

No. S103781

**IN THE**

**SUPREME COURT OF CALIFORNIA**

INTEL CORPORATION	)	Court of Appeal No.
Plaintiff/Respondent	)	C033076
	)	
v.	)	Superior Court No.
	)	98-AS-05067
KOUROSH KENNETH HAMIDI	)	(Hon. John R. Lewis,
Defendant/Appellant	)	Judge Presiding)

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**BRIEF OF *AMICI CURIAE***  
**PROFESSORS OF INTELLECTUAL PROPERTY**  
**AND COMPUTER LAW,**  
**SUPPORTING REVERSAL**

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## **APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE***

Pursuant to California Rule of Court 29.3(c), the undersigned, 41 professors of intellectual property and computer law at universities throughout the country, request leave to file the attached brief as *amici curiae* in support of defendant Hamidi. This application is timely made.

The parties to this brief are professors of intellectual property and computer law. We have a special interest and expertise in Internet law. The brief is filed on our own behalf, and should not be attributed to the institutions by which we are employed. We have no financial interest in the outcome, and do not represent any party. But we are all interested in the proper development of legal rules relating to the Internet. The case is of great public importance to the continued development of the Internet. We believe that the Court of Appeal's decision—effectively creating a new tort, “trespass to computer server”—flies in the face of established California law, throws the legality of core Internet activities into question, and threatens the future economic and political development of the Internet.

We believe that additional briefing is necessary in this case in order to highlight the dramatic consequences the Court of Appeal's decision would have for the free flow of information on the Internet. Rather than focus our attention on the details of trespass law or on the First Amendment problems with the Court of Appeal's decision, as the parties will do, we emphasize the effect the new tort of trespass to

computer server will have on the economic and political role of the Internet in daily life.

Accordingly, we respectfully request that the Court accept and file the attached amicus brief.

Respectfully submitted,

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## ARGUMENT

The undersigned, professors of intellectual property and computer law at Universities throughout the country, write to encourage this Court to reverse the Court of Appeal's decision in *Intel Corp. v. Hamidi*, 94 Cal. App. 4th 325, 114 Cal. Rptr. 2d 244 (Ct. App. 2001). We have no financial interest in the outcome, and do not represent any party. But we are all interested in the proper development of legal rules relating to the Internet. The case is of great public importance to the continued development of the Internet. The Court of Appeal's decision flies in the face of established California law and threatens the future economic and political development of the Internet.

### **I. The Court of Appeal Has Radically Rewritten the Law of Trespass to Chattels.**

The Court of Appeal decided that the doctrine of trespass to chattels no longer requires proof of actual injury to the chattel. Removing the actual injury requirement from this ancient doctrine is not a gentle stretch, as the court suggests, but rather a radical break with precedent. In the absence of injury to the chattel, the court found sufficient harm in evidence that Intel's employees read the emails in question and were thereby distracted from their job. Both decisions are simply unprecedented in California law, or indeed in the law of any other state.

The law of trespass has always distinguished between trespass to real property and trespass to chattels. Trespass to real property was considered a more serious offense at common law than trespass to chattels, and the law accordingly dispensed with any requirement that the property owner prove actual injury to the property in question. By contrast, the tort of trespass to chattels has always required proof of demonstrable injury to the chattel in question, or to the owner's ability to use the chattel, in order to state a cause of action. As the Restatement (Second) of Torts makes clear,

[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 . . . in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time.

Restatement (Second) of Torts, § 218 cmt. e (1977).

The court's reasoning for departing from this long-standing legal principle relies on a theory of "inviolability" of property that has never been the rule for personal property—and certainly not for information. The Court of Appeal's error in this respect is well-documented by Justice Kolkey's dissenting opinion. *See* 114 Cal. Rptr. 2d at 258. Indeed, the requirement of injury is even clearer in the few cases that deal, as *Intel* does, with intangible "trespass" rather than physical contact. Where the "trespass" is by something other than physical contact, the requirement of injury is crucial because of

the multitude of intangible things that might come into “contact” with a chattel. As previously applied by California courts to the Internet, trespass to chattels “lies where an intentional interference with the possession of personal property has proximately caused injury.” *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1566 (1996). The Restatement clearly speaks of injury *to the chattel*, not some other sort of indirect harm.

