

Use of UCE: State Laws Regarding Unsolicited Commercial Electronic Mail Advertisements

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INTRODUCTION

Fueled by the declining effectiveness of direct mail solicitations, public concerns about anthrax, and recent increases in postal rates, many businesses have been exploring alternative advertising opportunities, including the use of electronic mail ("e-mail") advertisements. E-mail users, however, consider unsolicited commercial electronic mail (UCE) (also known as "spam") to be an unwelcome intrusion. Similarly, e-mail service providers are wary of the operational and financial burdens that can be associated with UCE. State legislatures have responded to these concerns by enacting "anti-spam" legislation to protect their citizens from abusive e-mail practices.¹

As of September 2002, the following twenty-four states had enacted UCE laws: Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia.² Pennsylvania and Wisconsin have also enacted UCE statutes,

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1. See *infra* note 2. Several federal bills regarding UCE have been introduced but none has been successful yet. See, e.g., Anti-Spamming Act of 2001, H.R. 1017, 107th Cong. (2001); Unsolicited Commercial Electronic Mail Act of 2001, H.R. 718, 107th Cong. (2001); Unsolicited Commercial Electronic Mail Act of 2001, H.R. 95, 107th Cong. (2001). For discussion of some related issues, see Helen G. Kirsch & Robert H. Jackson, *Advertising Property, Goods or Services by Fax Machine May Place Your Company at Risk for Class Action and Significant FCC Fines*, 56 CONSUMER FIN. L.Q. REP. 250 (2002); John H. Bedard, Jr., *Defending TCPA Actions in San Diego Small Claims Court*, 56 CONSUMER FIN. L.Q. REP. 253 (2002).

2. See ARK. CODE ANN. §§ 5-41-201 to -206 (Michie Supp. 2001); CAL. BUS. & PROF. CODE §§ 17538.4, .45 (West Supp. 2003); COLO. REV. STAT. ANN. §§ 6-2.5-101 to -105 (West 2002); CONN. GEN. STAT. ANN. §§ 53-451 to -453 (West 2001); DEL. CODE ANN. tit. 11, §§ 931-941 (2001); IDAHO CODE § 48-603E (Michie Supp. 2002); 815 ILL. COMP. STAT. ANN. 511/1 to 511/10 (West Supp. 2002); IOWA CODE ANN. §§ 714E.1-2 (West Supp. 2002); KAN. STAT. ANN. § 50-6,107 (Supp. 2002); LA. REV. STAT. ANN. §§ 14:73.1-7 (West 1997 & Supp. 2003); MD. CODE ANN., COM. LAW I §§ 14-3001 to -3003 (Supp. 2002); MINN. STAT. ANN. § 325F.694 (West Supp. 2003); MO. ANN. STAT. §§ 407.020, .025, .1120-1132, (West 2001 & Supp. 2003); NEV. REV. STAT. ANN. §§ 41.705-735 (Michie Supp. 2001); N.C. GEN. STAT. §§ 14-453 to -459, 1-539.2A (2002 & Interim Supp. 2002); OHIO REV. CODE ANN. § 2307.64 (Anderson Supp. 2002); OKLA. STAT. ANN. tit. 15, §§ 776.1-4 (West Supp. 2003); R.I. GEN. LAWS §§ 6-47-2 (Unsolicited Electronic Mail), 11-52-1 to -8 (Computer Crime) (Supp. 2000 & 2002); S.D. CODIFIED LAWS §§ 37-24-1 to -40 (Michie 2000 & Supp. 2002); TENN. CODE ANN. §§ 47-18-2501 to -2502 (2001 & Supp. 2002); UTAH CODE ANN. §§ 13-36-101 to -105

but such laws regulate only e-mail with explicit sexual material and, therefore, are beyond the scope of this Article.³ This Article provides an overview of the relevant state laws and offers UCE users some keys to minimizing risk.

GENERAL CATEGORIES OF LEGISLATION

INTRODUCTION

Specific requirements of UCE laws are discussed in further detail below, but, in general, UCE laws can be divided into three loose and somewhat overlapping categories: anti-fraud, opt-out, and service provider protection.

