

HEINONLINE

Citation: 2 Controlling the Assault of Non-Solicited Pornography
Marketing CAN-SPAM Act of 2003 A Legislative History
H. Manz ed. 1 2004

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Apr 22 11:51:16 2013

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

107TH CONGRESS
1ST SESSION

S. 630

To prohibit senders of unsolicited commercial electronic mail from disguising the source of their messages, to give consumers the choice to cease receiving a sender's unsolicited commercial electronic mail messages, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 27, 2001

Mr. BURNS (for himself, Mr. WYDEN, Mr. LIEBERMAN, Ms. LANDRIEU, Mr. TORRICELLI, Mr. BREAUX, and Mr. MURKOWSKI) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To prohibit senders of unsolicited commercial electronic mail from disguising the source of their messages, to give consumers the choice to cease receiving a sender's unsolicited commercial electronic mail messages, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Controlling the Assault
5 of Non-Solicited Pornography and Marketing Act of
6 2001", or the "CAN SPAM Act of 2001".

1 **SEC. 2. CONGRESSIONAL FINDINGS AND POLICY.**

2 (a) FINDINGS.—The Congress finds the following:

3 (1) There is a right of free speech on the Inter-
4 net.

5 (2) The Internet has increasingly become a crit-
6 ical mode of global communication and now presents
7 unprecedented opportunities for the development and
8 growth of global commerce and an integrated world-
9 wide economy. In order for global commerce on the
10 Internet to reach its full potential, individuals and
11 entities, using the Internet and other online services
12 should be prevented from engaging in activities that
13 prevent other users and Internet service providers
14 from having a reasonably predictable, efficient, and
15 economical online experience.

16 (3) Unsolicited commercial electronic mail can
17 be a mechanism through which businesses advertise
18 and attract customers in the online environment.

19 (4) The receipt of unsolicited commercial elec-
20 tronic mail may result in costs to recipients who
21 cannot refuse to accept such mail and who incur
22 costs for the storage of such mail, or for the time
23 spent accessing, reviewing, and discarding such mail,
24 or for both.

25 (5) Unsolicited commercial electronic mail may
26 impose significant monetary costs on providers of

1 Internet access services, businesses, and educational
2 and nonprofit institutions that carry and receive
3 such mail, as there is a finite volume of mail that
4 such providers, businesses, and institutions can han-
5 dle without further investment. The sending of such
6 mail is increasingly and negatively affecting the
7 quality of service provided to customers of Internet
8 access service, and shifting costs from the sender of
9 the advertisement to the provider of Internet access
10 service and the recipient.

11 (6) While some senders of unsolicited commer-
12 cial electronic mail messages provide simple and reli-
13 able way for recipients to reject (or “opt-out” of) re-
14 ceipt of unsolicited commercial electronic mail from
15 such senders in the future, other senders provide no
16 such “opt-out” mechanism, or refuse to honor the
17 requests of recipients not to receive electronic mail
18 from such senders in the future, or both.

19 (7) An increasing number of senders of unsolic-
20 ited commercial electronic mail purposefully disguise
21 the source of such mail so as to prevent recipients
22 from responding to such mail quickly and easily.

23 (8) An increasing number of senders of unsolic-
24 ited commercial electronic mail purposefully include
25 misleading information in the message’s subject lines

1 in order to induce the recipients to view the mes-
2 sages.

3 (9) Because recipients of unsolicited commercial
4 electronic mail are unable to avoid the receipt of
5 such mail through reasonable means, such mail may
6 invade the privacy of recipients.

7 (10) The practice of sending unsolicited com-
8 mercial electronic mail is sufficiently profitable that
9 senders of such mail will not be unduly burdened by
10 the costs associated with providing an “opt-out”
11 mechanism to recipients and ensuring that recipients
12 who exercise such opt-out do not receive further
13 messages from that sender.

14 (11) In legislating against certain abuses on the
15 Internet, Congress should be very careful to avoid
16 infringing in any way upon constitutionally protected
17 rights, including the rights of assemble, free speech,
18 and privacy.

19 (b) CONGRESSIONAL DETERMINATION OF PUBLIC
20 POLICY.—On the basis of the findings in subsection (a),
21 the Congress determines that—

22 (1) there is substantial government interest in
23 regulation of unsolicited commercial electronic mail;

1 (2) senders of unsolicited commercial electronic
2 mail should not mislead recipients as to the source
3 or content of such mail; and

4 (3) recipients of unsolicited commercial elec-
5 tronic mail have a right to decline to receive addi-
6 tional unsolicited commercial electronic mail from
7 the same source.

