

INTERNET LAW: SPRING 2010  
PROFESSOR GRIMMELMANN  
NEW YORK LAW SCHOOL

READING PACKET 4

CONTROL OVER SYSTEMS

# CONTENTS

<b>CLASS 17: HACKING</b> .....	<b>3</b>
State v. Allen.....	4
United States v. Morris .....	7
United States v. Drew .....	10
Bluebeard problem .....	16
<b>CLASS 18: TRESPASS</b> .....	<b>18</b>
Restatement (Second) of Torts .....	19
Bookstore problem.....	19
eBay, Inc. v. Bidder’s Edge, Inc. ....	20
Intel v. Hamidi .....	25
Wireless Router problem .....	34
<b>CLASS 19: CONTRACTS</b> .....	<b>36</b>
ProCD, Inc. v. Zeidenberg.....	37
Specht v. Netscape Communications Corp. ....	40
Bragg v. Linden Research, Inc. ....	44
BoardFirst problem:.....	49

## CLASS 17: HACKING

Our next unit deals with the legal relationship between the owner of a computer server and its users. Broadly speaking, there are three bodies of law a server owner can look to in setting the terms of how users interact with the server: criminal law, tort law, and contract law. We'll discuss them in order. In terms of course themes, for the moment we're leaving behind the government, and focusing intensively on intermediary power. In each class for this unit, ask yourself whether the law gives the intermediary too much power—or too little.

### *Preparation questions*

(1) Although computer intrusions were initially prosecuted under existing common-law or statutory theft laws, the field is now primarily defined by special-purpose computer misuse statutes. The federal Computer Fraud and Abuse Act (CFAA), the subject of *Morris* and *Drew*, has been the leading model here, but every state has its own statute, most of which parallel the CFAA in their essentials. The details vary enormously, and the CFAA itself has been frequently amended, so we won't focus on the exact structure of any particular statute. Instead, we'll walk through a number of common interpretive questions that arise under any of this family of statutes. As an initial matter, why do these statutes exist at all? Read the statements of facts from *Morris*. Does what he did strike you as problematic? Criminal? What general kinds of behavior does the CFAA target? Why might theft laws written for the offline world have been inadequate to respond to threats of this sort? Thinking back through the other cases and problems we've read, can you think of anyone else who seems to fit into this category?

(2) The general scheme of the CFAA and related statutes is that they prohibit "intentional" "access" to a computer "without authorization" that causes certain specified kinds of harms. The first issue taken up by *Allen* is what "access" means. What did Allen do, and why did the court hold that it didn't constitute "access?" Note that Allen did cause the SMS-800 to transmit information to him. Why doesn't that count as "access?" Suppose you were Allen's lawyer and it appeared that the court was ready to rule against you on the access issue. Could you argue that his limited use of the SMS-800 was "authorized?"

(3) The second issue *Allen* raises is the nature of of harm required. The Kansas statute refers to "damage." In what sense did Allen damage or not damage the SMS-800? Did it burst into flames? Did it become unusable? Did it require programming time to repair? Did it require programming time to investigate whether it needed to be repaired? The court calls the state's argument on this point "circular." Do you agree?

(4) *Morris* raises two important issues. The first is the nature of the *mens rea* required. Yes, the statute says "intentional," but does that mean only that the "access" must be intentional, or does the intentional mental state also apply to the lack of authorization, the resulting loss, etc.? How does *Morris* answer this question? Of equal importance, where does the *Morris* court look for evidence to help it decide the question? Can you explain why the court considers the placement of a comma potentially significant? In terms of legislative history, the court looks to the "Senate Report." What is that, who wrote it, and where would you look it up?

(5) The second issue *Morris* raises is perhaps the biggest: what is the nature of "unauthorized" access? It seems obvious that the Internet Worm was unauthorized, but

why? The *Morris* court gives two arguments. One has to do with the “intended function” of the programs he used; the other has to do with his lack of an account on various systems. Do these tests strike you as right? How does a user (or a court) determine what the “intended function” of a computer program is? Have you ever used a program for something other than its intended function? Have you ever used a computer on which you didn’t have an account?

(6) *Drew*, the infamous “MySpace suicide” case, further complicates the “authorization” question. What did Drew do that was in violation of the MySpace terms of service? Did she know that she was in violation? The government’s theory is that using a site in violation of its terms of service—in violation of the permission to use it granted by the server owner—is access “without authorization.” What do you think of that theory? Note that the court agrees: violation of the terms of service is use without authorization. So Drew loses. But then she wins. Why?

***State v. Allen***  
**260 Kan. 107 (1996)**

LARSON, J.: In this first impression case, we are presented with the question of whether a person’s telephonic connections that prompt a computer owner to change its security systems constitute felony computer crime in violation of K.S.A. 21-3755(b).

The charges against Anthony A. Allen arose from several telephonic connections he made with Southwestern Bell Telephone Company’s computers in early 1995. After preliminary hearing, the trial court dismissed the complaint, finding no probable cause existed to believe Allen had committed any crime.

The State has appealed pursuant to K.S.A. 22-3602(b)(1). We affirm the trial court. ...

Allen admitted to Detective Kent Willnauer that he had used his computer, equipped with a modem, to call various Southwestern Bell computer modems. The telephone numbers for the modems were obtained by random dialing. If one of Allen’s calls were completed, his computer determined if it had been answered by voice or another computer. These were curiosity calls of short duration. ...

Ronald W. Knisley, Southwestern Bell’s Regional Security Director, testified Allen had called two different types of Southwestern Bell computer equipment—SLC-96 system environmental controls and SMS-800 database systems. ...

Testimony confirmed Allen also called and connected 28 times with the SMS-800 systems at several different modem numbers. Each call but two was under 1 minute. Upon connection with this system, a person would see a log on request and a “banner.” The banner identifies the system that has answered the incoming call and displays that it is Southwestern Bell property and that access is restricted. Entry into the system itself then requires both a user ID and a password which must agree with each other. No evidence indicated Allen went beyond this banner or even attempted to enter a user ID or password.

Knisley testified that if entry into an SMS-800 system were accomplished and proper commands were given, a PBX system could be located which would allow unlimited and

nonchargeable long distance telephone calls. There was no evidence this occurred, nor was it shown that Allen had damaged, modified, destroyed, or copied any data.

James E. Robinson, Function Manager responsible for computer security, testified one call to an SMS-800 system lasted 6 minutes and 35 seconds. Although the system should have retained information about this call, it did not, leading to speculation the record-keeping system had been overridden. Robinson speculated Allen had gained entry into the system but admitted he had no evidence that Allen's computer had done anything more than sit idle for a few minutes after calling a Southwestern Bell modem number.

Robinson testified that Southwestern Bell was unable to document any damage to its computer equipment or software as a result of Allen's activities. However, as a result of its investigation, Southwestern Bell decided that prudence required it to upgrade its password security system to a more secure "token card" process. It was the cost of this investigation and upgrade that the State alleges comprises the damage caused by Allen's actions. Total investigative costs were estimated at \$4,140. The cost of developing deterrents was estimated to be \$1,656. The cost to distribute secure ID cards to employees totaled \$18,000. Thus, the total estimated damage was \$23,796. ...

The legal standard to be applied in a preliminary hearing is clear. If it appears from the evidence presented that a crime has been committed and there is probable cause to believe the defendant committed it, K.S.A. 22-2902(3) requires that the defendant be bound over for trial. If there is not sufficient evidence, the defendant must be discharged. From the evidence presented, the trial court must draw the inferences favorable to the prosecution, and the evidence need only establish probable cause. "Probable cause at a preliminary hearing signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." ...

Allen was charged with a violation of K.S.A. 21-3755(b)(1), with the second amended complaint alleging that he

"did then and there intentionally and without authorization gain access and damage a computer, computer system, computer network or other computer property which caused a loss of the value of at least \$500.00 but less than \$25,000.00, a severity level 9 non-person felony."

Felony computer crime as it is charged in this case under K.S.A. 21-3755(b)(1) required the State to prove three distinct elements: (1) intentional and unauthorized access to a computer, computer system, computer network, or any other property ... ; (2) damage to a computer, computer system, computer network, or any other property; and (3) a loss in value as a result of such crime of at least \$500 but less than \$25,000. The trial court found that the State failed to show probable cause as to each of these elements.

*Did the trial court err in ruling there was insufficient evidence to show Allen gained "access" to Southwestern Bell's computers?*

After finding the evidence showed Allen had done nothing more than use his computer to call unlisted telephone numbers, the trial court ruled there was insufficient evidence to show Allen had gained access to the computer systems. ... The trial court reasoned that unless and until

Allen produced a password that permitted him to interact with the data in the computer system, he had not “gained access” as the complaint required.

The State argues the trial court’s construction of the statute ignores the fact that “access” is defined in the statute, K.S.A. 21-3755(a)(1), as “to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system or computer network.” By this definition, the State would lead us to believe that any kind of an “approach” is criminal behavior sufficient to satisfy a charge that Allen did in fact “gain access” to a computer system.

The problem with the State’s analysis is that K.S.A. 21-3755(b)(1) does not criminalize “accessing” (and, thus, “approaching”) but rather “gaining or attempting to gain access.” If we were to read “access” in this context as the equivalent of “approach,” the statute would criminalize the behavior of “attempting to gain approach” to a computer or computer system. ...

The United States Department of Justice has commented about the use of “approach” in a definition of “access” in this context: “The use of the word ‘approach’ in the definition of ‘access,’ if taken literally, could mean that any unauthorized physical proximity to a computer could constitute a crime.” National Institute of Justice, Computer Crime: Criminal Justice Resource Manual, p. 84 (2d ed. 1989). ...

Webster’s defines “access” as “freedom or ability to obtain or make use of.” Webster’s New Collegiate Dictionary, p. 7 (1977). This is similar to the construction used by the trial court to find that no evidence showed that Allen had gained access to Southwestern Bell’s computers. Until Allen proceeded beyond the initial banner and entered appropriate passwords, he could not be said to have had the ability to make use of Southwestern Bell’s computers or obtain anything. Therefore, he cannot be said to have gained access to Southwestern Bell’s computer systems as gaining access is commonly understood. The trial court did not err in determining the State had failed to present evidence showing probable cause that Allen had gained access to Southwestern Bell’s computer system.

*Did the trial court err in ruling that no evidence showed Allen had damaged any computer, computer system, computer network, or any other property?*

The State acknowledges it cannot meet the damage element of the crime it has charged by any means other than evidence showing Allen’s actions resulted in expenditures of money by Southwestern Bell. It is crystal clear there is absolutely no evidence Allen modified, altered, destroyed, copied, disclosed, or took possession of anything. The State’s evidence clearly shows Allen did not physically affect any piece of computer equipment or software by his telephone calls. All the State was able to show was that Southwestern Bell made an independent business judgment to upgrade its security at a cost of \$23,796. The State argues this is sufficient.

The State’s argument is clearly flawed. The trial court reasoned by a fitting analogy that the State is essentially saying that a person looking at a no trespassing sign on a gate causes damage to the owner of the gate if the owner decides as a result to add a new lock. The trial court has clearly pointed to the correct analysis of this issue.

The State’s circular theory is that if someone incurs costs to investigate whether an activity is criminal, it becomes criminal because investigative costs were incurred. Although computer crime is not, for obvious reasons, a common-law crime, it nevertheless has a common-law

predicate which helps us to understand the legislature's intent. K.S.A. 21-3755 was not designed to update criminal trespass or malicious mischief statutes to the computer age but "to address inadequacies in the present theft statute related to prosecution of computer related crimes. Specifically, present theft statutes make prosecution difficult among crimes in which the computer owner was not actually deprived of the computer or its software." Kansas Legislature Summary of Legislation 1985, p. 80.

Theft, as defined in K.S.A. 21-3701, is not concerned with mere occupation, detention, observation, or tampering, but rather requires permanent deprivation. The intent required for theft is an "intent to deprive the owner permanently of the possession, use, or benefit of the owner's property." K.S.A. 21-3701(a). One may have wrongful intent, such as intent to trespass, without having the intent required for a theft. In addition, at common law, the thing of which the victim was deprived had to be something of value. The second element of computer crime mirrors this common-law requirement of the deprivation of something of value in a larceny action. As in a larceny action, the extent of the deprivation determines the severity level of the crime. This element of computer crime, as with other theft statutes, cannot be satisfied where there is no deprivation as in this case. . . .

