

FACES OF THE LAW

**HOW MUCH
SPAM DID YOU
GET TODAY?
YOU CAN
THANK HIM
THAT IT
WASN'T MORE**

It's hard to imagine now, but there was a day when Internet spam did not seem inevitable, when reasonable people thought that it—like polio and nuclear proliferation—could be systematically eliminated from American life if only the full force of the public and private sectors could be marshaled against it. Few have worked harder to accomplish

that than David Kramer, 36, a partner at the Palo Alto, California, law firm Wilson Sonsini Goodrich & Rosati, where he defines his bailiwick as "Internet abuse." This includes denial-of-service, privacy-abuse, and fraud issues. Much of Kramer's milestone work, however, has dealt with spam, the unsolicited commercial e-mail that got its name from a Monty Python skit in which a waiter deluges customers with choices—spam, eggs and spam, ham and spam, spam and spam—that they don't want.

Wilson Sonsini was establishing itself as one of the nation's top tech-oriented firms in 1996 when Kramer, an intellectual-property litigator, arrived. He had grown up in New York City and earned a B.A. from Dartmouth and, in 1993, a law degree from Georgetown. He'd spent a few years using America Online, so when asked whether he had ever been on the Internet, he was able to say yes. Then he was given a new client, a large Internet service provider known as Concentric, which was trying to figure out a way

KRAMER: SAY WHEN!



to combat spam. Concentric users were receiving e-mail solicitations for such things as time-share packages, baldness cures, and pyramid schemes. "Any legitimate products were the exception rather than the rule," says Kramer.

Many of the solicitations came from Cyberpromotions, whose founder, Sanford Wallace, was known as the Spam King. Concentric wanted to fight Wallace on two fronts. First, it hoped to protect its customers from receiving his spam. Second, it was eager to stop Wallace from spuriously showing Concentric e-mail addresses as the origins of his messages, which was causing Concentric's servers to get jammed with angry responses. There was no case law or regulation governing spam, so Kramer relied on aspects of trademark law to sue Wallace—who settled before the court handed down a decision and agreed to issue a public apology, pay damages of a few thousand dollars, and never send messages to Concentric subscribers again. "The settlement was a demonstration that it was possible to sue spammers, that you didn't have to take it," Kramer says.

When CompuServe faced the same problem with Cyberpromotions, that Internet service provider hired Kramer too. CompuServe recognized the long-term value of making law in the field and sought a decision to establish that sending mail after being told it is unwanted is a form of trespassing on the ISP's private computers. Kramer won again. He went on to handle about a dozen other spam cases, then turned his attention to legislative efforts. "Litigation was a very inefficient way to deal with the problem," he says. "Spam litigation is rarely justifiable from a pure dollars-and-cents perspective." It is inevitably costly and carries the challenge of trying to quantify the harm caused. In addition, a lot of spammers are what lawyers call judgment-proof: They don't have assets that a plaintiff can try to collect. "And if you do hire lawyers," says Kramer, "all you've done is stop one spammer."

In 1997 he began working with state governments to draw up anti-spam laws. Given the geographically indeterminate nature of e-mail,

among other considerations, Kramer believed that federal law was the only way to mount a serious fight against spam. But he felt that working with states to pass legislation would prompt Congress to act. "The states were making a patchwork quilt of different obligations in an area where a single federal statute is important," he says. "Congress was behind the times."

When Congress finally became interested in the issue, though, Kramer realized that his opponents weren't just the shadowy, assetless hornswogglers he had gone after in court. Spam had increasingly become the province of legitimate businesses—although, perhaps marking a deeper shift in anxieties, its sleazier substance seemed to be changing from baldness cures to erectile dysfunction and outright porn. Direct-marketing trade groups saw their future at stake and fought back with lobbyists.

In 2003 President Bush signed the Controlling the Assault of Non-Solicited Pornography and Marketing Act, known as the CAN-SPAM Act. Kramer calls it the You Can Spam Act. "It's essentially a license to spam," he says of the bill, which places restrictions on the types of mail that can be sent but also creates a framework for the legitimate delivery of spam. Moreover, the act overrides the limited anti-spam effectiveness of the patchwork quilt Kramer helped to assemble through legislation by the states.

So the flood of spam continues, and while Wallace is no longer the Spam King, says Kramer, "there is a long line of successors."

Kramer hopes Congress will revisit the issue, but until then he expects that in-boxes will be the site of a new arms race: broadband-equipped spammers against consumers and businesses with increasingly deft anti-spam technology. Software has become the substitute for justice.

by Sasha Issenberg



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