

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

E360INSIGHT, LLC, )  
Plaintiff, )  
v. )  
COMCAST CORPORATION, )  
Defendant. )

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COMCAST CORPORATION, )  
Counterclaimant, )  
v. )

Case No. 08 C 0340

Judge Zagel  
Magistrate Judge Mason

E360INSIGHT, LLC, )  
Counterdefendant, )

Jury Trial Demanded

DAVID LINHARDT, )  
MAVERICK DIRECT MARKETING )  
SOLUTIONS, INC., )

BARGAIN DEPOT ENTERPRISES, LLC, )  
d/b/a bargaindepot.net and )  
bargainshoppecorp.com, )

NORTHSHORE HOSTING COMPANY, LLC )  
d/b/a ROCKY MOUNTAIN INTERNET )  
SERVICES, LLC and BAY CITY HOSTING, )  
LLC, )

RAVINIA HOSTING COMPANY, LLC, )  
NORTHGATE INTERNET SERVICES, LLC, )

and )  
JOHN DOES 1-50, )

Third-Party Defendants.

**COMCAST’S REPLY IN SUPPORT OF  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Comcast’s Motion relies chiefly on a straightforward application of Section 230(c)(2) of the Communications Decency Act (“CDA”), 47 U.S.C. § 230. It is remarkable, then, that e360

never even mentions that relevant section of the CDA in its six page discussion of the statute. Nor can e360 “find a case on point.” (Pl.’s Resp. p. 4).

The law is clear – Comcast is not liable for filtering any of e360’s e-mail solicitations, regardless of their content, why they are sent, or their alleged compliance with CAN-SPAM. Congress has rejected the notion that an ISP such as Comcast is required by law to facilitate e-mail solicitations like e360’s. This Court, following the plain language of the CDA, should enter judgment on the pleadings for Comcast.

**I. COMCAST IS IMMUNE UNDER 230(C)(2).**

The CDA contains two provisions applicable to Internet Service Providers such as Comcast, namely:

Section 230(c)(1): “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider;” and

Section 230(c)(2): “no ... provider of an interactive computer service shall be held liable on account of ... any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be ... objectionable.”

47 U.S.C. § 230. e360 focuses entirely on Section 230(c)(1), inapplicable here, and completely disregards Section 230(c)(2), which *is* applicable and which is discussed at length in Comcast’s Memorandum (Def.’s Mem. pp. 5-8).

Ignoring both the plain text of 230(c)(2) and numerous cases applying it, e360 inexplicably argues that the CDA “was not meant to cover the actions of an ISP such as blocking of e-mails.” (Pl.’s Resp. p. 4). To the contrary, in discussing Section 230(c)(2), the Seventh Circuit has stated that “[a] web host that *does* filter out offensive material is not liable to the censored customer.” *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003). The Seventh Circuit affirmed this view in its recent opinion in *Chicago Lawyers Committee For Civil Rights Under*

*the Law, Inc. v. Craigslist, Inc.*, Case No. 07-1101 (7th Cir. Mar. 14, 2008), confirming the clear meaning of the statute's plain text.

e360's only argument is that, because it has informed Comcast that it is legally compliant with CAN-SPAM, Comcast cannot rely on CDA immunity in filtering e-mails using Comcast's independent technologies and criteria.<sup>1</sup> As discussed in Comcast's Memorandum, CAN-SPAM, by its own terms, has no effect on an ISP's policy of declining to transmit certain categories of messages; it cannot be used as a sword as e360 seeks to do. Moreover, e360's argument turns the CDA on its head. Accepting e360's arguments, an ISP is immune under the CDA only for filtering out e-mails it *correctly* identifies as unlawful under CAN-SPAM. Such immunity is no immunity at all. Forcing an ISP to litigate each instance where it filters an e-mail to determine immunity would provide enormous disincentives for an ISP to filter or block objectionable content. Likewise, allowing a speculative and implausible allegation of bad faith to eviscerate an ISP's Congressionally granted immunity would provide the same disincentives. Either result would be not only contrary to stated public policy and Congressional intent, it is not the law. In a world where 90% of e-mails sent to consumers are spam, Congress has stepped in to ensure the viability of ISPs as "conduits for the communication between 21<sup>st</sup> century Americans" (Pl.'s Resp. p. 10), to ensure that ISPs can, without fear of litigation, develop and implement technological measures that help protect their subscribers and their inboxes.

