Property
Spring 2022
(Gilden)

First Assignment (Monday, January 10)

1) Read the attached opinions in *Food Lion v. Capital Cities/ABC* and *Intel Corp. v. Hamidi*
2) Read pages xxxiii-xxxvi, 3-4, 38-42 in our textbook, Singer et al., Property Law: Rules, Policies, and Practices (7th Ed. 2017)

194 F.3d 505
United States Court of Appeals,
Fourth Circuit.

FOOD LION, INCORPORATED, Plaintiff–Appellee,
v.
CAPITAL CITIES/ABC, INC.
|
Decided: Oct. 20, 1999.

MICHAEL, Circuit Judge:

Two ABC television reporters, after using false resumes to get jobs at Food Lion, Inc. supermarkets, secretly videotaped what appeared to be unwholesome food handling practices. Some of the video footage was used by ABC in a *PrimeTime Live* broadcast that was sharply critical of Food Lion. The grocery chain sued Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., Richard Kaplan and Ira Rosen, producers of *PrimeTime Live,* and Lynne Dale and Susan Barnett, two reporters for the program (collectively, "ABC" or the "ABC defendants"). Food Lion did not sue for defamation, but focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices. Food Lion won at trial, and judgment for compensatory damages of $1,402 was entered on the various claims. Following a substantial (over $5 million) remittitur, the judgment provided for $315,000 in punitive damages. The ABC defendants appeal the district court's denial of their motion for judgment as a matter of law, and Food Lion appeals the court's ruling that prevented it from proving publication damages. Having considered the case, we (1) reverse the judgment that the ABC defendants committed fraud and unfair trade practices, [and] (2) affirm the judgment that Dale and Barnett breached their duty of loyalty and committed a trespass[…]

I.

In early 1992 producers of ABC's *PrimeTime Live* program received a report alleging that Food Lion stores were engaging in unsanitary meat-handling practices. The allegations were that Food Lion employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, and re-dated (and offered for sale) products not sold before their printed expiration date. The producers recognized that these allegations presented the potential for a powerful news story, and they decided to conduct an undercover investigation of Food Lion. ABC reporters Lynne Dale (Lynne Litt at the time) and Susan Barnett concluded that they would have a better chance of investigating the allegations if they could become Food Lion employees. With the approval of their superiors, they proceeded to apply for jobs with the grocery chain, submitting applications with false identities and references and fictitious local addresses. Notably, the applications failed to mention the reporters' concurrent employment with ABC and otherwise misrepresented their educational and employment experiences. Based on these applications, a South Carolina Food Lion store hired Barnett as a deli clerk in April 1992, and a North Carolina Food Lion store hired Dale as a meat wrapper trainee in May 1992.

Barnett worked for Food Lion for two weeks, and Dale for only one week. As they went about their assigned tasks for Food Lion, Dale and Barnett used tiny cameras ("lipstick" cameras, for example) and microphones concealed on their bodies to secretly record Food Lion employees treating, wrapping and labeling meat, cleaning machinery, and discussing the practices of the meat department. They gathered footage from the meat cutting room, the deli counter, the employee break ***511** room, and a manager's office. All told, in their three collective weeks as Food Lion employees, Dale and Barnett recorded approximately 45 hours of concealed camera footage.

Some of the videotape was eventually used in a November 5, 1992, broadcast of *PrimeTime Live.* ABC contends the footage confirmed many of the allegations initially leveled against Food Lion. The broadcast included, for example, videotape that appeared to show Food Lion employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at Food Lion stores across several states. The truth of the *PrimeTime Live* broadcast was not an issue in the litigation we now describe.

Food Lion sued ABC and the *PrimeTime Live* producers and reporters. Food Lion's suit focused not on the broadcast, as a defamation suit would, but on the methods ABC used to obtain the video footage. The grocery chain asserted claims of fraud, breach of the duty of loyalty, trespass, and unfair trade practices, seeking millions in compensatory damages. Specifically, Food Lion sought to recover (1) administrative costs and wages paid in connection with the employment of Dale and Barnett and (2) broadcast (publication) damages for matters such as loss of good will, lost sales and profits, and diminished stock value. Punitive damages were also requested by Food Lion.

[…] At the liability phase, the jury found all of the ABC defendants liable to Food Lion for fraud and two of them, Dale and Barnett, additionally liable for breach of the duty of loyalty and trespass.

[…]

After trial the ABC defendants moved for judgment as a matter of law on all claims, the motion was denied, and the defendants now appeal.

1.

[To prove fraud under North Carolina law, the plaintiff must establish that the defendant (1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation] Food Lion, proceeding under the proof limitations on damages, sought $2,432.35 in compensatory damages on its fraud claim and the jury awarded $1,400. According to ABC, the district court erred in upholding the verdict on this claim because Food Lion did not prove injury caused by reasonable reliance on the misrepresentations made by Dale and Barnett on their job applications. We agree.

