Troubled by a growing junk email problem, China's Ministry of Information Industry recently took the initiative to combat spam email by issuing new measures. However, despite its good intentions, are these new rules effective enough to prevent the receipt of unwanted emails?

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n recent years, the use of the internet has proliferated in the People’s Republic of China (PRC). According to the statistics provided by the China Internet Network Information Centre, the number of internet users in the PRC hit 110 million by the end of February 2006, making the PRC second only to the United States in terms of citizens having access to the internet. With the increasing use of the internet comes the growing problem of junk electronic-mail, or colloquially termed, ‘spam’.

The latest survey conducted by the Internet Society of China reveals that, during the period from November 2005 to March 2006, a frequent user of the internet in the PRC receives an average of 19.33 junk emails each week. It is not surprising that the PRC is labelled as one of the major sources of global junk emails. Sophos, an anti-virus software maker, estimates that 15.7% of spam received worldwide is being sent from or relayed through computers in the PRC, making the PRC the world’s number three producer of junk emails.

EMAIL MEASURES

To combat spam, the Ministry of Information Industry (MII) issued the Measures for the Administration of Internet Electronic Mail Services (Measures), which became effective on March 30 2006.

The Measures are intended to regulate the provision of internet email services, the provision of access services to internet email service providers (ESPs) and the dispatch of emails using the internet within the PRC. Pursuant to the Measures, an ESP must obtain a value-added telecommunications service operating permit or handle the required registration with the MII if it provides non-commercial internet information mail, or colloquially termed, ‘spam’.

The Measures specify three requirements that apply to emails containing ‘commercial advertisements’ and to which the Measures apply (‘regulated emails’):

i. the labelling requirement: requires a regulated email to include the abbreviation of advertising, ‘AD’, or the equivalent in Chinese in the subject heading.

ii. the opt-out requirement: requires a regulated email to include a means whereby the recipient may indicate that he/she no longer wishes to receive such emails.

iii. the express consent requirement: unless the recipient has expressly consented to receiving commercial advertisements from the sender, a regulated email must not be sent to a recipient.

Apart from specifying these requirements, the Measures also set out specific technical and administrative provisions to which an ESP must comply, as follows:

i. register the internet protocol (IP) addresses of its email servers with the MII and the relevant local communications administrative bureau;

ii. build email service systems in accordance with the technical standards formulated by the MII;

iii. disable anonymous forwarding functions of its email servers;

iv. strengthen the safety administration of its email systems and promptly take remedial measures as and when network safety loopholes are discovered;

v. inform users clearly of the service scope and the rules for the use of its email services;

vi. keep confidential the registration information and email addresses of users, and not to disclose them without the consent of the relevant users. Thus, when affiliated companies of the ESP exchange lists of email addresses of their respective users, the companies must ensure that all users consent to such disclosures. The Measures also restrict entities from selling, sharing or exchanging email addresses obtained through online automatic gathering or random combinations of the alphabets and numerals, and sending emails to email addresses obtained through such methods. As such, an ESP should not obtain lists of email addresses from any party unless they are certain that such addresses were not obtained through the aforementioned methods and that the addressers consented to their email addresses being disclosed to another party;

vii. maintain time records of both the dispatch and receipt of all emails, and the email addresses and IP addresses of all emails dispatched or received via its email servers, all of which must be kept for at least 60 days and disclosed to the state authorities upon request, and

viii. handle reports of junk emails from its users and put in place a convenient reporting mechanism. The ESP must take the following actions with respect to reports from users regarding junk emails:

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New Anti-Spam Measures

(a) promptly report to the state authorities if the email in question clearly contains any prohibited contents under the PRC Telecommunications Regulations, such as contents that may impair national security, or disseminate obscenity, pornography, gambling information, violence, homicide and terror, or incite crimes, insults or slanders others, or otherwise infringe the lawful rights and interests of such IP persons;

(b) report to the Internet Electronic Mail Reports Acceptance Centre under the Internet Society of China about emails that are junk emails but are free of any prohibited contents, and

(c) if the reported junk emails were sent from the IP address of the ESP itself, start investigations immediately and take preventive measures; and promptly report to the MII or the Internet Electronic Mail Reports Acceptance Centre the results of investigations.

PENALTIES
On the surface, the fines that may be imposed for violations of various provisions of the Measures are relatively insignificant (ranging from Rmb5,000 (US$624) to Rmb30,000 depending on the types of breach); however, it is unclear whether such fines will be imposed on a per-email basis or only once with respect to a mass mailing. Clearly, a per-email fine of Rmb30,000 could be very significant when thousands of emails are sent out.

GOOD NEWS OR BAD NEWS?
No definition of ‘spam’
The lack of a clear definition of ‘spam’ in the Measures is perhaps an intended legislative oversight. During interviews with the MII officials regarding the Measures, it was explained that whether an email is considered spam depends on the subjective judgement of the recipient; the MII does not take the position that spam should be given a statutory definition.

Sweeping definition of ‘advertising’
The Measures also do not stipulate clearly what constitutes commercial advertisements. Consultations made with the MII officials revealed that the definition of ‘advertising’ should follow the definition provided for in the advertising legislation.

Under the PRC Advertising Law promulgated by the National People’s Congress in October 1994, ‘advertising’ refers to “commercial advertising in which a commodity dealer or service provider directly or indirectly promotes his [or her] own commodities to be marketed or services to be provided at his [or her] own expense, through a certain medium and in a certain form.”

While the definition may be stretched to cover practically all emails concerning a commodity dealer’s products or services, a line should be drawn for the sake of business efficacy and the overriding public interest.

Difficulties obtaining express consent
The Measures prohibit the sending of emails containing commercial advertisements to recipients, which fail to meet the express consent requirement. The express consent requirement would be the most difficult to comply with in practice. Furthermore, the Measures do not provide any further information about what constitutes ‘express consent’. However, it has been confirmed by the MII officials that if there is a pre-existing relationship between the sender of the emails and the recipients, such as cases in which the recipients are customers of the email sender, then emails about the new services or products would be considered as communications with the customers and not commercial advertisements. Therefore, separate express consent from the customers is not required to distribute these emails.

Other shortcomings
The Measures only cover the sending of emails but not other messages sent via the telecommunications networks, such as short mobile messages. With the exponential growth of short messaging services (SMSs) in the PRC, junk SMSs have become a problem that needs to be addressed as well. It is suggested that either a new piece of legislation be enacted or the Measures be amended, to expand its jurisdiction to incorporate junk SMSs.

At the same time, because the fines and sanctions imposed by the Measures are comparatively low, its deterrence effect in eradicating spam is dubious. It is now clear from consultations with the MII officials that the MII will only take action prescribed under the legislation if a recipient makes a complaint. If the public is of the opinion that the Measures are not effective because of the insubstantial fines and ineffective sanctions, people may consider it not worthwhile for them to make a complaint, thus stripping the Measures of its operational value.

A STEP IN THE RIGHT DIRECTION
Although the Measures have obvious shortcomings in its effectiveness to contain the email spam problem, the issuance of the Measures reflects the PRC government’s resolve to tackle the problem of spam. The Measures are the first legislative attempt of the PRC government’s effort to combat spam and it has moved a step closer to the introduction of a more comprehensive anti-spam law.