

AB 2950 – False and Deceptive Commercial Email

Assemblymember Jared Huffman

IN BRIEF

AB 2950 declares the intent of the Legislature to prohibit false and deceptive spam, as specified.

THE ISSUE

Over 90 percent of all e-mail traffic in the United States is comprised of unsolicited commercial e-mail advertisements (spam), much of which includes false and deceptive content.

According to Ferris Research Incorporated, a San Francisco consulting group, spam cost United States organizations more than \$17 billion in 2005, and California organizations well over \$2 billion.

Spam threatens the very viability of email as a means of communication, for individuals and business alike. Polls have reported that 74 percent of respondents favor making mass spamming illegal with only 12 percent opposed.

BACKGROUND

SB 186 (Murray), Chapter 487/Statutes of 2003, completely banned e-mail spam in California. To enforce this ban, SB 186 created a private right of action whereby a consumer or an Internet Service Provider (ISP) could sue spammers and advertisers and recover actual or statutory damages.

Within months of its passage, Bus. & Prof. Code § 17529 (SB 186) was mostly preempted by the federal CAN-SPAM Act of 2003 (S. 877) which makes spam legal as long as various conditions are met. These conditions include offering the ability to opt-out, a valid e-mail address contact, and disclosure of the name and address of the sender.

Although federal law preempted California's total prohibition of spam, it did not preempt the private right of action consumers and ISPs have against those who send spam with misleading or falsified headers and information, as well as the advertisers of those products.

§ 17529.5 is better than most states' laws, by allowing individual recipients of spam to bring legal action, setting liquidated damages at \$1,000 per spam, and authorizing attorney's fees for a prevailing plaintiff.

However, existing laws have not stopped unlawful spam; in fact, the volume of spam has *increased* since

CAN-SPAM. Filters have not proven effective, in no small part because spammers use fraudulent and deceptive means to bypass filters and hide their identity. A significant amount of spam is false or deceptive, either technically or in terms of the advertised content. Advertisers benefit from, but deny liability for, their advertising agents' unlawful activities. And recipients bear the costs of spam, not the spammers/advertisers.

There has been litigation in California and federal courts under § 17529.5, but ambiguities and loopholes in the law make it too easy for spammers/advertisers to evade their liability, particularly when defendants lie under oath and judges do not fully understand the technological issues.

AB 2950

AB 2950 makes nominal, yet important changes to current law in order to remove ambiguities and loopholes, and carry out – as much as possible – the Legislative intent of § 17529. AB 2950:

- *Only* targets false and deceptive commercial email, and thus operates within the clear exception-to-preemption permitted by the CAN-SPAM Act.
- Targets spammers, advertisers (the ultimate beneficiaries of the emails), and “spam networks” involved in sending false and deceptive commercial email. It also prohibits spam networks from claiming they are entitled to the ISP “safe harbor” for routine transmission of commercial emails.
- Provides examples of falsity & deception.
- Adds standing for District Attorneys and City Attorneys.
- Allows courts to order injunctions.
- Does not change statutory damages of \$1,000 per email, private right of action, safe harbor for ISPs, attorney fees for prevailing plaintiff, and does not require a recipient to opt-out.

These changes are important and support public policy against false and deceptive spam. AB 2950 will enable California to regain its proper place as the leader in protecting its residents and businesses from false and deceptive commercial email.

FOR MORE INFORMATION

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