Cybertrespass

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One of the late Harry Kalven, Jr.'s favorite expressions about the common law was that "it always worked itself pure." I have always been certain that he was correct, but have never been quite sure what he meant. My best guess is that his general proposition counts as a passionate defense of incremental development of legal principles through cases and by analogies—a position that received its most cogent exposition in Edward Levi's *Introduction to Legal Reasoning*,[1] and that has been championed in our own time by, among others, Cass Sunstein, who has argued for the advantages of deciding one case at a time.[2] More recently, I have that argued moral incrementalism is the best way to conduct legal reasoning.[3]

The common thread in these writings is that the law takes a few steps in one direction or the other and then stops to reassess its progress. In so doing, the path that it takes from here to there may not be the most direct route available. Small incremental decisions make for irregular movements with lots of pitfalls. But in the long haul, sensible patterns emerge that can withstand both the test of history and the demands of reason. The common law method has hidden resources that are all too easily overlooked by scholars who start with some grand claim, such as the economic efficiency of the common law, only thereafter to force and flatten a somewhat fractious case law into this general framework.[4]

One obvious test of legal incrementalism is how it responds to changes in the legal environment brought on by technological advances. As a general proposition, new forms of technology create the

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1 Edward H. Levi, *An Introduction to Legal Reasoning* 1 (Chicago 1948) ("The basic pattern of legal reasoning is reasoning by example.").

2 Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 4 (Harvard 1999) (arguing that judicial minimalism "is likely to reduce the burdens of judicial decision" and "is likely to make judicial errors less frequent and (above all) less damaging").

3 Richard A. Epstein, *Skepticism and Freedom: A Modern Defense of Classical Liberalism* ch 4 (forthcoming 2003) ("The objective is to maximize social welfare (in my view, generally under Paretian standards), which is no mean feat to accomplish in the abstract. So we attack that problem by approximation, and within a few iterations reach a sensible result.").

4 See, for example, Richard A. Posner, *Economic Analysis of Law* 98 (Little, Brown 1972) ("Our survey of the major common law fields suggests that the common law exhibits a deep unity that is economic in character.").

opportunity for new forms of resource use. These uses might not map well with the existing framework of property rights. A common law system that is able to work itself pure should be able to respond to these changes both by preserving what makes sense in the older system and by changing what does not. That observation dovetails well with Harold Demsetz's famous thesis "that the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities."[5] Technology is, of course, one major source of new, relevant possibilities.

One convenient area in which to test the abilities of judges to adapt to changed circumstances lies in the humdrum tort of trespass, one of the oldest and most recognized of legal wrongs. The concern with trespass long antedates the common law. The Roman law system did not begin its version of tort law with a philosophical theory of but-for causation, but rather with the simpler (and more sensible) view that a core wrong by one person to another was harm inflicted *corpore corpori*—by the body and to the body. By easy analogy, either entry or dispossession were the core wrongs to real property. Similarly, meddling, removal, or damage were the core wrongs to chattels. More comprehensively, the dominant wrong was one person's deliberate violation of the property rights of another person. Liability for accidental harm, either under a negligence or a strict liability theory, was a second-order problem that shows the power of the Kalven maxim: So long as the law gets the critical case (of deliberate harm) right, then it tolerates a certain mess of uncertainty in the more complex case (of accidental harm). In the grand scheme of things, it doesn't make a dime's worth of difference whether accidental trespasses are governed by a strict liability rule or by a negligence rule supplemented by res ipsa loquitur.

By this measure, it is very difficult to conceive of a civilized world that does not count deliberate entries into the property of another as presumptive wrongs. Abandon this presumption and B can enter with impunity the land of A. A can, of course, seek to buy B off, but this agreement will yield little of permanent value to A so long as C, D, E, and F retain the right to enter A's land at will. Efficient contracting can take place only if A, as owner, is entitled to decide who enters his property and who keeps off. The prosaic but critical tort of trespass to real property offers dramatic proof of Ronald Coase's central proposition that the initial assignment of legal rights should minimize the transaction costs necessary to reach some (Pareto) optimal allocation of rights.[6] In the abstract, that proposition is all too often dismissed as

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5 Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am Econ Rev 347, 350 (1967).

