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## **HOW MUCH SPAM CAN CAN-SPAM CAN?: EVALUATING THE EFFECTIVENESS OF THE CAN-SPAM ACT IN THE WAKE OF WHITE BUFFALO VENTURES V. UNIVERSITY OF TEXAS**

*Fay Katayama\**

### **INTRODUCTION**

Millions of email users around the world face the same problem each time they go to check their email inbox—spam. Often, promises of free i-Pods or increased girth are invitations to a party far more sinister. At best, the email is simply a misleading advertisement. At worst, the email becomes a portal to an identity theft scam or invitations to lewd and shockingly illegal sites. In response to the ever-growing spam problem, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”).<sup>1</sup> Due to the relative youth of CAN-SPAM, no court in the nation had evaluated any portion of the statute until *White Buffalo Ventures v. University of Texas*<sup>2</sup> was heard in the Fifth Circuit.

While the court of appeals correctly decided *White Buffalo*

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<sup>1</sup> 15 U.S.C. §§ 7701-7713 (2000 & Supp. IV 2004).

<sup>2</sup> 420 F.3d 366 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

*Ventures*, this Note aims to further clarify the holding of the court, and give better guidance for the future. Part I describes the genesis of spam legislation up until CAN-SPAM's enactment. Part II sets out the factual and procedural background of *White Buffalo Ventures* and details the Fifth Circuit's holding. Part III argues that while the holding is correct, much of the analysis explaining the holding is missing. Finally, based on the previous discussion, Part IV suggests guidelines for the future.

## I. BACKGROUND

A better understanding of spam regulation requires a brief background on the history of email and the attendant increase in spam. This part discusses the ascendancy of email as the premier form of communication and the problems it created, the state legislatures' attempts to control the problem, and finally the federal legislature's solution.

### A. From Humble Beginnings

Email began as a way for colleagues to communicate amongst each other.<sup>3</sup> A pioneer of email described it as "a system for communication among colleagues, and your colleagues weren't about to bother you with stuff like spam."<sup>4</sup> However, the function of email was forever changed on May 3, 1978 when Gary Thuerk, a marketing manager, sent out the first piece of spam in an effort to advertise his

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<sup>3</sup> David Streitfeld, *Opening Pandora's In-Box*, L.A. TIMES, May 11, 2003, at 1.

<sup>4</sup> *Id.* (quoting Ray Tomlinson).

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company's open house. Even from its inception, spam was met with hostility. Thuerk received angry emails, calling his message "a clear and flagrant abuse."<sup>5</sup> Thuerk was reprimanded and instructed not to send such messages again. This reprimand proved effective and seemed to thwart other spammers from sending similar messages, at least for the time being.<sup>6</sup>

In 1994, Laurence Canter and Martha Siegel used Internet bulletin boards to send spam to millions of people.<sup>7</sup> The response was much harsher; Canter and Siegel were cut off from their Internet provider and "widely chastised."<sup>8</sup> However, unlike Thuerk, Canter and Siegel were decidedly less apologetic. Their response was, "[g]et used to it, because we're going to do it again."<sup>9</sup> And with this brazenness, an era of mass commercial emails was birthed. Cyberspace was not controlled by the government; thus, there was no one to prohibit spammers from sending out spam at will.

## B. The State Response

As Internet use soared, the volume of spam sent to email users rose accordingly and states began to take a more active role in controlling the types of messages sent. In 1997, Nevada enacted the

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> An Internet bulletin board, also called bulletin board systems (or BBS), provides an electronic database, the contents of which are controlled by a system operator. Users can log in to leave messages, browse archived files, and perform a number of other functions that the system operator chooses. Dictionary.com, <http://dictionary.reference.com/search?q=bulletin%20board%20system> (last visited Aug. 8, 2006).

<sup>8</sup> Streitfeld, *supra* note 3, at 1.

<sup>9</sup> *Id.*

nation's first anti-spam law.<sup>10</sup> The Nevada law required the sender to provide their legal name, complete street address, a valid return email address, and an "opt-out" option.<sup>11</sup> Washington followed, in 1998, by passing its own anti-spam statute prohibiting falsification of point of origin and subject line information.<sup>12</sup> Shortly thereafter, California enacted its own statute, requiring unsolicited messages to be labeled as "ADV:" or "ADV:ADLT".<sup>13</sup> By 2003, thirty-six states had enacted spam legislation and two states prohibited spam altogether.<sup>14</sup> The states sought to use the same basic formula; typically a combination of the basic provisions in the Nevada, Washington and California statutes; focusing on deceptive practices like "misleading subject lines, forged sender addresses, and false routing information contained in message headers."<sup>15</sup> Other features included clear labels in the header and "opt-out" options.<sup>16</sup> However, for a variety of reasons, the state legislative attempts failed. To begin with, few spammers complied with state requirements. Secondly, states were often unable to prosecute under their laws due to the high cost of

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<sup>10</sup> NEV. REV. STAT. ANN. § 41.705 (West 2006).

<sup>11</sup> *See id.* § 41.730(1)(c)(1)-(2).

<sup>12</sup> WASH. REV. CODE ANN. § 19.190.020(1)(a) (West 2006).

<sup>13</sup> CAL. BUS. & PROF. CODE § 17538.4(g) (West 1998) (repealed 2003). The "ADV:" label would signify general advertisements, while the "ADV:ADLT" label would signify messages with information consisting of "the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older . . ." *Id.*

<sup>14</sup> Among the states that attempted to ban spam outright were California and Delaware. CAL. BUS. & PROF. CODE § 17529.2 (West 2004); DEL. CODE ANN. tit. 11, § 937 (2003).

<sup>15</sup> David Sorkin, *Spam Legislation in the United States*, 22 J. MARSHALL J. COMPUTER & INFO. L. 3, 4 (2003).

<sup>16</sup> *Id.*

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tracking down spammers,<sup>17</sup> ambiguities in the definition of terms in the state laws,<sup>18</sup> and jurisdictional problems caused by the interstate nature of email.<sup>19</sup>

### C.      **The Federal Government Steps In**

It was not long before the Federal Government realized the problems associated with spam and its regulation. This section explains the steps taken by the Federal Government in recognizing and addressing the problems created by spam, and includes specific provisions of the CAN-SPAM Act.

