

The Feasibility of a Law to Regulate Pornographic, Unsolicited, Commercial E-Mail

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I.	INTRODUCTION	117
II.	THE PRESENT CIRCUMSTANCES SURROUNDING UCE	119
	A. <i>Problems</i>	119
	B. <i>Proposals</i>	122
	C. <i>Actions Taken by ISPs</i>	124
	D. <i>A Final Caveat: The Jurisdictional Limitations to Enforcement of Anti-UCE Legislation</i>	126
III.	JURISPRUDENTIAL CONSIDERATIONS.....	127
	A. <i>The First Amendment</i>	127
	B. <i>UCE Under the First Amendment</i>	128
IV.	THE FEASIBILITY OF A LAW TO REGULATE OBSCENE UCE PASSING JUDICIAL SCRUTINY	131
	A. <i>Obscenity</i>	131
	B. <i>Mailboxes</i>	135
	C. <i>Obscene UCE</i>	137
V.	CONCLUSION	141
	APPENDIX.....	142

I. INTRODUCTION

The origins of the term “spam,” slang for unsolicited commercial e-mail, lie in a Monty Python comedy sketch.¹ A chorus of Vikings sing “spam, spam, spam” at increasing decibels until all else is drowned out,² which is much like the effect spam has with regards to an individual’s e-mail in-box. A commercial e-mail message is defined as “any electronic mail message that primarily advertises or promotes the commercial availability of a product or service for profit or invites the recipient to

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1. Doug Bedell, *Smashing Spam*, DALLAS MORNING NEWS, July 13, 1999, at www.dallasnews.com/technology/0713tech10000spam.html.

2. *See id.*

view content on an Internet Web site” for commercial purposes.³ As with other forms of personal communication (i.e., phone and fax), advertisers have begun to use e-mail as a method to personally solicit products and services directly to consumers (frequently to the chagrin of the individual). An unsolicited commercial e-mail (UCE) message is “any commercial [e-mail] message that is sent by the initiator to a recipient with whom the initiator does not have a pre-existing business relationship.”⁴ One who sends UCE is often referred to as a “spammer.” Among the most commonly received UCEs are advertisements for multilevel marketing (pyramid schemes), “get rich quick” plans, stock offerings for obscure and unknown companies, pirate software, home health remedies, phone sex lines, and pornographic Web sites. America On-Line estimates that over thirty percent of all e-mail traffic is UCE.⁵

While much attention has been given to the protection of minors and nonconsenting adults who may be offended by obscene materials from readily accessible pornographic Web sites, UCE advertising pornography has been somewhat overlooked. Numerous bills have been introduced in Congress and state legislatures to regulate UCE, but none have specifically targeted the problem of pornographic UCE. An average hotmail account looks like the red light district of Amsterdam. The plethora of servers offering free e-mail accounts makes it even more difficult for parents to fully regulate the content of their child’s in-box. Moreover, unlike pornographic Web sites, filtration software for UCE is not as effective. Spammers also use deceptive techniques in transmitting their messages by disguising them as benign advertisements so that it will be read by unsuspecting recipients.⁶ To avoid filters altogether, a spammer will relay his message off the e-mail server of a third party to disguise its source of origin.⁷ Filtration programs consume great deals of Central Processing Unit (CPU) time, often making them an ineffective strategy for counteracting UCE.⁸

There is a movement at both the federal and state level to enact legislation to regulate UCE, and allow servers to legally enforce their own UCE policies. The constitutionality of these laws will nonetheless be challenged as violating the First Amendment. This Article proposes

3. H.R. 3113, 3(2).

4. *Id.* at 3(12).

5. Eric Hatchett, *The Spam Ban: The Feasibility of a Law to Limit Unwanted Electronic Mail*, at <http://raven.cc.ukans.edu/~cybermom/CLJ/hatchett.html> (Dec. 1998).

6. Coalition Against Unsolicited Commercial Email, *The Problem*, at <http://www.cauce.org/about/problem.shtml>.

7. *See id.*

8. *See id.*

to: (1) detail the problems associated with unsolicited commercial e-mail and some of the proposed solutions put forth by both the public and private sectors, (2) analyze the constitutionality of the regulation of UCE under the Supreme Court's commercial speech doctrine, and (3) determine whether it is feasible to enact a law to specifically regulate pornographic UCE that passes constitutional scrutiny.

II. THE PRESENT CIRCUMSTANCES SURROUNDING UCE

The current attempts to regulate the increasing flow of UCE, particularly messages aimed at defrauding consumers, by both the public and private sectors have proved inadequate in the absence of comprehensive federal legislation. Specifically, apart from general filtration software on some servers, there has been little attempt to address the growing amount of pornographic spam. UCE, itself, also poses problems on many levels in its current unregulated form. This section: (A) describes the problems associated with UCE; (B) surveys the proposed legislation at the Federal level, and the enforcement of existing consumer protection laws to UCE; (C) discusses the attempts made by ISPs to curb the flow of unwanted UCE; and (D) presents the jurisdictional limitations to enforcing a law to regulate UCE.

A. Problems

The first instance of UCE occurred in 1994 when two Phoenix attorneys, Laurence Carter and Martha Siegel, posted a mass advertisement on Usenet bulletin boards in order to promote their law practice.⁹ Although business in their practice did not increase, they discovered that they could offer their services in this advertising technique to other companies. Subsequently, they founded a company specializing in transmitting UCE. Thus, spam was born. The venture failed but the idea of mass postings and unsolicited e-mail was born.¹⁰ Another pioneer in UCE is Sanford Wallace¹¹ of Cyber Promotions. He used inexpensive software that could collect e-mail addresses from Web pages, message boards, and news groups, and used that material to send millions of e-mails.¹²

9. Dana Blankenhorn, *Almanac of Internet Politics, Chapter 4: Spam*, at <http://www.policy.com/reports/blankenhorn/spam.html>.

