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Canning Spam: CompuServe, Inc. v. Cyber Promotions, Inc.

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CANNING SPAM: *COMPUSERVE, INC. V. CYBER PROMOTIONS, INC.*

"As new technology emerges, the appearance of related legal issues seems never to be far behind."[1]

I. INTRODUCTION

A. *The Issue of Unsolicited Commercial Electronic Mail Messages*

The rapid development of the Internet as a source of information and as a means of communication has caused courts and legislatures to scramble to integrate old legal structures into a new framework. The characteristic of near-instantaneous access to millions of subscribers of various Internet service providers (ISPs) has attracted the attention of commercial advertisers, especially those seeking mass audiences. The Internet has also fostered the proliferation of electronic mail (e-mail) as a means of communication. Further, it has attracted the attention of Congress, where there are currently three bills pending which would restrict or prohibit unsolicited e-mail advertising.[2] The Federal Trade Commission also recently directed representatives of the computer industry, marketing companies and privacy advocates to formulate a voluntary method of dealing with the increasing volume of these advertising messages.[3]

A recent case from the Southern District of Ohio addressed the issue of an online computer service's right to prevent a commercial advertiser from sending unsolicited e-mail adver-

1. Lutz Appellate Servs., Inc. v. Curry, 859 F. Supp. 180, 181 (E.D. Pa. 1994).

2. *See* Victoria Shannon, *Advice for Removing Spam's Stain from the Screen*, WASH. POST, July 28, 1997 (Washington Business), at 19.

3. *See* Rajiv Chandrasekaran, *Group Blocks Postings of UUNet Customers*, WASH. POST, Aug. 5, 1997, at C1.

tisements (junk e-mail) to its subscribers. In *CompuServe, Inc. v. Cyber Promotions, Inc.*,[4] the service provider's motion for a preliminary injunction against an advertiser was granted, enjoining the advertiser from sending any unsolicited advertisements to the provider's subscribers.[5]

B. *The Status of the Law Prior to CompuServe*

The right of a recipient to refuse receipt of a commercial communication was upheld in *Rowan v. United States Post Office Department*.[6] The appellants in *Rowan*, who were in mail order-related businesses, challenged the constitutionality of a federal statute,[7] which required mailers to remove from their mailing list the name of anyone who requested removal, and to stop all future mailings to that household.[8] The United States Supreme Court, in upholding the statute, stated that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."[9] The Court found that the postal system had evolved from carrying primarily private communications to carrying mainly unwanted and unsolicited mail.[10] By prohibiting access to the unwilling recipient, the mailer's right to send such communications was infringed only when the addressee took the affirmative step of informing the mailer to stop the mailings. Chief Justice Burger's opinion analogized that to hold otherwise would be similar to saying that a television or radio viewer could not change to another station, even if the viewer found the conveyed message offensive or even boring.[11] While the statute in *Rowan* dealt only with "erotically arousing or sexually provocative" material,[12] the Court said that it gave the unwilling recipient unlimited power to stop *any* mailing to which he or she objected.[13]

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4. 962 F. Supp. 1015 (S.D. Ohio 1997).

5. *See id.* at 1028.

6. 397 U.S. 728 (1970).

7. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., and 39 U.S.C.).

8. *See Rowan*, 397 U.S. at 729; *see also* 39 U.S.C. § 3008(c) (1994).

9. *Rowan*, 397 U.S. at 736-37.

10. *See id.* at 736.

11. *See id.* at 737.

12. *See* 39 U.S.C. § 4009(a) (Supp. IV 1964) (current version at 39 U.S.C. § 3008(a) (1994)).

13. *See Rowan*, 397 U.S. at 737 ("[H]e may prohibit the mailing of a dry goods

A recent state court case upheld the right of a landowner to prevent a news distributor from continuing to deliver unwanted newspapers to his property, viewing the unwanted delivery as a trespass. In *Tillman v. Distribution Systems of America, Inc.*,[14] the Appellate Division of the New York Supreme Court held that once an unwilling recipient requested that delivery of the newspaper cease, there was no constitutional right on the part of the publisher or distributor to continue the delivery. The court stated that constitutional protection of speech had not eroded a landowner's privacy right to bar certain speech from his private property.[15]

The concept of constitutional protection for commercial speech is a relatively recent phenomenon. It was not until 1976 that purely commercial speech was deemed to be deserving of at least some First Amendment protection. The Supreme Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, Inc.,[16] held that commercial speech, while subject to some forms of regulation, is entitled to First Amendment protection.[17] Content oriented regulation of such speech would be seen as violative of the First Amendment, but time, place, and manner regulations, which were content-neutral, would be upheld.[18]

Four years after *Virginia State Board of Pharmacy*, the Supreme Court set out a four-part test for determining the validity of governmental regulation of commercial speech.[19] To be protected, the expression must be lawful and not misleading. Next, the asserted governmental interest must be substantial. If the regulation meets both of these tests, the issue then is whether the regulation directly advances the governmental

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catalog because he objects to the contents—or indeed the text of the language touting the merchandise.").

14. 648 N.Y.S.2d 630 (App. Div. 1996).

15. *See id.* at 635.

16. 425 U.S. 748 (1976).

17. *See id.* at 770.

18. *See id.* at 771.

