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September 13, 2004

**The Honorable Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580**

**RE: CAN-SPAM Act Rulemaking, Project No. R411008**

Dear Mr. Secretary:

Motion Picture Association of America (“MPAA”) is pleased to submit these comments (“Comments”) in response to the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”), published in the Federal Register, 16 C.F.R. 316, on August 13, 2004, with respect to regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM” or “the Act”) regarding the definition of “primary purpose” in the Act.

MPAA serves as the voice and advocate of the American motion picture, home video and television program production industries.<sup>1</sup> Members of MPAA provide permission-based electronic mail to consumers containing a wide range of promotional materials for member products. MPAA submitted comments (“MPAA ANPR Comments”) to FTC’s Advanced Notice of Proposed Rulemaking (“ANPR”) and now adds these comments on the FTC’s proposed Rule regarding the definition of primary purpose. These comments focus on: (1) the lack of clarity in the “transactional or relationship” exemption; (2) the subject line test; (3) the net impression test as applied by “reasonable recipients”; and (4) the importance of exempting editorial content from CAN-SPAM.

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<sup>1</sup> MPAA members include Metro-Goldwyn-Mayer Studios Inc.; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Warner Bros. Entertainment, Inc.; Universal City Studios LLLP; and The Walt Disney Company.

## **I. The FTC Should Refine the Test for Dual-Purpose E-mails that Include Transactional or Relationship Functions**

The FTC has rightly indicated that e-mails that contain both transactional or relationship content as well as commercial content may be outside the scope of CAN-SPAM.<sup>2</sup> The Act itself does not prohibit commercial content in a transaction or relationship message, and the final Rule should maintain that flexibility. In particular, MPAA agrees that bona fide electronic newsletters or other regular communication requested by a consumer should be deemed to fall within the Act's transactional or relationship exception.<sup>3</sup>

However, MPAA believes the transactional or relationship primary purpose test would benefit from several clarifications. First, MPAA is concerned that the requirement in proposed section 316.3(a)(2)(ii) that the transactional or relationship function be "at or near the beginning of the message" will be difficult to apply. For example, HTML e-mail messages, which commercial senders frequently use, allow commercial content to be presented side-by-side with non-commercial content. Similarly, an e-mail could begin with a commercial message (e.g., a banner ad) but contain primarily transactional or relationship content. It is not clear from the NPRM if these types of e-mails would be considered commercial and thus covered by the requirements in CAN-SPAM. Moreover, e-mails may transmit transactional information such as a bill or account update as an attachment or a secure link, which e-mail software often automatically places at the bottom of the message. If these predominantly transactional e-mails contain any commercial content, they could be improperly covered by CAN-SPAM.

Rather than relying solely on an "at or near the beginning" test, the FTC should use that proximity test as a safe harbor and then, if necessary, test whether a significant portion of the e-mail content relates to the transactional or relationship function. If a significant portion of the e-mail (such as two-thirds of the e-mail) is devoted to transaction or relationship functions, then the exemption applies.<sup>4</sup> A significant portion test not only avoids the difficulty of analyzing HTML e-mails, but also allows senders to use flexibility in presenting commercial content in an e-mail that is primarily transactional without unnecessarily triggering the CAN-SPAM requirements. Senders should have the discretion and the ability to send transactional messages in the manner that best suits their business operations, budget, and privacy and security concerns.

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<sup>2</sup> See 69 Fed. Reg. 50,096 (August 13, 2004).

<sup>3</sup> See 59 Fed. Reg. 50,099, 50,105 (August 13, 2004). MPAA believes that the statutory language "entitled to receive" in Section 7702(17)(A)(v) should be interpreted to apply to any agreement between a sender and recipient under which a recipient has requested or agreed to receive future e-mail transmissions. However, inclusion in the transactional or relationship exemption should not create any entitlement to receive such a newsletter in the future beyond any agreement entered into between the sender and the recipient. MPAA urges the FTC to clarify in the final Rule, or in subsequent rulemaking further defining the transactional or relationship exemptions, that the fifth exemption applies whether or not the sender has the unilateral right under the terms of the service agreement to suspend or change its service and that the exemption does not create any independent entitlement to the good or service itself.

