21. Trespass to Chattels and Conversion

“Okay, here’s the situation:
My parents went away on a week’s vacation and
They left the keys to the brand new Porsche
Would they mind? Umm, well, of course not
I’ll just take it for a little spin
And maybe show it off to a couple of friends … ”

– The Fresh Prince (Will Smith), in Parents Just Don’t Understand, written by Smith, Peter Harris, and Jeffrey Allen Townes, 1988

Introduction

The torts of trespass to chattels and conversion provide ways to sue people who “mess with your stuff.”

Both torts concern chattels. The universe of tangible property is divided into two categories: chattels and realty (or real property). The difference between a chattel and realty is whether its moveable or whether its fixed to the Earth.

In some other languages, there’s no need to memorize the definitions – they are clear on their face. In French, the words for chattels and realty are, respectively, mobiliers and immobilier. Mobile things and immobile things. The German language is similarly transparent: Chattels are Mobilien, and real property is Grundstück – a word which, on its face, looks like “stuck to the ground.” (Although in terms of word roots, it’s closer to “piece of land.”)

Whether or not something can be carted off drives a big legal distinction. While merely touching someone’s real property is actionable as trespass to land, merely touching someone’s movable property is not actionable. Instead, there’s a higher bar.

How high is that bar? It’s different between the two torts of trespass to chattels and conversion. Trespass to chattels requires something
that rises to an *interference*. That could be “borrowing” something for a short time or doing some minor damage to it. The more potent tort of conversion requires something more, for instance absconding with a chattel for a lengthy period of time or doing so much damage that it’s “totaled.”

Corresponding to its higher-threshold requirement of interference, the tort of conversion has a special remedy unavailable for trespass to chattels – the forced sale. A victorious conversion plaintiff can force the defendant to pay the full market value of the chattel before it was taken or destroyed.

We’ll have the same warning here as we did with other intentional torts: Don’t be fooled by the ancientness of these doctrines. Trespass to chattels and conversion may have grown up in an era of horse thieves and cattle rustlers, but both causes of action are highly relevant to the contemporary world. As we’ll see in this chapter, these torts can play a starring role in thoroughly modern lawsuits – including fights over biomedical research and internet communications.

**The Elements of Trespass to Chattels**

Here is the blackletter formulation of trespass to chattels:

A plaintiff can establish a **prima facie case for trespass to chattels** by showing: the defendant (1) intentionally (2) interfered with the (3) plaintiff’s right of possession in a chattel.

As was the case with trespass to land, it makes sense to take these elements slightly out of order, starting with the last.

**Trespass to Chattels: Plaintiff’s Right of Possession in Chattel**

There is no requirement that the plaintiff be the owner of the chattel – merely that the plaintiff have a current right of possession. This mirrors the requirement of trespass to land. Thus, a defendant who takes a baseball bat to the plaintiff’s leased car is not protected from liability by the fact that the plaintiff does not hold the car’s title.
Trespass to Chattels: Intent

The intent requirement for trespass to chattels is somewhat analogous to that for trespass to land. Assuming the defendant does not have permission to touch or use the chattel, the defendant need only intend to act upon the chattel. There is no requirement that the defendant intend to invade any legal right of the plaintiff or intend to harm the chattel. Nor is the defendant excused by way of honest mistake. For instance, if the defendants, innocently believing they are using their own mule, mistakenly use the plaintiff’s mule to plow their field, then the defendants are liable for trespass to chattels for the value of the plowing. If the mule is injured despite defendants’ best efforts to treat it properly, the defendants are on the hook for that damage as well.

It is important here to distinguish situations where the defendant is using the chattel with permission. Suppose Paul gives Dara permission to drive his car to the neighborhood store. While going to the store, Dara accidentally drives off the road and hits a tree. Paul has no cause of action against Dara for trespass to chattels. If he is going to recover, it will have to be through a negligence action. There is no trespass, because Dara was using the chattel with permission.

Now let’s tweak the hypothetical: Dara has permission to drive Paul’s car to the neighborhood store, but on a lark, she decides to drive the car out of town to see her mother. Leaving the city limits, she accidentally drives off the road into a tree. Dara has committed trespass to chattels, since her taking the car out of town exceeded the scope of her consent. In this situation, Paul will not need to prove negligence to recover – he can use a trespass-to-chattels action to get damages for the cost of repairs to the car, regardless of whether Dara was careless in her driving.

Note that under the traditional doctrine of transferred intent, trespass to chattels is eligible for the application of transferred intent doctrine with the torts of battery, assault, false imprisonment, and trespass to land.
Trespass to Chattels: Interference

It is in the interference element that trespass to chattels differs most starkly from trespass to land.

Merely touching a chattel does not create liability. For liability to arise, the defendant must “interfere” with the plaintiff’s possession. Interference can be established by any of the following:

1. actual damage to the chattel,
2. actual dispossession of the chattel,
3. loss of use of the chattel for some appreciable amount of time, or
4. harm to the plaintiff, or to something or someone in whom the plaintiff had a legal interest, on account of the defendant’s action.

An observation we can make here is that, in contrast to battery, assault, false imprisonment, and trespass to land, it is not possible to get nominal damages for a trespass-to-chattels action that is truly trivial in nature. Suppose a busybody is upset that a motorcycle enthusiast has parked a bike over a crosswalk. Too annoyed to walk away, the busybody moves the motorcycle a few feet away so that it is out of the crosswalk. Actionable? No. There is no trespass to chattels because there is no interference. Look back over the list, and you’ll see that nothing fits: The moving of the motorcycle effected no damage, no dispossession, no loss for an appreciable time, nor harm to anything or anyone connected with the plaintiff. Thus, there is no interference.

Let’s try a different motorcycle hypothetical to illustrate a case where there is an interference: Suppose the defendant takes a motorcycle, parked in front of a diner, and drives it a couple of miles away to visit a nail salon, returning it a couple of hours later. This counts as a dispossession, so it creates liability for trespass to chattels.

**Case: Intel Corp. v. Hamidi**

The following case explores trespass to chattels in a 21st Century context.
Intel Corp. v. Hamidi
Supreme Court of California
June 30, 2003


Associate Justice KATHRYN WERDEGAR:

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.

Our conclusion does not rest on any special immunity for
communications by electronic mail; we do not hold that
messages transmitted through the Internet are exempt from the
ordinary rules of tort liability, but because the trespass to
chattels tort – unlike the causes of action just mentioned – may
not, in California, be proved without evidence of an injury to
the plaintiff’s personal property or legal interest therein.

