UIC John Marshall Journal of Information Technology & Privacy Law

Volume 22
Issue 1 *Journal of Computer & Information Law - Fall 2003*

Article 10

Fall 2003

Intel v. Hamidi: Spam as a Trespass to Chattels - Deconstruction of a Private Right of Action in California, 22 J. Marshall J. Computer & Info. L. 205 (2003)

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CASENOTE

INTEL V. HAMIDI: SPAM AS A TRESPASS TO CHATTELS - DECONSTRUCTION OF A PRIVATE RIGHT OF ACTION IN CALIFORNIA

I. INTRODUCTION

This Casenote will explore the decision and underlying rationale employed by the California Supreme Court in the decision of *Intel v. Hamidi*.[1] In *Intel*, the Court reasoned that the plaintiff / respondent could not maintain a successful cause of action for trespass to chattels because they did not establish a sufficient showing of harm. This Note will argue that Intel did in fact meet the showing of harm, and that moreover, in reversing the issuance of an injunction[2] and its subsequent affirmation,[3] the California Supreme Court breaks with a trend of finding a cause of action for trespass to chattels where harm is caused by unwanted electronic communications established in cases such as *Thrifty-Tel, Inc. v. Benezek*,[4] *eBay v. Bidder's Edge*,[5] and principally, *CompuServe v. Cyber Promotions*.[6] In passing, the Majority offers several causes of action on which Intel might have proceeded which will each, in turn, be discussed with regard to their tenability as potential causes of action. Each potential cause will be shown to be less plausible than trespass to chattels in that some require a showing of injury[7] (which would make them equally indefensible as per the California Supreme Court), while others require investigation into the content and effects of the messages creating the additional burden of exploring tenuous causes of action on the defendant, Intel. Two dissenting opinions, which discuss the merits of recognizing an adequate showing of harm by Intel, as well as an implicit recognition of a defensible property right in cyber-

1. 71 P.3d 296 (Cal. 2003).
2. *Intel Corp. v. Hamidi*, 1999 WL 450944 (Cal. Super. App. Dept. Apr. 28, 1999).
3. 114 Cal. Rptr. 2d 244 (2001).
4. *Thrifty-Tel, Inc. v. Benezek*, 54 Cal. Rptr. 2d 468 (App. 4th Dist. 1996).
5. *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).
6. *CompuServe Inc. v. Cyber Promotions*, 962 F. Supp. 1015 (S.D. Ohio 1997).
7. Which would make them equally indefensible as per the California Supreme Court

space and the corollary right to be let alone / to exclude will be investigated in turn. In conclusion, this Note will submit that in certain instances, two exceptions should be recognized by courts in actions sounding in trespass to chattels involving unwanted trespassory actions of spammers in order to promote efficient, unimpeded use of e-mail and the Internet generally.

II. SUMMARY OF FACT & BACKGROUND

A. EMERGENCE OF SPAM

As a medium which has afforded tremendous opportunities for instantaneous, global communication, e-mail is arguably one of the most widely used modern amenities. With the advent of this landmark technology, however, regretful and unwanted uses have led to civil lawsuits, state legislation (some of which provide for a private cause of action),[8] as well as numerous attempts at proposed federal legislation, most all of which have died before being enacted.[9] The bulk of these efforts are in response to the proliferation of Unsolicited Commercial E-mail ("UCE"), Unsolicited Bulk E-mail ("UBE"), or as it is colloquially referred to, spam.[10] Although the definition of spam differs depending on the group or person to which the question is posed,[11] for purposes of this critique, it will be assumed that spam consists of UCE/UBE, and will forego the

8. At the time of publication, thirty-six states have existing "anti-spam" laws on the books, two of which (WA, & CA – which recently fined PW Marketing two million dollars for soliciting products instructing users how to spam others) have had successful prosecutions. Los Angeles Business, *PW Marketing Loses Spam Case in Court* <http://www.bizjournals.com/losangeles/stories/2003/10/20/daily64.html> (accessed Dec. 2, 2003). *See* Unspam, LLC, *How to Craft an Effective Anti-spam Law,* part 1 <http://www.spamseminar.com/materials/unspam_presentation.pdf> (accessed Jan. 23, 2004); *see generally* <www.spamlaws.com> (accessed Jan 23, 2004).

9. For example, nine bills were pending in the 108th Congress: *Anti-spam Act of 2003*, H.R. 2515, 108th Cong. (2003) (Wilson), *Ban on Deceptive Unsolicited Bulk Electronic Mail Act of 2003*, S. 1052, 108th Cong. (2003) (Bill Nelson), 108th Cong. (2003) (Burns-Wyden), *Computer Owners' Bill of Rights*, S. 563, 108th Cong. (2003) (Dayton), *Criminal Spam Act of 2003*, S. 1293, 108th Cong. (2003) (Hatch), *Reduction in Distribution of Spam Act of 2003*, H.R. 2214, 108th Cong. (2003) (Burr), *REDUCE Spam Act of 2003*, H.R. 1933, 108th Cong. (2003) (Lofgren), *Stop Pornography and Abusive Marketing Act*, S. 1231, 108th Cong. (2003) (Schumer), *Wireless Telephone Spam Protection Act* H.R. 122, 108th Cong. (2003) (Holt), *CAN-SPAM Act of 2003*, S. 877; since the writing of this article, the enrolled (final) text of S. 877 (*CAN-SPAM Act*) was passed by the Senate on November 25, 2003, and agreed to by the House of Representatives on December 8, 2003. The bill was signed by the President on December 16, 2003, and took effect on January 1, 2004. *See* David E. Sorkin, *Spam Laws: 108th Congress* <www.spamlaws.com/federal/list108.html> (accessed Jan. 23, 2004).

10. Spam as e-mail is based on a spoof of a skit performed by Monty Python's Flying Circus in which nothing was available on a menu except for spam, not to be confused with the food product SPAM™ which is a registered Trademark, manufactured by Hormel.

11. For example, (Mail Abuse Prevention System) MAPS, defines spam as:

temptation to include a more common definition of spam as *any unwanted*[12] e-mail. UCE, or Unsolicited Commercial E-mail, is unsolicited in the sense that there is no pre-existing business relationship between the sender and recipient, or else the recipient has made an effort to terminate the relationship, to no avail. [13] UBE, or Unsolicited Bulk E-mail is defined in terms of quantity as opposed to content in that a single, replicated message is simultaneously sent to numerous recipients - no threshold volume of communications sufficient to establish e-mail as bulk has been established.[14]

Spamming will therefore be defined for purposes of this Note as the practice of sending e-mail as UCE *or* as UBE, similar to bulk-rate commercial mailing of advertisements through land based mail service ("USPS") or "snail mail." This practice differs from the typical user-to-user implementation of e-mail in that spammers send upwards of millions of e-mail advertisements, virtually instantaneously, to an almost equally great number of recipients.[15] In addition, the practice of sending

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> An electronic message is 'spam' IF: (1) the recipient's personal identity and context are irrelevant because the message is equally applicable to many other potential recipients; AND (2) the recipient has not verifiably granted deliberate, explicit, and still-revocable permission for it to be sent; AND (3) the transmission and reception of the message appears to the recipient to give a disproportionate benefit to the sender.