8 **SEC. 3. DEFINITIONS.**

9 In this Act:

10 (1) **AFFIRMATIVE CONSENT.**—The term “af-
11 firmative consent”, when used with respect to a
12 commercial electronic mail message, means—

13 (A) the message falls within the scope of
14 an express and unambiguous invitation or per-
15 mission granted by the recipient and not subse-
16 quently revoked;

17 (B) the recipient had clear and con-
18 spicuous notice, at the time such invitation or
19 permission was granted, of—

20 (i) the fact that the recipient was
21 granting the invitation or permission;

22 (ii) the scope of the invitation or per-
23 mission, including what types of commer-
24 cial electronic mail messages would be cov-
25 ered by the invitation or permission and

1 what senders or types of senders, if any,
2 other than the party to whom the invita-
3 tion or permission was communicated
4 would be covered by the invitation or per-
5 mission; and

6 (iii) a reasonable and effective mecha-
7 nism for revoking the invitation or permis-
8 sion; and

9 (C) the recipient has not, after granting
10 the invitation or permission, submitted a re-
11 quest under section 5(a)(3) not to receive unso-
12 licited commercial electronic mail messages
13 from the sender of the message.

14 (2) COMMERCIAL ELECTRONIC MAIL MES-
15 SAGE.—The term “commercial electronic mail mes-
16 sage” means any electronic mail message the pri-
17 mary purpose of which is to advertise or promote,
18 for a commercial purpose, a commercial product or
19 service (including content on an Internet website).
20 An electronic mail message shall not be considered
21 to be a commercial electronic mail message solely be-
22 cause such message includes a reference to a com-
23 mercial entity that serves to identify the sender or
24 a reference or link to an Internet website operated
25 for a commercial purpose.

1 (3) COMMISSION.—The term “Commission”
2 means the Federal Trade Commission.

3 (4) DOMAIN NAME.—The term “domain name”
4 means any alphanumeric designation which is reg-
5 istered with or assigned by any domain name reg-
6 istrar, domain name registry, or other domain name
7 registration authority as part of an electronic ad-
8 dress on the Internet.

9 (5) ELECTRONIC MAIL ADDRESS.—

10 (A) IN GENERAL.—The term “electronic
11 mail address” means a destination (commonly
12 expressed as a string of characters) to which
13 electronic mail can be sent or delivered.

14 (B) INCLUSION.—In the case of the Inter-
15 net, the term “electronic mail address” may in-
16 clude an electronic mail address consisting of a
17 user name or mailbox (commonly referred to as
18 the “local part”) and a reference to an Internet
19 domain (commonly referred to as the “domain
20 part”).

21 (6) FTC ACT.—The term “FTC Act” means
22 the Federal Trade Commission Act (15 U.S.C. 41 et
23 seq.).

24 (7) FUNCTIONING RETURN ELECTRONIC MAIL
25 ADDRESS.—

1 (A) The term “functioning return elec-
2 tronic mail address” means a legitimately ob-
3 tained electronic mail address, clearly and con-
4 spicuously displayed in a commercial electronic
5 mail message, that—

6 (i) remains capable of receiving mes-
7 sages for no less than 30 days after the
8 transmission of such commercial electronic
9 mail message; and

10 (ii) that has capacity reasonably cal-
11 culated, in light of the number of recipi-
12 ents of the commercial electronic mail mes-
13 sage, to enable it to receive the full ex-
14 pected quantity of reply messages from
15 such recipients.

16 (B) An electronic mail address that meets
17 the requirements of subparagraph (A) shall not
18 be excluded from this definition because of a
19 temporary inability to receive electronic mail
20 messages due to technical problems, provided
21 steps are taken to correct such technical prob-
22 lems within a reasonable time period.

23 (8) **HEADER INFORMATION.**—The term “header
24 information” means the source, destination, and
25 routing information attached to the beginning of an

1 electronic mail message, including the originating
2 domain name and originating electronic mail ad-
3 dress.

