



Bethany Boyd

Bill Analysis
Legislative Service Commission

Am. Sub. H.B. 383*

125th General Assembly

(As Reported by S. Ways & Means & Economic Development)

Reps. Walcher, D. Evans, Aslanides, Wagner, McGregor, Reidelbach, Fessler, Price, Wolpert, Oلمان, Kearns, Setzer, Webster, Hagan, Collier, Schaffer, Widener, Distel, Barrett, Beatty, Carano, Carmichael, Chandler, Cirelli, DeGeeter, Domenick, C. Evans, Flowers, Gilb, Harwood, Hollister, Hughes, Jerse, Latta, Mason, Miller, Niehaus, Otterman, S. Patton, Perry, Reinhard, Schmidt, Schneider, Sferra, Slaby, G. Smith, S. Smith, D. Stewart, J. Stewart, Taylor, White, Wilson, Woodard

BILL SUMMARY

- Creates two computer "spamming" felonies of (1) illegally transmitting multiple commercial e-mail messages and (2) unauthorized access of a computer, and provides penalties for each offense.
- Provides enhanced criminal penalties for extensive spamming or repeat offenders.
- Applies existing seizure and forfeiture laws to computer contraband used to commit either spamming felony.
- Provides that an offender who illegally transmits multiple commercial e-mail messages or has unauthorized access of a computer also may be charged with conspiracy.
- Permits the Attorney General and e-mail service providers who are injured by the commission of either offense to bring a civil action against offenders, and establishes civil remedies.

* *This analysis was prepared before the report of the Senate Ways and Means and Economic Development Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Authorizes the Attorney General to bring a civil action for violations of the federal "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" on behalf of Ohio residents.

TABLE OF CONTENTS

Overview of the offenses.....	2
Illegally transmitting multiple commercial e-mail messages	3
Penalty enhanced for extensive spamming	4
Unauthorized access of a computer	5
Enhanced penalty for repeat offenders	6
Jurisdiction and venue for criminal prosecution.....	6
Seizure and forfeiture as contraband	6
Conspiracy may apply to both felonies.....	7
Civil action may be brought for committing the felonies.....	7
In a state court of common pleas under the bill.....	7
In a federal district court under the federal CAN-SPAM Act	8
Effect of bill on e-mail service providers	9
Definitions	9

CONTENT AND OPERATION

Overview of the offenses

The bill creates the offenses, both felonies, of (1) illegally transmitting multiple commercial electronic mail messages, and (2) unauthorized access of a computer (see **COMMENT**). "Electronic mail," as defined under existing law (R.C. 2307.64) and used in the bill, is 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 transmission or stored for later retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network (see "Definitions," below, for the definitions of "computer" and "computer network" that apply throughout the bill). This analysis refers to electronic mail as "e-mail."

A "commercial electronic mail message" is any e-mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service, including content on an Internet web site operated for a commercial purpose, but does not include a "transactional or relationship message" (see "Definitions," below, for that term). The inclusion of a reference to

a commercial entity does not, by itself, cause that message to be treated as a commercial e-mail message for the purpose of the new felonies, if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service (R.C. 2913.421(A)(2)). And to be "multiple" commercial e-mail messages under the bill, an offender must transmit more than ten commercial e-mail messages during a 24-hour period, more than 100 commercial e-mail messages during a 30-day period, or more than 1,000 commercial e-mail messages during a one-year period. (R.C. 2913.421(A)(12).)

Illegally transmitting multiple commercial e-mail messages

(R.C. 2913.421(B)(1) to (4) and (C)(1))

The bill prohibits a person, with regard to commercial e-mail messages sent from or to a computer in Ohio, from doing any of the following:

(1) Knowingly using a computer to relay or retransmit multiple commercial e-mail messages, with the intent to deceive or mislead "recipients" or any "e-mail service provider," as to the origin of those messages. A "recipient" is a person who receives a commercial e-mail message at a "receiving address" (see "Definitions," below) (a) furnished by an e-mail service provider that bills for furnishing and maintaining that receiving address to a mailing address within Ohio, (b) ordinarily accessed from a computer located in Ohio or by a person domiciled within Ohio, **or** (c) with respect to which the new felonies can be imposed consistent with the United States Constitution (R.C. 2913.421(A)(13)). The bill defines an "electronic mail service provider" as any person 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. It includes an Internet service provider (R.C. 2913.421(A)(6)).

