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Anne P. Mitchell

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VENDOR LIABILITY FOR ADVERTISING IN UNSOLICITED COMMERCIAL E-MAIL

ANNE P. MITCHELL†

In the fight against "spam," most commonly defined as "unsolicited commercial e-mail," irate recipients, perspicacious politicians, and ardent anti-spammers look high and low, near and far, to ascribe blame and pin liability.

But, as is often the case, the most obvious place to look is the one most oft overlooked - that which is right under their nose, or in their spam, as the case may be. In other words, those actually peddling the items that are advertised in the spam. Let's call them "vendors."

I. THE PROBLEM

Those who press 'send', and inject spam into the Internet stream from their off-shore hideaways are as often as not hired guns for the people who are actually driving the spam: the spammer's clients - the vendors.

Vendors generally accept no responsibility for the spam being sent on their behalf. Indeed, typically they have been able to shrug their shoulders and claim "it wasn't me who sent it, go bark up another tree."

This inequity has contributed to lawmakers' inability to make any meaningful dent in the war on spam: the spammers are open to prosecution, but difficult to find; the vendors are relatively easy to find, but immune from prosecution.

But should vendors be immune?

II. THE SOLUTION:

The law is rife with examples of contributory and vicarious liabilities, including in the areas of tort and trademark infringement. The concept is simple: those who contribute to the wrongful act, or who benefit

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from it, should be as liable for the act as are the primary actors. Put another way, one should not be able to contribute to or benefit from the wrongful act while escaping liability by hiding behind the primary actor.

The solution is to make vendors liable for using or allowing spam to advertise their wares. As noted above, there is ample precedence for holding those who facilitate, contribute to, or benefit from a bad act accountable for the act. And so it should be for vendors who utilize the services of a spammer to transmit the vendor's advertising.

Indeed, one anti-spam company, Habeas, Inc., has taken just this approach by providing a special trademark meaning "this is not spam" which one may include in e-mail which is, in fact, not spam. When spammers misappropriated the trademark and used it in spam, Habeas sued the vendors advertised in the spam on theories of contributory and vicarious trademark infringement, in addition to pursuing the spammer who had misappropriated the mark. The vendors had directly benefited from the infringing spam, and rightly were named in the suit.

As Habeas quickly found, suing vendors has several advantages and benefits:

a. Senders of spam often obfuscate their identity, making it both difficult and costly to identify and find them. In addition, many operate offshore, making them even more difficult to find, and more difficult to prosecute.

By contrast, most vendors are relatively easy to find. If they can't be found, they can't be paid, which rather defeats the purpose of their advertising in the spam. Furthermore, the vast majority of spam which is sent in the English language advertises a product, service or website with connections to the United States, making prosecution under U.S. law relatively straightforward and easy.

b. Holding vendors accountable for the methods used to advertise their goods or services via e-mail, where they know or should know what methods are being used, is practical, logical, and makes for good public policy.

c. Vendors who are willing to pay to have their marketing and advertising messages sent via spam are a core part of the spam problem. Cutting off this revenue stream at the source will help to reduce the spam problem. With no clients, the spam-senders will have far less reason to send spam.

d. Finding and prosecuting the responsible vendors is easier, faster, less time and money intensive, and more viable than trying to find and prosecute the spam-senders.

e. Once there is an active case against the vendor, it becomes much easier to uncover the spammer through the processes of discovery, and negotiation with the vendor.

f. There is already precedent for second-party liability in other areas of law, such as contributory and vicarious trademark infringement and contributory negligence.

III.   CURRENT VENDOR LIABILITY LEGISLATION

A.   BURNS WYDEN CAN SPAM

In June of 2003, the author worked closely with Senator John Mc-Cain's office to help develop and draft legislative language which would hold vendors liable for advertising in spam. This language was introduced as an amendment to the Burns-Wyden CAN SPAM Act, and adopted by committee as part of the bill. Vendor liability is now part of the Burns-Wyden bill that recently passed the Senate by unanimous vote.

The proposed legislation makes liable any vendor who advertises in spam which violates the general provisions of the law. Exceptions are made if the vendor truly did not know, and could not have been reasonably expected to know, that their advertisement would be mailed out in spam.

B.   CALIFORNIA SENATE BILL 186

California's Senate Bill ("SB") 186 was recently enacted and signed into law, and takes effect on January 1, 2004.

SB 186 states, in relevant part:

§ 17529.2. Notwithstanding any other provision of law, a person or entity may not do any of the following:
(a) Initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California.
(b) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

Note that SB 186 makes illegal not only initiating the unsolicited commercial e-mail advertisement, but *advertising in* the unsolicited commercial e-mail advertisement. In other words, vendor liability.

IV.   CONCLUSION

Vendor liability is a viable and rational way to go about addressing the spam problem. Holding vendors accountable for the method by which they market and advertise through e-mail is fair and logical, is more practical than chasing after offshore spammers who are hiding in the shadows (although it can lead to them), and will help to reduce the incidence of spam. It's a good idea which makes good sense, and, as

demonstrated by the Burns Wyden bill and California SB 186, should be part of any comprehensive anti-spam legislative package.[1]

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1. Since writing this article, the CAN-SPAM Act of 2003 was enacted and became effective on January 1, 2004. While CAN-SPAM preempts certain state anti-spam laws, including California SB186, many states have continued to successfully sue spammers, and still other states are looking at enacting new anti-spam laws, which include vendor liability.