

B. Reasoning By Analogy as Applied to the Internet

EBAY, INC. v. BIDDER'S EDGE, INC.

100 F. Supp. 2d 1058 (N.D. Calif. 2000)

ORDER GRANTING PRELIMINARY INJUNCTION

WHYTE, District Judge.

For the reasons set forth below, the court preliminarily enjoins defendant Bidder's Edge, Inc. ("BE") from accessing eBay's computer systems by use of any automated querying program without eBay's written authorization.

I. BACKGROUND

eBay is an Internet-based, person-to-person trading site. eBay offers sellers the ability to list items for sale and prospective buyers the ability to search those listings and bid on items. A potential purchaser looking for a particular item can access the eBay site and perform a key word search for relevant auctions and bidding status. eBay has also created category listings that identify items in over 2500 categories. Users may browse these category listing pages to identify items of interest.

Users of the eBay site must register and agree to the eBay User Agreement. Users agree to the seven page User Agreement by clicking on an "I Accept" button located at the end of the User Agreement. The current version of the User Agreement prohibits the use of "any robot, spider, other automatic device, or manual process to monitor or copy our web pages or the content contained herein without our prior expressed written permission." It is not clear that the version of the User Agreement in effect at the time BE began searching the eBay site prohibited such activity, or that BE ever agreed to comply with the User Agreement.

eBay currently has over 7 million registered users. Over 400,000 new items are added to the site every day. Every minute, 600 bids are placed on almost 3 million items. Users currently perform, on average, 10 million searches per day on eBay's database. Bidding for and sales of items are continuously ongoing in millions of separate auctions.

A software robot is a computer program which operates across the Internet to perform searching, copying and retrieving functions on the web sites of others.¹ A software robot is capable of executing thousands of instructions per minute, far in excess of what a human can accomplish. Robots consume the processing and storage resources of a system, making that portion of the system's capacity unavailable to the system owner or other users. Consumption of sufficient system resources will slow the processing of the overall system and can overload the system such that it will malfunction or "crash." A severe malfunction can cause a loss of data and an interruption in services.

¹ Programs that recursively query other computers over the Internet in order to obtain a significant amount of information are referred to in the pleadings by various names, including software robots, robots, spiders and web crawlers.

The eBay site employs "robot exclusion headers." A robot exclusion header is a message, sent to computers programmed to detect and respond to such headers, that eBay does not permit unauthorized robotic activity. Programmers who wish to comply with the Robot Exclusion Standard design their robots to read a particular data file, "robots.txt," and to comply with the control directives it contains.

To enable computers to communicate with each other over the Internet, each is assigned a unique Internet Protocol ("IP") address. When a computer requests information from another computer over the Internet, the requesting computer must offer its IP address to the responding computer in order to allow a response to be sent. These IP addresses allow the identification of the source of incoming requests. eBay identifies robotic activity on its site by monitoring the number of incoming requests from each particular IP address. Once eBay identifies an IP address believed to be involved in robotic activity, an investigation into the identity, origin and owner of the IP address may be made in order to determine if the activity is legitimate or authorized. If an investigation reveals unauthorized robotic activity, eBay may attempt to ignore ("block") any further requests from that IP address. Attempts to block requests from particular IP addresses are not always successful.

Organizations often install "proxy server" software on their computers. Proxy server software acts as a focal point for outgoing Internet requests. Proxy servers conserve system resources by directing all outgoing and incoming data traffic through a centralized portal. Typically, organizations limit the use of their proxy servers to local users. However, some organizations, either as a public service or because of a failure properly to protect their proxy server through the use of a "firewall," allow their proxy servers to be accessed by remote users. Outgoing requests from remote users can be routed through such unprotected proxy servers and appear to originate from the proxy server. Incoming responses are then received by the proxy server and routed to the remote user. Information requests sent through such proxy servers cannot easily be traced back to the originating IP address and can be used to circumvent attempts to block queries from the originating IP address. Blocking queries from innocent third party proxy servers is both inefficient, because it creates an endless game of hide-and-seek, and potentially counterproductive, as it runs a substantial risk of blocking requests from legitimate, desirable users who use that proxy server.

BE was founded in 1997. The BE web site debuted in November 1998. BE does not host auctions. BE is an auction aggregation site designed to offer on-line auction buyers the ability to search for items across numerous on-line auctions without having to search each host site individually. As of March 2000, the BE web site contained information on more than five million items being auctioned on more than one hundred auction sites. The information available on the BE site is contained in a database of information that BE compiles through access to various auction sites such as eBay. When a user enters a search for a particular item at BE, BE searches its database and generates a list of every item responsive to the search, organized by auction closing date and time. Rather than going to each host auction site one at a time, a user who goes to BE may conduct a single search to obtain information about that item on every auction site tracked by BE. It is important to include information regarding eBay auctions on the BE site because eBay is by far the biggest consumer to consumer on-line auction site.

In early 1998, eBay gave BE permission to include information regarding eBay-hosted auctions for Beanie Babies and Furbies in the BE database. In early 1999, BE added to the number of person-to-person auction sites it covered and started covering a broader range of items hosted by those sites, including eBay. On April 24, 1999, eBay verbally approved BE crawling the eBay web site for a period of 90 days. The parties contemplated that during this period they would reach a formal licensing agreement. They were unable to do so.

It appears that the primary dispute was over the method BE uses to search the eBay database. eBay wanted BE to conduct a search of the eBay system only when the BE system was queried by a BE user. This reduces the load on the eBay system and increases the accuracy of the BE data. BE wanted to recursively crawl the eBay system to compile its own auction database. This increases the speed of BE searches and allows BE to track the auctions generally and automatically update its users when activity occurs in particular auctions, categories of auctions, or when new items are added.

In late August or early September 1999, eBay requested by telephone that BE cease posting eBay auction listings on its site. BE agreed to do so. In October 1999, BE learned that other auction aggregations sites were including information regarding eBay auctions. On November 2, 1999, BE issued a press release indicating that it had resumed including eBay auction listings on its site. On November 9, 1999, eBay sent BE a letter reasserting that BE's activities were unauthorized, insisting that BE cease accessing the eBay site, alleging that BE's activities constituted a civil trespass and offering to license BE's activities. eBay and BE were again unable to agree on licensing terms. As a result, eBay attempted to block BE from accessing the eBay site; by the end of November, 1999, eBay had blocked a total of 169 IP addresses it believed BE was using to query eBay's system. BE elected to continue crawling eBay's site by using proxy servers to evade eBay's IP blocks. Approximately 69% of the auction items contained in the BE database are from auctions hosted on eBay. BE estimates that it would lose one-third of its users if it ceased to cover the eBay auctions.

The parties agree that BE accessed the eBay site approximate 100,000 times a day. eBay alleges that BE activity constituted up to 1.53% of the number of requests received by eBay, and up to 1.10% of the total data transferred by eBay during certain periods in October and November of 1999. eBay alleges damages due to BE's activity. eBay now moves for preliminary injunctive relief preventing BE from accessing the eBay computer system based on nine causes of action: trespass, false advertising, federal and state trademark dilution, computer fraud and abuse, unfair competition, misappropriation, interference with prospective economic advantage and unjust enrichment.

II. LEGAL STANDARD

To obtain preliminary injunctive relief, a movant must demonstrate "either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." The alternatives in the above standard represent "extremes of a single continuum," rather than two separate tests. "The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust

a likelihood of success on the merits as when the balance tips less decidedly." A "serious question" is one on which the movant has a "fair chance of success on the merits."

III. ANALYSIS

A. Balance of Harm

eBay asserts that it will suffer four types of irreparable harm if preliminary injunctive relief is not granted: (1) lost capacity of its computer systems resulting from to BE's use of automated agents; (2) damage to eBay's reputation and goodwill caused by BE's misleading postings; (3) dilution of the eBay mark; and (4) BE's unjust enrichment. The harm eBay alleges it will suffer can be divided into two categories. The first type of harm is harm that eBay alleges it will suffer as a result of BE's automated query programs burdening eBay's computer system ("system harm"). The second type of harm is harm that eBay alleges it will suffer as a result of BE's misrepresentations regarding the information that BE obtains through the use of these automated query programs ("reputational harm"). Since eBay does not move for injunctive relief tailored toward the alleged reputational harm, the court does not include the alleged reputational harm in the balance of harm analysis, nor does the court address the merits of the causes of action based on the alleged reputational harm in the likelihood of success analysis.

According to eBay, the load on its servers resulting from BE's web crawlers represents between 1.11% and 1.53% of the total load on eBay's listing servers. eBay alleges both economic loss from BE's current activities and potential harm resulting from the total crawling of BE and others. In alleging economic harm, eBay's argument is that eBay has expended considerable time, effort and money to create its computer system, and that BE should have to pay for the portion of eBay's system BE uses. California law appears settled that the appropriate measure of damages is the actual harm inflicted by the conduct:

Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.

eBay's allegations of harm are based, in part, on the argument that BE's activities should be thought of as equivalent to sending in an army of 100,000 robots a day to check the prices in a competitor's store. This analogy, while graphic, appears inappropriate. Although an admittedly formalistic distinction, unauthorized robot intruders into a "brick and mortar" store would be committing a trespass to real property. There does not appear to be any doubt that the appropriate remedy for an ongoing trespass to business premises would be a preliminary injunction. More importantly, for the analogy to be accurate, the robots would have to make up less than two out of every one-hundred customers in the store, the robots would not interfere with the customers' shopping experience, nor would the robots even be seen by the customers. Under such circumstances, there is a legitimate claim that the robots would not pose any threat of irreparable harm. However, eBay's right to injunctive relief is also based upon a much stronger argument.

