



Ethical reflections on the problem of spam

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Abstract. After reviewing some of the difficulties caused by spam and summarizing the arguments of its defenders, this paper will focus on its present legal status. It will then dwell on spam from a moral point of view and address some of the ethical implications associated with transmitting this unsolicited commercial e-mail. It will attempt to sort out the conflicting rights involved and develop a viable case that even if we prescind from its social costs, spam is ethically questionable under certain conditions. Moreover, given the current volume of spam and its negative impact on the Internet environment, the transmission of spam can also be characterized as an asocial act primarily because of the significant externalities which it generates. As a result, spam cannot be justified from the perspective of duty-based moral philosophies that emphasize the need to conform to the legitimate norms of the community.

Introduction

In a recent *New York Times* article spam was described as a 'betrayal of all that mail once stood for'.¹ This quote captures the negative sentiment that most users have cultivated about spam, a derogatory name for unsolicited, promotional electronic mail. Spam messages flood into mailboxes all over the 'Net and sell everything from education to sex. Spam is communicated to users either by postings to Usenet newsgroups or through bulk electronic mail delivered to Internet mailing lists. Spam may seem to be a trivial matter, nothing more than a minor nuisance and hardly a serious ethical problem. However, many users regard it as an invasive form of commercial advertising that perversely shifts some of its costs from the advertiser to the consumer. This cost shifting along with the deceptive tactics of 'spammers' has given spam a moral stigma that seems well deserved. Moreover the problem of unsolicited advertisements in cyberspace is likely to intensify in light of two important and converging trends: the rapid growth of electronic commerce and the continued reliance on direct marketing techniques deployed by advertisers soliciting a targeted or select group of consumers.

The ethical propriety of sending bulk promotional e-mail is not a simple matter to adjudicate since it does represent a form of free speech. How do we balance the right of commercial free speech with other rights at stake in this controversy such as the privacy rights of users? In addition, is the right to free speech curtailed

when certain costs are imposed on those to whom that speech is directed? Does my right to send someone an advertisement cease when the recipient has to incur some costs for receiving that ad? And if we agree that the consumer can absorb a trivial cost, where and how do we draw the line? At what point does cost shifting become truly burdensome for typical end users on the Internet?

We will attempt to address these and other salient moral issues about spam in this paper. Our primary theme is that the transmission of spam poses a considerable moral problem for two reasons: under some circumstances it constitutes a violation of personal autonomy, and because of its volume spam also has a disruptive effect on the fragile ecology of the Internet.

What's wrong with spam?

To begin with, how precisely should we define 'spam?' Spam refers to unsolicited, promotional electronic mail usually sent in bulk to thousands or millions of Internet users. Quite simply, it is junk e-mail which is usually a significant annoyance to its recipients. But is all unsolicited commercial e-mail a form of spam? Spam has typically been associated with 'get rich quick' schemes and other marginal businesses, but that is changing. As more and more individuals conduct business in cyberspace, mainstream advertisers and political organizations are beginning to rely on bulk e-mail to sell their products or solicit donations. The Democratic Party of California, for instance, uses e-mail to promote its activities and communicate

¹ M. Slatella. Hunting the Elusive Spammer. *The New York Times*, E11, March 19, 1998.

endorsements. Do these unsolicited communications also constitute spam? We seem to be in a nebulous area and the deployment of unsolicited e-mail by legitimate groups surely compounds the problem. Obviously, some unsolicited communications will have more merit than others based upon the sender and the content. We should keep this in mind throughout the course of this discussion, but for our purposes in this paper we will consider all forms of unsolicited promotional e-mail as spam.

Some of those vendors which do rely on spam maintain that this whole controversy is blown out of proportion by purists who want to see the Internet liberated from excessive commercial use. They argue that spam is no different from conventional junk mail which does not receive the same level of scrutiny or the same trenchant criticism. Opponents of spam, on the other hand, complain that it robs users and Internet providers of resources and sullies the Net just as litter or pollutants sully the physical environment.

