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**A FUNNY THING HAPPENED ON THE WAY  
TO THE CYBER FORUM: PUBLIC vs.  
PRIVATE IN CYBERSPACE SPEECH**

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## INTRODUCTION

Forums for public discourse play an important role in civic life. They are the venues for the open discussion that both enable democratic participation and form fundamental democratic values. For these reasons, the Supreme Court has afforded speakers within public forums special constitutional protections.

Although in its infancy, the Internet has already become a popular place of public discussion. Individuals from every part of American society visit and exchange ideas with others through various forums within cyberspace. The debate occurring in these forums in many ways embodies the Supreme Court's ideal of "uninhibited, robust, and wide-open" discussion.<sup>1</sup> Some, although by no means all, of these forums can be characterized as public forums. As more Americans become increasingly comfortable with cyberspace, the claim that certain portions of the Internet deserve or require "public forum" status will become compelling.

It is not surprising that litigation over access to cyberspace forums has already commenced.<sup>2</sup> Two significant factors characterize the early Internet forum cases, collectively called the *Cyber Promotions* cases.<sup>3</sup> First, private entities, rather than the govern-

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1. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (noting that "[b]ecause of the importance of 'uninhibited, robust, and wide-open' debate on public issues, we have traditionally subjected restrictions on public issue picketing to careful scrutiny" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

In addition to furthering First Amendment rights of individuals, the use of government property for expressive activity helps further the interests that freedom of speech serves for society as a whole: it allows the "uninhibited, robust, and wide-open" debate about matters of public importance that secures an informed citizenry, it permits "the continued building of our politics and culture," it facilitates political and societal changes through peaceful and lawful means, and it helps to ensure that government is "responsive to the will of the people."

*Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 815-16 (1985) (Blackmun, J., dissenting) (citations omitted) (quoting, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. at 270).

2. The recent Supreme Court case that addressed the constitutionality of the Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.), did not address questions of forum access. See *Reno v. ACLU*, 117 S. Ct. 2329, (1997) (striking down two provisions of the Communications Decency Act, 47 U.S.C. §§ 223(a)(1)(B)(ii), 223(d) (1996), as abridging the freedom of speech protected by the First Amendment).

3. *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) ("Cyber Promotions III"); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 459 (E.D. Pa. 1996) ("Cyber Promotions II"); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) ("Cyber Promotions I").

ment, owned and controlled the cyberspace forums to which access was sought. Second, the parties seeking access to those forums were commercial entities seeking to advertise products and services—not political or religious speakers seeking to affect public debate.

The factors distinguishing these cases from typical public forum cases are worthy of reflective analysis, particularly in light of their focus on the private and the commercial sphere rather than the public sphere.<sup>4</sup> As with analyzing many issues in this fluid medium, an initial question important to a sensible application of legal doctrine in cyberspace will be how to characterize places in cyberspace for particular purposes. Rather than trying to treat cyberspace under a single doctrine, courts, litigants, and legislators should be sensitive to a variety of legal doctrines and carefully apply those doctrines in light of the distinct characteristics of the implicated cyber forum. The appropriate legal analysis for many cases will not be immediately evident and may be complex. However, as more cases are litigated, a reasonable application of doctrine will develop. In attempting to establish legal rights in a new domain, plaintiffs should pick their disputes carefully to ensure the development of a coherent and nuanced body of case law. Rome's forums were not built in a day; cyberspace's will not be either.

This article explores the issues raised by the first cases which have begun to develop the law of forums in cyberspace, in part, to assess the extent to which various legal doctrines will support claims for a right of access under different factual circumstances. It urges the courts, lawyers, and legislators who will test the boundaries of access rights to cyber forums to be sensitive to the nuances that distinguish cyberspace from traditional public forums. Part I provides background regarding forums in cyberspace, including a discussion of the applicability of the public forum doctrine to cyberspace<sup>5</sup> and a summary of cases raising public forum issues in the context of cyberspace.<sup>6</sup>

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4. Cf. C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 CONST. COMMENT. 421, 421 (1993) ("My general thesis . . . is that an interpreter's concern or lack of concern about private power will also significantly affect her substantive interpretation of constitutional provisions.").

5. See *infra* Part I.A.

6. See *infra* Part I.B.

Part II investigates the significance of privately owned forums in cyberspace, an issue of increasing importance as private interests begin to dominate the Internet. This inquiry analyzes the potential scope of access to private forums under both federal constitutional law and state law. While the access claims available under federal constitutional law may be relatively limited,<sup>7</sup> the law of certain states—notably California—may provide outlets for free expression in private forums in appropriate cases.<sup>8</sup>

Yet, vindicating free speech rights by providing a right of access to private forums can impinge upon the free speech rights of the forum providers.<sup>9</sup> To address this concern, Part II.D., which considers a variety of approaches that legislators could use to provide access to private forums, focuses its inquiry on correcting market failures. Here too, whether analyzed under the rubrics of antitrust law,<sup>10</sup> communications law,<sup>11</sup> or general public policy,<sup>12</sup> an access right could be made available in appropriate cases, notwithstanding the countervailing interests of the forum provider.

