Executive Fights Faxes, One at a Time

By Craig Anderson
Daily Journal Staff Writer

SAN JOSE — Silicon Valley entrepreneur Steve Kirsch got angry four years ago when he kept getting unsolicited faxes. He's been trying to get even ever since.

Kirsch, the chief executive officer of a technology company, took on the biggest fish in the mass-faxing industry when he filed a $2.2 trillion — with a T — class action two years ago against Fax.com.

Although Fax.com is now defunct following a series of fines and sanctions by state and federal authorities, Kirsch continues to pursue his suit in U.S. District Court.

In fact, Kirsch and another employee of his company, Propel Software, have expanded their battle against "junk faxes" to another front, suing companies in small-claims court for each single unsolicited fax they send. And the successful strategy has defendants' attorneys crying foul.

"I think there will be a judge who agrees this is unlawful splitting of causes of action," said Costa Mesa attorney Terri Breer, who has represented several companies sued for sending commercial faxes. "We don't need these vigilantes taking advantage of a consumer law."

Kirsch and his allies are suing under the Telephone Consumer Protection Act, a 1991 federal law that makes it illegal to send faxes to people without their consent. The law is routinely ignored, a fact that galls Kirsch.

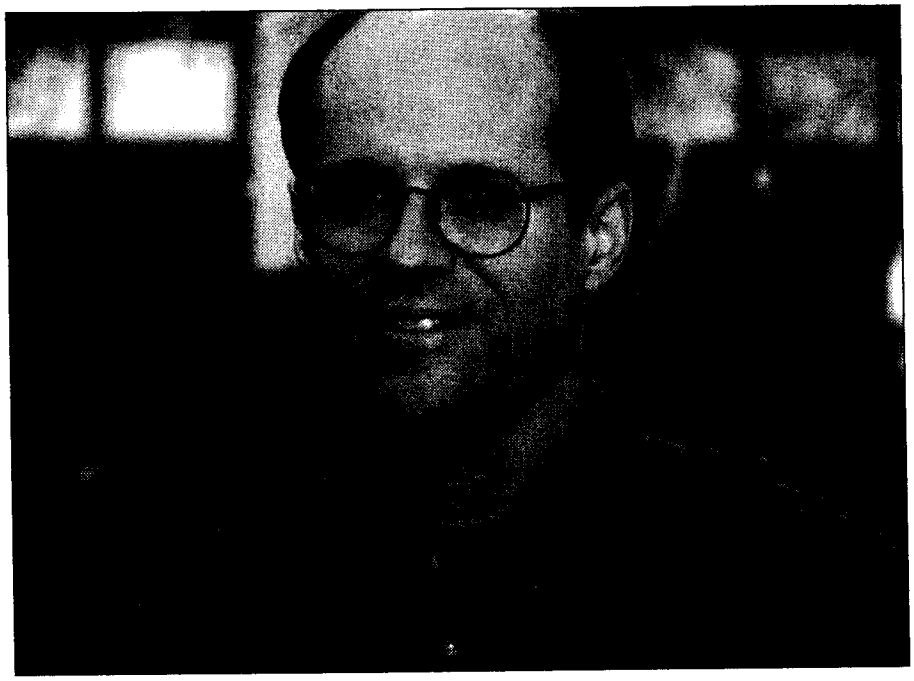
"It was something that bothered me, and nobody was doing anything about it," he said.

Kirsch started a Web site, junkfax.org, which explains the law and how to sue senders of junk faxes for as much as $2,500 per fax in California.

Taking the lead, Kirsch and his Propel Software employee, Jimmy Sutton, have filed a hundred cases in Santa Clara small-claims court during the last two years, alleging Telephone Consumer Protection Act violations and winning big awards.

