

## THE FUTURE OF WIRELESS SPAM

*Though US cellular networks currently lack the capacity for widespread distribution of unsolicited wireless advertising (wireless spam), these advertisements are already well known in Japan and Europe, where they have proven to be a significant burden on cellular users. This iBrief examines the recently ratified legislation in Japan and Asia that have attempted to stop the glut of wireless advertisements, as a foreshadowing of the problems and questions that will soon have to be addressed in the United States.*

Due to unbridled capitalism that created a series of heterogeneous cell phone networks, cell phone technology in the United States is antiquated when compared with Europe, Japan, and South Korea.<sup>1</sup> However, U.S. carriers are slowly developing true third generation wireless data networks, which allow for a rate of data transfer comparable to high-speed internet, thus moving U.S. wireless technology back into drafting position behind Europe and Japan.<sup>2</sup> The new technology will provide Americans with cellular access to conveniences such as high-speed multimedia, e-commerce, and mobile video conferencing. However, as this iBrief illustrates, using present-day Japan and Europe as examples, new cell phone technology may create only the illusion of enhanced freedom.

### **A False Promise**

Two years ago, cell phone advertising was hailed as the advent of a new and burgeoning market made available only through the advancement of technology. Japan's largest cellular provider, NTT DoCoMo ("DoCoMo"), believed it would lead the world in ushering in a new age of commerce.<sup>3</sup> Wireless advertisements, in the form of emails delivered to cellular phones, would offer consumers time and location-relevant information. These unsolicited advertisements are generally unwanted and commonly referred to as "spam." Those behind this innovative form of advertising failed to consider a possible backlash to being stalked by advertisements. Because of the glut of

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<sup>1</sup> Janet Rae-Dupree, *Slow Off the Line*, U.S.NEWS, Mar. 25, 2002, available at <http://www.usnews.com/usnews/nycu/tech/articles/020325/25wireless.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> Michele M. Yamada, *Japan Deal to Put Ads on Cell Phones*, STANDARD, June 2, 2000, available at <http://www.thestandard.com/article/display/0,1151,15659,00.html>.

such advertisements, cell phone users have effectively begun to view the reputed advantages of this new form of cell phone advertisements as more of a lie than the promises they receive from digital solicitors. In addition, the crowded in-boxes of cellular users have caused hassles for the providers, who bear significant costs handling the extra traffic. It costs them lost bandwidth, as well as having to provide more customer service and system administration.<sup>4</sup> It is estimated that of the 950 million emails exchanged daily in Japan, 84 percent are sent out at random.<sup>5</sup> At a cost to DoCoMo of over \$200 million, both the company and the industry needed a solution.<sup>6</sup>

### **Japan's Initial Response**

Japanese cellular users on the DoCoMo network are assessed a fee for every packet of information they transmit or receive. Emails or advertisements that they download onto their cellular phones consist of packets that vary in number according to the amount of data transmitted.<sup>7</sup> Following increasing complaints by cellular subscribers, who were receiving numerous emails daily from advertisers, DoCoMo solicited and received approval from Japan's Ministry of Public Management in November 2001 to utilize new measures to stem the torrent of spam.<sup>8</sup> The solution was to prevent advertisers from creating accurate target lists by blocking the spammers' ability to send ads to large numbers of invalid DoCoMo email addresses.<sup>9</sup> At the time, spammers commonly sent advertisements to numerous randomly generated addresses in an effort to find a small number of valid addresses.<sup>10</sup> In addition, users had other options such as blocking emails from unspecified addresses and changing email addresses.<sup>11</sup> However, these methods were not satisfactory to cellular users or providers, because despite reducing the amount of spam, ultimately these methods were imprecise, and often, the

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<sup>4</sup> Brandon Mitchener, *All Spam, All the Time*, WALL ST. J., Oct. 29, 2001, available at <http://interactive.wsj.com/archive/retrieve.cgi?id=SB1004116795770194080.djm>.

<sup>5</sup> Yomiuri Shimbun, DAILY YOMIURI, July 1, 2002, available at 2002 WL 19074087.

<sup>6</sup> Mitchener, *supra* note 4.

<sup>7</sup> DoCoMo Net Information, at [http://www.nttdocomo.co.jp/english/p\\_s/imode/](http://www.nttdocomo.co.jp/english/p_s/imode/).

<sup>8</sup> ADLAW, *Wireless Spam a Problem in Japan*, at <http://www.adlawbyrequest.com/international/DoCoMo111901.shtml> (Nov. 19, 2001).