6 See Ronald H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 19 (1960) ("It would

useless.[7] But in context, this transaction cost approach explains why every legal system, regardless of its social customs and mores, recognizes the tort of trespass to land, chattels, and people. Of course, sometimes the entry to someone else's land, or the use of someone's chattel, or even the infliction of harm on someone else's person may be *justified.* But these cases of privilege presuppose that the owner has given consent to enter or has used his property in an aggressive fashion against his neighbor: Self-help to abate a nuisance is one permissible, if easily abused, remedy.

With cyberspace, the hard question is whether technological changes could ever lead us to abandon the presumption that a deliberate trespass counts as a private wrong. The evolution of legal doctrine provides us with excellent examples of just how that shift takes place. One of the central rules of the common (and Roman) law is embedded in the maxim *cujus est solum, ejus est usque ad coelum et ad inferos*—"Whosoever owns the land, owns to the sky and to the bottom of the earth." One look to the heavens shows that, literally taken, the maxim is absurd, given the rotation of the earth: It's nice to own Orion for a second. But this error seemed harmless enough because no one could put the maxim to the test by taking possession of outer space. Yet the *ad coelum* rule had real functional advantages by allowing people to build on land; without the maxim, possession of the soil would work, weirdly, in only two dimensions, so that any one who built an overhang over a neighbor's land could take over the air space, at least until someone built over him. The incessant "race" to build solely to perfect title would generate massive social waste. The *ad coelum* rule saved the common law rule of occupation with respect to land.

This strong rule on possession had to respond, however, to technological and production requirements. One dividend of strong trespass rules is that they protect the privacy of the property owners, as they did even before privacy counted as an independent legal interest.[8] But an antitrespass rule does not offer sufficient protection against electronic snooping. Building therefore from Blackstone's

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therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions.").

7 See, for example, Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further,* 100 Yale L J 1211, 1212 (1991) ("[A]ny given society is always or will immediately arrive at a Pareto optimal point *given* transaction costs.").

8 See Samuel Warren and Louis Brandeis, *The Right to Privacy,* 4 Harv L Rev 193, 193–96 (1890) (discussing the evolution of the legal right to privacy from its origins in the "right to life" to the broader "right to be let alone").

simple condemnation of eavesdropping,[9] the courts have prevented prying by electronic means.[10] Everyone is, in the long run, better off if no one is in a position to snoop, so that by operation of law, boundaries of property are extended outward incrementally to accommodate that result.

I. TRESPASS IN CYBERSPACE

The end of the twentieth century has given rise to new technologies that are every bit as profound and beneficial in their operation as broadcast, air transportation, or power transmission. The internet is the ultimate network industry, which allows the near-instantaneous transmission of information from one person to another. As with so many earlier systems, the internet contains a mix of public and private elements. The internet highway is maintained by public or quasi-public bodies and individuals with their own computers or websites that can communicate across this commons. The question then arises whether the rise of the internet and web requires a rethinking of the property relations governed by the common law of trespass. In this case, moreover, the focus of emphasis shifts because the various equipment and facilities that make up the internet are not by any stretch of the imagination real property. Rather, they are a new form of chattel, which are presumptively governed by the law of trespass to chattels.

A. Trespass to Chattels and Real Property

What is striking about the law of trespass to chattels is how little doctrinal change it has undergone in hundreds of years. During the Middle Ages, the basic doctrine became established that the law of trespass to chattels covered deliberate removal of or damage to chattels. In those cases where the defendant threatened repeated invasions of the plaintiff's personal property, injunctive relief would be available on much the same ground as it was for trespass to real property. Within the classical common law framework, the one loose end in the system had to do with the treatment of those deliberate tres-

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[9] William Blackstone, 4 *Commentaries on the Laws of England* 169 (Chicago 1979) ("Eavesdroppers . . . are a common nuisance and . . . are indictable at the sessions.").

