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TOWARDS A THEORY OF CYBERPLACE:
A PROPOSAL FOR A NEW LEGAL FRAMEWORK

By: RONNIE COHEN* AND JANINE S. HILLER**

ABSTRACT

This article discusses whether the existing legal framework for property and places should apply to the electronic medium, or whether the uniqueness of the Internet requires a different characterization. The source of the right of the owner of an Internet site to legally control access to and use of the site and its content is the tort law of trespass and the law of contract. The sources of the right of users to freely access and use Internet content are the policies of free speech and public accommodation. Part I of this paper reviews the common law trespass theories that courts have employed to regulate online activities. Part II considers the definition of “place”¹ and whether particular uses of the Internet are “places of public accommodation.”² Part III proposes a new legal framework that could serve as a basis for legislative action to promote both of these policies in cyberspace. This framework recognizes the unique qualities of the Internet, incorporating both the public policy favoring freedom of expression and the private property interest in controlling unauthorized use of Internet resources.

I. INTRODUCTION

{1} Does the Internet contain a public commons in which speech and civil rights should be protected? Conversely, do networks consist of private property that the individual owner can control? When faced with these questions of Internet control, courts may stretch traditional legal concepts, statutory interpretations, and the application of legal precedent to issues involving similar, but ultimately different, questions of rights and obligations. Conflict arises over whether the existing legal framework for property and places should apply to the electronic medium, or whether the uniqueness of the Internet requires a different characterization. On the one hand, the Supreme Court characterized the Internet as the “most participatory form of mass speech yet developed,”³ while on the other hand, private networks are staking out their claims to cyber territory and suing those who interfere with their property rights.⁴ The tension between two conceptual frameworks, voice and place, is evident in the early development of Internet case law. As courts grapple with new cases, many have analogized cyberspace to physical places.⁵ The analogy is important, as it is well documented that the words we choose to describe a concept can influence the way in which the concept is understood.⁶ The use of a connected set of metaphors creates a cognitive model that unconsciously shapes our perception of the subject.⁷ Metaphors give us insight to our present and future experiences, thereby contributing to the creation of our social realities.⁸ The language we often use to describe the Internet is descriptive of physical places. For example, the Internet is frequently referred to as the “Information Superhighway.”⁹ Searching for information is often referred to as “surfing.”¹⁰ The NetLingo dictionary offers many other terms as examples of the language of place, including address, architecture, chat room, crawler, data traffic, domain name, firewall, gateway, local area and wide area networks, navigate, netizen, and portal.¹¹ We use these terms to describe both the concept of the Internet and the activities we associate with it. The

terms also play a part in setting the legal landscape of Internet law.¹² If we analogize various aspects of the Internet, such as networks and web sites, to physical places, which are generally governed by property law, then we will likely determine the relationships of people who occupy, visit, or intrude upon those places by reference to traditional property law.¹³

{2}The consistent application of a framework of either private or public property, place or possession, to the use of computer networks will resound in many ways that may not be within the current contemplation of the courts.¹⁴ Is there an alternative conceptualization of the Internet, one that overcomes the limitations of metaphor? Should this concept include the Internet as a voice, as well as a place? Is the law of speech and public forum an important element of the framework?¹⁵

{3}The right of the owner of an Internet site to legally control access to and use of the site and its content is based on the tort law of trespass and the law of contract. The right of users to freely access and use Internet content is based on policies of free speech and public accommodation. Part I of this paper reviews the common law trespass theories that litigants have argued, and courts have employed, to regulate online activities. Part II considers the definition of “place” and whether particular uses of the Internet are “places of public accommodation.” Part III proposes a new legal framework that could serve as a basis for legislative action to promote both of these policies in cyberspace. This framework recognizes the unique qualities of the Internet, incorporating both the public policy favoring freedom of expression and the private property interest in controlling unauthorized use of Internet resources.

II. TRESPASS

{4} Both trespass to personal property and trespass to real property are relevant to the discussion of Internet property. The Restatement of Torts is a leading treatise in the development of civil law. It is influential in state law development and serves as persuasive authority for judicial decisions.¹⁶ Section 217 of the Second Restatement of Torts defines a trespass to chattels, or personal property, as the following: “A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.”¹⁷ Section 218 states additional requirements for damages to the property in order for a person to be liable for the trespass:

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.¹⁸

{5} The comments to Section 218 explain that damages for trespass to chattels do not arise automatically, as with real property, but instead require that an important interest of the possessor of the chattel be affected.¹⁹ In addition, the comments explain that:

[O]ne 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.²⁰

Thus, there are two basic requirements to prove trespass to chattels. First, the chattel must be

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interfered with, or meddled with, and second, the chattel must suffer some damage.

{6} Illustration 2 of the Restatement is important in the context of trespass to chattels in the Internet environment. It explains; “A, a child, climbs upon the back of B’s large dog and pulls its ears. No harm is done to the dog or to any other legally protected interest of B. A is not liable to B.”²¹ As the example highlights, proof of damages should be an important element in a case of trespass to chattels in the Internet environment.

{7} In comparison to the tort of trespass to chattels, which requires proof of damages, the tort of trespass to land requires only that there be a proof of a physical incursion onto the property of another.²² It is the protection of the landowner’s right to exclude all others, which is reflected in the tort of trespass to land.²³ Thus, no actual damages need be proven in order to prove liability for trespass; nominal damages will be awarded.²⁴ To a great extent this is a result of the historical background of real property law, from English common law, that real property rights are inviolate.²⁵

{8} The right to exclude others is also seen as a part of a real property owner’s “bundle of property rights.”²⁶ Although historically real property rights have been seen as sacrosanct, the Supreme Court has noted that “[n]either property rights nor contract rights are absolute Equally fundamental with the private right is that of the public to regulate it in the common interest”²⁷ As Internet sites define their terms of use, and create contracts to delineate authorized access, Internet site administrators may exclude potential users and limit use of the website.²⁸ The state, however, may be within its rights to regulate the privately imposed terms of use to protect the public interest in an open Internet. In modern law, the nature of the property affects real property rights. That is, if private property is used as a public place, civil rights laws as well as the laws of common carriers place limitations on the owner’s right to exclude others.²⁹

{9} The state may also act to protect public speech on private property. While some state constitutions provide protection for free speech on certain types of private property,³⁰ most do not,³¹ and no equivalent federal protection exists.³² Moreover, while it is possible that the state’s enforcement of trespass laws might constitute the state action necessary to bring a speech claim in these cases, no such state action is present where a private entity engages in discriminatory enforcement of private terms of use.³³

{10} The controlling case recognizing the right of a state to protect speech on private property is *Pruneyard Shopping Center v. Robins*.³⁴ In *Pruneyard*, the United States Supreme Court held that California’s constitutional guarantee of the right to speech and petition was enforceable against the owner of a private shopping center, and that it did not amount to a taking of property to require the property owner to allow the speech on its private property.³⁵ Although the United States Constitution does not guarantee such a right, a state may do so, as long as it does not so interfere with the use of the property that it amounts to a “taking” under the Fifth Amendment.³⁶

{11} The most recent case to apply the *Pruneyard* rationale to state action is *Albertson’s Inc. v. Young*,³⁷ where the California Court discussed whether the right to free speech was protected on the sidewalk of a grocery store. The court stated that “[t]he test that courts must apply is whether, considering the nature and circumstances of the private property, it has become the functional equivalent of a traditional public forum.”³⁸ The court then carefully examined the physical location of the store, the layout, its size, parking lots, and relation of the speech to the business.³⁹ Because the store was a one-story building, not connected to other contiguous stores, with relatively site-specific parking, and no areas designed for public congregation, it was not a

public forum.⁴⁰ In addition, the speech did not relate to criticism of the business itself, therefore not implicating free speech under that more specific scenario.⁴¹

A. *Electronic Robots and Trespass to Chattels*

{12} Several trespass to chattel cases address the issue of Internet access to another's computer through its website. One of the first cases to consider the application of the trespass to chattels tort to the Internet was *TicketMaster Corp. v. Tickets.com, Inc.*⁴² A computer program, known as a web crawler, searched the Ticketmaster web site and transferred that information to the Tickets.com format on the Tickets.com web site.⁴³ The court found that while the trespass to chattels claim could apply to such a circumstance, because the information was publicly available and there was no proof of irreparable injury, the action failed.⁴⁴ To date this is the only case that has denied an injunction for trespass to chattels when an electronic agent has obtained web site information.

