Commercial Speech and the University Internet Account: Are Universities Selling Out the Spirit of the First Amendment?

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I. INTRODUCTION

As many already know, the Internet is a complete network of computers and underground lines connecting millions of users across the globe. Enormous and, at times, dizzyingly progressive, the Internet can transmit large quantities of information over great distances in a matter of minutes. Small wonder, then, that the Internet has become a gathering place for outspoken and easily distracted computer aficionados.

Like most excursions, though, a ticket to cyberspace[1] costs money, and many would-be travelers cannot afford the connection fees. Impoverished students would probably be among those without access were it not for the academic Internet account, a cheap and relatively effortless way to connect. The university provides a connection to the Internet backbone, establishes academic accounts for

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* Editor, *UCLA Law Review*, Volume 43. J.D., UCLA School of Law, 1996; B.A., Cornell University, 1993. For their insightful comments and guidance during the development of this piece, I am grateful to Professors Julian Eule and Eugene Volokh. I would also like to thank Daniel Clark, Travis Stansbury, and Michael Wichman for their thoughtful contributions and diligent editing. Finally, I dedicate this piece to my mother, father, and sister, who have blessed me with their love and wisdom.

[1] William Gibson, an award-winning science fiction writer, first coined the term "cyberspace" in 1984. WILLIAM GIBSON, NEUROMANCER 51 (1984). Today the term refers to the distance between computer users who are seamlessly linked by an electronic network.

each student, and best of all, pays for each user's connection.[2] With relative ease, students and faculty can communicate with others around the globe, receive hours of free e-mail, gain access to large databases, and link up to newsgroups. To gain access to the system, most new users need only sign a contract promising that they will not disrupt the university system or conduct illegal activity through the university account.

Perhaps unwittingly, some new users will also agree to one other condition imposed by the university that provides an Internet account. Most will waive their rights to engage in commercial speech on the Internet. This is a content-based restriction; the university is banning all commercial speech that is transmitted through a particular medium. Ordinarily, such a restriction might produce lawsuits from those who wish to engage in commercial speech. However, anti-commercial sentiment on the Internet, especially among the academics who established the Internet for research purposes, may deter anyone who would bring a claim based on the university's violation of First Amendment free speech rights. The user who asserts a right to post commercial messages on the Internet (also called the "Net") might be forced off the Net by other users even before the university enforces its regulations.[3]

Both public and private universities[4] provide the academic community with Internet access through regional links to a network

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[2] This Comment provides the viewpoint of the student/free rider, but it is a rather simplistic portrayal of the truth. In truth, the university receives funding from the government, from private donors, and even from the students themselves in the form of registration fees. One author estimates that universities will pay between $60,000 and $100,000 a year for a connection to the network. Tom Abate, *Information Highway May Soon Be Internet Toll Road; Privatizing Could Lead to Fees For Cyberspace Travel*, S.F. EXAMINER, July 8, 1994, at A1.

[3] *See infra* note 22 for a discussion of the ways to eject a user from the Internet.

[4] Public high schools and elementary schools, as government-run institutions, are also subject to the First Amendment. However, as this Comment goes to press, these schools provide Internet accounts to their students less frequently than do universities and thus are outside the scope of this piece.

backbone.[5] However, only the public university must consider its role as a public actor before it sculpts policy affecting the speech traveling on that backbone. More than the private university, the public university must be cautious when imposing restrictions on individual rights.[6] Especially as private companies begin to underwrite the Internet backbone, the public university will have difficulty claiming that the Internet is a government-owned forum for speech.

This Comment will argue that public universities are violating free speech rights when they seek to restrict all commercial speech on Internet user accounts. Even as a less-protected form of speech, commercial speech is entitled to First Amendment protection from such a total ban. In Part I, the Comment will first describe the basic technological principles of the Internet. Second, the history of the Net will be considered in order to explain why universities and others do not welcome commerce on the Net. Third, the role of universities in the Internet's evolution will be examined.

University policies restricting Internet commercial speech implicate two doctrines of First Amendment jurisprudence: the public forum doctrine and the commercial speech doctrine. In Part II of this Comment, university-provided access to the Internet will be analyzed according to the Supreme Court's current public forum doctrine, yet the Comment will show that public forum analysis is not the most appropriate standard by which to judge speech on the electronic forum. Part III suggests that commercial use of the Internet ought to be governed by application of the commercial speech doctrine. By focusing on the message and its audience, rather than the medium

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[5] Aside from access to the federal Internet backbone, many universities also provide access to Local Area Networks (LANs). Such networks are not at issue here, as they are established and governed according to the needs of a singular population of academic users.

[6] The First Amendment protects individual speakers only from state incursions on freedom of speech. Even though a government entity will not necessarily be considered a state actor for purposes of applying the First Amendment merely because it helps to fund the development of Internet lines, the public university acts in the capacity of state actor when it regulates the use of those lines.

itself,[7] the Comment seeks to develop a practical assessment of Internet user rights and a workable standard for protecting those rights. Specifically, the Comment argues that university restrictions on commercial speech do not adequately serve the university's stated interests in preventing congestion, avoiding undue cost, and preserving the school's academic mission. The Part III analysis ultimately reveals that current restrictions on academic accounts are simply overbroad. Finally, Part IV proposes an alternative to current restrictions that would achieve government objectives while also meeting constitutional requirements for narrow tailoring.

The treatment of commercial speech on the Internet has long-range implications for many users: merchants who want to advertise their products or services to a large consumer market; the remote consumer who seeks the variety provided by many producers; and the person who wants to conduct a simple exchange with a targeted and willing group of like-minded individuals. In addition, a court determination of the worth of Internet commercial speech could affect the tenor of a decision on a related issue, political speech on the Internet. Both types of speech could potentially be considered non-academic. However, political speech has traditionally received more First Amendment protection than commercial speech[8]—perhaps

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[7] *See* Note, *The Message In The Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994). The Note predicts that the Supreme Court, in its first attempts to grasp the intricate economic and technological issues of this new medium, may give short shrift to First Amendment concerns. *Id.* at 1083.

[8] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447,456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution [of the First Amendment's guarantee for noncommercial speech]. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited amount of protection, commensurate with its subordinate position in the scale of First Amendment values . . . ."). *But cf.* Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1218, 1220-21 (1983) ("[T]he [*Virginia Pharmacy*] Court never admitted that commercial speech was less valuable than political speech . . . [referring to Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748 (1976)]. Justice Blackmun labored to defend the

because political speech involves more self expression, is essential to a representative democracy, or seems especially vulnerable to attack. Thus, extending First Amendment protection to commercial speech (often viewed as less worthy of such protection) indicates that political speech should be similarly protected.

II. AN EXPLANATION OF ELECTRONIC COMMUNICATION

The Internet is an intricate feat of cooperation between millions of computers across the globe.[9] Thankfully, though, most users will never need to know the intricacies of a global computer network.[10] This is because computer scientists have labored to make the Internet relatively comprehensible, affordable, and democratic. Theoretically, this means that any person who has access to a computer—regardless of his or her geographical location—can communicate with any other computer user across Internet lines.[11] Likewise, there is no

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asserted equal relationship between commercial speech and political speech for the *Virginia Pharmacy* majority . . . . Justice Powell [in *Ohralik*] steered the Court to accept a hierarchy of protected speech for the first time . . . ."). For further discussion on the protection afforded to commercial speech, see *infra* text accompanying notes 85-88.

[9] *Wired*, a computer industry magazine, reported that as of July 1994, there were 3.2 million computers connected directly to the Internet. WIRED, Oct. 1994, at 34. The magazine noted that this figure included only direct connections, and not all of the machines that are connected to a computer with a direct Internet connection. *Id.* By January 1996, the Network Wizards Internet Domain Survey reported that the number of hosts had increased to 9.4 million. Available via the World Wide Web at http://www.nw.com. A host is a computer connected to the Internet. The host may be a single-user computer, or it may support hundreds of other users who wish to connect at the same time.

[10] Before the advent of user-friendly interfaces, the Internet was a much more exclusive domain. Using the Internet in the early days required both determination and some experience in the burgeoning field of computer science. Not surprisingly, the Internet of old was mainly populated by computer programmers.

[11] The assumption that a would-be communicator has access to a computer is not trivial. Internet speech is inherently limited to those who can obtain and afford access to a computer.

published age, gender, or race distinction between Internet users, other than those that the users themselves specify.

The Internet facilitates access to three main computer services: database retrieval,[12] electronic mail (e-mail), and newsgroups.[13] By accessing these three services, a user can search large archives, talk on-line ("chat") with other users, post messages aimed at a common interest, subscribe to a Usenet newsgroup, and send letters to other users.

The present-day Internet actually began in 1969, when the United States defense department developed ARPAnet[14] in order to link university researchers, military research contractors, and the Department of Defense via a computer network. Defense department researchers also envisioned that ARPAnet would become the national means for communication during a nuclear war; because the network automatically reroutes its messages when any one link fails, the system is almost invulnerable to attack or disruption.

