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AUGMENTED REALITY AND THE FUTURE OF INTERNET MARKETING

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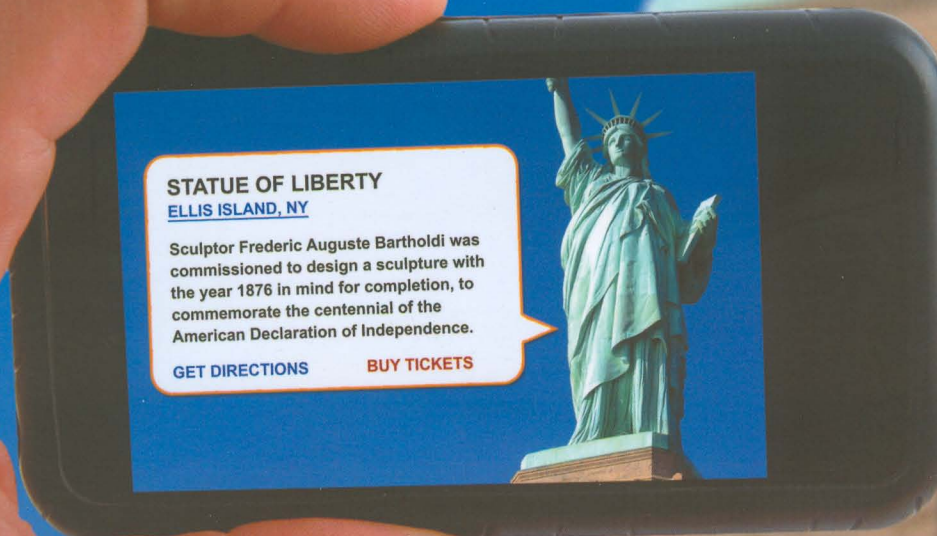
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CAN-SPAM: Understanding Federal and State Email Marketing Regulations

CAN-SPAM is merely the basics of email marketing law you have to know unless the law keeps changing

You are probably familiar with the Controlling the Assault of Non-solicited Pornography and Marketing Act. Perhaps, you know it as CAN-SPAM. In addition to the federal CAN-SPAM, at least 37 states have enacted their own anti-spamming laws that often require more than CAN-SPAM. So what laws do you need to know?

Do I Really Have to Know CAN-SPAM and the Law in 37 States?

The answer usually depends on the location of the recipient of the email. Unless you geographically limit your email marketing, you could be subject to 37 separate laws. Recent developments in the law, however, may make CAN-SPAM the only law you have to know.

Whether CAN-SPAM trumps the laws of individual states depends on where the courts go with a complicated legal concept known as federal pre-emption. Recently, a California state court dismissed a \$45 million false advertising lawsuit against ValueClick holding the federal CAN-SPAM act preempted California's more aggressive email marketing law.

In that case, Internet service provider Hypertouch filed suit against ValueClick and others under California's law barring false and misleading commercial emails. Hypertouch claimed its customers were harassed by almost 50,000 emails containing false claims. California's law applies to anyone who "initiate[s] or advertise[s] 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." It does not matter where the email comes from. It only matters whether it is received in California.

The district court judge found Hypertouch failed to show actual fraud or deception in any of the emails so the federal CAN-SPAM act applied. California's law would have only applied if the plaintiffs could have shown each element of fraud which includes the intent to purposefully and actually mislead the recipient.



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Do you have a legal question you want answered in the next column?

Send your questions to legalcorner@visibilitymagazine.com.

While the difference between intentional fraud and merely misstating something may seem like form over substance, it is a Grand Canyon-esque gorge in the courtroom. For example, CAN-SPAM requires you to allow the recipient to opt-out of the emails and to include other disclosure. The failure to include an opt-out is a mere failure to comply with notice requirements and is not sufficient to show the intent to defraud the recipient. The emails you get asking to free the Nigerian princess are intentional efforts to defraud you.