4 (9) IMPLIED CONSENT.—The term “implied
5 consent”, when used with respect to a commercial
6 electronic mail message, means—

7 (A) within the 5-year period ending upon
8 receipt of such message, there has been a busi-
9 ness transaction between the sender and the re-
10 cipient (including a transaction involving the
11 provision, free of charge, of information, goods,
12 or services requested by the recipient); and

13 (B) the recipient was, at the time of such
14 transaction or thereafter, provided a clear and
15 conspicuous notice of an opportunity not to re-
16 ceive unsolicited commercial electronic mail
17 messages from the sender and has not exercised
18 such opportunity.

19 (10) INITIATE.—The term “initiate”, when
20 used with respect to a commercial electronic mail
21 message, means to originate such message, to pro-
22 cure the origination of such message, or to assist in
23 the origination of such message through the provi-
24 sion or selection of addresses to which such message
25 will be sent, but shall not include actions that con-

1 stitute routine conveyance of such message. For pur-
2 poses of this Act, more than 1 person may be con-
3 sidered to have initiated the same message.

4 (11) INTERNET.—The term “Internet” has the
5 meaning given that term in the Internet Tax Free-
6 dom Act (Public Law 105–277, div. C, title XI,
7 § 1101(e)(3)(c)).

8 (12) INTERNET ACCESS SERVICE.—The term
9 “Internet access service” has the meaning given that
10 term in section 231(e)(4) of the Communications
11 Act of 1934 (47 U.S.C. 231(e)(4)).

12 (13) PROTECTED COMPUTER.—The term “pro-
13 tected computer” has the meaning given that term
14 in section 1030(e)(2) of title 18, United States
15 Code.

16 (14) RECIPIENT.—The term “recipient”, when
17 used with respect to a commercial electronic mail
18 message, means the addressee of such message. If
19 an addressee of a commercial electronic mail mes-
20 sage has 1 or more electronic mail addresses in addi-
21 tion to the address to which the message was ad-
22 dressed, the addressee shall be treated as a separate
23 recipient with respect to each such address.

24 (15) ROUTINE CONVEYANCE.—The term “rou-
25 tine conveyance” means the transmission, routing,

1 relaying, handling, or storing, through an automatic
2 technical process, of an electronic mail message for
3 which another person has provided and selected the
4 recipient addresses.

5 (16) SENDER.—The term “sender”, when used
6 with respect to a commercial electronic mail mes-
7 sage, means a person who initiates such a message
8 and whose product, service, or Internet web site is
9 advertised or promoted by the message, but does not
10 include any person, including a provider of Internet
11 access service, whose role with respect to the mes-
12 sage is limited to routine conveyance of the message.

13 (17) UNSOLICITED COMMERCIAL ELECTRONIC
14 MAIL MESSAGE.—

15 (A) IN GENERAL.—The term “unsolicited
16 commercial electronic mail message” means any
17 commercial electronic mail message that is sent
18 to a recipient—

19 (i) without prior affirmative consent
20 or implied consent from the recipient; or

21 (ii) to a recipient who, subsequent to
22 the establishment of affirmative or implied
23 consent under subparagraph (i), has ex-
24 pressed, in a reply submitted pursuant to
25 section 5(a)(3), or in response to any other

1 opportunity the sender may have provided
2 to the recipient, a desire not to receive
3 commercial electronic mail messages from
4 the sender.

5 (B) EXCLUSION.—Notwithstanding sub-
6 paragraph (A), the term “unsolicited commer-
7 cial electronic mail message” does not include
8 an electronic mail message sent by or on behalf
9 of one or more lawful owners of copyright, pat-
10 ent, publicity, or trademark rights to an unau-
11 thorized user of protected material notifying
12 such user that the use is unauthorized and re-
13 questing that the use be terminated or that per-
14 mission for such use be obtained from the
15 rights holder or holders.

16 **SEC. 4. CRIMINAL PENALTY FOR UNSOLICITED COMMER-**
17 ****CIAL ELECTRONIC MAIL CONTAINING FRAUD-****
18 ****ULENT ROUTING INFORMATION.****

19 (a) IN GENERAL.—Chapter 63 of title 18, United
20 States Code, is amended by adding at the end the fol-
21 lowing:

1 **“§ 1348. Unsolicited commercial electronic mail con-**
 2 **taining fraudulent transmission informa-**
 3 **tion**

4 “(a) IN GENERAL.—Any person who intentionally
 5 initiates the transmission of any unsolicited commercial
 6 electronic mail message to a protected computer in the
 7 United States with knowledge that such message contains
 8 or is accompanied by header information that is materially
 9 or intentionally false or misleading shall be fined or im-
 10 prisoned for not more than 1 year, or both, under this
 11 title.

