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Jacquelyn Trussell

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# NEWS

## Is the CAN-SPAM Act the Answer to the Growing Problem of Spam?

By Jacquelyn Trussell\*

### I. Introduction

As intrusive and aggravating as telephone solicitation, unsolicited commercial e-mail, commonly known as spam, is far worse.<sup>1</sup> Merely contrasting the amount of spam an e-mail user receives in a day with the number of telephone calls from marketers makes this apparent. The amount of spam sent to consumers daily is staggering.<sup>2</sup> The harm caused by the amount of spam sent to consumers, without even taking into consideration the effects of fraudulent and exploitative spam, exceeds \$1 billion.<sup>3</sup>

The detrimental effects of spam have caused considerable concern among consumers, who are no longer willing to accept the cost and burdens associated with this invasion of their privacy. In light of the recent passage of the Do-Not-Call Implementation Act of 2003 (“Do-Not-Call Act”),<sup>4</sup> many believe that an analogous Do-Not-E-mail list is the solution to spam.<sup>5</sup> Consequently, in making the

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\* J.D. candidate, May 2004, Loyola University Chicago School of Law; B.A. International Relations, 1997, Boston University.

<sup>1</sup> Daniel Thomas, *Governments under pressure to beef up anti-spam legislation to protect business*, COMPUTER WEEKLY, Oct. 14, 2003, available at 2003 WL 60336614.

<sup>2</sup> S. REP. NO. 108-102, 2003 WL 21680759, at \*2 (July 16, 2003).

<sup>3</sup> *Id.* at \*6-7.

<sup>4</sup> Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (codified at 15 U.S.C. §§ 6101-6108 (2003)).

<sup>5</sup> See S. 877, 108th Cong. (Nov. 25, 2003).

regulation of spam a priority,<sup>6</sup> Congress has passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"),<sup>7</sup> anti-spam legislation that includes a Do-Not-E-mail list.<sup>8</sup> Nevertheless, there is some doubt as to whether the CAN-SPAM Act or any legislation at all can adequately address spam.

## II. The Need for Federal Anti-Spam Legislation

Because of spam's pervasive intrusiveness,<sup>9</sup> legislators are facing increasing pressure to address the growing problems of spam.<sup>10</sup> Approximately 140 million Americans use e-mail regularly.<sup>11</sup> This number accounts for nearly half of all American citizens.<sup>12</sup> Less than two years ago, spam accounted for only eight percent of all e-mail sent worldwide.<sup>13</sup> Today, over 46 percent of global e-mail traffic is spam, a number that will have exceeded 50 percent by the end of 2003.<sup>14</sup> As a result of this increase, the Federal Trade Commission ("FTC") receives approximately 50,000 spam complaints a day from consumers.<sup>15</sup>

The growth in the use of spam is a consequence of its effectiveness. Unlike traditional mail or telephone solicitation, spam can be conveyed to millions of people almost instantaneously.<sup>16</sup> Even more impressive is the cost of sending spam. An e-mail can be sent at

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<sup>6</sup> Marylou Doehrmann, *Network security is crucial*, COLO. SPRINGS BUS. J., Oct. 10, 2003, at 1, available at 2003 WL 11772869.

<sup>7</sup> CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (to be codified at 15 U.S.C. §§ 7701-13; 18 U.S.C. §§ 1001, 1037; 28 U.S.C. § 994; and 47 U.S.C. § 227); Ted Bridis, *Congress agrees to 'can spam' Bill is designed to help Internet users unclog boxes*, STATE, Dec. 9, 2003, at 3, available at 2003 WL 62853320.

<sup>8</sup> CAN-SPAM Act § 109, 117 Stat. at 2716.

<sup>9</sup> S. REP. NO. 108-102, 2003 WL 21680759, at \*2 (July 16, 2003).

<sup>10</sup> Thomas, *supra* note 1.