[The court rejected Food Lion’s theory of damages—that it incurred administrative costs in having to replace Dale and Barnett after just a few weeks; these were at-will employees with no reasonable expectations of long-term employment. Any reputational harms were not proximately caused by the misrepresentations but instead by Food Lion’s substandard meat handling and labeling]

[…]

***515** 2.

ABC argues that Dale and Barnett cannot be held liable for a breach of duty of loyalty to Food Lion under existing tort law in North and South Carolina. It is undisputed that both reporters, on behalf of ABC, wore hidden cameras to make a video and audio record of what they saw and heard while they were employed by Food Lion. Specifically, they sought to document, for ABC's *PrimeTime Live* program, Food Lion employees engaging in unsanitary practices, treating products to hide spoilage, and repackaging and redating out-of-date products. The jury found that Dale and Barnett breached their duty of loyalty to Food Lion, and nominal damages of $1.00 were awarded.[3]

[…]. In South Carolina it is "implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment." *Berry v. Goodyear Tire and Rubber Co.,* 270 S.C. 489, 242 S.E.2d 551, 552 (S.C.1978). In North Carolina "the law implies a promise on the part of every employee to serve [her] employer faithfully." *McKnight v. Simpson's Beauty Supply, Inc.,* 86 N.C.App. 451, 358 S.E.2d 107, 109 (N.C.Ct.App.1987). […]

[…]

The interests of the employer (ABC) to whom Dale and Barnett gave complete loyalty were adverse to the interests of Food Lion, the employer to whom they were unfaithful. ABC and Food Lion were not business competitors but they were adverse in a fundamental way. ABC's interest was to expose Food Lion to the public as a food chain that engaged in unsanitary and deceptive practices. Dale and Barnett served ABC's interest, at the expense of Food Lion, by engaging in the taping for ABC while they were on Food Lion's payroll. In doing this, Dale and Barnett did not serve Food Lion faithfully, and their interest (which was the same as ABC's) was diametrically opposed to Food Lion's.

[…]

3.

ABC argues that it was error to allow the jury to hold Dale and Barnett liable for trespass on either of the independent grounds (1) that Food Lion's consent to their presence as employees was void because it was based on misrepresentations or (2) that Food Lion's consent was vitiated ***517** when Dale and Barnett breached the duty of loyalty. The jury found Dale and Barnett liable on both of these grounds and awarded Food Lion $1.00 in nominal damages, which is all that was sought in the circumstances.

In North and South Carolina, as elsewhere, it is a trespass to enter upon another's land without consent. *See, e.g., Smith v. VonCannon,* 283 N.C. 656, 197 S.E.2d 524, 528 (N.C.1973); *Snow v. City of Columbia,* 305 S.C. 544, 409 S.E.2d 797, 802 (S.C.Ct.App.1991). Accordingly, consent is a defense to a claim of trespass. *See, e.g., Miller v. Brooks,* 123 N.C.App. 20, 472 S.E.2d 350, 355 (N.C.Ct.App.1996), *review denied,* 345 N.C. 344, 483 S.E.2d 172 (N.C.1997). Even consent gained by misrepresentation is sometimes sufficient. *See Desnick v. American Broad. Cos.,* 44 F.3d 1345, 1351–52 (7th Cir.1995) (Posner, C.J.). The consent to enter is canceled out, however, "if a wrongful act is done in excess of and in abuse of authorized entry." *Miller,* 472 S.E.2d at 355 (citing *Blackwood v. Cates,* 297 N.C. 163, 254 S.E.2d 7, 9 (N.C.1979)). *Cf. Ravan v. Greenville County,* 315 S.C. 447, 434 S.E.2d 296, 306 (S.C.Ct.App.1993) (noting that the law of trespass protects the "peaceable possession" of property).

We turn first to whether Dale and Barnett's consent to be in non-public areas of Food Lion property was void from the outset because of the resume misrepresentations. "[C]onsent to an entry is often given legal effect" even though it was obtained by misrepresentation or concealed intentions. *Desnick,* 44 F.3d at 1351. Without this result,

> a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in a dealer's showroom.

Id.

[…]

We like *Desnick* 's thoughtful analysis about when a consent to enter that is based on misrepresentation may be given effect. In *Desnick* ABC sent persons posing as patients needing eye care to the plaintiffs' eye clinics, and the test patients secretly recorded their examinations. ***518** Some of the recordings were used in a *PrimeTime Live* segment that alleged intentional misdiagnosis and unnecessary cataract surgery. *Desnick* held that although the test patients misrepresented their purpose, their consent to enter was still valid because they did not invade "any of the specific interests[relating to peaceable possession of land] the tort of trespass seeks to protect:" the test patients entered offices "open to anyone expressing a desire for ophthalmic services" and videotaped doctors engaged in professional discussions with strangers, the testers; the testers did not disrupt the offices or invade anyone's private space; and the testers did not reveal the "intimate details of anybody's life." 44 F.3d at 1352–53. *Desnick* supported its conclusion with the following comparison:

> "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. The situation of [ABC's] "testers" is analogous. Like testers seeking evidence of violation of anti-discrimination laws, [ABC's] test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.