No such harm has been found in this case. Intel’s servers did not suffer any physical, economic, or other loss by virtue of Hamidi’s email. Its servers did not crash. They were not rendered unavailable to Intel employees. Nor can the requirement of injury be satisfied by evidence that Intel employees paid attention to Hamidi’s email, and were thereby distracted from their tasks. Such distraction is not an injury to the server itself, or even to the server’s ability to process data. *See* Dan L. Burk, *The Trouble With Trespass*, 4 J. Small & Emerging Bus. L. 27, 36 (2000) (describing the court’s reasoning in allowing employee distraction to qualify as injury to the chattel as “absurd”). The evidence in the case is uncontroverted: Intel’s computers were in no way damaged or even slowed down by the minuscule amount of data Hamidi sent to Intel. By allowing evidence of employee distraction to qualify as injury to the server, the Court of Appeal has further loosed the doctrine of trespass to chattels from its conceptual moorings.

Absent the requirement of actual harm to the chattel itself, the doctrine of trespass to chattels takes on absurdly broad dimensions. Sending paper junk mail would trespass on the recipient’s mailbox, since the recipient must take time to read and discard it. Telephone

solicitations would trespass on the recipient's telephone or answering machine, since they take up both time on the phone and space on the answering machine tape. Broadcasting undesired radio or television signals would trespass on the recipient's radio or television set, both distracting attention and taking up bandwidth that could otherwise be put to more valuable uses.

We do not suggest that such claims will become the norm anytime soon. But the fact that they would be actionable under the Court of Appeal's decision highlights the extent to which the court created an entirely new tort out of whole cloth. Indeed, the majority seemed to acknowledge that it was departing from existing law, discoursing at length on the power of the courts to modify common law doctrine. It is of course the duty of the courts to adapt the common law to new circumstances. But the Court of Appeal did not simply adapt an existing doctrine to new circumstances. It created a new tort—trespass to server—that differs in its substantive elements from the trespass to chattels doctrine that came before it.

Creating such a new tort is normally a matter best left to the legislature, a body that has wisely shown no inclination to do any such thing. Deference to the legislature is particularly appropriate in this case. The cases before *Intel* in which other courts have applied the doctrine of trespass to chattels to the Internet have involved “spam” (unsolicited commercial bulk email) or unauthorized access to Web sites. See, e.g., *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (automated access to Web page that threatened capacity of the server); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (spam that congested plaintiff’s

servers). California has enacted specific, targeted laws to deal with spam and computer hacking. *See* Cal. Bus. & Prof. Code § 17538.4 (outlawing spam); Cal. Penal Code § 502 (outlawing computer hacking). Where the legislature has chosen to tackle a complex new problem by passing new laws limited to particular circumstances, it would be unwise for this Court to sweep aside those limits by endorsing a new tort that would make illegal virtually any communication with an unwilling recipient. *Cf.* Burk, *supra*, at 47 (the elements of this new tort “are readily found in almost any online activity; the cause of action might better be named ‘using a networked computer.’”).

There is no need for the court to create a new tort taken from the realm of real property and applied to the Internet. But even if the court concludes that it must apply common law principles of real and personal property to the Internet, notwithstanding the legislature’s actions, trespass is the wrong tort to apply. Real property is protected by two different common law rules of exclusion. The doctrine of trespass protects owners against physical intrusions onto the land, which are actionable regardless of the defendant’s interests. But intangible interferences with the use and enjoyment of property—such as the playing of loud music next door or the emission of pollutants—are treated under the doctrine of nuisance. Nuisances may be enjoined only if the harm they cause the property owner exceeds the benefits associated with the conduct. The nuisance cases permit the court to focus on the defendant’s conduct, and the costs and benefits of exclusion—the right approach when considering the creation of a fundamentally new right that would change the balance of rights and

established patterns of behavior on the Internet.<sup>1</sup> Between trespass and nuisance, nuisance is a better choice.

