

DO NOT ADVERTISE: THE CURRENT FIGHT AGAINST UNSOLICITED ADVERTISEMENTS

Have you ever received a phone call from a telemarketer during dinner? Do e-mails entitled "Protect Your Computer Against Viruses for \$9.95" or "GET A FREE PASS TO THOUSANDS OF XXX SITES" annoy you? Are you tired of watching advertisements that continue after the posted start time for a movie? Many Americans are irritated with the amount of daily interruptions caused by the current lack of advertising regulations. In some instances, the advertisers shift their marketing costs to unwilling e-mail users or moviegoers. This article focuses on unsolicited communications and potential solutions to the seemingly endless problem of spam.

An Overview of Current Advertising Issues

Advertisements Before Movies

Miriam Fisch is tired of having to watch advertisements before the feature film at her local movie theater.¹ She is not the only one.² Ms. Fisch and her lawyer have brought a class-action lawsuit in Illinois against Loews Cineplex Entertainment Group on behalf of all of the movie theater's patrons.³ The complaint alleges fraud by misrepresentation, fraud by omission, and a breach of contract claim.⁴ Ms. Fisch alleges that beginning the commercials at the time listed as the start of the feature film, stole time from her and other movie goers and is a deceptive business practice that forced her to view unwanted advertisements.⁵ The suit prays for damages of up to \$75 per plaintiff and an injunction ordering Loews Cineplex to announce the official start time of the actual feature film.⁶

The plaintiff does not take issue with the advertisements and previews that run prior to the announced start time of the feature film.⁷ However, many theaters are continuing the commercials for 15 minutes after the announced start time.⁸ Douglas Litowitz, Ms. Fisch's attorney and Mark Weinberg are considering a similar lawsuit against Regal Entertainment, the

¹ Kristi Turnquist, *Suit targets ads in movie theaters*, THE OREGONIAN, at <http://www.oregonlive.com/business/oregonian/index.ssf?/base/business/104583228298380.xml> (Feb. 21, 2003).

² *Id.*

³ *Id.*

⁴ Complaint available at <http://www.nomovieads.com> (last visited Apr. 2, 2003).

⁵ Kristi Turnquist, *supra* note 1.

⁶ <http://www.nomovieads.com>.

⁷ *Id.*

nation's largest theater corporation, in addition to the lawsuit against Loews Cineplex. Matthew Kearney, president of the Cinema Advertising Council and chief executive of Screenvision, an advertising company, claims that movie patrons are accepting of the pre-movie advertisements.⁹ Nevertheless, Ms. Fisch and many others are bothered by the increasing amount of commercials. Ralph Nader stated in 1998, "[i]t's bad enough there are so many product placements paid for by brand-name companies in the films themselves without frontloading the audience's movie experience with more ads. Whatever happened to art?"¹⁰

Pop-Up/Pop-Under Advertisements

Advertisers are very clever at inventing new ways to get noticed. In addition to ads shown to a captive movie audience, pop-up and pop-under ads have become another popular and annoying way for advertisers to push their products.¹¹ An Internet user has a difficult time avoiding these ads because sometimes closing one ad makes another one pop-up. It is the Internet version of the carnival Whack-A-Mole game. Sometimes these ads cover parts of the website the user desired to view. Pop-up ads may not cover the intended website but still require the Internet user to close the window in order to remove it from the desktop and force the user to view an advertisement they might not want to see. Other pop-up ad creators use much more invasive techniques like "Search-Explorer.com's mouse-over downloads that can cause software to be downloaded to your PC's hard drive after you merely roll your pointer across an advertisement" which could increase the risk of computer virus transmission.¹² Another intimidating and scary invention is the marketing software that can track every website the Internet user visits, sometimes without the user's knowledge.¹³ Currently there is no effective regulation of these types of software and until their actions are regulated, web sites will continue to track web activity thus invading the privacy of unknowing and unwilling Internet users.

⁸Kristi Turnquist, *supra* note 1.

