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Trespass to Chattels and the Internet
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In *Reno v. ACLU*, the Supreme Court observed that “most Internet forums — including chat rooms, newsgroups, mail exploders, and the Web — are open to all comers.”¹ However, a survey of recent cases reveals the increasing frequency with which parties are attempting to restrict the “open” nature of electronic communication channels, be they websites or e-mail servers.² Contrary to the Court’s vision of “vast democratic forums”³ made possible by electronic communication, parties are turning to the courts to limit access to those channels.

One example is *Intel Corp. v. Hamidi*,⁴ recently decided by the California Supreme Court. In *Intel*, the plaintiff corporation sought to enjoin the defendant from sending unsolicited messages to the corporation’s employees’ work e-mail. According to the plaintiff’s theory, the sending of unwanted e-mail messages constituted a trespass to chattels.⁵ The court held that, though a party who receives unwanted e-mail messages may theoretically find redress under the doctrine, the

1. 521 U.S. 844, 880 (1997).

2. See, e.g., *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000). For a survey of the role of e-mail in litigation prior to 1999, see Samuel A. Thumma & Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (1999).

3. *Reno*, 521 U.S. at 868.

4. 1 Cal. Rptr. 3d 32 (2003).

5. “Trespass to chattels” is defined as “[t]he act of committing, without lawful justification, any act of direct physical interference with a chattel possessed by another. The act must amount to a direct forcible injury.” BLACK’S LAW DICTIONARY 1509 (7th ed. 1999).

plaintiff failed to establish the requisite “cyber-equivalent” of the doctrine’s traditional elements.⁶

Though an argument that the tort doctrine may be applied in cyberspace is not novel,⁷ the California Supreme Court’s treatment of the theory arguably is. In its holding, the court laudably reinvigorated a much-needed limiting element of the doctrine — the harm requirement. However, the opinion ultimately raises far more questions than it answers. In sum, the opinion serves as the most recent example of a court’s ultimately ill-fated attempt to adapt a traditional tort doctrine to the new legal frontier of cyberspace.

Like many firms, technology giant Intel maintains a computer system through which its employees may send and receive e-mail and access the Internet. Intel permits its employees “to make reasonable non-business use” of the system.⁸ On six occasions between 1996 and 1998, former Intel employee Kourosh Kenneth Hamidi⁹ sent current Intel employees e-mail messages criticizing the company’s employment practices.¹⁰

Hamidi was a founding member of and spokesperson for Former and Current Employees of Intel, or FACE-Intel, an organization whose aims were to “[n]etwork[], help [members in] landing jobs if unemployed, discuss any employment and labor issues, support each other with emotional trauma and etc. [sic],” according to one e-mail message.¹¹ By the organization’s own estimates, the messages were sent to as many as 35,000 e-mail addresses.¹² The messages stated that, at a recipient’s request, his or her e-mail address would be re-

6 *Intel*, 1 Cal. Rptr. 3d at 36.

7. See generally Susan M. Ballantine, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209 (2000); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 93–97 (2002).

8. *Intel*, 1 Cal. Rptr. 3d at 36.

9. Followers of the 2003 California recall election may know Hamidi as one of the 135 candidates who vied to replace Governor Gray Davis. The *Los Angeles Times* profiled Hamidi as part of its “Candidate Close-Ups” voter guide. Hamidi’s “career highlight” was his founding of “an organization advocating rights of workers in the high-tech industry.” *Candidate Close-Ups*, L.A. TIMES, Sept. 28, 2003, available at <http://www.latimes.com/news/local/la-me-prec28sep28000419,1,4933510.story>. A Libertarian candidate, Hamidi received 1,946 votes statewide. See *Statewide Special Election Returns*, at <http://vote2003.ss.ca.gov>Returns/gov/00.htm> (last visited Nov. 7, 2003).

10. *Intel*, 1 Cal. Rptr. 3d at 36.

11. First e-mail from FACE-Intel, available at <http://www.intelhamidi.com/emailmessages.htm> (last visited Oct. 19, 2003).

