

## The Continuing Evolution of Cyberspace Trespass to Chattels

The revival of the trespass to chattels doctrine in the context of cyberspace has had unexpected and far-reaching consequences. Trespass to chattels, a doctrine developed to protect physical property, initially seemed to courts to be merely a useful doctrinal tool to control spam, unwanted commercial bulk e-mail. However, the doctrine has recently expanded into other situations, making visible the flaws inherent in applying to cyberspace doctrines based in real and tangible property. This note charts the continuing evolution of this doctrine into activities which lie at the heart of the internet—non-commercial email in *Intel v. Hamidi*<sup>1</sup> and spidering websites in *eBay v. Bidder's Edge*<sup>2</sup> and two other cases.<sup>3</sup> This rapid expansion demonstrates the malleability of the doctrine as applied to cyberspace, which has stretched the definition of “trespass” and “chattel,” and stretched or even eliminated the traditional requirement of harm. The outcomes and reasoning in the most recent cases also illustrate the inappropriateness of applying to the Internet a property doctrine that construes electronic contact as trespass to physical property.

### I. Background

#### A. Technical Background

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<sup>1</sup> Super Ct. No. 98AS05067 (Cal. 3d App., Dec. 10, 2001), *aff'g* 1999 WL 450944 (Cal. Super., Apr. 28, 1999), *depublished*.

<sup>2</sup> 100 F.Supp.2d 1058 (N.D. Cal. 2000).

<sup>3</sup> *Register.com, Inc. v. Verio, Inc.*, 126 F.Supp.2d 238 (S.D. N.Y. 2000) and *TicketMaster v. Tickets.com*, 2000 WL 525390 (C.D. Cal. 3/27/00) and 2000 WL 1887522 (C.D. Cal. 8/10/00), *aff'd* 2 Fed.Appx. 741, 2001 WL 51509 (9th Cir. (Cal.)).

## 1. The Internet

The Internet is an interconnected network of computer networks.<sup>4</sup> Each computer has a numeric Internet Protocol (IP) address and generally a corresponding alphanumeric domain name.<sup>5</sup> Indexes and information about the location of networks (domains) are stored on computers, which provide routing and domain name service.<sup>6</sup> Information, such as email or webpages, is sent from one computer to another on the Internet.<sup>7</sup> The information is broken into packets of data and reassembled at its destination.<sup>8</sup> Information is exchanged in standardized ways, based on open, technical standards, voluntarily applied.<sup>9</sup>

People access information on the Internet through computer calls to servers, which are computers that accept computer calls and “serve” information.<sup>10</sup> People can make any kind of information available to the rest of the world by storing computer files on Internet-accessible server space.<sup>11</sup> This information may be in the form of text, graphics, programs, databases, or other forms.<sup>12</sup>

People who wish to gain access to the Internet have a variety of options, including purchasing an account from an Internet Service Provider (ISP).<sup>13</sup> ISP accounts typically include an email address and a variety of services, such as web-hosting, access to news

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<sup>4</sup> American Civil Liberties Union v. Reno, 929 F.Supp. 824, 830-832 (E.D. Pa. 1996).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Niva Elkin-Koren, Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing, 26 U. DAYTON L. REV. 179 (2001).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 843.

feeds, or special proprietary interfaces.<sup>14</sup> To set up a website with their own domain name, 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.<sup>15</sup> Currently, domain names are assigned by a variety of authorized commercial domain name registrars.<sup>16</sup>

The explosion of access on the Internet has created new ways of communicating and accordingly new problems. Unsolicited email, characterized variously as “unsolicited bulk email” (UBE), “unsolicited commercial email” (UCE), or, more derogatorily, “junk email” or “spam,” has caused both technical and legal resistance on the part of the Internet community.<sup>17</sup> Technical resistance has most often taken the form of filters that block particular IP addresses of spammers.<sup>18</sup> Congress has debated numerous anti-spam bills over the past several years but failed to pass any of them.<sup>19</sup> Courts have been forced to step in, and have done so using a variety of theories, including trespass to chattels, computer fraud and abuse, and trademark violations.<sup>20</sup>

## **2. Spiders**

Spiders are the programs used by search engines to create catalogs of information about the web. Like spam spiders indiscriminately touch everyone’s sites. But in contrast to spam, most internet users, including both consumers and businesses, find spiders

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<sup>14</sup> *Reno*, 929 F.Supp. 824; *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio 1997).

<sup>15</sup> *Register.com*, 126 F.Supp.2d 238.

<sup>16</sup> *Id.*

<sup>17</sup> *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).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g., CompuServe*, 962 F.Supp. 1015; *Cyber Promotions, Inc. v. American Online, Inc.*, 948 F.Supp. 436 (1996).

useful.<sup>21</sup> Most search engine databases are compiled in large part by software programs that search web-servers and index their contents.<sup>22</sup> These programs are variously known as “spiders,” “robots,” or “crawlers.”<sup>23</sup> A small amount, perhaps fifteen percent,<sup>24</sup> of the material on the Internet has been indexed and can be located using search engines such as Google,<sup>25</sup> Yahoo,<sup>26</sup> or FindLaw.<sup>27</sup> Spiders have largely been viewed as beneficial.<sup>28</sup> The operators of web search engines provide a necessary service, allowing individuals to find otherwise obscure information and allowing creators of information resources to rise from obscurity.<sup>29</sup> Consumers use search engines, made possible by spider-searches and indexes, 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,<sup>30</sup> organized hierarchical indexes,<sup>31</sup> caching (back-up copies stored on the search engine’s website in the event that the original server is not functioning),<sup>32</sup> and comparison shopping.<sup>33</sup> 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.<sup>34</sup> Website operators who do not wish to avail themselves of

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<sup>21</sup> See generally, Elkin-Koren, *supra* note 11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> <http://www.google.com/>

<sup>26</sup> <http://www.yahoo.com/>

<sup>27</sup> <http://www.findlaw.com/>

<sup>28</sup> Elkin-Koren, *supra* note 11.

