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## The CAN-SPAM Act of 2003: Is Congressional Regulation of Unsolicited Commercial E-Mail Constitutional?

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### I. INTRODUCTION

With the advent of the internet, commercial advertisers have seized the opportunity to exploit the new e-mail medium, one of the easiest, least expensive, and least regulated means of reaching a captive audience. In 1999, 2.2 billion junk e-mail messages were sent worldwide daily, totaling 803 billion pieces of junk or spam e-mail sent each year.<sup>2</sup> Today, spam constitutes more than 40 percent of all e-mail traffic on the internet, and it is anticipated that in the near future, that number will exceed 50 percent.<sup>3</sup> Furthermore, according

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2. The term "spam" reportedly came to be used in connection with online activities in the mid-1980's. The word arose out of a skit by Monty Python, which depicted a restaurant in which every meal contained spam, a meat product that many people apparently consider unpalatable. *See State v. Heckel*, 24 P.3d 404, 406 (2001). At first the term "spam" was used to refer to articles posted on Usenet newsgroups or other discussion forums in violation of certain forum policies or other rules or customs. *See Hormell Foods Corp., SPAM and the Internet*, at [http://www.spam.com/ci/ci\\_in.htm](http://www.spam.com/ci/ci_in.htm) (last visited on May 5, 2004) (defining spam). Later, the term came to be used for various types of unwanted e-mail messages, usually advertisements sent out in large quantities. *See id.*

3. *See* Legislative Efforts to Combat Spam: Joint Hearing Before the Subcomm. On Comm., Trade and Consumer Protection and the Subcomm. On Telecomm. and the Internet of the Comm. On Energy and Comm. House of Rep. [hereinafter Legislative Efforts to Combat Spam Hearing], 108th Cong. 12 (2003) (statement of Rep. Rick Boucher, Member, Subcomm. On Telecomm. and the Internet); Associated Press, Lawmakers and Technology Industry Call for National

(85)

to the Wall Street Journal and Reuters, 50 percent of children with e-mail accounts receive e-mail with pornography, and under current law, parents are virtually powerless to stop their children from receiving inappropriate and disturbing solicitations.<sup>4</sup> This rampant abuse of the internet by bulk commercial solicitors has led to a public outcry for action.<sup>5</sup>

On December 16, 2003, the President signed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act, the Act) into law.<sup>6</sup> The CAN-SPAM Act took effect on January 1, 2004.<sup>7</sup> This is the first federal law to attack the wave of spam that has overwhelmed computer in-boxes and cost businesses billions of dollars a year. Congress has tried numerous times in recent years to approve anti-spam legislation, but none of the over thirty proposals have made it through both houses.<sup>8</sup> Congress' efforts repeatedly have stalled over concerns about what is technologically possible and legally enforceable.

This article is one of the first to analyze the provisions of the CAN-SPAM Act in light of anticipated First Amendment challenges. The Act has yet to be challenged on constitutional grounds as it has only been in effect since January 1, 2004. However, a First Amendment challenge is imminent.<sup>9</sup>

The article contends that the CAN-SPAM Act will be upheld as constitutional in light of inevitable First Amendment challenges. Specifically, the article presents the likely First Amendment

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Law to Control Junk E-mail at

[www.bayarea.com/mld/mercurynews/business/5913848.htm](http://www.bayarea.com/mld/mercurynews/business/5913848.htm) (last visited Jan. 26, 2004); Bruce E.H. Johnson, *Is There a Constitutional Right to Bombard the Public With Penis Enlargement Proposals?*, 21 SUM COMM. LAW. 3, 3-4 (2003).

4. See Legislative Efforts to Combat Spam Hearing, 108th Cong. at 12 (statement of Rep. Jan Schakowsky, Member, House Comm. On Energy and Commerce); see also Christopher Scott Maravilla, *The Feasibility of a Law to Regulate Pornographic, Unsolicited, Commercial E-Mail*, 4 TUL. J. TECH. & INTELL. PROP. 117, 118-19 (2002) (stating that "[a]n average hotmail account looks like the red light district in Amsterdam").

5. See Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. 175, 176 (1999) (noting that unhappy UCE recipients turn to their ISPs for help and in turn ISPs turn to government for some form of regulation).

6. The CAN-SPAM Act of 2003, Pub. L. No. 108-87, 117 Stat. 2699 (2004).

7. *Id.*

8. See David E. Sorkin, *Spam Laws*, at

<http://www.spamlaws.com/federal/index.html> (last visited Dec. 9, 2003) (explaining that none of over 30 federal anti-spam bills were enacted).

9. See Matt Hines, *First Complaint Filed Under Can-Spam*, April 29, 2004, at <http://zdnet.com.com/2100-1105-5201906.html?tag=sas.email> (last visited May 5, 2004) (noting that Justice Department filed criminal complaint against four Detroit-area men under Can-Spam Act, marking first case under legislation)

challenges to the Act's labeling requirements for spam, the Act's creation of a national do-not-e-mail registry, and the Act's increased labeling requirements for sexually oriented unsolicited commercial e-mail (UCE). The article then concludes that the Act's provisions will pass constitution scrutiny when analyzed under the First Amendment's commercial speech doctrine. Although these provisions of the CAN-SPAM Act are likely to be upheld as constitutional, the article argues that the Act's do-not-e-mail registry will not be effective in reducing spam or locating senders of illegal UCE. The sheer breadth and physical makeup makes location of senders of illegal UCE impossible.

Part II of the article gives a brief overview of the CAN-SPAM Act. Part III discusses the current problem of junk e-mail. Part IV provides the legal background of the court's commercial speech doctrine. Part V analyzes the constitutionality of the CAN-SPAM Act's requirements for labeling regular UCE and the creation of a do-not-e-mail list. Part VI analyzes whether the CAN-SPAM Act may constitutionally require UCE containing sexually explicit material to be labeled further as a sexually explicit UCE. Part VII concludes that the labeling and do-not-e-mail provisions of the CAN-SPAM Act of 2003 will most likely be upheld as constitutional in the face of First Amendment challenges.

## II. OVERVIEW OF THE CAN-SPAM ACT OF 2003

The CAN-SPAM Act of 2003 requires unsolicited commercial e-mail messages to be labeled (though not by a standard method) and to include opt-out instructions and the sender's physical address. The law prohibits the use of deceptive subject lines and false headers in such messages. It pre-empts state laws that require labels on unsolicited commercial e-mail or prohibit such messages entirely, but does not affect provisions that address merely falsity and deception. Furthermore, the CAN-SPAM Act includes a provision authorizing the FTC to establish a national do-not-e-mail registry of addresses of persons and entities who do not wish to receive unsolicited commercial e-mail messages. The bill imposes both civil and criminal penalties for various illegal spammer tactics and non-compliance with opt-out and do-not-e-mail requests.

## III. THE UCE PROBLEM

The principal reasons for the explosive growth of spam include the ease with which senders can transmit large quantities of e-mail and

the similar ease with which spammers can conceal their identities as the source of this junk mail.<sup>10</sup> The internet allows senders to transmit virtually unlimited quantities of advertising messages at very low costs.<sup>11</sup> Therefore, spammers have every incentive to send out as many e-mails as possible, even if virtually no recipient wants or responds to the promotions.<sup>12</sup>

Spammers do not bear the costs of processing, sorting, and delivering e-mails; instead, it is the recipients and their internet service providers (ISPs) who must absorb the costs of managing the huge volume of unwanted mail.<sup>13</sup> The ISPs used for transmitting spam must deal with the problem of increased bandwidth, requiring the expense of large amounts of money on hardware to handle the increased volume of e-mail sent and stored on a daily basis.<sup>14</sup> Floods of e-mails from remote computers can cripple ISP servers for hours.<sup>15</sup> Service providers must also hire additional administrative staff to register and to handle customer complaints.<sup>16</sup> Ultimately, the added expenses incurred by the ISPs are passed onto the customers in the form of increased hourly or monthly charges.<sup>17</sup>

Additionally, technical protocols used to send e-mails on the internet can be manipulated by spammers, both to conceal their identities as spam senders and to conceal the volume and scope of their e-mailing activities.<sup>18</sup> The open nature of the internet allows spammers to avoid accountability for their activities and to

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10. See Legislative Efforts to Combat Spam Hearing, 108th Cong. at 37-38 (2003) (prepared statement of Charles Curran, Assistant General Counsel, America Online, Inc.).

