COMMERCIAL SPEECH ON THE INTERNET: SPAM AND THE FIRST AMENDMENT

Since its inception, the Internet[1] has undergone tremendous change. The Internet is more accessible and has become a viable means of communication for people all over the world. Since the Internet is a quick and efficient way to reach millions of people, advertisers seek to realize its potential as an efficient tool for advertising.[2]

Internet advertising takes many different forms. It can be a Web site[3] on the World Wide Web,[4] an e-mail, or a message posted

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[1] The Internet was originally built 25 years ago by the U.S. Defense Department so that academic and military researchers could continue to do work in the event of a nuclear attack. Initially, only universities and government facilities had access to Unix (an operating system needed to access the Internet) and computers with enough power to access the Internet. Eventually technology improved and the government relaxed its standards allowing commercial entities to provide private persons access to the Internet. Today, with the help of major on-line providers like America Online, Prodigy, CompuServe, and others, the Internet is available to millions of commercial and private users all over the world. *See generally* Phillip Elmer-Dewitt, *Battle for the Sole of the Internet*, TIME, July 25, 1994, at 50 (chronicling the emergence of the Internet as a new media form).

[2] Due to the Internet's direct customer contact and its desire to lure young, affluent professionals (the Internet's largest user group), the presence of private businesses on the Internet has increased exponentially over the last few years. As of early 1996, approximately 11% of the homes in the United States were connected on-line. *See* Naaman Nickell, *"Spamming" on the Internet Dips Sharply*, THE ARIZ. REPUBLIC, Mar. 18, 1996, at E2. In 60% of the homes having computers the annual income exceeded $50,000 a year. *Id.* For more information on the business side of advertising on the Internet, see Michael D. Scott, *Advertising In Cyberspace: Business and Legal Considerations*, 12 COMPUTER/L.J. 1 (1995); L. A. Lorek, *Cybershopping: Retailers and Service Firms Plug In On-Line To Get Customers Via the Internet*, SUN-SENTINEL, May 28, 1995, at F1; *Electronic Bulletin Boards Let Your Fingers do the Shopping*, SEATTLE TIMES, Aug. 15, 1994, at E1; Michelle Quinn, *Internet Spawns Cottage Industry/ Upstart Advertising Agencies Surf Madison Avenue*, S. F. CHRON., June 12, 1995, at B1; Elizabeth Corcoran, *The Marketers Are On-Lining Up for You; Interactive Ads, Other Gimmicks Kick Off the Internet's New Era*, WASH. POST, Sept. 27, 1995, at F1; Victoria Griffith, *Media Futures: A Hard Sell Down the Line-Advertising is Finding its Feet in Cyberspace*, FIN. TIMES, Mar. 6, 1995, at 13; Jane Weaver, *Net Gain (Advertising on the Internet Computer Network)*, INSIDE MEDIA, July 13, 1994, at 28.

[3] A Web site is a collection of "pages." *See* Walter S. Mossberg, *Getting to know the ABCs of the WWW to Dazzle Friends*, WALL ST. J., Jan. 4, 1996, at B1. Each page is composed of text, pictures, and graphics. *Id.* These pages also contain "links"—so that if visitors click their mouses on the link, they will be transported to another page of the Web site or sometimes to pages of a completely different Web site. *Id.* The "home page" (often the first page you view when you visit a Web site) usually consists of an introduction to the Web site. It serves as a table of contents to that site by displaying numerous links which send one to other pages of the Web site which contain more specialized information regarding the subject of the Web site. *Id.*

[4] The World Wide Web is the most hyped and used component of the Internet. Unlike other areas of the Internet—where only text and pictures can be displayed—on the Web, sound and video can be transmitted in addition to text and pictures. Because of these advantages, the Web is the most commercial and advertising-friendly place on the Internet. For more information on the World Wide Web, see Mossberg, *supra* note 3, at B1.

on a Usenet-news group site.[5] Internet advertising falls into one of two distinguishable types: passive or intrusive. Passive Internet advertising, the most prevalent form of advertising on the Internet, is an advertisement which the consumer seeks out and accesses himself. The most common form of a passive Internet advertisement is a Web site on the World Wide Web which gives information about a product or service. Intrusive Internet advertising is unsolicited advertising which the consumer receives from a seller, such as an e-mail from another person or a message posted on an electronic bulletin board which can be accessed by others.[6]

This Note will examine how the First Amendment commercial speech paradigm applies to the problems created by intrusive commercial speech on the Internet. Part I details the problems that intrusive Internet advertising poses, and discusses whether on-line providers or Internet users, under current laws and practices, are able to alleviate those problems. Part II discusses the applicable First Amendment standards that should be applied to these problems. Finally, Part III will examine whether Congress can draft a regulation capable of passing constitutional muster.

I. AN INTRODUCTION TO INTRUSIVE ADVERTISING ON THE INTERNET

A. *An Overview Of The Problem*

Before the Internet became accessible to the general public,[7] a debate erupted in the on-line community as to whether advertising should have any place on the Internet.[8] A series of norms and rules on how one should use the Internet, called 'Netiquette,'

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[5] The Usenet is a component of the Internet which is similar to a bulletin board. *See* Yardena Arar, *Techno-Babble Spotlighting the Computer World "Most Hated" Couple Beefs Up On-line "Spamming,"* L.A. DAILY NEWS, Nov. 28, 1994, at L5. On it, anyone visiting the site can view other users' postings and respond to those postings and/or can create a posting themselves. Most Usenet news groups are geared toward a specific topic which users are invited to discuss by posting a message. For example, a Usenet site can be geared towards discussion on a topic (i.e., regulation on the Internet), on a profession (i.e., a Usenet group discussing medical topics), or on hobbies (i.e., Usenet news groups geared towards gardening or a sports team). It seems that there is a Usenet group for just about any topic one can imagine. Most Usenet activity is not carefully monitored and anyone can participate.

[6] In *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), the court singled out e-mail communications as the only form of Internet communication one could receive without taking an affirmative step. The court noted that a person must take affirmative steps to read articles posted in a newsgroup. *Id.* While this is true, newsgroup advertisements are intrusive because the user ordinarily does not desire to see the advertisements but rather is interested in receiving information about which the site pertains.

[7] *See supra* note 1.

[8] *See* Jayne Levin, *Ban Business Use of the Internet: The Internet isn't an Academic Playground*, COMPUTERWORLD, Nov. 28, 1994, at 117.

quickly developed.[9] Netiquette, among other things,[10] established that advertisers wishing to advertise on-line should confine their activities to sites where advertisements would be welcomed.[11] Since the Internet community was small, violators of Netiquette were chastised and shunned.[12]

Soon, two developments drastically changed the way commercial messages were handled on the Internet. First, the development of the World Wide Web allowed Internet users to create their own sites. This led to a dramatic increase in the number of commercial sites on the Internet. Second, when the Internet became more accessible to the general public, many newcomers failed to adhere to Netiquette due to ignorance or disrespect.[13]

While most Internet users have grown accustomed to its commercialization, there is still an on-line debate about whether the Internet community should accept intrusive advertising, or as Internet users call it, "spam."[14] Specifically, spam is the term Internet users give to messages which are posted many times to multiple news groups or mailing lists.[15] Typically, the term spam is used to denote bulk e-mail advertisements and postings on Usenet-

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9 *See* Aggi Raeder, *Beyond Netiquette*, SEARCHER, Jan. 1, 1995, at 26. *See also* Michael Pellecchia, *The Netiquette of On-Line Advertising: Authors Use Their Real-Life Experience to Explore Opportunities, Limitations*, DALLAS MORNING NEWS, Jan. 8, 1995, at 5H; *On-Line Marketing Success Depends on 'Netiquette,' as Much as Know-How*, PR NEWS, Sept. 5, 1994. When the Internet became more accessible to the general public, Nettiquette survived. Today many books have been written on the subject and on-line providers have often given members suggestions on how to communicate on the Internet.

10 Some examples of Netiquette rules are: don't post a message to a newsgroup unless the message deals in some way with the subject of the news group, don't publish private e-mail without permission, don't type in capital letters, and don't criticize people for bad grammar or spelling. *See* Elmer-Dewitt, *supra* note 1, at 50. Netiquette was developed by Internet users when the Internet was not easily accessible to the majority of the public. As many first-time Internet users have recently joined the on-line community, it will be interesting to see if the tenets of Netiquette will continue to be followed.

11 *See* Pellecchia, *supra* note 9, at 5H.

12 *See* Elmer-Dewitt, *supra* note 1, at 50.

13 *Id.*

14 The term "spam" is believed to have derived from a Monty Python skit in which a pair of diners entered a restaurant in which every item on the menu contained the Hormel product spam. *See* Thom Stark, *Use Policies for Internet Access*, LAN TIMES, Apr. 15, 1996, at 84; *Monty Python's Flying Circus: Episode 25* (BBC television broadcast, Dec. 15, 1970). Eventually all of the patrons in the diner started saying the word "spam" ad nauseam. *See* Jana Sanchez-Klein, *Meet the Most HATED MAN on the INTERNET; Spamming: on the Net, Sanford Wallace's junk mail solicitations for business opportunities and diet supplements are about as welcome as a virus*, BALTIMORE SUN, May 28, 1996, at 1D. *But see* Elmer-Dewitt, *supra* note 1, at 50 (the term "spam" was derived from the analogy of dropping a can of Spam into a fan, thus filling the surrounding area with spam, as compared to putting out an advertisement which is sent to many newsgroups on the Usnenet, thus filling the surrounding Internet "area" with the message).

15 *See* Judith H. Bernstein, *Attack of the Killer Spam—Been Spammed? It Likely Won't be the Last Time so be Prepared*, NETGUIDE, Nov. 11, 1995, at 91.

news group sites.[16]

The following examples illustrate some of the major problems created by spamming. Perhaps the most notorious spamming incident is one that involved two lawyers from Scottsdale, Arizona.[17] On April 12, 1994, these lawyers posted a solicitation for legal services on 6,000 to 9,000 Usenet news groups, directed to those wishing to join in the "Green Card" immigration lottery.[18]

The effect was that those who went to visit a Usenet site to satisfy their interests in pottery, cricket, or Elvis-sightings were greeted with an advertisement from the lawyers.[19] To make matters worse, if a person went to visit other Usenet sites over the course of a day, that person would see the same message posted again and again.[20] The advertisement generated an estimated 30,000 e-mail messages,[21] but cost the lawyers only thirty dollars (the price of an Internet access provider). The lawyers claimed that they made close to $50,000 in business.[22]

In addition to business replies, the lawyers also received a deluge of hate mail,[23] death threats, and anti-Semitic remarks.[24] Some Internet users even attempted to sabotage the lawyers' telephone and fax lines and posted the lawyers' home addresses on the Internet.[25] Despite these attacks, the lawyers vowed to use this form of advertising again.[26]

Recently, there has been a proliferation in the number of ad-

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16 *See supra* note 5 for a description of Usenet sites. Note that one can very easily send multiple messages via e-mail or to newsgroups which have nothing to do with commercial speech. For example, someone could send a message about their views on abortion, gun control, or any other hot topic to multiple Usenet sites or e-mail addresses. If regulation of such a message is desired, traditional First Amendment doctrine would be applied. *See infra* Section II(a). This note will deal only with the problem of intrusive commercial messages.

17 Lawyers must comply with professional ethical standards when they advertise. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1991); MODEL CODE OF PROFESSIONAL RESPONSIBILTIY Canon 2 (1981). While this particular example of spam may be regulated by a rule of ethics, the fact that the mailing was done by lawyers bears little significance to the real problem. Today, most persons selling products or services over the Internet are advertising a business or product which is not regulated by ethical rules. Thus, specific regulations aimed at specific professions would be fruitless.

18 The U.S. Government allowed foreign applicants to participate in a lottery for U.S. work permits. *See* Peter H. Lewis, *Advertiser Unfazed by Internet Outrage*, SAN DIEGO UNION & TRIB., Apr. 26, 1994, at 3.

19 *Id.*

20 *Id.*

21 *Id.*

22 *See* Jared Sandberg, *Lawyers Whose Ads Crashed the Internet Help You Do It Too*, WALL ST. J., May 9, 1994, at B2.

23 *See* Brad Patten, *Local Lawyers Ad Stirs Internet Furor*, PHOENIX GAZETTE, Apr. 15, 1994, at A1.

24 *See* Mark Hansen, *Lawyers' Internet Ad Angers Users*, A.B.A. J., July 1994, at 26.

25 *Id.*

26 Lewis, *supra* note 18, at 3. Due to their success on the Internet, the lawyers have

vertisements on Usenet sites. A visit to just about any Usenet site will result in the discovery of ads for miracle cures, money-making schemes, and other dubious products.[27]

Placing advertisements on news groups is very popular for a number of reasons. First, this form of communication allows an advertiser to make a cheap investment which can potentially reach millions of people. Although the risk of bad publicity will likely prevent major companies from using this type of advertising, a small or new business which can sustain the wrath of other Internet users could use this method effectively. Second, this type of advertising lets advertisers get in touch with consumers who are likely to be more educated and better off financially than the average consumer. However, this technique of advertising is extremely problematic. If thousands of people use this method to advertise, few people would visit the news groups on the Internet, because it would be too costly and few would want to tolerate wading through thousands of advertisements before actually accessing the information they seek.[28]

Another form of intrusive Internet advertising is e-mail. An advertiser could send unsolicited e-mail to millions of users. For as little as a fifty dollar investment, Internet marketing companies will connect you with thousands of Internet users.[29] Internet marketing companies compile lists of users from membership lists they buy from the major on-line providers[30] or from information they can find out about individuals who post messages on a Usenet group or chat room.[31] Currently, a list of as many as 25 million e-mail addresses can be purchased.[32]

Electronic mail is different from regular mail in two respects. First, many on-line services charge e-mail users by the minute when they view mail.[33] Second, unlike someone receiving regular mail, a person receiving e-mail often cannot discern that he is getting an

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written a book on how to advertise on the Internet and have given up their legal practice to form an on-line advertising consulting service. Arar, *supra* note 5, at L5.

27 Today, there is even a Usenet group which deals explicitly with spammers: alt.spam. Users of this site sound off about recent spam, and users are warned of major spammers. At http://math-www.uni-paderborn.de/axel/BL there is an Internet "blacklist" where notorious spammers are immortalized.

28 Hansen, *supra* note 24, at 24.

29 *See* Jean Heller, *Junk Mail Creates Computer Headache*, ST. PETERSBURG TIMES, Jan. 2, 1996, at 1A.

30 *See* Rusty Coats, *Marketers Jamming the Internet with Junk E-Mail*, SACRAMENTO BEE, Feb. 7, 1996, at D2.

31 *Id.*

32 *See Spam, Spam, Spam, Spam, Spam, Spam*, PRECISION MARKETING, Mar. 25, 1996, at 22.

33 *See* Bruce V. Bigelow, *Infuriated Client Sues Over Junk E-Mail*, SAN DIEGO UNION & TRIB., Feb. 19, 1995, at H1.

advertisement until he actually views the e-mail.[34] These problems are multiplied if there is an increase in the amount of e-mail distributed. Thus, e-mail is very different from regular mail because regular mail can be discarded easily and can be used at almost no cost to the mail receiver.

One of the most notorious spammers is Cyber Promotions which sends advertisements to 900,000 e-mail addresses twice a day.[35] The president of the company, who has been unaffectionately nicknamed the "spam king" by other Internet users, has been even more successful than the two Scottsdale lawyers.[36] However, he has also felt the wrath of annoyed Internet users.[37] The Internet community's reaction to spam has been anything but passive. Spammers have been sent "flames"[38] and viruses, have had pranks played upon them, and have had personal information about them printed on the Internet.[39] While traditional laws can deal with these problems, another response to spam has been releasing a "cancelbot." A cancelbot is a program, which when used, can wipe out any message that a particular user sends to different sites of the Internet. Cancelbots have been used over the Internet to get rid of many commercial ads including the previously mentioned lawyers' ads.[40] Thus, the cancelbot problem creates a whole new set of problems rarely encountered in other types of media.

