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Information v. Commercialization: The Internet and Unsolicited Electronic Mail

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I. Introduction

{1} In November of 1996, the District Court of Eastern Pennsylvania allowed America Online to prohibit a business from using the Internet for sending bulk, unsolicited electronic mail.^[1] The decision highlighted some intriguing issues related to how the Internet interacts with the current legal framework and how legal standards that have adequately encompassed most business uses for emerging technologies are not a perfect fit for issues related to the Internet. This article will focus on the current struggle to fit the Internet into some type of existing legal framework, especially with respect to Internet business uses. It will focus primarily on the problem of bulk, unsolicited business advertising. The article will advise that the Internet's unique character requires that the Internet be left to formulate its own policies with minimal legislation imposed on it, but also allow for private companies providing Internet access to restrict some uses so that the emerging etiquette on the Internet will be preserved and not require legislative scrutiny.

II. The Internet and Advertising

{2} The Internet is the most unique form of communication in existence because its potential is almost unlimited.[2] The Internet can act as a telephone with an immediate exchange or as a medium enabling a user to send written letters and messages via e-mail. The Internet also may be a newspaper, an encyclopedia, a travel guide, a shopping center or even an entire library. Potentially, there is "real time"[3] visual communication and viewing of previously recorded "moving video images"[4] available on the Internet.

{3} The Internet has more potential business uses than any other medium of communication because of its infinite possibilities.[5] Web sites, which are information access sites on the Internet, are often set up to advertise a product or to promote a business.[6] Not only might a flashy web site catch the attention of a potential consumer, but links to other web sites might give that consumer an additional hook and keep the consumer interested in that business by providing comprehensive industry information.[7] These Internet sites are beneficial to new and existing businesses because they provide "another medium in which [the business] could create a dialogue with [its] customers." [8]

{4} Many web sites are more than information pages by promoting business among its customers and potential customers. Many online catalogs enable consumers to buy while logged onto the computer without having to go to a store, get cash, or write a check.[9] Purchases may be accomplished electronically without any true physical exchange or presence.[10]

{5} The problem with web sites is that the user needs to be able to find them in order to use them.[11] As an analogy, a web site is much like the address of a store. If someone does not know where a store is, he or she cannot go shopping there, and finding a particular store might be a fortuitous piece of luck. Fortuitous discovery of an Internet location is accomplished by Internet "browsing" or "surfing." [12] An entire industry has taken advantage of the need to be able to locate sites on the Internet and companies have developed and continued to modify Internet "search engines." [13] These search engines, however, are only a more sophisticated way of browsing and generally lead the computer user to a variety of related sites rather than just one.[14]

{6} Prior to the development of the electronic marketplace, successful businesses overcame the problem of having consumers find their location by advertising, usually by paper medium or, more recently, by television advertising.[15] Where local advertising is concerned, the business might run an ad in newspapers, the yellow pages, or mail flyers to homes. The store might include colorful pictures of its sale items, give its hours of business and, at the very least, let the prospective buyer know where the store is located.

{7} Internet web sites are, in some respects, intended to accomplish what traditional advertising accomplishes, but they are useless if they are not seen.[16] Some businesses that have web sites often include the location of the site in their traditional media ads or advertise by some other means.[17] Absent some degree of traditional advertising, making the location of a particular web site known is difficult.[18] If a web site can only be found by way of a random search or "surf," the business' efforts at Internet advertising might not be worth the trouble.[19]

{8} A way to eliminate a "random chance" shopper has been to go directly to the potential consumer through unsolicited e-mail. Unsolicited e-mail, in many respects, is similar to telephone soliciting and advertising by regular "junk" mail. An unsolicited e-mail informs the recipient of whatever the sender wants the recipient to know, and the person receiving it either investigates further or disregards the message. The unsolicited e-mail may be for the purpose of informing the receiver of where a web site is located, or may simply be an advertisement for a particular product with information about where to purchase that product. The ad does

not necessarily have to be for Internet related services.[20]

{9} The problem with unsolicited commercial e-mail, at least for the recipient, is that if it is truly unwanted, it can be annoying and costly.[21] While many people complain about regular junk mail, it not only can be thrown out en masse, but it is somewhat limited in volume by the fact that the sender must still pay postage to get it to the consumer.[22] That means the advertiser must weigh the costs and benefits of sending out this mail and may ultimately decide that the return is not worth the postage spent and stop the advertising.[23] Similarly, telemarketers may be hung up on or be faced with an answering machine.[24] The cost of paying the callers may wind up being more than the profits derived through the scheme.

