

Marketing in the US - A privacy progress report

Speaking at PL&B's Annual International conference in July, **Ron Plesser** of US law firm Piper Rudnick outlined the recent legislative steps being taken to protect consumers from unwanted marketing communications. Report by **Professor Colin J Bennett**.

The task of explaining US data protection law to a European audience is a difficult one. The bewildering complexity of federal and state statutory provisions stands in stark contrast to the European approach, typified by comprehensive data protection legislation applying to both private and public sectors. Over the years, American commentators have strived to provide an accurate and up-to-date picture of a fluid and complicated legal environment, and to dispel European misconceptions that there are no regulations on how American companies can treat personally identifiable data.

The sectoral approach to data protection in the private sector has its origins in the 1970s, and the report of the US Privacy Protection Study Commission, for which Ron Plesser was the General Counsel. Since then, a string of privacy laws have been enacted to cover specific sectors of the economy. The most important are the Fair Credit Reporting Act, the Electronic Communications Privacy Act, the Children's Online Privacy Protection Act, the Gramm-Leach-Bliley provisions on financial data, the Drivers Privacy Protection Act, and of course the Health Insurance Portability and Accountability Act.

These, and others, all influence the use and disclosure of marketing information. New uses for marketing and reference information are also being proposed under provisions such as the Patriot Act, the Terrorist Information Awareness (TIA) project, and the CAPPSSII programme (see *PL&B Int*, Feb 2003, p.8 and May/June 2003, p.11). The challenge of understanding the rules for the collection, use and dissemination of personal data for marketing purposes is as daunting as ever.

FEDERAL DO-NOT-CALL LIST

Ron Plesser's presentation first concentrated on recent efforts to develop a Do-Not-Call Registry. Announced by the Federal Trade Commission (FTC) in December 2002, the Do-Not-Call Implementation Act was enacted in January 2003. The Do-Not-Call provisions will become effective on October 1st 2003.

Consumers began registering in July with 10 million people signing up to the opt-out list during the first week of registration. And, it is estimated that a total of 60 million people will ultimately join the service.

According to Plesser, this experience is testament to the

of the telemarketers' rights of free speech. Three separate cases, filed by various telemarketers and their professional trade associations, are currently pending in lower federal courts.

COMBATING E-MAIL SPAM

Plesser then turned his attention to the thorny issue of how to prevent unsolicited e-mails (spam). Most spam originates from "dictionary attacks" (the generation of random lists of e-mail addresses) or from the harvesting of addresses from websites, newsgroups, listservers and so on. We hear several quite frightening, if unreliable, statistics about spam. For instance it is often asserted that only 200 spammers

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effectiveness of "opt-out" methods for ascertaining customer consent. Any campaign to sell goods or services through interstate calls must comply with these regulations and take steps to remove those names and addresses from their marketing lists. Telemarketers cannot place calls to anyone on the do-not-call list unless there is consent, or an established business relationship.

But there is a chance that the US Supreme Court could respond to claims by the telemarketing industry that the freedom of a homeowner to regain some privacy against these unwanted calls is an unconstitutional abridgement

account for 70-80 per cent of the messages generated. America Online (AOL) has reported that 60-70 per cent of its traffic is spam. Everyone, including direct marketers, can agree that this menace needs to be curtailed. The question is what to do.

Plesser reported that there are now more than 30 state laws governing spam, which so far have survived constitutional challenges. The California spam law is probably the most influential. This legislation stipulates that all messages must include opt-out instructions and contact information. The senders must honour opt-out requests, and the text 'ADV'

must be inserted into the subject line of the e-mail. But the law applies only to e-mails delivered to Californian residents via a provider's facilities located in California.

So the interstate and international dimension of the problem has convinced the US Congress of the need for federal legislation. It is widely expected that spam legislation will pass the Congress in the next legislative session. There are various bills currently in both House and Senate, the most important being the Wilson Bill in the House (HR 2515) and the Burns/Wyden Bill (S. 877) in the Senate. The key components are: a required opt-out; criminal penalties for fraud and deception; a notification that the message is an advertisement; and enforcement by Internet Service Providers, state Attorneys General and the FTC. The bills do not generally allow a consumer right to sue.

There are, however, differences between Senate and House versions, particularly with regard to scope: the Senate bill applies to "unsolicited messages" whereas the House Bill applies to all commercial messages. We need to wait until later this year to see how these various differences will be reconciled.

At the end of the day, however, the most important action against spam might be the recent litigation against some prominent "spammers" launched by Microsoft. There is common agreement that this problem will not be eliminated unless there is a concerted international effort, involving both government and private sector organisations.



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CONFERENCE SPEAKER: Ron Plessler is a partner at Washington-based law firm, Piper Rudnick. For further information: www.piperrudnick.com



events diary

E-business - A Regulatory Nightmare?

October 9, London, UK

A one-day event examining UK data protection issues such as data transfers, employee monitoring, e-mail marketing and security policies. The event will also look at additional regulation affecting online businesses, such as the E-commerce and Copyright regulations.

Contact: E-business Regulatory Alliance

Tel: +44 (0)1491 411 642

Fax: +44 (0)1491 579 835

E-mail: events@e-ra.org.uk

Website: www.e-ra.org.uk

8th Symposium of Privacy and Security

October 21-22, Zurich, Switzerland

Issues covered include identity management, anonymisation and the development of data protection within Europe. The conference also features an exhibition of privacy and security products with a series of lectures provided by exhibitors.

Contact:

Tel: +41 (61) 270 1770

Fax: +41 (61) 270 1771

E-mail: symposium@privacy-security.ch

Website: www.privacy-security.ch

IAPP Privacy and Data Security Academy and Expo

October 29-31, Chicago, United States

The International Association of Privacy Professionals (IAPP) presents a comprehensive three-day event, featuring expert speakers on issues such as healthcare privacy, financial privacy, security, technology, marketing privacy and spam issues.

Contact: IAPP

Tel: +1 215 545 8990

Fax: +1 215 545 8107

E-mail: info@privacyassociation.org

Website: www.privacyassociation.org

Compec 2003

October 30-31, London, UK

Compsec 2003 aims to map out the near future of IT security, offering a practical guide to action on current and upcoming threats. It addresses some of the frameworks of information security and looks at the latest technologies. The conference is co-located with Biometrics 2003 and ID Smart: Cards for Government and Healthcare, and is supplemented by an exhibition area.

Contact: Nina Woods, Compsec 2003 Conference Secretariat, Elsevier

Tel: +44 (0) 1865 843297

E-mail: n.woods@elsevier.com

Website: www.compsec2003.com

The Data Protection Act Explained - Basic Training for Beginners

September 24 - London; October 29

- Bristol; November 26 - Edinburgh;

December 17 - London

Privacy Laws & Business consultant, Sandra Kelman, presents a series of training workshops aimed at anyone who requires a basic course explaining the fundamentals of the UK Data Protection Act.

Contact: Sandra Kelman, Privacy Laws & Business

Tel: +44 (0) 208 423 1300

E-mail: sandra@privacylaws.com

Website: www.privacylaws.com/whats-newframe.htm

How to use the UK Information Commissioner's DP Audit Manual

December 8-9 - London; February

9-10, 2004 - Leeds; May 10-11, 2004 -

London; July 6-7, 2004 - Cambridge

Privacy Laws & Business is conducting a series of two day interactive audit workshops across the UK or in-house.

Contact: Shelley Malhotra, Privacy Laws & Business

Tel: +44 (0) 208 423 1300

E-mail: shelley@privacylaws.com

Website: www.privacylaws.com/whats-newframe.htm