ANTI-FRAUD

One-half of state UCE laws, including the laws of Arkansas, Connecticut, Illinois, Louisiana, Maryland, North Carolina, Oklahoma, Rhode Island,⁴ South Dakota, Virginia, Washington, and West Virginia, are designed primarily to deter fraud by prohibiting e-mails with false or misleading information in the point of origin (e.g., the identity of the sender),⁵ transmission path (e.g., how the message traveled from the sender's outbox to the recipient's inbox),⁶ or subject line.⁷ Another common anti-fraud provision is a prohibition against using a third-party's Internet address without permission.⁸ This type of statute requires only accurate and complete disclosures, so compliance with such laws should be relatively easy for legitimate, law-abiding advertisers. Note, however, that the majority of these anti-fraud statutes either carry criminal penalties or allow civil damages of up to \$25,000 per day, so the cost of non-compliance can be high.⁹

OPT-OUT

The other state UCE laws, including the laws of California, Colorado, Delaware,¹⁰ Idaho, Iowa, Kansas, Minnesota, Missouri, Nevada, Ohio, Rhode Island,

(Supp. 2002); VA. CODE ANN. §§ 18.2-152.1 to -152.15 (Michie 1996 & Supp. 2002); WASH. REV. CODE ANN. §§ 19.190.005-.050 (West 1999 & Supp. 2003); W. VA. CODE ANN. §§ 46A-6G-1 to -5 (Michie 1999). The California and Washington laws have already been upheld against constitutional challenges. See *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258, 269 (Ct. App. 2002); *State v. Heckel*, 24 P.3d 404, 412 (Wash. 2001), cert. denied, 534 U.S. 997 (2001) (holding that neither the California statute governing UCE nor the Washington Commercial Electronic Mail Act violates the dormant Commerce Clause of the U.S. Constitution).

3. 18 PA. CONS. STAT. ANN. § 5903 (West 2000 & Supp. 2002); WIS. STAT. ANN. § 944.25 (West Supp. 2002). Utah has both a general-purpose UCE statute, see *supra* note 2, and a sexually explicit UCE statute, see UTAH CODE ANN. §§ 13-36-101 to -105.

4. Rhode Island has two UCE statutes, one of which (Computer Crime) is in the "anti-fraud" category and the other (Unsolicited Electronic Mail) is in the "opt-out" category.

5. See, e.g., COLO. REV. STAT. ANN. § 6-2.5-103(1).

6. See, e.g., DEL. CODE ANN. tit. 11, § 937(2).

7. See, e.g., ILL. COMP. STAT. ANN. § 511/10(a)(2).

8. See, e.g., MD. CODE ANN., COMM. LAW I § 14-3002(b)(2)(i) (Supp. 2002); R.I. GEN. LAWS § 6-47-2(d) (Supp. 2000 & 2002).

9. See *infra* notes 46-61 and accompanying text.

10. Although the Delaware UCE law can be classified among the opt-out statutes, it outright prohibits unsolicited bulk commercial e-mail: "[a] person is guilty of the computer crime of unrequested

Tennessee, and Utah, require senders to give recipients the option of declining future UCE. Typically, opt-out type statutes (i) provide that UCE messages must contain a statement of the right to opt-out with a toll-free telephone number or address for opting out; (ii) prohibit sending UCE to those who have opted out; and (iii) often include anti-fraud measures as well. Opt-out statutes pose more of a compliance challenge than anti-fraud statutes, particularly because the opt-out regulations are more detailed and less uniform. The penalties under these statutes are slightly less intimidating, but are by no means insignificant.¹¹

SERVICE PROVIDER PROTECTION

The sheer volume of UCE mailings potentially could overburden service providers' equipment and disrupt service to their customers and/or damage their equipment. Thus, over one-third of the state UCE laws, including the laws of California, Connecticut, Delaware, Iowa, Louisiana, North Carolina, Ohio, Rhode Island, and West Virginia, generally prohibit e-mail in contravention of the authority granted or in violation of service providers' policies.¹² In light of these laws, e-mail marketers should ensure that their use of UCE is consistent with their service providers' policies as well as applicable state laws.

