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Communications and Technology Branch
Commerce, Industry and Technology Bureau
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Attn: Assistant Secretary (B)

LEGISLATIVE PROPOSALS TO CONTAIN THE PROBLEM OF UNSOLICITED ELECTRONIC MESSAGES

Yahoo! Holdings (Hong Kong) Limited is pleased to have the opportunity to respond to the above consultation.

Background about Yahoo! Hong Kong

Yahoo! Hong Kong is a division of Yahoo! Inc., a leading provider of comprehensive online products and services to consumers and businesses worldwide. Yahoo! is the No. 1 Internet brand globally and the most trafficked Internet destination worldwide. Launched in January 1999, Yahoo! Hong Kong is a Chinese-language site of the Yahoo! network tailored to meet the needs of local audience of Hong Kong. Yahoo! Hong Kong is consistently ranked No. 1 in audience reach in monthly Nielsen//Netratings Reports since April 2001. Serving Hong Kong's largest web audience, Yahoo! Mail is the most used web/internet email tool in Hong Kong.

Executive Summary

The consultation paper reflects a thorough investigation of worldwide regulatory and legislative regimes. An in-depth understanding of the balance of interests necessary to both combat spam and maintain the flow of legitimate commerce is evident throughout the proposal. The Commerce, Industry and Technology Bureau has applied the rules in a nuanced fashion, recognizing the need for specific exceptions and for disparate treatment of different technologies.

Part III

The consultation paper takes an expansive view of scope, representing a long-term approach to the spam problem. By rightly recognizing that abuse can take place in any number of electronic messaging formats, the law has a better chance of staying ahead of the abusers. However, it is equally important to recognize that each format will have slightly different characteristics requiring a nuanced approach and some exceptions to the general rule. The proposed legislation has made some critical distinctions, such as messaging requiring manpower resources, pre-recorded elements, transmissions regulated by other statutes, and messages sent over private networks. It should also be considered whether a banner advertisement on a public website constitutes an electronic message under the proposed language. If so, it should not be covered by the scope of the statute, as many users understand that free content is often supported by the display of advertisements on a website.

The proposal to establish a process for the regulator to assess whether additional aspects of commercial messaging should, or should not, be regulated adds flexibility and longevity to the proposed statute. This element is critical.

A helpful clarification to the definition of “commercial electronic message” would be to allow a “primary purpose” test, eg, define “commercial electronic message” to mean “any electronic message the primary purpose of which is to offer, advertise, promote or sponsor the provision of goods, facilities, services, land or a business or investment opportunity...”.

This concept relies on a judgment that more of the content is marketing than not. Non-electronic communications such as a billing statement one receives in the mail will likely contain some limited marketing information. This does not change the fact that the message is expected by the consumer, nor does the consumer consider the letter containing the statement to be invaluable simply because it contains a limited amount of marketing communications. Electronic commercial communications should not be competitively disadvantaged with respect to offline communications.

Yahoo! takes issue with one element of the nexus factors outlined in the Consultation Paper. Element (b) of paragraph 26 indicates that mere transmission through Hong Kong should constitute nexus. However, a sender is unlikely to know the path a message will take en route to its destination and cannot be clear that it will not travel through Hong Kong. A network will find the most efficient route for the bits of information being transported, and that may mean parts of networks in Hong Kong will be implicated, even if the message originates in another jurisdiction and the destination is in another jurisdiction. The transmission lines used to transport electronic messages are rarely owned by those who send messages across them. It is entirely possible that a message could be in compliance with the laws of both the sending and receiving jurisdictions, but in violation of the Hong Kong statute. This is a perverse outcome, and should not be pursued. Elements (a), (c) and (d) give broad jurisdiction sufficient enough to play a role in not only the protection of Hong Kong’s citizens, but many of those around the globe. The assertion of jurisdiction over senders outside of Hong Kong will ensure Hong Kong’s rightful place in international enforcement. Thus, in the legislative language, (f)(ii) should be eliminated.

Part IV

An opt-out regime is a reasonable choice to balance the needs of the SMEs making up much of the Hong Kong economy and the needs of electronic messaging.

Yahoo! particularly supports the inclusion of options to select categories of services where messages are wanted when unsubscribing to an unwanted message. Large companies with many different product offerings are likely to have multiple areas of interest for a typical user. For instance, if Yahoo! Sports markets to a customer some users will not be interested, but that is not necessarily an indicator that they do not want to hear about Yahoo! Shopping offers. The demographics for use of such products may be vastly different. Giving users the control to make choices in this area is essential.

The prohibition on inaccurate contact information in electronic messages is an important tool for enforcers. Similarly, a prohibition on misleading subject headings gives enforcers a clear standard and useful tool. If a recipient gets a message that appears to be an update on world events but instead contains information on getting software “below cost”, it is clearly misleading and no further investigation is required. The trickery used in misleading headers to get users to open messages puts them at risk of spyware, viruses and other malware. While enforcers must conduct tedious research to establish whether unsubscribes were observed or how an unsubscribe interacts with other consents that may have been given under the opt-out regime, the facts are evident for a fraudulent header (referenced in Part VI) or a misleading subject line.

