

Rosolowski et al. v. Guthy-Renker LLC

California Court of Appeals, 29 October 2014

The Appeals Court eased certain restrictions on marketers sending ads in commercial email messages under California law, finding that unsolicited commercial emails can be examined in their entirety for purposes of compliance with California's anti-spam law.

On 29 October 2014, the California Court of Appeals handed down its decision in *Rosolowski et al. v. Guthy-Renker LLC*, easing certain restrictions on marketers sending advertisements in commercial email messages under California law. The decision allows email marketers to use 'from' names that are not official entity names, and domain names that are not traceable using a publicly available database, provided that the sender is expressly identified in the body of the email. The decision also clarifies that marketers may qualify statements made in the email subject line by including qualifying language in the body of the email message.

Background

Plaintiffs brought a class action lawsuit alleging that defendant Guthy-Renker ('Guthy') sent unsolicited commercial email advertisements to the lead plaintiff Rosolowski, along with 45 individual co-plaintiffs, in violation of California's anti-spam law¹.

Plaintiffs alleged that the defendant sent them unsolicited email advertisements with misleading header information. Namely, the defendant used domain names in the email header that were not traceable to the defendant, either as fictitious business names or names that are traceable through a publicly available database, such as WHOIS. This included emails with headers purporting to be from 'Proactive Special Offer,' 'Proactive Bonus Gift,' 'Wen Hair Care,' among others, sent from domain names such as mavk@r.andedox.info. Plaintiffs argued that since the header did not identify defendant Guthy by name and instead used the defendant's various products and random domain names, this was considered spam in violation of California law.

Plaintiffs also alleged that the 'subject' lines of the emails falsely represented that the recipients were entitled to a fee or complimentary gift or shipping, without mentioning that it was contingent upon a purchase. This included subject lines such as 'Get 33% More with New Wen Hair Care System plus Two Free Gifts and Free Shipping.'

After finding that the header and subject lines were not materially false or misleading, the trial court sustained defendant's demurrer to the first amended complaint and dismissed the case without leave to amend. Plaintiffs appealed the trial court's judgment of dismissal.

California's anti-spam law

California's anti-spam legislation imposes broad restrictions on advertising in unsolicited commercial email advertisements sent from or to a computer within California. Two of these broad restrictions were at issue in *Guthy-Renker*. First, commercial email advertisements are prohibited if the 'email advertisement contains or is accompanied by falsified, misrepresented, or forged header information.' Second, commercial email advertisements are prohibited if the email 'has a subject line that a person knows would be likely to mislead a recipient acting reasonable under the circumstances about a material fact.' See Cal. Bus. & Prof. Code §§ 17529.5(a)(2); (a)(3).

The federal CAN-SPAM Act, passed shortly after California's anti-SPAM legislation, includes a provision that expressly preempts state statutes that regulate the use of commercial email, except to the extent that any such statute prohibits falsity or deception in any portion of the email. See 15 U.S.C. § 7707(b)(1). The intent was to regulate commercial email on a nationwide basis, but allow

state statutes, such as California's, to continue prohibiting falsity or deception under this narrow exemption.

Court of Appeals findings

The Court of Appeals concluded that no cause of action was stated for violation of Section 17529.5, and affirmed the trial court's judgment of dismissal. The Court found that both the email header information and the email subject line were not materially false or misleading to recipients.

Two recent California decisions guided the Court's ruling concerning the non-misleading nature of the email header. In 2010, the California Supreme Court determined in *Kleffman v. Vonage Holding Corp.* that using a domain name in a single email that "does not make clear the identity of either the sender or the merchant-advertiser on whose behalf the email is sent" is not prohibited under California's anti-SPAM law, so long as the domain name is traceable to the sender. The Supreme Court found that use of a domain name in such a way does not, in fact, make any representation concerning the email's source. The Court also concluded that construing otherwise would raise a substantial question with regard to federal preemption under the CAN-SPAM Act. In the 2012 decision of *Balsam v. Tranco, Inc.*, the California Court of Appeals found that the sender intentionally concealed its identity, since the domain names were not traceable to the actual sender.

Based on these rulings, the Court of Appeals in *Guthy-Renker* determined that the header was traceable to the defendant. Although the identity of Guthy could not be ascertained through the header or the use of a publicly available database, such as WHOIS,

the body of the emails was sufficient to enable the recipient to identify Guthy as the sender. The emails were advertisements for various brands offered by Guthy. In addition, the emails provided a hyperlink to the Guthy website, and provided an unsubscribe notice as well as a physical address in Palm Desert, California. The Court rejected Plaintiff's arguments that Guthy attempted to conceal its identity, since the clear purpose of the email was to drive traffic to the Guthy website.

The Court concluded that a header line in a commercial email advertisement does not misrepresent the identity of the sender merely because it does not identify the official name of the entity that sent the email, or does not identify an entity whose domain name is traceable from an online database, provided that the sender's identity is reasonably ascertainable from the body of the email.

In addition, the Court determined that the body of the email made it clear that free shipping or complementary gifts were contingent upon a purchase. During the course of the action, plaintiffs had acknowledged that the emails, in their entirety, were not misleading because the body of the email clearly identified the conditional purchase to receive the free gift or shipping.

The Court found that the subject lines were not likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message. Specifically, the email

advertisements plainly and conspicuously stated the conditional nature of the offer, so that the email recipient would understand that the offer of a free gift or free shipping was conditioned upon a purchase. Thus, the Court considered the email subject line in conjunction with the body of the email, rather than in isolation, in finding that the subject line was not misleading.

Practical takeaway

The practical takeaway from *Guthy-Renker* is that unsolicited commercial emails can be examined in their entirety for purposes of compliance with California's anti-spam law. The decision provides companies with greater flexibility under California law to deliver advertising content and information in the header and subject line, provided that the email expressly identifies the sender and any necessary qualifying information is contained clearly and conspicuously within the body of the email.

Nonetheless, marketers should ensure the 'from' names are relevant to the emails themselves, and that no false or deceptive information is contained in any part of the email header or subject line. In particular, email marketers should be mindful of the general principle, which applies to all types of offers, that limitations or qualifications relating to a claim, such as 'free gift,' must be clearly and conspicuously disclosed to the consumer in close proximity to the claim itself.

Despite the ruling, *Guthy-Renker* did not address whether

California's anti-spam law is preempted by the federal CAN-SPAM Act. Trancos reasoned that because the California law prohibits material falsity in a commercial email message, CAN-SPAM does not preempt it. Thus, email senders should not rely on CAN-SPAM preemption for claims arising under California's anti-spam law.

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1. Cal. Bus. and Prof. Code § 17529.5.

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