{10} The Internet, however, is somewhat different. E-mail may be sent to theoretically millions of people, anywhere, anytime, at the same time, within seconds.[25] There is no cost for postage, and no wages or potential benefits to be paid to multiple employees placing phone calls. E-mail costs about a tenth of what it would cost to send advertising by traditional mail.[26] Economically, it would seem that there is more reason to attempt the electronic scheme rather than the ordinary media of advertising.[27]

{11} Similar to dealing with telemarketers and paper junk mail, the e-mail recipient has various measures of self-defense or self-help. Computer users may have a "filter" that will turn back unsolicited e-mail.[28] They may simply delete messages from a list before reading them, or they may actually view the message but quickly delete it if uninterested. Although these measures might be comparable to tossing unopened mail or hanging up on the telemarketer, they still require some effort. Moreover, since sending e-mail is so quick, cheap, and far-reaching, businesses engaging in the practice often believe they can afford to be an annoyance to some.[29] Because the cost is so minimal, there is much more incentive for businesses to engage in the practice without being dissuaded by any repercussions from users.[30] Consequently, there could be thousands of companies a day risking "annoyance" as opposed to, for example, three or four telemarketers that call up during dinner hour.

{12} The prospect of sifting through a thousand unwanted pieces of correspondence a day portrays an easy enough picture to comprehend. Such a scene in tangible media would translate into phones that never stop ringing, a perpetual mail delivery system, and a world without trees. The physical act of dealing with unsolicited correspondences would take huge amounts of time, even if the correspondences were discarded without having been read.

{13} The time element is only one of the factors that makes unsolicited e-mail not only annoying, but costly in terms of resources. If a person does not have a filter, or if an e-mail solicitor has found a way to circumvent this filter, the e-mail recipient must deal with the mailings. Dealing with them takes time for which the user might be paying, and the physical space the messages take up may slow down a system or otherwise consume space that might be needed for more important processing tasks.[31] In this respect, the recipient of unsolicited e-mail messages is actually paying a part of the cost for what he or she does not want, either monetarily or in other resources.[32] This would be tantamount to the telemarketer calling collect or the "junk" mail arriving postage due.

III. The Case of Cyber Promotions

{14} Unsolicited commercial e-mail is undesired by the Internet community.[33] Dealing with unsolicited e-mail has been labeled as one of the major problems with having an Internet e-mail address.[34] In response to receiving bulk, unsolicited e-mail, there have been various reprisals when "flaming" e-mail, or return e-mail, bombards the system of the "offender." [35] The reprisal results in the sender's own system being slowed or shut down because of the volume of incoming messages. *Cyber Promotions, Inc. v. America Online, Inc.*[36]

involved such a situation.[37]

{15} *Cyber II* highlights conflicting ideals of permissible Internet usage for business purposes. It also illustrates what the users, as "self-policers" of the Internet, could and should do to preserve the autonomy of the Internet system.[38] The *Cyber Promotions* cases arose as a dispute between America Online, an Internet access provider, and Cyber, a company paid by other companies to do advertising on the Internet.[39] Cyber used access to the Internet to send unsolicited commercial e-mail to America Online subscribers. The company sent an average of one million messages a day through the America Online system to various America Online subscribers.[40]

{16} America Online considered Cyber's actions to be an undesirable use of their service; therefore, the system "bombed" Cyber Promotions with their own unsolicited e-mail.[41] As part of the "bombing", messages addressed to noncurrent addresses were "bounced back" to Cyber's system.[42] The result was that Cyber's own access provider was disabled because of the volume of incoming messages. Cyber sued America Online in order to enjoin them from the "bombing." Once litigation began, Cyber also advanced an argument that America Online should be prohibited from enabling its subscribers to refuse unwanted commercial e-mail through a menu mechanism provided by America Online.[43]

{17} Even though Cyber Promotions reserved the right to advance alternate theories of the case in the future, [44] Cyber's original argument was that it had a First Amendment right to send unsolicited e-mail. Cyber later argued that it was unfair competition to block the receipt of those transmissions by virtue of a device that enabled subscribers to refuse the unsolicited e-mail.[45] Without addressing the merits of the First Amendment argument, the District Court determined that America Online was not a state actor for purposes of constitutional scrutiny.[46] The court later determined that Cyber's unfair competition claim was without merit.[47]