Part III turns to the role of commercial speech in public forums. First, Part III.A. reviews the scope and function of commercial speech in public forums outside of cyberspace. The assertion of an access right for commercial speech in a public forum would be unusual outside of cyberspace.<sup>13</sup> In fact, the enhanced protection for speech in public forums is at cross-purposes with the reduced protections for commercial speech.<sup>14</sup> The justifications for both the public forum doctrine and the commercial speech doctrine are at least as valid in cyberspace as they are in the rest of the world. Therefore, it is unlikely that a court would reach out to extend public forum protections in cyberspace—at least in the first instance—to commercial speech, even though some protection is certainly in order.<sup>15</sup>

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7. See *infra* Part II.A.

8. See *infra* Part II.B.

9. See *infra* Part II.C.

10. See *infra* Part II.D.1. (discussing the essential facilities doctrine).

11. See *infra* Part II.D.2. (discussing the common carrier doctrine).

12. See *infra* Part II.D.3. (discussing particular market failures unique to cyberspace and appropriate responses).

13. See *infra* Part III.A.1.

14. See *infra* Part III.A.2.

15. See *infra* Part III.B.

Finally, Part IV returns briefly to the precise factual context of the *Cyber Promotions* cases to evaluate the lessons of those cases. Part IV combines Part II's discussion of access rights to private forums with Part III's discussion of commercial speech in public forums. Recognizing that each claim is by itself tenuous, it advises caution on the part of zealous commercial speakers who would assert rights in private forums in cyberspace. While such rights may legitimately exist, the moral of the *Cyber Promotions* cases is that courts are reluctant to recognize such rights. Courts are more likely to recognize the rights of speakers in cyberspace forums if claimants elect to litigate claims with facts more sympathetic than those in the *Cyber Promotions* cases. Just as Rome's forums were not built in a day, cyberspace's forums will not be either. The claims of commercial speakers in private cyber forums should be brought only after development of the law in the more sympathetic cases, rather than in the most expedient ones.<sup>16</sup>

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16. See *infra* Part IV.

*Something familiar,  
Something peculiar,  
Something for everyone—  
A comedy tonight!*

*Something appealing,  
Something appalling,  
Something for everyone—  
A comedy tonight!*<sup>17</sup>

## I. PUBLIC FORUMS IN CYBERSPACE: A STARTING POINT FOR ANALYSIS

Forums hold an important role in the civic life of a democracy. Events such as the historic March on Washington of 1963, which culminated in an assembly of hundreds of thousands of people on the National Mall, have transformed public forums into familiar icons. The “public forum doctrine” is a set of constitutional dictates that have evolved to ensure the continued utility of such forums. Although applying legal doctrine established for customary public forums to forums that exist on the Internet may seem peculiar, the increasingly significant role of cyberspace speech as a component of civic discourse compels it. If, for example, the National Park Service were to establish a “National Cyber Mall” for purposes of cyber-assembly, the use, misuse, and regulation of that forum would be subject to the constitutional constraints embodied in the public forum doctrine.

### A. *Applying the Public Forum Doctrine to Cyberspace*

The public forum doctrine defines the scope of First Amendment protection for speakers who use government-owned public spaces. This doctrine has evolved amidst some criticism into a formal set of regulations. The Supreme Court has continually upheld the principle that a citizen does not necessarily forego his or her constitutional rights merely because

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17. STEVEN SONDEHEIM, *Comedy Tonight, on A FUNNY THING HAPPENED ON THE WAY TO THE FORUM* (Broadway Angel Records 1996). Forums have long been familiar icons and have been put to use for peculiar purposes. The variety of activity that takes place in forums is appealing to some, appalling to others. *See generally id.*

he chooses to exercise them in arenas owned or controlled by the government. This principle will hold equally true in cyberspace.

As usually described, the public forum doctrine outlines three categories of property owned or controlled by the government: traditional public forums, designated public forums (or limited public forums), and nonpublic forums.<sup>18</sup> Activity in traditional public forums, such as parks, is accorded the highest level of First Amendment protection.<sup>19</sup> These places are defined by reference to tradition.<sup>20</sup> Other government property is presumptively treated as a nonpublic forum, where activity is subject to relatively limited constitutional protection,<sup>21</sup> unless it has been "designated" for speech-oriented activity, in which case more substantial protections may inure, according to the "designation."<sup>22</sup>

Even though speech in public spaces might provide scholars with a model for the type of activity the First Amendment was intended to protect, the public forum doctrine as a protector of

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18. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). For completeness, a fourth category of property owned or controlled by the government should be recognized, where the public is not permitted at all and in which speakers receive no First Amendment protection, but the courts have not remarked much upon this category. "[T]he prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (dictum); cf. *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting Native American couple's religion-based claim that the government should not make internal use of their daughter's social security number).

19. See, e.g., *Perry Educ. Ass'n*, 460 U.S. 37; *United States v. Grace*, 461 U.S. 171 (1983).

20. See, e.g., *Grace*, 461 U.S. at 177. ("It is also true that 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be 'public forums.' In such places, the government's ability to permissibly restrict expressive conduct is very limited . . ." (citations omitted)). But cf. *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality opinion) (permitting restrictions on postal sidewalk).

21. See, e.g., *Perry Educ. Ass'n*, 460 U.S. at 47. But cf. *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam) (striking down restriction on leafletting in nonpublic forum, even though restriction on solicitation was upheld).

22. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995) ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set."); see also, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) (requiring a state university to permit a student religious group to continue using school meeting facilities); *Southeastern Promotions v. Conrad*, 420 U.S. 546, 552-58 (1975) (holding that a rejection of an application to use a municipal theater for a production of "Hair" amounted to a prior restraint in violation of the First Amendment).

such speech is often criticized and its very vitality at times has been questioned.<sup>23</sup> However, as the Supreme Court's recent decision in *Rosenberger v. Rector & Visitors of the University of Virginia* demonstrates, the doctrine remains alive.<sup>24</sup> That the doctrine endures is not surprising, in light of the many values that it serves, including providing objectivity and fairness, balancing government roles of governance and management, and subsidizing undervalued speech.<sup>25</sup>

These values resonate equally when the public forum doctrine is applied to public forums in cyberspace. As the Supreme Court recognized in *Rosenberger*, "the same principles are applicable" to forums that exist "more in a metaphysical than in a spatial or geographic sense."<sup>26</sup> In addition, the Supreme Court, in a non-public forum context, applied the same First Amendment principles to cyberspace regulations that it would have in physical space.<sup>27</sup>

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23. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 12-24, at 987 (2d ed. 1988) (calling the public forum doctrine "quite manipulable and problematic"); David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 202 n.416 (1992); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987).

24. 115 S. Ct. 2510, 2516-17 (1995) (applying principles relevant to a limited public forum to the University's student activity fund). This continued vitality has already been recognized by lower courts. See, e.g., *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) (holding that senior center is a designated public forum).

25. By its formality, the public forum doctrine serves values often associated with "rule-of-law virtues," and thereby encourages government officials as well as judges to be more objective and fair. See Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739, 742 (1991). The public forum doctrine provides a valuable constitutional framework for government officials to navigate between their roles as governors and as managers. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1782 (1987). As a matter of policy, public forums are important because they provide a platform for speech that might otherwise be undervalued. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 568-74 (1991). In addition, the development of the public forum doctrine has theoretical importance; it can serve as a case study of the Court moving beyond a libertarian analysis of free speech claims analogous to those economic rights once championed during the *Lochner* era. See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1741, 1752 (1991).

26. 115 S. Ct. at 2517.

27. See *Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997) (striking down provisions of the Communications Decency Act under a strict scrutiny analysis because it found "no basis for qualifying the level of First Amendment scrutiny that should be applied to" regulations that restrict speech throughout the Internet).

Applying public forum principles in the contexts of cyberspace can be difficult, and should be done with care. Rather than simply inquiring whether cyberspace generally is a public forum, cyberspace should be understood to be more like a city, with numerous diverse forums. The important question will not be "Whether cyberspace is a public forum," but "Where are the public forums in cyberspace?"<sup>28</sup>

This author has previously proposed four abstract criteria for identifying public forums in cyberspace: (1) the cyber forum is owned or controlled by the government; (2) it is not operated at a profit; (3) receipt of forum messages is not restricted; and (4) the forum affords viewpoint-neutral access to a reasonably large number of senders.<sup>29</sup> In the absence of litigated cases, this analysis was theoretical.<sup>30</sup> Actual litigants have since asserted speech claims on cyber forums and invoked the public forum doctrine. These cases provide platforms for envisioning the genuine role of forums in cyberspace. The rest of this article will draw lessons from those first-litigated claims which will be important to all constituents concerned with the issues surrounding access to cyber forums.

### *B. Litigating the First Public Forum Claims in Private Cyberspace*

Two courts have had the opportunity to address public forum claims in cyberspace. Both of them declined to treat the forums at issue as First Amendment public forums because they were owned or controlled by a private entity—not the government. Nonetheless, the facts of the cases are interesting because they provide an example of the context in which public forum claims

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28. David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335 (1995) (arguing that cyberspace should be treated for public forum purposes not as a single forum, but as a city, with many forums within it, some of which should be treated as public forums and others of which should not).

29. See *id.* at 383.

30. For a discussion of the analysis that animated the author's definition of public cyber forums and of an analysis of the constitutional relevance of public forum landmarks in cyberspace, see *id.* at 379-91 (setting out analysis motivating definition of public forums in cyberspace) and *id.* at 391-402 (explaining the significance of forum landmarks in cyberspace). For a brief discussion of edited forums on public computers or run by public employees, see Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective*, 1996 U. CHI. LEGAL F. 377, 407-10 (1996).

can arise, and they reveal some of the other legal doctrines that speakers may utilize in lieu of the public forum doctrine.

The first case squarely facing the reach of the public forum doctrine in cyberspace, *Cyber Promotions, Inc. v. America Online, Inc.* ("Cyber Promotions I"), was filed on November 4, 1996.<sup>31</sup> The defendant, America Online, Inc. ("AOL"), is a well-known privately owned Internet service provider ("ISP") which offers a variety of services, options, resources, and support, including content-based services, access to stock quotes, children's entertainment, news, and the ability to send and receive Internet e-mail to and from both AOL members and non-AOL members.<sup>32</sup> AOL currently serves at least nine million subscribers.<sup>33</sup>

The plaintiff, Cyber Promotions, Inc., is less well-known. It described itself as "an advertising agency [that] provides advertising services for companies and individuals wishing to advertise their products and services via e-mail."<sup>34</sup>

The dispute arose after Cyber Promotions sent regular advertising messages by e-mail to multitudes of Internet subscribers.<sup>35</sup> Many of the messages promoted get-rich-quick schemes, weight loss gimmicks, health aid promises, and phone sex services.<sup>36</sup> This mass e-mailing, or in Internet jargon "spamming,"<sup>37</sup> was quite noticeable to AOL, a large ISP, because so many of its subscribers received these messages that its servers were overloaded—promptly leading to large numbers of "disgruntled" subscribers.<sup>38</sup> This practice also generated a large number of messages sent to undeliverable e-mail addresses, which AOL then collected and returned to Cyber Promotions.<sup>39</sup>

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31. 948 F. Supp. 436 (E.D. Pa. 1996) ("Cyber Promotions I"); *see also supra* note 2.