By 1980, though, the National Science Foundation (NSF) had obtained a grant to begin work on the NSFNET, an expansion of network technology to NSF supercomputers. Though the supercomputers proved too costly to be viable, the NSFNET and its many regional networks quickly eclipsed the ARPAnet. In fact, in 1990, the ARPAnet was shut down. Today most universities and large corporations connect to the Internet by means of a leased line that runs to a regional network and connects to the backbone established by the NSF. Because the federally-subsidized NSF restricted NSFNET use to educational and research purposes,[15] most

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[12] For example, both LEXIS-NEXIS® and WESTLAW® may be accessed through the Internet.

[13] A newsgroup is a discussion group to which one can subscribe and contribute (or "post") messages. There are thousands of newsgroups on the Internet at any given time, and the discussion topics range from local politics to nationally syndicated television sitcoms.

[14] ARPA, the Advanced Research Projects Agency, administers the grants awarded by the Department of Defense.

[15] The NSFNET Backbone Services Acceptable Use Policy, June 1992. The Acceptable Use Policy can be reached via anonymous ftp at the following address: NIC.MERIT.EDU/nsfnet/acceptable.use.policies/nsfnet.txt.

organizations providing service through the NSF backbone—such as universities—adopted "acceptable use policies" as a condition of the service.

However, even the NSF-subsidized backbone has become a thing of the past.[16] NSF now funds only a set of Network Access Points, a routing service, and one high-speed network aimed at developing capabilities for video transmission.[17] At present, four commercial providers are collaborating on a five-year franchise in which they compete with each other to carry electronic traffic.[18] Regional networks are no longer wholly funded by the NSF,[19] and several commercial providers are hooked into regional networks via leased lines or dial-up access.

To the extent that it has no central command authority, the Internet is quite unlike other mediums. Aside from rules established by individual service providers or other self-appointed "guardians" of

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[16] The NSFNET was retired on April 30, 1995. *See* Release, available via anonymous ftp to NIC.MERIT.EDU/nsfnet/news.releases/nsfnet retired. Cost surely influenced the decision to eliminate federal subsidies for the Net. According to one estimate, the United States spent $11 million to run the NSFNET in 1993. Abate, *supra* note 2.

[17] Jeffrey K. MacKie-Mason & Hal Varian, *Economic FAQS About the Internet*, 8 J. ECON. PERSP. 75, 78-79 (1994). The new backbone network service, called vBNS, will connect six supercomputer sites and will be subject to a wide range of use restrictions. *Id.*

[18] Pac Bell, Sprint, Ameritech, and Metropolitan Fiber Systems take traffic from the federally subsidized backbone and transfer it to four network access points. Abate, *supra* note 2. In addition, on September 18, 1995, the Internet's official domain name registry became a private enterprise, run by Network Solutions, Inc. Stephen Pizzo, *Spies at the Gate: An All Star Cast of Shady Characters Now Controls the Net's Domain Name System*, WIRED, Feb. 1996, at 72. It is questionable whether the government has really relinquished all its control over the Internet, though. At least one critic has pointed out that Network Solutions, Inc. is not entirely free of government control; the corporation's parent company, Science Applications International Corp., derives more than 90% of its income from U.S. defense department contracts. *Id.*

[19] Many are funded by a state government and are run by a state agency or a nonprofit coalition of universities.

the Internet,[20] there is only one federal law that specifically mentions online communications, and it addresses only harassing, obscene, indecent, and patently offensive sexual or excretory communications.[21] Procedurally speaking, "netiquette" is the closest thing to a set of universal rules for the network. If a user offends the rules of netiquette, he or she may be evicted from the Internet by a commercial service provider or by other users.[22] Netiquette is an unofficial and evolving standard, though, and it is interpreted differently by each user.

For some, it may be difficult to anticipate the reaction of the Net community. Among other things, the mass dissemination of unsolicited advertisements[23] can provoke an eviction from the Internet.[24] However, because netiquette has never been codified,

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[20] The Electronic Frontier Foundation (EFF) is probably the best known group of those that concern themselves with Internet regulation and legal issues. EFF is an organization dedicated to raising "public awareness about civil liberties issues arising from the rapid advancement in the area of new computer-based communications media." EFF Mission Statement, available via anonymous ftp to eff.org.

[21] Communications Decency Act of 1996, Pub. L. No. 104-104, § 502.

[22] Users who defy Net rules may be subject to the modern-day, technological equivalent of a spanking if the violation is sufficiently grave. Usually, angered users send "flames," or angry messages, to the offender or, better yet, to the service provider. When enough users are angered to the point of sending a message, the flames multiply and the offender's system runs out of capacity to store information. Consequently, the system overloads and "crashes" (refuses to operate). Sometimes, the mere threat of Internet discipline is enough to prompt a fearful provider to revoke access to the burdensome offender. Thus, many on the Net have likened the governance of cyberspace to a form of "electronic frontier justice."

[23] Understandably, most Internet users do not want to be bothered by pesky advertisers who waste both the user's time and the computer's memory. Solicited advertisements, on the other hand, are not similarly condemned because the user has elected to receive the commercial information.

[24] The most notorious case of mass mailing (in Internet parlance, "spamming") involved the sale of legal services. Seeking to advertise their law firm, Laurence Canter and Martha Siegel sent a message to almost every active usenet newsgroup on the Internet. (One account estimates that 5,500 newsgroups were affected.) Once thousands of users received the message multiple times, Canter and Siegel became the targets for vicious flaming. Though the two tenacious lawyers vowed

there is often no way to predict what other behavior might be deemed "illegal."

Illegal or unwanted conduct is not only hard to define, but it also may go undetected or unreported. A majority of the service providers do not have the resources to police illegal conduct on the Net. Thus, they informally rely on third party informants to tell them when another user has offended provider policies. Universities providing access to the Internet similarly rely on students, faculty and other diligent computer users to keep them abreast of policy violations.[25]

III. PUBLIC FORUM ANALYSIS INADEQUATE

The public university acts as a property owner when it purchases computers and establishes network connections for student use. Thus, when a university restricts the type of expression that can be communicated via its computers, those restrictions might be examined as restrictions on public use of government property. The Supreme Court normally reviews such restrictions according to the doctrine of the public forum. Public forum analysis balances the government's interest in restricting "the use of its property to its

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to continue advertising on the Net, their commercial provider eventually yanked their account. Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50. The advertisement, however, was largely successful; Siegel wrote in July 1995 that nearly 1,000 customers purchased her firm's services after seeing the Internet message. Martha Siegel, *Internet Ads Aren't All Bad*, S.F. EXAMINER, July 10, 1994, at B5. Copycat spammers now claim they can reach up to 8 million people with one spam. Simson Garfinkel, *Spam King: Your Source for Spams Netwide!*, WIRED, Feb. 1996, at 84.

[25] Upon uncovering a student offender, the university system administrator will either issue a warning to the student or close the account in order to prompt the student to contact the system administrator. Telephone Interview with Mark Hale, Center for Instructional and Research Computing, University of Florida (Oct. 11, 1994); Telephone Interview with Bonnie Mika, Manager of User Relations, UCLA Office of Academic Computing (Oct. 28, 1994).

intended purposes" against an individual's desire to use that same property for other purposes.[26]

Under the public forum doctrine, the character of a forum will determine how much the government can regulate speech in that forum.[27] Government-owned fora are classified according to three categories: the public forum, the nonpublic forum, and the limited public forum. Because government regulations on commercial speech are usually triggered by the commercial content of the message, they are considered content-based, as opposed to content-neutral regulations.

In a public forum, content-neutral regulation by a government must meet three criteria: ample alternative channels of communication must exist; the regulation must be narrowly tailored; and the regulation must serve a significant government interest.[28] The criteria for content-based regulations in a public forum are even stricter; the government must show that the restriction is necessary to serve a compelling interest and that it is narrowly drawn to achieve that goal.[29]

It is useful to contrast the judicial review of speech regulations in a public forum with the review reserved for regulations in a nonpublic forum. When the speech occurs in a nonpublic forum, such as a private university, the government has substantially more leeway to regulate and must only prove that the restriction is reasonable and viewpoint neutral.[30]

Finally, a limited public forum is a private forum that the government has opened to certain people for expressive activity. In the past, limited public fora have included those created exclusively

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[26] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). Thus far, the public forum doctrine has only been applied to noncommercial speech.

[27] "[T]he extent to which the Government can control access depends on the nature of the relevant forum." *Id.* at 797.

[28] Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 64 (1981). *See also* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[29] Carey v. Brown, 447 U.S. 455, 461 (1980).

[30] *See infra* text accompanying Part III.A.

for student groups[31] and those created for discussion of a specific topic.[32] Government regulations in a limited public forum must meet some of the same requirements for regulations in a traditional public forum, but the government may close the forum to communication at any time and limit use to that in accordance with the forum's purpose.[33]

Public forum analysis is not without its critics.[34] Yet the purpose of this Comment is not to challenge the general utility of the public forum doctrine, but to suggest that the public forum framework is ill-fitted for expression communicated across a nontraditional medium such as the Internet.[35] Public forum analysis would yield comparisons between the Internet and government-owned property—especially streets, parks, and sidewalks—whose traditional purpose was to facilitate expressive activity. Such comparisons are ultimately unconvincing.[36] The university owns the academic Internet accounts and the university server that links students to the Internet. However, the entire electronic forum is not owned by the

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[31] Widmar v. Vincent, 454 U.S. 263 (1981).