SCOPE AND EXEMPTIONS

JURISDICTIONAL SCOPE

From an advertiser's perspective, one of the great advantages of e-mail is the ability to distribute advertisements quickly and inexpensively to current or potential customers across the country. Because a state's jurisdiction over an e-mail sender is often dependent upon the residence or location of the recipient, however, the sender may not know how many states' laws might apply to any given message. For example, under the Delaware UCE law, conduct occurring outside of Delaware will be sufficient to constitute the offenses of (i) unrequested or un-

or unauthorized electronic mail (1) [w]hen that person, without authorization, intentionally or recklessly distributes any unsolicited bulk commercial electronic mail . . . to any receiving address or account under the control of any authorized user of a computer system." DEL. CODE ANN. tit. 11, § 937(1) (2001).

11. See *infra* notes 46-61 and accompanying text.

12. Other service provider-oriented laws provide a safe harbor for service providers that block UCE they reasonably believe may violate the provider's policies or UCE statutes. South Dakota's UCE law provides that "[a]n interactive computer service may, upon its own initiative, block the receipt or transmission through its service of any commercial electronic mail that it reasonably believes is, or will be, sent in violation of [the Misleading Unsolicited Commercial E-mails Act]." S.D. CODIFIED LAWS § 37-24-39 (Michie 2000 & Supp. 2002); see also COLO. REV. STAT. ANN. § 6-2.5-104(5) (West 2002); IDAHO CODE § 48-603E(6) (Michie Supp. 2002); 815 ILL. COMP. STAT. ANN. 511/10(f), (g) (West Supp. 2002); IOWA CODE ANN. § 714E.1(6)(b) (West Supp. 2002); KAN. STAT. ANN. § 50-6,107(e), (f) (Supp. 2002); LA. REV. STAT. ANN. § 14:73.6(D) (West 1997 & Supp. 2003); MD. CODE ANN., COM. LAW I § 14-3002(d); MINN. STAT. ANN. § 325F.694, subd. 5 (West Supp. 2003); MO. ANN. STAT. § 407.1132(1), (2) (West 2001 & Supp. 2003); OHIO REV. CODE ANN. § 2307.64(D) (Anderson Supp. 2002); R.I. GEN. LAWS § 11-52-4.1(b); WASH. REV. CODE ANN. § 19.190.050 (West 1999 & Supp. 2003).

authorized electronic mail, or (ii) failure to promptly cease electronic communication upon request if:

the receiving address or account was under the control of any authorized user of a computer system who was located in Delaware at the time he or she received the electronic mail or communication and the defendant was aware of circumstances which rendered the presence of such authorized user in Delaware a reasonable possibility.¹³

For another example, the applicability of Ohio's Electronic Mail Advertisements statute hinges upon the definition of "recipient," meaning a person who receives an e-mail advertisement at a receiving address: (i) furnished by an electronic mail service provider that bills to a mailing address within Ohio; (ii) ordinarily accessed from a computer located within Ohio; (iii) ordinarily accessed by a person domiciled within Ohio; or (iv) any other receiving address with respect to which the obligations imposed by the statute can be imposed consistent with the federal Constitution.¹⁴ Given the wide jurisdictional scope of these statutes and the impracticality of investigating the residence, mailing address, domicile, and location of each recipient of an e-mail advertisement, a conservative advertiser will likely choose to comply with every state's UCE laws unless a relevant exemption exists (see discussion below).

EXEMPTIONS FROM UCE LAWS

There are at least four exemptions potentially applicable to a commercial e-mail advertiser.

Prior or Existing Business Relationship

California, Colorado, Delaware, Illinois, Kansas, Minnesota, Missouri, Nevada, North Carolina, Ohio, Rhode Island, South Dakota, and Utah laws, representing over half of the UCE statutes, provide some type of exemption for messages sent to persons with whom the sender has a prior or existing business relationship.¹⁵ "Commercial electronic mail message" under Missouri's Electronic Mail Practices

13. DEL. CODE ANN. tit. 11, §§ 937(4), 938(b). "Authorized user" is not defined and "circumstances which rendered the presence of such authorized user in Delaware a reasonable possibility" is neither defined nor explained. *Id.*

