

January 8, 2004

## Is Spam "Canned"?

### Businesses Beware of New Rules for Sending Commercial E-mail in the United States and the EU

If you use e-mail to contact consumers, beware. Federal legislation aimed at stopping unsolicited commercial e-mail ("spam") has just been enacted and may require changes to your e-mail marketing practices.

On December 16, 2003, President Bush signed into law the **Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003** or the "**CAN-SPAM Act of 2003**" (PL 108-187). CAN-SPAM makes it unlawful to initiate the transmission of commercial e-mail if the message does not contain a functioning return electronic mail address or some other Internet-based mechanism that allows the recipient to "opt-out" of receiving future commercial e-mails. CAN-SPAM became effective on **January 1, 2004**.

While previously there has been a hodgepodge of state laws dealing with spam, CAN-SPAM represents the first federal legislation designed to create a uniform playing field for businesses in all states. CAN-SPAM preempts many of the anti-spam provisions of state laws, including a California law that had been set to go into effect on January 1, 2004. The California law would have been the most prohibitive anti-spam legislation in the United States, called for fines of up to \$6 million or jail terms of up to five years for some spammers.

On a related note, companies that send business-related e-mail messages from or to the countries in the European Union ("EU")<sup>1</sup> should be aware that each EU Member State was obligated by October 2003 to implement the **Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector** ("**Directive on privacy**

**and electronic communications**"), which also imposes restrictions on the use of e-mail for commercial purposes. Implementing legislation has already become effective in the United Kingdom and several other EU Member States.

#### CAN-SPAM

##### What is Regulated— What Is A "Commercial E-mail"?

A "**commercial e-mail**" is defined as any e-mail message whose primary purpose is the commercial advertisement or promotion of a commercial product or services (including content on an Internet Web site operated for a commercial purpose. It does **not** include "transactional or relationship messages."

A "**transactional or relationship message**" is an electronic mail message whose primary purpose is:

- to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- to provide: (1) notification concerning a change in the terms or features; (2) notification of a change in the recipient's standing or status; or (3) account balance information or other type of account statement, with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving

<sup>1</sup> The Member States of the EU are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the U.K. Note that the Treaty of Accession 2003 was signed in April 2003 with respect to accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the EU. These "accession countries" are set to join on May 1, 2004. Bulgaria and Romania hope to do so by 2007.

the ongoing purchase or use by the recipient of products or services offered by the sender;

- to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction, which the recipient has previously agreed to enter into with the sender.

## How Can Commercial E-mail Be Sent?

CAN-SPAM makes it unlawful to initiate the transmission of “commercial e-mail” unless it contains certain elements. **Commercial e-mail** must contain the following when it is transmitted:

- A **functioning return e-mail address** or other Internet-based mechanism, clearly and conspicuously displayed, that: (1) recipient may use to submit a reply e-mail or other form of Internet-based communication requesting not to receive future commercial e-mail from that sender (an “**opt-out**”); and (2) remains capable of receiving such opt-outs for no less than 30 days after the transmission of the commercial e-mail;
- Clear and conspicuous **notice of the opportunity to decline to receive** further commercial e-mails from the sender;
- Clear and conspicuous **identification that the message is an advertisement or solicitation**, unless the recipient has given prior affirmative consent to receive the e-mail. If the commercial e-mails contain sexually oriented material, specific notices to be prescribed by the Federal Trade Commission (FTC) must also be included; **and**
- A valid physical **postal address** for the sender.

## What is Prohibited?

CAN-SPAM makes it unlawful to:

- **Initiate the transmission** of a commercial e-mail to a recipient who has opted out of receiving such, or any commercial e-mails, from the sender more than 10 days after the sender has received the opt-out.
- **Sell, lease, exchange, or otherwise transfer or release the e-mail address** of a recipient who has opted out of receiving commercial e-mails from the sender.
- **Initiate the transmission** of commercial e-mails if the sender knows or reasonably should know that the **subject header** of the e-mail is **likely to mislead the recipient** about a material fact regarding the contents or subject matter of the e-mail.

- **Initiate the transmission** of commercial e-mails **using e-mail addresses obtained by automated means** and generated by combining names, letters, or numbers into numerous permutations.

