

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**IMPULSE MEDIA GROUP, INC.,**

a Washington corporation,

Defendant.

**No. CV05-1285L**

**UNITED STATES' RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

25  
26  
27  
28

**I. Introduction**

Plaintiff United States of America ("United States"), by and through its counsel, submits this Memorandum of Law in Opposition to the Motion by Defendant Impulse Media Group, Inc. ("IMG") for Summary Judgment.<sup>1</sup> The United States brought this action under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM" or "the Act"), 15 U.S.C. § 7701 *et seq.*, and the Federal Trade Commission's Adult Labeling Rule (the "Adult Labeling Rule" or the "Rule"), 16 C.F.R. § 316, against Defendant IMG. The case concerns Defendant's liability for sexually explicit spam that was broadcast to in-boxes across the Internet advertising Defendant's adult content websites. Under agreed facts and the plain meaning of the Act, Defendant's Motion for Summary Judgment must be denied, as Defendant is

---

<sup>1</sup> This response is supported by and incorporates by reference Plaintiff's Motion and Memorandum in Support of Summary Judgment and Statement of Facts ("SOF") (Docket #17)(hereinafter "Plaintiff's Motion and Memorandum"), and all exhibits previously filed in support of Plaintiff's Motion for Summary Judgment.

1 liable for the violations that took place.

2 The parties have filed cross-motions for summary judgment that disagree not on the facts  
3 of the case, but on what the law requires to impose liability for a violation of CAN-SPAM. The  
4 parties agree that IMG “affiliates” sent spam which does not comply with the Act. The parties  
5 agree on the contractual relationship between IMG and its affiliates that induced the affiliates to  
6 drive prospective members to IMG’s websites. The parties also agree that IMG paid its affiliates  
7 when new members, attracted by the affiliates, signed up for those websites. What the parties  
8 disagree on, however, is what steps Congress took to prevent such email from being sent in the  
9 first place.

10 Congress recognized that there was often a distinction between firms that benefit from  
11 sexually explicit spam, and entities that actually push the button to send the spam. The United  
12 States contends that Congress, motivated in large measure by a desire to prevent pornographic  
13 email from being delivered to children, deliberately excluded a “knowledge” requirement from  
14 the pertinent provision of CAN-SPAM to expressly impose liability for injunctive relief on both  
15 those that induce spam and the button pushers, thus reaching firms like IMG that motivate and  
16 provide consideration to others who send sexually explicit email to non-consenting recipients.  
17 The United States contends that Congress imposed a “knowledge” requirement only in  
18 connection with criminal liability or liability for civil penalties. IMG, on the other hand,  
19 contends that Congress only meant to impose liability, even for injunctive relief, on those entities  
20 that could be proven to have a specific intent to purposely and knowingly solicit others to send  
21 illegal spam on their behalf. However, as discussed in Section V(A)(2) and (3), *infra*, the text,  
22 structure, and legislative history of the Act unequivocally show that no such mens rea  
23 requirements exist.

24 There is no genuine dispute of the facts that compel liability under the standard Congress  
25 enacted. As discussed in Section III, *infra*, IMG operated an affiliate program and induced  
26 affiliates to bring paying customers to IMG as a part of the Soulcash affiliate program by  
27 providing them with marketing materials and support, and paying them for bringing customers to

1 IMG. Further, the evidence shows, and the Defendant does not dispute, that IMG affiliates  
2 promoted IMG's websites through unsolicited commercial email messages that contained  
3 sexually oriented material that violated CAN-SPAM and the Adult Labeling Rule. Therefore,  
4 summary judgment is appropriate in this case, but in favor of the United States.

5 As demonstrated below, IMG should be held liable for both injunctive relief and civil  
6 penalties. IMG's liability for injunctive relief rests on its having intentionally induced affiliates  
7 to initiate violative emails. While there is no knowledge requirement for injunctive relief, there  
8 is such an element in the civil penalty calculus. As discussed in Section V(B), *infra*, IMG's  
9 liability for civil penalties follows from its actual and implied knowledge of its affiliates'  
10 activities and of CAN-SPAM. The contours of any injunction and the amount of any civil  
11 penalty will be decided in later proceedings.

