

November 16, 2003

The Honorable Thomas M. Davis, III

U.S. House of Representatives

306 Cannon House Office Building

Washington, D.C. 20515-4611

Dear Congressman Davis:

I am writing to convey my opposition to S. 877 (CAN-SPAM ACT OF 2003). Although the title of this bill promises to fight spam, the actual contents would exacerbate the problem. If the House version does not correct the problems with the bill, I ask that you vote against it and sponsor a bill along the lines of Representative Chris Smith's H.R. 1748.

I don't guaranty that I have spotted all of the problems with this bill, but here are my comments on the problems that I have noticed.

SEC. 102. CONGRESSIONAL FINDINGS AND POLICY.

This section does not address the property rights aspects of spam. An e-mail address, and any other personal data, should be treated as the property of the owner and explicitly protected from theft the same as any other intellectual property. The communications lines and servers of an Internet service provider, and the equipment of a user, are private property and should be protected. I believe that Congress should acknowledge and endorse such decisions as AOL v Cyber Promotions, ruling spam to be theft by conversion, theft of service and trespass to chattel.

This section addresses unsolicited commercial e-mail (UCE), but does not address unsolicited bulk e-mail (UBE). A recent decision on the junk call DNC list suggests possible Constitutional issues. Further, as the owner of my computer and a paying customer of an Internet service provider, I find noncommercial spam to be every bit as burdensome as commercial spam. Decisions such as *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), and *America Online Inc. v. Cyber Promotions Inc.*, C.A. No. 96-5213 (Nov. 4, 1996), support the Constitutionality of such a provision.

(9) While some senders of unsolicited commercial electronic mail messages provide simple and reliable ways for recipients to reject (or ``opt-out" of) receipt of unsolicited commercial electronic mail from such senders in the future, other senders provide no such ``opt-out" mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both.

This suggests that it is legitimate to seize the assets of owners until such time as they ask the spammer to stop. It is analogous to a bill on credit card fraud saying that some forgers do not provide a means to request that the stop running up unauthorized charges. The proper policy on spam is that nobody has the right to use my property without express, informed prior permission ("opt-in").

(2) senders of unsolicited commercial electronic mail should not mislead recipients as to the source or content of such mail; and

(3) recipients of unsolicited commercial electronic mail have a right to decline to receive additional unsolicited commercial electronic mail from the same source.

Again, these amount to tacitly granting a right to steal until asked to stop.

SEC. 103. DEFINITIONS.

(5) ELECTRONIC MAIL ADDRESS.--The term "electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part") and a reference to an Internet domain (commonly referred to as the "domain part"), whether or not displayed, to which an electronic mail message can be sent or delivered.

This would allow spammers to circumvent the law by specifying a host address instead of a host name, e.g., [root@\[130.215.24.62\]](mailto:root@[130.215.24.62]) rather than root@smtp.WPI.EDU. The definition of e-mail address should allow either a host name or an IP address in the format for either IP V4 or IP V6.

(8) HEADER INFORMATION.--The term "header information" means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.

This definition conflicts with the way that e-mail operates on the Internet. The transmission of an e-mail, as defined in RFC 2821 and 2822, has three elements: an envelope, a header and a body. The routing information is contained in the envelope, and forgery in the envelope is a much more serious problem than forgery in the header. I believe that the law should prohibit forgery in either the envelope or the header.

9. *IMPLIED CONSENT.--*

I do not believe there is any justification for a concept of implied consent. It legalizes fraud equivalent to allowing product warning to be printed in type too small to be read. Further, there is an issue of what was consented to; if I buy a television set, should that be taken as consent to send me advertisements for pump-and-dump stock manipulations or Viagra®?

SEC. 104. PROHIBITION AGAINST PREDATORY AND ABUSIVE COMMERCIAL E-MAIL.

I believe that this should also prohibit unsolicited bulk e-mail (UBE).

I believe that the provisions against fraud and forgery should apply to all e-mail. However, I believe that it should be explicitly allowed to use a return address for a noncommercial one-on-one message that has an explicitly anonymous return address, as defined by the IETF, e.g., ending in ".invalid".

