

## **Trespass to Chattel Doctrine Applied to Cyberspace**

### **Briefing Paper** (background on trespass to chattel doctrine)

#### **I. The Classic Trespass to Chattels Action**

##### **A. Trespass to Chattels Defined.**

Trespass to chattels is a common law tort action which provides redress for unauthorized use of or intermeddling with another's personal property.<sup>1</sup> The interference must be intentional; it must be unauthorized; it must be substantial, involving actual harm or a serious infringement of rights, and it must involve physical contact with the property.<sup>2</sup> Chattel, or personal property, is defined as physical, tangible property, and is distinguished from both real property and intellectual property.

Consent of the owner is a defense to trespass to chattel,<sup>3</sup> although the owner can revoke consent, or limit it as to time, place, or other conditions.<sup>4</sup> Acting outside the scope of limited privilege may create liability for trespass to chattel.<sup>5</sup> Defendants may raise other defenses to trespass to chattel, including a privilege for using public utilities.<sup>6</sup>

Although trespass to chattel derives from the same historical roots as trespass to land, the two actions have diverged significantly in modern law. While the doctrine of trespass to land continues to play a significant role in the law, trespass to chattel has largely fallen into disuse. Serious infringements to possessory rights have generally been remedied using the conversion doctrine, discussed in Section I.A.3, below.

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<sup>1</sup> Keeton, W. Page. Prosser and Keeton on Torts, 5th Edition. 1984. Section 14, p. 85; and Restatement (Second) of Torts, §§ 217-218 (1965). See also Burk, *The Trouble with Trespass*.

<sup>2</sup> Restatement (Second) of Torts, §§ 217-218 (1965).

<sup>3</sup> Id. § 218, "Liability to Person in Possession," cmt. b; § 892(a), "Effect of Consent."

<sup>4</sup> Id. § 252, "Consent of Person Seeking Recovery," cmt. c.; Id. § 254 cmt. a.

<sup>5</sup> Id. § 256, "Use Exceeding Consent"; § 252 cmt. c.

## 1. Intermeddling

Intermeddling can be any tangible interference with the chattel, which harms it, dispossesses the owner, interferes with the owner's use of the chattel, or lessens the economic value of the chattel. Actual dispossession would give rise to both an action for trespass to chattel, or conversion, although conversion has been by far the more commonly applied legal theory under those circumstances. Intermeddling has traditionally been tangible – involving physical contact between the chattel and the tortfeasor, or physical contact between the chattel and some object the tortfeasor controls.<sup>7</sup> Intangible interferences with chattel – such as gasses or vibrations – have historically not been recognized as trespass to chattel. However, some recent cases have established the notion that electrons and electronic signals are sufficiently physical and tangible to constitute intermeddling – the subject of this paper.<sup>8</sup>

## 2. Requirement of Harm

Recovery under trespass to chattels theory has been limited to the actual harm or damage suffered. Nominal damages, available for trespass to land, are not available for de minimis harms in trespass to chattel.<sup>9</sup> Trespass to chattel does not protect the inviolability of the chattel – it only protects against actual harm to the chattel.<sup>10</sup> Instead

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<sup>6</sup> Id. § 259, “Privilege to Use Facilities of Public Utility”; 252 cmt. c.

<sup>7</sup> Id. § 217, “Ways of Committing Trespass to Chattel,” cmt. e;

<sup>8</sup> Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468 (Ct. App. 1996) found that computer-generated signals used to access a telephone system were sufficiently tangible. Several District Court-level cases have since alleged trespass to chattels on the basis of email sent to their computer networks, including America Online, Inc. v. IMS, 24 F.Supp. 2d 548 (E.D. Va. 1998); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D. Ohio 1997), and, notoriously, eBay, Inc. v. Bidder's Edge, Inc., 100 F.Supp. 2d 1058, 54 U.S.P.Q. 2d 1798 (N.D. Cal. 2000). A few state courts have also recognized this new form of trespass to chattels, including Intel Corporation v. Hamidi, 1999 WL 450944 (Cal.Super. 1999).

<sup>9</sup> Id., § 218, cmt. e.

<sup>10</sup> Id., § 218, cmt. e.

of a legal remedy, the owner of a chattel has a privilege to use reasonable force to protect the inviolability of its chattel.<sup>11</sup>

## **B. Trespass to Chattel Distinguished from Related Theories**

Although trespass to chattel and trespass to land are derived from the common law doctrine of trespass, the two have developed separately and have different requirements. Trespass to chattel is more often identified as “the little brother of conversion,” a related common law tort which involves chattel, not real property.

