

1997

How Will Consumers Be Protected on the Information Superhighway

Dee Pridgen

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Pridgen, Dee (1997) "How Will Consumers Be Protected on the Information Superhighway," *Land & Water Law Review*. Vol. 32 : Iss. 2 , pp. 237 - 255.

Available at: https://scholarship.law.uwyo.edu/land_water/vol32/iss2/8

This Special Section is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

University of Wyoming
College of Law

LAND AND WATER LAW REVIEW

VOLUME XXXII

1997

NUMBER 1

SPEECH

HOW WILL CONSUMERS BE PROTECTED ON THE INFORMATION SUPERHIGHWAY?*

*Dee Pridgen***

INTRODUCTION

The information superhighway, or the Internet, means many things to many people. It is viewed by some as akin to the Yellow Brick Road, which, if we follow it, will lead us to the Wizard who will solve all of our problems.¹ It is viewed by others as a path toward depravity, that lures children into computerized pornographic encounters with pedophiles. Like it or not, the Information Superhighway is a powerful communication tool, which will likely prove very useful for businesses and consumers. But far from solving all the world's problems, the Internet can also be a trap for the unwary.

What is the Internet? Basically it is a worldwide network of comput-

*. Centennial Distinguished Professor Lecture, University of Wyoming College of Law, March 29, 1996. For publication purposes, the author has expanded, updated and re-edited the text and footnotes of the paper delivered on this occasion.

** . Centennial Distinguished Professor of Law, University of Wyoming College of Law, 1995-1998.

1. See L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* (1900).

er networks, and nobody is in charge.² It is a decentralized yet intricately interconnected information medium, hence, it is also known as the Net or the Web.

The Internet was unheard of a few years ago, but now it seems to be in the news every day. Newsweek magazine declared 1995 the Year of the Internet,³ and indeed, its growth has been exponential. In 1981 there were a mere 213 host computers on the Internet. Ten years later there were 400,000. By 1995 that figure had jumped to 4.8 million.⁴ In 1996, over 9.4 million computers were linked on the Net and the number of hookups is growing rapidly.⁵ In the U.S. alone 50 new businesses and 1000 new host computers join the Internet every day. As far as users (as opposed to computers) are concerned, it is estimated that there are 50 million Internet users world-wide and 24 million in North America.⁶ Some estimates have been more conservative. A recent survey reported that a mere 9.5 million people in the United States now use the Internet, including 1.1 million children under 18.⁷ But whatever estimate you use, it is sure to be outdated as soon as you put it down on paper.

At first the Internet was used by universities and government researchers for academic and military purposes.⁸ When the so-called World Wide Web was instituted in about 1992, however, the Internet became more interesting and more accessible to more people.⁹ The World Wide Web provides multi-media interactive sites, and apparently almost anyone can set up a site or home page on the World Wide Web at relatively little cost. Netscape is a computer software program that has itself rapidly increased Net usage because Netscape (and other web browsers like it) makes it relatively easy for non-technically oriented people to get around on the Net.

Whether or not the Internet will live up to its hype remains to be seen. I have learned over the years not to be too quick to make predictions, because they often turn out to be wrong. For instance, when I was working in the Federal Trade Commission's Consumer Protection Bureau in the late 1970's and early 1980's, I recall how many

2. G. BURGESS ALLISON, *THE LAWYER'S GUIDE TO THE INTERNET* 19 (1995); MARK GIBBS & RICHARD SMITH, *NAVIGATING THE INTERNET* 8-10 (1993).

3. Steven Levy, *The Year of the Internet*, NEWSWEEK, Dec. 25, 1995, at 21.

4. ALLISON, *supra* note 2, at 175.

5. See *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

6. Kara Swisher, *Internet's Reach In Society Grows, Survey Finds; Internet's Popularity Grows with Public, Survey Finds*, WASH. POST, Oct. 31, 1995, at A1.

7. *Business News Briefing*, ROCKY MOUNTAIN NEWS, Jan. 12, 1996, at 56A.

8. GIBBS & SMITH, *supra* note 2, at 5.

9. ALLISON, *supra* note 2, at 181.

people, including myself, predicted that we would all be buying things, paying bills, doing our banking, employing in-home security systems, etc., over interactive cable television systems. There were also predictions that consumers would flock to a new technology called "teletext," which would transmit data with your broadcast television signal.¹⁰ But neither interactive cable nor teletext ever really caught on. So I have learned to take some of the Internet hype with the proverbial grain of salt.

Here is what I would like to discuss today. First, what will advertising and marketing be like on the Internet? Second, what types of consumer issues will spring up? Will it just be the same old scams in a new medium? Or will there be new twists? Third, what type of regulation, if any, should there be to protect consumers on the I-way? Will the same consumer protection laws be applicable and/or enforceable? Should there be a new set of regulations applicable to Internet marketing in lieu of or in addition to the existing ones? Will the community of Internet users be willing or able to rise up and beat down the forces of consumer fraud on their own?

COMMERCIALISM ON THE INTERNET

The Internet already is and will inevitably become a commercial more medium. All modern means of communication are used in part to communicate marketplace information, and the Internet is no different in that regard.

Thus far, advertising on the Internet has taken four basic forms:

- spamming, the electronic equivalent of junk mail;
- classified advertising services;
- commercial advertising sites on the World Wide Web; and
- so-called "cyber malls."

Spamming

In April of 1994, the Phoenix law firm of Canter & Siegel posted an advertisement to thousands of Internet newsgroups all over the world, offering legal services to would-be immigrants to the United States.¹¹ The

10. Cf. *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987) (discussing applicability of political broadcast regulation to teletext).

