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A Call to Arms: Marching Orders for the North Carolina Anti-Spam Statute

Michael B. Edwards

Recent Development: A Call to Arms: Marching Orders for the North Carolina Anti-Spam Statute

Michael B. Edwards[1]

An estimated 2.3 billion spam[2] electronic messages (e-mails) are sent daily.[3] An average Internet user is likely to receive approximately 1,500 spam e-mails by 2006.[4] Spam e-mail has increased an incredible 450% in the year between summer 2001 and summer 2002.[5] According to a recent European Union study, the cost to consumers and businesses of unsolicited e-mail is between eight and ten billion dollars annually, and other damages include decreased productivity, time taken to delete unwanted messages, server crashes, and the higher cost of Internet access.[6] Money spent to combat spam is estimated to reach $88 million this year, a cost that is expected to double by 2006.[7]

As significant as these costs are, the estimated cost to the spammer is a mere .00032 cents per message,[8] or $320 per million e-mails sent. Based on the numbers above, spammers pay an annual cost of approximately $270 million.[9] Compared with the

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[1] J.D. Candidate, University of North Carolina School of Law, 2004.

[2] David E. Sorkin, *Spam Laws: Glossary* (last visited Nov. 17, 2002) *at* http://www.spamlaws.com/glossary.html (on file with the North Carolina Journal of Law & Technology) (defining spam as unsolicited bulk e-mail or unsolicited commercial e-mail). For purposes of this article, spam e-mail and bulk e-mail will be used interchangeably.

[3] Henry Norr, *Spam Stampede Clogs Internet, E-mail Now One-third Advertising*, S.F. CHRON. (Sept. 8, 2002), *at* http://sfgate.com/cgibin/article.cgi?file=/chronicle/archive/2002/09/08/MN137044.DTL (on file with the North Carolina Journal of Law & Technology).

[4] Daniel Tynan, *Spam Inc.*, PC WORLD, Aug. 2002, at 108.

[5] Sam Vaknin, *The Economics of Spam-1*, UNITED PRESS INT'L (July 23, 2002), *at* http://www.upi.com/view.cfm?StoryID=20020723-121152-3651r (on file with the North Carolina Journal of Law & Technology).

[6] *Id.*

[7] *Id.* (citing an unlisted Radicati Group report).

[8] Vaknin, *supra* note 5.

[9] This is based on the following calculation: 2.3 billion e-mails sent daily x 365 days x .00032 cents/message = $268,640,000.

eight to ten billion dollars in costs for consumers and businesses,[10] this cost differential amounts to a gigantic exercise in cost shifting.[11] Litigation expenses, however, effectively take the free out of free ride by shifting costs back to spammers, costs that may ultimately put them out of business.[12]

With the costs of spam rising rapidly, North Carolinians might be heartened to know that the North Carolina General Assembly passed a fairly comprehensive anti-spam statute[13] in 1999 aimed at protecting average e-mail users and Internet service providers ("ISPs") from spam. Yet, in the two and one half years since the passage of the North Carolina anti-spam statute, no cases have been fully litigated under the Act.[14]

This note will take an in-depth look at the North Carolina anti-spam statute, compare relevant parts of the statute with similar provisions in other state statutes, explore remedies and pitfalls brought to light by case law, and address why the North Carolina law's substantive strength does not bear on its actual use. The North Carolina anti-spam statute will likely withstand challenges under the First Amendment[15] and the dormant Commerce Clause[16]

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[10] *See* Vaknin, *supra* note 5.

[11] *See* David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 Buffalo L. Rev. 1001, 1019 (1997) (comparing junk faxes to junk e-mail, and documenting complaints by Congress that junk faxes amounted to receiving "junk mail with the postage due") (quoting Jerry Knight, *The Junk Fax Attack: Why Maryland May Outlaw Unsolicited Advertisements*, WASH. POST, May 23, 1989, at C3).

[12] Earthlink Networks v. Cyber Promotions, Inc., No. BC 167502 (Cal. Super. Ct. L.A. County, Mar. 30, 1998) (credited with putting defendant out of spam mail business) (quoting Earthlink Pressroom, *Cyber Promotions Finally Chokes on Its Own Spam* (March 30, 1998), *at* http://www.earthlink.net/about/press/pr_cp_judgement/) (on file with the North Carolina Journal of Law & Technology)).

[13] *See generally* N.C. GEN. STAT. §§ 14-453(1b), (4a), (6b), (6c), 14-458(6)(b)-(c), 1-539.2A(a), 1-75.4(4)(c) (2002).

[14] *But see Political Spamming*, THE DAILY TAR HEEL, Oct. 9, 2002, at 10 (A suit was recently filed against the Elizabeth Dole Senate Campaign for sending political e-mail. This suit is destined to fail, as the e-mail is not commercial in nature, and furthermore, the First Amendment protects political expression.).

[15] U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

but will, nonetheless, remain ineffective due to the lack of state enforcement resources, a scarcity in individual lawsuits, the management decisions of ISPs, and spammers' ingenuity.

I. The North Carolina Unsolicited Electronic Bulk Commercial Mail Act

The North Carolina statute has four substantive parts, along with other sections covering standing, criminal penalties, and damages.[17] A statutory violation of the Act occurs when a person sends unsolicited bulk commercial e-mail into or within the state[18] that falsely identifies with an "intent to deceive or defraud the recipient" or that contains forged routing information and that violates an ISP's[19] policies.[20] Standing is granted to individuals,[21] ISPs,[22] and the state.[23] Criminal penalties range from a Class 3 misdemeanor to a Class 1 felony, depending on the amount of property damage caused by the spam e-mail.[24]

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the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[16] U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[17] *See generally* N.C. GEN. STAT. §§ 14-453(1b), (4a), (6b) (6c), (10), §§ 14-458(6)(b)-(c), § 1-539.2A(a), § 1-75.4(4)(c) (2002).

[18] § 1-75.4(4)(c).

[19] § 14-453(6c) (defining email service provider as "any person who . . . is an intermediary in sending or receiving electronic mail" and provides to end users "the ability to send or receive electronic mail"). For purposes of this article, ISP and email service provider will be used interchangeably.

[20] § 14-458(a)(6).

[21] § 14-458(a)(6)(c); § 1-539.2A(a).

[22] § 1-539.2A(a).

[23] N.C. GEN. STAT. § 14-458(a)(6)(b) (giving standing to the state by virtue of criminal penalties contained therein) (2002).

[24] § 14-458(a)(6)(b).