<sup>4</sup> See MPAA ANPR Comments at 3-5.

Providing such flexibility is consistent with the FTC's stated objective to "strike the appropriate balance, maximizing protections for email recipients, while avoiding the imposition of unnecessary compliance burdens on legitimate industry"<sup>5</sup>

Second, the FTC should exercise its rulemaking authority under Section 13 of the Act to add specificity to the transactional and relationship exemption.<sup>6</sup> Currently, the NPRM relies solely on the definition of "transactional or relationship" found in the Act. While this definition may suffice for the purposes of the current rulemaking, the broad categories in the Act do not provide sufficient guidance for senders and serve as a barrier to legitimate businesses offering new services to consumers. As discussed in more detail in MPAA's comments to the ANPR,<sup>7</sup> the FTC should issue regulations that explicitly include the following types of e-mail in the transactional and relationship exemption:

- Bona fide newsletters and e-mails related to loyalty programs;
- Business-to-business e-mails where the companies have an established business relationship;
- E-mails thanking customers for completing a transaction, which are implicitly included in the exemption for "confirm[ing] a commercial transaction," whether or not such e-mails contain advertising or promotional content; and
- E-mails sent to a person who has been offered employment, but is not yet an employee.

Thus, e-mails that fall into one of these categories and also contain some commercial content should be analyzed under the dual-purpose test advocated above.

These ambiguities in the current "primary purpose" test, and with regard to the transactional e-mails detailed above, are hindering legitimate businesses in servicing their own customers and should be resolved at the FTC's earliest opportunity.

## **II. The Subject Line Test Should Not be Determinative and Should be Carefully Tailored**

Sections 316.3(a)(2)(i) and (a)(3)(i) of the proposed Rule deem the primary purpose of an e-mail to be commercial if a "recipient reasonably interpreting the subject line" would conclude the message advertises or promotes a product. While the subject line of an e-mail may be part of the analysis used in the FTC-advocated net impression test, under any test, the subject line test should not be determinative. The Act calls for an analysis of the primary purpose of the e-mail in its entirety, not just the subject line.<sup>8</sup> Moreover, in the NPRM the Commission analogized to its analysis of advertising, noting that it "will examine 'the entire

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<sup>5</sup> 69 Fed. Reg. 50,093 (August 13, 2004).

<sup>6</sup> CAN-SPAM §§ 3(17)(a)(i-v).

<sup>7</sup> See MPAA ANPR Comments at 11-12.

<sup>8</sup> CAN-SPAM § 3(17).

mosaic, rather than each tile separately.”<sup>9</sup> Simply analyzing the subject line of an e-mail is not sufficient to determine whether or not the primary purpose of the e-mail is commercial or transactional. In many situations, the subject line could be interpreted in one way depending on circumstances, while the purpose of the e-mail is clearly and explicitly different. By focusing on the subject line in this proposed Rule, the FTC has ignored legislative intent, and has improperly emphasized the subject line as the test for the primary purpose of the entire e-mail to the exclusion of the e-mail itself.

In addition, the subject line test fails to account for forwarded, reply and chain messages. For example, if someone forwards a commercial e-mail and adds a non-commercial message such as the confirmation of a transaction, the subject line test would deem the new message commercial. In a similar fashion, if the last e-mail in a chain of e-mails between two parties confirms a product or service transaction, but the first e-mail simply promoted the product or service, the subject line test would deem the final transactional message to be commercial. Business-to-business marketing frequently takes advantage of e-mail in these ways and would be unduly burdened if the subject line test proposed in the NPRM is adopted in the final Rule. For these reasons, MPAA urges the FTC to make the subject line test part of the analysis, rather than determinative.<sup>10</sup>

The subject line test should also be modified to ensure that it applies only to *commercial* e-mail that advertises or promotes a *commercial* product or service. In the definition of “commercial e-mail”, Congress used the adjective “commercial” to qualify both “advertising or promotion” and “product or service” with regard to the e-mail’s primary purpose.<sup>11</sup> By dropping this adjective in its proposed primary purpose Rule, the FTC is broadening the scope of the Act well beyond the intent of Congress. Expanding the definition of commercial e-mail to include all e-mail that advertises or promotes a product or service would apply the requirements of the Act to an individual sending one e-mail to a single recipient or to content that should be exempt. MPAA suggests the Commission adopt the wording used in the Act to define commercial e-mail and add the word “commercial” to these sections as well as to every other use of these terms in §316.3.