19. *See* Central Hudson Gas and Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

interest asserted. Finally, the regulation must not be broader than necessary to serve that interest.[20]

Paid commercial advertisements, such as those sent by Cyber Promotions, Inc.,[21] have been accorded the status of commercial speech.[22] Speech in the form of commercial advertising, although protected by the First Amendment, may receive less protection than the traditional focus of free speech, which has been political and social discourse considered to be of public importance.[23]

Examples of what has been construed to be protected commercial speech include: advertising by attorneys;[24] advertising by doctors;[25] an attorney's advertising referring to her Certified Public Accountant designation;[26] statements of alcohol content on malt beverage labels;[27] and a beer label that depicts a frog "giving the finger."[28]

C. *Purpose and Scope of this Casenote*

This casenote examines the issues raised by the district court's decision in *CompuServe*. In particular, it will analyze *CompuServe*'s effect on the First Amendment protection of commercial speech in cyberspace. Discussed next is the concept of what constitutes trespass in cyberspace as defined by this decision. The succeeding section looks at whether the federal prohibition on unsolicited commercial facsimile transmissions might apply to electronic mail. Next, two cases relevant to

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20. *See id.* at 566.

21. Cyber Promotions is the defendant in *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

22. *See* Bates v. State Bar, 433 U.S. 350, 363 (1977); Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

23. *See generally* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

24. *See Bates*, 433 U.S. at 363, 381-82.

25. *See* Health Sys. Agency v. Virginia State Bd. of Med., 424 F. Supp. 267, 269 (E.D. Va. 1976).

26. *See* Ibanez v. Florida Dept. of Bus. and Prof. Regulation, 512 U.S. 136, 142-43 (1994).

27. *See* Adolph Coors Co. v. Bentsen, 2 F.3d 355, 359 (10th Cir. 1993), *aff'd sub nom.* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

28. *See* Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 96-97 (2d Cir. 1998).

CompuServe are discussed, and a survey is taken of pending legislation which could impact future fact situations such as the one presented in *CompuServe*. Finally, a prediction is made of how the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court might decide probable appeals.

II. THE DECISION IN *COMPUSERVE, INC. V. CYBER PROMOTIONS, INC.*

A. *Summary of the Case*

The defendants, Cyber Promotions ("Cyber") and its president, were in the business of sending unsolicited e-mail advertisements to Internet users, among them subscribers of plaintiff CompuServe. CompuServe is a large national provider of online communication and information services.[29] After numerous complaints from its subscribers, who were charged for their time online while reviewing, reading or discarding such advertisements, CompuServe notified Cyber to stop using CompuServe's equipment to process and store these unsolicited messages. In addition, CompuServe requested that Cyber cease sending unsolicited e-mail to CompuServe's subscribers. Cyber continued to send unsolicited e-mail messages, or "spam,"[30] even increasing the volume sent. CompuServe, in response, attempted to screen out and block these messages, utilizing a variety of software programs. The defendants were able to evade these measures by concealing both the true point-of-ori-

29. *See* CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1017 (S.D. Ohio 1997).

30. There is apparently some dispute about the origin of the term "spam." The *CompuServe* court cites a skit on the British television show Monty Python's Flying Circus, where the word "spam" is repeated "to the point of absurdity" on a restaurant menu, as the source of the term. *See id.* at 1018 n.1. Another source asserts that it originated from the image of throwing Spam, a canned meat product, into a fan, with the resulting pieces being strewn about. *See* Todd H. Flaming, *The Rules of Cyberspace: Informal Law in a New Jurisdiction*, 85 ILL. B.J. 174, 176 n.30 (1997).

gin information and the domain names used in sending the messages.[31]

CompuServe sought and was granted a temporary restraining order against Cyber by the United States District Court for the Southern District of Ohio, Eastern Division. CompuServe then applied to the same court for a preliminary injunction to extend the temporary restraining order, preventing Cyber from sending any unsolicited advertisements to CompuServe subscribers.[32]

The district court held that CompuServe had a claim for trespass to personal property against Cyber and granted CompuServe's motion for a preliminary injunction.[33] In regard to the need for an injunction, CompuServe argued that it had been harmed by Cyber's trespass in two respects. First, CompuServe suffered a burden to its computer equipment by the sheer volume of the e-mail messages sent by Cyber. This was because the equipment had a defined processing and storage capacity. The processing of Cyber's e-mail slowed CompuServe's processing of other communications. If the volume continued to increase, CompuServe would be forced to purchase additional processing equipment.[34] Second, CompuServe argued that Cyber's advertisements harmed a legally protected property interest. That property interest was its reputation and its goodwill with its subscribers. CompuServe argued that the advertisers were in effect shifting part of the cost of their advertising to these subscribers, who in turn voiced their dissatisfaction to CompuServe.[35] This cost was in the form of charges for the subscriber's time online while accessing and reading Cyber's e-mail.

CompuServe's cause of action was based on a common law theory of trespass to chattels. Prior to analyzing this theory, the court first discussed the common law theory of conversion. In deciding that conversion did not apply in the instant case, the court noted that trespass to chattels is an appropriate action where the aggrieved party seeks recovery for interferences

31. *See CompuServe*, 962 F. Supp. at 1019.
32. *See id.* at 1017.
33. *See id.* at 1028.
34. *See id.* at 1022.
35. *See id.* at 1023.

with possession of chattels, where the interference was not significant enough to be classified as a common law conversion.[36] The court found that Cyber had not interfered with CompuServe's property significantly enough to be considered a conversion.