Nor does our holding affect the legal remedies of Internet
service providers (ISP’s) against senders of unsolicited
commercial bulk e-mail (UCE), also known as “spam.” A series
of federal district court decisions has approved the use of
trespass to chattels as a theory of spammers’ liability to ISP’s,
based upon evidence that the vast quantities of mail sent by
spammers both overburdened the ISP’s own computers and
made the entire computer system harder to use for recipients,
the ISP’s customers. In those cases, the underlying complaint
was that the extraordinary quantity of UCE impaired the
computer system’s functioning. In the present case, the claimed
injury is located in the disruption or distraction caused to
recipients by the contents of the e-mail messages, an injury
entirely separate from, and not directly affecting, the possession or value of personal property.

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. (Galanty v. Paul Revere Life Ins. Co. (2000) 23 Cal.4th 368, 374, 97 Cal.Rptr.2d 67, 1 P.3d 658; Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 404, 87 Cal.Rptr.2d 453, 981 P.2d 79; Code Civ. Proc, § 437c, subd. (c).) 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.[1] 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. The trial court entered default against FACE-Intel upon that organization’s failure to answer. The court then granted Intel’s motion for summary judgment, permanently enjoining Hamidi, FACE-Intel, and their agents “from sending unsolicited e-mail to addresses on Intel's computer systems.” Hamidi appealed; FACE-Intel did not.[2]

The Court of Appeal, with one justice dissenting, affirmed the grant of injunctive relief. The majority took the view that the use of or intermeddling with another’s personal property is actionable as a trespass to chattels without proof of any actual injury to the personal property; even if Intel could not show any damages resulting from Hamidi’s sending of messages, “it showed he was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of
trespass to chattels.” The dissenting justice warned that the majority’s application of the trespass to chattels tort to “unsolicited electronic mail that causes no harm to the private computer system that receives it” would “expand the tort of trespass to chattel in untold ways and to unanticipated circumstances.”

We granted Hamidi’s petition for review.

Discussion

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 plaintiff’s rights in it. Under California law, trespass to chattels “lies where an intentional interference with the possession of personal property has proximately caused injury.” (Thrifty-Tel, Inc. v. Bezenek (1996) 46 Cal. App.4th 1559, 1566, 54 Cal.Rptr.2d 468, italics added.) In cases of interference with possession of personal property not amounting to conversion, “the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.” (Zasloiv v. Kroener, supra, 29 Cal.2d at p. 551, 176 P.2d 1, italics added.) In modern American law generally, “trespass remains as an occasional remedy for minor interferences, resulting in some damage, but not sufficiently serious or sufficiently important to amount to the greater tort” of conversion. (Prosser & Keeton, Torts, supra, § 15, p. 90, italics added.)

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
“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, italics added.)

The Court of Appeal referred to “a number of very early cases [showing that] any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass.” But while a harmless use or touching of personal property may be a technical trespass, an interference (not amounting to dispossession) is not actionable, under modern California and broader American law, without a showing of harm. As already discussed, this is the rule embodied in the Restatement and adopted by California law.

In this respect, as Prosser explains, modern day trespass to chattels differs both from the original English writ and from the action for trespass to land: “Another departure from the original rule of the old writ of trespass concerns the necessity of some actual damage to the chattel before the action can be maintained. Where the defendant merely interferes without doing any harm – as where, for example, he merely lays hands upon the plaintiff’s horse, or sits in his car – there has been a division of opinion among the writers, and a surprising dearth of authority. By analogy to trespass to land there might be a technical tort in
such a case .... Such scanty authority as there is, however, has considered that the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly it has been held that nominal damages will not be awarded, and that in the absence of any actual damage the action will not lie.” (Prosser & Keeton, Torts, supra, § 14, p. 87, italics added, fns. omitted.)

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. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 782, p. 239.) Even in an action for trespass to real property, in which damage to the property is not an element of the cause of action, “the extraordinary remedy of injunction” cannot be invoked without showing the likelihood of irreparable harm. A fortiori, to issue an injunction without a showing of likely irreparable injury in an action for trespass to chattels, in which injury to the personal property or the possessor’s interest in it is an element of the action, would make little legal sense.

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.~

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” 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, 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”, 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 (S.D. Ohio 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. Similarly, in Hotmail Corp. v. Van$ Money Pie, Inc., (N.D. Cal. 1998) 1998 WL 388389, 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.”

Building on the spamming cases, in particular CompuServe, three even more recent district court decisions addressed whether unauthorized robotic data collection from a company’s publicly accessible Web site is a trespass on the company’s computer system. (eBay, Inc. v. Bidder’s Edge, Inc., (N.D. Cal. 2000) 100 F.Supp.2d 1058 (eBay); Register.com, Inc. v. Verio, Inc. (S.D.N.Y. 2000) 126 F.Supp.2d 238; Ticketmaster Corp. v. Tickets.com, Inc., (C.D. Cal. 2000) 2000 WL 1887522.) The two district courts that found such automated data collection to constitute a trespass relied, in part, on the deleterious impact this activity could have, especially if replicated by other searchers, on the functioning of a Web site’s computer equipment.

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. 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.” 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.”

Another district court followed eBay on similar facts – a domain name registrar’s claim against a Web hosting and development site that robotically searched the registrar’s database of newly registered domain names in search of business leads – in Register.com, Inc. v. Verio, Inc. Although the plaintiff was unable to measure the burden the defendant’s searching had placed on its system, the district court, quoting the declaration of one of the plaintiff’s officers, found sufficient evidence of threatened harm to the system in the possibility the defendant’s activities would be copied by others: “I believe that if Verio’s searching of Register.com’s WHOIS database were determined to be lawful, then every purveyor of Internet-based services would engage in similar conduct.” Like eBay, the court observed, Register.com had a legitimate fear “that its servers will be flooded by search robots.”

In the third decision discussing robotic data collection as a trespass, Ticketmaster Corp. v. Tickets.com, Inc., the court, distinguishing eBay, found insufficient evidence of harm to the chattel to constitute an actionable trespass: “A basic element of trespass to chattels must be physical harm to the chattel (not present here) or some obstruction of its basic function (in the court’s opinion not sufficiently shown here) .... The comparative use [by the defendant of the plaintiff’s computer system] appears very small and there is no showing that the use interferes to any extent with the regular business of [the plaintiff].... Nor here is the specter of dozens or more parasites joining the fray, the cumulative total of which could affect the operation of [the plaintiff’s] business.”