Businesses should also take a look at any agreements they have with service providers or business partners who provide advertising services and may send e-mails on their behalf. Businesses can be subject to criminal and civil liability under CAN-SPAM if they **promote**, or allow the promotion, of their goods or services in a **commercial e-mail** that does not contain clear and conspicuous notice of an opt-out opportunity, an identification of the e-mail as an advertisement or solicitation, or a postal address, if the businesses:

- know, or should reasonably know, that their goods or services were promoted in such a commercial e-mail;
- received or expect to receive economic benefit from such promotion; **and**
- took no reasonable action to prevent the transmission or detect and report the transmission of the commercial e-mail to the FTC.

## Other Provisions

In addition, the new law also directs the FTC to consider the establishment of a nationwide marketing Do-Not-E-mail registry, and prohibits other uses of computer systems and e-mails.

Specifically, CAN-SPAM also prohibits knowingly:

- accessing protected computers without authorization and intentionally initiating the transmission of multiple commercial e-mails from such computers;
- using protected computers to relay or retransmit multiple commercial e-mails, with the intent to deceive or mislead recipients;
- materially falsifying header information in multiple commercial e-mails and intentionally initiating the transmission of such messages;
- registering five or more e-mail accounts or online user accounts or two or more domain names, using information that materially falsifies the identity of the actual registrant, and intentionally initiates the transmission of multiple commercial e-mails from any combination of such accounts or domain names; or
- falsely representing oneself to be the registrant or the legitimate successor in interest to the registrant of five or more IP addresses, and intentionally initiating the transmission of multiple commercial e-mails from such addresses.

## Preemption of State Law

The California spam law, California Senate Bill 186, was to prohibit, in part, sending even a single e-mail advertisement or promotional message from California or to a California e-mail address unless the sender has first received an explicit opt-in from the addressee or unless there was a “preexisting commercial relationship”<sup>2</sup> with the sender. **CAN-SPAM preempts** the California law and other state laws that expressly regulate “the **use of electronic mail to send commercial messages**,” except to the extent that any law prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. CAN-SPAM does not preempt state laws that (1) are not specific to electronic mail, including state trespass, contract, or tort law; or (2) other state laws to the extent that they relate to acts of fraud or computer crime.

Thus, anyone who uses a computer or computer network with the intent to falsify or forge e-mail transmission information or other routing information in connection with the transmission of unsolicited bulk electronic mail through a computer network, or knowingly sells, gives, or otherwise distributes software that is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information may still be found **criminally liable** under state law. For example, Virginia recently announced the prosecution of two significant spammers under its state criminal law, and has taken the position that the CAN-SPAM Act would not preempt the state law under which the spammers are being prosecuted.

## Damages and Penalties

In addition, CAN-SPAM amends the federal criminal code to subject to a **fine, imprisonment, or both** any person who: (1) accesses a protected computer without authorization and intentionally initiates the transmission of multiple commercial electronic mail messages from or through such computer; (2) uses a protected computer to relay or retransmit multiple messages, with the intent to deceive or mislead recipients or any Internet access service as to the origin of such messages; (3) falsifies header information in multiple messages and intentionally initiates the transmission thereof; (4) registers, with false identifying information, for five or more electronic mail accounts or online user accounts or two or more domain names and intentionally initiates the transmission of multiple messages from such accounts or domain names; or (5) falsely represents the right to

use five or more Internet protocol addresses and intentionally initiates the transmission of multiple messages from such addresses.

CAN-SPAM also contains, among other things, a prohibition against using automated means to register for multiple e-mail accounts for the transmission of spam and against relaying or retransmitting an unlawful unsolicited message.

CAN-SPAM sets forth a maximum civil penalty of \$1 million for knowing and willful violations of the Act.

CAN-SPAM also permits civil enforcement of the Act by the states.

## Remember, Sending Unsolicited Faxes Is Actionable Under Federal and State Laws

With all the attention about spam, marketers can easily forget that depending, on whether a state has enacted implementing legislation, it is improper to send unsolicited faxes to persons or businesses unless you have a customer relationship with the recipient or the recipient has otherwise agreed to receive the faxes. Many individual actions and class actions have been filed against companies and service providers for sending “spam” faxes.