Despite finding a relative lack of authority, the district court concluded that trespass to chattels was an actionable tort under Ohio law.[37] The court cited The Restatement (Second) of Torts (Restatement) for the proposition that a trespass to chattels may be committed by "intermeddling with the chattel of another."[38] "Intermeddling" is defined as "intentionally bringing about a physical contact with the chattel."[39] The court noted that electronic computer signals have been held to be of a sufficient physical nature to sustain a trespass action.[40] Since it was clear both that CompuServe had a possessory interest in its computer systems, and that Cyber had intentionally contacted these systems, the court held that a trespass to chattels had, in fact, taken place.[41] In doing so, the court rejected the defendant's argument that an actual dispossession or substantial interference with the chattel was required.[42] Under the Restatement, a showing of harm to something in which the possessor has a legally protected interest suffices for an action under a trespass to chattels theory.[43]

The court next dealt with the defendant's argument that, since CompuServe made the voluntary business decision to connect to the Internet, Cyber was, in essence, a business invitee. As such, CompuServe should not be allowed to later revoke Cyber's access to the property as a business invitee. The district court held that, under Ohio law, an invitee's privilege to remain

36. *See id.* at 1020.
37. *See id.* at 1021.
38. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 217(b) (1985)).
39. RESTATEMENT (SECOND) OF TORTS at § 217 cmt. e (1985).
40. *See CompuServe*, 962 F. Supp. at 1021 (citations omitted).
41. *See id.* at 1021-22.
42. *See id.*
43. *See id.*

could be revoked upon reasonable notification.[44] CompuServe provided notice twice. First, there was a policy statement displayed online denying unauthorized parties the use of CompuServe's computer systems to send unsolicited e-mail. Second, Cyber received actual notice from CompuServe that their use of these systems to send unsolicited e-mail was unauthorized and should cease.[45]

The court then considered whether CompuServe, as an ISP, could qualify as a public utility so as to allow access by the public at large. Under Ohio law, an entity's status as a public utility depends on two primary characteristics. The first is whether an essential good or service, to which the public has a legal right, is involved. The second is whether the entity operates essentially as a monopoly in the marketplace.[46]

The court found that neither characteristic was present insofar as CompuServe's provision of Internet access services was concerned. First, services provided by CompuServe were not essential, in that there were many alternative means of communication available. Second, CompuServe did not operate as a monopoly because there were other major ISPs available, and subscribers could switch between them as they wished. Finally, the defendants had not, in fact, asserted that CompuServe was a public utility.[47]

The next issue before the *CompuServe* court was whether Cyber had a right under the First Amendment to the United States Constitution to send unsolicited commercial e-mail messages through the plaintiff's computer systems. Citing *Hurley v. Irish-American Gay Lesbian and Bisexual Group*[48] and *Hudgens v. NLRB*,[49] the court noted that the protection afforded by the First Amendment extends only to action by the federal or state governments, not against private conduct.[50] In *Hurley*, the Supreme Court upheld the right of the private organizers of a parade to exclude certain groups because the

44. *See id.* at 1024.
45. *See id.*
46. *See id.* at 1025.
47. *See id.*
48. 515 U.S. 557 (1995).
49. 424 U.S. 507 (1976).
50. *See CompuServe*, 962 F. Supp. at 1025.

organizer's action in doing so was considered to be private conduct.[51] A speaker has the right to choose "not to propound a particular point of view," and the parade organizers could exclude the group if inclusion would seem to condone the group's message.[52]

In *Hudgens*, a shopping mall was held not to be the functional equivalent of a municipality solely because it was open to the public.[53] Had it been considered such, the striking union members in *Hudgens* would have been allowed to picket the mall retail store owned by the company against whom they were striking.[54] More is required, such as some assumption or exercise of traditional municipal powers, before a private entity is considered to have the character of a governmental actor for purposes of First Amendment prohibitions on regulation of speech.[55]

In a recent action filed by Cyber against America Online, which is an ISP who provides services similar to those offered by CompuServe, America Online was held to be a private actor for First Amendment purposes.[56] The *CompuServe* court agreed with that court's reasoning and found that CompuServe was also a private actor.[57] The court also rejected defendant's contention that, while conceding CompuServe's status as a private actor, the service provider should be subject to some type of regulation because it had a degree of control over a central avenue of communication.[58] Since there were no applicable reg-

51. *See Hurley*, 515 U.S. at 566. The respondents, the Irish-American Gay Group of Boston, had argued in the lower courts that the organizers' actions had the character of state action, but did not include this issue in their briefs filed with the Supreme Court. *See id.*

52. *Id.* at 574-75.

53. *See Hudgens*, 424 U.S. at 520-21.

54. *See id.*

55. *See id.* at 516-20.

56. *See* Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436, 443-44 (E.D. Pa. 1996).

57. *See* CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1025-26 (S.D. Ohio 1997).

58. *See id.* at 1026.

ulations in place at the time, common law principles governed until such regulations were actually in place.[59]

The court concluded its analysis of Cyber's First Amendment claim by noting that CompuServe was the physical recipient of defendant's messages and was also the owner of the property on which the trespass occurred.[60] Since CompuServe is not a governmental actor seeking to limit Cyber's attempt to communicate, it may act so as to serve the expressed wishes of its subscribers not to receive the defendant's unsolicited advertisements.[61] The court cited *Rowan v. United States Post Office Department*[62] and *Tillman v. Distribution Systems of America, Inc.*,[63] as support for an unwilling recipient's right to stop otherwise protected speech from entering the recipient's private property.[64]

B. *Analysis of the Decision in CompuServe*

1. Effect on Free Speech

The *CompuServe* court confronted the question of the First Amendment protection given to speech that is solely commercial in content. As opposed to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[65] *CompuServe* involved no governmental regulation. In *Virginia State Board*, a Virginia statute declared that a pharmacist who advertised prescription drug prices engaged in "unprofessional conduct."[66] In *CompuServe*, on the other hand, Cyber attempted to show that, although there was no direct governmental action involved, CompuServe had taken on a governmental character or function. Cyber asserted that CompuServe had assumed the role of a postmaster by acting as a conduit for communication and should be subject to First Amendment scrutiny. The district

