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**FTC SPAM FORUM -- DAY THREE**

**SECOND VERSION**

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FEDERAL TRADE COMMISSION

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I N D E X

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**P R O C E E D I N G S**

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For The Record, Inc.  
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1 MS. HARRINGTON: Well, this is the day we've  
2 all been waiting for when we figure it all out and then  
3 go home for the weekend. Before I introduce Commissioner  
4 Swindle, I want, once again, to recognize and thank the  
5 people who work at the Federal Trade Commission who have  
6 done such a magnificent job in every respect putting this  
7 program together.

8 The ring leaders are Brian Huseman and Sheryl  
9 Novick and Renard Francois; Jennifer Bernan from our  
10 Western Region has worked on this; we have a former staff  
11 member who was key, Lisa Tobin, with us; the lawyers whom  
12 I have the great good fortune of working with every day,  
13 Dan Salsburg, Eric Wenger, Steve Cohen -- who am I  
14 forgetting? Mark Groman, who is up later today and has  
15 been up. Just wonderful colleagues, and they have spent  
16 -- Steve Wernikoff, from our Midwest Office, Lisa Hone --  
17 they have spent months reading up about you, and trying  
18 to assemble the richest and most varied panels to really  
19 develop a deep and broad record. And I just want to  
20 thank and recognize them.

21 **(Applause.)**

22 MS. HARRINGTON: And many other staffers at the  
23 FTC. We have our security people and our technology  
24 people and our press people and our business education  
25 people -- everybody has worked as a team.

1           So, you know, it's a great place to work and a  
2           great honor to work with all of these good people. And I  
3           wanted to just take a minute to recognize them.

4           Now, some of the other good people who we get  
5           to work with are Commissioners at the FTC, and you've  
6           heard from our Chairman and from Commissioner Thompson on  
7           the first two days. This morning we'll be hearing from  
8           Commission Orson Swindle, who has played a key role  
9           inside the agency in putting Spam front and center on our  
10          agenda.

11          Commissioner Swindle is one of the most amazing  
12          people I've ever met. Yesterday, he demonstrated, once  
13          again, the diversity of his expertise by playing  
14          Sergeant at Arms and subduing a little brawl that almost  
15          erupted here. So, we appreciate that. He is a retired  
16          Marine and he is a real -- he is such a clear voice for  
17          doing the right thing, and I think you'll find that in  
18          his remarks this morning.

19          So, Commissioner Swindle, thank you for being  
20          here and we look forward to hearing from you.

21                           **(Applause.)**

22          COMMISSIONER SWINDLE: Thank you. It's nice to  
23          see everyone and thank you all for coming. The event  
24          yesterday, I came in late for the second session of the  
25          morning, and I missed some of the early verbal

1 confrontation and I was sitting right here and when lunch  
2 broke and being hungry, I was the first to leap up and  
3 start running for the door and I was caught in between  
4 two gentlemen --

5 **(Group laughter.)**

6 COMMISSIONER SWINDLE: -- Of somewhat smaller  
7 statue than myself, one slightly larger than the other.  
8 And what I didn't know was in the earlier conversations  
9 apparently these guys -- and I won't mention names and  
10 you can all pick them out if they're in the audience --  
11 but they were nice when they calmed down, but they were  
12 rushing to confront each other and I just happened to  
13 walk in the middle of them, between them, you know. And  
14 they both bumped up against me and they started jabbing  
15 at each other, and one saying, he assaulted me, and I  
16 said, take a deep breath. I said, if you want to see  
17 assault, I can give you some real good lessons in it --

18 **(Group laughter.)**

19 COMMISSIONER SWINDLE: -- but this is not  
20 assault. So, anyway, the third day, I'm amazed this many  
21 are still alive, you know, given the tenor of some of the  
22 conversations yesterday. It's been fascinating. I've  
23 been trying to spend a little time over here and then we  
24 have this magnificent thing that -- can I mention a brand  
25 name? CISCO hooks us up and we can watch the proceedings

1 here live and distract me from everything else I've done,  
2 but it's been entertaining and, obviously, informative  
3 and I'd like to spend just a few minutes here.

4 We've talked a lot about complexities the last  
5 couple of days. In fact, my head's been swimming because  
6 there's so much complexity in all this. And I confess,  
7 very quickly, to not really understanding much of what's  
8 been said, but that's your job. My job is to try and  
9 inspire, and perhaps I can do that with such common-sense  
10 approaches.

11 Last summer I was engaged in reading a book  
12 entitled Tuxedo Park. How many of you have read it, by  
13 chance? We're got a lot of techies in here and surely  
14 you've read this book. One person? No people? My  
15 goodness. I would recommend you read it. It's  
16 fascinating reading. It's an account of some behind-the-  
17 scenes activities that took place in the early days --  
18 actually, the European early days -- of World War II. It  
19 started about September of 1940 and it involved -- this  
20 is true -- it involves two very wealthy financiers in the  
21 United States who were scientifically oriented and they  
22 were concerned that America was not ready for World War  
23 II.

24 In technology we were way behind. If you  
25 recall, those of you who are old enough -- I think I may

1 be the only one in the room old enough -- but you've  
2 certainly read the British were in dire straits because  
3 they were being overwhelmed at sea; the submarine packs  
4 of the Germans were sinking shipping and shipping was  
5 their lifeline; and we were on the verge of having Europe  
6 lose the war in 1940.

7 And, so, we've got to do something. And the  
8 British had developed a magnificent device called a  
9 magneton (phonetic). If I remember correctly, this is  
10 way over my head, too. By the way, is Pete Wellborne in  
11 here.

12 MR. WELLBORNE: Yes.

13 COMMISSIONER SWINDLE: Where are you, Pete?  
14 Are you a Georgia Tech graduate?

15 MR. WELLBORNE: Yeah, I'm a Georgia Tech  
16 graduate.

17 COMMISSIONER SWINDLE: I was told to look you  
18 up. Now, I'm going to make a confession here, I am, too.  
19 I am not an engineer, so I have no idea what a magneton  
20 is. But, anyway, in reading this book, it was the guts  
21 of what would be radar and the British were well ahead of  
22 us and it was not an original idea, but they were well  
23 ahead of us and these financiers gathered together some  
24 incredible renowned scientists around the world.

25 The Europeans had come over fleeing Germany;

1 Einstein and others; Lawrence of Lawrence-Livermore Labs;  
2 just some brilliant people. And they got them in a room  
3 at Tuxedo Park, which was the estate of Albert Loomis,  
4 and they said, we've got to solve some problems and we've  
5 got to solve them fast.

6 And they got to work and their collective  
7 efforts led to the rapid development, sometimes in weeks  
8 -- and certainly within months -- of radar, air-to-air,  
9 air-to-surface, and early warning types of radar. The  
10 air-to-surface radar was extremely critical because it  
11 enabled planes to find submarines with their antennas  
12 stuck up and they were able to start sinking submarines,  
13 which kept the fleet from being sunk that was supplying  
14 Europe.

15 They were very much involved in fire-control  
16 systems for weapons, in building Oak Ridge, and,  
17 ultimately, the atomic bomb. They solved incredibly  
18 difficult problems in remarkably short periods of time.

19 Well, I finished reading this book and I was so  
20 impressed by the commitment of these brilliant and  
21 somewhat driven scientists and engineers working  
22 together, focusing on great problems and finding  
23 solutions to meet severe challenges and confront danger,  
24 I said, you know, we ought to try this again.

25 And, in a way, this was the beginning, back



1           then, of the technology revolution. I get a lot of Spam;  
2           those of you who communicate with me know I get somewhat  
3           enraged by Spam. I use e-mail a lot. I believe in  
4           communication because I think that's where we all learn,  
5           and because of liking e-mail, using it a lot and hating  
6           Spam, I'm frustrated all the time.

7                         So, when I finished reading this book, I said  
8           to Tim Muris, I said, you know, Chairman Muris, you and I  
9           ought to call together a group of people who are involved  
10          in all this, put them in a room and tell them they can't  
11          come out until they solve this darn problem.

12                         **(Group laughter.)**

13                         COMMISSIONER SWINDLE: So, I told Tim that we  
14          ought to use the Tuxedo Park strategy and get these  
15          people to working. Many of the people we called in in  
16          early September last year -- I believe it was  
17          September -- are in this room or have been here and have  
18          participated in these proceedings -- ISPs, servers,  
19          computer companies, technology people, communication  
20          people -- everybody who's involved in all this, and we  
21          sat down and we had a discussion.

22                         We challenged them to collectively find the  
23          solution to meet what I -- and I'm sure all of us would  
24          probably agree on -- of what I perceive to be a grave  
25          danger and a severe challenge -- somewhat not unlike a

1 long time ago -- and that challenge is Spam.

2 I know that many of you have been with me at  
3 conferences over the past several years where we've been  
4 in these wonderfully intellectually stimulating  
5 discussions on the deployment of broadband -- the killer  
6 ap. We were in search of the killer ap, and the killer  
7 ap was going to make broadband take hold and broadband  
8 would be everywhere and the world would be a greater  
9 place and everybody would be happy.

10 Well, so far we haven't found the killer ap for  
11 broadband in the sense that it was discussed. It's still  
12 rather expensive to use. But, I would contend, from a  
13 purely consumer perspective, that the only killer ap I've  
14 seen around is e-mail.

15 We've got 250 million people in this country  
16 probably using e-mail in one way or the other, directly  
17 or indirectly. Businesses rely on it, we certainly rely  
18 on it at the Federal Trade Commission, that is the killer  
19 ap. And guess what, folks, I mentioned the challenge,  
20 complicated problems, dire danger -- Spam is going to  
21 kill the killer ap if we don't do something about it.

22 So, Tim and I called everybody in and said  
23 solve the problem. We don't want your advice; if we ask  
24 for your advice we have to have a Federal Register notice  
25 and we've got to get everybody involved. We just want

1       you to solve the problem. Don't come back until you  
2       solve the problem.

3               Well, actually, they came back. We had two or  
4       three meetings, as I recall, between last September and  
5       the end of the year, and things are starting to happen.  
6       This three-day workshop, in which the staff, as Eileen  
7       said, has done just a remarkable job on, is a product of  
8       those early discussions. The staff's efforts have been  
9       rewarded by your attendance and your participation,  
10      sometimes wildly impassioned participation, but  
11      nevertheless you've been participating and that's what it  
12      was intended to do.

13              All of you, our staff and you who have been  
14      here, are to be commended, and I offer my personal  
15      appreciation. And, as I like to say, we're going to  
16      solve this problem bit by bit and it's going to be done  
17      through a continuance of dialogue -- no single law, no  
18      single new technology, no new initiative, no new meetings  
19      are going to solve this problem alone -- it's going to be  
20      solved by all of us coming together and crossing paths  
21      and bumping heads and having little confrontations like  
22      we had yesterday. These are the ingredients that are  
23      going to bring us to a solution.

24              But, the key to getting the solution is that  
25      every single day and every hour of every day we have to

1 make some progress. That's a fact.

2 I would like to think that the recently  
3 announced combined efforts of Microsoft, AOL and Yahoo to  
4 go after Spam is an outgrowth of those meetings. Now, I  
5 read one account that said they didn't know who brought  
6 this idea up of them getting together, and I'd like to  
7 think we had something to do with it. But, regardless of  
8 whose idea it was, the fact is they're getting together  
9 and I personally am expecting results -- not PR -- and I  
10 look forward to meeting with them on frequent occasions  
11 in the future to hear about how they're doing it. I  
12 commend them for getting it going. They're engaged in a  
13 dialogue.

14 Today's discussion will focus on Potential  
15 Solutions to Spam; specifically, legislation; maybe  
16 litigation -- do we really want any more of that? And  
17 technology -- and God knows that's got to be an  
18 understatement, for sure.

19 As complex as all this is, I believe I know a  
20 few things for certain as we search for solutions.

21 One, not one of these avenues -- legal,  
22 technology, political, you name it -- alone is going to  
23 solve this problem.

24 Two, we can never stop refining practices and  
25 searching for better solutions.

1           Three, we will never find a perfect solution,  
2 it does not exist.

3           Four, new laws that are unenforceable for a  
4 myriad of reasons, or that are overtaken by the advances  
5 of technology, have the potential to do more harm than  
6 they do good.

7           Five, and I would like to emphasize this and I  
8 will repeat it again. We need consumers and average  
9 users involved in this process. Awareness is essential.  
10 Without it, we get nowhere.

11           Six, we must get this right and get on with it  
12 quickly or we run the grave risk to the potential of the  
13 internet, e-mail, electronic commerce and, I might add  
14 with great emphasis, national security.

15           Seven, we must all work together to solve the  
16 Spam problem.

17           And, finally -- perhaps most important of all  
18 these -- this is a journey; it is not a destination.  
19 Political solutions, my own personal opinion, are  
20 oftentimes destinations. There is a clamor of great  
21 cries, do something, do something, do something, do  
22 something, at every even year, there are those compelled  
23 to do something. And doing something is often  
24 legislation, at whatever level. Once the legislation is  
25 passed amidst all the emotion, we declare victory and go

1 home, the dialogue stops, and we're getting behind the  
2 minute it stops.

3 So, we have a lot of work to do. This is a  
4 journey and not a destination.

5 I see two spheres of problems: One is very  
6 complex in terms of technology, the law, business models,  
7 relationships, intellect, politics and, of course, cost.

8 We've been addressing much of these  
9 complexities and these problems over the past two days.  
10 These problems and challenges will demand of you all  
11 considerable time, resources and cooperation to solve.

12 The other problem sphere is the one I want to  
13 talk about today and hope generate some discussion from  
14 our panelists. It involves the sphere of internet users  
15 and consumers. There are a hundred million or so here in  
16 the United States alone -- I believe someone mentioned  
17 yesterday, I think, that there are 600 million around the  
18 world, and that's irrelevant because it's growing every  
19 day.

20 This problem is less complex but it's more  
21 emotion. Emotion will kill you before facts will. These  
22 end users, these consumers by the millions, are  
23 absolutely getting fed up with Spam. If we turn them  
24 off, the consequences economically, socially and  
25 development-wise are going to be extremely serious. If

1 we fail to solve either problem's sphere, it bodes ill  
2 for the potential of this marvelous tool for growth and  
3 development.

4 It seems to me we are closer to failure we  
5 consumers, than we are with the more complex problems, at  
6 least from an economic and emotional standpoint. The  
7 damage will occur far more quickly, yet I have heard  
8 today, in this conference, very little, up to now, about  
9 helping consumers and avid users cope with Spam. It  
10 seems to me we could help them quickly and quell some of  
11 the frustration and quell it quite significantly.

12 I hope today's discussions will focus a bit on  
13 empowering consumers so that they might be in control,  
14 **THEY** might be in control of their inbox. They need the  
15 option, easily executed, at no additional expense,  
16 preferably, to block Spam. I prefer the word "nuisance"  
17 to Spam. I don't care if it's commercial, if it's  
18 religious, if it's entertainment, if it's jokes, if it's  
19 pornography -- it's all a nuisance to me, and I'm sure  
20 most consumers would probably agree with that. We need  
21 to stop that from entering their lives and frustrating  
22 them and turning them off to this fabulous medium.

23 I sometimes get the distinct impression that  
24 commercial interests of internet providers and marketers  
25 are reluctant to empower consumers. I just had this

1 sneaking suspicion.

2 (Group laughter.)

3 COMMISSIONER SWINDLE: Certainly, some of the  
4 remarks we've heard here have hinted of this. Firstly, I  
5 think the right to be left alone trumps what some  
6 marketing firms might think is its right to intrude  
7 regardless of my desires.

8 (Group applause.)

9 COMMISSIONER SWINDLE: May I suggest for  
10 beginners that ISPs try the Tuxedo Park strategy -- very,  
11 very quickly. Give the consumers the capacity to easily  
12 and inexpensively designate with a personal filter those  
13 from whom e-mails are acceptable. For example, the  
14 consumer's personal address book or any e-mail address  
15 they might choose to put in that personal filter that  
16 sits right here, before anything comes in. And if the  
17 incoming doesn't match what's here, it doesn't come in.

18 Now, some tell me, oh, you might miss getting  
19 an e-mail from a friend you haven't seen. My problem --  
20 I'll take care of that. If that friend really wants to  
21 talk to me, guess what? They'll find me somewhere. But  
22 give the consumer something that simple. I am amazed, in  
23 particular with major ISPs who have done remarkable work  
24 -- and I'm not trying to pick on ISPs here, because  
25 everybody's at fault, this problem is an obvious problem,



1 it's been obvious for years, and we've been so obsessed  
2 with getting so far down the road and new bells and  
3 whistles that we've not taken care of security and  
4 privacy as we've gone along this path. And it's time to  
5 do that. It's past time to do it.

6 So, I'd like to see the ISPs and the servers  
7 who are providing consumers this service -- and I say  
8 providing, I think, you know, there's a fee associated  
9 with it. I pay for mine, some use it free. I don't  
10 think things should necessarily be free. I think if it  
11 costs something to provide this that that's legitimate.  
12 That's the American way. But let's put that shield out  
13 there so that, number one, we can quickly get to this  
14 sphere of consumers and users and the emotional fallout  
15 from their frustration -- let's get that taken care of as  
16 soon as we can.

17 We can do that fairly quickly, that will solve  
18 that problem, and then the genius of all of you, working  
19 together, working in conflict, beating each other about  
20 the head and shoulders and doing all these things that  
21 you do so well, using and deploying this immense talent  
22 that you have that has given us all this and you can  
23 solve the complexity sphere. But that's going to take a  
24 long time. But emotion can be handled fairly quickly if  
25 you do it right.

1                   So, I would challenge you all to think in terms  
2 of empowering consumers. Once you do that and give the  
3 consumer, at his option -- he doesn't have to turn the  
4 thing on or he can turn it off -- but give them the  
5 option to put that screen out there to keep out all e-  
6 mail that he or she does not want to see. And the ISPs  
7 can have all that other stuff -- just don't send it to  
8 me; I don't want to see it; give me the option to easily  
9 take care of it.

10                   And one of the first steps would be to make it  
11 possible to copy my address book -- this is a novel idea.  
12 I'm amazed that I came up with this.

13                   **(Group laughter.)**

14                   COMMISSIONER SWINDLE: To copy my address book,  
15 easily, and move it, with one click, to the filter. You  
16 know, I was with one of the biggest ISPs in the whole  
17 universe, and I can't do that; but yet, I can talk to  
18 Mars -- something's wrong here.

19                   **(Group laughter.)**

20                   COMMISSIONER SWINDLE: This gives you sort of  
21 the hint that maybe they don't want you to have that  
22 empowerment. And, folks, at the FTC, consumers come  
23 first and if you don't want an FTC in your future, don't  
24 mess with consumers.

25                   We have a busy day ahead of us and as my

1 favorite Robert Frost said, "We have miles to go before  
2 we sleep." As I said, this is a journey and not a  
3 destination and, believe me, we all have to make this  
4 trip.

5 Thank you very much.

6 **(Applause.)**

7 MS. HARRINGTON: Thank you very much,  
8 Commissioner Swindle. As you see, we selected him for  
9 Day 3 because he doesn't have any opinions about  
10 anything.

11 **(Group laughter.)**

12 MS. HARRINGTON: Before we begin, let me ask  
13 you to please, please, please turn off your cell phones  
14 and remind you that if your cell phone rings, we will  
15 harvest the address and send you wireless Spam.

16 **(Group laughter.)**

17 MS. HARRINGTON: Is this a great technology and  
18 medium, or what? It's been brought to my attention that  
19 we have a news group called The Secret Diaries of the FTC  
20 Conference --

21 **(Group laughter.)**

22 MS. HARRINGTON: -- and if you go there, you'll  
23 read things about yourselves. But, here's one that came  
24 in the other day to me -- or about me. It's very  
25 interesting. "Any man that brave can drink out of my

1 canteen any time. You rock, rough and stuff with your  
2 Afro puffs and get down with your bad self, girl. When  
3 I'm king, you're going to be the Castellan that actually  
4 runs everything." Okay!

5 **(Group laughter.)**

6 MS. HARRINGTON: Keep it coming; keep it  
7 coming. Now, this morning we're going to discuss the key  
8 issues that everyone is wrestling with on the subject of  
9 legislation. Should there be legislation -- state  
10 legislation, federal legislation? What should it  
11 contain, what should the nature of laws be, should there  
12 be broad federal preemption, should there be an  
13 advertising, labeling requirement, should there be a  
14 private right of action, should there be criminal  
15 sanctions? These are the core issues, and we have, I  
16 think, a very good panel to help us explore those.

17 Jerry Cerasale is the Senior Vice President of  
18 the Direct Marketing Association, an organization that is  
19 much loved by all in the room, as we know from the other  
20 day.

21 We have Ray Everett-Church, who is counsel with  
22 the Coalition Against Unsolicited Commercial E-mail.

23 David Kramer, to my immediate right, is with  
24 Wilson Sonsini Goodrich and Rosati.

25 Chuck Curran, down on the end, is the Assistant

1 General Counsel at America Online.

2 John Patrick is the -- John, are you down  
3 there? John is the Chairman of the Global Internet  
4 Project.

5 Steve Richter is General Counsel for the E-mail  
6 Marketing Association.

7 Paula Selis is Senior Counsel in the Washington  
8 State Attorney General's Office.

9 And David Sorkin, to my immediate left,  
10 Associate Professor of Law at The John Marshall School of  
11 Law.

12 I think I want to really dive right into this,  
13 because the issues are numerous, important and meaty. We  
14 would note that there are now, I think, 29 states -- is  
15 that right -- that have enacted some kind of Spam laws,  
16 the most recent to be signed into law in Virginia just  
17 the other day, which criminalizes a certain kind of  
18 Spamming activity. There are a number of other states  
19 with legislation introduced this year. Of course, we  
20 have legislation pending in Congress and, as we've heard  
21 this week, there's more legislation expected to be  
22 introduced at the Federal level.

23 The laws that we've seen, both enacted and  
24 proposed, fall into several categories. Some have a  
25 private right of action, as well as Government

1 enforcement; others call only for Government enforcement;  
2 some require labeling; others don't; and we heard  
3 yesterday, particularly, I think some good discussion  
4 about labeling and whether it does any good at all. And  
5 that's an issue that the panel will touch on, but we've  
6 heard from marketers that the view is that labels don't  
7 do any good.

8           There are statutes, existing and proposed, that  
9 prohibit certain false aspects about Spam; false header  
10 information, for example. There are laws that prohibit  
11 all Spam.

12           So, we see a variety of approaches that have  
13 been taken, that are proposed and, I think, we'll just  
14 get right to it with a first question; and that is -- and  
15 I'm going to call on the panelists, in no particular  
16 order, and I'd really like about 30 seconds from you,  
17 just to give us a sense of your going-in position here.

18           Is a Federal law necessary in the United  
19 States; will it do any good?

20           Paula, why don't we start with you, speaking  
21 from your perspective as a State law enforcer. Is there  
22 a need for a Federal law? Will it do any good?

23           MS. SELIS: Well, let me start with, is there a  
24 need for a Federal law? Right now, I think, as Eileen  
25 pointed out, there are 29 laws on the books, and

1 Washington was the second state to pass legislation in  
2 this area. As with a lot of consumer protection-type  
3 issues, the states are usually the place where these laws  
4 first get passed. And what happens is you get  
5 essentially what becomes a patchwork of laws across the  
6 country. This happened in telemarketing, it happened in  
7 900 numbers, it happened in credit reporting, and on and  
8 on. And what happens eventually is that those who are  
9 regulated eventually come to Congress and say, please,  
10 please legislate, because we can't deal with the  
11 patchwork of laws. And I think that's part of the  
12 impetus for this Federal legislation that we're seeing  
13 now.

14 Is Federal legislation going to work? Is it  
15 important in this area? Is it necessary? I think only  
16 effective Federal legislation would work, and what I mean  
17 by that is that as long as we have strong Federal  
18 legislation, the states will not need to enforce their  
19 laws. But if we don't, then state law is necessary.  
20 That Federal legislation should be a ceiling and not a  
21 floor.

22 MS. HARRINGTON: Thanks, Paula. Steve Richter,  
23 where are you on this?

24 MR. RICHTER: In support of Federal law. It's  
25 impossible right now to advise a client on either side of

1 the equation as to what rights they have when you have  
2 the example we use is that someone opts-in for receiving  
3 e-mail; they live in the State of Washington; and then  
4 someone sends them from New York, through a Nevada  
5 server, an e-mail and they now have moved to New Jersey.  
6 What law can you tell either of the parties -- the sender  
7 or the recipient -- what law they should follow?

8 And, so, I'm in agreement with Paula that a  
9 Federal law has to be done in order to have any kind of  
10 compliance, but it has to have some teeth, and I also see  
11 where the state agencies can enforce the Federal law.

12 MS. HARRINGTON: Okay. David Kramer?

13 MR. KRAMER: I absolutely think we need Federal  
14 legislation here. I think Paula Selis is quite correct  
15 that the impetus behind the state legislation was really  
16 to send a message to Congress years ago that this is a  
17 problem that cries out for a legislative solution. It is  
18 a classic case of tragedy of the commons in large  
19 numbers, in economics, creating a situation where no one  
20 has a vested enough interest to go after the parties that  
21 are responsible, while the parties that are responsible  
22 have every economic interest to generate massive  
23 quantities of Spam.

24 So, I absolutely think we need Federal  
25 legislation, but I completely agree with Paula that a



1 Federal legislation that does not effectively solve the  
2 problem will simply make the problem worse.

3 MS. HARRINGTON: Okay. Before I call on Ray  
4 Everett-Church, let me pick up on that qualification that  
5 Federal legislation needs to be effective.

6 As you continue to answer the fundamental  
7 question, tell me one thing -- if you're saying that  
8 there is a need for Federal legislation -- what would  
9 make it effective.

10 MR. KRAMER: The biggest thing that would make  
11 Federal legislation effective is a private right of  
12 action. Without a private right of action, Federal  
13 legislation will make the problem worse. There is only  
14 one way to deal with a large numbers problem, it is to  
15 empower the large numbers of us that are affected by this  
16 problem to take action, ourselves, to redress it.

17 Is everyone going to take action? Of course  
18 not. But we have a paradigm here; we have a junk fax law  
19 that was passed in this country in 1991; we have a  
20 problem, at that point, where our fax machines were  
21 flooded with faxes, almost rendering the medium useless.  
22 We passed a statute and, thankfully, today you can come  
23 into the office and get faxes and your fax paper isn't  
24 all strewn about the floor with ads for radio stations  
25 and dinner menus and so forth.

1                   That statute worked because of the threat of  
2 private enforcement. The statute empowers people to sue  
3 for \$500 to \$1,500 for each fax they receive.

4                   MS. HARRINGTON: Thanks. Ray?

5                   MR. EVERETT-CHURCH: The Coalition Against  
6 Unsolicited Commercial E-mail was founded in 1997 on the  
7 premise that Federal legislation was necessary. The  
8 Coalition believes that a multiplicity of approaches --  
9 including technical and economic and social and legal  
10 components are all necessary to address the problem.  
11 And, at that point in '97, the legislative angle had not  
12 been fully discussed or explored.

13                   We have been working as an organization for  
14 Federal legislation throughout the intervening years,  
15 and, if anything, the arguments we made in 1997, at the  
16 Federal Trade Commission event to discuss Spam, are all  
17 the more relevant and all the more pressing and it's time  
18 for Federal legislation. We advocate an approach similar  
19 to the junk fax law. And an opt-in approach for  
20 unsolicited commercial e-mail because the cost-shifting  
21 issues that David mentioned are so similar in e-mail  
22 space without the governor of things like phone lines and  
23 fax paper, it costs no more to send that next 10 million  
24 e-mails than it does the first 10 million, as an  
25 incremental expense.

1                   So, Federal legislation can effectively address  
2 what is a breakdown in the marketplace.

3                   MS. HARRINGTON: Thank you. I'm going to ask  
4 if people can shorten it up just a little bit for me.  
5 Jerry?

6                   MR. CERASALE: Federal legislation is required  
7 to be part of the solution for the problem we face with  
8 Spam. We need it. It has to be in conjunction with  
9 industry-working filters, ISPs and so forth. We think  
10 that what is necessary, as well, besides just the  
11 legislation, is resources to the Federal government and  
12 to the states to enforce.

13                   MS. HARRINGTON: So, resources is your answer  
14 to what would make it effective -- one answer?

15                   MR. CERASALE: There's more than one, yes.

16                   MS. HARRINGTON: David?

17                   MR. SORKIN: Well, certainly Federal  
18 legislation is preferable to state legislation. My  
19 concern really isn't so much the enforcement aspect as  
20 the substantive rule. Most of the state Spam laws, most  
21 of the bills that have been proposed in Congress are  
22 counter-productive, and if we're going to have a bad law,  
23 I think we'd be much better off with none at all.

24                   If we're going to have a strong, opt-in law,  
25 then I think the law can be an effective part of the

1 solution.

2 MS. HARRINGTON: So, opt-in is a key element?

3 MR. SORKIN: Yes.

4 MS. HARRINGTON: John?

5 MR. PATRICK: Well, I guess I'm in the minority  
6 here. I feel quite strongly we do not need any new  
7 legislation. If we get any new legislation, it has zero  
8 probability of working. And it's very easy to forget  
9 that the internet is global and, in fact, Americans are  
10 the minority of users of the internet, and in the fairly  
11 near future, the use of the English language will be a  
12 minority language on the internet.

13 So, we have to think about here a  
14 communications medium that is unlike anything we've ever  
15 had before. It works exactly the same in Burlingame as  
16 it does in Boston or Berlin or Beijing or Bangkok. It's  
17 exactly the same. And, so, to impose a law at the  
18 Federal government means absolutely nothing to most  
19 people in the world. So, the laws really have no chance  
20 of working.

21 There are, however, solutions to Spam. I agree  
22 it calls out for legislation -- this is a very emotional  
23 thing, as Commissioner Swindle pointed out so eloquently.  
24 We all want something to happen, but legislation has no  
25 possibility of working. And I have some ideas on things

1 that will work when it's time to talk about it.

2 MS. HARRINGTON: Okay, thanks, John. Chuck?

3 MR. CURRAN: We've seen staggering viral growth  
4 in the volume of Spam messages sent to our users, and the  
5 primary face of Spam is sent by techniques of  
6 falsification and identity concealment, and Federal  
7 legislation is an absolutely vital component to bringing  
8 some deterrent to that viral growth and to the  
9 practitioners of those kinds of outlaw techniques.

10 That's really -- it's not just civil penalties  
11 that complete the enforcement picture, criminal penalties  
12 are also necessary to truly deter those who are  
13 continuing this vile growth of concealment and  
14 falsification mail.

15 MS. HARRINGTON: Okay, thanks. Since, as Paul  
16 notes, the states have really, as always, been the  
17 laboratory on this issue, as they've enacted state laws  
18 and then worked with those. I'd like to spend a little  
19 bit of time talking about the state laws, our experience  
20 with them, and a fundamental question: Have they had any  
21 effect?

22 I would note that one of the features common  
23 among many of the state laws is that Spam bear a label,  
24 an ADV label. We, the other day, announced the results  
25 of a study that we did, pulling a random sample of Spam

1 that we have in our datasets at the FTC, and we found  
2 that only 2 percent of the Spam in our sample bore the  
3 label. And, I think, we have to assume that virtually  
4 all of those Spammers were sending Spam, in part, into  
5 the states with the labeling requirement, California  
6 being one of them. It's hard to imagine someone sending  
7 a huge volume of Spam and sending none to California.  
8 And that was an interesting thing for us to see, that  
9 only 2 percent of our sample bore the label.

10 I wonder why that is and whether we can have  
11 some assessment, in concrete terms, of the effectiveness  
12 of various state laws. Now, the laws vary. Some have  
13 private right of action in them; some don't. Some have  
14 labeling; some don't. Some prohibit falsity  
15 specifically; others don't. So, we're talking about  
16 different components in terms of effectiveness.

17 Why don't we first talk about the labeling  
18 issue, and whether, in your view, the finding from our  
19 study is off or whether it's consistent. You know,  
20 what's the deal with labeling?

21 Who would like to start?

22 MR. PATRICK: I'll take a crack at that.

23 MS. HARRINGTON: Okay.

24 MR. PATRICK: If I'm a Spammer in Tajikistan,  
25 why do I care about any state of Federal law; whether

1 it's labeling -- why do I care?

2 MS. HARRINGTON: Okay.

3 MR. PATRICK: It's that simple. It really is  
4 that simple.

5 MS. HARRINGTON: The Tajikistan Perspective.

6 **(Group laughter.)**

7 MS. HARRINGTON: We've heard that. Do we have  
8 any of the other stands here?

9 MS. SELIS: I have a thought on that --

10 MS. HARRINGTON: The Seattle Stand.

11 MS. SELIS: The Seattle Stand, yeah. Actually,  
12 Washington does not have an ADV requirement. Our law  
13 simply prohibits deceptive headers, deceptive subject  
14 lines. But, I think, this points out something that  
15 David Kramer said, was you need effective enforcement;  
16 you need widespread enforcement; you need an active  
17 deterrent to keep people from violating the law. And, as  
18 long as it's more profitable for people to Spam and the  
19 risks are fairly low that there will not be the  
20 enforcement effort, they're going to go ahead and do it.  
21 It's an economic decision.

22 And if, in fact, there's effective enforcement,  
23 there will be an effective deterrent and the rate of  
24 Spam, those kind of violations, including the failure to  
25 put ADV, will slow down. But we haven't seen that yet

1           because we've only seen limited enforcement. Of the 29  
2           states that have statutes on their books, I know of only  
3           three who have actually taken state action.

4                       MS. HARRINGTON: Why is that? Why isn't there  
5           more active enforcement?

6                       MS. SELIS: Well, you know, it's a variety of  
7           things. It has to do with budgets, it also has to do  
8           with the difficulty of actually filing cases, finding  
9           Spammers, the technical barriers. But, I think, over  
10          time it's going to get easier and the enforcement  
11          authorities will get better at it. Especially if there's  
12          right of action that is in the private sector. Private  
13          people will take action, too, and there will be massive  
14          enforcement and massive deterrent.

15                      MS. HARRINGTON: Why do we think that private  
16          citizens will be more successful tracking down Spammers  
17          than government enforcers have been?

18                      MS. SELIS: Well, some of them have taken  
19          action in Washington, and they face some of the same  
20          difficulties. But, in fact, some of them have been  
21          successful. And, in fact, some of them have sued the  
22          merchants who are selling via the Spam. So, it's not an  
23          impossibility. There are barriers, it's true, but I  
24          think with a widespread law, with an automatic  
25          enforcement mechanism, people are more likely to take



1 action.

2 MS. HARRINGTON: Some of my colleagues in this  
3 room -- Jennifer, Marc, Lisa, others -- spent 18 months  
4 going around the country training state and local  
5 enforcers on internet investigation technique. We got a  
6 lot of interest, we trained, I don't know -- Marc --  
7 1,750 local and state enforcers on how to do this kind of  
8 investigation. And, so, for us there's a little bit of a  
9 disconnect between the effort to put in that kind of  
10 training effort and the lack of enforcement at the local  
11 level of these laws.

12 Is there more that we can do to encourage  
13 enforcement?

14 MS. SELIS: As an agency? I think if there's a  
15 Federal law, and it's a good Federal law, and every state  
16 and every Federal entity -- the FTC and the states are  
17 working together -- there will be more cooperation.  
18 Because now when you've got 29 different laws; 29  
19 different standards; and you've got the FTC, who doesn't  
20 really have a law to work with -- you're only working  
21 with your FTC Act -- I think you have a divergence of  
22 legal opinions and even if you understand the methods  
23 with which you need to investigate these cases, you have  
24 a disconnect over what law to use and what court to go  
25 into.

1                   So, if there's a uniform standard, I think  
2 that's going to go a long way toward uniform enforcement.

3                   MS. HARRINGTON: Now, when you talk about  
4 uniform standard, this is for Paul and all of you, that  
5 suggests preemption to me.

6                   MS. SELIS: Um-hmm. And, as I said earlier, I  
7 don't have a problem with preemption as long as there is  
8 a strong Federal law and as long as that law makes it  
9 easy or relatively easy to take enforcement action.

10                  MS. HARRINGTON: Okay.

11                  MS. SELIS: And we can talk about the substance  
12 of that later.

13                  MS. HARRINGTON: Okay. Chuck, what's the view  
14 from AOL about the effectiveness of state laws and, in  
15 particular, you guys have been big champions of this new  
16 Virginia law that criminalizes the most egregious kind of  
17 Spamming.

18                  MR. CURRAN: We get millions of complaints from  
19 our members every day and we use them as evidence in  
20 cases. We find that the majority of those involve these  
21 kinds of techniques of falsification and concealment.  
22 The Virginia statute, like any other states, is focused  
23 on the kind of computer crime aspect of that, and gives  
24 both enforcement and civil remedies.

25                  So, we're a big believer -- instead of either

1 or -- of both and -- that Federal enforcement remedies  
2 that are targeted towards the people who send the most  
3 objectionable Spam, by the most objectionable means, and  
4 in the greatest volumes, that's where you get the biggest  
5 -- when you were talking about effectiveness -- that's  
6 where you achieve effectiveness.

7 MS. HARRINGTON: Okay. Now, David, you're a  
8 proponent of private right of action in state laws and  
9 you have actually used private right of action in some of  
10 your work, what's your assessment of the effectiveness of  
11 state laws?

12 MR. KRAMER: I would say they have been  
13 completely ineffective, but I would say that if what the  
14 goal was was to generate interest at the Federal level,  
15 they've served their purpose. They were never intended  
16 to solve the problem. And, in fact, when a state acts in  
17 the context of interstate commerce, it needs to be very  
18 careful about what it's trying to do. A state can't ban  
19 all Spam on the internet because of Constitutional  
20 concerns with the commerce clause. So, states have taken  
21 a very limited approach to the problem, all their  
22 statutes reflected.

23 With respect to the issue of a private right of  
24 action, however, you will see private enforcement where  
25 it makes economic sense. Where there is a reward to the

1 consumer for serving the public interest by going out and  
2 taking action, if only for \$1,500 in his or her own name  
3 against a Spammer, you will see an individual going to  
4 court and bringing those claims.

5 Right now, we don't have a lot of private  
6 rights of action over state laws that give individual  
7 consumers or individual businesses the ability to bring a  
8 lawsuit that makes economic sense.

9 MS. HARRINGTON: All right, now, if you talk  
10 about private right of action, we take a look at Utah,  
11 for example, where there are class actions being filed by  
12 one particular law firm that's, you know, demanding \$10  
13 per client; \$6,500 in fees, you know, does private right  
14 of action open the flood gate for that kind of aggressive  
15 class action?

16 MR. KRAMER: Yeah. I mean, Steven can speak to  
17 this as well, but certainly that was an example of state  
18 legislation gone awry. The statute was not written with  
19 careful protections in it to ensure that what it was  
20 actually doing was fighting Spam and it has, instead,  
21 become a class action lawyer's full employment act in  
22 Utah.

23 That wasn't ever the intention, but it wasn't  
24 properly written. I think with, even, the least bit of  
25 careful drafting, we can prevent that problem. We see it

1 at the Federal level in the Fair Debt Collection  
2 Practices Act; we have limits on what class action  
3 attorneys can do when there's a private right of action  
4 for statutory damages, and any Federal legislation needs  
5 to have that kind of limitation in it.

6 MS. HARRINGTON: Okay. Can anyone on the panel  
7 point me to an example of enforcement of a state law or  
8 enactment of a state law that has achieved a demonstrable  
9 result in reducing the amount of some kind of Spam -- any  
10 kind of Spam? Is there any anecdotal or, even better,  
11 any survey-based evidence that anyone knows of on the  
12 effectiveness of any state law? Anyone?

13 MR. SORKIN: I guess I can speak to that  
14 anecdotally. I think state laws have done quite a bit to  
15 legitimize Spam in that nearly all of the state laws, in  
16 effect, authorize Spam that doesn't contain fraudulent  
17 headers, that has an ADV label and so on. And, so, I  
18 think the state laws have had an effect, but in the  
19 opposite direction.

20 MR. CERASALE: I don't -- with only 2 percent  
21 putting ADV, I'm not sure I agree with that statement.  
22 But, Eileen, I think the situation -- your study shows  
23 that at least two-thirds -- and I think Chairman Muris  
24 said that they didn't look further into the other one-  
25 third -- are people who are already doing something

1 fraudulent and the --

2 MS. HARRINGTON: No, our study said that there  
3 was likely false information.

4 MR. CERASALE: Likely false information. The  
5 incentive for them to try to follow -- outside of just  
6 being in Tajikistan or whatever the "stan" it was that we  
7 were concerned about, that that tends to be a problem in  
8 trying to get people to follow those state laws in a  
9 prescriptive type of labeling.

10 The other thing on the states, of course, is  
11 the problem -- and it's another problem that we should  
12 talk about today and how people obtain those addresses --  
13 but, unlike the telephone, where state "do not call"  
14 lists and so forth work, where you know what state you're  
15 going into or a mail address -- a physical United States  
16 mail address has a state indicator, a geographic  
17 indicator -- an e-mail address does not, and we can --  
18 how people paint it is another problem we should talk  
19 about today -- but that's another issue with state  
20 enforcement.

21 MS. HARRINGTON: Okay, anything else on  
22 existing state laws before we move on to some other  
23 topics?

24 MR. RICHTER: We all agree that they don't  
25 work, right?

1 MS. HARRINGTON: Well, I think what I'm hearing  
2 is there are certainly issues with ability to enforce, in  
3 terms of resources, in terms of locating, in terms of  
4 jurisdiction and venue. There are big compliance  
5 problems, obviously, and there are not strong incentives,  
6 perhaps, to comply. That seems to be the view.

7 MR. RICHTER: Eileen?

8 MS. HARRINGTON: Yes.

9 MR. RICHTER: I have a comment, since I'm very  
10 familiar with the Utah situation, and Utah is the poster  
11 child -- their statute in my mind is the poster child of  
12 what not to do if you want to make -- or what to do if  
13 you want to make sure you have no effect on giving any  
14 private citizen any rights.

15 And what's interesting in talking to their  
16 state legislators -- and the Utah bill was revised by the  
17 legislature in this last session -- but as the vote came  
18 to the final call, the clock struck midnight and their  
19 session ended. The government now has been urged by the  
20 President of the Senate and the Speaker of the House of  
21 Utah to call a special session for the sole purpose of  
22 revising the Utah law because it's a joke. And they all  
23 know because it's resulted in over -- right now I think  
24 it's over 1,600 lawsuits that have been filed -- and not  
25 more than \$10 has ever gone into hands of any plaintiff

1 and over half of the plaintiffs are members or employees  
2 of the law firm that filed the lawsuits. So, it's an  
3 embarrassment to everyone.

4 But where I'm going with this is that we can  
5 look at the Utah situation and try to learn from it.  
6 What has gone on there, the theory of giving that Dave  
7 said, it's so important to give the private right of  
8 action to the citizen having the private right to act,  
9 but it has to be well done or the only people who are  
10 going to benefit are going to be the lawyers.

11 MS. HARRINGTON: Ray?

12 MR. EVERETT-CHURCH: A real quick comment. To  
13 say that state laws have been ineffective doesn't mean  
14 that there couldn't be more effective state laws, and I  
15 know from personal experience that Dave Kramer has  
16 drafted some good proposals, and has worked hard on that,  
17 and others in other states as well.

18 There could be more effective states laws, but  
19 what you see is a response in those states to Federal  
20 inaction on the issue, and you see an outcry from  
21 consumers, from voters, to address the problem, even if  
22 it is locally. And that lesson extends also to the  
23 global situation, as well, which indicates that even if  
24 Federal laws aren't effective globally, that doesn't mean  
25 that it's not a valuable thing to address it



1           domestically.

2                       MR. CURRAN:  And there's the part about  
3           drafting the statute and then there's the execution part.  
4           Certainly, in Virginia -- Virginia has tough and strong  
5           legislation -- but a lot has to do with the execution.

6                       Well, how do you actually prove the case?  
7           Where is the evidence?  We, as ISPs, think that we need  
8           to do a better job of putting together the kind of  
9           various pieces of the chain of transmission, the evidence  
10          that enforcement agencies need to prove up the cases.

11                      And I think this is an area that we can make  
12          progress in, working together, on the industry side.  We  
13          have the evidence; we have the complaints; we just need  
14          to put it in the hands of state enforcement in an  
15          appropriate manner, such that the right kinds of large-  
16          scale Spammers can be identified and, then, actioned,  
17          under appropriate legislation.

18                      MS. HARRINGTON:  I know one issue that we in  
19          the Department of Justice and other enforcement agencies  
20          have been struggling with for the last couple of years  
21          concerns a balance between privacy protection in the  
22          Electronic Privacy Act and the hoops that we have to jump  
23          through to get that evidence from you that you have and  
24          our need to get it quickly.  And that may be that's not  
25          the subject of this panel -- we're talking about Spam

1           legislation -- but there are certainly other existing  
2           laws that hinder the ability of law enforcement to  
3           quickly gather evidence that really need to be looked at.

4                   MR. CURRAN:   Sure, right.   And there are many  
5           ways to balance those interests in gathering evidence  
6           and, then, kind of little acorns that are available for  
7           subpoena under existing processes.   There's really, you  
8           know, thinking it through, there's really no reason why  
9           we can't balance both privacy and enforcement interests  
10          in an appropriate manner.

11                   MS. HARRINGTON:   Well, let's turn to the  
12          subject of possible Federal legislation.   But let me say,  
13          again, that what I think I'm hearing from the panel is  
14          there are concerns about the effectiveness of existing  
15          state laws.   Ray's point that perhaps state laws could be  
16          made more effective noted.

17                   If there are such problems with existing state  
18          laws or if enforcement and effectiveness are  
19          questionable, why does anyone think it might be better or  
20          different with a Federal law?   You know, is this just a  
21          matter of taking an idea that has been executed in the  
22          states that hasn't had demonstrable results and  
23          nationalizing it?

24                   MS. SELIS:   Let me speak to that here for a  
25          second.   I don't think it's that the laws themselves are

1 bad in the states, I think that there is a problem with a  
2 lack of enforcement and a lack of resources. And  
3 somebody, I can't remember who, pointed out that in order  
4 to have effective legislation at the Federal -- and that  
5 goes for the state level -- you need effective amounts of  
6 money to fund it.

7 So, I think if there were a law on the books at  
8 the Federal level, it would have to have enough money  
9 behind it so that it would be enforced and, as Dave  
10 pointed out, there absolutely has to be a private right  
11 of action and there has to be an ISP right of action.  
12 Because the people who have the incentive to bring these  
13 cases are not necessarily the government authorities, but  
14 they're the ISPs and the individuals who are annoyed and  
15 harmed.

16 And if, in fact, all those things were present,  
17 I think what you'd see is more enforcement, therefore,  
18 more deterrent and more effect on the problem as a whole.

19 MS. HARRINGTON: Now, Dave mentioned the  
20 Telephone Consumer Protection Act, which prohibits junk  
21 faxes and has a private right of action in it, it also  
22 has a private right of action for telemarketing calls  
23 from companies that consumers have told to refrain from  
24 calling them.

25 Just anecdotally, my fax machine at the Federal

1 Trade Commission gets unsolicited faxes all the time. I  
2 don't know if the FTC has a private right of action under  
3 TCPA, but I'm interested in your observation that the  
4 private right of action in the junk fax and junk call  
5 laws has worked, because that wouldn't be my perspective  
6 from where I sit.

7 MR. KRAMER: I think that we have to go back in  
8 time 10 years and think about what it was like when you  
9 had a fax machine in 1991 to recognize just what impact  
10 the junk fax legislation really had.

11 MS. HARRINGTON: But do you think that it's the  
12 junk fax legislation or the widespread availability of  
13 the internet and e-mail? I mean, you know, faxing costs  
14 money; e-mail really doesn't. Has technology overtaken  
15 faxing as a popular marketing tool?

16 MR. KRAMER: Well, I certainly think that a  
17 marketer with the ability to send his or her message out  
18 at no marginal cost would much prefer to use e-mail than  
19 a fax machine. However, we still see fax marketing from  
20 time to time; people still think it's effective. It is a  
21 way of forcing your message into the hands of the  
22 unwitting recipient and forcing them to expend their time  
23 and their resources to deal with the message.

24 That's why we have a private right of action  
25 under the junk fax statute, and it's the same kind of

1       problem with respect to junk e-mail. It forces you to  
2       receive a message that you didn't ask to receive, it  
3       expends your resources and the ISP's resources with  
4       eventually no marginal cost on the sender.

5                So, in answer to your direct question, I think  
6       that the private right of action under TCPA has made a  
7       huge difference. I think there is, for lack of a better  
8       term, a cottage industry of enforcement springing up  
9       using the internet to gather information, with attorneys  
10      and individuals helping one another to bring these kinds  
11      of actions against telemarketers and junk faxers, and I  
12      think without that methodology, without that means of  
13      obtaining redress under a Federal statute, there's simply  
14      no effective enforcement mechanism. You're like the dog  
15      chasing the car -- what happens when you catch it?  
16      Nothing. And that's the problem we have today.

17               MS. HARRINGTON: Okay, as we continue on the  
18      private right of action and Federal law discussion, let  
19      me add to the question; and that is, if there were a  
20      private right of action, should it be in Federal court  
21      -- yikes -- or how would that work?