10. *See id.*

11. Often derogatorily referred to by antispam groups as "Spamford" Wallace.

12. Bedell, *supra* note 1, at 2.

Unsolicited commercial e-mail is not a benign phenomenon that merely promotes goods and services. Spam is used to transmit harmful computer viruses.¹³ It has knocked out the systems of such Internet Service Providers (ISPs) as AT&T, Pacific Bell, Netcom, and GTE.¹⁴ Most of all, UCE is an economically inefficient method of mass advertising. Cost shifting is a major problem with unregulated UCE. A study released by the European Commission, the executive department of the European Union, revealed that unsolicited commercial e-mail costs Internet subscribers \$9.4 billion world-wide, in connection costs.¹⁵

The Internet was founded as a cooperative arrangement in which a participant pays for his part of the infrastructure. The costs associated with relaying, transmitting, receiving, storing, and downloading e-mail messages is borne by others, not the sender. A spammer can displace UCE, making it difficult to receive e-mail.¹⁶ A Gartner Group study of 13,000 Internet users found that twenty-five percent of users blamed their ISPs for the problem, and that only forty-four percent bothered to protest UCE.¹⁷ One of the reasons UCE is so popular is because it is inexpensive to send.¹⁸ For an outlay of only \$100 for hardware, software, and CD-Rom databases costing \$10 per million addresses, a spammer can transmit millions of UCE messages to individuals. With a 28.8 dial-up connection and a standard PC, a spammer can send hundreds of thousands¹⁹ of UCE messages per hour.²⁰ The ISP then must use greater

13. *See id.*

14. Written Testimony on Behalf of the Coalition Against Unsolicited Commercial E-mail, Ray Everett-Church Before U.S. Senate Commerce Subcommittee (June 17, 1998), at http://www.cauce.org/testimony/senate_testimony.shtml.

15. *Spam Costs Users \$9.4 Billion*, Mobile Computing Online (Feb. 2, 2001), at <http://www.mobilecomputing.com/shownews.cgi?1400>.

16. CAUCE, *supra* note 6.

17. Bedell, *supra* note 1, at 2.

18. Everett-Church, *supra* note 14.

19. Here is an example of a typical offer for e-mail addresses for sale (as received on hotmail):

142 MILLION EMAIL ADDRESSES FOR ONLY \$149. You want to make some money? I can put you in touch with over 140 million people at virtually no cost. Can you make one cent from each of these names? If you can you have a profit of over \$1,400,000.00. That's right, I have over 142 Million Fresh email addresses that I will sell for only \$149. These are all fresh addresses that include almost every person on the Internet today, with no duplications. They are all sorted and ready to be mailed. That is the best deal anywhere today! Imagine selling a product for only \$5 and getting only a 1% response. That's OVER \$7,000,000 IN YOUR POCKET !!! Don't believe it? People are making that kind of money right now by doing the same thing, that is why you get so much email from people selling you their product . . . it works! I will even tell you how to mail them with easy to follow step-by-step instructions I include with every order. I will send you a copy of every law concerning email. It is easy to

amounts of CPU time processing UCE which drags the time on all e-mail. America Online, Hotmail, AT&T, Earthlink, UUNet, Netcom, Compuserve, and Erols have all had to hire large staffs and spend millions of dollars to process UCE.²¹ The cost of bandwidth is the largest outlay for an ISP, making the profit margins low for many of the smaller companies.²² Bandwidth, the connection to the rest of the Internet, is based on projected usage by the user base.²³ Spam uses a great deal of bandwidth with no added customers. The small ISP must then either raise rates, swallow the cost, or provide a slower service.²⁴

Some ISPs use individually installed e-mail filtering programs to halt the flow of UCE. However, these filters are not very effective. Filtering also consumes a great deal of CPU time.²⁵ Spammers use deceptive methods to send UCE by disguising commercial messages as personal, or business, in order to guarantee that the recipient will read it.²⁶ To avoid filters, spammers will relay off the mail server of a third party in order to disguise its origin, or they will forge the headers.²⁷ The Internet auctioneer eBay recently implemented a new e-mail system intended to use filtration software to be UCE free.²⁸ It allows eBay members to be able to contact one another without revealing their e-mail addresses.²⁹ However, the program is filtering out legitimate messages from customers.³⁰ This occurs because the program filters out those messages that omit a recipient's address because spammers often send blind carbon copy e-mails to their target audience.³¹ The only effective means found by eBay sellers to prevent the loss of legitimate messages is

obey the law and make a fortune. These 142 Million email addresses are yours to keep, so you can use them over and over. They come on a collection of several CDs. This offer is not for everyone. If you can not see just how excellent the risk/reward ratio in this offer is then there is nothing I can do for you. To make money you must stop dreaming and TAKE ACTION.

20. CAUCE, *supra* note 6.

21. Everett-Church, *supra* note 14.

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. CAUCE, *supra* note 6.

27. *See id.*

28. Troy Wolverton, *eBay Sellers Say New Anti-spam System Is Backfiring*, News.com (Feb. 27, 2001), at <http://news.cnet/news/0-1007-200-4967317.html?tag=ovv>.

29. *See id.*

30. *See id.*

31. *See id.*

to turn off the filter altogether.³² Thus, filtration software is not the best means to regulate UCE.

B. Proposals

At both the state and federal level, many bills have been introduced to regulate UCE. None of the proposed legislation has yet passed the full Congress. Among the states with antispam laws are: California,³³ Colorado, Maryland,³⁴ Nevada,³⁵ and Washington.³⁶ The Federal Trade Commission, in conjunction with other federal agencies and local law enforcement, has also attempted to control UCE by prosecuting those who set out to defraud consumers. In the end, all of these efforts are inadequate in solving the problem, and none specifically addresses the nuisance of pornographic UCE.

On July 18, 2000, the United States House of Representatives passed the Unsolicited Commercial Electronic Mail Act of 2000, H.R. 3113, by a margin of 427 to one.³⁷ It later stalled in the Senate. The bill was introduced in the 106th Congress by Rep. Heather Wilson (R-NM) and Rep. Gene Green (D-TX).³⁸ A bill, identical to H.R. 3113, was introduced on February 14, 2001, to the 107th Congress in the House.³⁹ It has been assigned to the House Energy and Commerce Committee. Its purpose is “[t]o protect individuals, families, and Internet service providers from unsolicited and unwanted electronic mail.”⁴⁰ The congressional determination of public policy supporting the legislation

32. See *id.*

33. The California law permits ISPs to sue those who send unsolicited commercial e-mail in violation of an ISP's posted policy if the sender had actual notice of the policy, and imposes criminal sanctions upon those who disrupt computer systems by using a false domain name to send messages. A second bill enacted into law requires UCE senders to include opt-out instructions with a toll-free telephone number or a valid return address, requires senders to honor opt-out requests, and requires certain advertisements to contain “ADV” in their header.

34. The Maryland law prohibits use of e-mail with the intent to harass except for “peaceable activity” intended to express political views.

35. The Nevada law requires UCE messages to identify the sender and include instructions for the addressee to opt-out of future mailings. It also prohibits UCE advertisements to clients of ISPs that register with the state as “restricted solicitation electronic mail providers.”

36. The Washington state law prohibits false headers and misleading subject lines to be included in UCE messages. It also created a task force to study whether there is a need for further legislation.

37. CAUCE Newsletter, Vol. 4, #1, July 2000, at <http://www.cauce.org/newsletter/vtn1.shtml>.

38. Coalition Against Unsolicited Commercial Email, Currently Pending Legislation, at <http://www.cauce.org/legislation/index.shtml> (last visited Feb. 14, 2002).