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59. *See id.*
60. *See id.* at 1027.
61. *See id.*
62. 397 U.S. 728 (1970).
63. 648 N.Y.S.2d 630 (App. Div. 1996).
64. *See CompuServe*, 962 F. Supp. at 1026-27.
65. 425 U.S. 748 (1976) (holding that commercial speech enjoys some First Amendment protection).
66. *See id.* at 749-50.

court rejected this position, noting that Cyber would first need to show, before asserting this status as a postmaster, that CompuServe was a state actor, a point which the defendants never argued.[67]

The court also dismissed Cyber's argument that since the Internet might someday be subject to governmental regulation, it presently should be treated as actually being regulated.[68] The defendants appeared to ask the court to anticipate future regulations which might be applicable to providers such as CompuServe. The court declined this invitation, since it would be impossible to correctly surmise what form such regulations may take, if indeed they were to materialize. More importantly, it is not a judicial prerogative to anticipate the future actions of legislative bodies.

Given the large number of ISPs available from which consumers can choose, there is at present no single dominant provider who is capable of effectively denying a commercial advertiser from gaining access to the Internet for purposes of communicating their messages. Any concerns that consumers may not have the opportunity to obtain this particular information, should they desire to do so, because CompuServe denied Cyber access to its subscribers are undercut by the availability of other means of communication. ISPs other than CompuServe are available for dissemination of these messages via the Internet. Restricted access may become a legitimate concern, however, if a small number of ISPs come to dominate the market in the future. Should all these ISPs deny companies such as Cyber access to their subscribers, it is likely that judicial relief would be warranted to provide access to the commercial e-mailers.

As stated above, access to CompuServe's subscribers is also possible through means other than e-mail messages. Advertisements may be placed "through online bulletin boards, web page advertisements, as well as through more conventional [advertis-

67. *See CompuServe*, 962 F. Supp. at 1026.
68. *See id.*

ing] means such as the U.S. mail or telemarketing" and regular mail.[69] The *CompuServe* court rejected the defendant's assertion that the low cost of mass e-mail transmissions made it a unique means of communication that has no adequate alternative.[70]

E-mail, however, is a unique means of communication. It offers a low cost means for reaching a very large audience. ISPs provide the only current practicable medium for advertisers to reach a potentially lucrative economic resource. Thus, e-mail is a low-cost, highly efficient method for commercial enterprises to distribute advertising.[71] In fact, it can be argued that commercial entities have been key players in Internet growth, and, as such, they should be allowed to reap the benefits of the seeds they have sown.[72]

In *CompuServe*, no governmental regulation was used to prohibit Cyber from transmitting its e-mail advertisements to CompuServe members. *CompuServe* is distinguished in this regard from *ACLU v. Reno*,[73] discussed below, in which provisions of the Communications Decency Act of 1996[74] were successfully challenged as unconstitutional. In *CompuServe,* the actions of an admittedly private company (CompuServe) were at issue, a fact which Cyber did not dispute.[75] As is discussed below, Cyber unsuccessfully attempted to portray CompuServe's actions as taking on the "character" of the state for First Amendment analysis purposes.[76]

The decision in *CompuServe* does not disturb existing law regarding commercial speech. The court rejected any attempt to paint ISPs as state actors in the current milieu for purposes of First Amendment protection.[77] Regarding access to computer bulletin boards, it has been suggested that "[c]onstitutionally

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69. *Id.*
70. *See id.*
71. *See* David E. Sorkin, *Unsolicited Commercial E-mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1007 (1997).
72. *See id.*
73. 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd* 117 S. Ct. 2329 (1997).
74. 47 U.S.C. app. § 223(a)-(h) (Supp. I 1998).
75. *See CompuServe*, 962 F. Supp. at 1026.
76. *See id.* at 1026-27.
77. *See id.*

guaranteed access . . . ultimately founders . . . on the state action requirement."[78] The concept that there must be more than "mere judicial enforcement of neutral trespass laws"[79] for government action to be involved is left undisturbed.

As a private means of communication offering many avenues of access, the Internet has not yet been the subject of intense governmental regulation. Should such regulation occur, it is likely that regulation will be preceded by a legislative determination that the Internet has become so essential as a communications medium as to invoke federal intervention. As one commentator has said, "[o]nly if the [Federal Communications Commission] or the Congress or another governmental entity imposes specific affirmative requirements on private information service providers is the conduct of the service providers likely to be sufficient state action to implicate the First Amendment."[80]

2. "Public Utility" as Applied to Internet Service Providers

The issue of whether an ISP could be considered a public utility was addressed by the *CompuServe* court, even though Cyber did not specifically argue that point.[81] If such status were found, there would be some right of access by the general public to the services provided by CompuServe.[82] The hallmark of a public utility is its engaging in the supplying of goods or services "of public consequence, such as electricity, gas, water, transportation, or telephone or telegraph service."[83] Ohio law, as stated above, considers whether goods or services essential to the general public are involved, and whether the supplier of these goods or services "occupies a monopolistic or oligopolistic position in the marketplace."[84]

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78. Edward J. Naughton, *Is Cyberspace A Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 432 (1992).

79. *CompuServe*, 962 F. Supp. at 1026.

80. Henry J. Peritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 128 (1992).

81. See *CompuServe*, 962 F. Supp. at 1025.

82. *See* 64 AM. JUR. 2D *Public Utilities* § 1 (1972).