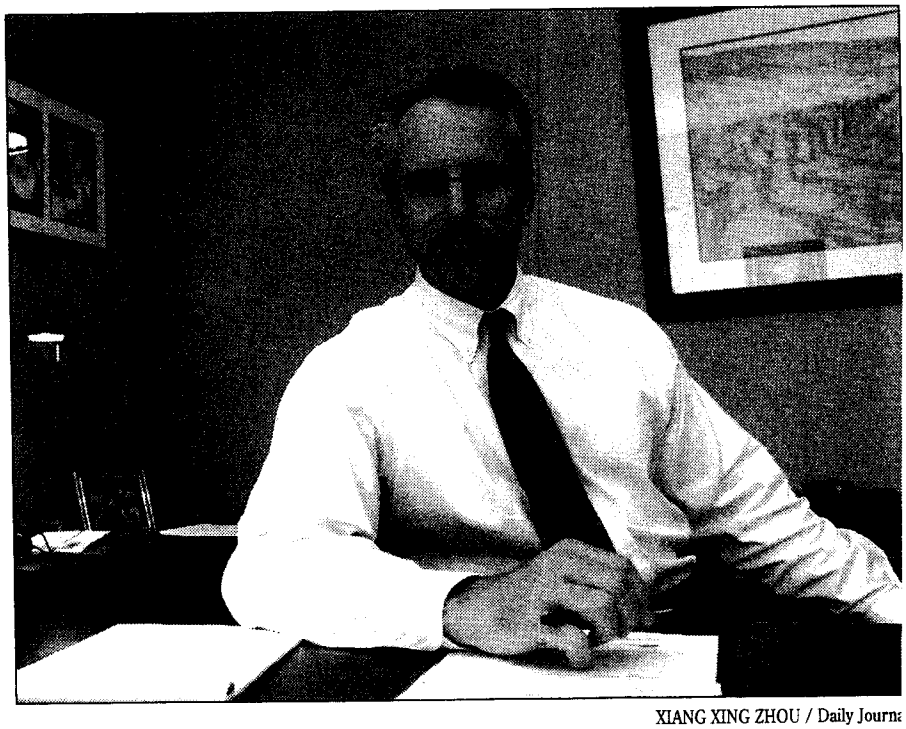
The jurisdictional limit in small-claims court is $5,000, but Kirsch has gotten around that limitation by persuading judges and commissioners to allow him to file claims based on each fax received.

Last fall, Kirsch won a $42,260 award from the Bay Area company First Chartered Investments Inc., which had sent 16 faxes pitching mortgage brokerage services.



Courtesy of Steve Kirsch

Steve Kirsch, above, is using a 1991 federal law to sue companies over junk faxes. Attorney Paul Avilla, below, is appealing a judgment against one such company.



XIANG XING ZHOU / Daily Journa

Telephone Consumer Protection Act "constitutes a separate and distinct statutory violation, and that an aggrieved consumer can sue separately ... for each such alleged violation."

"As such, plaintiff Sutton may file each

Kirsch argues that suing in small claims court makes sense because i allows nonattorneys to take direct actio against a junk fax company without hav ing to hire a lawyer and fight an expensiv legal battle.

On his Web site, Kirsch reports that the judgment followed a 10-minute hearing. The company's representative, Katrina Hartwell, appealed the award all the way to the U.S. Supreme Court, but the high court refused to hear it.

More recently, Propel Software won $35,000 from Global QA, an Oxnard-based consulting firm that sent 11 unsolicited faxes.

San Jose attorney Paul Avilla of McPharlin Sprinkles & Thomas is appealing the small-claims judgment, asking Santa Clara Superior Court Judge James Kleinberg to order Propel and its agent, Sutton, to sue in Superior Court — where the defendant can be represented by an attorney and is entitled to discovery — or waive all but $5,000 of Propel's claim.

A hearing on the matter is set for June 22. *Propel Software v. Global QA Corp.*, 2-04-SC-001397 (Santa Clara Super. Ct.).

"When you get up to this dollar amount, I think the defendants are entitled to have discovery and even the playing field," Avilla said.

If a plaintiff files cases in small-claims court, with its "abbreviated, informal procedures, you have to take with it the limitations on the amount you can recover," he said.

Thus far, Kirsch and Sutton are winning the legal argument. Courts that have considered the small-claims cases have agreed that, under the law, plaintiffs are allowed to win judgments in the tens of thousands of dollars.

In the appeal of Sutton's case against First Financial, Santa Clara Superior Court Judge Robert A. Baines ruled in October that each violation of the

As such, plaintiff Sutton may file each of his statutory actions separately [as he already has done], and he may have each heard separately without violating the prohibition on splitting claims in Small Claims Court," he ruled.

Baines added, "Nothing in this ruling, however, prevents the Small Claims Court from scheduling more than one of plaintiff's cases for hearing on the same calendar." *Sutton v. First Chartered Financial*, 4-03-SC-003174 (Santa Clara Super. Ct., October 2004).