11. Jared Sandberg, *Lawyers Whose Ads Crashed the Internet Help You Do It Too: New Effort*

event made the law firm famous, or infamous, as the original "spammers," the term used to describe those who send advertising messages indiscriminately to internet discussion groups.¹² The law firm was immediately "flamed"¹³ by thousands of internet users who felt the ad had violated "netiquette."¹⁴ Undaunted, Canter & Siegel have since set up an internet advertising company called Cybersell, and written a book, "How to Make a Fortune on the Information Superhighway."¹⁵ Another individual, Jeff Slaton, who calls himself the "Spam King," has developed his own business of charging customers a flat fee to distribute their unwanted junk mail over the Internet.¹⁶

The objection to spamming is deeper than to the ordinary junk mail that most people receive via the U.S. Postal Service. Internet discussion groups are usually maintained by volunteers, and they do not appreciate having their cyberspace clogged up with unwanted messages from advertisers. Despite the resentment, however, advertisers are tempted to flock to electronic mail groups, because it is cheaper to advertise on the internet than by direct mail or telephone. But thus far there has been little or no effort to target such mail to people who might actually be interested in the product being advertised. Jeff Slaton, the Spam King, has been quoted as saying "It's just as cost-effective for me to send to six million e-mail addresses as one million, so why bother?"¹⁷ However, internet users point out that the reason e-mailing to large groups is so cheap is that the costs are shared by the users. And users do not appreciate having to subsidize unwanted advertising messages.¹⁸

Classified Ads

On October 17, 1995, six of the largest newspapers in the United States announced that they will be putting a computerized, searchable version of their help-wanted advertising on the World Wide Web.¹⁹ Sever-

to Push Envelope Spooks Many Who Fear Junk Mail in Cyberspace, WALL ST. J., May 9, 1994, at B2, available in 1994 WL-WSJ 293112.

12. The term "spamming" apparently originated as an analogy to a Monty Python television comedy sketch.

13. "Flame" usually means a personal uninhibited attack on another person sent via e-mail or by posting to an online discussion group.

14. "Netiquette" is the unwritten rules of proper behavior on the internet.

15. Axel Boldt, *Blacklist of Internet Advertisers*, <axel@uni-paderborn.de>.

16. Simson L. Garfinkel, *The King of Spam, Scattershot on Internet Lambasted as Cyber-Junk Mail*, SAN JOSE MERCURY NEWS, Oct. 24, 1995, at A1.

17. *Id.*

18. Joel K. Furr, *Advertising on Usenet: How to Do It, How Not to Do It*, <jfurr@acpub.duke.edu>.

19. Jonathan Oatis, *Advertising on the Internet, Classified Advertising On-Line Becoming Burgeoning Business*, SAN DIEGO UNION-TRIB., Jan. 2, 1996, at 8. The companies involved are The

al on-line service providers have already had classified advertising for some time, such as Prodigy's "Web Personals" and America Online's "Career Center."²⁰ Real estate brokers are beginning to post their property listings on the Internet.²¹ Some say that "classified advertising is going to be one of the killer applications of the Internet."²²

The on-line classified seems a natural because it allows the user to customize the search, so that they need only view those ads that fit their particular criteria, rather than browsing through hundreds of ads that do not meet their needs. More information could be included on-line than in print, including pictures. For employment ads, the interactive feature could even allow people to fill out an application on-line.

Web Sites

One of today's fastest growing businesses is World Wide Web site construction.²³ Businesses want to have the latest multi-media gimmicks on their web sites but they do not know how to do it themselves. It has become a status symbol for major advertisers to have their URL²⁴ (World Wide Web address) scroll across the bottom of the screen on television commercials. McDonalds,²⁵ Walt Disney World,²⁶ Sega²⁷ (maker of video games) and Toyota,²⁸ to name a few, all have web sites. The interactive nature of the Internet allows the marketer not only to tell the customer all they would ever want to know about their product, but also allows the marketer to collect information about who visits their web site. Thus, they can build a data base about potential customers.²⁹

New York Times, The Boston Globe, the Chicago Tribune, the Los Angeles Times, the Washington Post, and the San Jose Mercury News. *Id.*

20. David Barboza, *Classified Ads Are Rapidly Finding a New Home on the Internet*, N.Y. TIMES, Nov. 13, 1995, at D6.

21. Judith Evans, *Hitting the 'Net in Search of a New Home; Buyers, Brokers Streamline Process by Going On-Line*, WASH. POST, Dec. 9, 1995, at E1.

22. Mike Mills, *Six Newspapers Put Job Ads on Internet; the Post Joins Effort to Challenge On-Line Competition for Revenue*, WASH. POST, Oct. 18, 1995, at C3, quoting Lorraine Silio of Simba Information, Inc.

23. See James Coates, *The New Hard Hats for a Software World; As Companies Establish Web Sites, Construction Crews Do Big Business*, CHI. TRIB., Feb. 25, 1996, at C1; Sarah P. Jones, *'Net Gains Made by Advertising Agency CEO*, BOST. HER., Feb. 19, 1996, at Finance 25.

24. URL stands for "Uniform Resource Locator" and is the functional equivalent of an "address" on the Internet.

25. <<http://www.mcdonalds.com>>.

26. <<http://www.disney.com>>.

27. <<http://www.sega.com>>.

28. <<http://www.toyota.com>>.

29. Elizabeth Corcoran, *The Marketers Are On-Lining for You; Interactive Ads, Other Gimmicks Kick Off the Internet's New Era*, WASH. POST, Sept. 27, 1995, at F1.