{13} Most courts have found that even minimal harm can support a trespass to chattels claim and have more broadly applied this common law tort to the new medium.⁴⁵ In *eBay v. Bidder's Edge*,⁴⁶ *Register.com v. Verio*,⁴⁷ and *Oyster Software v. Forms Processing*,⁴⁸ the courts addressed whether the use of an electronic robot to search a plaintiff's website constitutes a trespass. In *Intel v. Hamidi*,⁴⁹ the court considered whether the sending of an e-mail through a proprietary company e-mail network constitutes trespass to chattels. In all of these cases, the court examines the intangible attributes of the electronic environment in order to apply the age-old tort of trespass to chattels, where the computer system was the personal property subject to the trespass. These three recent trespass cases involving commercial robots searching the computers of another are important background to the Hamidi case that involves expressive action, but which, nonetheless, is pursued under the rubric of an invasion of a common law right in property.

{14} An electronic robot is a program that will scour web sites automatically for particular information.⁵⁰ Robots can also be known as "scrapers," as they scrape information off of web sites, or as "spyzers," as they spin a web to catch information.⁵¹ In each of the three cases, *eBay v. Bidder's Edge*, *Register.com v. Verio*, and *Oyster Software v. Forms Processing*, the defendant used an electronic robot to secure some type of information from the plaintiff's web site. Bidder's Edge and Verio obtained significant amounts of information from the plaintiff's site in this manner. Bidder's Edge robots scanned the prices listed on eBay approximately 100,000 times a day.⁵² Verio accessed the WHOIS database of Register.com daily to obtain registered domain names and to match them with contact information.⁵³ Although these websites are open to the public, and no information obtained by the robots is in any way confidential, in each case the terms of use prohibits the use of electronic access by robots. Thus, in both cases the unauthorized access by these robots to automatically collect publicly available information, coupled with the use of the plaintiffs' system capacity, resulted in the issuance of a preliminary injunction by the courts based on trespass to chattels. The unauthorized access, viewed in light of the terms of use, satisfied the meddling component of trespass, and the reduced network capacity satisfied the damage component.⁵⁴

{15} *Oyster Software* involved a different level of interference with chattels. An automated program extracted information contained in the web page metatags, which are simple codes that list identifying words that are like an index to finding the web site.⁵⁵ Without discussion, the court made note that the access to the computer to copy the metatags was without authorization.⁵⁶ The court found that significant damages are not required to prove trespass to chattels when a computer is the property involved; all that is needed is use of another's computer.⁵⁷ Therefore, the mere copying of the plaintiff's metatags by Oyster's electronic robot was a sufficient allegation to

defeat the motion to dismiss the trespass to chattels claim.⁵⁸ It has been suggested that when courts allow minimal damages to suffice, as was the situation in the Oyster case, they confuse the analysis of trespass to chattels with trespass to real property.⁵⁹

B. Unwanted Messages and Trespass to Chattels

{16} Unsolicited bulk e-mail, also known as spam, is a problem for system administrators and individuals because it uses server space and interferes with normal communications. Early cases established a fairly consistent view that spam could be actionable as a trespass to chattels. The first case was *CompuServe Inc. v. Cyber Promotions, Inc.*⁶⁰ Because of customer complaints, CompuServe notified Cyber Promotions to cease sending e-mails to its subscribers; however, Cyber Promotions refused to do so. The court applied the law of trespass to chattels as found in the Restatement and identified the harm to CompuServe's computer service caused by the large amount of unsolicited e-mail as the core of the tort.⁶¹ Following the *CompuServe* case, several cases brought by America Online (AOL) confirmed the application of the tort of trespass to chattels as a basis for injunctions to prevent spam and awarded damages to the plaintiff. According to the court in these cases, the sending of bulk e-mail, the spam, violated the site's stated terms of use. The number of e-mails sent was significant to the computer network in these cases: in *AOL v. IMS*,⁶² 60 million e-mails were sent, in *AOL v. LCGM, Inc.*,⁶³ over 90 million e-mail messages sent, and in *AOL v. Greatdeals.net*,⁶⁴ over 130 million e-mails were sent. In all of these cases, AOL was successful in arguing that the spam constituted a trespass to its system, and that it had been harmed by the effect on the system of the large amounts of unsolicited e-mail.

{17} In contrast to commercial messages, *Intel Corp. v. Hamidi*⁶⁵ involved the use of a company's e-mail system without the system's permission in order to convey messages criticizing the company. The decision addressed the clash between speech and property rights. Hamidi was the webmaster for a forum devoted to airing grievances about the work environment and conditions at Intel Corporation. The forum was not hosted on Intel's network. In addition, he sent several e-mails to all of Intel's employees and took steps to defeat Intel's security that blocked messages from certain outside sources. Hamidi argued that this electronic forum was essential for communication between employees of Intel's international corporation, who otherwise would be unable to effectively communicate across the globe.⁶⁶

{18} Intel, however, did not appreciate Hamidi's e-mails to its employees, and Intel claimed a trespass to its chattel. The action was based on the argument that Hamidi committed a trespass to the internal e-mail system of Intel, because he sent six e-mails to thousands of electronic work addresses of Intel employees. Intel claimed the e-mails clogged its system and wasted company human capital, because the company had to use additional resources to stop Hamidi's messages.⁶⁷ The additional resources were necessary, in part, because Hamidi took steps to defeat Intel's security, forcing the company to bolster that security by blocking and removing the messages.⁶⁸

{19} The California appellate court began its discussion of the nature of trespass to chattels and the Internet by noting "[t]he common law adapts to human endeavor."⁶⁹ The court recognized the additional challenge of applying the law to the electronic world of communication in that "[t]respass to chattels is somewhat arcane and suffers from desuetude."⁷⁰ Not dissuaded, the court then proceeded to chart the development of the common law of trespass to chattels and its historical precedents.⁷¹ It noted the progression of cases from early in the common law, and arrived at the conclusion that trespass to chattels could occur with electronic messages, as they are close enough to tangible personal property to fall into the chattel category.⁷² In addition, the

damage to the chattel was found in the time that the system administrators of Intel took to block the messages, and the time of each employee who opened, read and disposed of the individual message found in their e-mail. Thus, the court upheld an injunction ordering Hamidi to cease sending e-mails to Intel employees' business addresses.⁷³

{20} In June 2003, the Supreme Court of California reversed judgment of the appellate court, distinguishing both the facts and the law from the earlier decision.⁷⁴ Noting most of the facts cited by the summary judgment, the sending of critical emails to Intel employees by Hamidi and the subsequent blocking and cease and desist notices by Intel, the court reached different conclusions about these actions.⁷⁵ Whereas in the earlier decision the court described Hamidi's actions as a breach of Intel's security system, the Supreme Court of California noted that no evidence supported this allegation.⁷⁶ Instead, internal Intel e-mails referred to the fact that no security was breached, and Hamidi stated that he obtained the e-mail list from a computer disc that was sent to him anonymously.⁷⁷

{21} Next, the Supreme Court discussed and adopted the Restatement definition of trespass to torts as the law of California.⁷⁸ The court noted the position of Prosser & Keeton and found that while there has been some disagreement, there must be actual damage to the personal property, not merely nominal damages.⁷⁹ The court stated that "[t]he 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."⁸⁰ Reviewing past cases, the court found that in order to constitute damage to a computer system there must be an "actual or threatened interference with the computers' functioning."⁸¹ The court considered the application of the tort of trespass to chattels in cases of automated search engines and spam and found that the damages required an impairment of the system, as with the sending of millions of spam e-mails and automated searches, or the threatened impairment of the system.⁸²