#### 1.      ***Recognizing That There is a Problem is the First Step***

In mid-2003, aware of the failure of state legislation to curtail unsolicited commercial email, the Federal Trade Commission began a forum on spam to determine the best solution to the problem. A collection of almost 400 “bureaucrats and lawmakers, consumers, lawyers, Internet service providers, techies, and, most perilously, anti-spam activists and spammers” sat down for several days to discuss ways of curbing what was described as “today’s onslaught of unsolicited e-mail ads.”<sup>20</sup> A persistent problem with the drafting of anti-spam legislation stems from spam’s very definition. Depending

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<sup>17</sup> Matthew Prince & Patrick Shea, *After CAN-SPAM, How States Can Stay Relevant in the Fight Against Unwanted Messages*, 22 J. MARSHALL J. COMPUTER & INFO. L. 29, 40 (2003).

<sup>18</sup> *Id.* at 43-44.

<sup>19</sup> Daniel Mayer, *Attacking a Windmill: Why the CAN SPAM Act is a Futile Waste of Time and Money*, 31 J. LEGIS. 177, 186 (2004).

<sup>20</sup> Don Oldenburg, *Spam and a Case of Dyspepsia; Marketers and Blacklisters Face Off at FTC’s E-Mail Forum*, WASH. POST, May 3, 2003, at C01.

on the context, “spam” may be defined very broadly to include all forms of unsolicited email, very narrowly to include only commercial emails that are deceptive and fraudulent, or something in between. Congress ultimately defined spam as a “commercial electronic mail message” meaning “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.”<sup>21</sup>

## 2. *Striking a Balance between the Need for Uniformity and Allowing States to Fashion Their Own Remedies*

CAN-SPAM’s main provisions prohibit such things as “initiat[ing] the transmission . . . of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading;”<sup>22</sup> transmitting “a subject heading . . . [which] would be likely to mislead a recipient;”<sup>23</sup> and failure to include a “functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed.”<sup>24</sup> Furthermore, CAN-SPAM also prohibits businesses from knowingly promoting their trade in an email that contains false or misleading transmission information.<sup>25</sup>

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<sup>21</sup> 15 U.S.C. § 7702(2)(A).

<sup>22</sup> *Id.* § 7704(a)(1).

<sup>23</sup> *Id.* § 7704(a)(2).

<sup>24</sup> *Id.* § 7704(a)(3)(A).

<sup>25</sup> See generally *id.* § 7705 (stating that it is unlawful for a person to promote his trade/business in a commercial electronic mail message in violation of § 7704(a)(1) if he knew or should have known the trade/business was being promoted in such a manner or if he received economic benefit from such promotion).

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By enacting the statute, Congress largely preempted state law.

CAN-SPAM states:

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.<sup>26</sup>

However, Congress also recognized that “[t]he problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone.”<sup>27</sup> Therefore, Congress also included in the statute certain provisions that exempt Internet access providers by specifically stating that:

Nothing in this chapter shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.<sup>28</sup>

Similarly, CAN-SPAM was not meant to apply to state policies not specific to email but which may affect email, as is evidenced by language stating, “[t]his chapter shall not be construed to preempt the applicability of . . . State laws that are not specific to

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<sup>26</sup> 15 U.S.C. § 7707(b)(1).

<sup>27</sup> *Id.* § 7701(a)(12).

<sup>28</sup> *Id.* § 7707(c).



electronic mail, including State trespass, contract, or tort law; or . . . other State laws to the extent that those laws relate to acts of fraud or computer crime.”<sup>29</sup> These exemptions were included to supplement CAN-SPAM and account for areas not covered under the legislation.

## II. WHITE BUFFALO VENTURES V. UNIVERSITY OF TEXAS AT AUSTIN

The tension between CAN-SPAM and the remedies fashioned by the states and their entities is seen in *White Buffalo Ventures*. This Part discusses the facts leading up to the litigation in the case, as well as the procedural background.

### A. Factual Background

The University of Texas at Austin (“UT”) provides free Internet access and email address to its faculty, staff and students.<sup>30</sup> The UT email accounts can be accessed either on-campus, through use of both wireless and wired connections, or remotely, through other Internet service providers.<sup>31</sup> White Buffalo Ventures, LLC (“White Buffalo”) operates several online dating services, one of which is LonghornSingles.com.<sup>32</sup> In February of 2003, White Buffalo submitted a Public Information Act request<sup>33</sup> and UT

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<sup>29</sup> *Id.* § 7707(b)(2)(A)-(B).

<sup>30</sup> *White Buffalo Ventures*, 420 F.3d at 369.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> The Texas Government Code provides that all people of the state are entitled to “complete information about the affairs of government and the official acts of public officials and employees.” TEX. GOV’T CODE ANN. § 552.001 (Vernon 2006). “Public information” is defined in section 552.002(a) as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental

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responded by disclosing all qualifying email addresses.<sup>34</sup> In April of 2003, White Buffalo began sending “legal commercial spam” to people affiliated with UT.<sup>35</sup> A total of 55,000 emails promoting LonghornSingles.com were sent.<sup>36</sup> Although the emails were not initially detected by spam filters,<sup>37</sup> UT officials began to receive complaints.<sup>38</sup> The University then sent White Buffalo a cease and desist letter, which was ignored.<sup>39</sup> Pursuant to its Regents’ Rules which block incoming, unsolicited commercial emails, UT responded by blocking all emails from White Buffalo’s source address to addresses containing the “@utexas.edu” string.<sup>40</sup>

## **B. Procedural History**

White Buffalo filed a motion for a temporary restraining order in the District Court for the State of Texas to enjoin UT from blocking emails to UT students and the Order was issued on May 9, 2003.<sup>41</sup> UT subsequently removed the case to federal court.<sup>42</sup> After a hearing in May 2003, the district court denied White Buffalo’s petition for a preliminary injunction and both parties moved for

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body owns the information or has a right of access to it.” *Id.* § 552.002.

<sup>34</sup> *White Buffalo Ventures*, 420 F.3d at 369.

<sup>35</sup> *Id.*

<sup>36</sup> *White Buffalo Ventures v. Univ. of Tex.*, No. A-03-CA-296-SS, 2004 WL 1854168, at \*1 (W.D. Tex. Mar. 22, 2004), *aff’d*, 420 F.3d 366.

<sup>37</sup> *White Buffalo Ventures*, 2004 WL 1854168, at \*1. UT has developed its own commercial spam filters designed to alert the network system operators when a large amount of email emanates from one source. *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Brief of Plaintiff-Appellant at 7, *White Buffalo Ventures*, No. 04-50362 (5th Cir. Aug. 3, 2004).