## **II. EVEN IF COMCAST IS NOT IMMUNE UNDER THE CDA, E360'S CLAIMS FAIL.**

Even if the Court finds that Comcast is not immune under Section 230(c)(2) of the CDA, e360 has failed to allege any claim on which it is entitled to relief.

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<sup>1</sup> Throughout its Response, e360 implies that the CAN-SPAM Act provides the sole litmus test for whether an e-mail is objectionable. Contrary to e360's characterizations, e-mails that violate CAN-SPAM are only a subset of what consumers reasonably consider objectionable.

A. e360 Fails to Plead Tortious Interference.

e360 claims that it “can simply allege a ‘class’ of third-parties with whom it had a business expectancy.” (Pl.’s Resp. p. 7). Yet, e360 has not alleged any existing business relationships with Comcast’s subscribers. e360’s Complaint states that it is an “email marketing company” (Compl. ¶ 4) who “is hired by and partners with companies that wish to market their products or services using the internet.” (Compl. ¶ 7). Thus, the relationships with which e360 alleges Comcast has interfered are those with e360’s marketing clients and partners, not Comcast’s customers. Further, Comcast’s Memorandum clearly demonstrates that any alleged relationships between e360 and Comcast’s subscribers are far too attenuated to be viewed as “reasonable” to support a claim.<sup>2</sup>

e360’s argument is the equivalent of holding a newspaper liable for refusing to run an offensive advertisement because the newspaper “interfered” with a prospective business relationship with its own subscribers. Such an argument is not supported by law or reason.

B. e360 Fails to Plead a Violation of the Computer Fraud and Abuse Act.

Comcast’s filtering technologies do nothing more than react, in accordance with industry standards, to objectionable e-mails sent to its network. Mislabeling Comcast’s responses to e360’s bulk e-mails as a “denial of service *attack*” does not turn Comcast’s reaction into the type

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<sup>2</sup> While some courts in the Seventh Circuit have recognized that alleging a “class” of prospective customers is sufficient to survive a motion to dismiss a tortious interference claim under Rule 12(b)(6), none involved a class of potential customers as tenuous as that alleged here. *See generally Cook v. Winfrey*, 141 F.3d 322 (7th Cir. 1998) (plaintiff’s allegation that defendant interfered with certain third parties interested in purchasing the rights to publication of his experiences was sufficient to survive a motion to dismiss where defendant’s actions were directed at those third parties); *River Park, Inc. v. City of Highland Park*, 281 Ill.App.3d 154, 667 N.E. 2d 499 (Ill. App. Ct. 2d. Dist. 1996) (noting that plaintiff’s expectation of a business relationship was “reasonable” where plaintiff alleged the existence of some contracts and an expectation of entering into more); *Celex Group, Inc. v. Executive Gallery, Inc.*, 877 F. Supp. 1114 (N.D. Ill. 1995) (granting summary judgment for defendant where plaintiff failed to identify a specific third party with whom it had a reasonable expectation of entering into a business relationship).

of “access” to a protected computer system required to establish a violation of the CFAA. e360 claims a “denial of service attack” involves “establishing a connection with a victim’s server and preventing the victim from breaking the connection.” (Pl.’s Resp. p. 9). Yet, in reacting to e360’s e-mail solicitations, Comcast’s filtering technologies neither establish the connection with e360 nor prevent e360 from breaking the connection. By e360’s own description, it is e360’s systems – not Comcast’s – that prevent any servers or connections from disengaging. (Pl.’s Resp. p. 9).

With respect to the allegedly false bounce information, e360 admits that it is complaining about how it chooses to *react* to information generated by Comcast’s servers in response to e360’s e-mails. Apparently, even though e360 believes the bounce notifications to be false, e360 irretrievably deletes allegedly valid and valuable e-mail addresses in response to such notifications (as opposed to, say, putting the entries in a separate database until it can independently confirm the accuracy of the information). (Pl.’s Resp., p. 9). It is clear from the complaint that Comcast does not, as required to trigger liability under the CFAA, access e360’s computers.

C. Comcast Is Not A State Actor.

Because it is not a state actor, Comcast cannot violate e360’s First Amendment rights, and e360 cites no case finding an ISP to be a state actor for purposes of the First Amendment.

Both of the theories e360 advances for finding Comcast to be a state actor fail. First, the “public function” test is applied narrowly by the courts: only when an entity performs an activity or function that is *traditionally and exclusively* performed by the government, such as governing a city, managing an election, or eminent domain, does it constitute state action. *See e.g. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (providing electric utility power services not reserved exclusively to the state).

