



## STANFORD LEGAL OFFICE MEMORANDUM

**TO:** Distribution  
**FROM:** Patrick Dunkley  
**SUBJECT:** Anti-Spam Law  
**DATE:** December 18, 2003

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As many of you have no doubt seen or read in the news media, both the California Legislature and the United States Congress have enacted legislation to prevent “spam” email. The state legislature passed S.B. 186 with an effective date of January 1, 2004 only to see that legislation later preempted by S. 877 (Controlling the Assault on of Non-Solicited Pornography and Marketing Act of 2003 – “CAN-SPAM” or the “Act”) to go in to effect on the same date. This memo provides a summary of this new law that imposes some very specific requirements and has some very substantial penalties for failure to comply. If you engage in conduct covered by CAN-SPAM you should review the legislation and/or call the Office of the General Counsel for guidance.

### **Scope of the Law**

The CAN-SPAM law applies to all “commercial electronic email messages.” The Act defines such messages as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” Excluded from this definition are “transactional or relationship messages” which are messages to: (i) facilitate, complete or confirm a commercial transaction that the recipient agreed to enter; (ii) provide notification of a change in the recipient’s standing or status; (iii) provide account statements or other account information; (iv) provide information directly relating to an employment relationship or related benefit plan in which the recipient is involved, participating or enrolled; or (v) deliver product updates or upgrades that the recipient is entitled to receive under the terms of a transaction with sender.

### **Requirements of the Act**

Unlike the S.B. 186, the Act allows the sending of commercial emails, even if there is no prior relationship, however, the emails must meet certain requirements.

1. Commercial emails must be identified – Such emails must be “clearly” and “conspicuously” identified as advertisements or solicitations. Deceptive subject headings are prohibited.
2. Opt-out provisions are required – The sender must give recipients the means of asking not to receive future commercial emails. The sender must give the recipient the ability to send a reply message or other internet based communication that opts out of future emails from the sender.
3. Emails may not be sent to persons who have opted out or otherwise asked not to receive them. This requirement becomes effective ten (10) days after receipt of the opt out request.
4. The commercial emails and transactional or relationship messages cannot use false or misleading headers.
5. Entities may not use third parties to accomplish any act prohibited under CAN-SPAM.
6. The email message must provide a valid physical postal address of the sender.
7. Any sexually explicit material must contain a notice of such in the subject heading.

### **Penalties under CAN-SPAM**

Email recipients do not have the right to bring legal action under the Act. Criminal enforcement efforts are reserved to the Federal Trade Commission (FTC) or state law enforcement agencies. The FTC, state law enforcement and internet service providers also have the right to bring civil suits.

The penalties under the Act can be as high as \$250 per email and up to \$2,000,000 per incident. These penalties may be trebled if the court determines that the violation of the Act was willful and knowing. The court may, at its discretion, also award costs and attorney fees.

### **Reduction in Damages**

In assessing damages under the Act the Court may consider whether (a) the defendant has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent such violations, or (b) the violation occurred despite commercially reasonable efforts to maintain compliance of the practices and procedures.

### **Further Information**

This memo is intended to be a brief summary of the Act to provide awareness to those who might be impacted. The entire Act is posted on the Office of the General Counsel website at <http://www.stanford.edu/dept/legal/recent/index.html>. If you have any questions, please feel free to contact Patrick Dunkley at 5-7655 or [pdunkley@stanford.edu](mailto:pdunkley@stanford.edu).