



Sub. H.B. 383*

125th General Assembly

(As Reported by H. Commerce and Labor)

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BILL SUMMARY

- Creates the offenses of illegally transmitting and retransmitting multiple e-mail advertisements and unauthorized access and use of a protected computer to transmit or retransmit e-mail advertisements, and provides penalties for each offense.
- Permits the Attorney General and e-mail service providers who are injured by the offense to bring a civil action against offenders and establishes civil remedies.

CONTENT AND OPERATION

Overview of the offenses

The bill creates the offenses of illegally transmitting or retransmitting electronic mail advertisements and unauthorized access and use of a protected computer to transmit or retransmit e-mail advertisements. Under the bill, "electronic mail message" means each "e-mail" addressed to a discrete addressee.¹

* *This analysis was prepared before the report of the House Commerce and Labor Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

¹ *Electronic mail, as defined under current law, means an electronic message that is transmitted between two or more telecommunications devices or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt, and whether or not the message is viewed upon the transmission or stored for later retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network (see sec.*

The bill defines "multiple" as more than ten e-mail messages during a 24-hour period, more than 100 e-mail messages during a 30-day period, or more than 1,000 messages during a one-year period. (Sec. 2913.421(A)(6) and (14).) A "protected computer," under the bill, is (1) a computer exclusively for the use of state government or a financial institution, (2) a computer used by or for state government or a financial institution when the conduct constituting the violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer affects that use by or for the state government or financial institution, or (3) a computer that is used in intrastate or interstate communication (sec. 2913.421(A)(15)). (See **COMMENT.**)

Illegally transmitting multiple electronic mail advertisements

The bill prohibits persons, with regard to e-mail advertisements sent from or to a protected computer in this state, from engaging in the following activities:

(1) Knowingly use a protected computer to relay or retransmit multiple e-mail advertisements, with the intent to deceive or mislead recipients or any e-mail service provider, as to the origin of those advertisements;

(2) Knowingly and materially falsify header information in multiple e-mail advertisements and purposely initiate the transmission of those advertisements. Under the bill, "header information" means the source, destination, and routing information attached to an e-mail message, including the originating domain name, the originating e-mail address, and technical information that authenticates the sender of an e-mail message for network security or network management purposes. "Initiate the transmission," when used in respect to a commercial e-mail message, means to originate or transmit that message or to procure the origination or transmission of that message, regardless of whether the message reaches its intended recipients. (Sec. 2913.421(A)(9) and (10).)

(3) Knowingly register, using information that materially falsifies the identity of the actual registrant, for five or more e-mail accounts or online user accounts or two or more domain names and purposely initiate the transmission of multiple e-mail advertisements from one, or any combination, of those accounts or domain names;²

2913.421(A)(5) and R.C. 2307.64, not in the bill). This bill analysis refers to electronic mail as "e-mail."

² *Under the bill, a "domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority, and that is included in an e-mail message (sec. 2913.421(A)(4)).*



(4) Knowingly falsely representing the right to use five or more Internet protocol addresses, and purposely initiate the transmission of multiple e-mail advertisements from those addresses. (Sec. 2913.421(B)(1) to (4).)

Under the bill, "materially falsify" means to alter or conceal in a manner that would impair the ability of a recipient of an advertisement, an e-mail service provider processing a message on behalf of a recipient, a person alleging a violation of illegally transmitting multiple e-mail messages or unauthorized access of a protected computer, or a law enforcement agency to identify, locate, or respond to a person that initiated an e-mail message or to investigate an alleged violation of illegally transmitting multiple e-mail messages or unauthorized access of a protected computer (sec. 2913.421(A)(13)).

Unless otherwise specified in the bill, anyone who violates (1), (2), (3), or (4) above is guilty of illegally transmitting multiple e-mail advertisements, which is a fifth degree felony under the bill (sec. 2913.421(C)(1)).³ The bill raises a violation to a fourth degree felony if any of the following apply:⁴

(a) Regarding a violation of (3) above, the offender, using information that materially falsifies the identity of the actual registrant, knowingly registers for 20 or more e-mail accounts or online user accounts or ten or more domain names, and purposely initiates, or conspires to initiate, the transmission of multiple e-mail advertisements from the accounts or domain names.