Id. at 1353 (citation omitted).[4]

We return to the jury's first trespass finding in this case, which rested on a narrow ground. The jury found that Dale and Barnett were trespassers because they entered Food Lion's premises as employees with consent given because of the misrepresentations in their job applications. Although the consent cases as a class are inconsistent, we have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer's premises to begin work. Moreover, if we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land. *See Desnick,* 44 F.3d at 1352; *see generally Matthews v. Forrest,* 235 N.C. 281, 69 S.E.2d 553, 555 (N.C.1952); *Ravan,* 434 S.E.2d at 306. Accordingly, we cannot say that North and South Carolina's highest courts would hold that misrepresentation on a job application alone nullifies the consent given to an employee to enter the employer's property, thereby turning the employee into a trespasser. The jury's finding of trespass therefore cannot be sustained on the grounds of resume misrepresentation.

There is a problem, however, with what Dale and Barnett did after they entered Food Lion's property. The jury also found that the reporters committed trespass by breaching their duty of loyalty to Food Lion "as a result of pursuing [their] investigation for ABC." We affirm the finding of trespass on this ground because the breach of duty of loyalty—triggered by the filming in non-public areas, which was adverse to Food Lion—was a wrongful act in excess of Dale and Barnett's authority to enter Food Lion's premises as employees. *See generally Blackwood,* 254 S.E.2d at 9 (finding liability for trespass when activity on property exceeded scope of consent to enter).

The Court of Appeals of North Carolina has indicated that secretly installing a video camera in someone's private home can be a wrongful act in excess of consent given to enter. In the trespass case of *Miller v. Brooks* the (defendant) wife, who claimed she had consent to enter her estranged husband's (the plaintiff's) house, had a private detective place a video camera ***519** in the ceiling of her husband's bedroom. The court noted that "[e]ven an authorized entry can be trespass if a wrongful act is done in excess of and in abuse of authorized entry." *Miller,* 472 S.E.2d at 355. The court went on to hold that "[e]ven if [the wife] had permission to enter the house and to authorize others to do so," it was a jury question "whether defendants' entries exceeded the scope of any permission given." *Id.* We recognize that *Miller* involved a private home, not a grocery store, and that it involved some physical alteration to the plaintiff's property (installation of a camera). Still, we believe the general principle is applicable here, at least in the case of Dale, who worked in a Food Lion store in North Carolina. Although Food Lion consented to Dale's entry to do her job, she exceeded that consent when she videotaped in non-public areas of the store and worked against the interests of her second employer, Food Lion, in doing so.

We do not have a case comparable to *Miller* from South Carolina. Nevertheless, the South Carolina courts make clear that the law of trespass protects the peaceable enjoyment of property. *See Ravan,* 434 S.E.2d at 306. It is consistent with that principle to hold that consent to enter is vitiated by a wrongful act that exceeds and abuses the privilege of entry.

Here, both Dale and Barnett became employees of Food Lion with the certain consequence that they would breach their implied promises to serve Food Lion faithfully. They went into areas of the stores that were not open to the public and secretly videotaped, an act that was directly adverse to the interests of their second employer, Food Lion. Thus, they breached the duty of loyalty, thereby committing a wrongful act in abuse of their authority to be on Food Lion's property.

In sum, we are convinced that the highest courts of North and South Carolina would hold that Dale and Barnett committed trespass because Food Lion's consent for them to be on its property was nullified when they tortiously breached their duty of loyalty to Food Lion. Accordingly, as far as North and South Carolina law is concerned, the jury's trespass verdict should be sustained.

4.

[…]

B.

ABC argues that even if state tort law covers some of Dale and Barnett's conduct, the district court erred in refusing to subject Food Lion's claims to any level of First Amendment scrutiny. ABC makes this argument because Dale and Barnett were engaged in newsgathering for *PrimeTime Live.* It is true that there are "First Amendment interests in newsgathering." *In re Shain,* 978 F.2d 850, 855 (4th Cir.1992) (Wilkinson J., concurring). *See also Branzburg v. Hayes,* 408 U.S. 665, 681, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated."). However, the Supreme Court has said in no uncertain terms that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.,* 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); *see also Desnick,* 44 F.3d at 1355 ("the media have no general immunity from tort or contract liability").

C.

