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Legislative Note: Recent State Laws Regulating Unsolicited Electronic Mail

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LEGISLATIVE NOTE: RECENT STATE LAWS REGULATING UNSOLICITED ELECTRONIC MAIL

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I. INTRODUCTION

This Note surveys recent state laws enacted in response to unsolicited electronic mail or "spam."[1] Unsolicited electronic mail is perceived by many users of the Internet and the Worldwide Web as a nuisance. Other authors have described the economic incentives for, and the infrastructural costs associated with, spam.[2] More seriously, spam may be an obstacle to the success of the Internet economy.[3] While the U.S. Congress has been slow to act,[4] state legislatures have been far more responsive. Since the first bill was introduced in the

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1. Unsolicited electronic mail is known by many names, including "unsolicited bulk email," "unsolicited commercial email," or UCE, and spam. In this Note, "unsolicited electronic mail" and "spam" will be the preferred names.

2. *See, e.g.*, Lisa M. Sternoff, Comment, *Taking Spam Out of the American Diet* (Feb. 1999) (unpublished comment, text available online at <http://www.lisasternoff.com>); Michael W. Carroll, *Garbage In: Emerging Media and Regulation of Unsolicited Commercial Solicitations*, 11 BERKELEY TECH. L.J. 233, 276 (1996); Barry Bowern, *Controlling unsolicited bulk e-mail: Who's taking action? What's being done?* SUNWORLD (Aug. 1997) <http://www.sunworld.com/swol-08-junkemail.html>.

3. *See, e.g.*, Lorrie Faith Cranor et al., *Beyond Concern: Understanding Net Users' Attitudes About Online Privacy*, AT&T LABS-RESEARCH TECHNICAL REPORT TR 99.4.3 (Apr. 14, 1999) <http://www.research.att.com/projects/privacystudy> (documenting Internet users' concerns regarding, *inter alia*, receiving unsolicited communications as a result of their on-line activities).

4. As of March 2000, the U.S. Congress is considering nine different bills addressing unsolicited electronic mail. Eight bills were introduced in the 105th Congress, none of which became law. For a detailed list of pending legislation, see CAUCE, Coalition Against Unsolicited Commercial Email (visited Mar. 28, 2000) <http://www.cauce.org>.

Nevada senate in January 1997,[5] fourteen states have passed sixteen laws regulating spam, and four states created committees charged with addressing a host of Internet related issues, among them, spam.[6]

In enacting spam legislation, states have adopted a variety of approaches have been implemented by the states in the new laws, exemplifying Justice Brandeis' observation that the state may "serve as a laboratory; and try novel social and economic experiments."[7] Nonetheless, general patterns in the enacted legislation are emerging. Section II of this Note describes these general patterns and highlights a few notable exceptions from the trends.

As companies strive to get attention on the web, many are turning to consumers' inboxes.[8] In practice, it is difficult for anyone to know the physical location of the recipient only from an individual's e-mail address.[9] As a result, companies interested in exploiting the economic efficiencies of unsolicited electronic mail, but wanting to comply with the various state laws, must comply with the superset of the various state laws.[10] Section III describes "best practices" to be used by companies trying to minimize their exposure under the spam laws.

Section IV describes some shortcomings of the current laws, both legal (constitutionality and enforceability) and practical (effectiveness and ease of use by recipients of spam), and makes suggestions for improvements. Section V presents a very brief discussion of two recent decisions, one declaring Washington State's law unconstitutional under the "Dormant Commerce Clause," and another rejecting a summary judgement motion seeking to declare Louisiana's statute unconstitutional. Section VI concludes the Note.

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5. NEV. REV. STAT. § 41 tit. 3 (1998) (introduced Jan. 1997, enacted July 1997, effective July 1, 1998).

6. Maine, Maryland, New Jersey and Oregon.

7. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

8. An "inbox" is the electronic equivalent of a mailbox, where a user may see the electronic messages, solicited and unsolicited, that have been sent to the e-mail address associated with that inbox.