## SPAM IN THE EUROPEAN UNION

**The Directive on privacy and electronic communications** extends controls on unsolicited direct marketing in the EU to all forms of electronic communications including unsolicited commercial e-mail and SMS/text messages to mobile telephones. Spam and SMS will be subject to a prior consent requirement. Companies will need to have the advance consent of the receiving party prior to sending unsolicited direct marketing electronically, except in the context of an existing customer relationship, where companies may continue to email or SMS to market their own similar products on an “opt-out” basis. The Directive is similar to the California legislation, but has broader application beyond just e-mail to other forms of electronic communication, such as text messages and facsimiles.

Each EU Member State has enacted, or is in the process of enacting, implementing legislation. The **UK’s** implementing legislation went into effect on **December 11, 2003**. In addition to the UK, the Directive on privacy and electronic communications has been implemented in Austria, Denmark, Germany, Ireland, Spain (in part), and Sweden.

---

<sup>2</sup> A “preexisting or current business relationship” was defined as existing when the intended recipient of a commercial e-mail (a) has made an inquiry and has provided his or her e-mail address, or (b) has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

The UK's Privacy and Electronic Communications (EC Directive) Regulations 2003 require substantial changes to commercial electronic communication direct marketing practices that were previously permitted. The Regulations prohibit direct marketing to individuals by electronic means unless they have given consent in advance, thus, generally requiring an **opt-in** prior to sending promotional e-mails. However, there is an exception for communications where:

- the sender has **obtained** the contact details **in the course of a sale** or negotiations for a sale of a product or service to the recipient,
- the **marketing is** in respect of **similar products and services only**,
- the recipient was given the opportunity to refuse (**opt out of**) the marketing process by questions **at the time the details were collected, and**
- the recipient is given the opportunity to refuse (**opt out**) in **each subsequent communication**.

The Regulations also prohibit commercial e-mail that contains false information about the sender.

The Regulations provide for an action for actual damages suffered as a result of contravention.

## CONCLUSION

Organizations sending commercial or promotional e-mails of any kind should:

- determine what their commercial e-mail practices are, including the practices of their service providers;
- evaluate whether their current practices in relation to the dispatch of e-mails (and faxes) comply with relevant legislation in the **country of receipt** as well as the **country of transmission**;
- determine whether their recipients of commercial e-mails have opted-in or otherwise **consented** to receive advertising by e-mail, and ensure that, on a going-forward basis, this can be tracked;
- consider including an **explicit** advertising **opt-in** on order forms and web pages, or other communications with clients; and
- include contact details and an **opt-out** clause in all commercial e-mails and advertising newsletters.

We are ready to help with your company's anti-spam compliance. Seyfarth Shaw has extensive experience with spam and privacy law compliance matters. Please contact Bart Lazar at (312) 269-8986, Joseph Lanser at (312) 269-8557, or Inna Tsimerman at (312) 269-8557 if you have any questions or concerns.

---

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact the firm's Litigation Practice Group.

### ATLANTA

One Peachtree Pointe  
1545 Peachtree Street, N.E., Suite 700  
Atlanta, Georgia 30309-2401  
404-885-1500  
404-892-7056 fax

### BOSTON

Two Seaport Lane, Suite 300  
Boston, Massachusetts 02210-2028  
617-946-4800  
617-946-4801 fax

### CHICAGO

55 East Monroe Street, Suite 4200  
Chicago, Illinois 60603-5803  
312-346-8000  
312-269-8869 fax

### HOUSTON

700 Louisiana Street, Suite 3850  
Houston, Texas 77002-2731  
713-225-2300  
713-225-2340 fax

### LOS ANGELES

One Century Plaza  
2029 Century Park East, Suite 3300  
Los Angeles, California 90067-3063  
310-277-7200  
310-201-5219 fax

### NEW YORK

1270 Avenue of the Americas, Suite 2500  
New York, New York 10020-1801  
212-218-5500  
212-218-5526 fax

### SACRAMENTO

400 Capitol Mall, Suite 2350  
Sacramento, California 95814-4428  
916-448-0159  
916-558-4839 fax

### SAN FRANCISCO

101 California Street, Suite 2900  
San Francisco, California 94111-5858  
415-397-2823  
415-397-8549 fax

### WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500  
Washington, D.C. 20006-4004  
202-463-2400  
202-828-5393 fax

### BRUSSELS

Boulevard du Souverain 280  
1160 Brussels, Belgium  
(32)(2)647.60.25  
(32)(2)640.70.71 fax