IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

INTEL CORPORATION, Plaintiff and Respondent, vs. KOUROSH KENNETH HAMIDI, *et al.*, Defendant and Appellant.	No. C033076 Sacramento County Superior Court Case No. 98AS05067 (Hon. John R. Lewis)

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF DEFENDANT-APPELLANT HAMIDI

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INTRODUCTION

"The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984). It is this principle that is at stake here: the right of an individual to speak his mind about the actions of a large and powerful corporation by using e-mail to communicate his views to that corporation's employees.

E-mail is a relatively new but extremely important medium of communication in today's world. It is made possible through the development of the Internet, which enables both businesses and individuals to communicate almost instantaneously over immense distances at relatively little cost. However, just as businesses and individuals that wish to communicate by telephone must have the necessary equipment on their premises to connect to the telephone communications network, those wishing to use e-mail must have the necessary equipment at home or in the office to connect to the worldwide communications network known as the Internet.

In times past, the telephone company owned the on-premises systems that connected people to the vast network of telephone lines that make telephone communication possible. That is no longer true today. Both individuals and businesses own their own telephone equipment,

whether it be a single telephone or a complex system that allows employees to communicate with one another through an internal telephone system and that links the company to the outside world, as well. Similarly, both individuals and companies own the equipment that allows them to communicate by e-mail. In the case of an individual, a family, or even a small business, the system may be as simple as a computer, a modem, and a contract with an Internet service provider. In the case of a larger organization, computers at the company's locations throughout the world may be "networked" together through their own server, providing both an internal e-mail system and a system that allows outsiders to communicate with the company through e-mail. In either case, however, whenever someone calls us on the telephone or sends us an e-mail, the communication must go through our privately owned equipment before reaching us.

Like most other businesses, and certainly like all "high tech" businesses, Intel has an e-mail system through which outsiders can contact Intel employees. That e-mail system is also available to employees for their own reasonable personal use. When Ken Hamidi sent his e-mails to Intel employees, they reached employees via the same Intel e-mail system through which all outsiders communicate electronically with Intel employees and through which, on a reasonable basis, Intel employees send personal communications.

Hamidi did not send a large number of e-mails. All in all, he sent a total of only six e-mails over a period spanning close to two years. Moreover, Hamidi told the recipients of the e-mails that he would remove them from his mailing list upon request, a promise that he honored.

As Intel itself admits, such a small number of e-mails did not in anyway damage or disrupt the functioning of Intel's e-mail system. However, Intel did not like the content of the e-mails, which were highly critical of Intel's employment policies and of Intel's positions on issues such as the need for more workers from abroad. Intel characterizes the messages as "highly inflammatory and calculated to upset Intel's employees." Respondent Intel Corporation's Brief ("hereafter Intel Brief") at 2 n.1. They caused "consternation" among Intel's employees. *Id.* at 2. Accordingly, Intel filed this lawsuit, asking the court to enjoin Hamidi from communicating with Intel employees using their work e-mail addresses.

Intel claims that Hamidi's e-mails constitute a trespass to its chattel, *i.e.*, an "invasion" of its e-mail equipment. Using that somewhat novel theory, it successfully invoked the power of the state to stop Hamidi's e-mails. Thus, the injunction issued by the trial court prohibits Hamidi "from sending unsolicited e-mail to addresses on Intel's computer systems."

The court recognized that Hamidi's e-mails did not in any way harm Intel's e-mail system. It concluded, however, that Intel was entitled to an injunction because Intel's displeasure with the content of Hamidi's e-mail

caused it to spend time and money trying to block it, and because, as a result of what Hamidi had to say, Intel employees spent time discussing the e-mails and Intel management had to spend time answering employee questions generated by the e-mails.

Because it is the state, acting through a court-imposed injunction, that now prevents Mr. Hamidi from communicating with Intel employees using their e-mail addresses at work, this case raises substantial questions under both the First Amendment and article 1, section 2 of the California Constitution. This court must thus determine the extent to which constitutional protections limit the state's power to construe the tort of trespass to chattel as authorizing a content-based injunction that restrains a private individual's criticism of his previous employer.

In *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997), the Supreme Court held that the Internet, like books and newspapers, is entitled to the highest level of First Amendment protection. E-mail is an integral part of this vital new medium of communication. It is, in some respects, the electronic equivalent of more familiar means of grassroots communication, such as leafleting, targeted mailings, or labor picketing. But, unlike mail or other one-way forms of communication, e-mail permits the recipient to respond. It is interactive. It invites conversation and debate. As such it provides a vitally important and constitutionally protected method of reaching a

particularized audience—here Intel employees—in an efficient and inexpensive manner.