After the initial novelty wears off, why would people want to visit an advertising web site anyway? Let me give you a few examples of what advertisers do to entice the customer. At Walt Disney World's web site, you can find out about the attractions, the calendar of events, prices and the availability of accommodations, and even make a reservation on-line.³⁰ The Butterball Turkey web site will tell you how to cook your turkey and provides lots of turkey recipes.³¹

Companies also advertise their advertising sites, such as by having a "hot link" button at the top or bottom of a Netscape page, or included in the text of an electronic magazine. An interested customer can click on the button, and be instantly transported to the advertising web site. Such popular net sites as the ESPN SportsZone,³² or Playboy³³ also display advertising buttons or banners to commercial advertising sites.

Cyber Malls

The "cyber mall" is a particular form of web site advertising, which attempts to analogize itself to the standard brick-and-mortar shopping mall. Some examples of cyber malls I found on a recent net search include: "Cyberland Mega Mall," "Cyber Heaven," "Wicked Cool Mall," "Australian Cyber Mall," "World Wide Mall," "Virtual Department Store," "Awesome Mall of the Internet," "The Golf Mall," "Internet Auto Mall" (which claims you can buy a car on the Internet), "Tokyo Electric Mall," and the inevitable "Adult Sex Mall." Many other names could be added to the list, and are added every day.³⁴

To create a so-called "cyber mall," basically, someone sets up a web site, and then offers to sell or rent space to other advertisers. Once the mall is established, a net surfer could visit the mall site, click on a particular category of interest to him/her (such as computer software, health-related products, books, etc.) and then find advertisements from various suppliers. At present this seems to be roughly a cross between catalogue sales, window shopping, and browsing the Yellow Pages.

Yet one has to wonder how popular these "virtual malls" will actually be with shoppers. Clifford Stoll, author of *Silicon Snake Oil, Second*

30. <<http://www.disney.com>>.

31. *How to Prepare a Picture Perfect Turkey*, at <<http://www.butterball.com/butterball/turkey.html>>.

32. <<http://www.espnetsportszone.com>>.

33. <<http://www.playboy.com>>.

34. For a directory of Internet malls, see <<http://www.directory.net>> (an alphabetical listing of commercial web sites, with a search engine); <<http://www.shoppingdirect.com/index.html>>; <<http://www.worldshopping.com>>.

Thoughts on the Information Highway, points out that “no electronic shopping can compare with the variety, quality, and experiential richness of a visit to even the most mundane malls.”³⁵ Even the photographs are not as good as what you would get in most printed catalogs, and they seem to take a long time to appear on your computer screen. At the present time, electronic shopping malls probably work best for products that can be sampled and experienced via computer, such as computer software, games, music, etc. And cybermalls do have the advantage of being open for business twenty-four hours a day.³⁶

Another problem with cyber shopping is the payment system. There is currently no secure system for paying for items directly over the Internet.³⁷ Some cyber sellers apparently will accept credit card numbers on-line, but consumers should be aware that electronic mail is not nearly as private as the telephone or the U.S. mail. Even if you are dealing with a reputable seller, a “hacker” could break into the electronic mail and steal your credit card number.³⁸ So cyber shoppers may still have to go to the trouble of phoning in a credit card, or mailing in their payment. Despite these obstacles, however, it remains evident that commerce already is and will be taking place over the Internet.

HIGHWAY ROBBERY

Are there now and will there be consumer ripoffs on the information superhighway? Yes, inevitably, that’s the nature of the marketplace, whether electronic or not. Will consumer fraud on the Internet be any different from that found in any other medium? That remains to be seen.

35. CLIFFORD STOLL, *SILICON SNAKE OIL, SECOND THOUGHTS ON THE INFORMATION HIGHWAY*, 19 (1995).

36. For a favorable view of shopping via Internet malls, see Carol Blake, *Shop Around the Clock*, INTERNET WORLD, Jan. 1996, at 71.

37. However, two major credit card companies, Visa and Mastercard, have apparently reached an agreement for a security standard for payments made over the Internet, which is supposed to come into effect later in 1996. Francis C. Nantha, *More Companies to Offer Services over Internet*, NEW STRAITS TIMES PRESS, Feb. 23, 1996, at Bus. Sec. 16. The FTC also held a workshop in June of 1996 to explore self-regulatory approaches to assuring consumer privacy in Internet transactions. See *FTC Holds Workshop on Consumer Privacy and Online Marketplace*, 70 Antitrust & Trade Reg. Rep. (BNA) 630 (June 6, 1996). See also Henry H. Perritt, Jr., *CyberPayment Infrastructure*, 1996 J. ONLINE L., art. 6, available online at <<http://www.wm.edu/law/publications/Iol>>.

38. See Ilene K. Gotts & Rebecca R. Fry, *Danger May Await Internet Shoppers*, NAT’L L.J., Mar. 25, 1996, at C9. Some would argue that giving out your credit card number over the telephone or on credit card slips that may be dumped in the trash is just as, if not more, risky than using your credit card in an internet transaction. See A. Michael Fromkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49, 76 (1996).

The Internet could be called the "Net of a Million Lies." Some claim consumer fraud on the Internet is rampant.³⁹ Con artists may become more bold because it is possible to disappear into cyberspace after perpetrating their scams.⁴⁰ On the Internet, it is indeed somewhat easier to use assumed names, change your e-mail address, etc., in order to set up a business aimed mainly at defrauding innocent victims. Thus, we might come across some firms like this as we are surfing the net; "http://www.bizness@nocturnal-aviation.com."⁴¹ The Internet also makes it easier to operate across state and international boundaries, which may provide another way for ne'er-do-wells to escape prosecution.