<sup>9</sup> *Id.*

<sup>10</sup> Christopher Saunders, *Japan Takes Anti-Spam Steps*, at <http://www.internetnews.com/IAR/article.php/1402331> (July 11, 2002).

<sup>11</sup> ADLAW, *supra* note 8.

blocked messages were ones the users actually wanted to receive.<sup>12</sup> Further, these methods do not completely eliminate the unwanted spam. Therefore, prompted by DoCoMo and with the support of popular opinion, the Japanese Parliament enacted two anti-spam bills in April 2002.<sup>13</sup> On July 1, cellular consumers and providers in Japan may have found a lasting solution when the two new laws regulating wireless commercial solicitations--cell phone spam--came into effect.<sup>14</sup>

### **Japan's Legislative Response**

The Law for Appropriate Transmission of Specified Emails (Law No. 26 of 2002), which was first approved by the House of Councilors, was passed into law by Japan's House of Representatives on April 11, 2002.<sup>15</sup> The bill controls spam disseminated by anyone under the jurisdiction of the Ministry of Public Management, Home, Affairs, Posts and Telecommunications, which includes the entire country and the solitary islands.<sup>16</sup> The aim is to prevent the transmission of unsolicited commercial email.<sup>17</sup> Consisting of several parts, the bill obligates senders of unsolicited email to display the sender's name, contact information, and state at the beginning of the subject line, which can be viewed before the body of the email is downloaded, that the email is an advertisement that was neither consented nor requested.<sup>18</sup> Users will then have the option to automatically block all mail that contains unsolicited advertising in the subject line.<sup>19</sup> The bill also prohibits the transmission of emails to randomly generated email addresses.<sup>20</sup> Further, the bill prevents senders from emailing recipients that have informed senders by phone or email that they refuse email from them, imposing a 500,000 yen (U.S. \$ 4,180) fine for non-compliance.<sup>21</sup> Finally, the bill allows

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<sup>12</sup> *Id.*

<sup>13</sup> Saunders, *supra* note 10.

<sup>14</sup> Shimbun, *supra* note 5.

<sup>15</sup> Japan Computer Industry Scan, *Law Enacted to Regulate Unsolicited E-mail Ads*, April 15, 2002, at LEXIS, IAC Japan.

<sup>16</sup> Shimbun, *supra* note 14.

<sup>17</sup> Japan Computer Industry Scan, *supra* note 15.

<sup>18</sup> Press Release, NTT DoCoMo, *NTT DoCoMo to Offer New Anti-Spam Option*, at <http://investor.nttdocomo.com/ReleaseDetail.cfm?ReleaseID=83905&page=article&type=Press> (July 2, 2002).

<sup>19</sup> *Id.*

<sup>20</sup> Saunders, *supra* note 13.

<sup>21</sup> Shimbun, *supra* note 16.

telecommunication carriers to refuse email from spammers if it may create system problems.<sup>22</sup>

One day after the enactment of the Law for Appropriate Transmission of Specified Emails, the House of Councilors enacted an amendment to update the 1976 Specific Commercial Transactions Law (Law No. 28 of 2002), which governs mail-order business and was instituted in order to protect consumers from exploitive marketing techniques, such as direct marketing.<sup>23</sup> The amendment is narrower than the Law for Appropriate Transmission of Specified Emails, as it only applies to products and services. The amendment is narrowly tailored to avoid excessive control and hindrance of the free market.<sup>24</sup> It provides cellular users with an opt-out option, requiring senders of email ads to attach messages telling receivers how to reject future ads. Individuals receiving spam mail have the option to report the mail to the Public Management Ministry, which will subsequently issue cease-and-desist orders to the senders of the unsolicited advertisements.<sup>25</sup> Once the ads have been rejected, senders are prohibited from sending the ads again.<sup>26</sup> Violations of this new law will result in maximum prison terms of two years or fines up to three million yen (U.S. \$ 24,000).<sup>27</sup>

### **EU Legislative Response**

In Europe, unsolicited wireless emails are currently less of a problem than they are in Japan. In addition, on May 30, 2002, the European Union's Parliament approved the Directive for the Protection of Personal Data and Privacy in the E-communications Sector.<sup>28</sup> The directive contains a spam clause which, unlike the Japanese Law for Appropriate Transmission of Specified Emails and the amendment to the Japanese Specific Commercial Transactions Law, which establish an opt-out model, the EU adopts an opt-in approach to unsolicited commercial email, faxes, and automated calling

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Asahi Shimbun, *Ministry LDP Split Over Spam*, at <http://www.asahi.com/english/business/K2002020200259> (Apr. 20, 2002) (last visited Aug. 30, 2002).

<sup>25</sup> *Id.*

<sup>26</sup> Shimbun, *supra* note 21.

