

Spamming Gets A Closer Look

The U.S. government is taking more action than other countries against unwanted e-mail

Bob Tillman

Receiving unwanted e-mail is a common concern for computer users around the world, and legislators are taking action. Unwanted e-mail is particularly troublesome in the United States, where protecting individual privacy has long been the goal of legislation. As a result, proposals to prevent unsolicited e-mail, otherwise known as spam, have begun to re-emerge for possible legislative action in the second session of the 107th U.S. Congress. Legislative activity, however, is likely to be a replay of the 106th Congress, when the House of Representatives passed anti-spamming legislation while the Senate did nothing. The House has traditionally reacted quickly to voter concerns about spamming, while the Senate takes much longer to discuss and debate the matter.

The most recent development in anti-spamming legislation was revealed by Reps. Bob Goodlatte (R-VA) and Rick Boucher (D-VA), co-chairmen of the Congressional Internet Caucus, who indicated that the House is likely to pass anti-spamming legislation this year. Negotiations to bring a bill to the House floor on September 12, 2001, were stalled by the terrorist attacks of September 11.

The Debate about Spamming

In addition to the obvious annoyance factor, proponents for a crackdown on spam point to the cost shifting that e-mail makes possible, forcing the recipient who pays for online service to bear the economic burden associated with spam. Proponents also point to the propensity of spam to contain fraudulent claims or pornographic

material, and the waste of private resources in terms of time required for the recipients to identify and delete unsolicited e-mail, and the unproductive use of bandwidth. There is increasing concern that spam will harm legitimate e-mail, now an essential business tool. In 2000, the average U.S. e-mail account received 440 unsolicited e-mails offering pornography, fake diplomas, empty lottery jackpots, and other deceptive offers. In 2001 that total rose to 570 unsolicited e-mails, and the growth rate is expected to rise 200 per year to nearly 1,500 e-mails annually by 2006. Several states have enacted anti-spam legislation to allow consumers or Internet service providers to recover damages relating to spam.

The House has given much attention to the spamming topic; the Committee on Energy and Commerce and the Committee on the Judiciary have both held hearings and reported on legislation for floor consideration. Further action will require the House Committee on Rules to determine how the two bills will be presented to the full House for debate. But while all this has taken place, the Senate has taken no significant action.

The committees are attempting to balance limitations on unsolicited commercial e-mail with the right of free speech on the Internet and the

need for a level playing field for e-commerce marketing and communications. In the legislative report H.R. 718, the Committee on Energy and Commerce acknowledged that there is a right of free speech on the Internet. It also stated that "in legislating against certain abuses on the Internet, Congress should be very careful to avoid infringing in any way upon constitutionally protected rights, including the rights of assembly, free speech, and privacy."

The committee went on to say that "unsolicited commercial electronic mail can be an important mechanism through which businesses advertise and attract customers in the online environment." At the same time, the com-

spamming legislation may also require markers indicating if unsolicited e-mail contains sexually oriented material and impose penalties for failure to comply with these requirements.

In the House, the two principal bills are Rep. Wilson's H.R. 718 and Rep. Goodlatte's H.R. 1017. The Wilson bill would require unsolicited e-mails to include a valid return e-mail address, offer the recipient a way to opt out of future unsolicited e-mails from the same sender, and follow the posted policy of the recipient's Internet service provider. The Wilson bill would also give Internet service providers protections and rights to file suit against violators. The Goodlatte bill would require unso-

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The House of Representatives passed spam legislation in 2000 during the 106th Congress. The Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Energy and Commerce held a hearing about spamming on November 3, 1999, focusing at that time on H.R. 3113, the Unsolicited Commercial Electronic Mail Act, introduced by Rep. Wilson in 1999. In addition to receiving testimony from Reps. Wilson, Green, Smith, and Gary Miller (R-CA), the subcommittee heard from representatives of the Marketing Practices Bureau of Consumer of the Federal Trade Commission, iHighway.net Inc., SBC Communications, the Direct Marketing Association, and Alladvantage.com.

The subcommittee marked up H.R. 3113 on March 23, 2000, the full commerce committee marked up the legislation on June 14, 2000, and the House passed the legislation on July 18, 2000, by a recorded vote of 427 yeas and one nay. The bill, as passed by the House, would have required unsolicited commercial e-mail to be identified as an unsolicited commercial message, with a notice that the recipient may request to not receive further messages. It would have required spam to contain a valid e-mail address that is conspicuously displayed and to which a recipient could respond to stop further spam. H.R. 3113 would have considered the response as a termination of any pre-existing business relationship between the recipient and the sender. It would also have provided protections for Internet service providers, created rights of action for individuals and providers, and directed the Federal Trade Commission to enforce the law. It was a solid attempt to control the proliferation of spam but to no avail.

FTC Cracks Down on Spamming

In the ongoing initiative to prevent spamming, the Federal Trade Commission (FTC) is taking action against one form of spam: deceptive e-mail marketing. In September 2000, the FTC sent letters to 1,000 known spammers, warning them that their chain letter spam schemes were illegal and instructing them to stop promoting their chain letters, to return any monies received, and to forward a copy of the FTC's warning letter to everyone who had received their solicitation. On February 12, 2002, the FTC announced it had settled with seven individuals accused of spamming who had been notified in September 2000 and that it would be sending warning letters to more than 2,000 individuals still running the chain letter scam.

mittee recognized that receiving spam may result in "costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail or for the time spent accessing, reviewing, and discarding such mail."

