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# DO YOU WANT SPAM WITH THAT? THE CAN-SPAM ACT, PREEMPTION, AND FIRST AMENDMENT COMMERCIAL SPEECH JURISPRUDENCE CONCERNING STATE UNIVERSITY ANTI-SOLICITATION E-MAIL POLICY

*Dan Hopper\**

THE Fifth Circuit recently held that the CAN-SPAM Act<sup>1</sup> does not preempt a state university's anti-solicitation policy because of a presumption against preemption.<sup>2</sup> The court also ruled that the University of Texas's anti-solicitation policy did not violate the plaintiff's First Amendment commercial speech rights because no less extensive measures existed to protect the interests of user efficiency.<sup>3</sup> The Fifth Circuit was incorrect in its holding. Instead, it should have held that the federal CAN-SPAM Act preempted the university's anti-solicitation policy based on the language of the statute and, further, that the university should not have been allowed to regulate commercial speech based on "user efficiency" interests without any exploration of less extensive measures.

In *White Buffalo*, several users complained to the University of Texas ("UT") regarding unsolicited bulk emails (commonly known as spam) that they had received from White Buffalo Ventures, LLC ("WBV").<sup>4</sup> WBV had targeted several thousand UT students for one of their online dating websites, longhornsgingles.com, and had sent legal commercial spam emails to those students.<sup>5</sup> After an internal UT investigation into the complaints revealed that WBV had indeed sent tens of thousands of

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1. 15 U.S.C. §§ 7701-7713 (2003). This act is generally called the CAN-SPAM Act, which stands for Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003.

2. *White Buffalo Ventures, LLC v. Univ. of Tex. at Austin*, 420 F.3d 366, 370-74 (5th Cir. 2005).

3. *Id.* at 374-78.

4. *Id.* at 369.

5. *Id.*

unsolicited emails, UT wrote a cease and desist letter to WBV.<sup>6</sup> WBV refused to comply with the request, prompting UT to block all emails coming from WBV's IP address to any UT email address.<sup>7</sup>

In rendering its decision, the Fifth Circuit failed to consider three key factors. Notably, only fifteen UT email users complained in response to the approximately 59,000 emails that WBV sent.<sup>8</sup> Also, the messages contained a functioning, one-click "unsubscribe" feature that allowed users to opt-out of receiving future emails.<sup>9</sup> Finally, in an online Information Technology guideline, UT advised its users that they had a great deal of control regarding unsolicited email and even suggested four specific ways to deal with the problem.<sup>10</sup>

Immediately after UT blocked WBV's emails, WBV obtained a temporary restraining order ("TRO") in Texas state court.<sup>11</sup> The University then removed the case to federal district court based on the federal question jurisdiction.<sup>12</sup> The federal district court continued the TRO, pending a hearing on the preliminary injunction.<sup>13</sup> After the hearing, the district court denied the injunction, the parties conducted discovery, and both parties then moved for summary judgment.<sup>14</sup> The district court granted UT's motion and denied WBV's motion for summary judgment.<sup>15</sup>

WBV appealed the judgment on the grounds that the federal CAN-SPAM Act preempted any internal UT anti-spam policy, and that UT's policy violated the First Amendment.<sup>16</sup> The Fifth Circuit affirmed the district court's decision, noting that the case presented several novel issues that will grow in proportion to society's cultural and economic reliance on the internet.<sup>17</sup> The court also recognized that as of August 2005, no other Fifth Circuit panel had examined any portion of the CAN-SPAM Act, and further, that no other court in the country had examined the preemption provision of the statute, making this "an issue of very, very first impression."<sup>18</sup>

The Fifth Circuit affirmed the district court's ruling by making two determinations: 1) the CAN-SPAM Act does not preempt UT's anti-solicitation policy, and 2) the anti-solicitation policy is permissible under First Amendment commercial speech jurisprudence.<sup>19</sup> In general, the CAN-SPAM Act "prohibits fraudulent, abusive and deceptive commercial

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6. *Id.*

7. *Id.* at 369-70.

8. Original Brief on Behalf of Plaintiff-Appellant White Buffalo Ventures, LLC at IV.B., *White Buffalo*, 420 F.3d 366 (No. 04-50362).

9. *Id.*

10. *Id.*

11. *White Buffalo*, 420 F.3d at 370.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 368-69.

17. *White Buffalo*, 420 F.3d at 368-69.

18. *Id.* at 371.

