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Fighting for the Right to Communicate

By JILL ANDRESKY FRASER

In its simplest terms, this is all about one man, one company and six e-mail messages. Oh yes, and one lawsuit, which took nearly five years to wind its way through the California court system.

Yet the Intel Corporation v. Hamidi never has been all that simple.

It originated in a battle against Intel, the giant semiconductor manufacturer, by Kourosh Kenneth Hamidi, known as Ken, who has spent eight years trying to rally employees at Intel, his former employer, to resist what he considers abusive workplace practices. Mr. Hamidi, who was fired by Intel in 1995 for what it terms cause, sent six e-mail messages after his departure to thousands of company employees, prompting Intel to sue him for trespassing.

Over the last few years, the case has assumed importance far beyond one man and one company. A range of public interest activists, cyberlaw experts and labor organizers believed that the suit's decision, if it favored Intel, would restrict free speech and other activities that people now take for granted on the Internet. Business leaders like the National Association of Manufacturers sided with Intel, arguing that the company had the right to block the electronic transmissions since they passed through Intel's private property.

Two weeks ago, the California Supreme Court overturned two lower court decisions and sided with Mr. Hamidi rather than Intel, arguing that Intel could not properly use state trespass laws to block Mr. Hamidi's e-mail messages since its property had not been damaged by them.

Already, the ruling has come to be viewed as a landmark decision affecting the future of the Internet. Other states are likely to follow California's legal precedent, according to lawyers, legal scholars and cyberspace rights advocates. The decision is not expected to be appealed to the United States Supreme Court, since "trespass" is a state issue.

The consequences of this victory, meanwhile, are equally great for Mr. Hamidi, who has struggled against enormous odds, in the face of public ridicule, financial ruin and a number of stinging legal defeats. With the California Supreme Court's decision, he has quickly become a symbol of initiatives for cyberspace rights and fair working conditions.

If life were a 1940's movie, the hero of this man-against-the-system drama might be played by Gregory Peck. But at the center of this legal maelstrom is a deceptively ordinary looking 56-year-old man, who lives in Citrus Heights, Calif., a suburb of Sacramento, and now works as a compliance officer for the state's Franchise Tax Board.

His background was scarcely ordinary, however. Born in Tehran, Mr. Hamidi spent 11 years during the 1960's and 70's as an officer and instructor in Iran's air force, struggling to be released from military service and to win permission to emigrate to the United States.

"Living under the shah's dictatorship, I used to watch John Wayne movies and dream about freedom," he recently recalled. "I remember being on the plane, finally flying to the U.S. with my wife and our 3 1/2-year-old daughter and telling them, 'I will work. I'll be able to vote. I'll be free. Our children will be free.'"
That was 1978. The Hamidis settled in Los Angeles, where their struggle became a financial one. "In the beginning, I worked three jobs," Mr. Hamidi said. "I'd wake up at 3 o'clock in the morning, because I had a newspaper delivery route. I was 31 years old and I was delivering newspapers. Then I'd rush home, shower and get dressed in a suit and tie, and go to my next job, which was managing a small, bilingual travel agency." After that job, he would head home for dinner and a change of clothes, and then on to the evening shift at a liquor store.

Along the way, Mr. Hamidi put himself through college, majoring in engineering; eventually he earned an M.B.A. He remembers 1986 as a glorious year. "I became a citizen," he said. "I received my engineering degree. And I got hired by Intel."

But in September 1990, the glorious days ended when the car that he was driving home from a work-related conference was hit from behind. Mr. Hamidi was left in chronic pain with shoulder and neck injuries. Although the injuries resisted treatment, he continued to work for more than a year, often putting in what he said were 16-hour workdays. "I was sleep-deprived because I was working so hard to keep up with my workload and I was in so much pain," he said. "I was fainting at the office. I became clinically depressed." In February 1992, he took a prolonged medical leave.

Mr. Hamidi filed a claim for workers' compensation benefits, contending that he had work-related physical and mental injuries. His claim was initially granted, but it was overturned upon appeal from Intel. Mr. Hamidi said he had unsuccessfully tried to return to his job. Chuck Mulloy, an Intel spokesman, would not comment on specifics, noting only that the company dismissed the engineer for cause in 1995.

Living with chronic pain and constant financial anxieties, Mr. Hamidi said he was hospitalized twice, under a suicide watch. "I was losing everything I had," he said. Unable to find another job, with little income except state disability payments, Mr. Hamidi declared personal bankruptcy in 1997.

Despite the magnitude of his personal problems, Mr. Hamidi found his calling in a growing determination to publicize his accusations about excessive job demands and unfair employment practices at Intel.

In 1995, he started an organization that soon came to be known as FACE Intel, for former and current employees of Intel, and the next year he developed a Web site, www.faceintel.com, to disseminate information, including accounts that contended there was a connection between job stress at Intel and employee suicides and heart attacks. Mr. Mulloy at Intel said such statements "are examples of the absurdity and the falsehoods that Mr. Hamidi continues to perpetuate." Mr. Hamidi also filed a wrongful termination lawsuit against Intel, but later dropped it for lack of resources.

