

Spammers, Spiders, and Other Free-Riders:

Trespass to Chattels Doctrine Applied to Cyberspace

D R A F T

I. Introduction

Imagine that you have a program on your personal computer that automatically gathers news on particular topics of interest to you. Your program can search cnn.com, nyt.com, indymedia.org, and a host of other news websites, and organize the information for you to produce your own personalized, digital edition of My Morning News.

Now imagine that Yahoo.com sues you for trespass to chattels, because their license terms to explicitly deny permission to automated search programs. Yahoo can take you to court, get a permanent injunction against the use of your software program, and possibly sue for monetary damages for the computer resources your program used.

This hasn't happened yet, but it could under the reasoning of some of the new Internet trespass to chattels cases.

Some of the biggest names on the Internet are using the doctrine of trespass to chattels to stop a variety of behaviors. Companies such as CompuServe, AOL, eBay, Intel, and TicketMaster have alleged this doctrine, and a host of others, in efforts to stop spam and prevent spiders from searching their websites.¹ While the application of this doctrine has had seemingly salutary effects in at least some cases², it has had equally troubling effects in other cases. In general, the doctrine of trespass to chattels, while it has provided an experimental stop-gap remedy for some situations, has shown itself to be

¹ See [CompuServe v. CyberPromotions](#), [CyberPromotions v. America Online, Inc.](#), [eBay v. Bidders Edge](#), [Intel v. Hamidi](#), and [TicketMaster v. Tickets.Com](#).

² E.g., the spam cases – almost everybody, except the spammers themselves, is happy with outcomes that reduce the overall quantity of spam. The outcomes of the cases are to be distinguished from the legal principles which are embodied in doctrines, and happy outcomes of particular cases do not always coincide with fortunate legal outcomes.

Laura Quilter

a little too malleable, to have too many unintended and undesirable consequences, and to be not quite the right metaphoric fit for cyberspace.

II. Background

A. The Internet

The Internet is an interconnected network of computer networks.³ Each computer has a unique address – a numeric IP (Internet Protocol) address, and a alphanumeric domain name.⁴ Indexes and information about the location of networks (domains) are stored on computers, which provide routing and domain name service.⁵ Information – such as email or webpages – is sent from one computer to another on the Internet.⁶ The information is broken into packets of data – floods of organized electrons! – and reassembled at its destination.⁷ Information is exchanged in standardized ways, based on open, technical standards, voluntarily applied.⁸

Domain names are currently assigned by a variety of authorized, commercial, domain name registrars.⁹ Individuals and organizations may purchase a domain name, and then either rent storage space on a web host server or set up their own server.¹⁰ By storing computer files on their Internet-accessible server space, people can make any kind of information available to the rest of the world.¹¹ The information that people make available to the Internet may be in the form of text, graphics, programs, or databases,

³ a series of footnotes drawn from Reno, Elkin-Koren article, etc. *I have these all in a separate file on technology notes and just need to correspond them here.*

⁴ Reno

⁵ Reno.

⁶ Reno.

⁷ Reno.

⁸ Reno.

⁹ Register.com

¹⁰ Register.com

Laura Quilter

among other forms.¹² Some small percentage, perhaps 15%,¹³ of the material that is “on” the Internet has been indexed, and can be located using search engines such as Google or Yahoo, or specialized search engines such as FindLaw.¹⁴ Most search engine databases are compiled in large part by software programs, variously known as “spiders,” “robots,” or “crawlers,” that recursively search web-servers, and index their contents.¹⁵

People who wish to gain access to the Internet have a variety of options, including purchasing an account from an Internet Service Provider (ISP).¹⁶ Those accounts will typically come with an email address, and a variety of services, including web-hosting, access to news feeds, or special proprietary interfaces.¹⁷ People may pay for Internet access by flat rates, the amount of time spent online, or the amount of data sent and received.¹⁸

B. Social Issues Surrounding the Internet

Unsolicited email, characterized variously as “unsolicited bulk email” (UBE), “unsolicited commercial email” (UCE), or, more derogatorily, “junk email” or “spam,” is the subject of much hair-pulling, teeth-gnashing, and technical and legal resistance on the part of the Internet community.¹⁹ Technical resistance has most often taken the form of

¹¹ Elkin-Koren.

¹² Elkin-Koren.

¹³ Elkin-Koren.

¹⁴ Id.

¹⁵ Id.

¹⁶ Reno at 843.

¹⁷ Reno, CompuServe.

¹⁸ AOL, CompuServe.

¹⁹ *See, generally*, Scot M. Graydon. Much Ado About Spam: Unsolicited Advertising, the Internet, and You. 32 St. Mary's L.J. 77 (2000); and Sabra-Anne Kelin, State Regulation of Unsolicited Commercial E-Mail. 16 Berkeley Tech. L.J. 435 (2001).

Laura Quilter

filters that block particular addresses.²⁰ Legal resistance has been multi-pronged: state and federal, legislative and judicial. State regulatory efforts have attempted to provide more choice for recipients of UBE by requiring that commercial mailers label their messages as such²¹, or provide opt-outs for recipients.²² States have also provided some consumer protections by barring the use of anonymous or falsified address information in email messages.²³ Finally, states have attempted to create accountability by imposing civil liability and sometimes criminal penalties.²⁴ Congress, on the other hand, although it has debated numerous anti-spam bills over the past ____ years, has failed to pass any of them.²⁵ Courts have been forced to step into the gap, and have done so using a variety of theories, including trespass to chattels, computer fraud and abuse, and trademark violations.²⁶

By contrast, spiders have largely been viewed as forces for good on the Internet. The operators of web search engines provide a necessary service, allowing individuals to find and make use of information otherwise obscure, and allowing creators of information resources to rise from obscurity.²⁷ Website operators who do not wish to avail themselves of the publicity that spiders provide may invoke the Robot Exclusion standard, which, like many such standards on which the Internet is based, is open and voluntary.

²⁰ <citation.>

²¹ See, e.g., CAL. BUS. & PROF. CODE § 17538.4(g) (West Supp. 2000).

²² <citation.>

²³ See Kelin, 443-445.

²⁴ <citation.>

²⁵ See, e.g., examples of bills from the past and the present Congress. *Need to get year of first anti-spam bill.*

²⁶ See, e.g., CompuServe, AOL, etc.

