BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of CAN-SPAM	)	
Rulemaking – Comment	)	Project No. R411008

COMMENTS OF COX ENTERPRISES, INC.

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INTRODUCTION

Cox Enterprises, Inc. ("Cox") hereby submits these comments in response to the Federal Trade Commission's ("FTC" or "Commission") Advance Notice of Proposed Rule Making ("ANPRM") relating to the implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act" or the "Act").[1] Cox has a 106-year history of leadership in the media and communications industries and today is one of the nation's largest diversified media companies, with significant operations and investments in newspapers, cable television systems, broadcast television and radio stations, and local Internet content. Most of Cox's newspaper and broadcast media subsidiaries operate popular websites that offer consumers the opportunity to register online to receive a variety of free content and information services, such as electronic newsletters and weather alerts. As a convenience to consumers, many of these websites also feature electronic mail utilities – so-called "tell-a-friend" or "search agent" tools – that enable website visitors to forward content of their choosing to friends, family

[1] *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Advance Notice of Proposed Rulemaking*, 69 Fed. Reg. 11776 (March 11, 2004).

members and colleagues, or to register for automated email alerts whenever a job listing, classified advertisement or other advertising offer of specific interest is added to the website's database.

Cox, through subsidiaries, also owns or controls some of the most popular consumer advertising sites on the World Wide Web, including AutoTrader.com, a classified advertising forum for the listing of used vehicles, and Valpak.com, the country's largest distributor of online coupons. Several of Cox's websites operate permission-based affinity programs that allow consumers to register to receive periodic electronic mail messages with special offers and discounts from the website's advertisers. These mailings are never distributed to a recipient who has not previously expressly consented to receive them. They are only sent by the website publisher at the specific request of the consumer and recipients are free to unsubscribe from these program lists at any time.

Cox supports the goals of the CAN-SPAM Act and recognizes that federal regulation of commercial electronic mail messages is necessary to protect consumers from fraud and abuse, as well as to reduce the volume of unwanted email that threatens to undermine the convenience, reliability and efficiency of email as a medium of communication and commerce for consumers and businesses alike. At the same time, however, Cox urges the FTC to recognize that overbroad interpretations of the CAN-SPAM Act could abridge fundamental constitutional rights of online publishers and threaten to undermine responsible permission-based email marketing programs that promote the free distribution of valuable editorial content, services and commercial opportunities over the Internet.

In particular, Cox proposes in these comments that the FTC exercise its rulemaking authority to clarify: (i) that electronic newsletters and similar editorial content-based emails are not "commercial electronic mail messages" covered by the CAN-SPAM Act, even if such communications are supported by paid advertising; (ii) that email messages expressly requested by members of a website publisher's affinity program constitute "transactional or relationship messages" or, alternatively; (iii) that the operator of the affinity program is the sole statutory "sender" of such messages, even if such communications contain multiple third-party offers; and; (iv) that messages initiated by website visitors using "tell-a-friend" email utilities and automated "search agent" tools are not commercial email.

DISCUSSION

I. Electronic Newsletters And Similar Email Messages That Contain Editorial Content Should Be Excluded From the Definition of "Commercial Electronic Mail Messages," Even When Such Messages Are Supported By Paid Advertising.

The CAN-SPAM Act defines a "commercial electronic mail message" as a message "the primary purpose of which is the commercial advertisement or promotion of a commercial product or service."[2] The Act directs the FTC to issue regulations that define criteria for determining the "primary purpose" of an electronic mail message. To this end, the ANPRM suggests a variety of criteria, many of which attempt to assess the relative importance of "commercial advertising or promotion" in relation to other noncommercial purposes for transmitting a particular electronic mail message.[3]

Cox believes that this approach is ill-advised. Any test that focuses on whether commercial advertising or promotion is an "important" purpose for sending an email

[2] CAN-SPAM Act § 3(2).

message will raise difficult and speculative questions about the subjective intent and priorities of particular senders and will not provide the objective standard necessary to enable email users and law enforcement officials alike to determine which communications are subject to the Act. Moreover, when applied to Cox and other media publishers, the criteria suggested in the ANPRM threaten to suppress core constitutionally-protected speech. For example, Cox's newspaper and broadcast affiliates typically offer visitors to their websites opportunities to subscribe to electronic newsletters. These newsletters are distributed in the form of electronic mail messages and contain valuable news, sports, weather and other editorial information provided either in full text or through headlines with hyperlinks to stories. Unlike most print newspaper publications, Cox's electronic newsletter publications are offered free of charge to registered subscribers. Like their print counterparts, however, Cox's electronic newsletters are supported by paid advertising and, although the content of such newsletters is predominantly editorial, a single edition may include multiple third-party advertisements.