9. For example, maxochoa@yahoo.com alone, does not indicate that I am a resident of the State of California, or of the United States, for that matter.

10. In truth, the problem is far more vexing. As non-U.S. jurisdictions pass legislation regulating spam, a sender may need to worry about complying with the superset of all laws, foreign and domestic.

II. *LEITMOTIFS*[11] IN STATE LAWS REGULATING SPAM

As of March 3, 2000, fourteen states have passed sixteen laws regulating spam.[12] Additionally, the legislatures of four states[13] have formed committees charged with exploring legislative approaches to control spam. A review of the various statutes reveals that there are certain trends in the legislative efforts to date.

The laws can be divided into explicit unsolicited electronic mail regulation statutes and consumer protection statutes. Within each of these two broad categories of laws, there are many elements or legislative *leitmotifs* that can be seen at play.

A. Express Unsolicited Electronic Mail Statutes

These are statutes that attempt to define unsolicited commercial e-mail and to regulate it. A typical definitional scheme is that of North Carolina: "'Unsolicited' means not addressed to a recipient with whom the initiator has an existing business or personal

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11. *Leitmotifs* are melodic passages or phrases in music, Wagnerian opera in particular, that represent a character or emotion. *Leitmotif* may also refers to a dominant and recurring theme or pattern, and that is the sense in which it is used in this Note.

12. In order of date of effectiveness of the laws, the states that have enacted spam regulations are:

Washington, WASH. REV. CODE § 19.190 (1998) (effective June 11, 1998, *as amended* by H.B. 1037 (Wash. 1999), *declared unconstitutional* in State v. Henckel. *See* Section V, *infra.* note 40);

Nevada, NEV. REV. STAT. §§ 41.705-.735 (1998) (effective July 1, 1998);

California, CAL. BUS. & PROF. CODE § 17538.4 (1999) and §17538.45 (1999) (both effective Jan. 1, 1999);

West Virginia, W. VA. CODE § 46a-6G-1 *et seq.* (1999) (effective June 11, 1999);

Tennessee, TENN. CODE ANN. §§ 47-18-2501, -2502 (1999) (effective June 17, 1999);

Iowa, IOWA CODE § 714D (1999) (effective July 1, 1999);

Oklahoma, OKLA. STAT. Tit. 15, § 776.1 *et seq.*, Tit. 74, § 5060.52 (1999) (effective July 1, 1999);

Virginia, VA. CODE ANN. §§ 8.01-328.1, 18.2-152.2, -152.4, -152.12 (1999) (effective July, 1, 1999);

Delaware, DEL. CODE ANN. tit. 11, §§ 936-941 (1999) (effective July 2, 1999);

Rhode Island, R.I. GEN. LAWS § 6-47 (1999) (effective July 8, 1999) and §§ 11-52-1, -6, -4.1 (1999) (effective Oct. 1, 1999);

Louisiana, LA. REV. STAT. §§ 14:73.1(5), (8), (12), (13), 14:73.6 (1999) (effective Aug. 15, 1999);

Connecticut, 1999 Conn. Acts 99-160 (Reg. Sess.) (effective Oct. 1, 1999, *also repealing and substituting* CONN. GEN. STAT. § 52-59(b)) CONN. GEN. STAT. §§ 42 *et seq.*, 52-59(b) (1999) (effective Oct. 1, 1999)];

North Carolina, N.C. GEN. STAT. §§ 1-75.4, 14-453, 14-458, 1-539.2a (1999) (effective Dec. 1, 1999);

Illinois, 815 ILL. COMP. STAT. 511/1 *et seq.* (1999) (effective Jan. 1, 2000).

