

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 relating to commercial e-mail messages. An act to amend Section 17529.5 of the Business and Professions Code, relating to advertising.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 2950, as amended, Huffman. Computers: false or deceptive commercial e-mail messages.

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.

~~This bill would declare the intent of the Legislature to prohibit false and deceptive spam, as specified.~~

This bill would instead make it unlawful and a misdemeanor for any person or entity to send, initiate, or advertise in, or knowingly enable

another to send, initiate, or advertise in, a commercial e-mail message that contains falsity or deception in any portion of the message or information attached thereto and that is either sent from California or to a California e-mail address. The bill would also authorize a district attorney or city attorney to bring an action for a violation of these provisions, and would authorize a court to increase or reduce damages, as specified, and to award injunctive relief.

Because a violation of the provisions of this bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

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

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

1 SECTION 1. Section 17529.5 of the Business and Professions
2 Code is amended to read:

3 17529.5. (a) It is the intent of the Legislature that this section,
4 which prohibits falsity and deception in commercial e-mail
5 messages and attachments, shall operate within the exception to
6 federal preemption to the full extent permitted by the CAN-SPAM
7 Act of 2003 (17 U.S.C. Sec. 7707(b)) and any other provision of
8 federal law.

9 (b) It is unlawful for any person or entity to send, initiate, or
10 advertise in, or knowingly enable or assist another to send, initiate
11 or advertise in, a commercial e-mail-~~advertisement~~ message that
12 contains falsity or deception in any portion of the message or
13 information attached thereto and that is either sent from California
14 or sent to a California electronic mail address ~~under any of the~~
15 ~~following circumstances~~. For the purposes of this section, falsity
16 or deception in any portion of a commercial e-mail message or
17 any information attached thereto includes, but is not limited to,
18 any of the following:

19 (1) The commercial e-mail-~~advertisement~~ message contains or
20 is accompanied by a third-party's domain name without the

1 permission of the third party. *Accurate source or destination*
2 *information shall not constitute a violation of this paragraph.*

3 (2) The e-mail advertisement contains or is accompanied by
4 ~~falsified, misrepresented, or forged~~ header information *that is*
5 *materially false or misleading, as defined in Section 7704 of Title*
6 *15 of the United States Code.* This paragraph does not apply to
7 truthful information used by a third party who has been lawfully
8 authorized by the advertiser to use that information.

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

13 ~~(b)~~

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

17 (i) The Attorney General, *a district attorney, or the city attorney.*

18 (ii) An electronic mail service provider.

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

21 (B) A person or entity bringing an action pursuant to
22 subparagraph (A) may recover ~~either or both~~ *or be awarded any*
23 *or all* of the following:

24 (i) Actual damages.

25 (ii) Liquidated damages of one thousand dollars (\$1,000) for
26 each ~~unsolicited~~ commercial e-mail ~~advertisement~~ *message*
27 transmitted in violation of this section, up to one million dollars
28 (\$1,000,000) per incident.

29 (iii) *If the court finds that the defendant willfully or knowingly*
30 *violated this section, the court may, in its discretion, increase the*
31 *amount of the award to an amount equal to not more than three*
32 *times the amount otherwise awarded pursuant to clauses (i) and*
33 *(ii) combined.*

34 (iv) *An order enjoining violations of this section.*

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

39 (D) However, there shall not be a cause of action under this
40 section against an electronic mail service provider that is only

1 involved in the routine transmission of the *commercial* e-mail
2 ~~advertisement~~ *message* over its computer network. *For purposes*
3 *of this section, “routine transmission” does not include actions*
4 *taken as an advertising network.*

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

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

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

23 ~~(e)~~

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

28 (e) *The provisions of this section are severable. If any provision*
29 *of this section or its application is held invalid, the invalidity shall*
30 *not affect any other provision or application that can be given*
31 *effect without the invalid provision or application.*

32 *SEC. 2. No reimbursement is required by this act pursuant to*
33 *Section 6 of Article XIII B of the California Constitution because*
34 *the only costs that may be incurred by a local agency or school*
35 *district will be incurred because this act creates a new crime or*
36 *infraction, eliminates a crime or infraction, or changes the penalty*
37 *for a crime or infraction, within the meaning of Section 17556 of*
38 *the Government Code, or changes the definition of a crime within*
39 *the meaning of Section 6 of Article XIII B of the California*
40 *Constitution.*