83. *Id.*

84. A&B Refuse Disposers, Inc. v. Board of Ravenna Township Trustees, 596

There were no factual findings presented in *CompuServe* which show that Internet access services were considered essential, or that CompuServe dominated the marketplace of access providers. Defining what a public utility is in Ohio, the Ohio Supreme Court previously had rejected the claim of a disposal service seeking status as a public utility for its landfill in order to be exempt from local zoning codes. The court stated that the burden of proof is on the entity claiming such status.[85]

In the present case, CompuServe would likely attempt to disavow such status. Thus, it is unclear whether Cyber would have been permitted to analogize CompuServe to a public utility. In any event, the lack of evidence demonstrating that the service offered by CompuServe was essential, or that CompuServe operated in a monopolistic manner, would seem to preclude a finding that the company is a public utility under Ohio law.

Some courts, however, might take a less rigid view of what comprises a public utility. These courts would not require that all members of the public have an enforceable right to an entity's operation before it could be considered a public utility. These courts look at whether a substantial portion, rather than all, of the public is being served so as to make its operations a matter of public concern.[86]

This analysis is somewhat analogous to the argument that Cyber made in *CompuServe.* Instead of arguing that CompuServe was a public utility, Cyber argued that because CompuServe was so "intimately involved" with the new avenue of communication, that is the Internet, it should be subject to "some special form of regulation."[87] It can be argued that given the unique character of the Internet as a rapidly growing medium for communication, its operations would be a matter of public concern. As more and more people come to depend on the Internet as a primary, if not exclusive, means of both gath-

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N.E.2d 423, 425-26 (Ohio 1992).

85. *See id.* at 425.

86. *See* Industrial Gas Co. v. Public Utils. Comm'n, 21 N.E.2d 166, 168 (Ohio 1939).

87. CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1025-26 (S.D. Ohio 1997).

ering information and communicating, the time when a substantial portion of the public is involved may arrive sooner than later.

However characterized, both the Internet and ISPs such as CompuServe will undoubtedly continue to grow exponentially, as they have in the past decade.[88] As personal computers become as plentiful and as commonplace as televisions and telephones in American and international homes, it is probable that ISPs will be likened to public utilities. As Internet communication becomes increasingly common, it is also likely that it may take on the "essential" character required to become regulated as a public utility. If, as has happened in other industries associated with the Internet,[89] a small number of ISPs come to dominate the market for providing Internet access services due to mergers, acquisitions, or shakeouts, governmental regulation is probable. This could be in the form of state public utility regulation or perhaps through federal antitrust oversight. It should be noted that at least one long distance telephone service carrier, MCI, is now offering Internet access as part of its customer services.[90] The provision of such services by traditional utilities may spur the regulation of ISPs by state public utility regulators.

In another sense, however, the public utility concept may not be an apt analogy to use when discussing ISPs. With the traditional utility, such as telephone, gas, or electricity, one entity is given a virtual monopoly to serve customers in a defined geo-

88. "In 1981, fewer than 300 computers were linked to the Internet." ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). By 1996, it was estimated that worldwide, there were more than 9,400,000 linked to the Internet. *See id.*

89. Microsoft's chairman Bill Gates recently testified before Congress in regard to allegations that Microsoft's web browser, included as part of its Windows95 software package, is dominating the market for web browsers as a result of Microsoft's dominance of the operating system software market. *See* Rajiv Chandrasekaran, *Competitors, Senators Assail Gates at Hearing*, WASH. POST, Mar. 4, 1998, at A1.

90. *See MCI Advertisement* (CNN Headline News broadcast, Mar. 16, 1998). Additionally, Bell Atlantic, a local telephone service provider, is now offering Internet access services. *See Bell Atlantic Advertisement* (NBC television broadcast, Mar. 17, 1998).

graphic area. Part of the rationale is to prevent wasteful competition among providers, where the initial costs in terms of building the required plants and generating facilities are prohibitively expensive. Because the provision of Internet access services does not require a physical geographic presence in the area served, there is no need for the state or locality to provide a monopolistic economic environment. Indeed, since Internet users can select any ISP they wish to use, no matter where they or the ISP are physically located, individual regulation as a public utility by a particular state becomes problematic. This same problem may affect federal regulation because the advertisers or the ISP may be located outside of the United States.[91]

3. What Constitutes Trespass in Cyberspace?

The electronic nature of the domain of cyberspace presents both conceptual and logical queries for courts where common law trespass on computer systems or networks is the cause of action. Absent statutes or regulations drafted specifically to address computer trespassing, judges must reason by analogy to case law decided on the basis of traditional notions of trespass upon real estate or chattels.

The physical act of trespass in cases such as *CompuServe* is committed through the intentional, unauthorized transmission of electronic signals. This element of the cause of action is unlikely to give the courts conceptual difficulty. It is the determination of the ownership of the interest trespassed upon that may prove to be more vexing. One observer, in discussing special subject online discussion groups, or "Usenets," asserts that "[b]y staking out a particular area of cyberspace for a particular use . . . , the creators of a discussion group should gain ownership of the space, including the classic hallmark of ownership—the right to exclude others."[92]

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91. *See generally* Steven Crist, *All Bets Are Off*, SPORTS ILLUSTRATED, Jan. 26, 1998, at 82 (regarding attempts to regulate Internet gambling, where the "sports books" are frequently located in foreign countries).

92. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 103 (1996).