39. Margret Johnston, *U.S. Representatives Mount Attack on Spam*, (Feb. 16, 2001), at <http://www.cnn.com/2001/TECH/internet/02/16/attack.on.spam.idg/>.

40. H.R. 3113.

was that “recipients of unsolicited commercial electronic mail have a right to decline to receive, or have their children receive, unwanted commercial electronic mail.”⁴¹ Section 4(a) of the Act required all UCE to: (1) Include a valid and conspicuous return address, (2) Bar retransmission after objection by a recipient, (3) Include accurate routing information for the purpose of identifying the sender, and (4) Display a clear and conspicuous identifier with an opt-out mechanism followed by a clear and conspicuous notice that the recipient may opt-out from any future messages.⁴² Section 4(b) grants civil enforcement for the posted UCE policies of ISPs.⁴³ Therefore, an ISP may enforce its policy on UCE, and prohibit transmissions that are in violation of its policy. An ISP may also prohibit spammers from using its equipment for transmission of UCE.⁴⁴ The requirements for an ISP to be able to enforce its UCE policy under the Act are clarity, availability of the policy to the public by Web posting or other conspicuous means of notification, and an internal opt-out list must be maintained by the ISP for subscribers who do not wish to receive UCE.⁴⁵ An exception was carved out in circumstances where subscribers agree to receive UCE in return for free e-mail service.⁴⁶ Another significant piece of legislation is H.R. 2162. The Can Spam Act was introduced by Rep. Gary Miller (R-CA), and would also grant ISPs a civil action against spammers who violate their posted UCE policies while providing criminal sanctions for those spammers using others’ domain names to transmit UCE.⁴⁷ Senate bill S. 759, sponsored by Senators Murkowski and Torricelli, required valid information in UCE, no forgery of headers, and the honoring of name removal and opt-out requests by recipients.⁴⁸ ISPs under this bill would be able to enforce a strict no UCE policy.⁴⁹ They would also be required to maintain lists and make them available to users who request to receive UCE.⁵⁰ The ISPs would also have to arrange, whatever the cost, to allow opt-out by users.⁵¹

41. H.R. 3113 § 2(b)(3).

42. H.R. 3113 § 4(a).

43. H.R. 3113 § 4(b).

44. *See id.*

45. *See id.*

46. *See id.*

47. CAUCE, *supra* note 38.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

The Federal Trade Commission along with the U.S. Postal Inspection Service, the Securities and Exchange Commission, and several state attorneys general are also attempting to deter the deceptive practices of spammers. For the past year, "Project Mailbox IV" has brought hundreds of actions against individuals who use fraudulent messages in unsolicited commercial e-mail and faxes intended to defraud consumers.⁵² Internet based frauds accounted for more than 300 of the actions brought by law enforcement in 2000.⁵³

There is a strong need for federal legislation to regulate UCE. The state laws are inadequate because only a few states have enacted such legislation. Also, with the national and international scope of the Internet, it is impossible for a few states to go it alone. A spammer may violate the laws of one state while transmitting from a jurisdiction that has no such law. The efforts by the FTC and others are commendable; however, they are only aimed at a small portion of UCE that is transmitted. Furthermore, a comprehensive regulation of UCE may make such efforts unnecessary, and save the taxpayers millions of dollars. Finally, none of these efforts positively affect the desire, by some consumers, to curb the flow of pornographic UCE.

C. *Actions Taken by ISPs*

In addition to efforts by the public sector to control the flow of UCE, market forces have also pushed the private sector into attempts to deal with the problem. As discussed earlier, misallocation of resources is a large problem with UCE. It is the extreme embodiment of the free rider problem in economics. ISPs have turned to filtration software as a way to regulate UCE.

There are several methods used by ISPs to filter UCE. Many ISPs ban e-mail based on regularly updated Unix databases of known spamming sites.⁵⁴ For example, through Realtime Blackhole List, developed by Mail Abuse Prevention System, ISPs can block junk e-mailers.⁵⁵ However, many spammers circumvent these lists by commandeering security holes in legitimate servers to transmit their messages under the guise of a legitimate sender.⁵⁶ Junkbusters developed Spamoff that provides a notice for posting on ISPs, and generates a reply

52. Press Release: January 5, 2001, Federal Trade Commission, at <http://www.ftc.gov/opa/2001/01/mailbox.htm>.

53. *See id.*

54. Bedell, *supra* note 1, at 2.

55. *See id.*

56. *See id.*

to UCE messages demanding that the sender cease, or else pay an unenforceable \$10 fine.⁵⁷ Nail'em traces spam to its source of origin and notifies the ISP of the problem.⁵⁸ This method is ineffective because many spammers disguise their source of origin. Other tracing and notice software includes Spam Cop and Abuse Net.⁵⁹ Another product, Sam Spade, available free of charge, analyzes programs for Windows, and decodes the headers of UCE to guess its origin.⁶⁰ Free for Macintosh is Spam Apple Script which scans messages and forwards UCE to ISPs in complaint.⁶¹

Another method used by some ISPs is to install filters into their e-mail programs so that users may opt to block UCE by using keywords. Blocked messages are put into a trash folder.⁶² Netscape Communicator provides an edit option at its Message Center that allows clients to activate e-mail filters.⁶³ It works with the client entering keywords like "XXX" or "Adult," and the program then automatically moves all such messages to a designated folder.⁶⁴ Microsoft Explorer has Outlook 97 set up and filter incoming messages with keywords. Spam Busters, for \$19.95, will even filter mail before it reaches your hard drive.⁶⁵ More sites allow opt-in features where you can choose the category of information you wish to receive.⁶⁶ Among the more stringent blocking programs is one provided by a new, free e-mail service, called Message To, that offers completely UCE-free e-mail. All incoming messages are blocked from the user's account.⁶⁷ Every time a message from a sender not yet known to the Message To delivery system comes in, Message To tests it by sending a reply seeking a response from the sender.⁶⁸ Fake addresses and automated programs will be unable to respond correctly,⁶⁹ or at least until a program has been written to give Message To its desired response. Messages that fail the test are put into a separate folder which the user may access anytime if he wishes to actually read the UCE.⁷⁰ Any

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *Spam-Free E-mail at Last?*, Aug. 9, 1999, About: The Human Internet.

68. *See id.*

69. *See id.*

70. *See id.*

future messages from a legitimate sender will be automatically accepted. The user may also register with newsgroups without any inconvenience.⁷¹ In return for the service, Message To only asks for demographic data which it can then use to set up a future opt-in system for UCE.⁷² In the absence of comprehensive legislation, ISPs are limited in their ability to bring a halt to UCE. The filtration software is generally ineffective. Moreover, the use of resources to filter UCE does not solve the problem of misallocation of resources. In fact, it exacerbates the problem by increasing the costs. Many of the bills in Congress have proposed granting a civil action to ISPs to enforce a conspicuously posted UCE policy in federal courts. Absent such measures by the federal government, the attempts by the private sector to regulate UCE will continue to be futile.