{18} In *Cyber I*, resolving the First Amendment issue hinged on identifying the parties and characterizing their relation to the alleged constitutional deprivation. The resolution of legal issues raised by this characterization must occur prior to the application of any criteria respecting litigation involving the Internet as a major player. The Internet is neither a thing nor a place, but a network of circuitry that makes tangible presence something between "virtual" and omnipresent.[48] Although it is international in scope, it is not a place or thing capable of actions for purposes of asserting state action within the jurisdiction of the United States. As a consequence, any "actor," in Internet litigation of this sort, would have to be an entity that provided Internet access. Since these entities are private companies, any plaintiff asserting state action would have to link a private company's actions to unconstitutionally controlling something public in scope.

{19} Cyber made the previous argument. Cyber argued, but the court did not accept, that America Online engaged in the conduct of and had the character of a state actor.[49] In attempting to make an analogy to a "company town" found to be a state actor in the Supreme Court case of *Marsh v. Alabama*, [50] Cyber unsuccessfully argued that Internet e-mail through America Online gave the appearance of being state actor oriented. Cyber argued that e-mail provided access to a public forum and America Online, as a conduit to the public forum, performed a public service.[51] Cyber contended this role as a conduit raised America Online to the level of a state actor.

{20} Like most Internet access providers, America Online is a private company. The only avenue a company such as Cyber would have to assert freedom of speech would be to prove the private entity was a state actor. Since the access providers have little to do with the federal government and there is not one exclusive provider that has a monopoly on Internet access, proving that a private entity was a state actor would be virtually impossible.[52] Moreover, since the subscribers themselves have a choice as to whether they would like to receive "junk mail," it does not make sense that an access provider could be accused of restricting speech.

{21} Part of Cyber's argument was that subscribers to America Online were conspiratorially helping violate Cyber's rights by choosing the option to reject receiving unsolicited commercial e-mail. Even though this argument was made as an unfair trade accusation against America Online,[53] it is intertwined with the First Amendment issue because speech was allegedly being restricted. Cyber's argument is novel and cannot even be tied to precedent dealing with free speech issues regarding traditional advertising media. Forcing people to be subject to unwanted commercial e-mail would be similar to being forced to listen to a telemarketer or being forced to, in some way, acknowledge the "junk" mail arriving each day.[54]

IV. Regulation and the Internet

{22} Since its inception, the Internet has always raised various concerns about what could and should be regulated.[55] While all other forms of media deal with some type of regulation, the Internet is still enjoying its unregulated status.[56] This is true, in many respects, because of its unique property as a "shared resource" without an owner.[57] As an international network of wires, the Internet need not deal with licensing requirements that necessitated government involvement in other areas.[58]

{23} While television and radio stations have been regulated for efficiency and pragmatic management, the Internet neither has the same physical properties nor limitations of these media. Not only does this eliminate the necessity for a government nexus, but government monitoring of any regulation would be difficult given the fluidity of the Internet.[59] As stated by the United States Internet Council in its Statement of Principles:

The Internet has flourished due in large part to the unregulated environment in which it has developed and grown. Voluntary codes of conduct, industry-driven standards, individual empowerment, technological innovation and a market environment generally promise greater future success than does intrusive governmental regulation.[60]

Currently, most Internet access providers monitor what is being disseminated within their subscriber group, particularly in the "chat rooms." [61] Some Internet access providers, such as America Online, give parents the ability to block access to materials regarded as unsuitable for children.[62] These functions replace what the government might proscribe by statute and, arguably, are done much better by the individual access providers than by the federal government.[63]

{24} With private Internet access providers dictating rate and monitoring substance to a certain extent, the individual user or consumer can choose his or her access company depending on what is being offered and/or restricted. When one company proves unsuitable, the subscriber is free to choose another. The marketplace still rules and there need not be any central regulation of the Internet itself. As a self-policing entity, however, the Internet must still yield to many traditional standards that have dictated how other traditional media have done business. Freedom of speech might allow for what others regard as obscene, but in some realms of business, inappropriate obscenity is not a marketable characteristic.[64]

{25} Additionally, there is a certain amount of business etiquette involved in all capital ventures, and some of these reach the standard of being legally enforceable for pragmatic reasons.[65] The Internet is still in its infancy regarding what should be its own etiquette and what effect traditional legal concepts should have on the way it conducts itself. In fact, it is the conflict between self-governance and regulation that enabled Cyber to make the argument that the First Amendment protected the sending of bulk, unsolicited electronic mail. [66]