Although not clear, the law is trending so that intentional fraud would make you subject to individual state laws, while failures to include notices or including unintentional misleading statements would be the subject of CAN-SPAM actions. CAN-SPAM "supersedes any statute, regulation, or rule of a State . . . that expressly regulates the use of electronic mail to send commercial messages, except to the extent any such statute, regulation, or rules prohibits falsity or deception in any portion of a commercial mail message or information attached thereto." Some courts have suggested the "falsity or deception" exception to preemption is limited to only fraud as opposed to mere inaccuracies.

These fine distinctions are being debated in various cases in California, Washington and Maryland. Until then, I would follow the advice I give about email--if it is something you would be ashamed to tell your grandmother about, don't do it. If you need or want to do it anyway, then I would at least know CAN-SPAM. If you want to know the worst that can happen to you, know California's anti-spam law which levies the biggest fines.

So, what are the CAN-SPAM Basics?

CAN-SPAM prohibits sending deceptive or misleading information to promote businesses; using deceptive headings in commercial e-mails; and sending e-mails after the recipient has indicated that it does not want to receive more e-mails. It also requires senders to include return e-mail addresses in their e-mail messages.

CAN-SPAM covers unsolicited email messages, as opposed to messages where the consumer has already opted-in or authorized. The unsolicited emails, among other things, must:

1. Be labeled as an advertisement;
2. Include opt-out instructions meaning it contains a return email address or an automated way for to opt out that is actually honored within ten business days;
3. Include the sender's physical address;
4. Not use deceptive subject lines and false headers meaning the subject and the content must match; and
5. Have accurate information in your "From" and "To" lines showing who initiated the email.

CAN-SPAM is enforced by the Federal Trade Commission and the state attorneys general. Only internet service providers have a right to bring private actions. Violating CAN-SPAM can result in severe penalties including possible jail time for repeat offenders. In addition, courts can fine violators for actual damages, statutory damages or fines of \$250 per violation, with each unlawful message to each recipient being a separate violation.

What about the obscenity?

Even if you comply with CAN-SPAM, you may run afoul of certain obscenity violations when marketing pornography. The recent Ninth Circuit decision of *U.S. v. Kilbride* focused on two spammers who earned \$1.1 million by mass marketing pornographic websites over email. The marketers received fees each time a subscription was ordered. In 2007, they were sentenced to more than five years for CAN-SPAM violations and criminal obscenity.

On appeal, the Court focused on whether the government could criminalize the speech in the emails in light of First Amendment of the Constitution guaranteeing the right to free speech. If the speech in the email is "obscene," it does not receive First Amendment protections. When the infamous "I know it when I see it" obscenity test was not sufficient, the Supreme Court developed a new test. Now, speech is obscene and not worthy of First Amendment protections when: (1) "the average person, applying contemporary community standards" would find that the work appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct; and (3) whether the work lacks serious literary, artistic, political, or scientific value.

By definition, pornographic spam contains sexual content and most spam and porn sites do not invoke the art of Hemingway. But when dealing with the Internet, rather than local issues with local juries, the Ninth Circuit had to determine whether to apply the community standards of Manhattan or Manhattan, Kansas.

Trying to apply a community standard to mass-distributed emails, the Ninth Circuit determined "a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email." This would be a fundamental shift in First Amendment law for the marginal cases. The "community standard" was created because showing a borderline-pornographic film in Las Vegas draws a different reaction than in the same viewing in the heart of the Bible Belt. Because email marketing and the Internet have no geographic boundaries, perhaps it is time to adopt a national standard.

The issue may make its way to the Supreme Court. Who knows, email marketers may carry the First Amendment torch once shouldered by the likes of Larry Flint in the past.

Additional helpful resources

- "The CAN-SPAM Act: A Guide for Business" published by the Federal Trade Commission: <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus61.shtm>
- The FTC's home page on spam: <http://www.ftc.gov/spam/>
- The full text of CAN-SPAM: <http://uscode.house.gov/download/pls/15C103.txt>
- The full text of California's anti-spam law and links to those of other states: <http://www.spamlaws.com/state/ca.shtml>
- CAN-SPAM, 15 U.S.C. § 7704(a)(1): "Prohibition of false or misleading transmission information. It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading."
- Or 15 U.S.C. § 7707(a)(1): "[CAN-SPAM] supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto."