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Note

SPAM – It's not Just for Breakfast Anymore: Federal Legislation and the Fight to Free the Internet From Unsolicited Commercial E-Mail

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SPAM – It’s not Just for Breakfast Anymore: Federal Legislation and the Fight to Free the Internet From Unsolicited Commercial E-Mail†

Gary S. Moorefield*

I. INTRODUCTION

1. “Spam,”¹ also known as Unsolicited Commercial E-mail (“UCE”), is no longer just a term that uniquely identifies a variety of luncheon meat, but now also refers to a source of controversy on the Internet.² This Note describes UCE’s effect on the Internet community, explains why non-legislative efforts are unable to protect Internet users and Internet Service Providers (“ISPs”), and proposes a combination of existing legislative efforts that will hold Internet advertisers to the same standards as advertisers that use other avenues to reach consumers.

2. Part II discusses forms of mass advertising for which the federal government has already passed regulations to protect citizens from advertising abuses. It concludes that similar legislation can be effective in controlling UCE. Part III describes recent civil claims that litigants have brought to combat UCE and concludes that legislation is necessary to adequately remedy the UCE threat. Part IV explains why federal legislation is needed instead of or in addition to state regulations. It also describes recent unsuccessful attempts to pass such federal

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¹ “Spam,” a generally accepted slang term for Unsolicited Commercial E-mail, is thought to derive from a comedy sketch on the television show Monty Python’s Flying Circus, wherein a Viking choir sang “SPAM, SPAM, SPAM . . .” so loudly that all other conversation was drowned out. *See RE: SPAM: SPAM and the Internet* (last modified July 23, 1998) <http://www.spam.com/ci/ci_in.htm>. The name attached because UCE similarly hampers Internet communication. *See id.* Hormel, the maker of SPAM® luncheon meat, does not officially oppose the use of the slang term “spam,” but does oppose the act of spamming. *See id.* It further hopes that consumers do not confuse its trademark with Internet spam, especially because Hormel has never engaged in, and is itself a victim of, the practice. *See id.* This Note, out of respect to Hormel and SPAM®, will use the acronym UCE rather than spam.

² One company, Cyber Promotions, sends UCE mailings to 900,000 e-mail addresses two times a day. *See* Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam & the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 250 (1998).

legislation. Finally, Part V proposes legislation based on effective elements of past anti-UCE efforts.³

II. THE ANALOGY BETWEEN UCE AND JUNK-MAIL

3. The following offers, invitations, and advertisements are typical of the material that is found within UCE messages:

- MAKE IT YOURSELF ACNE RECIPE . . . I could have charged more for this [than \$19.95], but I thought, help others like I was helped out by my family.
- DIRECT YOUR OWN ADULT VIDEO THIS VERY MINUTE!
- Attention Tie Wearers!!! Are you tired of having to tie and retie your tie several times in the morning to get the proper length for a professional appearance? . . . (The Tie-Rite Marker lets perfectionists highlight the right spot to begin their knot.).
- Cable Descramblers! See what you've been missing . . . STOP PAYING THOSE OUTRAGEOUS CABLE BILLS.⁴

4. These offers, invitations, and advertisements are typical of the material that is found within UCE messages. As the above examples demonstrate, some UCE messages are benign, others offensive, and still others merely misdirected; occasionally, recipients may even welcome the content of these advertisements. The question is not whether the medium of UCE messages serves some good; the question is whether the drawbacks of this medium of commercial expression outweigh the benefits to a degree that necessitates government intervention and control.

A. Junk-Mail in the Past

5. Since UCE is merely opportunistic advertisers' latest effort to force their messages upon consumers, a survey of the government's early attempts to regulate commercial speech is necessary.

³ See *Spam Law on Congress Docket, Wired News Report* (visited Apr. 5, 1999) <<http://www.wired.com/news/politics/story/17065.html>> (quoting House Commerce Committee Chairman Tom Bliley as saying that he "will work with legislators and the private sector to resolve the problem of computer junk mail"). That Bliley made this comment in a 1998 year-end speech indicates that the 106th Congress will reopen the topic of UCE. See *id.*

⁴ Thomas E. Weber, *The Three Most Dreaded Words in Cyberspace? 'You've Got Mail!'*, WALL ST. J., Oct. 2, 1997, at B1. These messages are just some of the thirty-nine that one America Online subscriber received in one week. See *id.*

1. *Rowan v. United States Post Office Department*

6. Prior to the advent of the Internet and e-mail, advertisers flooded the United States mail with copious unsolicited advertisements.⁵ This practice forced myriad pieces of mail upon recipients who could sort through, open, and read the mail, but who were unable to prevent delivery of advertisements they found objectionable.⁶ Eventually, the federal government passed legislation that provided consumers with a means of removing their names and addresses from the mailing lists of advertisers who were selling “erotically arousing or sexually provocative” material.⁷

7. It did not take long for advertisers to challenge this statute on the grounds that it “violate[d] their constitutional right to communicate.”⁸ The Supreme Court, in *Rowan v. United States Post Office Department*, rejected this contention and asserted that “[n]othing in the Constitution compels [people] to listen to or view any unwanted communication, whatever its merit.”⁹ In upholding the statute, the Court suggested that there had been a shift in the Postal Service’s original purpose from carrying primarily private mail to carrying mostly commercial junk-mail.¹⁰ Therefore, the Court may have been comfortable with the regulation of this commercial outgrowth because such regulation would not detract from the Service’s original purpose.

8. Most importantly, the Court stressed that the statute in question gave the homeowner, not the government, the power to regulate what mail came into the home.¹¹ It found that “Congress provided this sweeping power [to homeowners] not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.”¹²

⁵ See *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 736 (1970) (commenting on the “plethora” of commercial mail subsidized by low postal rates then being delivered to residents, either against or without their consent).

⁶ See *id.* The Court stated that “Everyman’s mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.” *Id.*

⁷ 39 U.S.C. § 3008(a)-(b) (1997) (formerly 39 U.S.C. § 4009).

⁸ *Rowan*, 397 U.S. at 735.

⁹ *Id.* at 737.

¹⁰ See *id.* at 736. The Court observed that the mailing of advertisements “changed the mailman from a carrier of primarily private communications, . . . and [has] made him an adjunct of the mass mailer.” *Id.*

¹¹ See *id.* at 736-37.

¹² *Id.* at 737. The Court also took comfort in the constitutionality of the statute because “the mailer’s

2. The *Central Hudson* Test

9. In 1980, the Supreme Court, in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, eased its stance and recognized that commercial speech was due some First Amendment protection.¹³ The Court announced that before the government could regulate commercial speech, it must demonstrate that: (i) the speech has no association with illegal activity and does not mislead listeners; (ii) a substantial governmental interest is at stake; (iii) restriction of the speech right directly advances the government's interest; and (iv) the regulation is "not more extensive than is necessary" to meet its objective.¹⁴ Courts have applied the *Central Hudson* test both to uphold and strike down governmental regulation of commercial speech.¹⁵ The essential rule that resulted from *Central Hudson* and *Rowan* is that while the government cannot regulate an advertisement's content, it can and does regulate the form in which an advertiser communicates that content to potential consumers.

3. The Telephone Consumer Protection Act

10. In 1991, the government passed legislation to thwart mass telephone advertising.¹⁶ The Telephone Consumer Protection Act prohibits the use of auto-dialers to call homes and businesses and play pre-recorded messages, and prohibits unsolicited transmissions from computers or fax machines to "telephone facsimile machines."¹⁷ In addressing the need for the ban, Congress found the messages to be an invasion of privacy and a safety hazard.¹⁸

11. The Ninth Circuit Court of Appeals, in *Destination Ventures v. Federal Communications Commission*, analyzed this statute in the context of fax transmissions, and found that it was narrowly tailored to address the substantial

right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Id.* Hence, the government is not controlling the mail's content.

¹³ 447 U.S. 557 (1980).

¹⁴ *Id.* at 564-66.

¹⁵ See, e.g., *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 894 (7th Cir. 1991) (validating local legislation requiring realtors to remove residents from their address lists upon request); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 84 (1983) (invalidating a federal statute that banned the mailing of advertisements for contraceptives).

¹⁶ See 47 U.S.C. § 227 (1997).

