

State of Washington v. Heckel

Briefing Paper

Background Dormant Commerce Clause Jurisprudence, State & Federal Anti-Spam Legislation

Note: I currently see the structure of the final paper as discussing *State v. Heckel*, dormant commerce clause jurisprudence, and evaluating whether state legislation, federal legislation, or a combination thereof would be the best method for dealing with spam.

A. Technological Background

1. The Internet

The Internet is a collection of local computer systems connected to high-capacity national and international networks.¹ Data is transmitted via packets that can be routed according to available bandwidth.² As many academics have pointed out, the Internet's structure "confounds geography."³ Internet host computers are identified by IP [define IP] addresses,⁴ not geographic location. Even knowing locations of sender and recipient computers gives no insight to the digital routes packets will follow as they are relayed among intermediate hosts.⁵

The Internet originated as product of the Cold War, linking U.S. Department of Defense researchers, and until relatively recently was used primarily by the academic and scientific research community.⁶ With the emergence of private Internet Service Providers (ISPs), increasing numbers of consumers entered cyberspace.⁷ As the Internet has increased in popularity, it has become an increasingly commercial.⁸

This communication network has spawned two principle types of communications: directed and indirect communication.⁹ Directed communication includes email and "listserv" mail exploders which send email to all addresses in a list.¹⁰ Indirect communication includes newsgroups, chat rooms, and webpages posted on the World Wide Web.¹¹

¹ Burk, 28 CONN. L. REV. at 1097.

² Burk, 28 CONN. L. REV. at 1097.

³ Gaylord, 52 VAND. L. REV. at 1100.

⁴ Gaylord, 52 VAND. L. REV. at 1100 (defining IP addresses as unique 32-bit numbers divided into four 8-bit numbers identifying individual host computers).

⁵ Gaylord, 52 VAND. L. REV. at 1101. *See* Bassinger, 32 GA. L. REV. at 894 (noting that because of packet switching, "it is impossible to limit Internet communications to a particular geographic area or state.").

⁶ *See* Burk, 28 CONN. L. REV. at 1099. In 1969, the Department of Defense created the Advanced Research Project Agency Network (ARPANET), the parent of the existing Internet, which fell out of use by the late 1980s. Gaylord, 52 VAND. L. REV. at 1099-1100.

⁷ *See* Burk, 28 CONN. L. REV. at 1099.

⁸ *See* Burk, 28 CONN. L. REV. at 1100 (from 1996: noting "businesses of all types routinely use the Internet for commercial transactions, and consumer services have begun to appear . . ."); Sorkin, 35 U.S.F. L. REV. at 342 ("commercial activities became generally accepted on the Internet and ultimately far surpassed the volume of academic and research usage . . .").

⁹ *See* Bassinger, 32 GA. L. REV. at 892-93 (defining two methods of communications: "communications directed by one person to another person or group" and "communication . . . broadcast for all to see.").

¹⁰ Bassinger, 32 GA. L. REV. at 893.

¹¹ Bassinger, 32 GA. L. REV. at 893.

2. Spam

“Spam” is an unsolicited email message,¹² most commonly defined as unsolicited commercial email (UCE) or unsolicited bulk email (UBE).¹³ These terms highlight important aspects of spam. For an email to be unsolicited, no prior relationship exists between the sender and recipient and the recipient has not explicitly consented to the communication.¹⁴ Commercial refers to the content of the email, which usually promotes the sale of goods or services, rather than the actual or presumed motivation of the sender.¹⁵ “Bulk” email is a single message sent to a large number of recipients.¹⁶

Spam is widely condemned as practice to be regulated or eradicated.¹⁷ It is estimated that three to thirty percent of email messages are spam.¹⁸ It has been criticized as a burden on Internet resources, a security threat, and interfering with legitimate business.¹⁹ Messages may contain sexually-explicit content or solicitations for “questionable ventures” that many users find objectionable.²⁰

The costs of spam are high and “widespread,”²¹ causing wasted productivity as recipients skim and delete spam. ISPs bear a large proportion of costs as spam, consumes large amounts of “network bandwidth, memory, [and] storage space” requiring ISPs to have greater hardware capabilities than otherwise necessary.²² ISP employees spend large amounts of times filtering and blocking spam, fixing server crashes and service outages, and resolving spam-related consumer complaints; consequentially consumers pay more for Internet access.²³

Various measures have been advocated and implemented to counteract spam, including self-regulation, technical approaches, litigation, and legislation.²⁴ Self-help and technical defense mechanisms include against spam [give examples and cites]. These measures have largely proved ineffective, as spammers have succeeded in adapting their techniques to evade anti-spam technology.²⁵ Likewise, expensive individualized litigation has only been effective relatively large entities in eradicating “relatively large, highly visible, and persistent spammers”.²⁶

¹² See Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 915. The term “spam” was originally derived from a Monty Python skit. *Id.* at 918 n.13.