For the foregoing reasons, we affirm the judgment that Dale and Barnett breached their duty of loyalty to Food Lion and committed trespass. We likewise affirm the damages award against them for these torts in the amount of $2.00. We have already indicated that the fraud claim against all of the ABC defendants must be reversed. Because Food Lion was awarded punitive damages only on its fraud claim, the judgment awarding punitive damages cannot stand.

AFFIRMED IN PART AND REVERSED IN PART

Intel Corp. v. Hamidi

Supreme Court of California

June 30, 2003, Decided ; June 30, 2003, Filed

No. S103781.

Reporter
30 Cal. 4th 1342; 71 P.3d 296

INTEL CORPORATION, Plaintiff and Respondent, v. KOUROSH KENNETH HAMIDI, Defendant and Appellant.

WERDEGAR, J.

Intel Corporation (Intel) maintains an electronic mail system, connected to the Internet, through which messages between employees and those outside the company can be sent and received, and permits its employees to make reasonable nonbusiness use of this system. On six occasions over almost two years, Kourosh Kenneth Hamidi, a former Intel employee, sent e-mails criticizing Intel's employment practices to numerous current employees on Intel's electronic mail system. Hamidi breached no computer security barriers in order to communicate with Intel employees. He offered to, and did, remove from his mailing list any recipient who so wished. Hamidi's communications to individual Intel employees caused neither physical damage nor functional disruption to the company's computers, nor did they at any time deprive Intel of the use of its computers. The contents of the messages, however, caused discussion among employees and managers.

On these facts, Intel brought suit, claiming that by communicating with its employees over the company's e-mail system Hamidi committed the tort of trespass to chattels. The trial court granted Intel's motion for summary judgment and enjoined Hamidi from any further mailings. A divided Court of Appeal affirmed.

After reviewing the decisions analyzing unauthorized electronic contact with computer systems as potential trespasses to chattels, we conclude that under California law the tort does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. Such an electronic communication does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself . . . The consequential economic damage Intel claims to have suffered, i.e., loss of productivity caused by employees reading and reacting to Hamidi's messages and company efforts to block the messages, is not an injury to the company's interest in its computers--which worked as intended and were unharmed by the communications--any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment.

Our conclusion does not rest on any special immunity for communications by electronic mail; we do not hold that messages transmitted through the Internet are exempt from the ordinary rules of tort liability. To the contrary, e-mail, like other forms of communication, may in some circumstances cause legally cognizable injury to the recipient or to third parties and may be actionable under various common law or statutory theories . . . Intel's claim fails not because e-mail transmitted through the Internet enjoys unique immunity, but because the trespass to chattels tort--unlike the causes of action just mentioned--may not, in California, be proved without evidence of an injury to the plaintiff's personal property or legal interest therein.

Nor does our holding affect the legal remedies of Internet service providers (ISP's) against senders of unsolicited commercial bulk e-mail (UCE), also known as "spam." (See *Ferguson v. Friendfinders, Inc.* (2002) 94 Cal.App.4th 1255, 1267 [115 Cal. Rptr. 2d 258].) A series of federal district court decisions, beginning with *CompuServe, Inc. v. Cyber Promotions, Inc.* (S.D.Ohio 1997) 962 F. Supp. 1015, has approved the use of trespass to chattels as a theory of spammers' liability to ISP's, based upon evidence that the vast quantities of mail sent by spammers both overburdened the ISP's own computers and made the entire computer system harder to use for recipients, the ISP's customers. (See *id.* at pp. 1022-1023.) In those cases, discussed in greater detail below, the underlying complaint was that the extraordinary *quantity* of UCE impaired the computer system's functioning. In the present case, the claimed injury is located in the disruption or distraction caused to

recipients by the *contents* of the e-mail messages, an injury entirely separate from, and not directly affecting, the possession or value of personal property.

FACTUAL AND PROCEDURAL BACKGROUND

. . .

Hamidi, a former Intel engineer, together with others, formed an organization named Former and Current Employees of Intel (FACE-Intel) to disseminate information and views critical of Intel's employment and personnel policies and practices. FACE-Intel maintained a Web site (which identified Hamidi as Webmaster and as the organization's spokesperson) containing such material. In addition, over a 21-month period Hamidi, on behalf of FACE-Intel, sent six mass e-mails to employee addresses on Intel's electronic mail system. The messages criticized Intel's employment practices, warned employees of the dangers those practices posed to their careers, suggested employees consider moving to other companies, solicited employees' participation in FACE-Intel, and urged employees to inform themselves further by visiting FACE-Intel's Web site. The messages stated that recipients could, by notifying the sender of their wishes, be removed from FACE-Intel's mailing list; Hamidi did not subsequently send messages to anyone who requested removal.