Mail Abuse Prevention System LLC, *What is "spam"?* <http://mail-abuse.org/standard.html> (accessed Nov. 26, 2003). The (Direct Marketing Association) DMA "defines" spam as: "spam is essentially e-mail that misrepresents an offer or misrepresents the originator, or in some way attempts to confuse or defraud people[.]" DMNews.com (available at <http://www.dmnews.com/cgi-bin/artprevbot.cgi?article_id=24536>) (link has been restricted to DMA members since initial posting). Robert Wientzen, president of the Direct Marketing Association, has an unusual view of what types of junk e-mail qualify as spam. Wientzen said during an appearance on CBS News last week that spam is only "e-mail that misrepresents an offer or misrepresents the originator—or in some way attempts to confuse or defraud people." Declan McCullagh, CNETNews.com, The DMA's Doublespeak on Spam (July 21, 2003), <http://news.com.com/2010-1071_3-5047695.html>.

12. Regardless of content.

13. David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. Rev. 325, 328-329 (2001).

14. *Id.* at 330-332.

15. In fact, spammers typically send a large volume of advertisements to e-mail addresses which may in fact, not actually exist which creates a problem of "bounced" e-mails which are suspended in cyberspace in the server space of the domain name to which they are sent until they are eventually discarded. This creates the problem (in addition to the sheer volume of spam mailings) of wasted server space and lost processing cycles - an unnecessary burden on ISP servers. The reason spammers send e-mail to addresses which do not in fact exist is that various "harvesting" methods such as dictionary attacks generate a list of all possible e-mail addresses at a particular domain name (dictionary attacks are in essence the practice of starting with a Secondary Level Domain (SLD) designator such as aol, or hotmail, at any of the popular Top Level Domain (TLD) extensions - .com, .net. org, etc. in an attempt to list all possible addresses for that particular host. This is done for example by starting with a@—-.com, ab@—-.com, abc@—-.com, abc123@—-.com, etc. inter-

spam shifts, in significant part, the burden of receiving the message to the recipient as the sender incurs only a minimal cost[16] in sending into the millions of messages to recipients,[17] whereas the recipients must subscribe[18] to an Internet service provider ("ISP"). The practice of spamming differs from traditional bulk marketing in which the sender incurs substantial costs in production and distribution in comparison to no cost[19] on the part of the recipient. Spamming also differs from typical solicitations in that many, if not most spammers mask their identity and go underground sending messages from a given machine as little as one time at which point they move operations to hide from being tracked.[20] When these spammers are actually caught,[21] the law should afford the aggrieved party a remedy in equity.

In response to proliferation of spamming, there have been several successful civil cases by ISPs using a trespass to chattels cause of action. Several of these cases were distinguished by the Majority in *Intel*, most notably, *CompuServe, Inc. v. Cyber Promotions, Inc.*[22] in which the U.S. District Court for the Southern District of Ohio, Eastern Division acknowledged CompuServe's showing of injury in the increased burden on the plaintiff ISP's server and bandwidth resources coupled with the

posing all possible alphanumeric combinations until the possibilities are exhausted) many of which have never existed, but potentially could, but the software which creates these randomly generated lists is not concerned with creating valid e-mail recipient addresses, but rather in simply creating a marketable database of potential customers.

16. By way of example, the cost of initiating a spam campaign is relatively cheap. One needs a home computer (approx. $1000), Internet connection (approx. $50 per month), a list of e-mail addresses (which are widely available online and start at around $70.00 for 100 million addresses; *see* www.bulkemailcds.com) and spamming software (approx. $30.00 www.bilkemailcds.com) which turns the act of sending each individual message into an automated process, eliminating the need for further human intervention. *See generally* <http://www.bulkemailcds.com/> (accessed Feb. 21, 2004).

17. For an example of the relatively small cost involved, at www.myOpt.com, an individual may solicit 300,000 addresses for $69.00, up to 1,000,000 addresses for only $169.00, and can even do a "State Specific Blast" for only $299.99. Bulk Email Master, *Bulk Email Marketing Service* <http://www.myopt.com> (accessed Nov. 26, 2003). In fairness, however, myOpt states on its site that it does not spam, nor does it condone spamming, and that all of its lists are generated through online surveys and are permission based. Bulk Email Master, *Bulk Email Master Policies* <http://www.myopt.com/policies.html> (accessed Nov. 26, 2003).

18. Most often for a fee.

19. And minimal, if any, nuisance.

20. A new, more insidious technique "wardriving" is being used by spammers where they will drive around dense city blocks searching for wireless networks with security holes exploiting these weaknesses and "sending" spam from an unsuspecting domain name by gaining access to the wireless network illegally. *See* generally <http://www.wardriving.com/> (accessed Feb. 21, 2004).

21. Which is quite a feat in itself.

22. 962 F. Supp. 1015 (S.D. Ohio 1997).

threatened and actual increased difficulty in use of CompuServe's services by its end-user clients.[23] Another case involving an ISP suing an alleged spammer, which proceeded on similar facts, that the Majority chose to distinguish from the present case was *America Online, Inc. v. IMS*.[24] In that case, as in *CompuServe*, the plaintiff's suit, based on trespass to chattels, was successful in establishing the necessary showing of injury through the plaintiff's alleging "that processing the bulk e-mail costs them time and money, and burdened their equipment."[25] Finally, the Majority chose to distinguish *Thrifty Tel, Inc. v. Benezek*, an early case involving trespass to chattels concerning electronic communications, in which software was used that allowed the defendants to autosearch the plaintiff telephone carrier's system for long distance authorization codes.[26] While this was not a case in which an ISP brought suit against an alleged spammer, the court in *Thrifty Tel* found the required evidence of harm in that the defendant's actions "overburdened the [plaintiff's] system denying some subscribers access to phone lines."[27] The same underlying rationale employed in *Thrifty Tel* can be found in the two aforementioned opinions. In all of the cases distinguished by the Majority in *Intel,* the requisite showing of harm was met in essence by demonstrating an increased burden on the plaintiff's equipment combined with some loss of service, albeit temporarily, much as was the case for Intel.

B. Facts & Holding

The Majority in *Intel* found no cause of action for trespass to Intel's proprietary system established for e-mail based communication between employees, and through which employee's are permitted to make reasonable non-business use of the system.[28] Hamidi, a former engineer for Intel, and others, formed an organization named Former and Current Employees of Intel ("FACE-Intel") for the purpose of circulating information critical of Intel's employment practices.[29] FACE-Intel created and maintains a Web site[30] consistent with FACE-Intel's purpose, on which Hamidi is named Webmaster.[31] During a twenty-one month period, FACE-Intel/Hamidi sent a series of six e-mails ranging from 8,000 to 35,000 in number to the employees of Intel by way of Intel's e-mail sys-

23. *Id.*
24. 24 F. Supp. 2d 548 (E.D. Va. 1998).
25. *Id.* at 550.
26. 54 Cal. Rptr. 2d 468, 471 (App. 4th Dist. 1996).
27. *Id.*
28. *Intel Corp. v. Hamidi*, 71 P.3d 296, 299, 301 (Cal. 2003).
29. *Id.* at 301.
30. www.faceintel.com
31. *Id.*

tem.[32] While the messages sent by Hamidi were not commercial in nature,[33] sending this volume of messages qualifies them as bulk. [34] The messages were, consistent with FACE-Intel's goals, critical of Intel, and encouraged employees to join the ranks of FACE-Intel and consider changing employers.[35] In an attempt to block forthcoming mailings from Hamidi, Intel devoted employee time and resources to this cause, only to have these efforts subverted by Hamidi, who admitted evading Intel's efforts to block his messages by sending the messages through various machines. [36] Hamidi did, however, apparently honor individual requests of employees to be removed from future mailings from FACE-Intel. [37]

