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Much Ado about Spam: Unsolicited Advertising, the Internet, and You.

Scot M. Graydon

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MUCH ADO ABOUT SPAM: UNSOLICITED ADVERTISING, THE INTERNET, AND YOU

SCOT M. GRAYDON*

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I. INTRODUCTION

Much has been written regarding unsolicited commercial e-mail ("UCE"), often referred to as "spam," and its effect upon Internet service providers.¹ However, Internet service providers are not the only victims in the transmittal of UCE. Ultimately, Internet users

1. See generally Jeffrey L. Kosiba, Comment, *Legal Relief from Spam-Induced Internet Indigestion*, 25 U. DAYTON L. REV. 187 (1999) (reviewing the legal remedies available to Internet service providers); Cathryn Le, Note, *How Have Internet Service Providers Beat Spammers?*, 5 RICH. J.L. & TECH. 9 (1998) (discussing how Internet service providers have been successful in their fight against spammers), at <http://www.richmond.edu/jolt/v5i2/le.html>; Derek D. Simmons, Comment, *No Seconds on Spam: A Legislative Prescription to Harness Unsolicited Commercial E-Mail*, 3 J. SMALL & EMERGING BUS. L. 389 (1999) (defining the scope of the Internet service provider's problems caused by unsolicited commercial e-mail), WL 3 JSEBL 389.

bombarded with numerous UCEs suffer as much, if not more, than the service provider. While case law consistently addresses the rights of Internet service providers,² it offers no insight into the rights of Internet users. Consequently, questions arise regarding what rights, if any, an Internet user possesses to protect against the unwanted e-mail of a “spammer.”

The Internet has undoubtedly created a new frontier for commercial advertisers. Indeed, the advent of the Internet created a network of endless possibilities. Nowhere are these possibilities more evident than in personal and business communications.³ As a result, innovative commercial advertisers seized the opportunity to exploit a new medium and began to employ UCE aggressively.⁴ Many Internet users, however, responded negatively to the constant flow of UCE into their own personal e-mail accounts.⁵

2. See generally *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999) (granting AOL's motion to dismiss GreatDeals.Net's counter claims that alleged violations of the Federal Communications Act, the Telecommunications Act, the Sherman Act and tortious interference); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998) (granting summary judgment in favor of AOL after concluding that IMS violated the Lanham Act and committed a trespass to chattels); *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998) (granting AOL summary judgment based on LCGM's violations of the Lanham Act, the Computer Fraud and Abuse Act, the Virginia Computer Crimes Act and Virginia common law trespass to chattels); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (granting CompuServe's motion for a preliminary injunction against Cyber Promotions on an action for trespass to chattels).

3. See Linda A. Goldstein, *Emerging Issues in Online Advertising and Promotion Law*, in *eCOMMERCE: STRATEGIES FOR SUCCESS IN THE DIGITAL ECONOMY 2000* at 481, 483 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. 588, 2000) (noting that “Internet usage continues to grow at exponential rates with marketers and consumers embracing the new media in increasing numbers”), WL 588 PLI/Pat 481; Michael S. Yang, *E-Commerce: The Internet and E-Commerce*, 33 MD. B.J. 12, 12 (2000) (indicating that the advent of the Internet has led “to a rapid and relentless commercialization of cyberspace, as companies, businesses and individuals have rushed to capitalize on a new frontier full of possibilities”).

4. See David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1007 (1997) (attributing much of the Internet's growth to the commercial sector's use of e-mail); Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART. & ENT. L. 175, 175 (1999) (describing the Internet as “an indispensable medium of communication” that has fallen prey to advertisers), WL 10 DPLJAEEL 175.

5. See David T. Bartels, *Canning Spam: California Bans Unsolicited Commercial E-Mail*, 30 MCGEORGE L. REV. 420, 420 (1999) (stating that many Internet users find spam to be bothersome and annoying), WL 30 MCGLR 420; Jennifer M. Kappel, Note, *Government Intervention on the Internet: Should the Federal Trade Commission Regulate Unsolicited E-Mail Advertising?*, 51 ADMIN. L. REV. 1011, 1012 (1999) (commenting that spam is unpopular with Internet users and “can result in annoyances to customers”); Derek D.

In responding to the outcry over UCE, many states enacted "spam" laws.⁶ State regulation, however, has incurred limited application due to the endless nature of cyberspace and the jurisdictional restraints on state authority. Therefore, state law ultimately will prove inadequate in its attempt to protect an Internet user's rights. As a result, the implementation of federal regulations, such as the Unsolicited Commercial Electronic Mail Act of 2000,⁷ is necessary to overcome the jurisdictional limitations that plague state law and render such regulation ineffective.

This Article primarily concerns UCE's impact on Internet users. The discussion proposes that federal legislation regulating UCE, modeled after state law, can overcome the jurisdictional limitations of state law and ultimately give Internet users greater protection against UCE. Section II provides an overview of UCE including some of the strategies currently used by Internet service providers and web sites to combat UCE. In particular, Section II discusses what makes the dissemination of UCE so popular and how the Internet user can benefit from the actions of the Internet service community. Section III reviews the history of commercial speech in advertising by focusing on the regulation of other forms of advertisement under *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁸ Section IV discusses current state laws that directly regulate UCE and analyzes why such state laws fail to adequately protect the Internet user. Finally, Section V discusses

Simmons, Comment, *No Seconds on Spam: A Legislative Prescription to Harness Unsolicited Commercial E-Mail*, 3 J. SMALL & EMERGING BUS. L. 389, 389 (1999) (indicating that e-mail recipients "are angered by seeing their e-mail accounts filled with solicitations they do not wish to receive"), WL 3 JSEBL 389.

6. See CAL. BUS. & PROF. CODE § 17538.4 (Deering Supp. 2000); COLO. REV. STAT. ANN. § 6-2.5-103 (West, WESTLAW through 2000 2d Reg. Sess.); 1999 Conn. Legis. Serv. 99-160, § 1 (West); DEL. CODE ANN. tit. 11, § 937 (West, WESTLAW through 1999 First Spec. Sess.); IDAHO CODE § 48-603E (Michie Supp. 2000); 815 ILL. COMP. STAT. ANN. 511/10 (Supp. 2000); IOWA CODE ANN. § 714E.1 (West Supp. 2000); LA. REV. STAT. ANN. § 14:73.6 (West Supp. 2000); 2000 Mo. Legis. Serv. 407.1310 (West); NEV. REV. STAT. 41.730 (1999); N.C. GEN. STAT. § 14-458 (1999); OKLA. STAT. ANN. tit. 15, § 776.1 (West Supp. 2000); R.I. GEN. LAWS §§ 6-47-2, 11-52-4-1 (Supp. 1999); TENN. CODE ANN. § 47-18-2501 (West, WESTLAW through 1999 Reg. Sess.); VA. CODE ANN. § 18.2-152.4 (Michie Supp. 2000); WASH. REV. CODE ANN. § 19.190.020 (West Supp. 2000); W. VA. CODE ANN. § 46A-6G2-2 (Michie 1999).

7. Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. (2000).

8. 447 U.S. 557 (1980).

House Bill 3113, the Unsolicited Commercial Electronic Mail Act of 2000, and the impact such regulation would have on UCE. More specifically, Section V applies the *Central Hudson* test to the Unsolicited Commercial Electronic Mail Act, and demonstrates that such legislation would survive constitutional scrutiny. Consequently, Congress should enact the Unsolicited Commercial Electronic Mail Act in order to effectively regulate UCE and protect the rights of Internet users.

II. OVERVIEW OF SPAM AND INTERNAL METHODS OF INTERNET SERVICE PROVIDERS IN COMBATTING UNSOLICITED COMMERCIAL E-MAIL

A. *Spam Basics*

Spam has taken the Internet by storm.⁹ Few days pass when such UCE does not inundate Internet users.¹⁰ Those who have spent any time accessing e-mail accounts will recall receiving messages from an unknown party, usually an advertiser. When advertisers began sending UCE in the thousands, unsuspecting recipients began referring to such e-mail as “spam.”¹¹ Over the past several years, spam has become one of the most annoying and frustrating aspects of e-mail use.¹²

9. See David T. Bartels, *Canning Spam: California Bans Unsolicited Commercial E-Mail*, 30 MCGEORGE L. REV. 420, 420 (1999) (pointing out that the “expansion of the Internet has been accompanied by a dramatic increase in the use of e-mail”), WL 30 MCGLR 420; David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1006-07 (1997) (discussing the rapid expansion of the Internet and attributing the Internet’s growth to the dramatic increase in unsolicited commercial e-mails).

10. See Kenneth C. Amaditz, *Canning “Spam” in Virginia: Model Legislation to Control Junk E-Mail*, 4 VA. J.L. & TECH. 4, ¶ 11 (1999) (noting that “[o]n any given day, a typical e-mail user’s mailbox may be half-filled with spams”), at http://vjolt.student.virginia.edu/graphics/vol4/home_art4.html.

11. See, e.g., *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1018 (S.D. Ohio 1997) (recognizing that the term “spam” is often used to refer to unsolicited e-mail advertising). The term “spam” originated from a sketch by the British comedy group Monty Python in which a crowd of Vikings stands in the corner of a restaurant chanting “spam, spam, spam,” so loud that nobody in the restaurant can hear what anyone else is saying. See *id.* at 1018 n.1.

12. See Kenneth C. Amaditz, *Canning “Spam” in Virginia: Model Legislation to Control Junk E-Mail*, 4 VA. J.L. & TECH. 4, ¶ 11 (1999) (noting that to an e-mail recipient, spam is an annoying and costly practice), at http://vjolt.student.virginia.edu/graphics/vol4/home_art4.html; David T. Bartels, *Canning Spam: California Bans Unsolicited Commer-*

As evidenced by a decade of tremendous economic growth fueled by e-commerce, businesses quickly recognized and harnessed the commercial power of the Internet. UCE initially gained popularity because of its low cost, ease in distribution and high likelihood of reaching its intended recipient—the exploding number of worldwide Internet users.¹³ Of these three factors, however, low cost is the most influential and the greatest cause for the growth in Internet-focused advertising.¹⁴ As a result of this popularity, numerous marketing services specializing in e-mail advertising flourished throughout the last decade.¹⁵

Unlike other forms of advertising, spamming does not involve overhead costs such as a permanent physical location, the cost of renting or purchasing equipment and the costs attributable to the distribution of physical materials.¹⁶ Apart from the value of man-

cial E-Mail, 30 McGEORGE L. REV. 420, 420 (1999) (indicating that to Internet users, spam is annoying and bothersome), WL 30 MCGLR 420.

13. See David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1012 (1997) (reasoning that “[b]ecause it is so easy and inexpensive to send bulk e-mail, advertisers are beginning to bombard recipients with such messages”); Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 175 (1999) (noting that Internet advertisers “have found that spam is one of the easiest, least expensive, and least regulated means of reaching a captive audience”), WL 10 DPLJAEEL 175; Jeffrey L. Kosiba, Comment, *Legal Relief from Spam-Induced Internet Indigestion*, 25 U. DAYTON L. REV. 187, 192-93 (1999) (indicating that billions of UCEs are sent out due to “the low start-up cost and ease of obtaining worldwide access”).

