No. S103781

IN THE

SUPREME COURT OF CALIFORNIA

INTEL CORPORATION, Plaintiff/Respondent, v. KOUROSH KENNETH HAMIDI Defendants/Appellant	))))))))))	Court of Appeal No. C033076 Superior Court No. 98-AS-05067 (Hon. John R. Lewis, Judge Presiding)

BRIEF OF *AMICUS CURIAE*
ELECTRONIC FRONTIER FOUNDATION
SUPPORTING REVERSAL

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APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 29.3(c), the undersigned Electronic Frontier Foundation ("EFF") requests leave to file the attached brief as amicus curiae in support of defendant Kourosh Kenneth Hamidi. This application is timely made.

EFF is a non-profit civil liberties group working to protect rights in the digital world. EFF is based in San Francisco with members all over the United States, and maintains one of the most-linked-to Web sites (http://www.eff.org) in the world. EFF encourages and challenges industry and government to support free expression, privacy, and openness in the information society. EFF has litigated and filed amicus briefs in many Internet cases.

EFF has no financial interest in the outcome of this case; EFF seeks to participate as amicus curiae solely out of concern that the legal rule articulated by the Court of Appeal endangers both free speech and commerce on the Internet.

Dated: _____

Respectfully submitted,

Lee Tien

Senior Staff Attorney

Electronic Frontier Foundation

INTRODUCTION

The facts of the case are simple: After defendant Hamidi was fired by plaintiff Intel Corporation ("Intel"), he sought to communicate with Intel employees at their Intel e-mail addresses. On six occasions, he sent e-mail to between 8,000 and 35,000 Intel employees. Intel demanded that Hamidi stop, but he refused. Intel sought, and ultimately received, an injunction prohibiting Hamidi from sending e-mail to Intel employees at their Intel e-mail addresses, based on the common-law tort of trespass to chattels.

Despite the simplicity of these facts -- a company seeking to stop unwanted e-mail from a former employee -- this case has serious implications for the Internet's future as a medium of free speech and of commerce.

On the surface, the decision of the Court of Appeal injures the freedom of speech guaranteed by both the federal and state constitutions by upholding an injunction against protected speech.

The free speech issue, however, should never have been reached. The Court of Appeal majority only reached this constitutional issue by unnecessarily and unjustifiably distorting the ancient doctrine of trespass to chattels so as to remove any requirement of actual physical damage to the chattel or its value. The majority ignored crucial differences between property in land and in chattels that have been emphasized by this Court.

Moreover, the Court of Appeal rewrote trespass-to-chattels doctrine so that many common Internet activities will be potentially tortious. Under the majority's analysis, any unwanted electronic signal to an electronic device -- an e-mail message, even a click on a hyperlink -- is unauthorized "use" of that device and can create tort liability. In so doing, the majority both committed serious legal errors and failed to consider the likely effects of its decision on speech and commerce on the Internet.

The desire to reduce unwanted e-mail is understandable. But the majority's mutant doctrine not only leads to a wrong outcome in this case but also creates an unnecessary new tort that threatens the free flow of information on the Internet. The majority's cure is far worse than the disease.

ARGUMENT

The tort of trespass to chattels generally requires that the putative trespasser proximately and physically cause impairment of the chattel's condition or value to its owner. Thus, the dispositive fact here is that Hamidi's e-mails caused no physical impairment to the condition or value of Intel's chattel, its computer system. Instead, Intel suffered harm in non-physical ways — first, the semantic content of Hamidi's e-mails affected Intel's employees, and second, Intel expended resources in addressing and seeking to prevent this communicative impact.

The difference between Intel's claims of harm and those in every other trespass-to-chattels case could not be plainer. Physical impairment of the chattel's value to its owner, or its high likelihood, was a critical fact in every other trespass-to-chattels case. In older cases the physical impairment was a physical dispossession; in the modern Internet cases, the physical impairment was to the intended functioning of the computer. Intel's computers, however, suffered no loss of function.

The simple point is that Hamidi's e-mails only affected Intel because Intel employees were affected by the meaning of Hamidi's words. Hamidi's words were not, however, alleged to be false, defamatory, or otherwise legally actionable. Hamidi's e-mails were fully protected speech.