D. A Final Caveat: The Jurisdictional Limitations to Enforcement of Anti-UCE Legislation

The regulation of unsolicited commercial e-mail by the United States, or any other country for that matter, faces the same jurisdictional problems as the regulation of the content of Web sites. UCE may be sent outside the borders of the United States, thereby avoiding any sanctions which may be provided for under U.S. law. Currently, more and more UCE is moving offshore. A newsadmin.com list of the leading one hundred Usenet UCE hosts found that fifty-two of them are offshore.⁷³ The leading sources of origin were found to be Russia, France, Greece, and the Netherlands.⁷⁴ Of the five ISPs that receive the most complaints for transmitting an abundance of UCE, two are located outside the United States.⁷⁵ In addition, twenty-five of the worst Web administrators for dealing with user complaints over UCE are located in foreign countries—among them China, Korea, Thailand, and Japan.⁷⁶

It is worth noting this phenomenon in order to understand the limits of regulating UCE. However, the nature of UCE is different from that of Web sites. Even if some UCE moved off shore, a comprehensive federal law would curb a great deal of what is already being transmitted. At the moment, an individual can buy some hardware and an inexpensive list of

71. *See id.*

72. *See id.*

73. Declan McCullagh, *Spam Oozes Past Border Patrol*, (WIRED NEWS) Feb. 23, 2001, at <http://www.wired.com/news/politics/0,1283,4186,00.html>.

74. *See id.*

75. *See id.*

76. *See id.*

millions of e-mail addresses in which to send his or her UCE message. A federal law would help stop these domestic spammers. Therefore, this does not mean that a law should not be enacted because there are those out of the jurisdiction.

III. JURISPRUDENTIAL CONSIDERATIONS

Any discussion of whether it is feasible to regulate pornographic UCE must begin with the ability of the federal government to enact a law that would regulate UCE, in general, without offending the First Amendment. The Supreme Court has held that a content neutral regulation of the time, place, and manner of speech is acceptable. Commercial speech, in which UCE would come under the category, is less protected; however, it is still under the aegis of the First Amendment. This Part will: (1) discuss the acceptability of content-neutral time, place and manner regulations of speech under the First Amendment and (2) discuss the acceptability under the First Amendment of a general law to regulate UCE.

A. *The First Amendment*

In *Police Department of Chicago v. Marley*, the United States Supreme Court held that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁷⁷ The freedom of speech is “indispensable to the discovery and spread of political truth.”⁷⁸ The “best test of truth is the power of the thought to get itself accepted” in the marketplace of ideas.⁷⁹

A valid regulation of speech is one of a reasonable time, place, or manner that serves a significant governmental interest while allowing for alternative forums.⁸⁰ A content-neutral regulation of the time, place, or manner of speech may be imposed when it is reasonable.⁸¹ The rationale behind a regulation of speech for a reasonable time, place, or manner is that some forms of speech, regardless of content, may obstruct legitimate government interests.⁸² For example, the Supreme Court upheld a licensing requirement for parades in city streets as a reasonable

77. 408 U.S. 92, 95 (1972).

78. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., dissenting).

79. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

80. See, e.g., *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977).

81. *Id.*

82. *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530 (1980).

regulation of time, place, or manner because of the government interest in controlling the flow of traffic, maintaining public order, and ensuring that rival parades do not attempt to mollify the licensed parade.⁸³ However, a permissible time, place, or manner regulation of speech cannot be based on its content.⁸⁴ When a regulation is based on the content of speech, the government action must be scrutinized carefully to ensure that it is not prohibited solely “because public officials disapprove [of] the speaker’s views.”⁸⁵

B. UCE Under the First Amendment

The Constitution accords less protection to commercial speech than to other constitutionally protected forms of expression.⁸⁶ Commercial speech is distinct from other forms of expression.⁸⁷ It is defined as “expression related solely to the economic interests of the speaker and [the] audience.”⁸⁸ The traditional approach to commercial speech was laid out in *Valentine v. Chrestensen*. In that decision the Supreme Court stated that the Constitution imposes no restraints on the government with respect to the regulation of purely commercial advertising.⁸⁹ Revisiting the issue in *Breard v. City of Alexandria*, the Court indicated that there was a commercial speech exception to the First Amendment.⁹⁰ However, since the *Breard* decision, the Court has never denied First Amendment protection to a communication that can be characterized as strictly commercial.⁹¹ The validity of *Valentine* first came into question in the mid-1970s. The Court upheld “a reasonable regulation of the manner in which commercial advertising could be distributed” by distinguishing the *Valentine* holding as a “distinctly limited one.”⁹² The Court observed that the “relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”⁹³

83. See *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

84. See *Consol. Edison*, 447 U.S. at 536.

85. See *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

86. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980).

87. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978).

88. See *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

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

90. 341 U.S. 622, 642 (1951) (upholding conviction for violation of ordinance barring door to door solicitation).

91. See *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 759 (1976).

92. See *Bigelow v. Virginia*, 421 U.S. 809, 819 (1975).

93. *Id.* at 826.

In the landmark case, *Virginia Pharmacy Board v. Virginia Consumer Council*, the Supreme Court held that commercial speech, defined as speech that serves only to propose a commercial transaction, is not outside the protection of the First Amendment.⁹⁴ This commercial speech doctrine is based on the informational function of advertising.⁹⁵ There exists a First Amendment right to “receive information and ideas.”⁹⁶ The protection of the First Amendment extends “to the communication, to its source and to its recipient both.”⁹⁷ Society has a strong interest in the free flow of commercial information.⁹⁸ The consumer’s interest in the availability of products and services “may be as keen . . . than his interest in the day’s most urgent political debate.”⁹⁹ The Court noted that “[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.”¹⁰⁰ Because the United States operates under a free market economy, the allocation of resources is made predominantly through private economic decisions dependent upon the free flow of accurate and truthful information.¹⁰¹ It is a matter of public interest that the economic decisions of the nation’s citizens be informed ones.¹⁰²

Commercial speech may be protected by the First Amendment, but it may nevertheless be subject to regulation.¹⁰³ The protection of commercial speech is dependent upon the nature of the speech itself, and the nature of the governmental interest in its regulation.¹⁰⁴ For example, commercial speech may be prohibited in circumstances where the information contained therein is either false or misleading.¹⁰⁵ It may also be prohibited where the content of the speech is directly related to the undertaking of an illegal activity.¹⁰⁶ However, the government must possess a substantial interest to be achieved through these restrictions on speech.¹⁰⁷ There is a four-part test for the permissive regulation of

94. 425 U.S. 748, 762 (1976).

95. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

96. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

97. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 756 (1976).

98. See *id.* at 764.

99. See *id.* at 763.

100. See *id.* at 765.

101. *Id.*

102. See *id.*

103. See *id.* at 770.

104. *Central Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

105. See *id.*

106. See *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 388 (1973).

107. See *Central Hudson*, 447 U.S. at 564.

commercial speech: (1) the speech must concern lawful activity and not be misleading or false, (2) the asserted government interest must be substantial, (3) the regulation in question must directly advance the government interest,¹⁰⁸ and (4) the regulation in question cannot be more extensive than is necessary to serve the state interest.

Mass mailings fall within the ambit of commercial speech as “speech which does ‘no more than propose a commercial transaction.’”¹⁰⁹ The overwhelming majority of UCE merely requests the recipient to either visit a commercial Web site, purchase an item, or become a partner in some business scheme. A government regulation of UCE would be aimed at allowing ISPs to enforce a posted UCE policy, prevention of UCE aimed at defrauding the recipients, and controlling the flow of UCE altogether. UCE could be diverted into specifically designated in-boxes like the My Message e-mail service. This latter form of regulation would be content neutral, and come under the ambit of a time, place, and manner regulation. It would only control where UCE would go, or allow an ISP to bar UCE altogether regardless of content.

The governmental interest in regulating UCE is substantial. As discussed earlier, there are many harmful effects associated with UCE. It is used to transmit dangerous computer viruses, and it increases the costs while simultaneously decreasing the effectiveness of Internet access provided by ISPs. The government’s interest in preventing substantial harm to a segment of the nation’s economy is a substantial interest.¹¹⁰ The technology sector, and particularly e-commerce and ISPs, is a major area of future growth in the U.S. economy. UCE in its current form undermines consumer confidence, ties up valuable bandwidth and personnel resources at ISPs, and provides a general nuisance to the public while threatening to carry viruses. It threatens to put the smaller ISPs out of business, and forces all ISPs to allocate greater resources just to process the UCE or filter it. The ISPs bear the costs, not the senders; therefore, the government interest in protecting this sector of the economy would justify the regulation of UCE. The proposed methods are the least restrictive means available because ISPs may still allow UCE to be transmitted that is pre-approved, and UCE may still reach consumers possibly through an opt-in or opt-out feature.

108 . The Court refuses to uphold regulations that only indirectly advance a state interest. *See id.* at 566.

109 . *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

110 . *See United States v. Frame*, 885 F.2d 1119, 1134 n.12 (9th Cir. 1989).

IV. THE FEASIBILITY OF A LAW TO REGULATE OBSCENE UCE PASSING JUDICIAL SCRUTINY

For purposes of First Amendment analysis, electronic mail is analogous to the U.S. postal mail. The primary difference between the two is that postal mail is run by the U.S. government, and electronic mail is a product of the private sector. However, neither a mailbox that receives U.S. mail nor an e-mail account are considered to be a public forum. In other words, the fact that one is run by the public sector and the other by private firms does not alter the application of the First Amendment to its regulation. Both receive the same types of materials: personal correspondence, newsletters, and commercial messages. The bulk mail service of the U.S. Post Office is similar to bulk UCE except that in the former case the sender bears the costs, which is not true under the latter.

In addition, the problems associated with the bulk mailing of pornographic material to households that led to government regulation in the 1960s are applicable to UCE. First, pornographic UCE is too numerous to deal with on an individual basis, much like bulk mail. Pornographic UCE is too numerous and burdensome to expect an individual to contact every sender requesting that his name be removed from their lists. Moreover, spammers use different servers and addresses to make a thorough request impossible. Second, minors are at risk to receive pornography. A parent who desires to prevent his or her child from receiving pornographic UCE must undertake the burdensome, and likely ineffective, task of screening their child's e-mail account and deleting the undesired messages.

This Part will (1) discuss the Supreme Court's jurisprudence on obscenity under the First Amendment, (2) discuss the Court's cases involving the First Amendment and individual mailboxes, and (3) discuss the feasibility of a law to regulate pornographic UCE passing constitutional scrutiny.

A. *Obscenity*

The Supreme Court has declared, "If there is a kind of commercial speech that lacks all First Amendment protection, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject."¹¹¹ Mere offensiveness is "classically not [a] justificatio[n] validating the

111. *Va. Pharmacy Bd.*, 425 U.S. at 761.

suppression of expression protected by the First Amendment.”¹¹² The Court has consistently held that the fact that protected speech may be found to be offensive to some people does not justify its extirpation. The government may not “reduce the adult population . . . to reading only what is fit for children.”¹¹³ The “First Amendment does not permit the government to prohibit speech as intrusive unless the ‘captive’ audience cannot avoid objectionable speech.”¹¹⁴ An individual is free, under the First Amendment, to promote controversial yet socially informative ideas, like family planning, and provide information relating to the prevention of sexually transmitted diseases.¹¹⁵

In *Chaplinsky v. State of New Hampshire*, the United States Supreme Court first stated that “certain well-defined and narrowly limited classes of speech” are not afforded First Amendment protection that includes among them obscenity.¹¹⁶ Indecent speech is protected by the First Amendment while obscene speech does not possess the same constitutional safeguards.¹¹⁷ “It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹¹⁸ Obscenity “deals with sex in a manner appealing to the prurient interest.”¹¹⁹ Or, as Justice Stewart remarked in *Jacobellis v. Ohio*, “I know it when I see it.”¹²⁰ Justice Stewart also remarked that obscene speech does not easily lend itself to an objective definition, and, therefore, may be impossible to regulate.¹²¹

In *Roth v. United States*, the Supreme Court gave a more specific definition of obscene speech. Roth ran a New York business in the publication and sale of pornographic books and magazines.¹²² He was convicted under a federal statute for mailing obscene advertisements and an obscene book.¹²³ The Court reaffirmed that “obscenity is not within

112. *Id.*

113. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

114. *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 541-42 (1980).

115. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977).

116. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

117. *See, e.g., Roth v. United States*, 354 U.S. 476, 485 (1969).

118. *See Chaplinsky*, 315 U.S. at 572.

119. *See Roth*, 354 U.S. at 487.

120. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

121. *Id.* at 197 (trying to define what may be indefinable).

122. *Roth v. United States*, 354 U.S. 476, 479 (1957). In the companion case to *Roth*, *Alberts v. California*, 354 U.S. 476 (1957), the petitioner was convicted of keeping for sale obscene material and publishing advertisements of that material.

