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ABSTRACT

In Gordon v. Virtumundo, the United States Court of Appeals for the Ninth Circuit published its first opinion on private plaintiff standing requirements for actions under the federal CAN-SPAM Act. The court strictly interpreted CAN-SPAM's enforcement language, rejecting attempts by professional litigants to insert themselves into CAN-SPAM's limited private right of action. This Article analyzes Gordon's treatment of CAN-SPAM's private right of action and federal preemption provisions. It concludes by assessing the decision's expected effect on future spam-related litigation.

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INTRODUCTION

The public furor over unsolicited commercial e-mail, known as spam, has fed a cottage industry dedicated to profiting from statutory damages codified in the CAN-SPAM Act of 2003.[1] Uncertainty about the scope of CAN-SPAM's private right of action and limited precedent left courts largely powerless to dismiss such claims without expending significant resources on evaluating their individual merits. In its landmark *Gordon v. Virtumundo* decision, the Ninth Circuit erased many, but not all, of these ambiguities. It derived eligibility from legislative intent and held that CAN-SPAM's private standing requirements should be narrowly construed.[2] The court also held that eligible private plaintiffs must demonstrate actual harm of a specific type and causation.[3] Finally, the court determined that CAN-SPAM's preemption clause was broad, only allowing spam-related litigation under state law if the violation materially and intentionally references the state law at issue and the law itself specifically relates to falsity or deception.[4] *Gordon* largely shuts out professional plaintiffs from CAN-SPAM eligibility. It also modifies the requirements for legitimate claimants, necessitating a change in litigation approach.

I. THE CAN-SPAM ACT OF 2003

Unsolicited bulk and commercial e-mail messages, known as spam, are sent in large quantities to indiscriminate sets of recipients. During the first half of 2009, spam constituted 85.5% of all e-mail traffic.[5]

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[1] Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. §§ 7701-7713 (2006); *See, e.g.*, Mike Masnick, *Serial Anti-Spam Lawsuit Filer Loses Appeal . . . And His Possessions*, TECHDIRT (Aug. 24, 2009, 10:25 AM), http://www.techdirt.com/articles /20090821/0334155954.shtml.

[2] *See* Gordon v. Virtumundo, 575 F.3d 1040, 1051 (9th Cir. 2009).

[3] *See id.* at 1053-54.

[4] *See id.* at 1063.

[5] *Kaspersky - Spam Volume Remained High in H1 2009 Despite Economic Crisis*,

This ever-rising tide of spam has caused public consternation and high business spending toward network and business asset protection.[6] Legislators balanced this public sentiment with the economic and marketing utility of legitimate commercial e-mail when they drafted and subsequently enacted CAN-SPAM in 2003.[7]

CAN-SPAM governs the content, representation, and delivery of commercial e-mail.[8] It does not outlaw unsolicited e-mail outright. Commercial e-mail is only unlawful if it does not allow for verifiable and timely user-initiated unsubscription,[9] contains inaccurate or misleading sender information,[10] or is sent under or through falsified means.[11] CAN-SPAM also limits standing to governmental and regulatory bodies, but provides a limited private right of action to a class of plaintiffs it terms Internet access services ("IASs").[12] The term "Internet access service" is statutorily defined as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."[13] In the absence of precedent, this language was sufficiently ambiguous to cause most courts to construe the definition very

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SPAM FIGHTER (Nov. 9, 2009), http://www.spamfighter.com/News-13076-Kaspersky-%E2%80%93-Spam-Volume-Remained-High-in-H1-2009-Despite-Economic-Crisis.htm

[6] *See* Rebecca Lieb, *Make Spammers Pay Before You Do*, ISP-PLANET (Jul. 31, 2002), http://www.ispplanet.com/business/2002/spam_cost.html.

[7] *See* 15 U.S.C. § 7701 (2006).

[8] *See* 15 U.S.C. § 7702(2) (2006).

[9] 15 U.S.C. § 7704(a)(3)(A)(i) (2006).

[10] 15 U.S.C. § 7704(a)(2) (2006).

[11] *See* 15 U.S.C § 7704(b) (2006).

[12] *See* 15 U.S.C. § 7706(g)(1) (2006).

