

United States District Court,
S.D. Ohio, Eastern Division

COMPUSERVE INCORPORATED, Plaintiff,
v.
CYBER PROMOTIONS, INC. and Sanford
Wallace, Defendants.

Feb. 3, 1997

MEMORANDUM OPINION AND ORDER

GRAHAM, District Judge.

This case presents novel issues regarding the commercial use of the Internet, specifically the right of an online computer service to prevent a commercial enterprise from sending unsolicited electronic mail advertising to its subscribers.

[Plaintiff CompuServe Inc. is an Internet service provider and a provider of e-mail accounts (e.g., lewisclark@compuserve.com) to tens of thousands of CompuServe subscribers. Defendants Cyber Promotions, Inc. and its president Sanford Wallace are in the business of sending unsolicited e-mail advertisements on behalf of themselves and their clients to hundreds of thousands of Internet users, many of whom are CompuServe subscribers.]

This matter is before the Court on the application of CompuServe for a preliminary injunction which would . . . prevent defendants from sending unsolicited advertisements to CompuServe subscribers.

For the reasons which follow, this Court holds that where defendants engaged in a course of conduct of transmitting a substantial volume of electronic data in the form of unsolicited e-mail to plaintiff's proprietary computer equipment, where defendants continued such practice after repeated demands to cease and desist, and where defendants deliberately evaded plaintiff's affirmative efforts to protect its computer equipment from such use, plaintiff has a viable

claim for trespass to personal property and is entitled to injunctive relief to protect its property.

I.

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Internet users often pay a fee for Internet access. However, there is no per-message charge to send e-mails over the Internet and such messages usually reach their destination within minutes. Thus e-mail provides an opportunity to reach a wide audience quickly and at almost no cost to the sender. It is not surprising therefore that some companies, like defendant Cyber Promotions, have begun using the Internet to distribute advertisements by sending the same unsolicited commercial message to hundreds of thousands of Internet users at once. Defendants refer to this as "bulk e-mail," while plaintiff refers to it as "junk e-mail." In the vernacular of the Internet, unsolicited e-mail advertising is sometimes referred to pejoratively as "spam."

. . . . E-mail sent to CompuServe subscribers is processed and stored on CompuServe's proprietary computer equipment. Thereafter, it becomes accessible to CompuServe's subscribers, who can access CompuServe's equipment and electronically retrieve those messages.

Over the past several months, CompuServe has received many complaints from subscribers threatening to discontinue their subscription unless CompuServe prohibits electronic mass mailers from using its equipment to send unsolicited advertisements. CompuServe asserts that the volume of messages generated by such mass mailings places a significant burden on its equipment which has finite processing and storage capacity. CompuServe receives no payment from the mass mailers for processing their unsolicited advertising. However, CompuServe's subscribers pay for their access to CompuServe's services in increments of time and thus the process of accessing, reviewing and discarding unsolicited e-mail costs them money, which is one of the reasons for their complaints. CompuServe has notified defendants that they are prohibited from using its proprietary computer equipment to process and store

unsolicited e-mail and has requested them to cease and desist from sending unsolicited e-mail to its subscribers. Nonetheless, defendants have sent an increasing volume of e-mail solicitations to CompuServe subscribers.

In an effort to shield its equipment from defendants' bulk e-mail, CompuServe has implemented software programs designed to screen out the messages and block their receipt. In response, defendants have modified their equipment and the messages they send in such a fashion so as to circumvent CompuServe's screening software. . . . Also, defendants have developed the capability of configuring their computer servers to conceal their true [IP address] and appear on the Internet as another computer, further concealing the true origin of the messages. By manipulating this data, defendants have been able to continue sending messages to CompuServe's equipment in spite of CompuServe's protests and protective efforts.

Defendants assert that they possess the right to continue to send these communications to CompuServe subscribers. CompuServe contends that, in doing so, the defendants are trespassing upon its personal property.

II.

The grant or denial of a motion for preliminary injunction rests within the discretion of the trial court. In determining whether a motion for preliminary injunction should be granted, a court must consider and balance four factors: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction. . . . A preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a full trial on the merits. Indeed, "[a] party . . . is not required to prove his case in full at a preliminary injunction hearing."

III.

...

IV.

...

CompuServe predicates . . . its motion for a preliminary injunction on the common law theory of trespass to personal property or to chattels, asserting that defendants' continued transmission of electronic messages to its computer equipment constitutes an actionable tort.

Trespass to chattels has evolved from its original common law application, concerning primarily the asportation of another's tangible property, to include the unauthorized use of personal property:

Its chief importance now, is that there may be recovery . . . for interferences with the possession of chattels which are 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. Trespass to chattels survives today, in other words, largely as a little brother of conversion.

