

# Canning Spam: Unclogging Law Firm Mailboxes

by Sharon D. Nelson, Esquire, and John W. Simek  
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So how much do you hate spam? Spammers have become the world's largest club. People talk more about the bane of spam than the latest "reality" shows. Where we once had a trickle of unsolicited e-mail that turned into a river, most lawyers now see spam in terms of a tsunami that grows in height on a daily basis and threatens to crush legitimate e-mail correspondence. Only the larger firms have been able to filter spam well. And now we have a new federal anti-spam law, whose effectiveness remains a matter of great speculation.

As a practical matter, can we "can the spam?"

## The Grim Facts

First, let's examine the unnerving statistics, as reported by Massachusetts Institute of Technology's *Technology Review* and *Consumer Reports*. Spam now constitutes more than half of the average inbox, up from eight percent in 2000. More than thirteen billion unsolicited e-mail messages swamp inboxes worldwide every day. America Online reports it routinely blocks more than one and a half million spam messages per day and yet it also receives an average of seven million complaints daily about the spam that gets through. According to the Radicati Group Inc., a market research firm specializing in e-mail, the number of spam messages is doubling every eighteen months. Ferris Research now estimates spam causes a ten billion dollar-a-year drag on the economy.

## How the Spammers Find You

How do spammers get your address in the first place? One way is the "dictionary attack" in which spammers target guessed names such as johndoe, johndoe1, johndoe2, etc. Spammers have software to facilitate these attacks. If they don't receive a "bounceback" indicating that the address is invalid, they add it to their "confirmed valid" database.

Spammers buy mailing lists. If you shop or register for something online, be wary. L.L. Bean will not sell your e-mail address, but

"Joe's Bargain Computers" might. Make sure you look at privacy policies and be skeptical about companies you don't know to be reputable.

Spammers use special harvesting software to scan the Net for visible e-mail addresses posted on Web sites. As an experiment, The Center for Democracy & Technology, a Washington, D.C., advocacy group, posted 250 new e-mail addresses on its Web site. Within six months, the addresses received more than ten thousand unsolicited e-mails. Spammers also harvest e-mail addresses from free chat services. That was at least part of the reason that Microsoft closed its chat rooms in 28 countries on October 14, although it allowed them to remain open on a subscription basis in the U.S., Canada and Japan, where visitors are more accountable because their billing details are on record with Microsoft.

Spammers often find your address through reselling. Sometimes lawyers are their own worst enemies as they reply angrily "Remove" or "Unsubscribe," only to have their address now added to "confirmed valid" lists, which spammers will of course then sell to other spammers. Unsurprisingly, "confirmed valid" lists are generally resold many times over.

Experts agree that fewer than two hundred people send ninety percent of all spam. Jon Praed, an attorney with the Internet Law Group in Arlington, told *Technology Review* these major league spammers are "hackers gone bad, or they are crooks gone geek."

## Can the Federal CAN-SPAM Act Can Spam?

As thirty-five states passed anti-spam legislation, Congress remained, for a shamefully long time, a lumbering ineffectual giant that listened to the lobbyists for marketing groups, particularly the powerful Direct Marketing Association. Finally, prodded by their constituents, every member of Congress got one clear message: the voters wanted them to do something

about spam, and quickly. Hence, the CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING ACT OF 2003. It was signed by President Bush on December 16, 2003, and went into effect January 1, 2004. It preempts state anti-spam laws except to the extent that they prohibit falsity or deception in any portion of a commercial electronic mail message or information attached to it. The federal law is an "opt-out" law. It does not ban spam outright. The act does not apply to political or charitable spam. For other unsolicited bulk e-mail, the act:

- Prohibits senders from falsifying or disguising their true identity;
  - Prohibits the use of misleading subject lines;
  - Prohibits the harvesting of e-mail addresses by either (1) automatic means from an Internet Web site or proprietary online service maintained by a third party; or (2) an automated system that generates possible electronic addresses by combining names, letters and numbers in numerous permutations;
  - Prohibits businesses from knowingly promoting themselves through false or misleading e-mails.
- \* Requires the inclusion of a legitimate return e-mail and physical postal address for the sender;
- \* Requires the inclusion of a functioning opt-out mechanism, clear and conspicuous notice of the opportunity to opt-out and require senders to honor any such opt-out request;
- \* Requires clear and conspicuous notice that the message is an advertisement or solicitation; and
- \* Require messages with sexually oriented material to be clearly identified.

(See part two in the June/July issue of *Virginia Lawyer*.)