

The Impact of Junk E-mail on Maryland Business and Consumers

The Forum for Responsible and Ethical E-mail

Junk E-mail and Electronic Commerce in Maryland

Let there be no mistake: with the consideration of HB 573, the Maryland General Assembly is taking up an issue of tremendous importance for the future of online commerce.

There is no other medium quite like junk e-mail in its ability to damage Internet systems and impede legitimate Internet commerce. There is no more efficient means of consuming the time, money and resources of millions against their will.

Unlike virtually every other communications medium, the majority of e-mail costs are paid by the recipients – not the sender. This is, for better or for worse,

the nature of the Internet. It grows out of the cooperative arrangements upon which the Internet was created, where each participant pays for their portion of the infrastructure. This means that once an e-mail is sent, whether it is an advertisement or a letter from a college student to her parents, the costs for relaying, transmitting, receiving, storing, and downloading the message borne by any number of people, *except* the sender. When one is not paying the freight, as is the case with the sender, it is only natural to be less concerned with the costs involved. And therein lies the problem. The problem with junk e-mail

stems from the realization by unscrupulous mass marketers that they can force unwanted and unwelcome mes-



sages on millions of consumers, with just the touch of a button, at virtually no cost to themselves.

But the same cannot be said for recipients of junk e-mail.

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Junk E-mail in Brief:

- On three occasions, different courts have ruled that First Amendment guarantees do not apply to junk e-mail.
- Junk e-mail shifts the cost of advertising from the sender to the recipient.
- The effect of junk e-mail on business is exactly like a tax on the Internet.
- Junk e-mail is a threat to electronic commerce because it undermines trust in the medium.
- The right of private action for individual recipients is the best deterrent against junk e-mail.

Q&A: Answers to the most frequently asked questions about junk e-mail.

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A Chilling Effect: E-mail by the Numbers

- E-mail is the most used online business application in the U.S., with over 14.7 million business users.¹
- 19 percent of U.S. businesses use e-mail to seek new customers, and 45 percent said they planned to use it to solicit customers during 1998.¹
- Junk e-mail could be costing both British and Irish businesses up to USD8.2 billion per year.²
- 41.5 million U.S. adults have access to the Internet, up one third from last year's figure. An additional 23.8 million people will go online in the US in next twelve months. 75 percent of US adults accessing the Internet use it for e-mail.³
- In 1997, America Online testified before the Federal Trade Commission that junk e-mail is the number one consumer complaint. It estimated that 30 percent of the traffic across its network is junk e-mail.
- In the summer of 1998, America Online was forced to raise its monthly subscription fee from \$19.95 to \$21.95 – almost 10%.
- The SBA estimates there are 23.3 million businesses in America.⁴ If only three percent of those business send junk e-mail just once per year, then **each recipient should expect to see an average of 1,890 junk e-mail messages each and every day.** ►►

¹ From the U.S. Small Business Internet Survey, conducted by Cyberdialogue/FINDSVP July 1998.

² From a survey conducted by Benchmark Research of information technology companies in the UK during April 1998.

³ From the American Internet User Survey, conducted by Cyberdialogue/FINDSVP in February 1999.

⁴ The Small Business Administration Office of Advocacy, September 1997.

Q&A: Isn't this censorship?

No.

The Federal junk fax law, upon which certain key provisions of HB 573 is based, survived a Constitutional challenge. The courts upheld the law because it is not censorship. It's about making the advertisers bear their own costs

Commercial e-mail would be permitted under HB 573, but only if junk e-mailers bear the minimal burden of ensuring that their messages only go to people who have expressly agreed to bear the costs. It's called "opting in". HB 573 merely says that if you want to advertise,

you have to pay the costs and not force those costs onto others.

When junk e-mail supporters hide behind the First Amendment, it is helpful to remember the words of Federal Judge Stanley Sporkin in the case of *Turner Broadcasting v. FCC*:

"[They've] come to court not because their freedom of speech is seriously threatened but because their profits are; to dress up their complaints in First Amendment garb de-means the principles for which the First Amendment stands."

Junk e-mailers would prefer to have us all "opt-out", or ask e-mailers to remove us from their lists for a finite period after the first e-mail. But opt-out laws give every junk e-mailer one free bite at our wallets. If opt-out were the law of the land, we'd have to respond to a daily average of 1,890 junk e-mails if a mere 3% of businesses in America decide to use junk e-mail just once per year. How's that for a chilling effect on electronic commerce?

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The 105th Congress failed to take action on three different bills aimed at curbing junk e-mail. The States are left to close the breach.

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"Unlike virtually every other communications medium, the majority of e-mail costs are paid by the recipients – not the sender."

Costs to the ISPs include the load on the processor in their mail servers. "CPU time" is a precious commodity and processor performance is a critical issue for ISPs. When their CPUs are tied up processing junk e-mail, it creates a drag on all of the mail in that queue – wanted and unwanted alike. This is also a problem with "filtering" schemes; filtering e-mail consumes vast amounts of CPU time and is the primary reason most ISPs cannot implement it as a strategy for eliminating junk e-mail.

ISPs purchase bandwidth – their connection to the rest of the Internet – based on their projected usage by their prospective user base. For most small to midsize ISPs, bandwidth costs are among one of the greatest portions of their budget and contributes to the reason why many ISPs have a tiny profit margin. Sans junk e-mail, greater consumption of bandwidth would normally track

with increased numbers of customers. However, when a junk e-mailer begins to consume an ISP's bandwidth, the ISP has few choices: 1) let customers cope with slower internet access, 2) eat the costs of increasing bandwidth, or 3) raise rates. In short, the recipients are still forced to bear costs that the advertiser has avoided.