A. Legislative Intent

The North Carolina bill was modeled after existing statutes in Washington,[25] California,[26] and Virginia.[27] The clear intent was to facilitate quick and efficient access to the Internet for users instead of "having the system clogged with unsolicited bulk e-mail."[28] The statute discourages spamming by giving ISPs, individual users, and the state standing to sue spammers and collect damages.[29]

B. Unsolicited Electronic Bulk Commercial Mail

The North Carolina statute only applies to e-mail that is both commercial and unsolicited. Commercial electronic mail is defined as "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."[30] "Unsolicited" means e-mail sent to anyone with whom the initiator does not have an "existing business or personal relationship" and that is not sent at the "request of, or with the express consent of, the recipient."[31]

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[25] WASH. REV. CODE § 19.190.020 (2002) (amended 1999).
[26] CAL. BUS. & PROF. CODE § 17538.4 (Deering 2002).
[27] *An Act to Extend North Carolina's "Long Arm Jurisdiction" Statute to Include Senders of Unsolicited Electronic Bulk Mail and to Make the Sending of Unsolicited Electronic Bulk Commercial Mail Unlawful in This State: Hearing on S.B. 288 Before the Senate Information Technology Committee*, 1999 Leg., Reg. Sess. 1 (N.C. 1999) [hereinafter *Hearing*] (referencing Sen. Reeves who added that the Virginia anti-spam statute is "much more punitive" than North Carolina's proposed bill). *See* VA. CODE ANN. § 18.2-152.4 (2002).
[28] *Hearing*, *supra* note 27, at 1–2.
[29] *See generally* N.C. GEN. STAT. §§ 14-453(1b), (4a), (6b) (6c), (10), 14-458(6)(b)-(c), 1-539.2A(a), 1-75.4(4)(c) (2002).
[30] § 14-453(1b) (emphasis added).
[31] § 14-453(10).

C. The First Amendment and the *Central Hudson*[32] Test

Although the initial scope of the North Carolina bill covered all e-mail, the General Assembly eventually limited its scope to commercial e-mail,[33] with the exception that an organization may send commercial e-mail to its members.[34]

Two theories best support the inclusion of the word "commercial" in the North Carolina statute. First, as a practical matter, spam is almost exclusively commercial in nature. To date, there has been little practical gain in legislating against non-commercial e-mail. For example, even though the Virginia statute does not include the word "commercial" within the definitions section of the statute,[35] it has been utilized primarily in litigation against commercial e-mail.[36] Second and, perhaps, more importantly, government regulation of non-commercial speech would almost certainly implicate the First Amendment.[37] While the First Amendment does not protect against speech restrictions

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[32] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[33] *Hearing*, *supra* note 27, at 1–2 (citing statement of Sen. Eric Reeves, Chair, Information Technology Committee, giving no reasons other than "various special interests" for the change in the text).

[34] N.C. GEN. STAT. § 1-75.4(4)(c) (2002).

[35] *See* VA. CODE ANN. § 18.2-152.2 (2002) (not including the word "commercial" within its definition of spam).

[36] *See, e.g.*, Am. Online, Inc. v. Nat'l Health Care Discount, Inc., 121 F. Supp. 2d 1255, 1270 (N.D. Iowa 2000) (applying Virginia law); Am. Online, Inc. v. Over the Air Equip., No. 97-1547-A, 1997 WL 1073949 (E.D. Va. Nov. 19, 1997); Verizon Online Servs., Inc. v. Ralsky, 203 F. Supp. 2d 601 (E.D. Va. 2002).

[37] Max P. Ochoa, *Legislative Note: Recent State Laws Regulating Unsolicited Electronic Mail*, SANTA CLARA COMPUTER & HIGH TECH. L.J., 459, 464 (2000). *See also Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562–3 ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). *But see* David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 63–5, 70 (1998) (cautioning against denying commercial e-mailers First Amendment protections).

by a private party,[38] its protections do circumscribe government action.[39] The government, nonetheless, may restrict certain types of speech, such as commercial speech,[40] subject to the test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*.[41] Because the North Carolina statute regulates commercial speech,[42] the *Central Hudson* test would apply.

Central Hudson arose from a challenge to a New York regulation banning a utility company from promotional advertising.[43] The Supreme Court, in reversing the New York Court of Appeals' validation of the regulation on the ground that the governmental interest involved outweighed the speech's limited value,[44] formulated a four-prong test[45] that analyzes restrictions on commercial speech.[46] The first prong of the *Central Hudson* test holds that unlawful or misleading speech is not protected speech.[47] Second, the test requires a determination of whether the governmental interest in regulating the commercial speech is substantial.[48] Finally, if the speech at issue is lawful, and the government interest is substantial, then the statute must directly advance the governmental interest being asserted and do so in a manner that is limited to that which is necessary to assert that

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[38] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 566 (1995) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)) (stating generally that the First Amendment does not apply to private actors).

[39] *See* Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (citing Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 120–1 (1973)).

[40] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[41] *See id. See also* State by Humphrey v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 885 (1992) (holding that there is no presumption of constitutionality where a statute circumscribes speech and that the state bears the burden of proof demonstrating constitutionality).

[42] N.C. GEN. STAT. § 1-75.4(4)(c) (2002).

[43] *Cent. Hudson*, 447 U.S. 557 (1980).

[44] *See generally Cent. Hudson*, 447 U.S. 557 (1980).

[45] *See* Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (condensing the third and fourth prong of the Cent. Hudson test into a third prong only).

[46] *Cent. Hudson*, 447 U.S. at 566.

[47] *Id.*

[48] *Id.*

interest.[49] The last two prongs may be condensed such that there is a reasonable "'fit between the legislature's ends and the means chosen to accomplish those ends.'"[50] The *Central Hudson* test applies to both state and federal government actors regulating commercial speech. Thus, it applies in evaluating the constitutionality of the North Carolina anti-spam statute for purposes of the First Amendment because the North Carolina statute limits commercial speech by granting standing to the state attorney general.[51] The North Carolina statute also grants standing to individuals and ISPs, but this requires a different First Amendment analysis, which will be discussed in greater detail below.

1. First Prong under *Central Hudson* Test

The first question under the *Central Hudson* test is whether the speech is unlawful or misleading. If the speech is found to be unlawful or misleading, it will not be afforded constitutional protection.[52] Most spam is misleading, either because the message itself misrepresents what is being sold or because false routing information[53] has been provided.[54] In effect, falsified routing information may be considered misleading because it prevents the recipient from determining who actually sent the e-mail. Thus, a court might either treat spam as unprotected speech under the first prong of the test or rule that commercial speech itself is not

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[49] *Id.* at 566–7.

[50] Lysaght v. N.J., 837 F. Supp. 646, 650 (D.N.J. 1993) (quoting *Fox*, 492 U.S. at 480). *See also* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 414 (1993) (combining the last two prongs of the *Cent. Hudson* test into the "reasonable fit" inquiry).

[51] *See* N.C. GEN. STAT. § 14-458(b) (2002) (granting standing also to individuals and ISPs).

[52] *Cent. Hudson*, 447 U.S. at 566.

[53] Sorkin, *supra* note 2 (defining routing information as the lines appearing in the header line of the e-mail message, detailing the path of the e-mail from the sender to the recipient).

