

# ARTICLE

## GARBAGE IN: EMERGING MEDIA AND REGULATION OF UNSOLICITED COMMERCIAL SOLICITATIONS

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## I. INTRODUCTION

Much ado has been made of the technological advances emerging out of the digital revolution.<sup>1</sup> Now that technology exists to convert all forms of information—movies, music, newspapers, voice, video—into digital “software,” prognosticators have made great sport of predicting how quickly our televisions, telephones, VCRs and newspapers will be replaced by a unified medium through which we can scan the day’s news, order video-on-demand, video conference with friends, balance the electronic checkbook, place a grocery order, send a few emails, compose a computer-generated song and, perhaps, publish a sonnet. What many futurists overlook is that while such a unified medium may provide consumers with a greater variety of the information they seek at much greater speed, it also opens up new opportunities for consumers to receive information they do *not* seek at much greater speed and in much greater volume. I refer to the equivalent of junk mail in the unified medium.

While unwanted commercial solicitations have been a fact of life for a long time, never before have they threatened the viability of an entire mode of communication. Because the marginal costs of producing and distributing electronic junk mail are very low, the incentives for advertisers to flood the network with unsolicited commercial solicitations are substantial. Left unchecked, this flood of advertisements could produce a tragedy of the commons; advertisers, acting in their rational self-interest, will distribute as many unsolicited advertisements as they can until most users of the medium find that the effort of sifting through unwanted solicitations has become too great. At a minimum, this result would substantially impede communication through the medium.

This article considers the recognized means to avoid the tragedy of the commons—self-regulation, regulation by market forces, and government regulation—and concludes that some government regulation of unsolicited commercial solicitations in a unified medium is likely to be necessary and will be permissible under the prevailing interpretation of the First Amendment.

Before proceeding further, the terminology used in this article merits a short discussion. The object under study is the practice of sending

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1. For example, when predicting the benefits made possible by developments in digital technology, the Commerce Department gushed:

Imagine you had a device that combined a telephone, a TV, a camcorder, and a personal computer. No matter where you went or what time it was, your child could see you and talk to you, you could watch a replay of your team’s last game, you could browse the latest additions to the library, or you could find the best prices in town on groceries, furniture, clothes—whatever you needed.

Administration Policy Statement, 58 Fed. Reg. 49,025, 49,026 (1993).

unsolicited commercial solicitations; these include the credit card applications and catalogues you often receive in the mail, the phone call from the long distance phone company asking you if you want to switch your service, or the Internet email inquiring about your interest in purchasing a cassette tape of erotic readings.<sup>2</sup> The advertising industry considers these all to be forms of "direct marketing" because they are solicitations sent directly from the advertiser to a known universe of consumers. Direct marketing is distinguished from mass marketing, by which advertisements are transmitted via mass media to an imprecisely known universe of consumers.<sup>3</sup> This article will not adopt the industry phrase "direct marketing" because in the eyes of most recipients these solicitations are better described as junk.<sup>4</sup> A more accurate legal description would be unsolicited commercial solicitations, but repetitious use of this phrase—or worse, its acronym (UCS)—would be cumbersome for reader and writer alike. Therefore, for the sake of variety, this article also uses the terms "junk communications," "unsolicited advertisements" and "spam"<sup>5</sup> to designate unsolicited commercial solicitations sent directly from advertiser to consumer.

Part II briefly surveys the permissible scope for regulation of unsolicited commercial solicitations in developed media—door-to-door solicitations, junk mail, junk phone and junk fax. The First Amendment,<sup>6</sup> as currently interpreted, requires courts to apply intermediate scrutiny to content-based regulations of commercial speech. Under that test, complete bans on junk communications through any media have been held to be unconstitutionally overbroad—except in the case of junk fax. But restrictions allowing individuals to stop the flow of junk communications or to limit certain technologies that can be used for unsolicited communications have been upheld.

Part III first reviews current attempts by private parties to regulate electronic junk mail on the Internet. These attempts have been mostly

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2. A recent widespread commercial solicitation on the Internet is an advertisement for the "Euphoria Tape" which exhorts recipients to "[d]o the Euphoria Tape alone the first time, and then with a lover. It's a phenomenon you will feel within the first 3 minutes—what you feel the rest of the time is unbelievable. [The tape is] an audio stimulation of brain centers controlling pleasure." Rusty Coats, *Marketers Jamming the Internet with Junk E-mail*, SACRAMENTO BEE, Feb. 7, 1996, at D2.

3. Within the industry there is some rivalry between direct marketers and mass marketers; many in the direct marketing industry blame television advertisers for labeling direct mail as "junk mail." See, e.g., James R. Rosenfield, *Confessions of a Gasp "Junk Mailer"*, DIRECT, May 1994, at 82 (pointing out that most television advertising is as much junk as is direct advertising).

4. See *id.*

5. This is the term used by Internet inhabitants for electronic junk mail. See *infra* part II.A.

6. The First Amendment to the United States Constitution simply provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

unsuccessful and probably will continue to fail absent some government regulation. Instead of considering how the government might regulate the Internet as it is presently constituted, this part anticipates that a new, unified medium will emerge in which most, if not all, of our communications will consist of paperless, digital bits of information moving along an open network and funneled through a single box in our homes and offices. This part next considers what might happen were there no regulation of unsolicited solicitations in this medium. Concluding that unregulated electronic junk mail could substantially impede the medium's functioning, the part then considers what market responses might develop to prevent such an outcome. Part III concludes with an assertion that market regulation alone will not sufficiently respond to unsolicited commercial solicitations, and that some form of government regulation will be necessary.

Part IV explores whether the principles and doctrine of the law on junk communications set out in part II can readily support government regulation of unsolicited commercial solicitations in a unified medium. This section indicates that some forms of regulation, such as a requirement that unsolicited commercial solicitations bear a label identifying them as such, probably would be supportable under existing First Amendment doctrine. A more difficult issue arises if the government attempts to ban junk communications altogether.

## II. JUNK COMMUNICATIONS—PRESENT LAW AND COMMENTARY

In the recent past, advertisers have moved quickly to exploit the potential of newly developed media to purvey their wares. The ardency and perceived intrusiveness of such efforts have led to statutory responses to regulate these sales techniques. Advertisers have challenged the constitutionality of these statutory responses in court, with mixed results.

Litigation has arisen with regard to door-to-door sales,<sup>7</sup> unsolicited mail,<sup>8</sup> unsolicited telephone calls,<sup>9</sup> and unsolicited fax transmissions.<sup>10</sup>

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7. See *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991); Howard B. Altman, Note, *Strangers in the Night: Ordinances Restricting the Hours of Door-to-Door Solicitation*, 63 WASH. U. L.Q. 71, 77-78 (1985).

8. See, e.g., *Rowan v. United States Post Office*, 397 U.S. 728 (1970).

9. See generally Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99 (1986) (referring to cases, statutes and FCC regulations on junk phone calls).

10. See Jennifer L. Radner, Comment, *Phone, Fax and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359 (1993).

Interestingly, many of the issues have been developed in the context of unsolicited contacts made by attorneys.<sup>11</sup>

With regard to unsolicited commercial solicitations made door-to-door, by mail and by phone, the dominant theme of the litigation has been to balance the First Amendment rights of the advertisers to speak and individuals to hear that speech against other individuals' rights to privacy in their homes. With regard to junk fax, legislatures and courts have employed a different analysis because most persons affected by unsolicited fax transmissions have been businesses, whose privacy interests carry less weight. In the junk fax context, courts have allowed government regulation because junk faxes use the recipient's paper and ink (a conversion or unjustified cost-shifting rationale) and the junk fax transmission precludes other, desired, transmissions from getting through (a scarcity rationale).

A problem that arises in many of the challenges to content-based government regulation of unsolicited commercial solicitations is that the regulations are stated overbroadly, such that they reach unsolicited religious or political solicitations, which are protected by a stricter judicial test for legitimacy. While this is likely to remain an issue with respect to junk communications in a unified medium, the focus of this article is on regulating those unsolicited communications that are clearly commercial in nature.

This section briefly discusses the First Amendment test for government regulation of commercial speech and then reviews how that test has thus far been applied to government regulation of unsolicited commercial solicitations. From this review, I draw some general principles about the permissible scope of government regulation of junk communications.

### A. The *Central Hudson*/Fox Test

In 1996, commercial advertisers celebrated the twentieth anniversary of receiving heightened judicial scrutiny for government regulation of commercial speech. Until 1976, the Supreme Court adhered to the rule that while the First Amendment guards against government

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11. With regard to unsolicited "snail" mail from attorneys, see *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466 (1988); Katherine A. Laroe, Comment, *Much Ado About Barratry: State Regulation of Attorney's Targeted Direct-Mail Solicitation*, 25 ST. MARY'S L.J. 1513 (1994). With regard to unsolicited electronic mail from attorneys, see generally Michael L. Winick, et al., *Attorney Advertising on the Internet: From Arizona to Texas—Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH L. REV. 1487 (1996); Brian G. Gilpin, Note, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. MARSHALL J. COMPUTER & INFO. L. 697 (1995).

restriction of speech in most contexts, "the Constitution imposes no such restraint on government as respects purely commercial advertising."<sup>12</sup>

With the development of our information economy, however, the Court has come to read the First Amendment to provide broader protection over the nexus between the marketplace of ideas and the marketplace for goods and services. Thus, in 1976, the Court invalidated a state statute barring pharmacists from advertising prescription drug prices on the ground that the First Amendment protected consumers' interest in a free flow of commercial information to better assist their purchasing decisions.<sup>13</sup> Some commentators have challenged the distinct treatment of commercial speech under the First Amendment,<sup>14</sup> but the Court appears firmly committed to its course.

By 1980, the Court had settled on intermediate scrutiny as the appropriate standard of review for restrictions on most commercial speech. Under this test, commercial speech that neither concerns unlawful activity nor is misleading may be regulated if: (1) the government asserts a substantial interest in support of its regulation; (2) the government demonstrates that its restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly drawn.<sup>15</sup>

For a state interest in a regulation to be substantial, the government must show that the regulation is directed at a "real" harm rather than a conjectural harm.<sup>16</sup> To show that a regulation directly and materially advances the state interest, the government must demonstrate that the regulation will in fact alleviate the real harm to a material degree.<sup>17</sup> To be narrowly drawn, a government regulation does not have to be the least restrictive means available; rather, there must be a "reasonable fit" between the government interest and the regulation.<sup>18</sup> In determining whether a fit is reasonable, the presence of "numerous and obvious less-burdensome alternatives" to the restriction is relevant.<sup>19</sup>

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

13. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-70 (1976).

14. See generally Ronald K. L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993); Alexander Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

15. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980); accord *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375-76 (1995).

16. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

17. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995) (citing *Edenfield*, 507 U.S. at 770-71).

18. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

19. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n.13 (1993) (invalidating city ordinance that selectively banned newsracks belonging to commercial handbill distributors but not those belonging to newspapers).

## B. The Test Applied

Interestingly, many of the cases applying the *Central Hudson* test to unsolicited mail or phone calls involve ethics regulations limiting attorneys or other professionals from sending junk mail or making junk calls.<sup>20</sup> However, these cases are of limited value in analyzing the general principles for permissible government regulation of junk communications because the state's licensing power gives it an independent interest in regulating commercial communications by lawyers and other professionals. This independent interest acts as a thumb on the scale in the First Amendment balance, leading courts to uphold some regulations that would probably be impermissible in other contexts.

Nevertheless, sufficient case law exists to tease out the general principles on which courts rely to assess government regulation of junk communications. A recurrent issue that will not receive much discussion here is whether content-based regulations are narrow enough to effectively disaggregate and regulate only commercial solicitations but not solicitations by political or religious organizations. The focus of the discussion is on the courts' analyses once they are satisfied that the regulation reaches only unsolicited solicitations that are purely commercial.

### 1. DOOR-TO-DOOR

Governmental restrictions on door-to-door solicitation pit the state's interests in protecting residential privacy and in preventing crime against advertisers' rights to use an inexpensive avenue of speech. The First Amendment does not guarantee an absolute right "to enter on the premises of another and knock on a door for any purpose."<sup>21</sup> But while door-to-door solicitation may be a nuisance to residents and a possible blind for criminal activity, the Court has asserted that door-to-door solicitation also is a valuable and inexpensive means for disseminating ideas.<sup>22</sup> To balance the interests of residential privacy and free speech, the Court has held that state and local governments may not ban door-to-door solicitation altogether,<sup>23</sup> but they may impose reasonable time, place and manner restrictions on all door-to-door solicitations.<sup>24</sup> Commercial solicitations, in theory, are potentially subject to even more burdensome

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20. See, e.g., *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1988).

21. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976).

22. *Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943).

23. *Id.* at 149.

24. E.g., *Pennsylvania Alliance for Jobs & Energy v. Council of Munhall*, 743 F.2d 182, 185 (3d Cir. 1984).

regulation;<sup>25</sup> however, the government also may not ban door-to-door commercial solicitations altogether.<sup>26</sup> Such a ban would treat all commercial solicitations as trespasses per se, even if some residents may have welcomed the solicitations.<sup>27</sup> The government may not supplant private decision making as to whether the solicitations are welcome.

## 2. JUNK MAIL

Junk mail has been subject to relatively little governmental regulation, despite (or perhaps because of) its pervasiveness as a daily reality. In the sparse case law that does exist, courts have upheld government regulation that enables individuals to filter junk mail but have invalidated regulation in which the government filters junk mail.

### a. Junk Mail as Social Phenomenon

The United States Postal Service would have you deny that there is any such thing as "junk mail."<sup>28</sup> Many advertisers in the "direct marketing" business also would prefer that you speak of unsolicited commercial solicitations that arrive in your mail slot as "direct mail," although some have given up the fight.<sup>29</sup> Regardless of the label, unsolicited commercial solicitations made by mail involve a large part of the American economy and are a pervasive social reality. Some estimate

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25. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980).

26. See *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991) (holding, on remand from Supreme Court, that even under the *Fox* "reasonable fit" standard, complete ban on commercial solicitation is unnecessarily broad in furthering the state's interest in protecting privacy and preventing crime).

27. *Id.* at 638-39.