Southwestern Bell's computer system was not "damaged" in the sense the statute requires. Southwestern Bell was not deprived of property in the manner required to support a criminal charge. The fact an independent business judgment that Southwestern Bell's computer systems might be accessible was made after Allen's conduct was discovered does not support the second and third elements of the crime charged. The trial court correctly determined the State failed to meet its probable cause burden on these issues as well.

Affirmed.

***United States v. Morris***  
**928 F. 2d 504 (2d Cir. 1991)**

JON O. NEWMAN, Circuit Judge:

... In the fall of 1988, [Robert Tappan] Morris was a first-year graduate student in Cornell University's computer science Ph.D. program. Through undergraduate work at Harvard and in various jobs he had acquired significant computer experience and expertise. When Morris entered Cornell, he was given an account on the computer at the Computer Science Division. This account gave him explicit authorization to use computers at Cornell. ...

In October 1988, Morris began work on a computer program, later known as the INTERNET "worm" or "virus." The goal of this program was to demonstrate the inadequacies of current security measures on computer networks by exploiting the security defects that Morris had discovered. ... Morris designed the program to spread across a national network of computers after being inserted at one computer location connected to the network. Morris released the worm into INTERNET, which is a group of national networks that connect university, governmental, and military computers around the country. The network permits communication and transfer of information between computers on the network.

Morris sought to program the INTERNET worm to spread widely without drawing attention to itself. The worm was supposed to occupy little computer operation time, and thus

not interfere with normal use of the computers. Morris programmed the worm to make it difficult to detect and read, so that other programmers would not be able to “kill” the worm easily.

Morris also wanted to ensure that the worm did not copy itself onto a computer that already had a copy. [Due to programming and mathematical mistakes, Morris’s safeguard failed, leading the worm to install thousands of copies of itself on each computer it reached.]

Morris identified four ways in which the worm could break into computers on the network:

- (1) through a “hole” or “bug” (an error) in SENDMAIL, a computer program that transfers and receives electronic mail on a computer;
- (2) through a bug in the “finger demon” program, a program that permits a person to obtain limited information about the users of another computer;
- (3) through the “trusted hosts” feature, which permits a user with certain privileges on one computer to have equivalent privileges on another computer without using a password; and
- (4) through a program of password guessing, whereby various combinations of letters are tried out in rapid sequence in the hope that one will be an authorized user’s password, which is entered to permit whatever level of activity that user is authorized to perform.

On November 2, 1988, Morris released the worm from a computer at the Massachusetts Institute of Technology. MIT was selected to disguise the fact that the worm came from Morris at Cornell. Morris soon discovered that the worm was replicating and reinfecting machines at a much faster rate than he had anticipated. Ultimately, many machines at locations around the country either crashed or became “catatonic.” When Morris realized what was happening, he contacted a friend at Harvard to discuss a solution. Eventually, they sent an anonymous message from Harvard over the network, instructing programmers how to kill the worm and prevent reinfection. However, because the network route was clogged, this message did not get through until it was too late. Computers were affected at numerous installations, including leading universities, military sites, and medical research facilities. The estimated cost of dealing with the worm at each installation ranged from \$200 to more than \$53,000.

Morris was found guilty, following a jury trial, of violating 18 U.S.C. § 1030(a)(5)(A). He was sentenced to three years of probation, 400 hours of community service, a fine of \$10,050, and the costs of his supervision.

## *DISCUSSION*

### *I. The intent requirement in section 1030(a)(5)(A)*

Section 1030(a)(5)(A), covers anyone who

(5) *intentionally accesses* a Federal interest computer without authorization, *and* by means of one or more instances of such conduct alters, damages, or destroys information in any such Federal interest computer, or *prevents authorized use* of any such computer or information, *and thereby*



(A) *causes loss* to one or more others of a value aggregating \$1,000 or more during any one year period; ... [emphasis added].

The District Court concluded that the intent requirement applied only to the accessing and not to the resulting damage.

Judge Munson found recourse to legislative history unnecessary because he considered the statute clear and unambiguous. However, the Court observed that the legislative history supported its reading of section 1030(a)(5)(A).

Morris argues that the Government had to prove not only that he intended the unauthorized access of a federal interest computer, but also that he intended to prevent others from using it, and thus cause a loss. The adverb “intentionally,” he contends, modifies both verb phrases of the section. The Government urges that since punctuation sets the “accesses” phrase off from the subsequent “damages” phrase, the provision unambiguously shows that “intentionally” modifies only “accesses.” Absent textual ambiguity, the Government asserts that recourse to legislative history is not appropriate.

With some statutes, punctuation has been relied upon to indicate that a phrase set off by commas is independent of the language that followed. However, we have been advised that punctuation is not necessarily decisive in construing statutes, and with many statutes, a mental state adverb adjacent to initial words has been applied to phrases or clauses appearing later in the statute without regard to the punctuation or structure of the statute. In the present case, we do not believe the comma after “authorization” renders the text so clear as to preclude review of the legislative history. ...

First, the 1986 amendments changed the scienter requirement in section 1030(a)(2) from “knowingly” to “intentionally.” *See* Pub.L. No. 99-474, section 2(a)(1). ...

According to the Senate Judiciary Committee, Congress changed the mental state requirement in section 1030(a)(2) for two reasons. Congress sought only to proscribe intentional acts of unauthorized access, not “mistaken, inadvertent, or careless” acts of unauthorized access. S.Rep. No. 99-432, 99th Cong., 2d Sess. 5 (1986), *reprinted in* 1986 U.S.Code Cong. & Admin.News 2479, 2483 [hereinafter Senate Report].

Also, Congress expressed concern that the “knowingly” standard “might be inappropriate for cases involving computer technology.” *Id.* The concern was that a scienter requirement of “knowingly” might encompass the acts of an individual “who inadvertently ‘stumble[d] into’ someone else’s computer file or computer data,” especially where such individual was authorized to use a particular computer. *Id.* at 6. The Senate Report concluded that “[t]he substitution of an ‘intentional’ standard is designed to focus Federal criminal prosecutions on those whose conduct evinces a clear intent to enter, without proper authorization, computer files or data belonging to another.” *Id.* ...

The rationale for the *mens rea* requirement suggests that it modifies only the “accesses” phrase, which was the focus of Congress’s concern in strengthening the scienter requirement. ...

Despite some isolated language in the legislative history that arguably suggests a scienter component for the “damages” phrase of section 1030(a)(5)(A), the wording, structure, and purpose of the subsection, examined in comparison with its departure from the format of its

predecessor provision persuade us that the “intentionally” standard applies only to the “accesses” phrase of section 1030(a)(5)(A), and not to its “damages” phrase.

*II. The unauthorized access requirement in section 1030(a)(5)(A)*

Section 1030(a)(5)(A) penalizes the conduct of an individual who “intentionally accesses a Federal interest computer without authorization.” ... Morris argues that there was insufficient evidence to convict him of “unauthorized access,” ...

We assess the sufficiency of the evidence under the traditional standard. Morris was authorized to use computers at Cornell, Harvard, and Berkeley, all of which were on INTERNET. As a result, Morris was authorized to communicate with other computers on the network to send electronic mail (SENDMAIL), and to find out certain information about the users of other computers (finger demon). The question is whether Morris’s transmission of his worm constituted ... accessing without authorization. ...

The evidence permitted the jury to conclude that Morris’s use of the SENDMAIL and finger demon features constituted access without authorization. ... Morris did not use either of those features in any way related to their intended function. He did not send or read mail nor discover information about other users; instead he found holes in both programs that permitted him a special and unauthorized access route into other computers.

Moreover, the jury verdict need not be upheld solely on Morris’s use of SENDMAIL and finger demon. As the District Court noted, in denying Morris’ motion for acquittal,

Although the evidence may have shown that defendant’s initial insertion of the worm simply exceeded his authorized access, the evidence also demonstrated that the worm was designed to spread to other computers at which he had no account and no authority, express or implied, to unleash the worm program. Moreover, there was also evidence that the worm was designed to gain access to computers at which he had no account by guessing their passwords. Accordingly, the evidence did support the jury’s conclusion that defendant accessed without authority as opposed to merely exceeding the scope of his authority.

In light of the reasonable conclusions that the jury could draw from Morris’s use of SENDMAIL and finger demon, and from his use of the trusted hosts feature and password guessing, his challenge to the sufficiency of the evidence fails. ...

***United States v. Drew***  
**259 F.R.D. 449 (C.D. Cal. 2009)**

**OPINION BY: GEORGE H. WU**

***II. BACKGROUND***

***A. Indictment***

... The Indictment included, inter alia, the following allegations (not all of which were established by the evidence at trial). Drew, a resident of O’Fallon, Missouri, entered into a conspiracy in which its members agreed to intentionally access a computer used in interstate commerce without (and/or in excess of) authorization in order to obtain information for the

purpose of committing the tortious act of intentional infliction of emotional distress upon “M.T.M.,” subsequently identified as Megan Meier (“Megan”). Megan was a 13 year old girl living in O’Fallon who had been a classmate of Drew’s daughter Sarah. Pursuant to the conspiracy, on or about September 20, 2006, the conspirators registered and set up a profile for a fictitious 16 year old male juvenile named “Josh Evans” on the www.MySpace.com website (“MySpace”), and posted a photograph of a boy without that boy’s knowledge or consent. Such conduct violated MySpace’s terms of service. The conspirators contacted Megan through the MySpace network (on which she had her own profile) using the Josh Evans pseudonym and began to flirt with her over a number of days. On or about October 7, 2006, the conspirators had “Josh” inform Megan that he was moving away. On or about October 16, 2006, the conspirators had “Josh” tell Megan that he no longer liked her and that “the world would be a better place without her in it.” Later on that same day, after learning that Megan had killed herself, Drew caused the Josh Evans MySpace account to be deleted.

## B. Verdict

[The jury deadlocked on a conspiracy charge and acquitted Drew on three felony counts. It did, however, convict Drew of] “accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information ..., a misdemeanor.”

## C. *MySpace.com*

... MySpace is a “social networking” website where members can create “profiles” and interact with other members. Anyone with Internet access can go onto the MySpace website and view content which is open to the general public such as a music area, video section, and members’ profiles which are not set as “private.” However, to create a profile, upload and display photographs, communicate with persons on the site, write “blogs,” and/or utilize other services or applications on the MySpace website, one must be a “member.” Anyone can become a member of MySpace at no charge so long as they meet a minimum age requirement and register.

In 2006, to become a member, one had to go to the sign-up section of the MySpace website and register by filling in personal information (such as name, email address, date of birth, country/state/postal code, and gender) and creating a password. In addition, the individual had to check on the box indicating that “You agree to the MySpace **Terms of Service** and **Privacy Policy**.” The terms of service did not appear on the same registration page that contained this “check box” for users to confirm their agreement to those provisions. In order to find the terms of service, one had (or would have had) to proceed to the bottom of the page where there were several “hyperlinks” including one entitled “Terms.” ... A person could become a MySpace member without ever reading or otherwise becoming aware of the provisions and conditions of the MySpace terms of service by merely clicking on the “check box” and then the “Sign Up” button without first accessing the “Terms” section.

As used in its website, “terms of service” refers to the “MySpace.com Terms of Use Agreement” (“MSTOS”). The MSTOS in 2006 stated, inter alia:

This Terms of Use Agreement (“Agreement”) sets forth the legally binding terms for your use of the Services. By using the Services, you agree to be bound by this Agreement, whether you are a “Visitor” (which means that you simply browse the Website) or you are a “Member” (which means that you have registered with

Myspace.com). The term “User” refers to a Visitor or a Member. You are only authorized to use the Services (regardless of whether your access or use is intended) if you agree to abide by all applicable laws and to this Agreement. Please read this Agreement carefully and save it. If you do not agree with it, you should leave the Website and discontinue use of the Services immediately. If you wish to become a Member, communicate with other Members and make use of the Services, you must read this Agreement and indicate your acceptance at the end of this document before proceeding.

By using the Services, you represent and warrant that (a) all registration information you submit is truthful and accurate; (b) you will maintain the accuracy of such information; (c) you are 14 years of age or older; and (d) your use of the Services does not violate any applicable law or regulation.