Do the pro-spammers have a point? After all, why single spam out when there are so many other forms of 'junk' communication such as regular junk mail and unsolicited phone calls? What makes spam so pernicious and costly? The major difference between electronic junk mail and paper junk mail is that the per copy cost of sending the former is so much lower. There are paper, printing, and postage charges for each piece of regular junk mail but the marginal cost of sending an additional piece of junk e-mail is negligible. For instance, Jeffrey Slaton, a direct marketer who specializes in spam, charges his clients a flat fee of \$425 to send out several million messages. As he explains in a recent interview in *Wired*, 'It's just as cost effective to send to 6 million e-mail addresses as to 1 million e-mail addresses, so why bother being selective?'²

But spam is not cost-free. The problem is that the lion's share of these costs are externalities, that is, they are costs borne involuntarily by others. As Raisch³ (1995) has observed, spam is 'postage-due marketing.' The biggest cost associated with spam is the consumption of computer resources. For example, when someone sends out spam the messages must sit on a disk somewhere, and this means that valuable disk space is being filled with unwanted mail. Also, many users must pay for each message received or for each disk block used. Others pay for the time they are connected to the Internet, time which can

be wasted downloading and deleting spam. As the volume of spam grows and commercial use of the Internet expands, these costs will continue their steady increase.

Further, when spam is sent through Internet Service Providers (ISP's) they must bear the costs of delivery. This amounts to wasted network bandwidth and the utilization of system resources such as disk storage space along with the servers and transfer networks involved in the transmission process. Despite its efforts to control junk e-mail, America-on-Line reports that 2.5 million pieces of spam still engulf its system each day. According to the ISP's trade group,⁴ 'Although the cost for a single UCE [unsolicited commercial e-mail] message may be small, when messages to be processed swell into the thousands or millions, that cost becomes both significant and burdensome.'

In addition to these technical costs imposed by spam there are also administrative costs. Users who receive these unwanted messages are forced to waste time reading and deleting them. If a vendor sends out 6 million messages and it takes 6 seconds to delete each one, the total cost of this one mailing is 10,000 person hours of lost time. Spam is also a disutility because it clutters mailboxes and usegroup postings. If a business is forced to deal with and delete a large volume of electronic junk mail every day, that unwanted mail may be interfering with the timely receipt and disposition of its regular mail. If the volume of spam continues its rapid grow rate, it could seriously attenuate the utility of electronic mail.

Finally, junk mailers often use questionable practices to gather names and addresses. The spammers have been accused of violating privacy rights by distributing e-mail addresses without consent, by harvesting e-mail addresses left at web sites, by ignoring those who submit requests to have their names removed from mailing lists, and by making it virtually impossible to submit those requests by using forged addresses.

Defending spam

Those who defend the right to send out unsolicited junk electronic mail might concede that spam does impose some costs on its recipients. They claim, however, that those costs are trivial and that many users enjoy and benefit from this form of advertising. Unsolicited advertising does not necessarily mean that it is unwanted. Spam represents an efficient and inexpensive way to advertise many worthwhile products. In addition, it stands to reason that if firms are going

² S. Garfinkel. Spam King! Your Source for Spams Netwide. *Wired*, 84-92, February, 1996.

³ R. Raisch. Postage Due Marketing: An Internet Company White Paper, 1995. (<http://www.Internet.com:2010/market-ing/postage.html>)

⁴ Internet Service Providers Consortium ISP/C Position on Unsolicited Commercial E-Mail. (<http://www.mids.org>), 1997.

to do business in cyberspace they must be allowed to advertise there, and direct electronic mail campaigns are an effective means of accomplishing this.

Spam also makes it much easier for small entrepreneurs to get their message out in a cost effective way and to thereby compete on a more level playing field with their larger and more established counterparts. The chance to advertise to millions of prospective customers on the Internet represents a significant economic opportunity especially for the growth market of electronic commerce, and it should not be undermined by meddlesome and restrictive regulations.