22               Jerry?

23               MR. CERASALE: I wanted to go back just a  
24      second to the TCPA and so forth and discuss private right  
25      of action. I think that private right of action for an

1 ISP to sue is also a private right of action. So, that I  
2 think when you think of that, we have to separate between  
3 citizens going to small claims court, et cetera, and ISPs  
4 for example.

5 And, under the TCPA, it is different because  
6 they use common carriers. So that there is a requirement  
7 to deliver, whereas in the internet context there can be  
8 -- and I think everything that DMA's worked on with any  
9 Federal legislation continues that right to filter for  
10 internet service providers, and so forth, and I think  
11 that that's a strong area where we can look to  
12 enforcement. They have the evidence, they know the big  
13 attacks on them and so forth, and we have to work in that  
14 context. So, I think it is different from the fax area  
15 in that context.

16 MR. KRAMER: I actually think it's worse in e-  
17 mail than it is in the fax context, because in a fax  
18 context the sender has a marginal cost and there's a  
19 natural limitation on the sender's ability to transmit  
20 his or her messages.

21 In the e-mail context, there isn't a marginal  
22 cost and the problem is exponentially worse. Beyond  
23 that, I think, the disruption that's caused by e-mail to  
24 businesses is one that's just not experienced in the fax  
25 context.

1                   The massive loss of productivity in this  
2 country -- when an e-mail message hits the e-mail server  
3 at my law firm and it goes out to 2,000 people, the  
4 incremental loss of productivity from that single e-mail  
5 message is something that cries out for a legislative  
6 solution.

7                   MS. HARRINGTON: Okay. Steve Richter, where  
8 are you on private right of action?

9                   MR. RICHTER: I'm for private right of action  
10 in a court of competent jurisdiction, and what I want to  
11 do is allow the citizens to get into court without having  
12 to find an attorney and without having the attorneys  
13 profit. So, in most claim courts right now, their  
14 limitation, I think, is about \$5,000 -- maybe some states  
15 a little bit less -- but I think everybody is leaning  
16 toward the \$5,000. I don't think we're talking about a  
17 \$5,000 fine, so where we're talking in the neighborhood  
18 of \$250 or \$500 per e-mail, you know, as a violation, let  
19 the consumer be able to go into a small claims court,  
20 file a \$30 fee, and have their day.

21                   You're going to get a lot more -- I really  
22 think what the Commissioner said this morning has to be  
23 taken at heart about let's protect the consumer in all of  
24 this -- and that's one way of the consumer letting the  
25 world know they're sick and tired of it. If they are a

1        silent minority or a silent majority, we won't know this,  
2        and we don't know this in Utah where 1,600 lawsuits are  
3        filed. The legislators there will tell you that they  
4        can't say that there's one less unsolicited personal e-  
5        mail coming into Utah because of the lawsuits, because  
6        the plaintiffs are getting \$10 and the attorneys are  
7        getting \$6,500. Who's winning?

8                MS. HARRINGTON: All right. It sounds like  
9        some on the panel, at least, would advocate for a private  
10       right of action for individuals in small claims courts;  
11       perhaps a private right of action for ISPs in Federal  
12       court. Is that the distinction that I'm hearing?

13               John?

14               MR. PATRICK: I think we're --

15               MS. HARRINGTON: John would not advocate for a  
16       private right of action.

17               MR. PATRICK: No, we're really kidding  
18       ourselves here, if we think that you can go to small  
19       claims court and sue this Spammer in Tajikistan. You  
20       cannot solve this with legislation. I don't mean to  
21       sound negative; I'm actually very hopeful right now --  
22       more so than I've been in a long time -- about Spam.  
23       Spam can be solved; a private right of action is a  
24       technological action. It includes things such as  
25       Commissioner Swindle pointed out.



1                   Personally, I don't want to eliminate any Spam  
2 unless someone's in my address book because I'm an author  
3 and a public speaker and I get e-mails from people I  
4 never met before and I like those e-mails. That's a good  
5 source of input for me.

6                   But there are a lot of ways to solve this that  
7 are effective -- extremely effective. PC Magazine just  
8 ran a review of four different technologies that  
9 eliminate 99.9 percent of Spam.

10                  MS. HARRINGTON: Well, John, that's a view that  
11 we're going to explore in great depth later today, but  
12 right now we're going to talk about legislation.

13                  MR. PATRICK: Okay. I just want to say --  
14 okay, since this is a legislative panel, so I won't make  
15 the technology plea. However, from the legislative point  
16 of view, you have to be able to define what it is you're  
17 legislating. And to talk about fax laws is really  
18 irrelevant. That's like talking about applying laws  
19 related to horses to laws about airplanes or cars.

20                  E-mail was designed to be really, really simple  
21 and a lot of thought went into the protocol of e-mail to  
22 make it possible for anybody anywhere in the world to be  
23 able to send a message to anybody else anywhere in the  
24 world at very low cost and very high reliability. And,  
25 of course, that's what has made it desirable to the

1 Spammers. But it also makes it impossible to be able to  
2 pass a law that says you can't do that. It's like  
3 passing a law to say you must behave -- people must  
4 behave. You can't do it.

5 MS. HARRINGTON: Okay, Ray?

6 MR. EVERETT-CHURCH: If I could just respond to  
7 the Ambassador from Tajikistan.

8 **(Group laughter.)**

9 MR. EVERETT-CHURCH: The vast majority of Spam  
10 that gets forwarded to the Coalition Against Unsolicited  
11 Commercial E-mail is -- and please don't forward your  
12 Spam to us -- we get enough already -- but those  
13 complaints we receive are largely coming from servers,  
14 bounced off servers all over the internet -- all over the  
15 world. But still, the largest volume of that is  
16 advertising products and services that are being  
17 distributed domestically.

18 These are folks who may hire a Spammer who has  
19 a server farm in China, but who is still going to fulfill  
20 that order for herbal viagra out of their basement in  
21 Pasaic, and it's a bit of a red herring to focus on  
22 foreign relays if you still have a situation, which we  
23 have today, of the products and services being advertised  
24 largely domestic-based.

25 MR. RICHTER: Eileen?

1 MS. HARRINGTON: Hold on a second. I'm back  
2 with the image of the server farm in China. That's quite  
3 an image.

4 MR. RICHTER: I just want to say one of the  
5 things that also actually really speaks well that the  
6 lawsuits -- that there's validity in bringing them here  
7 in Utah, over 70 percent of the lawsuits filed have been  
8 answered. So, you know, I understand the issue of having  
9 servers in China and trying to avoid the lawsuits, but as  
10 we heard, the product is here and you can find someone to  
11 serve who is responsible for sending that e-mail. So, I  
12 really think we're chasing a rabbit.

13 MS. HARRINGTON: Okay. I want to shift to a  
14 different issue and that is the issue of preemption. If  
15 there were Federal law, how important is the preemption  
16 issue, how could it work without preemption?

17 Paula, would you like to start on that?

18 MS. SELIS: I'll jump in on this one, yeah. As  
19 Chris Gregoire, the Attorney General of Washington, said  
20 on the first day, there are 44 Attorneys General who have  
21 written a letter to the Federal legislators who are  
22 looking at legislation at this point voicing their  
23 opposition to a bill that would preempt the states.

24 That being said, I know that the Attorney  
25 General, at least of Washington, has said that if there

1       were effective Federal legislation, then the states would  
2       not have a problem or at least Washington wouldn't have a  
3       problem with preemption.

4               Now, what is effective Federal legislation?  
5       That's what it really comes down to. In looking at the  
6       Burns-Wyden bill, at least at this point, that is not  
7       effective Federal legislation, as the states see it.

8               MS. HARRINGTON: And why not?

9               MS. SELIS: Well, funny you should ask. Let me  
10      give just a little historical perspective on consumer  
11      protection law, and that, I think, will give you some  
12      frame of reference.

13              Before the days of consumer protection law, in  
14      order to show that one business has ripped off a  
15      consumer, you'd have to show fraud and for all of you  
16      lawyers and non-lawyers in the audience, let me say that  
17      fraud has a number of elements that you have to prove,  
18      including materiality and intent and knowledge and so on  
19      and so on and so on. And it became acknowledged that  
20      that was a pretty high burden and something else needed  
21      to happen.

22              So, hence, the creation of consumer protection  
23      law, which does not have such a high burden and, for the  
24      most part, only requires what we call a tendency or  
25      capacity to deceive, so you don't have to show intent,

1       you don't have to show knowledge, you don't have to show  
2       materiality and so for. So, it's a lot easier standard.

3               When we look at the Burns-Wyden bill and what  
4       does it do? It re-institutes all of the elements -- or  
5       at least most of the elements -- of fraud. So, in order  
6       to show a violation, you have to show that it was a  
7       material violation, that the violator had intent, that  
8       the violator knew that he was violating the law.

9               This, we see, as a step backward; especially  
10       since Spam is the number one consumer complaint these  
11       days, why give Spammers essentially what amounts to a  
12       lower burden than a higher one. I mean, it just doesn't  
13       make sense. So, I think that's an important reason that  
14       we oppose the bill.

15               The other reasons for opposing it have to do  
16       with loopholes and exceptions. And there's one in  
17       particular, I think, that we have an issue with and that  
18       is that there is essentially an excuse if the violator  
19       can show that he or she had what is called in the statute  
20       "reasonable business practices" then he or she can escape  
21       liability.

22               Well, what's a "reasonable business practice"?  
23       That means going into court, that means the Spammer is  
24       always going to pose that as a defense. Another defense  
25       is the Spammer's "good faith."

1           So, essentially, what this bill does is set us  
2 up for extensive litigation, court battles, they're going  
3 to last a long time, that aren't going to provide quick  
4 and effective deterrents.

5           And, finally, I guess we're going to wind up  
6 getting into controversy over penalties. The bill  
7 proposes a \$10 per Spam penalty. In Washington we now  
8 have a \$500 penalty, and I ask you if we're talking about  
9 deterrents is \$10 a pop enough? I don't think so. We  
10 want to make it not worth the Spammer's time and effort  
11 to send the Spam, but at \$10 a pop, it's basically the  
12 cost of doing business.

13           So, those are just a few of the reasons why at  
14 this point we oppose the legislation.

15           MS. HARRINGTON: You oppose Burns-Wyden. And  
16 we're going to talk about that, we're going to also talk  
17 about at least a couple of other proposals that we've  
18 heard mentioned here. One Representative Lofgren's  
19 bounty-hunting proposal; another Senator Schumer's  
20 proposal to create a national do-not-Spam legislation.  
21 Burns-Wyden is the one that's been there for quite some  
22 time.

23           MS. SELIS: Right. And a lot of those bills  
24 that you mention kind of jump off of Burns-Wyden and have  
25 a lot of the same elements, but I do want to at least

1 make sure that we acknowledge that the effort itself is a  
2 good one. That we applaud the effort of trying to put  
3 together decent Federal legislation, and there are some  
4 elements of Burns-Wyden that we think are good and we  
5 are, in fact --

6 MS. HARRINGTON: What are those?

7 MS. SELIS: I think the ADV label is a good  
8 one; I think the idea of having a notice --

9 MS. HARRINGTON: Why?

10 MS. SELIS: Well, it allows the consumer to  
11 filter. And I know there's some controversy about that  
12 and the effectiveness of that, and we can talk about it,  
13 but as a starting point, I think it's a good idea.

14 The notice and the ability to opt-out, we think  
15 are good, provided that they're effective and that there  
16 aren't any loopholes there, and we do have some concerns  
17 about that.

18 So, we think those are good places to start.

19 MS. HARRINGTON: Okay. Jerry, does the Direct  
20 Marketing Association support Burns-Wyden in its  
21 entirety?

22 MR. CERASALE: We support principle and  
23 approach. There are a few definitional things right at  
24 the moment that we would like to have straightened out,  
25 but, basically, we like the approach; we think --

1 MS. HARRINGTON: What do you like about it?

2 MR. CERASALE: Well, as we've heard from many  
3 of our members, many ISPs, the big things are the people  
4 who are lying and so forth, and we want to try to get out  
5 to the big push on that.

6 MS. HARRINGTON: Is the standard too high?

7 MR. CERASALE: Is the standard too high? I  
8 don't think the standard is too high. I think that the  
9 area of -- the other things in Burns-Wyden you must  
10 produce a physical address, show exactly where you are;  
11 you must have a unsubscribed -- say, hey, don't send me  
12 anymore, and it must work. Those are things that are not  
13 intent to fraud; you either have that or you don't. So,  
14 that, you have some of those issues that are added in.

15 The mistake problem -- there has to be  
16 something to look at on the mistake. This is your  
17 telemarketing sales rule -- has the mistake area pattern  
18 and so forth, and, you know, you do it two or three  
19 times, you can come after them and you lose the mistake.

20 So, we support that approach, and I don't  
21 believe there's an ADV label in Burns-Wyden, so that, I  
22 mean, we don't support that.

23 MS. HARRINGTON: What are the definitional  
24 problems that you have?

25 MR. CERASALE: Well, we want to look at --



1           there's some of the consent definitions that are there,  
2           we want to tighten up that definition and we want --

3                       MS. HARRINGTON:  You want more people to be  
4           able to receive Spam or fewer people, you know, let's get  
5           concrete here.

6                       MR. CERASALE:  Right, sure.  We want the  
7           consent to specifically talk about notice and opportunity  
8           to say no, which I think they do have, but we want to  
9           make sure that that isn't confused; that also you  
10          obliterate the opportunity where someone says, I want to  
11          receive it.  So, you have to make sure that your  
12          definitions include, from our perspective, people told us  
13          to say no and also people said, yes, I want to receive  
14          things.  So, that we want to make sure that that's  
15          correct in that area.

16                      And we also want to make sure we define,  
17          specifically, a little bit more tightly, the rights of  
18          the internet service providers to go to Federal court to  
19          enforce the civil side of Burns-Wyden.

20                      MS. HARRINGTON:  Okay.  Thank you.  David?

21                      MR. KRAMER:  I have a real problem with this  
22          legislation.  It's unfortunate that it's called the  
23          Canned-Spam Act for short, because what it really is is  
24          the act that says "you can Spam."

25                      **(Group laughter.)**

1           MR. KRAMER: It is legitimizing a practice that  
2 is reprehensible in our society. It's a practice of  
3 theft and this statute -- the problem isn't that Spam is  
4 fraudulent, the problem is Spam. I don't care that a  
5 message that I get is --

6           MS. HARRINGTON: Theft is a strong term.

7           MR. KRAMER: It's a theft of resources, it's a  
8 theft of my time, it's a theft of the ISPs resources for  
9 processing data, for storing these messages, and,  
10 obviously, we're not talking about one message when we're  
11 talking about theft, but one message is the tip of the  
12 iceberg.

13           The problem here is that we're codifying, with  
14 this legislation, a suggestion that it's okay to Spam as  
15 long as you do it within these certain rules. It's okay  
16 consumers, you're going to get 1,000 messages a year and  
17 you're going to have to opt-out of 1,000 lists that you  
18 didn't ask to get on in the first place, and there's no  
19 private right of action in any event, so, too bad, if you  
20 have a problem and they didn't take you off the list,  
21 tell the FTC and they'll take care of it, or tell your  
22 State Attorney General and they'll take care of it.

23           Not nearly enough with this bill. And while I  
24 again, like Paula, applaud the Senators for taking some  
25 action here, I think it's badly misdirected.

1                   **(Applause.)**

2                   MS. HARRINGTON: Okay.

3                   MR. PATRICK: I want to strongly agree.

4                   MS. HARRINGTON: Nice of you to bring your  
5 whole family today, David.

6                   **(Group laughter.)**

7                   MS. HARRINGTON: John?

8                   MR. PATRICK: I want to strongly agree. This  
9 is wonderful that there's an attorney on this panel that  
10 I really strongly agree with. Because the reasons that  
11 he gave for why that bill can't work are going to be the  
12 reasons that no bill can work. And, so, I'm in violent  
13 agreement that private action really is the answer here,  
14 but it's not private legal action -- it's private action  
15 to not technically permit those e-mails to come into my  
16 inbox if I don't want them.

17                   MS. HARRINGTON: David Sorkin?

18                   MR. PATRICK: There's a lot of ways to do that.

19                   MR. SORKIN: If I were going to draft the worse  
20 possible bill, I would probably do a few things slightly  
21 different than the Burns-Wyden bill did. It would take  
22 me awhile to figure out which things I would do  
23 differently.

24                   **(Group laughter.)**

25                   MR. SORKIN: I would probably draft a

1       preemption clause very much like the one I read in the  
2       bill, which preempts only the one strong state's Spam law  
3       and leaves all of the counter-productive ones and the one  
4       that's somewhere in the middle, which I would say is  
5       Ohio's -- it leaves all of those in place.

6                It creates a labeling scheme which, I think,  
7       many -- probably most of us -- agree is the wrong idea  
8       and, yet, the labeling requirement in the bill isn't even  
9       the standard method, so it wouldn't even work. It simply  
10      says a clear and conspicuous identifier, not an ADV  
11      label. If we're going to have to live with the label, at  
12      least we'd like one we can use.

13              So, I have to agree with Dave. I think the  
14      bill would be a large step in the wrong direction. But I  
15      do want to add, I think, to some extent, we're putting  
16      the cart before the horse when we talk about enforcement  
17      before we talk about what the rule should be. I don't  
18      really care that much about enforcement, I'm not crazy  
19      about the idea of having a Spam law that doesn't work  
20      real well that doesn't get enforced, but I think the real  
21      principle we should be following at this point is, do no  
22      harm. If we come up with a Spam law that might do some  
23      good and won't invite a hundred times or a thousand times  
24      or a million times more Spammers into the business, then  
25      I think at least we're starting to accomplish something.

1 MR. EVERETT-CHURCH: Eileen?

2 MS. HARRINGTON: Yes, Ray.

3 MR. EVERETT-CHURCH: Those of who've been  
4 involved in the anti-Spam activities for a long time,  
5 recognize Burns-Wyden as sort of the logical descendent  
6 of a proposal that then Senator Merkowski from Alaska --  
7 the current Senator's father, I believe -- proposed and,  
8 in fact, was almost immediately taken up as a cause celeb  
9 by the Spammers themselves, citing the legislative  
10 proposal in their Spam. It even occurs still today, if  
11 you search your database, the FTC's refrigerator, for  
12 S1618, as authorizing this piece of e-mail, in most cases  
13 it wouldn't have if it wouldn't have if it had become  
14 law, but the Spammers took it up as something that  
15 legitimizes their activities, and Burns-Wyden would do  
16 the same.

17 MS. HARRINGTON: Okay. I want to talk about  
18 another fundamental question, and that is whether  
19 enactment of a Federal statute regarding Spam would put  
20 on the books a set of requirements that would be  
21 immediately outstripped and outdated by development of  
22 the technology. There's some concern about the ability  
23 of law -- and particularly statutory law -- to keep up  
24 with innovation and development in the technology.

25 Can you think of some sort of statutory scheme

1           that would be less likely to be immediately obsolete?

2                       MS. SELIS: I have a suggestion on that and, in  
3 fact, Washington has a good example. Just this last  
4 session, we realized that not only a conventional Spam  
5 problem but text messaging, which is its own form of  
6 Spam, is a problem, too, and our legislature just passed  
7 a law prohibiting commercial text messaging. I think it  
8 might be the first one in the country, but it points out  
9 what Eileen just mentioned that you've got technological  
10 changes, sort of variations on a theme, and how are you  
11 going to keep up with them. And I don't think you can do  
12 by coming back to your legislature year after year after  
13 year with a new problem.

14                      Now, the FTC, I think, is set up to deal with  
15 that far better than the states in what you have rule-  
16 making authority at the FTC, and if you wrote a statute  
17 that provided for rule-making at the FTC, which could  
18 allow for those changes, those subtle changes -- granted  
19 not wholesale changes to the law by the FTC, but  
20 something within the FTC's ability to change -- I think  
21 you'd have a built-in mechanism for some kind of  
22 flexibility.

23                      MS. HARRINGTON: Chuck, you wanted to say  
24 something, it looked like.

25                      MR. CURRAN: Yeah, actually, I don't think it's

1 necessarily as great a challenge. There's a problem with  
2 drafting to technology if you get lost in the weeds of  
3 the technology. However, if you, you know, certainly  
4 from the kinds of what I call the outlaw Spam, the  
5 fundamental activity is the acts of falsifying your  
6 location and your identity.

7 Technologies may vary, but if you draft to the  
8 fundamental act that's occurring, basically people are  
9 engaging -- concealing who they are, what they're doing,  
10 how much they're sending -- in order to trick ISP and  
11 individual consumer filters.

12 So, I think you can anticipate new technologies  
13 by simply saying it's the act of concealment, you speak  
14 to those by-whatever technological means.

15 MS. HARRINGTON: Do you suggest that the volume  
16 issue is one that should be left alone -- legislatively/  
17 statutorily?

18 MR. CURRAN: The volume issue is a very  
19 difficult issue because, certainly, every day, seven by  
20 24, the Spammers are out there on a technology side  
21 testing whatever filter -- if you say the number is 10,  
22 they're at nine; if you say the number is 100 -- and the  
23 nature of SMTP -- mailing protocols -- allows mail  
24 transmissions to be broke up into so many little packets  
25 that mail, as sent by sophisticated Spammers today,

1 generally comes in in a kind of diffuse cloud. It's very  
2 difficult to identify one source.

3 So, you know, trying to hit a number is  
4 something of a drafting trap. It encourages Spammers to  
5 just come up with one more game to beat the number  
6 somehow. But once, again, if you draft creatively with  
7 keeping an eye on the fundamental objective, you can  
8 reach the act.

9 MR. PATRICK: I disagree.

10 MS. HARRINGTON: Who said that?

11 MR. PATRICK: John.

12 MS. HARRINGTON: John?

13 MR. PATRICK: You really can't. I mean, we are  
14 moving into a world whose identity is going to be  
15 extremely difficult to define. Is it our virtual  
16 identity? Is it our wireless identity? What kind of  
17 identity are we talking about? And you can't define that  
18 from a legislative point of view.

19 You can define, however, content. And this is  
20 what's working today is that, although the techniques  
21 that were just pointed out, are happening in terms of  
22 randomizing the to address and the from address and the  
23 subject line and so on, the basic content of the message  
24 is basically the same.

25 And, so, collaboratively, if 1,000 people got a



1 message that contain service, similar kind of message,  
2 then it's probably Spam. And those are the techniques  
3 that are actually working. And people that use them  
4 don't get any Spam. It's just eliminated.

5 **(Mixed applause.)**

6 MS. HARRINGTON: Ray?

7 MR. EVERETT-CHURCH: I agree with Chuck that  
8 the minute you start trying to define technical processes  
9 and standards in legislation you slide into a morass.  
10 But legislation can encourage the adoption of certain  
11 approaches by granting safe harbors to those who adopt  
12 those approaches, by encouraging the use and creating  
13 some penalties for things like new technologies that may  
14 come down the pike that enable a better statement of  
15 identity, statement of content.

16 We'll see some proposals later today and the  
17 Coalition has endorsed one proposal that you'll hear, the  
18 Trusted E-mail/Open Standard, which would enable senders  
19 to state identity in a secure way; to state content  
20 assertions in a verifiable manner and legislation that  
21 encourages adoption of those standards and punishes the  
22 misuse of identity and misstatement of assertions, could  
23 encourage solutions, including better technical solutions  
24 without getting lost in the technology morass.

25 MS. HARRINGTON: I see people are getting a

1 little restless, and we're not going to take a formal  
2 break right now, but let's involve some of you in the  
3 discussion for a moment. Let's go to the video.

4 Steve, are you there with your mic? Great.  
5 Steve and Sheryl, you didn't know we were going to do  
6 this right now, not a problem.

7 Okay, Steve, let's go to this gentleman in the  
8 white shirt right here for a question for the panel.

9 TOM: Two points: One, you can tell the  
10 country where a packet of IP comes from, technically.  
11 So, if all the Spammers are in Tajikistan or China, we  
12 can filter. That's number one.

13 Number two, I believe that there is a scam  
14 behind every Spam. This is a law enforcement issue and  
15 we've got to give the law enforcement people the tools  
16 that they need to go after these organized crime.

17 MS. HARRINGTON: Okay, thank you.

18 TOM: And just, finally, I'd like to suggest  
19 the U.S. Postal Inspectors. They're doing this thing for  
20 the mails today. The rules say that they go after things  
21 that go through the physical post. The same exact job  
22 needs to be done online. They've got the tools, they've  
23 got the competence, give them the mandate for cyberspace.

24 MS. HARRINGTON: Okay. This gentleman, Sheryl,  
25 right here.

1                   DAVE CROCKER: My name is Dave Crocker,  
2            Brandenburg Consulting. I wrote a fair portion of the  
3            internet technical standards for doing e-mail. So, this  
4            is a fairly interesting topic to me.

5                    There's a peculiar mix coming from the table up  
6            there. One thing I would encourage people is to pay a  
7            lot of attention to the cautions being raised about the  
8            degree of control that is available. There was an  
9            observation made that making state laws is more for the  
10           purpose of getting Federal interest, because of the scope  
11           issue -- the scope of control.

12                   That is worse for Spam than it is for fax,  
13            because Spam can come from anywhere. There is an  
14            observation that generals tend to fight the last war --  
15            we need to be careful that when we pass laws we're not  
16            fighting the last Spam.

17                   Spammers are extremely adaptive. The things  
18            that work today -- I'm sorry -- the things that worked  
19            yesterday do not work today. The comment that content  
20            filters work today was true for me six months ago and  
21            useless today. The more adaptive techniques that are  
22            coming around in content filtering are much more  
23            powerful, but we are in an arms race if we take that  
24            approach. I think we need to take that approach because  
25            we need an array of tools.

1           My own view about Spam is that we need to view  
2           it the same way we view fighting roaches. You don't get  
3           rid of roaches, you bring them under control and you  
4           don't use one technique, you use an array, and you keep  
5           changing them over time because the roaches keep  
6           adapting.

7           So, let me suggest that there is a major value  
8           in legislation and the value is to create some very clear  
9           terminology that people will use consistently. And you  
10          may notice that is not yet true.

11          And the second is it creates some very clear  
12          guidelines for what's acceptable and what's not, because  
13          as we talk about Spam, we need to remember subscription  
14          mail, which in every technical detail looks exactly the  
15          same as Spam.

16          MS. HARRINGTON: Thank you. Is there anything  
17          in the mailbox? Brian, do we have some e-mail?

18          MR. HUSEMAN: Yes. Eileen, we have one  
19          comment, rather than a question. Why is the unsolicited  
20          bulk e-mail problem any different than the issues  
21          addressed by the existing fax advertising laws? With the  
22          existing fax advertising laws, we are not required to  
23          submit our fax machine number to an opt-out list.

24          MS. HARRINGTON: Any comment on that comment,  
25          from the panel?

1 MR. KRAMER: Yeah, it isn't, is the short  
2 answer to the question. The problem is almost exactly  
3 the same. I would suggest that it's far worse, in fact,  
4 in the context of e-mail, as I did previously, and I  
5 think the solution that we came up with as a society in  
6 1991 here ought to be the solution that we come up with  
7 to this problem in 2003.

8 MR. CURRAN: And Professor Sorkin wrote a  
9 definitive Law Review article saying that the TCPA can't,  
10 unfortunately, be stretched to cover Spam, but makes some  
11 really interesting arguments about how to do it.

12 MS. HARRINGTON: Okay. We're going to come  
13 back to you with your questions and comments in a minute,  
14 but I want to move to a couple of suggestions that we've  
15 heard from your legislative components in the last couple  
16 of days.

17 First, we heard from Representative Lofgren  
18 about her bounty hunting suggestion on Spamming. Does  
19 everyone on the panel know what I'm talking about?

20 That's all around. Okay. What do we think?

21 MR. KRAMER: The San Jose Mercury News, which  
22 is a very tech-savvy paper in Congressman Lofgren's  
23 district, panned it twice. Basically, the Mercury News  
24 thinks that a TCPA-like legislative solution is the  
25 appropriate one.

1                   The problem with Congressman Lofgren's  
2                   legislation is that it's solving a problem that really  
3                   isn't the problem. I have never had a problem finding  
4                   the person I wanted to take action against. The problem  
5                   was, an economical matter, it wasn't justifiable for me  
6                   to sue that person. The person who is sending you Spam  
7                   wants to sell you something, and with a little social  
8                   engineering and a little investigation, you can almost  
9                   always find out who that person is, if you want to take  
10                  action against them and if there's enough economic  
11                  justification for doing so. If you invest in resources,  
12                  you are more often than not going to find the person.

13                 MS. HARRINGTON: Let me just take issue with  
14                 that, David. I think our people are as nimble and  
15                 skilled as any in finding Spammers, but there's a certain  
16                 category of Spammers who are not trying to get money, and  
17                 they are very difficult to find. You know, law  
18                 enforcement can follow the money, but if people are  
19                 doing, you know, nasty and, you know, pranksterious  
20                 things that impose significant cost but they aren't  
21                 trying to collect money, then they are hard to find.

22                 MR. KRAMER: Agreed. No, this is not a  
23                 complete solution to the problem. I agree with everyone  
24                 that has said that this is one of the tools that we need  
25                 in the arsenal in the fight against Spam. I do not think

1           that any kind of legislation is going to eliminate the  
2           problem. I do think it will help bring it under control  
3           and that we ought to be thinking about ways we can do  
4           that.

5                         The concern that has been expressed that you  
6           can't find these people, is simply a red herring in a lot  
7           of cases. In a lot of cases, you can find these people  
8           and you can't take action against them.

9                         MS. HARRINGTON: Okay. Anyone else in the  
10          Lofgren proposal here? We're not going to hear from --  
11          keep your hands down out there right now -- we'll come  
12          back to you, don't worry.

13                        MR. RICHTER: I would just add that, you know,  
14          anybody can learn how to track down Spammers. I have a  
15          free website for people -- [privacyfordummies.com](http://privacyfordummies.com) -- has a  
16          tutorial that can teach anybody how to do what  
17          Congressman Lofgren is encouraging. The problem, again,  
18          isn't finding the Spammers, it's getting law enforcement  
19          to act or to have a private right of action for an  
20          individual to act.

21                        The other component is --

22                        MS. HARRINGTON: Well, where are you then?  
23          Representative Lofgren would say that, I would imagine,  
24          that her proposal would make it easier for law enforcers  
25          because people would be out there turning in these bad

1 Spammers.

2 MR. RICHTER: Well, I think --

3 MS. HARRINGTON: Do you like this idea?

4 MR. RICHTER: -- the FTC's -- I don't like the  
5 idea. The FTC's own UCE@ftc.gov mailbox is proof  
6 positive that there's no lack of complaints about Spam  
7 out there. You can find Spammers relatively easily,  
8 although there are evidentiary requirements to bringing  
9 an action that even state Attorneys General have  
10 difficulty meeting.

11 So, I don't see that an individual, unless  
12 you're somehow going to encourage people to hack into  
13 systems and find the kind of data that it takes subpoenas  
14 to otherwise obtain. Without that kind of action, you're  
15 not going to get any more useful information by creating  
16 a bounty.

17 So, I would agree with David, it's a solution  
18 for a problem that doesn't really exist.

19 MS. HARRINGTON: Is there anyone on the panel  
20 who wants to speak in favor of Representative Lofgren's  
21 approach?

22 **(No response.)**

23 MS. HARRINGTON: Representative Lofgren, we  
24 love you, but the panel doesn't love your proposal.

25 Let's turn to the Schumer approach, which



1 suggests the creation of a national Do Not Spam Registry  
2 that the FTC would run and --

3 UNIDENTIFIED SPEAKER: Lucky you.

4 MS. HARRINGTON: -- yeah. But Representative  
5 Schumer said that if this becomes law, we're going to get  
6 a lot of money to do this. And all I can say is, we  
7 would need it.

8 MR. SORKIN: Let me suggest a really easy way  
9 that the FTC could run that registry: Allow the listing  
10 of top-level domains, like .com.

11 **(Group laughter.)**

12 MS. HARRINGTON: And who would have the  
13 authority to register the domain?

14 MR. SORKIN: Preferable anybody but ICANN.

15 **(Group laughter.)**

16 MS. HARRINGTON: Okay, there's a thought.

17 MR. PATRICK: Eileen?

18 MS. HARRINGTON: Yes? John?

19 MR. PATRICK: Yeah, on this registry, it's a  
20 tempting idea. Many of these ideas are tempting and  
21 they're well-founded sort of philosophically, but they  
22 just -- they're not practical. I mean, look at the  
23 challenge --

24 MS. HARRINGTON: Why? Tell me really  
25 concisely, why this isn't practical?

1 MR. PATRICK: Well, because people change their  
2 e-mail addresses all the time; ISPs fold, new ones come  
3 up. We can't manage security very well in many  
4 instances, what makes us think we could do this? There  
5 are things much simpler than this that we can't do.

6 MS. HARRINGTON: Why is it significant that  
7 people change their e-mail addresses? Say, that I change  
8 my e-mail address every month and register my new e-mail  
9 address every time I change it. What's the problem?

10 MR. PATRICK: Well, again, it's just not an  
11 American problem, it's a global issue. People don't like  
12 Spam anywhere in the world, and trying to solve this at a  
13 local level, which is America, is just not practical. It  
14 doesn't address the entire issue.

15 MS. HARRINGTON: Well, we'll have a separate  
16 workshop on the Tajikistan --

17 **(Group laughter.)**

18 MS. HARRINGTON: -- and there's actually an  
19 international panel following, and I think that these are  
20 some of the issues that they will deal with, but Jerry?

21 MR. CERASALE: Well, unlike the telephone,  
22 where a do-not-call-list works, has worked in the states  
23 and so forth, and even the DMA list has been around since  
24 '85, where the fraudulent people were in telephone  
25 marketing or on the fringe, it's the legitimate marketers

1           that are on the fringe and the simple core are  
2           fraudsters, in essence.

3                         And they're not going to follow. And, so, I  
4           think that you have a problem that it's not going to work  
5           because the basis of the users are not necessarily law  
6           abiding.

7                         The other thing, from a marketer's standpoint,  
8           raises a real problem for us -- and we've seen this in  
9           part with even exemptions in phone lists -- if it doesn't  
10          work, that the fraudsters don't use it, and you put  
11          out -- we have this national registry and Jerry Cerasale  
12          enters the registry, I assume that's going to work, it's  
13          going to stop Spam, and I'm going to get inundated with  
14          it, still, plus the legitimate marketers will use the  
15          list, we're still going to be painted with the same brush  
16          that we don't even follow the law.

17                        And, so, I think you have that kind of a  
18          problem. You don't want to set up that list when there  
19          is little likelihood that it's going to be successful.

20                        MS. HARRINGTON: Well, would the purpose of  
21          this kind of law be, do the panelists think, primarily to  
22          reduce the volume of unwanted Spam or to provide an  
23          easier enforcement hook for law enforcement?

24                        MS. SELIS: Well, actually, that's exactly what  
25          I was going to say. Looking at the state as a

1 laboratory, when we created a do-not-call-list, what it  
2 did for us is that enforcement authorities -- it enables  
3 us to go in and file what's called a summary judgment.  
4 We didn't have to prove anything, all we had to show was  
5 that Joe Blow's name was on this list, he got the call  
6 anyway; therefore, a judgment in favor of the state.

7 And I think that's the utility of having a do-  
8 not-spam list, it enables the enforcement authority to go  
9 in and get a pretty quick judgment against the spammer  
10 without having to prove more.

11 Jerry does point out something that I think is  
12 important, and that is that when you have a list, it  
13 creates an expectation on the part of the consumer that  
14 he or she is not going to receive spam. When they do,  
15 they get angry. They think, gee, I thought this law was  
16 out there to protect me, and it's not.

17 So, there has to be some important consumer  
18 education that goes along with it.

19 MS. HARRINGTON: Okay.

20 MR. PATRICK: It's a database management  
21 problem, also, in that -- that's what I mean by it's not  
22 practical. I mean, when American Express sends out an e-  
23 mail every month to tell you that it's time to pay your  
24 bill, they send out very large numbers of these e-mails.  
25 UPS is one of the largest e-mail generators in the world;

1 and FedEx and Airborne. So --

2 MS. HARRINGTON: The point being perhaps if  
3 there were such a law, there would need to be an  
4 exception for e-mail from --

5 MR. PATRICK: Yes, I mean, this is a human cry  
6 right now, from associations, for example, the IEEE, or  
7 the Association of Computing Engineers or, I mean,  
8 there's thousands of associations, as you know. Right  
9 here in Washington there's thousands of them. They all  
10 have e-mail newsletters. All companies are moving toward  
11 legitimate e-mail for purposes of customer service; for  
12 purposes of order acknowledgment.

13 MS. HARRINGTON: Well, this gets us back to the  
14 definitional issue that we discussed on the very first  
15 panel; and that is, if Spam is defined in the law as  
16 including unsolicited and bulk, and we look further at  
17 the solicitation definition to exclude, you know,  
18 membership --

19 MS. HARRINGTON: Pardon me?

20 MR. PATRICK: You can't define it. I mean,  
21 American Express' monthly statement is bulk, unsolicited  
22 e-mail.

23 MS. HARRINGTON: No, not necessarily. If  
24 there's a contractual relationship --

25 MR. PATRICK: Well, it's --

1 MS. HARRINGTON: -- or an existing business  
2 relationship, I mean, there are ways --

3 MR. PATRICK: That's the point. I mean, so in  
4 this database we have to have a field to say, well, this  
5 particular case is an exception because there's a  
6 contractual relationship. Who's going to administer this  
7 database?

8 MR. SORKIN: This is exactly the case where the  
9 law can do better than the technology can in defining  
10 things like unsolicited.

11 MR. PATRICK: Not really. The only person that  
12 can define Spam is the recipient. Nobody can define it,  
13 but you know it when you see it.

14 MR. KRAMER: That's why you have laws.

15 MR. PATRICK: The law defines what Spam is, and  
16 if the definition in the statute is unclear, that's why  
17 you have courts. Why don't we define pornography?

18 MS. HARRINGTON: Excuse me, all right. We're  
19 going to continue on this discussion of the do-not-Spam  
20 with original thought here.

21 MR. KRAMER: I actually think that short of a  
22 ban on unsolicited commercial e-mail, that a do-not-Spam  
23 list in which I can put my name and know that having put  
24 it there I should not receive, and if I do receive any  
25 further unsolicited commercial e-mail, that it's a

1 violation of the law, if it gives me a private right of  
2 action, I am in support of that -- short of a complete  
3 ban on unsolicited commercial e-mail, because it doesn't  
4 put the burden on me to opt-off of all these lists and it  
5 does give me some measure of comfort, at least knowing  
6 that this will reduce if not eliminate unsolicited  
7 commercial e-mail. I don't think any of us can say that  
8 putting your name on a list is going to completely stop  
9 this problem, but it will help bring it under control.

10 So, short of a ban, I think this makes sense.

11 MS. HARRINGTON: Ray?

12 MR. EVERETT-CHURCH: I have severe concerns  
13 about the logistics of how a list would be operated. I'm  
14 all in favor of giving you lots more money, though,  
15 Eileen, so --

16 **(Group laughter.)**

17 MS. HARRINGTON: David?

18 MR. SORKIN: I think, in theory, or at least in  
19 looking at some of these proposals in the most charitable  
20 light, they may end up merging into an opt-in regime, if  
21 we have a do-not-e-mail list that contains every e-mail  
22 address of everyone who doesn't want Spam -- it's hard to  
23 imagine a database large enough to hold that -- but if we  
24 have such a list, or if we have an ADV law that requires  
25 an ADV label on every Spam and every internet provider

1 declines to transport any e-mail that has that label, and  
2 we allow them to do that, then what we effectively have  
3 is a legislative ban on Spam that doesn't admit that it's  
4 one.

5 Or if we have a law that says every internet  
6 provider has the authority to enforce it's anti-Spam  
7 policy as long as they post it on a webpage somewhere --  
8 which we almost have in Ohio, but not quite. Again, we  
9 have something that becomes the equivalent of a ban on  
10 Spam -- an opt-in law.

11 Now, I think it probably has the same potential  
12 Constitutional problems as such a law, so I don't think  
13 it gets us around that question, and it's certainly less  
14 efficient, but if that's possible, then we may have  
15 another way of doing an opt-in without really admitting  
16 that's what we're doing.

17 MS. HARRINGTON: Okay. I'm going to turn to  
18 the big brain in the back row, Brian, do you have any  
19 questions that you'd like to hear the panel talk about?

20 MR. HUSEMAN: I do have one kind of technical  
21 question about the Burns-Wyden, but I think it is an  
22 important point. My understanding of the current draft  
23 is that the requirements that messages include an opt-out  
24 notice and, also, a physical address, those requirements  
25 only apply to unsolicited commercial messages. And I'm



1 wondering what is the panel's view on whether those  
2 requirements, including requiring messages to have an  
3 opt-out, should apply to all commercial messages rather  
4 than just unsolicited messages.

5 MS. HARRINGTON: Okay, Jerry, you get the first  
6 crack.

7 MR. CERASALE: Like I said, we support Burns-  
8 Wyden, but we believe that every commercial message  
9 should have an unsolicited and should clearly state who's  
10 sending it with a physical address where they can find  
11 you; physical address does not include a post office box.

12 MS. HARRINGTON: So, should apply to all, is  
13 the DMA view?

14 MR. CERASALE: Should apply to all.

15 MS. HARRINGTON: Chuck?

16 MR. CURRAN: I think as a matter of practice  
17 today, all commercial e-mail from the reputable senders  
18 contains opt-out messaging, just sort of mainstream  
19 companies are using that.

20 So, I think Burns-Wyden is about baseline  
21 standards and I actually disagree with some of my  
22 colleagues, I think they've done a good job in defining  
23 and attempting definitions of Spam.

24 But, you know, Burns-Wyden doesn't necessarily  
25 have to address -- as a matter of ISP practice, we can

1 set our own policies as well as it relates to certain  
2 kinds of desirable practices that we'd want to see.

3 So, I don't think it has to be necessarily  
4 decided entirely as a matter of legislation. Obviously,  
5 companies and technologies that can be developed that  
6 would kind of signal that perhaps higher practices are  
7 being followed by the sender, and those could be passed  
8 on through to the recipient.

9 So, you have to -- there's not just a  
10 legislation option, but there are also technology  
11 options.

12 MS. HARRINGTON: Ray?

13 MR. EVERETT-CHURCH: From the consumer point of  
14 view, having the ability to identify the sender is a very  
15 valuable thing, not only for weeding out the folks that  
16 you distrust, but for being able to recognize the folks  
17 that you do trust. That you see a communication from  
18 somebody that you recognize you have a relationship with,  
19 and that there is some recourse, some ability to contact  
20 them, as well as a standardized opt-out mechanism.  
21 That's something that technology can provide, but a  
22 baseline requirement of all commercial e-mail having some  
23 sort of standardized mechanism for removal would assist  
24 consumers very greatly.

25 MS. HARRINGTON: Okay. Steve Richter, should

1 those provisions of Burns-Wyden apply to all, not just  
2 unsolicited?

3 MR. RICHTER: Yes. In order to become a member  
4 of EMA, you have to subscribe to doing that. So,  
5 absolutely in favor of it.

6 MS. HARRINGTON: Okay, David?

7 MR. SORKIN: I suppose it makes sense. I don't  
8 think they help as much to deal with Spam, but I don't  
9 have any problem with them. I suppose I'd also say we  
10 ought to do it in a medium/neutral way and require all  
11 direct advertisers to identify themselves and provide  
12 people with a way to get off the list or stop receiving  
13 the junk, regardless of whether it's e-mail or telephone  
14 or door-to-door or direct mail.

15 MS. HARRINGTON: Well, now, there's the DMA's  
16 worst nightmare.

17 **(Group laughter.)**

18 MR. PATRICK: Eileen?

19 MS. HARRINGTON: Yes?

20 MR. PATRICK: May I comment on that same point?  
21 Yeah, I think it's a really good, sensible business  
22 practice to provide opt-out and to also provide an easy  
23 way to communicate back to the business. But, again, to  
24 define that through legislation is really not a good  
25 idea.

1           There are many entrepreneurs in the world today  
2 who operate out of their home, have legitimate  
3 businesses, who do not necessarily want to reveal their  
4 physical address for their own personal security reasons.  
5 They may be a consultant providing advice and very  
6 successful at it, and they have a right to be able to  
7 participate in that kind of business.

8           So, the market can regulate this and consumers  
9 can select businesses that they want to do business with,  
10 based on these kinds of features, but to legislate it and  
11 define how an address should be specified or how the opt-  
12 out should work, would limit the innovation that's  
13 possible. We're only 2 percent of the way into what the  
14 internet offers, so why try to define how it should work?

15           MS. HARRINGTON: Brian, is that satisfactory  
16 for you?

17           MR. HUSEMAN: Yes.

18           MS. HARRINGTON: Good. All right, I want to  
19 shift to a different question, and that is whether there  
20 should be criminal sanctions for some kinds of Spam. I  
21 think what we've been talking about so far are  
22 legislative proposals and, for the most part, except for  
23 Virginia state laws, that impose civil or administrative  
24 sanctions on those who violate or would violate these  
25 statutes.

1           Is there a kind of Spamming activity that  
2           should implicate criminal law? Chuck, you guys have been  
3           like major proponents, out in Virginia, of this new law.

4           MR. CURRAN: Yes, there are the people we  
5           believe are responsible for the greatest volume and the  
6           most objectionable Spam consistently use any number of  
7           techniques of falsification or stealing other's accounts,  
8           we think of it as a kind of computer crime. And I might  
9           add that Virginia is not the only state to have laws.

10           Many other states do recognize the sort of  
11           criminal element to the large-scale behavior that's going  
12           on. I think Connecticut, Arkansas, Illinois, North  
13           Carolina -- there's a school of thought in the states  
14           that this is a particular kind of problem that is  
15           recognizable as an act of using method of concealment to  
16           get stuff through and appropriate advertising resources.  
17           It's a form of theft -- burglary tools.

18           MS. HARRINGTON: What would the triggers, you  
19           know, be for imposing or possibly imposing criminal  
20           sanctions?

21           MR. CURRAN: I think they probably boil down to  
22           three concepts: One is just a flat-out falsification of  
23           header or transmission information to conceal identity  
24           and scope of mail.

25           MS. HARRINGTON: And doing that intentionally

1 would be the intent to falsify?

2 MR. CURRAN: Yes, that's right. Secondly,  
3 certainly if I hack into hundreds of people's accounts,  
4 take them over, take over my grandma's account on AOL in  
5 order to send mail, which is not dishonestly addressed,  
6 but obviously not from my grandma, that's a form of  
7 hacking that's a well-recognized defense.

8 And, finally, third you see the systemized  
9 taking over of free e-mail accounts by the hundreds for  
10 the purpose of disguising mail transmissions.

11 So, yeah, we believe that there's a clear  
12 pattern of activity that supports the large-scale  
13 spamming and that it can be reached, obviously with  
14 appropriate gradations, obviously, not just one mail  
15 should be a felony, but with appropriate tiers and  
16 triggers reflecting the amount of money or the amount of  
17 mail sent. It's possible to appropriately define  
18 offenses in the same way we do for many other crimes.

19 MS. HARRINGTON: Thoughts on criminalization?  
20 Paula?

21 MS. SELIS: I agree with what he said, I agree  
22 with that. I also think there's a practical issue,  
23 though, that we can't really ignore and that is whether  
24 prosecutors are going to take these cases.

25 It's all well and good to have a law on the

1 books, and the question is what are the competing  
2 problems that those prosecutors are having to grapple  
3 with -- budgets, other cases that involve physical crimes  
4 as opposed to property crimes. And the perception,  
5 unfortunately, that the big guys, you know, the ISPs  
6 might be able to take care of themselves in the civil  
7 arena.

8 So -- and I'm not citing anybody in particular  
9 for having that position. So, I think that it might give  
10 you a sort of false sense of security in some sense to  
11 have a criminal law on the books, but the practical  
12 reality may well be that a prosecutor -- Federal or state  
13 prosecutor -- may not have resources or time to take  
14 those cases.

15 MS. HARRINGTON: Other thoughts on the issue of  
16 criminalization? Jerry?

17 MR. CERASALE: The DMA supports AOL and it's  
18 approach here, as we take a look at it. One of the  
19 things that -- and this is beyond our panel here, so I  
20 apologize for 30 seconds -- I think, as another facet of  
21 how we can go after Spammers is -- and we're starting to  
22 try and do this -- is to get together with ISPs and even  
23 law enforcement, to see what kinds of things can  
24 marketers, ISPs do, to gather information to give to  
25 prosecutors to assist them, in both civil and criminal

1 cases, to help them put together a case, in part. And  
2 there are a lot of legal issues and so forth, and we're  
3 just starting that.

4 But those are some of the things that we're  
5 looking at, as well, and I think go beyond the  
6 legislation but we'll try to answer the issue there of  
7 resources and effort to try to help in that sense.

8 MS. HARRINGTON: All right. I'm going to shift  
9 for a minute before we go back to our wonderful audience  
10 members for questions, and ask each of the panelists to  
11 take full advantage of the fact that we have C-SPAN with  
12 us together and perhaps, in addition to Congressional  
13 staffers who are here, we have members who are watching.