Notably, Intel does not discuss whether any of its employees were interested in or learned anything from Hamidi's e-mails. As the Court of Appeal recognized, each of Hamidi's e-mailings informed the addressees that he would remove them

from the mailing list upon request; he only received 450 such requests. (Intel v. Hamidi (2001) 94 Cal.App.4th 325, 329.)

Intel's argument thus entails that unauthorized "use" of its e-mail system can render an e-mail sender liable in tort even if the e-mails cause no impairment of the system, even if the e-mails only have significant effects through their communicative impact upon its recipients, and even if the e-mails are fully protected speech. No trespass-to-chattels case has ever found harm based simply on message meaning; to do so would raise significant and unnecessary freedom-of-speech issues.

I. The Court of Appeal wrongly distorted the doctrine of trespass to chattels.

Had the Court of Appeal simply followed California law, this case would be unremarkable. Intel would have no cause of action, because Hamidi's e-mails did not physically damage Intel's computers or impair their condition, quality, or value. Nor was Intel dispossessed of its computers in any way.

Accordingly, the Court of Appeal majority was forced to rely on two other, consequential harms: "loss of productivity caused by the thousands of employees distracted from their work and by the time its security department spent trying to halt the distractions after Hamidi refused to respect Intel's request to stop invading its internal, proprietary e-mail system." (Hamidi, 94 Cal.App.4th at 333.)

In thus upholding the injunction against Hamidi's speech, the majority wrongly extended the doctrine of trespass to chattels. The majority's fundamental errors were to conflate real and personal property, and the physical with the electronic, online world. Intel's e-mail servers are personal, not real, property, and the contacts at issue are online, electronic contacts. A chattel owner's interest in the inviolability of a chattel is much weaker than a landowner's interest in the inviolability of land. Yet the majority invokes the notion of "trespass" to "private property" as though Hamidi had physically entered Intel's land and damaged

Intel's servers. Intel, for its part, rhetorically frames the case in terms of "the right to control the use of its private property." Intel Brief, at 9.

But even if Intel's servers were real property, trespass would not lie. Recovery for trespass to land must be "predicated upon the deposit of particulate matter upon the plaintiffs' property or on actual physical damage thereto. . . . All intangible intrusions, such as noise, odor, or light alone, are dealt with as nuisance cases, not trespass." (San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 936, *quoting* Wilson v. Interlake Steel Co. (1982) 32 Cal.3d 229, 232-233 (citations omitted).) The Court of Appeal extended the reach of trespass to chattels beyond that of trespass to land.

A. Trespass to chattels requires both interference with a possessory interest in the chattel and significant physical harm to the chattel, which Intel has not shown.

The tort of 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 (fn. omitted); *see* REST. 2D TORTS (1977) § 217 cmt. e (liability only if "intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel").) The only exceptions were for loss of possession, which was deemed to constitute actual damage, or harm to some person or thing in which the possessor has a legally protected interest.

1. Hamidi did not interfere with Intel's possessory interest in its computers.

As a threshold matter, Hamidi did not interfere with Intel's possessory interest in its computers. Intel has not argued that Hamidi's e-mails prevented any other e-mails from being sent or from reaching their intended recipients; simply

put, Intel's e-mail system continued to function throughout Hamidi's e-mailings. One could characterize Hamidi's e-mails as affecting Intel's interests in various ways, but Intel has not shown that Hamidi's e-mails affected Intel's *possessory* interest in its computers. (Hamidi, 94 Cal.App.4th at 348 ("Reading an e-mail transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment.") (Kolkey, J., dissenting).)

Even in other Internet cases applying trespass to chattels, some interference with a possessory interest was arguably present. For instance, in eBay, Inc. v. Bidder's Edge, Inc. (N.D.Cal. 2000) 100 F.Supp.2d 1058, the defendant accessed eBay's web site approximately 100,000 times a day for several months. (Id. at 1071.) The court, however, found this "use" of eBay's servers in itself inadequate to support an injunction. Instead, the court was forced to rest its injunction on the assumption that the defendant's conduct, if permitted to continue, would encourage other auction aggregators to do the same "such that eBay would suffer irreparable harm from reduced system performance, system unavailability, or data losses." (Id. at 1066.)

While this reasoning is highly speculative, there was in eBay at least a possibility that repeated conduct of the same type would cause greater harm. Here, there is no possibility that denying Intel's claims "would encourage an increase in the complained of activity." (Ibid.) Hamidi is unique.