<sup>11</sup> S. REP. NO. 108-102, 2003 WL 21680759, at \*2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Bob Mims, *Spam Bill now on House's plate*, SALT LAKE TRIBUNE, Nov. 9, 2003, at E1, available at 2003 WL 3697108.

<sup>16</sup> S. REP. NO. 108-102, 2003 WL 21680759, at \*2.

such a negligible cost<sup>17</sup> that it is virtually free.<sup>18</sup> If this were not reason enough for marketers to take advantage of spam, the fact that the cost of using spam does not rise in proportion to the number of solicitations made would be sufficient reason.<sup>19</sup> Spam allows marketers to anonymously<sup>20</sup> send out as many copies of their e-mails as they want with no proportional rise in costs.<sup>21</sup> Consequently, marketers send out millions of e-mails at a time.<sup>22</sup> In fact, "more than 2 trillion spam messages are expected to be sent over the Internet this year, or 100 times the amount of direct mail advertising pieces delivered by the U.S. mail last year."<sup>23</sup>

Spam's effectiveness becomes more problematic because of its ability to be used as a vehicle for fraud or exploitation. An FTC study presented in May 2003 found that two-thirds of spam contains fraudulent, misleading, or objectionable content.<sup>24</sup> Common types of fraudulent or misleading spam include pyramid schemes, stock and investment scams, solicitations for fake charitable causes, and lures to websites that contain viruses, spy ware, or other malicious computer codes.<sup>25</sup> Spam of this type puts a consumer's financial assets at risk and has resulted in considerable loss.<sup>26</sup> In contrast to fraudulent spam objectionable spam normally includes pornographic content, or links to websites with such content that does not pose a financial risk to consumers.<sup>27</sup> However, this type of spam is potentially offensive and burdens parents because they must monitor

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<sup>17</sup> John Magee, *The Law Regulating Unsolicited Commercial E-Mail: An International Perspective*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 333, 338 (2003).

<sup>18</sup> Beatrice E. Garcia, *Spam haters; More is coming to your computer, A Research firm says. And while legislation to block spammers is making its way to Congress, it may not be enough.*, MIAMI HERALD, Sept. 30, 2003, at 1, available at 2003 WL 62533689.

<sup>19</sup> Magee, *supra* note 17, at 338.

<sup>20</sup> Garcia, *supra* note 18, at 1.

<sup>21</sup> Magee, *supra* note 17, at 338.

<sup>22</sup> *Id.*

<sup>23</sup> S. REP. NO. 108-102, 2003 WL 21680759, at \*2 (July 16, 2003).

<sup>24</sup> Garcia, *supra* note 18, at 1.

<sup>25</sup> S. REP. NO. 108-102, 2003 WL 21680759, at \*5-6.

<sup>26</sup> *Id.* at \*5.

<sup>27</sup> *Id.*

their children's e-mail.<sup>28</sup> In either instance the unwary user's privacy rights are harmed by the invasion.

The public has suffered as a result of spam's ability to be used for fraud. A study from the European Union found that "spam cost Internet subscribers worldwide \$9.4 billion each year," and "research organizations estimate that fighting spam adds an average of \$2 per month to an individual's Internet bill."<sup>29</sup> Similarly, costs to U.S. businesses as a result of spam exceeded \$10 billion in 2003.<sup>30</sup> Nearly \$4 billion of that amount can be attributed to productivity losses from sifting through and deleting spam from email accounts.<sup>31</sup> The remaining \$6 billion comes from network system upgrades, unrecoverable data, and increased personnel costs.<sup>32</sup>

Because of these substantial economic burdens, spam may soon undermine the usefulness and efficiency of e-mail as a means of communication.<sup>33</sup> In fact, more than half of all e-mail users are already more distrustful of e-mail, while one quarter of all users have actually reduced their overall use of e-mail.<sup>34</sup> What is most alarming about the growth of spam is that the number of spam messages sent and the problems spam causes will continue to increase exponentially. Some have projected that e-mail will be unusable without government intervention by 2009.<sup>35</sup>

Consequently, this increase will have a tremendous effect on the public's use of the Internet, a burgeoning marketplace that offers tremendous opportunities to sellers and advertisers.<sup>36</sup> Because it is cheaper to advertise through spam than it is to advertise using print

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at \*6.