19. *Id.* at 369.

email,” and the parties agreed that WBV complied with the requirements of the Act.<sup>20</sup> In deciding that the CAN-SPAM Act did not preempt UT’s internal anti-solicitation policy, the court weighed two conflicting statements within the Act regarding which state rules are preempted and who is exempt from preemption. The court decided that, due to the statute’s internal conflict, it could not overrule the strong presumption against federal preemption.<sup>21</sup> The court then analyzed the First Amendment claim using the four-part commercial speech test found in *Central Hudson*<sup>22</sup> and determined that UT’s policy “survives First Amendment scrutiny” of the *user* efficiency interest, but not of the *server* efficiency interest.<sup>23</sup>

The court began its preemption analysis by stating that based on Supremacy Clause jurisprudence and history, the U.S. Supreme Court has expressed a presumption against preemption of state law.<sup>24</sup> In other words, “tie goes to the state,” and just because Congress has created an express provision of preemption in a statute, it may not clearly define what is preempted and what is not.<sup>25</sup> The conflicting statements on preemption that specifically apply to a state university are found in the CAN-SPAM Act itself. The provision that provides for preemption of state laws is stated in Section 7707(b)(1):

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.<sup>26</sup>

The court acknowledged WBV’s argument that UT is a state actor and that WBV did not send any false or fraudulent spam, and that, therefore, this provision could apply to preempt UT’s anti-spam policy.<sup>27</sup> The court, however, then discussed the complication that exists because, in addition to expressly preempting state laws, Section 7707(c) also *exempts* “providers of internet access” from the preemption:

Nothing in this chapter shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.<sup>28</sup>

The court went one step further than the district court and attempted to define “provider of internet access service,” noting that Congress im-

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20. *Id.* at 371.

21. *Id.* at 372-74.

22. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

23. *White Buffalo*, 420 F.3d at 378.

24. *See id.* at 370 n.9.

25. *Id.* at 370.

26. 15 U.S.C. § 7707(b)(1).

27. *White Buffalo*, 420 F.3d at 371.

28. 15 U.S.C. § 7707(c).

ported the definition wholesale from the Internet Tax Freedom Act: "A service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as a part of a package of services offered to consumers."<sup>29</sup> The court simply concluded, "we are hard-pressed to find that providing email accounts and email access does not bring UT within the statutory definition borrowed from the Internet Tax Freedom Act."<sup>30</sup> Finally, the court explained that because UT is both a state actor *and* a provider of Internet access, this creates tension in the statute's application; thus, the court was unwilling to overrule the strong presumption against preemption of UT's policy.<sup>31</sup>

Next, the court turned its attention to WBV's First Amendment claim, which it analyzed using the four-part commercial speech test in *Central Hudson*: 1) whether the speech is unlawful or misleading; 2) whether the government's expressed interest is substantial; 3) whether the state action directly promotes that interest; and 4) whether the state action is more extensive than necessary to promote that interest.<sup>32</sup> The first prong presented no issues, as both parties agreed that the speech was lawful and not misleading.<sup>33</sup> Under the second prong, the court determined that UT's interest in protecting users of its email network from spam (*user* efficiency) is substantial.<sup>34</sup> The court further held that the interest in protecting the efficiency of its networks and servers (*server* efficiency) was also substantial, but that this interest must independently satisfy a "goodness of fit" inquiry under the fourth prong.<sup>35</sup> For the third prong, the court focused on the action taken by UT to advance its interests in user and server efficiency and wasted no time in holding that "there can be no serious dispute that UT's anti-spam policy, which blocks specific incoming commercial spam after account-holders have complained about it, directly advances both interests."<sup>36</sup> Finally, under the fourth prong, which the court contends is the most difficult inquiry, the court simply stated that UT's policy is no more extensive than necessary, asserting that "we have little problem affirming the proposition that, to keep community members from wasting time identifying, deleting, and blocking unwanted

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29. *White Buffalo*, 420 F.3d at 373 (citing 47 U.S.C. § 151 (The Internet Tax Freedom Act)). See *infra* note 41 for a discussion on the inaccuracy of this analysis.

30. *Id.* at 373.

31. *Id.* at 373-74.

32. *Id.* at 374 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

33. *Id.* at 374.

34. *Id.* at 374-75.

35. *White Buffalo*, 420 F.3d at 375. Because the court later rejects the proposition that UT's policy to protect the interest of *server* efficiency was no more extensive than necessary (i.e. UT could have taken less extensive measures), this casenote will not analyze this issue to the same extent as *user* efficiency. *Id.* at 376.

36. *Id.* at 375.

spam, UT may block otherwise lawful commercial spam . . . .”<sup>37</sup> Thus, the court found all four of the factors in favor of UT and determined that UT’s anti-spam policy was constitutionally permissible under the *Central Hudson* analysis.<sup>38</sup>

The Fifth Circuit should have held that the federal CAN-SPAM Act preempted the university’s anti-solicitation policy based on the statute’s preemption language and the policies behind the adoption of the statute. At the least, the court should have further explored previous statutes in its definition analysis of who is a provider of Internet services. UT is clearly a state actor, and according to the CAN-SPAM statute, its rules can be preempted by the federal Act.<sup>39</sup> Therefore, the only way that the court could exempt UT’s policy from preemption would be to determine, as it did, that UT was a “provider of Internet access.”<sup>40</sup> The court’s determination that UT was a “provider of Internet access,” however, was inaccurate and incomplete in several ways. First, the court incorrectly attempted to define Internet access *service* instead of defining who is a *provider* of that service, and even cited to an improper previous statute for its definition.<sup>41</sup> Second, even though the previous statute was cited incorrectly, the Internet Tax Freedom Act’s definition of Internet access service is virtually identical to the actual definition in 47 U.S.C. § 231(e)(4). Therefore, because CAN-SPAM does not define who a *provider* is, the court could have gone a bit further into the Internet Tax Freedom Act and found that Congress had defined an “Internet access provider” as “a person *engaged in the business* of providing a computer and communications facility through which a customer may obtain access to the Internet.”<sup>42</sup> The court should have at least considered whether UT was *engaged in the business* of providing Internet access, educating students, or both.