III. Legal Doctrinal Background

A. The Classic Trespass to Chattels Action

Trespass to chattels is a common law tort action which provides redress for unauthorized use of or intermeddling with another's personal property.²⁸ 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.²⁹ Chattel, or personal property, is defined as physical, tangible property, and is distinguished from both real property and intellectual property.³⁰

Consent of the owner is a defense to trespass to chattel,³¹ although the owner can revoke consent, or limit it as to time, place, or other conditions.³² Acting outside the scope of limited privilege may create liability for trespass to chattel.³³ Defendants may raise other defenses to trespass to chattel, including a privilege for using public utilities.³⁴

Although trespass to chattel derives from the same historical roots as trespass to land, the two actions have diverged significantly in modern law.³⁵ While the doctrine of trespass to land continues to play a significant role in the law, trespass to chattel had until recently largely fallen into disuse.³⁶ Serious infringements to possessory rights have generally been remedied using the conversion doctrine, discussed in Section I.A.3, below.

²⁷ See generally, Niva Elkin-Koren, Let The Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing, 26 U. Dayton L. Rev. 179 (2001).

²⁸ 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.

²⁹ Restatement (Second) of Torts, §§ 217-218 (1965).

³⁰ cite.

³¹ Id. § 218, "Liability to Person in Possession," cmt. b; § 892(a), "Effect of Consent."

³² Id. § 252, "Consent of Person Seeking Recovery," cmt. c.; Id. § 254 cmt. a.

³³ Id. § 256, "Use Exceeding Consent"; § 252 cmt. c.

³⁴ Id. § 259, "Privilege to Use Facilities of Public Utility"; 252 cmt. c.

³⁵ Dan Burk, etc. ...

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.³⁷ 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.³⁸ 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.³⁹ Intangible interferences with chattel – such as gasses or vibrations – have historically not been recognized as trespass to chattel; instead, they have been recognized as nuisance, or in some cases trespass to land.⁴⁰ 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.⁴¹

2. Requirement of Harm

Recovery under trespass to chattels theory has been limited to the actual harm or damage suffered.⁴² Nominal damages, available for trespass to land, are not available for

³⁶ Restatement, Keeton

³⁷ Restatement, Keeton

³⁸ Restatement, Keeton

³⁹ Id. § 217, “Ways of Committing Trespass to Chattel,” cmt. e;

⁴⁰ Burk.

⁴¹ 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).

⁴² Restatement, Keeton

Laura Quilter

de minimis harms in trespass to chattel.⁴³ Trespass to chattels does not protect the inviolability of the chattel – it only protects against actual harm to the chattel.⁴⁴ Instead of a legal remedy, the owner of a chattel has a privilege to use reasonable force to protect the inviolability of its chattel.⁴⁵

C. Trespass to Chattels Distinguished from Related Common Law 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.⁴⁶ Trespass to chattel is more often identified as “the little brother of conversion,” a related common law tort which involves chattel, not real property.⁴⁷

1. 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.⁴⁸ 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.⁴⁹ The serious interference with the owner’s rights, and the subsequent forced judicial sale,

⁴³ Id., § 218, cmt. e.

⁴⁴ Id., § 218, cmt. e.

⁴⁵ Id., §§ 77, 218 cmt. e.

⁴⁶ Burk article.

⁴⁷ Keeton, W. Page. Prosser and Keeton on Torts, 5th Edition. 1984. . . . <pincite> . . .

⁴⁸ Id.

⁴⁹ Id.

Laura Quilter

are the hallmarks of conversion.⁵⁰ Conversion typically involves physically taking something a tangible item of property.⁵¹ Historically, conversion involved an owner misplacing her property, and the defendant “converting” it to his own use.⁵²

2. Trespass to Land

Trespass to land has been a common law tort action which provides redress for any unauthorized interference with “real property,” or land.⁵³ The interference must be unauthorized, and must involve physical contact with the property.⁵⁴ However, in contrast with trespass to chattels, trespass to land could be done unintentionally, and could involve little or no harm to the land.⁵⁵ 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.⁵⁶ Actions for harmless trespasses to land are awarded nominal damages.⁵⁷ Trespass to land also requires a physical trespass, but some cases have allowed recovery for intangibles, such as sound, microscopic particles, gasses, and vibrations.⁵⁸ Most courts, however, have treated an intangible interference under nuisance law.⁵⁹

IV. Trespass to Chattels in Cyberspace Cases

⁵⁰ Id.

⁵¹ Robins article, pp. 1-2.

⁵² Prosser & Keeton on Torts.

⁵³ Keeton, W. Page. Prosser and Keeton on Torts, 5th Edition. 1984. <pincite>

⁵⁴ Id. <pincite>

⁵⁵ Id. <pincite>

⁵⁶ Ballantine article.

⁵⁷ Keeton, W. Page. Prosser and Keeton on Torts, 5th Edition. 1984. Section 13, p. 67.

⁵⁸ See, e.g., <the list of cases and trespasses>

The relatively recent resurrection of the doctrine of trespass to chattel has seen it applied to a variety of “cyberspace” fact patterns. Courts, forced to deal with a “space” that is not spatial, and a new category of resources that are neither wholly public goods nor wholly rivalrous, have adapted common law doctrine to new situations, with mixed results. In about a dozen cases dealing with unsolicited bulk commercial email (UBCE, also known as spam), unsolicited non-commercial email, and spider searches of databases, courts have more often than not extended an absolute form of property protection to the property-owner under a newly resurrected and broadened “trespass to chattels” theory.⁶⁰

The trespass to chattels doctrine is an old and until recently rarely used doctrine, described as the “little brother of conversion.”⁶¹ However, in the cases discussed in this paper, courts have analyzed computers and computer functions as chattel property; determined that non-permissive or unauthorized use of the computers did not rise to the level of conversion; and therefore considered the uses to be a trespass to chattels. While the claim has been trespass to chattels, the relief has been granted in a way more usually seen with trespass to land – injunctive and in at least one case punitive damages.⁶² Trespass to chattels has thus been stretched and in some respects blended with the trespass to land doctrine. While this has arguably had some salutary results in particular cases, there are some collateral risks to these doctrinal shifts.

⁵⁹ Burk article.

⁶⁰ See Table 1, p. ---, for a listing of the cases in which trespass to chattels has been alleged, successfully or unsuccessfully.

⁶¹ Keeton on Torts, § 14, pp. 85-86.

⁶² Punitive damages -- \$200,000! – in AOL v. Christian Brothers, but note that punitive damages were the only damages asked for on the “trespass to chattels” charge; injunctive relief was also granted in that case on other grounds.

