

Child Protection Registry Acts: A Constitutional Gamble for the Gaming Industry

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I. INTRODUCTION

ON AUG. 10, 2006, the Michigan Attorney General filed criminal and civil charges against two direct marketers who sent unsolicited messages to minors whose e-mail addressees were registered under the Michigan Child Protection Registry Act.¹ The Michigan Act declares that it is the Legislature's intent "to provide safeguards to prevent certain messages regarding ... *gambling* ... and other products from reaching minor children of this state."² In reality, the Michigan Act places at risk of criminal and civil prosecution a wide variety of lawful commercial business activity within the gaming industry.

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¹ Hereinafter the "Michigan Act".

² See MICH. COMP. LAWS ANN. § 752.1061.

On July 21, 2004, and Aug. 15, 2005, variations of the so-called Child Protection Registry Act became effective in Michigan and in Utah.³ The Michigan and Utah Child Protection Registry Acts⁴ (collectively, the "Child Protection Registry Acts") prohibit sending or causing to be sent electronic communications to communication devices a minor has access to that are registered in a state-maintained database.⁵ A violation of the Child Protection Registry Acts is subject to both criminal and civil sanctions.⁶

While the Child Protection Registry Acts have received considerable attention from the direct-marketing industry, they have received little attention from most of the gaming industry. The affected industries are nonetheless at grave risk. Ignoring the Child Protection Registry Acts exposes gaming businesses to significant criminal and civil liability, where the business is advertising by sending e-mail messages, cell phone text messages, facsimile messages, and other electronic messages (collectively herein, "spam").

The extent of liability for gaming business interests does not end with the Child Protection Registry Acts penalties. Violations of the acts can result in adverse licensing actions

³ See MICH. COMP. LAWS ANN. §§ 752.1061 et seq. and UTAH CODE ANN. § 13-39-101. The Utah version of the Child Protection Registry Act is referred to herein as the "Utah Act".

⁴ The Michigan version of the Child Protection Registry Act was enacted with the popular name of "Michigan Children's Protection Registry Act." MICH. COMP. LAWS ANN. § 752.1061(1). For convenience, the uniform state law popular name, The Child Protection Registry Act, is used in this article when collectively referring to both the Michigan Act and the Utah Act.

⁵ See MICH. COMP. LAWS ANN. § 752.1065(1) and UTAH CODE ANN. § 13-39-202(1).

⁶ See MICH. COMP. LAWS ANN. § 752.1067 and UTAH CODE ANN. § 13-39-301(1).

initiated by state gaming regulators. Particularly troublesome is the fact that the Child Protection Registry Acts extend to a gaming business that *unintentionally* sends an electronic communication to a Michigan or Utah e-mail address or phone number that is a prohibited destination.⁷

II. OVERVIEW OF THE MICHIGAN AND UTAH CHILD PROTECTION REGISTRY ACTS

The Child Protection Registry Act, on its surface, appears to accomplish a noble goal: protecting minors from receiving advertisements promoting products or services that are illegal for a minor to possess or consume.⁸ The prohibited products and services include promoting tobacco, alcohol, gaming, illegal drugs, and other illegal products (leaving to the marketer to determine what constitutes an "illegal product").⁹ The inclusion of "gaming" within the scope of

⁷ See *Free Speech Coalition, Inc. v. Shurtleff*, No. 2:05CV949DAK, 2007 WL 922247 (D. Utah Mar. 23, 2007).

⁸ See, e.g., MICH. COMP. LAWS ANN. § 752.1061(2) and MICH. ADMIN. CODE r. 484.501(j). The Michigan version of the Child Protection Registry Act provides that "the intent of this act is to provide safeguards to prevent certain messages regarding tobacco, alcohol, pornography, *gambling*, illegal drugs, and other illegal products from reaching minor children in this state." MICH. COMP. LAWS ANN. § 752.1061(2) (emphasis added).