28. See *Postal Notes*, WASH. POST, Feb. 21, 1996, at A17 (Postal Service advertisement admonishing the public to respect direct mail and not use phrase "junk mail"). In fact, the United States Postal Service is aggressively seeking to *increase* the volume of junk mail sent by advertisers. See WALL ST. J., Oct. 25, 1996, at B22 (full-color, full-page advertisement promoting the benefits to advertisers of "direct mail" over mass media advertising).

29. Compare, e.g., Denison Hatch, *An Alternative to "Do Not Mail"*, TARGET MARKETING, March 1995, at 80 (exhorting industry colleagues to challenge negative publicity on junk mail) with Rosenfield, *supra* note 3, at 82; Phil Herring, *Life Beyond the Spreadsheet; the Future of Direct Marketing*, FUND RAISING MGMT., January 1992, at 36 (urging direct marketers to accept term "junk mail" and to respond by better targeting audience so that unsolicited mail no longer will be considered "junk").

This rhetorical battle seems ill-advised on several levels. First, it is insulting to people who consider unwanted solicitations to be junk to tell them otherwise. See, e.g., *Make Post Office Recycle Junk Mail*, WIS. ST. J., Feb. 17, 1996, at 7A (letter to editor) (expressing anger at Post Office advertising campaign against moniker "junk mail"). Second, attaching or removing the label "junk" will not in itself alter consumer behavior. Why, for instance, have we not seen an analogous campaign waged by Frito-Lay to relabel "junk food" as "fun food" or some such name? A recipient may occasionally respond to an unsolicited solicitation but continue to regard the entire class of such communications as "junk."

that 62 billion pieces of unsolicited mail are sent per year.<sup>30</sup> Up to forty-four percent of these are thrown away unopened and unread.<sup>31</sup> That has little effect on the practice because some advertisers can make a profit with only a one percent response rate,<sup>32</sup> and most advertisers expect less than ten percent of junk mail recipients to respond.<sup>33</sup> While increased costs might reduce the total volume of junk mail, the Postal Rate Commission recently reduced the cost of sending pre-sorted junk mail by 3.7 percent.<sup>34</sup>

A large number of Americans consider junk mail to be annoying or even offensive.<sup>35</sup> Many are willing to pay to avoid it.<sup>36</sup> Additionally, concern is growing about the harm done to the environment by the resource consumption involved in producing and disposing of junk mail.<sup>37</sup> This concern remains somewhat diffuse because the environmental groups most likely to put the concern in focus are themselves junk mailers.<sup>38</sup>

This discontent has led to a governmental regulatory response. Numerous pieces of legislation have been proposed to regulate junk mail,<sup>39</sup> but because the phenomenon is so pervasive and so many interests rely on junk mail for revenue, the proposed legislation very rarely becomes law. Thus, to the extent that junk mail is regulated, it is done so primarily by forces other than the law.

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30. See "Stop the Junk Mail" Kit Soothes Raw Nerve of American Public; Cuts Out Virtually All Junk Mail While Allowing Wanted Mail to Get Through, PR NEWswire, Nov. 21, 1995, available in LEXIS, News Library, Wires File [hereinafter *Stop the Junk Mail*]; Michael W. Miller, "Greens" Add to Junk Mail Mountain, WALL ST. J., May 13, 1991, at B1 (putting the figure at 63 billion for 1990).

31. *Stop the Junk Mail*, *supra* note 30. Others estimate that only fifteen percent of the unsolicited pieces of mail were discarded unopened. Miller, *supra* note 30, at B1.

32. See Herring, *supra* note 29, at 36.

33. See Rosenfield, *supra* note 3, at 82 ("Everyone knows that more than 90% of direct mail turns into literal junk; how many people get response rates of more than 10%, particularly in mass mailings?").

34. *Postal Panel OKs Rate Cut for Junk Mail; Commission Rejects Hike in Price of 1st-Class Stamp*, CHI. TRIB., Jan. 27, 1996, at N1.

35. See, e.g., *Stop the Junk Mail*, *supra* note 30.

36. A company marketing a "Stop the Junk Mail" kit that will filter out unwanted mail received 7,000 calls in its first two weeks in business. *Id.* Private Citizen, Inc. (1-800-288-5865), an Illinois company, sells a service to remove people's names both from junk mail address lists and national telephone solicitation lists.

37. See CHRIS CALLWELL, 50 SIMPLE THINGS YOU CAN DO TO SAVE THE EARTH (1991) (best-selling book urging a stop to unwanted junk mail as first suggestion).

38. See Paul N. Bloom, et al., *Avoiding Misuse of New Information Technologies: Legal and Societal Considerations*, 58 J. MARKETING 98 (1994) (describing, *inter alia*, environmentalists' shift from command "Stop Junk Mail" to "Stop Unwanted Junk Mail" in CALLWELL, *supra* note 37).

39. See Hatch, *supra* note 29, at 80 ("So far some 430 bills have been introduced in federal and state legislatures to limit ad mail, limit the access to names, the rental of lists and the perceived invasion of privacy."); Herring, *supra* note 29, at 36 ("There are currently 600 bills at the state and federal level which directly affect direct marketers, covering telemarketing, privacy and environmental issues.").

Members of the direct mail industry have responded to public anger with limited self-regulation: the Direct Marketing Association (DMA) is the trade association for the industry, and it assists consumers in removing their names from DMA-member solicitation lists.<sup>40</sup> As of 1995, 3.5 million consumers were on the list, which was expanding at a rate of 50,000 per month.<sup>41</sup> In addition to self-regulation by the industry, individuals have occasionally found other means to respond to junk mail; for example, one creative person successfully used state contract law to strike back.<sup>42</sup>

Another emerging regulatory tactic is attempting to restrict marketers from buying and selling names, addresses, and other personal information. In a novel Virginia case, the plaintiff claimed a right under the state's right-of-publicity statute to be asked for consent before a marketer traffics in his personal information, and a right to be compensated if it does.<sup>43</sup> In addition, the New Jersey legislature considered a measure that would allow marketers to traffic in the

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40. To be removed from junk mail lists, write to: Mail Preference Service, P.O. Box 9008, Farmingdale, N.Y. 11735-9008. To be removed from telephone marketing lists, write to: Telephone Preference Service, P.O. Box 9014, Farmingdale, N.Y. 11735-9014. In both cases, supply full name, variations on one's name, full address and phone number.

41. Hatch, *supra* note 29, at 80. Approximately 875 million names (including variations on the same name) have been deleted as of May 1994. Tara Aronson, *Fighting Back*, S.F. CHRON., May 25, 1994, at 1Z1.

42. *Junk Mail Crusader Wins Battle in Small Claims Court* (National Public Radio broadcast, Feb. 8, 1996), available in LEXIS, News Library, Script File. A San Diego software engineer, Robert Beken, bought a book at a Computer City outlet. On the back of his check he wrote the following contract:

Computer City agrees not to place Robert Beken on any mailing list or send him any advertisements or mailings. Computer City agrees that breach of this agreement by Computer City will damage Robert Beken and that these damages may be pursued in court, further, that these damages for the first breach are [\$1,000]. The deposit of this check for payment is agreement with these terms and conditions.

*Id.* Shortly after the store cashed his check, Mr. Beken received a number of advertisements from the chain. Mr. Beken sued the retailer in San Diego Municipal Court and was awarded \$1,000 plus \$21 in court costs. *Id.*

43. Ram Avrahami filed his suit against *U.S. News and World Report* for selling his name and address without obtaining his permission. Paula Squires, *Lawsuit Could Force Direct-Mail Firms to Change Tactics*, RICHMOND TIMES DISPATCH, Feb. 4, 1996, at E1. Mr. Avrahami filed the suit in the Arlington County General District Court (small claims) seeking \$100 in compensatory damages and \$1,000 in punitive damages. *Id.* The Court dismissed the suit without prejudice in February 1996 on the ground that it did not have jurisdiction to grant the relief sought. Paula Squires, *Junk Mail Suit Unexpectedly Dismissed*, RICHMOND TIMES DISPATCH, Feb. 7, 1996, at C1. *U.S. News* filed a parallel action in the Arlington County Circuit Court (trial court of general jurisdiction) for a declaration of the legality of its practice of trafficking in names and addresses. The trial in that case was held on June 6, 1996, the court ruled in favor of *U.S. News*, and, on September 11, 1996, Mr. Avrahami appealed to the Virginia Supreme Court. Steve Twomey, *A Brave Heart Fights Fiercely For Our Names*, WASH. POST, Sept. 30, 1996, at B1.

personal information of only those state residents who consented to such use of their personal information.<sup>44</sup>

b. Junk Mail and the First Amendment

In the few cases involving legal regulation of junk mail, the issue raised is how to strike the First Amendment balance between a commercial mailer's interest in speaking and citizens' privacy interest in controlling the items that enter their homes. As early as 1970, the Supreme Court took judicial notice of the fact that the average person's mail is overwhelmingly made up of material she did not seek sent by persons she does not know.<sup>45</sup> Because some citizens find unsolicited junk mail to be offensive, the Court has held that where a government regulation grants the citizen the unfettered discretion to refuse to receive unwanted mail, the regulation is a constitutionally permissible protection of individual privacy.<sup>46</sup> This is because "[i]n today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of autonomy must survive to permit every householder to exercise control over unwanted mail."<sup>47</sup> Thus, when preventing the receipt of junk mail requires an affirmative act on the part of the citizen, it is that private act rather than a government edict that frustrates the commercial mailer's efforts to communicate.<sup>48</sup>

However, when the government attempts to protect individual privacy by preventing an entire category of unsolicited commercial solicitations from being sent through the mail on the ground that the

44. Terry Pristin, *New Jersey Daily Briefing: Bill Would Curtail Junk Mail*, N.Y. TIMES, Feb. 12, 1996, at B1; Ken Liebeskind, *NJ Sen. to Propose Opt-in Legislation; Invasion of Privacy Must End*, says Codey, DM NEWS, Jan. 22, 1996, at 1.

45. *Rowan v. United States Post Office*, 397 U.S. 728, 736 (1970).

46. *Id.* at 736-37 (upholding federal statute allowing recipient unfettered discretion to request that the Postmaster inform a sender to stop sending any future mailings to that recipient).

47. *Id.* at 736.

48. See, e.g., *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991) (upholding municipal ordinance precluding real estate agents from mailing solicitations to homeowners who had indicated a desire not to receive those solicitations); *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988) (upholding state statute with similar real estate prohibition); *Baldigo v. Postmaster Gen.*, 514 F.2d 142 (7th Cir. 1975).

While these cases uniformly recognize the substantiality of an individual's privacy interest while in her home, the privacy interest of a public official in her office is quite circumscribed. *United States Postal Service v. Hustler Magazine, Inc.*, 630 F. Supp. 867 (1986) (holding that Members of Congress cannot use the statute upheld in *Rowan* to stop receipt of lewd magazine at their offices because magazine publisher has an independent right to petition the government, which changes the balance struck in *Rowan* as applied to Congressional offices). What is left untested in the junk mail context is the strength of a business entity's privacy interest in regulating the inflow of junk mail.

solicitation is offensive, the government violates the First Amendment.<sup>49</sup> The First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.<sup>50</sup> Recipients of junk mail can avoid offensive speech because the "short, though regular, journey from mail box to trash can . . . is an acceptable burden . . . so far as the Constitution is concerned."<sup>51</sup> Moreover, there may be some willing junk mail recipients whose interests in communication also would be frustrated by a government ban on certain classes of junk mail.

### c. Junk Mail, Attorneys, and the First Amendment

A sub-class of junk mail cases involving solicitations by attorneys and other professionals also exists. Whether the holdings in these cases are of more general application is difficult to gauge because the state asserts two independent interests in regulating solicitations by professionals: protecting the privacy of recipients and regulating professionals licensed by the state. When upholding these regulations, the courts have not explicitly parsed which interests are being advanced by the regulation. The trend in these cases appears to be to allow for greater governmental regulation of solicitations by professionals.<sup>52</sup>

The government may prohibit attorneys from sending unsolicited mail for a brief period of time when that mail is likely to be a significant invasion of privacy and when attorneys have available alternative means of advertising their services.<sup>53</sup> In addition, because communications from attorneys have the potential to have a coercive effect, the government may require attorneys to label their unsolicited commercial solicitations as an "Advertisement."<sup>54</sup>

49. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983) (declaring unconstitutional a federal statute that prohibited unsolicited mailing of advertisements for contraceptives); cf. *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946) (invalidating Postmaster General's procedure by which it determined postal rates according to whether publication "contributes to the public good and public welfare").

50. *Bolger*, 463 U.S. at 72.

51. *Id.* (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)).

52. See, e.g., *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2378-79 (1995) (5-4 decision) (allowing for 30-day post-accident ban on targeted mail by attorneys).

53. See *id.* at 2381.

54. See, e.g., *In re R.M.J.*, 455 U.S. 191, 206 n.20 (1982) (holding that imposition of labeling requirement is constitutional); *Texans Against Censorship, Inc. v. State Bar*, 888 F. Supp. 1328 (E.D. Tex. 1995) (upholding attorney disciplinary rules requiring attorneys to mark unsolicited solicitations made by mail as an "Advertisement" when such mail is likely to provoke anxiety in recipient); *Spencer v. Honorable Justices*, 579 F. Supp. 880, 890 n.13 (E.D. Pa. 1984) (indicating labeling requirement for unsolicited solicitation by attorney sufficient protection of privacy for those potentially offended by solicitation); *Florida Bar v. Herrick*, 571 So. 2d 1303, 1305-07 (Fla. 1990) (disciplining lawyer who sent letter not marked "Advertisement"); see also *Laroe, supra* note 11, at 1549 (1994) (appendix collecting state laws requiring attorneys to identify solicitations as such).

The labeling requirement potentially could be applied to all commercial solicitations. In upholding labeling requirements for attorney solicitations, the decisions appear to reflect a broader principle that a government labeling requirement places only a slight burden on the speaker and the consumer has a strong interest in knowing the nature of a communication received. In addition, commercial speech is entitled to intermediate judicial scrutiny only to the extent that the speech is not misleading.<sup>55</sup> A government labeling requirement may actually provide greater protection for the sender by curing what might otherwise be misleading commercial speech.

d. Summary

In sum, government regulations that merely assist individuals in acting affirmatively to stop the inflow of junk mail are permissible because such regulations simply provide an enabling structure in which individuals can guard their own privacy against communications *they* regard as offensive. In contrast, government regulations that prohibit a mailer from sending junk mail that the *government* deems offensive are impermissible because the government supplants private decisionmaking with regard to desired communications.<sup>56</sup> To facilitate private decision making, the government can require a mailer to label junk mail as an unsolicited commercial solicitation.