[32] City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employer Relations Comm'n, 429 U.S. 167 (1976).

[33] *See infra* text accompanying Part III.C.

[34] *See generally* Michael L. Taviss, Editorial Comment, *Dueling Forums: The Public Forum Doctrine's Failure to Protect the Electronic Forum*, 60 U. CIN. L. REV. 757 (1992) (arguing that because current trends of public forum analysis do not sufficiently protect public electronic fora, the public forum doctrine should be reshaped to recognize electronic fora as traditional public fora); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

[35] An electronic medium can be distinguished from traditional mediums because it easily and economically transmits enormous amounts of information, all the while allowing the user great freedom to modify transmitted data. Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 424-26 (1993).

[36] Were a critic to compare the Internet and other labeled fora, he or she could only compare the *functions* of each venue. "The mere physical characteristics of the property cannot dictate forum analysis." United States v. Kokinda, 497 U.S. 720, 727 (1990). If the argument centered solely around physical characteristics, a court would probably find it impossible to compare the Internet to any other forum.

university or any other government entity.[37] Thus, the public university may be without power to govern the electronic forum or declare an acceptable use. Just as the public university is powerless to censor the commercial speech of students who are not at school, so it should similarly be forbidden to adopt unacceptable restrictions on student speech conveyed not in the school, but over the Internet. Even when students access the Internet through government-owned computer terminals, the government probably does not control the infinite array of network lines connecting those terminals to others around the world.

At most, it would appear that the university can control the university server and student use of its computer terminals and the university server. Less secure is the university's asserted property interest in controlling the Internet connections *through* the server, which is itself one of many intermediaries in the public electronic forum.

Given its expansive nature, the Internet may be "outside" the realm of university control. Yet this is not a widely held viewpoint, and for that reason, the Comment proceeds to the public forum analysis below.

A. *Nonpublic Forum*

If the public university can establish that the Internet is a nonpublic forum, it may then exercise the power to control expression transmitted through an academic Internet account. The government may control access to a nonpublic forum based on subject matter and speaker identity as long as "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[38] The government may exclude a speaker from a nonpublic

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[37] To send an e-mail to a mailbox served by a commercial access provider, for example, requires that the message travel over lines that have been purchased by the commercial provider. It would be folly to suggest that the university may flex its muscle over lines owned by a private company.

[38] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

forum if the speech topic is not encompassed within the purpose of the forum[39] or if the speaker is not a member of the class for whom the forum was created.[40] Nonetheless, the "government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject."[41]

In classifying a forum as nonpublic, the Supreme Court usually determines that the government never intended to dedicate the forum to First Amendment activity.[42] The historical use of a forum is thus useful in helping the Court to determine what the government intended when it established the forum.[43] However, even when a forum has been dedicated to some expressive use, the Court may find that the government has reserved aspects of that same forum for nonpublic use. Aspects of the forum that are deemed nonpublic will only be subject to the reasonableness test applied to all nonpublic fora.[44]

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[39] Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (because advertising space on public transit vehicles does not constitute a public forum, the city may limit access and refuse would-be advertisers).

[40] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

[41] *Cornelius*, 473 U.S. at 806. Most often, a state can meet its burden by showing that the speaker can reach the same audience through alternative channels or by communicating at another time, in another place, or in another manner.

[42] *See Perry*, 460 U.S. at 49; *see generally* United States v. Kokinda, 497 U.S. 720 (1990) (postal sidewalk inside post office-owned parking lot is nonpublic forum); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (high school newspaper is nonpublic forum); Pacific Gas and Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986).

[43] *See generally Kokinda*, 497 U.S. at 728-29; Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 650-51 (1981); Burson v. Freeman, 504 U.S. 191 (1992). Location and current purpose of such property are also valuable in determining whether a forum is nonpublic. *Kokinda*, 497 U.S. at 731 (discussing the fact that the Postal Service has been regulating commercial solicitation since 1958).

[44] *Kokinda*, 497 U.S. at 730 ("[A] regulation prohibiting disruption . . . and a practice of allowing some speech activities on [government] property do not add up to the dedication of [government] property to speech activities."). In some ways, the nonpublic forum doctrine is but a judicial creation. A forum may be nonpublic because it has always been used as a nonpublic forum, but it may also be nonpublic even if it has already been used as a public forum; a court could reason that the

The status of the Internet forum cannot be determined by looking at historical use; long gone are the days when an academic Internet account was intended to be only a communication tool between researchers and government war strategists. It would broaden the definition of academic speech quite a bit to say that the historical intent, to facilitate defense communication, was ever academic. In addition, Internet applications are many and varied, so much so that it is difficult to analyze the Internet's forum status by looking to its current purpose. The current purpose of a university-provided account is likewise difficult to discern, given the fact that such accounts are used by thousands to accomplish a vast number of tasks, not all of which are academically related.

In a nonpublic forum, the government usually seeks to restrict expressive activity (speech) because such expression would disrupt that property's intended use.[45] On the Internet, speech *is* the intended use of the property. To the extent that the Internet is primarily dedicated to facilitating communication between computer users, adding more speech should not upset the intended use of the network.[46]

However, this may be a simplistic analysis. Adding more speech threatens transaction speed. When Internet traffic reaches the physical maximum flow rate, congestion results and messages travel more slowly.[47] In extreme situations, congestion can lead to decreased storage capacity or system failure.[48] A host computer's

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government reserved every subsequent use of the property for nonpublic use.

[45] *Id.* at 732-35 (stating that sidewalk solicitation is inherently disruptive to the U.S. Postal Service's business).

[46] If, as the university may argue, Internet access has been dedicated to facilitating *academic* communication between users, then adding commercial speech may upset the network's intended use. The university's argument is weakened, however, by the fact that it already permits academic account users to transmit personal, political, and religious speech (via e-mail) in addition to academic speech.

[47] "[The] network is a shared-media technology: each extra packet [or package of data] that I send imposes a cost on all other users because the resources I am using are not available to them. This cost can come in the form of delay or lost (dropped) packets." MacKie-Mason & Varian, *supra* note 17 at 84.

[48] John Markoff, *Jams Already on Data Highway*, N.Y. TIMES, Nov. 3, 1993, at D1.

storage capacity is large but finite. Indeed, if the host is used for limitless expressive activity, the system may suffer growing pains.

These results are exactly what the university dreads, since congestion on the host computer impairs regular transmission of all messages. Indeed, nonpublic fora are established precisely in order to ensure that government property is used to accomplish specific objectives in the most efficient manner possible. Rightfully so, the government may wish to retain Internet use for efficient accomplishment of academic research.

Efficient use of the Internet for academic communication and commercial speech on the Internet need not be mutually exclusive, though. The Net's value is derived from the fact that it gives students, faculty, and staff affordable and easy access to millions of other computer users. Recognizing the value of this connectivity, the university wants to minimize excessive traffic on the Internet. This is not the same as saying that the university should or can control commercial speech, and only commercial speech, in the electronic medium. While the university may justify limits on activities that disrupt school operations, it cannot similarly justify penalizing commercial speech when excessive message transmissions are really the disrupting culprit. The Supreme Court stated as much in 1993, when it ruled that a ban on commercial newsracks alone did not reasonably advance one city's asserted interest in reducing the total number of newsracks.[49]

For the most part, the Internet is simply different from a postal sidewalk (or other nonpublic forum) that was not designed for speakers.[50] The Court has ruled that speech on a sidewalk adjacent

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[49] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993). The Court stated, "Cincinnati has not asserted an interest in preventing commercial harms . . . which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id.* Applying the Court's reasoning from *Discovery Network* to university Internet access, a university would have to assert an interest in guarding against commercial harms before it could sustain a ban on commercial speech.

[50] The Net may, however, resemble a nonpublic forum that *was* designed for speech. *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983) (discussed *infra* text accompanying notes 71-74).

to a post office and located inside a parking lot owned by the post office may disrupt business and promote inefficient use of government property that has been reserved for travel into the post office.[51] As opposed to normal sidewalks, the Internet is regularly used for expressive activity and the addition of commercial speech should not disturb Internet functions any more than the addition of other forms of speech. The content of the speech is not determinative.

B. *Public Forum*

As applied to noncommercial speech, the public forum doctrine protects all expression that occurs in a site sanctioned by the government for use by the public for communication. For this reason, any content-based regulation must be proven both necessary to serve a compelling state interest and narrowly drawn to achieve that end. Even content-neutral regulations, such as those that restrict the time, place, or manner of speech instead of its content, will not pass the Court's scrutiny if they are not closely tailored to serve a significant governmental interest or do not leave ample alternatives open for communication.[52]

Still, it stretches even the most progressive analysis to liken cyberspace to other traditional public fora such as city streets, sidewalks, and parks.[53] To argue that computer speech deserves the heavy protection afforded to speech made in a public forum, moreover, would necessitate a finding that computers "have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating

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[51] *See Kokinda*, 497 U.S. 720, discussed in *supra* notes 42-44.

