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# SPAM (Supremacy Clause, Public Forums, and Mailings): The Fifth Circuit's Interpretation of the CAN-SPAN Act in White Buffalo v. University of Texas Comment.

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# SPAM (SUPREMACY CLAUSE, PUBLIC FORUMS, AND MAILINGS): THE FIFTH CIRCUIT'S INTERPRETATION OF THE CAN-SPAM ACT IN *WHITE BUFFALO V. UNIVERSITY OF TEXAS*

**JASON A. SMITH**

## I. INTRODUCTION

"I don't want *any* Spam!"[1]

This is the cry of many e-mail users around the world who are frustrated by the volume of unsolicited bulk e-mail (a.k.a. spam) that they receive everyday. International Data Corp. (IDC) estimates that Internet marketers sent close to 4.5 trillion spam e-mails in 2003; an amount that IDC projects will nearly double in the near future.[2] This flood of unwanted information also costs corporations $50 billion globally in lost productivity,[3] including about $47 per user for e-mail operations and spam prevention.[4] Yet with all of the data available, nothing can measure the frustration that each e-mail user experiences when they open their inboxes to numerous advertisements for Nigerian get-rich-quick schemes, online pharmacies, and pornography. Much like the sketch that gave rise to the term, spam recipients have found it hard to raise their voices over the drowning tide of spam from the vikings of Internet marketing.

Although many view unsolicited electronic advertisement as a recent development, it has a long history.[5] The first recorded instance of computer spam occurred on ARPANET (a predecessor to the Internet) on May 3, 1978, and consisted of an advertisement sent by Gary Thurek, a marketing representative for Digital Equipment Corp. (DEC).[6] Although Mr. Thurek claimed that he sent the message for informational purposes rather than as an advertisement, the reaction was negative,[7] thus preventing such marketing from gaining a foothold for several years.

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1. *Monty Python's Flying Circus: Series 2, Episode 12* (BBC television broadcast Dec. 15, 1970). The term *spam* derives from a sketch where a restaurant owner is frequently drowned out by a group of Vikings singing "Spam, spam, spam, spam . . ." much the same way that pertinent e-mails are drowned out by unsolicited advertisements. *See* Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 355 n.1 (2005) (citing DAVID CRYSTAL, LANGUAGE AND THE INTERNET 53 (Cambridge 2001)) (noting that the "spam" term derives from the Monty Python sketch).

2. Crayton Harrison, *It Cost Millions, but Majority of Users Now Protected from Most Spam*, DALLAS MORNING NEWS, Aug. 14, 2005, at 1D.

3. Tom Zeller Jr., *Law Barring Junk E-mail Allows a Flood Instead*, N.Y. TIMES, Feb. 1, 2005, at A1.

4. *The Battle for Your Inbox*, DALLAS MORNING NEWS, Aug. 15, 2005, at 12.

5. *See* Laborlawtalk.com, http://dictionary.laborlawtalk.com/Spamming#Etymology (last visited Nov. 1, 2006) (claiming that the first example of an unsolicited electronic message was a telegram recorded on Sept. 13, 1904, thirty-three years before Hormel developed SPAM luncheon meat) (on file with the *St. Mary's Law Journal*).

6. *All Things Considered: Spam: A 25th Anniversary* (NPR radio broadcast May 2, 2003), http://www.npr.org/templates/story/story.php?storyId=1250161 (last visited Nov. 30, 2006) (on file with the *St. Mary's Law Journal*).

7. *See id.* (pointing out that the Department of Defense, who operated ARPANET as a research support tool, chastised DEC for sending the advertisement).

In 1994, two immigration lawyers from Arizona sent what many Internet historians recognize as the first deliberately commercial electronic message, posting an advertisement for their services to over 6,000 Usenet discussion groups.[8] The "green card spam," as it was labeled, marked a revolutionary moment in the history of the Internet when its non-commercial nature quickly transformed into a frontier of electronic commerce.[9] Not surprisingly, there was an equal and opposite reaction to this development. The first commercial spam led to the first efforts at anti-spam software when Usenet users created programs that sought out the offending postings and deleted them.[10]

The advent of e-mail in the late 1990s made it easier for Internet marketers to reach larger numbers of people; instead of posting advertisements on a mere 6,000 newsgroups, modern spammers can issue up to 250

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8. Neil Swidey, *Spambusters*, BOSTON GLOBE, Oct. 5, 2003, at 12. The two lawyers, Laurence Canter and Martha Siegel, subsequently formed a company called Cybersell to take advantage of Internet advertising. *See* Peter Lewis, *Cyberspace Wrestles with Unsavory Characters – Abuse of Networks Increases Hostility Between Users*, DALLAS MORNING NEWS, May 11, 1994, at 11D (noting the wrath that Canter and Siegel brought down upon themselves from other Usenet users); Sarah Lyall, *Ads in Cyberspace Fire a Debate While Heating Lawyers' Book Sales*, CHI. TRIB., Oct. 20, 1994, at 11A (noting that the publisher of their book on advertising on cyberspace increased the first printing from 25,000 to 100,000 copies). Reaction to the book was decidedly negative, however. *See* Barbara Kantrowitz & Adam Rogers, *Don't Buy This Book*, NEWSWEEK, Nov. 21, 1994 at 14 (claiming that Canter and Siegel's book was little more than "a self-promoting primer on how to make a bundle of bucks by being a boor").

9. Adam Mossoff, *Spam—Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625, 631-32 (2004); *see also* Amy Harmon, *The American Way of Spam*, N.Y. TIMES, May 7, 1998, at G1 (noting that Usenet newsgroups were the target of the first spammers); Tom Lowry, *Legal Profession Tries Internet Marketing*, USA TODAY, Oct. 20, 1997 at 8B (recognizing the effect Canter and Siegel had on advertising for legal services). Canter was eventually disbarred by the Supreme Court of Tennessee in 1997, in part because of his spamming activities. Sharael Feist, *The Father of Modern Spam Speaks*, C-NET, Mar. 26, 2002, http://news.com.com/2008-1082-868483.html (last visited Oct. 23, 2006) (on file with the *St. Mary's Law Journal*). Mr. Canter claims that the infamous "green card spam" generated from $100,000 to $200,000 worth of business from a negligible investment.

10. John Schwartz, *'Cancelbot' Software Raises Specter of On-Line Censorship*, WASH. POST, Dec. 26, 1994, at F14. In the article, the author ironically questions whether early anti-spam efforts created in response to the "green card spam" constituted censorship. *Id.*; *see also* Jared Sandberg, *Phoenix Lawyers Irk Internet Users Again by Broadcasting Ad*, WALL ST. J., June 22, 1994, at B5 (demonstrating how Internet users responded to a second spam from the same lawyers; namely complaining to their ISP, signing the lawyers up for phony magazine subscriptions, and placing obscene phone calls to their home and office numbers). Canter and Siegel's ISP eventually terminated their account due to the volume of e-mail that the message generated. Jared Sandberg, *Phoenix Lawyers Irk Internet Users Again by Broadcasting Ad*, WALL ST. J., June 22, 1994, at B5. Later, a different ISP dropped Canter and Siegel because they had "boasted" about their commercial activity. *Id.*

million e-mails each day.[11] Not only is e-mail more efficient, but also it is considerably less expensive than sending conventional mail.[12] This efficiency is not passed on to the recipient however. E-mail users in the U.S. spend approximately $10 billion dealing with spam messages, with $4 billion of that total absorbed by businesses as productivity losses.[13] The ability to reach large numbers of people at a low cost also gave rise to consumer fraud, limiting the efficiency of legitimate e-mail marketing efforts.[14] Many of these fraudulent messages also had pornographic content, posing problems for users both at home and at the workplace.[15]

Facing this onslaught, users fought back with a variety of methods. Computer programmers developed filtering software that allows Internet service providers (ISPs) to block spam sent through their servers before it reaches individual e-mail accounts.[16] Unfortunately, these filters are not

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11. *See* Adam Mossoff, *Spam—Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625, 632 (2004) (indicating that the advent of individual e-mail accounts has dramatically increased the potential exposure of a spam message).

12. Erin Elizabeth Marks, Comment, *Spammers Clog In-boxes Everywhere: Will the CAN-Spam Act of 2003 Halt the Invasion?*, 54 CASE W. RES. L. REV. 943, 944-45 (2004). The fees charged by commercial spammers are similarly low. *See* Jack Hitt, *Confessions of a Spam King*, N.Y. TIMES, Sept. 28, 2003, § 6, at 48 (noting that the spammer interviewed for the article charges as low as $300 for 100,000 e-mail solicitations, and that the fees have been dropped to as low as $25 for 1 million addresses).

13. Erin Elizabeth Marks, Comment, *Spammers Clog In-boxes Everywhere: Will the CAN-Spam Act of 2003 Halt the Invasion?*, 54 CASE W. RES. L. REV. 943, 943-44 (2004).

14. Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 970 (2005) (citing PETER A. JOHNSON, DIRECT MARKETING ASSOCIATION, WHAT COMMERCIAL E-MAIL CONTRIBUTES TO THE U.S. ECONOMY 7-8 (May 20, 2003)).

15. *See* Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 970-71 (2005) (pointing out that anti-spam activists were concerned with children having access to spam containing graphic depictions of sexual acts). This concern was later mirrored by Congress when considering anti-spam legislation. *See* Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. § 7701(a)(5) (Supp. III 2005) (recognizing that some spam "contains material that many recipients may consider vulgar or pornographic in nature"); *see also* S. REP. NO. 108-102, at 4 (2003) (stating the concern that unsuspecting children may open seemingly innocent messages to find either pornographic images or be taken to adult web pages). The Senate Committee on Commerce, Science, and Transportation report also noted that fraud was particularly a problem with pornographic spam, and additionally that "the FTC found that more than [forty] percent of all pornographic spam either did not alert recipients to images contained in the message or contained false subject lines." S. REP. NO. 108-102, at 4 (2003). Such false subject lines could lead recipients to unknowingly open offensive messages. *Id.*

16. *See* Adam Mossoff, *Spam—Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625, 632-33 (2004) (pointing out that ISPs are increasingly depending on filtering software to block unwanted spam). Companies such as Brightmail and SpamGuard have even been created for the sole purpose of filtering, and such capability is one of the key components

without their problems. Between false positives (deleting a legitimate e-mail because of its similarity to spam) and spammer avoidance tactics, filters are not as efficient as most users would prefer. Some anti-spam advocates have resorted to using vigilante tactics against spammers, employing techniques to clog the spammer's servers.[17] Finally, e-mail users have resorted to the courts, suing spammers under the "trespass to chattels" theory popularized in early cases such as *eBay, Inc. v. Bidder's Edge, Inc.*[18] Not all courts have agreed with this theory, however, as there is often little evidence that the owner's use of their servers is adversely affected by a digital trespass.[19]

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of AOL's software. *Id.* at 633. These anti-spam efforts have been in place since the mid-1990s. *See* Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 973 (2005) (identifying AOL as one of the first ISPs to attempt to filter spam).

17. *See* Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 974 (2005) (noting that users have employed "e-mail bombs, blacklisting, and even death threats" to deter spammers). These methods are not only legally questionable, but also are not terribly successful because spammers have become adept at hiding their identities. *See* Jack Hitt, *Confessions of a Spam King*, N.Y. TIMES, Sept. 28, 2003, § 6, at 48 (documenting spammers' use of fictitious e-mail and physical addresses, assumed names, and temporary credit cards). Despite the difficulty, a popular Internet magazine proposed vigilante justice through denial of service attacks on spammer ISPs. *See* Adam Mossoff, *Spam—Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625, 634 (2004) (citing Paul Boutin, *101 Ways to Save the Internet*, WIRED, Jan. 2004, at 132) (claiming that such attacks were "the number one way to save the [Internet]").

18. 100 F. Supp. 2d 1058, 1071 (N.D. Cal. 2000) (applying the theory of trespass to chattels to a case involving computers and servers). The defendant, Bidder's Edge, an auction aggregation company had been using an automated querying program known as a "spider" to search the plaintiff's auction site (eBay). *Id.* at 1062. The information the spider gathered was used in the defendant's site to provide its users a quick method of searching for specific items across several Internet auction sites, rather than having to visit each site individually. *Id.* at 1061. EBay had given permission to Bidder's Edge to include information for a limited scope of auctions, but Bidder's Edge later expanded that scope without permission. *Id.* at 1062. After a temporary oral agreement allowing the activity had expired, eBay requested that the defendant modify its site to only conduct searches of eBay's database upon the query of a user, rather than automatically as Bidder's Edge had been doing in the past. *Id.* The court found that defendant's activities constituted a trespass to chattels as they "diminished the quality or value of eBay's computer systems" by consuming part of the plaintiff's bandwidth and server capacity. *eBay*, 100 F. Supp. 2d at 1071. As a result, the court enjoined the defendant from accessing the plaintiff's computer systems by means of an automated program without written authorization. *Id.* at 1073.