## 12 **II. Background on CAN-SPAM and the Adult Labeling Rule<sup>2</sup>**

13 Congress enacted CAN-SPAM and directed the Federal Trade Commission ("FTC") to  
14 promulgate the Adult Labeling Rule in part to protect email recipients from being exposed to  
15 sexually explicit material without taking an affirmative step to see the material. The Act requires  
16 a warning and an opt-out mechanism to appear in the initially viewable area of sexually explicit  
17 email, and bans sexually explicit material from that area. The Act and Rule thus protect  
18 recipients from unintentionally viewing material that may be vulgar or pornographic. The Act  
19 was explicitly intended to protect minors from being exposed to such material.

20 The Act and Rule also provide recipients of unsolicited commercial email messages,  
21 whether or not the messages are sexual in nature, the opportunity to contact the sender and  
22 request not to receive further messages.

23 Under the Act and the Rule, any person who initiates the transmission to a protected  
24 computer of any commercial email message that includes sexually oriented material must

---

25 <sup>2</sup> To avoid undue repetition, this section includes a much abbreviated discussion of the  
26 background of CAN-SPAM, compared to a similar section in the Government's Summary Judgment  
Memorandum. *See* Docket #17 at pp. 15-20.

1 include the phrase "SEXUALLY-EXPLICIT: " at the beginning of the subject line in the header  
 2 of the message. CAN-SPAM and the Adult Labeling Rule also require that when recipients of  
 3 commercial email messages with sexually oriented material open the email, they see only the  
 4 following: (1) "SEXUALLY-EXPLICIT: "; (2) identification that the message is an  
 5 advertisement or solicitation; (3) notice of the opportunity to decline to receive further spam  
 6 from the sender; (4) a functioning return email address that a recipient may use to submit a reply  
 7 email message requesting not to receive future spam from the sender; (5) a valid physical postal  
 8 address of the sender; and (6) instructions on how to access the sexually oriented material. *See*  
 9 15 U.S.C. § 7704(d)(1); 16 C.F.R. § 316.4(a).

10 CAN-SPAM itself also requires that spam provide notice of an opt-out provision and  
 11 bear a valid physical postal address of the sender. *See* 15 U.S.C. § 7704(a)(5). These last two  
 12 provisions apply whether or not the email contains sexually oriented material.

### 13 **III. Factual Background**

14 The undisputed facts are set forth at pages 3 through 14 of Plaintiff's Motion and  
 15 Memorandum. Below, the government sets forth a brief summary of the operative facts.

#### 16 **A. IMG Induced Affiliates to Send Violative Messages**

17 There is no genuine dispute that IMG operated an affiliate program called "Soulcash,"  
 18 that IMG provided affiliates with marketing materials and support, that IMG paid affiliates for  
 19 bringing paying customers to IMG as a part of the Soulcash affiliate program, that IMG induced  
 20 affiliates to bring paying customers to IMG as a part of the Soulcash affiliate program, that  
 21 affiliate members of the Soulcash program promoted IMG's websites through unsolicited  
 22 commercial email messages that contain sexually oriented material, and that these messages  
 23 violate CAN-SPAM and the Adult Labeling Rule.<sup>3</sup>

24 Affiliates of the Soulcash program are provided marketing materials to advertise IMG's  
 25 websites and earn money each time they refer a customer who subscribes to one of IMG's adult

---

26 <sup>3</sup> The operation of Soulcash is detailed in the Plaintiff's SOF at ¶¶ 9-27.

1 websites. (SOF 10, 18, 19) IMG provides these marketing and promotional tools to affiliates to  
2 “give the affiliate a means to drive new . . . prospective website members to our [IMG’s] sites.”  
3 (SOF 20) IMG has two payment plans for affiliates, “per sign-up” and “50/50 rev share.” (SOF  
4 26) As part of the affiliate program, IMG provides assistance to affiliates through a support  
5 system that allows affiliates to send questions to IMG and receive responses, “via toll and toll  
6 free telephone numbers posted in the footer of every page,” and through email communications  
7 and instant messenger. (SOF 24) IMG also provides detailed sales statistics to affiliates. (SOF  
8 23) IMG even sends a notification email to an affiliate each time the affiliate is credited with a  
9 subscription to an IMG website. (SOF 25)