14 There's been a great deal of discussion, I  
15 think on-line and off-line, about Federal legislation and  
16 whether, ultimately, it will make matters worse, not  
17 better. And, certainly, all of us who work in the public  
18 policy arena sometimes view the process of developing  
19 legislation as being similar to that of making sausage.

20 I think that I'd like each of the panel members  
21 to look right into our camera and give us 60 seconds of  
22 your most fervent wish and intent with regard to  
23 Congressional action on legislation. What is the thing  
24 that would be a disaster; what is the thing that you most  
25 want or wish; what would say if you hold the pens of the



1 members as they write and draft?

2 And I'll ask for a volunteer to go first on  
3 this, instead of putting anyone on the spot.

4 MR. SORKIN: I'll go first.

5 MS. HARRINGTON: Sixty seconds.

6 MR. SORKIN: I'll take less than that, do no  
7 harm and opt-in. If you can't do anything other than  
8 opt-in, leave the technologists to do what they can.

9 MS. HARRINGTON: David, excellent. Who would  
10 like to go next?

11 MR. PATRICK: I'll go. Sixty seconds.

12 MS. HARRINGTON: John?

13 MR. PATRICK: Well, I would suggest put your  
14 pens away.

15 **(Group laughter.)**

16 MR. PATRICK: We do not need legislation, and  
17 this is a time to be very optimistic -- very optimistic,  
18 actually, about Spam. There are a lot of good things  
19 happening. Commissioner Swindle pointed out that three  
20 of the major internet service providers are getting  
21 together; they're competitors and they're getting  
22 together and talking about this.

23 MIT recently held a technology conference and  
24 some of the smartest computer scientists in the world are  
25 really intrigued by this problem, and they have a lot of

1 good ideas.

2 Venture capitalists see this as an opportunity  
3 to make money. Wherever there's a problem, there's a  
4 chance to make something out of it. And, so, they're  
5 investing in companies that are actually doing the roach  
6 approach, that the gentleman in the back talked about,  
7 and it's working.

8 It is a moving target, but they're moving very  
9 quickly on this, and there are people that actually get  
10 no --

11 MS. HARRINGTON: Five seconds.

12 MR. PATRICK: -- Spam, because they use this.  
13 So, put your pens away, just wait a little bit.

14 MS. HARRINGTON: Ding. Next?

15 MR. KRAMER: This is an enormous problem; it's  
16 been a problem for 10 years and Congress hasn't acted  
17 yet. It needs to act now. The problem has reached  
18 epidemic levels; the cost of Spam to the industry, to  
19 businesses and, ultimately, to consumers, is staggering.  
20 This cries out for a legislative solution, and the  
21 legislative solution is right in front of us. We already  
22 have a model for it -- it's the junk fax statute. Spam  
23 raises the same problems as does junk faxes.

24 We need a legislative solution that allows me,  
25 and anyone else who feels aggrieved by a particular

1 message, to go to court and take action on his or her own  
2 behalf, seeking statutory damages, seeking a penalty  
3 against the Spammer for its misconduct in such a manner  
4 as to vindicate the public interest and to tell Spammers  
5 that their messages have consequences; to change the  
6 economics of Spam; to put the costs back where they  
7 belong, on the Spammers --

8 MS. HARRINGTON: Five seconds.

9 MR. KRAMER: -- and get them off of consumers.

10 MS. HARRINGTON: Excellent, Dave.

11 **(Applause.)**

12 MS. HARRINGTON: You guys are really the  
13 masters of the 60-second pitch. Who's next?

14 MS. SELIS: That's a hard act to follow, but I  
15 have to point out that David used to be in radio at one  
16 point in his life.

17 **(Group laughter.)**

18 MS. SELIS: He has professional training here.  
19 I think the most important thing for the states, and for  
20 consumers, is to have effective, substantive enforcement  
21 provisions that enable people to go into court and get  
22 relief, and that it will ultimately make more sense for a  
23 Spammer to stop Spamming than to keep making money.

24 In other words, I think it's an economic  
25 incentive issue. As long as a Spammer can continue to

1 make money by sending out big volumes -- maybe getting a  
2 1 percent return -- it makes sense for him to keep  
3 Spamming. But the minute he has to face criminal  
4 penalties, statutory damages, the threat of big lawsuits,  
5 he'll stop. It's a dollar-and-cents issue, and if the  
6 balance is on the side of fear of enforcement, the  
7 Spamming will stop.

8 MS. HARRINGTON: Excellent, thank you. Who's  
9 next? Ray?

10 MR. EVERETT-CHURCH: I would urge you to resist  
11 the temptation to repeat past mistakes, and we've seen  
12 mistakes in anti-Spam legislation. Opt-out approaches  
13 have not worked; labeling has not worked; and look beyond  
14 the borders. Labeling approaches in other countries have  
15 not worked. Other countries have moved steadily toward  
16 an opt-in approach. Business can live with opt-in --  
17 business lives every day with opt-in -- they do great  
18 good and great business by adopting opt-in approaches.  
19 The law can encourage companies to do the right thing, to  
20 encourage best practices, if the law works to encourage  
21 opt-in.

22 MS. HARRINGTON: Okay. Next? Chuck?

23 MR. CURRAN: I'll take a shot here. We believe  
24 that technology and legislation compliment each other in  
25 terms of solutions. There is no magic bullet, and

1 certainly penalties with teeth for the outlaw Spammers  
2 will reduce the incentives and create the kinds of  
3 deterrents we think are necessary.

4           Legislation is also needed, we think, to uphold  
5 the integrity of the technologies. The unfortunate  
6 history of anti-Spam technology is that it's been  
7 circumvented. And, so, legislation, just like in any  
8 other kind of criminal activities, needed to back up and  
9 set boundaries for activity. Certain technologies can  
10 solve a lot of problem and make the experience better,  
11 but legislation has to be there to provide the back-up  
12 for those who step outside and transgress the boundaries  
13 that we've set.

14           So, we support both approaches and think there  
15 is a role for Federal legislation to provide the kind of  
16 backstop to a good consumer experience.

17           MS. HARRINGTON: Okay. We haven't heard from  
18 Steve.

19           MR. RICHTER: Well, I want to say that we can't  
20 wait for Enron and WorldCom to hit this industry where  
21 we're going to make examples of a few and hope that the  
22 others run or then we catch them and we fine them.

23           This is something that has got to go right now,  
24 and my feeling is that legislation has to go, if it's not  
25 the best legislation, we can always catch up with it

1 later. But the EMA absolutely would like to see the  
2 Spammers out of business and I agree it's economic, we  
3 have got to go after their pocketbooks and that will put  
4 them out of business.

5 MS. HARRINGTON: Okay. I think Jerry, it's to  
6 you.

7 MR. CERASALE: Well, we need legislation. We  
8 have to go after the bad actors who are just swamping  
9 this internet system, and we have to also open the  
10 pocketbook, give money for the Federal enforcers to  
11 enforce whatever law you have. That is absolutely  
12 required. If you don't do that, don't bother writing a  
13 law.

14 But you also have to keep in mind that the  
15 internet is an unbelievable economic and informational  
16 system, and you can't -- don't close it up. It's 10  
17 years old, it's still a relatively new technology, in all  
18 other channels of marketing; for example, pornographers  
19 have come first; and we're still in that stage. Don't  
20 close it; let's try and protect it and keep it open so in  
21 the future this can be an economic driver for our country  
22 and the world economy.

23 MS. HARRINGTON: Thank you. We're going to go  
24 to Commissioner Thompson in just a moment, but speaking  
25 only for myself, as a staffer at the FTC, and not on

1       behalf of the Commissioner or any individual  
2       Commissioner, I would say two things to members and  
3       Senators: Please make it an offense to send Spam to  
4       Commissioner Swindle because he forwards it all to me.

5                   **(Group laughter.)**

6                   MS. HARRINGTON: So that's my first concern,  
7       and the second is on a more serious note, if you do  
8       anything that implicates the Federal Trade Commission,  
9       please give us the resources to carry out your intent.

10                  Now, Commissioner Thompson?

11                  COMMISSIONER THOMPSON: First of all, I want to  
12       thank you all for being here. I thought this was a great  
13       panel in hearing from you. But I wanted to maybe sharpen  
14       the pencil a little bit, because I heard a range of  
15       responses to one topic, and we've talked about whether  
16       some Federal response is appropriate and what the nature  
17       of that response should be.

18                  I guess I'm a little bit concerned about  
19       timing. Have we reached a tipping point, in your eyes,  
20       that you think for the Federal Government not to do  
21       anything would be inappropriate?

22                  MS. HARRINGTON: Very good question.

23       Panelists? Ray?

24                  MR. EVERETT-CHURCH: If I could just echo what  
25       I said at the opening, the Coalition Against Unsolicited

1 Commercial E-mail has been working on this issue since  
2 1997, when we were founded. We felt that it was a  
3 problem then and a growing problem, and that the dire  
4 predictions we made and were laughed at for have,  
5 unfortunately, come to pass.

6 So, I'm here to say, we told you so. And a bad  
7 solution, a bad legislative solution will only exacerbate  
8 the problem. It's past time for a solution.

9 MS. HARRINGTON: Steve?

10 MR. RICHTER: Commissioner, I would tell you  
11 that it's a disincentive to anybody not wanting to Spam  
12 the longer the Government waits to get into this; that  
13 the state laws and the precious little that they can do  
14 is just not enough; and to me this is a rabbit farm and  
15 every single day there's more rabbits, being the  
16 Spammers, and there's no reason to tell them to stop  
17 proliferating.

18 MS. HARRINGTON: David?

19 MR. KRAMER: I think that we've gotten to the  
20 point where businesses recognize what a serious problem  
21 this is. If we're not in this for the consumers,  
22 recognize that businesses are spending hundreds of  
23 thousands of dollars to protect the productivity of their  
24 enterprises against the onslaught of Spam.

25 At that point, you know that there's a real



1       problem here. They're looking for solutions; technology  
2       can provide some relief; but legislation can provide  
3       more.

4                   MS. HARRINGTON: John?

5                   MR. PATRICK: Well, I think it would be a  
6       mistake to take any legislative action, as I've said, and  
7       there isn't time to go into all the technology, and I  
8       wouldn't attempt to do that, but I can tell you that the  
9       technology is working for companies and for individuals.  
10      And a lot of the Spam does come through employers and  
11      employers are putting technology in their mail servers  
12      that are examining the pattern of what's coming in and  
13      eliminating huge amounts of it.

14                  MS. HARRINGTON: Okay.

15                  MR. PATRICK: So, technology does work, and we  
16      need to give it just a little more time.

17                  MS. HARRINGTON: Okay. The tipping point  
18      question, Chuck?

19                  MR. CURRAN: I absolutely think we reached our  
20      kind of viral level, critical mass in the last year, and  
21      that everyone is now experiencing the sheer load of, as  
22      fewer and fewer people respond to any sort of e-mail, the  
23      Spammers are just turning up the dial in terms of what is  
24      being sent, and that is what is really rippling out, not  
25      just the consumerized P level, but at the transport

1 network level, at the business level, and there really  
2 are no impediments to growth other than stronger  
3 penalties and decisive action, otherwise there's nothing  
4 to stop the growth.

5 MS. HARRINGTON: Any panelist have anything to  
6 add on this tipping question, whom we haven't heard from?

7 MR. SORKIN: Yeah, I think we're at the tipping  
8 point, to mix two or three metaphors, with the bills I  
9 see in Congress now, I'm afraid we're going end up on the  
10 wrong side of the cow.

11 **(Group laughter.)**

12 MS. HARRINGTON: Moo! Okay. Let's open it.  
13 Steve, would you catch this gentleman in the dark blue  
14 shirt?

15 MR. PRINCE: I'm Matthew Prince from On-Spam.  
16 Hopefully it's clear that we're on the right side of this  
17 debate. I wanted to merge a couple of different issues  
18 that came up.

19 The first is, to start out with the Schumer  
20 proposal -- or taking that actually down to the state  
21 level -- there are currently eight states considering do-  
22 not-e-mail registries on the state level. I was actually  
23 just in Michigan the other day speaking with them about  
24 the subject.

25 The second is the state actions and making

1 state laws effective, and the third is private causes of  
2 action. It seems to me that there's an additional  
3 benefit of a do-not-e-mail registry that it associates a  
4 jurisdiction with an e-mail address. It says that  
5 there's a jurisdictional hook onto which a State Attorney  
6 General can latch onto a lawsuit, in addition to  
7 providing the summary judgments and more effective means  
8 of going to court and getting a quick judgment, you can  
9 also actually latch on the laws that states are passing,  
10 helping solve many of the problems that we're having.

11 MS. HARRINGTON: What you mean is that there is  
12 victim-venued jurisdiction, clearly, in the do-not-Spam  
13 laws that help states that may not otherwise be able to  
14 effectively assert jurisdiction?

15 MR. PRINCE: If I have an e-mail address,  
16 matthew\_prince@hotmail.com, whose jurisdiction applies?  
17 Is it Redmond, Washington, where Microsoft is based? Is  
18 it Santa Clara, California where Hotmail servers are  
19 based? What states are trying to say is their  
20 jurisdiction should be able to cover me, a citizen of the  
21 state. The problem with e-mail is that it is, at some  
22 level, jurisdiction-free, and until you solve that  
23 problem, there's going to be no way for a state just to  
24 address the issues on a state-by-state-by-state basis.

25 Furthermore, this actually can extend to the

1 Federal level. Everyone has said, what is the problem?  
2 If I'm a Spammer and I'm sending out mail, how do I know  
3 whether an address is in the United States or it's in  
4 Canada? That seems like an absolute defense -- and going  
5 back to my first year of law school, I mean, that's an  
6 impossibility, right?

7 I don't know what law applies and, then,  
8 therefore, there is no way for me to ever comply with the  
9 law unless I'm on notice of what I need to comply with.

10 MS. HARRINGTON: Okay, thanks.

11 MS. SELIS: You're absolutely right, and I  
12 think it's really a state problem more than a Federal  
13 problem. In Washington we dealt with that issue by  
14 creating a registry, but the state didn't create the  
15 registry; the state didn't have the resources to create  
16 the registry and our legislature refused to create it  
17 legislatively.

18 So, what happened was an association of  
19 internet service providers, The Washington State Internet  
20 Service Providers Association, put up an on-line registry  
21 so that people could register themselves as Washington  
22 State citizens, enabling the state to come in and assert  
23 jurisdiction.

24 So, you point out a very good point and that is  
25 that one of the hurdles that states have to jump over is

1 that jurisdictional one, which is yet another reason why  
2 there should be Federal legislation.

3 MS. HARRINGTON: Okay. Sheryl, let's go to the  
4 gentleman back with the glasses and the shirt and tie.  
5 To that handsome devil in the back row. It's hard to  
6 describe people in the audience from up here without  
7 offending.

8 UNIDENTIFIED SPEAKER: First of all to John, I  
9 would make a brief comment, which is, I spent the last  
10 year and a half working on anti-Spam filtering technology  
11 and more recently corresponding with a lot of the people  
12 throughout the industry who are working on the  
13 technology, and they are not nearly as confident as you  
14 are. I think everyone who is working on the technology  
15 feels severely the limits of what can be done by  
16 technology alone. And there are many of them here today  
17 in the audience who'll be happy to talk to you.

18 **(Group laughter.)**

19 UNIDENTIFIED SPEAKER: The second point, I have  
20 a question for the panel which is, as I understand it,  
21 and this is very new legislation, Senator Schumer's bill  
22 goes quite a bit beyond the do-not-Spam registry that  
23 everyone has latched onto and, in fact, covers a number  
24 of other areas relating to Spam, including some of the  
25 falsification of trespass on servers and some of these

1 other issues. I'm not yet aware of all the details, but  
2 I wonder if any of you could comment on those provisions  
3 of Senator Schumer's bill.

4 MS. HARRINGTON: Well, I think Senator Schumer  
5 indicated when he was here that he hasn't introduced his  
6 bill and that he has a number of ideas that he intends to  
7 put forward in the next couple of weeks; and, so, I think  
8 that beyond the do-not-Spam registry idea, for myself, at  
9 least, I haven't seen the proposals and it's hard to  
10 comment.

11 I don't know if anybody on the panel has seen  
12 any additional language or proposal from the Senator.  
13 Anyone? Anyone?

14 **(No response.)**

15 MS. HARRINGTON: Okay. Too soon. Steve, can  
16 we go to the woman in blue in the back? Aqua?  
17 Turquoise?

18 MS. COHN: I have to ask my mother, she picked  
19 it out. This is Cindy Cohn, I'm with the Electronic  
20 Frontier Foundation and I wanted to just make a comment  
21 on something that Brian said and make sure I understood  
22 him.

23 MS. HARRINGTON: My Brian -- our Brian from the  
24 FTC?

25 MS. COHN: Yeah. Brian asked whether we needed

1 positive identification capabilities for noncommercial as  
2 well as commercial e-mail, and --

3 MS. HARRINGTON: No.

4 MS. COHN: Did I misunderstand?

5 MS. HARRINGTON: Yes.

6 MS. COHN: I think it's really important that  
7 we make sure that in these laws that we recognize that a  
8 lot more goes on in the internet than commerce.

9 MS. HARRINGTON: Yeah, but Brian's distinction  
10 was unsolicited/solicited. So --

11 MS. COHN: Oh, I misunderstood?

12 MS. HARRINGTON: Yeah. We're only talking -- I  
13 believe -- Brian, am I on your wavelength?

14 MR. CERASALE: My answer was only on  
15 commercial.

16 MS. HARRINGTON: Yeah, okay. Moving along.  
17 Sheryl, the guy with the blue shirt-sleeve right there.  
18 Vince -- you're not Vince, but that's fine.

19 MR. BLACKMAN: My name is Ed Blackman from  
20 Eureka Computing Solutions, and I want to agree with  
21 John. I don't think there is any legislative body with  
22 global authority to regulate e-mail. What we need is a  
23 market-based solution. Sending Spam has to cost the same  
24 as printing and sending bulk mail, and until that  
25 happens, we're going to get inundated with Spam.

1 MS. HARRINGTON: Okay, so it's the cost  
2 shifting issue?

3 MR. BLACKMAN: It's a market-based issue.

4 MS. HARRINGTON: Okay, thank you. Steve, the  
5 gentleman in the front row up here in the tan.

6 MR. HENDRICKS: Yeah, thank you. Evan  
7 Hendricks, Privacy Times. It seems to me that, you know,  
8 why do they rob banks, because that's where the money is;  
9 why do they send Spam, because that's where they're  
10 trying to make money. The experience shows we have a  
11 significant percentage of people who are in the United  
12 States of America that are Spamming, okay?

13 So, our laws have never been designed to stop  
14 crime around the world or to regulate it around the  
15 world, but if a U.S. law can help stop the problem in the  
16 United States and bring people to justice or create  
17 economic penalties, I don't understand how you can be  
18 against a U.S. law, John, that can cut into a significant  
19 portion of the problem.

20 MS. HARRINGTON: Well, what a nice set-up for  
21 the next panel, which is going to deal with the  
22 international aspects, and I think that's a bit  
23 rhetorical, so we're going to move on.

24 Back here, in the blue shirt -- Steve or Sheryl  
25 or someone. That's okay. This is likely, I think, to be



1 our last audience question.

2 MR. SWILLINGER: Mark Swillinger from the law  
3 firm of Sonschein, Nath and Rosenthal. I just wanted to  
4 follow up on the question David raised about businesses.

5 My clients, corporate America, is concerned and  
6 is spending money on fighting Spam and they want to know  
7 why none of the state proposals or Federal proposals  
8 deals with a corporation's ability to control its own  
9 network. That is, if a corporation says, I have 100,000  
10 e-mail addresses around the world, you can't send e-mail  
11 to any of them, if it's commercial Spam, why shouldn't  
12 that trump an individual employee who signs up for a list  
13 and says send me messages?

14 MR. KRAMER: Interesting question. I suspect  
15 that -- let me answer it this way first, to say that  
16 California's law, Business and Professions Code 17538.45,  
17 takes exactly that approach to the problem. I happen to  
18 know a little bit about that statute.

19 **(Group laughter.)**

20 MR. KRAMER: It basically says you, as a  
21 business, have the right to control who has access to  
22 your mail servers, as long as they're physically located  
23 in the State of California, and you can give notice to  
24 whomever you choose that their messages are not welcome  
25 on your network. So, it's not quite accurate to say that

1       that hasn't been discussed in the state legislative  
2       efforts.

3               I think that the problem with California's  
4       approach is that it's a state's approach, and at the  
5       state level -- I touched on this before -- the state  
6       needs to be quite careful about how it goes out and tries  
7       to regulate interstate commerce.

8               So, a state that, for example, said, you cannot  
9       send messages to any businesses in our state, would have  
10      some problems because as Jerry and others have pointed  
11      out, a Spammer doesn't know where his or her messages are  
12      going. So, California has this rather cumbersome process  
13      that says, hey, you have to give notice first that your  
14      messages are going to be using servers that are located  
15      in California before you can sue, and if we had that at  
16      the Federal level, I think it might be a useful, but  
17      certainly not, end-all solution to the problem.

18              MR. EVERETT-CHURCH: If I could say this real  
19      quick, that that statute in California does also include  
20      something very useful. It says that, if technology comes  
21      up with a better way to provide notice in the future,  
22      that that notice can be effective, rather than certified  
23      mail and service a process, and the Coalition Against  
24      Unsolicited Commercial E-mail has proposed, at the  
25      Federal level and in state legislative proposals as well,

1 to create a standard to work through the technical  
2 standard's process for the internet, to encourage a  
3 technical standard that could be recognized in statute  
4 and enforced, that would give recipients the ability to  
5 say, we don't accept unsolicited commercial e-mail. And  
6 there are technologies that could make even more granular  
7 statements possible. We don't accept certain types of  
8 unsolicited commercial e-mail, adult e-mail, et cetera.

9 MS. HARRINGTON: Okay. We're almost out of  
10 time. We began with Commissioner Swindle. I think,  
11 Commissioner, you may have been out of the room when I  
12 made my plea to Congress if they legislated at all to  
13 prohibit Spam to you since you forwarded it all to me,  
14 and also your friends. We want their Spam blocked.

15 **(Group laughter.)**

16 MS. HARRINGTON: Is there anything that you  
17 would like to say, as we wrap up this panel?

18 COMMISSIONER SWINDLE: Solve the problem.

19 MS. HARRINGTON: Solve the problem.

20 COMMISSIONER SWINDLE: You know, we spent,  
21 what, two hours here discussing, in very complex terms a  
22 very complex matter, and that is legislation and law and  
23 how we can deal with this. I still go back to my concern  
24 for consumers. Will somebody that has more brain power  
25 than me, come up with a way to give the consumer the

1 power to say, no -- period. That would solve an  
2 immediate problem for an extended period of time.

3 The guys are going to try to get around that  
4 and they will get around it, but in the meantime we've  
5 diminished the frustration of consumers. And, as I said,  
6 if this frustration gets to a high enough level, we have  
7 done some irreparable damage, and we need to solve that.

8 So, I would challenge AOL and Yahoo and  
9 Microsoft and Earthlink and on and on and on to start  
10 competing with each to give consumers the power to say  
11 no. And the one that comes out of the shoot first is  
12 going to be a big winner.

13 Thank you.

14 MS. HARRINGTON: Okay. Well, we're going to  
15 wrap this panel. In 10 minutes we will begin with the  
16 international panel and we will start promptly.

17 Thank you, panelists.

18 **(Applause.)**

19 **(Whereupon, a brief recess was taken.)**

20 MR. STEVENSON: All right. I'm Hugh Stevenson  
21 from the Federal Trade Commission and we proceed now to  
22 the Panel on International Perspectives on Spam. And I  
23 think we heard right from the start of this forum about  
24 the importance of considering Spam from an international  
25 perspective, and this has been an issue, and not

1       surprisingly, of concern to many countries and, so, we're  
2       able to assemble really a truly distinguished and diverse  
3       panel of foreign visitors to offer their views here. We  
4       really appreciate their taking the time and trouble to  
5       come from so far away to offer their views.

6                 And I think that it's important to emphasize  
7       that getting their views is important, both so we can  
8       compare notes -- what has their experience been with  
9       Spam; what has their experience been in terms of  
10      legislation; what challenges have they seen in trying to  
11      enforce the legislation they have.

12                It is also an important issue because, as I  
13      think a number of people have noted, enforcement is a  
14      global challenge, as well, requiring international  
15      coordination and cooperation. And that requires thinking  
16      about how do the various national approaches there fit  
17      together.

18                Our format for this panel is that we've asked  
19      our speakers to start by giving a five-minute  
20      introduction, talking about the experiences they've had  
21      in their countries, and we will then turn to a discussion  
22      format and take questions from the audience, if people  
23      have them.

24                I'd like to start in Asia. There is some  
25      legislation already in place in Korea and Japan, and

1 we'll turn first to Dr. Hyu-Bong Chung from KISA, which  
2 is the Korea Information Security Agency. KISA has done,  
3 actually, a paper that is out on the tables out there on  
4 the Spam laws that they have, which date back, I think,  
5 initially to the year 2001, and I'd also note, they have  
6 collected an increasing number of Spam complaints. I  
7 believe they had over 100,000 for the year 2002.

8 And, so, Dr. Chung, I turn it to you.

9 DR. CHUNG: Thank you. Thank you, Mr.  
10 Stevenson. Good morning. I am from Korea, but  
11 definitely from South Korea, not from North Korea.

12 **(Group laughter.)**

13 DR. CHUNG: As we have discussed two-and-a-half  
14 days, there are lots of policy measures and options of  
15 alternatives we have at our hand. I think, personally,  
16 that we can briefly categorize those tools into three.  
17 One might be legal approach and the second might be  
18 technical approach and the third would be, I think,  
19 market approach. When I say, market approach, it means  
20 pricing scheme and so on, which we can think about.

21 Okay, since I have a very limited time, I will  
22 just focus on the legal approaches which we have pursued  
23 over two-and-a-half years in Korea. So, let me first  
24 start with some background information; some numbers,  
25 which gives you some understanding of the current

1 situation in Korea.

2 Total population of Korea last year was around  
3 47 million, and about 58 percent of the population, which  
4 is equivalent to 26 million, reports that they have  
5 access to the internet and use it at least 12 hours a  
6 week. And we have, also, around 30 million people who  
7 use mobile telephone, hand phone sets.

8 Eighty-five percent of internet users in Korea,  
9 around 22 million, report that they have e-mail accounts  
10 and almost every individual and business owns -- uses e-  
11 mail address and enjoys this powerful medium for  
12 expressing ideas, sharing information and opinions and  
13 doing businesses.

14 The result of a survey of 2,000 e-mail users  
15 conducted by KISA last year shows that every user has an  
16 average of four e-mail accounts and receives 14 e-mails  
17 every day in each account. And eight out of 14, they  
18 report, were unsolicited and unwanted ones. So, around  
19 60 percent is unwanted ones. This is a rapid increase  
20 from 2001 when Spam occupied 44 percent.

21 Fifty-one percent of respondents replied that  
22 they do not even read and they just delete it immediately  
23 upon their receipt and only 40 percent reported they read  
24 the ones only with interesting titles.

25 Next, let me move to the regulatory efforts of

1 the Korean Government to control the Spam. Anti-Spam  
2 legislation in Korea has been enacted since 1999. The  
3 law prohibits the transmission of unsolicited commercial  
4 e-mails. The regulation has evolved to become stricter  
5 over time, as the prevalence of Spam increases in the  
6 market.

7 In Korea, sending commercial advertisement  
8 information against the addressee's specific rejection is  
9 illegal and subject to penalty. In addition, under the  
10 law, the sender of commercial advertisement should  
11 identify the name of the sender, e-mail address and the  
12 mailing address to contact and provide convenience for  
13 said recipients to express their rejection of the e-  
14 mails.

15 Despite this regulatory item, the Spam  
16 increased rapidly on the internet and we introduced new  
17 regulation to help to ease the Spam filtering by  
18 recipients.

19 From July last year, the senders of commercial  
20 advertisement are required to include labels about the  
21 advertisement specified by the law, such as advertisement  
22 or adult advertisement in Korean and English in the title  
23 of their commercial e-mails. A breach of this  
24 requirement is subject to fine under the law.

25 To fight against the technological development



1 of Spamming, we also introduced several regulations, from  
2 January this year. First, we added unsolicited messages  
3 via telephone and other media for the definition of  
4 illegal Spam, including wireless mobile phones.

5 Second, sending advertisement implying media  
6 materials harmful to minors. For example, obscene and  
7 violent ones to the minors is prohibited. That is  
8 subject to the criminal sanction.

9 Third, automatic harvest of e-mail addresses  
10 from the website and the other internet is prohibited.

11 Last to the technical manipulation to evade the  
12 law and avoid the recipient's refusal, automatic  
13 generation of a contact, such as e-mail addresses and  
14 telephone numbers, is prohibited by law.

15 For the details of the regulations I mentioned,  
16 I want you to refer to the handout that reads, Anti-Spam  
17 Regulations in Korea.

18 To enforce the laws to control the Spam, KISA,  
19 for which I am working, established Spam Response Center  
20 last year, and in 2001, we had 254 complaints against  
21 Spam from the public, and last year we received 69,609  
22 complaints, literally an explosive increase we had. In  
23 the first quarter of this year, we received 27,810  
24 complaints.

25 Besides the enforcement laws, KISA also

1 conducts public awareness programs and technology  
2 development. We opened a website to provide information  
3 to reduce the suffering of the public last year. We  
4 provided useful information for filtering unwanted e-  
5 mails for the end users of the e-mail services and tips  
6 to avoid receiving Spam.

7 We also inspected the 40,000 mail servers in  
8 the country and provided technical assistance to block  
9 the Spam relays. KISA also developed a special software  
10 to protect the websites from automatic e-mail address  
11 harvesting and made it available to the public from our  
12 website.

13 We organized, also, a coalition network  
14 fighting against Spam with mail service providers and  
15 ISPs in Korea and we established hotlines between KISA  
16 and mail service providers. Korean ISPs and mail service  
17 providers are becoming more and more proactive in  
18 fighting against Spam and protecting their customers. To  
19 save my time, I will not elaborate about that.

20 Let me just speak about my our concerns,  
21 lastly, at the international level. We have found more  
22 and more Korean Spammers are moving out of Korea and into  
23 foreign countries, such as the U.S., to avoid punishment  
24 of the law. For example, illegal pornographic e-mails  
25 are under strict control by Korean law. The Spammers

1 moved their mail servers and pornographic web service to  
2 a foreign country and they operate there.

3 The second thing I want to mention is actually  
4 a suggestion. I suggest choosing and using a common  
5 international symbolic letter for the labeling of  
6 commercial advertisement e-mails. As I mentioned before,  
7 we have mandatory labeling law, but it requires putting  
8 Korean letters -- Korean language -- and does not work  
9 for American recipients, since no U.S. citizens  
10 understand Korean letters. Similarly, commercial e-mails  
11 from U.S. sometimes has the label, ADV. That will not  
12 work for Korean recipients because they do not understand  
13 English.

14 In conclusion, I wish to emphasize the need for  
15 close international cooperation, especially among the  
16 policymakers and the interested parties in each country  
17 to reduce the Spam. I think this is one of the most  
18 urgent issues for us to improve the internet use  
19 environment at the global level in these days.

20 Thank you.

21 **(Applause.)**

22 MR. STEVENSON: Thank you, Dr. Chung. We'll  
23 turn now to Japan, which also has passed recently some  
24 legislation on Spam. We heard a little bit about it  
25 yesterday from the representative from NTT DoCoMo. We

1 have now Mr. Motohiro Tsuchiya, who also -- I actually  
2 should invite our panelists, if they want to, to just sit  
3 down and talk would be fine to, so we don't have to walk  
4 around.

5 So, Mr. Tsuchiya, if you want to describe the  
6 Japanese experience.

7 MR. TSUCHIYA: Thank you very much. There  
8 used to be a big trade gap between the United States and  
9 Japan in terms of automobiles or a semiconductor or  
10 everything, but we are now importing more Spam from the  
11 United States, so. . .

12 **(Group laughter.)**

13 MR. TSUCHIYA: Now, we are actually learning  
14 what American culture is through Spam, so. . .

15 **(Group laughter.)**

16 MR. TSUCHIYA: My colleague is always  
17 forwarding his Spams, and isn't it interesting. And I  
18 just say, just throw away, but he is always forwarding  
19 it.

20 We have a kind of similar regulation with the  
21 State of California, but it's working in Japan. So,  
22 somebody -- as the last panel said, labeling is not  
23 working in other countries, but it's working in Japan.

24 I have a one-page handout for the entrants.  
25 But I came late, so everyone does not have this, but I

1 have a handout, so please look at it.

2 So, I don't want to repeat regulation  
3 legislation in Japan, as Mr. Murayama told you yesterday,  
4 but there are two laws: One is regulating advertisement  
5 owners; the other one is regulating Spam senders. So,  
6 the content of the legislation is almost the same. So,  
7 you have to put a kind of ADV sign, written in Japanese,  
8 in the header section, and you have to give your real  
9 name and physical address and no fake e-mail address and  
10 never send again to the customer who opted-out.

11 Ministry can issue an order, so you should stop  
12 this Spam or something like that. After this, they can  
13 punish the sender or advertisement owners. So, their  
14 penalty could be two years in prison or \$25,000 U.S. a  
15 fine, or a company can be punished. The fine will be --  
16 oh, I am sorry, it's a big number, \$3.5 million U.S. a  
17 fine. So, this is working.

18 I have a number. The first quarter of the last  
19 year, there were 173,000 complaints about wireless Spam.  
20 But one year later, only 74,000 complaints. So, almost  
21 less than half. So, it's working. It's not perfect yet,  
22 but it's working. It's reducing the number of Spams.

23 And why are these regulations effective in  
24 Japan? I have no clear answer about this. There are  
25 several reasons. One is cultural difference. So,

1 Spammers don't want to take any risk to do legal attempts  
2 and online shopping and credit card shopping is not  
3 popular -- less popular than the United States, so they  
4 don't want to buy online. So, they just want to go to  
5 shops.

6 And maybe the second reason is social sanction.  
7 So, if Spammers are penalized or publicized, family  
8 sanction or community sanction is more stricter than in  
9 the United States. So, we are living in a small country  
10 and we have many day-to-day communications.

11 And the third reason will be the stricter  
12 domain name legislation. So, Japanese country is .JP and  
13 JP NIC (phonetic) institution is regulating the JP NIC  
14 domain names, and they request more detailed information  
15 of the owners of the domain names. So, they can easily  
16 identify who is owning this domain name and who is used  
17 for relaying Spams.

18 The last reason should be ISP control. So, a  
19 judicial precedent allows an ISP to stop Spams in terms  
20 of wireless Spam. So, all Spams that go to wireless  
21 phones or mobile phones goes through the NTT DoCoMo  
22 servers or the KDDI servers or a J-Phone (phonetic)  
23 server. So, if ISP finds this is a Spam, they can stop.  
24 Of course, Spammers cannot appeal, but they can go to a  
25 court. They can fight in the court. So, this is allowed

1 for the ISP to stop Spam. This reason is very possible,  
2 but this is not perfect. So, this is our experience.  
3 Thank you very much.

4 MR. STEVENSON: Have you seen a mix in terms of  
5 a change in terms of the amount that appears to be from  
6 outside Japan of Spam?

7 MR. TSUCHIYA: Mostly from --

8 MR. STEVENSON: You spoke of the imported  
9 American culture and --

10 MR. TSUCHIYA: Yeah. Actually, there's no  
11 official stats, but somebody -- interested people are  
12 counting the numbers of Spams. They said -- people are,  
13 on average, getting 10 to 30 Spams per month and maybe 80  
14 percent or 70 percent from outside of Japan. So, Spam  
15 written in the Japanese language is decreasing.

16 MR. STEVENSON: So, those other ones, a lot of  
17 them are in English then?

18 MR. TSUCHIYA: English, Chinese and Korean, but  
19 mostly English.

20 MR. STEVENSON: Okay, thank you. Well, why  
21 don't we turn next to Australia and Canada. These are  
22 countries that have privacy legislation, but not Spam-  
23 specific legislation at this point. Our first Australian  
24 speaker is Tom Dale who comes from -- it's called NOIE,  
25 the National Office for the Information Economy of the

1 Australia Government, and they last year issued an  
2 interim report, and last month a final report, on the  
3 issue of what to do about Spam.

4 MR. DALE: Thank you, good morning. Yes, the  
5 agency that I represent is an Australian Federal  
6 Government agency, the National Office for the  
7 Information Economy and about 12 months ago, the Federal  
8 Government in Australia asked us to conduct an inquiry  
9 into Spam for essentially the same sorts of public policy  
10 reasons that you've heard elaborated on in great detail  
11 here over the last couple of days. We published, as Hugh  
12 said, a final report only a week or two ago. It's  
13 available on our website, the ever popular www.noie -- N-  
14 O-I-E -- .gov.au in the equally popular PDF format  
15 amongst others, so help yourself.

16 At any given time, I guess, there are no end of  
17 reports from government agencies floating around the  
18 system in most countries. In this case, however, we  
19 found as an issue of public policy that Spam and the need  
20 for some measures, including government action against  
21 Spam, has a great degree of political support across the  
22 political spectrum and we're hopeful that the measures  
23 that we've recommended will be adopted by the government,  
24 and we've had some indications from our minister already  
25 that the government will be proceeding as quickly as



1 possible on most, if not all, of those recommendations.

2           There are basically three sets of actions that  
3 we're proposing to address Spam issues in Australia  
4 coming out of our report. Those dealing with legislation  
5 -- and I'll talk about those because that's been a topic  
6 of much interest this morning, of course. A number  
7 dealing with joint action by government and industry, and  
8 Mr. Coroneos, on my right here, is from a major  
9 Australian internet industry body and he'll be talking  
10 about the complimentary industry initiatives that we hope  
11 to go forward with there.

12           And thirdly, and very important for this  
13 morning's session, I think a number of international  
14 perspectives on the issue. I don't quite know why  
15 Tajikistan was singled out this morning for particular  
16 attention, but I have nothing against them one way or the  
17 other. I do know that, like Japan, we're finding, as far  
18 as Spam is concerned, Australian e-mail users are finding  
19 out far more about American culture than they really  
20 wanted to know.

21           **(Group laughter.)**

22           MR. DALE: However, let's talk quickly about  
23 legislation firstly and what we think will be an  
24 appropriate set of legal measures at the Federal  
25 Government level in Australia, and I should stress that

1 Australia is a federal system and at the moment, as Hugh  
2 said, there is no Spam-specific legislation at either the  
3 federal or the state level in our country. There is  
4 federal privacy legislation, which has recently been  
5 extended to most of the private sector. But its  
6 application to Spam as Spam, putting the content issues  
7 aside for the moment, isn't really clear at the moment.

8 So, what we concluded in our report was that  
9 there was a need for federal legislation which would have  
10 the following features. Firstly, that no commercial  
11 electronic messaging should be sent without the prior  
12 consent of the end user unless there is an existing  
13 business customer relationship. Now, is that an opt-in  
14 screen that's being proposed? Yes, it is.

15 Before I go on, I should stress, we're very  
16 careful to use the term "electronic messaging" because we  
17 believe that for purposes of government policy, we have  
18 to encompass not just e-mail, which is where the majority  
19 of the problems are at the moment, but emerging problems  
20 in areas like real-line chat or instant messaging, heaven  
21 help us, and also wireless or SMS Spam potential  
22 problems. We believe that we can address those as part  
23 of the general package of measures here.

24 Secondly, we believe legislation should provide  
25 for all commercial electronic messaging to contain

1 accurate details of the sender's name and physical and  
2 electronic addresses. Now, I think we're familiar with  
3 the reasons for that, again, through discussions here  
4 over the last few days, and there's nothing particularly  
5 unique about our reasons for wanting that.

6 Thirdly, we are suggesting that there be  
7 provision in the legislation for what we term in  
8 Australia a "co-regulatory approach" with industry, which  
9 provides, if you like, a regulatory incentive for  
10 industries to develop codes of practice to address issues  
11 so that the legislation does not have to be called into  
12 play, but there is provision for enforcement of the  
13 legislation should the industry be unable to apply or  
14 agree on codes of practice, and that has worked quite  
15 successfully in a number of other areas of internet  
16 regulation in Australia and, again, Mr. Coroneos has been  
17 an active participant on the industry side in that kind  
18 of regulatory approach.

19 And, finally, we'll be including in that  
20 legislation, should it go ahead, appropriate enforcement  
21 sanctions which would include, probably at the least, a  
22 range of criminal sanctions and we're certainly looking  
23 closely at the issue of scope for private action, as  
24 well, again covering some of the broader legal conceptual  
25 issues covered in the panel session earlier this morning.

1                   MR. STEVENSON: What has been the reaction to  
2 your legislative proposals in Australia?

3                   MR. DALE: Generally very supportive from most  
4 industry areas and also from a number of internet user  
5 groups and political parties, as well. The only  
6 qualification -- and it's not a major one and perhaps is  
7 not a surprise -- is the Australian Direct Marketing  
8 Association had some concerns and we believe that we'll  
9 be able to work through the concerns of the direct  
10 marketers through perhaps some code of practice issues or  
11 focusing on that prior existing business relationship  
12 provision that I talked about.

13                   So, generally, it's been pretty hard in the  
14 last couple of weeks since the report was released to  
15 find anybody who has a major problem with it, which is  
16 pretty encouraging for any area of public policy.

17                   MR. STEVENSON: Great, well, thank you. We'll  
18 turn now to Peter Coroneos, also from Australia, the  
19 Chief Executive of the Internet Industry Association, and  
20 the IIAA just last month announced an industry initiative  
21 to address Spam and if you can describe what that's about  
22 and also what industry reaction has been to the NOEI  
23 initiatives.

24                   MR. CORONEOS: Thank you, Hugh. Firstly, I'd  
25 like to thank the Federal Trade Commission for inviting

1 me to attend this session, and particularly to  
2 Commissioners Mozelle Thompson and Orson Swindle, both of  
3 whom I've worked with personally on issues ranging from  
4 privacy to security and consumer protection. And, in  
5 fact, we see Spam as covering all of those areas, so I  
6 think it's highly relevant that whatever initiatives and  
7 international cooperation we can put in place, perhaps as  
8 a result of this forum, will also have, hopefully, a  
9 positive contribution to make in those other areas as  
10 well.

11 What I'm going to say might seem shocking to  
12 you when I describe to you who our association is and who  
13 we represent in Australia. As Tom said, we're the  
14 national industry body for the internet. We have over  
15 300 companies, representing a Who's Who of the internet  
16 industry in Australia. They include players like  
17 Telstrel (phonetic) Optus, AOL, Aussie Mail, MSN, Yahoo,  
18 a lot of the major security and filter providers,  
19 Symantec, GenMicro, Message Labs, and others, and, of  
20 course, several hundred smaller players as well.

21 One thing is clear and one thing that our  
22 members all agree on, however, is that Spam is killing  
23 the Internet. We are seriously concerned about the  
24 undermining of the essential utility of e-mail, and as  
25 Commissioner Swindle said today, that remains the killer

1 application in Australia and the rates of Spam that we  
2 are now experiencing in Australia are equal to those that  
3 are being experienced elsewhere.

4 So, this is no longer a matter of choice for  
5 the industry. This is really, at the point now, one of  
6 commercial necessity where we have to act in the  
7 interests of end users if we are to preserve the rates of  
8 growth that we've been experiencing in the past. And,  
9 interestingly, I was in Washington this week when AOL,  
10 Microsoft and Yahoo jointly announced their combined  
11 initiative to combat the Spam problem, and I think that,  
12 in itself, is highly significant, given that our U.S.  
13 affiliate in Washington has informed me in the past how  
14 hard he's found it to get competitors to work together.

15 The fact that we now have competitors all  
16 pushing in the same direction here is evidence enough of  
17 the seriousness of the problem.

18 To that end, in Australia, we launched what we  
19 believe, two weeks ago, is a world first in terms of  
20 industry proactive response or industry proactivity to  
21 the question of Spam. And there's a press release  
22 outside on the table that describes what we've done, but  
23 essentially, we are providing for the next month,  
24 starting from about two weeks ago, every Australian  
25 internet user, be they corporate, small business or home

1 user, with a free internet Spam filter for one month, and  
2 after that, there are very low cost plans. In some  
3 cases, they'll remain free. Because we believe that  
4 there are technical solutions out there that are capable  
5 of empowering people to take control.

6 We acknowledge that they're not perfect  
7 solutions. We also acknowledge that legislation is not  
8 going to be perfect either. But we believe that if we  
9 can do what we can as an industry, and remembering that  
10 our members touch collectively over 80 percent of every  
11 internet user in Australia, we think that is an  
12 incredibly powerful statement to make, and I have to tell  
13 you that the URL for this, if you'd like to write this  
14 down, is [www.iaa.net.au/nospam](http://www.iaa.net.au/nospam). If you go to that page,  
15 you'll see the initiative and you'll see the 11 vendors,  
16 all fierce competitors in the marketplace, have all come  
17 together under this initiative, because we're trying to  
18 raise awareness as to the availability of the solutions  
19 and also to encourage them to use it.

20 I know I'm running out of time here. I just  
21 wanted to say one quick thing about legislation because I  
22 know that that was a part of what I was asked to address.  
23 Our industry association is not opposed to legislation  
24 provided that it's effective legislation. One concern  
25 that we have is that opt-out legislation, which creates a

1 very low threshold, is not going to be effective.

2 And the major point -- and I'm happy to talk  
3 about this later -- is how does a so-called legitimate e-  
4 mail marketer differentiate themselves from the worst  
5 kind of Spamster, and I think opt-out is problematic in  
6 that it's too easy for the wrong kind of players to  
7 comply with that and you end up with a solution where,  
8 you know, the aggregate effect of me getting 30, 40, 50,  
9 100 opt-out e-mails in my mailbox every day still  
10 constitutes a Spam problem of major proportions.

11 So, we can talk about that, but that's our  
12 perspective as the industry in Australia. Thank you.

13 **(Applause.)**

14 MR. STEVENSON: All right, we'll turn next to  
15 Peter Ferguson -- from Peter Coroneos to Peter Ferguson  
16 who is from Industry Canada, who's long been involved in  
17 privacy issues. And Industry Canada, I believe, put out  
18 a discussion paper on Spam back in '99 and is now having  
19 a process of consulting with its stakeholders and  
20 revisiting the issues that were addressed then.

21 MR. FERGUSON: Thank you very much, Hugh. Let  
22 me update you very quickly on what's going on. I'd like  
23 to offer some comments generally about international  
24 cooperation at the conclusion. Our policy on Spam, our  
25 current policy, was developed in 1999 and it basically



1 takes the position that the application of existing laws,  
2 appropriate industry policies, technology, and consumer  
3 awareness can, to a large extent, curtail e-mail abuse.

4 We have been subject to criticism over the last  
5 year about that general thrust, most of which is focused  
6 on the fact that the burden really is shifted to the  
7 individual consumer, and it's true in terms of actions  
8 that need to be taken and cost. However, the policy is  
9 consistent with our general approach to the internet,  
10 which is one very much of hands-off.

11 Laws of general application do apply in Canada.  
12 Particularly, there are provisions in the Criminal Code  
13 of Canada that can be applied to the Spam situation.  
14 However, I should note that the Criminal Code is a  
15 federal act. The problem is that it's enforced by the  
16 provinces and the response from the provinces is, I think  
17 to be polite about it, uneven. And I think it's uneven  
18 generally towards the e-environment. It's not just the  
19 matter of Spam and that really does get us back to a  
20 serious resource question that we've got in Canada about  
21 enforcement of the Criminal Code.

22 By the way, we do have Spammers in Canada. I  
23 don't say that with pride. We don't have any sense of  
24 volume, but they are there.

25 We began the current review in 2002 more in

1 response to media pressure than to individual complaints.  
2 Unfortunately, my name is at the bottom of the current  
3 policy. So, my phone does ring and that does sharpen my  
4 attention, and it has contributed to us getting on with  
5 the particular review.

6 We put a discussion paper out in January of  
7 this year. We sent it electronically to 19 key  
8 stakeholders and I think it's fair to say that within 24  
9 hours it was everywhere.

10 The paper focuses on seven specific issues,  
11 consumer choice, filtering technologies, their  
12 effectiveness, are they part of the premium or basic  
13 service, appropriate industry policies, what might those  
14 be, network solutions, what might some of those be, a  
15 role for government, are new laws required, applying  
16 existing laws, Spams and scams, and the question, of  
17 course, of enforcement, and consumer awareness, who has  
18 the lead responsibility with respect to consumer  
19 awareness.

20 Very quickly, some of the responses, consumers  
21 consider Spam filtering a part of basic e-mail service  
22 and most put the responsibility on ISPs to clean up the  
23 situation. Most internet users, when we asked the  
24 question, are not comfortable with desktop filtering.  
25 There's a consensus in all of the responses that there is

1 no silver bullet and that a tool kit approach is  
2 necessary. Industry does not see a need for new law, but  
3 better enforcement. Consumers see a need for new law.  
4 So, we've got a polarization around that issue.

5 If we are to consider legislation, I would note  
6 that it would have to be based on good public policy if  
7 it's to be effective. So, we're really moving ahead now  
8 on the tool kit strategy. We want to set long and medium  
9 term targets. We want to allocate responsibilities and  
10 get agreement on what those would be in the marketplace  
11 and to identify common initiatives. I won't, because of  
12 time, go into what some of those might be, and it is very  
13 much, at this point in time, might be.

