelhamidi.com/supremepetition.htm> (last visited Oct. 14, 2002).

judicial recognition of the absurdity of applying trespass to chattel in such a situation, where the chattel (cows) are completely unaffected.⁴³

Apparently, the court in *Hamidi* did not view the outcome of its decision in light of this illustration when they departed from established requirements of trespass to chattel.

IV. ERRONEOUS READING OR DISREGARD FOR CALIFORNIA CASE LAW

A. *Erroneous Reading*

The court's decision is based on an erroneous reading of existing California case law. The first California case to apply the common law doctrine of trespass to chattels in a computer context was *Thrifty-Tel, Inc. v. Bezenek*.⁴⁴ The court in *Hamidi* purportedly relied on this case for its proposition that Hamidi's unsolicited e-mail messages were actionable under a trespass to chattels claim. However, the court in *Hamidi* did not give true effect to the *Thrifty-Tel* decision and relied solely on the seriously flawed reading of a footnote within the case.

In *Thrifty-Tel*, two young computer hackers hacked into the plaintiff's computer system in order to obtain access and authorization codes for Thrifty-Tel's long distance telephone service to enable them to make free long distance phone calls. In order to obtain the codes, the hackers ran search programs on the plaintiff's system.⁴⁵ The searches overburdened the telephone system, and, as a result, some authorized subscribers were unable to access the network to make calls.⁴⁶ The court applied trespass to chattels based on its reading of California case law, Prosser and Keeton's treatise on torts, and the *Restatement (Second) of Torts*.⁴⁷ In *Thrifty-Tel* the plaintiffs met the requirement of actual injury because the defendants had overburdened the telephone system, effectively denying some paid subscribers access to the phone lines.⁴⁸

In *Hamidi* the court inexplicably focused on a footnote in the *Thrifty-Tel* decision instead of following the elements of trespass to chattels set

43. *Id.*

44. 54 Cal. Rptr. 2d 468 (Ct. App. 1996).

45. *Id.* at 471.

46. *Id.*

47. *Id.* at 473; *see infra* Part III.A–B (discussing the actual physical injury, dispossession, or disruption to the chattel prerequisites to the trespass to chattels tort). Thrifty-Tel actually brought their claim based on conversion and not trespass to chattels because the latter tort had yet to be actionable in this context. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 472–73. However, the court recognized that conversion was not applicable in this setting. Conversion requires that the loss of an intangible property interest be reflected in something tangible that can be physically taken, so the court *sua sponte* raised the trespass to chattel claim for Thrifty-Tel. *Id.*

48. *Id.* at 471.

forth in the text of the decision. In this footnote the *Thrifty-Tel* court had said: “In our view, the electronic signals generated by the [defendants’] activities were sufficiently tangible to support a trespass cause of action.”⁴⁹ The *Hamidi* court based its decision solely on this footnote and concluded that the e-mail messages from Hamidi alone, without any associated physical disruption to the chattel itself, were sufficiently tangible to support a trespass cause of action. The court read this footnote out of context and drew from it principles that could not logically be drawn. The court’s reading of this footnote was in opposition to the text of the *Thrifty-Tel* decision and in opposition to the cases the *Thrifty-Tel* court relied on to reach that decision. The *Thrifty-Tel* holding should have been read as it was intended to be read, that electronic signals are “sufficiently tangible to support a cause of action”—but only when an actual injury is found.⁵⁰

Following the *Thrifty-Tel* decision, other courts applied the trespass to chattels doctrine to computer systems only after faithfully following the guidelines set out in *Thrifty-Tel*. For example, in *CompuServe Inc. v. Cyber Promotions, Inc.*, a federal district court found that the transmittal of unsolicited bulk e-mail advertisements burdened CompuServe’s computer equipment and diminished its goodwill. The court therefore held that the defendant had denied CompuServe its possessory interest in its computer network to the extent that the defendant interfered with its operation, and thus diminished the value of its chattel, the computer servers.⁵¹ The court found both harm to the actual chattel and an interference with the possession of that chattel. *America Online, Inc.* successfully maintained a similar claim where the court used similar reasoning.⁵² The dissent in *Hamidi* cited two other prior federal district

49. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 251 (Ct. App. 2001) (quoting *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6), *review granted*, 43 P.3d 587 (Cal. 2002).

50. The court’s reading of this footnote is also in opposition to the California Supreme Court’s holding that all intangible intrusions that do not cause physical damage to plaintiff’s property must be dealt with as a nuisance and not a trespass. *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 695 (Cal. 1996); *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924 (Cal. 1982).

51. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017, 1022, 1027 (S.D. Ohio 1997).

