

2004 NEXPO CONFERENCE

SPAM

THE LAW, THE RISKS, THE REMEDIES

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SPAM: What is it?

- **CAN-SPAM Act defines it as unsolicited e-mail whose purpose is “primarily commercial” & which does not include a “transactional or relationship message.”**
- **But Florida “Electronic Mail Communications Act” defines Spam more broadly, including not only commercial messages but also “any electronic mail message that may interfere with any trade or commerce, including messages that contain computer viruses.”**



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THE LAW: SPAM

- **Federal CAN-SPAM Act**
- **State laws: preempted unless they prohibit falsity or deception or are not Spam-specific.**
- **An increasing number of states are adopting laws that attempt to regulate Spam by prohibiting commercial e-mail elements that are false misleading.**



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STATE LAWS

- **California: Tough Anti-Spam Law**
(approved Sept. 23, 2003; was to have taken effect on Jan 1, 2004; preempted by CAN-SPAM Act)

Prohibited unsolicited commercial e-mail from California or to a California e-mail address. Imposed an “opt-in” requirement versus “opt-out” provision of CAN-SPAM Act. Also permitted individual recipients to sue for damages.



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STATE LAWS

- **Florida:** **Electronic Mail Communications Act (2004)**

Prohibits unsolicited commercial e-mail (including intentionally transmitted viruses) which contain false identities, address, or subject lines, as well as certain false or deceptive information in the body of the e-mail. Broad jurisdiction: extends to any person “who knew or should have known” that the e-mail would be received in Florida. Enforced by Fla. Dept. of Legal Affairs & e-mail providers; damages & injunctive relief are provided for violations.

STATE LAWS

- **Maryland: Maryland Spam Deterrence Act (2004)**

**Prohibits falsify identities, address or subject lines in spam e-mail messages (potential penalties of 10 years in jail & fines of up to \$25,000).
(effective Oct. 1, 2004)**

STATE LAWS

- **Virginia: Virginia Computer Crimes Act**

Prohibits the sending of “Unauthorized Bulk E-mail” containing false electronic mail transmission information or other false routing information. UBE is defined as where the volume transmitted exceeds 10,000 recipients in any 24-hour period, 100,000 attempted recipients in any 30-day period or one million recipients in any 1-year period -- or where revenue from one UBE transmission exceeds \$1,000 or the total generated from all UBE sent to a single e-mail provider exceeds \$50,000.



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STATE LAWS

- **Virginia: Virginia Computer Crimes Act (cont.)**

Broad jurisdictional provision. Law defines using a computer or computer network within Virginia as conferring jurisdiction in Virginia. Given that the bulk of U.S. (and perhaps the world's) Internet traffic passes through Virginia, this gives Virginia broad authority to bring actions for fraudulent Spam. Both criminal and civil actions may be brought under the law, including by individual recipients.



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LAWS OF OTHER COUNTRIES

•EU: EUROPEAN PRIVACY DIRECTIVE

Requires member states to adopt by October 31, 2003 laws that permit e-mail for direct marketing only with respect to subscribers who have given their prior consent (i.e., an opt-in requirement). As of April, 2004, eight EU nations had neither adopted nor informed the EU of plans to adopt such laws: Belgium, Greece, Germany, France, Luxembourg, the Netherlands, Portugal & Finland.



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LAWS OF OTHER COUNTRIES

•AUSTRALIA: THE SPAM ACT OF 2003

Prohibits the sending of commercial e-mail to recipients without their consent. Requires that the e-mail contain accurate information about the sender & a functional way for the recipients to unsubscribe. Use of electronic address harvesting software or lists which have been generated using such software is prohibited for the purpose of generating unsolicited e-mail messages. Applies to e-mail sent from Australia & to e-mails sent to an address accessed in Australia.

