Omega World Travel Inc. v. Mummagraphics Inc.: How the Fourth Circuit Got It Wrong

By Dan Balsam

One anomaly regarding federal preemption of state anti-spam laws is a recent Fourth Circuit decision, in which the court found that the fraudulent elements of the email headers were not "materially" fraudulent, and therefore the CAN-SPAM Act preempted Oklahoma's anti-spam law. *Omega World Travel Inc. v. Mummagraphics Inc.*, 2006 U.S. App. LEXIS 28517, *1 (4th Cir. Nov. 17, 2006). This runs counter to the opinions of numerous state and federal courts, and while at first glance this is an unfortunate setback for the anti-spam cause, any court that properly reads the opinion should immediately see the faulty logic behind it. The Fourth Circuit misread the plain language of CAN-SPAM as to preemption of state law, and improperly read Oklahoma law as if it contained the same *materially* false requirement of CAN-SPAM.

Background: Mummagraphics alleged that the spam sent by Omega World Travel violated Oklahoma law because: 1) Omega fabricated the domain name "FL-Broadcast.net" and forged the UCE headers to make them show "FL-Broadcast.net" even though that domain name did not accurately represent the computers sending the email, and 2) The messages' 'from' address read cruisedeals@cruise.com, although that e-mail address was apparently non-functional. *Omega*, 2006 U.S. App. LEXIS 28517 at *22. The court determined that these falsities were not *materially* false… although it did not explain *how* it reached that finding.

But even assuming that the court was correct that the fake domain names and email addresses somehow were not materially false, it does not change the fact that CAN-SPAM does not preempt state law when spam is unlawful under *state* law.

Spam only violates CAN-SPAM if it contains *materially* false or misleading information. 15 U.S.C. § 7704(a) (emphasis added). But the plain language of CAN-SPAM states that it does not preempt state anti-spam laws to the extent that the *state* laws prohibit falsity or deception in the UCE. 15 U.S.C. § 7707(b)(1) (emphasis added). The fact that Congress omitted the word "materially" from the exception-to-preemption section, although it used "materially" in other sections of CAN-SPAM, indicates Congress' intent to let the *states* determine what constitutes fraudulent spam under *state law* (i.e., *material* falsity or *any* falsity) and regulate fraudulent spam.[1] Thus, whether or not a UCE violates state law turns on the language of the *state law*.

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[1] Because Congress affirmatively allowed the states to act in this area, spammers cannot claim that state anti-spam laws are unconstitutional under the dormant commerce clause. The dormant commerce clause acts as a brake on the states' authority to regulate in areas in which Congress has not affirmatively acted. *See Camps Newfound Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997). California has already addressed the issue of its (previous) anti-spam law and the dormant commerce clause and concluded that: 1) The statute does not discriminate against out-of-state actors because it applies equally to California and foreign spammers that send UCE to California residents, *Ferguson v. Friendfinders Inc.*, 94 Cal. App. 4th 1255, 1262 (1st Dist. 2002), and 2) On balance, whatever minimal burdens the statute might create on interstate commerce are outweighed by the local benefits of protecting California citizens from spam, *id*. at 1266-1269. *See also State of Washington v. Heckel*, 24 P.3d 404, 411, 412 (Wash. 2001); *Jaynes v. Commonwealth of Virginia*, 48 Va. App. 673, 694-696 (2006); *Beyond Systems v. Keynetics Inc.*, 422 F. Supp. 2d 523, 535 (D. Md. 2006); *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818, 842-843 (Md. Ct. Spec. App. 2006).

CAN-SPAM cannot require that a UCE contain materially false information in order to violate state law because Congress cannot write laws for the states. How the Fourth Circuit decided it could is anybody's guess.

Here, Oklahoma's Legislature decided to prohibit email that "Misrepresents *any* information in identifying the point of origin or the transmission path of the electronic mail message," 15 Okl. St. § 776.1(A)(1) (emphasis added). Note the use of the word "any" as opposed to CAN-SPAM's requirement of "materially." Consequently, the proper analysis is whether the spam contains any fraudulent information in violation of *Oklahoma* law. If it does, then CAN-SPAM, by its own plain language, does *not* preempt Oklahoma law.

To summarize: Even though violations of CAN-SPAM itself may require material falsity, the Fourth Circuit inexplicably interpreted Oklahoma's law as if it had the same materiality requirement. It doesn't. Any fraudulent information makes a spam illegal under Oklaoma law. And that's how the Fourth Circuit got it wrong. (It's also interesting to note that state courts in Virginia and Maryland, both within the Fourth Circuit, and U.S. District Courts of the Fourth Circuit, have consistently ruled against spammers.)

I live in California, and the Mummagraphics opinion shouldn't have much effect here for plaintiffs suing spammers under California Business and Professions Code § 17529.5, which prohibits false, misrepresentative, and forged information in email headers. For one thing, opinions from federal courts within the Ninth Circuit are more persuasive for California state courts than opinions from the Fourth Circuit. The U.S. District Court for the Eastern District of Washington correctly read the plain language of CAN-SPAM and held that where spams are false and deceptive under Washington's anti-spam law, then Washington's law is not pre-empted by CAN-SPAM. *Gordon v. Impulse Marketing Group*, 375 F. Supp. 2d 1040, 1045-1046 (E.D. Wash. 2005).

A California superior court came to the same conclusion. "[A]ctions under Business & Professions Code § 17529.5(a) fall within the *express exception to preemption* provided in 15 U.S.C. § 7707(b) (the CAN-SPAM Act) and the *private right of action* provided by Business & Professions Code § 17529.5 is a *permissible exercise of a state's right* to regulate falsity or deception in any portion of an electronic mail message expressly recognized by 15 U.S.C. § 7707(b)." *Infinite Monkeys & Co., LLC v. Global Resource Systems Corp.*, No. 1-05-CV039918, *1, *2 (Cal. Super. Ct., County of Santa Clara, Sep. 14, 2005) (Order re: Demurrer, Motion to Strike, and Motion for Preliminary Injunction) (emphasis added).

Additionally, Oklahoma's anti-spam law differs significantly from California law in an important manner: Oklahoma only holds a party liable for initiating a spam with false or misleading information if the party has knowledge of the false content. 15 Okl. St. § 776.1(A). On the other hand, California has a strict liability standard – a party is liable for advertising in an unlawful spam – and there is no requirement of knowledge or intent. Bus. and Prof. Code § 17529.5(a). Thus it is much easier for a California court to find a company liable for unlawful spam sent by its affiliates, for example, because the plaintiff does *not* need to prove that the advertiser knew or intended that its affiliates send fraudulent spam.