### **1. Trespass to Land**

Historically, trespass to land has been a common law tort action which provides redress for any unauthorized interference with “real property,” or land. The interference must be unauthorized, and must involve physical contact with the property. However, in contrast with trespass to chattels, trespass to land could be done unintentionally, and could involve little or no harm to the land. The rationale for the stricter formulation of trespass with regard to land is that ownership of land creates an interest in inviolability – any minor contact could ultimately result in grant of a license or easement, and so the owner’s best interests are served by preventing any incursions, no matter how harmless.<sup>12</sup> Actions for harmless trespasses to land are awarded nominal damages.<sup>13</sup> Trespass to land also requires a physical trespass, but some cases have allowed recovery for intangibles, such as sound, microscopic particles, gasses, and vibrations. Most courts, however, have treated an intangible interference under nuisance law.<sup>14</sup>

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<sup>11</sup> Id., §§ 77, 218 cmt. e.

<sup>12</sup> Ballantine article.

<sup>13</sup> Keeton, W. Page. Prosser and Keeton on Torts, 5th Edition. 1984. Section 13, p. 67.

<sup>14</sup> Burk article.

## **2. Conversion**

Conversion, a third, related common law tort, involves not merely interference or intermeddling, but something more closely akin to theft. Conversion is defined as a major interference with the chattel or the owner's rights in it – often an actual dispossession. In conversion, the interference is extremely serious, and results in a “forced judicial sale” – the defendant must pay the owner for the value of the chattel. The serious interference with the owner's rights, and the subsequent forced judicial sale, are the hallmarks of conversion. Conversion typically involves physically taking something a tangible item of property.<sup>15</sup> Historically it involved an owner misplacing her property, and the defendant “converting” it to his own use.

## **II. Trespass to Chattel in Cyberspace**

The relatively recent resurrection of the doctrine of trespass to chattel has seen it applied in several different situations, and involved some stretching of the original doctrine and some confusion of trespass to chattel with the trespass to land doctrine.

### **A. Novel Circumstances for Trespass to Chattel**

Trespass to chattel has been used recently in several different situations, involving computers and electronic networks as the chattel property. First, Thrifty-Tel v. Bezenek applied trespass to chattel doctrine to a case in which minor youth were using computers to gain access to a telephone network.<sup>16</sup> Following up on that single successful use, several Internet Service Providers (ISPs) have used trespass to chattel theory to buttress

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<sup>15</sup> Robins article, pp. 1-2.

their claims against “spammers,” senders of unsolicited commercial email.<sup>17</sup> The theory has also been employed – though not always successfully – against the use of web-based software searching programs,<sup>18</sup> against the use of “deep-linking” to specific portions of a website,<sup>19</sup> and by a corporation against a sender of unsolicited, non-commercial email critical of the corporation.<sup>20</sup>

## **B. Stretchmarks on the Traditional Doctrine of Trespass to Chattels**

### **1. Definition of Physical & Tangible**

Trespass to chattels traditionally required a trespass that was physical and tangible – physical presence of the trespasser, or an object controlled by the trespasser making contact with the chattel. Gasses, microscopic particles, and the like have been found to be trespasses to land, but not trespasses to chattel. However, with the application of trespass to chattel to electrons and electronic transmissions, a whole host of non-tangibles may now be considered.

### **2. Definition of Harm**

The harms considered in the new cyber trespass to chattels cases are much more tenuous and vague. In eBay, all eBay’s alleged harms were disallowed by the court, which instead found harm in a potential aggregated affect. The harm did not have to be definite or likely: theoretically possible was sufficient. Furthermore, the theoretical harm

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<sup>16</sup> Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468 (Ct. App. 1996).

<sup>17</sup> America Online, Inc. v. IMS, 24 F.Supp. 2d 548 (E.D. Va. 1998); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D. Ohio 1997).

<sup>18</sup> eBay, Inc. v. Bidder’s Edge, Inc., 100 F.Supp. 2d 1058, 54 U.S.P.Q. 2d 1798 (N.D. Cal. 2000); Register.Com v. Verio, Inc., <citation>.

<sup>19</sup> TicketMaster v. Tickets.Com, Inc. One of the few Internet-related cases to date in which trespass to chattels was claimed, but not allowed.

<sup>20</sup> Intel Corporation v. Hamidi, 1999 WL 450944 (Cal.Super. 1999).

– lost server time, or less access to the servers – was difficult to define and was itself a new harm: not a deprivation to the owner of the use of his computer, but instead not allowing the owner to pick and choose which users among many to allow. Ultimately, this type of harm is borrowed from trespass to land – no showing of actual harm is required; mere harmless use is sufficient.