

Testimony of Eric Menhart

Re: District of Columbia Spam Deterrence Act of 2007

Council of the District of Columbia

Committee on Public Services and Consumer Affairs

March 11, 2008

My name is Eric Menhart. I'm an attorney with the firm of CyberLaw PC, here in Washington. I want to thank the Committee for this opportunity to testify.

I testify today on behalf of my firm and many of my current and former clients who strongly support the Spam Deterrence Act of 2007.

Briefly, my background in this area. While a law student, I formed a public policy organization in Maryland known as MaryCLE. MaryCLE was a plaintiff in a suit that helped to enforce Maryland's anti-spam statute, which I attached to my written testimony as Exhibit A. Since the success in enforcing Maryland's spam deterrence law, I have represented clients in spam-related and other technology litigation. I've seen most of the arguments made in attempts to circumvent such statutes, and I believe well-drafted legislation can assist the judiciary in rebuking most arguments that may be raised in opposition to such bills.

I generally believe that the Spam Deterrence Act of 2007 in its current state is well drafted. In particular, I believe that the damages provided for Internet Service Providers, known as ISPs, are appropriate. I would, however, recommend an increase in damages for non-ISP recipients of messages. Maryland's statute provides for \$500 per message received by a recipient, and I would recommend the same for the proposed District legislation.

I also believe that the criminal provisions are welcome and important parts of the legislation.

There are also a few sections of the proposed act that concern me.

First, the language regarding "an established business relationship" concerns me. I believe that this language would be heavily employed by misleading marketers to suggest that recipients had somehow "opted in" to receive messages, when no such access had actually been granted by a recipient. For example, I foresee marketer arguments that a consumer's request for commercial information about Company A would allow Company B to buy Company A's marketing list. Company B could then hire Marketer C to "legally" e-mail the recipient. One can see how these

arguments can be long-winded, complicated and designed to avoid the legislative intent of the proposed bill.

I would address this issue in one of two ways. My first preference would be to totally scrap the language and eliminate any “established business relationship” provision in the bill. If that is not acceptable to drafters, I would recommend that language be added that would require courts to “strictly construe” such language, and require that there be a rebuttable presumption that the marketer had not obtained a recipient’s consent. A marketer would shoulder the burden of proving that it had consent of the recipient as contemplated under the statute.

Second, I believe the proposed Section 4(c) deserves attention. One thing that is very apparent in spam related litigations is the fact that there are many rogue ISPs that not only assist in transmitting fraudulent messages, but actively solicit such customers. I’ve included in my written materials Exhibit B from a litigation in which I was involved. The diagram explains how an ISP not only encourages fraudulent messages, but profits as a result of “looking the other way,” when its customers are using its resources inappropriately.

The proposed bill can avoid this concern by simply striking the language in 4(c) altogether. Alternatively, language recognizing that ISPs that actively “assist” and allow sending of fraudulent messages can be liable, under a standard negligence analysis, would also be acceptable.

In addition to these changes, I would suggest a provision that expressly recognizes that a Plaintiff with a well-pled complaint be given opportunity for limited discovery before a judge may dismiss a Plaintiff’s complaint under the statute.

Marketers are extraordinarily talented at masking themselves and creating very complicated paths to their true identities. I believe that the act should provide a rebuttable presumption that a Plaintiff with a well-pled complaint and reasonable factual support is entitled to limited discovery in an attempt to find the true identity of marketers that work so hard to stay in the shadows of the Internet.

Finally, I note that I have provided in my written materials as Exhibit C a draft “Model-Anti Spam Law” as written by some of my colleagues that have interest in effective spam deterrence. While I would not endorse every provision, I believe that the document is generally sound and provides prime “talking points” for

drafters of spam deterrence legislation. I would encourage the Council to review it when revising and considering the District's proposed spam deterrence bill.

In closing, I appreciate the Council's leadership on this issue. While I believe this already strong bill can be improved by employing my suggestions, my support for the bill is steadfast, and I strongly urge its passage.

I thank the committee for this opportunity to testify and I am willing to answer any questions that the panelists may have for me.



Monday, March 10th, 2008

MARYLAND COMMERCIAL LAW CODE
TITLE 14. MISCELLANEOUS CONSUMER PROTECTION PROVISIONS
SUBTITLE 30. COMMERCIAL ELECTRONIC MAIL
(Enacted in 2002)

§ 14-3001.

(a) In this subtitle the following words have the meanings indicated.

(b) (1) "Commercial electronic mail" means electronic mail that advertises real property, goods, or services for sale or lease.

(2) "Commercial electronic mail" does not include electronic mail to which an interactive computer service provider has attached an advertisement in exchange for free use of an electronic mail account.

(c) (1) "Interactive computer service provider" means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer service.

(2) "Interactive computer service provider" includes a service or system that provides access to the internet and systems operated or services offered by a library or educational institution.

§ 14-3002.

(a) This section does not apply to an interactive computer service provider or a telecommunication utility to the extent that the interactive computer service provider or the telecommunication utility merely handles, retransmits, or carries a transmission of commercial electronic mail.

(b) A person may not initiate the transmission, conspire with another person to initiate the transmission, or assist in the transmission of commercial electronic mail that:

(1) is from a computer in the state or is sent to an electronic mail address that the sender knows or should have known is held by a resident of the state; and

(2) (i) uses a third party's internet domain name or electronic mail address without the permission of the third party;

(ii) contains false or misleading information about the origin or the transmission path of the commercial electronic mail; or

(iii) contains false or misleading information in the subject line that has the capacity, tendency, or effect of deceiving the recipient.

(c) a person is presumed to know that the intended recipient of commercial electronic mail is a resident of the state if the information is available on request from the registrant of the internet domain name contained in the recipient's electronic mail address.

(d) an interactive computer service provider:

(1) may block the receipt or transmission through its interactive computer service of commercial electronic mail that it reasonably believes is or will be sent in apparent violation of

this section; and

(2) may not be held liable for an action under item (1) of this subsection that is voluntarily taken in good faith.

§ 14-3003.

A person who violates this subtitle is liable for reasonable attorney's fees and for damages:

(1) to the recipient of commercial electronic mail, in an amount equal to the greater of \$500 or the recipient's actual damages;

(2) to the third party without whose permission the third party's internet domain name or electronic mail address was used, in an amount equal to the greater of \$500 or the third party's actual damages; and

(3) to an interactive computer service provider, in an amount equal to the greater of \$1,000 or the interactive computer service provider's actual damages.

