

Policy Summit on Issues in Cyberspace: Cyberethics, E-Commerce, Spam

*Spam & Taxes on E-Commerce:
How are they Different?
How are they Alike?*

Cem Kaner, J.D., Ph.D.

June 17, 2004

Center for State Policy & Leadership
University of Illinois at Springfield

About Cem Kaner

My current job titles are *Professor of Software Engineering* at the Florida Institute of Technology, and *Research Fellow* at Satisfice, Inc. I'm also an attorney, whose work focuses on same theme as the rest of my career: satisfaction and safety of software customers and workers.

I've worked as a programmer, tester, writer, teacher, user interface designer, software salesperson, organization development consultant, as a manager of user documentation, software testing, and software development, and as an attorney focused on law of software quality. These provided many insights into relationships between computers, software, developers, and customers.

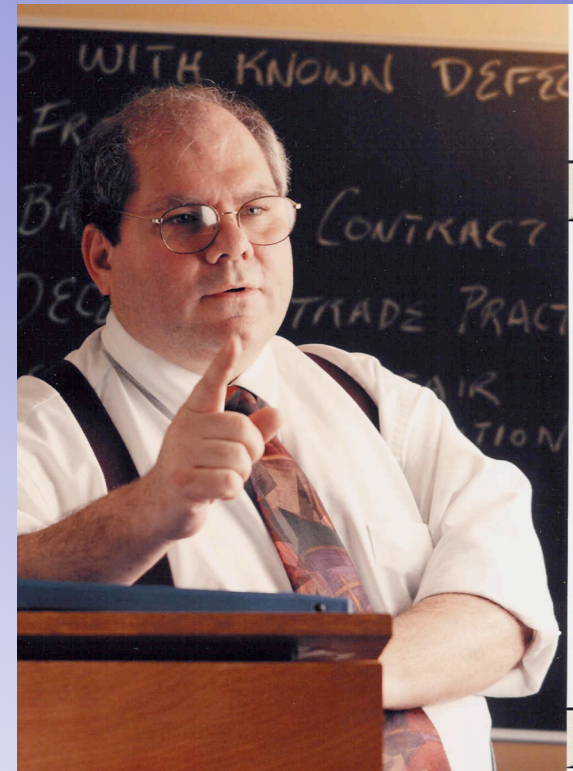
I'm the senior author of three books:

- *Lessons Learned in Software Testing* (with James Bach & Bret Pettichord)
- *Bad Software* (with David Pels)
- *Testing Computer Software* (with Jack Falk & Hung Quoc Nguyen).

I studied Experimental Psychology for my Ph.D., with a dissertation on Psychophysics (essentially perceptual measurement). This field nurtured my interest in *human factors* (and thus the usability of computer systems) and in *measurement theory* (and thus, the development of valid software metrics.).

As an attorney, I am a member of the American Law Institute, and of the ALI's Members Consultative Groups for the Uniform Commercial Code Article 2 revision, the Restatement of Agency Law and the Restatement of Employment Law. I also participated in the drafting of the Uniform Computer Information Transactions Act and the Uniform Electronic Transactions Act.

CyberEthics



What's Common to E-Commerce Sales/Use Tax & Spam?

- These are persistent solution-defying problems.
- We will not reach stable solutions until we find ways to fundamentally simplify the problems.
- They involve a diverse set of stakeholders who have a diverse set of many-of-them-conflicting interests.
- They pose enormous risk of short-term solutions that have unintended side effects

Let's Start with Taxes

- Sales Tax versus Use Tax
 - A vendor is located in one state (BlackAcre)
 - Customer lives (has principle office) in) WhiteAcre
 - Vendor has insignificant ties or no ties to WhiteAcre
- U.S. Supreme Court has twice ruled that Vendor cannot be expected to collect sales taxes from WhiteAcre customers.
 - IT'S TOO COMPLICATED

What Should We Tax?

Tangibles	a printer
Intangibles	the trademark rights to the logo on the printer
Services	writing a patch to fix the driver for the printer
Access	get onto the Internet, run a search, download the patch for the printer driver
	What is COTS software? What is custom software?

