OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO.   P024407

TITLE   SPAM PROJECT

PLACE   FEDERAL TRADE COMMISSION
              600 PENNSYLVANIA AVENUE, N.W.
              WASHINGTON, D.C. 20580

DATE   MAY 1, 2003

PAGES   1 THROUGH 324

FTC SPAM FORUM -- DAY TWO

SECOND VERSION

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

```
 1                    FEDERAL TRADE COMMISSION

 2                         I N D E X

 3
```

```
 8

 9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25
```

P R O C E E D I N G S

- - - - -

1   MR. HUSEMAN: We want to go ahead and get

2   started this morning. Thank you all for arriving back

3   for day two.

4   Before we begin, I just want to make a few

5   housekeeping announcements. Remember, if you have a cell

6   phone or other device that beeps, make sure to turn it

7   off, please.

8   Remember that the exits are directly behind you

9   and then out towards the front where you came in.

10   Again, we would like to thank the companies who

11   have provided us refreshments this morning. Those

12   include AOL, AT&T Wireless, EarthLink, ePrivacy Group,

13   Microsoft, SpamCon Foundation, Words to the Wise and

14   Yahoo!.

15   Before we begin day two, I would like to

16   introduce Commissioner Mozelle Thompson, who will start

17   off the day by giving us introductory remarks.

18   Commissioner Thompson became a Commissioner at the FTC in

19   1997. He's Chairman of the OECD's Committee on Consumer

20   Policy, where he leads the United States delegation, and

21   during his time at the Commission, he has been very

22   involved in technology, privacy and other information

23   practices, including the issue of Spam, and he's done a

1   great deal of important work in those areas.

2   And, just specially, we would also like to

3   thank him from the perspective of putting on this forum.

4   He has provided us with a great deal of valuable advice

5   and input in making this event possible. So, we would

6   like to thank him in that regard as well.

7   I now introduce Commissioner Mozelle Thompson.

8   **(Applause.)**

9   COMMISSIONER THOMPSON: Good morning. Welcome

10   all of you, and for those of you from out of town,

11   welcome to allergy season in Washington.

12   I wanted to tell you how happy I am to see you

13   all here at the second day of the FTC's Spam Workshop.

14   As you know, my name is Mozelle Thompson, and I'm one of

15   the Commissioners here, and I hope that you -- first of

16   all, I think you should give yourselves a round of

17   applause, because -- for just being here, attending and

18   participating, because I think that in the future we'll

19   look back on these three days as one of the most

20   significant events, international events that deals with

21   the subject of Spam. So, I want to thank you all for

22   being here.

23   **(Applause.)**

24   COMMISSIONER THOMPSON: You know, one of the

25   principal purposes of having this workshop, in case it

1   wasn't that clear, is to provide the Commission with the

2   best and latest information about Spam and the problems

3   of unsolicited e-mail and that I hope all of you will

4   learn as much as I expect to learn from the events of

5   these three days.

6   Now, yesterday we attempted to define what Spam

7   is, other than the fact that it's a very popular meat out

8   in Hawaii, and I think that that definition was a diverse

9   definition that we heard yesterday when we start to

10   consider what types of communications we should put under

11   the title "Spam" and what benefits and problems they pose

12   for consumers, businesses and governments. We also heard

13   from experts about the mechanics of how Spam works.

14   Now, today we'll continue our work by

15   discussing the economics of Spam. I hope after this

16   morning, we will all become more knowledgeable about the

17   real costs of unsolicited commercial e-mail. And these

18   costs go well beyond the simple cost of sending a

19   message. They also include the costs of individuals

20   reading and disposing of unwanted e-mail and the cost of

21   carrying Spam on a network as well as potential lost

22   opportunities that would -- of bandwidth that could be

23   provided for perhaps more useful and important purposes.

24   We'll also talk about the market and

25   competitive forces that can affect the value we ascribe

1   to Spam. In thinking about all these costs, however, I

2   ask that you also consider the larger costs to the

3   marketplace to the extent that unsolicited e-mail can

4   undermine consumer confidence and feed public distrust of

5   the internet.

6   Finally, we will finish today's sessions by

7   looking forward at best practices and the next frontier,

8   or what many would say is already the current frontier,

9   the wireless marketplace.

10   So, to assist in our discussion, I'm reminded

11   that this might be an illustration of the old adage what

12   the problem is depends on where you sit, and I'm sure

13   that our panelists today will give us a lot of insight as

14   to how we should think about Spam.

15   So, thank you very much for being here, and

16   without further delay, we have our panel.

17   **(Applause.)**

18   MR. FRANCOIS: Thank you, Commissioner

19   Thompson, for not only your remarks but for your efforts

20   in the FTC's work on Spam.

21   My name is Renard Francois. I'm a staff

22   attorney with the Division of Marketing Practices at the

23   Federal Trade Commission and also pitching in a little

24   bit with the Spam Forum. So, we have a distinguished

25   panel here, and as Commissioner Thompson said, we are

1   going to talk about the costs and benefits of Spam, and

2   part of this panel, what we're going to do is talk about

3   dollars, but we're also going to expand the term of

4   "cost" to include the potential impact on e-mail

5   marketing and the potential impact on e-mail as a means

6   of communication, but we'll also include in the

7   definition of "cost" opportunity costs and loss to a

8   business' reputation that unsolicited e-mail may have.

9   One of the things that we recognized yesterday

10   was -- we focused on Spam and a lot of it on falsity and

11   people who intentionally manipulate systems to try and

12   maintain an illusion of anonymity, try and maintain

13   anonymity by falsifying where the e-mail is coming from,

14   but one of the things that we struggled with in our

15   conference call and the issues that we'd like to at least

16   be aware of throughout the panel is that it's not just

17   deceptive Spam that affects many of these panelists, and

18   it's not just deceptive Spam that affects e-mail as in

19   e-mail marketing and as a means of communication, but it

20   is the volume as well.

21   So, to some degree, I don't know if we are

22   going to get into a lot of distinctions between

23   legitimate bulk marketers and bulk marketers who engage

24   in deceptions and falsity.

25   One of the things that we want to start out

1   with that I've sent all the panelists is Mail Shell, a

2   company who was kind enough to forward us a study that

3   they had done, and copies of the study are outside in the

4   back on the table, and I think there's also a

5   representative here who may answer any questions that you

6   may have about it, but they did a Spam Catcher Attitude

7   Survey, where they surveyed 9,000 -- approximately 9,321

8   individuals about their attitudes towards Spam, and out

9   of the 1,118 responses that they received, I think one of

10   the things that we'll start the conversation with is,

11   that leapt out at me, is that 8 percent of people that

12   use disposable e-mail addresses, which we presume are

13   somewhat tech-savvy and maybe not the everyday, average

14   consumer, but approximately 8 percent of them have

15   indicated in the study that they have made purchases

16   based on the Spam that they receive. And I just want to

17   throw that out to some of the panelists to see what their

18   responses and reactions are and probably direct it

19   specifically toward Mr. DiGuido, CEO of Bigfoot

20   Interactive, and Ms. Laura Betterly as well, and then

21   probably Laura Atkins.

22   MR. DiGUIDO: Thanks, Renard.

23   Just to make it very clear, the role of Bigfoot

24   Interactive in the marketplace today is we work with many

25   of the Fortune 2000 companies in the industry who are

1   reputable providers of goods and services to the economy.

2   These are folks who are using e-mail marketing as one of

3   the ways in which they communicate to their target

4   audience and to their current customers, with their

5   information, with services that they find for us.

6   What's interesting about this study that 8

7   percent of folks actually purchase something via Spam is

8   if you think about the role of advertising in the U.S.

9   marketplace today, $228 billion spent annually in the

10   year 2003, forecasted, by marketers selling products to

11   customers, customers and/or prospects, the e-mail

12   marketing channel isn't just another channel of

13   distribution in terms of ways in which you can intersect

14   your product with a potential prospect.

15   When you think about the average newspaper or

16   the average television station or the average magazine,

17   while you're going through that publication or through

18   that television station, you're being inundated with all

19   types of commercial messages, and you're browsing. You

20   pick certain messages and you say that's of relevance to

21   me, and others that are not relevant to me. You take

22   action on those that are relevant, don't take any action

23   on those that are not.

24   The e-mail delivery channel is a similar

25   channel. So, it's not surprising that a percentage of

1   folks who are browsing, using e-mail, have been exposed

2   to products and services that are of interest to them and

3   that they have actually taken those actions. It's

4   consistent with other media that are out there. So, as

5   much as we would like to say that, you know, everything

6   we receive from an advertising standpoint is something we

7   solicit, we are actually being targeted by marketers from

8   an advertising perspective based on our profile, based on

9   our interests and are exposed to advertising that

10   sometimes we're interested in and we do take action. So,

11   I think the e-mail channel is just indicative of that

12   type of behavior.

13   MR. FRANCOIS: And before we move on to Mrs.

14   Betterly, I just want to ask you a couple questions.

15   Is there any way to compare this response rate

16   to unsolicited e-mail and compare that to unsolicited

17   regular mail in terms of the percentage of people that

18   receive unsolicited mail in their mailboxes, how many

19   make purchases based on those unsolicited mails, compared

20   to the people who make purchases --

21   MR. DiGUIDO: It's really tough, Renard, to do

22   that, because where we spent most of our time with

23   reputable marketers is having those marketers understand

24   the profile of their potential prospect and trying to use

25   e-mail -- and this is where the distinction happens

1   between e-mail and other broadcast type of media   --

2   through the e-mail channel, the marketer is really given

3   the opportunity to establish a dialogue. There's an

4   exchange of information between that customer and/or

5   prospect over preferences, so marketers are getting much

6   more sophisticated in terms of learning more about what

7   their customers and/or prospects want. With that type of

8   information, they can be much more contextually relevant

9   using e-mail versus offline channels.

10   So, using Spamming, by whatever media we're

11   talking about, whether direct mail or newspapers or print

12   or television, in that general description, there's no

13   real data in terms of one versus the other.

14   MR. FRANCOIS: Okay. Also, you said that

15   marketing was or advertising was approximately a $228

16   billion business, and I was just wondering, was that

17   online advertising, advertising in general, and if it's

18   just advertising in general, how much of the $228 billion

19   is --

20   MR. DiGUIDO: Is e-mail?

21   MR. FRANCOIS: -- online versus -- and e-mail

22   versus pop-ups and stuff like that.

23   MR. DiGUIDO: $228 billion is the total

24   advertising marketplace. Today, the statistic we look

25   at, the e-mail business as a business, is projected by

1   2006 to be anywhere from a $6 to $8 billion piece of the

2   overall pie. So, if you think about e-mail as a

3   communications channel, it is a relatively small

4   percentage of the overall advertising dollars being used

5   in the marketplace today.

6   However, what's incredibly important I think.

7   I have been in the media business for 25 years and sold

8   print advertising, broadcast advertising and so on. This

9   is the fastest-growing channel in terms of consumer

10   acceptance. So, there is no doubt more people -- an

11   average of 2 million users per month going on the

12   internet, more and more as the behaviors change, as the

13   demographic profile of the audience change, more and more

14   gravitating to the e-mail and to the internet channel as

15   a primary channel of information exchange. So, it's

16   incredibly important. It's a relatively small percentage

17   right now of the overall advertising dollars but growing

18   very, very fast.

19   MR. FRANCOIS: Do you know roughly how much the

20   percentage has grown in the past year?

21   MR. DiGUIDO: In terms of advertising dollars?

22   MR. FRANCOIS: Yeah.

23   MR. DiGUIDO: It's probably doubled just in the

24   last year.

25   MR. FRANCOIS: Okay.

1   MR. DiGUIDO: Again, amongst Fortune 2000 types

2   of companies.

3   MR. FRANCOIS: Mrs. Betterly, anything to add

4   about the study?

5   MS. BETTERLY: Well, I do want to just say, I'm

6   actually in agreement with Mr. DiGuido on all points, but

7   the one thing that really needs to be taken a look at is

8   that he works with Fortune 500 companies -- Fortune

9   2000 --

10   MR. DiGUIDO: No, Fortune 2000.

11   MS. BETTERLY: 2000, I'm sorry, I apologize,

12   and my clientele is actually more small entrepreneurial

13   kind of guys, and they don't have an advertising budget

14   for print or to be on TV or to get a billboard and so

15   forth, and a lot of these guys, we pass on very good

16   values to consumers. For example, I have a client who is

17   a manufacturer of PCs, and they don't have an advertising

18   budget of a Dell or a Compaq or a Gateway, and they can

19   give a computer to a consumer, I mean, for $299.

20   It's kind of -- when you look at the dollars

21   that are spent, you -- the value of what you're going to

22   get as an e-mail marketer and going ahead and pushing it

23   that way is a lot less expensive than going the other

24   route. So, it actually has an entrance point for

25   entrepreneurs to see, does that product work, is it

1   interesting to people? And I'm not talking about the

2   same offers that everybody sees, you know, lower your

3   mortgage, you know, things that are kind of customary and

4   everybody goes, oh, God, not another one of these.

5   We try to look for newer guys -- I mean, I

6   have another client who is on Social Security and has

7   written a book about billiards, and he supplements his

8   Social Security with a very small mailing once a month,

9   and he's pretty high maintenance, but we love him, and

10   you know, he gets 30 orders, and he makes, you know, an

11   extra $200 or $300, and that supplements his Social

12   Security. So, we're talking about real people being able

13   to market. Now, that guy could not buy an ad anywhere

14   else or be able to push to people.

15   MR. FRANCOIS: I want to backtrack for a second

16   and then I am going to return to you, Mrs. Betterly, and

17   forgive me if I get people confused, because we have two

18   Lauras and a Lisa, so -- and it's been a long night, so

19   I want to return to Al for a second and, you know, as we

20   all know, the economy has had a downturn, and I just

21   wanted to get your perspective on what impact a slow

22   economy has had on the use of online advertising, and in

23   particular, the use of e-mail marketing.

24   MR. DiGUIDO: Yeah, I think just to carry on

25   the point there and to address yours, the appeal of

1   e-mail marketing has been the fact that the threshold,

2   the barrier that a marketer, whether it's a small to

3   mid-size company or a large company, can intersect

4   between a message and its audience is probably the lowest

5   threshold of any media out there. Not probably, is the

6   lowest threshold. So, for that small to mid-size company

7   to go out and run local spots on TV or radio or in print

8   is going to be cost-prohibitive.

9   What has really accelerated the growth of the

10   e-mail marketing business today is the fact that budgets

11   are tighter. There is not a company that we deal with in

12   the Fortune 500 or 2000 that is looking at larger budgets

13   this year to grow sales, acquire new customers and retain

14   their existing customers. Most of these companies are

15   faced with tighter budgets, smaller budgets, and being

16   asked to stimulate greater sales this year versus last

17   year. So, they are desperate to find much more

18   cost-effective and efficient ways to get their message in

19   front of the consumer.

20   What the beneficial part of the internet is,

21   just at this point, where their budgets are being

22   constrained, the Internet is exploding and providing them

23   a very cost-effective and efficient way to do

24   permission-based contextual messaging. So, during this

25   period of time, our business has actually grown, and the

1   percentage of a reputable marketer's budget that is being

2   targeted to this area is growing exponentially.

3   MR. FRANCOIS: Let me return back to Mrs.

4   Betterly and ask you just a little more specifically

5   about your business and the type -- what you do for your

6   clients in terms of -- how much does it cost in terms

7   -- how much does it cost for you to take the time to

8   craft an advertising campaign with a particular client?

9   How long does it take?

10   MS. BETTERLY: Well --

11   MR. FRANCOIS: Just some more specifics about

12   -- about the cost structure.

13   MS. BETTERLY: -- I would say in general, to

14   actually put together a creative or an advertisement for

15   one of our clients, we don't charge a lot. We charge

16     $250, and we give them a couple of changes in that. We

17   give them a big questionnaire so that we get what they're

18   trying to achieve out of it and whatnot, and we spend

19   time.

20   Now, a lot of our clients will also do that

21   work themselves, but we provide that service, because a

22   lot of the guys that we're dealing with are new and

23   entering the marketplace, you know, for the first time.

24   I don't believe in price-gouging. I mean,

25   we're all -- you know, I'm trying to help guys like

1   myself who are in business for themselves and trying to

2   grow. We don't also charge a lot either, I mean, in

3   conjunction -- of course, we make money with what we do,

4   but I would say depending, you know, on how targeted

5   we're going, because we can take our lists, which are,

6   you know, permission-based, and we can find, for example,

7   major markets like New York or Tampa, and we've done this

8   with several types of -- we find broadcasts for

9   entertainment or new shows and whatnot. I come out of

10   the music business, so I have a lot of contacts there.

11   For example, we've been able to -- with a

12   couple of pilots we've done with a few clubs, where we've

13   been able to pack the club that they have actually not

14   been turned away business, I mean closed for the night

15   because they are at capacity, and people seem to be

16   willing to get that kind of mail also, you know, telling

17   them about events, you know, we worked with an equestrian

18   event down in Florida, and they had their highest sales

19   in 31 years in business.

20   So, we're seeing what is successful and what's

21   not, and frankly, if I look at a campaign and I don't

22   think it's successful or I think it's too similar to

23   other things that are out there, I will turn down the

24   business, because that's not what we're looking to do, is

25   we want to keep people's permission, you know what I'm

1   saying?

2   MR. FRANCOIS: Well, let me jump in and

3   interrupt you and ask you what do you consider to be a

4   successful ad campaign from the perspective of response

5   rates? I know a successful one ideally would be

6   everybody responds to it or everybody purchases the

7   product, but in reality, what is a response rate that you

8   consider to be a successful campaign?

9   MS. BETTERLY: Well, on these broadcasts, I've

10   actually had open-ups where people have looked at it as

11   high as 35 percent, which is very unreal, but because we

12   targeted and the people that were actually targeted

13   wanted to get this information, they looked at it.

14   We have done some where the response rate was

15   less than 1 percent, I mean, opening up, and that was not

16   successful. The big thing is to test it, you know, and

17   when you're talking about e-mail marketing and guys with

18   not a big budget, they don't spend for marketing surveys

19   and what are the buttons and what colors do people more

20   indicate to mean this for them and that for them. So,

21   sometimes it's actually reworking it several times to see

22   where the biggest response is.

23   You know, you'll send out a few and see what

24   that rate is, and you'll try another thing or another

25   idea several times until you get what works. You know,

1   you do it a certain amount of times, and then you look at

2   it and you go, well, this is not the thing, but we try to

3   work along with everybody to see that we get that.

4   MR. FRANCOIS: And let me ask you, you

5   mentioned the fact that on one particular campaign you

6   had 35 percent open-ups. If you could explain what that

7   means and how you all are able to monitor whether the

8   e-mail has been opened up or not.

9   MS. BETTERLY: Well, first of all, we send --

10   well, first of all, the thing that people will see is

11   that it's from -- and it may be events in Tampa or, you

12   know, computer offers or whatever it is, so they kind of

13   get an idea of what it's about, and then there's a

14   subject line. Now, the subject line is relevant to

15   what's inside, and if the subject line has enough

16   information that makes people interested, they'll open

17   up. So, your first indicator of what's what -- and also

18   how good of a list you're dealing with, is the percentage

19   of people that open up.

20   Technically, in HTML, you can put in a pixel so

21   that every time someone opens up the mail, it will count

22   what it is. It's just -- it's part of the technology of

23   it.

24   The second statistic you have, because the goal

25   of an e-mail is actually to get somebody to a landing

1   page, and the landing page is the thing that goes ahead

2   and lets the individual decide if this is something they

3   want to opt into -- want more information, want to

4   purchase or whatever it is -- and that's your second

5   percentage, is out of these guys that looked at what you

6   sent, how many wanted more information from those?

7   And those are -- and then thirdly, of course,

8   out of that, how many people converted to actually

9   buying, et cetera and so on? And by monitoring those

10   three statistics, you're able to tell if something is

11   viable or not.

12   MR. FRANCOIS: I know this may be very

13   difficult, and I didn't kind of put you on notice that I

14   might ask for this, but if you could give us in a general

15   sense -- you gave us the three classifications of

16   numbers that you look at, if you could give us in a

17   general sense, from your advertising campaigns, the

18   percentage of open-ups to the percentage that go to the

19   landing pages and then the percentage that actually

20   purchases.

21   MS. BETTERLY: I would say that it's very

22   probable, if we have a good campaign, to get anywhere

23   from 2 to 8 percent to open-up. Now, the actual

24   click-through itself really varies on the campaign. It

25   really does. Like I told you, my computer offer, every

1   time I send it out, we end up selling 20 to 30 computers,

2   and that's a wonderful -- you know, that's a wonderful

3   campaign, and we're very happy with that.

4   But again, it's hard to say on that, and I'm

5   not trying to be nonresponsive. It's just such a large

6   variable.

7   MR. FRANCOIS: What in your campaigns do you

8   find have the largest response rates or the most

9   successful campaigns out of all that you advertise?

10   MS. BETTERLY: Things that are tech-related,

11   like software, the computers, and the thing I think that

12   actually does the best is the stuff related to

13   entertainment and what is going on entertainment-wise

14   within somebody's local neighborhood.

15   We did a promotion for a show that was being

16   aired on Much Music, and we were trying to see if we

17   could affect the Neilson ratings, and we did. Not much,

18   but we were able to see that there was a difference in

19   those target areas that we sent.

20   MR. FRANCOIS: And I also want to briefly --

21   go ahead.

22   MR. DiGUIDO: Are you mailing -- Laura, are

23   you mailing third-party opt-in on behalf of this

24   audience, right? You don't have your own -- these

25   aren't house files that you're mailing to?

1   MS. BETTERLY: They're both.

2   MR. DiGUIDO: Okay. So, you're getting a

3   better -- are you getting better click-through on house

4   files versus third-party opt-in?

5   MS. BETTERLY: It depends. Like I said, the

6   stuff that's broadcast and informational on what's going

7   on seems to just blanketly do better, and -- because,

8   you know, like I said, we have proven that several times

9   at this point. Again, it just depends. I mean, we have

10 -- you know, our collection sites are more high-tech

11 oriented because I come out of that, so of course, my

12 high-tech type offers do better with them.

13   MR. FRANCOIS: Earlier -- previously you had

14 talked about tailoring your ad, and I just wanted to get

15 a sense of is that something that you do, a service that

16 you provide for your clients in terms of targeting --

17 I'm sorry, targeting, not tailoring, but targeting your

18 ad, but is that something that the clients walk in the

19 door with, we would like to advertise to these people, or

20 how is that done?

21   MS. BETTERLY: It's both. It's both. It

22 really just depends on the client. And again, there's

23 such a diverse range of what people need and want.

24   Right now, we're actually doing a survey in

25 Virginia for -- for a company that's actually a

1   lobbyist, and they want to ask -- they are asking three

2   questions about what's going to affect the law, and they

3   want people's response to that, and that will probably go

4   out in the next week or two, and we will see what kind of

5   response we get to something like that.

6   But because of that, he only wanted the State

7   of Virginia, and the -- and this D.C. area, so that is

8   -- again, that's just one way we can select. We can also

9   select music lovers. I've also -- as I've told -- the

10   audience doesn't know, but I'm also the founder of an MP3

11   software company, and that particular list is very

12   responsive to very specific types of offers, musically

13   related and so forth.

14   MR. FRANCOIS: So, generally speaking, about

15   how much e-mail marketing materials do you send out on a

16   weekly basis?

17   MS. BETTERLY: It depends, again, how many

18   clients we have and what's going on. I would say on an

19   average, 2 to 4 million e-mails a day is probably what we

20   do. We've done more, and we've done less. It just

21   depends on what's going on.

22   MR. FRANCOIS: And do you have something --

23   like a -- do you have a benchmark, like a percentage per

24   million that you have to have a response rate for that is

25   a profitable percentage or a break-even percentage?

1   MS. BETTERLY: Again, it depends on what the

2   deal is, and I -- again, I'm not trying to be

3   unresponsive. What we usually do is we charge per

4   million on -- if we're -- so that whatever I'm mailing

5   out, I'm going to make a certain amount, and we usually

6   will do that versus a commission on the product, and so

7   if we meet our threshold -- so, let's say it's like, you

8   know, X amount per million, up to a cap of let's say 3

9   million e-mails sent or this many orders, whichever comes

10   first, and then after we look at that and look at the

11   response rate and what the commission is, we decide if

12   we're going to run that further as a per acquisition or

13   continue to test with the client themselves.

14   MR. FRANCOIS: Well, client expectations, is

15   there any difference in terms of what you and your staff

16   considers to be a successful response rate versus what

17   clients walking in the door consider to be successful or

18   are shooting for?

19   MS. BETTERLY: Well, everybody who comes and

20   wants to market wants to sell as many of whatever it is

21   they're selling as possible, and they want to make a ton

22   of money and do very, very well. Now, is that always

23   realistic? No, but there's two things.

24   Is the customer looking to sell something or to

25   acquire a customer, because if you're talking about

1   acquiring a customer, you might not actually make as much

2   money as you spent in the actual marketing itself, but

3   now you have captured a customer and somebody who you can

4   now target yourself and resell and upsell, et cetera and

5   so on, like in any other kind of marketing.

6   So, it really has more to do with the

7   customer's goal and what they're trying to do and what

8   they're trying to capture in the market. If it's a

9   one-time type of sale, like my friend who sells a book on

10   billiards, there's nothing else for him to sell to them.

11   So, he has to make money on that particular campaign.

12   But other guys who have a disposable product that

13   somebody will be buying again in three or four months and

14   they can keep in touch with them, then it's the cost of

15   the actual acquisition of the customer itself.

16   MR. FRANCOIS: Okay, Mr. DiGuido wanted to add

17   something.

18   MR. DiGUIDO: Yeah, I just think from the

19   perspective of the Fortune 1000 types of companies,

20   today, wherever we go, ROI is something that is top of

21   mind for all marketers that we talk to. So, in the years

22   gone by in the advertising business, there was a --

23   there could be an opportunity where you weren't as

24   tightly held in terms of accountability in terms of

25   dollars spent. Today, it's a significant issue.

1   So, when marketers come to us, what they want

2   to do is use this medium in a new way to be much more

3   contextually relevant to that consumer and provide that

4   consumer specifically the type of information that they

5   need. I'll give you an example. We do a lot of work in

6   the publishing area, Washingtonpost.com is one of our

7   accounts. What they're trying to do in their newsletter

8   products and deliver appropriate content to their

9   audience, to their subscriber base. They realize that if

10   they understand more about the preferences of those

11   customers in terms of the types of editorial content they

12   want, they can deliver a much more contextually relevant

13   message.

14   When they do that, it becomes a much tighter

15   relationship between the content provider and the

16   audience and a much more fertile advertising environment

17   for the advertiser. So, when you talk about the overall

18   effectiveness of a campaign, the more that a marketer

19   understands about the preferences of their audience, they

20   can use the e-mail marketing platform as a way that they

21   can't use any other medium in terms of targeting and

22   relevancy.

23   So, our marketers will come back to us and say,

24   again, so this segment of my audience, we got this type

25   of open rate or this kind of click-through rate, and we

1   can actually track, with the vendor's permission and the

2   customer's, all the way to a website, to a transaction.

3   So, the correlation between understanding the

4   audience, understanding what the preferences of that

5   audience are and delivering a relevant message provides a

6   high conversion rate.

7   MR. FRANCOIS: And finally, to return to Mrs.

8   Betterly, I just wanted to get a sense of, as you alluded

9   to in the beginning, that you work on behalf of small

10   companies, and you are not -- I just wanted to get a

11   sense of the size of your staff and how much it -- from

12   start-up to right now, how much you generally spend on

13   internet service provider connections, staff, just to get

14   a sense of the -- how large -- I don't want to say how

15   large your operation is, but in terms of -- how

16   cost-effective it is to engage in e-mail marketing.

17   MS. BETTERLY: Well, I'm very lucky in many

18   different respects, because I have the background of

19   being a founder of PCDJ.com, and from there I actually

20   did a lot events in the dot com world. So, I already had

21   a very good contact list of individuals that I had

22   already had previous -- previously worked with and knew

23   me and knew I always did what I said and, you know, and

24   that was very, very helpful.

25   I saw the advantages of marketing via e-mail as

1   a founder of PCDJ, because we sold a lot of software. We

2   had a free download. We would market similar kinds of

3   things to that demographic, which are, you know, kids,

4   DJs, music lovers and whatnot, and, you know, these are

5   guys who buy music. They buy software. They like

6   snowboards. They like, you know, cool clothes. And we

7   saw that that was very, very effective. And although

8   that mailing list is only about a million and it gets two

9   mailings a week, it's always strong, and I thought that

10   was great.

11   Then when I did the events, I was actually

12   e-mailing out the invitations for these events, and these

13   would be events attached to trade shows that are now

14   defunct, like Web Noise and Jupiter and -- that's still

15   around, but it's gotten a lot smaller, so I don't want to

16   give a wrong impression there, but at that time, a lot of

17   dot coms were willing to spend a lot of money on

18   marketing, and we would rent out a club and get, you

19   know, Jam Master J or Deaf Poetry Jam, and we would do

20   this whole thing where there would be a place after a

21   trade show for people to do their business development.

22   And you didn't get into an event without giving

23   a business card, and everybody knew who I was, and I

24   amassed this great list for events, and whenever we would

25   have an event, we would send an e-mail, and I would get

1   my guest list back, and that's all we marketed to that

2   list, and that was a great response rate.

3   And I thought, you know, between this and that

4   -- and I'm looking at, like, what do we do next, because

5   when the dot com world -- or dot bomb, depending on how

6   you want to look at it -- kind of crashed, I was like,

7   okay, now what do I do?

8   And what I did was I leveraged two people that

9   I knew that each had a very, very good opt-in list who

10   wanted a copy of each other's, and what I did was I got

11   paid by getting a copy of that, and that put me in

12   business, and then what I did was is I researched

13   infrastructure and had a couple of friends who actually

14   helped me start PCDJ who knew the technical end of it,

15   because I know enough technology to be dangerous, but I

16   can't put a network together.

17   MR. FRANCOIS: So, would you say a fairly low

18   barrier economically to entering?

19   MS. BETTERLY: Yeah, so I would say our initial

20   costs were about $15,000 to start, and that was last

21   August, and that was me and two others. We're now up to

22   nine people. We're moving out of my house into a real

23   office space next month. The press that we've gotten, of

24   course, has helped it grow tremendously, but yeah,

25   that's -- and it is profitable, and it was profitable

1   from day one.

2   MR. FRANCOIS: So about $15,000 down in August.

3   About how long did it take you before you broke even?

4   MS. BETTERLY: Probably by the beginning of

5   November, we were -- broke even.

6   MR. FRANCOIS: Okay.

7   MS. BETTERLY: And we were able to draw

8   salaries in actual fact probably in October.

9   MR. FRANCOIS: Okay.

10   MS. BETTERLY: Yeah, so that -- which is a

11   very, very -- you know, bootstrap, startup, you know, do

12   the best you can and whatnot and try to do it right.

13   We encountered some very interesting things,

14   though, which do affect us economically.

15   MR. FRANCOIS: And we will get to that.

16   MS. BETTERLY: Okay.

17   MR. FRANCOIS: But I wanted to touch upon one

18   thing that -- and talk about your costs in terms of

19   maintenance and upgrading systems. Is that -- well,

20   we'll save that for later, because I think I know where

21   you're going, and we'll tackle that in a second, but I've

22   been putting Ms. Atkins on hold for a long time, and

23   let's get to her about the study and other things that

24   she's heard.

25   MS. ATKINS: I was actually quite surprised by

1   the 8 percent number in the study, and then I thought

2   about it a little bit, and I looked through, and one of

3   my questions would be, is that 8 percent of the people

4   who are defining Spam as mail I don't like and mail

5   that's pornography, or is that 8 percent -- are they

6   making purchases from companies who are sending them

7   mail, they're defining it as unwanted mail sent from

8   companies from whom you've purchased something before,

9   and that was 50 percent of the respondents, but if

10   they're purchasing something from a company that they've

11   already purchased from before, is that the same as

12   purchasing from random commercial e-mail advertising

13   pornography?

14   And I think the numbers may need to be broken

15   out a bit better to give us a better understanding of

16   what the respondents are actually saying here. That's my

17   big comment about the 8 percent number, because in that

18   case, I'm not even sure that that really is Spam. If I

19   make a purchase from a company and when I purchase I give

20   them an e-mail address and I say, yeah, let me know about

21   other offers, I've solicited mail from them.

22   And so while I may turn around and decide that

23   a certain company is sending me mail that I don't want

24   and now that's Spam, it's hard to measure the

25   solicitation inherent in what these purchases are, not

1   knowing who's purchasing what and what they're actually

2   purchasing in the survey.

3   MR. FRANCOIS: And what Laura is referring to

4   is MailShell study also had a question or a list of

5   statements and an area for consumers to agree -- the

6   respondents to agree with, and 53 percent agreed with the

7   statement that they consider Spam to be any unwanted

8   e-mail from a company from whom they have purchased

9   something. So, existing business relationship arguably,

10   but they still consider the receipt of a subsequent

11   e-mail to be Spam, and more than half of the respondents

12   considered that, just for clarification.

13   Well, with that in mind, let's turn to the ISP

14   folks and ask them a couple of questions, and we have got

15   Dale Malik from BellSouth and Lisa Pollock Mann from

16   Yahoo! in terms of, well, what is Spam and has their

17   definition changed based on what their consumers say?

18   And do we want to start with Mrs. Mann?

19   MS. MANN: So, we define unsolicited -- we

20   define Spam to be basically unsolicited bulk e-mail, but

21   it's actually really, really difficult to define what

22   Spam is, and that's part of why we're all here over those

23   three days, right, because essentially the customer tells

24   you it's Spam, as an e-mail service provider, you have

25   got to kind of trust the customer, right, and our point

1   of view is to really provide the best online experience

2   that we possibly can for our customers.

3   And we actually have built things into our

4   systems to get that kind of feedback, so when you receive

5   an e-mail in your inbox in Yahoo! mail, you actually have

6   a choice to click on a link that says this is Spam, and

7   conversely if you receive a message in your bulk mail

8   folder, you can click on a link that says this is not

9   Spam. So, we receive a lot of that feedback from our

10 customers.

11   So, it's -- we have our own definitions,

12 everyone on this panel has their own definitions, and I

13 think the broad definition that we often subscribe to is

14 e-mail that is sent to individuals without their request

15 or their consent and without a preexisting business

16 relationship with the sender. That's kind of the

17 broadest definition that we subscribe to.

18   Most important for us is to give our users the

19 choice to be able to give us that feedback as to what

20 they think is Spam or not.

21   MR. FRANCOIS: Is that a definition that you

22 all have had for a long time or is that a definition that

23 you all have recently, in the present, changed based on

24 consumer response?

25   MS. MANN: Well, that's pretty much been

1   consistent from the time that we started offering e-mail,

2   which over five years ago at Yahoo!. What has changed is

3   not the definition of what is Spam, but rather, the

4   tactics that people are using to get into the inbox.

5   People are getting more and more devious. They are using

6   more misleading, more deceptive practices. So, we have

7   to be much more aggressive in how we are dealing with

8   people that are trying to get in to destroy our users'

9   online experience.

10   MR. FRANCOIS: Have your consumers'

11   expectations and how you all deal with Spam changed over

12   time?

13   MS. MANN: Well, I would say probably not. I

14   mean, we have prioritized fighting Spam for a long time.

15   We actually have developed in-house technology, and we

16   launched our first version of SpamGuard back in 1999. We

17   have been continually revising it ever since. Consumers'

18   expectation from Yahoo! as an e-mail service provider to

19   provide them a top-notch online experience with e-mail,

20   that hasn't changed and will not change. What has

21   changed is consumers are receiving more Spam today than

22   they were a year ago and two years ago. In fact, we're

23   actually catching five times more Spam today than we were

24   a year ago. So, their expectations continue to be

25   Yahoo!, make sure that you keep my inbox clean and make

1   sure that you're providing me with an online experience

2   that I can trust.

3   MR. FRANCOIS: Well, and let me jump back to

4   the study again, which said -- I think it was 48 percent

5   of the people agree that their ISP could do more to stop

6   Spam but is not doing so. Do you find that that is a

7   sentiment that you all have to address and that you've

8   come into contact with on a not insignificant --

9   insubstantiate basis?

10   MS. MANN: Well, I very much believe that our

11   customers rely on us to provide them with a top-notch

12   user experience. I would say that our internal

13   statistics actually are a little bit different from the

14   statistics that we've gotten from the Mail Shell survey.

15   In fact, we have done some surveys of our customers, and

16   we say that about two-thirds of our users have actually

17   told us that they are satisfied or more than satisfied

18   with what we're doing to protect them against Spam. I

19   can't speak for the industry as a whole.

20   I think it does speak to the fact that we are

21   doing what we can and continue to prioritize fighting

22   Spam. Why is that? Because our business relies on

23   providing top-notch, quality consumer experiences, and if

24   we don't do that, then our customers will leave us. So,

25   for Yahoo!, doing what's right for the customer is what's

1   right for our business, and we're very pleased to hear

2   that we are doing a good job for most of our customers.

3   Is that good enough? Of course not. We always want to

4   try and do better.

5   MR. FRANCOIS: Just to continue on, you

6   mentioned that your internal study -- and I'd be curious

7   to know what else you all asked your customers about Spam

8   and what their responses were to those questions, not

9   all, but relevant.

10   MS. MANN: Well, we talk to our customers all

11   the time about all sorts of things, what do they like

12   about Yahoo! mail, what don't they like about Yahoo!

13   mail. We recently did a very small poll on our site to

14   ask our users really a very targeted question, are we

15   doing enough about Spam?

16   So, the top-line take-away from that is really

17   that two-thirds of them were satisfied, more than

18   satisfied, which is, as I mentioned, comforting to us,

19   but there's still one-third of those people that are not

20   satisfied.

21   So, that's why it is a corporate priority for

22   us, and we're spending a lot of money and a lot more

23   money today than we were last year and more than a year

24   ago in the fight against Spam.

25   MR. FRANCOIS: Okay, thanks, Lisa, and I know

1   that Laura had something to add.

2   MS. ATKINS: I think one of the struggles that

3   ISPs have to make is they put all this money into

4   filtering technology, but actually determining what's

5   Spam versus what's not Spam is not a technologically easy

6   thing to do, and so they can't ratchet up the Spam

7   filters as much as their users might like, because what I

8   think is Spam and what I don't want, because it's in a

9   Chinese language, for instance, they can't just block all

10   mail in a Chinese language, because some of their

11   customers may actually get mail from people in Mainland

12   China.

13   And so, the ISPs are spending a lot of money to

14   try and balance their consumer needs with their -- with

15   what the consumer wants, and so Spam filtering is not as

16   simple as it might seem on the surface, because I know

17   what Spam is when I see it, but it's hard to do that

18   automatically.

19   MR. FRANCOIS: Steve Smith from MindShare

20   Interactive?

21   MR. SMITH: That's MindShare Design.

22   MR. FRANCOIS: MindShare Design, I'm sorry, I

23   need to change that name.

24   MR. SMITH: Bigfoot.

25   MR. FRANCOIS: Yeah, sorry.

1   MR. SMITH: I would just observe that I think

2   ISPs are doing what any reasonable business would do,

3   which is just listening to their customers, and as a

4   provider of technology for senders, you know, we have to

5   communicate in recipients' and ISPs' expectations as far

6   as e-mail expectations back to our customers, and we have

7   had to change our definition of Spam from being centered

8   around permission and consent to being basically whatever

9   recipients perceive that they don't want to get, and

10   that's one of the reasons we spend a lot of our time now

11   not just, you know, trying to enforce opt-in and consent,

12   but also working on what are the best practices to make

13   sure that the e-mail that they get is going to be

14   accepted and wanted.

15   MR. FRANCOIS: Okay. I just want to jump back

16   to -- because Laura mentioned a balancing act, and I

17   know that initially Lisa and I had spoken about some of

18   the things that had to be balanced, and I wondered if you

19   could kind of articulate for us a little bit some of the

20   cost-benefit analysis that Yahoo! has to do in terms of

21   how much to spend on Spam at the expense of other things

22   that maybe they could provide or would like to provide to

23   their customers.

24   MS. MANN: Sure. As a business that is

25   developing products for consumers, we are always making

1   trade-offs, of course, given a limited set of resources;

2   however, given that providing for our customers and

3   protecting our customers is paramount for our business,

4   it's not a trade-off for us. It's not an option. We

5   need to invest and we continue to invest in fighting

6   Spam. It's simply -- if we didn't, we would really be

7   risking our customer base, and that's really not an

8   option for us.

9   So, we do spend a lot of money, and we do spend

10   a lot of time on a number of different fronts, and I can

11   walk through with you the multifaceted approach that

12   we're taking to fighting Spam, and that might give you

13   some sense of the kind of prioritization that we put on

14   fighting Spam at Yahoo!.

15   MR. FRANCOIS: If you could briefly do it, that

16   would be great.

17   MS. MANN: Okay, I'll run through it quickly.

18   MR. FRANCOIS: All right.

19   MS. MANN: So, the multifaceted approach is

20   really as follows:

21   We're investing in technology, so we have

22   people at the company that are working on product

23   development, product management, marketing, operations,

24   customer care across the company. We are dedicating

25   human capital to fighting this problem that, of course,

1   we could be spending on other things, but again, because

2   fighting Spam is such a corporate priority, we have

3   significant numbers of people that are dedicated to doing

4   that.

5   We have hardware costs and we have machines

6   that are dedicated to fighting Spam, servers that are

7   dedicated to fighting Spam, lots of them. As one of the

8   world's biggest e-mail providers with tens of millions of

9   users, you can only imagine how many machines we have for

10   our system, and there are a lot of those machines that

11   are dedicated to fighting Spam.

12   A few of the other -- and in terms of R&D and

13   development, we're constantly rolling out features that

14   are helping to give our users more choice in the way they

15   deal with Spam. So, we're investing in -- wow, we need

16   to do things systemwide, but we also need to put tools in

17   the hands of our users so that they can customize and

18   personalize their experience. So, that's really the

19   technology bucket.

20   The other fronts that we are investing in, and

21   again, making trade-offs throughout our entire business,

22   but prioritizing Spam are on the litigation front, on the

23   legislation front, working with members of Congress to

24   develop effective legislation that is anti-Spam, and also

25   industry collaboration efforts.

1   MR. FRANCOIS: In terms of consumer complaints,

2   over time, has consumer complaints about Spam -- are

3   consumer complaints about Spam kind of the number one

4   complaint about the e-mail service for Yahoo!?

5   MS. MANN: It's an interesting question that

6   you ask. Certainly Spam has risen in the public eye.

7   Again, that's why we're all here. But I would say that

8   we are actually doing a better job of fighting Spam today

9   than we have been in the past. One statistic that we

10   have is actually we have seen a 40 percent decline in

11   customer complaints as a result of a new version of our

12   Spam-fighting technology that we rolled out just a month

13   ago.

14   So, the fact is that while we do hear from our

15   customers that Spam across the industry is an issue, and

16   we hear this from our industry colleagues as well, we

17   know that what we're doing is effective, and we know that

18   every time we roll out new improvements to our system,

19   which we do all the time, each time we do that, we see a

20   reduction in Spam, we see a reduction in complaints.

21   MR. FRANCOIS: And maybe I can throw this open

22   to all of the ISP providers and anybody else that would

23   care to address it, before I get to Dale Malik, who I

24   have promised to get to and not forgotten about.

25   To what extent has technology and kind of what

1   technology is added to make e-mail more consumer friendly

2   and interesting with its features caused more

3   complications with combating Spam? And I'm thinking

4   notably of the ability to use HTML in e-mail, and I've

5   heard from a number of people that, well, that makes it

6   hard, because -- to stop Spam, because a lot of the

7   Spammers try and evade filters by manipulating HTML, and

8   you're getting more HTML graphic Spam instead of

9   text-based Spam.

10   Mr. Malik?

11   MR. MALIK: Thank you, Renard.

12   I think it certainly makes the issue much more

13   complicated from a detection perspective, but I think the

14   customer perspective is even more important, because we

15   have such a large educational gap. You know, most people

16   are on the internet, they love the internet for what it

17   is, but at the same time, they don't necessarily

18   understand the technology like the rest of us do here,

19   and when we deal with customer service issues and folks

20   say, I can see something and it's obviously offensive to

21   me, how come you can't see what I see? And we go through

22   the educational process of saying, well, it's a picture.

23   Only humans can interpret a picture. So, we definitely

24   have both an educational issue as well as a technology

25   issue combined, and that's really what ups the severity

1   of it.