14 Next steps for us is then going to be convening  
15 key stakeholders again on a common approach in the  
16 development of what we hope will be good public policy  
17 and we hope to have a meeting in June of his year, taking  
18 advantage of this workshop and also one being hosted by  
19 the ILPF and Global Business Dialogue on Electronic  
20 Commerce in June where Spam is one of the agenda items.

21 We want to have a practical action plan and I  
22 want to stress that. We've really got to be able to do  
23 some things and do them now. But -- and this is where I  
24 want to really bring in the need for international  
25 cooperation. This is not a subject, as we've heard this

1 morning, that's going to be handled in splendid  
2 isolation. We need to bring to the table internationally  
3 good domestic policy. The stronger the domestic policy  
4 is, the easier it's going to be to arrive at useful  
5 solutions.

6 We want to avoid the away syndrome. I think  
7 certainly in Canada, but we have to do it  
8 internationally. Driving Spamming offshore and creating  
9 safe havens is really no solution for anybody.

10 We want to look at Spam in a broader context  
11 and I really think we have to do that. We've heard  
12 allusions to security of systems and networks and I think  
13 we've got to pay much, much more attention to that. And  
14 we do have, from an OECD perspective, the OECD security  
15 guidelines, which we spent an immense amount of time  
16 updating over the last two years, and a real push, we  
17 think, is needed in the private sector to become much  
18 more conscious, aware of and active in implementing  
19 appropriate security measures for this environment.

20 I think another thing that needs to be looked  
21 at is the whole question of the economics of the Internet  
22 and probably an organization like the OECD would be a  
23 useful body for international cooperation to better  
24 understanding how the economics work and how we might  
25 address some of those problems of, for instance, passing

1 costs onto consumers.

2 The OECD is 30 member countries. There are  
3 three working groups, at present, tasked with looking at  
4 the Spam issue, a technology policy group, a consumer  
5 policy group and the group I'm part of, Information  
6 Security and Privacy, and we are cooperating and moving  
7 ahead on work.

8 What's missing from this equation is  
9 involvement by APEC, the Asian Pacific Economic  
10 Cooperation Forum, and I think we really have to drive  
11 APEC into formal discussions on that, internally and in  
12 cooperation with the OECD. And, finally, let me note  
13 that I think our international work really has to focus  
14 on the doable, on harms and on vehicles for mutual  
15 recognition and mutual cooperation, and that's a big  
16 task, but I think it really does have to be addressed.  
17 I'll stop there.

18 MR. STEVENSON: Thank you very much. We'll  
19 turn now to Europe where there are more extensive  
20 regulations that have been in place to address some of  
21 these issues. And our next speaker is Philippe Gerard  
22 from the European Commission. The European Union has a  
23 directive on electronics communication privacy which was  
24 -- that dates from, I believe, last year, and this is a  
25 directive that, even as we speak, a number of the members

1 states are working on implementing and so, Philippe.

2 MR. GERARD: Well, thank you. Thank you, also,  
3 for inviting the European Commission here today. It's a  
4 good thing because it is a global issue, so I think it's  
5 understandable that we look at what's going on in other  
6 parts of the world.

7 It's been a very interesting workshop so far.  
8 I didn't travel just for two hours, so I've been here for  
9 a few days listening to what people have said and, in  
10 fact, I've never been more convinced than today that we  
11 may have chosen the right solution, i.e., an opt-in  
12 solution.

13 Well, probably I need to give you some  
14 background information on how things are regulated in the  
15 EU on privacy first of all. We have a horizontal data  
16 protection directive which is applicable to both public  
17 and private entities, and that includes general  
18 principles on how, for instance, you can process personal  
19 data. This is important to bear in mind because this may  
20 explain why so far harvesting, for instance, has been  
21 less of a problem in Europe compared to the United  
22 States, simply because you can't pick up lists wherever  
23 you want and start e-mailing people. So, that's an  
24 important part of the answer probably to Spam.

25 Now, we have, also, an inter-market principle,

1 that means that within the EU, if there's an obstacle to  
2 the freedom to provide services, we can take legislation.  
3 It's a bit like the interstate thing here. And so, we  
4 have had the Telecom Data Protective Directive in '97  
5 where we provided for an opt-in for faxes. Well, this  
6 was in '97. Then we had in '99, the review of the entire  
7 set of laws for telecommunications, which we call now  
8 electronic communications because we don't want to take  
9 different approaches, you know, depending on whether you  
10 send mobile communications or e-mails or fixed  
11 communications, et cetera.

12 So, we tried to design a technologically  
13 neutral approach and that's why in terms of the -- and so  
14 this is a commercial communications and we have now an  
15 opt-in system which is applicable to faxes, to e-mails.  
16 And when I am talking about e-mails, I'm talking about  
17 electronic mail as we know through the internet or SMSs  
18 or MMSs. It's all the same answer, if you want, because  
19 there's no reason to differentiate we think.

20 Of course, it's been a quite tough debate, as  
21 you can imagine. There's been strong lobbying. People  
22 around the table will not agree. But I think we've found  
23 a good solution because we think, first of all, we've  
24 provided user empowerment. That's, I think, a key  
25 element here. We keep talking about consumers. In fact,

1       there's an easy way to tackle this which is to leave it  
2       to consumers to say whether they want or not electronic  
3       commercial e-mails. That's one element.

4               And, also, in terms of marketing, and that's  
5       what was important for us, we really think that  
6       permission-based marketing is more efficient. So, we see  
7       no sign that sending e-mails to thousands or millions of  
8       people is very efficient in terms of marketing. So, we  
9       really think that permission marketing is more efficient.  
10      So, there's no reason to be afraid of an opt-in system.  
11      That was our conclusion.

12             So, let's talk probably about now the opt-in  
13      system in greater detail. Well, what does it mean, opt-  
14      in for e-mails? It means that the use of e-mail for  
15      direct marketing to consumers is only allowed when  
16      subscribers have given their prior consent. Actually,  
17      it's kind of an easy definition. I'm not saying that it  
18      will be easy to implement in all member states, but at  
19      least the principle is easy to understand.

20             As I said, e-mail means SMS, MMS, et cetera, it  
21      must be for marketing purposes, so there's no question of  
22      preventing normal communications or non-commercial  
23      communications. We're talking about marketing.

24             Well, the advantage of this system is that you  
25      don't have to enter into discussions about what is bulk



1 or what is not bulk, what is Spam or not Spam, what is  
2 deceptive, not deceptive, what is fraudulent and not  
3 fraudulent. You have to say, did you get the consent or  
4 not. Then you can start your marketing practice.

5 Well, there's an exception to this opt-in  
6 system which is when you have an existing customer  
7 relationship. Again, you have to see this in the context  
8 of purpose limitation and are the rules applicable. So,  
9 it's not like if you had once a contact with someone just  
10 through a website, you cannot take advantage of this to  
11 Spam that person. You have to control that -- I mean, to  
12 start from an existing sale or the context of a sale as a  
13 minimum.

14 Also, it's business to consumers, right?  
15 Business to business is left to member states, individual  
16 member states to regulate. This means that they can  
17 choose. But, of course, you can choose to implement an  
18 opt-in for business to business, also. That's easier.

19 Also, we've got kind of additional safeguards,  
20 like the disclosure of the identity of the sender, which  
21 is required. And you have to have a valid opt-out  
22 address in there. So, we've got probably the entire set  
23 of measures, at a logistical level of course. In terms  
24 of enforcement, of course, it's for member states,  
25 individual member states to enforce that. It's not for

1 the Commission to do that.

2 We can coordinate, we can promote, we have a  
3 provision saying that there must be enforcement, there  
4 must be a right of action, but what you would probably  
5 call private right of action. There must be possibly to  
6 claim for damages and there must be suitable damages to  
7 ensure effective implementation at member states' level  
8 and there must be sanctions. So, this is also a kind of  
9 diverse set of enforcement tools.

10 On implementation, well, we have conducted a  
11 consultation with member states, with data protection  
12 authorities or agencies if you want and to see what  
13 practical follow-up we could take in terms of not only  
14 legislative action, but also awareness raising  
15 activities, contacts with the industry to see what a  
16 possible -- like codes of conducts could be adopted, et  
17 cetera. We're still in the process of deciding on this  
18 follow-up, so I can't tell you more about this. Probably  
19 we'll come back to international cooperation later on.

20 MR. STEVENSON: If I can ask you just one  
21 follow-up question. What are the main concerns --  
22 because you're in the process of the member states, the  
23 countries in the European Union -- transposing this or  
24 implementing it in their own laws? What are the main  
25 concerns that they have raised? If I have the timing

1 right, that process is going on now.

2 MR. GERARD: Well, I would say it's nothing  
3 unusual, right? When you draft legislation in an  
4 individual member state, you get questions of  
5 interpretation, right? What does this mean? What the  
6 opt-in means -- what the opt-out means for an existing  
7 customer relationship? We have limitations. When you  
8 have this opt-out, it must be for similar products only  
9 and by the same legal entity. So, you can imagine the  
10 kind of forceful lobbying to understand what it is in  
11 whatever direction. But this is the kind of thing that  
12 we have at the moment.

13 MR. STEVENSON: Thank you. We'll turn now to  
14 Marie Georges from France's Privacy Protection Authority.  
15 Last year, her agency did a very interesting study on  
16 Spam. They set up a Spam box and received, I think, over  
17 300,000 Spam and there have been copies out on the table  
18 of this report. And France also has some law that, I  
19 believe, predates the directive that has been used to  
20 address these issues. So, we thought we'd benefit from  
21 hearing from the French perspective on this, as long as  
22 there are no comments about exportive U.S. culture.

23 **(Group laughter.)**

24 MS. GEORGES: Thank you. I could be up, but it  
25 is not necessary. Just to show our logo, just because

1       it's quite an international one with the French (speaking  
2       French), better show the European one and democracy as a  
3       figure of Greece and the digitalized democracy which is  
4       not so nice. If you can show it, that's all. But you  
5       can stop it now.

6                I would like just to add to what Philippe just  
7       said that in the European model, as you know, the  
8       enforcement is both at the level of independent data  
9       protection authority and a court. The authority I belong  
10      to, the Board is from the ways people elected from the  
11      Parliament, both Senate and House and Congress. Also,  
12      high churches, and there are 17 and I'm in the staff.

13               I would like to say that regarding Spam as we  
14      have been set up in '98 and with experience in both  
15      public and private sector. We have, by the way, a priori  
16      control upon the public sector. No public file can be  
17      set up without our favorable, positive opinion.

18               We have, also, investigation power. But we  
19      don't have sanction power for the moment. We may have  
20      with the new law this year. But what we have, also, as a  
21      mission is to follow new practices, new technology and I  
22      would be a testimony of the fact that it's not because  
23      you have general laws with general fair information  
24      principle coming from the United States. In our European  
25      laws, it prevents the progress of technology, but it

1 gives because they are neutrally technically like fair  
2 collective principle, like purpose principle. I don't  
3 see technology in that, but it is very coherent with  
4 technology -- with that technology.

5 So, it gives us the mean to follow the practice  
6 and react currently. For instance, the question of Spam  
7 came up -- well, by '97 or so, not -- I mean, several  
8 practices at that moment, mainly list serve mailing lists  
9 were attacked. So, we worked with these people to see  
10 how to settle the problem. Then, because we are well-  
11 known in France, people who wanted to start to make  
12 software to grab information in the public space came to  
13 us and said, well, how can I do that. We'd say, well,  
14 I'm sorry, even if you have -- it's a hard time for you  
15 because of the economic situation, but I think it will be  
16 prohibited and things like that.

17 We made a lot of educational programs with also  
18 professions, and I can say that all the recommendations  
19 that we took in '98, '99 were in the code of conduct of  
20 professionals at that time, we have been very much  
21 discussing.

22 We didn't have the opportunity at that moment,  
23 but we had already information at the time of collection  
24 and possibility to object right away by a box you check  
25 at that moment. Any time you collect data for any kind

1 of purpose, for another purpose than the one who is for  
2 the collection, you have to have this kind of phenomenon.  
3 So, it was also for marketing.

4 What we see as the opt-in solution being a  
5 qualification, it's because the harvest. We don't have  
6 any case law saying that harvesting was prohibited. We  
7 said so as an interpretation. But saying that there is  
8 this opt-in solution is more clear for everybody, very  
9 simple to interpret, because sometimes interpretation,  
10 you know, for actors are very difficult. So, we had been  
11 very much supporting the project of the directive,  
12 especially because we started to have some kind of new  
13 problems within 2001.

14 Even with SMS, you know, that GSM is widespread  
15 in Europe. The origin of GSM is -- SMS is very much used  
16 by young people, you know, all the time sending them  
17 messages and so forth. And so, then we saw new economic  
18 business model coming up and was sending SMS unsolicited  
19 e-mail. By the way, we had to -- we brought the case to  
20 -- one big case in July last year on SMS to court and we  
21 are awaiting for the results. They are in investigation.

22 So, as the directive was discussed -- by the  
23 way, it had been adopted within two years, which is not  
24 very long because I always hear outside Europe that, you  
25 know, the process in Europe is very long and so forth.

1       Once you -- my experience, because I had been working  
2       also in Brussels -- is that once you put a new subject, a  
3       new field of legislation, it takes longer. The general  
4       directive took seven years, the whole thing, you know,  
5       preparation and premeditation.

6                 But once you are in a field, new initiatives  
7       can come very fast, and that's the case for these two  
8       directives, which compliment the general one, which has  
9       been, I think, one year and a half and one year for  
10      implementation.

11                At that moment, of course, lobbies were made in  
12      member states to go back over the discussion you had here  
13      I would say, and now it comes back for the  
14      implementation. We can always repeat the discussions,  
15      okay.

16                So, we opened this Spam box in July. I have to  
17      say that my president took the idea to the FTC telling  
18      me, the FTC opened a box, we should do that. We did it  
19      during the summertime in July. 3,500 Spam came to us  
20      every day non-stop, even in August -- you know, August in  
21      France everybody is on the seaside. No, we were getting  
22      them.

23                The first days, we had been bombed, of course.  
24      We got virus of every kind. So, we have to fix the  
25      system and have a new contract because the message system

1 needed space, you know, and we still needed to work also  
2 inside. And the results are the following. They are in  
3 the paper. I don't know if there are some.

4 The Spam targets individuals 85 percent and 15  
5 percent business. The most horrible figures are the  
6 language of the Spams. I'm sorry to say that 84.8 are in  
7 English. We didn't make a study on are they from  
8 England, from Canada or from U.S., but all those we had  
9 been looking at were for American enterprises. So, I  
10 would say about 70 percent.

11 Eight percent from Asian languages, Chinese,  
12 Korean and Japanese; 7 percent in French. I would say  
13 they are all French, maybe some from Canada; and 0.2 from  
14 other countries in Europe, Germany and Italy, for  
15 instance.

16 The content, you will see in my paper, are  
17 culturally different. For instance, you have a level of  
18 -- I mean, the American Spam were 12.3 in the health  
19 sector. It is only 0.9 in French. Financial, in  
20 English, 40 percent, 5 percent only in France. Porn  
21 messages, 42 in English and 55 in French.

22 **(Group laughter.)**

23 MS. GEORGES: What a joke. On this basis, they  
24 were not complaining of the content, they were  
25 complaining about the unsolicited --



1                   **(Group laughter.)**

2                   MS. GEORGES: So, what we decided was that it  
3 was time to continue to bring the cases to court because  
4 all the petit grazi (phonetic) was not enough. But we  
5 did, also, a huge campaign of petit grazi with  
6 professionals, with direct marketing associations, with  
7 consumer associations and so forth. We brought five  
8 cases, one American, in different sectors with different  
9 manner of Spamming. One French was using relay from  
10 outside Europe, of course. One French had a remote  
11 address in Los Angeles and was registered in South  
12 America, things like that, you know.

13                   So, I completely agree with all those who say,  
14 even if Spam is international, they are originated from  
15 somewhere and the French were in France and the  
16 Americans, I guess, are originated here. So, what we see  
17 for the future that -- I mean, I won't go through the  
18 sanctions power we have. We can, in the discussion, say  
19 what they are --

20                   MR. STEVENSON: Why don't we come back to that  
21 part of it because I think we want to just --

22                   MS. GEORGES: Yeah, yeah. But for the  
23 corporation, I would say, the most efficient is, first,  
24 that each of us on the basis of clear law, because for  
25 good practice and so forth, make his own job to clean the

1 market and you will save the others outside. We will do  
2 it and, of course, we may need some cooperation. Thank  
3 you.

4 MR. STEVENSON: Okay, thank you. Why don't we  
5 turn now to FEDMA, the Federation of European Direct  
6 Marketers and for those of you who know Alastair Tempest,  
7 this is not him. This is Axel Tandberg who's kindly  
8 agreed to substitute for Alastair Tempest. And I think  
9 it would be helpful if we can hear from your group what  
10 the main concerns are that you've had in looking at the  
11 member state legislation and also the European Directive  
12 on electronic communications privacy as it's in the  
13 process of being implemented.

14 MR. TANDBERG: Well, yes. First of all, I'd  
15 like to thank the FTC for giving us the opportunity to  
16 come here. It's a great honor for us, the European  
17 Direct Marketing Association, to be here to give the  
18 European perspective.

19 Now, I'm going to try to speak a bit. First of  
20 all, you have to excuse me if you don't understand what  
21 I'm saying. I'm not a native English speaker, as most of  
22 us here are not. So, if we say something funny for you  
23 guys, sorry, we're speaking Brusselwaza (phonetic).

24 First of all, we have been working closely  
25 together with both the Commission, the Parliament and the

1 EPAs in Europe. Europe has had a direct data protection  
2 law legislation that Marie referred to since 1995. This  
3 has made harvesting -- we completely supported the French  
4 and harvesting is illegal. You have to have given the  
5 right to opt-out straight away when you collect the data  
6 in Europe. So, on that tone, a lot of Spam was already  
7 illegal in our sense. But the question is, of course,  
8 how do we define Spam. I won't go into that debate  
9 because you already have that one.

10 But to return to the new directive that just  
11 came out, we had a long discussion with the people in  
12 Europe about this. The problem we see with the new  
13 directive is how do you get the permission, because I get  
14 the question every time from members in Europe saying,  
15 can I send an e-mail asking for their permission. And I  
16 say, no, you have to have it before you send the e-mail.  
17 This isn't a way that you might say, the Commissioners  
18 tried to get a best practice. I think it might be good  
19 for business to do that because you get a closer  
20 relationship, but yet again, I'm not saying that is the  
21 best way.

22 The best way forward would be, as our friend  
23 said about the roaches, we need tools, we need a tool  
24 kit, we need different things, we need not just  
25 legislation.

1                   But to go on to the issue of will opt-in solve  
2 Spam, I'm sad to say no because as we've seen, a lot of  
3 e-mails comes not from the -- comes from outside. We did  
4 a study, together with others, in I think it was 2001  
5 where we had done sort of income unofficial studies of  
6 ourselves opening e-mail boxes and checking what comes  
7 in, and unfortunately, 60 percent comes from the U.S.

8                   Can anybody tell me what the 40/40/40 plan is?  
9 I haven't got a clue and I still get this.

10                   About 35 percent was from -- sorry, about 15  
11 percent was from Asia and about -- I have to get my  
12 corrections right here -- about 22 percent was outside  
13 the European Union but within Europe, that means the  
14 associated states becoming states, other states in  
15 Europe. Three percent was from within Europe and 1 and a  
16 half percent of that was actually what we would say,  
17 untargeted, not even close to what I was. So, where are  
18 we going to?

19                   But in five member states in Europe, they have  
20 had opt-in and they still get Spam e-mails. What we need  
21 is very good cooperation on an international level. OSD  
22 might be a solution. We're working closely together with  
23 the ICC, the International Chamber of Commerce of trying  
24 to get a solution to how we can solve the Spam issue. We  
25 also want to work very closely with Philippe, the

1 Commission.

2 We have finally been invited to take part in  
3 the next meeting of how to interpret the new directive  
4 and how to implement it in the same way in all member  
5 states because it's quite important that we don't -- with  
6 a directive in Europe, you have to interpret it according  
7 to the culture and to the legislative system because  
8 there's three different major cultures in Europe and when  
9 you come to law, you have the Code Seville (phonetic)  
10 represented by France, you have the German system which  
11 is mixed of American and -- I would say based on -- well,  
12 actually I should say -- you have the German system which  
13 is federal-based but strong interpretation by courts, you  
14 have the Anglo-Saxon way where it's basically just courts  
15 and you have the Nordic way, where I come from, where  
16 it's basically what it says in the law is right. If it  
17 says but, it must be a but in the message. It's quite  
18 literally interpreting what it says in the law.

19 But what we think is important to solve the  
20 issue, as I said, it's cooperation, ability for technical  
21 solutions to come up, don't stifle some technical  
22 solution with legislation that's too hard and we need to  
23 work together with consumers, internet service providers  
24 and the guys who develop the technical parts. Please  
25 don't use a sledgehammer to crack a nut. We need to do

1           it in the right way.

2                   MR. STEVENSON:  Have there been concerns -- I  
3           think one of the provisions in the European Directive  
4           concerns sending messages when there's a prior existing  
5           relationship, which I think Philippe referred to.  Has  
6           interpreting that been one of the areas of challenge?

7                   MR. TANDBERG:  Well, we're talking in Europe  
8           about a soft opt-in.  I didn't want to put that in there,  
9           but a soft opt-in we see is that they're saying you have  
10          -- you can send e-mails to an existing client to or if  
11          you have received the e-mail in the context of a sale.  
12          And the context of the sale is where the debate is going  
13          to be now and also what is a similar product and similar  
14          services.  According to the Commission, similar products  
15          are, for instance, household appliances or e-mails, DVDs  
16          and books.  Those are similar products.

17                   But, yes, we do interpret it a bit differently  
18          than the Commission in the context of a sale.

19                   MS. GEORGES:  I would like to complete.  This  
20          exemption is only to the point that for those who will  
21          benefit from this exemption from consent.  They will  
22          still have to inform the individual at the time of  
23          collection and give the opportunity to opt-out right away  
24          by a box to check.  So, it's not a complete exemption.

25                   MR. STEVENSON:  Okay, thank you.  Our final

1 foreign panelist is actually from Massachusetts.

2 MS. GRANT: It is a foreign country.

3 MR. STEVENSON: But, actually, that's not the  
4 reason she's here. Susan Grant from National Consumers  
5 League is also the Co-Chair of the Internet Working Group  
6 and the Transatlantic Consumer Dialogue, which is a  
7 dialogue of the U.S. Government and European Commission,  
8 as well as the consumer groups from the United States and  
9 Europe, and the TACD has made Spam one of its priorities.  
10 Susan.

11 MS. GRANT: Thank you very much. I'm really  
12 pleased to be here today representing the Transatlantic  
13 Consumer Dialogue. Obviously, unsolicited commercial e-  
14 mails are flooding in-boxes on both sides of the  
15 Atlantic, threatening the internet as a viable means of  
16 commerce and communication. It's not just a matter of  
17 fraudulent or offensive content to us. Spam is a  
18 violation of our fundamental privacy rights and it's,  
19 obviously, not just a transatlantic problem. It's a  
20 global problem that requires a global approach.

21 The TACD believes that the cornerstone of such  
22 an approach should be the basic principle that commercial  
23 e-mails should not be sent without the affirmative prior  
24 consent of the recipients. If we're going to get serious  
25 about Spam, and I think our audience in the last few days

1 has made clear that we need to get serious, we must  
2 promote a consistent and cooperative approach that  
3 includes legislation, best practices, technology and  
4 public education. This will facilitate cross border  
5 enforcement and help us achieve our ultimate goal, which  
6 is to create an environment in the internet where Spam  
7 simply isn't tolerated anywhere in the world.

8 MR. STEVENSON: Thank you. Well, let's turn to  
9 a few discussion points and welcome questions from the  
10 audience. I think one of the issues I would like us to  
11 focus on for a bit is how enforcement can work in an  
12 international environment. We heard somebody earlier  
13 saying it's like a dog chasing a car, but if the dog has  
14 to chase the car across international borders and learn  
15 about the Hague Service Convention to do it and so forth,  
16 there are complications involved in the enforcement  
17 across borders.

18 And I wondered what our panelists thought about  
19 how that should work and how that can work even assuming  
20 that -- well, given that there are different provisions  
21 in place, how can that work? Do people have thoughts on  
22 that?

23 MS. GEORGES: Before saying how it can work on  
24 an international level, I would like to say if you look  
25 at the laws, you may have in national laws means for



1 foreigners to act. For instance, our law protects even  
2 Americans that are processed by us. So, no problem on  
3 this question. If Spam are coming from France -- not too  
4 much -- okay.

5 Secondly, if you have penal sanctions, our  
6 judge can act even on an international level and under  
7 international private law. The question is to execute  
8 the decision and there you need to have in the other  
9 country, some kind of, what we say, double -- the same  
10 kind of sanction.

11 In the case we brought to the court, we took a  
12 case in which we knew that there was the equivalent in  
13 the United States. So, you know, in those questions of  
14 unsolicited Spam, unsolicited commercially or other  
15 nature thing, you have a long list of possible criminal  
16 offense, a lot -- a lot different from fraud, from  
17 computer fraud to misrepresentation to all kinds of  
18 offenses deriving from the data protection issue.

19 So, for the moment, my view is that we have  
20 some hooks, even in the United States, for the moment.  
21 Of course, it would be better if we had a complete  
22 harmonized view, I think. In this case, we may have some  
23 kind of material recognition. But if you don't, it won't  
24 be.

25 So, how it can work? First, doing our job.

1 MR. STEVENSON: Okay. Peter Ferguson.

2 MR. FERGUSON: Thanks, Hugh. I think Marie has  
3 really singled out a number of things here similar to the  
4 European data protection, Canadian law would, for  
5 example, protect information about Europeans collected by  
6 Canadian enterprises and held in Canada. So, we already  
7 have some reciprocity and mutual recognition and there is  
8 other law where this is clearly enshrined.

9 I think one of the things that's going to be  
10 important here, and perhaps the United States'  
11 relationship with Europe on privacy is indicative on  
12 this. Even where there are different approaches to  
13 privacy protection, I'll single it out. There can be  
14 compatibilities and mutual recognition to some degree and  
15 protections offered around those mutual recognitions.

16 The other thing I don't think we want to  
17 overlook here is the very important role that the private  
18 sector is going to play in this and major international  
19 private sector organizations in organizing and building  
20 approaches to this problem, but others as well and, of  
21 course, there's all kinds of precedent for that in the  
22 marketplace at this time.

23 MR. STEVENSON: Would the panelists agree that  
24 there is -- well, let's take a scenario. In the NOIE  
25 report, an example of some Spam that appeared to be from

1 the United States that was, in fact, coming through  
2 Eastern Europe, although sometimes it's hard to tell  
3 whether it really is or whether you're led to think it is  
4 when, in fact, it's really coming from the United States.  
5 They made it look like it's from Eastern Europe and then  
6 going through the United States. I mean, there's a  
7 channel of where that's going and let's say there are  
8 people receiving it in France and in the United States.  
9 I mean, who should take action in this example and how  
10 should that happen?

11 MR. DALE: I think there are two levels at  
12 which we can look at this question of international  
13 cooperation and enforcement. At one level, as far as  
14 fraudulent content is concerned, and that is going to  
15 address a significant portion of the problem simply  
16 because of the high proportion of Spam that is fraudulent  
17 or almost certainly illegal somewhere in the world.

18 We know that, at the moment, there are a number  
19 of cooperative arrangements among agencies, including one  
20 that the FTC and a number of its corresponding agencies  
21 participate in. I think it's the International Consumer  
22 Protection and Enforcement Network. Though ultimately, I  
23 guess, that relies on sharing information about  
24 enforcement under existing national laws. But my  
25 understanding is that as far as fraudulent e-mail content

1 is concerned, it has been an extremely useful  
2 clearinghouse and, in some cases, has led to enforcement  
3 measures. And I think that sort of model is to be  
4 encouraged between corresponding government agencies.

5 But at the other level, I think that's where  
6 governments are still being a little bit cautious about  
7 agreement on policy principles here, that is Spam as Spam  
8 regardless of the content. It may be as far as the U.S.  
9 and its international policy position on Spam as opposed  
10 to Spam content is concerned, some of the issues arising  
11 from this workshop may help in a clear position not just  
12 for the U.S. but for other countries in forums like the  
13 OECD and APEC. I hope so.

14 I guess we have to build, to coin a phrase, a  
15 coalition of the willing as far as Spam is concerned.  
16 And I think it's easier now than it was 12 months ago.  
17 The problem is so bad, the public policy responses are  
18 starting to coalesce towards a reasonably common set of  
19 principles. But working that through bodies like the  
20 OECD and APEC, as Peter mentioned, isn't often a rapid  
21 process, but it can be done. And I think there's been a  
22 good start made by most countries.

23 MR. FERGUSON: I just wanted to add one further  
24 comment here. Some of this, unfortunately, has a bit of  
25 baggage attached to it and I refer to things like

1 governments being able to cross jurisdictional  
2 boundaries, tracing information flows, and I know the G8  
3 has been -- the Leon Group, particularly, has been  
4 struggling with this and how do you build permissions in  
5 for that kind of thing. There are very serious  
6 diplomatic questions behind some of this. But I think  
7 the current environment really points to the need for  
8 speed in arriving at some mutually agreeable approaches.

9 MS. GRANT: Hugh?

10 MR. STEVENSON: Did you say Hugh or Hyu-Bong  
11 Chung?

12 MS. GRANT: I said Hugh, I'm sorry.

13 MR. STEVENSON: Oh, I'm sorry. We'll go down  
14 here and then to you, Susan.

15 MS. GRANT: Okay.

16 MR. CHUNG: For me, as for me personally, I  
17 think there are several things we should think about for  
18 the international cooperation. The first step we should  
19 think about is that let's promote each jurisdiction to  
20 have established rules for Spam regulation and then set  
21 up some institutional framework within the jurisdiction.  
22 That effort might be the first step we should take.

23 The second step we might need is to establish  
24 some kind of a network among the agencies in charge in  
25 each jurisdiction so that we can discuss or contact each

1 other for cooperation.

2 And then, the third step might be to have some  
3 harmonization proceed for the harmonization of the legal  
4 system against Spam. That's my personal opinion.

5 MR. STEVENSON: Thank you. Susan?

6 MS. GRANT: I agree with that. I think that  
7 consumers will naturally go to the authorities in their  
8 own countries first. They're more readily accessible,  
9 they speak their language. But there may be many  
10 situations where the Spammer is in another country and  
11 that agency has to have the ability to take action and  
12 also to get help from the agency in the other country.  
13 And that's why we're so supportive of the OECD guidelines  
14 that are being developed for cross border enforcement,  
15 and once those are adopted, it seems to me that there has  
16 to be some framework developed for mutual cooperation and  
17 assistance on a global basis.

18 MR. STEVENSON: Peter Coroneos.

19 MR. CORONEOS: I would agree with that. And to  
20 add, just going back to my preliminary remarks about Spam  
21 as a security issue, I mean, there is a school of thought  
22 emerging which says that if you release enough volume of  
23 Spam onto a network so as to impede the ability of that  
24 network to function, that that's tantamount to an attack  
25 on the network.

1                   And Australia, certainly in the wake of  
2                   September 11th, as I know the U.S. has done, has  
3                   introduced legislation. Ours is called the Cyber Crime  
4                   Act, which provides the means for agencies to actually  
5                   pursue those who have instituted unauthorized  
6                   interference with networks and it's just occurring to me  
7                   as a vague thought that to the extent that there's  
8                   commonality emerging in various nations, that that might  
9                   be one basis for cross referral of investigations.

10                   I think you need to -- my former background  
11                   before I started this job was actually with the Consumer  
12                   Protection and Competition Regulator in Australia, the  
13                   ACCC, and I know that they've had a longstanding  
14                   arrangement with the FTC and similar bodies elsewhere  
15                   conducting sweeps, internet sweep days, where they  
16                   determine fraud and scams and other things like that and  
17                   then refer them to their sister agencies for  
18                   investigation. So, I'm just raising it as a possible  
19                   solution to international cooperation that you look at  
20                   it. What is illegal in many jurisdictions without having  
21                   to necessarily even change the laws that already exist  
22                   and use that as a basis of cooperation.

23                   MR. STEVENSON: So, I'm hearing from this  
24                   discussion then that the panelists seem to -- or I guess  
25                   I'm asking whether I have this consensus right. That

1       there seems to be a value that people see in looking to  
2       where there are rules in common, where there is some  
3       degree of a common approach as an aide to enforcement,  
4       that there is support for developing a network or  
5       networks on an enforcement level to coordinate how  
6       enforcement would happen and that there is a value to  
7       sharing the information necessary to pursue these cases.

8               Is that fair or do people have qualifications  
9       or comments?   Philippe?

10              MR. GERARD:   Probably -- yes, just a comment on  
11       the previous question, also.   It's true that we have  
12       already some kind of legislation levels.   We mentioned  
13       the Cyber Crime Convention for the big problems like  
14       hacking and that is being designed to get out with the  
15       United States.   So, it's more a question of implementing  
16       this.

17              When you're talking about fraudulent, I think  
18       that most countries of the world have similar provisions.  
19       So, it's a question of just starting cooperation tomorrow  
20       if you want.

21              Now, there is another issue which is about  
22       Spam.   If we go beyond, as we did, as Australia is  
23       considering going, and other countries like Korea, if you  
24       consider going beyond fraudulent Spam and you're talking  
25       about opting, there you need this kind of similar



1 approach because the more similar the system will be, the  
2 more similar the rules will be throughout the world, I  
3 mean, the better the enforcement will be. There's no --  
4 you know, it's quite natural. I mean, if you don't have  
5 the same rules, you don't want to cooperate because you  
6 don't see a reason to do that.

7 If you have the same kind of values shared, in  
8 terms of what should be banned, how to clean up the Spam  
9 problem, then it's easier than to cooperate once you've  
10 got similar rules. I'm not -- you know, it's easy to say  
11 when you've got rules in place probably because then you  
12 kind of set the standard, but I think it's crucial in  
13 this area.

14 MR. STEVENSON: Mr. Tsuchiya.

15 MR. TSUCHIYA: I'm sorry, but I have a  
16 skeptical comment because I'm not working for a  
17 government agency or a public sector, but I am very much  
18 interested in what is the internet community. And people  
19 living in the internet community or cyberspace don't care  
20 jurisdiction. So, they are very quick. They have better  
21 -- they will try to avoid any rule or go beyond the  
22 legislation or something like that.

23 So, raising awareness must be first. So,  
24 coordination between law enforcement agencies takes much  
25 time. So, like-minded countries like G8 is easier, but

1 more international, wide area of coordination of ITU or  
2 UN takes much time. So, putting people realize that,  
3 what is Spam and Spam is not beneficial for the public.  
4 So, this must be the first choice.

5 MR. STEVENSON: Thank you. Yes, ma'am?

6 MS. GEORGES: From the enforcement point of  
7 view, I think the first time cooperation -- and we asked  
8 the Commission to organize this cooperation on an  
9 international level through a question that we had some  
10 weeks ago. I think that the first effect would be to  
11 stimulate those authorities in other countries who don't  
12 do their job, if you see what I mean.

13 It will be stimulation before talking about  
14 exchange of information on logs and everything. It is  
15 very easy to know where this panel originated. It is not  
16 a question of roots of IP and so forth, I can assure you.  
17 Some others during this forum said so and I completely  
18 agree. And so, the best thing in the cooperation is  
19 stimulation. We are going to have it in Europe, of  
20 course, because there is a challenge to implement this  
21 directive in a very strategical coordinated way.

22 We have to act at the same time with the same  
23 goal because if some of us enforce and some others don't,  
24 you see what will happen. So, we are going to have this  
25 coordination, and on an international level, it will be

1 very interesting to have a coordinated policy at first  
2 and this would be very effective, I think, because I'm  
3 sorry, sir, but laws are enforced mostly nationally. We  
4 are in a democracy and it's not because internet is  
5 somewhere or anywhere. We have laws and we implemented  
6 them where we are competent to do so. That's the legal  
7 system, you know. So, we still need cooperation on the  
8 international level. Thank you.

9 MR. STEVENSON: Peter?

10 MR. FERGUSON: I have just a very brief  
11 observation and following up on Marie, I agree we need  
12 international agreement on what it is the harms are that  
13 we're addressing, and that's a policy discussion. Then  
14 the rules become obvious or more obvious and appropriate.

15 MR. STEVENSON: Thank you. Do we have any  
16 questions from the audience?

17 MR. KELLY: Hi, Bennie Kelly. One thing we've  
18 been talking about in the panel over the past couple of  
19 days has been the use of some kind of symbol in the  
20 subject line, ADV or whatever the appropriate would be  
21 for the language. We do have some panelists here who's  
22 nations do implement that. I guess the question would  
23 be, given the disputes that we've had so far, what are  
24 basically the benefits of that approach? And two, do  
25 ISPs then screen those out and does that discourage

1 compliance by Spammers?

2 MR. STEVENSON: Would somebody like to address  
3 that?

4 MR. CORONEOS: Well, I think this is one of the  
5 weaknesses in a legislative approach in and of itself is  
6 that -- speaking as a lawyer here as well as an industry  
7 activist that tries to generate actual outcomes, the  
8 problem with any legal solution, in and of itself, is  
9 that of course the people that have got the greatest --  
10 the ones that you're trying to target, have got the  
11 greatest motivation not to comply.

12 And I think, you know, that really the reason  
13 that you would legislate is to do a couple of things.  
14 Firstly, to send a clear signal to the market as to what  
15 is and what is not acceptable practice.

16 Secondly, you would do it because you would  
17 hope to move towards some degree of cooperation from the  
18 industry. I've been told and I've not been able to  
19 verify this, but there are some elements within industry  
20 that are not yet prepared to act, while the conduct  
21 itself is not technically illegal. So, to actually  
22 create an offense gives you a foothold to get industry  
23 attention and cooperation where, at the moment, they may  
24 be reluctant to do so because they may be concerned about  
25 their own liability in taking preemptive steps.

1                   So, you know, it's not that it's a bad idea,  
2                   but then the question is, how then do you complement that  
3                   with technical solutions so that for those that aren't  
4                   prepared to comply with the strict letter of the law then  
5                   you've got some other means of catching the Spam.

6                   MR. STEVENSON: Alex?

7                   MR. TANDBERG: Axel.

8                   MR. STEVENSON: I'm sorry.

9                   MR. TANDBERG: That's okay, I'm used to it.  
10                  The thing about labeling, I must say, will not really  
11                  work because if you use the abbreviation ADV, it will  
12                  work in English-speaking countries. But where I'm from,  
13                  we don't say advertisement, we say reklam (phonetic).  
14                  Reklam -- is that the abbreviation that will be REK  
15                  recommended?

16                  Now, I say labeling is not the answer and a  
17                  Spammer -- a Spammer doesn't give a damn about the law.  
18                  He will not set ADV in front of it. That would be -- the  
19                  marketers would do that. So, the only ones who will  
20                  follow the law will be the ones trying to be legitimate  
21                  marketers and not -- you won't get to the Spammers  
22                  through that, I'm sorry.

23                  MR. STEVENSON: Motochiro Tsuchiya? Susan  
24                  Grant?

25                  MS. GRANT: I just wanted to address the issue

1 of public awareness. I think the public is very aware of  
2 Spam and that's why we're here today because people are  
3 demanding action. What I think will be really crucial in  
4 terms of public awareness going forward is making sure  
5 that people know what their rights are in those places  
6 where there are legal rights in this regard and where to  
7 complain, especially since it can be confusing. You  
8 don't know whether to go to your own country or to  
9 another country.

10 I think the econsumer.gov website that the FTC  
11 and several other countries have set up to capture  
12 complaints about internet fraud and the complaint system  
13 that we have at the National Consumers League for  
14 capturing that information, those are good models that  
15 should be promoted around the world so that complaint  
16 information can be captured in a meaningful way, not just  
17 put in the refrigerator, but gotten to agencies in  
18 realtime to take action.

19 MR. TSUCHIYA: I'm a political scientist, but I  
20 am believing technology motivates politics and ADV as a  
21 labeling is working. Japanese people are communicating  
22 with more Japanese people and European people with maybe  
23 Russian people is communicating with Russian people. So,  
24 their own language works. And if we can coordinate those  
25 labeling internationally so we have a list of ADV or a

1 Japanese label or a Chinese label, so it can be easy to  
2 opt-out via software.

3 MR. STEVENSON: And I think the Korean law has  
4 a provision on labeling. How is that working?

5 MR. CHUNG: Oh, yes. Well, let me just briefly  
6 speak about the purpose and the background of these  
7 labeling systems. The purpose of instituting this  
8 framework is to give the consumers an easy and convenient  
9 way of filtering out of the commercial advertisement at  
10 all. I mean, if somebody doesn't want any commercial e-  
11 mail, he can do it simply because most of the e-mail  
12 programs provide such kind of functions at the market.  
13 So, he can do it and some -- of course, there is a legal  
14 system saying you can go to civil suit or a court. You  
15 should think about the cost of suit or lawsuits. So, we  
16 should provide some simple way of filtering or refusing  
17 from the first step of receiving commercial  
18 advertisement.

19 If somebody does not want to receive any  
20 commercial e-mails, he will do it. So -- and then how we  
21 can -- the second thing I want to mention to you to  
22 enforce this framework is that it really needs some -- it  
23 is really a resource-consuming framework for the  
24 government. We implemented it -- we introduced this  
25 enforcement from July last year and last year the public

1 submitted the unlabeled commercial e-mails to our office  
2 and most of the complaints were composed of this  
3 complaints and we prosecuted. We levied surcharge or  
4 penalty to the e-mail centers without this labeling.

5 MR. STEVENSON: Thank you. Thank you very  
6 much. I think we, unfortunately, are out of time, but it  
7 just sounds like we need an internationally recognizable  
8 symbol for Spam, and we thank our panelists for their  
9 contributions and for coming so far to be with us. Thank  
10 you.

11 (Whereupon, at 12:15 p.m., a luncheon recess  
12 was taken.)

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**AFTERNOON SESSION**1  
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MR. GROMAN: Good afternoon. My name is Marc Groman. I'm an attorney with the Federal Trade Commission here in Washington, D.C. I do realize that this is the eleventh panel in a three-day workshop, that it's 1:30 p.m. on a Friday afternoon, and you all just ate lunch. That being said, I guarantee you this panel will keep you awake. Because not only do we have five esteemed attorneys up here, we have five litigators.

**(Laughter).**

MR. GROMAN: And the topic this afternoon is Spam litigation. Unfortunately, if you look at your agenda, you'll note we did lose a panelist. Ken Wilson, who is Defense Attorney for Etracks couldn't be here because he had a litigation emergency. But I have full confidence that the five remaining lawyers will fill up the time without a problem.

**(Laughter).**

MR. GROMAN: For the past three days, we have heard numerous people say that increased litigation and increased law enforcement is the Spam solution. Others, however, have noted that litigation in law enforcement has serious limitations. This panel is going to look at the practical challenges that litigation attorneys face when bringing cases against Spammers. And we're going to

1 look at these practical challenges with an eye towards  
2 the big picture. Is litigation and law enforcement  
3 indeed the solution? Or are we kidding ourselves and are  
4 we about to engage in the courthouse version of Whack-a-  
5 Mole, where we're going to bop a Spammer in a lawsuit  
6 over here and another one's going to pop up out of a  
7 different hole. Or worse, the same Spammer, new hole,  
8 different identity. Is that where we're going?

9 The individuals who are going to address these  
10 complex issues are as follows. First we have Pete  
11 Wellborn who has litigated numerous cases on behalf of  
12 Earthlink, including a \$25 million judgment he obtained  
13 in 2002 on behalf of Earthlink. He also teaches internet  
14 law at Georgia Tech.

15 Next we have Jon Praed. Jon is a founding  
16 partner of the Internet Law Group in Virginia. He has  
17 litigated numerous case on behalf of both AOL and  
18 Verizon, including Verizon v. Ralsky and AOL v. CN  
19 Productions. Currently, Jon is litigating the five new  
20 cases announced by AOL just two weeks ago.

21 To my immediate right is Dietrich Biemiller.  
22 Dietrich is an attorney in Washington State who is a solo  
23 practitioner and who represents small ISPs and  
24 individuals who sue under the Washington Anti-Spam  
25 Statute, litigating the private right of action that

1 we've heard so much about this morning.

2 To my left is Paula Selis, who we have heard  
3 from this morning. Paula is with the Washington State  
4 Attorney General's Office. Indeed, she is the head of  
5 the Consumer Protection High-Tech Unit and has been  
6 intimately involved in the four cases that have been  
7 brought out of her office.

8 All the way on the end is Stephen Kline.  
9 Stephen is a former Assistant District Attorney and is  
10 currently with the Internet Bureau at the New York State  
11 Attorney General's Office and recently has prosecuted the  
12 MonsterHut e-mail case on behalf of that office.

13 We're going to go directly into questions, but  
14 I want to let you know that I promise a large amount of  
15 time at the end, because I know that members of the  
16 audience are anxious to cross examine the trial attorneys  
17 up here.

18 **(Laughter).**

19 MR. GROMAN: Litigation challenge number one.  
20 It's been alluded to this morning by Paula and by others,  
21 to have a lawsuit, you need a defendant. So, how easy or  
22 difficult is it to find a Spammer and how do you go about  
23 doing it? Let's start with you, Pete.

24 MR. WELLBORN: Finding the defendant in a Spam  
25 case is about 98 percent of the battle, but that being

1 said, once you find him, it's usually a slam dunk on the  
2 liability. I've been a little surprised at some of the  
3 conversation that implies there's a gray area. If you  
4 send Spam into an ISP that you know prohibits Spam,  
5 that's illegal. But finding the defendant, if you know  
6 the tricks of the trade, and the more you do it, the more  
7 you learn, it's not as hard as it would seem.

8 I think somebody made a very astute comment  
9 this morning that -- I think it was Dave Kramer -- one  
10 common thing that every piece of Spam or virtually every  
11 piece of Spam, except pump and dump, which is a different  
12 conversation for a different time, every piece of Spam is  
13 trying to separate you from your money, so it can have a  
14 false header, a false remove-me address, a false  
15 corporate name, but it has to have one bit of true  
16 information, maybe it's an 800 number or a fax number.

17 A little translation here, in Spammer-speak,  
18 suite means Mailboxes, Etc. box, but it might have a  
19 suite to send your money to, but there's got to be some  
20 true bit of information for you to get your money to  
21 them. And if you start backtracking, it's just good old-  
22 fashioned detective work. And I keep thinking at some  
23 point we're going to hit a case where we rush in to get  
24 the defendant and it's an empty house, whirring with  
25 computers, and there's no such person, but every case

1 we've had, we've found who we're looking for.

2 MR. GROMAN: So, Pete, finding the Spammer is  
3 not about high-technology issues, it's really just follow  
4 the money?

5 MR. WELLBORN: It's about both. What's scary,  
6 though, is that technologically, as a lot of the panels  
7 have alluded to, we're in a game of -- I think someone  
8 called it an arms race. It's a game of technological  
9 one-upmanship. And, so, if a Spammer really knows what  
10 he's doing, you can chase your tail from whichever stand  
11 that we were talking about this morning to China, to the  
12 third-party relays. So, in my experience, if it's an  
13 inexperienced Spammer or a sloppy Spammer, if he forgets  
14 to dial star-67 when he dials into the pop and you get  
15 his caller ID, fantastic. Otherwise, usually the best  
16 and quickest way to find him is to track the money.

17 MR. GROMAN: Okay. Jon, you're currently  
18 litigating, I believe, five new cases that AOL announced  
19 two weeks ago. I believe four or five of those cases are  
20 actually AOL v. John Doe, which means at the time the  
21 cases were filed you didn't have the identity of the  
22 defendant or the Spammer you wanted to sue. How does  
23 that work? Are you going to identify those individuals  
24 or corporations?

25 MR. PRAED: Well, certainly I know that AOL --

1 MR. GROMAN: Please talk into the microphone.

2 MR. PRAED: AOL has every plan to do what it  
3 takes to discover them, if they're discoverable. Three  
4 of the lawsuits name purely John Does. One of the five  
5 lawsuits does name some individual defendants but also  
6 has some John Doe affiliates that we believe were  
7 affiliated with some of the named parties. But we're  
8 engaged in discovery. We've just been granted permission  
9 to conduct John Doe discovery, which is one of the first  
10 hurdles you have to get over. And AOL's now in the  
11 middle of discovery.

12 MR. GROMAN: You said AOL is going to do  
13 everything it takes to find the Spammers. What does it  
14 take?

15 MR. PRAED: Well, it's changed over time. I  
16 wanted to echo some of the things Pete had suggested.  
17 When Spam first started, we were seeing what I call  
18 direct Spam, first generation Spam where people were  
19 simply registering a domain name, Spamming from that  
20 domain name and advertising that domain name, oftentimes  
21 adult content, oftentimes trying to sell the very  
22 products that they were using to send the Spam.

23 Once Spammers figured out that that was pretty  
24 easy to catch, they started then doing it through false  
25 registration of those domain names, but that was also

1 fairly easy to catch, so you saw a second generation  
2 develop pretty quickly in the late '90s of the affiliate  
3 model. We took that model on in the AOL v. Cyber  
4 Entertainment case, and I think that judgment resulted in  
5 what is really a fairly good model for how affiliate  
6 programs need to be run.

