

**A Statutory Private Right of Action
against Spammers in Canada:**
Canadian Context, Lessons Learned, and
Implications of Different Approaches

**Report
to Industry Canada's Task Force on Spam**

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Introduction

This is an interim report on the viability of a statutory private right of action against spammers in Canada. It is based on ongoing research being conducted by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) for Industry Canada's Special Task Force on Spam. CIPPIC's final report will be completed by December 17, 2004.

As noted in Industry Canada's May 2004 Action Plan,

There is merit in examining the use of current laws, and possible new laws, to fight spam. However, unless accompanied by a range of technical measures, and commitments by network managers, business and legitimate marketers, and by changes in consumer behaviour, laws alone will not stem the current flood of unwanted commercial e-mail solicitation.

This is the context in which the Task Force on Spam is considering a statutory right of action: not as a solution to the spam problem, nor as the primary measure in an anti-spam action plan – rather, as one possible component of a broad set of measures designed to combat spam.

The following report is based on:

- a review of the current state of Canadian law regarding private rights of action generally, as well as existing private rights of action applicable to spamming, in order to establish the context in which any new anti-spam right of action would operate;
- a review of anti-spam statutes in other jurisdictions, and in particular, those statutes that provide for private rights of action;
- a review of the literature on anti-spam efforts; and
- interviews of key stakeholders and experts in order to determine the extent to which a private right of action against spammers in Canada might be used and useful, the implications of different approaches to such a right, and the lessons learned from other jurisdictions.

Statutory Private Rights of Action in Canada

Private rights of action can be found in numerous Canadian statutes, ranging from provincial consumer protection laws¹ to federal legislation governing competition,² telecommunications,³ broadcasting,⁴ and protection of intellectual property.⁵ Such actions provide an avenue of redress for those who have suffered as a result of specified illegal behaviour. In most cases, government authorities (regulators,

¹ e.g., Ontario's *Consumer Protection Act, 2002*, S.O.2002, c.30, ss.14-18.

² *Competition Act*, R.S.C. 1985, c. C-34 (as amended), s.36.

³ *Telecommunications Act*, R.S.C. 1993, c.38 (as amended), s.72.

⁴ *Radiocommunication Act*, R.S.C. 1985 c.R-2, s.1; 1989, c.17, s.2; ss.18, 19.

⁵ *Copyright Act*, R.S.C. 1985, c. C-42, s.34.

government agencies, or Attorneys General) are empowered to pursue wrongdoers under either criminal or civil provisions of the statute. But such government actions do not necessarily respond to individual complaints, and rarely permit remedies designed to compensate those affected by the wrongdoing. The inclusion of private rights of action alongside government enforcement allows individuals and other legal entities to pursue wrongdoing where the government has failed to do so, and to recover damages that they have incurred as a result of the wrongdoing.

Outside the context of intellectual property protection, where plaintiffs have substantial and exclusive interests at stake, statutory private rights of action do not appear to be commonly used in Canada. This could be due to a number of factors, including the high cost of litigation, insufficient pecuniary interest, the limited scope of such rights of action, difficulty tracking down those responsible for fraud, difficulty proving damages, difficulty proving reliance on a misrepresentation (under the *Competition Act* and consumer protection legislation), and the risk of an adverse cost order in the event that the lawsuit does not succeed.

The high cost of litigation is a significant barrier to the use of private rights of action, especially by individual consumers. Even Small Claims Court proceedings can be intimidating and costly for individuals. More accessible are streamlined administrative proceedings that can be set in motion by a mere complaint, and that do not require high standards of due process. Where the administrative body has expertise in the subject-matter, parties can be better and more efficiently served than via the general court system. However, most such proceedings offer limited recourse to complainants.

It is the promise of a remedy that entices claimants to avail themselves of a statutory right of action. Such remedy must be sufficient to justify the expense of litigation. The scope of remedies available in Canada's statutory actions varies. Intellectual property statutes lie at one end of the spectrum. These offer a staggering – and growing – array of remedies.⁶ At the other end lie the consumer statutes, which provide for monetary damages, but require proof of damages, and offer sparing injunctive relief.⁷ The private rights of action under the *Competition Act*, *Telecommunications Act*, and *Radiocommunication Act* all require proof of damages. The obligation to prove damages can be a difficult burden in obtaining relief from violation of a statutory right. Copyright owners found it so, and lobbied successfully for amendment of the *Copyright Act* to provide for statutory damages in 1996.⁸

The availability of injunctive relief is a further remedial consideration. Some consumer protection statutes provide only compensatory remedies, without offering equitable

⁶ The *Copyright Act*, for example, offers a wide range of remedies including damages, statutory damages, an accounting of profits (on top of a damages award), Anton Pillar orders, interlocutory, interim and permanent injunctions, and orders for delivery up, to name but a few. See Part IV, "Remedies", s. 34 - 43. Statutory damages and "wide injunctions" were added to the Act in 1997 – see s. 38.1 and 39.1.

⁷ See, e.g., Ontario's *Consumer Protection Act, 2002*, s.18, which provides for rescission and damages, but not for injunctions.

⁸ *Copyright Act*, R.S.C. 1985, C. C-42, s. 38.1.

remedies.⁹ Similarly, the forum may limit available remedies. Generally, small claims courts lack the jurisdiction to offer injunctive relief.¹⁰ Even if statutorily available within the forum's jurisdiction, interlocutory relief can be notoriously difficult to obtain, and the obligation to compensate the defendant if the action proves unsuccessful can be prohibitive. The burden and expense of establishing "irreparable harm" – an element of the test for obtaining an interlocutory injunction – has proven fatal to many applications for interlocutory relief.¹¹ British Columbia's consumer protection legislation overcomes that problem by relieving the consumer of this burden on interim injunctions, and granting the consumer the balance of convenience as a bonus.¹²

The availability of costs – particularly enhanced costs – to a successful defendant constitutes another disincentive to litigate. While plaintiffs under the *Competition Act's* private right of action can recover the costs of their investigation under the Act, consumer protection statutes are typically silent as to the issue of costs, leaving it to the procedural rules of the forum to determine costs entitlement. The risk of an adverse costs award may deter consumers from making use of anti-spam rights of action. At the same time, the limits on Small Claims Court cost awards (\$150 in Ontario) mean that even successful plaintiffs cannot recover anything close to the costs of their actions, again discouraging private actions to enforce the law.

