

STATE OF INDIANA)	IN THE PORTER SUPERIOR COURT
) ss:	DIVISION 4
COUNTY OF PORTER)	VALPARAISO, INDIANA
HOWARD MOSELEY)	
Plaintiff,)	
)	
vs.)	64D04-0506-SC-3211
)	
AMERICA ONLINE, INC.)	
Defendant)	

FINDINGS AND JUDGMENT

I. FACTS AND PROCEDUAL POSTURE

On June 15, 2005, the Plaintiff filed a Notice of Claim in small claims court seeking \$2850 from the Defendant. The facts are largely uncontested. Plaintiff purchased a domain name and hosting services from Godaddy.com, a registrar, to host the internet website, www.sportsonlyauction.com. The Plaintiff acknowledges and admits that he sends unsolicited commercial email, called “spam”¹. Plaintiff testified at trial that he would buy lists of email addresses from providers, and send approximately 15,000 spam emails on a daily basis, all advertising his web site which sold various sporting goods. Unsolicited commercial email can be either an effective marketing tool or an annoying and persistent problem for consumers as well as ISP’s such as Defendant, America Online Corporation, depending on its future regulation. There are some benefits to this type of direct marketing. Marketers profit because the cost of sending bulk email is low and still allows for reaching a mass audience. While faxes and postal mail cost the solicitor the price of a phone call or stamp, email is much less expensive to send in bulk. A spammer could send fifty million email messages at a cost of approximately \$100. By contrast, sending the same number of messages by first-class mail, at thirty-nine cents

¹Use of the term “spam” as Internet jargon for seemingly ubiquitous junk email arose out of a skit by the British comedy troupe Monty Python, in which a waitress can offer a patron no single menu item that does not include spam: “Well, there’s spam, egg, sausage, and spam.”As additional items of spam are ordered, the name of the menu item grows, i.e. spam, spam, spam, spam, eggs. See also: Kadow’s Internet Dictionary, at www.msg.net/kadow/answers.html. Washington v. Hackel, 143 Wn.2d 824, 24 P.3d 404 (Wash.), cert. denied, 534 U.S. 997 (2001).

per envelope, would cost approximately \$18.5 million in postage alone.

However, because of the relative ease with which bulk email can be sent, many consumers are inundated by email they did not request and did not wish to receive. The sheer volume creates a burden for consumers and Internet Service Providers (ISP's) in increased expenses and bandwidth. There is a high cost associated with remedying spam; some consumers have been forced to abandon the email. ISP systems are burdened by the amount of email traffic created. Spam uses additional bandwidth forcing ISP's to try expensive and not always effective technical solutions. For instance, spam blocking filters may be over and under inclusive in the type of spam it catches. Legitimate email may be blocked or unwanted spam may get through. In addition, the content of the spam can be harmful when it is fraudulent, offensive or inappropriate for children. *Note: Arminda B. Bepko: "A State-by-State Comparison of Spam Laws."* 13 Media L. & Policy 20 (Summer 2004).

Defendant, America Online Incorporated, (AOL) is the largest commercial online service with more than twenty million individual subscribers across the United States. [America Online, Inc. v. GreatDeals.net](#) 49 F.Supp.2d 851 (E.D. Va. 1999). The Internet is an international network of interconnected computers," currently used by approximately 40 million people worldwide. *Reno v. ACLU*, 138 L. Ed. 2d 874, 117 S. Ct. 2329, 2334 (1997). One of the many means by which individuals access the Internet is through an interactive computer service. Another name of these is Internet Service Providers (ISP's). These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network. *Id.* AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber. [Zeran v. America Online](#), 129 F.3d 327(4th Cir. 1997).

II. DISCUSSION

Which brings the Court to Plaintiff's claim. Plaintiff claims that on March 25, 2005, his hosting service ("registrar") Godaddy.com was informed by Defendant, America Online Company (AOL) that spam was being generated from Plaintiff's website. The Defendant had

received complaints from various email account holders of AOL of the spam. In its capacity as an ISP, AOL blacklisted the Plaintiff by threatening Godaddy.com that AOL would refuse to let any Godaddy email pass through its servers, clearly a threat to Godaddy's network.

Plaintiff claims that this act of blacklisting amounts to tortious interference of the contract between Plaintiff and Godaddy, and the resulting shutdown of Plaintiff's website by Godaddy resulted in loss of business and goodwill.

Plaintiff sued AOL for the tortious interference of his contract with Godaddy and in a separate action under 64D04-0508-SC-4356, entitled Howard Mosely versus Godaddy.com, filed suit against his domain registrar for breach of contract. In a Motion to Dismiss, filed by Defendant, Godaddy.com, in SC-4356, the dismissal of that cause of action is relevant to the current matter. In a pleading filed October 6, 2005, Godaddy argued:

On 25 March 2005, Go Daddy received notification that Spam was being generated from Plaintiff's website and subsequently received threats of blacklisting by Internet Service Provider America Online ("AOL"). Being "blacklisted" in Internet terminology means that AOL would refuse to let any Go Daddy email pass through its servers, clearly a threat to Go Daddy's network. With over four million customers, Go Daddy simply could not take that risk. Thus, following its standard operating procedures, as well as those outlined in the Spam Policy, Go Daddy removed the Website from its network and notified Plaintiff of the infraction....On 30 March, 2005, Plaintiff followed the procedure for reinstating the Website and access was therefore restored on that date.