In March of 1998, Intel sent a cease and desist letter asking Hamidi to discontinue future mailings, only to have Hamidi assert his right to send messages to willing employees; he then sent another of his rounds of spam in September of 1998.[38] Both parties stipulate that Hamidi did not breach Intel's security to obtain the e-mail addresses of Intel employees, but rather obtained them on a floppy disk from an "anonymous" source.[39] There was no evidence presented to the effect that Hamidi's messages damaged Intel's proprietary system, and, as the Majority asserts, no evidence that it "slowed or impaired it's functioning." [40] Intel did stipulate, however, that it received many requests from employees that it stop the messages from Hamidi, and furthermore, that the content of the messages caused discussion between "excited and nervous managers."[41]

On these facts, Intel sued Hamidi for trespass to chattels and nuisance, seeking both actual damages and an injunction against future mailings; Intel later waived the nuisance claim[42] and dropped the de-

32. *Id.*

33. If commercial, Intel may have been protected by CA statutory remedies.

34. This may be up for dispute only for the fact that the volume sent by Hamidi may not be equivalent to organized campaigns sent by the "typical" spammer; however, legitimate individuals do not typically send thousands of unwanted e-mails at one instance, therefore, Hamidi's communications will be considered as having been sent in bulk.

35. *Intel*, 71 P.3d at 301.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Intel*, 71 P.3d at 301.

41. *Id.*

42. In an amicus brief submitted by the Electronic Freedom Foundation (EFF), the argument is made that Intel withdrew its nuisance claim for two reasons; lack of evidentiary support to allege a cause of action, and because the trial court, the EFF suggests, would be more receptive to a cause of action for trespass to chattels. As the EFF brief points out, in *San Diego Gas and Electric Co. v. Superior Court*, 920 P.2d 669, 694-696 (Cal. 1996), the court noted that "electromagnetic waves arising from powerlines 'are wholly intangible phenomena within the meaning of *Wilson.*'" *Id.* at 695. This built upon the hold-

mand for damages.[43] At trial, Intel obtained a default judgment and was granted a motion for summary judgment permanently enjoining FACE-Intel and its agent(s) from sending future unsolicited e-mails to Intel's system.[44] Hamidi appealed, FACE-Intel, however, did not.[45] On appeal, the injunction was affirmed, with one justice dissenting.[46] In affirming the injunction, the court of appeals maintained that even if Intel could not show proof of actual damages, it was entitled to injunctive relief; the California Supreme Court granted certiorari, and reversed based in part on the fear that allowing Intel to succeed would expand the tort of trespass to chattels "in untold ways."[47]

III. ANALYSIS

A. TRESPASS TO CHATTELS

Trespass to chattels, dubbed by Prosser as the "little brother of conversion," allows for recovery for interferences with property in which there is not sufficient dispossession to amount to conversion, but justice

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ing in *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924-925 (Cal. 1982), which suggested that "noise, odor, [and] light" are examples of ethereal intrusions which cannot support a claim of trespass unless they cause physical damage to the plaintiff's property. *Id.* at 233. The EFF then posits that "[e]lectronic signals, such as Internet e-mail messages, that travel over phone lines (or any other transmission line) into a private computer system consist of nothing more than electromagnetic waves. *See e.g.* 18 McGraw-Hill Encyclopedia of Science & Technology 555-62 (8th ed. 1997)." Assuming arguendo that no damage was caused to Intel's system, this assertion by the EFF neglects to acknowledge that e-mails in particular are more than mere electromagnetic signals. They are more than electromagnetic signals in that they are not mere transitory signals (as the term is used in the typical sense of a nuisance claim); they are packets of information which reside on the plaintiff's system until they are read and deleted or expire. These packets take up space – physical space on the plaintiff's hard drives. While Intel is seeking redress in part for the electromagnetic transmissions which depleted its bandwidth capabilities, it is, in like manner, seeking redress for the loss of storage space on its servers caused by Mr. Hamidi's messages sent in bulk. Moreover, Intel is seeking redress for employee time devoted to efforts to block future communications as well as time spent reading the messages. It is these intrusions that when aggregated, result in harm. Therefore, I submit that Intel *may* stand an equal chance of proving a cause of action under trespass to chattels or nuisance, but that trespass is more attractive. The reason, perhaps that Intel chose to proceed on trespass to chattels is because it deemed that the line of cases beginning with *CompuServe* were more soundly established in the context of cyberspace, – nuisance cases typically apply to airborne particles such as some form of pollution – hence there is a more plausible argument that Intel's proprietary network of servers, as its chattels; its property, had been violated, rather than the transmission lines of its system.

43. *Id.*

44. *Id.* at 301-02.

45. *Id.* at 302.

46. *Intel*, 71 P.3d at 302.

47. *Id.*

affords that some recovery may be had by the possessor.[48] Hence, while the interference does not amount to conversion, under California law, in an action for trespass to chattels, the plaintiff must demonstrate "*an intentional interference with the possession of personal property* [which] *has proximately caused injury.*"[49] Turning to the position regarding trespass to chattels under *Restatement* section 218(a), the Court notes that dispossession standing alone, without evidence of further injury will give rise to liability.[50] The Court points out that Intel was not dispossessed of its chattel, and notes that the system worked concurrently with Hamidi's messages. Likewise, Intel was not deprived of the use if its chattel for a substantial time which gives it no right of action under *Restatement* section 218(c).[51] This is not, however, an exhaustive list of potential remedies under the *Restatement*; section 218(b) provides that an action may lie where "the chattel is impaired as to its *condition, quality, or value*, or . . . (d) bodily harm is caused to the possessor, or harm is caused to *some person or thing in which the possessor has a legally protected interest.*"[52] Looking to the plain text in either of these clauses provides a means by which Intel could have demonstrated harm to its chattel, or in the alternative, an interest directly relating to the chattel. The Majority, however, saw fit to distinguish these sections of the *Restatement*, holding that, *inter alia*, regardless of whether the type of relief sought is merely injunctive, Intel must show injury, which it has not.[53] That is the basis on which the opinion of this case turns; lack of proof of harm according to the analysis put forth by the California Supreme Court.

Intel attempted to argue that according to section 218(b), its chattels were damaged in their condition, quality or value. [54] The Majority distinguished a line of cases beginning with *Thrifty Tel v. Benezek*, including *America Online, Inc. v. IMS, CompuServe v. Cyber Promotions infra*, and so forth, which have conclusively established that overburdening the plaintiff's system, processing ability, and system storage capacity, in addition to extra time and money involved in processing bulk e-mail respectively, categorically establish harm to the chattel.[55] The Majority chose not to recognize the showing of harm by Intel in its interest's condition, quality, or value despite the fact that Intel endured many of the same

48. *Id.* (citing Prosser & Keeton, *Torts* § 14, 85-86 (5th ed., 1984)).

49. *Id.* (emphasis in original) (citing *Thrifty Tel, Inc. v. Benezek*, 54 Cal. Rptr. 2d 468 (App. 4th Dist. 1996)).

50. *Id.* (citing *Restatement (Second) of Torts* § 218(a) and comment (d)).

51. *Restatement (Second) of Torts* § 218(c) (2003).

52. *Restatement (Second) of Torts* §§ 218(b), (d) (emphasis added).