13. *See supra* note 6.

relationship and not sent at the request of, or with the express consent of, the recipient."[14] "'Commercial electronic mail" means messages sent and received electronically consisting of commercial advertising material, the principal purpose of which is to promote the for-profit sale or lease of goods or services to the recipient."[15]

B. Consumer Protection Statutes

These laws are arguably the easiest with which to comply. In general, the only requirements on spam are that no misleading subject lines be used and that the sender of the e-mail not alter or misrepresent or obfuscate the so-called header (information describing the route the e-mail has taken through the Internet from sender to recipient) of the e-mail. The intent of the laws is not to prevent spam, but rather to make spammers be "honest" in the subject lines of their e-mails and for their e-mails to be traceable.

Provided, if one complies with these requirements, one can send as much spam as one likes. These statutes are generally codified along with other consumer protection provisions of the particular state.

C. Additional Legislative Leitmotifs

1. Spam Software Prohibitions

Beginning with Virginia, several states seek to prohibit software that facilitates spam.[16] Because software can be speech, it is likely that these provisions of the statutes will be found to violate the First Amendment.[17]

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14. N.C. GEN. STAT. §§ 14-453(10) (1993).

15. N.C. GEN. STAT. §§ 14-453(1b) (1999).

16. *See, e.g.*, VA. CODE ANN. §§ 18.2-152.4(b) (1999):

> It shall be unlawful for any person knowingly to sell, give or otherwise distribute or possess with the intent to sell, give or distribute software which (i) is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information; (ii) has only limited commercially significant purpose or use other than to facilitate or enable the falsification of electronic mail transmission information or other routing information; or (iii) is marketed by that person or another acting in concert with that person with that person's knowledge for use in facilitating or enabling the falsification of electronic mail transmission information or other routing information.

17. *See* Junger v. Daley, 2000 WL 343566, *4 (6th Cir. 2000). Justice Martin wrote: "Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment." See *also* Bernstein v. U.S. Department of Justice, 176 F.3d 1132 (9th Cir. 1999), *reh'g granted,*

2. Long Arm Statutes

While the judicial framework of jurisdiction is being crafted case-by-case, several state legislatures have attempted to assist judges' traditional personal jurisdiction analysis by explicitly amending their long-arm statutes to contemplate the sending of spam into their state from outside the state.[18] This is an obvious benefit to plaintiffs, who may be spammed from beyond the borders of their home state.

3. ISP Safe Harbors

All states which have passed spam laws have created safe harbors for Internet service providers, or ISPs. ISPs are companies that provide individuals with connectivity and bandwidth to the Internet. States have created two forms of ISP safe harbors. The first is the safe harbor for the transmission of spam. In every state regulating spam, with the notable exception of Louisiana, an ISP cannot be held liable for a violation of the spam laws because it simply transmitted spam-encoding packets.[19] About half the states have created a second type of safe harbor, shielding ISPs from liability for attempting to prevent spam.[20] Left unanswered by the statutes is the question of vicarious liability of an ISP that knowingly allows spam to be sent through its servers.

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withdrawn, 192 F.3d 1308 (9th Cir. 1999), where the court found that not even the Government's strong interest in preventing the proliferation of strong encryption code, surely more compelling than the state's interest in preventing spam, could limit the free speech inherent in the creation of software.

18. *See, e.g.*, OKLA. STAT., Tit. 15, § 776.3 (1999): "Transmitting or causing the transmission of fraudulent electronic mail to or through a computer network of an electronic mail service provider located in this state shall constitute an act in this state."

19. *See, e.g.*, W. VA. CODE § 46a-6G-3(4) (1999): "No interactive computer service or public utility will be liable for merely transmitting a bulk electronic mail message on its network."

20. *See, e.g.*, W. VA. CODE § 46a-6G-3(1)-(3) (1999):

> (1) An interactive computer service may block the receipt or transmission through its service of any bulk electronic mail that it reasonably believes is, or will be, sent in violation of this article.
>
> (2) An interactive computer service may disconnect or terminate the service of any person that is in violation of this article.
>
> (3) No interactive computer service may be held liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any bulk electronic mail which it reasonably believes is, or will be, sent in violation of this article; nor will any interactive computer service be held liable for any action voluntarily taken in good faith to disconnect or terminate the service of any person that is in violation of this article.