If BE's activity is allowed to continue unchecked, it would encourage other auction aggregators to engage in similar recursive searching of the eBay system such that eBay would suffer irreparable harm from reduced system performance, system unavailability, or data losses. BE does not appear to seriously contest that reduced system performance, system unavailability or data loss would inflict irreparable harm on eBay consisting of lost profits and lost customer goodwill. Harm resulting from lost profits and lost customer goodwill is irreparable because it is neither easily calculable, nor easily compensable and is therefore an appropriate basis for injunctive relief. Where, as here, the denial of preliminary injunctive relief would encourage an increase in the complained of activity, and such an increase would present a strong likelihood of irreparable harm, the plaintiff has at least established a possibility of irreparable harm.

BE correctly observes that there is a dearth of authority supporting a preliminary injunction based on an ongoing trespass to chattels. In contrast, it is black letter law in California that an injunction is an appropriate remedy for a continuing trespass to real property. If eBay were a brick and mortar auction house with limited seating capacity, eBay would appear to be entitled to reserve those seats for potential bidders, to refuse entrance to individuals (or robots) with no intention of bidding on any of the items, and to seek preliminary injunctive relief against non-customer trespassers eBay was physically unable to exclude. The analytic difficulty is that a wrongdoer can commit an ongoing trespass of a computer system that is more akin to the traditional notion of a trespass to real property, than the traditional notion of a trespass to chattels, because even though it is ongoing, it will probably never amount to a conversion. The court concludes that under the circumstances present here, BE's ongoing violation of eBay's fundamental property right to exclude others from its computer system potentially causes sufficient irreparable harm to support a preliminary injunction.

BE argues that even if eBay is entitled to a presumption of irreparable harm, the presumption may be rebutted. The presumption may be rebutted by evidence that a party has engaged in a pattern of granting licenses to engage in the complained of activity such that it may be reasonable to expect that invasion of the right can be recompensed with a royalty rather than with an injunction. BE alleges that eBay has engaged in a pattern of licensing aggregators to crawl its site.

If eBay's irreparable harm claim were premised solely on the potential harm caused by BE's current crawling activities, evidence that eBay had licensed others to crawl the eBay site would suggest that BE's activity would not result in irreparable harm to eBay. However, the gravamen of the alleged irreparable harm is that if BE is allowed to continue to crawl the eBay site, it may encourage frequent and unregulated crawling to the point that eBay's system will be irreparably harmed. There is no evidence that eBay has indiscriminately licensed all comers. Rather, it appears that eBay has carefully chosen to permit crawling by a limited number of aggregation sites that agree to abide by the terms of eBay's licensing agreement. "The existence of such a [limited] license, unlike a general license offered to all comers, does not demonstrate a decision to relinquish all control over the distribution of the product in exchange for a readily computable fee." eBay's licensing activities appear directed toward limiting the amount and nature of crawling activity on the eBay site. Such licensing does not support the inference that carte blanche crawling of the eBay site would pose no threat of irreparable harm.

B. Likelihood of Success

As noted above, eBay moves for a preliminary injunction on all nine of its causes of action. These nine causes of action correspond to eight legal theories: (1) trespass to chattels, (2) false advertising under the Lanham Act, (3) federal and state trademark dilution, (4) violation of the Computer Fraud and Abuse Act, (5) unfair competition, (6) misappropriation, (7) interference with prospective economic advantage and (8) unjust enrichment. The court finds that eBay has established a sufficient likelihood of prevailing on the trespass claim to support the requested injunctive relief. Since the court finds eBay is entitled to the relief requested based on its trespass claim, the court does not address the merits of the remaining claims.

Trespass

Trespass to chattels "lies where an intentional interference with the possession of personal property has proximately cause injury." Trespass to chattels "although seldom employed as a tort theory in California" was recently applied to cover the unauthorized use of long distance telephone lines. Specifically, the court noted "the electronic signals generated by the [defendants'] activities were sufficiently tangible to support a trespass cause of action." Thus, it appears likely that the electronic signals sent by BE to retrieve information from eBay's computer system are also sufficiently tangible to support a trespass cause of action.

In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff. Here, eBay has presented evidence sufficient to establish a strong likelihood of proving both prongs and ultimately prevailing on the merits of its trespass claim.

a. BE's Unauthorized Interference

eBay argues that BE's use was unauthorized and intentional. eBay is correct. BE does not dispute that it employed an automated computer program to connect with and search eBay's electronic database. BE admits that, because other auction aggregators were including eBay's auctions in their listing, it continued to "crawl" eBay's web site even after eBay demanded BE terminate such activity.

BE argues that it cannot trespass eBay's web site because the site is publicly accessible. BE's argument is unconvincing. eBay's servers are private property, conditional access to which eBay grants the public. eBay does not generally permit the type of automated access made by BE. In fact, eBay explicitly notifies automated visitors that their access is not permitted. "In general, California does recognize a trespass claim where the defendant exceeds the scope of consent."

Even if BE's web crawlers were authorized to make individual queries of eBay's system, BE's web crawlers exceeded the scope of any such consent when they began acting like robots by making repeated queries. Moreover, eBay repeatedly and explicitly notified BE that its use of eBay's computer system was unauthorized. The entire reason BE directed its queries through proxy servers was to evade eBay's attempts to stop this unauthorized access. The court concludes that BE's activity is sufficiently outside of the scope of the use permitted by eBay that it is unauthorized for the purposes of establishing a trespass.

eBay argues that BE interfered with eBay's possessory interest in its computer system. Although eBay appears unlikely to be able to show a substantial interference at this time, such a showing is not required. Conduct that does not amount to a substantial interference with possession, but which consists of intermeddling with or use of another's personal property, is sufficient to establish a cause of action for trespass to chattel. Although the court admits some uncertainty as to the precise level of possessory interference required to constitute an intermeddling, there does not appear to be any dispute that eBay can show that BE's conduct amounts to use of eBay's computer systems. Accordingly, eBay has made a strong showing that it is likely to prevail on the merits of its assertion that BE's use of eBay's computer system was an unauthorized and intentional interference with eBay's possessory interest.

b. Damage to eBay's Computer System

A trespasser is liable when the trespass diminishes the condition, quality or value of personal property. The quality or value of personal property may be "diminished even though it is not physically damaged by defendant's conduct." The Restatement offers the following explanation for the harm requirement:

The 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, 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.

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

eBay is likely to be able to demonstrate that BE's activities have diminished the quality or value of eBay's computer systems. BE's activities consume at least a portion of plaintiff's bandwidth and server capacity. Although there is some dispute as to the percentage of queries on eBay's site for which BE is responsible, BE admits that it sends some 80,000 to 100,000 requests to plaintiff's computer systems per day. Although eBay does not claim that this consumption has led to any physical damage to eBay's computer system, nor does eBay provide any evidence to support the claim that it may have lost revenues or customers based on this use, eBay's claim is that BE's use is appropriating eBay's personal property by using valuable bandwidth and capacity, and necessarily compromising eBay's ability to use that capacity for its own purposes.

BE argues that its searches represent a negligible load on plaintiff's computer systems, and do not rise to the level of impairment to the condition or value of eBay's computer system required to constitute a trespass. However, it is undisputed that eBay's server and its capacity are personal property, and that BE's searches use a portion of this property. Even if, as BE argues, its searches use only a small amount of eBay's computer system capacity, BE has nonetheless deprived eBay

of the ability to use that portion of its personal property for its own purposes. The law recognizes no such right to use another's personal property. Accordingly, BE's actions appear to have caused injury to eBay and appear likely to continue to cause injury to eBay. If the court were to hold otherwise, it would likely encourage other auction aggregators to crawl the eBay site, potentially to the point of denying effective access to eBay's customers. If preliminary injunctive relief were denied, and other aggregators began to crawl the eBay site, there appears to be little doubt that the load on eBay's computer system would qualify as a substantial impairment of condition or value. California law does not require eBay to wait for such a disaster before applying to this court for relief. The court concludes that eBay has made a strong showing that it is likely to prevail on the merits of its trespass claim, and that there is at least a possibility that it will suffer irreparable harm if preliminary injunctive relief is not granted. eBay is therefore entitled to preliminary injunctive relief.²

IV. ORDER

Bidder's Edge, its officers, agents, servants, employees, attorneys and those in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined pending the trial of this matter, from using any automated query program, robot, web crawler or other similar device, without written authorization, to access eBay's computer systems or networks, for the purpose of copying any part of eBay's auction database. As a condition of the preliminary injunction, eBay is ordered to post a bond in the amount of \$2,000,000 to secure payment of any damages sustained by defendant if it is later found to have been wrongfully enjoined. This order shall take effect 10 days from the date on which it is filed.

