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THE FUTURE OF SPAM LITIGATION AFTER *OMEGA WORLD TRAVEL V. MUMMAGRAPHICS*

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I. INTRODUCTION

Unsolicited commercial e-mail ("UCE"), commonly known as spam,[1] is both ubiquitous and profitable.[2] In 2006, approximately forty percent of the thirty-one billion e-mails sent daily were classifiable as spam, costing U.S. corporations an estimated $8.9 billion and non-corporate Internet users $255 million.[3] While many delete these messages, UCE does convince some recipients to buy the advertised products, and the combination of sizeable audience and low cost to

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1. Colloquially, "spam" refers to "any unwanted e-mail." Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 963 (2005). Others have defined it as unsolicited bulk e-mail. *See id.* (citing David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325, 327 (2001)). The CAN-SPAM Act applies only to "spam" consisting of unsolicited bulk *commercial* e-mail. *See id.* at 964.

2. *See id*. at 965–66. The amount of spam users receive is increasing: since 2005, worldwide spam volumes have doubled, accounting for more than nine out of every ten e-mails sent over the Internet. Brad Stone, *Spam Doubles, Finding New Ways to Deliver Itself*, N.Y. TIMES, Dec. 6, 2006, at A2.

3. Don Evett, Spam Statistics 2006, http://spam-filter-review.toptenreviews.com/spam-statistics.html (last visited Apr. 26, 2007).

the advertiser makes this medium highly profitable.[4] The real costs of UCE are borne by recipients in the form of lost time and by Internet Service Providers ("ISPs") in the form of higher operating expenditures.[5]

To fight spam, ISPs and consumers have mainly relied on self-help measures including manual filtering, software filtering,[6] and private no-spam registry services.[7] Prior to 2003, a diverse set of state laws provided the only regulatory framework for UCE.[8] While these laws took different approaches, they generally sought to eliminate deceptive e-mail practices and reduce the volume of spam.[9]

To address the deleterious effects of UCE, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM") of 2003.[10] CAN-SPAM, like state anti-spam laws, attempts to address deceptive marketing practices and the burdensome volume of spam by imposing header and content requirements on UCE.[11] The Act preempts state anti-spam laws, but it contains a savings clause that allows states to prohibit falsity or deception in UCE and preserves actions arising out of state law that are not specific to e-mail.[12] Noncompliance is punishable by criminal or civil penalties.[13] Besides delegating enforcement responsibility to the Federal Trade Commission ("FTC"), the Act provides a civil cause of

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4. *See* Hamel, *supra* note 1, at 967 (comparing the cost advantages of e-mail advertising to conventional media). Of the consumers it surveyed, the Direct Marketing Association reported that thirty-seven percent had bought something as a result of receiving UCE from marketers. S. REP. NO. 108-102, at 2–3 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 2348, 2349.

5. *See* S. REP. NO. 108-102, at 2–3, 6–7, *as reprinted in* 2003 U.S.C.C.A.N. at 2349, 2352–53; FTC, MATTER NO. P024407, FTC SPAM FORUM — DAY ONE 29, 37–38 (2003) (statements of Mark Ferguson, owner, Ferguson Graphics and Clifton Royston, co-founder, LavaNet), *available at* http://www.ftc.gov/bcp/workshops/spam/transcript_day1.pdf.

6. While such software filters differ in functionality, they all attempt to block spam before it reaches the end user. *See* Sorkin, *supra* note 1, at 345–46. Some filters identify and block likely spam by analyzing the header information, subject line, or content of the message. *See id.* Such software filters may also rely on blacklists of spammers and their computers. *See* Peter B. Maggs, *Abusive Advertising on the Internet (SPAM) Under United States Law*, 54 AM. J. COMP. L. 385, 386–87 (2006).

7. *See* Hamel, *supra* note 1, at 971–75.

8. *See id.* at 975–76.

9. *See* Roger Allan Ford, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 382–84 (2005). By 2003, thirty-six states had passed anti-spam laws. *See* David E. Sorkin, Spam Laws, http://www.spamlaws.com/state/summary.shtml (last visited Apr. 26, 2007) (providing links to all state anti-spam laws).

10. 15 U.S.C.A. §§ 7701–7713 (West Supp. 2006); *Spam (Unsolicited Commercial E-Mail): Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 108th Cong. (2003) (testimony of Orson Swindle, Comm'r, FTC), *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=773&wit_id=2088.

11. *See* 15 U.S.C.A. §§ 7701, 7704; *see also* S. REP. NO. 108-102, at 7–8 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 2348, 2353–54.

12. *See* 15 U.S.C.A. § 7707(b).

13. *See id.* §§ 7703–7706.

action to state attorneys general and ISPs.[14] It does not, however, extend this right to private individuals.[15] To date, both the FTC and ISPs have brought actions under CAN-SPAM.[16]

Future litigation under CAN-SPAM will likely be affected by the Fourth Circuit's recent decision in *Omega World Travel, Inc. v. Mummagraphics, Inc*.[17] In *Mummagraphics*, the Fourth Circuit addressed the scope of CAN-SPAM's preemption clause and the appropriate standard for imposing liability for errors in e-mail header information ("header errors").[18] The court ruled that CAN-SPAM preempted Oklahoma's anti-spam law to the extent that the state law prohibited non-material falsities not sounding in tort.[19] The court also ruled that header errors, when accompanied by e-mail bodies containing accurate contact information, did not violate CAN-SPAM.[20]

Part II of this Note describes the provisions of CAN-SPAM and the portion of Oklahoma's anti-spam statute at issue in *Mummagraphics*. It then summarizes the case, emphasizing the Fourth Circuit's rulings regarding preemption and the liability standard for header errors. Part III critiques the court's analysis by arguing that its interpretation of CAN-SPAM may insulate senders of spam from legal action. Part IV examines the possible implications of *Mummagraphics* for future spam litigation. While acknowledging that CAN-SPAM has weaknesses,[21] this Note suggests that courts can use CAN-SPAM to

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14. *Id.* § 7706. In addition to the FTC, other federal agencies can enforce the Act. *Id.*

15. Many have attributed CAN-SPAM's ineffectiveness in part to the absence of a private right of action. *See* FTC, MATTER NO. PO44405, IN THE MATTER OF: CAN-SPAM REPORT TO CONGRESS 74 (2005) [hereinafter FTC, REPORT TO CONGRESS] (statements of Joe St. Sauver, Doctoral Candidate, University of Oregon and Steve Bellovin, Professor of Computer Science, Columbia University), *available at* http://www.ftc.gov/reports/canspam05/50721AM.pdf; *cf.* FTC, MATTER NO. P024407, FTC SPAM FORUM — DAY THREE 25–26 (2003) (statement of David Kramer, Partner, Wilson Sonsini Goodrich & Rosati), *available at* http://www.ftc.gov/bcp/workshops/spam/transcript_day3.pdf (arguing, prior to enactment of CAN-SPAM, that a private right of action was needed to make CAN-SPAM effective).