[10] See, for example, *Roach v Harper*, 143 W Va 869, 105 SE2d 564, 568 (1958) (holding that plaintiff's right to privacy was violated by the existence of a "hearing device" in her apartment enabling defendant to hear her conversations). For the constitutional implications with searches and seizures, see, for example, *Katz v United States*, 389 US 347, 353 (1967) (holding that an FBI wiretap of a phone booth constituted a search and seizure within the meaning of the Fourth Amendment). For a discussion of the logic of implicit-in-kind compensation as it relates to privacy, see Richard A. Epstein, *Deconstructing Privacy: And Putting It Back Together Again*, 17 Soc Phil & Pol 1, 6–7 (2000).

passes to chattels that resulted in neither damage to, nor removal of, the chattel. In these cases, the Restatement (Second) of Torts sets out the standard American legal view on the question:

> 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 as stated in Clause (c) [relating to the deprivation of use for a substantial time]. Sufficient legal protection . . . of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.[11]

The one illustration of nominal damages reads in full:

> 2. A, a child, climbs upon the back of B's large dog and pulls its ears. No harm is done to the dog, or to any other legally protected interest of B. A is not liable to B.[12]

The English rule on the subject appears, by the balance of legal sentiment, to run in the opposite direction. But the analysis offered is fragmentary to say the least. *Winfield & Jolowicz on Tort* offers the most detailed analysis, which in its entirety runs as follows:

> Despite the fact that trespass is actionable *per se,* there is some authority to the effect that trespass to goods requires proof of some damage or asportation but the general view of textbook writers is the contrary and there must be many instances where, if mere touching of objects like waxworks or exhibits in a gallery or museum be not trespass, their possessor would be without remedy.[13]

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11 Restatement (Second) of Torts § 218 cmt e (1965) (emphasis added).

12 Id.

13 W.V.H. Rogers, ed, *Winfield and Jolowicz on Tort* 585–86 (Sweet & Maxwell 15th ed 1998) (citations omitted). See John Fleming, *The Law of Torts* 59 (LBC Information Services 9th ed 1998) ("[I]t is still moot whether the action [of trespass to chattels] lies without proof of actual damage."). Another commentator states:

> Probably the courts will hold that direct and deliberate interference is trespass even if no damage ensues, but where the interference is by way of negligent or inadvertent contact,

The initial question is, why the distinction between trespasses to chattels and trespasses to land? The answer to that lies, I think, by and large in the action of trespass to try title. There, in many cases, neither plaintiff nor defendant has done any damage to the land in question. The only issue is who owns it. A requirement of actual damages would place an obstacle in the path of litigation, so the law dispensed with the test altogether. Trespass to title cases raise no question of damage *to the land*. But they do raise the very real question of damage *to the owner* who is wrongfully deprived of exclusive possession.

Chattels do not give rise to boundary disputes. In those cases where one party takes a chattel on the ground that he owns it, trespass *de bonis asportatis* works as the functional equivalent of trespass to try title: Once again the tort does not allege damage to the goods but only that the plaintiff was deprived of their lawful possession. The tort thus operates as a sensible way to try title. There is no reason, therefore, to relax the rules on nominal damages.

All this, however, does not explain why the Restatement does not allow trespass to chattels without actual damage but does allow the owner of that chattel to use reasonable force to protect his possession of that chattel. Here again, however, it is possible to venture an explanation. No one in his right mind sues for nominal damages. The litigation costs of such a noble undertaking dwarf the pitiful recovery even if the suit is certain to succeed. For a one-of-a-kind occasion, injunctive relief is neither here nor there. The law in its infinite wisdom has denied a cause of action that no rational person has ever wished to bring. But if one starts to mess with your chattels, even if he does not harm them when you are present, then the calculus of advantage switches. The refusal to back off is often a precursor to the forcible removal or damage to the chattels. Rather than forcing the owner to wait until it is too late to prevent the harm, the law allows him the right to use reasonable force to protect his "inviolate" interest in his chattel from the incursions by others. "Reasonable force" is a term of art, but surely if the chattel owner can avoid the confrontation by putting his property in his pocket or driving it away, then the use of force would not be justified. There is little occasion to test these rules in ac-

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the general trend of recent judicial decisions and dicta in England suggest that there is a requirement of proof of special damage.

Margaret R. Brazier, ed, *Clerk and Lindsell on Torts* § 13-159 at 703 (Sweet & Maxwell 17th ed 1995). See also P.A. Landon, ed, *Pollock's Law of Torts* 264–65 (Stevens & Sons 15th ed 1951) ("[C]ases are conceivable in which the power of treating a mere unauthorised touching as a trespass might be salutary and necessary."); *William Leitch & Co, Ltd v Leydon*, [1931] AC 90, 106 (HL) (Lord Blanesborough) ("[T]he wrong to the appellants in relation to [the] trespass is constituted whether or not actual damage has resulted therefrom.").

tion, for while they may not be perfect, at least they have done their job.