2   MR. FRANCOIS: Okay. Anybody else?

3   MS. MANN: Well, I was going to comment on an

4   example of a feature that we've rolled out recently that

5   has given our customers the ability to deal with those

6   images and those technological problems. It's just an

7   example, but we give our consumers the ability to block

8   HTML images in their messages, and they can go -- they

9   can turn that on simply by clicking on the options page

10   and then checking off don't show me these images. They

11   can also do that from within a message.

12   So, that's an example of putting some power in

13   the hands of the consumers to be able to deal with these

14   kinds of technological problems that are more difficult

15   for service providers like ourselves to deal with on an

16   entire platform basis.

17   MR. HUSEMAN: Mr. DiGuido?

18   MR. DiGUIDO: Yes, we're releasing the findings

19   of a telephone survey today that we've done in

20   coordination with the Roper Organization, and amongst a

21   lot of other things that were asked, they were asked --

22   the subscribers -- the individuals were asked what they

23   thought the ISPs could provide in terms of help in terms

24   of distinguishing between Spam and messages that they

25   wanted to unsubscribe? And 89.7 percent of them said I

1   would prefer it if my ISP or e-mail service provider

2   would include an unsubscribe option that would safely

3   remove you from an e-mail list.

4   So, with AOL, the do not -- you know, the Spam

5   button and all those issues, it's pretty clear that most

6   consumers would want to have their ISPs have the option

7   to unsubscribe out of that mailing and then be able to

8   purge their name from a mailing list, and again, 79

9   percent of them said that they wanted to see -- and we

10   keep lumping in, you know, volume buyers -- volume

11   senders and pornographers and those folks into the whole

12   -- into the same common definition of Spam. What 79

13   percent of these folks said was they want to see ISPs

14   treat fraudulent e-mails and pornography in a separate

15   way than they do other mailings that come through.

16   So, having that unsubscribe option on the same

17   page with your Spam button seems to be one of the

18   solutions that most of the folks that we polled are

19   interested in having from an ISP standpoint.

20   MR. FRANCOIS: Do you all feel for the service

21   providers a little apprehensive or inhibited about

22   devoting resources to research and development because

23   they may potentially provide the opportunity to be

24   manipulated by Spammers? Mrs. Betterly?

25   MS. BETTERLY: Well, I have a couple of

1   comments on a lot of stuff that was said. I'm sorry, I

2   hope you don't mind, but I have a Yahoo! account, and

3   I've had it since 1998, and I've never opted to anything

4   on it, and in the last month I have gotten 11 unsolicited

5   e-mails, which is totally within my tolerance level. So,

6   it's an interesting thing.

7   On my personal e-mail, though, since it was

8   published on the net and also in the Wall Street Journal,

9   in the last two days, I got 357 unsolicited e-mails, of

10   which 50 were pornography. Now, I'm pointing this out

11   because I understand both ends of the stick here, but the

12   thing that I find interesting and the thing that I'd like

13   to know from the internet service providers is actually

14   how much of this -- these complaints are coming from

15   stuff that has ripped headers, no legitimate unsubscribes

16   and are being hidden, because it's so hard and so

17   expensive for us to be in business legitimately because

18   of all of that? And how many of those complaints are

19   from consumer complaints or actually anti-Spam groups who

20   are actually trying to entrap legitimate marketers?

21   Because you can even see it on the net, they'll actually

22   opt-in to a list to complain. Once they complain, they

23   don't tell you who it is who complained. I could shoot

24   somebody in the street and have more rights.

25   MR. FRANCOIS: Well, let's defer the law --

1   MS. BETTERLY: And that's something that needs

2   to be --

3   MR. FRANCOIS: -- let's not shoot anybody in

4   the street, and at least if we shoot anybody in the

5   street, let's not make it the street in front of this

6   building.

7   MS. BETTERLY: No, of course not, and I'm

8   sorry, I'm a little passionate about the issue.

9   MR. FRANCOIS: So, I know Laura is -- Laura

10   Atkins was motioning me to make a comment.

11   MS. ATKINS: There's a couple thing, and one is

12   what Al said about the ISP should manage the unsubscribe,

13   and I'm not convinced that there's any way they can do

14   that, because the mailers -- a lot of the mailers,

15   particularly the problem mailers -- and listening to

16   you, I wouldn't actually put you in that category, but a

17   lot of the problem mailers --

18   MS. BETTERLY: Thank you.

19   MS. ATKINS: -- but a lot of the problem

20   mailers, they don't care. You unsubscribe, and we heard

21   yesterday about how you unsubscribe, and then, you know,

22   two weeks later, you're on -- it's the same company,

23   it's the same whois data, but you're on a different list

24   from them.

25   So, I'm not sure -- it's -- I understand what

1   you're saying, but I'm not sure, unless there is a change

2   in the way mail is sent, particularly bulk mail is sent,

3   that does give the ISPs the control over that, it may be

4   helpful, but at this point the ISPs don't have that level

5   of control.

6   MR. FRANCOIS: Let's go -- Mr. Shivers -- I'm

7   sorry, I don't want to cut you off.

8   MS. ATKINS: But in terms of what Laura is

9   saying about what people are complaining about, I have a

10 number of clients who -- what I do for them is I manage

11 their relationships with the ISPs, and I manage their

12 abuse box, and I see those unsubscribe requests and I see

13 those Spam cop complaints and I see all of that, and I

14 can tell when my customer has gotten a bad egg on their

15 list, because my complaint rate goes from three or four

16 complaints a day up to maybe 15 or 20, and that's usually

17 based on a single list, and it's a bad customer, and we

18 go and we deal with the customer and it's all taken care

19 of.

20   So, you know, from the perspective of someone

21 who works with a lot of bulk mailers, if you're getting a

22 lot of complaints, then what you're doing is upsetting

23 your clients and your customers and the people you're

24 sending mail to, and that means you need to change your

25 business, and you need to work to not upset the people

1 who you are trying to convince to pay you money to sell

2 your product.

3   MR. FRANCOIS: Mr. Shivers from Aristotle.

4   MR. SHIVERS: Thank you. We actually do the

5 opposite, and we encourage our customers to not use the

6 unsubscribes, and it's unfortunate. We would love to be

7 able to have that as a valid means for that customer to

8 click and get off that list, but it does not work. We

9 actually go a next step to if your mailbox starts filling

10 up, you've done it once, and then all of a sudden now

11 you're getting 30 a day instead of five a day, we say,

12 okay, what we'll do for you, for free, is you can get an

13 additional e-mail address, we encourage you to put a

14 number in the address so it makes harvesting a little bit

15 harder, and we go to all these links just to prevent the

16 Spam from coming into their mailboxes, and we do also get

17 complaints just daily, just droves.

18   MR. FRANCOIS: Roughly -- how many customers

19 do you all have? You all are based in Arkansas, Little

20 Rock, right?

21   MR. SHIVERS: Yeah, Little Rock, Arkansas,

22 which actually I grew up in Houston, Texas. I know

23 that's a good thing to be here, too.

24   MR. FRANCOIS: I'm a Tennesseean. No, it's

25 not. But roughly how many customers do you all have?

1   MR. SHIVERS: Appreciate that.

2   We have roughly 26,000 customers -- it

3   fluctuates. We're a little bit different, because we

4   charge by the hour. In one sense, you could look at it,

5   Spam is -- helps us, because we charge by the hour, but

6   we've also built in systems for our own customers where

7   we have our own browser where they can go in, they get to

8   see the headers, they get to see the subject lines before

9   the mail gets to them, so they can just delete them

10   before they have to pull them, which takes a lot of time.

11   So, we're trying -- which kind of in a sense

12   cuts our own throat, because then they're not downloading

13   all that e-mail and they're not paying us by the hour,

14   but we have 26,000 customers, and we started out back in

15   '95 -- we're a small business -- we started out with

16   one computer and 32 modems, and Spam now is our number

17   one issue. It's become -- it's shaking the foundations

18   of our business, which is a small business.

19   MR. FRANCOIS: And we are going to return to

20   that in a second.

21   Mr. Smith had something to say.

22   MR. SMITH: Yeah, I just wanted to get back to

23   your question regarding the technology and then some of

24   the capabilities of e-mail, and I just wanted to point

25   out that a lot of the efforts that both mail service

1   providers and the e-mail client developers are taking to

2   improve the security and reduce the risk of proliferation

3   of Spam in their clients and services is starting to

4   erode some of the fundamental technology in e-mail for

5   like rich media, active X controls, HTML image rendering,

6   and we're at risk -- Spam is putting the richness of

7   e-mails as a medium at risk, and we should consider that

8   also as a factor that Spam is having on e-mail.

9   MR. FRANCOIS: In terms of the decisions about

10   these features and being able to turn off HTML graphics,

11   I wanted to return to Mr. DiGuido, and we've heard about,

12   you know, Yahoo!'s capability empowering consumers to

13   turn off HTML graphics. Have you heard anything from

14   marketers that say that that inhibits their ability to

15   advertise? Does that -- are they concerned about that

16   in future advertising campaigns?

17   MR. DiGUIDO: They're concerned, just as

18   Yahoo!'s concerned, in optimizing the relationship

19   between their company and their customers. So, through

20   our technology, we're able to sniff the individual's

21   mailbox and deliver the most optimized message to that

22   consumer that that consumer wants. So, if the consumer

23   says, listen, I want a text e-mail or I'm using AOL and I

24   want an AOL version of the message, we are going to

25   deliver on behalf of that marketer a message in the

1   context of the way the consumer wants it.

2   So, through sending multi-part messages, we're

3   basically optimizing the mailbox to the point where if an

4   individual -- like I said, if an individual says,

5   listen, I do not want HTML, I prefer that I receive text

6   messages, then text messages are sent. If they're

7   willing to receive messages from -- that are HTML, they

8   get HTML.

9   Again, really, where a lot of work is being

10   done on our behalf is working with marketers on

11   establishing that dialogue between the customer. So,

12   driving somebody to a website and saying, I'm now going

13   to start to send you e-mail communications, what type of

14   information would you prefer, and in what format would

15   you prefer it? So, that all goes towards building a

16   tighter dialogue. So, they are not really being hampered

17   at all, because they don't think about it as a broadcast.

18   Everybody gets broad band or everybody gets HTML.

19   They're thinking about optimizing to that consumer's

20   preferences and to their mailbox.

21   MR. SMITH: Although, Renard, I would respond

22   to that by saying if less people have less capability

23   fundamentally in their e-mail client, that's just going

24   to reduce the effectiveness of the medium in general.

25   MR. DiGUIDO: That has -- I mean, I take that

1   point, but again, I think that the power of the medium is

2   really about the messaging and the relevancy to that

3   consumer, okay? I mean, I can't open up a newspaper and

4   have 3D graphics. I can't --

5   MR. SMITH: Yet.

6   MR. DiGUIDO: -- each -- well, each medium

7   has -- has been optimized and leveraged for the power

8   that it has. E-mail communication is all about

9   delivering a contextually relevant message to a consumer

10   based upon what they are interested in receiving. So,

11   we've seen some incredibly successful clients using text

12   messaging. You talk about the IT sector or people who

13   are interested in computers, those folks are not

14   traditionally people who are enamored with a lot of HTML

15   whiz-bang type of messages. They want the information in

16   a concise and contextual standpoint, and we've seen

17   incredibly effective campaigns that are text campaigns.

18   MR. MALIK: I'd just like to add to that a

19   little bit. Some of the experience that we've seen, and

20   I'll challenge the notion that not much has changed from

21   a customer's perspective, I believe that from their

22   relationship with us where two years ago they might have

23   said you're doing an okay job on my behalf as my proxy,

24   essentially, in delivering my mail, now to the point

25   where we have such a wide customer base, people are

1   feeling, well, you need to help me on my personal level,

2   which is what we're hearing in the conversations, provide

3   me the tools to make my decisions, because this is a

4   relatively complicated technology when we get down to it.

5   But you now need to simplify it for the

6   customer so that it's -- you know, if I use a telephone

7   analogy like call waiting, you click to get the other

8   call. In the old days, you know, you used to have to --

9   Molly, please switch me to another line, I hear another

10   call's coming in.

11   So, they don't understand the technology, so

12   that we need to bring it down to a level that's easy for

13   the customer, give them those tools and I think, you

14   know, some of the discussions here will be very

15   beneficial, agreement on the industry on sort of

16   practices so that we don't kind of bump into each other

17   in the night, that I give you a tool that you

18   inadvertently cut into something that you really wanted.

19   Because we had a number of customers -- and I

20   am not going to get into statistics now, but some of the

21   internal research that we did, and it was surprising to

22   myself as we looked into it, but there were a number of

23   customers that said I like to look at this, please give

24   me a choice to at least look, because if I am proxying on

25   their behalf and blocking unsolicited mail generically

1   and I don't give them the opportunity to look at, well,

2   maybe there is something. Maybe there is an offer. It's

3   a -- a thousand shades of gray.

4   What we had to do is implement -- we actually

5   gave the customer a choice. We said we will completely

6   proxy on your behalf and take it out immediately, and the

7   second option, which we got very good response to, was

8   let me take a look for a little while, and then I'll get

9   rid of it. If I don't look right away, it's time to get

10 rid of it.

11   So, that's kind of been the negotiation between

12 us and our customer base as we kind of walk towards the

13 -- I'll call it the customer empowerment level that we

14 really need to deal with it generically as an industry

15 and then specifically from each individual customer's

16 needs.

17   MR. FRANCOIS: Well, let me ask Laura, because

18 I know you speak with many consumers and consumers --

19 and ISPs about their consumer issues. What are the

20 consumer -- first, what are the consumer issues that

21 they have with Spam? Is it the content? Is it the

22 volume? Is it the fact that it's unsolicited? And what

23 do they want?

24   MS. ATKINS: Well, the answer to actually all

25 three questions is yes. It's the volume, and it's coming

1   back from a weekend and finding that you have 150

2   messages in your mailbox and that two of them are from

3   people you know and 70 of them are mortgage and 20 of

4   them are pornographic, and so it's the volume.

5   We try and not make it a content-based

6   decision. We believe it is a consent-based decision, and

7   it's whether or not the individual has asked for the

8   mail. You know, if you want to get the porn, hey, go for

9   it. So, we don't believe it's a content-based issue, but

10   what we're hearing from a lot of consumers is that

11   certain content upsets them more, and that contends to be

12   the porn, particularly when you have young children, you

13   know, on the internet, and they're dealing with it, and

14   they're getting all of these porn Spams in their

15   mailboxes, and they're just using a Yahoo! account or

16   they're using a Hotmail account, and when they look on

17   that -- when they click on that e-mail, they get that

18   picture right in front of them.

19   And I know that there's very little I -- I use

20   the text-based messaging or text-based e-mail program for

21   most of my stuff, so I don't actually see a lot of the

22   images that come through on Spam, but I hear about it a

23   lot, and some of it's very bad.

24   So, it's the content, but it's also the volume,

25   and trying to delete through things, going through a big

1   mailbox and trying to delete -- and actually, you

2   occasionally have people who have accidentally deleted

3   mail they wanted because they didn't know or they were

4   going through and they had 15 Spams in a row, and they

5   got to the 16th one, and it was actually a newsletter

6   they asked for or it was actually something they

7   solicited, but they were going through and hitting that

8   delete key, and boom, that's gone, and they've lost mail

9   that they wanted, and that's entirely due to Spam.

10   MR. FRANCOIS: So, what is it that consumers

11   want? Do they want it stopped? Do they want more

12   empowerment?

13   MS. ATKINS: I think one of the great things

14   about the internet is it does give the consumer the

15   empowerment to control what is marketed to them, and

16   we're seeing that Spam is trying to bypass that, but

17   there are companies who are doing things that -- to make

18   that channel a more consumer-oriented channel, and they

19   can target it to the individual.

20   But in many cases, what we're hearing from

21   consumers is we just don't want the Spam. We want the

22   mail we want, and we don't want the Spam, and this puts

23   ISPs in a very difficult decision, and that's why they're

24   spending so much money on research and development,

25   because they're trying to work out what does the consumer

1 want versus what does the consumer not want, and we are

2 trying to draw that line, and unfortunately for the ISPs,

3 particularly with a huge customer base, is that line can

4 be 15 shades of gray, because this consumer -- while

5 this consumer, okay, they kind of like the porn and they

6 want the porn, and this consumer over here has a bunch of

7 kids and decides, no, I don't want the porn at all, and

8 it's a difficult decision for the ISPs to make, and

9 they're having to invest huge amounts of money into

10 making it.

11   MR. FRANCOIS: Mr. Shivers?

12   MR. SHIVERS: First I'd like to say it's a

13 little bit different for a small ISP. I don't have any

14 resources to dedicate to, you know, development. So,

15 what I have to do is I have to go out and get products

16 like -- I mean, everybody knows like BrightMail or

17 Vircom, and I hope to roll out a new one coming up pretty

18 soon this next week is Spam Squelcher. I mean, I have to

19 buy things in a box.

20   And there's inherent problems in that. What

21 if, you know, one of my state customers doesn't get an

22 amber alert, you know, and am I responsible? I have

23 these worries.

24   The other thing is, I mean, I just want to read

25 you a little bit -- something from just a customer. I

1   receive pornography almost every day on my site. It's

2   totally unsolicited. I'm tired of receiving this with

3   the explanation someone has submitted my name and they

4   -- or they wouldn't have sent it. I don't know why we

5   can't stop this, and I spend undue time having to delete

6   it. I have granddaughters who use my computer, and I

7   don't need to worry about the contents of my mail.

8   And that comes in daily, every system day that

9   we work.

10   MR. FRANCOIS: So -- and I am not going to

11   neglect the issue of cost, but I am going to segregate

12   that out to a different section that we will explore more

13   fully, but this brings us to kind of the idea of churn

14   and the number of customers that turn over and change

15   ISPs, and one of the questions that I wanted to ask was

16   -- and we will start with Laura, who has some contact

17   with many ISPs -- in terms of the amount of churn in the

18   area and how much of the churn is devoted to -- is

19   because of Spam?

20   MS. ATKINS: There are some people I have

21   talked to who will tell me that they don't actually

22   believe that any of their customer churn is related to

23   Spam, but there are other companies who certainly believe

24   that they're losing 10, 15 percent of their customer base

25   every few months because of churn.

1   And what we're seeing -- what I'm seeing in

2   some of the stuff I'm dealing with with my mailing

3   customers and the people who are sending mail is that

4   they can be mailing lists, and as they mail lists, we

5   gradually lose subscribers off those lists because those

6   addresses go dead. So, you know, it's an address that

7   will deliver and will deliver and will deliver and will

8   deliver and then goes away.

9   From my own perspective and from my own working

10   with consumers, is people don't like to change their

11   e-mail address, because they have given it out, it's on

12   their business cards, their family knows, their friends

13   know, and so it is not a normal choice that they make to

14   change their e-mail address. So, the perception is that

15   some of the churn is absolutely because of Spam.

16   MR. FRANCOIS: And let me direct this to the

17   ISPs, Dale Malik from BellSouth, I forgot to introduce

18   you, and Lisa Pollock Mann from Yahoo!.   I assume that

19   you all both have churn, and one of my questions is,

20   after you all kind of address generally the concept of

21   churn, is are you all gathering -- whatever the

22   percentage of customers that you're losing, which may or

23   may not be attributable to Spam, are you replacing those

24   customers at the same rate, so you're not at a net loss?

25   For example, if you're losing 20 percent of

1   your customers every month, are you gaining, then, 15

2   percent new customers or are you gaining 25 percent new

3   customers? What is the impact on churn with your ISP?

4   MR. MALIK: Generically speaking, we're still

5   in a fairly good growth market from increasing customer

6   base, and I think churn in the industry is fairly

7   pervasive at this point. I mean, there's been different

8   numbers stated that I've seen in different reports, but

9   basically for us, when we look at the customer

10   satisfaction pieces, is that Spam has been raised as an

11   issue on different surveys of a customer satisfaction

12   piece.

13   On the good side of the equation, you know, the

14   information we have seen from customers, similar to some

15   other comments earlier, is that the means that we are

16   taking are fairly effective. We're up in the 80 to 90

17   percent, you know from what we're reading, and this

18   isn't -- there is no statistical way to measure how much

19   you catch, because you can't tell what you didn't catch,

20   you can only tell what you've caught, but when we look

21   out on things like DSL reports and places like that, we

22   see verbatims from customers, and it's probably not

23   statistically valid, but you see things like it's

24   catching 80 to 90 percent, and that is a satisfaction

25   level that says, hey, that's a pretty good job.

1   But the real issue is as the volume goes up, 80

2   to 90 percent -- and I'll be ridiculous -- of a million

3   is a lot. So, now, what was a nuisance before is not

4   only just an annoyance, it's almost an invasion of

5   privacy, because it's come into my home, and it's not

6   just resident at my address. People feel that their

7   e-mail address is their -- you know, it's like their

8   personal cell phone. That's mine. That's not just my

9   household's. Now you've invaded my personal privacy.

10   So, it's really now moved to that level, and when you've

11   crossed that boundary, then it's a very important

12   customer service issue and, you know, kind of the round

13   it all up, it can affect churn.

14   We've considered that, and that's why we make

15   the additional investment to keep it that level, because

16   obviously if you don't do it, then it will absolutely

17   cause churn, because people will say, you know, this is

18   unacceptable. They are not doing enough on my behalf. I

19   will go to somebody who will do something on my behalf.

20   So, it is -- and in certain regards, minimal table

21   stakes. You must do it as a provider. You must do it

22   well to have a good level of customer service, and

23   certainly like many companies in this industry, we pride

24   ourselves on customer service, so it is imperative.

25   MR. FRANCOIS: Ms. Mann?

1   MS. MANN: So, our user base, as my colleague

2   on the other side of the table has mentioned, our user

3   base has actually continued to grow. We believe very

4   strongly that that is in part due to the fact that we're

5   doing a good job in fighting Spam.

6   We are seeing high month-to-month retention

7   rates, and our user base has grown despite the increase

8   in Spam, again, leading us to emphasize why fighting Spam

9   and being good at fighting Spam and providing good user

10   experience is important to our user loyalty.

11   We also think that's one of the reasons why

12   we've been potentially gaining share over the past couple

13   months, and we have been gaining share. We believe that

14   one of the reasons why is due to the fact that we're

15   doing a better job at fighting Spam than some of the

16   other people out there, so it's very much worth our

17   investment and a very important business decision for us.

18   MR. FRANCOIS: And Mr. Shivers, as a small ISP,

19   do you have problems with losing customers?

20   MR. SHIVERS: Yes, well, we're still growing,

21   too. I mean, we put on more customers a week than

22   cancel, but for the first time in the last, I would say

23   six months, we are starting to get cancellations directly

24   attributable to Spam, where before, you know, it's like,

25   hey, I'm moving out of town, blah-blah blah-blah, but now

1   it's I'm quitting, I can't do this anymore.

2   It also hurts our branding of our own name --

3   MR. FRANCOIS: Well -- go ahead, I don't want

4   to interrupt you.

5   MR. SHIVERS: -- because if you switch

6   providers, let's say you go from Aristotle to WorldLinks,

7   a competing provider in Little Rock, what happens is the

8   nature of the move is they immediately don't get Spam. I

9   mean, because they've moved, and nobody knows where to

10   find them. Of course, they will get harvested at some

11   point in the near future, but until that point happens

12   -- so, what they say is, hey, I moved away from

13   Aristotle, I used to get 30 Spams a day, and now I'm not

14   getting any. You guys need to come over here to

15   WorldLinks and get away from Aristotle, and that's what's

16   starting to hurt our business, I believe, because of the

17   explosion in the last six months.

18   MR. FRANCOIS: Now, when you said -- at first

19   you said that they were quitting. When you mean -- when

20   you say quitting, do you mean they're stopping the

21   Aristotle service and moving on to another internet

22   service provider or do you find that some people are just

23   quitting to participate in the internet or e-mail?

24   MR. SHIVERS: Both, I mean both. I have

25   stories here, but I won't read them all, but they are

1 saying -- and they are just point blank saying, I'm not

2 going to use my e-mail anymore. Well, for us, that means

3 a lot, because that's the primary reason that they're on

4 our business. So, they are quitting using their e-mail.

5 Also, they are just flat quitting and going to

6 -- well, they go to other places, and we have --

7 usually, because we cover rural Arkansas, we have a lot

8 of older people who use our service because they're so

9 inexpensive that they are just flat quitting because they

10 can't take it anymore.

11 MR. FRANCOIS: All right. Ms. Atkins also

12 mentioned the fact that they're finding a number of dead

13 addresses, addresses that are not being used anymore, and

14 I wanted to get Mr. DiGuido and Mr. Smith's input on how

15 that may affect e-mail marketers, the concept of churn

16 and, you know, the fact that maybe you have more dead

17 addresses that are getting -- receiving legitimate

18 e-mail marketing materials.

19 MR. DiGUIDO: Well, one of the things that

20 happens right away in sending to -- there's all types of

21 things that retention-based, reputable vendors are doing

22 with their own house files in terms of data hygiene and

23 list management in terms of their own lists, so there are

24 services out there that we work with that are ECOA that

25 are looking at helping our clients do a better job in

 1   terms of cleansing their lists of names that are dead

 2   addresses.

 3   When we send mail out, we know immediately

 4   whether that message has been received to a valid e-mail

 5   box or whether it's bounced out of that. So, there's a

 6   lot of -- on our side, there's a lot of cleansing of the

 7   data and cleansing of those lists, because again, these

 8   marketers, they're not in the business of just throwing a

 9   lot of stuff up against the wall. They want to make sure

10   that they're dealing with a valid address. So, if we're

11   working with a third-party company where we're doing some

12   acquisition work for a client, we will look at the bounce

13   rate of a given list and take a look at what percentage

14   bounces out of that list, and you're looking for lists

15   with low bounce rates, because those are valid e-mail

16   addresses that are opt-in that people are interested in

17   receiving messages.

18   So, it's not like in other channels, in the

19   direct marking business, where you could be mailing stuff

20   to a mailbox and it's being delivered but there's nobody

21   home. Here we know immediately whether that message has

22   been received by a valid e-mail address or not, and the

23   next step is we know whether people opened it or clicked

24   on it. So, that level of reporting is something that you

25   don't get in any other media.

1   MR. FRANCOIS: Mr. Smith?

2   MR. SMITH: Yeah, I would echo Al's sentiments,

3   and a lot of that, I think that there's some very basic

4   list management and data hygiene and list hygiene

5   techniques that responsible mailers employ, you know,

6   taking your bounces, interpreting the bounce codes

7   appropriately, removing the hard bounces off the list,

8   dealing with soft bounces appropriately, and I think

9   most -- most of the legitimate services, like Al's and

10   myself's, that do these types of things do these basic

11   functions as well as provide the reporting,

12   click-through, open tracking, so that you can actually

13   try to limit your list to the people who are getting it,

14   who are opening it, who are responding to it and get rid

15   of not just the invalid addresses but the inactive people

16   as well, the people for whom the messages aren't

17   relevant.

18   MR. DiGUIDO: Those marketers are taking -- I

19   don't know, Steve, you might see this, you probably do,

20   the whole ROI factor, using e-mail as a cost-effective

21   and efficient way to get out to an audience, it's only

22   effective if the message is delivered to most mailboxes,

23   a certain percentage of the folks open them and actually

24   take some action.

25   So, the level of accountability in terms of the

1   performance of this medium, I've never been involved in

2   any other medium that is as accountable in terms of

3   return on investment amongst reputable vendors as this

4   one has been, because all the capability and the

5   technology and the reporting is all there to provide that

6   level of accountability.

7   MR. FRANCOIS: Yeah, absolutely.

8   Mr. Lewis from NortelNetworks?

9   MR. LEWIS: Yeah, I'm coming -- we're coming

10   from a somewhat different perspective than the ISPs and

11   the marketers. Being a corporation, we have a somewhat

12   different perspective on how we use the internet. One of

13   the comments I'd like to make about some of the issues

14   that have been discussed is that they were mentioning

15   about reputable marketers and bounces.

16   One of the things that we have been discovering

17   is that a lot of the even big name marketers that you

18   would assume and usually are quite legitimate, some of

19   their bounce handling is quite bad, in addition to the

20   more obnoxious and more deceptive practices who couldn't

21   receive a bounce even if you did bounce it, but we have

22   had a number of issues with major marketers not being

23   able to do very good bounce handling.

24   For example, as I mentioned yesterday, one of

25   our old domains we turned off for a period of over a

1   year, and the day we turned it off, we were getting

2   50,000 e-mails a day to it, and when we turned it back on

3   again a year later, we were getting 600,000. And during

4   that year, every single piece of e-mail to those

5   addresses bounced. So, obviously bounce handling is not

6   handled in a very -- very well in a global fashion.

7   The other one I wanted to mention was the issue

8   about inline images sometimes where they were talking

9   about open-up, you know, you can tell that your recipient

10   opened up the e-mail message. As many companies,

11   particularly major ones in the internet, we're also very

12   concerned about our own security, and things like knowing

13   when our user opens up a piece of e-mail is something

14   that we do start to look upon as being a security issue,

15   and there are many other things like that.

16   For example, we have been balancing the options

17   about inline images, like the one pixel, did this person

18   preview the e-mail, and we've been trying to balance,

19   should we block those or should we eviscerate those? And

20   the first thing that we think about is, who's the biggest

21   person who's -- who's the most prominent person that we

22   see doing that? And it's EVA (phonetic) groups. And we

23   certainly don't want to interfere with that.

24   On the other hand, we have things that are

25   saying, well, most of the major browsers on the internet

1   or that are used on the internet, just by having that

2   subject line headlighted or highlighted, you have an HTML

3   request going back to the sender that not only tells you

4   that the user has seen your message in some notion of

5   seeing, but what it also can be used for is a form of

6   being able to say, well, the user confirmed because they

7   clicked on something, the browser did it for them. And

8   in fact, from what I understand, the current versions of

9   Netscape do not have the ability to turn that off, and

10   the next version does. So, we have some issues

11   surrounding inline active content.

12   For both anti-Spam issues and for anti-virus

13   issues, we have had to deliberately start banning certain

14   kinds of content -- sorry about that -- and I think

15   that some of the marketers will start to find that the

16   -- most of the media, the rich media they are trying to

17   use is being blocked not only from an anti-Spam

18   perspective but from an anti-virus perspective. Most

19   people who are power users will have noticed that it's

20   starting to get very hard to send executable programs

21   anywhere. Well, it's going to get that way and much

22   worse with even simple things like HTML and inline

23   images.

24   MR. FRANCOIS: Now I am going to jump back to

25   Mr. Malik for one last comment before we actually return

1   to Mr. Lewis to talk about the impact on businesses as

2   well.

3   MR. MALIK: Some of the discussion has been

4   around what I'll call dead accounts. There's also

5   another element that needs to be considered as part of

6   the cost as we get into this, it's really abandoned

7   accounts. We have a number of customers that -- maybe

8   their initial account that they have had for three years

9   is now no longer usable from their perspective, and some

10   of the suggestions were made earlier, we make to our

11   customers, you know, moving to a slightly different

12   account name, adding numerical things. There's a bunch

13   of different suggestions depending on the situation the

14   customer is in, but that's when we have knowledge that

15   the customer is moving, we can take action to maybe

16   remove the -- I don't know, the abandoned or moved-from

17   account.

18   But when you have -- and I'll use a --

19   probably not the best analogy, but when you have

20   abandonment of a sort, you can wind up with effectively

21   ghost towns in different sections of your systems that

22   people that have been maybe long-standing customers have

23   had to go get other accounts because they have no way off

24   of these lists. They have no way to really drop this

25   down. And they have other accounts they can go to.

1   But now, from a provider's perspective, I need

2   to carry the cost and the maintenance for those abandoned

3   accounts, and they continue to get mail, because not

4   everybody is doing the policing of their accounts to see

5   if somebody is up. They really don't care. They just

6   know that it went out, it's still a valid address, they

7   are going to continue to pump mail at it, continue to,

8   you know, have me hold storage for some period of time.

9   So, that creates this other secondary effect that, you

10   know, really isn't that well known in the industry, and

11   it's perfectly fine for the customer to move and it's a

12   good thing to do, but I can't tell that they've moved and

13   stop using it quite as easily as if they come and tell

14   me. So, it creates another issue.

15   MR. FRANCOIS: And some of the people that I

16   have been -- okay, some of the people that I've spoken

17   to have said that as a way to control the amount of

18   unsolicited e-mail that they receive, they have several

19   e-mail accounts.

20   MR. MALIK: Correct.

21   MR. FRANCOIS: Devoted to specific purposes,

22   and some are devoted just to simply sign up for something

23   and catch the unsolicited e-mail, and they don't really

24   use it for anything else, but it sounds like you're

25   saying that can have a pretty -- still cost you.

1   MR. MALIK: Exactly, and it is -- and the

2   interesting thing is is that the customer feels that it's

3   not usable anymore and it requires no maintenance by

4   them, which is a reasonable expectation.

5   Now, in a -- kind of a back-end operation

6   side, we have to go look and see how many of those

7   accounts maybe haven't been used in, I don't know, pick a

8   time period, six months, and have they filled to the brim

9   with e-mail, and if you take a quick look without looking

10   at the contents, there's, you know, maybe -- I'll make

11   it up, a thousand messages all between 7 and 10K, which

12   is about the size of a normal Spam message. You can

13   reasonably assume that that's what's in there and it's

14   just been flooded with that and now you have got to start

15   going with your maintenance issues or cleaning that out.

16   So, it is a -- you know, if you want to call

17   it public works maintenance, it's a form of that, but it

18   is definitely a side effect of the volume that's gone up,

19   and more and more people are feeling forced to abandon

20   accounts because of that, because of the volume that's

21   increasing. Say, I just can't take it anymore, I am

22   going to move over here. So, that's why the issue is

23   moved to that space.

24   MR. FRANCOIS: Okay. We have talked about --

25   it looks like you wanted to say something.

1   MR. DiGUIDO: Well, what I would say is I think

2   that the -- there's no doubt that the consumer, if you

3   gave the -- an option to the consumer on a free service

4   to have a mailbox that was secure delivery, something

5   that they could say, okay, on that mailbox, the things

6   that I want and I've told you that I want can be

7   delivered there, that would be a great thing for the

8   consumer, and the marketer -- I mean, the impact to the

9   reputable marketer in terms of Spam is significant. It's

10   clutter. It gets in the way of their permission-based

11   e-mail communication getting to the customer. So, the

12   marketers would embrace that type of an effort as well.

13   The big, big issue that I think that we have to

14   address as well is that -- as we talk about Spam, and

15   Laura has mentioned this before, this delineation between

16   what is Spam and what isn't, we -- the poll that we did,

17   40 percent of the folks that responded said that they --

18   that a message that they wanted, they wanted to receive

19   from a reputable, trusted source, didn't get to them, and

20   when you're dealing with companies like ourselves that

21   work with a lot of financial services organizations, that

22   are starting to use e-mail for service messages, and a

23   service message gets caught up in a Spam filter and I've

24   suppressed direct mail, now I don't get my billing

25   statement.

1   Well, that's a significant problem. So, there

2   -- you know, as much as we hear the stories about

3   pornography, we want to put that over on the side here,

4   and fortunately it's over on the side there, but we don't

5   want to use the same brush to kind of sweep away the

6   stuff that needs to get there from a consumer standpoint.

7   So, a separate, secure mailbox or given an option for

8   that would be something that I think marketers and

9   consumers would be interested in.

10   MR. FRANCOIS: We've talked about marketers,

11   consumers, and we want to talk about the impact on

12   unsolicited commercial e-mail on businesses and what that

13   does, and for this we are going to turn again to Chris

14   Lewis from NortelNetworks, and I know that they have

15   undertaken some efforts to actually quantify how much it

16   costs their business for each Spam that gets through

17   their system. So, we'll --

18   MR. LEWIS: Yeah, we have been able to quantify

19   parts of it. I think it's important to mention a little

20   bit about who we are, because we have a sort of an

21   unusual position in terms of the internet being --

22   NortelNetworks is one of the world's largest

23   manufacturers of internet equipment. A lot of the wires

24   and equipment that your e-mail travels over is produced

25   by Nortel or its various competitors. So, we are very

1   heavily reliant on the internet both as we build it, but

2   also because we do business over it, because that's how

3   -- that's our whole -- that's our business, in addition

4   to the telecommunications industry and telephony and so

5   on. So, we rely on the internet to do business.

6   Logically, if you look at this at a high level,

7   you'd think that a company like NortelNetworks would

8   benefit from Spam, because it's increased bandwidth, more

9   hardware, more equipment, but it's not working that way.

10   We find that instead that Spam is having a chilling

11   effect on the industry as a whole. People have alluded

12   to stories about people who have abandoned the internet

13   completely.

14   Now, of course, you know, everyone knows the

15   internet is having various economic difficulties, and I

16   personally believe that much -- some of what we are

17   seeing is actually because of this chilling effect. Of

18   course, there are other issues involved about

19   over-capacity and so on, but what we're seeing is that it

20   is driving some consumers away, and it's inhibiting the

21   growth of the internet. That's what's inhibiting our

22   bottom line, is the growth of the internet itself.

23   One of the best ways of looking at that is that

24   there have been a number of studies over the years in the

25   UK and in the United States about lost opportunity costs

1   due to Spam, on the order of billions of dollars.

2   We're very much unlike an ISP in some ways and

3   like an ISP in others. E-mail to us is a mission

4   critical resource. We use this to do business. That's

5   how we do our deals. That's how we support our customers

6   who are buying our equipment and so on. But we also give

7   our users considerable latitude in what they can do on

8   their own, what they can do for a personal basis.

9   So, while our employee agreements will prohibit

10   certain kinds of behavior, which we'll touch on a little

11   bit later, we do allow people to buy things using their

12   NortelNetworks connectivity and so on. So, that is sort

13   of our, you know, introduction to it.

14   We have some advantages over an ISP in dealing

15   with Spam, because there are certain things I can look at

16   and say, yeah, that's Spam, that's blocked -- that gets

17   blocked, and our users, who are employees, don't get a

18   choice.

19   Now, there are a lot of other things where the

20   converse of that is that a -- the consequences of

21   accidentally blocking something we shouldn't is

22   considerably -- can be considerably higher, because when

23   you're talking about very, very large contracts about

24   selling equipment around the world, a missed piece of

25   e-mail can delay something or can lose a potential sale

1   all altogether.

2   So, we have a very difficult balancing act

3   about, yes, certain classes of Spam are easier to

4   determine and block, but on the other hand, our false

5   positive rates of accidentally misidentifying something

6   as Spam, the consequences can be considerably higher.

7   And the other thing that it would be

8   interesting, is very worth pointing out, is that we have

9   very little churn with employees due to Spam, because how

10   many people are going to quit their job because they're

11   getting too much Spam? That's obvious. On the other

12   hand, if you're not doing a very good job at Spam

13   control, you can have a serious impact on your employees.

14   So, I'm going to give a little bit of our

15   numbers here just to give you an idea of the scale of the

16   issue we're dealing with, and I personally believe that

17   we're -- the industry, the e-mail industry, is actually

18   in serious trouble right now. I'm in a unique position

19   that I have been involved with e-mail -- with Spam in

20   various forms for almost a decade, but we are seeing this

21   exponential growth, and it is getting truly, truly

22   frightening, even over the last couple of weeks, the

23   numbers are getting staggering.

24   When I first started with e-mail Spam, we're

25   talking about less than a 1 percent, a few thousand

1   e-mails to a user base of 50,000 to 60,000. Nowadays, I

2   did some -- I ran some metrics about a month ago, and

3   between 75 and 80 percent of all of our inbound e-mail is

4   unsolicited bulk e-mail. That's over 1 million Spams

5   each and every day. And it's now doubling every four to

6   five months.

7   Now, I say that, that's the sort of accepted

8   value, what BrightMail is talking about. The thing that

9   really scares me is I'm looking at numbers over the last

10 two weeks, and I am even afraid to quote because people

11 are not going to believe me, but over the last six weeks,

12 we were seeing doubling on the order of every four to six

13 weeks. It's just totally unbelievable.

14   In a few months or even a few weeks, we're

15 going to be seeing 2 million Spams a day. We are going

16 to be seeing 4 million Spams a day. Many of our

17 employees are getting -- routinely getting a hundred or

18 more Spams per day. These are real numbers of stuff that

19 they report to us or stuff that we have blocked from

20 them. We're somewhat different than other ISPs and some

21 of the industry where we have direct channels to our

22 employees. We tell them how to behave when they get

23 Spam, and we tell our users, do not click on the Spam --

24 do not try to do a delete.

25   We believe that in many -- in most cases,

1   certainly with many of the legitimate marketers

2   represented here, if you go to their unsubscribe and you

3   hit unsubscribe, you will get unsubscribed. We have no

4   problem with that, with believing that, but a lot of the

5   stuff is not that way, and when you see some of the

6   studies, like the CBT study, they talk about, well, we

7   tried four or five e-mail addresses, we seeded them in a

8   couple places, and then we unsubscribed, and we didn't

9   see those addresses getting more Spam. Well, that sample

10   size was simply not big enough.

11   We have 50,000 users. We see a different

12   behavior. What they talked about, if this e-mail address

13   disappears -- if -- once this e-mail address was

14   Spammed the first few times, if you didn't seed it

15   somehow, the volume tailed off. Well, that doesn't

16   happen. We are seeing a jump from 50,000 to 600,000 over

17   a one-year period where the mail was 100 percent

18   undeliverable.

19   MR. FRANCOIS: So, Chris, let me interrupt you.

20   What are the steps that you all are taking to --

21   MR. LEWIS: Well, I was just going to -- okay,

22   yeah. So, you wanted to talk about steps.

23   MR. FRANCOIS: Well, no, I remembered we were

24   talking and you gave me in terms of the study that you

25   all had done and what you all had figured out in terms of

1   how much it cost you all in terms of lost productivity.

2   MR. LEWIS: Okay. In addition to the various

3   costs like bandwidth, increased bandwidth -- I mean,

4   when we're talking about 80 percent Spam, 80 percent of

5   our bandwidth costs are due to e-mail or due to Spam in

6   additional equipment. We have dedicated anti-Spam

7   servers. We have people who are responsible for

8   operating these things and for tuning them and so on, in

9   addition to all of the other effects about reputation

10   lost due to people forging in your name.

11   I decided to take a very focused approach on

12   trying to justify doing anti-Spam at NortelNetworks,

13   because when this thing first came out, when I first

14   started working in this area and start dealing seriously

15   with e-mail Spam in '97, there wasn't very much Spam, and

16   nobody thought it was a problem, but I thought it's going

17   to go like this (indicating). So, the focus of our --

18   of the study that we used to justify our anti-Spam work

19   is how much productivity is lost for every e-mail Spam

20   that gets through to the end user?

21   And the number that we're using right now is

22   that every Spam that gets past our filters to one of our

23   users costs us about a minute of lost productivity, and

24   that would seem surprisingly high. I mean, the Spammers

25   will say, well, how long did it take to just hit delete?

1   Three or four seconds to -- I have to recognize, oh,

2   yes, that subject doesn't look kosher quick enough, but

3   what those aren't including are things like how long does

4   it take to download that message to your thing. That's,

5   you know, relatively straightforward technological thing.

6   But what we have is a much bigger issue around most Spams

7   do take 10, 15, 20 seconds to just purge out of your way,

8   but there are many Spams that take considerably longer

9   than that.

10   For example, we have Spams that trigger

11   security investigations. I just got a pornographic Spam

12   from my deskmate. How is he allowed to do this? And

13   then we have to figure out, oh, no, it didn't come from

14   our deskmate. The Spammer forged this address. Or the

15   types of content or senior management finding -- trying

16   -- yelling, how did this person find out my e-mail

17   address?

18   So -- and then it goes into Spams that subvert

19   browsers and put out pop-ups and pop-unders and trying to

20   kill things. Many of us have seen Spams which will open

21   up multiple windows, and when you start closing them, new

22   ones will pop up. How long does that take to deal with?

23   We have -- especially with some of the more

24   objectionable material, Nortel is in a number of

25   different places around the world where certain things

1   are even more objectionable than they are here, and we're

2   dealing with employees who will get something that

3   literally puts them off their work for 10-15 minutes, an

4   hour or days.

5   We have had situations where people call you

6   literally in tears about the material they're getting,

7   and that means we lose the benefit of our employees for

8   that period of time. That also involves complaints up

9   and down the management chain whenever a senior manager

10   gets Spammed, support costs for complaints and employees

11   trying to, in addition to our Spam filters, put in their

12   own Spam solution problems. So, I said that that takes

13   about a minute of each of our employees' time.

14   Using our loaded labor rates, which are

15   relatively in line with the rest of the industry, and

16   rounding up and rounding down and so on, we are basically

17   looking at every e-mail that gets past our filters costs

18   us $1 in lost productivity.

