

MEMORANDUM

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TO: ESPC Members

FROM: D. Reed Freeman

DATE: March 2, 2012

FILE: 68223-0000001

RE: *Balsam v. Trancos, Inc.*: CAN-SPAM and Federal Preemption

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I write to update you regarding the opinion in *Balsam v. Trancos, Inc.*, a California Court of Appeals case with implications for the breadth of federal preemption of state law under the CAN-SPAM Act. The decision of the California intermediate appellate court was handed down on February 24, 2012.

**Summary**

In *Balsam v. Trancos, Inc.*, \_\_\_ Cal. Rptr. 3d \_\_\_ (1st App. Dist., February 24, 2012), the California intermediate appellate court held that ***the federal CAN-SPAM Act does not preempt California's anti-Spam law*** (Cal. Bus. & Prof. Code § 17529 *et seq.*) ***in cases where the sender of the unsolicited email messages deliberately uses randomly chosen, untraceable domain names in the email header for the purpose of concealing its role in sending those messages.*** The court found that the statute was saved by CAN-SPAM's exemption from preemption of state laws that prohibit falsity or deception in any portion of a commercial email, as long as the deception is material.

**Background**

Trancos, Inc. operates several internet advertising ventures. It had bought the rights to several email address lists, and in the summer of 2007 it sent eight emails to Balsam, a California attorney who has either been a plaintiff or represented plaintiffs in dozens of lawsuits against companies for unsolicited email advertising. Balsam had not consented to receive the emails.

Of the eight emails, only one contained the name of an existing company (eHarmony) in the "From:" line, and all eight (including the eHarmony email) were sent from fancifully-named domains, such as misstepoutcome.com and moussetogether.com, that were privately registered to Trancos. Because the domains were privately registered, a search of a publicly-available database such as "WHOIS" would show the name of the registrar of the site (in this case The GoDaddy Group, Inc. or Domains by Proxy, which is a GoDaddy service) as the owner. It would be impossible to determine that Trancos was the true owner of those domains. All eight emails contained an opt-out link indicating the name

USAProductsOnline.com and a street address in Santa Monica, California. The address was for a UPS store, where Trancos maintained a mailbox. It was only by subpoenaing the UPS store that Balsam was able to determine that Trancos was in fact the entity sending the emails. Brian Nelson, Trancos's owner, indicated that Trancos used private registration because of past retaliation and threats, and to protect its employees.

California's anti-spam law makes it unlawful, as relevant here, to send email advertisements that contain or are accompanied by falsified, misrepresented, or forged header information. Cal. Bus. & Prof. Code § 17629.5(a)(2). The act does not contain a definition of "header information," but in *Kleffman v. Vonage Holdings Corp.*, 49 Cal.4th 334 (2010), the California Supreme Court borrowed the definition from the CAN-SPAM Act. Under this definition, "header information" is "the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message." 15 U.S.C. § 7702(8). For the purposes of this case, the court determined that the header information included the purported sender names, domain names, and emails addresses that appeared in the emails' "From:" lines.

## Analysis

In *Kleffman*, the California Supreme Court decided that sending multiple emails from a variety of fancifully-named domains for the purposes of avoiding spam filters did not *per se* violate California's anti-spam law. In *Kleffman*, the plaintiff argued that the defendants had violated the statute by sending emails from domain names that did not identify Vonage as the company originating the emails, and by sending the emails from a variety of domains, giving the impression that they were from different entities. The Court rejected the argument that "misrepresented" in the statute meant "misleading" or "likely to mislead," and held that using multiple domain names did not violate the statute, and neither did using domain names that did not clearly identify the sender or advertiser.

The *Balsam* court distinguished the case it was reviewing from the one reviewed in *Kleffman* in three ways. First, the court below did not find that Trancos's use of multiple nonsensical domain names to defeat spam filters or give the impression that its emails were coming from different sources violated the anti-spam statute. Second, the trial court did not decide that the use of a domain name that failed to identify Trancos violated the anti-spam statute. Third, most critically, and unlike in *Kleffman*, the trial court here decided that the fact that the sender's names in seven of the emails did not represent a real company, and in all eight cases could not be traced back to Trancos, the owner of the domains and sender of the emails, *did* violate the anti-spam statute. Further, the purpose in using multiple domains was in fact to prevent email recipients from determining who the owner actually was. Thus, where the *Kleffman* court decided that "[a]n e-mail with an accurate and traceable domain name makes no *affirmative* representation or statement of fact that is false," *Kleffman* at 347, here, "an e-mail with a made-up *and untraceable* domain name affirmatively *and falsely* represents the sender has no connection to Trancos." *Balsam* at \*13. The fact that consumers could contact

Trancos—via the unsubscribe link in the email, and via an email address contained in the message—was of no importance, because that did not cure the misrepresentation inherent in the untraceable domain name.

Therefore the essence of the holding is the *traceability* of the domain name—either by direct identification, or by accurate information discoverable by searching a public database such as WHOIS. In the absence of the ability of those aggrieved by the emails to trace them to their source, consumers are unable to seek redress either from Trancos directly, or from those law enforcement entities empowered to defend consumers. Allowing entities like Trancos to hide behind anonymity, when they send out millions of emails every month, amplifies the likelihood of Internet fraud and abuse, which are the evils the Legislature sought to combat in passing the anti-spam law.

### **Preemption**

Trancos argued that the clause in the CAN-SPAM Act that exempted state statutes that prohibit falsity or deception in any part of a commercial email from preemption required that the plaintiff be able to prove all the elements of common law fraud, including reliance and damages. The *Balsam* court admitted that there has been a split of opinion in federal courts regarding the breadth of the scope of CAN-SPAM’s preemption, with some courts requiring plaintiffs prove common law fraud, while others have found the savings clause is broader than that. *Compare Kleffman v. Vonage Holdings Corp.*, 2007 WL 1518650 (C.D. Cal. May 22, 2007) at \*3, with *Asis Internet v. Consumerbargaingiveaways, LLC*, 622 F.Supp.2d 935, 941-944 (N.D. Cal. 2009).

Despite the split of opinions in the federal courts, the *Balsam* court credited the analysis undertaken by a different California appellate court in *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal.App.4th 805 (2d App. Dist. 2011). The *Hypertouch* court rejected ValueClick’s argument that CAN-SPAM’s savings clause required a showing of all the elements of common law fraud. Rather, it held that the savings clause applied to “any state law that prohibits material falsity or material deception in commercial e-mail.” *Id.* at 833. Considering the text, legislative history, and purpose of the federal statute, the court decided that Congress had intended the savings clause to have a broader meaning than merely common law fraud. Instead, the phrase “falsity or deception” merely requires some element of tortiousness or wrongfulness. State laws that prohibit immaterial or nondeceptive inaccuracies or omissions in emails are preempted, however.

In this case, the court determined that Trancos’s deliberate use of randomly chosen, untraceable domain names in the “From:” line of the emails, for the admitted purpose of concealing its role in sending them, does involve deception as to a material matter—the sender’s identity—as well as an element of wrongful conduct. Therefore, it decided that CAN-SPAM’s savings clause applied, and California’s anti-spam law was *not* preempted.