10 Affiliates on the per sign-up payment plan are paid more per sale the more sales they  
11 refer to IMG’s websites. Affiliates on the “rev share” program earn fifty percent of the payments  
12 made by a subscriber. (SOF 26) IMG also runs bonus payouts to encourage affiliates to bring  
13 subscribers to IMG’s websites. (SOF 27) Several of the affiliates who sent the violative emails  
14 at issue were paid for successfully recruiting subscribers to IMG’s adult websites. IMG paid  
15 affiliate “b32day” \$1,634.97 (SOF 49); affiliate “scorpion” \$2,057.00 (SOF 54); affiliate  
16 “teddybear” \$2,367.16 (SOF 58); affiliate “dacash” \$8,121.27 (SOF 56); and affiliate “a313372”  
17 \$4,201.47 (SOF 51).

18 While many of the affiliates who sent violative emails received payment for the sales  
19 they referred to IMG, the CAN-SPAM Act does not require an affiliate to be paid for sending  
20 violative emails in order for a violation to occur. A company could be liable as an initiator of  
21 violative emails without ever paying an affiliate for its services. This is because the Act imposes  
22 liability on a company that procures the initiation or transmission of a message, and a company  
23 can procure the initiation of a violative email by paying an affiliate *or* by inducing an affiliate to  
24 send violative email. Inducement is sufficient because it is the procuring of the initiation of the  
25 email that creates the forbidden result, *i.e.*, the sending of the violative email. After-the-fact  
26 payment to the affiliate by a company is a telling, but not a necessary component of liability.

## 27 **B. IMG’s Knowledge or Implied Knowledge of Violations**

1 IMG intended to induce affiliates when it knew or should have known that affiliates  
2 were sending spam in violation of the law and IMG consciously avoided taking steps to  
3 determine how its affiliates were promoting IMG's websites. (SOF 34-36) IMG knew that some  
4 of its affiliates relied on unlawful spam as a means to advertise IMG's websites because IMG  
5 received complaints regarding affiliates sending spam. (SOF 32) Despite this knowledge IMG  
6 did little to stop its affiliates from violating the law on its behalf.

7 Further, IMG was aware that it was operating in an environment conducive to spamming  
8 because IMG operates in an on-line world and pays affiliates who successfully bring customers  
9 to its websites through on-line advertising. (SOF 11, 29) IMG's agreement with affiliates to  
10 provide advertising services foreseeably involved the affiliates' use of on-line advertising  
11 including email. In responding to discovery, IMG identified electronic mail and electronic  
12 newsletter marketing as examples of a type of marketing IMG affiliates may choose to use.  
13 (SOF 29)

14 In addition, IMG took no affirmative steps to monitor its affiliates to ensure that they  
15 were not using violative emails to promote IMG's websites. IMG did not regularly ask affiliates  
16 what kinds of promotional tools they were using to promote IMG's websites (SOF 36(b)); IMG  
17 did not ask subscribers if they were directed to IMG's websites through emails sent by affiliates  
18 (SOF 36(a)); and IMG did not create a textlink on the first page of IMG's adult websites  
19 directing people who arrived there unwillingly to a complaint form (SOF 36(c)). It would have  
20 been feasible for IMG to undertake any of these monitoring methods, but IMG chose not to  
21 inquire into its affiliates' marketing practices. (SOF 34(a)-(c))

22 IMG exercised little caution during the affiliate sign-up process. IMG's affiliates are the  
23 sales force of the company. Even though affiliates are provided with the marketing and  
24 promotional tools to introduce IMG to the public, IMG does not interview affiliate applicants,  
25 ask for references, or conduct any detailed review of affiliates as a part of the affiliate sign-up  
26 process. (SOF 11-13) IMG approves applicants even when the answers the applicants provide  
27 on the affiliate sign-up questionnaire are senseless. For example, affiliates who provided the

1 names “hjghgj,” “ccc xzc,” and “sfdsgd dsfsdsgd” were approved, provided a unique user ID,  
2 and granted access to IMG’s promotional materials. (SOF 14)

3 IMG does have a provision in its Program Agreement that on paper restricts affiliates  
4 from sending commercial email in violation of CAN-SPAM and the Rule. (SOF 30) IMG’s  
5 Program Agreement for affiliates states that IMG does not tolerate spamming and that IMG  
6 reserves the right to terminate an affiliate for spamming. IMG claims that it has terminated  
7 twelve affiliates for spamming,<sup>4</sup> however, as explained in the paragraph immediately below,  
8 IMG did not always terminate all of an affiliate’s accounts when one of the affiliate’s accounts  
9 was terminated for sending spam.

