

# When Bad Things Happen to Good Laws: Fighting Spam With the Law of Trespass and Other Novel Approaches

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## Introduction

Many Americans waste valuable time each day deleting e-mails advertising free Viagra, free doctorate degrees, and the opportunity to become rich by assisting a wealthy Nigerian to smuggle millions of dollars to America. The majority of Americans are cyber citizens, part of a community whose members receive an average of over 2,200 unsolicited bulk e-mails per year.<sup>1</sup> The act of sending unsolicited e-mails in bulk is called "spamming," and the unwelcome messages are called "spam."<sup>2</sup> Spamming, which accounts for 40% of global e-mail traffic,<sup>3</sup> is appealing precisely because it is cheap. Unlike traditional direct mail solicitation whereby the sender incurs thirty-seven cents per envelope, the spammer's only investment is the approximately thirty dollars she pays to the Internet Service Provider (ISP) for an e-mail account. The spammer bears basically the same cost for sending one unsolicited e-mail as she would for sending one million. While the cost to the spammer is minimal, the cost to consumers and ISPs is immense.

This article focuses on two legal approaches to combating spam: (i) trespass to chattels and (ii) trademark. This article will review and critique the main cases that have formed, what I consider, the "neo-trespass to chattels doctrine." In addition, this article will show that the misapplication of the trespass to chattels doctrine has drastically (and excessively) morphed the law of trespass. This article concludes by positing the dangers inherent in recent developments of the law of trespass.

## Consumers

According to the SpamCon Foundation, an organization dedicated to the protection of "email as a viable communication and commerce medium,"<sup>4</sup> the costs of spam, for cybercitizens, are "diversion of time, loss of productivity and loss over their online privacy."<sup>5</sup> SpamCon, citing a 1998 Washington State Commercial Electronic Messages Select Task Force Report, declares that "between \$2-3 of a consumer's monthly Internet bill is for handling spam."<sup>6</sup> Further, for consumers that access the Internet on a per-minute ISP service, the extra time needed to delete spam becomes expensive.<sup>7</sup> For the blind or visually impaired, who use speech-synthesis apparatuses, spam may have a disproportionate impact, in that the time it takes to distinguish spam from real e-mail imposes an undue burden.<sup>8</sup>



## ISPs

The Gartner Group reports that 7% of Internet users that switch from one ISP to another do so because of spam, which results in the loss "of more than \$250,000 per month for an ISP with 1 million subscribers."<sup>9</sup> Additionally, America Online estimated that it dedicates between 5% and 30% of its e-mail server time to handling spam.<sup>10</sup> The overall effects of spam cost Americans an estimated \$8.9 billion dollars annually.<sup>11</sup>

## The Government's Response

Many states have implemented measures to combat spam. Presently, twenty-seven states have anti-spam legislation.<sup>12</sup> Almost all of the states with anti-spam laws make it illegal to send unsolicited e-mails with false routing information, a common practice.<sup>13</sup> Seven of these twenty-seven states also make it illegal to disobey an ISP's spam policy.<sup>14</sup> As with false routing information, violations of ISP spam policies still persist.

Recently, Virginia enacted what is considered "the toughest move to date against [spam]."<sup>15</sup> Under the newly enacted Virginia law, anyone who intentionally sends over 10,000 deceptive e-mails in a day or 100,000 in a month may be imprisoned for one to five years and subject to loss of money or property connected with the solicitation.<sup>16</sup> Virginia's new law will not end spam, but if adopted and enforced by other states, it will likely curtail the number of unsolicited e-mails.

