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Law & Technology Writing Seminar
September 4, 2001

Case Report:
State of Washington v. Heckel[1]

Facts

In 1997, Jason Heckel, an Oregon resident doing business as Natural Instincts, developed a forty-six page online booklet entitled "How to Profit from the Internet." In it, he described how to set up an online promotional business, acquire free email accounts, and obtain software for sending bulk email.[2]

Beginning in June 1998, Heckel used the methods described in his own pamphlet and began marketing the booklet by sending between 100,000 and 1,000,000 unsolicited email messages per week. [cite] Heckel used the Extractor Pro software program to "harvest" email addresses from various online messages and send bulk-mail messages using only simple commands.[3] Heckel's email text was a long sales pitch including testimonials from satisfied purchasers and an order form that the user could download, print, and mail (along with $39.95) to Heckel's Salem, Oregon mailing address. Heckel sold thirty to fifty pamphlets per month using these marketing methods.

In June 1998, the Washington State Attorney General's Office, Consumer Protection Division ("the Division") began receiving complaints from Washington residents who had recieved Heckel's email. The complaints alleged that his "messages contained misleading

[1] State v. Heckel, 24 P.3d 404 (Wash. 2001).

[2] *Heckel*, 24 P.2d at 406.

[3] *Id*. at 406. The Extractor Pro software required the user to enter only a return email address, subject line, and message text.

subject lines and false transmission paths."[4] The Division sent Heckel a letter advising him of the Act.[5] In response, Heckel called the Division and discussed procedures that bulk emailers could follow to avoid emailing Washington residents. Nonetheless, the Division continued to receive complaints that Heckel was violating [Washington's Commercial Electronic Mail—see below] Act.[6]

Procedural History

The State of Washington filed suit against Jason Heckel, a resident of Oregon, alleging that his transmission of e-mail to Washington residents violated RCW 19.190, Washington's commercial electronic mail act ("the Act").[7] In particular, the State alleged three causes of action: (1) violation of RCW 19.190.020(1)(b) by using false or misleading subject headers;[8] (2) violation of RCW 19.190.020(1)(a) by misrepresenting email transmission paths;[9] (3) commission of a deceptive trade practice under RCW 19.86.020 by failing to provide a valid email address to which recipients could respond.[10] The State sought a permanent injunction under RCW 19.86.140 and 19.86.080, civil penalties, costs, and attorneys fees.

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[4] *Id*. at 406.

[5] *Id*. at 407. The act provides that persons sending an email message may not use a third party's domain name without permission, misrepresent or disguise the message's point of origin or transmission path, or use a misleading subject line.

[6] *Id*. In total, twenty documented complaints were received.

[7] *Heckel*, 24 P.3d at 405.

[8] *Heckel*, 24 P.3d at 407. The two misleading subject lines used were, "Did I get the right email address?" and "For your review--HANDS OFF!" *Id*.

[9] *Id*. at 407. Nine of the messages generating complaints used the domain name "13.com" as the originating ISP. However, 13.com had been registered to another user since November 1995 and at the time of Heckel's bulk emails was inactive. Thus no messages could have been sent through 13.com. *Id*.

[10] *Id*. at 407.

On cross-motions for summary judgment, the lower court dismissed the suit against Heckel, concluding in a brief opinion "that the statute in question here violates the Federal Interstate Commerce clause" and it "is unduly restrictive and burdensome."[11]

Challenging the trial court's finding, the State sought direct appeal and Heckel cross-appealed seeking reversal of the trial court's denial of his request for attorneys fees.[12] The Washington Supreme Court granted direct review. It reversed the trial court's decision and remanded the matter for trial, holding that the Act did not "unduly burden interstate commerce."[13]

Supreme Court Analysis

The single issue facing the Washington Supreme Court was whether the Act's limitations on bulk emailing activities violated the dormant Commerce Clause and unconstitutionally burdened interstate commerce.[14]

The court reviewed the trial court's summary judgment *de novo*, viewing all facts in the light most favorable to the State.[15] Under the Commerce Clause, the court noted an implicit dormant Commerce Clause principle that when states enact laws that unduly burden interstate commerce, they "impermissibly intrude" on the federal government's regulatory powers.[16] The court used a two-step test to analyze the Act under the dormant Commerce Clause:. First, they determined whether the Act "openly discriminate[d] against interstate commerce in favor of

[11] *Id*. at 408; State v. Heckel, 2000 WL 979720 *1 (Wash. Super. Ct. 2000).

[12] *Heckel*, 24 P.3d at 408.

[13] *Id*. at 406.

[14] *Id*. at 408.

[15] *Id*. at 408.

[16] *Id*. at 409.

intrastate economic interests." If they determined the law is facially neutral, then they balanced the local benefits against the intrastate burdens.[17]

Based on the language of RCW 19.190.120, the court quickly concluded that the Act applied evenhandedly to in-state and out-of-state spammers and thus was not facially discriminatory.[18] The court then declared that the Act survived the *Pike* balancing test because its "local benefits surpass[ed] any alleged burden on interstate commerce."[19] Noting that the Act protected the interests of Internet Service Providers (ISPs), owners of forged domain names, and email users, the court cited dicta from other cases that disfavored bulk email on a theory of trespass to chattels.[20] [is last sentence relevant?]

The court discussed actual costs to these parties, noting that hardware and consumer service costs on ISPs. [cite] Additionally, it cited instances where owners whose domain names had been forged in spam headers and consequentially had their computers shut down by spam responses. Finally, when "e-mail recipients cannot promptly and effectively respond to the message (and thereby opt out of future mailings) their efforts cost time and hamper their ability to use computer time most efficiently. The court used a weak analogy that spam was equivalent to sending junk mail with postage due or telemarketing calls to a pay-per-minute cellphone.[21]

The court noted that the only burden placed on spammers was a requirement of truthfulness, and that this requirement didn't burden commerce but actually facilitated it by

[17] *Id*. at 409. The balancing portion is drawn from *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).

[18] *Id*. at 409. [can't use id]

[19] *Id*. at 409.

[20] *Id*. at 409 (discussing *Compuserve v. Cyber Promotions, Inc*., 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) and *Am. Online, Inc. v. IMS*, 24 F. Supp.2d 548, 550 (E.D. Va. 1998)).

[21] *Id*. at 410. [can't use id]

removing fraud and deception. [cite] It argued that the trial court erred when its inquiry focused on the sanctions for noncompetition on the burden of competition. [cite][22]

The court also dismissed Heckel's arguments that the Act could create inconsistency among the states or could regulate commerce occurring wholly outside of Washington. It stated that the imposition of "additional, but not irreconcilable obligations" doesn't make the requirements "irreconcilable" and hence barred by the dormant Commerce Clause. Likewise, the court focused on the Act;s requirements that illegal bulk messages be read by a Washington resident or be initiated from a Washington computer. Thus, the court argued, that statute didn't extend to emails routed through Washington computers which didn't meet the other requirements of the Act.[23]

On these grounds, the court reversed the trial court, vacated the order relating to attorneys' fees, and remanded the matter for trial.

[22] *Id*. at 411.

[23] *Id*. at 412-13.2