16. *See* FTC, EFFECTIVENESS AND ENFORCEMENT OF THE CAN-SPAM ACT: A REPORT TO CONGRESS apps. 5 & 6 (2005) [hereinafter FTC, EFFECTIVENESS AND ENFORCEMENT], *available at* http://www.ftc.gov/reports/canspam05/051220canspamrpt.pdf.

17. Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348 (4th Cir. 2006).

18. *Id.* at 353–59. Header information includes the "source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message." 15 U.S.C.A. § 7702(8). A recipient typically views only a portion of the header, including the "To," "From," "Subject," and "Date" fields. *See* FTC, NATIONAL DO NOT EMAIL REGISTRY 7 (2004), *reprinted in* FTC, SUBJECT LINE LABELING AS A WEAPON AGAINST SPAM app. 2 (2005), *available at* http://www.ftc.gov/reports/canspam05/050616canspamrpt.pdf.

19. *See Mummagraphics*, 469 F.3d at 353–55.

20. *See id.* at 357–59.

21. Some argue that CAN-SPAM's opt-out framework, combined with its preemption of stricter state anti-spam laws, has legitimized, not deterred, senders of UCE. *See, e.g.*, 149 CONG. REC. S15947 (daily ed. Nov. 25, 2003) (statement of Sen. Leahy); FTC, REPORT TO CONGRESS, *supra* note 15, at 83–85 (statements of Joe St. Sauver, Doctoral Candidate,

facilitate self-help measures, without substantially undermining regulatory uniformity, by interpreting the preemption provision more narrowly and by enforcing the Act's content requirements more strictly.

II. BACKGROUND

A. The CAN-SPAM Act

CAN-SPAM applies to any e-mail that has as its primary purpose the "advertisement or promotion of a commercial product or service."[22] The Act reflects Congress's desire to minimize the negative externalities of UCE without unduly inhibiting its use for legitimate marketing purposes.[23] Accordingly, CAN-SPAM does not ban UCE but rather regulates it to prevent fraudulent or otherwise objectionable uses.[24]

The Act prohibits the transmission of UCE that "contains, or is accompanied by, header information that is materially false or materially misleading."[25] Header information is "materially" false or misleading when it impairs the ability of "an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to" the sender of the UCE.[26] CAN-SPAM additionally prohibits deceptive subject headings that "would be likely to mislead a recipient . . . about a material fact regarding the contents or subject matter" of the e-mail.[27]

CAN-SPAM also regulates the content of UCE. It requires the sender to "clear[ly] and conspicuous[ly]" identify UCE as an advertisement and provide a "valid physical postal address of the sender."[28] The e-mail must also contain a "clear and conspicuous" Internet-based method for recipients to opt out of future UCE from the sender.[29]

University of Oregon and Steve Bellovin, Professor of Computer Science, Columbia University); *United States Set to Legalize Spamming on January 1, 2004*, SPAMHAUS NEWS, Nov. 22, 2003, http://www.spamhaus.org/news.lasso?article=150.

22. 15 U.S.C.A. § 7702(2) (West Supp. 2006).

23. *See* S. REP. NO. 108-102, at 2 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 2348, 2349; 149 CONG. REC. S15946 (daily ed. Nov. 25, 2003) (statement of Sen. Leahy).

24. *See* S. REP. NO. 108-102, at 1, *as reprinted in* 2003 U.S.C.C.A.N. at 2348; FTC SPAM FORUM — DAY ONE, *supra* note 5, at 14–15 (statement of Sen. Burns).

25. 15 U.S.C.A. § 7704(a)(1). For CAN-SPAM's definition of "header information," see *supra* note 18.

26. 15 U.S.C.A. § 7704(a)(6). Because only certain entities may bring actions under CAN-SPAM, this prohibition does not by itself cover all recipients. *See supra* text accompanying notes 14–15. However, header information is also considered materially false or misleading when it impairs the ability of *any* recipient to "respond" to UCE. 15 U.S.C.A. § 7704(a)(6).

27. 15 U.S.C.A. § 7704(a)(2).

28. *Id.* § 7704(a)(5).

29. *Id.* § 7704(a)(3).

CAN-SPAM contains a preemption provision, along with a savings clause. The Act

> supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, *except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto*.[30]

The preemption provision reflects findings by Congress that state anti-spam laws "impose[d] different standards and requirements" that made compliance difficult without curtailing the problems associated with UCE.[31] While CAN-SPAM presumptively preempts any state anti-spam law, the savings clause (the portion beginning with "except") contemplates a role for state-based regulation.[32] One important question, which the Fourth Circuit addressed in *Mummagraphics*, is the exact scope of this exception.[33]

B. Oklahoma Anti-Spam Legislation

Enacted in 1999, Oklahoma's anti-spam law regulates e-mail content and prohibits deceptive practices in e-mail.[34] The law prohibits e-mails that omit or misrepresent "information in identifying the point of origin or the transmission path of the electronic mail message" or that contain "false, malicious, or misleading information which purposely or negligently injures a person."[35] Unlike CAN-SPAM, the Oklahoma law creates a private right of action, allowing "[a]ny person whose property or person is injured by reason of a violation of any provision of this act" to "sue for and recover any damages sustained, and also recover the costs of bringing the suit."[36] While these provisions were enacted prior to CAN-SPAM, Oklahoma courts have not yet construed the scope of the prohibitions against header errors and against e-mails containing "false, malicious, or misleading information."[37]

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30. *Id.* § 7707(b)(1) (emphasis added).

31. *Id.* § 7701(a)(11).

32. The preemption clause also excepts state laws "that are not specific to electronic mail, including State trespass, contract, or tort law." *Id.* § 7707(b)(2)(A).

33. *See* Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 353–54 (4th Cir. 2006).

34. H.R. 1410, 47th Leg., 1st Sess. (Okla. 1999).

35. OKLA. STAT. ANN. tit. 15, § 776.1 (West Supp. 2007).

36. *Id.* tit. 15, § 776.2.

37. *See Mummagraphics*, 469 F.3d at 352.