When applied to these types of electronic newsletter publications, which include both editorial and advertising content, many of the criteria suggested by the Commission for determining an email's "primary purpose" would offer no meaningful guidance. For example, with respect to advertising-supported newsletters, it is pointless to debate whether the distribution of the advertisements within the message is merely an "incidental" purpose, an "important" purpose, or even the "most important" purpose of the message. Cox's newspapers and broadcast stations are vital sources of news, commentary and public affairs information in their communities. Like the vast majority

[3] ANPRM at 16-17.

of the private media, however, they also are commercial enterprises and their lifeblood is advertising. Advertising supports the creation of the editorial content contained in email newsletters, just as it supports the dissemination of editorial content in newspapers and television broadcasts. Therefore, the dissemination of advertising is necessarily an "important" purpose of these newsletters. However, as discussed below, the presence of advertising in editorial content-based email communications does not subject such communications to regulation as mere commercial speech, any more so than the presence of classified advertising in print newspapers would enable the government to regulate the content and distribution of *The Atlanta Journal-Constitution* under a law that applied to "commercial advertising and promotion."

To avoid encroaching on core constitutionally-protected expression, Cox urges the Commission to refrain from adopting any "primary purpose" test that seeks to prioritize the subjective motivations of email senders. Instead, the FTC should clarify that the "primary purpose" of an email message that contains substantial editorial content is to convey constitutionally-protected speech – regardless of whether the message is supported by advertising. As discussed below, such an objective test is consistent with the intent of Congress and would harmonize the CAN-SPAM Act with the requirements of the First Amendment.

By its terms, the CAN-SPAM Act is directed only to "commercial" email messages. Nothing in the text or legislative history of the Act suggests that Congress intended to regulate editorial content-based communications.[4] Moreover, electronic

[4] To the contrary, the legislative history of the Act makes clear that Congress did not intend the CAN-SPAM Act to "intrude on the burgeoning use of email to communicate for political, *news*, personal and charitable purposes." 149 Cong. Rec. H12186, 12193 (daily ed. Nov. 21, 2003 (Statement of Congressman James Sensenbrenner (R.-Wisc.) (emphasis added).

newsletters and similar editorial content-based publications do not lose their claim to the strongest protections of the First Amendment[5] simply because they contain paid advertising. *See, e.g., Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) (holding that speech does not retain its commercial character when it is "inextricably intertwined with otherwise fully protected speech); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 953 (D.C. Cir. 1995); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1961) (noting that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit"); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (noting that "the pamphlets of Thomas Paine were not distributed free of charge"). Instead, the email newsletters and similar editorial messages sent by Cox and other media publishers are a form of core constitutionally-protected speech and cannot be regulated absent a governmental interest of the highest order.

The CAN-SPAM Act directly and selectively regulates the content of commercial electronic mail messages and, therefore, is not a neutral time, place and manner regulation, which, under certain circumstances, can withstand First Amendment scrutiny. Properly understood as a content-based statute,[6] the Act cannot be applied to electronic newsletters or other fully protected noncommercial speech unless it satisfies the rigorous

[5] It is beyond question that newspaper content is entitled to the full protection of the First Amendment, *Mills v. Alabama*, 384 U.S. 214, 219 (1966), and the First Amendment does not distinguish between editorial content distributed on newsprint and editorial content disseminated through emails or other electronic media. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). *See also Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [speakers'] right not only to advocate their cause, but also to select what they believe to be the most effective means of doing so.").

[6] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that city ordinance selectively restricting the location of newsracks for commercial publications while exempting newsracks for noncommercial publications is "by any commonsense understanding of the term . . . 'content based'"); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (holding that "by distinguishing between commercial and noncommercial forms of expression, the . . . ordinance is content-based").

requirements of strict constitutional scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

The application of the CAN-SPAM Act to electronic newsletters cannot possibly satisfy this demanding standard, which requires a showing that the law or regulation is the least restrictive means available of achieving a compelling state interest. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Of course, "it is the rare case in which . . . a law survives strict scrutiny." *Id.*, 492 U.S. at 126; *Burson v. Freeman*, 504 U.S. 191, 211 (1992). The Supreme Court "has sustained content-based restrictions only in the most extraordinary circumstances." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). Congress identified no "compelling" governmental interest in regulating electronic mail. Instead, the legislature articulated only "substantial" interests for regulation, which are inadequate as a matter of law to support the requirements of strict scrutiny. *Baugh v. Judicial Inquiry & Review Comm'n.*, 907 F.2d 440, 445 (4th Cir. 1990); *S.O.C., Inc.*, 152 F.3d at 1146.

