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Counting "Spaces" in Virginia Model Legislation to Control Junk E-mail

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1. Introduction

The technological agenda in terms measure, and electronic mail is "a tool it is encapsulate. Junk Mail (Junk E-mail) is the Internet equivalent of the junk mail that is sent through the postal system. Virginia Legislation (Clauses) is the Internet equivalent for the postman, the Internet equivalent for the postman, the Internet equivalent for the postman,

4.4 FDPA are having a difficult time obtaining opens, lists, call and spam legislation do, not have?

[1] According to Pamela Jones, Groklaw, "Yesterday, Microsoft's Jim Allchin testified that Microsoft's Vista OS would be ready for the public by the end of November, and that Microsoft had "no plan" to delay it. Microsoft's Vista OS has been in development for three years. Microsoft's Vista OS is the first product since the opens and lists, call and spam legislation, which was developed under the Trustworthy Computing initiative. Microsoft's Vista OS is the first product since the opens and lists, call and spam legislation, which was developed under the Trustworthy Computing initiative. Microsoft's Vista OS is the first product since the opens and lists, call and spam legislation, which was developed under the Trustworthy

[178] See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

[179] See *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989).

[180] *Florida Bar v. Went For It*, 515 U.S. 618, 623 (1995).

[181] *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn of New York*, 447 U.S. 557, 566 (1980).

[182] See id.

[183] See, e.g., *Florida Bar*, 515 U.S. at 623 (applying *Central Hudson* analysis to unsolicited advertising by attorneys).

[184] *Central Hudson*, 447 U.S. at 566.

[185] *Ohralik v. Ohio*, 436 U.S. 447, 456 (1978).

[186] *Destination Ventures, Ltd. v. FCC*, 844 F. Supp. 632, 637 (D. Or. 1994), *aff'd*, 46 F.3d 54 (9th Cir. 1995). On the Internet, Cassell, supra note 16, at 214-16, see also *Dimensions v. Distribution Ex. of America, Inc.*, 648 N.Y.S.2d 630 (1996) (finding that newspaper distributor did not have First Amendment right to continue to deliver newspapers to a private housing complex).

[188] *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970).

[189] Id.

[190] For example, a district court in *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 450 (E.D. Pa. 1996) stated:

> A private company such as Cyber simply does not have the unlimited right under the First Amendment to invade AOL's private property with mass e-mail advertisements. Put another way, the First Amendment does not dictate that AOL must open its computers to Cyber's e-mail. Cyber may not commandeer AOL's computers to transmit its e-mail. Such a forced relationship would violate AOL's property and disrupt AOL's operation while at the same time not receiving any compensation whatsoever from Cyber.

[191] See *Cyber Promotions*, 948 F. Supp. at 450-51.

[192] See id. at 56.

[193] See id.

[194] See id.

[195] See id.

[196] In contrast to the third prong, this prong potentially has some bite. See *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (striking down city ordinance that banned commercial newsracks from city streets while permitting newsracks that dispensed free newspapers, on ground that ordinance's effect on commercial newsracks was not justified by its asserted interests).

[197] Although courts hold that commercials do not have a First Amendment right to send spam to nonconsenting ISPs, *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996); *Hotmail Corp. v. Van Money Pie, Inc.*, 1998 WL 548639 (N.D. Cal. Aug. 25, 1998), it is arguably contended that the Supreme Court's decision in *Rowan* bars state laws from being enacted, *Cyber Promotions*, 948 F. Supp. at 450; *Cassidy v. Superior Ct.*, 92 F. Supp. 2d 1025-28. Although the passage of anti-spam legislation would qualify as state action that trigger the First Amendment, these decisions could prompt the limited relication that courts may have if Congress acted.

[198] See id. Joseph Hamilton & William Miles, *The Dormant Commerce Clause Meets the Internet*, 41 Boston B.J., Sept. Oct. 1997, at 5; also Peter Lewis, Spam on Trial, Newsweek, June 7, 1998, at 52.

[199] The Congressional Research Service, 47 U.S. 417 (1973) (discussing Foreign Nations, and among the several States." U.S. Const. art I, § 8.

[200] See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *Cooley v. Board of Wardens*, 22 U.S. (9 Wheat.) 419 (1824).

[201] See *R.F. Hood & Sons, Inc. v. Dalkhul*, 336 U.S. 525, 537-38 (1949).

[202] See *City of Philadelphia*, 437 U.S. at 623-24.

[203] See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945).

[204] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

[205] See *City of Philadelphia*, 437 U.S. at 624.

[206] *Pike*, 397 U.S. at 142.

[207] See id.

[208] See *R.F.H. Hood*, 336 U.S. at 537.

[209] See id.

[210] See id.