Distinguishing complaints mechanisms from private rights of action

Rights of action are distinct from rights to complain in a number of respects. A private right of action is an adversarial mechanism relying on the pursuit of an individuated remedy to achieve behavior the legislators seek. A complaints-based system, in contrast, merely requires the rights-holder to lay out the facts of the matter. The authority then analyzes the facts and legal framework, investigates and may prosecute the alleged transgressor itself. The system is inquisitorial, not adversarial, and does not require the authority to act on behalf of the complainant, nor provide the complainant with a remedy. Many complaints bodies do not have the power to award damages or other compensation to complainants. Rights of action generally require significant expense and effort on the part of plaintiffs – the procedural, legal and evidentiary onus lies on the complainant to articulate the legal wrong and to prove that it occurred. In contrast, complaints usually require little in the way of effort and almost nothing in the way of expense.

⁹ See, e.g., Ontario's *Consumer Protection Act, 2002*, s.18, which provides for rescission and damages, but not for injunctions.

¹⁰ As Courts of statutory jurisdiction, small claims courts generally lack jurisdiction to issue equitable relief. See, e.g., *Small Claims Act*, R.S.B.C. 1996, c. 430.

¹¹ See, e.g., *Centre Ice Inc. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (F.C.A.).

¹² *Trade Practice Act*, R.S.B.C. 1996, C. 457, s. 18(1).

Existing private rights of action in Canada relevant to spam

There are a number of common law and statutory rights of action in Canadian law that could be used to pursue spammers. However, to our knowledge, few lawsuits have been launched in Canada against spammers.

Common Law Torts – Trespass to Chattels

As a tort in Canadian common law, trespass to chattels is the intentional interference with the personal property in the possession of another. The tort is meant to protect against violence and is therefore focused on possession rather than ownership. It is not clear from the case law whether a tort is actionable where no damage has been caused.¹³

In the US, the Restatement (Second) of Torts, §217(b) defines the tort with essentially the same elements.¹⁴ Furthermore, in the US, electronic signals have been held to be capable of supporting a trespass cause of action.¹⁵ In the seminal spam-as-trespass case, the giant ISP CompuServe won a judgment in trespass against a bulk mailer.¹⁶ Other ISPs have had similar success.¹⁷ Despite the similarity of this tort in the two countries, Canadian ISPs have apparently not pursued actions in trespass against spammers.¹⁸

Trade-mark Infringement; Passing-off

Where spammers spoof the domain name of another company, that company can sue for damages under the *Trade-mark Act*, as well as under the common law tort of passing-off. We are aware of one such case in Ontario, in which Amazon.com sued an Ontario-based spammer. That case was settled.¹⁹

Breach of Contract

Every connection to the internet involves a contractual relationship between a service provider and a subscriber. Large Canadian ISPs frequently exercise their contractual right to terminate subscribers who breach the terms of contract forbidding spam. Indeed, the first report Canadian lawsuit involving spam was brought by a subscriber against its ISP for just such a termination.²⁰

¹³ Philip H. Osborne, *The Law of Torts*, 2nd. ed. (Toronto: Irwin, 2003), pp.274-5.

¹⁴ US case law sometimes refers to the tort of conversion: See *e.g.*, *CompuServe, infra* note 15. However, since conversion is the forced judicial purchase of a chattel by the defendant, we do not feel it is likely to be an appropriate avenue for recovery in spam actions. Similarly, the tort of nuisance, which was apparently the basis for at least one judgment against spammers in the US (*Parker v. C.N. Enterprises*, No. 97-06273 (Tex. Travis County Dist. Ct. Nov. 10, 1997), cited in *1267623 Ontario Inc. v. Nexx Online Inc.*, 45 O.R. (3d) 40), only applies to interference with land and is therefore not appropriate to the online environment.

¹⁵ *State v. McGraw*, Ind. 1985, in which a hacker's activities gaining unauthorized access to a computer system were found to be more akin to trespass than theft.

¹⁶ *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

¹⁷ *Hotmail Corp. v. Van\$ Money Pie, Inc.*, N.D.Cal., Apr. 16, 1998, No. C 98-20064 JW, *America Online, Inc. v. IMS*, (E.D.Va. 1998) 24 F. Supp. 2d 548, and *America Online, Inc. v. LCGM, Inc.*, (E.D.Va. 1998) 46 F. Supp. 2d 444.

¹⁸ Interviews with Canadian ISP representatives.

¹⁹ *Amazon.com Inc. v. 1505820 Ontario Inc., c.o.b. Natural Grains Deli and Catering* (Statement of Claim filed August 25, 2003 in Ontario Superior Court of Justice); case settled before defence filed.

²⁰ *1267623 Ontario Inc. v. Nexx Online Inc.*, 45 O.R. (3d) 40, (June 14, 1999), Ont Sup Ct J.