19   MR. FRANCOIS: And roughly how much e-mail gets

20   through your filters on a daily basis?

21   MR. LEWIS: On a daily basis, we are estimating

22   between 5,000 and 10,000 are getting past our filters.

23   MR. FRANCOIS: So, according to your study,

24   approximately $5,000 to $10,000 a day --

25   MR. LEWIS: That's right.

1   MR. FRANCOIS: -- in lost productivity.

2   MR. LEWIS: Now, if our filters weren't as good

3   as they are, we would be talking a million per day. So

4   -- and it's taken six years to keep the effectiveness

5   rate that we have, and we have played a number of tricks

6   that aren't available to ISPs to try and make our

7   filtering job easier, but I really can't go into those.

8   MR. FRANCOIS: I know Mr. DiGuido had something

9   to say.

10   MR. DiGUIDO: Yeah, I'm just sitting here

11   listening to this, and I've been watching this debate

12   played out on major periodicals in the country, and the

13   words that are being used are just incredible, chilling

14   effect, that the e-mail industry is in major difficulty

15   and that the scourge of Spam -- I'm not trying to

16   denigrate the debate or the conversation, but we need to

17   put it in proper perspective.

18   The e-mail industry is not, from a reputable

19   marketer's standpoint, in difficulty. More marketers

20   today are spending more time on just trying to understand

21   the e-mail delivery channel than ever before. We are

22   being inundated with major companies who are looking at

23   this channel of distribution as a way in which they can

24   communicate to their customer.

25   The scourge has been the cost of other media in

1   terms of delivering an audience from a prospective --

2   whether it's an acquisition message or attention message.

3   The cost of paper, printing and postage, continue to go

4   up. The cost of all media continue to go up. Marketers

5   are faced with incredible challenges today in terms of

6   instilling vitality and triggering the economic

7   conditions of their company. E-mail has become a place

8   that they have found as a refuge amongst all of those

9   different issues.

10   So, I take great cause in terms of the whole

11   issue that the e-mail industry or the internet industry

12   is in serious difficulty. What needs to change, and

13   we're not talking about that here, is the economic

14   relationship between the ISPs, the providers like

15   ourselves, and the marketers, the reputable marketers.

16   That's what needs to change. If the ISPs had a piece of

17   this overall transaction, this relationship, we would

18   start to see commercial service. We would start to see

19   dedicated places where consumers could go for minute

20   messages that they would be willing to pay for to

21   receive.

22   So, I think that any opinion or any statement

23   that comes out of here that says that the e-mail

24   communications business, that the internet industry is

25   somehow in dire straits, I mean, after all of what's

1   happened in the last three to five years, I mean,

2   business models have failed, no doubt, but this delivery

3   channel continues to grow. Reputable marketers continue

4   to work with reputable firms to figure out the secret

5   sauce, the way in which they can communicate in the

6   customer's preferred channel, which happens to be

7   internet, in an effective -- cost-effective and

8   efficient way.

9   So, if it's up to the NortelNetworks, the

10   BellSouths and those folks to figure out a way or the

11   Yahoo!s to figure out a way that commercially this makes

12   sense, then let's have a conversation about that, but to

13   say that the industry is in difficulty, it's not.

14   MR. FRANCOIS: And let's turn to Ms. Mann, who

15   has a comment.

16   MS. MANN: I just wanted to add that from our

17   point of view, e-mail continues to grow as well, so yes,

18   Spam is becoming an increasing problem. We hear from our

19   customers, we see it, we all see it in this room, but

20   e-mail usage around the world continues to increase. The

21   number of people who are using e-mail continues to

22   increase. The number of people who are transacting

23   online from our point of view at Yahoo! continues to

24   increase. So, certainly online activity is not being

25   squashed by Spam.

1   But of course, it is a priority to continue

2   fighting that, and we do need to work with lots of

3   players in the industry, with people who are doing direct

4   marketing with legitimate marketers, with people who are

5   working from the corporate perspective, with people who

6   are working to protect consumers like we are, absolutely.

7   So, I just wanted to echo that sentiment from our point

8   of view, as well. Despite the fact that fighting Spam is

9   one of our top corporate priorities, we do see the

10   continued growth of e-mail users and usage.

11   MR. FRANCOIS: Okay, let's turn to Mr. Malik,

12   he has a comment.

13   MR. MALIK: Thank you, Renard.

14   Even though, you know, we're certainly not in

15   any state of a crisis, what's really a business concern I

16   think to any business that would be trying to baseline

17   costs or, you know, forecast revenues and profitability,

18   this issue, because at least in the last six to eight

19   months, as the amount of Spam has increased and become

20   more the predominant volume of mail in our systems,

21   whether we're taking it out or not, it's still there, and

22   there's a cost to take it out.

23   So, if some of the figures that we've heard

24   from some of the other panelists continue to grow, then

25   from a cost to your business perspective, if I'm going to

1   provide let's say some new advanced e-mail service to

2   businesses, today that cost is one number. If I can't

3   forecast the future six months, 12 months, whatever that

4   horizon is that I'm preparing a business case for for

5   investment, it makes it very, very hard to run the

6   business going forward, because I don't know what my cost

7   base is going to be, at least that I can control.

8   So, this creates another element that I don't

9   have direct control over, even though I'm controlling

10   customer satisfaction, but my actual internal costs now

11   have a variable that is unknown.

12   MR. FRANCOIS: Let's go to Mr. Smith and then

13   Mrs. Betterly.

14   MR. SMITH: I just wanted to expand on what Al

15   said regarding e-mail and echo the sentiment that, you

16   know, our business is growing quarter over quarter in

17   terms of revenue as well, so it's not a -- it's not all

18   doom and gloom, although we do realize that spam probably

19   is the biggest threat to e-mail as a medium, but if you

20   take a step back and look at e-mail as a medium or a

21   communication method, it's still relatively young, you

22   know, 15-20 years old compared to television, radio,

23   newspapers, the telephone, all these other communication

24   methods and mediums have been around a long time and have

25   had a lot of -- a lot more time to work out the kinks,

1   if you will.

2   MR. FRANCOIS: Mrs. Betterly, briefly.

3   MS. BETTERLY: Well, I see it as profitable,

4   and it is profitable. In fact, you know, coming from the

5   dot com world, it was more profitable than having a dot

6   com with 150 employees, you know, with nine people, we

7   actually draw profit and we do well.

8   MR. FRANCOIS: And why is that?

9   MS. BETTERLY: Well, I mean, first of all,

10   we're not -- we absolutely refuse to take any investors,

11   so we make more money than we spend. We have to -- you

12   know, we have to be -- we have to actually look at the

13   bottom line and look at what we're spending and whatnot

14   and what's getting through and what's not. So, there's a

15   lot more control on the finance itself than there was,

16   you know, several years ago when, you know, you could

17   spend $30,000 on a party, you know, that doesn't happen

18   anymore, you know, we spend $20 for dinner, and it's, you

19   know, those kind of things.

20   So, I see it as one of the few profitable

21   things that you can actually do on the internet as

22   opposed to some of these other models that looked really

23   good that are no longer there, that were cool technology

24   and whatnot, but at the end of the day, there was no --

25   there was no revenue model behind it. There is a revenue

1   model behind what we do.

2   And at least, I'll speak for myself, trying to

3   do the best we can to be as legitimate e-mail marketers

4   is that we're very interested in getting rid of the guys

5   that are overseas and ripping headers and sending out

6   things that are absolutely -- it's affecting me

7   economically. It's harder for me to actually do my job,

8   even though I get virtually no complaints. You know, I

9   get filtered out, and I know I can see a big difference

10   in the response rate. I mean, in fact, sometimes we

11   don't even send to AOL anymore, because -- I mean, even

12   though we don't get any complaints, they look at our

13   stuff and say it's too many, and we -- so, you know,

14   there's that.

15   We also have to make sure that the names that

16   we have, that we have enough information about each

17   individual -- the original lists that I was working with

18   didn't have time, date, IP and physical address. I don't

19   send to anyone who doesn't have that anymore, because I

20   have to show exactly where this guy came from in case I

21   get a complaint.

22   MR. FRANCOIS: And I hate to cut you off, but

23   we are going to move to Mr. Malik and talk a little bit

24   more about at least the costs and the impact of Spam and

25   the growth of Spam that he's seen at BellSouth.

1   MR. MALIK: Thank you, Renard.

2   Over the last three years or so, I'm going to

3   try to paint the picture from 2000 to 2003, and give you

4   an idea of the juxtaposition in time and perception, and

5   if I look at the year 2000, you know, we're looking at

6   Spam as being, you know, from a customer's perspective,

7   I'll call it a minor nuisance, and in the single digits

8   within our systems. So, from our customers looking at it

9   and our cost perspective, we are spending adequate money

10   to deal with the problem at the level that it was at the

11   particular time.

12   The main focus of most of our work was really

13   strictly on more abuse and just general Spam filtering.

14   We weren't to the personal level that we talked about a

15   moment ago that's now -- because it's moved into the

16   space where in 2003, we're looking at in excess of 70

17   percent of the mail that we handle is Spam. The ones

18   that we can see, where we have seen a dramatic increase,

19   in just -- I think someone else mentioned on the panel,

20   just the last 60 days, we've managed to see an increase

21   from near 48 percent that we are seeing to over 60

22   percent, in the mid-sixties. That's a 25 percent

23   increase in things that we're seeing.

24   So, if the average person is, you know, has a

25   filter rate that's let's say 15 to 20 percent is still

1 getting through, that person is seeing somewhere around

2 70 percent coming towards them, and then, of course, you

3 know, a portion of that is passed on that we are not able

4 to catch. So, that is a significant cost to our

5 business, because if you look at the total volume of mail

6 and consider that 70 percent -- 75 percent of our

7 inbound traffic is Spam and 25 percent is not, if I

8 assume a one-for-one inbound to outbound -- close, let's

9 not get into a long discussion about it -- then that

10 means that 60 percent of my capacity carrying cost is

11 attributable to Spam today.

12   If I go back to 2000 and I do the same math,

13 the numbers are dramatically smaller. Basically what

14 it's caused is almost about a 5 to 700 percent increase

15 in our day-to-day carrying costs to carry Spam.

16   MR. FRANCOIS: And that's over what time frame?

17   MR. MALIK: That's over a three-year period.

18   MR. FRANCOIS: That's over a three-year period?

19   MR. MALIK: Not quite three years, you know,

20 I'm not -- we didn't time stamp 2000, and we're here

21 early in 2003, but over that horizon.

22   MR. FRANCOIS: So, over the past few years,

23 basically a 5 to 700 percent increase?

24   MR. MALIK: Right, and then the big, steep

25 curve has really occurred in the last year. I would say

1   that in the last year -- and I can't tell you what the

2   stimulus is, why it's happening. I think part of it has

3   to do with the fact that as our technology as providers

4   has gotten better, we'll use math, if I still want to get

5   ten messages through, the way to get ten messages through

6   is as the filter gets better, I up the volume, and I

7   still get ten messages through because my goal is to get

8   ten messages through.

9   So, that I think is one of the reasons that

10   we're such a higher volume as we've gotten better with

11   the technology. So, you know, as we get good, we also

12   have to take the burden of responsibility that we're also

13   going to have to deal with more until we change some of

14   the behaviors or the way we're dealing with things.

15   So, if this continues along this rate, and I

16   hope it doesn't, you know, we could be seeing, you know,

17   somewhere close to 80 percent in the next couple of

18   months, which would basically be such a significant

19   amount of cost in my system that for every customer that

20   I take on, I'm going to be looking at somewhere between

21   $3 to $5 a year per customer to deal with Spam alone,

22   which was not in existence a couple of years ago, not to

23   that level of magnitude, where it was really a cost

24   consideration and a business case, that we have got to

25   invest -- I think some of the things that I've heard to,

1   you know, in the technology, the people and so forth to

2   deal with it. So, it's a real cost to the business from

3   that perspective.

4   MR. FRANCOIS: Before we get to Mr. Shivers, I

5   want to ask Dale, what is the most significant cost that

6   you have? Is it hardware, software, abuse desk?

7   MR. MALIK: I'd say the most significant cost

8   is at the system level and the software that we have to

9   run, because if you're thinking that 60 to 70 percent of

10   my systems are tied up doing Spam -- processing Spam,

11   and I have a fairly significant investment in those

12   systems, because that is the next largest system, mail,

13   besides our internet access, that's a fairly good portion

14   of my cost base.

15   MR. FRANCOIS: Okay. Mr. Shivers?

16   MR. SHIVERS: Back in -- it was just not that

17   long ago, it was like February of 2002, we were running

18   35 percent of our e-mail was Spam, and now, right now,

19   we're running 65 to 70 percent of our e-mail is Spam.

20   MR. FRANCOIS: Is that e-mail that's coming

21   into your system, e-mail that gets through to the --

22   MR. SHIVERS: No, that's e-mail that's coming

23   into our system. If you look at 4 million messages,

24   approximately 2.5 million would be Spam, 1.5 million

25   would be supposedly good mail, but you have got to --

1   you always have to remember, like Dale said, that 15 to

2   20 percent of the stuff that is getting through is also

3   going to be Spam, and that's been -- since Spam is

4   growing exponentially, that 15 to 20 percent, where two

5   years ago it represented a very minor nuisance, is now

6   becoming an overwhelming situation.

7   From my standpoint, it's not just the customer

8   complaints, it's not just the systems I have to put in

9   place. I'm at the level of about $5 per customer per

10   year, what I'm throwing at it, and for me that's a lot.

11   MR. FRANCOIS: And you earlier alluded to the

12   fact that you all charge per time.

13   MR. SHIVERS: Correct.

14   MR. FRANCOIS: And so that has -- I mean --

15   MR. SHIVERS: Our average customer is about --

16   they spend with us about $6 a month, so if you figure $5

17   a year, that's quite a bit per customer.

18   The other side of the coin is right now, I am

19   actually behind the curve. I am not -- I don't have the

20   resources to keep throwing -- I mean, I am throwing --

21   I will throw as many servers as I have to at the problem,

22   but I am behind the curve. So, to me, to survive, I'm

23   doing everything I can, but it's almost like every day

24   I'm fighting a denial of service attack.

25   Just to give you a little story, I left to come

1   down here, I got up at 4:00 the morning on Wednesday to,

2   you know, get on the plane to get an early flight down

3   here so I could see the afternoon sessions. The first

4   thing I did when I got up and went and got into my

5   computer to see how my connections were doing, to see --

6   and I was amazed. It was 4:00 in the morning, and each

7   of my servers had 500 connections, and I have three

8   filtering services, and they had 500 connections apiece

9   to it. And they don't function too well over, like, 400.

10   So, I was being hurt at 4:00 in the morning.

11   The last thing I did before I stepped out of

12   the house to get on -- to go to get on the plane was to

13   check that again. As soon as I got to Charlotte, I

14   called my engineer and said, hey, what's going on? And

15   he had to call our vendor to see what was going on.

16   Then, luckily, I was at the open relays and proxies thing

17   yesterday, came up with a good idea. I called my

18   engineer immediately -- I walked out of the room, called

19   him, said get on that list right now. So, that's what

20   we're fighting.

21   MR. FRANCOIS: What are -- I know you alluded

22   to not having the resources, but what do you find as a

23   small ISP that because of limited resources you are not

24   able to get to try and handle this situation? Is it a

25   better filtering service? Is it more servers? Is it --

1   what is it?

2   MR. SHIVERS: Well, it's two things. One is

3   it's -- yeah, we're -- I'm not touting this new

4   technology, but we're excited if it works. I think it

5   will start helping us. It's one that actually will

6   punish, so to speak, the Spammers hitting our system,

7   because it will actually tighten down on their bandwidth

8   and then allow the good mail to come through. We're

9   hoping that that works.

10   The other side of the coin is when we get into

11   these positions where it's almost like a denial of

12   service situation where our servers start delaying mail,

13   our customer complaints go up astronomically. Our

14   customer support team struggles to keep up. Our customer

15   service team struggles to keep up. Our switchboards

16   light up. It's just -- that's where we go.

17   MR. FRANCOIS: And roughly how many employees

18   do you have that spend -- how many do you have, and how

19   many of those spend the vast majority of their time

20   dealing with Spam issues?

21   MR. SHIVERS: Well, customer service and

22   customer support combined, we have seven people that do

23   those, those aspect of our business. Right now, just to

24   monitor systems, that's part of my job and my network

25   engineer's. So, we basically have two that are

1   dedicated. He covers DSL, and I cover other issues, like

2   we also host websites, like most small ISPs do and we

3   have domains and all that, but it used to be that's where

4   I would spend most of time and getting new servers and

5   taking care of that or our website design teams, but now

6   I'm spending about 25 to 30 percent of my time dedicated

7   to this issue alone, and he's spending probably 50

8   percent. So, our other aspects of our business are

9   starting to suffer.

10   MR. FRANCOIS: How much yearly, if it's

11   possible, do you all spend on addressing Spam issues?

12   MR. SHIVERS: Well, today -- well, we started

13   in about April 2001 with the Brightmail folks, and to

14   date, we've spent something in the neighborhood of like

15    $112,000, and I anticipate, just over the next six

16   months, I'll probably have to like spend that type of

17   money again just to keep up with the problem.

18   MR. FRANCOIS: Okay. And I want to return to

19   Dale for a brief moment in terms of the increase in costs

20   you said over the past few years has gone up anywhere

21   between 500 to 700 percent, and my question to you is,

22   where does that money come from? Does it just eat into

23   your profit margin? Do you increase your monthly access

24   fees? How have you all tried to address such an

25   exponential increase?

1   MR. MALIK: Right. So far, it's really been

2   built into the base cost of running the business. You

3   know, I don't believe our pricing has changed much over

4   the years. In fact, the pricing pressures, many are

5   aware in the industry, is the other way, coming down as,

6   you know, as competition is fairly fierce in the

7   marketplace. So, it really does -- it raises our

8   general cost base, which at some point, you know, the

9   consumer is paying for it depending on how you look at

10   it.

11   But of course, because it's in the expectation

12   level now that this is something you have to do on my

13   behalf, and you must do a good job if you would like my

14   business, then, of course, it has to be incorporated into

15   the bottom line. There isn't -- you can't separate it

16   out.

17   MR. FRANCOIS: And you know, there's a lot to

18   cover on this, but I want to kind of talk about something

19   that we had briefly or I had e-mailed to everybody is

20   with the onslaught of proposed legislation, we wanted to

21   kind of address some of the economic issues and, you

22   know, keeping in mind that there will be a state and

23   Federal legislation panel that will address these issues

24   -- more issues in more detail, I sent you all a link to

25   the Burns-Wyden legislation that was introduced and

1   wanted to get your opinions, brief opinions, because

2   we're running into our question and answer time period,

3   on whether, if this legislation is passed, whether this

4   would have any effect on your economic interests,

5   whether -- good or bad, and what would it bad.

6   Actually, I am going to start with Steve, who

7   will talk about that briefly and also potential -- the

8   impact of the tapestry of state laws that are out there.

9   MR. SMITH: Okay, so, as far as Burns-Wyden,

10   the two main areas where we see that potentially

11   impacting our business economically is, one, in our

12   exposure to litigation and frivolous lawsuits, and two,

13   on whether or not it actually does impact Spam or is able

14   to control Spam.

15   First, in terms of litigation or frivolous

16   lawsuit exposure, the existing -- you know, the existing

17   state Spam statutes that are already out there, I think

18   it's 27 states have -- and somebody can correct me if

19   I'm wrong -- 27 states already have state laws in place

20   regulating Spam, and some of those laws are relatively

21   poorly crafted, particularly like in Utah, for example,

22   there's a great exposure to frivolous lawsuits, and we

23   actually were named as -- one of our customers was in a

24   lawsuit where we found that -- in our research that the

25   recipient in question who received the e-mail, there was

1   records showing that they actually did subscribe when it

2   came down to it, which is kind of scary, because it kind

3   of shows the potential for abuse of a poor law.

4   MR. FRANCOIS: Do you know roughly how much it

5   cost you to litigate and research that issue?

6   MR. SMITH: That particular one I don't have

7   the numbers on, but it's thousands of dollars generally,

8   and every time that happens, you know, you can't just

9   ignore it. You have to actually respond to it.

10   And, in fact, there was an article two days ago

11   in DM News quoting Al Mancell (phonetic), the president

12   of the Utah Senate, and Martin Stevens, Speaker of the

13   Utah House. They are trying to pass some amendments to

14   correct that law, and they said that Utah's current law,

15   and I quote, "has resulted in the proliferation of over

16   1500 lawsuits in the last ten months. Two Utah law firms

17   are taking unfair advantage of our legal system." And

18   that's from Utah legislators.

19   This is one of the reasons why we think

20   Burns-Wyden may actually be a benefit to us if we can get

21   one consistent well-crafted Federal law rather than

22   potentially 50 different state laws all regulating things

23   in potentially conflicting ways. I think some of the

24   laws, if you look at them now, actually are conflicting

25   in the way they address this. And I think also if you

1   consider it, it really doesn't make sense to have

2   state-level legislation addressing a global network.

3   MR. FRANCOIS: And I'm going to move on to Mr.

4   Shivers, Burns-Wyden and your economic interest.

5   MR. SHIVERS: Well, I don't think it goes far

6   enough at this point. I think there's some definitions

7   that need to be added in there, because it would -- that

8   has to do with the sender. If it's -- there needs to be

9   like a right of action in relation to both company and

10   e-mail sender, because otherwise, companies can just move

11   off-shore, and what's our recourse? And there won't be

12   very much.

13   MR. FRANCOIS: Is that because of the -- the

14   problem lies in the volume that you receive?

15   MR. SHIVERS: Yes, I would say so.

16   MR. FRANCOIS: Okay. Mr. Malik?

17   MR. MALIK: Well, generally speaking, any

18   legislation that is going to hopefully take some of the

19   Spam out of our network, you know, through legal means

20   will certainly be a help and, you know, as we're looking

21   at this bill and other things that are out there, we plan

22   to spend, you know, a reasonable amount of time providing

23   input into some of these complexities, because I think as

24   many of the panelists agree, there's a lot of layers to

25   this. It isn't just one aspect.

1   And you have to really carefully peel through

2   those layers, because there are a lot of

3   interdependencies, and we don't want to negatively affect

4   those that are doing legitimate business. We want to

5   provide the right level of service to our customers at

6   the same time. So, it's a fairly complex balance, and I

7   think it will take, you know, a reasonable amount of

8   discussion to get there, both in the industry and within

9   the legislative community.

10   MR. FRANCOIS: Ms. Atkins?

11   MS. ATKINS: I'm not convinced Burns-Wyden --

12   again, the Burns-Wyden Bill goes far enough, and I don't

13   see -- looking at the law, it's very similar to many of

14   the state laws, and even in those states, the laws

15   haven't had much effect. So, any law that's passed will

16   need to be enforced, and if Burns-Wyden isn't enforced,

17   it's no good, but I don't believe that the enforcement of

18   the law, as it is written now, will be a trivial matter,

19   and that in and of itself will increase expenses both for

20   the government to prosecute, and if they do incorporate

21   private right of action both for the ISPs and the

22   individuals.

23   MR. FRANCOIS: Mr. DiGuido, economic impact of

24   Burns-Wyden?

25   MR. DiGUIDO: Yeah, we think it's a good first

1   step. We don't believe that it is going to solve the

2   problem. We think that the legislation is solid. We

3   think that most of this is occurring off-shore, as my

4   other panelists have said. We do believe there's a

5   commercial solution to this problem. We think until

6   there is a meeting of the minds between the ISPs, the

7   marketers and providers, reputable providers, the problem

8   will not go away. And it is a commercial, economic

9   solution that will be -- that will end this problem.

10   MR. FRANCOIS: Lisa Pollock Mann, briefly?

11   MS. MANN: We believe that anything that acts

12   as a deterrent to Spam and to help protect the online

13   user experience is in our best interests, and we do

14   support the Burns-Wyden Bill, because we do believe that

15   it provides for effective deterrents, penalties and

16   marketing rules. And really briefly, five things about

17   it that we think does make for -- I'm losing my -- I

18   can't speak.

19   MR. FRANCOIS: Now you're down to four things.

20   MS. MANN: Five points in it that we support.

21   It gives users the right to say no. It gives rights to

22   service providers to sue. It provides for criminal

23   penalties for fraudulent e-mails, preserving service

24   providers' anti-Spam tools and providing for a consistent

25   national standard, because again, Spam does cross state

1   lines, and for all those reasons, we do believe that it

2   is in our economic interest.

3   MR. FRANCOIS: Chris Lewis?

4   MR. LEWIS: Yeah, we see basically three issues

5   with the bill. First of all, it's opt-out only. We

6   believe that that might have held three or four years

7   ago, but now, it probably would not have an appreciable

8   effect. And any sort of opt-out legislation would have

9   to have a global opt-out mechanism, because it is too

10   easy to do multiple bites.

11   The second issue is that we would require to

12   ban wide opt-out. One of the more interesting things is

13   we believe that anyone that is sending porn Spam into a

14   company is breaking the law through sexual harassment

15   legislation, and in fact, that in many cases put the

16   administrators and executives of the companies personally

17   at legal risk due to the way that the legislation works

18   in various jurisdictions. So, corporations need to be

19   able to say, no, not only do I not want it, our whole

20   company does not want it.

21   And finally, I don't think that it adequately

22   defines providers of internet services. I've been asking

23   around -- I didn't have access to the other legislation

24   which actually defines what that means, but I understand

25   that that part of the law was enacted in 1934 or

1   something like that, and while ISPs are obviously

2   internet service providers, in the eyes of 877, are

3   corporations who have their own e-mail infrastructures

4   also ISPs? We would feel that for the purposes of an

5   anti-Spam bill, definitely the corporations would have to

6   have right of action against Spammers, because they're

7   running the infrastructure. It's costing them money.

8   MR. FRANCOIS: Last, but not least, but with

9   the utmost celerity, Laura Betterly.

10   MS. BETTERLY: I actually believe that the

11   legislation does have to be on a Federal level as opposed

12   to a state level. There are frivolous lawsuits, and it's

13   very hard to ascertain when you are and aren't breaking

14   another state law. I mean, the State of Florida, we

15   don't have any particular laws that -- not in general,

16   okay, just on this, okay?

17   **(Laughter.)**

18   MR. FRANCOIS: I am going to interrupt you

19   there, because we need to save a little bit of time for

20   -- and we have just that, a little bit of time for a

21   couple of questions.

22   Right there. Wait for the microphone, wait for

23   the microphone.

24   MR. MOORE: Charlie Moore with MailShell, and I

25   just wanted to address a couple things. We conducted the

1   survey and sort of started off with Commissioner

2   Thompson's recommendation or --

3   MR. FRANCOIS: Charlie, I hate to interrupt

4   you, but I need you to get to that question, because --

5   MR. MOORE: Yeah, the question is really about

6   the fear of buying online, and I think Laura brought up

7   an excellent point, which is the 8 percent, you know,

8   what does the 8 percent mean and that question of

9   consumer confidence? So, really, specifically, about

10   buying online, because our survey does say that folks are

11   confused about what is Spam. We certainly pride

12   ourselves on not -- on low false positives, but how do

13   you feel about that eroding the confidence in buying

14   online, which is such a fundamental part of the economics

15   of the internet, and Spam is really eroding that

16   confidence right now?

17   MR. DiGUIDO: You know, we work with about over

18   a hundred reputable marketers. About half of those folks

19   are actually doing online e-commerce. We are not hearing

20   from them as a result of Spam thus far that there's any

21   degradation in terms of transactions being consummated on

22   the web. As a matter of fact, counter to that. They're

23   seeing more and more folks spending more and more time

24   transacting on the web. So, we haven't seen the impact.

25   They haven't come to us and said, you know what, this

1   medium used to work a year ago, and today it's not

2   working at all. They're actually saying the opposite.

3   They're starting to spend more money and more time and

4   more effort in terms of driving more folks online to do

5   transactions.

6   MR. FRANCOIS: Laura Atkins?

7   MS. ATKINS: I think that there is -- there

8   are consumers out there who are not purchasing because

9   they do not want certain groups to have their e-mail

10   address, and they are -- they are not making those

11   purchases, and I can tell you, I mean, in my business, we

12   make a lot of purchases over the internet, and there are

13   companies that we will not purchase from. We will not

14   purchase hardware from, we will not purchase routers

15   from, because we cannot trust that our e-mail address

16   will be held confidentially with that company, and that

17   is money that those companies have lost because of that

18   lack of consumer confidence.

19   MR. DiGUIDO: There are people who still don't

20   want to give credit cards in restaurants because they're

21   worried about someone taking their credit card number. I

22   don't think that you can say that e-mail is any different

23   than any other channel in terms of folks who do not want

24   to transact with a channel because of whatever reason are

25   not going to transact.

1   MS. ATKINS: No, they're specific companies.

2   It's not the channel. We purchase -- we have made, you

3   know, hundreds of thousands of dollars in capital

4   investments in purchases over the internet, and the

5   decisions of who we purchase from are based on their

6   privacy policies and how we believe and how we perceive

7   their consumer status. So, it's the specific companies.

8   It is not the internet in general.

9   MR. FRANCOIS: We have two questions. It looks

10   like Mona might have one from the internet, and also the

11   gentleman in the second row after that.

12   MS. SPIVACK: What does the panel think about

13   third-party programs designed to help reverse the cost

14   model of Spam? For example, bonded sender, which

15   requires senders to post a financial bond that gets

16   debited if end user complaint rates exceed a certain

17   threshold?

18   MR. FRANCOIS: As a caveat, we do not want to

19   steal the thunder of the technical solutions panel,

20   because one, that's the last panel of the forum, and they

21   would be angry if we took away from their audience. So,

22   who wants to address that?

23   MR. SMITH: I can say briefly that bonded

24   sender, trusted sender, paying for access, all of those

25   solutions require one thing, which is being able to

1   discard everybody else, and until we have infrastructure

2   in place that allows us to recognize who's being sent in

3   the first place, we can't do that. So, that -- the

4   first step has got to be accountability and

5   identifiability from senders.

6   MR. LEWIS: One of the other issues is that

7   depending on who the recipient is, for example, a

8   corporation such as ourselves, the amount of money that

9   would be involved in borrowing an employee to market to

10   them. I would find that most marketers would not be

11   prepared to spend the 50 cents or a dollar each. So, you

12   have to be -- it depends a lot on who the recipients

13   are.

14   MR. FRANCOIS: The gentleman in the second row?

15   MR. SILVER: My name is David Silver, and I

16   have a quick question for the FTC. I'm noticing in these

17   panels that one constituency is missing, and that is the

18   marketer for large corporations, and when we talk about

19   the cost of marketing, and I think Al has done a great

20   job in being a voice for the cost to his company in

21   servicing marketers, but my real question is, you know,

22   the Lands Ends of the world or the Continentals of the

23   world or the BellSouth or let's look at Nortel, there are

24   marketers within those companies that are using

25   permission-based marketing techniques and sending the

1   very e-mail that we are having discussions about, yet

2   they are not represented in the cost to their marketing

3   or their ability not to market as a result of these

4   e-mails.

5   I'm just curious as to when the FTC was putting

6   this forum together, was there an effort to reach out to

7   the key marketers, CMOs, et cetera, to hear from their

8   point of view what their challenges are or what the cost

9   is of not getting their marketing delivered?

10   MR. FRANCOIS: I will do my best to give you a

11   governmental answer that's not an answer. We -- in

12   terms of putting the forum together and putting panels

13   together, we undertook the opportunity to, one, contact

14   as many people as we could on an informational interview

15   basis. So, to that extent, we contacted a variety of

16   people in the Spamming community, the anti-Spamming

17   community, the chief marketing organizations, marketers,

18   list brokers, you name it, just to kind of cover -- get

19   enough information for us to articulately define the

20   issues.

21   And if you look at the Federal Register notice,

22   some of the issues -- we have many more issues than we

23   have panels, and through that process of interviewing

24   people, we were able to whittle down what we felt were

25   the most salient features.

1   To that endeavor, we did try and reach out to

2   marketers and try and offer them a seat at the table, and

3   I think our feeling was also that their perspective could

4   be represented not by them necessarily specifically being

5   here, but their sentiments could be represented best by

6   other people.

7   And finally, you know, in the terms of people

8   sending in a request for participation, we had about 225,

9   so we were limited in who we selected to be participants

10   and panelists, and that's kind of how we got with the

11   composition of the panels.

12   In terms of what they do to market to

13   consumers, I think that is something that can be

14   addressed also on the best practices panel, where their

15   perspectives will be represented there.

16   UNIDENTIFIED AUDIENCE MEMBER: (No microphone.)

17   I was just questioning about -- you know, we're talking

18   about the costs of marketing, and we aren't hearing the

19   representation directly from that marketer, so I'm

20   curious for the panel discussion, you talk about the

21   problems of getting that e-mail, getting to the boss, et

22   cetera, or opting for the information going in, but we

23   are not hearing the other side, and I'm kind of

24   interested in understanding from the panel's perspective,

25   you know, from their representation, what is the cost of

1   not getting the messages delivered --

2   MR. FRANCOIS: Stan, and I hate to cut you off,

3   but we could go on for this -- we could go on for hours,

4   but we are out of time and currently eating into your

5   coffee break. So, if you care to discuss it, I'm happy

6   to.

7   Thank you for your time.

8   **(Applause.)**

9   **(Whereupon, a brief recess was taken.)**

10   MR. HUSEMAN: We are going to get started with

11   our blacklists panel, so if everyone could please take

12   their seats.

13   To begin, my name is Brian Huseman, I'm an

14   attorney with the Division of Marketing Practices at the

15   FTC, and this panel is going to be about blacklists. I'm

16   going to start by reading a quote from a recent article

17   that talks about blacklists. I'm going to ask first if

18   you're out in the hallway if you can please shut the

19   doors if you're not coming in. Thanks a lot.

20   I'm going to start by reading a quote about

21   blacklists. It says, "Black hole lists or blacklists,

22   databases where various organizations track IP addresses

23   for suspected Spammers and their cohorts, there are more

24   than 150 such lists, the most famous of which are run by

25   SpamCop, the Mail Abuse Prevention System, MAPS, Spamhaus

1   and the Spam Prevention Early Warning System or SPEWS.

2   Many top ISPs use one or more lists, blocking all mail

3   coming from these addresses to keep Spam from reaching

4   your inbox. The problem? Sometimes innocent bystanders

5   or well-meaning marketers get blocked along with the bad

6   guys, and getting unblocked can be a nightmare."

7   That's one person's opinion, so we are going to

8   discuss some of these issues. Let's start off with

9   Margie Arbon from MAPS, the Mail Abuse Prevention System.

10   You don't like the word blacklist, do you? I think in

11   one of our conversations, you said that that term

12   actually almost made your skin crawl?

13   MS. ARBON: Yeah.

14   MR. HUSEMAN: Can you tell me why?

15   MS. ARBON: The original list was one that we

16   had, and it was the realtime black hole list. Black hole

17   is a router command. It was originally implemented in

18   BGP feed, and the term came from the command black hole

19   in a CISCO router. So, the term blacklist has kind of

20   developed, and it's technically not what it was --

21   MR. HUSEMAN: Sort of a McCarthyism.

22   MS. ARBON: -- what it was, yes, and there's

23   some -- it carries some emotional connotations that

24   really it shouldn't carry.

25   MR. HUSEMAN: What does MAPS do?

1   MS. ARBON: We maintain lists of IP addresses,

2   dynamically assigned IP addresses that are not intended

3   to be sending mail, open relays, open proxies, IP

4   addresses that have originated or in some way support

5   Spamming activities.

6   MR. HUSEMAN: Julian Haight, you operate

7   SpamCop. What is SpamCop?

8   MR. HAIGHT: It originally is a reporting

9   service where somebody can file a complaint, and we try

10   to identify the abuse desk responsible for the source of

11   the e-mail they're complaining about and pass the

12   complaint on. It has grown to include a blacklist, which

13   is built from the data collected by that process, as well

14   as an end-user filtering product.

15   MR. HUSEMAN: How does SpamCop differ from

16   MAPS?

17   MR. HAIGHT: Well, the very fact that the

18   blacklist is built dynamically in realtime from the user

19   complaints rather than in a more judicious longer view, I

20   think, and the realtime black hole list also has sort of

21   a punitive motive that -- I don't know if you like that

22   term, but you do blacklist sites that aren't actually the

23   origination point of the e-mail but are politically

24   connected to the origination point.

25   Is that correct or --

1   MS. ARBON: Politically connected --

2   MR. HAIGHT: Not politically connected but

3   financially connected maybe.

4   MR. HUSEMAN: Go ahead.

5   MS. ARBON: We list sites that are in some way

6   supporting the Spamming activity. Take, for example, the

7   case that we have been talking about of open proxies.

8   Listing the proxy is one thing, but if the same site is

9   being advertised to the same mechanism over and over

10   again, the site itself is a problem. The site itself is

11   supporting the Spamming activity.

12   MR. HUSEMAN: Alan Murphy, you're with

13   Spamhaus, what is your position with Spamhaus?

14   MR. MURPHY: I'm a volunteer. I --

15   MR. HUSEMAN: Speak into the microphone as

16   well.

17   MR. MURPHY: I'm a volunteer. I am an editor

18   at Spamhaus. I investigate Spam issues and make

19   recommendations to the list.

20   MR. HUSEMAN: What is Spamhaus?

21   MR. MURPHY: Spamhaus provides two services

22   that are widely used. One is ROKSO, the record of known

23   Spam offenders. It's documentation really of Spammers or

24   organizations which have been terminated for violations

25   of acceptable use policies by at least three ISPs.

1   We also maintain a DNS zone, a block list, if

2   you will, of ROKSO Spammers and other Spam sources and

3   Spam support services.

4   MR. HUSEMAN: How does Spamhaus differ from

5   SpamCop and from MAPS?

6   MR. MURPHY: DSBL is somewhat similar to MAPS

7   RBL, the criteria to be entered and removed are somewhat

8   different, but I would say substantially similar.

9   MR. HUSEMAN: How are they different?

10   MR. MURPHY: MAPS uses a various rigid,

11   formalized nomination process. We rely more on

12   observation of publicly available information.

13   MR. HUSEMAN: What type of publicly available

14   information do you use?

15   MR. MURPHY: We look -- we use SpamCop

16   statistics for one thing. We look at a number of other

17   publicly available archives of Spam. We have our own

18   Spam trap addresses. We know network administrators that

19   run fairly extensive Spam traps. So, we look at a wide

20   range of information about Spam sources and Spam support

21   services.

22   And I think it's important for me to emphasize

23   this, because this does distinguish us from SpamCop. We

24   don't just look at the end user reports. It -- SpamCop

25   provides a really interesting dynamic look at when Spam

1   hits. It requires relatively little effort to trigger a

2   SpamCop listing, and then the SpamCop listing will

3   deteriorate very quickly over time.

4   Our list is not nearly that dynamic. We need

5   to look at a wide range of sources to determine that

6   there really is a Spam pattern here, there really is an

7   abuse pattern, there really is e-mail that is unsolicited

8   and bulk, and not just identified by a single -- or a

9   few users, a relatively small number of users, but

10   identified across a very wide range of network sources.

11   MR. HUSEMAN: A question for all three of you.

12   Who makes the decisions about what IP addresses to place

13   on your list?

14   MS. ARBON: We have a nomination procedure. We

15   also have procedures for Spam in progress or Spam that we

16   get to our own addresses. We have an investigator that

17   actually looks at the nomination. They require

18   notification to the ISP. We require -- if they're in

19   the United States, a phone call to the ISP or whoever is

20   being listed to tell them that there is a nomination and

21   give them an opportunity to cure. Our intent is not to

22   list anything. We list -- we only list -- this is

23   specifically for the RBL. We only list when there is no

24   way to resolve the problem any other way.

25   After that, someone has to certify the

1   nomination that it does meet our criteria for listing,

2   and then a third person has to approve it.

3   MR. HAIGHT: Very conservative.

4   MS. ARBON: Yes.

5   MR. HAIGHT: You try to be as conservative as

6   possible.

7   On the other hand, SpamCop is at the other end

8   of the spectrum. It's very aggressive. It's intended to

9   actually stop as much Spam as possible, and it has the

10   potential for problems. I recognize this.

11   MR. HUSEMAN: Julian, why did SpamCop choose to

12   go the aggressive route rather than --

13   MR. HAIGHT: Well, because I saw other

14   solutions that weren't effective at actually keeping Spam

15   from my inbox. You know, if you use the realtime black

16   hole list, you're still going to get a lot of Spam, and I

17   was trying to find a way to stop that, and one of the

18   things that I identified was the need to list sites

19   within minutes of them showing up, because Spammers are

20   morphing so fast from one IP address to another, that you

21   really have to list the site as quickly as you possibly

22   can in order to prevent it from getting into somebody's

23   inbox.

24   MR. HUSEMAN: Alan, who makes the decisions

25   about what IP addresses to list at Spamhaus?

1   MR. MURPHY: I'd like to defer on that.

2   MR. HUSEMAN: Is there a reason why?

3   MR. MURPHY: I'm currently facing litigation

4   from my participation as a volunteer with Spamhaus.

5   MR. HUSEMAN: Okay. What percentage of ISPs

6   use blacklists?

7   MR. HAIGHT: All of them. I mean --

8   MR. HUSEMAN: Every ISP uses a blacklist?

9   MR. HAIGHT: With very rare exceptions. We

10   have just heard from AOL, Microsoft and Yahoo!, that they

11   all do.

12   MR. HUSEMAN: What ISPs use SpamCop?

13   MR. HAIGHT: Ah, you know, I don't have one I

14   can name. I don't think that most ISPs who use it want

15   people to know that they use it.

16   MR. HUSEMAN: Margie, what about MAPS? What

17   ISPs use MAPS?

18   MS. ARBON: We give ISPs, anybody who

19   subscribes to our list, the opportunity to say whether or

20   not they want to be named, and off the top of my head,

21   I'm -- I can't think of anybody that's --

22   MR. HUSEMAN: Said yes to that?

23   MS. ARBON: -- has said yes. There are a few.

24   MR. HAIGHT: Nobody wants to stand up.

25   MS. ARBON: The smaller ones will typically say

1   yes.

2   MR. HUSEMAN: Clifton Royston (phonetic) from

3   LavaNet (phonetic) says yes, that he uses MAPS.

4   MS. ARBON: Okay, thank you.

5   MR. HUSEMAN: Alan, what ISPs use Spamhaus?

6   MR. MURPHY: Again, I would probably not want

7   to list specific names. I believe that the FTC, though,

8   as long as we're here, I believe you use that --

9   Spamhaus on some of your servers at least.

10   MR. HUSEMAN: And I will mention that the FTC

11   -- you are correct, the FTC has been using some

12   blacklists recently, and we are in the process of

13   examining blacklists and what procedures we will use for

14   blocking and which ones to subscribe to.

15   MR. MURPHY: I would like to comment that it is

16   widely used. There are probably -- by -- it's very

17   difficult to estimate the penetration of a DNS black hole

18   zone, because it's queried by an indeterminate number of

19   end users and because the mirrors for the zone are not

20   centralized. So, the estimates for Spamhaus penetration

21   are somewhere around 100 million mailboxes protected by

22   SBL.

23   MR. HUSEMAN: Why would ISPs not want to be

24   identified as using one of your lists?

25   MS. ARBON: Well, one reason is it's a business

1   decision on the part of the ISP. I think there's

2   probably some competitive advantage in not telling people

3   exactly what you're doing so that you can offer a unique

4   service to anyone else, and to be honest, with past

5   history, I don't think they want to be targets.

6   MR. HAIGHT: Right, they don't want to get

7   sued. I should also -- I just want to interject that I

8   recommend that people use my blacklist in only an

9   advisory mode, not to actually bounce e-mail, but in

10   combination with other factors, to either filter it,

11   sideline it into a junk mail folder or something like

12   that, you know, I -- not everybody does, but that's how

13   I recommend it's used.

14   MR. HUSEMAN: Let's talk now about some of the

15   pros and cons of using blacklists. I'm going to turn now

16   to Trevor Hughes. Trevor, you're executive director of a

17   new association, the E-mail Service Provider Coalition.

18   First of all, can you tell us, what is an

19   e-mail service provider?

20   MR. HUGHES: Thanks. An e-mail service

21   provider is a company -- an e-mail service provider is a

22   company that helps other companies send e-mail. The full

23   breadth of the marketplace uses the power of e-mail to

24   communicate today. It's not just marketing messages.

25   It's transactional messages, publications, relational

1   messages. An e-mail service provider industry helps

2   those companies, those organizations, those people send

3   their volume messages.

4   MR. HUSEMAN: Is your coalition opposed to the

5   use of blacklists?