12. See *id.* According to the trial court, Hamidi obtained these addresses from an outdated Intel list not released for public use. *Intel Corp. v. Hamidi*, No. 98AS05067, 1999 WL 450944, at *1 (Cal. App. Dep’t Super. Ct. Apr. 28, 1999). Hamidi stated that he obtained the addresses from a floppy disk anonymously sent to him. *Intel*, 1 Cal. Rptr. 3d at 38.

moved from the mailing list,¹³ Hamidi apparently honored all of the 450 removal requests that he received.¹⁴

Though numerous — and certainly unwanted from Intel's perspective — Hamidi's e-mail messages did not interfere with the normal operations of Intel's computer system. The system was able to receive and relay Hamidi's messages to the employees' e-mail addresses without slowing from its normal operating speed. There was no evidence that the messages caused or threatened damage to the hardware or software that comprised Intel's computer system.¹⁵

Intel employed internal "self-help" measures to block the e-mail messages. According to Intel's brief to the California Supreme Court, its support personnel "struggled to block or remove Hamidi's e-mails from the Intel e-mail system."¹⁶ However, Intel's efforts were largely unsuccessful. Hamidi circumvented the company's blocking measures by using different computers to send the e-mail messages¹⁷ and deliberately misspelling key words in the messages.¹⁸ In March 1998, attorneys for Intel sent a cease and desist letter to Hamidi, labeling FACE-Intel's e-mail messages as "spam"¹⁹ and their delivery as "an unsolicited intrusion on the company's proprietary computer equipment."²⁰ Following another mass e-mailing by Hamidi in September 1998, Intel filed suit against Hamidi and FACE-Intel, claiming trespass to chattels and nuisance. The company sought both a permanent injunction and monetary damages.²¹

13. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 247 (Cal. Ct. App. 2001).

14. See Letter from FACE-Intel to Linda E. Shostak, Morrison & Foerster LLP (Mar. 30, 1998), available at <http://www.intelhamidi.com/intelletters.htm>.

15. *Intel*, 1 Cal. Rptr. 3d at 41.

16. Respondent's Answer Brief, *Intel*, 1 Cal. Rptr. 3d (No. S103781), at 2002 WL 1926523, *7.

17. *Intel*, 1 Cal. Rptr. 3d at 38.

18. See Fourth e-mail from FACE-Intel, available at <http://www.intelhamidi.com/emailmessages.htm> (last visited Oct. 19, 2003). "To assure that at least some of you will receive this message," Hamidi wrote, "we have encoded some of the key words and names. The following words have been purposely misspelled (adres, webb, sight, enternett, and e male) [*sic*]." *Id.*

19. In the context of e-mail messages, "spam" commonly denotes unsolicited commercial e-mail or unsolicited bulk e-mail. See David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325, 328 (2001). Though the moniker for unwanted e-mail is almost certainly here to stay, Hormel Foods Corp., maker of the canned meat product SPAM, filed a trademark dilution suit against SpamArrest, a Seattle firm whose product blocks unsolicited e-mail, in July 2003 to challenge the use of its product name in connection with unwanted e-mail messages. See Ray Cooklis, *Spam/SPAM: Uncanny Resemblance?*, CINCINNATI ENQUIRER, Aug. 1, 2003, available at http://www.enquirer.com/editions/2003/08/01/editorial_memo01ray.html.

20. Letter from Linda E. Shostak, Morrison & Foerster LLP, to Kourosh Kenneth Hamidi, FACE-Intel (Mar. 17, 1998), available at <http://www.intelhamidi.com/intelletters.htm>.