14. See Kenneth C. Amaditz, *Canning “Spam” in Virginia: Model Legislation to Control Junk E-Mail*, 4 VA. J.L. & TECH. 4, ¶ 70 (1999) (indicating that “the low marginal cost of sending each additional e-mail creates an incentive for spammers to send more spam”), at http://vjolt.student.virginia.edu/graphics/vol4/home_art4.html.

15. See Donna M. Lampert et al., *Overview of Internet Legal and Regulatory Issues*, in 16TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION, at 179, 211 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. 544, 1998) (noting that “the growth of organizations that ‘harvest’ e-mail addresses and sell them to other marketers” has led to an increased volume of spam).

16. See Eric J. Sinrod & Barak D. Jolish, *Controlling Chaos: The Emerging Law of Privacy and Speech in Cyberspace*, 1999 STAN. TECH. L. REV. 1, ¶ 48 (1999) (comparing the costs incurred by advertisers sending junk-mail with the minimal costs incurred in sending spam), at http://stlr.stanford.edu/STLR/Articles/99_STLR_1/; Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 176-77 (1999) (comparing an e-mail advertiser’s costs in sending millions of e-mail messages with the costs of sending junk mail the traditional way), WL 10 DPLJAEEL 175; Jennifer M. Kappel, Note, *Government Intervention on the Internet: Should the Federal Trade Commission Regulate Unsolicited E-Mail Advertising?*, 51 ADMIN. L. REV. 1011, 1012 (1999) (indicating that commercial e-mail provides an inexpensive alternative to more traditional advertising methods).

hours necessary to create UCE and the cost of connecting to the Internet, sending massive quantities of e-mail costs an advertiser virtually nothing.¹⁷ The minimal production cost consists primarily of the cost in gathering lists of e-mail addresses.¹⁸ Internet advertisers obtain e-mail addresses by either purchasing lists from other Internet marketing companies¹⁹ or by using software packages designed to capture or “harvest” addresses.²⁰ Hence, an Internet advertiser can potentially connect with millions of Internet users for as little as fifty dollars.²¹ Truly, advertising through fliers and mailers has evolved into a simple click of the mouse.

17. See Kenneth C. Amaditz, *Canning “Spam” in Virginia: Model Legislation to Control Junk E-Mail*, 4 VA. J.L. & TECH. 4, ¶ 3 (1999) (pointing out that UCE advertisers can transmit junk e-mail for next-to-nothing), at http://vjolt.student.virginia.edu/graphics/vol4/home_art4.html; Daniel J. Langin, *Risk Identification, Management and Transfer for Cyberspace Business*, 64 DEF. COUNS. J. 78, 79 (1997) (explaining that spamming is appealing to “marketers because it costs no more to e-mail a message to a million users on the Internet than to e-mail it to one user”).

18. See Eric J. Sinrod & Barak D. Jolish, *Controlling Chaos: The Emerging Law of Privacy and Speech in Cyberspace*, 1999 STAN. TECH. L. REV. 1, ¶ 48 (1999) (indicating that it costs “pennies per name to purchase e-mail or news group lists”), at http://stlr.stanford.edu/STLR/Articles/99_STLR_1/.

19. See Jeffrey J. Hass, *Small Issue Public Offerings Conducted over the Internet: Are They “Suitable” for the Retail Investor?*, 72 S. CAL. L. REV. 67, 93 (1998) (providing that e-mail lists can be purchased from various sources); see also Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 249 (1998) (indicating that, for a nominal fee, an Internet marketing company can connect a UCE advertiser with thousands of Internet users); Abigail Goldman, *You’ve Got Ads: E-Marketing Is Thriving Advertising: Experts Say Enough Consumers Follow Links Sent to Them to Make Unsolicited Mail Worth Retailers’ While*, L.A. TIMES, Jan. 24, 2000, at C1 (providing that gathering lists of recipients is the primary task of e-mail marketers), 2000 WL 2203860.

20. See Eric J. Sinrod & Barak D. Jolish, *Controlling Chaos: The Emerging Law of Privacy and Speech in Cyberspace*, 1999 STAN. TECH. L. REV. 1, ¶ 48 (1999) (providing that spammers “can even ‘harvest’ the information themselves with software that gathers e-mail addresses”), at http://stlr.stanford.edu/STLR/Articles/99_STLR_1/; see also Discovery Marketing, Inc., *E-Mail Magnet Lets You Advertise to OVER 100 Million People Free!*, at <http://www.emagnet.com/emagnet.htm> (last visited Oct. 13, 2000) (advertising software capable of providing 1.2 million new addresses per hour coupled with the ability to send 1 million e-mail messages per hour).

21. See Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 249 (1998) (explaining that, for as little as fifty dollars, Internet marketing companies can connect an Internet advertiser with thousands of Internet users via e-mail).

Spam's widespread proliferation as a form of advertising, however, has caused problems within the Internet community.²² Because UCE causes a massive drain on Internet service providers as a result of processing and storing UCE, many Internet users suffer delays with their Internet access.²³ For example, when floods of data stream in from remote computers, established Internet service providers such as America Online, CompuServe, Earthlink and Prodigy can find their Internet servers crippled for hours.²⁴ These delays cause dissatisfaction among subscribers of the Internet service, which often results in subscribers discontinuing their current Internet service and seeking service elsewhere.²⁵ Such a change, however, does not occur without its costs. Reconnecting with another service provider often costs the user an additional "start-up" fee.²⁶

22. See Karin Mika, *Information v. Commercialization: The Internet and Unsolicited Electronic Mail*, 4 RICH. J.L. & TECH. 6, ¶ 14 (1998) (indicating that UCE "is undesired by the Internet community" and adding that "one of the major problems with having an Internet e-mail address" is dealing with UCE), at <http://www.richmond.edu/~jolt/v4i3/mika.html>; Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 175 (1999) (revealing that UCE "has gorged Internet [s]ervice [p]roviders . . . worldwide, creating a need for legislative intervention"), WL 10 DPLJAE 175.

23. See Ron N. Dreben & Johanna L. Werbach, *Senators Versus Governors: State and Federal Regulation of E-Commerce*, 17 NO. 6 COMPUTER LAW. 3, 7 (2000) (indicating that UCE is a form of inexpensive advertising which often clogs ISPs thereby annoying consumers), WL 17 No. 6 CLW 3; Jeffrey L. Kosiba, Comment, *Legal Relief from Spam-Induced Internet Indigestion*, 25 U. DAYTON L. REV. 187, 188 (1999) (pointing out that Internet subscribers face delays in service because of the inundation of spam to service providers).

24. See Michael S. Yang, *E-Commerce: The Internet and E-Commerce*, 33 MD. B.J. 12, 16 (2000) (explaining that an ISP's computer networks may crash if too many UCE are transmitted); Gary S. Moorefield, Note, *Spam - It's Not Just for Breakfast Anymore: Federal Legislation and the Fight to Free the Internet from Unsolicited Commercial E-Mail*, 5 B.U. J. SCI. & TECH. L. 10, ¶ 13 (June 1, 1999) (stating that "[t]he enormous volume of UCE that users send out over the Internet can slow communications and cripple ISP servers"), at <http://www.bu.edu/law/scitech/volume5/5bujstl10.pdf>.

25. See Ron N. Dreben & Johanna L. Werbach, *Senators Versus Governors: State and Federal Regulation of E-Commerce*, 17 NO. 6 COMPUTER LAW. 3, 7 (2000) (commenting on customer dissatisfaction resulting from clogged Internet service), WL 17 No. 6 CLW 3.

26. See Elizabeth Douglass, *A Consumer Look at Telecommunications Sprint's ION Bundles Services All in One Despite the Steep Start-up Fee, the Key Item for Many Customers Is the Promise of Fast Internet Connections Using DSL*, L.A. TIMES, July 20, 2000, at C7 (indicating that "Sprint's start-up costs are truly steep" for high-speed service), 2000 WL 2261985. *But see* Peter Dizikes, *Free Net Providers Not Created Equally*, STAR TRIB., Mar. 5, 2000 (listing Internet service providers that offer free access and no start-up fees), 2000 WL 6963053.

In addition to the expense of avoiding UCE by changing Internet service providers, Internet users also incur other, less direct costs. For instance, many Internet users choose to pay only for a limited amount of time during which they may access the Internet. These users absorb the cost of UCE each time they pay for the additional time required to download and delete unwanted UCE, as well as to register complaints against its sender.²⁷ Moreover, in many instances, since an e-mail recipient cannot initially discern whether an e-mail message consists of an unsolicited commercial advertisement, the user must open and view the message before discarding it.²⁸ Although opening, viewing and deleting UCE takes only seconds, these seconds can aggregate into significant expenditure of time and money. Indeed, for the many Internet users charged by the minute²⁹ or hour, these seconds add up quickly.³⁰ As a result, the receipt of seemingly unlimited amounts of UCE understandably burdens the user and discourages continued Internet use.

B. *What the Internet Industry Has Done to Combat Unsolicited Commercial E-Mail*

Acting under the business assumption that an unhappy customer is a potentially lost customer, Internet service providers took the early lead in combatting UCE. Likewise, the growing dissatisfaction with UCE has resulted in creative efforts by Internet users in

27. See Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 176-77 (1999) (explaining that Internet users absorb the cost of junk e-mail incurred "for additional time of Internet access in order to download, delete and register complaints"), WL 10 DPLJAEEL 175.

28. See Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 249-50 (1998) (noting that the recipient of an e-mail message often cannot discern its content until it is opened); David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1011 (1997) (reiterating that an e-mail message must be opened before the recipient can determine its relevance).

29. See Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 249 (1998) (indicating how many users are charged by the minute and how wading through numerous UCEs can be too costly).

30. See Jeffrey L. Kosiba, Comment, *Legal Relief from Spam-Induced Internet Indigestion*, 25 U. DAYTON L. REV. 187, 188 (1999) (discussing how hourly subscribers must pay for the time it takes to read and discard UCEs).

finding ways to alleviate the rising tide of UCE.³¹ In that regard, Internet users have resorted to several forms of self-help.³²

First, Internet users may benefit from Internet service providers who have taken affirmative steps towards limiting the amount of UCE that comes through their servers.³³ These Internet service providers intend to ease customers' concerns by attempting to control the overwhelming volume of UCE.³⁴ For example, some providers have installed filters in their programs to block the distribution of UCE.³⁵ However, most filters lack the scope to catch all forms of UCE.³⁶ In addition, most providers prohibit the use of their e-mail services for the purpose of distributing UCE.³⁷

31. See David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1023-31 (1997) (discussing alternative solutions including self-help efforts and regulatory approaches).

32. See *id.* at 1024-27 (explaining that Internet users reduce the amount of UCE received by keeping their e-mail address private, complaining to the spammer, filtering incoming e-mail messages and retaliating); Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 177-78 (1999) (discussing measures that are commonly used to reduce the amount of spam received such as contacting the sender to request cessation of further transmissions and using spam-blocking filters), WL 10 DPLJAEEL 175; Susan M. Ballantine, Note, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209, 250 (2000) (explaining that after self-help procedures are exhausted, "seeking judicial help is the only other recourse").

