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Unsolicited email in business: spam, murk and the opt-in /opt-out debate

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Unsolicited email in business

Spam, murk and the opt-in/opt-out debate

by Jay Forder, Consultant Editor

At first glance, email could be viewed as just another method of communication. You might think it wouldn’t raise any new legal issues. But the change is not so much in what businesses do, but in how quickly and easily they are able to do it. The increase in speed, quantity and reach of communications leads to a fundamental change in the way business is conducted. Direct marketing takes on a whole new significance.

The printing press brought about a similar change in the Middle Ages. Before the press, publishing books took a long time. Afterwards, the increase in speed and quantity led to fundamental changes that required legislative intervention, eg to deal with copyright. Will similar intervention be needed to deal with unsolicited email (“spam”)?

The Australian Direct Marketing Association (ADMA) issued a press release on 9 November 1998 announcing a new Code of Practice. It believes it has the opportunity to show that self-regulation will be sufficient. The Code includes an “opt-out” provision, ie consumers can register their unwillingness to receive spam, and ADMA members will be required to comply.

In the USA several different approaches have been introduced or are being discussed. There is growing support in the Internet community for an “opt-in” approach, ie consumers should only get unsolicited email if they consent to it. This report will note the situation in Australia and compare it with some of these overseas developments.

The situation in Australia

Apart from common law fraud or general prohibitions against misleading and deceptive conduct (eg in the Trade Practices Act), unsolicited email is not regulated. Some statutes might cover specific situations. For example s 76C of the Commonwealth Crimes Act makes it an offence to interfere with, interrupt, obstruct, impede, prevent access to or impair the usefulness or effectiveness of the Commonwealth Government’s computers or data. But these provisions would be of limited use in dealing with spam.

The ADMA Code of Practice has been developed after years of consultation with government, consumer and industry groups. It includes privacy standards drawn from the Federal Privacy Commissioner’s “National Principles for the Fair Handling of Personal Information”. All members will be required to adhere to it. Members will also be responsible for the conduct of their agents, subcontractors and suppliers. The opt-out service will be a central “Do Not Mail/Do Not Call” database accessible by a free call (1-800) telephone number. An independent Code Authority (with equal numbers of industry and independent/consumer representatives) will investigate complaints.

Members have until 1 July 1999 to become fully compliant and will have the right to use a “Direct Marketing Code Compliant” seal.

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The Australian Competition and Consumer Commission (ACCC) recognises that unsolicited email will be a problem for online commerce. It advised ADMA and supported its move to introduce a code. But there is little other activity in Australia regarding unsolicited email.

**Developments in other jurisdictions**

Some provisions in existing laws regulate specific situations. A recent case in the USA provides a compelling example. The defendants entered into a contract to use the Internet to promote the shares of the EvenTemp Corporation and JT’s Restaurant. Their remuneration was to include cash and stock in the companies. Between November 1997 and August 1998 they created several web sites and sent countless unsolicited email messages recommending the shares. They were charged with violating s 17(b) of the Securities Act 1993 (USA) for not fully disclosing their vested interest in the stock.

There have been other well-known actions against spammers that have relied on fraud and other consumer protection provisions. But, as in Australia, existing laws don’t cover all situations.

**New legislation and cases**

The State of Washington in the USA passed legislation on 11 June 1998. It does not prohibit the sending of unsolicited email. It merely makes it illegal to send unsolicited email:

- using a third party’s address as the point of origin without permission;
- with false information in the header (ie hiding the true origin of the message);
- with misleading information in the subject line.

To overcome the jurisdictional problems, it is also a requirement that the email is sent from a computer located in Washington or from anywhere in the world to a Washington email address. The sender must know or have reason to know that the email is being sent to Washington, but the sender is deemed to know this if the information is publicly available.

Actions have been instituted under the law. An action is pending against an Oregon business after a number of Washington residents received email promoting a booklet entitled “How to Profit From the Internet”.

The subject line read “Did I get the right e-mail address?”. Recipients could not tell where the message came from.

