

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C.**

**COMMENTS OF
REED ELSEVIER INC.**

Responding to the Notice of Proposed Rulemaking re: “Primary Purpose”

CAN-SPAM Act Rulemaking, Project No. R411008

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I. Introduction and Background

Reed Elsevier Inc. appreciates this opportunity to submit comments to the Federal Trade Commission (the “Commission”) in response to the Commission’s Notice of Proposed Rulemaking, 16 C.F.R. Part 316, 69 Fed. Reg. 50091 (August 13, 2004) (“NPRM”), on the regulations to be promulgated for determining the “primary purpose” of e-mail messages under the Controlling the Assault of Non-Solicited Pornography and Marketing Act, Pub. L. No. 108-187, 117 Stat. 2699, 15 U.S.C. §§ 7702 *et seq.* (“CAN-SPAM Act” or the “Act”).

As stated in our comments, submitted April 20, 2004, in response to the Commission’s Advance Notice of Proposed Rulemaking (“ANPRM”), Reed Elsevier is one of the world’s leading publishing and information companies, employing more than 20,000 people in the United States and more than 35,000 people worldwide.

Reed Elsevier businesses rely heavily upon e-mail for key operations such as communicating with and offering choices to current and potential customers about product and service offerings, providing up-to-date information via e-mail newsletters, conducting surveys and other market research, providing subscriber account expiration and renewal information, and legitimately advertising products and services.¹ In addition, Reed Elsevier provides via e-mail many products that are available solely in electronic form or as an alternative to hard copy versions.

¹ We also depend on other media, including telephone and facsimile.

Reed Elsevier supports efforts to eliminate fraudulent and deceptive e-mail, and shares with the Commission the common goal of making e-mail a more useful medium for both businesses and consumers. We agree in general with the Commission that the acceptance by consumers of electronic commerce is critical to our better serving the consumer and solidifying economic growth for our industry in the future. At the same time, we believe that the Act is not intended to curtail legitimate commercial e-mail and electronic commerce, and should not be implemented in a manner that does so.

Reed Elsevier maintains that there are additional issues that require clarification which are not covered in this NPRM. Perhaps the most perplexing and difficult scenario in which to apply the Act is where an e-mail message contains the advertisements of multiple parties. Such messages could be interpreted to have multiple “senders” under the Act.

While it is fairly straightforward for the true sender of a commercial e-mail message to maintain and check its own list of consumers who opt out of receipt of such messages, it would be logistically difficult and expensive if the sender had to process the opt out lists of all advertisers whose commercial messages appear in a commercial electronic mail message. Advertisers would need to exchange opt-out lists with the true sender/distributor to “scrub” the sender’s list against theirs. Likewise, the advertisers would need to receive any new opt outs generated as a result of the dual-purpose e-mail message and add those addresses to their own opt-out lists. Such exchanges of opt-out lists among advertisers would raise significant new privacy issues.

The Commission must clarify how e-mail messages containing commercial messages from multiple advertisers are to be treated in order to protect both the market and consumers. The Commission's position on this multiple advertiser scenario directly affects the practical application of the Act, and this issue should be considered together with our comments set forth below. In response to the focus of this NPRM on "primary purpose," however, Reed Elsevier submits the following recommendations for the Commission's consideration.

II. Objective Criteria Should Be Established For Determining The "Primary Purpose" Of An Electronic Mail Message

As indicated in our ANPRM comments, Reed Elsevier encourages the Commission to identify objective criteria that businesses can use to determine the primary purpose of an electronic mail message. Although Reed Elsevier requests further clarification on the matter, we support the Commission's approach of classifying electronic mail messages into three categories of (1) purely "commercial"; (2) "commercial" and "transactional or relationship"; and (3) "commercial" and other content that is neither "commercial" nor "transactional or relationship."

Criteria such as a recipient's reasonable interpretation of the subject line of an e-mail, while subjective, provide companies like Reed Elsevier with guidance for compliance with the Act. With further clarity for certain types of e-mail that are not solely commercial, these categories could provide businesses with a more objective framework for determining an e-mail's primary purpose. We address the two categories of commercial content mixed with other content below.