In the decisions so far reviewed, the defendant’s use of the plaintiff’s computer system was held sufficient to support an action for trespass when it actually did, or threatened to, interfere with the intended functioning of the system, as by significantly reducing its available memory and processing power. In Ticketmaster, the one case where no such effect, actual or threatened, had been demonstrated, the court found insufficient evidence of harm to support a trespass action. These
decisions do not persuade us to Intel’s position here, for Intel has demonstrated neither any appreciable effect on the operation of its computer system from Hamidi’s messages, nor any likelihood that Hamidi’s actions will be replicated by others if found not to constitute a trespass.

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 and America Online, Inc. v. LCGM, Inc. 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.” 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.) “[I]n the absence of any actual damage the action will not lie.” (Prosser & Keeton, Torts, supra, § 14, p. 87.) Short of dispossession, personal injury, or physical damage (not present here), intermeddling is actionable only if “the chattel is impaired as to its condition, quality, or value, or ... the possessor is deprived of the use of the chattel for a substantial time.” (Rest.2d Torts, § 218, pars, (b), (c).) In particular, an actionable deprivation of use “must be for a time so substantial that it is possible to estimate the loss caused thereby. A mere momentary or theoretical deprivation of use is not sufficient unless there is a dispossession....” (Id., com. i, p. 423.) 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.

Whether the economic injuries identified in CompuServe were properly considered injuries to the ISP’s possessory interest in its personal property, the type of property interest the tort is primarily intended to protect (see Rest.2d Torts, § 218 & com. e, pp. 421-22; Prosser & Keeton, Torts, supra, § 14, p. 87), has been questioned. “[T]he court broke the chain between the trespass and the harm, allowing indirect harms to CompuServe’s business interests – reputation, customer goodwill, and employee time – to count as harms to the chattel (the server).” (Quilter, The Continuing Expansion of Cyberspace Trespass to Chattels, supra, 17 Berkeley Tech. L.J. at pp. 429-430.) “[T]his move cuts trespass to chattels free from its moorings of dispossession or the equivalent, allowing the court free reign [sic] to hunt for ‘impairment.’” (Burk, The Trouble with Trespass (2000) 4 J. Small & Emerging Bus.L. 27, 35.) But even if the loss of goodwill identified in CompuServe were the type of injury that would give rise to a trespass to chattels claim under California law, Intel’s position would not follow, for Intel’s claimed injury has even less connection to its personal property than did CompuServe’s.

CompuServe’s customers were annoyed because the system was inundated with unsolicited commercial messages, making its use for personal communication more difficult and costly. Their
complaint, which allegedly led some to cancel their CompuServe service, was about *the functioning of CompuServe’s electronic mail service*. Intel’s workers, in contrast, were allegedly distracted from their work not because of the frequency or quantity of Hamidi’s messages, but because of assertions and opinions the messages conveyed. Intel’s complaint is thus about *the contents of the messages* rather than the functioning of the company’s e-mail system. Even accepting *CompuServe’s* economic injury rationale, therefore, Intel’s position represents a further extension of the trespass to chattels tort, fictionally recharacterizing the allegedly injurious effect of a communication’s *contents* on recipients as an impairment to the device which transmitted the message.~

Nor may Intel appropriately assert a *property* interest in its employees’ time.~ 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. (San Diego Gas & Electric Co. v.
Superior Court (1996) 13 Cal.4th 893, 936-937, 55 Cal.Rptr.2d
724, 920 P.2d 669.) 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. (See eBay, supra,
100 F.Supp.2d at pp. 1065-1066 (rejecting eBay’s argument that
the defendant’s automated data searches “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”).)

The plain fact is that computers, even those making up the
Internet, are – like such older communications equipment as
telephones and fax machines – personal property, not realty.
Professor Epstein observes that “[a]lthough servers may be
moved in real space, they cannot be moved in cyberspace,”
because an Internet server must, to be useful, be accessible at a
known address. But the same is true of the telephone: to be
useful for incoming communication, the telephone must remain
constantly linked to the same number (or, when the number is changed, the system must include some forwarding or notification capability, a qualification that also applies to computer addresses). Does this suggest that an unwelcome message delivered through a telephone or fax machine should be viewed as a trespass to a type of real property? We think not: As already discussed, the contents of a telephone communication may cause a variety of injuries and may be the basis for a variety of tort actions (e.g., defamation, intentional infliction of emotional distress, invasion of privacy), but the injuries are not to an interest in property, much less real property, and the appropriate tort is not trespass.[7]

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,
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.” Another writer warns that “[c]yber-
trespass theory will curtail the free flow of price and product
information on the Internet by allowing website owners to
tightly control who and what may enter and make use of the
information housed on its Internet site.” (Chang, Bidding
on Trespass: eBay, Inc. v. Bidder's Edge, Inc. and the Abuse of Trespass
Theory in Cyberspace Law (2001) 29 AIPLA Q.J. 445, 459.) 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; see also Hunter, Cyberspace as
Place, and the Tragedy of the Digital Anticommons, supra, 91 Cal.
L.Rev. at p. 512 (“[If we continue to mark out anticommons
claims in cyberspace, not only will we preclude better, more
innovative uses of cyberspace resources, but we will lose sight of
what might be possible”).)
We discuss this debate among the amici curiae and academic writers only to note its existence and contours, not to attempt its resolution. Creating an absolute property right to exclude undesired communications from one’s e-mail and Web servers might help force spammers to internalize the costs they impose on ISP’s and their customers. But such a property rule might also create substantial new costs, to e-mail and e-commerce users and to society generally, in lost ease and openness of communication and in lost network benefits. In light of the unresolved controversy, we would be acting rashly to adopt a rule treating computer servers as real property for purposes of trespass law.

[We] are not persuaded that these perceived problems call at present for judicial creation of a rigid property rule of computer server inviolability.

DISPOSITION

The judgment of the Court of Appeal is reversed.

Justice JANICE ROGERS BROWN, dissenting:

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. (Loving v. Boren (W.D.Okla.1997) 956 F.Supp. 953, 955.) A private property owner may choose to exclude unwanted mail for any reason, including its content. (Rowan v. U.S. Post Office Dept. (1970) 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (Rowan); Tillman v. Distribution Systems of America Inc. (1996) 224 A.D.2d 79, 648 N.Y.S.2d 630, 635 (Tillman).)