(b) Regarding any violation of (1) through (4) above, the volume of e-mail advertisements the offender transmitted in committing the violation exceeds 250 during any 24-hour period, 2,500 during any 30-day period, or 25,000 during any one-year period.

(c) Regarding any violation of (1) through (4) above, during any one-year period the aggregate loss to the victim or victims of the violation is \$500 or more or during any one-year period the aggregate value of the property or services obtained by any offender as a result of the violation is \$500 or more.

³ A fifth degree felony may carry a prison term for 6 to 12 months, a fine of not more than \$2,500, or both, and other possible sanctions (see R.C. 2929.14 and 2929.18, not in the bill).

⁴ A fourth degree felony may carry a prison term of 6 to 18 months, a fine of not more than \$5,000, or both, and other possible sanctions (see R.C. 2929.14 and 2929.18, not in the bill).

(d) Regarding any violation of (1) through (4) above, the offender committed the violation with three or more other persons with respect to whom the offender was the organizer or leader of the activity that resulted in the violation.

(e) Regarding any violation of (1) to (4) above or the unauthorized access of a protected computer (see "*Unauthorized access of a protected computer*," below), the offender knowingly assisted in a violation of those offenses through the provision or selection of addresses to which the message was transmitted, if that person knew that the e-mail address of the recipients was obtained using an automated means from an Internet website or proprietary online service operated by another person, and that website or online service included, at the time the address was obtained, a notice stating that the operator of that website or online service will not transfer addresses maintained by that website or online service to any other party for the purposes of initiating, or enabling others to initiate, electronic mail messages.

(f) Regarding any violation of (1) to (4) above or the unauthorized access of a protected computer (see "*Unauthorized access of a protected computer*," below), the offender knowingly assisted in a violation of those offenses through the provision or selection of e-mail addresses of the recipients obtained using an automated means that generates possible e-mail addresses by combining names, letters, or numbers into numerous permutations. (Sec. 2913.421(C)(2).)

In addition, illegally transmitting multiple e-mail advertisements under the bill is raised to a second degree felony if the offender was convicted previously of a violation of this offense or the unauthorized access of a computer, a law of another state or the United States regarding the transmission of multiple e-mail advertisements or unauthorized access to a computer system, or if the offender committed the violation in the furtherance of a felony (sec. 2913.421(C)(4)).⁵

Unauthorized access of a protected computer

The bill prohibits persons, with regard to e-mail advertisements sent from or to a protected computer in this state, from knowingly accessing a protected computer without authorization and purposely initiating the transmission of multiple e-mail advertisements from or through the protected computer (sec. 2913.421(B)(5) and (C)(3)). A person who violates this prohibition is guilty of unauthorized access of a protected computer, which is a fourth degree felony, except as otherwise provided in the bill.⁶ A violation of this prohibition is raised

⁵ A third degree felony carries a prison term of 1 to 5 years, a fine of not more than \$10,000, and other possible sanctions (see R.C. 2929.14 and 2929.18, not in the bill).

⁶ See footnote 4, above.

to a third degree felony if the offender was convicted previously of a violation of this offense or illegally transmitting multiple e-mail advertisements, or a violation of a law of another state or the United States regarding the transmission of multiple electronic mail advertisements or unauthorized access to a computer system, or if the offender committed the violation in the furtherance of a felony.⁷

Jurisdiction and venue

Under continuing law unchanged by the bill, a person is subject to criminal prosecution and punishment in this state if the person, by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, causes or knowingly permits any writing, data, image, or other telecommunication to be disseminated or transmitted into this state in violation of the law of this state. The bill includes a "protected computer" in the list of devices that may be used. Similarly, under continuing law unchanged by the bill, when the offense involves a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense, in any jurisdiction from which or into which, as part of the offense, any writing, data, or image is disseminated or transmitted by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense. Under the bill, if the offense involves a "protected computer," the offender may be tried in any jurisdiction containing any location of the protected computer, in any jurisdiction from which or into which any writing, data, or image is disseminated or transmitted by means of the protected computer, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense. (Secs. 2901.11 and 2901.12.)

