

HAS SPAM BEEN CANNED? CONSUMERS, MARKETERS, AND THE MAKING OF THE CAN-SPAM ACT OF 2003

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I don't want ANY spam!
-Monty Python¹

spam: *n.* Unsolicited e-mail, often of a commercial nature, sent indiscriminately to multiple mailing lists, individuals, or newsgroups; junk e-mail.²

INTRODUCTION

On January 1, 2004, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 took effect.³ The “CAN-SPAM Act” is the first attempt by the United States Congress to regulate unsolicited commercial e-mail (UCE), commonly called “spam.”⁴ Hailed by its supporters as a landmark victory against a costly and invasive Internet pest, the Act marks the end of six years of legislative stalemate in which consumer groups, business interests, and ideological partisans played tug-of-war over how best to craft a national response to the apparent scourge of spam.⁵

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1. See *The Spam Sketch From the Second Series of “Monty Python’s Flying Circus” and “Monty Python’s Previous Record*, available at <http://bau2.uibk.ac.at/sg/python/Scripts/TheSpamSketch> (last visited Nov. 6, 2004).

2. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1665 (4th ed. 2000).

3. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699, 2719 (2003) (to be codified at 15 U.S.C. §§ 7701–7713) [hereinafter CAN-SPAM Act of 2003].

4. The moniker was “probably inspired by a comedy routine on the British television series *Monty Python’s Flying Circus*, in which the word is repeated incessantly.” THE AMERICAN HERITAGE DICTIONARY, *supra* note 2.

5. See Declan McCullagh & Paul Festa, *Congress OKs Antispam Legislation*, CNET NEWS, Dec. 8, 2003, at <http://news.com.com/2100-1028-5116940.html>; Declan McCullagh, *Spam Fight Divides on Party Lines*, CNET NEWS, July 9, 2003, at <http://news.com.com/2100-1028-1024385.html>; Declan McCullagh, *Spam Stuck in*

By all accounts, UCE is a major problem for both Internet consumers and businesses.⁶ Internet experts estimate that spam constitutes as much as sixty-five percent of all e-mail processed worldwide.⁷ The overall cost to consumers and to the economy in general—including lost productivity costs associated with receiving, sorting, storing, and discarding unwanted e-mail—is estimated to be in the billions of dollars each year.⁸

The Act makes it illegal to send certain types of UCE under certain conditions,⁹ and consumers now have the right to demand that a particular sender discontinue sending them UCE;¹⁰ to effectuate this right, senders of UCE must now provide a functional “opt-out” mechanism.¹¹ Commercial and pornographic e-mails must be conspicuously labeled, and all UCE must come from a genuine e-mail address and Internet domain.¹² The Act creates civil and criminal sanctions for sending UCE meant to deceive recipients as to its source or content or which fail to include proper notifications.¹³

Despite this new regulatory regime, however, many anti-spam advocates and consumer groups have been strongly critical of the Act.¹⁴ They claim that the Act serves corporate interests at the expense of consumers.¹⁵ Instead of taking bold action to stop spam, argue the critics, Congress bowed to the advertising and marketing lobby and legitimated a vast amount of UCE. They accuse Congress of essentially legalizing unsolicited e-mail.¹⁶ Supporters of the legis-

Legal Time Warp, CNET NEWS, Sept. 30, 2003, at <http://comment.zdnet.co.uk/declanmccullagh/0,39020670,39116776,00.htm>.

6. See, e.g., John Fontana, *Tallying the True Cost of Spam*, NETWORK WORLD FUSION, Nov. 17, 2003 (discussing costs of spam imposed on Los Angeles law firm), at <http://www.nwfusion.com/news/2003/1117spamcost.html>.

7. Stefanie Olsen, *U.S. Cooks Up Most Spam*, CNET NEWS, Aug. 24, 2004, at http://news.com.com/2100-1024_3-5322803.html.

8. See Fontana, *supra* note 6.

9. CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699, 2703–08 (2003) (to be codified at 15 U.S.C. §§ 7703, 7704).

10. *Id.* 117 Stat. at 2700, 2707–08 (to be codified at 15 U.S.C. §§ 7701, 7704).

11. *Id.* 117 Stat. at 2708 (to be codified at 15 U.S.C. § 7704).

12. *Id.* 117 Stat. at 2707, 2709 (to be codified at 15 U.S.C. § 7704).

13. *Id.* 117 Stat. at 2703–05, 2711–15 (to be codified at 15 U.S.C. §§ 7703, 7706).

14. See, e.g., Declan McCullagh, *Bush OKs Spam Bill—But Critics Not Convinced*, CNET NEWS, Dec. 16, 2003, at http://news.com.com/2100-1028_3-5124724.html?tag=mainstry; David Berlind, *Score One for the Spammers: CAN SPAM Bill to Become Law*, TECH UPDATE, Nov. 30, 2003, at http://techupdate.zdnet.com/techupdate/stories/main/Score_one_for_the_spammers_print.html.