<sup>42</sup> *White Buffalo Ventures*, 420 F.3d at 370.

summary judgment.<sup>43</sup> In an opinion by Judge Sparks, the court granted UT summary judgment, holding that the University was an Internet access provider and that their policy was thus not preempted under CAN-SPAM.<sup>44</sup> Judge Sparks also held that UT's policy did not violate White Buffalo's free speech rights.<sup>45</sup> Finally, the district court held that the Board of Regents' policy was not specific to email and instead was a general set of rules governing solicitation using university facilities.<sup>46</sup>

The Fifth Circuit Court of Appeals affirmed the ruling of the district court. In reviewing the decision of the district court *de novo*,<sup>47</sup> the court of appeals found that while CAN-SPAM's preemption clause did apply to UT, the exemption clause in § 7707 allowed UT to employ protective measures because of its status as an Internet service provider.

### III. ANALYSIS

In looking to the issues created by the preemptive powers of CAN-SPAM, there are two distinct issues. The first section explores the first issue—the difficulties created by textual ambiguities of CAN-SPAM, including its failure to more completely define what constitutes an Internet access provider and what constitutes a state law broad enough to be considered not specific to electronic mail. The second section explores whether the provisions of CAN-SPAM

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<sup>43</sup> *Id.*

<sup>44</sup> *White Buffalo Ventures*, 2004 WL 1854168, at \*3.

<sup>45</sup> *Id.* at \*6 n.5.

<sup>46</sup> *Id.* at \*3.

<sup>47</sup> *White Buffalo Ventures*, 420 F.3d at 370.

infringe on White Buffalo's commercial free speech rights.

### A. Textual Ambiguity and Preemption

The first issue addressed with respect to the preemptive effect of CAN-SPAM is the textual ambiguity of the Act itself, which expressly preempts:

[A]ny statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.<sup>48</sup>

Although CAN-SPAM itself fails to define the meaning of either "State" or "political subdivision of a State,"<sup>49</sup> the word "State" is construed to encompass "other entit[ies] that [are] . . . created by the constitution . . . including a university system or institution of higher education."<sup>50</sup> Therefore, UT is encompassed under the banner of "State or political subdivision of a State."<sup>51</sup> CAN-SPAM also provides an exemption clause, which states, "[n]othing in this chapter shall be construed to have any effect on the lawfulness or unlawfulness . . . of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail

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<sup>48</sup> 15 U.S.C. § 7707(b)(1).

<sup>49</sup> *Id.* § 7702 (containing the definitions of terms under CAN-SPAM, but omitting definitions of either "State" or "political subdivision").

<sup>50</sup> TEX. GOV'T CODE ANN. § 2260.001(4) (Vernon 2006).

<sup>51</sup> 15 U.S.C. § 7707(b)(1).

messages.”<sup>52</sup> Due to the fact that UT provides Internet access to its students, UT is also encompassed under the banner of “Internet access provider.” CAN-SPAM gives no guidance as to which provision controls when a state or political subdivision of a state is at the same time an Internet access provider. The court held, “[t]he textual ambiguity triggers the strong presumption against . . . a finding” of preemption.<sup>53</sup> However, the court failed to explain why such a strong presumption exists.

It is first important to further clarify what the court meant when it referred to a “textual ambiguity.” In the preceding paragraph, the court discusses the two “competing” interpretations of CAN-SPAM: 1) that “state entities may not regulate commercial speech except where that regulation relates to the authenticity of the speech’s source and content”<sup>54</sup> versus 2) “state entities may implement a variety of non-authenticity related commercial speech restrictions, provided the state entity . . . is an ‘Internet access provider.’”<sup>55</sup> However, applying the plain meaning of the statute, the two theories are not in conflict with one another. The exemption clause at § 7707(c) clearly states, “[n]othing in this chapter shall be construed to have *any effect*” on the legality of a policy adopted by an Internet access provider.<sup>56</sup> The plain language of this clause suggests that the preemption clause is superseded by the exemption clause when the party implementing the restriction is an Internet access

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<sup>52</sup> *Id.* § 7707(c).

<sup>53</sup> *White Buffalo Ventures*, 420 F.3d at 372.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 15 U.S.C. § 7707(c) (emphasis added).

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provider, regardless of whether such provider is a state agent. However, the court confuses this issue by stating only that the exemption clause triggers the *presumption* against preemption.<sup>57</sup> In fact, this is not just a presumption but, in effect, a definitive preemption of the preemption clause.

If ambiguity exists at all, it is whether a state actor may ever constitute an Internet access provider for purposes of CAN-SPAM. The Act defines an Internet access provider as “a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.”<sup>58</sup> There is nothing in this definition that would exclude a state actor, or any other entity, from classification as an Internet service provider. Therefore, the presumption exists that an entity can concurrently be considered an Internet access provider and a state or political subdivision of a state.

An application of the definition of an Internet access provider to UT shows that the University is, in fact, an Internet access provider. The faculty, students and staff of the University are able to access the Internet, including their UT email accounts, through both wired and wireless service on-campus.<sup>59</sup> Although White Buffalo

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<sup>57</sup> *White Buffalo Ventures*, 420 F.3d at 372.

<sup>58</sup> 15 U.S.C. § 7702(11) (importing the definition of an Internet access service from The Child Online Protection Act of 1998, 47 U.S.C. § 231(e)(4), *invalidated by* Ashcroft v. ACLU, 542 U.S. 656 (2004)). There is seemingly no distinction between an Internet access provider and an Internet access service. It should be noted that the Fifth Circuit erroneously credits this definition to the Internet Tax Freedom Act. *White Buffalo Ventures*, 420 F.3d at 373.

<sup>59</sup> *White Buffalo Ventures*, 420 F.3d at 369.

cites the fact that only 6,000 of the 59,000 individuals with “utexas.edu” email address check their accounts on-campus, perhaps in an effort to illustrate that UT is not an Internet access provider, the court stated, “we are hard-pressed to find that providing email accounts and email access does not bring UT within the statutory definition . . . .”<sup>60</sup> Absent any language barring a state actor from consideration as an Internet access provider, UT is clearly within the exemption.

The purposes behind CAN-SPAM lend further support for the presumption that a state actor can be considered an Internet access provider. Congress, in enacting CAN-SPAM, recognized the necessity for a uniform law with regard to email, especially because emails are very often interstate and there are jurisdictional problems imposed if different laws apply when the same email is sent to different states. However, Congress also recognized that, “[t]he problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone.”<sup>61</sup> It is reasonable to assume that the existence of the exemption clause stems from this recognition. Those that provide Internet access necessarily need freedom in order to specifically tailor spam filters to their own users. In light of Congress’ findings that email “has become an extremely important and popular means of communication, relied on by millions of Americans on a daily basis . . . .”<sup>62</sup> and that “[t]he convenience and efficiency of electronic mail are

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<sup>60</sup> *Id.* at 373.