The majority appeared to believe that Hamidi's e-mails in some way physically disrupted Intel's e-mail system, saying that Hamidi should not be allowed to "flood Intel's system to the penultimate extent before causing a computer crash." (Id. at 335.) But nothing remotely resembling a "computer crash" occurred, and nothing in the record suggests that the computer systems were or would be overloaded by Hamidi's e-mails.

Equally important, Hamidi wanted to speak to Intel employees; he had no interest in "crashing" the very medium by which he sought to speak. As one commentator noted, "[t]he trouble that the [Intel] employees are addressing is not that the computer systems are functioning improperly, but rather that they are functioning properly, receiving transmitted bits precisely as they were designed and intended to do." (Burk, *The Trouble with Trespass* (2000) 4 J. SMALL & EMERGING BUS. L. 27, 36.)

2. Hamidi did not cause actual injury to Intel's computers.

Historically, actual injury was required because an owner's interest in "inviolability" of personal property is far weaker than that for real property. (PROSSER & KEETON, TORTS (5th ed.1984) § 14, at 87 (fns. omitted) ("the dignitary interest in the 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"); REST. 2D TORTS, § 218, cmt. e ("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").)

Here, the functioning of Intel's computer system was never threatened and Intel has not shown that any such threat existed. Intel does not claim that its computers worked poorly because of Hamidi's e-mails. Intel claims instead that its employees were distracted by Hamidi's e-mails and that it was forced to expend resources in addressing the distractions, including trying to prevent Hamidi's e-mails from reaching its employees.

The majority opinion thus distorts trespass to chattels in a basic but crucial way: it effectively eliminates the traditional requirement that the chattel (or the owner's possession thereof) itself be significantly harmed by the defendant's

physical contact with the chattel. As Judge Kolkey noted in dissent, the majority either eliminated any requirement of actual injury or treated the time spent reading and blocking unwanted e-mail as "actual injury" -- neither of which is consistent with California law. (Hamidi, 94 Cal.App.4th at 344, 347-348 (Kolkey, J., dissenting).)

The Court of Appeal majority placed much weight on the notion that "any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass." (Hamidi, 94 Cal.App.4th 325, 331 (citation omitted).)

In so doing, however, the majority elided the policy reason behind this rule: that even slight physical trespasses were "likely to result in arousing conflict" between plaintiff and defendant. (Ibid ("the peace of the community was put in danger by the trespasser's conduct. . . . relief was granted to the plaintiff where he was not actually damaged, partly, at least, as a means of discouraging disruptive influences in the community") (citation omitted).)

Unlike physical trespasses, electronic trespasses lack "the immediacy and opportunity for physical confrontation that provides a policy basis for the trespass cause of action." (O'Rourke, *Shaping Competition on the Internet: Who Owns Pricing Information* (2000) 53 VAND.L.REV. 1965, 1994.) Accordingly, the social interest in protecting against electronic trespass that causes no damage to property is far weaker than that for physical trespass, whether to land or chattels.

B. The Court of Appeal majority's reliance on Thrifty-Tel is misplaced.

In Thrifty-Tel, two minors used a confidential access code to gain unauthorized entry into Thrifty-Tel's long-distance telephone system, and then searched for an authorization code that would have allowed them to make free telephone calls. In the process, the minors generated electronic signals that

overburdened Thrifty-Tel's system, denying some subscribers access to phone lines. (Thrifty-Tel, 46 Cal.App.4th at 1563-1564.) In this context, the electronic signals were deemed sufficiently tangible or physical to maintain an action for trespass to chattels.

Following Thrifty-Tel, the Court of Appeal majority specifically held that "[t]he tangibility of the contact is not dependent on the harm caused." (Hamidi, 94 Cal.App.4th at 335.) This reliance is misplaced, because the reasoning of Thrifty-Tel is dubious to begin with; it relied on cases involving trespass to land, not to chattels. (Burk, *supra*, 4 J. SMALL & EMERGING BUS. L. at 33 ("The Thrifty-Tel opinion blithely glosses over this distinction, noting simply that both legal theories share a common ancestry"); id. at n.52 (citing cases).)