[54] *See, e.g.*, Am. Online, Inc. v. Nat'l Health Care Discount, 121 F. Supp. 2d 1255, 1259–60 (N.D. Iowa 2000) (explaining software which allows spammers to manipulate headers to include false or misleading information).

unlawful, even when the vehicle by which it arrives, the message's path of identity, is unlawful.

The North Carolina statute specifically prohibits sending e-mail that "falsely identifies with the intent to deceive or defraud the recipient" or that forges routing information.[55] This would appear to satisfy the first prong of the *Central Hudson* test, which allows state regulation of commercial speech that is unlawful or misleading. Under this view, no further analysis under *Central Hudson* would be required because the North Carolina statute would satisfy the First Amendment.

Nonetheless, courts might not find spam unlawful or misleading under the first prong of the *Central Hudson* test for two reasons. First, as mentioned above, the North Carolina statute requires that the e-mail be false or misleading.[56] There are two parts of a spam e-mail that may be misleading, the routing information and the actual message itself. These two parts require separate inquiries and present different outcomes. Arguably, the message itself is the actual speech, while routing information, although possibly false, is not speech but, rather, a technical requirement of sending an e-mail that does not depend on truth of origin for it to be sent. Thus, a truthful message sent with false routing information would still need to be analyzed under the *Central Hudson* test because the message itself is not false or misleading.

On the other hand, an e-mail's delivery mechanism might bear the same speech characteristics as the e-mail message itself. Consider one's own experience. Upon opening one's inbox, a person might erase messages with an unrecognized name or e-mail return address. Speech is that which transports ideas. False routing information represents an idea, the idea that *this* e-mail is spam. Under this rationale, routing information is speech, and its truth or falsity would bear on whether or not a court advances past the first prong of the *Central Hudson* test. If a court treats both the

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[55] N.C. GEN. STAT. § 14-458(a)(6) (2002). *See also* VA. CODE ANN. § 18.2-152.4(A)(7) (2002) (regulating falsified routing information); WASH. REV. CODE § 19.190.020(1)(a) (2002) (regulating falsified routing information).
[56] N.C. GEN. STAT. § 14-458(a)(6) (2002).

message and the routing information as speech, then both would need to be unlawful or misleading to fail the first prong of the test.

Courts may be reluctant to find spam unlawful or misleading under the first prong of *Central Hudson* for another reason. The North Carolina statute requires that a false or misleading e-mail also violate an ISP's policies.[57] Thus, even if an e-mail is false or misleading in its subject message, it is not unlawful unless it violates an ISP's own spam policy. Since ISPs have different spam policies, what might violate one ISP's policy might not violate another's spam policy. In essence, the *Central Hudson* analysis under the first prong, determining if the message is unlawful or misleading, changes depending upon the contours of an ISP's spam policy. First Amendment protections, thus, would hinge primarily upon the policy of an ISP and, secondarily, upon the statutory definition of what is considered illegal.

2. Second Prong under *Central Hudson* Test

The second prong of the *Central Hudson* analysis asks whether the government has a substantial interest in regulating the speech at issue.[58] In a case considering a type of speech analogous to spam, *Destination Ventures, Ltd. v. F.C.C.*,[59] the Ninth Circuit Court of Appeals recognized a substantial governmental interest in preventing the cost shifting that results from junk faxing. Plaintiff Destination Ventures, Ltd. argued that it had been unconstitutionally singled out for regulation since the FCC had not demonstrated that unsolicited faxes have a greater cost-shifting effect than other types of faxes.[60] The court responded that Congress's goal was to prevent the shifting of advertising costs, which was accomplished by limiting the statute to commercial

[57] *Id.*
[58] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
[59] Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 56 (9th Cir. 1995).
[60] *Id.*

faxes,[61] and that this amounted to a substantial governmental interest.[62]

The government also has a substantial interest in regulating spam e-mail. The costs that spam e-mail places upon ISPs and consumers are well documented. The property interests of computer users and ISPs deserve protection. Moreover, the Internet has become central to modern-day communication. These factors converge to form a substantial governmental interest.

Conversely, in dicta, two courts have cast doubt upon a state's substantial interest in regulating bulk mail, not e-mail, by comparing it to a state's substantial interest in regulating telemarketers.[63] *State by Humphrey v. Casino Marketing Group*[64] and *Lysaght v. State of New Jersey*[65] held that a telemarketer's telephone call is very different from unsolicited bulk mail and differentiated a state's substantial interest in "protecting the privacy of the home" from regulating bulk mail.[66]

Casino Marketing was a state action against a company that used automatic dialing announcement devices to make 28,000 to 32,000 calls per day in violation of a Minnesota statute.[67] The defendant, Hall, counterclaimed on the ground that the statute facially violated the First Amendment.[68] Using the *Central Hudson* analysis, the court, finding that the state had a substantial interest in both protecting the privacy of the home and preventing telemarketing fraud, upheld the statute.[69] In reaching its conclusion, however, the court stated that "unlike the *unsolicited bulk mail advertisement* found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt

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[61] *Id.*
[62] *Id.*
[63] Lysaght v. N.J., 837 F. Supp. 646, 649 (D.N.J. 1993) (quoting State by Humphrey v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 888–9 (Sup. Ct. Minn. 1992)).
[64] *Casino Mktg.*, 491 N.W.2d at 888–9.
[65] *Lysaght*, 837 F. Supp. at 650.
[66] *Id.* (quoting *Casino Mktg.*, 491 N.W.2d at 888–9).
[67] *Casino Mktg.*, 491 N.W.2d at 884 (referring to MINN. STAT. §§ 325E.26-325E.31 (2001)).
[68] *Id.* at 884–5.
[69] *Id.* at 885, 891–2.

response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom."[70] Certainly, the distinction between a telemarketer's phone call and bulk mail could be extended to unsolicited bulk commercial e-mail. This would, in turn, cast doubt on a state's substantial interest in regulating bulk e-mail.

The *Lysaght* court evaluated a statute virtually identical to Minnesota's statute, but unlike the court in *Casino Marketing,* it found a First Amendment violation, at least for purposes of issuing a preliminary injunction, because there was "not a reasonable fit between the statute and the interest in protecting persons in their homes."[71] While the court upheld the government's interest in protecting the privacy of the home as substantial, it relied on the language in *Casino Marketing* that explicitly differentiated between unsolicited bulk mail and a telephone call, stating that a telephone call is "'uniquely intrusive.'"[72]

Both courts gave significant weight to the privacy interests of the unwilling listener, which today is an even greater concern because those depending on e-mail for personal and business communication are essentially a captive audience. Given the modern dependence on e-mail, the overwhelming amount of junk messages received, and the cost shifting involved, a state arguably has a substantial interest in regulating spam.