The majority refuses to protect Intel’s interest in maintaining the integrity of its own system, contending that (1) Hamidi’s mailings did not physically injure the system; (2) Intel receives many unwanted messages, of which Hamidi’s are but a small fraction; (3) Intel must have contemplated that it would receive some unwanted messages; and (4) Hamidi used the email system for its intended purpose, to communicate with employees.
Other courts have found a protectible interest under very similar circumstances. In *Thrifty-Tel v. Bezenek* (1996) 46 Cal. App.4th 1559, 54 Cal.Rptr.2d 468 (*Thrifty-Tel*), the Court of Appeal found a trespass to chattels where the defendants used another party’s access code to search for an authorization code with which they could make free calls. The defendants’ calls did not damage the company’s system in any way; they were a minuscule fraction of the overall communication conducted by the phone network; and the company could have reasonably expected that some individuals would attempt to obtain codes with which to make free calls (just as stores expect shoplifters). Moreover, had the defendants succeeded in making free calls, they would have been using the telephone system as intended. (*Id* at p. 1563, 54 Cal.Rptr.2d 468.)

Because I do not share the majority’s antipathy toward property rights and believe the proper balance between expressive activity and property protection can be achieved without distorting the law of trespass, I respectfully dissent.

Those who have contempt for grubby commerce and reverence for the rarified heights of intellectual discourse may applaud today’s decision, but even the flow of ideas will be curtailed if the right to exclude is denied. As the Napster controversy revealed, creative individuals will be less inclined to develop intellectual property if they cannot limit the terms of its transmission. Similarly, if online newspapers cannot charge for access, they will be unable to pay the journalists and editorialists who generate ideas for public consumption.

This connection between the property right to objects and the property right to ideas and speech is not novel. James Madison observed, “a man’s land, or merchandize, or money is called his property.” (*Madison, Property*, Nat. Gazette (Mar. 27, 1792), quoted in McGinnis, *The Once and Future Property-Based Vision of the First Amendment* (1996) 63 U.Chi. L.Rev. 49, 65.) Likewise, “a man has a property in his opinions and the free communication of them.” (*Ibid.*). Accordingly, “freedom of speech and property rights were seen simply as different aspects of an indivisible concept of liberty.” (*Id* at p. 63.)
The principles of both personal liberty and social utility should counsel us to usher the common law of property into the digital age.

Justice STANLEY MOSK, dissenting:

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.
The law of trespass to chattels has not universally been limited to physical damage. I believe it is entirely consistent to apply that legal theory to these circumstances – that is, when a proprietary computer system is being used contrary to its owner’s purposes and expressed desires, and self-help has been ineffective. Intel correctly expects protection from an intruder who misuses its proprietary system, its nonpublic directories, and its supposedly controlled connection to the Internet to achieve his bulk mailing objectives – incidentally, without even having to pay postage.

The trial court granted an injunction to prevent threatened injury to Intel. That is the purpose of an injunction. Intel should not be helpless in the face of repeated and threatened abuse and contamination of its private computer system. The undisputed facts, in my view, rendered Hamidi’s conduct legally actionable. Thus, the trial court’s decision to grant a permanent injunction was not “a clear abuse of discretion” that may be “disturbed on appeal.”

The injunction issued by the trial court simply required Hamidi to refrain from further trespassory conduct, drawing no distinction based on the content of his emails. Hamidi remains free to communicate with Intel employees and others outside the walls – both physical and electronic – of the company.

For these reasons, I respectfully dissent.

**Questions to Ponder About Intel v. Hamidi**

**A.** What do you think of the decision in *eBay v. Bidder's Edge*, discussed by the court? Should trespass to chattel lie for automated information-inquiries of a website by a another company, such as a competitor?

**B.** What do you think of Professor Richard A. Epstein’s idea, discussed in the case, of applying property rights to the internet similar to how they are applied to land? What effect would that have? Would it be positive, negative, or neutral?

**C.** Do you think Justice Brown’s analogy to water-soluble spray paint is an apt one? Why or why not?
D. In the text prior to the case, a prima facie trespass to chattels was said to require showing that the defendant (1) intentionally (2) interfered with the (3) plaintiff’s right of possession in a chattel. Interference, we said, could include any of the following:

(1) actual damage to the chattel, (2) actual dispossession of the chattel, (3) loss of use of the chattel for some appreciable amount of time, (4) harm to the plaintiff, or harm to something or someone in whom the plaintiff had a legal interest, on account of the defendant’s action.

Does the majority in Intel reject this conception of the blackletter law? In other words, in the view of Intel, is that an accurate description of the law in California? What differences are there, if any?

The Elements of Conversion

Trespass to chattels has a big sibling – the tort of conversion. Here’s a blackletter formulation of the conversion tort:

A plaintiff can establish a prima facie case for conversion by showing: the defendant (1) intentionally (2) interfered with (3) the plaintiff’s right of possession in a chattel (4) in so substantial a manner as to warrant the remedy of a forced sale.

Conversion: Intent

The intent requirement for conversion works like that for trespass to chattels. Conversion requires only that the defendant intend the actions that constitute conversion. There is no requirement of bad motive, nor is there a requirement that the defendant intend to effect a conversion.

An example that is used in the Restatement concerns an auctioneer who takes a fine-art painting from a third party, honestly and reasonably believing that the third party is the true owner of the painting. If the auctioneer sells the painting, as instructed by the third party (the intended act), the auctioneer is liable for conversion to the painting’s actual owner.
As loose as the intent element may be, it is still there. If a person does not intentionally exercise un permitted dominion over the property, then there is no conversion. Suppose a museum is given artifacts on loan, and the museum negligently loses them. There may be a good negligence case here, but there is no conversion, because the intent element is unsatisfied.

**Conversion: Interference and Substantiality to Warrant Remedy**

For an interference with a chattel to qualify as a conversion, the defendant must exercise dominion over the chattel in a way that is so substantial that it warrants the remedy of the forced sale. There is no way to precisely delineate the threshold – it’s a matter of degree.

Let’s extend the example of the borrowed motorcycle that we used to illustrate trespass to chattels: The defendant borrows a motorcycle for a couple of hours to go to a nail salon a couple of miles away and then returns the bike to where it was originally parked. That is a trespass to chattels, since it constitutes a dispossession. Yet it is not conversion. Why not? The defendant has not exercised dominion over the chattel so seriously as to force the defendant to purchase the motorcycle. Now, if we change the hypothetical so that, instead of going to the nearby nail salon, the defendant drives the motorcycle from Milwaukee to South Dakota, then the dispossession unquestionably qualifies as a conversion.