53. *Intel*, 71 P.3d at 303.

54. *Id.* at 307.

55. *Id.* at 304-07.

injuries as the plaintiffs in the aforementioned cases, albeit to a slightly lesser degree. The Majority argued that Intel has shown neither an "appreciable effect on the operation of its computer system. . .nor any likelihood that Hamidi's actions will be repeated by others. . . ,"[56] the latter of which was a concern of the *eBay* court. The Majority distinguishes the instant case partly on the basis that Intel did not suffer the same degree of harm as the plaintiffs in *CompuServe* and its progeny,[57] yet the injuries in those cases were not so distinct as to warrant finding no injury whatsoever to Intel's chattels.

The series of cases where ISP plaintiff's brought suit against spammers in which injury was found based in part on damage in processing cycle loss, server space loss, and generally in time and money wasted to oppose the efforts of spammers do not differ from the Intel case except in overall volume. The fact that the ISPs were presenting numbers often into the millions of spammed messages sent to their servers does not equate to a substantially great percentage of lost processing time or server space, but rather reflects only a small percentage of the actual processing and storage capabilities of their systems.[58] For example, in *eBay*, Bidder's Edge accessed eBay's site approximately 100,000 times per day.[59] Despite this ostensibly staggering number, in actuality, this amounted to only between 1 and 2 percent of the information transferred by eBay, nonetheless, the Court issued an injunction based on the harm caused by Bidder's Edge, coupled with the threat of future harm should others replicate the actions of Bidder's Edge.[60] On the facts of this case, Intel did suffer injury similar to the plaintiffs in the aforementioned cases in lost server space, processing capability, user disruption, and in lost bandwidth. Furthermore, Intel suffered injury as per section 218(d) "harm . . . caused to some person or *thing in which the possessor has a legally protected interest*" in employee time wasted in deleting e-mails[61] and in excessive employee time wasted in attempting to thwart Hamidi's

56. *Id.* at 306.

57. *Id.*

58. Some have even argued that in fact no injury has occurred because the systems are in fact simply doing what they are designed to do. However, the true injury is not only found in the extra burden (as it is arguably minimal), but in the intrusiveness and unwanted nature of the spam messages which causes the recipients from the end-user to the ISP to employ additional means (whether this be in the form of purchasing filtering software, or devoting employee or personal resources) to attempt to block the unwanted messages.

59. *eBay, Inc.*, 100 F. Supp. 2d at 1063.

60. *Id.* at 1061-72.

61. *Restatement (Second) of Torts* § 218(d). For example, 100,000 (which falls somewhere in the middle of the amount of alleged e-mails sent by Hamidi) e-mails @ 3 seconds to delete = 5000 minutes or 83.3hrs or 10.4167 days of wasted employee time, not to mention time devoted to block the messages by technical means.

efforts to evade blocking methods. In fact, the Majority acknowledges that: "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.*"[62] While these injuries might not appear to have been to the same degree as the damage in the foregoing cases, there was injury nonetheless, and the California Supreme Court chose to tailor this need for showing of injury very narrowly; as it notes that its holding in the present case would not affect the ability of ISP's to bring causes of action for trespass to chattels, which reflects its misguided focus on the content of Hamidi's messages, as opposed to the simple fact that they were unwanted, and intrusive *i.e.* trespassory.

B. Recognition of a Right to Action in Trespass to Chattels

In recognizing a right of action for harm caused due to trespass to chattels, the dissenting justices relied primarily on two lines of reasoning: recognition of an implicit real property right in cyberspace, or, alternatively, recognition of actual harm done to Intel by Hamidi's e-mails. Additionally, it is noted that "there may. . . 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."[63] One line of reasoning espoused by Justice Brown is that found in the *Rowan v. U.S. Post Office* decision which was settled in response to the appellants challenging the Constitutionality of 39 U.S.C. § 4009,[64] which states in relevant part that an individual may block snail mail / postal pornography, and its corollary, section 3010 which states that an individual may block any pandering which he may personally find objectionable.[65] In upholding the Constitutionality of the statute, the Supreme Court held that "[a] private property owner may choose to exclude unwanted mail for any reason, including its content."[66] Following this line of reasoning, Justice Brown goes on to point out that

> [o]f course, speakers have rights too, and thus the result is a balancing: speakers have the right to initiate speech but the listener has the right to refuse to listen or to terminate the conversation. This simple policy thus supports Hamidi's right to send the e-mails initially, but this right does not manifest itself into a right to repeatedly send messages after Intel expressed its objection.[67]

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62. *Intel*, 71 P.3d at 301 (emphasis added).

63. *Id.* at 313 (Brown, J., dissenting) (quoting *Restatement (Second) Torts* § 218, comment (h)).

64. Now 39 U.S.C. § 3008.

65. *Id.* at 313-14 (citing *Rowan v. U.S. Post Off. Dept.*, 397 U.S. 728, 738 (1970)).

66. *Id.* at 314 (citing *Rowan v. U.S. Post Off. Dept.*, 397 U.S. 728, 738 (1970)).

67. *Id.*

In holding that Hamidi may use Intel's proprietary system as a vehicle for his speech, the Majority implicitly allows Hamidi to appropriate Intel's system for his own use, a function clearly inconsistent with *Rowan* and its progeny. This precedent also opens up the door for other former employees of Intel[68] to send e-mails to Intel's private property unimpeded. This was the concern of the court in *eBay*, and was distinguished by the Majority only in the manner in which the system was used – spidering,[69] as opposed to spamming. Furthermore, the precedent from this case may have an undesirable effect on a private property owner's ability and incentive to protect their interests because apparently, any non-commercial e-mail is not actionable under trespass to chattels.

Addressing concerns over whether Intel may properly speak on behalf of its employees, Justice Brown notes that *Watchtower Bible & Tract Society v. Village of Stratton* does not compel a converse result "in holding that the government may not bar a speaker from a homeowner's door, *but the homeowner surely may*."[70] Justice Brown also notes that in the *Hudgens v. NLRB* case[71] the owners could make this decision to exclude, despite the fact that they were not the "intended and actual recipients of [the speakers'] messages."[72] Likewise, Intel should not be forced to bear the burden of providing a forum for Hamidi to air his grievances to Intel or its employees; they should enjoy the rights advocated by *Rowan*, *Hudgens*, and *Watchtower*.[73] To hold that Hamidi, a non-commercial actor, may bombard Intel's e-mail system invalidates the reasoning of the aforementioned cases for private, non-ISP plaintiffs. As mentioned, the Majority mentions that the holding of this case does not affect the ability of ISP's to bring a case on similar facts based on trespass to chattels. Seizing on a misguided distinction between the quantity and content of the messages, the Majority reasons that the cases brought by ISP's relied simply on the quantity of messages received,

68. And any other corporation for that matter.

69. Spidering, similar (in that it uses a brute force approach) to dictionary attacks, rapidly searches a site for a given piece of information whereby it is indexed (typically for sale to marketing / spamming groups).

70. *Intel*, 71 P.3d at 314 (emphasis in original) (citing *Watchtower Bible & Tract Socy. v. Village of Stratton*, 536 U.S. 150 (2002)).

71. Which held that where private shopping mall owners validly excluded speakers from their malls.

72. *Id.* at 315 (citing *Hudgens v. NLRB* 424 U.S. 507 (1976)).