21. *Intel Corp. v. Hamidi*, No. 98AS05067, 1999 WL 450944, at *1 (Cal. App. Dep't Super. Ct. Apr. 28, 1999). Before the trial court's hearing on its summary judgment motion, Intel voluntarily dismissed its nuisance claim and waived monetary damages. *Id.*

The Superior Court of San Francisco County, California, granted Intel's motion for summary judgment on its trespass to chattels claim.²² The court determined that Intel was entitled to a permanent injunction because Hamidi would persist in sending e-mail messages unless restrained and it was "clear that Intel's self-help remedies are insufficient to the task of protecting Intel's property."²³

In its decision, the trial court raised three issues that would prove key in the subsequent development of the dispute. First, citing *Thrifty-Tel, Inc. v. Bezenek*²⁴ and *CompuServe, Inc. v. Cyber Promotions, Inc.*,²⁵ it summarily concluded that trespass to chattels was the appropriate doctrine under which to analyze the case.²⁶ Second, the court determined that "[p]hysical harm to [Intel's] system is not required" as an element of the doctrine; rather, "any impairment in the value to Intel of its e-mail system" was sufficient to satisfy the harm element.²⁷ Finally, the court rejected Hamidi's free speech arguments under both the California and United States Constitutions, finding no state action and determining that "[t]he mere connection of Intel's e-mail system with the Internet does not convert it into a public forum."²⁸

Though bolstered by briefs of notable amici,²⁹ Hamidi's arguments met with a similar fate at the appellate level. In what was effectively a more in-depth version of the trial court's opinion,³⁰ the Court of Appeal for the Third District affirmed.³¹ Conceding that there was "confusion in the [precedential] cases," the court focused much of its energy on the harm element of the trespass to chattels doctrine.³² After a lengthy analysis of the origin of the doctrine, the court determined that "the nature of the remedy sought colors the analysis."³³

In effect, the court posited that the elements of a party's trespass to chattels claim would be adjudged by different standards according to the requested relief. If seeking nominal damages, a party "must prove the value of the property taken, or that he has sustained some

22. *Id.*

23. *Id.* at *3.

24. 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).

25. 962 F. Supp. 1015 (S.D. Ohio 1997).

26. *Intel*, 1999 WL 450944, at *1.

27. *Id.* at *2.

28. *Id.*

29. On appeal, Hamidi was supported by amici Electronic Frontier Foundation and American Civil Liberties Union. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 246 (Cal. Ct. App. 2002).

30. See Tyson Marshall, Note, *Intel Corp. v. Hamidi: Trespass to Chattels, the Internet's Greatest Antagonist?*, 40 SAN DIEGO L. REV. 461, 465 (2003) ("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." (emphasis added)).

31. *Intel*, 114 Cal. Rptr. 2d at 244.

32. See *id.* at 249.

33. *Id.* at 248.

special damage.”³⁴ By contrast, a party such as Intel who is seeking an injunction is not required to demonstrate such harm. Rather, “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.”³⁵ Relying in part on *CompuServe* and *Thrifty-Tel*, the court found that Intel had “show[n] it was hurt” by offering evidence of loss of employee productivity and expenditure of support personnel resources.³⁶

In a vigorous dissent, Judge Kolkey intimated that the majority was, in effect, creating a new tort: “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.”³⁷ Kolkey expressed concern that, under the majority’s analysis, a range of everyday actions (e.g., unwanted telephone calls) would be actionable as trespasses to chattels.³⁸ Though seemingly sympathetic to Intel’s plight,³⁹ Kolkey ultimately concluded that the extension of the doctrine to include the transmission of unsolicited e-mail that causes no injury was a decision best suited to the legislature.⁴⁰

In a 4–3 decision, the California Supreme Court reversed.⁴¹ In a lengthy majority opinion accompanied by vigorous dissents by Justices Brown and Mosk,⁴² Justice Werdegar concluded that Intel had failed to establish trespass to chattels because it could not demonstrate that its chattels (i.e., computer system) had been damaged.⁴³ The court’s decision may be distilled into five pronouncements necessary to reach its conclusion; each will be discussed in turn.

First, the court held that under California law, harm to chattels is a necessary element of a trespass to chattels claim, regardless of the

34. *Id.* at 249 (quoting 1 WATERMAN, TRESPASS REMEDY FOR WRONGFUL TAKING OF PROPERTY § 596 (1875)).