While the ire that Internet users have had against some commercial advertisers may be extreme, it is understandable. They are, in a sense, footing part of the bill for every advertisement they see. When an Internet user goes on-line, he pays money to an on-line provider—usually at an hourly rate. This Internet user is interested in staying on the Internet as little as possible in order to save money. When the user has to view an advertisement, which he would not ordinarily be interested in viewing, the user is helping the advertiser defray the cost of sending information about a product to a consumer. The cost of viewing one advertisement is of small consequence to the user. But, when the aggregate cost of all the advertisements that the Internet viewer sees is tabulated, the sum is significant. In this sense, the spam problem can be equated

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34 *Id.*

35 Sanchez-Klein, *supra* note 14, at 1D.

36 Estimates show that Mr. Wallace, the President of Cyber Promotions, has made more than one million dollars a year in sales. *Id.*

37 *Id.* Mr. Wallace's actions have led America Online to sue him. *See infra* Section I(B).

38 "Flames" is the term given to hate mail sent over the Internet. *See* David Freedman, "*E-Mail With . . . Spammers,*" INC., June 22, 1995, at 44.

39 Patten, *supra* note 23.

40 *Id.*

to the tragedy of the commons.[41] Since advertising by e-mail or by posting a message on a Usenet site is fast and cheap to the advertiser but places external costs on others, the use of Internet advertising is likely to proliferate to the extent that it may not pay to use the Internet, since the cost of getting non-advertising messages may be exceeded by the costs of wading through all of the advertisements.

The main question is whether government regulation, or the Internet community and on-line providers should regulate spam. The Internet community does not seem ready to regulate itself. Since Internet users are not adhering to the rules of Netiquette,[42] it appears that self-regulation by Internet users who send commercial messages will not happen. Voluntary regulations by trade associations[43] have also been promulgated without much success, because they have difficulty contending with the ease and profitability of spam advertisements.

Internet users who have received messages have not been suc-

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41 The "Tragedy of the Commons" problem was first discussed in Garret Hardin's article of the same name. Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). That article notes that activities which provide benefits to one, but in which the consequence of the activity are externalized to the general public, would have to be regulated in lieu of disastrous results to the whole community. *Id.* For example, a commons which is open to anyone to breed his herd would have to be regulated because a rational person would try to breed as many animals as he could. *Id.* at 1244. That would be so because the benefit of having more cattle on the land directly benefits him while the negative affects on the land (i.e. overgrazing) is borne by all of those in the community. *Id.* The problem of intrusive Internet advertising is directly analogous to the tragedy of the commons. A rational person who desires to send a commercial message over the Internet would likely send out as many commercial messages as possible, because the benefit (sending an advertisement with the benefit of having the consumer bear part of the cost of the advertisement) of doing so is solely reaped by that person, while the disadvantages (increased clutter) are shared by all Internet users. It seems that the Internet becomes a paradox: its greatest attribute—its ability to allow everyone to participate—becomes its greatest detriment. Thus, to further the benefits of this medium, regulation will be needed.

42 *See supra* notes 8-12 and accompanying text.

43 The Direct Marketing Association and the Interactive Services Association, two trade associations which often suggest advertising guidelines, have issued guidelines for advertising on the Internet. *See* Kara Swisher, *Curbs on Cyberspace Ads Proposed; Trade Groups Offer Guidelines as FTC Workshop Airs Privacy Issues*, WASH. POST, June 5, 1996, at F1. These "Principles for Unsolicited Marketing E-Mail" suggest that: (1) solicitations posted in news groups, bulletin boards, and chat rooms should be posted only when the message is consistent with the forum's stated policies; (2) e-mail solicitations should be clearly identified as such; (3) e-mail advertisers who send unsolicited e-mail should allow consumers to notify the advertiser that they do not wish to receive future advertisements; (4) marketers should furnish consumers with an opportunity to tell the advertisers that they do not wish to be put on any other mailing lists; (5) any person who collects information on-line about potential customers should offer that consumer an opportunity to have that information suppressed; (6) marketers operating chat areas, news groups, or other public forums should inform users that information that they provide may result in unsolicited advertisements; and (7) persons who use, rent, sell, or exchange Internet marketing lists should take reasonable steps to ensure that the sharing of lists and data adheres to marketing principles. *See generally* Direct Marketing Association and Interactive Services Association, *Principles for Unsolicited Marketing E-Mail.*

cessful in preventing the proliferation of spam. Although many users have fought back against the spammers, their efforts have been fruitless and in many instances possibly illegal.[44] Unless on-line providers can be held accountable, it would seem that federal legislation would be necessary to prevent the onslaught of intrusive commercial messages.

B. *Should On-line Services Be Responsible For Preventing Spam?*

From a practical standpoint, on-line providers are not in the best position to prevent spam. Several practical considerations would seem to work against placing the onus on on-line providers. First, on-line providers would be forced to expend a great deal of resources to prevent spam. This would result in an increase in rates to the users of that service— especially for users of smaller on-line providers who offer nothing but Internet access and e-mail services. Second, it would not be in the on-line provider's interest to prevent spaming. On-line services generally charge by the hour. A person who is exposed to commercial messages which he would not ordinarily desire to view, would be forced to spend additional time on-line to sift through these unwanted commercial messages. This results in greater on-line time which generates more income for the on-line provider.

Finally, on-line providers may not be able to prevent spamming from certain spammers without adequate legislation. Although many of the major on-line providers have contractually forbidden their users from sending unsolicited e-mail or posting commercial messages on the Internet,[45] it is rare for a spammer to use one of these companies. Typically, spammers use small on-line providers which either don't frown upon such activity or just don't care.[46] Thus, in this circumstance, the on-line provider is prevented from acting against the spammer unless the provider takes legal action.

The recent case of *America Online v. Cyber Promotions*[47] shows that litigation by on-line providers against spammers is not the best way to regulate this problem. In that case, Cyber Promotions sued America Online for sending mail bombs to its on-line provider[48]

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[44] *See supra* notes 23-25, 41-43 and accompanying text.

[45] *See* John Schwartz, *Internet Community Cracks Down On Unsolicited E-Mail; Ad Distributor Takes Legal Action Against 'spammers,'* OTTAWA CITIZEN, Dec. 4, 1995, at B4.

[46] Cyber Promotions, like most other spam advertisers, uses a smaller on-line provider for their Internet access. *Id.*

[47] *See* Sanchez-Klein, *supra* note 14, at 1D.

[48] A "mail bomb" occurs when one sends an extreme amount of data to an e-mail address in order to crash the user's system so that he is temporarily disabled from using the

with the intent to deny Internet access to Cyber Promotions. America Online countersued Cyber Promotions for service mark and trademark infringement, service mark and trade name dilution, false designation of origin, false advertising, unfair competition, violation of the Virginia Consumer Protection Act,[49] violation of the Electronic Communications Privacy Act,[50] violation of the Computer Fraud and Abuse Act,[51] and violation of the Virginia

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system. Richard Raysman and Peter Brown, *Regulating Internet Advertising,* N.Y. L. J., May 14, 1996, at 3. What America Online did was send thousands of Cyber Promotions' e-mail back to Cyber Promotions' on-line provider, which crashed the on-line provider's computer system. *Id.*

[49] Complaint for Service Mark and Trade Name Infringement, Service Mark and Trademark Dilution, False Designation of Origin, False Advertising, Unfair Competition and Violations of the Virginia Consumer Protection Act, the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, and the Virginia Computer Crimes Act at 1, America Online, Inc. v. Cyber Promotions, Inc., 948 F. Supp. 456 (E.D. Pa. 1996) (No.96-5213). Note that these causes of action have to do with Cyber Promotions' use of "aol.com" in its advertisements and they do not go to Cyber Promotions' spamming.

[50] *Id.* The Electronic Communications Privacy Act, in part, states:

> (a) Offense. Except as provided in subsection (c) of this section whoever:
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> 1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
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> 2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system
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> shall be punished as provided in subsection (b) of this section.

Electronic Communications Privacy Act of 1986 § 101, 18 U.S.C. § 2701(a) (1995). Cyber Promotions has argued that it does not have the proper intent to be charged with violating the statute since it did not intend to damage America Online—rather, it intended only to send e-mail to users of America Online. Plaintiff's Memorandum In Support of a Judgment Declaring that Plaintiff is Entitled to Send E-mail to Defendant's Members at 11-12, *America Online* (No.96-2486). Cyber Promotions also argued that it did not obtain, alter, or prevent access to a wire or electronic communication while it was in storage and that the legislative history of the Act infers that messages posted on electronic billboards and e-mail communications were not covered by the statute. *Id* at 9-11. Regardless of this case, this statute, even if applicable, would not be useful in preventing most spam because few spammers have the capacity to cause damage to an on-line provider's system since the number of messages they send dwarf in comparison to the amount Cyber Promotions typically sends. On-line providers would also have a much more difficult time showing that a small time spammer had the requisite intent needed under the statute.

[51] Plaintiff's Complaint at 2. The Computer Fraud and Abuse Act, in part, states:

> a) whoever . . .
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> (5)(a) through means of a computer used in interstate commerce or communications, knowingly causes the transmission of program, information, code or command to computer or computer system if-
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> (i) the person causing the transmission intends that such transmission will-
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> (I) damage, or cause damage to, a computer, computer system, network information, data, or program; or
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> (II) withhold or deny, or cause the withholding or denial, of the use of a computer, computer services, system or network, information, data, or program; and
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> (ii) the transmission of the harmful component of the program, information, code, or command-
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> (I) occurred without the authorization of the persons or entities who own or are responsible for the computer system receiving the program, information, code, or command; and

Computer Crimes Act.[52] The Eastern District of Pennsylvania is hearing the case.

Although America Online has taken legal action against a spammer, the main thrust of its complaint against Cyber Promotions is that Cyber Promotions used America Online's "aol.com" designation. America Online also filed causes of actions regarding the damages caused to their servers.[53] The federal laws that America Online argues to be applicable, the Electronics Communications Privacy Act and the Computer Fraud and Abuse Act, prevent both intentional access without authorization of a facility and intentional or reckless damage to a computer system.[54] Thus, America Online is not really suing Cyber Promotions for spamming. Rather, it is suing Cyber Promotions for damaging America Online's servers while it was engaged in spamming. Even if America Online was to prevail in its suit, it is doubtful that it or other on-line providers could use the arguments advanced by America Online in other spamming cases for two reasons. First, since a degree of culpability is needed to trigger the statutes, it would be difficult to show that the spammer had the requisite intent. Second, if the spammer sent his messages to fewer Usenet sites or e-mail addresses, an on-line provider would not be able to use America Online's arguments. It would be difficult for an on-line provider to show that it was injured.

Legal considerations dictate that on-line providers are not in a good position to alleviate the problem. Even if a new cause of action were brought which would allow on-line providers to deal with

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(II) (aa) causes loss or damage to one or more other persons of value aggregating $1,000 or more during any 1-year period; or

(bb) modifies or impairs, or potentially modifies or impairs the medical examination, medical diagnosis, medical treatment, or medical care of one or more individuals. . .

shall be punished as provided in subsection (c) of this section.

The Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A) (1995). Section 1030(a)(5)(B) of the Act is the same as 1030(a)(5)(A) except that it applies to transmissions sent "with reckless disregard of a substantial and justifiable risk." *Id.* § 1030(a)(5)(B). Cyber Promotions argued that it does not have the intent required by the statute. Plaintiff's Memorandum In Support of a Judgment Declaring that Plaintiff is Entitled to Send E-mail to Defendant's Members at 8-9, *America Online* (No.96-2486). Regardless of the Cyber Promotions case, in cases involving small time spammers, this section would probably be inapplicable because an on-line provider would have a hard time proving the requisite intent and damages.

52 Complaint for Service Mark and Trade Name Infringement, Service Mark and Trademark Dilution, False Designation of Origin, False Advertising, Unfair Competition and Violations of the Virginia Consumer Protection Act, the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, and the Virginia Computer Crimes Act at 1, *America Online* (No.96-5213).

53 *Id.*

54 *Id.*

the problem, practical considerations show that it would not make sense to assign the role of protector to on-line providers. A law which creates a cause of action for those who have been subjected to an intrusive advertisement would make more sense because in most cases they would bear the greatest injury from such an activity. This raises the next issue—how to write a law which would be constitutional. To answer this question, a survey of First Amendment law is necessary.

II. A Survey Of The Commercial Speech Doctrine — A Search For The Applicable Standard

When a First Amendment[55] issue is presented, the initial query is, what applicable standard should be used? This is essential in this case because it must be determined how a law prohibiting Internet advertising would be analyzed when faced with a First Amendment challenge. In this case, two inquires must be made: (1) what is the applicable First Amendment standard for commercial speech? and (2) should speech via the medium of the Internet be given more or less First Amendment protection than speech via other media? Section A will discuss whether the "time, place, and manner doctrine" has any applicability to the spam problem. Section B gives an overview of the Supreme Court's battle to formulate a coherent commercial speech doctrine over the last forty years. Finally, Section C will determine whether the Internet should be treated like other media for First Amendment purposes.

A. *Time, Place, And Manner Restrictions*

Traditionally, one of the most important constitutionally permissible ways to regulate free speech has been by a "time, place, or manner restriction."[56] Such a time, place, or manner restriction is constitutional if it meets four requirements: (1) the time, place, or manner regulation is content neutral;[57] (2) the regulation is narrowly drawn; (3) the regulation promotes a significant government interest; and (4) alternative channels of communication are left

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[55] The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . . " U.S. Const. amend. I.

[56] *See* Cox v. Louisiana, 379 U.S. 536 (1965); Grayned v. City of Rockford, 408 U.S. 104 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

[57] A content neutral regulation is a regulation which is justified without reference to the content of the regulated speech. *See* Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748, 771 (1995); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); United States v. O'Brien, 391 U.S. 367 (1968).

open.[58] Since time, place, or manner restrictions can be placed on protected First Amendment Speech, commercial speech which is also protected by the First Amendment should be able to be limited by a time, place, or manner restriction.[59]

Since a time, place, or manner restriction must be content neutral and cannot discriminate in terms of subject,[60] the issue arises whether such a time, place, or manner regulation could discriminate against commercial speech since commercial speech is entitled to less First Amendment protection.[61] This argument has no merit. In *Linmark Associates, Inc. v. Willingboro,*[62] the Court rejected an argument by the town of Willingboro that an ordinance which prevented "For Sale" signs from being posted in an effort to curtail the perceived fleeing of white persons from the town was a valid time, place, or manner requirement.[63] The Court struck down the ordinance, because, among other reasons,[64] the ordinance "proscribed particular types of signs based on their content."[65]

Other decisions by the Court have reiterated that a time, place, or manner regulation cannot be used to discriminate against commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[66] the Court addressed whether a Virginia law making a pharmacist guilty of professional misconduct if he advertised the price of prescription drugs was a valid time, place, or manner regulation.[67] In writing for the Court, Justice Blackmun stated "that time, place, and manner restrictions are permissible if 'they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . that in so doing they leave open ample alternative channels

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58 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

59 *See* Elisabeth Alden Langworthy, Note, *Time, Place, or Manner Restrictions on Commercial Speech,* 52 GEO. WASH. L. REV. 127 (1983).

60 *Mosley,* 408 U.S. at 92.

61 *See infra* Section II(B). That section chronicles the Supreme Court's treatment of commercial speech from the mid part of this century—when the court believed commercial speech should be given no protection under the First Amendment—to present, where the Court has held that commercial speech should be given some First Amendment protection, but only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1977).

62 431 U.S. 85 (1977).

63 *Id.* at 86-88.

64 The other reasons for the Court invalidating the ordinance were the "serious questions" as to whether alternative channels for communication were left open and the fact that the ordinance was not concerned with the place or the manner of speech. *Id.* at 93.