<sup>61</sup> 15 U.S.C. § 7701(a)(12).

<sup>62</sup> *Id.* §7701(a)(1).

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threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail,”<sup>63</sup> it can be presumed that Congress intended to liberally grant entities the freedom to formulate their own spam policies as an Internet access provider.

Finally, the provision in § 7707(b)(2), which states that “State laws not specific to electronic mail, including State trespass, contract, or tort law” are not preempted by CAN-SPAM favors an interpretation supporting a State’s right to regulate spam. The district court held that UT’s policy was not exempted because “it regulates all forms of solicitation.”<sup>64</sup> The court of appeals, in its decision, declined to address this issue “because . . . [it had] alternate grounds of making . . . [its] preemption decision.”<sup>65</sup> However, rather than leave this discussion for another day, the court of appeals could have easily provided an answer to this issue.

Under CAN-SPAM, state laws that are not specific to electronic mail, or that regulate acts of fraud or computer crime, are not subject to preemption under the Act.<sup>66</sup> However, there is some question as to whether the policies of a state university have the requisite weight to be considered a “state law.”<sup>67</sup> In its decision, the court of appeals summarily rejects an argument that UT’s anti-spam

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<sup>63</sup> *Id.* § 7701(a)(2).

<sup>64</sup> *White Buffalo Ventures*, 2004 WL 1854168, at \*3.

<sup>65</sup> *White Buffalo Ventures*, 420 F.3d at 373 n.12.

<sup>66</sup> 15 U.S.C. § 7707(b)(2)(B).

<sup>67</sup> The district court may have confused this issue by questioning whether the spam policy itself can be considered a “statute, regulation, or rule.” However, the spam policy was promulgated only in conjunction with UT’s general anti-solicitation policy as laid out in the Regents Rules. The Regents Rules themselves clearly fall within the category of a “statute, regulation, or rule.”



policy is not a “ ‘statute, regulation, or rule of a State . . . .’ ”<sup>68</sup> To spell this out, first, it is well established that UT is encompassed by the term “State.”<sup>69</sup> Second, the document that houses the University’s anti-spam policy, the Regents Rules, clearly indicates that the policy is part of a “rule of a State.” However, the pertinent portion of CAN-SPAM uses the word “law.”<sup>70</sup> For argument’s sake, one must assume that a statute, regulation, or rule, as per this discussion, fall under the Act’s definition of “law.”

The issue can be summarized as follows: absent a finding that UT is an Internet access provider, would its policy be exempted because it is a “State law not specific to electronic mail?”<sup>71</sup> The pertinent part of UT’s Rules and Regulations is found in Part One, Chapter VI Section 6.6 of the Rules and Regulations of the Board of Regents of the University of Texas System for the Government of the University of Texas System (“Regents Rules”). The Regents Rules define “solicitation” as “the sale, lease, rental or offer for sale, lease, rental of any property, product, merchandise, publication, or *service*, whether for immediate or future delivery . . . .”<sup>72</sup> Although the precise nature of the email sent by White Buffalo is not in the record,

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<sup>68</sup> *White Buffalo Ventures*, 420 F.3d at 373 (quoting 15 U.S.C. § 7707(b)(1)). “Any suggestion along the lines . . . that an ITC policy does not constitute a policy of a state subdivision – is incorrect and requires little explanation. ITC implements the directive of, and operates pursuant to the authority of, the Board of Regents; its policies therefore constitute *rules of a state subdivision*.” *Id.*

<sup>69</sup> In fact, this issue is so well established that UT itself conceded that it was a state actor. Brief of Defendant-Appellee at 1, *White Buffalo Ventures v. Univ. of Tex.*, No. 04 - 50362 (5th Cir. Aug. 2, 2004).

<sup>70</sup> 15 U.S.C. § 7707(b)(2).

<sup>71</sup> *Id.* § 7707(b)(2)(A).

<sup>72</sup> UT BD. OF REGENTS RULES & REGS., Pt. One, Ch. VI, “Student Services and Activities and Regulations on Facilities Use,” § 6.6 “Solicitation” (emphasis added) (last amended 11/13/03) (superseded by New Rules 12/10/04).

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it is presumed that the email contained an offer for the sale of dating services. Therefore, the email is covered under UT's anti-solicitation policy. It can hardly be said that this policy is specific to email. The Regents Rules do not specifically mention email, or even the Internet, in setting out its anti-solicitation rules. Therefore, the Regents Rules set out a broad anti-solicitation policy. The pertinent portion of CAN-SPAM states, "[t]his chapter shall not be construed to preempt the applicability of—(A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law."<sup>73</sup> While the mention of "State trespass, contract, or tort law" may indicate that Congress had specific fields of law that CAN-SPAM was not meant to affect, the statute's actual language only states that these areas of law are "included" among those not preempted, but not that they are the *exclusive* areas.

This analysis is especially pertinent because the inapplicability of CAN-SPAM to UT's anti-spam policy under this situation opens the door for practically any state actor to escape preemption under CAN-SPAM simply by using a broad anti-solicitation policy to shield what is essentially an anti-spam policy. It is hard to imagine that Congress foresaw the situation at hand—a university's anti-spam policy escaping preemption because it is encompassed in their general anti-solicitation policy. The failure of the court to address this issue can lead to a potential expansion of the exemption for state actors to every state entity.

It may be that the wording of CAN-SPAM is important after

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<sup>73</sup> 15 U.S.C. § 7707(b)(2)(A).

all. While the above analysis proceeded on the assumption that the Regents Rules would be incorporated under the heading “state law,” the wording of CAN-SPAM may indicate that Congress did in fact intend to limit the policies that could escape preemption. The section of CAN-SPAM that outlines the general preemption rules states, “[t]his chapter supersedes any *statute, regulation, or rule* of a State . . . .”<sup>74</sup> However, the section that discusses what CAN-SPAM *will not* affect reads:

(2) State *law* not specific to electronic mail

This chapter shall not be construed to preempt the applicability of—

(A) State *laws* that are not specific to electronic mail, including State trespass, contract, or tort *law*; or

(B) other State *laws* to the extent that those laws relate to acts of fraud or computer crime.<sup>75</sup>

The word “law” or “laws” is used four times in this section of CAN-SPAM, and there is no indication that a state “rule” would be sufficient. The inclusion of the word “rules” in the preceding section outlining what CAN-SPAM preempts, and the absence of the word “rules” in the section outlining what is exempted from preemption, leads to the inference that “rules” are *not* sufficient for purposes of the latter section. While this word choice may have been an unintentional one, Congress may have more likely intended only “laws,” which presumably are more difficult to enact than “rules,” to escape preemption under certain situations. Applying such an interpretation, the Regents Rules, which the court of appeals

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<sup>74</sup> *Id.* § 7707(b)(1) (emphasis added).