35. *Id.* (citing *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249–50 (S.D.N.Y. 2000)).

36. *Id.* at 250.

37. *Id.* at 258 (Kolkey, J., dissenting).

38. *Id.* at 261. In response to Kolkey’s criticism, the court opined that the receipt of unwanted telephone calls or unwanted first-class mail may be actionable — “[t]he issue is one of degree.” *Id.* at 252.

39. “I understand Intel’s desire to end what it deems harassment by a disgruntled employee.” *Id.* at 258 (Kolkey, J., dissenting).

40. *See id.* at 264. Currently, two California statutes place restrictions on the sending of unsolicited advertising e-mails. *See* CAL. BUS. & PROF. CODE §§ 17538.4, 17538.45 (West 2003). Though bills which seek to revise these statutes are currently pending before the California legislature, none of the proposed amendments would extend the statutes’ scopes to include non-advertising or non-commercial e-mail. *See, e.g.*, S.B. 186 (Cal. 2003).

41. *Intel Corp. v. Hamidi*, 1 Cal. Rptr. 3d 32, 32 (2003).

42. *See id.* at 52–67 (Brown, J., dissenting); *id.* at 68–75 (Mosk, J., dissenting).

43. *Id.* at 36.

remedy sought by the complaining party. Conducting a lengthy review of both California case law and secondary authorities,⁴⁴ the court concluded that “the trespass to chattels tort . . . may not, in California, be proved without evidence of an injury to the plaintiff’s personal property or legal interest therein.”⁴⁵ Though Intel argued that the harm requirement was unnecessary because it sought injunctive relief — an argument that had carried the day at the appellate level — the state supreme court criticized Intel’s reasoning as nonsensical: “[T]o issue an injunction without a showing of likely irreparable injury in an action for trespass to chattels, in which injury to the personal property or the possessor’s interest in it *is* an element of the action, would make little legal sense.”⁴⁶

Second, the court found that Intel failed to prove this necessary harm element. While the nature of the remedy sought by Intel did not alter the fact that Intel had to prove harm to chattels, it nonetheless entered into the court’s calculus as to whether Intel had proved that harm. As had the trial court and appellate court, the state supreme court looked to decisions such as *Thrifty-Tel* and *CompuServe* for guidance.⁴⁷ It determined that “decisions finding electronic contact to be a trespass to computer systems have generally involved some actual or threatened interference with the computers’ functioning.”⁴⁸ Thus, it framed Intel’s burden as “whether . . . [Intel could] demonstrate Hamidi’s actions caused *or threatened to cause* damage to Intel’s computer system.”⁴⁹ This second available line of argument — that Hamidi’s e-mail messages threatened to cause damage — could be proven via evidence that Hamidi’s actions “will be replicated by others if found not to constitute a trespass.”⁵⁰ However, despite the court’s acknowledgement that threatened harm could justify injunctive relief, the court concluded that Intel had proved neither harm nor threatened harm to chattels. In the court’s view, Hamidi had engaged in “the mere sending of electronic communications”⁵¹ and had not caused the requisite “interference with the efficient functioning of [Intel’s] computer system.”⁵² Moreover, Intel had been unable to

44. *See id.* at 39–41.

45. *Id.* at 37.

46. *Id.* at 41 (emphasis in original).

47. *See supra* notes 24–26, 36 and accompanying text; *Intel*, 1 Cal. Rptr. 3d at 41–42.

48. *Intel*, 1 Cal. Rptr. 3d at 42.

49. *Id.* at 41 (emphasis added).

50. *Id.* at 44.

51. *Id.* at 41.