7 The current generation of Spam is really an  
8 amalgam of different types of tactics, the most  
9 sophisticated of which involves movement off-shore, using  
10 ISPs and IP addresses that make it difficult to find out  
11 who you are or funneling your money through entities that  
12 make it difficult or because of their business structure  
13 make it difficult for you to find out who the ultimate  
14 Spammer is.

15 MR. GROMAN: Okay. I'm going to turn to our  
16 government now, which if you get confused, is to my left.  
17 Paula, General Gregoire referred to a case out of your  
18 office that took 14 pre-filing subpoenas to find a  
19 Spammer. What challenges do you face in the Attorney  
20 General's Office trying to find your defendants?

21 MS. SELIS: Well, that's a very good example of  
22 why it isn't always easy to track a Spammer. There are  
23 really two ways to look at these cases. You can either  
24 go against the seller, in which case you have an easier  
25 battle, because you can always tell who the seller is,

1 the seller wants to sell you something and you can  
2 usually figure out who that person is.

3 But what we've found recently is that the  
4 seller is never the Spammer. There are two different  
5 entities, and as Jon pointed out, there are often a lot  
6 of steps in finding out who actually did press the button  
7 to send the Spam. And in the case that you were talking  
8 about against a guy named Samuel Meltzer out of  
9 Minneapolis, I'll tell the war story here, because I  
10 think it demonstrates the problems.

11 We had complaints about a Spam that people were  
12 receiving that said something like board meeting three-  
13 ish, that was the subject matter line. And you opened it  
14 up and it was an ad for a debt adjustment company. And  
15 the debt-adjustment company site had a form that you  
16 could fill out if you were interested in getting debt-  
17 adjustment services, and people would fill out the form.

18 And obviously this is a violation because there  
19 was a misleading subject line. There was also a false  
20 header. So, we figured, well, we'll just contact the  
21 debt-adjustment company and find out who the Spammer is,  
22 you know, how do they get their leads. Well, we  
23 contacted them and they said, well, we don't know, we  
24 contract with a company in New York who gives us the  
25 leads.



1           So, we contacted them with a pre-suit subpoena.  
2           We'd already sent one to the company in Florida. And the  
3           company in New York said, well, we contract with another  
4           company in Chicago. We sent a CID to the company in  
5           Chicago, and so on and so on and so on. We found out  
6           that really ultimately we couldn't trace the Spammer that  
7           way. What we wound up doing was finding out where the  
8           Spammer was hooked up at the time the ad was run, what  
9           the IP address was. We found out that it belonged to  
10          Microsoft, we CIDEd Microsoft, who in fact had leased out  
11          that line to another company. We had to CID that ISP;  
12          found out who the line was leased to; of course it wasn't  
13          leased to the Spammer; it was leased to somebody who used  
14          a fake identify.

15                 Ultimately, the way we found out was that the  
16          credit card that was used to pay the ISP was under one  
17          person's name. We found out who put the money in the  
18          account, who paid the bills on that account, and that way  
19          we traced it to the Meltzers. Now, you know, that's a  
20          lot of steps. That's 14 pre-suit subpoenas, and that  
21          gives you an idea of how difficult it is. And when you  
22          look at the resources --

23                 MR. GROMAN: Let me ask you a question. What  
24          ultimately happened? So, that's an enormous amount of  
25          work for one Spam case. What ultimately happened in that

1 case?

2 MS. SELIS: Well, we sued Mr. Meltzer and we  
3 got a judgment against him.

4 MR. GROMAN: For how much?

5 MS. SELIS: \$10,000, which wasn't a lot, but I  
6 think it was enough to keep him from Spamming again, in  
7 our state, at any rate. And we had spent a lot more than  
8 that.

9 MR. GROMAN: Right.

10 MS. SELIS: So, you know, a sort of happy  
11 ending, but, you know, not exactly an economical one.

12 MR. GROMAN: Okay, let's hear from Stephen.  
13 Same issue, tracking down the Spammer.

14 MR. KLINE: Yeah, exact same problems that  
15 Paula had. We'd been receiving several thousand  
16 complaints a year about Spam, and when we first started  
17 focusing on this issue, we started doing it the same way,  
18 so we'd get the complaints in and we'd start going  
19 backwards. And it was beyond frustrating. It was too  
20 time-consuming, and in the end, you know, a lot of the  
21 Spammers weren't within the jurisdiction or in the end  
22 maybe not even worth going after any further.

23 MR. GROMAN: So, you have examples of cases  
24 where you open up the matter, start the investigation and  
25 then have to close it?

1                   MR. KLINE: Yeah. And so we figured that there  
2 must be a more efficient way to find the evidence. And,  
3 so, I started reaching out to the ISPs, figuring that  
4 they were the ones who knew the most about where the Spam  
5 was coming from and all of that. And it's worked pretty  
6 well. The ISPs that I've met with, I usually meet with  
7 their attorney and their abuse team. And the abuse teams  
8 have been giddy, that somebody is actually wanting to  
9 prosecute.

10                   MR. GROMAN: Well, on that note, have you --  
11 talking about the challenges that you're facing with  
12 ISPs, have you had a situation where you've served a  
13 subpoena on an ISP and then had one of two concerns, you  
14 either found that the evidence you needed or data you  
15 needed was no longer available, or you had the concern  
16 that the ISP might actually notify the subject of your  
17 subpoena?

18                   MR. KLINE: We always run into the situation  
19 where the data is no longer available. But if it's a  
20 Spammer that they're continuing to have problems with,  
21 you know, they're going to have the data available. They  
22 may not have all the data about the Spamming history, but  
23 they're going to have some of it. So, that's how we  
24 actually picked up the MonsterHut case. It wasn't an ISP  
25 that we had talked to, but it was a referral from another

1           ISP and the ISP came to us and said we are getting killed  
2           with these bozos up in Niagara Falls, and it was great,  
3           they had all the evidence, they had been collecting it  
4           for their own lawsuit, and it worked well.

5                        There have been other times where we've reached  
6           out and for one reason or another it hasn't worked out.  
7           So, we're still trying to figure out the best way to  
8           handle it, but I think going to the people with the  
9           evidence, rather than -- and saying who's in New York,  
10          who's Spamming from New York, has been a lot more  
11          successful than trying to get the Spam from consumers and  
12          then going backwards.

13                       MR. GROMAN:   Okay, thank you.

14                       MS. SELIS:   Can I address that second question,  
15          because I think it's a valid one?

16                       MR. GROMAN:   Please, please.

17                       MS. SELIS:   What happens when you subpoena  
18          information from an ISP and that ISP has a privacy policy  
19          that says that we must tell our customers if there's been  
20          any inquiry about them or any subpoena.  Actually, the  
21          states have a mechanism where you can go into court and  
22          ask the court to order the ISP to keep the fact of that  
23          subpoena confidential, and we have done that consistently  
24          and it has worked quite well.

25                       MR. GROMAN:   Dietrich, in your cases, your

1 clients are not Earthlinks or Verizons but smaller  
2 individuals. My understanding is that when they come to  
3 you with a case they already know who the Spammer is. Is  
4 that correct?

5 MR. BIEMILLER: Usually. And ours is not as  
6 much a problem of tracking them down, but choosing who to  
7 sue to begin with. We have to go for the low-hanging  
8 fruit because we just don't have the resources of a large  
9 firm or the government. So, if we have a clear line of  
10 sight and a large number of Spam, we will usually go for  
11 those. And generally the guys have done a lot of  
12 research and tracked them down already. And I follow up  
13 and make sure that it's the right person before we go and  
14 off we go.

15 MR. GROMAN: Okay, well, that's a good segue  
16 into the next topic I want to discuss, which is who in  
17 fact do you sue. Paula, you stated that the Spammer is  
18 never the same person as, what, the marketer?

19 MS. SELIS: The merchant.

20 MR. GROMAN: The merchant. So, I'd actually  
21 like each person to address that. Who do you sue? You  
22 could have a situation where you have a Spammer, someone  
23 selling a product, an advertising company, an e-mail  
24 marketing company and an affiliate program. There are  
25 contracts between all these entities, or maybe not. So,

1       who is it? Who is it that you choose to sue? I guess --  
2       I'm going to start with Jon on that, because you have the  
3       five new cases, and I've looked at them. It seems to me  
4       that your approach is sue everybody.

5                   **(Laughter).**

6                   MR. GROMAN: But how does that work?

7                   MR. PRAED: I don't know that I want to address  
8       in particular decisions on any particular case, but I  
9       think generally my approach is to sue as big a fish as  
10      you can find. I spend probably a majority of my time  
11      actually trying to identify characteristics, I call them  
12      fingerprints, that constitute a big fish and then target  
13      a lawsuit against that individual or group of  
14      individuals.

15                   And it's really -- you're looking in the end  
16      for someone who is sending unsolicited commercial mail  
17      using some sort of fraud, and it is a target-rich  
18      environment. You talked earlier about Whack-a-Mole.  
19      That is the risk that you run, that you are simply  
20      playing Whack-a-Mole. I think both on the filter side  
21      and on the litigation, you have to systematize what  
22      you're doing so that you're not playing Whack-a-Mole.

23                   Litigation is critical, though, because I think  
24      it is your best opportunity to make the mole pull out his  
25      driver's license and actually show you who he is, so that

1       you can thereafter -- he's been bagged and tagged, in a  
2       sense.

3               MR. GROMAN: On the issue of who do you sue, if  
4       you've got a situation with multiple parties involved,  
5       you have a merchant who hires a marketing company, who  
6       maybe goes through an affiliate, and then we end up with  
7       an individual who sends out the Spam and pushes the  
8       button. And the Spammer changes -- or someone along that  
9       chain changes the subject line or makes it a deceptive  
10      subject line, and you want the big fish who may be on the  
11      end. Why is that party liable? Why can they be sued?

12             MR. PRAED: Well, you can make all sorts of  
13      arguments to why they should be and why they shouldn't  
14      be. In the end, though, Spam conspiracy and assistance,  
15      liability for assisting Spammers is not that much  
16      different from liability for any other type of illegal  
17      conduct. Conspiracy is an old established theory of law.  
18      We're not inventing very much law here, really. We're  
19      simply trying to take -- in fact, I think one of the best  
20      provisions to go after Spammers trespassed the channels.  
21      It predates the Constitution. It's not rocket science.  
22      The trick is simply getting everyone to agree and  
23      understand that these fairly basic concepts of legal  
24      principles can be applied in a very new arena in some  
25      factually unique circumstances, where identity and really

1 identifying who is the big mole is the real issue.

2 MR. GROMAN: Pete, who do you sue and why?

3 MR. WELLBORN: I'm going to answer that in two  
4 parts. I think of Spammers much like Dante's levels of  
5 hell.

6 **(Laughter).**

7 MR. WELLBORN: There are ascending levels of  
8 egregiousness. At the bottom we have -- we'll call them  
9 vanilla Spammers. Those are the ones that send  
10 unsolicited commercial e-mail through ISPs that they know  
11 forbid that e-mail. It's not spoofed; it's not  
12 fraudulent; it's not selling herbal products; it's not  
13 selling illegal descrambler boxes. That's your lowest  
14 level.

15 Compound that by spoofing and by some of the  
16 fraudulent tactics that we've heard about for the last  
17 two days. Compound that even more by Spammers who are  
18 selling these fraudulent or illegal products. That's the  
19 next level. Then there's a top level of egregiousness  
20 that the Spammers that are doing all those things and  
21 using accounts that are purchased with stolen credit  
22 cards or by identity theft to send these e-mails.

23 So, you have those three levels. And as Jon  
24 said, what we've done so far is we've gone after the top  
25 level, the old saying that the squeaky hinge gets the



1 grease, well, that's the one that we've gone after.  
2 After sitting through these panels for the past couple of  
3 days, I'm convinced that we need to start going after the  
4 lowest level to send a message, because it seems as  
5 though there's a fundamental misunderstanding that if  
6 you're not spoofing and you're not selling a fraudulent  
7 product your unsolicited commercial e-mail is somehow  
8 legal or at least a gray area, even if you're sending it  
9 through the ISPs of the world who forbid Spam. And  
10 that's wrong.

11 If you knowingly send your Spam into an ISP  
12 that forbids Spam you're committing a criminal act. You  
13 know, there was a lot of discussion this morning about do  
14 we -- we need a criminal statute, we need a Federal  
15 statute. We've already got them. We've got a criminal  
16 statute, it's called the Computer Fraud & Abuse Act.  
17 We've got other criminal statutes. It's the state  
18 prohibitions against common trespass, the same thing that  
19 keeps someone from walking into your house and getting on  
20 your computer, keeps them from sending unwelcome Spam  
21 into the ISPs. So, let's sue some of these lower level  
22 Spammers and send a message that we're not going to only  
23 go after you if you're committing credit card fraud --

24 MR. GROMAN: Pete, when you say let's sue, who  
25 do you mean? Who's let's?

1 MR. WELLBORN: Let's -- the ISPs that can  
2 afford to bear the mantle of the battle, for starters.  
3 The Earthlinks who are doing it right now; the AOLs and  
4 the Microsofts. For now, with as much cooperation from  
5 the government and from law enforcement as we can get, I  
6 think these need to be the mantle bearers.

7 MR. GROMAN: Okay, Dietrich, back to you on the  
8 same topic. Your client comes into your office with the  
9 Spam e-mails, says I've identified who it likely is, I'll  
10 use your term, you want to go after, what was it, the  
11 low-hanging fruit?

12 MR. BIEMILLER: Low-hanging fruit.

13 MR. GROMAN: Who is that?

14 MR. BIEMILLER: It's somebody who -- first of  
15 all, we can't afford to do what Paula does with spending  
16 a huge amount of money and getting a minimal return, so  
17 we have to -- one of the things unfortunately we have to  
18 determine is whether they have money or not to pay a  
19 judgment or to pay a settlement. And most of my clients  
20 are pretty anti-Spam-active folk, and they go after the  
21 highest circle of hell there, and so usually those -- if  
22 we can find somebody that combines those qualities and we  
23 can identify them, that's a likely target.

24 MR. GROMAN: Stephen, when you're at the end of  
25 your investigation, you're making a determination of

1       whose name, what corporation, what individual's name goes  
2       on your complaint, what factors are you considering and  
3       does jurisdiction become an issue there?

4               MR. KLINE:  Yeah, jurisdiction is always an  
5       issue for us, but when we are trying to figure out who to  
6       sue and why, you know, we -- it's a little -- the Spam  
7       cases are a little bit different for us than the rest of  
8       our cases, because normally what we're looking to do is  
9       get restitution back to consumers.  Here restitution is  
10      such a tough thing to calculate per Spammer.  And then  
11      any sort of damages are also tough to calculate.

12              You know, we do consider whether they have  
13      money, but what our overall purpose is to do is impact  
14      litigation.  And if we wind up with an empty judgment but  
15      the precedent that we set will steer the industry in the  
16      right direction, I think that is the major concern that  
17      we have.

18              MR. GROMAN:  You mentioned the issue of  
19      jurisdiction and you said that's always a factor.  Can  
20      you explain why that's always a factor?

21              MR. KLINE:  Well, because we represent the  
22      state.  We generally prosecute corporations or people  
23      doing business in New York.  We have in the past sued  
24      people from out-of-state for injuries in New York, but in  
25      cases like the Spam cases where we are going to have so

1 many other issues to deal with, and there are Spammers in  
2 New York, you know, we try to cut our litigation risk and  
3 focus on the bad actors in New York right now.

4 MR. GROMAN: So, if you have an investigation  
5 that's open and you ultimately discover somewhere down  
6 the road that the Spammer's actually in Texas, what do  
7 you do with that case?

8 MR. KLINE: Most likely we'd refer to the Texas  
9 AG or the FTC.

10 MR. GROMAN: Have you had luck referring those  
11 kinds of cases to other states?

12 MR. KLINE: We haven't had to do that yet.  
13 We've -- you know, we've gone to the ISPs and said who's  
14 in New York, tell us where they are, tell us what's  
15 happening, and we've kind of gotten to pick and choose  
16 our cases.

17 MR. GROMAN: Paula, same question. Is  
18 jurisdiction a challenge for you or is it really not?

19 MS. SELIS: Well, let me just kind of follow up  
20 on what Stephen was saying. When you start out in a Spam  
21 case, at least when we start out, we don't know where our  
22 defendant is going to be necessarily, true with the  
23 Meltzer case. And while in some cases you can pick and  
24 choose where your defendants are located, it's harder in  
25 a Spam case, you can't, at least not very easily. But in

1 terms of jurisdiction, we haven't run into any issues  
2 thus far, though Dietrich has run into jurisdictional  
3 issues.

4 We take the position that if you are sending e-  
5 mail to the State of Washington and the person to whom  
6 you are sending that e-mail has identified him or herself  
7 as a Washington resident, then Washington courts can,  
8 under long-arm jurisdiction, hear cases involving the  
9 defendants. So, so far, so good. I think Dietrich can  
10 talk about his case, because his defendant did, in fact,  
11 question Washington's jurisdiction, and he got a very  
12 favorable ruling.

13 MR. BIEMILLER: They all do. I spend about 80  
14 percent of my time litigating jurisdiction, long-arm  
15 jurisdiction, so . . .

16 MR. GROMAN: Okay, and just for a background  
17 for those of us who are not attorneys in the room, the  
18 question really is if the proposed plaintiff is in the  
19 State of Washington, and that's where that person may  
20 have had their injury, but the Spammer is elsewhere, can  
21 Dietrich's client bring the lawsuit in the State of  
22 Washington, even though the Spammer may be on the other  
23 side of the country and then be forced to litigate the  
24 issue there. So, speak about your experiences with that  
25 issue.

1 MR. BIEMILLER: Well, that's generally the main  
2 question, and they tend to make the same arguments over  
3 and over. I mean, why should we have to go to Washington  
4 to defend this case, but, you know, the tort occurred in  
5 Washington and we exert the long-arm jurisdiction by the  
6 statute that we have. It can't exceed the Federal  
7 Constitutional issue there about purposeful availment and  
8 those kind of issues, but we've been very successful both  
9 in superior state court and federal court defending that  
10 question.

11 MR. GROMAN: So, you're finding that in your  
12 cases the issue of jurisdiction really isn't a challenge  
13 or a problem.

14 MR. BIEMILLER: Well, it was a problem for a  
15 long time, and I guess Paula can also speak to this, we  
16 just recently passed a law specifically addressing  
17 jurisdiction because it has been such a problem, for us  
18 at least.

19 MR. GROMAN: Okay, turning to the attorneys who  
20 represent the big ISPs, I know that AOL's cases have all  
21 been filed in Virginia. I think Earthlink's cases have  
22 all been filed in Georgia, regardless of where your  
23 potential defendants are located. So, let's look to you,  
24 Jon, first, and you litigated the Ralsky case. From your  
25 perspective, is the jurisdiction just settled, where

1 done, and it's not a challenge anymore?

2 MR. PRAED: I think it was settled before it  
3 was even started, but that doesn't keep a defendant from  
4 bringing a motion to dismiss, and I think you have to  
5 bring a Spam case, wherever you want to bring it, in  
6 anticipation of a motion. But I think that it is pretty  
7 clearly decided today in the Spam arena. I think the  
8 Verizon Online v. Ralsky case was an excellent decision  
9 that addressed -- you have a question of forum non  
10 conveniens. Can a Spammer be put to the inconvenience of  
11 being sued in the state where he actually Spammed, which  
12 is a separate question.

13 The real question is did he purposefully avail  
14 himself of the protection of the state into which his  
15 Spam landed. And a lot of Spammers defend by saying  
16 essentially I didn't have a clue. I fired a gun, and the  
17 bullet left the gun, and I had no clue as to where that  
18 bullet was directed, other than the e-mail address. And  
19 I think the court, in the Verizon case, pretty clearly  
20 decided that apathy, as to jurisdiction, is not a defense  
21 to a personal jurisdiction argument.

22 MR. GROMAN: Okay, so grandma in Oklahoma who  
23 sends out 10,000 e-mails and 800 of them actually end up  
24 going through an AOL server in Virginia, she's going to  
25 be hauled here?

1 MR. PRAED: Well, I have been surprised. I  
2 have yet to identify a fraudulent Spammer that actually  
3 was a grandma.

4 (Laughter).

5 MR. PRAED: If I got one of them, she's  
6 probably going to be driving a Porsche or a Ferrari, and  
7 she'll know exactly what she was doing or she won't care.  
8 I hear the point. Someone might make an argument that  
9 the mere incidental transmission of a small volume  
10 doesn't necessarily give rise to personal jurisdiction.  
11 An interesting argument, but not one that really has more  
12 than a theoretical application in most of these cases.

13 And one correction. AOL has actually filed  
14 suit, I think throughout the country. Certainly Virginia  
15 has been a common state for suits, but AOL has, in fact,  
16 filed I think in California, New York, many other states,  
17 in part to try to establish this fairly basic principle  
18 across the country.

19 MR. GROMAN: Okay, I want to turn to another  
20 issue that our attorneys face, which is causes of action.  
21 When you want to bring a lawsuit, there needs to be a law  
22 that's been broken. So, what are the causes of action  
23 that you are using or advising your clients to use in  
24 your complaints? Let's start with you, Pete.

25 MR. WELLBORN: Okay. And one interesting note



1 on the jurisdiction issue, we all owe a debt of thanks to  
2 Shirley Jones, the mother from the Partridge Family,  
3 whose landmark lawsuit, jurisdiction lawsuit against a  
4 writer and editor for The National Enquirer, gave us the  
5 most widely cited jurisdiction case when you're claiming  
6 the effects test that you can sue here because this is  
7 where we got hurt. That's a little hinting aside.

8 **(Laughter).**

9 MR. WELLBORN: Causes of action. I have a  
10 laundry list of about 12 or 13 different causes of  
11 action, any one of which will carry the day in a typical  
12 Spamming and spoofing case. The two most common that we  
13 see, as I mentioned earlier, the Computer Fraud & Abuse  
14 Act, Federal -- a computer-specific Federal statute that  
15 provides for criminal liability in a civil action, as  
16 well, if there's been intentional access of a protected  
17 computer system that's unauthorized and that causes  
18 damage, which that's the very definition of unwelcome  
19 Spam coming into an ISP system.

20 Another cause of action that we see a lot and  
21 use a lot is common law trespass. It's like I said, the  
22 same law that keeps one of you from breaking into my  
23 house, coming in and sitting down at my computer and  
24 using it, that same general law in each state also  
25 prohibits a Spammer from taking unfair advantage of the

1 ISP's computer system and converting the ISP's computer  
2 system to the Spammer's benefit.

3 MR. GROMAN: Dietrich, in the private right of  
4 action cases that you file, is the cause of action  
5 strictly under the Washington Spam statute?

6 MR. BIEMILLER: Typically. I mean, we do cite  
7 trespass through chattel, as well, because under their  
8 consumer protection act some of the judges have found  
9 that they need to have some actual damages in order to  
10 enact the treble damages provision of that. But  
11 typically we just have this nifty statute that Paula had  
12 something to do with, and we use that.

13 MR. GROMAN: Stephen, for your cases for the  
14 New York State Attorney General, New York, unlike  
15 Washington State, does not have a Spam statute. So, what  
16 is the cause of action that you used in your Monster Hut  
17 case or other potential cases?

18 MR. KLINE: New York doesn't have a Spam  
19 statute, per se, but I consider all of our laws anti-Spam  
20 statutes, because the same sort of fraud that's committed  
21 on-line has been committed off-line, as well. So, we've  
22 been using our deceptive practices statute, which is  
23 similar to the FTC act, but we also have a statute,  
24 Executive Law 6312 that allows us to prosecute civilly  
25 any business who is repeatedly committing fraud or any

1 sort of illegality, which opens the door to all the laws  
2 in New York, even common laws. So, we can -- if  
3 someone's violating the criminal forgery statute, an  
4 administrative statute, common law, all of those fall  
5 under 6312 for us. So, I feel right now that I've got  
6 all the tools I need to prosecute a Spammer. If they  
7 want to give us another one via a Spam statute, which I  
8 think they're going to, fine with me.

9 MR. GROMAN: What is the relief that you are  
10 seeking in your cases? You mentioned that restitution is  
11 not something you're seeking, so what would it be?

12 MR. KLINE: In the MonsterHut case we were  
13 seeking penalties. Under our consumer protection  
14 statute, we're allowed to seek up to \$500 per violation.  
15 And the -- I think the injunctive relief is actually  
16 going to be more important than any sort of money  
17 judgment. A lot of the -- the two principals in  
18 MonsterHut, one fled to Canada; the other one ran down to  
19 Florida and is not working. They don't have any assets.  
20 So, the money judgments that we're going to get, whether  
21 it's penalties or restitution I think are going to be  
22 somewhat meaningless. So, I think any sort of injunctive  
23 relief is probably the most important thing that we'll  
24 get.

25 MR. GROMAN: Paula, turning to your cases and a

1 comment made by Stephen in that -- I know I'm  
2 paraphrasing, the money judgment is essentially  
3 meaningless or worthless.

4 MR. KLINE: In some cases.

5 MR. GROMAN: In some cases. What is the relief  
6 that you're looking for and what is your view on the  
7 money judgments?

8 MS. SELIS: Well, this brings up a whole  
9 question, how do you measure the injury? I mean there  
10 are a lot of injuries with the receipt of Spam, some of  
11 which are measurable and some of which are not. So, an  
12 ISP who can say his system went down for two days and he  
13 lost X amount of money has an easier time showing an  
14 amount certain.

15 But a consumer who gets Spammed, you know, how  
16 is he or she going to show that there is money actually  
17 lost? So, our statute has a \$500 per Spam penalty  
18 associated with it for consumers and \$1,000 per Spam  
19 penalty associated with it for ISPs. Or, in the  
20 alternative, if actual damages are more, then you can ask  
21 the court to give you actual damages.

22 Your question, though, which I haven't really  
23 answered, is how important are damages. I talked this  
24 morning about deterrent effect, and I think that's -- I  
25 have to come back to that. If you can hit a Spammer in

1 his or her pocketbook, then you've done a successful job.  
2 Now, some of them are real mom-and-pop operations,  
3 they're not making a lot of money, and so if you can hit  
4 them with a \$10,000 judgment, that to them is a deterrent  
5 and that will make them stop.

6 If, on the other hand, you come up against what  
7 we'd call a Spam house, a really big operation, and I  
8 don't think we have yet to take one of those down,  
9 although I think we would like to, I would look to  
10 getting a significant amount of damages. So, I think  
11 damages are important, as long as they act as a deterrent  
12 effect.

13 MR. GROMAN: Okay, following up on the same  
14 path of the issue of the judgment, turning to my right,  
15 there's certainly a big difference between filing a case  
16 and getting a judgment, possibly by default and actually  
17 collecting on that judgment, meaning -- and if you're not  
18 collecting, are you really hurting someone in their  
19 pocketbook. Starting with, Dietrich, have you had the  
20 case where you've got judgments that are just not going  
21 to be collected?

22 MR. BIEMILLER: We've got one right now that is  
23 a Spammer down in Florida that we got a \$270,000 judgment  
24 on that we're never probably going to see. The ones that  
25 we have collected money are usually ones that have

1 settled. They see the writing on the wall typically and  
2 will talk to us about, you know, getting out of it.

3 MR. GROMAN: Pete, you had -- the ISP cases  
4 tend to make really fantastic headlines that read  
5 something like \$25 million judgment against Smith on  
6 behalf of Earthlink. Will you ever see that \$25 million?  
7 I mean, has that been collected and what will happen with  
8 that?

9 MR. WELLBORN: We're currently looking for that  
10 off-shore as we speak. Will we get the whole \$25  
11 million? Who knows. Will that send a message to every  
12 other Spammer in the country, that if you Spam you'll get  
13 the financial death penalty? Yeah, that's going to send  
14 that message. And what's more, talking about the  
15 remedies, it's just as important as the money, turning  
16 back to the idea of injunctive relief, one thing that  
17 we've done for the past three or four years for, you  
18 know, for Earthlink in every case they resolve; for some  
19 of the smaller ISPs as well that I represent, when we get  
20 relief in these cases, we don't ask the court protect  
21 Earthlink from -- Earthlink and Earthlink only from the  
22 Spammer's future bad acts or if it's for Friendly E-mail  
23 protect Friendly E-mail, no more bad acts against  
24 Friendly E-mail.

25 Instead, we get an order from the court that

1 directs the Spammer never to Spam, spoof or commit any  
2 other of a various list of prohibited conduct against  
3 anyone in the world. And, in fact, the order makes all  
4 ISPs and internet users worldwide express third-party  
5 beneficiaries who can sue under that -- for a violation  
6 of that order as if it were a contract to which they were  
7 a party.

8 MR. GROMAN: Pete, do you think that the  
9 Spammers you see are actually complying with that  
10 injunctive relief?

11 MR. WELLBORN: I do, because among other  
12 aspects of the relief, this is already the law, but we  
13 stress it in all caps and bold face that violation of  
14 this order will not only be a future Spamming violation  
15 but will result in civil and criminal sanctions against  
16 these Spammers. So, if you're talking about a small  
17 amount of money or even a big judgment if they're poor,  
18 maybe that doesn't get their attention, but if they  
19 understand, and I've had judges look the defendants in  
20 the face and tell them, if you violate this, you will go  
21 to jail. And that gets people's attention.

22 MR. GROMAN: Do you -- I understand that you  
23 say you believe they're following, but do you do what I  
24 would call compliance monitoring? Do you have any actual  
25 anecdotal or otherwise evidence that the Spammers aren't

1 just starting over under a different name in a different  
2 state or location?

3 MR. WELLBORN: We do. There is one Spammer who  
4 has -- he backslid, unfortunately, he Spammed me  
5 personally.

6 **(Laughter).**

7 MR. WELLBORN: And this was a guy who got drunk  
8 and told the -- got drunk, left a voicemail on my  
9 client's voicemail saying that he was in cahoots with me  
10 to Spam the client and have the client pay me legal fees  
11 and that I would split my fees with the Spammer. And of  
12 course when I played that tape for the federal chief  
13 judge in Atlanta, Orinda Evans, and she just about had a  
14 fit. She was not happy with this particular defendant.

15 But he Spammed me about six months ago, three  
16 months ago, and I'm finishing up the -- my personal suit  
17 to enforce the order of permanent injunction that we got  
18 against him on behalf of a couple of smaller ISPs three  
19 years ago. So, some backslide. Others that I've checked  
20 on periodically, just knowing they were going to  
21 backslide, have not.

22 So, yes, this global relief, it's really  
23 important because it protects -- it keeps the Spammer  
24 from moving on to smaller ISPs or smaller entities that  
25 are less able to defend themselves than the Earthlinks



1 and the AOLs and the Microsofts of the world, and this is  
2 something we all should use. I mean, I'll be happy, if  
3 anyone in this room is a Spam plaintiff and you want to  
4 e-mail me, I will send you the legal brief that explains  
5 why that relief is appropriate and explains to the court  
6 that the legal basis for awarding that universal relief,  
7 even if the plaintiff is only a single company. I'll  
8 give you my e-mail afterwards, and I will send that to  
9 you the day you e-mail me.

10 MR. GROMAN: Okay, Jon, we'll give you the last  
11 word on this idea. First of all, judgments, are the big  
12 headline judgments that aren't collected, is that still a  
13 deterrent? And then second of all, is this injunctive  
14 relief doing anything?

15 MR. PRAED: Yes, to both. Press is obviously  
16 an important part of what we're all doing, trying to get  
17 the message out there. Judgments are the first step.  
18 The first step is really before that. The first step is  
19 making Spammers realize that every step of the way  
20 there's going to be an increased cost to the business.  
21 They operate typically on fairly thin margins. Those  
22 that are making a great deal of money are working very  
23 hard to try to do everything they can to hide. And if  
24 you can get a judgment against them, even if it's not  
25 collectible today, that's not to say it's not going to be

1 collectible tomorrow, and it's very difficult for  
2 Spammers in my experience to discharge Spam judgments in  
3 bankruptcy. That's a message that I think too few  
4 Spammers realize.

5 But at the end of most of the cases that I have  
6 been involved in, the Spammer has been quite upset by the  
7 path that they have put themselves on. They understand  
8 that they've -- I wouldn't say ruined their lives, but  
9 they have made some tremendous mistakes along the way.  
10 Even if they can't write a large check at the end, they  
11 realize they're never going to be in a position to write  
12 themselves a large check for a very long time.

13 And that has an effect on them and it obviously  
14 has an effect. In fact, if this is a game of Whack-a-  
15 Mole, your focus is largely on general deterrents and not  
16 specific deterrents. And I think anyone who's thinking  
17 of getting into the Spam game needs to think twice when  
18 they see that many of the major players who are involved  
19 in the internet space are committing significant  
20 resources less towards recouping their costs of  
21 litigation but rather towards generally reducing their  
22 cost of hardware investment and of increasing the cost on  
23 the Spammer.

24 MR. GROMAN: Okay, thank you. Let's turn back  
25 to the idea of a private right of action, which had a lot

1 of attention this morning on the legislation panel.  
2 There are those who believe that giving individuals who  
3 receive Spam a private right of action to sue will have  
4 an enormous deterrent effect.

5 So, Dietrich, I'll turn to you on this. First  
6 of all, who are your clients and what are these lawsuits  
7 about?

8 MR. BIEMILLER: Most of them are tech-savvy ISP  
9 or tech people. I do have a small ISP. I've got a  
10 landscape design engineering company that got relay-  
11 raped. So, it's mostly -- I mean, I don't do any  
12 advertising, it's mostly word of mouth and people hearing  
13 about it through either media or friends.

14 MR. GROMAN: Are you litigating these Spam  
15 cases full-time?

16 MR. BIEMILLER: Yes. Well, yeah, among my  
17 other practice, but I'd say the majority of my stuff  
18 right now is Spam cases.

19 MR. GROMAN: And how do these private right of  
20 actions get resolved? Are these judgments, default  
21 judgments, settlements?

22 MR. BIEMILLER: All across the gamut. We do  
23 settle; we do default judgments. I haven't actually had  
24 one go to court yet because we just started doing these  
25 like last July and the court dates aren't, you know, that

1 speedy as we all know, but we're progressing through  
2 discovery on most of these right now.

3 MR. GROMAN: I'm going to ask you a question  
4 that I know that a lot of other attorneys have been  
5 wondering. Does this make financial sense for you? Are  
6 you making --

7 MR. BIEMILLER: I'm certainly not making money  
8 like I would like to, as if I had a large-firm job. The  
9 big payout at the end is quite the carrot though, if we  
10 do get a large judgment against somebody who actually has  
11 money and who actually pays it, which is three pretty  
12 attenuated things. But the settlements are kind of  
13 providing a war chest to go file more cases and proceed  
14 with the ones that are in the middle.

15 MR. GROMAN: Who's covering the cost of these  
16 private right of action cases?

17 MR. BIEMILLER: Right now, the co-counsel I  
18 have, Mr. D. Michael Tompkins, who I rent space from, is  
19 fronting most of these, but there really aren't that many  
20 costs. I mean, we try to do it on --

21 MR. GROMAN: So, it's not the client, then?

22 MR. BIEMILLER: No, no. We haven't had that  
23 many costs. Mostly it's just filing fees and that sort  
24 of thing. We haven't done a lot of traveling and that  
25 sort of thing.

1 MR. GROMAN: What is the goal of private right  
2 of action cases?

3 MR. BIEMILLER: Well, the goal of the client is  
4 to get the Spam to stop to them individually. And part  
5 of every settlement that we've had we do get the  
6 injunctive provisions, kind of like Pete was talking  
7 about, and it works for them. I mean, we obviously don't  
8 have the power to extend that -- well, I guess maybe we  
9 do. I'd like to get that brief from you, Pete.

10 **(Laughter).**

11 MR. BIEMILLER: I might be trying to get that  
12 incorporated, as well. But so far it's done a good job  
13 for them individually, but we do have the Whack-a-Mole  
14 situation, but if we want to go back to the analogy  
15 earlier today, the viral thing, I mean, if we whack one  
16 mole, if we just stop whacking them we're going to be  
17 overrun with moles. So, you just have to keep whacking  
18 until the problem changes.

19 MR. GROMAN: Why does an individual who wants  
20 to file a right of action or a small company, under the  
21 statute, need a lawyer? Shouldn't they be able to --

22 MR. BIEMILLER: Yes, we do have small claims in  
23 district court that they can go to. The ones that come  
24 to me, though, are typically large volumes. Like some of  
25 my clients have 300 or 400 Spams that they want to deal

1 with from real prolific Spammers. And those -- they tend  
2 to get in over their heads when they start getting  
3 removed to federal court and that kind of thing.

4 But one of my other cases is a guy who won in  
5 small claims court and they've appealed that all the way  
6 up to the court of appeals at this point, to keep the  
7 precedent from getting set. I guess the Spammers  
8 appealed it.

9 MR. GROMAN: Okay, I'd like to raise the issue  
10 of abuse litigation. And since you are the member of the  
11 plaintiff's bar on our panel, I'm going to toss it at  
12 you.

13 MR. BIEMILLER: Okay.

14 MR. GROMAN: There are those who would  
15 articulate a view that Spam statutes are going to be  
16 abused by the plaintiff's bar and that it might as well  
17 just be a personal injury case, it really doesn't matter.  
18 They're going to find a statute and they're going to  
19 abuse it as a money-making scheme. And is that a  
20 legitimate concern and does it matter?

21 MR. BIEMILLER: Well, I guess we've heard all  
22 about Utah this morning. We don't have that problem  
23 here. I guess like any kind of litigation it can be  
24 abused, so it's really going to be an individual case  
25 type thing. I don't feel like I'm abusing it personally.

1 It's just like a personal injury thing; you have to have  
2 a car wreck to bring a suit on that. With us, it just  
3 seems overwhelming because we have a bazillion million  
4 car wrecks to deal with. So, if that means we're suing  
5 to enforce a lawful statute to try to stem the tide of  
6 this stuff, I can't see that as abusive.

7 Further, it's kind of ironic that those who  
8 talk the most about we're trying to make money off this  
9 are the Spammers themselves who by their very definition,  
10 that's what they're doing when they're Spamming, is just  
11 trying to make as much money as they can, so --

12 MR. GROMAN: I want to open up that same  
13 question to Jon and Pete and just see if you have  
14 anything to say about this concern that Spam statutes and  
15 Spam litigation might actually have a chilling effect on  
16 legitimate companies who are fearful of litigation. You  
17 don't have to take it, but --

18 MR. PRAED: I think as Dietrich suggested,  
19 abuse is not unique to Spam litigation, and the concept  
20 of abuse and the mechanisms to prevent it have been  
21 around for a long time. Rule 11 is as effective in Spam  
22 litigation as it is anywhere else. And I think that  
23 those deterrent powers are perfectly adequate to keep  
24 people from using Spam litigation abusively.

25 I quite frankly think, though, if you're

1 talking bottom line justice that I have seen far more  
2 abuse on the defense bar in Spam cases where you have a  
3 defendant who is engaging in fraudulent Spam. There have  
4 been -- I don't want to talk about particular cases, but  
5 it is not unusual for Spammers to literally throw their  
6 computers away in order to keep them from being  
7 discovered. It's not unusual for -- I think one could  
8 argue that many of the answers that are filed in response  
9 to complaints are dancing on the line of Rule 11.

10 Those are abusive tactics, as well, and are as  
11 worthy of concern in an age when you can debate what "is"  
12 means. I think it is a real risk to fall into the trap  
13 that Spammers think that litigation over Spam is a  
14 continuation of the game that is Spam. And I think  
15 they're learning -- you know, Virginia has just -- or has  
16 just enhanced its criminal statutes. I think the day has  
17 come when Spammers are going to realize this is not a  
18 game. And likewise, people who engage in abusive conduct  
19 on the plaintiff's side, there are adequate measures in  
20 place to prevent that.

21 MR. GROMAN: Thank you. I'm going to turn back  
22 to my colleagues in the state government. Eileen asked a  
23 question this morning on the legislation panel that I  
24 thought was from my panel, but she's my boss, she can do  
25 that. And it was to Paula, so I'm going to turn the



1 exact same question to Stephen.

2 Twenty-nine states have Spam statutes, and I  
3 believe we've only see action out of three states. Why?

4 MR. KLINE: Well, I can tell General Spitzer  
5 will kill me if I start guessing as to why other states  
6 are not acting. I can tell you why -- it's tough. I  
7 mean, you're looking at our Spam litigation team. It's  
8 me and my civilian investigator. And it's not even full-  
9 time. I've got, you know, ten other cases that I handle  
10 as well.

11 MR. GROMAN: And that's for the State of New  
12 York which is a comparatively big state.

13 MR. KLINE: That's for the State of New York,  
14 yeah. And so there are -- I think one thing that you see  
15 in both the criminal side in which I've had experience  
16 and in this side is that a lot of the states attorneys  
17 just don't have the training in high-tech cases. It's  
18 expensive. It's -- once people get training in that  
19 area, it's -- there are certainly a lot of lucrative  
20 offers that come along. And, so, I think it's, one,  
21 tough to find people who can do it; two, I think it's  
22 tough to find the money to do it. And I think in some  
23 situations it may be tough to find the higher-ups that  
24 understand what's going on or understand the seriousness  
25 of it.

1 MR. GROMAN: Paula, how many --

2 UNIDENTIFIED SPEAKER: Can you elaborate on  
3 those lucrative offers?

4 **(Laughter).**

5 UNIDENTIFIED SPEAKER: A little more on those,  
6 please.

7 **(Laughter).**

8 MR. GROMAN: Paula, how many attorneys with the  
9 Washington State AG's Office are working on Spam issues?

10 MS. SELIS: You're looking at the one. I am  
11 she. I agree with Stephen, everything that he said is  
12 true. And just to highlight that, Spam is, I think  
13 everybody in this room recognizes, it's a problem, and  
14 it's a huge economic problem. But when you have  
15 consumers who are calling you about the fact that they  
16 have lost \$10,000 to a telemarketer and you've got to  
17 decide whether you're going to help that consumer or  
18 whether you're going to file a Spam suit where nobody's  
19 really lost any money, although the entire internet  
20 community has lost a significant amount, oftentimes  
21 you're going to take the case involving the telemarketer.  
22 And those are very real pressures, priorities that state  
23 AGs face every day. So, you know, I don't want to malign  
24 our brethren, sistren in other states, but there are good  
25 reasons for not taking Spam cases.

1 MR. GROMAN: I was going to follow up on that,  
2 but I'm actually going to turn that same question to the  
3 counsel for the big ISPs and say that there are those who  
4 would say that your -- the companies represented actually  
5 brought relatively few Spam cases. I think Earthlink's  
6 about a dozen. I think in total, from the press release  
7 I read about AOL, it's 25 total. And between May of 2001  
8 and April of 2003, they brought no cases. So, why do you  
9 think that would be?

10 MR. PRAED: Well, I don't know that those  
11 numbers are necessarily correct, and I don't want to  
12 debate the numbers with you necessarily. I will say  
13 bringing a lawsuit, first of all, is a tremendous  
14 commitment of resources. And there have been, I think, a  
15 lot of lawsuits brought, but the bringing of a lawsuit is  
16 really the tip of the iceberg. I think you're seeing the  
17 state attorneys general bring relatively few cases  
18 because it is so resource-intensive. It's resource-  
19 intensive for the ISPs, as well, regardless of size.  
20 And, again, it's a game of Whack-a-Mole. I think there  
21 are tremendous, tremendous volume of resources being  
22 devoted, first of all, to maintaining the networks. I am  
23 amazed at the job that large ISPs and small ISPs are  
24 capable of doing.

25 I would challenge -- I think it's remarkable in

1 a sense to step back and identify any other business  
2 enterprise that is capable of withstanding essentially 40  
3 to 70 percent free ridership problem. The Metro system  
4 here in town would collapse if 40 to 70 percent of us  
5 were jumping the turnstiles. There is no other business  
6 today that could support that level of free ridership,  
7 but it is not free in the end for the ISPs.

8 And what they are doing both in terms of  
9 managing the daily volume that they have and  
10 systematizing the investigation that allows them to put  
11 in place a process that culminates in a lawsuit. It is  
12 one thing to issue 14 subpoenas. Issuing subpoenas is  
13 really the last step in the process of sending letters,  
14 making phone calls, doing some very thorough  
15 investigations that provide you a great deal of  
16 information and that have real repercussions.

17 I'm as proud of the fact that we oftentimes  
18 chase Spammers across the network space as I am over the  
19 fact that we may sue them and identify them. Don't  
20 misunderstand. We put costs on Spammers the day we start  
21 thinking about them, not the day we start suing them.  
22 And that's the trick, is to try to find ways -- I want  
23 them in this room. We're all in a sense wasting our time  
24 talking about the problem. We need to go sit at  
25 computers and do the very hard work that the major ISPs

1 and the government officials and the solo practitioners  
2 are doing.

3 MR. GROMAN: I have a question to follow up on  
4 you, and I'd like a quick answer on this one. Do you  
5 subscribe to the point of view that there really are 150  
6 big guys out there doing most of the Spamming?

7 MR. PRAED: I don't know that that number's  
8 right, but I think you'd be shocked by how many few very  
9 big fish there are.

10 MR. GROMAN: Pete, do you agree with that?

11 MR. WELLBORN: I do right now, but what's scary  
12 is that going back to a theme of technology one-  
13 upmanship, if you go back to the Sanford Wallace days,  
14 you had to be an internet rocket scientist to figure how  
15 to pop these e-mails out, and even then you're doing it  
16 at a rate of thousands a day. Nowadays you've got script  
17 kiddies, you've got people who can barely log on that  
18 download this software, follow the idiot-proof directions  
19 and those people are popping out a million e-mails a day.  
20 And when you do the math, it's staggering, not even look  
21 at a honed reputation.

22 MR. GROMAN: So, is that a way of saying  
23 probably not just 150 people?

24 **(Laughter).**

25 MR. WELLBORN: I'm saying right now possibly

1       yes, but if we don't do something, it's going to be --  
2       that the number of awful, awful Spammers is going to  
3       grow.

4                   **(Applause).**

5               MR. GROMAN:   Okay.   So, while we're on the  
6       topic of big ISPs, we've heard that -- it happened on --  
7       this Monday, AOL, Yahoo and Microsoft announced that  
8       they're going to have increased coordinated efforts with  
9       law enforcement to enhance enforcement efforts against  
10      Spammers.   My question to Paula and Stephen is what is it  
11      that you want to see AOL, Yahoo and Microsoft do to help  
12      both of you do your jobs.

13              MS. SELIS:   Well, having had some experience in  
14      our own backyard with Microsoft and some very good  
15      cooperation, I'd like to see them and other ISPs take  
16      action and sue more Spammers.   I think that would be a  
17      huge step and a step in the right direction.   Also,  
18      information sharing, at least in Washington we have a  
19      data base of Spam complaints, sort of a mini FTC data  
20      base from Washington residents.   And we would share that  
21      information with the ISPs so that they could use it to  
22      target Spammers.   In turn, if there were a case or a  
23      particular Spammer who they thought would be best served  
24      by a state lawsuit, we would like to be able to take  
25      that.   So, I think there is a lot of room for

1 cooperation.

2 MR. GROMAN: Stephen?

3 MR. KLINE: I haven't run into any problems  
4 with the three of them. I think the intelligence-  
5 sharing, which we've started, has been unbelievably  
6 helpful. And, you know, every time our name winds up in  
7 the paper for a MonsterHut or something, we always wind  
8 up with 20 phone calls, some of them anonymous, some not  
9 so anonymous, saying well, there's five other Spammers,  
10 and here's some information.

11 You know, I would encourage not just the big  
12 ISPs, but the smaller ISPs, and any other sys-admin out  
13 there who has information on this, to pick up the phone  
14 and call your local AG. And if your local AG doesn't  
15 seem that up on the issues, sit down and educate them,  
16 you know? You know, we're not going to know as much as a  
17 sys-admin, but we're happy to be educated about it. And  
18 that's where the good cases are going to come from.

19 MR. GROMAN: We followed the international  
20 panel, and in my conversations with all of you before  
21 this panel, you all mentioned that you encounter concerns  
22 and challenges in the international arena. So, what are  
23 the issues as litigators that you're facing in terms of  
24 international issues. I'll start with you, Pete.

25 MR. WELLBORN: I knew you were going to start

1 with me, because I told you just to skip me on that  
2 question before we started that panel.

3 **(Laughter).**

4 MR. WELLBORN: And I'll speak very honestly.  
5 When an international issue is figured in, that can make  
6 the case and the discovery and the investigation a  
7 horrible pain in the rear. The best thing to do, it goes  
8 back to what we said earlier, which is follow the money,  
9 because if you have a Spammer from whatever-stan, chances  
10 are that Spam is not asking you to mail your check to  
11 some small town in whatever-stan. Instead, that's either  
12 a third-party relay, where the operation truly is in the  
13 U.S. or if it's especially sophisticated, it's a foreign  
14 mailer for a U.S. company. So, the first thing I do when  
15 I see any kind of indicia of foreign involvement is  
16 redouble my efforts to follow the money, and nine times  
17 out of ten, if not higher, I'll confirm that, hey, that  
18 was just a smoke screen, this is a guy down in Florida,  
19 or this is a guy up in New York.