{26} The interplay between self-policing and traditional legal standards are at issue in other facets of Internet organization. One such facet is in the case of domain registration. Web sites do not appear on the Internet

without some form of centralized organization.[67] Before a web site is constructed on the Internet, the individual or business wanting to have a web site must register a specific name that is assigned to a specific "domain." [68] Domain registration, like Internet access, is provided by a private company, Network Solutions, Inc. (NSI).[69]

{27} Internet domain agreements include restrictive criteria that would warrant a termination of the agreement in some circumstances, usually when the domain name is intended for an illegal use.[70] Although Internet domain agreements do not include revocation for sending bulk unsolicited e-mail, it is arguable that NSI could revoke a domain name and, consequently, eliminate a web site for breach of what might be regarded as an implied term for use of the Internet. If this is a legally valid and enforceable term, it is only because of traditionally applied contract principles derived by way of considering circumstances not remotely like the Internet.[71]

V. (N)etiquette vs. Customs and Standards

{28} Customs and standards of an industry are those practices so well-known that those dealing within that industry are presumed to know those customs, contract with respect to them, and recognize the threat of liability for their breach.[72] Generally, customs become legally enforceable practices by virtue of time and adherence to them. These customs tend to be enforced against businesses who have dealings with one another and are presumed to know about particular customs.[73]

{29} The Internet is a relatively new creation and its general use has begun to blossom within the last few years. It would be difficult for any legal scholar of contracts to pinpoint exactly what Internet custom and usage might be or against whom it might be enforced. Yet, there is an etiquette associated with the Internet, which is similar to the etiquette associated with things people do in their everyday lives.[74] Many of these matters are common sense or politeness; others are the socialization of society.[75] Many times, people who commit a social infraction do not do it again because the "self-policing" society makes known the breach of etiquette.

{30} Some matters of etiquette rise to the level of an enforceable law either because the etiquette was ignored or because something acceptable became burdensome when too many people took advantage of the etiquette in order to perpetuate a business scheme.[76] While not illegal, many things, especially in business, are annoying, harassing and on the cutting edge of fraud.[77]

{31} Innovations in communications technology have elevated what otherwise might be common sense to the level of enforceable customs and standards. Taking the "threatening call/threatening letter" out of the picture, there is still the issue of what legally enforceable standards might be imposed on commercial enterprises that use the phone or mail to further business. Each new "scheme" generates legislation to eliminate the potential for fraud.[78] Concomitantly, each new piece of legislation generates an effort to circumvent the law, perhaps by mixing the legitimate with the illegitimate.[79]

{32} The Internet is at the crossroads of regulation. Because of the physical properties of computers and the mechanism of phone lines, the Internet has a great potential for mischief, commercial and otherwise.[80] Virtually any Internet user has the capacity of slowing down, shutting down, or even sabotaging another person's system by sending bulk e-mail or transmitting viruses. If businesses used the Internet for advertising without restraint, there is the potential that the system could be slowed internationally. A slow down of the system would defeat one of the main commercial advantages of the Internet - its speed. If this were to happen, a need for both national and international legislation inevitably would arise and impose standards

upon Internet users who are unable to impose self-regulation.

{33} In view of this legislative possibility, a good argument exists that the Internet, although new, already has adopted a custom that prohibits the sending of unsolicited e-mail in bulk. Conceivably, this custom could be enforced by users without threat of legal reprisal. This particular custom would present an interesting use of legal standards without legislation, but an acceptable compromise nonetheless.

{34} It would not be unheard of to declare that the Internet, despite it being relatively new technology, has a legally enforceable custom and standard. All technologies are new at some point and each develops an etiquette fairly quickly. Rules of the road did not predate the invention of cars; however, once produced, it quickly became obvious that there had to be some semblance of organization for practical reasons. Another twentieth century invention - telephones - developed an etiquette that one should not listen in on a "party line" or take up an inordinate amount of time talking when others were waiting to use the phone.^[81] Additionally, shortwave and citizen band radios have an etiquette regarding length of time spent conversing and the channels on which people should converse.^[82]

{35} In many cases, customs and etiquette of an industry or technology ensure that the industry thrives. If the customs are not observed, there is a potential threat that the technology will become useless, or at least useless for the task for which it was meant to enhance. This is especially true of the Internet which, arguably, is technologically superior to any other mode of communication developed. The Internet, however, for all of its technological superiority, encapsulates a self-destruct mechanism that enables ordinary users to breach protocol and effectuate debilitating effects on the entire system.^[83]