52. *See America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 448–49, 451 (E.D. Va. 1998) (finding that defendants transmitted more than ninety-two million unsolicited e-mail advertisements over a five-day period, thereby “impairing the functioning of [the plaintiff’s] e-mail system”); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (finding that the defendants sent over sixty million unsolicited e-mail advertisements, which “burdened [the plaintiff’s] equipment”); *see*

court cases, *Register.com, Inc. v. Verio, Inc.*⁵³ and *eBay, Inc. v. Bidder's Edge, Inc.*,⁵⁴ for the proposition that “where the unauthorized search of, and retrieval of information from, [the plaintiff’s] databases reduced the computer system’s capacity, slowing response times and reducing system performance,” it amounted to sufficient actual injury to sustain a claim of trespass to chattel. In fact, the dissent remarked that each and every appellate court that has applied trespass to chattels in the computer or cyber context has done so only where the actual chattel or the possessory interest in that chattel was impaired as to its condition or value.⁵⁵ As the dissent indicated, no other case before *Hamidi* ignored the element of actual injury or replaced it with an element of attenuated harm that does not touch and concern the chattel.⁵⁶

Because Intel simply did not suffer any impairment of the chattel’s condition or value or of the possessory interest in that chattel that would place *Hamidi*’s acts within the scope of existing case law, the decision in *Hamidi* is different from all other cases that have applied trespass to chattel in this context. Therefore, the *Hamidi* decision is a departure from traditional notions of trespass to chattels, a departure from legal precedent, and a departure from the weight of legal authority, perhaps based solely on the flawed reading of a footnote.

B. Disregard in the Name of Adaptation

Perhaps understanding that its decision would be a departure from all existing case law and authority, the court may have attempted to excuse itself with the adage, “[t]he common law adapts to human endeavor.”⁵⁷ Although it is true that common law doctrines should evolve and adapt to new situations, the court’s departure is far more than evolution or mere adaptation. The court’s decision is the spontaneous creation of a new tort, one that differs vastly in substance and policy from the tort from which it allegedly evolved. In biblical proportions, the court has taken a new wine, placed it in an old

also *Hotmail Corp. v. Van\$ Money Pie Inc.*, No. C98-20064 JW C-98 JW PVT ENE, 1998 WL 388389, at *7 (N.D. Cal. Apr. 16, 1998) (finding that defendants caused tens of thousands of misdirected e-mail messages to be transmitted to plaintiff, thereby “filling up [the plaintiff’s] computer storage space and threatening to damage [the plaintiff’s] ability to service its legitimate customers”).

53. 126 F. Supp. 2d 238, 250 (S.D.N.Y. 2000).

54. 100 F. Supp. 2d 1058, 1066, 1071 (N.D. Cal. 2000).

55. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 259 (Ct. App. 2001) (Kolkey, J., dissenting), *review granted*, 43 P.3d 587 (Cal. 2002).

56. *Id.* (Kolkey, J., dissenting).

57. *Id.* at 247. The majority must clearly recognize their departure from the existing law, which may be why the court goes into a lengthy discussion on the power of the court to modify common law doctrines. However, this power is not unbridled and should be kept within the bounds that it was intended.

bottle, and clearly the bottle has burst.⁵⁸

The court's justification did not stop with adages. The court further attempted to justify its departure from the common law as appropriate in this circumstance because, as the court stated, "[w]e conceive of no public benefit from this wasteful cat-and-mouse game which justifies depriving Intel of an injunction."⁵⁹ However, the majority improperly balanced the benefits that would come to the public if Intel was denied an injunction. As Justice Kolkey explained in the dissent, the issuance of an injunction in this case "would expand the tort of trespass to chattel in untold ways and to unanticipated circumstances."⁶⁰

Not only did the court deviate vastly from the existing case law regarding trespass to chattels, but it also failed to satisfactorily explain why it was a proper time to make such a deviation. As the dissent noted, the court's removal, or perhaps relaxation, of the actual injury requirement did not merely adapt the tort, but "chang[ed] its nature."⁶¹ As Justice Kolkey went on to explain, to "dispense[] with the requirement of injury to the value, operation, or condition of the chattel, or the possessory