20 MR. GROMAN: Would you be less inclined to file  
21 a case if you know there's a large international  
22 component?

23 MR. WELLBORN: I would not be less inclined,  
24 but I would steel myself for the battle.

25 MR. GROMAN: Jon?



1 MR. PRAED: International is a major problem,  
2 and it's a growing problem. But, again, it's not a  
3 problem that's unique to Spam. I don't think it should  
4 deter Spam litigation, but you do have to plan for it.  
5 And one large thought, obviously there needs to be  
6 coordination, international coordination, and I know that  
7 that's happening, in large part with the FTC's help. And  
8 I applaud that, that international coordination.

9 I think, though, there's a technological  
10 coordination, as well, which involves providing the  
11 individual consumer the ability to tell their browser or  
12 their mail service that they want to respect geo-  
13 political boundaries and literally tell their browser I  
14 do not want you to take me to websites that are hosted in  
15 the former Soviet states. Right now, that is not  
16 technologically possible very easily, certainly not by  
17 the average consumer, and it's something that the  
18 consumer, I think, would applaud being provided that sort  
19 of empowerment.

20 MR. GROMAN: Dietrich, anything on the  
21 international front in your cases?

22 MR. BIEMILLER: We tend to figure that into the  
23 low-hanging fruit analysis and avoid them when possible.

24 MR. GROMAN: Paula?

25 MS. SELIS: I'll have to echo Dietrich on that.

1 It's very difficult using state resources to handle a  
2 foreign aspect to a case.

3 MR. GROMAN: Stephen?

4 MR. KLINE: I would have to echo that, as well.  
5 We did have a foreign aspect in the MonsterHut case, Gary  
6 Hartle, the technician that we sued was living in Canada,  
7 I think did most of his work from Canada, his non-  
8 MonsterHut work. When he heard -- we got a little lucky  
9 with a dumb defendant, because when he heard that we were  
10 looking for him, he called us and --

11 MR. GROMAN: That makes it easy.

12 MR. KLINE: -- asked us if he could -- if we  
13 could go to his attorney's office in Niagara Falls to  
14 serve him in front of his attorney, rather than coming up  
15 to Canada, and we said of course you can come back to the  
16 U.S.

17 **(Laughter).**

18 MR. KLINE: You know, I'm not so scared of the  
19 international aspect anymore, I guess.

20 **(Laughter).**

21 MR. KLINE: But generally, yeah, it -- the  
22 second we see it go to another country, the process for  
23 us is such a laborious one and such a time-consuming one  
24 that we really have to consider whether that's the best  
25 use of our resources.

1                   MR. PRAED:  Marc, if I can, I'd -- anyone who  
2                   wants a good primer on how complex the international  
3                   arena can be, AOL in the CN Productions case moved for  
4                   contempt against the defendants after having gotten a  
5                   judgment against them.  They continued to send Spam, and  
6                   we brought a motion for contempt and were ultimately  
7                   successful in that.  AOL on its legal website has a  
8                   lengthy brief that explains the factual scenario behind  
9                   what was an international conspiracy.  And I think the  
10                  facts would be -- it's a fascinating reading for people  
11                  who are really interested in that aspect of the Spam  
12                  fight.

13                  MR. GROMAN:  My last question for each of you,  
14                  before I open this up to the audience, is what is the  
15                  greatest challenge ahead, the greatest practical  
16                  challenge ahead, in terms of Spam litigation?  Stephen?

17                  MR. KLINE:  Manpower.  It is tough trying to  
18                  justify spending so much time and energy on a case where  
19                  we're not getting any money back to consumers and the  
20                  money for penalties isn't there and, you know, we get an  
21                  injunction and they flee the country.  So, it's --

22                  MR. GROMAN:  Resources.

23                  MR. KLINE:  Yeah, resources really is just the  
24                  toughest part.

25                  MR. GROMAN:  Paula?

1 MS. SELIS: I'd have to agree with that. I  
2 think resources and I think that the potential challenge  
3 is bad Federal law, I'm hoping that we don't face that.  
4 But given our current status, I think the biggest  
5 challenge is resources, the technical savvy, the people  
6 and the money to actually take these cases forward and  
7 win and to make it justifiable in the end.

8 MR. GROMAN: Dietrich, your thoughts?

9 MR. BIEMILLER: I can pretty much echo both of  
10 those things, even just from a small private side, trying  
11 to match up the resources and then the collections end on  
12 the other end. That's going to be a tough connect on  
13 some of these cases.

14 MR. GROMAN: Jon?

15 MR. PRAED: I'd echo that. Resources, and I  
16 think on a longer term, eventually the real hard-core  
17 fraud-Spam problem is going to be solved, I think, in the  
18 next couple of years. Then we'll be left with a low-  
19 level threshold of Spam, largely coming from young  
20 teenage boys. And I think our challenge as a nation, to  
21 be honest, is to find some way to engage some very sharp,  
22 young people, so that they can be challenged in a way  
23 that is fruitful. And dealing with that and finding a  
24 way to collectively do it, I think, is quite honestly our  
25 biggest challenge.

1 MR. GROMAN: Pete, you get the last word.

2 MR. WELLBORN: I think the biggest challenge is  
3 to generally deter the number of Spammers, because the  
4 technology, as it increases, puts so much power to do bad  
5 in the hands of so many people who don't have to be  
6 rocket scientists. We talked about a Whack-a-Mole idea,  
7 we need to take some Whack-a-Moles, and after we whack  
8 them, draw them, quarter them, put their head on a spike  
9 and parade that in front of the other Spammers.

10 **(Laughter).**

11 MR. WELLBORN: We really do need to send a  
12 message.

13 **(Applause).**

14 MR. GROMAN: On that colorful note, would  
15 anyone care to ask any of these trial attorneys  
16 questions? Where are the microphones? Okay, right up  
17 here in the front, the gentleman on the end. Please  
18 identify yourself and wait for the microphone.

19 MR. TYNAN: Dan Tynan, PC World Magazine. You  
20 guys have talked about Spammers engaging in fraud, in  
21 forgery, in hiding money off-shore, pump-and-dump  
22 schemes, a lot of pretty serious criminal activities.  
23 Have any of you in your investigations uncovered links to  
24 organized crime, and if so, would the RICO statutes  
25 apply?

1 MR. GROMAN: Why don't we start with the AGs.

2 MS. SELIS: No.

3 **(Laughter).**

4 MS. SELIS: New York is bigger; you go first.

5 MR. KLINE: You know, we've only had one case  
6 publicly, and anything that's pending, we couldn't  
7 confirm or deny. But I wouldn't be surprised if you  
8 started seeing money pop up in places like that.

9 MS. SELIS: Ooh.

10 **(Laughter).**

11 MS. SELIS: Well, we have not thus far seen any  
12 links with organized crime, but you bring up something,  
13 which is that apart from the Spam we oftentimes see an  
14 underlying scheme that we find problematic, you know, a  
15 get-rich-quick scheme or a wonder drug or something like  
16 that. And when we bring our cases, we not only file  
17 against them for purposes of violating our Spam statute,  
18 but we also allege that they're violating our consumer  
19 protection act by making misrepresentations, which isn't  
20 quite a crime, but it's a sort of similar kind of  
21 activity.

22 MR. KLINE: You know, I think there's one  
23 similar example. I think any time that there is an easy  
24 way, a shady way, to make money, organized crime is going  
25 to start to find their way into it. A perfect example of

1 that is a case I handled with the FTC against Crescent  
2 Publishing. We -- there was \$300 million worth of credit  
3 card fraud for -- through adult websites just -- I want  
4 to say a month ago, a month and a half ago. The Eastern  
5 District of New York and the U.S. Attorney's Office in  
6 the Eastern District of New York indicted Bruce Chew and  
7 two others involved for laundering money and kicking back  
8 about \$8 million to the Gambino family, was it? Yeah.

9 MR. GROMAN: Next question. The lady over here  
10 with the glasses, please.

11 MS. BECKER: Francois Becker from L-Soft  
12 International. If you're a legitimate list operator with  
13 double opt-in and everything, what kind of information do  
14 you need to keep on each of your subscriptions to protect  
15 yourself from frivolous lawsuits by people who subscribe  
16 and then claim you Spammed them?

17 MR. GROMAN: Do you want to pick a lawyer to  
18 answer that? Anyone want to handle that one?

19 MR. WELLBORN: I'll take it. The most obvious  
20 information in relation to the three-way handshake that  
21 you allude to, which is a means of confirming someone's  
22 opt-in, it's to keep false opt-ins -- if I wanted to  
23 really get back at one of ya'll, I could go to all these  
24 different sites and opt-in your e-mail address and then  
25 suddenly you're getting flooded with Spam.

1                   To prevent those false opt-ins, there's  
2 something called a three-way handshake where the list or  
3 the mailer to whom that e-mail address is opted does not  
4 just start Spamming, an e-mail is then sent to that  
5 person that says someone opted you in, we think this was  
6 you, if you do not reply to this, you'll never hear from  
7 us again. If it really was you, reply back. And, so,  
8 you actually have the reply coming from the e-mail  
9 address that was opted in. So, I'd say first and  
10 foremost, keep all information available, logs,  
11 everything, about each aspect of that three-way  
12 handshake.

13                   MS. BECKER: But you've got millions --

14                   MR. GROMAN: Do you need a microphone?

15                   MS. BECKER: If you have millions of  
16 subscribers throughout many lists -- if you have millions  
17 of subscribers, you're still saying we need to keep every  
18 single e-mail, or is it enough to have the IP address  
19 that the okay came from?

20                   MR. WELLBORN: I would keep

21                   AUDIENCE MEMBER: (Inaudible) -- I mean,  
22 there's a cost to doing business.

23                   MR. WELLBORN: I would say definitely keep  
24 every bit of the transaction, because especially -- my  
25 radar goes up, when people start talking about opt-in



1 lists with millions of people --

2 MS. BECKER: We've got hundreds of thousands of  
3 lists, each of them -- I run an epilepsy support list,  
4 500 people. We've got a site that has --

5 MR. GROMAN: Keep the follow-up very short,  
6 please.

7 MS. BECKER: We've got 200 cancer lists.  
8 There's a lot of people with cancer, and there are cancer  
9 support people. And we've got volunteers operating  
10 these. We don't have -- this isn't necessarily a money-  
11 making thing for some of them.

12 MR. WELLBORN: With the cost of storage, save  
13 all you can and you also have an important factor, a  
14 different conversation for a different time. I'm not  
15 sure you all are commercial, based on what you just said  
16 right now, so the rules are a little bit different for  
17 non-commercial activities.

18 MR. GROMAN: Okay, we'll move to the next  
19 question. Do we have any questions from the internet?  
20 Okay, any other questions from the audience here? Can we  
21 have the gentleman over here, please? Please identify  
22 yourself.

23 MR. GELLER: Hi, my name is Tom Geller from  
24 Spamcon Foundation. And my question is for all of the  
25 attorneys, especially the trial attorneys. How do you

1 manage consumer demand for your services? At Spamcon  
2 Foundation, we don't actually address individual Spam  
3 issues, but it doesn't stop dozens and dozens of people  
4 every week writing to us saying I received this Spam, can  
5 you help me out, can you figure this out for me. And I'm  
6 just assuming that it's similar for you folks.

7 MR. GROMAN: Paula, what do you do? You must  
8 get thousands and thousands of e-mails in your data base,  
9 consumer complaints. What do you do with them and how do  
10 you pick the case?

11 MS. SELIS: Okay, good question, good question.

12 MR. GROMAN: And I hope I paraphrased that okay  
13 for you.

14 MS. SELIS: A good example, just recently,  
15 there were 1,700 complaints during February of this year,  
16 so that gives you kind of an idea of the volume. And  
17 we're very lucky, we have a website that we put a lot of  
18 consumer education material on, tell people how to file  
19 their own private actions if they want to. But we can't  
20 handle each and every one individually; we can't file a  
21 lawsuit on behalf of them all.

22 So, what we do is we give them the consumer  
23 education materials. We have them file a complaint on-  
24 line, which enables them to cut and paste their Spam  
25 complaint onto the computer itself, and we keep a data

1 base of that. And then we periodically look at what's in  
2 our data base, having already given the consumer his or  
3 her education and decide, based on what we find, what  
4 would be a good case for us to bring.

5 MR. GROMAN: Does anyone else want to field  
6 that question?

7 Okay, let's move on. In the back, with the  
8 Spam hat.

9 **(Laughter).**

10 MR. GROMAN: We had to go there, right?

11 MR. FERGUSON: Jim Ferguson, I'm not spews  
12 (phonetic).

13 **(Laughter).**

14 MR. FERGUSON: What about the opposite side of  
15 the house where the Spammers are suing the anti-Spammers  
16 because we're denying them access to our personal  
17 inboxes, as well as our networks?

18 MR. GROMAN: If someone would like to take  
19 that, I'd like you to keep that brief. It's slightly off  
20 topic --

21 MR. WELLBORN: I'll keep it real brief. To the  
22 extent you're alluding to any particular case, since it's  
23 a business entity that was formed just a couple of weeks  
24 ago, two months ago, we don't know who it's composed of,  
25 but if there's an entity that's composed of Spammers, and

1 by Spammers I mean people sending unsolicited commercial  
2 e-mail into computer networks that they know forbid  
3 unsolicited commercial e-mail, those people are  
4 criminals, and for them to file suit is analogous to a  
5 burglar suing you because you put a lock on your door.

6 (Laughter).

7 MR. GROMAN: The gentleman in the back by the  
8 door, please.

9 MR. CROCKER: Hi, Dave Crocker, Brandenburg  
10 Networking. First of all, I'd like to thank you all for  
11 a great amount of candor, no matter how disconcerting it  
12 might be. It helps bring some reality to the  
13 expectations about legal enforcement of all this. And  
14 that ended up highlighting two disparities that I'd like  
15 to pursue. One I want to highlight and one I want to ask  
16 about.

17 The one I want to highlight is the comment  
18 about geographic boundaries and any expectation that  
19 we're going to be able to tell browsers, oh, just don't  
20 go to that country. And it was said that it's not  
21 something you could do now. I will tell you, I don't  
22 know how to do that, and I ought to, and I don't know how  
23 to do that. So, I think that any expectation that  
24 browsers are going to be able to do that any time in the  
25 near future, like 10 or 15 years, is pretty small.

1           The other disconcerting -- or disconnect that  
2 I'd like to ask about and get some feedback on is we have  
3 for most of this workshop been hearing about the high  
4 expectations that are held for passing laws and having a  
5 strong effect on Spam. And I would say that your  
6 consensus sounds an awful lot like that ain't going to  
7 happen, and would like you to speak to that some, please.

8           MR. GROMAN: Do you want to pick somebody? Who  
9 wants to field it?

10          MR. PRAED: I don't want to field that portion  
11 of the question, but I want to field -- we've been to the  
12 moon. We can certainly teach internet browsers how not  
13 to go to former Soviet states or to the Bahamians, the  
14 Bahamian Islands.

15          MR. GROMAN: Okay, the part of the question  
16 about is this legislation really going to do anything?  
17 Or are we kidding ourselves?

18          MR. CROCKER: My background's technical. When  
19 I said this, we haven't taught anybody how to stop war.  
20 There are lots of things we can't do. There are physical  
21 limits in this world.

22          MR. GROMAN: Okay, I want to stick to the issue  
23 of litigation and legislation, off the browser topic.  
24 Anyone want to give an opinion, as a litigator, if we  
25 have legislation that wants or seeks to encourage

1 litigation or law enforcement, are we going to see  
2 anything happen?

3 MR. WELLBORN: As far as the legislative end of  
4 things, if we have a law that tightens the noose, I'm all  
5 for that. If we have a law that arguably or purports to  
6 legalize that which is illegal right now, I'm against  
7 that, and in fact, it would be a bad Constitutional  
8 problem because an ISP's right to regulate how its  
9 computers are used, that's one stick in its bundle of  
10 property rights.

11 And, so, if you have any situation where the  
12 government comes in and says, ISP, you can no longer sue  
13 under common law trespass, you can no longer say that  
14 people can't send unsolicited commercial e-mail through  
15 your network, if that were to happen, there'd be serious  
16 Constitutional issues. Right now, even without the Spam-  
17 specific laws, which we would all love one if it had  
18 teeth and it were good, but even without that, our gun's  
19 already loaded with about a dozen or so bullets, any one  
20 of which will get the Spammer.

21 MR. GROMAN: Okay, next question. Gentleman in  
22 the back row.

23 MR. BERLIND: Hi, David Berlind with CNET. And  
24 to Paul Wellborn's last point that drew quite a bit of  
25 reaction from the audience, which is we should draw and

1 quarter Spammers, my question is, you know, we watched  
2 the news recently, now that the war is over, the news is  
3 going to other things, and one of the big focuses now is  
4 how none of these people who have run afoul of good  
5 corporate governance haven't gone to jail yet.

6 And the question here is, you know, I think a  
7 lot of people believe that in the world of Spamming,  
8 assets can be hidden and financial penalties are kind of  
9 worthless, but if we make examples of a few people and  
10 put them in jail that might change things, because you  
11 can't hide the body. You can hide the money, but you  
12 can't hide your own body, and so, what is it going to  
13 take to improve the punishment from the recipient's point  
14 of view to make a few examples here so that Spammers do  
15 really think twice because the punishment is much more  
16 serious than something that they can --

17 MR. GROMAN: Is the question do we need a  
18 bigger punishment?

19 MR. BERLIN: Sure.

20 MR. GROMAN: Anyone want to field that?

21 MR. WELLBORN: I hate to take every question.  
22 Make me prosecutor for a day, I'll put them all in jail.

23 **(Laughter).**

24 MR. GROMAN: Okay, we have a question up here,  
25 please. Right up here in the front row.

1                   MR. KELLY: Hi, Ben Kelly, Attorney in Los  
2 Angeles. I have a quick question for probably mostly the  
3 litigators here. What has been -- what are your thoughts  
4 or what have your experiences been with a would-be Spam  
5 plaintiff's duty to mitigate?

6                   MR. PRAED: I'll take that. Obviously duty to  
7 mitigate is a standard requirement. I think most of my  
8 clients in my experience have fully discharged that duty  
9 and are doing everything they can both to filter and to  
10 put Spammers on notice. I think the Verizon Online  
11 versus Ralsky case really stood for the principle that no  
12 professional Spammer today can realistically say that  
13 they don't know that what they're doing is in violation  
14 of what Pete so eloquently points out is one of the most  
15 important bundles in the bundles of sticks that we all  
16 have, the right to exclude others from our private  
17 property. Duty to mitigate is not a new concept.  
18 Plaintiffs generally meet that duty fairly easily.

19                   MR. GROMAN: I want to return to an earlier  
20 question and give our former assistant district attorney  
21 an opportunity to address that question about increased  
22 penalties. Stephen:

23                   MR. KLINE: You know, I agree with Pete that if  
24 a few of them were in jail it would be tougher for them  
25 to Spam. The problem that we have, and we have secondary



1 criminal jurisdiction in New York, is the same sort of  
2 problem we have on the civil side, and that is, you know,  
3 for all the resources we have, if I marched into my boss'  
4 office and said you wouldn't believe this guy is sending  
5 billions and billions of e-mails every day, and it's  
6 costing this large corporation a lot of money, and on the  
7 other side there's another assistant saying and over here  
8 we've got people who are creating false passports for  
9 terrorists, they're laundering money through Aholla's  
10 back to Pakistan and all of this, I can tell you who's  
11 leaving the office first and looking for another case.

12 **(Laughter).**

13 MR. KLINE: And I think Pete would agree.  
14 We've talked about this a little. As much as we despise  
15 Spammers, I'd much rather see a pedophile or a terrorist  
16 taking up that jail space than a Spammer.

17 MR. WELLBORN: As would I.

18 MR. PRAED: Just a quick comment. I think,  
19 though, what we're seeing is an exploitation of what in  
20 the end is a systematic problem, and I think Spammers are  
21 taking advantage of those same exploits that terrorists,  
22 quite frankly, are taking advantage of. And to the  
23 extent that we're -- to some sense and some degree it  
24 doesn't matter who you chase, as long as you are chasing  
25 someone who is taking advantage of that exploitation and

1 close the loophole. You're going to fix both problems.

2 MR. GROMAN: Okay, let's move on to another  
3 question. The lady up front please, in the white.

4 MS. ANGWEN: Hi, Julia Angwen (phonetic) of the  
5 Wall Street Journal. On the same note of increased  
6 penalties, I'm just wondering why, if some of these  
7 Spammers are using stolen credit cards and engaging in  
8 fraudulent marketing, why hasn't there been any criminal  
9 prosecution of them?

10 MS. SELIS: Well, I have to come back to what  
11 Stephen was saying in terms of resources. There are a  
12 lot of potential criminal cases out there, and when you  
13 are facing, you know, property crimes versus physical  
14 crimes versus terrorism and you have to choose among them  
15 because you have limited resources, what oftentimes  
16 happens is that you're going to go to the more serious  
17 crimes first. And of course that's a philosophical  
18 question as to what is the most serious one, but  
19 oftentimes it's the one where there involved some sort of  
20 bodily crime.

21 The Washington AG's Office does not have  
22 criminal jurisdiction, but we do try to look at the  
23 underlying issues. So, for example, if there is credit  
24 card fraud or if there is a misrepresentation going on,  
25 we may refer something out to the prosecutor. And there

1 is a question as to whether the prosecutor is going to  
2 take it or not. I can speak in the off-line world, where  
3 we have had just generic consumer protection cases that  
4 have involved identity theft or fraud, and I have  
5 referred some of those cases to our prosecutor and  
6 sometimes the prosecutor will take them, if they involve  
7 enough dollar loss, and sometimes our prosecutor will  
8 not. So, it really comes down to resources once again.

9 MR. GROMAN: I also want to point out in  
10 response to that question if you have a Spammer who is  
11 engaged in Spam but is also engaged in identity theft or  
12 credit card fraud or some other criminal behavior, that  
13 individual may very well have been prosecuted criminally,  
14 it's just not a Spam case necessarily. So, maybe they  
15 did go to jail for the other behavior, but it wasn't a  
16 Spam case under the Washington AG Spam statute.

17 So, I don't want to leave the idea that these  
18 people aren't being prosecuted; they very well maybe,  
19 it's just that it's not a Spam case then, it's a  
20 different criminal action.

21 Yeah, I'll take a question from the gentleman  
22 in the back, please.

23 AUDIENCE MEMBER: How do I go on notice saying  
24 that I don't want Spam sent to my domains? I'm not an  
25 ISP or anything. To whom do we send the check so that

1 the AGs can go to their bosses and say people are willing  
2 to pay for this?

3 MR. GROMAN: The IRS.

4 **(Laughter).**

5 AUDIENCE MEMBER: But the IRS doesn't know that  
6 I'm sending that check for this purpose. And can we  
7 create automated tools that facilitate the tracing of who  
8 it is that's sending the Spam so that it provides easier  
9 ways for the AGs and attorneys to figure out who to go  
10 after?

11 MR. GROMAN: The question's about automated  
12 tracing.

13 AUDIENCE MEMBER: Yes, the question is is --  
14 you know, can we create Spam bait out there like  
15 honeypots are doing and things like that to try to go and  
16 trace back who the Spammers are, so that the information  
17 is gathered, held onto and traced back and tools for  
18 figuring out --

19 MR. GROMAN: Well, I think that the next panel  
20 actually is going to address some technical issues, so  
21 let's keep this to litigation, and we'll leave that to  
22 the next panel.

23 If we could have the gentleman in the back,  
24 right behind you, please.

25 MR. SILVER: Hey, my name is David Silver.

1           Pete, I have a quick question for you just real quick.  
2           You had made a comment to a lady's question earlier  
3           about, you know, the kind of information that needs to be  
4           kept in order to prove whether you've not done Spam or  
5           not. So, just a point of clarification, so companies  
6           that may be not practicing double opt-in, are they at  
7           risk of being -- having a lawsuit filed against them?  
8           Because I think this question of what attributes are  
9           required to be kept is really important for lots of large  
10          corporations that are trying to identify how do they  
11          fight -- or keep from being sued as a result of what  
12          attributes are required to be kept. And many companies  
13          don't do double opt-in. So, I just have a question for  
14          you, are they open to a lawsuit as a result of not having  
15          that information?

16                   MR. GROMAN: And you can send a bill for legal  
17          services when you answer that.

18                   MR. WELLBORN: Oh, that's a great question, and  
19          it reminds me of an old contracts professor I had in law  
20          school. He would say you can sue the bishop of Boston  
21          for bastardy, but you might not win.

22                   **(Laughter).**

23                   MR. WELLBORN: And what that means is that  
24          might you get sued? Yes, certainly. If someone falsely  
25          opts in an e-mail address and there's no three-way

1 handshake to confirm that e-mail address, might that  
2 person get mad and sue. Yeah. Would your client  
3 possibly win because they had no way of knowing or they  
4 weren't one of these outfits that's in the business of  
5 taking false opt-ins, you know, yes, but the key factor  
6 there -- I would advise one of my clients to not think  
7 about what lets you win the lawsuit but instead think  
8 about what lets you avoid the lawsuit altogether.

9 MR. GROMAN: Next question? We're going to go  
10 all the way into the back corner. And please identify  
11 yourself before your question.

12 MR. LEVINE: I'm John Levine from CAUCE Abuse  
13 Net, and I have sort of a question and a half about  
14 private right of action.

15 MR. GROMAN: Well, we're almost out of time, so  
16 if we can keep it quick, please.

17 MR. LEVINE: The junk fax law is primarily  
18 enforced by private right of action. Two things to make  
19 it hard is it's complicated to explain to small claims  
20 judges who frequently don't have a lot of real training,  
21 and the other is that small claims have to be filed in  
22 the defendant's location, which with faxes is frequently  
23 the same as yours but with Spam never is. I'm wondering,  
24 is there anything we could do to make PROA more  
25 enforceable for small plaintiffs who have received Spam.

1                   MR. GROMAN: Dietrich, that would be you,  
2 private right of action.

3                   MR. BIEMILLER: Well, I think the  
4 jurisdictional issue is one -- I've got one case right  
5 now that was brought in small claims court and the  
6 defendant appeared over the phone, so it's really not  
7 that much of a hurdle for them to actually appear in  
8 court from anywhere in the world. Again, the enforcement  
9 of that is going to be difficult, but -- and as far as  
10 the junk fax thing goes, it's more of tracking down who  
11 the real Spammer is and it's something that anyone can do  
12 if they can find -- through vicarious liability theories  
13 where the money's going and then, you know, go against  
14 that person. Does that answer your question?

15                   MR. GROMAN: Paula wants a word on that.

16                   MS. SELIS: Just to follow up on that one, in  
17 Washington, small claims courts are courts of limited  
18 jurisdiction, and they define themselves by statute. And  
19 one of the ways that they define themselves is that they  
20 say that you can't bring an out-of-state defendant into  
21 small claims court. Yeah, I think it's very common. But  
22 you can bring an out-of-state Spam defendant into  
23 district court, which is very similar to small claims  
24 court. The filing fees are very low, pretty simple  
25 procedures.

1                   So, I think it's going to vary from state to  
2 state, jurisdiction to jurisdiction, whether you can haul  
3 somebody into small claims court or not. But it is an  
4 issue, and it was an issue in Washington, and as Dietrich  
5 pointed out, we clarified in our statute, just this last  
6 session, that you could at least bring an out-of-state  
7 spammer into district court.

8                   MR. GROMAN: Okay, I'm looking at a lot of  
9 glazed faces that appear desperate for caffeine.

10                   **(Laughter).**

11                   MR. GROMAN: So, I want to thank the panelists.  
12 Before we close, I do want to mention that the Chairman  
13 made -- mentioned in his opening remarks that the Federal  
14 Trade Commission, along with state law enforcement and  
15 other federal agencies, are going to be announcing on May  
16 15th some new law enforcement actions that will address  
17 on-line fraud and Spam. And that will be following up  
18 some of the things we've talked about at this forum.

19                   So, on that note again, thank you very much to  
20 our panelists and we'll see you back.

21                   **(A brief recess was taken).**

22                   MR. HUSEMAN: Good afternoon. We're finally  
23 here for the last panel of three days. And my name is  
24 Brian Huseman. I'm a Staff Attorney with the FTC's  
25 Division of Marketing Practices. And I just asked who



1 gave me this lousy time slot, but I guess that was me, so  
2 I guess I can't complain.

3 **(Laughter).**

4 MR. HUSEMAN: In this panel, we're going to be  
5 talking about two very distinct things but two very  
6 important topics in our solutions day. We'll be talking  
7 about technological solutions to Spam and also structural  
8 changes to e-mail. I really see the panel delving into  
9 three different phases, and the first will be what  
10 current technological approaches can we use to try to  
11 solve the Spam problem. And I want this panel not to be  
12 a discussion of should someone -- should a consumer or a  
13 business buy Spam product A versus Spam product B.  
14 That's not a very useful discussion. Instead, we're  
15 going to be focused more on the technologies and the  
16 approaches themselves, what are the pros and cons of each  
17 of these different methods of dealing with Spam in a  
18 technical manner.

19 The second phase of the panel will be talking  
20 about some specific panels that have been put forth about  
21 how we can, with technology, deal with the Spam problem.  
22 And then the third phase we'll be talking about some big  
23 picture structural changes to e-mail, the way that the e-  
24 mail protocol is set up, the way that we communicate with  
25 e-mail. And, so, we'll be just tossing some of these

1 ideas out there and evaluating whether they're efficient  
2 or even possible to do.

3 This is one area where the FTC, you know, does  
4 not have a lot of expertise in, as we're not  
5 technologists, we're lawyers instead, but it is probably  
6 one of the most important, if not the most important,  
7 possible solution to the Spam problem.

8 And I want to point out initially before we  
9 start that Ira Rubinstein from Microsoft has been  
10 replaced by Ryan Hamlin here on my far right, who is the  
11 general manager of the Anti-Spam Technology and Strategy  
12 Group at Microsoft, so just make that in your notes.

13 So, we're first going to start out with John  
14 Levine. John, will you please show us your presentation?  
15 We're going to -- get us all on the same playing field.  
16 And I would ask all the panelists, you know, as I said,  
17 I'm a lawyer, not a technologist. John is the author of  
18 "Internet for Dummies," so that's a good approach and  
19 mindset to keep in mind. Let's talk about this from a  
20 dummy's perspective at the beginning to examine the  
21 various approaches and the pros and cons of each.

22 MR. LEVINE: Thank you, Brian. I'm going -- I  
23 have set for myself the simple task of explaining all  
24 known approaches to Spam filtering in four minutes, which  
25 is not going to happen. But my goal in this little pitch

1 is basically to show you that there's a lot of different  
2 approaches that have already been attempted and are  
3 already fairly well understood and that people keep  
4 reinventing, because there's a very bad habit for people  
5 to think that they're the first person ever to invent the  
6 idea of a white list or something.

7 So, if we can categorize the approaches, I  
8 think it makes it much more -- it will make it much  
9 easier to talk about what's promising and what's not  
10 promising. And I will attempt to keep my snide remarks  
11 about the promisingness of each approach to a minimum.

12 As we move through sort of the stages of  
13 processing an e-mail, the first is source filtering,  
14 looking at where -- even before you receive the message,  
15 looking at where it comes from and how do you decide  
16 whether you even want to accept it in the first place.  
17 And I have five approaches here. I'm going to explain  
18 these very fast, and if you don't understand everything,  
19 come and talk to me later, and I'll be happy to tell you  
20 in more detail when I can talk slower.

21 The first couple of lists are blacklists.  
22 There's a variety of ways that people create blacklists.  
23 The first one is mechanical, mechanically generated DNS  
24 blacklists. These are things that report -- things that  
25 you can test mechanically that are known to be sources of

1 Spam, open relays, proxies, addresses that have sent to  
2 Spam-trap addresses.

3 The second category of blocking lists is what I  
4 call untrustworthy senders. If a machine is a dial-up  
5 user of a consumer ISP, a correctly configured mail  
6 system will route the mail through the ISP's mail server.  
7 If it attempts to send directly, it means it's either a  
8 Linux weenie or it's a Spammer. And Linux weenies are  
9 educable, so in general, it makes sense to reject that  
10 kind of mail.

11 The third kind of blocklists is what we call  
12 shared reports. A lot of people send in reports that  
13 they're Spam and based on those reports, it more or less  
14 automatically creates a blocklist of the addresses from  
15 which the reported Spams came.

16 The next kind of blocking lists are waiting  
17 services, Spam sources. These are actually created by  
18 human beings who are identifying sources that they  
19 believe are sources of Spam or related to Spam, that you  
20 probably wouldn't want to receive. And the best known  
21 are the SBL and the MAPS RBL, both about which we heard  
22 quite a lot yesterday.

23 And the final source filtering scheme is what I  
24 refer to as DNS poisoning, which is basically to say if -  
25 - when an incoming message has a return address or a lot

1 of domains that appear to send nothing but Spam, and if  
2 you simply adjust the mechanics of your internal domain  
3 server so those domains can't be found, then your normal  
4 reject scheme that rejects mail with impossible senders  
5 will reject it.

6 The other kind of poisoning is simply -- if you  
7 notice that there are Spammers on a particular network,  
8 you can adjust your own domain server so that when they  
9 send a request to you to say where do I deliver mail for  
10 your domain, it sends back a message saying I don't know,  
11 which is -- it's not widely used, but it's quite clever.

12 Once the message is received, now there's a  
13 whole bunch of approaches to content filtering, where you  
14 actually look at the message to decide whether or not you  
15 want to receive it. The first is protocol defects.  
16 There's a mechanical definition of the SMTP protocol, and  
17 in general, the legitimate software does SMTP correctly  
18 and the more defects in the transaction, the more likely  
19 it is that it's sloppily written Spamware.

20 MR. HUSEMAN: John, what is SMTP?

21 MR. LEVINE: Oh, it's the optimistically named  
22 simple mail transport protocol. It's the scheme used to  
23 transport mail from one computer to another over the  
24 internet. Sorry.

25 So, first -- again, you can make these fairly

1 mechanical tests, and these are quite reliable. The next  
2 is look at the headers of the message, and this is where  
3 you come into sender white lists and black lists. If  
4 it's from a sender that you know you don't like, you  
5 reject it; if it's from a sender that you know you do  
6 like, you accept it. And there also turn out to be other  
7 kinds of mechanical defects in the headers that you can  
8 check for, and again, the more defects you have, the more  
9 likely it is that it's Spam.

10 MR. HUSEMAN: John, can we go back to your  
11 first protocol defects. What is RDNS?

12 MR. LEVINE: RDNS is the reverse lookup to find  
13 out where the message came from.

14 MR. HUSEMAN: So, can you give us an example of  
15 how that would work?

16 MR. LEVINE: Yeah, whenever a message comes in,  
17 it has, as we saw in the session on the first -- in Nick  
18 Nicholas' session in the first day, it has a sender -- it  
19 has an address it's routed to and it has a return  
20 address. And the return -- what you can do is you can  
21 simply look up the return address and say, where would I  
22 deliver mail sent back to that return address. And if  
23 you don't get a response, you know the return address is  
24 forged, and that's a very strong indicator that it's  
25 Spam. And, again, my previous thing about DNS poisoning

1 basically makes it look like your own addresses are  
2 forged to confuse Spammers.

3           Once you've analyzed the headers, there's  
4 various things you can look for in there. Then I think  
5 the largest category of Spam filters are body strings.  
6 They actually look for pieces of text in the body of the  
7 message. These slides are all on my website. I can give  
8 you the URL later, so you don't have to carefully copy  
9 them all down.

10           There's two kinds of body filters. One are  
11 what I call fixed body filters, where the strings are  
12 more or less built into the filtering program or they're  
13 updated occasionally. The other is what I call adaptive  
14 body filtering, which is also known more trendily as  
15 Bayesian body filtering, where you simply say here's a  
16 whole bunch of Spam, here's a whole bunch of non-Spam,  
17 and it uses statistical methods to try and figure out  
18 what strings are likely to appear in Spam, what strings  
19 are likely not to appear in Spam.

20           Bayesian filtering used to work really well.  
21 But since Spammers are not totally stupid, they have  
22 figured out to make their Spam look either -- either look  
23 more like real mail or to be so short that there aren't  
24 enough strings to apply filters to.

25           MR. HUSEMAN: John, so Bayesian filtering,

1 would that be, for example, the same -- if a Spam message  
2 has the words free plus money plus offer, then there is  
3 an X percent chance that that is actually Spam message?

4 MR. LEVINE: Like that except that it's  
5 completely automated by software. You simply say here's  
6 all my Spam, here's all my real mail, and it figures out  
7 what those likely strings are. And having looked at some  
8 of the Bayesian filters that have been generated  
9 automatically, they come up with wild stuff, stuff that  
10 you wouldn't expect, which frequently turns out for a  
11 while at least to be a really good indicator of Spam, at  
12 least until the Spam mutates.

13 The next that I find works really well is bulk  
14 counting. I use a system called DCC, called short for  
15 distributed checks on clearinghouse, where basically what  
16 it does is it makes sort of a one-line code number that  
17 digests the content of each message. And then a group of  
18 DCC servers simply go and count the number of messages  
19 with the same signature. And if you have many messages  
20 with the same signature and they're not from a known good  
21 mailing list, it's probably Spam.

22 Again, I find this extremely effective,  
23 particularly I have a lot of e-mail addresses that appear  
24 in my books, so they never -- they absolutely cannot  
25 legitimately subscribe to any sort of real mailing list,



1 so any bulk mail that comes to those addresses must be  
2 Spam. And bulk counting works really well for that.

3 A related thing is what I called shared  
4 announcements, where DCC simply counts -- DCC counts all  
5 the messages, and you have to make special arrangements  
6 for it not to look at your legitimate mailing list.  
7 Shared announcements, the best known of which is Vipol's  
8 Razor, which has been commercialized as Cloudmark.  
9 People send in their Spam, and it attempts to come up  
10 with a shared counting system for just counting Spam, not  
11 counting all the messages.

12 MR. HUSEMAN: So, John, can you give an example  
13 of how that would work practically?

14 MR. LEVINE: Oh, people basically, when they're  
15 going through their mailbox, every time they see Spam,  
16 they forward it off to the local Razor server. And then  
17 it automatically updates the bulk counters that it keeps,  
18 so that when future mail comes in, it can say, oh, look,  
19 this has the same signature as all these messages that  
20 were reported as Spam, therefore it's probably Spam, too.

21 MR. HUSEMAN: So, is this also known as the  
22 peer-to-peer or collaborative approaches --

23 MR. LEVINE: It's one of the collaborative  
24 approaches. DCC is also collaborative. The difference  
25 is that DCC is automatic. It counts everything, and you

1 have to separately figure out what's from a real mailing  
2 list.

3 MR. HUSEMAN: Does DCC stand for something?

4 MR. LEVINE: Distributed checks on  
5 clearinghouse. It's a tool beloved by weenies.

6 **(Laughter).**

7 MR. LEVINE: It's hard to install and hard to  
8 explain, but it works really well.

9 **(Laughter).**

10 MR. LEVINE: Razor particularly in its  
11 commercialized form is easier to set up because it's been  
12 packaged in a more attractive way.

13 And, finally, what I can only call Spammy  
14 behavior, if you have like subject lines with random  
15 strings of text and numbers in them and e-mail messages -  
16 - you know, I get a lot of e-mail messages that start  
17 with sort of long sets of words that clearly mean  
18 nothing. Those are called hash busters. Those are  
19 specifically put in there to defeat these bulk counting  
20 systems, to try to make all the different copies of the  
21 Spam look different enough that they're not recognized as  
22 the same. However, you can look for hash. There's a lot  
23 of hash busters that turn out to be done in really dumb  
24 ways, and you can count them and you can identify them.

25 The next approach is hybrid filtering. No

1 single approach works all that well, so we mix them and  
2 match them. Some of the best known are Spam Assassin and  
3 Mail Shield. I happen to use Spam Assassin because it's  
4 free and it runs on the kind of server I use. And there  
5 are lots of add-ons to your mail transport agent, the  
6 actual mail server software, that you can buy. And I  
7 think if you talk to most ISPs, they will -- at least  
8 part of their Spam filtering will be home brew, so  
9 there's a lot of variation there, too.

10 Now, this next thing starts to approach on ways  
11 that we might be changing the way that e-mail works. And  
12 sender identification is a way to say that if we know who  
13 the sender is and we know it's not somebody we hate, then  
14 the mail is most likely good. The best known sender  
15 identification are the two cryptographic signature  
16 schemes, PGP and S/MIME. They work pretty well, but the  
17 fact that they've both been around for years and nobody  
18 uses them suggests that they have usability problems.

19 The next possibility is what I call per-  
20 correspondent addresses, and there was a blurb out there  
21 for one variation, a blurb out in the back, for one  
22 variation of this. And basically you give each of your  
23 correspondents a different address of yours to send mail  
24 to. And then if -- when the mail comes in, if the  
25 address it's sent to matches the correspondent you gave

1       it to, you know it's okay. If it comes in to some random  
2       other address, or even worse, if you get mail that you  
3       gave to person A, but you received mail to that address  
4       from person B, that suggests that they sold or  
5       transferred your address.

6                So, that can be a very good way to keep track,  
7       particularly when you're doing business with companies,  
8       all of whom require an e-mail address. It's a good way  
9       to keep track of who you're corresponding with. And in  
10      my case, I find it's very useful that a message shows up  
11      in my inbox and I say ooh, it looks like Spam, and then I  
12      say oh, wait, that's the right address, I did business  
13      with them a year ago, so I know it's okay.

14               MR. HUSEMAN: So, would this be a disposable e-  
15      mail address?

16               MR. LEVINE: You can treat them as disposable.  
17      In my case, they're not disposable; either they're active  
18      or they go to the Spam trap. But other people treat them  
19      as disposable.

20               A related thing to this, actually to the  
21      reverse DNS lookup is some mail systems actually when an  
22      incoming message comes in from an unfamiliar address, it  
23      actually starts a session back to the sending mail system  
24      and attempts to deliver -- it goes through the first half  
25      of an SMTP session to try and send mail back to that

1 address, to see whether at least the address is accepted.  
2 And this is a more sophisticated way to validate that the  
3 from address is real. This isn't widely used, and I  
4 think this has scaling problems. I think it would be  
5 really resource-intensive to use a lot.

6 Another popular scheme that I don't like for  
7 reasons that I won't take time to explain is challenge  
8 response. When somebody -- you send mail to someone you  
9 haven't heard -- you haven't corresponded with before.  
10 And his computer automatically sends back a message  
11 saying who the heck are you. And if you respond to the  
12 challenge in some satisfactory way, and satisfactory is  
13 anything from clicking on a link to sending them an essay  
14 explaining why you were worthy of their valuable  
15 attention. But if you send back a satisfactory response,  
16 then you're white listed.

17 There are a variety of trusted sender schemes,  
18 and Vince is going to tell us about one, so I won't  
19 attempt to describe it. But this is basically a way to  
20 say that not only can you identify who a message is from,  
21 but some organization who you presumably trust says we  
22 have investigated the sender and the sender says that  
23 this mail is of such and such a category and from our --  
24 as far -- you know -- and we will assert that what he's  
25 saying about it is true. So, that can be useful as a way

1        simply to put useful labels on mail, so that mail can  
2        identify itself as yes, this is bulk; yes, this is not  
3        bulk. And, so, if they lie about it, it's much clearer -  
4        - you have a much clearer way to go after them and say  
5        not only is it Spam, but you're a liar.

6                    And the final one in sender identification are  
7        various technical ways that are sort of analogous to the  
8        realtime mailback but more technically efficient to  
9        verify that the address -- that the internet address that  
10       a piece of mail is coming from is a sending server that  
11       is authorized to send mail with that return address, and  
12       it's simply -- it's a more complicated and more  
13       sophisticated way to validate that mail is actually  
14       coming from who it purports to be coming from.

15                   And, again, it's similar enough to per-  
16       correspondent addresses and signatures that we can  
17       consider them all together.

18                   MR. HUSEMAN: Now, where would the white list  
19       approach fall? Would it be a sender identification  
20       method?

21                   MR. LEVINE: I actually treat that more as  
22       content filtering, because partly it's -- well, no, white  
23       list is not sender identification because you have no way  
24       of knowing that the address that the message purports to  
25       be coming from is actually who it's coming from. In

1 other words, you know, if I -- if I know Brian's a good  
2 guy and I put his address in my white list, then all mail  
3 from you will automatically be white listed. But if some  
4 third party then sends me a virus that fakes your address  
5 in the return address, it will pass through my white  
6 list, even though it's not really from you. So, the  
7 point of the sender identification is to distinguish mail  
8 that's really from you versus mail that only purports to  
9 be from you.

10 MR. HUSEMAN: So, white list would fall under  
11 the content filtering. And if you could briefly explain  
12 what a white list is.

13 MR. LEVINE: Oh, a white list is simply a list  
14 of e-mail addresses from which you believe you want to  
15 receive mail. I mean, like everybody in this room, I  
16 would guess, would qualify for my white list. You know,  
17 so if you send me mail, it will basically say oh, it's  
18 from you, I'll bypass all those other filters and I'll  
19 just put it in my mailbox.

20 MR. SCHIAVONE: Did you opt in to every mailer  
21 in the room?

22 MR. HUSEMAN: Please speak in the mike.

23 MR. LEVINE: Did I -- Vince asked did I opt-in  
24 to every mailer in the room. For individual messages  
25 telling me how wonderful I am, yes.

1                   **(Laughter).**

2                   MR. LEVINE: And my final set of possible  
3 changes to e-mail are what I call -- are postage schemes,  
4 ways to put -- basically, some ways to charge the sender  
5 some amount for the privilege of delivering mail to you.  
6 And they fall into two large categories. One is what's  
7 called hash cash, where there's no money involved but the  
8 sender -- you present the sender with a computationally  
9 difficult computing problem, which it then has to solve  
10 to allow the message to be delivered. And the idea is  
11 that solving the message will be time-consuming enough  
12 that Spamming people will be too slow, because you'll  
13 have to solve too many of these problems.

14                  MR. HUSEMAN: Where would that message come  
15 from? Would it come from the ISP or from the individual  
16 recipient?

17                  MR. LEVINE: Ask six geeks, get six different  
18 answers. Some people attempt to send the hash challenge  
19 back from the mail server; some attempt to send it back  
20 from the end-user. I think that it's not practical  
21 simply because the computer speeds vary so much, you  
22 know, and my stepmother's 486 might take an hour to solve  
23 a problem that a Spammer's two-gigahertz Pentium VI could  
24 solve in a tenth of a second. So, I think that makes  
25 hash cash impractical.



1           The final thing is e-postage, where you put  
2 real money on it. And I think -- I think e-postage is  
3 impractical just because it requires building a brand new  
4 organizational structure like the post office, okay? We  
5 already have one of those, and it has its problems.

6           **(Laughter).**

7           MR. LEVINE: You know, so everything -- and I  
8 say, like, okay, if you're going to charge people two  
9 cents to send you mail, that's fine. Now, when a bad guy  
10 puts a virus on your machine that sends Spam to third-  
11 parties, who pays the postage? I don't know. Yeah, we  
12 can probably solve all these problems, but we're going to  
13 take one can of worms and replace it with a bigger,  
14 uglier, more expensive can of worms. So, e-postage --  
15 everybody says e-postage would be great. I simply don't  
16 think that it's implementable.

17           So, anyway, that's my very short overview.  
18 And, again, if you want more detail on what these things  
19 are the URL where the slides are, come and talk to me  
20 later.

21           MR. HUSEMAN: Can you just say the URL briefly?

22           **(Laughter).**

23           MR. LEVINE: www.iecc -- that's I E C C --  
24 .com/ftcSpamtech -- T E C H -- .ppt. And if you didn't  
25 get that, I'll tell you again later.

1                   MR. HUSEMAN: Thanks. Now, Matt Sarrel, you  
2                   are technical director for PC Magazine's Internet Lab,  
3                   and so you have examined all of the actual commercial  
4                   products, both for consumers and business and tested  
5                   those out. Let's go through John Levine's categorization  
6                   of all the various technical approaches to Spam and talk  
7                   about how those approaches have both pros and cons for  
8                   consumers and businesses and today's actual products that  
9                   are out there. What about any source filtering products?  
10                  What are the pros and cons of that approach?

11                  MR. SARREL: Source filtering works fairly well  
12                  on a system level. The only -- the immediately  
13                  noticeable problem to source filtering is when sending  
14                  systems get placed on blacklists incorrectly, which  
15                  actually, interestingly enough, happened to Ziff Davis --

16                  MR. HUSEMAN: Which we talked about yesterday,  
17                  had a sense of discussion kind of about that problem in  
18                  one of yesterday's panels.

19                  MR. SARREL: So, they can be helpful, but  
20                  they're not the answer to the whole problem. And they're  
21                  also, from a computational sense, they're relatively easy  
22                  to implement and not very costly.

23                  MR. HUSEMAN: What about content filtering?  
24                  So, this would include various things such as white  
25                  lists. Let's talk about white lists first. What are the

1 pros and cons of that approach?

2 MR. SARREL: I think one of the major pros to  
3 white listing is that it's a very easy concept to  
4 understand. So, it's sort of like you say this is a list  
5 of people that -- for whom I'm willing to accept e-mail,  
6 and whatever they send me, I'll accept. Now the problem  
7 is, when someone ends up on your white list who doesn't  
8 belong there, and the other problem is what happens when  
9 you add someone to a white list based on an ambiguous e-  
10 mail.