{36} Curbing the transmission of unsolicited commercial e-mail, whether by self-help or imposed contractually by private online access companies will preserve the integrity of the Internet. The efforts of businesses in asserting an enforceable right to send these bulk messages would not only be self-defeating for their marketing efforts, but will likely result in regulation that might impose more restrictions than e-mail advertisers would have liked.^[84]

VI. Conclusion

{37} The Internet is a rare entity that is not entirely conducive to the application of traditional laws, but its standards must be viewed with an eye on the imposed legal standards governing previous technological achievements. If the pragmatic reasons for these previous regulations are looked at in conjunction with the nature of the Internet and where it is going, then perhaps governmental regulation of the Internet will not be inevitable. There must be a compromise between imposing some standards and not imposing a centralized structure upon the Internet. Only with this compromise can the Internet continue to enjoy its unique status as the paradigm technology for information access.

[] NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

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[1] *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F.Supp.456 (E.D. Pa. 1996). This decision followed the Third Circuit's vacation of the original injunction granted against America Online. *See Cyber Promotions, Inc. v. America Online, Inc.*, C.A. No. 96-2486, 1996 WL 565818 (E.D. Pa. Sept. 4, 1996), *rev'd*, Nos. 96-1811, 96-1812 (3d Cir. Sept. 20, 1996).

[2] For a comprehensive discussion of what the Internet is and how it works, see *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

[3] *See id.* at 835.

[4] *See id.* at 834.

[5] *See* Kent Hansen Wadsworth, [Welcome to the Web: The New Marketing Frontier](#), 61 J. PROP. MGMT. 40 (1996).

[6] *See* Michael Muckian, *Firm Finding its Place on Internet's World Wide Web*, BUS. J. OF MILWAUKEE, June 24, 1995, at 5.

[7] *See* Kate Maddox, *Bell Companies have Edge Over Cable - Telcos on the Web*, *Interactive Age*, Jan. 30, 1995, at 21.

[8] *Id.* (quoting Mary Ellen Payne, executive director of corporate advertising at Bell Atlantic Corp.)

[9] *See* Craig W. Harding, *On-Line Distribution of Multimedia Products*, in MULTIMEDIA AND THE LAW 1996: Protecting Your Clients Interests, at 425 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-3955, Jan. 1996).

[10] *See* Philip Elmer-Dewitt, *Bill Gates: A Billionaire Genius, He Strove to Turn the Info Superhighway into a Virtual Marketplace*, *Time*, Dec. 25, 1995, at 100. *See also E-shopping: Prodigy to Launch First Personalized Virtual Mall with Secure Transactions on the Internet*, EDGE: WORK-GROUP COMPUTING REP., Dec. 4, 1995, available in 1995 WL 13722672

[11] *See* Sarah Stirland, *Technology Strategy: For Some Newcomers, Traffic's Skimpy on the Information Highway*, THE BOND BUYER, Dec. 4, 1996, at 38, available in 1996 WL 5644931

[12] *See* Nicholas G. Tomaiuolo & Joan G. Packer, *An Analysis of Internet Search Engines: Assessment of Over 200 Search Queries*, COMPUTERS IN LIBR., Jun. 1, 1996, at 58, available in 1996 WL 8953397.

[13] For a discussion of the various search engines, see Jack Egan, *Ready, Set, Search; Powerful New Search Engines Dig Out What You Seek*, U.S. NEWS & WORLD REP., Apr. 29, 1996, at 64.

[14] *See* Andrew Jenks, [Data Overload Short-Fuses Infobahn Promise](#), WASH. TECH., Sept. 14, 1995, available in 1995 WL 9479174.

[15] *See* Lesley Hensell, [Print-to-TV Shift Helps Pier I Reel in All-New Customer Base](#), DALLAS BUS. J., Sept. 27, 1996, available in 1996 WL 12493357

[16] *See* T.J. McCue, *Carving Your Niche on the Web*, GREENSBORO NEWS & REC., Apr. 3, 1996, at BH1,

[17] See, e.g., Pepsi cans, which include the following advertisement: VISIT PEPSI ON THE INTERNET <http://www.pepsi.com>, or UPS trucks which advertise the company's web location (<http://www.ups.com>). Many businesses include web site addresses on television. For a list of television show and station web sites, see Christopher M. Crowley, *Caught in the Web: A Guide to Cyber T.V.*, WASH. POST, June 30, 1996, at Y07.