15. See, e.g., Jennifer 8. Lee, *Bush Signs Law Placing Curbs on Bulk Commercial E-Mail*, N.Y. TIMES, Dec. 17, 2003, at C4.

16. Jonathan Krim, *Anti-Spam Act Signed But Some Are Skeptical*, WASH. POST, Dec. 17, 2003, at A18.

lation claim that the act will greatly aid consumers; Senator Conrad Burns (R-Mont.), one of the law's primary sponsors in the Senate, said, "I think we'll begin to see a real cutback in spam when someone is caught and prosecuted and spammers begin to realize we're serious about the enforcement of the law."¹⁷ Yahoo, one of the many corporate supporters of the Act, called the law "a victory for consumers and the Internet."¹⁸

Despite the rhetoric about canning spam, one thing is clear: consumers will continue to receive a vast amount of unsolicited commercial e-mail, because the CAN-SPAM Act makes spam legal.¹⁹ As one observer put it: "with this law, you *can* spam."²⁰ To understand why UCE is now legal and to understand how the law will increase UCE rather than reduce it, it is necessary to explore the theoretical and practical debate that led to this extended legislative stalemate. The two distinct approaches to regulating spam that emerged in Congress over the last half decade express a fundamental disagreement about the proper relationship between consumers and corporations in modern democratic society. The CAN-SPAM Act is a victory for one side of that debate—a victory for the marketing industry at the expense of individual consumers.

LEGISLATIVE HISTORY

In the spring of 2003, the necessary elements coalesced for congressional action: public frustration had reached a highpoint;²¹ con-

17. David McGuire, *New Law Won't Can Spam, Critics Say*, Dec. 17, 2003, at <http://www.washingtonpost.com/ac2/wp-dyn/A5943-2003Dec16>.

18. Stacy Cowley, *Bush Signs Bill Aimed at Controlling Spam*, THE INDUSTRY STANDARD, Dec. 16, 2003, at <http://www.thestandard.com/article.php?story=20031216210022620>. Similarly, AOL praised the Act as a "watershed event." *Id.*

19. McGuire, *supra* note 17 ("Even with the enactment of anti-spam laws in the United States and the European Union, e-mail security firm MessageLabs predicts that the volume of spam will continue to rise. The New York-based company, which scans 30 million e-mail messages a day for 7,500 companies around the world, predicts spam will grow to account for 70 percent of all e-mail traffic in 2004, up from 55 percent today.").

20. Amit Asaravala, *With This Law, You Can Spam*, WIRED, Jan. 23, 2004, at http://www.wired.com/news/business/0,1367,62020,00.html?tw=wn_story_top5.

21. A 2003 study revealed that almost eighty percent of the public wanted laws to reduce or ban spam. Lisa M. Bowman, *Study: Do-Not-Spam Plan Winning Support*, CNET NEWS, July 23, 2003, at http://news.com.com/2100-1024_3-5053306.html. Other studies have reached similar results. See, e.g., DEBORAH FALLOWS, PEW INTERNET & AMERICAN LIFE PROJECT, SPAM: HOW IT IS HURTING EMAIL AND DEGRADING LIFE ON THE INTERNET, i-iv (Oct. 22, 2003), http://www.pewtrusts.com/pdf/pew_internet_spam_102203.pdf.

sumer groups called for action;²² and the powerful corporate forces that had long opposed legislative action reversed course and found a way to satisfy the increasingly vociferous public demand for regulation without endangering their interests.²³ Thus, a six-year congressional stalemate that many thought would never break finally ended.

Since 1997, when spam first came onto the congressional radar, the marketing industry, led primarily by the Direct Marketing Association of America (DMA) and the U.S. Chamber of Commerce, had succeeded year after year in blocking attempts to take federal legislative action against UCE.²⁴ By late 2002, however, the spam problem had exploded to the point that UCE constituted almost half of all e-mail sent, up from less than ten percent before 2001.²⁵ Businesses and individual computer users were inundated with spam that advertised everything from herbal sexual aids to home mortgages, and UCE had captured the attention of the nation.²⁶ In September 2002, the nation's three largest consumer advocacy organizations—the Telecommunications Research and Action Center, the National Consumers League, and Consumer Action—called for the Federal Trade Commission (FTC) to take action against spammers.²⁷

Within a month, the DMA, which represents over 4,500 direct mail, catalog, and telemarketing companies both in the United States and abroad, realizing that some kind of federal response to spam was imminent, began actively lobbying for federal legislation.²⁸ In October 2002, the DMA publicly announced its intentions to push for federal anti-spam legislation.²⁹ As the 108th Congress opened, spam experts predicted that the marketing industry's decision to lobby actively for federal spam legislation would break the impasse that had blocked congressional action for six years.³⁰ They were right. In the

22. Declan McCullagh, *FTC Asked to Can Spam*, CNET NEWS, Sept. 4, 2002, at <http://news.com.com/2100-1029-956502.html>.

23. Declan McCullagh, *Direct Marketers Want Anti-spam Laws*, CNET NEWS, Oct. 21, 2002, at <http://news.com.com/2100-1023-962821.html>.