[52] United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 132 (1981). The Court found these requirements satisfied in Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding that the restrictions on the noise level of a concert in a public park were reasonable time, place, and manner restrictions).

[53] Justice Roberts first declared that streets and parks were public fora in Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939). Later, the Court added sidewalks to the list of traditional public fora. United States v. Grace, 461 U.S. 171, 177 (1983).

thoughts between citizens, and discussing public questions."[54] The Internet has not been "immemorially" held for the public use. Putting aside the hilarity of the proposition that the young Internet has been reserved for anything "immemorially," it is hard to argue that the Internet was initially reserved for the public, particularly when early use of the network was limited to government employees.[55]

Moreover, with university accounts, access is limited to the university community and is most often subsidized in small part through student activity fees and in large part through government funding. For those who are not university employees, no less than the cost of university tuition separates those who can access the Internet and those who cannot. While use of the Internet may seem "free" to students, it is only because the cost is incidental to the actual cost of qualifying for all of this "free" service, namely, the cost of going to college. This is hardly the same as free access to government-owned streets, parks, and sidewalks; streets may be taxpayer-supported, but they do not also require payment as a condition of use.

In several important respects, though, traditional fora such as streets or parks do resemble computer newsgroups or electronic mail messages. Both offer speakers a place of gathering and assembly

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[54] *Hague*, 307 U.S. at 515 (holding that the right to assemble and discuss national issues in public places is one of the "privileges, immunities, rights, and liberties" granted to every citizen by the Fourteenth Amendment).

[55] Justice Kennedy might argue that all of this emphasis on the history of the Internet is unnecessary anyway. In a concurring opinion, he stated that open public spaces that are suitable for public discourse should be considered public fora, regardless of their "historical pedigree."

> Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity. In a country where . . . parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.

International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 697 (1992) (Kennedy, J., concurring) (arguing that an airport should be considered a public forum because it is one of few government-owned places where many people have extensive contact with other members of the public).

where ideas can be freely exchanged;[56] both allow widespread distribution;[57] both are open at all hours of the day, and both offer these services at a bargain price.[58] In addition, like a public forum that must be affirmatively created, the Internet has been "intentionally open[ed] . . . for public discourse."[59] Perhaps, then, the Internet should be considered a limited public forum.

C. *Limited Public Forum*

To curb interruptions during the intended use of a public forum, the state may affirmatively limit the open character of a nontraditional public forum. This anomaly gives rise to the limited public forum, in which the Court tolerates constraints on expressive use. Accordingly, the state may choose to close the forum and curtail expressive activity at any time.[60] Content-neutral government regulations must be reasonable time, place or manner restrictions, and any content-based restriction must be sufficiently related to a compelling government interest.[61] However, limited public forum status allows the government to immunize itself against reproach for restrictions on speech in a particular forum.

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[56] A forum is a "public place, marketplace, [or] place of assembly . . . giving opportunity for debate." THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 416 (6th ed. 1976).

[57] At last count, there were 9.4 million computers connected to the Internet. *See supra* note 9.

[58] *See* Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 431-32 (1992). Naughton argues that a computer bulletin board is not a public forum because subscribers must pay a fee and comply with the provider's restrictions.

[59] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[60] Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, 4th § 20.47, at 311 (2d ed. 1992). For a good example, see Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981) (holding that a state fair is a limited public forum because it exists temporarily to provide a means for a large number of exhibitors to display their products and views to many people).

[61] *Id.*

The limited public forum is possibly the most confusing of all three fora. In *Widmar v. Vincent,* the Supreme Court invalidated a regulation prohibiting the use of school facilities for the purposes of religious teaching or worship.[62] Elaborating on the scope of the limited public forum doctrine, the Court pointed out that once a university "created a public forum generally open for use by student groups . . . [it] assumed an obligation to justify its discriminations and exclusions under applicable constitutional law."[63] Fundamentally, the forum was limited because the Court refused to hold "that a campus must make all of its facilities equally available to students and non students alike, or that a university must grant free access to all of its grounds or buildings."[64] *Widmar* suggested that the university could not impose conditions on the use of university facilities and speech within those facilities once it had created a limited public forum for students[65] by allowing expressive activity.

If analyzed under the limited public forum doctrine established in *Widmar*, most types of speech on the electronic forum could receive First Amendment protection. There would be many similarities between *Widmar* and a hypothetical case involving commercial speech on a college Internet account. It is well settled that school facilities[66]

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[62] Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[63] *Id.* The Court continued by saying that the university must assume this obligation "even if it was not required to create the forum in the first place." *Id.* at 268. In *Widmar*, a religious group sought to use University of Missouri facilities for its meeting. Despite having held previous meetings in the university facilities, the group was denied access based on a new policy aimed at fostering the separation of church and state. The Supreme Court ruled that, without a compelling reason, the university could not impose a content-based regulation on speech. *Id.* at 269-70.

[64] *Id.* at 268 n.5.

[65] Likewise, a university-controlled electronic forum is unavailable to non-students. However, all students and faculty have access to the network, a feature which is not true of some administrative buildings. In this sense, the network is not a limited public forum.

[66] The university is usually a safe refuge for free expression. Yet *Widmar* proved that some university buildings may qualify for limited public forum status. 454 U.S. 263. Thus, speech within those facilities would be subject to regulation. Speech occurring at elementary schools is even more likely to be overseen. Courts will not allow expressive activity on property adjacent to a secondary school

(such as those at issue in *Widmar*) and libraries[67] are limited public fora;[68] the university charges a minimal activity fee to help defray the costs of building and maintenance[69] and, in exchange, any student group is allowed to use the university facilities for meetings. University computing facilities operate in much the same way.[70] Students pay a nominal fee at registration, and they can expect to use the facilities for reasonable expression. Moreover, as in *Widmar*, the university can protect against unlimited public use of the Internet by restricting access to all but enrolled students, faculty members and school administrators.[71]

As comparable as they may seem, *Widmar* restrictions, with their emphasis on religious speech in physical buildings, and Internet commercial speech restrictions may not be altogether analogous. In fact, the Internet may not even be considered a limited public forum if the Court analogizes to *Perry Education Ass'n. v Perry Local Educators' Ass'n.* In *Perry*, a 5-4 decision, the Court invoked the public forum doctrine and upheld a school policy that restricted mailbox access to only one authorized teachers' union. Writing for the majority, Justice White ruled that a public school mailing system used by high school administrators and teachers was not a limited public forum.[72] The interschool system was not "open for use by the

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building, for example, if it disturbs the basic educational mission of the school. Grayned v. Rockford, 408 U.S. 104 (1972) (upholding an "anti-noise" ordinance on the grounds that it protected disruption of classes in session). *See infra* text accompanying note 107.

[67] In *Brown v. Louisiana*, the Supreme Court ruled that a silent and peaceful sit-in protest did not interfere with public use of a library. 383 U.S. 131 (1966).

[68] The *Widmar* Court recognized that although a public university may protect its academic mission through regulation, it "possesses many of the characteristics of a public forum." *Widmar*, 454 U.S. at 268 n.5 (reasoning that because a university acts as a "marketplace of ideas," its administrators may not unjustly restrict access to the means of communication with faculty, administration, and other students) (citing Healy v. James, 408 U.S. 169, 180-82 (1972)).

[69] *Widmar*, 454 U.S. at 265.

[70] *See supra* Part I.

[71] Likewise, *Perry* upholds restrictions on speech made by non-students. 460 U.S. 37 (1983).

[72] *Id.*

general public"[73] and the selective access characteristic of the forum alone could not entitle speakers to the protection associated with a public forum.[74]

Close scrutiny reveals that the issue of Internet access seems to share some factual similarities with the issues presented in *Perry*. In *Perry*, the public high school only allowed sponsors of academic-related activities to access the school mailing system. Reasoning that the high school had created a system with a singular purpose, the Court found that the competing teachers' union was not entitled to have access to the mailing system because it did not sponsor academic-related activities at the school. Similarly, university Internet accounts were also created with a limited purpose: to facilitate academic communication. If this purpose is read narrowly, as it would be under a *Perry* analysis, then university-provided Internet accounts could be classified as nonpublic fora. If, however, this purpose is read broadly—given the current, non-academic uses of the Internet and the decision in *Widmar*—the electronic forum might instead be granted limited public forum status.

Perry presents one other issue that might be relevant to the study of restrictions on Internet accounts. In *Perry*, the Court ruled on the forum status of an entire mailing system, not just the mailboxes. Such analysis could readily be applied to the Internet, where a public university asserts control of an entire networking system, rather than just the computer terminals used to access the network. Like the *Perry* mailboxes, each Internet account could be considered a nonpublic forum.

The comparison to *Perry* is not without flaws, though. The banished speakers in *Perry* were not students or members of the academic community. Therefore, they may have been excluded on the basis of their tenuous connection to the school. The Internet, on the other hand, is home to student speakers who engage in a host of

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[73] *Id.* at 47.