<sup>27</sup> *Id.*

<sup>28</sup> Council Directive 2002/58, 2002 O.J. (L 201) 37.

systems.<sup>29</sup> The opt-in approach means that consumers must give permission to marketers before they can be sent electronic communications. An opt-out approach would have allowed marketers to send unsolicited mail to individuals until they object. Retailers will be able to continue sending mail to existing customers, whose information they received in a previous transaction. This clause is the first restrictive legislation applicable to short message service (“SMS”) text messages-as well as other electronic messages received on mobile and fixed terminals.<sup>30</sup> Further, the directive requires the consent of cell phone users in order to use privacy sensitive location data that would provide for the exact location of cell phones, enabling marketers to provide area and interest specific advertisements.<sup>31</sup> The directive is the final piece of the Telecommunications Regulatory Package,<sup>32</sup> which was agreed upon last year and adopted on February 14, 2002.

After a year of debate, the European Parliament abandoned its opposition to a ban on spam and accepted the Council’s common position of an opt-in system.<sup>33</sup> The European Parliament, the European Commission, and the Spanish Presidency of the Council of the European Union were able to compromise on the opt-in approach and other contentious issues.<sup>34</sup> As a result, the Council of the European Union, following the formality of a second reading, formally adopted the directive.<sup>35</sup> The directive entered into force on July 31 when it was published in the Official Journal.<sup>36</sup> Therefore, the EU member states will individually implement the regulation as a part of their own national laws.<sup>37</sup> This process should reach fruition by 2003, thus setting an important precedent for confronting spam.<sup>38</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> Press Release, EU Institutions, Commission Welcomes European Parliament’s Vote to Accept Directive on Data Protection Rules for Electronic Communications Sector, *available at* <http://www.eurunion.org/news/press/2002/2002034.htm> (May 30, 2002).

<sup>31</sup> Council Directive, *supra* note 28.

<sup>32</sup> Seventh Report on the Implementation of the Telecommunications Regulatory Package, COM(01)706 final.

<sup>33</sup> Press Release, EU Institutions, *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Council Directive, *supra* note 31.

<sup>37</sup> Euractiv.com, *EP Plenary Adopts E-communications Directive*, at <http://www.euractiv.com/cgi-bin/cgint.exe/?targ=1&204&OIDN=1503516> (May 5, 2002).

<sup>38</sup> *Id.*

## A US Preemptive Solution

At present, the cell phone users in the United States have only dealt with cell phone spam on a small scale. As early as April 2000, spam infiltrated American cell phones in the form of a text message advertisement for new products.<sup>39</sup> Cell phone spam is hindered by the same limits in technology, in particular the different technology standards, which have rendered American cell phones antiquated as compared to phones in Asia and Japan. Unlike the United States, Japanese and European carriers, as required by their governments, have adopted uniform technology standards.<sup>40</sup> They did this because differing standards are hard to integrate and even more problematic to upgrade to third generation service. Because U.S. carriers still have these differing standards, they only provide 2.5 generation service, which are improved second generation networks that provide slightly higher transmission speeds.<sup>41</sup>

Further, the Wireless Telephone Spam Protection Act,<sup>42</sup> which will amend the Communications Act of 1934<sup>43</sup> to prohibit text, graphic, or image messaging systems on wireless devices, is now in the House Committee on Energy and Commerce.<sup>44</sup> In its current form, this law would be significantly stricter than the aforementioned laws in Japan and Europe, as it would provide cellular users with automatic protection from all unsolicited wireless emails. In the coming years this or a similar bill will likely provide some relief for what seems to be an imminent onslaught of cell phone spam. However, Americans should assume that the potential size of the mobile commerce market, which has been estimated by some to surpass \$20 billion by 2005,<sup>45</sup> will ultimately encourage marketers to find a way into cell phones just as they have in Japan.

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<sup>39</sup> Elisa Batista, *A Fight to Ban Cell Phone Spam*, WIRED, July 6, 2000, available at <http://www.wired.com/news/print/0,1294,37376,00.html>.

<sup>40</sup> Rae-Dupree, *supra* note 1.

<sup>41</sup> *Id.*

<sup>42</sup> Wireless Spam Protection Act, H.R. 113, 107th Cong. (2001).

<sup>43</sup> 47 U.S.C. § 227 (2002).

<sup>44</sup> Wireless Spam Protection Act, *supra* note 42.

<sup>45</sup> Ben Macklin, *Mobile Commerce Predictions*, ENTREPRENEUR, June 18 2001, available at <http://www.Entrepreneur.com/article/0,4621,290409,00.html>.