Laura Quilter

The doctrinal shift began in earnest in a California Appellate Court case, Thrifty-Tel v. Bezenek, in 1996.⁶³ The court in Thrifty-Tel found computer hacking constituted trespass to chattels. Following that case, CyberPromotions v. AOL determined that AOL, as a private ISP, had no First Amendment obligations to permit unsolicited email, or spam, to pass through its servers.⁶⁴ CompuServe v. CyberPromotions in 1997 relied on both Thrifty-Tel and CyberPromotions to find that spam constituted, among other things, a trespass to chattels. Several cases with almost exactly similar fact patterns have followed, mostly brought by AOL.⁶⁵ In the meantime, the doctrine has stretched to include other fact patterns. One case has found that that email that was *not* spam also constituted trespass to chattels.⁶⁶ In another very recent case, trespass to chattels has been alleged for merely linking to a website.⁶⁷ Finally, trespass to chattels was successfully alleged in eBay v. Bidder's Edge for searching web-accessible databases, and since then in at least one other case.⁶⁸

A. Precursors

In Thrifty-Tel, a California Appellate Court found that two minors had committed trespass to chattels when they used a computer program to repeatedly dial into a telephone company's system.⁶⁹ Amidst a host of other legal issues, the court determined that the passage of electrons that occurs during electronic communications is substantial

⁶³ Thrifty-Tel v. Bezenek,

⁶⁴ CyberPromotions v. AOL

⁶⁵ AOL v. Over the Air, Hotmail, AOL v. IMS, AOL v. LCGM, AOL v. GreatDeals.net, AOL v. National Health Care Discount, AOL v. Christian Brothers.

⁶⁶ Intel v. Hamidi.

⁶⁷ TicketMaster v. Tickets.com

⁶⁸ eBay v. Bidder's Edge, Register.com v. Verio.

⁶⁹ Thrifty-Tel.

Laura Quilter

enough to constitute trespass.⁷⁰ The court, in a case of first impression, relied on a series of cases involving trespass to land, a Washington state statute, and dicta in a case overturning a criminal theft conviction.⁷¹ Some of the precedents cited are troubling in this case. The court cites to the dicta in an Indiana Supreme Court case, which overturned the criminal theft conviction of an employee who had used his workspace on a computer to conduct personal business.⁷² The McGraw court found that this was not a burglary, and considered that it seemed more like trespass.⁷³ In fact, while some aspects of the case may have seemed like trespass, that was a novel observation that was given no further analysis, and no consideration for other more appropriate doctrines. The Thrifty-Tel court also mentioned another criminal case, based not on common law doctrines but on the state statutory offense of “computer trespass.”⁷⁴ Here, no analysis was given to determine whether the state statute was in fact based on common law doctrine of trespass (to land *or* to chattels), or whether the statute merely used the word “trespass.”

Finally, the Thrifty-Tel court cited a number of trespass cases, in support of its proposition that the requirements for the level of interference and harm had diminished over the years to practically nothing, and that the requirement for a physical touching had likewise diminished.⁷⁵ Here, the court cited four cases to suggest that the rule had been modernized to include indirect and intangible touchings, such as dust, smoke, and microscopic particles⁷⁶ The cases cited were trespasses to land that involved

⁷⁰ Thrifty-Tel at 1567, note 6; at 473, note 6.

⁷¹ Id. at 1567, notes 6 and 7; at 473, notes 6 and 7.

⁷² State v. McGraw, 480 N.E.2d 552, 554 (51 A.L.R. 4th 963) (Ind. 1985), cited in Thrifty-Tel, footnote 7.

⁷³ State v. McGraw.

⁷⁴ State v. Riley, cited in Thrifty-Tel, footnote 7.

⁷⁵ Thrifty-Tel, footnote 6.

⁷⁶ Id.

| Case | Context & Theory | Outcome |
|---|---|--|
| Register.com v. Verio S.D.NY 2000 (12/8/00) 126 F.Supp.2d 238 <i>US Dist. J. Jones</i> | Spidering. Register.com sued Verio for trespass to chattels for spidering Register's web database; Verio used addresses gleaned to spam. | for property owner (Register.com): injunction entered on trespass to chattels theory; <i>trial date set for</i> |
| EBAY v. BIDDER'S EDGE N.D.Cal. 2000 (5/24/00) 100 F.Supp.2d 1058 <i>U.S. Dist. J. White</i> | Spidering. eBay sued Bidder's Edge on multiple theories for spidering eBay's web database and republishing the information. | for property owner (eBay): injunction entered on trespass to chattels theory. (<i>Bidders Edge appealed, then settled, then went out of business.</i>) |
| TICKETMASTER v. TICKETS.COM C.D. Cal. 2000 2000 WL 525390 (3/27/00) 2000 WL 1887522 (8/10/00) <i>U.S. Dist. J. Hupp</i> | Spidering. TicketMaster sued Tickets.com for spidering and copying facts from its database, and then deep-linking to its website. | for spider / linker (Tickets.com): temporary injunction <i>not</i> issued; Court found that harms seemed more like intellectual property and not urgent; <i>trial date set for</i> |
| AOL v National HealthCare Discount N.D.Iowa 2000 (9/20/00) 121 F.Supp.2d 1255 <i>US Magistrate Judge Zoss</i> | Spamming. Spammer was independent contractor of defendant. | for spammer (NHCD): no summary judgment for AOL (because it's a question of fact as to whether NHCD is liable for actions of independent contract spammer.) for property owner (AOL): But, Court noted that AOL had a "prima facie" case for trespass-to-chattels, <i>if</i> NHCD was liable for the actions of its independent contractor. |
| AOL v. Christian Brothers S.D.N.Y. 1999 (12/16/99) 12/16/99 NYLJ 35, (col. 2) <i>US Magistrate Judge Pitman</i> | Spamming. AOL sued the Christian Brothers on multiple theories including trespass to chattels. | for property owner (AOL): Defendant did not show for hearing; was found liable on trespass and several other theories, and was assessed ~ \$400,000 damages. |
| AOL v. Greatdeals.net E.D.Va. 1999 (5/4/99) 49 F.Supp.2d 851 <i>US Dist. J. Lee</i> | Spamming. AOL sued GreatDeals.net for spamming on a trespass to chattels theory; GreatDeals.net counterclaimed to try to get AOL to stop blocking its email. | for property owner (AOL): Although not addressing the trespass claim directly, the Court relied on the notion that GreatDeals.net was a probable trespasser to dismiss its counterclaims. |
| INTEL v. HAMIDI Cal. Super. 1999 (4/28/99) 1999 WL 450944 <i>case de-published</i> | Unsolicited email. Intel sued Hamidi, a former employee, for sending unsolicited, non-commercial email to Intel's employee's email accounts. | for property owner (Intel): summary judgment for plaintiff Intel granted; Intel ordered to prepare papers for permanent injunction; <i>case on appeal.</i> |
| AOL v LCGM E.D.Va. 1998 (11/10/98) 46 F.Supp.2d 444 <i>US Dist. J. Lee</i> | Spamming. AOL sued LCGM for trespass to chattels and 6 other theories. | for property owner (AOL): summary judgment on trespass to chattels & 5 other counts; injunction issued; damages to be tried. |
| AOL v IMS E.D.Va 1998 (10/29/98) 24 F.Supp.2d 548 <i>US Dist. J. Brinkema</i> | Spamming. AOL sued IMS and 5 other defendants on trespass to chattels and 5 other causes of action. | for property owner (AOL): summary judgment on trespass to chattels; injunction granted. |
| SEIDL v. GREENTREE MORTGAGE | Spamming. Seidl alleged trespass to chattel, after spammer forged | for spammer (Greentree): dismissed because spammer was |