11. See *id.* at 38; see also Maravilla, *supra* note 3, at 120 (explaining that one reason UCE is so popular is because it is inexpensive to send). 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. See *id.*

12. See Maravilla, *supra* note 3, at 120.

13. See Legislative Efforts to Combat Spam Hearing, 108th Cong. at 37-38 (2003) (prepared statement of Charles Curran, Assistant General Counsel, America Online, Inc.).

14. See *id.*; *Written Testimony on Behalf of the Coalition Against Unsolicited Commercial E-mail, Ray Everett-Church Before U.S. Senate Commerce Subcommittee.*, 1998 WL 325434 (June 17, 1998) (noting that spam uses large amounts of bandwidth with no added customers forcing small ISPs to either raise rates, swallow costs, or provide slower services).

15. See Legislative Efforts to Combat Spam Hearing, 108th Cong. at 37-38 (2003) (prepared statement of Charles Curran, Assistant General Counsel America Online, Inc.).

16. See Toliopoulos, *supra* note 5, at 176.

17. See *id.*

18. See *id.* (noting that to avoid filters, spammers will relay off mail servers of third parties in order to disguise e-mails' origins, or spammers will forge headers).

undermine and to frustrate the attempts of consumers and ISPs to filter out or block their junk mail transmissions.<sup>19</sup>

#### IV. DEVELOPMENT OF THE FIRST AMENDMENT'S COMMERCIAL SPEECH DOCTRINE

The First Amendment to the U.S. Constitution provides that “Congress shall make no law. . . abridging the freedom of speech. . . .”<sup>20</sup> However, not all speech is automatically protected by the First Amendment. Courts must attempt to balance governmental interest against intrusion on speech to determine whether in light of the purposes of protecting speech, the First Amendment can allow the intrusion. First Amendment restrictions on speech have developed on a case-by-case basis.

The Supreme Court has created a hierarchy of speech, determining that certain types of speech are more essential than other types in the furtherance of our democracy, therefore receiving greater protection under the First Amendment.<sup>21</sup> At the top of this hierarchy is political speech, which is subject to minimal regulation.<sup>22</sup> The bottom of the hierarchy includes types of speech designated by the courts to be unprotected, including language that incites illegal activity, speech determined to be “fighting words,” and forms of communicated obscenity.<sup>23</sup> Government may freely regulate unprotected forms of speech, because the communications have little or no value.<sup>24</sup> In the middle of the court’s hierarchy is partially protected speech, which enjoys less protection than political speech.<sup>25</sup> This middle category includes sexually explicit non-obscene speech and commercial speech.<sup>26</sup>

Commercial speech regulation has gone through drastic changes

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19. *See id.* (noting that in AOL’s experience, most spam is sent using such evasive, “outlaw” transmission techniques).

20. U.S. CONST. amend. I.

21. *See* Ruth Ellen Smalley, *Will a Lawsuit Keep the Cyberdocs Away? Modern Theories of Medical Malpractice as Applied to Cybermedicine*, 7 RICH. J.L. & TECH. 29, 32 (2001)

22. *See id.* at 33.

23. *See* F. Jay Dougherty, *All the World’s Not a Stooge: the “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art.*, 27 COLUM. J.L. & ARTS 1, 36 (2003) (noting that few categories of content and speech occurring in certain settings are subject to specialized analyses or less rigorous balancing analyses).

24. *See id.*

25. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 563 (1980) (noting that the Constitution accords lesser protection to commercial speech than other constitutionally guaranteed expression).

26. *See id.*

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since its inception. In 1942, the Supreme Court held in *Valentine v. Chrestensoen*<sup>27</sup> that the First Amendment did not protect commercial speech.<sup>28</sup> Although the court found that states may not regulate the manner in which an individual communicates information and opinions in a public forum, the court held that the First Amendment “imposes no restraint on government as respects purely commercial advertising.”<sup>29</sup>

The Court reaffirmed its position in *Valentine* until 1976, when in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>30</sup> it concluded that commercial speech received First Amendment protections.<sup>31</sup> Prescription medication users challenged a Virginia statute that prohibited pharmacists from advertising medication prices.<sup>32</sup> They claimed that the First Amendment prohibited the government from disrupting the flow of information from pharmacists willing to provide the information to consumers who wished to receive it.<sup>33</sup> Weighing the asserted state interest in maintaining a high degree of professionalism and the protection of its citizens against First Amendment concerns, the Court held the Virginia statute unconstitutional.<sup>34</sup> However, the Court noted that despite its holding, some forms of commercial speech regulation as to time, place, or manner and prohibitions on false and misleading communication were still permissible.<sup>35</sup>

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court expanded on the idea that the government may regulate some commercial speech.<sup>36</sup> In *Central Hudson*, a utility

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27. 316 U.S. 52 (1942).

28. *See id.* at 54 (holding that states may not unduly burden dissemination of information in public forums).

29. *Id.* (explaining that while First Amendment protects dissemination of information in public forums, First Amendment does not protect commercial speech).

30. 425 U.S. 748 (1976).

31. *See id.* at 758-59 (reversing its stance that commercial speech receives no protection under First Amendment).

32. *Id.* at 753. This raised a standing issue; however, the Court declared that when the First Amendment was implicated, “the protection afforded is to the communication, to its source and to its recipients both.” *Id.* at 756.

33. *Virginia State Board of Pharmacy*, 425 U.S. at 754.

34. *See id.* at 766-770.

35. *See id.* at 770-71 (noting that time, place, or manner test for restrictions on speech requires that such restrictions be justifiable without reference to content of regulated speech, that restrictions be narrowly tailored to serve significant government interest, and that they leave ample alternative channels of communication open to information regulated).

36. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (providing four-prong analysis that has developed in commercial speech cases).

company challenged a regulation of the Public Service Commission of the State of New York that completely prohibited any promotional advertising by electrical utility companies.<sup>37</sup> The Court applied intermediate scrutiny, somewhere between the “least-restrictive means” test used in some cases involving freedom of the press and the “rational basis” test used in Fourteenth Amendment equal protection analysis, in making a determination whether a regulation of commercial speech offends the First Amendment.<sup>38</sup>

1. *Central Hudson Test.*

In *Central Hudson*, the Court sought to expand its commercial speech doctrine under the First Amendment by applying an intermediate scrutiny test when reviewing restrictions on commercial speech, the speech that best describes commercial e-mail.<sup>39</sup> The Court established a four-prong test to determine whether commercial speech enjoys First Amendment protections.<sup>40</sup> First, the Court makes a finding of whether the commercial speech concerns a lawful activity, and whether the commercial speech misleads customers.<sup>41</sup> Second, the court determines whether the government has a substantial interest in regulating the commercial speech.<sup>42</sup> If these first two prongs yield positive answers, the court then must apply the last two prongs.<sup>43</sup> Under the third prong, the court ascertains “whether the regulation directly advances the governmental interest asserted.”<sup>44</sup> Fourth, the court analyzes whether the governmental regulation operates in the least restrictive manner possible.<sup>45</sup> Together, the final two factors in the *Central Hudson* analysis require

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37. *See id.*

38. *See id.* at 564.

39. *See* Jan H. Samoriski, *Unsolicited Commercial E-mail, the Internet and the First Amendment: Another Free Speech Showdown in Cyberspace?* THE JOURNAL OF BROADCASTING AND ELECTRONIC MEDIA, Vol. 43, No.4, at <http://www.umd.umich.edu/casl/hum/comm/spam.html> (last visited on January 10, 2004).

40. *See Cent. Hudson Gas & Elect. Corp.*, 447 U.S. at 566 (noting that test essentially resembles intermediate scrutiny, which requires laws to be substantially related to important government interest).

41. *See id.* (noting that to fall within protection of First Amendment, commercial speech at least must concern lawful activity and not be misleading).

42. *See id.*

43. *See id.* (noting that if commercial speech concerns lawful activity, is not misleading and governmental interest is substantial, then next prong of test must be applied).

44. *See Cent. Hudson Gas & Elect. Corp.*, 447 U.S. at 566.

45. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (noting that court must determine whether regulation “is not more extensive than . . . necessary to serve governmental interest”).

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that there be a “fit between the legislature’s ends and the means chosen to accomplish those ends.”<sup>46</sup>

The government’s interest in regulating commercial speech is “substantial” if the government is able to show that the harms it seeks to prevent are real, and that the restriction will in fact alleviate them to a material degree.<sup>47</sup> In order to show that the regulation is not more extensive than necessary, the regulation must be narrowly drawn, but does not have to be the least restrictive means.<sup>48</sup> The government must also demonstrate that there is a “fit” between the means and ends chosen to accomplish them.<sup>49</sup> Other alternatives are relevant in determining whether the “fit” between the means and ends is reasonable.<sup>50</sup>

The Court in its adoption of the *Central Hudson* test has expressed a willingness to extend First Amendment protection to commercial speech and has provided courts with standards for judging restrictions on that type of speech. Therefore, the CAN-SPAM Act’s provisions restricting commercial speech must be judged against these standards.