⁹ *Id.*

¹⁰ Carl DiOrio, *Pre-pic ads drawing fire*, DAILY VARIETY, at http://www.nomovieads.com/news_article.htm (Feb. 20, 2003).

¹¹ Margaret Kane, *Pop-ups, the ads we love to hate*, at <http://news.com.com/2100-1023-980563.html?tag=rm> (Jan. 14, 2003) (stating that "[p]op-up ads seem to be the Internet equivalent of supermarket tabloids: Everyone claims to hate them, but somebody keeps reading. According to a study conducted by GartnerG2, 78 percent of respondents claimed they found pop-up ads 'very annoying.'").

¹² Tom Spring, *Web Ad Explosion: Financed by corporate ad dollars, some online marketers are getting sneakier—and more annoying*, PC WORLD MAGAZINE (Sept. 2002), available at <http://www.pcworld.com/resource/printable/article/0.aid.101916.00.asp>.

¹³ *Id.*

Some Internet providers refuse to sell pop-up ads including America Online (“AOL”).¹⁴ AOL decided that the interruptions caused by pop-up ads inconvenienced their Internet users too much.¹⁵ Instead, AOL will be selling advertisements on its “Welcome Screen” and sign off screen in order to try to gain more advertising revenue after a remarkable 40% revenue drop in 2002.¹⁶ Other service providers, including Earthlink have included pop-up blocking options in their software.¹⁷ Even though many people dislike pop-up ads, the ads are successful for some companies.¹⁸ There appears to be a high correlation between clicking on a pop-up ad and making a purchase according to online discount travel arranger Orbitz.¹⁹

One of the most prevalent pop-up ad creators was Gator Corporation.²⁰ Gator’s software included the Gator Advertising and Information Network (GAIN).²¹ The GAIN program monitors the websites the user visits and displays ads that correspond to the product/service the user is viewing. For example, GAIN might display a pop-up ad for a different airline when the user is reserving an airline ticket online. A group of news publishers sued Gator for trademark and copyright infringement claiming the Internet users were led to believe that Gators ads were affiliated with the news publishers’ websites.²² The news publishers successfully enjoined Gator from “causing its pop-up advertisements to be displayed on any website owned or affiliated with the Plaintiffs without the express consent of the Plaintiffs.”²³

However, many pop-ups and pop-unders probably do not infringe on others’ trademarks and copyrights. That does not mean that they are any less annoying or distracting. Pop-up blockers are available, many for a fee. Internet users not only pay for Internet service but now must get software to avoid being bombarded by advertisements. In addition, pop-up blockers are far from flawless as advertisers are become craftier in circumventing the blockers. One way to eliminate or reduce this form of advertising is if consumers would stop using pop-ups to purchase

¹⁴ Gretchen Hyman, *Building a Better Pop-Up Ad*, INTERNETNEWS.COM, at www.internetnews.com/IAR/article.php/1563441 (Jan. 2, 2003).

¹⁵ *Id.* See also Stefanie Olsen, *AOL unveils pop-up stoppers*, CNET NEWS.COM, at <http://news.com.com/2100-1024-992142.html> (Mar. 11, 2003).

¹⁶ *AOL: You’ve got ads! No. 1 Internet service provider will begin offering advertisers a place on its Welcome Screen*, CNN/MONEY, at http://money.cnn.com/2003/02/21/technology/aol_ads/index.htm (Feb. 21, 2003).

¹⁷ Gretchen Hyman, *supra* note 14.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Gator Corporation will be referred to as “Gator” in this iBrief.

²¹ Doug Isenberg, *Are Pop-Up Advertisements on the Web Illegal?*, GIGALAW, at <http://www.gigalaw.com/articles/2002-all/isenberg-2002-08-all.html> (Aug. 2002).

²² *Id.*

products. Ideally, if pop-ups become less effective, companies will earn fewer profits from the use and there will be fewer pop-ups to deal with. However, this seems too idealistic since pop-up ads are inexpensive and have been profitable thus far. Regulation, in addition to increased efficiency of pop-up blocking software, would be a more realistic alternative.