65 *Id.* at 94.

66 425 U.S. 748 (1976).

67 *Id.* at 771.

for communication of the information.'"[68] Similarly, in *City of Cincinnati v. Discovery Network, Inc.*,[69] Justice Stevens dismissed the notion that the City could selectively apply an ordinance against newsracks containing commercial publications and not newsracks containing noncommercial publications because the regulation was not content neutral.[70] The city had argued that to satisfy the element of content neutrality, it had to show that its *justification* for the regulation was content neutral.[71] The Court rejected this argument because the application of the law in essence banned commercial newsracks which would in turn discriminate against commercial speech solely because it is given less First Amendment protection.[72] Thus, it appears that a time, place, or manner regulation which discriminates against commercial speech will be held unconstitutional.[73]

Since a statute which regulates commercial speech under the guise of a time, place and manner restriction would be unconstitutional, it seems that a time, place, or manner regulation could not be drafted to regulate intrusive Internet advertising. A time, place, or manner regulation which does not discriminate against commercial speech would not be helpful because it would regulate noncommercial speech as well. Therefore, a regulation aimed at directly limiting commercial speech because of its content is the only way to bring about the desired result. Thus, one must look to the commercial speech doctrine to determine if a statute could be drawn to regulate intrusive Internet advertising.

B. *The Commercial Speech Doctrine*

The constitutionality of a regulation against intrusive Internet advertising would have to pass First Amendment muster under the commercial speech doctrine. Although the Supreme Court has struggled for forty years to come up with a coherent commercial speech doctrine, there are still many questions to be settled. Part I of this section will define the term 'commercial speech.' Part II will look at how the court has historically dealt with commercial speech.

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68 *Id.* This quote was also cited by Justice White for the plurality in *Metromedia.* Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1981).

69 City of Cincinnati v. Discovery Network Inc., 507 U.S. 410, 428-31 (1993). *See also Metromedia,* 453 U.S. at 516.

70 *Discovery Network, Inc.*, 507 U.S. at 429.

71 *Id.*

72 *Id.*

73 *See* EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 152-56 (1985).

1. Defining Commercial Speech

Of course, to apply the commercial speech doctrine, one must first determine what qualifies as commercial speech. The Supreme Court has had a hard time coming up with a clear and concise definition of commercial speech.[74] A clear definition of the term is essential because the Supreme Court treats commercial speech differently from other types of speech.[75] While the Court has often referred to the "common-sense difference"[76] between commercial speech and noncommercial speech to base its distinction, in several cases, the Supreme Court has found the distinction to be not so clear cut.[77] For example, in *Virginia Board,* [78] the first case that expressly recognized that commercial speech was protected somewhat by the First Amendment, the Court defined commercial speech as "speech which does 'no more than propose a commercial transaction.'"[79] Just five years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commisson of New York,*[80] the Court defined commercial speech as "expression solely related to the economic interests of the speaker and its audience."[81] These two tests could produce different results because the *Virginia Board* approach looks at the actual content of the commercial message while the *Central Hudson* approach is concerned with the economic intent of the speaker and audience. Many other cases have shown that the court has had a schizophrenic approach in its attempt to define commercial speech.[82]

The Court has only once expounded on what defines commer-

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[74] Justice Stevens has acknowledged that the Court's treatment of commercial speech cases "creates the impression that commercial speech is a fairly definite category that is protected by a fairly definite set of rules that differ from those protecting other categories of speech. That impression may not be wholly warranted." Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 81 (1983) (Stevens, J., concurring). Justice Stevens' thoughts echoed those of Justice Brennan's, who just a year earlier stated, "[i]f anything, our cases have recognized the difficulty in making a determination that speech is either 'commercial' or 'noncommercial.'" *Metromedia,* 453 U.S. at 539 (Brennan, J., concurring).

[75] *See infra* Section II(B).

[76] *See, e.g.,* Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 349 (1986) (Brennan, J. dissenting); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980); Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

[77] *Id.*

[78] 425 U.S. 748 (1976).

[79] *Virginia Bd.*, 425 U.S. at 762. But later in the opinion, the Court seemed to alter its definition of commercial speech when it recognized that "all commercial messages . . . contain a very great public interest element." *Id.* at 769.

[80] 447 U.S. 557 (1980).

[81] *Id.* at 561.

[82] *See* Bolger v. Youngs Drug Product Corp., 463 U.S. 60 (1983); Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989); Cincinnati v. Discovery Network, Inc. 507 U.S. 410, 419 (1993).

cial speech. In *Bolger v. Youngs Drug Product Corp.*,[83] the Court shows that commercial speech is not readily distinguishable from noncommercial speech. Youngs Drug Co., a manufacturer, seller, and distributor of contraceptives, wished to make unsolicited advertisement of its products through the U.S. postal service.[84] A Federal law prohibited the unsolicited advertisements of contraceptives through the mail.[85] Because some of the materials contained information about prophylactics, the issue was whether the speech was commercial or noncommercial.[86]

The Court held that: (1) the pamphlets proposed a commercial transaction; (2) the pamphlets were considered advertisements; (3) the pamphlets referred to a specific product; and (4) the speaker had an economic motivation for mailing the pamphlets; there was strong support that the pamphlets were commercial speech.[87] However, the Court noted that if only one of those four factors were present the speech would not necessarily be rendered commercial.[88] The Court also recognized that a company must have full First Amendment protection to speak on public issues if the communication did not have a commercial overtone.[89]

Many courts have followed the Court's holding in *Bolger* to determine whether speech is commercial or noncommercial.[90] However, since the *Bolger* Court noted that if only one of the four aforementioned factors was present, the issue remains—what combination of the factors is sufficient to make the speech commercial? In several cases, that issue has become the main focus of litigation.[91] Although the exact definition of commercial speech is unclear,[92] in most cases it can be determined whether speech is

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83 463 U.S. 60 (1982).

84 *Bolger*, 463 U.S. at 62. Youngs Drug wished to distribute three types of advertisements: a flyer promoting its different products available at drug stores including prophylactics, flyers exclusively or substantially devoted to promoting prophylactics, and flyers discussing the desirability and availability of prophylactics in general. *Id.* at 62.

85 *Id.* The statute in question, 39 U.S.C. § 3001(e)(2), states, "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service Directs. . . ." 39 U.S.C. § 3001(e)(2) (Supp. I 1994). *See also Bolger*, 463 U.S. at 61.

86 *Id.*

87 *Id.* at 66-67.

88 *Id.*

89 *Id.* at 68.

90 *See, e.g.*, Central Am. Refugee Ctr.-Carecen (N.Y.) v. City of Glen Cove, 753 F. Supp. 437 (E.D.N.Y. 1990); Curtis v. Thompson, 840 F.2d 1291 (7th Cir. 1988); Simon & Schuster, Inc. v. Members of State Crime Bd., 724 F. Supp. 170 (S.D.N.Y 1989).

91 *See, e.g.*, Ocean Bio-Chem., Inc. v. Turner Network Television, Inc., 741 F. Supp. 1546 (S.D. Fla. 1990).

92 Some critics have worried that the lack of a clear and concise definition of commercial speech has placed some noncommercial speech in jeopardy of receiving the full pro-

commercial or noncommercial. For speech which is deemed to be commercial the commercial speech doctrine is applied.

2. A Historical Overview of the Commercial Speech Doctrine

Up until two decades ago, commercial speech was not thought to be protected by the First Amendment.[93] The Supreme Court never discussed commercial speech until its decision in *Valentine v. Chrestensen.*[94] The *Chrestensen* case involved an entrepreneur who distributed leaflets inviting patrons to visit his Navy submarine.[95] After being told that his leaflets would violate a New York City law which prohibited the distribution of commercial and business advertising, the entrepreneur added to the other side of his leaflet a protest against the City Dock Department for refusing him wharfage facilities for his vessel.[96] Justice Roberts, writing for a unanimous Court stated, "the Constitution imposes no such restraint on government with respect to purely commercial advertising."[97] *Chrestensen* was a curious opinion because the Court relied on no reasoning or authority to back up its position.[98] Only seventeen years later, Justice Douglas, who had joined the unanimous *Chrestensen* opinion, criticized it as being "casual, almost offhand. And it has not survived reflection."[99]

The first indication that *Chrestensen* might be overruled appeared in *New York Times Co. v. Sullivan.*[100] In *Sullivan,* the Court

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tection under the First Amendment that it deserves. *See* ROME & ROBERTS, *supra* note 73, at 101. *See also* David F. McGowan, Comment, *A Critical Analysis of Commercial Speech,* 78 CAL. L. REV. 359, 401 (1990) (arguing that commercial speech should be defined as speech that does no more than propose the sale of a specific need, good, or service).

93 *See supra* note 55 and accompanying text. As you may note, the First Amendment does not distinguish between different types of speech. However, the Supreme Court has traditionally categorized certain types of speech to determine if they are constitutionally protected under the First Amendment. *See* Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Roth v. United States, 352 U.S. 964 (1957) (obscenity); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel). Many critics have stated that the framers of the Bill of Rights had no intention of protecting commercial speech. *See* MICHAEL J. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 5-6 (1979). *See also* Stuart Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?,* 76 VA. L. REV. 627, 631-32 (1990). Some commentators have criticized the distinctions that the court has made in delineating First Amendment Protection and have stated that only political speech should be given protection. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 20 (1971); 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) (Scalia, J., dissenting).

94 316 U.S. 52 (1941).

95 *Id.* at 52-53.

96 *Id.* at 53.

97 *Id.* at 54.

98 ROME & ROBERTS, *supra* note 73, at 24.

99 Cammarano v. United States, 358 U.S. 498, 514 (1959) (concurring opinion).

100 376 U.S. 254 (1964).

distinguished the advertisement at issue with the advertisement in *Chrestensen.*[101] Finding that the advertisement in *Sullivan*[102] "expressed opinion, re-cited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern,"[103] the Court found that the advertisement, "was not a commercial advertisement in the sense that was used in *Chrestensen.*"[104]

Four years later in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* the Court continued its assault on the *Chrestensen* holding.[105] In *Pittsburgh Press,* the Court cut back on *Chrestensen,* recognizing "that speech is not rendered commercial by the mere fact that it relates to an advertisement."[106] The Court distinguished the *Chrestensen* speech which did "no more than propose a commercial transaction"[107] with the protected speech of the New York Times advertisement of *Sullivan.*[108] The Court then asked whether the communication at issue was closer to that in *Sullivan* or *Chrestensen,* ultimately finding it closer to *Chrestensen* communication.[109] The Court noted that even if the advertisement at issue was entitled to some First Amendment protection, the advertisement would still not be entitled to First Amendment protection because the advertisement was for an illegal commercial activity.[110]

The Court continued its subtle attack against *Chrestensen* in *Bigelow v. Virginia.*[111] In *Bigelow,* the Court found unconstitutional a Virginia law which made the publishing of out of state abortion advertisements a misdemeanor.[112] The Court recognized that "speech is not stripped of First Amendment protection merely be-

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101 *Id.* at 266. *See also* David F. McGowan, *A Critical Analysis of Commercial Speech,* 78 CAL. L. REV. 359, 363 (1990).

102 The advertisement at issue in *Sullivan* detailed certain events in the South where it was alleged that non-violent black protesters were met by a "wave of terror" from those who refused to recognize their rights. 376 U.S. at 259. The article chronicled several events showing how peacefully protesting blacks were having rights taken away from them. *Id.* For example, the article detailed how blacks peacefully protesting at the Alabama capital were met with tear gas and also alleged that Martin Luther King's home had been bombed by "Southern violators." *Id.*

103 *Sullivan,* 376 U.S. at 266.

104 *Id.*

105 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

106 *Id.* at 384 (quoting *Sullivan,* 376 U.S. at 254).

107 *Id* at 385.

108 *Id.*

109 *Id.*

110 At issue in the case was whether a violation of First Amendment rights occurred when a newspaper publisher violated an ordinance prohibiting the publishing of a help wanted advertisement which discriminated by sex. *Id.* at 378.

111 421 U.S. 809 (1975)

112 *Id.* The specific law in question in section 18.1-63 of the Virginia Code Annotated stated, "[i]f any person, by publication, lecture, advertisement, or by the sale or circulation

cause it is published in that form."[113] However, it was not known at the time of the *Bigelow* decision whether the Court had granted protection because the communication at issue contained a non-commercial element or whether the Court was holding that all commercial speech was protected by the First Amendment.[114]

Finally, in 1975, twenty-four years after *Chrestensen,* the Court recognized that commercial speech was entitled to First Amendment protection in *Virginia Board.*[115] The issue before the court was the constitutionality of a Virginia statute which made a pharmacist guilty of unprofessional conduct if he advertised the price of prescription drugs.[116] Justice Blackmun, writing for the Court, felt the issue was whether the communication, "I will sell you the X prescription drug at the Y price" was wholly outside First Amendment protection.[117]

The Court held that commercial speech is not wholly outside First Amendment protection even if money is spent to protect the commercial speech.[118] The Court's rationale for protecting commercial advertisements was that consumers and society "may have a strong interest in the free flow of commercial information."[119] The court reasoned that if no protection were given, advertisers could simply achieve First Amendment protection by adding statements that comment on issues of public interest.[120] The Court did not address the issue of whether commercial speech had as much First

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of any publication, or in any manner, encourage or prompt the procuring of an abortion or miscarriage, he shall be guilty of a misdemeanor." *Id.* at 812-13.

113 *Bigelow,* 421 U.S. at 818.

114 *See* Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm,* 42 CASE W. RES. L. REV. 411, 443 (1992). *See also* Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1975).

115 425 U.S. 748 (1975).

116 *Id.* at 749-50. The statute in that case, section 54-524.2(a) of the Virginia Code Annotated stated:

> [a]ny pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts, by radio, or otherwise distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health or welfare; or (3) publishes, advertises, or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee premium, discount, rebate, or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

Id. at 750 n.2.

117 *Virginia Bd.,* 425 U.S. at 761.

118 *Id.*

119 *Id.* at 764.

120 The Court seemed to be worried that the *Valentine/Sullivan* distinction they created could have been evaded by altering the message of the commercial speech.

Amendment protection as other forms of speech.[121]

Soon after the *Virginia Board* decision, the Court addressed the commercial speech problem in the context of lawyer advertising in *Bates v. State Board of Arizona.*[122] The issue in *Bates* was whether Arizona's state bar disciplinary rules were unconstitutional because they prevented lawyer advertising.[123] After dispensing with the argument that the Sherman Act was not an issue,[124] the Court reaffirmed that commercial speech was entitled to some First Amendment protection and that the arguments made by the State bar were inadequate to suppress all advertising by lawyers.[125] While *Bates* dealt with many issues that were tailored to the legal profession,[126] it also clarified the *Virginia Board* decision. The Court reaffirmed that false and deceptive advertising could be regulated.[127] In addition, the Court found that there can be reasonable time, place, and manner restrictions on commercial speech similar to those placed on other types of protected speech.[128] Finally, the Court distinguished the issues in *Bates* from the "special problems of advertising on the electronic broadcast media which will warrant special consideration."[129]

A year after *Bates,* in *Ohralik v. Ohio State Bar Ass'n,*[130] the Court decided the extent to which commercial speech should receive First Amendment protection. The Court summed up its recent jurisprudence of the commercial speech doctrine by stating, "we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial

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121 After the *Virginia Board* case, the Court addressed this issue in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978). *See supra* notes 98-99 and accompanying text.

122 433 U.S. 350 (1977).

123 *Id.* at 355.

124 *Id.* at 359.

125 The Court rejected six of the State bar's justifications for the ban: the adverse affect on the profession, the inherent misleading nature of attorney advertising, the alleged effect on the administration of justice, the undesirable economic affects of advertising, the alleged adverse affect on the quality of legal services, and the problems of enforcement. *Id.* at 368-79.