33. See Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART. & ENT. L. 175, 178-79 (1999) (indicating that some ISPs create "opt-in" and "opt-out" lists that allow "subscribers to request to be taken off marketing lists"), WL 10 DPLJAEEL 175.

34. See *id.* at 177 (noting that ISPs "hire additional administrative staff to register and handle customer complaints").

35. See *id.* at 178 (providing examples of ISPs that set up spam-blocking filters).

36. See David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1026 (1997) (noting that filters are not perfect and "e-mail advertisers will become more adept at evading filters"); Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 178 (1999) (stating that "filtering systems are not foolproof"), WL 10 DPLJAEEL 175.

37. See, e.g., AOL.COM, *Unsolicited Bulk E-mail Policy*, at <http://www.aol.com/info/bulkemail.html> (last visited Oct. 13, 2000) (providing that AOL "does not authorize the use of its proprietary computers and computer network . . . to accept, transmit or distribute unsolicited bulk e-mail sent from the Internet to AOL members"); Netscape, *Terms of Service*, at <http://home.netscape.com/terms/index.html> (last visited on Oct. 13, 2000) (requiring that users not use Netscape "to distribute, link to, or solicit content that . . . constitutes unsolicited or unauthorized advertising, junk or bulk e-mail, chain letters, or any other unsolicited commercial communication"); Yahoo!, *Terms of Service*, at [http://docs/yahoo.com/info/terms](http://docs.yahoo.com/info/terms) (last visited Oct. 13, 2000) (requiring that a user agree not to use Yahoo! to "upload, post, email, transmit or otherwise make available any unsolicited or

Internet users violating this term of service may have their account cancelled by the Internet service provider.³⁸

Unfortunately, spammers often avoid the effects of these rules by using “guerrilla tactics.”³⁹ One example of a guerrilla tactic involves spammers who establish e-mail accounts for one day with the specific intent of disseminating UCE. Once the Internet service provider cancels the account, the spammers then create a new account the next day and begin anew.⁴⁰

Besides the use of guerrilla tactics, spammers also seek protection from the courts. As a result, attempts by Internet service providers to control UCE have resulted in litigation.⁴¹ Several companies have sued Internet service providers for blocking delivery of their UCE by alleging that this action violates their First Amendment rights to free speech.⁴² The First Amendment guarantee, however, only protects against government infringement.⁴³ Because most Internet service providers operate as private compa-

unauthorized advertising, promotional materials, ‘junk mail,’ ‘spam,’ ‘chain letters,’ ‘pyramid schemes,’ or any other form of solicitation”).

38. See, e.g., AOL.COM, *AOL.COM Terms and Conditions of Use*, at <http://www.aol.com/copyright.html> (last visited Oct. 13, 2000) (preserving the right to terminate access); Netscape, *Terms of Service*, at <http://home.netscape.com/terms/index.html> (last visited on Oct. 13, 2000) (indicating that Netscape may terminate the user’s account for violation of its terms of service); Yahoo!, *Terms of Service*, at <http://docs.yahoo.com/info/terms> (last visited Oct. 13, 2000) (providing that Yahoo! may terminate the user’s account if it believes that the user has violated any of its terms of service).

39. See Mitchel L. Winick et al., *Attorney Advertising on the Internet: From Arizona to Texas—Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH L. REV. 1487, 1495 n.37 (1996) (providing some examples of “guerrilla tactics” including “‘flaming’ the spammers, jamming their e-mail, ‘fax bombing’ by sending endless loops of black paper faxes, and use of a ‘kill-file’ program which will cause anything written by a specific person to be discarded, without viewing”); see also David A. Price, *Net Heads Are Fed Up with ‘Spam,’* INVESTORS BUS. DAILY, Aug. 1, 1997, at A1 (listing “guerrilla tactics” used by spammers, such as bouncing and mirroring), 1997 WL 10709799.

40. See Michael Dillon, *For Many ISPs, Spam’s Complexities Create an Intractable Problem*, INTERNET WORLD, Feb. 1, 1999 (describing how spammers move to another provider after the first provider terminates the account), 1999 WL 15787541.

41. See Jeffrey P. Cunard et al., *Internet Law*, in COMMUNICATIONS LAW 1999, at 853, 929-32 (PLI Patents, Copyrights, Trademarks, & Prop. Course Handbook Series No. 581, 1999) (providing case law where an ISP sued a spammer and requested an injunction).

42. See *id.* at 929 (recognizing that a spammer’s claim that an ISP unlawfully blocked UCE is often unsuccessful).

43. See *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 441 (E.D. Pa. 1996) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976)).

nies absent any governmental ownership, no cause of action can arise.⁴⁴

Second, another method for fighting UCE initiated by Internet service providers requires action on the part of the Internet user. Specifically, users can access several websites devoted to spam-stopping methods, which demonstrate how to identify and isolate UCE by transferring such messages into a bulk mail folder.⁴⁵ Users can then review the messages periodically to ensure that they did not miss or divert any desired mail.⁴⁶ Similarly, other websites contain step-by-step instructions detailing how to write a program that filters UCE.⁴⁷ In addition, some companies, such as SpamCop,⁴⁸ market programs that allow individuals to filter their e-mail messages.⁴⁹ Recipients of UCE may also contact the spammer and request that the spammer stop all future UCE distribu-

44. See Michael S. Yang, *E-Commerce: The Internet and E-Commerce*, 33 MD. B.J. 12, 16 (2000) (explaining that “[b]ecause service providers are private entities, they have prevailed against First Amendment challenges”); Jennifer M. Kappel, Note, *Government Intervention on the Internet: Should the Federal Trade Commission Regulate Unsolicited E-Mail Advertising?*, 51 ADMIN. L. REV. 1011, 1026 (1999) (stating that “spamming has generally remained unprotected because most courts hold that ISPs are private companies and do not serve the state function required by the First Amendment”).

45. See, e.g., Fred Elbel, *How to Get Rid of Junk Mail, Spam, and Telemarketers*, at <http://www.ecofuture.org/jnkmail.html> (last modified Sept. 24, 2000) (providing links to several websites that help with the elimination of spam); SpamCop, *Welcome to SpamCop!*, at <http://spamcop.net>, (last visited Oct. 13, 2000) (establishing a free service that gives Internet users the opportunity, through a reporting process, to limit unsolicited e-mail messages).

46. See SpamCop, *SpamCop FAQ: How Can I Effectively Manage the SpamCop Filters?*, at <http://spamcop.net/fom-serve/cache/38.html> (last visited Oct. 13, 2000) (explaining the capability of managing SpamCop to ensure that desired e-mail is not unintentionally filtered or deleted).

47. See, e.g., Fred Elbel, *How to Get Rid of Junk Mail, Spam, and Telemarketers*, at <http://www.ecofuture.org/jnkmail.html> (last modified Sept. 24, 2000) (highlighting websites that offer techniques to filter unwanted e-mail); SpamCop, *SpamCop FAQ: Filtering email*, at <http://spamcop.net/fom-serve/cache/34.html> (last visited Oct. 13, 2000) (demonstrating a method of setting up filters to block undesired e-mail).

48. See SpamCop, *Welcome to SpamCop!*, at <http://spamcop.net> (last visited Oct. 13, 2000) (offering a “quick and easy” way to “punish spammers for sending you their junk mail”).

49. See Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 178 (1999) (providing that some programs “attempt to stop spam . . . by allowing the e-mail user to create and maintain a ‘whitelist’ of names and addresses from whom e-mail is acceptable and a ‘blacklist’ of suspected spammers to be blocked out”), WL 10 DPLJAE 175.

tions to that e-mail address.⁵⁰ In some instances, individuals have even created websites publicizing major companies that send UCE in an effort to tarnish those companies' public reputation.⁵¹

Nevertheless, despite the steps taken, spam's exponential growth over the past decade proves that the collective effort of Internet users and Internet service providers has been insufficient to suppress or even control UCE's future proliferation.⁵² Consequently, a need exists for governmental regulation that provides Internet users with the right to demand relief from the constant barrage of UCE. Accordingly, because any governmental regulation limiting commercial speech will certainly face constitutional challenges, a closer inquiry into the history of commercial speech regulation is proper. Further, a discussion regarding the regulation of commercial speech associated with other types of advertising is warranted.

III. FIRST AMENDMENT APPROVAL OF COMMERCIAL SPEECH AND THE *CENTRAL HUDSON* TEST

Although the practice of sending unsolicited advertisements to consumers is not a new concept,⁵³ the manner in which advertisers reach out to potential customers has evolved with time.⁵⁴ Over the years, businesses have used a variety of advertising techniques to

50. See David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1025 (1997) (analogizing the recipient's requests to spammers to that of the "opt-out" systems used in telemarketing and direct mailers); Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 177 (1999) (indicating that the most obvious and often ineffective measure used to reduce the transmission of spam is "request[ing] that the sender cease further transmission"), WL 10 DPLJAEI 175.

51. See, e.g., *Spam-Sucking Slimeballs Page*, at <http://pw2.netcom.com/~rrhain/html/spammer.html> (last visited Oct. 13, 2000) (illustrating an example of a website that publishes a list of spammers).

52. See generally David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1032 (1997) (recognizing that many advertisers simply circumvent efforts of the Internet industry and Internet users that combat the use of spam); Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 198-99 (1999) (noting that techniques such as filtering e-mail and listing spammers has not deterred the spread of UCE), WL 10 DPLJAEI 175.

53. See Jeffrey L. Kosiba, Comment, *Legal Relief from Spam-Induced Internet Indigestion*, 25 U. DAYTON L. REV. 187, 192 (1999) (stating that advertisers often use unsolicited junk mail to reach consumers).

54. See *id.* (discussing the evolution in advertising methods by contrasting the lower costs associated with transmitting e-mail with the higher costs of sending postal mail).

reach as many consumers as possible. These techniques include door-to-door sales, telemarketing calls and advertisements transmitted through facsimile machines. As new methods of advertising progressed with time, Congress enacted statutes to alleviate the annoyance of unwanted, unsolicited commercial advertisements.⁵⁵ Existing law, however, lacks the scope necessary to properly combat UCE. Nonetheless, such law provides helpful examples of how Congress should approach UCE and the types of challenges any such legislation can expect.

As previously stated, regulating unsolicited commercial advertising raises constitutional issues.⁵⁶ Most frequently, opponents cite the First Amendment of the United States Constitution.⁵⁷ The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press."⁵⁸ Despite the wording of the First Amendment, the Supreme Court, at one time, held commercial speech unprotected under the First Amendment.⁵⁹ However, the Court subsequently reversed its holding⁶⁰ and developed a four-prong analysis to determine whether the First Amendment protects commercial speech.⁶¹

55. See Telephone Consumer Protection Act, 47 U.S.C. § 227 (1994) (restricting the use of telephone equipment, including facsimile machines, to send unsolicited advertisements).

56. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (recognizing that the First Amendment "protects commercial speech from unwarranted governmental regulation").

57. See, e.g., *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) (rejecting the spammer's contention that the ISP, who admittedly is a private actor, is subject to unique First Amendment constraints due to the ISP's authoritative control over the Internet—"a central avenue of communication"); *Cyber Promotions, Inc. v. Am. Online, Inc.* 948 F. Supp. 436, 442 (E.D. Pa. 1996) (expounding that AOL, a private actor, is not deemed a public actor for First Amendment purposes since "AOL has not opened its property to the public by performing any municipal power or essential public service").

58. U.S. CONST. amend. I.

59. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

60. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding that commercial speech is not completely beyond constitutional protection).

61. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (discussing the four-prong analysis in determining whether commercial speech is protected by the First Amendment).

A. *Development of a Commercial Speech Doctrine Under the First Amendment*

In 1942, the Supreme Court held in *Valentine v. Chrestensen*⁶² that the First Amendment did not protect commercial speech.⁶³ Although the Court found that states may not regulate the manner in which an individual communicates information and opinions in a public forum,⁶⁴ the Court noted that the First Amendment “imposes no restraint on government as respects purely commercial advertising.”⁶⁵ Almost a decade later, in *Breard v. City of Alexandria*,⁶⁶ the Supreme Court reaffirmed its stance that the First Amendment did not cover commercial speech.⁶⁷ In determining whether a city ordinance prohibiting door-to-door solicitation violated an individual’s First Amendment rights, the Court noted that the First Amendment has “never been treated as absolute[].”⁶⁸ Moreover, the Court emphasized that freedom of speech not only involved the advocate’s rights, but also the rights of others.⁶⁹ Accordingly, the Court balanced the conveniences of these rights and held that the city ordinance did not violate the First Amendment.⁷⁰ The Court stated “[i]t would be . . . a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents.”⁷¹

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁷² however, the Supreme Court reversed its stance that commercial speech receives no protection under the

62. 316 U.S. 52 (1942).

63. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

64. *See id.* (holding that states and municipalities may not unduly burden the dissemination of information in public forums).

65. *Id.* (explaining that although the First Amendment protects the dissemination of information in public forums, the First Amendment does not protect commercial speech).

66. 341 U.S. 622 (1951).

67. *See Breard v. City of Alexandria*, 341 U.S. 622, 642 (1951) (providing that the First Amendment is not an absolute right that allows an individual to speak or disseminate information “where, when and how one chooses”).

68. *Id.*

69. *See id.* (stressing that free speech involves the rights of others that must be adjusted in order to “have both full liberty of expression and an orderly life”).

70. *See id.*

71. *Id.* at 644-45.

72. 425 U.S. 748 (1976).

First Amendment.⁷³ Nonetheless, the Court noted that it did not hold that commercial speech can never be regulated.⁷⁴ Finally, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁷⁵ the Court expanded on the idea that the government may regulate some commercial speech by developing a four-prong test wherein a reviewing court may determine when commercial speech falls within the protections of the First Amendment.⁷⁶

B. *Central Hudson Test*

In *Central Hudson*, the Supreme Court defined commercial speech as an “expression related solely to the economic interests of the speaker and its audience.”⁷⁷ While acknowledging that the First Amendment protects some commercial speech, the Court emphasized that commercial speech receives less constitutional protection than other guaranteed expressions because commercial speech “occurs in an area traditionally subject to government regulation.”⁷⁸ Based on this premise, the Court sought to expand its commercial speech doctrine under the First Amendment.

In *Central Hudson*, the Court established a four-prong test to determine whether commercial speech enjoys First Amendment protection.⁷⁹ First, the *Central Hudson* test requires a court to determine whether the commercial speech concerns a lawful activity and whether the commercial speech potentially misleads customers.⁸⁰ Second, the court determines whether the government has a substantial interest in regulating the commercial speech.⁸¹ If these first two prongs yield positive answers, the court must then apply

73. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758-59 (concluding that commercial speech receives First Amendment protection).

74. See *id.* at 770 (noting that “[s]ome forms of commercial speech regulation are surely permissible”).

75. 447 U.S. 557 (1980).

76. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (providing the four-prong analysis that has developed in commercial speech cases).

77. *Id.* at 561.

78. *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)).

79. See *id.* at 566.

80. See *id.* (indicating that to fall within the protection of the First Amendment, the commercial speech “at least must concern lawful activity and not be misleading”).

81. See *Cent. Hudson*, 447 U.S. at 566.

the last two prongs.⁸² Under *Central Hudson's* third prong, the court determines “whether the regulation directly advances the governmental interest asserted.”⁸³ Fourth and finally, the court determines whether the governmental regulation operates in the least restrictive manner possible.⁸⁴

C. *Regulating Specific Types of Commercial Advertising and the First Amendment*

Parties often argue against the regulation of e-mail advertising as an infringement upon the advertisers' constitutionally protected commercial speech. However, a review of Supreme Court precedent concerning other forms of advertising suggests the contrary. Whether addressing the regulation of traditional door-to-door solicitors or telephone and facsimile solicitations, the central theme underlying the Court's approach displays a desire to protect the target of the advertisement—the consuming public.⁸⁵

1. Door-to-Door Solicitations

In *Martin v. City of Struthers*,⁸⁶ the Supreme Court examined the constitutionality of a city ordinance prohibiting solicitors from knocking at every home to distribute material.⁸⁷ The Court weighed the solicitor's right of free speech against the right of each individual householder to choose whether to receive the message.⁸⁸

82. *See id.* (indicating that if the commercial speech concerns lawful activity, is not misleading and the governmental interest is substantial, then the next prong of the test must be applied).

83. *Id.*

84. *See id.* (indicating that the court must determine whether the regulation “is not more extensive than . . . necessary to serve [the governmental] interest”).

85. *See Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (upholding a federal statute that allows a person to remove his name from mailing lists); *see also Martin v. City of Struthers*, 319 U.S. 141 (1943) (holding that a municipal ordinance that prohibits Jehovah's Witnesses from going door-to-door to distribute information is unconstitutional); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995) (holding that a statute banning prerecorded, automated calls to residents does not violate the First Amendment); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995) (holding that a statute prohibiting the transmission of unsolicited fax advertisements does not violate the First Amendment).

86. 319 U.S. 141 (1943).

87. *See Martin v. City of Struthers*, 319 U.S. 141, 141-42 (1943) (deciding the question of whether a city ordinance is consistent with the First Amendment).

88. *See id.* at 143 (weighing the conflicting interests of the religious solicitor's civil rights and the right of the householder to determine his willingness to receive the solicitor's message).

Furthermore, the Court considered the community's interest that the ordinance attempted to protect.⁸⁹ In holding that the ordinance violated the First Amendment, the Court stated "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved."⁹⁰ Still, the Court emphasized that the individual householder retains the right to decide whether to receive strangers as visitors.⁹¹ Thus, the Court essentially held that, though the government could not prohibit door-to-door solicitation, a homeowner may "bar, by order or notice, solicitors, hawkers, and peddlers from his property."⁹²

2. Mass Mailings

Before the invention of the Internet and e-mail, advertisers used mass mailings as an inexpensive, effective merchandising method. Such mailings often inundated the United States Postal Service and turned the postal carrier into "an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home."⁹³ In response to public concern, Congress enacted the Postal Revenue and Federal Salary Act of 1967 (the "Postal Revenue Act").⁹⁴ The Postal Revenue Act allows a mail recipient to prevent all future mail correspondence from a particular mailer by requiring the mailer to remove that person's name from the mailing list upon request.⁹⁵

89. *See id.* (considering the community's interest in protecting all of its citizens).

90. *Id.* at 146-47 (resolving that the distribution of information "can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors").

91. *See id.* at 147 (acknowledging that legal methods may control distribution of materials, but householders ultimately have the choice as to who is invited into their home).

92. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970) (referring to the Court's decision in *Martin v. City of Struthers*, 319 U.S. 141, 148-49 (1943) in expressing the Court's traditional sentiment to respect a householder's rights).

93. *Id.* at 736 (explaining that "the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry" changed the role of the postal carrier).

94. *See id.* at 731 (noting that the Postal Revenue and Federal Salary Act of 1967 was precipitated by concern over lewd and salacious unsolicited advertisements).

95. *See id.* at 729 (explaining the provisions of the statute and why appellants challenged its constitutionality).

Although reluctant to permit government regulation of advertisements sent through the U.S. mail, the Court decided in *Rowan v. United States Post Office Department*⁹⁶ that the right to bar solicitation extended to mass mailings.⁹⁷ In *Rowan*, advertisers challenged the constitutionality of the Postal Revenue Act as a violation of their First Amendment right to free speech.⁹⁸ The Supreme Court “reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another.”⁹⁹ In so finding, the Court noted that “[i]n today’s complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.”¹⁰⁰ Once again, the Court emphasized that the statute gave the householder the power to choose whether to receive the mail at home.¹⁰¹ As a result, no violation of an advertiser’s First Amendment right occurs by the government’s action of allowing regulation that permits an individual to affirmatively request removal from a mailing list.¹⁰²

3. Telemarketing Calls

In 1991, Congress enacted the Telephone Consumer Protection Act¹⁰³ (the “TCPA”) with the aim of thwarting mass telephone advertising.¹⁰⁴ This legislation protects consumers from the annoy-

96. 397 U.S. 728 (1970).

97. See *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 736-37 (1970) (holding that an advertiser’s right to communicate must stop at the recipient’s mailbox).

98. See *id.* at 729.

99. *Id.* at 738 (explaining that “Congress has erected a wall . . . that no advertiser may penetrate without [a citizen’s] acquiescence”).

100. *Id.* at 736 (explaining that the individual right to be let alone must be balanced with the right of others to communicate).

101. See *id.* at 736-38 (admitting that making “the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments” but otherwise noting that “no one has a right to press even ‘good’ ideas on an unwilling recipient”).

102. See *Rowan*, 397 U.S. at 737 (concluding that “[t]o hold less would tend to license a form of trespass”).

103. 47 U.S.C. § 227 (1994).

104. See 146 CONG. REC. H6374 (daily ed. July 18, 2000) (statement of Rep. Eshoo) (stating that the Telephone Consumer Protection Act was passed by Congress “to restrict the use of automated, prerecorded telephone calls and unsolicited commercial faxes on the grounds that they were a nuisance and an invasion of privacy”).

ance of unsolicited telemarketing calls.¹⁰⁵ The TCPA prohibits advertisers from using automatic dialers and playing pre-recorded messages.¹⁰⁶

Although the Supreme Court has never ruled on the TCPA's constitutionality, the Ninth Circuit Court of Appeals examined the issue in *Moser v. FCC*.¹⁰⁷ In *Moser*, the president of the National Association of Telecomputer Operators challenged the constitutionality of the statute alleging "that the law created a content-based restriction not narrowly tailored to further a substantial government[al] interest, in violation of the First Amendment."¹⁰⁸ Because the statute does not distinguish between commercial and noncommercial speech, the court used the test for restrictions of content-neutral speech rather than applying the *Central Hudson* test.¹⁰⁹ Nevertheless, the court acknowledged the essentially identical nature of the *Central Hudson* test and the test used for content-neutral speech.¹¹⁰ In finding that the TCPA did not violate the First Amendment, the court approved Congress' identification of automated telemarketing as a threat to privacy.¹¹¹

4. Facsimile Machine Advertisements

As the facsimile ("fax") machine became an integral part of today's world, fax solicitations became a common advertising technique.¹¹² Consequently, complaints regarding unsolicited fax

105. See Telephone Consumer Protection Act, 47 U.S.C. § 227(c)(1) (1994) (requiring the development of a rulemaking proceeding that concerns the protection of a residential telephone subscriber's privacy rights).