Telemarketing and a National “Do Not Call” Registry

The annoying sales call during dinner may soon become a thing of the past. A bill authorizing the Federal Trade Commission to collect fees for the implementation and enforcement of a “Do Not Call” registry, and for other purposes has been recently made law.²⁴ This bill is instrumental in allowing the Federal Trade Commission (FTC) to set up a national registry to help eliminate unwanted telemarketing phone calls.²⁵ Twenty-seven states had previously instituted “Do Not Call” lists and regulations.²⁶ While creation of the list will take a few months, the registration will be valid for five years and the FTC believes this will protect consumers’ right to privacy and protect against fraud perpetrated by unsolicited sales calls.²⁷

The national “Do Not Call” registry regulation packs a powerful fine of up to \$11,000 for violations.²⁸ Charities and political groups will be exempt from the regulations and will be allowed to continue making calls.²⁹ Telemarketers argue that there are plenty of effective call eliminating/blocking mechanisms already available to eliminate the necessity of a national “do not call” registry.³⁰ These mechanisms include Caller ID, other mechanical devices such as the Telezapper and state “Do Not Call” regulations.³¹ Apparently, Congress has decided that these mechanisms do not adequately protect the right of privacy of those consumers who do not wish to

²³ WashingtonPost.Newsweek Interactive Co. v. The Gator Corp., No. CIV.A.02-909-A, 2002 WL 31356645, at 1 (E.D. Va. July 16, 2002).

²⁴ Do-Not-Call Implementation Act, Pub. L. No. 108-10 (2003).

²⁵ *FTC Announces Final Amendments to Telemarketing Sales Rule, Including National “Do Not Call” Registry*, at <http://www.ftc.gov/opa/2002/12/donotcall.htm> (Dec. 18, 2002) (stating that calls on behalf of charities and political parties will be exempt from the regulations).

²⁶ Andy Sullivan, *Telemarketers Sue to Stop ‘Do Not Call’ List*, REUTERS, at http://www.infoworld.com/article/03/01/29/hnnocall_1.html (Jan. 29, 2003).

²⁷ *FTC Announces Final Amendments to Telemarketing Sales Rule, Including National “Do Not Call” Registry*, *supra* note 25.

²⁸ Andy Sullivan, *supra* note 26.

²⁹ *FTC Announces Final Amendments to Telemarketing Sales Rule, Including National “Do Not Call” Registry*, *supra* note 25.

²⁹ Andy Sullivan, *supra* note 26.

³⁰ *Id.*

³¹ See Andy Sullivan, *supra* note 26; Roland Jones, *Goodbye... don’t call back*, MSNBC, at <http://www.msnbc.com/news/872047.asp> (Feb. 26, 2003).

receive unsolicited phone calls.³² It is no surprise that telemarketing companies are upset. This legislation will most likely cause the loss of many jobs in a multibillion-dollar industry.³³ The negative effects may be greater in the long run than just dealing with the annoying phone calls since advertisers are likely to continue to turn to other forms of advertising such as Internet ads and more commercials.

This legislation may signal a great change in the balance between the advertisers's right to free speech and right to create a market for their wares and the private consumer's right to privacy. The Direct Marketing Association (DMA) President Robert Weintzen stated, "The FTC is singling out this form of advertising now, what will be next?"³⁴ Hopefully, for the sake of productivity and e-mail inboxes everywhere, spam will be singled out next.

Unsolicited Bulk E-mails

Another advertising technique that has gained widespread usage and consumer hate is unsolicited bulk e-mails also know as spam. Spam is perhaps the most costly advertising mechanism, not costly to the spammer but instead to the e-mail user.³⁵ Spammers, in effect, make consumers pay for the unwanted advertisements, which is similar to the objection to ads that continue after the advertised time for a movie.³⁶ In both scenarios, the consumer is forced to pay (with both time and money) to see advertisements they never wanted to see. Even if a consumer is not paying per minute for Internet service, the Internet Service Providers (ISPs) are paying for the costs of spam by being forced to purchase additional computers and increase bandwidth and take measures to try to minimize the effect of spam.³⁷ In another advertising forum, the Ninth Circuit held that cost-shifting was enough reason to ban advertisers' use of unsolicited faxes, "junk faxes".³⁸ However, in the case of junk faxes, the cost burden on the

³² Do-Not-Call Implementation Act, Pub. L. No. 108-10 (2003).