<sup>75</sup> *Id.* § 7707(b)(2) (emphases added).

characterized as “rules of a state subdivision,” would not qualify for exemption from preemption.<sup>76</sup>

The above analysis shows that much depends on how the words of CAN-SPAM are interpreted. On one hand, an interpretation that exempts from preemption a policy such as UT’s ITC policy could result in similar consequences for many of the state’s policies. On the other hand, an interpretation that does not include policies, and limits what can be exempted from preemption, would prevent a state entity like UT from regulating solicitation broadly in the hopes of reaching email solicitation as well. While it seems apparent that the words chosen by Congress are meant to include only state “laws”, perhaps the court will one day have cause to address this issue and decide which interpretation is the correct one.

### **B. Commercial Free Speech**

Having determined that UT’s policy fits under the exemption for Internet access providers, the court then turned its analysis to White Buffalo’s First Amendment freedom of commercial speech claim. The resolution of this issue requires application of the four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>77</sup> the seminal case in determining the legality of commercial speech regulation.<sup>78</sup> However, the court of appeals’

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<sup>76</sup> It is also important to note that 15 U.S.C. § 7707(b)(2) only refers to “State” and not to political subdivisions of States. Again, it is unclear whether this choice was intentional or unintentional, but more likely, the interpretation is that the choice is intentional and only laws promulgated by the State are included.

<sup>77</sup> 447 U.S. 557 (1980).

<sup>78</sup> *Id.* at 564. The four part test looks to: 1) Is the speech at issue lawful and not misleading; 2) Does the government have a substantial interest in regulation; 3) Does the

application of this test is problematic in the same way that much of its analysis of this case is because their holding lacks the clarity and discussion that would help decisions of future cases.

### 1. *Is the Speech Lawful or Misleading?*

The first part of the *Central Hudson* test focuses on whether the speech is lawful and not misleading. While this issue is answered easily in that both parties admit that White Buffalo's email was both lawful and not misleading, this is somewhat of an anomaly with respect to most forms of spam.

Most spam messages contain some form of falsity, whether it be in the "from" lines, "subject" lines, or text.<sup>79</sup> An interesting issue arises when trying to determine how much the spam must mislead the recipient in order to put the target of legislation outside of the purview of commercial free speech. While a discussion on this issue would have been *dicta* in the context of an analysis of the case at bar, a discussion would nonetheless have given valuable guidance for future courts in deciding commercial free speech cases.

The location of the misleading data may be dispositive to this issue. *Central Hudson*, in creating the threshold question of whether a message is false or misleading, stated, that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The

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state's action directly promote the interest; and 4) Is the state action more extensive than necessary to promote the state interest. *Id.*

<sup>79</sup> FED. TRADE COMM'N DIV. OF MKTG. PRACTICES, FALSE CLAIMS IN SPAM (2003), <http://www.ftc.gov/reports/spam/030429spamreport.pdf> at 10 (stating that sixty-six percent of spam analyzed by the Federal Trade Commission contained some form of falsity).

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government may ban forms of communication more likely to deceive the public than to inform it.”<sup>80</sup> If the basis for excluding misleading advertisements is to safeguard the public from misinformation, how misleading must the “subject” line, “from” line, or text be in order to be excluded? While it is most likely easier to omit a message from commercial free speech protections based on misinformation in the body of the text, which is more akin to false advertisement, issues may arise when evaluating the degree of misinformation required in the “subject” line or “from” line. One court has held that a subject line stating, “Did I get the right e-mail address?” when the body of the text was an advertisement, was sufficiently misleading to bar the sender from the protections of First Amendment Commercial Free Speech.<sup>81</sup> This subject line is somewhat misleading because the sender is most likely attempting to get the recipient to read the email because of the connotation of a prior relationship. However, if the test is whether or not the message is “more likely to deceive the public than to inform it,” it can be argued that such a subject line can better inform the public. Because most people are likely to delete emails from senders they do not recognize, a subject line that catches the eye and entices the recipient to open it can better inform the recipient about possible transaction opportunities, amongst other things, provided the body of the text itself is not misleading or

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<sup>80</sup> 447 U.S. at 563.

<sup>81</sup> *State v. Heckel*, 93 P.3d 189, 194 (Wash. Ct. App. 2004).

fraudulent. A narrow reading of “misleading,” such as that adopted by the Washington Court of Appeals in *State v. Heckel*, can severely hinder the rights of legitimate advertisers who may want to be a bit more creative in crafting subject lines.

To resolve this issue, the courts should look first to the body of the text to determine if it is misleading. Absent a finding of a fraudulent, or of course unlawful, advertisement in the body, the courts should then turn to the “from” and/or “subject” lines to determine the effect of the misinformation, if any, in these lines in determining whether an email fails the threshold test of the *Central Hudson* four-prong model.<sup>82</sup>

## 2. *Does the Government Have a Substantial Interest in the Regulation?*

The second part of the *Central Hudson* test examines whether the government’s expressed interest in the regulation is substantial. In its brief, UT argued that it had two primary interests worthy of being defined as “substantial”—time and interests of those with UT email accounts, and the efficiency of its networks and servers.

While the *Central Hudson* test looks to the government interest, the issue in this case is that of a state university. The interests of such a limited governmental entity are potentially much narrower than the interest of the entire state. However, in this case, the interests of the smaller entity, the state university’s board of regents, and the larger entity, the state government as a whole, are

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<sup>82</sup> *Id.*

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similar if not the same, and the following analysis assumes that the interests are the same.

With regard to the time and interest of email users, the court states, “[f]or purposes of evaluating the summary judgment, we acknowledge as substantial the government’s gatekeeping interest in protecting users of its email network from the hassle associated with unwanted spam.”<sup>83</sup> This conclusory statement gives no guidance as to why the time and interests of the email users is a “substantial” government interest.<sup>84</sup> In fact, those that send “spam” can argue that their messages are not any different from other annoyances in life. While most spam is typically irrelevant or unhelpful to the recipient, spam can also provide for “transaction opportunities that otherwise would not occur due to prohibitive search costs or lack of consumer awareness about products available to solve their needs.”<sup>85</sup> A further description of what this “hassle” is would have provided more guidance for this analysis, but absent this, identification of what these “hassle[s]” typically refer to is necessary.