C. Factual Background

Defendant Mummagraphics, Inc. ("Mummagraphics") is an Oklahoma corporation run by Mark Mumma.[38] For business purposes, it owns the domain name webguy.net and uses the e-mail account inbox@webguy.net.[39]

Plaintiff Cruise.com, a wholly-owned subsidiary of plaintiff Omega World Travel, Inc. ("Omega"),[40] operates cruise.com, a website that sells cruise vacations.[41] To advertise its travel offers, the company sent e-mail advertisements, called "E-deals," to prospective customers.[42] These messages provided two ways for a recipient to opt out of future mailings: by clicking on a hyperlink or by sending a request to a postal address.[43] Each message contained a link to Cruise.com's website and the company's toll-free phone number.[44]

Between December 29, 2004 and February 9, 2005, Cruise.com sent eleven E-deals to inbox@webguy.net.[45] Mumma contacted Omega's general counsel, John Lawless, on January 19, 2005 to request that Lawless remove every address containing a domain name listed on OptOutByDomain.com from the E-deals recipient list.[46] Lawless promised to remove those addresses "right now."[47] However, after the site's technical support division determined that removal would require considerable effort, the addresses were not immediately removed.[48]

Mumma received another E-deal on January 20, 2005 at inbox@webguy.net.[49] Mumma sent a letter to Omega stating his intent to sue the company for at least $150,000 in statutory damages unless

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38. *See Mummagraphics*, 469 F.3d at 350–51. Mummagraphics operates several websites dedicated to opposing spam, including SUEaSpammer.com and OptOutByDomain.com. *See id.*; OptOutByDomain.com, http://www.optoutbydomain.com/about.html (last visited Apr. 26, 2007); SUEaSpammer.com, http://www.sueaspammer.com/about.html (last visited Apr. 26, 2007).

39. *See Mummagraphics*, 469 F.3d at 351. Mummagraphics does business under the name Webguy Communications. Webguy Communications hosts and operates web pages, registers domain names, designs web pages, and sets up computer servers. *See id.* at 350–51; @WebGuy.com, http://www.webguy.com (last visited Apr. 26, 2007).

40. *See Mummagraphics*, 469 F.3d at 350.

41. *See id.* at 351; Cruise.com, http://www.cruise.com/misc_pages/about_us.html (last visited Apr. 26, 2007) (claiming to be the largest website specializing in cruise vacations).

42. *Mummagraphics*, 469 F.3d at 351; *see* Cruise.com, http://www.cruise.com (last visited Apr. 26, 2007) (containing a link allowing users to subscribe to weekly E-deals).

43. *Mummagraphics*, 469 F.3d at 351.

44. *Id.*

45. *Id.*

46. *Id.* Mumma admitted that he had seen the opt-out provisions in the E-deals but had not used them because he believed such mechanisms would simply lead to more unwanted e-mails. Mumma also refused to tell Lawless the e-mail address at which he was receiving the E-deals. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

the matter was settled for $6,250.[50] Based on the e-mails attached to the letter, Lawless determined that the e-mail address at issue was inbox@webguy.net, and he subsequently removed the address from Cruise.com's mailing list.[51] After Omega failed to pay Mumma the requested sum, one of Mumma's anti-spam websites accused Cruise.com, Omega, Omega's president, and Omega's chief operating officer of being "spammers" who had violated state and federal law.[52]

D. Procedural History

All four Omega parties filed suit against Mumma and Mummagraphics, claiming defamation, copyright and trademark infringement, and unauthorized use of likeness.[53] Mummagraphics sought summary judgment on all claims.[54] The district court granted the motion on all claims except defamation.[55] Mummagraphics counterclaimed under CAN-SPAM and Oklahoma law, alleging that the e-mails contained actionable inaccuracies and that the plaintiffs had violated federal and state law by sending E-deals to Mummagraphics after it had opted out through statutory procedures.[56]

After both parties sought summary judgment on Mummagraphics's counterclaims, the district court ruled in favor of Omega.[57] The court found that claims arising under Oklahoma's anti-spam law relating to e-mail inaccuracies were preempted by CAN-SPAM.[58] The court found the claims under CAN-SPAM unsustainable because the inaccuracies were not material and the plaintiffs had not violated the opt-out provisions.[59] Mummagraphics appealed.[60] On appeal, the Fourth Circuit affirmed both rulings.[61]

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50. *Id.* The letter stated that he had received six unsolicited E-deals, but it did not specify the e-mail address at which the messages were received. *Id.*

51. *Id.* at 352.

52. *Id. See generally* Omega World Travel Ownership, http://www.owt.net/tabs/aboutus/executive_leadership.html (last visited Apr. 26, 2007) (describing Omega's leaders). Mumma's website contained photos of Omega's president and chief operating officer obtained from Omega's website and described them as "cruise.com spammers." *Mummagraphics*, 469 F.3d at 352.

53. *Mummagraphics*, 469 F.3d. at 352.

54. *Id.*

55. *Id.*

56. *Id.* The alleged errors consisted of an unaffiliated domain name and a deactivated "from" address in the header, and text in the e-mail body indicating that the recipient had signed up for the E-deals. *Id.* at 351.

57. *Id.* at 352.

58. *Id.* at 352–53.

59. *Id.* at 352.

60. *Id.*

61. *Id*. at 350.

E. Federal Preemption of Oklahoma's Anti-Spam Law

To resolve whether CAN-SPAM preempted claims arising under Oklahoma's anti-spam law, the Fourth Circuit had to determine the scope of CAN-SPAM's savings clause.[62] The court relied on two presumptions to assess whether, as Mummagraphics claimed, immaterial errors fell within the scope of the savings clause.[63] First, the court assumed that because a preemption clause overrides state sovereignty, state law should not be displaced unless such a result is the "clear and manifest purpose of Congress."[64] Second, the court indicated that because Congress's purpose was the "ultimate touchstone" for such an analysis,[65] the preemption clause should be construed to effectuate the purpose of Congress as expressed by the language of the clause and the surrounding statutory framework.[66]

Turning to the language of CAN-SPAM, the Fourth Circuit found that while the savings clause permitted states to "prohibit[] falsity or deception in any portion" of UCE,[67] the Act defined neither "falsity" nor "deception."[68] Importing deception's settled meaning under common law as a tort based on misrepresentation, the court determined that "'deception' require[d] more than bare error."[69] Examined alone, the definition of "falsity" had no similarly established common-law heritage; the court found that either it could mean the "quality of not conforming to the truth or facts" or it could alternatively "convey an element of tortiousness or wrongfulness."[70]

To choose between the former, broader construction, which would have allowed Mummagraphics's action for immaterial errors to survive preemption, and the latter, narrower construction, which would not, the Fourth Circuit then read "falsity" in light of the savings clause as a whole.[71] Applying the maxim of *noscitur a sociis*,[72] the court concluded that the proximity of "falsity" to "deception" sug-

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62. The Oklahoma anti-spam law, which applied to and regulated e-mail use, fell within the scope of CAN-SPAM's preemption clause. This determination, however, did not end the inquiry because CAN-SPAM's savings clause provided a possible exception. *See* 15 U.S.C.A. § 7707(b)(1) (West Supp. 2006); OKLA. STAT. ANN. tit. 15, § 776.1 (West Supp. 2007).