Taxation of Computer Software, p. 14-21,

Kutten, *Computer Software: Protection/ Liability / Law / Forms*

Jurisdiction	Canned	Custom	Customiz.	Maint.	Internet Access	Electronic Downloads	Tax Rate
Alabama	Yes	No	Yes	Yes	No	Yes	4.0
Alaska	No	No	No	No	No	No	NA
Arizona	Yes	No	No	No	No	Yes	5.0
Arkansas	Yes	Yes	Yes	No	No	No	4.5
California	Yes	No	No	No	No	No	7.25
Colorado	Yes	No	No	No	No	Yes	3.0
Connecticut	Yes	Yes	Yes	Yes	Yes	Yes	6.0
Delaware	No	No	No	No	No	No	NA
Dist. of Columbia	Yes	Yes	Yes	No	Yes	Yes	5.75
Florida	Yes	No	No	No	No	No	6.0
Georgia	Yes	No	No	No	No	No	4.0
Hawaii	Yes	Yes	Yes	Yes	Yes	Yes	4.0
Idaho	Yes	No	No	No	No	Yes	5.0
Illinois	Yes	No	No	No	Yes	Yes	6.25
Indiana	Yes	No	No	No	No	Yes	5.0
Iowa	Yes	No	No	No	Yes	No	5.0
Kansas	Yes	No	No	Yes	No	Yes	4.9
Kentucky	Yes	No	No	No	No	No	6.0
Louisiana	Yes	Yes	Yes	Yes	No	Yes	4.0

Let's Start with Taxes

- Sales Tax versus Use Tax
 - Another table (same book) showed state-by-state differences in tax status depending on whether the Vendor mailed you a printout of your search results after you accessed the Vendor's database, searched it, and found what you were looking for.
- This is way too complicated to wish on anyone.
- So we don't.
- That's why vendor doesn't have to collect sales taxes from its out-of-state customers.

Let's Start with Taxes

- Use tax -- customer pays
- Sixteen states attempt to collect use tax via a line item on tax returns.
 - On average, only 1% of these states' tax-filers pay use taxes.
 - <http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf>
 - It's just too complicated to keep track of all those transactions
 - Some states will now take an estimate, based on percentage of your income, but almost no one is playing along.
- Unreasonable rules cause refusal to comply. We all become tax cheaters.
- Problem is, once you justify cheating in one context, you are more likely to rationalize cheating in another. It is incremental, rather than crossing a bright line.

Now Think About Spam

- FTC just issued its report on Do Not Email Registry (see www.ftc.gov)
- Concluded that there is more risk than benefit in creating such a list:
 - spammers would ignore or mine the list for valid addresses
- Other aspects of the report are interesting
- FTC has brought 62 cases against spammers

What About Self-Help?

- Why not do really aggressive spam filtering?
- Reject anything that looks suspicious
- Lose some legitimate mail, but such is life, right?
- Not quite --
- Take a look at
 - Uniform Computer Information Transactions Act
 - Uniform Electronic Transactions Act (and thus E-SIGN)
 - New revisions to Article 2 of the Uniform Commercial Code

Uniform Computer Information Transactions Act

<http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>

102 (53) "Receipt" means:

(A) with respect to a copy, taking delivery; or

(B) with respect to a notice:

(i) coming to a person's attention; or

(ii) being delivered to and available at a location or system designated by agreement for that purpose or, in the absence of an agreed location or system:

(I) being delivered at the person's residence, or the person's place of business through which the contract was made, or at any other place held out by the person as a place for receipt of communications of the kind; or

(II) in the case of an electronic notice, coming into existence in an information processing system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise has designated or holds out, that place or system for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place.

Uniform Computer Information Transactions Act

<http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>

- Coming into existence in an information processing system or at an address in that system
 - not necessarily your system
- in a form capable of being processed by or perceived from a system of that type
 - not necessarily readable on your computer
- by a recipient, if the recipient uses, or otherwise has designated or holds out, that place or system for receipt of notices of the kind to be given
 - if you are Joe@aol.com, this means AOL's computer, not yours.
- and the sender does not know that the notice cannot be accessed from that place.
 - if it's your old address, too bad for you.

