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THE DO-NOT-CALL REGISTRY MODEL IS NOT THE ANSWER TO SPAM

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I. INTRODUCTION

The overwhelming response to the federal Do-Not-Call telephone registry maintained by the Federal Trade Commission ("FTC") indicates that telephone customers do not like to receive telemarketing calls at home.[1] Whether the Do-Not-Call telephone registry will ultimately reduce unwanted telemarketing as planned remains to be seen.[2]

A recent survey of Internet users indicated that they would like to see a Do-Not-Spam registry as well. But, as will be discussed here, differences between Internet spam and telephone telemarketing make an "opt-out" Do-Not-Spam registry an impractical model to the Internet users' lament.

A. ONE PERSON'S SPAM IS ANOTHER PERSON'S VALUABLE INFORMATION

It is difficult to precisely define spam. As the Paul Simon song goes,

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1. *Consumers on Do Not Call Registry File over 15,000 Complaints Against Telemarketers*, <http://www.ftc.gov/opa/2003/10/dnccomplaints.htm> (Oct. 16, 2003). As of the middle of October 2003, more than 53.7 million residential telephone numbers have been registered on the Do-Not-Call list maintained by the Federal Trade Commission. The Commission has predicted registrations will grow to sixty million numbers by the summer 2004. Associated Press, *Telemarketing Group Sues FCC, Industry Seeks Another Challenge to Do-Not-Call List*, <http://www.msnbc.com/news/945151.asp> (July 28, 2003).

2. *Id.* As of October 16, 2003, the FTC had received more than 15,000 complaints against telemarketers from residential customers who signed up for the Do-Not-Call registry. Nearly 21,000 organizations have accessed the registry with 550 telemarketers downloading all area codes in the registry. On average, each telemarketer retrieved about forty-five area codes from the total national database of 317 area codes.

"Remember: one man's ceiling is another man's floor."[3] So it is with spam also. Unsolicited commercial e-mail sent to one person may be spam while the same message to another may be the message he or she wants.[4] That being said, however, most would agree that the enormous volume of unsolicited commercial e-mail causes problems for the recipients.[5] It takes time to sort through the spam and it clogs e-mail boxes.[6] The shear volume of spam affects the operation of the Internet. It has required Internet Service Providers ("ISPs") to institute blocking mechanisms and has forced many consumers to buy anti-spam programs to load onto their individual computers. Not only is there a cost in blocking spam, but there is the added problem caused when non-spam e-mails are blocked. As an AOL spokesman recently said, "[w]e block first and ask questions later when it comes to suspicious e-mail."[7] This blocking has included the FTC's own e-mail confirmation messages for persons enrolling in the Do-Not-Call registry.[8]

The cost of computing power used by spam and the wasted time has been estimated at ten billion dollars in the United States for 2003 and $20.5 billion worldwide.[9] The European Union found that

> . . . unsolicited commercial communications may on the one hand be relatively easy and cheap to send and on the other may impose a burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment.[10]

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3. *One Man's Ceiling is Another Man's Floor* in *There Goes Rhymin' Simon*, Artist Paul Simon, Warner Bros. Records, 1973.

4. For example, if you are in the market to refinance your mortgage, you may want to read unsolicited e-mail advertisements from a mortgage company. However, if you rent, the same e-mail advertisement may be of no interest to you.

5. ePrivacy Group, *The Economics of Spam*, <http://www.eprivacygroup.com/article/articlestatic/58/1/6> (Feb. 2003). The economics of spam do not encourage target marketing since the cost to send the e-mail does not increase by the volume of e-mail sent but rather is fixed. Moreover, the cost is largely borne by the recipient. Compare this to the economics of snail mail or telemarketing where every piece of mail or every telephone call has an associated cost. "In a nutshell, the parasitic economics of spam means this: the act of sending a message costs the sender less than it costs all other parties impacted by the sending of the message."

6. Hansell, Saul, *Totaling Up the Bill for Spam, Wasted Time, Computer and Human, Is Only Part of the Cost,* N.Y. Times (July 28, 2003).

7. Mangalindan, Mylene, *Didn't Get E-Mail? That Could Be Spam's Fault, Too. Vigilant Blockers Toss Out the Good With the Bad; Artist Misses Own Show,* Wall St. J. (Aug. 4, 2003).

8. *Id.*

9. Hansell, *supra* n. 6.

10. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, Official Journal of the European Communities 31.7.2002, L201/41.