Equally important, while Thrifty-Tel distorted the traditional meaning of "physical" contact with the chattel to include electronic signals (46 Cal.App.4th at 1566 n. 6), that distortion was by itself relatively minor because Thrifty-Tel required actual injury to the chattel's value or operation. (Id. at 1567 (noting that "migrating intangibles . . . may result in a trespass, provided they do not simply impede an owner's use or enjoyment of property, but cause damage"); id. at 1568-1569 (denying recovery for first trespass where plaintiff failed to mitigate damages); id. at 1569-1570 (requiring plaintiff to prove actual damages in order to recover).)

Here, there admittedly is no such harm. Accordingly, the majority relied on purely consequential, speech-based harms: "loss of productivity caused by the thousands of employees distracted from their work" and "the time its security department spent trying to halt the distractions." (Hamidi, 94 Cal.App.4th at 333.)

But as Judge Kolkey noted in dissent, "loss of employees' productivity (by having to read an unwanted e-mail on six different occasions over a nearly two-year period) [cannot] qualify as injury of the type that gives rise to a trespass to

chattel. . . . Reading an e-mail transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment." (Id. at 348 (Kolkey, J., dissenting).) "No case goes so far as to hold that reading an unsolicited message transmitted to a computer screen constitutes an injury that forms the basis for trespass to chattel." (Ibid.)

With respect to the resources spent in trying to prevent Hamidi's e-mails, Judge Kolkey correctly noted that "it is circular to premise the damage element of a tort solely upon the steps taken to prevent the damage. Injury can only be established by the completed tort's consequences, not by the cost of the steps taken to avoid the injury and prevent the tort; otherwise, we can create injury for every supposed tort." (Id. at 348 (Kolkey, J., dissenting).)

Intel argues that the Court of Appeal made an "undisputed" factual finding that "Hamidi's e-mail intrusions were massive in nature." Intel Brief, at 3. The Court of Appeal never found, however, that the "massive" nature of Hamidi's e-mails affected the functioning of Intel's computers. It did characterize Hamidi as having "repeatedly flooded" Intel's systems. (Hamidi, 94 Cal.App.4th at 328.) And it did characterize Hamidi's campaign as being of "massive size." (Id. at 342.) But these characterizations were not findings of fact and were tied to the same consequential harms of productivity loss and precautionary costs. (Ibid.)

C. The majority disproportionately extended trespass-to-chattels doctrine.

Even in actions for trespass to land, such consequential harm is insufficient. In Wilson, *supra*, the plaintiffs' use and enjoyment of their property was substantially disrupted by noise emanating from defendant's plant; the noise lowered the market value of their homes, but did not cause any physical damage. This Court made clear that trespass to land requires "the deposit of particulate matter upon the plaintiffs' property or actual physical damage thereto. . . .

actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion." (32 Cal.3d. at 232-233 (citations omitted).)

This Court reiterated this point in San Diego Gas, *supra*, where the plaintiffs alleged that electromagnetic fields rendered their property "unsafe and uninhabitable." (13 Cal.4th at 937.) Explaining that this allegation referred only to "a risk of *personal* harm to its occupants, which is manifestly different from damage to the property itself" (Ibid (emphasis in original).), this Court rejected the attempt to characterize loss of market value as physical damage: "A diminution in property *value* . . . is not a type of physical damage to the property itself, but an element of the measure of damages when such damage is otherwise proved." (Ibid (emphasis in original).)

Clearly, the harms on which the majority here relied are directly analogous to the harms that this Court has clearly rejected in trespass-to-land cases. As a result, the Court of Appeal's distortion of trespass-to-chattels doctrine gives chattel owners more protection than land owners.

The majority also sought to evade the requirement of actual injury to the chattel by noting that Intel sought an injunction, not damages. But as Judge Kolkey cogently observed, that "the relief sought is injunctive does not excuse a showing of injury, whether actual or threatened. . . . The majority therefore cannot avoid the element of injury by relying on the fact that injunctive relief is sought here." (Hamidi, 94 Cal.App.4th at 347 (Kolkey, J., dissenting).) Moreover, the issuance of injunctive relief traditionally requires consideration of the public interest, which, as shown below, militates strongly against the injunction here.

In short, the majority conflated electronic trespass to chattels with physical trespass to chattels, then with physical trespass to land -- and then went even further. Now, whenever electronic signals impinge upon a device without the

owner's consent, trespass to chattels may be invoked simply by giving notice to the sender of the signals.