6   MR. HUGHES: That's a really difficult question

7   to answer in a binary form, a yes or no answer. I -- my

8   answer is that in concept, what a blacklist is trying to

9   do is admirable. They are trying to reduce Spam, and I

10   think all of us recognize that that is something that we

11   need to move towards.

12   In application of some of the blacklists, the

13   related problem of false positives and some of the

14   arbitrary and really opaque practices of blacklists cause

15   us incredible concern.

16   MR. HUSEMAN: So, does your coalition encourage

17   or discourage ISPs from using blacklists?

18   MR. HUGHES: I would say that currently we

19   would discourage the use of blacklists.

20   MR. HUSEMAN: And, so, can you go through some

21   of the reasons why you would do that?

22   MR. HUGHES: Let me give you a really -- a

23   really clear and concise answer. Blacklists create false

24   positives. A false positive is a legitimate message that

25   is otherwise undelivered, and as Julian mentioned, that

1   he recognizes there are some problems with the blacklist

2   -- with the use of blacklists, those problems represent

3   what some in the community would call collateral damage.

4   It's false positives. It's legitimate messages that

5   otherwise aren't being delivered.

6   It's one thing to write off marketing messages

7   that aren't delivered. There's a very real cost to that,

8   and we think that's a problem, but it's not just

9   marketing messages that we're talking about as well.

10   It's transactional messages. It's airline ticket

11   confirmations. It's paid newsletters that aren't being

12   delivered. It's account transaction confirmations from

13   your online brokerage. Those are all messages that have

14   suffered under the blacklisting false positive problem.

15   MR. HUSEMAN: Okay, so talking about the

16   reasons why you would discourage use of blacklists,

17   you've mentioned the issue of false positives --

18   MR. HUGHES: Sure.

19   MR. HUSEMAN: -- otherwise wanted e-mail not

20   going through and the issue of collateral damage.

21   Let me turn over here. Julian, are you

22   familiar with the term collateral damage?

23   MR. HAIGHT: Indeed.

24   MR. HUSEMAN: And what would be your

25   definition?

1   MR. HAIGHT: The subtle distinction between

2   false positives and collateral damage, a false positive

3   is something that the list maintainer somehow -- they

4   recognize that they should not have listed something.

5   Collateral damage is like, well, here's a site that sends

6   a lot of legitimate e-mail and a lot of Spam, and I'm

7   going to make a decision to block it anyway, and the

8   messages that are legitimate from that site are now going

9   to be blocked, but I have to because there's so much Spam

10   also coming from the same site.

11   MR. HUSEMAN: Does SpamCop practice that

12   theory?

13   MR. HAIGHT: Well, because it's all automated

14   and statistical, it's not so much my decision about a

15   site as just the volume of complaints I get about a site.

16   MR. HUSEMAN: Alan Murphy from Spamhaus, what

17   would be -- are you familiar with the term collateral

18   damage, and what would be your definition?

19   MR. MURPHY: Collateral damage to me is

20   intentionally inflicting a black hole listing on IPs that

21   are not sending Spam. The issue of mixed lists of

22   senders that send both Spam and solicited e-mail is a

23   gray area, and it becomes an issue of identifying which

24   is Spam to which user, and it becomes a case-by-case

25   evaluation in the course of the SBL.

1   Could I comment on the false positive issue

2   that Trevor brought up? And that is that false positives

3   are not simply a function of black hole lists. They're a

4   function of any Spam filtering method. And indeed,

5   they're even -- the SMTP system itself is not 100

6   percent reliable, and messages can simply get lost.

7   As an example of a false positive from a

8   non-black hole list, the -- and this is somewhat

9   humorous -- it was caught by my own Spam filters. It

10   was a rule in my mail client that has successfully

11   filtered out some 35,000 Spams with never a false

12   positive before, and one of the announcements from the

13   FTC was encoded in Base 64, and it ended up in my Spam

14   folder.

15   MR. HUSEMAN: I think it was an e-mail from me

16   to you, wasn't it?

17   MR. MURPHY: I believe it was.

18   MR. HUSEMAN: Some funny characters or

19   something, I noticed that one, too.

20   MR. MURPHY: And particular to the SBL listing

21   and false positives, I have recent figures from three

22   large users of the SBL. One of them is NortelNetworks,

23   you heard Chris talk earlier. In -- I believe it was in

24   March of this year, they had an inbound on their primary

25   mail server of about 1.9 million e-mails. Of those, the

1   SBL blocked 85,000. Of those -- well, it identified

2   them. They have some processing that is beyond simply

3   using filter. They use very elaborate, very beautifully

4   architected mail system, but at any rate, it identified

5   85,000 out of 1.9 million.

6   Of those 85,000, 52 messages had been white

7   listed to be desirable traffic from a particular IP

8   address, and as a side note, I'll stress that white

9   listing is a very important function of anybody that uses

10   any generic black hole list. Of those 52 false positives

11   out of 87,000, 46 were from a single IP in an escalated

12   listing where we were inflicting collateral damage on a

13   network in China, because that network was largely

14   overrun by Spammers that had numerous notorious ROKSO

15   Spammers hosted on large parts of its network, had been

16   for months, were totally ignoring us, were not

17   responding.

18   We had escalated to their corporate servers,

19   and eventually after weeks and weeks of that, we had

20   escalated to their entire network. That one single IP

21   address accounted for -- which they were easily able to

22   white list -- accounted for 46 of the 52 false positives

23   out of 87,000 -- 85,000 total intercepted males. So,

24   that's the sort of false positive rating that you're

25   looking at by using what we consider to be a responsible

    1   black list.

    2   MR. HUSEMAN: Trevor?

    3   MR. HUGHES: You know, the statistics, I think

    4   a lot depends on exactly what process you're looking at

    5   and when you take your picture. Some of the statistics

    6   that I have, which come from the IATFASRG, the anti-Spam

    7   research group that has been working recently, suggest

    8   that the SPEWS list, used through a Cyrosoft (phonetic),

    9   has a 53 percent rate recognizing Spam coming through in

   10   any corpora (phonetic) and an 11 percent false positive

   11   rate. So, it's a 50/50 shot as to whether it identifies

   12   Spam or not, and it's hitting one out of ten in terms of

   13   false positives.

   14   MR. MURPHY: Yes, as I said, you need to be

   15   selective about what you use, and that's true in any

   16   market situation, and let me just finish this case by --

   17   that rate was a 90 -- 99.7 percent correct

   18   identification, and these figures were also supported by

   19   LavaNet, who ran 163,000 realtime actual mail stream

   20   messages and also registered 99.8 percent true positives.

   21   They also ran it on a test server that they

   22   were setting up for some other use. They ran about

   23   10,000 messages through that. They had 100 percent true

   24   positive. And at the Spam Assassin evaluation, I believe

   25   this was also on the ASRT group, they ran 150,000

1   messages built from a corpus of 20 people's mail feed

2   during the early part of this year. It contained about

3   45 percent Spam and 55 percent non-Spam. SBL again hit

4   99.7 percent true positive on the Spam -- on the mail

5   that I identified.

6   MR. HUSEMAN: So, Alan, you're saying that

7   Spamhaus, the SBL, only has a 3 percent false positive

8   rate, is that --

9   MR. MURPHY: No, I am saying it has a three per

10   thousand false positive rate according to three studies

11   of independent Spam bodies, independent mail feeds.

12   MR. HUSEMAN: Three per thousand, okay.

13   Trevor Hughes has identified the issue of false

14   positives as one of the problems with using blacklists.

15   Margie, would you think that -- what is your opinion?

16   Do you agree or disagree with that statement?

17   MS. ARBON: It's possible. To be honest, the

18   most false positive complaints that we get, which I don't

19   consider to be a false positive, it is a true positive,

20   but, quote, "wanted mail" being blocked is, to be honest,

21   from open proxies and open relays, not the RBL.

22   MR. HUSEMAN: So, you are saying that open

23   proxies and open relays are a greater source of false

24   positives?

25   MS. ARBON: But they are not false positives,

1   because the servers are, indeed -- have a security

2   problem --

3   MR. HUSEMAN: Or collateral damage more.

4   MR. HAIGHT: What has been identified as false

5   positives.

6   MS. ARBON: Yes, and to be honest, what the

7   problem there is, you have a perfectly legitimate company

8   with a mail server that either during an update or

9   something else has managed to become open, and yes,

10   people will complain about that mail bouncing, but we get

11   far more on that than we do on anything on the RBL.

12   MR. HUSEMAN: Scott Richter from Optinrealbig,

13   do you think that false positives are a problem with the

14   use of blacklists?

15   MR. RICHTER: Yeah, and my question was

16   actually for Alan. I was wondering what the false

17   positive ratio is when he blocks the IP -- the host's

18   mail servers.

19   MR. MURPHY: Well, the false positive rate

20   would depend on the specific output of whatever IP

21   address was listed.

22   MR. RICHTER: Well, I guess what my question

23   is, when you block the host's corporate mail servers,

24   what would the false positive be?

25   MR. MURPHY: Generally, there is very little

1   Spam coming out of a corporate mail server.

2   MR. RICHTER: So, why would it be listed?

3   MR. MURPHY: Because the network is pretty much

4   overrun by Spam and not enforcing their acceptable use

5   policy.

6   MR. HUSEMAN: To get the attention of the

7   people --

8   MR. MURPHY: Yeah, it's to get the attention,

9   and it's generally a very short-term thing. It generally

10   takes a day or two.

11   MR. RICHTER: So, like --

12   MR. HUSEMAN: Scott, let me ask you a question

13   real quick.

14   MR. RICHTER: Sure.

15   MR. HUSEMAN: Let me go back to my original

16   question. What about the issue of false positives? In

17   your business, have you seen that the use of blacklists

18   is creating false positives, and is that a problem for

19   your business?

20   MR. RICHTER: Yes, it's a large problem,

21   because we believe that some of the people who do decide

22   what should be listed and shouldn't be listed may not

23   have the adequate skills to decipher and, you know,

24   unfortunately some people -- you can't be a judge and a

25   jury, unlike other organizations, where they do have a

 1   nomination process and a little more organizational

 2   structure.

 3   MR. HUSEMAN: Are there particular blacklists

 4   that you have greater concerns about than others?

 5   MR. RICHTER: Well, I mean, there's obviously

 6   some lists, you know, I look at some people who run block

 7   lists and obviously aren't very proud of them, and that's

 8   probably why they wouldn't want to list and stay very

 9   secretive, and I also look at other blacklists where

10   people do change your record and are responsible for it

11   would not want to take credit for, you know, being

12   responsible.

13   MR. HUSEMAN: Okay. So, we've identified the

14   issue of false positives as an issue in the use of

15   blacklists. Someone has also identified the issue of

16   collateral damage as being another issue.

17   Cindy Cohn with the Electronic Frontier

18   Foundation, if I'm correct, your organization believes in

19   the privacy of the First Amendment. How does that --

20   MS. COHN: That's why it's the first one.

21   MR. HUSEMAN: How does that view affect your

22   view of blacklists?

23   MS. COHN: Well, I'm -- I think I'm a rarity

24   here, because I'm not actually here representing a

25   company or a business. I'm here because EFF has received

1   complaints from non-commercial list serve owners that

2   they have an ongoing continual problem getting their

3   solicited messages through because of various Spam

4   mechanisms. Blacklists are not the only problem.

5   And looking closely at the mechanisms and the

6   ways that all of these things are being blocked, as a

7   First Amendment lawyer, I see a lot of things that

8   frankly are traditional First Amendment problems in the

9   way that the anti-Spam mechanisms work. Lack of

10   transparency in the system, overbreadth, failure of due

11   process, so that if you get listed, you can't even know

12   in some situations who it is you go to to try to get off

13   the list, and then misuse of the list for improper

14   purposes.

15   Now, these are the sorts of things that would

16   be really an easy case for me to win should a government

17   entity do that in terms of trying to decide what speech

18   is allowed and what speech is not allowed, and while

19   there are significant differences between governmental

20   entities and non-governmental entities, both legally and

21   I think as a practical matter, I think it's reasonable to

22   question whether there's some basic fairness and real

23   problems here when these clear problems exist even in a

24   non-governmental context.

25   MR. HUSEMAN: Cindy, I think you made a couple

1   of really big points, so let's add to our list of cons

2   against using blacklists lack of transparency,

3   overbreadth, lack of due process and misuse of the list

4   for improper purposes.

5   Margie, what is your response to those four new

6   issues that Cindy raised? And let's start with the lack

7   of transparency in some blacklists.

8   MS. ARBON: The bottom line is blacklists are a

9   decision by the owner of the equipment that the mail is

10   going to. We are running a balancing act between

11   property rights and First Amendment rights. You have

12   people that are trying to maintain service, they are

13   trying to maintain a business. I've seen cases where

14   servers have been cascaded by the volume of mail coming

15   through them that may or may not have been solicited but

16   was definitely bulk, cases of a small ISP that was almost

17   completely put in bankruptcy because they had an

18   unfortunate name. They are defending their property.

19   They are trying to be able to maintain a business model,

20   maintain a correct, proper service, and they're being

21   inundated by that mail.

22   The advantage of a black hole type list or

23   DNS-based list over a lot of the other filtering

24   mechanisms is the content of the mail never actually hits

25   the server. In most cases, it's -- we had the

1   demonstration on e-mail yesterday. It's rejected after

2   the recipient, too. So, if you have a -- and I've seen

3   them -- 900-megabyte or 900-kilobyte Spam coming

4   through, the receiving server doesn't actually have to

5   accept that mail. It can bounce it back and say no, this

6   is coming from an IP that I'm not willing to receive mail

7   from.

8   MR. HUSEMAN: It saves bandwidth.

9   MS. ARBON: What's that?

10   MR. HUSEMAN: It saves bandwidth.

11   MS. ARBON: Who were her other --

12   MR. HUSEMAN: Well, let's go to Scott Richter.

13   What about the lack of transparency in blacklists? Let

14   me ask you a question. Are some of your IP addresses

15   listed on various blacklists?

16   MR. RICHTER: Yes.

17   MR. HUSEMAN: What is -- do you see that the

18   -- do you see a problem with lack of transparency as far

19   as standards and having your IP addresses listed?

20   MR. RICHTER: I believe that in any ISP, if

21   they want to block us, that's their decision, but when we

22   have relationships and we work with ISPs, we can also,

23   you know, come to an agreement or we can work to solve

24   the problem.

25   The problem, when you're dealing with a new --

1   a wide range of blacklisting products is they're all so

2   random. You have one person who hides and throws eggs.

3   You have one person who has volunteers who have no

4   guidelines and will basically list whatever information

5   they feel like listing on you, personal, private, you

6   know, doesn't -- doesn't phase them. And then you have

7   another blacklist where they don't -- you know, divulge

8   that anyone can send complaints, you know, they can --

9   anyone can join and sign up.

10   There is no proof whether these people who are

11   submitting the complaints really are getting Spam. I

12   mean, nobody really knows. With a lot of programs now,

13   it's all automated, where they just forward their entire

14   inbox to the program. You know, and then we think we

15   have one true blacklist where at least they take

16   accountability for it and, you know, have a nomination

17   process and, you know, call you up in advance and, you

18   know, tell you what you've done or, you know, how to

19   solve it or, you know, and are willing to work with you,

20   and I think that, you know, there's a big difference.

21   You have, you know, four different, you know, major

22   blacklisting groups that have such a wide range of

23   diversity.

24   MR. HUSEMAN: Julian Haight, your opinion on

25   the transparency and standards? As Scott Richter

1   mentioned, many systems or several blacklists I guess,

2   probably yours principally, uses an automated-based

3   system.

4   MR. HAIGHT: Right.

5   MR. HUSEMAN: How can -- if it's automated and

6   complaint-driven, how can a business or marketer know

7   what conduct they are doing will have them end up on your

8   list?

9   MR. HAIGHT: Okay, two different questions.

10   The -- as far as the transparency goes, I do

11   try to be accountable and transparent in my listing

12   criteria. The listing criteria is based on these user

13   complaints, so it may still be unpredictable. So, you

14   know, I don't know -- I guess what I would say to Scott

15   is that we know at least when someone files a complaint

16   about you that they did receive an e-mail from you if

17   they perceive it as Spam. I guess, you know, I --

18   MR. RICHTER: I think with some products now,

19   you know, for instance, Spam --

20   MR. HAIGHT: Just speaking for my own products.

21   MR. RICHTER: Yeah. I mean, on some of your

22   products, it's automated now?

23   MR. HAIGHT: Well, the whole -- I mean, it is

24   fully automated.

25   MR. RICHTER: And you're tied in with McCaffrey

1   (phonetic) now, right?

2   MR. HAIGHT: No, I --

3   MR. RICHTER: Or I know some users forward like

4   their entire inbox and --

5   MS. ARBON: That's Spamkiller.

6   MR. RICHTER: Okay, Spamkiller.

7   MS. COHN: I have one thing I'd just like to

8   toss into the mix about accountability and basing it on

9   user complaints. One of the things that is of concern to

10   us, I work with, again, some of the really large list

11   serves that do political activism online, which I view as

12   one of the tremendous benefits of the internet, is its

13   ability to allow people to do political organizing

14   online, much cheaper, more efficiently. One of the ones

15   I work with is Moveon.org.

16   They are quite concerned that the

17   complaint-driven Spam lists are actually being gamed by

18   people who have a political problem with the content of

19   their messages, and I -- you know, while I in general

20   like to empower the recipient to do things, I am quite

21   concerned about the misuse of some of these complaint-

22   driven mechanisms for really what is censorship and

23   content-based discrimination.

24   MR. HAIGHT: In cases like that, I am available

25   and willing to make an exception, if necessary, or to

1   take action to stop that use of my system. I wouldn't

2   support that.

3   MR. HUSEMAN: Alan Murphy, what is your --

4   MS. COHN: Can I just add one last thing?

5   Because the other piece of all of this is, of course,

6   it's very difficult to know why the list serve owners why

7   they are being blocked if the ISPs aren't being honest

8   about who's doing the blocking. So, how is my, you know,

9   little guy who's running a list serve, the Berkeley High

10   School list serve is getting blocked, how do they know

11   that they need to contact you?

12   MR. HAIGHT: Because every time their mail is

13   rejected, a bounce is sent back to them with a URL going

14   to my site where they can get more information, and if

15   somebody is not providing that bounce back -- well, if

16   they're sending to a large list, at least some percentage

17   of the recipient servers are going to provide that. If

18   they run into a situation where that's not happening,

19   well, it's out of my hands. That's the receiving

20   server's problem.

21   MR. HUSEMAN: Alan Murphy, what is your

22   response to Cindy Cohn's point that some lists are

23   misused for improper purposes?

24   MR. MURPHY: I think the way to address that is

25   looking at a definition of Spam, and I'm on a number of

1   Spam -- anti-Spam mailing lists by my own opt-in choice,

2   I'm on these lists, and sometimes I wonder about the

3   volume of mail that I receive due to these discussions

4   and how worthwhile it is to read for about the 5000th

5   time that -- what is Spam?

6   And Spam comes down to essentially unsolicited

7   bulk e-mail, and just briefly commenting on a lot of the

8   legislation that's been proposed, it looks at content, it

9   looks at fraud, and I understand some of the reasons for

10   looking at that, and it actually touches on Cindy's

11   point, because the Government does not want to interfere

12   with free speech, and I'm an adamant proponent of free

13   speech. So, I understand why the Government wants to

14   regulate that way.

15   But unfortunately, it doesn't address the basic

16   issue of unsolicited bulk e-mail, and one of the things

17   about a black hole list is it is very content-neutral.

18   The only way it touches on content is if the publisher of

19   the content uses a particular IP. All the list cares

20   about is that the IP, in Spamhaus' case, that the IP

21   either sends or supports unsolicited bulk e-mail. That's

22   our basic criteria.

23   MR. HUSEMAN: Scott Richter?

24   MR. RICHTER: Yes, my question was about

25   something that I had noticed on the person that posted

1 -- who I know that even I think SpamCop at one point was

2 using their records, their blacklist to query, about

3 working to get off these blacklists, and the person's

4 comment was when I pressed Julian to do the decent thing

5 to clear my name and to set the public record straight,

6 Julian flatly refused, providing me only with the excuse

7 that he felt that he had to fully maintain at all times

8 on the SpamCop website even evidence of SpamCop's own

9 clear mistakes for the sake of having a complete

10 historical record of these mistakes.

11   MR. HAIGHT: This was -- if I recall, this was

12 a situation where somebody had been blocked wrongly, we

13 reversed it or somehow corrected it, and I suppose to

14 this day that IP address shows a listing history which

15 says when the IP address had been blacklisted previously,

16 right, and I don't see a reason to erase that record.

17   MR. HUSEMAN: Let me move on to a different

18 topic real quick.

19   Trevor Hughes, the lack of due process in being

20 removed from some of the lists has been an issue that was

21 raised. What experience have e-mail service providers

22 had on this issue?

23   MR. HUGHES: They have had a terrible

24 experience. I -- it's related to the transparency or,

25 rather, the opacity issue that we're talking about here,

1   and I actually do have to commend Alan, Julian and Margie

2   for being here, because that is a big indication that

3   they want to be held accountable for what they're doing.

4   We do have blacklists out there where people

5   don't want to be held accountable for what they're doing,

6   where they have no identity, where the standards are

7   arbitrary and, in fact, they shift, and if you are listed

8   on the blacklist, the due process associated with being

9   removed from that blacklist is unknowable. In fact, in

10   some situations, you have to post on a public news group

11   in order to raise your concern and essentially expose

12   your problem for the entire world, whether or not it's a

13   real problem.

14   So, the due process issue is very real. The

15   experience of e-mail service providers with the due

16   process issue with blacklists is an incredible concern,

17   and I think it's very related to the accountability and

18   transparency issue that we've just been discussing.

19   MR. HUSEMAN: Margie, what is your view about

20   any due process concerns?

21   MS. ARBON: There's always another alternate

22   route. All of these lists are DNS-based. The DNS

23   configuration, the mail server configuration, is done by

24   the ISP. You know who's blocking the mail. You know

25   where you can go. If X domain is rejecting your mail

1 based on a list that you can't contact the operator, you

2 can always contact the ISP or corporation or whoever is

3 using the list and ask them to white list you.

4   MR. HUSEMAN: Or discontinue the use of that

5 list.

6   MR. HUGHES: Right, you know, if I could, my

7 members -- some of them had no one working on ISP

8 relationships 18 months ago. Many of them now have a

9 number of people working on ISP relationships today, and

10 it is for exactly that reason that many of the

11 blacklisting issues that they face, their only recourse

12 is to work with the ISPs. But in that situation, the

13 question is is that the right place to resolve the issue?

14   It is spreading the problem across literally

15 thousands of ISPs, thousands of corporate mail gateways

16 or mail gateways period as opposed to resolving it at the

17 source of the problem, where the listing occurs, and

18 that's at the blacklist.

19   MR. HUSEMAN: Margie?

20   MR. HAIGHT: Well, the alternate side of that,

21 if I may -- go ahead, Margie, if you like.

22   MS. ARBON: You do have a point. It is much,

23 much easier to deal with the list operator. On the other

24 hand, the fact that people that are sending large

25 quantities of bulk e-mail to ISPs, whether it be

1   solicited, unsolicited or anything else, that have no

2   relationship with the ISPs that they are sending large

3   quantities of mail into is disturbing.

4   MR. HAIGHT: Right. I mean, all of these

5   people or all of these thousands of sites are likemind, I

6   understand their desire to not receive the Spam. So, if

7   you want to send them the -- well, the supposed Spam or

8   the alleged Spam, then you should have to contact them

9   and say, hey, white list me. I mean, if -- well, I'll

10   leave it at that.

11   MR. HUGHES: We heard on the previous panel,

12   though, that there are many ISPs that have no resources

13   for those type of connections, that once you get past

14   the -- say the top ten ISPs, that those types of

15   interfaces do not exist. They need to buy something off

16   the shelf that is easy for them to resolve, and over and

17   above that, we see corporate mail gateways, we see

18   educational mail gateways, where there are no resources

19   for dealing with those types of interactions.

20   MS. ARBON: There has to be a postmaster.

21   MR. HUSEMAN: Scott Richter, what has been your

22   experience in dealing with ISPs for IP -- your IP

23   addresses that have been listed?

24   MR. RICHTER: We have had actually a very high

25   success rate in being white listed at the ISPs. The --

1   you know, the biggest thing is is it's -- you know, it's

2   just an extra hassle and an extra step for us to have to

3   undertake. It's not that it's -- you know, like I said,

4   it's just adding an extra, you know, process.

5   MR. HUSEMAN: Your comment was ominous, it made

6   the lights go down.

7   MR. HAIGHT: I would say that's a cost of doing

8   that type of business.

9   MS. COHN: Yeah, but the people that I'm

10   working with aren't about cost, right? I mean, the

11   problem is that if you build a system that you assume

12   that all the people who are participating in are

13   commercial entities with commercial business links,

14   that's fine, but, you know, the thing again about the

15   internet was that it was a -- you know, it started out

16   as the great democratizer so that you could be three

17   people in a garage who all had day jobs and still run a

18   very large list serve.

19   David Farber (phonetic), who's on our board,

20   created the very first list serve on the internet. It's

21   amazing, every time I talk to Dave Farber about

22   something, he always did it first, but, you know, he's

23   got a job and a life, and he spends an inordinate amount

24   of time trying to make sure that his messages get through

25   to his list, and it's a noncommercial, completely opt-in,

1 private list. So, I think you need to think about

2 solutions that work for people who don't have resources

3 as well or else we will have lost one of the more amazing

4 and important pieces of the internet.

5   MR. HUSEMAN: Trevor?

6   MR. MURPHY: Absolutely, but why would people

7 be using those lists in the first place if it -- that

8 caused that damage if there wasn't a huge problem to

9 begin with?

10   MR. HUSEMAN: Trevor Hughes?

11   MR. HUGHES: First, to Alan's point, I think

12 we're all here because we recognize the damage that Spam

13 is causing, and if we don't resolve the Spam problem,

14 that, you know, we will not be enjoying e-mail the way we

15 are today two years from now.

16   But I do want to respond to Julian's point

17 about purported Spam or --

18   MR. HAIGHT: Alleged Spam.

19   MR. HUGHES: -- unsolicited commercial e-mail

20 or marketing messages. We're not just talking about

21 marketing messages. We're talking about the full breadth

22 of communication in society today. We're talking about

23 transactional messages. We're talking about relational

24 messages. These are much higher-value messages, and

25 blacklists do not discriminate on a content basis. They

1   are wiping them clean across the board.

2   MR. HUSEMAN: I'm now going to go to one

3   specific list that has been alluded to now, that's the

4   SPEWS list, the Spam Prevention Early Warning System.

5   Julian, what is SPEWS and what do they do?

6   MR. HAIGHT: Okay, I just quickly want to

7   respond to that and say that these messages will only get

8   mixed, assuming that the same sender is sending their

9   transactional mail and their unsolicited bulk e-mail from

10   the same exact IP address or -- I don't know, I guess

11   depending on the blacklist, but that if you mix your

12   messages, then you're going to lose -- you're putting

13   all your eggs in one basket basically.

14   Okay, I'm sorry, could you repeat your

15   question?

16   MR. HUSEMAN: Now getting to the topic of the

17   SPEWS list in particular, what is SPEWS and what do they

18   do?

19   MR. HAIGHT: Okay, well, I'm not with them, but

20   I will try to put forward their argument. I'm not sure I

21   support it myself, but I think the argument is sort of

22   going back to what Margie was saying about the recipient

23   mail administrator -- that mail server being their

24   property and that if they want to use a list that has

25   those policies that is not accountable, is not available

1   for discussion like this, that that's their right and

2   that the publishers of the list are --

3   MR. HUSEMAN: Can you describe a little

4   background, please, what SPEWS is?

5   MR. HAIGHT: All right, it's a blacklist --

6   well, nobody really knows who's running it. We knew the

7   domain is SPEWS.org, I think that's it, but above that,

8   there's really not a whole lot of information. If you

9   have a problem with being on the list, you're instructed

10   to post to the Spam news group, basically outlining the

11   problem and making a case for why you shouldn't be on the

12   list, and presumably the people who are on the list

13   monitor that news group to see these types of things, but

14   who knows? And nobody knows, at least nobody I know

15   knows, who's behind it.

16   MR. HUSEMAN: Scott Richter, you don't like

17   SPEWS, do you?

18   **(Laughter.)**

19   MR. HAIGHT: But that speaks very well of it

20   that Scott does not like it.

21   MR. HUSEMAN: Scott, what is your view of

22   SPEWS?

23   MR. RICHTER: You know, I probably should let

24   that one go by for now.

25   MR. HUSEMAN: Okay, Cindy Cohn, do you have a

1   -- does EFF have a position on SPEWS?

2   MS. COHN: Not really. We don't generally take

3   positions on particular products and services. We try

4   and -- try not it. What we're trying to do is focus on

5   the principles. I think that, you know, my concerns

6   about the SPEWS list really fit very well in the general

7   concerns I have here, the transparency --

8   MR. HAIGHT: Well, let me outline their

9   position in terms of the First Amendment, that they have

10   the right to publish this list, you know, and people have

11   the right to use it for whatever they want.

12   MS. COHN: Yeah, I think that, you know,

13   there's an argument there, but I think that you can't

14   ignore the effect of what you're doing. You can't just,

15   you know, well, I have the right to say this, and the

16   fact that, you know, we had to kill the internet in order

17   to save it is just a side effect of me exercising my

18   First Amendment rights. I'm a big fan of First Amendment

19   rights, and I recognize the difference between a

20   governmental censorship scheme and a private censorship

21   scheme, but I'm quite concerned about the effect on the

22   end-to-end nature and the open architecture of the

23   internet with, you know, private entities and anonymous

24   entities deciding which of your mail gets through and

25   which of your mail doesn't get through.

1   I think one of the things that concerns me a

2   bit about some of the Spam debates is that it appears to

3   assume a world in which the only people who matter are

4   sys admins and ISPs and that end users are not, you know,

5   important, and so it's okay to blacklist an entire

6   domain, despite the fact that lots of people who are

7   sending mail through that domain and use that service are

8   not actually engaging in illegal behavior, but simply

9   just aren't getting their mail delivered or their mail

10   received.

11   MR. HAIGHT: What about the argument that this

12   is similar to a restaurant reviewer, say anonymously

13   saying, don't eat at Joe's, I got sick? How is this

14   different?

15   MR. RICHTER: The restaurant reviewer doesn't

16   block the entire street.

17   **(Laughter.)**

18   MS. COHN: Yeah, I think that's one argument.

19   MR. HAIGHT: But we're not blocking the

20   intermediate area routers between the sender and the

21   recipient. The recipient is making the decision or the

22   recipient's sys admin is making the decision.

23   MS. COHN: Yeah, I think that's an important

24   distinction, and it's one that we need to pay a little

25   more attention to than I hear sometimes. You know, I

1   love sys admins, I'm with the Electronic Frontier

2   Foundation, for God's sake, but this kind of -- I hate

3   to do this, but, you know, this kind of morlock

4   (phonetic) view of the world, right, that we only talk to

5   other people who are like us, and so we'll all decide, I

6   think is having some major collateral damage for end

7   users, you know, and I think that if you're responsible

8   and you're moral and you recognize that what you're doing

9   is processing speech, you'll think a little harder about

10   trying to make sure that you are careful in making sure

11   that you don't prevent the speech of, you know, people

12   who aren't violating your rules as a side effect of

13   trying to get at the people who are trying to violate

14   your rules.

15   Again, if the Government tried to do this in a

16   censorship scheme, it would be a slam-dunk easy case for

17   me, and if the harms are the same, then maybe you have a

18   moral obligation to think a little more carefully about

19   your techniques.

20   MR. HUSEMAN: I do have one announcement.

21   Security has informed me that we cannot block the doorway

22   entrances, so if those of you standing could just please

23   move away from the doorways themselves. Thank you very

24   much.

25   Okay, getting back to our discussion, let's

1   talk about the issue of best practices for blacklists.

2   I'm going to go back to Cindy really quickly. EFF has

3   been working or has developed a list of best practices

4   for blacklists. Is that correct?

5   MS. COHN: Well, we're starting a list of

6   principles and best practices that actually is trying to

7   encompass the problems of noncommercial list serve owners

8   and their best practices as well as those of ISPs and

9   people who are taking it upon their selves to try to do

10   anti-Spam things, and it's a work in progress.

11   We're just starting, actually, because the --

12   some of the problems that we're -- you know, what

13   happened was I got a call from Moveon, they said they

14   were having trouble getting their servers, you know,

15   their messages through, and I sent a little note out in

16   EFF's newsletter, which, by the way, has a continual

17   problem with Spam filters, because we cover Spam issue

18   and we talk about porn, because we cover those issues,

19   and I don't think we're a legitimate target of any of the

20   filters, but we have a continual problem trying to get

21   through.

22   But asking for noncommercial list serve owners

23   to tell me if they were having trouble with Spam filters,

24   and the reason I'm here today was because I got an

25   overwhelming response. I got high school newsletters. I

1   got, you know, Dave Farber, the first list serve ever on

2   the list. I got people from all sides and scopes of

3   noncommercial, you know, completely opt-in sorts of list

4   serves who were having trouble with Spam filters, and

5   that's when I decided that perhaps we were fundamentally

6   starting to break the internet and that it was time for

7   the EFF to actually participate.

8   So, we're starting a list of how to work

9   through the best practices. It's not easy and it's a

10   work in progress. So, if folks are interested in

11   assisting -- and again, I'm focusing on noncommercial

12   list serves now, because I can't take on the whole thing,

13   but I would be willing to talk with folks.

14   MR. HAIGHT: I certainly agree with what you're

15   saying, and my concern is just that the -- that

16   organizations like ours are legislated out of business or

17   out of existence even if it's not a business.

18   NEW SPEAKER: Or litigated.

19   MR. HAIGHT: You know, I agree with all the

20   concerns you're raising. It's just that these filtering

21   technologies are our last resort to save this medium.

22   MR. HUSEMAN: Let's move on to -- speaking of

23   some of these issues, moving on to another topic. Let's

24   talk about some of the legal issues involved with

25   blacklists. Let me turn to Stuart Ingis with Piper

 1   Rudnick, an outside counsel to the DMA. There have been

 2   several lawsuits involving blacklists. As Alan Murphy,

 3   one of our panelists said, he is an individual defendant

 4   in one of the lawsuits that has recently been filed.

 5   MAPS has been the subject of previous lawsuits.

 6   What is your view -- and there have been

 7   several causes of action as the basis of these suits.

 8   One has been defamation and another has been tortuous

 9   interference with contract. Does the use of blacklists

10   by blacklist operators amount to a tortuous interference

11   with contract?

12   MR. INGIS: Well, let me step back a second

13   before answering that, and I think that it's important

14   when you look at the litigations that have gone on to see

15   what steps it is before you get to the litigation, why it

16   is that you're at the litigation. I think we've kind of

17   covered some of that here, which is in the cases of all

18   of the lawsuits that have happened, where there are

19   legitimate communications where the consumer wants to

20   receive it and the sender wants it to get to the sender

21   that have been blocked by blacklists, in full recognition

22   that there are, you know, good values to a lot of

23   blacklists, and then they try and resolve their

24   complaints, and in many instances, I think a lot of the

25   varying blacklists, if you can find them, do resolve the

1   complaints.

2   But then there are the instances where you

3   can't resolve the complaints, and so in that instance,

4   you use your last resort, which is litigation, and to

5   answer the question, there are really -- there have been

6   three areas in litigation that have been used. One is

7   tortuous interference with contractual relations.

8   Another is defamation and another is more of an antitrust

9   concept. I think on all three of those areas, and we can

10   get into, if you want, into the specific criteria to

11   establish the violations, but I think that they're all

12   fact-sensitive, and they're really determinant based on

13   what types of communications are actually being blocked,

14   where the different contracts are.

15   In the case of contractual -- tortuous

16   interference with contractual relations, there are really

17   three different types of contracts that I think have come

18   up in these cases that the argument is that MAPS and its

19   -- and some of the other blacklists, MAPS really has been

20   the subject of most of the litigation, although a lot of

21   that is a couple of years old now, but there are several

22   different types of contracts that are blocked.

23   One is among the ISP that's providing service

24   for a sender of the message and that sender, because no

25   longer are the messages being sent, and somebody has paid

1   a significant amount of money to be able to send those

2   messages. Another is between the sender of the message

3   and the consumer, the customer, and, you know, as Trevor

4   has stated very well, it's not just solicitations we're

5   talking about here. It's bank statements, it's, you

6   know, I want the New York Times delivered via e-mail to

7   me every day, and so it's those types of communications,

8   and so those contracts, there's an interference with that

9   relationship.

10   And then there's a relationship in some cases

11   between the sender and the e-mail service provider, so

12   that the person who wants the communication to go out in

13   an instance where they contract with the service

14   provider, they've contracted, you know, for the service

15   provider to -- for a significant amount of money to

16   deliver these messages, which are no longer being

17   delivered. And so, those are the types of contracts

18   we're talking about.

19   MR. HUSEMAN: Would the cause of action be

20   against -- tortuous interference with the contract be

21   against the blacklist operator or against the internet

22   service provider that is using the blacklist?

23   MR. INGIS: I think both is the answer. It can

24   go both ways. In the instance of the blacklists, one

25   particular scenario which I think really is the most

1   egregious when you're looking at the contractual relation

2   is when there are IP -- there are senders that use the

3   same IP address but are totally unrelated to the sender

4   of the message that ultimately has caused the IP address

5   to be put on a list, and that particular sender has a

6   relationship with an ISP, and all of a sudden, their

7   messages aren't getting delivered, and they had -- they

8   weren't even the accused message.

9   MR. HUSEMAN: Have there been actions so far

10   against ISPs that have used a list to date?

11   MR. INGIS: A lot of the actions have named

12   multiple parties, the blacklists and the ISPs, and

13   interestingly, a lot of them settled fairly quickly with

14   some of the ISPs and almost in a white list type of

15   concept, which may be, you know, as we start talking

16   about solutions later in the other panels, you know, it

17   may be part of a solution to some of the excesses that

18   you see in blacklists.

19   MR. HUSEMAN: Michael Grow, you are an attorney

20   and have been involved in the anti-Spam field for quite

21   some time. What is your view about the legal theory that

22   either operating the blacklist or an ISP that uses a

23   blacklist is involved with a tortuous interference with

24   contract?

25   MR. GROW: Well, I have a different view. I

1   think it's like saying to those restaurants which require

2   you to wear a coat and tie that you're interfering with

3   business relationships among people who want to go there

4   and talk to each other. I think you have to step back

5   and understand that blacklisting exists only because ISPs

6   are trying to protect their own business interests. If

7   the ISPs didn't use a blacklist, you know, nobody would

8   be here today, and the ISPs, because they've made an

9   investment in this equipment and because they've got

10   customers who object to unsolicited bulk e-mail choose to

11   use blacklists as one means of protecting their customers

12   against this sort of thing, and they have a perfect right

13   to set whatever standards they want with respect to the

14   type of use that their equipment will be put to.

15   So, I don't think there's liability on the part

16   of either the blacklist or the ISP who chooses to use

17   this under a tortuous interference theory.

18   MR. HUSEMAN: Is publishing a list of IP

19   addresses of known or suspected Spammers, would that be

20   defamation?

21   MR. GROW: Well, I don't think so. I mean, it

22   depends, first of all, on what standards you use to

23   publish the list. I think if you knowingly put someone

24   on a list, knowing that they're not a source of Spam, and

25   you've made a false statement and that causes damage to

1   someone, that may be actionable, but if you conduct --

2   MR. HUSEMAN: Can you speak into the

3   microphone?

4   MR. GROW: Oh, I'm sorry, I'm sorry.

5   I think if you conduct a reasonable

6   investigation and you determine or you form an opinion

7   that someone is a source of Spam or that a particular

8   internet protocol address is being used to send or relay

9   Spam, there's a First Amendment right that attaches to

10   that as well, and if you have a right to express your

11   opinion in an e-mail, you've also got a right to express

12   an opinion about those who send that e-mail and as to

13   whether or not it constitutes Spam.

14   MR. HUSEMAN: Scott Richter?

15   MR. RICHTER: My question for Michael, what --

16   when a blacklist provider let's say lists the corporate

17   mail servers and ISP, would that -- and let's say the

18   ISP, let's say they're very large and they have, you

19   know, many customers, and they're listing them for the

20   sole purpose of, you know, because they want somebody to

21   be terminated, would that be damageable to the blacklist

22   then?

23   MR. GROW: Well, yeah, I'm sure from that

24   person's perspective, there's damage any time somebody's

25   listed on a blacklist, but I think this is really more of

1   a marketplace issue than a legal question. People who go

2   to a particular ISP do so for a number of reasons, but

3   one primary reason today is that that ISP is providing

4   some kind of Spam filter protection. If they don't get

5   that kind of protection, they're likely to leave that ISP

6   and go somewhere else.

7   On the other hand, if somebody is not getting

8   e-mail that they want, they may leave the ISP for that

9   reason. So, the ISP's got to make a business decision as

10   to how it crafts itself.

11   People who send e-mail have the same business

12   decision to make. If they want to ensure their mail goes

13   through, they won't use their corporate e-mail account to

14   send unsolicited bulk e-mail. They'll use some separate

15   IP address.

16   MR. HUSEMAN: Trevor Hughes, can you respond to

17   that question? If a customer has an issue with false

18   positives or does not like their mail being blocked by

19   their ISP, why can't they simply switch ISPs in the

20   marketplace?

21   MR. HUGHES: They can. They can. We all know

22   that there's a cost to that churn, though, both for the

23   recipient of the e-mails and for the ISPs.

24   You know, I -- one of the concerns that I

25   continue to have, and I'm not hearing a satisfactory

1   resolution to today, is that we're not hearing about

2   accountability from the blacklists. A blacklist demands

3   accountability from the sender community, but the inverse

4   is that -- or the flip side is that there's not a

5   recognition or a willingness to accept accountability for

6   the practices of the blacklist.

7   Now, SPEWS obviously is the most egregious

8   example of that, but if blacklists are to demand

9   accountability, I think they should be held to that same

10   standard.

11   MR. HUSEMAN: Alan Murphy, what's your response

12   to that?

13   MR. MURPHY: I'm not particularly clear on what

14   it is that Trevor says we're not responsible for or not

15   transparent about.

16   MR. HUSEMAN: We are here trying to take

17   responsibility and be accountable --

18   MR. MURPHY: Actually, I have a comment

19   relating to that that goes back to Cindy's talking about

20   a best practices document, and I think that's a wonderful

21   thing. I don't think it should be a -- well, let me --

22   on the internet, the internet is specified in a series of

23   documents called RFCs, and you don't have -- no one has

24   to follow an RFC. They're suggested best practice. And

25   one of the RFCs goes as far as to define the words

1   "should" and "must." I think we can all use them in

2   common context here.

3   I think a best practices document should be a

4   part of block hole lists. I think that if a block hole

5   -- if a person wants to run a DNS zone that is designed

6   to block e-mail and they don't want to follow current

7   best practices, it should be like the RFCs, they don't

8   have to do it.

9   Now, whether or not anybody wishes to exchange

10   traffic with that particular black hole list becomes a

11   market decision, and my personal recommendation to an ISP

12   or a business would be to not use a black hole zone that

13   does not follow good practices, and if there were a

14   document of current best practices with which I agreed, I

15   would recommend they follow that document.

16   MR. HUSEMAN: I want to get back to the legal

17   issue briefly about defamation. Stuart Ingis, what is

18   your response or what is your view about the defamation

19   theory?

20   MR. INGIS: Well, I think the defamation theory

21   actually kind of comes down to the type of message. I

22   think there is message under, you know, any -- or

23   numerous definitions that is Spam, and if that is blocked

24   and you're called a Spammer, then there's really nothing

25   defamatory about that.

1   However, the perception, when a lot of

2   messages -- legitimate messages are blocked, bank

3   statements, you know, your New York Times, you know,

4   daily e-mail and even solicitations that have been asked

5   for by consumers, if those are blocked and the theory by

6   which they're blocked that all of the lists are providing

7   is that they're Spammers, and in fact, they're not, these

8   are legitimate communications that are wanted and they

9   don't have the derogatory meaning, then I think that

10   there is some defamation and defamatory result.

11   MR. HUSEMAN: Cindy Cohn?

12   MS. COHN: I just wanted to jump back a second

13   to the idea that customers can switch ISPs if they don't

14   like how the Spam blocking is working and just highlight

15   a problem that came up in my investigation of this, which

16   was that there's an interesting problem with some of the

17   feedback loops for ISPs, which is that they don't

18   actually -- recipients don't often know when they're not

19   getting their mail. In fact, the whole moveon.org

20   incident arose because someone who is a large fan of the

21   organization wrote an extremely nasty e-mail to them

22   saying, you guys dropped me, you know, I love you guys

23   and you dropped me, I can't believe it, and, you know,

24   sure enough, it turned out that the ISP, in that case

25   AOL, had just not -- you know, had decided that this

1   was -- that it was a Spam and had not delivered the

2   mail.