[74] The Court indicates that its decision partially hinges on the fact that granting exclusive access to recognized bargaining representatives is a "permissible labor practice" that is part of the effort to keep much-feared labor squabbles outside the schools. *Id.* at 50-52.

academic and non-academic uses. Thus, a *student* using the network for another non-academic use, such as advertising, should not be excluded from access to the network. The student's connection to the university is far from tenuous; he or she is a member of the group upon which general access privileges have been bestowed by the university.

It is still unclear whether an Internet forum will be comparable to the mail facilities of *Perry* or the university building of *Widmar*. Descriptions of how the Court has previously considered a "public forum" provide little help because they are far from specific and they do not address emerging technological fora. Unfortunately, the public forum doctrine is all too often ambiguous in definition, yet rigid in application.[75]

III. COMMERCIAL SPEECH

In haste, critics have attempted to slide the electronic forum into categories for which it is too big, too new, and too progressive. After all, Net watchers predict that the network will soon span every inch of the globe,[76] reach into millions of homes and perform tasks beyond the scope of today's imagination.[77] The massive number of Internet users, and the network's potential for carrying unlimited amounts of communication, provide reason enough for guaranteeing the rights of Internet speakers beyond that which is guaranteed in a

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[75] *See generally* Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons From Lamb's Chapel*, 24 N.M. L. REV. 1, 15 (1994) (arguing that while predictability and objectivity may be enhanced by the doctrine, the rules often "dictate certain outcomes regardless of specific facts").

[76] For all intents and purposes, the Internet is already global. There are nodes in every country, and there is even a node in Antarctica.

[77] *See, e.g.*, HARLEY HAHN & RICK STOUT, THE INTERNET COMPLETE REFERENCE, *Introduction* (1994) (calling the Internet the greatest and most significant invention mankind has ever seen, and alluding to its many unfathomable capabilities); Katsh, *supra* note 35.

nonpublic forum.[78] In this respect, the Internet can be analogized to other instruments of mass communication such as the telephone system or the mail system.[79] At the same time, while public policy considerations may support the idea of labeling the Internet as a public forum, the Court's own language suggests that it will be difficult to liken the Internet to a public forum. Thus, the Internet may require a new forum category altogether. Alternatively, it may demand that administrators exert only the amount of control that is absolutely necessary to assure access for everyone.

This Comment argues that any university efforts to ban Internet commercial speech should be analyzed according to the standards for commercial speech in a public forum. Moreover, when university restrictions are evaluated according to commercial speech standards, there is a strong chance that the bans will not survive scrutiny. While mass advertising[80] may be an unfortunate development when commercial speech restrictions are lifted on academic accounts, the sacrifice will likely prove necessary to preserve the individual's right

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[78] A similar argument is advanced by Justice Anthony Kennedy in a concurring statement to a decision upholding restrictions on solicitation in airport terminals. Internatinal Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 693-709 (1992). Though Kennedy sided with the majority in determining that the restrictions were valid, he strongly disagreed with the majority's classification of an airport as a nonpublic forum. "It is the very breadth and extent of the public's use of the airports that makes it imperative to protect speech rights there." *Id.* at 700. Kennedy further argued that because they facilitate travel, airports can not be distinguished from streets or sidewalks. He concluded that public spaces in airports should be considered public fora. *Id.* Similarly, the Internet is populated by many users and subject to many and varied uses.

[79] Holmes' noteworthy dissent in a 1922 case first established that sealed letters containing commercial speech, though routed through the government-run post office, deserved full First Amendment protection. Leach v. Carlile, 258 U.S. 138, 140-41 (1922).

[80] See *supra* note 24 for a description of one electronic mass mailing that met with varied results.

to free speech and the interest in the free flow of commercial speech.[81]

A. *Defining Commercial Speech*

Central to any discussion of commercial speech is a description of the distinction between commercial and non-commercial expression. However, such a description is hard to come by. Commercial speech certainly encompasses any expression that proposes a commercial transaction. What is not so certain is whether commercial speech also includes speech "related solely to the economic interests of the speaker and its audience."[82] Definitions of this sort may be overinclusive, as many commentators have been quick to point out.[83]

To the extent that it will be necessary, defining unwanted commercial speech is difficult in the computer network forum. Under current policies, all commercial speech is considered unwanted, regardless of its actual effect on the audience. For example, a user who advertises his or her bicycle in a newsgroup entitled "alt.bikesale" will be in violation of campus policies that broadly restrict commercial speech, even though the advertisement was "solicited" by interested users who arguably did not need the

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[81] "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason and at what price . . . . It is a matter of public interest that those [private, economic] decisions . . . be intelligent and well informed. To this end, the free flow of commercial information is indispensable." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976).

[82] Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980). In Bolger v. Youngs Drug Prods. Corp., the Court states that a speaker's economic motivation would be "insufficient by itself to turn the materials into commercial speech," but when coupled with other characteristics of the speech, such as a reference to a product, it provides strong support for the argument that a particular form of speech is indeed commercial. 463 U.S. 60, 66-67 (1983).

[83] *Central Hudson*, 447 U.S. 557, 597 (Stevens, J. concurring); Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 381-83 (1979) (observing that personal profit motivates not only commercial speech, but also other forms of fully-protected speech, not the least of which is political speech).

university to intercede. Will the user who e-mails a friend, offering to sell a bicycle, also risk punishment from the university?[84] Probably, even though the speech was clearly interpersonal and could not have been censored had he or she used a normal letter. Ironically, although there is no group harmed by the content of these messages, all of these messages offend university computer account policies.

In truth, all commercial speech cannot be classified as unwanted. Not every commercial message inflicts harm, either. Thus, a broad regulation that does not recognize the possible benefits of properly disributed commercial speech may be unduly harsh.

B. *Commercial Speech Versus Other Permissible Speech*

Once an unprotected category,[85] commercial speech initially received First Amendment protection in 1976.[86] Nonetheless, commercial speech is still the target of allegations that it has no real social value.[87]

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[84] It might be economically impossible for the public university to finance an e-mail monitoring system, but that issue is not within the focus of this Comment.

[85] Valentine v. Chrestensen, 316 U.S. 52 (1942). Other types of speech that receive little or no First Amendment protection include obscenity, group defamation, and fighting words. For a discussion of how these categories evolved, see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1988).

[86] *Virginia Pharmacy*, 425 U.S. 748. Finding that society had a right to "the free flow of commercial information," the Court ruled that the government interest in maintaining "a high degree of professionalism on the part of licensed pharmacists" was not strong enough to sustain a prohibition on advertising drug prices. Furthermore, the state could not suppress information that was truthful simply because it wanted to keep consumers from knowing that information. This rationale also formed the basis for the decision in Linmark Associates, Inc. v. Willingboro, where the Court ruled that a town could not prohibit real estate "For Sale" signs. 431 U.S. 85 (1977).

[87] *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 486 (1985) (arguing that advertising should be excluded from First Amendment protection) ("Commercial advertising was never a concern in any of the historic political struggles over freedom of expression. The first amendment [sic] claimants in disputes over commercial advertising often are sophisticated and driven by the profit motive.") *But see* Ronald A. Cass,

In 1980, the Court, in an opinion written by Justice Powell, articulated a four-factor test for judging the constitutionality of a commercial speech regulation. The Court considered whether the restricted speech was protected commercial speech, whether the government had a substantial interest in the restriction, whether the regulation directly advanced that interest, and whether the regulation was more extensive than necessary.[88] Because the Supreme Court has used the test since then, this Comment looks at each factor and analyzes speech in the electronic forum accordingly.

1. Protected Speech

In *Central Hudson*, the Court first focused on the nature of the commercial speech. As Justice Powell explained, speech that is misleading or advertises illegal activity does not deserve protection at all.[89] In such a case, it would be unnecessary to proceed with further analysis.

In the case suggested by this Comment, the public universities can and often do exercise the power to regulate misleading speech and speech that concerns illegal activity. However, most university Internet policies concerning commercial speech restrict more than just fraudulent speech and speech related to illegal business.

Commercial Speech, Constitutionalism, Collective Choice, 56 U. CIN. L. REV. 1317, 1365-66 (1988) (arguing that because speech is a public good, it cannot be judged according to market-focused measures, and its inherent worth cannot be assessed except according to subjective analysis).

[88] Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980). The case itself stemmed from a prohibition against all promotional advertising by public utilities. The New York State Public Service Commission apparently wanted to discourage advertising that was designed to convince consumers to use more energy. Rejecting the "'highly paternalistic' view that government has complete power to suppress or regulate commercial speech," the Court defended even incomplete representations, stating, "the First Amendment presumes that some accurate information is better than no information at all." *Id.* at 562.

[89] *Id.* at 563. ("The government may ban forms of communication more likely to deceive the public than to inform it.").

