AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

107TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 107–41, Part II

ANTI-SPAMMING ACT OF 2001

JUNE 5, 2001.—Ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 718]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 718) to protect individuals, families, and Internet service providers from unsolicited and unwanted electronic mail, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

	Page
The Amendment	2
Purpose and Summary	3
Background and Need for the Legislation	3
Congressional Research Service Memorandum Regarding the Constitutionality of the Hart Amendment	10
Hearings	15
Committee Consideration	16
Votes of the Committee	16
Committee Oversight Findings	18
Performance Goals and Objectives	18
New Budget Authority and Tax Expenditures	18
Congressional Budget Office Cost Estimate	18
Constitutional Authority Statement	20
Section-by-Section Analysis	20
Changes in Existing Law Made by the Bill, as Reported	21
Markup Transcript	23
Additional Views	103

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Anti-Spamming Act of 2001".

SEC. 2. SPAMMING PROHIBITIONS.

(a) IN GENERAL.—Part I of title 18, United States Code, is amended by inserting after chapter 29 the following:

"CHAPTER 30—ELECTRONIC MAIL

"Sec.
"621. Unsolicited commercial electronic mail containing fraudulent transmission information.
"622. Warning labels for electronic mail containing advertisements harmful to minors.

"§ 621. Unsolicited commercial electronic mail containing fraudulent transmission information

"(a) Whoever intentionally initiates in one or more transactions the transmission of 10 or more unsolicited commercial electronic mail messages to one or more protected computers in the United States, knowing that each such message contains or is accompanied by header information that is materially false or misleading as to the identity of the person initiating the transmission shall be fined under this title, and in the case of an offense under this section which occurs after conviction for a prior offense under this section, shall be so fined or imprisoned not more than one year, or both.

"(b) As used in this section—

"(1) the term 'commercial electronic mail message' means an electronic mail message the primary purpose of which is to advertise or promote, for a commercial purpose, a product or service (including content on an Internet website);

"(2) the term 'header information' means the source, destination, and routing information, including the originating domain name and originating electronic mail address; and

"(3) the term 'protected computer' has the meaning given that term in section 1030(e)(2) of this title.

"(c)(1) A provider of Internet access service, if otherwise permitted by the laws or rules of a court of a State, may bring in an appropriate court of that State, or, if such laws or rules do not so permit, may bring in an appropriate Federal court, an action to recover for actual or statutory damages, as provided in paragraph (2), and for costs, as provided in paragraph (4).

"(2) A person committing a violation of subsection (a) is liable to a provider of Internet access service for either—

"(A) the actual damages suffered by the provider of Internet access service; or

"(B) statutory damages, as provided in paragraph (3).

"(3) At any time before final judgment in an action, a provider of Internet access service may elect to recover an award of statutory damages for each violation of subsection (a) in the sum of $5 per violation, not to exceed a total of $1,000,000, except that, during any one-year period for which the defendant has transmitted in excess of 20,000,000 unsolicited commercial electronic mail messages, no such limit on liability shall exist.

"(4) In any action brought under paragraph (1), the court may award to a prevailing party reasonable litigation expenses incurred by that party, including reasonable attorney's fees, as a part of the costs awarded under section 1920 of title 28 against any party found in that action to have committed a violation of subsection (a).

"§ 622. Warning labels for electronic mail containing advertisements harmful to minors

"(a)(1) The Attorney General shall prescribe marks or notices to be included in electronic mail that contains a sexually oriented advertisement in order to inform the recipient of that fact.

"(2) Whoever, in any electronic mail that is carried on an instrumentality in or affecting interstate or foreign commerce, knowingly includes a sexually oriented advertisement but does not include in such electronic mail the marks or notices prescribed by the Attorney General under this section shall be fined under this title or imprisoned not more than one year, or both.

"(b) As used in this section, the term 'sexually oriented advertisement' means any advertisement that depicts, in actual or simulated form, or explicitly describes, in

a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing, but material otherwise within the definition of this subsection shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.".

(b) CLERICAL AMENDMENT.—The table of chapters at the beginning of part I of title 18, United States Code, is amended by inserting after the item relating to chapter 29 the following new item:

"30. Electronic mail ..... 621".

SEC. 3. STUDY OF EFFECTS OF UNSOLICITED COMMERCIAL ELECTRONIC MAIL.

Not later than 18 months after the date of the enactment of this Act, the Attorney General shall submit a report to the Congress that provides a detailed analysis of the effectiveness and enforcement of the provisions of this Act and the need (if any) for the Congress to modify such provisions.

PURPOSE AND SUMMARY

The amendment in the nature of a substitute adopted by the Committee completely replaces the text of H.R. 718. It is a bipartisan targeted approach to address two specific problems relating to unsolicited commercial electronic mail ("UCE"). First, the amendment makes it illegal to conceal the identity of the sender of the e-mail. This misdemeanor prohibition is necessary because unscrupulous individuals conceal what is known as point-of-origin, routing or header information in order to defeat the preferences and filtering mechanisms employed by Internet service providers ("ISPs") and computer users. Furthermore, those who peddle schemes to defraud individuals, such as get-rich-quick schemes, and transmit pornography via e-mail often conceal the origin of the e-mail in furtherance of their unscrupulous desire to swindle consumers or entice them to purchase pornography over the Internet. There is no legitimate reason to falsify the header information accompanying commercial e-mail.

The second problem addressed by the amendment is unsolicited pornography sent via e-mail. This problem is addressed by the Hart amendment which was offered by Representative Melissa Hart. This provision directs the Attorney General to prescribe marks to be included in all pornographic e-mail. The amendment is modeled after a long-standing postal statute, 39 U.S.C. § 3010, which mandates that marks be included on the envelope of pornographic material sent through the United States Postal Service. This provision will allow users to delete pornographic material without viewing its contents and will assist parents in screening or filtering out unwanted pornographic e-mail, thereby protecting children from receiving and viewing pornography contained or accompanying e-mail. In short, a recipient of a pornographic e-mail will now have the ability to utilize technology to automatically do the equivalent of throwing out unopened junk mail.

BACKGROUND AND NEED FOR THE LEGISLATION

JURISDICTION AND PROCEDURE

H.R. 718, the "Unsolicited Commercial Electronic Mail Act of 2001" was introduced by Rep. Heather Wilson on February 14, 2001, and was referred to the Committee on Energy and Commerce and the Committee on the Judiciary for a period to be subsequently determined by the Speaker. The Committee on Energy and Com-

merce ordered the bill, as amended, reported on March 28, 2001. On March 29, 2001, the Committee on the Judiciary requested that its referral be extended to June 5, 2001.[1] The Committee on Energy and Commerce subsequently filed its report on April 4, 2001.[2] On that day, the Speaker granted an extension to the Judiciary Committee ending not later than June 5, 2001.

H.R. 718 was referred to the House Judiciary Committee because a number of provisions fall within the Committee's Rule X jurisdiction, including:

- Section 1—Short Title;
- Section 2—Congressional Findings and Policy;
- Section 3—Definitions—including paragraphs (4), (5), (8), (9), and (12);
- Section 4—Criminal Penalty for Unsolicited Commercial Electronic Mail Containing Fraudulent Routing Information;
- Section 5(c)—Internet Service Provider Immunity Provision;
- Section 6(a)(5)—Enforcement by Court Order;
- Section 6(b)—Private Right of Action;
- Section 7—Effect on Other Laws;
- Section 8—Study of Effects of Unsolicited Commercial Electronic Mail;
- Section 9—Separability; and
- Section 10—Effective Date.

The amendment in the nature of a substitute adopted by the House Committee on Commerce contained several additional provisions that fall within the Committee's jurisdiction, including, a prohibition on class action lawsuits (section 6(b)(4)) and a provision authorizing state attorneys general to file suit on behalf of their citizens (section 6(c)). The Committee also has pending before it H.R. 1017, the "Anti-Spamming Act of 2001," introduced by Rep. Bob Goodlatte, and H.R. 95, the "Unsolicited Commercial Electronic Mail Act of 2001," introduced by Rep. Gene Green. The Committee reviewed H.R. 1017 and H.R. 718 in depth at its May 10, 2001, hearing.

REGULATION OF ELECTRONIC COMMERCE AND SPAM

The increased use of the Internet for electronic commerce is desirable. In fact, the Congress has encouraged, through such measures as the "Electronic Signatures in Global and National Commerce Act,"[3] the full use of the Internet to conduct business. Businesses use e-mail, much like the regular mail, to market their products and services. E-mail marketing is viewed by many as a necessary component of electronic commerce. The market efficiencies that the Internet can provide consumers is facilitated by providing consumers with product information, notices about specials and discounts, and other wanted consumer information.

---

[1] See *Letter from the Honorable F. James Sensenbrenner to the Honorable Dennis Hastert, Jr.*, March 29, 2001.

[2] See *Unsolicited Commercial Electronic Mail Act of 2001*, H. Rept. 107–41, Part 1 (April 4, 2001) (hereinafter "Commerce Report").

[3] P.L. 106–229.

Electronic commerce is still in its infancy. Business models are constantly changing to find the right formula for success over the Internet. Electronic commerce is currently experiencing a number of difficulties. For example, banner ad revenue has fallen dramatically and many Internet companies have or are going out of business or filing for bankruptcy.

Marketing, no matter how annoying, is integral to the success of commerce, including electronic commerce. Members on both sides of the aisle have raised serious concerns about regulating e-mail marketing and its impact on the growth of commerce. The Committee, in adopting its position, has chosen a cautious approach regarding the regulation of electronic commerce, particularly given this era of great technological and market change.

Like any new technology, the Internet brings with it some challenges. One such challenge is the use of e-mail to deceive, cheat, defraud, and swindle consumers. Additionally, some mass commercial and non-commercial e-mailers send pornography to unwilling recipients. Some see the increased use of e-mail, particularly UCE (also known as "spam" or "junk e-mail"), as intrusive, annoying, and costly to consumers and ISPs.

The debate about spam is often complicated because policy makers often confuse or don't understand what constitutes spam. The term "spam" is used to encompass a number of different practices, some criminal, some annoying, and some benign. E-mail fraud, e-mail pornography, and e-mail marketing are all often erroneously lumped into the same category. They are demonstrably different, and the amendment adopted by the Committee recognizes those differences.

FRAUDULENT AND DECEPTIVE E-MAIL CONTENT

There are generally two types of fraudulent or deceptive e-mail. The first is e-mail that makes fraudulent claims, such as the typical pyramid or other get-rich-quick scheme which is intended to deceive, cheat, defraud, or swindle consumers. This type of fraud falls directly under existing laws such as section 5(a) of the Federal Trade Commission Act[4] or the Federal wire fraud statute.[5] In addition, the Computer Fraud and Abuse Act[6] provides the Federal Government with the statutory authority to investigate and prosecute those involved in damaging computers or accessing them without authorization.

On April 26, 2001, the Federal Trade Commission ("FTC"), testified before the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation about their efforts to address fraudulent UCE. Since 1994, when the FTC first filed an enforcement action against deception on the Internet, the Commission has brought 173 law enforcement actions against more than 575 defendants to halt online deception and fraud. Regarding deception and fraud, the FTC testified as follows:

> By no means is all UCE is [sic] fraudulent, but fraud operators, who are often among the first to exploit any technological innovation, have seized on the Internet's capacity to reach lit-

[4] 15 U.S.C. § 45(a).
[5] 18 U.S.C. § 1343.
[6] 18 U.S.C. § 1030.

> erally millions of consumers quickly and at a low cost through UCE. Not only are fraud operators able to reach millions of individuals with one message, but they can misuse the technology to conceal their identity. Many spam messages contain false information about the sender and where the message was routed from, making it nearly impossible to trace the UCE back to the actual sender. In the same vein, UCE messages also often contain misleading subject lines and extravagant earnings or performance claims about goods and services. These types of claims are the stock in trade of fraudulent schemes.
>
> Bulk UCE burdens (indeed, sometimes cripples) Internet service providers and frustrates their customers. The FTC's main concern with UCE, however, is its widespread use to disseminate false and misleading claims about products and services. The Commission believes the proliferation of deceptive bulk UCE on the Internet poses a threat to consumer confidence in online commerce and thus views the problem of deception as a significant issue in the debate over UCE.[7]

Fraudulent e-mail is a problem that the FTC is attempting to address, but some believe additional measures need to be taken to punish those who would use fraud or deception to take advantage of consumers. None of the spam bills pending before Congress would directly address issues relating to this type of fraudulent activity.

TECHNICALLY FRAUDULENT E-MAIL

The second type of e-mail fraud is technical fraud. Technical fraud, according to the Report to the Federal Trade Commission of the Ad-Hoc Working Group on Unsolicited Commercial Mail, "is defined as the variety of practices, such as relaying through third-party mail servers, dynamically forging header information and registering false domain names, used by those sending UCE to avoid detection, frustrate remove requests, misdirect replies, and generally frustrate efforts by users to prevent their continued receipt of UCE from the same sender."[8] Those who engage in the first type of fraud often times attempt to conceal their true identities through technical fraud. Technical fraud is used to defeat Internet service providers' and computer users' e-mail filters, preferences, and other technologies developed to combat unwanted e-mail.

Some Internet service providers have successfully used state statutory or common law as a basis to litigate against those who engage in technical fraud; however, most agree that more needs to be done. The Ad-Hoc Report reviewed whether Federal authorities could prosecute senders of UCE for using falsified addressing information and falsified headers to deceive consumers and concluded that the legality of such a practice was unclear.[9] The Ad-Hoc Work-

---

[7] Written testimony of the Federal Trade Commission submitted to the Senate Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation (April 26, 2001), available at *<http://www.ftc.gov/os/2001/04/unsolicommemail.htm>*, visited June 1, 2001.

[8] Report to the Federal Trade Commission of the Ad-Hoc Working Group on Unsolicited Commercial Email (hereinafter "Ad-Hoc Report") (July 1998).

[9] *Id.* at 16.

ing Group endorsed public policies that "prevent and/or prohibit the use of fraudulent headers to send unsolicited commercial email messages."[10] All of the witnesses who testified before the Committee endorsed the provisions in H.R. 1017 that address technical fraud. Addressing technical fraud is the cornerstone of the bipartisan compromise adopted by the Committee.

E-MAIL PORNOGRAPHY

E-mail pornography is a particularly troubling problem. E-mail pornography is also a concern of the Energy and Commerce Committee.[11] E-mail pornographers obtain e-mail addresses from a number of sources, including Internet chat rooms. Technology enables them to send millions of unsolicited pornographic e-mails to adults and children. Internet service providers and the FTC have received numerous complaints about such unwanted e-mail, but they have been virtuously powerless to stop this practice. The Hart amendment, adopted by the Committee, clearly and directly addresses this issue whereas H.R. 718, as introduced and reported by the Energy and Commerce Committee, treats pornographic e-mail in exactly the same manner as all unsolicited commercial e-mail.

UNSOLICITED COMMERCIAL E-MAIL

Unsolicited commercial e-mail, unlike fraudulent e-mail, is more difficult to define. Consumers and retailers often have various relationships through various affiliates in which they may or may not have prior business relationships. Some consumers may give permission to receive information about a certain product or type of product (i.e. womens clothing) but such permission may not be specific to a given company. Identifying the particular stage of e-mail marketing to regulate in the retailer-consumer relationship is a difficult issue and one the Committee rejected.

Furthermore, the Committee was not convinced that non-fraudulent or non-pornographic e-mail marketing requires regulation. Most legitimate users of e-mail advertising do not engage in fraud or deception and utilize some form of permission-based marketing. In their April 26, 2001, testimony, the FTC noted that "well-known manufacturers and sellers of consumer goods and services do not send UCE. Rather, such merchants use solicited e-mail to give consumers information that they have requested about available products, services, and sales."[12]

THE COMMITTEE ADOPTS A CAUTIOUS APPROACH TO THE REGULATION OF E-MAIL MARKETING

The Committee specifically rejected the legal and regulatory regime approved by the House Energy and Commerce Committee because of concerns about the necessity of regulating e-mail mar-

[10] *Id.* at 31.

[11] *Commerce Report* at 9 ("There are also concerns that many unsolicited commercial electronic mail messages contain material of an adult nature that can be easily accessed by children from the family computer, and in many instances these mail messages are intentionally sent with incorrect routing information").

[12] *Supra* note 7. See also, *Unsolicited Commercial Communications and Data Protection*, Report to the Commission of the European Communities, 24–26 (January 2001) ("As for spam, it is clear that its days are numbered, now that it is shunned by the marketing industry itself as well as by the network operators and by a public which will never be inclined to enter into a relationship of trust with at spammer.").

keting and the proportionality of the proposed enforcement mechanisms relative to the harm or damage caused by non-fraudulent unsolicited commercial e-mail. The amendment in the nature of a substitute does not contain many of the unprecedented, complicated, and disproportionate enforcement provisions contained in H.R. 718. H.R. 718 utilizes a number of legal enforcement and regulatory tools to control UCE. These provisions are disproportionate to the harm or damage caused by spam. H.R. 718, as reported by the Energy and Commerce Committee, contains two provisions which would empower Internet service providers to effectively write Federal law. These provisions raise serious Constitutional concerns.

First, an ISP's unsolicited commercial e-mail policy could be enforced through litigation initiated by ISPs, individuals, state attorneys general, and the Federal Trade Commission. The second provision would deem an ISP policy a "Federal trade regulation rule" under section 18 of the FTC Act. There is no requirement that the ISP's policy be open to the public pursuant to the Administrative Procedures Act as are Federal trade regulation rules under current law.[13] Thus, the approximately 5,000 ISP's could write different policies enforced by myriad legal actions without the due process afforded by traditional rules and law. The Committee's research has uncovered no precedent for these provisions, and concerns were raised that they are unnecessary and raise constitutional issues. Furthermore, because these various laws and policies could be enforced in State or Federal courts, a consistent application of the new proposed Federal cause of action is far from certain.

The Committee is also concerned about the regulation of on-line commerce, including e-mail marketing. H.R. 718, if not changed, would be the first major Federal regulation of online commerce. At a time of great technological and market changes in the electronic or Internet commerce arena, Congress should be cautious when considering new regulations of e-commerce so that it does not unintentionally stifle innovation in this emerging market place. Furthermore, the law should not, at this time, favor one method of conducting business over another. H.R. 718, as introduced and reported by the Energy and Commerce Committee, would apply onerous rules and regulations to online marketing which don't exist in the offline world. The consequence of favoring one method of commercial communication (mail) over another (e-mail) could adversely impact the growth of electronic commerce.

Another concern about the regulation of e-mail marketing has to do with proportionality. The Committee is concerned about making a Federal case out of a mere annoyance. Congress should carefully consider proposals that would unleash the FTC, state attorneys general, and the trial bar on U.S. businesses for sending unsolicited commercial e-mail. UCE that is not fraudulent or pornographic may be annoying; however, it can be easily discarded by deleting it—the equivalent of throwing junk mail away. Furthermore, most legitimate businesses are interested in attracting new customers and are concerned about annoying potential customers. Therefore, most legitimate businesses offer some form of permission based

[13] 15 U.S.C. § 57a(b)(1).

marketing and will readily remove one's name from a mailing list upon request.

Finally, consumers bear some responsibility in stemming the tide of spam. Consumers must be wary about giving out their e-mail addresses to people or businesses with whom they are unfamiliar. For example, by posting one's e-mail address on a chat room, one should know that anyone with Internet access potentially has access to that posted e-mail address. Online pornographers will "harvest" e-mail addresses posted on Internet chat rooms or message boards and then send pornographic material to those individuals. The same common sense rules that apply in the offline world also apply to the online world, i.e. consumers should only give out their names, addresses, and phone numbers to people and merchants that they trust.

AMENDMENT IN THE NATURE OF A SUBSTITUTE

Technical Fraud

The amendment in the nature of a substitute would create a new misdemeanor criminal provision to address the issue of technical fraud. Technical fraud includes forging or falsifying header and return information, thereby concealing the sender's identity. Those who send fraudulent e-mail or pornography often use technical fraud to conceal their true identities. Furthermore, technical fraud is used to defeat Internet service providers' and computer users' e-mail filters, preferences, and other technologies designed to block unwanted e-mail. All of the witnesses who testified before the Committee, the Federal Trade Commission (FTC) in other testimony, and the Ad-Hoc Working Group on Unsolicited Commercial E-Mail, which reported to the FTC in July 1998, all support public policies addressing fraudulently concealing one's identity. A first offense for sending UCE with falsified or misleading header information would be punishable by fine and a second offense would be punishable by imprisonment.

Goodlatte Amendment

The amendment in the nature of a substitute also includes a provision, offered as an amendment by Rep. Bob Goodlatte, authorizing Internet service providers to file suit to recover actual or statutory damages for engaging in technical fraud. Rep. Goodlatte argued that ISP's, which have a vested business interest in protecting its customers from receiving fraudulent e-mail, would help deter the type of behavior the bill seeks to prohibit. Furthermore, it is argued that spam causes ISPs to incur tangible quantifiable costs, namely the costs associated with maintaining computer networks that may be impaired by large volumes of spam and the dissatisfaction of customers and the consequent loss of goodwill. It is argued that ISPs would use this authority as they do other statutory and common law authorities to protect themselves and their customers. For example, ISPs have successfully utilized state trespass laws to prevent spammers from flooding their networks with unwanted e-mail.[14] The Goodlatte amendment is intended to sup-

[14] See e.g. *CompuServe Inc.* v. *Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *America Online, Inc.* v. *IMS*, 24 F. Supp.2d 548 (E.D. Va. 1998); America Online, Inc. v. LCGM,

Continued

plement any State or Federal authority already relied on by ISPs to protect their networks and their customers.

Hart Amendment

The amendment in the nature of a substitute contains a provision, offered as an amendment by Rep. Melissa Hart, that directs the Attorney General to prescribe marks to be included in all pornographic e-mail. The amendment is modeled after a long-standing postal statute, 39 U.S.C. § 3010, which mandates that marks be included on the envelope of pornographic material sent through the United States Postal Service. This provision will allow users to delete pornographic material without viewing its contents and will assist parents in screening or filtering out unwanted pornographic e-mail, thereby protecting children from receiving and viewing pornography contained or accompanying e-mail. In short, a recipient of a pornographic e-mail will now have the ability to utilize technology to automatically do the equivalent of throwing out unopened junk mail. Concerns were raised at the markup that this provision raised constitutional concerns; however, the Congressional Research Service, in a memorandum to the Committee, concluded that the Hart amendment is constitutional. The memorandum is reprinted in this report.

Schiff Amendment

Finally, the Committee adopted an amendment offered by Rep. Adam Schiff which directs the Attorney General to conduct a study of the effectiveness of the Act.

CONGRESSIONAL RESEARCH SERVICE MEMORANDUM REGARDING THE CONSTITUTIONALITY OF THE HART AMENDMENT

Because concerns were raised at the markup about the constitutionality of the Hart amendment, which would make it a misdemeanor to knowingly send an e-mail that includes a sexually oriented advertisement without a mark or notice prescribed by the Attorney General, the Committee requested a legal opinion from the American Law Division of the Congressional Research Service (CRS) regarding the constitutionality of the amendment. The opinion concludes that the Hart amendment would not violate the First Amendment of the U.S. Constitution. The CRS memorandum follows:

Inc., 46 F. Supp.2d 444 (E.D. Va 1998). For a more detailed review of statutory and common law legal theories utilized to address spam, see Credence E. Fogo, *The Postman Always Rings 4,000 Times: New Approaches to Curb Spam*, 18 John Marshall Journal of Computer and Information Law, 915 (2000); Michael A. Fisher, *The Right to Spam? Regulating Electronic Junk Mail*, 23 Columbia-VLA Journal of Law and the Arts 357 (2000); Kenneth C. Amaditz, *Canning "Spam" in Virginia: Model Legislation to Control Junk E-mail*, 4 Va. J.L. & Tech. 4 (1999).