Moreover, unless the FTC adopts a narrow definition of "primary purpose" that excludes editorial messages from the scope of regulation, the CAN-SPAM Act will be vulnerable to challenge as being both substantially overbroad and impermissibly vague. A statute is substantially overbroad if it would "'penalize a substantial amount of speech that is constitutionally protected' . . . even if some applications would be 'constitutionally unobjectionable.'" *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 867 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (finding federal Communications Decency Act unconstitutional). Any rules that expand the definition of "commercial electronic email messages" to encompass editorial content-based communications would produce exactly

this prohibited result. An unconstitutionally vague law is one that "fails to convey to persons of ordinary intelligence reasonable notice of what conduct is prohibited and creates a danger of arbitrary and discriminatory enforcement." *Shea v. Reno,* 930 F. Supp. 916, 935 (S.D.N.Y. 1996) (*citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Again, an objective standard is necessary to ensure that media publishers are not left to guess at where the law enforcement line will be drawn between commercial email messages and core constitutionally-protected editorial expression.

To avoid the serious constitutional problems that would otherwise arise,[7] the FTC should adopt a test to determine the "primary purpose" of an electronic mail message that is based on the same standard that the Supreme Court uses to distinguish commercial speech from fully-protected expression.[8] Consistent with this standard, the primary purpose of a message should be deemed to be "commercial advertising or promotion" only if the message "does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66. In other words, if an email message contains a substantial amount of editorial content, even if such content is accompanied by advertisements, the message should be

[7] The Supreme Court has repeatedly held that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999*); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988).

[8] The Constitution affords less protection to commercial speech than it does to noncommercial expression. *See Bolger*, 463 U.S. at 64. Nonetheless, commercial speech that is truthful and concerns lawful products and services is still entitled to substantial protection under the First Amendment and may only be regulated where there is a substantial governmental interest in the regulation, the regulation advances that governmental interest, and the regulation is not more extensive than necessary to serve the governmental interest. *Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 563 (1980). Moreover, advertisements encouraging the sale of books, newspapers, movies and other forms of core protected speech receive heightened protections and generally receive the same consideration under the First Amendment as the underlying works they promote. *See, e.g., Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.D.C. 1995) ("The critical question is whether the promotional material relates to a speech product that is itself protected," holding that because a book constituted protected speech, an advertisement for the book also was protected speech); *Lewis v. Columbia Pictures Indus., Inc.*, 23 Media L. Rptr 1052 (Cal. App. 1994) (unpublished) (holding that an advertisement for a movie was not commercial speech because it "goes beyond proposal of a commercial transaction and encompasses the ideas expressed in the motion picture which it promotes; thus it is afforded the same First Amendment protections as the motion picture").

presumed to have a primary purpose that is non-commercial and fall outside of the Act's definition of a "commercial electronic mail message."

Cox acknowledges that this standard should retain enough flexibility to allow for "common sense" judgments necessary to ensure that unscrupulous "spammers" cannot use this interpretation for editorial content to evade the requirements of the Act. The Supreme Court's commercial speech jurisprudence provides a ready framework for these distinctions. Specifically, the Supreme Court has made clear that advertising that merely "links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 67. This is because "[a] company has the full panoply of protections available to its direct comments on public issues so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Id.* at 68.

The Supreme Court has explained further that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* at 68. It likewise follows that spammers should not be permitted to immunize commercial messages from the requirements of the CAN-SPAM Act merely by including an incidental reference to a public issue or an editorial comment in a commercial sales solicitation. Thus, for example, spammers using commercial email messages to advertise discounts on generic Viagra tablets could not avoid the Act's requirements simply by larding their solicitations with an appeal for expanded Medicare prescription drug benefits. Nonetheless, the FTC can and should devise a standard consistent with the Supreme Court's commercial speech jurisprudence that distinguishes between commercial advertising that merely links a

product or service to a public issue and electronic newsletters and similar editorial messages that are supported by paid advertising.

II. The Definition of "Transactional or Relationship Messages" Should Include Email Messages That Computer Users Expressly Ask to Receive.