12 “(b) DEFINITIONS.—Any term used in subsection (a)
 13 that is defined in section 3 of the Unsolicited Commercial
 14 Electronic Mail Act of 2001 has the meaning giving it in
 15 that section.”

16 (b) CONFORMING AMENDMENT.—The chapter anal-
 17 ysis for chapter 63 of title 18, United States Code, is
 18 amended by adding at the end the following:

“1348. Unsolicited commercial electronic mail containing fraudulent routing in-
 formation”.

19 **SEC. 5. OTHER PROTECTIONS AGAINST UNSOLICITED COM-**
 20 **MERCIAL ELECTRONIC MAIL.**

21 (a) REQUIREMENTS FOR TRANSMISSION OF MES-
 22 SAGES.—

23 (1) PROHIBITION OF FALSE OR MISLEADING
 24 TRANSMISSION INFORMATION.—It shall be unlawful

1 for any person to initiate the transmission, to a pro-
2 tected computer, of a commercial electronic mail
3 message that contains, or is accompanied by, header
4 information that is materially or intentionally false
5 or misleading, or not legitimately obtained.

6 (2) PROHIBITION OF DECEPTIVE SUBJECT
7 HEADINGS.—It shall be unlawful for any person to
8 initiate the transmission, to a protected computer, of
9 a commercial electronic mail message with a subject
10 heading that such person knows is likely to mislead
11 the recipient about a material fact regarding the
12 contents or subject matter of the message.

13 (3) INCLUSION OF RETURN ADDRESS IN COM-
14 Mercial ELECTRONIC MAIL.—It shall be unlawful
15 for any person to initiate the transmission of a com-
16 mercial electronic mail message to a protected com-
17 puter unless such message contains a functioning re-
18 turn electronic mail address to which a recipient
19 may send a reply to the sender to indicate a desire
20 not to receive further messages from that sender at
21 the electronic mail address at which the message
22 was received.

23 (4) PROHIBITION OF TRANSMISSION OF UNSO-
24 LICITED COMMERCIAL ELECTRONIC MAIL AFTER OB-
25 JECTION.—If a recipient makes a request to a send-

1 er, through an electronic mail message sent to an
2 electronic mail address provided by the sender pur-
3 suant to paragraph (3), not to receive further elec-
4 tronic mail messages from that sender, it shall be
5 unlawful for the sender, or any person acting on be-
6 half of the sender, to initiate the transmission of an
7 unsolicited commercial electronic mail message to
8 such a recipient within the United States more than
9 10 days after receipt of such request.

10 (5) INCLUSION OF IDENTIFIER, OPT-OUT, AND
11 PHYSICAL ADDRESS IN UNSOLICITED COMMERCIAL
12 ELECTRONIC MAIL.—It shall be unlawful for any
13 person to initiate the transmission of any unsolicited
14 commercial electronic mail message to a protected
15 computer unless the message provides, in a manner
16 that is clear and conspicuous to the recipient—

17 (A) identification that the message is an
18 advertisement or solicitation;

19 (B) notice of the opportunity under para-
20 graph (3) to decline to receive further unsolic-
21 ited commercial electronic mail messages from
22 the sender; and

23 (C) a valid physical postal address of the
24 sender.

1 (b) NO EFFECT ON POLICIES OF PROVIDERS OF
2 INTERNET ACCESS SERVICE.—Nothing in this Act shall
3 be construed to have any effect on the lawfulness or un-
4 lawfulness, under any other provision of law, of the adop-
5 tion, implementation, or enforcement by a provider of
6 Internet access service of a policy of declining to transmit,
7 route, relay, handle, or store certain types of electronic
8 mail messages.

9 **SEC. 6. ENFORCEMENT.**

10 (a) ENFORCEMENT BY COMMISSION.—

11 (1) IN GENERAL.—Section 5 of this Act shall
12 be enforced by the Commission under the FTC Act.
13 For purposes of such Commission enforcement, a
14 violation of section 5 of this Act shall be treated as
15 a violation of a rule under section 18 (15 U.S.C.
16 57a) of the FTC Act regarding unfair or deceptive
17 acts or practices.