This court must therefore consider, as the court below did not, the interplay between the values embraced by the First Amendment (and its even more protective state counterpart) and the interests of the state that would be impaired by imposing constitutional limits on the common law tort of trespass to chattel. The limits we propose are modest: that in order to establish liability in a case involving the communication of information, ideas, or point of view, the plaintiff must plead and prove, by clear and convincing evidence, that the alleged trespass resulted in either physical damage to or impairment of its ability to make full use of the chattel. Harm flowing from the content of the communication may not form the basis for an action for trespass to chattel. The remedy for such content-related harm, to the extent one is permitted by the Constitution, must be found elsewhere in the law of torts.

SUMMARY OF ARGUMENT

The notion that the First Amendment protects the right to criticize others is hardly new. Regardless of the particular legal theory relied upon by the plaintiff, the cases consistently hold that the First Amendment either bars or significantly qualifies the right of a private party to turn to the courts to silence or punish the speech of another. The tort that most quickly

comes to mind, of course, is an action for libel. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964). Courts have imposed similar First Amendment constraints, however, in actions for interference with prospective economic advantage, invasion of privacy, and intentional infliction of emotional distress, as well as to actions under state and federal antitrust laws, and in disputes brought under the National Labor Relations Act.

Each of these cases involved a dispute between private parties. Yet in every single case, the court was unequivocal in holding that the First Amendment must be taken into account before speech may be enjoined or punished. In none of those cases did the court find the Constitution irrelevant—or that state action was missing—because the case concerned only a dispute between private parties. To the contrary, a long and distinguished line of cases holds that a court award of damages or a court ordered injunction in a common law tort action is state action that must comport with constitutional standards. Trespass to chattel "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. at 269.

In determining whether the First Amendment permits recovery, a number of factors are relevant. First, the court should determine whether it has before it a content neutral application of the tort. Second, in examining

whether liability may be imposed as the result of speech, the court must look closely to be sure that the state interests being protected are legitimate and that the record below supports the conclusion reached. Finally, in the case of an injunction that has as its purpose the prohibition of speech, the court must determine whether the injunction can survive the heavy presumption against the constitutionality of prior restraints. The injunction before this court fails all three tests.

What, then, should be the rule that ensures that constitutional requirements are given due consideration when a plaintiff claims that unwanted communications have trespassed on its communication system? In most cases, the tort will, in all probability, be inapposite since it was never intended to remedy injury flowing from the content of a communication. Only where a plaintiff can prove, by clear and convincing evidence, that there has been substantial damage to or disruption of its communication system, may liability be imposed. This rule will, on the one hand, safeguard against abuse of the tort of trespass to chattel to punish or prohibit speech based on its content while, at the same time, give due deference to the legitimate state interests that are served by the cause of action.

ARGUMENT

I. THE FIRST AMENDMENT LIMITS THE POWER OF THE STATE TO RESTRAIN OR PUNISH SPEECH, EVEN IN DISPUTES BETWEEN PRIVATE PARTIES.

A. The State May Not Enforce Its Tort Law Without Regard to First Amendment Principles.

In the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court was asked to consider for the first time whether the First Amendment limits the power of the state to award damages in a libel action. Although the tort was old and venerable, the Court nevertheless held that state tort law may not be enforced without regard to constitutional limitations. It concluded that "the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments . . ." *Id.* at 264. The Court then set forth the constitutional standards that must be satisfied in order to impose liability in a libel action against a public official. As the Supreme Court later explained in *Gertz v. Welch*, 418 U.S. 323, 332 (1974), *Sullivan* essentially established a rule of "constitutional privilege" to be applied in libel cases in order to safeguard First Amendment values.

In a series of subsequent cases, the Supreme Court continued to refine the constitutional rules applicable in libel actions. *See, e.g., Gertz v. Welch*, 418 U.S. 323; *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472

U.S. 749 (1985). However, the fundamental principle that animates the Court's decisions in *Sullivan* and its progeny is not confined to the common law of libel. It applies whenever the content of speech or the exercise of other First Amendment rights forms the basis for allegations of liability. First Amendment protections have thus been imposed in actions for interference with prospective economic advantage,[1] invasion of privacy,[2] intentional infliction of emotional distress,[3] fraud,[4] and malicious prosecution,[5] as well as in actions under state and federal antitrust laws,[6] and in disputes brought under the National Labor Relations Act.[7] Three of these cases are illustrative of the general principle.

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1 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033 (1986); *Paradise Hills Associates v. Procel*, 235 Cal. App. 3d 1528 (1991).

2 *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

3 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Paul v. Watchtower Bible Tract Society*, 819 F.2d 875 (9th Cir. 1987) (free exercise clause).

4 *Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1114 (1988).

5 *City of Long Beach v. Bozek*, 31 Cal. 3d 527 (1982), *vacated on other grounds*, 459 U.S. 1095, *opinion reiterated in its entirety*, 33 Cal. 3d 727 (1983).