4. Civil or Criminal Remedies; Who Can Seek Them?

The states have varied significantly in defining the potential plaintiff and in choosing whether or not to criminalize a violation of the spam law. States have variously given rights of action to one or more of the following: ISPs, individual recipients of the spam and the state attorney generals. Some states have made violations civil offenses and others have criminalized violations, with the most flagrant or repeated violations categorized as a felony with prison terms of several years.

D. Exceptions

Some state statutes do not limit themselves to commercial e-mails.[21] This raises clear constitutionality concerns as government regulations of non-commercial speech faces stricter scrutiny than does regulation of commercial speech.[22] However, to the extent these laws are addressing false advertising or fraudulent behavior, and arguably, the use of misleading subject lines and the misrepresentation of the origin or routing path of an electronic message constitute such behavior, the constitutionality question is not reached in the first instance.

III. "BEST PRACTICES" FOR MINIMIZING EXPOSURE TO STATE SPAM LAWS

If a sender could somehow know that all her intended unsolicited electronic mail recipients are in Louisiana, then she only need worry about complying with the Louisiana statute. As stated in the introduction, it is very difficult for a sender of an e-mail to know with any certainty where that e-mail will be received. In effect, an e-mail

21. Virginia, West Virginia, Oklahoma, Connecticut, and Rhode Island's statutes are illustrative of this point.

22. Supreme Court jurisprudence on the First Amendment is vast and complex. However, speaking broadly, the Supreme Court has held that content-based restrictions on speech are presumptively unconstitutional and that in order for such restrictions to be upheld, the government must show that the regulation is necessary to serve a compelling state interest and it is narrowly tailored to achieve that end, a level of judicial review commonly referred to as *strict scrutiny*. *See, e.g.*, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991). State restrictions on commercial speech are subject to somewhat greater deference from the courts, though false advertising is not protected by the First Amendment. After determining if the commercial speech addresses a lawful activity and is not misleading or fraudulent, a court will uphold a regulation on commercial speech if the regulation serves a substantial governmental interest, it directly advances that interest, and is narrowly tailored to serve the substantial interest. *See, e.g.*, Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989).

sender who desires to comply with, or at least minimize her risk of violating, the various state spam laws must tailor her messages to comply with the superset of all the state laws.[23] This could be a daunting challenge. However, because of the general patterns outlined in Section II, it turns out that the task is manageable. The following are suggested "best practices" for minimizing one's risk of violating the state spam laws.[24]

Do not "spoof" header information. "Spoofing" header information is a practice used to conceal, obfuscate or misrepresent the origination point and routing information present in the header of most e-mail messages. The "header" of an e-mail message is a field of information found at the beginning or "head" of an e-mail message. The header identifies the origination point and routing information of a given e-mail address. By reviewing the header of an e-mail, one can trace it to its origin. Washington law provides a typical statutory prohibition:

> No person may initiate the transmission... of a commercial electronic mail message... that uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message.[25]

Start subject lines with ADV: or ADV:ADLT. By starting the subject line of an unsolicited commercial e-mail with "ADV:" (or "ADV:ADLT" if the subject matter of the e-mail is intended for persons over 18 years of age), one will avail oneself of a safe harbor of the California, Tennessee and Rhode Island laws.[26]

Do not use misleading subject lines.[27] An example of a

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23. *See supra* note 10.

24. It should be noted that this area of the law is in heavy flux, and that as new laws are added by the states or Congress, this advice may change.

25. WASH. REV. CODE § 19.190.020(1)(a) (1998).

26. *See, e.g.*, TENN. CODE ANN. §§ 47-18-2501(e) (1999):

> In the case of e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift, offer or other disposition of any realty, goods, services or extension of credit, the subject line of each and every message shall include "ADV:" as the first four (4) characters. If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, that may only be viewed, purchased, rented, leased, or held in possession by an individual eighteen (18) years of age or older, the subject line of each and every message shall include "ADV:ADLT" as the first eight (8) characters.