## V ANALYSIS OF THE CONSTITUTIONALITY OF THE CAN-SPAM ACT OF 2003

### *1. Prong One: Commercial Speech Must Concern Lawful Activity and May Not be Misleading*

The most common problem with UCE is that advertisers often purposefully mislead e-mail recipients. Senders of UCE often include a misleading subject line in their e-mail, deceiving the e-mail recipient into believing that someone he or she knows has sent him or her a personal message. This deception prevents recipients from recognizing UCE and impedes the ISPs filters’ ability to identify the source of disruption to their communications networks. Similarly, some spammers provide false header information in the UCE, disguising the source, destination, and routing information of the UCE.<sup>51</sup> Some spammers also intentionally misrepresent domain

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46. *Unites States v. Edge Broad. Co.*, 509 U.S. 418, 427-28 (1993).

47. *See Edenfield v. Fane*, 507 U.S. 761, 761-62 (1993).

48. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 476-77 (1989).

49. *See id.* at 480.

50. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

51. For example, a spammer used the Hotmail domain name to solicit Hotmail’s subscribers, and falsely designate the UCE’s point of origin. *See Hotmail Corp v.*

names or web addresses in an e-mail.<sup>52</sup> This prevents the e-mail recipient from directly contacting the spammer to voice any displeasure.<sup>53</sup> An increasing number of senders of unsolicited commercial electronic mail purposefully disguise the source of such mail so as to prevent recipients from responding to such mail quickly and easily.<sup>54</sup> Some UCE advertisers use a dummy return address to disguise their true e-mail addresses, thus preventing any backlash against the advertisers.<sup>55</sup>

The CAN-SPAM Act prohibits any person from sending a message that contains a materially false or materially misleading header.<sup>56</sup> Furthermore, the Act makes it unlawful for any person to send an e-mail where the sender knows or “knowledge [is] fairly implied on the basis of objective circumstances” that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.<sup>57</sup> Also, the Act imposes sanctions on persons sending UCE from addresses which they have registered using false information which does not accurately identify themselves.<sup>58</sup>

The first prong of the *Central Hudson* test requires a court to review whether commercial speech, in this case the UCE, receives protection under the First Amendment.<sup>59</sup> To receive First Amendment protection, the commercial speech must involve lawful activity and must not be misleading.<sup>60</sup> Because the UCE techniques

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Van \$ Money Pie, Inc., 1998 WL 388389, (N.D.Cal.,1998). The forged sender addresses caused all customer complaints regarding the spam to “bounce back” to Hotmail. *See id.*

52. *See* The CAN-SPAM Act of 2003, Pub. L. No. 108-187, §5(a)(3)(A), 117 Stat. 2699 (2004) (requiring inclusion of return address from where message was received).

53. *See id.*

54. *See id.*

55. *See id.* (noting that more experienced spam generators routinely use dummy return addresses to bounce replies). Because mass e-mailings contain thousands of messages, many of these messages will inevitably return to the dummy address as undeliverable and have the potential of clogging the server and interrupting the server maintained by that Internet service provider. *See* Scot M. Graydon, *Much Ado About Spam: Unsolicited Advertising, the Internet, and You.*, 32 *ST. MARY'S L.J.* 77, 111 (2000) (arguing that requirement of return address through which receiver can contact advertiser advances governmental interest in protecting citizenry from unwanted advertising materials).

56. *See* CAN-SPAM ACT §4(a).

57. *See id.* §5(a)(2).

58. *See id.* at §4(a).

59. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n., 447 U.S. 557, 567-68 (1980).

60. *See id.* at 563-64.

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prohibited by the CAN-SPAM Act may mislead the recipient, such advertising strategies fail the first prong of the *Central Hudson* test. Since the First Amendment will not protect UCE, such advertisements are subject to government regulation under the CAN-SPAM Act.

Since fraudulent and misleading UCE is not protected as commercial speech under the First Amendment, courts have approved civil and criminal actions against senders of false and misleading UCE under other common law and statutory provisions. Lawyers representing ISPs have utilized not only common law fraud and misrepresentation, but also other sections of the United States Code proscribing fraud and related activity in connection with computers. In *America Online v. Prime Data Systems, Inc.*,<sup>61</sup> senders of UCE were enjoined from sending UCE and forced to pay damages when they counterfeited America Online's (AOLs) registered trade and service mark "AOL" to make the UCE appear as if it came from within AOL's system.<sup>62</sup> The court granted AOL's requested relief, because the defendants infringed plaintiff's registered trade and service marks both by diluting the marks and by falsifying the origin of the e-mail messages in violation of the Lanham Act and the Computer Fraud and Abuse Act.<sup>63</sup>

Furthermore, the Federal Trade Commission (FTC) along with the U.S. Postal Inspection Service, the Securities and Exchange Commission, and several state attorney generals have attempted to deter deceptive spamming.<sup>64</sup> Created in 2001, "Project Mailbox IV", which provides consumers with assistance on filing claims against fraudulent spammers, has helped bring hundreds of actions against individuals who use fraudulent messages in UCE intended to defraud consumers.<sup>65</sup>

## 2. Prong Two: Substantial Governmental Interest

While fraudulent and misleading UCE is unprotected commercial speech, not all UCE contains unlawful and misleading subject lines.

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61. 1998 WL 34016692 (E.D.Va. 1998).

62. *See id.* at \*4 (requiring defendants to pay compensatory damages jointly and severally in the amount of \$101,400 (computed at 130,000,000 UBE x \$.00078 per message), and punitive damages jointly and severally of \$304,200 (computed at 130,000,000 UBE x \$.00234 per message)).

63. *See id.* at \*3.

64. *See* Press Release: January 5, 2001, Federal Trade Commission (last visited Jan. 10, 2004), at <http://www.ftc.gov/opa/2001/01/mailbox.htm>.

65. *See id.*

UCE containing headers and subject lines that truthfully identify the e-mail's contents still creates problems for users, clogging inboxes and burdening individuals.<sup>66</sup> Under *Central Hudson*, “[i]f the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed.”<sup>67</sup> As a result, the government must apply the second prong of the *Central Hudson* analysis. The second prong requires a court to determine whether a substantial government interest exists.<sup>68</sup>

The CAN-SPAM Act expressly provides that Congress has a “substantial government interest in regulation of commercial electronic mail on a nationwide basis.”<sup>69</sup> The Act’s supporters base this assertion on congressional findings that the receipt of UCE results in costs to recipients who cannot refuse to accept such mail and who incur costs for storage and time spent accessing, reviewing, and discarding the mail.<sup>70</sup> Furthermore, the growth of UCE imposes significant monetary costs on providers of internet access services, businesses, and educational and nonprofit institutions which carry and receive UCE, because they can handle only a finite volume of mail without further investment in infrastructure.<sup>71</sup> Congress also makes findings that the receipt of large amounts of unwanted UCE creates a risk that wanted mail, both commercial and noncommercial, will be lost, overlooked, or discarded.<sup>72</sup> This will reduce the reliability and usefulness of e-mail to recipients. Lastly, Congress asserts that a federal law is necessary to regulate and reduce UCE, as state legislation has been unsuccessful in part, because each state imposes different standards and requirements.<sup>73</sup> Since an electronic e-mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which state statute they are required to comply.<sup>74</sup>

The congressional findings adequately satisfy the second prong of the *Central Hudson* test. Congressional findings acknowledge the costs incurred by internet users and providers, the threat of UCE to

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66. See Maureen Sirhal, *Anti-Spam Bills Debated at Hearing, in Letters*, National Journal’s Technology Daily (April 26, 2001), at <http://nationaljournal.com/pubs/techdaily/pmedition/tp010426.htm> (visited Jan. 4, 2004).

67. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

68. *See id.* at 566.

69. The CAN-SPAM Act of 2003, Pub. L. No. 108-187, §2(b)(1) (2003), 117 Stat. 2699 (2004).

70. *See id.* at §2(3).

71. *See id.* at §2(6).

72. *See id.* at §2(4).

73. *See id.* at §2(11).

74. *See* CAN-SPAM Act §2(11).

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the continued viability of the internet, and the state legislatures' inadequate attempts to regulate UCE. The CAN-SPAM Act satisfies the first two prongs of the *Central Hudson* test. Accordingly, the court must turn to the more contentious third and fourth prongs of the analysis.