On the federal level, although many proposals have been presented, anti-spam legislation has yet to be enacted. On April 10, 2003, however, Montana Senator Conrad Burns and Oregon Senator Ron Wyden introduced what may be a promising anti-spam bill.<sup>17</sup> The bill will mandate that marketers provide legitimate return addresses with their solicitations and honor requests to be removed from mailing lists.<sup>18</sup> In addition, New York Senator Charles Schumer recently introduced a bill to impose criminal penalties for spamming and to create a national e-mail registry for those who do not want to receive spam.<sup>19</sup> Thus far, though, the federal government has not been successful in the war against spam. As reported in an April 5, 2003 *New York Times* article, even the military has found it difficult to stop spam from infiltrating its servers.<sup>20</sup> As the chief executive of an anti-spam software company that services the military remarked, "spam is bad enough when you're here in the States on a high-speed connection. . . . It's painful when you're in the middle of a war."<sup>21</sup>

## The Private Sector's Success

For ISPs, spam results in lost profits. Therefore, ISPs have waged a vigilant effort against spammers. Initially, for the ISPs, the dearth of adequate statutes and judicial precedent presented a difficult hurdle in dealing with the cyber nuisance of spam. Consequently, ISPs, spearheaded by CompuServe, found success in using the common law doctrine of trespass to chattels against spammers.<sup>22</sup> Chattel is personal property, not to be confused with intellectual or real property.<sup>23</sup> Trespass to chattels occurs when there is a "direct and immediate intentional interference with a chattel in the possession of another."<sup>24</sup> Further, the use of another's property must be substantial,<sup>25</sup> meaning a use that causes real harm or grave infringement of rights or interference with the chattel which dispossesses harms or interferes with one's use of the chattel in a substantial way or period of time.<sup>26</sup> The trespass to chattels doctrine has been very successful in litigation involving spam, and the leading case is *CompuServe v. Cyber Promotions*.<sup>27</sup>

In *CompuServe*, Cyber Promotions spammed CompuServe servers by sending unsolicited bulk e-mails to thousands of CompuServe customers.<sup>28</sup> According to CompuServe, many of its subscribers complained about the spam, and many demonstrated their unhappiness by canceling their service with CompuServe.<sup>29</sup> Furthermore, CompuServe brought forth evidence to prove that Cyber Promotions had notice that its activities were unwelcome.<sup>30</sup> In building its case against Cyber Promotions, CompuServe relied on *Thrifty-Tel v. Bezenek*, the first case to use trespass to chattels in the context of electronic medium.<sup>31</sup>

In *Thrifty-Tel*, a long distance phone operator sued the parents of two minors who hacked into the operator's telephone system.<sup>32</sup> The children, after manually accessing the long distance codes by random guesses, used software that automated the process for them.<sup>33</sup> Even though the original claim against the parents was brought under a conversion theory, the court, *sua sponte*, substituted a trespass to chattel theory, concluding that accessing electronic access codes constituted trespass.<sup>34</sup> Consequently, the common law's contingency of tangible appropriation for trespass to chattel was abandoned and in its place arose the precept that electronic signals are "sufficiently tangible to support a trespass cause of action."<sup>35</sup>

Although Cyber Promotions maintained that trespass had to amount to a physical dispossession,<sup>36</sup> the court in *CompuServe* disagreed, finding that possession was not necessary.<sup>37</sup> Further, the court found that the damage to CompuServe's "good will" and the demand that Cyber Promotions' e-mails placed on CompuServe's servers were legally protected interests that were harmed.<sup>38</sup>

## The Non-Commercial Trespass to Chattel

On April 2, 2003, the California Supreme Court heard oral arguments in a case involving Kenneth Hamidi, a former employee of Intel Corporation. Hamidi ended his employment with the company after a disagreement concerning a work-related injury.<sup>39</sup> Shortly after his employment with Intel, Hamidi started a campaign against his former employer under the auspices of FACE-Intel (Former and Current Employees of Intel).<sup>40</sup> As part of his campaign tactics, Hamidi sent six e-mails within the span of three years to approximately 30,000 Intel employees.<sup>41</sup> Intel, like CompuServe, convinced the court that, once Hamidi had been given notice that his e-mails were not welcomed, subsequent transmissions constituted trespass to chattel.<sup>42</sup> Unlike CompuServe, however, Intel "could not claim that it lost customers from the transmission, since it is not in the business of providing Internet access. But it could claim that the company was injured due to the time and effort spent attempting to block the messages."<sup>43</sup> Two lower courts have thus far sided with Intel, and a decision from the California Supreme Court is anticipated later this year.