| | | |
|--|---|--|
| <p>D. Colo. 1998 (10/18/1998) 30 F.Supp.2d 1232 <i>Chief J. Alan B. Johnson</i></p> | <p>headers that resulted in onslaught of bounced email to Seidl's computer.</p> | <p>Greentree's independent contractor & not liable.</p> |
| <p>Hotmail v. Van\$ MoneyPie N.D.Cal. 1998 (4/16/98) 1998 WL 388389 <i>U.S. Dist. J. Ware</i></p> | <p>Spamming. HotMail sued 9 defendants, including ALS and LCGM, on 6 counts including trespass to chattels.</p> | <p>for property owner (Hotmail): preliminary injunction for trespass to chattel; relied on <u>Thrifty-Tel</u> for trespass; found plaintiff likely to prevail on <i>all</i> charges. ** verify the injunction ... **</p> |
| <p>AOL v. Over the Air Equipment E.D.Va. 1997 (10/31/97) 1997 WL 1071300 <i>U.S. Dist. J. Brinkema</i></p> | <p>Spamming. AOL sued Over the Air Equipment and Joe Tajalle.</p> | <p>for property owner (AOL): preliminary injunction granted against spammer; Court stated in a subsequent case that reasoning relied on <u>CompuServe</u>.</p> |
| <p>COMPU SERVE V. CYBERPROMOTIONS S.D.Ohio 1997 (2/3/97) 962 F.Supp. 1015 <i>U.S. Dist. J. Graham</i></p> | <p>Spamming. CompuServe sued for trespass to chattels.</p> | <p>for property owner (CompuServe): preliminary injunction granted against spammer on trespass to chattels theory; Court also found CompuServe is not a public utility.</p> |
| <p>CYBERPROMOTIONS V. AOL E.D.Pa. 1996 (11/4, 12/20/96) 948 F.Supp. 436 <i>U.S. Dist. J. Weiner</i></p> | <p>Spamming. CyberPromotions sued AOL for blocking spam, alleging violations of First Amendment.</p> | <p>for property owner (AOL): AOL can block spam; AOL is not a public forum.</p> |
| <p>THRIFTY-TEL V. BEZENEK 1996 Cal. Ct. App. (6/28/96) 54 Cal. Rptr. 2d 468, 46 Cal.App.4th 1559 <i>Acting P. J. Crosby</i></p> | <p>Hacking. Kids hacked into phone system to get long-distance codes.</p> | <p>for property owner (Thrifty-Tel): tort damages on trespass to chattels theory; found that electronic signals may constitute trespass.</p> |
| <p>State v. Riley Washington 1993 846 P.2d 1365, 121 Wash.2d 22</p> | <p>Hacking. Hacker broke into telco computer network to get phone codes; convicted of 3 counts of "computer trespass," a Washington statute.</p> | <p>for prosecutor (Washington): conviction on the computer trespass statute affirmed (other overturned because of bad search warrant)</p> |
| <p>State v. McGraw Indiana 1985 480 N.E.2d 552, 51 A.L.R. 4th 963</p> | <p>Misuse of employer resources. Employee used server space to store personal files; charged with criminal theft.</p> | <p>for defendant (McGraw): Indiana Supreme Court said use wasn't theft because no harm; in dicta, noted that the action was more akin to a de minimis trespass, or misdemeanor conversion.</p> |

Table 1. Cases that are heavily cited in cyber-trespass cases, or legally innovative are in **SMALL CAPS.**

Laura Quilter

dispossession or substantial interference with or harm to the property.⁷⁷ Without further analysis, the court simply then said, “In our view, the electronic signals generated by the Bezenek boys' activities were sufficiently tangible to support a trespass cause of action.”⁷⁸

That same year, a spammer, CyberPromotions, sued AOL on First Amendment grounds for trying to block CyberPromotions' spam. The District Court found that AOL was not a state actor, and therefore not subject to First Amendment limitations.⁷⁹ The court then granted summary judgment for AOL and denied the spammer's requested injunction. The First Amendment questions addressed in CyberPromotions have not really been seriously considered since, presumably based on the notion that indeed AOL is a private actor. However, some of the analysis and metaphors appear dated,⁸⁰ and it may be appropriate to fully review these questions at some point. It's also worth noting that the Court incorporated some of the trespass to chattels language in its summary of its reasoning.⁸¹

B. Spammers & Other Unsolicited Email

⁷⁷ Thrifty-Tel, footnote 6, citing Wilson v. Interlake Steel Co. (1982) 32 Cal.3d 229, 232-233, and Roberts v. Permanente Corp. (1961), 188 Cal.App.2d 526, 529; Bradley v. American Smelting and Refining Co. (1985), 104 Wn.2d 677; and Ream v. Keen (1982), 314 Or. 370.

⁷⁸ Thrifty-Tel, footnote 6.

⁷⁹ CyberPromotions at 441.

⁸⁰ Turner Broadcasting Sys., Inc. v. Federal Communications Comm., 512 U.S. 622, 114 S.Ct. 2445 (1994). See, e.g., the CyberPromotions' court's discussion of Turner at 453-455, where the Court mentions that “[t]he Internet may indeed some day be found to be a critical pathway of communication”; see also the discussion at 446 on state constitutional grounds about AOL as a public forum. The Court also seems to critically rely on the proposition that cable operators operate in a monopolistic marketplace; in the aftermath of the 1996 Telecommunications Act and deregulation, that distinction seems to have disappeared. The proportion of AOL's market-share has also increased in the intervening years, rendering that part of the analysis also a little shaky.

⁸¹ CyberPromotions v. AOL, at 456, discussing AOL's “private property rights”; mentioning CyberPromotions' “invasion” (at ---).

