



email marketers win decisive legal victory

Recently, a jury hearing *Beyond Systems v. Kraft Foods* unanimously found that anti-spam plaintiff Beyond Systems, Inc., an alleged Internet service provider, is “primarily or substantially” engaged in filing anti-spam lawsuits. Therefore, Beyond Systems is not a *bona fide* “Electronic Mail Service Provider” under California’s anti-spam statute, or a *bona fide* “Interactive Computer Service Provider” under Maryland’s anti-spam statute. This jury finding is important because it paves the way for the trial judge to rule as a matter of law that service providers that are “primarily or substantially” engaged in filing anti-spam litigation cannot sue under these state statutes. Such a ruling would, in effect, require plaintiffs to be *bona fide* to maintain state law causes of action in addition to federal CAN-SPAM lawsuits, and thereby provide a complete defense to email marketers sued for violations of state anti-spam laws.

Standing under CAN-SPAM (Federal Law): *Gordon v. Virtumondo*

CAN-SPAM (15 U.S.C. §§ 7701 *et seq.*) is the federal law that regulates commercial email, and prohibits certain types of commercial email identified by the statute. CAN-SPAM expressly allows an “Internet access service” to sue for violations of the statute. 15 U.S.C. § 7706(g).

The Ninth Circuit in *Gordon v. Virtumondo* held that the plaintiff lacked standing to sue under CAN-SPAM because the plaintiff did not “operate as a *bona fide* e-mail provider.” *Gordon v. Virtumondo*, 575 F.3d 1040, 1052 (9th Cir. 2009). In *Gordon*, the plaintiff alleged it was an “Internet access service” provider adversely affected by spam, and sued under CAN-SPAM and the Washington Commercial Electronic Mail Act (“CEMA”), Wash. Rev. Code § 19.190.010 *et seq.* While the defendant did not contest plaintiff’s standing to bring state law CEMA claims, the defendant did contest plaintiff’s standing to maintain its CAN-SPAM claims because the plaintiff undertook efforts to receive spam and sue over it.

In light of these and other facts, the Ninth Circuit held that plaintiff lacked standing to sue under CAN-SPAM because plaintiff was not *bona fide* Internet access service provider. Central to its holding, the Ninth Circuit found that plaintiff “has purposefully avoided taking even minimal efforts to avoid or block spam messages” and instead “accumulate[ed] spam through a variety of means for the purpose of facilitating litigation.” *Id.* at 1052. The Ninth Circuit did not decide whether plaintiff also lacked standing to maintain its state law CEMA claims.

Standing under Maryland and California State Law: Beyond Systems v. Kraft Foods

Maryland's anti-spam statute is based on the Washington state anti-spam statute, CEMA, at issue in *Gordon*. Like CEMA, the Maryland anti-spam statute allows an "interactive computer service" of fraudulent spam email to sue over such email. Likewise, California's anti-spam statute allows an "electronic mail service provider" or recipient of fraudulent spam email to sue over that email. The Maryland and California statute each allow a service provider to obtain \$1,000 for each unlawful email.

In 2008, Beyond Systems sued Kraft Foods and Connexus Corp., and claimed that it was an "interactive computer service provider" and an "electronic mail service provider" that received alleged fraudulent emails. Beyond Systems, Inc. is owned by Paul Wagner, the brother of Joe Wagner, owner of another anti-spam plaintiff, Hypertouch, Inc.

When it became clear that Beyond Systems was primarily and substantially engaged in filing lawsuits and provided services at most as a secondary purpose, the judge ordered a trial on the issue of whether Beyond Systems was a *bona fide* service provider under the California and Maryland statutes. After the first phase of the trial, the jury first found that Beyond Systems met the technical definitions of the statutes. Then, during the second phase, defendants presented the jury with evidence showing that Beyond Systems did everything it could to trap spam; agreed to receive vast amounts of spam from plaintiff's brother, Joe Wagner of Hypertouch; filed dozens of lawsuits across the country over alleged spam based on the spam that Beyond Systems trapped and alleged spam that Joe Wagner of Hypertouch sent to Beyond Systems; generated revenues from litigation that far exceeded revenues generated from alleged services provided to customers; and otherwise functioned to file lawsuits and not as a legitimate service provider. When confronted with this evidence, the jury found that Beyond Systems was not a *bona fide* "electronic mail service provider" under California's anti-spam or an "interactive computer service provider" under Maryland's anti-spam statute. Instead, Beyond Systems functioned to "primarily or substantially" file anti-spam lawsuits.

Import of the Jury's Finding in Beyond Systems, Inc. v. Kraft Foods

Given the jury's finding, the trial judge will now decide whether only *bona fide* service providers – and not service providers that primarily or substantially sue over alleged illegal email – can sue under the California and Maryland statutes. No court has decided this issue under these state laws.

J. Douglas Baldrige and Ari N. Rothman of Venable represented Connexus Corp. at trial. "We are grateful that the jury found that Beyond Systems was not *bona fide* but instead primarily or substantially engaged in filing anti-spam lawsuits, and hope that the trial judge sees through the facade that Beyond Systems put up during trial and issue a ruling that prevents anti-spam litigants from suing under the statutes by merely holding themselves out as service providers where they truly exist to file lawsuits and seek huge windfalls in statutory damages" said Ari N. Rothman, one of the trial lawyers for the defense. "If the logic of *Gordon* applies, as we believe it should, then the door will be shut on

state law suits brought by ISPs that are not *bona fide* – something that the Ninth Circuit in *Gordon* did not decide,” he added. Regardless of how the judge rules, the outcome of this case will have ramifications across the country and must be watched.

Briefing on this issue is expected to occur in the next few months, and a ruling is anticipated later this year. This case has been followed closely by local media in Washington, DC.

The case caption is *Beyond Systems, Inc. v. Kraft Foods et al.*, 8:08-cv-00409, United States District Court for the District of Maryland.

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