2. Does the Government Have a Substantial Interest?

The imperatives that mandate commercial speech restrictions in other areas do not exist here. As compared to commercial messages on billboards, Internet-carried commercial messages do not create visual blight on the Net, nor do they threaten road safety.[90] And an Internet restriction, unlike permissible restrictions on commercial presentations in college dormitory rooms, will not serve an interest in preserving residential tranquility or promoting an educational, rather than commercial, atmosphere on campus.[91]

In fact, restrictions on Internet commercial speech do not even serve the substantial government interest in preserving an individual's privacy in the home. Unlike direct mail advertisements, which arrive at the recipient's home,[92] Internet messages do not have to be received at all. Internet accounts can be tailored so that only the user who is authorized to access the e-mail program can receive messages.[93] Furthermore, a Net user can obtain a computer filter

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[90] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[91] Board of Trustees v. Fox, 492 U.S. 469, 475 (1989). Computer transmissions, because they are often individually tailored and not directed at a physically assembled group, cannot easily create an "atmosphere" like the one envisioned and feared in *Fox*. One other interest asserted by the state university in this case was the interest in "preventing commercial exploitation of students." *Id.* at 475. While the Court found this concern was substantial, it did not address whether the restriction on speech advanced this objective or whether the regulation was more extensive than necessary. Thus, there is room for the Court to find that commercial speech restrictions are excessive or that they do not substantially protect students from commercial exploitation.

[92] Rowan v. United States Post Office Dept., 397 U.S. 728 (1970).

[93] Programs that limit access according to the user who has signed on are already available. With one of these programs, a company can prevent employees from accessing regions of the Internet and a parent can direct the network wanderings of a child. This type of program also enables the university to restrict college students' access to the Net.

and block out at least a portion of the unwanted messages by restricting all incoming mail that contains transactional words.[94]

The public university's strongest interests in preventing commercial speech are embedded in its assertion of a property right. As a primary sponsor of both the computers that accept commercial messages and the dedicated lines that carry messages to the backbone, the public university may claim it owns the means for Internet access. An expansion of that reasoning suggests that the university has the right to govern its property so as to extract the most efficient use. If the efficiency of the Internet depends upon uncluttered lines, the university can justify a commercial speech restraint as an arbitrary line that will result in fewer Internet messages.

It is worth noting here that, unlike the cost of sending a letter, the direct usage cost of the Internet does not increase with every message.[95] Fixed costs, such as the cost to establish a dedicated line for message transmission, are invariably high, but each service provider incurs only a minimal variable cost to send each message. Consequently, most service providers charge users only a flat rate for the connection to the Internet.[96] By contrast, additional network traffic does generate *indirect* costs. Increased network traffic poses two potential problems: it may cause network line scarcity and it may temporarily strain resources.[97] In the future, a court may be forced to decide whether the government interest in preventing these problems is substantial enough to warrant speech restrictions. The balancing test will likely be a difficult one.

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[94] For example, a user could choose to block the words "For Sale" or "Price."

[95] "[D]irect usage cost is negligible, and by itself is almost surely not worth charging for given the accounting and billing costs." MacKie-Mason & Varian, *supra* note 17 at 89.

[96] As use grows, providers may attempt to deter unnecessary use of finite disk storage space by implementing a pricing scheme based on the amount of data received, as opposed to a flat rate pricing scheme.

[97] Unlike the erosion of other finite or destructible resources, any physical wear and tear suffered by Internet lines cannot be attributed to an increased margin of use.

On one hand, a court must consider the effects of high-volume traffic. Excessive messages can delay or even crash a network system.[98] Thus, a deluge of traffic on a system with limited bandwidth can be an effective, albeit unintended, method of denying access.[99] In the context of the university server, this result could hamper regular transmission of all messages campus-wide.

Broken systems notwithstanding, the university may resist opening the Internet accounts to commercial traffic because it fears the increased traffic will fill all existing disks. The storage capacity on a host computer's hard disk is rather large; still, overuse necessitates upgrades. Any substantial increase in use will periodically force a public university to make provisions for excess capacity. Such provisions usually are costly.

Both of the aforementioned fears are valid, but a factfinder should realize that arguments for restrictions are predicated on the notion that academic users who are permitted to use the Internet for commercial speech will swing open the floodgates and unleash a torrent of commercial speech. This may not be the case. Free advertising on the Net is certainly attractive, but as long as there are alternatives, and more direct ways to reach a consumer,[100] the

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[98] For a discussion of congestion on the Internet, see *supra* text accompanying notes 47-48.

[99] A good example of an application that demands quite a bit of bandwidth is Mosaic, a graphical service that allows users to browse data, including text, picture, video, and sound. Mark Gibbs, *Open for Business*, NETWORK WORLD, July 4, 1994, at 31.

[100] Some forms of advertising are more effective simply because they require little from the potential consumer. A television advertiser, for example, need only be concerned that his audience owns a television set and can either see or hear his message. The newspaper advertiser appeals to those who can afford a newspaper and can read. In both cases, the advertiser can reach many people because potential consumers need not possess a high degree of skill or money to be solicited. The Internet advertiser, however, will only be able to reach consumers who have physical and financial access to a computer, have a network connection, and are able to navigate the Net.

Internet will not be swarmed by mass mailing advertisers.[101] Because Internet users can be somewhat selective about the information they receive, they are most likely to respond only to advertisers who have targeted their appeals to a specific group or person.[102] This bodes well for the small scale advertiser, rather than the advertiser who wishes to saturate the populace. Similarly, many advertisers may not rush to design an Internet advertisement because the Internet currently lacks the same artistic appeal as other mediums that showcase commercial appeals.[103]

Without evidence that congestion is imminent, it is premature to allow the government to issue a ban on commercial speech. In 1993, the Supreme Court ruled that without evidence of harm, a state board's suppositions about the dangers of uninvited solicitation could not support a blanket ban on commercial solicitation conducted by Certified Public Accountants. The Court held that a government body may not justify a commercial speech restriction by alluding to "mere speculation or conjecture; rather, [the state actor] must demonstrate

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[101] Commerce has existed on the Internet for some time without intruding on other uses. Commercial transactions often occur in designated newsgroups, whose members subscribe solely in order to receive commercial messages. The existence of commercial newsgroups is essential if commercial speech is going to grow and thrive on the noncommercially-oriented Net.

[102] Net ads may be less effective for most advertisers than conventional advertising methods. For example, the mass mailer on the Internet may have a tough time reaching a mass audience if users can tell, by the content of a subject line, that the message is commercial. See discussion *infra* Part IV, suggesting that such labeling should be mandatory for all commercial messages. Those not directly interested in the product may just hit a delete key to erase the message without even viewing it. By contrast, a newspaper ad, television spot, flyer, or mail piece (unless enclosed in an envelope) must be seen and acknowledged at some level before an audience member can discard the message.

[103] Though technology is always changing, most Internet graphic images consume more space, require more time to create, and require more time to download than simple text. In addition, the audio component of the Internet is still underdeveloped; few users have speakers attached to their computers, and the sound quality is not likely to be good. In the final analysis, most will find the Internet useful as a targeted advertising tool but not as successful in the mass marketing arena.

that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[104]

A university's assertion that commercial messages will cause harm must be similarly substantiated by data. Such evidence may now exist for unsolicited commercial messages that are sent in bulk,[105] but it is unclear whether any harm can be attributed to solicited commercial messages. In the future, with bandwidth increases and more research aimed at increasing storage capacity,[106] the Internet may yet be able to accommodate all speech.

Despite the lack of evidence of harm, a university that wishes to suppress commercial speech on academic Internet accounts will have one substantial argument in its favor. As principals in the business of fostering a marketplace for ideas, universities may not want to allow commercial speech on academic accounts because such speech will dominate the market. If commercial messages become too frequent and every user receives several commercial messages (via e-mail or a subscription to a newsgroup), commercial speech may crowd out non-commercial discussion, inhibiting free expression and the receipt of other viewpoints. For example, a commercial message at least requires the recipient to scan and delete, if not read, the message. The mere presence of the commercial message may obscure other messages and prevent the user from being exposed to many different opinions.

This argument for commercial speech regulation is strengthened where the university's academic mission is concerned. The public university has a substantial interest in protecting the

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[104] Edenfield v. Fane, 507 U.S. 761, 770-71 (1993). *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'") (citing City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

[105] Credence must be given to the argument that in fact no substantial harm resulted when two lawyers promulgated their single unsolicited advertisement to thousands on the Net. The harm occurred later, when users who were angry at the couple flooded the lawyers' Internet account with mailbombs. *See supra* note 24.

[106] *See generally* Markoff, *supra* note 48.

integrity of its academic mission.[107] As a tax- and state-supported entity, the public university acts under a mandate from the public to educate the nation's students. Though the education of students is a broad goal that can be satisfied in many ways, a public university may be concerned by the idea that its academic mission is being corrupted by commercial speech. If, in fact, commercial speech on the Net impinges on any aspect of the university's educational mission—as commercial speech in a university building during class hours may impinge on academic instruction in that same building—then the university may correctly maintain that such speech need not be accommodated or tolerated.

However, commercial speech in and of itself does not impinge on academic or educational uses of the Internet. Extra messages, which cause higher volume and congestion on the network, may delay academic messages on the Internet, but the commercial nature of those messages is not determinative. Commercial messages do not have priority on the Net and a commercial message is just as likely to be delayed during times of congestion as an academic message. In other words, an academic message is just as likely as a commercial message to delay the transmission of other messages.