[211] Courts generally use two tests in such cases: (1) a law is per se invalid if it discriminates against out-of-state interests on its face, or if the practical effects are as if it were either facially discriminatory or protectionist; and (2) if the law is not facially discriminatory, the law is valid if the burdens imposed on interstate commerce are not clearly outweighed by the local benefits. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See also *Maryland Shipping Assn, Inc. v. City of Newtownland*, 101 F.Ed 1095, 1101 (5th Cir. 1996) (applying the third test to *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 482 (1887) (applying the third test to *American Libraries v. Pataki*, 969 F. Supp. at 166.

[212] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[213] Id. at 572-73.

[214] In a Rorschach test, the court's application of Gore would lead it to the absurd result that if certain conduct is legal in Connecticut, then New York is barred from using the same conduct when undertaken by a Connecticut resident in New York. Clearly, the Supreme Court did not intend such a result.

[215] See *Kenney v. Air-Line Pilots Ass'n*, International, 427 B.2d 326 (Ga. 1993) (classifying a New Yorker's act of transmitting a libelous statement to a person who was a resident of Georgia as "business" when New Yorker's messages used a computer system based in Virginia); *Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (replacing "intentional" with "purposeful" in the "minimum contacts" analysis, and holding that a Florida resident's actions were "purposeful" when they were directed at a California resident, because the actions were principles for defining out-of-state activity should apply in the Dormant Commerce Clause context.

[216] See *Pataki*, 969 F.Supp. at 168 ("The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and that possibly was unaware were being accessed."), 170-79.

[217] See Hamilton & Miles, supra note 198, at 21.

[218] See *American Libraries*, 969 F. Supp. at 181.

[219] See id.

[220] See id.

[221] See id.

[222] See id.

[223] See id.

[224] See id.

[225] See id.

[226] The next section of this article demonstrates that assuring production over out-of state spammers will not pose significant problems to Virginia.

[227] See *American Libraries*, 969 F. Supp. at 178-79.

[228] See id.

[229] See id.

[230] See id. at 179.

[231] See id. at 179.

[232] See id.

[233] See id. at 180.

[234] See id. at 181.

[235] The next section of this article demonstrates that assuring production over out-of state spammers will not pose significant problems to Virginia.

[236] See *American Libraries*, 969 F. Supp. at 178-79.

[237] See id.

[238] See *Lotus*, supra note 186, at C1.

[239] See id. Hotmail and Netscape, however, have aggressively pursued out-of-state advertisers and service providers who reach their citizens via the Internet. See *American Libraries*, 969 F. Supp. at 166.

[240] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[241] Id.

[242] Id. at 319. The test of fundamental fairness often hinges on whether sufficient contacts with the state have been established by the defendant to make it reasonable and fair to require the defendant to defend the suit. *Fundamental Fairness in a Virtual World*, 30 Cumberland L. Rev. 1100, 1175-76 (1997). Reasonable anticipation of being haled into court in the forum state is a factor that proponents generally articulate at the bottom of the "minimum contacts" analysis. See id. 1176-77.

[243] "Specific jurisdiction" generally applies to individuals who commit torts in the forum state or to individual contracts that have a nexus to the state. Mike & Robar, supra note 207, at 1173.

[244] See *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985).

[245] See Mike & Robar, supra note 245, at 1173.

[246] See U.S. Const. Art. I, §10. (Mike 1998).

[247] See *Gray v. Bell Atlantic Inc. v. Chesapeake Corporation*, 551 F.2d 664, 667 (Va. 1971); *Brown v. American Broadcasting Co., Inc.*, 704 F.2d 1296, 1301 (4th Cir. 1983).

[248] See *Gray*, 551 F. Supp. 664, 667 (Va. 1971).

[249] See U.S. Const. Art. I, §10.

[250] See id.

[251] See *John G. Kelley*, 180 S.E.2d at 667.

[252] See U.S. Const. Art. I, §10. (Mike 1998).

[253] See U.S. Const. Art. I, §10. (Mike 1998).

[254] See U.S. Const. Art. I, §10. (Mike 1998).

[255] See *e.g., Kenney v. Hunter Magazine, Inc.*, 465 U.S. 770 (1984); *Brown, Inc. v. Brown Foundation*, 958 F. 1001, 1 (D.C. 1992).

[256] See Mike & Robar, supra note 245, at 1177-78 (citing cases); *but see Halley v. Hickey*, 532 S.E.2d 117 (Va. 2000) (holding that the exercise of rights to participate in the District of Columbia because he could not possibly know where the recipients of his Report reside when a typical e-mail address simply reads "Johnsmith@aol.com").

[257] See Mike & Robar, supra note 245, at 1177-78. There is also a legitimate argument that spammers should expect to be haled into court anywhere in the U.S. because their solicitations are purposefully aimed throughout the nation. See *Internet Libraries*, 969 F. Supp. 160, 161 (S.D.N.Y. 1997) (discussing a similar Georgia law).

[258] See *Cyber Promotions*, 948 F. Supp. 436 (E.D. Pa. 1996) (discussing a similar Georgia law).

[259] See *Cyber Promotions*, 948 F. Supp. at 450-51.

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