3. Third and Fourth Prongs under *Central Hudson* Test

If a court finds that the speech in question is not unlawful or misleading and that a state has a substantial interest in regulating the speech, *Central Hudson* then posits two secondary questions: whether the statute directly advances the governmental interest being asserted and whether it is narrowly tailored to

[70] *Id.* at 888 (emphasis added).
[71] *Lysaght*, 837 F. Supp. at 650–3 (stating also that at trial the issue might be resolved in favor of the statute).
[72] *Id.* at 650 (quoting *Casino Mktg.*, 491 N.W.2d at 888–9).

address the interest being asserted.[73] Put another way, there must be a reasonable "'fit between the legislature's ends and the means chosen to accomplish those ends.'"[74] The *Lysaght* court held that "the distinctions drawn by the Act—between commercial telephone advertisements and noncommercial calls, and between prerecorded and live solicitations" were not reasonably related to New Jersey's interest in protecting the privacy of the home, mostly because both "equally disrupt residential privacy."[75] This assertion, that all calls are equal for purposes of disrupting privacy, may be countered by everyday logic. While there are exceptions, commercial solicitations are usually disruptive, while most non-commercial phone calls are personal in nature and, thus, not necessarily disruptive. The court's logic would abolish the great distinction between seeing an uninvited salesperson, quite unwelcome, and seeing one's family, not so disruptive, both sitting in one's living room at the end of a workday.

North Carolina's interest in regulating bulk e-mail is substantial and can be discerned from both the statute itself and the legislative history. The stated intent is to provide for efficient Internet access helping ISPs and consumers instead of a "system clogged with unsolicited bulk e-mail."[76] The statute gives ISPs, individual users, and the State standing to sue spammers in order to discourage spamming and provide for damages.[77] The legislative ends, to facilitate quick and efficient access to the Internet, are reasonably tied to the means, given that up to eighty-five percent of the e-mail entering one's Inbox is spam.[78] In short, the means, the prevention of spam, seems to be the best way of accomplishing the statutory end of keeping e-mail running efficiently. The state

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[73] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–3 (1980).

[74] *Lysaght*, 837 F. Supp. at 650 (quoting Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

[75] *Id.* at 651 (admitting, however, that the constitutional issue was a close question).

[76] *Hearing*, *supra* note 27, at 1–2.

[77] *See generally* N.C. GEN. STAT. §§ 14-453(1b), (4a), (6b), (6c), (10), 14-458(6)(b)-(c), 1-539.2A(a), 1-75.4(4)(c) (2002).

[78] Norah Vincent, *Put a Tight Leash on Spammers*, L.A. TIMES, August 15, 2002, at B15.

in *Lysaght* also made a numbers argument but was unable to prove that the amount of telemarketer phone calls was, in fact, overwhelming.[79] This, however, would not be the case with spam e-mail.[80]

North Carolina's anti-spam statute further meets the reasonable fit test[81] because of provisions that narrow its scope.[82] The e-mail recipient, for example, must have consented to receive the message.[83] Bulk commercial e-mail may not be unsolicited.[84] The e-mail may not be sent to strangers who did not ask to receive it.[85] The means by which e-mail is regulated, unsolicited and commercial in nature, further ensure a reasonable fit between the means used to accomplish the ends of eliminating spam.[86]

D. Private Restrictions on Free Speech and the First Amendment

The First Amendment serves only as a barrier against government action restricting speech, not private action.[87] Yet,

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[79] *Lysaght*, 837 F. Supp. at 651.

[80] Henry Norr, *Spam Stampede Clogs Internet, E-mail Now One-third Advertising*, S.F. CHRON. (Sept. 8, 2002), *at* http://sfgate.com/cgibin/article.cgi?file=/chronicle/archive/2002/09/08/MN137044.DTL (stating that 2.3 billion spam e-mails are sent daily) (on file with the North Carolina Journal of Law & Technology).

[81] *See* Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (explaining that the best fit need not be perfect or the very best fit but, rather, one best serving in proportion to interest).

[82] *See generally* N.C. GEN. STAT. §§ 14-453(1b), (4a), (6b), (c), (10), 14-458(6)(b)-(c), 1-539.2A(a), 1-75.4(4)(c) (2002) (providing specific requirement of commercial e-mail along with specific wording for users and equipment and trespass regarding the penalties involved).

[83] § 14-453(10).

[84] *See* § 1-75.4(4)(c). *See also Hearing*, *supra* note 27, at 1 (A staffer suggested that "unsolicited" be defined. California's statute, now codified as CAL. BUS. & PROF. CODE § 17538.4(e)(1)-(2) (Deering 2002), was copied.).

[85] N.C. GEN. STAT. § 14-453(10) (2002).

[86] *See Fox*, 492 U.S. at 480.

[87] *But see generally* David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1 (1998) (exploring areas in which private actors have been subjected to the First Amendment, the public forum doctrine, and looking at reasons why

many of the plaintiffs in lawsuits filed against spammers are ISPs or individuals. For example, an ISP in *Compuserve Inc. v. Cyber Promotions, Inc.*,[88] a private corporation, brought an action against a bulk e-mail company that used the ISP's equipment and accounts to send spam. The ISP based its claim on the theory that it constituted trespass to personal property or chattels.[89] The defendant, Cyber Promotions, Inc., claimed that such a restriction violated the First Amendment.[90]

The court did not find Compuserve confined by the First Amendment because the First Amendment only guarantees freedom of speech from abridgement by state actors.[91] Cyber Promotions argued that Compuserve's postmaster-like status subjected it to the First Amendment, but the court refused to apply the distinction because Compuserve was a private entity, not a state actor.[92]

The court's holding in *Compuserve*,[93] that First Amendment protections did not protect Cyber Promotions, suggests that the standing given by the North Carolina statute to private actors in suits against spammers[94] will also survive First Amendment scrutiny. It is inconsequential that the claim in *Compuserve* was brought under state common law, as opposed to statute, as would be the case in North Carolina, because a private entity, not the government, was enforcing the Act.[95]

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spammers have been unsuccessful in convincing courts that the Internet should be treated as a public forum for First Amendment purposes).

[88] Compuserve, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1024–5 (S.D. Ohio 1997).

[89] *Id.*

[90] *Id.*

[91] *Id.* (citing Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557, 566 (1995)).

[92] *Compuserve*, 962 F. Supp. at 1026.

[93] *Id.* at 1025–6.

[94] *See* N.C. GEN. STAT. § 1-539.2A(a) (2002). Note that the North Carolina General Assembly could theoretically have divided the remedy, such that state action would apply only against bulk commercial e-mail, while private actions would apply to e-mail generally. The statute would still pass constitutional muster while allowing private individuals to define for themselves what they consider spam.

[95] *Compuserve*, 962 F. Supp. at 1026–7.

