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Federal Trade Commission
CAN-SPAM Act
Post Office Box 1030
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CAN-SPAM Act Rulemaking, Project No. R411008
16 CFR Part 316
Federal Register: March 11, 2004 (Volume 69, Number 48, Page 11775-11782)
Public Comment
Issue: Definition of Multiple Sender
Sub-Issue: EMail generated on web site through embedded "mailto" command

Dear Sir or Madam:

The undersigned respectfully submit their comments to the issue of the multiple sender definition in Section 3(16) of the CAN-SPAM Act within the above rulemaking project, solely for themselves and not on behalf of their law firms, Berliner, Corcoran & Rowe, LLP, 1101 Seventeenth Street, NW, Suite 1100, Washington, DC 20036, and Law Office of William E. O'Brien, 363 Bailey Rd., Holden, MA 01520, or any client of either law firm thereof.

1. Issue Identified by the Commission

Section 3(16) of the Act defines when a person is a "sender" of commercial e-mail. The definition appears to contemplate that more than one person can be a "sender" of commercial e-mail; for example, an e-mail containing ads for four different companies. In such a case,

who is the "sender" of the e-mail? What costs or burdens may be imposed on such entities if all are determined to be "senders"? What costs or burdens may be imposed on consumers if only the entity originating the e-mail is determined to be the "sender"? If a consumer previously has exercised his or her rights under Sec. 5(a)(3) by "opting out" from receiving commercial e-mail from one of the companies advertised in the e-mail example above, has Sec. 5(a)(4) of the Act been violated? If so, by whom?

Comment

This comment examines the issue of EMail sent with the involvement of a web site that invites visitors to send eMail to third parties.

The sender should be the party identified in the FROM line of the EMail that contains fully disclosed contributions from two or more parties as long as that sender enjoys full control over the content and the act of sending the EMail.

The technical scenario contemplated here involves:

A web site that contains a button enabling the visitor to generate an EMail message to a third party in the visitor's EMail client program. For instance, the internet-standard "mailto"-command has traditionally permitted the opening of an EMail client from a web site, and to enter automatically, from the visitor perspective, an address, and/or a SUBJECT line, and/or a FROM line and/or the body of the message.

The use of the "mailto"-feature is accomplished without special programs and constitutes a standard use of the functionalities inherent in the internet technologies.

The message generated through the "mailto"-command embedded in a web site would be sent from the EMail client of the visitor to the web site.

Rationale for the Definition

Sending an EMail message via a "mailto"-command embedded in a web site requires a conscious decision on the part of the visitor to create and send an EMail to a person of its choosing. The internet-standard "mailto" command cannot, without trickery and special programs, automate the sending of the message from non-users of the particular web site.

The information in the message body in this scenario is generated, in whole or in part, by the web site, but the acts of sending and editing the EMail remains under the complete control of its visitor. The visitor often retains so much control that he or she can delete, replace or otherwise edit the message body.

The EMail message could be sent from the visitor's computer, through the visitor's outgoing EMail server. When the EMail is sent from the visitor's EMail account, the web site offering the

content would not provide any EMail services. In fact, it would often not even be capable of sending EMail, for lack of an smtp, sendmail or other mail server functionality.

In this case, the web site operator that merely provides editable content should not be seen as the person who generates spam because it does not control the actual sending of the content.

Since the owner of the site has no final editorial control over the use of the content it is providing, the sending of the message should not be attributed to the web server, or its owner, or its content creator, as a sender who would be jointly responsible for the EMail under the CAN SPAM Act.

A Practical Scenario

A web site or blog with news content offers visitors to send a news item by EMail. A “mailto”-button on the site helps the visitor transport the content into the visitor's EMail client program. This “mailto”-button merely facilitates the act of transporting the information from the web site to the EMail client program. It does nothing that the user could not, and would not, do manually to send the news content by EMail.

A practical illustration is found at www.6109.us/blog, a non-commercial site that does not provide EMail services, such as smtp, postfix or other such mail server programs. If the site carried subscription requests or advertisements, it could be a commercial site. Each news item could theoretically and practically contain commercial messages.

Assume a visitor elects to send a news item to the visitor's own EMail address or that of another person, and would elect to press the send button on the visitor's own EMail client program, the resulting EMail message might arguably, but should not, fall under CAN-SPAM Act provisions.

Another illustration involves the same visitor electing to press the mail button on the web site, but then changing the transferred content, such as by deleting all and replacing it with the visitor's own. Clearly, the message body is no longer, fully or partially, attributable to the party whose web site facilitates the generation of the EMail message. This example helps understand that the visitor alone has control over the EMail.

