



CAN-SPAM Update

A federal appeals court has ruled that CAN-SPAM pre-empts a state anti-spam statute, that minor inaccuracies in the header and transmission information are not material and therefore do not violate CAN-SPAM, and that failure to respond to a single opt-out request is not a violation.

The case was brought by an online service provider against a travel company that sent him eleven unsolicited commercial emails. According to the recipient, the "from" field contained a non-functioning email address and the transmission path listed a domain name that appeared to be an unrelated third-party's domain name. The emails also contained a working link to the sender's web site, the sender's physical address, and a toll-free telephone number.

CAN-SPAM prohibits sending commercial email that contains "materially false or materially misleading" header information. CAN-SPAM further provides that "the term 'materially', when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability" of a recipient or Internet service provider to identify, locate or respond to the sender.

The lower court held, and the Fourth Circuit Court of Appeals affirmed, that the inaccuracies in the "from" field and the transmission path did not make the headers materially false or materially misleading because each commercial email was "chock full of methods to identify, locate or respond to the sender." The court seemed to conclude that inaccuracies in the header information do not violate CAN-SPAM as long as there are methods for identifying or contacting the sender based on information provided in the email message.

The recipient also claimed that the sender violated CAN-SPAM because it sent him one email after he attempted to verbally opt-out of receiving more emails. (The court noted that the recipient did not use the link provided in the email to opt-out, but instead called the sender's general counsel, demanded to have his email address removed from the sender's list, but refused to provide his email address.) The court wrote that under CAN-SPAM an Internet service provider can bring suit for failing to honor an opt-out request only for "a pattern or practice" of violations. Because the recipient did not provide evidence of the sender's repeated failure to honor an opt-out request, the appeals court affirmed the lower court's ruling of summary judgment in favor of the sender.

The appeals court also affirmed the lower court's ruling that CAN-SPAM pre-empts Oklahoma's anti-spam statute as applied to "immaterial misrepresentations." The appeals court reasoned that Congress did not intend for CAN-SPAM to prohibit "bare errors" in commercial email, and to allow states to prohibit such emails would "undermine Congress' plain intent." The practical effect is that plaintiffs cannot file suit under the state statute for minor inaccuracies in commercial email. The court also found that the recipient of the emails failed to establish a cognizable claim under Oklahoma law for trespass against chattel. The court found that the recipient failed to submit any evidence that the receipt of eleven commercial email messages placed a meaningful burden on his computers or other resources. The case is *Omega World Travel, Inc. v. Mummagraphics, Inc.*, No. 05-2080 (4th Cir. Nov. 17, 2006).

In a separate action, the FTC announced a settlement with an email marketer who was charged with failing to process opt-out requests within 10 business days, as required by CAN-SPAM. According to the FTC, Yesmail, Inc., doing business as @Once Corporation, offers e-mail marketing services, including sending commercial email and processing unsubscribe requests from recipients. The FTC alleged that Yesmail's spam filtering software blocked certain unsubscribe requests, so the company continued to send commercial email to recipients who had opted-out of receiving future emails. Under the proposed settlement, Yesmail agreed to pay a civil penalty of \$50,717.

These two developments provide some additional guidance to marketers about what constitutes a violation of CAN-SPAM. The FTC is also expected to release, sometime in the next few months, a final rule on the proposals contained in its May, 2005, notice of proposed rulemaking. In the 2005 notice, the FTC proposed rules for emails containing advertisements from multiple sellers and changing the period to respond to opt-out requests from 10 business days to 3 business days.

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