[13] 47 U.S.C. § 231(e)(4) (2006).

broadly.[14]

IASs are only granted CAN-SPAM standing if they suffer adverse effects as a result of a substantive CAN-SPAM violation.[15] The courts generally construed CAN-SPAM's "adverse effects" language to require a showing of both sufficient extent of harm as well as type of harm generally suffered by IASs.[16] However, the courts broadly refused to require a showing of any connection between specific violations and alleged harm.[17]

The Act provides for statutory damages of up to $100 per violating message[18] and $1,000,000 in aggregate.[19] It allows treble damages for aggregated or willful violations.[20] The Act also preempts related state law that "expressly regulates the use of electronic mail to send commercial messages, except to the extent that [it] prohibits falsity or deception."[21] State laws not specific to electronic mail are saved from preemption, as are laws addressing fraud or computer crime.[22]

Between CAN-SPAM's steep statutory damages, the ease of meeting its standing requirements, and widespread public hatred for spam, it is easy to see how an unscrupulous private plaintiff could make a significant amount of money by manipulating the previous regime.

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[14] *See, e.g.*, Ferguson v. Quinstreet, No. C07-5378RJB, 2008 WL 3166307, at *5 (W.D. Wash. Aug. 5, 2008) (in the absence of guidance, the term must be given its broadest definition under CAN-SPAM); MySpace v. The Globe.com, No. CV06-3391-RGK(JCx), 2007 WL 1686966, at *3 (C.D. Cal. Feb. 27, 2007) (IAS providers can include any traditional ISP, any e-mail provider, and most Web site owners); Hypertouch v. Kennedy-Western Univ., No. C04-05203SI, 2006 WL 648688, at *3 (N.D. Cal. Mar. 8, 2006) (holding that providing e-mail service alone, without any other services, was sufficient to qualify as an IAS under CAN-SPAM).

[15] *See, e.g.*, *Ferguson*, 2008 WL 3166307; *MySpace*, 2007 WL 1686966, at *3; *Hypertouch*, 2006 WL 648688, at *3.

[16] *See, e.g.*, ASIS Internet Servs. v. Optin Global, No. C-05-05124JCS, 2008 WL 1902217, at *17 (N.D. Cal. Apr. 29, 2008); Brosnan v. Alki Mortgage, No. C074339JL, 2008 WL 413732, at *2 (N.D. Cal. Feb. 13, 2008); *Hypertouch*, 2006 WL 648688, at *4.

[17] *See, e.g., Optin Global*, 2008 WL 1902217, at *5-6.

[18] 15 U.S.C. § 7706(g)(3)(A)(i) (2006).

[19] 15 U.S.C. § 7706(g)(3)(B) (2006).

[20] 15 U.S.C. § 7706(g)(3)(C) (2006).

[21] 15 U.S.C. § 7707(b)(1) (2006).

[22] 15 U.S.C. § 7707(b)(2) (2006).

One CAN-SPAM defendant complained somewhat prophetically that such "a broad interpretation [would] create a flood of suits by 'spam litigation mills.'"[23]

II. THE *GORDON* DECISION

The Ninth Circuit chilled the potential anti-spam litigation industry with its decision in *Gordon*.[24] Appellant James S. Gordon was variously described as an "anti-spam enthusiast" and "professional plaintiff," whose sole source of income was monetary settlements from his litigation campaign.[25] His technique was to configure several Internet domains and e-mail inboxes under his control to not only passively accept spam but also to actively seek it. Once spam messages began arriving, Gordon would sue the senders or relaying providers. One such provider was Virtumundo, Inc., an e-mail marketing firm.

The district court determined that Gordon lacked CAN-SPAM standing and granted Virtumundo's motion for summary judgment.[26] It held that while Gordon qualified as an IAS under the prevailing definition of the term,[27] he failed to show adverse harm because any harm he suffered was the same as that suffered by ordinary e-mail users.[28] The court further held that since Virtumundo did nothing to hide its e-mail domains from end-users, it did not materially falsify or deceive, thus negating any claim Gordon might have had under state law via CAN-SPAM's preemption exception.[29]

Gordon appealed and the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision in a strongly worded and decisive ruling. First, it explicitly rejected a broad interpretation of the

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[23] ASIS Internet Servs. v. Active Response, No. C076211TEH, 2008 WL 2952809, at *6 (N.D. Cal. Jul. 30, 2008) (quoting defendant).