Bills on the Horizon

Several bills on unsolicited commercial e-mail have been introduced in the 107th Congress.

Common elements in many of the various bills include a requirement that unsolicited commercial e-mail have an identifier indicating source and content and a means for a recipient to prevent receiving further e-mail from this source or its affiliates. Anti-

lited e-mails to include correct routing information but would not establish requirements for transmission or protect Internet service providers. Consumers and businesses would generally prefer the Wilson bill because of its opt-out provisions.

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Because the Senate failed to act on anti-spamming legislation due to opposition by certain industry groups, the bill died with the adjournment of the 106th Congress in 2000.

With the introduction of anti-spamming legislation in the 107th Congress, the Telecommunications Subcommittee once again marked up legislation modeled on Rep. Wilson's H.R. 718 on March 21, 2001. The full commerce committee moved the same bill on March 28, 2001.

According to the Commerce Committee, H.R. 718 would impose penalties for intentionally sending 10 or more unsolicited commercial e-mails, which contain materially false or misleading information about the initiator's identity, to one or more protected computers in the United States. The bill would require unsolicited commercial e-mail to contain a clear and conspicuous identification that the message is spam and a notice allowing the recipient to decline receiving further unsolicited commercial e-mails. The bill would also require unsolicited commercial e-mail to have a valid, conspicuously displayed e-mail address to which the recipient may respond, requesting not to receive any further messages. Senders would be required to delete or suppress the e-mail addresses of these responders within a reasonable time.

The commerce committee version of H.R. 718 would also require Internet service providers to offer users an option not to receive spam unless such messages are part of discounted or free Internet access. The bill would give service providers the opportunity to bring a cause of action against any violations of the legislation and to request damages be brought against anyone violating the act. The attorney general could also prescribe marks or notices to be included in electronic mail that contains a sexually oriented advertisement, with penalties for failure to include them. The bill would create a limited private right of action for

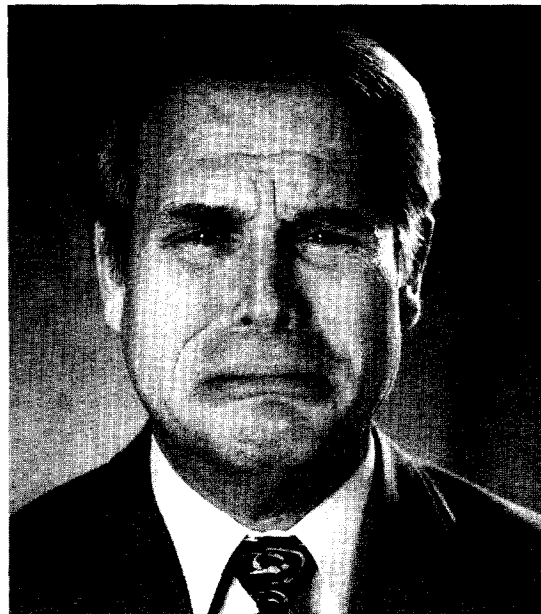
individuals to recover actual or statutory damages associated with receiving spam, but it specifically prohibits individuals from filing a class action lawsuit.

The committee adopted an amendment, offered by Rep. Wilson, to allow an Internet service provider to opt out of receiving unsolicited e-mails if the service provider has a publicly available policy against receiving unsolicited commercial e-mail and makes a good effort

to block it or if a significant portion of the service provider's customer base complains about receiving spam. The Wilson amendment gave marketers a reasonable amount of time to suppress the names of consumers opting out of spam and would prohibit the U.S. Federal Trade Commission from promulgating any rules regarding spam.

Expressing concern about the legislation possibly limiting e-commerce opportunities between the initiator

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and the recipient for renewal, upgrade, or replacement of existing service, the committee made clear that a recipient's request to not receive further messages from the initiator would not terminate the two parties' business relationship. The committee also made clear that only the sender would be liable for failure to comply with the legislation's provisions. This is intended to protect companies that the sender may use to route the message to the ultimate recipient.

The Committee on the Judiciary held a hearing focusing on H.R. 718 and H.R. 1017 on May 10, 2001. It received testimony from Rep. Wilson and representatives from the U.S. Chamber of Commerce, the Securities Industry Association, Amazon.com, the National Retail Federation, and the Cato Institute. Based on the testimony received by both committees, Internet service providers support a right for service providers to bring lawsuits against violators.

Understandably, direct marketers and online retailers oppose this right as well as any online disclosure requirements not also required in offline commercial practices. The U.S. Chamber of Commerce testified that both the Wilson and Goodlatte bills go too far in addressing the problems with spamming.

