

30 Cal.4th 1342
Supreme Court of California

INTEL CORPORATION, Plaintiff and Respondent,
v.
Kourosh Kenneth HAMIDI, Defendant and Appellant.

No. S103781. | June 30, 2003.

* * *

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 ***1347** 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.

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DISCUSSION

I. Current California Tort Law

[The court reviews tort principles and precedent, and concludes that Intel does not have a claim under the present state of the law.]

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. Intel, of course, was not the recipient of Hamidi's messages, but rather the owner and possessor of computer servers used to relay the messages, and it bases this tort action on that ownership and possession. The property rule proposed is a rigid one, under which the sender of an electronic message would be strictly liable to the owner of equipment through which the communication passes—here, Intel—for any consequential injury flowing from the *contents* of the communication. The arguments of amici curiae and academic writers on this topic, discussed below, leave us highly doubtful whether creation of such a rigid property rule would be wise.

Writing on behalf of several industry groups appearing as amici curiae, Professor Richard A. Epstein of the University of Chicago urges us to excuse the required showing of injury to personal property in cases of unauthorized electronic contact between computers, “extending the rules of trespass to real property to all interactive Web sites and servers.” The court is thus urged to recognize, for owners of a particular species of personal property, computer servers, the same interest in inviolability as is generally accorded a possessor of land. In effect, Professor Epstein 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 ***1361** 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. That is because, under California law, intangible intrusions on land, including electromagnetic transmissions, are not actionable as trespasses (though they may be as nuisances) unless they cause physical damage to the real property. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936–937, 55 Cal.Rptr.2d 724, 920 P.2d 669.) Since Intel does not claim Hamidi’s electronically transmitted messages physically damaged its servers, it could not prove a trespass to land even were we to treat the computers as a type of real property. 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. Professor Epstein observes that “[a]lthough servers may be moved in real space, they cannot be moved in cyberspace,” because an Internet server must, to be useful, be accessible at a known address. But the same is true of the telephone: to be useful for incoming communication, the telephone must remain constantly linked to the same number (or, when the number is changed, the system must include some forwarding or notification capability, a qualification that also applies to computer addresses). 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: As already discussed, the contents of a telephone communication may cause a variety of injuries and may be the basis for a variety of tort actions (e.g., defamation, intentional infliction of emotional distress, invasion of privacy), but the injuries are not to an ***1362** interest in property, much less real property, and the appropriate tort is not trespass.⁷

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. As Professor Dan Hunter of the University of Pennsylvania asks rhetorically: “Does this mean that one must read the ‘Terms of Acceptable Email Usage’ of every email system that one emails in the course of an ordinary day? If the University of Pennsylvania had a policy *1363 that sending a joke by email would be an unauthorized use of their system, then under the logic of [the lower court decision in this case], you commit ‘trespass’ if you emailed me a ... cartoon.” (Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons* (2003) 91 Cal. L.Rev. 439, 508–509.)

Web site linking, Professor Lemley further observes, “would exist at the sufferance of the linked-to party, because a Web user who followed a ‘disapproved’ link would be trespassing on the plaintiff’s server, just as sending an e-mail is trespass under the [lower] court’s theory.” Another writer warns that “[c]yber-trespass theory will curtail the free flow of price and product information on the Internet by allowing website owners to tightly control who and what may enter and make use of the information housed on its Internet site.” (Chang, *Bidding on Trespass: eBay, Inc. v. Bidder’s Edge, Inc. and the Abuse of Trespass Theory in Cyberspace Law* (2001) 29 AIPLA Q.J. 445, 459.) 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; see also Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons, supra*, 91 Cal. L.Rev. at p. 512 [“If we continue to mark out anticommons claims in cyberspace, not only will we preclude better, more innovative uses of cyberspace resources, but we will lose sight of what might be possible”].)

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.

***1364** The Legislature has already adopted detailed regulations governing [unsolicited commercial bulk email, i.e. spam]. (Bus. & Prof.Code, §§ 17538.4, 17538.45; see generally *Ferguson v. Friendfinders, Inc.*, *supra*, 94 Cal.App.4th 1255, 115 Cal.Rptr.2d 258.) 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. We therefore decline to create an exception, covering Hamidi's unwanted electronic messages to Intel employees, to the general rule that a trespass to chattels is not actionable if it does not involve actual or threatened injury to the personal property or to the possessor's legally protected interest in the personal property. No such injury having been shown on the undisputed facts, Intel was not entitled to summary judgment in its favor.

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***1366 DISPOSITION**

The judgment of the Court of Appeal is reversed.

[Concurring and dissenting opinions are omitted.]