In addition to terminating service with a spammer, an ISP could launch an action for breach of contract where its service agreement prohibits the sending of spam. We are aware of only one case in Canada using this right of action. In *I.D. Internet Direct Ltd. v. Cory Altelaar*²¹, an Ontario court judge found an absent respondent liable for breaching the terms of an e-mail use agreement by sending bulk unsolicited commercial e-mail. The applicant ISP was awarded an injunction restraining the subscriber from sending spam on the ISP's system.²²

Quebec Civil Code

An action could be launched in Quebec against spamming under Article 1457 of the *Civil Code*, which states:

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

Article 7 of the *Code*, addressing "enjoyment and exercise of civil rights", provides further that:

No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

Article 976, addressing property rights, provides some guidance as to what would constitute "an excessive and unreasonable manner", requiring that:

Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

The very first reported Canadian case involving spam, although not argued under Quebec law, involved judicial assessment of whether the alleged spamming activity breached generally accepted rules of "Netiquette". In *1267623 Ontario Inc. v. Nexx Online Inc.*²³, the service agreement required the subscriber to follow generally accepted "Netiquette". When the subscriber failed to stop sending spam through the service, the ISP terminated

²¹ [1999] O.J. No. 1804, (May 3, 1999), Ont Sup Ct J.

²² Microsoft and AOL France were successful earlier this year in suing a French spammer for breach of contract under French law: in *Microsoft Corp. & AOL France v. Mr. K.*,²² the Tribunal de Commerce of Paris awarded the requested injunction and ordered Mr. K. to pay each of the plaintiffs 5,000 Euros in damages and 3,000 Euros in costs.

²³ *Supra*, note 19.

the account. The subscriber brought an action in breach of contract, seeking an injunction requiring the ISP to reactivate their service on the grounds that the sending of spam is not a breach of Netiquette. Finding for the defendant ISP, the judge in that case found that “sending out unsolicited bulk e-mail for commercial advertising purposes is contrary to the emerging principles of Netiquette.”²⁴

Breach of statutory privacy rights: PIPEDA

The federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), as well as provincial data protection statutes in Quebec, British Columbia and Alberta, require organizations in the course of commercial activities to obtain an individual's consent before collecting, using or disclosing their personal information, except in specified circumstances. E-mail addresses can be considered "personal information" as long as they can be traced to the individual.²⁵ Hence, the collection and use for marketing purposes of a person's e-mail address violates the law unless it is done with consent.

Individuals can complain to the federal Privacy Commissioner about alleged breaches of the Act by organizations whose activities do not fall within the jurisdiction of the three similar provincial statutes. As a telecommunications undertaking that crosses provincial boundaries, spamming clearly falls under the federal statute. The Commissioner must conduct an investigation in respect of each complaint received (unless she finds that the complainant ought first to exhaust other procedures, the complaint is better dealt with under another procedure, the complaint is so late that a report would not serve any useful purpose, or the complaint is trivial, frivolous or vexatious or is made in bad faith), and must prepare a report disposing of the complaint within one year. However, the Commissioner's report is not binding, she can only issue recommendations, not orders.

Complainants who wish to enforce their rights can, after receiving a report from the Commissioner, apply to the Federal Court for redress. The Court is empowered to order corrective practices, publication of a notice regarding such corrective practices, and damages, including damages for humiliation, in addition to other remedies. Few cases under PIPEDA have been brought in Federal Court so far, likely because of the effort and expense of doing so, relative to the damages suffered as a result of the breach.

It should also be noted that the Privacy Commissioner is empowered to investigate of her own motion, and to apply to Federal Court for enforcement of her findings.

The Office of the Privacy Commissioner (OPC) recently issued its first finding on a spam complaint.²⁶ The OPC found that the collection of an individual's business email address from the employer's (a University's) website for marketing purposes, without that individual's consent, violated the Act. This finding confirms the OPC's view (a) that email addresses constitute "personal information" under the Act, and (b) that their listing

²⁴ *Nexx*, *supra* note 19.

²⁵ The Act defines "personal information" as "information about an identifiable individual", other than "name, title or business address or telephone number of an employee of an organization": s.2(1).

²⁶ See <http://www.mgblog.com/resc/GeistPCCSpamdecision.pdf>

on a publicly available University (or law firm) website does not make legal the collection and use of such addresses for purposes beyond those that the University (or law firm) could reasonably have intended. The company in question changed its marketing practices as a result of the complaint, and the complainant has indicated his satisfaction with the result. It is not clear how effective such findings will be against companies who are not so keen to comply with the law.

Competition Act – Misleading Advertising

The *Competition Act* (s.36) provides for a civil cause of action in respect of a breach of the criminal prohibitions contained in Part VI of the Act, or a failure to comply with any order of the Tribunal or a court under the Act. Examples of the relevant criminal provisions found under Part VI relate to materially “false or misleading” representations to the public and deceptive telemarketing (ss. 52, 52.1). No civil cause of action, under section 36, lies in respect of the contravention of the Act's reviewable or restrictive trade practices.

Such actions must be brought in a court of competent jurisdiction, i.e. either a provincial superior court or the Federal Court of Canada; the Competition Tribunal does not adjudicate section 36 actions.

Plaintiffs must prove the amount of loss or damages suffered as a result of the criminal offence or as a result of the failure to comply with an order, on the civil burden of proof, namely on a balance of probabilities. They may recover damages, and as an added incentive to litigate, may recover the costs of any investigation in connection with the matter and of the proceedings taken under section 36.

Provincial Consumer Protection Legislation – Misrepresentation

Most provinces have enacted consumer protection legislation that prohibits misrepresentation and misleading advertising. As with the *Competition Act's* prohibitions against misleading advertising, these measures would be useful only against spamming activities that employ deceptive messaging tactics.

Many of these statutes provide for private rights of action, administrative remedies (such as a complaints procedure involving provincial authorities), or both.²⁷ For example, Part III of Ontario's *Consumer Protection Act, 2002* prohibits engaging in unfair practices, which include false, deceiving or deceptive representations and unconscionable practices.²⁸ The Act provides for both a private right of action in respect of such practices, and for a complaint and investigation procedure by the Director. Remedies in respect of the private right of action include rescission, damages, and where merited, punitive damages.²⁹ The Director's administrative remedies include injunctions and

²⁷ See, e.g., *Consumer Protection Act*, R.S.Q. c. P-40.1, s. 215 and 219.