Laura Quilter

The majority of cyber-trespass cases have been email, and almost all of them spam (unsolicited, bulk, commercial email) with one non-commercial email exception.⁸² The leading case is CompuServe v. CyberPromotions, in which CompuServe sued CyberPromotions (it was a bad couple of years for CyberPromotions) on a trespass to chattels theory.⁸³ Here another District Court analyzed CompuServe's claims, ultimately finding that neither the First Amendment nor public utilities doctrine protected use of ISP networks by commercial emailers.

Several other cases have followed suit, with very similar fact patterns. A few cases have been dismissed because of issues surrounding the liability of businesses who subcontracted to spammers.⁸⁴ In one unreported District Court case, the spammers neglected to show up for their hearing, and were slapped with an injunction, damages, and, for the trespass to chattels charge, punitive damages.⁸⁵ These cases have largely adopted the reasoning in CompuServe almost wholesale, with very little additional analysis. In a couple of cases the Court has looked again at the question of whether the ISP constitutes a public utility.⁸⁶

One case, Intel v. Hamidi, has taken the doctrine to its natural extension, including non-commercial email which had political content, and in which the quantities of email were so (relatively) small that no harm to the actual servers was alleged.⁸⁷ Despite the lack of harms and the serious questions raised by Hamidi, the court nonetheless granted a permanent injunction against Hamidi sending any kind of email at

⁸² Intel v. Hamidi has been the exception to the commercial email, or spam, rule.

⁸³ CompuServe v. CyberPromotions.

⁸⁴ AOL v. National Health Care Discount; Seidl v. Greentree.

⁸⁵ AOL v. Christian Brothers.

⁸⁶

⁸⁷ Intel v. Hamidi.

Laura Quilter

all to persons at their Intel business email addresses.⁸⁸ The court rested its analysis primarily on Thrifty-Tel, CyberPromotions, and CompuServe, with virtually no analysis of any of those cases or their distinctions from the case at hand. Generally, the analysis in Intel seemed particularly weak, given the many serious rights involved, and has proven controversial.⁸⁹ The harms cited were purely indirect: no harm to the server or even interference with it was recognized, but the court recognized secondary harms to Intel resulting from employees blocking, or employees receiving, Hamidi's email.⁹⁰ Questions of federal and state labor law were virtually ignored; and the First Amendment analysis was given short shrift by a court that seemed bent on protecting Intel's interests – however framed – at all costs.⁹¹ The First Amendment question seems particularly troubling, given that almost all email sent travels over some privately-owned resources in its journey from sender to recipient. This decision has been de-published, and an appeal was heard by the California Court of Appeals on September 17, 2001. Intel v. Hamidi points up some of the difficulties with an uncompromising and absolutist vision of property protection that overrides all conflicts with numerous other areas of law, including civil liberties, and persists in viewing the Internet as nothing more than a network of interconnected chattels.

C. Spiders, Crawlers and Robots, O My

⁸⁸ Intel v. Hamidi

⁸⁹ See, e.g., numerous articles such as Burk; amicus briefs filed by both the ACLU and the EFF. http://www.eff.org/Legal/Cases/Intel_v_Hamidi/; <http://www.eon.law.harvard.edu/openlaw/intelvhamidi/>; <http://www.faceintel.com/>. See <http://www.faceintel.com/articles.htm> for a partial list of general press articles on the case.

⁹⁰ Intel v. Hamidi at 2.

⁹¹ Intel v. Hamidi

Laura Quilter

Three cases out of District Courts last year considered extending the private property metaphor to protect against interference by spiders, computer programs that search servers.⁹² These cases illustrate the continued stretching of the doctrine beyond its original roots, and the present application of an absolute vision of property rights, as courts try to grapple with the issues presented by cyberlaw.

The most notorious, eBay v. Bidder's Edge (2000), out of the Northern District of California, was a lengthy and thoughtful analysis of many of the issues involved.⁹³ However, the use of the new, reconfigured trespass to chattels doctrine to protect these rights continues to raise the same unanswered questions, and with each new application more issues arise. The eBay case centers on the access to and use of data stored and organized by eBay, the largest and most successful Internet auction website. As in many industries, one successful business created both many competitors and many spin-off industries. In the online auction industry, one spin-off industry was “aggregators” – businesses that aggregate selected data from a variety of online auction websites, and present it to the aggregator’s customer in some convenient, value-added format. Bidder’s Edge was an auction aggregator, gathering data from the various auction websites, compiling it in its own database, and then providing the data on demand as a sort of personalized consumer’s guide to the auctions for a particular item.⁹⁴ Bidder’s Edge was not alone in providing this value-added service; other companies performed similar services.⁹⁵

⁹² TicketMaster v. Tickets.com, eBay v. Bidder's Edge, and Register.com v. Verio.

⁹³ eBay v. Bidder's Edge.

⁹⁴ eBay v. Bidder's Edge. “Was” is the appropriate verb tense; Bidder’s Edge, after losing, appealing, and then settling, went out of business.

⁹⁵ E.g., AuctionWatch, which also has reportedly been sued by eBay.

As discussed earlier, spiders, unlike spammers, have generally been viewed as performing a valuable service.⁹⁶ Consumers use the search engines generated by spiders to locate information on the Internet – an almost impossible task without search engines. Consumers also appreciate the value-added services that may be included, such as reviews and rankings of websites,⁹⁷ organized hierarchical indexes,⁹⁸ caching (back-up copies stored on the search engine’s website) in the event that the original server is not functioning,⁹⁹ and comparison shopping.¹⁰⁰ Businesses indexed by spiders typically appreciate the inclusion in the databases; after all, bad publicity is better than no publicity at all, and even if a site is ranked poorly its presence in an index means that it is at least accessible to web searchers.¹⁰¹

eBay, however, sought to control the method of searching that the spiders utilized, determining that some methods are less process-intensive than others.¹⁰² For example, eBay wanted search engines to query the eBay database on the fly at the moment a user requests information; Bidder’s Edge, and other aggregators often prefer to search *in advance* of any particular user queries, and to compile the data on their own servers.¹⁰³ From the web-surfer’s perspective, the on-the-fly method provides the most up-to-date information; while the aggregation-in-advance method provides a fast retrieval of data, and perhaps some value-added information sorting services that are not possible with on-the-fly calculations.¹⁰⁴ Regardless of the search method, the original vendor profits from

⁹⁶ See Section II. B., *supra*.; also Elkin-Koren article.

⁹⁷ *E.g.*, Yahoo, Excite.

⁹⁸ *E.g.*, Yahoo.

⁹⁹ *E.g.*, Google.

¹⁰⁰ *E.g.*, Bidder’s Edge for auctions, CNet for online computer hardware vendors.

¹⁰¹ See, generally, Elkin-Koren.

¹⁰² eBay v. Bidder’s Edge.

