

JUL 13 2005

ALAN SLATER, CLERK OF THE COURT  
BY J. JONES

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

PALLORIUM, INC.  Plaintiff(s)  Vs.  JARED, ET AL  Defendant(s)	CASE NUMBER: 03CC12794
	CERTIFICATE OF SERVICE BY MAIL OF MINUTE ORDER, DATED JULY 13, 2005

I, ALAN SLATER, Executive Officer and Clerk of the Superior Court, in and for the County of Orange, State of California, hereby certify; that I am not a party to the within action or proceeding; that on July 13, 2005, I served the Minute Order, dated 7-13-05, on each of the parties herein named by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service mail box at Santa Ana, California addressed as follows:

Aaron P. Morris, Esquire  
The Morris Law Firm  
1851 E. First St., Suite 900  
Santa Ana, CA 92705

Gary Kurtz, Esquire  
20335 Ventura Blvd., Suite 200  
Woodland Hills, CA 91364

ALAN SLATER,  
Executive Officer and Clerk of the Superior Court  
In and for the County of Orange

DATED: 7-13-05

By: \_\_\_\_\_

Jeanette L. Jones, Deputy Clerk

**CERTIFICATE OF SERVICE BY MAIL**

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MINUTE ORDER**

Department: C22

<b>COURT CONVENE</b> D AT: ----	<b>ON:</b> JULY 13, 2005
<b>JUDGE / COMM:</b> GEOFFREY T. GLASS	<b>CLERK:</b> JEANETTE JONES
<b>BAILIFF:</b> -----	<b>REPORTER:</b>

**AND THE FOLLOWING PROCEEDINGS WERE HAD:**

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No appearances. The above matter having been taken under submission, the Court now makes its ruling as follows:

Pursuant to CCP § 632 and Rule of Court 232, the Court provides this written, tentative decision in this matter. There was no request for a statement of decision. Jared is ordered to prepare a proposed judgment within 10 days and any party affected by the judgment may serve and file objections thereto within 10 days after service (CRC 232(e)).

This matter involves the application of the immunity provisions of the Communications Decency Act of 1996, 47 U.S.C. § 230. This Court agreed to address that issue first at a court trial. After hearing all the evidence and the arguments of counsel, the Court rules that Jared is immune under the Act for the claims of Pallorium and that Jared is entitled to judgment.

In this case, defendant Jared posted a changing list of domains or websites known or suspected by others of originating or transferring unsolicited bulk e-mails (UBEs, also known as "spam"). Jared got the list of suspect sites from a variety of sources. The purpose of Jared's list was

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to identify as many potential sources of spam as possible. Individuals and companies were free to access and use the list, and did so in various ways to limit dissemination of spam. A common method used by third parties to block spam was to use Jared's list and others like it and simply block all the e-mail traffic from any site on those lists. Prodigy, Ameritech, and SBC, among others, blocked all traffic to their servers from the places on Jared's list. There was no evidence that Jared was paid for maintaining his list. Jared used his list for his personal use, but did not block any sites for anyone else. Users of the list were free to ignore any part of the list. Jared essentially published a list of sites that he mistrusted.

In addition to publishing the lists compiled by others, he offered a no-cost service: users could send a suspect e-mail to one of his e-mail addresses and his program would then direct an e-mail to the servers that had relayed the suspected e-mail. If any of the servers relayed that new e-mail back to another of Jared's addresses, then that server was listed as "open" on Jared's website. This process was done entirely automatically, with no editorializing or editing.

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The danger of an "open" server is that UBE distributors can use an unsuspecting server to relay UBEs, accomplishing two goals: one, hiding the true sender of the UBE and thus frustrating many UBE blocking algorithms, and two, using the bandwidth of the unsuspecting "open" server to send out huge numbers of UBEs.

Pallorium is a business reliant on e-mail communications. In the summer of 2003, it found its outgoing e-mails were being blocked by SBC and other providers of internet service because Pallorium's server was listed on Jared's list. Pallorium contends that it was never an "open" server and was not listed by any of Jared's other sources as a conveyor of UBEs. Because its customers were not receiving e-mails from the Pallorium server, Pallorium had to buy or rent other unlisted e-mail servers to conduct its business. Pallorium sued Jared for falsely including Pallorium on his list. Jared testified that he had no idea how Pallorium got onto his list. He manually tested the Pallorium server for "openness" after the lawsuit began and concluded at that time that Pallorium did not have an open server. Pallorium's CEO testified that the server configuration had not been changed and that if

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it were not open when it was tested manually, it was not open when originally listed. He also testified that he had checked all the possible third-party sources for Jared's list and Pallorium's server was not included on any of them.

To further complicate matters, Jared was the victim of a destructive denial of service attack that lasted several months and shut down his server, including the "openness" test and the ability of others to get through to his list. It also clogged his e-mails so that Pallorium could not get its complaints to Jared in a timely fashion. Jared eventually abandoned his list and his efforts to identify "open" servers.