1 ~~SECTION 1. The Legislature hereby finds and declares all of~~
2 ~~the following:~~

3 ~~(a) Prohibiting false and deceptive commercial e-mail is a matter~~
4 ~~vitaly affecting the public interest for the purpose of protecting~~
5 ~~consumers and businesses in California. Falsity or deception in~~
6 ~~commercial e-mail messages is not reasonable or necessary for~~
7 ~~the development and preservation of commerce, is unconscionable,~~
8 ~~and demands consumer protection.~~

9 ~~(b) The economic harm and invasion of privacy resulting from~~
10 ~~the transmission and receipt of false and deceptive commercial~~
11 ~~e-mail constitutes a threat to the welfare of residents of California.~~
12 ~~It is the intent of the Legislature that this act shall afford maximum~~
13 ~~protection to consumer and business recipients of commercial~~
14 ~~e-mail messages.~~

15 ~~(c) Because there are limited resources for the Attorney General~~
16 ~~to undertake action against out-of-state spammers, authorizing a~~
17 ~~private right of action for recipients of unlawful spam is necessary~~
18 ~~in order to protect consumers and further efforts to combat unlawful~~
19 ~~spam.~~

20 ~~(d) False and deceptive commercial e-mail costs California~~
21 ~~residents more than one billion dollars (\$1,000,000,000) per year~~
22 ~~as a result of the following:~~

23 ~~(1) The need to acquire additional capacity for computer~~
24 ~~systems.~~

25 ~~(2) The need to acquire software programs to filter and control~~
26 ~~false and deceptive commercial e-mail messages.~~

27 ~~(3) The time and productivity lost when businesses and public~~
28 ~~bodies must devote personnel resources to the following:~~

29 ~~(A) Creating and maintaining e-mail message filters for users,~~
30 ~~computers, networks, and e-mail service providers.~~

31 ~~(B) Removing infestations of false and deceptive commercial~~
32 ~~e-mail messages from computers, networks, and e-mail inboxes.~~

33 ~~(C) Unlogging transmission paths.~~

34 ~~(D) Repairing and restarting computer systems that have~~
35 ~~experienced system failures resulting from false and deceptive~~
36 ~~commercial e-mail messages.~~

37 ~~(E) Disruptions of legitimate e-mail communications and~~
38 ~~abandonment of e-mail addresses.~~

1 ~~(e) Federal and state laws have proven inadequate to prevent~~
2 ~~the harm to the public welfare that results from the transmission~~
3 ~~and receipt of false and deceptive commercial e-mail messages.~~

4 ~~(f) Existing federal law has preempted the regulation of truthful~~
5 ~~and — nondeceptive — commercial — e-mail — advertisements.~~
6 ~~Consequently, the Legislature only seeks to regulate false and~~
7 ~~deceptive commercial e-mail advertisements, until such time as~~
8 ~~federal law is amended.~~

9 ~~(g) At the present time, over 90 percent of all e-mail traffic in~~
10 ~~the United States is comprised of unsolicited commercial e-mail~~
11 ~~advertisements (spam), including false and deceptive spam.~~

12 ~~(h) The increase in spam is not only an annoyance but is also~~
13 ~~an increasing drain on corporate budgets and possibly a threat to~~
14 ~~the continued usefulness of the most successful tool of the~~
15 ~~computer age.~~

16 ~~(i) Complaints from irate businesses and home-computer users~~
17 ~~regarding spam have skyrocketed, and polls have reported that 74~~
18 ~~percent of respondents favor making mass spamming illegal and~~
19 ~~only 12 percent are opposed, and that 80 percent of respondents~~
20 ~~consider spam very annoying.~~