Each message was sent to thousands of addresses (as many as 35,000 according to FACE-Intel's Web site), though some messages were blocked by Intel before reaching employees. Intel's attempt to block internal transmission of the messages succeeded only in part; Hamidi later admitted he evaded blocking efforts by using different sending computers. When Intel, in March 1998, demanded in writing that Hamidi and FACE-Intel stop sending e-mails to Intel's computer system, Hamidi asserted the organization had a right to communicate with willing Intel employees; he sent a new mass mailing in September 1998.

The summary judgment record contains no evidence Hamidi breached Intel's computer security in order to obtain the recipient addresses for his messages; indeed, internal Intel memoranda show the company's management concluded no security breach had occurred. Hamidi stated he created the recipient address list using an Intel directory on a floppy disk anonymously sent to him. Nor is there any evidence that the receipt or internal distribution of Hamidi's electronic messages damaged Intel's computer system or slowed or impaired its functioning. Intel did present uncontradicted evidence, however, that many employee recipients asked a company official to stop the messages and that staff time was consumed in attempts to block further messages from FACE-Intel. According to the FACE-Intel Web site, moreover, the messages had prompted discussions between "[e]xcited and nervous managers" and the company's human resources department.

Intel sued Hamidi and FACE-Intel, pleading causes of action for trespass to chattels and nuisance, and seeking both actual damages and an injunction against further e-mail messages. Intel later voluntarily dismissed its nuisance claim and waived its demand for damages . . .The court then granted Intel's motion for summary judgment, permanently enjoining Hamidi, FACE-Intel, and their agents "from sending unsolicited e-mail to addresses on Intel's computer systems." . . .

The Court of Appeal, with one justice dissenting, affirmed the grant of injunctive relief. The majority took the view that the use of or intermeddling with another's personal property is actionable as a trespass to chattels without proof of any actual injury to the personal property; even if Intel could not show any damages resulting from Hamidi's sending of messages, "it showed he was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of trespass to chattels."

DISCUSSION

I. *Current California Tort Law*

(2) Dubbed by Prosser the "little brother of conversion," the tort of trespass to chattels allows recovery for interferences with possession of personal property "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."

Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiff's rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property *has proximately caused injury*." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566 [54 Cal. Rptr. 2d 468], italics added.) In cases of interference with possession of personal property not amounting to conversion, "the owner has a cause of action for trespass or case, *and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.*" . . . In modern American law generally, "[t]respass remains as an occasional remedy for minor interferences, *resulting in some damage,* but not sufficiently serious or sufficiently important to amount to the greater tort" of conversion. (Prosser & Keeton, Torts,

supra, § 15, p. 90, italics added.)

The Restatement, too, makes clear that some actual injury must have occurred in order for a trespass to chattels to be actionable. Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable (see *id.*, par. (a) & com. d, pp. 420-421), but other forms of interference require some additional harm to the personal property or the possessor's interests in it. (*Id.*, pars. (b)-(d).) "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 . . . .

The dispositive issue in this case, therefore, is whether the undisputed facts demonstrate Hamidi's actions caused or threatened to cause damage to Intel's computer system, or injury to its rights in that personal property, such as to entitle Intel to judgment as a matter of law. To review, the undisputed evidence revealed no actual or threatened damage to Intel's computer hardware or software and no interference with its ordinary and intended operation. Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any measurable length of time. Intel presented no evidence its system was slowed or otherwise impaired by the burden of delivering Hamidi's electronic messages. Nor was there any evidence transmission of the messages imposed any marginal cost on the operation of Intel's computers. In sum, no evidence suggested that in sending messages through Intel's Internet connections and internal computer system Hamidi used the system in any manner in which it was not intended to function or impaired the system in any way. Nor does the evidence show the request of any employee to be removed from FACE-Intel's mailing list was not honored. The evidence did show, however, that some employees who found the messages unwelcome asked management to stop them and that Intel technical staff spent time and effort attempting to block the messages. A statement on the FACE-Intel Web site, moreover, could be taken as an admission that the messages had caused "[e]xcited and nervous managers" to discuss the matter with Intel's human resources department.

Relying on a line of decisions, most from federal district courts, applying the tort of trespass to chattels to various types of unwanted electronic contact between computers, Intel contends that, while its computers were not damaged by receiving Hamidi's messages, its interest in the "physical condition, quality or value" (Rest.2d Torts, § 218, com. e, p. 422) of the computers was harmed. We disagree. The cited line of decisions does not persuade us that the mere sending of electronic communications that assertedly cause injury only because of their contents constitutes an actionable trespass to a computer system through which the messages are transmitted. Rather, the decisions finding electronic contact to be a trespass to computer systems have generally involved some actual or threatened interference with the computers' functioning.

. . .