<sup>29</sup> *Id.*

<sup>30</sup> *E.g.*, Yahoo, <http://www.yahoo.com/>, and Excite, <http://www.excite.com/>.

<sup>31</sup> *E.g.*, Yahoo, <http://www.yahoo.com/>.

<sup>32</sup> *E.g.*, Google, <http://www.google.com/>.

<sup>33</sup> *E.g.*, CNet, <http://www.cnet.com/>, for online computer hardware vendors.

<sup>34</sup> Elkin-Koren, *supra* note 11.

the publicity that spiders provide may invoke the Robot Exclusion technical standard,<sup>35</sup> which, like most of the standards on which the Internet is based, is open and voluntary.

## **B. Legal Background**

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

Trespass to chattels, an old and rarely-used common law tort action, provides redress for the unauthorized uses or intermeddling with another's personal property.<sup>36</sup>

Chattel, or personal property, is defined as physical, tangible property and is distinguished from both real property and intellectual property.<sup>37</sup> "Trespass" has likewise been defined as a tangible interference with property, requiring physical contact with the property as a threshold matter.<sup>38</sup> The trespassory use must be intentional,<sup>39</sup> unauthorized,<sup>40</sup> and substantial.<sup>41</sup> A "substantial" use involves actual harm or a serious infringement of rights – an interference with the chattel which dispossesses the owner,

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<sup>35</sup> The robot exclusion standard is a voluntary technical protocol. The protocol allows website operators to control whether or how their website is indexed by placing a file named "robots.txt" on the server. The file contains instructions for robots. Many search engines use the robots.txt standard, but it is not required.

<sup>36</sup> *See, generally*, RESTATEMENT (SECOND) OF TORTS §§ 217-218 (1965), and W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14 (5th ed. 1984). Trespass to chattel had until recently largely fallen into disuse. Restatement, Keeton. Cf. the doctrine of trespass to land which has played an ongoing and significant role in the law. Although trespass to chattel derives from the same historical roots as trespass to land, the two actions have diverged significantly in modern law. Although trespass to chattels and trespass to land are derived from the common law doctrine of trespass, the two have developed separately and have different requirements and rationales. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14 B.1 85-86.

<sup>37</sup> W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14, and Dan L. Burk, *The Trouble With Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000).

<sup>38</sup> RESTATEMENT (SECOND) OF TORTS § 217 cmt. e: "Intermeddling" means intentionally bringing about a physical contact with the chattel." Although dispossession is listed in § 217 as one of the two ways of committing trespass ("A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another[.]"), dispossessions have typically been handled under the tort action of conversion, discussed *infra*.

<sup>39</sup> RESTATEMENT (SECOND) OF TORTS § 217; *see* cmt. b's discussion of the level of intentionality required.

<sup>40</sup> RESTATEMENT (SECOND) OF TORTS § 217.

<sup>41</sup> RESTATEMENT (SECOND) OF TORTS § 218.

harms the chattel, interferes with the owner's use of the chattel for a substantial time, or causes bodily harm.<sup>42</sup>

A trespasser may claim a privilege to use public utilities as a defense.<sup>43</sup> Consent of the owner is also a defense to trespass to chattels,<sup>44</sup> although the owner can revoke consent or limit it as to time, place, or other conditions.<sup>45</sup> Licensees acting outside the scope of limited consent may bear liability for trespass to chattels.<sup>46</sup>

The remedies awarded for trespass to chattels have included both damages and injunctive relief. Injunctive relief has been available typically for ongoing trespasses.<sup>47</sup> Recovery for intermeddling has been limited to the actual harm or damage suffered.<sup>48</sup> Nominal damages are available for actual dispossession<sup>49</sup> but not for de minimis harms caused by intermeddling.<sup>50</sup> Trespass to chattels does not protect the inviolability of the chattel—it only protects against actual harm to the chattel.<sup>51</sup> This rationale makes it clear

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<sup>42</sup> RESTATEMENT (SECOND) OF TORTS § 218; W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14.

<sup>43</sup> RESTATEMENT (SECOND) OF TORTS § 259; § 252 cmt. c.

<sup>44</sup> RESTATEMENT (SECOND) OF TORTS § 218, cmt. b; § 892(a), “Effect of Consent.”

<sup>45</sup> RESTATEMENT (SECOND) OF TORTS § 252, “Consent of Person Seeking Recovery,” cmt. c.; § 254 cmt. a.

<sup>46</sup> RESTATEMENT (SECOND) OF TORTS § 256, “Use Exceeding Consent”; § 252 cmt. c. Note that in the Internet context, “permission” and “consent” are generally granted through a “clickwrap” mechanism, which is itself controversial. In “clickwrap” agreements, users are presented with a screen of conditions and a clickable “I agree” button. Users may or may not actually read the agreements, and have no opportunity to modify terms or participate in any of the traditional negotiations which form the background of contract law. These adhesion-style contracts have nonetheless been held enforceable in many cases.

<sup>47</sup> RESTATEMENT (SECOND) OF TORTS § 219-220 discuss a trespasser's liability to those who are entitled to immediate possession and those who are entitled to future possession, respectively, which may have some relevance to an ongoing trespass which dispossesses the owner of the chattel.