¹⁷ *Id.* at § 227(b)(1).

¹⁸ See 47 U.S.C. § 227 at Congressional Statement of Findings § 5 (stating that the prohibition on auto-dialers is justified because they intrude upon the privacy afforded to the home and tie up telephone lines such that emergency communications could be blocked).

government interest of preventing cost-shifting from advertisers to consumers.¹⁹ It is important to note, however, that this decision, by establishing that the prevention of cost-shifting is a substantial government interest, went beyond simply validating the statute as it applied to fax transmissions. Therefore, this decision established precedent for the expansive interpretation of the Telephone Consumer Protection Act.

B. UCE: Junk Mail on the Internet

12. The problems that UCE poses are analogous to those attributed to telephone and paper advertisements; therefore, traditional methods of treating telephone and paper advertisements would be equally effective in handling UCE. UCE creates the same type of inconvenience and cost-shifting problems as the media that federal legislation has already targeted.

13. UCE inundates recipients with useless and unwanted mail. Consequently, the virtual postal carriers, the ISPs,²⁰ have to carry the heavier load.²¹ In fact, because the cost of sending an additional e-mail is negligible, advertisers have less incentive to limit their transmissions.²² Indeed, because Internet use is constantly increasing, it follows that commercial use is also increasing.²³ Unfortunately, the growth of UCE and the growth of the Internet are

¹⁹ 46 F.3d 54, 56 (9th Cir. 1995) ("The ban is even-handed, in that it applies to commercial solicitation by any organization, be it a multi-national corporation or the Girl Scouts."); *see also* David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1009 (observing that recipients of junk faxes incur the costs of printing, paper, ink, and "wear and tear" on the fax machine).

²⁰ ISPs are generally responsible for relaying e-mail traffic to their clients and for storing user-bound e-mail until clients connect to their server computer to access the Internet. *See* Sorkin, *supra* note 19, at 1009-10.

²¹ To accommodate the increased e-mail capacity, ISPs must increase their "bandwidth," which is the range of frequencies that they use to transmit data for their customers. *See NetLingo: The Internet Language Dictionary* (visited Apr. 5, 1999) <<http://209.66.74.129/lookup.cfm?term=bandwidth>>. Many places, including libraries and educational institutions, pay their ISPs based upon the amount of bandwidth. *See* Sorkin, *supra* note 19, at 1009.

²² Users can send e-mails virtually cost-free because ISPs provide Internet access to users, including UCE senders, in return for a per month Internet access fee. *See* Sorkin, *supra* note 19, at 1009. Even under Internet access schemes that charge by the hour or minute, the cost of sending e-mails is negligible because a user can compose messages and address them to any number of recipients prior to connecting to the server computer; senders can deliver these messages in a matter of seconds once online, or connected to the server computer. *See id.* at 1007 n.34.

²³ *See id.* at 1006 (discussing the concurrent expansion of the Internet and e-mail use).

at odds with each other. The enormous volume of UCE that users send out over the Internet can slow communications and cripple ISP servers.²⁴

14. Another major concern with UCE is the costs involved with sending UCE, or cost-shifting, as seen in the junk-fax scenario.²⁵ The time it takes to download the unwanted mail inconveniences UCE recipients and ties up phone lines.²⁶ There are also reputational costs for the ISP that fields recipients' complaints even though it is not responsible for the transgressions.²⁷ Moreover, real expenses associated with cost-shifting are evident in ISPs' purchasing of increased bandwidth to accommodate the increased message traffic; ISPs then pass these costs on to their clients in the form of higher access fees.²⁸

III. NON-LEGISLATIVE EFFORTS TO CONTROL UCE

15. In the absence of federal regulation, the battle against UCE has made its way into the courts.²⁹ Typically, large ISPs bring claims against UCE originators because the ISPs feel the bite of UCE on a grand scale and have the financial

²⁴ See *Protecting Consumers Against Slamming: Hearing on H.R. 3050 and H.R. 3888 Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 88 (1998) [hereinafter *Slamming Hearing*] (statement of Ray Everett-Church, Co-Founder and Counsel, Coalition Against Unsolicited Commercial E-mail ("CAUCE")) (noting that "[j]unk email has knocked out systems belonging to major Internet service providers such as AT&T, @Home, Pacific Bell, Netcom, GTE, and literally hundreds of smaller ISPs serving rural communities across the nation.") (footnotes omitted).

²⁵ See *supra* note 19 and accompanying text.

²⁶ See Sorkin, *supra* note 19, at 1011 (discussing the increased download times and time and effort necessary to sort the e-mail messages).

²⁷ See *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) ("CompuServe has received many complaints from subscribers threatening to discontinue their subscription unless CompuServe prohibits electronic mass mailers from using its equipment to send unsolicited advertisements.").

²⁸ See Sorkin, *supra* note 19, at 1010 ("Ultimately, the costs involved in transmitting an e-mail message are divided roughly in half between the sender and the recipient"); see also *CompuServe*, 962 F. Supp. at 1019 ("Compuserve's subscribers pay for their access . . . in increments of time and thus the process of accessing, reviewing and discarding unsolicited e-mail costs them money").

²⁹ See *Unsolicited E-mail - Cases* (last modified July 31, 1998) <<http://www.jmls.edu/cyber/cases/spam.html>>. Since 1996, Cyber Promotions, a major UCE sender, has been the target of suits by America Online, Apex Global Information Systems, Bigfoot Partners, CompuServe, Concentric Network, Earthlink Network, Prodigy Services, Web Systems, and WorldCom. See *id.*

capability and incentive to take UCE senders to court.³⁰ In these cases, plaintiffs have brought various state and federal claims, discussed in detail below.³¹

A. State and Federal Trademark Claims

16. Recent cases have involved service, trade mark and/or trade name infringement, and dilution claims (state and federal).³² The theory is that, in efforts to disguise UCE as legitimate e-mail, UCE senders use ISPs' service marks in the bodies of their advertisements.³³ This disguising is necessary to fool both the ISPs that use sophisticated filters to find and prevent UCE delivery,³⁴ and the consumers, who may give more credence to an advertisement sanctioned by the ISP than they would otherwise give to UCE.³⁵

17. Dilution occurs on two fronts, both to the detriment of the ISPs' goodwill.³⁶ First, the ISPs suffer when Internet users who disdain UCE associate an ISP with UCE; second, as UCE senders perpetrate frauds or sell substandard products, the ISPs suffer reputational losses by association.³⁷

³⁰ See Daniel P. Dern, *Postage Due On Junk E-Mail – Spam Costs Internet Millions Every Month*, INTERNET WEEK, May 4, 1998 (visited Apr. 5, 1999) <<http://www.techweb.com/se/directlink.cgi?INW19980504S0003>> (detailing the costs to ISPs of handling and combating UCE).

³¹ See, e.g., *Compl. of America Online, Inc.* ¶ 1, *America Online, Inc. v. Cyber Promotions, Inc.*, No. CIV.A.96-462 (E.D. Va. 1997) (establishing federal jurisdiction for claims based on federal copyright and trademark statutes and supplemental jurisdiction for state claims arising under common law and the Virginia Computer Crimes Act).

³² See, e.g., *Hotmail Corp. v. Van\$ Money Pie Inc.*, Nos. C-98 JW PVT ENE, C 98-20064 JW, 1998 WL 388389, at *3 ¶ 20 (N.D. Cal. filed April 16, 1998) (bringing claims for false designation of origin and both federal and state dilution); *Compl. of America Online*, No. CIV.A.96-462, ¶ 1 (bringing claims for service mark and trade name infringement, dilution, and false designation of origin).

³³ See *Hotmail*, 1998 WL 388389, at *4, ¶¶ 21-23; *Compl. of America Online*, No. CIV.A.96-462, ¶¶ 37-39.

³⁴ See *OptList* (visited Apr. 25, 1999) <<http://www.optlist.com/consumer.html>> (discussing the use of filters to block out unwanted e-mail).

³⁵ See *Hotmail*, 1998 WL 388389, at *4-5, ¶¶ 23, 28 (claiming that the defendants' use of the plaintiff's mark could signify plaintiff's approval of the defendants' UCE); *Compl. of America Online*, No. CIV.A.96-462, ¶ 37 (alleging that use of plaintiff's mark implied false sponsorship).