The MSTOS prohibited the posting of a wide range of content on the website including (but not limited to) material that: a) “is potentially offensive and promotes racism, bigotry, hatred or physical harm of any kind against any group or individual”; b) “harasses or advocates harassment of another person”; c) “solicits personal information from anyone under 18”; d) “provides information that you know is false or misleading or promotes illegal activities or conduct that is abusive, threatening, obscene, defamatory or libelous”; e) “includes a photograph of another person that you have posted without that person’s consent”; f) “involves commercial activities and/or sales without our prior written consent”; g) “contains restricted or password only access pages or hidden pages or images”; or h) “provides any phone numbers, street addresses, last names, URLs or email addresses . . .” MySpace also reserved the right to take appropriate legal action (including reporting the violating conduct to law enforcement authorities) against persons who engaged in “prohibited activity” which was defined as including, inter alia: a) “criminal or tortious activity”, b) “attempting to impersonate another Member or person”, c) “using any information obtained from the Services in order to harass, abuse, or harm another person”, d) “using the Service in a manner inconsistent with any and all applicable laws and regulations”, e) “advertising to, or solicitation of, any Member to buy or sell any products or services through the Services”, f) “selling or otherwise transferring your profile”, or g) “covering or obscuring the banner advertisements on your personal profile page ...” The MSTOS warned users that “information provided by other MySpace.com Members (for instance, in their Profile) may contain inaccurate, inappropriate, offensive or sexually explicit material, products or services, and MySpace.com assumes no responsibility or liability for this material.” Further, MySpace was allowed to unilaterally modify the terms of service, with such modifications taking effect upon the posting of notice on its website. Thus, members would have to review the MSTOS each time they logged on to the website, to ensure that they were aware of any updates in order to avoid violating some new provision of the terms of service. Also, the MSTOS provided that “any dispute” between a visitor/member and MySpace “arising out of this Agreement must be settled by arbitration” if demanded by either party.

At one point, MySpace was receiving an estimated 230,000 new accounts per day and eventually the number of profiles exceeded 400 million with over 100 million unique visitors worldwide. “Generally speaking,” MySpace would not monitor new accounts to determine if they complied with the terms of service except on a limited basis, mostly in regards to photographic content. Sung testified that there is no way to determine how many of the 400

million existing MySpace accounts were created in a way that violated the MSTOS. The MySpace website did have hyperlinks labelled “Safety Tips” (which contained advice regarding personal, private and financial security vis-a-vis the site) and “Report Abuse” (which allowed users to notify MySpace as to inappropriate content and/or behavior on the site). MySpace attempts to maintain adherence to its terms of service. It has different teams working in various areas such as “parent care” (responding to parents’ questions about this site), handling “harassment/cyberbully cases, impostor profiles,” removing inappropriate content, searching for underage users, etc. As to MySpace’s response to reports of harassment:

It varies depending on the situation and what’s being reported. It can range from ... letting the user know that if they feel threatened to contact law enforcement, to us removing the profile, and in rare circumstances we would actually contact law enforcement ourselves.

Once a member is registered and creates his or her profile, the data is housed on computer servers which are located in Los Angeles County. Members can create messages which can be sent to other MySpace members, but messages cannot be sent to or from other Internet service providers such as Yahoo!. All communications among MySpace members are routed from the sender’s computer through the MySpace servers in Los Angeles.

### *III. APPLICABLE LAW*

#### *A. F.R.Crim.P. 29(c)*

A motion for judgment of acquittal under F.R.Crim.P. 29(c) may be made by a defendant seeking to challenge a conviction on the basis of the sufficiency of the evidence, or on other grounds including ones involving issues of law for the court to decide. Where the Rule 29(c) motion rests in whole or in part on the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the government, with circumstantial evidence and inferences drawn in support of the jury’s verdict. In 2006, the CFAA (18 U.S.C. § 1030) provided in relevant part that:

(a) Whoever —

\*\*\*\*

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains —

\*\*\*\*

(C) information from any protected computer if the conduct involved an interstate or foreign communication;

\*\*\*\*

shall be punished as provided in subsection (c) of this section. . . .

As used in the CFAA ... the term “exceeds authorized access” means “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter . . .” Id. § 1030(e)(6). ...

#### *IV. DISCUSSION*

##### *A. The Misdemeanor 18 U.S.C. § 1030(a)(2)(C) Crime Based on Violation of a Website's Terms of Service*

... [T]he primary question here is whether any conscious violation of an Internet website's terms of service will cause an individual's contact with the website via computer to become "intentionally access[ing] . . . without authorization" or "exceeding authorization." ...

In this particular case, as conceded by the Government, the only basis for finding that Drew intentionally accessed MySpace's computer/servers without authorization and/or in excess of authorization was her and/or her co-conspirator's violations of the MSTOS by deliberately creating the false Josh Evans profile, posting a photograph of a juvenile without his permission and pretending to be a sixteen year old O'Fallon resident for the purpose of communicating with Megan. ...

There is nothing in the way that the undefined words "authorization" and "authorized" are used in the CFAA (or from the CFAA's legislative history) which indicates that Congress intended for them to have specialized meanings. As delineated in Webster's New World Dictionary at 92, to "authorize" ordinarily means "to give official approval to or permission for . . ."

It cannot be considered a stretch of the law to hold that the owner of an Internet website has the right to establish the extent to (and the conditions under) which members of the public will be allowed access to information, services and/or applications which are available on the website. Nor can it be doubted that the owner can relay and impose those limitations/restrictions/conditions by means of written notice such as terms of service or use provisions placed on the home page of the website. While issues might be raised in particular cases as to the sufficiency of the notice and/or sufficiency of the user's assent to the terms, and while public policy considerations might in turn limit enforcement of particular restrictions, the vast majority of the courts (that have considered the issue) have held that a website's terms of service/use can define what is (and/or is not) authorized access vis-a-vis that website.

Here, the MSTOS defined "services" as including "the MySpace.com Website ..., the MySpace.com instant messenger, and any other connection with the Website . . ." It further notified the public that the MSTOS "sets forth the legally binding terms for your use of the services." Visitors and members were informed that "you are only authorized to use the Services ... if you agree to abide by all applicable laws and to this Agreement." Moreover, to become a MySpace member and thereby be allowed to communicate with other members and fully utilize the MySpace Services, one had to click on a box to confirm that the user had agreed to the MySpace Terms of Service. Clearly, the MSTOS was capable of defining the scope of authorized access of visitors, members and/or users to the website.

##### *B. Contravention of the Void-for-Vagueness Doctrine*

###### *1. Applicable Law*

Justice Holmes observed that, as to criminal statutes, there is a "fair warning" requirement. As he stated in *McBoyle v. United States*, 283 U.S. 25, 27, (1931):

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a

certain line is passed. To make the warning fair, so far as possible the line should be clear. . . .

To avoid contravening the void-for-vagueness doctrine, the criminal statute must contain “relatively clear guidelines as to prohibited conduct” and provide “objective criteria” to evaluate whether a crime has been committed. . . . However, a “difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness . . . Impossible standards of specificity are not required.” *Jordan v. De George*, 341 U.S. 223, 231 (1951) (citation and footnote omitted). “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *United States v. Williams*, 553 U.S. 285 (2008). . . .

## 2. *Definitional/Actual Notice Deficiencies*

The pivotal issue herein is whether basing a CFAA misdemeanor violation as per 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(A) upon the conscious violation of a website’s terms of service runs afoul of the void-for-vagueness doctrine. This Court concludes that it does primarily because of the absence of minimal guidelines to govern law enforcement, but also because of actual notice deficiencies.

As discussed in Section IV(A) above, terms of service which are incorporated into a browsewrap or clickwrap agreement can, like any other type of contract, define the limits of authorized access as to a website and its concomitant computer/server(s). However, the question is whether individuals of “common intelligence” are on notice that a breach of a terms of service contract can become a crime under the CFAA. Arguably, they are not.

First, an initial inquiry is whether the statute, as it is written, provides sufficient notice. Here, the language of section 1030(a)(2)(C) does not explicitly state (nor does it implicitly suggest) that the CFAA has “criminalized breaches of contract” in the context of website terms of service. Normally, breaches of contract are not the subject of criminal prosecution. Thus, while “ordinary people” might expect to be exposed to civil liabilities for violating a contractual provision, they would not expect criminal penalties. This would especially be the case where the services provided by MySpace are in essence offered at no cost to the users and, hence, there is no specter of the users “defrauding” MySpace in any monetary sense.

Second, if a website’s terms of service controls what is “authorized” and what is “exceeding authorization”—which in turn governs whether an individual’s accessing information or services on the website is criminal or not, *section 1030(a)(2)(C)* would be unacceptably vague because it is unclear whether any or all violations of terms of service will render the access unauthorized, or whether only certain ones will. For example, in the present case, MySpace’s terms of service prohibits a member from engaging in a multitude of activities on the website, including such conduct as “criminal or tortious activity,” “gambling,” “advertising to . . . any Member to buy or sell any products,” “transmit[ing] any chain letters,” “covering or obscuring the banner advertisements on your personal profile page,” “disclosing your password to any third party,” etc. The MSTOS does not specify which precise terms of service, when breached, will result in a termination of MySpace’s authorization for the visitor/member to access the website. If any violation of any term of service is held to make the access unauthorized, that strategy would probably resolve this particular vagueness issue; but it would, in turn, render the statute

incredibly overbroad and contravene the second prong of the void-for-vagueness doctrine as to setting guidelines to govern law enforcement.<sup>1</sup>

Third, by utilizing violations of the terms of service as the basis for the section 1030(a)(2)(C) crime, that approach makes the website owner—in essence—the party who ultimately defines the criminal conduct. This will lead to further vagueness problems. The owner’s description of a term of service might itself be so vague as to make the visitor or member reasonably unsure of what the term of service covers. For example, the MSTOS prohibits members from posting in “band and filmmaker profiles ... sexually suggestive imagery or any other unfair ... [c]ontent intended to draw traffic to the profile.” It is unclear what “sexually suggestive imagery” and “unfair content” mean. Moreover, website owners can establish terms where either the scope or the application of the provision are to be decided by them *ad hoc* and/or pursuant to undelineated standards. For example, the MSTOS provides that what constitutes “prohibited content” on the website is determined “in the sole discretion of MySpace.com . . .” Additionally, terms of service may allow the website owner to unilaterally amend and/or add to the terms with minimal notice to users..

#### V. CONCLUSION

For the reasons stated above, the Defendant’s motion under *FR.Crim.P. 29(c)* is GRANTED.

#### **Bluebeard problem**

Edward Bluebeard owned a computer. He gave his wife, Karin Bluebeard, an account on the computer, one that had no technical restrictions on what it could do. He also told her that she could do anything she wanted with the computer *except* look in the Secret001 folder. One day, when Edward was away on a business trip, Karin looked inside the folder, and discovered that he had a secret collection of Jonas Brothers MP3s. When he returned, Edward discovered that the folder had been opened. One thing led to another, and . . .

The state of Brittany has filed charges against Karin Bluebeard of violating its Computer Misuse Act, Brittany Consolidated Laws § 300-10, which reads, in relevant part:

(b)

(1) Whoever recklessly and without authorization accesses a computer and thereby causes damage to said computer shall be punished in accordance with [the Brittany criminal code].

(2) Whoever intentionally and without authorization accesses a computer and thereby obtains any thing of value shall be punished in accordance with [the Brittany criminal code]

(e) If the damage as described in paragraph (1) of section (b) exceeds \$10,000 to any victim or victims or the value of the thing obtained as described in paragraph (2) of section (b) exceeds \$10,000, such offense shall be punished as a class C felony. In all other cases it shall be punished as a class D misdemeanor.

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<sup>1</sup> Another uncertainty is whether, once a user breaches a term of service, is every subsequent accessing of the website by him or her without authorization or in excess of authorization.



(f) As used in this section—

(6) The term “computer” shall mean an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, a portable hand-held calculator, or a similar device which is non-programmable or which does not contain any data storage facility.

(7) “damage” shall mean any impairment to a computer or the integrity or availability of data, a program or system, or information, that causes loss to any person of \$5,000 or more; modifies or impairs the medical examination, diagnosis, treatment or care of any person; causes or threatens physical injury or death to any person; or threatens public health or public safety.