(2) Knowingly and materially falsifying "header information" (see "Definitions," below) in multiple commercial e-mail messages and purposely initiating the transmission of those messages. Under the bill, "materially falsify" means to alter or conceal in a manner that would impair the ability of a recipient of an e-mail message, an e-mail service provider processing an e-mail message on behalf of a recipient, a person alleging a violation of this new felony, or a law enforcement agency to identify, locate, or respond to the person that initiated the e-mail message or to investigate an alleged violation of the bill. The bill defines "initiate the transmission" as originating or transmitting a commercial e-mail message or procuring the origination or transmission of that message, regardless of whether the message reaches its intended recipients, but does not include actions that constitute "routine conveyance" of the message (see "Definitions," below) (R.C. 2913.421(A)(8)).

(3) Knowingly registering, 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" (see "Definitions," below), and purposely initiating the transmission of multiple commercial e-mail messages from one, or any combination, of those accounts or domain names;

(4) Knowingly falsely representing the right to use five or more "Internet protocol addresses," and purposely initiating the transmission of multiple commercial e-mail messages from those addresses. An "Internet protocol address" is a string of numbers by which locations on the Internet are identified by routers or other computers connected to the Internet (R.C. 2913.421(A)(10)).

Unless otherwise specified in the bill, anyone who violates (1), (2), (3), or (4) above is guilty of illegally transmitting multiple commercial e-mail messages, a felony of the fifth degree.¹

Penalty enhanced for extensive spamming

(R.C. 2913.421(C)(2)(a) to (f))

The penalty for illegally transmitting multiple commercial e-mail messages is increased to a felony of the fourth degree if any of the following apply:²

- 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 commercial e-mail messages from the accounts or domain names.
- Regarding any violation of (1) through (4) above, the volume of commercial e-mail messages 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.

¹ A fifth degree felony may carry a prison term of 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).

² 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).

- 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.
- 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.

The penalty for illegally transmitting multiple commercial e-mail messages is also increased to a felony of the fourth degree, if the offender knowingly assisted in the violation through the provision or selection of either of the following:

- The e-mail addresses to which the commercial e-mail message was transmitted, if the offender knew that the e-mail addresses of the recipients were obtained using an automated means from an Internet web site or proprietary online service operated by another person, and that web site or online service included, at the time the addresses were obtained, a notice stating that the operator of that web site or online service will not transfer addresses maintained by that web site or online service to any other party for the purposes of initiating the transmission of, or enabling others to initiate the transmission of, e-mail messages.
- The e-mail addresses of the recipients that were obtained using an automated means that generates possible e-mail addresses by combining names, letters, or numbers into numerous permutations.

Unauthorized access of a computer

(R.C. 2913.421(D))

The bill also prohibits a person, with regard to commercial e-mail messages sent from or to a computer in Ohio, from knowingly accessing a computer without authorization and purposely initiating the transmission of multiple commercial e-mail messages from or through the computer. Whoever violates this provision is guilty of unauthorized access of a computer, a felony of the fourth degree.

Enhanced penalty for repeat offenders

(R.C. 2913.421(E))

Illegally transmitting multiple commercial e-mail messages and unauthorized access of a computer are raised to felonies of the third degree if the offender was convicted previously of a violation of either felony, or of a law of another state or the United States regarding the transmission of e-mail messages or unauthorized access to a computer, or if the offender committed the violation in the furtherance of a felony.³

Jurisdiction and venue for criminal prosecution

(R.C. 2901.11 and 2901.12, not in bill)

Under continuing law, 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 Ohio. Similarly, when the offense involves one of the devices just listed, 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. Thus, under the bill, since both new felonies involve use of a computer, the offender may be tried in any jurisdiction containing any location of the computer, in any jurisdiction from which or into which any writing, data, or image is disseminated or transmitted by means of the computer, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of either of the felonies.

Seizure and forfeiture as contraband

(R.C. 2913.421(G))

Under the bill, any equipment, software, or other technology of a person who commits the felony of illegally transmitting multiple commercial e-mail

³ 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).

messages or unauthorized access of a computer that is used or intended to be used in the commission of the felony, is contraband. Any real or personal property that constitutes or is traceable to the gross proceeds obtained from the commission of those felonies also is contraband. Contraband is subject to seizure and forfeiture under existing law that establishes the procedures for seizure and forfeiture of contraband (R.C. 2933.42 and 2933.43, not in the bill).

Conspiracy may apply to both felonies

(R.C. 2923.01(A) and (J))

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. A person who violates this prohibition is guilty of conspiracy. 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 commercial e-mail messages and unauthorized use of a computer to the list of offenses for which a person may be convicted of conspiracy. 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.⁴

Civil action may be brought for committing the felonies

In a state court of common pleas under the bill

(R.C. 2913.421(F))

The bill authorizes the Attorney General or an e-mail service provider that is injured by a violation of illegally transmitting multiple commercial e-mail messages or unauthorized access of a computer to bring a civil action in an appropriate court of common pleas in Ohio seeking relief from any person whose conduct violated the bill. The Attorney General or e-mail service provider may bring the civil action within one year of the act that is the basis for the civil action.