³⁶ See *Hotmail*, 1998 WL 388389, at *5, ¶ 32 (noting that the use of identical marks by both plaintiff and defendant in "identical trade channels" supported the finding of a likelihood of success on the merits of the dilution claims); *Compl. of America Online*, No. CIV.A.96-462, ¶¶ 42-43 (alleging that the defendant's use of plaintiff's marks showed a "willful intent" to cause dilution to plaintiff's marks).

³⁷ See *Hotmail*, 1998 WL 388389, at *5, ¶¶ 31-32 ("[T]he use of identical marks by defendants . . . threatens to harm plaintiff's business reputation."); *Compl. of America Online*, No. CIV.A.96-462, ¶

B. Unfair Competition

18. Plaintiffs have also used unfair competition statutes (state and federal) to stop UCE.³⁸ Because the senders know that complaints from unhappy recipients will likely be forthcoming, it is very common for UCEs to have either no return address, a fake return address, or a return address that refers to a genuine account or contact phone number that the sender seldom, if ever, maintains.³⁹ As a result, competitors operate at a disadvantage if they utilize more expensive methods of advertising or if they participate responsibly in bulk advertising on the Internet.⁴⁰

C. Tort Claims

19. Tort remedies have been sought under state common-law misappropriation⁴¹ and conversion⁴² theories. The ISP will allege that the UCE consumes the ISP's valuable resources (bandwidth) to the benefit of the sender and the detriment of the ISP.⁴³ The senders of UCE benefit from virtually free advertising, resulting in profits to their companies, despite the fact that recipients throw away the bulk of the advertisements.⁴⁴ The ISPs, on the other hand, are

48 (alleging that defendant's actions caused plaintiff "loss of reputation" and irreparable harm).

³⁸ See *Hotmail*, 1998 WL 388389, at *4-5 at ¶¶ 25-26 (noting that the plaintiff and defendant not only share identical marks, but also share the same category of goods and services); *Compl. of America Online*, No. CIV.A.96-462, ¶¶ 49-53 (discussing plaintiff's claim of unfair competition arising from defendant's "confusingly similar" marks).

³⁹ See *Hotmail*, 1998 WL 388389, at *6, ¶ 34 ("[T]here are at least serious questions going to the merits of this claim . . . that defendants knowingly falsified return e-mail addresses . . . [and] that such addresses were tied to Hotmail accounts set up by defendants with the intention of collecting never-to-be read consumer complaints . . ."); *Compl. of America Online*, No. CIV.A.96-462, ¶ 55 (alleging that defendant "misrepresent[ed] the source . . . of its goods or services . . .").

⁴⁰ An example of responsible participation is the honoring of requests for removal from distribution lists.

⁴¹ Misappropriation occurs when UCE is sent via the sender's ISP in violation of and beyond the authorization of the sender's use contract with the ISP. See, e.g., *Compl. of America Online*, No. CIV.A.96-462, ¶¶ 74-81.

⁴² Conversion occurs when UCE senders cause damage to an ISP's computer, especially when UCE senders use an ISP's computer for their own benefit and exercise dominion over it by inundating the system with thousands of UCE transmissions. See *id.* ¶¶ 82-86.

⁴³ See *id.* ¶¶ 77, 84 (alleging that the defendant's use of plaintiff's services "clog[s] plaintiff's] mail server and has forced [plaintiff] to devote significant resources to manage" the UCE, hence "depriv[ing plaintiff] and its customers of the legitimate use" of the system).

⁴⁴ See James R. Rosenfield, *Confessions of a (Gasp) 'Junk Mailer'*, DIRECT, May 1, 1994, at 82 (noting that more than 90% of junk mail is discarded); see also *supra* note 22 and accompanying text (discussing the negligible costs of sending UCE).

saddled with the expenses associated with transmitting UCE and customer complaints.⁴⁵

D. Federal Technology Statutes

20. Plaintiffs have also applied federal technology law statutes to UCE. In *America Online v. Cyber Promotions*, America Online argued that the Electronic Communications Privacy Act⁴⁶ applied to UCE senders because UCE constitutes unauthorized access to the ISP's network.⁴⁷ However, two factors limit the application of these statutes. First, since ISPs operate under unrestricted access policies, it is difficult to argue unauthorized access.⁴⁸ Second, it may be difficult to apply technology law statutes because UCE does not "obtain[], alter[], or prevent[] unauthorized access to a wire or electronic communication while it is in electronic storage" ⁴⁹

21. America Online also argued that the Computer Fraud and Abuse Act ("CFAA")⁵⁰ applied to UCE senders because UCE causes harm to America Online's computer facilities.⁵¹ This approach is limited because of the inconsistency between the statute's narrow definition of a protected computer and the openness of the Internet.⁵² Because ISP computers and the Internet are available to the public, the statute's definition of a protected computer tends to fall short of encompassing these public networks. Further, the low incremental effect of each piece of UCE limits

⁴⁵ See *supra* Part II.B.

⁴⁶ 18 U.S.C. § 2701 (1994).

⁴⁷ See *Compl. of America Online*, No. CIV.A.96-462, ¶¶ 93-98 (claiming that defendant knowingly gained unauthorized access to plaintiff's system with the "specific intent . . . [of] distribut[ing] for profit, . . . , the promotional material of [defendant's] clients).

⁴⁸ The statute provides a remedy for damages resulting from unauthorized access to a computer network server. See 18 U.S.C. § 2701(a)(1). Therefore, the question for the courts is whether the statute, which protects free-standing or semi-private networks, applies to Internet servers.

⁴⁹ See 18 U.S.C. § 2701(a).

⁵⁰ 18 U.S.C. § 1030 (1994).

⁵¹ See *Compl. of America Online*, No. CIV.A.96-462, ¶¶ 99-105 (describing plaintiff's claim under the Act).

⁵² That a UCE sender "knowingly causes the transmission of . . . information" is undeniable. 18 U.S.C. § 1030(a)(5)(A). However, it is not clear that an ISP's server, or the Internet as a whole, constitutes a "protected computer"; defined as a computer "exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government." 18 U.S.C. § 1030(e)(2)(A).

this statute's application.⁵³ Therefore, an isolated instance of UCE appears too trivial to secure either statute's protection.

22. While these efforts represent plausible answers to the UCE problem, the judicial approach is severely limited in the absence of legislation tailored to UCE.⁵⁴ Litigation is overly repetitive, as each individual ISP must bring suit against each UCE originator.⁵⁵ Further, the general Internet user and recipient of UCE is unlikely to sue UCE senders because of the low individual stakes and the high costs.⁵⁶ Hence, ISPs shoulder the burden and cost of litigation, and then pass these costs on to the users through increased access fees.⁵⁷ Finally, application of current statutes and common law is unpredictable, given courts' differing interpretations in the absence of precedent or evidence of Congressional intent to address UCE.⁵⁸ Federal legislation would provide the consistency that current common laws and statutes lack.⁵⁹

⁵³ See Marcus, *supra* note 2, at 254 (noting that "if the spammer sent his messages to fewer . . . e-mail addresses, . . . [i]t would be difficult for an on-line provider to show that it was injured").

⁵⁴ See *Protecting Consumers Against Cramming and Spamming: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 63-64 (1998) [hereinafter *Cramming and Spamming Hearing*] (statement of Randall Boe, Assoc. Gen. Counsel, America Online) (stating the costs UCE imposes on ISPs and America Online's willingness to work with Congress in developing legislation). See generally Jonathan Byrne, *Squeezing Spam Off the Net: Federal Regulation of Unsolicited Commercial E-mail*, 2 W. VA. J.L. & TECH. 4, ¶¶ 6-16 (1998) <<http://www.wvjolt.wvu.edu/v2i1/byrne.htm>> (describing the historical roots of the judicial regulation of UCE).

⁵⁵ See *Unsolicited E-mail - Cases*, *supra* note 29 (demonstrating that just as a given UCE sender may be the subject of several lawsuits, each seeking relief for the same or similar acts, a given ISP may be the plaintiff in several lawsuits, each focused on only one UCE sender).

⁵⁶ See *Slamming Hearing*, *supra* note 24, at 91 (statement of Ray Everett-Church).