An advocate for speech restrictions still might argue that even though commercial speech is not the actual culprit, a speech restriction imposed by the university need not be the least restrictive means necessary to achieve the government objective.[108] The Court has "not gone so far as to impose on [the government] the burden of proving that the distinguishment is 100% complete, or that the manner is the least severe . . . ."[109] Rather, the Court requires that the restriction be "in proportion to the interest served" and articulates a test that is just "short of the least-restrictive-means standard."[110]

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107 *See generally* Board of Trustees v. Fox, 492 U.S. 469 (1989).

108 Consonant with past analysis, this Comment hypothesizes that the government objective is to limit the number of messages transmitted on the Internet, as opposed to limiting the commercial nature of the Net.

109 *Fox*, 492 U.S. at 480 (citations omitted).

110 *Id.* at 477-81 (citations omitted).

All the same, restrictions that disregard "far less restrictive and more precise means" will not be allowed under the Court's test.[111] A complete ban on Internet commercial speech, as opposed to labeling, zoning, or limiting the commercial messages transmitted, may well be an imprecise and excessive burden on speech.

Moreover, the university's claim that commercial speech threatens academic speech assumes that on the whole, the two are not often one and the same. Is non-commercial speech inherently academic? Not always. It would be hard to maintain that personal e-mail communication is academic. Yet because it is non-commercial, the university does not forbid personal e-mail.[112] On the other hand, is commercial speech always non-academic? Business classes may utilize the Internet in order to teach valuable lessons about economics, computing, advertising, and business. It is difficult to argue that the university should discourage entrepreneurial pursuits solely because the Internet user proposes a transaction from which he or she may personally benefit.

Perhaps the university should discourage entrepreneurial pursuits because they implicate the university in the funding for a commercial enterprise. A user who advertises over the Net is getting a free ride courtesy of the university's investment and is therefore unjustly enriched by tax dollars. The university may argue convincingly that it does not want to effectively subsidize commercial endeavors.

Yet the university already provides another forum through which students and other members of the academic community can advertise—the campus kiosk. One can conclude that the university's opposition to subsidizing commercial speech must not be too strong if it is willing to erect fora on campus that are dedicated to advertisements for such diverse subjects of commerce as baby-sitting services, motorcycles, and concert tickets. Support for this conclusion can be found in *Capital Cities Cable, Inc. v. Crisp*, where the Court held that a statute requiring cable systems to delete all out-of-state

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111 *Id.* at 479 (citations omitted).

112 This discussion does not purport to address the issue of underinclusiveness. For a discussion of the relevance of such a claim, see Part IV.C.

advertisements for alcoholic beverages could not be enforced, in part because the state had not made a similar prohibition in other mediums such as magazines.[113] The Court recognized the state's interest in limiting alcohol consumption and its narrow regulatory aims but reasoned that government interests could not have been substantial enough to warrant the ban because the state unevenly enforced its own statute.[114]

University kiosks and the Internet make strange siblings; consequently, analogies between the two are not always perfect. At the outset, the money required to establish a kiosk pales in comparison to the investment required to fund at least one Internet connection. The university may assert a greater interest in controlling its more expensive medium.[115]

Financial expense may not be the only justification for limiting commercial speech to the university kiosk. The university can simply assert that it finds commercial speech on a kiosk—where speech is non-intrusive and can be contained—more palatable than commercial speech on the free-wheeling Internet.

Since no case has yet challenged commercial speech restrictions, this portion of the Comment has speculated upon the interests a university might put forth in support of its restrictions. While the issue is not beyond debate, the university probably does have a substantial interest in restricting commercial speech sent over its Internet accounts. The indirect costs of increased traffic seem to warrant a regulatory scheme that ensures that the Internet is not overburdened.

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[113] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

[114] *Id.* Most significantly, Federal Communications Commission regulations and federal copyright law already forbade cable systems from censoring such ads. Still, according to the Court, the state's interest in preventing alcohol advertisements in a dry town might have been substantial enough to trump the Congressionally mandated law were it not for the fact that the state did not consistently enforce its own ban.

[115] The Internet is arguably a more valuable medium than the kiosk because it has the potential to facilitate communication between millions of people. Therefore, the marginal increase in investment may be equated with the return.

3. Is the Government Interest Directly Advanced?

While perhaps substantial, the goals of the university are not directly advanced by a restriction on all computer-based commercial speech. If the university is most concerned with the possibility of system failure after one too many commercial messages, for example, it is no solution to impose a message limit according to the content of the message. Imagine what would happen if the post office tried to control the number of letters we send by restricting our discussions to non-commercial subjects. The measure could perhaps be successful and would thereby force people to find another method of communicating the forbidden words. However, the public right to communicate through the mails without restriction is well-settled. From a public policy standpoint, the government-run post office should bear the burden of either hiring more postal workers or somehow restricting the number of letters each person can send.[116] Similarly, the university has not given a "constitutionally adequate"[117] rationale for promoting diversity in academic speech by restricting commercial speech over the Internet. Diversity is rarely promoted by a regulation that restricts lawful and truthful expression. A rule forbidding all commercial speech does not ensure that other speech will be heard.

If a restriction on commercial speech is intended to preserve the academic mission of the school, the restriction must further one of two possible objectives. On both accounts, the university policy does not advance the stated university goal. Restricting commercial speech does not ensure that the academic mission is uncorrupted. Personal e-mail, permissible under school policies, could be considered just as corruptive. Nor does commercial speech itself always corrupt the academic mission; in some instances, advertising could be used as an educational tool.

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[116] This is the practical effect of requiring the purchase and postage of stamps. The post office assumes that the economics of the marketplace—or what people are willing to pay—will limit the amount of mail each person sends.

[117] Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557, 569 (1980).

4. Is the Restriction Reasonably Tailored?

Courts usually grant legislative bodies great discretion in choosing the proper means of regulation. As a result, regulation does not have to be the least restrictive means of accomplishing an objective, but it must be narrowly tailored to achieve its purpose.[118] Commercial speech regulations on the Internet appear to fall short of this tailoring requirement. However substantial a university's interests in having commercial speech restricted, the restrictions themselves appear to be overbroad.[119]

In *Discovery Network*, the Court struck down a restriction of commercial newsracks initially justified by the city's interest in safety and aesthetics.[120] Finding that such a justification was unreasonable, the majority noted, "[T]he city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech."[121] On behalf of the majority, Justice Stevens concluded that "the distinction bears no relationship whatsoever to the particular interests that the city has asserted."[122] The concern was that each increase in the aggregate number of newsracks harmed city safety standards and lowered the aesthetic value of the property. For this reason, at least, *all* newsracks were at fault whether commercial or otherwise.

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[118] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) ("What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable . . . .") (citing Posadas de Puerto Rico Assocs. v. Tourism Co. Of Puerto Rico, 478 U.S. 328, 341 (1986)).

[119] While an allegation that the regulation is overbroad can be adequately maintained, a similar argument does not obtain, in converse, for underinclusiveness. For example, the university has not violated the First Amendment by failing to restrict religious or political speech, in addition to implementing its prohibition on commercial speech.

[120] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993).

[121] *Id.* at 419.

[122] *Id.* at 424.

A government prohibition on commercial Internet speech is similarly expansive. Public universities are proscribing commercial speech as it has never been proscribed before—across an entire medium.[123] Contrast the Internet, for example, with television, where the government would not even attempt to prohibit commercial speech for all messages communicated across the medium.

The university policy against commercial speech cannot be criticized as underinclusive, though the underinclusiveness argument is deceptively obvious. On its face, the university policy seems to be based on the idea that because commercial speech is nonacademic, it is unwanted on the Internet. Other forms of nonacademic speech, such as religious and political speech, do not get similar treatment. Thus, one could infer that this policy seeks to promote the university's

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[123] The *Discovery Network* decision refined the contours of the commercial speech doctrine in one other manner that may be relevant to Internet restrictions. The *Discovery Network* Court explained that *Metromedia*, an earlier case upholding commercial billboard regulations, was inapplicable. *Id.* at 425 n.20. In *Metromedia*, the Supreme Court ruled that the city of San Diego could distinguish between onsite and offsite billboard advertising in order to promote a legitimate interest in traffic safety and aesthetics. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). Even though the ordinance was underinclusive in its failure to regulate all billboards, the Court found that the ordinance directly advanced city goals and that the city was free to discriminate against offsite advertising based on the fact that its periodically changing content was a greater threat to traffic safety. *Id.* at 511. Furthermore, the Court ruled that the city had the right to decide that one form of commercial speech (advertising at the site of a commercial enterprise) was more valuable than another (advertising a business at another's location). The city could then choose to regulate accordingly. *Id.* at 512. The *Discovery Network* Court distinguished *Metromedia* by stating that the permissible San Diego regulation drew a distinction between onsite and offsite commercial speech, rather than a distinction between commercial and non-commercial speech. The majority specifically did *not* grant the city permission to "distinguish between commercial and non-commercial offsite billboards that cause the same aesthetic and safety concerns." *Discovery Network*, 507 U.S. at 425 n.20.