**Conversion: The Remedy of Forced Sale (or Forced Purchase)**

The sine qua non of the conversion action is the availability of the forced-sale remedy, in which the defendant is ordered to pay full value for the converted chattel. So if someone takes a joyride in your car and drives it into a lake, you can get the court to order the joyrider to pay the full fair market value of the car at the time it was taken, with the joyrider then taking title to the waterlogged car.

Pursuing the tort of conversion is a choice. No plaintiff can be required to sue for conversion rather than trespass to chattels. Because of this, conversion cannot be used to require an unwilling
plaintiff to sell her or his goods. For this reason, the terminology of “forced sale” is confusing. In this sense, it is more accurate to call the remedy a forced purchase. In fact, some commentators use this term. The doctrine of conversion doesn’t force anyone to sell anything. Instead, it can be used to force the defendant to buy something.

An example will help make this clear. Suppose you want your roommate’s signed first edition of *Harry Potter and the Sorcerer’s Stone*, but your roommate won’t sell it. It is not possible to game the conversion tort so that you wind up getting what you want. If you take the book and your roommate wants it back, your roommate can choose to sue for trespass to chattels. (Also, using something called a writ of replevin, your roommate can get a court order, even before trial, compelling you to return the book.) Alternatively, your roommate can choose to sue for conversion, yet elect the trespass-to-chattels remedy of compensatory damages for the dispossession. The remedy of the forced sale (or forced purchase) is something plaintiffs seek when they no longer want the chattels at issue.

**Conversion: Intangibles and Capturing Increased Value**

Beyond the forced-sale remedy, conversion has some other superpowers that the tort of trespass to chattels lacks. For one, conversion can be used with many intangible assets that are tied to tangible artifacts, such as stock certificates. And conversion can be used by the plaintiff to capture the benefit of increased market values.

Suppose the defendant steals certificates for 100 shares of stock on Monday, when they are worth $100,000. On Tuesday, the price of the stock rockets, and the shares are worth $200,000. At that point, the plaintiff can use conversion to get a judgment of $200,000. Now suppose the plaintiff waits to sue, and on Wednesday morning, the value of the stock plummets to $50,000, at which point the defendant sells the shares for a loss. The plaintiff can still use conversion to get a judgment of $200,000. In this way, conversion can be used like a
ratchet to capture increases in value without a possibility of slippage to a lower value.

**Case: Moore v. U.C. Regents**

This case explores the outer bounds of conversion doctrine. In the quarter century since it was handed down, the *Moore* case has become a modern classic.

*Moore v. Regents of University of California*

Supreme Court of California

July 9, 1990

51 Cal.3d 120. JOHN MOORE, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents No. S006987.

**Justice EDWARD A. PANELLI:**

I. Introduction

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all defendants’ demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician’s disclosure obligations, but not for conversion.

II. Facts

The plaintiff is John Moore, who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde, a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc.; and (5) Sandoz
Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and “withdrawing” extensive amounts of blood, bone marrow aspirate, and other bodily substances,” Golde confirmed that diagnosis. At this time all defendants, including Golde, were aware that “certain blood products and blood components were of great value in a number of commercial and scientific efforts” and that access to a patient whose blood contained these substances would provide “competitive, commercial, and scientific advantages.”

On October 8, 1976, Golde recommended that Moore’s spleen be removed. Golde informed Moore “that he had reason to fear for his life, and that the proposed splenectomy operation ... was necessary to slow down the progress of his disease.” Based upon Golde’s representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan “formed the intent and made arrangements to obtain portions of [Moore’s] spleen following its removal” and to take them to a separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities “were not intended to have ... any relation to [Moore’s] medical ... care.” However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore’s spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde’s direction and based upon representations “that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship ....” On each of these visits Golde withdrew additional samples of “blood, blood serum, skin, bone marrow aspirate, and sperm.” On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because
he had been told that the procedures were to be performed only there and only under Golde’s direction.

“In fact, [however,] throughout the period of time that [Moore] was under [Golde’s] care and treatment, ... the defendants were actively involved in a number of activities which they concealed from [Moore] ....” Specifically, defendants were conducting research on Moore’s cells and planned to “benefit financially and competitively ... [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde’s] ongoing physician-patient relationship ....”

Sometime before August 1979, Golde established a cell line from Moore’s T-lymphocytes.

A T-lymphocyte is a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value. If the genetic material responsible for producing a particular lymphokine can be identified, it can sometimes be used to manufacture large quantities of the lymphokine through the techniques of recombinant DNA. (See generally U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells (1987) at pp. 31-46)

While the genetic code for lymphokines does not vary from individual to individual, it can nevertheless be quite difficult to locate the gene responsible for a particular lymphokine. Because T-lymphocytes produce many different lymphokines, the relevant gene is often like a needle in a haystack. Moore’s T-lymphocytes were interesting to the defendants because they overproduced certain lymphokines, thus making the corresponding genetic material easier to identify.

Cells taken directly from the body (primary cells) are not very useful for these purposes. Primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a “cell line,” a culture capable of reproducing indefinitely. This is not, however, always an easy task. “Longterm growth of human
cells and tissues is difficult, often an art,” and the probability of succeeding with any given cell sample is low, except for a few types of cells not involved in this case.

On January 30, 1981, the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. “[B]y virtue of an established policy ..., [the] Regents, Golde, and Quan would share in any royalties or profits ... arising out of [the] patent.” The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell line and the Regents as the assignee of the patent. (U.S. Patent No. 4,438,032 (Mar. 20, 1984).)

The Regent’s patent also covers various methods for using the cell line to produce lymphokines. Moore admits in his complaint that “the true clinical potential of each of the lymphokines ... [is] difficult to predict, [but] ... competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines]....”

With the Regents’ assistance, Golde negotiated agreements for commercial development of the cell line and products to be derived from it. Under an agreement with Genetics Institute, Golde “became a paid consultant” and “acquired the rights to 75,000 shares of common stock.” Genetics Institute also agreed to pay Golde and the Regents “at least $330,000 over three years, including a pro-rata share of [Golde’s] salary and fringe benefits, in exchange for ... exclusive access to the materials and research performed” on the cell line and products derived from it. On June 4, 1982, Sandoz “was added to the agreement,” and compensation payable to Golde and the Regents was increased by $110,000. “[T]hroughout this period, ... Quan spent as much as 70 [percent] of her time working for [the] Regents on research” related to the cell line.