⁵⁷ See Sorkin, *supra* note 19, at 1019 (describing the shifting of costs to UCE recipients).

⁵⁸ See *supra* notes 29-53 and accompanying text.

⁵⁹ Although several states have proposed local regulation of UCE, few have actually enacted the legislation. See *Unsolicited E-mail - State Statutes* (last modified Mar. 5, 1999) <<http://www.jmls.edu/cyber/statutes/email/state.html>>. Moreover, it is unclear how effective state level regulation of UCE can be given the jurisdictional limitations; a national system of regulation should govern this national technology.

IV. LEGISLATION IS THE ANSWER TO THE UCE PROBLEM

23. Armed with specific anti-UCE statutes, ISPs and users would be better suited to take on the UCE senders.⁶⁰ To this end, several proposed legislative solutions have sought to counter UCE's increasing threat.

A. Application of the Telephone Consumer Protection Act

24. Arguably, the Telephone Consumer Protection Act of 1991 ("TCPA") can regulate UCE in the same manner as it regulates junk-faxes.⁶¹ This application, however, is strained in two respects. First, the TCPA's application to UCE depends upon an analogy between a fax machine and its transmissions, and a computer and its e-mail transmissions.⁶² Similar to a fax machine, a computer both transcribes text and pictures into data, and translates text and pictures from data; it transmits over telephone lines, and is capable of printing to an attached printer.⁶³ This is not an impossible analogy to develop, but, as of yet, no cases have applied the TCPA in any large-scale anti-UCE litigation.⁶⁴ Additionally, the viability of this analogy is defective because the TCPA's legislative history lacks any Congressional intent to limit computer-to-computer transmissions.⁶⁵ Also, in passing the TCPA, Congress was primarily concerned with cost-shifting from the advertiser to the recipient.⁶⁶

⁶⁰ See, e.g., Steven E. Bennett, Note, *Canning Spam: CompuServe, Inc. v. Cyber Promotions, Inc.*, 32 U. RICH. L. REV. 545, 569-70 (1998) (observing that because "existing law is likely to prove inadequate as advertisers, providers and subscribers journey deeper into cyberspace . . . , regulation on the federal level is an almost inevitable development . . .").

⁶¹ See *supra* notes 16-19 and accompanying text. See generally Sorkin, *supra* note 19, at 1020 (discussing the benefits of applying the TCPA to promote policy objectives).

⁶² See Bennett, *supra* note 60, at 562-63 (stating that the "TCPA's definition of a telephone facsimile machine can be seen as being broad enough to include most personal computers"); see also Sorkin, *supra* note 19, at 1013 ("A computer with a modem, a printer, and appropriate software . . . qualifies as a [telephone facsimile machine] under [the statute].").

⁶³ See 47 U.S.C § 227(a)(2) (1997).

⁶⁴ See Sorkin, *supra* note 19, at 1002 n.12. Professor Sorkin does briefly discuss one small claims case brought by an individual against CompuServe for UCE the man received after he notified CompuServe he did not want to receive UCE. See *id.* The parties eventually settled the case. See *id.*

⁶⁵ See SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSP., TELEPHONE CONSUMER PROTECTION ACT OF 1991, S. REP. NO. 102-178 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968; HOUSE COMM. ON ENERGY AND COMMERCE, TELEPHONE CONSUMER PROTECTION ACT OF 1991, H.R. REP. NO. 102-1096, at 222 (1992); see also Bennett, *supra* note 60, at 563.

⁶⁶ It is the recipient of a fax transmission who must pay for the paper and telephone-line usage. See *supra* note 19 and accompanying text.

Because this cost-shifting is difficult to demonstrate in UCE cases, litigators have not seized upon this line of attack when battling UCE senders.⁶⁷

B. Unsuccessful Attempts to Pass UCE-Specific Legislation

1. The Unsolicited Electronic Mail Choice Act

25. The Unsolicited Electronic Mail Choice Act of 1997 ("Senate Bill 771")⁶⁸ is representative of anti-UCE legislation that the legislature did not enact into law. The bill requires that UCE include as the first word in the subject line of the message the label "advertisement," and requires accurate physical and electronic mailing address and telephone contact information in the body of the message.⁶⁹ Thus, recipients could identify UCE without opening it and have a means of forwarding a request to the advertiser to opt-out of receiving further UCEs; the proposed legislation requires UCE originators to honor these requests.⁷⁰ The Senate Bill also allows the Federal Communications Commission ("FCC") to impose and enforce, through a civil action, fines up to an \$11,000 for violations.⁷¹ The bill further provides individuals with the opportunity to seek up to \$5,000 in damages via civil actions in district court.⁷² Unfortunately, the bill places heavy burdens on ISPs. This legislation requires ISPs to facilitate reporting of mass complaints from their subscribers to the FCC,⁷³ and to provide subscribers with blocking services.⁷⁴ Additionally, the forced labeling requirement for all advertisements may provoke a First Amendment challenge.⁷⁵ Given the government's substantial interest in

⁶⁷ See *generally supra* note 22 and accompanying text (describing the negligible costs that sending UCE entails).

⁶⁸ S. 771, 105th Cong. (1997) (proposal of Sen. Murkowski, May 21, 1997). This Bill was still in the Commerce, Science and Transportation Committee when the 1998 regular session adjourned. See United States Bill Tracking, 1997 U.S. SENATE BILL NO. 771.

⁶⁹ See S. 771, 105th Cong. § 3(a)(2)-(3).

⁷⁰ See S. 771 § 7(a). Upon receiving an opt-out request, UCE originators would have to cease sending e-mail to the requesting individual within 48 hours. See S. 771 § 7(a)(2).

⁷¹ See S. 771 § 4(a)(1)(B).

⁷² See S. 771 § 8(a)-(b).

⁷³ See S. 771 § 6(c)(1)(A), (2) If over 100 subscribers complain to the ISP regarding a specific UCE transmission, the ISP must report the violation to the FCC. See *id.*

⁷⁴ See S. 771 § 6(d)(1). This course of action may be one that ISPs voluntarily take, but should not be mandatory because the ISP is, in most cases, as much a victim as the Internet user who receives the mail. See *supra* notes 20-28 and accompanying text.

⁷⁵ See Michael W. Carroll, *Garbage In: Emerging Media and Regulation of Unsolicited Commercial*

controlling UCE and the statute's narrow application, however, it is possible the bill could have survived under the *Central Hudson* test.⁷⁶

2. The Data Privacy Act

26. The Data Privacy Act of 1997 ("House Bill 2368")⁷⁷ was Congress' next attempt at UCE regulation. The Act establishes guidelines requiring accurate originator identification data.⁷⁸ Similar to Senate Bill 771, House Bill 2368 forces advertisers to honor recipients' opt-out requests.⁷⁹ However, the bill avoids the forced labeling requirement and alleviates Senate Bill 771's burdens on ISPs.⁸⁰ Unfortunately, House Bill 2368 is merely a statement of guidelines and lacks any enforcement provisions.⁸¹ It is highly unlikely that companies already sending UCE with impunity would change their behavior simply because Congress established voluntary guidelines.⁸²

Solicitations, 11 BERKELEY TECH. L.J. 233, 270-71 (1996) ("The First Amendment places limitations on the government's ability to require that labels be put on unsolicited commercial solicitations. The requirement could be viewed as either a content-based requirement . . . or as a content-neutral time, place, and manner restriction . . .").

⁷⁶ See *id.* at 271 (concluding that a labeling requirement would withstand a constitutional challenge if the government asserts the substantial interests of protecting a citizen's privacy, preventing cost-shifting, and advancing the usefulness of the Internet).

⁷⁷ H.R. 2368, 105th Cong. (1997) (proposal of Rep. Tauzin, July 31, 1997). This Bill was still in the Commerce Committee when the 1998 regular session adjourned. See United States Bill Tracking, 1997 U.S. HOUSE BILL NO. 2368.

⁷⁸ See H.R. 2368 § 4.

⁷⁹ See H.R. 2368 § 3(c) (requiring that methods be established to provide consumers with options to stop delivery of UCE).

⁸⁰ Compare H.R. 2368 with S. 771 § 6(c)-(d) (1997). See also *supra* notes 69, 73 and accompanying text.