<sup>30</sup> *Id.* at \*7.

<sup>31</sup> S. REP. NO. 108-102, 2003 WL 21680759, at \*7 (July 16, 2003).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*6.

<sup>34</sup> Jane Black, *Needed: A Beefier CAN-SPAM Bill; Recipients of unwanted e-mail should have the right to sue, and law enforcement needs more muscle to put the pests out of business*, BUS. WK. ONLINE, Oct. 30, 2003, available at 2003 WL 6953366.

<sup>35</sup> Elizabeth Dunbar, *Options to stop spam stretch to taxing e-mail*, NEWS & OBSERVER, Nov. 17, 2003, at A1, available at 2003 WL 3489088.

<sup>36</sup> Andrea Stone, *Marketers trying to influence Congress on spam; They want a bill that won't shut out what they say are legitimate businesses*, USA TODAY, Nov. 11, 2003, at A13, available at 2003 WL 5323066.

ads, television commercials, or direct phone solicitation, advertisers are increasingly turning to the Internet and spam to sell their products.<sup>37</sup> Furthermore, the recently enacted Do-Not-Call Act,<sup>38</sup> which places limits on solicitation over the phone, will lead to an ever-increasing dependence on spam. In other words marketers will seek an alternative to replace lost telephone solicitation opportunities. Spam is an excellent option, because it is cheap, effective, and unregulated.

Fortunately, spam's exponential growth rate has not gone unrecognized. The Organization for Economic Cooperation and Development ("OECD") has "organized a World Spam Summit for October 2004—to push for consistent anti-spam legislation on a global basis."<sup>39</sup> Furthermore, on a governmental level, both Australia and the United Kingdom have recently passed legislation regulating spam.<sup>40</sup> Similarly, on the home front, thirty-six states have enacted some form of anti-spam legislation.<sup>41</sup> In fact, California recently enacted the harshest spam law in the nation. The newly enacted law has an opt-in standard that requires companies wanting to send spam to gain prior approval from consumers.<sup>42</sup> California's law also authorizes fines of up to \$1 million for each piece of spam.<sup>43</sup>

Congress has also recognized the problems spam poses if it continues to go unregulated. For the past three years, however, Congress has attempted to pass anti-spam legislation,<sup>44</sup> proposing approximately fourteen different anti-spam bills.<sup>45</sup> Recently, it

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<sup>37</sup> *Id.*

<sup>38</sup> See Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (codified at 15 U.S.C. §§ 6101-6108 (2003)).

<sup>39</sup> Thomas, *supra* note 1.

<sup>40</sup> James Hein, *Computer Currents—Yahoo forces an upgrade*, BANGKOK POST, Oct. 8, 2003, at 6, available at 2003 WL 65684669.

<sup>41</sup> See Hanah Metchis, *Spammers would feast on this list; Many e-mail marketers would treat it as a fresh contact list and would purposely send spam*, CHICAGO SUN-TIMES, Nov. 12, 2003, at 55, available at 2003 WL 9575710.

<sup>42</sup> See CAL. BUS. & PROF. CODE § 17529 (2003); Dunbar, *supra* note 35, at A1.

<sup>43</sup> See CAL. BUS. & PROF. CODE § 17529; James McNair, *From the stockroom to the boardroom, it's paralyzing all facets of business*, CINCINNATI ENQUIRER, Nov. 16, 2003, at 1, available at 2003 WL 67483777.

<sup>44</sup> Stone, *supra* note 36, at A13.