Internet and e-mail services have always been provided primarily by non-governmental entities, including private corporations, educational institutions, and non-profit organizations. e360's argument that e-mail is akin to "snail mail" by virtue of the government's operation of the United States Postal Service is not the law.<sup>3</sup> Just as courts have found that America Online, CompuServe, Google, and other ISPs do not engage in a traditionally exclusive public function, neither does Comcast. *See, e.g., CompuServe v. Cyber Promotions, Inc.*, 925 F. Supp. 1015 (S.D. Ohio 1997); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) ("AOL is merely one of many private online companies which allow its members access to the Internet....The State has absolutely no interest in, and does not regulate, this exchange of information between people, institutions, corporations and governments around the world.")<sup>4</sup>

e360 further misses the point with its attempt to distinguish the instant case from *Cyber Promotions* by arguing that, unlike the sender in *Cyber Promotions*, its e-mails are solicited. Neither the *Cyber Promotions* court, nor any other court, has relied on the fact that the senders' communications were unsolicited in holding that an ISP was not a state actor. *See Cyber Promotions, Inc.*, 948 F. Supp. at 445; *see also Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (E.D. Del. 2007); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003); *CompuServe Inc.*, 962 F. Supp. 1015. Whether an e-mail that Comcast filters is solicited or unsolicited has absolutely no bearing on whether Comcast is a state actor.

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<sup>3</sup> Notably, the only case e360 cites for this proposition found no state action because a privately held hospital did not operate a traditionally exclusive public function. *See Ridlen v. Four County Counseling Center*, 809 F. Supp. 1343, 1351 (N.D. Ind. 1992).

<sup>4</sup> In any event, the government is not the exclusive provider of mail delivery services as many private entities, such as UPS or Federal Express, also provide such services. By e360's rationale, these private entities' services would also constitute state action since they provide a service that the U.S. government also provides.

e360 also argues that Comcast is a state actor by virtue of the “special treatment” afforded to it under federal law, namely, that it is immune from liability for certain of its activities. By this logic, any entity that receives a government subsidy, license, immunity, or other benefit is a state actor. This is not the law. As the Second Circuit, among other courts, has held: “a finding of state action may not be premised on the private entity’s creation, funding, licensing, or regulation by the government.” *Loce v. Time Warner Entm’t Advance/Newhouse P’ship*, 191 F.3d 256, 266 (2d Cir. 1999); *see also Wilcher v. City of Akron*, 498 F.3d 516, 520 (6th Cir. 2007).

Privately owned television and radio stations, as well as cable providers, are not state actors because the federal government grants them a license to use the public airways, nor because state law allows them to implement and enforce policies banning programs they deem obscene or otherwise objectionable; thus, they can refuse to air certain programs or advertisements in their discretion. *See Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 93 S. Ct. 2080 (1973) (radio station’s refusal to air antiwar group’s messages not state action); *Loce*, 191 F.3d at 267-8 (Time Warner’s refusal to air programming it deemed indecent not state action). Likewise, Comcast is not a state actor because the government has provided it immunity to filter out e-mails it deems objectionable; like television and radio stations as well as cable providers, Comcast can refuse to “air” certain advertisements (in the form of commercial e-mails its filtering technologies deem objectionable) in accordance with its policies.<sup>5</sup>

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<sup>5</sup> Although Comcast is not a state actor subject to the restraints of the First Amendment, Comcast supports the free speech principles of the First Amendment and believes in the free flow of information. Comcast believes this interest is served by protecting the integrity of its ISP and e-mail services through filtering out commercial solicitations that are a nuisance or degrade the services offered to its subscribers.

D. e360 Fails to Identify Any Unfair or Deceptive Trade Practices Conducted By Comcast.

e360's arguments that Comcast violated its own policies or delivered e-mail from other companies do not support a claim under the ICFA.<sup>6</sup>

The plain language of Comcast's AUP could not be clearer – Comcast may “refuse to transmit or post and to remove or block any information or materials, in whole or in part, *that it in its sole discretion*, deems to be offensive, indecent, or otherwise inappropriate, regardless of whether this material or its dissemination is unlawful.” (Def's. Mem. p. 13-14). e360 alleges that the “posting” of its “e-mail deliver [sic] policies” amounted to an agreement that if e360 followed such policies, its “completely proper” e-mail would be delivered to Comcast's subscribers.<sup>7</sup> Such an interpretation of the AUP is at odds with the very provisions e360 cites. Accordingly, the AUP (and Comcast's compliance with it) cannot support a claim for unfair or deceptive trade practices.