¹⁰³ *Id.*

¹⁰⁴ eBay, and Elkin-Koren.

Laura Quilter

any sale that transpires; however, the consumer may determine from the comparative information that particular vendors' sales are not in their best interest.

eBay successfully negotiated around these issues with several auction aggregators, but was not able to come to terms with Bidder's Edge.¹⁰⁵ eBay then brought suit in the Northern District of California, successfully seeking a permanent injunction against Bidder's Edge's spider activity.¹⁰⁶ Although it was appealed, the case was ultimately settled – so there has still been no federal appellate review of any of these trespass to chattels cases.¹⁰⁷

Just prior to the eBay suit, TicketMaster, itself an aggregator of sorts, brought suit in the Central District of California against Tickets.com.¹⁰⁸ Tickets.com used a spider to search the databases of TicketMaster and other event ticket vendors.¹⁰⁹ Tickets.com gathered certain data – event location and time – reformatted it, and put it in its own database, with links to all available vendors, including itself.¹¹⁰ TicketMaster took issue with both the spidering, and the linking, and argued for trespass to chattels and certain copyright violations.¹¹¹ On the trespass to chattels claim, the court seemed to find that there were no cognizable harms sufficient to warrant a preliminary injunction.¹¹² After the eBay ruling came out, TicketMaster appealed, and the Court again found that on the facts no preliminary injunction was warranted.¹¹³ TicketMaster is, to date, the only case

¹⁰⁵ eBay v. Bidder's Edge.

¹⁰⁶ eBay v. Bidder's Edge.

¹⁰⁷ <article about the ultimate disposition of eBay>

¹⁰⁸ TicketMaster v. Tickets.com.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

Laura Quilter

in which a trespass to chattels case was decided against the property-owner, on the merits, and trial is pending.

Finally, shortly after the *eBay* and *TicketMaster* cases, *Register.com v. Verio* was heard in the Southern District of New York.¹¹⁴ Register.com, an ISP, maintained a database of domain name registrants.¹¹⁵ The database is accessible to the general public on the Internet.¹¹⁶ Verio used a spider to scan the database for recent registrants and their contact information, and then used that information to send targeted sales pitches for its ISP and web-hosting services, which were in direct competition with some of the same services offered by Register.com.¹¹⁷ The court found that the terms of service did not forbid spiders, but that the lawsuit had put Verio on notice that its spiders were unwanted.¹¹⁸ As in *eBay*, the plaintiff made some calculations of specific harms which were “thoroughly undercut” by the evidence.¹¹⁹ Nonetheless the court found that “evidence of a mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels.”¹²⁰ The court largely relied on *eBay* and *eBay*’s references from *CompuServe*.¹²¹

V. Analysis

In the five years we have seen some dozen-odd cyberspace trespass to chattels cases. It is now possible to pick out the distinguishing characteristics of this new action,

¹¹⁴ *Register.com v. Verio*.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 249.

¹¹⁹ *Id.* at 249.

¹²⁰ *Id.* at 250.

¹²¹ *Register.com v. Verio*.

Laura Quilter

the ways in which it has departed from the traditional doctrine, and some of the general benefits, harms, and risks.

A. Distinguishing Characteristics of Trespass to Chattels, as Applied to Cyberspace

1. The Quintessential Case

The quintessential cyberspace trespass to chattels case involves a conflict between two unlikable e-businesses, each with its axe to grind, and each promising it represents the needs and lofty ideals of the citizenry. In each case, one business is utilizing some of the resources provided by the other – for instance, a business operating an email advertising campaign. According to one conception, this is free-riding – it carries more than a hint of unfairness to the original business and violates some default notion of an absolute value in property. According to a different conception, the second business is merely a new layer in the Internet, building upon the resources contributed voluntarily in accordance with open standards and community practice – the outcome just another resource from which all may profit. At some point the original business becomes protective of its contribution. Perhaps the original business senses direct competition, or a fostering of a competitive environment which can only hurt the business. Or perhaps the business merely feels that it is a substantial enough contributor to the Internet that it has the right to control the terms on which it contributes.

2. Common Threads

A few common threads can be drawn from these cases and the responses to them. First, arguments are made by the alleged trespassers that the property-owners, by

Laura Quilter

connecting their servers to the Internet, have necessarily opened themselves up to certain kinds of interactions.¹²² These arguments seem to be based on the sense of the Internet as a cooperative venture. There is fear that if some portion of the Internet is walled off it will make it easier to wall off other portions. Judge Whyte referenced these fears briefly when he noted that both sides argue as if they must win or it will be the end of the Internet.¹²³ There is a sense, perhaps, that it is unfair to take advantage of the Internet's benefits in a one-sided manner – taking the good without contributing, or taking the good without taking the bad.¹²⁴

A second common thread through most of the cases is an almost unspoken assumption, held by the property-owners and most of the courts, that property ownership is absolute. Property rights therefore brook no opposition, flexibility or compromise with any other rights; the property doctrine reigns supreme over all other doctrines thus far considered.

A third thread has been seen throughout the courts and the legislature – the desire to *do* something about the Internet. Whether the interest is in crafting new laws to cover new situations, or shoe-horning the new situations into old doctrines, it seems that everyone has wanted a piece of the action. Courts have responded to this sense of urgency in these cases, issuing preliminary and permanent injunctions on vague harms, indirect harms, tenuous harms, and no harm at all.

A fourth thread is the presence of the undesirable, the annoying, the nuisance. Spam is a nuisance, and courts have – perhaps rightly – felt that something should be

¹²² See, e.g., Intel v. Hamidi amicus briefs; AOL v. CyberPromotions second opinion (denying motion for reconsideration), and especially the spidering cases.

¹²³ eBay

¹²⁴ see also Burk, Dan, The Trouble With Trespass.

Laura Quilter

done about it. Furthermore, few have been willing to stand up for spammers, or to try to identify any social goods that come with increasing quantities of spam. But the spam cases have been laid as if in an unpleasant but compelling trail directly towards much less appetizing outcomes, such as Intel v. Hamidi and to a lesser extent eBay v. Bidder's Edge and Register.com v. Verio.

B. Stretchmarks on the Traditional Doctrine of Trespass to Chattel

1. Novel Chattels

The trespass to chattels in the above noted cases have been to trespasses to computers, electronic networks, and computer processing power. While computers seem qualify neatly as chattels, it is at least questionable whether electronic networks and computer processing power fit so neatly.¹²⁵ It does make sense to qualify the processing power of one's chattel as some form of personal property, as one commentator suggests.¹²⁶ But the sorts of protections that this form of property needs – in order to ensure that it is available to its owner and for its owner's purposes, that it functions fully, that there is no risk of anybody else claiming it as their own – may not necessitate a strict form of property protection. And a strict form of property protection brings with it other risks, as shown below.