63. *Mummagraphics*, 469 F.3d at 352.

64. *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

65. *Id.*

66. *Id.* at 352–53.

67. 15 U.S.C.A. § 7707(b)(1).

68. *Mummagraphics*, 469 F.3d at 353–54.

69. *Id.* at 354.

70. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 820 (1971)); *see also infra* note 100 and accompanying text.

71. *Mummagraphics*, 469 F.3d at 352–55.

72. This canon of construction, literally translated as "it is known by its associates," holds that "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." BLACK'S LAW DICTIONARY 1087 (8th ed. 1999).

gested that Congress drafted the savings clause in the "vein of tort," and intended "falsity" to refer to torts involving misrepresentations, rather than to mere errors.[73] The court found this definition consistent with the use of "false" in other CAN-SPAM provisions.[74]

In attempting to construe the statute to effectuate the will of Congress, the Fourth Circuit concluded that a broad construction of "falsity" would undermine the creation of a uniform national standard for UCE.[75] Interpreting falsity to mean "mere error," according to the court, would create "a loophole so broad that it would virtually swallow the preemption clause itself."[76] Such a result, the court found, would be structurally inconsistent with CAN-SPAM because it would allow states to impose a strict liability standard for e-mail errors through the savings clause, even when Congress had chosen to employ a less demanding standard in CAN-SPAM.[77] The narrow construction avoided making one state's law the "de facto national standard"[78] and had the additional advantage of avoiding constitutional questions regarding the compatibility of Oklahoma law with the dormant commerce clause and the First Amendment.[79]

F. Alleged Violations of the CAN-SPAM Act

CAN-SPAM provides a civil cause of action for header inaccuracies only when the inaccuracies satisfy the materiality requirement of § 7704(a)(6).[80] To determine whether the E-deal inaccuracies violated this requirement, the Fourth Circuit evaluated the header errors in light of the e-mail bodies.[81] Part of this inquiry considered whether

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73. *Mummagraphics*, 469 F.3d at 354.

74. The heading "[p]rohibition of false or misleading transmission information" precedes a section that prohibits header information that is "materially false or materially misleading." *Id.* (citing 15 U.S.C.A. § 7704(a)(1) (West Supp. 2006)) (emphasis removed). The Fourth Circuit found the proximity of "falsity" to "materially" consistent with a tort-based definition for "falsity." *See id.*

75. *Id.* at 354–56.

76. *Id.* at 355.

77. *Id.* Under CAN-SPAM, it is a crime to "materially falsif[y] header information in multiple commercial electronic mail messages." 18 U.S.C.A. § 1037(a)(3) (West Supp. 2006). CAN-SPAM also provides a civil cause of action for "materially false or materially misleading" header information. 15 U.S.C.A. § 7704(a)(1); *see id.* at § 7706.

78. *Mummagraphics*, 469 F.3d at 354–56.

79. *Id.* at 356. The Fourth Circuit observed that this inquiry would have required balancing Oklahoma's interest in addressing the costs of deceptive e-mail practices against the compliance costs for out-of-state businesses and potential burden on innocent speech. *Id.* (citing PSINet, Inc. v. Chapman, 362 F.3d 227, 239–41 (4th Cir. 2004) and N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–73 (1964)); *see generally* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 818−21 (2001) (discussing the application of the dormant commerce clause to anti-spam legislation).

80. 15 U.S.C.A. §§ 7704(a)(1), 7706.

81. *Mummagraphics*, 496 F.3d at 357–58.

the e-mail bodies contained methods to identify, locate, and respond to the sender.[82]

The court found that the bodies of the E-deals were "chock full of methods" to identify, locate, and respond to Cruise.com.[83] Moreover, "several places in each header" referred to the Cruise.com domain name, and one line even listed Cruise.com as the sending organization.[84] Viewing the alleged inaccuracies in the context of the accurate identifiers in the bodies of the E-deals and at least portions of the headers, the court found that the alleged errors did not impair Mummagraphics's ability to identify the sender.[85] To classify such inaccuracies as "materially false or materially misleading," the court reasoned, when the e-mail as a whole contained "so many valid identifiers," would render the materiality requirement "all but meaningless."[86]

The court also found the claim regarding alleged violations of CAN-SPAM's removal provisions unsustainable because Mummagraphics had offered no evidence establishing a "pattern or practice" of such violations.[87]

G. Alleged Violations of State Law

Although the Fourth Circuit found that CAN-SPAM did not preempt claims arising under common-law tort, it affirmed the district court's order with respect to the tort claims because Mummagraphics had "not offered evidence that Cruise.com's e-mails caused the company more than nominal damages."[88] The court held that even if a tort based upon intangible invasions of computer resources were cognizable,[89] trespass to chattels claims should not be recognized if the action

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82. *Id.* The Fourth Circuit "assume[d] without deciding that Mummagraphics qualifie[d] as an Internet Access Service Provider entitled to bring a claim under the CAN-SPAM Act." *Id.* at 357 n.3; *see also supra* text accompanying notes 14–15 (explaining who can bring actions under CAN-SPAM); *supra* note 26 (explaining varying statutory materiality requirements for different types of recipients).

83. The identification methods in the e-mail body included: a clickable link allowing the recipient to remove himself from future mailings, a separate link to Cruise.com's website, a toll-free number to call, a Florida mailing address, and a local phone number for the company. *Mummagraphics*, 496 F.3d at 357–58.

84. The Fourth Circuit recognized that commercial e-mails, like other sales pitches, must enable the recipient to contact the sender. *Id.* at 358.

85. *Id.*

86. *Id.*

87. *Id.* CAN-SPAM only makes violations of the removal provisions actionable when such violations constitute a "pattern or practice." *See* 15 U.S.C.A. §§ 7704(a)(3)(A), 7706(g)(1) (West Supp. 2006).

88. *Mummagraphics*, 469 F.3d at 358.