North Carolina ISPs and individuals should prevail on any First Amendment challenge to the anti-spam statute because they are private actors. State actors, as suggested above, will receive more scrutiny.[96]

E. The Dormant Commerce Clause & The *Pike*[97] Test

Ironically, in its effort to escape the rocky shoals of the First Amendment, the North Carolina statute becomes more vulnerable to violating the dormant Commerce Clause. The dormant Commerce Clause is the negative implication placed upon states by virtue of the Commerce Clause. In effect, the states are restrained in passing a law that intrudes upon the federal prerogative to regulate commerce.[98]

Anti-spam statutes in Washington[99] and California,[100] upon which North Carolina's statute is modeled, recently survived dormant Commerce Clause challenges.[101] Both cases were analyzed under the test set out in *Pike v. Bruce Church, Inc.*,[102] a two-prong test that determines whether or not there has been a violation of the dormant Commerce Clause.[103] *Pike* requires that the law in question be facially neutral and that the local benefits of the law outweigh interstate burdens.[104] If both elements of the test are met, then the court analyzes the degree to which local benefits

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[96] *See* Joseph D'Ambrosio, *Should "Junk" E-Mail Be Legally Protected?*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 231, 246 (2001) (stating that the area is still an open question for litigation and that commercial e-mail will likely be afforded First Amendment protections if truthful) (citing *Reno v. ACLU*, 521 U.S. 844 (1997).

[97] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (establishing a two-part test for dormant Commerce Clause analysis).

[98] State v. Heckel, 24 P.3d 404, 409 (Wash. 2001) (citing Franks & Son, Inc. v. State, 136 Wash.2d 737, 747 (Wash. 1998)).

[99] *See* WASH. REV. CODE § 19.190.010-.050 (2002).

[100] *See generally* CAL. BUS. & PROF. CODE § 17538.4 (Deering 2002).

[101] *See Heckel*, 24 P.3d 404 (Wash. 2001); Ferguson v. Friendfinders, Inc., 115 Cal.Rptr. 2d 258 (Cal. Ct. App. 2002).

[102] *See Pike*, 397 U.S. at 142.

[103] *Id.*

[104] *Id.*

outweigh interstate burdens.[105] Finally, the statute must not create inconsistency between the states or regulate conduct wholly outside of the state in question.[106]

In *State v. Heckel,*[107] Washington sued an Oregon resident for sending unsolicited commercial e-mail to Washington residents containing misleading subject lines, false transmission paths, and for not providing a valid return e-mail address on his bulk e-mail.[108] The Washington Attorney General's Office contacted Heckel about the spam, but it continued to receive complaints.[109] Washington then filed suit.[110] The trial court granted summary judgment to Heckel, holding that the statute violated the dormant Commerce Clause.[111] In a unanimous opinion, the Washington Supreme Court reversed,[112] using the two-prong *Pike* test in determining that the anti-spam statute did not violate the dormant Commerce Clause.[113]

1. First Prong of the *Pike* Test

The first prong of the *Pike* test requires that a law be facially neutral, that is, that it not discriminate against interstate commerce in favor of intrastate commerce.[114] *Heckel* held that the Washington anti-spam statute was not facially discriminatory because it applied both to "*persons*" within and outside the state.[115]

The North Carolina anti-spam statute references persons in the same context and manner as Washington's anti-spam statute[116]

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[105] *Heckel*, 24 P.3d at 409.
[106] *Id.* at 411 (citing *Pike*, 397 U.S. at 143).
[107] *Heckel*, 24 P.3d 404 (Wash. 2001).
[108] *Id.* at 407–8.
[109] *Id.* at 407.
[110] *Id.*
[111] State v. Heckel, No. 98-2-25480-7, 2000 WL 979720, at *1 (Wash.Super. March 10, 2000).
[112] *Heckel*, 24 P.3d (Wash. 2001).
[113] *Id.* at 409 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
[114] *Pike*, 397 U.S. at 142.
[115] *Heckel*, 24 P.3d at 409 (citing WASH. REV. CODE § 19.190.020(1) (2002)).
[116] N.C. GEN. STAT. § 14-458(a) (2002).

by stating that "unsolicited bulk commercial electronic mail . . . sent into or within this State by the defendant" is a statutory violation.[117] It does not provide for a different standard or treatment toward out-of-state spammers but, rather, "applies evenhandedly to in-state and out-of-state spammers."[118] Thus, it is likely that a court would find that the North Carolina statute satisfies the first prong of the *Pike* test if challenged on dormant Commerce Clause grounds.

2. Second Prong of the *Pike* Test

If the first prong of the *Pike* test is satisfied, then the analysis advances to the second prong.[119] This requires a "balancing of the local benefits against the interstate burdens."[120] The *Heckel* court cited three key groups within the state that were protected by the anti-spam statute: ISPs, the true owners of forged domain names, and senders of e-mail.[121] The court described the numerous and well-documented problems that arise from spam[122] and held that these spam-related problems proved that local benefits outweighed potential burdens to interstate commerce.[123]

Like its Washington counterpart, the North Carolina anti-spam statute satisfies the second prong of the *Pike* test. First, it is not any broader than the Washington statute and, as such, creates no additional interstate burdens. Even though the North Carolina statute regulates spammers based upon an ISP's policies, which Washington's statute does not do, this difference actually narrows the reach of the North Carolina statute. An out-of-state spammer, for example, sending e-mail to a North Carolinian would not be

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[117] N.C. GEN. STAT. § 1-75.4(4)(c) (2002).
[118] *Heckel*, 24 P.3d at 409.
[119] *Id.* (citing *Pike*, 397 U.S. at 142).
[120] *Id.*
[121] *Heckel*, 24 P.3d at 409.
[122] *Id.* at 409–11 (describing the burden on ISP equipment due to spam, the loss of customers, the economic harm suffered by owners of impermissibly used domain names and e-mail addresses, frustration on the part of individual e-mail users, and the effects of cost-shifting). *See also* Ferguson v. Friendfinders, Inc., 115 Cal.Rptr. 2d 258, 267 (Cal. Ct. App. 2002).
[123] *Heckel*, 24 P.3d at 409.

liable in North Carolina if the ISP's policy allowed spam because the North Carolina statute only makes spam illegal if it violates the ISP's policy.[124] Illegality for purposes of the North Carolina statute is a function of an ISP's spam policy.[125]

Second, the problems of spam in Washington[126] are sufficiently similar to spam problems in North Carolina. Arguably, there is the similar effect of cost shifting from spammer to ISP and consumer, and there are similar amounts of spam. It follows that the local benefits realized in North Carolina from reducing spam are similar to the benefits gained in Washington, and as *Heckel* notes,[127] these benefits outweigh interstate burdens.

Once it has been established that local benefits outweigh potential burdens to interstate commerce, the test explores the degree to which benefits outweigh burdens.[128] Instead of providing more evidence of local benefits, *Heckel* followed *Pike's* example[129] and focused on the burden of compliance placed upon commercial spammers.[130] The court reasoned that the only true burden the Act presented was one of truthfulness, which would basically eliminate the problem of bulk e-mail because the act of compliance would make bulk e-mail unattractive to spammers.[131] Rather than a burden to interstate commerce, the court actually found truthfulness to be a facilitator to interstate commerce by "'eliminating fraud and deception.'"[132] For example, truthful bulk e-mail would both allow one to know to whom to reply in order to be removed from a bulk mailer's list, as well as allow

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[124] N.C. GEN. STAT. § 1-75.4(4)(c) (2002).