Prosser & Keeton, Prosser and Keeton on Torts, § 14, 85-86 (1984). . . . While authority under Ohio law respecting an action for trespass to chattels is extremely meager, it appears to be an actionable tort. *See* [citations].

Both plaintiff and defendants cite the Restatement (Second) of Torts to support their respective positions. In determining a question unanswered by state law, it is appropriate for this Court to consider such sources as the restatement of the law and decisions of other jurisdictions. . . .

The Restatement § 217(b) states that a trespass to chattel may be committed by intentionally using or intermeddling with the chattel in possession of another. Restatement § 217, Comment e defines physical "intermeddling" as follows:

... intentionally bringing about a physical contact with the chattel. The actor may

commit a trespass by an act which brings him into an intended physical contact with a chattel in the possession of another[.]

Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action. See [citations]. It is undisputed that plaintiff has a possessory interest in its computer systems. Further, defendants' contact with plaintiff's computers is clearly intentional. Although electronic messages may travel through the Internet over various routes, the messages are affirmatively directed to their destination.

Defendants, citing Restatement (Second) of Torts § 221, which defines "dispossession", assert that not every interference with the personal property of another is actionable and that physical dispossession or substantial interference with the chattel is required. Defendants then argue that they did not, in this case, physically dispossess plaintiff of its equipment or substantially interfere with it. However, the Restatement (Second) of Torts § 218 defines the circumstances under which a trespass to chattels may be actionable:

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

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

Therefore, an interference resulting in physical dispossession is just one circumstance under which a defendant can be found liable. Defendants suggest that "[u]nless an alleged trespasser actually takes physical custody of the property or physically damages it, courts will not find the 'substantial interference' required to

maintain a trespass to chattel claim." . . . It is clear from a reading of Restatement § 218 that an interference or intermeddling that does not fit the § 221 definition of "dispossession" can nonetheless result in defendants' liability for trespass. . . .

A plaintiff can sustain an action for trespass to chattels, as opposed to an action for conversion, without showing a substantial interference with its right to possession of that chattel. Harm to the personal property or diminution of its quality, condition, or value as a result of defendants' use can also be the predicate for liability. Restatement § 218(b).

An unprivileged use or other intermeddling with a chattel which results in actual impairment of its physical condition, quality or value to the possessor makes the actor liable for the loss thus caused. In the great majority of cases, the actor's intermeddling with the chattel impairs the value of it to the possessor, as distinguished from the mere affront to his dignity as possessor, only by some impairment of the physical condition of the chattel. There may, however, 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.... In such a case, the intermeddling is actionable even though the physical condition of the chattel is not impaired.

Restatement (Second) of Torts § 218, comment h. In the present case, any value CompuServe realizes from its computer equipment is wholly derived from the extent to which that equipment can serve its subscriber base. Michael Mangino, a software developer for CompuServe who monitors its mail processing computer equipment, states by affidavit that handling the enormous volume of mass mailings that CompuServe receives places a tremendous burden on its equipment. Defendants' more recent practice of evading CompuServe's filters by disguising the origin of their messages

commandeers even more computer resources because CompuServe's computers are forced to store undeliverable e-mail messages and labor in vain to return the messages to an address that does not exist. To the extent that defendants' multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff's computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants' conduct.

Next, plaintiff asserts that it has suffered injury aside from the physical impact of defendants' messages on its equipment. Restatement § 218(d) also indicates that recovery may be had for a trespass that causes harm to something in which the possessor has a legally protected interest. Plaintiff asserts that defendants' messages are largely unwanted by its subscribers, who pay incrementally to access their e-mail, read it, and discard it. Also, the receipt of a bundle of unsolicited messages at once can require the subscriber to sift through, at his expense, all of the messages in order to find the ones he wanted or expected to receive. These inconveniences decrease the utility of CompuServe's e-mail service and are the foremost subject in recent complaints from CompuServe subscribers. Patrick Hole, a customer service manager for plaintiff, states by affidavit that in November 1996 CompuServe received approximately 9,970 e-mail complaints from subscribers about junk e-mail, a figure up from approximately two hundred complaints the previous year. Approximately fifty such complaints per day specifically reference defendants. Defendants contend that CompuServe subscribers are provided with a simple procedure to remove themselves from the mailing list. However, the removal procedure must be performed by the e-mail recipient at his expense, and some CompuServe subscribers complain that the procedure is inadequate and ineffectual.