Memorandum May 30, 2001

TO: House Committee on the Judiciary
Attention: William E. Moschella, Chief Legislative Counsel

FROM: Henry Cohen
Legislative Attorney
American Law Division

SUBJECT: Constitutionality of Proposal to Require Sexually Oriented E-mail Advertisements to be Marked as Such

---

This memorandum is furnished in response to your inquiry as to the constitutionality of the "Amendment to the Amendment in the Nature of a Substitute to H.R. 718 Offered by Ms. Hart" (hereinafter "the Amendment"). The Amendment would require the Attorney General to "prescribe marks or notices to be included in electronic mail that contains a sexually oriented advertisement in order to inform the recipient of that fact," and would make it a crime knowingly to send an e-mail that includes a sexually oriented advertisement without a prescribed mark or notice. It appears that the Amendment would not violate the First Amendment's guarantee of freedom of speech.

The Amendment would define "sexually oriented advertisement" as "any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing." However, material otherwise within this definition would not "constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters." This definition is substantially identical to the definition of the same term in 39 U.S.C. § 3010, which requires that mail that contains sexually oriented advertisements include on the envelope or cover "such mark or notice as the Postal Service may prescribe."

The Amendment offers the Attorney General no direction as to the content or the placement of the marks or notices that he would prescribe. However, the fact that the Amendment is patterned on section 3010, which requires marks or notices on the envelope or cover, suggests that marks or notices under the Amendment are intended to appear on the e-mail equivalent of an envelope, namely in the line that a recipient of e-mail clicks on to open an e-mail. Representative Hart, at the House Judiciary Committee markup of H.R. 718, on May 23, 2001, said that she believes that the Amendment "can be effective in giving families control over the type of information that is sent to their e-mail accounts, the same

way now they currently have control over what's sent to their mail boxes. Individuals can be alerted before opening these e-mails containing sexually oriented material . . . but I think it's important that they can also use currently available filtering software." The language of the Amendment, however, would not preclude the Attorney General from permitting the mark or notice to appear only in the opened e-mail.

Section 3010, which is known as the "Goldwater amendment," has been upheld by a federal district court as constitutional, with the court concluding: "The Goldwater amendment is constitutional as applied to the plaintiffs at the present time, under regulations which permit the words 'Sexually Oriented Ad' to be placed on a sealed inner envelope."[1]

The court also found that the final clause of the definition of "sexually oriented advertisement" – "or any other erotic subject directly related to the foregoing" – is not unconstitutionally vague if it is "narrowly construed under the rule of *noscitur a sociis* ["it is known from its associates," or, less literally, "words grouped in a list should be given related meaning]."[2]

Apart from these two conclusions, however, the court did not discuss the provisions of section 3010 that would be incorporated into the Amendment. Rather, it focused on subsection (b) of section 3010, which is not incorporated into the Amendment. Subsection (b) authorizes any person to file with the Postal Service a statement that he desires to receive no sexually oriented advertisements through the mails, requires the Postal Service to keep a list of the names and addresses of persons who file such a statement, and prohibits any person to mail to a sexually oriented advertisement to anyone whose name and address has been on the list for more than 30 days.

The court noted: "The Goldwater amendment is an extension of the Pandering law [39 U.S.C. § 3008, formerly § 4009] . . . ."[3] "The Pandering law as construed by the Supreme Court permits individuals who in their sole discretion believe advertisements received from a mailer to be 'erotically arousing or sexually provocative' to request the Postal Service to issue an order prohibiting the sender from mailing any further mailings of *any* kind to such individual."[4] In *Rowan v. United States Post Office Department*, the Supreme Court upheld the constitutionality of this provision, "categorically reject[ing] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another."[5] Although *Rowan* did not address section 3010, it would appear to provide some support for the constitutionality of the Amendment. If the Attorney General implements the Amendment in keeping with Representative Hart's statement quoted above, then the Amendment might facilitate the use of filters to keep unwanted material from people's homes, and, even without the use of a filter, would facilitate a recipient's ability to delete unwanted material without viewing it.

---

[1] Pent-R-Books, Inc. v. United States Postal Service, 328 F. Supp. 297, 313 (E.D.N.Y. 1971).

[2] *Id.* at 308. The first definition in the brackets is from BLACK'S LAW DICTIONARY (6th ed.); the second is from *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

[3] *Id.* at 307.

[4] *Id.* at 307-308.

[5] 397 U.S. 728, 738 (1970),

In any event, because the Supreme Court has not addressed the constitutionality of section 3010, we must address the constitutionality of the Amendment. The Amendment would regulate only advertisements, and advertisements constitute what in the First Amendment context is called "commercial speech."[6] Commercial speech is entitled to less First Amendment protection than non-commercial speech. The Supreme Court has prescribed the four-prong *Central Hudson* test to determine whether a governmental regulation of commercial speech is constitutional. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, "it at least must concern lawful activity and not be misleading") and (2) "whether the asserted governmental interest [in restricting it] is substantial. If both inquiries yield positive answers," then to be constitutional the restriction must (3) "directly advance[ ] the governmental interest asserted," and (4) be "not more extensive than is necessary to serve that interest."[7]

The fourth prong is not to be interpreted "strictly" to require the legislature to use the "least restrictive means" available to accomplish its purpose. Instead, the Court has held, legislation regulating commercial speech satisfies the fourth prong if there is a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.[8]

We will attempt to apply the *Central Hudson* test to the Amendment, but first we note that the Amendment would compel speech, not censor it. "[I]n the context of [fully] protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[9] In the context of commercial speech, however, the difference has constitutional significance. In *Zauderer v. Office of Disciplinary Counsel*, which is the only post-*Central Hudson* case in which the Supreme Court case has considered a challenge to *compelled* commercial speech, the Court wrote that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[10] The Court, however, "recognize[d] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."[11]

Although, in *Zauderer*, the Court mentioned that the *Central Hudson* test was applicable, it did not apply the four prongs of the test in a step-by-step manner. Rather, the Court found that, absent the disclosures compelled by the government, the "possibility of deception" in the advertisements was "self-evident." And the Court held "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably

---

[6] Commercial speech is "speech that *proposes* a commercial transaction." Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original).

[7] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).

[8] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989).

[9] Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-797 (1988) (emphasis in original).

[10] 471 U.S. 626, 651 (1985).

[11] *Id.*

related to the State's interest in preventing deception of consumers."[12] This might be viewed as equivalent to applying the first prong of the *Central Hudson* test and finding the commercial speech to be misleading and therefore unprotected.

It does not seem likely that a court would take this approach in considering the constitutionality of the Amendment, because it does not appear that e-mail advertisements should be deemed deceptive merely for failing to disclose, before they are opened, that they are sexually oriented. Therefore, we will attempt to apply the *Central Hudson* test, prong-by-prong, keeping in mind that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal," but "that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."

First prong. The Amendment would regulate speech that concerns a lawful activity and that is not misleading. It would also regulate speech that is unlawful (obscenity and child pornography) and that is misleading (false or deceptive advertisements), but, as it would regulate speech that concerns a lawful activity and that is not misleading, we must apply the other prongs of the *Central Hudson* test.

Second prong. There appear to be at least two substantial governmental interests that may be asserted in support of the Amendment. The first is the interest that caused the Supreme Court to uphold the Pandering law in *Rowan*, namely keeping unwanted material from the home of the recipient (or, in this case, in homes that do not use filters, facilitating the recipient's ability to delete unwanted material without viewing it). The second is the "interest in supporting parental supervision of what children see and hear . . . ."[13] The case that cited this interest, in upholding the ban on "indecent" radio and television broadcasts from 6 a.m. to 10 p.m., found it "compelling," which is greater than the "substantial" interest required in commercial speech cases.

Third prong. The Supreme Court has written:

> The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." We have observed that "this requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'"[14]

To satisfy this prong, the government must present evidence that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. This would not seem difficult, as, to show that the harms it recites are real, it would appear to suffice for the

---

[12] *Id.* at 652, 651.

[13] Action for Children's Television v. Federal Communications Commission, 58 F.3d 654, 661 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996).

[14] Greater New Orleans Broadcasting v. United States, 119 S. Ct. 1923, 1932 (1999) (citations omitted).

government to present evidence that a substantial number of people find sexually oriented e-mail advertisements either offensive to themselves or inappropriate for their children. If this is so, then a mark or notice that enables them to identify such e-mails and delete them before opening them would appear to alleviate their concerns to a material degree.

A counterargument might be that the required mark or notice would exacerbate rather than alleviate the perceived harm by serving as an enticement to teenagers to open e-mail advertisements that they otherwise might not, and would therefore increase the need for parents who disapproved of their children's seeing sexually oriented advertisements to install filters on their computers or to monitor their children's use of the family computer. In response to this contention, a supporter of the Amendment might argue that, even if that were true in some families that do not use filters, the Amendment would nevertheless help alleviate the problem by facilitating the use of filters. A filter that needed only to identify a standard mark or notice would presumably be significantly more effective than one that had to search for various words and images. Furthermore, the Amendment would facilitate the ability of people who do not use filters to delete e-mails they found offensive, regardless of its possible impact on some teenagers.

Fourth prong. The Supreme Court has written:

> The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest – "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." On the whole, then, the challenged regulation should indicate that its proponent "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."[15]

The only question that this prong would appear to raise is whether the cost of placing marks or notices on sexually oriented e-mails would be unduly burdensome to their senders. We assume that it would not, but the government, if challenged in court, would have the burden of proving that it would not, as "[i]t is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'"[16]

In conclusion, it appears likely that the "Amendment to the Amendment in the Nature of a Substitute to H.R. 718 Offered by Ms. Hart" would not violate the First Amendment.

---

[15] *Id.* (citations omitted).

[16] Edenfield v. Fane, 507 U.S. 761, 770 (1993).

HEARINGS

The Committee held a legislative hearing on H.R. 718, the "Unsolicited Commercial Electronic Mail Act of 2001," and H.R. 1017, the "Anti-Spamming Act of 2001" on May 10, 2001. Testimony was received from The Honorable Heather Wilson, U.S. Representative from the First Congressional District in New Mexico; Mr. Rick Lane, Director, eCommerce & Internet Technology, U.S. Chamber of Commerce; Mr. Marc Lackritz, President, Securities Industry Association; Mr. Paul Misener, Vice President for Global Public Policy, Amazon.com (representing Amazon.com and the National Re-

tail Federation); and Mr. Wayne Crews, Director of Technology Studies, Cato Institute.

COMMITTEE CONSIDERATION

On May, 23, 2001, the Committee met in open session and ordered favorably reported the bill H.R. 718, as amended, by voice vote, a quorum being present.

VOTES OF THE COMMITTEE

1. Mr. Watt offered an amendment to the Goodlatte amendment to the amendment in the nature of a substitute which would have expanded the private right of action proposed by the Goodlatte amendment to allow customers of Internet service providers to bring an action against a person who violates subsection (a). The amendment was defeated by a rollcall vote of 10 to 17.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Cannon		X	
Mr. Graham			
Mr. Bachus		X	
Mr. Scarborough			
Mr. Hostettler			
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott			
Mr. Watt	X		
Ms. Lofgren		X	
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	10	17	

2. Ms. Lofgren offered and amendment to the Goodlatte amendment to the amendment in the nature of a substitute which proposed to strike the provision in the Goodlatte amendment which

provides statutory damages, thereby limiting damages to actual damages. The Lofgren amendment also proposed to permit an "e-mail recipient" to sue for actual damages. The amendment was defeated by a rollcall vote of 12 to 16.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Cannon	X		
Mr. Graham			
Mr. Bachus		X	
Mr. Scarborough			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa			
Ms. Hart		X	
Mr. Flake		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott			
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	12	16	

3. Mr. Schiff offered an amendment to the amendment in the nature of a substitute which proposed an additional misdemeanor offense for failure to include within the header information an identifier prescribed by the Attorney General which would have informed the recipient that the electronic message was an unsolicited commercial electronic message. The identifier would have also permitted automatic filtering. The amendment was defeated by a rollcall vote of 8 to 14.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas			
Mr. Coble		X	
Mr. Smith (Texas)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Gallegly	X		
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson			
Mr. Cannon		X	
Mr. Graham			
Mr. Bachus	X		
Mr. Scarborough			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa			
Ms. Hart		X	
Mr. Flake		X	
Mr. Conyers			
Mr. Frank			
Mr. Berman			
Mr. Boucher			
Mr. Nadler			
Mr. Scott			
Mr. Watt	X		
Ms. Lofgren		X	
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	8	14	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

Performance Goals and Objectives

H.R. 718 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House of Representatives is inapplicable.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to

the bill, H.R. 718, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 5, 2001.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 718, the Anti-Spamming Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for Federal costs), who can be reached at 226–2860, and Lauren Marks (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Member

H.R. 718—Anti-Spamming Act of 2001.

CBO estimates that implementing H.R. 718 would result in no significant costs to the Federal Government. Because enactment of the bill could affect direct spending and receipts, pay-as-you-go procedures would apply, however, CBO estimates that any impact on direct spending and receipts would not be significant. H.R. 718 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. The bill would impose a private-sector mandate as defined by UMRA on individuals who send commercial electronic mail containing a sexually oriented advertisement. Based on information provided by government and industry sources, CBO expects that the direct cost of complying with the mandate would fall well below the annual threshold established by UMRA ($113 million in 2001, adjusted annually for inflation).

H.R. 718 would impose new restrictions on the transmission of unsolicited commercial electronic mail (UCE). The bill would establish criminal penalties for knowingly sending certain UCE that contains false identification information or sexually oriented advertisements. Under the bill's provisions, providers of internet access could initiate legal action against persons who send UCE containing false identification information. H.R. 718 also would direct the Attorney General to prepare a report, within 18 months of enactment, on the effectiveness and enforcement of the bill's provisions.

CBO estimates that it would cost the Department of Justice less than $500,000 to prepare the report required by the bill, subject to the availability of appropriated funds. Because

H.R. 718 would establish a new Federal crime, the government would be able to pursue cases that it otherwise would not be able to prosecute. Under the bill, however, we expect a relatively small

number of cases would be pursued and that any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 718 could be subject to criminal fines, the government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent later. Any additional receipts and direct spending from enacting H.R. 718 are not likely to be significant because of the relatively small number of cases involved.

H.R. 718 would impose a private-sector mandate as defined by UMRA on individuals who send electronic mail that contains a sexually oriented advertisement. The bill would require the senders to include marks or notices, to be prescribed by the Attorney General, on all such messages that would inform recipients of the sexual content of the message. Based on information provided by government and industry sources, CBO estimates that the direct cost of complying with this mandate would fall well below the annual threshold established by UMRA for private-sector mandates.

On April 13, 2001, CBO transmitted a cost estimate for H.R. 718, the Unsolicited Commercial Electronic Mail Act of 2001, as reported by the House Committee on Energy and Commerce on April 4, 2001. CBO estimated that implementing that legislation would cost about $6 million over the 2002–2006 period and would increase revenues by about $13 million over the same period, mostly from provisions affecting the Federal Trade Commission.

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs), who can be reached at 226–2860, and Lauren Marks (for the private-sector impact), who can be reached at 226–2940. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clauses 3 and 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION AND DISCUSSION

Section 1. Short Title. Provides that the short title of the act shall be the "Anti-Spamming Act of 2001."

Section 2. Spamming Prohibitions. Adds a new "Chapter 30—Electronic Mail" to title 18 of the United States Code. Two new sections, 621 and 622, would be included in chapter 30. Section 621(a) would prohibit anyone from sending an unsolicited commercial electronic mail message that contains fraudulent transmission information. Specifically, the new section would prohibit the intentional transmission of 10 or more unsolicited commercial electronic mail message to one or more protected computers in the United States knowing that the message contains or is accompanied by header information that is materially false or misleading as to the identity of the person initiating the transmission. A first offense under this section is punishable by fine under the applicable provi-

sions of title 18, United States Code, and subsequent offenses may be punished by imprisonment for not more than 1 year.

Subsection (b)(1) of section 621 defines "commercial electronic mail message" as "an electronic mail message the primary purpose of which is to advertise or promote, for a commercial purpose, a product or service (including content on an Internet website)." Subsection (b)(2) defines "header information" as "the source, destination, and routing information, including the originating domain name and originating electronic mail address." Subsection (b)(3) defines "protected computer" in the same manner as it is defined by 18 U.S.C. § 1030(e)(2).

Subsection (c) of section 621 provides that an Internet service provider may bring a cause of action in an appropriate state court, or, if not permitted by state laws or rules, in an appropriate Federal court, against a person who commits a violation of subsection (a). Such a person would be liable for actual or statutory damages, an may be liable for costs. Statutory damages are $5.00 per violation, not to exceed $1,000,000, except that, no limit applies if during any 1-year period the defendant transmitted in excess of 20,000,000 unsolicited commercial electronic mail messages.

New section 622 would prohibit the inclusion of a sexually oriented advertisement in electronic mail unless it includes a warning label. Specifically, section 622 directs the Attorney General to prescribe marks or notices to be included in electronic mail that contains a sexually oriented advertisement in order to inform the recipient of that fact. Whoever knowingly includes such an advertisement without including the prescribed marks shall be fined under the applicable provisions of title 18, United States Code, or imprisoned not more than 1 year, or both.

Section 622(b) defines "sexually oriented advertisement" as "any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of sadism or masochism, or any other erotic subject directly related to the foregoing, but material otherwise within the definition of this subsection shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters."

Section 3. Study of Effects of Unsolicited Commercial Electronic Mail. Directs the Attorney General to submit a report to Congress with 18 months of enactment of the Act which provides a detailed analysis of the effectiveness of the enforcement provisions of the Act and the need (if any) for the Congress to modify such provisions.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

Chap.		Sec.
1.	**General provisions**	**1**
	* * * * * * *	
30.	***Electronic mail***	***621***
	* * * * * * *	

CHAPTER 30—ELECTRONIC MAIL

Sec.
621. Unsolicited commercial electronic mail containing fraudulent transmission information.
622. Warning labels for electronic mail containing advertisements harmful to minors.

§ 621. Unsolicited commercial electronic mail containing fraudulent transmission information

(a) Whoever intentionally initiates in one or more transactions the transmission of 10 or more unsolicited commercial electronic mail messages to one or more protected computers in the United States, knowing that each such message contains or is accompanied by header information that is materially false or misleading as to the identity of the person initiating the transmission shall be fined under this title, and in the case of an offense under this section which occurs after conviction for a prior offense under this section, shall be so fined or imprisoned not more than one year, or both.

(b) As used in this section—

(1) the term "commercial electronic mail message" means an electronic mail message the primary purpose of which is to advertise or promote, for a commercial purpose, a product or service (including content on an Internet website);

(2) the term "header information" means the source, destination, and routing information, including the originating domain name and originating electronic mail address; and

(3) the term "protected computer" has the meaning given that term in section 1030(e)(2) of this title.

(c)(1) A provider of Internet access service, if otherwise permitted by the laws or rules of a court of a State, may bring in an appropriate court of that State, or, if such laws or rules do not so permit, may bring in an appropriate Federal court, an action to recover for actual or statutory damages, as provided in paragraph (2), and for costs, as provided in paragraph (4).

(2) A person committing a violation of subsection (a) is liable to a provider of Internet access service for either—

(A) the actual damages suffered by the provider of Internet access service; or

(B) statutory damages, as provided in paragraph (3).

(3) At any time before final judgment in an action, a provider of Internet access service may elect to recover an award of statutory damages for each violation of subsection (a) in the sum of $5 per

violation, not to exceed a total of $1,000,000, except that, during any one-year period for which the defendant has transmitted in excess of 20,000,000 unsolicited commercial electronic mail messages, no such limit on liability shall exist.

(4) In any action brought under paragraph (1), the court may award to a prevailing party reasonable litigation expenses incurred by that party, including reasonable attorney's fees, as a part of the costs awarded under section 1920 of title 28 against any party found in that action to have committed a violation of subsection (a).

§ 622. Warning labels for electronic mail containing advertisements harmful to minors

(a)(1) The Attorney General shall prescribe marks or notices to be included in electronic mail that contains a sexually oriented advertisement in order to inform the recipient of that fact.

(2) Whoever, in any electronic mail that is carried on an instrumentality in or affecting interstate or foreign commerce, knowingly includes a sexually oriented advertisement but does not include in such electronic mail the marks or notices prescribed by the Attorney General under this section shall be fined under this title or imprisoned not more than one year, or both.

(b) As used in this section, the term "sexually oriented advertisement" means any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing, but material otherwise within the definition of this subsection shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.

* * * * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MAY 23, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [chairman of the committee] presiding.

Chairman SENSENBRENNER. The committee will be in order.

The next item on the agenda is H.R. 718, the Unsolicited Commercial Electronic Mail Act of 2001, and I move its favorable recommendation to the full House.

[H.R. 718 follows:]

I

107TH CONGRESS
1ST SESSION

H. R. 718

To protect individuals, families, and Internet service providers from unsolicited and unwanted electronic mail.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 14, 2001

Mrs. WILSON (for herself, Mr. GREEN of Texas, Mr. GARY MILLER of California, Mr. GOODLATTE, Mr. PICKERING, Mr. DEAL of Georgia, Mr. LARGENT, Mr. FOSSELLA, Mr. WALDEN of Oregon, Mr. BRYANT, Mr. TAUZIN, Mr. GILLMOR, Mr. FRELINGHUYSEN, Ms. CARSON of Indiana, Mr. KILDEE, Mr. ENGLISH, Mr. LEVIN, Mr. SIMMONS, Ms. ESHOO, Mr. HINCHEY, Mr. TERRY, Mr. RUSH, Mr. BONIOR, Mr. HORN, Mrs. EMERSON, Mr. ENGEL, Mrs. JO ANN DAVIS of Virginia, Ms. DEGETTE, Ms. HARMAN, Mr. MOORE, Mr. SHIMKUS, Mr. BARRETT, Mr. BOUCHER, Mr. GREENWOOD, Ms. MCCARTHY of Missouri, Mr. CRAMER, Mr. SESSIONS, Mr. GORDON, Mr. SHOWS, Mr. FRANK, Ms. MCKINNEY, Mr. HOLT, Mr. SANDLIN, Mr. SAWYER, Mr. STRICKLAND, Mr. WELLER, Mr. KING, Mr. BAKER, Ms. HART, Mr. PITTS, Mr. UDALL of New Mexico, Mr. LUTHER, Mr. REYES, Ms. PELOSI, Mr. FROST, Mr. EHRLICH, Mr. BURR of North Carolina, Mr. ADERHOLT, Mr. WOLF, Mr. ISAKSON, Mrs. CUBIN, Mr. BARTON of Texas, Mr. STEARNS, Mr. OXLEY, Ms. DUNN, Mr. HASTINGS of Washington, Mr. STUPAK, and Mr. BLUNT) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To protect individuals, families, and Internet service providers from unsolicited and unwanted electronic mail.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Unsolicited Commer-
5 cial Electronic Mail Act of 2001".

6 **SEC. 2. CONGRESSIONAL FINDINGS AND POLICY.**

7 (a) FINDINGS.—The Congress finds the following:

8 (1) There is a right of free speech on the Inter-
9 net.

10 (2) The Internet has increasingly become a crit-
11 ical mode of global communication and now presents
12 unprecedented opportunities for the development and
13 growth of global commerce and an integrated world-
14 wide economy. In order for global commerce on the
15 Internet to reach its full potential, individuals and
16 entities using the Internet and other online services
17 should be prevented from engaging in activities that
18 prevent other users and Internet service providers
19 from having a reasonably predictable, efficient, and
20 economical online experience.

