

General Counsel



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Perhaps one of the most unfortunate side effects of the Internet age is having to deal with the daily deluge of spam—the annoying messages peddling virtually everything from pornography to counterfeit prescription drugs. While most of us view spam as a relatively minor annoyance, to system administrators and Internet service providers, spam represents an expensive problem, as the floods of messages put undue strain on their systems and network infrastructure.

In 2003, in an effort to curb the rapidly growing spam problem, U.S. lawmakers passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act (better known by its catchier nickname, the CAN-SPAM Act), which became effective on January 1, 2004. The law, enforced by the Federal Trade Commission and the Department of Justice, aims to reduce the volume of unwanted spam by requiring emailers to comply with certain rules regarding the messages they send and the way they acquire email addresses. In recognizing that not all bulk email is necessarily sent for nefarious purposes, the Act aims

to regulate the manner in which such email is sent, rather than attempting to prohibit or otherwise regulate the use of the medium itself.

While the CAN-SPAM Act has little effect on the day-to-day lives of most planetarians, with more and more museums and planetariums relying on the Internet to communicate with their visitors and communities, I thought that in this quarter's installment of General Counsel, I would provide a brief introduction to the law and some factors to keep in mind to help you decide if your email communication is in compliance with the relevant legal requirements.

What's Covered

As an initial matter, the CAN-SPAM Act applies only to commercial email. The designation comes from the primary purpose of the email in question and not the nature of the sender. So, even email from noncommercial institutions, like most museums and planetariums, might be designated as commercial email if the primary purpose of the message is designed to advertise or promote a product or service, or engage the recipient in a business transaction.

Exempt from the definition of commercial email, and thus exempt from the provisions of the CAN-SPAM Act, are "transactional or relationship messages" designed to facilitate a transaction in an existing business relationship. For example, an order or shipping confirmation from a vendor would not need to conform to the requirements of the CAN-SPAM Act because it relates to a specific transaction arising out of an existing relationship with the customer.

It's worth noting that requiring recipients to opt-in to receive certain email communications, although good practice, does not excuse compliance with the Act. An email which is primarily commercial in nature must comply with the Act's requirements even if it is sent to someone who has previously requested such communications. It's also interesting to note that while the CAN-SPAM Act is aimed primarily at reducing unwanted bulk email, its terms are not limited to bulk or mass distributions. The CAN-SPAM Act requirements apply to a single email sent to a single recipient just as they do to mass email distributions. The sole determining factor for applicability of the CAN-SPAM Act is the primary purpose of the email: if it's commercial, you must comply.

The Act's Basic Requirements

Once you determine that a particular email message is considered "commercial" in nature, the provisions of the CAN-SPAM Act are surprisingly straightforward. For starters, the email must not contain any false or misleading information, which includes both the body of the message as well as the header and subject line. Spammers often "spoof" the "to" and "from" fields to make their messages appear as if they were sent by a legitimate party; such conduct is prohibited by the CAN-SPAM Act. Similarly, many spammers use deceptive subject lines to entice the recipient to read their messages, which are generally unrelated to the content of the subject line. This, too, is prohibited by the CAN-SPAM Act.

Another key provision requires emailers to offer an Internet-based mechanism to allow recipients to opt out of future commercial email. The sender must keep the opt-out mechanism active for 30 days following each email message sent, and after a recipient asks to be removed from the sender's list, the address must be removed within 10 days. The CAN-SPAM Act renders it unlawful for a sender to sell the list of recipients who have opted out, or to engage a third-party to send commercial email on its behalf, to recipients who have opted out.

The sender must also include a "clear and conspicuous notice that the message is an advertisement" along with a valid, physical postal address and a clear notice that the recipient may opt out of future commercial email in each message that it sends.

The Act also contains rules regarding the acquisition and use of email addresses, providing additional penalties for "harvesting" of email addresses from web-based services that explicitly state that the email addresses will not be used for such purposes. In other words, if a web site states, in a privacy policy or elsewhere, that it does not use or will not sell the email addresses it collects for commercial purposes, it is unlawful to then use those addresses commercially. Put simply, you can't say one thing, and then do another.

Additionally, it is unlawful to generate email address lists by engaging in "dictionary attacks," which the Federal Trade Commission describes as "combining names, letters, or numbers into multiple permutations," to use scripts or other automatic methods to register multiple email accounts for the purpose of sending commercial email, and to rely email through another computer or computer network without permission of the owner.

Penalties for Violations

The CAN-SPAM Act's penalty structure provides for fines of up to \$11,000 per violation, with enhanced fines for engaging in untoward methods of email address generation, ac-

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count registration, and network relaying. Particularly egregious conduct may be investigated by the Department of Justice and could result in criminal prosecution. The Act does not provide a private right of action - that is, private parties, like consumers or internet service providers, cannot sue spammers to enforce provisions of the CAN-SPAM Act.

Note that the \$11,000 figure is a maximum; one would assume that the Federal Trade Commission, or a court, would take into account the facts and circumstances surrounding an alleged violation and impose a fine commensurate with the degree of conduct. Put differently, one could expect lower fines in situations where the violation was innocent and/or relatively few recipients were affected, and higher fines in cases where the violation was knowing, willful, and/or affected large numbers of recipients.

Other Considerations and Seeking More Information

Although the CAN-SPAM Act is the primary anti-spam law at the national level, many



Photo by Chris Reed

states have enacted their own regulations that govern email as well. While a state-by-state discussion is beyond the scope of this column, you should take the time to identify and familiarize yourself with such rules and regulations, which are typically administered and enforced by each state's attorney general.

As I mentioned earlier, the CAN-SPAM Act has been law since January 2004, and since bulk email has become such a ubiquitous form of communication, many institutions have developed readily accessible compliance guides to help reduce the chances that institu-

tional mailers will run afoul of the law. Many institutions also have a specific person or department responsible for ensuring compliance with the CAN-SPAM Act. I encourage you to seek out these resources or contact your own counsel to learn more about the law and local policies that may apply to you. Like all laws, the CAN-SPAM Act merely set forth minimum standards - it is quite possible that your institution has established more stringent guidelines about which you should make yourself aware.

As with all of my columns, this discussion merely scratches the surface of a relatively complex area of law. The fact-specific nature of the CAN-SPAM Act necessarily requires that senders consider each and every email in terms of (1) whether the message's primary purpose is commercial; and (2) the measures necessary to comply with the Act. In view of the relatively simple requirements of the Act, it seems that the benefits of complying, even if not legally required in a particular instance, would far outweigh the potential costs associated with failing to comply when necessary. ☆



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