3. JUNK PHONE

Unsolicited commercial solicitations made by telephone, like junk mail, have become a pervasive—and many would add, invasive—social reality. The practice grew significantly during the 1980s.<sup>57</sup> By 1990, more than 30,000 telemarketing firms in the United States, employing more than 18 million people, generated aggregate sales in excess of \$400 billion.<sup>58</sup> One reason for the expansion in junk phone calls has been the technological development of automatic telephone dialing systems

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55. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980).

56. Under current First Amendment doctrine, a regulation prohibiting condom advertisements also could be struck down as a content-based regulation that fails to remain viewpoint-neutral. See *R.A.V. v. St. Paul*, 505 U.S. 377, 387-90 (1992).

57. Revenues from telephone solicitations increased sixfold from 1982 to 1983. *Telephone Calls from Computers May Be Curbed by Lawmakers*, INVESTOR'S DAILY, Aug. 15, 1991, at 25.

58. Memorandum Opinion and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 F.C.C.R. 12391, 12392 (1995) [hereinafter Memorandum Opinion and Order].

(ATDS).<sup>59</sup> Use of auto-dialing systems greatly reduces the cost of telemarketing.<sup>60</sup>

Unsolicited telephone solicitations are intrinsically more invasive of privacy than junk mail.<sup>61</sup> A junk call requires an immediate response because—at least for the time being—there is a cultural expectation that a person should answer a telephone call at the time it comes in.<sup>62</sup> Some also argue that aural communication is inherently more intrusive than visual communication.<sup>63</sup> The perceived intrusion of a junk call is worse when the caller is not even a person but a machine.<sup>64</sup>

As with junk mail, telemarketers have engaged in some self-regulation,<sup>65</sup> but this effort has been largely ineffective at stemming public frustration with junk phone calls.<sup>66</sup> Perhaps because the intrusiveness of junk calls is treated as a legislative fact,<sup>67</sup> government has responded by regulating junk phone calls far more extensively than it has regulated junk mail.

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59. "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." 47 U.S.C. § 227(a)(1) (1994).

60. For example, an auto-dialing machine with a cost of \$1,800 enables the owner to dial 1,500 telephone numbers per day with no more effort than pushing a button. Ann Marie Arcadi, Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991"*, 1991 COLUM. BUS. L. REV. 417, 418 & n.5 (citing interview with manufacturer of automatic telephone dialing systems).

61. Nadel, *supra* note 9, at 103; Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029, 1063 (1992) ("[T]elephone messages received in one's home are more invasive of privacy rights than mail, television messages, or telephone messages received in the office."); *see also* Nadel, *supra* note 9, at 99 n.6 (summarizing results of a 1978 research report commissioned by Pacific Telephone Company). In the survey, only 0.1% of respondents "liked" receiving calls made by sales people, and only 9.1% "did not mind" receiving such calls. *Id.*

62. As one court has remarked: "A ringing telephone is an imperative, which, in the minds of many, must be obeyed with a prompt answer." *People v. Weeks*, 591 P.2d 91, 96 (Colo. 1979).

63. Nadel, *supra* note 9, at 103 n.23 (citing FRANKLYN HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 146 (1981)).

64. Congress found that automated calls are "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons" because the caller "cannot interact with the customer except in preprogrammed ways" and these calls "do not allow the caller to feel the frustration of the called party . . . ." Telephone Consumer Protection Act of 1991, S. Rep. No. 178, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970; *see also* Nadel, *supra* note 9, at 100 n.7.

65. *See supra* note 40 (providing address of the Direct Marketing Association's Telephone Preference Service).

66. For anecdotal evidence of that frustration, *see* Thomas Petzinger, Jr., *They Keep Workers Motivated to Make Annoying Phone Calls*, WALL ST. J., Sept. 20, 1996, at B1 (describing the abuse and rejection faced by those who place junk phone calls).

67. *See* Telephone Advertising Consumer Rights Act, S. 1410, 102d Cong., 1st Sess. (1991) (presenting as a finding that "[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers").

a. Federal Regulation

Unsolicited telephone calls have received significant attention from both federal and state regulators. At the federal level, both Congress and the Federal Communications Commission have been active in regulating junk phone calls. The most recent congressional action was the Telephone Consumer Protection Act of 1991 (TCPA).<sup>68</sup> Congress considered federal legislation necessary because the ease of interstate calling allowed telemarketers to circumvent state laws regulating telephone solicitations.<sup>69</sup>

Pursuant to the TCPA, the Federal Communications Commission (FCC) engaged in rulemaking to implement the Act.<sup>70</sup> Some of the significant regulations promulgated pursuant to the TCPA include a "labeling" requirement by which a telemarketer must identify himself,<sup>71</sup> time restrictions limiting calls to between 8 a.m. and 9 p.m.,<sup>72</sup> and a provision requiring telemarketers to record and respect do-not-call requests.<sup>73</sup> On reconsideration, the FCC has maintained all of these restrictions.<sup>74</sup>

The TCPA also directed the FCC to explore the possibility of compiling a national database of those who do not want to receive unsolicited telephone solicitations.<sup>75</sup> The FCC considered the option but decided that the costs of compiling and maintaining such a database would exceed the benefits to the public.<sup>76</sup>

The most far-reaching regulation of junk phone calls in the TCPA is a *prohibition* on artificial or prerecorded voice message calls made to residences without prior express consent.<sup>77</sup> Congress provided a private right of action to assist in the enforcement of this provision.<sup>78</sup> The

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68. Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227 (1994)). For a discussion of the TCPA's legislative history, see Howard E. Berkenblit, Note, *Can Those Telemarketing Machines Keep Calling Me?*, *The Telephone Consumer Protection Act of 1991 After Moser v. FCC*, 36 B.C. L. REV. 85, 96-100 (1994).

69. Section 2(7) of Pub. L. No. 102-243 states:

Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices.

70. See Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752 (1992) [hereinafter Report and Order].

71. 47 C.F.R. § 64.1200(e)(2)(iv) (1994) (requiring telemarketer to provide to called party: (1) the name of caller; (2) name of entity for whom call was placed; and (3) contact telephone number or address).

72. 47 C.F.R. § 64.1200(e)(1) (1994) (stating that the hours are as measured by the local time at the called party's location).

73. 47 C.F.R. § 64.1200(e)(2)(iii) (1994).

74. See Memorandum Opinion and Order, *supra* note 58.

75. 47 U.S.C. § 227(c)(3).

76. See Report and Order, *supra* note 70.

77. 47 U.S.C. § 227 (b)(1)(B).

78. 47 U.S.C. § 227(b)(3).

breadth of the prohibition on automated calls prompted a swift court challenge, resulting in the decision in *Moser v. Federal Communications Comm'n* [*Moser I*].<sup>79</sup> The *Moser I* court enjoined the FCC from enforcing the prohibition on prerecorded message calls to residences on the ground that the prohibition was a content-based regulation that did not reflect a reasonable fit between the government's substantial interest in protecting individual privacy and the means chosen, which still left open the possibility of auto-dialed message from noncommercial speakers.<sup>80</sup>

The FCC appealed the decision and won.<sup>81</sup> In *Moser II*, the Ninth Circuit reversed the district court, holding that the ban on auto-dialing machines was a content-neutral time, place, and manner restriction that was narrowly tailored and which left abundant alternatives open to advertisers.<sup>82</sup> Judge Fletcher, author of the *Moser II* opinion, read the statute to be content-neutral because it bans all automated calls, regardless of content.<sup>83</sup> While the statute uses permissive language that allows the FCC to exempt calls not made for a commercial purpose,<sup>84</sup> this permissive language alone does not convert the all-encompassing ban into a content-based prohibition.<sup>85</sup>

The *Moser II* court recognized that choosing to view the statute as a content-neutral regulation rather than as a content-based regulation of commercial speech was a distinction without a difference in First Amendment terms,<sup>86</sup> but the *Moser II* court appears to have made the distinction to imply that Congress could have banned telemarketing calls altogether. For authority to uphold the selective ban on automated telephone calls, the court relied on a series of Supreme Court decisions holding that underinclusive government regulations on speech are permissible so long as the government's distinction does not amount to viewpoint discrimination.<sup>87</sup> The court found the statute to be reasonable because "Congress may reduce the volume of intrusive telemarketing calls without completely eliminating the calls."<sup>88</sup> Having prefaced this comment with a review of permissible underinclusive regulations, the

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79. 826 F. Supp. 360 (D. Ore. 1993), *rev'd*, 46 F.3d 970 (9th Cir. 1995).

80. *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995) [hereinafter *Moser I*].

81. *Id.* at 971.

82. *Id.* at 974-75.

83. *Id.* Interestingly, in Judge Fletcher's opinion in *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995), decided five days earlier, she is silent when reviewing the lower court's opinion which, in dicta, considered the ban on automated calls to be a content-based regulation. *Destination Ventures, Ltd. v. FCC*, 844 F. Supp. 632, 638 (D. Or. 1994).

84. See 47 U.S.C. § 227(b)(2). The FCC adopted regulations exempting automated calls made by tax-exempt, non-profit organizations. 47 C.F.R. § 64.1200(c)(4) (1995).

85. *Moser II*, 46 F.3d at 973.

86. See *id.* (stating that the standard of review in either case is "essentially identical").

87. *Id.* at 974-75.

88. *Id.* at 975.

court implied that Congress acted reasonably in banning automated calls because it could have banned all telemarketing calls as unwarranted invasions of residential privacy.

#### b. State Regulation

More than half the states regulate commercial solicitations made by phone. Forty-one states and the District of Columbia have restricted or banned intrastate automated commercial calls.<sup>89</sup> Of the state statutes prohibiting use of auto-dialing machines, three have been challenged on constitutional grounds, with mixed results.<sup>90</sup> A complete review of the state law variations is beyond the scope of this article, but state law remains a relevant consideration because the TCPA explicitly preserves state regulations that are more restrictive than federal law.<sup>91</sup> Most states also have statutes banning telephone harassment that arguably could be applied to some telemarketing practices. The Supreme Court has passed on reviewing the constitutionality of these statutes.<sup>92</sup>

#### c. Summary

Unsolicited telephone solicitations are a pervasive phenomenon that simultaneously generates a great deal of revenue and causes a great deal of frustration. The practice is now regulated primarily by federal law, which requires that callers fully identify themselves, allow individuals to opt out of receiving further calls from individual telemarketers, call only at reasonable times, and not subject recipients to a prerecorded message. The ban on automated calls is a reasonable restriction because it reduces the invasion of residential privacy by banning the most intrusive kind of telemarketing while leaving open abundant alternative channels to advertisers.

### 4. JUNK FAX

Regulations directed against unsolicited commercial solicitations transmitted by facsimile machines have been the most recent challenges

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89. *Id.* at 972.

90. Compare *Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993) (invalidating New Jersey statute banning auto-dialed commercial solicitations as violation of First Amendment); *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993) (invalidating Oregon statute as violation of Oregon Constitution) with *State v. Casino Mktg. Group*, 491 N.W.2d 882 (Minn. 1992) (upholding Minnesota statute as consistent with both state and federal constitution), *cert. denied sub nom.* *Hall v. Minnesota*, 507 U.S. 1006 (1993).

91. See 47 U.S.C. § 227(e)(1); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547-48 (8th Cir. 1995).

92. See *Gormley v. Director, Connecticut State Dep't of Adult Probation*, 449 U.S. 1023, 1023-24 (1980) (White, J., dissenting from denial of certiorari) (seeking to review decision upholding state statute that provides misdemeanor sanctions for persons who have "intent to harass, annoy or alarm another person" when making a telephone call).

presented to the courts. Because most communications sent by facsimile machines are business-to-business, legislatures have justified, and courts have analyzed, regulations on junk fax slightly differently than those on advertisements made door-to-door, by mail or by phone. In those cases, the state interest primarily has been to protect individual privacy in the home. The law tends to give the privacy interests of business enterprises less weight than the interests of individuals in their homes, and thus governments that have regulated junk fax have asserted alternative state interests in regulation. The two leading interests are to provide freedom from conversion of paper and ink and to protect against preclusion of a desired communication by an unsolicited fax solicitation.<sup>93</sup>

a. Federal Regulation

As with junk phone, junk fax has been subjected to federal regulation by Congress and the FCC and to extensive state regulation. On the federal level, the Telephone Consumer Protection Act of 1991 (TCPA), in addition to regulating junk phone, *prohibits altogether* unsolicited fax solicitations containing advertisements.<sup>94</sup> Predictably, the ban has been challenged in court, and, somewhat surprisingly, the ban has been upheld.<sup>95</sup>

In *Destination Ventures*, the Ninth Circuit held that the government has a substantial interest in preventing the shift of advertising costs from sender to recipient—here the relevant costs are paper and toner—and in preventing unsolicited advertisements from precluding receipt of desired communications. The court concluded that the interest in preventing cost-shifting is directly advanced by a total ban on fax advertisements and the ban is a reasonable fit with the interest; the government is not required to adopt less restrictive regulations such as time or page restrictions on unsolicited fax advertisements.<sup>96</sup> By using an underinclusion rationale similar to that in her *Moser II* opinion, Judge Fletcher found that Congress could reasonably choose to ban unsolicited fax advertising without addressing other unsolicited fax transmissions such as those with political messages since junk faxes impose the bulk of the cost-shifting problem.<sup>97</sup> Interestingly, the court was not swayed by the plaintiff's evidence that there soon may be technological solutions to avoid the "real harm" of cost-shifting.<sup>98</sup>

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93. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995).

94. 47 U.S.C. § 227(b)(1)(C).

95. See *Destination Ventures*, 46 F.3d 54.

96. *Id.* at 56-57. See *infra* text accompanying notes 187-91 for a critique of this reasoning.

97. *Id.* at 56.

98. *Id.* at 57 ("The possibility of future technological advances allowing simultaneous transmission and eliminating the need for paper does not alter this conclusion. We look at

### b. State Regulation

States began regulating junk fax transmissions in 1989.<sup>99</sup> Currently, eighteen states have passed statutes regulating junk fax transmissions.<sup>100</sup> The TCPA leaves in place those state regulations that are more restrictive than the federal law,<sup>101</sup> and impliedly preempts less restrictive measures. Some state legislatures continue to consider junk fax legislation,<sup>102</sup> but it appears that the most the states can add is stiffer penalties for violating the federal ban.