OTHER RELEVANT LAWS

- **Spam that contains viruses or that provides a mechanism for others to access or control a computer for the purpose of using it to send Spam, or for other purposes, may violate anti-hacking & similar laws.**
- 7 U.S. Computer Fraud & Abuse Act prohibits unauthorized access to computer or computer networks which causes damage in a 1-year period of \$5,000 or more; prohibits transmission of viruses and other intentionally destructive code; both civil & criminal penalties are provided.**



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OTHER RELEVANT LAWS

7 Virginia Computer Crimes Act (in addition to regulating Spam) also prohibits unauthorized use of a computer or computer network to:

- # Tamper with computer programs, software or data**
- # Cause a computer to malfunction (even for a short period of time)**
- # Create or alter a financial instrument or an electronic transfer of funds**
- # Cause physical injury to the property of another.**



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THE RISKS

- **Commercial e-mail sent by you/your company**
- **Spam received by you/your company**



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THE RISKS

- **Commercial e-mail sent by you/your company**

7 Where are the targeted recipients located?

(may be subject to requirements of other states and if international, may subject the sender to opt-in & other requirements)

7 Is there any false information in the e-mail header or subject line?

The CAN-SPAM Act makes it unlawful to send a commercial e-mail when the initiator has actual or constructive knowledge that the subject heading would mislead a reasonable recipient as to the contents or subject matter of the message.



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THE RISKS

- **Commercial e-mail sent by you/your company (cont.)**

7 Does commercial e-mail (even a single such message) contain appropriate opt-out language? Are opt-out requests timely complied with?

(The CAN-SPAM Act requires that opt-out requests be honored within 10 business days.)

THE RISKS

- **SPAM Received By You/Your Company**
 - 7 **Wasted Resources**
 - # **Bandwidth**
 - # **Server Capacity**
 - # **Individual Productivity**
 - 7 **Virus Infection/Hacker Attack**
 - # **System Down-time**
 - # **Corruption or Loss of Data**
 - # **Theft of Sensitive Personal, Financial or Corporate Data**
 - 7 **Possible Claims By Those Whose Private or Financial Data is Impermissibly Accessed or Stolen**

THE REMEDIES

- **For Risks Resulting From Commercial E-Mail Sent By You/Your Company**
 - 7 **Compliance with CAN-SPAM Act & applicable state laws**
 - # **Distinguish “commercial” from “transactional” or “relationship” e-mail**
 - # **Have opt-out info in all commercial e-mail**
 - # **Have mechanism in place to honor all opt-out requests within 10 business days**
 - # **Ensure no “materially false or materially misleading” header info (commercial & transactional/relationship e-mail)**
 - # **Ensure no e-mail subject headings likely to mislead a reasonable recipient about the content of the message (commercial e-mail)**



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THE REMEDIES

- **For Risks Resulting From Commercial E-Mail Sent By You/Your Company (cont.)**

7 Compliance with relevant laws of other states/countries

- # **Identify other states/countries to which you/your company normally sends e-mail**
- # **Consult with legal counsel as to requirements of those states/countries applicable to e-mail**
- # **Consider possible need to institute policies to comply with requirements of those states/countries (e.g., EU opt-in provisions)**

THE REMEDIES

- **For Risks Resulting From SPAM Received by Your Company**
 - 7 **Primary defense is technical (anti-virus, anti-spam software, firewall, etc.)**
 - 7 **But you can help increase the likelihood that these technical means will work (and decrease the resulting risks if they don't) by adopting appropriate policies governing e-mail, computer & Web site use, by informing your customers & employees of those policies and by obtaining agreement/consent where necessary.**



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THE REMEDIES

- **For example, policy might include the following:**
 - 7 Web site disclaimer and user agreement indicating that company will take reasonable steps to safeguard private data but that company will not be responsible for theft or misuse of data**
 - 7 Prohibition on employee use of company e-mail address for personal business**
 - 7 Prohibition on employee use of company computer for non-business purposes (including personal e-mail using non-business e-mail address)**
 - 7 Prohibition on employees installing unauthorized software on their computers (whether or not licensed)**
 - 7 Prohibition on Internet downloads to company computer.**



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OTHER INFORMATION

- **For copies of the laws mentioned in this presentation, a list of other Web sites related to the Spam problem, and other SPAM-related information, go to www.AllianceLawGroup.com/spam**