18 (2) SCOPE OF COMMISSION ENFORCEMENT AU-
19 THORITY.—

20 (A) The Commission shall prevent any per-
21 son from violating section 5 of this Act in the
22 same manner, by the same means, and with the
23 same jurisdiction, powers, and duties as though
24 all applicable terms and provisions of the FTC
25 Act were incorporated into and made a part of

1 this section. Any person who violates section 5
2 of this Act shall be subject to the penalties and
3 entitled the privileges and immunities provided
4 in the FTC Act in the same manner, by the
5 same means, and with the same jurisdiction,
6 powers, and duties as though all applicable
7 terms and provisions of the FTC Act were in-
8 corporated into and made a part of this section.

9 (B) Nothing in this Act shall be construed
10 to give the Commission authority over activities
11 that are otherwise outside the jurisdiction of
12 the FTC Act.

13 (b) ENFORCEMENT BY CERTAIN OTHER AGEN-
14 CIES.—

15 (1) IN GENERAL.—Compliance with section 5 of
16 this Act shall be enforced under—

17 (A) section 8 of the Federal Deposit Insur-
18 ance Act (12 U.S.C. 1818), in the case of—

19 (i) national banks, and Federal
20 branches and Federal agencies of foreign
21 banks, by the Office of the Comptroller of
22 the Currency;

23 (ii) member banks of the Federal Re-
24 serve System (other than national banks),
25 branches and agencies of foreign banks

1 (other than Federal branches, Federal
2 agencies, and insured State branches of
3 foreign banks), commercial lending compa-
4 nies owned or controlled by foreign banks,
5 and organizations operating under section
6 25 or 25A of the Federal Reserve Act (12
7 U.S.C. 601 et seq. and 611 et seq.), by the
8 Federal Reserve Board; and

9 (iii) banks insured by the Federal De-
10 posit Insurance Corporation (other than
11 members of the Federal Reserve System)
12 and insured State branches of foreign
13 banks, by the Board of Directors of the
14 Federal Deposit Insurance Corporation;

15 (B) section 8 of the Federal Deposit Insur-
16 ance Act (12 U.S.C. 1818), by the Director of
17 the Office of Thrift Supervision, in the case of
18 a savings association the deposits of which are
19 insured by the Federal Deposit Insurance Cor-
20 poration;

21 (C) the Federal Credit Union Act (12
22 U.S.C. 1751 et seq.) by the National Credit
23 Union Administration Board with respect to
24 any Federal credit union;

1 (D) part A of subtitle VII of title 49,
2 United States Code, by the Secretary of Trans-
3 portation with respect to any air carrier or for-
4 eign air carrier subject to that part;

5 (E) the Packers and Stockyards Act, 1921
6 (7 U.S.C. 181 et seq.) (except as provided in
7 section 406 of that Act (7 U.S.C. 226, 227)),
8 by the Secretary of Agriculture with respect to
9 any activities subject to that Act;

10 (F) the Farm Credit Act of 1971 (12
11 U.S.C. 2001 et seq.) by the Farm Credit Ad-
12 ministration with respect to any Federal land
13 bank, Federal land bank association, Federal
14 intermediate credit bank, or production credit
15 association; and

16 (G) the Communications Act of 1934 (47
17 U.S.C. 151 et seq.) by the Federal Communica-
18 tions Commission with respect to any person
19 subject to the provisions of that Act.

20 (2) EXERCISE OF CERTAIN POWERS.—For the
21 purpose of the exercise by any agency referred to in
22 paragraph (1) of its powers under any Act referred
23 to in that paragraph, a violation of section 5 of this
24 Act is deemed to be a violation of a requirement im-
25 posed under that Act. In addition to its powers

1 under any provision of law specifically referred to in
2 paragraph (1), each of the agencies referred to in
3 that paragraph may exercise, for the purpose of en-
4 forcing compliance with any requirement imposed
5 under section 5 of this Act, any other authority con-
6 ferred on it by law.