<sup>45</sup> Magee, *supra* note 17, at 357.

appears that Congress has finally overcome its prior indecisiveness.<sup>46</sup>

### III. The CAN-SPAM Act

#### A. Baby Steps Toward Legislation

By making anti-spam legislation a major focus of last year's legislative session,<sup>47</sup> Congress has made a concerted effort to curb the harm spam has caused through the passage of the CAN-SPAM Act. The Senate took the first step toward implementing this legislation, and, in a unanimous vote on October 23, 2003, passed the first version of the Act.<sup>48</sup> The bill, S. 877, was sponsored by Senator Burns (R-Mont.) and Senator Wyden (D-Ore.)<sup>49</sup> and is an amalgam of five separate bills the Senate had been considering.<sup>50</sup>

The House, on the other hand, failed to reconcile the differences between two competing anti-spam bills. The representatives sponsoring each bill<sup>51</sup> agreed to consensus legislation based on the Senate's CAN-SPAM Act.<sup>52</sup> Following an all-night session in the House on November 22, 2003, the House passed a modified version of the Act by a vote of 392-5.<sup>53</sup> The Senate quickly responded by adopting a slightly modified version of the Act on

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<sup>46</sup> Bridis, *supra* note 7, at 3; See CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (to be codified at 15 U.S.C. §§ 7701-13; 18 U.S.C. §§ 1001, 1037; 28 U.S.C. § 994; and 47 U.S.C. § 227).

<sup>47</sup> Doehrman, *supra* note 6, at 1.

<sup>48</sup> See 149 CONG. REC. S13176-03 (daily ed. Oct. 23, 2003), available at 2003 WL 22415941; Black, *supra* note 34.

<sup>49</sup> See S. 877, 108th Cong. (2003); Black, *supra* note 34.

<sup>50</sup> Numerous Spam Bills Find Home in Senate-Clearing Package, WASH. INTERNET DAILY, Oct. 24, 2003, Vol. 4, Issue 206, available at 2003 WL 16118519. The Senate's version of the CAN-SPAM Act was based in part on the following bills: S. 1231, S. 1237, S. 1293, S. 1052, S. 630, S. 563, and S. 877.

<sup>51</sup> Capitol Hill, WASH. INTERNET DAILY, Nov. 3, 2003, available at 2003 WL 16118570.

<sup>52</sup> Anti-Spam Bill Awaits Senate Action After House Approval, CONGRESS DAILY/A.M., Nov. 24, 2003, available at 2003 WL 68223936.

<sup>53</sup> See 149 CONG. REC. H12186-02 (daily ed. Nov. 21, 2003), available at 2003 WL 22852344; Declan McCullagh, House passes antispam bill, CNET NEWS.COM, at <http://news.com.com/2100-1024-51106222.html> (last modified Nov. 22, 2003).

November 25, 2003.<sup>54</sup> After the Senate made minor technical corrections,<sup>55</sup> the House approved the CAN-SPAM Act without dissent on December 8, 2003.<sup>56</sup> President George W. Bush then signed the Act into law on December 16, 2003.<sup>57</sup>

## **B. The Birth of the CAN-SPAM Act**

The CAN-SPAM Act does not outlaw all unsolicited e-mail,<sup>58</sup> but in fact legalizes some forms of spam.<sup>59</sup> Businesses and marketers can now send unsolicited e-mail to anyone with an e-mail address as long as they have identified themselves clearly, do not use fraudulent headers and honor consumer requests to cease sending them unsolicited commercial e-mail.<sup>60</sup> Under the Act, junk e-mail is treated like junk postal mail, with non-fraudulent e-mail legalized until the recipient chooses to unsubscribe.<sup>61</sup> Other key provisions of the CAN-SPAM Act are as follows:

- Labeling: unsolicited e-mails must be clearly identified as solicitations or advertisements for products and services.<sup>62</sup> Additionally, e-mails containing sexually explicit content must be labeled to indicate the contents of the e-mail.<sup>63</sup>

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<sup>54</sup> See 149 Cong. Rec. S15938-01 (daily ed. Nov. 25, 2003), available at 2003 WL 22799269; *Law to stop junk e-mail—Spammers face jail*, SUNDAY TELEGRAPH, Nov. 30, 2003, at 49, available at 2003 WL 65525806.