123. *See id.*

the area of constitutionally protected speech or press.”¹²⁴ The Court stated, “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties. . . .”¹²⁵ The Court held that “[o]bscene material is material which deals with sex in a manner appealing to prurient interest.”¹²⁶ Prurient is defined as “arousing or appealing to an obsessive interest in sex.”¹²⁷ Material that provokes only normal, healthy sexual desire is not obscene.¹²⁸ Sex is not the same as obscenity.¹²⁹ The test for whether material is obscene under *Roth* is “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”¹³⁰

In *Memoirs v. Massachusetts*, a plurality opinion with only three justices supporting, the Supreme Court first articulated three elements which constitute obscenity. The case involved the adjudication that the book, *Memoirs of a Woman of Pleasure* (more well known in the popular mind as *Fanny Hill*), written by John Cleland in 1750, was obscene.¹³¹ The three elements that must be established in order for speech to constitute obscenity and lose its First Amendment protections are: (1) the dominant theme of the material taken as a whole appeals to the prurient interest in sex, (2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (3) the material is utterly without redeeming social value.¹³²

The Supreme Court revisited the *Memoirs* test of obscenity seven years later in *Miller v. California*.¹³³ The appellant in that case was convicted of a misdemeanor, under California Penal Code 311.2(a), for knowingly distributing obscene materials in his mass mail advertising of “adult” books for sale.¹³⁴ He sent unsolicited brochures advertising his books and films.¹³⁵ One such brochure went to a Newport Beach,

124. *See id.* at 485.

125. *See id.* at 484.

126. *See id.* at 487.

127. WEBSTER’S II NEW COLLEGE DICTIONARY 892 (1995).

128. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

129. *See Roth*, 354 U.S. at 487.

130. *See id.* at 488.

131. *See* *Memoirs v. Massachusetts*, 383 U.S. 413, 415 (1966) (plurality opinion).

132. *See id.* at 418.

133. *Miller v. California*, 413 U.S. 15 (1973).

134. *See id.* at 16-17.

135. *See id.*

California restaurant, and was read by the manager and his mother who in turn filed a complaint with the local authorities.¹³⁶ The brochure advertised the books *Intercourse*, *Man-Woman*, *Sex Orgie Illustrated*, *An Illustrated History of Pornography*, and the film *Marital Intercourse*.¹³⁷ The Supreme Court, in upholding the conviction, stated that states have a legitimate interest in regulating obscene material when the methods of distribution possess the potential to offend unwilling recipients or may risk exposure to minors.¹³⁸ Chief Justice Warren Burger, writing for the majority, proffered a three-prong test that became known as the *Miller* test to define obscene speech. The test is: (1) whether the average person, applying contemporary community standards, would find that the work taken as a whole, appeals to a prurient interest in sex; (2) whether the work depicts or describes sexual conduct in a patently offensive manner; and (3) whether “the work taken as a whole, lacks substantial literary, artistic, political or scientific value.”¹³⁹ The Chief Justice observed¹⁴⁰ that “to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”¹⁴¹

The Court established a community standard in which to apply these three criteria in lieu of a national standard.¹⁴² What constitutes obscene material is a question of fact for a jury.¹⁴³ A jury is to apply contemporary community standards to judge the impact of the material in question on an average person, not as to a sensitive person.¹⁴⁴ Thus reasoning why should the Bible Belt judge what is obscene or indecent

136. *See id.*

137. *See id.*

138. *See id.* at 18-19. For further support on the state's interest in regulating obscene material, *see also Roth v. United States*, 354 U.S. 476, 502 (1957); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968); *Redrup v. New York*, 386 U.S. 767, 769 (1967); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964); *Rabe v. Washington*, 405 U.S. 313, 317 (1972); *United States v. Reidel*, 402 U.S. 351, 360-62; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949); and *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944).

139. *Miller*, 413 U.S. at 24.

140. Chief Justice Burger further noted that in terms of the First Amendment “the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.” *Id.* at 25.

141. *Id.* at 34.

142. Justice Douglas dissented from the community standards criteria stating, “If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays [it], then a vague law has been made specific.” *Id.* at 38.

143. *See id.* at 30.

144. *See id.* at 33.

by Pre-Mayor Giuliani Times Square standards. The Court specifically said that “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”¹⁴⁵ The Court went on to define as indecent speech, thereby attempting to limit the reach of the long arm of puritanical prosecutors, that which is not completely devoid of “social, literary, artistic, political or scientific value.”¹⁴⁶ This aims to prevent the scope of obscenity from swallowing whole the works of D.H. Lawrence and James Joyce, among others.

The Supreme Court in *Paris Adult Theater I v. Slaton*, decided on the same day as *Miller*, expanded upon the concept of the legitimate state interest in the regulation of pornography. In that case, the petitioners, two Atlanta, Georgia movie theaters specializing in the showing of “adult” films, were subject to civil complaints in violation of Georgia Code annotated 26-2101 for showing the allegedly obscene films, *Magic Mirror* and *It All Comes out in the End*.¹⁴⁷ The Court rejected the argument that obscene films acquire the protection of the First Amendment when they are shown exclusively to a consenting adult audience.¹⁴⁸ The protection of minors and nonconsenting adults who may be offended by such materials are not the only legitimate state interests in regulating pornography.¹⁴⁹ The state has an interest in limiting the growth of the commercial porn industry.¹⁵⁰ Other state interests at stake are the quality of life of individuals in the community, the environment of the community, and the tone of commerce and public safety.¹⁵¹ However, the state may not prohibit the mere possession of obscene materials by an adult.¹⁵² They just may do everything in their power to obstruct its path into willing hands.

B. Mailboxes

The United States Supreme Court has laid the contours of the applicability of the First Amendment to an individual’s postal mailbox. The Court has held that a mailbox, despite its nature as property of the

145. *Id.* at 32.

146. *Id.* at 25.

147. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 50-51 (1973).

148. *See id.* at 57.

149. *Id.*

150. *See id.*

151. *See id.* at 88.

152. *See Stanley v. Georgia*, 394 U.S. 557, 567 (1969).

federal government, is not a public forum. The government may regulate its use such as requiring only stamped materials to be placed within it. Thus, the government may pass reasonable regulations for mailboxes.