Based upon these allegations, Moore attempted to state 13 causes of action: (1) “Conversion”; (2) “lack of informed consent”; (3) “breach of fiduciary duty”; (4) “fraud and deceit”; (5) “unjust enrichment”; (6) “quasi-contract”; (7) “bad faith breach of the implied covenant of good faith and fair dealing”;

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Each defendant demurred to each purported cause of action. The superior court, however, expressly considered the validity of only the first cause of action, conversion. Reasoning that the remaining causes of action incorporated the earlier, defective allegations, the superior court sustained a general demurrer to the entire complaint.

With one justice dissenting, the Court of Appeal reversed, holding that the complaint did state a cause of action for conversion. The Court of Appeal agreed with the superior court that the allegations against Genetics Institute and Sandoz were insufficient, but directed the superior court to give Moore leave to amend. The Court of Appeal also directed the superior court to decide “the remaining causes of action, which [had] never been expressly ruled upon.”

III. Discussion

A. Breach of Fiduciary Duty and Lack of Informed Consent

{The court discussed Moore’s claims for breach of fiduciary duty and lack of informed consent. The court remanded to the Court of Appeal, ordering it to: direct the trial court to overrule the physician’s demurrers to these causes of action and sustain, with leave to amend, the demurrers of the four other defendants to the purported causes of action for breach of fiduciary duty and lack of informed consent. The court held that a physician who is seeking a patient’s consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient’s informed consent, disclose personal interests unrelated to the patient’s health, whether research or economic, that may affect his medical judgment. – Ed. (compiled from clerk’s case summary)}

B. Conversion

Moore also attempts to characterize the invasion of his rights as a conversion – a tort that protects against interference with possessory and ownership interests in personal property. He
theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore’s argument, defendants’ unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research. While that fact does not end our inquiry, it raises a flag of caution. In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.

Conversion arose out of the common law action of trover. “We probably do not have the earliest examples of its use, but they were almost certainly cases in which the finder of lost goods did not return them, but used them himself, or disposed of them to someone else. ... By then allegations of the complaint had become more or less standardized: that the plaintiff was possessed of certain goods, that he casually lost them, that the defendant found them, and that the defendant did not return them, but instead ‘converted them to his own use.’ From that phrase in the pleading came the name of the tort.” (Prosser & Keeton, Torts (5th ed. 1984) § 15, p. 89.)

Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being’s immune system. Moore alleges, for example, that “genetic sequences ... are his tangible personal property ....” We are not, however, bound by that
conclusion of law. Moreover, as already mentioned, the genetic code for lymphokines does not vary from individual to individual.

We have recognized that, when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly. Moreover, we should be hesitant to “impose [new tort duties] when to do so would involve complex policy decisions”, especially when such decisions are more appropriately the subject of legislative deliberation and resolution. This certainly is not to say that the applicability of common law torts is limited to the historical or factual contexts of existing cases. But on occasions when we have opened or sanctioned new areas of tort liability, we “have noted that the ‘wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework.”

Accordingly, we first consider whether the tort of conversion clearly gives Moore a cause of action under existing law. We do not believe it does. Because of the novelty of Moore’s claim to own the biological materials at issue, to apply the theory of conversion in this context would frankly have to be recognized as an extension of the theory. Therefore, we consider next whether it is advisable to extend the tort to this context.

1. Moore’s Claim Under Existing Law

“To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. ... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.” Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore’s claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the
Regents’ patent – the patented cell line and the products derived from it – cannot be Moore’s property.

Neither the Court of Appeal’s opinion, the parties’ briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property.

[The court provided footnotes for the foregoing list as follows:]

human tissues – [No footnote.]

transplantable organs – “See the Uniform Anatomical Gift Act, Health and Safety Code section 7150 et seq. The act permits a competent adult to “give all or part of [his] body” for certain designated purposes, including “transplantation, therapy, medical or dental education, research, or advancement of medical or dental science.” (Health & Saf. Code, §§ 7151, 7153.) The act does not, however, permit the donor to receive “valuable consideration” for the transfer. (Health & Saf. Code, § 7155.)”

blood – “See Health and Safety Code section 1601 et seq., which regulates the procurement, processing, and distribution of human blood. Health and Safety Code section 1606 declares that “[t]he procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same ... is declared to be, for all purposes whatsoever, the rendition of a service ... and shall not be construed to be, and is declared not to be, a sale ... for any purpose or purposes whatsoever.””

of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration.”

pituitary glands — “See Government Code section 27491.46: “The coroner [following an autopsy] shall have the right to retain pituitary glands solely for transmission to a university, for use in research or the advancement of medical science” (id., subd. (a)) or “for use in manufacturing a hormone necessary for the physical growth of persons who are, or may become, hypopituitary dwarfs ...” (id. , subd. (b)).”

corneal tissue — “See Government Code section 27491.47: “The coroner may, in the course of an autopsy [and subject to specified conditions], remove ... corneal eye tissue from a body ...” (id. , subd. (a)) for “transplant, therapeutic, or scientific purposes” (id. , subd. (a)(5)).”

dead bodies — “See Health and Safety Code section 7000 et seq. While the code does not purport to grant property rights in dead bodies, it does give the surviving spouse, or other relatives, “[t]he right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent ....” (Health & Saf. Code, § 7100.)”

It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy rights. (Lugosi v. Universal Pictures (1979) 25 Cal.3d 813; Motschenbacher v. R. J. Reynolds Tobacco Company (9th Cir. 1974) 498 F.2d 821.) These opinions hold that every person has a proprietary interest in his own likeness and
that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. Each court stated, following Prosser, that it was “pointless” to debate the proper characterization of the proprietary interest in a likeness. For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted.

No party has cited a decision supporting Moore’s argument that excised cells are “a species of tangible personal property capable of being converted.” On this point the Court of Appeal cited only Venner v. State (1976) 30 Md.App. 599, which dealt with the seizure of a criminal defendant’s feces from a hospital bedpan by police officers searching for narcotics. The court held that the defendant had abandoned his excrement for purposes of the Fourth Amendment.

In dictum, the Venner court observed that “[i]t is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body ....” This slender reed, alone, supported the Court of Appeal’s conclusion in the case before us that “it cannot be said that a person has no property right in materials which were once part of his body.” However, because Venner involved a criminal-procedure dispute over the suppression of evidence, and not a civil dispute over who was entitled to the economic benefit of property, the opinion is grounded in markedly different polices and has little relevance to the case before us.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that “[i]f the courts have found a sufficient proprietary interest in one’s persona, how could one not have a right in one’s own genetic material, something far more profoundly the essence of one’s human uniqueness than a
name or a face?” However, as the defendants’ patent makes clear – and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent – the goal and result of defendants’ efforts has been to manufacture lymphokines.