21 (3) Unsolicited commercial electronic mail can
22 be an important mechanism through which busi-
23 nesses advertise and attract customers in the online
24 environment.

1 (4) The receipt of unsolicited commercial elec-
2 tronic mail may result in costs to recipients who
3 cannot refuse to accept such mail and who incur
4 costs for the storage of such mail, or for the time
5 spent accessing, reviewing, and discarding such mail,
6 or for both.

7 (5) Unsolicited commercial electronic mail may
8 impose significant monetary costs on Internet access
9 services, businesses, and educational and nonprofit
10 institutions that carry and receive such mail, as
11 there is a finite volume of mail that such providers,
12 businesses, and institutions can handle without fur-
13 ther investment. The sending of such mail is increas-
14 ingly and negatively affecting the quality of service
15 provided to customers of Internet access service, and
16 shifting costs from the sender of the advertisement
17 to the Internet access service.

18 (6) While some senders of unsolicited commer-
19 cial electronic mail messages provide simple and reli-
20 able ways for recipients to reject (or "opt-out" of)
21 receipt of unsolicited commercial electronic mail
22 from such senders in the future, other senders pro-
23 vide no such "opt-out" mechanism, or refuse to
24 honor the requests of recipients not to receive elec-
25 tronic mail from such senders in the future, or both.

1 (7) An increasing number of senders of unsolic-
2 ited commercial electronic mail purposefully disguise
3 the source of such mail so as to prevent recipients
4 from responding to such mail quickly and easily.
5 (8) Many senders of unsolicited commercial
6 electronic mail collect or harvest electronic mail ad-
7 dresses of potential recipients without the knowledge
8 of those recipients and in violation of the rules or
9 terms of service of the database from which such ad-
10 dresses are collected.
11 (9) Because recipients of unsolicited commercial
12 electronic mail are unable to avoid the receipt of
13 such mail through reasonable means, such mail may
14 invade the privacy of recipients.
15 (10) In legislating against certain abuses on the
16 Internet, Congress should be very careful to avoid
17 infringing in any way upon constitutionally protected
18 rights, including the rights of assembly, free speech,
19 and privacy.
20 (b) CONGRESSIONAL DETERMINATION OF PUBLIC
21 POLICY.—On the basis of the findings in subsection (a),
22 the Congress determines that—
23 (1) there is substantial government interest in
24 regulation of unsolicited commercial electronic mail;

1 (2) Internet service providers should not be
2 compelled to bear the costs of unsolicited commercial
3 electronic mail without compensation from the send-
4 er; and
5 (3) recipients of unsolicited commercial elec-
6 tronic mail have a right to decline to receive or have
7 their children receive unsolicited commercial elec-
8 tronic mail.

9 **SEC. 3. DEFINITIONS.**

10 In this Act:
11 (1) CHILDREN.—The term "children" includes
12 natural children, stepchildren, adopted children, and
13 children who are wards of or in custody of the par-
14 ent, who have not attained the age of 18 and who
15 reside with the parent or are under his or her care,
16 custody, or supervision.
17 (2) COMMERCIAL ELECTRONIC MAIL MES-
18 SAGE.—The term "commercial electronic mail mes-
19 sage" means any electronic mail message that pri-
20 marily advertises or promotes the commercial avail-
21 ability of a product or service for profit or invites
22 the recipient to view content on an Internet web site
23 that is operated for a commercial purpose. An elec-
24 tronic mail message shall not be considered to be a
25 commercial electronic mail message solely because

1 such message includes a reference to a commercial
2 entity that serves to identify the initiator.
3 (3) COMMISSION.—The term "Commission"
4 means the Federal Trade Commission.
5 (4) DOMAIN NAME.—The term "domain name"
6 means any alphanumeric designation which is reg-
7 istered with or assigned by any domain name reg-
8 istrar, domain name registry, or other domain name
9 registration authority as part of an electronic ad-
10 dress on the Internet.
11 (5) ELECTRONIC MAIL ADDRESS.—
12 (A) IN GENERAL.—The term "electronic
13 mail address" means a destination (commonly
14 expressed as a string of characters) to which
15 electronic mail can be sent or delivered.
16 (B) INCLUSION.—In the case of the Inter-
17 net, the term "electronic mail address" may in-
18 clude an electronic mail address consisting of a
19 user name or mailbox (commonly referred to as
20 the "local part") and a reference to an Internet
21 domain (commonly referred to as the "domain
22 part").
23 (6) INTERNET.—The term "Internet" has the
24 meaning given that term in section 231(e)(3) of the
25 Communications Act of 1934 (47 U.S.C. 231(e)(3)).

1 (7) INTERNET ACCESS SERVICE.—The term
2 "Internet access service" has the meaning given that
3 term in section 231(e)(4) of the Communications
4 Act of 1934 (47 U.S.C. 231(e)(4)).
5 (8) INITIATE.—The term "initiate", when used
6 with respect to a commercial electronic mail mes-
7 sage, means to originate such message or to procure
8 the transmission of such message.
9 (9) INITIATOR.—The term "initiator", when
10 used with respect to a commercial electronic mail
11 message, means the person who initiates such mes-
12 sage. Such term does not include a provider of an
13 Internet access service whose role with respect to the
14 message is limited to handling, transmitting, re-
15 transmitting, or relaying the message.
16 (10) PRE-EXISTING BUSINESS RELATION-
17 SHIP.—The term "pre-existing business relation-
18 ship" means, when used with respect to the initiator
19 and recipient of a commercial electronic mail mes-
20 sage, that either of the following circumstances exist:
21 (A) PREVIOUS BUSINESS TRANSACTION.—
22 (i) Within the 5-year period ending
23 upon receipt of such message, there has
24 been a business transaction between the
25 initiator and the recipient (including a

1 transaction involving the provision, free of
2 charge, of information requested by the re-
3 cipient, of goods, or of services); and
4 (ii) the recipient was, at the time of
5 such transaction or thereafter, provided a
6 clear and conspicuous notice of an oppor-
7 tunity not to receive further messages from
8 the initiator and has not exercised such op-
9 portunity.
10 (B) OPT IN.—The recipient has given the
11 initiator permission to initiate commercial elec-
12 tronic mail messages to the electronic mail ad-
13 dress of the recipient and has not subsequently
14 revoked such permission.
15 (11) RECIPIENT.—The term "recipient", when
16 used with respect to a commercial electronic mail
17 message, means the addressee of such message.
18 (12) UNSOLICITED COMMERCIAL ELECTRONIC
19 MAIL MESSAGE.—The term "unsolicited commercial
20 electronic mail message" means any commercial
21 electronic mail message that is sent by the initiator
22 to a recipient with whom the initiator does not have
23 a pre-existing business relationship.

1 **SEC. 4. CRIMINAL PENALTY FOR UNSOLICITED COMMER-**
2 **CIAL ELECTRONIC MAIL CONTAINING FRAUD-**
3 **ULENT ROUTING INFORMATION.**

4 Section 1030 of title 18, United States Code, is
5 amended—

6 (1) in subsection (a)(5)—

7 (A) in subparagraph (B), by striking "or"
8 at the end;

9 (B) in subparagraph (C), by inserting "or"
10 after the semicolon at the end; and

11 (C) by adding at the end the following new
12 subparagraph:

13 "(D) intentionally initiates the transmission of
14 any unsolicited commercial electronic mail message
15 to a protected computer in the United States with
16 knowledge that any domain name, header informa-
17 tion, date or time stamp, originating electronic mail
18 address, or other information identifying the
19 initiator or the routing of such message, that is con-
20 tained in or accompanies such message, is false or
21 inaccurate;";

22 (2) in subsection (c)(2)(A)—

23 (A) by inserting "(i)" after "in the case
24 of"; and

1 (B) by inserting before "; and" the fol-
2 lowing: ", or (ii) an offense under subsection
3 (a)(5)(D) of this section"; and
4 (3) in subsection (e)—
5 (A) by striking "and" at the end of para-
6 graph (8);
7 (B) by striking the period at the end of
8 paragraph (9) and inserting a semicolon; and
9 (C) by adding at the end the following new
10 paragraph:
11 "(10) the terms 'initiate', 'initiator', 'unsolicited
12 commercial electronic mail message', and 'domain
13 name' have the meanings given such terms in section
14 3 of the Unsolicited Commercial Electronic Mail Act
15 of 2001.".

16 **SEC. 5. OTHER PROTECTIONS AGAINST UNSOLICITED COM-**
17 **MERCIAL ELECTRONIC MAIL.**

18 (a) REQUIREMENTS FOR TRANSMISSION OF MES-
19 SAGES.—
20 (1) INCLUSION OF RETURN ADDRESS IN COM-
21 MERCIAL ELECTRONIC MAIL.—It shall be unlawful
22 for any person to initiate the transmission of a com-
23 mercial electronic mail message to any person within
24 the United States unless such message contains a
25 valid electronic mail address, conspicuously dis-

1 played, to which a recipient may send a reply to the
2 initiator to indicate a desire not to receive any fur-
3 ther messages.

4 (2) PROHIBITION OF TRANSMISSION OF UNSO-
5 LICITED COMMERCIAL ELECTRONIC MAIL AFTER OB-
6 JECTION.—If a recipient makes a request to a per-
7 son to be removed from all distribution lists under
8 the control of such person, it shall be unlawful for
9 such person to initiate the transmission of an unso-
10 licited commercial electronic mail message to such a
11 recipient within the United States after the expira-
12 tion, after receipt of such request, of a reasonable
13 period of time for removal from such lists. Such a
14 request shall be deemed to terminate a pre-existing
15 business relationship for purposes of determining
16 whether subsequent messages are unsolicited com-
17 mercial electronic mail messages.

18 (3) INCLUSION OF IDENTIFIER AND OPT-OUT IN
19 UNSOLICITED COMMERCIAL ELECTRONIC MAIL.—It
20 shall be unlawful for any person to initiate the
21 transmission of any unsolicited commercial electronic
22 mail message to any person within the United States
23 unless the message provides, in a manner that is
24 clear and conspicuous to the recipient—

1 (A) identification that the message is an
2 unsolicited commercial electronic mail message;
3 and
4 (B) notice of the opportunity under para-
5 graph (2) not to receive further unsolicited
6 commercial electronic mail messages from the
7 initiator.
8 (b) ENFORCEMENT OF POLICIES BY INTERNET AC-
9 CESS SERVICE PROVIDERS.—
10 (1) PROHIBITION OF TRANSMISSIONS IN VIOLA-
11 TION OF POSTED POLICY.—It shall be unlawful for
12 any person to initiate the transmission of an unsolic-
13 ited commercial electronic mail message to any per-
14 son within the United States in violation of a policy
15 governing the use of the equipment of a provider of
16 Internet access service for transmission of unsolic-
17 ited commercial electronic mail messages that meets
18 the requirements of paragraph (2).
19 (2) REQUIREMENTS FOR ENFORCEABILITY.—
20 The requirements under this paragraph for a policy
21 regarding unsolicited commercial electronic mail
22 messages are as follows:
23 (A) CLARITY.—The policy shall explicitly
24 provide that compliance with a rule or set of
25 rules is a condition of use of the equipment of

1 a provider of Internet access service to deliver
2 commercial electronic mail messages.
3 (B) PUBLICLY AVAILABILITY.—The policy
4 shall be publicly available by at least one of the
5 following methods:
6 (i) WEB POSTING.—The policy is
7 clearly and conspicuously posted on a
8 World Wide Web site of the provider of
9 Internet access service, which has an Inter-
10 net domain name that is identical to the
11 Internet domain name of the electronic
12 mail address to which the rule or set of
13 rules applies.
14 (ii) NOTIFICATION IN COMPLIANCE
15 WITH TECHNOLOGICAL STANDARD.—Such
16 policy is made publicly available by the
17 provider of Internet access service in ac-
18 cordance with a technological standard
19 adopted by an appropriate Internet stand-
20 ards setting body (such as the Internet
21 Engineering Task Force) and recognized
22 by the Commission by rule as a fair stand-
23 ard.
24 (C) INTERNAL OPT-OUT LIST.—If the pol-
25 icy of a provider of Internet access service re-

1 quires compensation specifically for the trans-
2 mission of unsolicited commercial electronic
3 mail messages into its system, the provider
4 shall provide an option to its subscribers not to
5 receive any unsolicited commercial electronic
6 mail messages, except that such option is not
7 required for any subscriber who has agreed to
8 receive unsolicited commercial electronic mail
9 messages in exchange for discounted or free
10 Internet access service.

11 (3) OTHER ENFORCEMENT.—Nothing in this
12 Act shall be construed to prevent or limit, in any
13 way, a provider of Internet access service from en-
14 forcing, pursuant to any remedy available under any
15 other provision of Federal, State, or local criminal or
16 civil law, a policy regarding unsolicited commercial
17 electronic mail messages.

18 (c) PROTECTION OF INTERNET ACCESS SERVICE
19 PROVIDERS.—

20 (1) GOOD FAITH EFFORTS TO BLOCK TRANS-
21 MISSIONS.—A provider of Internet access service
22 shall not be liable, under any Federal, State, or local
23 civil or criminal law, for any action it takes in good
24 faith to block the transmission or receipt of unsolic-
25 ited commercial electronic mail messages.

1 (2) INNOCENT RETRANSMISSION.—A provide
2 of Internet access service the facilities of which ar
3 used only to handle, transmit, retransmit, or rela
4 an unsolicited commercial electronic mail messag
5 transmitted in violation of subsection (a) shall no
6 be liable for any harm resulting from the trans
7 mission or receipt of such message unless such pro
8 vider permits the transmission or retransmission o
9 such message with actual knowledge that the trans
10 mission is prohibited by subsection (a) or subsectio
11 (b)(1).

12 **SEC. 6. ENFORCEMENT.**

13 (a) GOVERNMENTAL ORDER.—

14 (1) NOTIFICATION OF ALLEGED VIOLATION.—
15 The Commission shall send a notification of allege
16 violation to any person who violates section 5 if—

17 (A) a recipient or a provider of Interne
18 access service notifies the Commission, in sucl
19 form and manner as the Commission shall de
20 termine, that a transmission has been receive
21 in violation of section 5; or

22 (B) the Commission has other reason t
23 believe that such person has violated or is vio
24 lating section 5.

1 (2) TERMS OF NOTIFICATION.—A notification
2 of alleged violation shall—
3 (A) identify the violation for which the no-
4 tification was issued;
5 (B) direct the initiator to refrain from fur-
6 ther violations of section 5;
7 (C) expressly prohibit the initiator (and
8 the agents or assigns of the initiator) from fur-
9 ther initiating unsolicited commercial electronic
10 mail messages in violation of section 5 to the
11 designated recipients or providers of Internet
12 access service, effective on the third day (ex-
13 cluding Saturdays, Sundays, and legal public
14 holidays) after receipt of the notification; and
15 (D) direct the initiator (and the agents or
16 assigns of the initiator) to delete immediately
17 the names and electronic mail addresses of the
18 designated recipients or providers from all mail-
19 ing lists owned or controlled by the initiator (or
20 such agents or assigns) and prohibit the
21 initiator (and such agents or assigns) from the
22 sale, lease, exchange, license, or other trans-
23 action involving mailing lists bearing the names
24 and electronic mail addresses of the designated
25 recipients or providers.

1 (3) COVERAGE OF MINOR CHILDREN BY NOTIFI-
2 CATION.—Upon request of a recipient of an elec-
3 tronic mail message transmitted in violation of sec-
4 tion 5, the Commission shall include in the notifica-
5 tion of alleged violation the names and electronic
6 mail addresses of any child of the recipient.
7 (4) ENFORCEMENT OF NOTIFICATION TERMS.—
8 (A) COMPLAINT.—If the Commission be-
9 lieves that the initiator (or the agents or as-
10 signs of the initiator) has failed to comply with
11 the terms of a notification issued under this
12 subsection, the Commission shall serve upon the
13 initiator (or such agents or assigns), by reg-
14 istered or certified mail, a complaint stating the
15 reasons for its belief and request that any re-
16 sponse thereto be filed in writing with the Com-
17 mission within 15 days after the date of such
18 service.
19 (B) HEARING AND ORDER.—If the Com-
20 mission, after an opportunity for a hearing on
21 the record, determines that the person upon
22 whom the complaint was served violated the
23 terms of the notification, the Commission shall
24 issue an order directing that person to comply
25 with the terms of the notification.

1 (C) PRESUMPTION.—For purposes of a de-
2 termination under subparagraph (B), receipt of
3 any transmission in violation of a notification of
4 alleged violation 30 days (excluding Saturdays,
5 Sundays, and legal public holidays) or more
6 after the effective date of the notification shall
7 create a rebuttable presumption that such
8 transmission was sent after such effective date.
9 (5) ENFORCEMENT BY COURT ORDER.—Any
10 district court of the United States within the juris-
11 diction of which any transmission is sent or received
12 in violation of a notification given under this sub-
13 section shall have jurisdiction, upon application by
14 the Attorney General, to issue an order commanding
15 compliance with such notification. Failure to observe
16 such order may be punishable by the court as con-
17 tempt thereof.
18 (b) PRIVATE RIGHT OF ACTION.—
19 (1) ACTIONS AUTHORIZED.—A recipient or a
20 provider of Internet access service may, if otherwise
21 permitted by the laws or rules of court of a State,
22 bring in an appropriate court of that State, or may
23 bring in an appropriate Federal court if such laws
24 or rules do not so permit, either or both of the fol-
25 lowing actions:

1 (A) An action based on a violation of sec-
2 tion 5 to enjoin such violation.
3 (B) An action to recover for actual mone-
4 tary loss from such a violation in an amount
5 equal to the greatest of—
6 (i) the amount of such actual mone-
7 tary loss; or
8 (ii) $500 for each such violation, not
9 to exceed a total of $50,000.
10 (2) ADDITIONAL REMEDIES.—If the court finds
11 that the defendant willfully, knowingly, or repeatedly
12 violated section 5, the court may, in its discretion,
13 increase the amount of the award to an amount
14 equal to not more than three times the amount
15 available under paragraph (1).
16 (3) ATTORNEY FEES.—In any such action, the
17 court may, in its discretion, require an undertaking
18 for the payment of the costs of such action, and as-
19 sess reasonable costs, including reasonable attorneys'
20 fees, against any party.
21 (4) PROTECTION OF TRADE SECRETS.—At the
22 request of any party to an action brought pursuant
23 to this subsection or any other participant in such
24 an action, the court may, in its discretion, issue pro-
25 tective orders and conduct legal proceedings in such

1 a way as to protect the secrecy and security of the
2 computer, computer network, computer data, com-
3 puter program, and computer software involved in
4 order to prevent possible recurrence of the same or
5 a similar act by another person and to protect any
6 trade secrets of any such party or participant.

7 **SEC. 7. EFFECT ON OTHER LAWS.**

8 (a) FEDERAL LAW.—Nothing in this Act shall be
9 construed to impair the enforcement of section 223 or 231
10 of the Communications Act of 1934, chapter 71 (relating
11 to obscenity) or 110 (relating to sexual exploitation of chil-
12 dren) of title 18, United States Code, or any other Federal
13 criminal statute.

14 (b) STATE LAW.—No State or local government may
15 impose any civil liability for commercial activities or ac-
16 tions in interstate or foreign commerce in connection with
17 an activity or action described in section 5 of this Act that
18 is inconsistent with the treatment of such activities or ac-
19 tions under this Act, except that this Act shall not pre-
20 empt any civil remedy under State trespass or contract
21 law or under any provision of Federal, State, or local
22 criminal law or any civil remedy available under such law
23 that relates to acts of computer fraud or abuse arising
24 from the unauthorized transmission of unsolicited com-
25 mercial electronic mail messages.

1 **SEC. 8. STUDY OF EFFECTS OF UNSOLICITED COMMERCIAL**
2 **ELECTRONIC MAIL.**

3 Not later than 18 months after the date of the enact-
4 ment of this Act, the Federal Trade Commission shall sub-
5 mit a report to the Congress that provides a detailed anal-
6 ysis of the effectiveness and enforcement of the provisions
7 of this Act and the need (if any) for the Congress to mod-
8 ify such provisions.

9 **SEC. 9. SEPARABILITY.**

10 If any provision of this Act or the application thereof
11 to any person or circumstance is held invalid, the remain-
12 der of this Act and the application of such provision to
13 other persons or circumstances shall not be affected.

14 **SEC. 10. EFFECTIVE DATE.**

15 The provisions of this Act shall take effect 90 days
16 after the date of the enactment of this Act.

○

Without objection, the bill will be considered as read and open for amendment at any point, and the amendment in the nature of a substitute, which the members have before them, will be considered as read and considered as the original text for purposes of amendment.

[The amendment in the nature of a substitute follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 718 OFFERED BY MR. SENSENBRENNER AND MR. CONYERS

Strike all after the enacting clause and insert the following:

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Anti-Spamming Act
3 of 2001".

4 **SEC. 2. SPAMMING PROHIBITION.**

5 (a) IN GENERAL. Part I of title 18, United States
6 Code, is amended by inserting after chapter 29 the fol-
7 lowing:

8 **"CHAPTER 30—ELECTRONIC MAIL**

"Sec.
"621. Unsolicited commercial electronic mail containing fraudulent transmission information.

9 **"§ 621. Unsolicited commercial electronic mail con-**
10 **taining fraudulent transmission informa-**
11 **tion**

12 "(a) Whoever intentionally initiates in one or more
13 transactions the transmission of 10 or more unsolicited
14 commercial electronic mail messages to one or more pro-
15 tected computers in the United States, knowing that each
16 such message contains or is accompanied by header infor-

1 mation that is materially false or misleading as to the
2 identity of the person initiating the transmission shall be
3 fined under this title, and in the case of an offense under
4 this section which occurs after conviction for a prior of-
5 fense under this section, shall be so fined or imprisoned
6 not more than one year, or both.

7 "(b) As used in this section—

8 "(1) the term 'commercial electronic mail mes-
9 sage' means an electronic mail message the primary
10 purpose of which is to advertise or promote, for a
11 commercial purpose, a product or service (including
12 content on an Internet website);

13 "(2) the term 'header information' means the
14 source, destination, and routing information, includ-
15 ing the originating domain name and originating
16 electronic mail address; and

17 "(3) the term 'protected computer' has the
18 meaning given that term in section 1030(e)(2) of
19 this title.".

20 (b) CLERICAL AMENDMENT.—The table of chapters
21 at the beginning of part I of title 18, United States Code,
22 is amended by inserting after the item relating to chapter
23 29 the following new item:

"30. Electronic mail ..... 621".

Chairman SENSENBRENNER. The Chair recognizes himself to strike the last word.

The amendment in the nature of a substitute that all members have before them is the product of bipartisan cooperation between the majority and the minority, and I appreciate the work of all members on this bill. Judiciary Committee members on both sides of the aisle voiced concern about sweeping legislation that would regulate e-mail marketing, and this bipartisan substitute addresses those concerns.

Specifically, the substitute would create a new misdemeanor criminal provision to address the issue of technical fraud. Technical fraud includes forging or falsifying header and return information, thereby concealing the sender's identity. Those who send fraudulent e-mail or pornography often use technical fraud to conceal their true identities. Furthermore, technical fraud is used to defeat Internet service providers' and computer users' e-mail filters, preferences, and other technologies designed to block unwanted e-mail.