Proponents of spam also contend that this is simply another form of commercial free speech which deserves the same level of First Amendment protection as traditional advertising. They point out, perhaps correctly, that a ban on spam would not only be impractical but also unconstitutional since it would violate their constitutional right to communicate. The right to commercial forms of speech has stood on tenuous ground and has never been seen as morally equivalent to political speech. In recent years, however, the Court has tended to offer more substantial protection for commercial speech than it did several decades ago. According to Carroll,⁵ 'With the development of our information economy, the Court has come to read the First Amendment to provide broader protection over the nexus between the marketplace of ideas and the marketplace for goods and services.'

Finally, defenders of spam also support any legal, albeit questionable, methods of collecting e-mail addresses. They believe that they have every right to gather e-mail addresses from various sources (such as AOL's member directory) and to use them for commercial purposes. In a *Computerworld* interview David Silver, a direct marketer who uses spam, contends that e-mail addresses are just as public as phone numbers: 'If I look up a phone number in the White Pages, I have the right to call that number because it's public information. So is the E-mail address that's posted anywhere on the 'net. If I had to break in with a password to get that address, that would be illegal. But what I do is the same as opening the phone book. If someone doesn't want bulk E-mail, they shouldn't place their address anywhere that's publicly accessible.'⁶

⁵ M. Carroll. Garbage In: Emerging Media and Regulation of Unsolicited Commercial Solicitations. *Berkeley Technology Law Journal* 11, Fall, 1996.

⁶ L. Goff. A Line in the SPAM. *Computerworld*, 88-89, August, 1997.

The legal status of spam

Prior to this current controversy over spam, unsolicited commercial advertisements transmitted by facsimile machines posed the same sort of challenge to public policy makers. The response was the Telephone Consumer Protection Act or TCPA⁷ which banned any such solicitations that contained advertising:

It shall be unlawful for any person within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

The rationale behind this legislation was based on a recognition of cost-shifting: there is some expense involved in receiving faxes (such as the consumption of paper and toner) so the recipient is implicitly subsidizing the advertiser. These costs are unavoidable and constitute enough of a burden to warrant regulatory protection.

The more significant problem with unsolicited faxes, however, was perceived to be message preclusion: faxes often involve the transmission of time sensitive material and that transmission might be disrupted if one is "forced" to consistently receive junk faxes. Thus, the primary difficulty with unsolicited faxes is that they can too easily prevent the timely reception of critically important material.

Although many see an analogy between these two forms of junk communication, electronic junk mail is not covered by the TCPA. There may be some cost shifting involved with spam especially for those who pay for their on-line services by the minute. But there are many others who pay a flat fee to be connected to the Internet. Hence from a legal point of view it is difficult to make a strong case that cost shifting is as serious a problem for spam as it is for junk faxes. Likewise, the preclusion problem poses a more notable difficulty for a fax machine than it does for electronic mail. If a fax machine is forced to receive a piece of junk mail all other incoming faxes are on hold. It is highly unlikely, however, that a critical piece of electronic mail could not be delivered because a user's mail box was filled with useless spam messages.

It seems evident that the Internet provides a more flexible mode of communication than telephones and fax machines, and hence it is difficult to draw an exact comparison between junk e-mail and junk faxes. As a result, since spam does not cause the same level of cost shifting and message preclusion as do junk faxes, and therefore is not as burdensome to individual users,

⁷ The Telephone Consumer Protection Act, 47 USC 227 (b) (1), 1991.

legislators in the U.S. have concluded that it should not be subject to the restrictions imposed by the TCPA.

Ethical issues and spam

Spam may indeed be perfectly legal, but is the practice of sending bulk promotional e-mail within the bounds of ethical propriety? In my estimation, a strong case can be put forth demonstrating that spam is morally objectionable in its current form. There are two basic problems with spam – its negative effects on the Internet environment which can lead to an electronic version of a ‘tragedy of the commons’ and its potential for violating the rights of the individual recipients of this junk mail.

Let us first deal with the latter concern. On one level this issue can be seen as a conflict of rights: the right of the vendor or advertiser to communicate with others by means of unsolicited electronic mail in conflict with the right to autonomy and privacy. Do vendors actually have such a right in this context?