## **II. The Court of Appeal's New Tort is Overly Broad and Threatens the Fabric of the Internet.**

Although the Internet shares some characteristics with physical space, that fact does not impel the law inexorably towards an absolute right of exclusion from Internet “space.” Rather, the Court should ask whether, in the context of the Internet, the defendant’s conduct is one that intrudes on some fundamental right we as a society want to confer on the owner of a Web server. Even if this Court decides that the Court of Appeal had the power to rewrite the common law in this way, it must still assess the wisdom of doing so. And the Court of Appeal's decision is manifestly bad public policy. Indeed, the court's decision is a threat to the fabric of the Internet itself.

Prior cases that have sought to apply the doctrine of trespass to chattels to the Internet have done so in circumstances in which there was arguably harm to the server itself, or its ability to process data. Thus, it seems perfectly reasonable to prohibit so-called “denial of service” attacks by hackers, in which the hacker shuts down a Web site by deliberately sending massive amounts of meaningless data to

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<sup>1</sup> See Burk, *supra*; cf. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 394-95 (2001) (nuisance is the appropriate doctrine for new types of intrusion on property).

the site.<sup>2</sup> Similarly, an argument can be made that "spammers" who send so many emails to a single Internet service provider (ISP) that they prevent it from performing its function have unlawfully interfered with the ISP's ability to use its own server.<sup>3</sup>

Decisions that accept less evidence of harm are far more problematic. For instance, the district court's decision in *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000),<sup>4</sup> which barred an auction price comparison site from checking eBay's auction listings in order to report how they compared with competitors, seemingly accepted an argument about injury similar to the one adopted by the Court of Appeal. The *eBay* decision has been roundly and justly criticized. *See, e.g.*, Maureen O'Rourke, *Property Rights and Competition on the Internet: In Search of An Appropriate Analogy*, 16 Berkeley Tech. L.J. 561 (2001); Maureen O'Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 Vand. L. Rev. 1965 (2000); Laura Quilter, Note, *The Continuing Expansion of Cyberspace Trespass to Chattels*, 17 Berkeley Tech. L.J. 421 (2002). *cf.* Dan L. Burk, *The Trouble With Trespass*, 4 J. Small & Emerging Bus. L. 27 (2000).

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<sup>2</sup> There is no need for a doctrine of trespass to chattels to resolve such a case, however, since it seems clear that denial of service attacks violate both federal and state computer crime laws. Computer Fraud and Abuse Act, 18 U.S.C. § 1030; Cal. Penal Code § 502.

<sup>3</sup> Again, however, it does not necessarily follow that the doctrine of trespass to chattels provides the answer. A number of states, including California, have passed statutes targeted specifically at spam. *See, e.g.*, Cal. Bus. & Prof. Code § 17538.4.

<sup>4</sup> The case settled while on appeal, producing no appellate guidance.

The Court of Appeal's decision to extend the right to control access to a server that has been opened to the public without regard to actual injury to that server has broad implications for the Internet's functionality. The decision raises troubling questions about the legality of the fundamental building blocks of the Internet such as links, search engines, crawlers, and basic email. As such, the decision threatens the tools that support communication and commerce on the Internet. The single most basic characteristic of the World Wide Web is one Web site's ability to link to another, and users' ability to follow those links. Under the Court of Appeal's rationale, linking would now seem to exist at the sufferance of the linked-to party, because a Web user who followed a "disapproved" link would be trespassing on the plaintiff's server, just as sending an email is trespass under the court's theory.

The Court of Appeal's decision also threatens the legality of search engines, one of the fundamental building blocks of the Internet. Search engines are the primary Internet navigation tool. They allow individuals to efficiently search the more than three billion documents currently on the World Wide Web. Search engines rely on "spiders"—automated software robots that "crawl" through the Web indexing the content they find.<sup>5</sup> Through the purely automated process of

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<sup>5</sup> Search engines are critical to the effective use of the Internet. The Internet has multiple sources of information at the back end (hundreds of millions of Web pages), but only one means of accessing that information at the front end (the consumer's computer screen). Further, the Internet is a medium where information transmission is predominantly of the "pull" type: servers on the Internet are passive and do not deliver information to a consumer's computer unless that information is requested. Unless consumers have reliable means to

“spidering,” search engines compile an “index” much like a card catalog in a library, which, when queried by a user, returns corresponding web pages, commonly called “hits.” When the user selects a reference by clicking on the associated link, she is directed to the corresponding web page.