<sup>48</sup> RESTATEMENT (SECOND) OF TORTS § 218, cmt. e.

<sup>49</sup> *Id.*, § 218, cmt. d. However, dispossessions have typically been treated under the tort of conversion. See *infra* Part I.B.

<sup>50</sup> By contrast, trespasses to *land* that cause no harm may be remedied by nominal damages.

<sup>51</sup> RESTATEMENT (SECOND) OF TORTS § 217, cmt. a states “the fact that one person is committing a trespass to another's chattel, while it may not be actionable because it does no harm to the chattel or to any other legally protected interest of the possessor, affords the possessor a privilege to use force to defend his interest in its exclusive possession.” § 218, cmt. e., notes that “[t]he interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect **some other and more important interest of the possessor**. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition,

that trespass to chattels does not apply to all situations in which there is use of another's chattel. Where there is no legal remedy, the owner of a chattel has a privilege to use reasonable force to protect her chattel.<sup>52</sup>

## **2. Trespass to Chattels Distinguished from Related Common Law Theories**

Trespass to chattels is frequently confused with related common law theories, such as trespass to land, conversion, and nuisance. For instance, recent applications of the trespass to chattels doctrine in cyberspace have liberally borrowed from the related theory of trespass to land.<sup>53</sup> Trespass to land, a common law tort action, provides redress for any unauthorized interference with “real property” or land.<sup>54</sup> As with trespass to chattels, the interference must be unauthorized and involve physical contact with the property.<sup>55</sup> However, in contrast with trespass to chattels, trespass to land can be committed unintentionally and can involve little or no harm to the land.<sup>56</sup> The rationale for the stricter formulation of trespass with regard to land is that ownership of land creates an interest in inviolability. In the real property context, any minor contact could ultimately result in a grant of a license or easement, so the owner's best interests are served by inviolability—preventing any incursions, no matter how harmless.<sup>57</sup> Traditionally, trespass to land required physical contact, but some cases have allowed

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quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c). Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.” (emphasis added).

<sup>52</sup> RESTATEMENT (SECOND) OF TORTS § 218, cmt. e, and § 77 on defense of possession by force.

<sup>53</sup> See Burk, *supra* note 37.

<sup>54</sup> W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14.

<sup>55</sup> *Id.*

<sup>56</sup> Actions for harmless trespasses to land are awarded nominal damages. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 13, p. 67.

<sup>57</sup> Susan M. Ballantine, Computer Network Trespasses: Solving New Problems With Old Solutions, 57 WASH. & LEE L. REV. 209 (2000).

recovery for intangibles, such as sound, microscopic particles, gasses, and vibrations.<sup>58</sup>

Most courts, however, have treated those kinds of intangible interference under nuisance law.<sup>59</sup>

The common law tort of private nuisance provides redress for nontrespassory interferences with land.<sup>60</sup> Intangible interferences with property rights, such as gasses, noxious fumes, electromagnetic interference, and blocking of light and air, have generally all been handled under nuisance doctrine.<sup>61</sup> Nuisance doctrine employs a balancing test, weighing the harms and benefits to the owner, the tortfeasor, and the public interest. Typically the liability is assigned on the basis of both efficiency and fairness, and the parties are able to bargain around injunctions and damages awards.<sup>62</sup>

A third relevant tort, conversion, involves a major interference with chattel or the owner's rights in it.<sup>63</sup> This is often an actual dispossession—physically taking a tangible item of property from the owner.<sup>64</sup> In conversion, the interference is so serious that it results in a “forced judicial sale”—the defendant must pay the owner for the value of the chattel.<sup>65</sup> This serious interference with the owner's rights and the subsequent forced judicial sale are the hallmarks of conversion.<sup>66</sup> Conversion, therefore, is a more serious infringement than trespass to chattels, which has been frequently identified as “the little

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<sup>58</sup> See Burk, *supra* note 37.

<sup>59</sup> *Id.*

<sup>60</sup> See RESTATEMENT (SECOND) OF TORTS §§ 821B, 821D, 822.

<sup>61</sup> *Id.*

<sup>62</sup> See Carol Rose, Crystals and Mud in Property Law, 40 STAN. L.R. 577, 594 (1988). For instance, in a typical nuisance case a new factory producing noxious fumes might pay damages to a nearby long-time land-owner. Conversely, a new housing development might pay for the factory to relocate, depending on the allocation of property rights and the liability.

<sup>63</sup> RESTATEMENT (SECOND) OF TORTS §§ 223-241.

<sup>64</sup> Mark D. Robins, Electronic Trespass: An Old Theory in a New Context, 7 COMPUTER LAW. 1, 1-2 (1998). Historically, conversion involved an owner misplacing her property and the defendant “converting” it to his own use. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

brother of conversion.”<sup>67</sup> Actual dispossession of the chattel would give rise to both an action for trespass to chattels and for conversion, although conversion has been by far the more commonly applied legal theory under those circumstances.<sup>68</sup>

### 3. The Emergence of Cyberspace Trespass to Chattels

The 1996 California Appellate Court decision in *Thrifty-Tel v. Bezenek*<sup>69</sup> established the notion that electrons and electronic signals are sufficiently physical and tangible to constitute intermeddling, and a trespass to chattels. In *Thrifty-Tel*, a telephone operator sued the families of two minors who hacked the telephone system. The court in *Thrifty-Tel* found the presence of electronic signals constituted trespass to chattels,<sup>70</sup> relying principally on cases involving intangible interferences in real property (land), not chattel property. Having relied on cases that moved intangible interferences from the realm of nuisance to the realm of trespass, *Thrifty-Tel* then moved intangible interferences even further, from trespass to land to trespass to chattels.