## The Latest Extra-Legal Approach to Combating Spam

On March 28, 2003, Habeas, an anti-spam company, announced that it filed two law suits in federal court in San Jose, California.<sup>44</sup> In contrast to CompuServe and Intel, however, Habeas' spam suit does not rest upon a trespass to chattels argument, but rather under copyright and trademark law. Habeas was founded in August of 2002 with a novel approach to fighting spam.<sup>45</sup> The Habeas software, used by many ISPs and spam filtering software, "includes a copyrighted haiku poem, known as a warrant mark, in e-mail headers. With the Habeas service, emailers must agree to abide by Habeas' e-mail rules to send out mailing with the Habeas warrant. Those violating the warrant are liable for prosecution."<sup>46</sup> According to *Business Week Online*, "Habeas' approach is one of the latest in an innovative string that includes pay-per-message plans, limits on outgoing messages, and a concept that forces people to donate money to charity if they want to reach a recipient."<sup>47</sup> Habeas is suing Intermark Media (a financial services company) and Avalend, its affiliate.<sup>48</sup> The suit claims that "the companies included the Habeas mark in their e-mails to ensure the messages got through."<sup>49</sup>

## The Problem with the Judicial Approach to Spam

E-mail marketing is an extremely lucrative field. Forrester estimates that spending on e-mail marketing will grow from \$1.3 billion in 2001 to \$6.8 billion in 2006.<sup>50</sup> Jupiter Media Metrix projects even faster growth, from \$1 billion in 2001 to \$9.4 billion in 2006.<sup>51</sup> The cost versus benefit analysis that a spammer conducts, for now, will always favor the continuance of spamming. State law

has not been adequately tailored to combat spam, and, although there has been success by the private sectors in using trespass to chattels, these are only limited gains. Laws that predate the information age were created to handle tangible issues, and were not crafted to contend with this type of technological change. This sentiment was expressed in an *amicus* brief filed in the *Hamidi* case by Professors of Intellectual Property and Computer Law. In their brief, the Professors denounced the California appellate court's reasoning (relying on *CompuServe*) "that the doctrine of trespass to chattels no longer requires proof of actual injury to the chattel."<sup>52</sup> The brief further declared that "[r]emoving the actual injury requirement from this ancient doctrine is not a gentle stretch, as the court suggests, but rather a radical break with precedent."<sup>53</sup> Although the Professors posit a sound position, in all fairness to the California courts, the "radical break" occurred in *Thrifty-Tel*. Consequently, the California courts are following precedents, albeit wrongly decided ones.

In *Hamidi*, the neo-trespass doctrine is tested in the non-commercial e-mail sphere. Again, the ghost of *Thrifty-Tel* haunts us. To substantiate the weakening of the tangibility requirement for trespass, and find that electronic signals can constitute trespass, the *Thrifty-Tel* court relied on several cases standing for the proposition that dust, microscopic particles, or smoke can amount to trespass.<sup>54</sup> A closer look at the cases cited reveals that the decision suffers from the fallacy of composition: inferring a conclusion about a whole from incomplete details of its parts. The cases cited in *Thrifty-Tel* did find trespass from dust,<sup>55</sup> microscopic particles,<sup>56</sup> or smoke.<sup>57</sup> Nevertheless, a reading of these cases reveals that these intrusions were not inherently trespass, but the resulting harm caused to property that arose from them constituted trespass. The appellate court in the *Hamidi* case, now awaiting a final decision by the California supreme court, held that harm transcends denial of access to phone lines (*Thrifty-Tel*) or the burdening of disk space for customers (*CompuServe*). Harm can now be found in "diminished employee productivity, and in devoting company resources to blocking efforts and to addressing employees about Hamidi's e-mails."<sup>58</sup> Essentially, harm is the "impair[ment of] the value to Intel of its e-mail system."<sup>59</sup> Now, tangible harm has been removed from the original trespass to chattels doctrine. *Thrifty-Tel* and its progeny leaves us with the proposition: *Where any property of another is intentionally used without permission, causing an interference with the property that impairs the value or substantially interferes with one's use of that property, then a trespass to chattels has occurred.*