Let us assume for the sake of this argument that unsolicited, promotional e-mail is a rare occurrence in cyberspace and therefore does not amount to a widespread problem. Let us also assume that there are no measurable direct costs involved, i.e., the recipient pays a flat fee to be connected to the Internet.

Under these conditions, one can certainly argue that the isolated act of sending a piece of unsolicited electronic mail, advertising a legitimate

product or service, is perfectly reasonable and hardly amounts to a transgression of commonly accepted ethical norms. Vendors are simply exercising their right of free expression within an open medium of communication.

Some anti-spammers have asserted that all Internet communications should be ‘consensual’.⁸ But this is an extreme and untenable position that would be difficult to justify from any ethical standpoint. The heavy costs of such an exclusionary policy would far outweigh any benefits. Do the majority of Internet users really want to preclude any communications to which they have not given their consent? Wouldn’t they be impoverished by such a restriction? For instance, if I’m a novelist and a colleague writes without my consent to offer some thoughtful reflections on my latest book, wouldn’t I be quite eager to read his e-mail? How could such communications fall under the category of useless spam? The open communications and democratic expression enabled by the Internet would be seriously undermined if we insisted that all exchanges had to be consensual.

⁸ A. Harmon. American Way of Spam: An E-Mail Battleground. *The New York Times*, E8, May 7, 1998.

However, although advertisers do have a right to send this mail they do not have a right to force it upon someone. The right to communicate in this fashion must be balanced with the right of privacy which is essentially defined as the right to be left alone within one’s own personal domain. In order to effect some compromise in this situation individuals must be allowed to maintain their autonomy by exercising some measure of control over this unwanted mail. Each individual should have the right to control his or her domain or private space. This should include the prerogative to protect it from unwanted mail whether it be regular mail sent to one’s house or electronic mail sent to one’s electronic mailboxes which should also be regarded as an extension of one’s private physical space. This is derived from the more basic right of autonomy over one’s person and possessions which is violated by the coercive activity of making someone a captive audience to another’s communications. Of course, the user can exercise control simply by deleting the unwanted message. It also seems reasonable, however, that the user should be able to go a step further and tell the sender to stop sending any more messages or mailings. The right to communicate must be limited by the preferences of an unreceptive consumer.

Vendors and advertisers, therefore, must respect this right and not impose their mailings on unwilling recipients. For regular mail this amounts to providing people with the opportunity to have their names removed from a mailing list, and this same opportunity must be provided by spammers. At a minimum, they too must allow users a convenient opportunity to ‘opt out’ of future mailings. Vendors should not send unsolicited electronic mail unless they have the facility and willingness to expediently remove names from their lists, enabling them to respect the rights of those who reject this mail. Thus, the transmission of spam could be an unethical act if (a) it is carelessly or intentionally sent to someone who has opted out or (b) there is no intention to comply with requests to opt out and thereby respect the rights and autonomy of the recipients.

What about the cost factor for the individual who receives junk e-mail? Should the right to commercial free speech be curtailed when that ‘speech’ is not exactly free to its recipients? It must be recognized that most types of junk communication, including phone calls and regular mail, entail certain costs for the recipients. These might include time lost answering the phone or sifting through piles of junk mail. To some extent, they represent the cost of living in a free and open society and do not impose a heavy burden on the vast majority of individuals. An occasional piece of junk e-mail would also fall within this category. Even if users do pay for their Internet time

by the minute, the miniscule costs involved in deleting a piece of unwanted mail does not seem to warrant the suppression of another's right to free speech. Such a solution would be disproportionate to the gravity of the problem. Thus, we still conclude that it is not really unethical for a vendor to send out unsolicited e-mail even if there is a minimal cost imposed upon the recipient. The real problem arises, of course, when users are forced to contend with a large volume of junk e-mail, but we have been assuming up to now that spam is an infrequent occurrence.

Even if we reach the conclusion that the transmission of electronic junk mail is not an unethical act per se as long as the mailer does not coerce his or her message and provides a reasonable opportunity to opt out, there are still problems with spam when one considers its overall collective effect in cyberspace. The conditions described above do not exist since spam is quite common on the Internet. Unfortunately, spam is growing at an exponential rate as direct mailers seek to capitalize on the Internet's expanding population, and this raises the ethical stakes quite considerably.