<sup>55</sup> *Congress Preempts States, Particularly Cal., on Privacy and Spam*, WASH. INTERNET DAILY, Nov. 28, 2003, Vol. 4, Issue 229, available at 2003 WL 16118721 [hereinafter *Congress Preempts States*].

<sup>56</sup> See 149 Cong. Rec. H12854-08 (daily ed. Dec. 8, 2003), available at 2003 WL 22889088; Bridis, *supra* note 7, at 3.

<sup>57</sup> See Fact Sheet, White House, Bush signs anti-spam law (Dec. 16, 2003), available at 2003 WL 22954891.

<sup>58</sup> Andy Sullivan, *U.S. Senate gives assent to anti-spam bill: Bid to head off e-mail plague: Bush expected to sign it into law by the end of the year*, NAT'L POST, Nov. 26, 2003, at FP16, available at 2003 WL 68065131.

<sup>59</sup> McCullagh, *supra* note 53.

<sup>60</sup> See *Congress Preempts States*, *supra* note 55.

<sup>61</sup> McCullagh, *supra* note 53.

<sup>62</sup> CAN-SPAM Act, Pub. L. No. 108-187, § 105(a)(5)(A), 117 Stat. 2699, 2706-7 (2003).

<sup>63</sup> § 105(d), 117 Stat. at 2709.

- **Opt-out:** senders must provide easily accessible, legitimate means for consumers to opt out of receiving future messages.<sup>64</sup> Furthermore, transmission of spam or an e-mail address after a consumer has opted out is prohibited.
  
- **Sender's Addresses:** unsolicited emails must contain legitimate return e-mail addresses, as well as the sender's postal address.<sup>65</sup> Transmission of false or misleading transmission information is prohibited.<sup>66</sup>
  
- **Honest Subject Lines:** use of misleading or bogus subject lines to trick consumers into opening messages is forbidden.<sup>67</sup>
  
- **Do-Not-E-mail registry:** within six months of the CAN-SPAM Act's enactment, the FTC must deliver to Congress a plan and a timetable for the creation of a Do-Not-E-mail list and an explanation of how the list would be implemented.<sup>68</sup> Nine months after the enactment of the Act, the FTC is required to establish and implement the list or explain to Congress why it cannot establish and implement the list at that time.<sup>69</sup>
  
- **Bulk Solicitation:** using automated means to establish multiple e-mail accounts for the transmission of spam, including "harvesting" e-mail addresses by crawling web sites and automated guessing of e-mail addresses by trying mike1@aol.com, mike2@aol.com, and so on, is prohibited.<sup>70</sup> Furthermore, it is a felony to transmit more than 2,500 e-mails in a 24 hour period, 25,000 in 30 days,

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<sup>64</sup> § 105(a)(5)(B), 117 Stat. at 2708.

<sup>65</sup> § 105(a)(5)(A), 117 Stat. at 2708.

<sup>66</sup> § 105(a)(1), 117 Stat. at 2706.

<sup>67</sup> § 106, 117 Stat. at 2710.

<sup>68</sup> § 109, 117 Stat. at 2716.

<sup>69</sup> *Id.*

<sup>70</sup> § 104, 117 Stat. at 2703-06.

or 250,000 in one year.<sup>71</sup>

- Violations: only the Federal Department of Justice, FTC, state attorneys general and Internet service providers can file suit against violators.<sup>72</sup>

- Penalties: violators can be assessed penalties of up to \$2 million, and any penalty assessed can be tripled where the violator has acted intentionally.<sup>73</sup> In contrast damages for fraud and abuse are unlimited.<sup>74</sup> Furthermore, prison terms of up to five years will be given if the felony provisions are violated.<sup>75</sup>

These provisions illustrate that the CAN-SPAM Act is truly consensus legislation that regulates without being too restrictive.