The implications of this are potentially far-reaching. Using *Thrifty-Tel* and its progeny, citizens could sue every major television network—under the trespass to chattels doctrine—that broadcasts reality television

shows. Those shows are electronic signals that, many would argue, have impaired the value of their television. Why stop there? If one can retroactively apply what the courts now call trespass to chattels, suits may be viable against all the radio stations that played Celine Dion's "My Heart Will Go On," or Whitney Houston's "I Will Always Love You."

## Conclusion

The foregoing parade of horrible comparisons is, of course, farfetched, but illustrates a point. No one loves spam, but the desire to liberate our inboxes should not be an excuse to water down the underpinnings of long-standing legal doctrines.

## Endnotes

1. Mike Welland, Internet providers attack, but war is hardly over with spam, Detroit Free Press, at [http://www.freep.com/money/tech/mwend11\\_20021211.htm](http://www.freep.com/money/tech/mwend11_20021211.htm) (Dec. 11, 2002) (number is expected to increase to 3,600).
2. The origin of the term "spam" is highly disputed. Most cyber citizens who practice cyber-law believe that the term is from a Monty Python skit in which the actors would sing the word "spam" continuously, with increasing volume until no one is able to hear each other. Apparently, the analogy is that the volume of unsolicited e-mail eventually drowns out legitimate e-mails.
3. Reuters, Senators Introduce Junk E-Mail Bill, at <http://www.reuters.com/newsArticle.jhtml?storyID=2546775> (Apr. 10, 2003).
4. SpamCon Foundation, *About Spam Com Foundation—Summary*, at <http://www.spamcon.org/about/index.shtml> (last updated June 17, 2002).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
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10. *Id.*
11. P.J. Huffstutter, Military Battling Junk E-Mail; Unsolicited ads pester troops checking for messages from home. Some advertisers use patriotism to lure the unsuspecting, N.Y. Times, Business, Apr. 5, 2003, page 1, at part 3 (citing technology market research firm Ferris Research).
12. David E. Sorkin, Spam Laws: Summary, at <http://www.spamlaws.com/state/summary.html>.
13. *Id.*
14. *Id.*
15. Saul Hansell, *Virginia Law Makes Spam, With Fraud, A Felony*, N.Y. Times, Apr. 30, 2003, Section C, page 1, Column 5.
16. *Id.*
17. Reuters, *supra* note 3, at <http://www.reuters.com/newsArticle.jhtml?storyID=2546775> (April 10, 2003).
18. *Id.*
19. *Id.*
20. Huffstutter, *supra* note 11.
21. *Id.*
22. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).
23. W. Page Keeton, *Prosser and Keeton on Torts* § 14, 85-86 (Trespass to Chattels), (5th ed. 1984).
24. *Id.*