19. *See* Ticketmaster Corp. v. Tickets.com, Inc., CV99-7654-HLH(VBKx), 2003 U.S. Dist. LEXIS 6483, at *13 (C.D. Cal. Mar. 6, 2003), *aff'd* 127 Fed. Appx. 346 (9th Cir. 2005) (finding that the use of a spider to access a public website to gather information is not a trespass to chattels unless there is a demonstrable harm). Both the plaintiff and defendant sold tickets for various events to the public. *Id.* at *3. From 1998 to 2001, the defendant operated a spider which extracted information from the plaintiff's website for use on their

Now, both sides of the spam issue are locked in a struggle, with spammers continually developing new methods to defeat ISP efforts to protect their customers from the onslaught. Not surprisingly, many consumer groups sought help from the government to stem the tide of unsolicited e-mail that washes into inboxes on a daily basis.[20] While states were the first to address the issue, Congress responded in 2003 with the first nationwide anti-spam legislation, the CAN-SPAM Act.[21] The first actions brought under the CAN-SPAM Act were primarily brought by government agencies accusing electronic marketers of fraud. However, a recent case in the Fifth Circuit, *White Buffalo v. University of Texas*,[22] was different; a spammer was seeking protection under this Act to continue sending unsolicited e-mail advertisements to students and employees of the defendant university.[23] The unusual nature of this issue of first impression could have a significant impact on the future of decisions in CAN-SPAM Act actions, particularly regarding how legitimate marketers may apply the CAN-SPAM Act as a shield to allow their activity.

This Comment will review *White Buffalo v. University of Texas*, examining how the Fifth Circuit reached their decision and how some of the

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own website, but a customer was still sent to the plaintiff's website to make a final purchase. *Id.* at *5-6. The plaintiff was unable to demonstrate an actual disposition or injury of chattel. *Id.* at *13. Thus, the court denied the trespass to chattels claim on the grounds that the defendant did not harm the plaintiff, particularly as the users were aware that the purchase was actually being made through the plaintiff. *Id.* at *12-13.

20. Jennifer 8. Lee, *Spam: An Escalating Attack of the Clones*, N. Y. TIMES, June 27, 2002, at G1; *see also* Susan Milligan, *A Federal Push on Security Stirs a Bipartisan Bid to Guard Privacy*, BOSTON GLOBE, Apr. 8, 2002, at A1 (noting that groups such as the ACLU and NRA point to spam as part of an increasing invasion of interests seeking personal information for marketing purposes). Some consumers even sought new laws to indirectly prevent spam. *See* Mary Morgan Edwards, *Support Growing for Bill Aimed at Unsolicited E-Mail; Using Fake Identity Would Be Felony*, COLUMBUS DISPATCH, Mar. 23, 2002, at 3B (noting that consumers were advocating a new law that would require spam to include the sender's name and address, as well as making falsification of such information a felony); *see also* Henry Norr, *Spam Stampede Clogs Internet; E-mail Now One-Third Advertising*, SAN FRANCISCO CHRONICLE, Sept. 8, 2002, at A1 (acknowledging that various consumer groups were calling on the Federal Trade Commission to "launch a broader anti-spam offensive"). The author also questions whether such legislation will be effective, given that more and more junk mail comes from overseas. Henry Norr, *Spam Stampede Clogs Internet; E-mail Now One-Third Advertising*, SAN FRANCISCO CHRONICLE, Sept. 8, 2002, at A1.

21. Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. §§ 7701-7713 (Supp. III 2005) (hereinafter CAN-SPAM Act).

22. 420 F.3d 366 (5th Cir. 2005), *cert denied*, 126 S. Ct. 1039 (2006).

23. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 378 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006) (finding that a public university's prevention of legal marketing e-mails was not an unconstitutional restriction on free speech).

court's reasoning can be brought into question. The first part of the discussion will concern the preemption clause found within the CAN-SPAM Act, which outlines when federal law takes precedence over similar state laws. Next, this Comment will review whether the university's e-mail servers constitute a public or nonpublic forum, a question which the Fifth Circuit declined to answer. Finally, the Comment will examine the court's finding on White Buffalo's claim that their First Amendment right to free speech was violated by the University of Texas's actions.

## II. BACKGROUND

### A. *Anti-Spam Efforts Among the States*

In response to consumer complaints, states began enacting their own laws to regulate commercial e-mail, starting with Nevada in 1997.[24] Several other states followed suit, and by the end of 2003 thirty-six states had passed their own versions of anti-spam legislation.[25] Most of these stat-

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24. Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 976 (2005).

25. ALASKA STAT. § 45.50.479 (2004); ARIZ. REV. STAT. ANN. § 44-1372 (Supp. 2005); ARK. CODE ANN. §§ 4-88-601 to -607 (Supp. 2005); ARK. CODE ANN. §§ 5-41-201 to -206 (2006); CAL. BUS. & PROF. CODE §§ 17529, 17538.4-.45 (Deering Supp. 2006); COLO. REV. STAT. §§ 6-2.5-101 to -105 (2005); CONN. GEN. STAT. ANN. §§ 53-451 to -453 (West 2001); DEL. CODE ANN. tit.11, §§ 931, 937-38 (2001); IDAHO CODE ANN. § 48-603E (2003); 720 ILL. COMP. STAT. ANN. 5/16-1 (West 2003 & Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/16-2 to -7 (West 2003); 815 ILL. COMP. STAT. ANN. 505/2z, 7 (West 1999 & Supp. 2006); 815 ILL. COMP. STAT. ANN. 511/1, 5, 10, 15 (West Supp. 2006); IND. CODE ANN. § 24-5-22-1 to -10 (LexisNexis 2006); IOWA CODE ANN. § 714E.1-.2 (West 2003); KAN. STAT. ANN. §§ 50-6,107 (Supp. 2004); LA. REV. STAT. ANN. § 14:73.1 (1997 & Supp. 2006); LA. REV. STAT. ANN. §§ 14:73.6, 51:1741-1741.3 (Supp. 2006); LA. REV. STAT. ANN. § 14:106.A(7)(a) (2004); ME. REV. STAT. ANN. tit. 10, § 1497 (Supp. 2005); MD. CODE ANN., COM. LAW §§ 14-3001 to -3003 (LexisNexis 2005); MICH. COMP. LAWS SERV. § 445.2501-.2508 (LexisNexis 2005); MINN. STAT. ANN. § 325F.694 (West 2004) (expiring by its own terms upon the enactment of the CAN-SPAM Act); MO. REV. STAT. § 407.1120-.1132 (West 2001) (expiring by its own terms upon the enactment of the CAN-SPAM Act); MO. REV. STAT. § 407.1135-.1141 (West Supp. 2006); NEV. REV. STAT. §§ 41.705-.735, 205.492-.513 (2005); N.M. STAT. ANN. 1978 §§ 57-12-23 to -24 (Supp. 2005); N.C. GEN. STAT. §§ 1-75.4, 1-539.2A, 14-453, 14-458 (2005); N.D. CENT. CODE §§ 57-21-01 to -09 (Supp. 2005); OHIO REV. CODE ANN. § 2307.64 (West Supp. 2006); OKLA. STAT. ANN. tit. 15, § 776.1-.7 (West Supp. 2006); OR. REV. STAT. § 646.607-.608 (2005); 18 PA. CONS. STAT. ANN. § 5903 (West 2000 & Supp. 2006); 18 PA. CONS. STAT. ANN. § 7661 (West Supp. 2006); R.I. GEN. LAWS §§ 6-47-2 to -3 (2001); R.I. GEN. LAWS §§ 11-52-1 to -8 (2005); S.D. CODIFIED LAWS §§ 37-24-36 to -40 (2004); TENN. CODE ANN. §§ 47-18-2501 to -2502 (2001 & Supp. 2005); TENN. CODE ANN. §§ 47-18-2502 (2001); TEX. BUS. & COM. CODE ANN. § 46.001-.011 (Vernon Supp. 2006); UTAH CODE ANN. §§ 13-36-101 to -105 (repealed 2004); VA. CODE ANN. § 8.01-328.1 (2000 & Supp. 2006); VA. CODE ANN. §§ 18.2-152.2, -152.3:1, -152.4, -152.12 (2004 & Supp. 2006); WASH. REV. CODE ANN. § 19.190.010 - .040 (West 1999 & Supp. 2006); WASH. REV. CODE ANN. § 19.190.050 (West 1999); W. VA. CODE ANN. §§ 46A-6G-

utes addressed consumer fraud, but some also included provisions for subject-line labeling requirements, opt-in/opt-out provisions, mandatory disclosure of sender contact information, bans on certain types of software, and bans on violating ISP policies.[26] States utilized these different methods with the hope of reducing the volume of unsolicited commercial e-mail and combating consumer fraud.[27]

## B. *The CAN-SPAM Act*

While state legislatures were enacting these measures, Congress began work on their own legislation. After considering nearly thirty different anti-spam bills,[28] Congress passed the Controlling the Assault of Non-

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1 to -5 (LexisNexis 2006); WIS. STAT. ANN. § 944.25 (West 2005); WYO. STAT. ANN. §§ 40-12-401 to -404 (2005); *see also* Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 976 (2005) (noting that a vast majority of states have passed some sort of anti-spam legislation). For an excellent summary of all state anti-spam laws, see David E. Sorkin, Spam Laws: United States: State Laws, http://spamlaws.com/state/index.shtml (last visited Oct. 23, 2006) (on file with the *St. Mary's Law Journal*).

26. Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 363-65 (2005); *see also* Jordan M. Blanke, *Canned Spam: New State and Federal Legislation Attempts to Put a Lid on It*, 8 COMP. L. REV. & TECH J. 305, 308-10 (2004) (identifying and defining the different types of anti-spam provisions in state legislation).

27. Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 977 (2005). It is important to note that states were not attempting to stop spam altogether, but were merely trying to slow it down. *See* Sameh I. Mobarek, Comment, *The CAN-SPAM Act of 2003: Was Congress Actually Trying to Solve the Problem or Add to It?*, 16 LOY. CONSUMER L. REV. 247, 252 (2004) (recognizing that a majority of states sought to regulate, but not prohibit, unsolicited commercial e-mails); *see also* David Dickinson, Comment, *An Architecture for Spam Regulation*, 57 FED. COMM. L.J. 129, 130 (2004) (lamenting the fact that the problem of spam continues despite attempts to regulate it).

28. Criminal Spam Act of 2003, S. 1293, 108th Cong. (2003); Anti-Spam Act of 2003, H.R. 2515, 108th Cong. (2003); Stop Pornography and Abusive Marketing Act, S. 1231, 108th Cong. (2003); Reduction in Distribution of Spam Act of 2003, H.R. 2214, 108th Cong. (2003); Ban on Deceptive Unsolicited Bulk Electronic Mail Act of 2003, S. 1052, 108th Cong. (2003); REDUCE Spam Act of 2003, H.R. 1933, 108th Cong. (2003); Computer Owners' Bill of Rights, S. 563, 108th Cong. (2003); Wireless Telephone Spam Protection Act, H.R. 122, 108th Cong. (2003); Netizens Protection Act of 2001, H.R. 3146, 107th Cong. (2001); Protect Children from E-Mail Smut Act of 2001, H.R. 2472, 107th Cong. (2001); Who Is E-Mailing Our Kids Act, H.R. 1846, 107th Cong. (2001); CAN SPAM Act of 2001, S. 630, 107th Cong. (2001); Anti-Spamming Act of 2001, H.R. 1017, 107th Cong. (2001); Unsolicited Commercial Electronic Mail Act of 2001, H.R. 718, 107th Cong. (2001); Wireless Telephone Spam Protection Act, H.R. 113, 107th Cong. (2001); Unsolicited Commercial Electronic Mail Act of 2001, H.R. 95, 107th Cong. (2001); Wireless Telephone Spam Protection Act, H.R. 5300, 106th Cong. (2000); Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, 106th Cong. (2000); Controlling the Assault of Non-Solicited

Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act).[29] The CAN-SPAM Act adopts provisions similar to many of the rules adopted by the states and provides for several methods of enforcement, including government/ISP actions and limited criminal penalties. Private citizens and non-ISP businesses who receive spam, however, do not have the ability to sue marketers who send messages in violation of the CAN-SPAM Act.[30] The public policy reasoning behind the CAN-SPAM Act mirrors the states' concerns about fraud and solicitation volume.[31] But Congress also identified another issue that states were not as concerned about—the need for national regulation of commercial e-mail standards.[32]

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Pornography and Marketing Act of 2000, S. 2542, 106th Cong. (2000); Netizens Protection Act of 1999, H.R. 3024, 106th Cong. (1999); Can Spam Act, H.R. 2162, 106th Cong. (1999); E-Mail User Protection Act, H.R. 1910, 106th Cong. (1999); Internet Freedom Act, H.R. 1686, 106th Cong. (1999); Internet Growth and Development Act of 1999, H.R. 1685, 106th Cong. (1999); Inbox Privacy Act of 1999, S. 759, 106th Cong. (1999); Telemarketing Fraud and Seniors Protection Act, S. 699, 106th Cong. (1999); Protection Against Scams on Seniors Act of 1999, H.R. 612, 106th Cong. (1999). Since the passage of the CAN-SPAM Act, Congress has proposed subsequent legislation, but none were ultimately adopted. Anti-Phishing Act of 2005, H.R. 1099, 109th Cong. (2005); Anti-Phishing Act of 2005, S. 472, 109th Cong. (2005); Anti-Phishing Act of 2004, S. 2636, 108th Cong. (2004); *see also* David E. Sorkin, Spam Laws: United States: Federal Laws, http://spamlaws.com/federal/index.shtml (last visited Oct. 23, 2006) (summarizing and providing a brief history for each of the proposed bills) (on file with the *St. Mary's Law Journal*).