B. INTERNET USERS DO NOT WANT UNSOLICITED COMMERCIAL E-MAILS

According to a study by ePrivacy Group[11] and Ponemon Institute[12] published in July 2003:

> Unwanted solicitations represent more than 25% of all e-mail traffic getting through to 61% of consumers inboxes every day. Nearly 40% of consumers spend 30 minutes or more each day just dealing with spam.[13]

The same report that surveyed a sample of 1,090 adults in the United States found:

> 1. Most consumers support a Do-Not-Spam list, federal law and legal penalties to deter spammers. (A total of seventy-four percent of those surveyed stated they wanted a federal do-not spam list).
> 2. Current solutions to stop unwanted e-mail, such as filtering and opt-out mechanisms, do not appear to work well.
> 3. Most consumers define spam by their relationship with the sender or the type of the e-mail they receive. They don't think of spam in terms of an opt-out or opt-in permission to receive e-mail messages.
> 4. Consumers want redress and greater control over their e-mail inboxes.[14]

II. DO-NOT-CALL REGISTRY MODEL MAY NOT BE TRANSFERABLE TO DO-NOT-SPAM

A Do-Not-Spam registry would have many similar traits to the Do-Not-Call telephone registry, so a brief review of how the Do-Not-Call telephone registry began may be helpful in assessing the potential success of a Do-Not-Spam registry.

A. DO-NOT-CALL STARTED WITH TCPA

1. *Congress Found Telemarketers Mobile and Consumer Fraud Over Forty Billion Dollars a Year*

In 1991, Congress passed the *Telephone Consumer Protection Act*

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11. ePrivacy Group, "Background" <http://www.eprivacygroup.com/pdfs/Background 03.pdf> (accessed Dec. 2, 2003). ePrivacy Group is based in Philadelphia and is a privately held company. It promotes itself as an advisor to corporations on governments on spam and other electronic privacy and security issues.

12. 2003 Privacy Trust Survey <http://cioi.web.cmu.edu/research/2003PrivacyTrust-SurveyExecutiveSummary.pdf> (accessed Dec. 2, 2003). Ponemon Institute describes itself as a "think tank" dedicated to advancing responsible information management practices in business and government. It is headquartered in Tucson, Arizona.

13. Executive Summary, 2003 Consumer Spam Report, ePrivacy Group and Ponemon Institute, <http://www.eprivacygroup.net/spamstudy/2003ConsumerSpamStudyExecutive Summary.pdf> (accessed Jan. 17, 2004).

14. *Id.* at 1.

("TCPA") of 1991.[15] Among the findings supporting the passage of the legislation was that telemarketing differs from other activities because:

-Telemarketing can be carried out by sellers across state lines without direct contact with the consumer; and

-Telemarketers are very mobile, moving from state to state.

In 1991, it was estimated that consumers lost forty billion dollars a year through telemarketing fraud and that there were 300,000 solicitors to eighteen million Americans every day that generated sales of $435 billion annually.

B. FTC AND FCC GIVEN RULE-MAKING AUTHORITY UNDER TCPA

Under the TCPA, the FTC and Federal Communications Commission ("FCC") were charged with carrying out the intent of the Act.[16] Both passed rules and regulations regarding telephone solicitation. In 1991, neither agency proposed implementing the TCPA provision[17] that allowed for the establishing of a national database of residential customers who objected to telemarketing calls and establishing rules to prevent calls to such consumers. The rules adopted in 1991 basically provided consumers with the ability to "opt-out" from receiving unwanted telephone solicitations by contacting each individual company or marketer that the consumer wished to block and to be placed on a company-specific "Do-Not-Call" list. The TCPA provided that the two agencies were to review the success of the regulations five years after passage and make a report to Congress. During its required five-year review, the FTC found several problems with the company-specific Do-Not-Call scheme, including:

-The company-specific approach was extremely burdensome to consumers.

-Consumers' repeated requests to be placed on a Do-Not-Call list were ignored.

-Consumers had no way to verify that their names had been taken off a company's telemarketing list.

-The private right of action provision was very complex and time-consuming and placed the evidentiary burden on consumers.[18]

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15. 15 U.S.C. § 6101.

16. The authority of the FTC generally is to prevent deceptive trade practices. The FCC's authority is over telecommunications, including common carriers.

17. 47 U.S.C. § 227(c)(3)(A)-(L) (2003).

18. 68 Fed. Reg. 4629 (Jan. 29, 2003).