B. Application of Traditional Trespass to Chattel to the Internet

The pressure on these rules has mounted with the rise of the internet. Firms and individuals invest substantial amounts of capital and effort to create servers and websites that are linked to the rest of cyberspace via the internet. No technical wizardry is needed to realize that the possibilities for invasions in cyberspace parallel those in physical space. The most obvious illustration of these invasions is spam—those mass messages sent by a single party to all sorts of people who would rather not receive them. It is an open question whether spam counts as a trespass if the spammer has not received any desist message from an internet service provider or ordinary email users (who are not shy to make their concerns known).[14] After all, ordinary phone calls are not trespasses to chattels. But the analysis changes radically once the phone caller or the spammer receives a specific notice asking him to cease and desist. Any implied authorization of the practice is negated by this express command. The rules here are similar to those that govern entering into or remaining on the land of another individual.[15]

But why would one want to stop communications from others? In some cases, the intrusions could be serious enough to overload the computer and perhaps to cause it to crash. In other cases, it might clog the limited capacity of the hard drive or put the owner of the system to some burden to remove the emails in question. On multiple occasions courts have held that these unauthorized intrusions count as deliberate trespasses to chattels, for which either damages or, more critically, injunctive relief should be allowed.[16] It seems impossible to deny

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14 See, for example, Brad Stone and Jennifer Lin, *Spamming the World*, Newsweek 42, 43–44 (Aug 19, 2002) (noting Verizon Online's suit against Al Ralsky, a bulk emailer, for crashing its servers).

15 See, for example, Restatement (Second) of Torts at § 160 (cited in note 11) (liability for "failure to remove thing placed on land pursuant to license or other privilege"); id § 161 (liability for "[f]ailure to remove thing tortiously placed on land").

16 See, for example, *eBay, Inc v Bidder's Edge, Inc*, 100 F Supp 2d 1058, 1060–63 (ND Cal 2000) (granting a preliminary injunction even though Bidder's Edge's incursions occupied at most only between 1.11 and 1.53 percent of the total load of eBay's servers); *CompuServe, Inc v Cyber Promotions, Inc*, 962 F Supp 1015, 1019 (SD Ohio 1997) (granting a preliminary injunction to prevent defendant from continuing to send unsolicited emails to plaintiff's subscribers). See also *Oyster Software, Inc v Forms Processing, Inc*, 2001 US Dist LEXIS 22520, *40 (ND Cal) (stating that evidence that defendant made use of plaintiff's computer is all that is required to sustain a trespass claim); *Ticketmaster Corp v Tickets.com, Inc*, 2000 US Dist LEXIS 12987, *16–18 (CD Cal), affd, 248 F3d 1173 (9th Cir 2001) (denying injunction because of insufficient proof of trespass and irreparable injury, but noting that the use of a computing system that interferes with regular business is a trespass); *America Online, Inc v IMS*, 24 F Supp 2d 548, 550 (ED Va 1998) (holding that defendant committed a trespass to chattels by sending unauthorized bulk

that the defendant has entered and used the plaintiff's facilities, which must in principle count as some form of trespass. The rule on nominal damages is not invoked because harms to equipment, real or threatened, count as actual damages for which both monetary compensation and injunctive relief are appropriate. This new technological innovation offers *no* reason to bend the traditional rules of chattel trespass to take into account the unique circumstance of the internet.

The key bone of contention, however, arises when defendant's cyber-entry into the plaintiff's system causes neither disk damage nor computer slow-down. In these cases, defendants have argued that the nominal damage rule of the Restatement precludes any lawsuits at all. Two cases in which I have written amicus briefs against allowing cybertrespasses, *eBay, Inc v Bidder's Edge, Inc*[17] and *Intel Corp v Hamidi*,[18] show the range of arguments that have been used to defeat the claim for injunctive relief in cases of cybertrespass. The two situations were as follows.