⁸¹ See H.R. 2368. The Act does provide some enforcement provisions, but these target specific types of information, such as social security numbers and medical information. See H.R. 2368 §§ 6(b), 7(a).

⁸² See Marcus, *supra* note 2, at 251 (discussing the disincentives that UCE senders have to comply with voluntary regulation and asserting that "[s]ince Internet users are not adhering to the rules of Netiquette, it appears that self-regulation by Internet users who send commercial messages will not happen").

3. The Electronic Mailbox Protection Act

27. Another proposed anti-UCE bill is the Electronic Mailbox Protection Act of 1997 ("Senate Bill 875").⁸³ This proposal prohibits UCE senders from harvesting e-mail addresses,⁸⁴ requires all senders of unsolicited e-mail (commercial and noncommercial) to provide valid reply addresses and honor opt-out requests,⁸⁵ and requires UCE senders to comply with "Internet standard[s]" regarding unsolicited e-mail.⁸⁶ However, the bill faces two problems. First, it regulates non-commercial speech, in apparent violation of the First Amendment.⁸⁷ Second, the Internet standards that the bill mentions are nonexistent; until such standards are in place, the bill lacks effectiveness⁸⁸

4. The E-Mail User Protection Act

28. The E-Mail User Protection Act of 1998 ("House Bill 4124")⁸⁹ is the first bill to attempt to protect ISPs' interests.⁹⁰ This bill establishes requirements for

⁸³ S. 875, 105th Cong. (1997) (proposal of Sen. Torricelli, June 11, 1997). This Bill was still in the Commerce, Science and Transportation Committee when the 1998 regular session adjourned. *See* United States Bill Tracking, 1997 U.S. SENATE BILL NO. 875.

⁸⁴ *See* S. 875 § 3(a)(8). The bill's "Findings" section explains that the collection of e-mail addresses from ISP files without the knowledge or permission of users and ISPs violates the rules of many jurisdictions. *See* S. 875 § 2(8).

⁸⁵ *See* S. 875 § 3(a)(2)-(3).

⁸⁶ S. 875 § 3(a)(5). UCE distributors would violate the bill if they sent UCE after receiving notice "either directly or through a standard method developed . . . by an Internet standard setting organization . . . that the recipient does not wish to receive such messages." *Id.*

⁸⁷ Note that while the government can readily limit commercial speech under *Central Hudson*, attempts to regulate non-commercial speech, while not wholly forbidden, enjoy much greater First Amendment protection. *See* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980).

⁸⁸ This Bill gives no authority to any particular group to establish Internet policies and guidelines, but does make reference to standard-setting organizations such as the Internet Engineering Task Force and the World Wide Web Consortium. *See* S. 875 § 3(a)(5).

⁸⁹ H.R. 4124, 105th Cong. (1998) (proposal of Rep. Cook, June 24, 1998). This Bill was still in the Commerce Committee when the 1998 regular session adjourned. *See* United States Bill Tracking, 1997 U.S. HOUSE BILL NO. 4124.

⁹⁰ *See* Dern, *supra* note 30 (detailing the costs to ISPs of UCE and establishing that they are as in need of protection as Internet users).

valid return addresses⁹¹ and for UCE senders to honor opt-out requests.⁹² Moreover, the bill prohibits knowing or negligent transmission of UCE via ISPs that disallow UCE traffic,⁹³ and the distribution of address lists containing opt-out candidates.⁹⁴ Further, the bill validates, as a matter of law, an ISP's authority to determine and enforce guidelines for access to its services, such as prohibitions against the dissemination of UCE.⁹⁵

29. Additionally, this bill provides ISPs with a civil cause of action for injunctive relief and statutory damages up to \$10,000, with a discretionary multiplication factor of ten for particularly egregious or knowing violations.⁹⁶ The bill also allows a state's attorney general to bring an action on behalf of aggrieved individuals.⁹⁷ The attorney general can seek injunctive relief, statutory damages of up to \$500 per violation, and a multiplication factor of ten for egregious violations.⁹⁸ Additionally, in all cases, plaintiffs could seek "reasonable attorneys' fees."⁹⁹

30. This legislation's primary shortfall is that it would allow UCE to continue until recipients specifically request that they do not receive UCE.¹⁰⁰ Another drawback is that although UCE senders would be unable to send UCE in violation of certain ISPs' guidelines, they could send UCE to or from ISPs that do not prohibit UCE.¹⁰¹ Thus, Internet user protection would only come through ISPs' voluntary actions, and UCE abusers could find safe haven on UCE friendly servers. An Internet user should not have to seek out an ISP that prohibits UCE anymore

⁹¹ See H.R. 4124 § 3(a)(2)(A)-(B).

⁹² See H.R. 4124 § 3(b)(2)(A).

⁹³ See H.R. 4124 § 3(a)(2)(E).

⁹⁴ See H.R. 4124 § 3(a)(2)(C).

⁹⁵ See H.R. 4124 § 3(a)(2)(E). This section's reference to "rules of the interactive computer service with respect to unsolicited commercial e-mail messages" gives ISP regulations presumptive validity. *Id.*

⁹⁶ See H.R. 4124 § 3(c)(1)(B).

⁹⁷ See H.R. 4124 § 3(c)(2)(B).

⁹⁸ See H.R. 4124 § 3(c)(2)(C)-(D).

⁹⁹ H.R. 4124 § 3(c)(1)(C), (2)(E). This amendment makes it conceivable for smaller ISPs and users to seek remedies in court where their losses otherwise would not justify the expense of litigation.

¹⁰⁰ See H.R. 4124 § 3(b)(2).

¹⁰¹ See H.R. 4124 § 3(a)(2)(E). The bill recognizes that ISPs can establish rules regarding UCE, but does not require such rules. See *id.*

than a telephone customer should have to contract for telephone service through a company that does not allow telemarketing or junk-fax transmissions.¹⁰²

31. Although this bill may be easier to push through Congress than other proposed legislation, it fails to adequately protect UCE recipients because it stops short of a complete ban.¹⁰³ Therefore, this bill does not protect a customer of an ISP that forbids UCE from users who send UCE using a second ISP that does not forbid UCE.

5. The Digital Jamming Act

32. The Digital Jamming Act of 1998 ("House Bill 4176")¹⁰⁴ is another unsuccessful attempt by the 105th Congress to address the problem of UCE. It proposes "[t]o amend the Communications Act of 1934¹⁰⁵ to protect consumers against 'spamming', 'slamming', and 'cramming.'"¹⁰⁶ While this bill targets UCE by requiring originator identification data, contact information for opting out, and senders' maintenance of opt-out lists,¹⁰⁷ it mixes these efforts with non-UCE issues. Slamming and cramming are telecommunications issues that have nothing to do with the UCE problem; therefore, it is difficult to know which regulation is riding on the other's coattail.¹⁰⁸ Because courts applying the *Central Hudson* test look closely at Congressional intent, this statute might not survive review.¹⁰⁹

¹⁰² See *supra* notes 16-18 and accompanying text. The regulation of auto-dialers and facsimile machines was medium-specific, not provider-based. See generally 47 U.S.C. § 227 (1997) (establishing restrictions on the use of auto-dialers and facsimile machines to transmit unsolicited commercial materials).

¹⁰³ See *Slamming Hearing*, *supra* note 24, at 90 (statement of Ray Everett-Church). Mr. Everett-Church asserts that "any legislation that sanctions the sending of unsolicited email, however well-intentioned, does nothing short of legalizing a kind of theft." *Id.* He finds that UCE "steal[s] the time, money, and resources of others against their will." *Id.*

¹⁰⁴ H.R. 4176, 105th Cong. (1998) (proposal of Rep. Markey, June 25, 1998). This Bill was still in the Commerce Committee when the 1998 regular session adjourned. See United States Bill Tracking, 1997 U.S. HOUSE BILL NO. 4176.

¹⁰⁵ 47 U.S.C. § 227 (1997).

¹⁰⁶ H.R. 4176.

¹⁰⁷ See H.R. 4176 tit. I § 101(2)(D)(M), (e)(1)(A)-(B).

¹⁰⁸ See H.R. 4176 tit. II (discussing the prohibitions on slamming and cramming in regards to telecommunications companies). There are no stated findings in the text of this bill by which to demonstrate the Congressional motive for the legislation. See H.R. 4176.

