
SPAM BE DAMMED

The Battle Over Junk E-Mail

BY D. DOWD MUSKA

While the Internet has empowered computer users in ways that were once unimaginable, cyberspace has not come without costs. E-mail, for example, has enabled advertisers to cheaply hawk their wares to any individual with an electronic address. Unsolicited Commercial E-Mail (UCE), more commonly known as "spam" (after a classic Monty Python sketch), is pervasive—for some time now, members of the online community have been receiving as many as 15 junk e-mails a day. Sprinkled amidst the subject lines of a user's professional and personal messages are inducements such as "hey guys ... have some FUN" and "The Ultimate Stock Report." More clever enticements, such as "RE: Your Order," often compel users to read the full message—only to discover it has nothing to do with a previously placed order.

Vociferous arguments prevail in cyberspace, but if the online community agrees about one thing, it agrees that spam is a scourge. With hatred of UCE so widespread, many wonder why spammers even bother.

"You'd think that any business model that depends on alienating 99 percent of your target market would be guaranteed bankruptcy," theorized Stanton McCandlish of the Electronic Frontier Foundation (EFF). But a one percent response rate might just be enough. The cost of a massive e-mailing list is small—a file containing one million electronic addresses can be obtained for as little as \$11.

"Wildcat entrepreneurs," wrote *New York Times* reporter George Johnson, "selling everything from software to sex have learned that it is so cheap to automatically crank out millions of messages that just a few sales can easily cover the cost."

Spam shouldn't be dismissed as a mere annoyance. In testimony submitted to the Federal Trade Commission, Paul Hoffman of the Internet Mail Consortium noted the key distinction between spam and traditional junk mail: "UCE shifts almost all the costs of the message onto the recipient." Junk mail senders must pay postage for each solicitation, but junk e-mailers face no such per-unit cost. Once spammers blast their UCE into cyberspace, Internet Service Providers (ISPs) bear the burden of delivering the messages to recipients. This clogs ISPs' servers and decreases the speed and efficiency of the Internet itself. Receivers of spam must then prune the unwanted messages—a cost which can add up, especially for Internet users who pay for the amount of time they spend online. (Residents of isolated communities in the West, who also incur long-distance charges to access the Internet, pay even more.)

"Multiply these costs by the hundreds of thousands or millions of users that many pieces of UCE go to," Hoffman wrote, "and you can see that the cost to recipients is quite high." His organization even contends that

"spam frustration" prompts many to abandon e-mail, thus curtailing the medium's ability to reach its full potential.

With the population of cyberspace growing exponentially, it's little wonder that politicians are hearing the cries of the spammed. Surprisingly, Nevada was the first state in the union to adopt an anti-spam law—signed by Governor Miller last year, it became effective July 1. (Due to the long delay between passage and adoption of the law, Washington state's anti-spam legislation outpaced Nevada's, and took effect June 11.) SB13 gave Nevadans the ability to sue for civil damages of \$10 per piece of unwanted spam.

Sponsored by Senate Majority Leader Bill Raggio, SB13 went through a number of revisions before being passed overwhelmingly by both the Senate and Assembly. But Nevadans who expect to be freed from spam are likely to be disappointed—the law is stuffed with loopholes. "The Direct Marketing Association gutted the measure," claimed David H. Kramer, a California attorney who lobbied in support of the initial draft of SB13. Kramer's biggest complaint? The revised version absolves spam which includes both the address and phone number of the marketer and a way for recipients to request no further solicitations.

The loose language of SB13 angers others. Nevadans who have a "preexisting business relationship" with a company are considered, under the law, legitimate recipients of spam from that company. For many, that's the rub—just what constitutes a preexisting business relationship?

Kristina Pfaff-Harris of Great Basin Internet Services expressed concern over this vagueness to the *Reno News & Review*: "Does it mean if I e-mail you an ad for a new computer system because I've heard you were looking for one, and then you get mad at me ... you can sue me for spamming you?"

"It's clearly unconstitutional and inconsistent," added Gary Peck, executive director of the ACLU of Nevada. Peck told *Nevada Journal*, "Our local cooperating attorneys, regional attorneys and national attorneys have reviewed the legislation and we continue to discuss the possibility of bringing a challenge."

So the nation's first legislative foray into spam regulation satisfies neither anti-spam crusaders nor First Amendment watchdogs. There's no doubting that the law is an example of the weakness of legislation based primarily on good intentions, but its passage might also be due in part to Silver State legislators' flimsy grasp of the complexities of the Information Age. A survey conducted by the legislature's information systems office yielded some interesting data on how often legislators use the laptop computers purchased for them at taxpayer expense. Thirty-one of 63—including Raggio and Senate Minority Leader Dina Titus—turned on their computers only once

during the first seven weeks of the 1997 session. Twenty-six legislators complained they did not receive adequate training—these were user-friendly laptops, remember—and 25 asked to have their electronic correspondence printed out and mailed to them, thus defeating the very purpose of e-mail. If the survey is reliable, it is safe to assume that an average 10-year-old knows more about the subtleties of spam than Nevada's legislators.