²⁸ *Op cit.*, s. 14 – 15, 17.

²⁹ *Ibid.*, s. 18.

restraining orders, freeze orders, and, in respect of criminal convictions, the power to impose fines.³⁰ British Columbia's *Trade Practice Act*³¹ similarly provides for both administrative complaint procedures³² and private rights of action.³³ Interestingly, the B.C. action permits a claimant to bring an action "on the person's own behalf and, at the person's option, on behalf of consumers generally, or a designated class of consumers."³⁴ Alberta's *Fair Trading Act*³⁵ similarly addresses misrepresentations and similar unfair trade practices with a combination of administrative procedures and private rights of action, and provides specifically that "consumer organizations" may bring an action without having an interest in the matter.³⁶

Use of existing Private Rights of Action against Spammers

Despite all of these potential avenues through which spammers can be pursued in Canadian courts, we have come across only one reported case (breach of contract), and one case that was settled.

Discussions with Canadian ISPs indicate that most ISPs have limited resources, and need to focus those resources on keeping their networks operating, their employees paid, and their customers happy. They simply cannot afford to fund a costly lawsuit. The small contingent of larger Canadian ISPs who have the resources to sue, choose not to do so primarily because they do not see lawsuits against spammers as a worthwhile investment of their resources. They find that investment in technological (e.g., filtering) and other anti-spam measures is a much better use of their resources. Indeed, their deployment of anti-spam technology appears to have been reasonably successful so far - spam is no longer the same threat to their networks that it used to be. Hence, they have little incentive to spend money on lawsuits against spammers.

Others affected by spam have not seen fit to engage the courts in legal action for a number of possible reasons, including:

- the high cost of litigation;
- limited potential for reward even from successful litigation;
- lack of a clearly defined cause of action against spamming that is easy to prove;
- the requirement to prove damages;
- uncertain quantum of recoverable damages; and
- difficulty identifying, pursuing, and recovering from defendant(s).

A new anti-spam private right of action would have to address these barriers if it is to be used.

³⁰ *Ibid.*, see, generally, s. 109 – 117.

³¹ R.S.B.C. 1996, c. 457.

³² *Ibid.*, s. 5.

³³ *Ibid.*, s. 18.

³⁴ *Ibid.*, s. 18(3).

³⁵ R.S.A. 2000, c. F-2.

³⁶ *Ibid.*, s. 18(4).

Approaches in other jurisdictions

The European Union

Under its 2002 Directive on Privacy and Electronic Communications,³⁷ the EU required its member states to adopt legislation implementing a requirement for prior consent to electronic mail for the purposes of direct marketing.³⁸ The Directive also requires Member States to prohibit the practices of disguising or concealing the sender's identity, or failing to include a valid return address to which recipients may send a request that such communications cease. As under the Data Protection Directive,³⁹ Member States must provide, among other things, for the right of every person to a judicial remedy, and must further provide that "any person who has suffered damage as a result of ... any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered."⁴⁰ These statutory private rights of action are in addition to state enforcement measures.

A number of EU Member States have legislated anti-spam private rights of action pursuant to this Directive. For example,

- Under s. 30 of the UK *Privacy and Electronic Communications (EC Directive) Regulations 2003*,⁴¹ individuals and corporations can seek compensation in UK courts for quantifiable damages resulting from breaches of the anti-spam law. The statute explicitly notes that it is "a defence [for a defendant] to prove that he had taken such care as in all the circumstances was reasonably required to comply with the relevant requirement".
- Under the Italian law, data subjects may seek compensation from the "data controller marketer" for breach of the law if they have suffered damages.⁴² As in the UK, proof of loss is required.
- New regulations under the Swedish *Marketing Practices Act*⁴³ permit both individuals and other legal entities to seek remedy from the marketer for breach of the new anti-spam regulations. Both injunctions and damages are available, in addition to fines for disruptive marketing practices.
- Under the new law in Belgium, cease and desist proceedings can be initiated by the recipient of unsolicited email or by a competitor.⁴⁴

We are not aware of any civil suits under these or similar provisions in other EU Member States. As noted above, a successful suit was brought against a spammer in France by Microsoft and AOL, but under Article 1147 of the French Civil Code (breach of contract) rather than a specific anti-spam right of action.

³⁷ Directive 2002/58/EC, 12 July 2002; Article 13.

³⁸ Exceptions are specified in Art.13(2).

³⁹ 95/46/EC

⁴⁰ Article 15, Directive 2002/58/EC.

⁴¹ S.I.2003/2426, 11 Dec.2003

⁴² Legislative decree no. 196 (30 June 2003), and legislative decree no.181 (May 1998).

⁴³ 1995:450 (1 April 2004)

⁴⁴ Royal Decree (4 April 2003); Law of 11 March 2003 on certain legal aspects of information society services, Belgian State Gazette 17 March 2003.

Australia

Australia's *Spam Act 2003* prohibits the sending of unsolicited commercial email without consent, without including information about the individual or organisation who authorised the sending of the message, or without a functional unsubscribe facility. It also prohibits the use of address-harvesting software. The Act does not include a private right of action as such. Instead, individuals and others can complain to the Australian Communications Authority (ACA), who may initiate civil actions against spammers for fines of up to \$1.1m. per day. However, the Act does provide for court orders, upon application by either the ACA or a person who has suffered loss or damages as a result of the contravention, for compensation to the victim. Such court orders can only be made in the context of an ACA action against the spammer, but compensation orders may be made even where no fines are ordered.

The USA

The federal government and thirty-seven states in the USA have passed laws to control spam. Most of these statutes include a private right of action. However, the federal *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* ("CAN-SPAM") supersedes provisions of state anti-spam laws that specifically regulate commercial email use, other than those laws that prohibit falsity and deception in commercial email messages. As a result, anti-spam legislation in Alaska, Nevada, New Mexico, and Tennessee may have no effect, and other state anti-spam legislation is limited to those provisions addressing deception. See Appendix A for a table of US anti-spam statutes comparing the various elements of their private rights of action.