10 After the United States filed its Motion for Summary Judgment, the Defendant provided  
11 written answers to Government Deposition Exhibit 31. *See* Exhibit 21. Based on this additional  
12 evidence provided by the Defendant, the United States has two additional undisputed facts.  
13 First, the affiliate accounts “scumbag” and “cracker” are operated by the same person. These  
14 two accounts were registered under the same name and physical address. Affiliate accounts  
15 “scumbag” and “cracker” both directed that their payments be made in the same name of  
16 Angelina Johnson (Excerpts from Response No. 4 to Document Requests - Affiliate Information,  
17 attached as Sealed Exhibit 23) (SOF 65). Second, the affiliate account “cracker” was not shut  
18 down when the account “scumbag” was terminated for sending spam. The affiliate account  
19 “cracker” is currently an active IMG affiliate account. (Response to Question 12 on Government  
20 Deposition Exhibit 31, attached as Exhibit 21) (SOF 66).

#### 21 **IV. Legal Standard**

22 The parties do not disagree that summary judgment is warranted if there is no genuine  
23 issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

---

24  
25 <sup>4</sup> When asked for the specifics regarding these terminations, IMG’s owner and president Seth  
26 Schermerhorn stated that he did not recall the specifics of any of these terminations and that IMG did not  
27 make a record of the reasons for the termination anywhere. *See* Exhibit 21 at p. 14; Schermerhorn  
28 deposition, attached as Exhibit 22 at p. 35 line 25 to p. 36 line 22.



1 Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Baccarat Fremont*  
 2 *Developers v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1158 (9th Cir. 2005). Summary  
 3 judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions  
 4 on file, together with the affidavits, if any, show that there is no genuine issue as to any material  
 5 fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.  
 6 56(c); *Rollison v. Hotel, Motel, Rest.*, 677 F.2d 741, 745 (9th Cir. 1982).

## 7 **V. Argument**

8 IMG is liable for initiating the transmission of hundreds of unsolicited commercial email  
 9 messages that violate CAN-SPAM and the Adult Labeling Rule. These are the emails that are  
 10 the subject of the United States' Motion for Summary Judgment. *See* Docket #17; Ex. 15. IMG  
 11 affiliates promoted IMG's websites through unsolicited commercial email messages that contain  
 12 sexually oriented material and violate CAN-SPAM and the Rule.

13 IMG does not deny this. *See* at Def. S.J. Mem. at p. 11. Indeed, it admits that it "entered  
 14 into agreements with the third parties [the affiliates who sent the emails] whereby it paid those  
 15 third parties a commission, or 'finders fee,' for sales resulting from referrals by those third  
 16 parties to Defendant[']s Web sites." Def. S.J. Mem. at p. 5. Defendant attempts to draw a  
 17 distinction between this practice and paying the third parties to market or advertise Defendant's  
 18 websites. *Id.* This distinction has no legal significance under CAN-SPAM.

19 Defendant does not disagree with the government concerning the facts surrounding the  
 20 relationship between IMG and its affiliates, it merely argues that those facts do not make IMG  
 21 liable for the violations. IMG argues that it cannot be found liable because it did not "know or  
 22 authorize or permit or suffer" the CAN-SPAM violations. *Id.* at 6. IMG argues that "for liability  
 23 to attach" the Act requires that IMG paid its affiliates

24 to commit the **specific** act of sending "a commercial electronic mail message"  
 25 that violates the Act. Even mere compensation for general advertising is not  
 26 enough under the Act. Such payment must be **intentionally** made by Defendant  
 27 to obtain the specific and actual result of the third person sending such an e-mail.