There are counter-arguments to this concept that cyberspace somehow confers different property interests on its users. One commentator has suggested that, when it is used for the same purposes as the telephone, mail or fax machine, that is, for direct communication between people, cyberspace raises no materially different legal issues than are present in "real" space.[93] In this view, calls for new or revised legislation to deal specifically with the Internet may be premature or even unwarranted.[94]

In *CompuServe,* this concept of ownership is less of a conceptual stretch. The trespass of Cyber was through the instrumentality of CompuServe's equipment. There was no trespass in cyberspace itself; instead, it was more in the nature of an unauthorized hitchhiking. The trespass involved the unauthorized access to the means of arriving at the e-mail addresses, rather than the arrival itself. There might be different considerations had the action in question been brought by CompuServe's subscribers directly, instead of by CompuServe, the intermediary in this case. Had Cyber not been notified by CompuServe that its transmissions were unauthorized, the question becomes whether the subscribers could have maintained a common law action for trespass to their e-mail addresses.

The answer would appear to be "yes." Under *Rowan,* the right of one who seeks to communicate "must stop at the mailbox of an unreceptive addressee."[95] The *Rowan* Court indicates that regardless of whether the medium used to convey the message is the mail, radio or television, that fact should not affect the unwilling recipient's right to stop the message where it enters his home.[96] This reasoning is easily applied to the electronic mailbox. An individual's e-mail address serves many of the same functions as the traditional mailbox. Both the traditional mailbox and the e-mail address are used by the address-

93. *See* I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1000 (1994).

94. *See id.*

95. Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970).

96. *See id.*

ee to receive and send communications. Once notice is given to the sender that the particular addressee does not wish to receive this type of message through their e-mail address, continued transmission to that address appears to satisfy the traditional cause of action for trespass, or trespass to chattels.

4. Does "Spam" Fall Under the Federal Prohibition Against Junk Faxes?

In *Destination Ventures, Ltd. v. FCC*,[97] the United States District Court for the District of Oregon denied constitutional challenges to sections of the Telephone Consumers Protection Act of 1991 (TCPA).[98] The TCPA prohibits sending unsolicited advertisements to a telephone facsimile machine. The court voiced concerns, similar to those expressed in *CompuServe*, about advertisers shifting part of the cost of their advertising to unwilling recipients. This cost shifting was in the form of using the recipient's fax paper to print the message, and also in tying up the recipient's fax machine while the advertisement was being received, thus not allowing the recipient the use of the fax machine during the reception of these faxes.[99] As with e-mail, the relative ease and low cost of distributing a large volume of fax advertisements has drawn substantial interest from mass marketers.

The factual situations in *CompuServe* and *Destination Ventures* are markedly similar. Both involve mass marketing advertisements sent through higher technology devices, received by mostly unwilling recipients, who are required to bear some burden in order to receive these advertisements. There are significant differences, however, which would block applying the federal ban on junk faxes to junk e-mail. The most obvious difference is that there is a federal statute,[100] which specifically prohibits sending unsolicited advertisements to a telephone fax machine. While the statute does include computers as being a prohibited means of sending unsolicited advertisements, the only prohibited recipient device included within the statutory

97. 844 F. Supp. 632 (D. Or. 1994), *aff'd* 46 F.3d 54 (9th Cir. 1995).
98. 47 U.S.C. § 227(b)(1)(C) (1994).
99. *See Destination Ventures*, 844 F. Supp. at 636.
100. 47 U.S.C. § 227(b)(1)(C) (1994).

language is a telephone fax machine.[101] The *Destination Ventures* court quotes Congressional testimony that indicated concern with the problem of junk faxes, not with junk e-mail.[102] Given the plain language as to fax machines being the prohibited target device, it is unlikely that this statute could be construed as prohibiting junk e-mail.

Others have suggested, however, that the TCPA could in fact be applied to junk e-mail. The TCPA's definition of a telephone facsimile machine can be seen as being broad enough to include most personal computers.[103] Even proponents of this view, however, concede that Congress probably did not intend that the statute apply to e-mail.[104]

Not all commercial uses of unsolicited fax messages have been held to violate the TCPA. A former employee's faxes to his previous place of employment seeking to hire away the current employees of that business were held not to be unsolicited advertisements. These faxes did not, in the opinion of the court, advertise the availability of property, goods or services, as required to be included under the ambit of the TCPA.[105]

III. E-MAIL AND THE INTERNET: THE VIEW OF THE COURTS AND CONGRESS

A. Cyber Promotions, Inc. v. America Online, Inc.[106]

The analysis of another district court regarding unsolicited e-mail provides a forum in which to analyze *CompuServe. Cyber Promotions, Inc. v. America Online, Inc.*, decided by the United

101. *See id.*

102. *See Destination Ventures*, 844 F. Supp. at 636-37 (citing *Hearing Before the House Subcomm. on Telecommun. and Fin.*, 102d Cong., 1st Sess. (1991)).

103. *See* Sorkin, *supra* note 71, at 1013. Sorkin suggests that all that is needed for a literal compliance with the TCPA's definition of a fax machine is a computer with a modem, printer, and the appropriate software.

104. *See id.*

105. *See* Lutz Appellate Servs., Inc. v. Curry, 859 F. Supp. 180, 181 (E.D. Pa. 1994) (citing 47 U.S.C. § 227(a)(4) (1991)).

106. 948 F. Supp. 436 (E.D. Pa. 1996).