{22} Significantly, the court carefully described and distinguished the case from *eBay v. Bidders Edge*.⁸³ To the extent that the *eBay* court based its decision on the threatened harm that many automated searches could inflict upon the computer system if allowed access without limit, the court agreed with the finding that trespass occurred because of the threatened impairment.⁸⁴ The court expressly disagreed with any application of the principle that harm could result from minor intrusions, and declined to accept the *eBay* decision taken out of that specific context.⁸⁵ Furthermore, the court noted its skepticism about accepting the *CompuServe* line of cases that categorized the loss of goodwill and more generalized economic injury as sufficient for trespass to chattels.⁸⁶ Even if it were to accept this approach, however, the Intel injury would still be too attenuated to suffice as a recognizable harm. *CompuServe* lost customers as a result of the impact that spam had on the functioning of the system, while Intel's loss was only for the "distraction" that the e-mails caused to its employees, unrelated to the system function.⁸⁷ Finally, the court specifically rejected the *Oyster Software* decision as an incorrect statement of California law to the extent that it held that the mere access to another's website in order to copy metatags was a trespass, without proof of actual damages.⁸⁸

{23} Thus, the California Supreme Court returns the tort of trespass to chattels to its common law roots. In order to succeed, a trespass to chattels allegation involving computer systems must include actual or threatened damage. This decision squarely puts the computer system into the realm of personal property rather than real property, although arguments that the real property analogy should apply were raised by *amici*.

C. Electronic Speech and Real Property

{24} The rights of free speech often conflict with the rights of the landowner to control access to and use of the property.⁸⁹ The appellate court in *Hamidi* was one of the first courts to address this issue as it applies to the Internet, and it favored property rights over rights of speech, at least within the facts presented.⁹⁰ However, the dissent in the appellate *Hamidi* case focused on the fact that the damage alleged was too far removed from the property to constitute a trespass.⁹¹ The dissent argued that employee time is not closely connected to the system itself,⁹² unlike previous electronic trespass cases, where the damage caused by robots, for example, was identified as the use of and limitation to the electronic system.⁹³ Indeed, in *Hamidi*, Intel claimed no damage from the e-mails clogging their system, and under the facts it is questionable that they could have succeeded in that argument.⁹⁴

{25} The dissent warned that extending the tort of trespass to chattels to situations where the harm consists of merely having to read unwanted e-mails could result in quite significant unintended consequences,⁹⁵ and that it, “transforms a tort meant to protect possessory interests into one that merely attacks speech.”⁹⁶ One commentator criticized the majority’s characterization of the e-mails as a physical trespass on private property and suggested that *Hamidi*’s conduct was instead like that of a person shouting at Intel’s employees from a public park outside Intel’s offices “and Intel wants the court to force *Hamidi* to take his megaphone and his message elsewhere.”⁹⁷ Indeed, it is likely that Intel’s primary objection was to the message, not to the minimal burden of closing the office windows to reduce the noise.

{26} The California Supreme Court in *Hamidi* agreed with the dissent in the lower court, specifically reviewing, but rejecting, arguments that the law applied to computer systems should mirror the inviolability of real property so that the owner would have complete control over the use of that system.⁹⁸ *Amici curiae* briefs were filed on both sides of the case. On one side, amici argued in support of the real property analogy, pointing out that the metaphors used for the Internet are real property ones such as those discussed earlier: “information superhighway,” “cyberspace,” and “addresses.”⁹⁹ The court was not persuaded that metaphors should have an effect on law and noted that other metaphors lent themselves to concepts of personal property, such as the “Net,” which could be analogized to a fisherman’s net.¹⁰⁰ The court noted that “such fictions promise more confusion than clarity in the law.”¹⁰¹ The second argument, that it would be economically beneficial and socially desirable to treat computer systems as real property, was also rejected by the court.¹⁰²

{27} *Amici* also argued that companies that are given the right to complete control over their computer systems will continue to allow linking and connecting to the Internet, and that in a specific case of access denial, individual licensing will most efficiently resolve the dispute.¹⁰³ However, other *amici* argued that the benefit of the Internet itself is that it is an open network. Individual restrictions on the operation and use of the open network could impose significant transaction costs and decrease its intrinsic value.¹⁰⁴ Despite this dilemma, the court declined to offer a solution, maintaining instead that legislatures had already separately begun to address the problems of spam and that a blanket ruling analogizing computer systems to real property would be premature.¹⁰⁵

{28} A related issue is whether the real property analogy should qualify the system as a public forum. Although a recent case held that an internet chat room is not a place of public accommodation, no case to date has presented the general question of whether a private web site can operate as a public forum.¹⁰⁶ This could be the basis of future action if the court applies

the physical place analogy. If a court uses the *Albertson* case as a guide, it may well classify a private web site as a public forum.¹⁰⁷ A business web site that is open to the public cannot exist as a “stand alone” store.¹⁰⁸ Only through its existence within the Internet and interconnectedness with all other web sites does it operate. The interconnected web of the Internet is its essence and its commercial value. In addition, the history of the Internet as a government sponsored medium – where the government still maintains an active but indirect role in its management – provides an argument for its categorization as a public forum.¹⁰⁹ The Supreme Court has noted that the Internet is truly a medium for communication.¹¹⁰ Yet how does an internal company network, limited to employee use and utilizing the public network known as the Internet, relate to public communication?¹¹¹

{29} The next section considers another cyberspace context in which the concepts of property and place are intertwined with speech. Do the laws preventing discrimination in places of public accommodation apply to Internet chat rooms? Should the anti-discrimination laws applicable to private property govern a virtual forum for communication?

III. PUBLIC ACCOMMODATION AND COMMON CARRIAGE

{30} The law applied to public accommodations is found in the common law, the Civil Rights Act of 1964, and the Americans with Disabilities Act. Like trespass, the law regarding public accommodation has a long history in the common law. This history was recounted in a U.S. Supreme Court case challenging the conviction for trespass of twelve African American students after a sit-in at a Maryland restaurant in 1963.¹¹² The court stated that “the good old common law” required that the state insure all citizens’ access to places of public accommodations.¹¹³ This is the basis of an innkeeper’s duty “to take in all travelers and wayfaring persons,” then extended to common carriers, and later to public shows and amusements.¹¹⁴

A. Civil Rights Act

{31} Access to public accommodation is also guaranteed under federal civil rights laws. The common law duty to provide access to public accommodations is the basis of Title II of the 1964 Civil Rights Act. The Act provides: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.”¹¹⁵

{32} Since its enactment in 1964, the Civil Rights Act and its state counterparts have been interpreted many times as the struggle to end discrimination extended to forums beyond essential services, such as education, transportation, and lodging.¹¹⁶ Among the many defenses raised by groups and institutions seeking to avoid the mandate of equal treatment, a number of cases revolved around the question of whether the site of the discrimination was a “place” at all. Defendants who are membership organizations have argued that they are “private clubs” and thus exempt from the Act.¹¹⁷ Alternatively, if membership is non-exclusive, organizations have argued that their activities are not tied to a particular place and therefore the organization does not come within the definition of “place of public accommodation.”¹¹⁸

{33} In *Welsh v. Boy Scouts of America*,¹¹⁹ Mark Welsh, a seven year-old boy who was denied admission to the Boy Scouts because of his refusal to take an oath affirming his belief in God, argued that that his exclusion from the organization was illegal discrimination based on his religious belief. The Boy Scouts of America asserted that the organization was a membership organization and therefore not subject to the Act. First, the court asked “whether Congress

intended to govern organizations like the Boy Scouts within the statutory language ‘place of public accommodation’ or ‘other place of . . . entertainment?’”¹²⁰ The court noted that although the statute lists fifteen examples of regulated facilities, none of them “remotely resembles a membership organization.”¹²¹ The court then considered whether the Boy Scouts of America was included as a place of exhibition or entertainment. And again, the court concluded that the language of the statute does not include a “membership organization whose purpose is not closely connected to a particular facility.”¹²²

{34} Title II of the Civil Rights Act does not include a prohibition against gender discrimination in places of public accommodation. Thus, when the National Organization for Women successfully challenged the Little League’s exclusion of girls from its activities, it did so under the New Jersey state civil rights statute.¹²³ The New Jersey law is broader than the federal law, because it extends to gender discrimination, but the public accommodation language is similar to Title II. In interpreting that language, the New Jersey court stated:

The statutory noun “place” (of public accommodation) is a term of convenience, not of limitation. It is employed to reflect the fact that public accommodations are commonly provided at “fixed places,” e.g., hotels, restaurants, swimming pools, etc. But a public conveyance, like a train, is a “place” of public accommodation although it has a moving situs....¹²⁴

{35} Likewise, the court dismissed the defense that Little League is a membership organization similar to a private club. The court approved of the lower court’s conclusion that “membership organizations, although not having a ‘specific pinpointable geographic area,’ are nevertheless places of public accommodation if, as Little League does, they offer advantages and facilities on the basis of a general, public invitation to join.”¹²⁵

B. Americans with Disabilities Act

{36} The Americans with Disabilities Act requires that access to public accommodation be available to persons with disabilities, providing that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹²⁶

{37} A recent, much debated case interpreting this language in the Americans with Disabilities Act is *PGA Tour, Inc. v. Martin*.¹²⁷ Casey Martin, a well-known and talented professional golfer, has a circulatory disorder that prevents him from walking golf courses.¹²⁸ The use of a golf cart violated one of the rules of the Professional Golfers’ Association (PGA), which sponsors major golf tournaments for which Martin qualified in all other respects.¹²⁹ Martin sued, alleging that the PGA was a place of public accommodation, and as such, was required to make reasonable accommodation to individuals with disabilities.¹³⁰ The court examined whether the PGA is a place of public accommodation, under Title III of the Americans With Disabilities Act, and if so, whether the use of the golf cart fundamentally alters the nature of the event?¹³¹

{38} The PGA argued that it was a private club or private establishment, or, alternatively, that “the play areas of its tour competitions do not constitute places of public accommodation.”¹³² The list of covered establishments under Title III of the Americans with Disabilities Act and those of Title II of the Civil Rights Act are similar. In fact, the first three categories of the Americans with Disabilities Act are identical to the categories of the Civil Rights Act, although the language is slightly more modern.¹³³

{39} The *Martin* Court noted the similarity of the two statutes. The Court stated that its conclusion that the PGA is a place of public accommodation is consistent with case law under the Civil Rights Act, citing *Daniel v. Paul*,¹³⁴ a 1969 civil rights case. In *Daniel*, the court found that a snack bar in a recreational club made the club a place of public accommodation,¹³⁵ but the Court in *Martin* cited *Daniel* as standing for the proposition that the phrase “place of public accommodation” covers participants in a sport or athletic activity, with no reference to the snack bar that was the basis of the *Daniel* court’s decision.¹³⁶ In essence, the *Martin* court interpreted the Civil Rights Act to apply to a much broader range of activities than those occurring at a specific, physical place.¹³⁷ The court concluded that the PGA was a place of public accommodation, but, in fact, the Professional Golfers’ Association is an organization and not a place at all.

{40} Can we conclude that, in using the same language as the Civil Rights Act, Congress, when it enacted the Americans with Disabilities Act almost thirty years later, intended that the Acts would be interpreted consistently? That appears to be what the Supreme Court believed in the *Martin* case. To take the contrary position that the Americans with Disabilities Act contains a broader description of place of public accommodation than the Civil Rights Act would mean that Congress is more concerned about disability discrimination than it is about racial, religious and ethnic discrimination. If the Supreme Court correctly interpreted Congress’ intent, it is certainly likely that in the passage of time since 1964, Congress realized that more and more activities are important to equal access to society’s benefits and opportunities.

C. The Internet and Public Accommodation

{41} Accommodation law, as described above, requires that places open to the public be non-discriminatory. But, is the Internet a place?¹³⁸ Webster’s Dictionary defines “place” as, among other things, a “physical environment” or “an indefinite region or expanse.”¹³⁹ While the first definition describes the traditional notion of place, the second one could describe the concept of cyberspace as a place.

{42} Cases discussed in the previous sections of this paper indicate that a number of courts have viewed computer networks as property with physical characteristics, upon which robots may enter and trespass.¹⁴⁰ It has been recognized that “at early common law, trespass required a physical touching of another’s chattel or entry onto another’s land. The modern rule recognizes an indirect touching or entry.”¹⁴¹ This rule has recognized trespass from dust particles, smoke, sound waves, and, most recently, electronic signals.¹⁴² Thus, the courts have interpreted the common law tort of trespass over time to award damages for harm similar to a physical interference, although the property being trespassed on and the trespasser are no longer required to have a physical form. Using the development of this trespass model for the question of place, will the law recognize the Internet as fitting within Webster’s definition of “an indefinite region or expanse”¹⁴³ that has no physical location as a place?

{43} This question is posed with respect to online chat rooms in a United States District Court case in which the plaintiff claimed that America Online’s unequal treatment of hate messages based on religion and national origin in its chat rooms amounted to discrimination in a place of public accommodation, prohibited by Title II of the 1964 Civil Rights Act.¹⁴⁴ Plaintiff Noah, a Muslim male, filed suit on behalf of himself and other Muslims who were current and former members of American Online and were “insulted, threatened, mocked, ridiculed and slandered by other AOL members due to their religious beliefs in AOL’s ‘Beliefs in Islam’ and ‘Koran’ chat rooms.”¹⁴⁵ Although AOL’s terms of service state that this type of offensive content is prohibited,

and that those who post such messages may have their membership terminated, Noah claimed that AOL did not enforce these rules in the chat rooms equally, and that content offensive to Muslim beliefs was not addressed. Furthermore, Noah claimed that AOL enforced the rules in chat rooms dealing with other subjects and, particularly, with other faiths. As a result, Noah argued this differential treatment was religious discrimination in violation of the contract with AOL in its terms of use, Title II and the First Amendment.¹⁴⁶ The court recognized that the identified chat room communication directed to Muslims was “offensive, obnoxious, and indecent.”¹⁴⁷ Regardless, AOL’s terms of service allowed, rather than required, AOL to take action, and therefore the breach of contract claim failed.¹⁴⁸

{44} The *Noah* court rejected Noah’s Title II claims for two reasons. First, it found that section 230 of the Communications Decency Act¹⁴⁹ granted immunity to AOL, an interactive computer service provider.¹⁵⁰ It found that AOL, as a service provider, cannot be treated as a publisher, and cannot be held liable for the statements of third parties made in the chat rooms, according to section 230. Noah’s argument that AOL was a place of public accommodation, not a publisher, and was therefore without immunity under section 230, was unpersuasive. In considering Noah’s request for an injunction, the court noted that it would treat AOL as a publisher under section 230.¹⁵¹ And, since the Civil Rights Act was not mentioned in the list of exceptions to section 230 immunity, the court found that claims such as Noah’s were subject to its provisions.¹⁵²

{45} Nevertheless, the court went on to consider the Title II claim, and concluded that “AOL’s chat rooms and other online services did not constitute a ‘place of public accommodation’ under Title II.”¹⁵³ The court rejected the reasoning that computer networks share the legal attributes of physical places for purposes of coverage under the Civil Rights Act, stating that “[a]lthough a chat room may serve as a *virtual* forum through which AOL members can meet and converse in cyberspace, it is not an ‘establishment’ under the plain meaning of that term as defined by the statute.”¹⁵⁴ In reaching its conclusion, the court noted that membership organizations, such as the Boy Scouts, were not found to be places of accommodation.¹⁵⁵ The court also reviewed the Americans with Disabilities Act cases involving the issue of non-physical places as public accommodations, noting that jurisdictions are split on this question.