89. Oklahoma courts have not yet addressed the application of the tort of trespass to chattels to intangible invasions of computer resources. The Oklahoma Supreme Court's interpretation of the tort, however, suggests the need for physical contact with the chattel. *Id.* at 359 (quoting Woodis v. Okla. Gas & Elec. Co., 704 P.2d 483, 485 (Okla. 1985)).

involved "nominal damages for harmless intermeddlings with the chattel."[90] The court found that Mummagraphics had not demonstrated that the E-deals placed a "meaningful burden on the company's computer systems or even its other resources."[91]

III. ANALYSIS

This Part critiques the Fourth Circuit's rulings on preemption and the appropriate standard for evaluating header errors. With respect to preemption, this Note argues that a broader reading of the savings clause could have preserved essential state experimentation — a likely source of new methods for fighting spam — without conflicting with the purpose of CAN-SPAM.[92] With respect to liability for header errors, this Note suggests that the text of CAN-SPAM supports a stronger rule that would facilitate self-help measures.

A. Federal Preemption of State Law Under CAN-SPAM

In *Mummagraphics*, the Fourth Circuit's adoption of a narrow construction of "falsity" was motivated at least in part by its assumption that even "immaterial" errors, such as those in Cruise.com's E-deals, may be actionable under Oklahoma's anti-spam law because the statute contains no materiality requirement.[93] To support its narrow construction of "falsity" in the savings clause, the Fourth Circuit relied heavily on a contextual analysis that in effect equated "falsity" with "deception."[94] Putting aside policy considerations momentarily, this result is surprising. Congress used two words to define the scope of the preemption clause — "falsity" and "deception."[95] While a word's placement and purpose in the statutory scheme should be considered,[96] constructions that "treat [as surplusage] statutory terms in any setting" are generally disfavored.[97] In this case, interpreting "falsity" to refer to torts involving misrepresentations results in disfa-

90. *Id.* (quoting Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003)).

91. *Id.*

92. *See* Ford, *supra* note 9, at 379 (discussing how courts' interpretation of the preemption clause will help determine CAN-SPAM's effectiveness).

93. *Mummagraphics*, 469 F.3d at 353; *see* OKLA. STAT. ANN. tit. 15, § 776.1 (West Supp. 2007).

94. *See Mummagraphics*, 469 F.3d at 354.

95. 15 U.S.C.A. § 7707(b)(1) (West Supp. 2006).

96. *See* Brown v. Gardner, 513 U.S. 115, 118 (1994).

97. Bailey v. United States, 516 U.S. 137, 145 (1995) (quoting Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994)) (alteration in original). In other contexts, the Supreme Court has "assume[d] that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Id.* at 146; *see also* Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1879) (applying a canon of construction that presumes that Congress "use[s] no superfluous words").

vored, unnecessary redundancy, as the term "deception" already refers to tortious misrepresentations.[98] This definition of "falsity" also creates unnecessary overlap with the subsequent preemption exception, which exempts "State laws that are not specific to electronic mail, including State . . . tort law."[99]

Moreover, unlike "deception," the terms "false" and "falsity" have no settled meaning at common law and do not necessarily carry a materiality requirement.[100] Any shared common-law antecedent for "falsity" and "deception" does not provide a satisfactory basis for imposing deception's common-law meaning onto "falsity."[101] The "canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with an established meaning at common law."[102] When a statute, like CAN-SPAM, describes an offense analogous to one at common law, but refrains from using the common-law term, the interpretation of the statutory term should not look to the analogous common-law term.[103]

Although the Fourth Circuit believed that the meaning of "falsity" in the savings clause of CAN-SPAM was ambiguous,[104] using the ordinary meaning of falsity makes it possible to end the textual inquiry with the language of the savings clause.[105] A broader definition of falsity is consistent with the meaning of "falsity" as used by the FTC, experts, and other courts that have interpreted CAN-SPAM's savings clause. When discussing "false claims in spam," the FTC has repeatedly used the term "falsity" in the "mere error" sense[106] without

98. *Mummagraphics*, 469 F.3d at 354.

99. 15 U.S.C.A. § 7707(b)(2).

100. *See* United States v. Wells, 519 U.S. 482, 490–93 (1997) (discussing the meaning of "false statement" and "false testimony" at common law).

101. The rules for imputing common-law meaning to statutory terms do not "sweep so broadly" as to impose the meaning of one common-law term onto other potentially related terms. *Id.* at 492 n.10.

102. Carter v. United States, 530 U.S. 255, 264 (2000).

103. *See id.* at 264–66; *Wells*, 519 U.S. at 492; United States v. Turley, 352 U.S. 407, 411–12 (1957) (declining to look to the common-law crime of larceny when the statute used the term "stolen").

104. Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 354 (4th Cir. 2006).

105. *See* Smith v. United States, 508 U.S. 223, 228–29 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); *see also* Mallard v. U.S. Dist. Court, 490 U.S. 296, 301 (1989) (concluding that Congress intended the word "request" to bear its most common meaning when used in a statute); United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989) (noting that when the statute's language is plain, the sole function of courts is to enforce it according to its terms).

106. *See, e.g.*, *Spam (Unsolicited Commercial E-Mail) Before the S. Comm. on Commerce, Sci. & Transp.*, 108th Cong. (2003) (testimony of Mozelle W. Thompson, Comm'r, FTC), *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=773&wit_id=2089 (using the term "false" in the mere error sense to describe the results of the "False Claims in Spam Study"); FTC, FALSE CLAIMS IN SPAM 1 (2003) [hereinafter FTC, FALSE CLAIMS], *available at* http://www.ftc.gov/reports/spam/030429spamreport.pdf; FTC, EFFECTIVENESS AND ENFORCEMENT, *supra* note 16, app. 1, at A8–A10 (discussing impact of falsified errors); FTC SPAM FORUM — DAY ONE, *supra* note 5, at 9–10 (statement of Timo-

referencing the well-established elements of fraud.[107] Experts use the term "falsity" to mean "untruth" when describing header information.[108] Courts have read the term the same way. For example, in *Gordon v. Impulse Marketing Group, Inc.*,[109] the district court adopted the broader definition of "falsity," ruling that Washington's anti-spam statute was not preempted because its prohibition on "false or misleading information in the subject line" fell within CAN-SPAM's savings clause.[110] The consistent use of "falsity" to mean "untruth" suggests that the two definitions for "falsity" did not truly indicate ambiguity in the preemption clause.

Even assuming, as the Fourth Circuit did, that the meaning of "falsity" in the savings clause is ambiguous, the text and section headings of CAN-SPAM provide little support for the Fourth Circuit's interpretation of "falsity." The Fourth Circuit's survey of CAN-SPAM mentions only the section heading of § 7704(a)(1), in which the term "materially" modifies "false";[111] however, the concurrent use of "false" and "materially" in other sections of CAN-SPAM is arguably more germane. Within the same savings clause, Congress explicitly provided that CAN-SPAM should not be "construed to affect in any way the Commission's authority to bring enforcement actions under [the] FTC Act for *materially false* or deceptive representations or unfair practices" in UCE.[112] Applying the Fourth Circuit's interpreta-

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thy J. Muris, Chairman, FTC) (using the term "false" in the mere error sense when discussing the proportion of claims in e-mails and header information "likely to be false").