28 *Id.* at 10 (emphasis in original). In this, IMG could not be more wrong. The Act does not  
 require any showing of specific intent or knowledge for liability to attach here. Rather, IMG's



procurement of violative email makes IMG liable for injunctive relief for violating the Act. Furthermore, while not necessary for injunctive relief, IMG's actual or constructive knowledge of the violations is sufficient to make it liable for civil penalties pursuant to CAN-SPAM and the FTC Act.

## **A. Liability for Injunctive Relief for Violating CAN-SPAM and the Rule**

### **1. The Words of the Statute**

Liability under CAN-SPAM is assessed for "initiating" email messages that violate the statute. 15 U.S.C. § 7704(a)(1) ("It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message . . . ."); 15 U.S.C. § 7704(a)(5)(A) (same). Under CAN-SPAM:

The term "initiate," when used with respect to a commercial electronic mail message, means to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message.

15 U.S.C. § 7702(9). CAN-SPAM defines "procure" as follows:

The term "procure," when used with respect to the initiation of a commercial electronic mail message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf.

15 U.S.C. § 7702(12).

IMG is liable for the email messages violating CAN-SPAM and the Rule because IMG procured their initiation. IMG induced affiliates to send emails (both violative and non-violative) through promises of payment and extensive affiliate support. Thus, IMG procured the transmission of the violative emails, including the hundreds of emails detailed in the Government's Motion for Summary Judgment. As such, IMG initiated the unlawful email messages and violated CAN-SPAM and the Rule.

### **2. Statutory History and Structure of CAN-SPAM**

As discussed in Plaintiff's Motion and Memorandum, Congress, motivated in large measure by a desire to prevent pornographic email from being delivered to children, deliberately excluded a "knowledge" requirement from the pertinent provision of CAN-SPAM to expressly

1 impose liability for injunctive relief on both “button pushers” and those who induce the “button-  
 2 pushers,” thus reaching firms like IMG that motivate and provide consideration to others to send  
 3 sexually explicit email to non-consenting recipients. Plaintiff’s Motion and Memorandum at pp.  
 4 16-17. As discussed in Plaintiff’s Motion and Memorandum, the text, structure, and legislative  
 5 history of the Act unequivocally show that IMG is liable for injunctive relief regardless of  
 6 IMG’s knowledge of its affiliate’s activities. The legislative history of the Act demonstrates that  
 7 Congress specifically rejected a knowledge requirement in the relevant section of CAN-SPAM.  
 8 Congress demonstrated its intent to impose a lower burden of proof for injunctive relief against  
 9 entities such as IMG in a civil government enforcement action by placing a “knowledge”  
 10 element in other CAN-SPAM provisions, such as the criminal provision and the section allowing  
 11 enforcement by Internet Service Providers, even as it deleted “knowledge” as an element in  
 12 cases such as this one. Plaintiff’s Motion and Memorandum at pp. 24-26.

13 Congress has imposed even more stringent liability on violators without a knowledge  
 14 element than it did in CAN-SPAM in other arenas where Congress sought to eliminate what it  
 15 viewed as particularly grave problems. For example, in protecting migratory birds, Congress  
 16 made it a crime to kill a bird, with absolutely no regard to state of mind. *See, e.g., United States*  
 17 *v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (holding company liable under the Migratory Bird  
 18 Treaty Act for unintentional death of birds resulting from dumping waste water); *United States v.*  
 19 *Corbin Farm Serv.*, 444 F. Supp. 510, 532-35 (E.D. Cal. 1978) (holding that the Migratory Bird  
 20 Treaty Act can constitutionally be applied to impose criminal liability on those who did not  
 21 intend to kill migratory birds), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978). Similarly,  
 22 in passing the Federal Food, Drug, and Cosmetic Act, Congress imposed criminal liability on  
 23 anyone with a “responsible relation” to a violation. *United States v. Wiesenfeld Warehouse Co.*,  
 24 376 U.S. 86, 91 (1964). “[T]he Act imposes not only a positive duty to seek out and remedy  
 25 violations when they occur but also, and primarily, a duty to implement measures that will insure  
 26 that violations will not occur. . . . The Act does not . . . make criminal liability turn on  
 27 ‘awareness of some wrongdoing’ or ‘conscious fraud.’” *United States v. Park*, 421 U.S. 658,  
 28 672-73 (1975). Congress left it to the discretion of enforcement authorities to determine

1 appropriate cases to bring.<sup>5</sup> *See Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-99  
 2 (1950); *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978) (noting that “the sound  
 3 discretion of prosecutors and the courts” would limit the scope of the Migratory Bird Treat Act’s  
 4 strict liability provisions to prevent results that would offend reason and common sense). In  
 5 sum, Congress has imposed stringent liability on violators when it sought to eliminate  
 6 particularly grave problems, even imposing criminal liability with no element of knowledge.  
 7 CAN-SPAM is another instance of Congress imposing liability without requiring the  
 8 government to prove knowledge to obtain, in this instance, some sort of injunctive relief.