24. *Id.* In 2000, for instance, the U.S. House of Representatives passed an anti-spam bill 427 to 1, but the Senate never acted on it, and the bill never became law. Declan McCullagh & Ryan Sager, *Cooking Up a Revised Spam Bill*, WIRED, Mar. 27, 2001, at http://www.wired.com/news/politics/0,1283,42630,00.html?tw=wn_story_related.

25. *International Cooperation Required to Fight Spam*, UNSPAM, Oct. 12, 2004, at http://www.unspam.com/fight_spam/articles/1452.html.

26. Declan McCullagh, *Congress to Take on Spam, Copyright*, CNET NEWS, Jan. 8, 2003, at <http://news.com.com/2100-1023-979623.html>.

27. McCullagh, *FTC Asked to Can Spam*, *supra* note 22.

28. McCullagh, *Direct Marketers Want Anti-spam Laws*, *supra* note 23.

29. *Id.*

30. McCullagh, *Congress to Take on Spam, Copyright*, *supra* note 26.

spring of 2003, the world's two largest Internet service providers (ISPs), AOL and MSN, both of which were beginning to incur serious costs due to spam, decided that they should join forces to push for a legislative response that would meet their shared interests.³¹

In May 2003, the *Washington Post* reported that members of Congress were working with the online marketing, retail, and ISP industries to draft legislation that would protect the ability of "legitimate" businesses to send spam.³² Almost immediately consumer groups and privacy advocates also criticized the proposals that resulted from the marketing industry's lobbying effort as inadequate and potentially harmful.³³ Throughout the summer, Congress engaged in partisan wrangling over which party would take credit for fighting spam.³⁴ Legislators also sparred over how to best combat spam: proposals ranged from an outright ban on all UCE to demands that Congress stay out of the business of regulating speech.³⁵

But the real sticking point was one over which Republicans and Democrats are sworn enemies—consumer private rights of action and class action lawsuits.³⁶ By September, it looked as though there would be no compromise among the many competing bills and yet another attempt to regulate spam would fail. The Senate's version of the CAN-SPAM Act passed out of the Senate Commerce Committee in mid-July without a consumer private right of action, an exclusion which consumer groups consider a fatal flaw. While the Senate's bill sat on the Calendar of General Orders, the House was divided over the same issue.³⁷ In the House, the battle involved two competing bills—the Republican-sponsored Reduction in Distribution of Spam Act of

31. David A. Vise, *AOL Joins Microsoft In a Reply to Spam*, WASH. POST, Feb. 21, 2003, at E5.

32. Jonathan Krim, *Draft of Bill on Mass E-Mail is Called Weak*, WASH. POST, May 13, 2003, at E1 ("According to participants in at least three meetings in recent weeks, e-mail marketers prevailed in adding provisions that would supersede tougher state anti-spam laws, would prohibit consumers from suing spammers and would give companies the right to send e-mail to anyone who has done business with them in the past three years.")

33. See Letter from Jason Catlett, President, Junkbusters Corp., to Senator Orrin G. Hatch, et al. (May 22, 2003) ("We are writing you to express our concerns regarding several pieces of anti-spam legislation that have been introduced or are currently being prepared for introduction."), at <http://www.cauce.org/legislation/openletter.shtml>.

34. McCullagh, *Spam Fight Divides on Party Lines*, *supra* note 5.

35. See *id.*

36. See *id.*

37. Roy Mark, *Anti-spam Bills Stalling in House*, CLICKZ, Sept. 23, 2003, at <http://www.clickz.com/news/article.php/3081231>.

2003 (Rid Spam Act),³⁸ and the bipartisan Anti-Spam Act of 2003, championed by Reps. Heather Wilson (R-NM) and Gene Green (D-TX). The Rid Spam Act contained no consumer private right of action and it explicitly prohibited class action lawsuits, while the Anti-Spam Act would have allowed individuals to sue spammers for damages.³⁹

That fall, the marketing industry shifted its lobbying effort into overdrive.⁴⁰ After several months of lobbying for an anti-spam bill that protected the ability of marketers to send UCE, it looked as if that effort would be fruitless and anti-spam legislation would die for the seventh year in a row.⁴¹ But this year the marketers desperately needed federal action to preempt state laws. On January 1, 2004, the strictest state anti-spam law in history would have taken effect in California, and numerous other states like Virginia and Washington were also implementing strict laws.⁴² The DMA joined with the American Association of Advertising Agencies and the Association of National Advertisers to write an open letter to Congress asking legislators to “pass a federal antispam law to bring consistency to the fragmented antispam laws already on the books in 37 states and to pave the way for legitimate companies to continue communicating via e-mail with their customers.”⁴³ The marketers specifically endorsed two then-pending bills, the Rid Spam Act, and the bill that eventually became law, the CAN-SPAM Act—both of which “permit marketers to send unsolicited bulk mail to any number of recipients, provided that the sender includes a way to be removed from future mailings and honors ‘opt out’ requests.”⁴⁴