#### IV. Reactions to the CAN-SPAM Act

Reactions to the CAN-SPAM Act have been mixed. Some critics say that the Act is weak and full of loopholes because it does not mandate a Do-Not-E-mail list, has so many exceptions, and has such a high standard of proof that it provides only minimal consumer protection.<sup>76</sup> Moreover, under the Act, consumers do not have the opportunity to file their own action against violators of the Act, but instead have to depend on the FTC or their state attorneys general for legal redress.<sup>77</sup> Opponents have also objected to the “opt-out” provision of the CAN-SPAM Act, even though there is a similar provision in the Do-Not-Call Act, because it forces consumers to take action to block subsequent messages.<sup>78</sup> These opponents prefer an

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<sup>71</sup> § 104(b)(2)(C), 117 Stat. at 2704.

<sup>72</sup> § 107, 117 Stat. at 2711-15.

<sup>73</sup> § 107(f)(2)(B), (C), 117 Stat. at 2713.

<sup>74</sup> § 104(b)(1), 117 Stat. at 2704.

<sup>75</sup> *Id.*

<sup>76</sup> Stone, *supra* note 36, at A13.

<sup>77</sup> *Congress Preempts States*, *supra* note 55.

<sup>78</sup> Marilyn Geewax, *Senate Oks bill to curb junk e-mail Measure likely to take effect next month*, ATL. J.-CONST., Nov. 26, 2003, at C1, available at 2003 WL 68975347.

“opt-in” approach, which would require companies to get consumers’ permission before sending any messages.<sup>79</sup>

Many consumer advocates find the CAN-SPAM Act’s clash with state legislation to be the worst feature of the bill.<sup>80</sup> Opponents criticize the Act because it supercedes state legislation that is already in place.<sup>81</sup> In fact, some states actually provide stricter spam regulations than those regulations promulgated under the Act.<sup>82</sup> Thus, in certain states, such as California, the adoption of federal anti-spam legislation reduces consumer protection from spam.<sup>83</sup>

Others like President Bush<sup>84</sup> and the Justice and Commerce Departments, however, favor the CAN-SPAM Act.<sup>85</sup> In fact, proponents find many of the Act’s alleged weaknesses to be its strengths. In particular many marketers favor the Act’s preemption of state law because they would find it difficult to comply with a patchwork of disparate state laws.<sup>86</sup> The provision of one federal standard makes compliance simpler and much more cost efficient and allows legitimate marketers to use the medium of e-mail.<sup>87</sup> Furthermore, effective enforcement of anti-spam legislation requires cooperation that cannot be achieved if there are a variety of different standards.<sup>88</sup> Adequate policing also necessitates close cooperation not only among the states but also between the United States and international authorities because a lot of spam actually originates

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Chris Gaither, *Antispam bill nears final OK*, BOSTON GLOBE, Nov. 26, 2003, at A1, available at 2003 WL 66479385.

<sup>82</sup> *Spam, Spam, Spam / Congress is right to strike a blow to save e-mail*, HOUS. CHRON., Nov. 29, 2003, at 40, available at 2003 WL 68824707.

<sup>83</sup> Simon London, *Mixed Reception on US laws to curb e-mail spam.*, FIN. TIMES, Nov. 24, 2003, at 10, available at 2003 WL 68045495.

<sup>84</sup> *U.S. Senate Passes Anti-Spam Bill*, ELECTRONIC COM. NEWS, Oct. 27, 2003, Vol. 8, Issue 21, available at 2003 WL 7823479.

<sup>85</sup> McCullagh, *supra* note 53.

<sup>86</sup> *Congress Preempts States*, *supra* note 55.