States District Court for the Eastern District of Pennsylvania, involved nearly identical facts to *CompuServe.* In *Cyber Promotions,* the plaintiff was the same company that was the defendant in *CompuServe.* Cyber Promotions sued America Online (AOL) as result of AOL sending a number of "e-mail bombs"[107] to Cyber. Cyber alleged that, because of these "bombings," it lost the services of three ISPs, who either terminated their relationship or refused to contract with Cyber.[108] Among other claims, Cyber asserted that AOL had violated the First Amendment free speech guarantees. Cyber argued that AOL's conduct had the character of state action because AOL had opened its property to the public by performing an essential function and there were no alternative avenues of communication by which Cyber's e-mail could reach AOL members.[109]

The United States District Court for the Eastern District of Pennsylvania rejected Cyber's claim of state action by AOL. The court stated that AOL was not assuming any municipal powers or performing any essential services.[110] Since both parties had previously stipulated that AOL was a private company, Cyber was not entitled to First Amendment protection, in that there was no governmental encroachment.[111] The court also found that there were numerous means open for Cyber to send its advertisements. The World Wide Web allowed access by any Internet users, including "AOL customers . . . who *want* to receive Cyber's e-mail."[112] The court also reasoned that Cyber still had access to members of competing online services, including CompuServe, the Microsoft Network, and Prodigy, as well as traditional, non-internet avenues of communication.[113]

The holdings in *CompuServe* and *Cyber Promotions* were nearly identical. This is not unexpected, as the two cases involved a common party. They also involved the same types of transactions—the broadcast of unsolicited commercial e-mail

107. The "e-mail bombs" occurred when AOL collected all unsolicited e-mail sent by Cyber to undeliverable AOL addresses, altered the return paths and sent the e-mail in bulk back to Cyber's ISPs in order to disable the ISPs. *See id.* at 437 n.1.

108. *See id.* at 437.

109. *See id.* at 441-42.

110. *See id.* at 442.

111. *See id.* at 441.

112. *Id.* at 443 (emphasis in original).

113. *See id.* at 443-44.

messages. The fact that the conclusions reached by the two courts are similar is not particularly instructive, since they dealt with basically the same fact patterns. As such, they duplicate each other without separately defining the parameters for use by courts ruling on different facts.

In another sense, however, the two cases are helpful. They stand as a concrete guide to how the districts courts view unsolicited e-mail communications. Should appellate courts believe that lower courts are misinterpreting the current law, the two cases likely will serve as an impetus for higher courts to accept a promising case on appeal and issue a guiding opinion.

B. ACLU v. Reno[114]

ACLU v. Reno concerned provisions of the Communications Decency Act of 1996,[115] which prohibits communications over the Internet that might be seen as "indecent" or "patently offensive" to minors. These provisions were challenged as violating the First Amendment and the Due Process Clause of the Fifth Amendment.[116] The provisions were held to be unconstitutional, and a preliminary injunction against their enforcement was granted. The United States Supreme Court affirmed.[117]

The decision in *ACLU v. Reno*, in one sense, represents a watershed moment in the evolution of Internet communication. The court recognized that the Internet differs significantly from other forms of communication.[118] The barriers to entry present in traditional media, such as television or cable, are not present in the Internet. Unique to the Internet is the fact that access does not differ significantly between the listener and speaker; both are able to gain access and to communicate in basically

114. 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2328 (1997).
115. 47 U.S.C. § 223(a)-(h) (1994).
116. *See Reno*, 929 F. Supp. at 827.
117. *See* 117 S. Ct. 2329, 2330 (1997).
118. "The Internet is . . . a unique and wholly new medium of worldwide human communication." *Reno*, 929 F. Supp. at 843.

the same manner.[119] The speaker and listener may both enter cyberspace with relative ease and, by engaging in a dialogue, may, in essence, trade places.

The decision in *ACLU v. Reno*, however, may not be particularly applicable to the facts in *CompuServe* in an illustrative manner. *ACLU v. Reno* concentrates its analysis on the Internet as a whole and devotes little attention specifically to unsolicited commercial e-mail. The differences between the two are important. While using the Internet requires an affirmative act by the listener to access any messages or information, e-mail is more akin to the telephone or facsimile machine. The latter devices allow a sender, once he or she has the means of identifying the prospective customer, to make sure the message reaches its intended destination. The recipient then has to either respond to the message, or discard or delete any unwanted messages. The Internet user, on the other hand, can choose not to access any messages at all. E-mail, as a subset of Internet communication, can be viewed as a more intrusive form of receiving a company's advertisements when compared to the voluntary nature of perusing that same company's website.

In addition, public debate differs in regard to the Internet as a whole and e-mail in particular. As illustrated by *ACLU v. Reno*, much of the public and legislative debate on the Internet centers on its content, whether it is sexually explicit or controversial material such as bomb-making recipes. E-mail, however, raises concerns more as to the fact or form of the communication itself rather than its content. It is the fact that an advertiser can reach the e-mail addressee without any action on the addressee's part which is the most objectionable part of unsolicited commercial e-mail. For the Internet, it is the type of material that can be accessed by a willing (often underage) recipient that engenders controversy.

C. *Pending Legislation Which Could Affect the CompuServe Fact Situation*

There are currently three bills in Congress which are directly

119. *See id.* at 843-44.

applicable to the facts in *CompuServe*. All three bills propose to regulate, in varying degrees, unsolicited commercial e-mail.

The first is the Netizen's Protection Act of 1997,[120] sponsored by Representative Chris Smith (R-N.J.). Smith's bill would ban outright unsolicited, unwanted e-mail. It would also require that any commercial e-mail which is sent include the date and the time the message was sent, and the identity and return e-mail address of the sender.