In late October, while anti-spam legislation was still stalled in the House, Senator Charles Schumer (D-NY) announced a compromise

38. Supporters included Rep. Billy Tauzin (R-LA), chairman of the House Energy and Commerce Committee, Rep. James Sensenbrenner (R-WI), chairman of the House Judiciary Committee, and Rep. Richard Burr (R-NC), who introduced the bill. *Id.*

39. *Id.*

40. See Stefanie Olsen, *Ad Groups Lobby for Antispam Law*, CNET NEWS, Nov. 13, 2003 (“The trade groups’ joint endeavor to lobby Congress signals new urgency among marketers to avert a spam crisis.”), at http://news.com.com/2100-1024_3-5107059.html.

41. Mark, *supra* note 37 (predicting that anti-spam legislation would not pass Congress due to divisions among lawmakers over ability of individuals to sue spammer, caps on damages, and definitions of spam).

42. See Olsen, *Ad Groups Lobby for Antispam Law*, *supra* note 40; Paul Festa, *Spam Crusaders Slog it Out in Court*, CNET NEWS, Aug. 23, 2002, at <http://news.com.com/2100-1023-954960.html>.

43. Olsen, *Ad Groups Lobby for Antispam Law*, *supra* note 40.

44. *Id.*

amendment to include a no-spam e-mail registry in the Act.⁴⁵ On October 22, the CAN-SPAM Act was passed by the Senate 97-0. The Senate's version of the bill included Senator Schumer's provision; a requirement that sexually explicit material be labeled as such in the subject line to allow for easy filtering; and a requirement that the FTC consider mandatory labeling for all commercial e-mail.⁴⁶ These provisions were heavily watered-down versions of the key components of earlier bills supported by consumer groups and anti-spam advocates.

In the wake of the CAN-SPAM Act's whirlwind passage in the Senate, the marketing industry's lobbying and public relations effort came under widespread attack from anti-spam activists, and even from some state legislators and state attorneys general. The Internet Committee of the National Association of Attorneys General wrote a letter to House leaders urging them not to approve the Senate's version of the bill, arguing that it was designed not to end spam but to legalize it and that it would not allow effective enforcement.⁴⁷ Many of the anti-spam groups who had spent more than half a decade advocating for federal action against spam denounced the Senate bill as weak and possibly harmful.⁴⁸

Despite the public outcry, however, exactly a month after the Senate passed its bill, the House of Representatives passed one almost identical to the Senate version.⁴⁹ The two houses eventually passed a common bill in the first week of December,⁵⁰ and President Bush signed the CAN-SPAM Act into law on December 16, 2003.⁵¹

45. Press Release, Senator Charles Schumer, Schumer: Compromise Reached on Bill to Create a No-Spam Registry (Oct. 22, 2003), at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR02128.html.

46. Roy Mark, *Senate Anti-Spam Bill Ups Ante for House Action*, INTERNETNEWS, Oct. 23, 2003, at <http://boston.internet.com/news/article.php/3097521>.

47. See Letter from the Internet Committee of the National Association of Attorneys General, to Dennis Hastert, Speaker of the House, et al. 2 (Nov. 4, 2004), at http://www.epic.org/privacy/junk_mail/spam/agltrs877.pdf; Susan Kuchinkas, *AGs Want to Can the Can Spam Bill*, CLICKZ, Nov. 6, 2003 (reporting that Attorney Generals from California, Kansas, Maryland, Nevada, Texas, Vermont, Virginia, and Washington signed letter to House leaders opposing the CAN-SPAM Act and objecting to Act's preemption of stronger state laws), at <http://www.clickz.com/news/article.php/3105361>.

48. Peter Brownfeld, *Consumer Groups Seek to Put a Can on Spam*, FOX NEWS.COM, Nov. 20, 2003, at <http://www.foxnews.com/story/0,2933,103540,00.html>.

49. McCullagh & Festa, *Congress OKs Antispam Legislation*, *supra* note 5.

50. *Id.*

51. Lee, *supra* note 15.

THE CAN-SPAM ACT OF 2003: PROHIBITING AND PUNISHING
COMMERCIAL E-MAIL FRAUD

The CAN-SPAM Act defines “commercial electronic mail message” as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).”⁵² It directs the FTC to issue regulations defining criteria that would determine the “primary purpose” of an e-mail message.⁵³ The definition explicitly excludes from coverage “transactional or relationship messages,”⁵⁴ which facilitate existing commercial exchanges or provide information necessary to existing commercial relationships.