Further, Congress’ intent as to who are providers of Internet access and as to the policy of preemption can be found in the Congressional Findings and Policy section of the CAN-SPAM Act itself.<sup>43</sup> In Section 7701(a)(6), Congress states that spam “imposes significant monetary costs on providers of Internet access services, businesses, and educational and

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37. *Id.* at 376. Although the interest of server efficiency was analyzed in detail by the court regarding evidentiary requirements, it was rejected by the court and was not a determining factor in the case. Therefore, it will not be analyzed here.

38. *Id.* at 378.

39. See 15 U.S.C. § 7707(b)(1); *White Buffalo*, 420 F.3d at 370-72.

40. See *White Buffalo*, 420 F.3d at 371, 371-73.

41. See 47 U.S.C. § 151, which is cited by the court for its definition of Internet access services (Internet Tax Freedom Act, § 1101(e)(2)(B)). However, the CAN-SPAM actually imports the definition for Internet access services from 47 U.S.C. § 231(e)(4). See 15 U.S.C. § 7702(11). The court may have understandably been confused because Section 7702(10), the immediately preceding section, does import the definition of “Internet” from 47 U.S.C. § 151.

42. 47 U.S.C. § 151 (Historical and Statutory Notes, Internet Tax Freedom Act, § 1101(e)(2)(A) (emphasis added)).

43. See 15 U.S.C. § 7701.

nonprofit institutions that carry and receive such mail . . . .”<sup>44</sup> By mentioning providers of Internet access services separately from businesses and educational and nonprofit institutions, Congress seems to be differentiating between a provider and an educational institution, even though UT may “provide” Internet services. This, taken in combination with the Internet Tax Freedom Act’s definition of a “provider” as an entity that is “engaged in the business of” providing Internet access service, seems to strongly suggest that UT, as an educational institution, is not a “provider of Internet access service.” If UT is not a provider, then it cannot fall within the exemption for Internet providers, and therefore, UT’s anti-spam policy should have been preempted by the CAN-SPAM Act. Further, concerning preemption, Congress wished to promote consistency among the different states so that businesses could comply with one federal law instead of various state laws.<sup>45</sup> Allowing various state policies at different universities would tend to undermine this desire for consistency.

Regarding the First Amendment claim, on the fourth prong of the *Central Hudson* analysis, the court summarily ruled in UT’s favor with no discussion of any alternative measures. On this important fourth prong, the court merely stated that the anti-spam policy was no more extensive than necessary to protect user efficiency; the court never considered any less extensive measures that clearly could have been debated based on the evidence.<sup>46</sup> The “user efficiency interest” is the interest in keeping the UT email community from “wasting time identifying, deleting, and blocking unwanted spam.”<sup>47</sup> The court saw no problem in blocking all future emails from WBV as long as it kept some members from wasting time.<sup>48</sup> Because only fifteen users complained when 59,000 emails were sent, it is hard to believe that UT could not have taken less extensive measures by advising those users to unsubscribe from the messages using the one-click feature in the email, referring the students to the online IT guideline that suggested four specific ways of dealing with spam,<sup>49</sup> or using available technology to create filters for only those users that complained. Although the court may have decided that these alternatives were not feasible, it should have at least explored and discussed them before summarily finding that UT may block all emails from WBV.

In conclusion, the Fifth Circuit should have held that the federal CAN-SPAM Act preempted UT’s anti-solicitation policy because the preemption language of the statute, congressional policy statements, and the definition of “Internet service provider” all suggest that UT is not a provider of internet access and, therefore, should not be exempted from preemp-

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44. § 7701(a)(6).

45. See § 7701(a)(11).

46. *White Buffalo Ventures, LLC v. Univ. of Tex. at Austin*, 420 F.3d 366, 376 (5th Cir. 2005).

47. *Id.*

48. See *id.*

49. Original Brief on Behalf of Plaintiff-Appellant *White Buffalo Ventures, LLC* at IV.B, *White Buffalo*, 420 F.3d 366 (No. 04-50362).

tion. Further, the policy behind the federal Act that seeks to ensure consistency between the states should have swayed the court to rule for preemption. Finally, the court quickly approved the measures taken by UT to protect “user efficiency” interests without discussing any less extensive measures that could have been taken. Although it is hard to argue that spam should be allowed to clutter our inboxes, it will be interesting to see if other districts and circuits will follow the Fifth Circuit’s example, or if they will give spammers a fighting chance under the CAN-SPAM Act as it was written by Congress.