To supplement the content and services offered on their websites, several Cox affiliates provide consumers with the option to sign up for various affinity programs that provide opportunities to receive special promotions and offers from the website's advertisers. These programs deliver added value to website users and provide Cox's affiliates with an important source of advertising revenue that defrays the costs of providing valuable content and services to consumers free of charge over the Internet.

The messages sent through these programs are readily distinguishable from the spam messages that Congress sought to restrict under the Act.[9] First, the messages delivered through these affinity programs are never unsolicited; they are sent only to registered subscribers who have "opted-in" to receive these communications. Second, the origin of the messages is always transparent to the recipient. The website publisher that established the program and obtained the consent of the message recipients is always conspicuously disclosed as the source of every message, both in the "from" line of the header and in the message text. Finally, a convenient unsubscribe mechanism is included in every message. If a subscriber decides that she no longer wishes to receive mailings through a particular program, she can easily remove her email address from the program distribution list at any time.

[9] The Act itself recites that Congress enacted the legislation to reduce the volume of "unwanted" emails that clog inboxes and "unsolicited" commercial emails that account for over half of all email traffic. CAN-SPAM Act § 2(a).

These affinity programs operated by Cox's websites do not implicate the primary concerns underlying the CAN-SPAM Act. Indeed, although these messages are in large part comprised of commercial advertising and promotional material, they properly should be classified as "transactional or relationship messages," and not commercial email, because their principal purpose is to deliver a service that the recipient has affirmatively requested to receive. In terms of the Act, website visitors who have signed up for a publisher's affinity program are "entitled to receive" the mailings they request "under the terms of a transaction that the recipient has previously agreed to enter into with the sender." CAN-SPAM Act § 3(2)(B). The FTC should therefore clarify that the fifth category of "transactional or relationship messages" includes emails that website visitors have expressly asked to receive.

III. Alternatively, the Online Publisher Who Forms and Operates a Permission-Based Email Marketing Program Should Be Deemed to be the Sole Statutory "Sender" of Any Emails Sent Through That Program.

Alternatively, if the Commission concludes that the affinity program mailings described above do involve the distribution of commercial electronic mail messages, it should exercise its discretionary authority to establish that the publisher of such programs is the sole statutory "sender" of such messages, even if the mailings contain multiple advertisements. The contrary interpretation of the term "sender"[10] suggested in the ANPRM threatens to impose unduly burdensome requirements on valuable forms of permission-based marketing.[11] For example, under such an interpretation, every time an affinity program publisher sought to send its members an email containing a special offer

[10] "[T]he term 'sender' […] means a person who initiates such a message *and* whose product, service, or Internet website is advertised or promoted by the message." CAN-Spam Act § (16)(A) (emphasis added).

for another company's product, the publisher would be required to compare that company's suppression list with the publisher's own membership rolls to ensure that no subscriber who had opted out of advertiser's lists received the offer. This burdensome process makes little sense for emails sent as a service that the affinity program publisher's members have expressly requested to receive. The burdens quickly multiply when the affinity program publisher provides offers from several advertisers in a single mailing. Under these circumstances, the publisher would have to "scrub" its membership files against multiple third-party email suppression lists and cancel the mailing for any subscriber whose email address appeared on even a single advertiser's opt-out list. Such a result would be contrary to the consumer's wishes. Affinity programs like those operated by Cox's affiliates benefit consumers by aggregating special offers and discounts from multiple advertisers into one branded service that is assembled and distributed by an online publisher that the program members know and trust. By registering for these programs, consumers clearly indicate that they consider them to be valuable. Moreover, there is no reason to believe that a consumer would object to a program mailing that he signed up to receive simply because it contained an offer from an advertiser that he might not have welcomed had the offer been sent on an unsolicited basis outside of the program.

[11] Specifically, the Commission suggests in the ANPRM that the Act contemplates that more than one person or entity can be a "sender" of a commercial email message, as in the case in which a single email contains advertisements from multiple companies. ANPRM at 23.

In addition to creating severe administrative burdens,[12] the ANPRM's suggested interpretation of the statutory term "sender" also raises serious privacy concerns. To screen its distribution lists against an advertiser's opt-out lists, an online publisher must either disclose the email addresses of its subscribers to the third-party advertisers or obtain copies of the advertisers' opt-out lists. Either way, this procedure would require publishers and advertisers to exchange sensitive personally identifiable information about consumers. Additionally, if every owner of a product or service featured in a publisher's program mailing is considered to be a "sender" of the mailing, each such advertiser must collect and retain personally identifiable information about the program's members – *i.e.*, the email addresses of any members who have opted-out. This result would be the case even if the advertiser never independently engaged in any email marketing activity outside of placing offers with third-party affinity programs.