e360 cites absolutely no authority for its claim that “as an intermediary, Comcast owes a duty not only to its subscribers but also to individuals communicating with its subscribers.” (Pl.'s Resp. p. 13). Comcast's AUP and related policies provide guidance as to what is considered an acceptable use of Comcast's network, but nowhere do they create an obligation on behalf of Comcast to “deliver” e360's e-mail to its subscribers. The fact that Comcast permits, either through agreements or otherwise, certain e-mail to reach its consumers is irrelevant.

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<sup>6</sup> Plaintiff ignores the numerous cases cited by Comcast requiring dismissal of its ICFA claim. (Mov. Br. 12-13.) Plaintiff only cites *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 775 N.E. 2d 951 (Ill. 2002), a case affirming dismissal of a complaint where the plaintiff could not identify an unfair or deceptive act under the ICFA.

<sup>7</sup> e360 does not address its failure to plead its claims sounding in fraud (Comcast's alleged misrepresentations of its policies) with particularity under Fed. R. Civ. P. 9(b). (Def.' Mem. p. 13.) Thus, Comcast and the Court can assume that e360 has conceded the failure.

Congress has expressly recognized the important public policy behind controlling the massive amounts of junk e-mail received by consumers. The extensive legislative and judicial history addressing this problem confirm that, far from “offending” public policy, Comcast’s conduct is manifestly consistent with it.

Under well-established Illinois and Seventh Circuit law, because e360 is not a “consumer” as defined by the ICFA, it must “plead and prove a nexus between the complained-of conduct and consumer protection... .” *Pace American, Inc. v. Elixir Inds.*, No. 06 C 4661, 2007 WL 495302, \* 4 (N.D. Ill. Feb. 13, 2007), citing *Athey Products Corp. v. Harris Bank Roselle*, 89 F.3d 430 (7th Cir. 1996); see also *New Freedom Mortgage Corp. v. C & R Mortgage Corp.*, No. 03 C 3027, 2004 WL 783206 (N.D. Ill. Jan. 15, 2004) (granting motion to dismiss where the complaint did not allege any public injury or injury to consumers). Tellingly, here, as in *Pace American*, e360 seeks no relief on behalf of consumers, but rather solely damages payable to it and injunctive relief permitting it to send e-mail solicitations. (Compl. ¶¶ 35, 46, 53, 62).

Ignoring the long line of cases in this court addressing this issue, e360 states in a conclusory manner that “e360’s allegations directly relate to its and consumer’s ability to freely communicate and transact business.” (Pl.’s Resp. p. 15).<sup>8</sup> e360 can cite no law or set of facts supporting its position. Try as it may, e360 cannot cloak its own financial interest in sending e-mail solicitations as a public-spirited act of consumer protection. Indeed, the Complaint speaks only of harm to e360 and its business, not to consumers. (Compl. ¶¶ 54-62). Notably, e360

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<sup>8</sup> Throughout its Response, e360 suggests that “e360’s customers are completely unaware of the failure of e360 to be able to communicate with them regarding orders or other advertising.” (Pl.’s Resp., p. 15). e360 does not allege to have “orders” from any of Comcast’s subscribers and is merely trying to avoid the inevitable dismissal. As discussed in Comcast’s Memorandum, e360’s customers are the companies it is sending e-mail on behalf of, not Comcast’s subscribers.

makes no allegations of consumer complaints, and, still further, e360 concedes that its intended recipients, who allegedly have “opted-in” to receive e360’s solicitations, never even notice they are not receiving them.

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Respectfully submitted,

LOEB & LOEB LLP

/s/ Douglas N. Masters  
Douglas N. Masters  
Nathan J. Hole  
321 N Clark Street, Suite 2300  
Chicago, IL 60610  
Phone: (312) 464-3144  
Fax: (312) 464-3111  
dmasters@loeb.com

*Attorneys for Defendant  
Comcast Corporation*

**CERTIFICATE OF SERVICE**

I, Douglas N. Masters, hereby certify that I electronically filed the foregoing **COMCAST'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** with the Clerk of the Court for the Northern District of Illinois using the ECF System which will send notification to the registered participants of the ECF System as listed on the Court's Notice of Electronic Filing this 27<sup>th</sup> day of March, 2008.

/s/ Douglas N. Masters