

FTC offers CAN-SPAM e-mail clarification



By Bart
A. Lazar

Even though the CAN SPAM Act is a bit more than a year old, it is clear that it has not accomplished the goals of Congress or the Federal Trade Commission. Most Internet users are still awash in spam, and the typical law-abiding marketer is still full of questions as to how to comply in a variety of situations. However, the FTC recently has done more to enforce the law against the spammers in the black hats and provide some guidance on how those of us wearing white

MARKETING AND THE LAW

hats can reasonably comply with the Act. Since e-mails can promote more than one product and can be used for many purposes, the FTC's guidance is important to understand how to craft and send e-mails that are CAN SPAM-compliant.

There can be one "sender" for advertisements. Because the Act defined the term "sender" of a commercial e-mail quite broadly, some diversity of opinion had arisen on who had to provide opt-out mechanisms in situations in which an e-mail had dual or multiple senders. For example, when one company (Company A) pays or otherwise compensates another company to send an e-mail (Company B) to its members, both companies could be considered senders even though Company A did not even know who the recipients were. Also, companies in the Company B role were asking advertisers like Company A to provide

their own opt-out lists so it could scrub out the opt-outs before sending the e-mail.

Thus, companies such as Company A have been asked by companies like Company B for their opt-out lists, even though Company A does not know the identity of any of the recipients of Company B's communications. Creative ways of structuring the transactions in order to deal with this situation exist—such as having Company A appoint Company B as its service provider, or using a third party to scrub the lists—but interpreting the Act to require Company A to provide an opt-out list just did not make sense.

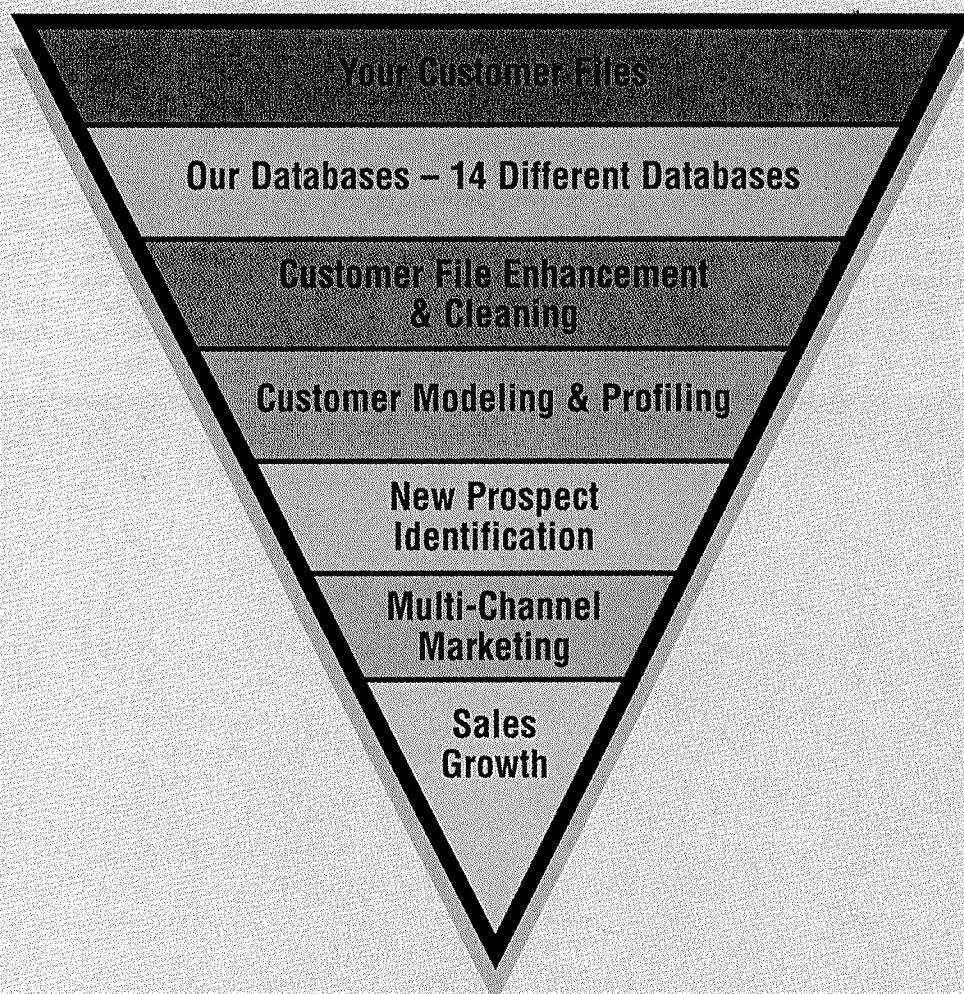
In the off-line world, the situation would be akin to a retailer or service company sending a catalog or direct mail piece featuring an ad for a perfume the retailer carries or a hotel chain the service company co-markets, and asking the perfume company or hotel chain for its opt-out list before sending the catalog or direct mail piece to customers. As the Direct Marketing Association put it, "The treatment of each advertiser in a single e-mail message containing multiple advertisements as a 'sender' (in this type of situation) would result in extremely complicated compliance obligations under the Act, including an unworkable suppression environment." Luckily, the FTC staff has clarified its view, agreeing that companies like Company A are not senders.