Nothing in this order precludes BE from utilizing information obtained from eBay's site other than by automated query program, robot, web crawler or similar device. The court denies eBay's request for a preliminary injunction barring access to its site based upon BE's alleged trademark infringement, trademark dilution and other claims. This denial is without prejudice to an application for an injunction limiting or conditioning the use of any information obtained on the theory that BE's use violates some protected right of eBay.

INTEL CORPORATION v. HAMIDI 71 P.3d 296 (Cal. 2003)

WERDEGAR, J.

Intel Corporation (Intel) maintains an electronic mail system, connected to the Internet,

² As discussed below, eBay has established a strong likelihood of success on the merits of the trespass claim, and is therefore entitled to preliminary injunctive relief because it has established the possibility of irreparable harm. Accordingly, the court does not reach the issue of whether the threat of increased activity would be sufficient to support preliminary injunctive relief where plaintiff has not made as strong of a showing of likelihood of success on the merits.

through which messages between employees and those outside the company can be sent and received, and permits its employees to make reasonable nonbusiness use of this system. On six occasions over almost two years, Kourosh Kenneth Hamidi, a former Intel employee, sent e-mails criticizing Intel's employment practices to numerous current employees on Intel's electronic mail system. Hamidi breached no computer security barriers in order to communicate with Intel employees. He offered to, and did, remove from his mailing list any recipient who so wished. Hamidi's communications to individual Intel employees caused neither physical damage nor functional disruption to the company's computers, nor did they at any time deprive Intel of the use of its computers. The contents of the messages, however, caused discussion among employees and managers.

On these facts, Intel brought suit, claiming that by communicating with its employees over the company's e-mail system Hamidi committed the tort of trespass to chattels. The trial court granted Intel's motion for summary judgment and enjoined Hamidi from any further mailings. A divided Court of Appeal affirmed.

After reviewing the decisions analyzing unauthorized electronic contact with computer systems as potential trespasses to chattels, we conclude that under California law the tort does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. Such an electronic communication does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself. The consequential economic damage Intel claims to have suffered, i.e., loss of productivity caused by employees reading and reacting to Hamidi's messages and company efforts to block the messages, is not an injury to the company's interest in its computers—which worked as intended and were unharmed by the communications—any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment.

Our conclusion does not rest on any special immunity for communications by electronic mail; we do not hold that messages transmitted through the Internet are exempt from the ordinary rules of tort liability. To the contrary, e-mail, like other forms of communication, may in some circumstances cause legally cognizable injury to the recipient or to third parties and may be actionable under various common law or statutory theories. Indeed, on facts somewhat similar to those here, a company or its employees might be able to plead causes of action for interference with prospective economic relations, interference with contract, or intentional infliction of emotional distress. And, of course, as with any other means of publication, third party subjects of e-mail communications may under appropriate facts make claims for defamation, publication of private facts, or other speech-based torts. Intel's claim fails not because e-mail transmitted through the Internet enjoys unique immunity, but because the trespass to chattels tort—unlike the causes of action just mentioned—may not, in California, be proved without evidence of an injury to the plaintiffs personal property or legal interest therein.

Nor does our holding affect the legal remedies of Internet service providers (ISP's) against senders of unsolicited commercial bulk e-mail (UCE), also known as "spam." A series of federal

district court decisions, beginning with *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997), has approved the use of trespass to chattels as a theory of spammers' liability to ISP's, based upon evidence that the vast quantities of mail sent by spammers both overburdened the ISP's own computers and made the entire computer system harder to use for recipients, the ISP's customers. In the present case, the claimed injury is located in the disruption or distraction caused to recipients by the contents of the e-mail messages.

FACTUAL AND PROCEDURAL BACKGROUND

Hamidi, a former Intel engineer, together with others, formed an organization named Former and Current Employees of Intel (FACE-Intel) to disseminate information and views critical of Intel's employment and personnel policies and practices. FACE-Intel maintained a Web site (which identified Hamidi as Webmaster and as the organization's spokesperson) containing such material. In addition, over a 21-month period Hamidi, on behalf of FACE-Intel, sent six mass e-mails to employee addresses on Intel's electronic mail system. The messages criticized Intel's employment practices, warned employees of the dangers those practices posed to their careers, suggested employees consider moving to other companies, solicited employees' participation in FACE-Intel, and urged employees to inform themselves further by visiting FACE-Intel's Web site. The messages stated that recipients could, by notifying the sender of their wishes, be removed from FACE-Intel's mailing list; Hamidi did not subsequently send messages to anyone who requested removal.

Each message was sent to thousands of addresses (as many as 35,000), though some messages were blocked by Intel before reaching employees. Intel's attempt to block internal transmission of the messages succeeded only in part; Hamidi evaded blocking efforts by using different sending computers. When Intel, in March 1998, demanded that Hamidi and FACE-Intel stop sending e-mails to Intel's computer system, Hamidi asserted the organization had a right to communicate with willing Intel employees; he sent a new mailing in September 1998.

The record contains no evidence Hamidi breached Intel's computer security in order to obtain the recipient addresses for his messages; indeed, internal Intel memoranda show the company's management concluded no security breach had occurred. Hamidi stated he created the recipient address list using an Intel directory on a floppy disk anonymously sent to him. Nor is there any evidence that the receipt or internal distribution of Hamidi's electronic messages damaged Intel's computer system or slowed or impaired its functioning. Intel did present uncontradicted evidence, however, that many employee recipients asked a company official to stop the messages and that staff time was consumed in attempts to block further messages. According to the FACE-Intel Web site, moreover, the messages had prompted discussions between "[e]xcited and nervous managers" and the company's human resources department.

Intel sued Hamidi, pleading causes of action for trespass to chattels and nuisance, and seeking both actual damages and an injunction against further e-mail messages. Intel later voluntarily dismissed its nuisance claim and waived its demand for damages. The trial court granted Intel's motion for summary judgment, permanently enjoining Hamidi, FACE-Intel, and their agents "from sending unsolicited e-mail to addresses on Intel's computer systems." Hamidi appealed.

The Court of Appeal, with one justice dissenting, affirmed the grant of injunctive relief. The

majority took the view that the use of or intermeddling with another's personal property is actionable as a trespass to chattels without proof of any actual injury to the personal property; if Intel could not show any damages resulting from Hamidi's sending of messages, "it showed he was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of trespass to chattels." The dissenting justice warned that the majority's application of the trespass to chattels tort to "unsolicited electronic mail that causes no harm to the private computer system that receives it" would "expand the tort of trespass to chattel in untold ways and to unanticipated circumstances."

Discussion

I. Current California Tort Law

Dubbed by Prosser the "little brother of conversion," the tort of trespass to chattels allows recovery for interferences with possession of personal property "not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered." Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiff's rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property has proximately caused injury." In cases of interference with possession of personal property not amounting to conversion, "the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use." In modern American law generally, "[t]respass remains as an occasional remedy for minor interferences, resulting in some damage, but not sufficiently serious or sufficiently important to amount to the greater tort" of conversion.

The Restatement, too, makes clear that some actual injury must have occurred in order for a trespass to chattels to be actionable. Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable, but other forms of interference require some additional harm to the personal property or the possessor's interests in it. "The 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, 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. 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."

In this respect, as Prosser explains, modern day trespass to chattels differs both from the original English writ and from the action for trespass to land: "Another departure from the original rule of the old writ of trespass concerns the necessity of some actual damage to the chattel before the action can be maintained. Where the defendant merely interferes without doing any harm—as where, for example, he merely lays hands upon the plaintiff's horse, or sits in his

car—there has been a division of opinion among the writers, and a surprising dearth of authority. By analogy to trespass to land there might be a technical tort in such a case Such scanty authority as there is, however, has considered that the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly it has been held that in the absence of any actual damage the action will not lie."

Intel suggests that the requirement of actual harm does not apply here because it sought only injunctive relief, as protection from future injuries. But as Justice Kolkey, dissenting below, observed, "[t]he fact the relief sought is injunctive does not excuse a showing of injury, whether actual or threatened." Indeed, in order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause irreparable injuries, ones that cannot be adequately compensated in damages. Even in an action for trespass to real property, in which damage to the property is not an element of the cause of action, "the extraordinary remedy of injunction" cannot be invoked without showing the likelihood of irreparable harm. A fortiori, to issue an injunction without a showing of likely irreparable injury in an action for trespass to chattels, in which injury to the personal property or the possessor's interest in it is an element of the action, would make little legal sense.

The dispositive issue in this case, therefore, is whether the undisputed facts demonstrate Hamidi's actions caused or threatened to cause damage to Intel's computer system, or injury to its rights in that personal property, such as to entitle Intel to judgment as a matter of law. To review, the undisputed evidence revealed no actual or threatened damage to Intel's computer hardware or software and no interference with its ordinary and intended operation. Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any measurable length of time. Intel presented no evidence its system was slowed or otherwise impaired by the burden of delivering Hamidi's electronic messages. Nor was there any evidence transmission of the messages imposed any marginal cost on the operation of Intel's computers. In sum, no evidence suggested that in sending messages through Intel's Internet connections and internal computer system Hamidi used the system in any manner in which it was not intended to function or impaired the system in any way. Nor does the evidence show the request of any employee to be removed from FACE-Intel's mailing list was not honored. The evidence did show, however, that some employees who found the messages unwelcome asked management to stop them and that Intel technical staff spent time and effort attempting to block the messages. A statement on the FACE-Intel Web site, moreover, could be taken as an admission that the messages had caused "[e]xcited and nervous managers" to discuss the matter with Intel's human resources department.