27. *See, e.g.*, NEV. REV. STAT. § 41-730(1)(c) (1998): "[I]f a person transmits or causes to

misleading subject line is "Great seeing you last week!". One expects to receive an enthusiastic e-mail from a friend. Instead, the e-mail is an unsolicited electronic mail. Arguably if one follows the prior suggestion, one will automatically comply with this statutory requirement of many of the laws. An example of an accurate subject line for a widget-monger might be "We are offering you a one-time special on widgets."

Establish a valid reply-to e-mail address or toll-free telephone number.[28] One must make it easy and cost-free for a recipient of one's unsolicited electronic mail to notify one that they do not wish to receive further e-mails.

Notify recipients of how they can request no further e-mails.[29] The first text in the body of the e-mail should describe the method that may be used by the recipient to request that no more e-mails be sent to her.[30] This can be a bitter pill to swallow for many people with sales and marketing responsibilities. They want the advertisement to be the first thing seen. While many senders of spam place the information on discontinuing further e-mails at the end of their messages, they are not complying with the letter of the law.

Do not send further e-mails to people who have requested to be removed from the distribution list.[31] Senders of unsolicited electronic mail must set up a mechanism to compare e-mail addresses

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be transmitted to a recipient an item of electronic mail that includes an advertisement, the person is liable to the recipient for civil damages unless the advertisement is readily identifiable as promotional, or contains a statement providing that it is an advertisement . . . ."

28. *See, e.g.*, TENN. CODE ANN. §§ 47-18-2501(d) (1999): "[Sender shall] establish a toll-free telephone number or valid sender operated return e-mail address that the recipient of the unsolicited documents may call or e-mail to notify the sender not to e-mail any further unsolicited documents."

29. *See, e.g.*, CA. BUS. & PROF. § 17538.4(b) (1999):

> All unsolicited faxed or e-mailed documents subject to this section shall include a statement informing the recipient of the toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or e-mail, as the case may be, notifying the sender not to fax or e-mail the recipient any further unsolicited documents to the fax number, or numbers, or e-mail address, or addresses, specified by the recipient. In the case of faxed material, the statement shall be in at least nine-point type. In the case of e-mail, the statement shall be the first text in the body of the message and shall be of the same size as the majority of the text of the message.

30. It should be noted that in the unsolicited facsimile context, some states only require that this information be provided at the end rather than the beginning of the fax. *See id.*

31. *See, e.g.*, TENN. CODE ANN. §§ 47-18-2501(c) (1999): "Upon notification by a recipient of the recipient's request not to receive any further unsolicited faxed or e-mailed documents, no person or entity conducting business in this state shall fax or cause to be faxed, or e-mail or cause to be e-mailed, any unsolicited documents to that recipient."

for subsequent e-mail messages against the e-mail addresses of those who have previously requested to no longer receive e-mails. Failure to do so will give rise to a cause of action under many of the statutes.

Keep up to date with the spam laws. As of March 3, 2000, Congress is considering nine bills to regulate spam,[32] and twenty-five states are considering new or additional legislation addressing spam.[33] Because of the need to comply with the superset of all spam laws, it is imperative that senders of unsolicited electronic mail that wish to so comply stay current with legislative developments.

IV. DO THE SPAM LAWS WORK? SUGGESTIONS FOR LEGISLATIVE ACTION

If one assumes that state laws are a desirable and effective means of regulating spam, are the current crop of laws doing the job? If we answer in the negative, what suggestions might be advanced? One of the largest problems facing the state statutes looms on the horizon. As stated in the Introduction, the U.S. Congress is currently contemplating federal legislation governing spam. As other authors have pointed out, federal action with regard to spam is desirable.[34] However, if the Congress is wise, any legislation that is ultimately enacted will expressly preempt the state laws we have discussed. State legislators should also show foresight, as have their peers in California and Tennessee,[35] and include specific language in their legislation stating that the state laws will terminate when a federal law is enacted. If either of these two legislative actions does not occur, spam law will have the same patchwork quilt quality seen in the unsolicited fax context.[36]