Many subscribers have terminated their accounts specifically because of the unwanted receipt of bulk e-mail messages. Defendants'

intrusions into CompuServe's computer systems, insofar as they harm plaintiff's business reputation and goodwill with its customers, are actionable under Restatement § 218(d).

...

The owner of personal property can create a privilege in the would-be trespasser by granting consent to use the property. A great portion of the utility of CompuServe's e-mail service is that it allows subscribers to receive messages from individuals and entities located anywhere on the Internet. Certainly, then, there is at least a tacit invitation for anyone on the Internet to utilize plaintiff's computer equipment to send e-mail to its subscribers. However, in or around October 1995, CompuServe employee Jon Schmidt specifically told Mr. Wallace that he was "prohibited from using CompuServe's equipment to send his junk e-mail messages." There is apparently some factual dispute as to this point, but it is clear from the record that Mr. Wallace became aware at about this time that plaintiff did not want to receive messages from Cyber Promotions and that plaintiff was taking steps to block receipt of those messages.

Defendants argue that plaintiff made the business decision to connect to the Internet and that therefore it cannot now successfully maintain an action for trespass to chattels. Their argument is analogous to the argument that because an establishment invites the public to enter its property for business purposes, it cannot later restrict or revoke access to that property, a proposition which is erroneous under Ohio law. See, e.g., *State v. Carriker*, 5 Ohio App. 2d 255, (1964) (the law in Ohio is that a business invitee's privilege to remain on the premises of another may be revoked upon the reasonable notification to leave by the owner or his agents). On or around October 1995, CompuServe notified defendants that it no longer consented to the use of its proprietary computer equipment. Defendants' continued use thereafter was a trespass. Restatement (Second) of Torts § 217, Comment f ("The actor may commit a new trespass by continuing an intermeddling which he has already begun, with or without the

consent of the person in possession. Such intermeddling may persist after the other's consent, originally given, has been terminated.”).

Further, CompuServe expressly limits the consent it grants to Internet users to send e-mail to its proprietary computer systems by denying unauthorized parties the use of CompuServe equipment to send unsolicited electronic mail messages. This policy statement, posted by CompuServe online, states as follows:

CompuServe is a private online and communications services company. CompuServe does not permit its facilities to be used by unauthorized parties to process and store unsolicited e-mail. If an unauthorized party attempts to send unsolicited messages to e-mail addresses on a CompuServe service, CompuServe will take appropriate action to attempt to prevent those messages from being processed by CompuServe. Violations of CompuServe's policy prohibiting unsolicited e-mail should be reported to....

Defendants Cyber Promotions, Inc. and its president Sanford Wallace have used plaintiff's equipment in a fashion that exceeds that consent. The use of personal property exceeding consent is a trespass. Restatement (Second) of Torts § 256. It is arguable that CompuServe's policy statement, insofar as it may serve as a limitation upon the scope of its consent to the use of its computer equipment, may be insufficiently communicated to potential third-party users when it is merely posted at some location on the network. However, in the present case the record indicates that defendants were actually notified that they were using CompuServe's equipment in an unacceptable manner. To prove that a would-be trespasser acted with the intent required to support liability in tort it is crucial that defendant be placed on notice that he is trespassing.

...

Plaintiff has demonstrated a likelihood of success on the merits [and] has submitted affidavits supporting its contention that it will suffer irreparable harm without the grant of the

preliminary injunction. . . . Plaintiff has demonstrated that defendants' intrusions into their computer systems harm plaintiff's business reputation and goodwill. This is the sort of injury that warrants the issuance of a preliminary injunction because the actual loss is impossible to compute.

It is improbable that granting the injunction will cause substantial harm to defendant. Even with the grant of this injunction, defendants are free to disseminate their advertisements in other ways not constituting trespass to plaintiff's computer equipment. Further, defendants may continue to send electronic mail messages to the tens of millions of Internet users who are not connected through CompuServe's computer systems.

Finally, the public interest is advanced by the Court's protection of the common law rights of individuals and entities to their personal property. Defendants raise First Amendment concerns and argue that an injunction will adversely impact the public interest. High volumes of junk e-mail devour computer processing and storage capacity, slow down data transfer between computers over the Internet by congesting the electronic paths through which the messages travel, and cause recipients to spend time and money wading through messages that they do not want. It is ironic that if defendants were to prevail on their First Amendment arguments, the viability of electronic mail as an effective means of communication for the rest of society would be put at risk. In light of the foregoing discussion, those arguments are without merit. . . .

Having considered the relevant factors, this Court concludes that the preliminary injunction that plaintiff requests is appropriate. . . .