[18] Businesses with web sites can advertise on Internet search engines or within online malls. "The problem is letting your customer know that you are there . . . It's like finding a needle in a haystack." R. Lee Sullivan, *Toll Booths on the Info Highway*, FORBES, Mar. 25, 1996, at 118 (quoting Kenneth Hawk, owner of Power Express).

[19] Advertising on the Internet is not necessarily cheap. Companies must pay to have a home page designed and spend money to maintain the page. Many sites must pay for hypertext links and advertise on search engine home pages. See Mark Poirier, *Think the Internet is Cheap? Think Again*, CATALOG AGE, Jan. 1, 1995, at 16.

[20] Such was the case of the "infamous" Canter & Siegel, attorneys who advertised their immigration services through bulk, unsolicited e-mail. See *infra* note 29.

[21] Not all unsolicited commercial e-mail is unwanted. Much like regular postal mailing lists, certain users can be targeted by a specific business. Usually such a legitimate business effort would afford the recipient the opportunity to stop receiving even the targeted e-mail. See Margie Wylie, *Free E-mail! Marketers Trade Online Time For Captive Audiences*, DIGITAL MEDIA, May 14, 1996, at 3, available in 1996 WL 9070751.

[22] See Wayne Rash Jr., *Putting Up with Junk Mail is Bad Enough . . . Junk E-mail is Even Worse*, COMM WK., Nov. 4, 1996, at 98, available in 1996 WL 12486950.

[23] See *id.*

[24] See Mary Hance, *Ms. Cheap: Simple Suggestions Help You Give Telemarketers the Dial Tone*, NASHVILLE BANNER, May 20, 1996, at C1, available in 1996 WL 10313982.

[25] See John Jainschigg, *E-mail Blasts and Mailing Lists*, TELECONNECT, June 1, 1996, at 39.

[26] See Wylie, *supra* note 22.

[27] For a discussion of the commercialization of the Internet and the economics of Internet advertising, see Glenn Spencer Bacal and Jennifer Wuammet, *Net Commercialization Creates On-line Conflict*, Bus. J.-PHOENIX, Dec. 1996, available in 1996 WL 14760785.

[28] Martin Williams, *Hitting Back At E-Mail Spammers Made Easy*, NEWSBYTES, Nov. 11, 1996, available in 1996 WL 12026946.

[29] The original furor over the sending of unsolicited e-mail over the Internet began with the Phoenix law firm of Canter & Siegel. Canter & Siegel, immigration attorneys, advertised their services by posting their ad to 5,000 different bulletin boards. Although Canter & Siegel became infamous and were bombarded with 30,000 messages themselves, they did reach 20 million people through an account costing twenty to thirty dollars a month. See Brad Patten, *Local Lawyers' Ad Stirs Internet Furor*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Apr. 15, 1994, at A1, available in 1994 WL 6404694.

[30] There are many more industries starting up to perpetuate sending junk e-mail. See, e.g., *List Seller*

[31] The running of any program takes up an amount of memory on the computer. Also some online access providers have a finite space for e-mail. If the space is filled up with unsolicited commercial e-mail, the subscriber might not be receiving the mail she wants. Patrick McKenna, *Cyber Promotions*, NEWSBYTES, Oct. 10, 1996, available in 1996 WL 12025666.

[32] Stephen H. Wildstrom, *They're Watching You Online: As Privacy Concerns Grow, So do Chances of Restrictions Imposed by the Government*, BUS. WK., Nov. 11, 1996, at 19.

[33] See, e.g., Robert Craig Waters, *An Internet Primer for Florida Legal Researchers*, 70 FLA. B.J. 12 (1996); Susan B. Ross, *Netiquette: Etiquette Over the ABN and the Internet*, 33-OCT ARIZ. ATTY. 13 (1996).

[34] See, e.g., *AOL Puts a Lid on Spam*, INTERACTIVE DAILY, Sept. 6, 1996, available in 1996 WL 10360061.

[35] See Williams, *supra* note 29.

[36] 948 F. Supp. 456 (E.D. Pa. 1996) [hereinafter *Cyber II*].

[37] Two *Cyber Promotions* cases were decided in November of 1996. The first case decided on November 4, involved the alleged violation of First Amendment rights, *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) [hereinafter *Cyber I*], and the second case decided on November 26, involved unfair trade allegation, *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F.Supp. 456 (E.D. Pa. 1996) [*Cyber II*].

