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Congress Finds Rare Unity in Spam, to a Point

By JENNIFER S. LEE

WASHINGTON, June 22 — At a time when lawmakers are sharply divided on everything from Arctic oil drilling to Medicare drug benefits, spam has emerged as a powerful bipartisan issue.

Lately this has become abundantly clear as the first bill this year promising to control unwanted messages that clutter e-mail in-boxes flew through a Senate committee on Thursday by a unanimous vote. Meanwhile, the Christian Coalition, which rarely sees eye to eye with Senator Charles E. Schumer, Democrat of New York, has endorsed his separate proposal for a do-not-spam registry and labeling pornographic messages.

As with a variety of other technology debates about privacy and copyright, Congressional positions on spam have little to do with political ideology and turn more on interpreting the balance between the rights of consumers and the rights of the businesses that sell to them.

"This hasn't resonated with standard partisan positions," said Lawrence Lessig, a professor of law at Stanford University. "It's an advantage because I think something will happen. It's a disadvantage because just anything will happen."

In this case, spam frustrates everyone — Republicans and Democrats, urban and rural residents alike. Lawmakers themselves are consumers with overflowing in-boxes. Crises also cut across partisan politics. Spam, the consensus says, has reached a crisis point — consuming an estimated 40 percent of all e-mail traffic. Technology solutions have not been a panacea. As a result, various other business interest groups (with the exception of the spammers themselves) that might normally defend the free play of market forces have converged in support of some kind of federal regulation.

Technology companies, which traditionally eschew intervention from Washington, now fear the economic potential of the Internet will drown in the vast volumes of spam. Microsoft, America Online, Earthlink, eBay and Yahoo have rallied behind a fairly stringent Senate antispam bill sponsored by Conrad Burns, Republican of Montana, and Ron Wyden, Democrat of Oregon. And even the marketers have repositioned themselves.

"Legitimate industry has a benefit from cleaning up," said Louis Mastria, a spokesman for the Direct Marketing Association, which originally advocated industry self-regulation, but now endorses the Burns-Wyden bill.

The consumer-marketer dynamic spawns a spectrum of antispam proposals. One general approach centers on the collective consumer desire to protect in-boxes by requiring prior consent, creating do-not-spam databases and allowing individuals to take spammers to court.

Another approach emphasizes how marketing e-mail can be legitimate if it has options called opt-outs for consumers to remove themselves from mailing lists; postal or street addresses; and clear labeling. This approach also outlaws spamming techniques like using automated programs to harvest or generate e-mail addresses. The intent is to eliminate the bottom feeders (the generic Viagra and buy-a-diploma ads), while preserving the right for mainstream companies to market to consumers.

But any regulation will be crude compared with the agility of elusive spammers. Even the bill's sponsors acknowledge that no matter what legislation passes, spammers will find loopholes, including moving more of their operations overseas. The hope is to at least slow the deluge.

A flurry of antispam bills has been introduced and reintroduced in Congress in the last several months. The bills rival one
another as much for their attempt to create catchy acronyms as for legal content: the CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing), the SPAM Act (Stop Pornography and Abusive Marketing Act), REDUCE Spam Act (Restrict and Eliminate the Delivery of Unsolicited Commercial Electronic Mail or Spam Act), and the RID Spam Act (Reduction in Distribution of Spam).

But only bills with either a long history or the backing of key committee chairmen have credibility. This narrows the field to four: two rival bills in the House and two bills that are expected to be merged on the floor of the Senate.

In the Senate, the competition has become who can add another tough provision or close another loophole.

Senators Burns and Wyden updated their original bill to require opt-outs and advertising labeling for all commercial e-mail, solicited or unsolicited. They also clarified that a mere visit to a Web site does not create a prior business relationship.

Senator Schumer pushed for a provision calling on the Federal Trade Commission to explore creating a do-not-spam registry similar to the national do-not-call list it is about to begin compiling for telemarketers. John McCain, the Arizona Republican who is chairman of the influential Commerce Committee, which approved the bill, added his own amendment that would hold businesses accountable for hiring spamming services.

The two leading members of the Senate Judiciary Committee, Orrin G. Hatch, the Republican chairman, from Utah, and Patrick J. Leahy, the committee's senior Democrat, from Vermont, have introduced their own bill that would give spammers up to five years in prison. Those provisions would toughen the Burns-Wyden bill.

But the Burns-Wyden bill also makes a concession to marketers. It allows initial unsolicited e-mail messages, as long as there is a clear way for consumers to opt-out from receiving additional ones.

By contrast to the Senate, two bills have emerged in the House. One is sponsored by two longtime antispam advocates. The other, which is backed by two powerful committee chairmen, has been criticized for being too sympathetic to marketers.

On the surface, the two look remarkably similar — both create prison terms for spammers, forbid harvesting of random e-mail addresses from the Internet and demand opt-outs and street addresses in marketing e-mail. The differences, as with so much legislation, lie in the definitions and the enforcement provisions.

Billy Tauzin from Louisiana, chairman of the Energy and Commerce Committee, and F. James Sensenbrenner Jr., chairman of the Judiciary Committee, of Wisconsin, who are both Republicans, have overcome their traditional rivalries to introduce a spam bill with Richard M. Burr, Republican of North Carolina.

The bill started out as a collaborative effort, but ultimately a number of lawmakers defected because they were dismayed by the active role the financial services industry, among other industries, had in shaping the legislation.

"In the end I wasn't willing to sign on to that bill," said Heather A. Wilson, Republican of New Mexico, who has been pushing antispam legislation for the past four years. "The reason is that there were too many loopholes that would allow junk e-mail to continue."

Critics note that one loophole is that the Burr-Tauzin-Sensenbrenner bill defines marketing e-mail messages as those whose "primary purpose" is to promote a product, as opposed to a message which promotes a product in any capacity, primary or not.

State attorneys general are not given the authority to enforce the opt-out provision, though they are able to enforce other aspects, like fraudulent subject lines. "It's a fundamental consumer protection issue," Senator Wyden said. "If recipient asks to be taken off the list and there are no consequences, it's not on the level."

The omission is rooted in Representative Sensenbrenner's skepticism about overly aggressive state attorneys general, say people who worked on the bill.
In response, Mr. Wilson and Gene Green, a Texas Democrat, revived an antispam bill they had introduced in two previous sessions of Congress. In 1999, the bill passed the House by a 427-to-1 vote. In 2001, the bill passed out of committee and never made it to a floor vote, in part because of resistance from Mr. Sensenbrenner.

The Wilson-Greene bill requires warning labels on pornography, has a tighter definition of prior commercial relationship and forbids the sharing or selling of e-mail addresses with third parties.

But in order to broaden its appeal, the Wilson-Green bill eliminated the right of individuals to sue spammers, leaving that right to the F.T.C., states and Internet service providers.

In the last few weeks, the Wilson-Green bill has gained considerable momentum in the House. It has gathered over three dozen co-sponsors, including the ranking Democrats on the Energy and Commerce Committee, Representative John D. Dingell of Michigan, and on the Judiciary Committee, John Conyers Jr. from Michigan. Both had been disappointed in the other proposal.

This attention has not gone unnoticed. "There is enough support behind the Wilson bill to stimulate a dialogue between our two committees," said Ken Johnson, a spokesman for Mr. Tauzin.

But outside of Washington there is still considerable skepticism as to the effectiveness of the emerging legislation.

"There just seems to be that there is a simpler cheaper way to enable enforcement," said Professor Lessig, who has proposed setting bounties on spammers, an idea introduced by Representative Zoe Lofgren, Democrat of California. "We are going to have another Homeland Department of E-Mail Security or something like that."