D. The Court of Appeals' distortion of trespass-to-chattels doctrine threatens the Internet.

Judge Kolkey said in dissent that "[t]o apply this tort to electronic signals that do not damage or interfere with the value or operation of the chattel would expand the tort of trespass to chattel in untold ways and to unanticipated circumstances." (Id. at 345; id. at 348 ("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") (Kolkey, J., dissenting).)

Judge Kolkey was right; the majority's approach creates enormous problems for the Internet and other forms of electronic communication. First, as an architectural matter, the majority's approach would transform many commonly accepted Internet activities into potential trespasses. An example is the activities of search engines like Google, which automatically "crawl" websites, indexing the information contained there. Under the majority's approach, any website owner may simply inform Google that it may not "browse" his or her website -- or even post a "no trespassing" sign on its website -- making any subsequent "contact" by Google a trespass despite lack of any harm.

Similarly, trespass to chattels poses a threat to linking. Under the majority's approach, any website could post a "no linking" sign. Although the law is unsettled as to whether websites have a legal right to prohibit unauthorized links, the majority's extension of trespass-to-chattels doctrine would make the unwitting user who clicks on an unauthorized link a trespasser. (*See* Caffarelli, Note, *Crossing Virtual Lines: Trespass on the Internet* (1999), 5 B.U.J. SCI. & TECH. L.

6, 26-27 (noting that visiting and copying data from author's website could potentially qualify as trespass).) That the websites being searched or linked to were publicly accessible would make no difference under the majority's approach; after all, anyone can send e-mail to Intel's e-mail servers.

Both search engines and links are critical to the Internet. Because the Internet is so vast, only search engines give users the ability to find information of interest to them easily and quickly. Meanwhile, "the ability to link from one computer to another, from one document to another . . . regardless of its status or physical location is what makes the Web unique." (ACLU v. Reno (E.D. Pa. 1999) 31 F.Supp.2d 473, 483, *aff'd* (3d Cir. 2000) 217 F.3d 162, *reversed sub nom.* ACLU v. Ashcroft (2002) 2002 WL 970708 (U.S.).) Requiring permission to link, the predictable outcome of creating a cause of action for unauthorized linking, would fundamentally alter the character of the Internet.

Moreover, such changes in the Internet's architecture are likely to have significant consequences for competition. In two federal cases, trespass to chattels has been used to prevent firms from aggregating price information. (Register.com, Inc. v. Verio, Inc. (S.D.N.Y.2000) 126 F.Supp.2d 238, 250 (on appeal); eBay, Inc. v. Bidder's Edge, Inc. (N.D.Cal. 2000) 100 F.Supp.2d 1058, 1066, 1071.) Company control over the dissemination of price information for products sold on the open market harms competition.

Equally important, the use of trespass-to-chattels doctrine in these price information cases creates the functional equivalent of copyright protection for databases and collections of facts that would not otherwise be protected by copyright. TicketMaster Corp. v. Tickets.com, Inc (C.D. Cal. Aug. 10, 2000) 2000 WL 1887522, at *3 ("The major difficulty with many of plaintiff's theories and concepts is that it is attempting to find a way to protect its expensively developed

basic information from what it considers a competitor and it cannot do so."), *aff'd* (9th Cir. 2001) 2 Fed. Appx. 741.

Unsurprisingly, several law review articles have criticized the application of this distorted trespass to chattels doctrine to the Internet. (Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels* (2002) 17 BERKELEY TECH. L.J. 421; O'Rourke, *Property Rights and Competition on the Internet: In Search of An Appropriate Analogy* (2001) 16 BERKELEY TECH. L.J. 561 (criticizing distortion of trespass to chattels in Register.com and eBay*)*; Ballantine, Note: *Computer Network Trespasses: Solving New Problems with Old Solutions* (2000) 57 WASH & LEE L. REV. 209, 248 ("failure to allege or to support a showing of actual harm should have precluded Intel from prevailing on a trespass to chattels theory"); Burk, *supra*, 4 J. SMALL & EMERGING BUS. L. at 39-54; *Developments in the Law -- The Law of Cyberspace* (1999) 112 HARV. L. REV. 1574, 1622-34 ("*Developments*"); *cf.* Warner, *Border Disputes: Trespass to Chattels on the Internet* (2002) 47 VILL. L. REV. 117 (arguing for modified form of trespass to chattels but not discussing Hamidi).)