The Federal Trade Commission has already published a consumer bulletin entitled *Online Scams: Road Hazards on the Information Superhighway*.⁴² The FTC's position is that thus far the consumer scams on the Internet are basically the same as one would find in any other medium, but perhaps with some new variations. For instance, one common consumer scam that has been around for years is the "work-at-home" deal, usually promising buyers that for a small fee, they will make hundreds or thousands of dollars stuffing envelopes or raising chinchillas at home. The updated version of this might be an advertisement urging readers to "use your home PC to make money fast."

The FTC claims that some sellers have tried to gain advantage by pretending *not* to be what they really are. Most television viewers are probably familiar with "Infomercials" that try to look like news or talk shows but are really program-length advertisements.⁴³ Similarly, door-to-door and telephone sales people frequently pose as market researchers or survey takers to trick consumers into giving them a bit of their precious time and attention. The FTC has noted the computer age version of this old idea—apparently some salespeople are hyping their products in on-line chat rooms or on bulletin boards, while pretending to be just regular

39. See Joel Reidenberg et al., *Panel III: The Privacy Debate: To What Extent Should Traditionally "Private" Communications Remain Private on the Internet?* 5 *Fordham Intell. Prop., MEDIA & ENT. L.J.* 329, 333 (1995) (remarks of Norman I. Silber); Gots & Fry, *supra* note 38.

40. See Froomkin, *supra* note 38, at 74.

41. STOLL, *supra* note 35, at 57. As Clifford Stoll's humorous URL suggests, one might encounter the legendary "fly-by-night" outfit while shopping the Internet.

42. Federal Trade Commission, *Online Scams: Road Hazards on the Information Superhighway*, found at <<http://www.ftc.gov/bcp/scams01.htm>>.

43. See, e.g., *In re Nu-Day Enterprises*, FTC Final Consent C-3380, Apr. 28, 1992 (company promoted weight loss program on a program-length advertisement masquerading as a consumer news show); *In re Synchronal*, 58 Fed. Reg. 59041 (FTC 1993) (Consent order Docket No. 9251), 58 Fed. Reg. 32947 (FTC 1993) (proposed consent) (talk shows alleged to be disguised commercials for weight loss cream and baldness remedy).

consumers or even celebrities.⁴⁴ It is indeed difficult to tell where people are coming from in such electronic settings.

Investment opportunities have traditionally provided a fertile field for fraud. With reports of skyrocketing prices for shares of Netscape,⁴⁵ the company that devised the popular internet browser, it is no wonder many consumers think there is money to be made by investing in anything having to do with the Internet. Thus, it should come as no surprise to anyone that the National Fraud Information Center web site has reported that someone has been trying to sell shares in cyber malls—using prices that one might encounter for investments in a real mall. The sales offering relied on the fact that many people do not realize how cheap it is to set up a mall site on the World Wide Web, at least in comparison to building a three-dimensional mall. Also, unlike real malls, cyber malls can come and go in a day, along with your investment dollars.⁴⁶

In addition to the modern packaging of old consumer scams, there is at least one “new” form of consumer deception on the Internet. This particular scheme exploits the technology of the so-called “search engines” that people use to find their way around the Internet. Many search mechanisms rank their findings based on the number of times the searcher’s key words are used at a particular site. Apparently, one can embed at the beginning of a web site all kinds of key words that would not be seen on the screen but that will be picked up by the search engine. Thus, if you want to be number one on everyone’s list of Internet automobile sellers, for instance, you could embed the key words “automobile,” or “car,” hundreds of times at the beginning of your site.⁴⁷ Thus it appears to the consumer that yours is the most relevant web site for her needs, but in fact it is coming up number one because of the hidden embedded key words. Some may argue, however, that this is really not new, but is simply a variation on the old practice of naming your company the ABC company so it will be the first listing in the Yellow Pages.

Another aspect of questionable advertising on the Internet involves the promotion of alcohol and cigarettes to teenagers. As noted above, one survey says 1.1 million persons under the age of eighteen are now using

44. FTC, *supra* note 42.

45. Allan Sloan, *High Wired. (Hot Internet Stocks are Dangerously Overpriced)*, NEWSWEEK, Dec. 25, 1995, at 38.

46. The National Fraud Information Center, *Do You Need Concrete to Construct on the Internet?* (last modified Mar. 8, 1996) <<http://fraud.org/March96.htm>>.

47. *Alternative Approaches to Protecting Consumers in Cyberspace: FTC Hearings on Global and Innovation-Based Competition* (Nov. 20, 1995) (statement of Steve Cole, Senior Vice President, Council of Better Business Bureaus). Transcript available at <<ftp://ftp.ftc.gov/pub/global/gc112095.zip>>.

the Internet in the United States.⁴⁸ Of course it is perfectly possible that many young persons who are “surfing the net” are doing research for term papers, finding out all kinds of important information, and making useful contacts with people all over the world. However, the openness of the Net may pose some social problems.

The issue of young people’s access to adult sexually-oriented material I will leave to another day or another discussion. However, in my own Net surfing research, I did come across a particular type of advertising that, while not exactly deceptive, may be objectionable for other reasons. For instance, Zima, a malt beverage manufactured by Coors Brewing Company, has a web site purportedly designed to attract Generation X, (i.e., people in their twenties) but which would be quite enticing to those under twenty-one as well. The Zima site offers stories about a fictional Net-surfer character named Duncan, offers free computer games to download, sells clothing with the Zima logo, and offers browsers the chance to join “Tribe Z,” a community of Zima lovers.⁴⁹ At the Stolichnaya vodka web site, one can play spin the vodka bottle.⁵⁰ The Real Beer page seems like an information site for beer lovers, but is actually the creation of three West Coast microbrewers. This web site offers a wide assortment of drinking games that can be downloaded for free, and which, like most drinking games, appear to encourage people to drink to excess.⁵¹ Although I have yet to find a cigarette manufacturer’s web site on the Internet, this may well be next.

