

## Can **SPAM** Be Stopped?

**Rather than legislate a quick fix, Congress needs to look harder at legal and technical complexities.**

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**T**he deluge of unsolicited commercial e-mail, or spam, that threatens to choke the Internet has produced that rarest of Washington occurrences: consensus. Even rarer, the consensus is on the need to regulate. Major Internet companies, consumer advocates, and policy-makers agree that to protect the viability of electronic mail—probably the most widely used Internet application—Congress must enact legislation to reduce the amount of spam.

The concern about spam is growing and well-founded. Spam is estimated to now make up 40 percent of all e-mail communications, posing problems for consumers, Internet service providers, and legitimate marketers alike. Consumers complain of mailboxes full of messages that are at the very least annoying, and that at their worst are personally offensive. Spam imposes costs on ISPs that can be measured in reduced available bandwidth, and in the increased equipment and person-hours required to stem the flow. Legitimate marketers worry that unwanted marketing messages drown out appropriate, permission-based marketing. Noncommercial political speech is also drowned out. Overall, there is concern that unsolicited e-mail will compromise the value of electronic mail and, ultimately, of the Internet.

### HIDDEN COMPLEXITY

However, as Congress prepares to respond to the public demand for legislation, the appearance of consensus hides complex questions and conflicting ideas about how best to fight spam. As so often happens in the policy arena, there are competing interests at stake, all with some validity.

Legislation must effectively curb the proliferation of commercial spam, without constraining the legitimate online marketplace. It must limit the unwanted messages that reach consumers, while protecting the right of free speech. It must address the technological threats to the Internet experienced most directly by ISPs, without stifling innovative means of

reaching individuals. And as a federal law, it must take into account the interests of the states in protecting the consumer rights of their citizens.

A look at just some of the tough issues raised by spam proposals highlights the challenges ahead:

- *“ADV” labeling vs. the First Amendment:* Several legislative proposals to combat spam include a requirement that the sender of commercial e-mail label the message with “ADV” in the subject line. Alternative proposals require notification of the commercial nature of the e-mail within the text of the message itself. Labeling or notification could allow ISPs and consumers to more effectively filter out unwanted commercial messages. Such proposals, however, meet with opposition by defenders of the First Amendment. Mandatory labeling, they argue, would be tantamount to what is referred to as “forced speech”—requiring by law that online speakers characterize the nature and content of their communication. Moreover, it is doubtful that senders of the most offensive and pervasive types of spam would comply with an ADV requirement.

- *Accurate header information requirements vs. the right to online anonymity:* Some anti-spam proposals have also included provisions requiring that unsolicited commercial e-mail contain routing information accurately representing the true origins of the message. Some proposals cast this provision in terms of fraud. Providing this kind of accurate information could have two salutary effects: It could aid ISPs in filtering messages from known spammers, who currently mask the source of their messages by using falsified header information. And it could assist consumers in identifying the source of unwanted e-mail, so they can effectively opt out of receiving further communications. Advocates of an individual’s right to online anonymity, however, raise concerns that some formulations requiring accurate header information would destroy anonymous communication on the Internet. They further argue that mere concealment of one’s identity, without intent to deceive, is not in and of itself fraud.

- *Opt out vs. opt in:* The mother of all conflicts is between an opt-out approach, which could involve requiring each commer-

cial e-mail to include a return address giving consumers the right to insist that they receive no more e-mail from that sender, and an opt-in one, which prohibits e-mail to anyone who has not explicitly requested it. One version of opt out would be the online equivalent of the Federal Trade Commission's soon-to-be created "do not call" list. The European Union recently adopted a directive prohibiting spam unless consumers affirmatively opt in.

- *Pre-emption vs. states' right to restrict spam:* Another contentious issue is whether federal law should pre-empt state restrictions on spam. One line of argument states that a single federal standard of compliance would streamline business requirements and afford consumers a consistent expectation of protection. Such an approach would benefit the online marketplace by encouraging continued development of the Internet as a borderless medium. But consumer advocates disagree, citing the long-standing interest of the states in protecting consumers, their role as sites for legislative debate and experimentation, and their ability to provide a quicker legislative response to changing conditions than is possible through congressional action.

### STILL MORE ISSUES

Numerous other provocative issues underlie the collective call for spam legislation. Indeed, even defining what constitutes spam is difficult and prompts intense debate. Should there be exemptions for mail to customers with whom there is a pre-existing relationship? If spam involves e-mail messages that are commercial in nature, how in this context is *commercial* defined?

The complexity of the issue and the widely divergent approaches being proposed to address the spam problem are apparent in the legislative proposals currently under consideration. A brief look at two of them illustrates the point.

S. 877, introduced by Sens. Conrad Burns (R-Mont.), Ron Wyden (D-Ore.), and others would prohibit transmission of commercial e-mail with a deceptive subject heading, and require all unsolicited e-mail to have a valid return e-mail address so recipients can request to be removed from mass e-mail lists. Marketers would be prohibited from sending any further messages to a consumer who has asked them to stop sending e-mail. The bill would require that unsolicited commercial e-mail include identification that the message is an advertisement or solicitation, notice that there is an opportunity to opt out of subsequent mailings, and the valid physical postal address of the sender. In addition, ISPs would be able to bring legal action to keep unlawful spam from their networks and to recover damages. The legislation contains an enforcement provision allowing the FTC to impose civil fines on those who violate the law, and state attorneys general could bring suit on behalf of citizens. The bill would preempt existing state laws regulating spam.

In contrast, Sen. Charles Schumer (D-N.Y.) has proposed legislation that would create a "do not spam" list of e-mail address-

es similar to the FTC's new "do not call" registry. The legislation would institute anti-fraud measures and include specific provisions to address the deceptive information that the FTC estimates is present in 66 percent of all junk e-mail.

### NEED FOR DIALOGUE

While proposals for spam legislation abound in Washington, it is clear that more work is needed to understand the underlying issues and determine what elements will comprise an effective solution. To do that, it's critical that the affected parties break the problem down and examine its component pieces.

What we believe is needed is a consultation on spam—a focused, substantive dialogue among key stakeholders about this host of proposals. A private or public organization should hold a one- or two-day session, gathering representatives of all stakeholder groups to examine the matrix of interests, problems, and possible solutions pertinent to the issue. Discussions need not necessarily attempt to reach broad consensus, but should highlight some common areas of agreement and disagreement about what could reasonably be expected to work to solve the problem. So far, the spam issue has not benefited from such a forum.

Embarking on such a "spam consultation," it will be important to recognize several things:

First, there is no "silver bullet." No legislative solution to the problem of spam will be perfect, and nothing can be expected to eliminate spam entirely. At best, the incidence of spam can be reduced and controlled. But even that would go a long way toward easing the burden on consumers and industry.

Second, the most effective solution to spam will combine legal and technological elements. Technological tools available to consumers and ISPs cannot by themselves provide a complete solution to the problem of spam. Filters are often a blunt instrument that block wanted messages along with unwanted ones. The most effective legislation will be crafted with the technology in mind, designed to enhance the tools' usefulness.

Finally, in considering legislative options, industry, advocates, and legislators should resist the idea that they only will have one bite at the legislative apple. It is not necessary to enact the comprehensive spam law on the first try. A better approach may be incremental, allowing time to evaluate the impact, positive and negative, of step one before deciding on step two.

It is not apparent yet what form legislation should take. A consultative process could deepen our understanding of likely effectiveness and consequences of the proposals on the table. If we do not have such a dialogue, the competing proposals may yield only gridlock, as the search for a perfect solution becomes the enemy of a good one. ■

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