2. Novel Trespasses

¹²⁵ ; *cf.* Albritton.

¹²⁶ Albritton.

The actual trespass traditionally required by trespass to chattels was physical and tangible – the physical presence of the trespasser, or an object controlled by the trespasser making contact with the chattel. Less tangible or direct impacts, caused by gasses, microscopic particles, and the like have been found to be trespasses to land, but not generally trespasses to chattel. As some commentators have pointed out, the new cyberspace trespass to chattels is essentially a marriage of the two doctrines.¹²⁷ At least one commentator has called for these sorts of cases to be analyzed as trespasses to land, reasoning that that theory grants the most protection to property owners.¹²⁸ Needless to say, analyzing computers and computer networks as land would stretch the definitions of real property, and those strict protections, in an uncontrollable fashion; no doubt why the courts have wisely steered clear of the real property analogy. But insofar as these cases are *already* being analyzed as if they were trespass to land, but under the name trespass to chattels, it makes sense to rethink the use of the trespass to chattels label.

3. Novel , Not To Say Vague, Harms

The harms considered in the original trespass to chattels cases were attenuated and indirect. Much of the harm that was considered was employee resources spent on blocking spam, and good-will harm.¹²⁹ In the more recent extensions of the doctrine, the harms have become even more vague. In eBay, for instance, all eBay's actual alleged harms to the server were disallowed by the court, which instead found harm in a potential

¹²⁷ Burk

¹²⁸ Ballantine. The author seems unconcerned with the possibility that other real property doctrines – adverse possession, say, or easements – might put a crimp in the owner's style. Perhaps only the pro-owner aspects of real property doctrine will be adopted.

¹²⁹ CompuServe.

Laura Quilter

aggregated affect.¹³⁰ That harm, already somewhat attenuated vague, has been seriously questioned as to whether it could ever actually happen in the real world.¹³¹

The actual impact to servers of spam or spiders, figured as a quantity or percentage of computer resources lost, has rarely been calculated, probably both for the very good reason that it is both difficult to measure, and for the not-so-good reason that it would seem to be an insignificant or slight impact.¹³² Which begs the question of whether the kind of impact mentioned – use of computer resources used, measured by computer cycles, throughput, memory, and disk space – is the sort of impact that can should be conceived of as constituting harm to the chattel. As Burk points out, the real value of the chattel is clearly not lessened by the alleged trespass.¹³³ But it does seem that there should be some redress for the property owner whose server is noticeably affected, or at risk for being affected, by an over-and-beyond usage. Perhaps, as Burk suggests, the common law tort of private nuisance offers a better alternative for those kinds of situations. But one can imagine the nuisance doctrine mutating as the trespass doctrine has. The real difficulty lies in the current lack of a judicial conception of what the owner's interests might be and what might therefore constitute a harm to those interests. By default, the owner's interests have been filled in as an absolute interest in inviolability; the owner merely has to withdraw permission for a use to be deemed harmful.

C. Outcomes

¹³⁰ eBay

¹³¹ Elkin-Koren.

¹³² It was calculated in one of the AOL cases; and the plaintiffs and defendants helpfully tried to calculate it for the eBay court.

Detailing all the possible outcomes of these cases could fill a book; by necessity, therefore, this will be a very brief sketch of some of the possible benefits and risks offered under the trespass to chattels approach. These cases point out certain benefits in the common law approach to this problem, generally, and to results in some instances that are pleasing to the majority of Internet users.

1. (Some) Happy Outcomes

Specifically, most Internet users would not complain about the outcomes of the spam cases, granting injunctions against spammers. More generally, however, the use of common law doctrines has provided a flexible, rapid approach. Courts have been able to make decisions quickly, without waiting for a time-consuming legislative response that might be insufficiently responsive to protect certain interests. Spam, for instance, is almost universally decried,¹³⁴ but Congress has been unable to pass anti-spam legislation in the ____ years it has been considering it.¹³⁵ In the meantime, the courts have stepped in with some relief. Courts have also been able to tailor results to specific circumstances, and adapt to new circumstances easily. Even if one is not convinced by the spamming and spider cases, one can certainly imagine circumstances in which a property-owner's legitimate interests are threatened in a way that is both congruent with traditional trespass to chattels doctrine, and profits from the new cyberspace trespass to chattels reasoning.¹³⁶

2. The Courtroom as Laboratory

¹³³ Burk.

¹³⁴ Alas, poor spam; who cries for spam?

¹³⁵

¹³⁶ *E.g.*,

Also on the positive side, experiments with different metaphors and legal theories are exactly the sort of work at which the common law excels. There is absolutely no reason that the common law should not be able to grow and adapt and even innovate in new circumstances. The best of these adaptations and innovations can then propagate throughout the law. This may have negative consequences, of course – bad rulings stick around and may provide bad precedent for years to come. A single poorly-thought-out case may be adopted wholesale for its factual similarities; and even well-reasoned cases may sometimes have devastating assumptions, methodological failures, or hidden biases. Fortunately, even bad cases have some positive impact – they may generate reams of scholarly opinion urging a different course, and public or political outcries have been known to generate legislative reversal of decisions.¹³⁷

3. The ISP Fights For You And Me

One under-analyzed question in the spamming scenario has been the role of the ISP in representing the user's interests. It seems to be accepted almost without saying that the harm to the ISP's server is really a proxy for the harm to the user – that harm can be measured at least in part by the numbers of irate communiques from user to ISP. As one commentator pointed out, however, it is not clear whether these users ever had a reasonable expectation that their ISP would eliminate spam. It could certainly be considered that the ISP is not at all responsible for the elimination of spam; even without the ISP exemption in the 1996 Telecommunications Act, it is difficult to imagine that courts would generally hold ISPs liable to their subscribers for third-party spam, forged headers or otherwise. And as already discussed, the actual harm to the servers is more

¹³⁷ See, e.g., U.S. v. LaMacchia.