[125] *See id.*

[126] *See Heckel*, 24 P.3d at 409–11 (describing the burden on ISP equipment due to spam: the loss of customers, the economic harm suffered by owners of impermissibly used domain names and e-mail addresses, frustration on the part of individual e-mail users, and the effects of cost-shifting). *See also Ferguson*, 115 Cal.Rptr. 2d at 267.

[127] *Heckel*, 24 P.3d at 409–11.

[128] *Id.* at 410–1.

[129] Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970).

[130] *Heckel*, 24 P.3d at 411.

[131] *Id.* (citing Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 819 (2001)).

[132] *Id.*

identification of a message as junk mail without opening it.[133] Only fraudulent interstate commerce is hampered. This further benefits non-fraudulent interstate commerce.

3. The Two *Pike* Subtests

There were two other parts of the *Pike* test that the Washington statute had to survive. The statute could not "1) create inconsistency among the states, and 2) regulate conduct occurring wholly outside of Washington."[134] The Washington statute did not create inconsistency because no other state requires e-mail to be deceitful.[135] While other states may have additional requirements, the court stated, these requirements "merely create additional, but not irreconcilable obligations," which is sufficient for purposes of surviving a dormant Commerce Clause challenge.[136]

Commentators have noted that if a statute imposes an affirmative obligation, such as requiring identification in the subject line, as opposed to a negative obligation, such as prohibiting false routing information, there could be a dormant Commerce Clause problem.[137] In effect, the imposition of affirmative obligations forces a junk mail sender "to comply with a superset of all state regulations or not send e-mail altogether."[138] The North Carolina statute has no such affirmative obligation. The only external obligation is the truthfulness inquiry the *Heckel* court adequately addressed.[139] Since states support non-fraudulent commerce, the North Carolina statute does not create inconsistency among the states and should pass this part of the test.

The second part of the *Pike* test applied by *Heckel* required that the statute not regulate activity "wholly outside of

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[133] *Heckel*, 24 P.3d at 411.
[134] *Id.*
[135] *Id.* at 412.
[136] *Id.* (citing Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 826 (3d Cir. 1994)).
[137] Michelle Armond, *Cyberlaw: State Internet Regulation and the Dormant Commerce Clause*, 17 BERKELEY TECH. L.J., 379, 399–400 (2002).
[138] *Id.* at 400.
[139] *Heckel*, 24 P.3d at 412.

Washington."[140] Washington's statutory construction imposes geographical limitations: it only applies to e-mails sent from a computer in Washington or to an e-mail address that the bulk e-mailer knows or has reason to know is that of a Washington consumer.[141] The statute does not regulate conduct exclusively outside of Washington. While the bulk e-mail might be coming from across the river, by targeting Washington consumers, it is landing on Washington shores.

North Carolina's statute, however, has a wider application. It applies to e-mails sent into or within North Carolina in violation of an ISP's policies.[142] There is no requirement that the e-mail be sent from a computer or through a server actually located in North Carolina. Nonetheless, the broader geographical reach of the North Carolina statute should not pose a problem because instead of controlling out-of-state commerce in any way, the law is actually controlled by the spam policies of ISPs, wherever they may be located. By making a violation of the North Carolina law a function of an ISP's policies, the statute is not regulating commerce but, rather, mirroring the policy of the private ISP through which the spammer contracted to receive service. This partially addresses the concern that the North Carolina statute is regulating commerce outside of North Carolina because an ISP is allowed to formulate its own spam policy, regardless of North Carolina law. It could be argued that there is still an impermissible regulation of interstate commerce, since there is an impact from the North Carolina statute, in the form of penalties levied against a spammer outside of North Carolina. This argument fails because the regulation of the spammer is no greater an exercise of authority than the regulation already governing the spammer in the form of the private contract signed between himself or herself and the ISP.

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[140] *Id.* at 411.

[141] *See* WASH. REV. CODE § 19.190.020(1) (2002). *See also* CAL. BUS. & PROF. CODE § 17538.4 (Deering 2002) (applying only to e-mail that is sent through a server physically located in California). *But see* Armond, *supra* note 137, at 397–8 (pointing out the troubling possibility that the California law's geographic limitation could actually cause a dormant Commerce Clause problem, where a "data packet" is sent through a server located in the state, thus opening up the sender to liability).

[142] N.C. GEN. STAT. § 1-75.4(4)(c) (2002).

The penalty for violation may be greater than what an ISP would levy, but the regulation against bulk e-mail is the same.

While some state Internet regulations have been found to violate the dormant Commerce Clause,[143] the Washington and California anti-spam statutes, both similar to North Carolina's anti-spam statute, have survived dormant Commerce Clause challenges.[144] The North Carolina statute should satisfy all elements of the *Pike* test, including its inconsistency and extraterritoriality elements.

II. The North Carolina Anti-Spam Statute Is and Will Remain Ineffective

There are a number of reasons why the North Carolina anti-spam statute has not been utilized effectively, including: few resources at the state level to pursue spammers; a scarcity of individual lawsuits; ISPs that use the state laws of their principal place of incorporation, profit from spam, and view the rising trend in e-mail as a legitimate means of advertisement;[145] and spammers' ingenuity. Taken in combination, these factors have prevented North Carolinians from taking shelter under a law that would be of great benefit to them.

A. Lack of State Resources to Prosecute Spammers

While twenty-six states have anti-spam statutes,[146] only two states, California and Washington,[147] have dedicated official

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[143] *See generally* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) (holding that a statute banning child pornography violated the dormant Commerce Clause because the statute was "an unconstitutional projection of New York law into conduct that occurs wholly outside New York," the burdens on interstate commerce exceeded the local benefit derived from it, and the statute was "inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether").

[144] *See* State v. Heckel, 24 P.3d 404 (Wash. 2001); Ferguson v. Friendfinders, Inc., 115 Cal.Rptr. 2d 258 (Cal. Ct. App. 2002).

[145] Tynan, *supra* note 4, at 110.

[146] *See* ARK. CODE ANN. 5-41-205 (Michie 2001); CAL. BUS. & PROF. CODE § 17538.4 (Deering 2002); COLO. REV. STAT. § 6-2.5 (2000); CONN. GEN. STAT. §

resources to prosecuting spam.[148] Arguably, the North Carolina General Assembly allowed for private remedies knowing that state enforcement would be haphazard at best. It should be noted that ISPs have taken advantage of the private remedies available to them in other states, both statutorily and through common law.[149] Yet, there remains a potentially powerful role for the state's attorney general. Spam e-mail is not harmless, and individual consumers and ISPs deserve state protection from daily annoyances and unfair cost shifting.