29. CAN-SPAM Act, 15 U.S.C. §§ 7701-7713.

30. *Id.* § 7706(b) (providing enforcement for various federal agencies and the applicable statutes from which the corresponding agencies draw their authority). State attorneys general may bring suit for damages up to $250 for each violation. *Id.* § 7706(f)(3)(A). ISPs are allowed to sue for damages of either $100 (in the case of false or misleading header information) or $25 (for any other violation of § 7704). *Id.* § 7706(g)(3)(A). The CAN-SPAM Act also states that any violation will be considered "an unfair or deceptive act or practice . . . under . . . the Federal Trade Commission Act." *Id.* § 7706(a).

31. Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 360-611 (2005); *see* Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. § 7701(b)(2)-(3) (Supp. III 2005) (determining that "senders of commercial electronic mail should not mislead recipients as to the source or content" and "recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source").

32. *See* CAN-SPAM Act, 15 U.S.C. § 7701(b)(1) (stating that "[t]here is a substantial government interest in regulation of commercial electronic mail on a nationwide basis"); *see also* S. REP. NO. 108-102, at 1 (2003) identifying the regulation of interstate commerce as one of the purposes behind the CAN-SPAM Act. The Senate report also recognized the "inherently interstate nature of e-mail communications." S. REP. NO. 108-102, at 21 (2003). Thus, the Senate Committee on Commerce, Science, and Transportation recommended the bill because it believed that the "bill's creation of one national standard" for spam was "a proper exercise of the Congress's power to regulate interstate commerce." *Id.* The Committee also noted that such a standard would protect the *senders* of e-mail be-

Although the CAN-SPAM Act utilizes many of the same anti-spam methods that states employed to fight fraud and message volume, legal scholars and consumer advocates argue that the federal legislation is merely a watered-down version of the somewhat tougher state laws.[33] The CAN-SPAM Act bans certain deceptive practices, but generally it defers to state consumer protection law for the definition of fraudulent messages, identification of those messages, and enforcement of penalties against the marketers sending those messages.[34] The CAN-SPAM Act permits the Federal Trade Commission (FTC) to create an e-mail version of the "do not call list," but falls short of requiring it to do so.[35] Congress

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cause the addresses do not contain information concerning the state in which the recipient is located, thus preventing the sender's ability to determine the applicable state law. *Id.* at 21-22. State laws concerning fraudulent or deceptive e-mails still remain valid, however, because those laws "target behavior that a legitimate business . . . would not be engaging in." *Id.* at 22.

33. *See* Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 962 (2005) (arguing that the state anti-spam laws have had little effect on the volume of spam that e-mail users actually receive). Additionally, the federal CAN-SPAM Act has had little success reducing the volume of spam received. *See* Tom Zeller, Jr., *Law Barring Junk E-Mail Allows a Flood Instead*, N.Y. TIMES, Feb. 1, 2005, at A1 (lamenting that within one year of the passage of CAN-SPAM Act, spam accounted for 80% or more of all e-mail sent). This amount represents an increase from the 50%-60% of spam e-mail reported before the CAN-SPAM Act was in effect. *Id.* The ineffectiveness of the federal CAN-SPAM Act has led one leading anti-spam crusader to claim that the CAN-SPAM Act "legalized spamming itself." *Id.* Not only has spam increased in volume, but also the spam received is typically not compliant with the provisions of the CAN-SPAM Act. *See* Erin Chambers, *The Lid on Spam is Still Loose*, BUS. WK., Feb. 7, 2005, at 10 (reporting that an e-mail security company, MX Logic, found that 97% of commercial e-mail was not compliant with the CAN-SPAM Act). Despite the questionable effectiveness of the CAN-SPAM Act, some studies have reported changes in the public attitudes toward commercial e-mail and the Internet in general. *See* Patrik Jonsson, *Getting Serious About the War on Spam*, CHRISTIAN SCI. MONITOR, Apr. 14, 2005, at 2, *available at* http://www.csmonitor.com/2005/0414/p02s01-usju.html (stating that current studies indicate that the public is less suspicious of the Internet, partly due to a decrease in the number of pornographic messages). Concerns over consumer backlash against e-mail marketers have also led some businesses to reconsider their strategies. *Id.*

34. *See* CAN-SPAM Act, 15 U.S.C. § 7704(a)(1) (prohibiting false or misleading information with regards to message headers and sender information in the "from" line). However, the CAN-SPAM Act does not make a general statement about false or misleading messages. *See* Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 359 (2005) (recognizing that such messages are generally subject to state deceptive practice laws).

35. *See* CAN-SPAM Act, 15 U.S.C. § 7708 (directing the FTC to create a report on the feasibility of a "Do-Not-E-Mail registry"). The FTC later decided not to enact such a registry. *See* Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 69 Fed. Reg. 55,765, 55,778 (Sept. 16, 2004) (noting that the FTC concluded that the costs of such a system would outweigh the benefits, particularly with regards to the effect on small businesses). The FTC was particu-

does require spammers to provide methods for e-mail users to "opt-out" of further messages, but does not provide the strict "opt-in" provisions adopted by states such as California and Delaware that would prevent users from receiving any spam from a marketer who has not been previously approved.[36]

Enforcement of the CAN-SPAM Act's provisions is delegated to both the FTC and individual ISPs.[37] Congress limited private actions to those taken by ISPs because they are best equipped to handle the widespread spam problem.[38] Additionally, ISPs have the most to gain from the CAN-SPAM Act because they can use the Act to reduce their operating costs by filtering out unsolicited e-mail advertisements and increase their customer base by providing superior filters that minimize the flow of spam into users' inboxes.[39] ISPs have broad enforcement powers to sue

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larly concerned with the unique nature of e-mail addresses and how this would affect the use of such a database. *Id.* Therefore, the FTC adopted rules requiring wireless Internet providers to record certain domain names so as to minimize the impact of spam on mobile Internet users. *Id.*

36. *Compare* CAN-SPAM Act, 15 U.S.C. § 7704(a)(5) (requiring e-mail solicitors to include a "clear and conspicuous notice of the opportunity . . . to decline to receive further commercial electronic mail messages from the sender"), *with* CAL. BUS. & PROF. CODE § 17529.2 (Deering Supp. 2006) (providing that persons and entities cannot "[i]nitiate or advertise in an *unsolicited* commercial e-mail advertisement to a California electronic mail address") (emphasis added), *and* DEL. CODE ANN. tit. 11, §§ 931, 937 (2001) (prohibiting the unauthorized distribution of unsolicited bulk commercial e-mail when there is no preexisting relationship between the parties). Under the CAN-SPAM Act, each message must also contain a "functioning return electronic mail address or other Internet-based mechanism" that allows a recipient to opt-out of further solicitations. CAN-SPAM, 15 U.S.C. § 7704(a)(3). The stronger opt-in provisions in the California and Delaware laws were both preempted by the enactment of the CAN-SPAM Act. *See* Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 364-65 (2005) (implying that the "opt-in" laws do not fall within the specific exemption for state laws prohibiting falsity or deception).

37. CAN-SPAM Act, 15 U.S.C. § 7707(a), (c); *see also* 47 U.S.C. § 231(e)(4) (2002) (defining "Internet access service" as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet that may also include access to proprietary content, information, and other services as part of a package of services offered to consumers").

38. *See* Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 361-62 (2005) (noting that large ISPs have technological and financial assets which puts them in the best position to curtail spammers).

39. *See id.* (noting that ISPs can seek large amounts in damages from violators). Damages could be as large as "$100 per false or misleading message." *Id.* at 362. A court also has the option of charging the guilty party costs, including attorney's fees. *Id.* However, in certain situations, the damages can be reduced. *See* CAN-SPAM Act, 15 U.S.C. § 7706(g)(3)(D) (providing that when assessing damages, a court may consider whether the defendant has implemented practices to prevent future violations and if the violation occurred despite such efforts).

spammers for damages of up to $1 million for each message in violation of the CAN-SPAM Act, including treble damages if plaintiffs can prove that spammers "willfully and knowingly" violated the law.[40]

With enforcement of the CAN-SPAM Act left primarily to ISPs, Congress focused most of its efforts on regulation by creating a national standard for unsolicited commercial e-mail.[41] Rather than join many of the states in an attempt to stop spam altogether, Congress used the CAN-SPAM Act to "create an environment where 'legitimate' marketers could make use of [e-mail]"[42] and thus avoid a scenario where marketers would be forced to tailor their solicitations towards various state laws.[43] The CAN-SPAM Act requires marketers to provide accurate sender information, allows users the opportunity to opt-out of future mailings, places warning labels on e-mail containing sexual material, and prohibits certain methods of "harvesting" target e-mail addresses.[44]

Further frustrating state efforts to curtail spam is the CAN-SPAM Act's preemption clause found in section 7707(b)(1), which states:

> This Act supersedes any statute, regulation, or rule of a [s]tate or political subdivision of a [s]tate that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.[45]

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40. CAN-SPAM Act, 15 U.S.C. § 7706(g)(3); *see also* Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 362 (2005) (explaining the enforcement provisions of the CAN-SPAM Act).

41. *See* Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 374 (2005) (stating that Congress created the preemption clause to resolve the "inconsistency in state laws that would make it hard for 'legitimate' users of commercial [e-mail] to operate").

42. *Id.* at 355, 378. This concern is also echoed within the CAN-SPAM Act itself. *See* CAN-SPAM Act, 15 U.S.C. § 7701(a)(1) (recognizing that e-mail is important for both commercial and personal purposes). Additionally, the CAN-SPAM Act points out that the growing volume of spam could lead legitimate commercial e-mail to be "lost, overlooked, or discarded." *Id.* § 7701(a)(4). Finally, Congress asserts its interest in interstate commerce by acknowledging that "there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis." *Id.* § 7701(b)(1).

43. *See* CAN-SPAM Act, 15 U.S.C. § 7701(a)(11) (noting that because "an [e-mail] address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply"); *see also* S. REP. NO. 108-102, at 21-22 (2003) (describing the difficulties that legitimate marketers could face from having to comply with several different state laws).

44. *See generally* CAN-SPAM Act, 15 U.S.C. § 7704 (outlining the various methods used to protect e-mail users).

45. *Id.* § 7707(b)(1).

This clause renders the CAN-SPAM Act controlling over most state anti-spam efforts, save legislation pertaining to "falsity or deception."

