

BEFORE THE  
SUBCOMMITTEE ON  
COMMUNICATIONS  
OF THE  
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

HEARING ON  
S. 630  
CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND  
MARKETING ACT OF 2001

April 26, 2001

TESTIMONY OF JERRY CERASALE  
ON BEHALF OF  
THE DIRECT MARKETING ASSOCIATION, INC.

Jerry Cerasale  
The Direct Marketing Association, Inc.  
1111 19<sup>th</sup> Street, N.W. #1100  
Washington, D.C. 20036  
202/955-5030



## **I. Introduction**

Good afternoon, Mr. Chairman, and thank you for the opportunity to appear before your subcommittee as it examines unsolicited commercial electronic mail. I am Jerry Cerasale, Senior Vice President of Government Affairs for The Direct Marketing Association, Inc. (“The DMA”).

The DMA is the largest trade association for businesses interested in direct, database, and interactive marketing and electronic commerce. The DMA represents more than 4,500 companies in the United States and 54 foreign nations. Founded in 1917, its members include direct marketers from 50 different industry segments, as well as the non-profit sector. Included are catalogers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them. The DMA’s leadership also extends into the Internet and electronic commerce areas through the companies that are members of The DMA’s Internet Alliance and the Association for Interactive Media.

The DMA member companies, given their track record in delivering high quality goods and services to consumers, have a major stake in the success of electronic commerce, and are among those most likely to benefit immediately from its growth. The healthy development of electronic commerce depends on consumer trust. It is imperative that the e-mail communications medium earns that trust.

The DMA commends the drafters for this legislation. While it is not clear that legislation is imperative at this juncture, we support the efforts of Senators Burns and Wyden. We think that S. 630 takes the appropriate approach for legislation regarding UCE. S. 630 contains many of the elements of what successful legislation in this area should look like. We believe that the requirement that senders of unsolicited commercial electronic mail identify themselves truthfully and provide individuals the ability to

opt out of unsolicited commercial electronic mail messages is essential. Likewise, The DMA is very supportive of maintaining the ability for businesses to send messages to those individuals who have provided affirmative consent and those individuals with which a business has a pre-existing business relationship without such messages being treated as unsolicited commercial electronic mail. We also believe that providing criminal penalties for sending unsolicited commercial electronic mail that contains fraudulent routing information should prove very useful in limiting egregious unsolicited messages. We continue to have some concerns with the definitions of “initiator” and “affirmative consent” and look forward to working with the members and staff on these issues.

There are several topics I wish to focus on in more detail in my testimony today. These are:

- The DMA’s self-regulatory program the e-Mail Preference Service;
- The need for strong penalties against entities that send fraudulent messages;
- Federal Trade Commission enforcement of a uniform federal standard; and
- Permission-based communications.

The DMA welcomes this congressional inquiry into these important matters.

## **II. The DMA’s e-Mail Preference Service Empowers Consumers With Choice Concerning Receipt Of Unsolicited Commercial E-Mail**

Mr. Chairman, The DMA is a long time leader in self-regulation and peer regulation. We believe that in the borderless world of electronic commerce self-regulation with effective choice to consumers is the best means of empowering consumer regarding receipt of unsolicited commercial electronic mail, creating and maintaining opportunity for the many exciting new benefits of legitimate marketing in the interactive economy.

For this reason, since publishing our electronic commerce guidelines almost five years ago, we have supported an industry standard of notice and opt-out for electronic mail marketing communications. More recently, last year we created and launched the e-Mail Preference Service (“e-MPS”). The e-MPS allows individuals to remove their e-mail addresses from Internet marketing lists. This ambitious undertaking is aimed at empowering consumers to exercise choice regarding receipt of UCE, while creating opportunity for the many exciting new benefits of legitimate marketing in the interactive economy.

The e-MPS is based on The DMA’s very successful Mail Preference Service (“MPS”) and Telephone Preference Service (“TPS”) self-regulatory initiatives. Both of these initiatives represent The DMA’s response to consumers’ request for choice in the amount of mail and telephone solicitations that they receive. In developing responsible marketing practices for the Internet age, we have adapted this important concept of consumer choice to the Internet medium through the development of e-MPS.

As of January 2000, consumers have been able to register for the e-MPS at a special DMA web site. Consumers can use this service, at no cost, to place their e-mail addresses on a list indicating that they do not wish to receive UCE. This service affords consumers with flexibility to determine the types of solicitations they receive. Through this service, individuals can opt out of business-to-consumer UCE, business-to-business UCE, or all UCE.

