



Mediasmith Anvil

Special Edition

What should we do about the CAN-SPAM Act?

December 16, 2003--WASHINGTON (AP) -- President Bush signed legislation Tuesday meant to stem the flood of unwanted e-mail pitches, a problem he believes is hurting the economy. "Spam, or unsolicited e-mails are annoying to consumers and costly to our economy," White House spokesman Scott McClellan said after Bush signed the bill. "This will help address the problems associated with the rapid growth and abuse of spam by establishing a framework of technological, administrative civil and criminal tools, and by providing consumers with options to reduce the volume of unwanted e-mail."

Editor's note: We try to send out the Anvil at least once a month. While we recognize that an Anvil appeared in your in-box only a few days ago, many are asking us what the implications are about the CAN-SPAM Act recently signed into legislation by President Bush. To this end, we sat in on a recent conference call held by the IAPP. What follows is an executive summary of the conference call.

CAN-SPAM Act

"Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003"

Source of Information

IAPP, International Association of Privacy Professionals
Audio Conference
The CAN-SPAM Act: Analysis and Guidance for Compliance
Wed, December 10th 2003

Speakers

Nicole Wong (Perkins Coie LLP), Ken Hirschman (Digital Impact), Brian Husemann (FTC: Bureau of Consumer Protection)

Key notes

- Proposed effective date: January 1st, 2004
- This is the 1st anti-spam initiative at the federal level
- There are 37 pre-existing state level laws
- President Bush signed the Act on December 16, 2003

Terminology

Please note that the following definitions are for the sole purpose of this summary. For a complete and official listing of terms, please refer to Section 3 of the [Act](#).

- **Sender:** The company/department of a company or individual who has identified themselves as the correspondent. (Mediasmith example: Napster)

- **Promoter:** The supporter/co-producer of an emailing. (Mediasmith example: Spin, or other magazine, merchandising opportunity to send out a mailing to Spin's opt-in user base, with a Napster message).
- **Transmitter:** The company/individual who physically initiates the email (Mediasmith example: Mediaplex or other email technology vendor).
- **Opt-out/Unsubscribe:** (process)
 - Mail recipient clicks unsubscribe link, often at the bottom of an email.
 - This action is conveyed to the transmitter and noted accordingly.
 - This action should remove this address from any future mailings, specific to that particular list.

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According to the DoubleClick Smart Marketer Report, Average click-through rates for email in Q3 2003 were 9.2%, an increase of 8.2% versus Q3 2002 (8.5%). Despite a drop in open rates in a number of categories, click-through rates increased year-over-year in the Consumer Products and Services (up 12.0% to 11.2%), Retail and Catalog (up 27.5% to 8.8%), Travel (up 2.4% to 8.5%) and Business Publisher (up 15.9% to 8.0%) categories. The click-through rate remained at 7.8% in the Business Products and Services category, while it fell 17.7% to 9.3% in the Consumer Publisher category. So much for Spam killing email marketing!

Overview of CAN-SPAM Act:

The CAN-SPAM Act is a federal level initiative that would place greater restrictions on email transmissions. Efforts to eliminate the amount of deceptive advertising and un-solicited messages containing sexually mature content will come from both Federal and State level task forces. Comparatively, the State participation will be minimal to that of the Federal involvement.

Where the Act covers all email messaging and senders, the target is aggravated mailers and not legitimate marketers. Legitimate marketers that should be most cautious about this act are those with poor opt-out technology/practices and those using rented/purchased lists. All parties involved in the mailing process (senders, promoters and transmitters) are subject to criminal prosecution. ISP's will not face any penalties for allowing SPAM to pass through their servers on this particular act.

What emails should not have:

- Falsifying headers, subject lines or messaging
- Misleading/deceptive source of email (sender)
- Opt-out mechanisms that don't work (where notification goes to address that doesn't exist or is invalid)
- Sexually explicit messaging without a parental consent warning label (see rule making timeline).

What emails should have:

- Clear-Opt-out mechanism
- Clear and conspicuous headers/subject lines and messaging.

Types of transactional messaging that will be subject to minimal restrictions.

- Product recall/warranty information
- Purchase/Registration confirmation messages.
- Personal account information. (Change in terms, account status, automatic bill pay)

(Note: All messaging described above could still be routed as SPAM by ISP's and aftermarket anti-SPAM software)

Penalties

Please refer to [Act](#) (Section 4) for a complete listing of penalties

- Federal prosecution: up to 1 million dollars and/or up to 5 years in prison.
- No private action under law.

FTC Rule Making Timeline

- 120 days after signage: Create a label for sexually mature mailings.
- 6 months after signage: "Do Not Email" registry. Not a requirement of the Act to implement, but the FTC will need to be ready to present a viable structure and technology. There are several cautions against having a registry.
 - Who will maintain?
 - Will it be too big?
 - Security against hackers.
 - Would marketers have access to list, or would all email transmissions have to be passed through FTC servers.
 - Inability for smaller legitimate marketers to acquire the technology to comply.
 - Would it even be possible to enforce?
- 9 months after signage: Bounty System against spammers. Percentage of the fine will go to the bounty.
- 2 years after signage: Congress to measure the act and its effectiveness, make amendments if necessary.

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According to ePrize, in a recent survey published by eMarketer, the chance to win was the number one most effective tool to motivate consumers to participate in permission-based marketing efforts, even ahead of a favorably disposed existing customer. Similarly, 82% of consumers are willing to provide personal information in exchange for the chance to win, according to a separate Jupiter Research study.

Best practices

- Provide clear and conspicuous subject lines, headers and messaging.
- Include clear and easy to use opt-out mechanisms.
- Use incremental lists as often as possible. Stand-alone lists do not include unsubscribe and bounce history.
- Minimize list rental/purchasing
- Audit your data
- Review your data collection practices

What is still uncertain?

- Timeline for unresolved issues still unclear
- How will multi-advertiser messaging be taken into consideration?
- What types of ISP involvement can be expected?
- How will the FTC manage mass blocking of legitimate/complying marketers?
- How will the FTC approach mailing from:
 - Automated software such as crawlers and harvesters
 - Illegitimate use of someone else's account to send messaging

Supplemental Information:

[The CAN-SPAM Act](#) (21 pages, PDF file)

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According to DoubleClick's annual consumer email study, nearly 64% of consumers cite the "from" line as the most important factor in opening an email. The average number of emails received per week is at 264, very similar to last year (254) and, on average, 56% of those emails are spam. About 65% of users will delete without reading anything they consider spam. Those trying to unsubscribe to unwanted email is down to 34% from 44% last year but 52% are reported to be using some kind of spam filtering.

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