

UNDISPUTED MATERIAL FACTS

¶3 On April 14, 2002, plaintiff, Gillman, registered on the Audio Galaxy website and, by so doing, agreed to receive promotional email. Through an intermediary, Audio Galaxy sold its email addresses to Traffix, Inc. (“Traffix”).² Traffix and its subsidiaries contract with businesses to send promotional email to consenting individuals.

¶4 On May 6, 2002, the Act became effective.

¶5 On or about May 14, 2002, Traffix, Inc., through its subsidiary, GroupLotto, initiated a campaign to send promotional email to those addresses it had purchased. The promotional emails were intended to advertise Sprint's Nickel Nights long-distance telephone service.

¶6 That same day, May 14, 2002, Gillman requested removal from GroupLotto's email distribution list.

¶7 Gillman's name and email address were actually removed from GroupLotto's email distribution list a day later, on May 15, 2002. However, they were not immediately removed from the queue of emails advertising Sprint's Nickel Nights. As a result, on May 16, 2002, Gillman received an email from GroupLotto advertising Sprint's Nickel Nights.

¶8 On May 28, 2002, Gillman filed a class action lawsuit against Sprint, alleging that Sprint sent him UCE in violation of the Act.

STANDARD OF REVIEW

¶9 The Court may award summary judgment only if the Court finds there is no genuine issue as to any material fact and the Court concludes that the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *see also Winegar v. Froerer Corp.*, 813 P.2d 104 (Utah 1991). The Court must draw all inferences in favor of the nonmoving party.

¶10 Issues of statutory interpretation, as questions of law, are appropriate for summary judgment. The Court has a duty to interpret statutes so as to uphold their constitutionality whenever possible. *See Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464, 467 (Utah 1989) (“If there are alternative statutory constructions possible, one rendering a statute

² There is no evidence before the Court concerning the terms under which Gillman consented to receive emails as a result of his enrollment in the Audio Galaxy site, nor as to whether the consent expressly extended to subsequent purchasers of Audio Galaxy's email lists. Without information one way or another on this issue, one could argue that Audio Galaxy's sale of Gillman's personal information to Traffix and GroupLotto may have been an unauthorized act by Audio Galaxy. Notably, Gillman has never raised this issue so it has been waived. To the contrary, Gillman concedes his relationship with GroupLotto, but argues that he terminated the relationship before the Sprint email was sent. Indeed, in order to attempt to hold Sprint legally liable in this case, Gillman has no choice but to rely on the agency relationship between GroupLotto and Sprint.

constitutional and the other unconstitutional, the former should be adopted.”).

ANALYSIS

¶11 Sprint’s four statutory arguments dispute liability on the grounds that: (a) Sprint itself was not the entity that sent the email; (b) the email was sent accidentally; (c) Plaintiff consented to receipt of the email; and (d) Plaintiff had a pre-existing relationship with GroupLotto, the actual sender of the email.

¶12 Sprint’s first argument is wrong as a matter of law. While it is true that the email was sent by GroupLotto rather than by Sprint itself, liability attaches under the Act to “[e]ach person who sends *or causes to be sent* an unsolicited commercial email.” § 13-36-103 (emphasis added). By hiring Traffix and its subsidiary GroupLotto to advertise on its behalf, Sprint “caused” the email at issue to be sent to Gillman.

¶13 Sprint’s second argument, that transmitting the subject email was unintentional, places material issues of fact in dispute; accordingly, it is not an appropriate ground for summary judgment. Because Gillman had previously agreed to receive commercial advertisement, GroupLotto, at Sprint’s behest, identified Gillman as one of a group of intended recipients of the Sprint advertisement. Webster’s New World Dictionary (2d coll. ed. 1986) defines “intentional” as an act that is “done with intent,” and “done purposely.” “Intention” is further defined, *inter alia*, as “a determination to do a specified thing”; “the general word implying having something in mind as a plan or design.” *Id. Cf.* Utah Code §76-2-103 (in criminal context, one acts intentionally when it is his conscious objective to engage in the conduct or cause the result). There is no dispute that GroupLotto disenrolled Gillman from its list of consenting recipients the day before the offending email was transmitted. The issue is why Gillman’s name and email were not simultaneously deleted from the queue. As a result, the following material issues of fact are in dispute:

(A) Whether the queue of the Sprint advertisements was actually assembled prior to, or subsequent to, receipt of Gillman’s disenrollment request.

(B) If the advertisement queue was assembled prior to receipt of the disenrollment request, whether GroupLotto intentionally decided not to incur the costs of removing Gillman’s name and email from the pre-established queue for the Nickel Nights advertisement. And, if so, whether Sprint should be liable for that decision.