II. The Court of Appeal erroneously decided that the injunction did not infringe Hamidi's right to free speech.

These problems are only exacerbated given that many of the activities affected by trespass to chattels in cyberspace are speech activities. *Developments*, *supra*, 112 HARV. L. REV. at 1628 ("plaintiffs are aggressively using the theory of electronic trespass to block unwanted speech"). Search engines and links are often used for academic, research, cultural and political purposes. Hamidi was exercising his right to speak; his sending e-mail to Intel employees was protected "peaceful pamphleteering." (*See* Organization for a Better Austin v. Keefe (1971) 402 U.S. 415, 419 ("peaceful pamphleteering is a form of communication

protected by the First Amendment . . . so long as the means are peaceful, the communication need not meet standards of acceptability").)

More important, it is clear that Intel's position is based solely on the consequential effect of the communicative impact of Hamidi's e-mails on Intel's employees, not on any noncommunicative impact of Hamidi's e-mails on Intel's computers.

Thus, after distorting a sound common-law doctrine designed mainly to protect possessory interests in chattels, the majority was forced to consider the consequences of its reasoning: upholding a judicial order prohibiting Hamidi's speech. It is no accident that the majority devotes nearly half of its opinion to an attempt to explain why a judicial prohibition on sending e-mail does not violate Hamidi's right to free speech under both the federal and state constitutions.

A. The Court of Appeal wrongly concluded that the injunction does not implicate the First Amendment

The majority found that "this lawsuit does not implicate federal constitutional rights, for lack of state action." (Hamidi, 94 Cal.App.4th at 337.) This decision was wrong, because the Court of Appeal misunderstood the underlying law of First Amendment limits on state authority.

Judicial action aimed at restricting speech generally triggers constitutional scrutiny, even when the government is not a party. Defamation cases are the most obvious example. As the U.S. Supreme Court said,

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . .

> The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

(New York Times v. Sullivan (1964) 376 U.S. 254, 265 (citations omitted).)

The principle is not confined to defamation. (*See, e.g.*, Hustler Magazine, Inc. v. Falwell (1988) 485 U.S. 46, 50, 56 (liability for intentional infliction of emotional distress must take into account First Amendment standards); NAACP v. Claiborne Hardware Co. (1982) 458 U.S. 886, 916 n. 51; Keefe, *supra*; Blatty v. New York Times Co. (1986) 42 Cal.3d 1033.)

To distinguish this well-settled principle, the Court of Appeal seized upon doubt about the state action doctrine as expressed in Shelley v. Kraemer (1947) 334 U.S. 1. But Shelley was not a First Amendment case. The rule of Sullivan and its progeny is not about "classic" state action and is not related to the "governmental function" reasoning of Marsh v. Alabama (1946) 326 U.S. 501, 502 (addressing criminal liability of individual who "undertakes to distribute religious literature on the premises of a company-owned town"). Rather, it is about First Amendment limitations on state or common law. (*E.g.*, Hustler, *supra*, 485 U.S. at 50 (referring to "First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress").) These cases seek to create "breathing space" for individual speech. (Id. at 52.) Put simply, states may not ignore the effects of their laws on First Amendment liberties, even when these laws are invoked by private parties to protect private rights.

Much of the majority's reasoning talismanically invokes the notion of "private property." (Hamidi, 94 Cal.App.4th at 339 (distinguishing Claiborne Hardware, Keefe, and Blatty as involving "private tort actions," not "private property").) But there is nothing magical about "private property" in the speech

context.[1] That something may be private property does not eliminate First Amendment considerations. The U.S. Supreme Court's accommodation of private property and free speech carefully balanced the property rights of a shopping center owner against the rights of leafleters -- with no mention of state action at all. (Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74, 88.) Copyright law, which creates a species of private property in information, is bounded by the First Amendment in at least two ways: the idea-expression dichotomy, and the fair use doctrine, which allows a form of "trespass" onto another's informational property. Similarly, the state right of publicity is bounded by the First Amendment. (Comedy III Productions, Inc. v. Saderup (2001) 25 Cal.4th 387.)

Finally, the Court of Appeal reasoned that trespass cases are unlike defamation cases because the latter cases "pit common law rights protecting reputation against the constitutional right of a newspaper to publish," while in the former cases "the speaker's rights are pitted against a property owner's rights -- of at least equal constitutional force." (Hamidi, 94 Cal.App.4th at 337.)