73. By way of analogy, if the speakers in *Hudgens* had persisted in communicating their message to shoppers at the mall, the owners of the mall could enforce their rights to exclude the speakers under a theory of trespass because the speakers would, at that point, be trespassing on the private property of the "recipients." Hamidi, in like manner, had been given notice to cease the communications, the difference being the medium through which the message was conveyed.

whereas Intel's cause of action must rely on "the claimed injury . . . located in the disruption or distraction caused to recipients by the *contents* of the e-mail messages, an injury . . . not directly affecting. . .[the] value of [the] property."[74] Intel does not, however, need to rely on the contents of the messages, but can, as *CompuServe* and its progeny advocate, rely simply on the unwanted, intrusive, bulk nature of the messages.[75] It should be noted, as well, that the plaintiff's in the cases cited by the Majority must have objected to the *contents* of the unwanted messages, otherwise, they would have had no reason to bring a suit.[76] The messages were undisputedly of the type meant to be delivered by the systems, and by inference from the causes of action suggested by the Majority, absent any objection by the recipient end-users to the content of the messages, the ISP's would have no reason to attempt to block the messages simply based on volume. Otherwise it would seem, this would be self-defeating, and in direct conflict with the very nature of their business of providing a medium for electronic communication.

In closing, Justice Mosk notes that in certain circumstances, other causes of action might be available to Intel on proceedings based on similar facts; but that the remedy based on trespass to chattels in simply the most efficient, requiring less tactical maneuvering.[77] He further points out accurately that litigating other causes of action would require an investigation of the content of the messages sent by Hamidi, and would necessarily involve "questions of degree and value judgments based on competing interests;"[78] a burden laced with Constitutional arguments, which a plaintiff in Intel's position should not be required to bear in seeking an injunction to prevent unwanted speech.

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74. *Intel*, 71 P.3d at 300-01.

75. Hamidi attempted to argue at the Appeal stage that he had a valid defense in the Moscone Act in that his speech was labor related, but the court deemed this issue waived and thus did not directly address any such claims. Indeed, in its brief, Intel points out that

> while the content of Hamidi's e-mails 'appeared to' relate to a labor dispute, the Moscone Act did not affect the outcome because the method Hamidi used to convey the message was illegal conduct not protected by the statute: '*Unlawful conduct is expressly excluded from the protections of the statute. Although the content of Hamidi's e-mail communications appear to fall within the statute's broad definition of labor disputes, the court finds that the manner of their delivery is an unlawful trespass to chattels.*' (C.T.121).

Br. of Respt. at 41, *Intel Corp. v. Hamidi*, 2002 WL 1926523 (June 17, 2002) (citing Third Appellate District, No. C033076) (emphasis added).

76. For example, in *CompuServe*, *infra*, the plaintiff brought suit after receiving troubling responses from its customers regarding the messages sent by CyberPromotions.

77. *Intel*, 71 P.3d at 330 (Mosk, J., dissenting).

78. *Id.*

C. Suggested Causes of Action

The Majority suggests that while Intel did not have a cause of action using a theory of trespass to chattels, there are other causes of action on which Intel might have proceeded "on facts somewhat similar to those here."[79] The Majority proposes that Intel may have been able to plead a cause of action for: interference with prospective economic relations (advantage), interference with contract, intentional infliction of emotional distress, defamation, publication of private facts, "or other speech based torts" [80] such as libel, or false light. Intel might have even possibly had an answer by means of statutory remedies found in CA Business & Profession Code sections 17538.4, 17538.45, or alternatively in CA Penal Code section 502. This note will examine the soundness of each of these prospective causes of action generally as per the Restatements[81] to show a general stance on the available remedies, and show why the most tenable cause lies in trespass to chattels, in recognition of Intel's showing of harm.

1. *Interference with Prospective Economic Relations*

The first cause of action suggested by the Majority in *Intel* is interference with prospective economic relations, which has been referred to as injurious falsehood.[82] According to Prosser, injurious falsehood consists of

> (a) false statement of a kind calculated to damage a pecuniary interest of the plaintiff, (b) publication to a third person, (c) malice in the publication, and (d) resulting special damage to the plaintiff, in the form of pecuniary loss.[83]

This cause of action is not a viable option for Intel because, as for the requirement of malice in the publication, Hamidi claims[84] on www.faceintel.com that the statements he sent were true; they are additionally potentially privileged under federal labor law as being in the

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79. *Id.* at 300.

80. *Id.*

81. Which may or may not coincide with CA case law for a given tort.

82. It is noted in Prosser, that the leading case on "action on the case for words," *Ratcliffe v. Evans*, 2 Q.B. 524. Court of Appeal, 1892, notes

> [e]arlier cases had involved 'slander of title,' or 'trade libel,' which had developed as isolated torts of limited scope. Sometimes they were joined together and the term 'disparagement' was used. 'Injurious falsehood' now denotes a broad general principal of liability for any false a malicious statement resulting in pecuniary loss to another. [It is further noted that [t]he principle is generally recognized at the present time, but courts have been slow to adopt the name.

Prosser, Schwartz, Kelly, Partlett, *Prosser, Wade, & Schwartz's Torts Cases & Materials*, 1065-68 (10th ed., Foundation Press).

83. *Id.* at 1067.

84. And this seems undisputed.

public interest - they claim to expose objectionable employment practices. Additionally, like trespass to chattels, interference with prospective business relations requires a showing of special / pecuniary damages, which leads to the same result for Intel so long as the California Supreme Court refuses to recognize a viable economic injury in Intel's interest in its computer system, or in the corresponding rights related to that property via Intel's employees.

For a plaintiff to have a viable cause of action under a theory of interference with prospective economic relations in the spam context would require damages in addition to those encompassed by *Restatement (Second) of Torts* sections 218(b), (d). A plaintiff in Intel's position would have to allege and show that it incurred some pecuniary loss, possibly in the form of lost employee productivity, or loss of expected sales. However, the Hamidi's e-mails were directed to the employees of Intel, not potential patrons. Were a spammer in Hamidi's position to send a message similar to that which he sent to Intel staff to prospective consumers of a company, rather than its employees, a cause of action might lie if the intent was to maliciously interfere and damages ensued. This is not, however, the situation in the instant case, and as such a claim for interference with prospective economic relations does not provide a remedy for Intel.

2. *Interference with Contract*

The next cause of action suggested by the Court is that of interference with contract. According to the Restatements, intentional interference with performance of contract by a third person is found where:

> One. . .intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, [and the tortfeasor] is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.[85]

However, this is only applicable if the employees of Intel are not at will, and are bound by contract.[86] Moreover,

> the particular elements of the tort [of tortious interference with contractual relations as stated by the Restatements] include[s] (1) the existence of a business relationship or expectancy, (2) knowledge by the interferor of the relationship or expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained,

85. *Restatement (Second) of Torts* § 766.

86. *See Roy v. Woonsocket Inst. for Sav.*, 525 A.2d 915, 917, 919 n. 4 (R.I. 1987) (citing *Restatement (Second) of Torts* § 766 at 11 (1979), which states: "One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them").

and (5) damages to the plaintiff.[87]

Here, concerning interference with contract, as well as under injurious falsehood, damages are required, giving this cause of action no more strength for Intel under the analysis espoused by the California Supreme Court than trespass to chattels.