(C) Whether technological limits made it impossible to remove Gillman’s name and email from the already established queue (which, under the right set of facts could support the claim that transmission of the advertising email to Gillman should be legally construed to be “unintentional”).

¶14 Sprint’s third argument, that Gillman consented to receipt of the email, also raises material, disputed issues of fact precluding entry of summary judgment. Sprint correctly argues that “[t]he statute says nothing about e-mails sent before a withdrawal of consent has been

received by the sender.” Memorandum in Support of Defendant’s Motion for Summary Judgment [Revised], at 3. From that premise Sprint argues that “the Act must be read to provide for a reasonable period of time following the withdrawal of permission during which the previously sent messages may be delivered without liability attaching to the sender.” *Id.* Of course, the facts of this case do not correspond to Sprint’s argument since the sender—GroupLotto—in fact *received* and processed the disenrollment request a day before the offending email was actually transmitted to Gillman. Sprint’s argument rests on the premise that once an email is in the queue it has been “sent.” There are no facts before the Court to support that claim. All that Sprint has argued in its brief is that it is common in the industry for a disenrollment request to take 2-3 days to process. That does not answer the question whether it was reasonable for GroupLotto not to purge the email to Gillman from the advertising queue, given that *in this case* GroupLotto was able to purge Gillman from its list of subscribers in advance of the email’s transmission.³

¶15 In addition to the above-referenced material issues of fact in dispute, there are several legal issues that have yet to be fully addressed by the parties. For example, the parties have provided no legal analysis as to when, under the facts of this case, a commercial email should be deemed “sent,” or what legal considerations militate in favor, or against, construing the Act to permit a “reasonable period” of disenrollment irrespective of actual technical capabilities. Each of these issues bears directly on the question whether Gillman’s consent could have been legally withdrawn with respect to advertisements that were then in the queue. Consequently, summary judgment for Sprint cannot be granted on any of the preceding grounds.

¶16 Although the first three statutory arguments fail to support entry of summary judgment in Sprint’s behalf, the Court agrees that summary judgment is appropriate as to the fourth statutory ground. Sprint’s final argument is that the email at issue did not violate the Act because it fell within the Act’s “preexisting business relationship” exception. Specifically, Sprint relies on Gillman’s preexisting business relationship with GroupLotto to argue that the email was, by definition, not “unsolicited.”

¶17 Among other things, the Act proscribes the sending of “unsolicited” commercial emails if they do not comply with the Act’s requirements. A commercial email is “unsolicited” if it is received “without the recipient’s express permission.” § 13-36-102(8)(a). However, “[a] commercial email is *not* ‘unsolicited’ if the sender has a preexisting business or personal relationship with the sender.” *Id.* § (b) (emphasis added). Gillman does not dispute that he had a preexisting business relationship with GroupLotto. As Sprint’s agent, expressly hired to disseminate Sprint’s Nickel Nights advertising campaign, GroupLotto’s relationship to Gillman is properly imputed to Sprint.

¶18 Gillman claims that Sprint’s message was “unsolicited” because he had disenrolled before the email was sent. From that premise Gillman argues that Sprint is liable, under the Act,

³As noted previously the parties have also not addressed the technological feasibility of “instantaneous” disenrollment, nor the associated economic costs.

because the commercial email message failed to comply with the Act's express requirements. The plain language of the Act renders Gillman's argument unavailing.

¶19 "A fundamental rule of statutory construction is that statutes are to be construed according to their plain language." *Arndt v. First Interstate Bank*, 991 P.2d 584, 586, 1999 UT 91 ¶ 10 (quoting *O'Keefe v. Utah State Retirement Bd.*, 956 P.2d 279, 281 (Utah 1998)). "[W]here the statutory language is plain and unambiguous, we do not look beyond the statute's plain meaning to divine legislative intent." *Horton v. Royal Order of the Sun*, 821 P.2d 1167, 1168 (Utah 1991). See also *Olson v. Samuel McIntyre Inv. Co.*, 956 P.2d 257, 259 (Utah 1998) ("We do not look beyond the plain language unless we find ambiguity").

¶20 Here, the Act provides that "[i]f the recipient of an *unsolicited* commercial email . . . notifies the sender that the recipient does not want to receive future commercial email . . . from the sender, the sender may not send that recipient a commercial email . . . either directly or through a subsidiary." §13-36-103(3) (emphasis added). Because a commercial email is, by definition, not "unsolicited" if it is based on a preexisting business relationship, this subsection only applies to prohibit the sending of a second (or subsequent) unsolicited email to recipients with whom the merchant or advertiser did not have a preexisting business relationship.