### C. *The* White Buffalo *Case*

The first lawsuits brought under the CAN-SPAM Act were injunctions requested by ISPs[46] and the FTC[47] to prevent spammers from sending unsolicited advertisements. In *White Buffalo Ventures, LLC v. University of Texas*, however, the tables were turned when an online dating service sought to use the CAN-SPAM Act to require a state university to cease blocking their e-mail advertisements.[48] White Buffalo Ventures (White Buffalo) was the owner and operator of longhornsingles.com, a dating website aimed at students of the defendant university.[49] White Buffalo filed a Public Information Act application with the university to acquire a list of "all non-confidential, non-exempt [e-mail] addresses," with which

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46. *See* Microsoft Corp. v. Neoburst.net, LLC, No. C-03-00718 RMW, 2004 WL 2043093, at *1 (N.D. Cal. Sept. 3, 2004) (enjoining defendant from interfering with plaintiff's servers). In *Microsoft Corp.*, the plaintiff sought an injunction against the defendant corporation to prevent it from sending any commercial e-mail to clients of Microsoft's communication servers, including MSN Internet Access and MSN Hotmail. *Id.* The court granted the injunction, prohibiting the defendant from obtaining or selling any e-mail addresses in violation of any state or federal law (including the CAN-SPAM Act). *Id.*

47. *See* FTC v. Bryant, No. 3:04-cv-897-J-32MMH, 2004 WL 2504357, at *1, *4-*5 (M.D. Fla. Oct. 4, 2004) (involving an FTC restraining order against the defendants from sending spam offering an envelope-stuffing business opportunity for violations of the CAN-SPAM Act). Specifically, in *FTC v. Bryant*, the FTC claimed that defendant gave misleading transmission information and had been hiding its identities. *Id.* The defendants were also enjoined from making claims about consumer financial success in their e-mail solicitations. *Id.* Additionally, *FTC v. Phoenix Avatar, LLC*, demonstrates that the FTC is making proactive efforts to stop fraudulent spammers. *See* FTC v. Phoenix Avatar, LLC, No. 04 C 2897, 2004 WL 1746698, at *12 (N.D. Ill. July 30, 2004) (enjoining defendant diet patch producer from sending e-mails due to multiple CAN-SPAM Act violations, such as concealing the sender, false header information, and a lack of an opt-out provision). In *Phoenix Avatar*, the FTC discovered the violation through e-mails sent by consumers to the FTC website. *Id.* at *2. The FTC then investigated the links from several e-mails and determined that they were interrelated, but the actual identity of the business was not disclosed to consumers. *Id.* at *2, *12. Upon granting the injunction, the court noted that the defendants had violated "most, if not all" of the major provisions of the CAN-SPAM Act. *Id.*; *see also* FTC v. Harry, No. 04C 4790, 2004 WL 1749515, at *2-*3 (N.D. Ill. July 27, 2004) (finding the defendant's claims that their product would reduce aging and help people lose weight without exercise to be a misrepresentation, thus worthy of an injunction prohibiting the defendant from sending any more commercial e-mails).

48. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 368-71 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006) (discussing the ability of the defendant university to block White Buffalo's spam e-mails "pursuant to its internal anti-solicitation policy").

49. *Id.* at 368.

the university complied.[50] Two months after the request, White Buffalo began sending CAN-SPAM Act compliant e-mail solicitations to many of the e-mail addresses displayed on the list.[51] Recipients of the messages complained to the university, and after calculating the volume of e-mail sent through their servers, the university issued a cease and desist letter notifying White Buffalo of their intent to enforce the anti-solicitation policy.[52] When White Buffalo failed to abide by the letter, the university programmed its e-mail servers to block all messages sent from White Buffalo's IP address.[53]

White Buffalo sued to enjoin the university from blocking its e-mails based on two different arguments. First, White Buffalo argued that the preemption clause found in section 7707(b)(1) of the CAN-SPAM Act prohibited the university from blocking their e-mail solicitations.[54] The

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50. *Id.* at 369.

51. *Id.* The Fifth Circuit noted that "[t]he parties . . . agreed, in the district court and on appeal that White Buffalo complied with the requirements of the CAN-SPAM Act" and concluded that "[i]ts e-mail blasts were not unlawful." *Id.* at 371.

52. *White Buffalo Ventures*, 420 F.3d at 369.

53. *Id.* at 369-70; *see also* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 U.S. Dist. LEXIS 19152, at *20 n.5 (W.D. Tex. Mar. 22, 2004) (noting White Buffalo's complaint that by completely blocking all of their e-mails, the university effectively prevented White Buffalo from contacting their customers, and the university's response that such correspondence would be permitted once White Buffalo stopped sending unsolicited e-mails). The district court in *White Buffalo* also commented that the university's action did not prevent White Buffalo from reaching its customers through other e-mail accounts, such as Yahoo or Microsoft Hotmail. *White Buffalo Ventures*, 2004 U.S. Dist. LEXIS 19152, at *20 n.5. This result appears inconsistent with the CAN-SPAM Act because it frustrates the purpose of the Act's opt-out requirements by not allowing interested recipients the opportunity to respond to an otherwise legal solicitation. *See generally* CAN-SPAM Act, 15 U.S.C. § 7704. The CAN-SPAM Act opt-out provision allows commercial e-mailers to give recipients the option to tailor the types of future e-mails they receive from the sender, thus allowing the parties to continue a business relationship. *See id.* § 7704(a)(3)(B) (stating that "[t]he person initiating a commercial [e-mail] message may comply . . . by providing the recipient a list or menu from which the recipient may choose the specific types of commercial [e-mail] messages the recipient wants to receive . . . from the sender"). Prior to the passage of the CAN-SPAM Act, the Senate Committee acknowledged that commercial e-mailers needed a method by which they could target their marketing efforts. *See* S. REP. NO. 108-102, at 17-18 (2003) (commenting that "the opt-out mechanism" need not "be an 'all or nothing' proposition," but rather, it could be used to give a recipient the option to decline all messages, or select the option of receiving only certain kinds of messages"). In actuality, this would benefit businesses who advertise electronically by allowing them to focus their efforts on a population that has demonstrated a specific interest. *See* Ben Carter, *E-Mail Grows in Popularity for CRM Work*, MARKETING, Dec. 4, 2003, at 8 (noting a Direct Marketing Association survey indicating that e-mail is the leading way for marketers to continue relationships with current clients).

54. *White Buffalo Ventures*, 420 F.3d at 371.

preemption clause states that the provisions of the CAM-SPAM Act supersede any state action that regulates the use of e-mail to send solicitations, except with regards to regulations governing "falsity or deception."[55] Because the University of Texas at Austin is a public school, it operates as a state political subdivision.[56] However, a competing provision in section 7707(c) of the CAN-SPAM Act allows "provider[s] of Internet access service" to adopt, implement, and enforce any anti-spam measure they deem necessary, regardless of whether those messages conform to the Act.[57] Thus, the preemption clause could be interpreted either as preventing state actors from regulating commercial e-mail when the validity of the source or content is not in doubt (White Buffalo's view), or as allowing states to enact any restrictions they choose so long as the state is the Internet access provider (the University of Texas's view).[58] The Fifth Circuit adopted the university's view, deciding not to imply preemption in a situation in which Congress had not expressly stated that it applied.[59]

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55. CAN-SPAM Act, 15 U.S.C. § 7707(b)(1). Congress justified the preemption clause by noting its power over interstate commerce. *See* S. REP. NO. 108-102, at 21 (2003) (stating that "this bill's creation of one national standard is a proper exercise of Congress's power to regulate interstate commerce"). Furthermore, mentioning that this exercise of power is "essential to resolving the significant harms from spam faced by American consumers, organizations, and businesses throughout the United States." *Id.*

56. *White Buffalo Ventures*, 420 F.3d at 373. The district court was less clear on this issue. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 U.S. Dist. LEXIS 19152, at *12-*13 (W.D. Tex. Mar. 22, 2004) (claiming that although the university's information technology department is related to a state institution, "it is not clear [whether] a [technology department] policy is a 'statute, regulation, or rule of a [s]tate or political subdivision of a [s]tate' and therefore preempted," (quoting CAN-SPAM Act, 15 U.S.C. § 7707(b)(1))). However, the district court found the issue to be unimportant, preferring to focus on the university's status as an Internet service provider. *Id.* at *13.

57. CAN-SPAM Act, 15 U.S.C. § 7707(c); *see also White Buffalo Ventures*, 420 F.3d at 371-72 (citing the CAN-SPAM Act's language exempting Internet service providers from the preemption clause). This finding was in accordance with the district court. *See White Buffalo Ventures, LLC*, 2004 U.S. Dist. LEXIS 19152, at *14 (finding that the CAN-SPAM Act "does not preclude a state entity . . . from using technological devices . . . [to] safeguard the time and resources of its employees, students, and faculty"). Both courts cited a section of the CAN-SPAM Act that indicates that such technological efforts may be necessary. *See* CAN-SPAM Act, 15 U.S.C. § 7701(a)(12) (noting that the problems caused by spam cannot be solved by legislation alone, but also require the development of technology).

58. *White Buffalo Ventures*, 420 F.3d at 372.

59. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 372 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006). The Fifth Circuit continues by noting that "[t]he textual ambiguity triggers the strong presumption against" preemption. *Id.* Because the court was not positive that such actions fall within the clause, it found that the university's filtering of White Buffalo's e-mails did not violate the Supremacy Clause. *Id.*

The second point White Buffalo argued was that the University of Texas violated their right to free speech under the First Amendment by filtering the e-mails.[60] The Fifth Circuit passed on the issue of whether the university's e-mail servers constituted a private or a public forum, and addressed the issue as if the servers were a public forum.[61] Because the court found that White Buffalo's e-mail solicitations were clearly commercial speech,[62] these solicitations were thus subject to the *Central Hudson* four-part test to determine the validity of a restriction on commercial speech.[63] The court quickly dismissed the first requirement of the *Central Hudson* test (concerning whether the speech is "unlawful or misleading") as there was no dispute that the e-mails themselves were CAN-SPAM Act compliant.[64] With the parties agreeing on the legality of the e-mails, the court reviewed the substantiality of the government interests, which the university identified as an interest in *user* efficiency (the time and effort expended by account holders to sift through spam) and *server* efficiency (the potential drain on server resources if the university were forced to accept spam).[65]

While the Fifth Circuit found the interest in server efficiency lacking,[66] it found that user efficiency was a substantial interest for the purposes of

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60. *Id.* at 368-69.

61. *See id.* at 374 & n.15 (acknowledging that regardless of what type of forum the servers were, the result would be the same). The court does note that if the servers are considered a private forum, then the state may regulate speech as long the regulation is viewpoint neutral. *White Buffalo Ventures*, 420 F.3d at 374 n.15. In acknowledging the tricky question of whether the servers are a public or private forum, the court avoids resolving the issue by reaching the same conclusion regardless of forum type. *Id.* This result is in accordance with the district court's finding. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 U.S. Dist. LEXIS 19152, at *23 (W.D. Tex. Mar. 22, 2004) (finding that because the court upheld the policy, it was unnecessary to determine forum type).

62. *White Buffalo Ventures*, 420 F.3d at 374.

63. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (defining the four-part test to evaluate commercial speech regulation). The four parts of the test are the following: (1) whether the speech is unlawful or misleading; (2) whether the government's expressed interest is substantial; (3) whether the state action directly promotes that interest; and (4) whether the state action is more extensive than necessary to promote that interest. *Id.*

64. *White Buffalo Ventures*, 420 F.3d at 374. The court specifically mentioned that both parties were in agreement that the e-mails were legal and contained factual information. *Id.*

65. *Id.*

66. *See id.* at 375 (bemoaning the "suffer the servers" approach to Internet litigation). The court viewed this argument as "among the most chronically over-used and under-substantiated interests asserted by parties . . . involved in Internet litigation." White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 375 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

the *Central Hudson* test.[67] The court went on to find that the restriction on commercial e-mails directly advanced their interest in user efficiency, and thus met the third prong of the test.[68] Finally, the court addressed the fourth prong of the *Central Hudson* test: whether the University of Texas's policy of blocking commercial e-mails was no more extensive than necessary.[69] In order for a restriction on commercial speech to be legal, the restriction must be narrowly construed to protect the state's substantial interest.[70] The Fifth Circuit found that the university's policy banning commercial e-mails was justified by the state's interest in protecting user efficiency, and thus was a valid restriction on White Buffalo's First Amendment guarantee of freedom of speech.[71] White Buffalo lost both arguments, with the court finding in favor of the University of Texas and upholding the summary judgment.[72]

## III. ANALYSIS OF *WHITE BUFFALO*

The uniqueness of the *White Buffalo* decision makes it a bellwether for future cases concerning conflicts between state laws and the CAN-SPAM Act. As various government entities fight spam, legitimate marketers will likely point to their compliance with the CAN-SPAM Act as a shield against additional regulation. The fact that these marketers may use the Act to support their activities—though ostensibly it was supposed to *fight*

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67. *Id.* at 376.

68. *Id.* at 375. The court points out that the methods used by the university are probably the best means available to promote user efficiency. *Id.*

69. *Id.*

70. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 570 (1980) (stating that "no showing [had] been made that a more limited restriction on the content of promotional advertising would not serve adequately the [s]tate's interest"). In *Central Hudson*, the petitioner electric company challenged a regulation that banned advertising by electrical utility companies. *Id.* at 558-60. The Supreme Court found that the proposed advertisement was not inaccurate or unlawful and that it was considered protected commercial speech. *Id.* at 566-68. However, the Court found that there was a substantial link between the advertising ban and the state's interest in promoting energy conservation. *Id.* at 569. As a result, the outcome depended on whether the advertising ban was no more extensive than required to further that interest. *Id.* at 569-70. The Court found that a complete ban was unnecessary, and the utility commission could therefore impose requirements on advertising that furthered their interests. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 570-71. Thus, the Court overturned the advertising ban. *Id.* at 572.