How is this fair?

- The idea is that you appoint your ISP as your agent to receive your mail
- And the spam filter is a tool under your control
- (As if either of them warrant ANY aspect of their performance! HA!)
- And if you can delete it, then you must possess it, be in control of it, and therefore be able to read it (assuming it is readable) if you want.
- (New scam -- take notices (like class action settlement, or right to a refund) and make them look like spam. If your filter deletes it, you lose.)
- In the tradeoff of spam overload versus accountability for receipt, the UCITA, UETA and Article 2 drafters explicitly chose accountability, after extensive discussion.

Uniform Computer Information Transactions Act

<http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>

- 102 (49) "Notify", or "give notice", means to take such steps as may be reasonably required to inform the other person in the ordinary course, whether or not the other person actually comes to know of it.
- 102(60) (60) "Send" means, with any costs provided for and properly addressed or directed as reasonable under the circumstances or as otherwise agreed, to deposit a record in the mail or with a commercially reasonable carrier, to deliver a record for transmission to or re-creation in another location or information processing system, or to take the steps necessary to initiate transmission to or re-creation of a record in another location or information processing system. In addition, with respect to an electronic message, the message must be in a form capable of being processed by or perceived from a system of the type the recipient uses or otherwise has designated or held out as a place for the receipt of communications of the kind sent. Receipt within the time in which it would have arrived if properly sent, has the effect of a proper sending.

Uniform Electronic Transactions Act

<http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>

- **SECTION 15. TIME AND PLACE OF SENDING AND RECEIPT.** (a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it: (1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; (2) is in a form capable of being processed by that system; and (3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient. (b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when: (1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) it is in a form capable of being processed by that system. (c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d). (d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply: (1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction. (2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be. (e) An electronic record is received under subsection (b) even if no individual is aware of its receipt. (f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received. (g) If a person is aware that an electronic record purportedly sent under subsection (a), or purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

Conclusion

- Aggressive spam filtering subjects the customer to risk of being held accountable for notices that were "received" but not noticed.
- So, you can't count on the prosecutors to protect you
- And there's a limit to how aggressively you can filter.
- So, can you sue the spammers?
- State laws gave people a chance to do this, but Can-Spam took those away:
 - prosecutors (federal and state)
 - ISP's
- get to sue, but not private individuals

Interest Analysis

- Engineers call this requirements analysis
- Ethicists call this consequentialist analysis (or something like that)
- Legislative drafters don't do this; they rely on the individual stakeholders to present their own cases. Causes a lot of distortion in the process.

Start with the stakeholders

- Senders
 - Corporate
 - spammers
 - permission-based marketers
 - operations (billing, etc.)
 - Religious spammers, marketers, operations
 - Political spammers, marketers, operations,
 - ISPs
 - Terrorists
 - Virus-distributors
 - Friends and family
 - Criminals (identity theft, robbery)
 - Criminals (fraudulent sales)
- Receivers
 - ISPs
 - Organizations
 - corporations, schools, governments
 - Individual workers
 - Individuals at home
- Legal
 - Government regulators
 - consumer protection
 - national security
 - financial agencies, etc.
- Tool vendors
 - antispam
 - antivirus

What are their interests?

- terrorists?
- Corporate operations?
- Individual recipients?

Impact of proposed actions on them

- Existence of registry:
 - on individuals
 - potential risk of new spam
 - creates liability for sender
 - on terrorists
 - no effect?
 - target list?

Impact of actions they want to take

- Individual recipient wants to sue
 - The history of Private Attorneys General
 - False Claims Act

Facilitating Private Attorneys General

- Jurisdiction
- Attorneys fees
- Damages to partially compensate actual plaintiffs
- Ability to aggregate small cases
- BRIGHT LINE LIABILITY
 - In re Northwest Airlines Litigation, Minnesota
 - Deceptive practice and warranty claims dismissed b/c privacy policy was not read and relied by the customer before giving private information. (Under that reading, EULAs should be unenforceable too.)
- Do Not Email registry could create bright line

Is this the right solution?

- Partial at best
- Is it good?
 - have to do an impact analysis on the other stakeholders