¹³ See Sorkin, 35 U.S.F. L. REV. at 325 (noting difficulties in defining spam due to differing perspectives among Internet users and discussing arguments for defining spam as UCE or UBE).

¹⁴ See Sorkin, 35 U.S.F. L. REV. at 329.

¹⁵ See Sorkin, 35 U.S.F. L. REV. at 329-30.

¹⁶ See Sorkin, 35 U.S.F. L. REV. at 330-31 (finding no distinction between a message addressed to large numbers of recipients or separate but identical copies of a message sent to a large number of recipients).

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¹⁸ See Sorkin, 35 U.S.F. L. REV. at 336 n.48.

¹⁹ See Sorkin, 35 U.S.F. L. REV. at 336-40.

²⁰ Sorkin, 35 U.S.F. L. REV. at 336.

²¹ Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 919.

²² Sorkin, 35 U.S.F. L. REV. at 336.

²³ See Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 919; Sorkin, 35 U.S.F. L. REV. at 336-37.

²⁴ See Sorkin, 35 U.S.F. L. REV. at 341-83.

²⁵ See Sorkin, 35 U.S.F. L. REV. at 356.

²⁶ See Sorkin, 35 U.S.F. L. REV. at 367. See Fogo, 18 J. MARSHALL J. COMPUTER & INFO. L. at 922 (noting that “scattershot private suits by ISPs” using “novel legal theories” have not worked against spammers).

B. Dormant Commerce Clause

1. In General

Congress' commerce clause power is drawn directly from Article I of the Constitution.²⁷ By contrast, the dormant commerce clause limitation on state regulation of interstate commerce has been implied from the text and structure of the Constitution.²⁸ The dormant commerce clause has been used to enjoin states from impeding the flow of interstate commerce, practicing "economic protectionism", and discriminating against outsiders.²⁹

When evaluating a state statute relating interstate commerce, courts must determine whether the statute facially discriminates against interstate commerce. [cite] If not, the court applies the balancing test from *Pike v. Bruce Church* to determine whether the local benefits outweigh the burdens on interstate commerce.³⁰

2. Transportation Cases

*Cooley v. Board of Wardens*³¹ introduced the concept that there were some aspects of commerce requiring uniform national regulation. The transportation cases are the progeny of *Cooley v. Board of Wardens*. These cases include *Wabash v. Illinois*,³² *South Carolina v. Barnwell Brothers*,³³ *Southern Pacific v. Arizona*,³⁴ *Bibb v. Navajo Freight*.³⁵ Most recently in *Kassel v. Consolidated Freightways*,³⁶ the Court invalidated state laws that limited truck lengths on highways. It rejected arguments that this law promoted highway safety, pointing to exceptions given to trucks traveling wholly intrastate as "raising the specter" of interstate discrimination.³⁷

3. Extraterritoriality Cases

The extraterritoriality cases include *Edgar v. MITE Corp.*,³⁸ *Brown-Forman v. New York*,³⁹ *CTS Corp. v. Dynamics Corp.*,⁴⁰ and *Healy v. Beer Institute*.⁴¹ *Edgar* proposed that

²⁷ U.S. CONST, art. I § 8 cl. 3.

²⁸ Lawrence, 21 HARV. J.L. & PUB. POL'Y at 403. The Supreme Court's dormant commerce clause jurisprudence has been criticized as "erratic", with "complex exceptions" and "dubious consistency". *See id.* at 397. Lawrence proposed an alternate, cohesive "Unitary Framework" to remedy the jurisprudential confusion. *Id.* at 416-18.

²⁹ *See Burk*, 28 CONN. L. REV. at 1123-24.

³⁰ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Biddle*, 37 CAL. W. L. REV. at 165; *Gaylord*, 52 VAND. L. REV. at 1108-09.