Laura Quilter

theoretical than real.¹³⁸ So what seems to be going on is an acceptance of the ISP's alleged harms as a proxy for the actual harms of the user – the user's time, inconvenience, annoyance, and in some cases money or lost opportunity.¹³⁹ The ISP in some ways seems to be an ideal proxy: it is a single chokepoint for many users; the ISP has resources, technical, financial, and legal, to eliminate spam from its servers; and finally the ISP, as a responsible player on the Internet, may feel it is their role to provide users with that kind of representation and support. The transaction costs for the many, many millions of users affected by spam – sometimes a single instance of spam! – would be extraordinarily high, no matter what method they individually employed. Thus allowing the ISP to represent its users' interests could, if done transparently and with an eye to input from users, be advantageous. It should be noted, however, that the rights of users vis-à-vis their ISP are unclear: if an ISP can filter out spam before it reaches the user, who defines "spam"? What rights does the user have *to receive* information the ISP has determined to be spam? Are any or all of these rights preempted by contract law? Finally, it is not clear that other sorts of online services could adequately represent their users' interests in the same ways that ISPs could.¹⁴⁰

4. Unintended Consequences.

We have already seen how the original doctrine morphed to include trespass, by electrons, onto property, without damaging it.¹⁴¹ That was then stretched to include a

¹³⁸ See Section V. B. 3.

¹³⁹ Imagine, for example, the user whose inbox is filled with spam, exceeding the user's purchased disk space quota, and causing legitimate, desirable mail to bounce back to the sender.

¹⁴⁰ For instance, in any kind of online store situation, the users may have interests in access to pricing information that are contrary to the interests of the store-owner.

¹⁴¹ Thrifty-Tel

Laura Quilter

variety of fact patterns in cyberspace, beginning initially with unpopular spammers on trespass and other theories.¹⁴² We have since seen the doctrine stretched even further to include actions which are arguably not harmful at all, beneficial to society or the property-owner, and with much riskier consequences to other doctrines and rights.¹⁴³

Dan Burk has fancifully analyzed the sorts of cases that may arise now that electrons, and their ordinary flow through systems, have been labeled as potentially trespassory.¹⁴⁴ He identified broadcast receivers (TV and radios), and electrical and telephone systems, as potential objects of suit.¹⁴⁵ While each of these situations is factually distinct from the cases seen thus far, the recent morphing of the doctrine makes his hypotheses seem considerably more real. And as technologies develop even further, it is difficult to see what kinds of sensible lines can be drawn to distinguish the current set of cases from a whole range of scenarios.

The disagreeable consequences extend to the marketplace and consumer protections. While it is difficult, as Judge Whyte noted in eBay, to fully anticipate the market consequences of an action,¹⁴⁶ it is certainly predictable to say that there will be some consequences to new liability rules or even new applications of old liability rules. In a marketplace where consumers are sometimes their own best protection, placing restrictions higher up in the hierarchy is potentially dangerous. eBay is a perfect example: a case which holds as trespass that the very sort of action that any consumer would have to take in order to comparison shop. This case ultimately used the

¹⁴² Spam cases: CyberPromotions v. AOL; CompuServe v. CyberPromotions; Hotmail v. Van\$; AOL v. a lot of other parties; Seidl v. Greentree.

¹⁴³ Intel v. Hamidi; TicketMaster v. Tickets.com; eBay v. Bidder's Edge; Register.com v. Verio.

¹⁴⁴ Burk.

¹⁴⁵ Burk.

¹⁴⁶ eBay

Laura Quilter

consumer's welfare as an excuse (eBay would be unable to adequately serve its consumers) for an action which ultimately injured consumers.¹⁴⁷ And while spam is no doubt a nuisance to all, the noticeable economic consequences of allowing spam have not been the destruction of the Internet¹⁴⁸; but those cases in which spam has been disallowed have certainly had a deleterious effect on both the businesses involved, and the (alas) numerous recipients who respond to spam.¹⁴⁹

Finally, the theory of unpredicted consequences certainly applies to other bodies of law. When creating new applications for doctrines, it is almost certain that other doctrines have not yet been fleshed out for those new areas. For instance, First Amendment rights in the Internet have barely been touched upon, and have thus far largely related to government action. The sorts of actions in cyberspace that might equate to protected conduct in real space (e.g., picket lines) have yet to be identified.¹⁵⁰ The questions of contractual preemption of all kinds of other rights have yet to be worked out. In fact, fundamental questions relating to the contractual relationships between ISPs and their customers; online auction-houses and the individual auctioneers; online stores and their shoppers; all these relationships have embedded rights and responsibilities which have yet to be worked out. Presently, it is more than a possibility that the mere withdrawal of a web-owner's permission to surf, or the violation of some ISP's contractual term (late payment, posting of an ambiguously pornographic photograph on one's website), could conceivably render any individual liable for trespass on a website or their own ISP. These sorts of conflicts arise when one doctrinal area is aggressively

¹⁴⁷ [eBay](#)

¹⁴⁸ See the closing notes of [AOL v. CyberPromotions](#), where the judge notes that it is ironic that spam, if unchecked, could destroy the Internet.

¹⁴⁹

Laura Quilter

pursued before other doctrines have a chance to be fully born. While the applications of these other doctrines are still being debated, anything other than baby steps in the granting of absolute rights of property ought to be treated very cautiously.

5. Inhibiting Other Developments

Related to the law of unintended consequences is the risk of inhibiting other appropriate developments in the law. First, the rush to accept an absolute conception of trespass to chattels has outshone any attempts to present other theories, such as nuisance¹⁵¹ or a fleshing out of civil liability under the Computer Fraud and Abuse Act. The ability of courts to make the least amount of decisions per case has, in this situation, led to a large number of factually similar cases being decided on the grounds of trespass to chattels, without a deeper examination of other causes of action. Finally, this rush to action has perhaps let Congress off the hook. By granting a trespass action where none before existed, the courts have filled a gap that perhaps might have been better analyzed by Congress. In some cases, such as this one, the judicial system can do a better, more nuanced job when it trims and fits new statutory material, than when it adapts and twists old doctrines to new situations.

VI. Conclusion

The scenario sketched at the beginning of this note has not occurred and hopefully will not. However, it illustrates some of the dangers of an overly generous grant of property rights, and some of the necessity for a thorough exploration of these issues.

¹⁵⁰ See, e.g., Anita R.'s work, in progress.

¹⁵¹ See Burk.

Laura Quilter

In conclusion, trespass to chattels, although it has met some of the stop-gap needs of internet service providers and has generated some intriguing opinion and scholarship on the theory of property, is ultimately not the right common law approach for dealing with the problems caused by non-permissive communications. Relaxing the doctrine from its traditional restraints threatens to encode an increasingly absolutist property doctrine that needs more thought and public deliberation before it is encoded in real space or cyberspace. The cases which have pushed trespass to chattels doctrine beyond spam – Intel, eBay, and Register.com – clearly demonstrate some of the risks in the current applications of trespass to chattels doctrine. Courts considering these cases should be much more cautious about applying this doctrine beyond spam, and even for spam, numerous commentators have identified federal legislation as the most appropriate tool.