Federal legislation

CAN-SPAM provides for a private right of action. However, this private right of action is only available to ISPs. No statutory right of action is available to individual recipients of spam or businesses that provide their own email services.

While the law generally applies to vendors of products and services advertised via spam, as well as to those who send spam, private rights of action are only available against those who send spam.

Causes of action under the CAN-SPAM private right of action include false or misleading transmission information, deceptive subject headings, violation of opt-out consent provisions, and the violation of certain form requirements including requirements to identify the email as an advertisement, to provide a notice of the opportunity to opt out of receiving future messages and to provide a postal address for the sender. ISPs may recover the greater of actual monetary loss or statutory damages (up to \$25 or \$100 per violation, depending on the violation, to a maximum of \$1 m.).

State legislation

In total, 37 US States have enacted anti-spam legislation. For the most part, the elements of spam that they address can be divided into three categories: labeling requirements, deceptive messages or transmission information, and consent requirements. As noted above, the CAN-SPAM Act pre-empts labeling and consent-based causes of action, leaving only the possibility of deception-based actions under State legislation.

With the exception of Idaho, Nevada and Rhode Island, all anti-spam statutes with a private right of action allow ISPs to sue. Many statutes allow “email service providers” to sue, expanding the scope to include businesses or individuals operating their own email servers, but excluding individuals who simply receive email. Other statutes permit email recipients to sue.

Actions under State statutes can be brought against those responsible for the act of sending messages that violate statutory requirements. Under some statutes, actions may also be brought against parties who promote themselves through spam, or against those who maintain databases for the purpose of sending spam. The Virginia statute is unique in holding liable a person who uses a minor to transmit spam.

US Case Law under Anti-Spam Statutes

It is unclear how many cases have been brought against spammers in the US, under statutory rights of action. One expert estimates there have been thousands of lawsuits in the US involving spam. The SpamCon Foundation Law Center⁴⁵ lists dozens of actions that have been brought against spammers in the US. Some of these were brought by ISPs, while others were brought by private citizens or organizations. Most appear to have been brought under statutory rights of action. For the purposes of these submissions, we have described a small sample of these actions in order to give a flavour of the ways in which private rights of action have been used in the US. It is not yet clear whether these actions have had, or are likely to have, an impact on spamming activity in the USA.

Actions under Federal Legislation

Only ISPs have a private right of action under the federal CAN-SPAM Act. Three private actions have been launched under this Act, all of which cite common law and state-based rights of action, as well as prohibitions under CAN-SPAM.

On March 4, 2004, Hypertouch, Inc. brought an action against BVWebTies, LLC, BlueStream Media, and 10 unnamed defendants alleging the use of a nonexistent company name, sending to an address that had “opted-out”, the failure to provide a postal address and the harvesting or automatic generation of email addresses.⁴⁶

On March 10, 2004, an ISP industry group known as The Industry Anti-Spam Alliance, filed the first major private lawsuits under the federal CAN-SPAM Act. The Alliance represents the four largest internet service providers: America Online, EarthLink,

⁴⁵ <http://law.spamcon.org>

⁴⁶ <http://www.gigalaw.com/canspam/litigation.html>

Microsoft and Yahoo! The six actions target hundreds of defendants, “including some of the nation’s most notorious large-scale spammers.”⁴⁷

In early June, 2004, Microsoft Corp. filed eight lawsuits against 220 unnamed defendants and several named companies. Microsoft alleged the use of fraudulent and deceptive transmission information and subject lines. The actions were brought under CAN-SPAM, two Washington State statutes and the common law of trespass to chattels.⁴⁸

Actions under State Legislation by ISPs

One expert estimates that there have been 25-30 state-based actions by ISPs against spammers. While AOL⁴⁹, Microsoft⁵⁰ and Yahoo⁵¹ all maintain web pages describing litigation they have undertaken, many of these actions were brought under either the common law or statutes of general application. Our research so far indicates that ISPs have settled actions brought under state laws.

Actions under State Legislation by Individuals

It is difficult to gather information about anti-spam actions brought by individuals in small claims court, since the decisions are reported only by the individual plaintiffs on their own websites. In addition, it appears that some anti-spam activists have created small internet service companies in order to bring actions as ISPs. From available reports, it appears that most plaintiffs use statutory private rights of action. Some anti-spammers have refused to settle cases, saying they are in it for the principle, not the money.

Two groups have formed to assist plaintiffs in taking on mass e-mailers: the Informal Coalition of Private Anti-spam Litigants (ICPAL) and the Institute for Spam and Internet Public Policy (ISIPP). The strategy of these groups is to remain informal but organized, so that spammers can't retaliate.

In Washington State, a small group of individuals have been fairly successful bringing actions in small claims court against spammers. The Washington State legislation allows a Washington resident to recover, from the business or person responsible for the spam, \$500 for each piece of unsolicited bulk e-mail received in violation of the statute's prohibitions against forged headers and other misrepresentative practices of spammers. One resident, Bruce Miller, claims to have collected \$5,600 from 6 spammers as of April 25, 2002.⁵² Another, Ben Livingston,⁵³ has brought a number of claims, including one

⁴⁷ AOL Press Release, March 10, 2004, online: <http://media.aoltimewarner.com/media/>. The actions themselves are *EarthLink v. John Does 1-25 (The "Prescription Drug Spammers")*; *John Does 26-35 (The "Mortgage Lead Spammers")*; *John Does 36-45 (The "Cable Descrambler Spammers")*; *John Does 46-55 (The "University Diploma Spammers")*; and *John Does 56-65 (The "Get Rich Quick Spammers")* and *John Does 66 - 75, other spammers*; *Yahoo! Inc. vs. Eric Head, Matthew Head and Barry Head, and their companies Gold Disk Canada, Inc., Head Programming, Inc., and Infinite Technologies Worldwide, Inc. collectively known as "The Head Operation."*, *Microsoft v. JDO and John Does 1-50, Microsoft v. Super Viagra Group*, and *AOL v. Davis Wolfgang Hawke, et al.*, *AOL v. John Does 1-40*.