7 (c) ENFORCEMENT BY STATES.—

8 (1) CIVIL ACTION.—In any case in which the
9 attorney general of a State has reason to believe
10 that an interest of the residents of that State has
11 been or is threatened or adversely affected by any
12 person engaging in a practice that violates section 5
13 of this Act, the State, as *parens patriae*, may bring
14 a civil action on behalf of the residents of the State
15 in a district court of the United States of appro-
16 priate jurisdiction or in any other court of com-
17 petent jurisdiction—

18 (A) to enjoin that practice, or

19 (B) to obtain damages on behalf of resi-
20 dents of the State, in an amount equal to the
21 greater of—

22 (i) the actual monetary loss suffered
23 by such residents; or

24 (ii) the amount determined under
25 paragraph (2).

1 (2) STATUTORY DAMAGES.—For purposes of
2 paragraph (1)(B)(ii), the amount determined under
3 this paragraph is the smaller of—

4 (A) the amount determined by multiplying
5 the number of willful, knowing, or negligent vio-
6 lations by an amount, in the discretion of the
7 court, of up to \$10 (with each separately ad-
8 dressed unlawful message received by such resi-
9 dents treated as a separate violation); or

10 (B) \$500,000.

11 In determining the per-violation penalty under this
12 paragraph, the court shall take into account the de-
13 gree of culpability, any history of prior such conduct,
14 ability to pay, effect on ability to continue to do
15 business, and such other matters as justice may re-
16 quire.

17 (3) TREBLE DAMAGES.—If the court finds that
18 the defendant committed the violation willfully and
19 knowingly, the court may increase the amount recov-
20 erable under paragraph (2) up to threefold.

21 (4) ATTORNEY FEES.—In the case of any suc-
22 cessful action under subparagraph (1), the State
23 shall be awarded the costs of the action and reason-
24 able attorney fees as determined by the court.

25 (5) NOTICE.—

1 (A) PRE-FILING.—Before filing an action
2 under paragraph (1), an attorney general shall
3 provide to the Commission—

4 (i) written notice of that action; and
5 (ii) a copy of the complaint for that
6 action.

7 (B) CONTEMPORANEOUS.—If an attorney
8 general determines that it is not feasible to pro-
9 vide the notice required by subparagraph (A)
10 before filing the action, the notice and a copy
11 of the complaint shall be provided to the Com-
12 mission when the action is filed.

13 (6) INTERVENTION.—If the Commission re-
14 ceives notice under paragraph (4), it—

15 (A) may intervene in the action that is the
16 subject of the notice; and

17 (B) shall have the right—

18 (i) to be heard with respect to any
19 matter that arises in that action; and

20 (ii) to file a petition for appeal.

21 (7) CONSTRUCTION.—For purposes of bringing
22 any civil action under paragraph (1), nothing in this
23 Act shall be construed to prevent an attorney gen-
24 eral of a State from exercising the powers conferred

1 on the attorney general by the laws of that State
2 to—

3 (A) conduct investigations;

4 (B) administer oaths or affirmations; or

5 (C) compel the attendance of witnesses or
6 the production of documentary and other evi-
7 dence.

8 (8) VENUE; SERVICE OF PROCESS.—

9 (A) VENUE.—Any action brought under
10 paragraph (1) may be brought in the district
11 court of the United States that meets applicable
12 requirements relating to venue under section
13 1391 of title 28, United States Code.

14 (B) SERVICE OF PROCESS.—In an action
15 brought under paragraph (1), process may be
16 served in any district in which the defendant—

17 (i) is an inhabitant; or

18 (ii) maintains a physical place of busi-
19 ness.

20 (9) LIMITATION ON STATE ACTION WHILE FED-
21 ERAL ACTION IS PENDING.—If the Commission or
22 other appropriate Federal agency under subsection
23 (b) has instituted a civil action or an administrative
24 action for violation of this Act, no State attorney
25 general may bring an action under this subsection

1 during the pendency of that action against any de-
2 fendant named in the complaint of the Commission
3 or the other agency for any violation of this Act al-
4 leged in the complaint.

5 (d) ACTION BY PROVIDER OF INTERNET ACCESS
6 SERVICE.—

7 (1) ACTION AUTHORIZED.—A provider of Inter-
8 net access service adversely affected by a violation of
9 section 5 may bring a civil action in any district
10 court of the United States with jurisdiction over the
11 defendant, or in any other court of competent juris-
12 diction, to—

13 (A) enjoin further violation by the defend-
14 ant; or

15 (B) recover damages in any amount equal
16 to the greater of—

17 (i) actual monetary loss incurred by
18 the provider of Internet access service as a
19 result of such violation; or

20 (ii) the amount determined under
21 paragraph (2).