eBay runs online auctions both great and small. Bidder's Edge (BE) is (or more accurately was) an auction aggregator whose market niche was to ease the costs of surfing the internet. It did so by consolidating information about the goods and prices available on multiple auction sites. Initially BE sought a license from eBay to gather this information. Similar licenses had been issued to other internet firms such as Yahoo!. These licenses regulated the terms and conditions of access, and also provided the aggregator with small compensation for any business directed to the auction site. But when negotiations between eBay and BE broke down, BE sent its spiders (in other words, probes to find information on the eBay site) on thousands of separate occasions onto the eBay site to gather large amounts of information that BE then displayed on its own site. The theoretical question is: If one brackets any damage to eBay's equipment or capacity, is this entrance one that eBay is entitled to enjoin? The district court held the unauthorized entry counted as a trespass to chattels which, in light of its repetitive nature, justified injunctive relief.[19]

In *Hamidi*, the defendant was a former employee of Intel who surreptitiously obtained Intel's email registry and used it to send inflammatory emails to between eight thousand and thirty-five thousand Intel employees on six specific occasions. Intel claimed loss of productivity attributed to distracted and distraught employees and to

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email messages to plaintiff's subscribers).

17 100 F Supp 2d 1058 (ND Cal 2000).

18 114 Cal Rptr 2d 244, 246 (App 2001) (upholding injunction enjoining a disgruntled former employee of plaintiff from sending thousands of inflammatory emails to other employees), petition for review granted, 118 Cal Rptr 2d 546 (2002).

19 *eBay*, 100 F Supp 2d at 1069–70.

its extended but unsuccessful attempts to keep Hamidi from cracking the website. When Hamidi refused to stop his emails on Intel's request, Intel then sought and obtained injunctive relief that was affirmed on appeal by a divided court.[20]

The defendants in both cases argued that the law of trespass to chattels did not allow suit in the absence of damage to the chattel, which was restricted to damage to its "condition, quality, or value," none of which were directly implicated in these cases. The basic argument is wholly doctrinal in its appeal to the language of the Second Restatement. But as a functional matter, the claim appears to go astray at two levels: first, in their claim that the damages were solely nominal, and second, in their application of the nominal damage rule, which in principle has no place in cybertrespass cases.

In both these cases, the definition of nominal damages is far more expansive than its ordinary definition. If eBay or Intel had suffered only nominal damages, then why would either firm spend enormous sums of money in order to stop conduct that at some level they regarded as deleterious to their businesses? The central insight in the economics of litigation is that no plaintiff will sue to recover when the costs of litigation exceed the expected recovery of suit. But in this context the mystery disappears when the ordinary definitions of causation and damages are carried over from physical space to cyberspace. Even in cases of *un*intended entry, the plaintiff would recover harms that were caused directly, so long (at least in some versions of the rule) as the harm is foreseeable. Intended consequences are always foreseeable, so that the only question is whether the respective plaintiff can point to some form of *consequential damages* for which recovery is appropriate. These damages have been routinely allowed in cases of trespass to real property: "A trespasser is liable to respond in damages for such injuries as may result naturally, necessarily, directly and proximately in consequence of his wrong."[21]

These rules carry over to cyberspace without missing a beat. In *America Online, Inc v IMS*,[22] the court held that AOL's loss of good will when customers complained about the slow and balky operation of their service was an element of actionable damages, above and beyond any physical damage to the system itself.[23] Actions for trespass to real property have also allowed actions for consequential damages related to the distress of an occupant that is not attributable to the as-

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20 See *Hamidi*, 114 Cal Rptr 2d at 246.

21 *Bouillon v Laclede Gaslight Co*, 148 Mo App 462, 129 SW 401, 402 (1910) (allowing recovery for nervous shock from defendant's servant's entry to property, even though plaintiff was not personally assaulted).

22 1998 US Dist LEXIS 20448 (ED Va).

23 Id at *14 n 13.

sault of a wrongful entrant.[24] In *eBay v Bidder's Edge*, eBay's damages could easily include loss of good will if BE displays its listings incorrectly or in some unattractive format that makes its goods look inferior to those sold on others' online auctions. The usual control of trade dress and appearance matters for ordinary store windows. It surely matters here. Likewise, employee distraction translates itself into poor morale, which in turn becomes lower productivity and lower profits. We do not have to estimate in the abstract how substantial these damages are because we have a perfect case of revealed preferences. The willingness of firms to sue in order to defend the exclusive use of their own space is evidence enough that the damages count. Even if these are difficult to estimate, we know that they are far greater than zero, so that the very inability to estimate the actual damages offers yet an additional reason to award injunctive relief. On this particular issue, the consequential losses should be estimated by the same rules that apply in physical space. The common law works itself pure by *not* adopting ad hoc rules when none are required.