³¹ *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851). The case challenged the constitutionality of a requirement that all boards traveling through the Philadelphia harbor hire a local pilot of pay a fine. The Court upheld the law. *See Biddle*, 37 CAL. W. L. REV. at 170. For an analysis of the transportation cases, *see Bassinger*, 32 GA. L. REV. at 898-904.

³² *Wabash Railway Co v. State of Illinois*, 118 U.S. 558 (1886).

³³ *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177 (1938). The Court refused to invalidate a state law that placed width and weight restrictions that 85% to 95% of trucks currently in use would exceed. Although admitting the law would have a negative impact on interstate commerce, the Court deferred to Congress. *See Biddle*, 37 CAL. W. L. REV. at 172.

³⁴ *Southern Pacific v. Arizona*, 325 U.S. 761 (1945) (invalidating an Arizona law that limited the length of trains within the state). *See Biddle*, 37 CAL. W. L. REV. at 173.

³⁵ *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (striking down an Illinois law that required trucks to be equipped with a specific, curved type of tire mudguard). *See Biddle*, 37 CAL. W. L. REV. at 175.

³⁶ *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1980).

³⁷ *Biddle*, 37 CAL. W. L. REV. at 175.

³⁸ *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

³⁹ *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

⁴⁰ *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987).

the “commerce clause . . . precludes the application of a state statute to commerce that takes place wholly outside the state’s borders, whether or not the commerce has effects within the State.”⁴² These cases held that a statute that directly controls commerce occurring outside a state’s boundaries exceeds the enacting state’s authority and is invalid regardless of whether the legislature intended the extraterritorial reach.⁴³

4. *The Dormant Commerce Clause and Internet Regulation*

Some commentators have noted “striking similarities” between the Internet and transportation⁴⁴ or expressed concern over the extraterritorial implications of state Internet regulations.⁴⁵ These commentators tend to find that state Internet regulations do violate the dormant commerce clause. [cite] By contrast, others have noted that many state Internet laws relate to traditional state police powers, including regulation of fraud and deceptive trade practices.⁴⁶ These commentators tend to find that state Internet regulations don’t violate the dormant commerce clause. [cite]

In *American Libraries Association v. Pataki*,⁴⁷ the court applied the transportation and extraterritoriality cases to a New York state law that criminalized the distribution of harmful content to a minor via computer.⁴⁸ The court held that the Internet was “wholly insensitive to geographic distinctions” and equated the Internet with modes of transportation, an area of exclusive national control.⁴⁹ The court also used the extraterritoriality cases to invalidate the New York law based on its extraterritorial effects, which encroached on other states’ regulatory programs.⁵⁰

C. State and Federal Regulation

As of October 2000, thirty-three states have considered and seventeen have enacted anti-spam laws.⁵¹ Some of these laws include opt-out systems, content regulation, and civil and/or criminal penalties.⁵²

Many bills have been proposed in the House and Senate, but none have become law. In 1999 alone, the Email User Protection Act, Netizen Protection Act, Inbox Privacy Act, and Unsolicited Electronic Mail Act were co-pending.⁵³ During the current session, the Unsolicited Commercial Email Act of 2001, Anti-Spamming Act of 2001, and CAN SPAM Act of 2001 are under consideration.⁵⁴ [need cites for all listed legislation]

⁴¹ *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

⁴² *Edgar v. MITE Corp.*, 457 U.S. at 642-43.

⁴³ *See Gaylord*, 52 VAND. L. REV. at 1112.

⁴⁴ *See Burk*, 28 CONN. L. REV. at 1125.

⁴⁵ *See Gaylord*, 52 VAND. L. REV. at 1096.

⁴⁶ *See Burk*, 28 CONN. L. REV. at 1124; *Biddle*, 37 CAL. W. L. REV. at 162.

⁴⁷ *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

⁴⁸ *See Biddle*, 37 CAL. W. L. REV. at 165.

⁴⁹ *See Biddle*, 37 CAL. W. L. REV. at 166-67.

⁵⁰ *See Biddle*, 37 CAL. W. L. REV. at 167-68.

⁵¹ *See Fogo*.

⁵² *See Sorkin*, 35 U.S.F. L. REV. at 368-379.

⁵³ *See Dreben* at 8.

⁵⁴ *See* www.spamlaws.com/federal/summ107.html.