71. *White Buffalo Ventures*, 420 F.3d at 376. The court found that the policy was "no more extensive than necessary" to promote the interest in user efficiency. *Id.* The court also determined that the University of Texas was within its right to filter lawful commercial e-mail, so long as the filtering was "content- and viewpoint-neutral." *Id.*

72. *Id.* at 378.

their activities—will only bolster those consumer advocates who nicknamed the legislation the "You *Can* Spam Act."[73]

Aside from consumer complaints, this conflict raises important questions: What was Congress's primary reason for passing the CAN-SPAM Act? Was it enacted to stop the flow of spam into inboxes nationwide, or is it merely a framework for legitimizing spam? These questions are important because if a court determines that Congress intended the latter (rather than the former, as the Fifth Circuit believed), then any state action against spam that does not involve fraud or deception could be seen as unconstitutional under the Supremacy Clause.[74] Even if a court agrees with the Fifth Circuit on the applicability of the CAN-SPAM Act's preemption clause, that court could disagree with the application of the *Central Hudson* test in *White Buffalo*. For example, a court could find that user efficiency is not a substantial state interest, or, alternately, it could find that an outright ban on CAN-SPAM Act compliant spam is more extensive than necessary to meet a state's objective. Judicial interpretation of these issues could lead courts to conclusions that are different than the Fifth Circuit's, which, in turn, could have an interesting impact on future anti-spam efforts.

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73. *See* Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 998 (2005) (noting that consumer groups feel that the statute did little more than legitimize spam). Critics of the CAN-SPAM Act also feel that it is as ineffective as state laws are at combating spam. *Id.* at 962. State laws that were not preempted by CAN-SPAM face problems as well. *See* Kortney Stringer, *E-mail Law Upsets Parents; Indecent Messages Still Reach Children*, DETROIT FREE PRESS, Oct. 25, 2005, at Business 1 (discussing the difficulties that the State of Michigan has had in enforcing its law protecting minors from receiving e-mails promoting products that are illegal for minors). The Michigan law provided for a do-not-e-mail registry for children, which operates in a similar manner to the proposed registry that the FTC decided not to implement. *See id.* (describing Michigan's anti-spam efforts). Some groups continue to petition Congress for stronger anti-spam laws. *See* Chris Reidy, *Spammers Must Shut Websites, Judge Says*, BOSTON GLOBE, Oct. 12, 2005, at D1 (interviewing the vice president of the Coalition Against Unsolicited Commercial E-mail). These groups argue that the CAN-SPAM Act does not provide government agencies in charge of enforcing the act with enough resources. *Id.* Another point of contention from critics is the preemption clause itself. *See* Sarah B. Miller & Patrik Jonsson, *Victories – Kind Of – In the Fight Against Spam*, CHRISTIAN SCIENCE MONITOR, May 16, 2005, at USA pg. 2 (recognizing that the CAN-SPAM Act preempts stronger state anti-spam laws, and thus shifts the power of enforcement from private individuals to state and federal agencies). The CAN-SPAM Act has also forced some spammers to use offshore resources, thus making it difficult for authorities to find violators. *Id.*

74. *See* U.S. CONST. art. VI, cl. 2 (pronouncing "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land") (capitalization in original).

### A. *The CAN-SPAM Preemption Clause and the Federal Preemption Doctrine*

The Supremacy Clause of the U.S. Constitution states that federal law overrules a valid, but conflicting, state law.[75] The preemption may be either expressly written in the law (as in the CAN-SPAM preemption clause) or implied (apparent from legislation even though there is no specific mention of preemption).[76] The Supreme Court has recognized two methods of implied preemption: "when the federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the [s]tates to supplement it" (known as field preemption); and when a state law or regulation contradicts or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (known as conflict preemption).[77]

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75. *Id.* The Supremacy Clause prevents a state from operating in a manner that affects the operation of valid acts of Congress that utilize the powers vested in the federal government. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (proclaiming that "[t]he government of the United States . . . is supreme" and its laws supersede all others, provided the law follows from the powers vested in the federal government by the Constitution). The Clause is not a source of rights but rather gives federal rights priority whenever they conflict with state law. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979) (noting that "all federal rights . . . are 'secured' by the Supremacy Clause"). The Supreme Court has also interpreted the clause to allow congressional purpose to determine preemption in situations where its legislation does not specifically preempt all state laws. *See* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (determining that states cannot enforce laws that prevent Congress from achieving its objectives). *Hines* involved a Pennsylvania law requiring all aliens of majority age to register with the commonwealth. *Id.* at 59. The Supreme Court struck down the law, citing the federal government's constitutional control over foreign affairs. *Id.* at 62. The Court also noted that while Pennsylvania may have had the right to enact such a law, Congress had passed its federal law to create a single system for registering aliens, and the Pennsylvania law frustrated that purpose. *Id.* at 73-74.

76. *See, e.g.*, Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 366 (2005) (summarizing the two primary ways in which federal law supplants state law).

77. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *Hines*, 312 U.S. at 67). *Rice* is an example of field preemption. *See Rice*, 331 U.S. at 236 (finding that a federal law takes precedence over a state law when it is apparent that Congress intended to regulate that area). The petitioner in *Rice* brought suit alleging violations of an Illinois statute that regulated grain storage fees. *Id.* at 220-21. The respondent countered by arguing that a federal statute had superseded any state regulation in the matter. *Id.* at 222. The Court recognized that Congress had written a law covering an area that was traditionally regulated by the states; thus, the Court sought evidence that Congress had a "clear and manifest purpose" to supplant state law. *Id.* at 230. While the original federal law expressly stated that it was subservient to state regulation, Congress later amended the law and gave the Secretary of Agriculture the exclusive power to enforce the Act. *Id.* at 233. Accordingly, the Court found that Congress intended that the Act be independent of and superior to state law. *Rice*, 331 U.S. at 236. The Court outlined the test for field preemp-

1. Implied Preemption

Although a congressional act may expressly preempt some state laws, it does not preclude a court from finding implied preemption within other parts of the same law.[78] In *Lorillard Tobacco Co. v. Reilly*,[79] the U.S. Supreme Court found that Congress's regulation of tobacco advertising demonstrated its intent to dominate the field, leaving no room for states to issue their own regulations.[80] The case centered on a Massachusetts law written to prevent the marketing and sale of tobacco products to minors that restricted outdoor and point-of-sale advertising "within a [one-thousand] foot radius" of schools or playgrounds.[81] The express preemption provision in the federal law prevented states from "imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes."[82] Massachusetts argued that its regulations merely addressed advertising, not health information, and therefore, were not in conflict with the federal regulations.[83] The Supreme Court disagreed, citing the modification of the preemption provision as evidence that Congress was not only concerned about health warnings, but also "sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising."[84] This concern was sufficient for the Court to determine that Congress had intended to regulate the entire field of tobacco advertising, and any state law conflicting with federal law could not be enforced.[85]

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tion as whether the state asserts a right that is regulated in any form by a federal act; if so, the federal act prevails even if it is less restrictive than the state law. *Id.* On the other hand, *Hines* is an example of conflict preemption. *See Hines*, 312 U.S. at 74 (striking down a Pennsylvania alien registration law because it was in conflict with the Congressional objective of maintaining a single registration system).

78. *See* Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 368 (2005) (stating "a statute could expressly preempt a category of state laws, and yet also implicitly preempt state laws more broadly").

79. 533 U.S. 525 (2001).

80. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551 (2001). The Court asserted that Congress prevented state regulation of tobacco advertisements because such laws "would upset federal legislative choices to require specific warnings." *Id.*

81. *Id.* at 533-34.

82. *Id.* at 542.

83. *Id.* at 547.

84. *Lorillard Tobacco*, 533 U.S. at 547-48. The Court stated, "The context in which Congress crafted the . . . pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health." *Id.* The Court also pointed out that Congress vested all authority to enact further regulation of tobacco advertising in the FTC. *Id.* at 548.

85. *Id.* at 548.

In *White Buffalo*, the Fifth Circuit found that the preemption clause in the CAN-SPAM Act did not apply to the University of Texas as an Internet access provider, and thus, was exempt under section 7707(c).[86] Although the clause did not expressly exclude states acting as Internet access providers from the CAN-SPAM Act, the court noted the traditional presumption against preemption and thus refused to infer it.[87] This result is questionable, particularly when looking at the preemption clause under close inspection. Section 7707(b)(1) limits state regulation of spam to laws regarding fraud or deception.[88] Looking at it another way, the CAN-SPAM Act only preempts those state laws that prohibit activities that a "legitimate" spammer would *not* do.[89] The Act provides the framework for both sides to operate; spammers can establish their legitimacy by following the CAN-SPAM Act, while the states can use the Act to readily identify those marketers who are not compliant. Using the CAN-SPAM Act to target those marketers who are following the Act

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86. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 372 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006); *see also* Dan Hopper, Casenote, *Do You Want SPAM With That? The CAN-SPAM Act, Preemption, and First Amendment Commercial Speech Jurispudence Concerning State University Anti-Solicitation E-Mail Policy*, 59 SMU L. REV. 387, 391 (2006) (arguing that the Fifth Circuit overlooked the fact that statutory definition of "Internet access provider" specifically referred to business use).

87. *See White Buffalo Ventures*, 420 F.3d at 370 (noting that "the existence of an express preemption provision does not always plainly demarcate what the federal law expressly preempts"). A review of Supreme Court decisions, however, demonstrates that the Court adopted such a position in cases where Congress demonstrated an intent not to be involved in the area at all. *See* P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988) (finding that a federal law authorizing the President to regulate the pricing of petroleum products did not supersede state regulations because Congress had removed itself from all involvement in the area); *see also* Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995) (refusing to infer preemption of a state law when "there is simply no federal standard for a private party to comply with").

88. CAN-SPAM Act, 15 U.S.C. § 7707(b)(1).

89. Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 377 (2005). As part of its report on the CAN-SPAM Act, the Senate Committee on Commerce, Science, and Transportation noted this as well. *See* S. REP. NO. 108-102, at 22 (2003) (recognizing that state laws concerning e-mail fraud are not preempted because "they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway"). Other areas of the report indicate the congressional intent to protect legitimate e-mail solicitations. The report notes that the CAN-SPAM Act's prohibition of falsified headers is important to minimize the risk to companies operating legally who provide accurate information concerning their identity, specifically stating that the practice is "something that legitimate marketers and retailers will never do." *Id.* at 19-20. The Committee also noted that businesses are only subject to the CAN-SPAM Act's enforcement provisions when they knowingly engage in or benefit from falsified spam and do not take reasonable measures to stop the e-mails. *Id.* at 20. This requirement was enacted to protect businesses who suffer from illegitimate spam using their legitimate identity in e-mails. *Id.*

only serves to frustrate one of Congress's purposes for passing the law—the creation of a national standard for e-mail solicitations.

2. *White Buffalo*'s Impact on Future CAN-SPAM Preemption Cases

The Fifth Circuit's interpretation of the CAN-SPAM preemption clause could have a significant impact on future decisions. Arguably, the court projected powers on the state that Congress had set aside for private actors by granting the state the status of an Internet service provider. Such status allows the state to take actions that it would not normally be able to take, such as blocking e-mail that is otherwise compliant with the CAN-SPAM Act. While Congress did demonstrate an interest in reducing spam, it also created the CAN-SPAM Act to provide a framework for legitimate businesses to operate, and thus regulate interstate commerce. When the state stops a legitimate e-mail from being sent to a state-operated server, the state is interfering with interstate commerce in a manner not specifically permitted by Congress. Thus, the decision may lead to courts finding that states may interfere with the CAN-SPAM Act more frequently than Congress had intended and therefore cause problems with the notion of a single national standard for commercial e-mail.

B. *University E-mail Servers – Private or Public Forums?*

An issue that the Fifth Circuit failed to fully resolve was whether the university's e-mail servers were public forums.[90] Instead, the court found that the type of forum was immaterial because the university's actions did not violate White Buffalo's First Amendment rights.[91] The answer to the forum question, however, could have a significant impact on future cases. To date, only two cases have addressed the forum issue with regards to university servers: *Loving v. Boren*[92] and *Faculty Rights Coalition v.*

90. *White Buffalo Ventures*, 420 F.3d at 374-75.

91. *Id.* at 374.