Under the Court of Appeal’s decision, most search engines would seem to be engaged in illegal activity. At best, they now exist only at the collective sufferance of millions of Web site owners. The process of creating the searchable index (“crawling”) and of sending users to an indexed site (“linking”) are now potentially actionable by the owner of any Web page or server. Any of the billion of pages can prevent indexing, or (more likely) control the terms of that indexing. While many companies will want their public pages to appear in search engines, others may not.<sup>6</sup> Alternatively, and more likely, sites may insist upon selective or preferential indexing. Web sites might cut exclusive deals with one search engine, and refuse access to the rest. They may demand preferential treatment from search engines, so that their pages appear above anyone else’s. They may want their pages to appear to certain individuals but not others. If permission

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search through the immense number of passive servers quickly, easily, and independently, many consumers will not be able to find the information that would be most useful to them. To provide impartial, accurate and timely information, search engines, shop bots, and other data tools must access and centralize information that already exists on other Web servers, but which is too distributed to be of practical use to the consumer who cannot possibly locate all of the information herself.

from the owner of each and every Web page or server is a prerequisite for indexing and linking, Internet users will lose the central means of navigating the vast information on the Internet, and development of new navigation tools will grind to a halt.

Similarly, under the court's decision, sending emails requires permission from potentially *all* the servers a message will traverse. In this case, users actually at Intel were the end recipients of the messages. Yet with the actual injury requirement removed there is nothing to preclude a mere conduit of a message from bringing a similar action alleging that certain messages distracted its employees or led indirectly to harm to another interest. Requiring permission to send emails has dire implications for free speech as well as electronic commerce. The court has given Intel—and every owner of a computer—the stunning power to determine in advance to which bits of information it and its employees can be exposed.

The Internet simply doesn't work this way. Every transaction involves bits of data going to and from computers at both ends of the transaction, and across numerous intermediate computers. Search engines must send bits of information in order to catalog the Internet. Price comparison sites must send bits of information in order to check prices and the availability of goods. Individuals must send bits of information to public Web sites in order to view the sites themselves. Companies or individuals who link to a Web page must send bits of information to test the links, and of course anyone who follows the

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<sup>6</sup> A number of Web site owners have indeed attempted to assert such control, suing to prevent links to their content, as we discuss in section III.B *infra*.

link is sending bits of information to the Web page at the other end. And everyone must send bits of information in order to communicate by email. Without people sending bits of information to computers, the Internet simply can't function.<sup>7</sup>

### **III. The Court of Appeal's New Tort Threatens Free Speech and Commerce.**

The technical architecture of the Internet supports a wide range of commerce and a diverse marketplace of ideas. The court's decision places both the distribution of information and access to information at the sufferance of the millions of individuals who run servers connected to the Internet.

#### **A. The Court of Appeal's Decision Interferes with the Communication of Ideas.**

In this case, we need not rely on a "slippery slope" argument that affirmance will lead to bad consequences in the future. The Court of Appeal's decision *is* the "horrible" at the end of the "parade of horrors." Intel's suit is clearly an attempt to suppress the speech of a former employee who sent email to current Intel employees. Hamidi wanted to speak to Intel's employees on issues of social importance. Had he sent each of them a letter, there is no question that his activity would be protected by the First Amendment. *See, e.g., Bolger v.*

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<sup>7</sup> Indeed, under the Court of Appeal's decision it would appear to be illegal even to send an email to Intel asking permission to send emails to Intel employees: doing so would constitute a "use" of Intel's server under the court's sweeping logic.

*Youngs Drugs Prods. Corp.*, 463 U.S. 60, 72 (1983). Intel could not enforce a law banning junk mail by pointing out that Hamidi would be wasting its employees' time. As the U.S. Supreme Court explained in *Bolger*,

[W]e have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended. The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." Recipients of objectionable mailings, however, may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." Consequently, the "short, though regular, journey from mail box to trash can ... is an acceptable burden, at least so far as the Constitution is concerned."