Had Intel[88] alleged and proved that it had lost contractually bound employees due to the unwanted messages, a cause of action may lie. However, demonstrating such causation may prove difficult. In showing damages under interference with contract, it would be more plausible to examine and attack individual messages, the content therein, and the effects of that content on individual employees. While on its face, this is no less tenable a cause of action, it removes the objectionable conduct from the issue at hand, and instead causes plaintiff's to view each e-mail individually based on content, not on the unwanted, voluminous nature of the communication. A plaintiff who receives thousands of e-mails against its will, should not be forced to conduct an investigation into the content of the messages when the law affords a remedy on a showing that the medium used to transport the e-mails was illegitimately encroached upon.

3. *Intentional Infliction of Emotional Distress*

The next cause of action, which the Majority proposes that Intel could have utilized, is intentional infliction of emotional distress ("IIED"). IIED is found where

> (1) [o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another [and] is [therefore] subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm, or
> (2) [w]here such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.[89]
>
> To impose liability for intentional infliction of emotional distress: (1) [t]he conduct must be intentional or reckless; (2) [t]he conduct must be extreme and outrageous; (3) [t]here must be a causal connection between the wrongful conduct and the emotional distress; [and finally,] (4) the emotional distress must be *severe*.[90]

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87. *Id.* at 919 (quoting *Mesolella v. City of Providence*, 508 A.2d 661, 669-70 (R.I. 1986)).

88. Or a similarly situated plaintiff.

89. *Restatement (Second) of Torts* § 46 (1965).

90. *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977) (emphasis added).

Other than the harm caused by lost processor speed, devotion of extra time and money resources to block Hamidi's efforts, etc. and a stir in employee discussion[91] there is ostensibly no evidence suggested, or even possible, showing any degree of severe emotional harm. In light of this, the last element, severity, would prove troublesome for Intel to demonstrate as it would likely involve investigation into the specific contents and resulting effects, and therefore serves as a less likely cause of action by which Intel might have prevailed than trespass to chattels.

A situation may perhaps arise where under similar facts, a cause might lie for intentional infliction of emotional distress. Hamidi's actions, however, were not so severe as to warrant a finding of severe emotional distress transcending the bounds of decency. However, should a spammer in Hamidi's position relentlessly continue to bombard a plaintiff's e-mail system in yet further subversion of demands to cease the offending activity, at some point the conduct would cross the limits of decency, amounting to conduct egregious enough to merit a successful claim for intentional infliction of emotional distress. When this threshold is passed, and the conduct is so aggravating that receipt of and dealing with the messages detracts from the daily activities[92] at hand, then a case for intentional infliction of emotional distress might be shown. Intel showed that it diverted employee efforts from other tasks to attempt to block Hamidi's messages.[93] This does not rise to the level of outrageousness, nor do the contents of Hamidi's messages rise to the level of outrageousness. It is not clear in the passing reference the Court makes to intentional infliction of emotional distress to what extent this game of cat and mouse must occur in order to provide success on the merits. It should be fairly clear however, that to be successful, a plaintiff must show several good faith effort(s) to block the offending messages, and this would certainly include more than a preemptory challenge to receipt of the message. No clear threshold can be drawn as to the number of offending messages sent in subversion of efforts to block their receipt required for a successful cause; courts must necessarily look to other factors such as the content of the messages,[94] the volume of messages sent, the time frame over which the egregious conduct occurs, etc. to make a

91. None of which are recognized as a legitimate showing of injury by the Majority in any case.

92. Work including useful use of e-mail.

93. *Intel*, 71 P.3d at 313.

94. The content of a message could in and of itself rise to the level of outrageousness, however, in such a case, an action for defamation would probably be more plausible, and so the example above is based at least in part on the assumption that the messages were not by their content sufficient to meet a showing of intentional infliction of emotional distress, but that other factors must be analyzed for proper resolution of the case.

determination as to the merits of a case for intentional infliction of emotional distress.

4. *Defamation / Libel*

The Majority also proposes that Intel might have had a cause of action in the tort of defamation; "that which tends to injure reputation."[95] The *Restatement* position on defamation states: "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[96] However, the *Restatement* makes the caveat that

> actual harm to reputation [is] not necessary to make [a] communication defamatory [*per se* defamation][97]. To be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with him. Its character depends upon its general tendency to have such an effect. In a particular case it may not do so either because the other's reputation is so hopelessly bad or so unassailable that no words can affect it harmfully, or because of the lack of credibility of the defamer. [However], there is a difference in this respect between determining whether a communication is defamatory and determining whether damages can be recovered. Thus *some types of defamation are not actionable unless there is proof of special harm to the other*, which may involve proof that the communication was in fact believed and so did in fact damage the reputation of the plaintiff and cause pecuniary loss to him .... In addition, the Constitution limits recovery in defamation actions to compensation for 'actual injury,' at least in the absence of knowledge or reckless disregard as to the falsity of the communication.[98]

Damages for a defamation cause according to the *Restatement* supports the view that:

> [o]ne who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed. It is doubtful that an article or publication subjecting a person to ridicule because of the happenings of a true occurrence should be regarded as

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95. *Prosser & Keeton on Torts* (5th ed., West 1984).

96. *Restatement (Second) of Torts* §559 (1977).

97. *Per se* defamation covers:

> a) imputations of major crime; b) imputations of loathsome disease; c) false statements regarding business, trade, profession, or office; d) allegations of serious sexual misconduct. Although Hamidi's statements were undisputedly in reference to Intel's business practices, he arguably enjoys a constitutionally protected right to disseminate the message. This right does not extend however to situations where the speaker is shown to have published the statements with malice, nor does it extend Hamidi's right to speak to force Intel to accept the message.

See generally Hudgens v. NLRB, 424 U.S. 507 (1976).

98. *Restatement (Second) of Torts* § 559, comment (d) (emphasis added).

actionable, and, if actionable, on the basis of defamation.[99]

Once again, assuming the contents of Hamidi's messages were believed as true, Intel would be faced with showing some special harm absent a showing of actual malice on the part of Hamidi, which proves defamation no more likely to be successful for Intel than a trespass theory.

Also amongst the possible defamatory "speech based torts" that Intel may have attempted to bring a case on is that of libel. The *Restatement* position is that

> (1) [l]ibel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.[100]

Furthermore, section 569 (Liability Without Proof of Special Harm—— Libel) states: "[o]ne who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication."[101] The parties have briefed this issue in terms of Constitutionality. Hamidi argues that the Internet is one of the most "diverse and democratic" mediums for communication that the world has ever known.[102] Hamidi argues that the Opinion of the Court of Appeals has adverse impact on the "democratic, speech-enabling characteristics of the Internet."[103] In continuing this line of argument, Hamidi posits that recognition of a showing of harm for trespassory e-mails would give rise to a cause of action for almost *any* unwanted e-mail because virtually every e-mail message travels through and onto private property.[104] This might be true if the Court recognized a cause of action for any unwanted e-mail, but this does

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99. *Prosser & Keeton on Torts* (5th ed., West 1984) (quoting *Restatement (Second) of Torts* § 621).

100. *Restatement (Second) of Torts* § 568 (1997).

101. *Id.* at § 569.

102. Br. of Respt. at 17, *Intel Corp. v. Hamidi*, 2002 WL 1926521 (May 16, 2002).

103. *Id.* at 18.