Contraband

Under the bill, any equipment, software, or other technology of a person who commits the violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer that is used or intended to be used in the commission of a violation of those offenses, is contraband. Any real or personal property that constitutes or is traceable to the gross proceeds obtained from the commission of a violation of those offenses is contraband. Under existing law not affected by the bill, contraband is subject to seizure and forfeiture

⁷ See footnote 5, above.

pursuant to the laws governing offenses involving contraband and the procedures for seizures and forfeiture of contraband under R.C. 2933.42 and 2933.43. (Sec. 2913.421(E).)

Conspiracy

Continuing law prohibits any person with purpose to commit or to promote or facilitate the commission of specified offenses from either planning or aiding in the planning of the commission of the offenses specified with another person or persons, or agreeing with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses (sec. 2923.01(A)). A person who violates this prohibition is guilty of conspiracy (sec. 2923.01(J)). The list of specified offenses includes aggravated murder, murder, engaging in a pattern of corrupt activity, and robbery, among others. The bill adds illegally transmitting multiple electronic mail advertisements to the list of offenses for which a person may be convicted of conspiracy (sec. 2923.01(A)). Under continuing law, a conviction of conspiracy is a felony of the next lesser degree than the most serious offense that is the object of the conspiracy, when the most serious offense that is the object of the conspiracy is a felony of the first, second, third, or fourth degree, unless otherwise specified in the law. (Sec. 2923.01(J)(2).)⁸

Civil action

The bill permits the Attorney General or any person engaged in the business of an e-mail service provider that is injured by a violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer or by the use of e-mail addresses obtained from that e-mail service provider in a manner described under the bill. Under the bill, the Attorney General or e-mail service provider may bring a civil action in an appropriate common pleas court in this state or the appropriate district court of the United States that has jurisdiction for a violation of illegally transmitting multiple e-mail messages or unauthorized access of a public computer or a violation of the federal "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" (the CAN-SPAM Act of 2003), Pub. L. No. 108-187, but not in both courts. The Attorney General or e-mail service provider may bring the civil action for the violation of illegally transmitting multiple e-mail messages or unauthorized access of a public computer within one year of the act that is the basis for the action.

⁸ *Under continuing law, when a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit the specific offense, the person is not convicted of conspiracy involving the same offense (sec. 2923.01(G)).*

(Sec. 2913.421(D)(1).)⁹ The bill, however, does not authorize the Attorney General or an e-mail service provider to bring a civil action against a person convicted of conspiracy to commit either violation.

Under the bill, in an action brought by the Attorney General for a violation of illegally transmitting multiple e-mail messages of unauthorized access of a protected computer, a court may award temporary, preliminary, or permanent injunctive relief. In addition, under the bill, a court may impose a civil penalty against the offender in an amount not to exceed \$25,000 for each day a violation occurs, or not less than \$2 but not more than \$8 for each e-mail advertisement that is initiated, as the court considers just. Additionally, the federal CAN-SPAM Act of 2003, authorizes the Attorney General, official, or agency of the state to bring a civil action on behalf of residents of the state in the appropriate U.S. district court to obtain the appropriate injunctive and monetary relief as described in the Act. The bill permits the Attorney General to bring that action, and an action for a violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer on behalf of the residents of this state in the appropriate U.S. district court (sec. 2913.421(F)).

In an action brought by a person engaged in the business of an e-mail service provider, the court may award temporary, preliminary, or permanent injunctive relief, and may award damages in an amount equal to whichever of the following is greater:

(1) The sum of the actual damages incurred by the e-mail service provider as a result of the violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer, plus any receipts of the offender that are attributable to the violation of those offenses and that were not taken into account in computing actual damages;

(2) Statutory damages in an amount not exceeding \$25,000 for each day a violation occurs, or not less than \$2 but not more than \$8 for each e-mail advertisement initiated in violation of this section. (Sec. 2913.421(D)(3).)