6 *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961) (right to petition gov't); *Mine Workers v. Pennington*, 381 U.S. 657 (1965) (same); *Matossian v. Fahmie*, 101 Cal. App. 3d 128 (1980) (same).

7 *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (right to petition gov't).

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the NAACP and its members engaged in a boycott to force a number of local businesses to end their discriminatory practices. The merchants filed a state tort law action for malicious interference with business. They obtained an injunction against further boycott activities and a substantial damages judgment against the NAACP and a number of its members. The defendants claimed the judgment violated the First Amendment.

In the early stages of the boycott, there were a few instances of unlawful conduct by one or two of the defendants. However, the Supreme Court found that most of the conduct that formed the basis for the judgment, including attempts to shame others into not doing business with the stores, was protected by the First Amendment. In reversing the judgment against the defendants, the Supreme Court held: "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability . . . ." 458 U.S. at 916-17. The Court went on to hold that "'the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity.'" *Id.* at 918 (emphasis added) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966)).

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), was an action for common law invasion of privacy. Using this theory, Keefe

obtained an order enjoining the activities of a civic organization that had been distributing leaflets in a shopping center, at Keefe's church, and in his neighborhood, accusing him of block-busting. The Supreme Court reversed on First Amendment grounds: "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.* at 419; *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (First Amendment limits liability in action for intentional infliction of emotional distress based on unflattering parody).

Finally, the California Supreme Court's decision in *Blatty v. New York Times Co.*, 42 Cal. 3d 1033 (1986), is important. *Blatty* sued the New York Times for intentional interference with prospective business advantage based on the Times' erroneous failure to include his novel in its list of best sellers. Labeling Blatty's action as a claim for injurious falsehood, the court held that the same First Amendment limitations on liability that apply in libel actions are applicable to all causes of action for injurious falsehood, regardless of how the plaintiff has chosen to denominate the cause of action. The court noted that limiting First Amendment protection to defamation actions would simply allow a canny plaintiff to put some other label on the action, "and thereby avoid the operation of the [First Amendment] limitations and frustrate their underlying purpose." 42 Cal. 3d at 1045; *accord Paradise Hills Associates*

v. Procel, 235 Cal. App. 3d 1528, 1542-45 (1991) (truthful statements are protected by the First Amendment, regardless of whether they injure the defendant by making it more difficult to attract customers).

Intel is employing the same strategy that the California Supreme Court condemned in *Blatty*. It attempts to avoid the constitutional limitations imposed on tort actions that seek redress based on the content of speech by grounding its cause of action in the relatively obscure (at least until recently) tort of trespass to chattel. Calling this an action for trespass to chattel, however, does not change the fact that the gravamen of Intel's grievance is its distaste for the content of Hamidi's messages, not its objection to the method of their delivery.

The First Amendment does not permit such tactics. To the extent Intel seeks relief by way of an action for trespass to chattel, that tort must be applied in a manner that prohibits the imposition of liability based on the content of the communication rather than on physical damage to or disruption of Intel's e-mail system.

B. Although This Is A Dispute Between Private Parties, A Court's Issuance Of An Injunction Constitutes State Action Subject To Constitutional Review.

This Court need only review the cases cited above to reject Intel's claim that the injunction issued by the trial court does not constitute state action and hence is immune from constitutional imperatives. But that

conclusion need not rest merely on inference. The Supreme Court has directly addressed the argument that Intel makes here: that there is no state action when a court awards damages or issues an injunction in a dispute between private parties. Invariably the Supreme Court has held that when private parties turn to the courts to enforce their rights under statute or under the common law, the action of the court in enforcing those rights is state action that must be exercised in accordance with constitutional requirements. As the Supreme Court held in *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948): "[I]t has never been suggested that state court action is immunized from the operation of [the Constitution] simply because the act is that of the judicial branch of the state government."

Although the Supreme Court's ruling in *Shelley* is one of the earliest cases to address the issue, it is by no means the only one. Nor has the holding there been confined to cases in which the court's action involved racial discrimination. In the Supreme Court's seminal decision in *New York Times v. Sullivan*, 376 U.S. 254, for example, the issue was whether an award of damages for libel constituted state action. The Court held:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

376 U.S. at 265 (citations omitted).

The Court reached the same conclusion in *NAACP v. Claiborne Hardware Co.*:

> Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment.

458 U.S. at 916 n. 51. It reached that same conclusion again in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991), a case in which plaintiff's claim was based on the common law contract doctrine of promissory estoppel. *See also American Federation of Labor v. Swing*, 312 U.S. at 325-26 (injunction prohibiting labor picketing: "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."); *cf. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (considering First Amendment challenge to injunction limiting expressive activities of anti-abortion protestors); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 56 (liability for intentional infliction of emotional distress must take into account First Amendment standards); *Organization for a Better Austin v. Keefe*, 402 U.S. at 419 (First Amendment barred injunction in invasion of privacy action).