Loss of productivity and time are frequently reasons cited in condemning spam. However, it could be argued that spam *saves* email users time, if the messages are pertinent. A quick perusal of subject headings, provided the subjects are accurate, can tell an email user whether or not the email is of any value to them. Deleting irrelevant emails takes a matter of seconds and if emails pertaining to

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<sup>83</sup> *White Buffalo Ventures*, 420 F.3d at 374-75.

<sup>84</sup> In the court’s defense, more analysis is not required in evaluating a summary judgment.

<sup>85</sup> Eric Goldman, *Where’s the Beef? Dissecting Spam’s Purported Harms*, 22 J. MARSHALL J. COMPUTER & INFO. L. 13, 16 (2003).



goods and services that the email user has been thinking about consuming remain, reading these emails can provide potential money-saving offers and information for comparative pricing.<sup>86</sup>

Also, spam is not unlike many other forms of advertisement. People are inundated with advertisements, whether watching television, reading a magazine, or even driving down the freeway. Yet in these other contexts, people are willing to wade through the advertisements, or simply ignore them. If the reason for regulating spam is to save people time, it could be argued that the government has a similar “substantial” interest in ridding people of advertisements altogether. Of course, there is more at issue in examining the harm of spam. This discussion is meant only to illustrate that the court’s dismissal of this issue by pronouncing an interest in protecting people from “hassle” is not nearly enough to prove a “substantial” interest.

The court correctly decided that UT has a substantial interest in protecting its email users from spam messages. First, UT has an interest in protecting its users from wasted time. Although, as argued above, spam messages can provide some benefits to email users, if spam messages are allowed to reach the UT email users unchecked, the loss of productivity and time would be crippling.<sup>87</sup> Furthermore,

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<sup>86</sup> See Derek F. Bambauer, *Solving the Inbox Paradox: An Information-Based Policy Approach to Unsolicited E-Mail Advertising*, 10 VA. J.L. & TECH. 5, 120-21 (2005). An information-based model of spam policy was created to weigh the value the information in the email provides against the cost and harms it imposes. An element in the model comprises a positive consumer value from relevant advertising information. *Id.*

<sup>87</sup> *White Buffalo Ventures*, 2004 WL 1854168, at \*5. The district court, citing to a 2003 Ferris Research report, stated that “employee productivity losses from sifting through and deleting spam account[ed] for nearly \$4 billion.” *Id.*

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if the UT email users' accounts are continuously filled with spam messages, the users are more likely to become frustrated and discontinue use of their accounts, thereby negating a benefit that the University intended to offer those affiliated with it. UT has a substantial interest in protecting those affiliated with the University, and to ensure their time and efforts are not consumed searching through emails to find the messages pertinent to them.

The court similarly handles the "server efficiency" interest advanced by UT, by simply stating, "[a]lso substantial is the 'server efficiency' interest . . . ."<sup>88</sup> Again, this language provides no guidance for future decisions. With regard to this issue, a complete analysis is in the interest of judicial economy, providing valuable precedent. While the volume of emails sent by a spammer such as White Buffalo may vary, the interest of each state actor in protecting the efficiency of its server is likely to be very similar for each state actor. That which constitutes a burden on server efficiency should not be based solely on the volume of emails sent because this would lead to potentially nonsensical line drawing. Therefore, a determination of whether or not the server efficiency interest is a substantial one would save significant time in the future.

The server issue is perhaps an easier one to determine than the user efficiency argument. It has been held that there is a substantial state interest in the protection of its servers. If the servers are overloaded by spam to the point that they no longer function, the state's email, and perhaps other Internet services, will be halted.

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<sup>88</sup> *White Buffalo Ventures*, 420 F.3d at 375.

Therefore, a substantial interest exists.

**3. *Does the State's Action Directly Promote the Interest?***

The court holds that UT's policy is clearly directed to promote its interest in both user efficiency and server efficiency. The policy of blocking unwanted spam serves *only* the purpose of saving email users' time and frees the UT servers from overloading on emails. In fact, the court itself stated, "[o]ne can hardly imagine a more direct means of preventing commercial spam from appearing in account-holders' inboxes and occupying server space than promulgating a policy that excludes such material from the email network."<sup>89</sup>

**4. *Is the State Action More Extensive Than Necessary to Promote the Interest?***

The court has no problem in holding that the policy is no more extensive than necessary to safeguard user efficiency, but declines holding that the policy is no more extensive than necessary to protect *server* efficiency. Although the court's analysis of this considers the evidence in the light most favorable to the nonmovant because it is reviewing a grant of summary judgment, there are discrepancies between the analyses regarding user efficiency and server efficiency.

First, the court concludes that UT's ITC policy is no more extensive than necessary because blocking unwanted spam "keep[s]

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<sup>89</sup> *Id.*

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community members from wasting time identifying, deleting, and blocking” the unwanted messages.<sup>90</sup> This statement seems to suggest that the degree to which the users are protected is not at issue. The ITC policy is no more extensive than necessary because it fulfills its goal of preventing wasted time. However, in looking at the server efficiency issue, the court does not begin and end its analysis at whether the policy fulfills its stated goal of protecting server efficiency. As a matter of common sense, the ITC policy would fulfill the goal of protecting server efficiency—if the server does not have to process White Buffalo’s email, its efficiency is improved. If an analysis of the degree to which the efficiency is protected is not warranted, as it was not in examining user efficiency, then UT prevails on this issue as well. Arguing this issue may be moot in that “a governmental entity may assert that a statute serves multiple interests, and only one of those need be substantial.”<sup>91</sup> However, it is confusing why the court feels the need to further analyze the server efficiency issue while at the same time summarily dismissing the user efficiency issue.

The court stated that “the challenged regulation should indicate that its proponent ‘carefully calculated the costs and benefits associate with the burden on speech imposed by its prohibition.’ ”<sup>92</sup> If the court is required to follow this rule, there is no issue in applying it to the server efficiency interest that UT advances.

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<sup>90</sup> *Id.* at 376.

<sup>91</sup> *Id.* at 378 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71-73 (1983)).

<sup>92</sup> *Id.* at 376-77 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)).

