
Courts Declare Two State Anti-Spam Laws Unconstitutional

2000-11-29

"Spam" is unsolicited bulk e-mail — the electronic version of junk mail. Because all spam is, by definition, unwanted, several states have enacted laws seeking to curb the distribution of spam within their borders. Those statutes were discussed in our [October 26, 2000 Internet Alert](#).

Two recent state court decisions, however, have held that the California and Washington state anti-spam laws are unconstitutional because they violate the Commerce Clause of the United States Constitution. These recent court decisions may mark the beginning of a trend against state laws regulating spam.

The Constitution's Commerce Clause empowers Congress to regulate interstate commerce. If Congress has not acted with respect to any given area of interstate commerce, states may enact their own regulations, provided that the regulation is rationally related to a legitimate state purpose and the burden on interstate commerce is outweighed by the state's interest in enforcing the regulation. Although Congress has not enacted any laws regulating spam, a number of states have.

In [Washington v. Heckel](#) (March 10, 2000), a Washington state court held that Washington's anti-spam statute, [Revised Code of Washington](#) § 19.190.020, violated the Commerce Clause because it was "unduly restrictive and burdensome." In Heckel, an Oregon spammer was sued by Washington's attorney general for violating a state statute which prohibited senders of unsolicited e-mail from using deceptive subject lines regarding the purported contents of the e-mail. The Washington statute protected only Washington residents but, unlike physical addresses, e-mail addresses do not identify the state in which the recipient resides. As a result, to comply with the Washington statute, a spammer would have to determine each recipient's state of residency. Heckel successfully argued that such an investigation was unduly burdensome to interstate commerce because, theoretically, only a small fraction of recipients are likely to be Washington residents but a spammer would nonetheless be required to investigate the residency of all its targeted recipients each time a new message was sent to verify that it was not sending e-mail to Washington residents. The court agreed with Heckel and dismissed the complaint.

Similarly, in [Ferguson v. Friendfinder, Inc.](#) (June 7, 2000), a San Francisco Superior Court judge struck down California's anti-spam law, [California Business and Professionals Code](#) § 17538.4. In Ferguson, the plaintiff alleged that Friendfinder had committed unlawful advertising practices and

unfair business practices in violation of the California anti-spam law.

The California law required unsolicited e-mail advertisements for any goods or service to contain the prefix "ADV:" in the subject line and to include a return address for receiving requests for removal from any e-mail mailing list. The court held that the California law violated the Constitution because it "subjects interstate use of the Internet to inconsistent regulations."

The California statute was explicitly enacted as a stop-gap measure until Congress regulates spam through federal legislation. By its own terms, once Congress acts, the California statute will expire.

In July 2000, the House of Representatives passed the proposed [Unsolicited Commercial Electronic Mail Act](#), which would permit the Federal Trade Commission to regulate spam.

Under the House-passed bill, violations of FTC spam regulations could result in civil penalties of \$500 per violation, up to \$50,000. The proposed legislation would impose criminal sanctions for persons sending e-mail that contains fraudulent routing information. It would also require senders of all unsolicited e-mail to include a valid return address and to honor requests to be removed from distribution lists. Comparable legislation is currently pending in the Senate, but it is unclear whether the bill will be considered before Congress adjourns.

The Heckel and Ferguson decisions may mark the beginning of a trend against state regulation of spam, based on constitutional concerns. If that trend continues, then only Congress, through the Commerce Clause, would have the power to regulate spam. However, before any such federal legislation is enacted, Congress would still have to consider First Amendment commercial speech rights of spammers, as well as the international impact of any attempt by the United States to regulate international e-mail.

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