*Id.* (citations omitted). By setting up a contrary rule for the Internet, the Court of Appeal's decision threatens to stifle the free and robust exchange of information that has become the celebrated hallmark of the Internet.<sup>8</sup>

Under the Court of Appeal's decision, each of the hundreds of millions of users must get permission in advance from anyone with whom they want to communicate and anyone who owns a server through which their message may travel. The fact that no one gets such permission now only points up how dramatically at odds the decision is with common practice. This Court should think long and hard before creating a new tort that makes hundreds of millions of

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<sup>8</sup> See, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997): "[The Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers."

people into potential lawbreakers merely for doing what they do every day.

**B. The Court of Appeal's Decision Interferes with the Collection of Data Necessary for a Competitive Marketplace.**

The breadth of the Court of Appeal's holding also poses a serious threat to commerce on the Internet. By concluding that any information sent to a server is illegal so long as someone, somewhere, is injured by it, the court has put in jeopardy a wide range of activity heretofore legal. On the court's theory, every ecommerce site in the country can prevent shop bots, price comparison sites, or critical review sites like *Consumer Reports* from accessing their Web pages or using the information they find there.<sup>9</sup> This is not just an idle academic concern. eBay did precisely this in its suit against an auction aggregator, Bidder's Edge. MySimon, itself an aggregator collecting price and shopping information, sued to block priceman.com from collecting data about products and prices from the mySimon site.

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<sup>9</sup> Established online merchants have a substantial incentive to use the doctrine of trespass to interfere with the flow of price and product information on the Internet. The Court of Appeal's decision places the flow of information within their control, as it allows them to circumscribe the use of tools that gather information and present the results in a usable format. These tools are essential to make the process of gathering information both feasible and useful to the average consumer. Without information about online alternatives, competition on the Internet will be reduced. The Court of Appeal's opinion gives companies the power to block such a price-comparison service altogether. While the promise of ecommerce is to improve consumer information and lower transaction costs, under a trespass theory many of those benefits will disappear.

Ticketmaster, the country's largest ticket agency, has sued both Microsoft and Tickets.com in an effort to prevent that company from collecting information on entertainment events for which Ticketmaster is the exclusive provider.<sup>10</sup> In addition, a number of online music sellers have used technical means in an attempt to block access by comparison shoppers. The Court of Appeal's opinion, if allowed to stand, will give all these companies the legal power to prevent consumers from obtaining product and price information in the only effective means available to them.

If the law gives owners of publicly accessible Web sites the power to control searches, it will help create a world in which the price any given consumer finds when she searches for a book or other commodity is a function of what the searched site knows about her age, income, prior buying habits, and the like. This form of sophisticated control over competition is not possible if information about prices is freely available. But it is possible if every company on the Web can control the circumstances under which people can search for information about the company.

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<sup>10</sup> Fortunately, the district court in *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 Copyright L. Decs. ¶28,146, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000), rejected the very theory that Intel presses here. The court refused to apply California's doctrine of trespass to chattels to preclude systematic links to plaintiff's display of factual information. It distinguished *eBay* on the grounds that the servers themselves had not been harmed in *Ticketmaster*.

## CONCLUSION

The Court of Appeal's decision is unprecedented in its interpretation of California law. The new tort it has created is dangerous to the Internet, to electronic commerce and to free speech. This is an important case, and the Court of Appeal got it wrong in almost every particular. We urge this Court to reverse.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation of the California Rules of Court Rule 14(c)(1).

Exclusive of the exempted portions in California Rules of Court Rule 14(c)(3), the brief contains 4249 words.

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## PROOF OF SERVICE

I, Rhamon Serbellon, certify and declare as follows:

I am over the age of 18 years, not a party to this cause, and employed in the county where the mailing took place. My business address is Center for Clinical Education, University of California at Berkeley School of Law (Boalt Hall), 396 Simon Hall, Berkeley, CA 94720-7200, which is located in Alameda County.

On July 26, 2002, I served the following document(s):

**BRIEF *AMICI CURIAE* OF PROFESSORS OF INTELLECTUAL PROPERTY AND COMPUTER LAW, SUPPORTING REVERSAL**

by placing a true copy thereof in a sealed envelope and served to each party herein by delivery via express mail to:

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Dated: July 26, 2002