*3. Prongs Three and Four: Whether the Government Regulation Directly Advances the Interest Asserted and Whether the Government Interest is Narrowly Tailored.*

The third prong of the *Central Hudson* test calls for a determination of "whether the regulation directly advances the governmental interest asserted."<sup>75</sup> The fourth prong requires that the government's interest be narrowly draw.<sup>76</sup> In order to test if the CAN-SPAM Act satisfies the third prong, a court must scrutinize closely whether the Act's substantive restrictions on senders of UCE are necessary. Specifically, the following analysis will focus on three provisions of The CAN-SPAM Act: labeling requirements for UCE; the creation of a national do-not-e-mail list; and labeling requirements for sexually oriented UCE which are different than regular UCE.

*A. Labeling*

*i) Information Filters*

Currently, much of the effort in the fight against spam has been devoted to filtering, which involves the automatic analysis of e-mail messages to determine whether or not they are spam.<sup>77</sup> Once a filter had determined that a message is spam, the e-mail system can take appropriate action, such as placing the message in a junk mail folder or deleting it prior to delivery. Filtering has proven to be a useful and necessary mechanism to reduce the volume of spam traveling over ISP and corporate networks. Already, filters on servers at AOL block more than eighty percent of UCE before it ever reaches its customers' mailboxes.<sup>78</sup>

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75. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

76. See *id.* (whether suppression of speech ordinarily protected by First Amendment must not be more extensive than necessary to further state's asserted interest).

77. See Michael W. Carroll, *Garbage In: Emerging Media and Regulation of Unsolicited Commercial Solicitations*, 22 BERKELEY TECH. L.J. 233, 258-59 (1996).

78. See *Reduction in the Distribution of Spam Act of 2003: Hearing on H.R. 2214 Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 108th

Filtering can be accomplished in one of two ways, “opt-in filtering” or “opt-out filtering”.<sup>79</sup> With opt-in filtering, users receive no mail unless incoming e-mail meets certain criteria.<sup>80</sup> For example, unless a particular e-mail address is on a user’s opt-in list, mail is rejected. Opt-out filtering accepts all e-mail sent to a user’s mailbox unless the user has specifically instructed the software to reject mail from certain addresses.<sup>81</sup> Users can turn filtering on or off, obtain lists of known spammers from their ISPs, or have their service provider filter mail for them.

Even with the passage of legislation, filtering will continue to play an essential role, both as a means of dealing with those who ignore laws or are beyond the scope of the law (foreign spam) and of helping consumers manage their inboxes. However, filters need help, as many filters today do not have detailed information about senders, may misclassify legitimate e-mail as spam and mistakenly fail to catch all spam.<sup>82</sup> By providing filters with more information about senders of UCE, filters may more accurately screen unwanted e-mail. For filters to work effectively, communications need to be accurately labeled.

The CAN-SPAM Act requires senders of UCE to include in its subject heading a message that alerts a recipient that the e-mail is or contains an advertisement.<sup>83</sup> While the Act does not require the subject heading to be labeled by a standard method, it prohibits senders of UCE from including messages in the subject line that “mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.”<sup>84</sup>

In addition, the Act requires that all UCE contain a clearly and conspicuously displayed functioning return electronic mail address or other mechanism that a recipient may use to submit a reply requesting not to receive future UCE from the sender at the address provided.<sup>85</sup> The sender of the UCE must remain capable of receiving the request for at least thirty days after the transmission of the

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Cong. 2 (2003) (statement of Howard Coble, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security) (noting that AOL is now blocking large amounts of junk e-mails per day).

79. *See* Carroll, *supra* note 73, at 267.

80. *See id.*

81. *See id.*

82. *See id.* at 268.

83. *See* The CAN-SPAM Act of 2003, Pub. L. No. 108-187, §5(d)(1), 117 Stat. 2699 (2004).

84. *Id.*

85. *See id.* at §5(a)(3).

original UCE. Furthermore, the Act requires the UCE to include a valid physical postal address of the sender.<sup>86</sup>

While these requirements force spammers to be accountable for their UCE, the Act also forces spammers to “speak.” At the heart of the labeling issue is the requirement that speakers provide information about the nature and origin of themselves and their message that they would not ordinarily include in their spam e-mail.<sup>87</sup>

*ii) Constitutionality of Labeling Requirements*

The CAN-SPAM Act’s labeling requirements would be upheld as constitutional in the face of a First Amendment challenge. Generally speaking, restrictions on commercial speech are subject to “intermediate scrutiny” and analyzed under the framework set forth in *Central Hudson*.<sup>88</sup> However, labeling requirements involve an even more deferential standard of review, because the CAN-SPAM Act’s labeling requirements do not restrict commercial speech but rather require the commercial speaker to make various disclosures.<sup>89</sup>

As the Second Circuit explained in *National Electrical Manufacturers Association v. Sorrell*,<sup>90</sup> “commercial disclosure requirements are treated differently from restrictions on commercial speech, because mandated disclosure of accurate factual commercial information does not offend core First Amendment values of promoting efficient exchange of information or protecting liberty interests.”<sup>91</sup> In *National Electric Manufacturers*, the Second Circuit upheld as constitutional a Vermont labeling statute requiring manufacturers of some mercury containing products to label their products and packaging to inform consumers that the products contained mercury and on disposal, should be recycled or disposed of

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86. *See id.* at §5(a)(5).

87. *See* Samoriski, *supra* note 34 (arguing that legislation requiring name, physical address, e-mail address and telephone number of person who created the message would likely be challenged, particularly if message contained elements of non-commercial speech).

88. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n., 447 U.S. 557, 566 (1980).

89. *See* *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

90. 272 F.3d 104 (2d Cir. 2001).

91. *Id.* at 113-14. These disclosures further rather than hinder the First Amendment goal of the discovery of truth and contribute to the marketplace of ideas. *See id.* Protection of the free flow of accurate information is the principal First Amendment justification for protecting commercial speech and requiring disclosure of truthful information furthers that goal. *Id.* Therefore, where non-misleading commercial speech is being restricted, less exacting scrutiny is necessary. *Id.*

as hazardous waste.<sup>92</sup> The court held that although *Central Hudson* applies to statutes that restrict commercial speech, *Zauderer v. Office of Disciplinary Counsel* sets forth the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases.<sup>93</sup> The *Zauderer* standard dictates that the First Amendment is satisfied by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose.<sup>94</sup>

Opponents of the CAN-SPAM Act would claim that the disclosure requirements of the Act are unjustified and unduly burdensome under the *Zauderer* standard.<sup>95</sup> Specifically, the labeling requirements unduly burden the ability of UCE senders to communicate their own speech to their potential customers.<sup>96</sup> They would argue that the Act overly burdens the rights of legitimate businesses to advertise their products, police their intellectual property, and service their customers.<sup>97</sup> Therefore the requirements offend the First Amendment by chilling protected commercial speech.<sup>98</sup> Furthermore, opponents would question whether government regulation of truthful unsolicited commercial electronic mail is appropriate at all.<sup>99</sup> They would contend that where the communication is truthful, it is generally preferable to let the marketplace and the recipients control whether to receive UCE, rather than allowing the government to intervene.<sup>100</sup>

Furthermore, opponents of the CAN-SPAM Act's labeling requirement for all UCE would argue vigorously that the *Zauderer* test is fatally flawed. They would claim that were it enough for the state to demonstrate a "reasonable relationship" with any legitimate governmental interest, there would be no end to the disclosures, statements, and other messages that the government could append to

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92. *See id.* at 115.

93. *See id.*

94. *See Zauderer*, 471 U.S. at 651 (holding that because First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, it is not appropriate to strike down requirements merely because other possible means by which state might achieve its purposes can be hypothesized).

95. *See Legislative Efforts to Combat Spam Hearing*, 108th Cong. 37-38 (2003) (prepared statement of Laura W. Murphy, Director and Marvin J. Johnson, Legislative Counsel, American Civil Liberties Union).

96. *See id.*

97. *See id.*

98. *See id.*

99. *See R. Jonas Geissler, Whether 'Anti-Spam' Laws Violate The First Amendment*, 2001 J. ONLINE L. art. 8, par. 35 (2003) available at <http://www.wm.edu/law/publications/jol/articles/geissler.shtml> (last visited Dec. 14, 2004).