A. **The Commission should exempt certain “transactional or relationship” messages from the requirements of the Act – whether they contain commercial content or not.**

Reed Elsevier supports the Commission’s approach, in 16 C.F.R. § 316(a)(2), of creating a category of electronic mail messages that advertise or promote a product or service as well as content that pertains to a “transactional or relationship” function. There are messages, however, that could be classified as having a “commercial” primary purpose under the Commission’s proposed criteria for this category that in all instances have a non-commercial primary purpose as contemplated by the Congress.

To avoid incorrectly categorizing mixed content messages that are “transactional or relationship” in nature as having a “commercial” primary purpose, the Commission should provide examples of messages that never have a commercial primary purpose and, therefore, are never subject to the evaluation criteria set forth in 16 C.F.R. § 316.3(a). Three types of e-mail that currently fall within the scope of § 316(a)(2) and should never be classified as having a “commercial” primary purpose are: (1) billing statements; (2) renewals of subscriptions, memberships, accounts, loans, or other comparable ongoing commercial relationships; and (3) e-mail sent at the recipient’s request.

1. **Billing statements sent via e-mail do not have a commercial primary purpose.**

E-mail messages that contain billing statements should not be deemed to have a primary purpose that is “the commercial advertisement or promotion of a commercial product or service.” Reasonable consumers would not expect that they would be able to opt out of receiving bills. Under the Commission’s proposal, e-mailed billing statements in which the billing content did

not appear at or near the beginning of the message, would need to include a mechanism for the recipient to opt out of the receipt of such billing statements. Congress did not intend this result. When bills are sent via e-mail, such messages have a primary purpose that is “transactional or relationship” in nature. Irrespective of the location within the message of the billing content, the primary purpose of the message is to send the bill to the recipient. The e-mail would be sent irrespective of whether there is any purpose other than sending a bill. To avoid the result of requiring opt outs for bills, the Commission should indicate in the final rule that messages accompanying a bill sent on regular basis (for continuing relationships), or sent as part of a transaction, are not “commercial” messages.

Such an approach is analogous to the U.S. Postal Service’s treatment of mail that includes billing statements. The fact that a communication contains a billing statement determines its status. The Postal Service treats any message with a billing statement as “first class” mail, irrespective of the existence or intensity of advertisement or promotions in such message. Messages that do not contain billing statements may be treated as a different class of mail. This same approach should apply to billing statements sent via e-mail: the existence of a billing statement being the sole factor in determining the classification of an e-mail.

Therefore, if an e-mail contains a billing statement, further analysis of the subject line and placement of the “transactional or relationship” contact would be unnecessary.

2. **Electronic messages regarding renewals or similar ongoing commercial relationships do not have a commercial primary purpose.**

Reed Elsevier requests that the Commission state that subscription renewals never have a primary purpose that is commercial in nature. Notifications regarding subscription renewals and the renewal of other ongoing services are transactional in nature and deal with existing

commercial relationships. While most renewals are sent during the term of an existing relationship, some offers may be considered a new contract if the term of the previous subscription has expired. Nonetheless, such information should be characterized as an “ongoing commercial relationship involving ongoing purchase or use by the recipient of products or services offered by the sender” under 15 U.S.C. § 7702(17)(A)(iii).

For instance, Reed Elsevier sends e-mail notices to existing customers to alert them of exhibition space renewal. In this process, called “Space Draw,” exhibitors, in advance of attending an upcoming event, are e-mailed information about participation in the upcoming Space Draw for the event. Space is sold on a “first right of refusal” basis, and is based on a point system. If a high-priority exhibitor does not receive the e-mail notification for Space Draw, both Reed Elsevier and the exhibitor could find themselves in a difficult situation.

Similarly, it has been a long-standing practice for Reed Elsevier to send existing advertisers reminders of advertising opportunities in future issues of publications. While all advertising space is sold in advance of publication, lead times may be even greater for issues of a publication that are dedicated to a specific topic or event. While each new ad placement might be viewed as a separate transaction, taken as a whole, the placements and related communications are part of a single ongoing relationship.

