



March 28, 2011

Internet

Microsoft, Yahoo! Held Immune Under CDA To Suits Alleging Wrongful E-Mail Filtering

by Amy E. Bivins

The Communications Decency Act, 47 U.S.C. §230, shielded two e-mail services from claims that they improperly filtered e-mails that plaintiffs said contained legitimate “business content,” the U.S. District Court for the Northern District of California ruled March 11 in an opinion involving Microsoft Corp. and a separate opinion involving Yahoo! Inc. (*Holomaxx Techs. v. Microsoft Corp.*, N.D. Cal., No. 10-4924, 3/11/11; *Holomaxx Techs. v. Yahoo! Inc.*, N.D. Cal., No. 10-4926, 3/11/11).

Holomaxx Technologies, an online marketer, contended that the companies violated the Wiretap Act, 18 U.S.C. §§2510 et seq.; the Stored Communications Act (CDA), 18 U.S.C. §§2701 et seq.; and the Computer Fraud and Abuse Act, 18 U.S.C. §1030, among other things, when they filtered and blocked its bulk e-mails. The plaintiff firm asserted that its e-mails complied with the CAN-SPAM Act.

Broad Discretion for E-Mail Screening

The court dismissed both cases, with leave to amend, citing the CDA's protection for services that engage in “good samaritan” filtering that extends immunity to blocking of material that a provider considers to be “obscene, lewd, lascivious, filthy, excessively violent, or otherwise objectionable.”

The law permits service providers to establish standards of decency without risking liability for doing so, the court added, citing *Goddard v. Google*, No. 08-2738 (N.D. Cal. Dec. 17, 2008) (8 PVLR 49, 1/12/09).

No court has articulated specific, objective criteria to be used in assessing whether a service provider's assessment of content as “objectionable” is protected under the CDA.

But the court noted that in *Zango v. Kaspersky Lab Inc.*, 568 F.3d 1169 (9th Cir. 2009) (8 PVLR 984, 7/6/09), concurring Judge Raymond C. Fisher of the U.S. Court of Appeals for the Ninth Circuit expressed concern about a rule that gives service providers the right to unilaterally block any content they deem objectionable, the court here noted.

In the current cases, the court concluded that both Microsoft and Yahoo! acted well within their CDA §230 immunity when they filtered the plaintiff's e-mails.

The plaintiff acknowledged that it sent millions of e-mails through the systems, and that at least some of those messages are sent to invalid e-mail addresses or result in user opt-out. In the Yahoo! case, the court wrote that “It is clear ... that Yahoo! reasonably could conclude that Holomaxx's e-mails were ‘harassing’ and thus ‘otherwise objectionable.’”

In a footnote, the court said it was significant that the number of messages that resulted in delivery to invalid addresses or in opt outs was calculated with the filters in place. “Had Yahoo!'s filters been inactive it is reasonable to assume that the number of invalid deliveries and user opt-outs would be far greater than 0.1%.”

Holomaxx Technologies was represented by Erik Swen Syverson, of Pick & Boydston, in Los Angeles. Microsoft Corp. was represented by Julio Cesar Avalos and Gabriel M. Ramsey, of Orrick Herrington & Sutcliffe, in Menlo Park, Calif. **Yahoo! Inc. was represented by Diana BIASON, Ann Marie Mortimer, and John W. Woods Jr., of Hunton & Williams, in Los Angeles.**