3   So, there was an interesting feedback loop

4   issue, because I think recipients often know -- you

5   know, always know pretty much when they get something

6   that they don't want, and I think there's less --

7   there's less ability for a recipient to learn what it is

8   they're not receiving, and so the ISP ends up hearing all

9   about the Spam and very seldom hearing about the

10 legitimate e-mails that get thrown away.

11   MR. HUSEMAN: Julian Haight, is that an issue

12 about senders of e-mail not knowing if their e-mail got

13 through or recipients not knowing if they did not receive

14 an e-mail?

15   MR. HAIGHT: Yeah, it certainly is, but sort of

16 the bigger issue here is that e-mail has for a long time

17 seemed free, but it really isn't, and that the senders of

18 e-mail, like you're talking about, who have real jobs and

19 don't have a lot of money to spend on this are sort of

20 freeloading and that at some point those costs have to be

21 paid.

22   If the recipient wants, they can pay to get an

23 unfiltered e-mail account, and then they can get all

24 their Spam, everything, or design the filters as they

25 choose, but with a situation where you have free Yahoo!

1   accounts and people who are sending using a small account

2   at an ISP, the cost is sort of built into the recipient's

3   e-mail, but it's also saying, but we're going to filter

4   out some of the e-mail because -- you know, and this is

5   sort of built into the user's agreement with their ISP,

6   that the ISP is going to do this filtering or at least it

7   should be built into the agreement with the ISP, that the

8   ISP says, well, we're going to do this filtering, it's on

9   a best effort basis, and if you don't want that, you're

10   going to have to pay more, because it's going to cost

11   more.

12   MR. HUSEMAN: Scott Richter, what's your

13   response?

14   MR. RICHTER: Well, as far as the costs and I

15   think also with the first question, I was just wondering

16   -- I was noticing that on your people who use SpamCop to

17   block and with the recipient, I think a lot of times the

18   recipient -- obviously a mail sender is sending the

19   mail, they always should know if their mail doesn't get

20   delivered for the most part, they should receive a

21   message back, but a lot of these recipients -- and you

22   brought up the fact of if you want all your mail, go to a

23   paid service, but a lot of the paid services still use

24   filtering, Hotmail, MSN, Yahoo!, AOL, I mean, they're all

25   paid services, and they have filtering that the end

1   recipient may not know that he is receiving, but I guess

2   my biggest question is, I notice on your site it says,

3   you know, do not use this, just in beta testing. I mean,

4   do you think that there's some risk in that, having a

5   product out that shouldn't -- you know, that you're kind

6   of saying not to use that people are?

7   MR. HAIGHT: What's the question?

8   MR. RICHTER: I was wondering if the -- on the

9   website it says to -- I think the product is in beta

10   testing, you know, not to use, you know, because it could

11   affect e-mail delivery. Do you think there's a danger

12   knowing that some medium-sized ISPs are using the product

13   knowing that there's some issues with it?

14   MR. HAIGHT: Well, I think the users expect

15   their mail to be filtered by their ISP and that if it

16   weren't, they would be more upset than they are at losing

17   some e-mail that they do want, at least in the

18   proportions that they are. Yeah, I agree that if

19   somebody absolutely must receive e-mail, then they

20   shouldn't be using any sort of filter and that users

21   should be aware that ISPs are doing that filtering, and I

22   think by and large they are, and they like it.

23   MR. HUSEMAN: Alan, your response on this

24   issue, and then we'll move on to another topic, about not

25   knowing whether you did not receive e-mail or not knowing

1   whether your e-mail was actually sent?

2   MR. MURPHY: Yes, exactly. As Cindy pointed

3   out and also as Scott touched on, while a lot of the

4   blocking can go on from any sort of filtering list, not

5   just a DNS blocking list, it could be content filters or

6   a variety of other filters, any of those methods can be

7   used to bounce e-mail, but by default configuration,

8   black hole lists are at the server level, automatically

9   return an error message that can be read by the sender,

10   and that is not true for many content filters. While

11   they can be configured into a mail server that way, the

12   default configuration is often not done that way, and

13   other method -- other filtering methodologies do not

14   have that feedback loop built into them.

15   MR. HAIGHT: That's as far as the sender goes.

16   MR. HUSEMAN: As far as the sender goes was

17   your point, Julian.

18   I want to touch on the last legal issue, and

19   that is about the antitrust and illegal restraint of

20   trade issue. Stuart, what is your viewpoint on that?

21   MR. INGIS: Well, it's a very complicated

22   issue, so just briefly, there's -- there are a couple of

23   concepts that would need to be shown. One is that

24   there's an agreement among internet service providers,

25   and to show that, you can show a contract between all the

1   ISPs and a black list, which probably doesn't exist here,

2   or there are other indications that you can show that

3   there are a series of agreements, and everyone kind of

4   knows that the others are acting this way and put people

5   on the list with that knowledge, and I think that that

6   probably could be shown.

7   Then you need to get into the second, broader

8   element, which is whether there's a what's called per se

9   violation or rule of reason, and the interesting question

10   really on the per se analysis, and then I'll stop boring

11   people with the legal terminology, but is really whether

12   there's market power among the ISPs, and I think that the

13   antitrust lawyers in our firm that I've spoken with about

14   this say that, you know, the internet raises particularly

15   interesting questions as to what is market power, because

16   you only really need to have one entity kind of on the

17   whole broader internet or one piece of the backbone --

18   in some instances, not all instances -- routing messages

19   off into the black hole or off into, you know,

20   nondelivery land, and so the result of that is it doesn't

21   take, you know, but one individual theoretically, you

22   know, as you heard, well, you know, if there's a problem,

23   you can contact me, you know, and I'll address that, to

24   exercise significant market power.

25   So, I think that, you know, the issue hasn't

1   been resolved by the courts, but I think that that really

2   is what it would hinge on in that type of analysis.

3   MR. HUSEMAN: Michael Grow, your response

4   briefly before we break for questions?

5   MR. GROW: I don't think the antitrust laws

6   apply to this at all. I think they're set up initially

7   or in corpus to prevent unlawful conspiracies that

8   restrain trade, and there is an exemption for joint

9   activity where it's noncommercially motivated and it's

10   aimed at achieving some social or political goal. Most

11   of the blacklists and other anti-Spam organizations are

12   actively involved in trying to promote legislation that

13   will prevent this type of activity. So, the fact that

14   there may be multiple blacklists or ISPs that use them I

15   don't think gives rise to anything.

16   The antitrust laws have also long recognized

17   that businesses are free to act independently and to

18   choose who they will deal with, and that's exactly what

19   ISPs do when they choose to use a Spam filtering device

20   or a blacklist. And a group boycott can only be per se

21   unlawful if it applies to horizontal agreements among

22   direct competitors. Generally, these agreements are not

23   among competitors. The ISPs may be trying to protect

24   themselves, but they're not aimed -- their agreements or

25   whatever they may be are not aimed at other ISPs.

1   They're aimed at people who send Spam. So, it doesn't

2   apply in that regard.

3   So, the rule of reason analysis is what would

4   be applied if there were an antitrust argument, and in

5   that case, the person bringing the claim would have to

6   show that there's an adverse effect, a significant

7   adverse effect, on competition in a particular market,

8   and even if there is, then they have to show that the

9   pro-competitive -- whether or not the pro-competitive

10   benefits outweigh the anti-competitive benefits. There's

11   significant pro-competitive benefits in blocking Spam or

12   using a blacklist. In fact, without some kind of

13   blocking or filtering, ISPs wouldn't be able to compete.

14   They'd all be out of business.

15   MR. HUSEMAN: We are now going to take

16   questions for our last 15 minutes from the audience.

17   Yeah, great.

18   Sir, standing up right there?

19   MR. FELSTEIN: My name is Mark Felstein. I

20   represent emarketersamerica -- my name is Mark Felstein.

21   I represent emarketersamerica.org, and I represent, and I

22   am the gentleman that just filed the lawsuit against

23   Spamhaus and SPEWS and several other individuals, and my

24   question, which I hope that Mr. Murphy will answer, is

25   that in his definition of collateral damage, he defined

1   it as intentionally inflicting a blacklisting upon an

2   innocent, and then he went on to say that it's a gray

3   area. My question is that after stating that he's an

4   abundant proponent of free speech, if and when the

5   Government passes a law on Spam, will he abide by it?

6   MS. ARBON: I think discovery is normally done

7   in the legal process.

8   MR. FELSTEIN: I'm not asking you a question,

9   but -- I understand that, but this is a public forum,

10   and what he says is -- actually will be transcribed and

11   used, but that's another matter. Okay.

12   I'll answer it, how about -- it's actually for

13   Alan, because my impression of the blacklist is that it's

14   a mob mentality.

15   MR. HUSEMAN: Let's move on to another

16   question.

17   MR. MURPHY: I think I have an answer, but I

18   will decline to answer you at this forum.

19   MR. HUSEMAN: Can we have another question,

20   please? Right here in front.

21   MR. BAKER: I'm Phillip Pound Baker. I was

22   going to say I'm rarely with Cindy here in that the

23   blacklist people have really got my goat. The gentleman

24   over there has got my goat even more.

25   The question I was going to ask is whether any

1   of the blacklists know how often that they list the A

2   route of DNS and the other DNS route. One of the

3   problems that we have on the internet is that there are a

4   lot of really bad people, and it's not just the Spammers,

5   and whenever you have an information collection resource,

6   there will be people who put deliberately false

7   information in, as Cindy mentioned with the Moveon case,

8   but one of the little games that people like to play is

9   let's list the A route on SPEWS, and then the internet

10   will turn off.

11   Now, you know why that's not going to happen,

12   but you also know that the A route doesn't send a single

13   piece of e-mail.

14   MR. HAIGHT: So, it doesn't matter.

15   MR. BAKER: Yes, but it does affect your

16   credibility.

17   MS. COHN: Well, we were founded by the

18   operator of route server F, so we've never done it.

19   MR. HAIGHT: It displays the problem of, you

20   know, that there are -- that there is this capability

21   for -- for this sort of thing.

22   UNIDENTIFIED SPEAKER: (No microphone.)

23   MR. BAKER: The point is there's a system

24   called the DNS that they have re-used the protocols of

25   the DNS to create this blacklist system, and Paul Vicksy

1   (phonetic) was the first guy who did it. I think it's a

2   bad use of technology to advertise blacklists, but that's

3   by the by. The point is that the DNS routes are under

4   continuous attack by hackers. Some of them went down a

5   while ago, Paul's didn't, ours didn't. That's because

6   people just want to take out the internet.

7   So, one of the other things that we see, the

8   little games that people try to try and take out the

9   internet is, let's see what happens when you list the A

10   route on one of these listing services, so they will

11   create bogus claims saying the A route is sending me

12   Spam.

13   MR. HAIGHT: If I can try and paraphrase, he's

14   saying that black -- if I -- he's saying, if I can try

15   and paraphrase, he's saying how often does the blacklist

16   list this IP address which is obviously not the source of

17   Spam, it could not be, and it's also important to the

18   internet? It's just a --

19   MR. HUSEMAN: Let's briefly answer this and

20   then move on to another question, please.

21   MS. ARBON: Let's back up real quick. There

22   are 13, I believe, route servers that answer queries for

23   like calmnet.org, UK, it tells them where the domains are

24   and then they go to the domain system. They are part of

25   how the internet works.

1   The only way that that would hurt even anything

2   is if it got put into a BGP feed. 99 percent of these

3   lists are being operated on a DNS base that is used by

4   mail server. I think we're the only one that has a BGP

5   feed, and we don't list route servers.

6   MR. HUSEMAN: Question over here in the front

7   row. I thought there was right there.

8   Okay, right over here.

9   MR. BARRETT: Josh Barrett. I really want to

10   echo your comments. I really appreciated Cindy's

11   comments. I thought they really helped give us a

12   vocabulary for things that I didn't have before. From a

13   service provider perspective, I really hone in on -- the

14   two problems for me with blacklists are not that other

15   people may not want to receive mail from us, I think

16   that's okay and they have the right to make that

17   decision.

18   What the problem is is, like she said, the

19   transparency, not being able to know who it is, not

20   having anyone to talk to, and them often not having the

21   resources to talk to you, and the collateral damage,

22   which I think is the big part of it. It's that -- from

23   a service provider perspective, I can understand their

24   rules and I can set something up where mail that doesn't

25   follow their rules goes off certain IPs, and they might

1   choose to list those, and I'm okay with that, because I

2   understand their rules and it doesn't follow them, and I

3   have other customers that I can put on IPs that do follow

4   their rules and they shouldn't get listed.

5   From a service provider perspective, that gets

6   hit by the collateral damage, and at the same time, all

7   these other people are getting hit by it. I think

8   blacklists do have the right to block stuff themselves.

9   They don't have a right to go intentionally damage other

10   companies and try to fix the internet, and I think that's

11   really where the problem of blacklists comes in, is where

12   they're doing all these things besides just stopping them

13   from getting mail from someone they know is sending mail.

14   MR. HUSEMAN: Does anyone have any response?

15   Okay, in the back.

16   MR. LEVINE: Yeah, I'm John Levine from

17   abuse.net, and in case anybody was wondering, does not

18   publish a blacklist.

19   My question actually picked up on something

20   that Julian said, is that the fundamental economic model

21   of e-mail is based on freeloading, consensual

22   freeloading, that when any -- you know, I have lists of

23   people who have bought my books. I send e-mail to it,

24   which costs me ISP, you know, which is then received by

25   the recipient ISPs out of the charity -- out of the

1   goodness of their heart, because they think their

2   recipients want it, and I think Moveon is -- I'm

3   Unitarian, so Moveon is wonderful, but -- you know, and

4   Moveon has this large list which is delivered through the

5   charity of the recipient ISP.

6   So, my question is in this question about

7   responsibility and stuff, how much of a burden -- is it

8   reasonable to put on network providers to deliver mail

9   sent by people with whom they have no contractual or

10   other relationship at all?

11   MS. COHN: If I can take a shot at that, I

12   actually think that the freedom and openness of the

13   internet is a feature and not a bug, and I think that any

14   attempt to rethink the internet such that it's a little

15   fiefdom of private property where you only get to

16   communicate with someone else with their approval ahead

17   of time will kill something really important that we

18   managed to create with cyberspace.

19   I think -- I mean, I -- there is certainly a

20   way you could re-imagine the internet that's like that,

21   and -- but I think that you will be missing some of the

22   things that really matter, and frankly, I think ISPs are

23   in the -- you know, they're getting paid to deliver

24   people's mail to them or they're -- you know, they're

25   finding other business models to deliver people's mail to

1   them, and so the idea that it's charitable for them to do

2   what essentially their customers are paying them to do is

3   something I have a difficult time with.

4   MR. HUSEMAN: We have an e-mail question we're

5   going to read. The Washington Post reported that the

6   domain registrar of an association of emarketing

7   companies was blacklisted for their association with an

8   organization deemed sympathetic to Spam. Since neither

9   the domain registrar nor the association in question were

10   accused of sending Spam, isn't that using the blacklist

11   to silence critical speech?

12   Does anyone have a response to that?

13   MS. COHN: Well, I know that we were recently

14   threatened with blacklisting, because somebody linked --

15   MR. FELSTEIN: I know what you're talking

16   about. That was my domain --

17   MR. HUSEMAN: Please sit down. Thank you.

18   MS. COHN: Yeah, I know that one of the things

19   that we had recently heard was that somebody who actually

20   had a website who was in a fight with some -- you know,

21   there was a Spam/anti-Spam battle, the EFF was going to

22   be blacklisted because their website linked to us, and,

23   you know, again, I think we really have to think

24   carefully about tactics and how far you're willing to go

25   in terms of doing these things and who gets hurt in the

1   meantime.

2   MS. ARBON: Can I make a point on what she

3   just --

4   MR. HUSEMAN: Margie, just one moment, please.

5   MS. ARBON: One thing I need to make clear,

6   everybody keeps talking about the lists like they're one

7   thing. There's not -- as someone said, there's 400 of

8   them.

9   The other thing is there are people out there

10   that will send you mail and say, if you don't do X, I

11   will have you put on so and so's blacklist. If doesn't

12   work that way. So, a lot of it's just people getting

13   excited.

14   MR. HAIGHT: And I have a blacklist of IP

15   addresses that end in dot ten. I mean, you know, there's

16   all kinds of listing criteria, and that's really what

17   defines what a blacklist is, is how those criteria are

18   defined.

19   UNIDENTIFIED SPEAKER: Is vindictive use of

20   blacklists a problem or no?

21   MR. HAIGHT: Yeah, it's a problem, one I hope

22   we can overcome, but --

23   MR. HUSEMAN: Here in the front row.

24   MR. GELLER: Thank you, Tom Geller from SpamCon

25   Foundation. My question is for Cindy.

1   In the emarketersamerica case against SPEWS, et

2   al., it seems to me a conflict between two different

3   versions of free speech, one being alleged Spammers

4   saying they have the right to send and so forth, and the

5   other from the blacklists saying they have the right to

6   call them on what the alleged Spammers are doing.

7   Does the EFF or do you have a position on the

8   rightness or the credibility of that case?

9   MS. COHN: No. I mean, I've read the

10   complaint, but like most complaints, it's not

11   particularly illuminative of, you know, what's going on,

12   and I have no other information, so I really can't

13   comment about that specific case.

14   MR. HUSEMAN: Laura Betterly in the back?

15   MS. BETTERLY: Hi.

16   MR. HUSEMAN: Wait for the microphone, please.

17   MS. BETTERLY: I'm the benefit of a lot of

18   press in the last six months, and one thing I have to

19   say, because -- regarding the blacklisting, I was

20   personally blacklisted on SPEWS based on press, not on

21   one complaint, and my upline provider shut off my website

22   based on the complaint -- on that particular thing,

23   although my corporate site has not even sent out one

24   commercial e-mail.

25   We've found that these kind of things, where

1   -- if you look at even some of the message boards where

2   guys are being incited to opt-in and then complain and

3   whatnot, and that's a problem, because it actually stops

4   people from legitimately doing business, if anyone could

5   comment on that.

6   MS. ARBON: We're not SPEWS.

7   MR. HAIGHT: Yeah, we can't comment on SPEWS.

8   Does anyone have any response? Okay.

9   MR. HAIGHT: Certainly I only would list IPs

10   that sent mail.

11   MR. HUSEMAN: Go to the woman behind you.

12   MS. BALLY: I'm Karen Bally, also known as

13   Resch Kugal (phonetic) from RCN. We heard earlier from

14   AOL and from Yahoo! and they're using a similar blocking

15   system to SpamCop, which you say is in beta tests and

16   it's completely complaint-driven. You say that SpamCop

17   isn't ready for -- isn't -- it's beta testing.

18   MR. HAIGHT: I don't say that anymore, no. He

19   -- Scott said that.

20   MS. BALLY: Right. I haven't read SpamCop in a

21   while, so please forgive me.

22   MR. RICHTER: Did it come off yesterday?

23   MS. BALLY: But, so, you get a lot of criticism

24   for the SpamCop blacklist, but AOL and Yahoo! are getting

25   a lot of praise. What are all of your thoughts on this?

1   I mean, we have -- we hear from the legal part that

2   SpamCop might not necessarily be legal. So, how does

3   this apply to AOL and Yahoo! as well?

4   MR. HAIGHT: Yeah, that's exactly what I'm

5   worried about, is that anything that's applied to those

6   of us who are a little aggressive in our blocking is

7   going to then be applied, you know, successively to less

8   and less aggressive black -- filtering in general, I

9   mean blacklists is just one kind of filtering, and

10   eventually you get to a point where filtering all is

11   illegal.

12   MR. HUSEMAN: Stuart Ingis?

13   MR. INGIS: I think the praise comes from the

14   fact that in many ways filters and blacklists are

15   effective. I think the criticism comes from the fact

16   that there are excesses and where there are legitimate

17   communications that are being blocked, and I think that

18   that probably is the issue that needs to really be the

19   focus going forward.

20   MR. HAIGHT: Yeah, but we have to recognize

21   that nobody's perfect, that there are going to be

22   mistakes.

23   MS. ARBON: And on the flip side, there is

24   excesses with bulk mailers where they don't send at the

25   same -- they will try to send at the same rate to a huge

1   ISP as a small ISP, so --

2   MR. HUSEMAN: Trevor?

3   MR. HUGHES: Sure, you know, my response to

4   that is that I think the false positive problem exists

5   throughout ISPs using proprietary filters and ISPs using

6   blacklists. It exists in both places, and we're

7   concerned about it in both places.

8   One of the differences, the key differences

9   that we see, is that the major ISPs with proprietary

10   filters are engaging in a debate, in a discussion,

11   because they recognize the false positives are a problem

12   for their subscribers, that if their subscribers are not

13   getting messages that they otherwise want to receive,

14   that that's a customer service issue for them.

15   Blacklists have no similar skin in the game,

16   and the -- one of the significant differences that we

17   see is that we -- okay.

18   MR. HUSEMAN: One more response and then one

19   more question.

20   MS. ARBON: I would beg to differ, because I

21   would say at least four times a week I get e-mail from

22   bulk mailers, service bureaus wanting our help to

23   understand what we consider to be best practices and how

24   they could apply it, and we are more than happy to

25   discuss that with anybody, any time.

1   MR. HAIGHT: We're very concerned about these

2   problems.

3   MR. HUSEMAN: Behind you, standing up, that

4   would be the last question.

5   MR. BROWER: I'm Adam Brower, citizen of the

6   United States. I have an interesting question, a paradox

7   that just occurred to me. It seems to me that part of

8   the meat of this issue is the associated text records

9   with listed IP addresses. In other words, might an

10   operator of a block list immunize himself against

11   putative claims of damage by supplying no explanatory

12   text record and simply listing an IP address? I address

13   this to all the panelists.

14   MS. ARBON: Most of our lists don't have text

15   records anymore. It's more of a function of the fact

16   that when you have a 25 megabyte zone in and of itself,

17   adding text records is a little bit ridiculous.

18   MR. HAIGHT: And that won't protect you,

19   because the recipient site is blocking -- is going to

20   implicate you eventually.

21   MS. ARBON: And the bounce message we recommend

22   will say specifically why someone is listed.

23   MR. BROWER: May I clarify, because I wasn't

24   really clear in my comment or question.

25   MR. HUSEMAN: You have ten seconds.

1   MR. BROWER: Okay, there are several block

2   lists that maintain also explanatory sites, explaining to

3   the blocked individual why his mail may or may not have

4   been bounced. Without associated explanations, would

5   part of this putative problem of damage disappear?

6   MS. COHN: So, less transparency would make it

7   even better? Yeah, I would have a real hard time with

8   that.

9   MS. ARBON: No, we want people to come to us

10   and ask us why they're listed so we can tell them how to

11   get off.

12   MR. HUSEMAN: Thank you very much. We're out

13   of time. We will start promptly back at 1:45 p.m. Thank

14   you.

15   **(Whereupon, a lunch recess was taken.)**

16

17

18

19

20

21

22

23

24

25

1   **AFTERNOON SESSION**

2   MR. SALSBURG: Okay, we are going to get

3   started. So, could the people please come on in and take

4   a seat?

5   We have a couple of really quick announcements

6   before we get started on the best practices panel. The

7   first one is, does everybody know the best practice

8   regarding cell phone use? We heard a few phones ringing

9   earlier today and yesterday, and the announcement that we

10   have is if self-regulation doesn't work, we will be

11   forced to call Congress, so please turn off cell phones.

12   For much of the last day and a half, we've

13   focused on worst practices, things like harvesting,

14   dictionary attacks, falsity in Spam. We've seen the dark

15   side. Now we're going to see the light side.

16   And to help me with this, we have a really

17   distinguished set of panelists. On my far right is Jason

18   Catlett. He's the President and Founder of JunkBusters.

19   Next to Jason is Ted Gavin of the SpamCon

20   Foundation.

21   On my immediate right is Tim Lordan, who is the

22   Staff Director of the Internet Education Foundation.

23   On my left is Rebecca Lieb. Rebecca is the

24   Executive Editor of internet.com's Interactive Marketing

25   Channel.

1   To her left is Anna Zornosa, and Anna is the

2   CEO of an e-mailer called Topica.

3   On her left is Michael Mayor. Michael is the

4   President of another e-mailer, Netcreations.

5   And at the end of the panel on my far left is

6   Ben Isaacson of the Isaacson Group, and he is a

7   consultant to e-mail marketers.

8   So, what are we here to talk about? Well, our

9   goal here today is to identify best practices, not okay

10   practices or pretty good practices, but really to find

11   what are those practices that both consumers and industry

12   members can engage in that will help solve the problem

13   that we've been talking about, which is a volume of

14   e-mail that is threatening to burst the system.

15   So, let's start with just identifying some best

16   practices for the panel. As with the other panels, if

17   any of the panelists want to respond to comments made by

18   another panelist, please put up your name tent, and I'll

19   let you have your -- say your piece. If any of the

20   members of the audience want to ask a question, please

21   hold it until the question period at the -- towards the

22   end of the panel. And if anybody on the conference call

23   line wants to ask a question, you can fax it to

24   spamquestions@ftc.gov.

25   So, why don't we get started by first talking

1   about best practices for consumers.

2   Jason Catlett, I am a consumer who's about to

3   open a new e-mail account. I've heard about something

4   called Spam, and I don't want to receive it. In fact,

5   the only reason that I want to have an e-mail account is

6   to receive and send personal e-mail. I don't want to

7   have anything to do with any commercial e-mail.

8   What should I do when I'm establishing my

9   e-mail account to ensure I don't get Spam?

10   MR. CATLETT: Okay, my answer is going to be

11   quite long and complicated, and I'd first like to comment

12   on the fact that it has to be like that, particularly

13   with the name best practices, which suggests sort of this

14   is business as usual and the way things are and the way

15   it should be.

16   You shouldn't have to follow the advice I'm

17   about to give you. If we had a proper public policy in

18   place about Spam, these measures would not be necessary,

19   and it's going to sound like I'm describing a state of

20   siege because of the threats that you're trying to

21   counter and the measures that you're taking, and that's

22   what it's -- that's unfortunately the way it is.

23   So, I'm assuming you are, as you said, a

24   consumer, and you can buy a new e-mail address. There

25   are two things to consider here in the e-mail address.

1   There's the bit before the "at" sign and there's the bit

2   after the "at" sign, and you have some freedom in

3   choosing those, too. You want to try to avoid dictionary

4   attacks, which we heard about yesterday, with -- if you

5   choose a name like john42@aol.com, well, it's probably

6   taken, but even if you could get it, you would probably

7   get a lot of Spam even if you did nothing to reveal your

8   e-mail address to the public. So, the dictionary attacks

9   would find out that that address is valid and would --

10   you would get Spam from it.

11   MR. SALSBURG: Are you less likely to be the

12   victim of a dictionary attack if your e-mail address

13   begins with a Z rather than an A?

14   MR. CATLETT: That's -- I believe that effect

15   would be true, because a lot of junk e-mail lists are

16   purchased sort of alphabetically, and a lot of Spamming

17   campaigns are cut off by an ISP in mid -- throughout the

18   middle of it. So, if you choose -- if the first letter

19   of your e-mail is a Z, you are probably likely to get

20   less Spam. If you're very high in the alphabet, I think

21   you may see a disproportionate increase.

22   MR. SALSBURG: Do the number of characters on

23   the left side of the "at" symbol affect your

24   vulnerability to a dictionary attack?

25   MR. CATLETT: Yes, but it depends on your

1   choice of characters. Maybe I should give you my ideas

2   on what those bits on the left should be.

3   It should not be a common name, first name or

4   last name or combination thereof, because Spammers look

5   at these lists such as ted@aol.com, and they say, well,

6   let's try ted@earthlink.net, ted@yahoo.com and so forth.

7   So, something that exists elsewhere, you should not

8   choose.

9   Some people say, well, should I then get the

10   cat to walk across the keyboard of my PC and use the 16

11   or 17 letters there as my e-mail address? Well, that's

12   probably pretty random, but the problem with that is if

13   you want to tell a -- your grandmother your e-mail

14   address and you're speaking over the phone, it's going to

15   sound like alphabet soup, and she is going to have some

16   difficulty with it, or if you're in a noisy bar or if you

17   want to scratch it down on the back of a napkin, it's not

18   very intelligible.

19   So, one trick that I've recommended is using

20   something like an acronym. For example, the letters

21   TBONTB are not obvious, but if you remember Hamlet, "To

22   be or not to be," that's fairly simple. Putting in

23   numbers also helps, although if you want to speak the

24   name in a bar, then a lot of numbers are easily confused,

25   like the digit two or the letter -- letters T-O. Zeroes

1   get confused with Os; ones get confused with Ls. So, I

2   would actually recommend if you are using numbers, avoid

3   the binary numbers, zero, one, two, four, eight, and go

4   for the nonbinary numbers, three, five, six, seven, nine.

5   The -- and longer is better. Of course,

6   longer is much more cumbersome and more difficult to

7   remember, but if you choose a favorite line of poetry or

8   a catch slogan or something like that, you can devise

9   something unique that is unlikely to be guessed by a

10   dictionary attack.

11   MR. SALSBURG: Or I imagine something like --

12   if your name is long enough, your name spelled backwards

13   even, you can let somebody know.

14   MR. CATLETT: Yeah, that would be good. I hope

15   no dictionary Spammers are listening to that one. I

16   think they're unlikely to try that. I mean, that shows

17   you we're really dealing with an arms race here where

18   counter-measures are being met by counter-

19   counter-measures.

20   MR. SALSBURG: In addition to the dictionary

21   attacks, if I were to open an e-mail account and only use

22   it for personal e-mail, are there any other sorts of

23   methods that my e-mail address could be gotten by a

24   Spammer?

25   MR. CATLETT: Well, principally the e-mail you

1   send to your wife could be intercepted by the Spammer in

2   transit, but it's extremely unlikely. It's not a

3   convenient or an economical attack for them. So --

4   actually, go ahead, Ted.

5   MR. GAVIN: There is a recent case that has

6   caused much controversy in the public. A commercial

7   white list provider had in its privacy policy that if you

8   send e-mail to somebody who is our customer, it goes

9   through our system, it comes back and says, hey, you're

10   sending e-mail to Bob, and Bob's using our service, just

11   click here and type in what you see, and you can send

12   your e-mail to Bob forever. This service then took the

13   addresses of people who were corresponding with their

14   customers and sent them unsolicited commercial

15   advertisement for their service, saying, hey, you won't

16   get Spam if you use our service.

17   Now, the ethical questions notwithstanding, it

18   was, in fact, in their privacy policy that they were

19   going to do this. I look at this from a few

20   perspectives.

21   My day job is very heavily rooted in business

22   management, consulting for distressed companies, so I

23   understand best practices like ISO 9000, which is

24   quality, and you can be quality certified and say that

25   our quality practice is we're going to pour sugar in the

1   gas tanks of our customers because we don't like them.

2   You can get certified as long as you can do that

3   consistently. So, having a privacy policy that says bad

4   things or says we're going to do things that probably

5   aren't going to be very popular in the public is not

6   necessarily a cure-all.

7   So, to that degree of if we're just going to

8   send e-mail, you know, if I open my new account and I

9   only send to my friends, my friend may subscribe to a

10   commercial service that I then have to interact with even

11   though they are basically my friend's proxy, which gives

12   them access to my e-mail address, which they can then use

13   or sell or it gets scraped or any number of other things,

14   which now takes control of that address completely out of

15   my hand, and I had no idea that that would ever happen,

16   because all I wanted to do was send e-mail to Grandma.

17   MR. SALSBURG: So, then, there is virtually no

18   way to protect yourself here?

19   MR. CATLETT: Well, there's -- the only way to

20   get absolute privacy and security in e-mail is to turn

21   off your computer and disconnect it from the power

22   supply. Beyond that, it's really a matter of controlling

23   the level of exposure to the different attacks, and I

24   think -- I don't think any major ISP currently would

25   pull the kind of dirty tactics that Ted describes,

1   although I'm sure it is a risk, and if you e-mail a lot

2   of people, then obviously there's more opportunity for

3   harvesting that address.

4   MR. SALSBURG: The way Ted described it, the

5   risk, though, is something that you couldn't control as

6   the consumer.

7   MR. CATLETT: Correct, because -- well, under

8   U.S. law. You could argue under many -- under the

9   privacy laws of many other countries that that was unfair

10   collection and take action against the party that

11   harvested it, but we don't have such a right in the

12   United States.

13   MR. SALSBURG: Let's say the consumer is the

14   more typical consumer, doesn't just want to use it for

15   --

16   MR. CATLETT: Okay, actually, we didn't do the

17   right-hand side of the "at" sign. Should I do that?

18   MR. SALSBURG: Sure, do the right-hand side.

19   MR. CATLETT: Should I give advice on that?

20   You do have a choice of what goes on the

21   right-hand side based on the ISP that you go to, and I'm

22   afraid the bad news is that the large ISPs tend to

23   attract more Spam, not because they're lax on Spammers

24   but because -- well, I mean, it's the same reason as

25   bank robbers rob banks, it's because that's where the

1   money is, and Spammers harvest addresses from large ISPs

2   because that's where most customers are. So, your

3   Yahoo!, your AOL, your Earthlink and so forth is more

4   likely to be the subject of a dictionary attack than

5   others.

6   Now, you can still have your internet service

7   from such a company but not use an e-mail address with

8   them. You can register your own domain name and then

9   have it forwarded, but that actually brings up risks of

10   its own, because many registrars will provide in certain

11   circumstances e-mail addresses to other parties, and

12   particularly you would not want to forward, for example,

13   web master to your own account, because that is probably

14   the number one Spam magnet in the world.

15   So, if you have a choice of where to register,

16   if you're registering your own, the ideal top-level

17   domain to get is dot gov, but you would have to start a

18   government department or institution in order to obtain

19   that, which is very burdensome on consumers. Probably

20   dot com is one of the worst, and some of the two-letter

21   exotic countries are probably a better choice.

22   There's lots of competition in the registrar

23   business now. You can register many choices of

24   countries, from lots of different sources, and I've heard

25   reports that say a registrar in Germany has a more

1   restrictive policy on disclosing the existence of the

2   domain's contact detail than, for example, some of the

3   major vendors that have a larger market share.

4   MR. SALSBURG: Are harvesting programs less

5   likely to harvest a domain that has a two-letter country

6   code?

7   MR. CATLETT: I think they'll still get it

8   anyway. I don't think it's -- they see the "at" sign,

9   and they recognize the country code. I mean, I know

10   Spammers -- some Spammers certainly do have a policy of

11   throwing away dot gov to avoid, for example, Spamming a

12   Commissioner of the Federal Trade Commission, but I don't

13   know if they're more likely to Spam -- we're assuming

14   here that the address is not put up on a web page or

15   maybe that's going to be your next question. So, to

16   summarize on what's on the right-hand side of the domain,

17   the more obscure is less likely to be the subject of

18   dictionary attack and therefore more protected.

19   MR. SALSBURG: Okay, so let's move on to the

20   consumer who also, in addition to wanting to send

21   personal and receive personal e-mail wants to engage in

22   some commerce, wants to visit the travel site, subscribe

23   to a newspaper, you know, an online newspaper, that sort

24   of thing. What additional steps should that consumer

25   take to reduce the risk of being Spammed?

1   MR. CATLETT: So, the common practice here is

2   to reserve your real e-mail address or some other alias

3   for personal correspondence and to have a disposable

4   e-mail address of some kind for the purpose of signing up

5   for a newsletter or giving to an airline when you make an

6   online reservation, and there are various ways of getting

7   disposable e-mail addresses.

8   A common one is using a web-based e-mail

9   service, such as Yahoo! mail, Hotmail, and there are

10   many, many alternatives there. That has a bit of a

11   difficulty that they tend to expire after a certain

12   period of time, which may or may not be a problem.

13   Perhaps you want to be able to check for e-mail saying

14   your reservation is being changed and you're now flying

15   out at 6:50 p.m. instead of 6:40 p.m. So, the time

16   expiring may not be a problem if you go on vacation.

17   It's also possible to get purpose-built

18   disposable e-mail addresses with a time destruction

19   feature on them that say after seven e-mails to this

20   address, it stops forwarding. There are -- there's the

21   option of many ISPs, if you have a mid to high tier

22   internet plan with them, will offer you several

23   addresses, and you can use some of them for the purpose

24   of those commercial transactions and revoke them if they

25   start to be the source of more Spam.

1   Of course, that burdens you with the job of

2   looking at the headers to see which e-mail address it was

3   sent to and then maintaining them, but it's better than

4   having to abandon your real principal e-mail address,

5   which often, frequently occurs.

6   MR. SALSBURG: What happens if rather than to

7   start again with a new e-mail address, you have an e-mail

8   address, you have given it out to all your friends and

9   family, your business colleagues, and it is inundated

10   with Spam? How do you clean it up? Is it possible to

11   make that e-mail address a good address again that you

12   can feel safe going to your inbox and not having to

13   review a boat load of Spam every morning?

14   MR. CATLETT: I don't think it's possible.

15   It's -- I mean, you could try getting off these e-mail

16   lists, and in some cases you can reduce the volume a bit.

17   It depends on how your address was contaminated by the

18   Spam, but in general, it's not possible.

19   MR. GAVIN: Dan, I think there are new

20   technologies out there that you can now forward your

21   e-mail address on to one of these new kind of inboxes

22   that has challenge response systems, so that you upload

23   your approved sender list, and any other e-mail won't get

24   into your inbox as a result, so you can continue the

25   legacy old e-mail address, and it just forwards on to a

1   box that only has a challenge response system set up.

2   MR. SALSBURG: So, did you want to --

3   MR. CATLETT: That's true, and my answer was

4   omitting the whole field of filtering systems, which you

5   can add to -- add to your e-mail address, but your

6   e-mail address is still going to get the Spam. It may be

7   filtered by someone else. And I should say, some of

8   these systems are becoming fairly easy to use by changing

9   the POP settings and putting basically what's a bump in

10   the cord to your delivery. You can get filtering added

11   on, but it's still a filtering solution, even though it

12   doesn't come to your PC, it may be filtered before it

13   gets to the PC, and with filtering come the inevitable

14   false positive errors there, so...

15   MR. SALSBURG: The precise type of filter --

16   Ben Isaacson, you're describing is the challenge?

17   MR. ISAACSON: It is a -- correct me if I'm

18   wrong, the e-mail comes in, and if the e-mail isn't from

19   somebody on your address book, there's a question asked,

20   you know, who are you? Give some information. And if

21   it's Spam, it's automated, and there will be no response,

22   and it won't get through.

23   MR. CATLETT: Well, actually, that's not true.

24   It may not be Spam. It may be, for example, the airline

25   mailing you your reservation number and confirmation, and

1   they're sure as hell not going to respond. It's not

2   Spam.

3   MR. ISAACSON: That's why you made the false

4   positives comment.

5   MR. CATLETT: Right, yeah.

6   MR. GAVIN: And one additional problem with

7   that is you don't always know from what address something

8   that is critical to you is going to be sent, you know,

9   you take some of the larger travel ticket clearing

10   houses, they may have hundreds of mail servers that send

11   from hundreds of IPs and hundreds of identities. I have

12   virtually no way of white listing those after forwarding

13   to an e-mail box, and they're not going to -- you know,

14   they're not going to call me and say, well, we sent you

15   your ticket, and they are not getting an undeliverable.

16   There is a message saying, you know, click here and type

17   in what you see in the picture, and that's not going to

18   be recognized systemically. So, not getting the airline

19   ticket may be almost as bad as having deleted it

20   mistakenly because it was under the deluge of Spam.

21   MR. SALSBURG: So, far from a perfect solution.

22   MR. GAVIN: I would agree, it is far from a

23   perfect solution.

24   MR. SALSBURG: Jason, what is munging

25   (phonetic), and is it an effective strategy for

1   consumers?

2   MR. CATLETT: Ted, do you want to take that?

3   MR. GAVIN: Sure, I guess I will speak to that.

4   Munging is the practice of altering how a person's e-mail

5   address appears in a given medium that is readable by

6   humans and intended not to be readable by harvesters, the

7   intent being if I change my address so it is no longer

8   alphanumeric string at alphanumeric string dot something,

9   the bots (phonetic), the e-mail address harvesting

10   programs will not be able to automatically get that.

11   We heard discussion yesterday about different

12   methods through which munging was more or less effective

13   given different types of harvesting technology. There

14   are a few problems with munging. First, it's considered

15   incredibly rude if you munge your e-mail address and

16   you're participating in e-mail correspondence. It is

17   generally much more widely used in usenet posts and in

18   public forums, such as web sites or online discussion

19   groups.

20   You know, if I send an e-mail to you, Dan, and

21   I've physically altered my e-mail address, so instead of

22   being tedgavin@example.com, it's tednospam___

23   @example.com, and somewhere in the body, I say, "Remove

24   nospam___ to reply," you're probably not going to reply

25   too many times, because there's far too much effort

1   involved in the process than is really warranted.

2   The problem that we've seen technologically

3   over the past five or six or more years is that as --

4   you know, munging is one of those anti-Spam techniques

5   that is basically building a broader or higher wall to

6   protect yourself from the flood of Spam, and what that

7   does is it promotes people to design software which is

8   basically more effective, stronger battering rams to get

9   down the walls.

10   There are munging programs that know how to

11   decipher different types or there are harvesting programs

12   that know how to decipher different types of munging and

13   look for cues that are commonly used and automatically

14   filter them out.

15   So, while we heard yesterday that physically

16   spelling out all the characteristics of addresses, like

17   spelling out A-T for "at" or D-O-T for "dot" have varying

18   degrees of effectiveness that tend to be more effective

19   than inserting various alphanumerics into the e-mail

20   address, nothing is perfect and, you know, this is, as

21   Jason said, an arms race.

22   Everything is always responsive. You're going

23   to munge because you got Spammed. Somebody is going to

24   see that affecting their ability to harvest and will come

25   up with a technology to work around that, and then we go

1   to another step of reactive steps.

2   MR. SALSBURG: So, let's say I have an

3   anti-Spam program that I want to market. I very well

4   might Spam people based on the harvest program that

5   collected just the names of those people that munged.

6   MR. CATLETT: Those sorts of conspiracy

7   theories are always leveled against anti-virus companies

8   who are accused of making up viruses so that people are

9   forced to upgrade. It's a cute theory, but I simply

10   don't think it's true. There's enough Spammers and

11   enough virus writers there to explain it without any

12   conspiracy.

13   MR. SALSBURG: Tim Lordan, let's say that as a

14   parent of young children, my main problem with Spam is

15   the pornographic images that automatically appear when I

16   open certain messages. Is there anything that I can do

17   to prevent this?

18   MR. LORDAN: Well, when it comes to young

19   children, what you really need to do when it comes to

20   porn Spam, on our getnetwise.org website, we say -- and

21   you've heard this before, parents -- it says, take the

22   computer, put it in a room, a common room like the den or

23   something, get a big screen so you can see what your kids

24   are doing, and lo and behold, the porn Spam comes up when

25   you're checking your e-mail, and it's harsh, the kids are

1   terrified.

2   One thing you can do, and you actually

3   mentioned it, is actually converting the e-mail client to

4   display only text. Now, what you've done is you've

5   downgraded the richness of the medium from images to

6   text, certainly not for porn, but for other things that

7   are more worthwhile.

8   So, you can do that, but for kids, you know, my

9   basic message for kids is, depending on their age group

10   -- I mean, a 15-year-old is vastly different than a

11   10-year-old. For kids of the younger ages, under 11 or

12   something, what you want to do is set up an e-mail

13   account and have an address book of their aunts, their

14   uncles, their cousins, their sisters, their pen pals, et

15   cetera, and let them only accept e-mail from those

16   people.

17   You know, if a new friend they met at the park

18   is trying to e-mail them, you know, there's ways you can

19   add that to the list, but that's a really good strategy.

20   MR. SALSBURG: And Jason Catlett, assuming it's

21   my e-mail account, not my children, I can't really limit

22   the people that are sending e-mail, if I want to get rid

23   of the so-called sporn, can I -- how easy is it to

24   adjust my e-mail program to convert HTML code coming in

25   just to plain text?

1   MR. CATLETT: Well, it depends on your e-mail

2   handler. Some allow it. Others don't. I personally

3   don't use Microsoft products as a conscientious objector,

4   but I'm told that in Outlook or whatever their product's

5   called, it's actually not possible to disable the HTML

6   rendering, and in the preview perhaps also, there's a

7   whole another privacy issue there with the web bugs

8   rendering the -- sending back information that the

9   e-mail has been delivered.