Inside the cell, a gene produces a lymphokine by attracting protein molecules, which bond to form a strand of “messenger RNA” (mRNA) in the mirror image of the gene. The mRNA strand then detaches from the gene and attracts other protein molecules, which bond to form the lymphokine that the original gene encoded. (OTA Rep., supra, at pp. 38-44.)

In the laboratory, scientists sometimes use genes to manufacture lymphokines by cutting a gene from the chromosome and grafting it onto the chromosome of a bacterium. The resulting chromosome is an example of “recombinant DNA,” or DNA composed of genetic material from more than one individual or species. As the bacterium lives and reproduces, the engrafted gene continues to produce the lymphokine that the gene encodes.

It can be extremely difficult to identify the gene that carries the code for a particular lymphokine. “Since the amount of DNA in a human cell is enormous compared to the amount present in an individual gene, the search for any single gene within a cell is like searching for needle in a haystack.” As the Regents’ patent application explains, the significance of a cell that overproduces mRNA is to make the difficult search for a particular gene unnecessary. (U.S. Patent No. 4,438,032 (Mar. 20, 1984) at col. 2.) If one has an adequate source of mRNA – the gene’s mirror image – it can be used to make a copy, or clone, of the original gene. The cloned gene can then be used in recombinant DNA, as already described, for large-scale production of lymphokines.

Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being’s immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in
every person; it is no more unique to Moore than the number of vertebras in the spine or the chemical formula of hemoglobin.

By definition, a gene responsible for producing a protein found in more than one individual will be the same in each. It is precisely because everyone needs the same basic proteins that proteins produced by one person’s cells may have therapeutic value for another person. Thus, the proteins that defendants hope to manufacture — lymphokines such as interferon — are in no way a “likeness” of Moore.

The next consideration that makes Moore’s claim of ownership problematic is California statutory law, which drastically limits a patient’s control over excised cells. Pursuant to Health and Safety Code section 7054.4, “[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety.” Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute’s practical effect is to limit, drastically, a patient’s control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to “property” or “ownership” for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit “scientific use” contrary to the patient’s expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right,
however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

Finally, the subject matter of the Regents’ patent – the patented cell line and the products derived from it – cannot be Moore’s property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore’s body. Federal law permits the patenting of organisms that represent the product of “human ingenuity,” but not naturally occurring organisms. Human cell lines are patentable because “[l]ong-term adaptation and growth of human tissues and cells in culture is difficult – often considered an art ... ,” and the probability of success is low. (OTA Rep., supra, at p. 33.*) It is this inventive effort that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore’s allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention.

The distinction between primary cells (cells taken directly from the body) and patented cell lines is not purely a legal one. Cells change while being developed into a cell line and continue to change over time. “[I]t is clear that most established cell lines ... are not completely normal. Besides [an] enhanced growth potential relative to primary cells, they frequently have highly abnormal chromosome numbers ....” (2 Watson et al., Molecular Biology of the Gene (4th ed. 1987) p. 967.)

The cell line in this case, for example, after many replications began to generate defective and rearranged forms of the HTLV-II virus. A published research paper to which defendants contributed suggests that “the defective forms of virus were probably generated during the passage [or replication] of the cells rather than being present in the original tumour cells of the patient.” Possibly because of these changes in the virus, the cell line has developed new abilities to grow in different media. (Chen, McLaughlin, Gasson, Clark & Golde, Molecular Characterization of Genome of a Novel Human T-cell Leukaemia Virus, Nature (Oct. 6, 1983) vol. 305, p. 505.)
We find it interesting that Justice Mosk, in his dissent, would object to our “summar[y] of the salient conclusions” (People v. Guerra (1984) 37 Cal.3d 385, 412 [opn. by Mosk, J.]) of relevant scientific literature in setting forth the technological background of this case. (Dis. opn. of Mosk, J., post, at p. 182.) This court has previously cited scientific literature to show, for example, that reports of hypnotic recall “form[ed] a scientifically inadequate basis for drawing conclusions about the memory processes of the large majority of the population” (People v. Shirley (1982) 31 Cal.3d 18, 59 [opn. by Mosk, J.]), and that eyewitness testimony can be unreliable (People v. McDonald (1984) 37 Cal.3d 351, 365-367 [opn. by Mosk, J.]).

2. Should Conversion Liability Be Extended?

As we have discussed, Moore’s novel claim to own the biological materials at issue in this case is problematic, at best. Accordingly, his attempt to apply the theory of conversion within this context must frankly be recognized as a request to extend that theory. While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore’s claim demands express consideration of the policies to be served by extending liability rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.

There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore’s complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients’ rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent patient’s right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-standing principles of fiduciary duty and informed consent. This policy
weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor’s wishes.

To reach an appropriate balance of these policy considerations is extremely important. In its report to Congress, the Office of Technology Assessment emphasized that “[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry, particularly when the rights are asserted long after the specimen was obtained. The assertion of rights by sources would affect not only the researcher who obtained the original specimen, but perhaps other researchers as well.

“Biological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories [such as conversion]. Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.”

Indeed, so significant is the potential obstacle to research stemming from uncertainty about legal title to biological materials that the Office of Technology Assessment reached this striking conclusion: “[R]egardless of the merit of claims by the different interested parties, resolving the current uncertainty may be more important to the future of biotechnology than resolving it in any particular way.” (OTA Rep., supra, at p. 27.)

We need not, however, make an arbitrary choice between liability and nonliability. Instead, an examination of the relevant
policy considerations suggests an appropriate balance: Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients’ rights of privacy and autonomy without unnecessarily hindering research.

To be sure, the threat of liability for conversion might help to enforce patients’ rights indirectly. This is because physicians might be able to avoid liability by obtaining patients’ consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort, it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient’s right to make an informed decision.

“The foundation for the action for conversion rests neither in the knowledge nor the intent of the defendant. ... [Instead,] “the tort consists in the breach of what may be called an absolute duty; the act itself ... is unlawful and redressible as a tort.”’

“Conversion is a species of strict liability in which questions of good faith, lack of knowledge and motive are ordinarily immaterial.”

In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research.

The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. Thousands of human cell lines already exist in tissue repositories, such as the American Type Culture Collection and those operated by the National Institutes of Health and the American Cancer Society. These repositories respond to tens of thousands of requests for samples annually. Since the patent office requires the holders of patents on cell lines to make samples available to anyone, many patent holders place their cell lines in repositories to avoid the administrative burden of
responding to requests. At present, human cell lines are routinely copied and distributed to other researchers for experimental purposes, usually free of charge. This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit.