¶21 The Act is silent as to how a recipient like Gillman, who indisputably had a preexisting business relationship with the commercial email sender, can effectively terminate that relationship in order to claim the protection of the Act. By definition, to "preexist" means "to exist previously or before." Webster's New World Dictionary (2d coll. ed. 1986). Thus, a relationship between two parties can "preexist" if it existed at any time in the past, even if that relationship has been subsequently terminated.⁴ That is true irrespective of when in time that relationship existed. Thus, Gillman continued to have a preexisting business relationship with GroupLotto.

¶22 Because of Gillman's preexisting business relationship with GroupLotto, the email Gillman received was, by definition, *not* unsolicited. Under the Act, recipients of unwanted commercial email can only disenroll themselves if the email received is an "unsolicited commercial email." § 13-36-103(3). The Court concludes that, for purposes of the Act, Gillman's attempt to disenroll himself—and thus terminate the business relationship with

⁴ The legislature is presumed to use language in its common and ordinary meaning. Thus, unless the legislature expressly defines the terms or phrases it uses in its enactments, the Court will interpret those terms or phrases as generally understood. In common usage, a "preexisting business relationship" clearly encompasses not only present business relationships but also any such relationship that may have existed at some point in the past, even if it no longer exists. Thus, persons have preexisting business relationships with former landlords or employers, even if those relationships no longer exist. Had the legislature intended to limit the application of the definition to a *presently existing* business relationship, it would have qualified its language to set a time limit to the relationship. Not having done so, this Court would be overstepping its authority to impute a time limitation to the language the legislature adopted. See *Assoc. Gen. Contrs. v. Bd. of Oil, Gas & Mining*, 2001 UT 112 ¶ 30, 38 P.3d 291, 301 (When statutory language is unambiguous, the Court is not at liberty to "infer substantive terms into the text that are not already there"), quoting *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994); see also *In re I.M.L. v. Utah*, 2002 UT 110 ¶ 25, — P.3d —.

GroupLotto and Sprint—was ineffective.

¶23 Gillman’s claim that the Nickel Nights advertisement did not comply with the Act’s requirements that commercial emails include specific language in the subject line is also unavailing. By its terms, those requirements also apply only to “unsolicited commercial email[s],” see Utah Code §13-36-103(1)(a), (b), (c), and (d) (2002). Thus, the fact that the email message received by Gillman did not comply with those requirements does not trigger liability for GroupLotto or Sprint.⁵

¶24 To be sure, this reading of the statutory language excludes from the Act’s protection a potentially sizeable group of people. Given the unqualified nature of the Act’s language, the exclusion precludes any challenges under the Act that are brought by commercial email recipients who have had *any* prior business relationship with the sender.

¶25 The Court concedes that its reading of the Act’s language could be questioned as creating an outcome the legislature could not have intended. As noted previously, however, the best evidence of legislative intent is the language the legislature enacted into law. Further, the Court is precluded from examining other indicators of legislative intent if, as is the case here, the language is unambiguous.⁶ If the Court’s interpretation of the Act’s language does not adequately reflect the legislature’s intentions, the legislature is better positioned than this Court to determine whether the statutory language should be clarified.


⁵Gillman makes no claims under §13-36-103(2), but the same analysis would apply to bar liability under the Act in cases where a recipient with a “preexisting business relationship” to a commercial email sender complained of improper use of another’s domain name, or misrepresentation of point of origin of an email message.

⁶Although the Court rests its holding squarely on the statutory language, there are reasonable bases to believe this outcome is not inconsistent with the statutory scheme. Legislatures have the discretion to address identified problems, such as the problem of “spammers,” one step at a time. Thus, even if the scheme adopted by the legislature does not eliminate all unwanted commercial email, the drafters of the Act may have viewed it as an important “first step” in addressing the issue, with further steps to follow. That is an especially plausible argument in cases where, as here, the legislature is venturing into a relatively new and judicially untested area of legislation. It is also possible that the drafters may have intentionally structured the Act’s language as part of a legislative compromise, in order to secure its passage. In any event, this Court will not second-guess the legislature when the statutory language is clear.

DECISION AND ORDER

¶26 Because the email at issue in this case does not fit the statutory definition of an "unsolicited commercial email" under the plain language of the Act, the Court GRANTS Defendant Sprint's motion for summary judgment. So ordered.

This 28th day of February, 2003. By the Court:


Denise Posse Lindberg, Third District Judge.

