

Judge finds Maryland's anti-spam law unconstitutional.
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Dec. 14--In a decision that could hamper Maryland's efforts to control spam -- the popular term for junk e-mail advertising on the Internet -- a Montgomery County judge has ruled that the state's anti-spam law is unconstitutional because it seeks to regulate commerce outside the state's borders.

Circuit Court Judge Durke G. Thompson, in a written opinion filed late last week, tossed out the case brought against a New York e-mail marketer by Eric Menhart, a George Washington University Law School student. Thompson's ruling is among the first to interpret Maryland's 2002 Commercial Electronic Mail Act, the first state law passed to penalize people who sent spam.

"If this decision is upheld, it will serve as a roadmap for future defendants -- to argue that they cannot be held liable," said David H. Kramer, a California attorney who specializes in Internet law.

Congress and several state legislatures have passed laws to corral spam, which has flourished in recent years. Critics complain that it chokes computer in-boxes often with offensive solicitations for everything from male impotence drugs to weight counseling. Businesses lose millions of dollars trying to filter it, and individuals waste time managing it.

Among the more than three-dozen state anti-spam laws on the books, laws in California and Washington were declared unconstitutional on similar grounds to Thompson's ruling in Maryland. But higher courts overturned those decisions. The federal CAN SPAM Act that took effect this year doesn't allow individuals to sue spammers. It superseded most state laws unless they specifically addressed deceptive or fraudulent e-mail, which Maryland's does.

The confusion and contradictory opinions are par for the course in Internet regulation, where geographic boundaries are nonexistent and precedent hard to find. Some said this decision could have implications for other states looking for guidance in interpreting new laws. Thompson's ruling came from a case filed by Menhart, 25, who last year set up a limited liability corporation called "MaryCLE" to fight spam under Maryland's civil law. Menhart sued Joseph Frevola in Montgomery County Circuit Court, claiming the New York e-mail marketer sent MaryCLE more than 80 fraudulent e-mails and seeking \$168,750 in damages.

But the judge's decision dismissing the case could mean "Eric Menhart's out of business," said Frevola's attorney, Andrew Dansicker of Baltimore. "All of his cases are based on the Maryland statute. All of his cases are going to be dismissed."

Menhart vowed to appeal the decision by either asking the judge to reconsider or by filing an appeal in a higher court. "If we took it to appeal and lost, then that would be a big problem," Menhart said. "If we took it to appeal and won, which we frankly plan to do, it will make it that the law will have been enforced."

Assistant Attorney General Steve Sakamoto-Wengel said he believes that the law as written should stand and he'll watch any appeals that come from the decision closely and possibly intervene by filing a brief to support the law.

"The law over the Internet is developing. There are going to be conflicting rulings," he said. But the ultimate hope is that "they all get resolved and we have clear rules over what states can and can't regulate."

The Maryland law interpreted by Thompson allows Maryland residents who receive e-mail with certain false information to sue for damages. Individuals may sue for \$500 per message or more, and Internet service providers -- like Neit Solutions, a Frederick company that joined Menhart's actions -- may sue for \$1,000 per message or more. A separate Maryland criminal statute enacted in October adds criminal penalties not found in the earlier civil statute by making falsified commercial e-mail a misdemeanor and punishable by fines of up to \$25,000 and 10 years in prison.

The Maryland law applies to e-mail sent to or from Maryland residents, but it leaves vague the actual location of the resident -- potentially affecting companies who send e-mail to people who live in Maryland, but who might receive the transmission elsewhere via laptop.

Menhart incorporated

MaryCLE in Maryland and pays Maryland taxes, but he lives in Washington, and his e-mail address is linked to Virginia. "The defendants had no way of knowing whether MaryCLE would receive its email in Virginia, D.C., Maryland, or any other state for that matter," the judge wrote.

Menhart, however, contended that he created an e-mail address specifically to alert spammers they were sending solicitations to Maryland. His domain name is "maryland-state-resident.com" "MaryCLE is in every way shape and form a Maryland corporation," Menhart said. But Thompson concluded that the law is unconstitutional because it attempts to regulate commerce that may never enter Maryland. He also said the court does not have jurisdiction against a New York defendant who may not have committed a crime in Maryland, and that Frevola -- as an officer of a corporation -- should not have been named a defendant at all. State Sen. Leonard H. Teitelbaum, the Montgomery County Democrat who sponsored the state's Commercial Electronic Mail Act, said he's willing to change the law to satisfy the judge's concerns if need be. "This person [Menhart] has opened up a whole new area for us. It's a possibility that we could amend our law or update it if you will to

protect people doing business in Maryland, even if they live [elsewhere]," he said. "It may very well be that the Maryland bill turns out to be a sample that other states might use."