The California Supreme Court is in accord. S*ee Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1114 (1988) (action for fraud and deceit: "[J]udicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes"); *Britt v. Superior Court*, 20 Cal. 3d 844, 856 n.3 (1978) (judicial discovery orders are state action subject to the strictures of the First Amendment's protection of the right of association) (dictum). So too is the Supreme Court of Oregon. *See Lloyd Corp. v. Whiffen*, 307 Or. 674, 680, 773 P.2d 1294, 1297 (1989) (action for unreasonable interference with plaintiff's property: "A court applying a common-law rule or fashioning an equitable order must observe constitutional principles as much as a legislative or administrative body."); c*f. Aguilar v. Avis Rent A Car*, 21 Cal. 4th 121, 133 (1999) (considering First Amendment challenge to injunction in employment discrimination case). Lower federal and state courts have reached the same conclusion. *See, e.g., Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (magistrate's order compelling discovery and trial court's enforcement of that order constitutes state action); *Paul v. Watchtower Bible Tract Society*, 819 F.2d 875, 880 (9th Cir. 1987) ("State laws whether statutory or common law, including tort rules, constitute state action."); *Gerber v. Longboat Harbour North Condominium, Inc.*, 724 F. Supp. 884, 886-87 (M.D. Fla. 1989), *vacated on other grounds*, 757 F. Supp. 1339, 1342 (M.D. Fla. 1991) ("It is an exercise in sophistry to posit that courts act as the state

when enforcing racially restrictive covenants but not when giving effect to other provisions of the same covenant."); *Snyder v. Evangelical Orthodox Church,* 216 Cal. App. 3d 297, 306 (1989) (imposition of tort liability is state action).

In short, there is a fundamental distinction between the actions of a private party that punish or prohibit speech[8] and the actions of a court that either punish or prohibit speech. *See Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953); *Shelley v. Kraemer*, 334 U.S. at 19. This court explicitly recognized that distinction in *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, 1665 (1995), a case on which Intel relies: "Free speech concerns may be raised as a shield against injunctive relief . . . because the effectuation of such relief entails government action. . . . However, the same concerns cannot be used as a sword to obtain relief against a private party." Thus, the critical factor in determining whether state action giving rise to constitutional scrutiny is present is the identity of the actor charged with the constitutional violation. When it is a court that acts to inhibit speech, its injunction must comport with the relevant constitutional standards.

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[8] For example, in the absence of statutory prohibitions, *see* Labor Code §§ 1101, 1102, a private employer would be permitted to prohibit the discussion of politics in the workplace or could fire an employee whose politics it finds disagreeable.

None of the cases Intel cites contradict this basic principle. *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), certainly cannot be read, as Intel suggests, as standing for the proposition that there is no state action involved in the enforcement of state trespass laws. *Lloyd* was a suit by private individuals seeking to compel a shopping center to allow them to engage in hand-billing at the center. Similarly, *Hudgens* concerned an unfair labor charge brought by a union against a shopping center owner who refused to allow union picketing. In neither case had the shopping center owners obtained an injunction barring the speech activities. Hence, the Supreme Court was not asked to consider whether the issuance of a speech-restrictive injunction constitutes state action. Indeed, when the plaintiffs did prevail on state law grounds in a similar suit in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the shopping center raised and the Supreme Court considered claims that the California Supreme Court's ruling abridged the shopping center's rights under the First Amendment and deprived the center of its property rights under the Fifth and Fourteenth Amendments. Such constitutional claims never could have been considered if the California Supreme Court's order were not state action.

The other cases on which Intel relies are equally inapposite. They do not discuss whether a court's issuance of an injunction or award of damages is state action that must comport with constitutional mandates.

They hold only that asking the state for assistance in enforcing private rights does not transform a private party into a state actor. *See, e.g., Cobb v. Georgia Power Co.*, 757 F. 2d 1248, 1251 (11th Cir. 1985) (employer does not become state actor by obtaining temporary restraining order; if order was improper, remedy was an appeal, not a § 1983 action against employer); *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238, 243 (1st Cir. 1981) (act of nursing home management in calling police did not make nursing home state actor); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) (act of filing lawsuit did not make CompuServe a state actor);[9] *International Society for Krishna Consciousness, Inc. v. Reber*, 454 F. Supp. 1385, 1388-89 & n.1 (C.D. Cal. 1978) (threatening to have police arrest plaintiffs did not make Knotts Berry Farm a state actor; action against police chief and district attorney improper not because of absence of state action but because