C. Rules Established for Do-Not-Call Registry

1. *FTC / FCC to Jointly Regulate Registry*

In an attempt to solve these problems, one recommendation by the FTC after the review was to supplement the then company-specific Do-Not-Call provisions[19] to include a central "Do-Not-Call" registry maintained by the FTC to stop calls from all companies within the FTC's jurisdiction.[20]

In adopting its rules for the Do-Not-Call registry,[21] the FTC limited the list to residential customers only. Also, the FTC found it had no jurisdiction to exclude calls from common carriers, banks, credit unions, savings and loans, companies engaged in the business of insurance, airlines, and intra-state calls. The FTC also excluded tax-exempt non-profit organizations but said it would revisit the exemption if problems developed.[22] All of the groups still are subject to deceptive trade practice violation enforcement actions by the FTC and company-specific Do-Not-Call requests from consumers.

In response to the FTC action, in 2003, Congress passed the *Do Not Call Implementation Act*.[23] The 2003 *Do Not Call Act* provided the funding mechanism to allow the FTC to establish the national Do-Not-Call registry. An initial contract of three and a half million dollars was awarded to AT&T to assist the FTC in establishing the registry. The registry is to be self-funding[24] and is expected to generate seventy-three million dollars in user fees over the 2003-2008 time-frame.

After the FTC completed its rule-making for the registry, the FCC took up consideration of its mandate regarding the Do-Not-Call regis-

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19. 47 U.S.C. § 227(c)(3)(A)-(L). Under this provision, a consumer can request that he or she not receive telephone solicitation by giving notice to each company he or she wants to preclude. For those who do not sign up on the Do-Not-Call list, they still can block telemarketers for specified companies by contacting those companies individually.

20. Federal Trade Commission, Telemarketing Sales Rule, 68 Fed. Reg. 4583 (Dec. 18, 2002).

21. 68 Fed. Reg. 4580 (Jan. 29, 2003).

22. *Id.* "Nevertheless, if experience indicates that the company-specific approach does not in fact provide adequate protection for consumers' privacy in the context of charitable solicitation telemarketing, the Commission may revisit this decision in the future, and reconsider whether to require telemarketing calls soliciting charitable donations to comply with the national 'Do-Not-Call' registry requirements." *Id.*

23. Public L. No. 108.10.

24. *Telemarketing Sales Rule Amended to Establish Fees for Industry Access to National Do Not Call Registry* <http://www.ftc.gov/opa/2003/07/trsfeesfrn.htm.> (accessed July 29, 2003). The FTC has established the annual access cost of companies for the registry at twenty-five dollars per area code, up to a maximum annual fee of $7,375 to access numbers for the entire country. There is no fee for companies to access the first five area codes.

try.[25] It agreed that there would be only one Do-Not-Call registry maintained by the FTC.[26] Because of its jurisdiction over telecommunications generally, the FCC rules filled the gap as far as including common carriers, banks, insurance companies, airlines, and both intrastate and wireless numbers[27] under its rules.

2. *Telemarketers Given 'Safe-Harbor' Provision*

Pursuant to the TCPA, the regulations adopted by the FTC and the FCC include a "safe harbor"[28] provision where a telemarketer would not be liable for penalties and damages to consumers if it can establish:

-It has established and implemented written procedures to comply with Do-Not-Call rules.

-It has trained its personnel in procedures established pursuant to the Do-Not-Call rules.

-It has maintained a list of telephone numbers that it may not contact.

-It uses a process to prevent calls to those on the Do-Not-Call list using a version of the registry no more than three months old.[29]

-Any subsequent call otherwise violating the rules is the result of an error.

3. *Three-Exemptions to* Do-Not-Call *Registry*

There are three categories of calls exempted from the restrictions of the Do-Not-Call provisions. They are:

a. *Established Business Relationships.* This is defined as a relationship where a consumer has purchased, rented or leased seller's goods or services within eighteen months immediately preceding the date of the call or where there has been a consumer inquiry or application regarding a product or service offered by the seller within three months preceding the date of the call.[30]

b. *Prior Express Permission.* Express prior permission must be evi-

25. The FCC considered its mandate in CG Docket No. 02-278, In the Matter of Rules and Regulations Implementing the *Telephone Consumer Protection Act* of 1991, Report and Order adopted June 26, 2003 and released July 3, 2003, hereinafter referred to as the FCC Order.

26. FCC Order at ¶ 28. The FCC and FTC are to enter into a Memorandum of Understanding to outline the respective federal responsibilities of each agency. FCC Order at ¶ 75.