California has recently passed two Bills. The Internet Consumer Protection Act (AB 1629) comes into force in January 1999. It was originally based on a federal Bill (HR 1748), but was considerably modified during its passage through the Californian legislature. It has an interesting approach that attempts to take the onus of policing spam off the authorities. It provides that email service providers can prohibit the use of their equipment for sending or delivering spam, and may then sue any violators for $50 per message (up to $25,000 per day). It also has a provision, similar to Washington’s, prohibiting the unauthorised use of a third party’s email address. Also coming into force on 1 January 1999 is a Californian Act (AB 1676) that requires unsolicited email to have “tags” such as ADV in the subject line, and to provide a toll-free number for opting-out.

**Other Bills**

There are literally scores of other spam-related Bills before the state and federal legislatures in the USA. This note will mention only some of the more important ones.

The US federal Netizens Protection Act 1997 (HR 1748) has not passed through the legislature yet. As introduced, it prohibits sending unsolicited email to an individual with whom the sender lacks an existing business or personal relationship, unless (1) the individual expressly consents, or (2) the sender clearly provides the date and time of the message, the identity of the business sending the message and the sender’s return address.

Amendments have included a provision for consumers to claim $500 for each message in contravention of the Act. Some commentators suggest this proposal is the closest to an “opt-in” scheme and deserves support.

Another US federal Senate Bill (S 1618) and its similarly worded counterpart in the House (HR 3888) have caused controversy. While appearing to be a well-intentioned effort to regulate spam, it is seen by Internet commentators as weak and likely to legitimise unsolicited email. It merely requires unsolicited email to be identifiable, and to have an opt-out method. Note that this is not a global opt-out system, but would need to be repeated for each spammer’s mailing list. The Senate version was lashed onto other legislation and passed in June. While it has not passed the House of Representatives, its support in the Senate has apparently prompted some direct marketers to use legitimising messages citing the Bill and saying: “For the last two years bulk email has been at the forefront on controversy … But NO more!!! It’s Legal.” A new epithet has been coined to describe these messages – “murk” (after Senator Murkowski, who sponsored the Senate Bill).

Disquiet in the Internet community over the Murkowski Bill led to a “pink-out” protest – pink web pages to indicate opposition. Whether because of the effect of pink web pages or other more skilful lobbying, Congress’ Commerce Committee gave an adverse report on these Bills in October, suggesting that self-regulation would be a better option.

**Other views**

A new organisation in the USA, the Internet Direct Marketing Bureau, has endorsed an opt-in policy for unsolicited email. The Canadian Direct Marketing Association is also amending its code of ethics to require consent before sending email. This contrasts with the US Direct Marketing Association’s opt-out model.

These developments are interesting. The direct marketing associations are powerful lobby groups. If some of them are prepared to go along with the Internet community in supporting an opt-in approach, this view has a good chance of succeeding. On the other hand, the recent EU draft directive (noted elsewhere in this issue) takes the more traditional “tag in the header” approach.
Conclusions

The ADMA Code of Practice should be warmly welcomed as a positive step in the right direction. In particular, its single opt-out database will be a useful contribution. Regrettably it won’t apply to non-members, so there will still be a problem. In the long term, it is doubtful that self-regulation by direct marketing associations will be sufficient to protect consumers. It will probably be necessary to regulate further. Australians will need to debate the merits of the opt-in scheme and the interesting possibility of giving ISPs the right to recover fixed civil claims against spammers as a deterrent.

2 For an earlier comment on some of these provisions and relevant cases, see Randal Leeb-du Toit, “No TrUCE on Spam”, Issue 5, Law & Technology Newsletter, May 1998.
6 Summaries can be found at sites such as <http://www.junkbusters.com/> and <http://www.oa.net/waytosuccess/nospam.html>.
8 See Latest News at <http://www.cauce.org/> [as accessed on 2/12/98].
10 See a summary as introduced at <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR01748:@@@L>.
11 See <http://www.oa.net/waytosuccess/spamlegal_muckhist.html>.
12 See Latest News at <http://www.cauce.org/> [as accessed on 2/12/98].