However, there is no indication that such careful calculation was made when examining the user efficiency interest advanced by UT. The costs of UT's ITC policy are the same, whether the policy is used to advance user efficiency or server efficiency. Regardless as to which interest is at issue, the cost is the blocking of otherwise legal commercial emails. If a difference exists, it must be in the "benefits associated with the burden on speech."<sup>93</sup>

When examining user efficiency, the benefit that accrues to UT is the amount of time saved by protecting UT email account holders from White Buffalo's unwanted email. Although this could add up to hours in the aggregate, when considering the amount of time saved by all UT email account holders combined, each user individually is only minimally benefited by UT blocking White Buffalo's spam.<sup>94</sup> After all, it takes a matter of seconds for a reader to look at the sender or subject line of the email and determine it is not an email in which they are interested.<sup>95</sup> The benefit accrued to UT in protecting its servers is increased efficiency. The emails sent by White Buffalo, or any other spammer, take up disc space and drain processing power. These resources are therefore unavailable to process the requests of other UT users.<sup>96</sup> The number of emails sent

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<sup>93</sup> *Discovery Network*, 507 U.S. at 417.

<sup>94</sup> The court makes it very clear that only the benefit accrued in blocking White Buffalo's spam can be considered, and not the effect of spam "taken in its entirety." *White Buffalo Ventures*, 420 F.3d at 376.

<sup>95</sup> Although the veracity of the subject and/or sender lines may be an issue in other cases, it was conceded that White Buffalo's email contained "factually accurate information." *See id.* at 374. Therefore, a quick perusal of this subject and/or sender line would give accurate information to the recipient, who would then be able to make a quick decision as to whether or not to open the email.

<sup>96</sup> *See CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997).

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by White Buffalo, estimated at 55,000, is unlikely to significantly affect the UT servers, and therefore the benefit to server efficiency is probably not significant. However, for the above reasons, the benefit to user efficiency is likewise not significant. Therefore, another reason must exist to explain the distinction the court makes between evaluating user efficiency and server efficiency.

The court expresses reticence in “declaring server integrity to be a substantial interest without evidentiary substantiation” because there might be “unforeseen and undesirable ramifications in other online contexts.”<sup>97</sup> In a footnote, the court, after warning that it is no more than a “cautionary note,” explains that there is a danger that courts will conclude that there is a burden on a system without requiring evidence or explanation as to how the system is burdened.<sup>98</sup> The court cites to a number of cases in which such a scenario came to fruition.<sup>99</sup> However, if the court is simply willing to accept, without evidence or explanation, a burden on user efficiency, the same dangers exist. In this case, the court ultimately granted summary judgment to UT based on its user efficiency interest alone. Pursuant to the court’s holding here, a government entity need only advance a user efficiency interest, and attach or even forego the server efficiency interest, and the outcome will be the granting of summary judgment. If the court really wanted to prevent other courts from deciding the issue of burden on a state interest without support of

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<sup>97</sup> *White Buffalo Ventures*, 420 F.3d at 377.

<sup>98</sup> *Id.* n.24.

<sup>99</sup> See, e.g., *CompuServe*, 962 F. Supp. at 1022; *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No. C-98-20064, 1998 WL 388389, at \*7 (N.D. Cal. Apr. 16, 1998).

evidence or explanation, more scrutiny should have been given to the user efficiency interest advanced by UT.

The court completely declined to address the “dicey but admittedly important question of the public versus private forum status of public university email servers.”<sup>100</sup>

Before examining whether a public university’s email server is a public or private forum, it is important to first understand what constitutes a public forum. In *Perry Education Association v. Perry Local Educators Association*,<sup>101</sup> the Supreme Court outlined a “tripartite forum-based framework to analyze First Amendment issues involving governmentally-owned property.”<sup>102</sup> The first category includes “places which by long tradition or by government fiat have been devoted to assembly and debate,”<sup>103</sup> otherwise known as “quintessential public forums.”<sup>104</sup> The second category includes “public property which the state has opened for use by the public as a place for expressive activity.”<sup>105</sup> The third category includes “[p]ublic property which is not by tradition or designation a forum for public communication.”<sup>106</sup> The third category is essentially a catch-all designed to encompass anything that does not fit into the first two categories.

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<sup>100</sup> *White Buffalo Ventures*, 420 F.3d at 374 n.15.

<sup>101</sup> 460 U.S. 37 (1983).

<sup>102</sup> Brief of Defendant-Appellee at 9, *White Buffalo Ventures*, No. 04-50362 (5th Cir. Oct. 4, 2004).

<sup>103</sup> *Perry*, 460 U.S. at 45.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 46. Although the Supreme Court does not label it as such, this third category is what will be referred to as a private forum.

The difference between a public forum and a private one is important because different restrictions can be applied depending on which forum the email server constitutes. If the server is deemed to be a public forum, then the university may impose reasonable time, place and manner regulations and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.<sup>107</sup> However, if the server is a private forum, in addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.<sup>108</sup>

While neither the Supreme Court nor any court in the Fifth Circuit has ruled on whether a university's email server constitutes a public or private forum, decisions by the Supreme Court concerning what *does* constitute a private forum can, by comparison, help determine how the Fifth Circuit Court of Appeals should have ruled with regard to this issue. In *Perry*, the issue was whether a school's internal mail system was a public forum. An educators' association sued the Perry school board and teachers' union after it was denied access to the internal mail system.<sup>109</sup> While conceding that the internal mail system's purpose was to facilitate communication matters amongst teachers, and not for use by the public, the educators' association tried to argue that the mail system was a

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<sup>107</sup> *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

<sup>108</sup> *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 131 n.7 (1981).

<sup>109</sup> *Perry*, 460 U.S. at 41.



“limited public forum.”<sup>110</sup> The teachers’ association’s position was that it could not be excluded “because of the periodic use of the system by private non-school connected groups.”<sup>111</sup> The court, however, rejected the teachers’ association’s argument. While stating, “use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration,” the court also pointed to the fact that use by non-affiliated groups was not indiscriminate.<sup>112</sup> For a non-affiliated group to use the internal mail system, they must ask for permission from the school’s principal. The educators’ association failed to do this. The court held, “[t]his type of selective access does not transform government property into a public forum.”<sup>113</sup> Due to the nature of the forum, the court upheld the school’s use of the internal mail system and their restriction of the educators’ association’s use of the system. In so holding, the court stated:

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.<sup>114</sup>

UT provides email accounts to its faculty, staff, and students

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<sup>110</sup> *Id.* at 47.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Perry*, 460 U.S. at 49.

and the messages sent to these accounts are stored on UT's servers. The email accounts at issue here are comparable to a mail box in an internal mail system in that mail is sent to the "owner" of the mail box.<sup>115</sup> Like in *Perry*, UT's email account can still be used for communication by non-school affiliated groups. Also like *Perry*, UT can allow selective access to the use of its system. Although the form of selection is slightly different, in *Perry* the school allows use of the system only by those organizations that seek and obtain permission while UT employs filters to block certain strings, the difference flows necessarily from the nature of physical mail versus use of the Internet. Since the Internet and email are more widely used vehicles of communication, and are free of charge as compared to the requirement of paid postage for "snail mail," the screening measures employed to block emails serve the function of preventing email accounts from an inundation of messages.