107. The FTC has specifically distinguished its analysis of falsities in spam from common-law fraud: the "presence of signs of falsity in a message . . . does not mean that the message satisfies the legal standard of deception." FTC, FALSE CLAIMS, *supra* note 106, at 1. The elements of fraud are: "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance on the misrepresentation." Gordon v. Impulse Mktg. Group, Inc., 375 F. Supp. 2d 1040, 1048 (E.D. Wash. 2005) (citing Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976)).

108. *See, e.g.*, FTC SPAM FORUM — DAY ONE, *supra* note 5, at 174, 179, 183–86, 192–93 (statements of Stephen Cohen, Staff Attorney, Division of Marketing Practices at the FTC; Bryan Bell, Senior Abuse Investigator, MCI; Samuel Simon, Chairman, Telecommunications Research & Action Center; and Margot Koschier, Manager, Anti-Spam Analysis and Prevention Team at AOL); FTC SPAM FORUM — DAY THREE, *supra* note 8, at 20, 29 (statement of Chuck Curran, Assistant General Counsel, AOL).

109. 375 F. Supp. 2d 1040.

110. *Id.* at 1045–46; *see* WASH. REV. CODE ANN. § 19.190.020 (West Supp. 2007). In *Asis Internet Services v. Optin Global, Inc.*, the district court determined that the anti-spam laws of Washington and California, like CAN-SPAM, were not limited to common-law fraud. Asis Internet Servs. v. Optin Global, Inc., No. C 05-5124 CW, 2006 WL 1820902, at *3 (N.D. Cal. June 30, 2006). Washington was among the first states to enact anti-spam legislation, and Washington's statute is one of the few state anti-spam laws that has been subject to appellate review. *See* Washington v. Heckel, 24 P.3d 404 (Wash. 2001). The wording of the Washington statute is nearly identical to that of the Oklahoma statute. *Compare* OKLA. STAT. ANN. tit. 15, §§ 776.1, 776.6 (West Supp. 2007), *with* WASH. REV. CODE ANN. § 19.190.020.

111. 15 U.S.C.A. § 7704(a)(1) (West Supp. 2006); *see* Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 354 (4th Cir. 2006).

112. 15 U.S.C.A. § 7707(a)(2) (emphasis added).

tional approach that "identical words used in different parts of the same act are intended to have the same meaning"[113] suggests that Congress understood the distinction between a "material" and "non-material" falsity,[114] yet purposefully chose *not* to limit the exception for state anti-spam laws to "materially false or materially misleading" e-mail.

Although CAN-SPAM's text supports the broader reading of "falsity," Congress's purpose is the "ultimate touchstone" for any pre-emption analysis.[115] For this reason, the Fourth Circuit's analysis might still be preferable if the alternate construction would be incompatible with CAN-SPAM's structure. The congressional findings in CAN-SPAM[116] and the Act's legislative history suggest two major policy rationales: the need to "stem the tide of junk mail that is flooding our Nation's inboxes,"[117] and the realization that state regulation had not accomplished that objective.[118] When discussing spam, many experts advocated for strong federal legislation that would obviate the need for state regulation.[119] Assuming that federal regulation would be sufficiently strong, these experts generally supported preemption, envisioning it as a "regulatory ceiling and not a floor."[120]

The legislative history and text of CAN-SPAM do not unambiguously establish whether the Act was intended to be a regulatory ceiling or floor. Indeed, the preemption provision appears to cut in both directions: the first half addresses the goal of national uniformity, but the second half suggests that states might still exercise some concurrent regulatory authority.[121] This structure suggests that Congress was not trying to occupy the entire field of spam regulation, but instead intended to divide responsibility between the federal and state gov-

113. *Mummagraphics*, 469 F.3d at 354 (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995)).

114. *See* Carter v. United States, 530 U.S. 255, 262 (2000) (using a "textual comparison" to give meaning to the extra clauses in the statute to avoid disregarding them as "mere surplusage").

115. *Mummagraphics*, 469 F.3d at 352 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

116. 15 U.S.C.A. § 7701(a).

117. 149 CONG. REC. S15943 (daily ed. Nov. 25, 2003) (statement of Sen. Burns).

118. *See id.* at S15946 (statement of Sen. Leahy). The passage of CAN-SPAM also appeared to be motivated in part by California's pending anti-spam legislation, which would have imposed an opt-in scheme. *See* Ford, *supra* note 9, at 375 ("Congress wanted to avoid both incompatible state limitations and an outright ban, both of which would prevent any commercial email from being legally sent."). Conflicting opt-in and opt-out state laws would have imperiled the desirable qualities of UCE. *See* S. REP. NO. 108-102, at 21–22 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2365–66; *see generally* Hamel, *supra* note 1, at 994–95 (discussing differences between opt-in and opt-out).

119. FTC SPAM FORUM — DAY THREE, *supra* note 8, at 23–27.

120. *Id.* at 23.

121. 15 U.S.C.A. § 7707(b)(1); *see supra* text accompanying notes 30–32.

ernments.[122] The Committee Report on CAN-SPAM further suggests that what distinguishes state anti-spam laws that should be preempted[123] from those that should not[124] is that the latter "target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway."[125] Together, the language of the savings clause and the Committee report suggest the preemption analysis requires a case-specific, functional inquiry.

In ruling that CAN-SPAM preempted the stricter Oklahoma law, the Fourth Circuit prioritized the creation of a national liability standard for UCE.[126] However, furthering uniformity in this general fashion may undermine the arguably more important goal of "address[ing] [the] difficult and urgent problem" of reducing spam.[127] The difficulty of treating CAN-SPAM as a regulatory ceiling is that without room for state regulation, CAN-SPAM is probably not strong enough to deter even legitimate businesses from engaging in prohibited practices.[128] To account for CAN-SPAM's weaknesses, the Fourth Circuit should have construed CAN-SPAM as a regulatory floor. Far from abrogating CAN-SPAM's purpose, giving maximum effect to the savings clause is the best way to achieve the statutory goal of effective regulation.

As the Committee Report suggests, CAN-SPAM promotes national uniformity, not for the sake of uniformity, but to protect businesses from running afoul of state laws that regulate *legitimate* business uses of UCE.[129] This concern about protecting legitimate businesses, however, is not implicated by state anti-spam laws like Oklahoma's, which target behavior that a "legitimate business trying to comply with the relevant law would not be engaging in anyway."[130] Compliance with such state laws is costless; if anything, laws prohibiting falsity and deception in e-mail increase efficiency by deterring businesses from incurring costs associated with deceptive practices.[131] Even the broadest reading of CAN-SPAM's preemption clause cannot

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122. *See* Ford, *supra* note 9, at 377–78. This shared responsibility is also reflected in CAN-SPAM's enforcement provisions. *See* 15 U.S.C.A. § 7706.