⁹ See MICH. COMP. LAWS ANN. § 752.1061(2) and MICH. ADMIN. CODE r. 484.501(j).

the Child Protection Registry Acts directly raises red flags for any business conducting activities within the global gaming industry.¹⁰

The legislative history of the Michigan Act states that the policy underlying the act is to eliminate "the potential that a child will be exposed to inappropriate material."¹¹ Evidence cited in the legislative history supporting enacting the Michigan Act included the allegation that "80% of children online report receiving inappropriate unsolicited e-mail messages on a daily basis."¹² The legislative history went on to state that "[i]n addition, it is estimated that 791,000,000 text messages containing sexual content will be sent to cell phones in the United States by 2007, and approximately 60% of teen-agers in the country already have cell phones."¹³ Such allegations motivated, at least in part, the Michigan Legislature and, presumably, the Utah Legislature to enact the Child Protection Registry Acts.

The Michigan Act and the Utah Act both prohibit a person from sending or causing to be sent electronic communications containing proscribed content. A violation of the Child

¹⁰ For example, although it may not be intuitively clear from the Child Protection Registry Act, the ambit of the act may reach hotel promotions by commercial casino operators, advertisements of a cruise ship company that has an onboard casino, and even gaming equipment suppliers.

¹¹ Michigan Senate Fiscal Agency, S.B. 1025 (S-3) Bill Analysis (May 25, 2004).

¹² *See id.*

¹³ *See id.*

Protection Registry Acts occurs when two elements are satisfied. First, a person¹⁴ must either send, cause to be sent, or conspire to send a message to a "contact point" that has been registered on a state registry list for more than 30 days.¹⁵ Second, the primary purpose of the message must be to directly or indirectly "advertise or otherwise link to a message that advertises a product or service that a minor is prohibited by law from purchasing, viewing, possessing, participating in, or otherwise receiving."¹⁶

The term "contact points" is broadly defined under both the Michigan Act and the Utah Act. Contact points include instant message identities, wireless numbers, facsimile numbers, e-mail addresses, and other electronic addresses.¹⁷ A communication sent to a contact point violates the Child Protection Registry Act when the contact point has been registered for a

¹⁴ "Person" is broadly defined under the Michigan and Utah Child Protection Registry Acts. The Michigan act defines a "person" to mean "an individual, corporation, association, partnership, or any other legal entity." MICH. COMP. LAWS ANN. § 752.1062(d).

¹⁵ See MICH. COMP. LAWS ANN. § 752.1065(1) and UTAH CODE ANN. § 13-39-202(1). In Michigan, the registry is maintained by the Michigan Public Service Commission. In Utah, the registry is maintained by the Utah Department of Commerce.

¹⁶ *Id.* The Utah Child Protection Registry Act provides that a person shall not send to a registered contact point a communication with "the primary purpose of advertising or promoting a product or service that a minor is prohibited by law from purchasing; or ... that is harmful to minors." UTAH CODE ANN. § 13-39-202(1).

¹⁷ See MICH. COMP. LAWS ANN. § 752.1062(a) and UTAH CODE ANN. § 13-39-102(1).

30 day period with the state maintained registration list.¹⁸ Any contact point that a minor may have access to can be registered pursuant to the Child Protection Registry Acts.¹⁹

The products and services that may not be advertised to a minor under the Michigan Act include tobacco, alcohol, gaming, pornographic materials, illegal drugs, and other illegal products.²⁰ Administrative regulations promulgated under the Michigan Act reiterate the exact same products and services that may not be advertised to a registered contact point.²¹ What is not clear under the Michigan Act or its related rules is the breadth of the reach of the prohibition. By way of example, does the Michigan Act prohibit advertising by a Las Vegas casino, a local bar, or a smoke shop? Moreover, what are the "other illegal products" referred to by the Act? Consequently, those gaming businesses that do not directly operate commercial casinos and, additionally, business tangentially connected with the gaming industry may face liability exposure under the Act.

The Utah Act provides that a person may not send a message that advertises a "product or service that a minor is prohibited by law from purchasing; or ... that is harmful to minors."²² The precise types of products and services banned by the Utah Act are not identified in the statutory

¹⁸ See MICH. COMP. LAWS ANN. § 752.1063(1) and UTAH CODE ANN. § 13-39-201(1). The obvious implication is that the Child Protection Registry Acts require the state to create and maintain registration lists whereby contact points that a minor has access to can be registered.