3. E-mail sent at the recipient’s request does not have a commercial primary purpose.

In all instances where an e-mail is sent in response to a request for information, products or services, the requested e-mail does not have a “commercial” primary purpose under the Act. This e-mail is fulfilling a relationship between the sender and recipient. In these cases, the

requirements of opt out, suppression, and other inclusions are wholly unnecessary. It is clear that if an individual requests e-mail or even a response in an unspecified form, then they desire to receive a response – whether in e-mail form or otherwise. The Commission’s recognition that e-mails requested or consented to *never* have a commercial primary purpose will provide businesses with certainty that they do not need to take the steps of analyzing the e-mail under the Act, determining who is the sender, and its corresponding requirements.

B. The Commission should provide clarification as to how the primary purpose of electronic mail messages that contain commercial content as well as other content that serves neither a commercial nor a transactional or relationship function will be determined.

In response to the Commission’s ANPRM, Reed Elsevier requested exceptions from the Act’s requirements for electronic mail messages where the primary purpose is not commercial in nature, but yet are not transactional. The Commission’s proposal in 16 C.F.R. § 316.3(a)(3) recognizing a category of dual-purpose messages that are commercial and neither commercial nor transactional or relationship addresses this type of communication. While we agree that creation of this category meets the need to address such messages, we believe that the factors to be considered when assessing the “net impression” are inappropriate and, in many circumstances, will give an unfair result. Two types of e-mail that may fall within the scope of § 316(a)(3) and should never be classified as having a “commercial” primary purpose are: (1) newsletters and other e-mail primarily comprised of editorial content; and (2) digital magazines and other periodicals.

1. **Newsletters and other electronic messages with substantially editorial content are not commercial in nature.**

The Commission should state that any e-mail that provides substantial editorial content should not be considered to be commercial e-mail. The primary purpose of such messages is not the commercial advertisement or promotion of a commercial product or service, but rather the provision of editorial content. Newsletters are an example of a widely used method of communication with legitimate editorial content that should not be treated as commercial e-mail. Such communications provide recipients with updates on developments in the marketplace and information that does not promote products or services.

In most cases, newsletters do not contain offers within the editorial text of the messages. In some instances, newsletters contain advertisements that are incidental to the editorial content. Neither the content of the subject line nor the placement of a commercial message within the editorial content changes the fact that the purpose of the message or newsletter is not commercial.

2. **Digital periodicals such as magazines and journals do not have a commercial primary purpose.**

The Commission should state that digital periodicals, such as magazines and journals, do not have a commercial primary purpose — even though a significant percentage of the material may consist of advertisements. The primary purpose of Reed Elsevier’s e-mails that transmit digital periodicals is to deliver legitimate editorial content requested by the consumer. Approximately 10-12% of the readers of Reed Elsevier’s periodicals, when offered a choice, have opted to receive periodicals in digital editions rather than in print. Reed Elsevier plans to

expand its offering of digital editions of periodicals in the near future to serve increasing customer demand.

Materials such as digital magazines and journals are originally designed for display and distribution offline, in the physical world. Factors such as use of color, ad placement, graphics, type size, layout, and commercial content are determined by a range of considerations having nothing to do with dissemination or effectiveness in the digital world. Rather, digital magazines and other similar digital periodicals are designed to be visually and functionally equivalent to their physical world counterparts. Application of the proposed factors contained in 16 C.F.R. § 316.3(a)(3) to digital periodicals may have the effect of classifying these materials as “commercial electronic mail messages” subject to the opt-out and other requirements of the Act when, in fact, they are customer-requested editorial content.

In lieu of “factors” to measure the “net impression” of a digital periodical on the consumer, we propose recognition of an exception or safe harbor for digital editions of periodicals, such as magazines and journals, also disseminated in physical form and for digital periodicals that, while not disseminated in physical form, closely resemble magazines and journals generally available in the marketplace. If digital magazines, journals, and other similar digital periodicals are considered commercial electronic mail messages under the Act, compliance with the Act’s requirements would impose additional cost burdens on our business while providing consumers with no additional protection from unwanted e-mail.

III. Conclusion

Reed Elsevier thanks the Commission for the opportunity to provide these comments on the NPRM. All Reed Elsevier businesses are committed to complying with the CAN-SPAM Act and appreciate all guidance offered by the Commission in that regard. Should the Commission have any questions concerning these comments or our practices and procedures, please do not hesitate to contact us.

Respectfully submitted,
REED ELSEVIER INC.

By: _____
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