11 One of the problems that we had in our testing  
12 is that the actual definition of Spam, so what's really  
13 Spam, what do you really want, what do you really not  
14 want. And we happened to get an awful lot of e-mail that  
15 we called gray Spam, which is Spam that we didn't ask  
16 for, but we read and it turns out to be relatively  
17 interesting.

18 **(Laughter).**

19 MR. SARREL: That doesn't happen to everyone,  
20 but being in the media, I get e-mail every day from  
21 someone I've never met who wants me to look at their  
22 product. And if I start rejecting everything that comes  
23 from someone I don't know, then that's going to affect my  
24 business.

25 MR. HUSEMAN: Do you think that white lists are

1 practical for businesses, as opposed to consumers?

2 MR. SARREL: No, I do not. I think white lists  
3 may play a role in the consumer market, primarily because  
4 it's very easy to understand. You just put all of the  
5 people that you trust already into your white list, and  
6 you receive mail and you can look at that. But then you  
7 run into the situation of what happens if a long lost  
8 friend finds you in some kind of e-mail directory and e-  
9 mails you and they're not in your white list. So, then  
10 even though you have the white list, you still have to  
11 dig through all your quarantined e-mail. The white list  
12 is a start. I think actually white lists and blacklists  
13 are a start, but they're not an answer.

14 MR. HUSEMAN: Dan Tynan, you are contributing  
15 editor of PC World, and you've also examined the various  
16 approaches, technical approaches to Spam, as well as  
17 you've also looked at the world of Spamming and some  
18 particular Spammers as you described them as well. Let's  
19 talk about some more content filtering, and specifically  
20 content filtering based upon certain words, their  
21 messages. What are the benefits and also the negatives  
22 to that type of approach?

23 MR. TYNAN: Well, I would say that that's kind  
24 of been the traditional form of Spam filter for a long  
25 time has been content filtering, where it looks for words

1       like Viagra and worse. We all know what they are. I'd  
2       say the sort of the flavor du jour is really white list  
3       and challenged response. The last three or four products  
4       I've looked at have been exactly that. And that seems to  
5       be where the thing is going. I think that's also a  
6       response to the fact that content filtering is  
7       continually defeated by Spammers.

8                One example is, you know, a product like Spam  
9       Killer. Spam Killer will look for words and phrases. It  
10      has something along the lines of 5,000 different content  
11      filters. And, so, it will look for the word Viagra, and  
12      so Spammers will then put the word Viagra with a little  
13      star between each letter, so they have to change the  
14      filter. And then they'll put it inside HTML code, and so  
15      they'll have to change the filter. And then they'll put  
16      an HTML tag in the middle of the word Viagra that's  
17      invisible but defeats the filter, and so they have to  
18      change the filter. So, it's a constant game of cat and  
19      mouse. As a result, my testing, content filters out of  
20      the box, 80 to 90 percent effective.

21               MR. HUSEMAN: And I address this issue, let's  
22      say, to John Levine. Is 80 to 90 percent effective  
23      filter good enough?

24               MR. LEVINE: It kind of depends on who you are.  
25      If you get ten Spams a week, you know, and it knocked you

1 down to one, then that's -- you're in pretty good shape.  
2 I've had the same e-mail address for ten years, so I get  
3 a lot of Spam. And in my case, you know, if my Spam  
4 filter is running less than like 98 or 99 percent  
5 accurate, I'd have some -- my regular inbox would still  
6 have more Spam than regular mail.

7 MR. HUSEMAN: What about the issue of Spammers  
8 using -- or sending a message that has only an HTML  
9 image, so there are basically no text words in which to  
10 filter? Can these filters solve that problem?

11 MR. TYNAN: There are some filters that do that  
12 look for specific HTML characteristics. Spamnix is one  
13 that does that. I think Spam Assassin also does. And,  
14 so, they have a waiting system, they assign points and  
15 say, okay, if it has this kind of image, then it assigns  
16 X number of points. And when it reaches a certain point  
17 threshold, it says, okay, this is probably Spam, and it  
18 shuttles it off into a Spam folder.

19 MR. HUSEMAN: What's your response to that,  
20 Matt? Do you agree?

21 MR. SARREL: Oh, with that particular kind of  
22 Spam, which is just an HTML image, that's really easy to  
23 filter, since no one ever sends you real mail that looks  
24 like that. The issue is how hard is it to update your  
25 filter to recognize the Spammer gimmick of the week, and

1 it's more of a software maintenance problem than a  
2 technical ability to deal with that particular kind of  
3 Spam.

4 Right now, that's the constant battle, is  
5 what's the Spam flavor of the week. Is it V/I/, or is  
6 V\*I/, or is it Spam sent to me from another country in  
7 another language, or is it a graphic. That's -- right  
8 now, that's where the war seems to be fought, is can the  
9 Spam filtering products keep up with the Spammers.

10 MR. HUSEMAN: I guess one question I want to  
11 pose is that if this is an 80 to 90 percent effective  
12 solution, what are the -- first of all, is this solution  
13 good enough because of the continual updating and trying  
14 to figure out what the new Spammer tactic is.

15 MR. SARREL: Well, one thing that we did when  
16 we looked at these products, we looked at the consumer  
17 products and we found them to be roughly between 75 and  
18 85 percent effective. And then we looked at the ISP or  
19 corporate products, and they were roughly between 85 and  
20 95 percent effective. And we said well, that's  
21 significantly better.

22 But then if you think about it, if you're --  
23 like John was saying, if you're a consumer and you get 10  
24 Spam messages a day and this software filters them out  
25 and now you're only getting two, that's great. But what

1 if you're an actual company and at this point you're  
2 getting 10,000 Spam messages, you know, in a week. So,  
3 now what are you filtering out? You still end up with a  
4 thousand Spam messages. So, I think it's not necessarily  
5 as important to filter out -- the statistics are more  
6 interesting than just who's catching the most Spam. It's  
7 whether the legitimate mail is making it into your inbox,  
8 so in other words, avoiding a false positive, which in a  
9 business sense could be very costly. And it's also --  
10 like correctly diagnosing a true Spam..

11 MR. HUSEMAN: Let's now talk about the  
12 technical approach, the collaborate or a peer-to-peer  
13 approach. This is where consumers or individuals vote on  
14 what they think is Spam and then based upon the aggregate  
15 statistics that message is labeled as Spam and then  
16 filtered or blocked out. Dan Tynan from PC World, what  
17 are the pros and cons to that?

18 MR. TYNAN: Well, the one that I've used  
19 personally is Cloudmark Spamnet and when I started it, it  
20 caught about 66 percent of the Spam. And it's one of  
21 those products that you have to continually use and tweak  
22 and you submit -- you know, you get a piece of Spam, you  
23 click on it, you submit it back to Cloudmark, and  
24 eventually they develop what they call a trust rating,  
25 whether you are a trustworthy sender of actual Spam. And



1 as your trust rating grows, they give more weight to your  
2 submissions. So, eventually they decide that you know  
3 what you're talking about and that they will start  
4 blocking the Spam for you and for everyone else that you  
5 submit. But it takes a while. You know, I didn't test  
6 it long enough to really see the improvement. People who  
7 were here this morning heard John Patrick on a panel  
8 earlier who claimed he had 99.9 percent Spam protection.  
9 He uses Cloudmark Spamnet.

10 MR. HUSEMAN: Ryan Hamlin at Microsoft.

11 MR. HAMLIN: One comment, we use at Microsoft  
12 collaborative filtering, and that's the version that will  
13 be shipping now with Outlook and with our next version of  
14 MSN. What we like about collaborative filtering is that  
15 it's not dependant on a specific set of words, like  
16 Viagra, right? There's a bucket of good mail and a  
17 bucket of bad mail. And in that bucket of bad mail,  
18 maybe the combination M, dash, period, space, space, Y  
19 has shown up in many bad mails, and so it's based on  
20 that. And, so, it's not as prone as rules-based human  
21 error, because it's based on a large sampling of what  
22 users identify as good mail versus bad mail.

23 The key point, too, is that it has to have a  
24 mechanism of realtime, because as you know, it's a  
25 countermeasure, a battle that we have with the Spammers.

1 And, so, the nice thing about collaborative filtering, it  
2 is near realtime, and so you're constantly training your  
3 filters on a frequent basis to react to that Spammer, and  
4 so when they find a way around it, you know, little be  
5 known to the Spammer, you know, the next day we have a  
6 new train filter that has caught. And, so, there's a lot  
7 of advantage, we believe, in the collaborative filtering  
8 approach.

9 MR. HUSEMAN: I would just make one point. You  
10 know, again, we're not here to talk about the pros and  
11 cons of various products, but instead various approaches.  
12 And with that, John Levine, I have one question, and then  
13 I'll let you have a response as well. Is this too hard  
14 for the average user, this type of approach?

15 MR. LEVINE: Given how successful AOL has been  
16 with their report Spam button, probably not. And people  
17 are very happy to say -- people are very happy to have a  
18 hammer they can use to hit their Spam with. However, I'm  
19 worried that Spammers are adapting and collaborative  
20 filtering is becoming less effective.

21 The granddaddy of collaborative filters is a  
22 system called Brightmail, where they have Spam-trap  
23 mailboxes, mailboxes that are legitimately used for  
24 anything but seeded on the web pages and stuff. And from  
25 these Spam-trap mailboxes, they get vast amounts of Spam,

1 all filtering back to Brightmail's headquarters, where  
2 they have three shifts of highly trained geeks looking at  
3 the stuff coming in and updating filters in realtime that  
4 then are shipped out to filtering servers that their  
5 customers use.

6 And it's a great concept, and when Brightmail  
7 first came out, it was a killer. It caught all the Spam.  
8 But looking now, I happen to have a few mailboxes that  
9 are behind Brightmail filtering, and now it catches maybe  
10 two-thirds of the Spam, you know, and Brightmail -- and  
11 Brightmail is run by very competent people. And, so, I  
12 am -- I have some doubt that collaborative filters in the  
13 long run can do much better than that.

14 MR. SARREL: There is one advantage to  
15 collaborative filtering, though, which is that if it's  
16 not catching all the Spam, it's certainly not creating  
17 any false positives.

18 MR. LEVINE: It's negligible, yeah. The only  
19 time you get a false positive is when you report a Spam  
20 and then the ISP writes back to you with a response. It  
21 happens to quote the Spam that you reported. But that's  
22 actually easy to white list.

23 MR. HUSEMAN: I just have one point of  
24 clarification. A false positive, of course, is a message  
25 that is labeled as Spam that is, in fact, not Spam. On

1       these collaborative approaches, though, if it's up to the  
2       individual to label something as Spam, you know, as we've  
3       been talking about for the past three days, no one can  
4       really agree on a definition of Spam, so how can there be  
5       no false positives if it's up to the individual to report  
6       each message as Spam.

7               MR. LEVINE: Generally, the number of people  
8       that you are accepting reports from is large enough that  
9       the only ones that pass the filtering threshold is stuff  
10      that everybody agrees is Spam.

11             MR. HUSEMAN: Now let's talk about some of  
12      these sender identification approaches. And, Dan Tynan,  
13      what about the challenge response system? Does this work  
14      and what are the pros and cons of that?

15             MR. TYNAN: Well, I tested a challenge response  
16      system recently, and I heard back from a couple of people  
17      who said why are you challenging my e-mail? Why are you  
18      inhibiting my ability to communicate with you? And I  
19      said it wasn't me, it was my filter. But they had a  
20      valid point, and, you know, that is one major problem  
21      with challenged response. Another problem is dealing  
22      with automated e-mail. I get a lot of it. I'm on a lot  
23      of newsletter lists, and challenged response really  
24      doesn't work there. You have to manually add them to  
25      your white list. And, you know, it's not infallible.

1                   Until recently, I would have said, you know,  
2                   the advantage for white list with challenged response is  
3                   it's 100 percent effective, but I tested one recently and  
4                   I got some Spam, and they were on my accepted sender  
5                   list. And I have no idea how they got there. But I'm  
6                   trying to find out.

7                   MR. HUSEMAN: Matt Sarrel, will senders of  
8                   messages that receive a challenge, will they respond to  
9                   those messages, or is that too much work?

10                  MR. SARREL: I think it's too much work. In my  
11                  experience, having run several of their products that  
12                  rely on challenged response, there are a few things to  
13                  consider. One, if the person -- if the sender doesn't  
14                  quite understand the challenge response method, then they  
15                  don't really know what's going on. They don't know if  
16                  it's a legitimate challenge. And, also, it may not even  
17                  make sense to them, at which point they'll just hit  
18                  delete. They won't understand that you didn't actually  
19                  get their original message. And the other thing with a  
20                  challenged response is that they're not perfect. One of  
21                  the challenge response products sends you an e-mail, how  
22                  many kittens are in this picture, and guess what, no  
23                  matter what you answer, it accepts that as a valid  
24                  response.

25                  **(Laughter).**

1                   MR. SARREL: So, there's actually a pretty easy  
2 way around that. And, finally, one other thing that  
3 concerns me a great deal is that the other day, while I  
4 was testing this challenge response, I got an e-mail, I  
5 sent a challenge back, I got a response back that  
6 included a challenge.

7                   **(Laughter).**

8                   MR. SARREL: And that wasn't a good system.

9                   **(Laughter).**

10                  MR. HUSEMAN: John Levine, what is your  
11 thoughts on the challenge response?

12                  MR. LEVINE: I don't like them at all. Partly  
13 it's that, you know, they're insulting. Somebody's  
14 saying I'm much too important to listen to you unless you  
15 beg. Partly it's that they tend -- is that they're very  
16 difficult to implement without making egregious mistakes.  
17 Every time I write to a large mailing list these days, I  
18 always get back a couple of challenges from broken  
19 challenge systems that don't recognize that it's mail  
20 from a mailing list.

21                  I think challenge -- something like challenge  
22 response could work, but it would have to be more -- but  
23 it would have to be one where the challenge was not sent  
24 as e-mail but it was sent by some other scheme that  
25 couldn't be misinterpreted as e-mail. And this gets back

1 more to things more like trusted sender, where you --  
2 where basically the challenge goes back to sort of a  
3 separate place that says was this message really from  
4 you, but not sent as e-mail. Those -- you know, those  
5 could be built on principle, but not many of them really  
6 exist yet and they're not widely enough deployed to be  
7 widely useful.

8 MR. HUSEMAN: Talking about trusted sender, Dan  
9 Tynan, what are the benefits to consumers and some of the  
10 negatives of using a trusted sender program?

11 MR. TYNAN: Well, trusted sender generally  
12 relies on a large number of people using the same system.  
13 I think the main drawback would be critical mass in that  
14 case.

15 MR. HUSEMAN: Can you explain that a little bit  
16 more?

17 MR. TYNAN: Well, the system -- for example,  
18 there's a system done by Habeas, and I'm willing to bet  
19 that Ann Mitchell is here, that inserts copyrightable,  
20 trademarkable material into the header of an e-mail  
21 message. It actually inserts a poem, a haiku. And  
22 people who sign a license agreement to use this can  
23 insert the text into the headers of their e-mail  
24 messages, and then that's identified as a verified  
25 certifiable sender. And people who fake it, people who

1 are Spammers who put the haiku in, can then be sued for a  
2 lot more money than they could be sued under normal law,  
3 because they're breaking, you know, copyright law.

4 And, so, this is a disincentive. And this has  
5 already happened. You know, Habeas has already sued  
6 people. So, the advantage there is you do have a -- you  
7 know, not only a way of identifying good actors, but you  
8 also have a means of redressing bad actors. The bad part  
9 is you really need everybody using the same system.

10 MR. HUSEMAN: So, if you were a consumer who  
11 used a trusted sender program, and there is currently --  
12 let's say that there's not a current system that has a  
13 critical mass of users that you can trust, how is that  
14 practical? Can you only -- can you accept mail from  
15 trusted senders and no one else? I mean, what are the  
16 issues here?

17 MR. TYNAN: You know, I'm not familiar enough  
18 to really give you the details on it. I think one of the  
19 presentations later involves trusted sender.

20 MR. HUSEMAN: Matt, what's your thoughts on the  
21 trusted sender technological approach?

22 MR. SARREL: I'm in agreement with Daniel that  
23 it's going to be a critical mass issue. And, also, one  
24 thing that I see is how much do you trust the trusted  
25 sender? So, is that -- like, is that going to be the



1 next Spamming technique, how to get around a trusted  
2 system, and perhaps Vincent will shed some light on that  
3 later.

4 MR. SCHIAVONE: I'd be happy to.

5 **(Laughter).**

6 MR. HUSEMAN: Now let's take a moment for  
7 questions about these various approaches, before we move  
8 into our structural changes to e-mail portion of the  
9 panel. And, again, as I reminded the panelists, I'd ask  
10 the audience members who are asking questions, let's not  
11 have your questions be commercials, but let's have them  
12 as actual questions and discussions about these  
13 approaches.

14 Does anyone have any questions about some of  
15 these various approaches currently? Yes, way in the back  
16 over here.

17 MR. FERMANSKY: McLean Fermansky, I-space  
18 Research Labs. Gentlemen, I'm afraid that your  
19 technological solutions don't solve one problem that  
20 still stands. It's been alluded to a few times,  
21 mentioned a couple of times, and that is cost-shifting.  
22 I'd like to use the figures from Mr. Lewis from Nortel.  
23 If he were my ISP, he would be running a machine and  
24 hiring personnel to carry 400 percent more traffic than  
25 he would have to otherwise, if there weren't Spam.

1                   Now, Chris is a nice guy, but he's a  
2                   businessman, as my ISP, and he's going to be charging me  
3                   for that. Likewise, his upstream provider has to carry  
4                   that bandwidth, charges him, he charges me. Gentlemen,  
5                   your solutions only handle Spam that has arrived. I may  
6                   have a 100 percent effective filter, but it only works on  
7                   the Spam that's arrived and it doesn't do anything to  
8                   stop that traffic, to block that bandwidth.

9                   MR. HUSEMAN: John Levine, what's your response  
10                  to that?

11                  MR. LEVINE: To a large extent, you're right.  
12                  In the source filtering approaches tend to knock away --  
13                  knock down much of the cost by preventing you from  
14                  receiving the mail, but, I mean, all these filtering  
15                  techniques fit into the current -- the current design of  
16                  mail, which as we -- as somebody commented yesterday, the  
17                  fundamental model is one of the sender freeloading on the  
18                  recipient. And to fix the cost-shifting requires some  
19                  fairly fundamental -- deeper changes to the structure of  
20                  e-mail than we had discussed so far.

21                  And I think we can look at them, but I think  
22                  it's not -- I don't think it's a very promising approach,  
23                  just because I think that that deep a change to the  
24                  structure of e-mail, both is something that we don't know  
25                  how to do and something that even if we did, it took us

1 10 years for people to move from random proprietary mail  
2 systems to SMTP, and I'm afraid it would take 10 years to  
3 move from SMTP to anything else.

4 MR. HUSEMAN: Vince Schiavone from ePrivacy  
5 Group.

6 MR. SCHIAVONE: Well, a couple of things.  
7 There is technology available that goes in front of the  
8 receiving servers that can analyze traffic paths and, in  
9 fact, reverse the economics by slowing the ability to  
10 deliver. Right now the economics of Spam are delivery  
11 over time. And much of the Spam-fighting -- the Spamming  
12 technology moves on if the connection and receipt is too  
13 slow on the uptake. So, by analyzing it, you could call  
14 it a pre-filter or a squelching technology. You can then  
15 slow up the Spam and inhibit their ability to deliver as  
16 much and their profit and reduce the costs on the  
17 enterprise or the ISP.

18 MR. HUSEMAN: Paul Judge?

19 DR. JUDGE: The question was about cost-  
20 shifting, and I think the person asking the question was  
21 alluding to some of the technologies that add a monetary  
22 cost to sending e-mail, but I believe there's other ways  
23 to shift the cost and really aim at the profit of the  
24 Spammers without necessarily introducing a cost for e-  
25 mails. I think that a number of solutions that we're

1 working on, even detection systems, focus on shifting the  
2 cost, at least reducing the profit of Spammers.

3 If you look at Spamming, it comes down to a  
4 business, and it's about making a profit and what that  
5 entails is the amount of money that the Spammers make,  
6 minus the amount of money that it costs them to send the  
7 Spam, and the amount of money that they make is affected  
8 by a couple of parameters. And one of those is the  
9 number of Spam messages that are actually received by  
10 end-users and the response rate.

11 So, the number of messages that are received,  
12 we have the ability to affect that by the effectiveness  
13 of our Spam filters and also the deployment percentage of  
14 Spam filters. The response rate, we have the ability to  
15 affect that with best practices and user education. And  
16 then some of the other costs that we're able to introduce  
17 into the system are kind of the cost of litigation and  
18 the legislation and going after the Spammers in that  
19 manner.

20 MR. HUSEMAN: With this panel, we're really  
21 focusing on kind of the technological issues in regard to  
22 cost-shifting. Is there a technological way to -- what  
23 would you recommend?

24 DR. JUDGE: So, what I just mentioned was that  
25 there's two variables that we can affect with technology,

1 and it's really the number of messages received, and that  
2 affects the profit that they make. The number of  
3 messages sent affects the amount of money that it costs  
4 to send out that Spam flood, and the number sent minus  
5 the number received is affected by really the  
6 effectiveness of your Spam filters and the deployment or  
7 percentage of the Spam filters. So, just saying that  
8 even without introducing a system that charges for e-  
9 mail, we have the ability to affect the profits of  
10 Spammers.

11 MR. HUSEMAN: Steve Atkins from Word to the  
12 Wise and SamSpade, what is your thoughts on technological  
13 solutions to cost-shifting?

14 MR. ATKINS: Not so much to cost-shifting  
15 specifically, but in regards to rolling out new  
16 protocols, yeah, it took many, many years to go from  
17 proprietary e-mail to SMTP, but compare that with instant  
18 messaging. If the consumer, the user of the new  
19 protocol, sees the advantages of it as being huge, then  
20 you can roll out new protocols very quickly.

21 Currently, SMTP is being used for an awful lot  
22 of things, perfectly legitimate things and some Spam as  
23 well, but it's just really not very well suited to. If  
24 some of the traffic that currently is going over SMTP  
25 were rolled off onto a more appropriate protocol and it

1 was backed by AOL, Microsoft, Earthlink, Yahoo, Hotmail,  
2 then I could see new protocols being rolled out in months  
3 rather than years.

4 MR. HUSEMAN: We're going to get to that in  
5 just a little bit about some of the protocol changes.  
6 Matt Sarrel, what about the current technological  
7 approaches that we have and reversing the cost-shifting  
8 in Spam?

9 MR. SARREL: We had looked at a number of  
10 gateway devices, which Vincent mentioned, and these  
11 function similar to -- if you think about a firewall, at  
12 the edge of your network, in front of your mail server or  
13 in front of the ISP's mail server, and so what they do is  
14 not only do they filter the content of e-mails and they  
15 can also utilize white lists and blacklists, but there  
16 can also be the reverse DNS queries to make sure that the  
17 sender is legitimate. And they also look at SMTP traffic  
18 that is abnormal, such as someone trying to harvest e-  
19 mail addresses from your system using random characters.  
20 That's not a typical behavior when trying to send a  
21 message.

22 So, if you deploy a gateway device, then that  
23 keeps the e-mail from getting onto your systems and using  
24 up your resources, which does not entirely address the  
25 issue of cost-shifting. However, I think part of the

1 problem is that when we all go out and develop our anti-  
2 Spam products, we want to give people something that they  
3 see. So, if you -- you know, there's a big differences  
4 between a product that you install on your desktop and  
5 the next day you see it stopped two-thirds of your Spam  
6 and a product that gets deployed at an ISP and it takes a  
7 year or two and then we stop getting Spam. I think that  
8 the whole product development cycle is part of the  
9 issues.

10 MR. HUSEMAN: I have one quick question for  
11 some of the panelists, and then we're going to move on to  
12 some of the specific technological approaches that are  
13 being proposed currently. Let me ask John Levine, let's  
14 say your grandmother, to use a grandma example again, is  
15 setting up an e-mail account. What approach would you  
16 advise her to use?

17 MR. LEVINE: I'm thinking about my dear  
18 stepmother, who's a very smart lady, but her expertise  
19 is not in computing. And at this point, I would tell her  
20 to use an ISP who's got built-in Spam filtering that she  
21 doesn't have to mess with, because as someone else  
22 commented, the person running the mail server can do a  
23 lot better job of filtering than the end-user, just  
24 because it has a lot more data at its -- to use, and it's  
25 got a lot more compute power to throw at it. And at this

1 point, you know, there's not much more useful that I can  
2 tell her.

3 MR. HUSEMAN: Now, Dan Tynan, let's make the  
4 example now your teenage son or daughter.

5 MR. TYNAN: Okay.

6 MR. HUSEMAN: What approach would you tell them  
7 to use?

8 MR. TYNAN: I think I'd just lock them in their  
9 room away from the computer.

10 **(Laughter).**

11 MR. TYNAN: I'm hoping to do that anyway.  
12 They'd be more sophisticated, they'd be much more savvy.  
13 So, there won't be the technological barriers there are  
14 for John Levine's dear stepmother. But they will still  
15 be faced with a problem that the off-the-shelf Spam  
16 filters and the built-in Spam filters in things like AOL  
17 and Yahoo and MSN just don't -- aren't 100 percent  
18 effective.

19 So, my point of view on this is the whole  
20 purpose of Spam filtering software is to kind of turn  
21 back the clock five or six years, to the point where when  
22 we used to get e-mail and not Spam, at least not very  
23 much of it. And, so, it should be as close to mimicking  
24 that as possible, which means I would recommend something  
25 that goes right into the e-mail program you like to use,



1 filters it automatically and requires minimal  
2 interaction.

3 Unfortunately, most Spam filters require some  
4 interaction, because you have to look for false  
5 positives, but that's the approach I would go to. I  
6 would say okay, look at your e-mail program, your client,  
7 whether it's Outlook or Outlook Express or Eudora, find  
8 one that filters Spam inside that program with one or two  
9 clicks and go for that one.

10 MR. HUSEMAN: Matt Sarrel, let me ask you this  
11 question. What approach would you recommend for yourself  
12 or approach do you think works the best, or approaches?

13 MR. SARREL: Well, I'll tell you what I do.  
14 It's sort of along the lines of the disposable e-mail  
15 address model. And this, by the way, is just what I do  
16 personally. For work, we have this situation where I  
17 need -- I basically need to receive Spam, because some of  
18 it is a product announcement. Whether there's value in  
19 that or not, I won't comment.

20 So, what I -- I have three e-mail addresses.  
21 One is sacred. I don't give that out to anyone except  
22 for my friends. And you could sort of think of that as  
23 the white list model. And I don't -- I actually have not  
24 yet gotten any Spam there. The next account I have I use  
25 when you have to sign up for something, like -- but it's

1 something that you might want, like a newsletter or a  
2 shipment confirmation, an order confirmation, something  
3 like that. I get more and more Spam in there. And the  
4 third one is an address that I have where this is, you  
5 know, go ahead, Spam it, I check this once every two  
6 months just to keep it active, and it's where they force  
7 me to sign up for something, just to check a website, or  
8 if, you know, someone's giving something away and they  
9 need an address.

10 So, it's three levels of sort of what you would  
11 think of along the lines of like trusted sender or white  
12 lists. And admittedly, that's complicated. Like I  
13 wouldn't expect my mother or John's stepmother to be able  
14 to handle the three-address system.

15 MR. HUSEMAN: Let's change topics a little bit.  
16 Ryan Hamlin from Microsoft, you're the manager of the  
17 Anti-Spam Technology and Strategy Group there. As we  
18 know, AOL, Microsoft and Yahoo just came out with several  
19 proposals, and the proposal had four parts. I want to  
20 ask you about some of the specifics about that. The  
21 first one -- your first approach was protecting consumers  
22 from receiving Spam, and you talked about using the  
23 domain name system to better identify the location from  
24 which e-mail is originating. What does that mean and  
25 what is your proposal?

1 MR. HAMLIN: I'll speak as best as I can on  
2 behalf of the other companies, but defiantly should  
3 follow up with AOL and Yahoo, because I don't want to  
4 misrepresent them. So, from a Microsoft standpoint and  
5 what we kind of got out of this alliance is that around  
6 the best practices for protecting our consumers, we  
7 thought DNS made a lot of sense, because it's global.

8 MR. HUSEMAN: And DNS is?

9 MR. HAMLIN: DNS, domain name servers --  
10 server. So, it's global, it's distributed, it's well  
11 understood today and it really is the means obviously for  
12 the identification today.

13 MR. HUSEMAN: And, so, the DNS is where the  
14 internet protocol address matches up with the domain  
15 name?

16 MR. HAMLIN: Give it a domain name and get the  
17 -- exactly, get the IP address back. So, we felt like we  
18 want to leverage an existing technology that's well known  
19 and well understood and distributed. And there's  
20 multiple approaches to that. We talked about RDNS. I  
21 know John talked about reverse DNS as one way of  
22 potentially doing that. I mean, with this identity  
23 crisis, domain spoofing is one of the biggest issues that  
24 we need to really focus on in the short term. We believe  
25 that solving a lot of the identity issues will help -- is

1 a big step forward on reducing Spam.

2 MR. HUSEMAN: So, how does this proposal do  
3 that?

4 MR. HAMLIN: So, what we've said is that we  
5 want to leverage DNS and that we need to get in the room  
6 with others, because certainly Microsoft, AOL and Yahoo  
7 don't want to dictate to the industry exactly what to do.  
8 We want to definitely open this up to other independent  
9 parties and the consumer groups and the marketing  
10 organizations to get some feedback to us, but the idea is  
11 either via reverse DNS, to make sure everyone has a  
12 reverse DNS entry, so to John's point, when you do a  
13 reverse DNS, there actually is an entry there and you can  
14 associate the IP to the domain. Another approach that --  
15 and this is a Microsoft approach that we've just kind of  
16 thrown on the table -- is to put the IP addresses in the  
17 text field in DNS, again, the idea being --

18 MR. HUSEMAN: What does that mean?

19 MR. HAMLIN: So, much like the example I think  
20 on the first day, where they spoofed -- I think it was  
21 the gal from Yahoo that spoofed basically a mail coming  
22 in to the FTC, and basically pretended to be somebody  
23 from FTC and the mail coming in, and even though she was  
24 logged -- actually, it was an AOL person -- even though  
25 she was logged into the AOL domain and had an AOL IP, she

1 was spoofing that she was coming actually from ftc.org.

2 So, by having this solution, what the ISP would  
3 do or the in-bound receiver of that mail would do, would  
4 do a lookup and say this person claims to be from  
5 Hotmail, this person claims to be from ftc.gov, what is  
6 the associated outbound IP addresses that they send mail  
7 from, does it match? Oh, it doesn't, so in that case, it  
8 wouldn't have matched, because that IP would have come  
9 back as an AOL IP, and it would have been matched to the  
10 wrong domain, an ftc.gov domain. And, so, instantly you  
11 would have known that that was Spam and you could junk  
12 that mail.

13 MR. HUSEMAN: So, if one was sending e-mail  
14 from an AOL domain name, yet it was actually coming from  
15 a Hotmail IP address, then you would be able to tell  
16 that?

17 MR. HAMLIN: Correct.

18 MR. HUSEMAN: And prevent that form of  
19 spoofing? But this proposal would not prevent someone --  
20 that has an actual Hotmail account in using a Hotmail IP  
21 address from spoofing one of the other millions of  
22 Hotmail users? I mean, is that right?

23 MR. HAMLIN: Agree. I mean, this is going to  
24 be, you know, a multi-step approach. We believe that  
25 this is a great first step forward. We also believe that

1 a lot of the terms of use and the policies that are in  
2 place at the ISPs, by having this step forward, it will  
3 give the ability to really screen that out. And if  
4 within each of the ISPs, I can just speak for Hotmail  
5 today, one of the things we've done is we've locked down,  
6 for example, you can only send 100 mails a day. So there  
7 are certain things within the ISP, then, you can take the  
8 next step once you've got the identity crisis kind of in  
9 order.

10 MR. HUSEMAN: Steve Atkins, what -- is this  
11 effective? Will this do anything for the average  
12 consumer's inbox?

13 MR. ATKINS: Well, it will break e-mail. This  
14 is basically a variant on designated sender, which has  
15 been discussed fairly widely recently on a number of  
16 mailing lists where people are discussing this sort of  
17 approach. And while it looks tempting on the surface,  
18 there are some fundamental bits of e-mail that can break,  
19 like e-mail forwarding, e-mail exploders, mailing lists,  
20 if it's not implemented absolutely perfectly.

21 MR. HUSEMAN: And what do you mean by those  
22 things, e-mail forwarding?

23 MR. ATKINS: Well, if you sign up for -- if you  
24 have an e-mail account and you don't want to actually  
25 receive your e-mail there, you want to forward it on to

1 your new ISP, you can tell your old ISP to forward the  
2 mail on, depending on how that is implemented, it can  
3 look to the receiving new ISP like the incoming mail is  
4 Spam. At that point, if the new ISP is using a  
5 designated sender type protocol, it could mistakenly  
6 discard all the mail that was forwarded from your old ISP  
7 as Spam.

8 MR. HUSEMAN: Ryan Hamlin, what's your response  
9 to that?

10 MR. HAMLIN: So, agree that the way that you  
11 set it up, we need to have explicit directions. There's  
12 actually, you know, plenty of ways around that, both RDNS  
13 and the idea of embedding IPs in a text field. One  
14 solution would be embed additional IPs. You don't just  
15 put, you know, your mail server IP. If you use an ISP to  
16 send your mail for routing, you would have their IP's  
17 address in there, as well. So, you would basically allow  
18 for in that text field multiple IPs to get around the  
19 scenario that Steve described. It's a very real  
20 scenario. You would just need to be careful and have  
21 explicit instructions and well known in the industry of  
22 how to implement that.

23 MR. HUSEMAN: Steve Atkins, do you think that  
24 consumers will do this or will be able to do this?

25 MR. ATKINS: This isn't something consumers

1 would do. This is something ISPs would either choose to  
2 do or not choose to do. It's an interesting concept and  
3 a lot of people are interested in playing with it. How  
4 much of the network it will break when it's deployed,  
5 we're probably not going to find out until somebody  
6 deploys it and sees.

7 MR. HUSEMAN: John Levine, what are your  
8 thoughts on this proposal?

9 MR. LEVINE: I'm actually with Steve here,  
10 because I've -- this is -- in my taxonomy, this is what I  
11 referred to as designated sender, list the valid places,  
12 list the approved places that mail from certain domains  
13 can come from. It's certainly a way to keep down on  
14 spoofing. But, I mean, certainly on my own network I  
15 have a lot of indirect web hosting customers, and mail  
16 sent to webmaster@, you know, whoever it is, is then  
17 remailed off to wherever their actual ISP account is, and  
18 all of that mail will be broken by a straightforwardly  
19 implemented designated sender scheme.

20 I mean, I think there are ways around it, but  
21 for a lot of these changes, you really have to weigh off  
22 -- you have to balance to what extent will this break the  
23 way that mail works today and is the cost of that  
24 breakage worth whatever benefit it's going to provide.  
25 And in the case of designated sender, I think the jury is



1 still definitely out. I couldn't tell you either way.

2 MR. HUSEMAN: Ryan Hamlin, what does Microsoft  
3 see as the implementation and the timing of this change?

4 MR. HAMLIN: That kind of approach? So, like I  
5 said, I mean, we want to make sure that -- there's a lot  
6 of really smart people, and we've had a lot of great  
7 opinions and debate about this. I think it's very  
8 important, events like this are great because it will  
9 force us to move in a quick manner. And I agree with  
10 Steve, we need to do some of this trial and error to get  
11 it done. So, our plan is, again, to quickly open this up  
12 to others. Again, we don't want to just dictate it,  
13 Microsoft, or Yahoo or AOL, and get some additional  
14 feedback and opinion from others, but then we look for a  
15 short time frame to try it out, because we think that's  
16 an important next step.

17 MR. HUSEMAN: Paul Judge from the Anti-Spam  
18 Research Working Group, which we will talk about in a  
19 moment, but what are your thoughts on this particular  
20 proposal?

21 DR. JUDGE: So, within the Anti-Spam Research  
22 Group, a number of things we're looking at. One of them,  
23 of course, is authentication, and we do have a very  
24 similar proposal that has been put on the table and  
25 designated sender, we refer to it as reverse MX lookup.

1       There's reverse DNS. I think what he just described  
2       refers to a reverse MX lookup. And I think that it's  
3       something that can be deployed incrementally.

4                It doesn't require that one day everyone turns  
5       it on and we begin to drop the rest of the e-mail and  
6       break e-mail. If a domain decides to turn it on, then  
7       they've prevented forgery for their domain and they're  
8       protected. For persons that have not turned it on, then  
9       their e-mail still flows but they are not able to stop  
10      people from forging messages from their domain. So, I  
11      think it's something useful and can be deployed  
12      incrementally.

13               MR. HUSEMAN: Ryan Hamlin from Microsoft, the  
14      second part of yours and AOL's and Yahoo's proposal was  
15      eliminating the ability to create fraudulent e-mail  
16      accounts in bulk. Is that the limitation of sending out  
17      100 messages per day, or is this a different proposal?

18               MR. HAMLIN: Yeah, so to the earlier question  
19      about raising the cost barrier, we think it's really  
20      important to raise the cost barrier for Spammers to get  
21      accounts. So, when there is an opportunity for a free  
22      account or a nearly free account, meaning we don't get a  
23      full credit card and we're charging, you know, a full-  
24      access fee, we want to put a barrier in place so that  
25      they can't automatically -- Spammer can't automatically

1 generate mass accounts in bulk.

2 So, a few months ago, you could go out to  
3 Hotmail and it was free accounts and you could have  
4 automation to create thousands of accounts at a time.  
5 We've since put something we call HIP, or human  
6 interactive proof, in there, in the sign-up, so that when  
7 you sign up, it gives basically a set of letter  
8 combinations that are not readable by the machine, that  
9 requires a human to put in exactly what that is, and then  
10 respond, and the create is actually -- the account is  
11 actually created.

12 So, we've seen a drastic account of the bulk  
13 creation, once we put something like that in, so it's  
14 saying where there is a low cost to barrier for mass bulk  
15 accounts, we need to put a mechanism in place to stop  
16 that. That's just one approach that we put in as an  
17 example at Hotmail.

18 MR. HUSEMAN: Steve Atkins, what do you think  
19 of that approach? Is that effective?

20 MR. ATKINS: Yeah, there's been a number of  
21 cases for, oh, years back, where free web mail providers  
22 have been abused by bots in this way, and the approach  
23 Microsoft is suggesting is a well-proved, good one.

24 MR. HUSEMAN: John Levine, any thoughts?

25 MR. LEVINE: I agree that it's a well-proved

1 scheme, and if I may tweak you a little, Microsoft was a  
2 little behind the curve on this one.

3 **(Laughter).**

4 MR. LEVINE: Honestly, I think that something  
5 that's outside the purview of this panel, but what we  
6 really need is a credit bureau for ISPs, so that when you  
7 have someone who's been kicked off one ISP, it's harder  
8 for him to sign up on another one, you know, which is,  
9 you know, a completely non-technical thing, you know,  
10 it's what credit bureaus do. And the world desperately  
11 needs one specifically to meet the needs of ISPs.

12 MR. HUSEMAN: Microsoft, do you support the  
13 creation of such a bureau of information sharing between  
14 ISPs of Spammers who have been kicked off?

15 MR. HAMLIN: Yeah, in fact, I think the next  
16 bullet point in the press release talks specifically  
17 about that, about sharing that information. So, you  
18 know, the great thing that I thought about the  
19 announcement was, although, you know, Microsoft, AOL and  
20 Yahoo are fierce competitors and will continue to be  
21 fierce competitors, we do have one foe, and it's the  
22 Spammer.

23 And, so, you know, over the months of us  
24 talking, we realized that there are some best practices  
25 we can share, so things like that, where we've identified

1 a Spammer on our network, there's no reason why we  
2 shouldn't be sharing that with the other ISPs to take  
3 advantage of that, because it is solvable by an industry,  
4 because what's happening is the Spammer just hops to the  
5 next network.

6 MR. HUSEMAN: So, what type of information will  
7 you share?

8 MR. HAMLIN: So, there's a lot of -- there's  
9 kind of two different ways. One is sharing where we  
10 identify, obviously, harvest attacks or fraudulent  
11 account creation via an IP. So, we potentially will be  
12 discussing ways amongst the ISPs to share that  
13 information. Again, we're not going to -- because of the  
14 issues around blacklists, so you have to be very careful  
15 there when you start sharing IPs.

16 The other area that we talked about is in the  
17 area of enforcement, where we start to share electronic  
18 evidence, and that kind of goes into the fourth point,  
19 but it's where the ISPs work together to provide an  
20 electronic record, and so instead of just a Microsoft  
21 going after a particular Spammer, it's really the  
22 industry of ISPs going after these folks and providing up  
23 information across all ISPs.

24 MR. HUSEMAN: What type of electronic  
25 information does the proposal anticipate you sharing?

1 MR. HAMLIN: So, you've got to be aware,  
2 obviously, of the privacy information, but the idea would  
3 be we would start to log some of the activities. So, as  
4 there would be suspicious or fraudulent type behavior, we  
5 could notify the ISP community and others that have  
6 witnessed that same type of behavior, maybe associated  
7 with a given IP could start to track some of that  
8 information and logging. It doesn't mean black list  
9 them, it just means track that, so if it does turn out to  
10 be something of fraudulent behavior, we have that record.

11 MR. HUSEMAN: And when will that -- this take  
12 place? What is your time table for implementation of  
13 this?

14 MR. HAMLIN: So, I'm going to sound a little  
15 bit of a broken record, but really what we want to do is  
16 get the feedback from others, because we know, again, the  
17 three of us alone can't solve this thing, so we need to  
18 understand the technical implications across the board  
19 for small ISPs to do this, for medium-sized and the large  
20 ISPs.

21 MR. HUSEMAN: And, so, when are you going to  
22 get the feedback from others?

23 **(Laughter).**

24 MR. HAMLIN: So, it's a great -- so the plan is  
25 to absolutely in the very near short-term --

1 MR. HUSEMAN: Such as?

2 (Laughter).

3 MR. HAMLIN: I should have known with a lawyer.

4 (Laughter).

5 MR. HAMLIN: So, our plan is within the next  
6 couple of weeks, we will have another discussion, the  
7 initial ISPs that I talked, and then within a very short  
8 time after that, let's say, you know, 30, 60 days, we'll  
9 get together as an -- and invite the broader community to  
10 participate. So, this is something that will get done in  
11 the next couple of months, not something that's going to  
12 get done in 12 months from now.

13 MR. HUSEMAN: And will this -- these  
14 discussions and feedback, will that also include the  
15 credit bureau/Spamming bureau sharing of information?  
16 About people who have been kicked off? Will that be part  
17 of this discussion that you're talking about?

18 MR. HAMLIN: Oh, yeah, all these four pillars  
19 that we kind of laid out in the press release, those will  
20 all be discussed at that type of a forum. And we will --  
21 you know, we'll take a look at identity crisis, and we'll  
22 propose the idea that we talked about already. We'll  
23 look at other ideas, too, though, you know, that Paul is  
24 looking at, and others in the industry.

25 But the key is, and I said it before, we have

1 to show movement. It's an incremental process, but we've  
2 got to show movement. And this is a great forum over the  
3 last, you know, couple of days, to just do that, get in a  
4 lot of really good feedback. We now are ready in a  
5 position to move.

6 MR. HUSEMAN: Steve Atkins, what would you say  
7 to Microsoft about this?

8 MR. ATKINS: It's a very good idea.

9 **(Laughter).**

10 MR. HUSEMAN: Paul Judge, what would you say to  
11 Microsoft about this?

12 DR. JUDGE: I will be talking to Ryan further  
13 about this. We had some initial conversations. Also,  
14 I'm going to talk to another group that represents a  
15 different set of constituents in this ecosystem, and they  
16 have a detailed proposal coming out in a few weeks that  
17 looks at just that, a reputation system. I think it's  
18 really a good move from black lists, which used to give  
19 us a binary decision, to something like a reputation  
20 system that gives us more detailed information about a  
21 sender, about the bulk of mail that they send, about the  
22 number of complaints that they have, and then we're able  
23 to make more granular decisions about that sender.

24 MR. HUSEMAN: David Berlind, I want to move to  
25 you now. You are the founder of something called



1 JamSpam. This is a consortium that you put together of  
2 various industry and various other representative groups  
3 to try to come up with a solution. Can you briefly tell  
4 us about this group and what are your specific proposals  
5 and the time frame.

6 MR. BERLIND: Thanks, Brian. First, I think  
7 that Commissioner Swindle gave me the ultimate lob that  
8 anybody could ever dream of this morning when he said  
9 that it's up to everybody in this room to work together  
10 to arrive at a solution, and there is no one particular  
11 solution, so whether it's a technological solution or a  
12 legislative solution, none of them will work well if  
13 they're not harmonized to work together. It's sort of  
14 like getting the different federal agencies to work  
15 together to prevent terrorism, if they don't work  
16 together, the dragnet will never be sufficiently closed  
17 to keep terrorists from slipping through.

18 There are six distinct communities that must  
19 work together in order for any solution, any one  
20 particular solution, to work in concert with the others.  
21 One of those is the ISPs and in-box providers; the other  
22 one is the e-mail client and server providers; a third is  
23 the e-mail security and management providers. These are  
24 people who make products that run in parallel to the e-  
25 mail client and servers.

1           Then there are the high-volume e-mailers, the  
2 ones who are often accused of Spamming and maybe are not  
3 Spammers. I'm not here to pass judgment. Then there's a  
4 group of organizations that I refer to as the non-  
5 commercial and non-profit privacy and anti-Spam advocacy  
6 groups. And then finally the end-users.

7           All of these proposals, if each of these  
8 communities goes off and works on their solutions on  
9 their own, without consulting with the other communities,  
10 it runs a risk of creating a solution that will undermine  
11 the solution another community is working on. I'd like  
12 to just say that to the extent that Microsoft, AOL and  
13 Yahoo are soliciting input from the rest of these  
14 communities, JamSpam is to this day the only forum and  
15 it's the only one where all of those communities have so  
16 far gathered to discuss the problem. And that's what  
17 JamSpam is about. It's about all of these communities  
18 figuring out a way to work together.

19           And just by a show of hands, so everybody's  
20 really clear on the type of participation we're talking  
21 about, we have leaders from every one of these sectors,  
22 by the way, including AOL, Yahoo, Earthlink, Microsoft.  
23 In fact, I saw them all exchanging cards for the first  
24 time at the JamSpam meeting. I'd like to think that  
25 that's how this collaboration came to be.

1                   But could everybody in the room who is some way  
2 related to JamSpam, attended a meeting or something like  
3 that, raise their hands.

4                   So, there's quite a few people in this room and  
5 they represent all the different -- Paul Judge, you  
6 didn't raise your hand.

7                   **(Laughter).**

8                   MR. BERLIND: Vince, did you raise your hand?

9                   MR. HUSEMAN: Okay, David Berlind, so what is  
10 the specific outcome of JamSpam? What is your goal?

11                  MR. BERLIND: Well, the goal is that knowing  
12 full well that something like the IETF has to produce a  
13 protocol or enhance the protocol, as Steve said, and I  
14 think I absolutely agree with that, we need a hardening  
15 of the protocols. The hardening of those protocols  
16 shouldn't be done without consultation from each of these  
17 communities, so that we understand what the impact of any  
18 hardening is.

19                  To the extent that legislation is being  
20 proposed, legislation shouldn't take place without  
21 consulting with the technical community to see whether it  
22 makes sense. I mean, it makes no sense, for example, to  
23 enforce laws in different states if you have no -- if the  
24 e-mail technology is blind to the geographic location of  
25 the sender and the recipient.

1 MR. HUSEMAN: Let me interrupt for a minute.  
2 Does JamSpam hope to introduce a specific technical  
3 protocol or technical solution as a result of group  
4 discussions?

5 MR. BERLIND: I think that early that was the  
6 goal of JamSpam, was to create a new protocol. When we  
7 suddenly realized that there are existing intellectual  
8 property organizations already in place that are capable  
9 of doing that. The goal switched to being one that  
10 develops a 360-degree view of the complete problem that  
11 all of these communities then can work off of as a  
12 unified front in harmony with each other.

13 Right now, each of the communities is working  
14 off of roughly a 270-degree view of the problem. And if  
15 they only address those 270-degree views, then what ends  
16 up happening is some part of the problem is ignored and  
17 two solutions from different communities end up stepping  
18 on each other. Blacklists is a perfect example.

19 MR. HUSEMAN: Well, what is your time frame for  
20 the JamSpam for whatever proposals or discussions?

21 MR. BERLIND: Well, so far, we've had two  
22 meetings. The first was in February, and the second was  
23 in March. And last I heard, America Online volunteered  
24 to host the third of these meetings. The second meeting  
25 produced the 360-degree view. The third meeting is to,

1           technically speaking, to produce sort of a charter for  
2           the organization, how it will work with organizations  
3           like the IETF, government bodies, a variety of different  
4           organizations to move the ball forward in a way that  
5           again all the parts are moving in harmony with each  
6           other, not going off in separate directions doing their  
7           own thing.