10   So, the -- without giving details on

11   particular products, some products don't have good

12   defaults. You know, I think by default, there should be

13   no rendering of HTML graphic e-mail because of the

14   privacy impact that it has, but some of them not only

15   have bad defaults but don't even have the opportunity to

16   turn off some threats.

17   MR. LORDAN: Well, since you mentioned the kids

18   online issue and the parents trying to protect their kids

19   from porn or whatever, we're now talking about Spam, and

20   Jason was right, it is long and complicated, and I don't

21   even think you've exhausted your -- you have come close

22   to exhausting your knowledge on setting up an e-mail

23   account, and I think compare what a parent will do to

24   keep their kids safe online. Parents will do

25   extraordinary things to protect their kids, you know,

1   stories of women lifting cars and, you know, doing

2   anything to protect their kids in danger, and people and

3   parents are willing to do a lot more to protect their

4   kids from Spam. They're willing to listen to -- which

5   is not only a quarter of the way there -- all of the

6   things that they can do to protect their kids.

7   What is the average user going to do? What

8   should we ask the average user to do to protect himself

9   from -- everybody is really upset about Spam, but it's

10   really an annoyance. What are they willing to do? It

11   isn't protecting their kids from sexually explicit

12   material in most cases, and it isn't protecting them from

13   sexual predators.

14   Parents will download software tools, they'll

15   figure out the blocking lists and everything, they'll do

16   -- they'll take extraordinary steps to control their

17   kids' online experience when it comes to predators and

18   porn. When it comes to the average user dealing with the

19   annoyance of e-mail, how much are we asking them to do?

20   What is too much?

21   I think the Federal Trade Commission has it

22   right, the ftc.gov/spam site has some really simple

23   times, some good tips, and they're going to change, you

24   know, it is an arms race, and things are going to change.

25   Our tips are going to change, but I think you can only

1   ask so much of consumers, and maybe not ask anymore.

2   MR. CATLETT: Sure. I mean, consumers have a

3   certain amount of effort that they're willing to put into

4   maintaining a service before they abandon it, and we are

5   heading from 20, 30, 40, 50, 60 percent, there will be a

6   tipping point where the majority of consumers consider it

7   too much effort and will abandon e-mail, and we will have

8   had an enormous economic tragedy, because the gains of

9   the late nineties in technology and economic gains will

10 be jettisoned because the medium has been spoiled.

11 MR. SALSBURG: Ted, did you have a comment?

12 MR. GAVIN: I do. I have a few comments on

13 both points. Ironically, it may actually be more

14 effective in protecting children from inappropriate

15 content to give them their own e-mail account and apply

16 white listing. Parents should have some idea of who is

17 sending mail to their kids, and that is a perfect way.

18 I think the efforts of internet service

19 providers, and I won't name names, but they're a large

20 one in Virginia and they're nice enough to tell me when

21 I've got mail, you know, the ability that they give

22 parents to say, children have this type of account, and

23 they can't get e-mail from the outside, or they have this

24 type of e-mail account, and they can only receive e-mail

25 from people whom I specify, is very effective.

1   It can be even more complicated if you're

2   allowing your child to share the parents' e-mail account,

3   because you may not want the child seeing legitimate

4   e-mail that the parent gets. So, at what point do you

5   -- you know, do you draw that line?

6   To what Jason was just saying about when e-mail

7   breaks, e-mail was and in many ways still is the ultimate

8   killer app. It passes the grandmother test. You know,

9   if I can explain to my grandmother how I can send me an

10   e-mail, there is no stopping her. She has just

11   discovered a whole new realm of the world, and it's

12   valuable.

13   However, if I have to explain to my grandmother

14   that if she wants to keep herself from getting Spammed or

15   my child, setting up an address at college from getting

16   -- if he wants to keep himself from getting Spammed, to

17   use nonbinary numbers rather than binary numbers in the

18   address, I may have just gotten to the point where they

19   glaze over and say, you know what, this just isn't going

20   to happen, and that does threaten the viability of e-mail

21   as a mechanism for communications and commerce.

22   MR. SALSBURG: Tim Lordan of the Internet

23   Education Foundation, what do we do about that? How do

24   you take technophobes who are using the medium and want

25   to protect themselves and give them the tools they need

1   to protect themselves?

2   MR. LORDAN: Well, I think the Federal Trade

3   Commission educational resources, the consumer

4   educational resources coming out to the appropriate

5   level, they don't attack them with tech know-jargon. I

6   have heard terms here today that I have never even heard

7   today. Am I the only one? And this is a really

8   sophisticated audience.

9   What you need to do is have really -- I mean,

10   how many data elements can a consumer remember? What is

11   it, five, seven? Seven data elements? And you need to

12   be able to hit those top seven elements. We can't ask

13   them to do any extraordinary measures, because I don't

14   know if anybody saw the Pew (phonetic) internet study

15   that was done about a month ago. Forty-three percent of

16   people aren't online, and a lot of them proudly proclaim,

17   I'm not online, like it's a badge of honor, and I think,

18   what are we talking about here today?

19   And I'll stop talking, but what are we talking

20   about? Are we talking about maintaining the status quo

21   with regard to e-mail clients, and here's their e-mail

22   client, but are we talking about, you know, the future of

23   personal communications and the evolution of the

24   internet?

25   People are just going to -- at a certain

threshold, Jason's right, they are just going to abandon

it. They are going to abandon e-mail, and maybe they

will move to instant messaging or some other type of form

of personal communication, but I think what I've heard

today -- and I've been out a lot this week, I apologize,

I haven't made all the panels -- but I see more of

talking about maintaining the status quo rather than

addressing the evolution of the internet, particularly

e-mail and other types of personal communications, and I

think that's really a huge challenge.

MR. SALSBURG: Jason, parting shots on best

practices for consumers before we move on?

MR. CATLETT: Well, I could go on for hours,

but I'd actually just point you to the pages on our

website that have similar tips to the one that I've given

today, but I think it's improper to blame the dumb

consumer for not spending hours trying to figure out how

to do this kind of self-defense.

The medium has to be protected, and we should

have a law that says Spamming is illegal, and there

should be a private right of action by the consumer who

is Spammed against the Spammer directly. Now, none of

those laws are on offer at the moment before Congress,

but they sure as hell should be I think, and --

MR. SALSBURG: Well, we will be discussing

1   various legislative proposals on the panel tomorrow.

2   MR. CATLETT: Um-hum.

3   MR. SALSBURG: I guess actually, Tim, I'm going

4   to give you a parting shot on best practices for

5   consumers, if you could briefly describe, what do you

6   have on the getnetwise website that would help consumers.

7   MR. LORDAN: Well, we expanded -- getnetwise

8   was a kids online safety campaign. We are starting to

9   expand the repertoire into user empowerment with regard

10   to Spam, privacy, security. With regard to that, I

11   would, you know, welcome people to visit Jason's -- I

12   think Jason's tips, the Federal Trade Commission tips,

13   our tips, at spam.getnetwise.org, are all pretty much

14   similar, but, you know, at a certain point, you are going

15   to realize that people only do so much, and 43 percent of

16   people aren't online, and some are proud of it.

17   MR. SALSBURG: Ben?

18   MR. ISAACSON: Before we move on, I think it's

19   kind of a key point, we've been talking about this the

20   last couple days, and it hasn't been addressed enough,

21   the fact that I think it's up to the internet service

22   providers to help educate consumers on what is Spam and

23   what they can do to get off these lists and try and

24   eliminate the amount of Spam that's being driven.

25   I think that there's, you know, the Yahoo!

1   sweep stakes and some of the other efforts, they don't do

2   enough justice to the fact that consumers just do not

3   know what is coming from some of the people on my right

4   here and what is coming from the egregious actors.

5   So, strong, consensual education campaign from

6   all the major ISPs working together would be something of

7   great benefit to consumers.

8   MR. SALSBURG: So, consumers can't do it alone.

9   They need the ISPs and all the players to -- to do

10   something about the Spam problem?

11   MR. ISAACSON: I think so. Every time they

12   open their inbox, they should at least get some

13   information about how to stop the bad actors.

14   MR. SALSBURG: Well, let's turn to the role

15   that e-mailers themselves can play in curtailing the Spam

16   problem. We're going to look at best practices in four

17   areas. The first one is disclosures and the from or

18   subject line. The second one is the obtaining permission

19   for sending e-mail. The third one is unsubscribing from

20   e-mail lists. And finally, fourth, we'll look at the

21   practice called e-mail appending.

22   Let's start with disclosures in from or subject

23   lines. In a study that came out earlier this week in the

24   Division of Marketing Practices at the FTC, we found that

25   44 percent of the Spam that we looked at contained false

1   information in either the from or subject line.

2   Ben Isaacson, you helped create in your work at

3   the Association of Interactive Market's Council of

4   Responsible E-mailers, you helped create their Best

5   Practices Guide. Is there ever a circumstance where an

6   e-mailer should falsify a from or subject line?

7   MR. ISAACSON: Well, I think we had talked

8   about this in other -- in the falsification session

9   yesterday where there are circumstances where the brand

10   identity of the sender, the content of the message, might

11   be different from the actual sender. I wouldn't call

12   that falsification. So, except from those situations, I

13   don't think there are -- there are any good examples of

14   falsification of a from field or a sender field.

15   MR. SALSBURG: So, if an e-mailer is sending

16   out commercial e-mail on behalf of a client, the from

17   line should list the client's name?

18   MR. ISAACSON: Well, it can list either the

19   list owner's name, could certainly list the service

20   provider's name, but I don't consider that falsification.

21   That's simply who is sending the e-mail. It should be

22   responsive and identifiable and there should be an

23   accountable company or service at the other end of that

24   from address.

25   MR. SALSBURG: Okay. Any other comments on

1   that or -- okay, the same FTC study found that only 2

2   percent of the messages looked at contained an ADV label

3   in the subject line. Is this a practice that should be a

4   best practice? Should e-mail that's commercial in nature

5   include an ADV label?

6   Michael Mayor?

7   MR. MAYOR: Absolutely not. I think it's a

8   ridiculous law. I think most of the laws that we have

9   that are ADV are state by state and, you know, before we

10   get too deep into the different types of laws there are,

11   I think it's a terrible misconception to think that

12   e-mailers or list managers have all this kind of

13   information on their list members. We don't know all the

14   time what state they're in or what country they're in.

15   When we started our company in 1997, we just

16   asked for their e-mail address, because we were asking

17   them what they wanted to receive. What more do we need

18   to know? And so, you know, now we're getting deeper and

19   deeper, and we need to ask all of these questions so we

20   can guide ourselves around the law --

21   MR. SALSBURG: If this were a Federal

22   requirement, would that solve your problem with it?

23   MR. MAYOR: No, absolutely not. What does it

24   do to stop Spam? ADV does nothing. Spammers may or may

25   not use ADV. Why should I use ADV? They know that

1   they're getting advertisements from me.

2   MR. SALSBURG: Ted?

3   MR. GAVIN: There are a lot of risks to the use

4   of ADV and especially a legislated use of ADV, because as

5   we've heard about collateral damage and false positives,

6   if I decide as a consumer or if my ISP decides, acting on

7   my behalf, to filter traffic marked ADV, there's a fairly

8   good chance that I'm going to stop getting my online

9   credit card bill or my online phone bill. Without any

10   type of way for the sender to assert, this is who I am,

11   this is what I'm doing, and this is wanted, rather than

12   just some more ADV-classed mail, you break the system.

13   MR. MAYOR: The thing that I would add to that

14   is that most of the laws are written that if you are

15   sending unsolicited e-mail, you need to use ADV. Well,

16   I'm not sending unsolicited e-mail, and if I do send it

17   ADV, I'm sticking my hand up and saying, hey, I'm a

18   Spammer, and I think that's ridiculous.

19   MR. CATLETT: Could I add, almost nobody thinks

20   ADV is a good idea. Certainly consumer groups generally

21   don't think it's a good idea. The EPIC, for example,

22   which is also concerned with free speech, doesn't like

23   the compulsory labeling. It -- people sometimes say,

24   well, it makes it easy to filter, but in fact, that

25   doesn't practically work, and filtering is not a

1   sustainable solution to Spam anyway. So, I think

2   everyone thinks that this compulsory labeling is a bad

3   idea.

4   MR. SALSBURG: Rebecca Lieb from internet.com's

5   Interactive Marketing Channel, do you think it's a good

6   idea?

7   MS. LIEB: I think it's a terrible idea, and I

8   think it's not a terribly well-defined idea. There are

9   all kinds of commercial e-mail. My company publishes

10   double-confirmed opt-in newsletters. The vast majority

11   of them are free, and we're advertising supported.

12   Because our e-mail originates from a corporation and

13   there are advertisements in those e-mails, would that

14   then require us, for example, to put ADV on our

15   newsletters? You know, if that were the case, I would

16   argue that The New York Times would have to be called New

17   York Times ADV, it's effectively the same situation, and

18   that font would have to be as big as the headline font.

19   By the same token, I don't know that this would

20   apply to my brokerage statement or my bank account

21   statements, which are also arguably commercial e-mail,

22   they come from commercial entities. They couldn't be

23   more personalized or more opt-in. Are they

24   advertisements?

25   MR. SALSBURG: Would a more complex labeling

1   system solve some of these issues?

2   MS. LIEB: I think a more complex labeling

3   scheme would be more complex.

4   MR. SALSBURG: Ted?

5   MR. GAVIN: You know, one of the problems with

6   calling things -- you know, calling the problem

7   unsolicited commercial problem is that it costs just as

8   much to receive unsolicited bulk noncommercial e-mail,

9   and so saying, okay, the problem will be solved if only

10   we put ADV, means that, oh, somebody who's running for

11   the Governor of California, for example, can send

12   unsolicited e-mail to people in Toronto in huge numbers,

13   and that passes by without any type of labeling.

14   So, again, we hit that slippery slope of trying

15   to define and solve the problem based solely on content,

16   which, you know, it doesn't cost the recipient or the ISP

17   or the sender any more to deal with a content-based list

18   gone awry than it does a consent -- you know, if it's

19   commercial or if it's noncommercial, it's going to have

20   the same damage.

21   MR. SALSBURG: Michael Mayor, at Netcreations,

22   you send e-mail on behalf of clients. Is that right?

23   MR. MAYOR: Um-hum, correct.

24   MR. SALSBURG: And the question I have is,

25   should an e-mailer such as yourself do any checking to

 1   make sure that the subject line matches the content of

 2   the message before you send it out?

 3   MR. MAYOR: Absolutely, absolutely. I mean, we

 4   have very clearly asked the list member what they want to

 5   receive, and let me say this first. I think the from

 6   line and the subject line are the meat and potatoes of

 7   direct marketing, and you really need to be clear about

 8   who you are in the from line, and I agree with Ben that

 9   it should be either your brand or the list owner in

10   certain cases. I can't think of a third case that's

11   okay. Maybe there is one.

12   But then the subject line is -- that's your

13   direct marketing power, and deception does not work in

14   e-mail. You need to be very clear, and you need to say

15   who you are and what you're offering, and we do check for

16   that, absolutely.

17   MR. SALSBURG: Anna Zornosa?

18   MS. ZORNOSA: Yes, I would agree completely

19   that there's no room for deception in the case of e-mail.

20   You know, it's -- what we find in our case is we've got,

21   you know, thousands of customers using our products, not

22   just for marketing but also for communications, and when

23   -- you know, from nonprofits to discussion groups to

24   large marketers to large membership organizations, and it

25   does become impossible for us to verify their subject

1   lines.

2   But I'll tell you that, you know, we do an

3   awful lot in the area of education, and they also see a

4   lot. You know, today, a legitimate mailer who does in

5   any way start to deceive on the contents, we'll see that

6   immediately. You know, we can actually see the patterns

7   as they relate to unsubscribes and as they relate to

8   complaints when even a legitimate mailer starts to veer

9   in the direction of becoming confusing to the people that

10   they intend to reach.

11   MR. SALSBURG: If you were to receive

12   complaints against a client for falsifying a subject

13   line, what would you do with the client?

14   MS. ZORNOSA: The -- we would -- if the

15   complaints were of that degree, we would definitely fire

16   that customer. The -- of course, you're talking about a

17   gray area, you know, falsifying a subject line. The

18   first punishment that that mailer will get is if the

19   subject line is confusing to the person who is receiving

20   it, it will immediately pummel their open rates. You

21   know, we've actually started to counsel our customers not

22   to, you know, go in the direction so much of talking

23   about what's in the subject as opposed to saying, you

24   know, publishers lunch, Monday, the 16th, because the

25   more consistent identification they can do with an

 1   audience who understands and trusts them, the better they

 2   are going to get in terms of results.

 3   MR. SALSBURG: How do you check an open rate?

 4   Is that based on the pixels that are included in the

 5   messages?

 6   MS. ZORNOSA: You can only see an open rate, of

 7   course, if the message is not text. So, you're talking

 8   about HTML and multi-pipeline, which for the most part do

 9   not encompass 100 percent of the messages that a customer

10   receives. So, an open rate on that portion of the list

11   that can be seen is, you know, in most cases extrapolated

12   to the entirety of the list. Both HTML and

13   multi-pipeline, it's very easy for the list owner to see

14   their open rates. It's very easy for us to see it on

15   their behalf and to, you know, to be able to interpret

16   it.

17   MR. SALSBURG: If I have my e-mail program set

18   to preview e-mail and I see the first few lines of every

19   message, is that considered opened?

20   MS. ZORNOSA: In our system, it is not. In

21   many systems, it depends also where the pixel is placed

22   in the newsletter themselves.

23   Rebecca, is that common?

24   MS. LIEB: In some cases, it also depends on

25   what e-mail client you're using to preview. In some

1   cases yes; in some cases no.

2   MR. SALSBURG: Okay, well, let's move on to

3   probably the real meat and potatoes of best practices

4   with e-mail marketers, and that's obtaining permission

5   for sending e-mail.

6   Rebecca Lieb, what's the difference between

7   permission-based and nonpermission-based marketing?

8   MS. LIEB: Spam and not Spam. This is an

9   interesting subject, and I -- it's one I'm very glad

10   that we're getting into here, because lots of references

11   have been made over the past two days to opt-in and

12   opt-out, and there are more subtle gradations along that

13   chain, and I've identified five, and over lunch, Mike

14   told me he had identified four, so even marketers aren't

15   quite in accordance on what they are, nor the language

16   that is used to describe them.

17   So, when I -- I will -- my descriptions of

18   these are going to be more important than what I call

19   them. Some people say, well, only Spammers call it

20   double-opt-in, and if it's really double-opt-in, you have

21   to say it's confirmed opt-in if you're legitimate,

22   semantics. I suppose people are eventually going to

23   agree on the terminology. What's important is to

24   understand what the various options are and what they

25   mean to both users and to e-mailers.

1   Legitimate marketers want or should want to do

2   the best thing. You know, Spam is obviously infuriating

3   a lot of people, and that's why we're all here. It is

4   the goal of marketers not only to make their audience

5   like their products and themselves in order to sell or to

6   effect transactions. I would also posit that one of the

7   first tasks of marketers is not to make that same

8   audience hate them, because then, you know, working

9   towards like or love is going to be a much more difficult

10   task.

11   I'd also like to preface this by saying that

12   e-mail is a very low-cost medium. It's not absolutely

13   free, but it's close to it, and the barrier to entry is

14   very, very low. You know, just as I'm a journalist,

15   anybody can go on the web and become a journalist and

16   publish their writing. It doesn't mean it's going to be

17   as good as mine is, you know, with 25 years of experience

18   under my belt. Anybody can go online and become an

19   e-mail marketer. It's not really hard.

20   They'll do better at if they do it well. And

21   you know, even if it's low cost, you get what you pay

22   for. You have to invest a certain amount of money in

23   technology and in education to do this well. Just the

24   ability to do it does not mean that it's been with any

25   level of responsibility.

1   There are a number of people like my colleagues

2   on the panel here who, you know, are perhaps on one of

3   the highest echelons. There are, you know, the sort of

4   scumbag Spammers who we're all aware of. But there's a

5   huge, gigantic gray area of people in the middle who want

6   to use the internet to market their goods and services,

7   but that doesn't mean that they're marketers. Their

8   primary goal is to manufacture these things or package

9   the things --

10   MR. SALSBURG: So, from worst practices to best

11   practices, where would the different types of opt-in --

12   MS. LIEB: All right, I'll start with the worst

13   and work up. The worst practices, and I think there was

14   some consensus on this yesterday among the audience, at

15   least, is opt-out. Opt-out is when somebody's address is

16   added to a list without their knowledge or permission,

17   and it's the recipient's job to tell the sender that they

18   don't want it anymore. This is often not the case,

19   because people have been made to feel very afraid of

20   unsubscribing to things.

21   MR. SALSBURG: So, I guess with opt-out, it

22   could be the recipient's permission. You just don't know

23   for certain.

24   MS. LIEB: It depends on the privacy policy of

25   the site. The best case scenario is you have some sort

1   of relationship with the sender, and they sign you up for

2   something, and you get it, and you can opt-out. The

3   worst case scenario, it's pure Spam. You don't know

4   where it came from or why.

5   A step above that is confirmed opt-out. Your

6   e-mail address is added to a list of recipients, and you

7   receive an e-mail saying you have been added to this

8   list, you can do something about it, and then there is

9   some sort of unsubscribe option in that e-mail.

10   There's --

11   MR. SALSBURG: Ted, you had your tent up, but

12   is the risk with any sort of confirmed opt-out that the

13   opt -- the confirmation is going to be viewed as Spam

14   and never read?

15   MR. GAVIN: That's a pretty serious risk. You

16   know, it has been common internet wisdom, amassed over

17   the last several years of dealing with Spam, that you

18   don't click remove. You don't respond to unsolicited

19   e-mail that solicits any type of response from you,

20   because you are simply feeding the problem, either

21   through confirming that your e-mail address does connect

22   to a live human being, which means it can then be sold

23   for a higher premium, or that you just simply become a

24   more willing target.

25   So, with opt-out, by and large, the problem

1   simply doesn't get resolved through having been added

2   without consent to any list. Having been added without

3   consent to a list and then being told you have now --

4   you have been added to the list is like slapping somebody

5   and then telling them that you just slapped them. You

6   know, the damage has already been done. You are giving a

7   person the opportunity to do something about it that they

8   have been conditioned over years of experience not to do.

9   MR. SALSBURG: So, what's the next step that's

10   better?

11   MS. LIEB: Okay, I would also like to point

12   out, adding to what Ted just said, that the value is on

13   both sides of the relationship. You know, the value of

14   what a consumer is getting, whether they have volunteered

15   or not volunteered to receive something they're getting,

16   is one side of it. The other side of the coin is the

17   quality of the lists that the marketer has, the lists

18   that are going to get the most complaints, the lists that

19   are going to be blocked, the lists that people are going

20   to try to rent or to sell to other marketers that are

21   going to be near valueless.

22   Right in the middle of the equation is pure

23   opt-in, which is pretty straightforward. You go to a

24   website, there's a thing that says sign up for our

25   newsletter or our specials or our deals, you type in your

  1   e-mail address, hit send, and you're subscribed. That's

  2   okay.

  3   The lists are more responsive and they produce

  4   fewer complaints, but there are no safety mechanisms

  5   built in, and there are plenty of people out there who

  6   for reasons ranging from the mischievous to the downright

  7   malicious will sign, you know, their friends, their

  8   enemies, their co-workers, anybody who did anything they

  9   didn't like or, you know, their ex, their boss, up for

 10   about a billion e-mails.

 11   These people don't necessarily know how this

 12   happened or why or how to unsubscribe or how many things

 13   that they're signed up to, and this can lead to people

 14   being e-mail-bombed. It is, therefore, not too terribly

 15   responsible.

 16   MR. SALSBURG: So, what's better than that?

 17   MS. LIEB: Better than that is confirmed

 18   opt-in. You opt-in to something, and because you have

 19   opted into it, you get an e-mail, and it says, you have

 20   opted into this. Here's your user name and your

 21   password, if that's the case, and at least you know

 22   what's going on. If you were not personally the person

 23   who signed up for whatever it is that you've allegedly

 24   signed up for --

 25   MR. SALSBURG: Well, does the confirmation tell

1   you to contact the sender if you believe that you were

2   opted in inappropriately?

3   MS. LIEB: Yes, and it should -- everything

4   should always have an unsubscribe link, every piece of

5   communication in your chain.

6   MR. SALSBURG: So, essentially a confirmed

7   opt-in is really an opt-in that has a confirmation that's

8   an opt-out?

9   MS. LIEB: Exactly, but it also lets you know

10   what you were signed up for, how many, how much, so that

11   if you did not intend to get this, you have a chance of

12   stemming the tide before it hits.

13   The gold standard is what I term -- and there

14   is some disagreement on this, but I think it's the

15   clearest terminology -- double-confirmed opt-in. I'm

16   proud to say it's what we do. The user takes an action

17   to subscribe, and immediately receives an e-mail that

18   says, you have subscribed to this, but in case you are

19   not the person who subscribed to this, your subscription

20   is not going to be active until you answer this e-mail to

21   confirm that this e-mail address is really the e-mail

22   address that wants this subscription.

23   It's a more cumbersome process. The response

24   rate to those e-mails is between 40 and 60 percent, which

25   scares a lot of marketers and publishers to death, but it

1   makes for the least complaints, the happiest subscribers

2   and the most valuable lists for marketers and

3   advertisers, because these people have proven not once,

4   but twice, that this is, indeed, something that they want

5   and are eager to receive.

6   MR. SALSBURG: Ben Isaacson, what does the

7   Association for Interactive Marketing's Best Practices

8   Guide recommend in terms of the type of opt-in?

9   MR. ISAACSON: Well, they certainly -- there's

10   many different ways to determine opt-in, but certainly it

11   is having a prior business relationship is number one,

12   and then I don't want to categorize what Rebecca said,

13   because there's a key missing area here about both opt-in

14   and opt-out, and that is the offline relationship that

15   could be created or extended to the online environment

16   from the retail chain or the teleservices representative

17   or fax, and so within that, there's kind of opt-in and

18   opt-out. So, the opt-in being you fill out the card, you

19   send it back one way or another, you verbally give your

20   e-mail address to somebody on the telephone, and the

21   opt-out being that you have a strong prior business

22   relationship via a catalog or some other mechanism

23   offline, and they send you an opt-out e-mail saying we

24   would like to extend this relationship to e-mail, and

25   please unsubscribe if you don't want to extend the

1   already-established prior business relationship.

2   MR. SALSBURG: So, the Association for

3   Interactive Marketing would say that the level of

4   confirmation needed or the type of opt-out depends on

5   whether there's a prior existing relationship between the

6   customer and the business?

7   MR. ISAACSON: It's based on the prior business

8   relationship, and in my own consulting practice, I urge

9   that there are different layers of permission, permission

10   strategies for, you know, financial services will far

11   exceed that for a B2B niche e-mail newsletter. So, every

12   different communication vehicle should have a different

13   permission strategy.

14   MR. SALSBURG: Jason Catlett, if the

15   confirmation is sent and it just shows up in somebody's

16   inbox as if it's any old piece of commercial e-mail, what

17   good is it?

18   MR. CATLETT: Well, it looks just like Spam,

19   and this happens not only because of malicious signing

20   up, it also happens because e-mail addresses are

21   mistyped. People mistype e-mail addresses, their own

22   e-mail addresses, into forms all the time, and

23   john64@aol.com causes some Spam for john46@aol.com, and

24   when john46 gets it, this so-called confirmed opt-in

25   looks like Spam to them, and it's functionally like Spam.

1   If you don't opt-out, then you are going to get more.

2   So, we're back into the DMA's happy hunting ground of

3   Spam them until they scream.

4   MR. SALSBURG: Does anybody on the panel know

5   whether there have been studies done to show what

6   percentage of people that get the confirmations actually

7   read them?

8   MS. ZORNOSA: Yeah, this is an area that we

9   actually have a lot of experience with. We organize our

10   entire customer base against IP blocks where if you are a

11   double opt-in customer, you go to a very specific IP

12   block. If you're someone whose membership is not double

13   opt-in, you mail out of another one. And in fact, if

14   you're -- if you have a list and parts of it are double

15   opt-in, you will go out of one block and the other part

16   will go out of the other block, which gives us a very,

17   very good case -- you know, aquarium in which to see

18   what the response rates are if you're opt-in and if

19   you're not double opt-in, and we've encouraged our

20   customers a lot to double opt-in wherever they can,

21   because it's very clear that the response rates are 25 to

22   33 percent higher on the double opt-in block for the

23   names that are on the double opt-in block, even when our

24   list is divided between the two.

25   Now, we've also had a chance to sort of

1   experiment with you have a list that is -- that has been

2   gathered in an opt-in basis, and you want to confirm it

3   -- you want to turn it to double opt-in, and how many of

4   your customers are you likely to lose in that event? And

5   it's very interesting that I would agree with Rebecca's

6   statistics that you will lose, you know, 40 to 60 percent

7   of your list in the process.

8   Now, in our case, you're not losing them,

9   because you're able to continue to mail them, but you are

10   not mailing them out of the block that has the benefit of

11   being the double opt-in block.

12   Now, one of the things that we've learned is

13   that when you have a very good list that has a great

14   relationship with its customers, you will get, you know,

15   60 percent of them to convert to double opt-in upon a

16   request, but what's equally interesting to us is that

17   the, you know, 40 to 60 percent who do not convert are

18   not necessarily saying that they don't want your

19   e-mailing. You know, there are very specific reasons why

20   those people don't convert, which is why we have

21   continued to offer the hybrid option.

22   So, for instance, e-mail may be

23   grandmother-proof, but a confirmation opt-in that

24   requires her to open something that looks a little form,

25   that then has instructions for her, that has a link

1 inside, for some demographics, they are less likely to

2 follow all the steps.

3 The other thing that is sort of, you know,

4 particularly perhaps troublesome is that, you know, an

5 e-mail service provider, you know, such as mine -- in

6 fact, most e-mail service providers such as mine are on

7 one blacklist or the other, and so the problem that the

8 invitations never get to the person that you are now

9 inviting to participate in the gold standard that, you

10 know, of permission is also another problem.

11 And then, of course, you have just got the fact

12 that some people are on vacation or some people don't

13 rate that particular e-mail or that particular invitation

14 will go into a bulk folder as part of the -- part of the

15 phenomenon as well.

16 MR. SALSBURG: We've received an e-mail that we

17 all scream into the microphone, because apparently out in

18 the ether world, it's difficult to hear.

19 Ted Gavin?

20 MR. GAVIN: Anna raises an interesting

21 question, and I'd like to ask this directly to her.

22 Given that your business can be materially harmed by the

23 poor list practices of your customers, how do you -- how

24 do you deal with that just as a business? I mean, you

25 know, the concept of the mail service house is a fairly

1   new one, and, you know, SpamCon Foundation, our

2   constituents are recipients, legal professionals,

3   marketers and network operators, and mail service bureaus

4   or mail service providers are in this nebulous space

5   between that and also spanning all across it.

6   So, I'm curious as to how you reconcile your

7   business model with the fact that what you're sending is

8   not your own, you actually have no control over it, and

9   you do face very real material harm? As you mentioned,

10   you're on more than a few blacklist, and your firm is a

11   frequent topic of conversation among those communities.

12   MS. ZORNOSA: I think it's a very, very good

13   question. I mean, to be big in sending e-mail is to be

14   the subject of a lot of criticism and a lot of debate

15   about your practices, and it's something that -- oh,

16   thank you -- I said that to be big in e-mail is to be

17   subject to a lot of criticism and a lot of debate about

18   your practices, as I would note, I think it very well

19   should be.

20   You know, companies like mine -- like the

21   ISPs, we sit in the very middle of a spectrum that starts

22   with a sender, you know, and ends with a recipient, and

23   we do an awful lot of education and an awful lot of

24   policing of our own customer base to try to make sure

25   that their practices are, you know, acceptable enough to

1   stay on our service and acceptable enough to their end

2   users.

3   You know, one of the things, of course, is we

4   try as much as possible to encourage the use of double

5   opt-in, because we believe at the end of the day, the

6   responsibility for whether or not the mail is delivered

7   is -- should be that of the sender. Their practices

8   should determine whether or not that mail gets delivered.

9   Today, you know, if we put a good sender next

10 to a bad sender, it's very likely that the good sender

11 will be impacted by the bad sender's practices. So,

12 that's why we've told our customers that more and more,

13 if you will double opt-in, we will send you out of a

14 block that is 100 percent double opt-in. We will warrant

15 to the ISPs and to the community that that block is

16 double opt-in, and what we're trying to do is create a

17 set of aggressive carrots and tell our customers, if you

18 don't want to be blocked, then your real recourse at the

19 end of the day is to confirm opt-in the name.

20   Now, what we would love is to have industry

21 participation in that, because the more that we can say

22 to our customers you confirm opt-in, and the result is

23 you're going to get deliverability, then the more that we

24 will all together be truly solving this in a way that

25 matters an awful lot to my customers and that through the

1   practices we put in place, I can ascertain will

2   definitely be tempting to them and conducive for them to

3   follow it.

4   MR. SALSBURG: The big carrot that you offer is

5   the ability for your clients to get past blacklists, and

6   --

7   MS. ZORNOSA: I would say that's one, but let

8   me let you finish.

9   MR. SALSBURG: Okay, well, as one of the

10 incentives, a lot of consumers will have opted in and

11 forgotten about it. Is it a best practice to send

12 periodic reminders to the consumers saying, you know, you

13 opted in, do you still want to get this e-mail? And if

14 you don't get a response, stopping the e-mail?

15   MS. ZORNOSA: You know, it is not a best

16 practice today, and it is not a practice today. Most

17 people who double opt-in, you know, view that the

18 relationship has started on a very, very firm permission

19 basis and that you perhaps continually, you know, sort of

20 ask is a form of Spam in and of itself.

21   Now, we can debate as a name gets older, you

22 know, when a name is two years old, should there be some

23 sort of trigger for re-accepting them? I think we're

24 going to get there. You know, the majority of lists on

25 our system today are not older lists. Older lists are

1   very different than young lists in terms of their

2   behavior and those kinds of things, and I think -- and I

3   think there's room for discussion of that as a best

4   practice.

5   MR. SALSBURG: What if your response rates

6   indicated that a certain e-mail account hadn't opened a

7   message from you in, you know, six months?

8   MS. ZORNOSA: You know, that is a -- that is a

9   question that our senders would ask themselves, and I can

10   answer that question for you in the case of me being the

11   hypothetical user of my service and having a list. You

12   know, I believe if I was a user of my service and paying

13   a high CPM and I noticed that my list was not being

14   opened anymore, I would take definite steps, you know,

15   one of them perhaps to ask for re-opt-in, but of course,

16   if they're not responding, then that's not going to solve

17   the problem.

18   MR. SALSBURG: So, because they're paying a

19   higher message cost for having it sent, your client has

20   the incentive to purge the list of nonresponsive --

21   MS. ZORNOSA: My clients are making economic

22   decisions every day based on the responsiveness of their

23   lists.

24   MR. SALSBURG: Michael Mayor?

25   MR. MAYOR: I had forgotten I had put my name

1   bar up there. I will say this. I will say that, you

2   know, I'm in the business of managing for quality. I

3   need to have responsive lists to rent to the end mailer,

4   and double opt-in makes good sense not just for a privacy

5   standpoint. It makes good sense from a business

6   standpoint. They're not going to get added on my list if

7   they have filters, because they're not going to get the

8   confirmation. They're not going to get added to my list

9   if we're being blocked or if it bounces or if they have a

10   typo in the address. It makes good business sense to

11   have double opt-in, and that adds to the responsiveness

12   of the list, and you know, I think that's what we're all

13   talking about.

14   We're not talking about building the biggest

15   list and how to get people on my list. I want -- I'd

16   rather have 100,000 great responders than 10 billion

17   so-so responders, and I think that's really what it's all

18   about. It's about having the best list and what do you

19   do to put that together. You know, I'll tell you this,

20   about a year ago, we realized that the delete issue was a

21   big problem, that people would not delete because they

22   were afraid that that was an indicator and that they

23   would be added to a Spam list.

24   We took it upon ourself to remove millions of

25   names from our database, because they were nonresponsive

1   for our mailers. That's the name of the game. I will

2   not be in business if my lists do not respond, and that's

3   really what it's all about.

4   MR. SALSBURG: Ben Isaacson, where should the

5   breadth of an opt-in be disclosed? How should a consumer

6   be informed that their e-mail address will be used when

7   they opt-in under any of the various types of opt-ins?

8   MR. ISAACSON: Well, I mean, certainly you do

9   that during the confirmation process, as we have talked

10   about, but during the course of a communication

11   relationship, there are many different ways in which the

12   sender can identify themselves. I think for the known

13   brand e-mailers, there's no question that they did opt-in

14   and that that information can be at the bottom of the

15   e-mail message, and they can know this is where you can

16   opt-out and this is the e-mail address that you are

17   subscribed as.

18   MR. SALSBURG: But in the initial opt-in, would

19   it be good enough to stick in the privacy policy, the

20   uses that would be made of the e-mail address, or should

21   that be disclosed right alongside of the fields where a

22   consumer would enter the e-mail address?

23   MR. ISAACSON: Right, during -- there was

24   section solutions set for responsible e-mailers, and one

25   of them is at the point of collection, there should be

1   notice of how that e-mail address is going to be used,

2   and during that -- during the discussions, we -- at the

3   time, this was almost three years actually, we decided

4   that having a link to a privacy policy and having the

5   information in the privacy policy would be acceptable.

6   MR. SALSBURG: It would be acceptable?

7   MR. ISAACSON: Yeah.

8   MR. SALSBURG: Ted Gavin, what's your view on

9   that? Should the uses of an e-mail address be disclosed

10   in the privacy policy or somewhere -- somewhere else?

11   MR. GAVIN: Well, they certainly do need to be

12   disclose understand a privacy policy, and I think the FTC

13   has done a pretty thorough job in those cases where it

14   was warranted going after those firms that required

15   corrective action for not adhering to their own privacy

16   policy, especially with respect to their use of e-mail

17   addresses.

18   However, there needs to to be more. Privacy

19   policies can be very difficult to read. A lot of people

20   never read them. And while consumers should absolutely

21   read privacy policies whenever they're giving any type of

22   personal information, we all know that not everybody

23   does. No one reads every page of a contract unless

24   they've got a lot of time to spare.

25   When running an e-mail list, especially

 1   newsletters or lists of a commercial nature that you are

 2   either renting or selling, which -- and selling lists is

 3   a really bad thing to do, renting is marginally better,

 4   but not really as good as creating your own list for your

 5   own purposes, it's important that if you're not using

 6   those recipients' addresses frequently, you do remind

 7   them. If you're going to -- you know, if you're running

 8   a newsletter and there's a long gap, you should certainly

 9   have in each newsletter, you're receiving this because

10   you subscribed, and here's how you stop subscribing if

11   you want to.

12   If you're doing legitimate e-mail marketing,

13   having some sort of reminder to the members of your list

14   is pretty important, because you certainly don't want the

15   stigma of being labeled Spam because somebody forgot or

16   they haven't gotten an e-mail from you in six months

17   because you haven't had a customer who required that list

18   in six or eight months.

19   So, you know, there's -- and I think that the

20   earlier statement that Michael made about removing

21   dormant addresses from their lists is certainly a best

22   practice for marketers. You know, if you've bothered to

23   capture an address and you know that you're only going to

24   be effective if you don't alienate your potential

25   customers, then doing that type of list housekeeping is

1   not only a best practice, but is a means to survival.

2   MR. SALSBURG: Anna Zornosa, is disclosing the

3   frequency that messages will be coming a best practice as

4   well?

5   MS. ZORNOSA: Yes, in fact, what we recommend

6   is that every customer should be greeted with some sort

7   of memorable, you know, hello, even if they have already

8   confirmed opt-in, regardless of the method that they've

9   come onto your list, they should get a message from you

10   that says what frequency they can more or less expect,

11   that reminds them of the content, that reminds them what

12   to do if it ever should be subscribed, that restates the

13   privacy policy that you have on that name, but yes, I

14   think that having the customers understand something

15   about the frequency very early on in the process is very

16   important.

17   MR. SALSBURG: Do either you or Michael Mayor

18   purchase lists or these lists?

19   MR. MAYOR: Absolutely not. I -- we don't

20   practice the frequency. I think that we give the

21   consumer, the list member, choice. They have an

22   opportunity to opt-out with every message we send. And

23   so if we're doing a bad job, if we are basically

24   pummeling these people, we're going to have attrition,

25   and, you know, after all the opt-in and confirmed or

1   double opt-in, you know, you -- there's something

2   outlandish that you have to do. It's called managing

3   your list, and you've got to -- you know, you've got to

4   basically look at all the moving parts, and you've got to

5   act on them.

6   So, we gave them pure choice. They can get off

7   one list or every list in our database with every

8   mailing.

9   MR. SALSBURG: Let's move on to unsubscribing.

10   Michael Mayor, what options do you offer consumers to

11   unsubscribe from lists when they receive them?

12   MR. MAYOR: We give them two. We -- there's a

13   link that they can click in the e-mail, and they can send

14   the e-mail to an e-mail address.

15   MR. SALSBURG: Okay.

16   MS. ZORNOSA: And as a service provider, we

17   insist that everyone who uses our system embed a

18   one-click unsubscribe that's individual to the recipient

19   of that e-mail in their newsletter. What we have found

20   is multiple ways of unsubscription are, you know,

21   desirable.

22   So, there is a click within the newsletter.

23   There is a reply to, unsubscribe, service end function.

24   We have across Topica services the ability for you to

25   unsubscribe from all of a certain type of products. You

1   may want to unsubscribe from newsletters that our

2   customers publish but not unsubscribe from the discussion

3   groups.

4   So, we give them the option of doing either.

5   We also give them the option of just getting off of

6   everything that is in the -- that is in our database

7   that you've ever subscribed to.

8   MR. SALSBURG: Is there an economic reason why

9   unsubscribing should be made at least as easy as

10   reporting a message of Spam?

11   MS. ZORNOSA: Absolutely.

12   MR. GAVIN: I think that predicates that

13   reporting a message as Spam is easy.

14   MS. ZORNOSA: That's -- yes, I think that's

15   why I was a little confused.

16   MR. SALSBURG: Assuming there are some ISPs out

17   there where you can just click, this is Spam, on the

18   message, should an e-mail come from with an equally

19   prominent button saying unsubscribe?

20   MR. MAYOR: Maybe we could have a contest for

21   unsubscribes, too.

22   MS. ZORNOSA: We live in very confusing times,

23   you know? Unsubscription in -- from any newsletter

24   that's published on our service is a one-click process,

25   and it is something that, you know, that is the -- it is

1   the most important thing for us always to keep

2   functioning and keep functioning absolutely correctly.

3   However, you know, the subscribers are starting

4   to hear more and more that unsubscribing will propagate

5   e-mail they don't want, and it's become not a very

6   nuanced statement, and I'll tell you what, you know, from

7   the work I know that the FTC has done, looking at that

8   very fact in your Spam sting, whether or not someone

9   unsubscribing actually propagated their -- you know, had

10   more of a propensity to achieve Spam, I'm told that

11   that's not the case, that scientifically, you saw that

12   that was not the case.

13   However, you know, it is becoming more of a

14   belief in subscribers' minds that they can't do that.

15   Not everyone practices the same practices that we do. We

16   wish, you know, that were not the case. From our

17   perspective, life would be much easier if, you know, AOL,

18   for instance, was being told, this is Spam only when this

19   is Spam and being unsubscribed when they really wanted to

20   unsubscribe.

21   However, it's a reality of the field, of the

22   marketplace that we live in, that that's probably had to

23   be, you know, had to be said.

24   MR. SALSBURG: Assume that you as an e-mailer

25   are sending out e-mail to a single consumer from various

1   lists on behalf of various consumers. Does unsubscribe

2   apply to one list, one -- one client on your behalf?

3   MS. ZORNOSA: Yes.

4   MR. SALSBURG: Or everything?

5   MS. ZORNOSA: An unsubscribe to a particular

6   communication newsletter, discussion group, applies to

7   that particular newsletter/discussion group, unless you

8   come to the Topica site and do a product unsubscribe or a

9   global unsubscribe.

10   MR. SALSBURG: So, that would be one of the

11   options if you went to the links?

12   MS. ZORNOSA: That's right.

13   MR. MAYOR: We do both. We give them the

14   opportunity to get off that one list that generated that

15   e-mail, or they could click a link and look at everything

16   that we have on them in our database, and they can just,

17   you know, remove themselves from everything if they like.