22 (2) STATUTORY DAMAGES.—For purposes of
23 paragraph (1)(B)(ii), the amount determined under
24 this paragraph is the smaller of—

1 (A) the amount determined by multiplying
2 the number of willful, knowing, or negligent vio-
3 lations by an amount, in the discretion of the
4 court, of up to \$10 (with each separately ad-
5 dressed unlawful message carried over the fa-
6 cilities of the provider of Internet access service
7 treated as a separate violation); or

8 (B) \$500,000.

9 In determining the per-violation penalty under this
10 paragraph, the court shall take into account the de-
11 gree of culpability, any history of prior such conduct,
12 ability to pay, effect on ability to continue to do
13 business, and such other matters as justice may re-
14 quire.

15 (3) TREBLE DAMAGES.—If the court finds that
16 the defendant committed the violation willfully and
17 knowingly, the court may increase the amount recov-
18 erable under paragraph (2) up to threefold.

19 (4) ATTORNEY FEES.—In any action brought
20 pursuant to paragraph (1), the court may, in its dis-
21 cretion, require an undertaking for the payment of
22 the costs of such action, and assess reasonable costs,
23 including reasonable attorneys' fees, against any
24 party.

1 (5) **EVIDENTIARY PRESUMPTION.**—For pur-
2 poses of an action alleging a violation of section
3 5(a)(4) or 5(a)(5), a showing that a recipient has
4 submitted a complaint about a commercial electronic
5 mail message to an electronic mail address main-
6 tained and publicized by the provider of Internet ac-
7 cess service for the purpose of receiving complaints
8 about unsolicited commercial electronic mail mes-
9 sages shall create a rebuttable presumption that the
10 message in question was unsolicited within the
11 meaning of this Act.

12 (e) **AFFIRMATIVE DEFENSE.**—A person shall not be
13 liable for damages under subsection (c)(2) or (d)(2) if—

14 (1) such person has established and imple-
15 mented, with due care, reasonable practices and pro-
16 cedures to effectively prevent violations of section 5;
17 and

18 (2) any violation occurred despite good faith ef-
19 forts to maintain compliance with such practices and
20 procedures.

21 **SEC. 7. EFFECT ON OTHER LAWS.**

22 (a) **FEDERAL LAW.**—Nothing in this Act shall be
23 construed to impair the enforcement of section 223 or 231
24 of the Communications Act of 1934, chapter 71 (relating
25 to obscenity) or 110 (relating to sexual exploitation of chil-

1 dren) of title 18, United States Code, or any other Federal
2 criminal statute.

3 (b) STATE LAW.—No State or local government may
4 impose any civil liability for commercial activities or ac-
5 tions in interstate or foreign commerce in connection with
6 an activity or action described in section 5 of this Act that
7 is inconsistent with or more restrictive than the treatment
8 of such activities or actions under this Act, except that
9 this Act shall not preempt any civil action under—

10 (1) State trespass, contract, or tort law; or

11 (2) any provision of Federal, State, or local
12 criminal law or any civil remedy available under
13 such law that relates to acts of computer fraud per-
14 petrated by means of the unauthorized transmission
15 of unsolicited commercial electronic mail messages,
16 provided that the mere sending of unsolicited com-
17 mercial electronic mail in a manner that complies
18 with this Act shall not constitute an act of computer
19 fraud for purposes of this subparagraph.

20 **SEC. 8. STUDY OF EFFECTS OF UNSOLICITED COMMERCIAL**
21 **ELECTRONIC MAIL.**

22 Not later than 18 months after the date of the enact-
23 ment of this Act, the Commission, in consultation with the
24 Department of Justice and other appropriate agencies,
25 shall submit a report to the Congress that provides a de-

1 tailed analysis of the effectiveness and enforcement of the
2 provisions of this Act and the need (if any) for the Con-
3 gress to modify such provisions.

4 **SEC. 9. SEPARABILITY.**

5 If any provision of this Act or the application thereof
6 to any person or circumstance is held invalid, the remain-
7 der of this Act and the application of such provision to
8 other persons or circumstances shall not be affected.

9 **SEC. 10. EFFECTIVE DATE.**

10 The provisions of this Act shall take effect 120 days
11 after the date of the enactment of this Act.

○

DOCUMENT NO. 42