123. These include those laws requiring e-mail to "carry specific types of labels, or to follow a certain format or contain specified content," S. REP. NO. 108-102, at 21 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2365.

124. These include state anti-spam laws targeting "fraud or deception in e-mail." *Id.*

125. *Id.* at 22, *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2365.

126. Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 355 (4th Cir. 2006) (citing 15 U.S.C.A. § 7701(a)(11)).

127. 149 CONG. REC. S15947 (daily ed. Nov. 25, 2003) (statement of Sen. Leahy).

128. *See id.* (noting that the Act "may not be tough enough to do the job").

129. *See* S. REP. NO. 108-102, at 21–22 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2365–66; Ford, *supra* note 9, at 372–74.

130. S. REP. NO. 108-102, at 22, *as reprinted in* 2004 U.S.C.C.A.N. at 2365; *see* Ford, *supra* note 9, at 374 (arguing that courts should adopt a broad reading of the savings clause because legitimate business uses do not require deception).

131. *See* Goldsmith & Sykes, *supra* note 79, at 819.

fully address concerns about disparate standards for online advertising because businesses will still be subject to different regulations across the international community.[132] Since the international character of e-mail inevitably makes uniformity among spam regulations a question of degree, undue emphasis on promoting uniformity is misplaced.[133]

B. Evaluating Violations of CAN-SPAM

To evaluate whether header errors were "materially false or materially misleading," the Fourth Circuit did not limit its analysis to whether the header errors impaired Mummagraphics's ability "to identify, locate, or respond" to the sender, but conducted a holistic analysis that considered the errors in light of the e-mail as a whole.[134] The Fourth Circuit's formulation provides little incentive for advertisers to use accurate header information because it potentially allows a sender to escape liability so long as the e-mail body contains accurate identifying information.[135] The court's holistic approach makes it difficult to imagine how *any* commercial e-mail message will ever violate CAN-SPAM. The Act covers "commercial electronic mail message[s]" for which the "primary purpose" is the "advertisement or promotion of a commercial product or service."[136] By definition, the sender of UCE intends to be contacted by the recipient in order to sell commercial products or services.[137] Thus, under the court's holistic analysis, the header accuracy requirement becomes irrelevant, as the body of UCE inevitably will contain some method by which to contact the sender.[138]

Far from clearly dictating the Fourth Circuit's formulation, the text of § 7704(a)(1) suggests that this provision does not contemplate an analysis that includes the e-mail body.[139] Neither the language of § 7704(a)(1) nor the definition of "header information"[140] explicitly includes the e-mail body. When Congress intended the inquiry to extend to the e-mail body, it used the term "message" or "contents [of

132. FTC, REPORT TO CONGRESS, *supra* note 15, at 84–85.

133. *See* 15 U.S.C.A. § 7701(a)(12) (West Supp. 2006); FTC, REPORT TO CONGRESS, *supra* note 15, at 73–75, 83–85 (discussing how the Act's effectiveness is closely tied to the probability of enforcement); Ford, *supra* note 9, at 378.

134. Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 357–58 (4th Cir. 2006) (citing 15 U.S.C.A. § 7704(a)(6)).

135. Indeed, the Fourth Circuit found that bodies of the E-deals were "chock full of [such] methods" to identify, locate, and respond to Cruise.com. *Id.* at 358.

136. 15 U.S.C.A. § 7702(2)(A).

137. *See supra* note 84.

138. *See Mummagraphics*, 469 F.3d at 358 ("These references come as little surprise, because the 'E-deal' messages were sales pitches intended to induce recipients to contact Cruise.com to book the cruises that the message advertised.").

139. 15 U.S.C.A. § 7704(a)(1), (a)(6).

140. *Id.* § 7702(8); *see supra* note 18.

the message]" as opposed to "header information" or "subject heading."[141] The differences in language between the provisions that do include the body of the e-mail in the analysis and those that do not suggest that if Congress had intended to broaden the inquiry of § 7704(a)(1) beyond header information, it "could and would have specified"[142] its intent by choosing a different term or by explicitly stating, as it did in § 7704(a)(5), that the analysis should include the contents of the e-mail body.

Moreover, a stricter construction of § 7704(a)(1) would be consistent with how state courts have analyzed violations of state anti-spam laws that prohibit false or misleading information in the subject line. These courts have refused to examine the bodies of e-mails, finding that the prohibition on header errors "d[id] not regulate the body of the e-mail, [but] only the subject line."[143]

An analysis of the purposes of CAN-SPAM's consumer protection provisions provides further support for excluding the email body from the header analysis. CAN-SPAM assists the recipients of potential spam in two different ways: by enabling them to identify spam that has already been received and by helping them to avoid future spam. Truthful headers facilitate the ability to identify spam quickly and accurately, allowing consumers to discard e-mails without opening them if desired. Truthful headers also reduce the annoyance associated with spam and prevent recipients from being harmed or offended by an e-mail's contents.[144] In the future, truthful headers will be even more valuable to consumers as spammers increasingly embed harmful code in the e-mail body that the recipient activates by opening the message.[145] Truthful headers also improve the efficacy of automatic filters, helping consumers to avoid receiving spam in the first place. As even legitimate marketers may wish for their e-mails to bypass such filters, a strong legal incentive is necessary to encourage compliance.[146]

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141. *Compare* 15 U.S.C.A § 7704(a)(2), (a)(6), *with id.* § 7704(a)(3), (a)(5).

142. Bailey v. United States, 516 U.S. 137, 146 (1995) (noting that Congress could have substituted a different term had it wished a statute to have a broader or narrower reach).

143. Washington v. Heckel, 93 P.3d 189, 194 (Wash. App. 2004); *cf.* Asis Internet Serv. v. Optin Global, Inc., No. C 05-5124 CW, 2006 WL 1820902, at *3 (N.D. Cal. June 30, 2006) (noting that the Washington statute, like CAN-SPAM, "prohibits the use of commercial email that misrepresents information in identifying the message's origin or that contains false or misleading information in the subject line").

144. *See* FTC, EFFECTIVENESS AND ENFORCEMENT, *supra* note 16, app. 1, at A8–A9; Goldsmith & Sykes, *supra* note 79, at 819.

145. *See* S. REP. NO. 108-102, at 6 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2352–53; FTC, EFFECTIVENESS AND ENFORCEMENT, *supra* note 16, at 17–18; FTC SPAM FORUM — DAY ONE, *supra* note 5, at 193.