The Unsolicited Commercial Electronic Mail Choice Act of 1997[121] is sponsored by Senator Frank Murkowski (R-Alaska). This bill differs from the Netizen's Protection Act in that it does not seek to exclude junk e-mail from the Internet. This bill would require that the first word in the subject line of any commercial e-mail be "advertisement." It would also require that all routing information, such as the sender's return address, be valid. Senders also would be required to include their name, postal and e-mail address, and telephone number. The bill would impose fines of up to $11,000 per incident. ISPs would not be liable for such e-mail unless they actually created it.

The third bill is the Electronic Mailbox Protection Act,[122] sponsored by Senator Robert Torricelli (D-N.J.). This bill would make it illegal to send e-mail from a false or unregistered domain, or to disguise the e-mail's source. It would also require senders to remove recipients' names from their mailing lists upon that person's request, and it would prohibit the sale or exchange of such person's e-mail address. It is unique among the three bills in that it provides a private cause of action for the violation of any e-mail rules which have been adopted by an Internet standards body.

Of the three bills, Senator Torricelli's may be seen as the "lesser of three evils" by First Amendment proponents. Torricelli's bill focuses on the manner in which e-mail is sent,

120. H.R. 1748, 105th Cong. (1997).
121. S. 771, 105th Cong. (1997).
122. S. 875, 105th Cong. (1997).

while the other two concentrate more on the commercial content of an e-mail message as triggering coverage. It is likely that any proposed legislation that addresses content would be subject to constitutional challenge on First Amendment grounds. Torricelli's bill also forces users and ISPs to bear much of the costs of compliance. ISPs are required to install and maintain e-mail filters on their networks.

At last report, Smith's bill was in the House Committee on Commerce.[123] The other two bills were in the Senate Committee on Commerce, Science and Transportation.[124]

IV. A PREDICTION OF FUTURE COURT ACTION IN *COMPUSERVE*

Should it reach the United States Court of Appeals for the Sixth Circuit, an appeal of *CompuServe* would appear to be a case of first impression. Given that the holdings regarding trespass and the First Amendment protection of commercial speech do not depart from established case law, the result in *CompuServe* is likely to be upheld.

Should this case reach the United States Supreme Court, the prediction is that, factually, the background situation of the online information and communication service providers will have changed. Portions of the Communications Decency Act of 1996,[125] which restricted certain communications over computer networks, were held to be unconstitutional in *ACLU v. Reno*.[126] It is likely that Congress may draft similar legislation that passes constitutional muster. Included in such legislation may be language which specifically addresses the issue of junk e-mail, such as was done in regard to junk faxes in the TCPA. Additionally, if such a case does reach the Supreme Court, one

123. [2 105th Cong.] Cong. Index (CCH) 28,259 (June 13, 1997).

124. [1 105th Cong.] Cong. Index (CCH) 14,193 (June 6, 1997) (tracking S.771); *id.* at 14,198 (June 11, 1997) (tracking S.875).

125. 47 U.S.C. § 223(a)-(h) (1994).

126. 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). The decision in *ACLU v. Reno* is noteworthy for an additional reason. The opinion begins with 123 paragraphs of findings of fact, the first forty-eight stipulated to by the parties, regarding the current status of the Internet. It is recommended as a starting point for persons desiring a crash course on the Internet.

of the three bills mentioned above may have become law by that time.

Absent this congressional action, the Supreme Court will likely affirm the holding in *CompuServe*. The question of trespass in cyberspace should be settled by state common law. As for First Amendment concerns regarding commercial speech, the Court will find a lack of state action in CompuServe's denial of access to Cyber, precluding the latter's claim.

V. CONCLUSION

The ability of an ISP to protect its subscribers from unsolicited e-mail advertisements will likely become an increasingly difficult task. The fact that such a large number of potential customers may be reached immediately at a low cost will draw ever larger numbers of advertisers to the Internet. The use of self-help remedies by subscribers, such as blocking commercial postings, is becoming an increasingly familiar response.[127] Of interest is the fact that even Cyber Promotions is now selling an e-mail filter.[128] The states are also reacting to unsolicited commercial e-mail.[129]

The use of a common law trespass cause of action, while adaptable to property claims in cyberspace, is a less precise tool of adjudication than legislation which is drafted to deal specifically with questions of electronic access and privacy. The *CompuServe* court correctly applied the existing law. Nevertheless, existing law is likely to prove inadequate as advertisers, providers and subscribers journey deeper into cyberspace. As online information and communication services become more

127. *See* Chandrasekaran, *supra* note 3, at C1 (describing an occasion where almost 80,000 commercial postings to Usenet groups were blocked in 24 hours by an Internet users group).

128. *See* Hannah Kinnersley, *Net Users, Vendors Strive to Can Spam*, COMPUTER SHOPPER, Sept. 1, 1997, *available in* 1997 WL 9025571.

129. On July 8, 1997, Nevada passed a law which provides for damages of $10 per item of unsolicited commercial e-mail. The measure is slated to go into effect in 1998. *See* EDGE: WORK-GROUP COMPUTING REP., Aug. 25, 1997, *available in* 1997 WL 12966944.

available, and as they begin to supplant more traditional methods of communication, regulation on the federal level is an almost inevitable development, as the pending legislation demonstrates.

Although *CompuServe, Inc. v. Cyber Promotions, Inc.* is a district court case, it does have important ramifications. It is likely that such cases will be arriving at an increasing rate at courts of appeals and, eventually, the Supreme Court. The reasoning in *CompuServe* should serve as guidance as courts come to grips with the problem of balancing the rights of e-mail subscribers and the legitimate needs of advertisers to take full advantage of the unique opportunities offered by the Internet and electronic mail.

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