Trespass to chattels was first applied to the Internet in a spam case, *CompuServe v. CyberPromotions*,<sup>71</sup> in which the ISP CompuServe sued CyberPromotions for spamming CompuServe account-holders.<sup>72</sup> *CompuServe* followed *Thrifty-Tel* in finding that electronic “touches” constituted a sufficient trespass to meet the requirements for trespass to chattels to apply.<sup>73</sup> This was despite the fact that the very same electronic

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<sup>67</sup> W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14.

<sup>68</sup> RESTATEMENT (SECOND) OF TORTS §§ 217-218, and W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 14.

<sup>69</sup> *Thrifty-Tel, Inc. v. Myron Bezenek*, 54 Cal. Rptr. 2d 468 (Cal. App. 4th 1996) found that computer-generated signals used to access a telephone system were sufficiently tangible. See Burk, *supra* note 37, for an analysis of this case, which discusses the court’s flawed analysis and reliance on inappropriate precedents. See *infra* for discussion of the current uses of this doctrine in cyberspace cases.

<sup>70</sup> *Thrifty-Tel*, 54 Cal.Rptr. 2d 468.

<sup>71</sup> 962 F.Supp. 1015 (S.D. Ohio 1997).

<sup>72</sup> *Id.*.

<sup>73</sup> *Id.*

“touches” were not only permitted by CompuServe, but they were the exact kind of uses that comprised any ISP’s principal service—receipt and delivery of email to account-holders who paid for that service. *CompuServe* transformed these electronic touches, which form the basis of all communications on the Internet, into trespasses any time an ISP merely withdraws its permission to a particular sender. The defenses which CyberPromotions raised—a First Amendment right to communicate to users,<sup>74</sup> and access to CompuServe as a public utility<sup>75</sup>—were dismissed by the court with slim analysis.<sup>76</sup>

Additionally, however, the court in *CompuServe* loosened the requirement of harm in the trespass to chattels doctrine, not requiring CompuServe to show harm to the actual chattel.<sup>77</sup> Instead, the court broke the chain between the trespass and the harm, allowing indirect harms to the CompuServe’s business interests—reputation, customer goodwill, and employee time—to count as harms to the chattel (the server).<sup>78</sup>

Several similar spam cases have followed suit.<sup>79</sup> These cases have largely adopted the reasoning in *CompuServe* almost wholesale, with very little additional analysis. These spam cases have until recently comprised the majority of the cyberspace trespass cases, providing courts a way of dealing with the problem of unsolicited

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<sup>74</sup> *Id.* at 1025-1028.

<sup>75</sup> *Id.* at 1025. The court did not accept CyberPromotion’s defense that CompuServe was a public utility. Instead the court found that email is not essential to society and that CompuServe did not occupy a monopolistic or oligopolistic position in the marketplace. *Id.* at 1025. The test for the public utility defense is that the service is essential to society, and that the provider occupies a monopolistic or oligopolistic position in the marketplace.

<sup>76</sup> *Id.* at 1025-1028. The court’s reasoning was based almost entirely on a previous spam case, *CyberPromotions v. AOL*, 948 F.Supp. 436 (E.D. Pa. 1996).

<sup>77</sup> See supra Part I.B.1. for a discussion of the factors of trespass to chattels.

<sup>78</sup> See *CompuServe* 962 F.Supp. 1015. The court did not address the indirect nature of these harms, glossing over the facts that (a) the servers themselves never experienced any loss of functionality, downtime, or any other harm; and (b) it was questionable whether users had any reasonable expectation that CompuServe would prevent third-party spam.

<sup>79</sup> See, e.g., *Hotmail v. Van\$ MoneyPie*, 1998 WL 388389 (N.D. Cal. 1998), and *AOL v. IMS*, 24 F.Supp.2d 548 (E.D. Va. 1998). For a complete table, see <http://walnut.he.net/~lquilter/law/trespass/>, last visited December 21, 2001.

commercial bulk email but not providing any new analysis to the implications of cyberspace trespass to chattels or the elimination of the public utility and First Amendment defenses to trespass to chattels.<sup>80</sup>

## II. Case Summaries: Trespass to Chattels in Cyberspace

The cases that follow chart the latest evolution of the cyber-trespass doctrine, which has stretched the traditional requirements of harm, trespass, and even the definition of a chattel.

### A. *eBay v. Bidder's Edge*<sup>81</sup>

The most recent cases have stretched the trespass to chattels doctrine beyond spam to include spidering, the core computer operation which creates web search engines.<sup>82</sup> In 2000, three District Court cases considered extending the private property metaphor to protect against alleged interference by spiders, computer programs that search servers.<sup>83</sup> The most famous of these cases, *eBay v. Bidder's Edge*, out of the Northern District of California, featured a lengthy and thoughtful analysis of many of the issues involved.<sup>84</sup> *eBay* was a dispute between two auction companies: eBay, the largest and most successful Internet auction website,<sup>85</sup> and Bidder's Edge an auction aggregator that gathered data from the various auction websites, compiled it in its own database, and

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<sup>80</sup> For a discussion of state legislative approaches to the problem, see Kelin, *supra* note 17.

<sup>81</sup> *eBay v. Bidder's Edge*, 100 F.Supp.2d 1058 (N.D. Cal. 2000).

<sup>82</sup> See *supra* part I.B.3. for technical background on spidering.