All of the witnesses who testified before the committee, the Federal Trade Commission in other testimony, and the Ad Hoc Working Group on Unsolicited Commercial E-Mail, which reported to the FTC in July 1998, all support public policies which address fraudulently concealing one's identity.

The substitute, however, does not address generalized concerns about unsolicited commercial e-mail, and the substitute does not contain many of the unprecedented and disproportionate enforcement provisions contained in H.R. 718.

The Wilson bill utilizes almost every legal enforcement tool known to lawyers to regulate and to litigate issues relating to unsolicited commercial e-mail. These provisions are disproportionate to the harm or damage caused by spam.

In addition to a complicated, cumbersome, and punitive regulatory regime, the Wilson bill contains two unprecedented provisions which would empower the Internet service providers to write Federal law. First, an ISP's unsolicited commercial e-mail policy could be enforced by a private right of action, State attorneys general, and the Federal Trade Commission. The second provision would deem an ISP policy a Federal regulation rule under Section 18 of the Federal Trade Commission Act. There is no requirement that the ISP policy be open to the public for comment, as are Federal Trade regulation rules under the Administrative Procedures Act. Thus, approximately 5,000 ISPs could write different policies, enforced by myriad legal actions, without due process afforded by traditional rules and by law. The committee's research has uncovered no precedent for these provisions, and I believe them to be unnecessary and may raise constitutional issues.

I am also skeptical of the regulation of online commerce, including e-mail marketing. H.R. 718, if not changed, would be the first major Federal regulation of online commerce. Congress should be cautious when considering new regulations of e-commerce.

Congress has always supported and encouraged Internet commerce in several ways. The e-signatures bill and the Internet access tax moratorium were affirmative signals that Congress wanted the efficiencies of the Internet to bring choices, competition, and needed information to consumers. Electronic commerce is still in its

infancy. Business models are constantly changing to find the right formula for success over the Internet.

For example, banner ad revenue has fallen almost as much as the stock prices of many dotcoms. Marketing, no matter how annoying, is integral to the success of commerce, including electronic commerce. Members on both sides of the aisle have raised serious concerns about regulating e-mail marketing and its impact on the growth of commerce, and I am convinced that a go-slow approach is needed during this time of great technological and market change.

Another concern about the regulation of e-marketing has to do with proportionality. I am concerned about making a Federal case out of a mere annoyance. Congress should carefully consider proposals to unleash the FTC, State attorneys general, and the trial bar on U.S. businesses for sending un-commercial—unsolicited commercial e-mail. I believe that we should do what we can to address fraudulent e-mail, but also believe that we need to be careful and cautious about regulating e-mail marketing.

We should not lump e-mail fraud, e-mail pornography, and e-mail marketing all in the same category. They are demonstrably different, and we should address the problems that actually cause harm or damage. Congress should avoid falling victim to the law of unintended consequences, particularly because Internet commerce is still in its infancy. The substitute forces on the issue of—focuses on the issue of fraud, which is an appropriate area for government action.

[The statement of Mr. Sensenbrenner follows:]

PREPARED STATEMENT OF THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

The amendment in the nature of a substitute that all Members have before them is the product of bipartisan cooperation between the majority and minority, and I appreciate the work of all Members on this bill. Judiciary Committee Members on both sides of the aisle voiced concerns about sweeping legislation that would regulate e-mail marketing and this bipartisan substitute addresses those concerns.

Specifically, the substitute would create a new misdemeanor criminal provision to address the issue of technical fraud. Technical fraud includes forging or falsifying header and return information, thereby concealing the sender's identity. Those who send fraudulent e-mail or pornography often use technical fraud to conceal their true identities. Furthermore, technical fraud is used to defeat Internet service providers' and computer users' e-mail filters, preferences, and other technologies designed to block unwanted e- mail. All of the witnesses who testified before the Committee, the Federal Trade Commission (FTC) in other testimony, and the Ad-Hoc Working Group on Unsolicited Commercial E-Mail, which reported to the FTC in July 1998, all support public policies addressing fraudulently concealing one's identity.

The substitute, however, does not addresses generalized concerns about unsolicited commercial e-mail and the substitute does not contain many of the unprecedented and disproportionate enforcement provisions contained in H.R. 718. The Wilson bill utilizes almost every legal enforcement tool known to lawyers to regulate and litigate issues relating to unsolicited commercial e-mail. These provisions are disproportionate to the harm or damage caused by spam. In addition to a complicated, cumbersome, and punitive regulatory regime, the Wilson bill contains two unprecedented provisions which would empower Internet service providers to write federal law.

First, an ISP's unsolicited commercial e-mail policy could be enforced by private right of action, state attorneys general, and the Federal Trade Commission. The second provision would deem an ISP policy a "federal trade regulation rule" under section 18 of the FTC Act. There is no requirement that the ISP's policy be open to the public for comment as are federal trade regulation rules under the Administrative Procedures Act. Thus, the approximately 5,000 ISP's could write different policies enforced by myriad legal actions without the due process afforded by traditional

rules and law. The Committee's research has uncovered no precedent for these provisions, and I believe they are unnecessary and may raise constitutional issues.

I am also skeptical of the regulation of on-line commerce, including e- mail marketing. H.R. 718, if not changed, would be the first major federal regulation of on-line commerce. Congress should be cautious when considering new regulations of e-commerce.

Congress has supported and encouraged Internet commerce in several ways. The E-signatures bill and Internet access tax moratorium were affirmative signals that Congress wanted the efficiencies of the Internet to bring choices, competition, and needed information to consumers. Electronic commerce is still in its infancy. Business models are constantly changing to find the right formula for success over the Internet. For example, banner ad revenue has fallen almost as much as the stock prices of many dot-coms. Marketing, no matter how annoying, is integral to the success of commerce, including electronic commerce. Members on both sides of the aisle have raised serious concerns about regulating e-mail marketing and its impact on the growth of commerce, and I am convinced that a go-slow approach is needed during this time of great technological and market change.

Another concern about the regulation of e-mail marketing has to do with proportionality. I am concerned about making a federal case out of a mere annoyance. Congress should carefully consider proposals to unleash the FTC, state attorneys general, and the trial bar on U.S. businesses for sending unsolicited commercial e-mail.

I believe we should do what we can to address fraudulent e-mail, but also believe we need to be careful and cautious about regulating e-mail marketing. We should not lump e-mail fraud, e-mail pornography, and e-mail marketing all in the same category. They are demonstrably different, and we should address the problems that actually cause harm, or damage.

Congress should also avoid falling victim to the law of unintended consequences, particularly because Internet commerce is still in its infancy. The substitute focuses on the issue of fraud which is an appropriate area for government action. Again, I want to I urge my colleagues to support the substitute and yield back the balance of my time.

Again, I want to urge my colleagues to support the substitute and now recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. Our negotiations have paid off again, and we now have a bill that really deals with the major concern that this legislation brought with it initially, and that was the First Amendment considerations by being no more extensive than necessary. And we have resolved those concerns by the elimination of a series of vague terms and prohibitions and sentencing procedures which now would require a second offense with over 10 or more e-mails to bring about any imprisonment.

We've also excluded the language that would require that 718 has the force of law to Internet service provider policies on blocking e-mails, which, again, was a First Amendment consideration. And I think that we've got now a substitute that people with differing philosophies can come together to deal with a very annoying problem that now will be able to receive congressional attention, and I think it'll remedy this problem a great deal, and I urge my colleagues to accept this substitute.

Chairman SENSENBRENNER. Without—without objection, all member's opening statements will be inserted in the record at this point.

[The statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

From scheduling the hearing to our negotiations over the past two weeks, the Chairman has not only upheld this Committee's jurisdiction but also worked with us to arrive at more reasonable legislation. Immediately after the hearing, we took to him our concerns with the original bill—he shared our concerns and was able to accept all of our suggested changes. And that is why I am pleased to join him in offering this substitute.

Our major concern was ensuring that the legislation complied with First Amendment rights by being "no more extensive than necessary." We resolved those concerns by eliminating vague terms and narrowing the prohibition to commercial e-mails with "materially false or misleading" header information. And the prohibition applies only to ten or more e-mails, so that the transmission of just one e-mail is not penalized.

We also eased the penalties themselves. The original bill provided for a fine or even imprisonment for a first offense. Under the Sensenbrenner- Conyers substitute, a first offense results in a criminal fine with no possibility of imprisonment. For a second offense, a violator can receive a fine, imprisonment for not more than one year, or both. Moreover, there are no mandatory minimum sentences.

Finally, we excluded language from H.R. 718 that gave the force of law to ISP policies on blocking e-mails. Not only did that language raise First Amendment concerns, but it gave congressional imprimatur to any ISP policy, even if that policy discriminated against competing ISPs.

I'd like to thank the Chairman again for working with us to draft this substitute and hope we can continue working together when the spam bills reach the floor and possibility go to conference.

Chairman SENSENBRENNER. Are there amendments? The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. COBLE. And I will not utilize my entire 5 minutes, but a concern's been raised that the legislation before us may produce the unintended consequence of prohibiting intellectual property owners attempting to protect their rights from sending electronic notices to infringing parties. Now, I'm satisfied that the nature—the amendment in the nature of a substitute to H.R. 718 alleviates this concern. Still, we will continue to monitor H.R. 718 as it moves forward to ensure that intellectual property owners may use electronic mail as a means of protecting their property.

The Digital Millennium Copyright Act, which Congress passed in 1998, made great progress in protecting intellectual property by applying traditional laws to the digital environment. However, the protection in the DMCA would be compromised, in my opinion, if intellectual property owners were not able to pursue Internet pirates and infringers. And if the gentleman from California, the ranking member of the Subcommittee on Courts, Internet, and Intellectual Property, would like to add further, I will happily yield to him.

Mr. BERMAN. Mr. Chairman, I thank the gentleman for yielding, and I agree entirely with him that it is critical that intellectual property owners be able to police their property on the Internet. The anti-spam legislation in all forms was not intended—in any of its forms was not intended to injure legitimate business interactions. Therefore, I'm encouraged that the amendment in the nature of a substitute being offered by the Chair and ranking member takes care of the intellectual property concerns. We just want to make sure as the bill moves along that property owners—we keep these intellectual property owners in mind as we move forward with this anti-spam legislation. And I yield back.

Mr. COBLE. I'll reclaim my time, Mr. Chairman, and yield back my time.

Mr. FRANK. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. FRANK. To strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. FRANK. Mr. Chairman, I agree that the original bill went too far. I was a cosponsor, and I think it was broader than was wise. In particular, giving legal force to the policies of the multiplicity of independent service providers obviously was just not a very good idea. And I'm going to vote for the substitute because it's better than nothing, but I am concerned that it does not go far enough. And I have a question for those who worked on the substitute and others who are knowledgeable.

In the original bill, one provision which seemed to me useful was allowing people to notify senders of their objection and for them then to have a right not to get further transmissions from that individual. What will the status of that policy be if we just adopt the substitute? There was a right to object to unsolicited mail and ask that it not be sent again.

Now, you helped us by giving—making sure the address is right, but will you have the right, if you get correctly return-addressed mail, to say please don't send this to me anymore? And I would yield to anyone who could answer that.

Chairman SENSENBRENNER. Would the gentleman yield?

Mr. FRANK. Yes.

Chairman SENSENBRENNER. The substitute deals with fraud. It does not—it does not deal with normal business practices, similar to the Postal Service. You know, if somebody sticks a stamp on a letter and addresses it to you, you know, it's delivered to your mailbox.

Mr. FRANK. Well, I appreciate that——

Chairman SENSENBRENNER. What happens after it gets there is up to you.

Mr. FRANK. Well, I understand that. I do think unsolicited mail is easier to deal with than unsolicited e-mail, which can cause a clog and you get a kind of Gresham's law in which the bad drives out the good when you have got to sort through a lot. And I regret the absence in the substitute of a provision that would allow people, having once been solicited, to tell the person who had solicited them not to do that again. We've followed that practice in some other areas of financial privacy, and I think that model is a good one. I don't think it interferes with First Amendment rights at all. And as I said, I do think being the recipient of e-mail can be more of an intrusion than the recipient of other mail which you can simply throw out and don't have to sort through. Sorting through e-mail can be a problem. I've had complaints about this.

So I do—I appreciate the fraud part, and I do agree that 718 went too far, particularly with regard to the independent service providers. But I think we are leaving people insufficiently protected, and it does seem to me people who notify——

Mr. GOODLATTE. Would the gentleman yield?

Mr. FRANK.—sent them the material ought to have a right to say no.

Yes, I'll yield to the gentleman from Virginia.

Mr. GOODLATTE. I thank the gentleman for yielding. As you may know, I have offered legislation on this matter as well, and I share the gentleman's concern. My concern with regard to what you're talking about—and I agree, we should have ultimately some provi-

sion that provides for the ability to request that your name—that you not be re-solicited, if you will. But it is in the remedies portion of that. I don't want to have a proliferation of lawsuits or whatever as a result of that.

So I would be happy to continue to work with the gentleman——

Mr. FRANK. Well, I thank the gentleman for that. Yes, I agree that probably a mandatory minimum sentence to which we resort all too quickly would probably not be appropriate, although the inappropriateness of mandatory minimum sentences has not deterred us sufficiently in the past.

And I would be glad to work with the gentleman on that in terms of other penalties. It might be that you had to spend 3 hours a day reading all your own e-mails. I can think of some others.

But on that assurance, as I said—well, I'm going to vote for the bill, anyway, and I'm not prepared with any alternative. But I'm glad to hear that because I do think we ought to be able to help people protect themselves from having—from getting flooded and having their ability to read what they want to read crowded out by what they don't want to read, which is a different situation than the mail. I'd yield again.

Mr. GOODLATTE. If you'd yield further, the reality here with this type of circumstance is that the Internet service providers are what people really have to depend on to help them fend off this enormous and rapidly growing flood of this type of e-mail. And I'll be offering an amendment shortly that will help in that regard as well.

Mr. FRANK. I thank the gentleman. I yield back.

Chairman SENSENBRENNER. Are there amendments?

Mr. GOODLATTE. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment offered by Mr. Goodlatte to the amendment in the nature of a substitute to H.R. 718. On page 2, after line 19, insert the following: (c)——

Mr. GOODLATTE. Mr. Chairman, I'd ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered.

[The amendment follows:]

Goodlatte Amendment

To the Amendment in the Nature of a Substitute
To H.R. 718
Offered by Mr. Sensenbrenner and Mr. Conyers

On page 2, after line 19, insert the following:

"(c) Private Right of Action.–

"(1) Actions authorized.–A provider of Internet access service, if otherwise permitted by the laws or rules of a court of a State, may bring in an appropriate court of that State, or, if such laws or rules do not so permit, may bring in an appropriate Federal court, an action to recover for actual or statutory damages, as provided in subsection 2, and for costs, as provided in subsection 3.

"(2) Award of Damages.–A person committing a violation of subsection (a) is liable to a provider of Internet access service for either–

"(A) the actual damages suffered by the provider of Internet access service; or

"(B) statutory damages, as provided in this paragraph. At any time prior to final judgment in an action, a provider of Internet access service may elect to recover an award of statutory damages for each violation of subsection (a) in the sum of $5 per violation, not to exceed a total of $1 million: *Provided*, That, during any one-year period for which the defendant has transmitted in excess of 20 million unsolicited commercial electronic mail messages, no such limit on liability shall exist.

"(3) Attorneys Fees.--In any action brought under paragraph (1), the court may, in its discretion, require the payment of the costs of such action, and may assess reasonable costs, including reasonable attorneys' fees, against any person found to have committed a violation of subsection (a).".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

And, Mr. Chairman, let me start, in lieu of an opening statement, by saying that I thank you for holding this markup and congratulate you for the very narrowly tailored substitute that you are offering that I think goes a long way toward addressing this problem without encountering some of the proliferation of litigation and micromanagement of our commercial enterprise system, and goes a long way to avoiding the problem of legitimate uses of commercial e-mail that help make things easier for consumers and help make them aware of things, including issues related to copyright, as the gentleman from North Carolina mentioned, that I think are very important.

I would also note that this is a growing problem. I hear on a weekly basis from constituents at home about their concern about spam. It is growing exponentially. And I do think we need to take

measures to solve this problem, so I also commend the gentlewoman from New Mexico for the legislation that she offered. I think, however, this—this alternative moves us closer to the objective we're trying to seek.

I have an amendment——

Ms. LOFGREN. Would the gentleman—I'm sorry.

Mr. GOODLATTE. I have an amendment that is intended to make this process more effective. And the fact of the matter is that right now law enforcement agencies are not going to give this problem the kind of attention that most of my constituents, most of all of our constituents would like them to give it. They are overtaxed in terms of their commitment to various enforcement measures, and this is not going to get as high a priority as I would like to see.

We have an amendment that will give the Internet service providers the ability to help protect the consumers, and they have an incentive to do this because it causes enormous problems on their systems. It can call—cause smaller ISPs to crash when they're overloaded with spam, and it certainly hurts their business reputation. They are, in effect, the carrier who is providing this service to people who use e-mail.

So this amendment will help to give them a very narrowly tailored cause of action. It does not give individuals a private right of action, but it does give the ISPs a narrowly tailored private right of action to enforce this. There is a——

Ms. LOFGREN. Would the gentleman yield?

Mr. GOODLATTE. Let me finish my statement. Then I'll be happy to yield.

There is a very narrowly tailored precedent for this in the Telephone Consumer Protection Act of 1991, which was enacted in response to the overwhelming volume of unsolicited faxes, spam faxes. You can all remember the complaints that came out about that when people wanted to offer spamming of all kinds of commercial advertisements over your fax machines. While there are some exceptions to my statement, generally you don't get a lot of unsolicited commercial spam over your fax machine, and the reason is this Telephone Consumer Protection Act of 1991 that helped to ensure compliance with these sorts of consumer protection laws. It had a $10 per violation—has, it's current law, $10 per violation, up to $500,000 statutory damage provision, and it has not led to a proliferation of lawsuits. It's had the opposite effect because it has worked to deter improper conduct and ensure better compliance with the law.

And that's exactly what this amendment is intended to do as well, and I would urge my colleagues to adopt it, and I'd be happy to yield to the gentlewoman from California.

Ms. LOFGREN. Thank you, Mr. Goodlatte.

In reading this amendment, I certainly understand the origin of the concern. My desire is to legislate as little as possible in the area of the Internet, and I think you feel similarly. And so the concern I have is whether this is necessary when it is possible for ISPs to bring a trespass action and protect themselves in that way.

Mr. GOODLATTE. Well, reclaiming my time, I understand that, and they definitely do have that right. The problem is that they have very little—remember, they're doing this as a service to their customers, and they have very little incentive to do it if, when they

go to court, they have experienced very little by way of actual damages to themselves. And that's what happens when they simply bring——

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. GOODLATTE. I would be happy to yield.

Chairman SENSENBRENNER. Let me say I think this amendment is an improvement to the bill. I'm not completely convinced that we don't need to further refine the amendment before this bill goes to the floor. But I think that the real meat of this amendment is the statutory damages provision where the ISP does not have to prove actual damages. You know, here in Section 2(B) of the amendment, it's $5 per violation, not to exceed a total of a million, except that if during a 1-year period somebody sends out in excess of 20 million items of spam, then there's no such limit on liability.

So I think that this makes it pay for the ISP to go to court to try to police its own self.

Ms. LOFGREN. Would the gentleman——

Chairman SENSENBRENNER. Without objection, the gentleman's given 2 additional minutes.

Mr. GOODLATTE. I'd be happy to continue to yield.

Ms. LOFGREN. The question I have is—I mean, we're talking about two goals here, if I'm understanding correctly. One is to incentivize ISPs to bring actions to deter unsolicited spam, and the second issue is to give remedies to ISPs who crash because of the volume, which is really the trespass case.

So I'm just not sure that we need to—I mean, that's why we have a delete button. I mean, I don't know that I'm yet convinced that we need to incentivize ISPs to bring action against——

Mr. GOODLATTE. I think this is far superior to the competing bill, which would——

Ms. LOFGREN. Oh, I don't—I don't disagree with that.

Mr. GOODLATTE.—incentivize everyone to bring actions. This narrowly tailors it, and the evidence from the previous law, the Telephone Consumer Protection Act, has been that it does not incentivize action but, rather, it incentivizes people to not send unsolicited commercial e-mails. And, remember, this ties into the main portion of the chairman's substitute, so it relates to fraudulent actions as well.

So this is a very, very narrowly tailored provision.

Ms. LOFGREN. I should have noted, before I made any comment, that I do very much appreciate that the substitute as well as this amendment is a considerable improvement over the underlying bill, and I do acknowledge that, although I do still have questions, and I thank the gentleman for yielding.

Mr. BERMAN. Would the gentleman yield?

Mr. GOODLATTE. I would be happy to yield to the gentleman from California.

Mr. BERMAN. Could the gentleman illustrate just what are the damages to an Internet service provider from conduit which would violate Subsection (A) of the amendment?

Mr. GOODLATTE. In many instances, an overload of spam can cause the server of the Internet service provider to crash, and that can have very substantial loss of all kinds of advertising revenue, of harm to their business reputation and so on. But in many instances, they are not heavily harmed themselves, but their cus-

tomers are harmed by being overloaded with e-mail, many of which is of a fraudulent, illegal character.

And if we simply wait for people to report to the various law enforcement agencies to attempt to enforce this and not give the Internet service providers, who are really the carrier in this case, the incentive to do this, what you wind up having is no action taken at all to address this problem. So this really adds some teeth to our legislation, and I think makes it, frankly, more competitive with the measure that passed the full House of Representatives last year by a 427 to 1 vote.

Mr. BERMAN. So, in effect, this is to give sort of real meaning to what we're trying to discourage through the provision by providing a relatively easy way to remedy the problem.

Mr. GOODLATTE. Without causing a proliferation of litigation——

Mr. BERMAN. Thank you.

Mr. GOODLATTE. It is narrowly targeted——

Mr. FRANK. Would the gentleman yield?

Mr. GOODLATTE. Yes, I would.

Mr. FRANK. I just had a question. Is this going to be precedential now, giving real meaning to what we do? I wonder if that is something we are going to follow, and——

Mr. GOODLATTE. No, I have cited the——

Mr. FRANK.—it can be very complicated.

Mr. GOODLATTE. We've already given real meaning in the past.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. Okay. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I rise in support of the amendment, but I had some questions to ask about what it does. It's been suggested that this, the amendment in the nature of a substitute with the amendment, will stop the flood of unsolicited e-mails. But the way I read it, it doesn't stop anything except anonymous or where the return address is misleading. Truthful e-mail, where it's coming from the vendor himself, and they properly identified, it seems like it's unlimited under the amendment in the nature of a substitute and the amendment. There's no limit to the amount; is that right?

Mr. GOODLATTE. If the gentleman would yield——

Mr. SCOTT. Yeah.

Mr. GOODLATTE. That is partly correct, and that goes back to what the gentleman from Massachusetts said about giving individuals the right to be able to take their name off. That's not in our legislation, but it may well be because it is provided for in the legislation offered——

Mr. SCOTT. There's nothing in the bill that addresses fraud or annoyance, one way or the other.

Mr. GOODLATTE. Well, but here's the point. The Internet service providers have mechanisms right now in place through technology to help cut back on the flood of that type of commercial e-mail. But what happens is that those who are bent upon committing fraudulent activity, which the chairman's mark addresses——

Mr. SCOTT. Well——

Mr. GOODLATTE. If I could just finish that point.

Mr. SCOTT. You mentioned fraud. Where is fraud?

Mr. GOODLATTE. The fraud is in the, in the chairman's underlying——

Mr. SCOTT. I don't see fraud.

Mr. GOODLATTE. You have to look at the chairman's substitute.