92. 956 F. Supp. 953, 955 (W.D. Okla. 1997) (finding that state university servers providing access to online newsgroups were not a public forum). *Loving* was brought by a professor at the University of Oklahoma who claimed that the university president violated his right to free speech by blocking access to certain newsgroups through the university's servers. *Id.* at 954. The president had placed the restrictions out of concern that certain newsgroups contained obscene material and the university might be in violation of state law by distributing such material. *Id.* Although the court did not address the issue of whether the university was in violation of state law, it determined that the servers were not a public forum because there was no evidence that they had ever been held open for public communication, and that they were created for academic and research purposes. *Id.* at 955-56. It is also important to note that the plaintiff represented himself and failed to present any evidence whatsoever that he was affected by the university's removal of access. *Id.*

*Shahrokhi*.[93] Both courts found that state university servers did not constitute a public forum because the servers were created for academic and research purposes and had traditionally not been open to the public.[94] The Fifth Circuit did not cite either of these cases in *White Buffalo* (although *Loving* was cited by the district court),[95] instead preferring to focus on the validity of the restriction on commercial speech. The lack of a definitive court finding on the type of forum leaves speech restrictions on university servers open to attack. If the servers are not public forums, any restriction is constitutional so long as it is reasonable and viewpoint neutral. If they constitute public forums, however, courts will give less deference to state regulation of free speech on university servers.[96]

1. Factors in Determining the Forum Type

The legality of a restriction on free speech depends on where the speech is taking place. While there is no general right to use private property for free speech, public property may be used in some locations,

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93. No. H-04-2127, 2005 U.S. Dist. LEXIS 16227, at *17 (S.D. Tex. July 13, 2005) (finding that a university's internal e-mail system for professors is not a public forum). This case involved an adjunct faculty member—and the organization he formed—at the University of Houston-Downtown who was "denied access to his e-mail account" by the university when he attempted to send messages complaining about the school's treatment of adjunct faculty. *Id.* at *3. In his complaint, the plaintiff claimed that the university had violated his right to free speech, and that the university had retaliated against him for exercising that right. *Id.* at *4. The university countered by arguing that the plaintiff's access was not restricted because of his speech, but, in part, because he twice exceeded the storage capacity the university had set for all e-mail accounts. *Id.* at *11. Also, the plaintiff had used a private e-mail address from outside the university, which led to his messages being filtered by the university's spam filtering software. *Id.* at *12. The university was able to demonstrate that had the plaintiff taken steps to avoid the filtering software, he would have been able to send e-mail to every address on the system, and that the blocking was not related to the content of his messages. *Faculty Rights Coalition*, 2005 U.S. Dist. LEXIS 16227, at *12. This evidence makes the court's determination that the e-mail servers do not constitute a public forum a moot point because the restrictions were the result of factors other than content. The court also recognized that the university's restriction on e-mail access to adjunct professors under contract was a legal means of controlling the volume of data stored on the university's servers. *Id.* at *17-18.

94. *Loving*, 956 F. Supp. at 955; *Faculty Rights Coalition*, 2005 U.S. Dist. LEXIS 16227, at *15.

95. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 U.S. Dist. LEXIS 19152, at *22-*23 (W.D. Tex. Mar. 22, 2004). The district court noted that *Loving* provides "some authority for the proposition that a state university's e-mail system . . . is a non-public forum." *Id.* at *22. However, the district court refused to make a finding on the issue. *Id.* at *23.

96. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983) (emphasizing that a "[s]tate must demonstrate compelling reasons for restricting access" to a public forum).

depending on how much control the government needs to exercise over that location. The Supreme Court outlined the importance of location in a state's regulation of speech in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[97] In *Perry*, the Court identified three distinct forums for free speech: traditional public forums,[98] designated public forums,[99] and nonpublic forums.[100] In each of these forums a court will apply a different level of scrutiny to determine the constitutionality of a government restriction on speech. Thus, the location of the speech in question plays a large role in determining the constitutionality of a restriction.

Through a series of cases, the Supreme Court has identified three factors for determining whether a particular forum is traditionally public, designated public, or nonpublic. The first factor is whether that place has traditionally been open to free speech.[101] Such places are typically considered traditional pubic forums.[102] States may enact restrictions that,

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97. *See id.* (finding that an inter-school mail system was not a public forum). *Perry* involved access to teacher mailboxes in a public school district. *Id.* at 39. At one time, teacher mailboxes in the school district were open to any union representing a teacher. *Id.* In 1977, the petitioner was certified by state law as the exclusive bargaining representative for teachers in the school district and later negotiated for exclusive access to the inter-school mail system as part of a labor contract. *Id.* at 39-40. A competing union challenged the policy, claiming it violated their First Amendment right to free speech. *Perry Educ. Ass'n*, 460 U.S. at 39-40. The Supreme Court found that because the mail system was not open to the general public, it was not a public forum, and thus the school district was not constitutionally obligated to allow the respondent use the system. *Id.* at 48.

98. *See id.* at 45 (defining traditional public forums as "places which by long tradition or by government fiat have been devoted to assembly and debate"). This definition encompasses areas such as streets and parks. *Id.*

99. *See id.* (defining limited public forums as "public property which the State has opened for use by the public as a place for expressive activity"). As the Court noted, a designated public forum "may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." *Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

100. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (defining nonpublic forums as "[p]ublic property which is not by tradition or designation a forum for public communication"). In nonpublic forums, the government may control the forum use "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

101. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (recognizing that "a principal purpose of traditional public fora is the free exchange of ideas"); *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (supporting the concept that streets and parks are traditional public forums because "they have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

102. *E.g.*, Burson v. Freeman, 504 U.S. 191, 196-97 (1992) (identifying public areas around polling locations as deserving protections consistent with traditional public forums); Frisby v. Schultz, 487 U.S. 474, 480, 487-88 (1988) (affirming that public sidewalks are a traditional public forum, but also finding that a city ordinance prohibiting "targeted residential picketing" was both narrowly tailored and supported by a substantial state in-

concerning "time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[103]

The second factor is whether free speech is compatible with the function of the place.[104] Courts have utilized this reasoning to uphold speech restrictions in environments where discipline is important, such as prisons,[105] military installations,[106] and schools.[107] Nonpublic forums are

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terest); Boos v. Barry, 485 U.S. 312, 318 (1988) (reaffirming the use of public sidewalks as traditional public fora); United States v. Grace, 461 U.S. 171, 179-80 (1983) (recognizing public sidewalks, specifically those outside the Supreme Court, as a traditional public forum); Grutzmacher v. Pub. Bldg. Comm'n, 700 F. Supp. 1497, 1502 (N.D. Ill. 1988) (finding that Chicago's Daley Plaza is a traditional public forum, and thus the city government's restriction on religious speech in the plaza was unconstitutional). However, the traditional public forum designation does not necessarily extend to everything that may lie within the forum. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984) (finding that the public does not have a traditional right to use utility poles for speech purposes).

103. *See Perry Educ. Ass'n*, 460 U.S. at 46 (1983) (citing Carey v. Brown, 447 U.S. 455, 461 (1980)) (identifying designated public forums as "property which the State has opened for use by the public as a place for expressive activity"). Designated forums are subject to the same level of scrutiny as traditional forums, but states do not have an obligation to keep them open to free speech. *Id.*

104. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 132-33 (1979) (finding that the prison's interest in maintaining order outweighs the prisoners' rights of free speech and freedom of association).

105. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 416 (1989) (upholding a federal regulation that allowed prison officials to intercept incoming publications that were, in the officials' opinion, hazardous to the security of the facility); *Jones*, 433 U.S. at 132-33 (concluding that "[t]he interest in preserving order and authority in the prisons is self-evident," and is sufficient justification for disallowing the formation of a prisoners union); Pittman v. Hutto, 594 F.2d 407, 412 (4th Cir. 1979) (agreeing with a lower court decision upholding a state penitentiary restriction on the publication of a magazine published by inmates); Nicholas v. Miller, 109 F. Supp. 2d 152, 159 n.5, 160 (S.D.N.Y. 2000) (referencing security concerns as justification for the refusal to grant a preliminary injunction forcing the New York State Department of Corrections to open a prison legal defense center); Hobbs v. Pennell, 754 F. Supp. 1040, 1043, 1049 (D. Del. 1991) (upholding a warden's refusal to allow a prisoner, who had previously given a sermon promoting violence, to lead fellow Muslims in religious services). This protection extends beyond the walls of the prison to the surrounding grounds as well. *See* Adderley v. Florida, 385 U.S. 39, 47 (1966) (upholding a state law prohibiting demonstrations on jailhouse grounds).

106. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 840 (1976) (holding that a base commander may prohibit publications that endanger military discipline, morale, or loyalty); Parker v. Levy, 417 U.S. 733, 761 (1974) (upholding speech restrictions in the Uniform Code of Military Justice that prohibit officers from urging enlisted soldiers to disobey orders); Gen. Media Commc'ns, Inc. v. Cohen, No. 97-6029, 1997 U.S. App. LEXIS 40571, at *46 (2d Cir. Nov. 21, 1997, revised Mar. 25, 1998) (finding that a Congressional prohibition on the sale of sexually explicit materials on military installations is justified by the government's interest in preserving the decorum of the armed forces); Ethredge v. Hail, 56 F.3d 1324, 1328-29 (11th Cir. 1995) (allowing a base commander to enforce a prohibition on

subject to more government control, as the states may restrict any speech, provided that the restrictions are reasonable and viewpoint-neutral.[108]

Finally, courts take into account whether speech is one of the purposes of the area.[109] While a forum may be open to the public, if the govern-

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messages that "embarrass or disparage" the President, even if the person displaying them is a civilian worker and not a member of the military); Carlson v. Schlesinger, 511 F.2d 1327, 1334 (D.C. Cir. 1975) (upholding an Air Force regulation restricting the solicitation of signatures for unauthorized petitions on military installations in combat zones).

107. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (announcing the proposition that a restriction on free speech in schools can be justified by demonstrating that the "activit[y] would materially and substantially disrupt the work and discipline of the school"). Although the restriction in *Tinker* was ultimately overturned, (*Id.* at 514), the Court's proposition has been applied in other cases to uphold speech restrictions. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that a school was justified in enforcing disciplinary sanctions against a student who engaged in "offensively lewd and indecent speech" during a school function, as such speech "undermine[d] the school's basic educational mission"); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (upholding a municipal noise ordinance prohibiting picketing in front of schools if such activities interfere with the learning process); S.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 422 (3d Cir. 2003) (finding that a school's prohibition on violent speech from elementary school students was a justifiable restriction on free speech); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 527 (C.D. Cal. 1969) (approving the suspension of students who published an article in the school newspaper containing profane and vulgar speech); Hughes v. Bd. of Trs., 480 S.W.2d 289, 293 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (noting that disruptive speech cannot be justified on school grounds by claiming that it is made in protest).

108. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (recognizing that time, manner, and place restrictions are allowed, and that "the [s]tate may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

109. *See* United States v. Kokinda, 497 U.S. 720, 727-28 (1990) (finding that a sidewalk running from a public passageway to the front door of a post office does not constitute a public forum simply because of its location and purpose). The Second Circuit Court of Appeals has applied *Kokinda* to political advertisements in post offices. *See* Longo v. United States Postal Serv., 983 F.2d 9, 12 (2d Cir. 1992) (upholding a United States Postal Service regulation prohibiting political campaigning on postal premises). The court noted the similarity between the premises in question and those in *Kokinda*, and found that "interior postal walkways" do not constitute public fora. *Id.* at 11. The Supreme Court has also allowed restrictions due to location and purpose at airport terminals. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 581-82 (2d Cir. 1991), *aff'd*, 505 U.S. 672, 685 (1992) (allowing prohibitions on in-person solicitation of funds in airport terminals because the purpose of such facilities is to serve a public necessity). Citing *Kokinda*, the Second Circuit found that airport terminals are "remote from pedestrian thoroughfares and are intended solely to facilitate a particular type of transaction—air travel—unrelated to protected expression." *Id.* at 581. Thus, the Port Authority's restriction on speech was

ment created it for free speech purposes, courts will consider it a designated public forum.[110] If a court finds otherwise, it should hold the forum to be nonpublic.

### 2. An Argument for Considering University E-mail Servers a Public Forum

A court applying these forum standards to the facts in *White Buffalo* likely would consider the university's e-mail servers a public forum. First of all, it is doubtful that the e-mail accounts could be considered to be traditionally open to free speech. One could argue that the university had "traditionally" allowed the general public to send e-mails to employee and student addresses without being filtered out, but a court would likely not consider the length of time sufficient to rise to the level of "tradition." E-mail is a relatively recent development, and attorneys would be hard pressed to convince the courts that it meets the "time out

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justified by its significant interest in protecting patrons from the disruption that in-person solicitation causes. *Id.* Even if the airport has facilities that resemble a typical street, those facilities "exist solely to accommodate the needs of air travelers." *Id.* Other facilities that have a more commerce-based purpose are also protected by the *Kokinda* doctrine. *See* New Eng. Reg'l Council of Carpenters v. Mass. Port Auth., 115 F. Supp. 2d 84, 91, 94 (D. Mass. 2000) (finding a ban on leafleting at a government-owned fishing pier to be constitutional). The plaintiff union sought to overturn a ban on leafleting on port authority property, including the public sidewalks in front of the pier. *Id.* at 85-86. The court determined that the Fish Pier was not a public forum, and that the roadways and sidewalks adjacent to the property were not public thoroughfares, but rather internal to the pier itself (much like the airport terminals in question in *Lee*). *Id.* at 90-91. Speech restrictions in public libraries are also protected by *Kokinda*. *See* Kreimer v. Bureau of Police, 958 F.2d 1242, 1260-62 (3d Cir. 1992) (determining that the purpose of a public library is inconsistent with the exercise of First Amendment activities, and that restrictions on patron conduct are constitutional). The petitioner, Kreimer, was a homeless man who was expelled from a public library on several occasions due to his conduct (such as "following patrons and talking loudly") and the library's contention that Kreimer's odor was so offensive it prevented patrons from enjoying the library and kept employees from performing their duties. *Id.* at 1246-47. The court found that the library was a limited public forum, and as such it is only required to allow the public to exercise rights related to the nature of a library. *Id.* at 1262.

110. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (stating that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse"). Similarly, school facilities are deemed a designated public forum when the local authority holds them open for speech activity. *See* Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1381-82 (3d Cir. 1990) (concluding that the breadth of access previously granted by the school district indicates the intent to create a designated public forum); *see also* Anthony H., Handmaker, Note, *Spam on Rye: How* White Buffalo Ventures v. University of Texas at Austin *Took a Bite Out Of the First Amendment*, 33 N. KY. L. REV. 513, 541 (2006) (arguing that "a public university network should be considered a designated public forum").

of mind" description of traditional public forums in *Hague v. Committee for Industrial Organization.*[111]

But are White Buffalo's messages compatible with the function of the university's e-mail servers? The university stated that the e-mail system is provided "to facilitate the research, teaching, learning, and service missions of the [u]niversity [c]ommunity."[112] Pointing to *Perry*, the university also argued that even though users could send and receive messages from outside the system, the system is not necessarily public.[113] There is, however, a distinction between *Perry* and *White Buffalo* that is not addressed by either the district court or the Fifth Circuit. *Perry* involved access to proprietary mailboxes for *teachers* that were not held open to the general public and were primarily used for internal communication.[114] White Buffalo's messages were also sent to *students* via a system that, although facially restricted to use for educational purposes, was capable of unrestricted public communications.[115] Restricting speech in proprietary forums involving state employees is not difficult to justify on efficiency grounds. In fact, the Fifth Circuit cited user efficiency as a le-

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111. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (recognizing that traditional public forums have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of . . . communicating thoughts between citizens, and discussing public questions"); *see also* Carey v. Brown, 447 U.S. 455, 460-61 (1980) (striking down an Illinois statute prohibiting residential picketing on public sidewalks in all situations other than the peaceful protest of an employer during a labor dispute); Kunz v. New York, 340 U.S. 290, 293 (1951) (determining that any state action "which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets . . . is clearly invalid as a prior restraint on the exercise of First Amendment rights"); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (overturning the arrest of two Jehovah's Witnesses who were speaking outside in a Roman Catholic neighborhood on a public street without a permit); Moskowitz v. Cullman, 423 F. Supp. 1263, 1266 (D.N.J. 1977) (finding that a public rail terminal constitutes a traditional public forum); Williams v. Denver, 402 P.2d 615, 617 (Colo. 1965) (noting that a speaker using a street corner was not impeding the use of the street or sidewalks, and therefore his arrest on charges of loitering was an unconstitutional infringement on his right to free speech).

112. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 U.S. Dist. LEXIS 19152, at *22 (W.D. Tex. Mar. 22, 2004) (quoting http://www.utexas.edu/directory/faq.php#bulk; then follow "May I send unsolicited commercial [e-mail] to addresses from this directory") (last visited October 23, 2006) (on file with the *St. Mary's Law Journal*).

113. *See id.* (arguing that because the university does not allow the general public to maintain e-mail accounts, their servers are not a public forum).

114. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) (noting that the district created the internal mail system for internal communication purposes among teachers).

115. *See White Buffalo Ventures*, 2004 U.S. Dist. LEXIS 19152, at *22 (noting that the university's e-mail users "can send and receive [e-mail] to those outside the system").

gitimate state concern justifying the university's filtering of commercial speech.[116] Students, however, are not state employees, thus the state does not have the same financial interest in their efficiency.

Looking at the compatibility issue from a broader perspective—namely whether the speech interferes with the university's educational function—could lead a court to find in favor of *White Buffalo*. In past cases, the Supreme Court has typically found that the right to free speech may be limited when it interferes with the demands of an authoritarian environment.[117] Schools fall into this category, but the courts have also carved out an exception for schools and universities that open their property for use by student and community organizations.[118] Arguably, the general public's ability to send e-mails to students at the University of Texas causes the e-mail servers to fall under this exception. Another factor to consider is the amount of actual interference that is caused by the messages. Courts have allowed state restriction of disruptive speech in educational environments,[119] but have also overturned regulations

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116. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 374-75 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006) (considering user efficiency a substantial state interest for the purposes of the *Central Hudson* test).

117. *See* Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (noting that while prisoners retain their constitutional rights, such rights are subject to restriction due to the delicate task of running prison facilities); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1979) (stating that "the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment"); Greer v. Spock, 424 U.S. 828, 840 (1976) (recognizing that "[t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command").

118. *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (finding a university policy limiting access to student groups based on the content of their activities to be unconstitutional). In *Widmar*, the University of Missouri at Kansas City initiated a policy prohibiting the use of school grounds for religious purposes. *Id.* at 265. A religious group who had previously been allowed to hold meetings on campus for four years challenged the rule on grounds that it violated their right to free speech, as well as other constitutional rights. *Id.* at 265-66. The university argued that the regulation was necessary to maintain a "strict separation of church and [s]tate," and that in allowing such meetings the school would be in violation of the Establishment Clause. *Id.* at 270-71. While the Court noted that the campus was generally a public forum, it also recognized that free speech rights would be reviewed according to the particular needs of the educational purpose of the school. *Id.* at 268. The Court found that the state interest in protecting itself against potential Establishment Clause violations was not sufficient enough to overcome a challenge on free speech grounds. *Widmar*, 454 U.S. at 277.

119. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that defendant school district was justified in its suspension of a student who gave a "lewd and indecent speech" at a school assembly); Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 902 (W.D. Mich. 2005) (affirming a school district's decision to suspend a student from graduation activities because he called a school official a vulgar name); Haynes v. Dallas County Junior Coll. Dist., 386 F. Supp. 208, 212 (N.D. Tex. 1974) (disagreeing with the

prohibiting non-disruptive speech.[120] How much the messages actually disrupt the educational mission of the university is questionable, even if the Fifth Circuit were to find that it rises to the level of a "significant state interest."

Unfortunately, the Fifth Circuit's refusal to answer the forum question could create problems for future courts. There is still no solid precedent on which courts may build a free speech analysis in regards to public university servers. This increases the likelihood that future courts will skip the question and turn to other methods—such as the *Central Hudson* test—to justify their final decisions.

### C. *Commercial Free Speech and* White Buffalo

The Fifth Circuit avoided the "admittedly important question" about forum by determining that the university had not violated White Buffalo's First Amendment rights.[121] As White Buffalo's e-mail advertise-

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plaintiff's contention that a state statute outlawing disruptive activity on public school campuses was unconstitutional). These regulations can extend even to speech outside the classroom if it affects the educational environment. *See* Boucher v. Sch. Bd., 134 F.3d 821, 829 (7th Cir. 1998) (permitting the expulsion of a student who published an anonymous article demonstrating how to hack into the school's computer system); *see also* Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 288 (Or. Ct. App. 2000) (upholding a school district's expulsion of a student who wrote violent threats in an unauthorized publication he distributed on school grounds).

120. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (declaring unconstitutional a school policy restricting after-hours use of school buildings to educational, artistic, social, recreational, or entertainment uses to the exclusion of religious groups); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (noting that if a public institution has opened a limited forum, "the [s]tate must respect the lawful boundaries it has itself set"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (stating that a school's regulation prohibiting a certain expression is unconstitutional unless there is demonstrable evidence that the school must institute it "to avoid material and substantial interference with schoolwork or discipline"); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216 (3rd Cir. 2001) (declaring that a school's anti-harassment policy was overbroad because it encompassed speech that *intends* to cause a disruption, irrespective of whether it *actually* causes a disruption or not); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 669 (S.D. Tex. 1997) (finding a school's prohibition on "gang-related apparel" vague because although rosary beads were frequently worn by gang members, the plaintiff's wearing of beads was not related to a school-disruptive activity); Right to Read Def. Comm. v. Sch. Comm. of Chelsea, 454 F. Supp. 703, 713 (D. Mass. 1978) (stating that a school board could not ban a book of poetry because it could not demonstrate that the board's interest in maintaining school discipline was threatened by the book); Eisner v. Stamford Bd. of Educ., 314 F. Supp. 832, 835-36 (D. Conn. 1970) (disallowing a school board's attempt to impose a prior restraint on an unofficial school newspaper distributed off of school property on the grounds that the board could not demonstrate harm to the school).

121. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 374 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

ments for their online dating service were clearly commercial speech,[122] the court used the test that the Supreme Court outlined in *Central Hudson* to determine the validity of the university's actions.[123]

*Central Hudson* involved an electric company's challenge of a state regulation banning advertisements endorsing the use of electricity.[124] In determining that the government's action was "more extensive than necessary" to promote its interest in energy conservation,[125] the Supreme Court created a four-part test.[126] First, the speech itself must "concern lawful activity and not be misleading."[127] Second, a court should determine whether the government has a substantial interest in restricting the speech.[128] If the answer is "yes" to both questions, the court then asks whether the restriction has a direct effect on a substantial interest.[129] Finally, the regulation will be upheld if it is "not more extensive than is necessary to serve that interest."[130]

### 1. Applying the *Central Hudson* Test to *White Buffalo*

In determining whether the University of Texas's efforts to restrict White Buffalo's e-mails were more extensive than necessary, the Fifth Circuit applied *Central Hudson's* four-part test. The first prong of the test was easily satisfied as neither party contested the legality or the truthfulness of White Buffalo's e-mails.[131] The fact that the e-mails were in every way compliant with the CAN-SPAM Act meant that legality was not an issue.[132] The Fifth Circuit's analysis of the "substantial interest" prong is

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122. *See id.* (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 572 (1980))).

123. *Id.*

124. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 558-59 (1980).

125. *Id.* at 570.

126. *Id.* at 566.

127. *Id.*

128. *Id.*

129. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

130. *Id.*

131. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 374 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

132. *See id.* at 371 (noting that "[t]he parties have agreed . . . that White Buffalo complied with the requirements of the CAN-SPAM Act" and that "[i]ts e-mail blasts were not unlawful"). Incidentally, the first prong of the *Central Hudson* test provides the legal justification for the CAN-SPAM Act provisions concerning fraud and deception by allowing for government regulation of commercial speech that is unlawful or misleading; if the speech in question is fraudulent, it is not constitutionally protected speech. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (stating that valid commercial speech "must concern lawful activity and not be misleading").

not so easily dismissed, however. The University of Texas argued that their policy was protecting two interests: user efficiency and server efficiency.[133] Although the court called the server efficiency argument "chronically over-used and under-substantiated," they agreed with the university that it was a substantial state interest.[134] The court also agreed that user efficiency satisfied the test as well, because the government had a substantial interest in "protecting users of its [e-mail] network from the hassle associated with unwanted spam."[135]

Despite this somewhat confusing finding, the court continued on to the question of whether the policy promoted the university's interests. The court determined that there was "no serious dispute" that the university's policy of blocking White Buffalo's e-mails advanced both the user and server efficiency interests.[136] Lacking pertinent case law concerning this issue, the Fifth Circuit pointed to the district court's reliance on information contained in the Senate report supporting the CAN-SPAM Act.[137]

Finally, the Fifth Circuit addressed the fourth prong of the *Central Hudson* test: whether the university's policy was no more extensive than necessary to achieve their interests. Because White Buffalo offered to send their e-mails during off-peak times and in smaller volumes to minimize the impact on the university's servers, the court found that the complete exclusion of the e-mails was too strict to satisfy the server efficiency interest.[138] However, the Fifth Circuit determined that both the server efficiency interest and the user efficiency interest were analogous in scope

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133. *See White Buffalo Ventures*, 420 F.3d at 374 (defining user efficiency as "the time and interests of those with UT [e-mail] accounts"). While the Fifth Circuit argues that the state should be concerned with user efficiency, at least one other court disagrees (albeit in a different context). *See* Biddulph v. Mortham, 89 F.3d 1491, 1500-01 (11th Cir. 1996) (finding no provision in the Constitution requiring states to formulate their ballot initiatives with user-efficiency in mind).