126 The issue of lawyer advertising has come up numerous times in the Supreme Court's search for a coherent First Amendment commercial speech doctrine. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1977); *In Re* Primus, 436 U.S. 412 (1978); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). *See also* Robert Battery, Note, *Loosening the Glue: Lawyer Advertising, Solicitation and Commercialism in 1995,* 9 GEO. J. LEGAL ETHICS 287 (1995).

127 *Bates,* 433 U.S. at 383. *See also Virginia Bd.,* 425 U.S. at 771-72.

128 *See also supra* Section II(A).

129 *Bates,* 433 U.S. at 384.

130 436 U.S. 447 (1977).

expression."[131] Thus, the Court held that commercial speech would be given less First Amendment protection than non-commercial speech. However, the Court did not address the question that was on everyone's mind: since commercial speech is protected by the First Amendment, but is afforded less protection than non-commercial speech, what is the applicable standard to determine if a regulation aimed at curtailing commercial speech is constitutional?

That question was answered in *Central Hudson.*[132] The issue in *Central Hudson* was whether the New York State Public Service Commission could prevent electricity companies from advertising in their electric bills during the energy crisis of the seventies.[133] The Court held that "the Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[134] The Court announced a four part test to determine whether a purely commercial expression can be regulated without violating First Amendment principles:[135]

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[131] *Id.* at 456. Several justifications have been given for giving commercial speech less First Amendment protection; commercial speech has less intrinsic value than political, scientific, artistic, or literary ideas; commercial speech is often accompanied by conduct; and commercial speech is not value free in that commercial speech tries to lead the world in a certain direction. *See* Edwin J. Eberle, *Practical Reason: The Commercial Speech Paradigm,* 42 CASE W. RES. L. REV. 411, 460-68 (1992). *See also* Richard A. Posner, *Free Speech in an Economic Perspective,* 20 SUFFOLK U. L. REV. 1, 22 n.43, 39-40 (commercial speech does not have the same qualities as other speech because advertising fails to yield significant external effects).

[132] 447 U.S. 557 (1980).

[133] *Id.*

[134] *Id.* at 563.

[135] The Court has stated that the analysis to be used in commercial speech cases is similar to the analysis used in determining the constitutionality for time, place, and manner regulations. In *San Francisco Arts & Athletics v. U.S.O.C.,* 483 U.S. 522 n.16 (1987), the Court stated:

> A restriction on nonmisleading commercial speech may be justified if the government's interest in the restriction is substantial, directly advances the government's asserted interest, and is no more extensive than necessary to serve the interest . . . . Both this test and the time for a time, place, or manner restriction under *O'Brien* require a balance between the governmental interest and the magnitude of the speech restriction. Because their application to these facts is substantially similar, they will be discussed together.

In *Central Hudson,* the Court never explicitly stated which level of judicial scrutiny was to be used in commercial speech cases. The Supreme Court in Equal Protection cases traditionally uses three levels of review to analyze the constitutional issues: strict scrutiny, intermediate level scrutiny and the rational relationship standard. *See* ROME & ROBERTS, supra note 75, at 117-19. The Court has recognized that the *Central Hudson* test is most similar to the intermediate level scrutiny test. *See also* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2379 (1995).

> At the outset, we must determine whether the commercial expression is protected by the First Amendment.[136] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial.[137] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted,[138] and whether it is not more extensive than is necessary to serve that interest.[139]

Applying this test to the New York Public Service Commission's regulation, the Court found the regulation to be unconstitutional.[140] First, the Court recognized that the expression at issue was neither inaccurate nor reflective of unlawful activity.[141] Next, the Court moved to the second part of the test, finding that the State's interest in conserving energy and keeping rates fair and efficient was a substantial governmental interest.[142] The Court then asked whether the regulation directly advanced the government's asserted interest.[143] The Court disagreed with the Commission's finding that the prohibition on advertising would create "equity and efficiency" in Central Hudson's rates, but it found that the conservation interest was advanced by the regulation.[144] Finally, the Court reached the issue of whether the "Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation."[145] The Court held that the

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136 *See* United States Postal Service v. Athena Prod., Ltd., 654 F.2d 362 (5th Cir. 1981); Hollywood House Int'l, Inc. v. Klassen, 508 F.2d 1276 (9th Cir. 1974).

137 *See* Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985); Sector Enter., Inc., v. DiPalermo, 779 F. Supp. 236 (N.D.N.Y. 1991); Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982); Guardian Plans, Inc. v. Teague, 870 F.2d 123 (4th Cir. 1989); Actmedia, Inc. v. Stroh, 830 F.2d 957 (9th Cir. 1986); Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985).

138 *See* Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983); John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980).

139 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980). *See also* Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992); American Future Sys., Inc. v. Pennsylvania State Univ., 752 F.2d 854 (3d Cir. 1984). The fourth prong required the State to show that other less restrictive measures would not suffice to meet the government interest. *Central Hudson*, 447 U.S. at 570. This is the prong from which many commentators believe the Courts derive most of their power. *See* Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 290-91 (1987); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359 (1990).

140 *Central Hudson*, 447 U.S. at 557.

141 *Id.* at 556.

142 *Id.* at 568.

143 *Id.*

144 *Id.* at 569.

145 *Id.* at 569-70.

burden was on the Commission to justify that the State interest could not be achieved by a more limited regulation and that it had not been proven that a more limited restriction would not adequately serve the State's interests.[146] The Court also held that the prohibition prevented utility companies from promoting the use of energy efficient products and services.[147]

After *Central Hudson,* it appeared that the Court had finally developed a permanent test to address the commercial speech problem. However, the Court has subsequently tinkered with the last two prongs of the *Central Hudson* test. The third prong—whether the regulation directly advances the governmental interest asserted—has been the prong with which the Court has scrutinized most carefully.

The Court first reexamined the third prong of the *Central Hudson* test in *Posadas.*[148] In *Posadas* the 5-4 majority used the *Central Hudson* test to uphold a Puerto Rican statute prohibiting casinos from advertising gambling in Puerto Rico, but allowing the casinos to advertise elsewhere in the United States and overseas.[149] The *Central Hudson* test was altered to give greater deference to state legislatures.[150] Chief Justice Rehnquist,[151] writing for the majority, found the second prong of the test—whether the asserted government interest is substantial—was satisfied by deferring to the reasons the legislature provided in asserting that the government interest was substantial.[152] In addition, when the Court addressed step three of the *Central Hudson* test—whether the regulation directly advances the governmental interest asserted—the Court asked whether the Puerto Rican Legislature "believed," when it enacted the legislation, that the regulation would serve to advance the government interest asserted.[153] The Court then rejected the argument that Puerto Rico could not prevent advertising in Puerto Rico because gambling is not a constitutionally protected activity.[154] Finally, the Court reasoned that since the legislature had the

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146 *Id.* at 570.

147 *Id.*

148 478 U.S. 328 (1986).

149 *Id.*

150 *Id.* at 331-37. *See also* Albert P. Mauro Jr., Comment, *Commercial Speech after* Posadas *and* Fox*: A Rational Basis Wolf in Sheep's Clothing,* 66 TUL. L. REV. 1931, 1954-58 (1992).

151 Chief Justice Rehnquist has played a major role in shaping the commercial speech doctrine. He was the only Justice to dissent in *Virginia Board* and *Central Hudson.* Some commentators have criticized the Chief Justice for transforming the *Central Hudson* intermediate level test to a rational basis review. *See* Mauro, *supra* note 150, at 1954-58.

152 *Posadas,* 478 U.S. at 341.

153 *Id.* at 342.

154 *Id.* at 345. Some have criticized the Court for its *Posadas* decision, pointing out that the Court applied a rationality test instead of the intermediate level of scrutiny that seemed

power to have gambling prohibited altogether, the legislature implicitly had the power to limit casino advertising.[155] Thus, the third prong of the *Central Hudson* test appeared to be altered, such that if the activity promoted by the commercial activity is not constitutionally protected, the Court may defer to the legislature to a greater extent than was thought to be allowed when *Central Hudson* was decided.[156]

Just eight years later, in *Cincinnati v. Discovery Network, Inc.*[157] the Court implicitly rejected *Posadas,* by holding that the City could not revoke two commercial advertisers' newsrack permits.[158] In a desire to prevent commercial newsracks from being placed on public property, Cincinnati revoked the newsrack permits on the ground that their magazines were commercial handbills under the City ordinance.[159] Those two companies' newsracks comprised only sixty-two of the two thousand newsracks that were on Cincinnati public property.[160] The City argued that it wished to only restrict newsracks which dispensed commercial materials and that the state's interest in aesthetics and safety allowed the city to discriminate against commercial newsracks.[161] The Court rejected the City's argument because it found that there was no reasonable relation to the City's interest in aesthetics and safety.[162] The Court rejected the argument that since commercial speech also receives less constitutional protection than noncommercial speech, the City could revoke the permits while allowing noncommercial newsracks to exist on public grounds without having the City's judgment undermined.[163] The Court reasoned that the City should not treat the commercial newsracks differently from the noncommercial newsracks, which were still allowed to be displayed because com-

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to be applied after *Virginia Board. See* Robert T. Cahill, Note, City of Cincinnati v. Discovery Network, Inc.: *Towards Heightened Scrutiny for Commercial Speech?,* 28 U. RICH. L. REV. 225, 233 (1994). *But see* Denise M. Trauth & John L. Hoffman, *The Constitutional Speech Doctrine:* Posadas *Revisionism- Advertising and Commercial Speech,* ADVERTISING AND COMMERCIAL SPEECH-READINGS FROM COMMUNICATIONS AND THE LAW 103, 111 (Honorable Theodore R. Kupferman ed., 1990), which argues that since gambling is a constitutionally protected activity, the Court was just following the holding of *Bigelow.*

155 *Id.* at 345-46. That argument has been dubbed the "greater-includes-the-lesser" argument. *See* 44 Liqourmart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1496 (1996).

156 *See also* Floyd Abrams, *Good Year for the Press, But Not for Advertisers,* NAT'L L. J., Aug. 11, 1986, at S13.

157 507 U.S. 410 (1993).

158 *Id.* at 413.

159 *Id.*

160 *Id.*

161 *Id.* at 418.

162 *Id.* at 419.

163 *Id.* at 418-24.

mercial speech is also constitutionally protected.[164] Finally, the Court noted that the traditional reason for treating noncommercial speech differently from commercial speech—asserting an interest in preventing commercial harms—was not present.[165]

The Court has continued to distance itself from *Posadas* in two recent decisions: *Edenfield v. Fane*[166] and *United States v. Edge Broadcasting Co.*[167] The *Edenfield* Court held that a Florida Bar of Accountancy's rule preventing direct, in-person solicitation was unconstitutional.[168] In that case, the Court held that the third prong of the statute was satisfied if the challenged regulation advances these interests in a direct and material way.[169] Elaborating on this prong, the Court stated: "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[170] Thus, it appeared that the Court was rejecting the *Posadas* test which was much more deferential to legislatures.

However, in *Edge*, the Court seemed to take out some of the bite that the third prong might have gained from Edenfield. At issue in *Edge* was whether a federal statute barring radio broadcasts of state lotteries by radio licensees in nonlottery states—even those stations which derive most of their revenue and have most of their viewing base in the lottery state—violated the First Amendment.[171] The District Court, affirmed by the Court of Appeals, found the law unconstitutional because the government did not satisfy the third prong of the *Central Hudson* test.[172] The court held that the regulation did not directly advance the government's interest of supporting a state's anti-gambling policy by excluding invitations to gamble because the restriction "was ineffective and gave only remote support to the Government's interest."[173] The District Court believed that although the law did prevent gambling advertising via the radio, citizens of the non-lottery state who watched television and bought newspapers which emanated from the lottery state

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164 *Id.* at 419.
165 *Id.* at 420-21.
166 507 U.S. 761 (1993).
167 509 U.S. 418 (1993).
168 *Edenfield,* 507 U.S. at 765.
169 *Id.* at 771.
170 *Id.* at 770-71.
171 *Edge,* 509 U.S. at 421.
172 *Id.* at 425.
173 *Id.* at 431.

were still exposed to gambling advertisements.[174] The Court reversed, holding that the third prong was satisfied. The decision stated that the law furthered the state interest because citizens in the non-lottery state who listened to the radio were prevented from being exposed to lottery advertising.[175] In so holding, the Court stated:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced.
>
> Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even when it is not wholly eradicated.[176]

The Court seemed to adopt that a piecemeal approach to solving the problem would be acceptable. The Court has made one attempt to clarify the fourth prong of the *Central Hudson* test — whether the regulation is not more extensive than is necessary to serve that interest— in *Board of Trustees of the State University of New York v. Fox.*[177] In *Fox,* the Court found that the fourth prong of the *Central Hudson* test did not require the government to promulgate regulations that protect the State's interest in the least restrictive fashion.[178] Rather, the Court found that regulations will pass the fourth prong of the *Central Hudson* test if the restrictions, "are 'narrowly tailored' to serve a significant governmental interest . . . ."[179] Specifically, the Court stated:

> What our decisions require is a 'fit' . . . that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interests served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.[180]

The majority in *Fox* acknowledged that some language from

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174 *Id.* at 427.
175 *Id.* at 434.
176 *Id.*
177 492 U.S. 469 (1989). At issue in *Fox* was whether the State University could bar "tupperware parties" in the student dormitories. *Id.* at 471.
178 *Id.*
179 *Id.* at 478.
180 *Id.* at 480.

prior decisions including language in *Central Hudson* itself could lead to that conclusion.[181] However, the Court noted that the word "necessary" is sometimes used too loosely[182] and that previous Supreme Court decisions had also stated that the fourth prong was more flexible.[183]

The most recent commercial speech case decided by the Court, *44 Liquormart, Inc. v. Rhode Island,*[184] shows that the Court is still deeply divided on many commercial speech issues. However, the case does seem to answer the question of what impact *Posadas* has on the commercial speech doctrine. In *Liquormart,* a Rhode Island statute categorically prohibited "the publication or broadcast of any advertisements—even those referring to sales in other States—that 'make reference to the price of any alcoholic beverages.'"[185] The Court of Appeals found the law constitutional. It reasoned that the law served the public interest because the competitive price advertising would lower prices which, in turn, would increase alcohol consumption.[186] While every Supreme Court Justice found the Rhode Island law unconstitutional, there was little agreement as to why this was so.

Justice Stevens opined that not all commercial speech regulations should be afforded the same review.[187] He distinguished laws that prohibit commercial speech because of the "substance of the information communicated," from laws which regulate commercial speech which target untruthful, misleading commercial messages for reasons related to the preservation of a fair bargaining process.[188] Justice Stevens believed that commercial speech which is regulated because of the message it communicates is dangerous because it "all but foreclose[s] alternative means of disseminating certain information."[189] According to Justice Stevens, that type of regulation appeared to be more like a traditional First Amendment concern. Thus, he argued, the less rigorous test used for commer-

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181 *Id.* at 476. This case was criticized for transforming the *Central Hudson* test from an intermediate scrutiny test to a rational basis test. *See* Mauro, *supra* note 152.

182 492 U.S. at 476-77. *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

183 *Fox,* 492 U.S. at 477; *see also In re* R.M.J., 455 U.S. 191, 203 (1982); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Bates v. State Bar, 433 U.S. 350 (1977).

184 116 S. Ct. 1495 (1996).

185 *Id.*

186 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1st Cir. 1994). Note that the Court of Appeals also found that the Twenty-First Amendment, which repealed the prohibition of liquor, gave the statute an added presumption of validity. *Id.* at 8. The Supreme Court rejected this argument. 116 S. Ct. at 1514.

187 *Liquormart,* 116 S. Ct. at 1507.

