

# California Spammin': Opening the E-mail Spigot

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A sharply divided California Supreme Court recently entered the fray over unwanted and unsolicited e-mails, and in the process issued a nearly unlimited license to send unsolicited and unwanted noncommercial e-mails.

In *Intel Corp. v. Hamidi*, the court held that even when the owner of an e-mail system has expressly told a sender of unwanted, noncommercial e-mails to knock it off, and even when the unwanted e-mails indisputably caused economic harm to the property owner (albeit not physical harm to the e-mail system itself), the e-mail sender did not commit an unlawful trespass by continuing the bombardment. This decision has potentially broad-ranging ramifications, and may further magnify the problem of unwanted and unsolicited e-mails.

What to do about such e-mails is one of the unresolved issues on the cyberspace frontier. Although most states have adopted legislation providing at least some restrictions on unsolicited commercial e-mails, these state statutes generally ignore noncommercial e-mails, even though such e-mails can be very problematic (e.g., racially or sexually offensive jokes), particularly in the workplace setting, where employers strive to provide a harassment-free environment.

One potential remedy for unwanted e-mails is the old common law tort of trespass to chattels, and some courts have applied this tort in the context of unwanted e-mails. After all, most people would assume that if the owner of an e-mail system tells a sender of unwanted e-mails to stop, and the instruction is ignored, the owner ought to have a remedy.

The court in *Intel* however, held that trespass to chattels is not the appropriate remedy in this circumstance. A former Intel employee had sent mass e-mails to as many as 35,000 Intel

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employees at their workplace e-mail addresses, even after Intel told him to stop. Intel turned to the judicial system for relief, ultimately proceeding on a trespass-to-chattels claim. To establish harm and a basis for injunctive relief, Intel stressed the loss of employee productivity it suffered resulting from 48,000 to 210,000 e-mails.

Although one of the concurring justices expressed sympathy for Intel, by a 4-3 vote the court concluded that Intel did not have a claim for trespass to chattels because it did not show that the e-mails caused physical damage or functional disruption to Intel's e-mail system, or somehow deprived Intel of its use.

In so ruling, the court set the burden too high. As one of the dissenting justices, Janice R. Brown noted, the majority's decision seemingly provides a right to spray-paint political graffiti on the bumper of an opposing candidate's vehicle, so long as the spray paint is water-soluble.

### Less value after intrusions

The majority concluded that no harm was done to Intel's computer system. But this ignored the negative economic consequences of mass unwanted e-mails. Such a harm ought to be sufficient to support a trespass-to-chattels claim, as well as a means of distinguishing the *Intel* scenario from a few unwanted phone calls. As discussed in the Second Restatement of Torts, "[t]here may...be situations in which the value to the owner of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition?... In such a case, the intermeddling is actionable even though the physical condition of the chattel is not impaired."

As an example, the restatement mentions the value of one's toothbrush after it has been used by another. It has suffered no physical harm, but it will never again have the same value. So, too, with an e-mail system vulnerable to repeated waves of mass unwanted e-mails.

The restatement also points out that a person commits an actionable trespass to chattels if, by his trespass, he "causes harm to any person in whom the possessor of the chattel has a legally protected interest." Employers have a legally protected interest in their relations with their employees; for example, one cannot tortiously interfere with that relationship. An unwanted e-mail sent to an employee's workplace e-mail address that causes harm to that employee (e.g., by wasting the employee's time, or causing anger or fear (in the case of a harassing e-mail)) should satisfy the restatement's definition of harm.

Even if the existing common law tort of trespass to chattels is not broad enough to encompass the wrong suffered by Intel, then perhaps this is one of those situations where the common law needs to evolve to meet the challenge of a new technology.

One justice in the majority, Joyce L. Kennard, invited a legislative solution that would balance the competing interests at stake. But in the meantime, an otherwise viable common law remedy has been declawed in California.

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