9 The colloquy between Senators Burns and Wyden that Defendant cites further supports  
 10 IMG’s liability for the affiliate emails at issue.<sup>6</sup> Def. S.J. Mem. at p. 14. In response to Senator  
 11 Burns’ question “Can’t the FTC, State A.G.s, and Internet Service Providers bring actions under  
 12 section 5 against parties who aren’t themselves spamming, but rather hire spammers to promote  
 13 their products and services,” Senator Wyden responds: “Absolutely. The bill’s definition of  
 14 ‘initiate’ makes that clear, because it applies not only to the spammer that originates the actual  
 15 email, but also to a party who has hired or otherwise induced the spammer to send the e-mail on  
 16 its behalf. If the e-mail message violates the bill, both parties would be on the hook under  
 17 section 5, and enforcement would be possible against both or either parties.” 149 Cong. Rec.  
 18 S15943, 15945 (2003). The Senators’ colloquy confirms that Congress intended that multiple  
 19 parties (*e.g.*, merchants and spammers) may both be liable under CAN-SPAM for the same  
 20 email. This is also confirmed by the definition of “initiate” (“For purposes of this paragraph,  
 21 more than one person may be considered to have initiated a message.”). 15 U.S.C. § 7702(9).

22 IMG asserts that the colloquy demonstrates that section 5 requires intent to violate the  
 23 law whereas section 6 does not. This interpretation finds no support in the statute or the  
 24 colloquy.

---

25 <sup>5</sup> Enforcement discretion in bringing injunctive cases provides the answer to IMG’s car dealer  
 26 dilemma. *See* Def. S.J. Mem. at p. 13.

27 <sup>6</sup> The Complaint alleges that IMG violated section 5 of the Act. Section 5 of the Act is 15 U.S.C.  
 28 § 7704. Section 6 of the Act is 15 U.S.C. § 7705.

1 With respect to the statute, section 6 relates exclusively to violations of 15 U.S.C.  
 2 § 7704(a)(1) and materially false or misleading header information in an email, whereas section  
 3 5 relates to a broader range of email, including email containing sexually explicit material. The  
 4 government's complaint here concerns violations of section 5, specifically 15 U.S.C.  
 5 §§ 7704(a)(3), (a)(5) and (d)(1). These latter sections of the law do not relate to email where the  
 6 header information is materially false or misleading.

7 With respect to the colloquy, the Senators are not discussing "intent" as it relates to third  
 8 parties and sexually explicit email. Senator Burns' statement that "what is different about  
 9 section 6, as I understand it, is that section 6 does not require any showing that the merchant  
 10 actually hired or induced the spammer to send the spam," applies in the context of false or  
 11 misleading header information. 149 Cong. Rec. S15943, 15945 (2003). Senator Burns  
 12 immediately thereafter stated: "if the spammer is hard to find and his contractual relationship  
 13 with the merchant has been obscured by under-the-table dealings, the FTC doesn't have to spend  
 14 time and effort trying to prove the relationship." *Id.* These statements make sense in the context  
 15 of false or misleading header information, because it may be hard to find the button pusher or  
 16 establish the relationship between the button pusher and person benefitting from the illegal  
 17 email. Despite IMG's assertions, the Senators are not discussing "intent" as it relates to the type  
 18 of email at issue here.

### 19 **3. IMG Violated CAN-SPAM and the Adult Labeling Rule**

20 The Defendant's sole argument is that it did not intentionally pay or intentionally induce  
 21 any person with specific intent to initiate prohibited emails. IMG attempts to read into a civil  
 22 violation in a government enforcement action a knowledge requirement that Congress  
 23 specifically considered, and deleted, from a bill before passing it as law. As Congress made  
 24 clear, the government is not required to show specific intent for a civil violation to attach.  
 25 Rather, the statute requires that IMG did not accidentally pay or accidentally induce its affiliates  
 26 to send commercial email on its behalf. This conclusion flows from the presence of  
 27 "intentionally" in the definition of "procure."