The criminal provisions of the Act amend Title 18 of the United States Code and create a new federal crime: “Fraud and related activity in connection with electronic mail.”⁵⁵ The Act defines five criminal violations: (1) accessing a protected computer to initiate and send multiple commercial messages; (2) transmitting multiple commercial electronic mail messages with an intent to deceive or mislead as to the messages’ origin; (3) falsifying header information in commercial messages; (4) falsifying account information regarding the sender of commercial messages; and (5) falsely representing oneself as a legitimate registrant of an account in order to send multiple commercial messages.⁵⁶

The Act further regulates the transmission of commercial e-mail by creating mandatory identification and labeling requirements and by establishing a set of conditions under which it is illegal to transmit messages to particular senders under any circumstances.⁵⁷ The Act confers enforcement powers upon the FTC and designated federal agencies; it also permits Internet service providers to bring civil actions.⁵⁸ The sending of unlimited amounts of UCE is legal as long as the message provides: (1) clear and conspicuous identification that the message is an advertisement or solicitation; (2) clear and conspicuous notice of the opportunity to decline to receive further messages from the sender; and (3) the sender’s valid physical postal address.⁵⁹

52. CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699, 2701 (to be codified at 15 U.S.C. § 7702).

53. *Id.*

54. *Id.*

55. *Id.* 117 Stat. at 2703 (to be codified at 15 U.S.C. § 7703).

56. *Id.*

57. *Id.* 117 Stat. at 2706–11 (to be codified at 15 U.S.C. §§ 7704, 7705).

58. *Id.* 117 Stat. at 2711–15 (to be codified at 15 U.S.C. § 7706).

59. *Id.* 117 Stat. at 2708 (to be codified at 15 U.S.C. § 7704).

The Act prohibits sending commercial e-mail to a recipient after ten business days of a recipient's request to discontinue further contact except if the recipient sends affirmative consent subsequent to a previous request to cease contact.⁶⁰ The Act also creates three "aggravated violations:"⁶¹ (1) "address harvesting and dictionary attacks," which involve obtaining e-mail addresses from webpages users view or programs that generate e-mail addresses by randomly combining letters and numbers; (2) "automated creation of multiple electronic mail accounts" for sending UCE; and (3) relaying or retransmitting commercial e-mail via a computer accessed without authorization.⁶²

Finally, the Act places additional regulations on "commercial electronic mail containing sexually oriented material."⁶³ The Act requires all such messages to include notice of its content in the subject heading. The Act directs the FTC "in consultation with the Attorney General" to "prescribe clearly identifiable marks or notices to be included in or associated with commercial electronic mail that contains sexually oriented material, in order to inform the recipient"⁶⁴ The penalties for violations of this section include fines and imprisonment of up to five years.⁶⁵

REDEFINING SPAM: HOW MARKETING INTERESTS WON OVER CONSUMER INTERESTS

In some ways the CAN-SPAM Act is revolutionary. For the first time in U.S. history, it is a federal crime to send commercial e-mail under certain conditions. The Act bans fraudulent and misleading headers and subject lines on all commercial e-mail. It creates substantial new labeling requirements for all commercial e-mail and special requirements for pornography. It gives the federal and state governments, as well as ISPs, broad new enforcement powers, and it establishes severe penalties for violations.

Despite the many ways in which the new law regulates e-mail as never before, however, it is almost impossible to find anyone who supports the law or thinks it will be effective—except Congressmen and businesses that profit from commercial e-mail.⁶⁶ Even the Chairman of the FTC, the agency in charge of enforcing the new law, thinks

60. *Id.* 117 Stat. at 2707–08 (to be codified at 15 U.S.C. § 7704).

61. *Id.* 117 Stat. at 2708–09 (to be codified at 15 U.S.C. § 7704).

62. *Id.*

63. *Id.* 117 Stat. at 2709–10 (to be codified at 15 U.S.C. § 7704).

64. *Id.*

65. *Id.*

66. See Enrique Salem, *Can-Spam Act is a Start*, CNET NEWS, Dec. 11, 2003, at <http://news.com.com/2010-1028-5119513.html>. Salem is senior vice president of se-

that the Act “could actually be harmful” to his agency’s ongoing enforcement efforts.⁶⁷

To understand why this is so, one must see that the two sides of the debate argue from fundamentally opposed assumptions about the very nature of spam and the value of unsolicited commercial e-mail. Supporters of the Act believe that unsolicited commercial e-mail, even in mass quantities, is not a bad thing per se. They believe that legitimate businesses should have the right to send marketing solicitations and other commercial communication via e-mail without the recipient’s prior permission. They believe that the burden to unsubscribe from a commercial mailing list should be on the consumer. The Act adopts this approach—the marketers’ approach. This choice to protect businesses rather than consumers is apparent in several key weaknesses of the bill: the definition of spam, the opt-out approach, the preemption of state laws, and the lack of a private right of action.