[For example,] a series of federal district court decisions held that sending UCE through an ISP's equipment may constitute trespass to the ISP's computer system. The lead case, *CompuServe, Inc. v. Cyber Promotions, Inc.*, *supra,* 962 F. Supp. 1015, 1021-1023 (*CompuServe*), was followed by *Hotmail Corp. v. Van$ Money Pie, Inc.* (N.D.Cal., Apr. 16, 1998, No. C 98-20064 JW) 1998 U.S. Dist. LEXIS 10729, page *7, *America Online, Inc. v. IMS* (E.D.Va. 1998) 24 F. Supp. 2d 548, 550-551, and *America Online, Inc. v. LCGM, Inc.* (E.D.Va. 1998) 46 F. Supp. 2d 444, 451-452.

In each of these spamming cases, the plaintiff showed, or was prepared to show, some interference with the efficient functioning of its computer system. . . .

That Intel does not claim the type of functional impact that spammers and robots have been alleged to cause is not surprising in light of the differences between Hamidi's activities and those of a commercial enterprise that uses sheer quantity of messages as its communications strategy. Though Hamidi sent thousands of copies of the same message on six occasions over 21 months, that number is minuscule compared to the amounts of mail sent by commercial operations. The individual advertisers sued in *America Online, Inc. v. IMS*, *supra*, 24 F. Supp. 2d at page 549, and *America Online, Inc. v. LCGM, Inc.*, *supra*, 46 F. Supp. 2d at page 448, were alleged to have sent more than 60 million messages over 10 months and more than 92 million messages over seven months, respectively. Collectively, UCE has reportedly come to constitute about 45 percent of all e-mail. (Hansell, *Internet Is Losing Ground in Battle Against Spam*, N.Y. Times (Apr. 22, 2003) p. A1, col. 3.) The functional burden on Intel's computers, or the cost in time to individual recipients, of receiving Hamidi's occasional advocacy messages cannot be compared to the burdens and costs caused ISP's and their customers by the ever-rising deluge of commercial e-mail.

. . .

In addition to impairment of system functionality, *CompuServe* and its progeny also refer to the ISP's loss

of business reputation and customer goodwill, resulting from the inconvenience and cost that spam causes to its members, as harm to the ISP's legally protected interests in its personal property . . . Intel argues that its own interest in employee productivity, assertedly disrupted by Hamidi's messages, is a comparable protected interest in its computer system. We disagree.

Whether the economic injuries identified in *CompuServe* were properly considered injuries to the ISP's possessory interest in its personal property, the type of property interest the tort is primarily intended to protect . . . has been questioned. "[T]he court broke the chain between the trespass and the harm, allowing indirect harms to CompuServe's business interests--reputation, customer goodwill, and employee time--to count as harms to the chattel (the server)." (Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels*, *supra*, 17 Berkeley Tech. L.J. at pp. 429-430.) . . . But even if the loss of goodwill identified in *CompuServe* were the type of injury that would give rise to a trespass to chattels claim under California law, Intel's position would not follow, for Intel's claimed injury has even less connection to its personal property than did CompuServe's.

CompuServe's customers were annoyed because the system was inundated with unsolicited commercial messages, making its use for personal communication more difficult and costly. (*CompuServe*, *supra*, 962 F. Supp. at p. 1023.) Their complaint, which allegedly led some to cancel their CompuServe service, was about *the functioning of CompuServe's electronic mail service.* Intel's workers, in contrast, were allegedly distracted from their work not because of the frequency or quantity of Hamidi's messages, but because of assertions and opinions the messages conveyed. Intel's complaint is thus about *the contents of the messages* rather than the functioning of the company's e-mail system. . . .

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

II. *Proposed Extension of California Tort Law*

We next consider whether California common law should be *extended* to cover, as a trespass to chattels, an otherwise harmless electronic communication whose contents are objectionable. We decline to so expand California law. . .

Writing on behalf of several industry groups appearing as amici curiae, Professor Richard A. Epstein of the University of Chicago . . . suggests that a company's server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass.

Epstein's argument derives, in part, from the familiar metaphor of the Internet as a physical space, reflected in much of the language that has been used to describe it: "cyberspace," "the information superhighway," e-mail "addresses," and the like. Of course, the Internet is also frequently called simply the "Net," a term, Hamidi points out, "evoking a fisherman's chattel." A major component of the Internet is the World Wide "Web," a descriptive term suggesting neither personal nor real property, and "cyberspace" itself has come to be known by the oxymoronic phrase "virtual reality," which would suggest that any real property "located" in "cyberspace" must be "virtually real" property. Metaphor is a two-edged sword.

Indeed, the metaphorical application of real property rules would not, by itself, transform a physically harmless electronic intrusion on a computer server into a trespass. . . . Some further extension of the conceit would be required, under which the electronic signals Hamidi sent would be recast as tangible intruders, perhaps as tiny messengers rushing through the "hallways" of Intel's computers and bursting out of employees' computers to read them Hamidi's missives. But such fictions promise more confusion than clarity in the law. . . .