In court papers supporting his appeal for Global QA, Avilla cites the 1982 case of *Lekse v. Municipal Court*, 138 Cal.App.3d 188 (1982), in which the 2nd District Court of Appeal considered how much money landlords could collect from tenants whom they had sued for four months of back rent.

The landlords tried to get around the jurisdictional limit in small-claims court, then $750, by filing separate claims for $750 each.

The court ruled against the landlords, saying "small claims court processes cannot be used to enable certain plaintiffs to bring multiple lawsuits where only one cause of action is stated within the jurisdictional limits of the court."

Avilla argues that the situation is the same in the case of junk faxes and that plaintiffs must abide by the same jurisdictional limit when filing multiple, identical claims against the same defendant.

Sutton said the *Lekse* case is not applicable.

The landlords' case "was held to be single cause of action," he said.

"These [fax] cases were held to be multiple causes of action," Sutton said.

legal battle.

Further, Kirsch argues, defendants who lose in small-claims court can appeal their cases to Superior Court for a court trial.

Kirsch said that gives the defendants an advantage because they have two chances to win.

But attorneys for the companies that send faxes contend the tactic is unfair, because Kirsch and others may be "semi-professional plaintiffs" who have an unfair advantage against fax company employees who do not know the law.

Kirsch is unsympathetic. He said that he doesn't abuse his knowledge of the system and that getting rich is not the idea.

The point, Kirsch said, is that when companies send junk faxes, those companies steal from their recipients, costing them toner, ink and wear on equipment. He said he focuses his action against repeat offenders.

"I try not to waste my time on dentists," he said.

Attorneys for junk fax companies "are looking to the court system to protect evildoers, and the court system doesn't protect evildoers," Kirsch said.

Breer said she believes the courts eventually will decide to crack down on what she considers an abuse of the small-claims system.

"It's making an absurdity out of the regulation," she said.

But Breer admitted that she has not been successful raising the argument in court. She said the law itself is flawed because it exposes the commercial fax industry to liability while ignoring equally annoying practices such as junk mail.

Court Takes Its Time With Apple vs. Bloggers

By Craig Anderson
Daily Journal Staff Writer

SAN JOSE — A state appellate court wants to hear more before deciding whether Apple Computer can subpoena the records kept by the Internet service provider for a Web news site that published information the company says were trade secrets.

The 6th District Court of Appeal issued an order last week requesting additional briefing on the question.

The appellate panel "had the opportunity to summarily deny the petition [and allow Apple's subpoena to be served], but they chose not to do so," said Kurt Opsahl, a staff attorney at the Electronic Frontier Foundation. He represents litigant Jason O'Grady and several other bloggers who operate sites that publish information about pending product releases.

Santa Clara Superior Court Judge James Kleinberg ruled March 11 that Apple could subpoena the e-mail service provider for O'Grady's Web site, PowerPage.org, rejecting arguments that the Apple news site operators are journalists entitled to protection under the First Amendment and the state's press shield law.

The Apple news site operators appealed Kleinberg's ruling. A 6th District Court of Appeal panel asked Thursday for additional briefing and gave the parties the option of requesting oral argument.

The case of *O'Grady v. Superior Court*, H028579, has attracted keen attention from corporations concerned about protecting trade secrets, journalism groups, the Internet industry and civil libertarians.

Attorneys agreed that, given the widespread interest in the case, the 6th District Court of Appeal's call for additional briefing was expected.

"This is not a particularly surprising result," Opsahl said. "The other options seemed very unlikely."

When the attorneys argued the case before Kleinberg, the main issue was whether the operators of the Apple news sites were entitled to the same protections as traditional journalists and on the company's right to ferret out the identity of the people who leaked its proprietary information.

The focus shifted in Opsahl's appeal, and in several amicus briefs filed on behalf of newspaper and communications industry groups, to a federal statute that has nothing to do with free speech rights or trade secrets law.

The Stored Communications Act, a provision of the Electronic Communications Privacy Act of 1986, contains language that the Web site operators and a coalition of Internet companies argue forbids the disclosure of the e-mail content sought by Apple.

Apple's attorneys say in their briefs that the law does not pre-empt civil discovery and was enacted only to regulate government searches of e-mail communications.

David Eberhart, an attorney with O'Melveny & Myers in San Francisco, declined Friday to comment on the latest development in the case.