{46} In *Access Now, Inc. v. Southwest Airlines, Co.*, the federal district court in Florida refused to extend the Americans with Disabilities Act to websites.¹⁵⁶ The plaintiff, an advocacy organization for the disabled, claimed that Southwest Airlines violated the Americans with Disabilities Act because its online ticket purchasing system was inaccessible to blind persons.¹⁵⁷ The court noted that the Eleventh Circuit had historically taken a narrow view of the Americans with Disabilities Act with respect to the definition of place, in contrast to the more inclusive position of other circuits. While these circuit court cases did not involve web sites, they each considered a service that was not attached to a physical location, and therefore were considered by the court.¹⁵⁸

{47} In *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Association*,¹⁵⁹ the First Circuit held that the Americans with Disabilities Act covers health benefit plans that are not affixed to any physical location.¹⁶⁰ The court noted that the Americans with Disabilities Act includes “travel service” among the list of services considered “public accommodations,” and concluded that the Americans with Disabilities Act is not limited to physical structures.¹⁶¹ The court further opined that “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.”¹⁶² It would certainly be consistent to include websites in the court’s characterization of alternate means of accessing services.

{48} In *Doe v. Mutual of Omaha Insurance Co.*,¹⁶³ the question was whether the Americans with Disabilities Act specifically included insurance policies.¹⁶⁴ Judge Posner wrote:

[T]he Core meaning of [42 U.S.C. § 12182(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site or other facility (whether in physical space or electronic space) . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.¹⁶⁵

{49} In *Access Now*, the District Court for the Southern District of Florida was not persuaded by the *Doe* and *Carparts* cases. The court stated that if it followed *Doe*, it would be compelled to find in favor of the Internet being a place of public accommodation, but that to hold in this way would conflict with the narrower view taken by the Eleventh Circuit.¹⁶⁶ In a previous Eleventh Circuit case, the plaintiff challenged the *Who Wants to be a Millionaire* television show's method of screening contestants over the telephone, as discriminating against the disabled.¹⁶⁷ The court held that if the discrimination does not actually occur at a physical place, in order to be actionable under the Americans with Disabilities Act, there must be a nexus between the discrimination and a physical location.¹⁶⁸ It found such a nexus in the case, because the screening process was the method to choose contestants who would appear at the physical site of the show.¹⁶⁹ Applying this narrow rationale, the district court in *Access Now* found that the website was not covered by the Americans with Disabilities Act because it was not a means of accessing an actual physical location.¹⁷⁰ The court noted that although such a nexus might be found between the virtual ticket counter and the aircraft, aircraft were specifically exempted from the Americans with Disabilities Act.¹⁷¹ One may speculate that the circuit courts that heard the *Carparts* and *Mutual of Omaha* cases might disagree if similar facts were presented.

{50} Relying heavily on the *Access Now* decision, the *Noah* court did not address the fact that the harm allegedly suffered by Saad Noah was exactly the kind of harm that Congress intended to redress in passing Title II of the 1964 Civil Rights Act.¹⁷² Support for taking this harm into account is found in prior Supreme Court decisions. In finding that the Act covered a recreational area with a snack bar in *Daniel v. Paul*,¹⁷³ the Supreme Court stated:

Admittedly, most of the discussion in Congress regarding the coverage of Title II focused on places of spectator entertainment rather than recreational areas. But it does not follow that the scope . . . should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage.¹⁷

{51} As the foregoing discussion suggests, a reading of the language is ambiguous with regard to the law's application to cyberspace. Consequently, unless Congress moves to amend the law, it may be left to the states to address online discrimination in the online forum. Lastly, the *Noah* court quickly dispensed with the First Amendment claim, because there was no state action involved in the private actions of AOL concerning its chat rooms.¹⁷⁵

IV. A NEW FRAMEWORK

{52} In the 1999 Department of Commerce report, *Falling Through the Net: Defining the Digital Divide*,¹⁷⁶ the National Telecommunications and Information Administration observed that access to the Internet was a prerequisite to full participation in the society of the twenty-first century.¹⁷⁷ In this early report, participation was equated with access:

For some individuals, it is an economic solution. Lower prices, leasing arrangements, and even free computer deals will bridge the digital gap for them. For high cost communities and low-income individuals, universal service policies will remain of critical importance. For other individuals, there are language and cultural barriers that need to be addressed. Products will need to be adapted to meet special needs, such as those of the disabled community. Finally, we need to redouble our outreach efforts, especially directed at the information disadvantaged.¹⁷⁸

{53} In its most recent report, the Department of Commerce found that Internet access was growing rapidly,¹⁷⁹ leading one commentator to conclude that the digital divide is not the civil liberties issue of the twenty-first century.¹⁸⁰ However, while access remains an important first step, it alone will not create equality of opportunity to participate in the electronic revolution.¹⁸¹ As demonstrated by the civil rights struggles of the past century, just opening the door to the schoolhouse is not sufficient for equality of treatment. The curriculum, the teachers, and the textbooks must not exclude anyone from meaningful participation. Similarly, the way in which the Internet is managed and how speech is allowed to be privately regulated will determine if certain groups are able to fully use and enjoy their access.

{54} Entertainment, work, banking and investing, shopping, and social interaction are just some of the functions that occurred in physical space in 1964 when the Civil Rights Act was passed to prohibit discrimination in these spaces. All of these lifetime activities, and more, now also occur in cyberspace. The stated purpose of the Civil Rights Act, however, is significantly undermined if the activities in cyberspace are exempt from its coverage. While economic barriers to Internet access appear to be diminishing, barriers based on discrimination have, heretofore, received little attention. Noah requires the court to consider whether the legal tools exist to insure that such barriers will not be built in cyberspace.¹⁸² The court in *Access Now* chose not to open the doors of the Internet to all citizens.¹⁸³ This presents a crossroads online; if access is to be guaranteed, it must be guaranteed through legislation.

{55} Any proposed legislation must take into account the various types of Internet activity. Participatory Internet activities, like their physical world counterparts, vary widely. For example, people may join a listserv in order to carry on a conversation with like-minded people, people in the same occupation, or with some other common characteristic. A listserv is analogous to a private club, if membership is based on a legitimate credential related to the purpose of the list. A listserv that admits members who only share a commitment to a particular purpose would likely be an exempt membership organization under the Civil Rights Act, if the Civil Rights Act is applied to the Internet.

{56} A chat room, on the other hand, is open to anyone who joins the network. AOL membership is solicited through general advertisement, distribution of the software through the mail, and automatic membership with the purchase of a new personal computer from certain manufacturers. It is "open to the public" in every sense of the word. People meet, and have real-time conversations in these virtual rooms, just as they would in physical rooms. The advent of streaming audio and video capability increasingly blurs the distinction between physical and cyber locations. Thus, the provider should not create discriminatory barriers by setting different standards for participation based on characteristics that are prohibited by civil rights legislation.

{57} Any proposal to relieve the tension between the legal treatment of the Internet as place

or property, or a medium of expression, should balance the interests of those who maintain the online forum and those who seek access to it. Rather than attempting to meld the analysis of the Internet medium into common law and existing statutes that are ill equipped to address the technological issues, it is proposed that a new framework be adopted. A new framework will result in a cleaner approach that does not blur the distinction between trespass to chattels and trespass to realty, and which will recognize the incredible public interest in preserving speech in this “most participatory form of mass speech yet developed.”¹⁸⁴ The metaphors used to describe the Internet, at their worst, serve to blur the nature of the medium. In truth, the Internet is a place where people meet to communicate, where businesses meet consumers and sell their products, and where investments in web site development and presence are electronic versions of property. No one metaphor, or legal parallel, will reflect the myriad nature of this Internet. Therefore, new terminology, which recognizes the complexity of the Internet relationship, is necessary. While abandoning outdated laws and imprecise language, it is unnecessary to abandon the principles upon which our historical legal concepts depend. The proposed framework creates new terminology for addressing the Internet, yet incorporates the recognized principles that public policy demands: private property, public access and free speech. Only new terminology can bring legal clarity to apply these principles to the Internet medium.

{58} One approach to resolving the tension between the Internet as a voice and the Internet as a place looks, in part, to the common law of public accommodation as the basis for a new Restatement concept. The authors propose the following new Restatement provisions:

Places of Public Communication

A private provider of online content and/or access creates a place of public communication when:

- 1) the online access or content is generally available to the public; or
- 2) the online access or content is available to a limited number of persons for a commercial reason.
- 3) A place of public communication does not include any content or access made available by a person for employee- or independent contractor-only use.

