

Assembly Bill No. 2950

Passed the Assembly August 12, 2008

Chief Clerk of the Assembly

Passed the Senate August 5, 2008

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2008, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

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, 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 3rd party's e-mail address without the permission of the 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.

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

SECTION 1. Section 17529.1 of the Business and Professions Code is amended to read:

17529.1. For the purpose of this article, the following definitions apply:

(a) “Advertiser” means a person or entity that advertises through the use of commercial e-mail advertisements.

(b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third

party who has been lawfully authorized by the advertiser to use that information.

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

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

- (i) The Attorney General, a district attorney, or a city attorney.
- (ii) An electronic mail service provider.
- (iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.

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

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

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

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

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

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

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

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

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

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

Approved _____, 2008

Governor