8                         MR. HUSEMAN:   So, you don't have a specific  
9           time frame for any end-product or resolution of this, or  
10          is this more an ongoing discussion?

11                        MR. BERLIND:   I think it's an ongoing  
12          discussion.  I think that the number one priority,  
13          though, just to comment on what some of the other  
14          panelists have said is that one of the reasons a lot of  
15          different things don't work is that there's no critical  
16          mass.  The only thing that's going to achieve critical  
17          mass is a standard that's in place that's complied with  
18          by every system that's out there.

19                        And, so, the number one priority for JamSpam is  
20          to make sure that such a standard is created and put in  
21          place as quickly as possible.

22                        MR. HUSEMAN:   And, Paul Judge, you are with the  
23          Internet Research Task Force, Anti-Spam Research Working  
24          Group.  Did I get that right?  That's a lot of words.

25                        DR. JUDGE:    Correct, yes.

1 MR. HUSEMAN: Briefly, what is the Internet  
2 Research Task Force and what is your working group?

3 DR. JUDGE: The Internet Research Task Force is  
4 the -- well, it's just an organization of the Internet  
5 Engineering Task Force, the IETF, that standardizes many  
6 protocols, the body that standardized SMTP and HTTP and  
7 so on. The Research Task Force has historically  
8 consisted of just a small number of groups focused on  
9 problems that are important to the future of the  
10 internet.

11 And we formed the Anti-Spam Research Group to  
12 focus on just that, the problem of unwanted messages and  
13 from the viewpoint of a networking problem and seeing how  
14 it's affecting local networks and internet and so forth.  
15 When we chartered the group a few months ago, we chartered  
16 it realizing that the definition of Spam is really  
17 inconsistent and not clear, so we generalized the problem  
18 into one of constant base communications, meaning that an  
19 individual or an organization should be able to define  
20 either consent or lack of consent from certain types of  
21 communication. So, from there, our goal is to first  
22 understand the problem, collectively propose solutions  
23 and then evaluate those solutions.

24 MR. HUSEMAN: So, what authority or incentive  
25 is there with the IRTF, for whatever proposals you come

1 up with for the internet community at large to adopt.

2 DR. JUDGE: So, I believe, in general we're  
3 dealing with the Spam problem, it's not hard to motivate  
4 the problem. So, I don't believe that we need to provide  
5 much incentive for people to do the work. The research  
6 group really provides a forum for people to come together  
7 to collaborate on a common ground. I think previously  
8 that there's been many individuals interested in the  
9 problem, and we've been in different corners of the world  
10 working on the problem. And we began to have meetings  
11 like this and on the research group meeting, only in  
12 January of this year that this group of people began to  
13 come in the same room. So, through the research group,  
14 our goal is to bring these people together and have some  
15 collaboration on the problem.

16 MR. HUSEMAN: So, your group will possibly come  
17 up with new protocols?

18 DR. JUDGE: So, a number of things, as I  
19 mentioned. It's really three phases. One is to  
20 understand the problem. The second is to propose and  
21 collect proposals for solutions. And then to evaluate  
22 those proposals. And as far as understanding the  
23 problem, I believe that we know a lot about the size and  
24 the growth of Spam, but there's many characteristics of  
25 the problem that we don't understand as a community.

1 Traditionally, any problems in networking and security,  
2 there's a lot of effort to characterize that problem and  
3 to understand and allow trace data to be established so  
4 that we can study exactly where we need to focus. And  
5 that hasn't been done traditionally. We've taken more ad  
6 hoc approaches to the Spam problem. So, we're really  
7 trying to take a more systematic or research-oriented  
8 approach to it.

9 And the second piece, as I mentioned, was  
10 either proposing solutions or first of all collecting the  
11 solutions that have already been proposed. So, one thing  
12 that we did that was very important was to establish a  
13 complete taxonomy of all the solutions that have been  
14 proposed over the years and to begin to understand how  
15 those interrelate and how they can be put together to  
16 leverage the benefits of each other.

17 And the third piece, as I mentioned, was  
18 evaluation. And I think over the years, that solutions  
19 have been proposed and persons have gone out and deployed  
20 those solutions, and it wasn't a lot of thought put into  
21 the evaluation, not only of the effectiveness and  
22 accuracy but also the burden of introducing this and how  
23 robust the solution is to countermeasures, and that's how  
24 we got ourselves into the cat-and-mouse game that we're  
25 into.



1                   So, as we think through the solutions now,  
2                   we're able to make better decisions, and objective ones,  
3                   about the solutions that we propose and move forward  
4                   with.

5                   MR. HUSEMAN:   What is your time frame for your  
6                   Research Working Group?

7                   DR. JUDGE:   So, the group was chartered a few  
8                   months ago.  We had the first physical meeting in San  
9                   Francisco in March.  We had about 250 participants there.  
10                  Most of the work is done through interactions on the  
11                  mailing list and off-line.  And there's a number of work  
12                  items that have been identified and we're currently  
13                  working on.  And there's a range of things, though,  
14                  everything from the taxonomy to really working on  
15                  measurement and analysis work.

16                  And there's a lot of collaboration between  
17                  different companies, ISPs, also different interest groups  
18                  and whatnot.  For example, at the first meeting, as we  
19                  talked about the collaboration of the different  
20                  constituents, we had representatives from each of those  
21                  organizations, and many of the persons I assume that are  
22                  in this room, were working on different projects.  So, I  
23                  can get into the details of each one of these, but things  
24                  are ongoing as we speak.

25                  MR. HUSEMAN:   So, when do you see the process

1           being completed?

2                         DR. JUDGE:  I don't know, when have we solved a  
3           problem?  Is it when --

4                         MR. HUSEMAN:  Are you talking about months, are  
5           you talking about years from now?

6                         DR. JUDGE:  I think that -- you said the  
7           process being complete, as far as the work of the  
8           research group?

9                         MR. HUSEMAN:  Yes.

10                        DR. JUDGE:  Something that's -- there's short-  
11           term deliverables as well as medium to long-term  
12           deliverables.  And some of the short-term ones are the  
13           analysis and the taxonomy work.  And then there's some  
14           short-term to medium-term actual solutions that we can  
15           roll out, mainly the identification systems, things such  
16           as reverse MX and the reputation systems that we talk  
17           about, introducing authentication and accountability into  
18           the system are short to medium-term, so you know, six to  
19           12 months we can begin to roll some of these out  
20           incremental.

21                        And then from there, there are more long-term  
22           things that we want to do, as we chartered it with this  
23           view of a consent-based communications framework, that's  
24           something that's definitely more long-term, allowing us  
25           to have granular definitions of different types of

1 messages and be able to enforce that policy. So, you  
2 know, to get to a perfect system, it's a few years, but  
3 to significantly affect the problem, it's more short-term  
4 than that.

5 MR. HUSEMAN: John Levine, what are your  
6 thoughts on the IRTF's working group efforts? Are you  
7 involved in this group, by the way?

8 MR. LEVINE: I stopped reading their mailing  
9 list a couple of months ago, so I don't really know what  
10 they're doing now.

11 MR. HUSEMAN: And is there a reason you stopped  
12 reading their mailing list?

13 MR. LEVINE: I have to say -- I talked to Paul  
14 a little bit a couple of nights ago, which is I didn't  
15 get the impression that the people in this -- at least on  
16 the mailing list had done their homework very well. I  
17 mean, I saw a lot of suggestions coming up and saying,  
18 you know, sort of suggestions that looked awfully  
19 familiar and that if -- I mean, I think a taxonomy is  
20 great, but I think also a taxonomy of how approaches have  
21 succeeded and failed would be -- is really important. I  
22 didn't see much appreciation at that point for all the  
23 work that had been done and the subtlety of some of the  
24 problems that people had run into.

25 MR. HUSEMAN: Paul Judge, your response?

1 DR. JUDGE: As he said, he stopped reading the  
2 mailing list a few months ago. I don't believe that he's  
3 looked into the details of the taxonomy or probably would  
4 have had some input into the one that was presented. But  
5 the point is that we have a research group and we  
6 announce that we're working on Spam, and there's many  
7 people across the world that are very sensitive and very  
8 emotional about this problem, everyone ranging from  
9 people that sit here that work on it day in and day out  
10 for the last couple of years to people that are end-users  
11 that want to affect the problem and believe that they  
12 have a bright idea.

13 So, as this open research group, as we're  
14 currently chartered, we must deal with that entire range  
15 of persons, so, there is, you know, some noise on the  
16 mailing list that is not the most insightful  
17 contributions, but there are many work items that are  
18 defined and are being worked on in the mailing list. So,  
19 persons that are paying attention to the mailing list can  
20 understand and appreciate that.

21 MR. HUSEMAN: Steve Atkins, will such an  
22 approach be effective with so many different users  
23 involved?

24 MR. ATKINS: Such an approach as the ASRG  
25 mailing list or -- I'm unclear?

1                   MR. HUSEMAN: As the Anti-Spam Research Working  
2 Group, can this approach or such an approach like that be  
3 effective with a solution?

4                   MR. ATKINS: I haven't stopped reading the  
5 mailing list, but apart from that, I would agree  
6 completely with John.

7                   MR. HUSEMAN: And why is that?

8                   MR. ATKINS: The amount of traffic on the  
9 mailing list was very high. Those people who actually  
10 work in the industry and understand the issues and have  
11 looked at the approaches three, four years ago that the  
12 ASRG is revisiting or reinventing now, mostly left in the  
13 first three or four weeks, because the amount of signal  
14 was low and the amount of noise was high.

15                   MR. HUSEMAN: Paul Judge, what is your  
16 response, if you have anything in addition to add,  
17 besides what you already said about this issue?

18                   DR. JUDGE: Well, so this is in the first three  
19 or four weeks when we really dealt with many newcomers to  
20 the area of Spam. This was not the persons that are  
21 sitting on this panel or many people in the room, but  
22 people that really didn't know much about the problem and  
23 came on to the research group looking for answers. And,  
24 so, there was a significant amount of noise; however, the  
25 research group isn't an entity or a body that exists by

1           itself. It's really a group of individuals, and it's  
2           about individual contribution, and it provides a place  
3           for people to come together and work on the problem.

4                   MR. HUSEMAN: So, do you have any specific  
5           proposals, or is that later on in your phase? And do you  
6           have any specific things about what types of solutions  
7           such as this will work, either be it protocol changes or  
8           advanced filtering or et cetera?

9                   DR. JUDGE: As I mentioned, there are a range  
10          of things we looked at, first of all, the things that  
11          have been proposed already, to sort of understand the  
12          solutions base and to realize that we've almost completed  
13          filling the solutions base, but as far as different  
14          proposals, it's individual contribution, and if you look  
15          back at the first meeting we had, there's been two major  
16          approaches submitted or published this week. One was by  
17          ePrivacy Group; and one was by NAI and their Lumos  
18          system. And both of those proposals were presented at  
19          the first Anti-Spam Research Group meeting. A few other  
20          proposals and systems we see information about on the  
21          table out there were presented as part of the Anti-Spam  
22          Research Group. So, I believe that, you know, a number  
23          of things have been funneled through there.

24                   MR. HUSEMAN: So, your position is that this is  
25          causing or helping with these proposals to being

1 introduced, is that correct?

2 DR. JUDGE: Yes.

3 MR. HUSEMAN: Okay. Let's talk about one of  
4 the proposals that was mentioned. Vince Schiavone  
5 briefly is going to talk about what he sees as a  
6 structural solution or protocol change to e-mail and  
7 describe that.

8 MR. SCHIAVONE: Having developed the trusted  
9 sender program and deploying it last year, we agree very  
10 much that there is a critical mass issue and it requires  
11 support. We are at some chicken-and-egg situations as  
12 far as e-mail goes. One of our large clients challenged  
13 us that for anything to pick up critical mass, it really  
14 needed to be an open standard that was free and available  
15 to all and involved many, many people.

16 What we heard here today so far is that we've  
17 been putting a lot of band-aids on something and we're  
18 losing. I mean, all these technologies are getting  
19 better and better and better, yet Spam is increasing  
20 geometrically in my e-mail box and in the filters before  
21 it gets to me. What Commissioner Swindle said this  
22 morning is we need to give the ISPs and the consumers a  
23 way to decide who and what they want to receive. Well,  
24 the who and what is the problem. Foundationally and  
25 fundamentally, there is no trust in e-mail. It was never

1           meant to contain trust, and I don't know who's sending me  
2           e-mail.

3                        What I'm receiving, there's no standard way for  
4           NAI members to tell me I'm receiving a statement, so my  
5           filter people don't inadvertently block it. So, what  
6           we've done is proposed here today an open standard where  
7           we are willing to contribute our technology and hope  
8           others will stand up to contribute theirs, to try to get  
9           to the point, using today's existing standards to  
10          seriously separate the good e-mail from the bad e-mail.  
11          And I'll go through it very quickly, or Brian will kick  
12          me off, he said.

13                        **(Laughter).**

14                        MR. SCHIAVONE: And at 4:00 in the afternoon,  
15          that's very sensitive.

16                        What we've learned in the last few years is how  
17          not to fix e-mail. Technology can only enforce policy;  
18          it can't create it. It can't tell who it is. Policy  
19          that's not aligned with technology won't work either,  
20          because it can exclude a lot of different people. An  
21          important thing that you'll hear us say is the ISPs  
22          adopting standards or not adopting standards is the issue  
23          that will change how Spam occurs, because so many -- so  
24          much of the e-mail goes through them.

25                        How to fix ISPs, we feel, is to use the ISPs



1 and the laws to encourage both a carrot and a stick  
2 approach. The ISPs can block things, okay? But they can  
3 also encourage, not give a free pass, but to weigh  
4 positive features that people step up to. The laws can  
5 create penalties, but they can also create safe harbors  
6 for people who choose to do things that encourages good  
7 behavior.

8 Our standard that we're proposing is a  
9 framework to provide trusted identity. The commerce on  
10 the web today is based on the DNS system with digital  
11 certificates layered on top of it, because DNS is not  
12 secure. We don't know who's sending. There's spoofing  
13 because there is no security, so we have to add it. We  
14 need to know with a secure, fast and lightweight method  
15 who is actually sending us e-mail, making trusted  
16 assertions. We need to know who the sender is, and we  
17 should have the ability for them to communicate to us the  
18 content of the individual e-mail, and many people in this  
19 group, although they may not agree what the permission  
20 should be, might think it would be useful that the  
21 permission be communicated with the e-mail. We need to  
22 create a framework for creating a federation of trusted  
23 e-mail programs. JamSpam was a great way to get  
24 everybody together, and it's only through cooperation and  
25 harnessing all the energy in this room that we get there.

1           Our plan calls for a small oversight board,  
2 very representative of the 360-degree view, okay? Oops,  
3 I'm on timing. Did you add the timing to this, Brian?

4           We believe there needs to be very minimum  
5 standards that do not disenfranchise either anonymous  
6 individual e-mail, which is very important to the  
7 internet, as well as small businesses who should not have  
8 to bear high costs. And that should include a basic  
9 identity, near zero costs, but create a standard language  
10 for stating it and communicating.

11           We also suggest a standard language for stating  
12 assertions, but at this level, it should be optional.  
13 It's very sensitive, excuse me. Is it unsolicited e-  
14 mail? Is it permission-based? We're not advocating  
15 labeling in the subject line. Mail moves very quickly  
16 and in large volumes, and if we want to empower ISPs and  
17 consumers, there need to be electronic ways for them to  
18 see, sort and decide what they wish to do to the e-mail.

19           Now, the bulk senders, the NAI e-mail service  
20 providers, deserve a lot of credit for the Lumos  
21 proposal. It's a very high standard they're talking  
22 about. They're talking about identifying themselves when  
23 they send e-mail at a secure level with a digital  
24 signature, as well as DNS, and asserting what type of e-  
25 mail it is. That is a very, very good plan.

1       Additionally, they may want to do a relationship  
2       permission. At this level, we should know who the people  
3       are and there should be a cost to that so it can start to  
4       change the economics of Spam, who are the people who are  
5       sending e-mail? And it's very important that there be a  
6       standardized opt-out. We're hearing from our friends at  
7       the filter companies and the ISPs, and these are things  
8       that can happen today.

9               At the highest level, if things that would  
10       create a visible seal for the consumer, and that's where  
11       our trusted sender program plays, there needs to be very,  
12       very sure ID. And visible assertions that should be made  
13       that there is a way to opt out that can be trusted, that  
14       there is a link to a privacy policy, that there is a  
15       dispute resolution mechanism in force. A trusted sender  
16       is with TrustE, which is a good body for industry self-  
17       regulation.

18              And the last thing I want to say, with this  
19       program that's an open standard and involves many, we can  
20       do this without breaking the existing protocols or  
21       waiting -- Paul's work is very important at the ASRG, but  
22       it takes time to change protocols at that level. We have  
23       existing protocols for SMTP with X headers, and we have  
24       existing protocols with X509 certificates that can change  
25       this problem very quickly.

1                   I just wanted to let you in on some information  
2 we know. There's an ROI for trust. We have done some  
3 studies with the program. We cannot name it, but there  
4 are higher open rates. There are higher click-through  
5 rates and there are lower opt-out rates. But more  
6 importantly, look at the numbers for the trust ROI.  
7 Trust pays for people, and as Commissioner Swindle said  
8 earlier today, we need to do something that will  
9 fundamentally change this equation in the short time.  
10 Steps that don't go from the legal responsible sender,  
11 okay, to the actual recipient and their ISP, with  
12 confidence in who they are and what they're sending, are  
13 only half steps. The mailers are very -- the service  
14 providers are willing to go there, and the advocates who  
15 supported this plan this morning, and we thank them, are  
16 willing to be part of this as well.

17                   So, that is our pitch for this. This is not an  
18 exclusion to anything that's happening here, but it's the  
19 first step where we come together and make technology a  
20 royalty-free open standard to enable all this to happen.  
21 Thank you.

22                   **(Applause).**

23                   MR. HUSEMAN: John Levine, your thoughts on  
24 this proposal?

25                   MR. LEVINE: I've actually looked at in some

1 detail, because the CAUCE board -- I'm a member of the  
2 board of CAUCE, and we have endorsed the concept, not the  
3 product or the implementation or anything, but the  
4 concept of being able to put assertions on e-mail like  
5 this that you can test and you can actually determine  
6 whether a mail purports to be bulk or doesn't purport to  
7 be bulk and who is making the assertion.

8 And although, like nothing else, it's no magic  
9 bullet. I was actually surprised. It looks really good.

10 MR. SCHIAVONE: Yeah, how about that?

11 **(Laughter).**

12 MR. LEVINE: And I think that something like  
13 this that can be layered on top of mail and particularly  
14 could work with laws that could -- assertions in mail  
15 about what the mail is, if it were -- that would make it  
16 easier to enforce laws that could sanction you if these  
17 statements you made about the mail you sent weren't true.

18 MR. HUSEMAN: David Berlind, do you have a  
19 comment on this proposal?

20 MR. BERLIND: Yeah, I think that -- first of  
21 all, I want to commend every organization that steps  
22 forward and says certify us, give us a hall pass based on  
23 our -- some best practices that we've advanced. But you  
24 should be aware of the fact that there are probably 20  
25 such organizations, all who have advanced a separate set

1 of best practices. There's no uniformed set of these,  
2 and that any time I hear the words dispute resolution,  
3 first of all, I -- you know, as a technologist, I say  
4 that's a human process, it's not possibly scalable on a  
5 global basis, number one; and number two, it implies a  
6 great degree of subjectivity.

7 And, so, you know, I think to the point of  
8 things like attestable things, like a verifiable -- I saw  
9 it in the diagram -- a verifiable opt-out link, that  
10 there should be no one set of best practices that speaks  
11 on behalf of me and what I want in my inbox. In fact,  
12 these best practices are proposed by the organizations  
13 who represent a high-volume e-mail constituency. They  
14 never consulted with me. And, so, it's kind of like the  
15 fox watching the hen house.

16 I think that ultimately what I want is a set of  
17 things that can be tested, like an unsubscribe link, that  
18 I can say well, if the e-mail has an unsubscribe link or  
19 something that terminates my relationship and it  
20 functions, then go ahead and let it through, but if it  
21 doesn't, then don't let it through. But I worry about  
22 any system that's based on best practices when currently  
23 we have no agreement on best practices within the borders  
24 of the United States and we certainly will never get an  
25 agreement internationally.

1 MR. HUSEMAN: Vince Schiavone, your response?

2 MR. SCHIAVONE: That's why we suggested there  
3 be an open standard of the ability to make assertions  
4 that will vary, because David's absolutely right, it's up  
5 to him what he wants to accept, and it's up to the ISP  
6 and their acceptable use policy. But if we have a  
7 standard way to make these assertions, then they can  
8 happen in a scalable way. And one other quick thing I'd  
9 like to say, we do have experience that with e-mail, much  
10 of dispute resolution, a very, very high percent of it,  
11 is automatic, it can be handled electronically, because  
12 mostly people want to come off the list, and they want to  
13 know that that will actually happen.

14 MR. HUSEMAN: Steve Atkins, any thoughts on  
15 this proposal?

16 MR. ATKINS: Of the various trust proposals  
17 I've seen, it's one of the better fleshed out. I'm not  
18 entirely convinced that trusted sender is the answer to  
19 everything, but it is a good way of reducing false  
20 positives if it's maintained properly.

21 MR. HUSEMAN: Steve, you also have your own  
22 proposal to change the protocol of e-mail. Can you  
23 briefly describe what you envision as solving the Spam  
24 problem.

25 MR. ATKINS: Well, watching a lot of the

1 discussions over the past couple of months, I've seen an  
2 obsession with putting more and more band-aids and duct  
3 tape around SMTP, and there's good reason for that.  
4 Rolling out a new protocol to replace SMTP altogether,  
5 the deployment issues are horrific. It would take many,  
6 many years. But that doesn't mean that it's not possible  
7 to use a different protocol in addition to SMTP for some  
8 of the applications that SMTP is currently used for.

9 So, I looked at some of the problems with  
10 solicited bulk e-mail, newsletters from a company that  
11 you've actually opted into and want to receive and saw a  
12 couple of problems. One is that an awful lot of them get  
13 caught in Spam filters because they look Spam as far as  
14 the rules-based system are done. A properly done  
15 newsletter will have an opt-out link. A very well known  
16 and widely used Spam filter considers an opt-out link to  
17 be a sign of Spam, so a lot of newsletter get erroneously  
18 filtered, a very high fraction of false positives in Spam  
19 filters are solicited bulk e-mail.

20 The other problem related with that is that the  
21 recipient has lost all control. They give their e-mail  
22 address to the sender, and then they have no control over  
23 what happens with it. The sender can sell it on; the  
24 sender can refuse to unsubscribe them when asked.  
25 They're relying on the integrity of the sender to control



1 their mailbox.

2           Because of that, they often fear to sign up for  
3 them. They're wary of signing up for newsletters,  
4 because they don't know what will happen when they do.  
5 They don't know whether they'll be able to unsubscribe,  
6 so I've spent the past few days fleshing out a short  
7 discussion document for an alternative protocol that  
8 you'd run in parallel with SMTP that any sender could  
9 choose to use in addition to their bulk mail  
10 distribution; any recipient could choose to use in place  
11 of their normal mail client or as part of their normal  
12 mail client, whereby instead of them sending their e-mail  
13 to address to the sender of the newsletter and the sender  
14 then starts sending it, instead the recipient fetches the  
15 newsletter from the publisher, and that way they have all  
16 control over when it's sent and when it isn't sent, and  
17 if they're subscribed to 20 different newsletters from 20  
18 different publishers, they're all administered in the  
19 same way, from a single screen on a single client. The  
20 full details are pretty simple.

21           It's the sort of protocol which could be  
22 prototyped in a couple of days. It could be made, you  
23 know, deployable within a month or so. If anyone's  
24 interested to talking about it, it's available up on my  
25 website at [word-to-the-wise.com](http://word-to-the-wise.com). And there's a dozen or

1           so copies on the table outside.

2                       MR. HUSEMAN: Ryan Hamlin from Microsoft, what  
3           are the practical difficulties of any protocol change,  
4           such as the one Steve Atkins just described?

5                       MR. HAMLIN: So, I don't -- you know, specific  
6           to Steve's -- I would love to look at it. I haven't had  
7           a chance to really look at. I think that Steve said it  
8           right, I mean, the implementation -- there's a lot --  
9           there's a lot of really good proposals, and Vince's is  
10          one and NAI's Project Lumos is yet another. The devil's  
11          kind of in the details in really understanding how long  
12          it's going to take to roll this out.

13                      I'm a strong believer in an incremental  
14          approach and that we are going to learn in kind of a  
15          trial by error, so taking the approach of something and  
16          trying it and seeing if it makes an effect, what kind of  
17          an effect it does have and if it does, roll it out  
18          broader, and then going back, and not trying to build,  
19          obviously the one-all solution today.

20                      MR. HUSEMAN: John Levine, your thoughts on the  
21          practical realities or difficulties of any protocol  
22          changes?

23                      MR. LEVINE: Getting rid of SMTP isn't going to  
24          happen for decades, if ever. But Steve is absolutely  
25          right, that for certain kinds of transactions, there are

1 other alternatives. I mean, mail is fundamentally a  
2 rotten way to send the same message to a million people.  
3 You're much better off doing that with -- over the web.  
4 You know, and if you can sort of remind the million  
5 people that here is a URL to go to to look at your  
6 newsletter, that's much -- you could concoct a scheme  
7 that would be much more resistant to abuse. You would  
8 waste much less bandwidth, because people would actually  
9 fetch the text of the newsletter when they were prepared  
10 to read it. And you could run something like that in  
11 parallel with e-mail.

12 You could tell people like here's your  
13 newsletter toolbar, which is automatically set up to kind  
14 of light up the buttons when there's a new issue ready to  
15 look at. And Steve is absolutely right, that sort of  
16 thing can be built on top of existing alphabet soup  
17 things like XML very quickly and could be quite useful as  
18 a way both to manage your subscriptions and to push back  
19 a whole bunch of Spam-like issues.

20 MR. HUSEMAN: David Berlind.

21 MR. BERLIND: Well, one thing about just that  
22 particular proposal is that e-mail is by nature a store  
23 and forward technology. There are millions of people who  
24 download their e-mail to their system and then read it  
25 later on an airplane. And, so, if I got some sort of

1 stub of an e-mail that said okay, now, if you want to  
2 read this newsletter fetch it, but I'm on an airplane  
3 where I can't get it, that would be problematic. There  
4 are probably ways around that, but that would be  
5 something that has to be addressed.

6 I absolutely agree that this has to be  
7 addressed at a protocol level. And I'll just give you  
8 another suggestion or another idea that happens at the  
9 protocol level, which is to take the notion of opt-out  
10 links completely out of the control of people who send e-  
11 mail to me or anybody else and build it into the  
12 protocol. Unsubscribe really means terminate  
13 relationship. The protocol right now, you know, in your  
14 e-mail client, you know, you have a send button, you have  
15 a reply button, why not a terminate relationship button?  
16 And when the e-mail arrives into my inbox, my inbox goes  
17 to check to see if the sending system will correctly  
18 respond to that command, and if it will not respond to  
19 that command, then it doesn't let the e-mail through to  
20 me.

21 It also provides an interesting test for  
22 legislators to say, hey, have you disabled this part of  
23 the protocol, it's kind of like disabling your odometer,  
24 you broke the law. Okay, that part of the protocol  
25 cannot be disabled, you have to respond to a terminate

1 relationship command.

2 And, so, I think there are plenty of really  
3 interesting things that can be done at the protocol level  
4 that serve as a pass-fail way of not eliminating the Spam  
5 problem from a technological solution but also from a  
6 legislation solution.

7 MR. HUSEMAN: I'm going to open the floor to  
8 questions now. This gentleman over here. Wait for the  
9 microphone, please.

10 MR. ROYSTON: Clifton Royston, LavaNet. I  
11 think we've just seen a great demonstration of why it's  
12 hard for the ASRG to make progress, because what Paul  
13 Judge, to his great credit, is doing has been managing  
14 for the last three months or so, more actually,  
15 succession of really clever, intelligent ideas like this  
16 from many very bright people, proposals like we've just  
17 seen from Vince, Ryan, Steve, David, about every three  
18 hours over the period of the last three months, there's a  
19 lot of good ideas out there, and I -- to be honest, I  
20 think some of the grilling that was directed at Paul  
21 Judge representing the ASRG in the context of how many  
22 weeks from now are you going to give us a solution to  
23 Spam, reflect a misunderstanding of what -- not only how  
24 the IETF works but what the distinction is, which is  
25 going to make no sense to many people who are between the

1 IETF -- Internet Engineering Task Force and a research  
2 task force. I understand all these issues that keep  
3 getting raised with each proposal that comes up is this  
4 going to work a year down the road, two years down the  
5 road? What will this break? Paul has been tasked with  
6 making sure that what gets proposed is good for the next  
7 20 years once it's deployed and that's --

8 MR. HUSEMAN: So, your point is that there are  
9 great difficulties in coming up with these solutions and  
10 that the process of sorting through all these ideas is  
11 difficult, which I guess leads me to a question of all  
12 the panelists. Will any -- will there be any  
13 technological solution or structural change to e-mail  
14 that will stop Spam?

15 MR. BERLIND: I would say the answer to that is  
16 the day that everybody decides to work together, and I  
17 mean the six different communities, we'll have a solution  
18 on very short order, as long as they commit to that.

19 MR. HUSEMAN: Let's keep it brief. Vince  
20 Schiavone?

21 MR. SCHIAVONE: Absolutely. As soon as we add  
22 security and trust to e-mail, we can get to the solution  
23 that excludes it. It will always come in, but it will be  
24 treated much differently than trusted e-mail.

25 MR. HUSEMAN: John?

1 MR. LEVINE: Will there be changes? I think  
2 the answer is yes, because when the three big gorillas --  
3 you know and say that, you know, you have to play by our  
4 rules to send us mail, the rest of us will have to do  
5 what they say. And it -- that's true, but it remains to  
6 be seen whether it's Vince's proposal or something else,  
7 whether it will actually deal with the issue in ways that  
8 Spammers can't get around.

9 MR. HUSEMAN: Ryan Hamlin?

10 MR. HAMLIN: Not as concerned as much about the  
11 forum, I think everyone has to have a seat at the table,  
12 which we will drive forward with. As an industry now  
13 it's very apparent, as well as being, I guess, one of the  
14 gorillas, I would say it's -- you know, we have high  
15 incentives to solve this problem. Not only is it the  
16 number one concern our consumers have, it is costing us  
17 millions of dollars a year to do that. So we are highly  
18 incentive to move forward on these.

19 MR. HUSEMAN: Matt Sarrel?

20 MR. SARREL: There will eventually be a  
21 solution. I think that, you know, in very vague, very  
22 quick terms, it will rely on knowing who the -- an  
23 authenticated sender, an unmodified e-mail that clearly  
24 states what it is and the recipient having an easy and  
25 accurate way of opting out.

1 MR. HUSEMAN: Dan Tynan?

2 MR. TYNAN: If you're speaking purely as a  
3 technological solution, then, no. Technology in  
4 combination with some form of, hopefully, smart  
5 legislation and perhaps private right of action combined  
6 may do it. But just providing technology will not get  
7 rid of the bad actors.

8 MR. HUSEMAN: Paul Judge?

9 DR. JUDGE: It's a simile with Daniel, that the  
10 solution is definitely one that's technical and  
11 legislative and so on, but on the technical side, I have  
12 not seen a silver bullet. I believe I've seen, you know,  
13 every proposal for anti-Spam system, but I haven't seen a  
14 silver bullet. I've seen a number of systems that  
15 crafted together carefully will tremendously help us to  
16 control the problem, and I think again it's about  
17 collaboration, people deciding that we're going to work  
18 together and come to some consensus and work together to  
19 deploy this.

20 MR. HUSEMAN: And one point of clarification  
21 about the process, correct me if I'm wrong, but your  
22 Anti-Spam Research Working Group will then make  
23 recommendations to your Internet Research Task Force,  
24 which is a sister organization of the Internet  
25 Engineering Task Force, which will -- is then the



1 organization that sets the standards for the internet.

2 Is that correct?

3 DR. JUDGE: So that's -- that's correct, one  
4 form of deliverables is recommendations on a solution set  
5 and that could be made as recommendations to the IETF,  
6 but in reality, there's really a couple of paths to  
7 solving a problem, and one is that traditional  
8 standardization approach. And that does take some time.  
9 But there's also de facto standards, they're sitting down  
10 and writing code and, I mean, code talks, and we're not  
11 confused about that, so that's why we're forging  
12 relationships between -- for example, in the Spam  
13 research group, every company that creates an anti-Spam  
14 product participates in that group. So, if you have  
15 consensus among that group and you begin to have  
16 consensus between those groups and the ISPs, then we can  
17 have things that are out there and out there working in  
18 the short term.

19 MR. HUSEMAN: Steve Atkins, to get back to the  
20 question, will there -- or is it possible to have a  
21 structural solution or technological solution to Spam?

22 MR. ATKINS: I don't believe a purely  
23 technological solution is possible, because as several  
24 people have mentioned, SMTP is not going to go away. For  
25 decades there will be people who will want to send my e-

1 mail over SMTP, so there will have to be some way for  
2 them to talk to me, even if I'm primarily using a  
3 different protocol. But I believe a combination of  
4 technological fixes and possibly legislation and  
5 definitely a lot of social and communication work,  
6 primarily between ISPs will happen, and it will happen  
7 soon. And the reason I say that is if it doesn't happen  
8 soon, in a lot of areas, SMTP mail is going to fall over  
9 or get worse. Even filters just push the problem to the  
10 ISPs, rather than the recipients. So, yes, there's going  
11 to be a technological and social fix soon, because  
12 otherwise everything is going to break.

13 MR. HUSEMAN: One question I had before I turn  
14 it back to the audience. We talked legislatively about a  
15 do-not-Spam list. Is such a list currently  
16 technologically feasible?

17 MR. LEVINE: I actually talked to Senator  
18 Schumer's office about this yesterday. A list of e-mail  
19 addresses is not practical. It would be too huge and too  
20 impossible to maintain and too onerous. As I said to  
21 them, I mean, do you really expect General Electric and  
22 Citibank to give you a list of all of their employees, to  
23 beg people not to Spam it. On the other hand, if you do  
24 it at a higher level, by domain or by putting no-Spam  
25 tags on mail servers, I think that would be

1           technologically implementable. As in connection with an  
2           effective do-not-Spam law.

3                     MR. HUSEMAN: Vince Schiavone?

4                     MR. SCHIAVONE: I hope it's not inevitable, but  
5           with the -- I'm from Pennsylvania, and our do-not-call  
6           list was very popular very quickly. Because I think a  
7           do-not-e-mail list would be a very bad idea. It's a  
8           different medium, and there are people who forget when  
9           they opt out that they also signed up to receive  
10          information. There's a lot of confusion.

11                    We do not currently have clear standard  
12          definitions of what a newsletter is or what UCE is, and  
13          if we need to go a step before that where we have some  
14          type of classifications that people can choose to sort  
15          by.

16                    MR. HUSEMAN: But does the technology exist to  
17          have such a list?

18                    MR. SCHIAVONE: The technology exists to do  
19          everything, but just like with Eileen here, if you fund  
20          it enough, we can do it, but I still don't think it's a  
21          good idea or it will work very well.

22                    MR. HUSEMAN: Paul Judge, would a do-not-Spam  
23          list be technologically feasible?

24                    DR. JUDGE: Yes, we have the technology to make  
25          it secure and to make it efficient. So, yes, it's

1           technically feasible. The one question is opt out of  
2           what?

3                           **(Laughter).**

4                           DR. JUDGE: I don't think the answers  
5           necessarily are global opt-out of e-mail. I think that  
6           you have to get some granularity there or you have to be  
7           able to express what you're expressing the lack of  
8           consent for, what type of communication do I not want to  
9           receive. And then perhaps there's multiple opt-out  
10          lists, and then you begin to have something that's  
11          useful.

12                          MR. HUSEMAN: David Berlind?

13                          MR. BERLIND: I think that such a list is just  
14          totally impractical, and the reason is that it relies on  
15          the fact that you have to define Spam, and that problem  
16          will never get solved. And I think that the real answer,  
17          if you're looking for some form of list management, would  
18          be a permissions data base, which basically allows me to  
19          track who I've given my permission to and who I have not  
20          and then when somebody sends me something, it better come  
21          with that permission attached to it.

22                          MR. HUSEMAN: Steve Atkins, is a do-not-Spam  
23          list technologically feasible?

24                          MR. ATKINS: Do-not-Spam is so ill-defined that  
25          no, it's not feasible. What's really meant is a list of

1 e-mail addresses or domains which do not want to receive  
2 some specific type of e-mail. Let's call it unsolicited  
3 bulk e-mail that is well defined. Is it technologically  
4 feasible? Yes. But at that point it becomes merely a  
5 legal nicety, because the last time such a list was  
6 created, one of the first things that happened was the  
7 whole of aol.com opted out. At that point, it's going to  
8 be used purely as a pretext for legal action, rather than  
9 as anything that really gives choice to the end-user,  
10 because given the choice, the end-users don't want  
11 unsolicited bulk e-mail, except for a very tiny fraction.

12 MR. HUSEMAN: Let's open it back to questions  
13 from the audience again.

14 MR. HUGHES: So, we're on the topic of do-not-  
15 e-mail lists. So, the question for the panel is doesn't  
16 a do-not-e-mail list create the richest source of e-mail  
17 addresses for Spammers? And doesn't the security around  
18 that list become an enormous problem? It just seems to  
19 me that that makes it an absolutely horrible idea.

20 MR. HUSEMAN: John Levine?

21 MR. LEVINE: You're absolutely correct, and  
22 that's one of the reasons why I suggested to Senator  
23 Schumer's office that doing it by domain or by server is  
24 much more practical, because then you're not listing  
25 individual addresses; you're only listing domains which

1 are already publicly known.

2 MR. HUSEMAN: Vince Schiavone?

3 MR. SCHIAVONE: Yes, it is a security  
4 nightmare. We've heard things of a hail storm where all  
5 data was stored in one particular silo. It's a very bad  
6 idea. But David Berlind suggesting that permission,  
7 whatever it be, whether it's unsolicited, whether it's  
8 existing relationship, can go with each and every e-mail.

9 MR. HUSEMAN: Paul Judge?

10 DR. JUDGE: So, I believe, yeah, if you  
11 implement it in a naive manner, then it's insecure, but  
12 there's very basic technologies available to implement a  
13 secure data base, simply an e-mail address and a data  
14 base of hashes of e-mail addresses. You'd have a one-way  
15 hash function of e-mail addresses, then you allow someone  
16 to check whether or not an e-mail is in that data base or  
17 not, without ever having access to what e-mail addresses  
18 are in there.

19 MR. HUSEMAN: Steve Atkins?

20 MR. ATKINS: What he said.

21 **(Laughter).**

22 MR. ATKINS: An e-mail opt-out list is a bad  
23 idea, but the security issues are not the reason it's a  
24 bad idea. They're easily resolved.

25 MR. HUSEMAN: The gentleman in the striped

1 shirt, right there.

2 AUDIENCE MEMBER: There was a solution that was  
3 mentioned at the beginning, and I don't think it was paid  
4 enough attention to, maybe because it's a good solution  
5 for users. I think it's also a good solution for those  
6 who send permission-based e-mail, and that is a token-  
7 based system, so the idea is that you take an e-mail  
8 address, and we understand that now to have two parts,  
9 the part before the @ sign and the part after the @ sign.  
10 What we can do is put in there a token, and this already  
11 exists in several ISPs. In the ISP I use, it's there.  
12 So, you have the first part, a plus sign, the token, the  
13 @ sign, and then the domain.

14 Now, that gives -- I think that solves the opt-  
15 in problem, because you've opted in because I've given  
16 you a token to get into my inbox. So, I think that's a  
17 good solution for those who want permission-based  
18 marketing. I think it's a good solution for users  
19 because it gives them virtually unlimited number of e-  
20 mail addresses that they can use, and they can filter on.

21 MR. HUSEMAN: Any comments from the panel on  
22 that question? Vince Schiavone.

23 MR. SCHIAVONE: E-mail's big and fast, and  
24 there's a lot of scalability issues, and disposable e-  
25 mail addresses are very good for technical people like us

1 in this room, but most consumers cannot handle it.

2 MR. HUSEMAN: One more response and then one  
3 more question. Steve Atkins?

4 MR. ATKINS: They're what I use, but they are  
5 not really appropriate for a lot of end-users. Managing  
6 the data base of them gets a little complex.

7 MR. HUSEMAN: Then Jason Catlett in the back,  
8 Jennifer.

9 MR. CATLETT: Thanks, Jason Catlett from  
10 JunkBusters, and I'm against Spam, and I encourage  
11 filtering by ISPs, but I don't feel entirely comfortable  
12 with the prospect of the three gorillas, as John Levine  
13 called them, getting together and running the post  
14 office, particularly when the three gorillas each have a  
15 large catalog business of their own. Is there anyone  
16 else who is worried about that?

17 **(Applause).**

18 MR. HUSEMAN: John Levine first.

19 MR. LEVINE: I wasn't proposing this as a  
20 desirable situation, but I was proposing it as one that  
21 was one that was not altogether implausible.

22 MR. HUSEMAN: Ryan Hamlin?

23 MR. HAMLIN: Yeah, and I think I was pretty  
24 clear, I mean, from the get-go, we've said all along that  
25 every group needs to have a seat at the table. We



1           certainly don't intend to exclude anybody. We are highly  
2           incentive, because we are the ones that are opening our  
3           checkbooks quite a bit today and spending millions and  
4           millions of dollars, but certainly everyone will have a  
5           seat at the table and a voice at the table. That was not  
6           the intention at all.

7                       MR. HUSEMAN: We have one more minute. I'm  
8           going to bleed every last second out of you for this  
9           forum, so one more question, and let's have it, Jennifer,  
10          from the gentleman in the back there.

11                      AUDIENCE MEMBER: I had a couple of questions,  
12          actually. One is --

13                      MR. HUSEMAN: Keep it very brief, please, you  
14          have about 15 seconds.

15                      AUDIENCE MEMBER: Okay, talk about the  
16          combination of technology and legislation, but I wonder  
17          if anyone could talk about the combination of technology  
18          and economic incentives? There's Shred, there's  
19          Vanquish, there's Bonded Sender. There's a lot of  
20          proposals there. And then just regarding the do-not-e-  
21          mail lists, I still would like to have someone explain to  
22          me how there's not an easy directory, harvest attack on  
23          such a do-not-e-mail list.

24                      MR. HUSEMAN: Does anyone want to address the  
25          directory harvest attacks?

1                   MR. LEVINE: Talk to one of us later and we can  
2 explain the technology. As far as e-postage, I have yet  
3 to see an e-postage system that looks even faintly  
4 implementable. So, at this point, it's just vapor-ware.  
5 I don't think it's a practical approach.

6                   MR. HUSEMAN: Okay. Steve Atkins, you have 15  
7 seconds.

8                   MR. ATKINS: Economic incentives, I-import,  
9 bonded sender, looks viable, maybe-ish in some cases.

10                   **(Laughter).**

11                   MR. HUSEMAN: Great. Thank you. Now I'm going  
12 to introduce Eileen Harrington, who will help conclude us  
13 off.

14                   **(Applause).**

15                   MS. HARRINGTON: Isn't Brian wonderful?

16                   **(Applause).**

17                   MS. HARRINGTON: He's been working around the  
18 clock on this for weeks, and here he is bleeding the last  
19 second out of the forum. I can't believe it. I would  
20 have been running out of the room by now, I think.

21                   One of your colleagues said to me a minute ago,  
22 it feels like this has been going on forever. I think  
23 some of us wish that it could go on for a few more days,  
24 because it's been so rich. And I think that we've saved  
25 the best for the last, and with that I certainly don't

1 mean me, and I don't even mean my boss, Howard, who I'm  
2 about to introduce, but this was really a wonderful panel  
3 and very rich in information, in thought, in idea, in  
4 challenge, and I want to thank all of you, and all of  
5 you. This is sort of the end of Survivor, except there's  
6 so many people left on the island.

7 **(Laughter).**

8 MS. HARRINGTON: I'm just amazed. I'd like to  
9 introduce Howard Beales, who is my boss and our boss and  
10 the Director of the Bureau of Consumer Protection at the  
11 FTC. As Commissioner Swindle said this morning, at the  
12 FTC, it's all about consumers. And Howard is the guy who  
13 is responsible for carrying that flag. So, to wrap  
14 things up for us, Howard Beales.

15 **(Applause).**

16 MR. BEALES: Thanks, Eileen. They always  
17 schedule me at the end of these workshops, in case there  
18 is nobody left.

19 **(Laughter).**

20 MR. BEALES: They figure commissioners might be  
21 upset, but the bureau director, well, that's okay. I  
22 want to -- we have come to the end of what I think has  
23 been a very productive and a very exciting forum over the  
24 last three or four days. I want to thank all of the  
25 panelists who volunteered their time and expertise and

1 everybody in the audience who volunteered their time and  
2 expertise to help educate us about the complexities and  
3 the realities of the Spam problem.

4 I also want to thank Chairman Muris and the  
5 commissioners who participated in the forum, Commissioner  
6 Swindle, Commissioner Thompson, in particular, for  
7 sharing their deep commitment to addressing and  
8 responding to the many questions and concerns that are  
9 out there about Spam.

10 And I want to thank the staff, who was really  
11 tireless in putting together an outstanding workshop.

12 **(Applause).**

13 MR. BEALES: It's really easy to say, and I've  
14 learned to say it very well, let's do a workshop.

15 **(Laughter).**

16 MR. BEALES: And it's very hard to actually do,  
17 and they've done an outstanding job. Over the last three  
18 days, we've heard from a number of people with different  
19 perspectives on addressing the Spam problem. That  
20 diversity of opinion has provided for a lively debate, a  
21 very informative and I think a very informed discussion  
22 on a great many issues.

23 The panel discussions I think have clearly  
24 confirmed there isn't a simple magic solution, sad as  
25 that may be, but they also illustrate that there are many

1 directions that we can take to try to protect e-mail for  
2 consumers and for commerce. Many panelists discussed how  
3 the swelling tide of Spam harms consumers and businesses  
4 by imposing significant costs on them. Consumers find  
5 themselves confronting unseemly images, spending time  
6 deleting unwanted messages or not receiving valued e-mail  
7 in lieu of receiving e-mails that promise immediate  
8 wealth or a cure-all health care.

9 Businesses lose productivity because employees  
10 spend time deleting unwanted e-mail. They spend more  
11 money putting systems in place that will diminish the  
12 amount of Spam that gets through their filters. Further,  
13 there are costs, both large and small, that Spam imposes  
14 on internet service providers.

15 Our panelists indicated that although the costs  
16 are currently significant, they're going to give way to a  
17 far greater harm, the loss of confidence in the powerful  
18 communications medium of e-mail, and quite potentially  
19 decreasing participation on the internet. We are at risk  
20 of killing the killer-app.

21 The panelists also reaffirmed, there's a role  
22 for continued aggressive law enforcement by the FTC and  
23 other law enforcement authorities. We're certainly going  
24 to continue to pursue vigorous enforcement against those  
25 who threaten this communications medium, and the

1 marketing tool, by sending deceptive e-mail. We'll also  
2 continue our efforts to educate consumers and businesses  
3 in the steps they can take to decrease the amounts of  
4 Spam and to recognize deceptive Spam when they see it.  
5 We'll continue to study the issues; we'll continue to  
6 take innovative steps to try to remain at the forefront  
7 of stopping deceptive Spam and providing meaningful  
8 consumer and business education. For example, you can  
9 expect action from the FTC on the open relay issue in the  
10 very near future.

11 One final housekeeping note, because of the  
12 overwhelming interest in this conference, and because of  
13 the turnout, I realize that many of you may not have had  
14 the chance to make a comment or ask a question. We  
15 invite you to supplement our record until May 16th. The  
16 details and the instructions for doing so are on our web  
17 page, at [www.ftc.gov/bcp/workshops/Spam](http://www.ftc.gov/bcp/workshops/Spam).

18 And speaking of this website, we're always  
19 interested in sharing the information on it with  
20 consumers and businesses. If you'd like to join us in  
21 this effort, then please contact Charles Lawson in our  
22 Office of Consumer and Business Education, at the risk of  
23 having him overwhelmed, he's at [clawson@ftc.gov](mailto:clawson@ftc.gov).

24 Again, we feel strongly about the issues  
25 concerning Spam, and I know that many of you are

1           passionate about these issues as well. I'm glad that  
2           we've been able to host this thoughtful and productive  
3           forum as a building block to address many of these  
4           issues. My colleagues and I look forward to working with  
5           you in the future. Thank you again for devoting your  
6           time and effort to the forum, and thank you for staying  
7           until the very end.

8                           **(Applause).**

9                           **(Whereupon, the hearing was concluded.)**

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## 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           DOCKET/FILE NUMBER: P0244073           CASE TITLE: SPAM PROJECT4           HEARING DATE: May 2, 2003

5

6           I HEREBY CERTIFY that the transcript contained  
7           herein is a full and accurate transcript of the notes  
8           taken by me at the hearing on the above cause before the  
9           FEDERAL TRADE COMMISSION to the best of my knowledge and  
10          belief.

11

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DATED: MAY 20, 2003

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SONIA GONZALEZ

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## 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

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SARA J. VANCE