Why would this type of advertising be any more objectionable than the magazine ads and billboards for alcoholic beverages and cigarettes that young people are already exposed to? Some child advocates might say it is the interactivity that makes it more alluring.⁵² While most people do not spend much time at all studying a magazine ad, and television commercials flit by in thirty seconds or less, these web sites offer games to play, and “freebies” to download, etc. Thus, one can spend much longer periods at interactive web sites. And although many of these alcohol-related sites proclaim that one has to be at least twenty-one to visit, there is virtually no enforcement. Indeed, the warning may actually entice underage Net surfers.

48. *Business News Briefing*, *supra* note 7.

49. <<http://www.zima.com>>.

50. <<http://www.stoli.com/central.html>>.

51. Laura Sessions Stepp, *Teens & Cyberbars; Youth-Oriented Drinking Games and Advertising on the Internet*, WASH. POST., July 24, 1995, at B5.

52. *Id.*

Another issue that has been raised with regard to children and the Internet is the gathering of information for marketing purposes from underage visitors to kid-attractive web sites. In May of 1996, the Center for Media Education filed a complaint with the FTC questioning the use of prizes given to children who fill out marketing questionnaires at the so-called "KidCom" web site.⁵³ The FTC has not yet determined whether this is an undue intrusion into children's privacy.

HIGHWAY PATROL

Given that there has been and will be highway robbery of consumers on the I-way, how should it be policed? There are at least three possibilities:

- (1) Apply current consumer protection laws to the Net;
 - (2) Create new laws or regulations that would be specific to the Net;
- and
- (3) Rely on self-policing, and consumer self-defense.

Apply Current Consumer Protection Laws

Some have argued that "cyber space" is a separate jurisdiction that should be subject to its own laws, and perhaps even its own "virtual courts."⁵⁴ Others point out that the Internet is a global medium that cannot be restricted by local laws. However, I personally do not see any legal obstacle to the application of existing consumer protection laws, at least to the category of "domestic" cyberspace transactions, meaning those where both seller and consumer are in the United States. Thus, the Federal Trade Commission and state attorneys general could readily reach out to snare the domestic highway robbers on the information superhighway.⁵⁵

Indeed, the FTC has already asserted jurisdiction over cybermarketers in several cases. The FTC says it needs to be aggressive, lest the Internet deteriorate into "the Wild West."⁵⁶ Thus, for example, on

53. *Group Files Complaint about Kids' Internet Site*, LARAMIE DAILY BOOMERANG, May 15, 1996, at A1.

54. I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994). Indeed, a "Virtual Magistrate" has already been set up to deal with complaints regarding copyright or trademark infringement, defamation, and other wrongful content on the Internet. See *Virtual Magistrate Established for the Internet; Voluntary Dispute Resolution for Network Conflicts*, (visited Nov. 11, 1996) <<http://mailmlnch.law.cornell.edu/listserve/cyberia/1075.html>>.

55. See *ABA Panel Addresses Concerns with Deceptive Advertising on Internet*, 70 Antitrust & Trade Reg. Rep. (BNA) 381 (Apr. 4, 1996).

56. *FTC Tackles Fraud on the Information Superhighway, Charges Nine On-Line Scammers*,

March 14, 1996, the FTC entered into consent agreements with nine online advertisers who had allegedly engaged in unfair and deceptive trade practices, such as phony credit repair services, work-at-home schemes, etc.⁵⁷ As early as 1994, the Commission obtained a settlement and consent order against Brian Corzine, a California man who sent out an advertisement via America Online which involved a fraudulent credit repair scheme.⁵⁸ In another case, the Commission obtained a settlement including \$17,500 for consumer redress against two New York City law firms who sent deceptive advertisements regarding their credit repair service to thousands of Internet news groups.⁵⁹ In May of 1996, the Commission obtained a temporary restraining order in federal court to stop an on line pyramid scheme.⁶⁰ Consumer Protection Director Bernstein reiterated the theme that the FTC will deal with standard consumer frauds as they crop up on the Internet: "This brand new, high tech scam is as old as Methuselah," Bernstein said in a press release.⁶¹ Nonetheless, the FTC availed itself of the new technology to notify consumers, by taking possession of the pyramid advertiser's homepage, replacing it with an announcement of the FTC's lawsuit, and providing a link to the FTC's own homepage.⁶² While the FTC wants to support the development of the Internet as a marketing medium, it feels this will not happen if the medium gets a tarnished reputation, and consumers cannot trust the information they find on the Internet.

State governments usually have consumer protection responsibilities concurrent with those of the FTC, and some states are also testing the waters in this area. Thus, when investigators in the Minnesota Attorney General's office "surfed the Net" at work, they found plenty of consumer ripoffs—ranging from phony AIDS cures, to illegal pyramid schemes, to credit repair fraud. As a result Minnesota Attorney General Hubert H. Humphrey III last summer filed six complaints charging several individuals and businesses with engaging in deceptive practices on the Internet.⁶³ In addition, Massachusetts Attorney General Scott Harshbarger reportedly

(last modified Mar. 14, 1996) <<http://www.ftc.gov/opa/9603/netsc.htm>> (quoting Jodie Bernstein, Director of the FTC's Bureau of Consumer Protection).

57. *Id.* See also *Internet Advertisers Are Targets in Nine FTC Cases; Eight Firms Settle*, 70 Antitrust & Trade Reg. Rep. (BNA) 320 (Mar. 21, 1996).