<sup>87</sup> *Id.*

<sup>88</sup> Terry Maxon, *Spam Fix may be slow Trying to stop illegal e-mail will be difficult, Texas official says*, DALLAS MORNING NEWS, Nov. 28, 2003, at 1, available at 2003 WL 68986145.

outside of the United States.<sup>89</sup> Thus, proponents argue that the creation of one federal standard through the CAN-SPAM Act is the only effective solution to the problem of spam.<sup>90</sup>

## V. Potential Obstacles to the Effective Implementation of Anti-Spam Legislation

There are still potential obstacles to the effective enactment of the CAN-SPAM Act, despite its passage into law. The recent legal wrangling over the Do-Not-Call Act is a portent of what could come.<sup>91</sup> Anti-spam legislation would likely face the same First Amendment challenges as the Do-Not-Call Act.<sup>92</sup> Like telephone solicitation, spam represents commercial speech<sup>93</sup> that is protected by the First Amendment's prohibition on the abridgment of free speech.<sup>94</sup> To regulate any commercial speech, including spam, Congress must assert a substantial governmental interest that will be directly advanced via a regulation that is not more extensive than necessary.<sup>95</sup> There is no question that the government has a substantial interest in regulating spam. After all, by regulating spam, Congress could argue that it is interested in preserving the viability of e-mail as a medium of communication or that it is protecting Internet users' privacy rights.<sup>96</sup> However, the questions of whether or not the legislation is appropriately tailored or directly advances either of these governmental interests can only be answered after the CAN-SPAM Act is implemented. Thus, until an anti-spam regulation survives a constitutional challenge, the First Amendment will pose as a potential obstacle to the Act's effective enactment.

Furthermore, the FTC, responsible for implementing and

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<sup>89</sup> *Id.*

<sup>90</sup> *Anti-Spam Act Passes in Senate*, TELECOMM. INDUSTRY LITIG. REP., Nov. 4, 2003, at 11.

<sup>91</sup> Metchis, *supra* note 41, at 55.

<sup>92</sup> Magee, *supra* note 17, at 358.

<sup>93</sup> *Id.*

<sup>94</sup> U.S. CONST. amend. I.

<sup>95</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

<sup>96</sup> Magee, *supra* note 17, at 360.

enforcing the CAN-SPAM Act, doubts its effectiveness.<sup>97</sup> FTC Chairman Timothy Muris stated that “spam was the most daunting consumer-protection problem this agency has ever faced,” and he “did not believe that legislation alone was the answer.”<sup>98</sup> Part of the problem is that the FTC does not have sufficient funds to create and administer such a list,<sup>99</sup> as it would cost substantially more than the \$18 million Do-Not-Call list.<sup>100</sup> Additionally, the FTC has neither the technology nor the staffing to establish such a registry.<sup>101</sup> Because the effectiveness of any law depends on the entity enforcing it,<sup>102</sup> the limited ability of the FTC to enforce any anti-spam law would likely reduce the potential effectiveness of the CAN-SPAM Act.<sup>103</sup> More important, because consumers cannot file private suits against violators of the Act, its effectiveness depends heavily on the FTC.<sup>104</sup>

The success of any anti-spam legislation will also depend on its ultimate effectiveness. The anonymity of e-mail makes it very difficult to discover the identity of spammers,<sup>105</sup> thereby making enforcement of any Do-Not-E-mail list difficult.<sup>106</sup> In light of this and of the negligible cost of spam, few Internet offenders will find any federal anti-spam regulations incentive enough to cease their use of spam.<sup>107</sup> Furthermore, e-mail addresses unlike telephone numbers are

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<sup>97</sup> Andrea Ahles, *Canning The Spam; New legislation targeting junk e-mail may not be effective but the battle has begun*, FORT-WORTH-STAR-TELEGRAM, Oct. 29, 2003, at 1, available at 2003 WL 65817974.

<sup>98</sup> Garcia, *supra* note 18, at 1.

<sup>99</sup> Metchis, *supra* note 41, at 55.