When turned into an advertising medium, the skewed economics of e-mail turn traditional notions of advertising on their head. In virtually no other advertising medium does the advertiser get to force the recipient to bear more costs than they do. With telemarketing, TV or print ads, or ads in the U.S. Mail, the sender incurs significant initial costs and is forced to target their advertising carefully because each additional ad bears an incremental cost. But in the world of junk e-mail marketing, it costs no more to send the first email than it does to send the ten millionth e-mail. Thus, there is every incentive for the marketers to cast their

advertisements as widely and indiscriminately as possible.

You will undoubtedly hear from representatives of the marketing industry who will say that e-mail represents a low cost method of marketing which will put mass advertising into the hands of even the smallest businesses. That is certainly true. But what they never acknowledge is that what makes junk e-mail so inexpensive is that every recipient is forced to subsidize that advertising whether they want to or not.

HB 573 creates real deterrence against *all* forms of cost shifted advertising, be it junk e-mail, junk faxes, or telemarketing calls to cellular telephones. We urge this body to pass this crucial legislation.

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Businesses that provide Net access to their employees suffer the same problems caused by junk e-mail as ISPs.

Q&A: Isn't this legislation really anti-business?

No.

There's a long tradition in this country of making commercial enterprises bear the costs of what they do to make money. For example, it would be far cheaper for chemical manufacturers to dump their waste into the rivers and lakes. However "externalities" (as economists call them) are bad because they allow one person to profit at another's — or everyone's — expense. If a business can't compete without stealing or engaging in unfair trade practices, then it has no business

being in business. The death of unprofitable or harmful businesses is the essence of capitalism, the essence of the free market. So long as junk mailers can't pay their own way, we all must fight to make sure that we don't pay their way for them against our will.

Furthermore, the expenditures by companies to defend themselves from junk e-mail and to keep their systems properly functioning amid the onslaught is not at all insubstantial. HB 573 provides relief from this cost, benefiting businesses of

all sizes.

But worst of all, junk e-mail degrades trust in this new medium over which billions of dollars in trade annually may eventually take place. Users are accosted daily by scams and snake-oil via e-mail. It's difficult enough to instill trust in something as intangible and ephemeral as the Internet without having to contend with the problem of junk e-mail.



Business should bear the costs of what they do to make money, not foist them on unwilling others.

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Q&A: Won't Junk E-mailers just go out-of-state?

If HB 573 becomes law, it won't matter if they do.

HB 573 does what neither of the other two pending e-mail bills do: It gives individual recipients of junk e-mail in Maryland a private right of action to pursue statutory civil damages in a court of small claims *no matter where in the U.S. the junk e-mail comes from.*

The reality, of course, is that

most people won't need to sue because the potential risk and cost to junk e-mailers will be felt even if only one or two people are motivated to bring a case and win a judgement.

HB 56 and HB 745 grant ISPs an additional venue to pursue their rights against junk e-mailers. But ISPs are reluctant to bring suit under existing law. Only the largest of ISPs have taken on junk e-mailers (and

they have prevailed under existing law). It's just too expensive for most others, and the cost would just be passed on to customers, *aggravating* the central problem of cost-shifting. The weak possibility of action by an ISP in Maryland is no deterrent at all. A private right of action for junk e-mail recipients in Maryland is crucial for effective deterrence. Almost anything else is worse than no law at all.

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Q&A: Can't we just filter out junk e-mail if we don't want it?

Sure.

Filtering technologies and strategies abound. But while filtering removes the annoyance of seeing junk e-mail in your mailbox, filtering actually exacerbates the central problem of cost shifting.

Effective filtering programs double or treble the time it takes to

process and deliver in-bound e-mail. That means ISPs or businesses with e-mail must double or treble their computing resources just to maintain the same level of service to its customers or employees. And the filtering technology that can catch *all* junk e-mail without discarding legitimate business communications hasn't been

invented yet.

So why not just hit the Delete key when it comes in? By the time you get to press the key, the costs associated with that piece of junk e-mail have already been extracted from your pocketbook. It's like hitting the snooze button on your alarm clock — the more you hit it, the deeper in trouble you are.



Popular speculation aside, anti-junk e-mail efforts are not funded in secret by timber companies (TINLC).

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Q&A: Isn't this just more stupid and dangerous government regulation?

No.

Unlike the blatantly unconstitutional Communications Decency Act, which put the Federal government in a position of policing the Net, HB 573 would empower *individuals* to take control of their own mailbox again. This is another reason why the private right of action is so crucial. Our legal system says that you can't sue someone unless you have a clearly established right to do so, and HB 573 would give people that right.

Unlike other efforts at "policing" the Net, this law doesn't create any bureaucracies or boards or committees to decide what's morally good or bad. It doesn't even divert enforcement dollars from the investigation and prosecution of other, more serious crimes. Instead, it clearly defines a deceptive and unfair business practice that is damaging and costly to businesses and consumers, and gives recipi-

ents a legal right to take the perpetrators to court. The right of private action embodied in HB 573 would place enforcement in the hands of the consumer, not in the hands of any government agency.

Most of those involved in anti-junk e-mail efforts (or "Anti-spammers") are long-time "Net Activists" who are zealously protective of the anarchy of the Net, especially in the face of regulation by the government. However, it is helpful to remember that we are a group of ISP administrators and technical experts who have realized that technical solutions are inadequate.

Unlike some efforts at internet-related laws, this is being requested by those experts most familiar with the technology. That's what makes this law different: it is one being requested *by* the Net Community rather than something being imposed *on* the Net Community.

This law won't harm legitimate Net commerce, but it will make advertisers accountable for their actions. It creates an incentive that's not there now — an incentive for commercial e-mailers to attract willing subscribers and leave unwilling recipients alone.