58. *In re Corzine*, FTC File No. 942-3295 DFLJFM (E.D. Cal. 1994) (consent agreement).

59. *FTC v. Consumer Credit Advocates, P.C.*, No. 96 Civ. 1990 (S.D.N.Y., Mar. 19, 1996).

60. *FTC v. Fortuna Alliance, L.L.C.*, No. C96-0799 (W.D. Wash. May 29, 1996).

61. *FTC Secures Temporary Halt to Alleged Scam on Internet*, 70 Antitrust & Trade Reg. Rep. (BNA) 627 (June 6, 1996).

62. See *Internet Scheme*, 460 FTC:WATCH at 8 (July 1, 1996).

63. *Humphrey Lodges Deception Charges Against On-Line Service Advertisers*, 69 Antitrust & Trade Reg. Rep. (BNA) 169 (Aug. 10, 1995).

obtained a temporary restraining order stopping the circulation on the Web of an advertisement for a false HIV cure.⁶⁴ Pennsylvania Attorney General Tom Corbett also announced plans for his office to expand their consumer protection monitoring activities to the Internet.⁶⁵

The major self-regulatory body for commercial advertising, the National Advertising Division of the Council of Better Business Bureaus, has also stepped into the fray, referring two Internet advertisers who touted deceptive claims for smoking cessation programs to the FTC for further action.⁶⁶

Even assuming that existing laws are fully applicable to Internet transactions, however, there may be a problem tracking down the perpetrators. As noted above, the costs of starting up a cyber mall or web site are relatively low, and these "virtual" stores can appear and disappear in days. While low barriers to entry are normally good for consumers, because new entry encourages more competition, such ease of entry and exit can also invite the less scrupulous members of the marketing community to set up shop. In testifying before the FTC in November of 1995, Minnesota Attorney General Humphrey noted that presently the Internet marketer has to give an address or phone number for payment purposes, which can also help law enforcement locate the fraudulent operator.⁶⁷ However, once there is a safe, secure way to pay on line,⁶⁸ the scammers may be able to take the money and run, leaving no way to trace them.

Another potential problem with enforcing the current consumer protection laws on the Internet will be jurisdictional. The Internet is renowned for its ability to cross national boundaries with lightning speed. The long arm statute and conflict of laws issues that may arise in Internet marketing could be staggering. Nonetheless, I believe these kinds of issues can probably be handled by analogy to existing communication methods, such as the use of the mail or telephone to transact business across state or national boundaries.

One thing that will *not* pose much of a problem with regulating advertising or marketing on the Internet is the First Amendment, because

64. *False AIDs Advertising*, 454 FTC:WATCH at 12 (Apr. 8, 1996).

65. *See Cyberspace (II)*, 460 FTC:WATCH at 7 (July 1, 1996).

66. *See Ad Self-Reg Efforts Hit the Internet; Smoking Cessation/Dietary Supplement Cited*, 445 FTC:WATCH at 12 (Nov. 20, 1995).

67. Hubert H. Humphrey III, *Consumer Protection Issues in Cyberspace: FTC Hearings on Global and Innovation-Based Competition* (visited Nov. 11, 1996) <<ftp://ftp.ftc.gov/pub/global/gc112095.zip>>.

68. Francis C. Nantha, *More Companies to Offer Services over Internet*, NEW STRAITS TIMES, Feb. 23, 1996, at Bus. 16.

commercial speech, especially of the deceptive variety, receives a low level of constitutional protection. It is true that noncommercial, even so-called "indecent" speech has received a relatively high level of protection on the Internet and elsewhere.⁶⁹ Thus, the portion of the 1996 Telecommunications Act which banned the transmission of child-available indecent speech via the Internet⁷⁰ has already been held to violate the free speech rights of Internet users.⁷¹ A three-judge court in Philadelphia held in June of 1996 that indecent speech, while it may be offensive, *is* protected by the First Amendment (as opposed to obscene speech, the more "hard core" material, which is *not* protected).⁷²

By contrast, commercial speech, which is the focus of my inquiry, receives a much lower level of constitutional protection than other types of speech, including even indecency. Indeed, the Supreme Court has always conceded that the government has the authority to police deceptive or misleading commercial speech without much concern about constitutional impediments.⁷³ Thus, standard FTC and state Attorney General policing efforts directed against old-fashioned frauds that happen to appear on the Internet should not run into any First Amendment barriers.⁷⁴ On the other hand, should the government attempt to restrict access to *truthful* commercial speech on the Internet by banning or limiting truthful advertisements for socially harmful products, such as alcohol and cigarettes, there may be a serious constitutional question to be addressed.⁷⁵

What about the so-called "system operators" who set up bulletin board discussion groups, or the commercial on-line service providers like America Online, Prodigy or Compuserve? Should they be responsible for fraudulent advertising that may appear in their part of cyberspace? As far

69. See *Sable Communications of Ca., Inc. v. FCC*, 492 U.S. 115 (1989).

70. Telecommunications Act of 1996, Pub.L. No. 104-104, §502, 110 Stat. 56, 133-35 (to be codified as 47 U.S.C. § 223(a) to (h)(1996)).

71. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) *see also* *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996).

72. *ACLU*, 929 F. Supp at 824.

73. *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

74. *Cf. Kraft, Inc. v. FTC*, 970 F.2d 311, 320-21 (7th Cir. 1992) (FTC case against deceptive television commercials for Kraft "Singles," easily withstood First Amendment challenge by advertiser).