¹⁰⁹ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest.").

6. The Anti-Slamming Amendments Act

33. In May 1998, the Senate did pass a bill containing an anti-UCE provision,¹¹⁰ but the House dispensed with the UCE language prior to passing on its version.¹¹¹ The Anti-Slamming Amendments Act was introduced to amend Section 258 of the Communications Act of 1934.¹¹² Senators Murkowski and Torricelli authored an anti-UCE amendment, while the Bill was in committee, that did not prohibit UCE transmissions, but required forced labeling¹¹³ and included an opt-out provision.¹¹⁴ On May 12, 1998, the Senate passed this Bill and sent it to the House.¹¹⁵

34. During the House hearings, proponents and opponents of UCE legislation explained the problem of UCE and described legislation that would benefit their organizations and constituencies.¹¹⁶ Internet giant America Online ("AOL") demonstrated the costs of UCE that Internet users bear.¹¹⁷ Although AOL

¹¹⁰ S. 1618, 105th Cong. (1998) (proposal of Sen. McCain, February 9, 1998). This bill became part of H.R. 3888, the "Anti-Slamming Amendments Act." H.R. 3888, 105th Cong. (1998).

¹¹¹ See H.R. 3888, 105th Cong. (amended 1998) [hereinafter "Amended H.R. 3888"].

¹¹² See S. 1618, 105th Cong. (1998) (amending 47 U.S.C. § 258 (1934)).

¹¹³ See S. 1618 tit. III § 301(a)(2)(A)-(B) (requiring UCE messages to contain the "name, physical address, electronic mail address, and telephone number of the person" transmitting the message and the author of the message, if different from the sender).

¹¹⁴ See S. 1618 § 301(a)(2)(C) (providing that a UCE originator may not continue to send such messages after a recipient has requested the termination of such transmissions).

¹¹⁵ See *105th, Second Session, Vote No. 130* (visited Apr. 29, 1999) <<http://www.senate.gov/~rpc/rva/1052/1052130.htm>>. The Senate unanimously passed the bill. See *id.*

¹¹⁶ See *Cramming and Spamming Hearing*, *supra* note 54, at 47-48 (statement of Jerry Cerasale, Senior Vice President, Government Affairs, Direct Marketing Association, Inc.) (warning against the effects of a ban on UCE); *id.* at 50-51 (statement of Deirdre Mulligan, Staff Counsel, Center for Democracy and Technology) (calling for more study of legislative efforts to control or eliminate UCE); see also *Slamming Hearing*, *supra* note 24, at 86-87 (statement of Mickey Chandler, Co-Founder and President, Forum for Responsible and Ethical E-mail) (endorsing House Bill 1748, opposing Senate Bill 1618, and calling for an all-or-nothing ban on UCE); *id.* at 65 (statement of Barbara A. Dooley, Executive Director, Commercial Internet Exchange) (criticizing Senate Bill 1618 because it fails to provide for ISP interests while focusing too much on spammers' interests); *id.* at 90, 92-94 (statement of Ray Everett-Church, Co-Founder and Counsel, Coalition Against Unsolicited Commercial Email) (endorsing House Bill 1748 and a complete ban on UCE); *id.* at 35-36, 38-39 (statement of Riley M. Murphy, Executive Vice President, E.spire Communications, Inc.) (opposing House Bill 3888 and calling for a complete ban on UCE).

¹¹⁷ See *Cramming and Spamming Hearing*, *supra* note 54, at 63 (statement of Randall Boe, Associate General Counsel, America Online, Inc.).

stated that it has been successful in recent court battles addressing UCE abuses, Internet user advocates argued that the user community would welcome government regulation as an essential step in remedying the UCE problem.¹¹⁸ By contrast, the Direct Marketing Alliance called for self-regulation and technology to control UCE.¹¹⁹ The legislature could not reconcile the controversy in the short time remaining in the 105th Congress, as both the last-minute deletion of the anti-UCE language from House Bill 3888 and insertion of the "Sense of Congress" announcement (stating that the subject of UCE was not the proper subject of federal legislation) demonstrate.¹²⁰

V. PROPOSAL FOR ANTI-UCE LEGISLATION

35. The answer to the UCE problem has eluded Congress because some proposed bills try to do too much while others attempt to do too little.¹²¹ When the 106th Congress takes up the subject of UCE regulation, a combination of the efforts that a few of the unenacted proposals represent may yield a satisfactory resolution. To be satisfactory, Congress must be able to justify such a bill without compromising another interest, and the bill must survive judicial challenge.¹²² This Note proposes the Unsolicited Commercial E-Mail Elimination Proposal ("UCEEP"),¹²³ a bill proposal that combines the effective elements of previous

¹¹⁸ See *id.* at 63-64 (discussing AOL's recent successes against junk e-mailers); see *Slamming Hearing*, *supra* note 24, at 87-94 (statement of Ray Everett-Church).

¹¹⁹ See *Cramming and Spamming Hearing*, *supra* note 54, at 46 (statement of Jerry Cerasale).

¹²⁰ See Amended H.R. 3888, 105th Cong. tit. II § 201 (Oct. 8, 1998), which states:

It is the sense of the Congress that--

- (1) in order to avoid interference with the rapid development and expansion of commerce over the Internet, the Congress should decline to enact regulatory legislation with respect to unfair or intrusive practices on the Internet that the private sector can, given a sufficient opportunity, deter or prevent; and
- (2) it is the responsibility of the private sector to use that opportunity promptly to adopt, implement, and enforce measures to deter and prevent the improper use of unsolicited commercial electronic mail.

Id.

¹²¹ See *supra* Part IV.B.

¹²² See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564-66 (1980) (providing the applicable constitutionality test).

¹²³ See *infra* app. I for text and app. II for incorporation with existing law.

proposals¹²⁴ with some new proposals, and avoids the pitfalls previously discussed. Rather than requiring an analogy between e-mail and fax transmissions, the UCEEP specifically prohibits UCE dissemination on the Internet by modifying the TCPA.¹²⁵

A. Elements of the UCEEP

1. Prior Relationship Between Consumer and Originator

36. This proposal is based primarily upon the Netizens Protection Act of 1997 ("House Bill 1748") because that bill attacks UCE at its source.¹²⁶ By adopting House Bill 1748's language, the UCEEP proposes that a personal or business relationship between an advertiser and a consumer must exist prior to any UCE transmission.¹²⁷ Because requiring such a relationship does not involve governmental judgment on a UCE transmission's specific content, the proposal satisfies the *Rowan* Court's concern of "avoid[ing] possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official."¹²⁸

37. The benefits of this proposal are two-fold; (i) the Internet user has control over whether to affiliate himself with an advertiser;¹²⁹ and (ii) parents do not have to worry that their children may be solicited for inappropriate purposes.¹³⁰

¹²⁴ Specifically, this proposal parses and incorporates the Netizens Protection Act of 1997, H.R. 1748, 105th Cong. (1997), the Electronic Mailbox Protection Act of 1997, S. 875, 105th Cong. (1997), and the Digital Jamming Act of 1998, H.R. 4176, 105th Cong. (1998).

¹²⁵ Cf. Sorkin, *supra* note 19, at 1007-13 for a supportive analysis of the TCPA as a tool against UCE.

¹²⁶ H.R. 1748, 105th Cong. (1997) (proposal of Rep. Smith, May 22, 1997). This Bill was still in the Commerce Committee when the 1998 regular session adjourned. See United States Bill Tracking, 1997 U.S. HOUSE BILL NO. 1748.

¹²⁷ See *infra* app. I § 4(3). Some ISPs have supported the idea of a prior relationship. See *Slamming Hearing*, *supra* note 24, at 39 (statement of Riley M. Murphy); *Cramming and Spamming Hearing*, *supra* note 54, at 64 (statement of Randall Boe).

¹²⁸ *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970); see also *supra* notes 5-12 and accompanying text.

¹²⁹ See *Rowan* at 736-37 ("Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.").

¹³⁰ See, e.g., *Cramming and Spamming Hearing*, *supra* note 54, at 62 (statement of Randall Boe) (noting the emergence of the trend of "junk e-mailers [to] indiscriminately [send] messages promoting pornographic Web sites without regard to the age or sensibilities of the recipients").

