

## Disclosures Located Only in Remotely Stored Images Violate CAN-SPAM

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A federal district court in Utah recently found a marketer liable for \$1.6 million in damages by default under the CAN-SPAM Act for making required advertising-related email disclosures only in remotely stored images (if at all) and using a proxy domain name registration service to obscure header information in its unsolicited commercial email messages. The marketing company, operating as Better Broadcasting, LLC and/or IONO Interactive, sent approximately 13,453 unsolicited commercial emails to plaintiff ZooBuh, Inc., an Internet access service provider. The CAN-SPAM Act requires that such messages clearly and conspicuously (i) identify that the message is an ad or solicitation, (ii) provide an opt-out to future messages, and (iii) include a valid physical postal address for the sender. The court found that Better Broadcasting/IONO had failed to include any of the required disclosures in its messages, and even if they had, they placed the disclosures inside “remote images.” Such images are not part of the email body, but instead link to a web server that could be anywhere on the Internet and are often controlled by an unknown third party. The court therefore concluded that even if the required disclosures appeared inside remote images, they were not “clearly and conspicuously displayed,” noting that there are strong concerns and recommendations against downloading remotely hosted images in email, industry standards prevent the automatic download of such images, and the images are not permanently available. The court further found that ZooBuh had been adversely affected by the spam, which caused hardware crashes, server spikes, and customer complaints; required significant man-hours to manage; and required ZooBuh to double its server capacity in order to successfully service its customers.

**Tip: Avoid placing email disclosures required by CAN-SPAM in remotely hosted images in commercial messages to ensure that consumers can access and read them.**

*This tip has been created for information and planning purposes. They are not intended to be, nor should they be substituted for, legal advice, which turns on specific facts.*

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