Part V

The proposal to link the prohibition on address harvesting to sending mail in contravention of the opt-out regime is wise given some legitimate uses of the technology. However, a message that breaks the rules requiring accurate contact information or prohibiting misleading subject lines should not be legal simply because the user has not yet opted out, mentioned as the basis for the linkage to violation of the opt-out regime. It should be clear that violation of the opt-out regime includes violations of contact information or subject line requirements. All such messages violate the statute contemplated.

In addition, Yahoo! urges the prohibition on address harvesting to be linked to fraudulent email, as defined in paragraph 74 of Part VI as well, as harvesting to send fraudulent mail is equally harmful to users.

Indeed, it is equally important, if not more important, to clearly link the prohibition to contravention of rules against fraudulent messages, inaccurate contact information or a misleading subject line. For the reasons stated above, it may be easier to prove facts surrounding fraud, contacts and subject lines rather than the opt-out regime.

Yahoo! suggests the legislative proposal read in paragraph 66 (a), (b) and (c):

“no person shall ...in contravention of the requirements of the opt-out regime or messages related to fraud as defined in [paragraph 74 or the reference to the section in the legislation when introduced].”

On the other hand, Yahoo! takes the view that the proposed penalties of up to 5 years' imprisonment are too severe. Although it is difficult to find a useful benchmark, we notice that certain existing offences which bear some resemblance to the proposed offences carry less penalty - no imprisonment or imprisonment of up to 2 years¹. We therefore suggest that the maximum penalty should be 2 years' imprisonment in relation to offences created under this Part.

Part VI

Yahoo! endorses the prohibited acts in this section and believes appropriate exceptions have been taken into account. However, again, a maximum penalty of 10 years' imprisonment is draconian and we suggest that it should be 2 years' imprisonment in relation to offences created under this Part.

¹ Direct marketing - any person that uses personal data for direct marketing purposes shall cease to use the data if the data subject so requests. Failure to comply may constitute an offence and the person is liable on conviction to a fine and to *imprisonment for 2 years*.

Unauthorized access to computer by telecommunications - any person who, by telecommunications, knowingly causes a computer to perform any function to obtain unauthorized access to any program or data held in a computer commits an offence and is liable on conviction to a fine of \$20,000 (*no imprisonment*).

Damaging telecommunications installation with intent - any person who damages, removes or interferes in any way whatsoever with a telecommunications installation with intent to prevent or obstruct the transmission or delivery of a message; or intercept or discover the contents of a message, shall be guilty of an offence and shall be liable on summary conviction to a fine of \$20,000 and to *imprisonment for 2 years*.

Part VIII

Yahoo! agrees that the TA should be given sufficient powers to enable it to undertake investigations and enforce the UEM Bill. However, safeguards should be built in to ensure that the TA's power to order from any person information or documents relevant to an investigation of a suspected contravention is exercised cautiously. This power of the TA will not affect just the culprits but also innocent bystanders who happen to possess the relevant information or document, such as email service providers like Yahoo!. There should be a balance between ensuring the TA's effective investigation and avoiding unfairly prejudicing the businesses that have to put in considerable corporate resources to comply with the TA's orders. One way to do that is to require that the orders must be issued by a magistrate.

Part IX

There should be clarity in paragraph 91 that the immunity provided telecommunications providers also extends to email service providers. Yahoo! Mail users control the messages sent over the mail system. While Yahoo! may place limits on the number of messages a user sends and respond to complaints about abusive users, it does not control the content of the messages and would not know if a user is using misleading subject lines or sending messages in contravention of the opt-out regime. Such email service providers merit the same protection from liability for such acts as the telecommunications service providers claim.

Paragraph 98 – we assume that it is meant that spam filters provided by email service providers do not violate Section 24 of the Telecommunications Ordinance.

Paragraph 100(g) provides that a telecommunications service provider who merely provides a service that enables a commercial electronic message to be sent shall not be taken to have sent or caused to have sent the message. We would suggest that a service provider of email and other Internet services that are interactive (such as message boards and BLOG) be expressly defined as being a telecommunications service provider.

Closing

In sum, Yahoo! believes the Commerce, Industry and Technology Bureau has created a regime for the regulation of commercial electronic messages that will reduce spam and give enforcers new tools to combat unwanted messages. We urge the adoption of the limited changes requested in this document as the process for bringing legislation to finalization proceeds. Thank you for the opportunity to comment.

Should you have further questions, please do not hesitate to contact our General Counsel, Ms Noelle Tai, at [redacted] or [redacted].

Yours faithfully

Mr Alfred Tsoi
Managing Director
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