At trial, Edward Bluebeard testified that on his return, he noticed that two of the Jonas Brothers MP3s, which he purchased from Amazon’s MP3 store for 89 cents each, were missing. He spent \$6,000 hiring a computer consultant to discover who had been using the computer and trying (without success) to recover the deleted MP3s. He claimed that no one besides himself and his wife had physical access to the computer. Mrs. Bluebeard admitted using the computer and looking inside the folder, but denied playing the MP3s, deleting them, or doing anything else with them,

The presentation of evidence at the trial has concluded, and Karin Bluebeard has moved the court for a judgment of acquittal. How should the court rule on her motion?

## CLASS 18: TRESPASS

Our second source of law for control over servers comes from the borderline between property law and tort law. If I use your computer without permission and cause it to burst into flames, it's generally accepted that you will have a valid lawsuit against me for trespass to chattels. (Ask, however, whether this common-law cause of action is still necessary, given the existence of a civil remedy in the CFAA.) The harder, more controversial questions arise in two settings. First, what if your use of the computer doesn't cause physical damage, but only some form of intangible trouble: deleted data, a slowed-down computer, or, perhaps, no visible harm at all? And second, how far will the tort reach in covering actors who indirectly cause access to a server?

### *Preparation questions*

(1) The first problem is a warmup, designed to start the conversation about the purpose of the trespass torts—and the critical difference between trespass and trespass to chattels. After you've decided whether the bookstore has a valid cause of action against crimsonreading.org, (and I hope you flagged the sub-issue of whether “crimsonreading.org” is the right defendant), ask whether this is what trespass is “for.” The ISBNs aren't copyrightable information; should trespass law give the bookstore a mechanism to prevent access to information copyright law thinks should be free? And, conversely, what interests is trespass meant to defend? Is one of them at stake here? What about trespass to chattels? Is the significant doctrinal difference between it and trespass to land a distinction you'd like to defend?

(2) Now we go to an extremely similar online case. If Bidder's Edge had caused eBay's computers to burst into flames, which tort(s) could eBay have used? Trespass? Trespass to chattels? In the event, Bidder's Edge didn't cause that kind of obvious physical harm. What *did* it do to eBay's computers? In what sense did it cause harm? Be as precise as you can. Are you convinced by the court's reasoning on this point? Do you think this court reached a fair and just overall result?

(3) Also of interest in *Bidder's Edge* is the part about the technological back-and-forth. Describe, as precisely as you can, what a “robot” or a “spider” is. How does the “Robot Exclusion Standard” keep unwanted robots off of a web site? Is it easier for a search engine to ignore the Robot Exclusion Standard or to comply with its requests? The next step in the war was IP-address blocking; how did that work? And how did Bidder's Edge get around it? All of these informal standards and self-help raise questions about the role of law. Is law more or less necessary in a world in which both sides have access to these self-help techniques? Should the law ignore the use of the Robot Exclusion Standard, enforce it, or something else entirely?

(4) *Intel v. Hamidi* is generally considered a landmark case in Internet law. It's only a California case, and thus not binding elsewhere, but it more or less singlehandedly reversed a trend of using the trespass-to-chattels tort as the first legal line of defense for server owners. We should start our analysis with the harm question. What harms did Hamidi cause to Intel, if any? Which of these is trespass to chattels intended to defend against? Which of them “count” in deciding whether Hamidi committed an actionable tort? Are you convinced that this case is consistent with *Bidder's Edge*? Is there any other difference in their factual settings that might help explain their divergent results?

(5) The dissents in *Hamidi* ask pointed questions about the majority's reasoning. Explain Justice Brown's campaign-cars analogy and Justice Mosk's mail-cart analogy. How persuasive are these analogies?

(6) *Hamidi* inspired a whole outpouring of law review literature, much of which is reflected in Part II of the majority's opinion. Much of the pro-*Hamidi* literature was concerned with the use of physical or place-based metaphors, and sought to argue that trespass was completely inappropriate online: a server is not a house. How strongly do metaphors to the offline world influence how you think about these types of cases? The policy arguments were more evenly split; can you explain the basis of the dispute between Richard Epstein and Mark Lemley?

(7) Finally, in the wireless router problem we switch to questions of responsibility. The problem asks you a legal question; I'd like you also to ask whether the law reaches a just result. How much responsibility *should* FixPoint bear in this situation? What can it do now that millions of these devices are out in the wild wreaking havoc?

### **Restatement (Second) of Torts**

#### *§ 158: Liability for Intentional Intrusions on Land*

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

- (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
- (b) remains on the land, or
- (c) fails to remove from the land a thing which he is under a duty to remove.

#### *§ 218: Liability to Person in Possession*

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

- (a) he dispossesses the other of the chattel, or
- (b) the chattel is impaired as to its condition, quality, or value, or
- (c) the possessor is deprived of the use of the chattel for a substantial time, or
- (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

### **Bookstore problem**

The following is taken from Christian B. Flow, *Coop Calls Cops on ISBN Copiers*, HARVARD CRIMSON (Sept. 21, 2007):

The Harvard Coop called police yesterday after three undergraduates collecting information for a student-run textbook-shopping Web site refused to leave the bookstore. The two Cambridge police officers who arrived allowed the students to

continue copying down book identification numbers, which they did for two and a half hours before leaving on their own terms. ...

The tense afternoon at the venerable 125-year-old bookstore comes two days after the Coop reaffirmed a policy discouraging students from copying down book identification numbers. Students are able to go online and use those numbers, known as ISBNs, to find better deals for textbooks.

The year-old, student-run crimsonreading.org site allows Harvard students to find cheap textbooks at Internet booksellers by clicking on the courses they are taking. The Coop has argued that it owns intellectual property rights to the identification numbers for the books it stocks, which are organized by course on the third floor. Crimson Reading Director John T. Staff V '10 insists the information is in the public domain.

The Coop is considering suing crimsonreading.org for trespass and trespass to chattels. Advise the Coop on its chances for success, the remedies (if any) it could obtain, and whether the lawsuit would be a good idea.

***eBay, Inc. v. Bidder's Edge, Inc.***  
**100 F. Supp. 2d 1058 (N.D. Cal. 2000)**

WHYTE, District Judge.

Plaintiff eBay, Inc.'s ("eBay") motion for preliminary injunction was heard by the court on April 14, 2000. The court has read the moving and responding papers and heard the argument of counsel. For the reasons set forth below, the court preliminarily enjoins defendant Bidder'sEdge, Inc. ("BE") from accessing eBay's computer systems by use of any automated querying program without eBay's written authorization.

***I. BACKGROUND***

eBay is an Internet-based, person-to-person trading site. eBay offers sellers the ability to list items for sale and prospective buyers the ability to search those listings and bid on items. The seller can set the terms and conditions of the auction. The item is sold to the highest bidder. The transaction is consummated directly between the buyer and seller without eBay's involvement. A potential purchaser looking for a particular item can access the eBay site and perform a key word search for relevant auctions and bidding status. eBay has also created category listings that identify items in over 2500 categories, such as antiques, computers, and dolls. Users may browse these category listing pages to identify items of interest.

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

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

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

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

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

... Outgoing requests from remote users can be routed through ... proxy servers and appear to originate from the proxy server. Incoming responses are then received by the proxy server and routed to the remote user. Information requests sent through such proxy servers cannot easily be traced back to the originating IP address and can be used to circumvent attempts to block queries from the originating IP address. Blocking queries from innocent third party proxy servers is both inefficient, because it creates an endless game of hide-and-seek, and potentially counterproductive, as it runs a substantial risk of blocking requests from legitimate, desirable users who use that proxy server.

BE is a company with 22 employees that was founded in 1997. The BE web site debuted in November 1998. BE does not host auctions. BE is an auction aggregation site designed to offer on-line auction buyers the ability to search for items across numerous on-line auctions without having to search each host site individually. As of March 2000, the BE web site contained information on more than five million items being auctioned on more than one hundred auction sites. BE also provides its users with additional auction-related services and information. The information available on the BE site is contained in a database of information that BE compiles through access to various auction sites such as eBay. When a user enters a search for a particular item at BE, BE searches its database and generates a list of every item in the database responsive to the search, organized by auction closing date and time. Rather than going to each host

auction site one at a time, a user who goes to BE may conduct a single search to obtain information about that item on every auction site tracked by BE. It is important to include information regarding eBay auctions on the BE site because eBay is by far the biggest consumer to consumer on-line auction site. ...

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

... On November 9, 1999, eBay sent BE a letter reasserting that BE's activities were unauthorized, insisting that BE cease accessing the eBay site, alleging that BE's activities constituted a civil trespass and offering to license BE's activities. eBay and BE were again unable to agree on licensing terms. As a result, eBay attempted to block BE from accessing the eBay site; by the end of November, 1999, eBay had blocked a total of 169 IP addresses it believed BE was using to query eBay's system. BE elected to continue crawling eBay's site by using proxy servers to evade eBay's IP blocks. ...

It appears that major Internet search engines, such as Yahoo!, Google, Excite and AltaVista, respect the Robot Exclusion Standard.

eBay now moves for preliminary injunctive relief preventing BE from accessing the eBay computer system ...

## II. LEGAL STANDARD

To obtain preliminary injunctive relief, a movant must demonstrate "either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1517 (9th Cir.1992) (citations omitted). ...

## III. ANALYSIS

### A. Balance of Harm

... According to eBay, the load on its servers resulting from BE's web crawlers represents between 1.11% and 1.53% of the total load on eBay's listing servers. eBay alleges both economic loss from BE's current activities and potential harm resulting from the total crawling of BE and others. In alleging economic harm, eBay's argument is that eBay has expended considerable time, effort and money to create its computer system, and that BE should have to pay for the portion of eBay's system BE uses. eBay attributes a pro rata portion of the costs of maintaining its entire system to the BE activity. However, eBay does not indicate that these expenses are incrementally incurred because of BE's activities, nor that any particular service disruption can be attributed to BE's activities. eBay provides no support for the proposition that the pro rata costs of obtaining an item represent the appropriate measure of damages for unauthorized use. In contrast, California law appears settled that the appropriate measure of damages is the actual harm inflicted by the conduct: ...

eBay's allegations of harm are based, in part, on the argument that BE's activities should be thought of as equivalent to sending in an army of 100,000 robots a day to check the prices in a

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

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

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

### *B. Likelihood of Success*

... The court finds that eBay has established a sufficient likelihood of prevailing on the trespass claim to support the requested injunctive relief. ...

#### *1. Trespass*

Trespass to chattels "lies where an intentional interference with the possession of personal property has proximately cause injury." *Thrifty-Tel v. Bezenek*, 46 Cal.App.4th 1559, 1566, 54 Cal.Rptr.2d 468 (1996). Trespass to chattels "although seldom employed as a tort theory in California" was recently applied to cover the unauthorized use of long distance telephone lines. *Id.* Specifically, the court noted "the electronic signals generated by the [defendants'] activities were sufficiently tangible to support a trespass cause of action." *Id.* at n. 6. Thus, it

appears likely that the electronic signals sent by BE to retrieve information from eBay's computer system are also sufficiently tangible to support a trespass cause of action.

In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff. See *Thrifty-Tel*, 46 Cal.App.4th at 1566, 54 Cal.Rptr.2d 468; Here, eBay has presented evidence sufficient to establish a strong likelihood of proving both prongs and ultimately prevailing on the merits of its trespass claim.

*a. BE's Unauthorized Interference*

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

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

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

*b. Damage to eBay's Computer System*

A trespasser is liable when the trespass diminishes the condition, quality or value of personal property. The quality or value of personal property may be "diminished even though it is not physically damaged by defendant's conduct." *Id.* at 1022. The Restatement offers the following explanation for the harm requirement:

The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected. ... 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 (Second) of Torts § 218 cmt. e (1977).

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

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

***Intel v. Hamidi***  
**71 P. 3d 296 (Cal. 2003)**

WERDEGAR, J.

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

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

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

#### FACTUAL AND PROCEDURAL BACKGROUND

We review a grant of summary judgment *de novo*; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. The pertinent undisputed facts are as follows.