28 The meaning of "intentionally" and "knowingly" in various statutes may vary, and

1 confusion persists in this area of the law. Here, Congress created a two-tiered system of liability  
2 in government enforcement actions. To obtain injunctive relief, the government must show that  
3 a “procuring” defendant “intentionally” paid or induced another person to initiate a message.  
4 15 U.S.C. § 7702(12). For criminal liability, the government must show that a procurer acted  
5 “knowingly.” 15 U.S.C. 7704(d)(5). In this context, it would make no sense to read  
6 “intentionally” as imposing more of a burden in a civil injunction case than required by the  
7 “knowingly” requirement in a criminal case.

8 IMG argues that to obtain injunctive relief, the government must show that IMG acted  
9 “intentionally” in the sense of with a purpose of procuring email. IMG claims that CAN-SPAM  
10 “requires that the Defendant acted towards the [affiliate] in a manner so as to actually cause the  
11 [affiliate] to specifically send an e-mail. If Defendant did not intentionally act with such end  
12 result in mind, Defendant is not liable under the Act.” Def. S.J. Mem. at p. 11. Similarly, IMG  
13 argues that to be liable it “must have intended the actual sending of the e-mails as the end result  
14 of such payment or inducement.” Def. S.J. Mem. at p. 11. Defendant reads far too much into  
15 the word “intentionally” in section 7702(12).

16 IMG conflates the concepts of “general intent” and “specific intent” and thereby ignores  
17 the requirement that Congress actually created for injunctive relief for the relevant CAN-SPAM  
18 violations. The type of intent set forth in IMG’s brief as quoted above, acting with a specific  
19 mindful purpose of causing e-mail to be sent, is “specific intent.” As the Ninth Circuit has said,  
20 “‘purpose’ corresponds to the concept of specific intent, while ‘knowledge’ corresponds to  
21 general intent.” *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000). “A  
22 person who causes a result prohibited by common law or statute is said to have acted purposely  
23 if he or she consciously desired that result . . .” *Id.*

24 IMG argues that to obtain injunctive relief, the government must show such specific  
25 intent. But even in a criminal case, the government need only show “knowledge” under section  
26 7704(d)(5), and “knowledge” is consistent with general rather than specific intent. Here, the  
27 government only alleges civil violations, so it would be absurd to require proof of purpose which  
28 is not even required in a criminal prosecution. The word “intentionally” simply does not require

1 the specific intent that IMG asserts: requiring that a defendant act “intentionally or voluntarily is  
 2 consistent with general, rather than specific intent.” *United States v. Martinez*, 49 F.3d 1398,  
 3 1401 n.5 (9th Cir. 1995).

4 If IMG accidentally procured the sending of violative spam, the word “intentionally”  
 5 would shield it from liability. For example, consider this hypothetical. IMG officers  
 6 contemplate an affiliate program that paid spammers to send violative email. IMG created draft  
 7 web pages and email, and had these items on its computers. IMG decided not to implement this  
 8 program, but a hacker penetrated IMG’s computers and thought the program was genuine, and  
 9 used IMG’s emails to spam the Internet, expecting to be rewarded by IMG for so doing. Despite  
 10 the fact that IMG would have “induced” the violative spam, the inducing would have been  
 11 accidental rather than intentional, so no liability would attach. But where, as in reality, IMG’s  
 12 deliberate and non-accidental policies procure violative spam, particularly where that result is  
 13 quite foreseeable, IMG is liable.

#### 14 **B. Liability for Civil Penalties**

15 Pursuant to Section 7(a) of CAN-SPAM, the Act “shall be enforced by the [Federal  
 16 Trade] Commission as if the violation of this Act were an unfair or deceptive act or practice  
 17 proscribed under Section 18(a)(1)(B) of the [FTC] Act (15 U.S.C. 57a(a)(1)(B)).” That provision  
 18 makes violations of CAN-SPAM enforceable as though they were violations of an FTC Trade  
 19 Regulation Rule. In order to recover civil penalties for violations of a Trade Regulation Rule,  
 20 and thus for a CAN-SPAM violation, the government has to prove that IMG acted “with actual  
 21 knowledge or knowledge fairly implied on the basis of objective circumstances that such act is  
 22 unfair or deceptive and is prohibited,” 15 U.S.C. § 45(m)(1)(A).