This brings us to the second moral issue concerning the social costs or externalities imposed by spam, that is, costs forced upon third parties in the Internet community as well as the direct recipients of spam. As we have already pointed out, spam shifts costs from the advertiser to several other parties including the recipients of the ad, the Internet Service Providers, and even to other users of the Internet who are indirectly inconvenienced by this practice.

In addition to this significant cost shifting, there is another externality involving a threat to the integrity and smooth functioning of the Internet. This is posed by the unabated growth of unsolicited commercial e-mail. There is a cumulative social cost to the sending of junk electronic mail, not unlike the social costs incurred when the environment is polluted.

Indeed the analogy between environmental degradation and the propagation of unsolicited junk e-mail in cyberspace is worth pursuing. Just as businesses have had a tendency to regard the environment (air, water, land) as a free and unlimited good, there has also been a tendency on the part of spammers to regard the Internet in the same way. But the conviction that these resources are unlimited and free sometimes promotes their wasteful consumption. The end result is what Garrett Hardin has characterized as a 'tragedy of the commons.'⁹

Picture a pasture open to all. It is expected that each herdsman will try to keep as many cattle as

possible on the commons. As a rational being, each herdsman seeks to maximize his gain [and] . . . concludes that the only sensible course to pursue is to add another animal to the herd. And another, and another. But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in commons brings ruin to all.

The moral of this story is clear enough: for any common good, problems can develop if individuals exclusively pursue their own rational self-interest and do not take into account the good of the whole (i.e., the commons). Each person rationalizes that their consumption of the resource is marginal and inconsequential but the combined result is the deterioration of that common resource. Thus, acting in concert they gradually destroy the natural environment or impair a pivotal public domain.

The situation in cyberspace is, of course, somewhat different since we are not talking about a physical resource that can be consumed or physically degraded. Nevertheless, like Hardin's pasture, the Internet is an open, free, and publicly accessible environment; just as there is no cost to use the pasture, there is virtually no cost to sending out a few extra pieces of junk e-mail. Consequently, if each small business in America and Europe decided to send out several hundred thousand advertising messages the cumulative effect of this on disk resources, bandwidth, and the general Internet infrastructure would be devastating. The Internet's viability as a common resource for exchanging valuable information would be seriously eroded and millions of people would be adversely affected by much slower response time and cluttered mailboxes. Further, given the complicated interdependencies we find in our economy the negative ramifications of widespread spamming will be diffuse, unpredictable, and potentially quite damaging.

The presence of both externalities, cost shifting and the erosion of the Internet's viability, cannot be casually ignored by spammers. Companies and individuals must assess and be accountable for *all* the short and long-range costs of their activities or transactions. It is morally unacceptable to thrust burdensome external costs on to third parties (such as the ISP's) against their will.

Moreover, all users have an obligation to respect the common good (in this case, the viability of Internet communications) which enables them to operate

⁹ G. Hardin. The Tragedy of the Commons, In B. Castro, editor, *Business and Society*. Oxford University Press, New York, 1996.

in the first place. They cannot maximize their short-term, private advantage by abetting the destruction of a common resource. There is no such thing as a purely private business that is not interconnected with and accountable to a greater whole. Instead there is a shared responsibility for preserving the efficiency and reliability of common communications systems such as the Internet. The Internet functions efficiently precisely because the majority of its users are cooperative and refrain from asocial activities like spamming. It is unfair, therefore, for spammers to dismiss or ignore the social costs of sending unsolicited bulk e-mail and to thereby benefit from the self restraint and moral decency of others.