104. *Id.* at 18-19

> Therefore, if trespass to chattel doctrine is applied on the Internet without any requirement of harm to the chattel, almost any e-mail message could constitute an actionable trespass. As Professor Burk has observed, if an 'electronic signal' is sufficiently tangible to support a trespass cause of action, then 'it is quite possible to torture the doctrine of trespass to chattels to cover any number of . . .inconvenient communications. . .[and] such contortions are not at all unlikely where Internet communications are at issue. . .all that any user needs to fulfill the elements of trespass is to withdraw consent for some real or imagined offense.' This aspect of the Court of appeal decision is greatly troubling, because it threatens to stifle a vibrant new medium of communication that has attained significant importance in today's society.

Id. (quoting Dan L. Burk, *The Trouble With Trespass*, 4 J. Small & Emerging Bus. L. 27, 47 (2000)).

not make the cause *prima facie* untenable. Intel has received between 48,000 and 210,000 unwanted e-mails from an unwanted source. Furthermore, they have attempted to block the e-mails from Hamidi, only to have their efforts evaded. Additionally, as Intel has noted, even if Hamidi might have initially gained protection under the Constitution, he did not address this until submission of his petition for review, and under *Palermo v. Stockton Theatres, Inc.*, the Court need not address newly framed Constitutional issues unless the case cannot be decided on other grounds[105] – which it can, traditional trespass to chattels and rights corollary to private property.[106]

It is not likely that a case for defamation can be made out on the facts of this case absent a detailed inquiry into the contents of the messages. In point of fact, it is not likely that a spamming case would ever give rise to a defensible claim for defamation based solely on the volume or unwanted nature of the e-mails. The crux of the case remains the same, the message must be defamatory[107] and in the case of a plaintiff in Intel's position, must be made with malice – a burden which is beyond proof based on the conduct at issue, and cannot be met by inquiry into the volume of messages sent.

5. *Publication of Private Acts*

Another of the speech-based torts on which Intel might have proceeded as implied by the Majority is publication of private facts. Again, the *Restatement* position is that

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105. *Palermo v. Stockton Theatres, Inc.*, 195 P.2d 1, 8-9 (Cal. 1948).

106. Br. of Respt. at 46-47, *Intel Corp. v. Hamidi*, 2002 WL 1926523 (June 17, 2002). (stating

> Determined to figure out some way to convert this private property case into one of constitutional dimensions, Hamidi has completely retooled his legal arguments. In his petition for review he argued that 'judicial enforcement of state law constitutes state action' (Pet. for Rev. at 21), while he now concedes that 'judicial enforcement of an existing, neutral legal rule . . . is arguably not state action.' (Opening Br. at 44.) He has thus jettisoned his original argument in favor of the different argument that only the expansion of a legal rule constitutes state action. Hamidi's contradictory arguments expose the futility of his efforts to articulate a coherent theory for why this trespass case is of constitutional dimensions. The Court need not reach Hamidi's new argument. The Court of Appeal's decision was consistent with Zaslow and the other foundational decisions defining the scope of the trespass to chattels tort, the Restatement (Second) of Torts, and the cases applying the trespass to chattels tort to unsolicited and unwanted e- mail. Thus, because this case involves only the application of an existing legal rule, the Court need not address Hamidi's new argument that expansion of legal rules amounts to state action. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65-66 [195 P.2d 1, 9] [appellate courts should avoid reaching constitutional issues unless absolutely necessary and case cannot be decided on other grounds]).

107. A cause for defamation could be shown on receipt of one e-mail by a third party *i.e.* publication.

> [o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[108]

However, as a public figure, Intel's employment practices are in the public interest and as such, Hamidi's messages are arguably privileged communication. Meeting the prong of a showing that the matter is highly offensive might not prove overly troublesome for Intel, as they have amply proven that Hamidi sent a vast amount of unwanted e-mails after repeatedly being asked to stop; in subversion of their efforts to block his communications. However, Hamidi is aware of, and in his petition for review, argues that California Law protects his speech as affecting labor relations, and may therefore be protected as work related communications. [109] The labor practices of Intel fall within the public interest, and for this reason an attempt at litigation under a claim of publication of private facts would fail. However, a case might arise such as this where the information contained in the communications was not in the public interest.[110] Had Intel been a private individual, or a smaller corporation of minor public interest, the case may have stood on its merits.

6. *False Light*

Yet another of the speech based torts on which Intel may have brought a claim is false light. According to the *Restatement* section 652D, Publicity Placing Person in False Light occurs when:

> [o]ne gives publicity to a matter concerning another that places the other before the public in a false light [and the tortfeasor] is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person,

and there must be a showing of actual malice *i.e.* that "(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[111] As noted previously, Hamidi claims truth in his messages, but even absent actual truth of the content of the e-mails, Intel would be faced with the burden of showing that he acted with malice or reckless disregard as to its publication which as previously mentioned, seems unlikely. Additionally, the arguments espoused by Hamidi regarding his Constitutionally protected right to speech relating to fair labor practices are concerning even if ultimately unsuccessful. In an action for false light

108. *Restatement (Second) of Torts* § 652D (Publicity Given To Private Life).
109. Br. of Respt. at 28, n. 7, *Intel Corp. v. Hamidi*, 2002 WL 1926521 (May 16, 2002).
110. Irrespective of any employer / employee relationship or lack thereof.
111. *Restatement (Second) of Torts* § 652E (1977).

such claims force Intel to bear the legal and financial burden of defending a Constitutional claim – something which is not necessary because as has been noted by Justice Mosk (dissenting), other remedies are available. Again, as with the other speech-based torts, a cause of action may arise for a non-public plaintiff, but is untenable as to Intel.

D. Statutory Remedies

The reasoning behind the Majority decision points to the conclusion that statutory remedies would likewise be insufficient to aid Intel in bringing suit against Hamidi. The statutory remedies available to Intel at the time of suit (applied only to Unsolicited *Commercial* E-mail, and declared in pertinent part: "no person . . . shall . . . [e-mail] or cause to be e-mailed documents containing unsolicited *advertising* material for the lease, sale, rental . . . of any goods, services [etc.] . . . unless . . . [there is a valid opt-out mechanism].")[112] As the provisions in the aforementioned statutes apply only to commercial communications, Intel would not be able to pursue the available remedies, as Hamidi's messages were not of a commercial nature. This does not, however, lead to the inescapable conclusion put forward in the brief for Hamidi suggesting that e-mail based intrusions such as those sent by Hamidi are in instances such as this, without remedy. Counsel for Hamidi would have the court ignore the plain fact that the legislative protection as recorded in California reflects the influences of media based lobbying efforts led by entities such as the Direct Marketing Association who wish to protect e-mail as a form of advertising, and seek only to "punish" those who solicit communications without having established a pre-existing business relationship;[113] a direct endorsement of the "preferred practices" such as double[114] opt-in for web and e-mail based advertising.[115] Had Hamidi been soliciting em-

112. Cal. Bus. & Professions Code Ann. §§ 17538.4, 17538.45 (LEXIS L. Publ. 2003) (emphasis added). Since the initial draft of this paper, § 17538.4 has been repealed and is now superceded by Cal. Bus. & Professions Code Ann § 17529 *et seq.*, which reads in pertinent part: [a person may not i]nitiate or advertise in an unsolicited commercial e-mail advertisement [to or] from California or advertise in an unsolicited commercial e-mail advertisement sent from California. . .[or to use false headers or subject line information]. This is also unavailing for Intel or a similarly situated plaintiff, and it should be noted that the amended text makes the caveat that a cause of action in existence before the effective date of the amendment shall not be affected, and shall be governed by the law applicable at the time of notice of suit.