21 ~~(j) According to Ferris Research Incorporated, a San Francisco~~
22 ~~consulting group, in 2005, spam cost United States organizations~~
23 ~~more than seventeen billion dollars (\$17,000,000,000), including~~
24 ~~lost productivity and the additional equipment, software, and~~
25 ~~manpower needed to combat the problem. California represents~~
26 ~~12 percent of the United States population with an emphasis on~~
27 ~~technology business and it is, therefore, estimated that spam,~~
28 ~~including false and deceptive spam, cost California organizations~~
29 ~~well over two billion dollars (\$2,000,000,000).~~

30 ~~(k) Like junk fax, false and deceptive spam imposes a cost on~~
31 ~~users, using up valuable storage space in e-mail inboxes, as well~~
32 ~~as costly computer bandwidth, and on networks and the computer~~
33 ~~servers that power them, and discourages people from using e-mail.~~

34 ~~(l) Spam filters have not proven effective because they are~~
35 ~~subject to spammers' ever-changing attempts at circumvention.~~

36 ~~(m) Like traditional paper “junk” mail, spam can be annoying~~
37 ~~and waste time, but spam causes many additional problems because~~
38 ~~it is easy and virtually free to create, but difficult and costly to~~
39 ~~eliminate.~~

1 ~~(n) The “cost shifting” from deceptive spammers to Internet~~
2 ~~businesses and e-mail users has been likened to sending junk mail~~
3 ~~with postage due or making telemarketing calls to someone’s~~
4 ~~pay-per-minute cellular phone.~~

5 ~~(o) Many spammers have become so adept at masking their~~
6 ~~tracks that they are rarely found, often due to return addresses that~~
7 ~~show up on the display as “unknown,” are fake, or are located~~
8 ~~outside of the United States. Spammers are technologically~~
9 ~~sophisticated and they can adjust their systems to counter special~~
10 ~~filters and other barriers against spam and can electronically~~
11 ~~commandeer unprotected computers, turning them into~~
12 ~~spam-launching weapons of mass production. At present, more~~
13 ~~than 80 percent of spam is sent through compromised computers,~~
14 ~~known as “zombie” machines.~~

15 ~~(p) There is a need to regulate the advertisers who promote their~~
16 ~~products and services through false or deceptive spam, as well as~~
17 ~~the actual senders of false or deceptive spam, because the~~
18 ~~advertisers are the ultimate beneficiaries of that spam and because~~
19 ~~spammers who actually “hit the send key” can be impossible to~~
20 ~~track down and are often outside of California or outside of the~~
21 ~~United States.~~

22 ~~(q) A significant amount of spam, including false and deceptive~~
23 ~~spam, is sent by affiliates or subaffiliates who act as marketing~~
24 ~~agents for the advertisers, through advertising networks that act~~
25 ~~as middlemen to connect advertisers with spammers, or through~~
26 ~~third-party e-mailing services. These advertising networks and~~
27 ~~e-mailing services also have a financial stake in any transactions~~
28 ~~resulting from this spam.~~

29 ~~(r) In addition, false and deceptive spam is responsible for virus~~
30 ~~proliferation that can cause tremendous damage both to individual~~
31 ~~computers and to business systems.~~

32 ~~(s) It is not necessary that recipients attempt to opt out of spam.~~
33 ~~Indeed, to attempt to do so is often ineffectual and often results in~~
34 ~~being a direct method of placing one’s e-mail address on even~~
35 ~~more spammers’ lists. E-mail service providers and the California~~
36 ~~Attorney General advise consumers not to attempt to opt out of~~
37 ~~spam lists. Furthermore, clicking on an “opt-out” line can place~~
38 ~~the recipient’s computer at high risk of being compromised or~~
39 ~~infected with malicious software.~~

- 1 ~~(t) Many, if not most, e-mail users have been forced to use spam~~
- 2 ~~filters to automatically sort and delete e-mails so that the user does~~
- 3 ~~not have to open or read spams unless they specifically desire to.~~
- 4 ~~However, these spam filters have not proven to be 100 percent~~
- 5 ~~effective, as spammers continually find new ways to bypass or~~
- 6 ~~defeat the spam filters, and sometimes the filters miscategorize~~
- 7 ~~solicited e-mail as spam.~~
- 8 ~~(u) Because of the above problems, it is the intent of the~~
- 9 ~~Legislature to prohibit false and deceptive spam.~~