⁴⁸ <http://www.gigalaw.com/canspam/litigation.html>

⁴⁹ <http://legal.web.aol.com/decisions/>

⁵⁰ Search at <http://www.microsoft.com/presspass/> for “spam litigation”.

⁵¹ <http://antispam.yahoo.com/spamandthelaw>

⁵² www.aboutspam.com/payup.php, accessed on November 1, 2004.

against Print Doctor, for which he won a judgment for over \$3000 from the court.⁵⁴ Martin Palmer, who claims to average \$175 per hour in winnings in his pursuits of spammers under Washington's statute.⁵⁵ Other individuals have used statutory rights of action to sue spammers successfully in under California's *Business and Professions Code*, obtaining judgments for up to \$5000.⁵⁶

It is not clear that these small victories of individual plaintiffs act as a deterrent to spammers or put more than a small dent in their incomes. For example, despite Bruce Miller's first victory against a spammer, in which he settled for \$200, the spammer enjoyed a net profit.⁵⁷

Other reports indicate that the courts themselves have been an obstacle to successful private actions, despite the presence of clear legislation addressing spam and permitting individuals to launch lawsuits. Judges have been reported not to take spam cases seriously, sometimes awarding substantial costs against plaintiffs. While they apparently win some of the lawsuits they launch, individuals report that they have trouble recovering enough to break even after paying court fees and related expenses.⁵⁸

Some cases reflect legislation that is ineffectively drafted. In *Gillman v. Sprint Communications*,⁵⁹ the Court of Appeals for Utah considered Utah's *Unsolicited Commercial and Sexually Explicit Email Act*.⁶⁰ Taking a narrow interpretation of the Act, the Court upheld the trial court's finding that the Act does not apply to e-mail received by a recipient with a pre-existing relationship with the sender, even where the recipient has explicitly attempted to sever that relationship. Gillman's attempt to revoke his consent to have GroupLotto send him e-mail was irrelevant to the Court's analysis.

Whether to legislate a Private Right of Action against Spammers

There is no consensus on whether a statutory private right of action against spammers is effective in the fight against spam. While some strongly support such a measure as part of a broader set of tools to fight spam, others are indifferent, citing its unproven effectiveness in deterring spam, and still others (some Canadian ISPs) oppose it, on the grounds that government is better placed to enforce laws against spam.

⁵³ www.smallclaim.info

⁵⁴ www.smallclaim.info/printdoctor/. This site has a copy of the judgment as well as an audio recording of the hearing, as do other claims on Livingston's website.

⁵⁵ Bennett Haselton, *Our long-term plan*, online: www.peacefire.org/anti-spam/details.html.

⁵⁶ Susan Kuchinskas, *Anti-Spammers on Attack*, Sept 24, 2004, internetnews.com, online: www.internetnews.com/xSP/article.php/3412891.

⁵⁷ Janet Kornblum, *Settlement in first antispam law*, CNET.com, July 16, 1998, online: <http://news.com.com/2100-1023-213430.html>.

⁵⁸ Beth Taylor, *Block Sender*, Legal Affairs (New Haven, CT), Jan/Feb 2003, online: legalaffairs.org

⁵⁹ 2004 UT App 143, May 6, 2004.

⁶⁰ Utah Code ss. 13-36-101 to 13-36-105 (2002).

Private rights of action are already available in Canada against misleading advertising and deceptive business practices, as well as for trespass and breach of contract. Under federal data protection legislation, complainants can also take spammers to court for unauthorized collection and use of their e-mail address, once they have a finding from the Privacy Commissioner. However, in all cases, damages must be proven, limiting the utility of the action from the complainant's perspective. Moreover, the cost of pursuing such actions is high, as is the risk of being left with a sizable legal bill that cannot be recovered at the end of the day, even in successful actions. In the case of traditional torts such as trespass, or statutory torts such as misleading advertising, actions against those responsible for spam would be breaking new ground; it is not clear that a judge would extend the traditional notion of trespass to unsolicited e-mail, or interpret provisions outlawing misleading advertising as encompassing deceptive headers on e-mail messages.

Even well-financed plaintiffs may not be willing to pursue spammers in court unless they have more to gain from proceeding. For example, private rights of actions under the *Radiocommunications Act*,⁶¹ targeting vendors of black market satellite signal receiving equipment, have recently been brought by large, well-financed corporate entities with a strong self-interest in shutting down the black market (against which technological tools have been less successful than in the spam context). These plaintiffs have found the proceedings expensive, time-consuming, and of little effect so far in deterring businesses from selling illegal equipment.

One way to make private actions against spam more worthwhile for plaintiffs is to provide for statutory damages - in an amount that constitutes sufficient incentive for plaintiffs to proceed. A number of commentators were of the view that there is little point in enacting a private right of action against spam without statutory damages.

But some parties (namely large Canadian ISPs) do not support an anti-spam private right of action even if it included statutory damages. They cite a concern that government and the public would then expect them to engage in costly legal proceedings at their own expense, when they would prefer to put their efforts into technological solutions that offer, in their view, better returns on investment. They express a concern that government would use the existence of a private right of action as an excuse to offload enforcement on industry, when in fact law enforcement agencies with broad investigatory and enforcement powers are much better placed to track down and prosecute spammers, especially where defendants are located in other jurisdictions.