TO some people Mr. Hamidi was considered crazy or vengeful. But his movement attracted attention. He conducted numerous interviews with reporters. He handed out leaflets to students at universities where Intel was recruiting. And at some point, he obtained two diskettes containing an electronic file of Intel's employee telephone book. (According to Mr. Hamidi, this came to him through the mail in an unmarked envelope.)

The rest, as they say, is history.

As the California Supreme Court noted in its 4-to-3 decision on June 30, the facts of Intel v. Hamidi are "simple and undisputed."

On six occasions, over a period totaling 21 months, Mr. Hamidi sent "a single e-mail message to between 8,000 and 35,000 Intel employees, highlighting what Mr. Hamidi considered to be Intel's abusive and discriminatory practices," the decision of the majority of the court said. He suggested that employees seek jobs elsewhere, and he solicited participation in FACE Intel. During this time, according Mr. Mulloy, the Intel spokesman, the company employed 65,000 to 70,000 people.
To put it mildly, the e-mail campaign attracted Intel's attention. "From Intel's perspective, Mr. Hamidi intended to disrupt employees by making inflammatory statements concerning Intel as an employer," Mr. Mulloy said.

"In March of 1998, after a few of these e-mails had come, we received a number of complaints from employees. The kind of comments we would hear were, 'Why are we getting these at work?' 'Can't you stop him?' We sent Mr. Hamidi a letter demanding that he refrain from sending them. He replied to us and refused to do so. He then sent more."

Intel tried to block Mr. Hamidi's messages but was only partially successful. By switching computers, Mr. Hamidi managed to evade the company's roadblocks. There is no evidence, however, that he sent additional e-mail messages to any recipient who asked him to desist.

Intel sued on two counts in 1998. One, later dropped, contended that the messages were a nuisance to Intel and its employees. The second was a "trespass to chattel" claim against Mr. Hamidi, that accused him, among other things, of disrupting Intel through unauthorized use of its computer system. "We disagree with everything he says about Intel," Mr. Mulloy said. "We think he's wrong. But we never did anything to try to prevent him from setting up his Web site or leafleting at universities.

"When someone is using our e-mail system, though, our thinking was that we had certain rights."

It was now autumn 1998. Mr. Hamidi was unemployed, had been through bankruptcy and was struggling to support a family of four on occasional odd jobs and his disability payments. It wasn't until late 2001 that he found his state job.

Soon after he was sued by Intel in 1998, however, Mr. Hamidi attracted a crucial supporter, William M. McSwain, a former Marine then in his second year at Harvard Law School and an editor of The Harvard Law Review. Listening to National Public Radio one day, he heard a mention of the Intel case that caught his attention.

"This was an unusual use of the trespass-to-chattel tort," he said. "I thought the case might have broad implications."

He decided to look into the case, thinking it might produce an article for the law review. "The more I found out, the more I wanted to help this guy. He was broke, fighting his own battle, getting beaten up and nobody was helping him."

MR. McSWAIN researched the issues and concluded that Intel had not demonstrated damage to the chattel, which in this case would be the computer system. "Intel was just claiming a more general kind of damage, through the loss of employees' productivity."

He said that he eventually came to believe that Mr. Hamidi's case was the most important Internet dispute ever litigated. "If Intel could use trespass laws, without demonstrating any damage to its equipment," he said, "then this would have huge implications for all kinds of communications taking place on the Internet."

The article that Mr. McSwain published in the May 1999 issue of The Harvard Law Review validated Mr. Hamidi's case. "It is ironic," he wrote, "that a technological giant such as Intel, which has helped to usher in and has greatly benefited from the cyberspace age, now expects the state to protect it from a creature of its making."

The article attracted attention.

But by the time it appeared, Mr. Hamidi had lost the first round. California's Superior Court granted Intel's request on the trespass to chattel claim and issued a permanent injunction against Mr. Hamidi.

Mr. Hamidi appealed. "They thought I was this bozo, coming here from some weird country. 'He is helpless,' "He
will come to his knees.' Instead, he went out of his way to attract public attention for his cause. That included a horseback ride to deliver a floppy disk to Intel's headquarters in Santa Clara, Calif., and a ride there in a horse-drawn carriage to deliver 40,000 printed copies of an e-mail message to company employees to publicize the fact that the court had barred him from communicating to Intel workers on the Internet.

It helped that he knew he was no longer alone. Through what seemed to him the hand of God, he had Mr. McSwain, who during his final year of law school was on an internship with the Electronic Frontier Foundation, a San Francisco-based nonprofit public-interest and civil-liberties group. There, Mr. McSwain wrote the substance of a brief filed by the foundation on the behalf of Mr. Hamidi.