188 *Id.*

189 *Id.*

cial speech cases should not be applied.[190] Justice Stevens reasoned that regulations suppressing the truth are just as troubling as a regulation which suppresses noncommercial speech.[191] He further argued that since the reason commercial speech is afforded less protection than other speech is to protect consumers from commercial harms (such as deception and overreaching), a regulation banning truthful, nonmisleading commercial speech would rarely protect consumers from such commercial harms.[192] Since the Rhode Island law was a ban on truthful, nonmisleading speech about a lawful product, Justice Stevens felt that "special care" should be taken in reviewing the constitutionality of the law.[193]

Turning to the *Central Hudson* test, Justice Stevens examined whether prong three of the test—whether the regulation directly advanced a government interest—was satisfied.[194] In believing that the state must show the regulation would advance its interest "to a material degree,"[195] Justice Stevens found that the state did not meet its burden because there was no proof that the price advertising ban would significantly advance the State's interest.[196]

He then directed an offensive against *Posadas.* The State argued that it had merely exercised appropriate legislative judgment, just like the Puerto Rican legislature.[197] Justice Stevens felt that since *Posadas,* extreme deference to legislatures was a clear break with the Court's past, and thus *Posadas* should not be given much force.[198] He also rejected Rhode Island's argument that since it had the power to ban alcohol, it could ban the advertising of alcohol prices.[199] Rather, Justice Stevens dismissed that argument as dicta.[200]

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190 *Id.* at 1506-07. Justice Stevens cited *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 n.9 (1980) ("We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech can screen from public view the underlying governmental policy."), and *Linmark Assoc., Inc. v. Willingboro,* 431 U.S. 85 (1977) to bolster his argument.

191 *Id.* at 1507-08.

192 *Id.* Justice Stevens was very critical of the legislature for enacting such a statute. He believed that the only reason a legislature would enact such a statute was because the legislature would "offensively" assume "that the public would respond 'irrationally to the truth.'"

193 *Id.* at 1508-09.

194 *Id.* at 1509.

195 *Id.*

196 *Id.* Justice Stevens also noted that the fourth prong—that the restriction on speech be no more extensive than necessary—could not be met. *Id.* at 1510.

197 *Id.* at 1510-11.

198 *Id.* at 1511.

199 *Id.* at 1512.

200 *Id.* Justice Stevens argued that the assumption of the greater than lesser argument—that banning the lesser activity is less intrusive then banning the greater activity—was un-

Justice Scalia acknowledged that the law was unconstitutional under the *Central Hudson* test but felt inclined to add that he would not be averse to revisiting whether *Central Hudson* was decided correctly. Noting that the core of the First Amendment—prevention of the suppression of political ideas—was not at issue and that he considered the state legislative practices toward commercial speech at the time the First Amendment and/or the Fourteenth Amendment was enacted relevant, it appeared that Justice Scalia favored giving commercial speech little or no First Amendment protection.[201]

Justice O' Connor rejected a more stringent review and applied the *Central Hudson* test.[202] Focusing on the fourth prong of the test—whether there is a reasonable fit between the legislature's goal and method—Justice O'Connor opined that the fit between the State's method (banning the advertising of alcohol prices) and its goal (to reduce alcohol consumption) was not reasonable. Other methods were available which would not intrude on the seller's ability to provide truthful, nonmisleading information.[203] Justice O'Connor reasoned that the State could have increased alcohol taxes, limited per capita purchases or conducted an anti-alcohol campaign.[204] O'Connor then took aim at *Posadas,* noting that since that case, the Court had been less deferential in accepting the State's professed goal.[205]

Justice Thomas found the law unconstitutional because the government's asserted interest— which in effect "was to keep users of a product or service ignorant in order to manipulate their choices in the marketplace"—was per se illegitimate.[206] Justice Thomas also stated that he did not see a philosophical or a historical reason why commercial speech is of lower value than noncommercial speech.[207] He indicated that he, too, was uncomfortable with *Central Hudson,* which in his opinion should not be applied where the asserted interest is to prevent the dissemination of information.[208] Rather, he would overrule *Central Hudson* (which he be-

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sound. *Id.* Using the proverb: "Give a man a fish, and you feed him once a day. Teach a man to fish, and you feed him for a lifetime." Justice Stevens argued that preventing the lesser activity—teaching a man to fish—was much more injurious then prohibiting the greater activity—giving a man a fish. *Id.*

201 *Id.* at 1515 (Scalia, J., dissenting).

202 *Id.* at 1520-21 (O'Connor, J., concurring).

203 *Id.* at 1521.

204 *Id.* at 1521-22.

205 *Id.*

206 *Id.* at 1515-16 (Thomas, J., concurring).

207 *Id.* at 1518.

208 *Id.* ("I do not join the principal opinion's application of the Central Hudson balanc-

lieves could never be applied uniformly) and return to the principles of *Virginia Board.*[209] Justice Thomas then criticized Justice Stevens' reliance on the third prong, noting that if the State was more successful with its price advertising ban, then the State may have been able to show that it had advanced the State's interest.[210] Justice Thomas then accused Justice Stevens and Justice O'Connor of adopting a stricter fourth prong of *Central Hudson.*[211] Noting that both Justices had repudiated the *Posadas* "greater includes the lesser" argument, Justice Thomas took that to mean that the fourth prong—the restriction on speech must be no more extensive than necessary—would be more lenient. A legislature could now choose between regulating speech of a type of activity or thing or regulating that activity or thing itself. Therefore, a restriction on the speech rather than on the activity itself will always be unconstitutional because the legislature could have been more effective by regulating the thing or activity itself.[212]

Although twenty years have passed since the Court first explicitly gave commercial speech First Amendment protection in *Virginia Board,* the commercial speech doctrine is still not a settled area of law. Despite a plethora of cases reaching the Court, there is still debate about the extent of the protection commercial speech deserves. The *Central Hudson* test, which was believed to be an "end all" test, has metamorphosed and is still under attack. However, many guiding principles have emerged from the *Virginia Board* progeny which will be useful in determining whether commercial speech on the Internet can be regulated.

While certain sections of the *Central Hudson* test have been whittled away, the first two prongs are still intact. Under *Central Hudson,* commercial expression must be protected by the First Amendment.[213] The commercial speech must concern lawful activity and not be misleading, and the regulation must directly advance the governmental interest asserted.[214] These two criteria are easily met in most cases. Once these criteria are met, the next step is to determine whether the regulation directly advances the government interest asserted under the *Central Hudson* test.[215] The ap-

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ing test because I do not believe that such a test should be applied to a restriction of commercial speech, *at least when,* as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark.") (emphasis added).

209 *Id.* at 1520.

210 *Id.*

211 *Id.* at 1518-19.

212 *Id.*

213 *See supra* notes 136-42 and accompanying text.

214 *See supra* notes 136-43 and accompanying text.

215 *See supra* notes 136-45 and accompanying text.

proach the court followed in *Posadas*—finding that the asserted government interest is substantial when the legislature has found the government interest to be substantial[216]—seems to have been overruled by *Liquormart*.[217]

Rather, a government body seeking to uphold the constitutionality of a restriction of commercial speech "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[218] However, a piecemeal approach can be used by the legislature. A legislature does not have to show that all harms it sought to prevent were eradicated by it—rather, the legislature can advance its purpose by substantially reducing the harm it seeks to regulate.[219] Finally, for the regulation to pass constitutional muster, the fourth prong of *Central Hudson* must be met—the regulation must not be more extensive than necessary to serve the government's interest.[220] However, in *Fox*, the Court stated that only a reasonable fit is needed to meet the fourth prong—the fit between the regulation and the government need not be perfect.[221]

While *Virginia Board* and its progeny have created a coherent doctrine of commercial speech, the commercial doctrine is still very unsettled. In the twenty years since *Virginia Board*, the Court has had to revisit the commercial speech doctrine to clarify what is needed in order for a regulation of commercial speech to be constitutional under the First Amendment. The widely varying views expressed by the Justices in *Liquormart* further show that the commercial speech doctrine is far from settled and may be completely overhauled in the upcoming years.

C. *Should Commercial Speech On The Internet Be Distinguished From Commercial Speech In Other Media?*

In its interpretation of the First Amendment, the Supreme Court has spent much time categorizing different types of speech and granting different levels of First Amendment protection depending on the Court's categorization.[222] The Court has traditionally applied different levels of First Amendment protection to

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216 *See supra* notes 149-57 and accompanying text.

217 *See supra* notes 185-201 and accompanying text.

218 Edenfield v. Fane, 507 U.S. 761, 762 (1993); *See also supra* notes 168-70 and accompanying text.

219 *See supra* notes 172-77 and accompanying text.

220 *See supra* notes 133-48 and accompanying text.

221 *See supra* notes 178-84 and accompanying text.

222 *See supra* Section II B(2).

different media.[223] The Court has stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[224] Thus, it is very important to categorize communications over the Internet, because the way they are categorized determines where Internet communication lies on the continuum of First Amendment protection.

One of the first express statements that different media are entitled to different First Amendment protection was found in Justice Jackson's concurring opinion in *Kovacs v. Cooper*.[225] Justice Jackson stated:

> I do not agree that, if we sustain regulations of prohibitions of sound tracks, they must therefore be valid if applied to other methods of 'communication of ideas.' The moving picture screen, the radio, the newspaper, the handbill, the sound track and the street corner orator have different natures, values, abuses and dangers. Each in my view is a law unto itself . . . .[226]

This idea was revived in Justice White's plurality decision in *Metromedia, Inc. v. San Diego*.[227] In deciding whether a San Diego ordinance prohibiting off site commercial billboards was unconstitutional, Justice White wrote:

> The Court has often faced the problems of applying the broad principles of the First Amendment to unique forms of expression. Even a cursory reading of these opinions reveals that at times First Amendment protection must yield to other societal interests. These cases support the cogency of Justice Jackson's remarks in *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949): 'Each method of communicating ideas is a law unto itself' and that the law must reflect the 'differing natures, values, abuses, and dangers' of each method. We deal here with the law of billboards.[228]

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223 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (illustrating how broadcast media is often given less First Amendment protection); Kovacs v. Cooper, 336 U.S. 77 (1949) (distinguishing sound tracks from other media); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1980) (distinguishing billboards from other media). *See also* Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067 (1994) (arguing that media specific distinctions should give way to a broad spectrum approach); Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995) (showing how the latest developments in communications should dispel the notion that freedom of speech depends on the method of communication).

224 *Red Lion*, 395 U.S. at 386.

225 336 U.S. 77, 96 (1948) (Jackson, J., concurring).

226 *Id.* at 97.

227 453 U.S. 490 (1980).

228 *Id.* at 500.

While these quotes are illuminating, they are not really helpful and beg the question: what is the law of the Internet? Since there is no established body of law for the Internet similar to the law for the broadcast medium[229] and billboards,[230] the only way this question can be answered is by comparing the Internet with other media. While the Court has rarely applied the same First Amendment principles to different media, the Court is often influenced by how other similar forms of media are treated.[231]

Broadcast media[232] (radio and television)[233] may be the most analogous to the Internet. Like radio and television, a large audience can be reached via the Internet. This analogy suggests that the Internet could be heavily regulated, as the First Amendment gives less protection to broadcast media.[234]

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229 Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1972).

230 *Metromedia*, 453 U.S. at 498.

231 A good example of how this tension is played out in the Supreme Court is found in *Denver Area Eduction Telecommunications Consortium, Inc. v. FCC*, 64 U.S.L.W. 4706 (1996). At issue in that case was whether it was constitutional to regulate the broadcasting of "patently offensive" sex-related materials on cable leased access channels. *Id.* Justice Kennedy, concurring in part and dissenting in part, analogized that leased access channels place the cable company in a position similar to common-carriers—they are obliged to provide a conduit for the speech of others. *Id.* Justice Thomas, dissenting in part and concurring in the judgment, acknowledged that the print and the broadcasting media have been treated differently. *Id.* Based on the Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), Justice Thomas argued that cable operators were entitled to the type of First Amendment treatment that is given to the print media. *Id.* Justice Breyer, in his plurality decision, felt that a categorical approach was problematic:

> Both categorical approaches suffer from the same flaws: they import law developed in different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect. . . . But no definitive choice among competing analogies (broadcast, Common carrier, bookstore) allows us to declare a rigid single standard, good for now and all future media and purposes. . . . Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications . . . we definitely believe it to be unwise and unnecessary definitively to pick one analogy or one specific set of words now.

Id.

232 Note that cable television has been treated differently then other broadcast media. *See Turner*, 512 U.S. at 622. Since cable television does not suffer from the problem of lack of frequencies like the broadcast media, the Court refused to extend the more deferential First Amendment analysis that the Court affords to the broadcast media.

It is interesting to note that the push for regulation of the broadcast media in the twenties and thirties seems analogous to the push for regulation of the Internet in the nineties. As Justice White noted in *Red Lion*, the electronic media was originally regulated because among other reasons, there was chaos from allowing, "anyone to use any broadcast frequency at whichever power he wished." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969). It seems that spam has caused the same type of chaos for Internet users.

233 *Red Lion*, 395 U.S. at 388.

234 Reno v. ACLU, 117 S. Ct. 2329, 2343-44 (1997). This case challenged the constitutionality of a provision of the Telecommunications Act of 1996 which made it a criminal offense to knowingly make, create, or solicit and "initiate the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or

The Court has given a number of reasons for why the electronic broadcast media should be treated differently from other media.[235] First, the Court has given the broadcast media less First Amendment protection because of the finite number of frequencies available to radio and television.[236] Since all persons who wish to broadcast cannot be given a channel on which to broadcast, "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[237] The Supreme Court has shown concern that those in the broadcast media will monopolize the finite channels. This would inhibit the 'marketplace of ideas' which is the purpose of the First Amendment.[238] Thus, the First Amendment right of access for electronic media is given less protection so that the First Amendment is not destroyed by granting a monopoly over a powerful technology to a select few.

In *Reno*, the court refused to find that the Internet was a scarce and expensive commodity similar to the broadcast media.[239] Rather, based on a stipulation between parties, the Court determined that the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds."[240] The Court noted that as many as forty million people are currently using the Internet, and two hundred million users are expected by the next millennium.[241] Similarly, there does not seem to be any reason why the "finite" channels argument would have any applicability to commercial speech.

The other reasons for treating the broadcast media with "the most limited First Amendment protection"[242] are found in *FCC v. Pacifica Found.*[243] In *Pacifica*, the Court held that First Amendment protection does not extend as far in the electronic media as in the print media because of the "pervasive presence" the broadcast me-

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indecent, knowing that the recipient of the communication is under 18 years of age." *Id.* at 2338-39.

235 Some commentators have argued that the reason why some media get less First Amendment protection than others is because those media can be more easily restricted by time, place and manner restrictions. *See* Bradford Wischerlott, *The First Amendment Protection of Advertising in the Mass Media, in* ADVERTISING AND COMMERCIAL SPEECH-READINGS FROM COMMUNICATIONS AND THE LAW 1, 12-14 (Honorable Theodore R. Kupferman ed., 1990).

236 *Red Lion*, 395 U.S. at 388-89.

237 *Id.* at 388. *See also* Columbia Broad. Sys., v. Democratic Nat'l Comm., 412 U.S. 94 (1972).

238 *Red Lion*, 395 U.S. at 390.

239 *Reno*, 117 S. Ct. at 2344.

240 *Id.*

241 *Id.*

242 FCC v. Pacifica Found., 438 U.S. 726, 748 (1977).

243 *Id.* at 726.

dia has on the lives of all Americans.[244] The Court felt that one has a right to be left alone in one's home because "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[245] Thus, the Court recognized in *Pacifica* that the First Amendment could be curtailed because of a privacy interest, but only if the media is capable of transmitting patently offensive material into people's homes. In addition, the Court has also stated that since broadcasting is "uniquely accessible to children," less First Amendment protection is given to the broadcast media.[246]

However, in *Reno*, the Court refused to find such arguments applicable to the Internet.[247] The Court held that the Internet was "not as 'invasive' as radio or television."[248] Relying on the findings of the District Court, Justice Stevens stated:

> [C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident'. . . . [A]lmost all sexually explicit images are preceded by warnings as to the content . . . odds are slim that a user would come across a sexually explicit sight by accident.[249]

However, the Court's reasoning is not applicable to intrusive Internet speech. It is conceivable that a person could come across a sexually explicit image by accident via a Usenet site or an e-mail. Although most intrusive advertising on the Internet may be aggravating, most of it cannot be called obscene.