<sup>83</sup> *TicketMaster v. Tickets.com*, *eBay v. Bidder's Edge*, and *Register.com v. Verio*.

<sup>84</sup> *eBay*, 100 F.Supp.2d 1058.

<sup>85</sup> As in many industries, this 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. See Elkin-Koren, *supra* note 11, for more discussion.

then provided the data on demand as a personalized consumer's guide to the auctions for a particular item.<sup>86</sup> The dispute was about access to and use of data stored and organized by eBay, eBay sought to control the method of searching that the spiders utilized, determining that some methods are less computation-intensive than others.<sup>87</sup> eBay successfully negotiated around these issues with several auction aggregators but was not able to come to terms with Bidder's Edge.<sup>88</sup> eBay then sued Bidder's Edge in the Northern District of California and on the basis of trespass to chattels obtained a permanent injunction against Bidder's Edge's spider activity.<sup>89</sup> Although eBay alleged several specific harms, those harms were undercut by the evidence and the court did not allow them.<sup>90</sup> Instead, the *eBay* court held that a *potential* harm was sufficiently substantial that it met the requirements for trespass to chattels.<sup>91</sup>

## **B. *TicketMaster v. Tickets.com***<sup>92</sup>

At roughly the same time as the *eBay* suit was in litigation, TicketMaster, a large retailer of events tickets, sued Tickets.com in the Central District of California.<sup>93</sup>

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<sup>86</sup> *eBay*, 100 F.Supp.2d 1058. "Was" is the appropriate verb tense; Bidder's Edge, after losing, appealing, and then settling, went out of business. Bidder's Edge was not alone in providing this value-added service; other companies performed similar services. E.g., AuctionWatch, reportedly also sued by eBay.

<sup>87</sup> *Id.* For example, eBay wanted spiders to query the eBay database on-the-fly when a user requested information. Aggregators, such as Bidder's Edge, often prefer to search *in advance* of any particular user queries and to compile the data on their own servers. From the web-surfer's perspective, the on-the-fly method provides the most current information, while the 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. Regardless of the search method, the original vendor profits from any sale that transpires; however, the consumer may determine from the aggregator's comparative information that particular vendors' sales are not in their best interest.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* Although it was appealed, the case was ultimately settled—so there was no federal appellate review of *eBay*, or, indeed, of any of the these three spidering cases.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* The potential harm was found in the (unproven) possibility that other data aggregators would also search eBay's website, and that taken as a group they would burden eBay's servers.

<sup>92</sup> 2000 WL 525390 (C.D. Cal., Mar. 27, 2000) and 2000 WL 1887522 (C.D. Cal., Aug. 10, 2000).

Tickets.com used a spider to gather event locations and times from TicketMaster and other ticket vendors.<sup>94</sup> Tickets.com then reformatted the data and stored it in a local database along with links to all available vendors, including both TicketMaster and Tickets.com.<sup>95</sup> TicketMaster took issue with both the spidering and the linking, and alleged trespass to chattels and copyright infringement.<sup>96</sup> The court made two decisions. In the first decision issued in *TicketMaster*, the court analyzed the same questions that *eBay* did, but arrived at a different conclusion. The court noted some concern with creating a backdoor intellectual property right,<sup>97</sup> and credited the alleged harms as not substantial. The court later reconsidered the matter in light of *eBay* in a second decision issued shortly after *eBay*.<sup>98</sup> In this second decision, the court factually distinguished *TicketMaster* without directly contradicting *eBay*, but its reasoning would be applicable to *eBay*. *TicketMaster* is, to date, the only case in which a property-owner has been unsuccessful on the merits of the claim, albeit only on a preliminary injunction motion as of yet.<sup>99</sup>

### ***C. Register.com v. Verio***<sup>100</sup>

Shortly after the *eBay* and *TicketMaster* cases, *Register.com v. Verio* was decided on the same principles in the Southern District of New York.<sup>101</sup> Register.com, an ISP,

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<sup>93</sup> *Id.* There were two opinions issued; the first opinion in March denied a preliminary injunction. The second opinion, issued in August, reconsidered the issue in light of *eBay* but affirmed.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* In *TicketMaster* as in many of these cases the plaintiffs allege many causes of action to see which will stick; only those relevant to the present discussion are listed.

<sup>97</sup> *TicketMaster I.*

<sup>98</sup> *TicketMaster II*, 2000 WL 1887522 (8/10/00) (C.D. Cal. 2000).

<sup>99</sup> Several other spam cases involving third-party contractors or other technicalities were decided against property-owners. *See, e.g.*, *Seidl v. Greentree Mortgage*, 30 F.Supp.2d 1232 (D. Colo. 1998).

<sup>100</sup> 126 F.Supp.2d 238 (S.D. N.Y. 2000).

maintained a database of domain name registrants.<sup>102</sup> The database is accessible to the general public on the Internet.<sup>103</sup> 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 own ISP and web-hosting services, which were in direct competition with some of the same services offered by Register.com.<sup>104</sup> The court found that Register.com's terms of service did not forbid spiders, but that the lawsuit had put Verio on notice that its spiders were unwanted.<sup>105</sup> As in *eBay*, the plaintiff made some calculations of specific harms which were "thoroughly undercut" by the evidence.<sup>106</sup> 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."<sup>107</sup> The court largely relied on *eBay* and *eBay*'s references from *CompuServe*.<sup>108</sup>

#### **D. *Intel v. Hamidi***<sup>109</sup>

*A new opinion came out in mid-December from the California Appellate Court, affirming the lower court decision. This case should have a paragraph of analysis, since the lower court opinion is important to the analysis. However, it arrived too late for me to analyze it before the 21st; so, I'll send this paragraph later in the week.*

### **III. Discussion**

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<sup>101</sup> *Register.com*, 126 F.Supp.2d 238.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 249.

