

AMENDED IN SENATE JUNE 11, 2008

AMENDED IN ASSEMBLY MAY 8, 2008

AMENDED IN ASSEMBLY APRIL 23, 2008

AMENDED IN ASSEMBLY APRIL 3, 2008

CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

ASSEMBLY BILL

No. 2950

Introduced by Assembly Member Huffman

February 22, 2008

An act to amend ~~Section~~ *Sections 17529.1 and 17529.5* of the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

AB 2950, as amended, Huffman. Commercial e-mail messages: falsity and deception.

Existing state law prohibits a person or entity from advertising in a commercial e-mail advertisement that is sent either from California or to a California e-mail address if the e-mail contains or is accompanied by a 3rd party's domain name without permission, contains or is accompanied by falsified, misrepresented, or forged header information, or has a misleading subject line, and makes a violation of the prohibition a misdemeanor. Existing law authorizes the Attorney General, an e-mail service provider, or the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of these provisions to bring an action to recover liquidated damages of \$1,000 per unsolicited commercial e-mail advertisement transmitted in violation of the provisions, up to \$1,000,000 per incident, subject to reduction by the court, as specified. Existing law specifies proper venue in civil actions.

This bill would *define the term “header information” for purposes of these provisions and would make it unlawful for a person or entity to advertise in a commercial e-mail advertisement sent from California or to a California e-mail address if the e-mail contains or is accompanied by the third-party’s e-mail address without the permission of the third party. The bill would also authorize a district attorney or a city attorney to bring an action under the above provisions. The bill would provide that venue in cases brought under the above provisions is also appropriate in any county in which the recipient of the commercial e-mail message resides. The bill would require an enforcement action pursuant to these provisions to be commenced within 3 years after the cause of action accrued.*

Vote: majority. Appropriation: no. Fiscal committee: no.
 State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 17529.1 of the Business and Professions
- 2 Code is amended to read:
- 3 17529.1. For the purpose of this article, the following
- 4 definitions apply:
- 5 (a) “Advertiser” means a person or entity that advertises through
- 6 the use of commercial e-mail advertisements.
- 7 (b) “California electronic mail address” or “California e-mail
- 8 address” means any of the following:
- 9 (1) An e-mail address furnished by an electronic mail service
- 10 provider that sends bills for furnishing and maintaining that e-mail
- 11 address to a mailing address in this state.
- 12 (2) An e-mail address ordinarily accessed from a computer
- 13 located in this state.
- 14 (3) An e-mail address furnished to a resident of this state.
- 15 (c) “Commercial e-mail advertisement” means any electronic
- 16 mail message initiated for the purpose of advertising or promoting
- 17 the lease, sale, rental, gift offer, or other disposition of any
- 18 property, goods, services, or extension of credit.
- 19 (d) “Direct consent” means that the recipient has expressly
- 20 consented to receive e-mail advertisements from the advertiser,
- 21 either in response to a clear and conspicuous request for the consent
- 22 or at the recipient’s own initiative.

1 (e) “Domain name” means any alphanumeric designation that
2 is registered with or assigned by any domain name registrar as part
3 of an electronic address on the Internet.

4 (f) “Electronic mail” or “e-mail” means an electronic message
5 that is sent to an e-mail address and transmitted between two or
6 more telecommunications devices, computers, or electronic devices
7 capable of receiving electronic messages, whether or not the
8 message is converted to hard copy format after receipt, viewed
9 upon transmission, or stored for later retrieval. “Electronic mail”
10 or “e-mail” includes electronic messages that are transmitted
11 through a local, regional, or global computer network.

12 (g) “Electronic mail address” or “e-mail address” means a
13 destination, commonly expressed as a string of characters, to which
14 electronic mail can be sent or delivered. An “electronic mail
15 address” or “e-mail address” consists of a user name or mailbox
16 and a reference to an Internet domain.

17 (h) “Electronic mail service provider” means any person,
18 including an Internet service provider, that is an intermediary in
19 sending or receiving electronic mail or that provides to end users
20 of the electronic mail service the ability to send or receive
21 electronic mail.

22 (i) *“Header information” means the source, destination, and*
23 *routing information attached to an electronic mail message,*
24 *including the originating domain name and originating electronic*
25 *mail address, and any other information that appears in the line*
26 *identifying, or purporting to identify, a person initiating the*
27 *message.*

28 (i)

29 (j) “Initiate” means to transmit or cause to be transmitted a
30 commercial e-mail advertisement or assist in the transmission of
31 a commercial e-mail advertisement by providing electronic mail
32 addresses where the advertisement may be sent, but does not
33 include the routine transmission of the advertisement through the
34 network or system of a telecommunications utility or an electronic
35 mail service provider through its network or system.

36 (j)

37 (k) “Incident” means a single transmission or delivery to a single
38 recipient or to multiple recipients of an unsolicited commercial
39 e-mail advertisement containing substantially similar content.

40 (k)

1 (l) “Internet” has the meaning set forth in paragraph (6) of
2 subdivision (e) of Section 17538.

3 ~~(t)~~

4 (m) “Preexisting or current business relationship,” as used in
5 connection with the sending of a commercial e-mail advertisement,
6 means that the recipient has made an inquiry and has provided his
7 or her e-mail address, or has made an application, purchase, or
8 transaction, with or without consideration, regarding products or
9 services offered by the advertiser.

10 Commercial e-mail advertisements sent pursuant to the
11 exemption provided for a preexisting or current business
12 relationship shall provide the recipient of the commercial e-mail
13 advertisement with the ability to “opt-out” from receiving further
14 commercial e-mail advertisements by calling a toll-free telephone
15 number or by sending an “unsubscribe” e-mail to the advertiser
16 offering the products or services in the commercial e-mail
17 advertisement. This opt-out provision does not apply to recipients
18 who are receiving free e-mail service with regard to commercial
19 e-mail advertisements sent by the provider of the e-mail service.