Justice ALLEN BROUSSARD, concurring and dissenting:

“When it turns to the conversion cause of action,” the majority opinion fails to maintain its focus on the specific allegations before us. Concerned that the imposition of liability for conversion will impede medical research by innocent scientists who use the resources of existing cell repositories – a factual setting not presented here – the majority opinion rests its holding, that a conversion action cannot be maintained, largely on the proposition that a patient generally possesses no right in a body part that has already been removed from his body. Here, however, plaintiff has alleged that defendants interfered with his legal rights before his body part was removed. Although a patient may not retain any legal interest in a body part after its removal when he has properly consented to its removal and use for scientific purposes, it is clear under California law that before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. If, as alleged in this case, plaintiff’s doctor improperly interfered with plaintiff’s right to control the use of a body part by wrongfully withholding material information from him before its removal, under traditional common law principles plaintiff may maintain a conversion action to recover the economic value of the right to control the use of his body part. Accordingly, I dissent from the majority opinion insofar as it rejects plaintiff’s conversion cause of action.

Justice STANLEY MOSK, dissenting:

I dissent.

The majority cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body,
and conclude in effect that in the present case we should also “look for guidance” to the Legislature rather than to the law of conversion. Surely this argument is out of place in an opinion of the highest court of this state. As the majority acknowledge, the law of conversion is a creature of the common law. “The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.” In short, as the United States Supreme Court has aptly said, “This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.” ... Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them.” (Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 394.)

Especially is this true in the field of torts. I need not review the many instances in which this court has broken fresh ground by announcing new rules of tort law: time and again when a new rule was needed we did not stay our hand merely because the matter was one of first impression. For example, in Sindell v. Abbott Laboratories (1980) 26 Cal.3d 588, we adopted a “market share” theory of liability for injury resulting from administration of a prescription drug and suffered by a plaintiff who without fault cannot trace the particular manufacturer of the drug that caused the harm. Like the opinion in the case at bar, the dissent in Sindell objected that market share liability was “a wholly new theory” and an “unprecedented extension of liability”, and urged that in view of the economic, social, and medical effects of this new rule the decision to adopt it should rest with the Legislature. We nevertheless declared the new rule for sound policy reasons.

Even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the
majority, Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had *the right to do with his own tissue whatever the defendants did with it*: i.e., he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that their right to do the foregoing is not barred by section 7054.4 and is a significant property right, as they have demonstrated by their deliberate concealment from Moore of the true value of his tissue, their efforts to obtain a patent on the Mo cell line, their contractual agreements to exploit this material, their exclusion of Moore from any participation in the profits, and their vigorous defense of this lawsuit. The Court of Appeal summed up the point by observing that "Defendants’ position that plaintiff cannot own his tissue, but that they can, is fraught with irony.” It is also legally untenable."

My respect for this court as an institution compels me to make one last point: I dissociate myself completely from the amateur biology lecture that the majority impose on us throughout their opinion. For several reasons, the inclusion of most of that material in an opinion of this court is improper.

First, with the exception of defendants’ patent none of the material in question is part of the record on appeal as defined by the California Rules of Court. Because this appeal is taken from a judgment of dismissal entered after the sustaining of general and special demurrers, there is virtually no record other than the pleadings. The case has never been tried, and hence there is no evidence whatever on the obscure medical topics on which the majority presume to instruct us. Instead, all the documents that the majority rely on for their medical explanations appear in an appendix to defendant Golde’s opening brief on the merits. Such an appendix, however, is no more a part of the *record* than the brief itself, because the record comprises only the materials before the trial court when it made its ruling. Nor could Golde have moved to augment the record to include any of these documents, because none was “part of the original superior court file,” a prerequisite to such augmentation. “As a general
rule, documents not before the trial court cannot be included as a part of the record on appeal.”

Second, most of these documents bear solely or primarily on the majority’s discussion of whether Moore’s “genetic material” was or was not “unique”, but that entire discussion is legally irrelevant to the present appeal. As Justice Broussard correctly observes in his separate opinion, “the question of uniqueness has no proper bearing on plaintiff’s basic right to maintain a conversion action; ordinary property, as well as unique property, is, of course, protected against conversion.”

Third, this nonissue is also a noncontention. The majority claim that “Moore relies ... primarily” on an analogy to certain right-of-privacy decisions, but this is not accurate. Under our rules, as in appellate practice generally, the parties to an appeal are confined to the contentions raised in their briefs (see Cal. Rules of Court, rule 29.3). In his brief on the merits in this court Moore does not even cite, less still “rely primarily,” on the right-of-privacy decisions discussed by the majority, nor does he draw any analogy to the rule of those decisions. It is true that in the course of oral argument before this court, counsel for Moore briefly paraphrased the analogy argument that the majority now attribute to him; but a party may not, of course, raise a new contention for the first time in oral argument.

I would affirm the decision of the Court of Appeal to direct the trial court to overrule the demurrers to the cause of action for conversion.

**Questions to Ponder About UC Regents v. Moore**

**A.** The court disapproves of John Moore’s “claims ownership of the results of socially important medical research,” yet the court looks approvingly on the patent that UCLA obtained on Moore’s cell line. The court appears to make this differentiation on the basis that culturing a cell line is “often considered an art” and is a “product of human ingenuity.” Are you persuaded by this distinction? Should Moore be incapable of owning his excised cells while UCLA can commercially exploit them?
B. The court says there is no support for Moore’s claim that excised cells can be considered a kind of tangible property for purposes of conversion. Does that mean that no one could convert the cells from UCLA? Suppose researchers from a rival lab at USC managed to surreptitiously take the excised cells from UCLA’s lab, and USC subsequently patented them, selling them for billions of dollars. Would UCLA have a claim for conversion against USC?

C. Do you find the court’s listing of California statutes as persuasive on the point that human biological materials are not to be “abandon[ed] to the general law of personal property”?

D. The court wrote that “a fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, is protected by the fiduciary-duty and informed-consent theories.” Do you agree with the court that these non-conversion claims sufficiently protect such a right? Note that Dr. David W. Golde personally received millions of dollars from providing Moore’s cell line to Genetics Institute, and UCLA may have received much more, with the overall worth being perhaps $3 billion. Suppose you were a lawyer for UCLA and Golde as they contemplated how to deal with Moore, and suppose you could accurately predict how this case would come out. Would you advise your clients to fully inform Moore about the intended research? Or would you advise them to proceed exactly as they did?