Digital Transactions: Part Two: Assignment 7

CAN-SPAM

- Requirements on senders of UCE
- Who can enforce
    - FTC
    - State AGs
    - ISPs
- State law preemption

- Impact on obtaining and using email lists
- Email marketing providers
    - Commercial practices keep a wide berth

Gordon v. Virtumundo, Inc. (9th Cir. 2009)

- Gordon / Omni – gordonworks.com (hosted at godaddy.com)
- About a half-dozen email addresses; opted into lists about 100-150 times; alleged over 13,800 spam messages to gordonworks.com
- Lawsuits starting in 2004; 2006 Federal Dist. Ct. suit in Washington against Virtumundo
- "the CAN-SPAM standing inquiry involves two general components: (1) whether the plaintiff is an 'Internet access service' provider ('IAS provider'), and (2) whether the plaintiff was 'adversely affected by' statutory violations. Beyond that, however, the statutory standing provision read as a whole is ambiguous- a point upon which all parties agree"
- IAS (more than ISPs) defined by reference to the Communications Act
- Gordon as a "spam trap" or "spam troll"

It is notable that Congress conferred standing only on adversely affected IAS providers, but not adversely affected consumers. Logically, the harms redressable under the CAN-SPAM Act must parallel the limited private right of action and therefore should reflect those types of harms uniquely encountered by IAS providers

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Gordon v. Virtumundo, Inc. (9th Cir. 2009)

- CEMA analysis for Gordon
  - "In contrast to the more restrictive standing requirement of the CAN-SPAM Act, CEMA authorizes a recipient of a commercial e-mail message or an 'interactive computer service' to bring a private action."
- CAN-SPAM preemption
  - Not preempted: falsity or deception; state laws non-specific to email; fraud or computer crime
- Gordon's CEMA claim is preempted

- Judge Gould concurrance

Gordon's claim is "for, at best, 'incomplete' or less than comprehensive information" regarding the sender. Such technical allegations regarding the header information find no basis in traditional tort theories and therefore fall beyond the ambit of the exception language in the CAN-SPAM Act's express preemption clause.

Jaynes v. Commonwealth of Virginia (Va. 2008)

- Jaynes sent many thousands of emails to AOL users in 2003
  - Disguised sender info
  - From multiple sending addresses
- Jaynes in possession of stolen AOL user info
- Nine years in prison based on jury conviction of Virginia law (AOLs servers are located in Virginia)
- Jurisdiction challenge
  - Jaynes is in North Carolina
  - "Jaynes knew and intended that the e-mails he sent to AOL subscribers would utilize AOL's servers which are located in Virginia"
- First Amendment

Nevertheless, Code §18.2-152.3:1 is not limited to instances of commercial or fraudulent transmission of e-mail, nor is it restricted to transmission of illegal or otherwise unprotected speech such as pornography or defamation speech. Therefore, viewed under the strict scrutiny standard, Code §18.2-152.3:1 is not narrowly tailored to protect the compelling interests advanced by the Commonwealth.

Sotelo v. DirectRevenue, LLC (N.D. Ill. 2005)

- DirectRevenue technology – has all the typical bad stuff in bad spyware
- Trespass to chattels claim by Sotelo, putative class action plaintiff
  - This claim survives DirectRevenue's motion to dismiss
  - The statement of the claim also gives sufficient pleading notice to aQuative and AccuQuote
- Illinois Consumer Fraud Act claim also survives motion to dismiss
- Unjust enrichment claim is dismissed
  - Sotelo alleges no claim or entitlement to the ad revenues
- Negligence claim survives a motion to dismiss
- A claim under the Illinois Computer Crime Prevention Law (CPPL), survives a motion to dismiss

Assignment Seven Problems

- 7.1 to 7.5