Mr. SCOTT. I'm looking at it. I don't see fraud. I see materially false and misleading. So, if you have the wrong address, whether it's fraudulent or not, if you have your right address and you're annoying people, that's no problem, but false and misleading as to the identity of the person means anonymous——

Mr. GOODLATTE. If the gentleman would yield, what commonly happens with this problem is that people steal other people's identification and use that to send the spam because the Internet service provider is able to detect large blocks of data being submitted, and what happens is there is they're able to block that. But if you break it down into a lot of smaller blocks, using other people's identity that you have falsely used, you are then able to circumvent the system. This is targeted at that activity.

Mr. BOUCHER. Would the gentleman from Virginia yield?

Mr. GOODLATTE. I yield to my colleague from Virginia.

Mr. BOUCHER. I thank the gentleman for yielding.

The question that the gentleman from Virginia has asked is how is the bill effective in addressing the situation where the spammer has not falsified any of the header information, where he's using his own address? And the answer is that the Internet service providers have now begun to use software that can detect large volumes of e-mail that originate from a common source simultaneously and the software used by the ISP correctly interprets that e-mail to be spam. And so that filter employed by the ISP is sufficient to keep that spam from reaching the recipient.

What the spammers have now started to do, in order to defeat that software, is change in each of the items of e-mails that goes out and each of the items of spam that is sent a little bit of the header information. The origination information may be altered in each subsequent message. The time that it is sent may be altered in each subsequent message just sufficiently to defeat the software that is used by the ISP as the filter.

And what the legislation that the gentleman from Virginia, Mr. Goodlatte, has offered, which I am pleased to co-sponsor, and what his amendment, which I strongly support, would help to implement, is a means of criminalizing the way in which spammers are now defeating the ISP's software because it would say that you cannot falsify any of the header information. It is a sound approach. It entirely addresses the concern that my friend, to my left, from Virginia—that is where he normally sits, on my left—has raised, and I think it is the right way, in the most minimalist possible fashion, to address the genuine problems associated with spam.

And I thank the gentleman for yielding.

Mr. SCOTT. Reclaiming my time, Mr. Chairman. I think there's a typo at the bottom of Page 1, lines 15 and 16, "such" is mentioned twice, and I think that could probably be taken out by unanimous consent.

I yield back.

Chairman SENSENBRENNER. The question is on——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER.—the adoption of the Goodlatte amendment.

For what purpose does the gentleman from North Carolina seek recognition?

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Mr. Chairman, unless I'm missing something here, we have started with a bill that was designed to protect consumers from annoying spam and have ended up with a bill that really doesn't do anything to help consumers be protected from annoying spam. And while this is a better bill than—probably drafted better, it does less. And this amendment, while it is better than nothing, doesn't give any remedy to the ultimate customer, which is, I mean, we didn't start off necessarily to protect the ISPs. I thought we started off this bill to protect customers.

So, unless I'm missing something here, let me just ask Mr. Goodlatte a question. In the—in the phone context, is it only the phone company that can file a lawsuit against somebody who keeps calling you, and you tell them to quit calling or is it the customer?

Mr. GOODLATTE. I don't know the answer to that. I suspect it may also include the customer. However——

Mr. WATT. Okay. But that's the parallel here. We've given a—your amendment gives a cause of action to the phone company, the service provider, but no cause of action to the customer.

Mr. GOODLATTE. Wood the gentleman yield?

Mr. WATT. I'll yield.

Mr. GOODLATTE. I understand the gentleman's point. However, in no way, shape or form is an Internet service provider to be compared with the phone company which takes a complete hands-off approach to what is going over its lines. The Internet service provider very much right now is very dedicated to controlling the amount of spam that goes over their system, and so we're—they're the best tool, far better than the individual consumer who, for $5, is not going to go to court to protect themselves against spam. But the Internet service provider faces a bigger problem.

Mr. WATT. Then what's the problem with giving an individual customer the right to file a cause of action? I mean, that's the ultimate protection we have. And, you know, we can criminalize this stuff, you're absolutely right. The criminal authorities are going to do absolutely nothing in this context. The ISP may or may not do anything, but the ultimate beneficiary of this bill ought to be the customer, it seems to me. And——

Mr. GOODLATTE. I understand the gentleman's concern, but I do not believe that will be an effective remedy. It's a far more effective remedy to have the ISP——

Mr. WATT. Let me see if I can get this——

Mr. GOODLATTE.—power to protect the consumer.

Mr. WATT. Let me see if I can get this squarely before us, Mr. Chairman. I have an amendment to the Goodlatte amendment at the desk.

Chairman SENSENBRENNER. The gentleman has been recognized to strike the last word. You know, you've got to offer your amendment at the beginning.

The gentleman from California—well, the gentleman from North Carolina still has the time.

Mr. WATT. I ask unanimous consent to offer the amendment.

Chairman SENSENBRENNER. Without objection, and the clerk will report the amendment. The clerk is reporting the Watt amendment.

The CLERK. Amendment offered by Mr. Watt to the Goodlatte amendment to the amendment in the nature of a substitute to H.R. 718. On Page 2, after line 19, insert the following: "(c) Private Right of Action—"

Mr. WATT. Mr. Chairman, I ask unanimous consent the amendment to the amendment be considered——

Chairman SENSENBRENNER. Without objection, so ordered.

[The amendment follows:]

Watt Amendment To Goodlatte Amendment

To H.R. 718

Offered by Mr. Sensenbrenner and Mr. Conyers

On page 2, after line 19, insert the following:

"(c) Private Right of Acton.—

"(1) Actions authorized.—A provider of Internet access service or a customer of such provider, if otherwise permitted by the laws or rules of a court of a State, may bring in an appropriate court of that State, or, if such laws or rules do not so permit, may bring in an appropriate Federal court, an action to recover for actual or statutory damages, as provided in subsection 2, and for costs, as provided in subsection 3.

"(2) Award of Damages.—A person committing a violation of subsection (a) is liable to a provider of Internet access service or a customer of such provider for either—

"(A) the actual damages suffered by the provider of Internet access service; or

"(B) statutory damages, as provided in this paragraph. At any time prior to final judgment in an action, a provider of Internet access service may elect to recover an award of statutory damages for each violation of subsection (a) in the sum of $5 per violation, not to exceed a total of $1 million: *Provided,* That, during any one-year period for which the defendant has transmitted in excess of 20 million unsolicited commercial electronic mail messages, no such limit on liability shall exist.

"(3) Attorneys Fees.—In any action brought under paragraph (1), the court may, in its discretion, require the payment of the costs of such action, and may assess reasonable costs, including reasonable attorneys' fees, against any person found to have committed a violation of subsection (a).".

Chairman SENSENBRENNER. And the gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I hope this came out good enough on the copy because I wrote it in.

Basically, what I'm doing, in two places, one on the first line, on the first line of subparagraph (c), I'm inserting language that would give a customer the same right to a cause of action as the Internet access service provider.

And in paragraph (2), also, subparagraph (2), I'm inserting that same, the same language.

Ms. LOFGREN. Read it, Mel, because you can hardly read it. What is it, "or a customer—"

Mr. WATT. It says, "A provider of Internet access service or a customer of such provider," and that gets inserted on—in that first line, and it gets inserted in the second line of subparagraph (2).

Ms. LOFGREN. Mr. Chairman?

Mr. WATT. Now, maybe—maybe this will never be used, but I, I mean, if I'm a customer, I think all of this is designed for the benefit of the ultimate customer. The Internet was not designed for the ISPs, the—it wasn't, I mean, any more than telephones were designed for the telephone company. Now maybe that's not a good parallel. I acknowledge that there is a difference, but I don't think criminalizing this is going to make a snip of difference in what happens in our life. The criminal law is never going to address this issue, and I don't think Internet service providers are going to be the ultimate people who address this issue. If you don't give the right to the ultimate customer, then I think it's never going to be addressed.

Mr. GOODLATTE. Mr. Chairman?

Chairman SENSENBRENNER. Would the gentleman yield back the balance of his time? Would the gentleman yield back? Mr. Watt?

Mr. WATT. I do, yes, Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Virginia, Mr. Goodlatte, seek recognition?

Mr. GOODLATTE. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, I will have to oppose this amendment because I think it's going to put us back in the direction of the major complaint about the legislation passed out of the Commerce Committee that it could provide a proliferation of litigation. I don't know if it will or not. It provides for attorneys' fees so somebody may think that because it provides for attorneys', even if they only have $5 in damages, that they're going to go ahead and bring a lawsuit for that purpose. I don't think that is necessary.

And I think the clear distinction here between this and the right of action that I don't know, but I assume may exist, under the earlier law related to faxes is that Internet service providers do have a very strong incentive, I do believe they will be in there aggressively combating those who flagrantly abuse this law and who do a multitude of faxes to thousands of people, no one of whom has any real incentive to take the action here, but they clearly do, and I think that we can narrowly provide for a way to give consumers very good protection without being accused of opening up—this up to a proliferation of litigation, and therefore I have to oppose the amendment to the amendment.

Ms. LOFGREN. Would the gentleman yield?

Mr. GOODLATTE. I yield to the gentlewoman.

Ms. LOFGREN. Thank you for yielding.

I agree that this amendment offered by my esteemed colleague is one that I cannot support, and it's not because I don't care about consumers versus ISPs, it's we should not legislate where there is

no need for passing laws. And right now the technology is more efficient to protect us than a Federal law. I mean, there are free sites that if you e-mail the offense—the offending spam to them for free, they will block all further spam.

I mean, there's—we don't need to pass a law. We don't need to clog up courts because the technology is way ahead of what we're doing here, and therefore I, although I appreciate the motivation of the amendment, I don't think it's an appropriate thing to do, and I still have reservations about the underlying Goodlatte amendment, at least as to 2(B).

But I yield back, and I thank the gentleman for yielding.

Mr. ISSA. Mr. Chairman?

Mr. GOODLATTE. I yield to the gentleman from California.

Mr. ISSA. I'll make it very quick. I see that there is no reason, again, for this amendment to Mr. Goodlatte's amendment. However, trying to kill two birds with one stone, for my colleagues, please understand from my experience specifically in this industry that what Mr. Goodlatte is trying to do here is to provide a legal remedy for that which cannot easily be technologically caught, and that is extremely important because this is a tool that the ISPs do not have today, and that is the proliferation of "sneaky" mail, if you will, this fraudulent mail.

By giving the ISPs the ability, on behalf of their customers, to provide this type of protection for themselves and their paying customers, we do what we really need to do, while both the ISP and the individual customer, with Outlook and other e-mail-receiving devices, have the ability to screen those pieces of mail which have a consistent address after the first time.

So, between the ISP and the consumer, we have tremendous power in the technology today, and I recommend that you look favorably on the Goodlatte amendment because it takes the one piece of the puzzle that doesn't exist today, it closes that loophole, and I believe we will all benefit very quickly from this change in the power of the ISP. And then if it doesn't work completely, I will be the first to come back to this body and say we have to do more. But I believe this will take care of 99 percent.

Ms. JACKSON LEE. Would the gentleman yield? Would the gentleman yield?

Mr. ISSA. I'd be happy to yield to the gentlewoman from Texas.

Ms. JACKSON LEE. Let me, first of all, I support your amendment, Mr. Goodlatte, and taking the gentleman's comments, the prior speaker's comments, Issa, comments about the value of this particular amendment to the ISP community, why not give the same limited leverage, if you will, to a customer, as Mr. Watt's amendment has offered?

And I guess I will ask the question and yield back to you. Does your amendment do anything, and this collective management amendment, do anything on the issue of pornography? Because when the witnesses were before on the other bill, the Wilson bill, they were talking about that. When I say "the witnesses," the members who were presenting their bills, they were talking about that. Can you help me on both the question as to why we wouldn't want to give the same privilege to the customer, and also my last point is whether or not this is a criminal action. I heard Mr. Bou-

cher say that, and I don't see it. It looks like a private right of action.

I yield back to the gentleman.

Mr. GOODLATTE. Well, my time has expired. If the gentleman would yield—if the chairman would yield me an additional minute.

Ms. JACKSON LEE. Can I yield him an additional minute?

Chairman SENSENBRENNER. Without objection, the gentleman is recognized for an additional minute.

Mr. GOODLATTE. I thank the chairman.

Ms. JACKSON LEE. I yield back. Thank you, Mr. Goodlatte.

Mr. GOODLATTE. In response to the gentleman, yes, my amendment will be a very effective tool to combat pornography on the Internet because it will, that is one of the prime violators of this false identification that is used for people to spam other people. You'll hear some friends of yours or constituents say, "Well, I got somebody who I thought was a friend of mine sent me pornographic material over the Internet." Well, they didn't send it to you. Someone stole their identification and sent it to them, and this is a very serious problem. The Internet service providers want this amendment. They strongly support this amendment in order to be able to combat that.

My reservation about going a step further of giving it to the individual consumer is that the criticism we have faced is that we're going to provide for a proliferation of litigation, particularly where we allow for attorneys' fees in this amendment. And, therefore, people who have a $5 statutory damage I don't think ought to be bringing an action like that. Let me consoli—they can also—they can complain to the Internet service provider. They can also complain to the various Government enforcement agencies.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Berman, seek recognition?

Mr. BERMAN. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. Yes. The gentleman from Virginia is persuading of the wisdom of his amendment for two reasons: One is there is actual damages to the Internet service provider when the volume of mail as a result of this kind of false header, spam mail causes the server to crash, but then the ISP can also be sort of a surrogate plaintiff for all the annoyances and inconveniences and other damages that the individual consumers face.

It's hard for me to quite understand why giving the individual consumer the right of action automatically results in proliferation. You seem to think it is the attorneys' fees part of that that makes that so. But the one flaw in this is you have two provisions in here, actual damages and statutory damages. Actual damages that the ISP suffers they collect for, if it's not greater than the statutory damages. Now, as surrogate, they collect what could be substantial amounts of funds from the offender on behalf of the consumer, but the provision to return it to the consumer isn't included in this amendment.

So it almost—this becomes a new revenue source for them for damages they didn't suffer, the consumer suffered.

Mr. GOODLATTE. If the gentleman would yield, that problem has been anticipated. That's why we put a, I think, a low cap on this. It's comparable to the low cap that is on the other previous bill.

Mr. BERMAN. Oh, I see.

Mr. GOODLATTE. And the hope is that it will be a deterrent rather than an incentive to do that.

Mr. FRANK. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. FRANK. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. FRANK. To strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FRANK. I want to speak in favor of the gentleman's from North Carolina's amendment. The gentlewoman from California argued that the gentleman from North Carolina's amendment is unnecessary because of technology, and I think she acknowledged her uncertainty about her feelings about the underlying amendment. I would think her argument would be, if it's technologically unnecessary for the Watt amendment, then the Goodlatte amendment is also technologically unnecessary, and I appreciate the consistency with which she stated her point. But it does seem to me it applies with equal force, both to the underlying amendment and the secondary amendment.

And I'm all for the secondary amendment. I think we're getting kind of "big brotherly" here. The notion is that the consumer need not worry. Her independent service provider will take care of her, and I think people may have developed this kind of warm relationship with their ISP, and they may be prepared to designate the ISP as their next friend and have the ISP be the defender of their rights. But in those cases where people aren't prepared to yield their rights to the ISP, I think they ought to be able to retain them.

And, also, it seems to me there are a couple of points here. One, the gentleman from Virginia correctly said the ISP can step in when this becomes a flagrant abuse. Well, what's a flagrant abuse as an ISP as a whole may be a higher threshold than a flagrant abuse to an individual group of individuals. It may well be that particular individuals are targeted by particular marketing operations, but this doesn't rise to the level of interference with the ISP.

It is possible for an individual to be given serious problems with an excess of unwanted commercial e-mail long before it's going to crash the system. And so it does seem to me that the logic of giving this right of action to protect, with all of the safeguards that the gentleman said. The gentleman from North Carolina's amendment plugs into the gentleman from Virginia's scheme. So the caps, and the low level, the $5, that's all in there.

I just think that there is really very little argument for the notion that the interest of the individual consumers and the ISP will be so substantially identical that they can be merged and that the individual can have that right given to the ISP.

There is also the case that there may be some other commercial interests involved between the ISP and some of the marketers. Maybe there are other factors here. But the general point is I think the gentleman from Virginia has a very thoughtful scheme. It is a reasonable way to go.

The flaw I think is that it assumes that there is, as I said, an identity or a virtual identity between the individual consumer and the ISP. And some of the arguments he gave about why the ISP will jump in, and clearly they would, don't apply. There may be consumer problems that don't reach that level. So I think that the gentleman from North Carolina's amendment is a very reasonable one, and I intend to support it.

Ms. HART. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Pennsylvania, Ms. Hart, seek recognition?

Ms. HART. Mr. Chairman, to address the issue that was raised by——

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. HART. Thank you, Mr. Chairman. I move to strike the last word.

In response to the issue raise by Ms. Jackson Lee regarding none of these amendments addressing the issue that was brought up at our hearing regarding pornography, I do have an amendment at the desk to offer that may address her concerns.

I yield back the balance of my time.

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. To strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. Let me, the, as I indicated, I am supporting Mr. Goodlatte's amendment, but I'm also supporting Mr. Watt's amendment. What I would suggest to Mr. Goodlatte is the same attributes attributed to the ISP community, which is that they would not be necessarily litigious, unnecessarily; meaning just to litigate. They have a cause. And I would say to you that users likewise, consumers, will pose or be in the same category, that their real concern is to be able to use the Internet unfettered and to not be attacked, if you will, by a proliferation of unnecessary or unsolicited intrusions.

I would offer to say that this makes your amendment better, if you can respond to their concerns, as well, and I just looked at my colleague, Mr. Weiner, and he turned and said class action. He'll probably speak on it himself. But the point is there are a variety of ways that you can handle this. I think that we are doing a much better task of responding to the concerns if we allow the opportunity for the consumer to likewise press their cause along with the ISP community.

The other point is I was not clear—I asked this question before—this is a private right of action, as I understand it. This is not a criminal action. And if anyone has a response to that, and I heard my colleague from Virginia, Mr. Boucher, I thought, say criminal. I don't want to put words in his mouth, but this looks like a private

action amendment versus criminal charges. And if anyone has a basis of correcting that, I will——

Mr. WEINER. The base bill——

Ms. JACKSON LEE. I'm sorry. I'll yield to Mr. Weiner.

Mr. WEINER. I think the reference was that the base bill has a criminal charge.

Ms. JACKSON LEE. The base bill. Thank you very much for that clarification.

In any event, let me just say that I think that the amendment should include protections for consumers, as well, and I would support both amendments.

I yield back.

Mr. WEINER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York, Mr. Weiner, seek recognition?

Mr. WEINER. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WEINER. Thank you, Mr. Chairman.

What troubles me in this debate about the Goodlatte amendment is we seem to be misunderstanding who the victim of spamming is and who we intended to be addressed when the original, when H.R. 718 was considered in this committee. The victim is the recipient of the e-mail. The victim who has very little recourse that I think we're trying to address with all of the legislation is that person.

I don't dispute Mr. Goodlatte's point that the ISP has the incentive. I would argue they also have the tools to defend themselves. There has been, several members here have talked about the technological advantage that have allowed ISPs to foil spammers that they wanted to stop. This seems to me the ISPs have a technical problem that is going to find, in eventuality, a technical solution.

Mr. Goodlatte has been forceful, and I think very clear-minded, in this committee in reminding us that very often technical problems need technical solutions. The victim of spamming is the individual. And I have to tell you my concern about the Goodlatte amendment is that, frankly, the idea that this is going to weed out fraud I think might be oversold. I think it's going to allow ISPs to harass its customers that it doesn't like.

Materially false or misleading, that's not a very narrow standard. If someone puts bob at mailhouse.com or joe at mailhouse.com, and there's no one named Joe there or Joe Smith, and there's no one named Joe Smith or administrator, I don't think that this necessarily solves the problem that we seek to.

I'm concerned that we're trying, with the Goodlatte amendment, to give the ISPs something that they should be doing technologically, and all its indications are that they are. The victims of spamming is the individual who gets spammed. And I think that if you're going to give some civil course of action, there is no—there hasn't been any argument from the other side, from the opponents of the amendment to the amendment, about why it is they shouldn't have that right.

You can say, well, that there's a greater incentive on the ISPs to go out and do it. Well, perhaps that's right. It's not really their—it's not really their problem to solve, and if it is, they're the ones

that have the technology to be able to solve the problem, and I expect they will.

Mr. CANNON. Would the gentleman yield?

Mr. WEINER. Certainly.

Mr. CANNON. May I just point out I think, referring back to the gentlewoman from California when she said that's the reason we have a delete button, people on the Internet are not victims. This is not a matter of victimization. Whatever your conclusions about this amendment, I don't think we need to be thinking in terms of people whom we've empowered with technology as being victims.

Thank you.

Mr. WEINER. Oh, I mean, obviously there's got to be a victim and a crime, and we have a bill here that—crime——

Mr. CANNON. This bill does not have crime. That's the underlying bill, as you pointed out just a moment ago.

Mr. WEINER. I don't know. It says here in the committee report that the first spamming offense is punishable by a fine up to—of a fine up to $100,000 if death does not result.

I mean, spamming is pretty bad. It rarely results in death.

Mr. WATT. Will the gentleman yield?

Mr. WEINER. The second offense can trigger a fine, imprisonment of not more than 1 year or both.

It sounds to me, Mr. Cannon, that that is a crime.

I would be glad to yield.

Mr. WATT. I would say to the gentleman that the underlying civil action is a civil action for the same misconduct that the underlying bill covers. It doesn't cover anything beyond the underlying bill. So this is not a generalized cause of action just because you get spammed. This is a cause of action for the misconduct that occurs under the underlying bill for which you have a criminal penalty, and now you turn around and say that this criminal activity doesn't even justify a civil cause of action.

Mr. WEINER. If I could just reclaim my time, very briefly. Another thing that's complex about this is materially false and misleading to whom? To the recipient? The ISP is then going to step in, and then they're going to bring a case to court saying, "Well, the ISP found it misleading," or are they going to have then bring in the recipients of the spam and get them individually on the stand and say, "Well, did you find this misleading? Was this materially false, as far as you're concerned?"

The ISP is not the victim here. So to give them the right to go to court when they have other tools at their disposal; i.e., a program which manages to stop this program.

I yield back my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from North Carolina, Mr. Watt to the amendment offered by the gentleman from Virginia, Mr. Goodlatte.

Those in favor will signify by saying aye.

Opposed, no.

The nos appear to have it.

Mr. WATT. Could we have a——

Chairman SENSENBRENNER. A recorded vote is ordered.

This in favor of the Watt amendment will, as your names are called, vote aye. Those opposed, will be vote no, and the clerk will call the roll.

The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Gekas?
Mr. GEKAS. No.
The CLERK. Mr. Gekas, no. Mr. Coble?
Mr. COBLE. No.
The CLERK. Mr. Coble, no. Mr. Smith?
Mr. SMITH. No.
The CLERK. Mr. Smith, no. Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no. Mr. Chabot?
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no. Mr. Barr?
[No response.]
The CLERK. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Hutchinson?
Mr. HUTCHINSON. No.
The CLERK. Mr. Hutchinson, no. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no. Mr. Graham?
[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Scarborough?
[No response.]
The CLERK. Mr. Hostettler?
[No response.]
The CLERK. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Ms. Hart?
Ms. HART. No.
The CLERK. Ms. Hart, no. Mr. Flake?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Frank?
Mr. FRANK. Aye.
The CLERK. Mr. Frank, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
[No response.]
The CLERK. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?

Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
Ms. LOFGREN. No.
The CLERK. I'm sorry?
Ms. LOFGREN. I said no.
The CLERK. Oh, I'm sorry. Ms. Lofgren, no.
Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional members in the room who wish to cast/change their vote?
The gentleman from Alabama?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Chairman SENSENBRENNER. Anybody else? If not, the clerk will report.
The gentleman from Arizona, Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Chairman SENSENBRENNER. The gentleman from Georgia, Mr. Barr?
Mr. BARR. No.
The CLERK. Mr. Barr, no.
Mr. Chairman, there are 10 ayes and 17 nays.
Chairman SENSENBRENNER. And the amendment to the amendment is not agreed to.
Ms. LOFGREN. Mr. Chairman?
Chairman SENSENBRENNER. The gentlewoman from California, for what purpose do you seek recognition?
Ms. LOFGREN. I have an amendment to the amendment at the desk.
Chairman SENSENBRENNER. The clerk will report the amendment to the amendment.
Ms. LOFGREN. I ask unanimous consent that the amendment be considered as read.
Chairman SENSENBRENNER. Well, let's take a look. The clerk will report——

The CLERK. Amendment offered by Ms. Lofgren to the amendment offered by Mr. Goodlatte to the amendment in the nature of a substitute to H.R. 718.

In Subsection (c)(2)——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

AMENDMENT OFFERED BY Ms. LOFREN

TO THE AMENDMENT OFFERED BY MR. GOODLATTE

In subsection (c)(2) of the matter proposed to be inserted by the Goodlatte amendment, strike subparagraph (B).

add to (c)(1) line one after "service" "or email recipient"

add to (2) line 2 after service "or email recipient"

add to (2)(A) line 2 after "service "email recipient"

Chairman SENSENBRENNER. And the gentlewoman from California will be recognized for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

In looking at the underlying Goodlatte amendment, I guess I'm becoming convinced that there's value in providing a very clear cause of action for an ISP that has been damaged through the volume of e-mails. And I mentioned earlier an instance, it wasn't an ISP issue, but it was a situation akin to this, where a company in

my county proceeded on a trespass cause of action successfully because the intrusion on its system actually caused damage to their servers, and I think that that is fair enough. But it's not necessarily clear that that cause of action is provided for in every State, and certainly under Federal law. And so I think there is value in providing the clear protection for someone damaged in that matter.

However, I am not convinced that Section (2)(B), which I would strike under this amendment to the amendment, is necessary. It seems to me that it would provide the opportunity for individuals who did not suffer much damage to go in and recover large amounts of money. Now, I understand there's a million-dollar cap, but to me half a million dollars is real money too. I mean, that's a lot of money, at least in my household. And so I'm not sure that it's—that's necessary.

I also think, and I think this would be difficult to prove, but there was a lot of discussion about providing rights for the recipients of e-mail, that they are the ones who really should be the subject of our concern. And so in my amendment, I would suggest that we, in addition to the ISPs who could bring action, we add e-mail recipients in Section (c)(1) and allow individuals, as well as ISPs, to go to court and prove and recover their actual damages, not a statutory scheme.

Now I'm not sure how an individual is going to prove that they had an actual damage from spam, but if they can do so, more power to them. I think that this proposal would really codify the trespass type of cause of action, would allow for ISPs to correct their actual damages from attacks or really service access problems, and would avoid the concern that I have, which is that we are legislating in an area that we don't need to legislate, where the technology will provide more protection than the Federal law.

I don't think that we ought to be passing laws unnecessarily in the area of the Internet, and I hope that the——

Mr. CONYERS. Would the gentlelady yield?

Ms. LOFGREN. I would certainly yield to the gentleman.

Mr. CONYERS. Well, I think that this is a more perfect solution really. I've been concerned about the ISPs getting away with a million dollars in damage awards. These guys have good lawyers too. So let's, let's turn it back to the e-mail user, to the person that got spammed, and I think you'd do both of these in a very commendable way. I'm going to support the amendment.

Ms. LOFGREN. Thank you. Mr. Chairman——

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The time belongs to the gentlewoman from California.

Ms. LOFGREN. Could I yield to Mr. Goodlatte, who I think is——

Mr. GOODLATTE. I seek my own time.

Ms. LOFGREN. All right. I will yield to the gentleman.

Mr. NADLER. Would the gentlelady yield?

Ms. LOFGREN. Yes.

Mr. NADLER. As I read your amendment, you do partially what Mr. Scott wanted to do—I'm sorry, what Mr. Watt wanted to do. I don't know why I did that—what Mr. Watt wanted to do. But then you eliminate the actual damages, I mean, the statutory damages.

Ms. LOFGREN. Correct.

Mr. NADLER. And you limit it to actual damages. Can you tell me under this, if the bill were amended as you want, what the measure of damages from a spam is? How do you measure those damages?

Ms. LOFGREN. Well, that's why I'm saying I'm not sure how an individual proves up actual damage from receiving an e-mail that they can delete, but I will tell you how an ISP would prove actual damages, which is the volume itself causes their computers to crash, requires them to go out and purchase ten more servers because they can't handle the volume of unwanted e-mail. That's the kind of case that's been put together on the trespass cases, and I think that's fair and legitimate.

Mr. NADLER. Can I ask you a further question?

Ms. LOFGREN. Certainly.

Mr. NADLER. If the bill were banning unsought e-mail, I understand your measure of damages for the ISP, but is banning——

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

Mr. NADLER. Mr. Chairman, could I ask unanimous consent for one additional minute?

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. Thank you.

But the bill bans unsolicited fraudulent e-mail. How would the—and the measure of damages is they have to buy an extra, the mach—the computer or whatever, how would they know when the headers are fraudulent?

Ms. LOFGREN. Well, the Goodlatte amendment to the amendment I think creates—it goes beyond the underlying bill. But I would note that the underlying amendment put together by Mr. Conyers and the chairman really relates to fraudulent headers, not to fraudulent content. And I agree with that because just because something's on the Internet doesn't make it exempt from the underlying fraud statutes already in the criminal code. We don't need to create another criminal code for the Internet.

I believe my time has expired.

Chairman SENSENBRENNER. The gentlewoman's time has once again expired.

The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. Mr. Chairman, I must reluctantly oppose this amendment. I have great respect for the gentlewoman, but I think the gentleman from New York's point is exactly the case here, and that is that by removing the statutory damages, we're taking out the provision that is based upon the precedent of the 1991 law that gives the Internet service provider the incentive to take an action here in the cases that don't involve circumstances where their system crashes, and they can actually show some significant damage.

But in those cases where, for example, you have the pornographic spammer that we've been talking about earlier, we are effectively taking away the incentive for them to act in response to the complaints of their customers to take a collective action. We're

not expanding the number of cases of litigation which she also does by adding the individual recipient in here. But then if they can't show any actual damages under the law, they're not going to take an action and neither is the Internet service provider.

So I think this would have the contrary effect of what many on the other side of the aisle spoke about earlier of wanting to have some action taken. They wanted to go a step further than I wanted to go, and many others wanted to go, and actually give that statutory damage to the individual, as well as to the ISP. But now we're going to go the opposite direction and not have any incentive for any action to be taken, and we will not have this added tool, which is based upon a law, a 1991 law, that has worked well to have a strong disincentive.

The gentlewoman is right, a million dollars can be considered a lot of money. The people we want to consider it a lot of money are these fraudulent spammers. We want them to say, "Well, I'm not going to risk a million dollars, so I'm not going to do this activity any more," and that's why I must oppose the amendment.

Ms. LOFGREN. Would the gentleman yield for——

Mr. GOODLATTE. I would be happy to yield.

Ms. LOFGREN. As the gentleman knows, because we've had an opportunity to discuss this outside of the public hearing, I do believe that there is a legitimate issue relative to sexually explicit e-mails that I believe should be tagged so people can be alert, so that they can delete them and not open them. But I think that the proper remedy for that kind of damage or assault is to go directly towards a requirement of labeling material that's unsuitable for minors rather than creating a statutory scheme.

Mr. GOODLATTE. Reclaiming my time. I respect that, but we've had several court challenges on our ability to define exactly what that is that must be labeled. Here we don't get into that issue, and there are plenty of other types of fraudulent, false, misleading spam, where headers are stolen and so on, that doesn't involve pornography, that consumers would also want to have addressed.

Mr. FRANK. Would the gentleman yield?

Mr. GOODLATTE. I've had the frustration—I will in just a second. I've had the frustration myself of trying to unsubscribe when I've gotten unsolicited commercial e-mail and have found that there's no way to find who it was that sent it to me because they used a false e-mail address, and this tool will address that.

I yield to the gentleman from Massachusetts.

Mr. FRANK. I thank the gentleman.

The question of pornography has come up or sexually oriented mail, and the gentlewoman referred to having markings on it, and I know we're going to get an amendment on that. I just want to point out, and people said, "Well, if it's got the marking on it, you can then delete it."

I would also point out, for those people who find that they're getting more e-mail than they can read, the marking might also be interpreted for them as a reason to open it. So we ought to be very clear that the markings on the pornography can go both ways. There might be a signal that this is something you want to read or there might be a signal it's something you don't want to read, it seems to me, that's somewhat content neutral.

Chairman SENSENBRENNER. Would the gentleman yield back?

Mr. GOODLATTE. I yield back. Thank you.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from North Carolina seek recognition?

Mr. WATT. Thank you, Mr. Chairman. First of all, I would like to——

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I'd like to request a division of the——

Chairman SENSENBRENNER. How does the gentleman propose to divide the amendment?

Mr. WATT. I wish to divide the first part, the striking of subparagraph (B) from the rest of the amendment, and I obviously would speak in favor of the rest of the amendment. It, more artfully, does——

Chairman SENSENBRENNER. Okay. The question will be divided in the amendment in front of the members, the first paragraph which begins, "In subsection (2)," through the end of (B), closed paren, period, is the first part that will be voted on, and then the rest of the Lofgren amendment will be the second part that's voted on.

And the gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I will be brief.

I've already spoken on the second part. I think Ms. Lofgren's wording is much more articulate than my wording was in the prior amendment. It is essentially the same concept, however.

But once you, if we were to adopt the second part, basically, you would—the first part would eviscerate whatever cause of action there would be because the amount of effort it would take—well, I can argue both sides.

Mr. CONYERS. Would the gentleman yield?

Mr. WATT. Let me argue both sides, as a good lawyer does. I could argue, number one, that it might increase the amount of litigation because, basically, any kind of conceivable harm could be the basis of a cause of action, but I think it's more likely to wipe out all causes of action because the harm to any individual would be so de minimus that it would be virtually not in an individual's interests to file a cause of action.

Mr. CONYERS. Would the good lawyer yield?

Mr. WATT. Yes. Yes, sir.

Mr. CONYERS. Did the author seek a division?

Mr. WATT. Yes.

Mr. CONYERS. She did.

Ms. LOFGREN. No, I didn't.

Mr. WATT. I did.

Mr. CONYERS. Oh, you did.

Mr. WATT. Yes.

Mr. CONYERS. But the author of the amendment that you're dividing, did she seek an amendment—a division?

Mr. WATT. No.

Mr. CONYERS. Oh, she didn't. Okay. I thank the good lawyer.

Mr. WATT. I yield to Ms. Lofgren.

Ms. LOFGREN. I would just note that unless we strike the statutory damage section, I would oppose the rest of the amendment be-

cause the whole point I'm trying to make is that if there—I don't want a lot of litigation about e-mail that you can delete. I don't think we ought to be creating a whole Federal statutory scheme for a minor annoyance.

On the other hand, if you can prove that you have actually been damaged, I think that having a clear cause of action, both for individuals, as well as ISPs, is appropriate. And so I think each member, my understanding of the rules has a right under our rules to divide the question.

Chairman SENSENBRENNER. The chair has already ruled that the question is divisible——

Ms. LOFGREN. Right.

Chairman SENSENBRENNER. Because any member may demand a division of the question if there are two separate and distinct propositions. And in your amendment, there are two separate and distinct propositions. One is to strike the statutory damage and remedy and the other is to include recipients of e-mail as parties who have standing to bring actions in the court.

Mr. WATT. Mr. Chairman, may I reclaim my time just briefly?

Mr. FRANK. Parliamentary inquiry.

Chairman SENSENBRENNER. The gentleman has got the time, and you cannot take a gentleman from the floor with a parliamentary inquiry. The gentleman from North Carolina may proceed.

Mr. FRANK. Will the gentleman yield for a parliamentary inquiry?

Mr. WATT. I'll yield to the gentleman.

Mr. FRANK. I wonder whether it might resolve this situation if, by unanimous consent, we retain the division, but vote it in reverse order on the two propositions, so that the second proposition was voted on first.

Chairman SENSENBRENNER. Without objection, proposition two will be voted on——

Ms. LOFGREN. I object.

Chairman SENSENBRENNER. Objection is heard, and the gentleman from North Carolina——

Mr. WATT. Mr. Chairman, let me reclaim my time.

Chairman SENSENBRENNER. You have some time left.

Mr. WATT. First of all, they say the definition of a good compromise is one that is uncomfortable for both sides, and maybe Ms. Lofgren has gotten us to a point where we are uncomfortable with both sides. So maybe we ought to vote this up or down.

I think the private cause of action is worth having in the bill, even though—even subject to striking out the statutory damages. So I want to ask unanimous consent to withdraw my request for a division of the question.

Chairman SENSENBRENNER. Without objection, so ordered.

Does anyone else demand a division of the question?

Going once, going twice.

[Laughter.]

Chairman SENSENBRENNER. If not, the question is on the adoption of the Lofgren amendment, in total, to the Goodlatte amendment.

Those in favor will say aye.

Opposed, no.

The nos appear to have it.

Ms. LOFGREN. Mr. Chairman, I'd ask a recall vote.

Chairman SENSENBRENNER. The rollcall will be ordered. The question is shall the amendment offered by the gentlewoman from California, Ms. Lofgren, to the amendment offered by the gentleman from Virginia, Mr. Goodlatte, be adopted?

Those in favor will signify, as your names are called, by saying aye; those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. No.

The CLERK. Mr. Gekas, no. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Barr?

Mr. BARR. No.

The CLERK. Mr. Barr, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Hutchinson?

Mr. HUTCHINSON. No.

The CLERK. Mr. Hutchinson, no. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Graham?

[No response.]

The CLERK. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Scarborough?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

[No response.]

The CLERK. Ms. Hart?

Ms. HART. No.

The CLERK. Ms. Hart, no. Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no. Mr. Conyers?

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers, aye. Mr. Frank?

Mr. FRANK. Aye.

The CLERK. Mr. Frank, aye. Mr. Berman?

Mr. BERMAN. Aye.

The CLERK. Mr. Berman, aye. Mr. Boucher?

[No response.]

The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
[No response.]
The CLERK. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional members in the room who desire to cast their vote or change their vote?
The gentleman from California?
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly, no.
Chairman SENSENBRENNER. Anybody else who wishes to cast or change their vote?
[No response.]
Chairman SENSENBRENNER. If not, the clerk will report.
The CLERK. Mr. Chairman, there are 12 ayes and 16 nays.
Chairman SENSENBRENNER. And the amendment is not agreed to.
The question now is on the adoption of the Goodlatte amendment to the amendment in the nature of a substitute.
Those in favor will say aye.
Opposed, no.
The ayes appear to have it. The ayes have it, and the Goodlatte amendment is adopted.
Are there further amendments? The gentlewoman from Pennsylvania?
Ms. HART. Thank you, Mr. Chairman. I have an amendment at the desk.
Chairman SENSENBRENNER. The clerk will report the amendment.
Ms. HART. Mr. Chairman, I move that the——
Chairman SENSENBRENNER. Well, let's let the clerk start passing the amendment out before members waive their rights.
Without objection, the amendment is considered as read.

[The amendment follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 718 OFFERED BY MS. HART

Page 2, line 19, strike the close quotation mark and the period that follows.

Page 2, after line 19, insert the following:

1 **"§ 622. Warning labels for electronic mail containing**
2 **advertisements harmful to minors**
3 "(a)(1) The Attorney General shall prescribe marks
4 or notices to be included in electronic mail that contains
5 a sexually oriented advertisement in order to inform the
6 recipient of that fact.
7 "(2) Whoever, in any electronic mail that is carried
8 on an instrumentality in or affecting interstate or foreign
9 commerce, knowingly includes a sexually oriented adver-
10 tisement but does not include in such electronic mail the
11 marks or notices prescribed by the Attorney General under
12 this section shall be fined under this title or imprisoned
13 not more than one year, or both.
14 "(b) As used in this section, the term 'sexually ori-
15 ented advertisement' means any advertisement that de-
16 picts, in actual or simulated form, or explicitly describes,
17 in a predominantly sexual context, human genitalia, any
18 act of natural or unnatural sexual intercourse, any act of

1 sadism or masochism, or any other erotic subject directly
2 related to the foregoing, but material otherwise within the
3 definition of this subsection shall be deemed not to con-
4 stitute a sexually oriented advertisement if it constitutes
5 only a small and insignificant part of the whole, the re-
6 mainder of which is not primarily devoted to sexual mat-
7 ters."

Insert at the end of the table of sections in the matterial following line 8 on the first page the following new item:

"622. Warning labels for electronic mail containing matter harmful to minors.".

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania is recognized for 5 minutes.

Ms. HART. Thank you, Mr. Chairman.

As I discussed briefly earlier, we did have a concern raised at the hearing, as well as having been raised today, about pornographic and sexually explicit materials being sent via e-mail advertising. I've also heard similar complaints from my constituents, both now as a Member of Congress and also as I served in the Pennsylvania State Senate. I've also discussed with other members here in this body that this is an issue, and we ought to address it. I think it's appropriate to address it in this bill.

My amendment is based on the same principles as legislation that we passed in Pennsylvania, basically, to label such e-mails. It is modeled after similar laws, postal laws, that require sexually oriented material to be labeled when it runs through the regular mail system.

It accomplishes several things. The amendment requires the Attorney General to create an identifying mark in the e-mail, to alert individuals to e-mails containing such sexually oriented material.

It also requires any individual sending such e-mail to have the proper identification such as has been discussed in Mr. Goodlatte's amendment, otherwise that sender would face tough penalties.

We also, in the amendment, define sexually oriented material in a manner that has already been found constitutional. It's in the current postal law, Title 39. The amendment, I believe, Mr. Chairman, is a common-sense solution to a serious problem. It is based

on, as I mentioned, Title 39, where the postmaster may prescribe that identifying marks be placed on mail that include sexually oriented material.

The Supreme Court upheld this law as constitutional in the case of Rowan v. United States Postal Department and a decision was followed in the case of Pent R. Books v. United States Postal Department. These laws have been effective in curbing the amount of sexually oriented material. I think these laws have been on the books for about 30 years. Basically, they cite the right of the receiver of mail not to be forced to receive sexually oriented advertising, sexually oriented materials unsolicited.

I believe these principles can be effective in giving families control over the type of information that is sent to their e-mail accounts, the same way now they currently have control over what's sent to their mail boxes. Individuals can be alerted before opening these e-mails containing sexually oriented material, as was referred to by the gentleman from Massachusetts, but also I think it's important that they can also use currently available filtering software to eliminate these ads so that their children can be protected.

Currently, these programs are available and can prevent families from accessing pornographic sites, but e-mail advertisements containing pornographic material are often missed by that type of filtering software.

I would encourage my colleagues to support the amendment.

Ms. LOFGREN. Would the gentlelady yield for a question?

Ms. HART. Yes, Mr. Chairman.

Ms. LOFGREN. I am very interested in doing something in this area, and in fact have talked to several members on the other side of the aisle about bringing forward a separate bill instead of an amendment.

The question I have is whether the definition on line 14 on the first page has been tested in court. Is that part of existing law and is it sufficiently unvague to avoid constitutional defects, in terms of court decisions, do you know?

Chairman SENSENBRENNER. The answer to her question is it is taken right out of the Postal Statute, which is 39 US Code 3010.

Ms. LOFGREN. Thank you very much then. I am happy then to support this amendment, noting that, unfortunately, Mr. Frank is correct, 16-year-old boys all over the country will be looking for the marks, but there is an opportunity at least to alert people, and I yield back.

Mr. WEINER. Will the gentlelady yield? Will the gentlelady yield?

Ms. LOFGREN. The time is to Congresswoman Hart.

Ms. HART. I will yield.

Mr. WEINER. Does the Attorney General or the Justice Department have a position on your amendment?

Ms. HART. No. We have actually shared this with the Attorney General, but we have not—I actually am not married to the idea of the Attorney General actually handling this, although I think it's the best idea, it's the most direct.

Mr. WEINER. Is there any—is there any reason why this couldn't be done under state law?

Ms. HART. Pardon me?

Mr. WEINER. Is there any reason why it couldn't be done under state law? Is there a problem inherent in the Internet that makes that a difficult thing to do?

Ms. HART. Well, we actually—it's a problem, obviously, with enforcement if you handle it another way. You're just going to have it so limited and so difficult, and spotty enforcement. We'd actually passed a state law in Pennsylvania that contained basically the same language, but, however, obviously, it doesn't cover enough——

Ms. LOFGREN. Mr. Chairman, could you give the gentlelady an additional 1 minute?

Ms. HART. I need to respond, first of all, to Ms. Lofgren——

Chairman SENSENBRENNER. Does the gentlelady want an additional 2 minutes or not?

Ms. HART. Please. Yeah, Ms. Lofgren suggested that——

Chairman SENSENBRENNER. Does the gentlelady want an additional 2 minutes because her time is expired?

Ms. HART. Yes, Mr. Chairman, thank you.

Chairman SENSENBRENNER. Without objection, the gentlelady is recognized for two additional minutes.

Ms. HART. A comment was made regarding labeling that would direct people to open such e-mails, but again, if there's a minor living in the parents' home, those parents should have control over their Internet, and would be able to use filtering software to filter out such advertising, because of the label. So they'd know to expect the label and be able to filter out that advertising——

Ms. LOFGREN. Would the gentlelady yield? In an ideal world, I would love to believe that's true, but as the mother of a 16-year-old son, who is a better programmer than I, those ideals don't always work out that way.

But I do believe that this is a step in the right direction. Support——

Ms. JACKSON LEE. Would the gentlelady yield?

Ms. LOFGREN. Sure.

Ms. JACKSON LEE. I raised a question earlier, and I appreciate the amendment, and wanted to—I'm going to support the amendment because I think this whole idea of intrusive e-mail that can be characterized as pornographic should be addressed, even though we want parents to work on it as well.

I would hope the gentlelady would be open—I'd hope the gentlelady would be open—it looks like this amendment may be moving toward passage—to considering whether or not the Attorney General is the best arbiter or decider of the marks, and that we could work together on that. But in any event, because I would want it to be done as expeditiously as possible, but in any event, I think the idea of curbing this electronic mail is a very good one, and I yield back.

Chairman SENSENBRENNER. The time of the gentlewoman is once again expired. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, with two boys not yet 16, I come to this with a great deal of interest.

Chairman SENSENBRENNER. And the gentleman is recognized for 5 minutes to express his interest.

Mr. CONYERS. At least 5 minutes. Okay. There's probably no more complicated or difficult area in law than obscenity, and so I

congratulate the gentlelady from Pennsylvania, but I want to remind her that in 1989 the Supreme Court struck down the FCC's dial-a-porn regulations. That Communication Decency Act in 1996 to regulate obscenity on the Internet, was struck down, again by the Supreme Court. The law successor, the Child Online Protection Act from two congresses ago, is currently being challenged in the Court as we speak. At the very least, we need to examine this, work on it together, probably have hearings. I want to do this thing with—I'm very anxious to do this, and I'm sympathetic to the good purposes behind it, and maybe if we just want to make everybody know that we're all good guys working on this, we can do it anyway.