[38] Ironically, resorting to the courts to establish legally enforceable etiquette on the Internet distorts the nature of what the Internet has been. Moreover, such legal actions might well be detrimental to the Internet's future as a unique, unregulated communication medium, something, it is arguable, both parties were fighting for by resorting to legal doctrine governing other forms of business and communication.

[39] *Cyber II* did not deal with other traditional forms of advertising media. See *Cyber II*, 948 F. Supp. at 458.

[40] See *id.* at 459.

[41] See *Cyber I*, 948 F. Supp. at 437, n.1.

[42] *Cyber II*, 948 F.Supp. at 460.

[43] *Id.* at 460.

[44] *Cyber* was granted the right to amend its complaint and given ten days from November 4, 1996 to advance alternate theories. See *id.* at 457-58.

[45] See *id.* at 460.

[46] *Cyber I*, 948 F. Supp. at 436.

[47] *Cyber II*, 948 F. Supp. at 456.

[48] *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996).

[49] *Cyber I*, 948 F. Supp. at 441.

[50] 326 U.S. 501 (1946).

[51] See Robert Gurrola, *No 1st Amendment Right to Send Junk E-mail, Says U.S. Court; AOL Can Block Cyber Promo's Ads*, WEST'S LEGAL NEWS, Nov. 11, 1996, available in 1996 WL 649538.

[52] *Cyber II*, 948 F.Supp. at 461.

[53] See *id.*

[54] Cyber never had the opportunity to argue why unsolicited commercial e-mail should be regarded as a protected dissemination of ideas and not regarded as unprotected commercial speech.

[55] The regulation of pornography on the Internet was recently addressed by the Communications Decency Act of 1996, 47 U.S.C.A. §§ 223(a)-(h) (West 1994 & Supp. 1997). The Act, among other things, proscribes the transmission of "obscene or indecent communications" by means of a telecommunications device, 47 U.S.C.A. § 223(a), and criminally penalizes those who knowingly transmit indecent material to those under the age of eighteen via interactive computer device, 47 U.S.C.A. § 223(d). These provisions were held violative of the First Amendment, U.S. CONST. amend. I, in *Reno v. ACLU*, 117 S.Ct. 2329 (1997) (only §§ 223(a) and 223(d) were held unconstitutional by the Court).

[56] *But see 10 Biggest Internet Lies Include Myth that 'Net is Unregulated'*, WEST'S LEGAL NEWS, Sept. 27, 1996, available in 1996 WL 545580 (discussing how activities on the Internet are subject to the same regulations governing other activities in a physical medium).

[57] See *Intellectual Property Protection in Cyberspace: Towards a New Consensus*, WEST'S LEGAL NEWS, Dec. 12, 1996, available in 1996 WL 710185.

[58] For a discussion of the FCC and its regulation of the communications industry, see generally Nancy R. Selbst, "Unregulation" and Broadcast Financing: New Ways for the Federal Communications Commission to Serve the Public Interest, 58 U. CHI. L. REV. 1423 (1991); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U.L. REV. 990 (1989).

[59] Unlike television and radio stations that broadcast on the same frequency from day-to-day, web sites are not always operating on a given day. Consequently, a search on one particular day might not yield the same results as a search on another day. In addition, different search engines may yield a different result using the same search terms, and a single search engine may yield different results for different people depending on the equipment used. See David Haskin, *The Smart Web Searcher*, PC MAG., Oct. 22, 1996, at 69.

[60] United States Internet Council, *Statement of Principles*, Dec. 9, 1996, available in WEST'S LEGAL NEWS, 1996 WL 699285. The United States Internet Council was formed by a bipartisan co-operative of state legislatures to provide a policy forum to discuss state level issues affecting the Internet. The group was formed as "an information exchange network for state legislatures." Bill Petrucha, *State Legislators Launch U.S. Internet Council*, NEWSBYTES, Dec. 10, 1996.

[61] See Peter Eisler, *Policing the Internet/Alert Center Keeps Prodigy Users in Line*, U.S.A. TODAY, Sept. 5, 1995, at 1A.

[62] See *Parental Controls Makers Confront PICS*, DIGITAL KIDS REP., Mar. 1, 1996, available in 1996 WL 9373368.

[63] For a discussion of worldwide privatization of telephone services, see *Telecommunications: A Copernican Revolution*, BANQUE PARIBAS CONJONCTURE, Feb. 1, 1995, at 25, available in 1995 WL 14414676.