"To us, it seemed very clear that if Intel won this case we'd all be at risk of losing the fundamental value of the Internet, which is its openness," said Lee Tien, a senior lawyer for the foundation. "Imagine what could happen if at any time any site could say, 'We don't want you to visit, we don't want you to search, we don't want your e-mail.' The Internet would fragment."

Nevertheless, the California Court of Appeal in Sacramento in December 2001 upheld the lower court and supported Intel.

"That was the proper decision," argued Richard A. Epstein, a professor at the University of Chicago Law School and the author of a brief, filed on behalf of a number of business groups, in Intel's support in Mr. Hamidi's appeal to the California Supreme Court. "This wasn't comparable to Mr. Hamidi standing outside Intel's property and shouting at employees using a bullhorn. It was as though he took Intel's bullhorn to do it."

But the appeals court was split on its decision, 2 to 1, with a dissent coming from one of the state's most influential judges, Justice Daniel M. Kolkey.

By now, Mr. McSwain was a lawyer, working at the Dechert firm in Philadelphia. With 700 lawyers and a large corporate law practice, Dechert might have seemed an unlikely firm to support Mr. Hamidi's case. But the young lawyer convinced his colleagues that this was a case "about the soul of the Internet," as he put it. He said he believed that if the decision in favor of Intel were allowed to stand, it would ultimately hurt business by lowering productivity and impeding commerce.

His colleagues at Dechert agreed. With a strong First Amendment practice, the firm also supported the freedom of speech aspects of Mr. Hamidi's case. They agreed to allow Mr. McSwain and another junior lawyer, F. Gregory Lastowka, to work on the case pro bono.

THE pairing proved to be a strong one. Mr. McSwain handled the legal theories, relations with the media, and of course, dealings with Mr. Hamidi, whom he calls an ideal client, rational and calm. Mr. Lastowka, a cyberlaw expert, coordinated briefs filed on Mr. Hamidi's behalf and wrote the response to Intel's arguments. The American Civil Liberties Union filed a separate brief, as did more than three dozen professors of intellectual property and computer law. Support also came from the Center for Internet and Society at Stanford Law School, from the A.F.L.-C.I.O. and from the Service Employees International Union.

"There was a lot of concern among union organizers about the lower court decisions," said Stacey M. Leyton, a lawyer with Altshuler, Berzon, Nussbaum, Rubin & Demain in San Francisco, which worked with the A.F.L.-C.I.O. and the service employees union. "Our concern was that, if the lower court decisions were left standing, this could become an important tool for employers to use against union activities."

The decision on June 30 came at the very end of the 90-day period to issue a ruling after oral arguments. Mr. McSwain knew that the decision was likely to be posted at 10 a.m. Pacific time, so back in Philadelphia, he grabbed a sandwich at Dechert's cafeteria and sat in front of his computer screen, staring at the Court's Web site and waiting for the notice. Mr. Hamidi was in his office at the Franchise Board, training two employees, but keeping an eye out for an e-mail message from his lawyer or the court.
When the notice came, "judgment reversed," Mr. McSwain sent out a two-word e-mail message to his client and colleagues, "We Won." Mr. Hamidi saw his computer's message light blinking and asked his co-workers for five minutes to himself. He called Mary, his wife of 32 years, could not reach her and left a message on the answering machine.

"I don't know how being electrocuted feels," he said, "but there were shocks going all through my body." His phone started ringing with calls from reporters. He received a voice-mail message from his wife, telling him that she had been unable to call back at first because she had been crying so hard she could not speak. Eventually, he asked his supervisor for permission to some time off.

Despite broad support for the decision, there are those who believe this is a dangerous legal decision, one that will open the floodgates to spam, erode employers' powers and give unions free rein to woo members by e-mail. As part of a longstanding policy, Intel would not allow the law firm that handled the case, Morrison & Foerster, to comment on the decision. But in one of its briefs for Intel, the firm wrote that the basic issue was property rights. "Ownership of private property carries with it the right to prevent others from using this private property to harm the owner," it said.

The day-to-day consequences are not yet clear. "I don't know if the downside from this decision is small or large, but I do know this: There's no upside," said Professor Epstein of the University of Chicago, who worked closely with the firm while writing a brief for Semiconductor Industry Association and other business groups.

As for Mr. Hamidi and his relationship with Intel, "The ball is in his court," said Mr. Malloy, Intel's spokesman. "If he decides to continue spamming us, we will have to evaluate our options."

Mr. McSwain said, "I don't want to speculate about what Ken will do." He said the original injunction will remain in place until 30 days after the Supreme Court's ruling "and the one thing I'm certain is, Ken won't do anything during that period." If, later, he does send more e-mails, his lawyer said, "Intel may go after him as hard or harder than ever."

The California Supreme Court said in its majority opinion that depending on what happens next, Intel might have the option of suing for interference with its business prospects, defamation or infliction of emotional distress.

For now, Mr. Hamidi will not disclose his plans. But he does give some hints.

"I have done my part for the American people," he said. "Now I am back to the fight for Intel's employees and other working men and women."