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

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

The summary judgment record contains no evidence Hamidi breached Intel's computer security in order to obtain the recipient addresses for his messages; indeed, internal Intel memoranda show the company's management concluded no security breach had occurred.

Hamidi stated he created the recipient address list using an Intel directory on a floppy disk anonymously sent to him. Nor is there any evidence that the receipt or internal distribution of Hamidi's electronic messages damaged Intel's computer system or slowed or impaired its functioning. Intel did present uncontradicted evidence, however, that many employee recipients asked a company official to stop the messages and that staff time was consumed in attempts to block further messages from FACE-Intel. According to the FAC-Intel Web site, moreover, the messages had prompted discussions between "[e]xcited and nervous managers" and the company's human resources department.

Intel sued Hamidi and FACE-Intel, pleading causes of action for trespass to chattels and nuisance, and seeking both actual damages and an injunction against further e-mail messages. Intel later voluntarily dismissed its nuisance claim and waived its demand for damages. ...

### *I. Current California Tort Law*

Dubbed by Prosser the "little brother of conversion," the tort of trespass to chattels allows recovery for interferences with possession of personal property "not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered." (Prosser & Keeton, *Torts* (5th ed.1984) § 14, pp. 85-86.)

Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiffs rights in it. ...

The Restatement, too, makes clear that some actual injury must have occurred in order for a trespass to chattels to be actionable. Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable (see *id.*, par. (a) & com. d, pp. 420-421), but other forms of interference require some additional harm to the personal property or the possessor's interests in it. (*Id.*, pars, (b)-(d).) "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). 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." (*Id.*, com. e, pp. 421-422.) ...

Intel suggests that the requirement of actual harm does not apply here because it sought only injunctive relief, as protection from future injuries. But as Justice Kolkey, dissenting below, observed, "[t]he fact the relief sought is injunctive does not excuse a showing of injury, whether actual or threatened." Indeed, in order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause irreparable injuries, ones that cannot be adequately compensated in damages. ...

The dispositive issue in this case, therefore, is whether the undisputed facts demonstrate Hamidi's actions caused or threatened to cause damage to Intel's computer system, or injury to its rights in that personal property, such as to entitle Intel to judgment as a matter of law. To review, the undisputed evidence revealed no actual or threatened damage to Intel's computer

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

Relying on a line of decisions, most from federal district courts, applying the tort of trespass to chattels to various types of unwanted electronic contact between computers, Intel contends that, while its computers were not damaged by receiving Hamidi's messages, its interest in the "physical condition, quality or value" (Rest.2d Torts, § 218, com. e, p. 422) of the computers was harmed. We disagree. The cited line of decisions does not persuade us that the mere sending of electronic communications that assertedly cause injury only because of their contents constitutes an actionable trespass to a computer system through which the messages are transmitted. Rather, the decisions finding electronic contact to be a trespass to computer systems have generally involved some actual or threatened interference with the computers' functioning.

In *Thrifty-Tel, Inc. v. Bezenek*, supra, 46 Cal.App.4th at pages 1566-1567, 54 Cal. Rptr.2d 468 (*Thrifty-Tel*), the California Court of Appeal held that evidence of automated searching of a telephone carrier's system for authorization codes supported a cause of action for trespass to chattels. The defendant's automated dialing program "overburdened the [plaintiffs] system, denying some subscribers access to phone lines" (*Id.*, at p. 1564, 54 Cal. Rptr. 2d 468), showing the requisite injury.

Following *Thrifty-Tel*, a series of federal district court decisions held that sending UCE through an ISP's equipment may constitute trespass to the ISP's computer system.

In each of these spamming cases, the plaintiff showed, or was prepared to show, some interference with the efficient functioning of its computer system. In *CompuServe [Inc. v. Cyber Promotions, Inc.]*, 962 F. Supp. 1015 (1997), the plaintiff ISP's mail equipment monitor stated that mass UCE mailings, especially from nonexistent addresses such as those used by the defendant, placed "a tremendous burden" on the ISP's equipment, using "disk space and draining] the processing power," making those resources unavailable to serve subscribers. (*Compu-Serve*, supra, 962 F. Supp. at p. 1022.) Similarly, in *Hotmail Corp. v. Van\$ Money Pie, Inc.*, supra, 1998 WL 388389 at 7, the court found the evidence supported a finding that the defendant's mailings "fill[ed] up Hotmail's computer storage space and threatened to damage Hotmail's ability to service its legitimate customers." ...

In the leading case, *eBay*, the defendant Bidder's Edge (BE), operating an auction aggregation site, accessed the eBay Web site about 100,000 times per day, accounting for between 1 and 2 percent of the information requests received by eBay and a slightly smaller percentage of

the data transferred by eBay. (eBay, *supra*, 100 F. Supp. 2d at pp. 1061, 1063.) The district court rejected eBay's claim that it was entitled to injunctive relief because of the defendant's unauthorized presence alone, or because of the incremental cost the defendant had imposed on operation of the eBay site, but found sufficient proof of threatened harm in the potential for others to imitate the defendant's activity: "If BE's activity is allowed to continue unchecked, it would encourage other auction aggregators to engage in similar recursive searching of the eBay system such that eBay would suffer irreparable harm from reduced system performance, system unavailability, or data losses." (Id. at p. 1066.) Again, in addressing the likelihood of eBay's success on its trespass to chattels cause of action, the court held the evidence of injury to eBay's computer system sufficient to support a preliminary injunction: "If the court were to hold otherwise, it would likely encourage other auction aggregators to crawl the eBay site, potentially to the point of denying effective access to eBay's customers. If preliminary injunctive relief were denied, and other aggregators began to crawl the eBay site, there appears to be little doubt that the load on eBay's computer system would qualify as a substantial impairment of condition or value." (Id. at pp. 1071-1072.) ...

That Intel does not claim the type of functional impact that spammers and robots have been alleged to cause is not surprising in light of the differences between Hamidi's activities and those of a commercial enterprise that uses sheer quantity of messages as its communications strategy. Though Hamidi sent thousands of copies of the same message on six occasions over 21 months, that number is minuscule compared to the amounts of mail sent by commercial operations. The individual advertisers sued in *America Online, Inc. v. IMS*, *supra*, 24 F. Supp. 2d at page 549, and *America Online, Inc. v. LCGM, Inc.*, *supra*, 46 F. Supp. 2d at page 448, were alleged to have sent more than 60 million messages over 10 months and more than 92 million messages over seven months, respectively. Collectively, UCE has reportedly come to constitute about 45 percent of all e-mail. The functional burden on Intel's computers, or the cost in time to individual recipients, of receiving Hamidi's occasional advocacy messages cannot be compared to the burdens and costs caused ISP's and their customers by the ever-rising deluge of commercial e-mail.

Intel relies on language in the eBay decision suggesting that unauthorized use of another's chattel is actionable even without any showing of injury: "Even if, as [defendant] BE argues, its searches use only a small amount of eBay's computer system capacity, BE has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes. The law recognizes no such right to use another's personal property." (eBay, *supra*, 100 F. Supp. 2d at p. 1071.) But as the eBay court went on immediately to find that the defendant's conduct, if widely replicated, would likely impair the functioning of the plaintiffs system, we do not read the quoted remarks as expressing the court's complete view of the issue. In isolation, moreover, they would not be a correct statement of California or general American law on this point. While one may have no right temporarily to use another's personal property, such use is actionable as a trespass only if it "has proximately caused injury." (*Thrifty-Tel*, *supra*, 46 Cal.App.4th at p. 1566, 54 Cal. Rptr. 2d 468.) ... That Hamidi's messages temporarily used some portion of the Intel computers' processors or storage is, therefore, not enough; Intel must, but does not, demonstrate some measurable loss from the use of its computer system. ...

This theory of "impairment by content" (Burk, *The Trouble with Trespass*, *supra*, 4 J. Small & Emerging Bus.L. at p. 37) threatens to stretch trespass law to cover injuries far afield from the harms to possession the tort evolved to protect. Intel's theory would expand the tort of trespass to chattels to cover virtually any unconsented-to communication that, solely because of its content,

is unwelcome to the recipient or intermediate transmitter. As the dissenting justice below explained, “‘Damage’ of this nature—the distraction of reading or listening to an unsolicited communication—is not within the scope of the injury against which the trespass-to-chattel tort protects, and indeed trivializes it. After all, ‘[t]he property interest protected by the old action of trespass was that of possession; and this has continued to affect the character of the action.’ (Prosser & Keeton on Torts, *supra*, § 14, p. 87.) Reading an e-mail transmitted to equipment designed to receive it, in and of itself, does not affect the possessory interest in the equipment. Indeed, if a chattel’s receipt of an electronic communication constitutes a trespass to that chattel, then not only are unsolicited telephone calls and faxes trespasses to chattel, but unwelcome radio waves and television signals also constitute a trespass to chattel every time the viewer inadvertently sees or hears the unwanted program.” We agree. While unwelcome communications, electronic or otherwise, can cause a variety of injuries to economic relations, reputation and emotions, those interests are protected by other branches of tort law; in order to address them, we need not create a fiction of injury to the communication system.

Nor may Intel appropriately assert a property interest in its employees’ time. “The Restatement test clearly speaks in the first instance to the impairment of the chattel.... But employees are not chattels (at least not in the legal sense of the term).” (Burk, *The Trouble with Trespass*, *supra*, 4 J. Small & Emerging Bus.L. at p. 36.) Whatever interest Intel may have in preventing its employees from receiving disruptive communications, it is not an interest in personal property, and trespass to chattels is therefore not an action that will lie to protect it. Nor, finally, can the fact Intel staff spent time attempting to block Hamidi’s messages be bootstrapped into an injury to Intel’s possessory interest in its computers. To quote, again, from the dissenting opinion in the Court of Appeal: “[I]t is circular to premise the damage element of a tort solely upon the steps taken to prevent the damage. Injury can only be established by the completed tort’s consequences, not by the cost of the steps taken to avoid the injury and prevent the tort; otherwise, we can create injury for every supposed tort.”

Intel connected its e-mail system to the Internet and permitted its employees to make use of this connection both for business and, to a reasonable extent, for their own purposes. In doing so, the company necessarily contemplated the employees’ receipt of unsolicited as well as solicited communications from other companies and individuals. That some communications would, because of their contents, be unwelcome to Intel management was virtually inevitable. Hamidi did nothing but use the e-mail system for its intended purpose—to communicate with employees. The system worked as designed, delivering the messages without any physical or functional harm or disruption. These occasional transmissions cannot reasonably be viewed as impairing the quality or value of Intel’s computer system. We conclude, therefore, that Intel has not presented undisputed facts demonstrating an injury to its personal property, or to its legal interest in that property, that support, under California tort law, an action for trespass to chattels.

## *II. Proposed Extension of California Tort Law*

We next consider whether California common law should be extended to cover, as a trespass to chattels, an otherwise harmless electronic communication whose contents are objectionable. We decline to so expand California law. Intel, of course, was not the recipient of Hamidi’s messages, but rather the owner and possessor of computer servers used to relay the messages, and it bases this tort action on that ownership and possession. The property rule proposed is a rigid one, under which the sender of an electronic message would be strictly liable to the owner of

equipment through which the communication passes—here, Intel—for any consequential injury flowing from the contents of the communication. The arguments of amici curiae and academic writers on this topic, discussed below, leave us highly doubtful whether creation of such a rigid property rule would be wise.

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

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

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

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

Other scholars are less optimistic about such a complete propertization of the Internet. Professor Mark Lemley of the University of California, Berkeley, writing on behalf of an amici curiae group of professors of intellectual property and computer law, observes that under a property rule of server inviolability, “each of the hundreds of millions of [Internet] users must get permission in advance from anyone with whom they want to communicate and anyone who owns a server through which their message may travel.” The consequence for e-mail could be a

substantial reduction in the freedom of electronic communication, as the owner of each computer through which an electronic message passes could impose its own limitations on message content or source. As Professor Dan Hunter of the University of Pennsylvania asks rhetorically: “Does this mean that one must read the ‘Terms of Acceptable Email Usage’ of every email system that one emails in the course of an ordinary day? If the University of Pennsylvania had a policy that sending a joke by email would be an unauthorized use of their system, then under the logic of [the lower court decision in this case], you commit ‘trespass’ if you emailed me a ... cartoon.” (Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons* (2003) 91 Cal. L.Rev. 439, 508-509.)