75. In last years's 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), the Supreme Court struck down a state ban on price advertising for retail liquor sales, but was sharply divided as to the rationale. The author of the plurality opinion, Justice Stevens (joined by Justices Kennedy and Ginsberg) stated that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 1507.

as independent bulletin board operators are concerned, I would say no. Mostly these are operated by volunteers who are trying to facilitate some type of online discussion among people with common interests.⁷⁶ To the extent they republish messages from others, these “sysops” appear to be a cross between a bookstore owner, the postal service and the telephone company. They probably are not as involved in the messages they carry as a newspaper or magazine publisher (although some are), and under current law and practice, usually newspapers and magazines are *not* held liable for fraudulent advertisements they publish.⁷⁷ Indeed, most system operators in charge of a bulletin board or discussion group try to screen out advertising altogether as a service to their participants. Saddling such people with legal responsibility for fraudulent advertising would probably deter many bulletin boards from continuing.

As far as the World Wide Web is concerned, it appears that this is so loosely controlled that there is no one entity to hold responsible. There is no “publisher” or “editor” screening content before it goes up on the Web, so it would be quite difficult to pin legal responsibility on anyone other than the web site sponsors themselves. On the other hand, large commercial on-line service providers, such as America Online or Prodigy, do have control over who can sell or advertise in their “cyberturf.” Nonetheless, they routinely require users to sign blanket waivers absolving the service providers from all liability for fraud or deception by vendors.⁷⁸ Some commentators have suggested that these providers should perhaps bear some responsibility for fraudulent use rather than continuing their current posture.

New Regulations for the Internet?

I have said that existing consumer protection laws can and should be applied to Internet marketing, but is there a need for additional regulations that would be specific to the Internet?

In the past, as new marketing media have come into existence, the FTC has promulgated consumer protection regulations specific to that medium.

76. See I. Trotter Hardy, *supra* note 54, at 1000-08 (1994) (discussion of system operator liability in context of defamation and copyright issues).

77. Thus, most states specifically exempt newspapers, magazines and broadcasters from the scope of their state consumer protection statutes, if they serve “merely [as] a conduit for the speech of the advertiser.” *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 479 (N.Y. Sup. Ct. 1978). See also DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 4.06 (updated through 1996).

78. See Reidenberg, *supra* note 39, at 344.

Examples include:

- Door-to-Door
- Mail Order
- 900 Numbers
- Telemarketing

When door-to-door selling was common, one of the main consumer complaints was that they were being pressured into purchases that they had not really had a chance to think about because a salesperson was in their home and often refused to leave without completing the sale.⁷⁹ In response, the FTC promulgated a regulation that basically allows the consumer a three day “cooling off” period for in-home sales.⁸⁰

Similarly, when mail order sales began to become widespread, the FTC focused on the particular medium of sale in issuing new regulations. A recurring consumer complaint with regard to mail order was that the customer sent a check or money order and the item either never came or came after an unreasonable delay. The FTC regulation, the Mail Order rule, requires that mail order merchants ship goods within the time promised or within a reasonable time, or else offer the consumer a refund.⁸¹

In 1993, the FTC issued a set of regulations governing pay-per-call or “900 number” services.⁸² The regulations require, among other things, that the cost of the 900 number be disclosed in a cost-free “preamble” message that allows the caller to hang up and avoid charges after learning what the costs actually are.⁸³ Again, the regulations are specific to the medium of communication.

Telemarketing has become an increasingly popular and lucrative way of selling goods, and indeed, has mostly replaced the old door-to-door sales method. And continuing the above-noted trend, the FTC in August of 1995, promulgated a regulation specifically aimed at consumer abuses that had cropped up in telemarketing.⁸⁴ This regulation, which applies to

79. FTC, Trade Regulation Rule, Cooling-Off Period for Door-To-Door Sales, Statement of Basis and Purpose, 37 Fed. Reg. 22,934 (1972).

80. FTC Cooling Off Rule, 16 C.F.R. § 429 (1996). Most states also have cooling-off regulations applicable to in-home sales. See DEE PRIDGEN, CONSUMER CREDIT AND THE LAW § 15.03, APPENDIX 15A (updated through 1996), for a summary of such state laws.

81. FTC Mail Order Rule, 16 C.F.R. § 435 (1996).

82. 16 C.F.R. § 308 (1996), (promulgated pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. § 5711(1)).

83. *Id.*

84. Telemarketing Sales Rule 16 C.F.R. §310 (1996). See also Statement of Basis and Purpose 60 Fed. Reg. 43842 (1995).

seller-initiated telephone calls only, requires certain disclosures to be made, and bans several questionable practices, such as credit card laundering, and advance payments for credit repair or loan brokering services.⁸⁵

In each of these areas, the FTC initially addressed consumer abuses associated with a particular medium or method of selling by relying on case-by-case enforcement under their general statutory authority. It was only after attaining a certain level of experience with consumer issues associated with a particular medium that the FTC issued more specific regulations. At the present time, the FTC does not have a specific regulation covering marketing practices on the Internet.⁸⁶

Given that the advertising and sale of goods via the Internet is still in its infancy, I would say that delaying specific regulations is probably the best approach. At the present time, very little selling is actually going on via the Internet, despite the hoopla. While we can speculate at length about what the potential consumer abuses *might* be, there is really no substitute for actual experience. Premature regulation of a new technology could have the adverse effect of stifling a medium that might actually improve consumers' access to marketplace information.

Another reason to be hesitant about regulating Internet marketing is the fact that much of what the consumer comes into contact with on the Net is consumer driven. It is the consumer who initiates almost all of the contacts with the advertiser, and not the other way around. Internet marketing does not appear to be nearly as intrusive as door-to-door or telephone sales.

