



# The Legal Pitfalls of Email Marketing

Since so many small businesses now do a substantial part of their marketing on the Internet, it is not surprising that many have resorted to doing e-mail marketing to advertise their products or services, since it costs next to nothing to send out zillions of e-mail messages, other than the cost of acquiring the "mailing lists."

You can't help but be aware of this kind of marketing blitz, since everyone on the planet with an e-mail address seems to receive dozens of e-mail ads every day for such necessities of life as those wonderful herbal supplements that will supposedly enlarge certain critical parts of your anatomy.

In recent years, most of us have grown tired of receiving these unwanted, unsolicited junk e-mail messages ("SPAM"), which now make up something like 80 percent of the e-mail volume we receive, even after SPAM filters have done their work. That has led to pressure on governments around the world to do something to stem the tide of SPAM. However, many of us who run small businesses may have privately thought about using such e-mail campaigns ourselves to market our own products or services. Or maybe we are doing it already, unaware of the possible legal consequences. Since we receive such a huge volume of SPAM in our e-mail inboxes every day, it isn't hard to jump to the conclusion that, since everyone does it, SPAM must be legal, as long as you aren't selling or promoting something like weapons-grade plutonium or some type of sleazy scam.

Right?

Wrong. In fact, most of the SPAM you receive on a daily basis (even "innocent," non-fraudulent SPAM) is illegal under U.S. laws, but since most of the illegal e-mail solicitations originate in places that don't crack down on SPAMmers, or even encourage them, there is very little most Western governments can do about it.

However, many small businesses who have heard about the new federal anti-SPAM law may be unnecessarily refraining from doing e-mail marketing, for fear of the legal consequences. Such caution is certainly warranted, but you should not assume that all e-mail marketing is illegal. It is still possible to legally send unsolicited e-mail to potential or existing customers -- but only if you meet a number of very specific federal guidelines.

Before embarking upon an e-mail marketing campaign, you need to be aware that, even though you and your business may be perfectly ethical and you may be advertising a useful, legal product or service, you must be extremely careful to avoid both criminal prosecution and, even more of a realistic risk, being sued for private damages by Internet service providers (ISPs) that provide Internet access and who are now authorized to sue the pants off SPAMmers -- for statutory legal damages.

Thus, if or when you decide to do any e-mail solicitations for your business, you first need to know what the legal ground rules are, to avoid incurring fines or massive legal liability to ISPs, either of which penalties could put you out of business in a hurry.

### **Does Canada have anti-spam laws?**

**No.** The distribution of unsolicited promotional and product information over electronic networks *per se* is neither illegal nor regulated in Canada. However, fraudulent practices and misleading representations are illegal, and privacy laws require an individual's consent to the collection and use of their e-mail address where it can be traced to them.

The Personal Information Protection and Electronic Documents Act (PIPEDA) requires that organizations obtain the knowledge and consent of individuals to the collection, use or disclosure of their personal information, except in specified situations. E-mail addresses are generally considered "personal information" since they can be associated with an identifiable individual. The federal Privacy Commissioner has found unsolicited marketing e-mail to violate PIPEDA in two reported cases. However, these findings are not legally binding, and there is no penalty associated with them.

In addition, the Criminal Code prohibits fraud, and the Competition Act prohibits misleading advertising. To the extent that spam is either misleading or fraudulent, it can be captured under these laws.

### **Does the US Have Anti-Spam Laws?**

**Yes.** The U.S. Congress has enacted legislation, effective in 2004, in an attempt to stem the flow of unwanted, unsolicited junk e-mail ("SPAM") and "porn mail" on the Internet, by enacting the "CAN-SPAM" Act [15 U.S. Code Sec. 7701]. This law imposes hefty penalties of up to \$250 per violation (limited to \$2 million total) on SPAMmers who engage in any of these practices:

- Sending out e-mail with deceptive "headers" or subject lines, which disguise the nature of the commercial message within.
- Sending e-mail with false return addresses ("spoofing") or false IP (Internet Protocol) addresses;
- E-mail solicitations sent to "harvested" addresses (gathered automatically from Internet web sites by special robot software) or to "dictionary lists" of e-mail addresses created by mechanically generating large numbers of target addresses, such as: abc1@xyz.com, abc2@xyz.com, abc3@xyz.com, etc.
- Sending e-mail solicitations to recipients who have requested that the sender (or all senders) cease sending messages to that recipient, more than ten business days after such a request