113. *See e.g.* Los Angeles Business, *PW Marketing loses spam case in court* <http:// www.bizjournals.com/ losangeles/stories/2003/10/20/daily64.html> (accessed Dec. 2, 2003) (detailing a recent fine imposed on PW Marketing in California of $2 Million for soliciting products instructing users how to spam others, and neglecting to include a valid opt-out provision for unsolicited recipients of the message).

114. Or confirmed.

115. Br. of Respt. at 29, *Intel Corp. v. Hamidi*, 2002 WL 1926521 (May 16, 2002). Given the complex, competing policy considerations inherent in regulating the new communica-

ployees of Intel in an effort to draw them to work for a competitor, or himself, then perhaps, his actions would fall under the prohibitions of the statute, but even then, providing a valid opt-out mechanism would allow a person in Hamidi's position to escape liability under the language of the statute. While it is not readily discernible from the record, it is interesting to note that while his messages were not commercial and therefore CA B & P Code §§ 17538 et seq. are of no avail, Hamidi made a point to include and respect an opt-out mechanism perhaps under the impression that this would place him under the statutory protections for commercial spammers.

IV. CONCLUSION

In light of the foregoing, the author suggests that courts should carve out an exception to the tort of trespass to chattels in cases involving unsolicited commercial, bulk e-mail/spam. Specifically, in order to protect private networks as well as individuals, the exception would allow a cause of action in an instance where the tortfeasor subverts reasonable technological efforts meant to stop future unwanted communications, and where other common law remedies are unavailing.[116] For example, after notice to cease from further contacts is made - and where the owner attempts to exercise his or her common law rights to protect the chattels - only to find that their effort is subverted by the trespasser, harm may, under this reasoning, be assumed given the unwanted nature of the trespass. In the same manner, courts might eliminate the need for, or in the alternative, assume a showing of damages in trespass to chattels cases involving spam where the trespass does not in

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tions phenomenon of e- mail, rewriting California tort law as applied to e-mail communications is a matter best left to the Legislature. Moreover, deference to the Legislature is particularly appropriate here, where the Legislature has, in fact, already acted to regulate unsolicited e-mail communications, but chosen not to permit censorship of the type of e-mail communications at issue in this case.

116. Although it is not clear whether the outcome of this case had any effect on proposed legislation, which has moved to full committee action, Representative Howard Coble R-NC introduced on October 08, 2003 the *Database and collections of Information Misappropriation Act*, H.R. 3261, 108th Cong. (2003) which states in pertinent part in § 3(a) that:

> Any person who makes available in commerce to others a quantitatively substantial part of the information in a database generated . . . by another person, knowing that such making available in commerce is without the authorization of that person. . . shall be liable . . . if—(1) the database was generated. . .through a substantial expenditure of financial resources or time;. . . (2) the unauthorized making available in commerce occurs in a time sensitive manner and inflicts injury . . .; and (3) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product. . . .

Whether this bill would extend copyright protection to databases is unclear, but currently, little protection exists for databases, especially of a highly factual nature. *See generally Feist Pub., Inc. v. Rural Telephone Serv.*, 506 U.S. 984 (1992).

fact dispossess the owner of their chattels, but causes other collateral harm, again, assuming that the communications continue after a demand to terminate further contact. The showing of harm as recognized in the *Restatement* section 218 is more responsive to the realities at the intersection between technology and law. Again, those elements which are recognized as warranting a showing of harm are: (b) *condition, quality, or value*, or "(d) bodily harm is caused to the possessor, or harm is caused to some person or *thing in which the possessor has a legally protected interest*." [117]

Expansion of the tort to trespass to chattels to accept a showing of damages in such cases would necessarily be limited to instances such as the preceding where the property owner notified the trespasser of the desire to have the unwanted behavior cease, and the tortfeasor *intentionally* ignored the demands of the claimant in order to limit the cause of action to legitimate interferences. It should also be noted that to expand this tort to include a private cause of action would necessarily be limited to cases involving a large number of unwanted trespassory intrusions [118] and not giving rise to a cause of action in instances of limited intrusion where an insignificant[119] number of spam e-mails are received by the recipient. Much as the *Zippo Mfg. v. Zippo Dot.com*[120] decision created a "sliding scale" of interactivity by which jurisdiction may be shown to lie in cases of tortious harm caused by Internet based contacts, courts would need to distinguish cases such as *Intel* where a substantially large private network was at issue from cases involving individual users and their single instances of spamming to their home computers.

It is furthermore, coterminous with this line of reasoning that there is nothing inherently wrong with extending a private cause of action to individual end users[121] for trespass to their chattels in their home computers assuming that there is at least some showing of the unwanted nature of the communication, and substantial demands to subsist from such activities and some showing of harm.[122] While this may seem an undue burden to place on end users, with the ability to track Internet Protocol ("IP") addresses[123] and/or originating vendors,[124] software

117. *Restatement (Second) of Torts* § 218 (1965) (Liability To Person In Possession) (emphasis added).

118. For example in the present case from 48,000 to 210,000 would be more than sufficient.

119. Or more importantly, unintentional.

120. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D.Pa. 1997).

121. As some state statutes do.

122. For example in the region of 100 to 1000 unwanted messages.

123. The underlying source of the communication.

124. *See e.g.* WHOIS, *Your First Step to Your Own Online ID* <www.whois.com> (accessed Dec. 2, 2003), *SamSpade.org* <www.samspade.org> (accessed Dec. 2, 2003) which allow a recipient to track the routing of a message from its original source and the subse-

could be developed to track the number of messages from a given source regardless of content and compile a target list of unwanted messages until the threshold is met. This is possible, and likewise, necessary because spammers will often send multiple unwanted messages from ostensibly different vendors, when they are in actuality originating from the same spammer - which can be established by cross checking the IP address from which the spam originates.[125] Alternatively, a similar right of action could be extended where a particular vendor "sends" numerous spams to an individual through different spammers. This is because of the rise of affiliate systems in spamming where a business will hire a spammer or spammers much like a typical pyramid scheme business model in which spammers are rewarded for the number of hits a vendor's site receives based on the particular affiliate from whom the message originates. Such schemes are so deleterious to successful use of the Internet and e-mail systems generally because under arrangements such as this, affiliates are encouraged to send the largest volume of messages they can possibly send at once regardless of their effectiveness. If individual users spend the time and effort to track the messages they are receiving to certain spammers or vendors, their effort should not go unacknowledged by the law. A policy such as this might also have the effect of curbing untargeted advertising, and cause marketers to direct their efforts to more willing recipients who have shown a desire to receive such communications to produce a meaningful return – something that the market has not been able to "enforce" due to the inexpensive nature of sending spam.

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quent paths by which spammers mask their true identity; whois.com will even give contact information for the person whom registered the site with NSI. The problem with this seemingly simple tracking method is that spammers will more often than not register under false names in foreign nations (or if they are based in the U.S., they will use routing technology to make the message virtually untraceable), giving more credibility to the idea that if an individual end user takes the time, and makes the effort to track a spammer in the Real world, they should be afforded a remedy at law. There are also related jurisdictional issues, but a spammer sending 100, 1000, or 100,000 unwanted communications would likely be subject to personal jurisdiction in the venue in which the harm occurs or takes effect. *See generally Calder v. Jones*, 465 U.S. 783 (1984).

125. Or the affiliate system to which it points.

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