18   MR. SALSBURG: Ben Isaacson?

19   MR. ISAACSON: I just want to add on top of

20   what Anna was saying about giving the users an option, I

21   think that's the -- the trend is to not only give them

22   an option but to even offer them preference management,

23   and I mean the truth is, everyone in this room has more

24   than one e-mail address, and often want to change where

25   certain newsletters and certain commercial solicitations

1   are going. So, changing your e-mail address, even if

2   you're going on a long vacation and you want to, you

3   know, stop that from being sent, there are many different

4   preferences that you can set.

5   And, of course, with the network providers that

6   have multiple lists, you might be on ten different types

7   of lists. So, sending them to a preference page where

8   they can then remove themselves from those particular

9   lists they no longer have interest in is something where

10 the marketplace is going.

11   MR. SALSBURG: Rebecca Lieb?

12   MS. LIEB: If I can add to that, we certainly

13 have all of those options, click here to unsubscribe, and

14 you're unsubscribed instantaneously. We have a manage

15 your subscriptions button where, you know, as my

16 colleague said, you can view and manage and change

17 anything.

18   However, we're noticing people have been so

19 conditioned not to click the unsubscribe buttons that

20 they would rather e-mail us and say, please unsubscribe

21 me, without specifying what they're subscribed to or what

22 e-mail address should be unsubscribed. It's really

23 exciting when they actually e-mail you from the address

24 that they are subscribed to, which then turns into a

25 time-consuming, costly and cumbersome process.

1   We have a desk of people that help our

2   subscribers do whatever it is they're having problems

3   with. Those people then have to go into the records,

4   find out who this person really is, what they really

5   want, what e-mail address is involved, and often you

6   can't unsubscribe them if all you have is an e-mail

7   address which is an e-mail address that is an unsubscribe

8   to anything at your company.

9   So, people I think are complaining that they're

10   not getting unsubscribed when they're actually with these

11   nine-year-old requests making it difficult if not

12   impossible for a publisher to do that without three or

13   four more e-mails back and forth, which can then anger a

14   customer, because they don't want to hear from you again.

15   MR. SALSBURG: Let's move on to e-mail

16   appending, because we're -- our time is fleeting. Ben

17   Isaacson, what is e-mail appending?

18   MR. ISAACSON: Well, there's a formal

19   definition on a website at Interactivemarketing.org. It

20   says, "E-mail address appending is the process of adding

21   an individual's e-mail address to a marketer's existing

22   database. This is accomplished by matching the

23   marketer's database against a third-party

24   permission-based database to produce a corresponding

25   e-mail address."

1   In other words, if you have an offline

2   relationship and you want to extend that to the e-mail

3   environment, you can then work with a third party that

4   has opt-in permission-based lists and try and find those

5   missing e-mail addresses, have that append provider send

6   a message on behalf of the brand marketer and then ask

7   them to either opt-out or opt-in. After a certain period

8   of time, those e-mail addresses are either transferred or

9   I guess in Mike's case they are not transferred but can

10   be used by the marketer.

11   MR. SALSBURG: Let's say that I purchase a

12   toaster oven, and I fill out the warranty card, and the

13   warranty card includes all fields you usually see, home

14   address, business phone, e-mail, and I leave the e-mail

15   address blank. Haven't I indicated I don't want to be

16   contacted by e-mail, leave me alone, contact me by, you

17   know, less intrusive means, like by telephone to my

18   house?

19   MR. ISAACSON: I mean, to me, just personally,

20   it often means that you don't have an e-mail address,

21   but -- because there are 43 percent of people who aren't

22   hooked up to the internet, as we learned from Pugh, so

23   that's the first impression that you get.

24   MR. SALSBURG: Ted Gavin?

25   MR. GAVIN: I saw a short article in one of the

1   business publications a week or so ago that talked about

2   how permission-based e-appending, where I have given you

3   my paper address, I have given you my e-mail address,

4   actually produces substantially higher conversion rates.

5   And if it is entirely permission-based, I

6   suppose it's okay. In fact, it's a very valuable and

7   legitimate marketing tool. Anything but that really has

8   significant, substantial and almost uncontrollable

9   privacy concerns on the part of the consumer. I have

10   four e-mail addresses. How can you possibly know which

11   one of those is appropriate to send things to me that we

12   may or may not have already established a prior business

13   relationship on?

14   You know, prior business relationships exist in

15   a myriad of companies, different products, different

16   sectors. If you get my e-mail address and you decide to

17   send me a catalog to my paper address, my physical

18   address, based on my e-mail practices, that could be

19   fine, that could be horrifically embarrassing, that could

20   damage various aspects of my personal or professional

21   life -- hypothetically speaking, I don't have that

22   problem personally -- and it seems to me that this has

23   gotten to the point where we are saying simply because we

24   can do this means we should.

25   You know, on behalf of the various constituents

1   that I'm here representing, I suspect that we need to

2   take the position that we are not the arbiters of the

3   technology that is at our disposal. We are the servants

4   of the people who will use it. And this does need to be

5   somewhat protected and more moderately applied.

6   MR. SALSBURG: Jason Catlett, let's say I fill

7   out this warranty card, and I give my e-mail address, but

8   when you as the e-mail marketer attempt to e-mail me, it

9   bounces. Isn't it appropriate for you then to try to

10   find a correct e-mail address for me?

11   MR. CATLETT: Well, first, I'm not an e-mail

12   marketer, but supposing that I were, warranty cards -- I

13   mean, they're just a privacy quagmire, because they

14   generally do not disclose the purpose for which the

15   information is to be put, and there seems to be some

16   other reason --

17   MR. SALSBURG: Well, let's say instead of a

18   warranty card, then, I try to -- I apply to enter a

19   contest in a box and win a trip to the Bahamas, a highly

20   legitimate contest.

21   MR. CATLETT: Yeah, well, I mean some of the

22   websites that offer sweep stakes get you to push a button

23   saying yes, I enter, and if you read the privacy policy,

24   it basically says we'll do whatever we want with any

25   information we get from you or about you via any means

1   whatsoever, and you absolve us of any liability,

2   blah-blah-blah-blah. So, basically it's a rape and

3   pillage clause that you're consenting to buried in the

4   fine print, which is unfair.

5   Also, I'd like to come back to this whole idea

6   of e-mail append. It's a really bad idea. If you

7   subscribe to a magazine, for example, you give them your

8   physical address and name, and then they start sending

9   you e-mail that they got from someone else saying

10   wouldn't you like to get our e-mail updates, that's just

11   wrong. If you wanted to get that, you would have gone to

12   their website. So, e-mail append is a privacy invasive

13   practice.

14   It also has other privacy problems, which is if

15   you get the wrong address, then -- and these data --

16   these lists are not 100 percent correct, then they may

17   -- the company may establish a relationship with the

18   wrong person, and I'd refer you to a story in the Wall

19   Street Journal a few months ago where Citibank used

20   e-mail append to send out some e-mails, and they weren't

21   all correct, and that went into -- that went into some

22   litigation I'm told.

23   MR. SALSBURG: Rebecca, does that mean when you

24   e-mail append, essentially you're sending an opt-out?

25   MS. LIEB: One would hope that you could opt-

1   out. There are some examples I think that are congruent

2   with your warranty card. I was at a conference last week

3   in which somebody at AOL complained that a major

4   retailer, a very major global retailer, was sending

5   e-mails through AOL, 60 percent of which were sent to

6   nonexistent AOL addresses, and that's because this

7   retailer had had an in-store promotion in which they had

8   something like 10 percent off your purchases today if you

9   give us your e-mail address.

10   You know, there are rapacious marketers, but

11   consumers are not always as stupid as people give them

12   credit for. For 10 percent off, I think somebody can be

13   induced to write anyone@anywhere.com and hand the card to

14   the lady, but that doesn't help marketers build lists.

15   It does not help marketers keep clean lists, and with

16   e-mail confirmation, list hygiene is taken care of right

17   out of the gate. It certainly doesn't help ISPs like

18   marketers any more when they're dealing with an old --

19   more load on their already overburdened servers. So, why

20   append, you know, under certain circumstances can

21   possibly work with a great deal of permission and

22   transparency, it has to be handled even more delicately

23   than straight web-based transactions.

24   MR. SALSBURG: Michael Mayor, e-mail appending,

25   a good thing or a bad thing?

1   MR. MAYOR: Bad. You know, this is where I

2   part company with most of my colleagues and everybody in

3   the industry. I think e-mail appending is based on one

4   principle, that permission is transferable, and it's not.

5   It is not, absolutely not. I think that if I gave my

6   friend Tony over here the car keys and said go pick up

7   something for me, he has no right to give me car to

8   somebody else, and that's what this is about.

9   E-mail appending is a black and white issue to

10   me. You either have permission or you don't. The only

11   people that are not getting e-mail appending are the

12   direct marketers who do it offline, and everybody else

13   -- everybody else in the world gets it. It's the wrong

14   thing to do, and it's not effective.

15   MR. SALSBURG: Okay, we are about out of time,

16   so why don't we turn it to the audience -- oh, five more

17   minutes? Jason, why don't you make a parting shot, and

18   then we will turn it over and hear some questions.

19   MR. CATLETT: Yeah, Michael is correct, it

20   comes from the paper world of direct marketing where an

21   append is the ability to buy the number of children in

22   the household or the number of cars or the income of a

23   particular place, but e-mail, it shouldn't be done.

24   The existing business relationship exception

25   that seems to be claimed is just not appropriate, and I

1   hope that any new legislation, that there's no exemption

2   saying that you can send unsolicited e-mail to someone

3   with whom you have an existing business relationship of

4   any quality offline.

5   MR. SALSBURG: Okay, let's turn it over to some

6   questions. Mona, back there?

7   MS. ARBON: Rebecca had made the point --

8   MR. SALSBURG: Can you identify yourself?

9   MS. ARBON: I'm sorry, I'm Margie Arbon with

10   MAPS. Rebecca had made the point and she made a

11   differentiation between opt-out and what she called

12   confirmed opt-in, which the only difference is a sign-up

13   on a website. To the user that did not sign up that

14   either maliciously, accidentally, whatever, got forged

15   subscribed to, say, 900 mailing lists, what's the

16   difference between opt-out and what you called confirmed

17   opt-in?

18   MS. LIEB: When you don't receive a

19   confirmation, you have no way of knowing what's coming

20   from where how frequently. At least a confirmation, if

21   somebody volunteered your information, would give the

22   victim some recourse prior to receiving, you know, an

23   overwhelming load of subscriptions that they didn't

24   solicit.

25   MR. SALSBURG: This gentleman right here?

1   MR. KELLY: Hi, Bennett Kelly, I'm an attorney

2   in Los Angeles. One question, in talking about the

3   different levels of permission from near the bottom to

4   the gold standard, as Congress considers regulating Spam,

5   what do you think would be the appropriate level for

6   Congress to require?

7   MR. SALSBURG: Who wants to take a quick

8   ten-second stab at answering what Congress should do?

9   MR. GAVIN: I can pitch something in. You

10   know, we're a nonprofit organization, so we don't lobby,

11   so this is all really just theoretical conversation for

12   me now; however, we -- SpamCon Foundation are

13   signatories to the open letter that was issued on Tuesday

14   to Congress and to the public with the Coalition Against

15   Unsolicited Commercial E-mail and JunkBusters saying that

16   any legislation that isn't going to legitimize and

17   legalize opt-out does need to be opt-in. I certainly

18   think confirmed opt-in would be the utopian ideal there,

19   and it would be the most respectful of the cost structure

20   of e-mail marketing.

21   MR. ISAACSON: And speaking on behalf of

22   myself, as I am no longer a registered AMDA lobbyist, I

23   believe that having a prior business relationship is

24   sufficient, as long as the recipient knows who you are

25   and can trace back and the sender can trace back where

1   that relationship started, then we are starting from a

2   good point, and then in the future, we can look to more

3   stringent matters, but to get something done today, we do

4   want something passed -- I want something passed in this

5   Congressional session, and in order to do that, we have

6   got to start somewhere, and I think that's prior business

7   relationship.

8   MR. SALSBURG: Okay, we have a question that

9   came in over the internet to us. One of the ways that

10   UCE is dealt with by bouncing it. At what point should a

11   bounce be considered a message to the mailer that they

12   should stop mailing to the recipient?

13   Anna Zornosa, if you get a bounce, do you just

14   take that person off the list?

15   MS. ZORNOSA: You know, a bounce -- of course,

16   there's different categories of bounces, and there are

17   -- there is enough divergence going on that -- in terms

18   of the bounce strings that you get back from the ISPs

19   that it is not always clear, you know, that what is

20   getting bounced back to you is being bounced back to you

21   because the mailbox is permanently disabled or

22   temporarily.

23   So, where it is clear that the mailbox is

24   permanently disabled, we immediately disable it. Where

25   it is not clear if it's a temporary or a permanent

1   relationship, we have a set number of times that it can

2   bounce and then it is taken off, and it is disabled.

3   MR. SALSBURG: Michael Mayor, is that typical?

4   MR. MAYOR: That's typical. I mean, there's

5   hard and there's soft bounces. A hard bounce is

6   indicative of the e-mail address not being there or

7   invalid. A soft bounce is that it's there, the mailbox

8   might be full. Most marketers will delete or remove on a

9   hard bounce, and they'll have a set number of bounces for

10   the soft bounce.

11   MR. SALSBURG: Okay, let's take another

12   question. Front and center, please wait for the

13   microphone, and identify yourself, please.

14   MR. HUDSO: Hi, Carl Hudso with America Online.

15   I work in the e-mail operations department, and my

16   question really centers around the thing that I find

17   interesting on these panels, when people disagree, it's

18   sort of boring, because it's sort of easy, but the one

19   thing everybody sort of agreed to, which surprised me,

20   was on the labeling aspect, and I wonder, I understand

21   some of the problems with trying to label commercial

22   e-mail with advertisements versus a newsletter with an ad

23   and so forth.

24   What about an effort to try and label something

25   that is a bulk e-mail as opposed to a personal one?

1   AOL's actually tried to do that ourselves in an effort to

2   try and allow our members to be able to sort mail just

3   like you might when you come home and read snail mail

4   that comes in your mailbox. So, what do you folks think

5   of that?

6   MR. MAYOR: What value is it to the recipient

7   to know that you sent 10 million or one? You know, I

8   mean, this bulk term is another term -- there's two

9   terms that need to be X'd out of the dictionary right

10   away. It's bulk and it's opt-in. Opt-in has no meaning

11   anymore. But bulk, you know, define bulk. Is it ten or

12   is it 10,000? You know, I think that when you're sending

13   e-mail that you have permission to, what is the problem?

14   If we get into subject line labeling, Spammers

15   are smart people. They -- you know, they've forged

16   headers. They can forge a subject line.

17   MR. ISAACSON: I think for AOL, you read the

18   headers, the actual header codes, and so if we were to

19   talk -- all talk about certification, I know there's

20   many programs being offered, where you and the other ISPs

21   would all agree on reading a label of a bulk sender as a

22   certified type sender, then that might be a different

23   type of labeling that would be transparent to the

24   customer.

25   MR. SALSBURG: Okay, let's take another

1   question. There's a gentleman over here. The microphone

2   is on its way.

3   MR. IVERSON: I know we had talked -- excuse

4   me, I'm Al Iverson from Digital River. I actually do a

5   lot of e-mail marketing for our clients, and I know

6   there's a lot of talk about the this is Spam button on

7   stuff like AOL, and I'm wondering if any of the other

8   e-mail marketers feel that it might be appropriate to

9   have some sort of trusted unsubscribe program or similar

10   to that. You know, is there something where us as

11   mailers opt-in to it, where we know that we get this, we

12   are going to deal with it, it's an unsubscribe, it won't

13   get bungled? What are your thoughts on that?

14   MR. SALSBURG: Rebecca, do you want to describe

15   what a trusted unsubscribe program is briefly?

16   MS. LIEB: I don't think that there is a firm

17   definition of a trusted unsubscribe program, but I think

18   that one should be concocted, and I am going to give Ben

19   credit with this, who wrote an article for one of my

20   publications recently describing the various unsubscribe

21   mechanisms that exist and are out there and essentially

22   saying that the industry does need an unsubscribe

23   standard. Again, I don't think this was on anybody's

24   radar screen two years ago.

25   MR. ISAACSON: And even prior to an unsubscribe

1   standard, because I know that's difficult and there's

2   liability issues, if next to this Spam button there could

3   be an add to approved senders button very visibly posted,

4   that would be, you know, that would be good, too, to help

5   expediate the white list process.

6   MR. SALSBURG: Well, that brings us to the

7   close of the session. Thank you very much for all coming

8   in.

9   **(Whereupon, there was a brief pause in the**

10   **proceedings.)**

11   MS. HONE: Thank you, everyone. My name is

12   Lisa Hone and I'm an attorney with the Division of

13   Marketing Practices here at the Federal Trade Commission.

14   Thank you all who've hung in through the day. This is

15   our last panel of today and tomorrow will be the third

16   and final day of the FTC Spam Forum.

17   This panel is a little different in a couple of

18   ways from all that has come before and all that will come

19   after. This panel is focused specifically on wireless

20   Spam and, obviously, there are overlapping issues when we

21   think about wireless Spam, but there are also some issues

22   that are distinct to wireless Spam. So, this panel, and

23   it's a large panel, has a large task in front of it in

24   the next hour and a half or so.

25   What we're going to do is talk about wireless

1   Spam from soup to nuts. And unlike most of the other

2   panels, there's not going to be so much give and take

3   between the moderator and the panelists. Our first four

4   speakers have volunteered to give us some real

5   introductory information about wireless messaging and

6   wireless Spam and our next five speakers will comment on

7   what's come before and issues that are of particular

8   interest to their organizations or portions of the

9   industry.

10   I'm going to do a quick introduction of

11   everyone just so that you know the line-up and then I

12   will ask our panelists to take it away. Our goal is to

13   make sure that we leave plenty of time for questions.

14   So, wish us luck.

15   First up will be Mike Altschul, who's a Senior

16   Vice President for Policy and Administration and the

17   General Counsel of CTIA. I will remind all the panelists

18   that you have to speak really close to your mic, and I'm

19   obviously having a little trouble doing that.

20   Second will be Jim Manis, who is the Chair of

21   the Mobile Marketing Association and with M-Cube.

22   Third will be Jiro Murayama, who's a Manager at

23   NTT DoCoMo, who's going to talk to us about the Japanese

24   experience. We have a lot to learn from the Japanese

25   experience with wireless Spam.

1   Fourth will be Rodney Joffe. He's on this

2   panel as a consumer who's dealt with wireless Spam.

3   Rodney is the plaintiff in a lawsuit in Arizona alleging

4   that a company, Acacia Mortgaging, wireless Spammed him

5   repeatedly. I will let Rodney get into the details

6   there. But he is also a computer scientist and has been

7   a member of the direct marketing industry. So, he comes

8   at it with a very global view.

9   Then Margaret Egler, who is with our sister

10   agency, the Federal Communications Commission. Margaret

11   is the Deputy Bureau Chief for Policy in the Consumer and

12   Governmental Affairs Bureau. I have to read that because

13   Margaret has a history at the Federal Communications

14   Commission. She's had a number of different jobs. But

15   in all of her jobs, she's worked closely with the Federal

16   Trade Commission on consumer protection matters. So, the

17   title is important but what's most important to us at the

18   FTC is her consistent cooperation with us on consumer

19   protection matters and, obviously, the FCC has an

20   interest in wireless Spam and consumer protection issues,

21   as well as industry issues.

22   To my left is Andrew Blander, Corporate Counsel

23   for AT&T Wireless. Then Marc Theermann, who's with

24   YellowPepper. Carl Gunell with Telemedia and Carl has

25   been very helpful to us over the course of the last

1   several years in terms of providing information and

2   suggestions to the Federal Trade Commission staff about

3   all sorts of mobile marketing issues. And, finally, at

4   the end, batting clean-up is Al Gidari, who's a partner

5   at Perkins Coie in Seattle.

6   So, Mike, if I could ask you to take it away.

7   MR. ALTSCHUL: Thank you, Lisa. And on behalf

8   of CTIA, I want to thank the commission for inviting us

9   to participate. We started life in 1984 as a typical

10   trade association representing what were there called

11   cellular carriers. Three years ago, CTIA recognized that

12   wireless text messaging and internet access was poised to

13   become a major source of growth for wireless carriers and

14   consumers. Text messaging, in particular, was taking off

15   around the world, and in the U.S., wireless carriers were

16   introducing these services as they upgraded their

17   networks. Moreover, the new, next generation wireless

18   technology promised to make internet browsing a faster

19   and more user-friendly experience for wireless customers

20   and to convert more customers to these new services.

21   CTIA was so impressed with the promise to

22   wireless data that we changed the name of our association

23   to reflect the importance of the internet. Didn't change

24   the initials, didn't buy any vowels, we just added -- we

25   changed the I from Industry to Internet. So, we now for

1   the Cellular Telecommunications and Internet Association,

2   and this reflects the importance of the internet and

3   wireless data to the wireless industry today.

4   While the average wireless customer continues

5   to shift more and more voice minutes to wireless networks

6   from wire line networks. It's the growth in wireless

7   data that has been the most explosive area for the

8   wireless industry. Today, all six of the national

9   wireless carriers support internet access and two-way

10   text messaging services and they're actively promoting

11   wireless data capabilities to customers.

12   I walked out of my office today at lunch, went

13   by a T-Mobile retail store and I was caught, knowing I

14   was going to be with you this afternoon, in the window

15   with a banner that said, limited time offer, unlimited

16   internet access, text messaging, $10 a month. So, I went

17   in -- and this is true of, I think, all of the national

18   carriers, but they have a big promotion, not advertising

19   just for T-Mobile, they have a much more attractive

20   spokesperson than me, but to give an example of how

21   popular these services are, it is the service du jour, at

22   least in the T-Mobile window, for the month of May.

23   While we have different interfaces, different

24   technologies in the United States, it's fair to say that

25   the wireless industry is supporting internet access at

1   data rates of about somewhere between 40,000 and 60,000

2   bits per second. It's fair to say wireless carriers are

3   still experimenting as to how they charge and how

4   customers want to pay for this service.

5   I'm an antitrust lawyer by background, so we

6   usually don't ask our members how much they're charging.

7   We certainly never ask them that in front of their

8   competitors. So, I've done a little research by going to

9   kiosks and the internet and because it's a dynamic

10   industry, I think that these rates change, you know,

11   almost weekly. But some carriers, such as AT&T wireless,

12   they charge $2.99 a month, plus two cents per thousand

13   bytes to $19.99 a month, $20 for eight million bytes

14   transmitted.

15   Other carriers, T-Mobile and Sprint, for

16   example, charge $10 a month for unlimited data use in

17   addition to their regular calling plan fees. Verizon

18   Wireless provides data service as an extension of voice

19   service, sort of as a minute, whether it's being used for

20   data or voice.

21   We think there are a number of reasons why

22   consumers are using their wireless phones and devices

23   more and more to access information on the internet and

24   send two-way text messages. First, of course, it's the

25   consequence of faster wireless networks. Second,

1   improved customer interfaces. The way the devices

2   present and organize data, the introduction of color

3   screens, larger devices that are similar to PDAs and have

4   better resolution and innovative input solutions, coupled

5   with the greater processing and memory of the devices

6   themselves.

7   In addition, we have air interface cards that

8   now permit laptops to access the internet over wireless

9   networks and give users a feel that is similar to a wired

10   internet connection.

11   The first data service that wireless users

12   typically experience is what we call SMS text messaging.

13   SMS is an acronym that stands for short message service.

14   To provide an idea of how explosive this growth has been,

15   in December 2000, roughly just a little more than two

16   years ago, CTIA took a survey of our members to see how

17   many text messages were sent in the month of December.

18   We counted 14.4 million messages. One year later in

19   December 2001, the traffic had jumped from 14 million SMS

20   messages to over 252 million messages. And this past

21   year, in December of 2002, the traffic grew four-fold

22   from the year before to more than a billion messages in

23   the month of December 2002.

24   And we see this growth continuing the -- if

25   you plot it -- I don't have a PowerPoint presentation

1   today -- but it's the proverbial hockey stick, with the

2   growth in messaging being fairly flat and slow on the

3   uptake and now going straight up.

4   Having said that, in the U.S., we still have a

5   long way to go to equal the 27 billion SMS messages that

6   are now being sent every month in the European community.

7   We know where this growth is going to come from. We

8   estimate that about 20 percent of U.S. wireless customers

9   are using SMS text services and sending these messages

10   today.

11   Included in this group of one out of five users

12   are young adults in the 18 to 24-year-old demographic.

13   In this group, 45 percent use text messaging and they use

14   it far more extensively than any other demographic group.

15   We anticipate that as more and more users come on into

16   our services that we'll see the same kind of uptake in

17   usage.

18   Last year -- and this also is a reason that

19   we've seen the messages take off in the U.S. -- we were

20   able to work with our member companies to facilitate

21   inter-carrier SMS messaging. Prior to this effort, it

22   was hit or miss as to whether or not a user could send a

23   text message to a customer on a different carrier's

24   network. But for the past year, all the national

25   wireless carriers have supported inter-carrier SMS

1   messaging. So, customers don't have to wonder or worry

2   about whether or not the recipient of the text message is

3   on the same carrier's network as they are.

4   To date, the wireless industry and its

5   customers have not had that many problems. We're not

6   saying that we're perfect or have had no problems. But

7   we have not had the kind of problems with unsolicited

8   wireless messages that certainly has been the average

9   internet user's experience. This isn't because of good

10   luck, but rather because wireless carriers are constantly

11   taking steps to prevent the explosion of Spam that has

12   invaded the wired internet. And wireless carriers have

13   done this because they recognize their strong incentive

14   to protect their customers from unwanted messages.

15   As I mentioned a minute ago, we still have most

16   of the market; most of the current users of wireless

17   services are voice customers. We want to convert them to

18   the benefits of using their devices for both voice and

19   data. To do that, the industry has to convince customers

20   to upgrade their handsets and devices to devices that

21   support data services, SMS and internet browsing, and

22   then to use these services. If Spam ruins the user

23   experience, the opportunity for wireless data will be

24   lost. Customers simply will not use their devices for

25   data services.

1   We have the benefit in the U.S., in a perverse

2   sort of way, of being a bit slower to roll out and

3   introduce these data services than mobile phone carriers

4   in Europe and Asia, and we'll hear in a minute about

5   DoCoMo's very successful roll-out and then their

6   experience with Spam in Japan. And having been a bit

7   later to roll out these services, we've had the benefit

8   of the experience of other carriers in other markets in

9   learning how to deal with unsolicited messages.

10   As I mentioned, we, at CTIA, facilitated inter-

11   carrier SMS messages. In the U.S., these messages are

12   defined as peer-to-peer messages with 160 characters.

13   That's the least common denominator message set or

14   message link that the various technologies will all

15   support. Because carriers typically charge a per message

16   fee for mobile-originated messages, the economics of

17   using a mobile network to send Spam messages is entirely

18   different from the internet model.

19   Moreover, while it's possible to send an SMS

20   message to a wireless user from the internet, wireless

21   carriers require messages to go through a carrier owned

22   and controlled gateway to reach their customers. This

23   gateway has been designed to be user-friendly for sending

24   individual SMS messages addressed to a wireless customer

25   and using the customer's phone number as the address.

1   But the gateways do not support multiple messages and

2   have been designed to detect and filter multiple

3   identical messages. So, from the initial gateway to the

4   public internet, carriers are able to identify and filter

5   identical Spam messages.

6   So, it is possible to send Spam to wireless

7   users, but if the systems work as they're intended, only

8   one or two messages at a time will go through and the

9   process is so cumbersome that it does not become a

10   problem for users. In this regard, the architecture of a

11   wireless network allows wireless carriers a level of

12   control that is not available on the public internet,

13   which is really designed to be open and free of these

14   gateways. And we've checked and all of the national

15   wireless carriers use intelligent software that filters

16   the Spam at their gateways.

17   As an aside to the telecom lawyers in the

18   audience, I should suggest that wireless carriers can

19   filter messages because they fall into the category of an

20   information service. It's a message that is stored and

21   then delivered to users and this fits the information of

22   an information service. In contrast to information

23   services, the Communications Act defines regular phone

24   calls as telecommunications services, and when common

25   carriers provide telecommunications services, they do not

1   have the right to filter content.

2   Congress addressed carriers' ability or users'

3   ability to be free of unsolicited phone messages in 1991

4   when it added Section 227 to the Communications Act to

5   prohibit telemarketing and unsolicited faxes to wireless

6   phones and fax machines. I understand Margaret is going

7   to talk a bit more on that.

8   To get back to the steps that wireless carriers

9   have taken to filter Spam on the front end, there's some

10   operational difficulties that are present in the wireless

11   sphere that also distinguish us from the public internet.

12   First, as I mentioned, for SMS text messages, carriers

13   use the customer's phone number as the address. While in

14   the past wireless carriers obtained phone numbers in

15   10,000 number blocks, and these were sequential numbers.

16   For the last year, numbers are being assigned in blocks

17   of 1,000. And with number portability, which is

18   scheduled to take effect in November of this year,

19   wireless numbers will be interchangeable with wire line

20   numbers and vice versa.

21   Wireless carriers do not market their

22   subscriber list to third parties. I'm not aware of third

23   party lists that market wireless numbers. And as a

24   result, wireless numbers are not posted throughout the

25   internet. This makes it difficult, not impossible, but

1   difficult for Spammers to obtain addresses for

2   unsolicited SMS messages.

3   So, just to recap, as an industry, wireless

4   carriers know they need to protect their customers from

5   Spam. They have the ability to monitor what people might

6   be trying to do in assessing their network and the

7   industry is doing everything it can to anticipate and

8   minimize these problems before they become a service

9   affecting problem that detracts from user's willingness

10 to use wireless data services.

11   MS. HONE: Thank you, Mike. And just to be

12 clear, we will take questions at the end of everybody's

13 presentations.

14   Jim Manis has a PowerPoint presentation. And,

15 again, Jim is the Chair of the Mobile Marketing

16 Association.

17   MR. MANIS: And, hopefully, this PowerPoint

18 will let me talk faster.

19   Just curious, while I'm bringing this up, I

20 presume that the majority of the audience here carries a

21 wireless phone. How many of you have ever sent a text

22 message? How many of you have received a text message?

23 And how many of those text messages have been something

24 other than peer-to-peer or to an associate or a friend or

25 family?

1   So, the Spam category that we're talking about

2   is that last category, is kind of the non-peer-to-peer

3   messaging traffic that we're seeing that we anticipate to

4   take place. And I think Mike's comments here are clearly

5   that. It's new and developing and, in fact, there are

6   some gating issues that have still not been resolved to

7   really accelerate the development of non-peer-to-peer

8   messaging, particularly that type of messaging that would

9   be branding related or fall into the mobile marketing

10   category.

11   So, I guess size does matter in the case that

12   as you see things like inter-operability and inter-

13   carrier agreements come into play, a common short code

14   agreement come into play, then you see a spiking of

15   activity in peer-to-peer or non-peer-to-peer messaging.

16   And carriers -- and in the case of mobile marketing,

17   certainly well-respected national brands have a lot at

18   stake in communicating to their subscribers or to their

19   customers. And there is a great degree of consistency,

20   if you will, in terms of taking strenuous measures to

21   protect that.

22   So, earlier today, sitting in the audience was

23   particularly useful for me to hear the concurrent debate

24   coming on between e-mail and wireless Spam. Wireless

25   mobile marketing is, in fact, very, very new. A lot of

1   the issues that have been discussed today and yesterday

2   and tomorrow are issues that are down-road issues for

3   mobile marketing, but are very serious issues that we

4   take into consideration today.

5   Mobile marketing is two-way interactive

6   marketing using a mobile message platform of SMS, MMS,

7   which is a multimedia platform that's coming into play

8   today in the United States, also in Europe and in Asia,

9   and it is direct and interactive with the consumer. And

10   it involves a variety of things. It involves everything

11   from sweepstakes trivia questions, polling primarily

12   through things that you've seen recently with AT&T and

13   American Idol; for example, coupon offers, et cetera.

14   This is nothing particularly different from the debate

15   that you're having with respect to e-mail.

16   But it is about -- because of the unique nature

17   of it, because of the personalized nature of mobile

18   marketing, where you're sending something to a handset

19   that we carrier around, that we all feel very

20   passionately about protecting intrusive type behavior.

21   It is a channel, a media channel that does generate, and

22   the value of it does generate customer loyalty. So,

23   behavioral aspects around that are designed to encourage

24   loyalty; therefore, measures to prevent Spam are

25   critical.

1   It also is uniquely qualified to provide the

2   consumer additional controls to protect their own access

3   to information, if you will, whether it's internet access

4   or whether it's simply access that they go out and grab

5   for whatever purpose. So, there is a value there.

6   Mobile marketing, itself, we define as an

7   association, with the Mobile Marketing Association

8   representing wireless carriers, major brands and vendors,

9   as something that has to provide value to the consumer.

10   There has to be some reason why you have a mobile

11   marketing campaign, whether that value is entertainment

12   or trivia value, which is a bit segmented based on who's

13   using mobile marketing. For example, you can appreciate

14   that perhaps a teen segment market might be particularly

15   interested in a trivia type exchange around a movie

16   property and they would see value in that entertainment

17   prospect.

18   Or a different segment, perhaps in the 30s and

19   40s, might be interested in collecting a specific mobile

20   coupon for a specific product discount at a specific

21   store location in order to save 25 percent right now on

22   this particular product that I want.

23   So, the industry is one, if you go back to

24   Mike's comment with respect to where we're going on this

25   hockey stick, has not taken off yet, but is scheduled to

1   take off, primarily because of a number of gating issues

2   in the process of being resolved. Analysts today predict

3   that the mobile marketing industry will be an industry

4   that will peak out at about $8 billion. It's certainly

5   active today in Europe and Asia.

6   You're seeing a substantial type of activity.

7   You're seeing a range of activity, some of which was

8   undertaken incorrectly, some examples which provide us

9   with a learning here in North America and examples that

10   relate to Spam, because if there's anything that will

11   kill this from developing and sustaining over a long

12   period of time, it is the introduction of Spam. So, it

13   is a threat. And as both CTIA and MMA and other industry

14   associations proceed in responsible development of this

15   industry, there are things that we are trying to take

16   into account.

17   So, the MMA, again, as an organization

18   representing an industry in a developmental stage, is in

19   the process of putting together policies for agreement

20   with -- between carriers and brands and technology

21   vendors, and our initiative, basically, is focused on two

22   types of things. One is establishing an industry code of

23   conduct that provides principles for companies that are

24   engaged in this behavior to follow, best practices and

25   things of that nature.

 1   Also, the second element of this is enforcement

 2   and that enforcement initiative is focused on a

 3   certification process, a verification process that, in

 4   fact, some companies are abiding by that code of conduct

 5   and technology elements that focus on both opt-in and

 6   opt-out principles.

 7   A code of conduct really provides the consumer

 8   with choice. This has to be in every element, an opt-in

 9   -- and I don't want to get into the semantic conversation

10   that occurred in the last panel. Let's just focus on the

11   principles here because that's what's important to us and

12   we can find the terminology as we wish, but nothing will

13   occur without you, as a user of your wireless device,

14   wanting that information on your phone.

15   And secondly, you will be given control that

16   after you opt-in to opt-out either at the end of that

17   campaign or after any other database that you're in. So,

18   those are both opt-in and opt-out principles, as well as

19   constraint. There's unique technology parameters that

20   allow you to set the number of messages that you would

21   like to receive. Part of the value of this activity is

22   to enter into a dialogue between the brand and the

23   consumer. So, there are constraint prospects for a code

24   of conduct that set the number of dialogue that you would

25   engage in.

1   Same thing with customization consideration, if

2   you will, with respect to the value that you need to

3   receive as a consumer and, of course, confidentiality.

4   Mobile marketing sits uniquely between the wireless

5   carrier and the national brand and both of those entities

6   have very strong and passionate concerns about protecting

7   their subscriber or protecting their consumer, and that

8   code of conduct has to acknowledge and allow for that.

9   So, the second aspect of this initiative is the

10   enforcement initiative and that's broken down again, as I

11   mentioned, in three different categories. One is the

12   certification or the verification that a company that's

13   engaged in this activity abides by the code of conduct

14   that is published and agreed to by the industry itself.

15   And that industry is representing a wide range of

16   players.

17   And then, secondly, is the development of the

18   technology tools that allow for those controls. In this

19   case, of course, is the opt-in databases, a national opt-

20   in database that would be appropriate for some segments

21   of the population, and as well as an opt-out database

22   that would be integrated with that to allow opt-out on

23   any given exchange that takes place or on a life span

24   basis.

25   So, this particular industry is viable. It is

1   one which has some unique value to all parties involved,

2   including consumers, and it is one which every aspect of

3   -- every player in this particular industry is today, at

4   the very early stages of this industry development, very

5   concerned about making sure that it's done correctly and

6   avoiding issues that we've seen around the world and

7   certainly avoiding the issues that we've seen with e-

8   mail.

9   So, I thank you very much for your attention.

10   I'd be happy to address any questions that you have.

11   MS. HONE: Thank you, Jim. Our next speaker is

12   Jiro Murayama, who is from NTT DoCoMo and will talk about

13   the experience in Japan with wireless messaging generally

14   and their Spam problem.

15   MR. MURAYAMA: Thank you very much. I would

16   like to appreciate FTC for organizing this kind of event

17   and also including DoCoMo in this panel.

18   Again, my name is Jiro Murayama and I work at

19   the Washington, D.C. office of NTT DoCoMo. So, I've been

20   here in D.C. for about one-and-a-half years, so please,

21   nobody worry about SARS.

22   **(Laughter.)**

23   MR. MURAYAMA: Today, I would like to talk

24   about Spam problems to wireless in Japan. First, I will

25   introduce the wireless industry and DoCoMo and then I

1   will get into wireless Spam problems and how we have been

2   dealing with and --

3   MS. HONE: Jiro, can I interrupt you for just a

4   second?

5   MR. MURAYAMA: Yes.

6   MS. HONE: It's a particular problem up there

7   that you need to be close to the mic.

8   MR. MURAYAMA: Okay, sorry about that. Then

9   legislative and legal measures taken to fight Spam in

10   Japan.

11   NTT DoCoMo is Japan's largest and leading

12   wireless communications services in Japan. We offer i-

13   mode, which is wireless internet service and the world's

14   first 3G service. On the screen, you can see some of our

15   latest handsets that we offer in Japan. Those built-in

16   camera type handsets are especially popular as users in

17   Japan can send and receive pictures and videos attached

18   to an e-mail.

19   Now, I'd like to introduce our i-mode service

20   which is a little bit in detail because it is deeply

21   related to wireless Spam problems in Japan. As of March

22   of this year, the number of mobile phone subscribers in

23   Japan is approximately 75.6 million. Among them, DoCoMo

24   has close to 44 million subscribers. And i-mode service

25   has attracted nearly 38 million subscribers since its

1   launch in February of 1999. So, about 85 percent of our

2   users subscribe to i-mode.

3   There are several reasons for this success.

4   One is rich content. Because of the business model in

5   the language which is called a compact CTML, it was easy

6   for content providers to offer i-mode sites. Currently,

7   there are close to -- there are more than 67,000 sites

8   for i-mode.

9   Second reason is various online services, just

10   like access via internet, e-mail, purchasing something,

11   reserving hotels, airline tickets, anything you can think

12   about that you can do over the internet.

13   Third reason is low fee of about $30 a month

14   and since it uses a packet switching system, meaning

15   users are charged for data they send and receive, it kind

16   of creates an always connected environment.

17   As you can see, our i-mode service has been

18   extremely popular. This popularity, in turn, has

19   unfortunately generated great interest from Spammers in

20   Japan.

21   So, let's get into the heart of our topic. E-

22   mail addresses for i-mode uses user name@nttdocomo.nejp.

23   Please imagine that AOL had about 35 million users

24   worldwide. I think that's as of June 2002 and i-mode now

25   has close to 38 million users. So, there are 38 million

1   users with the same domain names.

2   Initially, user names before at-mark (phonetic)

3   were their phone numbers. So, all Spammers had to do was

4   create an 11-digit numerical user name which was very

5   easy and cheap for them. Our initial response to this

6   was to encourage users to change their user names to

7   whatever they wanted, including alphabetical words.

8   However, these Spammers then developed a software that

9   generates a combination of random digits or alphabets

10   that could be utilized as an e-mail address to send bulk

11   e-mails.

12   These figures are as of October 2001, but in

13   one day, 150 million normal e-mails and Spams reached

14   users and 800 million were returned since they did not

15   exist at that moment. Those returned e-mail had an

16   enormous burden on our e-mail server which resulted in a

17   delay of e-mails. And Spams reaching users are, of

18   course, very annoying to most of our users, but on top of

19   that, as I mentioned in the last slide, because we charge

20   users from data they send and receive, they have to pay

21   for receiving Spam.

22   Let me now introduce measures that we have been

23   taking to fight those Spams, two aspects on our side and

24   one legislative measure. One is customer protection. As

25   I said, we promoted heavily on encouraging users to

1   change address and now 90 percent of our users have

2   changed their address. Also, as of October 2001, 54

3   percent of all users received zero Spam a day. But as

4   Spammers are going more and more ingenuous and were able

5   to create more accurate mailing lists, as they know which

6   ones were valid addresses and which ones were not used,

7   about 30 percent users still receive one to five Spams

8   per day and about 4 percent of them receive as many as 30

9   Spams a day. We also instituted a program to reimburse

10   users for charges they incurred on receiving Spam.

11   The second aspect is technical measures. We

12   began a measure such as to limiting incoming e-mail to

13   only user-specified addresses and domains and blocking

14   user-specified addresses. We also added new function in

15   network, on blocking any e-mail sent to large numbers of

16   invalid e-mail addresses and blocking fake domain e-

17   mails. This measure not only eliminated heavy burden on

18   our server but also inhibited the ability of Spam senders

19   to generate lists of valid addresses.

20   Also, we introduced new handsets that enabled

21   users to check the subject line of an incoming e-mail

22   prior to downloading. The users now can choose not to

23   receive the e-mail and simply delete it.

24   The third aspect is the legislative measures.

25   These are the two laws that were implemented in July of

1   last year. Both laws require to indicate unauthorized

2   advertisement on the title, sender's name, address and e-

3   mail on top of the message body and e-mail address for

4   opt-out. They both prohibit sending e-mails to users who

5   have opted out. The first law, it prohibits sending by

6   unknown e-mail address produced by Spam software.

7   In reaction to this law, we began taking

8   measures to blocking any e-mail containing the

9   unauthorized advertisement. After the warning then the

10   respective government body will go through a series of

11   steps of investigation in order, a violation of any of

12   these steps will consequence in fine or possibly even

13   imprisonment.

14   Now, I would like to introduce two litigation

15   cases in Japan. In October 2001, there was a preliminary

16   injunction to prohibit sending commercial bulk e-mail to

17   dating site Spammer. They had been sending as many as

18   900,000 bulk e-mails generated with random e-mail user

19   names, which resulted in delay of e-mails. Even after we

20   gave warning, they kept on sending Spam. So, we

21   requested for injunction.

22   The other cases, the company had been sending a

23   total of four million Spams in two months. We brought an

24   action against the company on the basis of violation of

25   contract for our service for legitimate internet

1   marketers.

2   So, have these measures been effective? First,

3   because of privacy of communications, which is guaranteed

4   by Japan's constitution, it's been difficult to take

5   legal measures against Spammers to this point. And up to

6   now, measure taking has not gotten as far as just sending

7   a warning. So, right after the laws went into effect or

8   we take any measures, the number of Spams decreases. But

9   from around November of last year, Spam started to

10   increase again. And Spammers are fully aware that they

11   are illegal and they continuously send Spam without

12   appropriate indication or valid return e-mail.

13   There are some positive signs looking forward.

14   We are encouraged with the latest litigation and we will

15   continue our litigation against malicious Spam senders.

16   Also, according to a research by one Japanese media, the

17   Spam industry seems to be in an oligopoly state, meaning

18   a technically savy company or individual that has updated

19   mailing lists is sending Spam on behalf of multiple

20   concerns. We see this as an indication that we have been

21   taking measures that's making it more difficult for

22   Spammers to succeed.

23   The number of entities that are sophisticated

24   enough to continue sending Spams have been narrowed.

25   This, in turn, we hope will make enforcement actions more

1   effective. Also, number of Spams in other normal e-mails

2   reaching users decreased from 150 million as of October

3   2001 to 90 million as of March of this year.

4   So, in conclusion, as data traffic over

5   wireless network continues to grow, so will Spam and Spam

6   to wireless is likely to become a social problem in the

7   U.S. as well. We all need to understand that Spam is a

8   potential problem on wireless networks, not just fixed.