[9] Although the court in *CompuServe* issued an injunction barring Cyber Promotions from continuing its spamming, the court did not discuss whether the injunction itself constituted state action subject to constitutional limitations. It simply concluded that CompuServe was not a state actor and ended its analysis there. The court thus failed to consider the Supreme Court cases that hold that the issuance of an injunction is state action. It is worth noting, however, that the great volume of e-mails at issue in *CompuServe* placed "a tremendous burden" on CompuServe's equipment, thus depriving CompuServe of the full use of its equipment. 962 F. Supp. at 1022. Thus the end result in that case may have been the same had the court applied the correct rule.

neither had threatened plaintiff with arrest).[10] Whether or not Intel, by filing this lawsuit, became a state actor is simply beside the point. It is the court's action in entering an injunction prohibiting Hamidi from communicating with others that makes this case subject to constitutional constraints.

C. The Injunction Entered By The Court Is A Content-Based Prior Restraint of Speech That Violates The First Amendment.

1. The Trial Court Imposed Liability Based Solely On The Content of Hamidi's Speech.

The tort of trespass to chattels requires, as a prima facie element of the claim, that the plaintiff plead and prove damages. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. at 1023; Restatement (Second) of Torts (hereafter "Restatement") § 218 and cmt. e. Thus unlike a claim for

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[10] Intel's reliance on the passage from Rotunda and Nowak is similarly misplaced. The section from which that passage is drawn discusses "the amount of contacts with government which will subject a private person's activities to the restrictions of the Constitution." 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 16.3 at 783 (3d ed. 1999). Indeed, the passage Intel quotes simply makes two points: First, Rotunda and Nowak note that the entry of a decree by a court is not dispositive of the underlying question of whether the decree violates the constitution. They do not suggest, however, that a lower court is not constrained by constitutional considerations in entering a decree or that the reviewing court should not address the constitutional question at all when one party appeals the lower court's decision. Second, Rotunda and Nowak note that simply bringing a lawsuit is not enough to transform a private party into a state actor. Nothing in the passage relied on by Intel supports their argument that a court's entry of an injunction is not state action that must comport with the Constitution.

trespass to real property, it is not enough to show an intermeddling with the property. As explained by the Restatement, the tortfeasor's "conduct must affect some other and more important interest of the possessor. . . . 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." Restatement § 218 cmt. e.

Intel does not argue, *see generally* Intel Brief at 2-3, and the lower court did not find, that Hamidi's e-mails caused any physical harm to or impairment of its use of its e-mail computer system. Rather, Intel argues, and the lower court concluded, that the discomfiture caused by Hamidi's communications was sufficient "damage" to support an injunction for trespass to chattel. Thus the trial court held that Intel had met its burden of proving damages based solely on the following: "Intel has been injured by diminished employee productivity, and in devoting company resources to blocking efforts and to addressing employees about Hamidi's e-mails. These injuries, which impair the value to Intel of its e-mail system, are sufficient to support a cause of action for trespass to chattels." *Intel Corp. v. Hamidi*, No. 98-AS05067, 1999 WL 450944 at *2 (Cal. Super. Apr. 28, 1999).[11]

[11] As discussed in the brief filed by amicus curiae Electronic Frontier Foundation (hereafter "EFF"), there is substantial doubt whether, as a

There can be no doubt that the diminished employee productivity, the felt need to stop Hamidi's e-mails through blocking, and the time spent talking to employees about the e-mails were all directly related to their content. Intel characterizes Hamidi's messages, which raised questions about Intel's future plans for its workforce, as "highly inflammatory and calculated to upset Intel's employees." Intel Brief at 2 n.1. It describes his messages as causing "consternation and bewilderment." *Id.* at 2. In short, employees were "diverted . . . from productive tasks," *id.*, because they were concerned about the charges that Hamidi made. Accordingly, management had to spend time answering their questions. And because Intel disliked and disagreed with what Hamidi had to say, it spent time and money trying to block the e-mails.

In sum, Intel does not, and cannot, argue that its claimed damages result from anything other than the content of Hamidi's e-mails. All of its allegations of damage focus on the reactions to Hamidi's messages; there is no evidence that Intel would have attempted to block Hamidi's messages had they been laudatory. These factors, coupled with the fact that Intel maintains an e-mail system that permits the outside world to communicate with its employees using e-mail and that, at the same time, it permits its employees to make reasonable personal use of its system, lead to but one

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matter of ordinary tort law, this is the sort of damage that will support an action for trespass to chattel.

conclusion: all of the damage that formed the predicate for the cause of action and hence, for the issuance of the injunction, resulted not from the use of the Intel e-mail system to complete the transmission of Hamidi's messages; it resulted from the impact of Hamidi's message on the audience (Intel and its employees).