³³ Roland Jones, *supra* note 31. "According to the Direct Marketing Association (DMA), a trade group, sales of goods and services through telemarketing generated \$274 billion in profit in 2001. American consumers and businesses receive some 104 million unsolicited sales calls daily, the DMA says."

³⁴ Andy Sullivan, *supra* note 26.

³⁵ Anick Jesdanun, *Spam costs U.S. firms about \$8.9 billion annually, study says*, AP ONLINE, at <http://news.spamcop.net/pipermail/spamcop-list/2003-January/029374.html> (Jan. 5, 2003).

³⁶ Edwin L. Klett and Rochelle L. Brightwell, *Spam Mail: An Electronic Nuisance To Be Reckoned With*, 4 NO. 11 LAW. J. 11 (May 31, 2002) (stating that "[c]onsumers who pay for their Internet service per minute of use and incur toll-call fees to receive each piece of spam argue that reviewing and deleting spam is particularly burdensome for them").

³⁷ Some ISPs have a full-time staff attempting to screen out spam before it is delivered to consumers. In addition, ISPs are being forced to provide spam-blocking software. Because of these anti-spam measures, ISPs must pass on the extra cost to consumers.

³⁸ *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995).

consumer was easily demonstrated due to use of the consumer's paper and phone line.³⁹ The costs to e-mail users may not be as easily demonstrated.

In January 2003 alone, 6,092,514 unique spam attacks occurred.⁴⁰ A recent study estimates that spam costs U.S. corporations \$8.9 billion each year and costs U.S. and European service providers an additional \$500 million.⁴¹ Some in the computer industry compare the aggressive spam industry to cyber-terrorists.⁴² Spam has become a huge problem for most individuals and businesses and there have not been any measures enacted that significantly eliminate the problem. Some continuing problems with current anti-spam measures include: loss of productivity in the workplace, the inappropriate material involved in many spam e-mails, the non-uniformity of state laws, and the loss of legitimate e-mails that the recipient never sees due to spam blockers. The current anti-spam measures are obviously not working since so much money is lost in productivity and spam is increasing in an almost exponential manner.⁴³ Congress recently decided that the current technologies, such as Caller ID or the Teleshopper, were not sufficient protection of consumer privacy.⁴⁴ These technologies were more effective at shielding the consumer from unsolicited and unwanted advertisements than spam blockers are and the consumer could choose not to pick up the phone. With spam, the consumer is usually still forced to view the subject line before deleting the e-mail. In order to eliminate many problems, major regulations need to be enacted and enforced in addition to the improvement of anti-spam technologies.

³⁹ *Id.*

⁴⁰ *Unique Spam Attacks*, Brightmail, at www.brightmail.com/pdfs/0103_spam_attacks.pdf (n.d.). This amount is up from 2,777,017 in January 2002. Thirty-three percent of spam is related to the sale of products; twenty-four percent is related to finances and eighteen percent is adult material. See *January 2003 Spam Category Data*, BRIGHTMAIL, available at www.brightmail.com/pdfs/0103_spam_definitions.pdf (n.d.).

⁴¹ Anick Jesdanun, *supra* note 35.

⁴² See Rene Ryman, *The Adverse Impact of Anti-Spam Companies*, 20 NO. 1 COMPUTER & INTERNET LAW. 15 (Jan. 2003). See also Tom Spring, *supra* note 12; David Berling, *First industry-wide antispam conference shows promise*, Tech Update, at <http://www.zdnet.com/filters/printerfriendly/0.6061.2911737-92.00.html> (Feb. 27, 2003) (stating that "[t]errorists are widely distributed, highly adaptable, incredibly tenacious and surprisingly well-organized. Sounds a lot like spammers, doesn't it?").