Under the CAN-SPAM Act, the obligation to include an unsubscribe mechanism in a commercial email message rests solely with the message's "sender."[13] Accordingly, an interpretation of the Act that assigns the obligations of the "sender" to the advertisers whose products and offers are featured in a permission-based affinity program mailing would defy consumer expectations and lead to paradoxical results that could not have

[12] The FTC's interpretation of the Act as applying to multiple "senders" of a single email would raise even more serious concerns for the publishers of electronic newsletters and other editorial content-based communications discussed above in Section I. Specifically, an interpretation of the CAN-SPAM Act as both including email newsletters within the definition of "commercial electronic mail messages" and treating each advertiser featured in such a newsletter as a separate "sender," would threaten to eliminate electronic newsletters as a viable distribution channel for news and other valuable information. As noted above, if each advertiser were deemed to be a separate sender of the message, the newsletter publisher would be required to "scrub" its distribution list for each edition against the suppression lists maintained by each individual advertiser. This time-consuming and expensive process would be utterly incompatible with the needs of newsletter publishers to distribute current and breaking news and would destroy the value of their services for subscribers.

[13] Section 5(A)(5)(a) of the Act makes it illegal to initiate a commercial email without including the proper unsubscribe option for the "sender" of the email.

been intended by Congress. Under this construction of the Act, the affinity program publisher would have no duty to enable consumers to unsubscribe from its program mailing list. Instead, the publisher would be legally entitled to ignore consumers' opt-out requests and force them to unsubscribe individually from every individual advertiser featured in its mailings because the publisher would not be considered the legal "sender" of these messages.

Such a result would be entirely inconsistent with the Congressional Determination of Public Policy in Section 2(b) of the Act, which declares that "recipients of commercial electronic mail have a right to decline to receive additional commercial electronic email from the same source." It should be apparent that when a consumer signs up to receive email offers through a particular online publisher's affinity marketing program, the consumer understands the publisher to be the "source" of any program mailings and expects the publisher to be responsible for honoring her privacy preferences.

To harmonize the reach of the CAN-SPAM Act with its underlying purpose and align its requirements with the reasonable expectations of consumers and publishers, Cox urges the Commission to promulgate rules clarifying the definition of a "sender." Specifically, if the FTC concludes that permission-based affinity program mailings are not exempt as "transactional or relationship messages," it should clarify that there is only a single "sender" of such mailings and deem that sender to be the program publisher.[14]

[14] Cox endorses the proposal of the Online Publishers Association that the FTC adopt rules that would define an online publisher to be the sole "sender" of a commercial email message for purposes of the Act, regardless of the offers or advertisements contained therein, when the following conditions are satisfied:

> (1) there is an existing relationship between the consumer and the online publisher sending the email (*i.e.*, a relationship formed by the consumer's registration to use the publisher's website);
>
> (2) the email communication is being sent pursuant to the consent of the recipient; and

IV. The FTC Should Clarify That Emails Generated by "Tell-a-Friend" and "Search Agent" Tools Are Not Subject to The CAN-SPAM Act.

For the convenience of website users, Cox's newspapers and broadcast stations typically provide certain "tell-a-friend" email utilities on their websites that enable individuals to forward – at their own initiative – editorial and advertising content of their choosing to friends, family members, and other associates. [15] Thus, a website visitor might use one of these utilities to forward a link to a classified ad listing for a vintage automobile to a friend who is a classic car buff.

Cox's newspapers also provide certain interactive "search agent" tools on their websites that enable users to request to be sent automated email alerts whenever the newspaper's website database is updated to include a job listing, classified item or other advertisement of particular interest. For example, an individual seeking employment as a legal secretary can register on the jobs.com section of *The Atlanta Journal-Constitution* website to receive an email alert whenever a job listing matching his criteria appears in the newspaper's employment classifieds. In every such instance, it is the individual website visitor, and not the newspaper or broadcast station, that selects the content and determines the destination address for these "tell-a-friend" and "search agent" messages. Cox's websites provide only a means of conveyance.

Emails that forward website content from one friend to another and emails that website visitors effectively send to themselves through the use of interactive database search tools should not be subject to regulation under the Act as commercial email

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(3) the publisher sending the email is identified clearly and accurately in the actual communication (whether in the "from" line, by virtue of a logo, or in the actual text of the message).