States should amend their long-arm jurisdiction statutes to include out-of-state senders of spam into their borders. This will

32. S. 759 106th Cong. (1999), S. 699 106th Cong. (1999), H.R. 612 106th Cong. (1999), H.R. 1685 106th Cong. (1999), H.R. 1686 106th Cong. (1999), H.R. 1910 106th Cong. (1999), H.R. 2162 106th Cong. (1999), H.R. 3024 106th Cong. (1999), H.R. 3113 106th Cong. (1999).

33. Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, Tennessee, Utah, Vermont and Virginia. Contact the author for citations to the various bills.

34. *See supra* note 2.

35. CA. BUS. & PROF. § 17538.4(i) (1999) and TENN. CODE ANN. §§ 47-18-2501(k) (1999), respectively.

36. Many states have laws regulating the transmission of unsolicited facsimiles. The federal government passed a law, 47 USC § 227 (1999), prohibiting unsolicited commercial facsimiles but did not preempt the state laws. This has created a complicated overlay of potential state and federal claims which depend on the state of residence of the aggrieved party.

facilitate prosecution of spammers and increase the effectiveness of the laws.

States should consider amending their small claims court statutes to allow out-of-state senders of spam to be easily served with process, and sued in small claims court. Additionally, the states should consider granting small claims courts the ability to grant injunctive relief in the case of spam prevention. Both of these small claims court statute modifications will increase the ability of recipients of spam to avail themselves of the simplest legal forum available without the complications attendant in superior or municipal courts. This in turn will enhance the deterrent effect of the laws.

Currently, it is unclear if an ISP that knowingly allows spam to be sent through its servers can be held liable under a vicarious liability theory. Since state legislatures have declared the reduction or eradication of spam desirable, their legislatures should consider the following suggestions: (1) expressly state that it will be a violation of the anti-spam law for an ISP to transmit spam with actual knowledge of such transmission, and (2) require ISPs to install spam-filtering technology within a reasonable period of time.

States need to do a more thoughtful job of defining what actually constitutes spam or "bulk" commercial e-mail.[37] Under many of the statutes, the sending of just one e-mail to just one recipient is spamming. This is probably not the intended result. The only state attempting to define "bulk" to date is Louisiana, which defines "unsolicited bulk electronic mail" as any commercial e-mail sent to more than one thousand recipients.[38] The obvious problem with this numerical definition is that many spam-facilitating programs can be used to send only 999 messages or n-1 messages, where n is the arbitrary, legislatively decreed numerical threshold defining "bulk" e-mailing or spam. While quantitative measures are probative, they should not be dispository. Legislatures should introduce a "totality of the circumstances" test that encourages a fact-finder to look at the alleged spammer's behavior in a broader context than just the number

37. The author recognizes that political economy theory contemplates purposeful ambiguity as the natural result of the inability of political actors to agree to any particular legislative definition. Because specificity may at times harm one party's vested political interest or the other or both, but faced with pressure to do *something*, legislatures have been known to pass vague laws and let the judiciary sort out the mess.

38. LA. REV. STAT. §§ 14:73.1(13) (1999). "'Unsolicited bulk electronic mail' means any electronic message which is developed and distributed in an effort to sell or lease consumer goods or services and is sent in the same or substantially similar form to more than one thousand recipients."

of e-mails sent.