[24] *See* Gordon v. Virtumundo, 575 F.3d 1040 (9th Cir. 2009).

[25] *Id.* at 1056.

[26] *See* Gordon v. Virtumundo, No. 06-0204-JCC, 2007 WL 1459395, at *15 (W.D. Wash. May 15, 2007).

[27] *See id.* at 8.

[28] *See id.*

[29] *See id.* at 12.

definition of IAS.[30] Although the court noted that the actual definition of IAS may have a technical or hardware prerequisite, it refused to set forth any general test or definitional boundaries.[31] Nevertheless, the court considered CAN-SPAM's legislative intent and determined that a plaintiff was not an IAS because it had no control over the serving hardware and did not provide any service the service provider could not offer. As Gordon provided no actual services beyond what was already freely available to his "customers," the court determined that he did not qualify as an IAS.

Second, the Ninth Circuit added a two-part *extent* of harm requirement to the existing "adversely affected" test, which only necessitated showing adequate *type* of harm. The resulting test has three elements: (1) that there be, "at bare minimum, a demonstrated relationship between purported harms and the type of e-mail practices regulated by the Act,"[32] (2) the type of harm suffered must be "both real and of the type experienced by ISPs,"[33] and (3) any ISP-type harm suffered must be above and beyond the ordinary difficulties suffered by the normal operation of the ISP, even after normal reasonable precautions to avoid them.[34] Gordon failed on all counts. He could not proffer evidence of a connection between spam and his purported harms; he only suffered harm of the type ordinarily incurred by ordinary consumers. Even if he could meet the first two criteria, his efforts in actually attracting spam could not be construed as reasonable precautions to avoid it. The court noted that, for fear of creating an impossibly high standard, it was not requiring direct evidence of harm from *specific* e-mails. It merely required evidence of general harm of the correct type and extent.[35]

Finally, citing *Omega Travel v. Mummagraphics*, the *Gordon* court

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[30] *See Gordon*, 575 F.3d at 1051.

[31] *See id.* at 1052.

[32] *Id.* at 1054.

[33] *Id.* at 1053.

[34] *Id.* at 1054.

[35] *See id.* at 1054 n.12. While the court noted the impracticability of tracing harm to a specific set of offending e-mails, it did not offer concrete examples of what it considered to be sufficiently harmful. Instead, the court reserved the future possibility of requiring evidence of specific e-mails causing alleged harm.

held that not only did Gordon's state claims fail to qualify for CAN-SPAM's preemption exception, but the state law itself was preempted.[36] The court seized on CAN-SPAM's stated legislative intent that the act regulate commercial e-mail "on a nationwide basis"[37] and only excepted state laws that "*target* fraud or deception."[38] The *Omega* court did not find that state laws prohibiting "mere error" or "insignificant inaccuracies" qualified as exceptions to preemption.[39] The *Gordon* court found that the state law in question, Washington's Commercial Electronic Mail Act (CEMA),[40] was substantially aimed at the same goals as CAN-SPAM and was thus preempted, regardless of CEMA's incidental language treating falsity or deception.[41] Such language, the court opined, left open the possibility of violation by inaccuracy, rather than intent, and thus ran afoul of *Omega's* preemption of statutes punishing "mere error" or technicalities.[42] In Gordon's case, because Virtumundo did nothing to hide the identity of its e-mails from discovery easily accessible by the public, Gordon's assertion of falsity and deception were without merit, and his state CEMA claims were preempted by his failed federal CAN-SPAM claims.

III. *GORDON'S* EFFECTS ON FUTURE SPAM LITIGATION

The *Gordon* decision drew mixed reactions. Some lauded the Ninth Circuit for sweeping away frivolous litigation and sharpening CAN-SPAM's focus,[43] while others criticized what they perceived as a

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[36] *See Gordon*, 575 F.3d at 1060-62 (citing Omega World Travel v. Mummagraphics, 469 F.3d 348 (4th Cir. 2006)).