Relying on a line of decisions, most from federal district courts, applying the tort of trespass to chattels to various types of unwanted electronic contact between computers, Intel contends that, while its computers were not damaged by receiving Hamidi's messages, its interest in the "physical condition, quality or value" of the computers was harmed. We disagree. The cited line of decisions does not persuade us that the mere sending of electronic communications that assertedly cause injury only because of their contents constitutes an actionable trespass to a computer system through which the messages are transmitted. Rather, the decisions finding

electronic contact to be a trespass to computer systems have generally involved some actual or threatened interference with the computers' functioning.

A series of federal district court decisions held that sending UCE [unsolicited commercial bulk e-mail] through an ISP's equipment may constitute trespass to the ISP's computer system. In each of these spamming cases, the plaintiff showed, or was prepared to show, some interference with the efficient functioning of its computer system. In *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp 1015, the plaintiff ISP's mail equipment monitor stated that mass UCE mailings, especially from nonexistent addresses such as those used by the defendant, placed "a tremendous burden" on the ISP's equipment, using "disk space and draining] the processing power," making those resources unavailable to serve subscribers. Building on the spamming cases, in particular *CompuServe*, three even more recent district court decisions addressed whether unauthorized robotic data collection from a company's publicly accessible Web site is a trespass on the company's computer system. (*eBay, Inc. v. Bidder's Edge, Inc.*; *Register.com, Inc. v. Verio, Inc.*; *Ticketmaster Corp. v. Tickets.com, Inc.*) The two district courts that found such automated data collection to constitute a trespass relied, in part, on the deleterious impact this activity could have, especially if replicated by other searchers, on the functioning of a Web site's computer equipment.

These decisions do not persuade us to Intel's position here, for Intel has demonstrated neither any appreciable effect on the operation of its computer system from Hamidi's messages, nor any likelihood that Hamidi's actions will be replicated by others if found not to constitute a trespass. That Intel does not claim the type of functional impact that spammers and robots have been alleged to cause is not surprising in light of the differences between Hamidi's activities and those of a commercial enterprise that uses sheer quantity of messages as its communications strategy. Though Hamidi sent thousands of copies of the same message on six occasions over 21 months, that number is minuscule compared to the amounts of mail sent by commercial operations. The individual advertisers sued in *America Online, Inc. v. IMS* and *America Online, Inc. v. LCGM, Inc.* were alleged to have sent more than 60 million messages over 10 months and more than 92 million messages over seven months, respectively. Collectively, UCE has reportedly come to constitute about 45 percent of all e-mail. The functional burden on Intel's computers, or the cost in time to individual recipients, of receiving Hamidi's occasional advocacy messages cannot be compared to the burdens and costs caused ISP's and their customers by the ever-rising deluge of commercial e-mail.

In addition to impairment of system functionality, *CompuServe* and its progeny also refer to the ISP's loss of business reputation and customer goodwill, resulting from the inconvenience and cost that spam causes to its members, as harm to the ISP's legally protected interests in its personal property. Intel argues that its own interest in employee productivity, assertedly disrupted by Hamidi's messages, is a comparable protected interest in its computer system. We disagree.

Whether the economic injuries identified in *CompuServe* were properly considered injuries to the ISP's possessory interest in its personal property, the type of property interest the tort is primarily intended to protect has been questioned. But even if the loss of goodwill identified in *CompuServe* were the type of injury that would give rise to a trespass to chattels claim under California law, Intel's position would not follow, for Intel's claimed injury has even less

connection to its personal property than did CompuServe's.

CompuServe's customers were annoyed because the system was inundated with unsolicited commercial messages, making its use for personal communication more difficult and costly. Their complaint, which allegedly led some to cancel their CompuServe service, was about the functioning of CompuServe's electronic mail service. Intel's workers, in contrast, were allegedly distracted from their work not because of the quantity of Hamidi's messages, but because of assertions and opinions the messages conveyed. Intel's complaint is thus about the contents of the messages rather than the functioning of the e-mail system. Even accepting CompuServe's economic injury rationale, therefore, Intel's position represents a further extension of the trespass to chattels tort, fictionally recharacterizing the allegedly injurious effect of a communication's contents on recipients as an impairment to the device which transmitted the message.

This theory of "impairment by content" threatens to stretch trespass law to cover injuries far afield from the harms to possession the tort evolved to protect. Intel's theory would expand the tort of trespass to chattels to cover virtually any unconsented—to communication that, solely because of its content, is unwelcome to the recipient or intermediate transmitter. As the dissenting justice below explained, "'Damage' of this nature—the distraction of reading or listening to an unsolicited communication—is not within the scope of the injury against which the trespass-to-chattel tort protects, and indeed trivializes it. Reading an e-mail transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment. Indeed, if a chattel's receipt of an electronic communication constitutes a trespass to that chattel, then not only are unsolicited telephone calls and faxes trespasses to chattel, but unwelcome radio waves and television signals also constitute a trespass to chattel every time the viewer inadvertently sees or hears the unwanted program." We agree. While unwelcome communications, electronic or otherwise, can cause a variety of injuries to economic relations, reputation and emotions, those interests are protected by other branches of tort law; in order to address them, we need not create a fiction of injury to the communication system.

Nor may Intel appropriately assert a property interest in its employees' time. "The Restatement test clearly speaks in the first instance to the impairment of the chattel.... But employees are not chattels (at least not in the legal sense of the term)." Whatever interest Intel may have in preventing its employees from receiving disruptive communications, it is not an interest in personal property, and trespass to chattels is therefore not an action that will lie to protect it. Nor, finally, can the fact Intel staff spent time attempting to block Hamidi's messages be bootstrapped into an injury to Intel's possessory interest in its computers. To quote, again, from the dissenting opinion in the Court of Appeal: "[I]t is circular to premise the damage element of a tort solely upon the steps taken to prevent the damage. Injury can only be established by the completed tort's consequences, not by the cost of the steps taken to avoid the injury and prevent the tort; otherwise, we can create injury for every supposed tort."

Intel connected its e-mail system to the Internet and permitted its employees to make use of this connection both for business and, to a reasonable extent, for their own purposes. In doing so, the company necessarily contemplated the employees' receipt of unsolicited as well as solicited communications from other companies and individuals. That some communications would, because of their contents, be unwelcome to Intel management was virtually inevitable. Hamidi

did nothing but use the e-mail system for its intended purpose—to communicate with employees. The system worked as designed, delivering the messages without any physical or functional harm or disruption. These occasional transmissions cannot reasonably be viewed as impairing the quality or value of Intel's computer system. We conclude, therefore, that Intel has not presented undisputed facts demonstrating an injury to its personal property, or to its legal interest in that property, that support, under California tort law, an action for trespass to chattels.

II. Proposed Extension of California Tort Law

We next consider whether California common law should be extended to cover, as a trespass to chattels, an otherwise harmless electronic communication whose contents are objectionable. We decline to so expand California law. The property rule proposed is a rigid one, under which the sender of an electronic message would be strictly liable to the owner of equipment through which the communication passes—here, Intel—for any consequential injury flowing from the contents of the communication. The arguments of amici curiae and academic writers on this topic leave us highly doubtful whether creation of such a rigid property rule would be wise.

Writing on behalf of several industry groups appearing as amici curiae, Professor Richard A. Epstein of the University of Chicago urges us to excuse the required showing of injury to personal property in cases of unauthorized electronic contact between computers, "extending the rules of trespass to real property to all interactive Web sites and servers." The court is thus urged to recognize, for owners of a particular species of personal property, computer servers, the same interest in inviolability as is generally accorded a possessor of land. In effect, Professor Epstein suggests that a company's server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass.

Epstein's argument derives, in part, from the familiar metaphor of the Internet as a physical space, reflected in much of the language that has been used to describe it: "cyberspace," "the information superhighway," e-mail "addresses," and the like. Of course, the Internet is also frequently called simply the "Net," a term, Hamidi points out, "evoking a fisherman's chattel." A major component of the Internet is the World Wide "Web," a descriptive term suggesting neither personal nor real property, and "cyberspace" itself has come to be known by the oxymoronic phrase "virtual reality," which would suggest that any real property "located" in "cyberspace" must be "virtually real" property. Metaphor is a two-edged sword.

Indeed, the metaphorical application of real property rules would not, by itself, transform a physically harmless electronic intrusion on a computer server into a trespass. That is because, under California law, intangible intrusions on land, including electromagnetic transmissions, are not actionable as trespasses (though they may be as nuisances) unless they cause physical damage to the real property. Since Intel does not claim Hamidi's electronically transmitted messages physically damaged its servers, it could not prove a trespass to land even were we to treat the computers as a type of real property. Some further extension of the conceit would be required, under which the electronic signals Hamidi sent would be recast as tangible intruders, perhaps as tiny messengers rushing through the "hallways" of Intel's computers and bursting out of employees' computers to read them Hamidi's missives. But such fictions promise more confusion than clarity in the law.