Unless the courts construe "header" as including the envelope, most of these provisions will be useless.

SEC. 105. OTHER PROTECTIONS FOR USERS OF COMMERCIAL ELECTRONIC MAIL.

(a) REQUIREMENTS FOR TRANSMISSION OF MESSAGES.--

I believe that this should also prohibit unsolicited bulk e-mail (UBE). Allowing spammers to send messages on an opt-out basis unduly burdens the recipient and the recipient's provider, and is guaranteed to make e-mail unusable in a short period of time.

I believe that the provisions against fraud and forgery should apply to all e-mail.

Unless the courts construe "header" as including the envelope, most of these provisions will be useless.

(6) MATERIALITY DEFINED.--For purposes of paragraph (1), an inaccuracy or omission in header information is material if it would materially impede the ability of a party seeking to allege a violation of this title to locate the person who initiated the message or to investigate the alleged violation.

Again, this should include envelope as well as header.

(b) AGGRAVATED VIOLATIONS RELATING TO UNSOLICITED COMMERCIAL ELECTRONIC MAIL.--

(1) ADDRESS HARVESTING AND DICTIONARY ATTACKS.--

(A) IN GENERAL.--It is unlawful for any person to initiate the transmission, to a protected computer, of an unsolicited commercial

electronic mail message that is unlawful under subsection (a), or to assist in the origination of such message through the provision or selection of addresses to which the message will be transmitted, if such person knows, should have known, or consciously avoids knowing that--

(i) the electronic mail address of the recipient was obtained using an automated means from an Internet website or proprietary online service operated by another person, and such website or online service included, at the time the address was obtained, a notice stating that the operator of such website or online service will not give, sell, or otherwise transfer addresses maintained by such website or online service to any other party for the purposes of initiating, or enabling others to initiate, unsolicited electronic mail messages; or

This should also include public fora such as chat rooms, list servers and Usenet news groups. Unauthorized harvesting from Usenet is much more common than from proprietary services.

(B) DISCLAIMER.--Nothing in this paragraph creates an ownership or proprietary interest in such electronic mail addresses.

If I pay money for an e-mail address, why should I not have a proprietary interest in it?

SEC. 107. ENFORCEMENT BY FEDERAL TRADE COMMISSION.

The FTC is generally understaffed and under budgeted. Without a right to private action by the recipient, in local or state courts, and substantial statutory and punitive damages, the protections of this bill would be minimal.

SEC. 108. EFFECT ON OTHER LAWS.

(b) STATE LAW.--

(1) IN GENERAL.--This title supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

This is the section that makes the bill totally unacceptable. Existing state laws are already too weak, and this bill is even weaker. Congress should either pass a real anti-spam bill or leave it up to the states. If the two houses cannot agree on a strong bill, then the forgery provisions should be passed in a separate bill.

SEC. 109. DO-NOT-E-MAIL REGISTRY.

The only way such a registry would be workable would be if it allowed listing entire domains and permitted "wild cards", that is, listing all names that included a specified string of characters at the beginning of the local name or of the host name.

SEC. 111. IMPROVING ENFORCEMENT BY PROVIDING REWARDS FOR INFORMATION ABOUT VIOLATIONS; LABELING.

(a) IN GENERAL.--The Commission shall transmit to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce--

(2) a report, within 18 months after the date of enactment of this title, that sets forth a plan for requiring unsolicited commercial electronic mail to be identifiable from its subject line, by means of compliance with Internet Engineering Task Force Standards, the use of the characters ``ADV" in the subject line, or other comparable identifier, or an explanation of any concerns the Commission has that cause the Commission to recommend against the plan.

Neither the Subject field, nor any other header field, is technically suitable for that purpose. If there is to be a flag, it belongs in the envelope, so that unwanted messages can be rejected without having to process them in their entirety.

Yours truly,

Marianne G. Metz

Seymour J. Metz

cc: The Honorable Dennis Hastert, Speaker of the House

The Honorable Tom DeLay, Majority Leader

The Honorable Nancy Pelosi, Minority Leader

The Honorable Roy Blunt, House Majority Whip

The Honorable Steny H. Hoyer, House Minority Whip