The government may not enact content based restrictions on an individual's access to material through the mails. *Lamont v. Postmaster General* was a collection of cases challenging the constitutionality of section 305(a) of the Postal Service and Federal Employees Salary Act of 1972 that required the Postmaster General to detain and deliver, only upon the addressee's request, unsealed foreign mailings of "communist political propaganda."¹⁵³ It was enforced by ten to eleven screening points in the postal system.¹⁵⁴ Unsealed mail arriving from foreign countries was checked. When identified as communist political propaganda, the post office would send a card to the addressee stating that the post office was in possession of the material, and that the addressee had twenty days to respond or it would be disposed of.¹⁵⁵ The Supreme Court held the act to be unconstitutional. The law imposed upon the addressee an affirmative obligation that limited his First Amendment right to receive such literature.¹⁵⁶ The law required an overt act by the U.S. government that served as an unfettered limitation on the addressee's First Amendment right to receive it.¹⁵⁷

However, the government may enact reasonable restrictions on the use of mailboxes that are content neutral. In *U.S. Postal Service v. Greenburgh Civic Associations*, 18 U.S.C. § 1725, which prohibits the deposit of unstamped "mailable material" in a post box approved by the U.S. Postal Service with violations punished by fine, was challenged¹⁵⁸ by a local civic association because they had been fined for distributing leaflets in this manner. The Supreme Court held that the law was not unconstitutional because the regulation was content neutral.¹⁵⁹ When a mailbox is designated as an "authorized depository" it becomes an essential part of the United States Postal Service system of nation-wide delivery and receipt of the mail.¹⁶⁰ The designation of the mailbox as an

153. *Lamont, DBA Basic Pamphlets v. Postmaster General*, 381 U.S. 301, 307 (1965).

154. *See id.* at 303.

155. *See id.*

156. *See id.* at 305.

157. *See id.*

158. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

159. *Greenburgh*, 453 U.S. at 114.

160. *See id.* at 128.

“authorized depository” does not transform it into a “public forum” with a guarantee of First Amendment rights.¹⁶¹

C. *Obscene UCE*

There is not a First Amendment right to conduct business in obscene materials and use the mails for such purposes.¹⁶² Obscenity is not protected speech under the First Amendment.¹⁶³ A law that would regulate pornographic UCE to a point that it would deter its transmission to unwilling recipients and minors would pass constitutional scrutiny. However, such a law could only apply to obscenity, and not to material possessing some social purpose. In *Bolger v. Youngs Drug Products Corp.*, 39 U.S.C. § 3001(e)(2), which prohibited the mailing of unsolicited advertisements for contraceptives, including pamphlets promoting the product, venereal disease and family planning, was challenged.¹⁶⁴ Holding the statute to be unconstitutional, the Supreme Court reasoned “we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended.”¹⁶⁵

In *Blount v. Rizzi*, the constitutionality of 39 U.S.C. § 4006, the Postal Reorganization Act, was challenged.¹⁶⁶ The Act allowed the Postmaster General, with administrative hearings, to bar mail and postal orders for the sale of obscene materials.¹⁶⁷ As applied, the procedures violated the First Amendment because they did not include safeguards for protected speech.¹⁶⁸ The government “is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.”¹⁶⁹ Therefore, a regulation of pornographic UCE would have to be narrowly tailored to strictly obscene material.

The courts have upheld regulations restricting the mass mailing of obscene advertisements in the mails. *Rowan v. United States Post Office Department* was a challenge to Title III of the Postal Revenue and Federal Salary Act of 1967.¹⁷⁰ The Act allowed an individual to require a

161. *See id.*

162. *See* United States v. Reidel, 402 U.S. 351, 356 (1971).

163. *See id.*

164. *Blount, Postmaster General v. Rizzi, DBA The Mail Box*, 463 U.S. 60 (1983).

165. *See id.* at 72.

166. 400 U.S. 410 (1971).

167. *See id.* at 411-12.

168. *See id.* at 416.

169. *See id.* (quoting *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961)).

170. 397 U.S. 728 (1970).

distributor of obscene literature or “matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative”¹⁷¹ to remove his name from its mailing list, and cease all mailings to that household.¹⁷² The Supreme Court had already recognized the right of a homeowner to bar solicitors from entering his property.¹⁷³ The Postmaster General, after notice from the individual, was required to issue an order directing the sender and his agents from any further mailings. In addition, the sender was required to delete the addressee’s name from the list, and also delete it from lists sold by the sender.¹⁷⁴ Section 4009 was a response to public and congressional concern with the increasing use of the mail to distribute unsolicited advertisements that recipients found to be offensive because of their “lewd and salacious” character.¹⁷⁵ Mail was discovered to have been sent to minors, as well as adults who did not want it.¹⁷⁶ A declared objective of Congress was to protect minors and the privacy of homes from obscene material, and to place the judgment¹⁷⁷ of what is and is not offensive in the hands of the addressee.¹⁷⁸ The plaintiffs charged that the statute violated their right to communicate with homeowners under the First Amendment.¹⁷⁹ The Supreme Court “categorically reject[ed] the argument that a vender has a right under the Constitution or otherwise to send unwanted material into the home of another.”¹⁸⁰ The Court held that the “mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.”¹⁸¹

In *Pent-R-Books, Inc. v. United States Postal Service*, the United States District Court for the Eastern District of New York upheld the Goldwater Amendment to the Postal Reorganization Act of 1970 that places two affirmative duties to senders of “sexually oriented advertisements.”¹⁸² First, the sender must purchase from the United

171. *See id.* at 729-30.

172. *See id.* at 729.

173. *See id.* at 737 (citing *Martin v. City of Struthers*, 319 U.S. 141 (1943)).

174. *See id.* at 730.

175. *See id.* at 731.

176. *See id.*

177. The Supreme Court made a note of this argument in their decision: “In today’s complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.” *Id.*

178. *See id.*

179. *See id.* at 735.

180. *See id.* at 738.

181. *See id.* at 736-37.

182. 328 F. Supp. 297 (E.D.N.Y. 1971).

States Postal Service a monthly list of individuals who have stated in writing that they do not wish to be sent materials of a sexually explicit nature, and, subsequently, the senders must remove those names from their lists.¹⁸³ Second, the sender must place a mark, or notice, on the envelope of his advertisement as prescribed by the Post Office¹⁸⁴ to identify it as containing sexually explicit content. The term “sexually oriented advertisement” was defined under the Amendment as “any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism, or masochism, or any other erotic subject directly related to the foregoing.”¹⁸⁵ The statute was intended to implement congressional findings that offensive sexually-oriented advertisements were so massive that individuals could not protect their privacy without Federal intervention.¹⁸⁶ Some of the other congressional findings for the Goldwater Amendment are especially relevant to the controversy surrounding pornographic UCE. The matter is “profoundly shocking and offensive to many persons who receive it, unsolicited, through the mails.”¹⁸⁷ Furthermore, “that such use of the mails constitutes a serious threat to the dignity and sanctity of the American home and subjects many persons to an unconscionable and unwarranted intrusion upon their fundamental personal right to privacy”;¹⁸⁸ “that such use of the mail reduces the ability of responsible parents to protect their minor children from exposure to material which they as parents believe to be harmful to the normal and healthy ethical, mental, and social development of their children”;¹⁸⁹ and “that the traffic in such offensive advertisements is so large that individual citizens will be helpless to protect their privacy or their families without stronger and more effective Federal controls over the mailing of such matter.”¹⁹⁰ The cost of the list provided by the Post Office was less than one cent per name, a fraction of the cost of postage. The Court found that this regulation was not overly burdensome to the sender.¹⁹¹ The complaint in the case dealt with material that was not obscene under the test

183. *See id.* at 300.