Professor Epstein argues that a rule of computer server inviolability will, through the formation or extension of a market in computer-to-computer access, create "the right social result." In most circumstances, he predicts, companies with computers on the Internet will continue to authorize transmission of information through e-mail, Web site searching, and page linking because they benefit by that open access. When a Web site owner does deny access to a particular sending, searching, or linking computer, a system of "simple one-on-one negotiations" will arise to provide the necessary individual licenses.

Other scholars are less optimistic about such a complete propertization of the Internet. Professor Mark Lemley of the University of California, Berkeley, writing on behalf of an *amici curiae* group of professors of intellectual property and computer law, observes that under a property rule of server inviolability, "each of the hundreds of millions of [Internet] 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 consequence for e-mail could be a substantial reduction in the freedom of electronic communication, as the owner of each computer through which an electronic message passes could impose its own limitations on message content or source. As Professor Dan Hunter of the University of Pennsylvania asks rhetorically: "Does this mean that one must read the 'Terms of Acceptable Email Usage' of every email system that one emails in the course of an ordinary day? If the University of Pennsylvania had a policy that sending a joke by email would be an unauthorized use of their system, then under the logic of [the lower court decision in this case], you commit 'trespass' if you emailed me a ... cartoon."

Web site linking, Professor Lemley further observes, "would exist at the sufferance of the linked-to party, because a Web user who followed a 'disapproved' link would be trespassing on the plaintiffs server, just as sending an e-mail is trespass under the [lower] court's theory." Another writer warns that "[c]yber-trespass theory will curtail the free flow of price and product information on the Internet by allowing website owners to tightly control who and what may enter and make use of the information housed on its Internet site." A leading scholar of Internet law and policy, Professor Lawrence Lessig, has criticized Professor Epstein's theory of the computer server as quasi-real property, previously put forward in the *eBay* case, on the ground that it ignores the costs to society in the loss of network benefits "from a network that is open and where access is free. It is this general feature of the Net that makes the Net so valuable to users and a source of great innovation. And to the extent that individual sites begin to impose their own rules of exclusion, the value of the network as a network declines. If machines must negotiate before entering any individual site, then the costs of using the network climb."

We discuss this debate among the *amici curiae* and academic writers only to note its existence and contours, not to attempt its resolution. Creating an absolute property right to exclude undesired communications from one's e-mail and Web servers might help force spammers to internalize the costs they impose on ISP's and their customers. But such a property rule might also create substantial new costs, to e-mail and e-commerce users and to society generally, in lost ease and openness of communication and in lost network benefits. In light of the unresolved controversy, we would be acting rashly to adopt a rule treating computer servers as real property for purposes of trespass law.

The Legislature has already adopted detailed regulations governing UCE. It may see fit in the future also to regulate noncommercial e-mail, such as that sent by Hamidi, or other kinds of unwanted contact between computers on the Internet. But we are not persuaded that these perceived problems call at present for judicial creation of a rigid property rule of computer server inviolability. We therefore decline to create an exception, covering Hamidi's unwanted electronic messages to Intel employees, to the general rule that a trespass to chattels is not actionable if it does not involve actual or threatened injury to the personal property or to the possessor's legally protected interest in the personal property. No such injury having been shown on the undisputed facts, Intel was not entitled to summary judgment in its favor.

Dissenting Opinion of BROWN, J.

Candidate A finds the vehicles that candidate B has provided for his campaign workers, and A spray paints the water soluble message, "Fight corruption, vote for A" on the bumpers. The majority's reasoning would find that notwithstanding the time it takes the workers to remove the paint and the expense they incur in altering the bumpers to prevent further unwanted messages, candidate B does not deserve an injunction unless the paint is so heavy that it reduces the cars' gas mileage or otherwise depreciates the cars' market value. Furthermore, candidate B has an obligation to permit the paint's display, because the cars are driven by workers and not B personally, because B allows his workers to use the cars to pick up their lunch or retrieve their children from school, or because the bumpers display B's own slogans. I disagree.

Intel has invested millions of dollars to develop and maintain a computer system. It did this not to act as a public forum but to enhance the productivity of its employees. Kourosh Kenneth Hamidi sent as many as 200,000 e-mail messages to Intel employees. The time required to review and delete Hamidi's messages diverted employees from productive tasks and undermined the utility of the computer system. "There 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." This is such a case.

The majority refuses to protect Intel's interest in maintaining the integrity of its own system, contending that (1) Hamidi's mailings did not physically injure the system; (2) Intel receives many unwanted messages, of which Hamidi's are but a small fraction; (3) Intel must have contemplated that it would receive some unwanted messages; and (4) Hamidi used the email system for its intended purpose, to communicate with employees.

Harmless Trespasses to Chattels May be Prevented

Regardless of whether property is real or personal, it is beyond dispute that an individual has the right to have his personal property free from interference. There is some division among authorities regarding the available remedy, particularly whether a harmless trespass supports a claim for nominal damages. The protection of land and chattels may differ on the question of nominal damages unrelated to actual injury. The authorities agree, however, that (1) the chattel is inviolable, (2) the trespasser need not tolerate even harmless interference, and (3) the possessor may use reasonable force to prevent it.

The law's special respect for land ownership supports liability for damages even without actual harm. By contrast, one who suffers interference with a chattel may prevent the interference before or during the fact, or recover actual damages (corresponding to the harm suffered), but at least according to the Restatement, may not recover damages in excess of those suffered. But the Restatement expressly refutes defendant's assertion that only real property is inviolable. From the modest distinction holding that only victims of a trespass to land may profit in the form of damages exceeding actual harm, defendant offers the position that only trespasses to land may be prevented. The law is to the contrary; numerous cases have authorized injunctive relief to safeguard the inviolability of personal property.

The majority summarily distinguishes CompuServe and its progeny by noting there the "plaintiff showed, or was prepared to show, some interference with the efficient functioning of its computer system." But although CompuServe did note the impairment imposed by the defendant's unsolicited email, this was not part of its holding. The court summarized its ruling without mentioning impairment. "[T]his Court holds that where defendants engaged in a course of conduct of transmitting a substantial volume of electronic data in the form of unsolicited e-mail to plaintiffs proprietary computer equipment, where defendants continued such practice after repeated demands to cease and desist, and where defendants deliberately evaded plaintiffs affirmative efforts to protect its computer equipment from such use, plaintiff has a viable claim for trespass to personal property and is entitled to injunctive relief to protect its property." The cited criteria apply fully to Hamidi's conduct. Likewise, the conclusion of CompuServe's analysis fully applies here: "Defendants' intentional use of plaintiffs proprietary computer equipment exceeds plaintiffs consent and, indeed, continued after repeated demands that defendants cease. Such use is an actionable trespass to plaintiffs chattel."

Post-CompuServe case law has emphasized that unauthorized use of another's property establishes a trespass, even without a showing of physical damage. "Although eBay appears unlikely to be able to show a substantial interference at this time, such a showing is not required. Conduct that does not amount to a substantial interference with possession, but which consists of intermeddling with or use of another's personal property, is sufficient to establish a cause of action for trespass to chattel." (eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1070 (N.D. Cal. 2000).) "Ultimately, the court in that case concluded that the defendant's conduct was sufficient to establish a cause of action for trespass not because the interference was 'substantial' but simply because the defendant's conduct amounted to 'use' of Plaintiffs computer." An intruder is not entitled to sleep in his neighbor's car, even if he does not chip the paint.

Hamidi concedes Intel's legal entitlement to block the unwanted messages. The problem is that although Intel has resorted to the cyberspace version of reasonable force, it has so far been unsuccessful in determining how to resist the unwanted use of its system. Thus, while Intel has the legal right to exclude Hamidi from its system, it does not have the physical ability. To the majority, Hamidi's ability to outwit Intel's cyber defenses justifies denial of Intel's claim to exclusive use of its property. Under this reasoning, it is not right but might that determines the extent of a party's possessory interest. Although the world often works this way, the legal system should not.

Intel Suffered Injury

Even if CompuServe and its progeny deem injury a prerequisite for injunctive relief, such injury occurred here. Intel suffered not merely an affront to its dignitary interest in ownership but tangible economic loss. Furthermore, it is entirely consistent with the Restatement and case law to recognize a property interest in the subjective utility of one's property. Finally, case law further recognizes as actionable the loss that occurs when one party maintains property for its own use and another party uses it, even if the property does not suffer damage as a result.

Intel suffered economic loss

Courts have recognized the tangible costs imposed by the receipt of unsolicited bulk e-mail (UBE). Especially where bulk e-mailers mask the true content of their messages in the "header" (as Hamidi did), there is a shift in costs from sender to recipient that resembles "sending junk mail with postage due or making telemarketing calls to someone's pay-per minute cellular phone." "Individuals who receive UCE can experience increased Internet access fees because of the time required to sort, read, discard, and attempt to prevent future sending of UCE. If the individual undertakes this process at work, his or her employer suffers the financial consequences of the wasted time." CompuServe likewise observed the recipient of unwanted e-mail must "sift through, at his expense, all of the messages in order to find the ones he wanted or expected to receive." Unwanted messages also drain the equipment's processing power, and slow down the transfers of electronic data.