Web site linking, Professor Lemley further observes, “would exist at the sufferance of the linked-to party, because a Web user who followed a ‘disapproved’ link would be trespassing on the plaintiffs server, just as sending an e-mail is trespass under the [lower] court’s theory.” ... A leading scholar of Internet law and policy, Professor Lawrence Lessig of Stanford University, has criticized Professor Epstein’s theory of the computer server as quasi-real property, previously put forward in the eBay case (eBay, *supra*, 100 F. Supp.2d 1058), on the ground that it ignores the costs to society in the loss of network benefits: “eBay benefits greatly from a network that is open and where access is free. It is this general feature of the Net that makes the Net so valuable to users and a source of great innovation. And to the extent that individual sites begin to impose their own rules of exclusion, the value of the network as a network declines. If machines must negotiate before entering any individual site, then the costs of using the network climb.” (Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (2001) p. 171; ...

We discuss this debate among the amici curiae and academic writers only to note its existence and contours, not to attempt its resolution. ...

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

Concurring Opinion by KENNARD, J.

I concur. ...

Intel has my sympathy. Unsolicited and unwanted bulk e-mail, most of it commercial, is a serious annoyance and inconvenience for persons who communicate electronically through the Internet, and bulk e-mail that distracts employees in the workplace can adversely affect overall productivity. But, as the majority persuasively explains, to establish the tort of trespass to chattels in California, the plaintiff must prove either damage to the plaintiffs personal property or actual or threatened impairment of the plaintiffs ability to use that property. Because plaintiff Intel has not shown that defendant Hamidi’s occasional bulk e-mail messages to Intel’s employees have



damaged Intel's computer system or impaired its functioning in any significant way, Intel has not established the tort of trespass to chattels.

This is not to say that Intel is helpless either practically or legally. As a practical matter, Intel need only instruct its employees to delete messages from Hamidi without reading them and to notify Hamidi to remove their workplace e-mail addresses from his mailing lists. Hamidi's messages promised to remove recipients from the mailing list on request, and there is no evidence that Hamidi has ever failed to do so. From a legal perspective, a tort theory other than trespass to chattels may provide Intel with an effective remedy if Hamidi's messages are defamatory or wrongfully interfere with Intel's economic interests. Additionally, the Legislature continues to study the problems caused by bulk e-mails and other dubious uses of modern communication technologies and may craft legislation that accommodates the competing concerns in these sensitive and highly complex areas.

Accordingly, I join the majority in reversing the Court of Appeal's judgment.

#### Dissenting Opinion of BROWN, J.

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

Intel has invested millions of dollars to develop and maintain a computer system. It did this not to act as a public forum but to enhance the productivity of its employees. Kourosh Kenneth Hamidi sent as many as 200,000 e-mail messages to Intel employees. The time required to review and delete Hamidi's messages diverted employees from productive tasks and undermined the utility of the computer system. "There may ... be situations in which the value to the owner of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition." (Rest.2d Torts, § 218, com. h, p. 422.) This is such a case.

The majority repeatedly asserts that Intel objected to the hundreds of thousands of messages solely due to their content, and proposes that Intel seek relief by pleading content-based speech torts. This proposal misses the point that Intel's objection is directed not toward Hamidi's message but his use of Intel's property to display his message. Intel has not sought to prevent Hamidi from expressing his ideas on his Web site, through private mail (paper or electronic) to employees' homes, or through any other means like picketing or billboards. But as counsel for Intel explained during oral argument, the company objects to Hamidi's using Intel's property to advance his message.

Of course, Intel deserves an injunction even if its objections are based entirely on the e-mail's content. Intel is entitled, for example, to allow employees use of the Internet to check stock market tables or weather forecasts without incurring any concomitant obligation to allow access

to pornographic Web sites. A private property owner may choose to exclude unwanted mail for any reason, including its content. ...

#### Dissenting Opinion by MOSK, J.

The majority hold that the California tort of trespass to chattels does not encompass the use of expressly unwanted electronic mail that causes no physical damage or impairment to the recipient's computer system. They also conclude that because a computer system is not like real property, the rules of trespass to real property are also inapplicable to the circumstances in this case. Finally, they suggest that an injunction to preclude mass, noncommercial, unwelcome e-mails may offend the interests of free communication.

I respectfully disagree and would affirm the trial court's decision. In my view, the repeated transmission of bulk e-mails by appellant Kourosh Kenneth Hamidi (Hamidi) to the employees of Intel Corporation (Intel) on its proprietary confidential email lists, despite Intel's demand that he cease such activities, constituted an actionable trespass to chattels. The majority fail to distinguish open communication in the public "commons" of the Internet from unauthorized intermeddling on a private, proprietary intranet. Hamidi is not communicating in the equivalent of a town square or of an unsolicited "junk" mailing through the United States Postal Service. His action, in crossing from the public Internet into a private intranet, is more like intruding into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks. Because Intel's security measures have been circumvented by Hamidi, the majority leave Intel, which has exercised all reasonable self-help efforts, with no recourse unless he causes a malfunction or systems "crash." Hamidi's repeated intrusions did more than merely "prompt[] discussions between '[e]xcited and nervous managers' and the company's human resource department" (maj. opn., ante, 1 Cal. Rptr.3d at p. 38, 71 P.3d at p. 301); they also constituted a misappropriation of Intel's private computer system contrary to its intended use and against Intel's wishes.

#### **Wireless Router problem**

This problem is loosely based on facts described in Dave Plonka, [\*Flawed Routers Flood University of Wisconsin Internet Time Server\*](#) (2003).

You are associate general counsel for the FixPoint Corporation, which makes consumer and enterprise networking equipment. You have recently become aware of an issue with your company's WX11N series of home wireless routers. Once daily, and after any reboot, each router connects to a "time server" to reset its internal clock. Each router ships with a list of roughly 100 different time servers once servers once every 90 days from a list your company maintains; each time they check what time it is, they pick a random server from the list. The goal is to spread the burden of checking what time it is across a large number of servers, so that none of them bears an excessive burden.

Unfortunately, due to a bug in the WX11N's software, the random-number generator always returns "16" when it picks which time server to consult. That means that the roughly three million WX11Ns in consumers' homes are all querying the same time

server at the University of Helsinki. Worse, due to another bug, they all do it at 2:00 AM local time. This leads to a flood of hundreds of thousands of queries to the time server at the University of Helsinki, which has caused it to crash on multiple occasions. The University is threatening to file suit, and possibly also to deactivate it entirely.

Evaluate the legal risk the FixPoint Corporation faces. You have a meeting schedule with the engineering team later today. Are there any questions you would want to ask them, either to evaluate the legal risks or to consider possible mitigation strategies?

## CLASS 19: CONTRACTS

Our final source of potential legal control over servers is contract law. Today's class should feel like (yet another) trip back to first year. We'll be applying what appear to be standard doctrines of contract formation. Is there anything truly new here?

### *Preparation questions*

(1) The first issue we'll look at is the exchange of offer-and-acceptance. In *ProCD*, the parties agree that putting the software on the shelf is an "offer" and that buying it is an "acceptance." From that perspective, what could possibly be missing in the contract formation? Is there another way to characterize the exchange of communications? In *Specht*, what's the purported "offer" and what's the purported "acceptance?"

(2) One way of putting Zeidenberg's challenge to the purported "contract" is that it was unreasonable for ProCD to treat his conduct as constituting an acceptance. This argument, of course, runs into the usual rule that the offeror is "master of his offer" and may define what conduct counts as acceptance. But how far can that rule really go? As James J. White puts it in *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, "Suppose that your form asserts that my intentional tying my shoelaces tomorrow will be assent to all of your terms. Since I cannot tie my shoelaces unintentionally and since I have no valet, I'm stuck, not so?" How would you respond? Does your answer mean that *ProCD* was wrongly decided?

(3) *ProCD* and *Specht* (written by now-Justice Sotomayor) are typically treated as bookends on which contracts will be enforceable online. Go back and re-read the MSN problem from the Personal Jurisdiction class. Based on what you've now read for this class, was this contract (a prototypical example of "clickwrap") validly formed?

(4) I have reprogrammed my web browser so that whenever I request a web page from a server, it sends the following text to the server: "By responding to this HTTP request, you accept legal responsibility for any resulting harm." (Technically, I send the text as the "User-Agent string," which would ordinarily tell the server, for example, whether I'm using Internet Explorer, Firefox, or Safari. The standard that defines the [HTTP protocol](#) neither requires nor forbids me using the User-Agent string in this way.) If a server sends me back a page with malware that crashes my computer, can I sue the site for my damages? Does it matter whether the site has its own browwrap terms of service disclaiming such liability? (This is a hard question with an uncertain answer; take your best shot.)

(5) *Bragg* introduces the unconscionability angle. (We'll look at the substance of this case later in the semester; for now, focus on the contract issue.) Linden got its offer-acceptance process right, didn't it? So what was wrong with their arbitration clause? Do the terms the court found objectionable seem "unconscionable" to you? As Linden's lawyer, would you advise trying to salvage the arbitration term, and if so, how, or should you just give up on it?

(6) Not all terms of service are the same. Go look at the [Central Pacific Railroad Photographic History Museum](#) web site at <http://cpr.org>, including its [User Agreement](#). Are these terms enforceable? All of them? Against whom? What's going on here?

(7) Finally, the BoardFirst problem serves as a wrap-up of this entire unit. How are the analyses under these three different legal headings similar? How are they different?

***ProCD, Inc. v. Zeidenberg***  
**86 F. 3d 1447 (7th Cir. 1996)**

EASTERBROOK, Circuit Judge.

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted ... ProCD sells a version of the database, called SelectPhone (trademark), on CD-ROM discs. (CD-ROM means “compact disc — read only memory.” The “shrinkwrap license” gets its name from the fact that retail software packages are covered in plastic or cellophane “shrinkwrap,” and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer “end user license,” but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users’ criteria (such as “find all people named Tatum in Tennessee, plus all firms with ‘Door Systems’ in the corporate name”). The resulting lists (or, as ProCD prefers, “listings”) can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone (trademark) cost more than \$10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and SIC codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately \$150 for the set of five discs) while selling information to the trade for a higher price. ...

Instead of tinkering with the product and letting users sort themselves — for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price — ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user’s screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone (trademark) database. The corporation makes the database available on the Internet to anyone willing to pay its price — which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone (trademark) packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). ...

## II.

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. ... Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an “offer,” which the customer “accepts” by paying the asking price and leaving the store with the goods. In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good — but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg’s position therefore must be that the printed terms on the outside of a box are the parties’ contract — except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties’ choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The “Read Me” file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge’s understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a “binder” (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers’ interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg’s lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert

describes drug interactions, contraindications, and other vital information — but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations (“MegaPixel 3.14159 cannot be used with BytePusher 2.718”), and the terms of sale. The user purchases a serial number, which activates the software’s features. On Zeidenberg’s arguments, these unboxed sales are unfettered by terms — so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two “promises” that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. ...

What then does the current version of the UCC have to say? We think that the place to start is § 2-204(1): “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying “you owe us an extra \$10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer’s net gains. ...

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be “conspicuous.” UCC § 2-316(2), incorporating UCC § 1-201(10). Promises to make firm offers, or to negate oral modifications, must be “separately signed.” UCC §§ 2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*. Zeidenberg has not located any Wisconsin case — for that matter, any case in any state — holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that *SelectPhone* (trademark) must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for \$100 rather than \$150 — although any of

these changes would be welcomed by the customer, if all other things were held constant — so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of “the product” than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy. ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers’ favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off. ...

***Specht v. Netscape Communications Corp.***  
**306 F. 3d 17 (2d Cir. 2002)**

SOTOMAYOR, Circuit Judge.