14. OHIO REV. CODE § 2307.64(A)(11).

15. CAL. BUS. & PROF. CODE §§ 17538.4(e)(1), .45(a)(2)(A) (West Supp. 2003); COLO. REV. STAT. ANN. §§ 6-2.5-102(1), 5-103(4)(c); DEL. CODE ANN. tit. 11, § 937(1); 815 ILL. COMP. STAT. ANN. 511/5 (definition of "unsolicited electronic mail advertisement"); KAN. STAT. ANN. § 50-6,107(b)(4), (c)(1)(C); MINN. STAT. ANN. § 325F694, subd. 3(4); MO. REV. STAT. ANN. § 407.1120(2)(b); NEV. REV. STAT. ANN. § 41.730(1)(a) (Michie Supp. 2001); N.C. GEN. STAT. § 14-453(10) (2002 & Interim Supp. 2002); OHIO REV. CODE § 2307.64(B)(3)(a); R.I. GEN. LAWS § 6-47-2(e)(1); S.D. CODIFIED LAWS ANN. § 37-24-6(13) (Michie 2000 & Supp. 2002); UTAH CODE ANN. § 13-36-102(8)(b) (Supp. 2002). Under the Colorado, Kansas, Minnesota, and South Dakota statutes, the exemption only excuses the sender from the requirement that "ADV:" be used in the subject line. COLO. REV. STAT. ANN. § 6-2.5-103(4); KAN. STAT. ANN. § 50-6,107(c)(1)(C); MINN. STAT. ANN. § 325F694, subd. 3; S.D. CODIFIED LAWS ANN. § 37-24-6(13).

statute, for example, does not include an e-mail message between persons with a prior business relationship (undefined).¹⁶ Similarly, e-mail advertisements sent to recipients with whom the sender has a pre-existing business relationship will not constitute a violation of Ohio's Electronic Mail Advertisements statute.¹⁷ Under the Ohio statute:

"Pre-existing business relationship" means that there was a business transaction between the initiator and the recipient of a commercial electronic mail message during the five-year period preceding the receipt of that message. A pre-existing business relationship includes a transaction involving the free provision of information, goods, or services requested by the recipient. A pre-existing business relationship does not exist after a recipient requests to be removed from the distribution lists of an initiator pursuant to division (B) of this section and a reasonable amount of time has expired since that request.¹⁸

Thus, the exemption is narrower in Ohio than in states such as Missouri because an opt-out request will effectively negate the existence of a business relationship. The exemption in Minnesota's Commercial Electronic Mail Solicitation statute is somewhat broader than the others in that it includes relationships between senders and recipients based on goods or services of the senders or an affiliate or agent of the senders.¹⁹ This inclusion of affiliates and agents is not found in the other business relationship exemptions.

Request or Consent

Messages sent at the request, or with the consent, of a recipient are exempt under the laws of fourteen states (Arkansas, California, Colorado, Delaware, Illinois, Kansas, Minnesota, Nevada, North Carolina, Ohio, Rhode Island, South Dakota, Utah, and West Virginia).²⁰ In the Kansas Commercial Electronic Mail Act, "express authorization" is defined as "an express affirmative act by a recipient clearly agreeing to receive commercial electronic messages from a specified and identifiable sender, or from multiple persons."²¹

16. MO. ANN. STAT. § 407.1120(2)(b).

17. OHIO REV. CODE ANN. § 2307.64(B)(3)(a).

18. *Id.* § 2307.64(A)(9).

