

Testimony and Statement for the Record of
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Hearing on Bill 17-34, the “District of Columbia Spam Deterrence Act of 2007”

Before the
Committee on Public Services and Consumer Affairs
Council of the District of Columbia

Tuesday, March 11, 2008
11:00 A.M., Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Washington DC

Thank you for the opportunity to testify today at this hearing on the proposed D.C. Spam Deterrence Act of 2007. My name is John Verdi, and I am Staff Counsel at the Electronic Privacy Information Center (EPIC). EPIC is a non-partisan public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, freedom of expression and constitutional values in the information age.

EPIC has a long history of providing information and guidance to policymakers regarding unsolicited commercial email, or “spam.” In 2003, EPIC, in its leadership role in the Privacy Coalition, proposed a multi-part policy framework for effective spam legislation. Also in 2003, EPIC testified before the Senate Committee on Commerce, Science, and Transportation regarding the CAN-SPAM Act (CAN-SPAM), the then-proposed federal bill intended to regulate spam. After CAN-SPAM was enacted, EPIC submitted detailed comments to the Federal Trade Commission regarding the Commission’s implementation of the law.

Spam is an issue of great concern to Internet users. D.C. businesses incur costs through lost productivity and the additional equipment, software, and labor needed to deal with the problem. District consumers face the ongoing annoyance that spam simply makes the Internet less friendly, and renders e-mail less useful.

Despite the implementation of the federal CAN-SPAM law, unsolicited commercial email continues to plague Internet users. The most recent analyses of spam volume indicate that spam accounts for approximately 80% of email traffic. This estimate is based on research performed by the Messaging Anti-Abuse Working Group, a global consortium of Internet Service Providers (ISPs) and network operators, and was derived from its study of traffic to over 100 million email addresses. The Working Group also discovered that the average email inbox receives hundreds of spam emails every month.

In fact, consumers receive more spam now than when the federal CAN-SPAM law was passed. Spam volume has increased steadily since 2003. From 2006 to 2007 alone, spam volume increased 100%, to more than 120 billion spam messages daily. In addition, the United States relays more than twice the spam of any other country. SophosLabs, which monitors spam internationally, recently reported that the United States relayed 21% of global spam in the fourth quarter of 2007. Russia, which relayed the second-most spam, accounted for only 8%. Spam has also become more of a threat to consumers. IronPort, which tracks internet security trends, recently reported that more than 83% of spam sent in 2007 directed users to websites that serve “malware,” malicious software, including computer viruses. In contrast, the typical purpose of earlier spam was merely “selling some type of product.”

The substantial increase in spam despite the federal CAN-SPAM law sends a clear message to District legislators that more must be done to protect consumers. The D.C. Spam Deterrence Act of 2007 is an important step for District consumers who are besieged by spam. The Act contains many important elements for a good anti-spam measure. The Act prohibits the transmission of false or misleading commercial email, and further enjoins the transmission of commercial email that appears to originate from a third-party, rather than the real sender. The Act also requires that all unsolicited commercial email contain an “opt-out” mechanism that would remove the recipient from the sender’s mailing list at the recipient’s request. The Act provides for civil liability, liquidated damages, and increased damages when a spammer violates the Act willfully and knowingly. Under the Act, consumers are given a private right of action. Finally, the Act imposes criminal penalties for the transmittal of large volumes of spam.

EPIC supports the Act’s inclusion of a private right of action for consumers and email providers. This improves upon federal law, which leaves consumers without a private right of action. EPIC also recognizes that damages caused by spam are real, but often difficult to prove. Therefore, EPIC supports the Act’s inclusion of liquidated damages provisions.

EPIC urges the Council to reconsider the Act’s reduction of damages recoverable against spammers who implement “practices and procedures reasonably designed” to effectively prevent spam. Sections 4(a)(1)(ii) and 4(a)(2)(ii) of the Act reduce by half the maximum liquidated damages awards recoverable by plaintiffs. These reductions diminish the deterrent value of the Act. This language is similar to CAN-SPAM’s provisions, and was criticized by the Internet Committee of the National Association of Attorneys General as “unprecedented in consumer protection law” and a “barrier to enforcement.”

Finally, EPIC urges the Council to adopt language that would harmonize the liquidated damages awards available to email service providers and other victims of spam. Although EPIC acknowledges the burden that spam places on email providers, individuals and non-email provider corporations bear even greater burdens as a result of equivalent spam volume. Email providers are uniquely situated to mitigate the hassle, expense, and privacy invasion of spam, while individuals and non-email provider

corporations are not. Therefore, the Act should provide email providers and others with equal maximum liquidated damages awards.

In summary, the District of Columbia Spam Deterrence Act of 2007 is important legislation that addresses a significant concern of District residents and businesses that rely upon the Internet. I appreciate the opportunity to testify in support of this legislation. I would be pleased to answer your questions.

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