Unlike academic Internet restrictions, the Cincinnati ordinance did not prohibit all billboard commercial speech. In contrast, the *Metromedia* Court did not have an opportunity to conclude that the regulation was overbroad without considering such a total prohibition on outdoor advertising. *Metromedia*, 453 U.S. at 515 n.20.

academic mission by including many potentially offensive forms of speech yet excluding commercial speech.

The argument is a good one. However, it is unlikely that such an argument will withstand attack, given the Court's position in *Metromedia Inc. v. City of San Diego* and in a more recent case, *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*.[124] As the Court stated in *Posadas*, "[W]hether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance."[125] A divided Court allowed the legislature to classify casino gambling separately, for purposes of an advertising ban, and stated that "the government could have enacted a wholesale prohibition of the underlying conduct [but instead took a constitutionally permissible] less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."[126] The Court seemed to imply that the legislature could implement a limited advertising ban as the first step in the move to regulate gambling.[127]

Following this lead, the university could contend, quite persuasively, that its regulation need not meet the underinclusiveness requirement as long as the school is attempting in good faith to remedy a large problem like congestion on the Internet. With the

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[124] 478 U.S. 328 (1986). In an opinion by Justice Rehnquist, the Court held that local restrictions on casino gambling advertisements were valid because they: 1) addressed a substantial government interest in reducing the demand for gambling; 2) directly advanced the government's interest and were not underinclusive; and 3) were not excessively restrictive because they affected only advertising aimed at residents and not at tourists.

[125] *Id.* at 342.

[126] *Id.* at 346. *But see* Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico 478 U.S. 328, 349 (Brennan, J., dissenting) (arguing that a ban on casino advertising raises First Amendment problems because it is a restriction on truthful speech concerning lawful activity).

[127] Some have suggested that the *Posadas* decision effectively eviscerated the *Central Hudson* test. *See* Curia Regis Kurland, Posadas de Puerto Rico v. Tourism Company*: 'Twas Strange, 'Twas Passing Strange, 'Twas Pititful, 'Twas Wondrous Pitiful*, 1986 SUP. CT. REV. (1) 1197.

apparent blessing of the Supreme Court, university policymakers might proceed one step at a time toward a solution. Banning commercial speech would then become just one component of a plan to restrict Internet speech in the name of public interest. A commercial speech ban would thereby be immune to any attack alleging that the ban does not prohibit all speech equally.

Based on *Discovery Network*, it is still possible to show that Internet speech restrictions are overbroad. Thus, the policy critic must consider whether alternate means of communication are available to the academic Internet user. Certainly, academic users retain the option to subscribe to the Internet through a commercial provider. Commercial providers such as America Online and Compuserve allow their users to access commercial messages without penalty.[128] However, because there is uncertainty about whether commercial service providers can be liable for the speech of others,[129] commercial providers may have the right to censor speech indiscriminately on a commercial account. Therefore, a university account may be the only true place where Internet speech restrictions must be justified by a significant interest. In the absence of incentives for the private sector to provide an unrestricted Internet forum, a court may find that the government should bear the burden of maintaining an outlet for free speech.

Finally, the government cannot show that the problem of Internet congestion will not be cured with a reasonable restriction on the time, place, and manner of commercial speech. For example, the university could require that bulk messages be transmitted only at 2

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[128] The cost of establishing an Internet account may be prohibitively high for some. For instance, the would-be user must have access to a computer. For many without ready access, a $1,000 purchase is the first obstacle to overcome. Thereafter, a user can expect to spend around $19.95 per month for the most basic services. PIPELINE, Brochure (1994).

[129] Cubby v. Compuserve, 776 F. Supp. 135, 141 (1991). The court suggests that without scienter, a bulletin board moderator cannot be held liable for the defamatory statements of one of its users.

a.m., when Internet lines are more available.[130] Even better, the university might require all unsolicited commercial messages to be labeled in the heading of the message. The Comment addresses this solution in the next section.

IV. TOWARD A SOLUTION

The university cannot be blamed for failing to discover a more practicable solution to the Internet congestion problem. Technological advances occur quickly, and the fact that universities provide access to the Net is a testament to their attempts to keep up with the times.

However, now that the Internet is moving toward privatization,[131] the university will be forced to justify its restrictions on access to a commercial medium. The university's primary concern will doubtless be to find a justifiable solution that will not facilitate abuse of a free service. Understandably, the university wants to avoid appearing as if it will happily accommodate unlimited and unsolicited mailings such as those that cripple the Internet system.[132]

Many universities already limit how much a user can access the Internet through a university account. At the University of California at Los Angeles, for example, the "open access" user is restricted to 130 resource units.[133] "Resource units" are like monetary units; they serve as a measure to determine the amount of the resource used in order to evenly allocate that resource among the university's 28,000 users.[134] Thus, each time the CPU (Central Procesing Unit) is utilized, a disk is read, or a user accesses a dial-up service, the user will be charged accordingly.

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130 A note of caution about such a policy: users across the globe will access the Net in different time zones, so there may never be a "slow period" in any day on the Internet.

131 *See supra* text accompanying note 18.

132 *See supra* note 24 (discussing the negative effects of an unsolicited mass advertisement on the Internet).

133 Telephone Interview with Bonnie Mika, *supra* note 25.

134 *Id.*

At the same time, the public university seeks an inexpensive method of regulating the activities of its many users. It certainly seems reasonable for the government provider to be able to control objectionable messages for users who request such screening yet allow others the freedom to receive and send those same messages.

Some critics have suggested requiring an Internet "stamp" on all commercial mail. According to reports, this device would redistribute the charge of an advertisement where it belongs—on the advertiser. However, requiring a stamp might imply that commercial speech is either more valuable (if one believes that all speech worth money is more valuable) or less valuable (if one believes that speech that does not enjoy free transmission is less worthy of transmission) than non-commercial speech. The stamp—as applied only to commercial speech—would come under constitutional scrutiny because a content-based tax on commercial speech (as opposed to non-commercial speech) would burden one form of permissible speech more than another.[135]

Alternatively, the university[136] could require that all commercial speech be labeled as such in the "subject" line of each message.[137] Every message already has such a line; the requirement would hinge on demanding that advertisers be truthful in labeling their messages.[138] Furthermore, with a requirement that all unsolicited commercial speech be labeled, readers could not only be alerted to

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[135] To enforce the stamp requirement, the government would need to prove that the regulation is a reasonable fit between the asserted ends and the means used to achieve those ends. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993).

[136] Eventually, congressional action might also be necessary to implement this requirement nationwide. For the purposes of this Comment, however, only university policies will be considered.

[137] This idea is not the author's own; among other places, it was suggested in an article in the *Washington Post*. Michael Schrage, *E-Mail Stamps, Software Filters Could Help Keep Cyberspace Clean*, WASH. POST, April 22, 1994, at G3.

[138] *Id.* The university could rely on third-party users, as it does now, in order to enforce its labeling requirement.

unwanted messages, but they could also screen them out with filters.[139]

A labeling requirement will not directly affect the First Amendment rights of any advertiser, as it does not prevent a speaker from advertising on the Internet. In 1985, the Supreme Court held that a law requiring political films to be labeled as "political propaganda" was not a burden on protected speech because the term "political propaganda" was neutral rather than pejorative. The Court found Congress was justified in requiring "additional disclosures that would better enable the public to evaluate the import of the propaganda."[140] Likewise, commercial labels for Internet messages would be neutral indicators of a message's source. The label would not burden advertisers unduly as a stamp might.

With a labeling requirement in place, the university might attempt to limit either the number of commercial speech messages sent by any one user or the number of message recipients. The university could, in good conscience, allow advertisers to participate on the Net without worrying that its users might strain the system with excessive messages.

V. CONCLUSION

At this stage in the evolution of the Internet, university access providers may be wary about allowing commercial speech to travel alongside non-commercial speech. Resource scarcity, in particular, seems a legitimate concern.

However, as a government entity, the public university probably cannot issue a flat-out ban on commercial speech. Despite the justifiable reasons for such a ban, under the commercial speech doctrine articulated in *Discovery Network*, a general policy restricting

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[139] *Id.* Filters can sort mail by sender or topic and then alert the mail recipient or place the special mail in a separate folder.

[140] Meese v. Keene, 481 U.S. 465, 480 (1987). In particular, the Court was concerned that "hearers and readers . . . not be deceived by the belief that the information comes from a disinterested source." *Id.* at 482.

commercial speech on the Internet would be overinclusive. A ban would impinge on the First Amendment rights of faculty and student speakers.

There may be many viable solutions not addressed in this Comment because they are too technical. However, one solution seems apparent; the university can prevent the harm it fears from commercial speech by requiring commercial messages to be labeled as such in the subject line of each message.

If the Internet is to become a widely used method of communication between millions of speakers, then speech restrictions on the Net should be carefully crafted. A revision of the policies governing university-provided Internet access is a good place to begin.