¹⁹ See MICH. COMP. LAWS ANN. § 752.1063(2) and UTAH CODE ANN. § 13-39-201(3).

²⁰ See MICH. COMP. LAWS ANN. § 752.1061(2).

²¹ See MICH. ADMIN. CODE r. 484.501(j).

²² See UTAH CODE ANN. § 13-39-202(1).

text. The Utah Department of Commerce has issued a policy statement that construes products and services that are deemed to be illegal or harmful to minors.²³ The policy statement identifies advertisements promoting alcohol, tobacco, and *gambling* as products and services that are illegal or harmful to minors.²⁴

Utah and Michigan must create and maintain registration lists for contact points that a minor may have access to.²⁵ Contact points may be registered by a parent, guardian or the minor.²⁶ Schools and other institutions that primarily serve minors may also register, in the case of the Michigan Act, contact points.²⁷ Under the Utah Act, schools and other institutions may register domain names.²⁸ Initially, a contact point will be maintained on the registration list for a three year period.²⁹ The contact point registration may thereafter be extended following the expiration of the initial three year period.³⁰

The Child Protection Registry Acts also place affirmative obligations on a person who wishes to send advertisements to contact points with prohibited content. Specifically, the Child Protection Registry Acts require that a person sending electronic communications with

²³ See Utah Department of Commerce, Policy Statement (July 8, 2005).

²⁴ See *id.*

²⁵ See MICH. COMP. LAWS ANN. § 752.1063(1) and UTAH CODE ANN. § 13-39-201(1).

²⁶ See MICH. COMP. LAWS ANN. § 752.1063(2) and UTAH CODE ANN. § 13-39-201.

²⁷ See MICH. COMP. LAWS ANN. § 752.1063(2).

²⁸ See UTAH CODE ANN. § 13-39-201.

²⁹ See MICH. COMP. LAWS ANN. § 752.1063(3) and UTAH CODE ANN. § 13-39-201.

³⁰ See MICH. COMP. LAWS ANN. § 752.1063(3) and UTAH CODE ANN. § 13-39-201.

prohibited content must use the state developed mechanism to purge all registered contact points from advertising lists.³¹ In other words, businesses within the gaming industry – including even gaming businesses which do not operate a commercial casino – that send spam messages will be forced to use the state maintained cleansing program.

The affirmative obligation to use the state developed purging program quite simply serves as a revenue-generating source for Michigan and Utah. Advertisers are forced to pay an access fee for each registered contact point that is checked.³² The maximum fee under the Michigan Act is three cents per contact point checked. A person is charged a fee of \$0.005 per contact point checked under the Utah Act.³³ The financial costs are compounded by the potential infinite number of registered contact points and the continuing obligation to cross-verify advertising lists for registered contact points. Thus, compliance with the Child Protection Registry Acts will increase the regulatory costs for the gaming industry.

There are two forms of sanctions for violations of the Child Protection Registry Acts. First, a violation of the Child Protection Registry Acts can result in the sender facing criminal punishment. Most violations, but not all, are misdemeanors.³⁴ A violation, however, can be punishable as a felony depending on the nature of the violation and surrounding circumstances.³⁵

³¹ See MICH. COMP. LAWS ANN. § 752.1063(7) and UTAH CODE ANN. § 13-39-201(4).

³² See MICH. COMP. LAWS ANN. § 752.1063(7) and UTAH CODE ANN. § 13-39-201(4).

³³ Gregory M. Saylin & Leanne N. Webster, *Utah's Newest Anti-Spam Law: The Child Protection Registry Act*, UTAH B.J. (Dec. 2005), at 33.

³⁴ See MICH. COMP. LAWS ANN. § 752.1067 and UTAH CODE ANN. § 13-39-301(1).

³⁵ See MICH. COMP. LAWS ANN. § 752.1067 and UTAH CODE ANN. § 13-39-301(1).