### c. Summary

Advertising by junk fax was a fast-growing practice until Congress banned it altogether in 1991. The fax context gives rise to a new principle for the regulation of junk communications: when unsolicited advertisements shift advertising costs from sender to recipient, the government may ban that mode of advertising altogether, even when less restrictive regulatory alternatives are available.

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the problem as it existed when Congress enacted the statute, rather than speculate upon what solutions may turn up in the future.”).

99. Connecticut was the first state to pass a junk fax law. See Michael M. Parker, *Fax Pas: Stopping the Junk Fax Mail Bandwagon*, 71 OR. L. REV. 457, 462 & n.22 (1992).

The story behind passage of Connecticut's law is ironic. After passage by the legislature, Governor William O'Neill was uncertain about signing the legislation. *Id.* He was persuaded to sign the bill after receiving by fax hundreds of letters opposing the legislation. *Id.* Receipt of these faxes had tied up his office's machine and had precluded receipt of time-sensitive information from the state's Office of Emergency Management on possible flooding. *Id.* The Governor stated that being subjected to a lobbying campaign by fax had “brought home” the need for junk fax legislation. *Id.*

Interestingly, signing the bill could not constitutionally do anything to alleviate the problems created by the fax lobbying campaign. The law reached *advertising* by fax and thus—as a restriction on *commercial speech*—could survive intermediate judicial scrutiny. The statute is silent with respect to *lobbying*, which is *political speech* situated at the core of the First Amendment's protective reach. Any prohibition on lobbying by fax would have to survive strict judicial scrutiny, a burden the state would not likely be able to meet.

100. See CONN. GEN. STAT. ANN. § 52-570c (West 1991); FLA. STAT. ANN. § 365.1657 (West Supp. 1992); GA. CODE ANN. §§ 46-5-25, 46-1-1(3) (Harrison 1990); ILL. ANN. STAT. ch. 720, para. 26-3 (Smith-Hurd Supp. 1992); MD. COM. LAW II CODE ANN. § 14-1313 (Michie 1990); MICH. COMP. LAWS ANN. §§ 445.1771-.1776 (West Supp. 1992); NEB. REV. STAT. §§ 86-1209 (1987 & Supp. 1991); NEV. REV. STAT. § 207.325 (Supp. 1991); N.Y. GEN. BUS. LAW § 396-aa (McKinney Supp. 1992); OKLA. STAT. ANN. tit. 21, §§ 1862-1863 (West Supp. 1992); OR. REV. STAT. §§ 646.872, 646.608(ff), 646.632, 646.638, 646.642 (1991); R.I. GEN. LAWS §§ 11-35-27 (Supp. 1991); S.C. CODE ANN. §§ 15-75-50 (Law. Co-op. Supp. 1991); TENN. CODE ANN. §§ 47-18-1601 to -04 (Supp. 1991); TEX. BUS. & COM. CODE ANN. § 35.47 (West Supp. 1992); UTAH CODE ANN. §§ 13-25a-101 to -107 (Supp. 1991); VA. CODE ANN. § 8.01-40.2 (Michie 1992); W. VA. CODE § 46A-2-139 (1992).

101. 47 U.S.C. § 227(e)(1).

102. See *Assembly Bill Would Stop Unwanted Faxes*, CAPITAL, Feb. 5, 1996, at A1 (discussing bill introduced in Maryland assembly to regulate junk fax).

### C. The Principles For Government Regulation of Junk Communications

By reviewing the application of intermediate judicial scrutiny to regulations on unsolicited advertisements in a variety of media, certain basic First Amendment principles emerge. The First Amendment requires that a government restriction on commercial speech must directly advance a substantial government interest by means that are reasonably fitted to the interest.<sup>103</sup> The government has a substantial interest in regulating junk communications to protect residential privacy and to prevent the shifting of advertising costs from sender to receiver.

Regulations that enable individuals to choose not to receive unsolicited advertisements are reasonable,<sup>104</sup> but the government may not supplant that private choice with a decision that an entire mode of communication should be foreclosed<sup>105</sup> or engage in content discrimination by banning unsolicited advertisements that the government deems to be offensive.<sup>106</sup> However, when Congress finds that use of a technology for advertising is particularly intrusive on residential privacy, and when recipients have no effective means of opting out of receipt of such intrusive communications, Congress may supplant private choice and ban advertising by those means so long as advertisers have alternative avenues open to them.<sup>107</sup> Congress also may supplant private choice and ban altogether a mode of advertising when that advertising necessarily shifts advertising costs from sender to recipient.<sup>108</sup>

### III. ELECTRONIC JUNK MAIL—PRESENT AND FUTURE

The analysis in this part is presented in two steps. First, it surveys the current state of regulation of commercial solicitations on the Internet because the future unified medium is likely to evolve out of the Internet. This regulation is almost entirely private and not particularly effective. The survey demonstrates the weaknesses of arguments that a unified medium can be regulated entirely without government intervention. Second, this part envisions that a unified medium is emerging in which most, if not all, of our communications consists of digitized information funneled through a single receiving unit in our homes and offices. The purpose of envisioning the emergence of a unified medium is to facilitate

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103. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

104. *Rowan v. United States Post Office*, 397 U.S. 728, 736 (1970).

105. *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991).

106. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983).

107. *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995).

108. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995).

discussion in part III about how the principles set out in part I might be applied to unsolicited commercial solicitations in such a medium.

### A. Junk Mail on the Internet: Enter the Spammers

In the brave new world of digital communication, unsolicited solicitations made via electronic mail are increasing at an exponential rate. As with many aspects of online life, electronic junk mail has a code name: spam.<sup>109</sup> As more and more people begin to use and rely on the Internet,<sup>110</sup> the scale and importance of the spam problem increases.<sup>111</sup> Many who follow the expansion of the Internet and media convergence recognize that unregulated electronic junk mail has the potential to overwhelm the network.<sup>112</sup> Others recognize the potential problems of electronic junk mail but express confidence that technological solutions will reduce these problems to no more than a minor nuisance.<sup>113</sup> This latter view could be overly optimistic.

This subsection briefly describes current attempts to privately regulate spam on the Internet. Concluding that these efforts alone cannot stem the rising tide of unwanted commercial solicitations made by electronic mail, this subsection then describes the constitutional issues that might arise should the government attempt to regulate electronic junk mail. Because these issues are likely to evolve as the medium develops, as discussed in part II.B., a full analysis of them is deferred to part III.

109. Spam is both a noun describing electronic junk mail messages and a verb describing the act of indiscriminately sending electronic junk mail messages; one who sends electronic junk mail is known as a spammer. One electronic junk mailer, who dubs himself "Spam King," claims to send three to four electronic mass mailings per day. Daniel Akst, *Postcard From Cyberspace*, L.A. TIMES, Nov. 1, 1995, at D4.

110. According to one estimate, as many as 50 million people around the world have at least begun to use the Internet. Stephen McGookin, *An Uncertain Feeling About the Internet*, FINANCIAL TIMES, Sept. 27, 1995, at IX (book review section). In the United States, a recent survey places the number of homes with Internet access at 14.7 million. See Jared Sandberg, *U.S. Households With Internet Access Doubled to 14.7 Million in Past Year*, WALL ST. J., Oct. 21, 1996, at B11. The same survey found that nearly nine million adults access the World Wide Web daily. *Id.*

111. See, e.g., Coats, *supra* note 2, at D2; Jeff Peline, *Junk Mail Proliferating on Internet; Boon for Advertisers, But Users Fret About Privacy*, S.F. CHRON., Nov. 2, 1995, at A1; John Schwartz, *It's the Spam You Read That's Making Many Interneters Queasy*, WASH. POST, Nov. 20, 1995, at F17.

112. The problem was recognized early in the development of electronic mail. See John Seaman, *Is Electronic Junk Mail Good for Users?*, COMPUTER DECISIONS, June 1, 1983, at 74 (discussing the problem of frivolous electronic mail on internal corporate computer networks). However, the need for a solution is only now becoming more urgent. Because electronic addresses are easy to identify and the costs of overhead for electronic advertising are minimal, "[t]he Internet could literally be buried in a flurry of electronic junk mail." Linda Himelstein, *Law and Order in Cyberspace?*, BUS. WK., Dec. 4, 1995, at 44 (quoting Marc Rotenberg, director of the Electronic Privacy Information Center).

113. "[A]ssuming that the relatively petty irritations and junk mail can be worked out, the advent of commerce on the network only underscores a larger question: Who, precisely, is going to control this new Internet?" Waldrop M. Mitchell, *Culture Shock on the Networks*, 265 SCIENCE 5174, 879.

## 1. PRIVATE REGULATION OF ELECTRONIC JUNK MAIL

Private regulation of electronic junk mail on the Internet has developed with increased use of the medium. Currently, private regulation consists of: (1) "cultural" regulation by customary law; (2) vigilante regulation by those who track down and spam the spammers; (3) structural regulation by the policies of online service providers; and (4) market regulation by those who buy and sell information filters to screen out spam. Each form of regulation deters some spamming, but, taken as a whole, these methods are unlikely to sufficiently restrict spamming so that the Internet can continue to function.

### a. Cultural Regulation: The Role of Netiquette

The Internet initially was developed as a means of linking defense-related scientific researchers across the world.<sup>114</sup> The small, relatively homogenous community of Internet users developed certain norms for communicating on the new medium. Over time, these norms—now subsumed under the rubric "netiquette"—provide guidance for members of the online culture.<sup>115</sup> Although original participants celebrated the lack of formal regulation on the Internet—often likening it to a new frontier, a Wild West—these same participants often were quite orthodox in their enforcement of the informal norms, and this orthodoxy has given netiquette the weight of customary law.<sup>116</sup>

As the number of Internet users has mushroomed, online culture and the customary law on the Internet are in a period of rapid, contentious development.<sup>117</sup> Battles over electronic junk mail capture aspects of this culture clash.<sup>118</sup> A general netiquette principle is that one's communications should not waste other people's time.<sup>119</sup> A second

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114. See Richard Zaitlen & David Victor, *The New Internet Domain Name Guidelines: Still Winner-Take-All*, 13 No. 5 COMPUTER LAW. 12, 13 (1996) (providing a succinct description of the Internet's development).

115. Many online service providers now post a statement of recommended online etiquette. A very general statement of some of the norms can be found in *FAQs (Frequently Asked Questions)*, TIME, July 25, 1994, at 50 [hereinafter *FAQs*].

116. See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1758-59 & nn.6-7 (1995) (describing norms and constraints of communication by electronic mail as "a form of customary law, determining how and when people communicate with one another"); see generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991) (describing how cultural norms can operate like legal constraints in absence of formal law).

117. Mitchell, *supra* note 113, at 879.

118. As discussed *supra* part I.2.a, the cultural norm in the physical world is to temper a strong distaste for paper junk mail with an acceptance of junk mail as an inevitable reality. Attempts by newcomers to extend this norm to cyberspace have been resisted by the early inhabitants of cyberspace, who cling to the competing norm of treating the Internet as a commercial-free zone.

119. This principle is reflected in rules on keeping communications succinct and to the point; rules on sticking to the subject of a discussion group; and a prohibition on needless communications concurring with statements by others. *FAQs*, *supra* note 115, at 50.

principle has been that the Internet is a non-commercial forum.<sup>120</sup> This latter principle has waned with the rise of commercial online service providers, but remnants remain. These two principles are brought together in the netiquette rule against unsolicited advertisements sent by electronic mail.<sup>121</sup>

While breaches of the netiquette prohibition on spamming continue to increase, the prohibition still acts as a constraint on some marketers.<sup>122</sup> For now, the netiquette prohibition increases the cost of spamming by increasing the risk that a spammer will receive a negative return on his investment. Even if one percent of the spam recipients purchase the spammer's goods or services, there is a real chance that the spam will drive away otherwise potential customers among the remaining ninety-nine percent of recipients.<sup>123</sup>

This constraint, however, is limited. The online culture is in the midst of rapid transformation. While some newcomers are likely to adopt current netiquette norms, many others are likely to bring the norms that govern our physical spaces into cyberspace. One of these norms may be an acceptance of junk mail as an inevitable nuisance. If all marketers engage in spamming, the risk of a negative return will decrease because consumers will not blame Sears for spamming them when they also receive spam from J.C. Penney, Macy's and all the other department stores.

#### b. Vigilante Regulation

One aspect of the informal nature of netiquette as a set of norms governing the medium is that no formal processes presently exist for enforcing these norms. For those new members of the Internet community who are not deterred from spamming by the opprobrium of breaching netiquette norms, another consideration that may deter some spamming is the presence of online vigilantes who enforce the netiquette norm against sending electronic junk mail.<sup>124</sup>

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120. See Mitchell, *supra* note 114, at 879.

121. See *id.* ("[T]he unwritten rules . . . tell users not to waste other people's time with irrelevant electronic chatter—and especially, not to sully the network with self-serving advertisements and junk mail.").

122. See, e.g., Kristen Baird, *Local Net Providers Feud Over Netiquette*, CRAIN'S CLEV. BUS., June 12, 1995, at 3 (quoting local junk mailer who publicly apologized for spamming but also said, "We realize this is a big cultural issue . . . [b]ut I think we would consider another bulk e-mail if we felt it was appropriate."); Rosalind Resnick, *Tread Lightly on the Internet*, HOME OFF. COMPUTING, April 1994, at 80 (advising marketers to be judicious when choosing targets for junk mail).

123. See *infra* part III.A.2 on spammer blacklists.

124. See Steven Carlson, *How To Keep "Spam" From Clogging E-mail*, BUDAPEST BUS. J., Dec. 4, 1995, at 30 (referring to one online vigilante who is dedicated to thwarting the efforts of the "Spam King," see *supra* note 110).

