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Technology Law Alert

## *Unsolicited Commercial and/or Bulk Electronic Mail: Is "Spam" Exposing Your Company To A Lawsuit?*

### *You Should Read This Advisory If:*

- Your company uses direct marketing, including commercial and/or bulk electronic mail advertising ("E-mail Ads") in the course of promoting its goods and services.
- Your company has purchased a database of contact information for use with E-mail Ads.
- Your company intends to take advantage of direct marketing opportunities presented by short messaging service ("SMS") on mobile phones, pagers and PDA devices.<sup>1</sup>
- Your company is an Internet Service Provider ("ISP") that transmits E-mail Ads to subscribers.

### *E-mail As a Marketing Tool*

E-mail offers businesses the ability to solicit millions of potential consumers at a fraction of the cost of traditional direct marketing techniques (such as telephone "cold calling" or bulk postal mailings). This technology has resulted in an explosion of direct marketing via e-mail. However, the proliferation of E-mail Ads has prompted the enactment of "anti-spamming" legislation in at least 21 states as well as several individual member states of the European Union. Numerous lawsuits between spammers, ISPs and private individuals have followed.

### *Anti-Spamming Litigation*

Because there is no current United States federal law prohibiting or limiting spam, there is an absence of uniformity among different jurisdictions as to what constitutes spamming. The legal elements required to prove "illegal" spamming are neither uniform nor clear: some states prohibit only unsolicited commercial e-mail, while others restrict unsolicited bulk e-mail as well as commercial e-mail. Unfortunately, the definitions of "commercial" and "bulk" e-mail are even more inconsistent.

Likewise, the circumstances under which spamming is actionable in different jurisdictions is not uniform. Some states declare spam unlawful only if it is sent via a provider's service or equipment located within the forum state, while others apply liability to messages sent into the state if the sender knew that there was a "reasonable possibility" that the recipient was in the forum state. Recent litigation in Colorado suggests that some states' anti-spamming legislation may be extended to SMS messages so as to effectively prohibit "wireless spamming".

Consequently, companies that utilize direct marketing via e-mail, whether by traditional means or now via wireless mobile phones, pagers or PDA devices, face uncertainties as to the

<sup>1</sup> Currently, SMS allows for text messaging up to approximately 130 characters (and thus makes possible wireless or "cell phone" spam).

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legality of their actions. The same direct electronic marketing activities that may be “legal” in one state (e.g., New York, which is perhaps the largest advertising market in the world and does not prohibit spamming), may trigger civil liability (including actual and statutory damages) as well as criminal penalties in other states (e.g., Delaware, which enforces perhaps the most restrictive anti-spamming laws).

## **Summary of Anti-Spamming Laws:**

- At present, 21 states have enacted anti-spamming laws: Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Louisiana, Missouri, Nevada, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Washington, West Virginia, and Wisconsin.
- Some states provide a private right of action for individuals and ISPs against spammers, including recovery of actual damages, statutory damages (based on the number of messages transmitted), and/or treble damages, plus attorneys’ fees & costs.
- Many states’ anti-spamming laws allow state attorneys general to file suit to impose monetary sanctions and criminal penalties.
- Other state laws eliminate or limit the civil liability of ISPs and/or e-mail service providers that adopt and implement certain terms, conditions, or technical measures with the intent to prevent or prohibit the origination or transmission of unsolicited E-mail Ads.
- Many states’ laws prohibit the sale, distribution, or possession of “spamware” - software that one can use to send bulk e-mail.
- The European Union does not uniformly regulate spam, but many individual member states, including Finland, Germany, Italy and Austria, currently have laws prohibiting forms of unsolicited commercial and/or bulk e-mail. Several other foreign countries have laws or pending legislation that regulate spam.
- Current U.S. federal law prohibits sending unsolicited advertisements by facsimile. Lawsuits have been filed attempting to extend the federal “junk fax law” to include transmissions sent via e-mail.
- The Federal Trade Commission may impose sanctions against originators of spam messages involving fraud or misrepresentation, while United States Postal Inspectors may investigate suspicious e-mail inviting replies to a United States mail address.
- Legal theories such as trespass, forgery, misappropriation, nuisance and deceptive trade practice and consumer protection laws have also been used as a basis for causes of action in the area of spamming.