The control extends to the message content, and to the TO, FROM and SUBJECT lines.

Control is Determinative

The undersigned respectfully request, therefore, that the Commission consider the issue of control over the sending of an Email message as the criterion for determining when an EMail should be attributed to multiple senders.

Assuming, arguendo, that a web site uses trickery to wrest from its visitor control over content, addressee, subject line and, possibly from identification, the original visitor who created the initial EMail should not be deemed the sender. Under this scenario, the original visitor to the site is no

longer the actual sender of the email, rather, the entity or person that has caused the EMail to be sent is the one who is responsible for the EMail.

The control criterion is also useful when the offeror of a web site enables its visitors to enter addressee information and select content, such as in e-card systems, commonly known for greeting cards, but also news items or product information, and to have the resulting composition mailed from the offeror's server.

The visitor elects to trigger the actual sending of the EMail message by clicking on a button identifying a mail function. In that situation, traditionally, the visitor retains creative content control and control over the TO entry. In application of the control standard, responsibility for being the sender should be attributed solely to the visitor.

The same situation allows, however, for gray areas and for circumstances involving abuse.

For instance, the offeror of a web site may enter its own name into the FROM line. In that case, ultimate control over sending the EMail message remains with the visitor. A reasonable solution is to consider the fact that the visitor has less control over the EMail message than in the first scenario, such as limited control over editorial content. The visitor may also not be aware of the complete content of the EMail message because an offeror may add additional, sometimes unanticipated, content to the content of the message, such as by-lines, disclaimers, or advertisements.

Again, the control criterion helps resolve the matter: Both parties to the transaction have exercised control over various aspects of the transaction. Therefore, both should be deemed the sender, each responsible for the aspects of the EMail message over which it was able to exercise control.

The control issue helps also understand the solution in the event of abuse. An offeror of a web site mail facility may collect EMail addresses and send EMail messages automatically, without approval or other action by the visitor. That would constitute abuse. Absent any controlling influence by the visitor, the sending should be attributed solely to the web site offeror.

The same conclusion would easily apply to a web mail service that surreptitiously sends EMail messages to the addresses it has collected in its mail systems, even as its users had entered the addresses into address books on the offeror's servers.

Likewise, the criterion of control helps assign responsibility when a web site generates an EMail body with invisible markers or HTML tags designed for display only when the EMail is opened. In that case, the website retains some control over the content, and the visitor exercises control over the sending of the Email. Both should be deemed senders.

2. Question Identified by the Commission

Should the Commission use its authority in Sec. 13 to issue regulations clarifying who meets the definition of "sender" under the Act? If so, how?

Comment

Based on the above technical scenarios, there is a need for clarification, by regulation, to attribute responsibility to the sender of EMail messages. There are various technical settings where more than one person influences the creation and sending of EMail messages.

The simplest solution appears to allocate responsibility according to the control exercised:

To the visitor: In instances where the visitor's EMail client is used to send EMail and the visitor exercises complete control over the content.

To the web site: In instances where only the web site exercises control over the content creation and sending of the EMail, especially in the event of abuse of trusted information provided by visitors to the web site for a specific purpose known to the visitor.

To both: In instances where editorial content are shared by web site and visitor, and the act of sending of the EMail occurs from a mail server integrated into the web site, unless the web site does not add content not disclosed to the visitor and the visitor is technically in a position to create or modify the content in its entirety.

As to the how of regulations to be drafted, the above control criterion could establish a useful standard.

By way of clarifying regulation, the Commission could, additionally, require that those web sites which offer the ability to generate and send EMail offer the visitor a preview page that enables the visitor to see the complete EMail message before electing to click on a web site button that triggers the sending of the EMail message, or an equivalent solution that lets the visitor make an informed decision of the entirety of the EMail message.

Such a clarification is not necessary for a web site that merely transfers EMail data from the web site to the visitor's own client EMail program because full control would remain with the visitor. A clarifying comment from the Commission, to that effect, would, however, be very helpful.

Finally, it would be also useful to have the Commission comment on to what extent a party can disclaim their actions through the terms of use or terms and conditions for using a web site. Providers of web services may be helped by permitting them to avoid allegations of spamming under the CAN SPAM Act, by warranting in their terms of use that the owner of the site will not collect EMail addresses of third party recipients of contents from it site and that abusing visitors to a web site, and abusers of material from the web site, shall indemnify the web site operator for all claims of spamming under the Act.

Respectfully submitted,

//Signed//

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