9   And in the Internet world, Spam is predicted to soon

10   exceed 50 percent of the e-mails being sent, but as for

11   DoCoMo, that percentage is far above the net figure and

12   DoCoMo is and continues to lead an aggressive fight to

13   control the Spam problem in Japan.

14   Lastly, from our experience, not only

15   legislation and regulation, but also measures by carriers

16   are also important. Therefore, there's a need for

17   stronger global coordination between regulators and

18   carriers for addressing the problem of wireless Spam.

19   Thank you.

20   **(Applause.)**

21   MS. HONE: Thank you very much. Our next

22   speaker will be Rodney Joffe who will tell us a little

23   bit about his experience with wireless Spam and his

24   litigation.

25   MR. JOFFE: Thanks, Lisa. I guess at the

1   beginning, I should start with a bit of background. I've

2   been a card-carrying member and a dues-paying member of

3   the Direct Marketing Association for 20 years. So, I

4   come from the marketing side. I've also been involved in

5   computing for 25 years, and in 1994, I was the founder of

6   a company that some of you know called Genuity, which I

7   sold to GT in 1998.

8   But in 1994, we really began to look at the

9   issues of Spam. The very first e-mail Spam occurred in

10   the beginning of 1994. And as a group, we sat by, looked

11   at the Spam, talked about it and said that it was a very

12   bad thing, as typical academics and scientists, and we

13   debated whether it was right or wrong and in what way it

14   was wrong. And while we did that, Spam took off and we

15   were unable to put the genie back in the bottle.

16   The costs were enormous from an ISP point of

17   view and I looked through that in 1996 and 1997, along

18   with most of the other ISPs. There's always been this

19   assumption that e-mail is free and the internet is free

20   and it truly isn't. The costs are enormous in terms of

21   server infrastructure, in terms of sys administration to

22   handle those, and it has to be borne by someone. And it

23   can't be borne by the senders, unfortunately; it's borne

24   by the recipients.

25   In 2001, in January of 2001 -- and I have to be

1 cautious and just preface my remarks, you're aware of

2 already that there is litigation pending, so I'm only

3 going to talk about the facts related to the case I'm

4 involved in. I received a text message to a cell phone.

5 As you all know, when you get a message on your cell

6 phone, it's not like e-mail. You can ignore the e-mail,

7 you can set it aside for once a day. But when you get a

8 message on your cell phone, by definition, it's immediate

9 and it's urgent and you look at it. And that's one of

10 the benefits and I recognize the benefits.

11   However, that particular message was addressed

12 to someone I had never heard of and I assumed it was a

13 message that had been sent to me by mistake. I called

14 the company involved and told them I had received the

15 message and they thanked me profusely for letting them

16 know and they said they'd get the message to the correct

17 person. I thought nothing more of it until about two

18 months later when I got another message also talking

19 about mortgages and the fact that the mortgage rate had

20 dropped, once again addressed to someone other than

21 myself.

22   Before calling the company, I happened to

23 mention it in a meeting with some of my staff who all

24 have cell phones from AT&T in the same 10,000 block.

25 Each one of the employees had received exactly the same

1   message. At that point, I began to realize that this

2   wasn't an error.

3   I probably would have ignored it like most

4   people -- most people you talk to in terms of e-mail and

5   say, why didn't you just hit delete, it's simple. But

6   having lived through what occurred in 1994 and having

7   understood how difficult it was to move things back once

8   it had grown legs, I was determined not to allow it to

9   become something that killed the benefits of cell phones

10   and small message services on cell phones. And so, I

11   filed an action.

12   The only avenue available to me was to actually

13   file under the TCPA, which I can thank Margaret for, is a

14   federal statute that governs telemarketing as well as

15   sending of junk faxes and I filed suit in small claims

16   court, which is the only court you can really file in for

17   both messages, which allowed me to file for $1,000. I

18   don't make a living out of the $500 judgments; however, I

19   wanted to try and do everything that I could to make sure

20   that I stopped it as early as I could. Now, understand,

21   this is now January of 2001. So, it's over two years

22   ago.

23   In that particular case, the case was moved

24   from a justice court by the company that I filed suit

25   against to the superior court. And at that point, it is

1   something that I'm no longer able to handle myself, that

2   requires counsel, and I engaged counsel in the case.

3   The status of the case currently is the

4   defendants in that case asked the court for a motion for

5   summary judgment to dismiss the case. The trial court

6   turned that down. The case was then appealed to the

7   Arizona State Appeals Court, certain parts of it, and the

8   appeal was turned down about a week ago. So, it's back

9   to the trial court. So, the current status is that the

10   case will be heard some stage in the next six or seven

11   months in Arizona.

12   I guess an easy segue to Margaret is to say

13   that it's not been easy to find legislation. The TCPA,

14   when it was first introduced, I don't think that SMS and

15   messaging to cell phones was something that anyone

16   envisaged. It would be very helpful if there was a clear

17   way of allowing individuals who receive cell phone Spam

18   to actually take advantage of the private right of

19   action, which is the key part of the TCPA, and allow

20   individuals, like myself, to make it much more different

21   for cell phone Spammers to send Spam.

22   In my case, it was done through AT&T, the use

23   of a cell phone number together with a publicly known

24   domain and there's no easy way to stop it. You know, I

25   appreciate the fact that there are filtering techniques,

1   but I know something about filtering techniques of e-mail

2   and I can tell you that the Spammers are very good at

3   bypassing them and the rest of my staff have continued to

4   receive Spam over the last two years.

5   The day that I filed suit against this

6   particular company was the last time that I received any

7   kind of unsolicited advertising to my cell phone. I've

8   had the same number for a number of years. What I will

9   say is, yesterday evening, I received my first cell phone

10   Spam in two-and-a-half years. It happened to be from a

11   company offering international advice on long distance

12   rates for telephones and it had a California phone number

13   to call back. As you know, there is a California law on

14   the books now that prohibits it.

15   So, it may be starting up again and it may be

16   becoming a problem once again. Hopefully, it's not going

17   to get that much worse.

18   MS. HONE: Thank you, Rodney. And just for

19   those of you in the room who aren't familiar with the

20   TCPA, that's the Telephone Consumer Protection Act.

21   The next group of our panelists are going to --

22   are limiting their remarks to two or three minutes, three

23   or four minutes depending, so that the audience has a

24   chance for questions. So, thank you to our first four

25   panelists for really covering the gamut for us so that we

1   could get to our commenters, and by way of introduction,

2   we're not expecting a symposium from Margaret on the

3   TCPA. She is one of our commenters and we've restricted

4   her to a few very moments of comment.

5   MS. EGLER: Thank you, Lisa. The TCPA,

6   Telephone Consumer Protection Act, let me just talk a

7   little bit about that. That would indicate why the FCC

8   would be at this panel, and we were very happy to be

9   invited. So, thank you.

10   The Telephone Consumer Protection Act is

11   actually -- you can't thank me. It was passed 12 years

12   ago. But even though it was passed 12 years ago, it had

13   specific protections for consumers when they receive

14   unsolicited faxes, when they get telemarketing calls that

15   are prerecorded or auto-dialed, when those calls come to

16   them during certain periods of the day, et cetera, et

17   cetera. I'm just going to talk about one small part of

18   it, although we do have an open proceeding, a very big

19   open proceeding going on right now on telemarketing and a

20   proceeding we're working closely with the FTC on, as a

21   lot of you probably already know.

22   But as far as the TCPA works, in terms of

23   wireless devices, the TCPA prohibits any call to any

24   number assigned to a cellular device or a pager that is

25   done using an auto-dialer or includes a prerecorded

1   message. So, that's an important thing to know. It's a

2   call done to a number assigned to a wireless device. So,

3   basically, if it's done -- whether it's done from one

4   cell phone to another cell phone or from a regular land

5   line phone, basically, if you're dialing in a number and

6   it's going to a cell device or a pager and it's using an

7   auto-dialer, which most of the -- you know, what we call

8   Spam or telemarketing calls are done using auto-dialers,

9   that would be prohibited.

10   But before you get excited about it, the way we

11   would read that is that would just be calls that are made

12   using the number to the device. We would just consider

13   that probably a violation under the TCPA.

14   What we have not reached is the question of

15   when it's sent to a cell device and it's an Internet

16   address. So, it would be, you know, lisa@ftc.gov or even

17   the phone number at Skytel.com or whatever that is,

18   that's different than going to a number assigned to a

19   wireless device. And we haven't reached whether or not

20   that would actually be something that's covered by the

21   TCPA.

22   So, to understand that and to understand what

23   Rodney went through in Arizona, the interesting thing

24   about the TCPA, Section 227 of our act basically allows

25   three different types of jurisdiction almost. It

1   basically lets the FCC to create rules. It allows the

2   states to also create rules that can be more restrictive,

3   as long as they're not inconsistent with ours.

4   So, it allows enforcement actions at those two

5   levels, but it also allows for private rights of action,

6   which is why you'd find Rodney in the small claims court

7   in Arizona making these claims and this happens for all

8   TCPA violations all over the country. So, there's a lot

9   going on and so there are lots of different jurisdictions

10 that could be saying lots of different things.

11   As far as what we've seen at the Commission, we

12 have not seen a lot of complaints on wireless Spam. We

13 have not seen things come in in the type of numbers that

14 we've seen in, say, for example, wire line telemarketing

15 or slamming, which are two of our biggest topic matters.

16 So, that's sort of the FCC view and what's going on with

17 us on this.

18   MS. HONE: Thank you, Margaret. Our next

19 panelist is Andrea Blander. She's filling in, so some of

20 you will have Wally Hyer listed on your agenda. Andrea

21 was good enough to fill in when Wally couldn't make it.

22 She's Corporate Counsel with AT&T Wireless and she

23 focuses her work in the privacy arena, but has a broad

24 understanding of the topic here today.

25   MS. BLANDER: My affectionate name at the

1   company is the Czarina of Privacy and for others in the

2   company, the less affectionate term is the acronym COP.

3   I think as a carrier, the Spam issue is one of

4   trust and confidence for our customers. We want our

5   customers to be able to use us SMS, we're encouraging

6   them to adopt it, and to the extent that they find

7   they're getting SMS on their phones, it's going to be a

8   problem for us.

9   We've learned from the foreign experiences, as

10   you've heard, we have filters in place, and we have been

11   aggressive in the instances where there have been Spam

12   incidents on the phone. Another way that we help our

13   customers is they are not charged for incoming messages

14   on our phones.

15   So, we're working on solutions. We've learned

16   from the online world. But we're in a position more like

17   an ISP in the wired world. Spam is bad for us. It uses

18   network resources. It will prevent people from using

19   SMS. But on the other hand, we also need to communicate

20   with our customers and we like to use SMS as one of those

21   methods. So, we're a little bit concerned about

22   legislation at this point. The technology is still

23   pretty new and we don't want anything coming out that's

24   so broad that it impacts our ability to communicate with

25   our customers.

1   In addition, it's different than e-mail.

2   Strict SMS has a limit of 160 characters. So, in terms

3   of providing opt-out opportunities, you are more

4   restricted in what you can do.

5   MS. HONE: Thank you very much, Andrea. Our

6   next two panelists are both mobile marketers and they

7   both have experience here in the United States and

8   abroad. So, first is Marc Theermann with YellowPepper.

9   MR. THEERMANN: Thank you. Carl and I maybe

10   stand on the other side of the fence a little bit and, of

11   course, while Spam is a horrible thing and it will hurt

12   the industry, so companies like ours are doing everything

13   to prevent it. Our company, in specific, provides a

14   wireless marketing platform that lets other companies

15   send and receive text messages.

16   So, I just want to highlight two instances

17   where a company that does everything right would appear

18   to be sending out Spam. Basically, there's two types of

19   Spam. The first one is an unwanted message from a known

20   source, and that could occur that a consumer has opted in

21   to receive messages either to a billboard or website or

22   maybe even a television ad. And the truth is, there's

23   two ways of how they could have opted in and then

24   received a message that they don't want anymore.

25   The first one is, the number could have been

1   reissued. So, for example, if I'm an AT&T customer and I

2   cancel my contract with AT&T, my number will be reissued

3   to another individual within a certain amount of time.

4   So, there could be instances where you would receive a

5   text message from a company that you don't know because

6   you have not signed up for the service, but somebody else

7   has signed up for the service and there would be no way

8   currently for the marketer to know this.

9   And the second way is that sometimes you have

10   forgetful consumers. We ran a campaign for a large

11   portal in Europe where people signed up to receive

12   marketing messages and in one particular instance, we had

13   a consumer that was so angry that the call got escalated

14   to me and they threatened to sue us and said, you are

15   sending me messages that I never signed up for. So, we

16   went to the system together and I looked him up in the

17   database and I could see the time and day when he signed

18   up with this mobile phone number. But, of course, there

19   is a chance that it wasn't him that signed up.

20   So, I said, do you maybe happen to have a

21   teenager in the household, and I heard him scream in the

22   background, Jason, come over here, there's somebody on

23   the phone that wants to ask you something.

24   **(Laughter.)**

25   MR. THEERMANN: So, Jason promised that he did

1   not sign up for the messages, which was true, but I saw

2   that the password in the account was Jason. So, the

3   consumer had obviously signed up with his son's name,

4   even as the password, so it was pretty clear that he did

5   sign up for the messages, yet he had either stopped

6   wanting those messages or forgot that he ever did sign

7   up.

8   So, I think those are two instances, A, a

9   reissued number, and secondly, the forgetful consumer,

10   where the marketer is doing everything right, yet it

11   appears that he's Spamming the person. So, we need to

12   find ways of how to protect companies that engage in good

13   marketing. And I think we all agree that one of the

14   biggest chances of doing that is a very, very easy opt-

15   out process. There's nothing worse than getting a

16   message that you can't opt-out of. So, if the opt-out

17   process is easy and good, I think that should be one of

18   the strongest defenses against Spam.

19   MS. HONE: Thank you, Marc. Carl from

20   Telemedia.

21   MR. GUNELL: I think that the difference

22   between the internet that you have on your desktop and

23   the internet you have on your telephone is that there is

24   a business model for the mobile internet. The recording

25   industry made more than $71 million last year from the

1   ring tone business in Europe, which would indicate that

2   the business is sort of in the excess of $750 million,

3   just selling legal content.

4   So, the reason we haven't really seen it in the

5   United States yet is because until very recently there

6   was a number of disperse networks that could not

7   communicate with each other and the handsets were

8   incapable of using the more sophisticated content, which

9   is changing very rapidly.

10   Another thing is that, talking about e-mail and

11   e-mail addresses being telephone number at a wireless

12   carrier, with all the new handsets that are in the stores

13   today, the camera phones and the color phones, it's

14   completely possible to configure those to receive the

15   same e-mail that you are on your Outlook in the office or

16   any other mail client. So, there isn't really a

17   distinction anywhere between wireless internet and the

18   internet. You will be able to -- I download my mail on

19   my phone. I think 70 percent or so of whatever e-mail I

20   receive is Spam. So, it's very important to not treat

21   the wireless world separately from the fixed line world

22   because the Spam issues will affect the wireless even

23   more simply because there is an ability to charge for

24   content, which is very, very appealing.

25   And much of what the music industry -- I mean,

1   their business model in the hardware world is dead and if

2   you think about it, there isn't really a format after the

3   CD. It will be digital transfer. And the mobile

4   telephone, the way it looks today, is an ideal device to

5   download content to, if it's an MP3 file or some other

6   proprietary format. And what they're seeking is the one-

7   to-one relationship with the customer. They want to know

8   the name of the person that likes that particular artist

9   simply because they want to communicate with them.

10   And the same sort of ties in to all this

11   location-based advertising, which we haven't even seen

12   yet, where you're sort of driving through an area and

13   there's a Starbucks in that area and they're sending out

14   a message to you offering you 10 percent off of the next

15   cup of espresso.

16   If you think about it, in the west, we already

17   have a location-based system because it's not like in

18   Europe where the area code of the mobile telephone

19   indicates what carrier you have. Here, you know, if

20   you're making a phone call or your mobile phone is a 202

21   area code, you can assume that that person is in

22   Washington, D.C. So, on a very broad level, it's already

23   possible to do some kind of location-based advertising.

24   So, I think what we need to address -- I think

25   it was this gentleman who received Spam in the past.

1   What we need to do is to focus on issues where the users

2   can opt-out of further information in a very easy

3   fashion, because there's going to be an enormous amount

4   of Spam and there's really no way that you can prevent it

5   technically. It's very possible to emulate person-to-

6   person messages simply by buying a SIM card and using GSM

7   mode. It would look to the operator like it came from

8   another individual.

9   So, I don't really believe in technological

10 solutions. I believe in organizations that work together

11 on a global basis because most of the Spam will come from

12 countries outside of the U.S. and can address this opt-

13 out issue. Thank you.

14   MS. HONE: Thank you, Carl. And our last

15 panelist is Al Gidari from Perkins Coie.

16   MR. GIDARI: Thanks, Lisa. You know, Carl's

17 exactly right. The very distinction between a wireless

18 telephone and a computer has disappeared. And to

19 actually separate out a panel on this is actually a

20 little bizarre today because it's the same set of issues.

21 It just happens over a different network with a multitude

22 of different network operators and people that interact

23 with it.

24   The real problem is that there is

25 jurisdictional uncertainty. We don't know who regulates

1   it. We have 30 states now with legislation that define a

2   computer broad enough to include a cell phone. But

3   certainly none of the restrictions in those statutes

4   about what has to be in an unsolicited e-mail to be legal

5   apply to a 160-character message. So, we have

6   uncertainty about what state laws apply.

7   Even trying to apply those laws to a telephone

8   which doesn't understand borders, which doesn't identify

9   a user other than whose hand it happens to be in, and

10   where the facilities happen to serve more than just one

11   jurisdiction. The switch could be in New Jersey serving

12   New York as, indeed, in the AT&T wireless network it is,

13   and in other carriers' networks as well.

14   So, we no longer have a clarity of jurisdiction.

15   It's also enjoyable to see the FTC and the FCC

16   up here, together, asserting jurisdiction over the same

17   thing. I can't imagine there's a single wireless carrier

18   out there that understands or believes SMS is regulated

19   by the FCC under the TCPA. They're all looking inside

20   messages today to filter them and we can't do that if

21   it's a telecommunications service, legally.

22   So, all the lawyers, go send your client

23   updates and I think you'll get a bunch of new clients

24   tomorrow giving them advice on what is or isn't legal.

25   That's a huge problem and it doesn't get any better when

1   you think about the globalization of the service because

2   we truly are in an era of convergence, where carriers now

3   facilitate these communications, and whether they're e-

4   mail, SMS or phone communications, wherever the user

5   wants to go and travel.

6   The business models are not clear. The

7   transactional uncertainties, really, I think create a

8   hindrance to rolling out the service. It's not the fact

9   that you might get Spam, it's actually now the fact that

10   somebody might regulate you out of business tomorrow by

11   changing the character of what that service actually is.

12   And so, I think clarity would be a good thing one way or

13   the other and that would help carriers immensely. Thank

14   you.

15   MS. HONE: Thank you all. Now, I have about 20

16   questions I want to ask myself and I understand why my

17   fellow moderators chose the question and answer format.

18   But I promised questions from the audience. So, if you

19   start to flag, I have questions. But questions? Right

20   here.

21   A mic is coming to you. And if people could

22   remember to identify themselves.

23   MS. BLAKELY: Hi, I'm Carrie Blakely (phonetic)

24   from Forbes. I'm sorry, I'm going to mispronounce your

25   name, Jiro, since you seem to be sort of in the future

1   and I had no idea that it was still so prevalent and so

2   heavy over there, the wireless Spam. We talked earlier

3   about the chilling effect that this was having on

4   business and the internet, you know, people are just

5   scared to buy things online. They didn't, you know, want

6   to have to have seven different e-mail boxes and stuff

7   and even legitimate marketers were having problems, and

8   it was chilling their business, and they weren't getting

9   response rates.

10   Are you seeing that with what could be

11   described as legitimate mobile marketers over there? Are

12   they having a chilling effect because of all this Spam?

13   MR. MURAYAMA: Yes, I think they are. I think

14   the legitimate internet marketers also want to send a

15   certain number of e-mails, but I think they are more or

16   less affected by the Spammers in Japan. And one of the

17   services we offer is provide for those legitimate

18   internet marketers the lasting connection with our server

19   so that they can send bulk e-mails who have opted in for

20   their service. So, yes, it is -- they are affected by

21   the Spammers and we are, also, taking measures for those

22   legitimate internet marketers to offer a legitimate

23   service.

24   MS. HONE: Actually, Rodney Joffe, one of our

25   panelists, has a question and I'm going to let him go

1   ahead and ask it.

2   MR. JOFFE: I guess it's aimed towards the

3   company's that are involved in SMS and electronic

4   marketing now, cell phone marketing. One of the

5   fundamental issues is that -- a real issue with Spam is

6   this ability for senders to shift the cost to the

7   recipients. I know that AT&T said that they don't

8   charge, but I know that if I asked if I could have a cell

9   phone account that only received SMS messages, there

10   would be a charge associated with that if I wasn't taking

11   anything else. So, there is a cost involved, the same as

12   there is in e-mail.

13   I'm real interested, if I wanted to opt out

14   from receiving cell phone messages, would I opt out once

15   and never again receive a cell phone message I didn't ask

16   for or are you suggesting that I should do it legitimate

17   marketer by legitimate marketer?

18   MR. THEERMANN: I can start. Well, the

19   question is, again, where did you first opt into the

20   marketing campaign? So, we've got to assume that

21   somewhere -- let's not talk about illegal Spam where

22   somebody generated your number and sent you something.

23   But we're talking about you opted in at some point and

24   now you want out. Then I think you should opt out of

25   that specific campaign for sure.

1   I think one of the main distinctions, and this

2   is where, I think, wireless is different than internet,

3   is that the opt-in is actually so much easier because we

4   can't forget, we're talking about a wireless device, so

5   you can opt-in everywhere, which means you could see a

6   poster on the street that says, you know, get your new

7   ring tone, send a text message to the system and so

8   forth, which means that any time you interact with your

9   cell phone, you could potentially opt-in to something

10   that you don't know.

11   So, if you would opt-out of everything, you

12   would opt out of the entire network, so to say, and you

13   couldn't really interact anymore.

14   MR. JOFFE: I think an interesting thing with

15   that then is that what you are not starting to see is

16   some of the legacy of what happened in the e-mail world

17   because I don't believe that anyone in the e-mail world

18   or the anti-Spam community has any issue with companies

19   that send e-mail that's been asked for.

20   But what's happened is a backlash. You have so

21   many people that assume that they get one bite at the

22   cherry or one bite at the apple, that you react to

23   everything. And if the kind of thing you're talking

24   about in the cell phone world is -- and your definition

25   of a legitimate marketer is someone who has an actual

1   active assertive way that someone opted in and that that

2   should continue, I don't believe you'll find anyone in

3   the anti-Spam community that argues in anyway.

4   On the e-mail side, we've heard a number of

5   panels over the last couple of days where people talked

6   about the fact that I am a legitimate marketer because

7   I've got bricks and mortar and I sell regular products

8   and I believe that my products are important for you and

9   I don't see why I shouldn't send mail to you.

10   So, I think that in the cell phone world, you

11   should differentiate very carefully when you talk about

12   legitimate marketers because in the e-mail world, and on

13   those panels, to them, legitimate marketers are people

14   that sell products and those that are illegal are people

15   that sell products that are not the products that they

16   sell. There's no definition in terms of whether it's

17   really illegal. It's someone else's product. And if you

18   listen to Bob Winston from the DMA, that's the kind of

19   message you heard for a couple of years.

20   And I know that Jerry Cerasale is over here.

21   It's been -- we're legitimate marketers, we've got a

22   normal business and we send you mail. I think it's

23   wonderful that that's your definition and make sure that

24   you publicize it. Because if you don't, you'll be

25   painted with the same brush as the legitimate e-mail

1   marketers.

2   MS. HONE: And there's a question over here.

3   MR. GUNELL: Can I make some comments to that,

4   if you don't mind?

5   MS. HONE: Okay.

6   MR. GUNELL: We keep talking about two things

7   here. We have sort of the SMS text messaging marketing

8   and then you have your e-mail marketing and there's --

9   you're going to receive e-mail marketing and there's

10   nothing really that companies like us can do about that.

11   On the SMS marketing side, I think that there

12   will be the establishment of trusted third parties. What

13   I mean by that is, that if we take the reality television

14   shows, for instance, like American Idol, it will be

15   beneficial to American Idol to make an arrangement with a

16   company who connects you to all six major networks

17   instead of just AT&T, because obviously that will

18   generate more traffic and more one-to-one relationships.

19   So, you will find there will be a number of

20   companies who will be connected with all the majors and

21   they will also, naturally, then be sort of a gateway to

22   consumers from brands they wish to advertise.

23   So, where would you opt out? You would opt out

24   through a trusted third party.

25   MR. JOFFE: Where would I have opted in, though

1   --

2   MR. GUNELL: Well --

3   MR. JOFFE: -- to those six companies I didn't

4   know about at the time I got my cell phone?

5   MR. GUNELL: Well, ideally, what's going to

6   happen is that there will be sort of unique short codes

7   that are networked across network. Otherwise, it's not

8   going to work from sort of an advertising standpoint.

9   MR. JOFFE: But how would I have identified the

10   fact that I'm prepared to accept messages from a TV show

11   that doesn't exist at the time I get my cell phone?

12   MR. GUNELL: Well, you're going to be invited

13   to vote on the TV show, right? So, you're --

14   MR. JOFFE: So, I didn't opt in?

15   MR. GUNELL: No, no, no, no, no. You're not

16   receiving the advertising to your telephone. It's part

17   of the television programming. So, do you want to vote

18   for a particular candidate or do you want to vote for a

19   particular issue, what you do is to send a message to

20   this in this short code. When you've done that, your

21   memory's been captured. And there might be sort of a

22   privacy policy, say, that by voting you also agree to

23   receive messages regarding a long distance service or

24   whatever it might be. So, you would go back and you

25   would opt out from whoever facilitated the message.

1   MR. JOFFE: I'll buy that.

2   MR. GUNELL: All right.

3   MS. HONE: Okay. There's a question over here.

4   MR. CROCKER: Thank you. Dave Crocker,

5   Brandenburg Inter-Networking. I think it's great to have

6   a panel like this. Wireless is interesting and it's a

7   different kind of experience from internet mail. But

8   what occurs to me is it takes a long time to make laws,

9   that laws are expensive, that other procedures take a

10   long time and that they're expensive, and that we want to

11   be careful about having too many different efforts

12   focused too narrowly, and that the view that SMS

13   messaging is somehow importantly different from internet

14   mail and that the kind of Spam in the one is somehow

15   interestingly different from the Spam in the other

16   strikes me as leading one down a very wasteful path.

17   Yes, SMS is low bandwidth right now and, yes,

18   the devices it goes to tend to be small resources. But,

19   in fact, low bandwidth and limited resources are true.

20   Often internet mail in some places, and oh, by the way,

21   the ones that are limited resources now and limited

22   bandwidth are getting higher bandwidth and more

23   resources.

24   So, let me strongly suggest that you represent

25   a very important exemplar of certain kinds of traffic and

1   activity, but that the real differences, the deep

2   differences probably are non-existent. For example, just

3   by way of an example, the idea that somehow it's easier

4   to opt in with phones rather than internet mail is just

5   plain not true.

6   MS. HONE: So, is your question, do the

7   panelists agree with that?

8   MR. CROCKER: Yes, thank you.

9   MS. HONE: Anyone in particular want to handle

10   that?

11   MR. THEERMANN: So, how would you opt in into

12   an e-mail campaign in the subway or with a magazine?

13   MR. CROCKER: Oh, I'm sorry. You were raising

14   the issue about mobility and the answer is? I don't use

15   SMS, I use internet mail and it will work in some

16   subways, though not much in the Metro here.

17   MS. HONE: Right. So, what you're speaking to

18   is the concept of convergence that I think all of our

19   panelists have touched on in one way or the other. But

20   there are some differences still. There's a question way

21   in the back.

22   MR. COGILL: My name is Gary Cogill. I'm an

23   attorney from New York. I have a question about the

24   slide on how it's very important for everyone to read

25   privacy policies when you opt-in for some service. If

1   I'm on a handset and I'm opting into a service on the

2   handset, what's -- I guess maybe the question to Mr.

3   Murayama or the person from AT&T -- are you going to post

4   a privacy policy to the handset or are you going to

5   encourage the user to go to a website later on to read a

6   privacy policy?

7   MS. BLANDER: It's interesting you ask that.

8   We're actually involved in a project with Trustee to come

9   up with some guidelines for the wireless world because

10   there are those technical limitations and we're trying to

11   develop some guidelines about what is a way to provide

12   reasonable notice to customers on a phone and what is a

13   way to give them meaningful choice. So, I don't know

14   that we have an answer for you today, but that we are

15   working on it because it's obviously an important issue.

16   Jim, this speaks to some of your issues. Did

17   you want to address it?

18   MR. MANIS: Yes. That is in the process of

19   being developed, but the norm today is to refer back to

20   the website.

21   MR. ALTSCHUL: If you go to each of the

22   national carriers' websites, you'll find privacy policies

23   associated with their service descriptions.

24   MS. HONE: There's a question right here in the

25   middle, if there's a mic.

1   MR. FOX: Hi, Jeff Fox, Consumer Reports. The

2   question of geographical marketing and the scenario that

3   I've heard raised a few times of you're driving down and

4   the Starbucks or the Home Depot sort of reaches out and

5   touches you and says, you know, come on it, a little

6   Orwellian, I think. It seems to me to raise some real

7   significant privacy questions. I was trying to think

8   about how it might worked, and either you've opted in

9   with Home Depot and Starbucks ahead of time, in which

10   case the cell phone company which is tracking your

11   location through the towers is somehow informing them

12   that you're in the neighborhood, which raises questions

13   about whether you want these companies knowing where

14   you're going and when you're going. You know, they've

15   got computers and they can track you.

16   If you haven't done that, does that mean that

17   the cell phone companies have standing orders to sort of

18   beckon to everyone who wanders through this particular

19   part of the highway, in which case that seems to me to be

20   Spam or really an unsolicited kind of offering? So,

21   really, the question is, how would this work and what are

22   the privacy implications?

23   MS. HONE: Let me just start by saying, your

24   question involves a whole lot of interesting issues; in

25   particular, the location information is something that

1   everyone on this panel has been grappling with in one

2   form or another. But we are focusing on unsolicited

3   wireless e-mail. So, to the extent that people want to

4   address the question, I would ask you to focus on the

5   unsolicited portion or the marketing portion and to the

6   extent location information sort of adds a veneer to it,

7   it's interesting and useful, but I don't want to use this

8   panel to get into a deep debate over location information

9   and the carrier's responsibility, the marketer's

10   responsibility, that sort of thing.

11   MR. ALTSCHUL: But, Lisa, there is an important

12   thing to note about location information. It's one of

13   these things that there ought to be a law and there is a

14   law. In 1999, Congress, as part of a statute in 9-11,

15   passed a law that establishes active consent from a

16   wireless user to use location information. That's very

17   different than other non-location based kinds of

18   services.

19   MS. HONE: That's right and that's part of what

20   makes it that much more complicated. Do our marketers

21   have any thoughts or Andrea on location information and

22   text messaging?

23   MR. GUNELL: I think sort of in the Starbucks

24   scenario, the most likely solution will be that you're

25   driving by a billboard and you're sending information --

1   you contribute your telephone number somehow and they

2   send you back a graphic picture, which is probably some

3   kind of a bar code that can be scanned in the store and

4   now they know where you live.

5   MR. MANIS: Yeah, the Starbucks example was

6   kind of overly used and abused. That just simply won't

7   happen. What will happen is exactly that. So, if you're

8   on the road and if you're changing locations, if you go

9   by a billboard, there will be a short code advertised on

10   that billboard for a discount at the Starbucks which is

11   located at the next exit. So, you access that texting in

12   the short code to your telephone and then you receive

13   back a coupon that when you pull off, you redeem for

14   whatever.

15   That's how -- you're not going to -- because of

16   the privacy issues here and the location-based issues

17   here, you're not going to just simply be roaming and

18   getting offers to your handsets.

19   MS. HONE: And you do that all while driving

20   very safely.

21   MR. MANIS: Yeah, thanks.

22   **(Laughter.)**

23   MS. HONE: Was there somebody down here who

24   wanted to add anything?

25   (No response.)

1   MR. CLARK: Jonathan Clark, Open Wave Systems.

2   The claim was made from one of the panelists that

3   filtering wireless messages was actually not legal in the

4   U.S. because these were regulated under the TCPA and,

5   hence, under common carrier, or at least what I

6   understand to be common carrier.

7   I'd like to ask the representatives from AT&T

8   and the FCC whether they consider this to be the case and

9   whether the answer is different for SMS versus electronic

10 mail, as Mr. Crocker brought up?

11   MS. HONE: I actually think the panelists said

12 that they thought -- Al, was that you or --

13   MR. ALTSCHUL: That was me.

14   MS. HONE: -- was that you, Mike?

15   MR. ALTSCHUL: I think a number of us touched

16 on it. My statement is --

17   MS. HONE: I'm sorry, I think you actually had

18 it backwards, so that's why I'm asking them to clarify.

19   MR. ALTSCHUL: Yes. My statement was that a

20 text message can be filtered because it's not a common

21 carrier service that falls under a definition of an

22 information service because it's a store and forward

23 message.

24   MS. EGLER: Yeah, I mean, right now, that's

25 definitely Mike's interpretation of what information

1   services and I'm not an expert on information services.

2   But there is a difference. There's telecommunications,

3   there's information services. But then there's this

4   thing called telephone calls in the TCPA and in the TCPA,

5   basically Congress said it's any call to a wireless

6   number. And because they use the examples of cellular

7   phones and pagers and pagers have -- even though this is

8   a 12-year-old statute -- has only ever had to do with

9   text, then we wouldn't differentiate between voice and

10   text.

11   So, what I'm saying is that if you're using a

12   wireless number, okay, and you're going to a wireless

13   device and you're using an automatic dialing system or a

14   prerecorded message, that would be considered a violation

15   of the TCPA. That's different than whether or not it's a

16   telecommunications service or an information service.

17   Does that make sense?

18   MR. ALTSCHUL: Well, I don't find in the TCPA

19   authority for carriers to filter. TCPA gives --

20   MS. EGLER: Right, that's what I'm saying.

21   We're talking about two different things.

22   MR. ALTSCHUL: -- the user a right of action

23   against the person sending the unsolicited message.

24   MS. EGLER: Right, right. That's what I'm

25   saying. The TCPA is sort of a special statute in that it

1   reaches all telemarketers, which isn't our -- the FCC's

2   usual group, but we have jurisdiction over everybody

3   because of the TCPA. The question about what's a

4   telecommunication service versus what's an information

5   service doesn't come from the TCPA.

6   But the content of a telephone call being made

7   to a wireless number is something that comes out of the

8   TCPA.

9   MR. GIDARI: I sure hope there are no class

10   action plaintiff lawyers in the audience.

11   MS. HONE: May I ask a point of clarification,

12   Margaret? So, if I get text messages on my phone number

13   at my wireless carrier, does the at my wireless carrier

14   take it out of the telephone number?

15   MS. EGLER: Yes, yes, and I want to make

16   that -- I think I was pretty specific about that when I

17   first talked, but let me just reiterate that. What we're

18   talking about is a wireless number, a number assigned to

19   a wireless device, and that's what the TCPA is limited

20   to. So, that's sort of the hypothetical that we're

21   dealing with is, you know, the text message to the

22   cellular device using a wireless number that's assigned

23   to a wireless device; it's not an e-mail address, it's

24   not your wireless number at AT&T or even your e-mail

25   address.

1   Our Commission has never reached the question

2   of whether or not an e-mail to a wireless device would

3   come under the TCPA. So, that's really important for

4   people to understand that.

5   MS. HONE: And can I ask our panelists who know

6   better than I, does anyone receive text messages that way

7   or is it always your phone number at your carrier?

8   MR. ALTSCHUL: No, peer-to-peer messages from

9   one wireless device to another or from one wireless

10 network or another just use the traditional telephone

11 number to address the message.

12   MS. HONE: Thank you.

13   MS. EGLER: And that would be the TCPA.

14   MR. JOFFE: Could I ask a technical question

15 there as a computer scientist? If I was to set up a

16 telephone system, a regular wire line telephone system

17 that had the ability to allow me to remotely program as a

18 forwarded number, a cell phone number, and I did that in

19 a highly automated way, the fact that I'm dialing a wire

20 line number, with a prerecord, and it's being translated

21 by a piece of equipment in the wire line system at my

22 office and dialing a cell phone number, am I violating

23 the TCPA in that way?

24   MS. EGLER: Well, I guess the first question

25 is, just to make sure we're all talking about the same

1   realm, are you using internet addresses at any point

2   here, e-mail addresses?

3   MR. JOFFE: I'm making a telephone call to a

4   wire line number which is not illegal under the TCPA.

5   MS. EGLER: To a wire line number.

6   MR. JOFFE: The wire line number has an

7   automated system of actually each time I dial the same

8   number, it increments a cell phone number by one, makes

9   the call and it's actually that automated process that's

10   doing that.

11   MS. HONE: So, you've created the software that

12   does that?

13   MR. JOFFE: It's trivial software.

14   MS. HONE: But you're purposefully using it

15   with the theory --

16   MR. JOFFE: Yes, correct.

17   MS. HONE: -- that you'll try and circumvent

18   the TCPA?

19   MR. JOFFE: Correct, absolutely. Because the

20   use of the e-mail address at a domain which is then going

21   through a switching mechanism at the central office of

22   AT&T Wireless and is then saying that that e-mail address

23   is actually this telephone number, is a way of

24   circumventing the TCPA in much the same way. And I have

25   to believe if that's the case, then there are probably

1   1,000 telemarketers that have suddenly said, aha, I can

2   avoid any prosecution under the TCPA because I'm calling

3   a wire line number, I'm not -- there's a mechanism that's

4   doing it automatically. It's not my fault.

5   MS. HONE: And we thank you, Rodney, for

6   suggesting that.

7   **(Laughter.)**

8   MR. ALTSCHUL: So, Rodney, the Spam that you

9   received previously was sent to your telephone

10   nubmer@attws.com, is that correct? Mobiled to att as

11   opposed to a text message sent to your phone, is that

12   right?

13   MR. JOFFE: Right.

14   MS. EGLER: So, then, that takes it out of the

15   hypothetical. As soon as we have the at whatever,

16   basically we've never reached that question, whether

17   that's covered under the TCPA. What we're talking about

18   specifically -- and this is why I told you not to get too

19   excited about it. What we're talking about specifically

20   are the numbers, the actual numbers that are assigned to

21   the wireless devices, and that would come under the TCPA,

22   not that are numbers that are part of an e-mail address

23   and then that --

24   MR. ALTSCHUL: So, there is delivery of text

25   messages today that way?

1   MS. EGLER: Yes, there is.

2   MR. ALTSCHUL: And we have defined the peer-to-

3   peer text messaging for the interoperability among

4   wireless carriers as a message that's coming from a

5   mobile device. So, using a wire telephone device with a

6   wire telephone number would not pass through the gateway,

7   not pass through the SMS interoperability gateway, at

8   least.

9   MS. HONE: There's a question in the back. Can

10   you please identify yourself?

11   MR. BAKER: Philip Alan Baker, VeriSign.

12   First, I just got a wireless Spam selling me the secret

13   to solving Spam. So, should I just reply to it and, you

14   know, we don't need to do anymore?

15   But the other question was, what happens when

16   the telephone system and the internet collide in that in

17   a very short time, the basic infrastructure that we're

18   going to be using for doing our SS7 (phonetic) messaging

19   is going to be the same infrastructure that we use to

20   support the DNS? So, these distinctions have been made

21   that, hey, it's going on the wire line, it's going to a

22   telephone number and, oh, it's got an at sign in it.

23   Those distinctions aren't going to mean very much in

24   maybe a few more months. So, what happens when there is

25   that convergence? Has anybody been looking into it?

1   MS. HONE: Al, do you want to answer that

2   question?

3   MR. GIDARI: No.

4   **(Laughter.)**

5   MS. HONE: Not because I think he's been

6   looking into it, just because I think he's the clean-up

7   hitter.

8   MR. GIDARI: But that's my point. These

9   regulatory structures just don't apply and to try to

10   stretch an old law to meet new technology produces the

11   business uncertainty that makes everybody afraid of those

12   that are sitting up here and those that are the class

13   actions lawyers and that add tremendous transaction cost.

14   And it's a real problem trying to stretch these

15   statutes to reach behavior that is absolutely bizarre

16   when you realize the TCPA does not cover a live person

17   calling a cell phone to market any product or service.

18   It's just not covered. It's not regulated. Only if it's

19   auto-dialed with a prerecorded message.

20   You're paying the cost of the phone call. I

21   get them all the time from brokers and other people that

22   get my name through some other list, and it's just not

23   regulated. Yet, an SMS message would be? I mean, it

24   really absolutely is a crazy structure.

25   MS. EGLER: Just a slight correction. It's

1   auto-dialed or with a prerecorded message.

2   MR. GIDARI: Sure. But that broker sitting

3   there at his desk dials away all day long at a number

4   range that he's picked up from some third party, the same

5   way you would generate a 10,000 block list.

6   MS. HONE: So, Al, are you recommending

7   national legislation?

8   MR. GIDARI: I'm not recommending a thing.

9   **(Laughter.)**

10   MS. HONE: There's a question all the way in

11   the back.

12   UNIDENTIFIED MALE: Globen from Mail Frontier.

13   This was more targeted toward Mr. Murayama, but somewhat

14   to the panel in general. Mr. Murayama mentioned that NNT

15   DoCoMo is partnering with some or providing a service to

16   some legitimate marketers to market to users. I'm

17   wondering how you go about making that definition, how

18   you actually verify if they come and say, this is a

19   completely double opt-in, super-confirmed list, how you

20   go about verifying and authenticating that process?

21   MR. MURAYAMA: I'm not exactly sure about how

22   they're going to verify that particular internet marketer

23   as legitimate. But I would believe that there is a

24   certain level of requirements that we require for each of

25   those internet marketers. For example, I don't think

1   DoCoMo and the internet marketer is merely exchanging

2   those information by e-mails, for example. So, they have

3   valid address, they have valid e-mail, for example.

4   There would be a certain level of requirements

5   to get into that service. That's what I would believe.

6   MS. HONE: And there's a question way over

7   here.

8   MR. GERARD: Sorry, it's another question. My

9   name is Philippe Girard from the European Commission in

10   Brussels. Just to tell you that we have this kind of

11   problem of convergence and we have a new directive in

12   place since last year where we have the same system, by

13   the way, it's an opt-in system. But anyway, we've tried

14   for a converging solution to that. So, we have an opt-in

15   system for all sorts of e-mails and that covers, of

16   course, SMS and MMS and normal e-mails, et cetera.

17   MR. ALTSCHUL: If I can say just one quick

18   note. I think Carl alluded to this earlier. It is

19   developing a little bit differently here in the United

20   States where the carriers are essentially -- there will

21   be a pool of aggregation companies who will perform a

22   variety of services, perhaps the most important of those

23   services will be to protect content in Spam.

24   MS. HONE: And before we end, did any of our

25   panelists have anything else they wanted to add or any

1   other questions you wanted to ask of each other that you

2   didn't get a chance to?

3   (No response.)

4   MS. HONE: Well, then I'd like to thank all the

5   panelists for participating and thank you to the audience

6   for staying. I hope this was helpful and useful to you.

7   We certainly found it informative.

8   **(Whereupon, at 5:14 p.m., the hearing was**

9   **adjourned.)**

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1   **C E R T I F I C A T I O N   O F   R E P O R T E R**

2

3   MATTER NUMBER: P024407

4   CASE TITLE: FTC SPAM PROJECT

5   DATE: MAY 1, 2003

6

7   I HEREBY CERTIFY that the transcript contained

8   herein is a full and accurate transcript of the notes

9   taken by me at the hearing on the above cause before the

10   FEDERAL TRADE COMMISSION to the best of my knowledge and

11   belief.

12

13   DATED: MAY 20, 2003

14

15   _____

16   SONIA GONZALEZ

17

18   **C E R T I F I C A T I O N   O F   P R O O F R E A D E R**

19

20   I HEREBY CERTIFY that I proofread the transcript for

21   accuracy in spelling, hyphenation, punctuation and

22   format.

23

24   _____

25   SUSANNE BERGLING

For The Record, Inc.
Waldorf, Maryland
(301)870-8025