52. *Id.* at 42, 44 (“That Hamidi’s message temporarily used some portion of the Intel computers’ processors or storage is . . . not enough; Intel must, but does not, demonstrate some measurable loss from the use of its computer system.”).

demonstrate that Hamidi's e-mail messages represented the tip of a crippling electronic iceberg.⁵³

Third, the court clarified the evidence necessary to fulfill the harm element of a trespass to chattels claim. The court conceded that "the type of possessory interest the tort is primarily intended to protect . . . has been questioned."⁵⁴ However, as was implicit in its holding that Intel had failed to demonstrate the requisite injury, the court found that a complaining party must demonstrate "an injury to *its personal property*, or to *its legal interest in that property*."⁵⁵ Consequently, evidence that Intel's employees' time was occupied by reading or attempting to block Hamidi's e-mail messages did not satisfy the harm element of trespass to chattels. While these costs represented real and measurable losses to Intel, they did not represent any decrease in the value of Intel's property interests.⁵⁶ Furthermore, the court determined that Intel could not claim injury to goodwill in order to satisfy the harm element of the claim. While *CompuServe* arguably opened the door for a trespass to chattels claim based on loss of business reputation or goodwill,⁵⁷ the court saw that holding as restricted to its facts. While an Internet Service Provider ("ISP") may have an argument that loss of goodwill constitutes harm to its legally protected interests in its chattels, the court concluded that "Intel's claimed injury has even less connection to its personal property than did CompuServe's,"⁵⁸ presumably because unlike an ISP, Intel's goodwill is not a function of the quality of the Internet services it can provide.

Fourth, having established that Intel failed to satisfy the traditional elements of a trespass to chattels claim under California law, the court next declined to extend the common law of trespass to real property to cover Intel's claim. The court considered arguments advanced by leading scholars and amici curiae, including Professor Epstein of the University of Chicago.⁵⁹ Bolstered by popular property-based metaphors for the Internet (e.g., "cyberspace" and e-mail "addresses"), Epstein has argued that the proper framework for cases such as this is trespass to real property.⁶⁰ By recognizing computer servers as inviolable in the same way real property is, Epstein asserts,

53. Viewers of Hamidi's website, www.intelhamidi.com, and FACE-Intel's website, www.faceintel.com, may be inclined to agree that Hamidi's e-mail messages do not lend themselves to replication.

54. *Intel*, 1 Cal. Rptr. 3d at 45 (citation omitted).

55. *Id.* at 47 (emphasis added).

56. *See id.* at 46.

57. *See CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

58. *Intel*, 1 Cal. Rptr. 3d at 45.

59. *See id.*

60. *See* Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73 (2003).

courts will encourage socially-optimal contracting between parties.⁶¹ The *Intel* court, obviously concerned by the prospect of creating a new, absolute property right and doubtful of Epstein's contracting evidence, declined to adopt the proposed framework. As had Judge Kolkey in his court of appeals dissent,⁶² the court viewed the regulation of non-commercial e-mail to be properly within the legislature's domain.⁶³

Finally, the court briefly discussed in dicta the constitutional implications of the case. Contrary to Justice Brown's dissent, the majority stated that Intel could not assert a constitutional "right not to listen."⁶⁴ In order to arrive at this conclusion, the court assumed that a firm may, under certain circumstances, claim such a personal right.⁶⁵ However, the right was unavailable to Intel because its individual employees, not the firm itself, were the recipients of Hamidi's e-mail messages.⁶⁶ The court's statements regarding the parties' constitutional arguments are dicta because the court had already concluded that no trespass to chattels had occurred. Thus, while some commentators speculated after the appellate decision was rendered that the case could have major implications for free speech and cyberspace,⁶⁷ its precedential value is now less clear and its effects will likely be less direct than previously predicted.

Though Intel's plight garnered sympathy from judges and commentators alike,⁶⁸ the California Supreme Court's decision will likely be met with relief, albeit in a limited fashion. In holding that a complaining party must prove that its chattels have been harmed, the court reinvigorated a key limiting element of the doctrine. Following the appellate decision in *Intel*, Professor Quilter observed:

By uprooting trespass to chattels from all its traditional restraints, the doctrine has become completely malleable, able to fit any and all situations [I]t would be difficult to conceive of anything that might not constitute a trespass; trespass is effectively de-

61. See *id.*; *Intel*, 1 Cal. Rptr. 3d at 48–49.

62. See *supra* notes 37–40 and accompanying text.

63. See *Intel*, 1 Cal. Rptr. 3d at 50.

64. *Id.* at 51.