Under the bill, in assessing damages awarded against an offender in a civil action brought by an e-mail service provider, the court may consider (1) whether the offender has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent the violations

⁹ *It might not entirely be clear, under the bill, as to which court (federal or state) may have jurisdiction over which (federal or state) claim in all possible circumstances (see COMMENT).*

or (2) the violation occurred despite commercially reasonable efforts to maintain the practices and procedures established. (Sec. 2913.421(D)(4).)

Requirements of e-mail service providers

The bill specifies that it does not require an e-mail service provider to block, transmit, route, relay, handle, or store certain types of e-mail messages or prevent or limit, in any way, an e-mail service provider from adopting a policy regarding commercial or other e-mail, including a policy of declining to transmit certain types of e-mail messages, or from enforcing that policy through technical means, through contract, or pursuant to any remedy available under any other provision of federal, state, or local criminal or civil law. The bill also specifies that it does not render lawful any policy that is unlawful under any other provision of law. (Sec. 2913.421(G).)

Definitions

The bill defines "Internet protocol address" as the string of numbers by which locations on the Internet are identified by routers or other computers connected to the Internet.

The bill uses terms defined in ongoing law as follows:

(1) "Advertisement," as defined by R.C. 4931.55, means a message or material intended to cause the sale of realty, goods, or services.

(2) "Computer," as defined by R.C. 2913.01(M), means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.

(3) "Commercial electronic mail message" means any e-mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product, including content on an Internet website operated for a commercial purpose, but does not include a transactional or relationship message. The inclusion of a reference to a commercial entity or a link to the website of a commercial entity does not, by itself, cause that message to be treated as a commercial mail message for the purpose of this section, if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or of a commercial product or service.

(4) "Computer network," as defined by R.C. 2913.01(O), means a set of related and remotely connected computers and communication facilities that

includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities.

(5) "Computer system" as defined in R.C. 2913.01(N), means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks.

(6) "Electronic mail advertisement," as defined in R.C. 2307.64(A)(4), means electronic mail containing an advertisement.

(7) "Electronic mail service provider," means any person, including an Internet service provider that is an intermediary in sending and receiving e-mail and that provides to the public e-mail accounts or online user accounts from which e-mail may be sent.

(8) "Originating address," as defined in R.C. 2307.64(A)(7), means the string of characters used to specify the source of any e-mail message.

(9) "Recipient" as defined in R.C. 2307.64(A)(11), means a person who receives an electronic mail advertisement at any one of the following receiving addresses:

(a) A receiving address furnished by an e-mail service provider that bills for furnishing and maintaining that receiving address to a mailing address within this state;

(b) A receiving address ordinarily accessed from a computer located within this state;

(c) A receiving address ordinarily accessed by a person domiciled within this state;

(d) Any other receiving address with respect to which the obligations imposed by this section can be imposed consistent with the U.S. Constitution.

(10) "Financial institution" as defined in R.C. 122.39, means any banking corporation, trust company, insurance company, savings and loan association, building and loan association, or corporation, partnership, federal lending agency, foundation, or other institution engaged in lending or investing funds for industrial or business purposes.



(11) "Internet" as defined in R.C. 341.42, means the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork called the World Wide Web. (Sec. 2913.421(A).)

COMMENT

The federal "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" (CAN-SPAM Act of 2003), Pub. L. 108-187, states that it expressly supercedes any statute, regulation, or rule of a state or political subdivision that expressly regulates the use of e-mail to send commercial messages, except the extent that any statute, regulation, or rule of a state or political subdivision prohibits falsity or deception in any portion of a commercial e-mail message or attachment (CAN-SPAM Act, § 8(b)). The general effective date of the Act was January 1, 2004. Because of the recent effective date, court cases have not been decided and therefore the effect of the Act on this bill is uncertain.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-27-04	p. 1553
Reported, H. Commerce & Labor	---	---

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