20 ~~(m)~~

21 (n) “Recipient” means the addressee of an unsolicited
22 commercial e-mail advertisement. If an addressee of an unsolicited
23 commercial e-mail advertisement has one or more e-mail addresses
24 to which an unsolicited commercial e-mail advertisement is sent,
25 the addressee shall be deemed to be a separate recipient for each
26 e-mail address to which the e-mail advertisement is sent.

27 ~~(n)~~

28 (o) “Routine transmission” means the transmission, routing,
29 relaying, handling, or storing of an electronic mail message through
30 an automatic technical process. “Routine transmission” shall not
31 include the sending, or the knowing participation in the sending,
32 of unsolicited commercial e-mail advertisements.

33 ~~(o)~~

34 (p) “Unsolicited commercial e-mail advertisement” means a
35 commercial e-mail advertisement sent to a recipient who meets
36 both of the following criteria:

37 (1) The recipient has not provided direct consent to receive
38 advertisements from the advertiser.

39 (2) The recipient does not have a preexisting or current business
40 relationship, as defined in subdivision (l), with the advertiser

1 promoting the lease, sale, rental, gift offer, or other disposition of
2 any property, goods, services, or extension of credit.

3 ~~SECTION 1.~~

4 *SEC. 2.* Section 17529.5 of the Business and Professions Code
5 is amended to read:

6 17529.5. (a) *It is the intent of the Legislature that this section,*
7 *which prohibits all types of falsity and deception in commercial*
8 *e-mail messages, shall operate within the exception to federal*
9 *preemption to the full extent permitted by the CAN-SPAM Act of*
10 *2003 (15 U.S.C. Sec. 7707(b)) and any other provision of federal*
11 *law.*

12 (b) It is unlawful for any person or entity to advertise in a
13 commercial e-mail advertisement either sent from California or
14 sent to a California electronic mail address under any of the
15 following circumstances:

16 (1) The e-mail advertisement contains or is accompanied by a
17 third-party's domain name *or e-mail address* without the
18 permission of the third party, *provided that nothing in this section*
19 *shall be construed to affect comparative advertising that references*
20 *domain names.*

21 (2) The e-mail advertisement contains or is accompanied by
22 falsified, misrepresented, or forged header information. This
23 paragraph does not apply to truthful information used by a third
24 party who has been lawfully authorized by the advertiser to use
25 that information.

26 (3) The e-mail advertisement has a subject line that a person
27 knows would be likely to mislead a recipient, acting reasonably
28 under the circumstances, about a material fact regarding the
29 contents or subject matter of the message.

30 ~~(b)~~

31 (c) (1) (A) In addition to any other remedies provided by any
32 other provision of law, the following may bring an action against
33 a person or entity that violates any provision of this section:

34 (i) The Attorney General, a district attorney, or a city attorney.

35 (ii) An electronic mail service provider.

36 (iii) A recipient of an unsolicited commercial e-mail
37 advertisement, as defined in Section 17529.1.

38 (B) A person or entity bringing an action pursuant to
39 subparagraph (A) may recover either or both of the following:

40 (i) Actual damages.

1 (ii) Liquidated damages of one thousand dollars (\$1,000) for
 2 each unsolicited commercial e-mail advertisement transmitted in
 3 violation of this section, up to one million dollars (\$1,000,000)
 4 per incident.

5 (C) The recipient, an electronic mail service provider, or the
 6 Attorney General, district attorney, or city attorney, if the prevailing
 7 plaintiff, may also recover reasonable attorney’s fees and costs.

8 (D) However, there shall not be a cause of action under this
 9 section against an electronic mail service provider that is only
 10 involved in the routine transmission of the e-mail advertisement
 11 over its computer network.

12 (2) If the court finds that the defendant established and
 13 implemented, with due care, practices and procedures reasonably
 14 designed to effectively prevent unsolicited commercial e-mail
 15 advertisements that are in violation of this section, the court shall
 16 reduce the liquidated damages recoverable under paragraph (1) to
 17 a maximum of one hundred dollars (\$100) for each unsolicited
 18 commercial e-mail advertisement, or a maximum of one hundred
 19 thousand dollars (\$100,000) per incident.

20 (3) (A) A person who has brought an action against a party
 21 under this section shall not bring an action against that party under
 22 Section 17529.8 or 17538.45 for the same commercial e-mail
 23 advertisement, as defined in subdivision (c) of Section 17529.1.

24 (B) A person who has brought an action against a party under
 25 Section 17529.8 or 17538.45 shall not bring an action against that
 26 party under this section for the same commercial e-mail
 27 advertisement, as defined in subdivision (c) of Section 17529.1.

28 (e)

29 (d) Venue for an action brought under this section is appropriate
 30 in any county in which the recipient of the commercial e-mail
 31 message resides or in any county appropriate pursuant to Chapter
 32 1 (commencing with Section 392) of Title 2 of Part 2 of the Code
 33 of Civil Procedure.

34 (d)

35 (e) A violation of this section is a misdemeanor, punishable by
 36 a fine of not more than one thousand dollars (\$1,000),
 37 imprisonment in a county jail for not more than six months, or
 38 both that fine and imprisonment.

39 (f) *Any enforcement action pursuant to this section shall be*
 40 *commenced within three years after the cause of action accrued.*

- 1 *No cause of action barred under existing law on the effective date*
- 2 *of this subdivision shall be revived by its enactment.*

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