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Four of seven Virginia Supreme Court judges uphold First-Amendment-violative criminal spam law.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). All spammers' eyes should be on Virginia -- where a high percentage of computer crime cases are prosecuted, due to Virginia's housing such major computer servers as America Online's -- after its Supreme Court wrongfully upheld the state's criminal anti-spam law that prohibits sending out bulk e-mail that hide the identify of the sender. Here is the text of Virginia's criminal spam statute: "Va. Code Ann. § 18.2-152.3:1 (2008)" § 18.2-152.3:1. Transmission of unsolicited bulk electronic mail (spam); penalty "A. Any person who: 1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers; or 2. Knowingly sells, gives, or otherwise distributes or possesses with the intent to sell, give, or distribute software that (i) is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information; (ii) has only limited commercially significant purpose or use other than to facilitate or enable the falsification of electronic mail transmission information or other routing information; or (iii) is marketed by that person acting alone or with another for use in facilitating or enabling the falsification of electronic mail transmission information or other routing information is guilty of a Class 1 misdemeanor." B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and: 1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period; or 2. The revenue generated from a specific UBE transmission exceeded \$ 1,000 or the total revenue generated from all UBE transmitted to any EMSP exceeded \$ 50,000. C. A person is guilty of a Class 6 felony if he knowingly hires, employs, uses, or permits any minor to assist in the transmission of UBE in violation of subdivision B 1 or subdivision B 2." The main dispute between the four judges in the majority and the three dissenters in this court opinion upholding the nine-year three-count (for three incident dates) felony sentence of spammer Jeremy Jaynes is whether the First Amendment applies in his case, whether emailers have a Constitutional right to email anonymously, and whether the statute is unconstitutionally overbroad. The case is *Jeremy Jaynes v. Virginia*, __ Va. __ (Feb. 29, 2008). Sadly, the Jaynes majority refuses even to let defendant Jaynes have standing to argue that Virginia's criminal spam statute violates the First Amendment: "We therefore hold that Jaynes has no standing to raise a First Amendment objection to Code § 18.2-152.3:1. No Virginia standing should be accorded a person to assert an overbreadth challenge when that person's conduct consists of misleading commercial speech that is entitled to no First Amendment protection on its own merits." The Jaynes minority responds in conclusion, after a lengthy analysis: "Because I would continue this Court's prior policy of recognizing the exception to the standing rule, I would allow Jaynes to pursue his First Amendment claim that Code § 18.2-152.3:1 is overbroad." Refusing to give Jaynes standing to argue the anti-spam statute's unconstitutionality, the majority does not reach his claim of a First Amendment right to remain anonymous in emails. The minority replies: "The current use of the Internet as the marketplace for expressing political ideas, views and positions emphasizes the need for insuring that use of this medium not be chilled by the threat of criminal prosecution. Those persons wishing to use this medium should have the same ability to express their views anonymously as did Thomas Paine during the founding of our country." Refusing Jaynes First Amendment standing, the majority gives him no relief on his overbreadth argument. The minority replies: "I would find Code § 18.2-152.3:1 unconstitutionally overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment to the United States Constitution." If United States Supreme Court certiorari review is sought of this case, I anticipate a good chance that such review will be granted. Although the Virginia Supreme Court may be the only court to have reached the foregoing issues, the First Amendment implications are too far-reaching in this day of rampant emailing for the Supremes to reject cert. merely for the lack of a split in the circuit. If cert. is granted, I would hope that the Virginia statute would be overturned at least by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:00