The Washington Attorney General's Office, which has taken a leading role in prosecuting unsolicited bulk e-mail, is an exception to the inaction of other state attorneys general offices. It

53-451 (1999); DEL. CODE ANN. tit. 11, § 937 (1999); IDAHO CODE § 48-603E (2000); 815 ILL. COMP. STAT. 511 (1999); IOWA CODE § 714E (1999); LA. REV. STAT. ANN. § 73.6 (West 1999); 2002 Md. Laws 14-2901, 14-2902, 14-2903; 2002 Minn. Laws 325F.694; MO. REV. STAT. § 407.020 (2000); NEV. REV. STAT. ANN. 205.4744, 205.4749 (Michie 2001); N.C. GEN. STAT. § 1-75.4(4)(c); OHIO REV. CODE ANN. § 2307.64 (Anderson 2002); OKLA. STAT. tit. 15, § 776 (1999); 1999 Pa. Laws 262; R.I. GEN. LAWS § 11-52 (1999); 2002 S.D. Laws 180, 183; TENN. CODE ANN. § 47-18-2501 (1999); UTAH CODE ANN. §§ 13-36-101, 102, 103, 104, 105 (2002); VA. CODE ANN. §§ 18.2-152.4 (2002); WASH. REV. CODE § 19.190.020 (1998); W. VA. CODE § 46A-6G-2 (1999); WIS. STAT. § 944.25 (2001). *See also* David E. Sorkin, *Spam Laws at* http://www.spamlaws.com/state/summary.html (listing anti-spam statutes from twenty-six states, as well as three states with statutes that regulate commercial e-mail solicitations by lawyers) (last visited Oct. 27, 2002) (on file with the North Carolina Journal of Law & Technology).

[147] *Ferguson*, 115 Cal.Rptr. 2d 258 (Cal. Ct. App. 2002); *Heckel*, 24 P.3d 404 (Wash. 2001).

[148] *See* Washington State Attorney General's Office, *Cyber Clearinghouse/Consumer Protection/Junk E-mail, at* http://www.wa.gov/ago/clearinghouse/consumer/junke-mail/links.html (last visited Oct. 2, 2002) (on file with the North Carolina Journal of Law & Technology). *See also* California Attorney General's Office's website *at* www.caag.state.ca.us/_misc/content/spam.htm (last visited Oct. 30, 2002) (on file with the North Carolina Journal of Law & Technology).

[149] *See, e.g.*, Am. Online, Inc. v. IMS, 24 F. Supp. 2d 548 (E.D. Va. 1998) (suing under the common law remedy of trespass to chattels). *See also* Am. Online, Inc. v. Nat'l Health Care Discount, Inc., 121 F. Supp. 2d 1255 (N.D. Iowa 2000) (applying Virginia, Washington, and Iowa statutory law, federal law, and common law).

prosecuted *Heckel*[150] and has a website dedicated to spam that collects consumer complaints, registers e-mail addresses so that bulk e-mailers will have a master opt-out list, and gives practical advice on how to take action against spammers.[151] California Attorney General Bill Lockyer also set up a website accepting copies of spam to test for violations of California law which might necessitate "consumer protection action."[152] It is likely that California and Washington have been more proactive than North Carolina on the issue of spam because of both states' status as technological centers. Yet, North Carolina also has a formidable technological sector in Research Triangle Park. Whatever the reasons, the simple fact remains that California and Washington are more active in prosecuting spammers.

Meanwhile, other state attorneys general have expressed reservations about prosecuting spammers. Minnesota Attorney General Mike Hatch stated that spam was not a priority for his office and that there were not sufficient resources to manage the problem.[153] The North Carolina Attorney General's Office of Public Information, explaining the lack of litigation filed on behalf of individuals and ISPs by the state, has suggested that because the North Carolina statute provides for criminal penalties, prosecution would fall within the jurisdiction of local district attorneys.[154] The Consumer Protection Division of the North Carolina Department of Justice might be better qualified to bring this type of litigation

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[150] *Heckel*, 24 P.3d 404 (Wash. 2001).

[151] Washington State Attorney General's Office, *Cyber Clearinghouse/Consumer Protection/Junk E-mail, at* http://www.wa.gov/ago/clearinghouse/consumer/home.html#Junk (last visited Nov. 7, 2002) (on file with the North Carolina Journal of Law & Technology).

[152] Norr, *supra* note 3 (stating that 2.3 billion spam e-mails are sent daily) (citing CA Attorney General's Office, *at* www.caag.state.ca.us/_misc/content/spam.htm (last visited Nov. 7, 2002) (on file with the North Carolina Journal of Law & Technology)).

[153] Dianne Plunkett Latham, *Spam Remedies*, 27 WM. MITCHELL L. REV. 1649, 1659 (2002) (citing Mike Hatch, *Consumer Fraud in the Cyber Age: Efforts to Protect Minnesotans Against Fraudulent Activities and Internet Crime*, 1999 Minnesota State Bar Ass'n Computer Law Institute (MSBA 1999)).

[154] E-mail from John Bason, Public Information Office, North Carolina Department of Justice, to Michael Edwards, author of this article (Oct. 29, 11:09 AM EST) (on file with North Carolina Journal of Law & Technology).

because of its greater resources and the fact that anti-spam legislation falls neatly under the rubric of consumer protection.

B. A Scarcity of Lawsuits Filed by Individuals

Nationally, there have been very few suits filed by individuals against spammers.[155] It is possible that many people do not know that their states even have anti-spam statutes that allow them to sue. Another reason is the difficulty of proving damages, combined with the amount of statutory damages likely to be recovered.[156] While the North Carolina statute sets different damages amounts for ISPs and individuals,[157] the amounts are ultimately a function of how many unsolicited bulk commercial e-

[155] *See* David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325, 358 (2001).

[156] *Id.* at 358 n.158.

[157] N.C. GEN. STAT. § 1-539.2A(a) (2002).

> Any person whose property or person is injured by reason of a violation of G.S. 14-458 may sue for and recover any damages sustained and the costs of the suit. Without limiting the general of the term, 'damages' shall include loss of profits. If the injury arises from the transmission of unsolicited bulk commercial electronic mail, the injured person, other than an electronic mail service provider, may also recover attorneys' fees and may elect, in lieu of actual damages, to recover the lesser of ten dollars ($10.00) for each and every unsolicited bulk commercial electronic mail message transmitted in violation of this section, or twenty-five thousand dollars ($25,000) per day. The injured person shall not have a cause of action against the electronic mail service provider which merely transmits the unsolicited bulk commercial electronic mail over its computer network. If the injury arises from the transmission of unsolicited bulk commercial electronic mail, an injured electronic mail service provider may also recover attorneys' fees and costs and may elect, in lieu of actual damages, to recover the greater of ten dollars ($10.00) for each and every unsolicited bulk commercial electronic mail message transmitted in violation of this section, or twenty-five thousand dollars ($25,000) per day.