<sup>106</sup> *Id.* at 249.

<sup>107</sup> *Id.* at 250.

<sup>108</sup> *Id.*

<sup>109</sup> Super Ct. No. 98AS05067 (Cal. 3d App., Dec. 10, 2001), *aff'g* 1999 WL 450944 (Cal. Super., Apr. 28, 1999), *depublished*.

## A. Filling Regulatory and Doctrinal Gaps

Cyberspace trespass to chattels has allowed courts to craft remedies and injunctions to quickly and expediently deal with nuisances like spam.<sup>110</sup> Internet users and courts alike approve of results that slow down spam, which is no doubt part of the popularity of these precedents in the spam cases. Dealing with spammers has been no small accomplishment. Congress has failed to pass spam legislation for several years running,<sup>111</sup> and the courts have used trespass to chattels to step in and fill this regulatory gap.<sup>112</sup> However, the use of this doctrine is not a substitute for a properly-crafted legislative response to spam, which would consider the rights of all parties and the public interest.<sup>113</sup>

The movement of trespass to chattels into regulating spiders is a somewhat more complex picture. There are greater benefits to the public from the activity of spiders, and fewer detrimental effects to the public or to the property-owner. In *TicketMaster* and *eBay*, for instance, the spiders arguably provided a useful service to the public, by

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<sup>110</sup> In addition to the cases we have already seen, one can imagine other situations in which trespass to chattels might lie for computer damage. See, e.g., Burk, *supra* note 37—someone using your computer without permission and actually damaging it, hacking in some way that is not covered by Computer Fraud & Abuse Act, for instance.

<sup>111</sup> See discussion of spam, *supra* Part I.A.2.

<sup>112</sup> On the other hand, it is not at all clear that this gap *needed* to be filled. Although the court in *CyberPromotions v. AOL* noted that spam, if unchecked, could destroy the Internet, spam has remained largely unchecked, and the Internet arguably has not been destroyed as a result.

<sup>113</sup> Specifically, First Amendment rights are implicated in regulation of spam. While *CyberPromotions v. AOL* (1996) examined the First Amendment question, its analysis seems out of date and the issue could in any case profit from a thorough legislative examination. See Kelin, *supra* note 17, for discussion of state legislative responses, ultimately recommending that federal legislation is needed. It is also worth noting that legislation in many situations has been spurred by courts refusing to stretch laws and doctrines too far. See, e.g., *U.S. v. LaMacchia*, 871 F.Supp. 535 (D.Mass. 1994), where the court's refusal to find the defendant guilty of wire fraud prompted Congress to pass the "No Electronic Theft Act." H.R. Rep. No. 339 (1997), available in 1997 WL 664424. In this respect, the use of trespass to chattels in the spam cases may actually have delayed an effective legislative response to spam by providing an easy, if problematic, solution for ISPs.

aggregating data from multiple services and providing cost-comparison information to consumers.<sup>114</sup>

While the benefits are greater, the harms from spider activity seem to be fewer. The harms recited in *eBay*, *Register.com*, and *TicketMaster* have all been vague and attenuated, or even disproved.<sup>115</sup> And while it is certainly conceivable that a spider might overburden a server or even crash it,<sup>116</sup> other theories already provide remedies for nuisance-like behavior, even on the Internet.<sup>117</sup> So it is not clear that trespass to chattels fills a useful regulatory gap for spider-activity.<sup>118</sup>

Finally, the practical effect of using trespass to chattels to selectively prevent spider activity is to carve out a rather strict form of property protection for property-owners. This strict property protection affords a new form of intellectual property protection for databases and collections of facts which would not otherwise be protected

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<sup>114</sup> *eBay v. Bidder's Edge*, Amicus curiae brief of 28 law professors, available at <http://www.gseis.ucla.edu/iclp/ebay-ml>, last visited 12/21/2001.

<sup>115</sup> This was true to some extent in the spam cases below. See Part III.B.3. *infra*.

<sup>116</sup> For instance, MySimon had received numerous complaints about the methods that its spiders employed in searching servers. Conversation with a former MySimon employee, 11/2001. A case was brought against MySimon but was settled before any judgments issued.

<sup>117</sup> See Burk, *supra* note 37, for a discussion of why trespass to chattels is so inappropriate and comparing it to other theories, specifically proposing a theory of cyber nuisance.

<sup>118</sup> In fact, the Restatement specifically notes that not all interferences with chattel property have an action. "Use of force"—private action, in other words—is the appropriate remedy for interferences that are not actionable. See *infra*. note. 51. On the Internet, a variety of technical means are available as private action against spiders, spammers and others: IP blocking, use of the afore-mentioned robots.txt standard, programming servers to prioritize particular types of uses, allowing users to easily deploy spam-filters, and even simple methods such as establishing password-access to databases. Part of the complaint in *eBay*, *Register.com*, and the spam cases has been that the technical means employed (IP blocking and use of robots.txt) have failed. This is of course par for the course with Internet technology—a constant race. Having to constantly deploy new technical methods for keeping ahead, however, should not be considered the sort of harm for which court remedies are in order. Moreover, the existence of alternative technical means which were not explored by the courts or attempted by the property-owners makes the granting of relief on the grounds that all available technical means failed problematic.

by copyright.<sup>119</sup> The court in *TicketMaster*, finding no trespass to chattels, explicitly stated that there were concerns about creating “backdoor” copyright protection.