The question of damages can also work in a second way. The usual rules of restitution hold that the plaintiff in a trespass action is normally entitled to choose between the benefits conferred on the defendant or the harm suffered by the plaintiff. In this case, the benefits to both defendants are hard to estimate. But difficult to estimate is one thing, nominal damages are quite another. With restitution damages as with tort damages, the difficulty in estimating substantial damages offers no reason to deny the injunction. It only proves that damages are inadequate as a matter of law. In a real sense, therefore, cybertrespasses do not require us to jettison the older requirement of actual damages. It only requires courts to interpret it sensibly in novel contexts that repeat familiar patterns.

C. Application of Trespass to Real Property to the Internet

The second point goes to analogy and comparison. Does a website look more like an ordinary chattel or more like real property? Thus far I have pursued the chattels line that has been followed in the cases. But, in principle, I think that the best answer comes from the descriptions of cyberspace offered by those who champion the distinctive nature of the cyber community, which appeals to an analogy drawn from ordinary understandings of real property. Common language speaks of internet "addresses," for, of course, individuals and

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[24] See, for example, *Bouillon*, 129 SW at 402–03 ("[A]lthough the assault was not directed against plaintiff and no physical injury was inflicted in the first instance, defendant was liable to respond for such consequences as were proximate to his wrongful act."), citing *Watson v Dilts*, 116 Iowa 249, 89 NW 1068 (1902).

firms occupy private "sites" along the internet "highway." It also speaks of the "architecture" of the internet, which may direct and influence conduct in both real and virtual "space."[25] Reference is common to "cybersquatters." To think of a fixed internet site, or the equipment that supports it, as though it were a chattel or personal property is to miss the operative distinction of the earlier law, where "movables" was often used as a synonym for personal property and "immovables" as a synonym for real property. The blunt truth is that an internet site is fixed in its cyberspace location; to change from one address to another risks the loss of its customer base, just like any ordinary store runs the risk of losing its customers when it changes locations. In these circumstances, cyberspace looks and functions more like real property than chattels. If one is forced to choose between the two sets of rules, then manifestly the real property rules offer a better fit.

The basic issues involved in these cybertrespass cases can be put in yet another fashion. When the dust settles, if these defendants had been allowed to continue just as they are, then the upshot is that the defendant is entitled to receive an uncompensated compulsory license to use the equipment of the plaintiff for his own advantage. It takes little imagination to see that these cases therefore amount to the claim that property rules should give way to forced transfers of wealth. But in this case, much is lost in making this assumption. Our two cases of course involve very different situations. In *Hamidi*, there is no chance that Intel would ever enter into a deal that would allow Hamidi to send spiteful emails to its employees. Given that transaction costs are low, this is the correct result: There is no reason to allow Hamidi's small gains to triumph over Intel's large costs. The initial allocation of rights holds form. In *eBay*, the situation is different because auction aggregators like BE could work to the benefit of firms like eBay by making their goods known to customers in a wider market. But a lot depends on the terms and conditions of the license. Here, moreover, the actual eBay licenses in use at the time of the BE suit were complex affairs. The "eBay Deep Link, Trademark, Copyright, and Banner Ad Agreement," for example, in effect at the time of the BE litigation, ran for seven pages and contained, *inter alia*, provisions that govern how eBay licensees could "deep link" to the eBay site; the default display of eBay content on the licensee's site; the protection and use of eBay's intellectual property and advertisement content; basic compensation provisions including front end licensing

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[25] See, for example, Lawrence Lessig, *Code and Other Laws of Cyberspace* 89 (Basic 1999) ("The software and hardware that make cyberspace what it is constitute a set of constraints on how you can behave.").

fees and additional payments *from* the auction aggregator for visits from its users to the eBay site and *from* eBay for each customer who registers with eBay when referred to it by an auction aggregator; restrictions on assignments and sublicensees; provisions governing termination and renewal of licenses; limitations on warranties for consequential damages; and provisions governing the cessation of services during emergencies. No compulsory license scheme, even with compensation, could hope to match the level of particularization and standardization achieved by contract.[26] This is a great improvement over a rule that allows one person to take the property of another until the system crashes or slows down.