Definition of Spam: Instead of adopting the most common definitions of spam—“unsolicited commercial e-mail,” or the more broad “unsolicited bulk e-mail”⁶⁸—the CAN-SPAM Act adopts the marketing industry’s definition of spam by banning only spam that is pornographic, misrepresentative, or fraudulent while legalizing unsolicited commercial e-mail that complies with the Act’s requirements.⁶⁹ Essentially, the Act adopts a spammer’s definition of spam.⁷⁰ A large amount of what most anti-spam advocates consider spam is defined by the Act as legitimate commercial communication.⁷¹ The CAN-SPAM Act *legalizes* unsolicited commercial e-mail, the most common definition of spam.⁷²

curity at Symantec, an Internet security firm involved in spam blocking and tracking. He argues that the Act is a “critical first step.” *Id.*

67. McCullagh, *Bush OKs Spam Bill—But Critics Not Convinced*, *supra* note 14.

68. See David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325, 328 (2000–01) (discussing different approaches to defining spam).

69. For instance, the President of the Direct Marketing Association, Robert Wientzen, a strong advocate of the CAN-SPAM Act, has stated that spam is “e-mail that misrepresents an offer or misrepresents the originator—or in some way attempts to confuse or defraud people.” Declan McCullagh, *The DMA’s Doublespeak on Spam*, CNET NEWS, July 21, 2003, at <http://news.com.com/2010-1071-5047695.html>.

70. See Chris Ulbrich, *Can Spam? Or New Can of Worms?* WIRED, Dec. 22, 2003, at http://www.wired.com/news/politics/0,1283,61679,00.html?tw=wn_tophead_2 (“[A]ntispam activists consider all unsolicited bulk e-mail spam, regardless of its origin or content [but] the DMA says the label should only apply to deceptive or fraudulent bulk e-mail.”).

71. *Id.*

72. See *United States Set to Legalize Spamming on January 1, 2004*, at <http://www.spamhaus.org/news.lasso?article=150> (last visited Oct. 24, 2004).

Opt-Out Approach: The Act adopts what is known as an “opt-out” approach instead of what many experts consider the more effective “opt-in” approach.⁷³ Under an opt-in regime, marketers must first receive permission from a consumer before sending a commercial solicitation. Under an opt-out regime, marketers may send commercial solicitations to consumers at will until asked to stop. An opt-in approach is the approach endorsed by the most prominent anti-spam organizations, as well as several major consumer groups.⁷⁴ The opt-in approach is considered much more restrictive since it allows consumers to choose what kinds of commercial e-mail they would like to receive and from whom they would like to receive it. Marketers, however, prefer the opt-out approach. “For more than 80 years, direct marketers have fought for opt-out, whether it is with financial, health or marketing data,” said Ben Isaacson, a former president of the Association for Interactive Marketing, a DMA subsidiary.⁷⁵ Well before the CAN-SPAM Act was passed, it was obvious to Isaacson, who now runs an e-mail consulting firm, that Congress would not adopt an opt-in approach.⁷⁶ “If you look at the legislation, it’s mostly meeting the DMA’s concerns,” he told CNET News last July.⁷⁷ “Antispam advocates can rally all they want. At the end of the day, this legislation is going to pass, and it’s going to have the DMA’s stamp of approval. It will be opt-out. In many ways, it will legitimize spam. We’ll see a great influx of your grey-type marketers sending more opt-out email.”⁷⁸

Even using the opt-out approach, Congress could have created a more consumer-protective law. An example of a strong opt-out approach is the newly-established national Do-Not-Call Registry.⁷⁹ Under this kind of opt-out system, consumers are able to refuse all contact, with certain exceptions, by placing their number or address on one central list. The CAN-SPAM Act directs the FTC to study this approach, but mandates no action.⁸⁰ For now the Act adopts the

73. Janis Mara, *CAN-SPAM Gets Mixed Reviews in Senate Testimony*, INTERNET NEWS, May 20, 2004, at <http://www.internetnews.com/ec-news/article/php/3357141>.

74. McCullagh, *Spam Fight Divides on Party Lines*, *supra* note 5.

75. McCullagh, *The DMA’s Doublespeak on Spam*, *supra* note 5.

76. *Id.*

77. *Id.*

78. *Id.* The Federal Trade Commission is instructing commercial e-mailers to comply with CAN-SPAM in part by implementing an opt-out method in their communications. See The Federal Trade Commission, *The CAN-SPAM Act: Requirements for Commercial Emailers* (Apr. 2004) at <http://www.ftc.gov/bcp/online/pubs/buspubs/canspam.pdf>.