The DMA posited an example in which the recipient of an e-mail provided consent to Company B; the e-mail communication contained one or more advertisements promoting the products or services of Company A, which did not obtain the consent to send the e-mail communication; Company B follows the requirements of the Act in terms of providing and honoring opt-outs; and Company A does not know the exact e-mail addresses of the recipients.

Under those circumstances, Eileen Harrington, associate director of the FTC's division of marketing practices, agreed in a staff opinion letter (a formal but not binding written interpretation of an Act), only Company B would be viewed as the sender of the e-mail, and Company A would not be required to provide its own opt-out mechanism or valid postal address, or process and honor opt-out requests related to the e-mail. Company B, of course, must comply fully with the Act and Company A, as an initiator of the e-mail must make sure that the e-mail message does not contain false or misleading transmission information or deceptive subject headings, and make sure that Company B includes a proper opt-out for Company A.

The staff letter also recommended that best practices be followed, including making sure that Company B's name appears in the "From" line of the e-mail, and that Company B, rather than a third party, be the company that provides the e-mail marketing list. While a staff opinion letter is not legally binding on the FTC, it can be reasonably relied upon, and demonstrates that when dealing with legitimate marketers, the FTC may be willing to interpret the Act in a practical manner.

Be careful in creating subject lines and placing e-mail content: An e-mail's primary purpose will be determined from the recipient's standpoint. The FTC recently issued regulations that acknowledge the many possible purposes to an e-mail. Determining the primary purpose of an e-mail is important because if the primary purpose of an e-mail is not the commercial advertisement or promotion of a commercial product or service, the e-mail is not a commercial electronic mail message as defined by the Act. As I noted last year, e-mails whose primary purpose



MARKETZONE®

by Donnelley Marketing®

For a **FREE** Demo of this powerful tool in your office,
Call David Hendricks, Senior VP of Sales, at 866-313-5394
or Email: dave.hendricks@donnelley.infoUSA.com

Donnelley®
an infoUSA Company MARKETING
470 Chestnut Ridge Rd. • Woodcliff Lake, NJ 07677

Phone: (866) 313-5394
Fax: (201) 476-2415
E-mail: dave.hendricks@donnelley.infoUSA.com
Web Site: www.dblink.com

LAZAR / From preceding page

is "transactional or relationship" in nature, or to provide information (such as e-mail newsletters), should not be considered commercial e-mails either.

The regulations state that the FTC will analyze the primary purpose from the point of view of the recipient of the e-mail. In cases in which an e-mail has multiple purposes, if a recipient reasonably interpreting the subject line of the message would conclude that the message contains commercial content, or the body of the message would likely conclude that the primary purpose of the message is commercial, the primary purpose of the e-mail will be viewed as commercial in nature.

This test is not as helpful as it could be because the reaction of a consumer is subjective. However, such a test is similar to those used by the FTC and Better Business Bureau analyze advertising, so it is at least

consistent. Therefore, for a significant e-mail campaign, or if a marketer wants to try a standardized e-mail format, a survey or focus group could test consumer reaction and substantiate an interpretation of the primary purpose of the e-mail.

Other than engaging in such research, marketers should take care in how they frame their subject lines since the FTC will analyze the subject line and consumers use the subject line to decide whether to open or delete an e-mail. If the subject line says, "Special offer from X Company for Y Company subscribers," it seems likely that the FTC likely ignore the placement of the special offer within the text of what might otherwise be viewed as a "transactional" commu-

nication. Since marketers like to use these types of subject lines to grab the attention of a recipient, it may be more prudent for companies who would like to make their subject lines more "commercial" to treat their communications as "commercial" even though such communications are being sent to a subscription list.