27. FCC Order at ¶ 33.

28. FCC Order at ¶ 38 (adopting FTC safe harbor provision 16 CFR Part 310.4(b)(3) at 68 Fed. Reg. 4645).

29. The registry itself is to be updated daily and made available for downloading on a constant basis so that telemarketers can access the registry at any time.

30. FCC Order at ¶ 42.

denced by a signed,[31] written agreement between the consumer and the seller that states that the consumer agrees to be contacted by the seller, including the telephone number to which the calls may be placed.[32]

c. *Tax-Exempt Nonprofit Organizations.* This includes not only the organization itself but also calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations.[33]

4. *Federal Regulations Trump State Laws*

The adoption of the federal Do-Not-Call registry conflicts with some existing state laws restricting telemarketers. The following conflicts of law principles apply: if a state has not adopted any Do-Not-Call rules, the federal rules will govern exclusively for both intrastate and interstate telephone solicitations.[34] For states that have adopted Do-Not-Call regulations, the federal rules constitute a "floor, and therefore would supersede all less restrictive state Do-Not-Call rules."[35] The FCC found that "application of less restrictive state exemptions directly conflicts with the federal objectives in protecting consumer privacy rights under the TCPA. Thus, telemarketers must comply with the federal Do-Not-Call rules even if the state in which they are telemarketing has adopted an otherwise applicable exception."[36] States are prohibited from passing any regulations more restrictive than the federal rules.[37]

5. *FCC Rules Require 'Opt-In' for Facsimile Transmissions*

One area in which the FCC goes beyond the regulations imposed by the FTC's Do-Not-Call registry pertains to unsolicited facsimile advertisements. The TCPA prohibits the sending of an "unsolicited advertisement" to a facsimile machine.[38] Unlike the Do-Not-Call registry, this

31. A signature includes an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal or state contract law. *See* footnote 158 in FCC Order.

32. FCC Order at ¶ 44.

33. FCC Order at ¶ 45; *see Mainstream Marketing Services, Inc. et. al. v. Federal Trade Commission et. al.,* Case No. 03 N 0184, slip opinion (Sept. 25, 2003) (the distinction between solicitations by commercial entities versus tax-exempt organizations was the critical factor that caused the U.S. District Court in Colorado to issue an injunction halting the implementation of the registry finding that the Do-Not-Call registry did not materially advance the government's interest in curbing abusive or fraudulent telemarketing calls, thereby making the registry fail stringent First Amendment scrutiny). A stay of the District Court's injunction was issued by the Tenth Circuit Court of Appeals on October 7, 2003.

34. FCC Order at ¶ 80.

35. FCC Order at ¶ 81.

36. *Id.*

37. *Id.* at ¶ 82.

38. 47 U.S.C. § 227(b)(1)(C).

opt-in provision applies to both residential and commercial consumers as well. The FCC found that consumers felt they were "besieged" by unsolicited faxes.

> Consumers emphasize that the burden of receiving unsolicited faxes is not just limited to the cost of paper and toner, but includes the time spent reading and disposing of faxes, the time the machine is printing an advertisement and is not operational for other purposes, and the intrusiveness of faxes transmitted at inconvenient times, including in the middle of the night.[39]

The existing rule allowed faxes to be sent where there was an existing business relationship. The FCC's new rule requires a person or entity sending unsolicited facsimile advertising to obtain the prior express invitation or permission of the recipient before transmitting an unsolicited fax. The express permission "must be in writing and include the recipient's signature," the recipient must clearly indicate consent to receiving such fax advertisements from the company and the recipient must provide a fax number to which faxes may be sent.[40] The signature may be in an electronic or digital form to the extent such is recognized as a valid signature under applicable law. The permission cannot be in the form of a "negative option."[41]

III. DO-NOT-CALL REGISTRY INAPPROPRIATE AS MODEL FOR REGULATING SPAM

On a first glance, it would appear that there are many similarities between telemarketing and spam that would make the Do-Not-Call registry an ideal framework for a Do-Not-Spam registry. Spammers are similar to telemarketers in that spamming, like telemarketing, is carried out across state lines (indeed, even over international boundaries). Spammers, like telemarketers, are very mobile, moving from state-to-state and from one Internet service provider to another on almost a moment's notice.