Id.

mails were received.[158] It is estimated that a typical consumer will receive approximately 1500 spam e-mails a year by 2006.[159] If even one-third of the spam messages could be tracked to one sender, the amount recoverable would be $5,000 plus attorney fees.[160] The technical and logistical difficulties in locating bulk e-mailers make recovery difficult. This dampens any initiative to sue.

With more money than the average spammer, ISPs themselves would be an inviting target for spam suits by aggrieved consumers, especially if the ISPs knowingly allow spammers to use their networks. ISPs are given immunity from suit under the North Carolina statute.[161] The statute grants immunity to those ISPs that "merely transmit" bulk e-mail over their networks.[162] It remains an open question, however, if this immunity extends only to ISPs that are victims of the spammer. Arguably, those that actively solicit or knowingly contract with spammers as customers would lose their immunity under the North Carolina law,[163] even if they had an anti-spam policy. An ISP that agrees to sell a spammer network connection services performs a function much different than "merely transmit[ting]" bulk e-mail.[164] The main problem with this argument is that the spammer must actually be in violation of the ISP's spam policy to be found liable,[165] and in this case, the spammer is not in violation of the ISP's spam policy. This scenario sheds light on a serious weakness of the North Carolina anti-spam statute: it assumes that all ISPs are against spam. As will be seen in the next section, some ISPs are moving

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[158] *Id.* Based on the assumption that an individual would not receive more than 2500 unsolicited bulk commercial electronic mail messages per day.
[159] Tynan, *supra* note 4.
[160] Based on one-third of 1,500 e-mails times 10 dollars per e-mail (citing N.C. GEN. STAT. § 1-539.2A(a) (2002) (allowing the lesser of ten dollars per e-mail or twenty-five thousand dollars per day for damages for an individual)).
[161] N.C. GEN. STAT. § 1-539.2A(a) (2002).
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] N.C. GEN. STAT. § 1-75.4(4)(c) (2002).

in the direction of contracting with spammers;[166] under the North Carolina law, spam e-mail sent through such an ISP is legal.

C. ISP Lawsuits

Nationally, ISPs constitute the majority of plaintiffs in suits involving spam because they suffer the greatest impact from spam.[167] Aside from the obvious incentive to protect their businesses,[168] ISPs also have the technical knowledge and financial resources available to pursue spammers. If they succeed, damages awards may be large,[169] but damages will be difficult to collect if the company is bankrupt or financially weak.[170] The North Carolina statute provides some added incentive because it authorizes recovery of attorney's fees and gives the option of damages, including lost profits, or the greater of ten dollars per unsolicited e-mail or $25,000 per day.[171]

Nonetheless, ISPs have yet to use the North Carolina anti-spam statute. One reason may be that ISPs prefer to use the laws of their principal place of business. America Online, Inc., for example, located in Virginia, has brought several lawsuits against spammers using Virginia's anti-spam law.[172] ISPs also profit from spam. Spammers pay large fees for the use of high capacity

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[166] *See* Tynan, *supra* note 4, at 109.

[167] *See* Sorkin, *supra* note 155.

[168] *See State v. Heckel*, 24 P.3d 404, 407 (Wash. 2001).

[169] *See Earthlink Wins Anti-spam Case But Collects No Money*, NAT'L JOURNAL'S TECH DAILY, *at* http://nationaljournal.com/cgi-bin/ifetch4?ENG+ALL-_-ALL_PUBS-_-TECHNOLOGY_DAILY_ALL+7-cr0199+1061110REVERSE+0+32+4556+F+1+1+1+spam+AND+PD%2f07%2f19%2f2002%2d%3e07%2f19%2f2002 (last visited Oct. 28, 2002) (winning a judgment of 24.8 million dollars) (on file with the North Carolina Journal of Law & Technology).

[170] *See id.*

[171] N.C. GEN. STAT. § 1-539.2A(a) (2002).

[172] *See, e.g.*, Am. Online, Inc. v. Nat'l Health Care Disc., 174 F. Supp. 2d 890 (N.D. Iowa 2001); Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444 (E.D. Va. 1998).

circuits.[173] Additionally, ISPs are beginning to view e-mail advertisement as a legitimate means of advertisement.[174] As a result, ISPs find themselves balancing the interests of their traditional base, individual consumers, with big business, which wants to use their servers to advertise.

D. Ingenuity on the Part of Spammers

Spammers use many successful techniques to send bulk e-mail. While the North Carolina statute makes some of these techniques illegal, such as providing false routing information,[175] these are the very techniques that make it difficult to catch spammers. For example, spammers have learned to route e-mails through international servers in order to maintain anonymity.[176] "'The typical [spam] operation has five to ten stealth servers pumping spam all day long through Chinese and Korean relays.'"[177] Further, spammers often sign up with the same carriers numerous times,[178] and software programs allow spammers to send e-mail with a false return address.[179] There are also software programs that harvest e-mail addresses from websites.[180] In short, there are a variety of ways to send spam without suffering the consequences.

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[173] *See* Tynan, *supra* note 4, at 109 (quoting spammer Ronnie Scelson's assertion that ISPs want his business because of the large monthly payments to ISPs ($120,000/month) for use of three high capacity DS3 circuits).

[174] *See* Tynan, *supra* note 4, at 110.

[175] N.C. GEN. STAT. § 14-458(a)(6) (2002).

[176] Vaknin, *supra* note 5 (stating that "some spammers hack into unsecured servers, mainly in China and South Korea, to relay their missives anonymously").

[177] Tynan, *supra* note 4, at 109 (quoting Steve Linford, overseer of the Register of Known Spam Operations).

[178] Tynan, *supra* note 4, at 109 (quoting Ronnie Scelson, who has "'signed up with the biggest 50 carriers two or three times'").

[179] Tynan, *supra* note 4, at 108–9 (describing Etoyi Technology's Email Sender Express, a computer program, priced at 40 dollars, that sends e-mail to a list of addresses and falsifies the return address).

[180] Tynan, *supra* note 4, at 109 (describing the Beijing Express E-mail Address Extractor, which is capable of producing 1000 e-mail addresses in five minutes).

III. Conclusion

The North Carolina statute should surpass First Amendment challenges, though with more difficulty when the plaintiff is a state actor. Following the example of the California and Washington anti-spam statutes, the North Carolina anti-spam statute should also surmount dormant Commerce Clause challenges. Despite its structural strengths, the practical realities have made the law a tool best utilized by ISPs because they suffer damages that are more easily documented than the damages to individuals. Furthermore, since illegality is defined as a function of an ISP's anti-spam policy, the statute gives ISPs an efficient mechanism for control, as ISPs can change spam policies as conditions change. The law's downside, given the uneconomical choice of individual action, is that individual consumers are left waiting for their ISP or attorney general to take legal action. Because provisions for damages are small and identifying spammers is difficult, it is likely that the North Carolina anti-spam statute will remain ineffective, unable to adequately protect the population for which it was designed to fight in the battle against spam.