65. *Id.*

66. *Id.*

67. See, e.g., Note, *The Long Arm of Cyber-reach*, 112 HARV. L. REV. 1610, 1622–23 (1999).

68. See, e.g., *Intel*, 1 Cal. Rptr. 3d at 52 (Kennard, J., concurring) ("Intel has my sympathy. Unsolicited and unwanted bulk e-mail, most of it commercial, is a serious annoyance and inconvenience for persons who communicate electronically through the Internet, and bulk e-mail that distracts employees in the workplace can adversely affect overall productivity.").

fined purely at the owner's will and can encompass almost any kind of act.⁶⁹

While Quilter and other commentators may argue that the doctrine remains loose of some of its other key underpinnings,⁷⁰ the state supreme court's opinion in *Intel* demonstrates that a plaintiff bringing a cyberspace trespass to chattels claim is no longer virtually guaranteed success.

Following the ruling, Intel joined TicketMaster as the only plaintiffs who have failed on the merits of such claims.⁷¹ In *TicketMaster Corp. v. Tickets.com, Inc.*, entertainment giant TicketMaster brought suit against Tickets.com, claiming, *inter alia*, trespass to chattels and seeking a preliminary injunction.⁷² Operating a website that listed tickets to various events, Tickets.com employed a search mechanism known as "webcrawlers" or "spiders" to search the websites of various vendors, including TicketMaster.⁷³ Upon rehearing, the district court found that TicketMaster had failed to establish the requisite harm: "The comparative use by [Tickets.com] appears very small and there is no showing that the use interferes to any extent with the regular business of [TicketMaster]."⁷⁴ In addition, TicketMaster was unable to demonstrate that the spider activity was likely to be replicated by other parties.⁷⁵

Taken together, *Intel* and *TicketMaster* appear to inject much-needed limitations into the claim of trespass to chattels in cyberspace. However, assuming for the sake of argument the propriety of applying the doctrine of trespass to chattels to cyberspace,⁷⁶ the court's opinion ultimately raises more concerns than it allays. First, though the California Supreme Court's opinion reinvigorates the harm to chattels element of the tort, the level of harm necessary for the trespass to be actionable is extremely amorphous.⁷⁷ At various points in the *Intel*

69. Laura Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels*, 17 BERKELEY TECH. L.J. 421, 441 (2002) (citation omitted).

70. See, e.g., *id.* at 437-41 (arguing that courts applying trespass to chattels doctrine to cyberspace claims have incorrectly recognized electronic networks and computer processing power as chattels and accepted electronic signals as trespasses).

71. See *id.* at 433.

72. No. 99-7654, 2000 WL 525390 (C.D. Cal. Mar. 27, 2000), *reconsidered in* No. 99-7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000), *aff'd* 2 Fed. Appx. 741 (9th Cir. 2001).

73. *TicketMaster*, 2000 WL 1887522, at *2. Briefly described, these "spiders" entered TicketMaster's website, extracted information from various event web pages, and copied this information onto Tickets.com's website. *Id.*

74. *Id.* at *4.

75. See *id.* ("Nor here is the spectre [sic] of dozens or more parasites joining the fray, the cumulative total of which could affect the operation of [TicketMaster's] business.")

76. *But see* text accompanying notes 88-92.