## **B. Doctrinal Evolution**

### **1. Novel Chattels**

Cyberspace trespass to chattels cases have assumed that computers, electronic networks, and computer processing power are chattels. While computers are undoubtedly chattels, it is questionable whether electronic networks and computer process power also qualify as chattel property.<sup>120</sup> While it may make sense to consider the processing power of one’s chattel as some form of personal property,<sup>121</sup> it is unclear what sorts of protection this sort of property requires, especially in light of the ways that this personal property is used by owners and others on the Internet. Computer owners may want to ensure that the processing power is available for their own purposes, that it functions fully, and that there is no risk of anybody else making property claims on that processing power.<sup>122</sup> The trespass to chattels doctrine, designed to ensure that a single, indivisible piece of tangible property is available to its owner, might not be suitable in this situation.<sup>123</sup> Furthermore, if processing power and network connection are a form of

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<sup>119</sup> In fact, eBay has lobbied Congress to craft new legislation protecting databases and effectively overruling *Feist*, which held that collections of fact cannot be protected by copyright. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1281 (1991). While such legislation would be in line with protections recently granted in Europe, it is questionable whether it would actually be Constitutionally permissible. See Pamela Samuelson and Kurt Opsahl, *How Tensions Between Intellectual Property Policy and UCITA Are Likely To Be Resolved*, 570 PLI/PAT 741 (1999) and Burk, *supra* note 37, for discussion of the ways in which trespass to chattels is being employed effectively as a new form of intellectual property.

<sup>120</sup> Chattel property traditionally has been items that can be literally picked up and carried away, such as food, furniture, clothing, or animals (including enslaved humans).

<sup>121</sup> See Melvin Albritton, *Swatting Spiders: An Analysis of Spider Activity on the Internet*, 3 TUL. J. TECH. & INTEL. PROP. 137 (2001), arguing that computer processing should be treated as a form of chattel.

<sup>122</sup> For instance, computer owners would want to be able to prevent members of the public from establishing easements on their property.

<sup>123</sup> Computer processing power is inherently divisible, and computers used as servers are designed to facilitate multiple tasks and multiple processes.

chattel, what affect does allowing public access via the Internet have on the owner's rights?<sup>124</sup> And what rights does the public gain as a result?

Finally, the question of whose chattel property is being trespassed has also not been adequately addressed. In *CompuServe* and the spam cases, it seems apparent that the real harms are suffered incrementally by the individual users, who, after all, pay the ISP for their email accounts, in effect renting access to the ISP's processing power and disk space. To the extent that spammers are trespassing, they are in some sense trespassing against the individual users, not the ISPs.

## 2. Novel Trespasses

The new cyberspace trespass to chattels has married the doctrines of trespass to land and trespass to chattels, blurring the traditional boundaries between them. The land formulation of trespass is a strict formulation, with no harm requirement, that protects the owner's interest in inviolability.<sup>125</sup> Traditionally, trespass to chattels required an actual physical trespass, and intangible impacts have not generally qualified as trespass to chattels.<sup>126</sup> However, beginning with *Thrifty-Tel's* recognition of electronic signals as a trespass, the trespasses recognized in cyberspace trespass to chattels eliminate the need for a physical trespass and recognize intangibles—electrons—as adequate. This blurs the boundary between trespass to chattels and trespass to land, and it also blurs the boundary between trespass to land and nuisance.<sup>127</sup> As doctrinal boundaries blur, the historic balances between owner's interests and the public interest shift.

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<sup>124</sup> In the context of computer processing power, it is interesting to consider whether using, without permission, the labor of someone else's horse would have been considered a *trespass*. To carry that examination further, if the horse were being generally used to give rides to any and all comers, would taking a ride under a false name be considered a *trespass*?

<sup>125</sup> See *supra* Part I.B.

<sup>126</sup> *Id.*

<sup>127</sup> Burk, *supra* note 37.

### 3. Novel Harms

As the cyberspace trespass to chattels doctrine has evolved, the requirement for harm has virtually disappeared, allowing vague, attenuated and indirect harms. While the chattel that was allegedly trespassed in each case was the *server*—the actual computer—the harms alleged and considered have rarely been to the server. In *eBay*, the court rejected as unproven all of the harms to the server that were alleged, and instead found a *potential* harm by aggregating the effect of multiple actors.<sup>128</sup> In the more recent *Intel*, the court ruled that the alleged psychological distress suffered by employees from reading the email constituted harm to the server.<sup>129</sup> Other harms allowed by courts have included the time wasted by employees<sup>130</sup>—surely a novel form of property in the twentieth century—and loss of corporate good-will.<sup>131</sup> The actual harm that spam or spiders cause servers has rarely been calculated as a quantity or percentage of computer resources lost.<sup>132</sup> This may be because it is difficult to measure, or, if measured, would seem insignificant or slight. Where use of available computer resources was alleged, it has rarely been found sufficient to constitute “harm.”<sup>133</sup> However, the further removed the doctrine becomes from a harm requirement, the more the doctrine becomes an absolute propertarian right without balance.

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<sup>128</sup> *eBay*, 100 F.Supp.2d 1058. And, as some commentators have noted, the harm was not only potential, it was speculative—it’s questionable whether the market would support dozens of Internet auction site aggregators in the real world. See Elkin-Koren, *supra* note 11.

<sup>129</sup> *Intel*, *supra* note 1.

<sup>130</sup> See *Id.* and the spam cases generally.

<sup>131</sup> This was true in the spam cases generally; see *supra* Part I.B.3.