While the Court has clearly rejected analogizing the Internet to the broadcast media, it has not discussed whether its treatment of other media is applicable to the Internet. Perhaps the problem of commercial speech on the Internet should be analogized to the law of billboards, since many of the ads that are placed on the Usenet are similar to electronic billboards. In *Metromedia,*[250] the Supreme Court decided the constitutionality of a city ordinance which prevented the use of off-site billboards unless the use fell

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244 *Id.* at 748.

245 *Id.*

246 *Id.* at 726.

247 Reno v. ACLU, 117 S. Ct. 2324, 2343 (1997).

248 *Id.*

249 *Id.*

250 453 U.S. 490 (1981).

into one or more of twelve possible exceptions.[251]

In writing for a plurality, Justice White[252] found the law unconstitutional. Justice White first distinguished how the ordinance affected commercial and noncommercial speech.[253] He used the *Central Hudson* four part test to determine whether the ordinance was unconstitutional with respect to commercial speech.[254] The plurality had little trouble with parts one, two, and four of the test.[255] Since the commercial advertising at issue was not illegal and did not concern an illegal activity, it satisfied part one of the test.[256] Justice White found that the goals of the ordinance—traffic safety and the appearance of the city—were substantial government goals.[257] The fourth prong of the *Central Hudson* test was met when the Court held that the ordinance was not broader than necessary since one of the most efficient ways to achieve the City's goals of traffic safety and beautification would be to directly ban billboards.[258]

The plurality found the only issue to be whether the third prong of the test was met.[259] San Diego argued that the ordinance directly advanced the governmental interest in traffic safety and the appearance of the City.[260] Justice White agreed that the City's interest in traffic safety was directly advanced since many local lawmakers and courts have recognized that billboards are hazards to traffic safety.[261] Justice White also agreed that the promotion of aesthetic interests was directly advanced by the ordinance and that since these legislative decisions were aesthetic they should not be

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251 The 12 exceptions which were exempt from the ordinance were government signs, bus stop signs, bench signs at bus stops, signs manufactured, transported and/or stored in the City of San Diego, commemorative historical plaques, religious symbols and decorations, signs located within malls, courts, arcades, etc., for sale/for rent signs, public service signs pertaining to weather or the temperature, signs on vehicles regulated by the City, signs on licensed commercial vehicles, temporary off-premise subdivisional directional signs, and temporary political signs. *Id.* at 495 n.3.

252 Justice Stewart, Justice Marshall, and Justice Powell joined Justice White's opinion. *Id.* at 493.

253 *Id.* at 504-05.

254 *Id.* at 507.

255 *Id.*

256 *Id.*

257 *Id.* at 507-08. *But see* Angela M. Liuzzi, Comment, *Metromedia, Inc. v. City of San Diego*, 11 HOFSTRA L. REV. 371, 377 (1982) ("[E]ven though the Court in Metromedia believed that the government interest outweighed the First Amendment interests, it deserved more then a summary determination.").

258 *Metromedia*, 453 U.S. 490, 508 (1981).

259 *Id.*

260 *Id.*

261 *Id.* at 508-09. Some have criticized the plurality's approach of treating the speech of *Metromedia* as commercial speech because the ordinance involved was content-neutral. *See* Mary B. Nutt, Comment, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 190 (1988).

scrutinized by the Court.[262] Justice White also rejected the argument that since only off-site billboards were regulated by the statute, the city's goals of traffic safety and aesthetic interests were undercut by the statute.[263] Finally, Justice White found that the ordinance regulated some noncommercial speech which was protected by the First Amendment and in this respect the statute was unconstitutional.[264]

In his concurring opinion, Justice Brennan took a different view of the problem.[265] Justice Brennan felt that this ordinance was a total ban of billboards.[266] Justice Brennan found that despite there being alternate channels for communication of messages appearing on billboards (e.g. newspapers, television, radio), "these alternatives have never dissuaded active and continued use of billboards as a medium of expression and appear to be less satisfactory."[267]

Justice Brennan believed that because a total ban on billboards was at issue, the *Central Hudson* test was not applicable. Rather, a test of a content-neutral prohibition of a particular medium of communication was appropriate.[268] Justice Brennan ruled that the principles stated in *Schad v. Mount Ephraim*[269] applied, and that the focus should be on whether the government's asserted interest is substantial and "whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment."[270] Justice Brennan applied these principles to billboards and wrote that a city could completely ban billboards, "if it could show that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction, *i.e.*, anything less than a total ban, would promote less than the achievement of that goal."[271] Justice Brennan used that test and believed that the ordinance was unconstitutional because "the city failed to provide an adequate justification for its substantial restriction of commercial activity."[272] Justice Brennan

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262 *Metromedia*, 453 U.S. at 508-09.
263 *Id.* at 511.
264 *Id.* at 513.
265 *Id.* at 521.
266 *Id.* at 522.
267 *Id.* at 524. *See also* Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977).
268 *Metromedia*, 453 U.S. at 526-27.
269 452 U.S. 61 (1981). That case involved a local zoning ordinance which banned live nude dancing in a commercial zone where appellant's business was located. *Id.* at 63. The Court held that the expression involved was protected by the First Amendment and that the local ordinance was unconstitutional. *Id.* at 77.
270 *Id.* at 70.
271 *Metromedia*, 453 U.S. at 528.
272 *Id.*

also believed that in this case it was not shown that banning billboards substantially furthers traffic safety and that the "ordinance is not narrowly drawn to accomplish the traffic safety goal,"[273] since the "asserted interest in aesthetics was not sufficiently substantial in the industrial and commercial areas"[274] of the city.

These two opinions have great significance for dealing with the problems of commercial speech on the Internet. A regulation preventing intrusive advertising on the Internet would run into the same issue—would the regulation entail cutting off one means of communication? If that is the case, an approach like Justice Brennan's in *Metromedia* would be applied rather than Justice White's approach, which followed the *Central Hudson* test. Since regulations probably would not target passive forms of advertising, an avenue of advertising would be left open on the Internet. However, if one accepts the premise that the means of communication at issue is not Internet communication in general but rather intrusive advertising in particular, a stronger argument is made that this is a regulation which cuts off a means of communication.

The *Metromedia* case is also useful for application to the Internet commercial speech problem because it discusses a government goal which may be applicable to the Internet's aesthetic appearance. The government may have a significant interest in making sure that the Internet is not bombarded with commercial messages which take away from the aesthetic enjoyment one expects while using the Internet. One who wants to visit a Usenet site to discuss bird watching with others should not be forced to view advertisements for the latest book on how to get rich. While this analogy can only be carried so far, this notion of aesthetics on the Internet does have some merit.

Perhaps the Court will analogize commercial speech on the Internet to advertisements sent through traditional mail. The Court addressed the commercial speech in mailings issue in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York.*[275] At issue in *Consolidated Edison* was whether the New York Public Service Commission could prevent the utility from inserting controversial issues of public policy into their monthly bills.[276]

The Court rejected the Commission's argument that this was a reasonable time, place, or manner regulation, noting that the regulation is not a precisely drawn means of serving a compelling state

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273 *Id.* at 528-29.
274 *Id.* at 530.
275 447 U.S. 530 (1980).
276 *Id.* at 532.

interest.[277] The Court then rejected the Commission's argument that the utility's customers' privacy prevented the Commission from refusing to allow Con Ed to state its views.[278] Specifically, the Court found that "the ability of government to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[279] The Court also acknowledged that:

> Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech . . . customers who encounter an objectionable billing insert may 'effectively' avoid further bombardment of their sensibilities simply by averting their eyes.[280]

Two years later in *Bolger* the Court affirmed its position in *Consolidated Edison* and stated, "the short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."[281]

Perhaps the courts will analogize the Internet problem to advertising by fax. Presently, a federal law exists which prevents the sending of unsolicited advertisements over a facsimile machine.[282] The Telephone Consumer Protection Act of 1991 states:

> (1) Prohibitions
>
> It shall be unlawful for any person within the United States . . .
>
> (C) to use any telephone facsimile machine,[283] computer,

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277 *Id.* at 540.

278 *Id.* at 541.

279 *Id. See also* Cohen v. California, 403 U.S. 15, 21 (1971).

280 *Consolidated Edison*, 447 U.S. at 541-42.

281 Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 72 (1983) (citing Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)).

282 Telephone Consumer Protection Act of 1986, 47 U.S.C. § 227 (1995). This statute also makes it unlawful for anyone in the United States to use an automatic telephone dialing system to call certain telephone lines in certain establishments (such as emergency lines of hospitals, "911" lines, medical offices, health care facilities, poison control centers, fire protection or law enforcement agencies, and patient rooms of hospitals, health care facilities, and elderly homes). *Id.* It also makes it unlawful for anyone to call any residential telephone line using a prerecorded or artificial voice without the prior express consent of the called party except for certain limited circumstances. *Id.* The law allows the FCC to promulgate regulations to protect residential telephone subscribers' rights. *Id.* § 227(b)(3)(c). These regulations can be found in Restrictions on Telephone Solicitation, 47 C.F.R. § 64.1200-01 (Supp. I 1994).

283 The statute defines a "telephone facsimile machine" as:

> equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular

or other device to send an unsolicited advertisement[284] to a telephone facsimile machine . . .[285]

Subsection (b)(3) gives any person a private right of action against any violation of the statute.[286] It states:

> (3) Private Right of Action
>
> A person or entity may, if otherwise permitted by the laws of or rules of a State, bring in an appropriate court of that State-
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such violation, or to receive $500 in damages for each violation, whichever is greater, or
>
> (C) both such actions
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.[287]

The section of the statute which prohibits unsolicited advertising by fax[288] was upheld as constitutional in *Destination Ventures,*

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telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

47 U.S.C. § 227(a)(2) (1990).

284 The term "unsolicited advertisement" is defined in the statute as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that persons' prior express invitation or permission." 47 U.S.C. § 227(a)(3) (1994).

285 Telephone Consumer Protection Act of 1991 (current version at 47 U.S.C. § 227(b)(1)(C) (1991)). It seems very likely that the prohibition of commercial advertising by fax, which occurred shortly before the Internet became popular, led to an increase in the explosion of commercial advertising on the Internet.

286 47 U.S.C. § 227(b)(3) (Supp. I 1994).

287 *Id.*

288 The portion of the section which makes it unlawful to initiate a telephone call by using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party was upheld in *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995). The Third Circuit in that case overruled the trial court, stating that since that section of the statute does not distinguish commercial from non-commercial speech, but rather distinguishes between prerecorded and live callers, the statute should be analyzed as a time, place, or manner restriction instead of under the commercial speech doctrine. *Id.* at 973. This trial court had ruled that the statute was not content-neutral since the purpose of a law prohibiting communication by a recording was to regulate the content of the message, since almost all calls by an artificial voice are for commercial purposes. Moser v. FCC(I), 826 F. Supp. 360 (D. Or. 1993). These cases seem to give the impression that if Congress is careful not to explicitly restrict commercial speech but rather restrict activities which are almost exclusively used by advertisers, the law will be analyzed by a time, place, or manner

Ltd. v. FCC.[289] The Court found that the regulation "must directly advance a substantial government interest in a manner that forms a reasonable fit with the interest.'"[290] The government's substantial interest was to prevent the shifting of advertising costs to consumers.[291] The appellant, Destination Ventures, claimed there was no reasonable link between the governmental interest and the manner chosen to advance that interest. They argued that unsolicited faxes not covered in the statute, such as "prank" faxes, are equally as costly to the consumer as unsolicited commercial faxes.[292] The court upheld the statute, finding a "reasonable fit" between the interest and the ban on fax advertisements. Since unsolicited faxes constitute the bulk of faxes that shift advertising costs, banning faxes was a reasonable means to achieve Congress' goal.[293] The court, quoting *United States v. Edge Broadcasting Co.*,[294] stated, "the First Amendment does not require Congress to forgo addressing the problem at all unless it completely eliminates cost shifting."[295]

The only case that has reached the Supreme Court, *Reno v. ACLU*,[296] does not sufficiently infer which direction the Court may

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approach rather then by traditional commercial speech doctrine. However, this is not as appalling as it seems since, as was pointed out by the Supreme Court in *Fox*, the tests for time, place, or manner restrictions for content-neutral speech and regulations for commercial speech are essentially identical. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477; *Moser*, 46 F.3d at 973.

289 46 F.3d 54 (9th Cir. 1995).

290 *Id.* at 55.

291 *Id.* at 56. The House Committee on Energy and Commerce Report explained this interest in detail:

> Facsimile machines are designed to accept, process, and print all messages which arrive over the dedicated lines. The fax advertisers take advantage of the basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the cost of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax. . . .
>
> In the case of fax advertising . . . the recipient assumes both the cost of the expensive paper used to print out the facsimile messages. It is important to note that these costs are borne by the recipient of the fax advertisement regardless of their interest in the product or the service being advertised.
>
> In addition to the costs associated with fax advertisements, when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications. . . .

H.R. REP. No. 317-102, § 10, 25 (1991).

292 Destination Ventures Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995).

293 *Id.* at 56. *But see* Jennifer L. Rudner, Comment, *Phone, Fax and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359 (1993) (No new regulation of unsolicited advertising by fax is needed because nuisance law is better equipped to deal with those problems.).

294 509 U.S. 418, 434 (1993).

295 *Destination Ventures*, 46 F.3d at 56.

296 117 S. Ct. 2329 (1997).

take in deciding the degree of protection afforded to the Internet. The Court's only clear statement is that the Internet should not receive the same limited First Amendment protection that the broadcast media receives.[297] The opinion of the Court relies heavily on findings made by the District Court—most of which were stipulated by the parties.[298] While the Supreme Court failed to make any findings which could illuminate the issues regarding intrusive Internet advertising, the District Court[299] made passing commentaries applicable to the issues of intrusive Internet advertising.

While each judge wrote a separate opinion invalidating the law as unconstitutional, the court made extensive findings of fact as to how the Internet works.[300] The court stated these findings concerning commercial communications on the Internet:

> 75. The Internet is not exclusively, *or even primarily*, a means of commercial communication. Many commercial entities maintain Web sites to inform potential consumers about their goods and services, or to solicit purchases, but many other Web sites exist solely for the dissemination of non-commercial information. *The other forms of Internet communication — e-mail, bulletin boards, newsgroups, and chat rooms — frequently have non-commercial goals.* For the economic and technical reasons set forth in the following paragraphs, the Internet is an especially attractive means for not-for-profit entities or public interest groups to reach their desired audiences . . .
>
> 76. Such diversity of content on the Internet is possible because the Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines . . . Any Internet user can communicate by posting a message to one of the thousands of newsgroups and bulletin boards or by engaging in an on-line "chat," and thereby reach an audience worldwide that shares an interest in a particular topic . . .
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> 80. It follows that unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener. Once one has entered cyberspace, one may engage in the dialogue that occurs there.