Finally, the FTC should clarify that the subject line test is not meant to apply to the incidental promotion of a brand name in the subject line of an e-mail. For example, if an e-mail with the daily news from a news website has as its subject line “Newswebsite.com Daily Updates,” the subject line could be interpreted as promoting the news website itself. Such incidental mention of the brand name (even if a commercial website) in a subject line should not render an otherwise non-commercial e-mail subject to the requirements of the Act. When

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<sup>9</sup> 69 Fed. Reg. 50,096 (August 13, 2004) (*quoting FTC v. Sterling Drug*, 317 F.2d 669, 674 (2<sup>nd</sup> Cir. 1963)).

<sup>10</sup> If the FTC does adopt the subject line test in the final Rule, MPAA urges the Commission to carve out an exception for forwarded or reply/chain e-mails that echo the subject line of the preceding message.

<sup>11</sup> “The term ‘commercial electronic mail message’ means any electronic mail message the primary purpose of which is the *commercial* advertisement or promotion of a *commercial* product or service (including content on an internet website operated for a commercial purpose).” CAN-SPAM § 3(2)(A) (emphasis added).

applied to an e-mail containing news that includes the name of the news website in the subject line, a broad reading of the subject line test could also restrict editorial content in violation of the First Amendment.

### **III. The Net Impression Test and Its Reliance on the “Reasonable Recipient” Standard Proposed by the FTC is Subjective and Difficult to Apply**

The FTC proposes to apply a “net impression” test, which would primarily be used for e-mails that contain both commercial content and content that is neither transactional nor relationship oriented, to determine whether an e-mail is commercial.<sup>12</sup> In such circumstances, MPAA continues to advocate a “more important” test, as it did in its comments to the ANPR, because the more important test provides clarity to MPAA companies when complying with CAN-SPAM.<sup>13</sup> MPAA encourages the FTC to consider the flaws inherent in the net impression test and to correct these problems in the final primary purpose Rule.

The NPRM proposes a “reasonable recipient” standard as part of the criteria for determining the primary purpose of a dual purpose e-mail. Proposed sections 316.3(a)(2) and (3) require an analysis of whether “a recipient reasonably interpreting the subject line [or the body] of the message would likely conclude that the message advertises or promotes a product or service.” This analysis of the “reasonable recipient” is used to determine whether the “primary purpose” of the e-mail is commercial.

A “reasonable recipient” standard is unnecessarily subjective. In its Comments in response to the ANPR, MPAA advocated the development of a clear, unambiguous, sender-based test for determining the “primary purpose” of an e-mail.<sup>14</sup> In contrast, the FTC’s proposed Rule requires an evaluation of how a “reasonable recipient” would interpret an e-mail’s subject line or message body and necessarily devolves into subjective and time-consuming analysis. Without the benefit of a bright-line rule, the FTC places an undue burden on senders. Senders will likely have to seek legal counsel prior to sending an e-mail to determine whether or not the “reasonable recipient” would conclude the subject line or body of each e-mail advertises or promotes a product or service.

In the context of advertising, the NPRM notes the possibility of analyzing “extrinsic evidence – such as expert opinion, consumer testimony, copy tests, surveys, or any other reliable evidence of consumer interpretation . . . .”<sup>15</sup> It would be extremely burdensome for companies to engage in such a “recipient-based” analysis regarding every e-mail they wish to send. The subjective “reasonable recipient” standard requires case-by-case, substantive analysis and will therefore be more difficult for senders to apply than would an objective, clear-cut, sender-based test such as that proposed by MPAA.

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<sup>12</sup> 69 Fed. Reg. 50,101-02 (August 13, 2004).

<sup>13</sup> MPAA ANPR Comments at 3-5.

<sup>14</sup> See MPAA ANPR Comments at 3.

<sup>15</sup> 69 Fed. Reg. 50,097 (August 13, 2004).