Access to Places of Public Communication

- 1) A place of public communication shall not discriminate based on age, disability, gender, national origin, political views, race, or religion.
- 2) Individuals who are harmed by discrimination in a place of public communication shall have an action in tort to recover actual damages, attorney’s fees and costs.

Rights Associated with Places of Public Communication

- 1) Reasonable, non-discriminatory restrictions on public access may be imposed on places of public communication in order to prevent interference with normal business operations.
- 2) Persons who enter places of public communication shall have the duty to abide by reasonable and non-discriminatory restrictions established by the provider.
- 3) Failure to follow reasonable and non-discriminatory restrictions creates tort liability

for the actual, non-trivial harm incurred by the provider of the place of public communication.

- 4) These rights replace the rights of the provider of the place of public communication to pursue actions in trespass.

{59} Thus, a place of public communication seeks to extend the common law duty of non-discrimination imposed on innkeepers and common carriers to online service providers. The provision seeks to protect the private property of the provider, while at the same time it recognizes the special duty to the public that a person or corporation has when the means of public communication are within that entity's control. The analysis of the cases described in this article under the proposed Restatement provisions would necessarily begin with an inquiry as to whether the Internet use in each case meets the definition of a place of public communication. Only if that preliminary test were met would the provider be required to open access to the public and face liability for discriminatory practices in that identified cyberplace.

{60} The AOL chat rooms in the *Noah* case clearly fall within the new definition, and Noah would have a claim in tort for damages. The Intel e-mail system in the *Hamidi* case would also fall within the definition because, although it is a local area network for employees, it is also connected to the Internet and messages can travel freely into and out of the local e-mail system. The critical issue in assessing Intel's liability under this new framework would be determining whether it had reasonable restrictions on public access and whether Hamidi violated those restrictions.

{61} The implication of establishing the concept of a place of public communication is resonant of the private property/public forum debate that emerged as privately-owned shopping centers and malls began to replace publicly-owned streets and parks in downtown areas.¹⁸⁵ In a series of cases, the Supreme Court first recognized rights of speech in a company town,¹⁸⁶ then in a shopping center,¹⁸⁷ whose recent development had replaced the downtown as a center of public activity.¹⁸⁸ The Supreme Court later overturned these rulings under federal law, but affirmed the rights of states to protect public speech on private property for the public good.¹⁸⁹ The debate re-emerges as the Internet begins to replace other forums for speech. The proposed framework utilizes state law, rather than federal law, to implement regulation, and is therefore consistent with precedent. Internet sites are open to vast numbers of people; therefore, the emphasis in *Pruneyard* that the regulations do not apply to small businesses or individuals¹⁹⁰ is easily met when applied to the online place of public communication.

{62} The requirement of reasonable terms of use recognizes that there should be a limit, for public policy reasons of openness and preservation of mass speech forums, to the terms that a private website owner may impose on the public. This right was referred to in *EF Cultural TravelBV v. Zefer Corporation*,¹⁹¹ a case brought under the Computer Fraud and Abuse Act.¹⁹² While the court recognized that terms of use could prevent the use of automated robots, similar to those used in *eBay v. Bidder's Edge*,¹⁹³ it also stated in dictum that terms of use that sought to completely deny website access to competitors, to otherwise publicly available website information, would raise serious policy concerns.¹⁹⁴ The reasonableness standard included in the framework recognizes the importance of the public policy of openness. It is also supported by the Supreme Court's statement that neither property nor contract rights are absolute, and may be narrowly regulated by the state.¹⁹⁵ It is particularly appropriate for the state to regulate places of public communication, because much of the value of website property comes from the interconnectedness of the network. While property, in general, is dependent on legal recognition

to define its parameters, no other type of property is as dependent upon the existence of, and connection with, other property as is web site property. While in the world of physical property it is the right to the exclusive use of property, and the corollary right to exclude all others, which gives value to the property, in the online world it is the ability of others to access, use, and communicate with the computer which gives value to the network.

{63} The place of public communication model adopts some of the trespass to chattels rationale, where interference with the network was the proven harm to the plaintiffs.¹⁹⁶ However, it would prevent further extension of the trespass doctrine as a means for service providers to suppress certain forms of speech where the damage is the unwanted speech itself, not interference with the operation of the website. That is, if the harm is trivial, it is similar to “pulling the ears of a dog,”¹⁹⁷ and may be non-compensable.

{64} On the other hand, the framework clearly protects rights of public speech when occurring in a place of public communication. An AOL chat room would fall within the definition of a place of public communication, and therefore, for example, if the allegations in Noah were proven to have been true, liability would have resulted under this provision.

V. CONCLUSION

{65} The proposed framework for places of public communication balances online property rights with online access and speech rights, and recognizes the unique quality of the Internet by protecting both voice and property. It seeks to preserve the rights historically associated with private property, while at the same time recognizing that when an online private property owner transforms that property into a place for public communication, receiving a benefit from that transformation, then the property owner can be subject to the common law duty of non-discrimination traditionally imposed on innkeepers and common carriers.

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¹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1727 (1993).

² 42 U.S.C. § 2000a(a)-(b) (2003).

³ *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (quoting district court findings).

⁴ See *infra* Part II.

⁵ *American Library Assoc. v. Pataki*, 969 F. Supp. 160, 161 (1997) (comparing the Internet to highways and railways).

⁶ See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 3-4 (1980).

⁷ GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* 65-66 (1981).

⁸ Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217, 231 (1997).

⁹ See NetLingo, at <http://www.netlingo.com> (last visited Sept. 7, 2003) (defining the term “Information Superhighway”).

¹⁰ *Id.* (defining “surfing”).

¹¹ *Id.*

¹² *But cf.* Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1361 (2003) (Writing for the majority of the California Supreme Court, Justice Werdegar warns us against an over reliance on metaphor and analogy. He notes that “‘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.”).

¹³ See generally Ethan Preston, *Finding Fences in Cyberspace: Privacy and Open Access on the Internet*, 6 J. TECH. L. & POLY 3 (2001) (arguing that “computer security law would be more coherent and protect equity more predictably if it treated the Internet as if it were physical place – cyberspace”); Harold Smith Reeves, *Property in Cyberspace*, 63 U. CHI. L. REV. 761 (1996) (discussing property-based models applicable to cyberspace).

¹⁴ See generally Maureen A. O’Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561 (2001).

¹⁵ See generally James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 52 DUKE L.J. 273, available at <http://james-boyle.com> (discussing these competing interests in the context of intellectual property protection); Carol. M. Rose, *The Several Futures of Property: Of Cyberspace ad Folk Tales, Emission Trade and Ecosystems*, 83 MINN. L.R. 129 (1998).

¹⁶ See Calvin Whang, *An Analysis of California’s Common and Statutory Law Dealing with Unsolicited Commercial Electronic Mail: An Argument for Revision*, 37 SAN DIEGO L. REV. 1201, 1208-09 (2000) (describing how the California courts adopted the Restatement view in its decisions concerning trespass to chattels).

¹⁷ RESTATEMENT (SECOND) OF TORTS § 217 (1965).

¹⁸ *Id.* § 218.

¹⁹ *Id.* § 218 cmt. e

²⁰ *Id.*

²¹ *Id.* § 218 cmt. e, illus. 2 (1965). The authors wish to comment that there are those who might dispute whether such treatment of the dog constitutes harm, and the authors believe that the illustration is not meant not to minimize or promote abuse of animals, and would be better put if the Restatement explained that the dog was not physically injured. Nevertheless, this is the example used by the Restatement to illustrate the legal requirements for actionable trespass to chattels.

²² *Id.* § 163. See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 75 (5th ed. 1984).

²³ Martin H. Malin & Henry H. Perritt, *The National Labor Relations Act in Cyberspace: Union Organizing in Cyberspace*, 49 U. KAN. L. REV. 1, 55 (2000).

²⁴ Edward W. Chang, *Bidding on Trespass: Ebay, Inc. v. Bidder’s Edge, Inc. and the Abuse of Trespass Theory in Cyberspace Law*, 29 AM. INTELL. PROP. ASS’N Q.J. 445, 448 (2001).