Because this injunction is justified solely on the basis of the impact of Hamidi's message on its audience, it is, by constitutional definition, content-based. *Reno v. ACLU*, 521 U.S. at 868; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Thus, while in an ordinary case, application of the tort of trespass to chattels may be content-neutral, its application here was solely content based.

2. The Trial Court's Injunction Is A Prior Restraint That Violates The First Amendment.

As originally filed, Intel's complaint sought both an award of damages and an injunction. Intel Brief at 3-4. When it moved for summary judgment, however, Intel dismissed its damages claim. *Id.* As between an award of damages, however, and the issuance of an injunction, the imposition of an injunction is, from a First Amendment perspective, far more draconian. While an award of damages may chill future speech, *New York Times v. Sullivan*, 376 U.S. at 278-79, an injunction that prohibits

future communications utterly silences speech before it occurs, regardless of its worth or consequences.

"Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see New York Times Co. v. United States*, 403 US. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). They come to the court bearing a heavy presumption against their constitutionality. *Organization for a Better Austin v. Keefe*, 402 U.S. at 419; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Wilson v. Superior Court*, 13 Cal. 3d 652, 657, 658 (1975) (noting, also, that the protection afforded by the California constitution is even broader than that provided by the federal constitution). A plaintiff "carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. at 419. They are rarely upheld. *See New York Times Co. v. United States*, 403 US. 713 (Pentagon Papers case); *Wilson v. Superior Court*, 13 Cal. 3d at 660 ("the circulation of election campaign charges, even if deemed extravagant or misleading, does not present a danger of sufficient magnitude to warrant a prior restraint.").

Two cases, one a United States Supreme Court case, the other a California case, are dispositive here. In *Organization for a Better Austin v.*

Keefe, 402 U.S. 415 (1971), discussed above, the Supreme Court reversed an injunction in an invasion of privacy action that prohibited the distribution of leaflets accusing the plaintiff of unsavory business practices. The Court held:

> It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights.

Id. at 418. As in this case, the "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications," the dissemination of ideas. *Id.* at 418-19.

In *Paradise Hills Associates v. Procel*, 235 Cal. App. 3d 1528 (1991), the defendant erected signs on her house calling attention to her dispute with the plaintiff. The plaintiff sued for interference with prospective business advantage and obtained a preliminary injunction prohibiting Procel from making any statements claiming that her house was defectively built. The court of appeal reversed, holding that the injunction was an invalid prior restraint. In words that are particularly apt here, the court quoted the Supreme Court's admonition in *Keefe*: '"No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets

warrants use of the injunctive power of court.'" *Id.* at 1539 (quoting *Keefe,* 402 U.S. at 419).

Hamidi's e-mails are the high tech equivalent of the leaflets in *Keefe* and the signs on the defendant's house in *Procel*. Just as the lower court's order prohibiting the distribution of leaflets in *Keefe* was an unconstitutional prior restraint, so too is the trial court's order prohibiting Hamidi from sending e-mails to Intel employees using their work e-mail addresses. It is, unquestionably, a court order that prohibits speech activities. *See Alexander v. United States*, 509 U.S. at 550. The fact that Hamidi may have other—obviously less effective—means of attempting to communicate with Intel employees does not change the nature of the court's injunction as a prior restraint. Nor does it make that prior restraint permissible. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766, 770 (1964) ("the union's interest in picketing is [not] diminished because it may communicate its message at other, admittedly less advantageous locations . . . ."); *see Reno v. ACLU*, 521 U.S. 844, 880 (1997). Calling an unwanted message a trespass to chattel does not surmount the constitutional obstacle.

II. WHERE A TRESPASS TO CHATTEL ACTION IS BASED ON THE USE OF THE CHATTEL FOR PURPOSES OF COMMUNICATION, THE FIRST AMENDMENT REQUIRES THAT THE ELEMENT OF DAMAGE BE PROVEN BY DAMAGE TO THE CHATTEL ITSELF

As can be seen from the discussion in Part I.A., where liability is based on otherwise protected First Amendment expression, the Constitution may impose special requirements before that expression may be punished or prohibited. In cases brought under common law tort theories, the Constitution often requires that additional elements be proven before liability will attach. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 56 (1988); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Blatty v. New York Times Co*., 42 Cal. 3d 1033 (1986),[12] and other cases cited in Part I.A., *supra*.

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[12] In *Blatty*, the plaintiff argued that the court could not require him to establish the elements of a defamation claim as part of his claim for interference with prospective business advantage. To do so, Blatty argued, would impermissibly add a new element to the tort. The court rejected the argument, finding its fundamental premise to be "unsound." 42 Cal. 3d at 1047. The California Supreme Court thus refused to adopt the Fourth Circuit's conclusion in *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), that requiring the plaintiff there to prove constitutional malice would impermissibly "add a new element to this tort, and alter its nature." 42 Cal. 3d at 1047, quoting *Falwell*, 797 F.2d at 1275. The California Court was prescient. The U.S. Supreme Court reversed the Fourth Circuit's decision in *Falwell*, holding that the plaintiff in that case was required to prove both that the statement complained of was false and that it was made with constitutional malice. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. at 50, 56.