Generally, the techniques vigilantes use to enforce the norm are: attempting to deny a spammer continued access to the Internet; putting the spammer on a blacklist; "flaming" the spammer (i.e., inundating his mailbox with hostile mail);<sup>125</sup> and using utility programs known as Cancelbots that automatically delete multiple postings to online discussion groups.<sup>126</sup> If the vigilantes cannot identify the spammer, they may seek to exact vengeance on the service provider that allowed the spam to get through.<sup>127</sup>

Vigilante justice generally is a troubling form of regulation because results are unpredictable and often appear more arbitrary than the results under a more formal system. For example, one marketing company claims that it was wrongly blacklisted, and those who have posted the blacklist have not provided a contact number or a process for getting off the list.<sup>128</sup> Vigilante regulation, then, is not likely to provide a systemic solution to the problem of unsolicited electronic junk mail, and there may be a backlash against the vigilantes if their actions produce arbitrary enforcement.

### c. Structural Regulation

Currently, the vast majority of Internet users access the network through intermediaries: internet service providers (ISPs). To the extent that the service agreements under which ISPs provide access have the same or similar terms, those agreements act as a form of structural regulation for the network.<sup>129</sup>

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125. See *id.* With "exquisitechutzpah," a company used spam to sell potential vigilantes an antidote to spam—The Spammer Slammer—a program that enables potential vigilantes to generate thousands of messages to be sent to the source of undesired email. Thomas Petzinger, Jr., *A Morality Tale From the Wild World of the Internet*, WALL ST. J., Nov. 1, 1996, at B1.

126. See Carlson, *supra* note 124, at 30.

127. Cynthia Flash, *A Breach of "Netiquette"; Junk E-mail Outrages Computer Users*, NEWS TRIB., Jan. 7, 1996, at A1 (describing vigilante attacks on one small-scale Internet service provider because it failed to stop spammer from spamming members).

128. Jean Heller, *Junk Mail Creates Computer Headache*, ST. PETERSBURG TIMES, Jan. 2, 1996, at A1 (describing a company blacklisted for allegedly marketing a T-shirt that it never made).

129. Commentators have recognized the increasing prevalence of structural regulation by contract, and they are split on its desirability. Compare Mark A. Lemley, *Shrinkwraps in Cyberspace*, 35 JURIMETRICS J. 311, 321 (1995):

But this new law of the Internet would be unlike any form of legislation known to modern society. No one elected its drafters or the Internet providers who adopted it. They are accountable to no one. . . . Nor is there any provision for "opting out" of this new social contract, other than by withdrawing from cyberspace. . . . It would be a sheer accident if the model code drafted (presumably) by the Internet providers themselves . . . happened to be the optimal means of regulating behavior in cyberspace.

with David R. Johnson & Kevin A. Marks, 38 VILL. L. REV. 487, 515 (1993):

Because both senders and recipients of electronic junk mail gain access to the Internet through ISPs, ISPs can regulate spam at both its origin and destination. To regulate spam at its origin, numerous ISPs, including those who operate proprietary networks that are also linked to the Internet, include terms that make it a violation of the service agreements to send electronic junk mail.<sup>130</sup> To regulate spam at its destination, ISPs can attempt to filter out the junk in their subscribers' incoming electronic mail. America Online, the largest commercial online service, recently began to filter subscribers' incoming mail by bouncing certain junk mail back to the sender, and, at the time of this writing, litigation is ongoing with respect to that policy.<sup>131</sup>

One commentator advances the view that America Online should be allowed to take this action and that ISPs should be allowed to use contract as a kind of marketplace for the law of the Internet.<sup>132</sup> However, this form of structural regulation of spam probably is of limited utility for practical, market and legal reasons. The practical constraints are that identifying the source of electronic junk mail is often difficult,<sup>133</sup> and junk mailers can themselves become ISPs. Spammers have incentives to disguise the origin of their mass mailings—to avoid being flamed among

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Cyberspace is, and should be, ruled mostly by contract. The highest duty of any sysop [system operator] is to be thoughtful and truthful regarding applicable ground rules. . . . The best policy, from a social perspective, is to let the new medium develop free of the shackles imposed by any particular, soon-to-be outmoded, legal metaphor.

130. *E.g.*, *No Spamming for MCI Under New Policy*, INVESTOR'S DAILY, Jan. 23, 1996, at A8 (quoting MCI official, "We reserve the right to automatically disconnect and deny access to any MCI customer who violates this spamming policy . . .").

131. America Online (AOL) adopted its filtering policy in response to subscriber complaints about the increase in spam received, amounting to 15 million pieces each week. See Jared Sandberg, *America Online Sets Cyberspace Barriers Against Junk E-mail*, WALL ST. J., Sept. 5, 1996, at B4 (reporting that AOL's view is that even with this policy "the government may have to intervene with regulations"). Even before adopting its policy, AOL was sued by Cyber Promotions, a Philadelphia junk mailing company, for tortious interference with contract. Trial is set for November 1996. *Id.* The head of Cyber Promotions, Sanford Wallace, is also known as the "Spam King." Jana Sanchez-Klein, *Meet the most HATED MAN on the INTERNET*, BALTIMORE SUN, May 28, 1996, at 1D; see *supra* note 111.

Almost immediately after the filtering policy went into effect, Cyber Promotions, which sends one to two mass mailings a day to 1.3 million Internet addresses, 75% of which are at aol.com, filed a separate suit against AOL. See David S. Hilzenrath, *AOL Ordered to Stop Blocking Junk E-mail*, WASH. POST, Sept. 7, 1996, at D1. The plaintiff won a preliminary injunction against the AOL policy in U.S. district court in Philadelphia. *Id.* But the Third Circuit swiftly reversed the ruling. Thomas E. Weber, *America Online Wins Rounds in Suits Over Junk E-mail and Billing Practices*, WALL ST. J., Sept. 23, 1996, at B6.

132. See David Post, *The Case of Virtual Junk Mail*, AM. LAW., Nov. 1996, at 97, 98 ("But if many Internet service providers implement a similar prohibition [against sending electronic junk mail], and if those service providers flourish and attract many subscribers . . . who has the right to say . . . that that isn't the best rule to deal with this problem?").

133. It is difficult but not impossible. See Tim Blangger, *You Can Shut Off Unsolicited E-mail*, MORNING CALL (Allentown, Pa.), Feb. 6, 1996, at D1 (describing process for identifying source of electronic mail message).

other reasons. As of this writing, litigation is in process over a leading spammer's practice of designating a different reply address than the originating address to avoid flames and the return of undeliverable messages.<sup>134</sup>

The market reason is that some of the larger service providers take an equivocal position toward spam. On the one hand, the service agreements of most major providers make it a breach of the agreement to spam other members.<sup>135</sup> On the other hand, these same providers can and do profit from selling subscriber profiles to spammers<sup>136</sup> or from spamming their own subscribers.<sup>137</sup>

The legal reason is that, even if the providers decided to crack down on spammers, to do so effectively they would have to act in concert,<sup>138</sup> and such action could raise antitrust problems. Regulation of electronic junk mail by online service providers is therefore not likely to stem the rising tide of spam.

#### d. Market Regulation: Information Filters

A number of people put great stock in the use of information filters to solve the problem of electronic junk mail. This article argues below that such hope is overly optimistic, but filters can unquestionably reduce the reach of spam.<sup>139</sup> Filters simply delete or reroute messages that fit a certain profile. So long as a user can accurately describe those messages that she wishes to delete—whether described by sender, by subject or otherwise—the filter can eliminate a great deal of electronic clutter. The

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134. *Concentric Network Corp. v. Wallace*, No. 96-CV-20829 (N.D. Cal. filed Oct. 2, 1996). Defendant Sanford Wallace, head of Cyber Promotions, Inc., agreed to cease the behavior in response to the plaintiff's motion for a temporary restraining order. 1 Electronic Info. Pol'y & L. Rep. (BNA) 672 (Oct. 18, 1996). The plaintiff is an Internet service provider. In addition to claiming that Cyber Promotions had violated the terms of its service agreement, the plaintiff also claimed violations of three federal statutes—the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701 *et seq.*, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A)(i), and the Lanham Act, 17 U.S.C. § 1125(a)—as well as a number of common law tort causes of action. *Id.* at 673-74.

135. See FIN. POST, October 26, 1996, at C12.

136. See Stephen Lynch, *Junk Mail Heads Your Way Online*, NEW ORLEANS TIMES-PICAYUNE, Jan. 13, 1996, at C1. Three of the largest service providers—Compuserve, Prodigy and America Online—sell the personal data of all subscribers who have not expressly indicated that they do not want their data sold. *Id.*

137. America Online "is no stranger to direct marketing: It bombards members with its own online sales pitches while the meter is ticking . . ." Hilzenrath, *supra* note 131, at D2.

138. First, there would have to be an industry-wide agreement to include in all ISP service agreements a term prohibiting spamming. Otherwise, those ISPs that allow spamming would become magnets for electronic junk mailers. Second, some form of coordinated enforcement would be necessary, such as a blacklist of all those who have had their access terminated for violation of the spamming prohibition. Otherwise, spammers could simply open an account with a different ISP if their current account were terminated.

139. See Brett Glass, *Server With Internet Link Will Help You Filter Unwanted Mail*, INFOWORLD, Dec. 18, 1995, at 41 (describing one successful method of filtering); Diana Hwang, *App to Help VARs Curb Net Mail*, COMPUTER RESELLER NEWS, Feb. 5, 1996, at 24.

problem is that spammers can disguise the nature of their message to circumvent most filters.

Each of the four aspects of private regulation on the Internet deter some spamming, but the costs imposed on spammers are fairly low in comparison to the potential benefits from spamming. Assuming rational action, we should expect spamming to become an increasingly common practice. We might reasonably expect to see some government regulation in response. As a historical matter, government at either the local, state and/or federal level has acted to regulate every other form of commercial solicitation.<sup>140</sup> As a practical matter, spamming potentially could become so pervasive that, left unregulated by government, it could drive people away from the network altogether.

## 2. GOVERNMENT REGULATION OF UNSOLICITED ELECTRONIC JUNK MAIL

Private regulation alone will not be able to stop electronic junk mail from overwhelming or impeding the functioning of the emerging information network. Therefore, some form of government regulation will be necessary. Already, the federal government has begun to contemplate regulation of electronic junk mail on the Internet.<sup>141</sup> This subsection briefly describes an argument that Congress already has banned electronic junk mail, and then—concluding that the argument is unpersuasive—considers the constitutional issues likely to arise if the government engages in more explicit regulation of electronic junk mail.

### a. Has Congress Already Banned Spamming?

Arguably, the Telephone Consumer Protection Act of 1991 (TCPA)—by its ban on sending unsolicited advertisements to a “telephone facsimile machine”—already makes illegal the sending of electronic junk mail. This textual argument has some surface appeal. It could potentially take care of the whole spamming problem without any new enactments.

The TCPA makes it unlawful for any person within the United States “to use any telephone facsimile machine, *computer* or other device to send an unsolicited advertisement to a telephone facsimile

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140. See *supra* text accompanying notes 6-9.

141. For example, the Federal Trade Commission devoted one of a series of hearings on regulating unfair business practices on the Internet to the junk mail problem. November 20, 1995. In addition, the Clinton Administration has advised providers of telecommunications services to get consumers' permission before using or selling information about their customers. See *Regulators/Regulations: Recommendations for Telecom Privacy*, DOT.COM, Nov. 1, 1995 (citing a Commerce Department report providing “recommendations” to the industry). Should the industry ignore the Administration's advice, formal regulations may follow. *Id.*

machine."<sup>142</sup> Thus, the focus is on the receiving device; to violate the TCPA, a spammer using a computer must simply send an "unsolicited advertisement" to a "telephone facsimile machine." An "unsolicited advertisement" is broadly defined as "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."<sup>143</sup> The TCPA defines a "telephone facsimile machine" as:

[E]quipment 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.<sup>144</sup>

Relying on the text of the statute, one could argue that a spammer violates the law when he sends an unsolicited advertisement from his computer over regular telephone lines to another computer via the Internet. That other computer is "equipment which has the capacity" to take the electronic signal and transcribe it onto paper—anyone can print their email. Further support for this reading can be found in the FCC interpretation of the TCPA to mean that a "telephone facsimile machine" includes fax/modems attached to a computer.<sup>145</sup> The fax/modem is a device capable of receiving an electronic signal sent either as an image file (fax) or a text file (electronic mail). In either case, the fax/modem makes it possible for the signal to be transcribed onto paper.

As appealing as this argument may be to those who wish to make spamming illegal, it presents a problem. If the government were to rely on this textual argument to apply the TCPA to spamming on the Internet, a court likely would find that application to violate the First Amendment. Most of the elements that persuaded the Ninth Circuit to uphold the ban as applied to conventional fax machines are not present in the context of junk mail on the Internet.<sup>146</sup>

In the fax context, the government persuaded the court that the ban was reasonably fitted to the government's interest in preventing unfair cost-shifting and preclusion of desired communications by unsolicited advertisements.<sup>147</sup> Neither of these harms are equally presented by unsolicited electronic mail.

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142. 47 U.S.C. § 227(b)(1)(C) (emphasis added).

143. 47 U.S.C. § 227(a)(4).

144. 47 U.S.C. § 227(a)(2).

145. Memorandum Opinion and Order, *supra* note 58, at 12405-06.

146. See *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995) (relying on district court's use of legislative history and fact that junk fax universally involves unfair cost-shifting to uphold TCPA's ban on unsolicited fax advertising), *aff'd* 844 F. Supp. 632 (D. Or. 1994).

147. *Id.*

There may be some cost-shifting for those who subscribe to commercial online services and who pay by the minute—these people pay for the time it takes to delete and/or download the junk mail. But many others have Internet access for which they pay a flat rate, which means that they incur no marginal cost in dollars and cents for the time it takes to throw out the spam.

Arguing that spam precludes other electronic mail messages is even more difficult. At present, the scale of the problem has not reached the level at which the network's electronic memory has been filled to capacity with electronic junk mail. Generally, electronic mail messages do not go undelivered because the addressee's box is overflowing with spam. The best argument for why message-preclusion is as big a problem with electronic junk mail as it is with fax solicitations is that in both cases what is precluded is *timely* receipt of a desired communication.

In the fax context, if a business does not receive a desired communication because junk faxes are tying up the line, that communication may eventually get through, but the business will have been precluded from receiving the message in a timely fashion. Similarly, with electronic junk mail, a business has not effectively "received" a desired communication until it is identified. If someone in the business has to scroll through and delete large amounts of electronic junk mail on a daily basis, that junk mail is precluding the business from effectively receiving its desired communications in a timely fashion.