A. Opt-out May Only Confirm Where to Send Spam

While spamming and telemarketing have many of the same traits, it does not follow that the same remedies can be applied to stop spamming. For example, it is nearly impossible to stop spamming on a company-specific basis since spammers work for many companies and can sent out multiple spam messages for different clients almost instantaneously. Moreover, Internet users believe that using an opt-out link on spam mes-

39. FCC Order at ¶ 186.
40. FCC Order at ¶ 187.
41. FCC Order at ¶ 191.

sage either does not work or merely confirms the existence of the e-mail address for future spamming.

Will a Do-Not-Spam list work in the same way as the do-not call list? In the view of at least one commentator, no. "To any non-expert, the question suggests that such registries would work must the way Do-Not-Call lists work. They won't."[42]

Unlike telemarketers, spammers do not want to talk to you. Rather, spammers often do their best to hide who they are through various means. The e-mail they send has been altered in several ways. First, the "From" line is faked. Second, headers and other pertinent data do not equal the "Sender" line. Third, other data and information as to the source of the e-mail has been changed so that it cannot be quickly traced. Fourth, the "Subject" line is usually ambiguous or misleading. And, as mentioned above, the opt-out link, if it exists, is either inoperative, goes to someone other than the spammer's e-mail (thus, clogging an innocent party's inbox) or is ignored by the spammer.

For these reasons, many believe that a do not spam list would only make the problem worse. "If the e-mail address is in the Do-Not-Spam registry, then the fact that there's a live person using that inbox is virtually guaranteed and the spammer has you."[43] This could happen even though the Do-Not-Spam list is not given to the spammer. Merely by having addresses purged from a larger list would indicate to the spammer that your address is a valid e-mail address.

B. Proposed Legislation Would Require Opting-out

In 2003, Congress considered several bills that addressed the spam issue. The Burns-Wyden bill[44] banned deceptive subject lines and required valid return addresses and a way to opt out of future commercial e-mail. This bill was passed by Congress as the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, also known as the *CAN SPAM Act of 2003*. A bill by Sen. Charles Schumer that would have required the FTC to create a Do-Not-Spam registry similar to the Do-Not-Call registry failed to pass.[45] A *Wall Street Journal* article found that some big spammers support this type of legislation.

> Consumer groups object to the bills not only because they still allow companies to send spam but also because they require consumers to take the trouble of removing themselves from the companies' e-mail lists and fail to allow consumers themselves to sue companies over

42. Berlind, David, *Why Do-not-spam Lists are a Bad Idea* <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2914363,00.html> (July 28, 2003).

43. *Id.*

44. Senate Bill 877, 108th Cong. (2003) (*CAN-SPAM* Act of 2003).

45. Senate Bill 1231, 108th Cong. (2003) (*Stop Pornography and Abusive Marketing Act*).

spam.[46]

The Direct Marketing Association's position is that it supports federal legislation that preempts state laws and that provides for penalties for violations of what it calls its three principles articulated as:[47]

> 1. Adherence to the Four Pillars of Responsible E-mail Marketing. A. An honest subject line. B. No forging of headers or technology deceptions. C. Identity of the sender, which includes a physical address. D. An opt-out that works and is easily to find and easy to use.
> 2. No Harvesting. No surreptitious acquisition of e-mail addresses via automated mechanisms without the consumer/customer's awareness and agreement. This includes prohibition on dictionary attaches or other mechanisms for creating e-mail addresses without the awareness and prior approval of the addressee.
> 3. Universal Opt-out. All commercial e-mailed communications must include a standardized out-out. This would include communications to customers as well as prospects and would utilize a standardized symbol.[48]

C. European Union Requires Opt-in to Receive Spam

Rather than requiring consumers to "opt-out" by signing up on a registry, the European Union has adopted a directive requiring consumers to "opt-in" to receive commercial e-mail. Under the European Union's directive, "electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent."[49] Moreover, direct marketing messages by e-mail may not conceal or disguise the identity of the sender.[50] This provision is to take effect for all EU members by October 31, 2003.[51]

An "opt-in" approach to spam is better than the "opt-out" mechanisms envisioned by Congress.[52] By definition, a person who opts in

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46. Dreazen, Yochi, *Why Some Big Spammers are Backing Spam-Control Laws*, Wall St. J., B1 (July 18, 2003).

47. The DMA, *Direct Marketing Association Anti-spam Working Strategy* <http://www.the-dma.org/cgi/disppressrelease?article=452> (accessed Dec. 2, 2003) (the DMA also proposes to establish a "Gold List" where companies agree to adhere to these principles. The companies would post a $500 bond per entity and a violation of the principles would result in the forfeiture of the bond).

48. *Id.*

49. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, Official Journal of the European Communities 31.7.2002, L201/45.