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297 *See supra* notes 234-49 and accompanying text.
298 *Reno*, 117 S. Ct. at 2334 n.2.
299 ACLU v. Reno, 929 F. Supp 824 (1996).
300 *Id.*

> In the argot of the medium, the receiver can and does become the content provider and vice-versa.
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> 81. *The Internet is therefore a unique and wholly new medium of worldwide human communication.*[301]

After finding the Internet to be a "unique and wholly new medium of worldwide human communication," the judges turned their attention to analogizing and differentiating other media to and from the Internet.[302] Judge Sloviter held that the lesser burden required in broadcasting cases was not applicable to the Internet and that the government would have to satisfy the compelling interest test for the law to pass constitutional muster.[303] On that theme Judge Sloviter stated:

> In any event, the evidence and our Findings of Fact based thereon show that Internet communication, while unique, is more akin to telephone communication . . . than to broadcasting, at issue in Pacifica because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve deliberate information online . . . Judge Dalzell's separate opinion fully explores the reasons for differential treatment of radio and television broadcasting for First Amendment purposes from that accorded other means of communication. It follows that to the extent the Court employed a less than strict scrutiny standard of review in Pacifica and other broadcasting cases, . . . there is no reason to employ a less than strict scrutiny standard of review in this case.[304]

Judge Buckwalter acknowledged as well that the uniqueness of the Internet impacted his decision:

> As I have noted, the unique nature of the medium cannot be overemphasized in discussing and determining the vagueness issue. This is not to suggest that new technology should drive constitutional law. To the contrary, I remain of the belief that our fundamental constitutional principles can accommodate any technological achievements, even those which, presently seem to many to be in the nature of a miracle such as the Internet.[305]

Judge Dalzell commented that since the Internet is a new medium of mass communication, "the Supreme Court's First Amendment jurisprudence compels us to consider the special qualities of

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301 *Id.* at 842-844 (emphasis added).
302 *Id.* at 844.
303 *Id.* at 862.
304 *Id.* at 852.
305 *Id.* at 865 n.9.

this new medium in determining whether the CDA is a constitutional exercise of governmental power."[306] Judge Dalzell then refuted the government's argument that the Internet should be treated like the broadcast media.[307] He noted that the Supreme Court has only followed *Pacifica* in broadcast media cases and has refused to extend its principles in cases concerning other media.[308] Judge Dalzell also found the rationales which the Supreme Court gave for giving the government more power to regulate the broadcast media in *Pacifica* to be lacking when applied to the Internet.[309] The Judge singled out four factors which differentiated the Internet from other media:

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.[310]

Judge Dalzell expressed concern that if the regulation at issue forced Internet users to behave like content providers in the broadcast and print media, they would have to tailor their image to the mainstream community, thus ensuring that their message would meet the moral standards in every community.[311] Judge Dalzell found such a result incompatible with the purpose and characteristics of the Internet.[312] Judge Dalzell continued with a lengthy discussion of the attributes of the Internet, requiring that the Internet receive greater First Amendment protection than other media:

Nearly eighty years ago, Justice Holmes, in dissent, wrote of the ultimate constitutional importance of the 'free trade of ideas':

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of thought to get itself accepted in the competition of the market . . . .Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> For nearly as long, critics have attacked this much-maligned

306 *Id.* at 872.
307 *Id.* at 871-80.
308 *Id.* at 875.
309 *Id.* at 874-76.
310 *Id.* at 877.
311 *Id.* at 878.
312 *Id.* at 879.

"marketplace" theory of First Amendment jurisprudence as inconsistent with economic and practical reality. Most marketplaces of speech, they charge, are dominated by a few wealthy voices. Individual citizens' participation is, for the most part, passive. Because people lack the money and time to buy a broadcast station or create a newspaper, they are limited to the role of listeners.

It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed this world—has yet seen. The plaintiffs in these actions correctly describe the "democratization" effect of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fisherman.

Indeed the government's "failure" on the Internet rests on the implicit premise that too much speech occurs in the medium, and that speech there is too freely available to the participants. This is exactly the benefit of Internet communication, however. The Government, therefore, implicitly asks the court to limit both the amount of speech on the Internet and the availability of that speech. This argument is profoundly repugnant to First Amendment principles.

My examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, leads me to conclude that the Internet deserves the broadest possible protection from government imposed, content-based regulation . . .

Finally, if the goal of our First Amendment jurisprudence is the 'individual dignity and choice' that arises from 'putting the decision as to what views shall be voiced largely into the hands of each of us' . . . then we should be especially vigilant in preventing content-based regulation of a medium that allows individual citizens to actually make those decisions every minute. *Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig.*[313]

While the court in *Reno* did a thorough investigation of the

313 *Reno*, 929 F. Supp. at 879-82 (emphasis added).

workings and development of the Internet, the principles from that case should not be applied to commercial speech on the Internet. Since the court did not have the issue of commercial speech in front of them, the statements must be read as dicta. More importantly, the statute at issue in the case applied to the making, creation, solicitation, and initiation of a transmission via a telecommunication device.[314] Thus, the court, in deciding the case, considered all Internet communications as a whole. Since there are different ways to communicate via the Internet (e-mail, visiting a newsgroup, visiting a Web site) with each method having different ramifications[315] especially when commercial speech is considered, the court's analysis may or may not be applicable. For example, should the principles enumerated by the judges apply to e-mail? Is communication by e-mail the most democratic form of communication?[316] Should Usenet newsgroup communications receive the highest level of First Amendment protection? Those may well be issues that the courts will be faced with in the upcoming decade.

While the scope of First Amendment protection for these media cannot be ascertained with any certainty, various considerations are recognized. First, it appears that no type of Internet communication should be given less First Amendment protection than the broadcast media. The reasons for treating the broadcast media somewhat differently do not apply to the Internet. Second, the argument that Internet speech is a more "democratic" medium and thus deserves "the broadest protection," may not apply to commercial speech on the Internet. Intrusive advertising on the Internet is a new phenomenon, alien to the traditional uses of the Internet. Intrusive advertising was not only unheard of, but it was forbidden by the rules of Netiquette. Can a method of speech on a specific medium be given the broadest protection despite being deplored by the users of that medium? Additionally, intrusive advertising on the Internet can hardly be called a model of democracy.[317] While everyone would be given a chance to hawk their wares, it would be

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314 *Id.* at 828.

315 *See supra* Section I.

316 *See* Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996). The court, in its findings of fact, found e-mail communications to be the only form of Internet communication that could be received without taking an affirmative step.

317 It may be argued that passive Internet advertising (i.e. advertising on the Web) should be given more protection under this rationale. Since this form of advertising is not thrust upon anyone and could be discussed or countered by other Web sites, this form of advertising could arguably have more First Amendment protection. Note that passive Internet advertising was traditionally discouraged. However, it has been accepted, albeit begrudgingly.

done at the expense of forcing others to read a message while at the same time creating a paralyzing amount of traffic on the Internet. Certainly those Federalists and Anti-federalists debating their position on a Usenet site should not have to be subject to interruptions by advertisements for pyramid schemes. For a court to rule otherwise would indeed be tantamount to burning the global village to roast the pig. Thus, it would seem that Internet communications by intrusive advertising should not be given any extended protection under the First Amendment.

III. Regulating Commercial Speech On The Internet: A Proposal For Congress

The Internet may not be able to live up to the ideals of its users if the "spam" problem is not solved. Without some type of regulation, the wonderful promise of the information superhighway allowing people to communicate easily and efficiently will be lost. In place of that wonderful ideal will be a medium in which thousands will be yelling "buy this." Since current law does not give any practical recourse to prevent spamming, a new law must be written. Such a law should give Internet users who are subjected to intrusive advertising the right to bring a cause of action against spammers. Giving that right to on-line providers does not make practical sense.[318]

The first issue is, who is best equipped to deal with this problem? On-line providers who prevent such activities by contract are not in a good position to prevent advertisers from sending spam across the Internet because many smaller on-line providers are filling the need of those advertisers.

Since a government response to this problem is necessary, it must be asked which level of the government is in the best position to pass meaningful legislation to deal with this international problem. Several have proposed an international conference among the countries of the world to solve the problem.[319] While an international agreement may ultimately be the best and most efficient way to approach this and many other Internet issues, it does not seem likely that this will happen any time soon, given the diverse views of different countries.[320]

Many countries have turned to the national level of govern-

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318 *See supra* Section I(B).

319 *See* Cynthia Flash, *Does the Internet Need Regulating? Conflicting Values and Visions of the Computer Network are Coming to a Head as Governments are Stepping In*, The News Trib., Jan. 21, 1996, at F1.

320 *Id.*

ment to solve Internet problems.[321] Germany's federal prosecutor's office ordered CompuServe to prevent Germans from accessing sites which violated German laws prohibiting child pornography and other sexually explicit materials.[322] China has issued regulations which require the flow of Internet information in that country to travel through officially controlled ports which can be monitored in order to prevent people from sending and receiving information deemed to be harmful to the public order.[323] When President Clinton signed the Telecommunications Act of 1996, the United States officially joined those countries which regulate the Internet on a national level.[324] It is true that several problems are created by enlisting Congress to solve this problem. Since the Internet is a global creature, a U.S. law would not end the problem because businesses outside the United States would continue their activities. However, for now it seems that the best way to attack the spam problem is to enact Federal legislation.

Congress could enact a law to prevent intrusive advertising over the Internet. This law should prevent the sending of bulk e-mail over the Internet and it should prevent using Usenet newsgroups to advertise a commercial product unless that group encourages the postings of unsolicited advertisements (such as a newsgroup which encourages advertisements concerning personal property or real estate).

The Telephone Consumer Protection Act of 1991[325] is a good statute on which to base a regulation of intrusive Internet advertising because both forms of advertising face similar problems. First, a regulation which bans the sending of intrusive commercial e-mail and the sending of commercial messages to commercial Usenet

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321 Some states in the United States have already begun their own regulation of the Internet. Nine states (Connecticut, Georgia, Illinois, Kansas, Maryland, Montana, New Jersey, Oklahoma, and Virginia) have already enacted laws which would regulate on-line indecency. Leslie Miller, *State Laws Add to Net Confusion*, USA TODAY, Feb. 5, 1996, at 6D. The Attorney General of Minnesota has announced that Minnesota has personal jurisdiction over any user or on-line provider which has an effect on Minnesota. Mark Eckenwiler, *States Get Entangled in the Web*, LEGAL TIMES, Jan. 22, 1996, at S35. However, State regulations are not the vehicle to effect regulation of the Internet since local regulation of an international animal will create numerous jurisdictional and choice of law problems. In addition, there is the issue of whether the dormant commerce clause may prevent state involvement and whether state law could ultimately be preempted by Federal regulation. *Id.* at S35.

322 *See* Karen Kaplan, *Germany Forces Online Service to Censor Internet; Regulation: CompuServe Reluctantly Complies, Cuts Off Access to 200 Newsgroups Deemed Indecent*, L.A. TIMES, Dec. 29, 1995, at A1.

323 *See* Seth Faison, *China's Grip on the Net*, N.Y. TIMES, Feb. 11, 1996 at D2.

324 The Telecommunications Law of 1996 criminalizes the sending of indecent materials over the Internet. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

325 *See supra* notes 283-89 and accompanying text.

newsgroups can be dealt with similar to the way in which intrusive commercial faxes are handled. A private right of action, where a receiver of spam could receive a nominal amount of damages (i.e. $500), would be a significant deterrent for those who spam. Although the amount one could receive from a spammer is small, a spammer who would be subject to multiple suits for his actions would be deterred.

Of course, the Internet contains unique problems that would have to be addressed. Intrusive advertising should be allowed if the recipient desires to receive such communications. Thus, intrusive advertisers should be allowed to assert a defense that the recipient of the communication desired the communication. The spammer could show this by proving that the recipient contacted the advertiser and wished to receive such information via e-mail.

Spamming via Usenet newsgroups should also be regulated. Since Usenet newsgroups are usually not run by a specific person, anyone using such a newsgroup should be entitled to assert a cause of action against the spammer. However, users of Usenet newsgroups that encourage commercial solicitations of the sort that the spammer sends to the newsgroups, should not be allowed to assert a cause of action. The spammer should have the burden of proving that the newsgroup has accepted commercial messages of the type that the spammer has sent.

Would such a law be constitutional? The answer to that question depends on two assumptions. First, it must be assumed that the *Central Hudson* test will continue to be the applicable test to be used in commercial speech cases. Given that the commercial speech doctrine has undergone great flux and that several Justices have openly criticized the *Central Hudson* test in *44 Liqourmart, Inc. v. Rhode Island,* it would not be surprising for the Court to abandon the *Central Hudson* test. Of course, since *Central Hudson* is still good law, it must be used to determine if a law regulating commercial speech is constitutional. Second, it must be assumed that the Internet, at least in the context of intrusive advertising, should not be given a higher degree of First Amendment protection than other media. Although a valid argument can be made that the Internet is a more "democratic medium" which deserves more First Amendment protection than other media, that argument is not applicable to protecting intrusive commercial speech over the Internet, because intrusive commercial speech sent to a captive viewer can hardly be deemed democratic.[326]

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[326] *See supra* Section II(C).

Assuming that the Supreme Court does not alter the *Central Hudson* test, a regulation of this sort would probably be constitutional. Under the first prong of the test—which determines if the commercial expression is protected by the First Amendment[327]—test, the law "must concern lawful activity and not be misleading."[328] Although some commercial expression regulated by this proposed law may concern unlawful activity or may be misleading, the proposed law does not apply only to speech concerning such unlawful activity. Thus, the speech regulated by the proposed law satifies the first prong, and the inquiry moves to the second prong of the *Central Hudson* test.

The second prong of the test asks if the governmental interest is substantial.[329] That, of course, depends on what the legislature chooses to define as its interest. This note has alluded to many potential "government interests." First, the government may be interested in preventing the cost shifting that occurs by intrusive Internet advertising. Second, the government may want to make the Internet a more aesthetic place. Third, the court could take the view that privacy interests of persons are implicated. Each of these potential governmental interests will be addressed in turn.

A. *Preventing Cost Shifting*

The first interest, preventing cost shifting would presumably be a valid interest if *Destination Ventures v. FCC*[330] is followed.[331] The Ninth Circuit did not address whether preventing fee shifting is a substantial governmental interest, but rather it noted that Destination Ventures did not contest the contention that preventing cost shifting was in the government's substantial interest.[332] However, the District Court did address that issue.[333] Adopting the findings and recommendations of the Magistrate Judge, the court held that preventing cost shifting was a substantial governmental interest.[334] Noting that the legislative history of the Telephone Consumer Protection Act of 1991 identified cost shifting as a governmental interest, the court held that under the principles of *Ed-*

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327 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980).
328 *Id.*
329 *Id.*
330 46 F.3d 54 (9th Cir. 1995).
331 *See supra* notes 203-09 and accompanying text. The Supreme Court has never addressed the issue of whether fee shifting is a substantial interest.
332 *Destination Ventures*, 46 F.3d at 56.
333 Destination Ventures, Ltd. v. FCC, 844 F. Supp. 632 (D. Or. 1994).
334 *Id.* at 635-37.

enfield v. Fane,[335] the government had shown that "protecting customers from the economic harm resulting from the 'unfair shifting of the cost of advertising from the advertiser to the unwitting customer'"[336] was a substantial governmental interest.

The court's reliance on *Edenfield* seems to be misplaced. The District Court cited *Edenfield* for the proposition that the Telephone Consumer Protection Act of 1991 presented substantial governmental interest because the restriction upon commercial speech "is not satisfied by mere speculation or conjecture; rather, a governmental body must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a certain degree."[337] However, that statement by the Edenfield Court was made when the court was analyzing the third prong of the *Central Hudson* test—whether the law directly advances the government's interest.[338] If that standard was the true test to determine whether the government had a substantial interest, then the legislature would only have to find that there are harms that are not imaginary and that the law does in fact alleviate those harms in order to meet the second prong of *Central Hudson* test. If the legislature did that, the court would not be able to make its own inquiry as to whether there was a substantial governmental interest. Such a standard seems to be identical to the *Posadas* standard which was very deferential to legislatures.[339] Since the majority in *Liqourmart* has rejected the *Posadas* standard,[340] it would seem that the District Court's analysis of the second prong would not be used if the same issue was brought before the court today.