134. *White Buffalo Ventures*, 420 F.3d at 375.

135. *Id.* at 374-75.

136. *Id.* at 375.

137. *Id.* at 375 n.17; *see also* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 U.S. Dist. LEXIS 19152 at *17-*20 (W.D. Tex. 2004) (outlining the economic impact of spam). This reliance by both courts on the Senate Report is troubling, particularly as several sections in the report support White Buffalo's position. *See, e.g.*, S. REP. NO. 108-102, at 1 (2003) (stating that the bill is intended "to regulate interstate commerce," an area constitutionally reserved for Congress). The Committee also recognized that e-mail solicitation is inherently interstate commerce, and that the CAN-SPAM Act's single national standard was "a proper exercise of Congress's power to regulate interstate commerce." *Id.* at 21. The Senate Report also acknowledges that many of the provisions are meant to protect legitimate businesses and their activities. *Id.* at 19-20. White Buffalo acted as a responsible business and followed the provisions of the CAN-SPAM Act, so arguably their messages should be protected as well.

138. *White Buffalo Ventures*, 420 F.3d at 377.

and significance. As such, complete exclusion on the grounds of a user efficiency interest *was* deemed by the court to be satisfactory without further explanation.[139]

2. *White Buffalo* and the User Efficiency Argument

The primary factor in *White Buffalo* that could have a significant impact on future anti-spam cases is the user efficiency argument. Although there is some support for server efficiency as a substantial interest (primarily as a trespass to chattels),[140] the Fifth Circuit, in *White Buffalo*, stated that "[t]he *server* efficiency interest is almost always coextensive with the *user* efficiency interest,"[141] and later noted that "[m]any courts mention system degradation . . . but focus primarily on things such as decline in customer goodwill, worker productivity, and the like."[142] Thus, *White Buffalo* is the first case on record to place such significance on user efficiency.

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139. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 377 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

140. *See* Compuserve Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (finding that Cyber Promotions' spam forced Compuserve to decrease the resources it offered to its customers and therefore constituted a compensable trespass to chattels despite a lack of physical damage). The district court determined that mere harm to the property or the "diminution of its quality, condition, or value as a result of defendant's use can also be a predicate for liability." *Id.* at 1022. The defendant's tactics were such that the plaintiff was required to use large quantities of processing power and memory that were thus unavailable to the plaintiff's customers. *Id.* There is also a reference to the harm to user efficiency in this opinion. The court noted that consumer complaints rose as a result of the defendant's activities, and that this affected the plaintiff's legally protected interest in those consumer accounts by influencing customers to leave. *Id.*; *see also* eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1066 (N.D. Cal. 2000) (determining that unauthorized access to the plaintiff's servers would result in "irreparable harm on eBay consisting of lost profits and lost customer goodwill," and thus justified injunctive relief). The court noted that if such activity were allowed to continue, other businesses would perform similar activities and increase the resulting harm. *Id.* The mere possibility of an increase in the use of spiders, the court argues, is justification for the plaintiff's argument that the defendant's actions pose an irreparable harm worthy of injunctive relief. *Id.*

141. *White Buffalo Ventures*, 420 F.3d at 377.

142. *Id.* at 378 n.24 (citing Am. Online Inc. v. IMS, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998); Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 452 (E.D. Va. 1998)). The volume of e-mails sent in each of these cases is extreme, however. *See IMS*, 24 F. Supp. 2d at 550 (noting that the defendant had sent "over 60 million pieces of unsolicited bulk [e-mail] over a ten-month period"); *see also LCGM, Inc.*, 46 F. Supp. 2d at 452 (referencing evidence that the defendant had paid a third party by a check with "5 million bulk e-mail" written on the note line). White Buffalo sent considerably fewer e-mails. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 U.S. Dist. LEXIS 19152 at *2 (W.D. Tex. 2005) (stating that White Buffalo sent around 55,000 unsolicited e-mails to students and employees advertising the company's website).

What the Fifth Circuit failed to mention is that in each of the cases where courts found server efficiency to be a substantial interest, private corporations owned the servers that were affected. Therefore, when a court concludes that a digital trespass has harmed servers, there is likely a potential financial loss to business interests—such as lost production or customer dissatisfaction (as the Fifth Circuit itself recognized).[143] In comparison, the university did not charge its students to use the e-mail system, nor was the system its primary "product." The university had no customer goodwill to protect because it provided e-mail services for free.[144] While the university has an interest in lost employee production, there is no similar interest in student production.

Also, the court noted that other jurisdictions have begun questioning the trespass to chattels approach to server invasion in the absence of physical harm.[145] The court attempted to rationalize this impasse, noting that when courts uphold server efficiency, they tend to do so on grounds more in line with the user efficiency argument.[146] But this creates a conundrum—while the *White Buffalo* Court failed to find that the e-mails had a detrimental effect on the school's servers, it justified the user efficiency argument by citing cases that claim that same detrimental effect.

Not only is user efficiency a new defense, but the court's dependence on user efficiency to satisfy the requirements of the *Central Hudson* test

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143. *White Buffalo Ventures*, 420 F.3d at 377 n.24.

144. *Id.* at 369.

145. *Id.* at 377 n.24 (citing Ticketmaster Corp. v. Tickets.com, Inc., CV99-7654-HLH(VBKx), 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Mar. 6, 2003)). While not technically dealing with commercial e-mail, *Intel Corp. v. Hamidi* addresses whether the amount of e-mail sent affects a trespass to chattels claim. *See* Intel Corp. v. Hamidi, 71 P.3d 296, 308 (Cal. 2003) (finding that defendant's unauthorized e-mails to the plaintiff's employees was not a trespass to chattels because the plaintiff could not demonstrate injury to its personal property). *Hamidi* involved a disgruntled former employee of Intel who was sending mass e-mails through Intel's system to its current employees. *Id.* at 299. Intel later urged Hamidi in writing to cease the e-mail campaign, but he continued, sending a total of six e-mails which each reached as many as 35,000 addresses. *Id.* at 301. Hamidi later used different computers in order to avoid Intel's attempt to filter his messages, but there was no evidence that Hamidi had engaged in any hacking of Intel's computer security. *Id.* Intel was also unable to demonstrate that Hamidi's messages damaged their computers or had any other effect on their ability to function, other than the employee time taken to block the messages and to address employee concerns arising from the messages. *Id.* The court disagreed with Intel's argument that Hamidi's messages affected their interest in the "physical condition, quality or value" of the servers. *Intel Corp.*, 71 P.3d at 304 (quoting RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965)). The court also noted that in previous decisions in similar cases, courts only found a trespass in situations where the action affected (or threatened to affect) a system's functions. *Id.* at 306. Such an affect resulted from the large amounts of e-mail, while Hamidi was sending only a small amount in comparison. *Id.*

146. *White Buffalo Ventures*, 420 F.3d at 377 n.24.

presents several other problems. First, the court did little to explain exactly what interest the state has in user efficiency aside from "wasting time identifying, deleting, and blocking unwanted spam."[147] It presented no statistical evidence of how much time was wasted, nor did it demonstrate any financial loss or damage that the university suffered as a result of the messages. In fact, the only evidence the court used to support their finding was the testimony of the university's vice president of information technology, wherein he stated that if the university was not allowed to block incoming spam, "it would severely degrade an *employee's* ability to do [his or her] job."[148] The Fifth Circuit failed to mention, however, that White Buffalo was also sending messages to *student* accounts, not just to *employees*.[149] It is generally accepted that a state has a substantial interest in the efficiency of its employees,[150] and as such it should be allowed to filter spam sent to employee e-mail accounts.

What is more difficult to identify, however, is what effect, if any, student efficiency would have on the school. The students are not working for the university, so no "job" is adversely affected as far as the state is concerned. It could be argued that students have a responsibility to the university to study diligently, but again the court did not even provide anecdotal evidence to justify such a position. *White Buffalo* would appear more equitable if the court had found that the university may have a substantial interest in user efficiency for its employees, but no such interest for its students. Because the university did not have a substantial interest in student user efficiency, White Buffalo should have a constitutional right to send commercial e-mails to university students.

## IV. CONCLUSION

Congress passed the CAN-SPAM Act with the hopes of quieting consumer discontent with the large volume of unsolicited commercial e-

147. *Id.* at 376.

148. *Id.* at 376 n.20 (emphasis added).

149. *Id.*

150. *See Ex parte* Curtis, 106 U.S. 371, 373 (1882) (recognizing that the government has an interest in "promot[ing] efficiency and integrity in the discharge of official duties"); *see also* Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006) (affirming that the government may restrict employee speech that is necessary "to operate efficiently and effectively"); Waters v. Churchill, 511 U.S. 661, 675 (1994) (acknowledging that "[t]he government cannot restrict the speech of the public at large just in the name of efficiency," but also stressing that "where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate"); Connick v. Meyers, 461 U.S. 138, 152 (1983) (noting that a government employer is not required "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action").

mails. While anti-spam advocates pushed for tougher laws that would severely curtail spamming, Congress sought a less strict law that would allow e-mail commerce to continue growing. The CAN-SPAM Act provides a framework for legitimate companies to continue using e-mail as a marketing tool by banning deceptive practices, regulating how spam can be sent, and requiring in each message a method by which a recipient can choose to opt-out of further messages. Recipients may also sue for damages under the CAN-SPAM Act when false or misleading messages are received. While these requirements provide protection to consumers, Congress also leveled the playing field by preempting existing state anti-spam laws to provide a national standard, thus facilitating legitimate marketing efforts. Yet, the CAN-SPAM Act does not preclude states from enforcing existing laws concerning fraud or deception. Additionally, Congress included a provision allowing Internet service providers the freedom to enact any anti-spam measures they choose, regardless of whether the blocked spam is compliant with the CAN-SPAM Act or not.

Because the CAN-SPAM Act regulates spam rather than restricting it, it is not surprising that a spammer would use the Act as a sword to challenge a state regulation. The first (and to date the only) case with such a challenge is *White Buffalo*.[151] The Fifth Circuit determined that the state, when acting as an ISP, was allowed to restrict e-mails that were otherwise compliant with the CAN-SPAM Act.[152] The court also decided that the university was not denying White Buffalo's First Amendment right to commercial speech, because they had a substantial interest in protecting user efficiency.[153]

The Fifth Circuit made decisions in *White Buffalo* that could have a significant impact on the future of CAN-SPAM Act litigation. By finding that a state acting as an ISP can block legal spam, the court extended state power beyond the limits set in the Act's preemption clause. This reading of the CAN-SPAM Act projects the rights that a *private* actor would have onto a *public* entity. Private ISPs, as owners and operators of their own servers, have a right to prevent spam from being transmitted through their property. They also have a variety of business reasons for doing so, such as controlling the kind of speech they endorse or providing a service to their customers. When a state operates the servers, however, they do not necessarily have the same interests and as a result should be required to meet different standards.

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151. *See White Buffalo Ventures*, 420 F.3d at 371 (recognizing that no other court had ruled on the CAN-SPAM Act's preemption clause).

152. *Id.* at 372.

153. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 378 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

The failure of the Fifth Circuit to determine whether the University of Texas's servers constituted a public forum may also have consequences. The next court to hear a similar case will not have a solid precedent upon which to rely. Also, if the Fifth Circuit had found that the university's servers were a non-public forum, a *Central Hudson* analysis would have been unnecessary.

Finally, the court's finding that user efficiency is a substantial state interest is questionable. There is no direct precedent supporting such a finding. Furthermore, the Fifth Circuit, rather than distinguishing the differences between user efficiency and server efficiency, attempts to liken the importance of user efficiency to that of server efficiency, while at the same time, criticizing the latter. A similar error is the court's failure to identify the significance of the audience for the e-mails. While few would doubt that the state has an interest in the efficiency of its employees, the same cannot be said for students attending its universities.

Almost all e-mail users hate spam. It clogs their inboxes, it takes time to filter out, and generally it creates more "noise" that people would just rather avoid. Congress passed the CAN-SPAM Act not only to allow users to opt-out of such mailings, but also to protect legitimate spam. The e-mails sent by White Buffalo were compliant with the CAN-SPAM Act, and were in no way deceptive to consumers. Nevertheless, the Fifth Circuit refused to protect White Buffalo under the CAN-SPAM Act and allowed the University of Texas to block all of the incoming messages. The *White Buffalo* decision gets CAN-SPAM Act jurisprudence off on the wrong foot by not protecting one of the very classes it was created to protect—legitimate marketers. Perhaps spam's negative connotation—even stronger than the attitude toward junk mail—persuaded the Fifth Circuit that none of these commercial communications has value. While consumer advocates might refer to the CAN-SPAM Act as the "You Can Spam Act," the *White Buffalo* decision shows that courts may still feel otherwise.