Consumer Self-Help

The final avenue for consumer protection on the information superhighway is consumer self-help. Many Internet users oppose any and all government regulations of cyberspace. Some may call it anarchy, but Internet users label themselves "netizens," citizens of the Internet world, who agree to abide by their own self-imposed rules of "netiquette."

A communal self-defense approach to consumer protection has been used in the case of junk e-mail or spamming. Thus, when immigration

85. 16 CFR § 310.

86. However, the Mail Order rule, was actually updated in 1994 to include sales by telephone, fax or computer as well as the traditional mail order. FTC, Final Trade Regulation Rule and Statement of Basis and Purpose, Mail or Telephone Order Merchandise Rule, 58 Fed. Reg. 49096 (Sept. 21, 1993). The amended rule became effective March 1, 1994. Thus, this rule that requires a merchant to ship within the advertised time or a reasonable time *would* seem to apply to Internet sales.

lawyers "spammed" discussion groups with an ad for legal services, as I described above, the netizens wreaked their own revenge without benefit of regulation or court order by sending thousands of outraged responses, or flames, to the advertiser.⁸⁷ There is at least one web site entitled the "Blacklist of Internet Advertisers," which is mainly devoted to curbing junk e-mail by publicizing the names and e-mail addresses of known spammers.⁸⁸ While this type of self-help may border on vigilantism, on the whole it appears to be mainly a vigorous expression of opinion. However, when America Online sent back large batches of undelivered junk mail to Cyber Promotions, Inc., thus crashing two of their server computers, the advertising firm sued for damages.⁸⁹

New technology and the private market may join to provide other methods for consumer self-defense on the information superhighway. For example, as stated above, junk e-mail can be a big problem and Internet users might want to be able to buy a program for their computers to screen out such unwanted solicitations. On-line shoppers may want to screen out unreliable vendors. Thus, a market might develop for so-called "certifying services" or "rating systems."⁹⁰ Such rating systems could tell you immediately which cyber malls or cyber sellers have been rated as reliable by a disinterested third party, such as the FTC or the Better Business Bureau. Perhaps a child advocacy group might provide ratings on web sites suitable for children. Filtering devices could black out the advertising sites, such as alcohol or cigarette ads, or indecent material, or fraudulent sellers, that do not fit your own individual rating criteria.⁹¹

87. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L. J. 1639, 1656-59 (1995).

88. Axel Boldt, *Blacklist of Internet Advertisers* (last updated Oct. 9, 1996) <<http://math-www.uni-paderborn.de/~axel/BL/>> .

89. Joseph A. Slobodzian, 'Junk E-Mail' to Get Federal Hearing, NAT'L L.J., Apr. 8, 1996, at A8. Another online service provider, CompuServe, has itself sued Cyber Promotions, and obtained a temporary restraining order preventing Cyber from falsifying the headers on their mass e-mailings to make it appear their messages originate from a CompuServe account, when in fact they do not. *CompuServe, Inc. v. Cyber Promotions, Inc.*, Civ. No. C2-96-1070 (S.D. Ohio. Oct. 23, 1996).

90. *Marketing in Cyberspace: FTC Hearings on Global and Innovation-Based Competition* (Nov. 20, 1995) (statement of Robert Gertner, Professor of Economics & Strategy, University of Chicago School of Business). Transcript available at <<ftp://ftp.ftc.gov/pub/global/gc112095.zip>> .

91. The technology that would allow such rating or filtering systems is called the Platform for Internet Content Selection, or PICS, and is being run by the World Wide Web Consortium. *Alternative Approaches to Protecting Consumers In Cyberspace: FTC Hearings on Global and Innovation-Based Competition* (Nov. 20, 1995) (statement of Daniel Weitzner, Co-Chair, Platform for Internet Content Selection). Transcript available at <<ftp://ftp.ftc.gov/pub/global/gc112095.zip>> . See also *FTC Holds Workshop on Consumer Privacy and Online Marketplace*, 70 Antitrust & Trade Reg. Rep. (BNA) 630 (June 6, 1996); *ACLU v. Reno*, 929 F. Supp. 824, 838-39 (E.D. Pa. 1996).

Finally, in this regard, I am mindful of the fact that the demographics of at least the current crop of Internet users are decidedly "upscale." Internet cheerleaders point out how everything one would ever want to know about or buy is on the Net. However, we must bear in mind that despite the hype, the percentage of regular Internet users is still quite small, and appears to be composed mostly of educated, relatively high income males.⁹² The average household income of an Internet user is \$62,000.⁹³ Thus, until the medium becomes more widely accepted and accessible, I think consumers will have to bear much of the responsibility for their own self-protection.

CONCLUSION

The information superhighway holds great promise for all of us. It can be a powerful tool for both business and consumers by providing worldwide access to people and products. The consumer is in the driver's seat, and can freely seek out a wealth of information. But the Internet takes us into uncharted territory. Inevitably there will be some villains out there ready to take advantage of the relatively lawless regime that currently prevails.

My advice to shoppers on the information superhighway is "buyer beware." Given the ease of entry and exit by sellers and the lack of normal "cues" such as an actual store or product to examine, I feel the consumer should be extremely wary of cyber sellers. My fear is, however, that given the Internet's current status as a new-fangled and super-hyped medium, some people may be lured into giving an Internet seller *more* credibility, not less, simply because the information is coming over "the Internet." The computer screen may be viewed as an authority figure, a modern day Wizard of Oz. But we all need to discover, just as Toto and Dorothy did, that behind that computer screen the "Wizard" is just another human being like ourselves.

92. Swisher, *supra* note 6.

93. *Business News Briefing*, ROCKY MOUNTAIN NEWS, Jan. 12, 1996, at A56.