*I. Facts*

In three related putative class actions, plaintiffs alleged that, unknown to them, their use of [the Netscape program] SmartDownload transmitted to defendants private information about plaintiffs’ downloading of files from the Internet, thereby effecting an electronic surveillance of their online activities in violation of two federal statutes, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 et seq., and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

Specifically, plaintiffs alleged that when they first used Netscape’s Communicator — a software program that permits Internet browsing — the program created and stored on each of their computer hard drives a small text file known as a “cookie” that functioned “as a kind of electronic identification tag for future communications” between their computers and Netscape. Plaintiffs further alleged that when they installed SmartDownload ... SmartDownload created and stored on their computer hard drives another string of characters, known as a “Key,” which similarly functioned as an identification tag in future communications with Netscape. According to the complaints in this case, each time a computer user employed Communicator to download a file from the Internet, SmartDownload “assume[d] from Communicator the task of downloading” the file and transmitted to Netscape the address of the file being downloaded together with the cookie created by Communicator and the Key created by SmartDownload. These processes, plaintiffs claim, constituted unlawful “eavesdropping” on users of Netscape’s software products as well as on Internet websites from which users employing SmartDownload downloaded files.

In the time period relevant to this litigation, Netscape offered on its website various software programs, including Communicator and SmartDownload, which visitors to the site were invited to obtain free of charge. ...

Each of these plaintiffs allegedly arrived at a Netscape webpage captioned “SmartDownload Communicator” that urged them to “Download With Confidence Using SmartDownload!” At or near the bottom of the screen facing plaintiffs was the prompt “Start Download” and a tinted button labeled “Download.” By clicking on the button, plaintiffs initiated the download of SmartDownload. ...



The signal difference between downloading Communicator and downloading SmartDownload was that no clickwrap presentation accompanied the latter operation. Instead, once plaintiffs Gibson, Gruber, Kelly, and Weindorf had clicked on the “Download” button located at or near the bottom of their screen, and the downloading of SmartDownload was complete, these plaintiffs encountered no further information about the plug-in program or the existence of license terms governing its use. The sole reference to SmartDownload’s license terms on the “SmartDownload Communicator” webpage was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen.

Had plaintiffs scrolled down instead of acting on defendants’ invitation to click on the “Download” button, they would have encountered the following invitation: “Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software.” Plaintiffs Gibson, Gruber, Kelly, and Weindorf averred in their affidavits that they never saw this reference to the SmartDownload license agreement when they clicked on the “Download” button. They also testified during depositions that they saw no reference to license terms when they clicked to download SmartDownload, although under questioning by defendants’ counsel, some plaintiffs added that they could not “remember” or be “sure” whether the screen shots of the SmartDownload page attached to their affidavits reflected precisely what they had seen on their computer screens when they downloaded SmartDownload. ...

Even for a user who, unlike plaintiffs, did happen to scroll down past the download button, SmartDownload’s license terms would not have been immediately displayed. ... Instead, if such a user had seen the notice of SmartDownload’s terms and then clicked on the underlined invitation to review and agree to the terms, a hypertext link would have taken the user to a separate webpage entitled “License & Support Agreements.” The first paragraph on this page read, in pertinent part:

The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below this paragraph appeared a list of license agreements, the first of which was “License Agreement for Netscape Navigator and Netscape Communicator Product Family (Netscape Navigator, Netscape Communicator and Netscape SmartDownload).” If the user clicked on that link, he or she would be taken to yet another webpage that contained the full text of a license agreement that ... granted the user a nonexclusive license to use and reproduce the software, subject to certain terms:

BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE (THE “PRODUCT”), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT (“LICENSEE”) IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS

AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

Among the license terms was a provision requiring virtually all disputes relating to the agreement to be submitted to arbitration:

Unless otherwise agreed in writing, all disputes relating to this Agreement (excepting any dispute relating to intellectual property rights) shall be subject to final and binding arbitration in Santa Clara County, California, under the auspices of JAMS/EndDispute, with the losing party paying all costs of arbitration.

...

## *II. Proceedings Below*

In the district court, defendants moved to compel arbitration and to stay court proceedings pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, arguing that the disputes reflected in the complaints, like any other dispute relating to the SmartDownload license agreement, are subject to the arbitration clause contained in that agreement. Finding that Netscape's webpage, unlike typical examples of clickwrap, neither adequately alerted users to the existence of SmartDownload's license terms nor required users unambiguously to manifest assent to those terms as a condition of downloading the product, the court held that the user plaintiffs had not entered into the SmartDownload license agreement. ...

Defendants took this timely appeal pursuant to 9 U.S.C. § 16, and the district court stayed all proceedings in the underlying cases pending resolution of the appeal. ...

## DISCUSSION

### *I. Standard of Review and Applicable Law*

A district court's denial of a motion to compel arbitration is reviewed de novo. The determination of whether parties have contractually bound themselves to arbitrate a dispute — a determination involving interpretation of state law — is a legal conclusion also subject to de novo review. The findings upon which that conclusion is based, however, are factual and thus may not be overturned unless clearly erroneous.

If a court finds that the parties agreed to arbitrate, it should then consider whether the dispute falls within the scope of the arbitration agreement. ...

### *III. Whether the User Plaintiffs Had Reasonable Notice of and Manifested Assent to the SmartDownload License Agreement*

Whether governed by the common law or by Article 2 of the Uniform Commercial Code ("UCC"), a transaction, in order to be a contract, requires a manifestation of agreement between the parties. Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract. Although an onlooker observing the disputed transactions in this case would have seen each of the user plaintiffs click on the SmartDownload "Download" button, a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms. California's common law is clear that "an offeree, regardless of

apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.”

Arbitration agreements are no exception to the requirement of manifestation of assent. ...

*A. The Reasonably Prudent Offeree of Downloadable Software*

Defendants argue that plaintiffs must be held to a standard of reasonable prudence and that, because notice of the existence of SmartDownload license terms was on the next scrollable screen, plaintiffs were on “inquiry notice” of those terms. We disagree with the proposition that a reasonably prudent offeree in plaintiffs’ position would necessarily have known or learned of the existence of the SmartDownload license agreement prior to acting, so that plaintiffs may be held to have assented to that agreement with constructive notice of its terms. It is true that “[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.” *Marin Storage & Trucking*, 89 Cal. App. 4th at 1049. But courts are quick to add: “An exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term.”

Most of the cases cited by defendants in support of their inquiry-notice argument are drawn from the world of paper contracting. ...

As the foregoing cases suggest, receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms. “Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.” Cal. Civ.Code § 19. These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to “Download Now!”. What plaintiffs saw when they were being invited by defendants to download this fast, free plug-in called SmartDownload was a screen containing praise for the product and, at the very bottom of the screen, a “Download” button. Defendants argue that under the principles set forth in the cases cited above, a “fair and prudent person using ordinary care” would have been on inquiry notice of SmartDownload’s license terms.

We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms. Thus, plaintiffs’ “apparent manifestation of ... consent” was to terms “contained in a document whose contractual nature [was] not obvious.” *Windsor Mills*, 25 Cal.App.3d at 992, 101 Cal.Rptr. at 351. Moreover, the fact that, given the position of the scroll bar on their computer screens, plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms. In their deposition testimony, plaintiffs variously stated that they used the scroll bar “[o]nly if there is something that I feel I need to see that is on — that is off the page,” or that the elevated position of the scroll bar suggested the presence of “mere[ ] formalities, standard lower banner links” or “that the page is bigger than what I can see.” Plaintiffs testified, and defendants did not refute,

that plaintiffs were in fact unaware that defendants intended to attach license terms to the use of SmartDownload.

We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms. ... Internet users may have, as defendants put it, “as much time as they need[ ]” to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. When products are “free” and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm’s-length bargaining. In the next two sections, we discuss case law and other legal authorities that have addressed the circumstances of computer sales, software licensing, and online transacting. Those authorities tend strongly to support our conclusion that plaintiffs did not manifest assent to SmartDownload’s license terms. ...

Cases in which courts have found contracts arising from Internet use do not assist defendants, because in those circumstances there was much clearer notice than in the present case that a user’s act would manifest assent to contract terms. See, e.g., ... *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118, 732 A.2d 528, 530, 532-33 (N.J.Super.Ct.App.Div.1999) (upholding forum selection clause where subscribers to online software were required to review license terms in scrollable window and to click “I Agree” or “I Don’t Agree”); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203-04 (Tex.App.2001)(upholding forum selection clause in online contract for registering Internet domain names that required users to scroll through terms before accepting or rejecting them); cf. *Pollstar v. Gigmania, Ltd.*, 170 F.Supp.2d 974, 981-82 (E.D.Cal.2000) (expressing concern that notice of license terms had appeared in small, gray text on a gray background on a linked webpage, but concluding that it was too early in the case to order dismissal).

After reviewing the California common law and other relevant legal authority, we conclude that under the circumstances here, plaintiffs’ downloading of SmartDownload did not constitute acceptance of defendants’ license terms. Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility. We hold that a reasonably prudent offeree in plaintiffs’ position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload’s license terms hidden below the “Download” button on the next screen. We affirm the district court’s conclusion that the user plaintiffs, including Fagan, are not bound by the arbitration clause contained in those terms.

***Bragg v. Linden Research, Inc.***  
**487 F. Supp. 2d 593 (E.D. Pa. 2007)**

EDUARDO C. ROBRENO, District Judge.

This case is about virtual property maintained on a virtual world on the Internet. ...

## *I. BACKGROUND*

### *A. Second Life*

The defendants in this case, Linden Research Inc. ("Linden") and its Chief Executive Officer, Philip Rosedale, operate a multiplayer role-playing game set in the virtual world known as "Second Life." Participants create avatars to represent themselves, and Second Life is populated by hundreds of thousands of avatars, whose interactions with one another are limited only by the human imagination. According to Plaintiff, many people "are now living large portions of their lives, forming friendships with others, building and acquiring virtual property, forming contracts, substantial business relationships and forming social organizations" in virtual worlds such as Second Life. Compl. Owing property in and having access to this virtual world is, moreover, apparently important to the plaintiff in this case. ...

### *C. Plaintiffs' Participation in Second Life*

In 2005, Plaintiff Marc Bragg, Esq., signed up and paid Linden to participate in Second Life. ...

The dispute ultimately at issue in this case arose on April 30, 2006, when Bragg acquired a parcel of virtual land named "Taessot" for \$300. Linden sent Bragg an email advising him that Taessot had been improperly purchased through an "exploit." Linden took Taesot away. It then froze Bragg's account, effectively confiscating all of the virtual property and currency that he maintained on his account with Second Life.

Bragg brought suit against Linden and Rosedale in the Court of Common Pleas of Chester County, Pennsylvania, on October 3, 2006. Linden and Rosedale removed the case to this Court and then, within a week, moved to compel arbitration. ...

## *III. MOTION TO COMPEL ARBITRATION*

Defendants have also filed a motion to compel arbitration that seeks to dismiss this action and compel Bragg to submit his claims to arbitration according to the Rules of the International Chamber of Commerce ("ICC") in San Francisco.

### *A. Relevant Facts*

Before a person is permitted to participate in Second Life, she must accept the Terms of Service of Second Life (the "TOS") by clicking a button indicating acceptance of the TOS. Bragg concedes that he clicked the "accept" button before accessing Second Life. Included in the TOS are a California choice of law provision, an arbitration provision, and forum selection clause. Specifically, located in the fourteenth line of the thirteenth paragraph under the heading "GENERAL PROVISIONS," and following provisions regarding the applicability of export and import laws to Second Life, the following language appears:

Any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination thereof, shall be finally settled by binding arbitration in San Francisco, California under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. . . . Notwithstanding the foregoing, either party may apply to any court of competent jurisdiction for injunctive relief or enforcement of this arbitration provision without breach of this arbitration provision.

## *B. Legal Standards*

### *1. Federal law applies*

The Federal Arbitration Act ("FAA") requires that the Court apply federal substantive law here because the arbitration agreement is connected to a transaction involving interstate commerce. ...

### *2. The Legal Standard Under the FAA*

Under the FAA, on the motion of a party, a court must stay proceedings and order the parties to arbitrate the dispute if the court finds that the parties have agreed in writing to do so. A party seeking to compel arbitration must show (1) that a valid agreement to arbitrate exists between the parties and (2) that the specific dispute falls within the scope of the agreement.

In determining whether a valid agreement to arbitrate exists between the parties, the Third Circuit has instructed district courts to give the party opposing arbitration "the benefit of all reasonable doubts and inferences that may arise," or, in other words, to apply the familiar Federal Rule of Civil Procedure 56(c) summary judgment standard. While there is a presumption that a particular dispute is within the scope of an arbitration agreement, there is no such "presumption" or "policy" that favors the existence of a valid agreement to arbitrate.