Second, the Child Protection Registry Acts provides for comprehensive civil penalties. At the threshold, both the Michigan Act and the Utah Act create a private cause of action permitting the recovery of monetary damages.³⁶ Monetary damages available under the Michigan Act include either actual damages (including attorney fees) or the lesser of \$5,000 per message or \$250,000 for each day the violation continues.³⁷ The Utah Act authorizes civil damages for violations of the Act equal to the greater of \$1,000 or actual damages.³⁸ As a significant incentive to plaintiffs' attorneys, the Utah Act also authorizes the prevailing party to recover his legal fees.³⁹

What is not addressed in the Child Protection Registry Acts, but which may be far more draconian than the civil or criminal penalties, is the impact on licensure of a business that violates the Child Protection Registry Acts. This is particularly the case for companies with gaming licenses and businesses with liquor licenses.

III. LEGAL CHALLENGES TO THE ACTS

The Michigan Act and the Utah Act are both constitutionally suspect. The Child Protection Registry Acts may not survive scrutiny under the federal dormant Commerce Clause and may also be preempted by other federal laws.⁴⁰

³⁶ See MICH. COMP. LAWS ANN. § 752.1068 and UTAH CODE ANN. § 13-39-302.

³⁷ See MICH. COMP. LAWS ANN. § 752.1068(5).

³⁸ See UTAH CODE ANN. § 13-39-302(2).

³⁹ See *id.*

⁴⁰ See Laura Dunlop *Don't Send that E-Mail!: Complying with State Child Protection Registry Statutes*, 2 SCHINDLER J.L. COM. & TECH. 4 (2006). The strongest constitutional arguments to

A. The Child Protection Registry Acts Unduly Burden Interstate Commerce

The United States Constitution affirmatively grants Congress the power "to regulate Commerce with foreign Nations, and among the several States."⁴¹ This provision is commonly referred to as the "Commerce Clause" or "Interstate Commerce Clause." The Commerce Clause was included in the federal Constitution in order to promote uniformity among the states in the regulation of commerce and trade that affects the economic well being of the nation as a whole. A long line of Supreme Court cases flowing from the Commerce Clause have established a negative inference from the Commerce Clause's affirmative grant of power to Congress to regulate interstate commerce.⁴² That is, the *states* may not legislate or regulate commerce in a

challenge the Michigan and Utah Child Protection Registry Acts are under the dormant Commerce Clause and Supremacy Clause of the federal Constitution. Accordingly, this article focuses an analysis of the Child Protection Registry Acts under such constitutional clauses. Other constitutional grounds exist that could be asserted in an effort to have the Child Protection Registry Act declared unconstitutional. In particular, it could be argued that the Child Protection Registry Acts unconstitutionally restrict commercial free speech and are overbroad. *See id.* For a discussion of the commercial free speech and overbroad constitutional issues facing the Child Protection Registry Acts, see Saylin & Webster, note 33, *supra*.

⁴¹ U.S. CONST. art. I, § 8, cl. 3.

⁴² *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

manner that infringes upon interstate commerce. The negative inference of the Commerce Clause is referred to as the "dormant Commerce Clause."

The "negative command [of the dormant Commerce Clause] prevents a State from 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would bear.'"⁴³ The Supreme Court "ha[s] found unconstitutional state regulation that unjustifiably discriminates on their face against out-of-state entities, ... or that impose burdens on interstate trade that are 'clearly excessive in relation to the putative local benefits.'"⁴⁴ A state regulation may also be invalidated on the ground that it regulates extraterritorially,⁴⁵ or "adversely affect[s] interstate commerce by subjecting activities to inconsistent regulations" across the nation.⁴⁶

A Michigan statute that imposed similar restraints on e-mail communications to those provided for in the Child Protection Registry Acts was recently struck down as unconstitutional

⁴³ *American Trucking Ass'n, Inv. v. Michigan Public Service Comm'n*, 545 U.S. 429, 433 (2005) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)).

⁴⁴ *American Trucking Ass'n, Inc.*, 545 U.S. at 433 (quoting *Pike*, 397 U.S. at 142).

⁴⁵ *See Healy v. Beer Institute*, 491 U.S. 324, 336 (1989).

⁴⁶ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). *See also Morgan v. Virginia*, 328 U.S. 373, 377 (1946) ("[S]tate legislation is invalid if it unduly burdens [interstate] commerce in matters where uniformity is necessary—necessary in the constitutional sense of accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation").

by a federal district court.⁴⁷ In *Cyberspace Communications, Inc. v. Engler*, the United States District Court for the Eastern District of Michigan struck down as unconstitutional a Michigan law that criminalized the use of the Internet to send sexually explicit materials to minors.⁴⁸ Michigan Public Act 33 of 1978⁴⁹ prohibited the distribution of obscene materials to children in Michigan. The Michigan Legislature sought to modernize 1978 Mich. Pub. Acts 33 in 1999 by making it unlawful to use computers or the Internet to disseminate sexually explicit materials to minors.⁵⁰ Specifically, the Michigan Legislature provided criminal sanctions for a violation or attempted violation of 1978 Mich. Pub. Acts 33 "involving the internet or a computer, computer program, computer system, or computer network occurs if the violation originates, terminates, or both originates and terminates in this state."⁵¹ The Michigan statutory amendments were immediately challenged on the basis of, among other things, the dormant Commerce Clause.⁵²

The *Cyberspace* court struck down the Michigan law. The court found that:

1. The Internet is a decentralized, global communications medium that links people, institutions, corporations and governments around the world. *ACLU*, 929 F.Supp. at 831; *Pataki*, 969 F.Supp. at 164; *Johnson*, 4 F.Supp.2d at 1031.

⁴⁷ See *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd and remanded*, 238 F.3d 420 (6th Cir. 2000) (memorandum opinion); *on remand*, 142 F. Supp. 2d 827 (E.D. Mich. 2001).

⁴⁸ 55 F.Supp. 2d at 741, 744–45

⁴⁹ Mich. Comp. Laws Ann. §§ 722.671 et seq.

⁵⁰ See *Cyberspace*, 55 F. Supp. 2d at 740.

⁵¹ MICH. COMP. LAW ANN. § 722.675(8).

⁵² See *Cyberspace*, 55 F. Supp. 2d at 740.

2. The Internet is a giant computer "network of networks" which interconnects innumerable smaller groups of linked computer networks and individual computers offering a range of digital information including text, images, sound and video, *Reno I*, 117 S.Ct. at 2334; *Pataki*, 969 F.Supp. at 164; *Johnson*, 4 F.Supp.2d at 1031; *Reno II*, 31 F.Supp.2d at 481.
3. While estimates are difficult due to its constant and rapid growth, the Internet is currently believed to connect more than 159 countries, and over 100 million users. *ACLU v. Reno*, 929 F.Supp. at 831; *Johnson*, 4 F.Supp.2d at 1031. The amount of traffic on the Internet is doubling approximately every 100 days.
4. Content ranges from academic writings, to art, to humor, to literature, to medical information, to music, to news, to sexually oriented material. *Pataki*, 969 F.Supp. at 164; *Reno I*, 117 S.Ct. at 2335.
5. Sexually explicit material is available on the Internet; however, it is not "the primary type of content on this new medium." *ACLU v. Reno*, 929 F.Supp. at 844; *Pataki*, 969 F.Supp. at 164; *Reno II*, 31 F.Supp.2d at 484.
6. In addition, at any one time, the Internet serves as the communication medium for tens of thousands of global conversations, political debates, and social dialogues. *Pataki*, 969 F.Supp. at 165-166.
7. The Internet is distinguishable in important ways from traditional media. It is a revolutionary medium that is dramatically altering traditional views of communications and community, *See ACLU v. Reno*, 929 F.Supp. at 843-844. No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked. *Reno I*, 117 S.Ct. at 2336; *Reno II*, 31 F.Supp.2d at 484.
8. The Internet is a global medium. *Reno II*, 31 F.Supp.2d at 482. At least 40% of the content of the Internet originates abroad. *Reno I*, 117 S.Ct. at 2334; *Reno II*, 31 F.Supp.2d at 484.
9. The Internet also differs from traditional media in that it provides users with an ability to interact with other users and with content. *ACLU v. Reno*, 929 F.Supp. at 843-44. Unlike radio or television, communications on the Internet do not "invade" an individual's home or appear on one's computer screen unbidden. *Id.* at 844. Rather, the receipt of information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial." *Reno I*, 117 S.Ct. at 2336 (*quoting ACLU v. Reno*, 929 F.Supp. at 845).
10. Because the Internet presents extremely low entry barriers to publishers and distributors of information, it is an especially attractive method of communicating for non-profit and public interest groups. *ACLU v. Reno*, 929 F.Supp. at 843; *Reno II*, 31 F.Supp.2d at 482.

11. Any person or organization with a computer connected to the Internet can "publish" information. *Reno I*, 117 S.Ct. at 2335.

12. Also, unlike radio, television, newspapers and books, the Internet is not exclusively, or even primarily, a means of commercial communication. *ACLU v. Reno*, 929 F.Supp. at 842. In sum, the Internet is "a unique and wholly new medium of worldwide human communication." *Reno I*, 117 S.Ct. at 2334 (*quoting ACLU v. Reno*, 929 F.Supp. at 844).⁵³

As such, the court concluded that even the Michigan Legislature's attempt to limit 1999 Mich. Pub. Acts 33 to acts in Michigan could not save the legislation from dormant Commerce Clause scrutiny. In preliminarily enjoining enforcement of the statute, the court wrote:

Although the Act by its terms regulates speech that "originates" or "terminates" in Michigan, virtually all Internet speech is, as stipulated by Defendants available everywhere including Michigan. A New York speaker must comply with the Act in order to avoid the risk of prosecution in Michigan even though (s)he does not intend his message to be read in Michigan. A publisher of a web page cannot limit the viewing of his site to everyone in the country except for those in Michigan. The Internet has no geographic boundaries. The Act is, as a direct regulation of interstate commerce, a *per se* violation of the Commerce Clause.⁵⁴

On remand after being affirmed by the Sixth Circuit Court of Appeals,⁵⁵ the *Cyberspace* court once again reached the same conclusion and *permanently* enjoined enforcement of the Michigan internet legislation.⁵⁶ The court held:

⁵³ *Cyberspace*, 55 F. Supp. 2d at 741–42.

⁵⁴ *Id.* at 751.

⁵⁵ The Sixth Circuit affirmed the district court's preliminary injunction because it "cited and relied upon opinions of the United States Supreme Court that arguably support its conclusion that plaintiffs would likely succeed on the merits of their claim," and thus the Sixth Circuit concluded that the district court did not abuse its discretion. 238 F.3d 420.

Michigan's effort to regulate what information may be transmitted to Michigan's children, via the Internet, attempts to control Internet communications which might originate within Michigan, in other states, or in other countries. The Commerce Clause precludes application of state statutes to commerce that commences or occurs outside of a state's borders. *American Libraries Association v. Pataki*, 969 F.Supp. 160, 175 (S.D.N.Y. 1997).

"[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Institute*, 491 U.S. [at 336]. Thus, regardless of the legislature's intent to regulate solely within the State's own borders, the Act would, in effect, attempt to control communications occurring outside of the State of Michigan. Therefore, Michigan's 1999 Public Act 33 would violate the Dormant Commerce Clause of the United States Constitution, and may not be enforced.⁵⁷

As stated in *Pataki*, upon which the *Cyberspace* court heavily relied:

[The] unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed . . . The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation—and in particular, the national infrastructure of communications and trade—as a whole. . . . [The] Internet is one of those areas of commerce that must be marked off as a national preserve to

⁵⁶ On remand, the *Cyberspace* court identified additional non-Michigan cases that enjoined similar state statutes on Commerce Clause grounds and were issued since the *Cyberspace* court issued the preliminary injunction. *Cyberspace*, 142 F. Supp. 2d at 830 (citing *ACLU v. Johnson*, 194 F.3d 1149, 1160–63 (10th Cir. 1999); *PSINET, Inc. v. Chapman*, 108 F. Supp. 2d 611, 626–27 (W.D. Va. 2000)).

⁵⁷ *Cyberspace*, 142 F. Supp. 2d at 830–31.

protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.⁵⁸

The legislation scrutinized in *Cyberspace* is analogous to the Child Protection Registry Acts. That is, in both cases, Michigan and Utah are attempting to regulate sending electronic messages through the Internet. Both the Michigan Act and the Utah Act seek to restrict sending e-mail messages with advertisements promoting, among other products or services, lawful commercial enterprises.⁵⁹ By permitting Michigan and Utah to regulate the Internet through the Child Protection Registry Acts, Internet advertisers "might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the [advertiser] never intended to reach and possibly was unaware were being accessed."⁶⁰ As a result, the Michigan Act and the Utah Act likely violate the dormant Commerce clause.⁶¹ That is, because "[t]he Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether," the Child Protection Registry Acts should not survive

⁵⁸ *Pataki*, 969 F.Supp. at 169, 170.

⁵⁹ *See* MICH. COMP. LAWS ANN. § 752.1065(1) and UTAH CODE ANN. § 13-39-202(1).

⁶⁰ *Pataki*, 969 F.Supp. at 169, 170.

⁶¹ *See id.*

scrutiny under the dormant Commerce Clause.⁶² Therefore, it is likely that the Child Protection Registry Act will suffer a fate similar to the Michigan legislation at issue in *Cyberspace*.⁶³

Although strong arguments can be presented that the Michigan Act and the Utah Act violate the dormant Commerce Clause, the Utah federal district court has held, in an order denying a request for preliminary injunction, that the Utah Act does not violate the dormant Commerce Clause.⁶⁴ In *Free Speech Coalition*, the court found that the Utah Act did not violate the dormant Commerce Clause "because Congress expressly allowed states to regulate commercial e-mail."⁶⁵ The Utah federal district court concluded that the Utah Act was an effort

⁶² *Id.*

⁶³ In denying entry of a preliminary injunction, the Utah federal district court in *Free Speech Coalition* found that the plaintiff failed to meet its burden to establish that the Utah Act violates the dormant Commerce Clause. It appears the plaintiff based its argument that the Utah Act violated the dormant Commerce Clause on the basis that the fees charged by Utah to sanitize contact lists impermissibly burdened interstate commerce. As a result, the court concluded that "the fee charged for the scrubbing services is not an excessive burden in relation to the local benefits of enabling parents to protect their children from instant exposure to pornographic materials which is already illegal to send." *Free Speech Coalition*, 2007 U.S. Dist LEXIS 21556 at*36. The court did not, thus, focus on the overall regulation of sending interstate electronic communications. The limitations imposed by the dormant Commerce Clause extend beyond state regulation of the fees charged. Accordingly, other arguments can still be presented to constitutionally challenge the Child Protection Registry Acts.

⁶⁴ See *Free Speech Coalition*, 2007 WL 922247 (D.Utah March 23, 2007).

⁶⁵ *Id.*

by Utah to regulate under the state's general police powers and, thus, did not violate the dormant Commerce Clause.⁶⁶ The *Free Speech Coalition* decision did not attempt to distinguish the Child Protection Registry Act from *Cyberspace*, which considered an analogous Michigan act.

The *Free Speech Coalition* decision completely ignores the fact that the Child Protection Registry Acts subject all gaming business which may *directly or indirectly* send spam to regulation. This is particularly true for gaming businesses which intentionally opt not to reach out to Michigan and/or Utah residents. That is, a spam send has no way of identifying the domicile or location of the recipient. Moreover, the acts present even greater jurisdictional questions when, for example, a the owner of a registered contact point changes domicile to a jurisdiction other than Michigan or Utah. In any event, the order in *Free Speech Coalition* simply denied a preliminary injunction. Although the denial of a preliminary injunction may be indicative that the constitutional challenge to the Utah Act will fail, a final judgment has not been entered.⁶⁷ Presumably, the final decision of the Utah federal district court will be appealed to the Tenth Circuit Court of Appeals.

B. Child Protection Registry Acts are preempted by the Federal CAN-SPAM Act

The Child Protection Registry Acts would also seemingly be prohibited under the doctrine of federal preemption, which has its roots in the Supremacy Clause of the U.S. Constitution:⁶⁸

⁶⁶ *Id.*

⁶⁷ *See, e.g., CAN-SPAM Unlikely to Nix Utah's Child Protection Registry Act*, 24 ANDREWS COMPUTER & INTERNET LITIG. REP. 5 (2007).

⁶⁸ U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of

State action may be foreclosed by express language in a congressional enactment, see, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), by implication from the depth and breadth of a congressional scheme that occupies the legislative field, see, e.g., *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), or by implication because of a conflict with a congressional enactment, see, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-874, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).⁶⁹

Given the nature of internet commerce and congressional regulation of spam e-mail, the efforts of Michigan and Utah to regulate electronic advertising of gambling, alcohol, tobacco, illegal drugs and "other products" is likely preempted.

Congress enacted the CAN-SPAM Act⁷⁰ to regulate "the transmission of unsolicited commercial and pornographic emails in attempts to protect consumers from misleading or fraudulent advertisements and allow consumers to choose not to receive such emails."⁷¹ Facially, the purpose of the CAN-SPAM Act directly conflicts with the Child Protection Registry Act.⁷² Accordingly, it can be persuasively argued that the federal CAN-SPAM Act occupies the field of

the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). See also *McCulloch v. Maryland*, 4 Wheat. 316 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and to modify every power vested in subordinate governments").

⁶⁹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

⁷⁰ 15 U.S.C.A. § 7701.

⁷¹ Saylin & Webster, note 33, *supra*.

⁷² See *Lorillard Tobacco*, 533 U.S. at 541.

regulating electronic advertisements and, thus, the Child Protection Registry Acts are preempted.⁷³

In *Free Speech Coalition*, the Utah federal district court denied a preliminary injunction by finding, in part, that the Utah Act was not preempted by the CAN-SPAM Act. The order in *Free Speech Coalition* denying a preliminary injunction appears to be inconsistent with *Cyberspace* with respect to the congressional intent for states to regulate the internet. Thus, it is possible that the Sixth Circuit (and a Michigan federal district court) would reach a different result than *Free Speech Coalition*.

IV. CONCLUSION

Michigan and Utah have both enacted versions of the Child Protection Registry Act. The Child Protection Registry Act has received considerable attention in the direct-marketing industry, but has flown under the radar screen in the gaming industry. The Michigan Act and the Utah Act both specifically prohibit sending communications promoting regulated products or services to registered contact points. A wake-up call has also been directly sent to regulated industries by way of Michigan and Utah commencing criminal and civil actions for violations of their respective Child Protection Registry Acts by sending advertisements that promote gambling and alcohol products and services.

The Child Protection Registry Acts appear to be constitutionally infirm and, thus, highly suspect to a constitutional challenge. Particularly, an analogous Michigan law prohibiting the

⁷³ *See id.* The federal district court in ruling on a motion for entry of a preliminary injunction in *Free Speech Coalition*, however, recently concluded that the Utah Act is not preempted by the CAN-SPAM Act.

sending of pornographic messages through the internet has already been struck down under the federal dormant Commerce Clause.⁷⁴ Similarly, a strong argument can be presented that the federal CAN-SPAM Act—along with other federal acts and regulations regulating electronic communications—preempts the Child Protection Registry Acts. Nevertheless, the Michigan Act has yet to be challenged constitutionally. The Utah Act is facing a constitutional challenge; however, the court has yet to enter a final judgment. Accordingly, the prudent approach for regulated businesses is to: 1.) assess current electronic advertising programs to determine whether the Child Protection Registry Acts are implicated, and 2.) if so, develop a compliance program.

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⁷⁴ See *Cyberspace*, 55 F. Supp. 2d at 751.