



**Testimony of James Guest
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Before

**The United States Senate
Committee on Commerce, Science and Transportation**

On

Progress of the CAN-SPAM Act

May 20, 2004

Chairman McCain, Ranking Member Hollings, and other distinguished members of this committee, I would like to thank you for inviting me to address you again today on behalf of Consumers Union,¹ the non-profit publisher of Consumer Reports magazine.

Are consumers getting less unsolicited commercial email since the new anti-spam law went into effect in January? While it is still early to have definitive results, the answer unfortunately seems to be no—in fact, consumers appear to be receiving even more spam than ever. And just to provide some perspective on the volume of spam consumers are barraged with on a daily basis, Brightmail, a producer of anti-spam software, recently measured 63 percent of all Internet e-mail as spam, compared to just seven percent in March of 2001.

The Can-Spam law has not yet achieved its intended aim, but we should all acknowledge that this is a dynamic process. Much as it took a decade to enact a meaningful federal “do not call” list, in passing the spam law, this Committee needs to monitor developments with spam carefully and continually look for ways to fine-tune the “Can-Spam” Act. In order to truly “Can-Spam,” Congress will need to update the law to keep abreast of new developments in technology, such as wireless spam, and keep on the trail of elusive spammers who are every day finding new ways to beat spam filters and evade anti-spam technologies.

But first, let’s look at what’s happened since the law went into effect in January.

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* and *Consumer Reports Online* (with approximately 5 million paid circulation) regularly carry articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

This March, Consumer Reports commissioned a survey on spam drawn from a nationally representative panel of more than 2,000 online users. Our September 2004 issue of the magazine will include more in-depth reporting and spell out more details from the survey, but I wanted to provide a snapshot of what we found to help inform the discussion today:

- Most (80%) respondents reported that they had not seen any reduction of spam compared to three months ago—before the CAN-SPAM law went into effect.
- About two thirds (69%) of all respondents noted that spam comprised at least half of their emails.
- A majority of respondents found that the “unsubscribe” or “opt-out” links were not very effective in stopping spam from reaching their mailboxes.

Another survey conducted in March by the Pew Internet & American Life Project also shows that spam does not appear to be on the decline. They found that:

- 24% of respondents are receiving more spam than before January 1
- 53% have not noticed any change
- 3% do not know
- Only 20% report that they are receiving less spam.

When our magazine reported on spam last August, our recommendation to policymakers for any legislation attempting to reduce spam was to create an opt-in system coupled with a private right of action to allow individuals to bring suit. We were pushing this solution rather than legislation relying on Internet service providers (ISPs), the Federal Trade Commission (FTC), and state attorneys general for enforcement. The law that this Congress passed went a different direction, with a mechanism for consumers to “opt-out” of unsolicited commercial email.

Our recommendation to consumers at the time was that they not click on unsubscribe or “opt-out” links, as this may signal a spammer that the user’s email address

works and cause them to get more spam. And our recommendation has not changed—leaving users in a difficult position with perhaps no real remedy against spam for the time being.

We still believe that “opt-out” creates a tremendous burden on consumers, because they have to say no to each and every piece of unwanted email—which results in a big loss in time and a big increase in frustration. And as I indicated earlier, our survey results show that “opting out” has not even been effective in stopping the flow of spam.

But even worse, there’s simply no way for consumers to distinguish between legitimate marketers and rogue spammers who will misuse an unsubscribe link. The result is a consumer catch-22, where the main remedy the law provides—an opportunity to opt-out—is one consumers shouldn’t use.

We believe the core improvement necessary in the spam law is to change the model from “opt-out” to “opt-in.” The law as it stands puts too much burden on consumers to block spam and makes it too difficult to hold spammers legally accountable for their inappropriate interference with consumers’ email.

Imagine that you put a “do not solicit” sign at the front door of your home, and every company in the world could only ring your doorbell once, at which point you could tell that salesperson not to bother you anymore. You would need to keep track of each company you told not to solicit you, and if a company violated your request, you could petition the Federal Trade Commission to take up your case. Of course, this is an absurd burden to place on people. We all know that “do not solicit” means exactly that.

Consumers can say no to advertising at their front door, period. The Federal Trade Commission’s enactment of a robust “do not call” list means that now consumers have a

real tool to say no advertising at the dinner table. Congress should provide consumers with a similar tool to say no to advertising on our computers.

To be clear, the law as passed had several excellent achievements: it prohibited senders from falsifying their identities, using misleading subject lines, and from harvesting email addresses in certain ways. By requiring that spam is clearly labeled and that pornographic email is effectively in an “email envelope,” over time this law may reduce the amount of obscene and objectionable content that parents and children have to see.

However, the ingenuity of spammers appears to be bottomless and it will be an enormous challenge for Congress to keep pace with them. They find our addresses in novel ways. They have figured out myriad methods to avoid being filtered by ISPs and consumers. They have discovered how to commandeer our computers to send spam for them, and they are even finding new devices, besides our computers, where they can send us spam.

For example, Consumers Union is also taking a hard look at wireless spam—the act of spamming cell phones and pagers. It's a practice that's more distracting and invasive than computer spam, since phones receiving messages beep or vibrate with each message. And the economics of wireless spam are different, since the costs of these messages are often borne solely by the consumer—at the rate of up to 15 cents per message.

Congress was wise to attempt to ban wireless spam completely in the Can-Spam Act. Consumers Union submitted comments in the Federal Communications Commission's wireless spam proceeding this week, where we urged the Commission to

ensure that certain kinds of wireless spam don't fall through the cracks. While wireless spam sent to an *email address* is prohibited under the Can-Spam Act, and wireless spam sent to a *telephone number* is under the purview of the National Do Not Call Registry (under the Telephone Consumer Protection Act), wireless spam sent to a 5-digit "*short code*" that some wireless carriers now use may fall into a regulatory no-man's land.

Wireless carriers are now pushing to explicitly exempt these 5 digit "short codes," though our position is that they should be covered either by the Do Not Call Registry or covered by the Can-Spam Act.

However, cell phone carriers may have a way around even these protections. Wireless companies are aggressively trying to get consumers to "opt-in" to business relationships with marketers, for example by getting them to vote on the TV program American Idol using 5 digit "short codes." Consumers should beware that simply by playing along with a TV show, they may unwittingly be signing up for loads of wireless spam.

Congress needs to take fine-tuning this law seriously because spam may not only make wireless devices less useful, but email in general as people are trusting it less—spam may "kill the killer application," as FTC Commissioner Swindle put it. The Pew survey shows a jump in email users who have reduced their use of email because of spam—from 25% last June to 29% at present. A year ago, 52% of users said that they are less trusting of email because of spam; today, 63% of users report they are less trusting of email due to inboxes crammed with spam.

As our *Consumer Reports* investigation last August confirmed, spammers are difficult to prosecute because they are often impossible to find. They hide behind an

untraceable tangled web transcending national borders, leaving few—if any—virtual footprints. Right now, national opt-out legislation is trying to curb an international problem perhaps without the full resources necessary to track violators of the law. An opt-in system would mean spammers would be forced out of hiding and forced into accountability.

Our bottom line is that Congress should not place the burden on consumers to fight the flood of spam, it should place the burden on marketers to woo consumers in a permission-based marketing model, enticing them with attractive, selective offers, not bludgeoning them with an enormous volume of junk. We look forward to continuing to work with this Committee to keep pace with technology and to help this law achieve its full potential. Thank you.