100. *See id.*

lawful commercial speech.<sup>101</sup> *Zauderer* in effect gives the state unfettered discretion as to what must be included in a UCE in order to make it “truthful” and “non-misleading”.<sup>102</sup> *Zauderer* does not allow the government to override a corporation’s First Amendment right not to speak merely upon establishing a “reasonable relationship” to a legitimate state interest.<sup>103</sup>

Although opponents of the CAN-SPAM Act would proffer that the Act’s labeling requirements are unconstitutionally burdensome under *Zauderer*, the Act’s requirements sufficiently satisfy the *Zauderer* test.<sup>104</sup> The prescribed labeling requirements contribute directly to the reduction in UCE. There is a sufficient reasonable relationship between the government’s labeling requirement and the government’s desire to reduce UCE in order to satisfy the *Zauderer* test. Furthermore, the Act presents a narrowly-tailored means to achieve the government’s interest in enabling Internet users to filter unsolicited commercial e-mail in order to pass intermediate scrutiny under *Central Hudson*.<sup>105</sup> The Act’s labeling requirement will successfully reduce costs to ISPs and to consumers who receive UCE labeled in accordance with the Act’s provisions. Furthermore, the Act’s labeling requirements will set baseline standards for all senders of UCE by defining what constitutes legal and non-misleading UCE.<sup>106</sup> By encouraging such changes in the practices of UCE senders, the labeling requirements set forth in the CAN-SPAM Act are rationally related to the government’s purported goals and would be upheld as constitutional in the face of a First Amendment challenge.

#### B. National Do-not-e-mail List.

In June 2003, the National Do-Not-Call Registry was established, allowing U.S. residents to signal their desire not to receive telemarketing calls by placing their names and telephone numbers on

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101. See *Additional Views of Rep. John Conyers, Jr. H.R. 718, Unsolicited Commercial Electronic Mail Act of 2001*, \*5, at [http://www.house.gov/judiciary\\_democrats/hr718addviews.pdf](http://www.house.gov/judiciary_democrats/hr718addviews.pdf).

102. See *id.*

103. See *id.*

104. For a discussion of the *Zauderer* test, see *supra* notes 89-94, and accompanying text.

105. See Samoriski, *supra* note 34 (arguing that current First Amendment jurisprudence does not support complete ban on UCE, but specific labeling requirements might pass constitutional challenges).

106. Compare Chris Ulbrich, *Spam Law Generates Confusion*, at <http://www.wired.com/news/business/0,1367,62031.html> (last visited Jan. 26, 2004) (noting that many telemarketers are unsure about potential exposure to lawsuits by government agencies and private Internet access providers).

a database maintained by the government.<sup>107</sup> Telemarketers calling numbers appearing on the lists face potentially serious civil penalties.<sup>108</sup> The do-not-call plan's popularity has fueled demand for a similar registry for unsolicited commercial e-mail.

The CAN-SPAM Act includes a provision for a do-not-e-mail registry.<sup>109</sup> The Act requires the FTC within six months of the passage of the Act to set forth a plan and timetable for establishing a nationwide marketing do-not-e-mail registry.<sup>110</sup> However, the Act does not specifically enumerate which types of e-mail a do-not-e-mail registry would prevent and what exceptions for various types of e-mail the registry would allow.

*i) National Do-Not-Call Registry*

In response to the public outcry over the proliferation of unwanted commercial telemarketing, Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) and the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA), to protect privacy and to shield consumers from abusive telemarketing strategies.<sup>111</sup> Pursuant to these statutes, the Federal Communications Commission (FCC) and the FTC promulgated regulations mandating that commercial telemarketers maintain company specific do-not-call registries.<sup>112</sup> When these failed to provide adequate protection from unwanted telemarketers, both agencies established a nationwide do-not-call registry for commercial telemarketers.<sup>113</sup> The do-not-call

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107. See *National Do-Not-Call Registry Opens*, Press Release by the Federal Trade Commission: June 27, 2003, at <http://www.ftc.gov/opa/2003/06/donotcall.htm> (explaining that consumers can register free online or by calling toll-free number).

108. See *The Do-Not-Call Registry*, Office of the Attorney General, Consumer Protection Division, at [http://www.atg.wa.gov/consumer/tmf\\_donotcall.shtml](http://www.atg.wa.gov/consumer/tmf_donotcall.shtml) (noting that fine per violation could be \$11,000 as well as injunctive remedies).

109. See The CAN-SPAM Act of 2003, Pub. L. No. 108-187, §9, 117 Stat. 2699 (2004).

110. See *id.*

111. See *Telephone Consumer Protection Act of 1991*, Pub. L. No. 102-243 §2, 105 Stat. 2394 (1991); *Telemarketing and Consumer Fraud and Abuse Prevention Act*, Pub. L. No. 103-297 § 3, 108 Stat. 1545 (1994).

112. See *Telemarketing Sales Rule*, 60 Fed. Reg. 43842, 43854- 55 (Aug. 23, 1995).

113. See 68 Fed. Reg. 4580, 4629 (Jan. 29, 2003) (noting that consumer groups and state law enforcement representatives, claimed that company-specific "do-not-call" provision was inadequate to prevent abusive patterns of calls it was intended to prohibit). Consumers claimed that the "company-specific" do-not-call scheme was extremely burdensome, as the consumers had to repeat their "do-not-call" request with every telemarketer that called. See *id.* The consumers' repeated

rules do not completely ban telemarketing calls, but instead provide a mechanism by which individual consumers may choose not to receive telemarketing calls.<sup>114</sup> The do-not call registry does not cover calls from political organizations, charities, telephone surveyors, or companies with which a consumer has an existing business relationship.<sup>115</sup>

a) *Constitutionality of Do-Not-Call/Do-Not-E-mail List*

i) *Mainstream Marketing Services v. FTC*<sup>116</sup>

The first significant challenge to the FTC's amended Telemarketing Sales Rules which created the federal do-not-call registry, was brought recently in *Mainstream Marketing Services v. FTC*. Various telemarketing companies filed suit in the Colorado District Court seeking an injunction prohibiting the FTC's application and enforcement of the do-not-call registry.<sup>117</sup> Specifically, the telemarketers argued that the do-not-call registry violated the First Amendment (among other things) by discriminating between commercial and non-commercial speech based solely on its content.<sup>118</sup> The court rejected a content-neutral time, place, or manner analysis and instead applied the *Central Hudson* test for restrictions on commercial speech.<sup>119</sup>

Although acknowledging the substantial government interest in protecting privacy, the court found that the do-not-call registry failed the third prong of *Central Hudson*.<sup>120</sup> In rejecting the FTC's justifications for distinguishing between commercial and charitable speech, the court held that because privacy was equally invaded by both commercial and charitable calls, the do-not-call registry did not directly advance Congress' interest in protecting privacy.<sup>121</sup>

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requests were ignored, and consumers had no way to verify that their names have been taken off of a company's calling list. *See id.*

114. *See id.*

115. *See id.* (discussing calls that are exempt from national do-not-call registry).

116. 283 F.Supp.2d 1151 (D. Colo. 2003).

117. *See id.*

118. *See id.*

119. *See id.* at 1162-63.

120. *See id.* at 1167 (holding that FTC's do-not-call registry does not materially advance interest in protecting privacy or curbing abusive telemarketing practices).

121. *See Mainstream Marketing Services, Inc.*, 283 F.Supp.2d at 1168 (rejecting FTC's justifications for distinguishing between commercial and charitable speech). The FTC argued that nonprofit corporations and political fund-raisers are less likely than for-profit entities to engage in abusive practices, because the consumer is both

Thereafter, the court held that the do-not-call registry's prohibition against telemarketing calls, while allowing charitable and political solicitations, was a content-based regulation unconstitutionally burdening telemarketers' commercial speech.<sup>122</sup>

Twenty days after the lower court decision, the Tenth Circuit granted the FTC's motion for stay of the injunction pending a decision on the merits, holding that the government's interest in preventing abusive sales practices and protecting privacy outweighed harm to telemarketers.<sup>123</sup> The Tenth Circuit, relying on the Supreme Court's decisions in *Martin v. City of Struthers*,<sup>124</sup> *Rowan v. U.S. Post Office Dept.*,<sup>125</sup> and *City of Cincinnati v. Discovery Network, Inc.*, held that the FTC would likely succeed on its argument that the distinction in the do-not-call registry between commercial and non-commercial phone solicitations passes constitutional muster under *Central Hudson's* reasonable fit analysis.<sup>126</sup>

In *Martin*, the Supreme Court struck down a city ordinance banning door-to-door canvassing, because it took the right to decide whether to receive visitors away from the individual homeowner.<sup>127</sup> While recognizing the government's interest in protecting privacy, the court held that the ordinance swept too broadly, because the dangers of door-to-door canvassing easily could have been controlled by giving the homeowner the right to decide whether to receive visitors.<sup>128</sup>

In *Rowan*, the court upheld an opt-in do not mail list system in which a homeowner could require that a commercial advertiser remove his or her name from its mailing list if the homeowner determined in his or her "sole discretion" that the material received

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a potential donor and a potential voter or volunteer for the charity or political party. *See id.*

122. *See id.* at 1167 (noting if do-not-call registry did not distinguish call based on content of the speech, or left autonomy in the hands of the individual, it might be different matter).