The economic costs of unwanted e-mail exist even if Intel employees, unlike CompuServe subscribers, do not pay directly for the time they spend on the Internet. No such direct costs appear here, only the opportunity costs of lost time. But for Intel, "time is money" nonetheless. One justification for the strict rule against unsolicited faxes is that they "shift costs to the recipients who are forced to contribute ink, paper, wear on their fax machines, as well as personnel time."

Although Hamidi claims he sent only six e-mails, he sent them to between 8,000 and 35,000 employees, thus sending from 48,000 to 210,000 messages. Since it is the effect on Intel that is determinative, it is the number of messages received, not sent, that matters. Even if it takes little time to determine the author of a message and then delete it, this process, multiplied hundreds of thousands of times, amounts to a substantial loss of employee time, and thus work product. If Intel received 200,000 messages, and each one could be skimmed and deleted in six seconds, it would take approximately 333 hours, or 42 business days, to delete them all. In other words, if Intel hired an employee to remove all unwanted mail, it would take that individual two entire months to finish.

Intel's injury is properly related to the chattel

The majority does not dispute that Intel suffered a loss of work product as a matter of fact, so much as it denies that this loss may constitute the requisite injury as a matter of law. According to the majority, the reduced utility of the chattel to the owner does not constitute a sufficiently cognizable injury, which exists only where the chattel itself suffers injury, i.e., its "market value" falls. The Restatement and related case law are to the contrary.

The Restatement recognizes that the measure of impairment may be subjective; a cognizable injury may occur not only when the trespass reduces the chattel's market value but also when the trespass affects its value to the owner. "In the great majority of cases, the actor's intermeddling with the chattel impairs the value of it to the possessor, as distinguished from the mere affront to his dignity as possessor, only by some impairment of the physical condition of the chattel. There may, however, 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."

The Restatement goes on to explain that A's using B's toothbrush could extinguish its value to B. The brushing constitutes a trespass by impairing the brush's subjective value to the owner rather than its objective market value. Moreover, there can be a trespass even though the chattel is used as intended—to brush teeth—if it is used by an unwanted party.

As the Court of Appeal's opinion below indicated, interference with an owner's ability to use the chattel supports a trespass. The opinion recalled the rule, which dates back almost 400 years, holding that chasing an owner's animal amounts to a trespass to chattels. These authorities do not require injury or damage to the animal; the interference with the owner's use of the animal suffices to create a trespass. Interference is actionable if it "deprives the possessor of the use of that chattel." Moreover, such interference need not permanently deny the owner the ability to use the chattel—mere delay is enough.

A contemporary version of this interference would occur if a trespasser unplugged the computers of the entire Intel staff and moved them to a high shelf in each employee's office or cubicle. The computers themselves would suffer no damage, but all 35,000 employees would need to take the time to retrieve their computers and restart them. This would reduce the computers' utility to Intel, for, like the chased animals, they would not be available for immediate use. If the chasing of a few animals supports a trespass, then so does even minimal interference with a system used by 35,000 individuals.

CompuServe is in accord, as it observed how a bundle of unwanted messages decreased the utility of the server. Here, Intel maintains a possessory interest in the efficient and productive use of its system—which it spends millions of dollars to acquire and maintain. Hamidi's conduct has impaired the system's optimal functioning for Intel's business purposes. As the Restatement supports liability where "harm is caused to ... some ... thing in which the possessor has a legally protected interest," Hamidi has trespassed upon Intel's chattel.

Finally, even if Hamidi's interference did not affect the server's utility to Intel, it would still amount to a trespass. Intel has poured millions of dollars into a resource that Hamidi has now appropriated for his own use. As noted above, "the appropriation of another's property to one's own use, even for a temporary purpose, constitute[s][a] trespass[]." The use by one party of property whose costs have been paid by another amounts to an unlawful taking of those resources—even if there is no unjust enrichment by the trespassing party.

Intel has paid for thousands of computers, as well as the costs of maintaining a server. Hamidi has acted as a free rider in enjoying the use of not only Intel's computer system but the extra storage capacity needed to accommodate his messages. Hamidi has thus unlawfully shifted

the costs of his speaking to Intel.

Moreover, even such free ridership is not necessary to establish a trespass to chattels. As in those cases in which courts have granted injunctions to prevent the delivery of unwanted mail, Intel is not attempting to profit from its trespass action by receiving nominal damages. Rather, it seeks an injunction to prevent further trespass. Moreover, Intel suffered the requisite injury by losing a great deal of work product, a harm properly related to the property itself, as well as the money it spent in maintaining the system, which Hamidi wrongfully expropriated.

Dissenting Opinion by MOSK, J.

In my view, the repeated transmission of bulk e-mails by Hamidi to the employees of Intel on its proprietary confidential email lists, despite Intel's demand that he cease such activities, constituted an actionable trespass to chattels. The majority fail to distinguish open communication in the public "commons" of the Internet from unauthorized intermeddling on a private, proprietary intranet. Hamidi is not communicating in the equivalent of a town square or of an unsolicited "junk" mailing through the United States Postal Service. His action, in crossing from the public Internet into a private intranet, is more like intruding into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks. Because Intel's security measures have been circumvented by Hamidi, the majority leave Intel, which has exercised all reasonable self-help efforts, with no recourse unless he causes a malfunction or systems "crash." Hamidi's repeated intrusions constituted a misappropriation of Intel's private computer system contrary to its intended use and against Intel's wishes.

The law of trespass to chattels has not universally been limited to physical damage. I believe it is entirely consistent to apply that legal theory to these circumstances—that is, when a proprietary computer system is being used contrary to its owner's purposes and expressed desires, and self-help has been ineffective. Intel correctly expects protection from an intruder who misuses its proprietary system, its nonpublic directories, and its supposedly controlled connection to the Internet to achieve his bulk mailing objectives.

The majority agree that an impairment of Intel's system would result in an action for trespass to chattels, but find that Intel suffered no injury. As did the trial court, I conclude that the undisputed evidence establishes that Intel was substantially harmed by the costs of efforts to block the messages and diminished employee productivity. The Restatement Second of Torts explains that a trespass to a chattel occurs if "the chattel is impaired as to its condition, quality, or value" or if "harm is caused to some ... thing in which the possessor has a legally protected interest." Moreover, "[t]he harm necessary to trigger liability for trespass to chattels can be ... harm to something other than the chattel itself." The Restatement points out that, unlike a possessor of land, a possessor of a chattel is not given legal protection from harmless invasion, but "the actor" may be liable if the conduct affects "some other and more important interest of the possessor."

The common law tort of trespass to chattels does not require physical disruption to the chattel. It also may apply when there is impairment to the "quality" or "value" of the chattel. It also applies "[w]here the conduct complained of does not amount to a substantial interference

with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property."

Here, Hamidi's deliberate and continued intermeddling, and threatened intermeddling, with Intel's proprietary computer system for his own purposes that were hostile to Intel, certainly impaired the quality and value of the system as an internal business device for Intel and forced Intel to incur costs to try to maintain the security and integrity of its server—efforts that proved ineffective. These included costs incurred to mitigate injuries that had already occurred. It is not a matter of "bootstrapp[ing]" to consider those costs a damage to Intel. Indeed, part of the value of the proprietary computer system is the ability to exclude intermeddlers from entering it for significant uses that are disruptive to its owner's business operations.

If Intel, a large business with thousands of former employees, is unable to prevent Hamidi from continued intermeddling, it is not unlikely that other outsiders who obtain access to its proprietary electronic mail addresses would engage in similar conduct, further reducing the value of, and perhaps debilitating, the computer system as a business productivity mechanism. Employees understand that a firewall is in place and expect that the messages they receive are from senders permitted by the corporation. Violation of this expectation increases the internal disruption caused by messages that circumvent the company's attempt to exclude them. The time that each employee must spend to evaluate, delete or respond to the message, when added up, constitutes an amount of compensated time that translates to quantifiable financial damage.

All of these costs to protect the integrity of the computer system and to deal with the disruptive effects of the transmissions and the expenditures attributable to employee time, constitute damages sufficient to establish the existence of a trespass to chattels, even if the computer system was not overburdened to the point of a "crash" by the bulk electronic mail.

Owners of computer systems, like owners of other private property, have a right to prevent others from using their property against their interests. That principle applies equally in this case. The fact that, like most large businesses, Intel's intranet includes external e-mail access for essential business purposes does not logically mean, as the majority suggest, that Intel has forfeited the right to determine who has access to its system. Its intranet is not the equivalent of a common carrier or public communications licensee that would be subject to requirements to provide service and access. Just as Intel can, and does, regulate the use of its computer system by its employees, it should be entitled to control its use by outsiders and to seek injunctive relief when self-help fails.

The majority also propose that Intel has sufficient avenues for legal relief outside of trespass to chattels, such as interference with prospective economic relations, interference with contract, intentional infliction of emotional distress, and defamation; Hamidi urges that an action for nuisance is more appropriate. Although other causes of action may under certain circumstances also apply to Hamidi's conduct, the remedy based on trespass to chattels is the most efficient and appropriate. It simply requires Hamidi to stop the unauthorized use of property without regard to the content of the transmissions. Unlike trespass to chattels, the other potential causes of action suggested by the majority and Hamidi would require an evaluation of the transmissions' content and, in the case of a nuisance action, for example, would involve questions of degree and value

judgments based on competing interests.

