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March 15, 2012

Commercial Email Advertisements Using Both Proxy/Private Registered Domains And Generic From Lines Deemed Unlawful

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The California appellate court's decision in *Balsam v. Trancos* requires marketers nationwide using commercial email advertisements to include in the from line of each email a domain name that is registered to the sender which can be determined by performing a WHOIS look-up, or the name of the sender or marketer on whose behalf the email was sent. Therefore, under this ruling, marketers – and the companies they hire including affiliate networks – can no longer send commercial email that contains both a generic from line and is sent from a proxy/private registered domain name. Marketers nationwide must take immediate action to ensure compliance with this latest development in anti-spam law.

The California Anti-Spam Statute and CAN-SPAM

California Business and Professions Code § 17529.5(a)(2) prohibits commercial email which “contains or is accompanied by falsified, misrepresented, or forged header information.” B&P Code § 17529.5(a)(2) is substantially similar to § 7704(a)(1) of CAN-SPAM, prohibiting commercial email “that contains, or is accompanied by, header information that is materially false or materially misleading.” B&P Code § 17529.5(a)(2) applies to marketers and their affiliate marketers who either send commercial emails from California or send commercial emails to California consumers.

The Emails at Issue in *Trancos* and the Trial Court's Decision

The plaintiff in *Trancos* sued an email marketer under B&P Code § 17529.5(a)(2) for sending eight commercial email advertisements on behalf of marketers that hired the email marketer. Before sending the emails, the email marketer privately registered the domains it used to send the emails with a proxy service. The proxy service, in turn, displayed the proxy service's contact information on the domain name registration records instead of the email marketer's contact information. That way, according to plaintiff, a recipient seeking to determine who sent the emails could not determine the sender because a WHOIS look-up (a publicly available service that allows users to determine persons associated with domain names) would reveal the proxy service's contact information and not that of the email marketer. Thus, the plaintiff alleged that the emails were false and deceptive under B&P Code § 17529.5(a)(2) for this reason. The plaintiff also alleged that the from lines were false and deceptive because they used generic phrases that did not identify the sender or the marketer on whose behalf the emails were sent, such as “Paid Survey” and “Christian Dating.”

The trial court found that seven of the eight emails violated B&P Code § 17529.5(a)(2) because the sending domains and from names failed to adequately identify the sender. For example, the trial court found unlawful an email that was sent using a privately/proxy registered domain with “Paid Survey” in the from line. By contrast, the trial court found that one email, which advertised eHarmony and which was sent from “eHarmony@minecyclic.com,” did not violate the statute despite the fact that the email marketer – not eHarmony – privately registered the sending domain name “minecyclic.com” with a proxy service.

The Appellate Court's Decision in *Trancos*

The appellate court affirmed the trial court's decision in all respects. Applying CAN-SPAM's definition of header information and noting CAN-SPAM's parallel provision to B&P Code § 17529.5(a)(2), the Court agreed that “the senders' domain names in seven of the e-mails did not represent a real company and could not be readily traced back to Trancos, the owner of the domain names and true sender of the e-mails, constituted falsification or misrepresentation for purposes of the statute.” As to privately registered domain names, the Court held “where, as in this case, the commercial e-mailer intentionally uses privately registered domain names in its headers that neither disclose the true sender's identity on their face nor permit the recipient to readily identify the sender... such header information is deceptive and does constitute a falsification or misrepresentation of the sender's identity.” Likewise, from lines that “misrepresented the sender's identity” were found unlawful. Accordingly, the Court held that “header

information in a commercial e-mail is falsified or misrepresented for purposes of section 17529.5(a)(2) when it uses a sender domain name that neither identifies the actual sender on its face nor is readily traceable to the sender using a publicly available online database such as WHOIS.”¹

Impact of the *Trancos* Decision

The *Trancos* decision affects marketers using email to drive traffic to their websites, and the companies they hire, nationwide. The greatest impact this decision has is that each commercial email advertisement must have, in the from line, either a domain name that is registered to the sender which can be determined by performing a WHOIS look-up, or the name of the sender or marketer on whose behalf the email was sent. Therefore, marketers can no longer send commercial email that contains both a generic from line and is sent from a proxy/private registered domain name. Therefore, In light of this development, and the substantial similarities between B&P Code § 17529.5(a)(2) and CAN-SPAM, marketers nationwide using commercial email advertisements must now revise and update their email protocols, and ensure they are compliant with this latest development in anti-spam law.

¹ *Trancos* also found that CAN-SPAM did not preempt B&P Code § 17529.5, thereby adding to the inconsistent decisions nationwide on the application of CAN-SPAM's preemption clause on state anti-spam laws.