106. See *id.* § 227(b)(1)(B) (prohibiting "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party").

107. 46 F.3d 970 (9th Cir. 1995).

108. *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995).

109. See *id.* (concluding that content-neutral speech should be used to analyze the statute in regards to restrictions on time, place and manner).

110. See *id.* (contending that the *Central Hudson* test and content-neutral test are identical).

111. See *id.* at 974 (stating that "Congress could regulate a portion of these calls without banning all of them").

112. See Jennifer M. Kappel, Note, *Government Intervention on the Internet: Should the Federal Trade Commission Regulate Unsolicited E-Mail Advertising?*, 51 ADMIN L. REV. 1011, 1018 (1999) (mentioning that "junk faxes" are an additional practice of spamming).

advertisements quickly followed.¹¹³ Foreseeing potential problems, however, Congress included fax solicitations in the Telephone Consumer Protection Act.¹¹⁴ Specifically, the TCPA prohibits an advertiser from using “any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”¹¹⁵

In *Destination Ventures v. FCC*,¹¹⁶ fax machine advertisers challenged the constitutionality of the TCPA asserting, in part, that the TCPA violated their First Amendment commercial speech rights.¹¹⁷ The Ninth Circuit Court of Appeals tested the constitutionality of the TCPA as applied to fax transmissions.¹¹⁸ The court upheld the TCPA as narrowly tailored to address a substantial governmental interest.¹¹⁹ More specifically, the court determined that the TCPA’s prohibition of unsolicited fax advertisements met the *Central Hudson* test because “unsolicited fax advertisements shift significant advertising costs to consumers.”¹²⁰

The history of unsolicited commercial advertising and its regulation illustrates the courts’ tendencies in allowing individuals to decide whether they would like to receive unsolicited advertising. In weighing the interest of the commercial speaker and the recipient, courts permit regulations that constrain commercial speech so long as the regulation allows the recipient the right to decline or accept the receipt of unsolicited advertising. As such, courts are unlikely to strictly prohibit the distribution of UCE because not only would it infringe on the advertiser’s First Amendment rights, but it would also violate the rights of individuals who actually want to receive such e-mail messages. However, considering the history of regulating unsolicited advertising, courts would approve of narrowly-tai-

113. *See id.* (indicating that an overwhelming amount of complaints led to the enactment of the Telephone Consumer Protection Act of 1991).

114. *See* Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C) (1994).

115. *Id.*

116. 46 F.3d 54 (9th Cir. 1995).

117. *See* *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 55 (9th Cir. 1995).

118. *See id.* (explaining that “[r]egulations of commercial speech must directly advance a substantial governmental interest in a manner that forms a ‘reasonable fit’ with the interest”).

119. *See id.* at 56 (indicating that the statute was justified because Congress’s purpose in regulating fax advertisements “was to prevent the shifting of advertising costs”).

120. *Id.* at 57 (concluding that the Telephone Consumer Protection passes muster under the *Central Hudson* test).

lored laws protecting resources and consumers as a means of continuing the trend towards the preservation of consumer rights.¹²¹

IV. STATE REGULATION OF UNSOLICITED COMMERCIAL E-MAIL

With unsolicited commercial e-mail on the rise,¹²² the conflict between commercial advertisers and Internet users will intensify.¹²³ Because the Internet exists beyond a state's boundary, state regulation proves inadequate and practically unenforceable. Nonetheless, some states have attempted to regulate spammers in lieu of any federal action. A review of various regulatory steps taken at the state level, however, offers the federal government a roadmap from which to develop a solid, workable federal UCE regulatory policy.

A. State Regulation Currently in Use

Only seventeen states have enacted laws seeking to regulate UCE.¹²⁴ Of these states, fourteen specifically provide civil reme-

121. See generally *Rowan v. United States Post Office Dep't*, 397 U.S. 728-29 (1970) (upholding a statute "under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder"); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995) (upholding a statute aimed at reducing the volume of telemarketing calls); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995) (upholding a statute enacted to prevent the cost shifting of fax advertisements to consumers).

122. See Derek D. Simmons, Comment, *No Seconds on Spam: A Legislative Prescription to Harness Unsolicited Commercial E-Mail*, 3 J. SMALL & EMERGING BUS. L. 389, 392 (1999) (indicating that the dramatic increase in e-mail use is attributed to the commercial industry), WL 3 JSEBL 389.

123. See Donald E. Biederman et al., *Interactive Online Entertainment*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 2000, at 469, 652 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. 598, 2000) (pointing out that UCE will continue to spawn legal disputes as an increasing number of companies and individuals utilize UCE to market products and services), WL 598 PLI/Pat 469.

124. See CAL. BUS. & PROF. CODE § 17538.4 (Deering Supp. 2000) (regulating unsolicited e-mail); COLO. REV. STAT. ANN. § 6-2.5-103 (West, WESTLAW through 2000 2d Reg. Sess.) (providing restrictions on UCE); 1999 Conn. Legis. Serv. 99-160, § 1(b)(7) (West) (making it unlawful to send unsolicited bulk e-mail with falsified or forged transmission or routing information); DEL. CODE ANN. tit. 11, § 937 (West, WESTLAW through 1999 First Spec. Sess.) (criminalizing the transmission of unrequested or unauthorized commercial e-mail); IDAHO CODE § 48-603E(3) (Michie Supp. 2000) (regulating bulk e-mail advertisement practices); 815 ILL. COMP. STAT. ANN. 511/10 (Supp. 2000) (providing prohibitions for unsolicited or misleading e-mail); IOWA CODE ANN. § 714E.1(2) (West Supp. 2000) (placing restrictions on the transmission of bulk e-mail); LA. REV. STAT. ANN.

dies for recipients of UCE against spammers found violating state law.¹²⁵ A closer look at these state regulations, and the scope of protection each provides the average Internet user, shows the inconsistency one might expect from multiple approaches to the same volatile issue. Though the states share a common purpose, state regulations vary on what kind of guidelines a spammer must follow in the dissemination of UCE. Still, the Internet user ultimately receives heightened protection. The strength of this additional protection, however, depends upon the strength of the regulation. For this reason alone, the need for a unified national policy becomes evident.

1. Toll-Free Numbers or Return E-Mail Address Requirements

Several states prohibit a sender from distributing UCE unless the sender “establishes a toll-free telephone number or valid sender operated return e-mail address that the recipient of the unsolicited documents may call or e-mail to notify the sender not to e-mail any further unsolicited documents.”¹²⁶ Furthermore, the e-

§ 14:73.6 (West Supp. 2000) (establishing offenses against e-mail service providers); 2000 Mo. Legis. Serv. 407.1310 (West) (providing restrictions on the transmission of UCE); NEV. REV. STAT. 41.730 (1999) (holding a person, who transmits advertisements via e-mail, conditionally liable); N.C. GEN. STAT. § 14-458 (1999) (developing the prohibition of computer trespass); OKLA. STAT. ANN. tit. 15, § 776.1 (West Supp. 2000) (prohibiting fraudulent e-mail messages); R.I. GEN. LAWS §§ 6-47-2, 11-52-4.1 (Supp. 1999) (prohibiting the transmission of unsolicited e-mail without a means to terminate future unsolicited e-mail and also creating the crime of computer trespass); TENN. CODE ANN. § 47-18-2501 (West, WESTLAW through 1999 Reg. Sess.) (regulating unsolicited electronic advertising); VA. CODE ANN. § 18.2-152.4 (Michie Supp. 2000) (penalizing the transmission of falsified or forged e-mail information as a computer trespass); WASH. REV. CODE ANN. § 19.190.020 (West Supp. 2000) (prohibiting misleading electronic mail); W. VA. CODE ANN. § 46A-6G-2 (Michie 1999) (forming limitations on unauthorized electronic mail).

125. See COLO. REV. STAT. ANN. § 6.2-5-104(1)(b) (West, WESTLAW through 2000 2d Reg. Sess.); 1999 Conn. Legis. Serv. 99-160, § 2(a) (West); IDAHO CODE § 48-603E(4) (Michie Supp. 2000); 815 ILL. COMP. STAT. ANN. 511/10(c) (Supp. 2000); IOWA CODE ANN. § 714E.1 (3)(a) (West Supp. 2000); 2000 Mo. Legis. Serv. 407.1310 (West); NEV. REV. STAT. 41.730(2) (1999); N.C. GEN. STAT. § 14-458(c) (1999); OKLA. STAT. ANN. tit. 15, § 776.1(A)-(B) (West Supp. 2000); R.I. GEN. LAWS § 11-52-6(a)-(b) (Supp. 1999); TENN. CODE ANN. § 47-18-2501(i)(1)-(2) (West, WESTLAW through 1999 Reg. Sess.); VA. CODE ANN. § 18.2-152.12(A)-(B) (Michie Supp. 2000); WASH. REV. CODE ANN. § 19.190.040(1) (West Supp. 2000); W. VA. CODE ANN. § 46A-6G-5(b) (Michie 1999).

126. CAL. BUS. & PROF. CODE § 17538.4(a)(2) (Deering Supp. 2000); 2000 Mo. Legis. Serv. 407.1310 (West); R.I. GEN. LAWS § 6-47-2(a) (Supp. 1999); TENN. CODE ANN. § 47-18-2501(a) (West, WESTLAW through 1999 Reg. Sess.).

mail must include a statement informing the recipient of the contact information required by state law.¹²⁷ For example, California stipulates that the statement appear at the beginning of the text and that the lettering is the “same size as the majority of the text of the message.”¹²⁸ Iowa, however, takes a less stringent approach by requiring that, at a minimum, the UCE “provide an electronic mail address readily identifiable in the advertisement to which the recipient may send a request for declining such electronic mail.”¹²⁹ The purpose of the toll-free number or return e-mail address is to protect Internet users. This contact information allows Internet users to call or e-mail the spammer to voice complaints or simply request removal from the distribution list.

2. Mandatory Requirements for Subject Lines

A few states require UCEs to include the notice “ADV:” as the first four characters of the subject line indicating that the message is an advertisement.¹³⁰ In addition, if the UCE contains material “that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older”¹³¹ then the first eight characters of the subject line must include

127. See CAL. BUS. & PROF. CODE § 17538.4(b) (Deering Supp. 2000) (requiring e-mail messages to include a statement that includes the advertiser's toll-free telephone number or return e-mail address); 2000 Mo. Legis. Serv. 407.1310 (West) (requiring contact information for e-mail messages only); R.I. GEN. LAWS § 6-47-2(b) (Supp. 1999) (indicating that electronic mail must include a toll-free number or an e-mail address that a person can contact to express a desire not to receive additional UCEs); TENN. CODE ANN. § 47-18-2501(b) (West, WESTLAW through 1999 Reg. Sess.) (warning that unsolicited e-mail must contain contact information).