[37] *Id.* (citing 15 U.S.C. § 7701(b)(1) (2006)).

[38] *Id.*

[39] *Omega*, 469 F.3d at 354-55.

[40] WASH. REV. CODE § 19.190.030 (2010).

[41] *See* Gordon v. Virtumundo, 575 F.3d 1040, 1064 (9th Cir. 2009).

[42] *Id.*

[43] *See, e.g.*, Bruce Nye, *CAN-SPAM Act–Common Sense From the Ninth Circuit*, CAL BIZ LIT (Aug. 10, 2009, 9:19 AM), http://www.calbizlit.com/cal_biz_lit/2009/08/canspam-act-common-sense-from-the-ninth-circuit.html; David Johnson, *CAN-SPAM Update: Ninth Circuit Ruling Shuts Down Anti-SPAM Cottage Industry*, DIGITAL MEDIA LAWYER BLOG (Aug. 20, 2009), http://www.digitalmedialawyerblog.com/

weakening of anti-spam measures."[44] The debate centers on a widely disparate portrayal of Gordon himself; those in favor of the ruling viewed Gordon as an opportunistic litigant, while those against praised him as a scrupulous and canny anti-spam crusader.

Whatever Gordon's true motivations, the Ninth Circuit used a less-than-favorable view to assess his claims and formulate its holding.[45] Generally, the court sought to separate the actual law as codified in CAN-SPAM from sentiment as to what it *should* have been.[46] The Ninth Circuit singularly emphasized the congressional intent behind CAN-SPAM in every part of its analysis, which has wide-ranging implications on private standing for future related litigation.[47]

A. Higher Threshold for Internet Access Service (IAS) Status

As noted above, prior to *Gordon*, courts construed CAN-SPAM's IAS definition broadly but inconsistently. While CAN-SPAM uses the definition of "Internet" from the Internet Tax Freedom Act (ITFA),[48] it does not use the ITFA's definition of either IAS or the more restricted "Internet access provider," which specifically invoked hardware-based Internet service providers (ISPs).[49] Instead, it uses a much broader IAS definition[50] from the Child Online Protection Act,[51]

2009/08/digital_media_law_ninth_circui.html.

[44] *See, e.g.*, J. Craig Williams, *Prying Back The Lid On The CAN-Spam Act: No Private Right To Challenge Spammers*, MAY IT PLEASE THE COURT (Aug. 9, 2009, 7:54 AM), http://www.mayitpleasethecourt.com/journal.asp?blogid=2025.

[45] *See Gordon*, 575 F.3d at 1055 ("It is readily apparent that Gordon, an individual who seeks out spam for the very purpose of filing lawsuits, is not the type of private plaintiff that Congress had in mind.").

[46] *Gordon*, 575 F.3d at 1056 n.15 ("As should be apparent here, 'the law' that Gordon purportedly enforces relates more to his subjective view of what the law ought to be, and differs substantially from the law itself.").

[47] *See id.* at 1057 ("The CAN-SPAM Act was enacted to protect individuals and legitimate businesses—not to support a litigation mill for entrepreneurs like Gordon.").

[48] 47 U.S.C. § 151 (2006).

[49] *Id.*

[50] *See* 15 U.S.C. § 7702(11) (2006).

[51] 47 U.S.C. § 231(e)(4) (2006).

which not only includes ISPs such as Comcast, and Verizon DSL, but also *meta*-level service providers.[52]

Gordon carved out an exception to this broad definition by excluding professional litigants and other small-time private plaintiffs like blog owners or personal Web site operators. The court "reject[ed] any overly broad interpretation of 'Internet access service' that ignore[d] congressional intent," which generally viewed CAN-SPAM as only applicable to those in the best position to regulate spam and not those who merely received it.[53] Though the court refused to lay down any specific test, it advised that subsequent courts should "inquire into the plaintiff's purported Internet-related service operations" in questionable cases and determine what purpose those operations served.[54] Even if the operations were legitimate, their scale and complexity must be weighed; those providing a "nominal role in providing Internet-related services" cannot qualify.[55]