32. *See Cyber Promotions I*, 948 F. Supp. at 438-39.

33. *See* Jon Swartz, *AOL E-Mail Moves Like Snail Mail*, S. F. CHRON., Oct. 7, 1997, at C4.

34. *Cyber Promotions I*, 948 F. Supp. at 439.

35. This flow allegedly included one to two million e-mail messages per day. *See Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 459 (E.D. Pa. 1996) ("Cyber Promotions II").

36. *See Cyber Promotions I*, 948 F. Supp. at 439.

37. *See, e.g.*, Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1657-59 & n.68 (1995) (describing spamming phenomenon).

38. *See Cyber Promotions I*, 948 F. Supp. at 438.

39. *See id.* at 437.

Cyber Promotions characterized AOL's actions as an "e-mail bomb." Allegedly, the undeliverable messages AOL returned caused two different ISPs to terminate their relationships with Cyber Promotions, apparently because the high volume of collected and returned messages overwhelmed the ISPs' storage or transmission capabilities. Cyber Promotions sued AOL in federal court in Philadelphia, *inter alia*, to enjoin these so-called "e-mail bombs" and—more importantly for the purposes of this article—to enjoin AOL from directly or indirectly preventing AOL subscribers from receiving e-mail messages from Cyber Promotions. Cyber Promotions' primary claim was that AOL was a public forum. AOL countersued with claims of its own.<sup>40</sup>

The Philadelphia court characterized the "novel issue" presented by the case as whether "one private company has the unfettered right to send unsolicited e-mail advertisements to subscribers of another private online company over the Internet and whether the private online company has the right to block the e-mail advertisements from reaching its members."<sup>41</sup> In addition to the novel context of cyberspace, the court highlighted two factors distinguishing this case from typical public forum cases: (1) the forum to which the speech right was asserted was privately created; and (2) the entity that asserted the right was motivated by purely private purposes, and was attempting to engage in "commercial speech" related to those purposes.

The court ruled against Cyber Promotions on its public forum claims under the First Amendment. As the court recognized,

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40. *See id.* at 437-38.

On April 8, 1996, AOL filed a ten-count Complaint against Cyber Promotions in the United States District Court for the Eastern District of Virginia, alleging service and trade name infringement, service mark and trade name dilution, false designation of origin, false advertising, unfair competition, violations of the Virginia Consumer Protection Act, the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act and the Virginia Computer Crimes Act. AOL seeks various injunctive relief and damages.

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On June 17, 1996, AOL filed a First Amended Complaint in the Virginia action in which it added claims for misappropriation, conversion, and unjust enrichment.

*Id.* (referring to the Virginia Consumer Protection Act, VA. CODE ANN. §§ 59.1-196 to 59.1-207 (Michie 1992 & Supp. 1997), the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520 (1994), the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1994), and the Virginia Computer Crimes Act, VA. CODE ANN. §§ 18.2-152.1, art. 7 (Michie 1996)).

41. *Id.* at 437.

AOL was simply not a state actor. This finding was facilitated by stipulations of the parties: that AOL was a *private* on-line company, not controlled or owned in whole or in part by the government; AOL was not a government entity or political subdivision; and there was no government involvement in AOL's business decision to institute or reinstitute a block directed at Cyber Promotions' e-mail.<sup>42</sup>

The Philadelphia court went on to consider and reject other arguments for a right of access offered by Cyber Promotions. It refused to treat AOL's private conduct as having the character of state action, which would have resuscitated the public forum claim.<sup>43</sup> It also rejected Cyber Promotions' claim under the Pennsylvania and Virginia state constitutions.<sup>44</sup> It specifically upheld AOL's right to block any attempts by Cyber Promotions to send unsolicited e-mail over the Internet to its subscribers.<sup>45</sup>

Cyber Promotions subsequently sought a preliminary injunction on antitrust grounds against AOL to enjoin it from providing a tool, called PreferredMail, to its subscribers to block e-mail from a list of advertisers prepared by AOL. PreferredMail allegedly grouped a variety of spammers together, including so-called legitimate advertisers and pornographic advertisers.<sup>46</sup> The Philadelphia court, describing this theory as "equally untenable,"<sup>47</sup> rejected Cyber Promotions' claim *in toto*.<sup>48</sup>

Similar facts were presented in a recent case in federal district court in Ohio in *CompuServe, Inc. v. Cyber Promotions, Inc.* ("Cyber Promotions III").<sup>49</sup> This case arose out of Cyber Promotions' advertising via e-mail to subscribers of CompuServe, a national commercial computer service that provides Internet access. After trying to employ technological filters that Cyber Promotions had managed to evade and after requesting that Cyber Promotions cease and desist its bulk e-mailing activity, CompuServe sued Cyber Promotions to preliminarily enjoin Cyber Promotions from sending its subscribers unwanted e-mail

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42. *See id.* at 441.

