

SPAM LAWSUITS

By Ben Chestnut and Rob Hassett

Rob is an attorney with Casey Gilson in Atlanta. He practices in the areas of corporate, technology (including internet related) and entertainment law. His website is www.internetlegal.com.

C'mon, it's just an email. What's the worst that can happen?

Here's a listing of email related lawsuits that have made the headlines over the last few years. Some of the violations include misleading subject lines, failure to include mailing addresses, failure to remove opt-outs from a list within 10 business days, improper use of the word "free," overaggressive affiliate marketers, failure to disclose that email was "sexually explicit" and more.

Kodak Imaging Network, Formerly Ofoto, Inc. \$26,331

*"The Federal Trade Commission has charged two Internet marketers with violating the CAN-SPAM Act by **failing to offer an opt-out method** or honor consumers' right to opt out of receiving future marketing mailings within 10 days of making the request. One marketer **also failed to include a valid physical postal address**, which also is required by the CAN-SPAM Act. Settlements with the marketers prohibit future violations of the Act and provide for civil penalties totaling more than \$32,000."*
<http://www.ftc.gov/opa/2006/05/ofotokodak.shtm>

Tip: It's been said that the Kodak incident was an accident, where someone mistakenly sent an email campaign to their list before it was complete with unsub links, physical mailing address in footer, etc. Simple, innocent mistakes can be costly.

Ice.com Fined \$6,500

The FTC also charged that ICE.com sent more than 6,000 e-mail messages to consumers **who had previously requested not to receive** future commercial e-mail messages from the company.
<http://www.ftc.gov/opa/2006/05/ofotokodak.shtm>

Tip: This can happen if you're not cleaning your lists properly, and accidentally send to people who previously opted-out.

Jumpstart Technologies fined \$900,000

"These defendants intentionally used personal messages as a cover-up for commercial messages," said Lydia Parnes, Director of the FTC's Bureau of Consumer Protection. "Deceptive subject lines and headers not only violate the CAN-SPAM Act, but also consumer trust."

<http://www.ftc.gov/opa/2006/03/freeflixtix.shtm>

Tip: In your effort to make people open your emails and "get the sale" it's important to not get over creative with your subject lines to the point of deception.

YesMail Fined by FTC for \$50,717

"The FTC's complaint alleges that Yesmail's spam filtering software filtered out certain "reply to" unsubscribe requests from recipients as "spam," which resulted in Yesmail failing to honor unsubscribe requests by sending thousands of commercial e-mail messages to recipients more than 10 business days after their requests."

<http://www.ftc.gov/opa/2006/11/yesmail.shtm>

Tip: Using the "reply-to us and we'll remove you" method is legal, but if those replies get accidentally deleted by your company's spam filter, you could get sued. Have you ever seen a legit email get flagged by your company's spam filter? Safer to use a link that instantly removes people from your list.

Adteractive Inc. will pay \$650,000 to settle charges with FTC

"The FTC has offered some guidance on how to use the word 'free' in advertising," he said. "At the end of the day, we're actually pleased to get this resolved."

<http://www.ftc.gov/opa/2007/11/free.shtm>

ValueClick to Pay \$2.9 Million to Settle FTC Charges

"According to the FTC, ValueClick subsidiary Hi-Speed Media used deceptive e-mails, banner ads, and pop-ups to drive consumers to its Web sites."

<http://www.ftc.gov/opa/2008/03/vc.shtm>

Tip: Nothing sells like free. But are there any catches to your offer? If so, using "free" in your subject line might be seen as deceptive.

Optin Global Fined \$475,000

In April 2005, the FTC and the Attorney General of California charged that the defendants used third-party affiliates or "button pushers" to send spam hawking mortgage loans and other products and services.

<http://www.ftc.gov/opa/2006/04/optin.shtm>

Tip: Do you use 3rd party affiliate marketers to sell your product? Do you closely monitor how they send *and collect* email addresses?

Cleverlink Trading Settles for \$400,000

*The FTC complaint states that the spam contained misleading headers, deceptive subject lines, did not contain a valid physical postal address and **did not disclose that the e-mail was sexually explicit.***

<http://www.ftc.gov/opa/2006/09/spammers.shtm>

Tip: Could the contents of your emails be construed as “sexually explicit”? Are you marking your subject lines appropriately?