123. *See* FTC. v. Mainstream Marketing Services, Inc., 345 F.3d 850, 860 (10th Cir. 2003) (noting holding of case).

124. 319 U.S. 141 (1943).

125. 397 U.S. 728 (1970).

126. *See* FTC. v. Mainstream Marketing Services, 345 F.3d at 860.

127. *See* *Martin*, 319 U.S. at 148-49 (explaining that freedom to distribute information to every citizen wherever he/she wishes to receive it is so vital to preservation of free society that it must be fully preserved).

128. *See id.* at 147-48 (holding that dangers of distribution can easily be controlled by traditional legal methods, allowing each householder to decide whether to receive strangers as visitors, "that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas").

was erotically arousing or provocative.<sup>129</sup> In finding the privacy regulation reasonable, the court emphasized the element of private choice, stating that the homeowner was the “exclusive and final judge of what will cross his threshold”.<sup>130</sup>

Furthermore, in *Discovery Network*, the Supreme Court struck down a city ordinance banning freestanding commercial news racks on grounds that the restriction was not narrowly tailored.<sup>131</sup> While the court recognized that the city had substantial interests in esthetics and safety that were impaired by the freestanding news racks, it concluded that there was no reasonable fit between those goals and the city’s policy of banning only commercial news racks while leaving similar non-commercial news racks undisturbed.<sup>132</sup> While the court recognized that there may be situations where “differential treatment of commercial and noncommercial news racks” could be justified by a reasonable fit with the government’s interest in esthetics and safety, it held that the government had failed to make any showing in that case.<sup>133</sup>

The Tenth Circuit in *Mainstream Marketing* examined the constitutionality of the do-not-call registry’s distinction between commercial and non-commercial speech under the *Central Hudson* test.<sup>134</sup> The court gave significant weight to the government’s alleged substantial interest in preventing the greater risk of privacy invasion from abusive sales practices apparent in commercial but not in non-commercial telemarketing.<sup>135</sup> It held that the do-not-call list will directly further the government’s substantial interests in halting the

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129. *See Rowan*, 397 U.S. at 730 (rejecting reject argument that vendor has constitutional right to send unwanted material into home of another). The court further explained that if the prohibition impeded the flow of even valid ideas, “the answer is that no one has a right to press even ‘good’ ideas on an unwilling recipient.” *Id.* at 738.

130. *Id.* at 736 (weighing right to communicate against right to be free from unwanted sights, sounds, and tangible matter, court held right to communicate must stop at the mailbox of an unreceptive addressee).

131. *See Discovery Network*, 507 U.S. at 430 (noting court’s holding).

132. *See id.* at 418 (determining that interests Cincinnati asserted were unrelated to any distinction between commercial handbills and newspapers).

133. *Id.* at 428.

134. *See* FTC. v. *Mainstream Marketing Services, Inc.*, 345 F.3d 850, 860 (10th Cir. 2003).

135. *See id.* The FTC and FCC asserts rationales for applying their national do-not-call restrictions only to commercial sales calls. *See Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4591 (Jan. 29, 2003); *FCC Rules, Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 Fed. Reg. 44144, 44145 (July 25, 2003) and Do-Not-Call Implementation Act, *Pub. L. 108-10*, § 3 (Mar. 11, 2003).

invasion of privacy by abusive commercial calls.<sup>136</sup> Furthermore, the court found it relevant that the do-not-call list is of an opt-out nature, which provides an element of private choice and thus weighs in favor of a reasonable fit under *Central Hudson*.<sup>137</sup> Also, the FTC had not exempted all non-commercial speech from the regulation, as consumers are also given some mechanism to block non-commercial solicitations by means of company specific objections to solicitations by charitable organizations.<sup>138</sup>

ii. The CAN-SPAM Act's National Do-not-e-mail Registry.

The CAN-SPAM Act's national do-not-e-mail registry would have to be very similar to the current national do-not-call list in order to be found constitutional in light of inevitable First Amendment challenges by senders of UCE. A consumer would be able to register his or her e-mail address on a national database, which would prohibit most senders of UCE from sending UCE to an e-mail address on the list. Just as with the national do-not-call registry, UCE from *registered* charitable and political organizations would be allowed as long as it is labeled in accordance with the Act's labeling requirements discussed in section V(3)A. However, recipients of UCE from charitable organizations could elect to be placed on the company specific do-not-e-mail list by responding to a properly labeled UCE from a registered charitable organization.<sup>139</sup> Furthermore, senders of UCE would be exempt from the do-not-e-mail prohibitions if they have received expressed written consent from the consumers they e-mail, or if they e-mail consumers with whom they have an established business relationship.

a) *Effectiveness of Do-not-e-mail List*

The do-not-e-mail list is identical in principle to the do-not-call list and would most likely be held constitutional under First Amendment challenges for the same reasons that the national do-not-call list will likely be upheld.<sup>140</sup> However, the various differences between e-mail

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136. See *FTC*, 345 F.3d at 858-59 (satisfying third prong of *Central Hudson* test).

137. See *id.* at 856-57 (concluding likelihood that FTC can show a reasonable fit between substantial governmental interests it asserted and national do-not-call list).

138. See *id.* at 860 (holding that FTC may fix a problem upon which it has record support without waiting until FTC can develop experience on whether or not company-specific do-not-call list will be effective to prevent such abuses in context of non-commercial telemarketing).

139. For a further discussion of the CAN-SPAM Act's labeling requirements, see notes 69-74 and accompanying text.

140. See John Magee, *The Law Regulating Unsolicited Commercial E-Mail: An International Perspective*, 19 *Santa Clara Computer & High Tech. L.J.* 333, 358

and telephones would make a do-not-e-mail list modeled after the do-not-call list unfeasible and ineffective.<sup>141</sup>

E-mail systems are spread out across the globe, and information about an e-mail sender is easy to fabricate.<sup>142</sup> The phone network is centralized and regulated, tends to follow national boundaries, and has fixed circuits that are less prone to spoofing.<sup>143</sup> These factors make telemarketers easier than spammers to find.<sup>144</sup> While the phone industry is well regulated, the internet has never been regulated, and there are no boundaries.<sup>145</sup>

Since it is easy to identify valid phone numbers, a list of valid phone numbers doesn't have much value to a telemarketer.<sup>146</sup> A list of valid e-mail addresses given to advertisers adhering to the do-not-e-mail guidelines would allow them to purge their lists of those e-mail addresses.<sup>147</sup> However, because it is difficult to trace a spammer or to identify an e-mail's source, spammers will use the list of valid e-mail addresses to send more UCE.<sup>148</sup> Another problem is the size of the data base.<sup>149</sup> People change their e-mail addresses frequently and the result would be a larger and larger database of more and more dead e-mail addresses.<sup>150</sup>

#### VI PORNOGRAPHIC SPAM- ARE THE CAN-SPAM ACT'S INCREASED LABELING REQUIREMENTS FOR PORNOGRAPHIC SPEECH CONSTITUTIONAL?

Another common form of UCE is spam with pornographic content or links to websites with pornographic content. Pornographic spam is more likely than other spam to contain fraudulent or misleading subject lines.<sup>151</sup> In its recent report, the FTC found that more than 40

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(2003).

141. See Do-Not-Spam? Don't Bet on It, *Wired News*, at [http://www.wired.com/news/privacy/0,1848,60867,00.html?tw=wn\\_story\\_related](http://www.wired.com/news/privacy/0,1848,60867,00.html?tw=wn_story_related) (last visited May 4, 2004).

142. See *id.*

143. See *id.*

144. See Jacquelyn Trussell, *Is the Can Spam Act the Answer to the Growing Problem of Spam?*, 16 *Loy. Consumer L. Rev.* 175, 186-87 (2004)

145. See Do-Not-Spam? Don't Bet on It at [http://www.wired.com/news/privacy/0,1848,60867,00.html?tw=wn\\_story\\_related](http://www.wired.com/news/privacy/0,1848,60867,00.html?tw=wn_story_related) (last visited May 4, 2004).

146. See *id.*

147. See David Berlind, Why Do-Not-Spam Lists Are a Bad Idea, at <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2914363,00.html> (last visited May 4, 2004).

