

Anti-Spam Legislation Hits Its Stride

Carol M. Morrissey

Legislation to ban unsolicited commercial e-mail, also known by that wonderful moniker, "spam," is receiving an incredible amount of attention in Congress this year. So far this session there have been hearings before House and Senate committees, markups before two House committees and a bill favorably reported by the House committee on Energy and Commerce. As those of us following the issue are aware, spam legislation has been pending before Congress for the past several years with varying degrees of success. (Please see the June 1998, CongressLine, Unsolicited Commercial Electronic Mail: Spam for the Masses.) Similar to what Supreme Court Justice Potter Stewart once famously remarked about obscenity, " But I know it when I see it." - we usually know what is spam when we open up our inboxes and consumers are tired of being inundated by it. Not only is spam an intrusive nuisance, it slows down our e-mail connections (and for those in rural areas who may be paying long distance charges to access their e-mail, time is money) and costs our Internet Service Providers (ISP's) for their policing efforts. Perhaps most frustrating of all, spammers have become craftier at disguising who they are and what they are about, which includes the proliferation of spam associated with pornographic websites.

CAN SPAM

On March 27, 2001, Sens. Burns (R-MT), Wyden (D-OR) and Lieberman (D-CT) introduced the CAN SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2001), S. 630. The bipartisan measure requires commercial e-mail to provide a "clear and conspicuous" return e-mail address and mailing address, so the recipient may "opt-out" of further communications. Internet Service Providers can bring action against spammers and the Federal Trade Commission (FTC) can bring enforcement

actions for "unfair and deceptive trade practices." Criminal penalties can be imposed if messages are intentionally sent with false address information, if the e-mail does not state that it is advertising and if the recipient is not informed of their option to refuse further messages (the penalty can go as high as \$500,000). Also, State Attorneys General can bring suits against spammers on behalf of residents. (Please see the press release by Sen. Burns on Can Spam Act at <http://burns.senate.gov/p010327a.htm> and click here for the text of S. 630.)

On April 26, 2001, the Senate Commerce committee, subcommittee on Communications (of which Sen. Burns was the Chairman prior to the change in the Senate balance of power) held a hearing on S. 630. Among the witnesses present was Eileen Harrington, the associate director of marketing practices at the FTC. Although she categorically stated that the FTC is ready to enforce anti-spam legislation, she voiced concern that an e-mail containing just a reference or link to a commercial website would not be considered unsolicited e-mail. This is a common practice among spammers, especially for pornographic websites. Please see the following for the testimony from the hearing:

<http://www.senate.gov/~commerce/hearings/0426harr.PDF>

<http://www.senate.gov/~commerce/hearings/0426cer.PDF>

<http://www.senate.gov/~commerce/hearings/0426buc.PDF>

<http://www.senate.gov/~commerce/hearings/0426moo.PDF>

<http://www.senate.gov/~commerce/hearings/0426cat.PDF>

<http://www.senate.gov/~commerce/hearings/0426pog.PDF>

<http://www.senate.gov/~commerce/hearings/0426mcc.PDF>

As of June, 2001, Sen. Hollings, (D-SC) is the new Chairman of the Senate Commerce committee. The Senator has not publicly endorsed any one bill on the issue of unsolicited e-mail, but he has stated that he plans to pursue a very pro-consumer (pro-privacy) agenda for the committee.

House Legislation - H.R. 718

H.R. 718, the Unsolicited Commercial Electronic Mail Act of 2001, was introduced by Rep. Wilson (R-NM) on February 14, 2001. H.R. 718 was marked up by the House committee on Energy and Commerce subcommittee on Telecommunications and the Internet on March 21, 2001 and the full committee marked it up and reported it out favorably on March 28, 2001. The bill as reported out by the committee contains a few controversial provisions, such as a private right of action for recipients of spam to sue and the extent of the power given to ISP's (some have called it almost a "regulatory authority") to police unsolicited e-mail. Rep. Wilson's bill also provides for civil penalties of \$500.00 for each violation which is capped at \$50,000, allows the State Attorneys General to sue on behalf of their residents (although they would not be able to regain the costs associated with these enforcement efforts) and bulk mailers must provide valid e-mail and mailing address information so that consumers may "opt-out" of further communications. (Please see the following materials referencing H.R. 718; the March 28, 2001 House Energy and Commerce committee Markup, Statement of Chairman Tauzin (R-LA) at http://energycommerce.house.gov/107/news/03282001_146.htm. Full Committee Markup materials, March 28, 2001 and March 21, 2001 Markup by the subcommittee on Telecommunications and the Internet. For the text of H. Report 107-41, April 4, 2001, click here.

On June 5, 2001, the House Committee on the Judiciary issued their report on H.R. 718 (House Report 107-41, Part II). The text of the report can be accessed [here](#).)

Rep. Goodlatte - H.R. 1017

Rep. Goodlatte (R-VA) introduced the Anti-Spamming Act of 2001 on March 14, 2001. This legislation is a simpler approach to fighting unsolicited e-mail. As introduced, it provides for criminal penalties under the Computer Fraud and Abuse Act of \$15,000 per violation or \$10.00 per message per violation (whichever is the greater amount). Computer programs that encourage unsolicited mail by hiding information to track the spammer are illegal under H.R. 1017, as is the use of fake return e-mail address information. (The text of H.R. 1017 is here. Please see the following for further information on the bill: <http://www.house.gov/goodlatte/spam.htm>.)

Wilson's Bill Gets Grilled

On May 10, 2001, the House committee on the Judiciary held a hearing on both H.R. 718 and H.R. 1017. The witnesses at the hearing were uniformly unhappy with many of the provisions of Rep. Wilson's bill, citing possible constitutional concerns over the enforcement powers granted to ISP's and private individuals using the right to sue in an indiscriminate manner. (The text of the testimony at the hearing is at: http://www.house.gov/judiciary/crews_051001.htm, http://www.house.gov/judiciary/lackritz_051001.htm, http://www.house.gov/judiciary/lane_051001.htm, http://www.house.gov/judiciary/misener_051001.htm.)

Two weeks later, on May 23, 2001, the House committee on the Judiciary marked up H.R. 718 and approved a gutted and pared down version of the bill reported out by the House committee on Energy and Commerce. Essentially, the House Judiciary committee substituted the Anti-Spamming Act for H.R. 718, eliminating its major provisions - the private right of action, the right of ISP's to sue spammers in state or federal court and the authority of the FTC and the State Attorneys General to enforce the anti-spamming policies of the ISP's. Currently in the bill, which is similar to H.R. 1017, are provisions making it illegal to send e-mails with "materially false or misleading" header information, with violators subject to fines and possible imprisonment. ISP's can sue for actual and statutory damages (\$5.00 per violation capped at \$1 million.) and sexually explicit e-mail

advertisements must place a mark in the subject line (to be designated by the Attorney General) as a type of "warning label." (Please see the following press release on the May 23, 2001 markup at: http://www.house.gov/judiciary/news_52301.htm.)

Showdown Time

The two House committees have radically different approaches to dealing with unsolicited e-mail. The House Judiciary bill is narrow, focusing on fraudulent unsolicited mail. The Energy and Commerce version is more consumer friendly, allowing for private rights of action and support for individuals through the Attorneys General. All of this activity has set the stage for a classic High Noon showdown that will ultimately be resolved by the House committee on Rules, which will negotiate with the committee members and the bill sponsors towards an agreement which can be brought to the House floor. When this will occur is all up in the air right now, but the sponsors are hoping for a resolution, and the sooner, the better.

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