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Spam and States’ Rights

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By Jeffrey Barlow <barlowj@pacificu.edu>

If politics makes strange bedfellows, the Internet occasionally makes truly bizarre ones. In this editorial, I find myself siding with the ghost of John C. Calhoun. The issue is the proper balance of federal and states rights with regard to the regulation of interstate commerce.

It is true that I usually find myself aligned with the heirs of Henry Clay, the American statesman who spoke for the expansion of federal regulations in support of commercial and economic expansion vs. Calhoun’s impassioned defense of states’ rights in all things. [1] But times change, and with them, the balance of power between the states and the central government.

In American history, one of the enduring conflicts is that between the desires of business and commerce to escape all possible control and regulation in pursuit of their proper end—profit—and the desire of citizens to either tax those profits or control the damages that they sometimes fear result from too ardent a pursuit of them. In this struggle, business and commerce sometimes see influence over local courts and legislators as the critical arena, at other times, the central government is the prize.

We are now in a strange period. For sometime we have focused upon the virtues of the free market, particularly when viewed against its virtual opposite, the federal government and its potential ability to tax, guide, and control. The War on Terror, however, has come to make the federal government seem a less threatening force, and the fight against the expansion of federal powers now is more likely to be based on the left than on the right of the American political spectrum. It is most frequently now liberals who resist the expansion of federal powers, often in the name of the very values that would earlier have caused them to champion that expansion. Rush Limbaugh is happier with the Patriot Act, for example, than is Ted Kennedy.

The Internet has always had a significant group of cheerleaders among Libertarians, who generally oppose the central government while supporting local solutions to nearly all problems. Libertarians have staunchly opposed all regulation of the Internet. [2] Now, however, I would argue, is the time for all friends of the Internet to support state legislation and to cast a suspicious
eye upon federal regulation of spam, unsolicited commercial email.

Spam, unfortunately, turns out to be the new “killer app” that each of the mayfly-like generations of computer-related businesses anticipates. But this application threatens to kill at least all possible joy in electronic communication and commerce. Anyone with any enthusiasm for opening their email must surely find that enthusiasm challenged by the deluge of offers ranging from the ludicrous to the obscene that comes in through even the best of filtering programs. [3] And who can order something over the Internet without thinking that all of that information solicited will result in even more such offers? [4]

I cannot speak for others, but I find electronic communication more and more a laborious trial as opposed to the pleasurable act it once was. Because some of my WWW pages in Asian Studies at Pacific University have rollover translations in Chinese of article summaries, I am now getting spam in Chinese on a daily basis. And while this spam is usually more informative and polite than the U.S. equivalent, I do not want to order irrigation equipment any more than I want to enlarge my lips!

And if I cannot speak for others, I certainly suspect that I am not alone because even Congress, which would rather regulate soft money than threaten a possible campaign contributor, has acted. We now have a bill working its way through the congressional labyrinth. [5] This is the first successful attempt in six years to get such a bill.

We must, however, be cautious about this bill. One frequent source of federal regulation is the fact that state legislation is actually in many cases more stringent, causing industry to rally behind federal law as the best of the alternatives open to them. There is some reason to fear such motives in the creation of this bill. We wrote, for example, about the need for federal regulation on database intrusions here in the pages of Interface. [6] What we had in mind, however, was strong federal legislation. Federal legislation which is weaker than that of most states (and almost all foreign countries, too) does little to improve the present problem.

The current proposed federal law, for example, is based upon “opt out” standards, meaning that spam can be sent to me, and a crime is committed only after I “opt out” by notifying the spammer that I do not want his or her (its?) messages but subsequently receive another email from the same spammer. This bill will, if passed, supercede a much tougher “opt-in” California law in which a crime is committed if any commercial e-mail is sent unsolicited.

The problem with opt out models is that to a spammer, an opt out is above all proof of a good, active, email address, which is then sold to yet other spammers, drawing premium prices. How I am to prove to even the most dogged federal agent that my opt out to “Hi” from “Lucy”, who feels that I can do a great deal to improve my, ah, community standing, and wishes to give me a guaranteed way to do so, is the same person as “Jane” whose similar offer arrives a week later, in multiple copies, despite my opting out of Lucy’s lists? If we were “opt in”, however, the cruel importunities of Lucy would be illegal from the beginning. [7]
At *Interface*, we know a little bit about this whole spam issue, as well as about opt in and opt out. We began, as we started up over a year ago, combing the Internet for the names of those we thought would be interested in receiving *Interface*, including those who worked or taught in the industry. We did not buy lists and immediately put up a form allowing those who were contacted with our announcements but did not wish to receive them to “opt out.” But some of the email we received would make even Jane and Lucy’s ears burn. We also were notified of state laws requiring that we go to an opt in strategy, which we have done. We do not even contact alumni of our core institution, Pacific University.

If the proposed federal legislation survives a conference committee, then I assume that *Interface* could legally go back to its invidious spamming ways should we wish to do so. [8] The real problem, however, with the federal legislation, is that other countries are doing a much better job of dealing with Spam than we are. [9]

One reason that others can do a better job of regulating spam is that they are much less dominated by the commercial interests who wish to avoid all meaningful regulation of their own or allied industries and have the political influence in our system for doing so.

But this is very short sighted. If spam continues to be a problem to the extent that it now is, it has the potential for seriously damaging the expansion of electronic communications and of electronic commerce. It may also drive some, ourself among them, to register with a foreign Internet Provider in a country with stronger laws so that we would receive less spam. It is true that no single approach can hope to regulate this problem, but a plethora of strong state laws in this case are superior to one, weak, federal one. Calhoun is now a more appropriate model than Clay.

Jeffrey Barlow
Editor, *Interface*


[4] There are, of course, many defenses against these threats and we have written about them often in Interface, However, they are all time-consuming and place one in a defensive war
against a massive industry with all the incentive in the world to keep chipping away at one’s
electronic ramparts, however strong they are at present.

[5] For a brief report and a download link to the bill go to the Slashdot site at:
http://yro.slashdot.org/yro/03/11/21/1856254.shtml?tid=103&tid=111&tid=126&tid=99 For a good

http://bcis.pacific.edu/journal/2003/06/edit.php

[7] It should be noted by those who are adamantly anti-spam that you may have your first
martyr, Charles Booher, who has been arrested for threatening to torture and kill spammers.
Charles was moved to “Spam Rage” at repeated aspersions cast upon an important portion of
his anatomy by Canadian spammers. See his tragic story at the Reuters site:
http://www.reuters.co.uk/newsPackageArticle.jhtml?
type=topNews&storyID=407453&section=news

[8] The risk of finding ourselves, as it were, in bed with Lucy or Jane, prevents us from doing so,
of course.

[9] Korea, the most wired of countries, is one such. See “Spam: South Korea and the U.S” at:

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