In fashioning the appropriate rule, the courts weigh the First Amendment interests at stake against the degree to which important state interests would be compromised by restricting the circumstances under which recovery is allowed. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985); *Gertz v. Welch*, 418 U.S. 323 (1974); *Britt v. Superior Court*, 20 Cal. 3d 844 (1978). In this connection, "[i]t is . . . appropriate to require that state remedies . . . reach no farther than is necessary to protect the legitimate interest involved." *Gertz v. Welch*, 418 U.S. at 349; *see Britt v. Superior Court*, 20 Cal. 3d at 859.

In this case, EFF argues persuasively that, simply as a matter of state tort law, an action for trespass to chattel based on the transmission of e-mail may lie, if at all, only upon a showing that the alleged trespass resulted in at least temporary physical damage to or physical disruption of the e-mail system. *See generally* Brief of Amicus Curiae Electronic Frontier Foundation In Support of Appellant (hereafter "EFF Brief") at 17-21. As a matter of constitutional law, we believe that that must be the rule whenever liability for trespass to chattel is imposed on the basis of communication presumptively protected by the First Amendment. Moreover, in order to establish liability such damages must be substantial and they must be proven by clear and convincing evidence. *See Gertz v. Welch*, 418 U.S. 323, 342 (1974); *New York Times v. Sullivan*, 376 U.S. at 285-86. Even upon such a showing, no injunction would be permissible

absent a finding by the court that the injunction is necessary to serve a significant state interest unrelated to the content of the communication and that the injunction burdens no more speech than necessary. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

This suggested rule is not only wholly consistent with the underlying nature of the tort of trespass to chattel, it is a rule that is constitutionally compelled. Because the essence of the wrong alleged in a case like this is that the communication of ideas or information has invaded the plaintiff's protected interest, it is critical that liability be imposed only where the harm that will support relief is unrelated to the content of the communication—an interest not legitimately served by the tort—and that even where a remedy may be appropriate, that the impact on communication is no greater than absolutely necessary.[13]

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[13] Amicus EFF suggests that in cases like this one, liability should turn on whether the communication involves speech of public concern. While the First Amendment most certainly protects speech of public concern, we believe that this requirement should not be added as an element to the tort of trespass to chattel. Rather, the First Amendment interests at stake may be more simply served by the rule proposed above. That rule guards against the imposition of liability based on the content of speech, while still preserving the essence of the tort: providing redress for harm to a chattel resulting from its unauthorized use. It also frees the court from the need to embark on the often difficult task of determining whether a particular utterance is of public concern, *see Gertz v. Welch*, 418 U.S. at 346. Rather, to the extent that a plaintiff seeks redress based on the content of speech, it must do so under one of the many other torts discussed above, all of which are intended to provide redress for harmful communications and all of which already have established First Amendment limitations on their application.

This proposed rule strikes the correct balance between the First Amendment interests at stake and the state's interest in the enforcement of its common law tort of trespass to chattel. Here the First Amendment interests are very strong. E-mail, by definition, involves the communication of information or ideas. As demonstrated in the brief submitted by EFF, e-mail is quickly becoming the preferred method of communication for an increasingly large segment of the population. It is particularly well-suited to communicating with employees concerning workplace-related issues, because the list of addresses is readily accessible, the messages need not be read during work hours, and delivery is quicker, more efficient and much less expensive than handing out leaflets at the entrance to the workplace or attempting to compile home addresses and mail the information. It is also less intrusive and less disruptive than attempting to communicate by telephone. Indeed, e-mail is now considered such an essential means of communication on workplace issues that the National Labor Relations Board has issued an advisory memo stating that a company's rule prohibiting all non-business use of e-mail is impermissibly overbroad, denying workers' federally protected rights. *Pratt & Whitney*, Nos. 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863, 1998 NLRB GCM LEXIS 40 (Office of Gen. Counsel Feb. 23, 1998); *see also*, Michael J. McCarthy, *Your Manager's Policy on Employees' E-Mail May Have a Weak Spot*, Wall Street Journal, April 25, 2000, at A1.

The infringement on legitimate state interests effected by requiring proof of damage to the chattel or disruption of its functioning, on the other hand, is slight. The tort of trespass to chattel does not have as its purpose the stifling of communication. The tort is aimed at the unauthorized use of personal property. *See* Restatement (Second) of Torts § 217(b) ("A trespass to a chattel may be committed by intentionally . . . (b) using or intermeddling with a chattel in the possession of another."). Moreover, while a trespass may occur through unauthorized use, no liability attaches in the absence of damage. *See id.* § 218.

