Chapter VIII
Controlling Electronic Intrusion by Unsolicited Unwanted Bulk Spam:
Privacy vs. Freedom of Communication

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ABSTRACT

The ordinary and uncomplicated Spam menace is made possible by technological advances which enable the sender to dispatch millions if not billions of commercial messages without significant monetary cost and without wasting time. The present review will focus on fundamentals, exploring what has already been done and suggesting avenues of improvement. The chapter promotes basic approaches of handling Spam depending on the actions and choices of the receiver. The anti-Spam campaign needs effective enforcement powers and should be able to use all available technological know-how. As the vagaries of enforcement are presented, the role of the Internet Service Providers and advertisers is envisaged.

INTRODUCTION

The Internet is vulnerable to a great variety of serious intrusive devices and practices involving mostly theft and fraud and the efforts at regulation focus mostly and justifiedly on them as discussed elsewhere in this collective volume. My topic will be pure SPAM, i.e. unsolicited, unwanted, bulk messages on line, which currently constitutes most of e-mail, containing advertising or otherwise proposing a commercial transaction but not connected with any other wrongdoing,. For my purpose, and in order to test the outer limits of the key concept of privacy, I will assume that the target address was obtained lawfully and that the message is not fraudulent.

In the United States, since the famous article of S. Warren and L.Brandeis (1890), *The Right of Privacy*, the notion of privacy has emerged as a key one needing legal protection against intrusion from many directions. The most offensive intrusion, which will not concern us here, is obtaining and/or publicizing confidential information about people without permission and without good cause. Prying is included in that. Our target instead will be Spam on the Internet which is forced on us by entering our space without invitation This kind of "privacy", which protects our personality as well as our property, needs added safeguards in the omnivorous world of the Internet, which safeguards, however, must be carefully drafted not to impinge upon the rival right of expression, even of the commercial kind, which is often constitutionally protected. Comparable intrusion is taking place through telephone calls, faxes and even regular mail as well as billboard and poster advertising in public places although the burden of avoidance and the nature of regulation differs depending on the medium. Some years ago, I published a lengthy article suggesting that even advertising on television and the print media, which are visited voluntarily by the public and not forced on them, should be controlled by a "rule of separation" invigorating the power of avoidance (Kozyris, 1973).

The ordinary and uncomplicated SPAM menace is made possible by the technology which enables the sender to dispatch millions if not billions of commercial messages without significant monetary cost and without wasting time. Even a minute response rewards the effort. The main harm of such SPAM is caused by flooding, first of the transmission lines of the Internet Service Providers and second of the computers of ordinary users whose address has been somehow harvested by the sender. The costs born by the victims of (a) filtering, with only partial success, and (b) finally separating and deleting the flood, are collectively enormous[1] while the resulting benefits to the quasi "free riders" are close to nil by comparison. In addition, the use of Spam often involves also unfair competition toward other forms of legitimate advertising. Finally, in the attempt to separate and delete Spam many legitimate messages are misread and misdirected. Thus, there no doubt whatsoever that Spamming causes a lot of harm to many for the minute benefit of a few, i.e. the practice is seriously harmful socially. Where and to what extent should the rights of privacy of the many here yield to the interests of intrusive commercial expression of the few? As reliance on the Internet for communication and information retrieval grows and spreads globally so does the harm of Spam .In this piece, it will be assumed that it cannot be seriously argued that Spam as such, unsolicited unwanted commercial bulk e-mail, excluding e.g. political or religious etc messages or custom-made personal e-mail, deserves any legal protection as against unwilling targets Thus, and quite important, the emphasis will be placed on the practices and techniques, legal and technological, for controlling it, with all the difficulties that this would entail.

The present review will focus on fundamentals, exploring what has already been done and suggesting avenues of improvement. For a recent, global eye-view of these issues, see Phaedon John Kozyris, General Report to the XVIIth Congress of the International Academy of Comparative Law, Regulating Internet Abuses: Invasion of Privacy (Phaedon John Kozyris, ed., Wolters Kluwer 2007) (hereinafter "General Report") reproduced, as modified, in Abusive Advertising on the Internet Through Spam: Problems and Solutions, General Reports to the XVIIth Congress of the International Academy of Comparative Law 587-601 (K.Boele-Woelki & S.Van Erp.eds, Bruylant 2007). See, also, Phaedon J. Kozyris, Freedom from Information: Limiting Advertising Intrusion on the Internet (Spam) and on Television, 2004 Hellenic Review of European Law 17-41 (hereinafter "Freedom").