2. Elimination of ISPs' Burdens

38. This proposal accomplishes its objective without burdening ISPs with mandatory reporting of violations, UCE filtering, or complaint processing. UCE also victimizes ISPs; therefore, it would be unfair to saddle them with a duty to enforce governmental regulations. ISPs should be free to form anti-UCE coalitions and coordinate legal efforts to protect their own or their members' interests, but the government should not require such behavior.

3. Remedies

39. If an individual wants to seek damages, the UCEEP provides for a private cause of action, but does not require individual litigation for enforcement.¹³¹ Rather, primary enforcement responsibility lies with proper state and federal authorities that can initiate suits independently or join in private suits.¹³² Regardless of who brings a suit, the remedies include preliminary and permanent injunctive relief, and minimum damages of five hundred dollars for each violation, with discretionary treble damages for knowing, willful, or egregious violations.¹³³ This amount is more than some proposed in other bills because it penalizes UCE originators for each violation, that is, for each piece of UCE sent.¹³⁴ Fixed amounts for each transmission, regardless of the number of recipients, may over or under compensate actual damages. The UCEEP scales damages to match UCE activity. By establishing a minimum amount per violation, the UCEEP encourages compliance and compensates for extreme losses with unlimited actual damages.

B. The UCEEP under *Central Hudson*

40. As with the other bills previously discussed,¹³⁵ it is important to determine if the UCEEP would survive a constitutional challenge using the *Central Hudson* test.

¹³¹ See *infra* app. II § 227(b)(3).

¹³² See *id.* § 227(g) (amending 47 U.S.C. § 227(f) (1997)) (authorizing state attorneys general and the Federal Trade Commission to bring causes of action on behalf of affected citizens or to join in private actions).

¹³³ See *infra* app. II § 227(b)(3) (amending 47 U.S.C § 227(b)(3)).

¹³⁴ Cf., e.g., S. 771, 105th Cong. §§ 4(a)(B), 8(b)(1) (1997) (providing for a maximum damage recovery of \$5000 and a maximum penalty of \$11,000).

¹³⁵ See *supra* Part IV.B.

1. Substantial Government Interest

41. To affirmatively demonstrate a substantial government interest, the UCEEP adds the Findings section from Senator Robert Torricelli's Electronic Mailbox Protection Act of 1997 ("Senate Bill 875")¹³⁶ to House Bill 1748.¹³⁷ This interest includes ensuring the Internet's continued viability¹³⁸ as well as the prominent role that the Internet plays in the world economy.¹³⁹ Further, the Findings address UCE both in terms of monetary losses¹⁴⁰ and infringement upon the recipients' constitutionally protected rights of assembly, speech, and privacy.¹⁴¹ Finally, the Findings reflect that while some UCE originators do provide methods for recipients to opt-out of receiving UCE, regulation is still necessary for those who do not opt-out.¹⁴²

2. Restriction Directly Advances Interests

42. The *Central Hudson* test next asks whether the proposed restriction on the targeted speech directly advances the government's interests.¹⁴³ In the case of UCE, less than a complete ban is unsatisfactory.¹⁴⁴ Requiring UCE recipients to affirmatively opt-out is counter to the legislative purpose of reducing UCE recipients' time-related costs.¹⁴⁵ By eliminating this step, the UCEEP places the burden on advertisers to establish a relationship with recipients rather than placing the burden on recipients to disestablish relationships foisted upon them. Further, if UCE is only eliminated one user at a time, and then only upon the recipient's request, large-scale UCE transmission will continue, forcing ISPs to

¹³⁶ See S. 875, 105th Cong. § 2 (1997).

¹³⁷ See H.R. 1748, 105th Cong. (1997).

¹³⁸ See *infra* app. I § 2(2) (adopting S. 875 § 2(2)).

¹³⁹ See *infra* app. I § 2(1) (adopting S. 875 § 2(1)).

¹⁴⁰ See *infra* app. I § 2(4)-(5) (adopting S. 875 § 2(4)-(5)).

¹⁴¹ See *infra* app. I § 2(10) (adopting S. 875 § 2(10)).

¹⁴² See *infra* app. I § 2(6) (adopting S. 875 § 2(6)).

¹⁴³ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

¹⁴⁴ See *supra* note 103 and accompanying text; see also CAUCE, *The Problem* (last modified Feb. 17, 1999) <<http://www.cauce.org/problem.html>> (detailing the problems with UCE and why it should be eradicated).

¹⁴⁵ See *infra* app. I § 2(4) (adopting S. 875 § 2(4)).

maintain increased bandwidth.¹⁴⁶ The UCEEP would immediately quell the flow of UCE, allowing ISPs to reduce their bandwidth to a level sufficient to manage authorized commercial and private transmissions.

3. The UCEEP is Narrowly Drawn to Address UCE

43. Finally, UCEEP's ban on UCE must be "narrowly drawn" to accomplish the governmental objectives set forth in the Findings.¹⁴⁷ First, by banning UCE unless a prior relationship exists between the advertiser and the recipient, senders will distribute less UCE.¹⁴⁸ Second, the UCEEP respects a recipient's affirmative right to associate or not to associate by making an existing relationship a prerequisite to UCE distribution.¹⁴⁹ These protections come at a price; advertisers' speech rights become more limited as the rights of their audience gain stronger protection. However, the Supreme Court has made it clear that the government can curtail commercial speech, so long as that curtailment is "not more extensive than necessary" to accomplish a substantial government objective.¹⁵⁰

44. If e-mail were the only method of commercial communication, UCE would probably be immune to regulation.¹⁵¹ UCE is, however, merely one of a long list of communication alternatives available to advertisers. Radio, television, and print media are available, as well as non-UCE advertising opportunities on the Internet. Hence, eliminating UCE as an advertising medium is not extreme, especially when balanced with an individual's right to privacy and ISPs' rights not to subsidize others' commercial efforts.

¹⁴⁶ See *supra* note 28 and accompanying text.

¹⁴⁷ *Central Hudson*, 447 U.S. at 565.

¹⁴⁸ Even assuming good faith compliance, a statute that requires an affirmative opt-out is not likely to have an immediate impact on UCE flow. In such a case, the ISPs would still need to maintain increased bandwidth and users would continue to pay higher prices. See *supra* note 28 and accompanying text.

¹⁴⁹ See *Rowan v. United States Postal Dep't*, 397 U.S. 728, 736 (1970) (recognizing "the right of every person 'to be let alone'").

¹⁵⁰ *Central Hudson*, 447 U.S. at 566; see also *Rowan*, 397 U.S. at 736 (recognizing that a court must weigh the right to communicate against the right of an individual to choose to block certain communications from reaching him).

¹⁵¹ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983) (holding that where alternative means of commercial communication exist, federal regulation of one channel of communication does not violate the Constitution's protections).

VI. CONCLUSION

45. Unsolicited commercial e-mail is a problem that will not go away on its own, and one that present resources can not adequately remedy. As the millennium approaches, the reality of the Internet's dominant place in society, commerce, and human interaction is undeniable. The government has an established duty to restrict the actions of those who devalue and degrade this valuable resource.

46. There are ways for Congress to rectify the problem, including this Note's proposal. Congress should implement the UCEEP to protect Internet users, ISPs, and the Internet as a whole. Advertisers should address Commercial e-mail only to those who invite it. An established prior relationship with the advertiser would provide evidence that the recipient willingly receives UCE. Once an Internet user decides that he no longer wishes to associate with an advertiser, the advertiser should honor this request by removing the user from e-mail distribution lists. If an advertiser fails to comply with these regulations, legislation should provide a predictable remedy available through the courts. This remedy should be available to the Internet user, the ISP acting on behalf of its clients, and the government acting on behalf of its citizens. The Unsolicited Commercial E-Mail Elimination Proposal addresses these issues and provides a package that Congress can pass into law and one that will likely survive constitutional challenge.

The Unsolicited E-Mail Elimination Proposal
A BILL PROPOSAL¹⁵²

To amend the Communications Act of 1934, to ban the transmission of unsolicited advertisements by electronic mail, and to require that sender identification information be included with electronic mail messages.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This act may be cited as the "Unsolicited Commercial E-mail Elimination Act".