50. *Id.* at 46.

51. EU Institutions Press Releases, *Questions and Answers on Spam and the EU Opt-in Regime* <http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist> (accessed Dec. 2, 2003).

52. *See Mainstream Marketing Services, Inc. v. Federal Trade Commission*, 283 F. Supp. 2d 1151 (D. Colo. 2003) (an opt-in approach would eliminate the distinction between commercial entities and charitable organizations that the U.S. District Court in Colorado found violated the First Amendment).

would be receiving solicited commercial e-mails. It also prevents any potential abuse of an "opt-out" list by spammers who either improperly obtained the list or use the list's scrubbing mechanism to verify e-mail addresses. But even with an opt-in requirement, legislation would not be adequate unless there is a way to stop or impose economic sanctions for the unsolicited commercial e-mail. What is the most effective way to do this?

IV. A BETTER APPROACH: OPT-IN WITH BENEFICIARY LIABLE FOR PENALTIES

As noted above, the only fact that is consistently valid and correct in an e-mail spam is the hyperlink to the Web site that the spammer wants the recipient to visit and, hopefully, buy the product or service or provide information. This should be the starting point for any effective legislation. In the words of Deep Throat: "Follow the money."[53] In other words, any effective anti-spam legislation should not only require the recipient of the e-mail to opt in but also should impose penalties on the party who benefits from the spam if the recipient has not opted in. For example, if the spam hyperlink is to XYZ Mortgage Company, then XYZ Mortgage Company, as well as the spammer would be liable for spamming unless the recipient had opted-in to receive the message or XYZ Mortgage could demonstrate that it was not responsible for the message or did not benefit economically from traffic being driven to its Web site by the unsolicited commercial e-mail. Furthermore, any legislation must include both residential and commercial Internet users.

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53. "Deep Throat" was the secret source that Washington Post reporters Carl Bernstein and Bob Woodward relied upon in breaking the Watergate scandal. They would meet Deep Throat in a parking garage. At a time when it looked as though they made several reporting errors and there was no future in the investigation, Bob Woodward had this exchange with Deep Throat:

> Woodward: The story is dry. All we've got are pieces. We can't seem to figure out what the puzzle is supposed to look like. John Mitchell resigns as the head of CREEP, and says that he wants to spend more time with his family. I mean, it sounds like bullshit, we don't exactly believe that. . .
> Deep Throat: No, heh, but it's touching. Forget the myths the media's created about the White House. The truth is, these are not very bright guys, and things out of hand.
> Woodward: Hunt's come in from the cold. Supposedly, he's got a lawyer with $25,000 in a brown paper bag.
> Deep Throat: Follow the money.
> Woodward: What do you mean? Where?
> Deep Throat: Oh, I can't tell you that.
> Woodward: But you could tell me that.
> Deep Throat: No, I have to do this my way. You tell me what you know, and I'll confirm. I'll keep you in the right direction if I can, but that's all. Just . . .follow the money.

All the President's Men, Warner Bros. (1976).

A. Proposal Would Benefit Both Sender and Recipients

This would have two benefits. First, for legitimate commercial e-mailers, they still could develop an e-mail list for advertising. Since recipients would not be deluged with unsolicited commercial e-mail, the commercial e-mails that they receive presumably would have more impact and time spent in preparing and sending the commercial e-mail. Second, for recipients of unwanted commercial e-mail, it would give them a valid starting point if they wanted to track down and stop the unwanted e-mail. The site to which the commercial e-mail is driving traffic has an economic interest in the e-mail and should be responsible for it. Presumably, the Web site has either directly contracted with the spammer or has an affiliate program where a third party is receiving payment for driving traffic to the Web site. In either case, the Web site would know, or should know, with whom it either had direct marketing contracts with or with whom it has established an affiliate relationship to pay for traffic to the Web site. By making the Web site owner liable as well as the spammer, the Web site has every incentive to police its commercial e-mail distribution or face civil action and monetary penalties.

This approach would be consistent with the restrictions on unsolicited facsimile advertisements that have been upheld by courts. Moreover, it would be consistent with the opt-in requirement that the European Union has implemented.