146. *See* FTC, EFFECTIVENESS AND ENFORCEMENT, *supra* note 16, app. 1 at A8–A10 (stating that falsified headers "can impede ISPs' efforts to filter out [UCE]"); *see also* FTC SPAM FORUM — DAY THREE, *supra* note 8, at 82.

While accurate header information enables consumers to manage e-mail that they have already received, it does not allow consumers to block spam from previously unknown senders. CAN-SPAM addresses this second need through content requirements, which require senders of UCE to identify themselves and provide a simple method for consumers to opt out of future e-mails.[147] Since CAN-SPAM only specifies that the e-mail must contain opt-out and contact information but does not indicate where it must be located, evaluating whether a sender has complied with CAN-SPAM's content requirements necessitates a holistic analysis of the e-mail.[148]

While CAN-SPAM's content requirements appropriately focus on the consumer's ability to avoid future spam, the correct question with respect to header errors is whether the spammer is more effective at luring the consumer into reading the message by using a deceptive heading.[149] This distinction reflects the different functions of header and content requirements and suggests that different tests should be used to determine whether an e-mail violates each respective provision. Evaluating header errors without considering the e-mail body is unlikely to impose a substantial burden on the sender.[150] In exchange for what is at most a minimal cost to the sender,[151] this interpretation has the potential to greatly facilitate recipients' ability to identify spam.

IV. CONCLUSION

No other appellate courts have construed CAN-SPAM's preemption clause or the provision concerning header errors.[152] To the extent

147. *See* 15 U.S.C.A. § 7704(a)(3), (a)(5) (West Supp. 2006). Although the Fourth Circuit did not specifically consider whether the E-deals complied with the content requirements of § 7704(a)(3), the E-deals probably did satisfy those requirements, given the inclusion of a link to Cruise.com's website, another link allowing the recipient to opt out of the E-deals, and the company's physical mailing address. *See* Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 357–58 (4th Cir. 2006).

148. *See* 15 U.S.C.A. § 7704(a)(3), (a)(5). Notably, these opt-out and contact provisions, after which the Fourth Circuit modeled its holistic inquiry for header information, are not described in § 7704(a)(1), but rather are contained in § 7704(a)(3) and (a)(5). *See id*. § 7704(a)(1), (a)(3), (a)(5).

149. FTC, REPORT TO CONGRESS, *supra* note 15, at 68.

150. *See* FTC, EFFECTIVENESS AND ENFORCEMENT, *supra* note 16, app. 1 at A8–A9; Goldsmith & Sykes, *supra* note 79, at 819.

151. It could be argued that senders will now invest more resources in avoiding typos and other minor inaccuracies. These costs, however, are not compelled by a stricter reading of CAN-SPAM, as any inaccuracies must still satisfy the "false or materially misleading" standard in order to be deemed violations of the Act. This standard is specifically designed not to penalize that type of error. *See* 15 U.S.C.A. § 7704(a)(1), (a)(6).

152. The only other appellate decision to consider the scope of CAN-SPAM, *White Buffalo Ventures, L.L.C. v. University of Texas at Austin*, did not address state law preemption because the Fifth Circuit found that the public university anti-spam measures fell within the

that other circuits adopt the holding of *Mummagraphics*, the Fourth Circuit's interpretation of CAN-SPAM may frustrate consumers' self-help measures and further insulate spammers from prosecution.[153]

This result, however, is not inevitable. Despite its opt-out structure and the failure to provide a private cause of action,[154] CAN-SPAM need not be ineffective. Rather, the Act can continue to serve as a valuable codification of industry best practices that helps to distinguish online marketing by legitimate businesses from fraudulent and deceptive spam.[155]

In particular, while CAN-SPAM preempts some stronger state anti-spam laws,[156] the savings clause leaves open the possibility of parallel state enforcement measures. As Congress recognized when enacting CAN-SPAM, rapid technological and marketplace developments can quickly make any legislation obsolete.[157] While regulation of the Internet will always present the danger of harming technological development,[158] preserving some space for state experimentation would assist federal efforts to develop future anti-spam legislation without unduly burdening interstate commerce.[159] CAN-SPAM's acknowledged weaknesses provide a strong impetus for a narrower construction of the Act's preemption clause than that employed by the Fourth Circuit; such a construction would leave room for different tools not contemplated by CAN-SPAM and partially mitigate federal under-regulation of the online market.[160]

Courts should similarly embrace CAN-SPAM's emphasis on accurate header information and determine liability under § 7704(a)(1) based solely on the content of the header. While this detail-oriented provision could be viewed as overregulation,[161] it is probably better characterized as a measure to assist consumer self-help by promoting

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Act's ISP exception under § 7707(c). White Buffalo Ventures, L.L.C. v. Univ. of Texas at Austin, 420 F.3d 366, 370–72 (5th Cir. 2005).

153. CAN-SPAM acknowledges that federal legislation alone cannot solve the "problems associated with the rapid growth and abuse of unsolicited commercial electronic mail," and explicitly contemplates that developing and adopting technological approaches may be "necessary as well." 15 U.S.C.A. § 7701(a)(12) (West Supp. 2006).

154. These features of CAN-SPAM have been criticized. *See supra* notes 15 and 21.

155. *See, e.g.*, FTC, EFFECTIVENESS AND ENFORCEMENT, *supra* note 16, at i–ii, app. 1 at A8–A24 (assessing effectiveness of different provisions of CAN-SPAM).

156. *See* 15 U.S.C.A. § 7707(b); Hamel, *supra* note 1, at 990–93.

157. *See* 15 U.S.C.A. § 7701(a)(12); 149 CONG. REC. S15944 (daily ed. Nov. 25, 2003) (statement of Sen. Wyden); FTC, EFFECTIVENESS AND ENFORCEMENT, *supra* note 16, at 15–18 (discussing new developments in spamming techniques).

158. *See* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 168–69 (S.D.N.Y. 1997); Goldsmith & Sykes, *supra* note 79, at 786.

159. *See* Goldsmith & Sykes, *supra* note 79, at 821 (discussing the role of state experimentation in federal lawmaking).

160. *See id.* at 820–21 (discussing how invalidation of state Internet regulations could lead to under-regulation).

161. *Cf. id.* at 819 (discussing how the requirements of certain state anti-spam laws may raise concerns about micromanagement).

header accuracy — a goal that can be accomplished only if § 7704(a)(1) is strictly enforced.

For CAN-SPAM to succeed in assisting consumers in these respects, however, courts must broadly construe the exception to the preemption clause and strictly apply the prohibition on header inaccuracies.