²⁵ Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 286 (2002).

²⁶ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179- 180 (1979)).

²⁷ *Id.* at 84-85 (quoting *Nebbia v. New York*, 291 U.S. 502, 523 (1934)).

²⁸ See *infra* notes 44-61 and accompanying text (discussing cases of spam and robots where a website successfully

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argued trespass due to the terms of use).

²⁹ See *supra* Part I.

³⁰ See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991). See generally Jennifer A. Klear, *Comparison of the Federal Courts' and the New Jersey Supreme Court's Treatments of Free Speech on Private Property: Where Won't We Have the Freedom to Speak Next?*, 33 RUTGERS L.J. 589 (2002) (comparing the Federal Court's and the New Jersey Supreme Court's holdings related to free speech on private property) .

³¹ See generally Mark C. Alexander, *Attention Shoppers: The First Amendment and the Modern Shopping Mall*, 41 ARIZ. L. REV. 1 (1999) (discussing free speech in shopping malls) .

³² *Pruneyard*, 447 U.S. at 85.

³³ See *Intel v. Hamidi*, 114 Cal. Rptr. 2d 244, 253-55 (reviewing the case law and the uncertainty of the state action doctrine); *infra* note 175 (discussing the Noah opinion).

³⁴ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

³⁵ *Id.* at 82-83.

³⁶ *Id.*

³⁷ *Albertson's Inc. v. Young*, 131 Cal. Rptr. 2d 721 (2003).

³⁸ *Id.* at 724.

³⁹ *Id.* at 725-26.

⁴⁰ *Id.* at 730.

⁴¹ *Id.* at 734 (“[T]he market should not be allowed to immunize itself against on-the-spot public criticism.”).

⁴² *TickerMaster Corp. v. Tickets.com, Inc.*, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000), *aff'd*, 2 Fed. Appx. 741 (9th Cir. 2001).

⁴³ *Id.* at *2.

⁴⁴ *Id.* at *4.

⁴⁵ See generally Melvin Albritton, *Swatting Spiders: An Analysis of Spider Activity on the Internet*, 3 TUL. J. TECH. & INTELL. PROP. 137 (2001); Susan M. Ballantine, *Computer Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209 (2000); Mary Anne Bendotoff & Elizabeth R. Gosse, “Stay off my Cyberproperty!”: *Trespass to Chattels on the Internet*, 6 INTELL. PROP. L. BULL. 12 (2001); R. Clifton Merrell, *Trespass to Chattels in the Age of the Internet*, 80 WASH. U.L.Q. 675 (2002); Laura Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels*, 17 BERKELEY TECH. L.J. 421 (2002); John D. Saba, *Internet Property Rights: E-Trespass*, 33 ST. MARY'S L.J. 367 (2002); Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117 (2002).

⁴⁶ *eBay v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

⁴⁷ *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

⁴⁸ *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C-00-0724 JCS, 2001 WL 1736382 (N.D. Cal. Dec. 6, 2001).

⁴⁹ *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Cal. App. 3d 2001).

⁵⁰ See Steve Fischer, *When Animals Attack: Spiders and Internet Trespass*, 2 MINN. INTELL. PROP. REV. 139, 141 (2001).

⁵¹ *Id.*

⁵² *eBay v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1063 (N.D. Cal. 2000).

⁵³ *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 243 (S.D.N.Y. 2000).

⁵⁴ *Bidder's Edge*, 100 F. Supp. at 1071-72; *Verio*, 126 F. Supp. at 250.

⁵⁵ *Oyster Software*, 2001 WL 1736382, at *1.

⁵⁶ *Id.* at *12.

⁵⁷ *Id.* at *13.

⁵⁸ *Id.*

⁵⁹ See Quilter, *supra* note 45, at 441. *But see* Ballantine, *supra* note 45, at 212 (arguing that trespass to real property ought to apply). See generally Jeffrey M. Rosenfeld, *Spiders and Crawlers and Bots, Oh My: The Economic Efficiency and Public Policy of Online Contracts that Restrict Data Collection*, 2002 STANFORD TECH. L. REV. 3 (2002), available at http://stlr.stanford.edu/STLR/Articles/02_STLR_3 (arguing for enforceability of contract restrictions on robot searching, and a fair use technical standard).

⁶⁰ *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

⁶¹ *Id.* at 1022-24.

⁶² *AOL v. IMS*, 24 F. Supp. 2d 548, 549 (E.D. Va. 1998).

⁶³ *AOL v. LCGM, Inc.*, 46 F. Supp. 2d 444, 448 (E.D. Va. 1998).

⁶⁴ *AOL v. GreatDeals.Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999). See generally Joseph D'Ambrosio, *Should "Junk" E-mail be Legally Protected?*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J.231 (2001); Calvin Whang, *Comment, An Analysis of California's Common and Statutory Law Dealing with Unsolicited Commercial Electronic Mail: An Argument for Revision*, 37 SAN DIEGO L. REV. 1201 (2000) (discussing application of laws to control spam).

⁶⁵ *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Cal. Ct. App. 2001), *review granted*, 118 Cal. Rptr. 2d 546 (Cal. Ct. App. 2002).

⁶⁶ *Id.* at 246-47.

⁶⁷ *Id.* at 246. See also Susan M. Ballantine, Note, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209 (2000) (discussing the nature of harm, and arguing that without actual harm, there should be no recognized trespass).

⁶⁸ *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 246 (Cal. Ct. App. 2001), *review granted*, 118 Cal. Rptr. 2d 546 (Cal. Ct. App. 2002).

⁶⁹ *Id.* at 247.

⁷⁰ *Id.*

⁷¹ *Id.* at 247-48.

⁷² *Id.*

⁷³ *Id.* at 258.



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⁷⁴ Intel Corp. v. Hamidi, 71 P.3d 296 (Cal. 2003).

⁷⁵ *Id.* at 301.

⁷⁶ *Id.*

⁷⁷ *Id.* The decisions also differ on whether Hamidi used unauthorized means to enter the Intel email system. The Supreme Court found that he simply sent the e-mails from different computers and therefore, did not use unauthorized means.

⁷⁸ See *supra* notes 16-21 and accompanying text.

⁷⁹ *Hamidi*, 71 P.3d at 302.

⁸⁰ *Id.* at 303.

⁸¹ *Id.* at 304.

⁸² *Id.* at 304-07. See also *supra* parts I(A) and I(B).

⁸³ eBay v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

⁸⁴ *Hamidi*, 71 P.3d at 306.

⁸⁵ *Id.* (asserting the eBay decision "would not be a correct statement of California or general American law" if taken out of context).

⁸⁶ *Id.*

⁸⁷ *Id.* at 307.

⁸⁸ *Id.* at n.5.

⁸⁹ See *supra* Part I.

⁹⁰ See Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244, 256-57 (Cal. Ct. App. 2001).

⁹¹ *Id.* at 261.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Compare *Hamidi*, 114 Cal. Rptr. 2d at 260-61, with eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1071-72 (N.D. Cal. 2000), and Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 249-50 (S.D.N.Y. 2000) (holding that trespass to chattels had occurred where defendant's actions reduced capacity, thereby slowing response times and reducing system performance).

⁹⁵ See *Hamidi*, 114 Cal. Rptr. 2d at 258-59 (Kolkey, J., dissenting).

⁹⁶ *Id.* at 264 (Kolkey, J., dissenting).

⁹⁷ Note, *The Long Arm of Cyber-Reach*, 112 HARV. L. REV. 1610, 1631 (1999).

⁹⁸ See Intel Corp. v. Hamidi, 71 P.3d 296, 309-11 (Cal. 2003).

⁹⁹ See *id.* at 309.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *id.* at 310-11.

¹⁰³ *Id.* at 310.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 311 (“We discuss this debate among the amici curiae and academic writers only to note its existence and contours, not to attempt its resolution.”).

¹⁰⁶ See *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 253 (E.D. Va. 2003).

¹⁰⁷ See *Albertson’s Inc. v. Young*, 131 Cal. Rptr. 2d 721 (2003).