B. Proposal is Consistent With Court-Approved TCPA Facsimile Rulings

As noted earlier, the TCPA prohibits the sending of an "unsolicited advertisement" to a facsimile machine.[54] An "unsolicited advertisement" is defined under the statute as "any material advertising the commercial availability, or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[55] Prior to the rewriting of the facsimile rules by the FCC, the permission was presumed where there was an existing business relationship. Under the new rule, the FCC requires that permission be given in writing and signed by the recipient.[56]

1. *Commercial Speech Given Lesser Protection*

The old rule had been challenged on several occasions with the result that the TCPA restriction was found not to be an impermissible First Amendment restriction on commercial speech. The question of

54. 47 U.S.C. § 227(b)(1)(C).
55. 47 U.S.C. § 227(a)(4).
56. FCC Order at ¶ 191.

"commercial speech" as it pertains to advertising is found in *Central-Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[57] Unlike the limited restrictions on facsimile advertising imposed under the TCPA, in *Central Hudson*, the electric utility was totally banned by the state regulatory authority from conducting any promotional advertising for electricity. The reason given for the ban was to prevent the consumption of energy during the energy crisis. The Supreme Court found the total ban on advertising violated the First and Fourteenth Amendments of the Constitution since it unduly restricted commercial speech, "that is, expression related solely to the economic interests of the speaker and its audience."[58] The court explained that even though the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. . . [t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[59] Because the ban in *Central Hudson* was total, it exceeded the interest being asserted by the government.

For commercial speech cases, the court in *Central Hudson* said a four-part analysis was necessary. The four parts of the test are:

1. The speech must concern lawful activity and not be misleading.
2. The governmental interest must be substantial.

If the answer to the first two parts of the test is positive, then:

3. The regulation directly advances the governmental interest asserted.
4. The regulation is not more extensive than is necessary to serve that interest.[60]

2. *Facsimile Provisions of TCPA are Valid Exercise of Governmental Regulation of Speech*

The Eighth Circuit used *Central Hudson* in determining that that facsimile provision in the TCPA was constitutional. In *State of Missouri v. American Blast Fax, Inc.*,[61] the appellate court reversed a finding by the district court that had found the TCPA to be unconstitutional. In *American Blast Fax*, the State of Missouri sued American Blast Fax and Fax.com, Inc. for violating the TCPA by sending facsimiles to consumers in Missouri. The district court had dismissed the complaint after finding the TCPA was unconstitutional because it unduly restricted commercial speech.[62]

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57. 447 U.S. 557 (1980).
58. *Id.* at 561.
59. *Id.* at 563.
60. *Id.* at 564.
61. 323 F.3d 649 (8th Cir. 2003).
62. *State of Missouri v. American Blast Fax, Inc.*, 196 F. Supp. 2d 920 (E.D. Mo. 2002).

In reversing the district court, the appellate court applied the four-part test. It first found that there was no allegation that the materials in the facsimiles were misleading or concerned unlawful activity.

As to the second factor—governmental interest—the court found "a substantial governmental interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient."[63] The court found "the harms of unsolicited fax advertising are real and have not been eliminated by technological changes."[64]

For the third factor, the court concluded that the regulation did advance the governmental interest of protecting members of the public from bearing the cost of unwanted advertising.[65]

Last, the court found that the restriction was not more extensive than was necessary. The court said the fourth factor of *Central Hudson* does not mean that in commercial speech the restraint does not have to be the "least restrictive" but rather must be a reasonable restriction. Restricting commercial facsimile advertisements to those that have agreed to receive them is not unreasonably restrictive.

> Advertisers remain free to publicize their products through any legal means; they simply cannot do so through an unsolicited fax. TCPA does not act as a total ban on fax advertising. Advertisers may obtain consent for their faxes through such means as telephone solicitation, direct mailings, and interaction with customers in their shops. . .[citation omitted.] While it is true that the effect of TCPA will be that some consumers will not receive unsolicited advertisements they might have appreciated, under the approach advocated by FC [Fax.com] there would always be individuals suffering costs and interference from unwanted advertisements. It was not unreasonable for Congress to choose a system that protects those who would otherwise be forced to bear unwanted burdens over those who wish to send and receive unsolicited fax advertising. Given the cost shifting and interference imposed by unsolicited commercial faxes and the many alternatives left available to advertisers, TCPA's approach is 'in proportion to the interest served . . [and is] narrowly tailored to achieve the desired objective.'[66]

Using similar rational, the TCPA's anti-facsimile provision was found valid in *State of Texas v. American Blastfax, Inc.*,[67] and *Covington & Burling v. International Marketing & Research, Inc.*[68]

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63. 323 F.3d at 656.

64. *Id.*

65. *Id.* at 658.

66. *Id.* at 659.