The judiciary committee marked up its version of H.R. 718, modeled on Rep. Goodlatte's H.R. 1017, on June 5, 2001. During the markup session, the committee accepted an amendment offered by Rep. Melissa Hart (R-PA) to require the attorney general to establish marks or notices that must be included in e-mail that contains sexually oriented material. It would also require the attorney general to conduct a study on the effectiveness and enforcement of the new law. Both provisions are included in the Wilson bill and the version of H.R. 718 passed by the commerce committee.

H.R. 718, as passed by the judiciary committee, would make it unlawful for anyone to intentionally send an unsolicited e-mail to a protected computer with knowledge that the message falsifies an Internet domain of the other identifier. It would make it unlawful to sell or distribute any computer program that is designed to conceal the source or routing information of the e-mail. The judiciary committee version would also require a warning label for any spam that contains a sexually oriented advertisement. It would give Internet service providers a right of action, include civil penalties, and allow recovery of attorney fees and other litigation costs. The bill would not create a private right of action to individuals.

The judiciary committee recognized the importance of marketing in the conduct of business, both on and off the Internet. In its legislative report on H.R. 718, the committee stated that "marketing, no matter how annoying is integral to the success of commerce, including electronic commerce." The committee also expressed concern that the commerce committee version of H.R. 718 would risk imposing unnecessary burdens on e-commerce. Its report went on to say that "identifying the particular stage of e-mail marketing to regulate in the retailer-consumer relationship is a difficult issue and one the Committee rejected." The judiciary committee distinguished spam that may simply be an annoyance, which it chose not to regulate, from spam that is either fraudulent, deceptive, or pornographic, which its version of H.R. 718 is intended to address.

Anti-spamming legislation in the House is currently positioned for a floor vote. Following the procedures of the House, with both committees of jurisdiction having reported their respective versions of H.R. 718, the rules committee will determine the posture of floor debate in the form of

Legislative Milestones		
Act	Sponsor	Date Introduced
Unsolicited Commercial Electronic Mail Act (H.R. 95)	Rep. Gene Green (D-TX)	January 3, 2001
Wireless Telephone Spam Protection Act (H.R. 113)	Rep. Rush Holt (D-NJ)	January 3, 2001
Unsolicited Commercial Electronic Mail Act (H.R. 718)	Rep. Heather Wilson (R-NM)	February 14, 2001
Anti-Spamming Act (H.R. 1017)	Rep. Bob Goodlatte (R-VA)	March 14, 2001
Who Is E-Mailing Our Kids Act (H.R. 1846)	Rep. Felix Grucci (R-NY)	May 15, 2001
Protect Children from E-Mail Smut Act (H.R. 2472)	Rep. Zoe Lofgren (D-CA)	July 11, 2001
Netizens Protection Act (H.R. 3146)	Rep. Christopher Smith (R-NJ)	October 16, 2001
Controlling Assault of Non-Solicited Pornography and Marketing Act (S. 630)	Sen. Conrad Burns (R-MT)	March 27, 2001

a rule, which will include the text of the principal bill and any allowable amendments.

Senior Capitol Hill staff members are hopeful that a piece of legislation can be negotiated between the commerce and judiciary committees. Rep. Wilson received a commitment from leadership last year that an anti-spamming bill would go to the full House for a vote. Reps. Wilson, Goodlatte, Boucher, and the respective committees of jurisdiction have continued negotiations to resolve differences between the two versions and expect to have a compromise version for floor vote early in 2002.

A Global Action

While anti-spamming legislation continues to be reviewed in the United States, European governments, and

others that do online business with the United States, are taking a look at their legislative actions. At the end of last year, for instance, the European Union Council proposed a ban on using e-mail for advertising without

the recipient's prior consent. Parliament is expected to consider the proposal as early as March. Other governments should take similar action if the spread of unwanted e-mail is to be controlled worldwide. ■

Bob Tillman is Director of Public Relations and Advocacy for ARMA International and can be reached at btillman@arma.org.

READ MORE ABOUT IT

The following are helpful Web sites to monitor late-breaking U.S. and international legislation:

The National Journal Group Web site: <http://nationaljournal.com/>

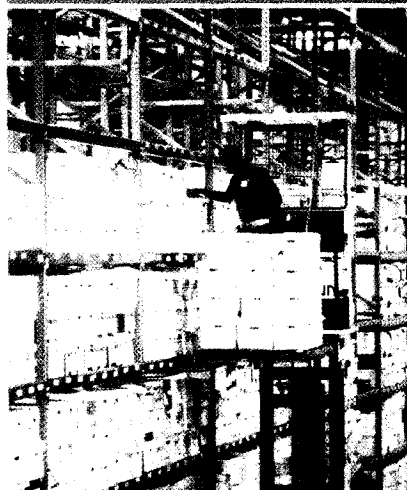
The THOMAS Legislative Information on the Internet Web site: <http://thomas.loc.gov/>

The U.S. Senate and House of Representatives Web sites: www.senate.gov, www.house.gov

The Washington Policy Watch and CLARA National and Province Report (available to ARMA International members only): accessible through the Member Resources area at www.arma.org/members/index.cfm

In the United States, the Federal Trade Commission encourages consumers to forward unsolicited commercial spam to uce@ftc.gov. Or visit www.ftc.gov to file a formal complaint against commercial spammers.

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