43. *See id.* at 441-45.

44. *See id.* at 445-47. *See infra* notes 98-99 and accompanying text.

45. *See id.* at 447.

46. *See Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 459 (E.D. Pa. 1996) ("Cyber Promotions II").

47. *Id.* at 458.

48. *See id.* at 464-65.

49. 962 F. Supp. 1015 (S.D. Ohio 1997) ("Cyber Promotions III").

on a theory of trespass to chattels.<sup>50</sup> The court framed the “novel issues regarding the commercial use of the Internet” as “the right of an online computer service to prevent a commercial enterprise from sending unsolicited electronic mail advertising to its subscribers.”<sup>51</sup> Like the Philadelphia court, the Ohio court highlighted both (1) the private status of the forum provider, here CompuServe, and (2) the commercial purposes of the message sender, Cyber Promotions.

The Ohio court, like the Philadelphia court, recognized that the public forum doctrine and the First Amendment would not apply directly to CompuServe’s actions because it was a private company, not the government.<sup>52</sup> The Ohio court similarly considered Cyber Promotions’ arguments in support of awarding it a right of access to a private forum. It rejected the claims that CompuServe should be subject to any exceptional legal obligations by treatment as a public utility, and that CompuServe’s activities constituted state action.<sup>53</sup> Finding that Cyber Promotions’ intentional use of CompuServe’s proprietary equipment had exceeded CompuServe’s consent and had continued after repeated cease and desist demands, the court granted the motion for a preliminary injunction under a trespass theory.<sup>54</sup>

Thus, in the first litigated cases involving forum issues in cyberspace, the courts dismissed the public forum doctrine in short order because private companies owned and controlled the forums. As mentioned above, the first requirement for any kind of public forum status, even in cyberspace, is that the forum is owned or controlled by a governmental entity.<sup>55</sup> Because Cyber Promotions did not assert governmental ownership or control of either AOL or CompuServe, the public forum doctrine was inapplicable. The courts returned the expected result<sup>56</sup> without

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50. *Id.*

51. *Id.* at 1017.

52. *See id.* at 1025-26.

53. *See id.* at 1025-27.

54. *See id.* at 1028.

55. *See* Goldstone, *supra* note 28, at 385, 390-91 (discussing what it means for a forum to be designated government owned or controlled).

56. *See, e.g., id.* at 350 (“[I]t would seem difficult to invoke First Amendment protections against actions like Prodigy’s refusal to allow a person to use its network.”).

exploring the constitutional significance of public forum landmarks in cyberspace.

If a government-owned or -controlled forum were faced with problems such as the spamming experienced by AOL and CompuServe, the government could probably impose rules of order<sup>57</sup> or charge user fees to particularly burdensome forum users without violating the First Amendment rights of those users.<sup>58</sup> Nevertheless, the *Cyber Promotions* cases shed little new light on these issues.

Rather, the interesting novel question directly raised by the *Cyber Promotions* cases is when could a purveyor of commercial speech or another actor seeking access to a privately owned cyberspace forum successfully assert a right of access claim?<sup>59</sup> To the extent that the *Cyber Promotions* cases are any indicator, claims on privately owned cyber forums are much more likely to arise than claims on government-owned forums. As will be discussed below in Part IV, a careful review of *Cyber Promotions'* claims illuminates the weakness of those claims and suggests circumstances that would increase the likelihood of a successful access claim. Indeed, other litigants have already asserted more colorable claims than those alleged by *Cyber Promotions*, albeit without litigating them nearly so fully.<sup>60</sup>

Before analyzing them together, the discussion below will address independently the two key factors remarked upon by both

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57. See *id.* at 394 & n.290 (arguing that maintenance of order is within the scope of proper government authority in a limited public forum, consistent with the First Amendment).

58. See *id.* at 400 (arguing that "[i]f government-controlled electronic forums were classified as limited public forums, it would be permissible to charge user fees for messages sent, similar to postal fees for paper mail, and messages received, similar to admission charges at municipal theaters").

59. Another factor distinguishing the *Cyber Promotions* cases from typical public forum cases is that the asserted right of access was to individual subscriber mailboxes. In usual public forum cases, access is sought to a forum where a message may be received by a large number of individuals. See, e.g., Goldstone, *supra* note 28, at 383, 386-87 (noting that one measure for determining whether a forum is public is whether receipt of forum messages is unrestricted). Therefore, in addition to claims of access to the personal mailboxes, this article will address claims of access to cyber forums, such as various discussion groups, mailing lists, and chat rooms on ISPs such as America Online and CompuServe.

60. See, e.g., *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997) (rejecting claim by plaintiff, a professor at the University of Oklahoma, that his rights of free speech as guaranteed by the First Amendment were violated by blocking of certain Internet "news groups" on university computers because he neglected to demonstrate that his constitutional rights were violated).

*Cyber Promotions* courts: (1) that the forum provider was privately owned;<sup>61</sup> and (2) that the speaker asserting a right of access was engaging in commercial speech.<sup>62</sup> To the extent that the Internet has become dominated by private interests, each of these two characteristics may become typical in speech-oriented cyberspace disputes. Finally, the article will consolidate these analyses and briefly consider the strength of a claim by a commercial speaker on a private forum.<sup>63</sup> Although this analysis may not prove immediately helpful to bulk e-mailers such as *Cyber Promotions*, it may help them develop a coherent strategy to clarify the evaluation of commercial speakers' rights in private cyber forums.