67. 121 F. Supp. 2d 1085 (W.D. Tex. 2000).

68. 2003 WL 21384825 (D.C. Super. 2003).

3. *Proposal Would Meet Central Hudson Tests*

By applying the four-part *Central Hudson* test to the proposal to limit unsolicited commercial e-mail only to recipients who have opted in to receive them, the proposal would not be a violation of the First Amendment.

a) Spam Frequently Contains Misleading Headers, "From" and "Subject" Information

First, in order to be protected commercial speech, the speech must concern lawful activity and must not be misleading. While the TCPA facsimile cases found that the speech concerned lawful activity and was not misleading, a similar finding would not be true for much of the unsolicited commercial e-mail. As discussed earlier, a great deal of the unsolicited commercial e-mail contains false "From" information, false header information, false, misleading or deceptive Subject lines, and inoperative "opt-out" hyperlinks. Under the first test, unsolicited commercial e-mail would not even qualify as "commercial speech" of the type to be afforded any protection under *Central Hudson*.[69]

b) Governmental Interest in Regulating Spam is Substantial

The second *Central Hudson* test is that the governmental interest must be substantial. Protection of consumers from false and misleading e-mails is an area in which the governmental interest is substantial.[70] Also, there is a substantial interest in the cost shifting that occurs with e-mails where the cost is borne by the consumers, not the entity sending the e-mails. The costs that are imposed on the recipients are real in time, money and resources used, just as it is in the case of unsolicited facsimiles.[71] As discussed earlier, the costs to the Internet, ISPs and consumers is in the billions of dollars annually.

69. *See Central Hudson*, 447 U.S. at 563 ("[t]he government may ban forms of communications more likely to deceive the public than to inform it").

70. *See Federal Trade Commission et. al. v. Mainstream Marketing Services, Inc. et. al.*, 345 F.3d 850 (10th Cir. 2003) (in its order granting a stay of the U.S. District Court of Colorado's order enjoining the implementation of the Do-Not-Call registry, the Tenth Circuit found that "preventing abusive and coercive sales practices and protecting privacy are substantial governmental interests").

71. *See Covington & Burling*, 2003 WL 21384825 at *3 (D.C. Super. 2003) ("Congress has a substantial interest in preventing business disruptions caused by the receipt of numerous unsolicited faxes").

c) Regulation of Spam Advances the Government's Interest in Protecting Consumers

Third, *Central Hudson* requires that the regulation directly advances the governmental interest asserted. In addition to the governmental need to protect recipients from deceptive and misleading unsolicited commercial e-mail, the recipients also need to be protected from cost shifting. These costs to the recipients are real in time and in dollars. By restricting commercial e-mails to those who specifically opt in to receive such solicitations, these governmental interests are served.

d) Opt-in Requirement is Necessary to Serve the Interest of Protecting Internet Users

The fourth *Central Hudson* test requires that the regulation be no more extensive than is necessary to serve the governmental interest it is seeking to protect. A requirement that senders of commercial e-mails have specific permission first is not overly broad to protect the interests. The restriction is not a total ban on commercial e-mail. It does not restrict the content of the commercial e-mail. Rather, it merely ensures that the recipient of the e-mail wants to receive it. This regulation would reduce the burden on the Internet, reduce costs for the recipient while allowing commercial e-mail to continue to be sent to a more targeted audience.

C. Monetary Penalties for the Beneficiary of Spam is an Appropriate Remedy

Finally, a word about imposing liability on the beneficiary of the unsolicited commercial e-mail. The TCPA allows for a private cause of action to be brought in state court to recover for monetary loss or $500 in damages for each violation, whichever is greater.[72] This provision has been interpreted "to apply not only to the actual sender of the unsolicited faxes, but also to the companies whose products are advertised."[73] The same should be true for unsolicited commercial e-mails. The ultimate Web site where the spammer is driving traffic should be liable for damages as well. Moreover, any legislation should allow for the aggregating of claims so that more than one aggrieved recipient can join together to bring a case against either the spammer or the ultimate Web site owner.

V. CONCLUSION

The Do-Not-Call registry may be appropriate for telemarketers, but using an opt-out mechanism for unsolicited commercial e-mail would be

72. 47 U.S.C. § 227(b)(3)(B).

73. *Covington Burling*, 2003 WL 21384825.

inadequate to control spam. As a result, any federal legislation should provide for an opt-in scenario with penalties that can be assessed not only against the spammer but also the beneficiary whose Web site is receiving the traffic generated by the unsolicited commercial e-mail.