19. MINN. STAT. ANN. § 325F694 (West Supp. 2003).

20. ARK. CODE ANN. § 5-41-205(a)(1), (2) (Michie Supp. 2000); CAL. BUS. & PROF. CODE §§ 17538.4(e)(2), 45(a)(2)(B); COLO. REV. STAT. ANN. § 6-2.5-102(5) (West 2002); DEL. CODE ANN. tit. 11, § 937(1) (2001); 815 ILL. COMP. STAT. ANN. 511/5 (West Supp. 2002) (definition of "unsolicited electronic mail advertisement"); KAN. STAT. ANN. § 50-6,107(b)(8), (c)(1)(C) (Supp. 2002); MINN. STAT. ANN. § 325F694, subd. 3(1) (West Supp. 2003); NEV. REV. STAT. ANN. §§ 41.730(1)(b), .735(2); N.C. GEN. STAT. § 14-453(10); OHIO REV. CODE ANN. § 2307.64(B)(3)(b) (Anderson Supp. 2002); R.I. GEN. LAWS § 6-47-2(e)(2) (Supp. 2000 & 2002); S.D. CODIFIED LAWS § 37-24-6(13); UTAH CODE ANN. § 13-36-102(8)(a); W. VA. CODE ANN. § 46A-6G-1(1) (Michie 1999). Under the Kansas, Minnesota, and South Dakota statutes, the exemption only excuses the sender from the requirement that "ADV:" be used in the subject line. KAN. STAT. ANN. § 50-6,107(c)(1)(C); MINN. STAT. ANN. § 325F694, subd. 3; S.D. CODIFIED LAWS ANN. § 37-24-6(13).

21. KAN. STAT. ANN. § 50-6,107(b)(8). Note that the exemption only excuses the sender from the requirement that "ADV:" be used in the subject line. *Id.* § 50-6,107(c)(1)(C).

Intra-Organizational E-Mail

The laws of Colorado, Connecticut, Delaware, Idaho, Iowa, Louisiana, Minnesota, Rhode Island, Tennessee, Utah, and Virginia exempt messages from organizations using e-mail to communicate exclusively with their members.²² The Iowa Electronic Mail Transmissions statute, for one, provides that transmission of electronic mail from an organization to the members of such organization will not be deemed to be actionable unsolicited bulk e-mail.²³

E-Mail to Certain Free Accounts

E-mail sent to certain free e-mail accounts is exempt under the laws of Idaho, Iowa, Maryland, Missouri, South Dakota, and Washington.²⁴ Idaho's Unfair Bulk Electronic Mail Advertisement Practices statute, which does not apply to "[a] person who provides users with access at no charge to electronic mail, including receiving and transmitting bulk electronic mail advertisements, and, as a condition of providing such access, requires such users to receive unsolicited advertisements," is one such law.²⁵

REQUIREMENTS AND LIMITATIONS

Absent a relevant and applicable exemption, commercial advertisers may be subject to the following state-law requirements and limitations.

"DO NOT E-MAIL"

The California, Colorado, Delaware, Idaho, Iowa, Kansas, Ohio, Rhode Island, Tennessee, and Utah UCE statutes expressly require senders to honor recipients' "do not e-mail" requests.²⁶ In other words, the laws of these ten states prohibit entities from sending UCE to persons who have requested to receive no further unsolicited e-mail advertisements. Although apparently most such requests must be recognized upon notification by the recipient, the laws of Idaho and Iowa provide

22. COLO. REV. STAT. ANN. § 6-2.5-103(4)(a); CONN. GEN. STAT. ANN. § 53-451(a)(14) (West 2001); DEL. CODE ANN. tit. 11, § 937(1); IDAHO CODE § 48-603E(5)(d) (Michie Supp. 2002); IOWA CODE ANN. § 714E.1(3)(b)(2) (West Supp. 2002); LA. REV. STAT. ANN. § 14:73.6(A) (West 1997 & Supp. 2003); MINN. STAT. ANN. § 325F694, subd. 3(2) (only exempts sender from requirement that "ADV." be used in the subject line); R.I. GEN. LAWS § 11-52-1(15)(vi); TENN. CODE ANN. § 47-18-2502(2); UTAH CODE ANN. § 13-36-102(8)(b) (Supp. 2002); VA. CODE ANN. § 18.2-152.2 (Michie 1996 & Supp. 2002).

23. IOWA CODE ANN. § 714E.1(3)(b)(2).

24. IDAHO CODE § 48-603E(5)(c); IOWA CODE ANN. § 714E.1(6)(a)(4); MD. CODE ANN., COM. LAW I § 14-3001(b)(2) (Supp. 2002); MO. ANN. STAT. § 407.1120(2)(a) (West 2001 & Supp. 2003); S.D. CODIFIED LAWS § 37-24-36(2) (Michie 2000 & Supp. 2002); WASH. REV. CODE ANN. § 19.190.010(2) (West 1999 & Supp. 2003).