⁴³ Anick Jesdanun, *supra* note 35. See also Jim Christie, *California Lawmaker Wants to Sue Spam E-Mailers*, REUTERS, at http://www.usatoday.com/tech/news/techpolicy/2003-02-19-spam-law_x.htm (Feb. 19, 2003).

⁴⁴ Do-Not-Call Implementation Act, *supra* note 32.

Proposed Solution to Problem Advertising

Federal legislation is an option. More than half the states already regulate spam but with little success.⁴⁵ These regulations do not necessarily prohibit spam but are aimed mostly at striking a balance between the advertisers' interests in promoting their products and the consumers' interests to be left alone.⁴⁶ State regulation has not been effective due in part to the lack of uniformity in the laws.⁴⁷ With the seemingly borderless nature of the Internet, it is difficult to regulate advertisers based on their location. If there were a federal law establishing regulations that apply throughout the nation, the uniformity would assist in the crackdown against this type of unwanted advertising.

Opponents to federal regulation argue that the government would be interfering inappropriately and ineffectively. Even if there were a federal regulation on spam, many spammers are located internationally making it difficult to enforce the regulations.⁴⁸ In addition to the possible difficulties in enforcement, regulating or banning spam would stifle the advertiser's right to free speech and destroy a new communication media. Regulation opponents argue that spam's inexpensive nature and broad reach are very beneficial to advertisers.⁴⁹ These qualities are exactly what consumers despise because it makes it cheap and easy for advertisers to bombard consumers with these unwanted advertisements.

Spam is "an annoying, unwanted intrusion on consumers' lives," states FTC staff attorney Brian Huseman.⁵⁰ The FTC will hold a forum from April 30, 2003 to May 2, 2003 in order to address the problem of spam.⁵¹ The primary objective of the forum will be "to explore the technical, legal and financial issues related to such mailings."⁵² Recently, a group of

⁴⁵ See Rene Ryman, *supra* note 42. States regulating spam include Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nevada, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia and Wisconsin.

⁴⁶ *Id.*

⁴⁷ Carol Jones, *E-Mail Solicitation: Will Opening a "Spam-Free" Mailbox Ever Be A Reality?*, 15 LOY. CONSUMER L. REV. 69 (2002).

⁴⁸ Nancy Vogel, *Bill would ban spam in California* (Mar. 10, 2003), L.A. TIMES, available at <http://www.nandotimes.com/technology/v-text/story/801135p-5710829c.html?printer>.

⁴⁹ Barbara Darrow, *Damming the Spam Deluge: Top 10 Spam Come-Ons in 2002*, CRN, at <http://crn.channelsupersearch.com/news/crn/39423.asp> (Jan. 20, 2003).

⁵⁰ Janet Kornblum, *Spam? No thanks, we're full* (Jan. 12, 2003), USA TODAY, available at http://www.usatoday.com/tech/webguide/internetlife/2003-01-12-spam_x.htm.

⁵¹ *Internet: Forum Will Focus on Unsolicited E-Mail*, N.Y. TIMES, Feb. 5, 2003, at C4.

⁵² *Id.* The main issues include those related to spam, "including security problems and viruses; possible structural changes to e-mail systems; email address harvesting technology; deceptive routing and subject information; the cost of technology to eliminate or negate spam; and effects on wireless devices, text messaging and wireless e-mail."

hundreds of programmers met at the Massachusetts Institute of Technology to discuss possible solutions to the rise in spam e-mails.⁵³ The DMA no longer opposes regulation and has pushed for legislation that would require fines of \$11,000 per email for spam violators; this fine amount is equal to those invoked by the “Do-Not-Call” regulations recently passed.⁵⁴ Taking into account the recent legislation against telemarketing phone calls, it might be an opportune time to institute a “Do Not E-Mail” registry.