23 Whether a defendant has violated a rule with actual or implied knowledge is  
 24 based on objective factors. A defendant is responsible where a reasonable person  
 25 under the circumstances would have known of the existence of the provision and  
 26 that the action charged violated that provision.

27 *United States v. Nat’l Fin. Servs., Inc.*, 98 F.3d 131, 139 (4th Cir. 1996) (citing legislative  
 28 history).

IMG is liable for civil penalties under this standard. IMG intended to induce affiliates

1 when it knew that affiliates were sending spam in violation of the law and IMG consciously  
 2 avoided taking steps to determine how its affiliates were promoting IMG's websites.<sup>7</sup> Further,  
 3 IMG was aware that it was operating in an environment conducive to spamming because IMG  
 4 operates in an on-line world and pays affiliates to bring customers to its websites through on-line  
 5 advertising. (SOF 1, 11) IMG's agreement with affiliates to provide advertising services  
 6 foreseeably involved the affiliates' use of on-line advertising including email. IMG even knew  
 7 that some of its affiliates were using spam to promote IMG's websites. IMG cannot avoid  
 8 liability by putting empty rhetoric in its contracts and claiming that it did not intend the obvious  
 9 results of its actions.

10 In sum, IMG is liable not only for injunctive relief but also for civil penalties on the basis  
 11 of uncontested facts.<sup>8</sup>

## 12 **VI. Conclusion**

13 For the foregoing reasons, the Court should deny IMG's Motion for Summary Judgment.  
 14 Rather, summary judgment finding liability for injunctive relief and civil penalties should be  
 15 entered against IMG. The scope of the injunction and amount of civil penalties will be  
 16 determined in subsequent proceedings.

17 DATED: September 25, 2006

Respectfully submitted,

18 FOR PLAINTIFF UNITED STATES:  
 19 PETER D. KEISLER  
 Assistant Attorney General,  
 Civil Division  
 U.S. DEPARTMENT OF JUSTICE

21 JOHN McKAY  
 United States Attorney

---

24 <sup>7</sup> See section (III)(B), *supra*; the Government's Summary Judgment Memorandum, Docket #17  
 25 at 26-29; and cited sections of the Statement of Facts, for further detail regarding IMG's actual and  
 constructive knowledge of the violations.

26 <sup>8</sup> Even if Congress had placed a knowledge requirement in the statute for the government to  
 27 obtain injunctive relief as IMG contends, the facts discussed in this section demonstrate that summary  
 judgment for the Defendant would nevertheless remain inappropriate.



BRIAN KIPNIS  
Assistant U. S. Attorney for the  
Western District of Washington  
700 Stewart Street  
PHONE: (206) 553-7970  
FAX: (206) 553-0882

EUGENE M. THIROLF  
Director  
Office of Consumer Litigation

KENNETH L. JOST  
Assistant Director  
Office of Consumer Litigation

JEFFREY STEGER  
Trial Attorney  
Office of Consumer Litigation

By: /s/ Lauren E. Hash  
LAUREN E. HASH  
Trial Attorney  
Office of Consumer Litigation  
U.S. Department of Justice  
P.O. Box 386  
Washington, DC 20044  
Telephone: (202) 353-1991  
Facsimile: (202) 514-8742  
Lauren.Hash@usdoj.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such to the following CM/ECF registrant:

Robert S. Apgood  
CarpeLaw PLLC  
2400 NW 80<sup>th</sup> Street #130  
Seattle, WA 98117-4449

By: /s/ Lauren E. Hash  
Lauren E. Hash  
Trial Attorney  
Office of Consumer Litigation  
U.S. Department of Justice  
P.O. Box 386  
Washington, DC 20044  
Telephone: (202) 353-1991  
Facsimile: (202) 514-8742  
Lauren.Hash@usdoj.gov