148. See *id.*

149. See *id.*

150. See *id.* (noting that people would have to register every time they change e-mail addresses).

151. See Maravilla, *supra* note 3, at 118 (noting that numerous bills have been

percent of all pornographic spam either did not alert its recipients to images contained in the message or included false subject lines, thus making it more likely that recipients would open the messages without knowing that pornographic images would appear.<sup>152</sup>

Unsuspecting children who simply open e-mails with seemingly benign subject lines may be either confronted with pornographic images in the e-mail message itself, or automatically and instantly taken to an adult web page exhibiting sexually explicit images, without requiring any further action on their part. Even pornographic spam with legitimate and non-misleading headers can still be accessed by children. Senders of unsolicited messages rarely know the age of persons to whom the messages are sent.<sup>153</sup>

The CAN-SPAM Act requires senders of UCE which includes sexually oriented material to alert the recipient that the UCE is (1) an advertisement; and (2) contains sexually oriented content.<sup>154</sup>

Specifically, the Act requires the subject heading for all sexually oriented UCE to contain a common mark or notice which the FCC will mandate and which will alert recipients that they are receiving UCE containing sexually oriented content.<sup>155</sup> While the Act's requirement of including a label of sexually oriented material in the subject line of UCE will be constitutionally permissible, requiring senders of pornographic UCE to include in the subject line a further

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introduced in Congress and state legislatures to regulate UCE, but none have specifically targeted problem of pornographic UCE).

152. See *False Claims In SPAM*, A Report by the FTC's Division of Marketing Practices, at <http://www.ftc.gov/reports/spam/030429spamreport.pdf>. "Seventeen percent of pornographic offers in the spam analyzed by FTC staff contained 'adult imagery.'" *Id.* Over forty percent of these pornographic spam messages contained false statements in their "From" or "Subject" lines. *Id.*

153. See Maravilla, *supra* note 3, at 119 (noting that spammers use deceptive techniques in transmitting their messages by disguising them as benign advertisements so that they will be read by unsuspecting recipients).

154. See The CAN-SPAM Act of 2003, Pub. L. No. 108-87, §5(d), 117 Stat. 2699 (Dec. 16, 2003).

155. *Id.* The Act defines "sexually oriented material" as  
(i) graphic sexual intercourse, including genital-genital, oral- genital, anal- genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;  
(ii) graphic or lascivious simulated;  
(I) bestiality;  
(II) masturbation; or  
(III) sadistic or masochistic abuse; or  
(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual materials. *Id.*

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indication that the UCE contains sexually oriented material raises separate First Amendment concerns.

*1. Sexually Oriented or Pornographic Speech*

Sexually oriented or pornographic commercial speech can be divided into three forms: speech considered obscene to both adults and minors, speech considered obscene only to minors, and speech that is indecent or offensive.

*A. Obscene Speech*

There is no First Amendment right to conduct business in obscene materials and use e-mail for such purposes.<sup>156</sup> Obscenity is not protected speech under the First Amendment.<sup>157</sup> The Supreme Court has held that “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>158</sup> Courts have had difficulty in defining what constitutes obscene speech, prompting Justice Stewart to remark in *Jacobellis v. Ohio*,<sup>159</sup> “I know it when I see it.”<sup>160</sup>

*B. Indecent Speech*

While sexually oriented UCE containing obscene speech will not be protected by the First Amendment, indecent speech is protected by the First Amendment. The Supreme Court has defined indecent speech as that which is not completely devoid of “social, literary, artistic, political, or scientific values.”<sup>161</sup> The court held further that “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.”<sup>162</sup>

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156. See *United States v. Reidel*, 402 U.S. 351, 356 (1971) (noting court’s holding)

157. See *id.*

158. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

159. 378 U.S. 184 (1964).

160. *Id.* at 197 (Stewart, J., concurring).

161. *Miller v. California*, 413 U.S. 15, 24 (1973).

162. *Roth v. United States*, 354 U.S. 476, 484 (1957).

*C. Obscene to minors*

Some sexually oriented material, while not obscene to adults, may still be considered obscene to minors. In *Ginsberg v. New York*,<sup>163</sup> the Supreme Court upheld the constitutionality of a New York statute that prohibited the sale of obscene materials to minors under the age of seventeen based on the standard of what is obscene to the average minor, not the average adult.<sup>164</sup> In *Ginsberg*, a Long Island newsstand sold a sixteen year old a magazine with nude pictures which was not considered obscene by adult standards.<sup>165</sup> Furthermore, in *Bookcase, Inc. v. Broderich*,<sup>166</sup> the New York Court of Appeals, whose reasoning was later adopted by the Supreme Court, stated, “material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children.”<sup>167</sup> It continued, “[i]n 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.”<sup>168</sup>

*2. The CAN-SPAM Act and Sexually Oriented Material*

Opponents of the CAN-SPAM Act’s requirement that sexually oriented UCE be labeled more extensively than regular UCE argue that the requirement is unconstitutionally vague.<sup>169</sup> Specifically, they would contend that the definition of “sexually oriented” advertisement is unnecessarily vague, could implicate e-mails that its proponents might not intend for labeling, and could chill otherwise lawful speech.<sup>170</sup> The Supreme Court has delineated a “strict prohibition of statutes which burden speech in terms that are so vague as either to allow including protected speech in the prohibition or leaving an individual without clear guidance as to the nature of speech for which he can be punished.”<sup>171</sup> Opponents of the increased

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163. 390 U.S. 629 (1968).

164. See *id.* at 631 (noting court’s holding).

165. See *id.* (noting facts of case).

166. 218 N.E.2d 668 (N.Y. 1966).

167. *Id.* at 671.

168. *Id.* (holding that state had interest in preventing distribution to children of objectionable material and can exercise power to protect health, safety, welfare and morals of community by barring distribution to children of books suitable only to adults).

169. See *Additional Views of Rep. John Conyers, Jr. H.R. 718, Unsolicited Commercial Electronic Mail Act of 2001*, p. 4 (Dec. 12, 2002), available at [http://www.house.gov/judiciary\\_democrats/hr718addviews.pdf](http://www.house.gov/judiciary_democrats/hr718addviews.pdf).

170. See *id.*

171. *Id.*

labeling requirements would fear that the Act might have an ‘in terrorem’ effect and deter persons from engaging in activities, such as constitutionally-protected speech, that are of particular constitutional importance.<sup>172</sup>

Opponents argue that the definition of sexually oriented speech carves out e-mails having sexual content that constitutes only a small and insignificant part of the whole (most of which is not primarily devoted to sexual matters), ensuring that e-mails with minimal sexual content do not have to be labeled.<sup>173</sup> The Act does not specify what is meant by a small or insignificant part. This term could implicate e-mails where ten percent of the content is sexually oriented or even where two percent is so oriented.<sup>174</sup> Furthermore, the definition of sexually oriented material could require the labeling of e-mail containing ads for a book about sexual health, ads for items intended to prevent sexually transmitted diseases, or even ads that contain double entendres.<sup>175</sup>

Opponents of labeling of sexually oriented material would also argue that the *Zauderer* test, while justifying compelled labeling of regular UCE, does not support the Act’s increased labeling requirement for pornographic UCE.<sup>176</sup> They would claim that *Zauderer* applies only to mandated disclosures that serve the government’s interest in preventing deception of consumers caused by the commercial speech itself.<sup>177</sup> It is undisputed that the Act’s labeling requirements for regular UCE are justified, because of UCE’s likelihood of misleading consumers by causing them to believe that the e-mail is not an advertisement.<sup>178</sup> Opponents of the Act’s increased labeling requirements for sexually oriented UCE contend that *Zauderer* should not apply, because the government’s substantial interest for the increased labeling requirements is not that consumers will be further misled about the contents of the UCE which is already labeled as an advertisement.<sup>179</sup> Accordingly,

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172. *See id.*

173. *See id.* at p. 5.

174. *See Additional Views of Rep. John Conyers, Jr. H.R. 718*, at p. 5

175. *See id.*

176. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

177. *See id.*

178. *See The CAN-SPAM Act of 2003*, Pub. L. No. 108-87, §2(a)(8), 117 Stat. 2699 (2004).