The e-MPS is part of The DMA’s “Privacy Promise to American Consumers,” which became effective July 1, 1999. The Privacy Promise requires as a condition of membership in The DMA, that companies, including online businesses, follow a set of privacy protection practices. As part of this promise, all DMA members who wish to send UCE to consumers are required to remove the e-mail

addresses of those consumers who have registered with the e-MPS from their lists of consumers to whom they send e-mail solicitations. Those consumers on the e-MPS list will receive no e-mail from DMA members unless they have an established online business relationship with that company. This service also is available to companies that are not members of The DMA so that they too may take advantage of this innovative service and respect the choice of those consumers who choose not to receive UCE.

### **III. Strong Penalties Should Exist To Combat Fraudulent Messages**

The DMA is particularly sensitive to the practice of sending fraudulent electronic mail messages in which some individuals are engaged, and fully supports a prohibition on this practice. This practice includes the sending of messages with false or fictitious header information. The use of such fraudulent e-mail has no place in a healthy and robust Internet. The sending of bulk fraudulent messages has crashed the networks of Internet service providers.

In addition to deceiving consumers, fraudulent e-mail diminishes the reputation of the entire medium, particularly messages sent from the responsible marketers that make up our membership. Ultimately, we believe the sending of fraudulent messages is an area in which legislation is critical, as it is more difficult to prevent fraudulent messages.

### **IV. Sending Of Commercial Messages When Consumer Permission From The Consumer Exists Should Be Outside The Scope Of Any Legislation**

Consumers often give permission to a company, or request that it pass along their e-mail address to receive information and offers from other service providers in a given category, such as

financial services. These consumers have requested information and granted permission, but it may not be specific to a particular initiator. For example, I might indicate that I would like to receive mailings on sales of men's clothing. A variety of different businesses could then send me messages when they have sales at their stores. Such marketing is very beneficial to consumers and to the free flow of commerce. Any legislation should allow such communications. It would burden the free flow of information to such consumers to require that they give specific permission to each "initiator."

#### **V. Any Legislation Should Provide Enforcement Of A Uniform Federal Standard**

The DMA supports the approach taken in the legislation that preempts state law by providing a uniform federal standard. Strong preemption is the appropriate approach in the electronic environment. Differing state regulatory standards for communicating via electronic mail could have the effect of eliminating the inherently global characteristics of the communications, which are in large part responsible for its extraordinary success. It would be impossible for businesses to comply simultaneously with different and potentially inconsistent laws in multiple jurisdictions where individuals to whom they send messages may be located. Often, the business is unaware of the location of the recipient of the message. If businesses were required to comply with the different laws of the 50 states, it would be a tremendous burden on the Internet and could have the result of limiting business offerings. Moreover, a patchwork of state laws, particularly as they affect interstate communications, may ultimately be found unconstitutional.

Likewise, we are heartened by the decision not to create a private right of action. Creating a private cause of action would impose substantial burdens on ISPs, resulting in the expenditure of

resources both in terms of time and money to defend litigation. Such an approach is unnecessary in light of the fact that the FTC would be empowered to protect consumer rights.

Inclusion of a consumer cause of action would create a very substantial bounty for class action lawyers that would produce very substantial damage awards wholly unrelated to the costs imposed by UCE.

The legislation must foreclose the possibility of class actions.

## **VI. Conclusion**

We thank the Members of Congress who have introduced legislation in this area for their thoughtful consideration of such an important issue. We also thank the Chairman and the Subcommittee for the opportunity to express the views of The DMA. We know that Congress and this Subcommittee will continue to monitor this issue closely and we look forward to working with you.

## **Jerry Cerasale**

Jerry joined The DMA in January 1995, as Senior Vice President, Government Affairs. He is in charge of The DMA's contact with the Congress, all federal agencies, and state and local governments. Prior to joining The DMA, he was the Deputy General Counsel for the Committee on Post Office and Civil Service, United States House of Representatives.

Jerry served for 12 years at the Postal Rate Commission, mainly as Legal Advisor to Chairman Janet Steiger and then as Special Assistant to the Commission. He was also an attorney advisor to Ms. Steiger when she was chairman of the Federal Trade Commission. Prior to working for the PRC, he was employed in the Law Department of the Postal Service.

Jerry received his B.A. in Government and Economics from Wesleyan University, Middletown, Connecticut, and his J.D. from the University of Virginia School of Law.