Banning spam is an option but it would be necessary to have a uniform federal ban. France’s National Assembly has already voted to ban spam e-mail.⁵⁵ California’s legislature is looking at a new bill to ban spam.⁵⁶ The bill would criminalize sending spam from California or to a consumer in California and would authorize the receiver to sue the spammer.⁵⁷ However, the difficulty in enforcement would remain a major problem partially due to the transient and often international nature of spammers.⁵⁸ The non-uniformity of the state laws regulating spam is a large obstacle and having one state with strict, but relatively unenforceable laws is not the answer to the widespread spam problem.⁵⁹

In addition to uniform legislation, anti-spam technologies must be improved.⁶⁰ Anti-spam software continues to block legitimate e-mails that the Internet user wants.⁶¹ The e-mails that get lost in anti-spam black holes will never be viewed by the recipient, potentially causing major problems. This can happen when an e-mail user does business with a company that sends bulk e-mails and the ISP begins to block all the e-mails sent by the company including legitimate ones in an effort to reduce spam. There are a variety of spam-blockers, some of which are free, that all work with varying success.⁶² If spam is not banned, the Internet industry must continue to

⁵³ Theo Emery, *MIT conference looks at ways to stop spam*, ASSOCIATED PRESS, at <http://www.sacbee.com/24hour/technology/story/723882p-5301318c.html> (Jan. 18, 2003).

⁵⁴ Jane Weaver, *Kill the spam, save my email*, MSNBC, at <http://www.msnbc.com/news/876595.asp?0sp=v3b2&0cb=-213139135> (Feb. 27, 2003).

⁵⁵ *French legislators vote to ban spam*, AGENCE FRANCE-PRESSE, at <http://newsobserver.com/24hour/technology/story/782597p-5609931c.html> (Feb. 26, 2003). The French Senate must still pass the law.

⁵⁶ Nancy Vogel, *supra* note 48.

⁵⁷ *Id.* (the bill would authorize suits for at least \$500 in damages per violation).

⁵⁸ *Id.*

⁵⁹ Jim Christie, *California Lawmaker Wants to Sue Spam E-Mailers*, REUTERS, at http://www.usatoday.com/tech/news/techpolicy/2003-02-19-spam-law_x.htm (Feb. 26, 2003).

⁶⁰ Jane Weaver, *supra* note 54.

⁶¹ Rene Ryman, *supra* note 42.

⁶² Jane Weaver, *supra* note 54 (stating that some anti-spam technologies cost the consumer more than \$40 a year and are often difficult for the average Internet user to use).

improve the spam-blocking technologies, which is not an easy task.⁶³ Marten Nelson, an analyst at Ferris Research claims that “an ‘arms race’ exists between spammers and the companies that sell software to block unsolicited e-mails.”⁶⁴

If no unified regulation occurs, consumers are left with few options. We can hope that the computer industry improves spam blocking technologies. We can be happy that fewer telemarketers are calling and simply continue to delete spam e-mails and close pop-up windows. We have the power to arrive to the movies a couple of minutes after the scheduled start time in order to avoid the unwanted commercials. Without regulation, the average American’s life will be little changed and still be inconvenienced daily.

Conclusion

Advertisers are being forced to get more creative and sneaky in order to grab a share of the market. The traditional forms of advertising including on-screen commercials and telemarketing are facing a breaking point because the American people are fighting against the daily interruptions. However, without regulation of the newer forms of advertising including pop-up advertising and spam, the interruptions will simply shift form and not be eradicated. The time for change and a rebalancing of rights is upon us. The right to privacy should not be outweighed by an advertiser’s right to sell his product by forcing a captured audience (in a movie theater, online or in an e-mail inbox) to be inundated with sales pitches.

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⁶³ Theo Emery, *supra* note 53 (stating that “[t]here are some really clever people making spam difficult to filter”).

⁶⁴ Nancy Vogel, *supra* note 48 (stating that Nelson believes that the anti-spam industry will win in the end; since spam is still a major problem, it appears that the spammers are currently leading the race).