Australia chose not to include a private right of action in its Spam Act, for a number of reasons, including concerns about frivolous, vexatious or ill-framed lawsuits, the risk of litigation targeting parties with “deep pocket” rather than the real culprits, the potential for lawsuits against the wrong party (given the difficulty identifying the true origin of spam), unequal access to justice (only those with sufficient resources would be able to take advantage of the right), and a desire to take a strategic approach to the problem of spam – i.e., to target “big ticket” spammers. Australia felt that it would be more efficient

⁶¹ R.S.C. 1985, c. R-2.

and effective to place the full burden of enforcement on a designated government agency with the expertise and resources necessary to investigate, gather evidence, and pursue a court action effectively, and who could make strategic decisions about who to prosecute.

In contrast, private rights of action are an integral part of the US approach to anti-spam legislation. Large ISPs such as Microsoft, AOL, and Earthlink are making use of such rights to pursue spammers, alongside government enforcement actions. They might well take advantage of similar rights in Canada to sue Canadian spammers under Canadian law, rather than having to rely upon US law to go after Canadian spammers, as they are currently doing.

Most experts we consulted supported a private right of action against spam, not as a replacement for state action, but rather as one at least potentially useful tool, among many others, in the battle against spam. Some consider it essential, given that the fight against spam does not rank high among priorities of law enforcement agencies. Proponents of a private right of action point out that a well-drafted private right of action will at least make possible private law enforcement where governments fail to exercise their powers of enforcement.

Jurisdictional Issues

While provinces could enact anti-spam legislation under their general consumer protection legislative responsibilities, such legislation could also find a home under federal powers over inter-provincial trade & commerce⁶² or broadcasting and telecommunications.⁶³ Most spamming activities have a commercial focus and cross jurisdictions, bringing them within federal jurisdiction.

A federal right of action against spammers could be created in a new statute, or could be added to either of two existing federal statutes:

*Competition Act*⁶⁴ – The constitutionality of the *Competition Act* rests in the federal trade and commerce power noted above.⁶⁵ The Act's misleading advertising and deceptive telemarketing provisions offer a solid basis from which the federal government could claim jurisdiction over the deceptive aspects of spam. Amendments may be needed to make illegal practices such as deceptive headers. The Act contains a limited private right of action in s. 36, which could be expanded to provide for statutory damages. Parliament is currently considering amendments to the Act which would allow for consumer access to the Competition Tribunal.

⁶² Sub-section 91(2) of the *Constitution Act*, 1867; see, e.g., *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927.

⁶³ Subs. 92(10); see, e.g., *Alberta Government Telephones v. Canada (CRTC)*, [1989] 2 S.C.R. 225.

⁶⁴ R.S.C. 1985, c. 19 (as amended).

⁶⁵ See, e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

*Telecommunications Act*⁶⁶ - The CRTC has already concluded that it possesses jurisdiction to regulate broadcasting and telecommunications activities that employ the Internet.⁶⁷ The CRTC actively regulates telemarketing, particularly in respect of privacy and consent issues,⁶⁸ and clearly has jurisdiction to regulate spam under s.41 of the Act, which allows the Commission to "prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression." The Act contains a limited private right of action in s.72. As with the *Competition Act*, this provision could be expanded to include statutory damages.

Key Elements of a Private Right of Action

If a private right of action against spammers is to be adopted in Canada, legislators can learn from the experience with such actions in other jurisdictions and under other Canadian statutes so as to construct a mechanism that is effective in deterring spam and that does not have undesired consequences.

Cause of Action

A statutory right of action in respect of spam should offer simple, uncomplicated rights of action that are easily susceptible to proof. In order to avoid lawsuits against *bona fide* marketers and to deter frivolous lawsuits, the cause of action can require demonstration of a "pattern or practice" of sending unsolicited e-mail (as under the US *CANSPAM Act*), or a second unsolicited e-mail message from the same party, after an objection and a sufficient length of time to permit removal of the address from any lists.⁶⁹

Eligible Plaintiffs

A private right of action for individual recipients of spam is seen by many as a crucial part of effective anti-spam legislation, given that it may not be in the interest of ISPs to litigate violations of a spam law.

However, individual consumers generally lack the resources to fund litigation, especially where they do not have a strong and unique self-interest in the case. The availability of class actions (together with other measures) can serve to mitigate this problem. In the context of spam, however, certain requirements for class certification may be difficult to

⁶⁶ R.S.C. 1993, c. 38 (as amended).

⁶⁷ CRTC, *Report on New Media* (May 17, 1999).

⁶⁸ See Telecom Decision CRTC 2004-35 (May 21, 2004), suspended by Telecom Decision CRTC 2004-35 (September 28, 2004), pending the disposition of the Canadian Marketing Association's application to review and vary Telecom Decision CRTC 2004-35. Note also that the Canadian Marketing Association has also filed a Petition to Cabinet in respect of CRTC 2004-35: see Canadian Marketing Association, *Petition to Her Excellency the Governor In Council pursuant to Section 12(1) of the Telecommunications Act, In the Matter of Telecom Decision CRTC 2004-35* (filed August 19, 2004).

⁶⁹ This would address the problem with Utah's legislation which did not allow the sender a reasonable time to comply with an opt-out request.

meet. In particular, it may be impossible to define an identifiable class of persons raising common claims (e.g., recipients of a given spam message who suffered damages as a result of reliance on a misrepresentation). On the other hand, some US experts warned against permitting class actions together with statutory damages and rights of action that can be used against legitimate marketers who have merely slipped up. Such a combination of factors can result in annihilation of companies rather than corrective practices.⁷⁰

Some stakeholders oppose permitting individuals to sue, arguing that ISPs and E-mail service providers are better placed to identify and pursue the worst spammers. If a new anti-spam private right of action is to be adopted in Canada, further consideration should be given to this issue.