77. In her dissent, Justice Brown castigated the *Intel* majority for its characterization of the harm element of the trespass to chattels doctrine. She maintained that neither injury to

opinion, the court stated that Intel must show that Hamidi's e-mail messages "impaired the system in any way,"⁷⁸ caused "some actual or threatened interference with the computers' functioning,"⁷⁹ and had an "appreciable effect on the operation of [Intel's] computer system."⁸⁰ Post-*Intel*, what level of storage capacity must be occupied by the unwelcome messages in order for a cause of action to arise? Furthermore, if the offending messages take up an appreciable amount of storage space or memory (e.g., 10% of the total available) but do not have an effect on the functionality of the computer server (i.e., all messages are received and relayed as usual), is the sending of the unwelcome messages actionable?⁸¹

Second, even if the requisite level of harm to the chattels themselves can be divined from the court's opinion, two questions loom large regarding the requisite level of harm to a party's legal interest in its chattels. First, under what circumstances does harm to customer goodwill constitute harm to a party's legal interest in its chattels? In *Intel*, the court struggled to square its holding with seminal cases such as *CompuServe*.⁸² It determined that, whereas an ISP such as CompuServe might demonstrate, at least in part, harm to its chattels via loss of customer goodwill, a firm such as Intel may not. Post-*Intel*, may customer goodwill harm only be claimed by ISPs, by virtue of the unique relationship ISP computer systems bear to the service of customers? If proof of harm to customer goodwill is not limited to ISPs, what degree of interconnectedness between the goodwill lost and the chattels in question is necessary in order for goodwill to satisfy the harm element of the claim? Far from providing guidance on this point, the *Intel* court summarily concluded that "Intel's claimed injury has even less connection to its personal property than did CompuServe's."⁸³

In addition, questions remain regarding a party's ability to prove harm to its chattels or its legal interest therein via what may be termed

the trespasser nor benefit to the trespasser is a necessary element of a successful trespass to chattels claim; rather, unauthorized use of another's personal property is sufficient. See *Intel Corp. v. Hamidi*, 1 Cal. Rptr. 3d 32, 65-66 (2003) (Brown, J., dissenting).

78. *Id.* at 41.

79. *Id.*

80. *Id.* at 44.

81. In his concurrence, Justice Kennard likened Intel's computer system to a cellular phone. See *id.* at 51-52. However, this analogy may be inapt. For example, absent call-waiting, a cellular phone may only receive one incoming call at a time. Subsequent callers are notified that the cellular phone user is unavailable (i.e., their calls will be forwarded directly to the cellular phone user's voicemail). By contrast, a computer system may receive and relay multiple messages at one time without any appreciable delay in the delivery of the messages. Provided maximum storage capacity is not reached, no e-mail message will be returned to the sender as undeliverable.

82. See *supra* notes 57-58 and accompanying text.

83. *Intel*, 1 Cal. Rptr. 3d at 45.

“replication evidence.” As previously discussed,⁸⁴ a party seeking injunctive relief for trespass to chattels may satisfy its burden of proof for the harm element by demonstrating that, absent the requested relief, the offending party’s actions are likely to be replicated by others.⁸⁵ Because of the relatively unique facts of *Intel* (i.e., non-commercial mass e-mail), it is difficult to surmise what might constitute the requisite replication evidence. Cases such as *eBay, Inc. v. Bidder’s Edge, Inc.*⁸⁶ and *TicketMaster* — both of which were relied upon by the *Intel* court — called upon the respective deciding courts to speculate on the potential for the offending party’s spider activities to be replicated by others. While *eBay* and *TicketMaster* themselves are far from immune from criticism for their amorphous standards,⁸⁷ the burden placed by the *Intel* court on a party receiving unwanted, non-commercial e-mail is even more difficult to extrapolate.