(Motion to Dismiss, October 6, 2005)

Plaintiff subsequently dismissed his action against Godaddy.com on October 20, 2005. The Plaintiff and Godaddy.com had executed a standard contract which defined their respective rights and responsibilities. Within that contract was a Spam Policy. In the first sentence of the Spam Policy Section of the contract, it states:

"Go Daddy Software, Inc. does not tolerate the transmission of spam. We monitor all traffic to and from our Web servers for indications of spamming." Also, in Paragraph three, "What we Allow and Don't Allow", it states:

"We will not allow our servers and services to be used for the purposes described above...You must abide by all applicable laws and regulations, which include the Can-Spam Act of 2003...but you must also abide by Go Daddy's no spam policies." The final paragraph clearly allows Godaddy to re-direct, suspend, or cancel any web site hosting.

In that regard, the Defendant, AOL, was merely assisting Godaddy in enforcing its own

anti-spam policies. Whether described as applied pressure, coercion, or blacklisting, if Godaddy could not be held contractually liable for shutting down Plaintiff's website for spamming, then AOL cannot be held liable for the shutdown. This logic goes back to the Plaintiff's theory of recovery, tortious interference with contract. A crucial element of interference with contract is that the negligent party, here alleged to be AOL, has induced a breach. In this matter, AOL did not induce a breach, but induced an adherence, i.e. it forced Godaddy to abide by its Anti Spam Contract with Moseley. Therefore, tortious interference with contract is inapplicable to this factual setting.

Secondly, the Federal Can Spam Act of 2003 is applicable and gives AOL immunity from lawsuit in a variety of situations, including the present action. Title 47 U.S.C. § 230 allows an Internet Service Provider full discretion to regulate and determine whether submissions are fraudulent or offensive, in any regard, and to take whatever action they deem appropriate.

Zeran, 129 F.3d 327 (4th Cir. 1997). Section 230(c)(2) provides in full:

No provider or user of an interactive computer service shall be held liable on account of-
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). 47 U.S.C. 230(c)(2).

Congress's purpose in providing such immunity is evident. As the Fourth Circuit noted in the Zeran case, ISPs such as AOL have millions of users who generate a "staggering" amount of content or information; thus it is "impossible for service providers to screen each of their millions of postings for possible problems." 129 F.3d at 331. If ISPs faced tort liability for information posted through their services by third parties, they might be forced to restrict access to their public forums. *Id.* Such a result would be counter to the statutory purpose of ensuring that the Internet remain a "forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* at 330; 47 U.S.C. § 230(a)(3). Thus, while parties that post information in Internet forums remain accountable under all applicable federal and state laws, they cannot be reached indirectly through the imposition of liability on the ISPs that serve as intermediaries in posting the information. See Zeran, 129 F.3d at 330.

Noah v. AOL/Time Warner., 261 F. Supp. 2d 532, 538 (D. Va. 2003)

The Plaintiff claimed at trial that his Spam was not illegal under the Can Spam Act, because it was not fraudulent, offensive or harassing. He testified that he followed the rules involving Spam by giving a return address, contact information and the ability to un-subscribe. However, the Act gives ISP's the full authority to find any spam to be "objectionable or harassing". Here, the complaints of several recipients of Spam were forwarded to AOL, who made a legal determination to force discontinuation of the Spam. In fact, in Cyber Promotions, Inc. v. American (sic Online, 948 F.Supp 436 (E.D. Pa. 1996), the exact issue as the present case was presented to the United States District Court for the Eastern District of Pennsylvania. The federal court analyzed the claims of a plaintiff similar to Moseley under First Amendment, Sherman Act Monopolization, Tortious Interference With Contract, and numerous other possible causes of action, and in each case the right of America Online to act as they did in this matter was upheld.

A recent law review article also dealt with the very issue presented by this case. "Note: The Right to Spam? Regulating Electronic Junk Mail, Columbia Journal of Law & Arts, Spring 2000. There the writer found:

It is therefore not surprising that the public is calling for limits on electronic junk mail. For example, the Federal Trade Commission's Bureau of Consumer Protection receives over 1000 complaints per day involving electronic junk mail. An attorney for the Securities Exchange Commission has reported that spam-related complaints are among the most common ones received by the Commission. Internet service providers (ISPs), the companies that offer customers a connection to the Internet, have responded to customer complaints by banning "spammers" from their services. Numerous states have recently enacted statutes which may curtail the ability of electronic junk mailers to disturb uninterested customers. Similar federal legislation is pending

Finally, even if the Plaintiff would have prevailed on his claim of tortious interference with contract, the damages sought by the Plaintiff were speculative and unproven. Plaintiff's

claimed loss of goodwill was nebulous. By agreement with Godaddy.com, his damages were capped at \$4.00.

III. CONCLUSION AND ORDERS

Therefore, because as a matter of contract, and because AOL has statutory immunity from the claims presented by Plaintiff, judgment is entered for Defendant.

SO ORDERED: March 6, 2006

JUDGE DAVID L. CHIDESTER

cc: all parties and counsel