<sup>100</sup> Mark Harrington, *Bill Calls for Do-Not-Spam List*, NEWSDAY, Nov. 6, 2003, at A53, available at 2003 WL 66841984.

<sup>101</sup> Ryan J. Foley & Don Clark, *Spam Pact Toughens Penalties, But Critics See a Lack of Muscle*, WALL ST. J., Nov. 24, 2003, at A3, available at 2003 WL-WSJ 68129130.

<sup>102</sup> Ahles, *supra* note 97, at 1.

<sup>103</sup> Metchis, *supra* note 41, at 55.

<sup>104</sup> CAN-SPAM Act, Pub. L. No. 108-187, § 107, 117 Stat. 2699, 2711-15 (2003).

<sup>105</sup> Kris Oser, *One Step Closer*, DIRECT, Nov. 15, 2003, at 1, available at 2003 WL 8203894.

<sup>106</sup> *Id.*

<sup>107</sup> Garcia, *supra* note 18, at 1.

not public knowledge.<sup>108</sup> Thus, if a Do-Not-E-mail list was generated, it is possible that spammers could access the information on the list and send spam to the addresses on the list without worrying about the possibility of getting caught or to whom they are sending spam.<sup>109</sup> This possibility has been recognized by Chairman Muris, who advised consumers that they should not sign up for a Do-Not-E-mail list if one were eventually implemented.<sup>110</sup>

Another potential obstacle to the CAN-SPAM Act's effectiveness is addressing legitimate spam. By regulating spam, the CAN-SPAM Act legitimizes certain types of spam. Many fear that a wave of legitimate spam will be unleashed from companies that previously feared being labeled as spammers.<sup>111</sup> The result would be the continued increase in the amount of spam sent daily. Thus, the legitimization of some spam could defeat one of the main purposes of anti-spam legislation, namely a decrease in the costs and burdens associated with the exponential increase in spam.<sup>112</sup>

## VI. Conclusion

Despite the potential obstacles and the possibility that legislation alone will be insufficient to solve the considerable problems spam causes, Congress needed to pass some sort of anti-spam measures. It does not matter whether the legislation took the form of a Do-Not-E-mail list versus some other type of regulation. What is important is that Congress made an attempt to regulate spam because it simply could not afford to wait any longer to legislate, a fact that Congress recognized.<sup>113</sup>

It is important to remember that 97 senators<sup>114</sup> and 392 representatives<sup>115</sup> felt that the CAN-SPAM Act was part of the

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<sup>108</sup> Oser, *supra* note 105, at 1.

<sup>109</sup> *Id.*

<sup>110</sup> Harrington, *supra* note 100, at A53.

<sup>111</sup> Mark Harrington, *Anti-Spam Bill Panned and Praised*, *NEWSDAY*, Nov. 23, 2003, at A16, available at 2003 WL 66844194.

<sup>112</sup> *Id.*

<sup>113</sup> See generally CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (to be codified at 15 U.S.C. §§ 7701-13; 18 U.S.C. §§ 1001, 1037; 28 U.S.C. § 994; and 47 U.S.C. § 227).

<sup>114</sup> Black, *supra* note 34.

<sup>115</sup> McCullagh, *supra* note 53.

solution to the problem of spam. America Online, the Direct Marketing Association, Bill Gates, founder and chairman of Microsoft, and many other influential figures in the on-line business also support the Act as a “major step towards preserving e-mail as a powerful communication tool.”<sup>116</sup> Although the CAN-SPAM Act might not cure all the problems and heal all the injuries caused by spam, it is surely an ideal alternative to doing nothing and not legislating at all.<sup>117</sup> Only time will tell whether the CAN-SPAM Act will solve or even ameliorate the growing problem of spam. But, if nothing else, the Act is a much-needed start towards the regulation of a growing problem.

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<sup>116</sup> London, *supra* note 83, at 10.

<sup>117</sup> Black, *supra* note 34.