It seems curious that the District Court would rely on *Edenfield* for another reason—that case explicitly recognizes that solicitation is a form of speech that the First Amendment protects.[341] In *Edenfield*, the Court upheld a Florida law prohibiting Certified Public Accountants ("CPAs") from making direct, personal solicitations to potential clients.[342] The Court held that solicitation was protected by the First Amendment, noting that:

> In the commercial context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication be-

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335 507 U.S. 761 (1993).
336 *Destination Ventures*, 844 F. Supp. at 635.
337 *Edenfield*, 507 U.S. at 770.
338 *Id.*
339 *See supra* notes 148-52 and accompanying text.
340 *See supra* notes 184-97 and accompanying text.
341 *Edenfield*, 507 U.S. at 762.
342 *Id.*

> tween buyer and seller. A seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact.
>
> Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service, and allows both parties to discuss and negotiate the desired form for the transaction or professional relation.
>
> Solicitation also enables the seller to direct his proposals toward those consumers whom he has a reason to believe would be most interested in what he has to sell. For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market. In particular, with respect to nonstandard products like the professional services offered by CPAs, these benefits are significant.
>
> In denying CPAs and their clients these advantages, Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. . . . The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish.[343]

Given the Court's assertion that solicitation is an activity protected by the First Amendment, it could be argued that a law banning solicitation would not implement a substantial governmental interest. However, such an argument would not withstand scrutiny for two reasons. First, the Court's analysis of the benefits of solicitation is not applicable to the medium of the Internet. An advertiser who has a Web site on the Internet and who responds to questions by consumers is afforded a similar amount of personal interchange as a face to face solicitor. Second, the *Edenfield* case can be distinguished because that case did not deal with solicitations which forced the consumer to pay a portion of the advertising cost.

If the substantial governmental interest is looked at in terms of protecting consumers from the economic harm that occurs by the cost shifting of advertisements, it would seem that the proposed law would meet the second prong of the *Central Hudson* test. While no court other than the District Court deciding *Destination Ventures* has addressed whether cost shifting is a substantial governmental interest, several courts have held that the government has a sub-

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343 *Id.* at 770.

stantial interest in regulating activities which may result in economic harm.[344] Thus, it would seem that preventing economic harm to Internet users is a substantial governmental interest.[345]

The third prong of the test—whether the regulation directly advances the governmental interest[346]—should be satisfied if the governmental interest prevents cost shifting, using either the *Posadas* approach, which largely defers to legislatures, or the standard set forth in *Edenfield.* Under *Posadas,* the third prong would be satisfied if it is shown that the legislature "believed" when it enacted the legislation that the regulation would serve to advance the governmental interest asserted.[347] Under the more stringent *Edenfield* standard, it must be shown that the regulation would advance the government's interest in a direct and material degree.[348] Under either standard, the regulation would pass, because a law preventing intrusive Internet advertising would completely prevent cost shifting by advertisers who advertise via the Internet.[349] Thus, the third prong would be met.

The fourth prong—whether the law is not more extensive then necessary to serve that interest—would also be met. Under *Fox,* there must be a reasonable fit—the law's means must be narrowly tailored to achieve the desired objective.[350] A law going no

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344 *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476 (1989) (preventing commercial exploitation of students is a substantial government interest); National Funeral Serv., Inc. v. Rockefeller, 870 F.2d 136, 142 (4th Cir. 1988) (holding that the government had a substantial governmental interest regulating door to door and telemarketing of pre-need funeral contracts because in such instances consumers are very likely to be swayed by overreaching and high pressure sales tactics); Brandt v. State Farm Mutual Ins. Co., 693 F. Supp. 877 (E.D. Cal. 1988) (protecting citizens from unfair and deceptive settlement practices in the insurance industry is a substantial government interest); *see also* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 348 (1986) (holding that the government has a substantial interest in preventing excessive casino gambling among local residents which "would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens.").

345 The proposed statute may not prevent all cost shifting because one could still get intrusive advertisements from users from other countries, and because the cost shifting would still occur for noncommercial messages. However, Congress does not have to forgo the problem just because the regulation will not completely eliminate it. United States v. Edge Broad. Co., 509 U.S. 418 (1993).

346 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

347 *See supra* notes 144-52 and accompanying text.

348 *See supra* notes 166-70 and accompanying text.

349 The District Court deciding *Destination Ventures* did address the issue of whether that law passed the third prong of *Central Hudson.* Destination Ventures, Ltd. v. FCC , 844 F. Supp. 632, 637 (1994). The plaintiff in that case had argued that the legislature had made no attempt to determine the 'unsolicited fax' problem so the degree of direct advancement was only mere speculation. *Id.* The court noted that since the legislature had addressed the economic harms created by the unsolicited advertisement faxes, this prong was passed. *Id.*

350 Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

further than meeting the state's goals will be sustained.[351] To see if that "reasonable fit" is maintained, the Court will inquire into whether "the costs and the burdens associated with the speech are carefully calculated," and whether there are lower cost alternatives.[352]

In *Destination Ventures*, the Ninth Circuit discussed whether the Telephone Consumer Protection Act met the fourth prong of *Central Hudson*. Since it was not disputed that unsolicited commercial faxes were responsible for the bulk of fee shifting, the Court, noting that the First Amendment does not require that the problem of cost shifting be completely alleviated for the statute to be constitutional, held that banning commercial faxes was a reasonable means to reduce cost shifting.[353]

The analysis of the court in *Destination Ventures* was essentially correct. In the case of the Telephone Consumer Protection Act, there is a reasonable fit—the law goes no further than is necessary to obtain the government's goals. A law prohibiting unsolicited fax advertising would prevent the most notorious instances of cost shifting and certainly achieves the government's goals. In addition, the legislature will have weighed the cost and burden of such legislation because it will have prevented the type of communication which creates the most cost shifting. Finally, there is no lower cost alternative available to the legislature.

Similarly, a law preventing intrusive Internet advertising would further the goal of limiting instances of cost shifting. By preventing intrusive Internet advertising, the legislature will have prevented the type of communication which creates the most instances of cost shifting. The legislature will be seen to have weighed the cost and burden of such legislation because it will have regulated the form of communication which is responsible for most of the cost shifting. It also seems that there cannot be a less costly way to further the government's interest. Although not all cost shifting would be eliminated by such a law—a person could send an unsolicited noncommercial message—that would not be necessary under *Edenfield*. Thus, if the government interest was to prevent cost shifting, the regulation would meet all of the *Central Hudson* prongs and would be constitutional.

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351 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1980).
352 *See* Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510 (1993).
353 Destination Ventures v. FCC, 46 F.3d 54, 56 (9th Cir. 1995).

B. *Aesthetics*

If the government's interest is aesthetic, the regulation would not meet the second prong of the *Central Hudson* test. Many cases have noted that the government has a substantial interest in promoting aesthetics.[354] However, all of those cases deal with the problems of billboards or signs and deal strictly with land usage problems. Can such arguments be analogized to the Internet? Perhaps it can be argued that the visual clutter of spam on the Internet is essentially similar to the visual clutter that billboards create. However, such an argument is flawed for two reasons.

First, the reasons why billboards are regulated, (i.e., the 'visual clutter') are just not present on the Internet. As the Court noted in *City of Laude v. Gilleo*:[355]

> Unlike ordinary speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs — just as they can with reasonable bounds and absent censorial purpose, regulate audible expression in its capacity for noise.[356]

Thus, it would seem that the Internet lacks the interest the government has in regulating billboards.

Second, regulating commercial speech on the Internet for "aesthetic" reasons would be tantamount to regulating commercial speech because it has less First Amendment protection. Since the Internet is completely composed of speech, a regulation regulating commercial speech would be discriminating against commercial speech solely for the reason that it is commercial speech. Since a regulation restricting commercial speech is unconstitutional if it discriminates against commercial speech because it has less First Amendment protection,[357] a law regulating spam would be unconstitutional. Therefore, a legislature could not regulate spam in the

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354 *See Metromedia*, 453 U.S. at 507-08; City Council v. Taxpayers For Vincent, 466 U.S. 789, 807 (1984); *see also* Mobile Sign, Inc. v. Town Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987); Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985); One World One Family Now v. City & County of Honolulu, 76 F.3d 1009 (9th Cir. 1996); Outdoor Sys., Inc. v. City of Tucson, 997 F.2d 604 (9th Cir. 1993); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); National Adver. Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991); Ackerley Communications, Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996); Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995); Gold Coast Publications, Inc. v. Corrigan, 42 F.3d 1336 (11th Cir. 1994); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994).

355 512 U.S. 43, 48 (1994).

356 *Id.* at 48-49.

357 *See supra* notes 69-74 and accompanying text.

belief that the government's substantial interest is to promote aesthetics.

Assuming that the second prong is met, it seems that if aesthetics was the governmental interest, the third prong of *Central Hudson*—whether the regulation directly advances the government interest—would probably be met. Under the *Edenfield* standard, it must be shown that the regulation would advance the government's interest in a direct and material degree,[358] and it also must be proven that the regulation alleviates the problem to a material degree.[359] Under *Posadas*, the third prong would be satisfied if it is shown that the legislature "believed" when it enacted the legislation that the regulation would serve to advance the governmental interest asserted.[360] If *Edenfield* is followed, it is doubtful that the third prong would be met because the regulation would not alleviate the problem to a material degree. If intrusive advertisements over the Internet were banned, there would still be an aesthetic problem as to the non-commercial intrusive advertisements one sees on the Internet. Thus, the problem would not be alleviated to a material degree. If *Posadas* was followed, this proposed law might meet the third prong, but in light of *Edenfield* and *Liqourmart*, it seems that the Court has rejected that more deferential test. However, under *Edge*, the Court could use the piecemeal approach. It could be argued that the regulation would in the aggregate reduce clutter and pesky Internet advertisements. Thus, under the asserted interest of aesthetics, the proposed law would fail the third prong.

C. *Privacy*

Finally, it can be argued that the government has a substantial interest in protecting people's privacy. That argument has not fared well in the commercial speech context. In both *Consolidated Edison*[361] and *Bolger*,[362] the Court rejected the argument that the government has a substantial interest in protecting an individual from unwanted junk mail. Noting that the people receiving the messages are not captive audiences[363] because they can "avoid fur-

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358 *See supra* notes 166-70 and accompanying text.

359 Edenfield v. Fane, 507 U.S. 761, 771 (1993).

360 *See supra* notes 144-52 and accompanying text.

361 447 U.S. 530 (1980).

362 463 U.S. 60 (1983).

363 The notion of a captive audience has appeared in many cases. Generally, the Court has held that in cases where the intrusive character and unavoidable nature of a particular mode of expression is so intrusive and unavoidable, the court may consider this in determining the constitutionality of a regulation limiting that type of speech. *See* Cohen v. Cali-

ther bombardment of their sensibilities by merely averting their eyes" and can discard the advertisement by merely throwing the advertisement in the trash, the Court held that such an interest was not substantial.[364] The Court also noted in *Bolger* that individuals can avoid the information in the advertisements after just one exposure.[365]

However, since those cases, the Court has recognized that the government has a *significant* interest in preserving the sanctity of the home. In *Frisby v. Schultz*,[366] the Court upheld an ordinance which prevented picketing in front of single residences. In holding that the law was a valid time, place, or manner regulation, the Court noted that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[367] The Court recognized that one who is in his home is likely to be a captive audience:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Rowan v. Post Office Dep't, 397 U.S. 728, 738 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.[368]

The *Frisby* decision can be distinguished from *Consolidated Edison* and *Bolger* on two grounds. First, since the regulation in *Frisby* was a time, place, or manner regulation, the government's interest only had to be significant, not substantial. Thus, it could be argued that protecting an individual's privacy at home may be a significant interest but not a substantial one. Second, the degree

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fornia, 403 U.S. 15, 21 (1971); Erznoznik v. Jacksonville, 422 U.S. 205, 211 (1975); Lehman v. Shaker Heights, 418 U.S. 298, 320 (1974); Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978); Kovacs v. Cooper, 336 U.S. 77 (1949).

364 *Consolidated Edison*, 447 U.S. at 541-42. *But see* Rowan v. Post Office Dep't, 397 U.S. 728 (1970), where the Court held constitutional a congressional law, which allowed homeowners to obtain a post office order removing the homeowners' names from the mailer's mailing list if the homeowners believed the material sent by the mailer was "erotically arousing or sexually provocative." *Id.* at 730.

365 *Bolger*, 463 U.S. at 78.

366 487 U.S. 474 (1988).

367 *Id.* at 484.

368 *Id.* at 484-85.

of intrusiveness is much more severe in *Frisby* then in *Bolger* and *Consolidated Edison.* It is certainly easier to escape from an unwanted piece of mail then from protesters directly outside one's home.

In other cases in which the Court has looked to see if there was a "captive audience", the Court has required a significantly greater amount of intrusion than was present in *Consolidated Edison* and *Bolger.* For example, in *Lehman v. City of Shaker Heights,*[369] where the Court upheld restrictions which forbid advertisements by political candidates to be placed inside of buses, the Court noted that, "the streetcar audience is a captive audience. It is there as a matter of necessity, not of choice."[370] *Lehman,* like *Frisby,* seems to involve a greater degree of intrusion than was present in *Consolidated Edison* and *Bolger.* One riding a bus would have a much harder time trying to prevent exposure to the sign than a person receiving an advertisement via the mail. Similarly, in *Kovacs v. Cooper,*[371] the Court upheld an ordinance which prevented trucks from emanating "loud and raucous noises" because of the intrusive nature of the speech. Once again, the speech involved in *Kovacs* would be much harder to avoid then the speech at issue in *Consolidated Edison* and *Bolger.*

Thus, it must be determined if receiving unwanted e-mail is more similar to *Consolidated Edison* and *Bolger,* or to *Frisby.* In many regards, the receiver of intrusive Internet advertising is more like the receiver of unwanted solicitations via the regular mail. Just as a receiver of a letter could look the other way to avoid further bombardment, so too can a receiver of intrusive Internet advertising. Further, a receiver of spam only has to endure one viewing before discarding the advertisement and can easily discard the message—usually by one click of the mouse. However, there is one distinguishing factor that makes spam different from regular mail. A receiver of regular mail can often discard the advertisement by merely looking at the envelope. A receiver of an e-mail which contains an active message may have to access the piece of mail to determine whether the message is an advertisement or not. Similarly, those visiting a Usenet site may not know that the message they are accessing is a commercial message because many advertis-

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369 418 U.S. 298 (1974).

370 *Id.* at 302. *But see* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), where the Court held constitutional an ordinance prohibiting drive-in-movie theaters whose screens were visible from a public street from showing films containing nudity, because the captive person could easily avoid the undesired exposure by looking away.

371 336 U.S. 77, 78 (1949).

ers do not mention that they are making a solicitation in their heading. Even so, the intrusive nature of spam does not seem to be at the same level of intrusiveness as that of *Frisby, Lehman,* and *Kovacs.* Thus, the government interest in protecting one's privacy from messages one cannot escape does not seem to be substantial in the context of intrusive Internet advertisements.

If the Court reached the third prong of the *Central Hudson* test—whether the regulation directly advances the government interest—it would probably pass such a test. Similar to the problem with aesthetics, a regulation aimed at protecting a person's privacy by prohibiting spam would not completely alleviate the alleged harm. If intrusive advertising was prohibited for the sake of protecting one's privacy interest, privacy could not be guaranteed because a person's privacy would still be infringed by noncommercial intrusive messages. However, since *Edge* allows the government to attack the problem by piecemeal legislation, and because the privacy interest would be protected to a material degree, that would not prevent the third prong from being met.

CONCLUSION

Regulation of commercial speech over the Internet is needed. Spamming is not only an annoyance, but it also shifts the advertising cost to the consumer. Since on-line providers and Internet users have no recourse to stop this problem, federal legislation is needed which would give Internet users a cause of action to sue spammers. Such a regulation would be constitutional under the four part *Central Hudson* test.

It is true that the Internet is ever changing and evolving. Perhaps future technology may solve this problem. However, if intrusive Internet advertising continues to persist, the information superhighway may become a road less traveled.

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