179. *See Appellant’s Petition for Writ of Certiorari to the Supreme Court of the United States at 24-26*, *Bell South Advertising and Publishing Corp. v. Tenn. Regulatory Authority*, 79 S.W.3d 506 (Tenn. 2002) (No.02-783) (challenging Tenn. law requiring publisher of telephone directories to display names and logos of competing telephone companies on cover of white pages directories that it publishes for its affiliated telephone companies).

opponents of the Act's increased labeling requirements with respect to sexually oriented UCE would argue that the "reasonable relationship" test under *Zauderer* provides insufficient protection to the right to engage in truthful and non-misleading sexually oriented commercial speech.<sup>180</sup>

Therefore, opponents of the Act's increased labeling requirements for sexually oriented speech would emphasize that except when necessary to prevent a commercial message from misleading consumers (as is the case with the Act's labeling requirement for regular UCE), government compulsion of commercial speech should be subject to the scrutiny of the *Central Hudson* standard. Opponents would assert that the Act's ordering of increased labeling requirements for sexually oriented UCE clearly fails the third and fourth prongs of *Central Hudson*.<sup>181</sup> Even assuming the asserted governmental interest is substantial, opponents would claim the Act's requirement does not "directly advance" that interest and is "more extensive than is necessary to serve that interest."<sup>182</sup>

Opponents of labeling of sexually oriented materials would maintain that other available measures are both more effective and less burdensome than increasing the labeling requirements for sexually oriented UCE.<sup>183</sup> Considering the technology that is available, the courts should refrain from approving an intrusive new labeling requirement.<sup>184</sup> Technology solutions such as software filters are much less intrusive to commercial speech than labeling requirements.<sup>185</sup> Currently, filters can screen obscene materials, and ISPs filter out e-mails for their customers.<sup>186</sup> Opponents to a secondary labeling requirement for sexually oriented material would further suggest that the labeling requirement will do exactly the opposite of what is intended to do, since marks actually could encourage children to view sexually oriented material.<sup>187</sup>

While opponents doubt the constitutionality of the CAN-SPAM Act's mandated additional labeling of sexually oriented materials, the

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180. *See id.*

181. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 566 (1980) (noting that third and fourth prongs require commercial speech to substantially further governmental interest and be no more extensive than necessary).

182. *See id.*

183. *See Additional Views of Rep. John Conyers, Jr. H.R. 718, Unsolicited Commercial Electronic Mail Act of 2001*, p. 3, available at [http://www.house.gov/judiciary\\_democrats/hr718addviews.pdf](http://www.house.gov/judiciary_democrats/hr718addviews.pdf).

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

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Act would most likely be held constitutional. The Act's increased labeling requirements for sexually oriented UCE will pass the *Zauderer* test. Furthermore, prior decisions upholding regulations requiring labeling of unsolicited commercial sexually oriented regular mail should be applied to labeling of UCE containing sexually oriented material.<sup>188</sup>

A. *Zauderer* Test Satisfied

In *Zauderer*, as in the CAN-SPAM Act's labeling requirements for sexually oriented UCE, the mandatory disclosure provided additional information about the speaker that was directly relevant to the commercial speech at issue.<sup>189</sup> The government's requirement for the additional labeling of UCE containing sexually oriented material is directly related to its desire to not only inform e-mail recipients that they are receiving an advertisement, but that they are receiving a sexually explicit e-mail advertisement.<sup>190</sup> The government's substantial interest in the increased labeling requirements includes the desire to protect unsuspecting children who open e-mails with seemingly benign subject lines, who are then exposed to pornographic images.<sup>191</sup> Furthermore, many adults who do not find regular UCE shocking or offensive do not desire to view or receive pornographic images regardless of whether they contain UCE or not.

B. *Central Hudson* Test Satisfied

Assuming *arguendo* that the Act's increased labeling requirements should be scrutinized under the *Central Hudson* test, the Act's labeling requirements further the government's substantial interest in regulating pornographic UCE for the same reasons set forth under the *Zauderer* test. Also, the regulation is narrowly drawn in that it requires senders of pornographic UCE simply to add an additional label to the subject heading of the e-mail, alerting the recipients as to the content of the UCE. The Act does not require senders of sexually oriented UCE to alter heading, return e-mail addresses, or content of the UCE.<sup>192</sup> Furthermore, it does not ban any pornographic UCE sent to computer users.<sup>193</sup>

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188. See *Pent-R-Books, Inc. v. United States Postal Service*, 328 F. Supp. 297 (E.D.N.Y. 1971)

189. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 629 (1985) (explaining that commercial speaker was attorney advertising his services).

190. See *id.* (noting level of review under *Zauderer*).

191. See *id.* (noting substantial interest part of *Zauderer* test).

192. See generally, CAN-SPAM Act.

193. See *id.*

*C.Pent-R-Books, Inc. v. United States Postal Service.*

The Act's labeling requirement of all sexually oriented UCE is similar to the post office's labeling requirement of sexually explicit mail which was upheld in *Pent-R-Books, Inc.*<sup>194</sup> In *Pent-R-Books, Inc.*, the United States District Court for the Eastern District of New York upheld the Goldwater Amendments to the Postal Reorganization Act of 1970.<sup>195</sup> The Amendments represented Congress' attempt to limit the distribution of erotic literature to individuals who wished not to receive it.<sup>196</sup> The law required that senders of sexually oriented advertisements purchase from the United States Postal Service a monthly list of individuals who have opted-out of receiving materials of a sexually explicit nature in order to remove their names from the lists and place a mark or notice on the envelope of the sender's advertisement to identify it as containing sexually explicit content.<sup>197</sup> The term sexually oriented advertisement was defined under the Amendments 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."<sup>198</sup> The statute regulated all sexually oriented advertisements regardless if they were obscene, obscene to minors, or indecent.<sup>199</sup>

The statute was intended to implement the congressional findings that offensive sexually-oriented advertising was so massive that individuals could not protect their privacy without federal intervention.<sup>200</sup> Congress found sexually oriented material "profoundly shocking and offensive to many persons who receive it, unsolicited, through the mails."<sup>201</sup> Congress had a substantial interest in regulating unsolicited sexually oriented mail because, "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"; and "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

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

195. *See id.* at 297.

196. *See id.*

197. *See id.* at 300.

198. *Id.* at 304.

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

200. *See id.*

201. Pub. L. No. 91-375 §14(a)(1).

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more effective Federal controls over the mailing of such matter.”<sup>202</sup>

*i. The Goldwater Amendments Applied to the CAN-SPAM Act of 2003*

Congress’ findings in enacting the Goldwater Amendment are especially relevant to the government’s interest in regulating sexually oriented advertisements in the CAN-SPAM Act. The Act’s labeling of sexually oriented material more extensively than regular UCE is justified by the increased governmental interests in protecting both minors and adults from pornographic material. In the Act, Congress finds that spam has become the method of choice for those who distribute pornography, and that a large amount of commercial electronic mail contains material that many recipients consider vulgar or pornographic in nature.

The court, in upholding the Goldwater Amendments, reasoned that they did not interfere with the First Amendment because they applied only to unsolicited and unwanted advertisements soliciting sexually explicit materials.<sup>203</sup> It did not prevent an author or publisher of a book from distributing his writings, even when they explicitly depicting human genitalia, sexual intercourse, acts of sadism or acts of masochism.<sup>204</sup> The court stated that although books containing sexually oriented material are entitled to First Amendment protection, the mailer’s right to advertise the books does not supercede the right of the addressee to his or her privacy.<sup>205</sup>

The CAN-SPAM Act’s labeling requirement for pornographic UCE follows the same guidelines as the Goldwater Amendments. Both the Act and the Goldwater Amendments require the same labeling requirements for senders of sexually oriented commercial mail and e-mail. They require a mark or notice on the envelope or outside of the mail advertisement which adequately identifies the mail as containing sexually explicit content.

While the CAN-SPAM Act regulates e-mail and not regular mail, e-mail is analogous to postal mail. The regulation of pornographic bulk mail by the U.S. Post Office is comparable to the regulation of pornographic bulk e-mail by the CAN-SPAM Act. Therefore, the CAN-SPAM Act’s requirement that all pornographic UCE be labeled as such will survive a First Amendment challenge, for the same reasons that the court upheld the Goldwater Amendments.

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202. *Id.* at §14(a)(3)-(5).

203. *See Pent-R-Books*, 328 F. Supp. at 310.

204. *See id.*

205. *See id.*

## VII CONCLUSION

With the advent of the internet and the widespread use of e-mail as both the business and personal communication of choice, a national consensus has emerged that unsolicited commercial e-mail threatens the viability of this medium and offends certain people. The Congressional response to this public clamor for action in the form of the CAN-SPAM Act does not offend free speech principles. The CAN-SPAM Act's labeling requirements for both UCE and sexually-oriented UCE, and its enactment of the national do-not-e-mail list will be upheld as constitutional in the face of First Amendment challenges.