Eligible Defendants

One of the thorniest problems in suing spammers is tracing and enforcing judgments against them. Many statutes surmount this problem by allowing plaintiffs to sue businesses who have engaged the spammer to advertise their wares. Indeed, this seems to be a key element of the more successful state statutes, as it allows plaintiffs to recover monetary awards from companies who want to stay in business. As noted by one expert,

"vendor liability reduces the problem of tracking down a target substantially. In most cases, vendors have a significantly more difficult time than the actual spammer at hiding their identity or internalizing the costs from the risk of prosecution. If you can dry up the demand by vendors for spammers' services, eventually the problem of spam will be greatly diminished."⁷¹

Another expert argues that businesses should not be able to escape liability by hiding behind spammers. Holding advertisers partly responsible for spam would encourage better "list hygiene", and would encourage businesses to use reputable marketers to send their messages. Without the ability to sue both the spammers themselves and the businesses who engage them, some experts argue that anti-spam legislation will simply encourage a shell game, with one shielding the other from liability.

Others raise concerns about making businesses liable for the practices of e-mail marketers they engage, arguing that they cannot control such practices, and that they rather than the real culprits will end up being the targets of anti-spam lawsuits simply because of their deep pockets. California considered, but did not adopt, a provision allowing actions against the business or individual that hired the e-mail sender. The provision came under attack by businesses who argued that they should not be held liable for problems with the address lists of marketers.

⁷⁰ Both class actions and statutory damages are meant to facilitate lawsuits. Depending on the quantum of statutory damages, a successful class action combined with statutory damages could annihilate a defendant, rather than lead to corrective practices.

⁷¹ Matthew B. Prince, *How to Craft an Effective Anti-Spam Law*", Paper prepared for the ITU World Summit on the Information Society (WSIS) thematic workshop on countering spam (July 2004).

CAUCE Canada withdrew its demands for a statutory right to sue the beneficiaries of spam because of a concern that no matter how certain the sender is that its list is “clean”, there will always be a risk that consent is lacking for a very small fraction of recipients. For example, a sender may send 24 million email newsletters on any given day containing as part of the message an advertisement from a third party business. If the sender were lacking consent for as few as 1% of those newsletters, the advertiser would still be liable for 240,000 messages. Since the proposed law provided for statutory damages, the risk to the advertiser would be too great to continue to advertise. Note that CAUCE’s concern exists only with a consent-based cause of action, and could be addressed via a “pattern or practice” requirement such as in the US *CAN-SPAM Act*.

Nature of the Forum

Consumer litigation behavior is highly sensitive to procedural complexity, timeliness and expense, suggesting that less formal forums may prove more attractive venues to a consumer considering bringing an anti-spam action. If a private right of action is meant to be used by individual plaintiffs, such plaintiffs should be able to bring their actions in provincial small claims courts. Even better from an access-to-justice perspective would be the establishment of less formal and onerous administrative processes by the CRTC or the Privacy Commissioner, were their governing statutes amended to permit the ordering of remedies.

Remedies

Without statutory damages, an anti-spam private right of action is unlikely to be used. Damages in such cases are difficult to prove, and may be insignificant. As noted by one expert,

"Many private organizations are already dedicated to tracking down spammers. If these organizations and other enterprising individuals are rewarded with a small fee from governments they may, in effect, serve as private bounty hunters for prosecutors. While it seems unlikely that such a system alone would be sufficient to deal with the spam problem, so long as negative impacts to society are minimized, and the fee paid to the bounty hunters is lower than the costs prosecutors would normally bear to identify spammers, such a program may assist in creating an effective anti-spam regime."⁷²

Every private right of action against spam in the US provides for statutory damages. The amounts of damages range from \$10 to \$10,000 per message or up to \$35,000 per day. CAN-SPAM provides for statutory damages of \$100 per message for false or misleading messages or \$25 per message violating other provisions to a maximum of \$1,000,000. Washington state law provides for \$500 per spam; this model was recommended by two of the experts we consulted. Lower amounts than this are unlikely to encourage lawsuits. The rationale behind selecting a value should be to set an amount low enough to

⁷² *Ibid.*, p.9.

discourage frivolous lawsuits but high enough to sufficiently reward plaintiffs and deter spammers.

Two of the experts we consulted pointed to the success of the anti-junk fax provisions of the US federal *Telephone Consumer Protection Act of 1991* in slowing down the rate of unsolicited fax transmissions in the USA. According to them, a key factor in this statute's success (in addition to its availability for use by anyone) is its provision for statutory damages.

Some commentators have argue that statutory damages in the hundreds of dollars are an insufficient incentive to private litigators, and that a significant "bounty" (e.g., \$100,000) for successful spam-hunters is likely to have more success. Such an approach has yet to be adopted. The FTC considered it earlier this year and found that the persons most likely to be able to identify spammers – insiders – may be reluctant to come forward even with high-dollar rewards.⁷³ It concluded that "the benefits of a reward system remain unclear".

In addition to damages, there is general agreement that injunctions should also be available to plaintiffs in anti-spam lawsuits.

Conclusions

A private right of action against those responsible for spam is one possible component of a broader legal toolkit in the fight against spam. If adopted, it should be treated as complementary to state enforcement of anti-spam laws, and should in no way be used as an excuse for less government action than would otherwise be the case. It should also be designed in such a way as to limit the potential for frivolous lawsuits, anti-competitive actions cloaked in the guise of a spam lawsuit, and extortionary actions against *bona fide* businesses who have merely slipped up.

Current private rights of action under Canadian law are unlikely to be used in the fight against spam, for a number of reasons. A new statutory private right of action specific to spam could be made more attractive to potential plaintiffs by providing for causes of action specific to spam (e.g., falsified headers, deceptive subject lines, non-functioning return address), by making liable businesses who knowingly promote their goods or services via spam (as well as the senders of spam), and by providing for statutory damages as well as injunctions.

The US has the most experience with private rights of action in the spam context, but it is still too early to tell whether such actions have had any impact on spam. In any case, it is difficult, if not impossible, to judge the effectiveness of private lawsuits in deterring spam: even if rates of spam continue to rise, they might have risen faster in the absence of such actions.

⁷³ See www.ftc.gov/opa/2004/09/bounty.htm