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61. *See infra* Part II.

62. *See infra* Part III.

63. *See infra* Part IV.

*Old situations,  
New complications,  
Nothing portentous or polite:  
Tragedy tomorrow,  
Comedy tonight!*<sup>64</sup>

## II. SPEECH RIGHTS IN CYBERSPACE'S PRIVATE FORUMS

The first key distinction in analyzing the facts in the *Cyber Promotions* cases, as was recognized by the *Cyber Promotions* courts, is that private entities created and controlled the forums. To the extent that privately owned forums predominate in cyberspace, it is important to consider the relevance of the public-private distinction in forum ownership as it relates to the peculiar cyberspace context.<sup>65</sup> Moreover, to the extent that federal constitutional law does not provide access rights to privately owned cyberspace forums, other legal regimes that address the private sector might.

In fact, as the *Cyber Promotions* cases themselves confirm, the forums available on the Internet have become increasingly privately operated and commercial.<sup>66</sup> The Internet was created in 1969 for the purpose of national defense and was linked, outside of government, primarily to research universities.<sup>67</sup> In the last few years, however, the number of private entities connected to the Internet has increased tremendously. Private entities now comprise the vast majority of Internet host computers. Most individuals who use Internet e-mail send and receive their mail through one of these privately operated hosts.

Not all cyberspace forums are privately owned or operated. Many individuals obtain Internet access from a public university or a public employer.<sup>68</sup> These entities can also provide host

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64. SONDEHEIM, *supra* note 17.

65. See Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 663 (1991) (concluding that common-law courts should declare forum-like private lands to be "vital" complements to traditional public space); see also Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

66. See generally Dee Pridgen, *How Will Consumers Be Protected on the Information Superhighway?*, 32 LAND & WATER L. REV. 237, 239-43 (1997) (discussing commercialism on the Internet).

67. See *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

68. See, e.g., *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997) (involving

services, like those mentioned above, to operate mailing lists and chat rooms. Access through these channels can be limited to individuals affiliated with or employed by a particular university or government entity, although many cities permit access to the Internet as part of city services, sometimes implemented through municipal libraries.

The Internet is home to a vast diversity of cyber forums. Many ISPs operate "mailing list" facilities that can be used to create e-mail discussion groups.<sup>69</sup> A large number of private entities on the World Wide Web have also created other kinds of forums, such as real time "chat rooms." Chat rooms allow interested individuals to participate in on-line discussions in real time on a myriad of general interest topics by sending and receiving messages via their ISP.<sup>70</sup> Another set of forums has been created by the Usenet news group system. Usenet news groups are a loosely organized collection of distributed bulletin boards,<sup>71</sup> each one dedicated to a particular topic. Their loose governance structure has been described as "informal" and "rather anarchic"; usually, they are not controlled by a single entity.<sup>72</sup> Because thousands of news groups are currently operating, they are an important fount of Internet-based public discourse.<sup>73</sup> Yet, because of the distributed control structure that

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dispute about Internet access provided by a public university in its capacity as an employer).

69. These facilities are sometimes called "mail reflectors" or, after the name of the software utility used to implement them, "listservs." See ED KROL, *THE WHOLE INTERNET USER'S GUIDE & CATALOG* 138-41 (2d ed. 1994).

70. See generally *ACLU v. Reno*, 929 F. Supp. at 834-36 (surveying common methods of communication on the Internet, including e-mail, "listserv" mailing lists, news groups, chat rooms, and remote information retrieval).

71. When a participant "posts" a message to a given news group, that message (or "article") is automatically copied to each of the thousands of Internet hosts that receive that group. The copy on each host resides in a publicly accessible file, where it may be read by any person who utilizes that particular site.

72. KROL, *supra* note 69, at 514.

73. For a fuller discussion of the operation of network news, see *id.* at 151-85. Because newsgroups are sometimes difficult to access or to use, their impact may be limited. See *ACLU v. Reno*, 929 F. Supp. at 834-35 (discussing news groups and noting that there are news groups on more than 15,000 different subjects). For a case in which an individual asserted a deprivation of free speech rights on the basis of blockage of his access to news groups, see *Loving v. Boren*, 956 F. Supp. 953 which rejected a claim by the plaintiff, a professor at the University of Oklahoma, that his rights of free speech as guaranteed by the First Amendment were violated by blocking of certain Internet news groups on university computers, because he neglected to demonstrate that his constitutional rights were violated.

governs them, they do not fit neatly into any established First Amendment box.<sup>74</sup>

As discussed in the remainder of this section, advocates already have and will continue to explore legal devices that might be utilized to ensure access to these unique forums. Future access claims might arise under federal constitutional law, state law related to public forums, or legal responses to market failures.

#### A. *Private Entities as First Amendment Actors*

Although the First Amendment applies on its terms only to Congress and is today understood to apply to government entities generally, there are limited situations in which private conduct can be attributed to the state and scrutinized under First Amendment principles.<sup>75</sup> As will be discussed in this section, this attribution will have only limited application in private cyber forum litigation. For example, the *Cyber Promotions* courts soundly rejected Cyber Promotions' claims that the actions of AOL and CompuServe should be attributed to the state.<sup>76</sup> Courts are likely to reject similar claims unless a private forum provider were providing a service undeniably governmental in nature.