This argument is problematic because it proposes a more subjective standard for preclusion. In the fax context, an unsolicited advertisement precludes a desired communication from reaching the recipient's "premises" at the time the fax is sent because the two machines cannot connect. In the electronic mail context, a desired communication reaches the recipient's "premises" to the same extent that all other electronic mail messages do because the two machines, via the network, connect.

To withstand intermediate scrutiny, the government must assert a substantial interest in imposing the regulation, and the regulation must alleviate a real harm.<sup>148</sup> The government interest in avoiding message preclusion is probably in preventing desired communications from being precluded from reaching the recipient's premises. This would be the case because the government risks its claim to a "substantial" interest in preventing message-preclusion if that interest is defined in the vague terms of preventing only the "untimely receipt" of desired communications. If preventing preclusion from the premises is the government interest, then that interest is present in the ban on unsolicited faxes but not present if the ban is applied to electronic junk mail. Thus,

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148. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

governments probably cannot enforce the TCPA as a ban on electronic junk mail.<sup>149</sup> The government may be able to ban electronic junk mail, but specific findings and potentially a different rationale may be necessary for such a ban to be constitutionally permissible.

## B. Through the Looking Glass—the Future and the Box

This article seeks to explore the regulatory possibilities for junk communications that may be present in a unified medium and to argue that the government should have greater latitude to regulate these communications than has been the case in some of the other junk communications contexts.

This analysis proceeds on the basis of two assumptions: that most communications will be digitized and sent through a unified medium, and that the structure of that medium will be a network with an open architecture.<sup>150</sup> "Open architecture" refers to a decentralized network structure, analogous to the telephone system, within which communications can take a number of paths to reach their destination. In this structure there is no single network operator and no single concentrated distribution point—as there is in a typical cable television system—over which a network operator can exercise private control to restrict communications. An additional assumption is that abundant memory capacity for electronic communications and sufficiently abundant channels of communication will be present so that there is no reasonable argument that the medium suffers from a "scarcity" problem that would provide the basis for content-based government regulation analogous to that in the broadcasting area.<sup>151</sup>

While this exercise requires a degree of speculation, some recent developments provide a basis for imagining how communication may take place in a unified medium. Evidence suggests that the Internet,

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149. See Michael D. McConathy, *Destination Ventures, Ltd. v. FCC and Moser v. FCC: How Much Should the Telephone Consumer Protection Act Restrict Your Phone, Fax and Computer?*, 26 GOLDEN GATE U. L. REV. 153, 180-81 (1996) (implicitly concluding that TCPA does not ban solicitation by electronic mail).

150. See generally Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995) (discussing advantages of open architecture in promoting First Amendment goals of viewpoint diversity and increased user control).

151. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court adopted a scarcity rationale to uphold the FCC's fairness doctrine—content-based regulation of political speech by broadcasters. 395 U.S. 367, 386-89, 400-01 (1969). With respect to other, less scarce media, application of a functional equivalent of the fairness doctrine was held unconstitutional. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Court has recognized criticism of the *Red Lion* decision, but for the moment it continues to read the First Amendment to mean that the scarcity of the broadcast medium entitles the government to more extensive regulation. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 2456-57 (1994).

particularly the World Wide Web, is beginning to take on attributes that may bring it closer to television as a medium of communication.<sup>152</sup> For example, some content providers have begun to assign "channels" for their information and to package it in the form of "shows."<sup>153</sup>

But because information on the Internet currently travels point-to-point rather than over the airwaves or via satellite signal, some content providers are exploring ways to exploit that attribute of the medium to send customized information to users in what are essentially personalized broadcasts.<sup>154</sup> At the same time, other companies have developed a means of using radio frequencies designated by the FCC for personal communication services (PCS) to send customized information from designated Web sites to computers equipped with an appropriate receiver.<sup>155</sup> While these developments demonstrate how consumers can increasingly use a computer as a kind of television, other developments allow the use of a television as a computer connected to the Internet.<sup>156</sup>

In light of these developments, we can fairly assume that instead of our recognized categories of communication—such as mass media, community newsletters, private mail—we will have a continuum of communications on the network, with familiar aspects at both ends of the spectrum. In terms of private communications, we will probably have one-on-one audio-visual conversations, protected by the same degree of privacy enjoyed by those who currently still use wireline telephones. At the mass media end, live video coverage of major events will continue to

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152. See Bart Ziegler & Jared Sandberg, *AOL Wants to Be Viewed Like a Cable-TV Company*, WALL ST. J., Oct. 31, 1996, at B4 (describing a new corporate strategy that would allow America Online to compete more effectively as an Internet service provider); see also G. Christian Hill, *U.S. West Media, Microsoft Buy VDOnet Stake*, WALL ST. J., Oct. 28, 1996, at A11B (describing investment in company that has developed technology "that squeezes video and voice over the narrow pipes of the Internet and its graphical layer, the World Wide Web").

153. See Don Clark, *Microsoft Unveils an Online Overhaul With TV-Style Structure on Network*, WALL ST. J., Oct. 11, 1996, at B5 (describing television-like attributes of Microsoft Network).

154. Software now on the market allows users to describe categories of information that they wish to have transmitted to, or retrieved by, their computers from specific Web sites at regular intervals. Jared Sandberg & Don Clark, *Two Start-Up Firms Unveil Software to 'Push' Information on the Internet*, WALL ST. J., Oct. 7, 1996, at B9 (describing software that not only sends updated information to computers but to pagers as well).

155. See Walter S. Mossberg, *Now Even Home PCs Can Get Web News, Data Automatically*, WALL ST. J., Oct. 10, 1996, at B1 (describing two products that provide this service and their respective limitations, including limited ability to customize the filters for incoming information).

156. See Patrick M. Reilly, *New WebTV Has Sony, Philips Racing to Snatch Holiday Sales*, WALL ST. J., Oct. 25, 1996, at B8 (describing efforts to market a new, relatively inexpensive device that allows navigation of the World Wide Web with a remote control and a television set); Walter S. Mossberg, *Now You Can Watch Another New TV Show, But It's No Sitcom*, WALL ST. J., Sept. 19, 1996, at B1 (describing the new technology and reporting on how it differs from navigating the Web with a personal computer).

exist, which millions of viewers may simultaneously access.<sup>157</sup> But in between, one can imagine the presence of a great deal more variety. For example, the category of an "unsolicited" commercial solicitation may become contentious as people can increasingly customize the information they receive via the medium.<sup>158</sup>

Small electronic discussion groups among friends may come to include strangers. In these groups, members may put on "performances,"<sup>159</sup> and they may begin to charge for access to these performances. Alternatively, members may include product endorsements or other advertising in their performances in exchange for money, which may be necessary for the production of the performances.<sup>160</sup> Mass media presentations also may be less uniform. The current model of particular shows or newspapers being sent to our homes at particular times could be inverted. Rather than being sent into our homes by producers, information might be made available for us to retrieve at our leisure.<sup>161</sup> Assume that standardized, "mass-produced"<sup>162</sup>

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157. Presentations of events that we may want to observe as they happen may be the last vestige of mass media as we know it because, as a general rule, we will no longer consume our cultural products on a uniform timetable. One person may choose to survey the news at 9:26 p.m. while another waits until 10:34 p.m. Some may want to skip the sports and lifestyle stories while others may only want the sports and weather. With video-on-demand, consumers will be able to watch movies and entertainment programs on their own schedule. This may mean that we are not watching exactly the same movies or shows. See *infra* notes 164-66 and accompanying text for a discussion of "modular" programming.

158. A number of companies already are marketing "mass customized" advertising for the Internet. See Amy N. Lipton & Jennifer S. Taub, *Real World Examples of Successful Electronic Commerce*, 452 PLI/PAT 405, 416-17 (1996) (citing examples).

159. The range of these presentations is virtually limitless. Non-entertainment performances might include such things as an opinion piece on an issue of public importance. This piece might be presented in text, in video, or in some combination thereof. Entertainment performances could include a multiplayer video game, a music/video/text performance of original composition, or a music/video/text compilation of existing compositions.

For example, imagine a group of friends who share an interest in popular music. As time has gone by, other music lovers have joined the group. To enjoy their favorite music better, group members compose multimedia presentations to accompany their favorite songs. These multimedia presentations consist of compilations of new and old scanned images, movies, and text.

160. In the music video example, see *supra* note 142, a group member may need to pay for intellectual property rights to compile such a performance.

161. How important the directionality of communication will be to the scope of permissible government regulation remains unclear. Communications that are perceived to radiate out into people's "private" spheres may be subject to greater regulation on the ground that the communicator's speech rights have to be balanced against the recipient's privacy rights. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978) (allowing regulation of indecent broadcasting on ground that pervasiveness of medium reduces parents' ability to guard against minor hearing indecent programming). Some cases appear to disregard the importance of directionality. "Pervasiveness" may simply mean readily available. See *Information Providers' Coalition v. FCC*, 928 F.2d 866, 873 (9th Cir. 1991) (upholding parents' right to block access to "1-900" telephone numbers).

162. This phrase will likely come to mean "produced for a mass audience." Rather than the provider sending a broadcast signal in numerous directions, the program itself will be

entertainment and non-entertainment "programs"<sup>163</sup> will continue to be available. Because we are the ones accessing the program, it need not be the same program for each of us.

Producers of standardized entertainment and non-entertainment programs might engage in "modular" programming. Under this form of production, a program would be composed of standardized modules that could be assembled differently according to consumer preferences. For example, when choosing to view a movie, viewers may be able to select the rated version they want, with additional scenes of sex and violence added in progressing from the G-rated version to the X-rated version. We may even get a choice of plot structure.<sup>164</sup> Assuming that some degree of modular programming comes into being,<sup>165</sup> advertisers may be better able to target their audiences.<sup>166</sup>

Under this scenario, the advertisements we receive will depend on the modules we have selected; the distinction between mass media advertising and junk mail will break down. Rather than selling advertising space directly to specific advertisers, programmers may simply sell blocks of space to advertising syndicates. Because programming will not be entirely standard and because the time constraints of fitting the program into a particular "time slot" will not exist, the limits on how much advertising can be attached to programming will be determined by the mix of government and market regulation that emerges in the unified medium. That is, will consumers be deemed to have consented to receive any and all advertisements attached to programming, such that they have no recourse but to not buy programs that include advertisements for, say, guns or sexual aids? Or might the

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capable of being copied millions of times in a very short period and will be available for retrieval by consumers.

163. What nomenclature will develop for clips of information in the unified medium remains to be seen. Here a "program" could be a video entertainment show, but it also could be the newspaper, a cookbook, etc.

164. For example, viewers could choose between a happy and sad ending or between light and dark comedy.

165. This does not seem to be such an outlandish assumption. Movies and television shows already are filmed scene-by-scene with no regard to sequence. So long as the marginal cost of producing additional scenes is less than the marginal revenue produced by giving consumers their choice of version, we would expect to see modular programming.

166. This assumes that advertising will still be attached to programming. All programming might instead be financed on a pay-per-view basis, but the incentives for programmers to sell advertising space in their programs are likely to be greater than the benefits of providing commercial-free programming.

An unscientific survey of 409 online users, conducted by a marketing magazine, provides some further support for the proposition that people would accept advertising in exchange for lower costs in receiving programs. *Online Users Survey Results: Electronic Junk Mail-No; Bribes-Maybe*, INTERACTIVE FACTS, June 6, 1994. The survey found that only 28% of respondents thought junk mail should be allowed on commercial online services, but 54% would accept junk mail in their boxes in exchange for free online hours or other financial incentive or rebate. *Id.*

government have a role in regulating the types and amount of advertising that can be attached to programs?

### C. Private Regulation in the Unified Medium

#### 1. THE NEED FOR REGULATION: A TRAGEDY OF THE COMMONS

One might imagine how the unified medium would operate absent government regulation of unsolicited solicitations on the network. From an advertiser's perspective, the incentives to send junk mail early and often would probably be great. Evidence indicates that even if only one percent of junk mail and junk phone recipients purchase the advertiser's product or service, the advertiser generates more revenue than the advertisements cost him.<sup>167</sup> If these are the numbers when a junk mailer has to spend, say, ten cents per mailing, what is to stop an advertiser when the marginal cost of sending a piece of electronic junk mail is virtually zero?

Given the incentives for advertisers, we should expect that the network would be flooded with unsolicited commercial solicitations.<sup>168</sup> If this comes to pass, the worst-case scenario would be a tragedy of the commons in which the entire network would be rendered useless.<sup>169</sup> Everyone's receiver would be so full of unwanted solicitations that the effort needed to sift the useful from the useless would be far too great to make the effort worthwhile. To avoid the tragedy of the commons, some form of regulation is needed. This could be self-regulation by advertisers, market regulation by other participants in the market, and/or government regulation. Under our constitutional scheme, which places limits on the scope of government regulation of commercial speech but which places no

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167. See Rosenfield, *supra* note 3, at 82.

168. See Himelstein, *supra* note 112, at 44 (discussing concerns over junk mail glut on Internet).

169. A "tragedy of the commons" occurs when users of a common asset or public good act in their rational self-interest to derive as many personal benefits as possible from the asset—a process that results in the depletion of the asset, leaving all involved in a worse position than they would have been had use of the asset been regulated to preserve it. See generally Garrett Hardin, *A Tragedy of the Commons*, 162 SCIENCE 1243 (1968). In this case, the tragedy would arise because advertisers' returns on junk mailing would drop so low that even with the minimal marginal costs, no net value will be derived from the advertising efforts.

In the popular press, discussions of junk mail on the Internet occasionally reference the problem of the commons. Referring to the Spam King, one article placed this junk mailer's activities in the "great American tradition of profit from abuse of the commons." Akst, *supra* note 109, at D4; see also Howard Rheingold, *Selfish Interests Spoil the Net*, DENVER POST, Jan. 27, 1995, at 23 (describing junk mail as tragedy of the commons analogous to overgrazing of land).

limits on private regulation, our cultural preference appears to be in favor of private regulation.

Although there is some precedent for self-regulation by advertisers, the motivation for that regulation appears to be to preempt government regulation rather than to preserve the commons.<sup>170</sup> If the threat of government regulation were neutralized, we probably would not see effective self-regulation by advertisers.