*If you have any questions regarding this Technology Law Alert or the other services that Holland & Hart LLP provides, please contact Matthew Abell at 719-475-7730 or at [mabell@hollandhart.com](mailto:mabell@hollandhart.com).*

## **Tips for Minimizing Liability**

While most state and international anti-spamming laws exclude from liability those situations where the sender has a pre-existing business or personal relationship with the recipient, anti-spam-related laws vary widely between states and foreign territories. Accordingly, companies carefully should consider and consult applicable forum and nexus jurisdiction laws prior to undertaking any marketing campaigns via e-mail. Holland & Hart LLP routinely advises its clients on how to eliminate legal liability and financial exposure associated with electronic commerce and direct marketing. To this end, we have included with this Technology Law Alert a list of tips to aid your company in avoiding disputes related to the use of E-mail Ads. This tip sheet may be used in conjunction with your company’s overall direct marketing compliance program to help demonstrate that your company has taken steps to comply with applicable anti-spamming laws.

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### **Compliance Tips For Direct Marketing Via Commercial and/or Bulk E-Mail**

The following precautions, when used in conjunction with a comprehensive direct marketing compliance program, may help minimize potential anti-spamming exposure and related liability:

- Know the location of your e-mail provider's offices and equipment and of all potential recipients. Review the anti-spamming laws of those jurisdictions.
- Monitor applicable federal and state anti-spamming laws, as new laws are likely to be enacted and existing laws likely will be subject to change.
- Consider limiting E-mail Ads to recipients with whom you have an existing business or personal relationship.
- Avoid buying, distributing, or using "spamware".
- Identify all E-mail Ads as such in the subject line and provide in a clear and conspicuous manner your legal name, address and originating e-mail address.
- Include a notice that the recipient may decline to receive additional e-mails and provide a mechanism allowing recipients to easily and at no cost remove themselves from your e-mail address lists.
- Include an easily identifiable toll-free telephone number that recipients can call to "opt out" of receiving further E-mail Ads.
- Promptly remove from your mailing list recipients who "opt out" or otherwise notify you of their objection to E-mail Ads.
- Identify yourself and do not misrepresent any information in identifying the point of origin or the transmission path of the e-mail. Do not falsify headers or domain names.
- Do not use the e-mail address or domain name of a third party in the return address field without written permission of the third party.
- Include only true statements in your E-mail Ads.
- Obtain appropriate representations, warranties and indemnifications from sellers of electronic mailing lists.
- Consider obtaining permission from targeted recipients by a pre-mailing notice asking whether the recipient would like to receive E-mail Ads.
- Obtain any necessary permissions from your ISP before sending unsolicited E-mail Ads.
- ISPs should consider implementing terms and conditions of service and related technical measures to prevent or prohibit the origination or transmission of unsolicited E-mail Ads.

## Looking Out for Our Clients

*The Technology Practice Group's Quarterly Technology Law Alert*

*Our technology lawyers are leading practitioners in the areas of equipment and software development, procurement, licensing, Internet, and e-commerce.*

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**HOLLAND & HART**<sup>LLP</sup>

*The Law Out West*<sup>SM</sup>

www.hollandhart.com

Attorneys at Law  
Technology Practice Group  
Suite 3200

555 Seventeenth Street  
Denver, Colorado 80202-3979

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**Dan Glivar**  
303-295-8322  
Denver  
dglivar@hollandhart.com



**Kevin Crandell**  
303-295-8052  
Denver  
kcrandell@hollandhart.com



**Lise Carney**  
303-295-8377  
Denver  
lcarney@hollandhart.com



**Wendy Pifher**  
719-475-6465  
Colorado Springs  
wpifher@hollandhart.com



**Matt Abell**  
719-475-6496  
Colorado Springs  
mabell@hollandhart.com



**Brad Wiskirchen**  
208-383-3914  
Boise  
bwiskirchen@hollandhart.com