The court used Gordon's enterprise as an example of a non-IAS, even though it met CAN-SPAM's literal IAS definition. On its face, this appears to violate the Ninth Circuit's general precedent that "the legislative purpose of a statute is expressed by the ordinary meaning of the words used."[56] Gordon's service appears to enable users to access e-mail, fitting squarely within the literal CAN-SPAM IAS definition. However, the *Gordon* court distinguished Gordon's enterprise from IAS classification by noting its lack of value.[57] It observed that Gordon failed to operate as a bona-fide e-mail provider; he "avoided taking even minimal efforts to avoid or block spam" and instead actively

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[52] *See* Ethan Ackerman, *Just Who Is an Internet Access Service Provider Under CAN-SPAM?*, TECHNOLOGY AND MARKETING LAW BLOG (Nov. 14, 2008, 1:29 AM), http://blog.ericgoldman.org/archives/2008/11/just_who_is_an.htm (asserting that Web sites like Facebook, Google, etc. also fall under the CAN-SPAM definition of IAS).

[53] Gordon v. Virtumundo, 575 F.3d 1040, 1050-51 (9th Cir. 2009).

[54] *Id.* at 1055.

[55] *See id.* at 1052.

[56] Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1066 (9th Cir. 1998); *accord* Seldovia Native Ass'n v. Lujan, 904 F.2d 1335, 1341 (9th Cir. 1990).

[57] *See Gordon*, 575 F.3d at 1051-52.

accumulated it for the purposes of initiating litigation.[58] The court also cited Gordon's lack of involvement in the creation of his e-mail service, which was limited to using a home computer to access a much larger e-mail provider's services.[59] The court determined that Gordon's service was not a service at all, as it did not provide users access to Internet resources beyond what was already available to them.[60]

The Ninth Circuit's decision sets the IAS threshold considerably higher, especially for professional plaintiffs. The decision's effect on more legitimate enterprises is still unclear, however. There is little to distinguish the methods used to set up legitimate e-mail domains, blogs, etc.—some of which may attract thousands or millions of users—from those employed by Gordon. The Ninth Circuit's expressly incomplete guidance on the matter suggests that it may have targeted Gordon's dubious aims rather than the lack of complexity or utility of his methods.[61]

The Ninth Circuit's precedent creates a definitional continuum for IAS status, requiring fact-based inquiry to determine eligibility. On the one hand, services created specifically to enable litigation are categorically ineligible. On the other hand, entities allowing primary access to the Internet itself or other legitimate Internet-based services—social networking and e-mail, for instance—are covered under IAS' generally broad definition. The threshold is less clear for plaintiffs between the extremes, especially for those providing secondary services such as personal blogs or family e-mail domains.

The Ninth Circuit's rule of statutory construction seemingly cabins the *Gordon* IAS limitations to explicitly illegitimate or useless services. Had Gordon actually maintained legitimate e-mail services for his clients, the court's analysis would have been a significantly closer proposition. Professional plaintiffs may begin "spam farming" more passively to avoid the elevated threshold.

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[58] *Gordon*, 575 F.3d. at 1052.

[59] *Id.*

[60] *See id.*

[61] *See* Eric Goldman, *An End to Spam Litigation Factories?*, TECHNOLOGY AND MARKETING LAW BLOG (Aug. 7, 2009, 12:40 PM), http://blog.ericgoldman.org/archives/2009/08/an_end_to_spam.htm.

B. *The "Adversely Affected" Test and Required Showing of Actual Harm*

Even if a private plaintiff can show bona-fide IAS status, under *Gordon* they must now show that they were both adversely affected by IAS-type harm and that the harm was real, with an extent beyond that of "mere annoyance . . . and greater than the negligible burdens typically borne by an IAS provider in the ordinary course of business."[62]

As before, the CAN-SPAM Act redresses only harms that parallel its limited private right of action, including harms unique to IAS providers such as "investing in new equipment to increase capacity[,] customer service personnel to deal with increased subscriber complaints, [and] maintaining e-mail filtering systems and other anti-spam technology."[63] *Gordon* made it clear that consumer-related harms are irrelevant to CAN-SPAM analysis, not only neutralizing claims by private consumers, but also claims by IASs based partially or entirely on, for example, loss of personal data.[64] Such claims must now seek redress for the derivative effects of consumer-related harms, such as additional customer service costs.[65]