25. Restatement (Second) of Torts § 218.
26. W. Page Keeton, *supra* note 23.
27. *CompuServe*, 962 F. Supp. at 1015.
28. *Id.*
29. *Id.* at 1023.
30. *Id.* at 1024.
31. *Thrifty-Tel, Inc., v. Bezenek*, 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).
32. *Id.* at 470-471.
33. *Id.* at 471.
34. *Id.* at 473.
35. *Id.* at 473 n6.
36. *CompuServe*, 962 F. Supp at 1021.
37. *Id.* at 1022.
38. *Id.* at 1022.
39. Dan L. Burk, *The Trouble With Trespass*, J. Small & Emerging Bus. L. 27, 31 (2000).
40. *Id.* at 31.
41. *Id.*
42. *Id.*
43. *Id.* at 32.
44. Brian Morrissey, *Habeas files first spam suits*, at <http://www.internetnews.com/IAR/article.php/2176071> (Apr. 4, 2003).
45. *Id.*
46. *Id.*
47. Lisa Bowman, CNET News, *Spam Suits Seek Poetic Justice*, at <http://news.com.com/2100-1024-995568.html>, April 4, 2003.
48. *Id.*
49. *Id.*
50. Adrian Mello, *Five guidelines for effective e-mail marketing*, at <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2867339,00.html> (May 22, 2002).
51. *Id.*
52. Brief of Amicus Curiae Professors of Intellectual Property & Computer Law, at 3, *Intel Corp. v. Hamid*, 43 P.3d 587 (Cal. 2002), available at <http://www.law.berkeley.edu/cenpro/samuelsan/projects/hamidi/Hamidi-Cal-2002-amicus-IP-profs.pdf> (last updated July 15, 2002).
53. *Id.*
54. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6.
55. *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 232-233 (Cal. Ct. App. 1982); *Roberts v. Permanente Corp.*, 188 Cal. App.2d 526, 529 (Cal. Ct. App. 1961).
56. *Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782,788-789 (Wash. 1985).
57. *Ream v. Keen*, 838 P.2d 1073, 1075 (Or. 1992).
58. *Intel Corp. v. Hamidi*, 1999 WL 450944 (Cal. App. Dep't Super. Ct. Apr. 28, 1999), *aff'd*, 114 Cal. Rptr. 2d 244 (Cal. Ct. App. (2001)), *review granted and opinion superseded by* 188 Cal. Rptr. 2d 546, 43 P.2d 587 (Cal. 2002), *rev'd.*, 1 Cal. Rptr. 32, 71 P.3d 296 (Cal. 2003).
59. *Id.*

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The preceding article, written several months ago, predates the California Supreme Court's highly anticipated decision in *Intel Corp. v. Hamidi*.<sup>1</sup> In holding that under California law, trespass to chattels should not extend to "communication that neither damages the recipient computer system nor impairs its functioning,"<sup>2</sup> the Intel decision addressed many of the issues presented in the preceding article. The most striking aspect of the decision was the majority's declaration that the failure of Intel's claim lies in the fact that "the trespass to chattels tort . . . may not, in California, be proved without evidence of an injury to the plaintiffs property or legal interest therein."<sup>3</sup> This statement may be the closest intimation that *Thrifty-Tel* may have been wrongly decided.

The California Supreme Court in *Hamidi* did not only reverse the lower court's decision on June 30th; more importantly, it preserved good law. As the majority reiterated, Intel was not without remedy, for "e-mail, like other forms of communication, may in some circumstances cause legally cognizable injury to the recipient or to third parties and may be actionable under various common law [or] statutory theories."<sup>4</sup> Justice Mosk, in his dissent, did not agree with the proposition that other forms of action, including nuisance would better suit Intel, for they "require an evaluation of the content of the transmissions," he wrote.<sup>5</sup> But the dissent failed to notice that, unlike many trespass to chattels actions, *Intel* is unique because it is indeed content based. As the majority declared, "Intel's complaint is thus about *the content of the messages* rather than the functioning of the company's e-mail system."<sup>6</sup> It was only fair that the California court, the body that ignited the flames of trespass litigation in the Internet era, be the same body to curtail the doctrine's attenuation.

## Endnotes

1. *Intel Corp. v. Hamidi*, 1 Cal Rptr. 3d 32, 71 P.3d 32 (Cal. 2003.)
2. *Id.*, 1 Cal. Rptr. at 36
3. *Id.* at 37.
4. *Id.*
5. *Intel* at 72.
6. *Intel* at 46.