The Court first considers the immunity granted by § 230(c)(1). Although it is possible that Pallorium was listed on some other third-party source as a UBE purveyor, the evidence was insufficient. More likely, Pallorium made it onto the list because some third party sent an e-mail to Jared's program that resulted in a finding of "open." Under these facts, Jared is not a publisher of information provided by third parties. His program processes information, manipulates it, and

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makes a conclusion, which is then published on Jared's list. The purpose of publisher's immunity is to protect the free flow of ideas by not punishing the messenger. Jared, in this case, was the originator of the information. Jared's program determined that Pallorium's server was "open" and Jared vouched for that conclusion. He is not entitled to immunity as a publisher, since he was also the internet content provider.

The Communications Decency Act, §230(c)(2)(A), also provides immunity for the provider or user of an interactive computer service for any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

To help us parse this clause phrase by phrase, we are mindful of the policy of the United States that encourages the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other

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interactive computer services and to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material. This policy requires a liberal application of the immunity provisions. As stated in Carafano v Metroplash, (2003) 339 F.3<sup>rd</sup> 1119, immunity under §230 is "quite robust."

We first consider whether Jared is a provider or user of an interactive computer service. The Court concludes that he is. He provides an information service that enables computer access by multiple users. Users access his list and interact with his server by querying it with e-mails that are then tested by Jared's program and the results posted. Alternatively, he is a user of the services of an interactive computer service in his connection with the Internet.

There is no doubt that Jared undertook the compilation and publishing of his list voluntarily. We next consider whether his actions were in good faith. The Court concludes that his list was compiled solely to seek an effective way to block unsolicited e-mails. There was no evidence that

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Jared sought to block certain sites for any other reasons and no evidence that he singled out Pallorium. In fact, he testified that he did not know what Pallorium was until the lawsuit had been threatened.

The Court rejects the argument that Jared's bad faith is shown by the inefficiencies of his methodology. The Court heard testimony that "open" servers account for only a very small amount of spam. However, efficacy is not a consideration in determining good faith. Jared's methods may have been over inclusive or too aggressive and may have resulted in blocked sites that were not purveyors of spam, but that is not evidence of bad faith.

The Court considered the argument that Jared in bad faith refused to shut down his list after a destructive denial of service attack. Around the same time as Pallorium was having its e-mails blocked by internet service providers, Jared was the victim of a vicious destructive denial of service attack, where for a long time his server was bombarded by unsolicited e-mails that froze his system. His eventual response was capitulation, but his mode of surrender was unique – he essentially put

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the entire Internet on his list, so that every query to his list would result in a negative report. In this way, he made his list valueless and thus discouraged users. Pallorium argues that this was done in bad faith and that he should have used some other means to disable his list. The Court, however, finds that his actions in response to the denial of service were not taken in bad faith and without any animosity toward any particular server or website.

Next, we turn to the objectionable nature of spam. Pallorium argues that immunity only applies to efforts to block the *content* of the spam under the Computer Decency Act. Since Jared's list was content neutral – if someone used the list, they would block the benign as well as the lewd – the immunity under §230(c)(2)(A) would not apply. The Court does not accept this interpretation. The immunity provision refers to "access to objectionable material" and Jared's list indisputably can be used to restrict access to spam which undeniably can and will contain objectionable material. The fact that Jared's list is over inclusive and, if used, will most likely also restrict access to non-objectionable material, is of no consequence in applying the immunity provisions. Among other

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things, the law was meant to foster new and more effective means of controlling unwanted intrusions from the Internet. The law contemplates that various methods will be tried, with the unsuccessful methods being laboratories for more effective methods. Jared's methods may be ham-handed and grossly ineffective, but they were intended to help others block spam and they accomplished that goal.

Further, the Court heard evidence that unsolicited e-mails are a burden on individual internet users and burden ISP's who must use bandwidth to deliver those messages. They can also be destructive, as shown by the denial of service attack on Jared. For these reasons, the Court concludes that UBEs, by virtue of their mere volume and regardless of its content, are harassing and objectionable. Under Federal law, any good faith attempt to restrict access to spam would be protected.

The Court also considered immunity under §230(c)(2)(B) for making the technical means available to information content providers to restrict access to spam. By allowing others to send a

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suspect e-mail to Jared's site, he is making available his program, which is a technical means of restricting access.

It is obvious that Pallorium is a collateral casualty in the war on spam. Pallorium incurred costs and suffered because of these events. Unfortunately, Pallorium cannot recover them from Jared. The Congress of the United States has determined that the risk of such damages would have to be borne by innocent parties like Pallorium.

Judgment for Jared. Jared to prepare a judgment.

IT IS SO ORDERED.

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