How might Intel have proven that for every Hamidi who sent an e-mail message there were ten more “Hamidis” waiting in the virtual wings? Monetarily speaking, Hamidi had little or nothing to directly gain from sending his e-mail messages. Thus, unlike in the context of commercial spiders, one cannot use the potential for monetary gain as a proxy for the likelihood of replication of the offending activity. If one assumes that Hamidi’s messages had social value, a cruel irony of the *Intel* case comes to light. In order to be entitled to injunctive relief on the grounds of replication evidence, Intel would have had to demonstrate that Hamidi was one among many persons who would eventually seek to barrage Intel’s system with unwanted e-mail messages. In effect, Intel would have had to argue that not only did Hamidi’s e-mail messages open the floodgates, but that a flood, in fact, was going to occur. Given the disgruntled nature of Hamidi’s messages, this might well have placed Intel in an awkward position; in order to obtain an injunction, it might have had to argue that a large number of persons were dissatisfied with its corporate practices. Furthermore, in light of the contents of Hamidi’s e-mail messages, it seems especially odd that, as the likelihood of replication increases, the likelihood of obtaining an injunction increases.

From a utilitarian perspective, this calculus seems ill-fitted to situations involving non-commercial e-mail messages. As a crude example, consider Firm A, which has received and is likely in the future to receive e-mail messages from numerous senders deriding its human resources practices. Firm B, by contrast, is plagued by e-mail

84. See *supra* text accompanying notes 47–53, 75.

85. See *Intel*, 1 Cal. Rptr. 3d at 44.

86. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

87. See, e.g., *supra* note 75. The reasoning underlying the *TicketMaster* court’s conclusion, however, is absent from the opinion, and thus it is difficult to determine the standard by which replication evidence is adjudged.

messages from one individual. In both cases, the senders of the unwanted messages are rational actors; thus, it might be inferred that Firm A has a larger problem with its human resources practices than does Firm B. Post-*Intel*, it would appear that Firm A is entitled to an injunction, whereas Firm B is not. Though granting an injunction to Firm A may be in keeping with the purposes of an injunction (i.e., prevention of future harm), it may be, from a utilitarian perspective, that Firm A should internalize the costs associated with these unwelcome messages, either by employing self-help measures or addressing its human resources problems directly.

The level of difficulty that the *Intel* court encountered in adapting the doctrine of trespass to chattels to the facts of the case naturally begs the question of whether the doctrine should be applied at all in cyberspace. Those in favor of the application of the doctrine “point to the void in statutory remedies available to litigants who depend on technology and Internet-based property.”⁸⁸ This argument may have particular force given the facts of *Intel*; California spam legislation does not cover the type of e-mail sent by Hamidi.⁸⁹

However, as commentators opposed to the application of the doctrine in cyberspace have observed,⁹⁰ the theory seems in direct conflict with our conception of the Internet and electronic communication channels as “new marketplace[s] of ideas,” in the words of the Supreme Court.⁹¹ Professor Hunter has argued that:

Cyberspace was once thought to be the modern equivalent of the Western Frontier. It was a place, albeit an abstract place, where land was free for the taking, explorers could roam, and communities could form with their own rules. It was an endless expanse of space: open, free, replete with possibility. No longer. As with the Western Frontier, settlers have entered this new land, charted the territory, fenced off their own little claims, and erected “No Trespassing” signs. Cyberspace is being subdivided. Suburbs and SUVs cannot be far off.⁹²

88. Edward W. Chang, *Bidding on Trespass: eBay, Inc. v. Bidder’s Edge, Inc. and the Abuse of Trespass Theory in Cyberspace-Law*, 29 AIPLA Q.J. 445, 456 (2001) (citation omitted).

89. See discussion *supra* note 40.

90. See, e.g., Chang, *supra* note 88, at 456.

91. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

92. Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 442–43 (2003) (citations omitted). Though Professor Hunter’s piece focuses on the application of the doctrine of trespass to real property to the Internet, the main thrust of his argument is relevant to the application of the doctrine of trespass to chattels.

Combined with the difficulty with which the *Intel* court adapted the doctrine to the facts of the case, the potentially stifling effect of the application of the doctrine leads one to wonder whether the *Intel* court not only failed to provide the right answers but also to ask the right questions. However, despite this underlying concern, the *Intel* opinion represents a significant step in the right direction, by anchoring, via the reinvigoration of the limiting element of the harm requirement, a doctrine that had drifted loose of its traditional moorings.