Chapter IX
Cyberproperty in the United States:
Trespass to Chattels & New Technology

Greg Lastowska
Rutgers School of Law, USA

ABSTRACT

During the past three decades, the growing importance of computing technology to modern society has led to regular calls in the United States for new and stronger forms of legal protection for computer equipment. Legal reforms in the United States have included the passage of laws targeting unauthorized access to computer systems, laws regulating online advertising, new criminal provisions related to identity theft, and copyright reforms protecting private interests in digital files. One of the most interesting and controversial legal developments, however, has been the acceptance by some courts of a new modification to an old common law property interest. Under the theory of cyberproperty, the owners of computer chattels have been granted the right to prohibit non-damaging contact with their systems. Essentially, cyberproperty amounts to a right to exclude others from network-connected resources (Wagner, 2005). The right is analogized to a right to exclude others from real property. Many legal scholars in the United States have supported the creation of a cyberproperty right, arguing in law review articles that this development is justified (Bellia, 2004; Epstein, 2003; Epstein, 2005; Fairfield, 2005; Hardy, 1996; McGowan, 2003; McGowan, 2005; Wagner, 2005; Warner, 2002). Other scholars, including myself, have argued against cyberproperty doctrine, claiming that it is dangerously overbroad and ill-suited to the nature of the networked environment (Burk, 2000; Carrier & Lastowka, 2007; Hunter, 2003; Lemley, 2003; Madison, 2003; O'Rourke, 2001; Quilter, 2002; Winn, 2004). This chapter has two parts. The first part explains the doctrinal evolution of cyberproperty in the United States. In the first part of this chapter,

I provide an overview of the seminal cases that led up to the California Supreme Court's decision in Intel v. Hamidi (2003). Though the Hamidi case was a landmark decision for trespass to chattels on the internet, the issue of cyberproperty in the United States remains largely an open question. In the second part of this chapter, I examine and criticize what I see as the theoretical foundations of cyberproperty. Cyberproperty grows out of two confusions. First, it is based on the strange belief that exclusion of a party from access to a computer can be easily analogized to the exclusion of a person from access to land. Second, many proponents of cyberproperty have confused the operation of computer code with the power of the law. This reasoning is based on Professor Lawrence Lessig's claim that "code is law." Both of these foundations of cyberproperty theory are suspect. Computer chattels are very much unlike land. Even if we apply standard law and economic principles to computer networks, we find that private interests in computer systems are unlike standard property interests. Also, code is unlike law in many ways. In fact, almost all cyberlaw scholars who reference the "code is law" equation do so in order to criticize the equation of code and law, not endorse it. Thus, the theoretical foundations of cyberproperty doctrine in the United States seem to be both easily identified and easily criticized. Despite this, as stated earlier, it is possible that cyberproperty doctrine will continue to develop in the United States and elsewhere.

THE DOCTRINE OF CYBERPROPERTY

This first part considers the historical evolution of cyberproperty doctrine in the United States. Cyberproperty doctrine arose from judicial efforts to remedy new forms of technological harm with the ancient doctrine of trespass to chattels. Thus, debates over cyberproperty have not been primarily policy debates over the creation of new law, but have also included disputes over the proper interpretation of existing legal doctrine as applied to evolving technology.

The first cyberproperty case that arose in the United States was *Thrifty-Tel, Inc. v. Bezenek* (1996). *Thrifty-Tel* involved two teenage boys who attempted to obtain "free" long distance service by attempting to discover account codes. Over a seven-hour period, the boys made 1,300 calls to a telephone network. This action resulted in the denial of telephone access to paying customers. The trial court found that the boys had converted the value of the phone network and awarded the phone company $50,000 in damages and fees, in part based on the phone company's own tariff fees.

The Bezenek parents appealed the decision to the California Court of Appeals, pointing out a doctrinal problem with the conversion claim raised by the phone company. The problem was that, under California property law, intangibles (such as phone service) were not subject to conversion. Though some state courts have been less formal about the tangibility requirement for the tort of conversion, the court in *Thrifty-Tel* respected this limitation. However, in order to preserve the victory of the phone company, the court found that the plaintiffs had demonstrated (although they had not pleaded it!) a cause of action for trespass to chattels.

In common law, trespass to chattels is not a tort of spatial intrusion, but simply an intentional action which causes harm to the personal property of another. A trespass to chattels lies where a defendant has, without privilege to do so, intermeddled with or disposed of the personal property of another. In practice, the trespass to chattels tort has been largely eclipsed by the tort of conversion. However, trespass to chattels recognizes a potentially more subtle form of injury. (VerSteeg, 1994).