## 2. INFORMATION FILTERS ALONE ARE NOT THE SOLUTION

The market regulation most commonly anticipated is production of information filters that will either screen out or sort junk communications.<sup>171</sup> Information filters can be classed generally as "opt-out" filters or "opt-in" filters, with the distinction deriving from the default position of the user. With an opt-out filter, the user will receive all communications until she opts out of receiving selected communications,<sup>172</sup> with an opt-in filter, the user will receive no communications until she opts in to receiving certain communications.<sup>173</sup> Opt-in filters could be "restrictive" opt-in filters through which users opt to receive the communications of identified parties, or they can be "broad" opt-in filters through which users opt to receive certain classes of information.

170. For example, in June 1996, the direct marketing community announced proposed self-regulation in response to a workshop on consumer privacy conducted by the Federal Trade Commission. Lipton & Taub, *supra* note 158, at 424-25. The Direct Marketing Association and the Interactive Services Association issued joint statements on "Principles for Unsolicited Marketing E-mail" and a "Draft Online Notice and Opt-Out Principle." *Id.* at 447-48 (providing full text of both statements). Arguably, then, self-regulation in the face of potential government regulation is actually effective. In the first document, the industry agreed to the "principle" that "[o]nline solicitations should be clearly identified as solicitations and should disclose the marketer's identity." *Id.* at 447. But query whether the industry would so readily agree if an enforcement mechanism were in place.

171. See, e.g., Joanne Pransky, *Robots: Our Future Information Intermediaries*, INFO. TECH. & LIBR., Dec. 1995, at 257 (describing need for and availability of information filters to "manage e-mail, handle phone calls, and read and organize your junk mail.").

172. For example, the statute at issue in *Rowan* provides individuals with an opt-out filter for junk mail by allowing them to inform the Postmaster not to deliver materials sent by selected mailers. *Rowan v. United States Post Office*, 397 U.S. 728, 730 (1970). Similarly, regulations promulgated pursuant to the Telephone Consumer Protection Act provide individuals with an opt-out filter by requiring callers to maintain lists of those who have requested that they not be called again. See 47 C.F.R. § 64.1200(e)(2)(iii) (1995).

173. An unlisted telephone number is effectively an opt-in filter. A person with an unlisted number will receive no telephone calls—except for calls generated by random digit dialing and misdialed calls—until that person gives her telephone number to people she selects. Some evidence suggests that people choose to have unlisted phone numbers precisely to filter out junk phone calls. See Nadel, *supra* note 9, at 100 & n.13 ("Many of the estimated 13.9% of consumers with unlisted telephone numbers [1981-82 figures] may have sought that refuge to protect themselves from [unsolicited junk] calls.").

Information filters would thus reduce the threat of junk mail mucking up the system so badly that it grinds to a halt. Users of opt-out filters presumably could set them either to exclude junk mail altogether or to shunt the junk mail to a holding place where it may or may not be read. Users of opt-in filters would get no unsolicited commercial solicitations unless they either gave their addresses to certain mailers—in which case the mail is not “unsolicited”—or if the primary recipients of their addresses intentionally or unintentionally passed them on to advertisers.

For either type of filter to work effectively, communications need to be accurately labeled. To enable someone to opt-out of junk mail without opting out of desired communications, the filter must reliably be able to distinguish the two categories. This is less an issue with restrictive opt-in filters, but if one uses a broad opt-in filter to receive certain classes of communications, accurate labeling is equally important.

If accurate labeling is not possible, only restrictive opt-in filters may make the medium work. But if this limited opt-in filter is the norm, a number of the advantages of the medium are foregone. Not only will each user have to designate affirmatively all the entities from whom she wishes to receive communications, but she also will not receive unsolicited but desired communications. Moreover, were use of this type of filter the norm, people would need to remain cautious about revealing their addresses. This caution might curtail participation in online discussion groups or any other public communication that would result in disclosure of one's electronic address to strangers. Since this result is undesirable and the only alternative is effective opt-out filtering, accurate labeling of junk mail will be important for the medium to fulfill its potential.

Moreover, for opt-out filters and broadly calibrated opt-in filters to work, *accurate* labeling is required. Why should an advertiser label his communication as an unsolicited commercial solicitation when the likely result is that it will get filtered out by numerous recipients? Why not circumvent the filter by mislabeling the advertisement as a desired or important communication?<sup>174</sup> Assuming that this is the likely response of most advertisers, how can the market alone regulate mislabeled advertisements? It simply cannot.

Thus, some form of government regulation in addition to market regulation through filters will be necessary to stop junk mailers from constipating the network. The three most likely forms of regulation the government might consider would be a labeling requirement, restrictions on commerce in personal information, and a complete ban on unsolicited electronic advertising. If the government is able to force advertisers to

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174. This certainly is the current practice among numerous (paper) junk mailers. All of us commonly find mail advertisements masquerading as prize announcements, checks, governmental communications (brown paper), etc.

label their solicitations accurately, filters should work to avoid the tragedy of the commons. Further, if the government can restrict the ability of businesses to sell customer profiles to advertisers, junk mailers will have less information with which to identify their targets.<sup>175</sup> A total ban on unsolicited electronic solicitations is obviously the most forceful means to regulate electronic junk mail. If these forms of government regulation become desirable or necessary, the question arises: will they be constitutionally permissible?

#### IV. REGULATING UNSOLICITED ADVERTISEMENTS ON THE BOX

The analysis in part II yielded the conclusion that some government regulation will be necessary to avert the tragedy of the commons which will result if advertisers so fill the medium with junk communications that its utility substantially declines. The aim of this section is to apply the First Amendment principles derived in part I to three principal types of potential government regulation.

Before taking this step, we must ask whether the principles from part I are likely to remain good law in the future. Will our understanding of the First Amendment be changed by our communicative efforts in a unified medium? Influential constitutional scholars who have thought about the issue conclude that First Amendment principles should not be viewed as technology-specific, and therefore the challenge will be applying the tried-and-true principles in new contexts.<sup>176</sup> A number of First Amendment scholars have begun to think about how these principles might be applied to speech communicated through the emerging media.<sup>177</sup> Most commentators assert that, so long as the new medium has an "open" architecture, the dominant feature of the new medium will be

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175. Such a regulation may actually exacerbate the junk mail problem, because greater information enables advertisers to limit their "mailing" to those who would have some likelihood of responding positively. Without that information and with low marginal costs, advertisers will resort to the blunderbuss approach and send their messages to everyone.

176. See generally Sunstein, *supra* note 117; Laurence H. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Keynote Address at the First Conference on Computers, Freedom & Privacy (Mar. 26, 1991) (transcript available at <http://www.cpsr.org/dox/conferences/cfp91/tribe.html>).

177. See, e.g., Sunstein, *supra* note 117; M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681 (1995); Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1 (1995); Joel R. Reidenberg & Francoise Gamet-Pol, *The Fundamental Role of Privacy and Confidence in the Network*, 30 WAKE FOREST L. REV. 105 (1995); David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335 (1995).

greater individual control over sending and receiving speech.<sup>178</sup> There is some suggestion that greater individual control may impact the rules for regulating "mass media," but there is little suggestion that that control will necessitate alteration of the principles for regulating unsolicited commercial solicitations. Therefore, this analysis will proceed on the assumption that the part I principles remain the relevant analytic framework.

The three types of regulation that I consider most likely are: (1) a labeling requirement for unsolicited advertisements so that individuals can use their information filters effectively; (2) restrictions on commercial use of personal information; and (3) a complete prohibition on unsolicited electronic advertisements.

### A. If It's Junk, Put a Label On It

In part II, the analysis indicated that unwanted commercial solicitations could be effectively controlled through the use of information filters. But to work effectively, information filters require accurate identifying marks on communications to enable effective discrimination between desired and undesired information. Since those sending unsolicited advertisements will have strong incentives to disguise the nature of their communications, the coercive force of a government labeling requirement is necessary for information filters to be used effectively.

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 applied only to commercial solicitations or as a content-neutral time, place, and manner restriction on all unsolicited solicitations; in either case the First Amendment analysis is virtually identical.<sup>179</sup> The government will have to demonstrate a substantial interest that is directly advanced

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178. See generally Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995).

179. In the commercial speech context, whether a regulation is content-based or is a content-neutral time, place and manner restriction has little functional impact because the constitutional test is the same. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

For an analysis of a labeling requirement for violent television shows via a ratings system, see Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487 (1995) (discussing the likely collapse of the cable/broadcast distinction for First Amendment purposes and the permissible range for government regulation of violent programming, including use of the V-chip).

by a labeling requirement, and the fit between the interest and the scope of the regulation must be reasonable.<sup>180</sup>

A labeling requirement for unsolicited commercial advertisements would probably be upheld as a constitutional regulation. To ensure such a result, the government should assert three independent substantial interests in regulating—protecting individual privacy, preventing unfair cost-shifting, and preserving the viability of the medium. The reason that the government should assert all three interests is that none of these interests alone is neatly transferred from other contexts to the unified medium. The government should then demonstrate how a labeling requirement reasonably advances these interests.

### 1. PRIVACY IN THE HOME

The primary government interest in regulation of door-to-door sales, unsolicited mail and unsolicited phone calls is the protection of individual privacy in the home.<sup>181</sup> The well-settled substantiality of this interest is evidenced by the Supreme Court's predilection for rhetorical flourish when describing it.<sup>182</sup> As strong as the state's interest is, however, the government may employ only limited means to protect against intrusions by unsolicited commercial solicitations. The government may regulate to provide an enabling structure for individuals to protect their own privacy but may not shift the locus of decisionmaking such that the government itself is banning certain classes of junk communication.<sup>183</sup>

In seeking to impose a labeling requirement for unsolicited solicitations in the unified medium, the government could argue that such a regulation is a reasonable fit with privacy protection because the locus of decisionmaking remains with the individual who chooses whether or not to filter out the labeled communications. The government could also point to current state law, which requires attorneys to label their solicitations as an "Advertisement" to ameliorate the potentially coercive effects of attorney communications and to protect privacy in the home.<sup>184</sup>

But would a labeling requirement for unsolicited advertisements in the unified medium really be protecting privacy in the home? Unlike a

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180. See *supra* part I.A. (discussing *Central Hudson/Fox* test for commercial speech regulation).

181. See *supra* parts I.A-C.

182. For example, in *Carey v. Brown*, 447 U.S. 455, 471 (1980), the Court asserted that "[t]he 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," and in *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988), the Court stated that "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."

183. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983).

184. See *supra* part I.B.2.c.

knock at the door or a ring on the phone, nothing is similarly disruptive and intrusive about receipt of an electronic message. Whether a government-enforced labeling requirement, which enables effective filtering, is sufficiently analogous to the statute upheld in *Rowan*, which enabled individuals to filter out offensive junk mail, remains to be seen. Such an analogy may be problematic depending on how we conceive of the "place" to which electronic messages are sent.

If the electronic mailbox is merely a part of our home, which is entitled to the fullest protection of privacy, then the analogy may be a snug fit. But if our electronic mailbox is a more public space than the physical mail slot entering our home, the government's interest in protecting privacy in that more public space will be diminished. As one writer has described it:

A home in the real world is, among other things, a way of keeping the world out. . . . It's like being inoculated with a little bit of the world, which makes you better able to survive the whole world.

An online home, on the other hand, is a little hole you drill in a wall of your real home to let the world in.<sup>185</sup>

How the concept of "privacy" will be constructed for cyberspace is a topic that has attracted a great deal of attention.<sup>186</sup> A full exploration of the privacy issue is beyond the scope of this article. It is sufficient to recognize that the government may not be able to rely on its interest in protecting residential privacy to justify regulation of electronic junk mail. Therefore, other potential state interests must be explored.

## 2. COST-SHIFTING

Whether a labeling requirement would be upheld as preventing unfair cost-shifting would probably depend on how the unified medium is financed. If a significant number of users of the unified medium are charged for their use by the amount of time they spend, then a labeling requirement avoids unfair cost-shifting by allowing users to automatically filter out unwanted advertisements without having to spend time and money deleting these advertisements individually.<sup>187</sup> If prevention of cost-shifting is an interest that is reasonably advanced by the greater step

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185. John Seabrook, *Home on the Net*, NEW YORKER, Oct. 16, 1995, at 66 (describing the author's experience in designing his Home Page on the World Wide Web).

186. See, e.g., Goldstone, *supra* note 177; Reidenberg & Gamet-Pol, *supra* note 177; see also Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989 (1995).

187. In the current environment, Internet service providers appear to be moving away from time-based access charges. "America Online, bowing to the inevitable, is expected to announce today that it will offer customers flat-fee pricing for unlimited access to the Internet in a bid to stay competitive with the fast-moving industry." Jared Sandberg, *America Online To Unveil Flat Fee for Internet Access*, WALL ST. J., Oct. 29, 1996, at B5.

of prohibiting all unsolicited fax advertisements,<sup>188</sup> then that interest is reasonably advanced by the lesser step of allowing such communications so long as they are accurately labeled.<sup>189</sup>

If the government sought to use this argument in support of a labeling requirement, it should do so cautiously because the reasoning for why prevention of cost-shifting is such a strong state interest or why a complete ban is reasonably fitted to that interest remains somewhat elusive. Neither Congress nor the courts have thus far considered it necessary to articulate precisely where the substance in the interest lies. The First Amendment merely requires that the state demonstrate that the harms it recites are real and that its restriction will in fact alleviate those harms to a material degree.<sup>190</sup> Thus far, the courts have accepted as evidence of real harm unchallenged testimony before Congress that junk fax forces unwilling recipients to pay for paper and ink and to forgo receipt of other transmissions while the unsolicited transmission is received.<sup>191</sup>

"Cost-shifting" cannot mean general cost imposition because every form of junk communication imposes some costs on recipients,<sup>192</sup> but the government cannot reasonably ban door-to-door sales or other junk communications in order to avoid those costs. On the one hand, a ban based on a cost-shifting rationale may mean that when junk communications impose objectively quantifiable costs on recipients, the state has a stronger interest in protecting recipients from unwillingly spending *money* on behalf of advertisers rather than from spending *time* for the benefit of advertisers.

On the other hand, the focus may be on situations in which advertisers *shift* costs from themselves to recipients. The time cost imposed on recipients of other forms of junk communication is not a cost the advertiser would otherwise bear. But presumably, the cost of paper and ink are costs an advertiser would bear but for the existence of fax technology that allows the advertiser to shift those costs to recipients. If

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188. See *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995) (upholding statutory ban on unsolicited fax advertising as permissible regulation).