As discussed above, I believe that existing legal principles are adequate to support Intel's request for injunctive relief. But even if the injunction in this case amounts to an extension of the traditional tort of trespass to chattels, this is one of those cases in which, as Justice Cardozo suggested, "[t]he creative element in the judicial process finds its opportunity and power" in the development of the law.

The law has evolved to meet economic, social, and scientific changes in society. The age of computer technology and cyberspace poses new challenges to legal principles. Before the computer, a person could not easily cause significant disruption to another's business or personal affairs through methods of communication without significant cost. With the computer, by a mass mailing, one person can at no cost disrupt, damage, and interfere with another's property, business, and personal interests. Here, the law should allow Intel to protect its computer-related property from the unauthorized, harmful, free use by intruders.

As the Court of Appeal observed, connecting one's driveway to the general system of roads does not invite demonstrators to use the property as a public forum. Not mindful of this precept, the majority blur the distinction between public and private computer networks in the interest of "ease and openness of communication."

By making more concrete damages a requirement for a remedy, the majority has rendered speech interests dependent on the impact of the e-mails. The sender will never know when or if the mass e-mails sent by him (and perhaps others) will use up too much space or cause a crash in the recipient system, so as to fulfill the majority's requirement of damages. Thus, the sender is exposed to the risk of liability because of the possibility of damages. In addition, a business could never reliably invest in a private network that can only be kept private by constant vigilance and inventiveness, or by simply shutting off the Internet. Moreover, Intel would have less incentive to allow employees reasonable use of its equipment to send and receive personal e-mails if such allowance is justification for preventing restrictions on unwanted intrusions into its computer system. I believe the best approach is to clearly delineate private from public networks and identify as a trespass to chattels the kind of intermeddling involved here.

ACCESS NOW, INC. v. SOUTHWEST AIRLINES, CO.

227 F. Supp. 2d 1312 (S.D. Fla. 2002)

PATRICIA A. SEITZ, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS MATTER is before the Court on Defendant Southwest Airlines, Co.'s ("Southwest") Motion to Dismiss Plaintiffs' Complaint. Plaintiffs, Access Now, Inc. ("Access Now"), a non-profit, access advocacy organization for disabled individuals, and Robert Gumson ("Gumson"), a blind individual, filed this four-count Complaint for injunctive and declaratory relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § § 12101, *et seq.* Plaintiffs contend that

Southwest's Internet website, southwest.com, excludes Plaintiffs in violation of the ADA, as the goods and services Southwest offers at its "virtual ticket counters" are inaccessible to blind persons. Southwest has moved to dismiss Plaintiffs' Complaint on the grounds that southwest.com is not a "place of public accommodation" and, therefore, does not fall within the scope of Title III of the ADA. For the reasons stated below, the Court will grant Southwest's motion to dismiss.

Background

Having found that nearly forty-three million Americans have mental or physical disabilities, that such individuals continually encounter various forms of discrimination, and that "the continuing existence of unfair and unnecessary discrimination denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous," Congress enacted the ADA in 1990. Congress' stated purposes in enacting the ADA were, among other things, to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Among the statutorily created rights embodied within the ADA, is Title III's prohibition against discrimination in places of public accommodation. 42 U.S.C. § 12182(a).

Since President George Bush signed the ADA into law on July 26, 1990, this Nation, as well the rest of the world, has experienced an era of rapidly changing technology and explosive growth in the use of the Internet. Today, millions of people across the globe utilize the Internet on a regular basis for communication, news gathering, and commerce. Although this increasingly widespread and swiftly developing technology provides great benefits for the vast majority of Internet users, individuals who suffer from various physical disabilities may be unable to access the goods and services offered on many Internet websites. According to Plaintiffs, of the nearly ten million visually impaired persons in the United States, approximately 1.5 million of these individuals use the Internet.

In an effort to accommodate the needs of the visually impaired, a number of companies within the computer software industry have developed assistive technologies, such as voice-dictation software, voice-navigation software, and magnification software to assist visually impaired persons in navigating through varying degrees of text and graphics found on different websites. However, not only do each of the different assistive software programs vary in their abilities to successfully interpret text and graphics, but various websites also differ in their abilities to allow different assistive technologies to effectively convert text and graphics into meaningful audio signals for visually impaired users. This lack of coordination between programmers and assistive technology manufacturers has created a situation where the ability of a visually impaired individual to access a website depends upon the particular assistive software program being used and the particular website being visited.

In light of this rapidly developing technology, and the accessibility problems faced by numerous visually impaired Internet users, the question remains whether Title III of the ADA mandates that Internet website operators modify their sites so as to provide complete access to

visually impaired individuals.¹ Because no court within this Circuit has squarely addressed this issue, the Court is faced with a question of first impression, namely, whether Southwest's Internet website, southwest.com, is a place of public accommodation as defined by the ADA, and if so, whether Title III of the ADA requires Southwest to make the goods and services available at its "virtual ticket counters" accessible to visually impaired persons.

Southwest, the fourth largest U.S. airline (in terms of domestic customers carried), was the first airline to establish a home page on the Internet. Southwest's Internet website, southwest.com, provides consumers with the means to, among other things, check airline fares and schedules, book airline, hotel, and car reservations, and stay informed of Southwest's sales and promotions. Employing more than 35,000 employees, and conducting approximately 2,800 flights per day, Southwest reports that "approximately 46 percent, or over \$ 500 million, of its passenger revenue for first quarter 2002 was generated by online bookings via southwest.com." According to Southwest, "more than 3.5 million people subscribe to Southwest's weekly Click 'N Save e-mails." Southwest prides itself on operating an Internet website that provides "the highest level of business value, design effectiveness, and innovative technology use achievable on the Web today."

Despite the apparent success of Southwest's website, Plaintiffs contend that Southwest's technology violates the ADA, as the goods and services offered on southwest.com are inaccessible to blind persons using a screen reader.² Plaintiffs allege that although "southwest.com offers the sighted customer the promise of independence of on-line airline/hotel booking in the comfort and safety of their home. . .even if a blind person like [Plaintiff] Gumson has a screen reader with a voice synthesizer on their computer, they are prevented from using the southwest.com website because of its failure to allow access." Specifically, Plaintiffs maintain that "the southwest.com website fails to provide 'alternative text' which would provide a 'screen reader' program the ability to communicate via synthesized speech what is visually displayed on the website." Additionally, Plaintiffs assert that the southwest.com website "fails to provide online forms which can be readily filled out by [Plaintiffs] and fails to provide a 'skip navigation link' which facilitates access for these blind consumers by permitting them to bypass the

¹ Some commentators, while recognizing the paucity of case law in this area, have suggested that Internet websites fall within the scope of the ADA. See, e.g. Jeffrey Scott Raneu, Note, Was Blind But Now I See: The Argument for ADA Applicability to the Internet, 22 B.C. Third World L.J. 389 (2002); Adam M. Schloss, Web-Sight for Visually-Disabled People; Does Title III of the Americans with Disabilities Act Apply to Internet Websites?, 35 Colum. J.L. & Soc. Probs. 35 (2001); Matthew A. Stowe, Note, Interpreting Place of Public Accommodation' Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications, 50 Duke L.J. 297 (2000).

² Plaintiffs claim that although purchasing tickets at southwest.com is "technically possible, plaintiffs found purchasing a ticket to be extremely difficult..." Plaintiffs do not argue that they are unable to access such goods and services via alternative means such as telephone or by visiting a particular airline ticket counter or travel agency.

navigation bars on a website and proceed to the main content."

Plaintiffs' four-count Complaint seeks a declaratory judgment that Southwest's website violates the communication barriers removal provision of the ADA, violates the auxiliary aids and services provision of the ADA, violates the reasonable modifications provisions of the ADA, and violates the full and equal enjoyment and participation provisions of the ADA. Plaintiffs ask this Court to enjoin Southwest from continuing to violate the ADA, to order Southwest to make its website accessible to persons who are blind, and to award Plaintiffs attorneys' fees and costs. Southwest has moved to dismiss Plaintiffs' Complaint.

Discussion

Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted

The threshold issue of whether an Internet website, such as southwest.com, is a "place of public accommodation" as defined by the ADA, presents a question of statutory construction. As in all such disputes, the Court must begin its analysis with the plain language of the statute in question. The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." A court need look no further where the statute in question provides a plain and unambiguous meaning.

1. Southwest.com is Not a "Place of Public Accommodation" as Defined by the Plain and Unambiguous Language of the ADA

Title III of the ADA sets forth the following general rule against discrimination in places of public accommodation:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place of public accommodation* by any person who owns, leases (or leases to), or operates a *place of public accommodation*.

42 U.S.C. § 12182 (a) (emphasis added).

The statute specifically identifies twelve (12) particularized categories of "places of public accommodation." 42 U.S.C. § 12181(7). "Public accommodations" include:

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

Furthermore, pursuant to Congress' grant of authority to the Attorney General to issue regulations to carry out the ADA, the applicable federal regulations also define a "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve (12) enumerated categories set forth in 42 U.S.C. § 12181(7).]" 28 C.F.R. § 36.101. Section 36.104 defines "facility" as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104. In interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation. *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) (noting that "because Congress has provided such a comprehensive definition of 'public accommodation,' we think that the intent of Congress is clear enough"). Where Congress has created specifically enumerated rights and expressed the intent of setting forth "clear, strong, consistent, enforceable standards," courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover "virtual" spaces would be to create new rights without well-defined standards.