128. CAL. BUS. & PROF. CODE § 17538.4(b) (Deering Supp. 2000).

129. IOWA CODE ANN. § 714E.1(2)(d) (West Supp. 2000); see also IDAHO CODE § 48-603E(2) (Michie Supp. 2000) (requiring that a sender of UCE must include an e-mail address within the e-mail message).

130. See CAL. BUS. & PROF. CODE § 17538.4(g) (Deering Supp. 2000) (requiring that UCE must have included such a designation); COLO. REV. STAT. ANN. § 6-2.5-103(4) (West, WESTLAW through 2000 2d Reg. Sess.) (making it a violation of Colorado law to send a UCE without such a designation); TENN. CODE ANN. § 47-18-2501(e) (West, WESTLAW through 1999 Reg. Sess.) (imposing a requirement that “each and every message” contain “ADV:” in the subject line).

131. CAL. BUS. & PROF. CODE § 17538.4(g) (Deering Supp. 2000); TENN. CODE ANN. § 47-18-2501(e) (West, WESTLAW through 1999 Reg. Sess.).

“ADV:ADLT.”¹³² Other states strictly prohibit “false or misleading information in the subject line.”¹³³

Like toll-free numbers and return e-mail address requirements, the regulation of an e-mail subject line also protects Internet users. Requiring that a spammer notify e-mail recipients that the e-mail, in fact, contains an advertisement and not a personal message gives the recipients the opportunity to eliminate the e-mail message without having to open it. As a result, the Internet user saves valuable time and money.

3. Misrepresentation of Domain Name

Several states prohibit the intentional misrepresentation of domain names or web addresses in an e-mail message.¹³⁴ The majority of states utilizing such an approach prohibit an advertiser from falsifying commercial e-mail transmission information in any manner.¹³⁵ Other states take a broader approach by prohibiting false statements and misrepresentations in connection with all types of e-mail messages, regardless of whether they are commercial or per-

132. See CAL. BUS. & PROF. CODE § 17538.4(g) (Deering Supp. 2000); TENN. CODE ANN. § 47-18-2501(e) (West, WESTLAW through 1999 Reg. Sess.).

133. 815 ILL. COMP. STAT. ANN. 511/10(a)(ii) (Supp. 2000); WASH. REV. CODE ANN. § 19.190.020(1)(b) (West Supp. 2000); W. VA. CODE ANN. § 46A-6G-2(2) (Michie 1999).

134. See COLO. REV. STAT. ANN. § 6-2.5-103 (West, WESTLAW through 2000 2d Reg. Sess.); 1999 Conn. Legis. Serv. 99-160, § 1 (West); DEL. CODE ANN. tit. 11, § 937(2) (West, WESTLAW through 1999 First Spec. Sess.); IDAHO CODE § 48-603E (Michie Supp. 2000); 815 ILL. COMP. STAT. ANN. 511/10(a)(i) (Supp. 2000); IOWA CODE ANN. § 714E.1(2)(a) (West Supp. 2000); LA. REV. STAT. ANN. § 73.6(B) (West Supp. 2000); N.C. GEN. STAT. § 14-458(a)(6) (1999); OKLA. STAT. ANN. tit. 15, § 776.1(A)(1) (West Supp. 2000); R.I. GEN. LAWS § 6-47-2(d) (Supp. 1999); VA. CODE ANN. § 18.2-152.4(A)(7) (Michie Supp. 2000); WASH. REV. CODE ANN. § 19.190.020(1)(a) (West Supp. 2000); W. VA. CODE ANN. § 46A-6G-2(1) (Michie 1999).

135. See COLO. REV. STAT. ANN. § 6-2.5-103(2) (West, WESTLAW through 2000 2d Reg. Sess.) (providing that it is a violation to send UCE that has false e-mail transmission information); IDAHO CODE § 48-603E(3) (Michie Supp. 2000) (making it unlawful to send UCE that has false information); 815 ILL. COMP. STAT. ANN. 511/10(a)(i) (Supp. 2000) (disallowing the transmission of UCE that contains false information); LA. REV. STAT. ANN. § 73.6(B) (West Supp. 2000) (prohibiting the transmission of UCE that has falsified or forged e-mail transmission or routing information); N.C. GEN. STAT. § 14-458(a)(6) (1999) (criminalizing the act of transmitting UCE containing false information); R.I. GEN. LAWS § 6-47-2(d) (Supp. 1999) (prohibiting the fraudulent transmission of UCE); WASH. REV. CODE ANN. § 19.190.020(1)(a) (West Supp. 2000) (prohibiting UCE that misrepresents information); W. VA. CODE ANN. § 46A-6G-2(1) (Michie 1999) (placing limitations on UCE).

sonal.¹³⁶ In addition to intentional misrepresentation, most states also prohibit the failure to “disclose the actual point-of-origin electronic mail address of the unsolicited . . . electronic mail message.”¹³⁷

Likewise, North Carolina, Rhode Island and Virginia regulate against misrepresentations in UCE. Notably, each of these states conclude that such a misrepresentation constitutes a computer trespass qualifying as a criminal offense.¹³⁸ In North Carolina and Virginia, whether the defendant receives a misdemeanor or felony conviction depends on the severity of the trespass.¹³⁹ Furthermore, under Rhode Island law, computer trespass also gives rise to a civil cause of action.¹⁴⁰

136. See 1999 Conn. Legis. Serv. 99-160, § 1 (West) (prohibiting the falsification or forgery of information in connection with the transmission of unsolicited bulk e-mail); DEL. CODE ANN. tit. 11, § 937(2) (West, WESTLAW through 1999 First Spec. Sess.) (providing that a person is guilty of a computer crime when he or she transmits falsified or forged information in connection with unsolicited bulk e-mail); IOWA CODE ANN. § 714E.1(2)(a) (West Supp. 2000) (prohibiting the misrepresentation of any information in the transmittal of bulk e-mail); OKLA. STAT. ANN. tit. 15, § 776.1(A)(1) (West Supp. 2000) (prohibiting any fraudulent e-mail messages); VA. CODE ANN. § 18.2-152.4(A)(7) (Michie Supp. 2000) (criminalizing the act of fraudulently transmitting bulk e-mail).

137. COLO. REV. STAT. ANN. § 6-2.5-103(1) (West, WESTLAW through 2000 2d Reg. Sess.); see also IDAHO CODE § 48-603E(3)(b) (Michie Supp. 2000); 815 ILL. COMP. STAT. ANN. 511/10(a)(i) (Supp. 2000); IOWA CODE ANN. § 714E.1(2)(b) (West Supp. 2000); OKLA. STAT. ANN. tit. 15, § 776.1(A)(1) (West Supp. 2000); R.I. GEN. LAWS § 6-47-2(d) (Supp. 1999); WASH. REV. CODE ANN. § 19.190.020(1)(a) (West Supp. 2000); W. VA. CODE ANN. § 46A-6G-2(1) (Michie 1999).

138. See N.C. GEN. STAT. § 14-458(a)(6) (1999) (penalizing as computer trespass the act of falsifying information in connection with the transmission of UCE); R.I. GEN. LAWS § 11-52-4.1(7) (Supp. 1999) (illegalizing the act of forging e-mail information); VA. CODE ANN. § 18.2-152.4(A)(7) (Michie Supp. 2000) (providing that falsifying or forging e-mail transmission information is a computer trespass).

139. See N.C. GEN. STAT. § 14-458(b) (1999) (providing that computer trespass is punishable as a Class 3 misdemeanor, yet if damage occurs to property, then it is a Class 1 misdemeanor if the damage is less than \$25,000 and is a Class I felony if the damage is more than \$25,000); VA. CODE ANN. § 18.2-152.4(C) (Michie Supp. 2000) (indicating that computer trespass is a Class 3 misdemeanor and also stipulating that it is a Class I misdemeanor if less than \$25,000 damage occurs to the property and is a Class 6 misdemeanor for damages higher than \$25,000).

140. See R.I. GEN. LAWS § 11-52-6(a) (Supp. 1999) (providing that a person, who is injured as a result of a legal violation, can “bring a civil action against the violator for compensatory damages, punitive damages, court costs, and such other relief as the court deems appropriate, including reasonable attorneys’ fees”).

B. Damages Available to Internet Users

As previously discussed, the distribution of UCE negatively affects Internet users. Because no actual damages usually result from the transmittal of UCE, many states allow Internet users to seek, in lieu of damages, a specified amount of money for each UCE received or a maximum amount of money per day. The damages recoverable vary from state to state. A closer look at this variance, however, emphasizes the need for a uniform federal system. For instance, Rhode Island allows an e-mail recipient to ask for compensatory and punitive damages.¹⁴¹ In addition, the recipient may elect the lesser of \$500 per UCE received or \$25,000 per day.¹⁴² Other states, including Connecticut, Illinois, Oklahoma and Virginia allow the e-mail recipient to request damages for lost profits and the lesser of ten dollars for every UCE received or \$25,000 per day.¹⁴³ Likewise, Tennessee provides the same recovery; however, it has a significantly lower cap of \$5,000 per day.¹⁴⁴ Furthermore, attorney's fees and costs are also available in most states.¹⁴⁵

In contrast, other states provide less recovery. For example, in Nevada, Internet users receiving UCE may sue the spammer for the greater of actual damages or ten dollars per every UCE received.¹⁴⁶ Comparatively, West Virginia allows e-mail recipients the choice of actual damages or a minimum of \$1,000.¹⁴⁷ Washington allows e-mail recipients to recover \$500 or actual damages, whichever is greater.¹⁴⁸ Under Louisiana law, the spammer cannot receive a fine of more than \$5,000.¹⁴⁹

141. *See id.*

142. *See id.* § 11-52-6(b).

143. *See* 1999 Conn. Legis. Serv. 99-160, § 2(b) (West); *see also* 815 ILL. COMP. STAT. ANN. 511/10(c) (Supp. 2000); OKLA. STAT. ANN. TIT. 15, § 776.2(B) (West Supp. 2000); VA. CODE ANN. § 18.2-152.12(B) (Michie Supp. 2000).

144. *See* TENN. CODE ANN. § 47-18-2501(i)(2) (West, WESTLAW through 1999 Reg. Sess.).

145. *See* COLO. REV. STAT. ANN. § 6-2.5-103 (West, WESTLAW through 2000 2d Reg. Sess.); 815 ILL. COMP. STAT. ANN. 511/10(c) (Supp. 2000); IOWA CODE ANN. § 714E.3(a)(2) (West Supp. 2000); NEV. REV. STAT. 41.730(2)(b) (1999); R.I. GEN. LAWS § 11-52-6(b) (Supp. 1999); TENN. CODE ANN. § 47-18-2501(i)(2) (West, WESTLAW through 1999 Reg. Sess.); VA. CODE ANN. § 18.2-152.12(B) (Michie Supp. 2000); W. VA. CODE ANN. § 46A-6G-5(b) (Michie 1999).

