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Bluespam: Is it legal?

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Security and Surveillance

Bluespam: Is it legal?

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Introduction

Many mobile phones now incorporate Bluetooth technology. This technology allows Bluetooth enabled electronic devices to connect and communicate with each other wirelessly through short-range, ad hoc networks known as "piconets". Increasingly, we are seeing Bluetooth technology being used for the purposes of direct marketing. For example, according to Marketing Week, Renault is shortly to trial the use of Bluetooth in the Metro Centre in Gateshead, enabling shoppers to download clips of Renault vehicles in a form of interactive advertising.

Whilst some will welcome the way this technological development is being used as a method of direct marketing, others view it as an invasion of their privacy. There are options for those that do not wish to receive direct marketing via Bluetooth – you can turn the Bluetooth on your mobile phone or other device off or "hide" your phone. However, many will take the view that they should not have to take such steps to avoid receiving what is termed as "Bluespam".

Whilst at first glance Bluespam appears to fall into the same category as unsolicited direct marketing via email, telephone and SMS spam (all of which are caught by the terms of the Privacy and Electronic Communications Directive (Directive 2002/58/EC) (the "Directive"), there is uncertainty whether the Directive extends to so-called Bluespam. This is an important determination as the Directive prevents, amongst other things, the transmission of certain unsolicited marketing communications without consent.

Privacy and Electronic Communications Directive

Article 13 (1) of the Directive provides:

"the use of...electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent."

This is the so called "anti-spamming" provision of the Directive. There are two definitions that are important in understanding this Article – "electronic mail" and "subscribers".

Electronic mail is defined as:

"any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient".

"Subscriber" is defined as:

"any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services".

The position in the United Kingdom

The Directive has been implemented in the United Kingdom by the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "Regulations") which are predominantly in the same terms as the Directive.

Guidance on the interpretation of the Regulations has been issued by the Information Commissioner. The Information Commissioner takes the view that marketing messages sent via Bluetooth constitute "electronic mail" for the purposes of the Regulations and that they are therefore caught by the "anti-spamming" provisions of the Directive and the Regulations. In the Information Commissioner's view, unsolicited Bluetooth marketing messages cannot be sent without the recipient having opted in to receiving such messages.

Other bodies have also expressed their views on whether Bluetooth marketing is caught under the Directive/Regulations. Amongst such bodies are the Direct Marketing Association and the Mobile Marketing Association, both of which share the Information Commissioner's view that an opt-in is required.

An alternative view

Although the Information Commissioner has stated that Bluetooth messages are "electronic mail", what is prohibited is the use of them for marketing to "subscribers". An analysis of this definition suggests an alternative interpretation.

Whilst it is clear that a network is created between a device transmitting via Bluetooth and a Bluetooth enabled handset, is this network a "public" electronic communications network? Arguably not.

Even if Bluetooth messages are "electronic mail", to be caught by the Directive, the messages must be sent to a "subscriber".

According to the definition of "subscriber" set out above, a contract with the provider of an electronic communications services for the supply of such services is required. In the Bluetooth scenario, such a provider would be the provider of the Bluetooth network – the ad hoc network created by Bluetooth is between the transmitting device and the Bluetooth enabled handset in the hands of the recipient. However, the only contract the recipient of the Bluespam is likely to have is with the company providing the handset. The implication of this analysis is that there is no "subscriber" (as defined) to the Bluetooth service.

This leads to an argument that Bluespam is not in fact caught by the Directive or the Regulations, meaning that consent is not required and that the Directive/Regulations cannot be used as a method of combating or preventing Bluespam.

Implications if an opt-in is required

At its simplest, if Bluetooth messages are within the scope of the Directive, they cannot be sent without consent. However, as the network created by Bluetooth is ad hoc and only lasts while the handset is within range of the transmitting device and because due to the nature of Bluetooth technology it is not possible for the transmitting device to identify particular handsets that have previously consented to the receipt of marketing messages from the particular transmitter, obtaining consent is not a straight forward issue. It cannot be assumed that because an individual has enabled Bluetooth on their handset, they have consented to the receipt of marketing messages.

One method currently adopted by marketers is to send an initial message asking the recipient whether they wish to receive the marketing message the device is attempting to transmit. The problem here is that this initial message will not have been consented to and, if the Directive applies at all, would be in contravention of Article 13(1).

The Direct Marketing Association has given guidance on how to obtain consent in compliance with the Directive. A solution they suggest is to promote Bluetooth content via media such as posters which would invite people to pair

with the Bluetooth transmitter to receive the content. If an individual paired with the device, they would be consenting to the receipt of messages. If they wanted to stop receiving the messages, they could stop the pairing. Although this suggestion by the Direct Marketing Association offers a Directive compliant way of using Bluetooth marketing, it will require a change in advertising approach from those using Bluetooth to promote their businesses.

Conclusion

If the Directive does apply and an opt-in is required for the sending of Bluetooth marketing messages, the practicalities of obtaining consent may render it practically impossible to lawfully market in this way.

We understand that the Information Commissioner is now considering a review of its current guidance and is liaising with other interested bodies to determine whether Bluetooth is properly within the scope of the Directive or not.

However, regardless of any revised guidance given by the Information Commissioner, the issue will not be properly resolved until the matter is brought before the courts for an interpretation of the Directive. In the United Kingdom, this could occur if the Information Commissioner were to issue an enforcement notice against a “spammer” which is appealed through the U.K. courts or if an individual subscriber were to sue a spammer for damages. Until there is a ruling declaring Bluespam to be contrary to the Directive, those wishing to avoid receiving Bluespam will have to remain “hidden”.