<sup>132</sup> Of the dozen cases so far, the harm to the server has been calculated by the court in two: *AOL v. Christian Brothers* and *CompuServe*. Although the *eBay* plaintiffs and defendants helpfully tried to calculate it for the court, the court did not allow those harms, finding the numbers too questionable.

<sup>133</sup> *eBay*, 100 F.Supp.2d 1058.

Even where specific harm in the use of computer resources is alleged, it is questionable whether the alleged actual harms should constitute harm to the chattel.<sup>134</sup> The alleged harms are, after all, the use *as intended* of computer resources, such as computer cycles, throughput, memory, and disk space. It does seem that there should be some redress for the property owner whose server is noticeably affected by an excessive usage. The value of the server to the owner is lessened if the server is not functional, as Judge Whyte observed in *eBay*.<sup>135</sup> Perhaps the common law tort of private nuisance offers a better alternative for those kinds of situations.<sup>136</sup> However, the real difficulty lies in the current judicial lack of a conception of what the owner's interests might be and what therefore might constitute harm to those interests. By default, courts have assumed that the owner's interest is absolute inviolability; thus, the owner merely has to withdraw permission for a use to be deemed harmful.

#### **4. Without Traditional Restraints, the Doctrine Is Malleable**

By uprooting the doctrine from its traditional restraints, trespass to chattels has become completely malleable and able to fit any and all situations for the property-owner. With trespasses as they have now been defined, and without a harm requirement, it would be difficult to conceive of anything that might *not* constitute a trespass; trespass

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<sup>134</sup> Dan Burk, for instance, points out that the chattel are not harmed in terms of sale value: a computer that had been trespassed would not have a lesser value at sale than a computer that had not been trespassed. Burk, *supra* note 37. However, other sorts of values are captured by the trespass to chattels doctrine. For example, even though my sweater is not going to be less valuable just because a third party wears it, does not mean that I have no right to prevent the third-party from wearing it. The right does not inhere solely in the *lost value*.

<sup>135</sup> *eBay*, 100 F.Supp.2d 1058.

<sup>136</sup> Burk, *supra* note 37.

is effectively defined purely at the owner's will and can encompass almost any other kind of act.<sup>137</sup>

### **C. Background Assumptions of the Cyberspace Trespass to Chattels**

It is worth examining some of the background assumptions displayed in the cyberspace trespass to chattels cases. First, and most obviously is the assumption held by the property owners and most of the courts: that property ownership is absolute. This assumption, in cyberspace, fails to distinguish between the *real property or land*, and *personal property or chattel*. By applying, without discussion, the stricter form of property protection traditionally granted to land, courts avoid analysis of both the rationales behind that strict property protection, and the carefully-crafted policy compromises that have modified those strict property protections.<sup>138</sup>

Second, courts seem to have operated under the assumption that for every problem there lies a legal remedy. Spam is a nuisance, and courts have—perhaps rightly—felt that something should be done about it. Complaints about spammers, trouble-makers, and perceived “free-riders,” have appealed to courts’ sense of fair play. Courts have responded to this sense of urgency in these cases, issuing preliminary and permanent injunctions despite harms that were vague, indirect, tenuous or completely nonexistent.

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<sup>137</sup> In fact, one commentator seemed to think this was a good thing, and that courts should just be up-front in applying trespass to land doctrine to computers. *See* Ballantine, *supra* note 57. 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. Other commentators have advocated strong property rights for website owners without going so far as to advocate a trespass to land-style regime. *See* I. Trotter Hardy, The Ancient Doctrine of Trespass to Web Sites, 1996 J. Online L. art. 7 (1996).

Finally, the alleged trespassers have argued that the property owners, by connecting their servers to the Internet, have necessarily opened themselves up to certain kinds of interactions.<sup>139</sup> These arguments have been little heeded, but arguably they are the working assumption for many Internet users. This is the sense that the Internet is a cooperative venture. There is a fear that if some portion of the Internet is walled off it will make it easier to wall off other portions. 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.<sup>140</sup> Judge Whyte acknowledged these fears briefly in *eBay*, noting that both sides argue as if they must win or it will be the end of the Internet.<sup>141</sup> Courts have preferred to work within the familiar realm of property law, but the extent to which “property” is a proper fit for the communications that take place on the Internet should be given more thorough consideration in the courts.

#### **IV. Conclusion**

Trespass to chattels, although it has met some of the stop-gap needs of ISPs and generated some intriguing opinion and scholarship on the theory of property, is not the right common law approach for dealing with the problems caused by non-permissive communications. Relaxing the doctrine of trespass to chattels from its traditional restraints has eliminated any way to limit it. The spidering and non-commercial email cases which have pushed trespass to chattels doctrine beyond spam—*Intel*, *eBay*,

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<sup>138</sup> See Maureen A. O'Rourke, Property Rights and Competition on the Internet: In Search of an Appropriate Analogy, 16 Berkeley Tech. L.J. 561 (2001), for more on whether property and trespass to chattels are the appropriate analogies.

<sup>139</sup> See, e.g., *Intel v. Hamidi* amicus briefs; *AOL v. CyberPromotions* second opinion (denying motion for reconsideration), and especially the spidering cases.

<sup>140</sup> See also Burk, *supra* note 37.

<sup>141</sup> *eBay*, 100 F.Supp.2d 1058.

*TicketMaster* and *Register.com*—clearly demonstrate some of the risks in the application to cyberspace of trespass to chattels doctrine. Courts considering similar cases should be cautious when applying this doctrine, and should consider other appropriate common law or statutory remedies.