Notwithstanding the fact that the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of "places of public accommodation," Plaintiffs allege that the southwest.com website falls within the scope of Title III, in that it is a place of "exhibition, display and a sales establishment." Plaintiffs' argument

rests on a definition they have created by selecting language from three separate statutory subsections of 42 U.S.C. § 12181(7). See § 42 U.S.C. § § 12181(7)(C), (H) & (E).³ While Plaintiffs can, as advocates, combine general from three separate statutory subsections, and apply them to an unenumerated specific term, namely Internet websites, the Court must view these general terms in the specific context in which Congress placed each of them.

Under the rule of *ejusdem generis*, "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." Here, the general terms, "exhibition," "display," and "sales establishment," are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely; "motion picture house, theater, concert hall, stadium"; and museum, library, gallery"; and "bakery, grocery store, clothing store, hardware store, shopping center," respectively. 42 U.S.C. § § 12181(7)(C), (H) & (E). Thus, this Court cannot properly construe "a place of public accommodation" to include Southwest's website, southwest.com.

2. Plaintiffs Have Not Established a Nexus Between Southwest.com and a Physical, Concrete Place of Public Accommodation

Although Internet websites do not fall within the scope of the ADA's plain and unambiguous language, Plaintiffs contend that the Court is not bound by the statute's plain language, and should expand the ADA's application into cyberspace. As part of their argument, Plaintiffs encourage the Court to follow *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Assoc. of New England*, in which the First Circuit broadly held that the ADA's definition of "public accommodation" is not limited to actual physical structures, but includes, *inter alia*, health-benefit plans. *Carparts*, 37 F.3d 12, 19 (1st Cir. 1994).⁴ While application of the broad holding

³ Plaintiffs created definition from the following italicized language in three subsection of 42 U.S.C. § 12181(7);

"a motion picture houses, theater, concert hall, stadium, or other *place of exhibition* or entertainment," 42 U.S.C. § 12181(7)(C);

"a museum, library, gallery, or other place of public *display* or collection," 42 U.S.C. § 12181(7)(H); and

"a bakery, grocery store, clothing store, hardware store, shopping center, or other *sales* or rental *establishment*," 42 U.S.C. § 12181(7)(E).

⁴ Although *Carparts* does not explicitly address the issue of whether an Internet website falls within the definition of "public accommodation," Plaintiffs focus on the First Circuit's dicta discussing the public policy reasons for why the ADA's definition of "public accommodations" should be read broadly:

By including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishment" include providers of services which do not require a person no physically enter an actual physical structure. Many travel services conduct by telephone or correspondence without requiring their customers to enter an office in order to

and dicta in *Carparts* to the facts in this case might arguably require this Court to include Internet websites within the ADA's definition of "public accommodations," the Eleventh Circuit has not read Title III of the ADA nearly as broadly as the First Circuit.⁵ See *Rendon*, 294 F.3d 1279.

Plaintiffs also cite to a September 9, 1996 letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to U.S. Senator Tom Harkin, advising the Senator that "covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well." Finally Plaintiffs cite the recent unpublished opinion in *Vincent Martin v. Metro Atlanta Rapid Transit Authority*, 225 F. Supp. 2d 1362 (N.D. Ga. 2002), in which U.S. District Judge Thomas W. Thrash, Jr. held that until the Metropolitan Atlanta Rapid Transit Authority ("MARTA") reformats its website in such a way that it can be read by visually impaired persons using screen readers, MARTA is "violating the ADA mandate of making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service." That case, however, is distinguishable in one critical respect: Plaintiffs in *Vincent Martin* filed suit under Title II of the ADA, 42 U.S.C. 12132, not Title III as in the present case. Title II prohibits qualified individuals from being "excluded from participation in or [being] denied the benefits of the services, programs, activities of a public entity, or [being] subjected to discrimination by any such entity." Title II of the ADA defines "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority...." Because the present case deals with Title III, not Title II, and Plaintiffs could not allege any facts that would place Southwest within the definition of a "public entity" under Title

obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase service are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.

Carparts, 37 F.3d at 19.

⁵ In addition to *Carparts*, Plaintiffs encourage this Court to follow *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), in which Chief Judge Posner approvingly cited to *Carparts* and stated in dicta that;

The core meaning of [42 U.S.C. § 12182(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space, [*Carparts*]), that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.

II, Vincent Martin is inapplicable.

In *Rendon v. Valleycrest Prod., Ltd.*, 294 F.3d 1279 (11th Cir. 2002), a recent Eleventh Circuit case addressing the scope of Title III, a group of individuals with hearing and upper-body mobility impairments sued the producers of the television game show, "Who Wants To Be A Millionaire," alleging that the use of an automated fast finger telephone selection process violated the ADA because it excluded disabled individuals from participating. The district court dismissed the complaint on grounds that the automated telephone selection process was not conducted at a physical location, and therefore, was not a "place of public accommodation" as defined by the ADA. The Eleventh Circuit reversed, holding that the telephone selection process was "a discriminatory screening mechanism... which deprives [the plaintiffs] of the opportunity to compete for the privilege of being a contestant on the [game show]." The Eleventh Circuit observed that "there is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA." Most significantly, the Eleventh Circuit noted that the plaintiffs stated a claim under Title III because they demonstrated "a nexus between the challenged service and the premises of the public accommodation," namely the concrete television studio.

Plaintiffs contend that the Eleventh Circuit in *Rendon* aligned itself with the First Circuit in *Carparts*, and that *Rendon* requires a broad reading of the ADA to include Internet websites within the "public accommodations" definition. However, these arguments, while emotionally attractive, are not legally viable for at least two reasons. First, contrary to Plaintiffs' assertion that the Eleventh Circuit aligned itself with *Carparts*, the Eleventh Circuit in *Rendon* not only did not approve of *Carparts*, it failed even to cite it.⁶

Second, whereas the defendants in *Rendon* conceded, and the Eleventh Circuit agreed, that the game show at issue took place at a physical, public accommodation (a television studio), and that the fast finger telephone selection process used to select contestants tended to screen out disabled individuals, the website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in *Rendon*.⁷ Although Plaintiffs contend that this "is a case seeking equal access to

⁶ In fact, the Eleventh Circuit recognized those courts which declined to follow *Carparts*, noting that "to the extent that a plaintiff intends to raise a claim of discrimination based on the kind of insurance offered, the plaintiff must demonstrate that the policy was offered to the plaintiff directly by the insurance company *and was connected with its offices*, as opposed to its being a privilege provided by the plaintiff's employer." *Rendon*, 294 F.3d at 1284 n. 8 (emphasis added) (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000) (noting that "some connection between the good or service complained of and an actual physical place is required"); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d. Cir. 1998) (noting that "the plain meaning of Title III is that a public accommodation is a place...").

⁷ In recognizing the requirement that a plaintiff establish "a nexus between the challenged service and the premises of the public accommodation," the Eleventh Circuit noted that the plaintiffs in *Rendon* stated a claim under Title II of the ADA because they sought "the privilege

Southwest's virtual 'ticket counters' as they exist on-line," the Supreme Court and the Eleventh Circuit have both recognized that the Internet is "a unique medium--known to its users as 'cyberspace'--*located in no particular geographical location* but available to anyone, anywhere in the world, with access to the Internet." *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001) (quoting *Reno v. ACLU*, 521 U.S. 844, 851 (1997)). Thus, because the website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.⁸ Having failed to establish a nexus between southwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim under Title III of the ADA.⁹ Accordingly, it is hereby ORDERED that Defendant Southwest's Motion to Dismiss Plaintiffs' Complaint is GRANTED.

of competing in a contest held in a *concrete space*..." *Rendon*, 294 F.3d at 1284 (emphasis added); compare *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995) (holding that hearing impaired plaintiffs, who alleged that National Football League "blackout rule" violated Title III of ADA, failed to state a cause of action, as there was no nexus between televised broadcast of football game and physical place of public accommodation). See also *Torres v. AT&T Broadband, LLC*, 158 F. Supp. 2d 1035 (N.D. Cal. 2001) (dismissing Title III claim that cable service provider must make a list of available programs accessible to the visually impaired, and holding that "neither the digital cable system nor its on-screen channel menu can be considered a place of public accommodation within the meaning of the ADA").

⁸ It is important to note that aircrafts are explicitly exempt from Title III of the ADA. 42 U.S.C. § 12181(10). Plaintiffs do not argue that Southwest's website impedes their access to aircrafts.

⁹ Given the number of visually impaired persons who utilize the Internet for commerce, and the amount of business that Southwest obtains through its Internet website, it is unfortunate that the parties have not cooperated to develop a creative solution that benefits both parties. That being said, as Congress has created the rights under the ADA, it is the role of Congress, and not this Court, to expand the ADA's definition of "public accommodation" beyond physical, concrete places of public accommodation, to include "virtual" places of public accommodation.