184. *See id.*

185. *See id.* at 304.

186. *See id.* at 311.

187. Pub. L. 91-375 § 14(a)(1).

188. Pub. L. 91-375 § 14(a)(3).

189. Pub. L. 91-375 § 14(a)(4).

190. Pub. L. 91-375 § 14(a)(5).

191. *Pent-R-Books*, 328 F. Supp. at 311.

enunciated in *Roth*.¹⁹² The statute relates only to advertising.¹⁹³ It did not prevent an author or publisher from any market even when explicitly depicting human genitalia, sexual intercourse, acts of sadism or acts of masochism.¹⁹⁴ Commercial advertising is subject to a greater degree of regulation than other publications.¹⁹⁵ The Court observed that “[t]he fact that the books which are advertised are entitled to First Amendment protection does not mean that the mailer’s right to communicate supercedes the right of the addressee to be let alone.”¹⁹⁶ The Goldwater Amendment did not interfere with the First Amendment because it only applied to unsolicited and unwanted advertisements soliciting sexually explicit materials.¹⁹⁷ The Goldwater Amendment requires the payment of a fee for the list of names to be removed from the mailers’ lists.¹⁹⁸ However, the cost of regulation may be placed upon the industry.¹⁹⁹ The First Amendment collection of cost of licensing is permitted,²⁰⁰ though it must be incident to administrative regulation.²⁰¹

A law regulating pornographic UCE would be drawn along the same lines as the Goldwater Amendment. Bearing in mind the current technologies associated with e-mail, the ideal means is to require ISPs to have an opt-in function. In other words, users who wish to receive UCE on pornographic materials must specifically request to receive it. This could be achieved indirectly by barring spammers from sending pornographic UCE to recipients who do not wish to receive it. The recipients could include their names on an opt-out list, or the server may just install such a function. Regardless, there are strong government interests present in the regulation of pornographic UCE. One of the rationales for regulating pornography in the mail, and by zoning, is the preservation of the quality of life of unwilling recipients. This rationale is also applicable to UCE. The average suburbanite does not wish to see a neon “girls, girls, girls” sign from his window, nor does someone wish to see “wet and horny” in his or her in-box.

192 . *See id.* at 307.

193 . *See id.*

194 . *See id.*

195 . *Banzhaf v. Fed. Communications Comm’n*, 405 F.2d 1082, 1101 (D.C. Cir. 1968).

196 . *Pent-R-Books*, 328 F. Supp. at 307 (citing *Rowan*, 397 U.S. at 736; *see also* *Breard v. City of Alexandria*, 341 U.S. 622 (1951)).

197 . *See id.* at 310.

198 . *See id.*

199 . *Charlotte, C & A.R. Co. v. Gibbes*, 142 U.S. 386 (1892); *Bronx Gas & Elec. Co. v. Maltbie*, 197 N.E. 281 (1935); *8200 Realty Corp. v. Lindsay*, 261 N.E.2d 647 (1970).

200 . *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).

201 . *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 116 (1943).

Another legal justification for the regulation of pornographic UCE is the protection of minors. The Supreme Court has stated that “[t]he State . . . has an independent interest in the well-being of its youth.”²⁰² In *Ginsberg v. New York*, the Supreme Court had to rule on the constitutionality of a New York criminal obscenity statute that prohibited the sale of obscene material to minors, under the age of seventeen, based on a standard of what is obscene to the average minor, not the average adult.²⁰³ A Long Island restaurant owner and news agent sold a magazine with nude photographs to a sixteen-year-old boy.²⁰⁴ The magazine showing only nudity was not considered obscene by adult standards.²⁰⁵ The New York Court of Appeals in *Bookcase, Inc. v. Broderich*, whose reasoning was adopted by the Supreme Court,²⁰⁶ stated:

[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.²⁰⁷

The Court upheld the statute because under its *Butler v. Michigan*²⁰⁸ decision the material could still be sold to adults.²⁰⁹ A law on pornographic UCE, as discussed above, would still either grant access to adults, or UCE would be based regardless of conduct on a server.

V. CONCLUSION

A law to limit the dissemination of unsolicited commercial e-mail that advertises pornography would pass constitutional scrutiny so long as it was narrowly tailored to apply to obscene materials only. Obscenity is not constitutionally protected speech under the First Amendment. E-mail is analogous to postal mail; moreover, neither is considered to be a public forum for First Amendment analysis. The regulation of pornographic bulk mail by the U.S. Post Office is analogous to the potential regulation of pornographic e-mail. The Supreme Court has held that there is no right to send advertisements of obscene materials through the mail to unwilling recipients.

202 . *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

203 . *See id.* at 631.

204 . *See id.*

205 . *See Redrup v. New York*, 386 U.S. 767 (1967).

206 . *Ginsberg*, 390 U.S. at 636.

207 . 18 N.Y.2d 71, 75, 218 N.E.2d 668, 671.

208 . *Butler v. Michigan*, 352 U.S. 380 (1957).

209 . *Ginsberg*, 390 U.S. at 634.

APPENDIX

SAMPLES OF UNSOLICITED COMMERCIAL E-MAIL
ADVERTISING PORNOGRAPHIC WEB SITES

A9945@TALK21.COM	THE HOTTEST GIRLS ON THE NET
@MSN.COM	THIS COULD BE LOVE!
IWLynn21136@SITES-IN . . .	GENTLEMEN, YOUR PRAYERS HAVE BEEN ANSWERED!!
MARY691AAAAAAAAAAAAA@M . . .	DO YOU LIKE SEX?
MDFHJVID@YAHOO.COM	ARE YOU WATCHING?
H17812@COVENTRYFAN.NET	TEEN GIRLS WANT YOU
JENNY83193@HOTMAIL.COM	HI MY NAME IS JENNY
SUSAN2@HUD.AC.UK	DO YOU LIKE SEX?
TEENNYMPOS(SIC)@HOTMAIL.COM	I NEED TO SHOW YOU MY . . .
PAIGE691@SOTON.AC.UK	ARE YOU HORNY?
@MSN.COM	ARE YOU THERE?
I3242@WRITEME.COM	TEEN GIRLS WANT YOU
CJDF87@YAHOO.COM	TRY THE VIRTUAL ADULT LIBRARY
F93@DERBYFAN.NET	TEEN GIRLS WANT YOU
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