## *C. Application*

### *1. Unconscionability of the Arbitration Agreement*

Bragg resists enforcement of the TOS's arbitration provision on the basis that it is "both procedurally and substantively unconscionable and is itself evidence of defendants' scheme to deprive Plaintiff (and others) of both their money and their day in court."

Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). When determining whether such defenses might apply to any purported agreement to arbitrate the dispute in question, "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, (1995). Thus, the Court will apply California state law to determine whether the arbitration provision is unconscionable.

Under California law, unconscionability has both procedural and substantive components. The procedural component can be satisfied by showing (1) oppression through the existence of unequal bargaining positions or (2) surprise through hidden terms common in the context of adhesion contracts. *Comb*, 218 F. Supp. 2d at 1172. The substantive component can be satisfied by showing overly harsh or one-sided results that "shock the conscience." The two elements operate on a sliding scale such that the more significant one is, the less significant the other need be. However, a claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, and the contract's purpose, and effect.

*(a) Procedural Unconscionability*

A contract or clause is procedurally unconscionable if it is a contract of adhesion. A contract of adhesion, in turn, is a “standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” Under California law, “the critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006). “When the weaker party is presented the clause and told to ‘take it or leave it’ without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.” *Id.*

The TOS are a contract of adhesion. Linden presents the TOS on a take-it-or-leave-it basis. A potential participant can either click “assent” to the TOS, and then gain entrance to SecondLife’s virtual world, or refuse assent and be denied access. Linden also clearly has superior bargaining strength over Bragg. Although Bragg is an experienced attorney, who believes he is expert enough to comment on numerous industry standards and the “rights” or participants in virtual worlds, he was never presented with an opportunity to use his experience and lawyering skills to negotiate terms different from the TOS that Linden offered. ...

*(b) Substantive Unconscionability*

Even if an agreement is procedurally unconscionable, “it may nonetheless be enforceable if the substantive terms are reasonable.” *Id.* at 1173 (citing *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416 (2000) (finding contract of adhesion to arbitrate disputes enforceable)). Substantive unconscionability focuses on the one-sidedness of the contract terms. Here, a number of the TOS’s elements lead the Court to conclude that Bragg has demonstrated that the TOS are substantively unconscionable.

*(i) Mutuality*

Under California law, substantive unconscionability has been found where an arbitration provision forces the weaker party to arbitrate claims but permits a choice of forums for the stronger party. In other words, the arbitration remedy must contain a “modicum of bilaterality.” This principle has been extended to arbitration provisions that allow the stronger party a range of remedies before arbitrating a dispute, such as self-help, while relegating to the weaker party the sole remedy of arbitration.

In *Comb*, for example, the court found a lack of mutuality where the user agreement allowed PayPal “at its sole discretion” to restrict accounts, withhold funds, undertake its own investigation of a customer’s financial records, close accounts, and procure ownership of all funds in dispute unless and until the customer is “later determined to be entitled to the funds in dispute.” 218 F. Supp. 2d at 1173-74. Also significant was the fact that the user agreement was “subject to change by PayPal without prior notice (unless prior notice is required by law), by posting of the revised Agreement on the PayPal website.” *Id.*

Here, the TOS contain many of the same elements that made the PayPal user agreement substantively unconscionable for lack of mutuality. The TOS proclaim that “Linden has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or

liability to you.” Whether or not a customer has breached the Agreement is “determined in Linden’s sole discretion.” Linden also reserves the right to return no money at all based on mere “suspicions of fraud” or other violations of law. Finally, the TOS state that “Linden may amend this Agreement . . . at any time in its sole discretion by posting the amended Agreement [on its website].”

In effect, the TOS provide Linden with a variety of one-sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden. This is precisely what occurred here. When a dispute arose, Linden exercised its option to use self-help by freezing Bragg’s, account, retaining funds that Linden alone determined were subject to dispute, and then telling Bragg that he could resolve the dispute by initiating a costly arbitration process. The TOS expressly authorized Linden to engage in such unilateral conduct. As in *Comb*, “[f]or all practical purposes, a customer may resolve disputes only after [Linden] has had control of the disputed funds for an indefinite period of time,” and may only resolve those disputes by initiating arbitration. 218 F.Supp.2d at 1175.

Linden’s right to modify the arbitration clause is also significant. “The effect of [Linden’s] unilateral right to modify the arbitration clause is that it could . . . craft precisely the sort of asymmetrical arbitration agreement that is prohibited under California law as unconscionable.” *Net Global Mktg.*, at 602. This lack of mutuality supports a finding of substantive unconscionability. ...

*(ii) Costs of Arbitration and Fee-Sharing*

... Here, even taking Defendants characterization of the fees to be accurate, the total estimate of costs and fees would be \$7,500, which would result in Bragg having to advance \$3,750 at the outset of arbitration. The court’s own estimates place the amount that Bragg would likely have to advance at \$8,625, but they could reach as high as \$13,687.50. Any of these figures are significantly greater than the costs that Bragg bears by filing his action in a state or federal court. Accordingly, the arbitration costs and fee-splitting scheme together also support a finding of unconscionability.

*(iii) Venue*

The TOS also require that any arbitration take place in San Francisco, California. In *Comb*, the Court found that a similar forum selection clause supported a finding of substantive unconscionability, because the place in which arbitration was to occur was unreasonable, taking into account “the respective circumstances of the parties.” 218 F.Supp.2d at 1177. As in *Comb*, the record in this case shows that Linden serves millions of customers across the United States and that the average transaction through or with Second Life involves a relatively small amount. See *id.* In such circumstances, California law dictates that it is not “reasonable for individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums.” *Id.* Indeed, “[l]imiting venue to [Linden’s] backyard appears to be yet one more means by which the arbitration clause serves to shield [Linden] from liability instead of providing a neutral forum in which to arbitrate disputes.” *Id.* ...

*(c) Conclusion*

When a dispute arises in Second Life, Linden is not obligated to initiate arbitration. Rather, the TOS expressly allow Linden, at its “sole discretion” and based on mere “suspicion,” to



unilaterally freeze a participant's account, refuse access to the virtual and real currency contained within that account, and then confiscate the participant's virtual property and real estate. A participant wishing to resolve any dispute, on the other hand, after having forfeited its interest in Second Life, must then initiate arbitration in Linden's place of business. To initiate arbitration involves advancing fees to pay for no less than three arbitrators at a cost far greater than would be involved in litigating in the state or federal court system. Moreover, under these circumstances, the confidentiality of the proceedings helps ensure that arbitration itself is fought on an uneven field by ensuring that, through the accumulation of experience, Linden becomes an expert in litigating the terms of the TOS, while plaintiffs remain novices without the benefit of learning from past precedent.

Taken together, the lack of mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally imposes through the TOS demonstrate that the arbitration clause is not designed to provide Second Life participants an effective means of resolving disputes with Linden. Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden's favor. As in *Comb*, through the use of an arbitration clause, Linden "appears to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices." 218 F.Supp.2d at 1176. ...

Finding that the arbitration clause is procedurally and substantively unconscionable, the Court will refuse to enforce it. ...

#### *IV. CONCLUSION*

For the reasons set forth above, the Court will deny Rosedale's motion to dismiss for lack of jurisdiction. The Court will also deny Defendants' motion to compel arbitration. An appropriate order follows.

#### **BoardFirst problem:**

Here are the facts as stated by the court in *Southwest Airlines Co. v. Boardfirst L.L.C.*, No. NO. 3: 06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230 (N.D. Tex. Sept. 12, 2007).

Southwest, a major, Dallas-based domestic airline carrier, subscribes to a rather egalitarian philosophy when it comes to boarding its flights. There are no first-class cabins, and no fee-differentiated service class options are offered. Instead Southwest maintains an "open seating" policy whereby its passengers are not assigned to specific seats but rather are divided into three distinct ("A", "B", and "C") boarding groups. Passengers in the "A" group are entitled to board the plane before those in the "B" group, and those in the "B" group take precedence over the unfortunates with a "C" pass, who board last. Boarding passes are awarded on a "first-come first served" basis — Southwest does not charge customers an extra fee to obtain a pass in a higher priority boarding group.

Southwest customers who have purchased a ticket are able to check in for their flights via the Southwest website — [www.southwest.com](http://www.southwest.com) — within 24 hours of departure. The earlier a customer checks in during this 24-hour period, the more likely it is that the customer will be awarded an "A" boarding pass, which are limited to the first 45 customers who check in. To check

in online, a customer must go to southwest.com and click on a tab marked “Check in Online”. A window then opens in which the customer inputs his name and flight confirmation number. The computer system then retrieves the customer’s reservation and an image of the boarding pass appears. The customer may opt to either print the pass, which may then be presented (along with appropriate identification) at the airport or the customer may wait to print the pass at the airport from a Southwest kiosk, ticket counter, or skycap.

BoardFirst began operations in Fall 2005. Its sole reason for being is to assist, for a fee, Southwest customers secure the coveted “A” boarding passes. The company operates through its website —\_www.boardfirst.com\_— in the following way. First, a Southwest customer who has previously purchased an electronic airline ticket from Southwest logs on to the BoardFirst site and requests assistance in obtaining an “A” pass. The customer must provide his name, flight confirmation number, and credit card information and authorize BoardFirst to act as his agent. Once the customer’s boarding pass becomes available for online download from southwest.com, BoardFirst employees log on to the “Check In and Print Boarding Pass” page of the Southwest site and check the customer in using his personal information. If all went well, an “A” boarding pass should appear on the screen. BoardFirst does not print the pass; it simply charges the customer’s credit card (the fee is \$ 5 per pass)<sup>1</sup> and e-mails the customer a receipt confirming that the pass was obtained and that it can be printed through southwest.com or at an airport kiosk. On average, BoardFirst procures fewer than 100 boarding passes for Southwest customers per day.

Southwest complains that BoardFirst’s use of the Southwest website violates the terms and conditions of use (the “Terms”) posted on the site. Southwest’s homepage states in small black print at the bottom of the page that “[u]se of the Southwest websites . . . constitutes acceptance of our Terms and Conditions.” Clicking on the words “Terms and Conditions”, which are distinguished in blue print, sends the user to the Terms page. From December 20, 2005 through February 1, 2006, the Terms read in pertinent part as follows:

Southwest’s web sites and any Company Information is available to you only to learn about, evaluate, or purchase Southwest’s services and products. **Unless you are an approved Southwest travel agent, you may use the Southwest web sites and any Company Information only for personal, non-commercial purposes.**

...

As a condition of your use of the Southwest web sites, you promise that you will not use the Southwest web sites or Company Information for any purpose that is unlawful or prohibited by these terms and conditions.

(emphasis added). Effective February 1, 2006, and continuing to today, the Terms were modified to include the following additional language, indicated in bold:

Southwest’s web sites and any Company Information is available to you only to learn about, evaluate, or purchase Southwest’s services and products. Unless you are an approved Southwest travel agent, you may use the Southwest web sites and any Company Information only for personal, non-commercial purposes. **For example, third parties may not use the Southwest web sites for the purpose of**

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<sup>1</sup> There is no charge if for some reason BoardFirst fails to obtain an “A” pass.

**checking Customers in online or attempting to obtain for them a boarding pass in any certain boarding group.**

(emphasis added). Southwest expressly added this language so as to leave no doubt that BoardFirst's use of southwest.com was prohibited by the Terms.

On December 20, 2005, Southwest sent a cease-and-desist letter to Kate Bell, BoardFirst's founder, President, and Chief Executive Officer. Among other things, the letter apprised Bell that Southwest's Terms prohibited the use of southwest.com for commercial purposes and that BoardFirst's activities breached the Terms. When BoardFirst's use of the Southwest site did not stop in response to the letter, Southwest sent a second cease-and-desist letter on February 16, 2006. Still, BoardFirst continued operations. Southwest responded with this lawsuit, filed on May 17, 2006. Southwest seeks to enjoin BoardFirst from using its site for commercial purposes and to recover damages for BoardFirst's past use of the site.

Southwest's complaint includes breach of contract, trespass to chattels, and Computer Fraud and Abuse Act claims. Southwest and BoardFirst have filed cross motions for summary judgment. How should the court rule?