But this amendment is probably—more than probably at this reading, likely to violate the First Amendment. And I'd be happy to work on this. Since this is commercial speech, the operative standard in the court is the Central Hudson test, saying that there must be a substantial government interest directly advanced by reasonable means in order to regulate obscenity.

Now, there is——

Ms. HART. Gentleman yield?

Mr. CONYERS. There is less obtrusive technology which could respond to the problem. For example, an entire software industry built on filters, so that people can screen obscene materials. Are we sure that these filters cannot mitigate the problem before us? In addition, it's unclear what good the marking requirement would accomplish since such marks, as already been indicated, actually encourage opening this kind of e-mail.

So the—so this proposal finally applies to unsolicited as well as solicited e-mails. What does that carry with it? It means that even person who want to receive these advertisements will be subject to the requirements, and I think that the Supreme Court, in its presently constituted——

Ms. HART. Will the gentleman yield?

Mr. CONYERS.—would find that this would be an unnecessary burden. I yield to the gentlelady from Pennsylvania.

Ms. HART. Thank you. First, to answer your question about the Communications Decency Act, what they did state—what the Court stated is that the burden was too broad, and if it could be made less restrictive, which I believe this amendment does, then I believe it would withstand a challenge. And also—that's all. I yield back.

Ms. LOFGREN. Would the gentleman yield?

Mr. CONYERS. That's not sufficient, and I don't think it would be sufficient. So we've got a huge problem here, folks, and I'd like to encourage all of us to come together around this and craft something that we can all agree on, rather than toss it up at this hour, a few minutes before we're going to break.

Mr. WATT. Would the——

Mr. CONYERS. I yield to the gentleman from North Carolina.

Mr. WATT. I thank the gentleman for yielding. Wouldn't one of the ways to establish and document the Government interest be to have the hearings that you're talking about——

Mr. CONYERS. Exactly.

Mr. WATT. And to build a congressional record in support of that, which this amendment currently lacks.

Mr. CONYERS. Yield to Ms. Lofgren.

Ms. LOFGREN. Thank you. That's why—I had actually talked to several members on the other side of the aisle about proceeding separately. I think it's important that whatever we do be upheld by the courts. I don't—I greatly respect the ranking member. I do think that the labeling is quite different than the prohibition, and I think that—I am willing to support this amendment today, but I do think it's important that we state that our motivation is to protect minors, that the definition that is encompassed in this amendment is really to allow for the protection of minors, it's not just about obscenity, and then also to provide for notice, because there are individuals—I mean if you get an e-mail, you click it, and there may be some stuff that you just don't want to see, and it should be up to the——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. LOFGREN. I would ask that the——

Mr. CONYERS. I ask for 1 minute.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. Could I yield 5 seconds to Mr. Frank for a quiip?

Mr. FRANK. I just want to say that if we're going to have those hearings, I hope we will advertise them appropriately, because I wouldn't want people to wander in and be offended by the material that would be at the hearings. The Attorney General's——

Chairman SENSENBRENNER. The staff is directed to put a sign—or to make a sign to put on the door, "offensive material inside."

Mr. FRANK. "May be heard." And no waiting—you've got to wait in line personally. No hiring someone to get in.

[Laughter.]

Chairman SENSENBRENNER. Now, that is a restriction on commerce that I don't think we ought to get in.

Mr. CONYERS. I yield to the gentlelady from——

Chairman SENSENBRENNER. Let me poll the——

Ms. HART. I thank the gentleman for yielding.

Chairman SENSENBRENNER. Excuse me. Excuse me. The time has expired.

Let me poll the committee to see how much longer this is going on. How many people more wish to speak on this amendment? One, two, three, four——

Mr. CONYERS. Let's hold a hearing.

Chairman SENSENBRENNER. Five. I know of an amendment to be offered by the gentleman from Utah, Mr. Cannon. How many other amendments are there? You have an amendment, Mr. Schiff?

Mr. SCHIFF. Yes, Mr. Chairman, I have three.

Chairman SENSENBRENNER. The gentleman from Michigan has a request.

Mr. CONYERS. Could I courteously ask the gentlelady from Pennsylvania, viewing how long this could go on, to withdraw this amendment and allow us all to consult with you?

Ms. HART. In light of the simplicity of the amendment, I would prefer not to do that. Again, we've gotten into—if I have a moment?

Chairman SENSENBRENNER. Well, if this is the case, the committee will be recessed until 2:00 o'clock. I would ask the members to come back promptly at 2:00 because the sequential on this bill expires on June 5th, which means that we have to report the bill

out on June 5, so that there is time for members to file additional dissenting or minority views.

The committee is recessed until 2:00 o'clock.

[Recess]

Chairman SENSENBRENNER. The committee will come to order.

At the time the committee recessed, pending was an amendment to the amendment in the nature of a substitute offered by the gentlewoman from Pennsylvania, Ms. Hart.

All those in favor of the Hart Amendment will signify by saying aye.

Opposed, no.

Ms. JACKSON LEE. What are the ayes about?

Chairman SENSENBRENNER. We're ayeing or noing about the Hart Amendment. Those opposed, say no.

Ms. JACKSON LEE. Mr. Chairman——

Chairman SENSENBRENNER. The ayes appear to have it.

Ms. JACKSON LEE. I'm an aye, but a question.

Chairman SENSENBRENNER. Okay. The ayes have it both wholeheartedly and questionably, and the amendment is agreed to. Are there further amendments?

Ms. JACKSON LEE. Can I make a parliamentary inquiry?

Chairman SENSENBRENNER. The gentlewoman will state her inquiry.

Ms. JACKSON LEE. This bill, Mr. Chairman, you—did you indicate how fast this bill would move?

Chairman SENSENBRENNER. No, I didn't. Our sequential expires on June 5th, which means that we have to report the bill out today in order to give the 2 days necessary for the filing of additional supplemental minority or dissenting views, and have the report filed the day that we get back from recess. If we don't file a report today, we end up losing jurisdiction, and everything we've done is for naught.

Ms. JACKSON LEE. Thank you, Mr. Chairman. It will give me time to work with Ms. Hart in her office on some issues that I have. Thank you very much, Mr. Chairman.

Chairman SENSENBRENNER. I have a feeling that there will be a negotiation in the Rules Committee because we are somewhat going down a different road than the Commerce Committee has.

The gentleman from California; for what purpose do you seek recognition?

Mr. SCHIFF. Mr. Chairman, I have three amendments at the desk.

Chairman SENSENBRENNER. Which ones do you want?

Mr. SCHIFF. Amendments 1, 2 and 3.

Chairman SENSENBRENNER. Do you want to do them en bloc?

Mr. SCHIFF. I think I prefer to do them separately. I think that at least two of them will be very quick, Mr. Chairman.

Chairman SENSENBRENNER. Which one do you wish to offer first?

Mr. SCHIFF. Amendment No. 1.

Chairman SENSENBRENNER. Well, I have 18, 19 and 20.

Mr. SCHIFF. This is 18, 19 and 22, Mr. Chairman.

Mr. GOODLATTE. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. Well, you've got to pick one.

Mr. SCHIFF. Yes, 18.

Chairman SENSENBRENNER. The clerk will report Schiff No. 18.

The CLERK. Amendment to the amendment——

Mr. GOODLATTE. I reserve a point of order, Mr. Chairman.

Chairman SENSENBRENNER. Point of order is reserved.

The CLERK. Amendment to the Amendment in the Nature of a Substitute to H.R. 718, offered by Mr. Schiff.

At the end of the amendment——

Mr. SCHIFF. Mr. Chairman, request waiving the reading.

The Chairman. Without objection, the amendment is considered as read, and the gentleman from California is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 718 OFFERED BY MR. SCHIFF

At the end of the amendment, add the following new section:

1 **SEC. 3. STUDY OF EFFECTS OF UNSOLICITED COMMERCIAL**
2 **ELECTRONIC MAIL.**

3 Not later than 18 months after the date of the enact-
4 ment of this Act, the Attorney General shall submit a re-
5 port to the Congress that provides a detailed analysis of
6 the effectiveness and enforcement of the provisions of this
7 Act and the need (if any) for the Congress to modify such
8 provisions.

Mr. SCHIFF. Thank you, Mr. Chairman. This amendment very simply requires that the Attorney General submit a report to Congress providing an analysis of the effectiveness and enforcement of the provisions of the act, and make suggestions or modifications if necessary.

In light of the fact that the amendments to the original bill reduced the penalties and changed the nature of the bill, I think it all the more important to make sure that those changes which reduced the penalties for violations, that we have some measure of whether it's effective in that form. This would simply require the Attorney General to report to Congress, and I urge an aye vote.

Mr. GOODLATTE. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman yield back the balance of his time?

Mr. SCHIFF. I do, Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Virginia seek recognition?

Mr. GOODLATTE. Mr. Chairman, I withdraw my objection, and support the amendment.

Chairman SENSENBRENNER. The question is the adoption of Schiff Amendment No. 1. Those in favor will signify by saying aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the amendment is agreed to.

The gentleman from California?

Mr. SCHIFF. Mr. Chairman, on Amendment 019, this amendment would simply express——

Chairman SENSENBRENNER. Does the gentleman offer Amendment 019?

Mr. SCHIFF. Yes, Mr. Chairman.

Chairman SENSENBRENNER. Clerk will report the amendment.

The CLERK. Amendment to the Amendment in the Nature of a Substitute to H.R. 718, offered by Mr. Schiff.

At the end of the amendment, add the following——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from California is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 718 OFFERED BY MR. SCHIFF

At the end of the amendment, add the following new section:

1 **SEC. 3. SENSE OF CONGRESS REGARDING INTERNATIONAL**
2 **COOPERATION ON ISSUE OF UNSOLICITED**
3 **COMMERCIAL ELECTRONIC MAIL.**

4 It is the sense of the Congress that the President
5 should provide for the Federal Government to engage and
6 participate with the governments of other nations and ap-
7 propriate international organizations in developing inter-
8 nationally accepted and consistent standards to address
9 the issue of unsolicited commercial electronic mail.

Mr. SCHIFF. Mr. Chairman, this amendment simply acknowledges that e-mails are international in nature, and any action that we take in Congress has to be mindful of the fact that people will be sending e-mails solicited and otherwise from around the world. And this expresses the sense of Congress, that the President should provide for the Federal Government to engage and participate in governments around the world, to develop internationally accepted and consistent standards to address the issue of unsolicited commercial electronic mail. I waive the balance of my time and urge an aye vote.

Chairman SENSENBRENNER. The gentleman from Virginia?

Mr. GOODLATTE. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, I have some concerns about this amendment, and the reason is that it goes beyond the scope of what the Chairman's mark I think intended to encompass with regard to the type of unsolicited commercial or electronic mail that we're dealing with. This is broader than the scope of the narrowly crafted legislation that is before the committee in terms of the fact that it covers more than just the types

of fraudulent and false and misleading e-mails that are covered under the legislation, and therefore, unless it's narrowed, I would be forced to——

Chairman SENSENBRENNER. Would the gentleman yield?

Mr. GOODLATTE. I would yield.

Chairman SENSENBRENNER. I would like to join in the opposition of the gentleman from Virginia. This rejects the bipartisan compromise that deals with fraud and criminal penalties, and gets this committee down the road of regulation, which is something that the bipartisan compromise attempted to avoid, so I would urge the rejection of this amendment.

Ms. LOFGREN. Would the gentleman yield?

Mr. GOODLATTE. I yield to the gentlewoman from California.

Ms. LOFGREN. I join in concern over the amendment. I appreciate the good motives behind the amendment, because indeed, the author is correct, the Internet is an international environment, but I think it does get into—at least down the road, more of a regulatory approach than I think we're trying to get.

And I would just note also that, unfortunately, in our interface with some in the international community, they do not have the same spirit of nonregulatory approach to the Internet that is common here in the US. So it's not always a wonderful experience to try and coordinate with our international partners.

Mr. GOODLATTE. Thank you. I yield back.

Mr. FRANK. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. FRANK. To strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FRANK. Mr. Chairman, I noted your point that this violates the bipartisan compromise, and I guess that makes it about 100 percent for me. I haven't seen a bipartisan compromise this year that I liked. I don't know when the word "partisan" took on negative connotations. I'm going to say I'm not the world's most complete historian, but I tried hard to think about a functioning democracy in modern times that didn't have parties, and parties being necessary to democracy, apparently. I don't understand why we're supposed to have them, and then ignore them. And the fact that something is bipartisan, I used to be neutral about it. Now I'm starting to go negative.

But I want to support the gentleman's amendment, and I—I hadn't fully understood this—the context I guess. I find myself in this—more on the side of the bipartisan compromise in the Commerce Committee than the bipartisan compromise in the Judiciary Committee, because I do not think limiting ourselves to fraudulently addressed mail is a sufficient answer. As I said before, I do think they over reached with the ISP part, but I think it's a perfectly reasonable thing.

And I have to say then, the gentlewoman from California, the fact that other nations don't agree with us ought not to be the basis on which we refuse to talk to them. I guess if people agree with you, you probably don't have to talk to them. You have—you know, we have to conclude very few treaties with people who agree with us exactly. The whole notion of international conversation is to try

and bridge gaps. So I think this is an important amendment, and I think it—I look forward to those negotiations because some of us are going to be trying to get something that's between the two bills, and for that reason, I support this particular amendment.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from California, Mr. Schiff.

Mr. SCHIFF. Mr. Chairman——

Chairman SENSENBRENNER. Those in favor will signify by saying aye.

Those opposed no.

The noes appear to have it. The noes have it, and the amendment is not agreed to.

Are there further amendments?

Mr. SCHIFF. Yes, Mr. Chairman.

Chairman SENSENBRENNER. Then we will have to come back after the last vote in this series. Please be prompt because we need a reporting quorum of 19 members. Otherwise, we're going to lose jurisdiction in this bill.

Mr. FRANK. Parliamentary inquiry, Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts.

Mr. FRANK. If we lose jurisdiction, that means the Commerce direction is the only one in the field?

Chairman SENSENBRENNER. That's right. Are there further amendments? If not——

Mr. SCHIFF. Yes, Mr. Chairman, I have one further amendment.

Chairman SENSENBRENNER. Well, then the committee will be recessed until immediately after the last vote in this series. Again, I ask the members to come back promptly so that we have a reporting quorum. Otherwise we will lose jurisdiction.

And the committee stands recessed.

[Recess.]

Chairman SENSENBRENNER. The committee will come to order. When the committee recessed, the bill was open to amendment at any point. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the Amendment in the Nature of a Substitute to H.R. 718 offered by Mr. Cannon and Mr. Berman.

Page 2, line 19——

Mr. CANNON. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection. The gentleman is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 718 OFFERED BY MR. CANNON AND MR. BERMAN

Page 2, line 19, strike the period and close quotation mark that follows.

Page 2, after line 19, insert the following:

1 **"§ 622. Harvesting electronic mail addresses**

2 "Whoever knowingly uses automated means to collect
3 electronic mail addresses from a website operated by an-
4 other person, without the consent of that other person,
5 for the purpose of initiating (or enabling others to initiate)
6 the transmission of any unsolicited commercial electronic
7 mail message, as defined in section 621, to a protected
8 computer, as defined in section 1030, shall be liable to
9 that other person for the sum of $10 for each address
10 so harvested, but not to exceed $500,000. Nothing in this
11 section creates any new proprietary right to electronic mail
12 addresses on a website or within a database.".

Amend the table of sections for the proposed new chapter of title 18 accordingly.

Mr. CANNON. Thank you, Mr. Chairman. Since the advent of the Internet, we have been given an incredible tool for both commu-

nication and trade, the ability to send electronic mail messages to one another. But as with any tool, it can be a boon when used properly, or a burden when it is not. The reason we're here today is just one of those burdens, unsolicited commercial e-mail or spam. By far the number one complaint of the vast majority of American Web users is their receipt of spam. Clearly, a requirement to have accurate header information is necessary so that the sources of unsolicited e-mail can be identified and consumers are able to have their addresses stricken from the spam list.

However, to ultimately resolve this problem, you must stop the spammer from obtaining the e-mail addresses in the first place. Many responsible websites pledge never to sell, rent or lease their users' e-mail addresses. It seems, however, that much spam is derived from harvested e-mail addresses from various websites. As in the past year alone, AOL Time Warner, e-Bay, Microsoft, Verizon, Register.com, and others have all been harvested, much to the detriment of their relationship with their users. Because no technology can completely protect people against this kind of scavenging, a distinct chill is being placed upon e-commerce. The sad fact is that American consumers are becoming reluctant to engage in any commerce, because they now feel that the Internet is not a safe place to do business. They feel that their website cannot protect their e-mail address.

That's why I'm offering an amendment to address this issue. But adding a narrow prohibition against this kind of behavior, my anti-harvesting amendment will help to eliminate consumer frustration and would thus encourage e-commerce. The proposed anti-harvesting amendment would create a cause of action for website only when a person uses automated means to harvest e-mails from a third-party website without that website's consent, and with the intent to transmit spam to enable others to—or to enable others to transmit spam.

The proposed amendment also includes a statutory damages provision of up to $500,000. This type of statutory damages provision will assist in making sure that harvesters do not consider lower level finds as simply the cost of doing business.

I'll face the efforts of my friend, Bob Goodlatte, the bill being considered today, coupled with my anti-harvesting amendment, will help eliminate spam. Taken together, this package will add up to consumer confidence on the Internet. It will also take—it will also be a step closer to the day when and individual—an individual's e-mail address will be as public or private, as the individual consumer wants it to be. Without an anti-harvesting provision, only one-half of the spam problem will be addressed. I accordingly offer this amendment and urge my colleagues——

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. CANNON.—to adopt this harvesting language. Yes.

Chairman SENSENBRENNER. I thank the gentleman for yielding, and appreciate his concerns, and would endeavor to work with him on this and other issues. You should know that many have concerns about this amendment because it is argued the amendment prejudices the database and privacy debates. Every week interested parties meet with the staff from this committee and that of the Energy and Commerce Committee to work out issues involving the database bill. This amendment may confuse that process, and thus,

in my opinion, is not appropriate at this time, although it would be appropriate at sometime in the future.

Furthermore, the amendment may impact the privacy debate because it prohibits the collection of information for marketing purposes. The substitute avoids the pitfall of regulating electronic commerce, including e-mail marketing.

I appreciate the gentleman's efforts on this issue, and will further review the matter and work with you as this legislation makes its way through the legislative process, but again, I do not believe that this is the proper time and place to offer the amendment.

Mr. CANNON. If the Chairman will work with us——

Mr. BERMAN. Would the gentleman yield?

Mr. CANNON.—we will be happy to continue working on it, and reclaiming my time, I'd like to yield to the gentleman from California, Mr. Berman.

Mr. BERMAN. Yes. Thank you, Mr. Chairman. I never—the argument about it prejudicing the database bill, I never fully understood, but the one thing I know is, having gotten some reports about that process, it's already confusing.

But I just—I appreciate the gentleman yielding, and I just wanted to agree with him that there should be an effort to deal with this at the source, and I support the anti-harvesting amendment. There is a belief out there that the robot harvesting, about which Mr. Cannon speaks, is covered by the Computer Fraud and Abuse Act already, known as Section 1030. Under this act, however, the plaintiff must prove that he or she has suffered at least 5,000 in damages or that his or her computer systems have been harmed.

It's difficult, however, to calculate the harm done to the reputation of the harvested website or to the entire system of e-commerce when consumers receive fraudulent e-mail, and they unfairly hold the harvested website—the harvested website, and by extension, e-commerce as a whole, responsible.

So I support the amendment because it gets at the root of spam. Spammers can't send their unsolicited e-mail messages without addresses to send their messages to.

I appreciate the gentleman yielding, and I yield back.

Mr. GOODLATTE. Would the gentleman yield?

Mr. CANNON. I ask unanimous consent for an extra 2 minutes, Mr. Chairman?

Chairman SENSENBRENNER. Without objection.

Mr. CANNON. Who asked for time?

Mr. GOODLATTE. I did.

Mr. CANNON. Oh, certainly, Mr. Goodlatte.

Mr. GOODLATTE. I appreciate the gentleman yielding, and I share his concern about the nature of—of this problem. I also share the concern addressed by the Chairman, in that this does effectively broaden the scope of what we're trying to do, because again, this goes beyond the issue of fraudulent, false and misleading e-mails covered under the narrow substitute that the Chairman has offered, and therefore, if the gentleman would withdraw, I certainly also commit to trying to find a way to address this problem.

Mr. CANNON. Great. Thank you. Let me just point out that on the recess, I—one of my staffers had an e-mail from—that was with a fraudulent header, Diane at abcmxk, something odd like that. When you clicked on the—on the button to de-list, you got a most

vulgar site coming up. In fact, I think it called itself filthy, but it was awful. This is a serious problem, and with the assurance of the Chairman and the gentleman from Virginia, I would withdraw my motion.

Mr. BERMAN. We now think better of abc.

Chairman SENSENBRENNER. The amendment is withdrawn. Are there further amendments? The gentleman from California.

Mr. SCHIFF. Thank you, Mr. Chairman. I'd like to offer Amendment 0.22.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the Amendment in the Nature of a Substitute to H.R. 718 offered by Mr. Schiff.

Page 1, line 12——

Mr. SCHIFF. Mr. Chairman, request waiving reading of the amendment.

Chairman SENSENBRENNER. Without objection, the gentleman is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO THE AMENDMENT IN THE

NATURE OF A SUBSTITUTE TO H.R. 718

OFFERED BY MR. SCHIFF

Page 1, line 12, after "Whoever" insert "(1)".

Page 2, line 2, after "transmission" insert the following:

1 , or (2) initiates the transmission of any unsolicited com-
2 mercial electronic mail message to one or more protected
3 computers in the United States that does not include with-
4 in the subject field the textual message 'ADV:',

Mr. SCHIFF. Thank you, Mr. Chairman. This amendment would simply require that in unsolicited commercial e-mail, in the subject field, the textual message would include ADV: for advertisement. This would allow the consumer who gets a flood of e-mails, to look at the list of e-mails and identify, without having to go through the laborious process of opening each one of them, which are unsolicited e-mails and which are not. Then the consumer can make the decision whether to spend his or her time opening them or simply deleting them, or employ a filtration device that will automatically delete them if the consumer doesn't want to get unsolicited e-mails.

It is, in that respect, I think, infinitely preferable both to compiling a list of people who don't want to receive e-mails and forcing direct marketers or others to check a list. It's also, I think, less cumbersome than a opt-out or an opt-in process. It is, in fact, California law already.

The honorable woman from Pennsylvania introduced an amendment which passed—just passed this committee, pertaining to sexually explicit materials. California law in fact does what that gentlewoman's amendment does, and what this amendment does. It requires ADV to appear in advertisements, and ADLT when those advertisements are not intended for those under 18. This is really designed to address the broader problem of unsolicited e-mail, and I think does it in probably the least restrictive means possible.

Unless there's any objection that this exceeds the bipartisan scope of what the committee is addressing, it does so no more and no less than the gentlewoman's amendment from Pennsylvania.

I think that this offers really a minimal investment or requirement on behalf of the marketers. On the other hand, it provides a great opportunity for consumers to make decisions for themselves about how much unsolicited e-mail they wish to read. I would urge your aye vote and reserve the balance of my time.

Chairman SENSENBRENNER. The gentleman has to yield back his time under the 5-minute rule. The gentleman yield back?

Mr. SCHIFF. Yes, Mr. Chairman.

Chairman SENSENBRENNER. The chair recognizes himself for 5 minutes in opposition to the amendment.