146. *See* NEV. REV. STAT. 41.730(2)(a) (1999).

147. *See* W. VA. CODE ANN. § 46A-6G-5(b) (Michie 1999).

148. *See* WASH. REV. CODE ANN. § 19.190.040(1) (West 1999).

149. *See* LA. REV. STAT. ANN. § 14:73.6(C) (West Supp. 2000).

C. *Potential Challenges to State Regulation*

Aside from the discrepancies between states, state regulations face legal challenges. Because these challenges focus more on the legality of any state regulation, rather than the inherent disparate treatment between states, an adverse court ruling in any one state could prove devastating in other states. As one state regulation fails, others will surely face the same successful challenge. Again, however, the weaknesses of state regulation evidences the need for a more centered federal approach.

1. Challenges to State Jurisdictional Limitations

In an attempt to resolve jurisdictional limitations that may arise when an e-mail recipient brings suit against a spammer located in another state, some states have expressly attempted to establish personal jurisdiction through statute. For instance, Oklahoma provides that transmitting fraudulent e-mail messages through an Internet service provider's computer network located within the state constitutes an act, thereby subjecting the spammer to the laws of Oklahoma.¹⁵⁰ Of course, the fraud requirement limits the applicability of the Oklahoma statute and fails to protect Internet users from a flood of legitimate e-mails.¹⁵¹ Other states attempt to resolve this problem by creating laws that apply to all e-mail messages sent to residents via an Internet service provider's network that is located in that state.¹⁵² A few states subject the spam-

150. See OKLA. STAT. ANN. tit. 15, § 776.3 (West Supp. 2000).

151. See *id.* (noting the prerequisites need for fraudulent activity to establish jurisdiction).

152. See CAL. BUS. & PROF. CODE § 17538.4(d) (Deering Supp. 2000) (applying California's prohibition on unsolicited advertising materials to electronic mail sent to California residents through an Internet service provider located in California); COLO. REV. STAT. ANN. § 6-2.5-105 (West, WESTLAW through 2000 2d Reg. Sess.) (incorporating unsolicited e-mails sent via Colorado Internet service providers to Colorado residents into Colorado's Junk E-mail Law); 815 ILL. COMP. STAT. ANN. 511/10(b) (Supp. 2000) (establishing jurisdiction for unsolicited electronic advertisements delivered via Illinois Internet service providers to Illinois residents); IOWA CODE ANN. § 714E.1(5) (West Supp. 2000) (creating jurisdiction for any transmission of unsolicited bulk e-mail through an Internet service provider located in Iowa); OKLA. STAT. ANN. tit. 15, § 776.3 (West Supp. 2000) (establishing that the transmission of fraudulent e-mails, via an Oklahoma Internet service provider to its residents, constitutes an act under state law); TENN. CODE ANN. § 47-18-2501(f) (West, WESTLAW through 1999 Reg. Sess.) (incorporating the transmission of bulk unsolicited electronic mail documents, sent to Tennessee residents via a Tennessee electronic mail service provider, into its regulations of unsolicited advertising).

mer to their laws by presuming that the spammer sends the UCE knowing that the recipient resides in that particular state.¹⁵³

Challenges to personal jurisdiction undoubtedly will arise when an Internet user in one state attempts to bring a suit against a spammer located in another. While courts often face jurisdictional issues, courts and litigants alike could avoid the needless expense associated with this type of dispute by invoking the broad jurisdiction federal law provides. Consequently, the need for federal UCE legislation becomes further evident.

2. State Regulation Challenges Under Protected Commercial Speech

Not surprisingly, one argument against state regulation of UCE is that it infringes on the freedom of speech guaranteed under the First Amendment.¹⁵⁴ Nevertheless, a regulation limiting commercial speech must satisfy the *Central Hudson* test to be upheld as constitutional.¹⁵⁵ In fact, several states have already enacted laws regulating UCE that afford e-mail recipients increased rights. However, to this day, none have been challenged on First Amendment grounds.

3. Washington Spam Law Held Unconstitutional

Another potential problem with UCE legislation surfaced in a recent ruling by the Superior Court of Washington.¹⁵⁶ In *State v.*

153. See DEL. CODE ANN. tit. 11, § 937(4) (West, WESTLAW through 1999 First Spec. Sess.) (allowing Delaware to regulate out-of-state conduct assuming the e-mail recipient used a computer system located in Delaware and the spammer potentially knew that the e-mail recipient was located in Delaware); R.I. GEN. LAWS § 6-47-2(a) (Supp. 1999) (prohibiting the transmission of UCE to a computer in Rhode Island if the sender knows the computer is located in Rhode Island); WASH. REV. CODE ANN. § 19.190.020(1) (West Supp. 2000) (incorporating UCE transmitted from outside the state into Washington's prohibition if the sender knows the recipient is a Washington resident); W. VA. CODE ANN. § 46A-6G-2 (Michie 1999) (forbidding known transmission of UCE to West Virginia residents).

154. Cathryn Le, Note, *How Have Internet Service Providers Beat Spammers?*, 5 RICH. J.L. & TECH. 9, ¶ 4 (1998) (recognizing that many spammers assert their First Amendment rights), at <http://www.richmond.edu/jolt/v5i2/le.html>.

155. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

156. See *State v. Heckel*, No. 98-2-25480-7 SEA, 2000 WL 979720, at *1 (Wash. Super. Mar. 10, 2000) (declaring that a Washington anti-spam statute violates the Interstate Commerce Clause).

Heckel,¹⁵⁷ the court deemed Washington's anti-spam law unconstitutional as an infringement upon Congress' Commerce Clause authority.¹⁵⁸ The court's decision primarily focused on the difficulty in determining the state residence of an Internet user solely from an e-mail address. Furthermore, the court expressed concern about subjecting senders of UCE to as many different standards of conduct as there are states, thus causing Commerce Clause problems.¹⁵⁹

The Washington state attorney general appealed the ruling to the state supreme court and indicated that an appeal to the United States Supreme Court might occur.¹⁶⁰ Other states can reasonably anticipate similar challenges to UCE legislation. If the Commerce Clause stands as the obstacle to state legislation, regulation must occur at the federal level in order to protect the rights of Internet users.

V. A CONSTITUTIONAL MEANS OF COMBATTING SPAM: FEDERAL LEGISLATION UNDER THE FOUR-PRONG *CENTRAL HUDSON* TEST

Currently, no Federal laws directly target UCE.¹⁶¹ However, New Mexico Representative Heather Wilson recently introduced the Unsolicited Commercial Electronic Mail Act of 2000 (the "Act").¹⁶² If passed by Congress, the Act would amend the Computer Fraud and Abuse Act.¹⁶³ Ultimately, this new federal legisla-

157. No. 98-2-25480-7 SEA, 2000 WL 979720.

158. See *Heckel*, 2000 WL 979720, at *1 (proclaiming the law was "unduly restrictive and burdensome" and in violation of the United States Constitution).

159. See Peter Lewis, *State Asks Supreme Court to Uphold Anti-Spam Law*, SEATTLE TIMES, Apr. 7, 2000, at C6 (reporting on the outcome of *Heckel*, 2000 WL 979720, at *1), 2000 WL 5529681.

160. See *id.* (indicating that the existence of a constitutional question places the case within the purview of the U.S. Supreme Court regardless of the state supreme court's ruling).

161. See Michael S. Yang, *E-Commerce: The Internet and E-Commerce*, 33 MD. B.J. 12, 17 (2000) (providing that, currently, there are no federal statutes that directly address the problem of UCE).

162. See Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. (2000).

163. See *id.* § 4.

tion creates the necessary protection against UCE and provides an avenue for the prosecution of spammers who violate the law.¹⁶⁴

The Act's stated purpose is to "protect individuals, families, and Internet service providers from unsolicited and unwanted electronic mail."¹⁶⁵ The Act achieves this goal by combining many of the state statutory provisions currently in existence into one all-encompassing statute. If enacted, the Act undoubtedly will face challenges from unsolicited commercial advertisers as an infringement of First Amendment commercial speech rights. Nevertheless, examining the Act under the four-prong *Central Hudson* test proves such legislation a constitutionally sound means of protecting Internet users from UCE.

A. *Prong One: Commercial Speech Must Concern Lawful Activity and May Not Be Misleading*

The first prong of the *Central Hudson* test requires a court to determine whether the commercial speech, in this case the UCE, receives protection under the First Amendment.¹⁶⁶ To receive First Amendment protection, the commercial speech must concern lawful activity and must not be misleading.¹⁶⁷ In the proposed Act, Congress states that "[a]n increasing number of senders of unsolicited commercial electronic mail purposefully disguise the source of such mail so as to prevent recipients from responding to such mail quickly and easily."¹⁶⁸ Indeed, as the Act recognizes, the most common problem with UCE is that advertisers often purposefully mislead e-mail recipients.¹⁶⁹ A misleading subject line deceives the e-mail recipient into believing that someone they know sent them a personal message, thereby causing the recipient to open the e-mail.¹⁷⁰ Similarly, some spammers provide false routing informa-

164. *See id.* §§ 4, 5 (providing enforcement procedures and other protections against UCE).

165. 146 CONG. REC. S7226 (2000) (reporting the measures referred to include H.R. 3113).

166. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

167. *See id.*

168. Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. § 2(a)(7) (2000).

169. *See id.*

170. *See generally* 146 CONG. REC. H6371-72 (daily ed. July 18, 2000) (statement of Rep. Wilson) (admitting that she first became aware of the problem with junk mail after

tion in the UCE.¹⁷¹ This prevents the e-mail recipient from directly contacting the spammer to voice any displeasure.

Because these UCE techniques may mislead the recipient, such advertising strategies fail the first prong of the *Central Hudson* test. As a result, the First Amendment would not protect UCE; therefore, the advertisement is subject to government regulation. Yet, not all UCE contains unlawful or misleading information. Under *Central Hudson*, “[i]f the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed.”¹⁷² As a result, the government must assert a substantial interest, thus requiring application of *Central Hudson*’s second prong.

B. Prong Two: Substantial Governmental Interest

Not all UCE contains unlawful or misleading information; therefore courts must apply the second prong of the *Central Hudson* test. The second prong requires a court to determine whether a substantial governmental interest exists.¹⁷³ The Unsolicited Commercial Electronic Mail Act of 2000 expressly provides that Congress has a “substantial government interest in regulation of unsolicited commercial electronic mail.”¹⁷⁴ The Act’s proponents base this assertion on congressional findings that “[t]he receipt of unsolicited commercial electronic mail may result in costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both.”¹⁷⁵ Indeed, as previously discussed, the receipt of UCE unnecessarily costs the recipient time and money in downloading, reviewing, and deleting UCE.