However, the calculation of adverse effect under CAN-SPAM now includes a baseline element. The *Gordon* court differentiates between the fixed and variable costs of spam prevention, and notes that subsequent courts must "be careful to distinguish the ordinary costs and burdens associated with operating an Internet access service from actual harm."[66] The court "expect[s] a legitimate service provider to secure adequate bandwidth and storage capacity and take reasonable precautions, such as implementing spam filters, as part of its normal operations."[67] The court seems to view spam as an expected part of the Internet industry, and any showing of actual harm for the purposes of CAN-SPAM standing must be above and beyond the normal expenses

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[62] *Gordon*, 575 F.3d at 1054.

[63] *Id.* at 1053.

[64] Goldman, *supra* note 61.

[65] *See Gordon*, 575 F.3d at 1054.

[66] *Id.*

[67] *Id.*

required to counteract it.[68] "Network slowdowns, server crashes, increased bandwidth usage, and hardware and software upgrades bear no inherent relationship to spam or spamming practices," and evidence of them alone is insufficient to show that the IAS was adversely affected by misconduct.[69] Such events must be accompanied with evidence that "the e-mails at issue . . . contribute to a larger, collective spam problem that cause ISP-type harms."[70]

This seems to imply that an influx of spam of an unusual amount or insidiousness, mapped to a specific and abnormal IAS-type harm, is required for private standing under CAN-SPAM. However, due to what the Ninth Circuit perceived as "the impracticability of tracing harm to a specific e-mail or batch of e-mails," it refused to impose "a direct causation requirement," though it reserved the right to do so in future litigation.[71]

Gordon's stricter private standing requirements are effectively waived for "well-recognized ISPs or plainly legitimate Internet access service providers."[72] It reasoned that "adequate harm might be presumed because any reasonable person would agree that such entities dedicate considerable resources to and incur significant financial costs in dealing with spam."[73] For these plaintiffs, standing under CAN-SPAM is automatically granted. Conversely, harms alleged by plaintiffs with questionable IAS status should be "closely examine[d]."[74] This language has the effect of bifurcating the "adverse effect" requirements for large commercial providers and smaller enterprises.[75] It should be noted that *Gordon* left open the question of what characterizes a "recognized" ISP or a "plainly legitimate" IAS.

As with its restriction of the IAS definition, the *Gordon* court's holding on the CAN-SPAM harm elements invalidates most profes-

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[68] Goldman, *supra* note 61.
[69] *Gordon*, 575 F.3d at 1054.
[70] *Id.*
[71] *Gordon*, 575 F.3d at 1054 n.12.
[72] *Id.* at 1055.
[73] *Id.*
[74] *Id.*
[75] Goldman, *supra* note 61.

sional litigants' standing arguments. It also requires a higher standing threshold for private plaintiffs of all but the largest and most well recognized IASs.

C. CAN-SPAM Preempts Overlapping State Law

Gordon's application of *Omega World Travel v. Mummagraphics* is a definite statement of CAN-SPAM's preemption of applicable state law. One of CAN-SPAM's stated aims is to address the states' disparate standards for commercial e-mail, which it found to be incompatible with the geographically independent nature of e-mail.[76] However, in some states, CAN-SPAM's enactment resulted in the creation of new anti-spam laws to work around the preemption statute, making enterprises like Gordon's more successful because of the additional state law action at their disposal.[77] These new laws were often more lax about standing and causation, sometimes focusing on the perpetrator's knowledgeable intent of their actions rather than any actual harm suffered by recipients, and provided any private recipient or Web site owner with a right of action.[78]

Just as the *Omega* decision invalidated these quickly-revised state laws in the Fourth Circuit, *Gordon's* affirmation of *Omega*'s principles may negate similarly situated state laws in the Ninth Circuit, following its disqualification of Washington's CEMA in *Gordon.* It is important to note that *Gordon* and *Omega* only interpret CAN-SPAM as preempting state laws specific to electronic mail; other laws, including statutes targeting fraud or computer crime, are still viable for litigation.[79] However, as *Gordon* demonstrated, such state claims must not be based on other, explicitly preempted grounds.[80]

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[76] 15 U.S.C. §7701(a)(11) (2006).