This amendment regulates e-mail marketing. There's no question about it. And it disadvantages electronic commerce because it has a different standard for the identifying of advertising materials on the Internet than if one sent advertising through the mail.

The bipartisan compromise between Mr. Conyers and myself decided to have a minimum or nonexistent regulation of the Internet, but instead go down the line of having misdemeanor penalties for those who violate the purposes of the law. This goes back to the scheme of regulation in the Wilson Bill, and I believe ought to be rejected.

I yield back the balance of my time.

Mr. GOODLATTE. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. GOODLATTE. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman. I won't use that amount of time. I want to join with you in opposition to the amendment, which I know is well intentioned by the gentleman from California, but I think it raises additional First Amendment questions regarding the commercial speech doctrine. Commercial speech can indeed by regulated differently than other forms of free speech, but there are limitations on what can be done in that regard, and I do not believe that the requirement of labeling all commercial communications as such is within the scope of that doctrine, and therefore, I think that's one additional reason not to support this amendment. But it also does drastically expand the scope of the legislation that this committee is crafting, and therefore, I would oppose the amendment.

Ms. LOFGREN. Would the gentleman yield?

Mr. GOODLATTE. I would be happy to yield.

Ms. LOFGREN. I would—I concur with the judgment made by yourself and the Chairman, and would note that to the extent that there is any burden on the First Amendment by Congresswoman Hart's amendment, it is counterbalanced by our motivation, which is to prevent minors from being exposed to indecent material. There is no such—which is a constitutionally permissible goal. There is no such countervailing rationale in non-explicit e-mails. And I would thank the gentleman for yielding.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. GOODLATTE. Yes.

Chairman SENSENBRENNER. The gentleman from Alabama, for what purpose do you seek recognition?

Mr. BACHUS. On the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BACHUS. Mr. Chairman, and members of the committee, I will tell you that as a user of the Internet, that this amendment does have some appeal to me. The amount of unsolicited commercial e-mails that I receive has basically eliminated my ability to use e-mail at my home in a practical manner. And while this may not be the appropriate time, I think in the future we have to seriously consider an amendment of this type.

If, as the sponsor has said, that California does this, and I think that's what he said, you know, I would wonder how that it passes constitutional muster there, but it's unconstitutional when offered here. So I will say to the sponsor and other members of the committee, at some point if those of us we represent who use the Internet continue to be frustrated by the large amount of unsolicited commercial e-mail, I think this approach is something we ought to seriously consider.

And I commend the gentleman for his thought, although I will probably not support his amendment at this time, but it is to me a very close question.

Mr. Chairman, I'm not sure that the public interest isn't in supporting his amendment.

Chairman SENSENBRENNER. The gentleman yield back? The gentleman from Alabama yield back his time?

Mr. BACHUS. Yes.

Chairman SENSENBRENNER. For what purpose does the gentleman from New York——

Mr. WEINER. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WEINER. I just—I mean it's very clear to me that the gentleman's amendment is within the narrow confines of this bill. The bill talks about regulating commercial electronic—unsolicited commercial electronic mail by indicating information in the header field, by regulating information in the heading field that would be material, false or misleading. All the gentleman is doing is adding a piece of information to the header field, clearly within the scope of this bill, indicating what type of content is therein, and thereby protecting anyone from saying it's misleading. If they put in ADV, then they are—that's a disclosure that ultimately may protect busi-

nesses from being sued in this—what has turned into the ISP enrichment act.

I think it's also—it's also worth noting that the gentleman's argument seems consistent to me. If we're going to put PRN in the Re line, why not say ADV? I think we're really doing nothing all that different, and I would remind my colleagues why we're here. We're here because our constituents are getting spam advertisements on their laptop and on their desktop, and if you're going to put—if you're going to put a chill on that, perhaps the best thing to do is just make is possible for people to exercise what the gentlewoman from California has espoused—and I kind of agree with—is the delete button. And a surefire way to know if you have an advertisement is if you put advertisement. And, frankly, we have these kinds of disclosures elsewhere in the law.

I yield the balance of my time to Mr. Schiff.

Mr. SCHIFF. Mr. Chairman, very briefly on the constitutional point, in fact, I think this amendment has much greater chance of surviving constitutional tests than the amendment already approved by the committee, because this amendment doesn't call for a decision to be made about whether something meets the test of the explicit nature of the prior amendment. In fact, any amendment—or any transmission that is an unsolicited commercial e-mail would be required to carry this, and the breadth of it actually strengthens it from a constitutional point of view, rather than having to decide between different types of speech, what is salacious and what is not.

This is why I think the California law is constitutional, but the California law is, I think, going to be ineffective because it really only pertains to e-mails that are generated from within the State. If this is to be effective, it really needs to be done nationally.

And just as the objection was made on this side of the committee to the gentlewoman's amendment, that this wasn't the right time and the right place, with all due respect, I think it is equally the right time and the right place, as it was for the prior amendment.

Ms. LOFGREN. Would the gentleman yield?

Mr. SCHIFF. Yes.

Ms. LOFGREN. One of the additional questions I have about the amendment is, although we've talked about commercial electronic messages, we don't really define what that is, and how will this relate to political speech that is not initiated by candidates, and what is the constitutionality of that?

For example, Buzz Flash, which is arguably commercial. They're trying to make money. It is political speech. It is not candidate generated. It does engage in unsolicited, you know, communication, and would have to be burdened in this way, and I'm not sure constitutionally how we can do that.

Mr. SCHIFF. It would apply to political speech the same degree, no more, no less than the bill does already in applying terms like materially false or misleading. This will apply and will be subject to the same criticism.

Mr. WEINER. Would the gentleman allow me to reclaim my—under the definition of the bill, political speech is not covered by commercial electronic mail message, because it is not to advertise or promote for a commercial purpose or product or service.

Ms. LOFGREN. Well, I think it is very gray. I mean, if you take a look for—I don't want to pick on Buzz Flash, because it's one of my favorite little areas, but I don't think it's—I don't think it's clear, and I thank the gentleman for yielding to make that point.

Mr. SCHIFF. Thank you. Just to reclaim the final balance of the time. If we're serious about doing something about this problem, there aren't a lot of great options. A cause of action, I think, is a very minimal—minimally effective way to address the problem. Giving consumers the cause of action is even more minimalist. This gives real relief to a very real problem, and it does so in a way that poses the least possible restriction on commercial unsolicited e-mails in the sense that all they need to do is put the ADV in the header, and it's so less cumbersome than an opt-in or opt-out. It really has a lot to be said for it, and I would urge your aye vote.

Chairman SENSENBRENNER. The time of the gentleman has expired. The question is on the Amendment No. 20 by the gentleman from California to the Amendment in the Nature of a Substitute.

Those in favor will signify by saying aye.

Opposed, no.

The noes appear to have it. The noes have it.

Mr. SCHIFF. Request a rollcall.

Chairman SENSENBRENNER. A rollcall is requested. Those in favor of the Schiff Amendment will, as your names are called, answer aye. Those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Barr?

Mr. BARR. No.

The CLERK. Mr. Barr, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Hutchinson?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Graham?

[No response.]

The CLERK. Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye. Mr. Scarborough?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
[No response.]
The CLERK. Ms. Hart?
Ms. HART. No.
The CLERK. Ms. Hart, no. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no. Mr. Conyers?
[No response.]
The CLERK. Mr. Frank?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
[No response.]
The CLERK. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
Ms. JACKSON LEE. Pass.
The CLERK. Ms. Jackson Lee, pass. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional members who desire to cast or change their vote? The gentleman from North Carolina?
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Chairman SENSENBRENNER. The gentlewoman from Texas?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Chairman SENSENBRENNER. Other members? Other members? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 8 ayes and 14 nays.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?

Ms. JACKSON LEE. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Texas.

Ms. JACKSON LEE. Yes, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Mr. Chairman, Amendment to the Amendment in the Nature of a Substitute to H.R. 718 offered by Ms. Jackson Lee.

Mr. GOODLATTE. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. A point of order is reserved. Without objection, the amendment is considered as read, and the gentlewoman from Texas is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 718 OFFERED BY MS. JACKSON-LEE

Page 2, line 19, strike the close quotation mark and the period that follows.

Page 2, after line 19, insert the following:

1 **"§ 623. Warning labels for electronic mail containing**
2 **certain advertisements harmful to minors**
3 "(a)(1) The Attorney General shall prescribe marks
4 or notices to be included in electronic mail that contains
5 a covered sexually oriented advertisement in order to in-
6 form the recipient of that fact. The marks or notices pre-
7 scribed under this section shall be identical to the marks
8 or notices prescribed under section 622(a)(1).
9 "(2) Whoever, in any electronic mail that is carried
10 on an instrumentality in or affecting interstate or foreign
11 commerce, knowingly includes a covered sexually oriented
12 advertisement but does not include in such electronic mail
13 the marks or notices prescribed by the Attorney General
14 under this section shall be fined under this title or impris-
15 oned not more than one year, or both.
16 "(b) As used in this section, the term 'covered sexu-
17 ally oriented advertisement' means any advertisement that
18 depicts, in actual or simulated form, or explicitly de-

1 scribes, in a predominantly sexual context, any sexual act
2 or any other erotic subject directly related to any sexual
3 act, except that—
4 "(1) such term shall not include any advertise-
5 ment that is a sexually oriented advertisement, as
6 such term is defined in section 622; and
7 "(2) material otherwise within the definition of
8 this subsection shall be deemed not to constitute a
9 sexually oriented advertisement if it constitutes only
10 a small and insignificant part of the whole, the re-
11 mainder of which is not primarily devoted to sexual
12 matters.".

Insert at the end of the table of sections in the material following line 8 on the first page the following new item:

"622. Warning labels for electronic mail containing certain advertisements harmful to minors.".

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

As I discussed earlier, we all have a neutral concern and interest in pornography. I am going to withdraw this amendment. I'd appreciate if the gentleman would withhold his point of order. But I wanted to bring to the members' attention language that I thought, even though it was in a particular section, was somewhat maybe even exclusive, the language "unnatural and natural sexual acts", and so I have sought to broaden that to make it where it refers to sexual acts, which allows for the coverage of anything that is untoward with respect to young people or anyone else.

I'm going to pursue this with—as this bill moves through the House—and try to ensure that the language keeps within certain protected features, but as well covers all aspects without having to

have someone scratch their head about what is defined as "natural and unnatural."

So I would ask my colleagues to consider this. I'm going to withdraw the amendment, but I do want to have acknowledged the presentation of the amendment, and then I intend to work on this as we move this legislation to the floor.

Chairman SENSENBRENNER. The amendment is withdrawn. Are there further amendments? If not, the question is on the Amendment in the Nature of a Substitute as Amended.

All those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the Amendment in the Nature of a Substitute is agreed to.

The question now occurs on the motion to report to bill H.R. 718 favorably as amended by the Amendment in the Nature of a Substitute as Amended.

All in favor, say aye.

Opposed, no.

The ayes have it, and the motion to report favorably is adopted.

Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all members will be given 2 days, as provided by House rules, in which to submit additional dissenting supplemental or minority views.

This concludes the business before the committee today. Let me thank the members for their patience in coming back this afternoon. We have fulfilled our mandate under the sequential referral. We will have other opportunities to do that in bills that we get from the Commerce Committee. I appreciate the indulgence of members, and let me say this isn't the last time we're going to fix up the Commerce Committee's work.

The committee is adjourned.

[Whereupon, at 4:13 p.m., the committee was adjourned.]

ADDITIONAL VIEWS

I strongly support the Sensenbrenner-Conyers substitute amendment to H.R. 718; however, I am writing additional views to indicate my concern that the Hart amendment would violate the First Amendment. The Hart amendment requires the Attorney General to prescribe marks or labels for e-mails containing "sexually-oriented advertisements" that senders of such e-mails must then include in all such transmissions.[1] The penalty for violations of the amendment's provisions includes a fine, imprisonment for not more than 1 year, or both.[2]

I agree with the general objective of the amendment—keeping sexually-oriented materials away from those who do not want them and minors who should not have them—but do not believe the amendment has been written with the necessary care to pass constitutional scrutiny. I would remind the Members that there are few more complicated or difficult area of the law than Federal regulations and restrictions of speech. This is evidenced by the Supreme Court's 1989 decision to strike down the Federal Communication Commission's dial-a-porn regulations,[3] and its 1997 decision to invalidate portions of the Communications Decency Act ("CDA"), which regulated pornography on the Internet.[4]

This line of cases should serve as a signal that, if we are to legislate on this matter, we must do so in a deliberative manner that respects constitutional freedoms. Unfortunately, I do not believe the Hart amendment will withstand First Amendment scrutiny be-

---

[1] H.R. 718, § 2 (proposing 18 U.S.C. § 622(a)). The amendment defines a "sexually-oriented advertisement" as "any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing, but material otherwise within the definition of this subsection shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters."

[2] *Id.* Pursuant to 18 U.S.C. § 3559, any violation of the Hart amendment would be classified as a Class A misdemeanor. The fine amounts for all offenses are specified in 18 U.S.C. § 3571. If the offender is an individual, the maximum fine is either $250,000 (if death results) or $100,000 (if death does not result). If the offender is an organization, the maximum fine is either $500,000 (if death results) or $200,000 (if death does not result).

[3] *Sable Comm'ns of California* v. *FCC*, 492 U.S. 115 (1989).

[4] *Reno* v. *ACLU*, 521 U.S. 844 (1997) (striking down portions of the Communications Decency Act of 1996, Pub. L. No. 104–104, title V, 110 Stat. 56 (1996)). The CDA's successor, the Child Online Protection Act, also is being reviewed in the Supreme Court. *ACLU* v. *Reno*, 217 F.3d 162 (3d Cir. 2000) (affirming trial court issuance of preliminary injunction against enforcement of Child Online Protection Act of 1998, Pub. L. No. 105–277, 112 Stat. 2681 (1998), a statute intended to protect minors from harmful material on the Internet), cert. granted and rev'd sub nom. *Ashcroft* v. *ACLU*, No. 00–1293 (2001).

Another recent law, the Children's Internet Protection Act of 2000, is also now the subject of First Amendment challenges. *Multnomah County Public Library* v. *United States*, No. 01-CV-1322 (E.D. Pa. filed Mar. 20, 2001); *American Library Ass'n* v. *United States*, No. 01-CV-1303 (E.D. Pa. filed Mar. 20, 2001). That law directs that schools or libraries receiving Federal funds to obtain computers for Internet access must utilize technological filters to block access by minors to materials on the Internet having sexual content. Children's Internet Protection Act of 2000, Pub. L. No. 106–554 (2000).

The Supreme Court also has struck down a Federal statute regulating the advertising of contraceptives on the grounds that it violated the First Amendment. See *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

cause it contains overbroad restrictions on commercial speech, and may well be found to be void for vagueness and to compel speech.

I. THE AMENDMENT PROPOSES AN OVERBROAD REGULATION OF COMMERCIAL SPEECH

It is entirely clear that the protections of the First Amendment extend to speech on the Internet,[5] which the Hart amendment proposes to regulate. It is also entirely clear that the First Amendment applies to advertisements or commercial speech, such as the e-mails covered by the Hart amendment.[6] In this regard, the Court has stated that the constitutional test for any regulation of truthful and non-misleading commercial speech is whether the law (1) pertains to a substantial government interest and (2) is reasonably and narrowly tailored to that interest.[7] In this case, it is not clear that the government has a substantial interest in marking sexually-oriented ads, nor is the proposal narrowly tailored to any such alleged interest.

As to the substantial government interest prong, the Hart amendment presumes that the government has a substantial interest in making consumers and parents aware that they are receiving sexually-oriented advertisements via e-mail. There is, however, no legislative history or congressional finding to support this presumption. The Committee did not hold hearings where any mention was made—either by witnesses or Members—of a need or desire to mark e-mails containing sexually-oriented advertisements. To the contrary, those hearings that Congress did hold on e-mail elicited testimony that the primary problem for e-mail users was the receipt of bulk, unsolicited commercial e-mail, otherwise known as spam.[8] This is not to say that Federal legislation addressing e-mails with sexual content is not needed, but merely that the legislative groundwork has not been laid for such a law.

As to the second prong, the amendment would not appear to be sufficiently narrowly tailored to pass constitutional scrutiny. For example, the intended beneficiaries of the amendment are presumably people who do not want to open e-mails with sexually-oriented ads. Unfortunately, even those who have asked for such ads would see the mark and possibly be deterred from requesting sexually-oriented advertisements.[9] Proponents of the amendment argue that it merely mirrors labeling regulations that exist for regular mail,

---

[5] Reno, 521 U.S. at 844.

[6] The Supreme Court has ruled that "speech is not stripped of First Amendment protection merely because it appears" as a commercial advertisement. *Bigelow* v. *Virginia*, 421 U.S. 808, 818 (1975). The Court later affirmed that speech that "does no more than propose a commercial transaction" is protected by the First Amendment. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[7] 44 *Liquormart* v. *Rhode Island*, 517 U.S. 484 (1996); *Central Hudson Gas* v. *Public Service Comm'n*, 447 U.S. 557 (1980). See also Letter from Marvin J. Johnson, Legislative Counsel, ACLU, to the Honorable F. James Sensenbrenner, Jr., Chair, House Comm. on the Judiciary, & the Honorable John Conyers, Jr., Ranking Member, House Comm. on the Judiciary 3 (May 23, 2001) [hereinafter *ACLU Letter*].

[8] See, e.g., *Senate Commerce Comm. Hearing* (statement of Jason Catlett, President and Founder, Junkbusters Corp.); H.R. Rep. No. 41, 107th Cong., 1st Sess. 9 (2001).

[9] It has been recognized that restrictions imposed for the benefit of people not wanting solicitations are reviewed differently when they impact people who do want them. *Pent-R-Books* v. *United States Postal Service*, 328 F. Supp. 297 (1971), *aff'd in part and rev'd in part*, 538 F. 2d 519 (1976), and *cert denied*, 430 U.S. 906 (1977) (upholding postal regulation on applying marks to postal mail with sexually-oriented ads in them because marks were applied to mailings only for people who had not requested the materials).

pointing to 39 U.S.C. § 3010(a) and its implementing regulations, which require distributors of postal mail with sexually-oriented advertisements in them to print "Sexually-Oriented Ad" on a sealed inner envelope that goes in a regular mailer to recipients.[10] Those regulations, however, applied only to solicitors sending sexually-oriented ads to people who had requested them; the regulations did not apply to unsolicited ads.[11] Under the Hart amendment, the marks and labels must be applied to *all* e-mails, regardless of whether they were solicited or unsolicited.

In addition, it is not at all clear that technology, which is much less obtrusive than Federal legislation, could not be used to respond to the problem. For example, there is an entire software industry built on filters so people can screen obscene materials, and there are Internet Service Providers that will filter out e-mails for their customers.[12] Considering that technology is available and being further refined, the courts may well question the need for an intrusive new labeling requirement. Furthermore, the restriction may not be reasonably related to the government's interest. It is possible that the marking requirement would do exactly the opposite of what it is intended to do, as such marks actually could encourage children to view sexually-oriented ads.

II. THE AMENDMENT MAY BE VOID FOR VAGUENESS

The Hart amendment also could be found constitutionally void on the grounds that it is vague. The Court has delineated a "strict prohibition of statutes which burden speech in terms that are so vague as either to allow including protected speech in the prohibition or leaving an individual without clear guidance as to the nature of speech for which he can be punished."[13] As one of the leading constitutional law treatises has observed, "to the extent that the law is vague and relates to fundamental constitutional rights, it might have an 'in terrorem' effect and deter persons from engaging in activities, such as constitutionally-protected speech, that are of particular constitutional importance."[14] The American Civil Liberties Union has further noted:

> Laws are supposed to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." . . . Failure to clearly define when speech transgresses the regulation or law [as the Hart amendment fails to do] will unconstitutionally force people to conform their speech to "that which is unquestionably safe."[15]

---

[10] See MARKUP OF H.R. 718, HOUSE COMM. ON THE JUDICIARY, 107th Cong., 1st Sess. (May 23, 2001) [hereinafter *H.R. 718 Markup*]. Portions of 39 U.S.C. § 3010 were reviewed and upheld in 1971. Pent-R-Books, 328 F. Supp. at 297.

[11] Pent-R-Books, 328 F. Supp. at 313–14.

[12] See John Schwartz, *Schools Get Tools to Track Students' Use of Internet*, N.Y. Times, May 21, 2001, at C6; Steve Woodward, *AOL Selects RuleSpace to Patrol the Internet*, OREGONIAN, May 3, 2001, at B1.

[13] RONALD D. ROTUNDA & JOHN E. NOWAK, 4 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.9 (2d ed. 1992).

[14] *Id.*

[15] *ACLU Letter* at 4 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) & *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964)).

In this case, the proposal's definition of "sexually-oriented advertisement"[16] may well be seen as unnecessarily vague, could implicate e-mails that its proponents might not intend for labeling, and therefore could chill otherwise lawful speech. More specifically, the definition does not specify what is meant by "natural or unnatural sexual intercourse" or "any other erotic subject," and could require the labeling of an e-mail containing an ad for a book about sexual health or even an ad that contains double entendres.[17] Furthermore, in an apparent effort to ensure that e-mails with minimal sexual content do not have to be labeled, the definition carves out e-mails having sexual content that "constitutes only a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters."[18] Unfortunately, the amendment does not specify what is meant by "a small and insignificant part"—that term could implicate e-mails where 10 percent of the content is sexually-oriented or even where 2 percent is so oriented.

III. THE AMENDMENT MAY UNCONSTITUTIONALLY COMPEL SPEECH

It also can be argued that the Hart amendment's labeling requirement represents an unconstitutional compulsion of speech in violation of the First Amendment. The Supreme Court has held that requiring private entities to provide disclosures implicates the First Amendment.[19] The Court has further ruled in the commercial context that, when the government requires disclosures, "an advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[20] In this case, the Hart amendment requires disclosures of e-mails containing sexually-oriented commercial speech but is not intended to "prevent deception of consumers." For that reason, the requirement could be seen as unconstitutional.

Proponents of the labeling requirement may argue that other forms of media—movies, television shows, and music—are labeled for sexual or violent content. There is, however, a significant difference between that labeling and what the Hart amendment proposes. Current labeling of content is done *voluntarily* by the private industries that distribute the media so that potential purchasers (or their parents) will be aware of what is being provided. Efforts in Congress to require labeling of those media have been previously rejected on the grounds they would violate the First Amendment.[21]

CONCLUSION

The protections of the First Amendment should not turn back at the doorstep of commercial speech. In fact, it is the protection that commercial speech receives that ensures that the right to engage in non-commercial speech will be limited in only the most extreme

---

[16] H.R. 718, § 2 (proposing 18 U.S.C. § 622(b)). This definition comes from 39 U.S.C. § 3010, which requires the labeling of postal materials with sexually-oriented ads in them.

[17] See *ACLU Letter* at 3.

[18] See H.R. 718, § 2 (proposing 18 U.S.C. § 622(b)).

[19] *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781 (1988) (striking down a state statute requiring professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations).

[20] *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651, 652 n.14 (1984).

[21] See, e.g., 145 Cong. Rec. H4491-H4499 (daily ed. June 17, 1999) (debate on Wamp amendment to H.R. 1501, which was defeated 161–266).

circumstances. For that reason, limitations on commercial speech must be reasonably and narrowly drafted to areas in which the government maintains a substantial regulatory interest. Unfortunately, the Hart amendment subjects a class of commercial speech to lesser constitutional protection than it otherwise deserves and does so without the foundation of even a single congressional hearing. I urge the Members to reconsider this hastily-drafted provision as we move to the floor.

JOHN CONYERS, JR.

○