

**EFF Comments
For CAN-SPAM NPRM
Docket ID 3084-AA96**

2. Section 316.3--Primary Purpose -- Does the Commission's "primary purpose" standard provide sufficient guidance as to when a message will be considered "commercial" under the CAN-SPAM Act?

The FTC has asked for clarification of this issue before (see, for example, CAN-SPAM ANPR, Docket ID 3084-AA96/16 CFR 316). Certainly the FTC has posed some additional questions in this NPRM. But as a nonprofit organization devoted to civil liberties, the Electronic Frontier Foundation's primary interest is in the question cited above, regarding how to use the "primary purpose" standard to guide decisions about whether a given piece of e-mail qualifies as commercial or free speech. This is the question we have addressed previously.

EFF believes that to protect freedom of speech, we must consider as noncommercial any message which contains noncommercial content. Because First Amendment issues are at stake, it behooves us to create a bright and simple rule that will protect the broadest range of communications from censorship and censure. Attempts to declare a message noncommercial based on any other standard are doomed to silence voices that deserve to be heard and will not stem the tide of spam.

Because nothing significant has changed in the landscape since we filed our comments on the CAN-SPAM ANPR, we stand by comments that we submitted to this body in April 2004 (See Additional EFF Comments for CAN-SPAM Act ANPR). For the FTC's convenience, we include those previous comments, with slight modifications:

In order to avoid Constitutional problems, the FTC should interpret a message as having a commercial "primary purpose" only when, if taken as a whole, it cannot be reasonably viewed as containing any noncommercial message. Put another way, if a message taken as a whole can be reasonably said to contain noncommercial content, then it **should not** qualify as having a "primary purpose" that is commercial under the statute. Any other interpretation of this phrase would, by definition, require the statute to reach noncommercial speech. To the extent that the statute reaches noncommercial speech, it should face, and would most certainly fail, strict scrutiny under settled Constitutional law.

EFF is strongly supportive of stopping spam, which we define as unsolicited, commercial, bulk e-mail. In that effort, however, it is unacceptable for noncommercial speech to be sacrificed as a side effect. Any rule that attempts to criminalize e-mails based upon the suggested tests in the NPRM -- the "importance" of the commercial portion, the "net impression" of the e-mail, or whether the commercial portion is "more than incidental" -- creates unacceptable uncertainty and risk for individuals,

corporations and organizations engaged in everyday activity online.

For example, a nonprofit organization that solicits donations or sells T-shirts within an email newsletter risks criminal and civil liability if a prosecutor or ISP determines that the “primary purpose” of its newsletter is to raise funds. Similarly, an individual plumber faces uncertainty if he answers a plumbing question posed by someone on a mailing list and includes a paragraph indicating that his services are for hire. Likewise, a fishing club encounters the same anxiety if it recommends specific products (with hyperlinks) to its members.

The legal doctrine underlying EFF’s suggested interpretation of the statute is straightforward and settled. “Commercial speech” for purposes of First Amendment scrutiny is an e-mail message that does “no more than propose a commercial transaction,” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), which has been described as “expression related solely to the economic interests of the speaker and its audience,” *Central Hudson Gas & Electric Corp v. Public Service Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

Here, the “primary purpose” clause in the statute is attempting to handle messages that contain both commercial and noncommercial speech. Long ago, the Supreme Court considered the question of mixed commercial and noncommercial speech and expressly rejected the claim that the admixture results in less protection for the noncommercial portion of the speech. Instead, the Court held that when the ad or promotional aspects of the message are inextricably intertwined with noncommercial aspects, then the message is noncommercial for purposes of First Amendment analysis. Thus any regulation that reaches such e-mail messages must survive strict scrutiny. *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 796 (1988)(ordinance regulating charitable fundraisers held unconstitutional). In *Riley*, the Court considered, and rightly rejected, many of the arguments likely to be made in support of expanding the reach of the CAN-SPAM law beyond purely commercial speech. For example, the Court rejected a test that would based liability on whether the speech would have occurred, but for the commercial element, stating: “solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and for the reality that without solicitation the flow of such information and advocacy would likely cease.” *Riley* at 796. It also rejected the claim that compelled speech requirements, such as the CAN-SPAM requirements of specific subject line information and compelled return address information, should be subject to reduced constitutional scrutiny than flat bans on the speech. *Id.* at 796-797.

The *Riley* case also provides a relatively bright line rule, avoiding the significant vagueness problems that would attend any of the other formulations suggested in the NPRM. Invariably, a test that turned on the “importance” of a portion of a message to the rest or the “net impression” of the message turn on individual

predilections of the reader or evaluator. One of the touchstones of First Amendment law is the requirement that rules criminalizing speech, or even discouraging it under pain of civil exposure, be extremely clear and objective. Rules that force the speaker to predict the subjective response of recipients or third party, such as law enforcement, about how "important" the commercial portion of a message was, will force speakers to be more cautious, creating a chilling effect on even legitimate speech for fear of an adverse response. Such rules are rightfully constitutionally suspect.

EFF believes that the Riley court analysis is correct, and that it is appropriately applied to the CAN-SPAM Act. The ability to combine commercial messages with noncommercial ones is one of the chief drivers for the creation of noncommercial speech both online and offline. Television, radio and newspapers are all funded by the inclusion of commercial messages into noncommercial programming. Nonprofit organizations, clubs and societies all utilize fundraising and commercial sales to support their activities. A rule that would potentially subject these activities to the severe penalties of the CAN-SPAM Act will chill these messages and reduce the amount of legitimate speech online.