Politicians in Washington are no different. "Congress isn't in the habit of hesitating in the face of its own ignorance," notes the Cato Institute's Solveig Bernstein, and indeed, there are several anti-spam bills kicking around Capitol Hill. Rep. Christopher Smith's "Netizen Protection Act" at this point appears to be the frontrunner, since it is the only bill which bans spam outright. The measure applies the preexisting federal ban on junk faxes—a law upheld by the courts—to the Internet. Separate proposals by Sens. Frank Murkowski and Robert Toricelli were recently combined into one bill, which like Nevada's existing law essentially sets up government-approved rules by which spammers can spam.

Gung-ho UCE warriors, including the group Citizens Against Unwanted Commercial E-Mail (CAUCE), have lined up behind Smith's bill. Most seem to agree with the assessment of Ken Wolfe, the congressman's press secretary: "Basically, our bill is a clean, straight-ahead bill that's supported by people who want to eradicate junk e-mail—not by people who want to provide junk e-mail. You can tell what the meaning of a bill is by those who support it."

That's a nice sound bite, but it is a mistake to view participants in the spam debate in such Manichean terms. Not every critic of anti-spam legislation is a shill for the Direct Marketing Association. The free-speech issues inherent in spam restrictions or bans are disturbing enough. But there is ample evidence that the private sector will devise more effective anti-UCE techniques than governments—methods which leave Internet consumers in control, not cyber-bureaucrats. With hatred of spam reaching a fever pitch, it's obvious that ISPs have an economic incentive in fighting UCE. *Reason* Washington Editor Michael W. Lynch reports that the Center for Democracy and Technology is coordinating "workshops in which major stakeholders, from consumer and industry activists to major corporate players such as America Online, MCI and AT&T, are exploring solutions to the problem." Lynch also notes that the EFF is doing the same.

The biggest Internet player isn't limiting itself to strategy sessions, though. In the fall of 1997 AOL began to aggressively target spammers who use its system. As many as 30 percent of the e-mail received by AOL members is UCE, and constant customer complaints prompted the provider to launch a legal fusillade.

So far, purveyors of UCE are losing badly. Arguing that spammers engage in fraud and misappropriation, and as a result its reputation and business interests suffer, AOL has won several injunctions against bulk e-mailers that continued to use its network despite being asked to stop. Last December AOL agreed to a settlement with a Las Vegas company which had infiltrated AOL to advertise

the live stripteases available on its website. Over the Air Equipment, Inc. agreed to pay a "substantial but undisclosed" fee—the agreement was one of the first of its kind.

Many other ISPs have joined AOL. In March Cyber Promotions, perhaps the most hated distributor of UCE, settled a lawsuit brought by Earthlink Network, Inc. for \$2 million. The settlement even brought about the defection of the most famous spammer of them all, Sanford Wallace. The "King of Spam" has agreed to assist Earthlink's lawsuits against two other distributors of UCE.

While the legal front has yielded encouraging results, in the long run technology itself is likely to solve the problem it created. In March, Sendmail, the most popular e-mail routing program, announced that the latest version of its software is capable of forcing spammers to disclose their real address—a powerful weapon, since so often UCE's points of origin are masked or simply bogus. Sendmail's new version also provides an automatically updated blacklist of addresses used by bulk e-mailers.

The future looks even brighter. Technology commentator Esther Dyson has predicted the development of "smart" e-mail systems—programs which allow users to charge a fee for unsolicited e-mail. If spammers had to pay for each message they sent, there's little doubt that UCE would slow to a trickle. By the same token, Bernstein believes "spam would die" if ISPs started charging customers for sending bulk e-mails.

With spammers under the gun legally and financially—and software developers striving for solutions to UCE—our children may yet live in a world without spam. That's why legislation at the federal or state level is so silly. But there is a darker side to feel-good Internet policy of this sort—anti-spam laws might establish a dangerous precedent. By joining the fight against UCE, Congress could establish the toehold in cyberspace denied it when the Supreme Court overturned 1996's ill-conceived Communications Decency Act. The CDA was universally reviled by the online community, so asking for federal help against spam could give Congress the wrong impression. "Once invited to exert its authority in cyberspace," warns Lynch, "Congress is not likely to leave."

In the spar over spam, the principle that legislators have no business either banning or legitimizing UCE is often lost. It shouldn't be. The market will provide an adequate response—provided government gets out of the way. ♦

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Electronic Frontier Foundation: <http://www.eff.org>

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