This distinction makes no difference here. That a property owner has constitutional rights is not in doubt. But the quality of the rights at stake implicates only the question of how such rights should be balanced, not the question of whether judicial enforcement of those rights implicates the First Amendment at all.

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[1]While the doctrine of trespass to chattels will not always be used to restrain speech, that does not insulate it from First Amendment scrutiny when it is so used. (*See generally* NAACP v. Claiborne Hardware (1981) 458 U.S. 886 (applying First Amendment scrutiny to state application of common-law tort of malicious interference with business).) The harms alleged by Intel here stem primarily from the communicative impact of Hamidi's speech on Intel and its employees, which is necessarily based on content. (Forsyth County v. Nationalist Movement (1992) 505 U.S. 123, 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation.").)

The U.S. Supreme Court confirmed this point in holding that a landowner has no Fifth Amendment takings claim against a state-created right to speak on private property. (Pruneyard, 447 U.S. at 82-88; cf. Nebraska Press Ass'n v. Stuart (1976) 427 U.S. 539 (judicial gag order intended to protect criminal defendant's Sixth Amendment right to a fair trial found to be invalid prior restraint).)

B. The Court of Appeals wrongly concluded that state action was lacking under the California Constitution

The majority also erred in finding that the injunction did not implicate the state constitutional right of free speech. The majority used the rule: "actions to halt expressive activity on one's private property do not contravene the California Constitution unless the property is freely open to the public." (Hamidi, 94 Cal.App.4th at 341, *citing* Golden Gateway Center v. Golden Gateway Tenants Association (2001) 26 Cal.4th 1013, 1033, 1036.) It then assessed Intel's e-mail servers in terms of the public forum doctrine.

Here again the majority elides the distinctions between "virtual" and physical property and between chattels and land. Tellingly, the majority says that "Intel is as much entitled to control its e-mail system as it is to guard its factories and hallways." (Hamidi, 94 Cal.App.4th at 342.) Golden Gateway and its predecessor, Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, *aff'd. sub nom.* Pruneyard, *supra*, are cases involving property in land. This case is about trespass to chattels, not trespass to land.

The majority compounds its error by analyzing the speech issues in terms of the public forum doctrine. The question is not, however, whether Intel's e-mail servers can be deemed a public forum; EFF does not claim that they are a public forum. Rather, EFF claims that any state or common-law doctrines underlying such judicial relief must provide breathing space for free speech, and that judicial

action that restrains communications based on the content of those communications requires speech scrutiny.

Thus, even assuming that trespass to chattels can be applied in this case, the Court of Appeals completely failed to address the significant free speech issues; for this reason alone this Court should reverse.

Should this Court find it necessary to reach the constitutional issues, a simple answer is appropriate: trespass to chattels cannot be applied when the only harms suffered by the chattel owner are effects of the content of the allegedly trespassory speech. The doctrine was never designed to and should not be permitted to regulate speech content.

On the other hand, if physical harm to the chattel or impairment of chattel value would exist regardless of what the e-mails said, much as a properly tailored ordinance regulating the decibel level of outdoor loudspeakers would protect against too-loud sounds without regard to the speech content of the sound, then the doctrine could be applied.

Even in the latter situation, however, the First Amendment requires meaningful judicial scrutiny in order to prevent the tort from being used as a pretext to curtail speech. In order to recover damages, the plaintiff must show by clear and convincing evidence that the actual, unrelated-to-speech-content harms are substantial. (*See* Gertz v. Welch (1974) 418 U.S. 323, 342; New York Times v. Sullivan, 376 U.S. at 285-86.)

In order to obtain an injunction, the plaintiff must not only show a strong likelihood of irreparable harm, but also that an injunction is necessary to serve a significant state interest unrelated to the content of the communication and that the injunction burdens no more speech than necessary. (Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 765; *see* Britt v. Superior Court (1978) 20 Cal.3d 844, 859.)

CONCLUSION

The Court of Appeal first distorted trespass-to-chattels doctrine and was then forced into constitutional terrain that it should never have entered. In neither step did the Court of Appeal manifest any recognition of the potential effects of its reasoning on Internet speech and commerce. For the foregoing reasons, the decision of the Court of Appeal should be reversed.

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