The plain fact is that computers, even those making up the Internet, are--like such older communications equipment as telephones and fax machines--personal property, not realty. . . . Does this suggest that an unwelcome message delivered through a telephone or fax machine should be viewed as a trespass to a type of real property? We think not . . . .

More substantively, Professor Epstein argues that a rule of computer server inviolability will, through the formation or extension of a market in computer-to-computer access, create "the right social result." In most circumstances, he predicts, companies with computers on the Internet will continue to authorize transmission of information through e-mail, Web site searching, and page linking because they benefit by that open access. When a Web site owner does deny access to a particular sending, searching, or linking computer, a system of "simple one-on-one negotiations" will arise to provide the necessary individual licenses.

Other scholars are less optimistic about such a complete propertization of the Internet. Professor Mark Lemley of the University of California, Berkeley, writing on behalf of

an amici curiae group of professors of intellectual property and computer law, observes that under a property rule of server inviolability, "each of the hundreds of millions of [Internet] users must get permission in advance from anyone with whom they want to communicate and anyone who owns a server through which their message may travel." The consequence for e-mail could be a substantial reduction in the freedom of electronic communication, as the owner of each computer through which an electronic message passes could impose its own limitations on message content or source. . . .

A leading scholar of Internet law and policy, Professor Lawrence Lessig of Stanford University, has criticized Professor Epstein's theory of the computer server as quasi-real property, previously put forward in the *eBay* case (*eBay*, *supra*, 100 F. Supp. 2d 1058), on the ground that it ignores the costs to society in the loss of network benefits: "eBay benefits greatly from a network that is open and where access is free. It is this general feature of the Net that makes the Net so valuable to users and a source of great innovation. And to the extent that individual sites begin to impose their own rules of exclusion, the value of the network as a network declines. If machines must negotiate before entering any individual site, then the costs of using the network climb." (Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (2001) p. 171 . . .

We discuss this debate among the amici curiae and academic writers only to note its existence and contours, not to attempt its resolution. Creating an absolute property right to exclude undesired communications from one's e-mail and Web servers might help force spammers to internalize the costs they impose on ISP's and their customers. But such a property rule might also create substantial new costs, to e-mail and e-commerce users and to society generally, in lost ease and openness of communication and in lost network benefits. In light of the unresolved controversy, we would be acting rashly to adopt a rule treating computer servers as real property for purposes of trespass law.

The Legislature has already adopted detailed regulations governing UCE. (Bus. & Prof. Code, §§ 17538.4, 17538.45; see generally *Ferguson v. Friendfinders, Inc.*, *supra*, 94 Cal.App.4th 1255 .) It may see fit in the future also to regulate noncommercial e-mail, such as that sent by Hamidi, or other kinds of unwanted contact between computers on the Internet, such as that alleged in *eBay*, *supra*, 100 F. Supp. 2d 1058. But we are not persuaded that these perceived problems call at present for judicial creation of a rigid property rule of computer server inviolability.

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BROWN, J., Dissenting.

Candidate A finds the vehicles that candidate B has provided for his campaign workers, and A spray paints the water soluble message, "Fight corruption, vote for A" on the bumpers. The majority's reasoning would find that notwithstanding the time it takes the workers to remove the paint and the expense they incur in altering the bumpers to prevent further unwanted messages, candidate B does not deserve an injunction unless the paint is so heavy that it reduces the cars' gas mileage or otherwise depreciates the cars' market value. Furthermore, candidate B has an obligation to permit the paint's display, because the cars are driven by workers and not B personally, because B allows his workers to use the cars to pick up their lunch or retrieve their children from school, or because the bumpers display B's own slogans. I disagree.

. . . [T]he Court of Appeal decision belongs not to a nightmarish future but to an unremarkable past--a long line of cases protecting the right of an individual not to receive an unwanted message after having expressed that refusal to the speaker. It breaks no new legal ground and follows traditional rules regarding communication.

. . . [T]he Supreme Court reaffirmed this rule in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L. Ed. 2d 131, 92 S. Ct. 2219] (*Lloyd*) and *Hudgens v. NLRB* (1976) 424 U.S. 507 [47 L. Ed. 2d 196, 96 S. Ct. 1029], where private shopping mall owners validly excluded speakers from their malls. The owners could make this decision, even though they were not the "intended and actual recipients of [the speakers'] messages." . . .

This rule applies not only to real property but also to chattels like a computer system. In *Loving v. Boren*, *supra*, 956 F. Supp. at page 955, the court held that the University of Oklahoma could restrict the use of its computer system to exclude pornographic messages, notwithstanding the contrary preferences of any individual faculty member (or student). Intel may similarly control the use of its own property, regardless of any specific employee's contrary wishes . . . In any event, Hamidi had ample opportunity in his preobjection e-mails to direct employees to his Web site or request the employees' private e-mail addresses. He thus continues to use the internal Intel network to speak to an unreceptive audience.