Finally, even if all these suggested improvements are made, the problem of spam is not actually solved. Individuals will still get spam, particularly if a spammer only needs to comply with the consumer-protection state statutes (no misleading subject lines or spoofed headers). People will still be frustrated and angered by the dozens of spam messages they receive each day. What is needed is a broad adoption by the states, or federal enactment, of a Nevada- and California-style prohibition on unsolicited commercial e-mails that requires the senders of the spam to only send e-mail to those recipients who have expressly opted in to receiving the e-mail. The opt-in language should have teeth. For example, when a user is first registering with a site, and she is being asked if she would like to receive occasional e-mails, the default answer should be "no." Only an affirmative act of the user should constitute opt-in. Other authors have described the inherent benefits of a strong opt-in approach for consumers.[39]

V. RECENT COURT DECISIONS

State v. Heckel.[40] On March 10, 2000, King County Superior Court Judge Palmer Robinson ruled that Washington's anti-spam law is unconstitutional because "the statute in question violates the Federal Interstate Commerce Clause of the United States Constitution, [and] that the Washington statute is restrictive and burdensome. . . ." The 145-word, handwritten decision echoes a string of cases that have rejected state regulation of Internet activities. The state attorney general has decided to appeal the decision. Whether or not any state regulation of the Internet can be legal is beyond the scope of this Note.[41] However, the recent Washington decision adds urgency to the need for comprehensive, federal legislation regulating spam and preempting state law.

Fox v. Reed.[42] On March 16, 2000, the United States District Court for the Eastern District of Louisiana granted defendants' motion to dismiss a case brought by plaintiffs engaged in transmitting

39. *See generally supra* note 2.

40. State v. Heckel, Case No. 98-2-25480-7 SEA (Wa. Super. Ct. 2000).

41. For a competent lay article on the subject, *see* Carl S. Kaplan, *State Internet Laws Face a Different Constitutional Challenge*, NEW YORK TIMES ON THE WEB (visited July 2, 1999) <http://search.nytimes.com/search/daily/bin/fastweb?getdoc+site+site+72211+44+wAAA+July%7E2,1999%7Eand%7Einternet>.

42. Fox v. Reed, Civ. Action No. 99-3094 Section : "R"(4), 2000 U.S. Dist. LEXIS 3318 (E.D. La. Mar. 16, 2000).

bulk electronic mail. The defendants were the Attorney General of the State of Louisiana and the District Attorney for the Parish of St. Tammany. The plaintiffs facially challenged the constitutionality of the Louisiana's statute under the Fourth and Fourteenth Amendments as vague and overbroad, raised the First Amendment rights of free speech and communication, and challenged the legislation based on the Commerce Clause of the United States Constitution. Plaintiffs had not in fact been charged or threatened under the statute; rather they were seeking to have the statute declared void in anticipation of an actual act.

Ultimately, the decision of the court does not indicate whether or not the statute would survive Constitutional scrutiny. The court refused to hear the merits of plaintiffs' case. It dismissed on the basis that, because plaintiffs had not established the requirements for standing, the case did not present a justiciable case or controversy under Article III of the United States Constitution and so lacked subject matter jurisdiction.[43] The court did not address the merits of plaintiffs' assertions, leaving the door open for plaintiffs to bring their case before a court with proper jurisdiction.[44]

VI. CONCLUSION

States have leapt into the breach left by Congress' inability to agree on an approach to regulating spam on the national level. Fourteen states have already enacted spam laws. At least twenty additional states are considering their own legislation. Because of the borderless nature of the Internet and the practical problem of knowing where a recipient of spam resides, a person interested in minimizing her exposure to the anti-spam statutes must comply with the superset of these regulations. This Note analyzed the common themes or *leitmotifs* that arise in the statutes and presented suggestions for compliance with the superset of the laws. I additionally made suggestions for lawmakers to consider in crafting the new statutes to address shortcomings in the current laws.

A recent decision has declared Washington's statute unconstitutional under the dormant commerce clause, calling into question the validity of the other regulations. For a variety of reasons, this Note advocates for the prompt enactment of a federal anti-spam statute that expressly preempts the state laws and incorporates a

43. *Id.* at *27.

44. *Id.* at *6.

strong opt-in requirement. Until such a federal law is enacted, the uncertainty for plaintiffs and defendants will only increase as new states increase the roster of spam laws, complicating compliance for businesses trying to legally use spam as part of their marketing efforts.