79. Mark, *Senate Anti-spam Bill Ups Ante for House Action*, *supra* note 46.

80. *Id.*

weaker approach that requires consumers to opt out of receiving e-mail from each of the individual businesses sending commercial mail.⁸¹

Preemption of State Law: Another major problem with the bill involves the issue of preemption. By adopting an opt-out approach, the Act actually preempts many more stringent state laws that experts argue would have been significantly more effective at reducing UCE.⁸² At least fifteen states require “ADV” (denoting an advertisement) or a similar label on all unsolicited commercial e-mail.⁸³ The CAN-SPAM Act contains no such requirement, but simply directs the FTC to study the issue.⁸⁴ Such a requirement would allow consumers to easily filter, or reject outright, all e-mail containing the ADV label.⁸⁵ Not surprisingly, the DMA has vigorously lobbied against ADV label requirements.⁸⁶ “The DMA opposes laws that would require government to classify speech with specific language,” the association said in a statement last spring as the spam fight was heating up.⁸⁷ The CAN-SPAM Act preempts all state laws that require an ADV label, including those of Arizona, California, Colorado, Illinois, Michigan, Nevada, Texas and Utah.⁸⁸

Private Right of Action: Another primary complaint against the CAN-SPAM Act is that it lacks a private right of action. The theory behind allowing an individual private right of action against spammers in small claims court is that a rash of small lawsuits can create significant costs for the spammer that are normally shifted to the recipient of an unsolicited communication and can thereby cause a reduction in the amount of spam sent. This is the approach adopted by the Telephone

81. Under the CAN-SPAM Act, every business on the planet can send endless e-mails and must stop only if specifically requested to do so by an individual recipient.

82. McCullagh, *Bush OKs Spam Bill—But Critics Not Convinced*, *supra* note 14.

83. *Id.*

84. CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699, 2717 (to be codified at 15 U.S.C. § 7710).

85. Jonathan Bick, *An Overview of the CAN-SPAM Act*, GIGALAW, Mar. 2004, at <http://www.gigalaw.com/articles/2004-all/bick-2004-03-all.html> (last visited Nov. 6, 2004).

86. *See, e.g.*, Press Release, The Direct Marketing Association, The DMA Opposes Dictionary Attacks and Surreptitious Harvesting of E-Mail Addresses (Apr. 30, 2003) [hereinafter DMA Press Release], at <http://www.thedma.org/cgi/dispypressrelease?article=417>; *see also* Declan McCullagh & Robert Zarate, *Spammers Slam Anti-Spam Proposals*, WIRED, Mar. 28, 2002, at <http://www.wired.com/news/print/0,1294,513700,00.html>; Michelle Delio, *Spam: Much Hated, Little Defined*, WIRED, May 1, 2003, at <http://www.wired.com/news/politics/0,1283,58682,00.html>.

87. DMA Press Release, *supra* note 86.

88. McCullagh, *Bush OKs Spam Bill—But Critics Not Convinced*, *supra* note 14.

Consumer Protection Act (TCPA),⁸⁹ which outlaws the sending of unsolicited “junk faxes.”⁹⁰ The DMA lobbied strongly against the inclusion of a private right of action, arguing that it would be ineffective. Anti-spam activists consider the lack of a private right of action a fatal flaw. However, the DMA’s opposition, combined with Rep. Tauzin’s pledge to kill any bill that included a private right, ensured its exclusion.

RECENT DEVELOPMENTS AND THE FUTURE OF SPAM

Thus far, the CAN-SPAM Act does not appear to be having any impact on the amount of unsolicited commercial e-mail received by U.S. consumers.⁹¹ UCE still accounts for sixty-five percent of all e-mail sent worldwide.⁹² In August 2004, it was estimated that a majority of e-mail marketers were not in compliance with the new law.⁹³ While the vast majority of spam still originates in the U.S.,⁹⁴ predictions that spammers would expand operations overseas in the wake of CAN-SPAM are coming true.⁹⁵

In the spring of 2004, the U.S. government brought the first criminal prosecutions under CAN-SPAM, but the charges were quietly dis-

89. See Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3) (2001).

90. For a full discussion of this approach and its role in the Telephone Consumer Protection Act of 1991, see Adam Zitter, Note, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 *FORDHAM L. REV.* 2767 (2004).

91. See Verne Kopytoff, *Spam Mushrooms: Despite a New Federal Law, the Barrage of Junk E-Mail Continues to Grow, and Experts Don’t Foresee Much Relief*, S.F. *CHRON.*, Sept. 2, 2004, at C1; *MX Logic Reports CAN-SPAM Compliance Increased To 2 Percent In August*, *WEBPRONEWS*, Sept. 8, 2004, at <http://www.webpronews.com/news/ebusinessnews/wpn-4520040908MXLogicReportsCANSPAMComplianceIncreasedTo2PercentInAugust.htm> (“spammers continue to develop tactics to dodge both legal and industry-backed efforts to curb spam”); see also Olsen, *U.S. Cooks Up Most Spam*, *supra* note 7 (“Almost nine months on from the Can-Spam legislation and the United States’ attempt to clean up its act appears to have had little impact”); *Study: Five Countries Send 99 Percent of Spam*, *CNET NEWS*, June 30, 2004 (“The adoption . . . of . . . last year’s Can-Spam act[] has done little to deter spammers . . .”), at http://news.com.com/2100-1024_3-5253411.html.