And it's not just the government

ISPs are using the violation of CAN-SPAM rules as ammunition against senders of unwanted email. Could your emails piss someone off enough to do this to you?

Anti-Spammer Goes Ballistic

Imagine responding to what you believe is a legitimate request for e-mail submitted through your Web site and ending up in the crosshairs of a lawsuit-happy anti-spam crusader.

http://directmag.com/email/news/anti-spammer_ballistic/

Tip: Even if you're totally innocent, could you imagine the legal expense and hassle of dealing with an irate anti-spammer? Have you considered using confirmed opt-in in order to keep proof of opt-in records for every recipient?

Kraft Sued over Alleged Gevalia Spam

Wagner, who filed the suit in federal court in San Francisco, claims he's entitled to \$11.7 million in compensation under federal and state anti-spam laws.

<http://www.msnbc.msn.com/id/7602542/>

Tip: Gevalia is a subsidiary of Kraft. Gevalia had 3rd party affiliates sending emails on their behalf. If you use “3rd party affiliates” in any way (resellers, distributors, etc), do you know how they're collecting and managing email lists?

Not-for-Profits Not Immune

[According to the FTC as expressed in its comments to the CAN-SPAM Act], “CAN-SPAM may apply to a trade association's email messages promoting a seminar because

a seminar may be considered a "commercial product or service" if attendees must pay an admission charge."

<http://www.ftc.gov/os/fedreg/2005/january/050119canspamact.pdf>

Tip: It's true that the CAN-SPAM act only applies to "commercial" email. However, being a not-for-profit does not make your email non-commercial. If you are trying to sell something, you must comply.

Affirmative Consent Does Not Create an Exemption from the Requirements of the CAN-SPAM Act

All terms other than the requirement that your email include "clear and conspicuous identification that the message is an advertisement or solicitation" apply even if the recipient has affirmatively consented to receiving the email.

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ187.108.pdf

Section 5(a)(5) of the CAN-SPAM Act

Tip: Even if you have express permission to send emails to customers and potential customers you still must make sure your email complies with every other requirement of the CAN-SPAM Act other than providing clear and conspicuous notice that the message is an ad or solicitation. For example you still must include an opt out mechanism, a physical address and accurate header and subject information.

And more lawsuits...

- <http://spamlinks.net/legal-action.htm> - archives
- <http://www.cbsnews.com/stories/2003/05/08/tech/main552866.shtml>
- <http://www.engadget.com/2008/09/23/timberland-and-gsi-cough-up-7-million-to-settle-text-spam-lawsu/>

More Takeaways

- Understand the rules of CAN-SPAM. Consult your lawyer. Consult your physician before you consult your lawyer. Whatever. Just consult someone and learn the rules, because the rules are how you can get sued:
<http://www.ftc.gov/spam/>
- By the way, different countries have different spam laws. Google 'em.

- Learn the ISPs' rules too. The rules of CAN-SPAM are not the end of it. If you send bulk email (even if it's permission-based) to recipients who have email accounts at major ISPs, you need to abide by the ISPs' rules too. They can usually be found at their postmaster pages (for example, postmaster.aol.com). See: <http://postmaster.aol.com/guidelines/bestprac.html>
- If you send emails through a 3rd party email marketing service, there are usually even stricter rules than CAN-SPAM, so that they can abide by rules of different countries, different ISPs, and different ISPs in different countries. Don't send messages to any emails unless you have proof you have opt-in permission from those recipients. If that sounds unreasonable or unacceptable to you, send the emails yourself, from your own servers. But first, start reading from the top of this document again. You need a refresher course.
- Never send emails to purchased lists (or lists you rent, or lists that a local group gives you, lists of attendees from a tradeshow, lists from the local Chamber of Commerce, lists that the big, major donor for your non-profit gave you). If you want to send emails to someone else's list, pay them to send the email to their subscribers on your behalf. That way, no surprises.
- Does your sales team know about all this? Before they go on their next trip to that big tradeshow and start collecting business cards to enter into your company CRM, you need to have measures in place to keep "prospects we might want to contact" segmented out of your "people who actually gave us permission to email them" lists.