189. This greater-includes-the-lesser justification for regulation of speech has its limits. Government may regulate underinclusively so long as that regulation does not amount to viewpoint discrimination or content discrimination. *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992). A labeling requirement remains viewpoint-neutral because all commercial speech would be subject to such labeling.

190. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

191. See *Destination Ventures, Ltd. v. FCC*, 844 F. Supp. 632, 635-37 (D. Or. 1994) (citing liberally from congressional hearings in support of the TCPA), *aff'd*, 46 F.3d 54 (9th Cir. 1995) (stating that parties concede substantiality of state interest in preventing cost-shifting).

192. These costs are, for example, the time it takes to sort through junk mail or listen to a telephone solicitor. Additionally, psychic costs are also imposed, such as the frustration caused by receipt of unwanted solicitations.

it is this shifting that is the key aspect of the cost-shifting rationale, the derived principle may be that when an advertiser can use a technology to shift costs that the advertiser otherwise would bear to the recipient, the government may reasonably correct that market failure by prohibiting the advertiser from using the technology altogether to make unsolicited solicitations.

### 3. PRESERVING THE VIABILITY OF THE MEDIUM

The last interest that the government should assert in favor of a labeling requirement is in maintaining the viability of a unified medium. All of the potential benefits of a unified medium, including increased productivity due to the ease of telecommuting and the enhancement of information-sharing and increased consumer choice with respect to educational and entertainment programming,<sup>193</sup> are lost if the medium is rendered useless by the tragedy of the commons. So long as the government can assert that the tragedy of the commons is a "real harm" that reasonably is avoided by a labeling requirement for unsolicited electronic advertisements, then this would be a separate interest not available to the government in other contexts. While ample evidence already exists that junk mail on the Internet frustrates many online inhabitants,<sup>194</sup> how close we must come to the tragedy of the commons before a court will consider the threat posed by unsolicited advertisements on the unified medium to be a "real harm" remains to be seen. In other contexts, courts have expressed skepticism over the government's claimed interest in structural regulation.<sup>195</sup>

Taken as a whole, the interests in protecting privacy in the home, preventing unfair cost-shifting, and preserving the viability of the medium appear to be fairly substantial even though none are neatly transferred from other contexts to the unified medium.

### 4. ALTERNATIVES FOR REGULATORS AND ADVERTISERS

In addition to asserting its interest in a labeling requirement, the government also must persuade a court that the requirement is reasonable given the regulatory alternatives and that the requirement leaves open alternative means for advertisers to communicate. The government does

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193. See *supra* note 1.

194. See *supra* part II.A.

195. See, e.g., *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993) (declaring unconstitutional the cross-ownership ban on telephone companies' owning video programmers (47 U.S.C. § 533(b)) because such "structural" economic regulation still disproportionately impacts entities engaged in protected speech), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated*, 116 S. Ct. 1036 (1996) (remanded to Fourth Circuit on question of mootness).

not have to use the *least* burdensome regulation available,<sup>196</sup> but the presence of numerous, less burdensome alternatives raises doubts about the reasonableness of the regulation.<sup>197</sup>

A labeling requirement would place a modest burden on commercial speakers. If the medium has become so pervasive that other alternatives for unlabelled solicitations such as paper junk mail are no longer viable, then the requirement effectively requires all in-bound communications to be labeled. The material costs for placing a label on the communication would be de minimus, and the label helps consumers better obtain the commercial information they want, which is the First Amendment value that justified heightened protection for commercial speech in the first instance.

In addition, advertisers can also communicate with consumers by maintaining "places" in the unified medium where consumers come to them. As with a home page on the World Wide Web, advertisers will be able to post information about their goods and services to a site on the medium.<sup>198</sup> When consumers seek information by entering a search command into their computer, the advertiser's information—if it fits within the consumer's search parameters—may then reach the consumer. In such a situation, the information travels into a consumer's home not as an unsolicited advertisement but as a solicited communication.

Furthermore, a labeling requirement appears to be one of the least restrictive alternatives available to the government. It would simply require that an advertiser identify in a header or in some other standardized format which could easily be read by the receiving device that the enclosed communication is an unsolicited commercial solicitation. Presumably, the advertiser would have the option to add additional descriptions of the contents—for example, "catalogue enclosed"—so long as those descriptions are not misleading. A labeling requirement is merely an enabling provision that allows private individuals to filter their communications. The requirement by itself does nothing to impede the flow of unsolicited advertisements. Therefore, a labeling requirement would be reasonably fitted to the government's interests in protecting individual privacy, preventing unfair cost-shifting and preserving the viability of the medium.

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

197. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417-18 (1993) (invalidating city ordinance as impermissible underinclusive regulation of commercial speech because it banned from the public streets only newsracks belonging to commercial handbill distributors but not newsracks belonging to newspapers).

198. Advertising via Web pages appears to be increasing. Bart Ziegler, *NetCount Seeks to Tally Users of Web Ads*, WALL ST. J., Oct. 11, 1996, at B17.

## B. Restricting the Sale of Personal Information

Perhaps the government could regulate unsolicited commercial solicitations indirectly. The government could regulate the sale of personal information in a number of ways; for example, it could grant individuals a property right in their personal information or directly regulate the sale of such information.<sup>199</sup> Granting such a right might create transaction costs that vastly outweigh the benefits.<sup>200</sup>

Quite possibly, a provision restricting the sale of personal information such as a person's address, phone number or email address has no First Amendment implications. What is being regulated is the sale, which under most analyses would be conduct rather than speech. A number of privacy advocates support such a restriction, and at least one state legislature recently considered such a provision.<sup>201</sup>

The government could also directly regulate the sale of personal information. A First Amendment issue might arise if such a regulation places a heavy burden on or effectively precludes communication by commercial speakers. But advertisers are unlikely to have the basis for such a claim. Assuming that some form of telephone directory will be available in the unified medium,<sup>202</sup> advertisers would find it difficult to argue that privacy restrictions precluded their ability to speak when such a directory would provide the means to address a large audience. This section simply points out that the government has another indirect means of regulating unsolicited advertisements by increasing the costs of information gathering for marketers through prevention of the sale of marketing lists.

## C. Can the Government Declare the Unified Medium a Junk-Free Zone?

A more difficult question arises if the government determines that, as a matter of public policy, the unified medium should be free from unsolicited advertisements. Under existing principles and precedents, the government cannot support such a ban as a means of protecting privacy

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199. Note that courts have not yet been willing to grant such a property right in personal information. See *supra* note 43 (discussing suit by Virginia man asserting property right in personal data under state right-of-publicity statute).

200. One commentator concludes that recognition of a property right in personal information would not be a solution because, although it would shift some costs to advertisers by requiring them to pay for the right to send junk mail, it would shift significantly greater transaction costs to consumers. See A. Michael Froomkin, *Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395, 492-93 (1996).

201. See *supra* notes 43-44 and accompanying text.

202. Already, some versions of Web browsers like Netscape Navigator include access to the "Internet White Pages." In addition, users can visit <http://www.four11.com> (Four11) or <http://www.whoWhere.com> (WhoWhere) to find Internet addresses.

in the home. Protecting privacy is not a sufficient justification for the government to place a complete ban on offensive commercial solicitations<sup>203</sup> or a complete ban on an entire mode of communication, such as door-to-door sales, to be used for commercial solicitations.<sup>204</sup>

Under current principles and precedents, the government may apparently ban this form of communication only if necessary to avoid unfair cost-shifting or as a reasonable time, place and manner restriction. This subsection considers whether either of these arguments would be likely to succeed in justifying such a ban on the unified medium.

### 1. COST-SHIFTING

The discussion in part III.A.2 *supra* suggested that the government might argue that a labeling requirement is a permissible underinclusive regulation because the government could have banned unsolicited commercial solicitations altogether. This subsection analyzes the validity of that claim. The government's interest in preventing unfair shifting of advertising costs from sender to receiver has been found to be sufficiently strong to justify a complete ban on a mode of communication, such as unsolicited fax advertising.<sup>205</sup> While the reasoning behind this principle remains somewhat elusive,<sup>206</sup> this rationale apparently obtains either when unsolicited commercial solicitations impose unavoidable and objectively measurable costs on the recipient or when the sender shifts costs that he otherwise would bear from himself to the recipient.

Whether this rationale would support a complete ban on unsolicited advertisements in a unified medium depends on how participation in the medium is financed. If most users incur time-based charges for online usage, then a fairly direct analogy to the fax context can be drawn: just as unsolicited faxes impose the unavoidable and objectively measurable costs of paper and ink on the recipient, so too do unsolicited electronic advertisements impose the unavoidable and objectively measurable costs of the online time required to download and delete the solicitations. If participation is free or financed through fixed monthly charges, then the analogy begins to evaporate. Under such a scheme the costs imposed by unsolicited advertisements would be the inconvenience of sorting through the junk. This inconvenience is analogous to the "short, though regular, journey from mail box to trash can" that the Court considered a reasonable cost for consumers to bear.<sup>207</sup>

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203. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983).

204. See *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991).

205. See *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995).

206. See *supra* part III.A.2.

207. *Bolger*, 463 U.S. at 72.

In the fax context, however, a complete ban is also justified by the interest in avoiding the added harm of message preclusion. This interest would not be present in the unified medium.<sup>208</sup> Whether this added element is necessary to justify a complete ban probably depends on the alternatives available to both parties. On the one hand the government could make the costs of electronic advertisements avoidable by enacting a labeling requirement, which would allow for effective filtering. On the other hand, advertisers would still have an electronic means of communicating with potential customers through their Web page, and advertisers would have the alternative channels of regular mail (assuming it still exists) and the voice component of the medium (the telephone equivalent), as well as door-to-door sales.

Given the wealth of alternatives for advertisers and the fact that the government does not have to choose the least restrictive means available, a complete ban on electronic advertisements would likely withstand intermediate scrutiny if electronic advertisements imposed unavoidable and objectively measurable costs on recipients, even though the message-preclusion problem is absent. If the medium were financed other than by charges for online time, the government interest in preventing the inconvenience of sorting through the junk would probably be insufficient to justify a complete ban. However, the government may be able to use an alternative rationale to reach the same result.

2. *PROTECTING PRIVACY: A COMPLETE BAN AS A REASONABLE TIME, PLACE, AND MANNER RESTRICTION*

If the government cannot support a ban on unsolicited electronic advertisements with a cost-shifting rationale, it may try to do so as a reasonable time, place, and manner restriction analogous to the complete prohibition on solicitations made by automatic dialing machines.<sup>209</sup> The analogy would be that the government has not banned all electronic solicitations because consumers still can receive these when they search for goods and services on the Web (or its future equivalent). The government has only banned those unsolicited electronic advertisements sent from advertisers to consumers. This is viewpoint-neutral because it bans solicitations from all advertisers, and advertisers still have available abundant alternatives, such as telephone solicitations, door-to-door solicitations, and mass-media advertising (which now would not be as distinct from direct marketing).<sup>210</sup>

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208. See *supra* part II.A. (explaining why message preclusion is not a problem in the Internet context).

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

210. See *supra* part II.B.

As discussed above, the government could constitutionally ban all unsolicited electronic advertisements if such a ban prevented the imposition of unavoidable and objectively measurable costs on recipients. Because the costs would be unavoidable, a government ban in effect would not be supplanting any private choice. Although a ban would burden commercial speakers and those willing recipients of unsolicited electronic advertisements, the burden would be permissible because it would avoid unfair cost-shifting while leaving open ample alternative channels to advertisers.

If electronic advertisements do not impose unavoidable costs on recipients, a closer question arises if the government attempts to ban all such advertisements. The government may attempt to justify such a ban as a reasonable time, place, and manner restriction. The precedents support both sides. Those challenging such a ban could point to attempts at similar bans on door-to-door solicitations, which have been invalidated as overinclusive.<sup>211</sup> The argument would be that just as a ban on door-to-door sales is overinclusive because it entirely forecloses a valuable avenue of communication for commercial speakers, so too would a ban on unsolicited electronic advertising be overinclusive because it shuts off the primary means of communication with potential customers. The government could respond that a ban on electronic advertising is no different than a ban on automated telephone calls. Just as the ban on auto-dialers reasonably protected privacy while leaving open the avenue of "live" telephone solicitation, so too would a ban on unsolicited electronic advertising protect privacy while leaving open the avenue of electronic advertising through the Web, telephone or door-to-door solicitation, or mass-media advertising. The issue is too close to predict an outcome without further experience.

#### D. Summary

Three of the likely types of regulation the government may consider for unsolicited direct advertising in a unified medium are a labeling requirement for junk communications, restrictions on the sale of personal information, and a complete ban on electronic solicitations. A labeling requirement would appear to be constitutionally permissible as an enabling regulation that allows us to avoid the tragedy of the commons while leaving the decision over which communications to receive in private hands. A restriction on the sale of personal information would be a matter more of privacy law and property law than a matter of free speech. However, were the restriction to place a material obstacle between commercial speakers and their intended audience, a court would

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211. See *supra* part I.A.

potentially analyze whether such a restriction is a reasonable time, place, and manner restriction on speech. Whether the government could completely ban unsolicited commercial solicitations in the unified medium would depend on the specific facts. If such a ban were to prevent unavoidable shifting of advertising costs, the ban probably would be upheld; but if the ban were simply to protect privacy, the issue would be close and its resolution would depend on the precise situation at the time.

## V. CONCLUSION

Rapid developments in digital technology present exciting new possibilities for communications. More information and new kinds of information increasingly are available to greater numbers of people around the world. The growth of electronic mail as a common means of communication may serve as a much-needed spur to improve literacy in America and beyond. The medium may well improve the operation of representative democracy by allowing the electorate to be better informed and representatives to be more accountable.

All of the benefits and the marvels offered by the emerging media, however, may be unobtainable if we allow ourselves to be buried in a blizzard of electronic clutter. The incentives for advertisers to communicate early and often are great, and relying on self-restraint by advertisers to avoid a tragedy of the commons in the unified medium would not be reasonable. Already the phenomenon of electronic junk mail—spam—is growing fast on the Internet. As more potential customers get wired, online advertisers will likely step up their efforts.

The market is responding with sophisticated information filters, but the government will have to provide an enabling regulatory structure for the filters to be effective. Should the government decide as a matter of sound public policy to ban all unsolicited commercial solicitations in the unified medium, it may be possible to do so under certain circumstances.