[77] *See* Goldman, *supra* note 61.

[78] *See, e.g.*, State v. Heckel, 93 P.3d 189, 192-94 (Wash. App. 2004) (assessing defendant's liability for violating Wash. Rev. Code 19.190.020 in terms of *constructive knowledge of receipt*).

[79] Gordon v. Virtumundo, 575 F.3d 1040, 1065 n.24 (9th Cir. 2009).

[80] *See id.* at 1064-65 n. 23.

D. Prevailing Defendants May Be Awarded Attorney's Fees

Virtumundo was able to recover attorney's fees from Gordon at the district court level. This may have been the first time a defendant had prevailed in collecting attorney's fees in a CAN-SPAM action.[81] The district court found that since CAN-SPAM was intended to have a limited private right of action, a dual-standard approach to attorney's fees where plaintiffs' requests are always viewed favorably was not appropriate.[82] Congress' intent, it reasoned, was not for "private parties with no harm to invoke CAN-SPAM [and] collect millions of dollars."[83] The district court concluded that CAN-SPAM was best suited for an even-handed approach under *Fogerty*, wherein a prevailing defendant's request for remuneration would be "'evaluated no differently than the question to whether to award fees to a prevailing plaintiff.'"[84] Upon evaluating Gordon's serial litigation tendencies, the district court found ample reason to award Virtumundo attorney's fees with the "goal of deterrence."[85]

This novel reasoning was not addressed and thus not explicitly overruled by the Ninth Circuit. The district court turned professional litigation under CAN-SPAM into a much riskier financial proposition in the Western District of Washington; the Ninth Circuit's silence on the matter may move other courts in its jurisdiction to rule similarly.

CONCLUSION

Gordon effectively neutralizes most professional plaintiffs' standing arguments in the Ninth Circuit under CAN-SPAM's private right of action. First, the threshold question of whether a plaintiff is an IAS

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[81] Eric Goldman, *CAN-SPAM Defendant Awarded $111k in Fees/Costs: Gordon v. Virtumundo*, CIRCLEID (Aug. 6, 2007, 4:44 PM), http://www.circleid.com/posts/070806_can_spam_act_gordon_virtumundo.

[82] Gordon v. Virtumundo, No. 06-0204-JCC, at *5-6 (W.D. Wash. Aug. 1, 2007) (order granting attorney's fees), *available at* http://www.spamnotes.com/files/31236-29497/Virtumundo_Order.pdf.

[83] *Id.* at *7.

[84] *Id.* at *5 (citing Fogerty v. Fantasy, 510 U.S. 517, 534 (1994)).

[85] *Id.* at *10.

involves close judicial scrutiny regarding its underlying purpose. Second, if the plaintiff is an IAS, it must show that it suffered significant IAS-type harm above and beyond ordinary inconvenience from a normal spam volume. Third, should the plaintiff's CAN-SPAM claim fail, the viability of a parallel state claim is now highly questionable. Finally, if the court determines that the claim is frivolous, the plaintiff runs the risk of being responsible for the defendant's legal fees and costs.

A side effect of the Ninth Circuit's methodical dissolution of CAN-SPAM litigation factories is that legitimate Web site operators and e-mail providers have a higher standard of harm, and possibly threshold IAS standing, to meet. Large and well-known providers and operators, however, may automatically be presumed to have standing with little inquiry into the merits of their claims.

PRACTICE POINTERS

- Examine the legitimacy and motives of private plaintiffs. New Ninth Circuit CAN-SPAM standing requirements make it difficult for litigation factories to succeed in court.
- Provide evidence of complexity, utility, and specialty. The more useful, involved, or unique the service provided by the plaintiff, the more likely they are to attain IAS status.
- Emphasize omnipresence or legitimacy of the service. A showing of obvious legitimacy of the plaintiff's service, or widespread recognition as an ISP, effectively bypasses the stringent "adversely affected by" requirements of the Ninth Circuit.
- Concentrate on materially deceptive practices. Mere errors and technical glitches are not likely to meet the standard under either federal or state law.
- Be prepared to defend against claims for attorney's fees. If the defendant prevails, it is possible that the court will use the *Fogerty* even-handed standard for determining costs.