⁴ 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 (R.C. 2923.01(G)).

In a civil action brought by the Attorney General for a violation of illegally transmitting multiple commercial e-mail messages or unauthorized access of a computer, a court may award temporary, preliminary, or permanent injunctive relief. In addition, the court may impose a civil penalty against the offender, as the court considers just, in an amount that is the **lesser** of: (a) \$25,000 for each day a violation occurs, or (b) not less than \$2 but not more than \$8 for each commercial e-mail message initiated.

In an action brought by an e-mail service provider, the court may award temporary, preliminary, or permanent injunctive relief, and also may award damages, as the court considers just, 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 commercial e-mail messages or unauthorized access of a 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 that is the **lesser** of: (a) \$25,000 for each day a violation occurs, or (b) not less than \$2 but not more than \$8 for each commercial e-mail message initiated.

In assessing damages awarded against an offender in a civil action brought by an e-mail service provider, the court may consider whether (1) the offender has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent the violation, or (2) the violation occurred despite commercially reasonable efforts to maintain the practices and procedures established.

In a federal district court under the federal CAN-SPAM Act

(R.C. 2913.421(H))

The bill provides that the Attorney General may bring a civil action, pursuant to the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the CAN-SPAM Act), on behalf of Ohio residents in a federal district court that has jurisdiction for a violation of the CAN-SPAM Act, but the Attorney General cannot bring a civil action under both that Act and the bill's civil action provision. (The CAN-SPAM Act prohibits predatory and abusive commercial e-mail in a manner similar to the bill, and does not supersede state laws that prohibit falsity or deception in commercial e-mail messages, or that relate to acts of fraud or computer crime. The CAN-SPAM Act also authorizes the attorney general of a state, or an official or agency of a state, to bring a civil

action on behalf of the state's residents in the appropriate federal district court to enjoin further violations of the Act or obtain monetary damages on behalf of the residents.) If a federal court dismisses the civil action for reasons other than upon the merits, a civil action may be brought for illegally transmitting multiple commercial e-mail messages or unauthorized access to a computer, in accordance with the bill.

Effect of bill on e-mail service providers

(R.C. 2913.421(I))

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. The bill cannot be construed to prevent or limit, in any way, an e-mail service provider from adopting a policy regarding 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 federal, state, or local criminal or civil law. The bill also specifies that it does not render lawful any such policy that is unlawful under any other provision of law.

Definitions

The bill applies the following definitions, which already exist in the theft and fraud laws (R.C. 2913.01), to the bill's felonies of illegally transmitting multiple commercial e-mail messages and unauthorized access of a computer:

(1) A "computer" is an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses, including 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.

(2) "Computer network" 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.

(3) A "computer system" is a computer and related devices, whether connected or unconnected, including 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.

The bill also defines the following terms that are used in the law regarding illegally transmitting multiple commercial e-mail messages and unauthorized access of a computer:

(1) "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 as part of an electronic address on the Internet (R.C. 2913.421(A)(3)).

(2) "Header information" is defined as the source, destination, and routing information attached to an e-mail message, including the originating domain name, the originating address (the string of characters used to specify the source of the message), and technical information that authenticates the sender of an e-mail message for computer network security or computer network management purposes (R.C. 2913.421(A)(7)).

(3) "Internet" means the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork called the World Wide Web (R.C. 2913.421(A)(9), and R.C. 341.42, not in bill).

(4) "Receiving address" means the string of characters used to specify a recipient with each receiving address creating a unique and separate recipient (R.C. 2913.421(A)(4), and R.C. 2307.64, not in bill).

(5) "Routine conveyance" is the transmission, routing, relaying, handling, or storing, through an automated technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses (R.C. 2913.421(A)(14)).

(6) "Transactional or relationship message" means an electronic mail message the primary purpose of which is to do any of the following:

(a) Facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(b) Provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(c) Provide notification concerning a change in the terms or features of, a change in the recipient's standing or status with respect to, or at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing

commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(d) Provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled;

(e) Deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender. (R.C. 2913.421(A)(15).)

COMMENT

The federal "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" (CAN-SPAM Act of 2003), Pub. L. 108-187, 117 Stat. 2699, 15 U.S.C. 7701 et seq., states that it expressly supersedes any statute, regulation, or rule of a state or political subdivision that expressly regulates the use of e-mail to send commercial messages, except to 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 that have been brought under the Act 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	05-04-04	pp. 1819-1820
Passed House (96-0)	05-05-04	pp. 1841-1843
Reported, S. Ways & Means & Economic Development	---	---

H0383-RS-125.doc/jc

