

AMENDED IN SENATE JULY 2, 2008

AMENDED IN SENATE JUNE 11, 2008

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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 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~~ *3rd-party’s* e-mail address without the permission of the ~~third~~ *3rd* 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,

1 either in response to a clear and conspicuous request for the consent
2 or at the recipient’s own initiative.

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

35 (2) The recipient does not have a preexisting or current business
36 relationship, as defined in subdivision (l), with the advertiser
37 promoting the lease, sale, rental, gift offer, or other disposition of
38 any property, goods, services, or extension of credit.

39 SEC. 2. Section 17529.5 of the Business and Professions Code
40 is amended to read:

1 17529.5. (a) It is the intent of the Legislature that this section,
2 which prohibits all types of falsity and deception in commercial
3 e-mail messages, shall operate within the exception to federal
4 preemption to the full extent permitted by the CAN-SPAM Act of
5 2003 (15 U.S.C. Sec. 7707(b)) and any other provision of federal
6 law.

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

11 (1) The e-mail advertisement contains or is accompanied by a
12 ~~third-party's~~ *third party's* domain name or e-mail address without
13 the permission of the third party, provided that nothing in this
14 section shall be construed to affect comparative advertising that
15 references domain names *or e-mail addresses*.

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

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

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

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

29 (ii) An electronic mail service provider.

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

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

34 (i) Actual damages.

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

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

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

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

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

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

24 (d) Venue for an action brought under this section is appropriate
25 in any county in which the recipient of the commercial e-mail
26 message resides or in any county appropriate pursuant to Chapter
27 1 (commencing with Section 392) of Title 2 of Part 2 of the Code
28 of Civil Procedure.

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

33 (f) Any enforcement action pursuant to this section shall be
34 commenced within three years after the cause of action accrued.
35 No cause of action barred under existing law on the effective date
36 of this subdivision shall be revived by its enactment.

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