SECTION 2. FINDINGS.¹⁵³

Congress makes the following findings:

- (1) The Internet has increasingly become a critical mode of global communication and now presents unprecedented opportunities for the development and growth of global commerce and an integrated worldwide economy.
- (2) In order for global commerce on the Internet to reach its full potential, individuals and entities using the Internet and other online services should be prevented from engaging in activities that prevent other users and Internet service providers from having a reasonably predictable, efficient, and economical online experience.
- (3) Unsolicited electronic mail can be an important mechanism through which commercial vendors, nonprofit organizations, and other providers of services recruit members, advertise, and attract customers in the online environment.
- (4) The receipt of unsolicited electronic mail may result in undue monetary costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both.
- (5) Unsolicited electronic mail sent in bulk may impose significant monetary costs on the Internet service providers, businesses, and

¹⁵² Except as noted, the text of this bill proposal is a variation on the Netizen's Protection Act of 1997, H.R. 1748, 105th Cong. (1997).

¹⁵³ These findings were adopted from the Electronic Mailbox Protection Act of 1997, S. 875, 105th Cong. (1997).

- educational and non-profit institutions that carry and receive such mail, as there is a finite volume of mail that such providers, businesses, and institutions can handle at any one point in time. The sending of such mail is increasingly and negatively affecting the quality of service provided to customers of Internet service providers.
- (6) While many senders of bulk unsolicited electronic mail provide simple and reliable ways for recipients to reject (or 'opt-out' of) receipt of unsolicited electronic mail from such senders in the future, other senders provide no such 'opt-out' mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both.
 - (7) An increasing number of senders of bulk unsolicited electronic mail purposefully disguise the source of such mail so as to prevent recipients from responding to such mail quickly and easily.
 - (8) Many senders of unsolicited electronic mail collect (or 'harvest') electronic mail addresses of potential recipients without the knowledge of their intended recipients and in violation of the rules or terms of service of the forum from which such addresses are collected.
 - (9) Because recipients of unsolicited electronic mail are unable to avoid the receipt of such mail through reasonable means, such mail may threaten the privacy of recipients. This privacy threat is enhanced for recipients whose electronic mail software or server alerts them to new mail as it arrives, as unsolicited electronic mail thereby disrupts the normal operation of the recipient's computer.
 - (10) In legislating against certain abuses on the Internet, Congress and the States should be very careful to avoid infringing in any way upon constitutionally protected rights, including the rights of assembly, free speech, and privacy.
 - (11) In order to realize the full potential for online electronic commerce, senders of bulk unsolicited electronic mail should be required to abide by the requests of electronic mail recipients, Internet service providers, businesses, and educational and non-profit institutions to cease sending such mail to such recipients, providers, businesses, and educational and non-profit institutions.
 - (12) Congress has authority to enact laws, under the Commerce Clause of the United States Constitution, regarding interstate communications and commercial solicitations via the Internet.

SECTION 3. DEFINITION OF COMMERCIAL ELECTRONIC MAIL

Section 227(a) of the Communications Act of 1934 (47 U.S.C. 227(a)) is amended--

- (1) by adding at the end the following new paragraphs:

- (5) The term “commercial electronic mail message” means any electronic mail message that is sent for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.

SECTION 4. PROHIBITION ON TRANSMISSION OF UNSOLICITED ADVERTISEMENTS BY ELECTRONIC MAIL

Section 227(b)(1) of the Communications Act of 1934 (47 U.S.C. 227(b)(1)) is amended--

- (1) by striking "or" at the end of subparagraph (C);
- (2) by redesignating subparagraph (D) as subparagraph (E);
- (3) by inserting after subparagraph (C) the following new subparagraph:

(D) to use any computer or other electronic device to send an unsolicited advertisement to an electronic mail address of an individual with whom such person lacks a preexisting and ongoing business or personal relationship unless said individual provides express invitation or consent/permission; or.

SECTION 5. COMMERCIAL ELECTRONIC MAIL SENDER IDENTIFICATION INFORMATION REQUIRED.¹⁵⁴

Section 227 of the Communications Act of 1934 (47 U.S.C. 227) is further amended--

- (1) by redesignating subsections (e) and (f) as subsections (f) and (g), respectively;
- (2) by inserting after subsection (d) the following new subsection:

(e)RESTRICTIONS ON THE USE OF COMMERCIAL ELECTRONIC MAIL MESSAGES-

(1) INFORMATION ABOUT SENDER; RIGHT TO REPLY- It shall be unlawful for any person within the United States—

(A) to initiate a commercial electronic mail message unless such message contains—

- (i) the name, street address, electronic mail address, and telephone number of the person who initiates transmission of the message;
- (ii) the name, street address, electronic mail address, and telephone number of the person who created the content of the message; or

¹⁵⁴ This section was adopted from the Digital Jamming Act, H.R. 4176, 105th Cong. (1997).

(iii) a reply electronic mail address, conspicuously displayed, where recipients may send a reply to indicate a desire not to receive any further messages.

(B) to initiate a commercial electronic mail message to any recipient who has previously indicated a desire not to receive such messages by sending a reply described in subparagraph (A)(iii)); or

(C) to initiate a commercial electronic mail message unless such message contains Internet routing information that is accurate, is valid according to prevailing standards for Internet protocols, and correctly reflects the actual message routing.

Telephone Consumer Protection Act of 1991
47 U.S.C. § 227
with proposed amendments (~~deletions~~ and additions)

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section -

- (1) The term "automatic telephone dialing system" means equipment which has the capacity -
 - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
 - (B) to dial such numbers.
- (2) The term "telephone facsimile machine" means 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 telephone line, or
 - (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.
- (3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message
 - (A) to any person with that person's prior express invitation or permission,
 - (B) to any person with whom the caller has an established business relationship, or
 - (C) by a tax exempt nonprofit organization.
- (4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.
- (5) The term "commercial electronic mail message" means any electronic mail message that is sent for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States -

- (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice -

- (i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
 - (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
 - (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;
- (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);
- (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; ~~or~~
- (D) to use any computer or other electronic device to send an unsolicited advertisement to an electronic mail address of an individual with whom such person lacks a preexisting and ongoing business or personal relationship unless said individual provides express invitation or consent/permission; or
- (E) ~~(D)~~ to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.
- (2) Regulations; exemptions and other provisions
The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission -
 - (A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;
 - (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe -
 - (i) calls that are not made for a commercial purpose; and

- (ii) such classes or categories of calls made for commercial purposes as the Commission determines
 - (I) will not adversely affect the privacy rights that this section is intended to protect; and
 - (II) do not include the transmission of any unsolicited advertisement; and
 - (C) may, by rule or order, exempt from the requirements of paragraphs (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.
 - (3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court 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 a violation, or to receive \$500 in damages for each such 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.
 - (c) Protection of subscriber privacy rights
 - (d) Technical and procedural standards
 - (1) Prohibition

It shall be unlawful for any person within the United States -

 - (A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or
 - (B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of

each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

...

(e) RESTRICTIONS ON THE USE OF COMMERCIAL ELECTRONIC MAIL MESSAGES-

(1) INFORMATION ABOUT SENDER; RIGHT TO REPLY- It shall be unlawful for any person within the United States—

(A) to initiate a commercial electronic mail message unless such message contains—

(i) the name, street address, electronic mail address, and telephone number of the person who initiates transmission of the message;

(ii) the name, street address, electronic mail address, and telephone number of the person who created the content of the message; or

(iii) a reply electronic mail address, conspicuously displayed, where recipients may send a reply to indicate a desire not to receive any further messages.

(B) to initiate a commercial electronic mail message to any recipient who has previously indicated a desire not to receive such messages by sending a reply described in subparagraph (A)(iii); or

(C) to initiate a commercial electronic mail message unless such message contains Internet routing information that is accurate, is valid according to prevailing standards for Internet protocols, and correctly reflects the actual message routing.

(f) Effect on State law

(1) State law not preempted

...

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or

both such actions. If the court finds the defendant willfully or knowingly violated such regulations, 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 the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right

(A) to intervene in the action,

(B) upon so intervening, to be heard on all matters arising therein, and

(C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the

attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.