58. The new wine into old bottles analogy comes from a biblical parable that states: "Neither do men put new wine into old bottles: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved." *Matthew* 9:17. Here the new wine is Hamidi's unsolicited messages which caused no actual injury to, or loss of possession of, chattel. The old bottle is the common law tort of trespass to chattel. Clearly, the old bottle is not suited to handle this new wine. See Susan M. Ballantine, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209, 212, 248 (2000) (arguing that "it is incorrect to apply the trespass to chattels theory to cases in which private network providers, specifically employers, seek to protect their interests in their computer networks" and "failure to allege or to support a showing of actual harm should have precluded Intel from prevailing on a trespass to chattels theory"); see also *infra* Part V.A-B. The dissent in *Hamidi* argued that such a departure from the common law doctrine is best handled by legislative action as opposed to judicial policymaking. *Hamidi*, 114 Cal. Rptr. 2d at 264 (Kolkey, J., dissenting). In fact, the California Legislature has stepped forward and labeled the appropriate bottles into which this new wine should be poured. As indicated by the dissent, the California Legislature has "restrict[ed] the e-mailing of unsolicited *advertising* materials" (which this is not), *id.* at 264 (Kolkey, J., dissenting) (citing CAL. BUS. & PROF. CODE §§ 17538.4, 17538.45), and has granted "a civil remedy to those who suffer *damage or loss* from . . . the unauthorized access to a computer system," *id.* (Kolkey, J., dissenting) (citing CAL. PENAL CODE § 502(e)(1)). These statutes show the legislature's recognition of needed protection in this area but, in the dissent's view, also show by failure to extend these new actions to noncommercial or noninjurious messages, a "deliberate decision" not to hold actionable the acts of Hamidi. *Id.* (Kolkey, J., dissenting).

59. *Hamidi*, 114 Cal. Rptr. 2d at 249.

60. *Id.* at 259 (Kolkey, J., dissenting).

61. *Id.* at 264 (Kolkey, J., dissenting).

interest therein, [is to] extend the tort's scope in a way that loses sight of its purpose."⁶² Its purpose is to provide recovery "for interferences with the possession of chattels" which do not quite rise to the level of a conversion.⁶³

V. ABSURD RESULTS AND ADVERSE CONSEQUENCES

A. *Absurd Results*

The court's application of trespass to chattels to Hamidi's electronic signals, which did not in any way damage or interfere with the value or operation of the chattel allegedly trespassed upon, expanded the tort to include many unanticipated, unwanted, and even absurd situations.⁶⁴

If Hamidi's e-mail messages constituted trespass to Intel's chattels as the court held, then trespass is actionable in a number of other absurd situations. Under this newly created tort, all unwanted mail delivered by the U.S. Postal Service would amount to a trespass to chattels, for it is intentionally placed in the recipient's mailbox, the chattel is interfered with, and the recipient suffers the same injury as Intel, that is, the lost time that it takes to read and discard these solicitations. All e-mail messages, whether jokes, chain letters, or personal correspondences from a subjectively unwanted sender would be actionable for the same reasons. Telephone solicitations would trespass the recipient's telephone or answering machine, based on the time spent on the phone deleting the message, listening to the message, or the space occupied on the answering machine. Even television and radio broadcasts would amount to trespass on the owner's stereo receiver or television anytime the recipient received signals subjectively held undesirable, the harm being the distraction and the use of bandwidth that could otherwise be put to more valuable uses.⁶⁵

62. *Id.*

63. *Thrifty Tel., Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 (1996) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 87 (W. Page Keeton general ed., 5th ed. 1984)). The Prosser and Keeton treatise refers to trespass to chattels as "a little brother of conversion." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 86 (W. Page Keeton general ed., 5th ed. 1984).

64. *See Hamidi*, 114 Cal. Rptr. 2d at 259 (Kolkey, J., dissenting).

65. Intel argued that these types of examples can be distinguished because Intel had ordered Hamidi to stop e-mailing its employees, thus giving Hamidi notice of the trespass. *Id.* at 261 (Kolkey, J., dissenting). However, merely giving notice does not end the possibility of absurd results.

[S]uch 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

Before this court's holding, plaintiffs would not have considered bringing a trespass to chattels claim based on the receipt of unwanted telephone calls, faxes, letters, radio, or television programs.⁶⁶ However, the court's decision may invite potential plaintiffs to try, and if *Hamidi* is followed, to win.

B. Adverse Consequences

The majority's refusal to follow the common guidance in its application of trespass to chattels also has adverse consequences for free speech on the Internet. If, as the court of appeal held, an electronic signal alone is sufficiently tangible to support a trespass cause of action even though no physical disruption to computer equipment actually occurred,⁶⁷ then any transmission becomes actionable if the plaintiff simply objects to the transmission before it is received. What the court failed to recognize is that the computers that run the Internet and the servers that receive e-mail are all, like Intel's system, privately owned. This means that all e-mail messages enter into private property.⁶⁸ As a result, under the *Hamidi* ruling almost any e-mail message could constitute an actionable trespass.

If most e-mail messages could constitute an actionable trespass, then the free speech landscape of the Internet would be drastically altered. E-mail is the primary mode of communication on the Internet, and both courts and commentators hail the Internet as potentially the most diverse and democratic communication medium that the world has ever known.⁶⁹ The U.S. Supreme Court has praised the Internet as a "vast democratic forum[]"⁷⁰ that is "open to all comers,"⁷¹ which has created a "new

the phone rings. Her fiancé wishing to make up? No, trespass to chattel. *Id.* at 261–62 (Kolkey, J., dissenting).