D. Beyond Basic Trespass Law

The arguments thus far have been designed to show why strong property rights for non-network elements function as well in cyberspace as they do anywhere else. In fact, both of these cases can be seen to raise issues that go beyond these points of trespass law. In *eBay*, for example, the defendant could argue that some limitation on eBay's ability to exclude was necessary to preserve a smooth-functioning competitive market in which information about relative prices flows quickly and easily between the parties. At one level, just that goal is achieved by the voluntary agreements that eBay entered with other auction aggregators. But in response it might be argued that eBay's refusal to deal on certain terms should count as anticompetitive behavior. But if that were the case, then what is needed is an action under the antitrust laws, not the trespass laws. That action will be hard to maintain. In the usual case the plaintiff alleges that the defendant had conspired to rig markets by some form of collective action. eBay has only refused to do business with one firm that offers both complement and substitute services on terms that it regarded as appropriate. So long as we do not require ordinary auction houses like Christie's or Sotheby's to allow any potential publicist to enter their showrooms, it is hard to see how this claim of an antitrust violation has much traction. But even if it does, it could be pleaded even if the ordinary rules of trespass to real property carried over to cyberspace.

Likewise in *Hamidi*, one argument was that virtually everyone who surfs the net will count as a trespasser, even in the absence of actual damages. Justice Kolkey put the point as follows: "[I]f a chattel's receipt of an electronic communication constitutes a trespass to that

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[26] See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal L Rev 1293, 1295 (1996) (noting how collective rights organizations function to create royalties in settings that are, in fact, more complex than those found here).

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 someone inadvertently sees or hears the unwanted program."[27] But this argument is wrong in all its analogies. Take first the telephone calls and the faxes, which are sometimes a real annoyance. The missing pieces in the puzzle are the rules on consent. In the ordinary situation a powerful set of social expectations make it clear that ordinary phone calls and faxes are not trespasses, any more so than routine entries into department stores. The operative principle in these cases is that consent is implied from the circumstances until the owner of the property tells the entrant to stay off (if not on the premises) or leave (if he is). Certainly, websites that clamor for "hits" are widely understood to take all the ordinary traffic that they receive, and we have little reason to think that anything decided in *Hamidi* will reverse those expectations. But in this case, one defendant was told to keep off, and here the background expectations have been shifted by explicit instructions, which should be as binding in this context as they are in cases of entry to real property. The problem that Justice Kolkey posits disappears unless we have a tin ear to standard social practices. "Unwelcome" is an evasive word, but it is not a synonym for unauthorized. There are lots of phone calls and faxes that we would rather not receive. But there are relatively few that we have forbidden. Unwelcome advances are reasons for rebuff; but until the rebuff comes, the implied license continues to hold. Hamidi crossed that line in ways that many others do not.

The analogies to radio waves and television shows are similarly unavailing. The radio waves that run across the land do not pack any cognitive wallop. Insofar as they are just waves, they are prime candidates for the live-and-let-live rule of no liability, for everyone is better off if the waves can be sent than if they were all quieted. Radio and television signals that are heard and seen do pack a cognitive wallop and, thus, cannot be easily subsumed under the live-and-let-live rule. No doubt in most cases the ability to turn the knob will stop the trespass. But think of the reaction if rogue broadcasters were able to take over established frequencies in order to broadcast pornography into households where it was not welcome. Hamidi is just another kind of resourceful intruder. His case would never have gone to litigation if he had identified himself unambiguously on arrival to Intel's servers.

E. First Amendment Issues

The question then arises whether Hamidi's effort to send a message over Intel's server is protected by the First Amendment. First

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[27] *Hamidi*, 114 Cal Rptr 2d at 261 (Kolkey dissenting).