25. IDAHO CODE § 48-603E(5)(c).

26. CAL. BUS. & PROF. CODE § 17538.4(c) (West Supp. 2003); COLO. REV. STAT. ANN. § 6-2.5-103(5) (West 2002); DEL. CODE ANN. tit. 11, § 938(a) (2001); IDAHO CODE § 48-603E(3)(d); IOWA CODE ANN. § 714E.1(2)(e); KAN. STAT. ANN. § 50-6,107(c)(2) (Supp. 2002); OHIO REV. CODE § 2307.64(B)(2) (Anderson Supp. 2002); R.I. GEN. LAWS § 6-47-2(c) (Supp. 2000 & 2002); TENN. CODE ANN. § 47-18-2501(c) (2001 & Supp. 2002); UTAH CODE ANN. § 13-36-103(3).

a grace period of five business days following a “do not e-mail” request before an e-mail will violate the statute, and the Ohio law provides that senders must cease transmitting UCE to those who have opted-out “within a reasonable period of time.”²⁷ Additionally, there must be a pattern of sending unsolicited advertisements to those who have opted out to establish liability under the Iowa statute.²⁸

Utah and California laws contain some unusual variations on the “do not e-mail” theme. The Utah Unsolicited Commercial Email Act prohibits the sending of e-mail to those who have opted out either directly, or through a subsidiary or affiliate, which seems to contemplate that affiliated companies will maintain centralized “do not e-mail” lists.²⁹ California law allows an employer who is the registered owner of more than one e-mail address to notify a person conducting business in California to cease e-mailing unsolicited advertising material to all employees who use employer-provided e-mail addresses.³⁰

OPT-OUT MECHANISM

To facilitate “do not e-mail” requests, the laws in thirteen states, including California, Colorado, Delaware, Idaho, Iowa, Kansas, Minnesota, Missouri, Nevada, Ohio, Rhode Island, Tennessee, and Utah, explicitly prohibit e-mail messages that fail to contain a toll-free telephone number and/or return address recipients may use to opt-out of future UCE.³¹ These UCE laws prescribe various methods of fulfilling this requirement. The Nevada law, for instance, provides that

if a person transmits or causes to 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 . . . [t]he advertisement is readily identifiable as promotional, or contains a statement providing that it is an advertisement, and clearly and conspicuously provides: (1) [t]he legal name, complete street address and electronic mail address of the person transmitting the electronic mail.³²

In Minnesota, customized opt-outs are specifically permitted (i.e., the notification process may include an option by which the recipient may direct the sender to send or not send particular e-mail messages based on products, services, divisions, organizations, companies, or other criteria).³³

27. IDAHO CODE § 48-603E(3)(d); IOWA CODE ANN. § 714E.1(2)(e); OHIO REV. CODE ANN. § 2307.64(B)(2).

28. IOWA CODE ANN. § 714E.1(2)(e) (West Supp. 2002). What constitutes a “pattern” is unclear.

29. UTAH CODE ANN. § 13-36-103(3) (Supp. 2002).

30. CAL. BUS. & PROF. CODE § 17538.4(h).

31. *Id.* § 17538.4(a); COLO. REV. STAT. ANN. § 6-2.5-103(5); DEL. CODE ANN. tit. 11, § 938(a); IDAHO CODE § 48-603E(2) (Michie Supp. 2002); IOWA CODE ANN. § 714E.1(2)(d); KAN. STAT. ANN. § 50-6,107(c)(1)(D); MINN. STAT. ANN. § 325F694, subd. 4 (West Supp. 2003); MO. ANN. STAT. § 407.1123(1) (West 2001 & Supp. 2003); NEV. REV. STAT. ANN. § 41.730(1)(c) (Michie Supp. 2001); OHIO REV. CODE ANN. § 2307.64(B)(1); R.I. GEN. LAWS § 6-47-2(a); TENN. CODE ANN. § 47-18-2501(a); UTAH CODE ANN. § 13-36-103(1)(c).

32. NEV. REV. STAT. ANN. § 41.730(1)(c).

33. MINN. STAT. ANN. § 325F694, subd. 4.