The findings additionally provide that “[t]he sending of [UCE] is increasingly and negatively affecting the quality of service provided to customers of Internet access service.”¹⁷⁶ This reiterates the idea

she received an X-rated e-mail with a misleading subject line entitled “What your Federal Government does not want you to know”).

171. *Id.* at H6373 (statement of Rep. Miller).

172. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

173. *See id.* at 557.

174. Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. § 2(b)(1) (2000).

175. *Id.* § 2(a)(4).

176. *Id.* § 2(a)(5).

of the spillover effect resulting from the inundation of UCE to Internet service providers. Moreover, the dissemination of UCE may cripple servers, thus leading to customer dissatisfaction. These findings acknowledge the costs incurred by Internet users, thus creating a substantial governmental interest that satisfies the second prong of the *Central Hudson* test.

Applying the first two prongs of the *Central Hudson* test results in the Act passing constitutional muster. Obviously misleading UCE fails to satisfy the first prong of the test; therefore, the UCE would not receive constitutional protection under the First Amendment.¹⁷⁷ Alternatively, should the UCE satisfy the first prong of *Central Hudson*, a reviewing court must then determine whether the Act concerns a substantial governmental interest.¹⁷⁸ If enacted in its present form, the congressional findings adequately satisfy the second prong of the test. Furthermore, Congress cited substantial supporting evidence, further satisfying *Central Hudson's* second prong.¹⁷⁹ As a result, the determination of the first two prongs of the *Central Hudson* test would yield positive answers. Accordingly, the court must turn to the more contentious third and fourth prongs of the test.

C. *Prong Three: Whether the Government Regulation Directly Advances the Interest Asserted*

The third prong of the *Central Hudson* test requires a determination of “whether the regulation directly advances the governmental interest asserted.”¹⁸⁰ Such a determination requires a closer inquiry into the Act’s substantive parameters. In general, the Act requires a clear identification of the sender, identification of the commercial nature of the messages and the inclusion of information detailing how a recipient may avoid such future messages.¹⁸¹

177. See *Cent. Hudson*, 447 U.S. at 566 (asserting that for commercial speech to receive constitutional protection, the communication must at least “concern lawful activity and not be misleading”).

178. See *id.* at 564 (stating that the government’s power is circumscribed when the commercial speech is neither misleading nor linked to unlawful activity).

179. See 146 CONG. REC. H6371-72 (daily ed. July 18, 2000) (statement of Rep. Wilson) (outlining that by prohibiting unsolicited commercial e-mail, the government is limiting an ISP’s cost and enabling a consumer to refuse unwanted information).

180. *Cent. Hudson*, 447 U.S. at 566.

181. See Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. § 5(a)(1), (3) (2000).

1. Fraudulent Routing Information

The Unsolicited Commercial E-Mail Act of 2000 would prohibit the transmittal of UCE containing fraudulent routing information. The proposed Act states that a violation occurs whenever an individual:

intentionally initiates the transmission of any unsolicited commercial electronic mail message to a protected computer in the United States with knowledge that any domain name, header information, date or time stamp, originating electronic mail address, or other information identifying the initiator or the routing of such message, that is contained in or accompanies such message, is false or inaccurate.¹⁸²

This language focuses on the sender's use of false identification information and misleading routing information. As previously noted, senders of unsolicited commercial e-mail insert a false name in the identification of the message's origin as a means to avoid retaliation from angry recipients or floods of messages returned as undeliverable.¹⁸³ Congress specifically found that "[a]n increasing number of senders of unsolicited commercial electronic mail purposefully disguise the source of such mail so as to prevent recipients from responding to such mail quickly and easily."¹⁸⁴ Therefore, in preventing the transmission of false or inaccurate information, Congress, by prohibiting its distribution, directly advances the governmental interest of protecting Internet users from intentionally false and misleading UCE.

2. Inclusion of Return Address

Related to the provision prohibiting the use of fraudulent routing information, the Act also provides a provision mandating the inclusion of a return address.¹⁸⁵ The Act provides:

It shall be unlawful for any person to initiate the transmission of a commercial electronic mail message to any person within the United

182. *Id.* § 4.

183. *See generally* 146 CONG. REC. H6373 (daily ed. July 18, 2000) (statement of Rep. Miller) (providing an example in which an e-mail address for a legitimate computer business was used as a dummy address for spam, basically closing down the business temporarily after thousands of replies came back).

184. Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. § 2(a)(7) (2000).

185. *See id.* § 5(a)(1).

States unless such message contains a valid electronic mail address, conspicuously displayed, to which a recipient may send a reply to the initiator to indicate a desire not to receive any further messages.¹⁸⁶

This provision prevents the spammer from sending UCE without a clearly identifiable return address through which the receiver may contact the sender.¹⁸⁷ Some UCE advertisers use a “dummy” return address to disguise their true e-mail address, thus preventing any backlash against the advertisers.¹⁸⁸ This backlash can result in a clogging of the domain’s system through which the advertiser established its dummy account.¹⁸⁹ Because mass e-mailings contain thousands of messages, many of these messages will inevitably return to the dummy address as undeliverable. Such returns have the potential of clogging the server and interrupting the server maintained by that Internet service provider. Aside from the inconvenience experienced by customers, such interruptions can result in the Internet service provider losing customers and the revenues these customers provide. As a result, the requirement of a return address through which a receiver can contact an advertiser advances the governmental interest in protecting the citizenry from unwanted advertising materials.¹⁹⁰

3. The “Opt-Out” Clause

Finally, the Act provides the receiver with a means of directly avoiding any future, undesired UCE. The Act contains a provision that requires the inclusion of an “opt-out” clause in every UCE.¹⁹¹ The Act states:

It shall be unlawful for any person to initiate the transmission of any unsolicited commercial electronic mail message to any person within the United States unless the message provides, in a manner that is clear and conspicuous to the recipient—

186. *Id.*

187. *See id.*

188. *See* 146 CONG. REC. H6372 (daily ed. July 18, 2000) (statement of Rep. Wilson) (arguing that the Act requires the inclusion of return e-mail addresses to avoid the disrespect of a consumer’s right to request not to receive further unsolicited e-mails).

189. *See generally id.* (exemplifying the consequences incurred by a business whose e-mail address is used as the dummy account in transmission of UCE).

190. *See* Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. § 2(b)(1) (2000).

191. *See id.* § 5(a)(3)(B).

- (A) identification that the message is an unsolicited commercial electronic mail message; and
- (B) notice of the opportunity . . . not to receive further unsolicited commercial electronic mail messages from the initiator.¹⁹²

This type of "opt-out" clause represents a logical and reasonable extension of the Supreme Court's jurisprudence concerning unsolicited advertisements. A person who does not want to continue receiving e-mail from an advertiser need only request the sender to remove that person's name from the mailing list.¹⁹³ As indicated in the proposed Act's Congressional findings,

While some senders of unsolicited commercial electronic mail messages provide simple and reliable ways for recipients to reject (or "opt-out" of) receipt of unsolicited commercial electronic mail from such senders in the future, other senders provide no such "opt-out" mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both.¹⁹⁴

This provision places e-mail recipients in a position of control by allowing them to decide what messages to receive.

4. All Three Provisions Satisfy *Central Hudson's* Third Prong

Based on these provisions, the Act directly advances the asserted governmental interests. In addition to providing a criminal penalty for transmitting a UCE that contains fraudulent routing information, the Act also sets forth requirements that an advertiser must follow before transmitting UCE.¹⁹⁵ These requirements directly advance the governmental interests of alleviating the costs incurred by Internet users and improve the quality of Internet service by giving substantial rights to Internet users. In particular, the inclusion of a return e-mail address and an opt-out clause in all UCE affords Internet users the right to refuse or opt-out of receiving any future UCE. Additionally, providing a civil remedy to Internet users whose rights have been violated by spammers enhances those

192. *Id.* § 5(a)(3).

193. *See id.* § 5(a)(2) (prohibiting the transmission of UCE once the e-mail recipient has requested "to be removed from all distribution lists under the control of such person").

194. *Id.* § 2(a)(6).

195. *See* Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. § 5 (2000) (listing the components that a sender must include in an UCE in order to comply with the Act).

consumer's rights. Therefore, one can conclude that the Act directly advances each governmental interest asserted by Congress.

D. *Prong Four: Whether the Regulation Is More Extensive Than Necessary*

The fourth prong of *Central Hudson* requires a determination of whether the Act "is not more extensive than is necessary to serve that interest."¹⁹⁶ Because of the Internet's vast nature and its ability to reach individuals on a worldwide level, Congress can reasonably regulate UCE. Although commercial speakers enjoy First Amendment rights, the Supreme Court has stated that these rights are not absolute.¹⁹⁷ Internet users also have a right to privacy and should be able to enjoy the Internet without being inundated with UCE when accessing e-mail accounts. Because the Act gives Internet users the right to control what they receive, as with other forms of commercial advertisements, the Act is no more extensive than reasonably necessary in serving the interests of Internet users.¹⁹⁸

VI. CONCLUSION

As the Internet becomes more congested with commercial advertisers, Internet users require additional protection. Because the same qualities that make UCE advertising attractive today will remain in the future, problems with UCE will not vanish with time. Consequently, the federal government must take active steps towards controlling the dissemination of UCE. For Internet service providers hindered by UCE, resources may be available to wage legal battles and attempt to forge law through litigation. For the Internet user, however, the law simply fails to provide enough avenues into court to have the same effect. Internet users need protection from uncontrollable UCE, and it must come from federal legislation.

196. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

197. *See Breard v. City of Alexandria*, 341 U.S. 622, 642 (1951) (stating that "[f]reedom of speech or press does not mean that one can talk or distribute where, when and how one chooses").

198. *See Cent. Hudson*, 447 U.S. at 571-72 (stating that policy regulation is constitutional so long as the regulation is not more extensive than necessary to achieve a government goal).

As noted, many states have sought to regulate UCE. In general, the primary focus of these states includes the right of opting not to receive UCE. To this end, legislation typically requires that senders of UCE include a way for recipients to respond in order to stop the flow of such messages. This may require the inclusion of contact information and frequently requires the sender to include a true address from which the UCE originated. While states have forged ahead with regulation in the absence of federal preemption, recent events have demonstrated that the avenue for change must originate from the federal rather than state level. Indeed, one court has already held that a state anti-spam law violates the Commerce Clause of the United States Constitution by imposing unreasonable burdens on senders of UCE.¹⁹⁹ Hence, similar laws in other states are threatened by this holding.

The specter of each state placing burdensome requirements on senders of UCE clearly demonstrates the need for federal regulation. Legislation proposed at the federal level, like the Unsolicited Commercial Electronic Mail Act of 2000, would address some of the problems individuals have with UCE and represents a step in the right direction for the rights of Internet users. Allowing Internet users to opt-out of receiving further UCE would give the recipient control that parallels the control enjoyed in other forms of unsolicited advertisements.

199. See *State v. Heckel*, No. 98-2-25480-7 SEA, 2000 WL 979720, at *1 (Wash. Super. Mar. 10, 2000) (declaring that a Washington anti-spam statute violates the Interstate Commerce Clause).