However, there is an important difference between the *Perry* mail box and the UT email account that creates difficulties in the comparison between the two. While the purpose of the *Perry* mail system was to "facilitate communication matters" amongst teachers, the UT email service is not so limited in its purpose.<sup>116</sup> In fact, communication amongst members of the school is almost an

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<sup>115</sup> It is interesting to note that White Buffalo, in its brief, erroneously calls the *Perry* mail system an email system. Furthermore, appellant states that Perry's "email" system was restricted for business purposes. This was not the holding of the case. The similarities between a physical mail box and email account necessitate further discussion of whether they are comparable. Brief of Plaintiff-Appellant at 5, *White Buffalo Ventures*, No. 04-50362 (5th Cir. Aug. 3, 2004).

<sup>116</sup> *Perry*, 460 U.S. at 47.

incidental use of the email service. Holders of an email account may receive emails from any number of people, including those affiliated with the school. Therefore, the UT email account is easily distinguishable from the *Perry* internal mail system. The question still remains whether UT allows enough access to email that it should be considered a public forum.

It is safe to say that the email accounts and the network system used to transmit and store the messages, are not a quintessential public forum. For one, there is not a “long standing tradition” of email use as the advent and widespread use of this form of communication is in its relative youth. However, even absent this weak temporal argument, it cannot be said that email has a tradition of use as a forum for assembly and debate. Although, to be sure, email can be used as a vehicle for debate, its principle use is for private communication between parties. Therefore, UT’s email accounts do not fit within the first category of public fora.

UT’s email system does not fit into the second category of public fora either. The second category includes “public property which the state has opened for use by the public as a place for expressive activity.”<sup>117</sup> The argument is defeated because the email system is not “public property.” UT correctly argues that it does not offer email accounts to the general public, but only to those who are affiliated with the school. Since the accounts are not available to the general public, they can hardly be considered to be available for the

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<sup>117</sup> *Id.* at 45.

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general public for “expressive activity.”<sup>118</sup> Although the email accounts may be used by certain members of the public for expressive activity, especially when account holders request such information, “selective access does not transform government property into a public forum.”<sup>119</sup>

Applying the categories outlined in *Perry*, it would seem that UT’s email network falls into category three.<sup>120</sup> There is some support for the categorization of a public university’s email system as a private forum. The District Court for the Western District of Oklahoma held that the University of Oklahoma (OU)’s server was a non-public forum.<sup>121</sup> In its decision, the court highlighted the fact that, “[a] university is by its nature dedicated to research and academic purposes.”<sup>122</sup> Therefore, “[t]he limitation of OU Internet services to research and academic purpose . . . is not a violation of the First Amendment, in that those purposes are the very ones for which the system was purchased.”<sup>123</sup> The *Loving* court also pointed to the fact that there was “no evidence . . . that the facilities . . . [had] ever been open to the general public or used for public communication.”<sup>124</sup> *Loving* lends support to UT’s position because, like OU, UT has purchased computers and has put a network in place of use by its students and faculty only. There is no evidence that the

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 47.

<sup>120</sup> The rule from *Perry* is that those fora that do not fit into the first two categories fall into the third. *Id.* at 46.

<sup>121</sup> *Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

system has ever been open to the general public or used for public communication. This network can be used to serve a research and academic purpose but, like the OU news server, the email system can also be used for a non-research and/or academic purpose. The similarities between access to OU's news servers and UT's email system support a conclusion that UT's email network should be considered a private forum.

Under the above analysis, UT's email system is a private forum, and thus, the University may reserve the forum for its intended purpose. While UT does not specifically state what the intended purpose of its email system is, presumably the use is for communication with the students and to provide the students with a means of communicating both with school affiliated and non-school affiliated persons.

Whether the email system is a public or private forum can serve as a threshold question for future cases because the analysis is different depending on what kind of forum is at issue. The less stringent requirements of a private forum will allow greater regulation of the forum's use. It is curious that the Fifth Circuit, instead of addressing this issue first, chooses to skip analysis of the forum at issue and toil through a *Central Hudson* analysis instead. The reason for this could be hesitation on the part of the court to create new precedent, instead relying on the tried and true formula of *Central Hudson*. However, *Central Hudson* would still play an important role in determining whether a public forum's regulation was constitutional and courts would have ample opportunity to

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continue application of this test.

By settling this issue, the court of appeals could have used the public versus private forum issue as a threshold question and avoided further analysis. Under the analysis in this Note, the UT email network is a private forum, and thus the policy adopted by UT passes constitutional muster. Should the court still wish to apply *Central Hudson*, it would be free to do so to support the holding with an alternative means.

#### IV. CONCLUSION

In examining the preemption language of CAN-SPAM, it is clear that Congress intended to expressly preempt all state laws. However, Congress also included an exemption for both Internet access providers and for state laws not specific to electronic mail. The court ultimately held that UT was an Internet access provider, and therefore, its ITC policy was not preempted by CAN-SPAM. Although the district court also analyzed the UT ITC policy as a state law not specific to electronic mail, it is more likely that the Regents Rules encompassing the ITC policy do not rise to the level of a state “law” as contemplated by Congress in drafting CAN-SPAM.

In addition to surviving preemption by CAN-SPAM, UT’s ITC policy must also pass constitutional muster. The court, after applying a *Central Hudson* analysis, held that the policy did pass muster with regards to UT’s interest in user efficiency, but not with regards to server efficiency. Due to the similarities between these two interests, it would seem that the court should apply an all-or-nothing approach—either both are acceptable interests, or neither are.

Finally, while the court of appeals did not address the issue of whether UT's email system constitutes a public or private forum, a comparison to existing case law leads to the conclusion that UT's email system is a private forum, and therefore, UT may reserve the system for its intended use.

In reviewing the holding of the Fifth Circuit, the theme of this Note is that much of the court's holding was correct. Nevertheless, critical analysis was left for another day, or for the dubious machinations of law school students in scholarly writings.