¹⁰⁸ Cf. *id.* at 734 (arguing that because of its nature, Albertson’s store is a stand-alone structure, and consequently not a public forum).

¹⁰⁹ *But see Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000) (holding that a local government website did not constitute a traditional or designated public forum, and that the city did not violate the First Amendment when it refused to include on its site a link to a small, tabloid web publication that reported on alleged city corruption, despite the fact that the cite did link to other profit and non-profit entities). The authors wish to point out that in rejecting the Internet as a traditional forum, the Putnam court characterized the traditional forum as a place with a long history of use as a public exchange and the Internet as “a recent technological development” without a history of communication between citizens.

¹¹⁰ *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa 1996)).

¹¹¹ See *United States v. Am. Library Ass’n*, 123 S.Ct. 2297, 2305 (2003) (holding that a public library does not create a public forum on its computers when it provides Internet access to library patrons).

¹¹² See *Bell v. Maryland*, 378 U.S. 226 (1964).

¹¹³ *Id.* at 294 (quoting Cong. Globe, 39th Cong., 1st Sess. 111 (1866) (statement of Sen. Wilson)).

¹¹⁴ *Id.* at 297 (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 475 (Schouler 9th ed. 1878)). See generally Serena J. Hoy, *Interpreting Equal Protection: Congress the Court, and the Civil Rights Acts*, 16 J.L. & POL. 381 (2000) (reviewing the Civil Rights Act of 1964, including judicial and legislative action).

¹¹⁵ Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2003).

¹¹⁶ See Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1580 (2002) (explaining, for example, how the Civil Rights Act applies to cruise ships).

¹¹⁷ See, e.g., *Daniel v. Paul*, 395 U.S. 298 (1969) (arguing that a membership club for recreational purposes was not a place of public accommodation under the CRA).

¹¹⁸ See, e.g., *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993) (arguing that the Boy Scouts are not a “place” under the Civil Rights Act).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1269.

¹²¹ *Id.*

¹²² *Id.* at 1276.

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¹²³ N.J. STAT. ANN. § 10:5-1 (2003).

¹²⁴ NOW v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. 1974).

¹²⁵ *Id.*

¹²⁶ 42 U.S.C. § 12182a (2003).

¹²⁷ PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

¹²⁸ *Id.* at 664.

¹²⁹ *Id.* at 666 n.4.

¹³⁰ *Id.* at 669.

¹³¹ *Id.* at 664-65.

¹³² *Id.* at 669.

¹³³ Compare 42 U.S.C. § 2000a (2001) with 42 U.S.C. § 12181 (2001).

¹³⁴ Daniel v. Paul, 395 U.S. 298 (1969).

¹³⁵ *Id.* at 305.

¹³⁶ *Martin*, 532 U.S. at 681.

¹³⁷ *Id.* at 674.

¹³⁸ See Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205 (2000); Mathew A. Stowe, *Interpreting Place of Public Accommodation Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implication*, 50 DUKE L.J. 297 (2000). The Civil Rights Division of the Department of Justice has taken the position that the ADA does apply to the Internet. See also Letter from David L. Patrick, Assistant Attorney General, Civil Rights Division, to Hon. Tom Harkin, U.S. Senate (Sept. 9, 1996), available at <http://www.usdoj.gov/crt/foia/cltr204.txt>.

¹³⁹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1727 (1993).

¹⁴⁰ See *supra* Part I.

¹⁴¹ Intel Corp., 114 Cal. Rptr.2d at 251 (quoting Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1566 (1996)).

¹⁴² *Id.*

¹⁴³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1727 (1993).

¹⁴⁴ Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 534 (E.D. Va. 2003).

¹⁴⁵ *Id.* at 535.

¹⁴⁶ *Id.* at 536.

¹⁴⁷ *Id.* at 535.

¹⁴⁸ *Id.* at 545.

¹⁴⁹ Communications Decency Act of 1996, 47 U.S.C. § 230 (2000).

¹⁵⁰ *Noah*, 261 F. Supp. 2d at 539.

¹⁵¹ One wonders if the court might have decided otherwise if the plaintiff did not ask for an injunction to stop the harassment, but instead asked for equal treatment, as compared with AOL's treatment of other offensive religious statements. Then, arguably, Noah would not be asking for AOL to act as a publisher but as a place of public accommodation.

¹⁵² *Noah*, 261 F. Supp. 2d at 539.

¹⁵³ *Id.* at 540.

¹⁵⁴ *Id.* at 544.

¹⁵⁵ *Id.* at 542.

¹⁵⁶ *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

¹⁵⁷ *Id.* at 1314.

¹⁵⁸ *See id.*

¹⁵⁹ *Carparts Distribution Ctr., Inc. v. Automotive Wolesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d. 557 (7th Cir. 1999).

¹⁶⁴ *Id.* at 558.

¹⁶⁵ *Id.* at 559 (citation omitted).

¹⁶⁶ *Access Now*, 227 F. Supp. 2d at 1321.

¹⁶⁷ *Rendon v. Valleycrest Prods. Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

¹⁶⁸ *Id.* at 1284.

¹⁶⁹ *Id.*

¹⁷⁰ *Access Now*, 227 F. Supp. 2d at 1321.

¹⁷¹ *Id.* at n.12.

¹⁷² *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540-45 (E.D. Va. 2003).

¹⁷³ *Daniel v. Paul*, 395 U.S. 298 (1969).

¹⁷⁴ *Id.* (citation omitted).

¹⁷⁵ *Noah*, 261 F. Supp. 2d at 546. *But see Intel Corp. v. Hamidi*, 71 P.3d 296, 311-12 (2003) (acknowledging that speech is protected from government and not private restrictions, but finding that state action is present in a trespass case when an injunction against speech on private property is issued, or damages are awarded for the result of speech on private property).

¹⁷⁶ DEPT OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE, at <http://www.ntia.doc.gov/ntiahome/fttn99/contents.html> (July 8, 1999).

¹⁷⁷ *Id.* at pt. 3.

¹⁷⁸ *Id.*

¹⁷⁹ DEPT OF COMMERCE, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET, at <http://www.ntia.doc.gov/ntiahome/dn/html/execsum.htm> (Feb. 2002).

¹⁸⁰ Sonia Arrison, *What Digital Divide?* (Mar. 13, 2002), at <http://news.com.com/2010-1078-858537.html>.

¹⁸¹ See generally Bradford L. Smith, *The Third Industrial Revolution: Policymaking for the Internet*, 3 COLUM. SCI. & TECH. L. REV. 1 (2001) (summarizing the debate concerning the role of technology and whether it offers the answer to problems, or represents a part of the problem itself), available at <http://www.stlr.org/cite.cgi?volume=3&article=1> (last visited Sept. 25, 2003).

¹⁸² *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 537, 543 (E.D. Va. 2003) (discussing whether the Civil Rights Act of 1964 or the ADA can be applied in cyberspace).

¹⁸³ *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (stating that “it is the role of Congress, and not this Court, to specifically expand the ADA’s definition of ‘public accommodation’ beyond physical, concrete places of public accommodation, to include ‘virtual’ places of public accommodation”).

¹⁸⁴ *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996)).

¹⁸⁵ See *supra* Part II.

¹⁸⁶ See *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹⁸⁷ See *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968).

¹⁸⁸ See *supra* note 31 and accompanying text.

¹⁸⁹ See *supra* note 32 and accompanying text.

¹⁹⁰ *Robins v. Pruneyard Shopping Ctr.*, 447 U.S. 74, 78 (1980) (quoting excerpt of the California Supreme Court’s opinion).

¹⁹¹ *EF Cultural TravelBV v. Zefer Corp.*, 318 F.3d 58, 63 (1st Cir. 2003) (“EF did not purport to exclude competitors from looking at its website and any such limitation would raise serious public policy concerns.”)

¹⁹² 18 U.S.C. § 1030 (1986).

¹⁹³ See *supra* note 46 and accompanying text.

¹⁹⁴ *EF Cultural*, 318 F.3d at 62.

¹⁹⁵ See *supra* note 27 and accompanying text.

¹⁹⁶ See *supra* Part I.

¹⁹⁷ See *supra* note 21 and accompanying text.