Finally, if the FTC does choose to incorporate the “reasonable recipient” standard into the final Rule, it should emphasize that the standard is audience-specific and should delineate between the business person and consumer recipient. The FTC states that in applying the traditional “reasonable consumer” standard, “[i]f a particular act or practice is directed to a particular audience, then the Commission assesses the overall sophistication and understanding of that particular group in determining the reaction of the ‘reasonable consumer.’”<sup>16</sup> To the extent that the FTC considers certain business-to-business e-mails to fall within CAN-SPAM,<sup>17</sup> MPAA urges the FTC to recognize that “[c]onsumers and businesses are two very distinct classes of e-mail recipients with very different privacy expectations, levels of sophistication, and relationships with senders.”<sup>18</sup> Therefore, the “reasonable recipient” standard should take into account whether the recipient is a business person or a consumer and assess the recipient’s overall sophistication and understanding accordingly.

#### **IV. The FTC’s Application of the “Commercial Speech” Standard to Constitutionally-Protected Editorial Content is Incorrect**

MPAA companies regularly transmit e-mails that contain primarily editorial content, but may include advertisements or commercial messages as well. Such editorial content is wholly protected by the Constitution regardless of the number of advertisements, and is not subject to FTC regulation as a result.<sup>19</sup> The FTC has proposed to apply the net impression test to these editorial content e-mails, contending that they are “commercial speech” and thus subject to some regulatory oversight.<sup>20</sup> The FTC has improperly construed its power to review the truthfulness of commercial advertising to constitute a power to hinder substantially or prevent the delivery of publications containing significant editorial content that is fully protected by the First Amendment.<sup>21</sup> This interpretation of the FTC’s authority would violate established First Amendment case law, and would not survive court scrutiny under either the commercial speech *Central Hudson* test, or under the more appropriate strict scrutiny standard applied to editorial

<sup>16</sup> 69 Fed. Reg. 50,097 n. 47 (August 13, 2004) (quoting letter from FTC to Rep. Dingell, Chairman, House Comm. on Energy and Commerce (Oct. 14, 1983) (“FTC Policy Statement on Deception”), *reprinted in Cliffdale*, appendix).

<sup>17</sup> As noted in its ANPR filing, MPAA believes that individual or a small number of e-mails, regardless of whether they are sent to businesses or consumers, do not constitute “commercial advertising or promotion.” *See* MPAA ANPR Comments at 18-19.

<sup>18</sup> MPAA ANPR Comments at 2-3.

<sup>19</sup> *See* MPAA ANPR Comments at 4-5 for a more detailed articulation of this position.

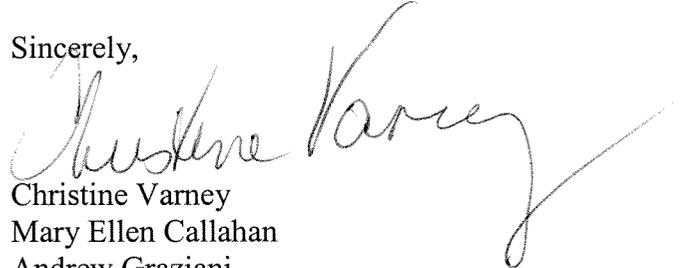
<sup>20</sup> 69 Fed. Reg. 50,099 (August 13, 2004).

<sup>21</sup> The ability of publishers to deliver advertising-supported editorial content would be substantially hindered, if not completely obstructed, if such e-mails required unsubscribe links for each advertiser and suppression of delivery of the e-mails to any recipient that previously had unsubscribed from prior e-mails from any of the advertisers.

content.<sup>22</sup> MPAA respectfully requests the FTC to reconsider its erroneous position on issues of constitutional importance.

For the foregoing reasons, we ask the FTC to consider modifying the proposed Rule to address the concerns raised in these Comments. Thank you for the opportunity to submit these Comments on the NPRM.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christine Varney", with a long, sweeping flourish extending to the right.

Christine Varney  
Mary Ellen Callahan  
Andrew Graziani  
Hogan & Hartson, L.L.P.  
Counsel to MPAA

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<sup>22</sup> See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n. 12 (1993) (city restriction on sidewalk news rack delivery of commercial publications violates First Amendment).