The FTC has also made it clear that if the subject line is not commercial, it will look at the placement and prominence of the content of an e-mail, suggesting that even if the subject line is noncommercial, such as "Great News for Y Company Members," if the content is solely an advertisement, or if an advertisement appears before transactional or relationship content, that will be viewed as a commercial e-mail. Therefore, it behooves companies who are sending transactional or relationship messages to put all

or a substantial part of the transactional or relationship content (which should be substantial in either volume or nature) before any commercial content.

While these interpretations and rules may not be as clear or as permissive as we would like, they do show that the FTC may continue to be receptive to the idea of adapting its interpretations to market realities. Also, the Act continues to permit legitimate, creative, successful direct e-mail marketing campaigns. Just be careful out there. ■

Bart A. Lazar is a partner who specializes in counseling, business transactions and litigation in intellectual property, advertising and promotions, privacy, Internet and related matters for Chicago-based Seyfarth Shaw LLP. He can be reached by e-mail at BLazar@seyfarth.com or news@ama.org.

ROUNDUP / From page 3

effects, and a related regulatory crackdowns on DTC marketing.

Clicks yield cash

■ Online advertising is becoming a major economic force, as demonstrated by Yahoo! Inc. and Google Inc.'s blockbuster first quarter financial results.

Advertisers continue to boost Sunnyvale, Calif.-based Yahoo! Inc.'s financial results each quarter: In late April, the online portal company announced first quarter earnings of \$204.6 million, more than double the result of last year when net income was \$101.2 million, on first-quarter revenue of \$821 million (after subtracting the commissions paid to other Web sites in Yahoo!'s ad network), an increase of 49% from the year earlier period.

Almost all of the nation's 200 largest advertisers use Yahoo! to market their products and services, according to Yahoo! Chairman Terry Semel.

Yahoo!'s No. 1 competitor, Google Inc. of Mountain View, Calif., came in with first quarter earnings of \$369.2 million, compared with net income of \$64 million for the same period last year, and first-quarter revenue of \$794.5 million after subtracting commissions paid to other sites in its advertising network. Google makes almost all of its money from text-based ads tied to search requests.

Analysts speculate that a new ad avenue for the two search engines may include TV and mobile phones.

Windows becomes clearer

■ Microsoft Corp. rolled out its biggest, most expensive ad campaign to date in late April, but it's not touting a new product. The 15-month international effort instead hopes to revitalize interest in an already dominant product: Windows XP.

The campaign focuses on specialized tasks users can take advantage of with the Windows XP operating system that they may not necessarily know about, such as making music or learning astronomy. These little-known, oft-unused operations have been a target of critics because, they say, the company has underpromoted them.

Scott Lennard, Microsoft's advertising director, declined to comment on the cost of the campaign. However, he did say it would be the largest in the corporation's history. When XP was launched in 2001, the Redmond, Wash.-based software maker spent \$200 million on a four-month marketing campaign.

Microsoft plans to roll out a new operating system, code-named Longhorn, sometime in late 2006. ■

—Nikki Hopewell, Managing Editor

PANEL
XXL
ONE SIZE FITS ALL
XXL TTG XXG

Now with more room to give you an even better fit.

© 2005 Greenfield Online, Inc.

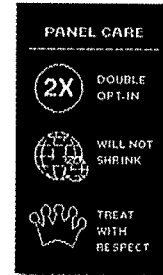
As a researcher, you want to be certain we have the panel size to deliver the qualified respondents you want. Your projects are dependent on it. Your clients demand it. And with Greenfield Online, you know you'll get it.

We're equipped to offer you expanded capabilities and a global panel capacity that rivals any in the industry. Our panel today is one of the largest, most demographically diverse and best positioned for continued growth.

We offer high-caliber respondents in specialties such as health care, teens and business-to-business.

And we approach panel maintenance with the same care as recruitment.

With Greenfield Online, you can expect prompt turnaround, authentic responses from qualified respondents and, ultimately, better results. Contact us with any size project at www.greenfield.com or call us at 1.866.899.1015.



Greenfield
ONLINE®
stay ahead.™

United States ■ Toronto ■ Amsterdam ■ London ■ Munich ■ Paris