Amendment issues would loom very large if Intel had sued Hamidi for defamation. But the argument here goes not to the truth of his message but to the mode of its distribution. In this case, the court of appeals labored at great length over the question of whether the issuance of an injunction counted as a form of state action[28] in light of the authority of *Shelley v Kraemer*,[29] which held that a state could act (for an analysis under the Equal Protection Clause) through legislative, executive, and judicial action. That decision has always been very troublesome because it suggests that the only thing that does not count as state action is self-help—the very remedy that has proved inadequate to keep Hamidi's emails from invading Intel's servers.

The court of appeals sought to avoid this difficulty by noting that the neutral application of the general trespass law did not count as a form of state action.[30] That denial seems a bit forced linguistically, because what is really being said is that the state action in question is justified because it counts as a neutral application of the trespass law. The point can, however, be made still stronger when it is noted that the decisive feature of private remedies is that they are sought by private parties. The entire question of monopoly force that troubles the application of state rules disappears from the equation except in those rare situations like *Marsh v Alabama*[31] where it is difficult to draw the line between the state and the private owner of property that looks (at least in some ways) to possess an unusual level of a local government.

But in this case the decisive precedent is *Rowan v United States Post Office Department*,[32] which upheld a *legislative* rule[33] that applied to "pandering advertisements," under which "a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder," noting that the right of privacy allowed the householder to be "the exclusive and final judge of what will cross his threshold."[34] This rule certainly allows an owner to keep peddlers and hawkers off his property. As the Court wrote, "To hold

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28 See id at 253–55.

29 334 US 1, 14 (1948) ("[A] State may act . . . either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [fourteenth] amendment extend to all action of the State denying equal protection of the laws."), quoting *Virginia v Rives*, 100 US 313, 318 (1880).

30 See *Hamidi*, 114 Cal Rptr 2d at 253–54.

31 326 US 501, 509 (1946) (holding that Gulf Shipbuilding Corp, which owned all the property in the town of Chickasaw, Alabama, could not prevent religious activity on its property).

32 397 US 728, 738 (1970) (holding that a vendor has no right to send unwanted material into the home of another).

33 Title III of the Postal Revenue and Federal Salary Act of 1967, Pub L No 91-375, 84 Stat 719 (1970), codified at 39 USC § 3008 (2000).

34 *Rowan*, 397 US at 729, 736.

less would tend to license *a form of trespass* and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home."[35]

Households are of course not businesses, but the differences do not matter in the grand constitutional scheme of things. The householder in *Rowan* did not want the mail delivered to his home for fear that it would find its way into the hands of minor children, which is the same sort of consequential damages applicable here. The general common law right to exclude is not, of course, confined to pandering materials, but extends to any information whatsoever. Because there is no general pressure to prevent the delivery of ordinary mail, the statutory protections did not authorize its interception by the Post Office. But it hardly follows that the individual householder could not communicate to any particular person that he should not deliver any mail to his home. Delivery, after notice, would count as a trespass, even in the absence of a mechanism that allows the Post Office to refuse to deliver the mail in the first place.

I can see no reason why the principles of exclusion that apply to households do not apply to businesses as well. It is common practice in many businesses to limit the connections that workers can make to and from the firm. So long as these restrictions are spelled out as part of the general employment relation, they do not amount to the infringement of any right of any employee to receive or deliver mail. Hamidi remains free to send his mail to Intel employees anywhere else. But he is denied the convenience of using their servers to reach this end. If the state can use its legislative power to assist personal owners in protecting themselves against the intrusions of others, then it seems as though they should be allowed to use the judicial agencies of the state to the same end. To reach any other conclusion would be odd in the extreme: Who would forfeit political power to the state if the legal remedies it supplied in exchange were worthless? So long as self-help is available in principle, then an injunction should be available to back it up.

CONCLUSION

In the end, therefore, a case as "simple" as cybertrespass leads us down all sorts of strange paths. But it also confirms Kalven's original insight about how the law works itself pure. There are many false turns that can be taken, and many technical and doctrinal complexities that can be injected into cases of this sort. In some circumstances we do need to modify traditional right situations to deal with new

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[35] Id at 737 (emphasis added).

forms of property rights. But that proposition is not some unarticulated but universal truth. Sometimes the old analogies work just fine. So long as we keep our eye on the ball, we do not have to be fearful of the imagined consequences that will follow by taking the older rules of trespass and carrying them over to the brave new world of cyberspace, which, when all is said and done, for legal purposes at least, is neither as brave nor as new as it first appears.