66. In fact, recall that even in *Thrifty-Tel* the plaintiff did not bring a trespass claim even where it was appropriate, and it took a benevolent court to mold a conversion claim into a trespass for chattel. *See supra* note 47.

67. *Hamidi*, 114 Cal. Rptr. 2d at 250–51.

68. *See, e.g.*, David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public Vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 17 (1998).

69. *See, e.g.*, *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (Dalzell, J., supporting), *aff'd*, 521 U.S. 844 (1997); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1833–43 (1995).

70. *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

71. *Id.* at 880.

marketplace of ideas”⁷² with “content [that] . . . is as diverse as human thought.”⁷³ Given the role of e-mail in cyberspace, the court of appeal’s ruling has potentially disastrous adverse consequences to freedom of speech.

Moreover, the court of appeal’s logic threatens the existence of the Internet itself, because, by nature, virtually every application on the Internet must generate electronic signals. Thus, if electronic signals alone can supply the basis for trespass to chattels, the application of the tort is limited only by a plaintiff’s imagination. As one commentator noted: “One can imagine the anti-commons nightmare that could ensue on the Internet in web linking, indexing, and other routine functions if every owner of equipment attached to the network were granted a cause of action for the trespass of unwanted electrons on her equipment.”⁷⁴

Furthermore, if

anyone should think that such trespass claims would be limited to e-mail or the Web, similar analyses could easily be supplied for FTP, telnet, streaming audio or video, Internet “chat” sessions, software agents, indexing “spiders,” and many other online applications. Trespass may indeed be the all-purpose cause of action for the Internet; the impingement of electrons . . . is inherent in connecting a machine to the Internet.⁷⁵

In short, the logic of the court of appeal’s decision stretches far beyond the boundaries of the dispute between Intel and Mr. Hamidi. The decision threatens both the free speech landscape of the Internet and the operation of the Internet itself.

VI. CONCLUSION

The court in *Hamidi* has gone against the overwhelming weight of authority by holding that trespass to chattels does not require injury to the chattel or to the possessor’s legally protected interest in the chattel. Its decision is in opposition to every judicial decision to have considered the trespass to chattels doctrine in the computer or cyberspace context, under which the courts have carefully limited the doctrine to those situations where the defendant has caused real physical disruption to the plaintiff’s computer server or computer equipment. The decision is also inconsistent with the *Restatement (Second) of Torts* and with Prosser and Keeton’s leading treatise on torts. The court has created a new tort with potentially absurd and damaging results.

Perhaps Hamidi was not a sympathetic defendant. Free speech issues

72. *Id.* at 885.

73. *Id.* at 870.

74. Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 49 (2000).

75. *Id.* at 46.

aside, “spamming”⁷⁶ is not an activity that most e-mail users would like to see encouraged or protected. Understandably, Intel did not want Hamidi openly contacting its employees and harassing them in an effort to incite animosity toward their employer. Furthermore, many may consider the unintended effects that would spill over to inhibit telephone solicitation or bulk junk mail to be a pleasant byproduct. While that may be true, the trespass theory has many dangerous implications that reach far beyond spam and other unsolicited communications. As expressed in the following words quoted by the dissent in *Hamidi*:

We 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 the centuries of the common law have set to judge-made innovations.⁷⁷

The requirement that a plaintiff prove actual injury to the chattel itself should not be set aside. The actual injury requirement has been the standard for many years and has recently received strong support in the few cases that have dealt with intangible trespass, thus showing the trend is not to depart from that standard.⁷⁸ Where the trespass is by something other than physical contact, the requirement of injury is even more important. As applied by California courts to computer networks, trespass to chattels “lies where an intentional interference with the possession of personal property has proximately caused injury.”⁷⁹ Intel did not meet this burden, and the court’s holding should therefore be reversed.

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76. The term “spam” refers broadly to unsolicited bulk e-mail (or “junk e-mail”), “which can be either commercial (such as an advertisement) or noncommercial (such as a joke or chain letter).” Use of the term “spam” as Internet jargon for this seemingly ubiquitous junk e-mail arose out of a skit by the British comedy troupe Monty Python, in which a waitress can offer a patron no single menu item that does not include spam Hormel Food Corporation, which debuted its SPAM® luncheon meat in 1937, has dropped any defensiveness about this use of the term and now celebrates its product with a website State v. Heckel, 24 P.3d 404, 406 n.1 (Wash. 2001) (citations omitted).

77. Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244, 258 (Ct. App. 2001) (Kolkey, J., dissenting) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103 (1921)) (footnote omitted), review granted, 43 P.3d 587 (Cal. 2002).

78. See *supra* Part IV.A. and notes 47–49.

79. Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 473–74 (Ct. App. 1996).

