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FEATURED ARTICLE
04/09



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Asis Internet Services, Inc. v Richard Rausch, et al

Case No. 08-03186 EDL (N.D. Cal.), 3 May 2010

A US court awards Asis - an internet service provider - \$2,596,020 in damages for having lost business, time and revenue by receiving more than 200,000 spam emails every day from the same company.

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ('the CAN-SPAM Act'), 15 U.S.C. §§ 7701, et seq., established a code of conduct for the transmission of unsolicited commercial emails to US citizens. The US District Court for the Northern District of California ('the Court') recently applied the CAN-SPAM Act in *Asis Internet Services, Inc. v Richard Rausch, et al*. Its judgment demonstrates that, seven years after its enactment, courts continue to struggle with ambiguities in the Act.

Case background

Asis Internet Services is an internet service provider (ISP) in Garberville, California, that offers internet and email services to approximately 1,000 customers. Asis is a serial CAN-SPAM Act plaintiff, having reportedly filed over 20 lawsuits alleging violations of the CAN-SPAM Act.

In 2008, Asis sued Kirk Whiting, Edward Heckerson, and Richard Rausch ('the Defendants') for violating the CAN-SPAM Act by sending Asis 24,724 unsolicited emails over an 18-month period beginning in 2006. The Defendants defaulted but Asis was not content to let Rausch go, and proceeded with the case.

On the basis of unanswered requests for admissions (which were deemed admitted by virtue of having been ignored), the Court granted summary judgment to Asis and awarded \$2,596,020 in statutory damages based on Rausch's violations of the CAN-SPAM Act.

Overview of the CAN-SPAM Act

As its acronym suggests, the CAN-SPAM Act does not outlaw spam. Rather, it makes certain limited types of unsolicited commercial emails illegal. For example, it is

unlawful to initiate (or have others initiate) the transmission of unsolicited commercial emails that contain false or misleading header information or a deceptive subject line. CAN-SPAM also places affirmative obligations on senders of unsolicited commercial emails. Email messages must include the sender's physical address, be labelled as advertisements, notify recipients of their ability to decline further mailings and provide an 'opt-out' mechanism.

Discussion

Since its enactment, courts have struggled with two particularly ambiguous provisions of the CAN-SPAM Act:

- whether private litigants can bring suit; and
- how much money should be awarded for violations.

The Rausch judgment shows that courts are still struggling with these provisions seven years later.

Standing to sue

A private litigant can sue for violations of the CAN-SPAM Act only if it is 'an [ISP] that has been adversely affected by statutory violations.

But who is 'an [ISP]'? In *Gordon v Virtumundo, Inc.*, the United States Court of Appeals for the Ninth Circuit held that 'there may be a technical or hardware component implicit in the definition' of ISP, but in any event, providing email accounts alone is insufficient to make one an '[ISP]'. Using something like this test, the Rausch Court found Asis to be an ISP with hardware components such as mail servers and technical support staff for its dial-up and broadband internet access customers.

More difficult seems to be the definition of what constitutes the 'adverse effect' that must be suffered before the suit can be

brought. At first, courts seemed to think that the 'harm' requirement was satisfied if an ISP found spam within its networks. More recently, however, courts - including the one in the *Gordon v Virtumundo, Inc.* case - have begun adopting a narrower view, requiring ISPs to show 'something beyond the mere annoyance of spam and greater than the negligible burdens typically borne by an IAS provider'. The court there seemed to want the plaintiff to show evidence of an actual impairment and a cost to clean it up, along with evidence that the plaintiff had taken reasonable precautions to avoid the spam in the first place. In other words, according to *Gordon*, ISPs are not harmed within the meaning of the CAN-SPAM Act unless the ordinary safeguards employed by reasonable companies are overcome - resulting in additional time and expense.

In this case, the Court recited the *Gordon* holding but failed to apply it properly. It concluded that Asis had suffered harm because:

- Asis received over 200,000 spam emails per day;
- it cost \$3,000 per month for the Postini filtering service that Asis used to process spam;
- Postini captured the 24,724 emails at issue; and
- Asis's four employees spent a total of 22 hours of staff time addressing complaints from three clients related to the defendants' unsolicited emails.

The Court did not demand any showing that the defendants' emails created costs or burdens beyond the typical burdens borne by an ISP like Asis in the ordinary course of operating its business, and Asis provided none.

The Rausch Court's failure to follow *Gordon* is underscored by a conflicting decision that another Northern District Court recently entered in *Asis Internet Services v*

Optin Global, Inc. On nearly identical facts, that Judge concluded that ‘no reasonable jury could find...that the emails that are the subject of this action caused any significant adverse effect to Asis’. Asis’s complaint was therefore dismissed for lack of standing due to no harm.

The undeveloped record in the Rausch case, and fact that the Defendants did not defend Asis’s claims most likely contributed to the Court’s flawed analysis on the standing issue. Litigants should expect that other courts will apply the Ninth Circuit’s Gordon decision more faithfully and perform a more rigorous analysis of evidence submitted to satisfy the ‘harm’ prong of the CAN-SPAM Act.

Calculation of statutory damages

The CAN-SPAM Act allows courts to award up to \$100 for each email containing false or misleading header information, and up to \$25 for the knowing transmission of an email containing a header that the sender knows (or has reason to know) would mislead the recipient concerning the message’s contents. Three times those damages are available if the defendant obtained email addresses through illegal means.

Asis sought maximum statutory penalties against Rausch totalling \$3,090,500. The Court rejected Asis’s request and awarded only \$865,340 or \$25 for each email containing false or misleading header information, and \$10 for each email that was knowingly transmitted with a header that would mislead the recipient. The Court justified the reduced award on the limited number of emails at issue and the lack of evidence of other misconduct. But the Court trebled Asis’s damage award after Asis presented evidence showing

that the Defendants engaged in directory harvesting and used automated scripts to create email accounts to transmit offending messages. Asis’s final damage award totaled \$2,596,020.

In the Ninth Circuit, plaintiffs may elect statutory damages regardless of the adequacy of the evidence they present on their actual damages or the amount of the defendant’s profits.

The legislative history of the CAN-SPAM Act suggests that its statutory damage awards are meant to punish spammers and deter future misconduct rather than compensate victims. While there is no requirement for plaintiffs to show actual damages, damage awards would be less subjective if courts considered the quantum of damages (or profits) at issue in each case. The authors believe that a less subjective approach - which some courts, including those in the Second Circuit have applied - is to require plaintiffs who seek more than de minimis statutory damages to present evidence concerning the harm they suffered (or the defendant’s profits), and to use that data to tailor damages awards to more closely reflect the quantum of harm or benefits associated with the unlawful activity.

Conclusion

For the foreseeable future, litigants should expect that residual ambiguities in the CAN-SPAM Act will continue to result in inconsistent lower court judgments. At least in the Ninth Circuit, courts will begin applying the more-stringent test for showing ‘harm’ that was articulated by the Ninth Circuit in *Gordon v Virtumundo, Inc.*, and some ISPs may be deterred from filing suit. The size of statutory damage awards will remain unpredictable until courts develop more objective tests for determining the amount

of statutory damages that should be awarded to plaintiffs who prove a statutory violation but fail to offer evidence of actual damages. On the other hand, the amount of statutory damages that courts award may not matter much. Many spammers choose not to defend CAN-SPAM Act lawsuits and it is likely difficult to collect on a default judgment for CAN-SPAM Act violations.

Heidi Keefe Partner
Orion Armon Associate
 Cooley LLP
 hkeefe@cooley.com
 oarmon@cooley.com



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Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com
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