We can undoubtedly find support for this position in several ethical frameworks, especially those that emphasize fairness or one's duty to abide by the legitimate norms of the community. For example, let us consider the nonconsequentialist framework of Immanuel Kant.¹⁰ Spamming clearly violates the spirit of Kant's categorical imperative ('Act according to a maxim which is at the same time valid as a universal law'), which requires us to perform only those actions that can be universalized. According to Kant, the test of moral correctness is the rational acceptability of a hypothetical, but universal, conformity to a policy or practice. In other words, the universalization process usually demands that we imagine a counterfactual situation. In this case, we must imagine what would happen if all organizations and vendors which had an interest in on-line advertising adopted a policy of spamming, that is, transmitting large volumes of bulk e-mail through cyberspace on a regular basis. Beyond any doubt, the Internet would become hopelessly congested and the entire system would rapidly become dysfunctional. Spamming therefore is not a coherently universalizable practice, since it entails a pragmatic contradiction to the categorical imperative. To avoid such contradictions, one must not pursue actions "whose efficacy in achieving their purposes depends upon their being exceptional".¹¹ Spamming, of course, can only be efficacious if it is an exception to the norm.

At the heart of Kant's ethical system is the notion that there are rational constraints on what we can do. We may want to engage in some action (such as sending millions of unsolicited electronic mail messages) but we are inconsistent and hence unethical unless we accept the implications of everyone doing the same

thing. According to Kant, it is unethical to make arbitrary exceptions for ourselves, which is exactly what the spammers are implicitly doing. As a result, they are violating the basic rule of fair play which is expressed in the categorical imperative as well as in other ethical principles. In the simplest terms, the categorical imperative suggests the following question: what if everybody did what you are doing? In this case if everybody practiced spamming the end result would be a calamity for the Internet and a debilitating effect on electronic commerce. Hence from a Kantian perspective and from the perspective of similar theories that emphasize fairness and consistency, there is a moral duty to eschew this questionable activity.

We conclude therefore that because spamming does entail these substantial social costs that burden others and could bring about a tragedy of the commons, it is a morally objectionable activity. It unfairly exploits the Internet and the majority of its users who refrain from spamming, and it is disrespectful of the common good. Imprudent practices like spamming that ignore the good of the community and treat its members as commodities are certainly problematic from an ethical perspective.

In order to be morally and socially responsible all Internet users must therefore be much more sensitive to the ecological nature of the 'Net, which, as the root of that word (Greek: *oikos* or house) connotes, is a sort of 'household' or community. Such sensitivity precludes spamming and similar disruptive activities out of deference to the welfare of the community.

Conclusions

We might conclude by observing that spam is also a troubling public policy issue. From a public policy viewpoint spammers represent a classic example of *free riders*, since they do not pay for disseminating their advertising message the way traditional advertisers do. The individuals or companies who use spam benefit from the servers and transfer networks that make up the Internet and from the efforts of others to make it an environment hospitable to electronic commerce. But they 'ride for free' by failing to contribute in a way that is proportionate to their consumption of Internet resources and by refusing to accept the obvious rules which enables the Internet and ISP's to function efficiently.

A discussion of the public policy issues associated with spam is well beyond the scope of this paper and we refer interested readers to Carroll⁵ for a thorough treatment of this issue. Suffice it to say that there should always be room for certain forms of advertising

¹⁰ I. Kant. *Foundations of the Metaphysics of Morals* (trans. Lewis White Beck), Bobbs-Merrill Company, Indianapolis, 1959.

¹¹ C. Korsgaard. *Creating the Kingdom of Ends*, Cambridge University Press, New York, 1996.

and promotional mailings on the Internet as long as users are willing to receive them and absorb their costs. But the exact limits on purely unsolicited commercial e-mail will be difficult to establish, and consequently the public policy debate on what to do about spam will not be settled any time soon.

We have simply tried to demonstrate here that if Internet users objectively reflect upon the moral implications of using spam they will reach the conclusion that its transmission is an asocial and selfish act. Even if the volume of spam were not an issue,

spam would still be unethical if there is no intention of honoring the user's request not to receive these mailings. This is based on the principle that no one should be forced to receive unwanted materials. Moreover, as we have been at pains to insist, because of the present and projected volume of spam it is also morally objectionable because it has the potential to bring about a tragedy of the commons for the Internet. It undermines the sense of shared responsibility which all users should assume for this important communications medium.

