

Our ref: SJ/KCL

14 October 2005

Mr Andrew Haire
Assistant Director-General (Telecoms)
Infocomm Development Authority of Singapore
8 Temasek Boulevard
#14-00 Suntec Tower Three
Singapore 038988

By Fax (6211 2116) &
E-mail (spamcontrol@ida.gov.sg)

Dear Sir

PROPOSED SPAM CONTROL BILL - COMMENTS


Thank you for the opportunity to comment on the Proposed Spam Control Bill. As a firm representing a large number of technology companies both in Singapore and overseas, we believe that the control of spam is important for both business efficiency and to ensure the effectiveness of electronic mail and mobile telephone communications.

The focus of our comments is on the provisions of the Bill and the means by which they reflect the proposed policy recommendations.

These comments represent our views and do not necessarily reflect the position of clients although we have sought to consider any views of our clients that have been made known to us.

We enclose our comments for your consideration.

Yours sincerely



Sheera Jacob
Partner



Koh, Chia Ling
Associate

enc.

COMMENTS ON THE PROPOSED SPAM CONTROL BILL

The focus of our comments is on the enforcement of the Bill under Part IV. However, we have several preliminary comments.

Requirement for commercial purpose

A message only qualifies as spam if it has a commercial purpose as defined in Section 3 of the Bill. Whilst the majority of spam may have a commercial purpose, spam which is not commercial in purpose and which is sent in bulk can have the same detrimental effect on the recipient. Therefore, when approached from the point of view of a recipient, the purpose of spam is irrelevant. If such a distinction is to be made, we would suggest that in the case of spam that is commercial in nature, the relief granted should include an account of profits.

Singapore link

We support the need for a Singapore link for the application of the provisions of the Bill, as the definition of a Singapore link in Section 7 is widely drafted.

Section 14 – Civil Action

A. Sending of Spam should be a criminal offence

1. The Bill seeks to "control" spam by granting a person the right to start civil action against a wrongdoer under certain circumstances. We believe that in principle, the obligation to control spam should not fall on the shoulders of private individuals. Such a right is unlikely to be exercised in practice and once this becomes patently obvious, compliance with the law is likely to be minimal.
2. In general terms, certain acts of spamming, like bulk spamming, should be made an offence. This would be a more effective means of controlling spam. Making the sending of spam a criminal offence creates a deterrent effect and would ensure that all senders of spam would comply with the conditions of the proposed Bill. To avoid unduly burdening the state, enforcement can be complemented by way of private complaints and summonses. For the same reason, a contravention of s.12 should be an offence.
3. Offences create greater deterrent effect than civil actions particularly in the case where the recipients of spam are likely to be individuals or individual businesses. It is in our view highly unlikely for individual companies to take civil actions to prevent a target from sending spam as the senders of spam would be numerous. Further, the gathering of electronic evidence to establish the sending of spam is difficult for most victims with limited resources.
4. We are of the view that civil actions should only be a complementary means of controlling spam. Otherwise the proposed law will have little practical effect.

B. Removing Requirement for Proving Loss or Damage

5. We believe that in most instances, it will be difficult to establish loss or damage as a result of the receipt of unsolicited electronic messages that have not complied with section 9 or 10. We submit that the requirement for "loss or damage" should be removed. A plaintiff who commences action does so to benefit more from injunctive relief. This is particularly the case for individuals. Since the Bill allows individuals to commence civil actions, they should not in reality be denied a claim merely

because they are unable to show loss or damage. If this is not the intention of the Bill, we suggest that this be clarified.

6. Removal of the "loss or damage" requirement is also consistent with section 15, which provides for statutory damages, suggesting that loss or damage need not be proved.
7. We believe that the "loss or damage" requirement may be intended to prevent the commencement of frivolous actions. However, we believe that this is unlikely in view of the legal expenses involved. Besides, in view of the proposed low quantum of statutory damages, a plaintiff has little incentive to commence such frivolous actions for profit.
8. We propose that the Bill should provide civil recourse for injunctive relief without proof of loss or damage, under either of the following circumstances:
 - (a) Bulk receipt of non-compliant spam; or
 - (b) After a recipient has communicated his desire to not receive further emails from a certain source, and despite such communication, he continues to receive emails from that source.

We believe any of the above circumstances alone would justify a cause of action.

C. Requirements to Establish Cause of Action

9. At first glance it appears that Section 14 allows a plaintiff to commence an action for relief without much difficulty. However, on further examination of the provision, this does not appear to be the case.
10. Section 14(a) provides that contravention of *any* requirement in section 9 or 10 (plus prove of loss or damage), would give rise to a cause of action. The requirement for loss or damage aside, it appears that a plaintiff must first establish that either section 9 or 10 applies before he shows that there is any non-compliance. To illustrate this point, supposing s.9(1)(c) (requiring the relevant statement to be in English) has not been complied with. It is not enough for the plaintiff to show he has received an "unsolicited message" that does not comply with s.9(1)(c). The plaintiff has to show, among others, that the defendant has sent unsolicited messages in bulk. If the plaintiff cannot show that the messages were sent in bulk, then section 9(1) does not apply at all. Section 10 also imposes the same difficulty.
11. Similarly, it would be difficult for most victims of spam to establish that there has been a dictionary attack or use of address harvesting software under s.14(b). Unless the victim has such expertise, all a victim would have as evidence, would be the unsolicited communication to him.
12. There is the danger that the Bill would effectively affect only legitimate commercial entities that give accurate information about themselves. For non-compliant entities that do not provide accurate information about themselves, there may be little that victims can do.

D. Definition of "recipient"

13. Given the current definition of "recipient", it is unclear whether a company can take legal action for the bulk spam received by its employees. Under s.14, as presently drafted, it is possible that a company can fall within the description of "any person, who has suffered loss or damage ...". If the "loss or damage" requirement is to be removed or not mandated, then "any person" must be qualified in some other ways. To avoid this, we propose s.14 be amended from:

"any recipient of the electronic messages or any person, who has suffered loss or damage as a result of any transmission of electronic messages," to

"any person who has suffered loss or damage as a result of any transmission of electronic messages, or any recipient of the electronic messages ...".

14. The definition of "recipient" should include a person who authorizes the use of the electronic address. A company will then fall within the definition of "recipient".

E. Persons who Authorise or Cause Spam

15. Section 14 states that sender, the person who authorizes the sending and anyone in section 13(1) is subject to action. The provisions in sections 9, 10 and 12 already make persons who "send, cause to sent or authorize the sending of" spam liable. Section 14 makes no reference to a person who causes spam to be sent. It is not clear what is the application to a person who "causes" the sending of the spam and what the difference is between these definitions. Further, section 13 (1) provides action against persons who aid and abet.
16. It would be preferable to deal with the sender and the various targets of liability in the same section to make clear who is specifically liable.
17. Further, where spam is authorized, conditions of knowledge and failure to take reasonable action to prevent spam should apply as otherwise companies that sub-contract their marketing activities may have difficulty complying.

F. Types of Relief

18. The Bill provides for relief in the form of injunctive relief, damages and statutory damages. We would like to propose that IDA consider allowing for account of profits. In cases where damages are difficult to quantify and the statutory damages too low, making the sender liable for profits may be a greater deterrent.
19. Such relief would be consistent with other laws which often provide for damages and an account of profits from the defendant at the plaintiff's option.

Please do not hesitate to contact Sheena Jacob at sheena@atmdlaw.com.sg or Koh Chia Ling at kohchialing@atmdlaw.com.sg if we can be of any assistance.