[15] To the extent that friends forward editorial content, as many Cox websites allow as a service to their subscribers, these messages plainly would be considered constitutionally-protected noncommercial speech

messages, even if such messages contain advertising or promotional content for commercial products or services. Such messages cannot properly be defined as "commercial electronic mail messages" for several reasons.

First, the "primary purpose" of tell-a-friend and search agent messages, measured from the perspective of the individual computer user who actually initiates them, is not the "commercial advertisement or promotion" of products or services. Rather, the purpose of a website visitor using a "tell-a-friend" utility is to share information in the context of a relationship that the sender thinks will be valuable or interesting to the recipient. Similarly, the purpose of a computer user who uses an interactive search tool to receive automated email alerts is not the "commercial advertising or promotion" of the products, services, or employment opportunities identified in the alert. Rather, her purpose is to receive information that she thinks may be useful to her in locating a particular product, service or job opportunity.

Second, there is no statutory "sender" of "tell-a-friend" or "search agent" messages. As noted above, the website publisher does not select the content or destination of these messages and provides only a mechanism for the passive transmission of these communications. Accordingly, the website publisher provides only a "routine conveyance," which the Act explicitly excludes from the definition of "initiate."[16] Likewise, the advertisers whose products or services are featured in the "tell-a-friend" or "search agent" emails do not "initiate" these messages. They do not physically transmit the messages, they do nothing to "procure" the website visitor to send or request the messages, they have no control over whether their content will be emailed

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that is not subject to the CAN-SPAM Act. For the reasons discussed above in Section II, this conclusion would hold true even if the "tell-a-friend" messages combined editorial and advertising content.

using the publisher's email utilities, and they do not determine where any such emails might be sent. If the advertiser does not "initiate" the email, the advertiser cannot meet the second element of the "sender" definition, and therefore cannot be the sender.[17] By contrast, the computer users who "originate" the messages could be said to "initiate" such communications within the meaning of the Act, but they also do not qualify as "senders" because they do not use these emails to promote or advertise their own products or services. Accordingly, it follows that there is no "sender" of such emails to whom the Act's requirements can be applied.

Third, even if the website publisher's physical transmission of the email is deemed to be more than an exempt "routine conveyance," given the permission-based nature of "tell-a-friend" and "search agent" emails, such messages should be viewed, at most, as "transactional or relationship messages." Although the website publisher technically transmits an email message with advertising content to consumers in these cases, it does so only as a service in response to a consumer's specific request.

This interpretation of the Act is entirely consistent with its language and purposes and is, moreover, the only practical way to deal with these types of email communications. For example, if "tell-a-friend" emails are considered to be commercial emails and the website publisher that provides the "tell-a-friend" email utility is somehow deemed to be the "sender," the email addresses of all of the recipient "friends" must first be compared to the publisher's suppression lists to confirm that the recipient had never opted out of receiving the publisher's emails. From a technical standpoint, performing this task in real-time simultaneously with the initiation of the email by the recipient's

[16] CAN-SPAM Act § 3(9).
[17] *Id.* § 3(16)(A).

friend would be enormously difficult, not to mention costly, to accomplish. Even if it could be accomplished, this process would only be confusing and frustrating to website visitors who would not understand why messages to their friends had been blocked by the publisher's filter.

Treating the advertisers of products and services featured in the content forwarded using a "tell-a-friend" or "search agent" utility as statutory "senders" would be even more problematic. Such an approach would essentially require every such advertiser to provide opt-out mechanisms and maintain email suppression lists, even though these advertisers might never intentionally engage in any form of email marketing and have no control over the specific email communications involving their products and services that are sent using the publisher's "tell-a-friend" and "search agent" email utilities. The advertisers who would be swept up in these requirements could include literally thousands of individual consumers who purchased ordinary classified listings. Obviously, it would be absurd and unjust to impose the requirements of the CAN-SPAM Act on these individuals.

As a practical matter, any determination by the FTC that "tell-a-friend" and "search agent" emails are commercial electronic messages subject to the requirements of the Act would force Cox and other publishers to withdraw the availability of these popular features from their websites. Such a result would deprive consumers of the ability to easily inform others of specific online content and deprive others of a convenient tool for searching advertising databases that poses no threat to the privacy interests that the CAN-SPAM Act was intended to protect.

For all of the foregoing reasons, the FTC should exercise its authority under Section 13 of the CAN-SPAM Act to clarify that "tell-a-friend" and "search agent" emails are not "commercial electronic mail messages."

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