92. Olsen, *U.S. Cooks Up Most Spam*, *supra* note 7 (“Spam accounts for more than 65 percent of all e-mail processed by mail servers, according to Symantec, a security company that recently bought Brightmail, a spam-filtering company.”); Saul Hansell, *Junk E-Mail and Fraud are Focus of Crackdown*, *N.Y. TIMES*, Aug. 25, 2004, at C1 (“Spam represents 65 percent of all e-mail, up from 58 percent when the [CAN-SPAM Act] was passed.”).

93. Olsen, *U.S. Cooks Up Most Spam*, *supra* note 7; Dinesh C. Sharma, *Marketers Falling Short on Can-Spam, Study Says*, *CNET NEWS*, Apr. 21, 2004, at http://news.com.com/2100-1028_3-5196362.html?tag=NL.

94. Olsen, *U.S. Cooks Up Most Spam*, *supra* note 7.

95. See Brad Stone, *Soaking in Spam*, *NEWSWEEK*, Nov. 24, 2003, at 66.

missed for lack of evidence.⁹⁶ In late August, the Justice Department announced specific plans to prosecute dozens of spammers for violations of the Act.⁹⁷ A significant amount of the cost of these enforcement efforts—as much as \$500,000—have been paid by the Direct Marketing Association as part of Operation Slam Spam, described by the association as “a public/private alliance between the FBI and the DMA to combat spam.”⁹⁸

In June, the FTC submitted its report on the potential for a Do Not Email registry. The Commission concluded that such a registry would be used by spammers to validate and possibly gather e-mail addresses, and it would raise serious security, privacy, and enforcement issues.⁹⁹ In September, the Commission endorsed a plan to offer a bounty of between \$100,000 and \$250,000 to citizens who report “high value” spammers to authorities.¹⁰⁰

Anti-spam activists and consumer advocates continue to argue that these efforts will not reduce the volume of UCE.¹⁰¹ E-mail technology experts also doubt the efficacy of the current approach, and industry divisions over technical innovations that might improve authentication and tracking of spam are also hampering progress.¹⁰²

Part of the problem is that the two sides in the debate over the best way to fight spam continue to use two vastly divergent definitions of what spam even is.¹⁰³ The marketing industry argues that spam

96. Hansell, *supra* note 92.

97. See Thomas Claburn, *Feds Target Scofflaws and Spammers*, INFORMATION WEEK, Aug. 30, 2004, at <http://www.informationweek.com/story/showArticle.jhtml?articleID=45400073&tid=13692>; see also Dennis Callaghan, *Federal Sweep Nets Spammers, Cyber-Criminals*, EWEEK, Aug. 26, 2004, at http://story.news.yahoo.com/news?tmpl=story2&u=/zd/20040826/tc_zd/134159.

98. Claburn, *Feds Target Scofflaws and Spammers*, *supra* note 97.

99. FED. TRADE COMM'N, NATIONAL DO NOT EMAIL REGISTRY: A REPORT TO CONGRESS 15–16, 23–24 (June 2004), at <http://www.ftc.gov/reports/dnregistry/report.pdf>.

100. Wayne Rash, *FTC Endorses Bounty for Spammers*, EWEEK, Sept. 17, 2004, at <http://www.eweek.com/article2/0,1739,1647398,00.asp>.

101. Enrique Salem, senior vice president at Symantec, argues that, “There is such a large number of spammers . . . that no matter how many you arrest, more people will send spam.” Hansell, *supra* note 92. Kevin Lyles, a partner at Jones Day, argues that “The law-enforcement authorities just don’t have the resources to make a dent in the spam problem in the United States.” Claburn, *supra* note 97.

102. See Arik Hesseldahl, *Why the Spam Crackdown Doesn't Matter*, FORBES.COM, Aug. 27, 2004, at http://www.forbes.com/2004/08/27/cx_ah_0827tentech.html; Wayne Rash, *AOL Dumps Microsoft's Sender ID*, EWEEK, Sept. 16, 2004, at <http://www.eweek.com/article2/0,1759,1647114,00.asp>; Matt Hicks, *Microsoft Patent Could Hamper E-Mail Authentication Group*, EWEEK, Sept. 17, 2004, at <http://www.eweek.com/article2/0,1759,1646926,00.asp>.

103. Grant Gross, *Can Spam Be Stopped?*, COMPUTERWORLD, May 1, 2003, at <http://www.computerworld.com/softwaretopics/software/groupware/story/0,10801,80848,00.html>.

should only be defined to include fraudulent or misleading e-mail while consumer advocates favor a broader definition encompassing all unsolicited commercial e-mail.¹⁰⁴

The future of spam is unclear, but one thing can be said of it for sure: Spam has not been canned. Massive amounts of spam, both fraudulent and accurate, misleading and honest, dangerous and innocuous, continues to be sent and received around the world, costing consumers and businesses billions of dollars. Instead of outlawing spam, the CAN-SPAM Act adopts the perspective of commercial marketers at the expense of consumers. The CAN-SPAM Act legalizes and legitimizes spam.¹⁰⁵

104. *Id.*

105. *See* Asaravala, *supra* note 20.