[64] For instance, obscenity during the course of a Christian chat session would be inappropriate, see Eisler, *supra* note 61. If a consumer is paying for access to such a chat session, he or she is likely to be offended and ultimately terminate the subscription.

[65] For a discussion of a court's imposition of too much enforceable business etiquette, see Robert L. Rancourt, Jr., *Freeman & Mills, Inc. v. Belcher Oil Co: Yes the Seaman's Tort is Dead*, 27 PAC. L.J. 1405 (1996).

[66] Cyber I, 948 F.Supp. at 438 (1996).

[67] For an explanation of domain registration, see Charles D. Ossola, *Electronic "Wild West": Trademarks and Domains on the Internet*, in PLI'S SECOND ANNUAL INSTITUTE FOR INTELLECTUAL PROP. 1996, at 401 (PLI Patents Practice Course Handbook Series No. G4-3961, 1996).

[68] See *id.* Domain names have commercial significance because the name allows a website to be found by way of a search. If a business is able to select a domain name that will come easily to the minds of people, there is a greater chance their site will be accessed by more consumers. See Jan Norman, *Web Sites Get Down to Business--Companies Should Develop Goals, Easy Accessibility When Setting Up Home Pages*, SAN ANTONIO EXPRESS-NEWS, June 9, 1996, available in 1996 WL 2836089.

[69] See Lloyd L. Rich, *Trademark Protection In Cyberspace*, 25 COLO. LAW. 101 (1996).

[70] A sample domain agreement is included at Appendix C in G. Andrew Barger, *Cybermarks: A Proposed Hierarchical Modeling System of Registration and Internet Architecture for Domain Names*, 29 J. MARSHALL L. REV. 623 (1996).

[71] For a discussion of enforceable customs and standards, see Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985).

[72] See, e.g., *Cal. Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785, 790, 794 (Cal. 1955) (holding that plaintiff could not avoid payment for goods where custom of the beet growers industry was to enter supplemental payment agreements after the initial contract).

[73] See, e.g., *Peskin v. Squires*, 319 P.2d 405, 410-11 (Cal. Ct. App. 1957) (holding that parties were bound by special meaning of the term 'invoice' as used in the lumber industry).

[74] See, e.g., Brian G. Gilpin, *Attorney Advertising & Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. MARSHALL J. COMPUTER & INFO. L. 697 (1995).

[75] See generally *The Principles of Social order: Selected Essays of Lon L. Fuller* (Kenneth J. Winston, ed. 1981) (Shows a discussion of how personal relationships influenced law).

[76] Telemarketing is at the top of the list. "Over eighteen million telemarketing calls are made to private homes and businesses each day." Joseph R. Cox, *Telemarketing, the First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL'Y 403, 403 (1996) (citations omitted).

- [77] Unbeknownst to some people who dial a solicitor back, they may be billed for the call. *See BBB Warns Callers of Costs to 809 Area Code*, RICHMOND TIMES DISPATCH, Oct. 29, 1996, at C8.
- [78] *See, e.g.*, Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-08 (1994); 18 U.S.C. §§ 2325 to 2327 (1994) (providing guidelines for telemarketers and criminal penalties for telemarketing fraud). For a discussion of the need for enhanced restrictions on high pressure telemarketers, see Stephanie Ebbert, *Proposed Legislation is Aimed at Fraud Lawmakers Target Telemarketing Scams*, HARRISBURG PATRIOT & EVENING NEWS, Jan. 7, 1996, at B1.
- [79] *See* THE PRINCIPLES OF SOCIAL ORDER, *supra* note 76.
- [80] *See* Harold Smith Reeves, *Property in Cyberspace*, 63 U. CHI. L. REV. 761, 765 (1996).
- [81] *See* Steve McReynolds, *Party Lines: Phone Service Not Fading Fast Enough for Some*, JOPLIN GLOBE, Apr. 1, 1996, at C1; *see also* CLAUDE S. FISCHER, *AMERICA CALLING: A SOCIAL HISTORY OF THE TELEPHONE TO 1940* (1992).
- [82] *See* THOMAS FENSCH, *SMOKEY'S, TRUCKERS, CB RADIOS & YOU: COMPLETE GUIDE TO CITIZEN'S BAND RADIO* (1976).
- [83] *See generally* Reeves, *supra* note 80.
- [84] *See E-Mail Marketers Try to Remove the 'Spam Factor'*, INTERACTIVE MKTG. NEWS, Nov. 8, 1996.

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