. . . The law favors prevention over posttrespass recovery, as it is permissible to use reasonable force to retain possession of a chattel but not to recover it after possession has been lost. (See 1 Dobbs, The Law of Torts (2001) §§ 76, 81, pp. 170, 186; see also *Deevy v. Tassi* (1942) 21 Cal.2d 109, 118-119 [130 P.2d 389].) Notwithstanding the general rule that injunctive relief requires a showing of irreparable injury (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 782, p. 239), Witkin also observes there are exceptions to this rule where injunctive relief is appropriate; these include repetitive trespasses. (*Id.*, § 784, p. 242.) The first case cited in that section, *Mendelson v. McCabe* (1904) 144 Cal. 230 [77 P. 915] (*Mendelson*), is apposite to our analysis.

In entering McCabe's property, Mendelson exceeded the scope of the consent he received to do so. McCabe had granted Mendelson the right to pass through his property on condition that Mendelson close the gates properly, which he did not do. (*Mendelson*, *supra*, 144 Cal. at pp. 231-232.) McCabe "did not allege that any actual damage had been caused by the acts of [Mendelson] … in leaving the gates open." (*Id.* at p. 232.) After finding that Mendelson planned to continue his conduct over McCabe's objection, we authorized injunctive relief. (*Id.* at pp. 233-234.) Our analysis in *Mendelson* applies here as well. "The right to an injunction is not always defeated by the mere absence of substantial damage from the acts sought to be enjoined. The acts of the plaintiff in leaving the gates open, if persisted in as he threatens, will constitute a continual invasion of the right of the defendant to maintain the gates … . Moreover, the only remedy, other than that of an injunction, for the injury arising from such continued trespass, would be an action against the plaintiff for damages upon each occasion when he left the gates open. The damage in each case would be very small, probably insufficient to defray the expenses of maintaining the action not recoverable as costs. Such remedy is inadequate and would require numerous petty suits, which it is not the policy of the law to encourage." (*Id*. at pp. 232-233.)

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The Restatement recognizes that the measure of impairment may be subjective; a cognizable injury may occur not only when the trespass reduces the chattel's market value but also when the trespass affects its value to the owner. "In the great majority of cases, the actor's intermeddling with the chattel impairs the value of it to the possessor, as distinguished from the mere affront to his dignity as possessor, only by some impairment of the physical condition of the chattel. There may, however, be situations in which the *value to the owner* of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition." (Rest.2d Torts, § 218, com. h , p. 422, italics added.)

The Restatement goes on to explain that A's using B's toothbrush could extinguish its value to B. The brushing

constitutes a trespass by impairing the brush's subjective value to the owner rather than its objective market value. (Rest.2d Torts, § 218, com. h, p. 422 **[***65]** .) Moreover, there can be a trespass even though the chattel is used as intended--to brush teeth--if it is used by an unwanted party. . . .

MOSK, J., **Dissenting**

. . . The majority fail to distinguish open communication in the public "commons" of the Internet from unauthorized intermeddling on a private, proprietary intranet. Hamidi is not communicating in the equivalent of a town square or of an unsolicited "junk" mailing through the United States Postal Service. His action, in crossing from the public Internet into a private intranet, is more like intruding into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks. Because Intel's security measures have been circumvented by Hamidi, the majority leave Intel, which has exercised all reasonable self-help efforts, with no recourse unless he causes a malfunction or systems "crash." . . .

The law of trespass to chattels has not universally been limited to physical damage. I believe it is entirely consistent to apply that legal theory to these circumstances--that is, when a proprietary computer system is being used contrary to its owner's purposes and expressed desires, and self-help has been ineffective. Intel correctly expects protection from an intruder who misuses its proprietary system, its nonpublic directories, and its supposedly controlled connection to the Internet to achieve his bulk mailing objectives--incidentally, without even having to pay postage.

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The majority agree that an impairment of Intel's system would result in an action for trespass to chattels, but find that Intel suffered no injury. As did the trial court, I conclude that the undisputed evidence establishes that Intel was substantially harmed by the costs of efforts to block the messages and diminished employee productivity. . . .

Here, Hamidi's deliberate and continued intermeddling, and threatened intermeddling, with Intel's proprietary computer system for his own purposes that were hostile to Intel, certainly impaired the quality and value of the system as an internal business device for Intel and forced Intel to incur costs to try to maintain the security and integrity of its server--efforts that proved ineffective. These included costs incurred to mitigate injuries that had already occurred. . . .

The time that each employee must spend to evaluate, delete or respond to the message, when added up, constitutes an amount of compensated time that translates to quantifiable financial damage.

All of these costs to protect the integrity of the computer system and to deal with the disruptive effects of the transmissions and the expenditures attributable to employee time constitute damages sufficient to establish the existence of a trespass to chattels, even if the computer system was not overburdened to the point of a "crash" by the bulk electronic mail.