Thus, the proposed rule infringes on the interests of the state, if at all, only on the margins. First, the rule will apply only in those cases involving the use of a chattel for the transmission of protected communications. Accordingly, the number of cases in which the rule will come into play is limited. Second, it will bar recovery in an even smaller subset of cases: those in which the alleged damage or disruption is not to the communications system itself, but rather is a result of the content of the message. It is in precisely these cases that the First Amendment interests at stake are at their highest, while the state's interests are at their most negligible since it is the protection of the chattel from harm that is the primary interest at stake. While the proposed rule would bar liability here, it would not affect Intel's ability, for example, to bring a trespass to chattel

action against someone who sent Intel employees an e-mail containing a virus.

Third, where it is the content of the communication that is the source of the alleged damage in a trespass to chattel action, it does not undermine a significant state interest to require that the plaintiff plead its case under a tort theory intended to address that sort of harm. As discussed above, these other causes of action, which the California Supreme Court has lumped together under the rubric "injurious falsehood," *see Blatty v. New York Times Co.*, 42 Cal. 3d 1033, have all been narrowed to accommodate the tension between the First Amendment and the state's desire to provide redress for speech that causes harm to the plaintiff. The proposed rule thus prevents a plaintiff from circumventing these First Amendment safeguards by transmuting a cause of action based on the content of speech into a cause of action for trespass to chattel. Since it is the method of delivery of the message that forms the basis for the trespass, it is both fair and reasonable to require that the damage that supports the tort be damage to or disruption of the delivery system, not damage resulting from the content of the message delivered.

Finally, it is likely that, as in this case, there are a number of self-help remedies that may be available to the plaintiff, making a court-imposed remedy unnecessary. *See CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1023 (S.D. Ohio 1997) (in trespass to chattel

action, self-help measures should be used before resorting to the processes of the court); *see also Gertz v. Welch*, 418 U.S. 323, 344 (1974). That is particularly important where, as here, the remedy sought is an injunction. Under traditional rules of equity, where there is a strong public interest at stake in not issuing the injunction (here the First Amendment interests affected by the injunction) and where there is little need for the injunction, an injunction should not be granted. *See, e.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal. 3d 317 (1979); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766 (1964); *Lloyd Corp., Ltd. v. Whiffen*, 307 Or. 674, 773 P.2d 1294 (1989). This rule has particular force where the injunction in question forbids not conduct but rather is a prior restraint on otherwise protected speech.

An examination of the remedies available to Intel illustrates this last point. First, Intel has at its disposal formidable resources to present its side of the story to its employees. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("the remedy to be applied is more speech, not enforced silence."). One can hardly argue that Hamidi has the advantage over Intel in terms of opportunity to make its case. *See Gertz v. Welch*, 418 U.S. at 344. Second, Intel could, if it chooses, instruct its employees not to read Hamidi's messages on company time. It could also make sure that employees are informed that Hamidi will delete an

employee's name from his mailing list upon the employee's request. *Cf. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994) (injunction prohibiting anti-abortion protestors from holding up signs that were visible from inside the clinic violated First Amendment; all clinic had to do was close its curtains). Hamidi has already honored similar requests by some 450 employees.[14] EFF Brief at 25. A court-issued injunction is unnecessary.

In sum, while Intel might prefer to have the added force of a court order to aid it in silencing Hamidi, it already has at its disposal ample means of combating Hamidi's messages. These remedies, coupled with Intel's willingness to allow the general public to communicate with its employees through its e-mail system and its willingness to allow Intel employees reasonable personal use of the system, all demonstrate that, even under ordinary rules of equity, no injunction should have been issued here. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25

[14] It is one thing for Intel to inform its employees that they can avoid further e-mails by asking Hamidi to delete their names from his mailing list. It is quite another for Intel to purport to speak on behalf of its many thousands of employees by sending such an instruction itself, on behalf of its entire workforce. *Compare Martin v. Struthers*, 319 U.S. 141, 146-47 (1943) (invalidating ordinance that prohibited leafletting at homes; decision should be that of individual homeowner) *with Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970) (upholding statute that requires mailers to honor householder's request to be removed from mailing list and to stop all further mailings). The decision whether or not to continue receiving Hamidi's messages should be that of the employee, not Intel.

Cal. 3d 317 (1979); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766 (1964); *Lloyd Corp. v. Whiffen*, 307 Or. 674, 773 P.2d 1294 (1989).

Holding that Intel may not establish liability for trespass to chattel based on injuries flowing from the content of Hamidi's messages works no substantial infringement on the state's legitimate interests. Such a ruling safeguards vital First Amendment interests while leaving the legitimate state interests served by the tort intact.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed.

Dated: May __, 2000

Respectfully submitted,

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