The primary issue is whether the private entity performs a "public function" by exercising powers or functions "governmental in nature."<sup>77</sup> The clearest example of a public function arose in a "company town" in which a private company actually operated all local municipal functions.<sup>78</sup> Although not usually implicated in the operation of private cyber forums, courts have also treated

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74. Cf. *Racism on the Net*, USA TODAY, Mar. 21, 1996, at 12A (explaining categorization of Usenet newsgroups in subject matter hierarchies).

75. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("The core issue presented in this case is not whether petitioners were discharged because of their speech . . . but whether the school's action in discharging them can fairly be seen as state action.").

76. See *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1025-28 (S.D. Ohio 1997) ("Cyber Promotions III"); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 441-45 (E.D. Pa. 1996) ("Cyber Promotions I").

77. See *Evans v. Newton*, 382 U.S. 296, 299 (1966). "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Id.*

78. See *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

private entities as state actors if the activities of the private entity are inextricably entangled with the government.<sup>79</sup>

The Supreme Court has sharply delimited the scope of the public function doctrine. The modern shopping mall provides an instructive case study of the Court's approach toward privately owned forums that purportedly serve public functions. The shopping mall has many public attributes, such as public access, parking, sidewalks, and frequently even a faux "Main Street." Yet a typical shopping mall is nonetheless privately owned. As a result of this dual character, the Court's protection of speech in shopping malls has ebbed and flowed notoriously. The Court first held that shopping mall operations were subject to constitutional limitations,<sup>80</sup> and then changed course. Most recently, it stated in *Hudgens v. NLRB* that mall operations were not subject to constitutional restrictions, even though they provide many public functions, such as parking, sidewalks, and streets, because they are privately owned.<sup>81</sup>

Cyberspace arguably shares many characteristics with a shopping mall: both are open to the public at large; both provide common areas for people to meet and converse; and both can provide platforms for raising public consciousness, if access is permitted. In fact, particular cyberspace locales have styled themselves as "virtual malls."<sup>82</sup> Yet, since shopping malls are not subject to the constraints of the federal constitution, an analogy of either cyberspace as a whole or a particular cyber forum to a shopping mall would provide no First Amendment leverage.<sup>83</sup>

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79. Cf. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (treating operation of a private restaurant within a public parking garage as state action for Fourteenth Amendment purposes). While the government obviously played an important role in establishing the Internet, and the appropriate status of the domain name registrars such as Network Solutions, Inc. is unclear, most forum cases will probably relate not to general Internet access, but to access to a particular forum or forums.

80. See *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968).

81. 424 U.S. 507, 519-21 (1976). The Court would later provide states with some latitude in defining the scope of speech rights in private forums such as shopping malls. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

82. See, e.g., *Virtual Mall* (visited Sept. 30, 1997) <<http://www.virtuamall.com>>.

83. See, e.g., *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 443 (E.D. Pa. 1996) ("Cyber Promotions I") (noting that *Logan Valley* was subsequently overruled). Cf. David Ehrenfest Steinglass, Note, *Extending Pruneyard: Citizens' Right to Demand Public Access Cable Channels*, 71 N.Y.U. L. REV. 1113, 1124 (1996) ("For commentators writing about cable television, shopping

Thus, taking the position that an Internet forum should be treated as a state actor based on an analogy to a shopping mall would not obtain for that cyber forum the “public forum” status coveted by the free speech proponents. Such a position might highlight the extent to which Internet forums do not provide the streets, sidewalks, or other open areas that are an integral part of many shopping malls and that are also the indicia of traditional public forums under the formal doctrine.<sup>84</sup> Therefore, a shopping mall analogy, though instructive, would not likely be a fruitful line of argument for the advocate seeking a right of access to a cyber forum.

Nevertheless, the “public function” exception to the general rule that the constitutional provisions limiting the government are inapplicable to private actors is not necessarily as tied to a particular analogy—that is, to shopping mall operations—as it is to the “governmental nature” of the function exercised.<sup>85</sup> Providing avenues for public discourse is an important governmental role.<sup>86</sup> Despite the apparent open access to the public and increasingly manifest public square functions of cyber forums, a court may not be inclined to treat the provision of such a forum as a “public function” based merely on the existence of lively discussion.<sup>87</sup>

The case more likely to result in First Amendment scrutiny of a private forum provider would involve an exercise of a clearly governmental function, such as voting for candidates for public office. While such voting has not yet taken place on-line, a

centers have provided a natural analogy.”)

84. See *United States v. Grace*, 461 U.S. 171, 177 (1983) (enumerating streets, sidewalks, and parks as examples of places considered “without more” to be public forums).

85. See *Evans v. Newton*, 382 U.S. 296, 299 (1966) (discussing “powers or functions governmental in nature”).

86. See, e.g., Farber, *supra* note 25, at 565 (explaining that providing avenues for public discourse is an important governmental role).

87. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (describing public functions as “powers traditionally exclusively reserved to the State”); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543-46 (1985) (abandoning effort to elaborate on the distinction between “traditional” governmental functions and proprietary functions). *But cf.* *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2409 (1996) (Kennedy, J., and Ginsburg, J., concurring) (“Public access channels . . . are public forums even though they operate over property to which the cable operator holds title.”); Steinglass, *supra* note 83, at 1159 (concluding that cable systems may be construed as public forums).

variety of cyber forums for political discussion already exist, and other political activity is sure to follow.<sup>88</sup> To the extent that holding primary or pre-primary elections are state functions if done by non-government actors,<sup>89</sup> such activity could give rise to state actor treatment if done on-line. And if voting does take place on-line, state actor treatment for a private administrator would be likely. Certainly, states or other actors should not be able to avoid their constitutional obligations that arise in the course of fulfilling public functions merely by carrying out those functions on the Internet.

This perspective clarifies the tenuousness of a right of access claim to a privately owned cyber forum, such as the ones Cyber Promotions brought. Cyber Promotions failed to even suggest that government obligations were being evaded by state officials and assumed by private actors. It argued that AOL was merely "providing Internet e-mail and acting as the sole conduit to its members' e-mail boxes."<sup>90</sup> Providing subscribers with an additional conduit for receiving speech is not solely a public function, and Cyber Promotions did not suggest that the government delegated or even encouraged AOL to take on this role.<sup>91</sup> Even though governmental neglect of certain functions, such as providing a meaningful opportunity for voting, might provide a claim of implicit delegation, it is hard to imagine that providing advertising alone—the common service offered by AOL

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88. See, e.g., BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 173-79, 273-79, 289-90 (1984); Charles Babington, *College's On-Line Vote Try Heralds a New Modem Operandi*, WASH. POST, May 6, 1996, at B1; Bruce Haring, *An On-Line Soapbox: Grass-Roots Politics Hits Cyberspace*, USA TODAY, Sept. 18, 1996, at 5D; Martha Moore, *Beginning Today, Clinton and Dole Clash on Internet*, USA TODAY, July 10, 1996, at 7A; Linton Weeks, *House Web Server Leaving Minority Off the Menu*, WASH. POST, July 1, 1996, at A15.

89. See *Terry v. Adams*, 345 U.S. 461 (1953) (holding pre-primary election unconstitutional); *Smith v. Allwright*, 321 U.S. 649, 660 (1944) (treating management of primaries as "a state function").

90. *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 442 (E.D. Pa. 1996) ("Cyber Promotions I").

91. See *id.*

[T]he parties have stipulated that AOL is a *private* online company that is not owned in whole or in part by the government. The parties have further stipulated that "AOL is not a government entity or political subdivision." They have also stipulated that there has been no government involvement in AOL's business decision to institute or reinstitute a block directed to Internet e-mail sent by Cyber [Promotions] to AOL members or subscribers.

*Id.* at 441 (citations omitted).

and Cyber Promotions—would qualify as a governmental function.<sup>92</sup> Actors seeking access to privately owned cyber forums based on a First Amendment claim, and particularly those pioneers seeking to establish the viability of such a claim, should direct their attention to forums that do serve governmental functions and should develop their arguments around the governmental aspects of the forum they have targeted.

*B. State Law: Supplemental Rights for Speakers in Private Forums*

An alternative strategy for parties seeking access in private forums is to establish a right of access based on state law. Recognizing the significant free speech implications of its narrow First Amendment review, the Court declined to make *Hudgens* its final word on subjecting private actors, like shopping mall operators, to free speech requirements. Four years later, in *Pruneyard Shopping Center v. Robins*, the Court provided the states with latitude to afford ample speech rights in private forums by declining to find a “taking” when a state forced a mall owner to permit speech.<sup>93</sup> In short, “[t]he definitive word was left to the state courts to write.”<sup>94</sup>

The *Pruneyard* decision has been praised as one of the leading cases “to identify the important, legitimate, and independent role that state courts play in protecting individual rights.”<sup>95</sup> California and New Jersey are two states that have taken advantage of this newfound freedom after specific state supreme court decisions held that speech rights in malls are protected under the respective state constitutions.<sup>96</sup> This experimentation

92. For a fuller discussion of the role of commercial speech in public forums generally and cyberspace forums particularly, see *infra* Part III.

93. 447 U.S. 74, 82-83 (1980).

94. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991).

95. Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make the Call,”* 30 VAL. U. L. REV. 509, 541 (1996).

96. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 346 (Cal. 1979); *New Jersey Coalition Against War in the Middle East v. JMB Realty Corp.*, 650 A.2d 757 (N.J. 1994). Other persuasive state decisions are highlighted in a comprehensive and thoughtful recent article, which recognized that these decisions have nonetheless been overruled by binding decisions of the respective state supreme courts. See Rishikof & Wohl, *supra* note 95, at 541-549 (describing appellate case in Ohio and plurality decision of the Washington Supreme Court).

by state courts has been lauded as "an example of how our Federalism works."<sup>97</sup>

The Philadelphia court, in *Cyber Promotions I*, analyzed Cyber Promotions' free speech rights under state law. In fact, the court found that the most similar right of access case in Pennsylvania (Cyber Promotions' home state) involved access to a privately owned shopping mall. The court recognized, however, that under the precedent provided by that case, Pennsylvania provided no right of access to shopping malls.<sup>98</sup> The court also found no decision under Virginia law, where AOL is based, supporting Cyber Promotions' position. Therefore, it rejected Cyber Promotions' claim under state law as well as under federal constitutional law.<sup>99</sup>

Although Cyber Promotions' claim was rejected, the Philadelphia court's analysis does not preclude a right of access claim under another state's law. One key, of course, would be finding the right state law.<sup>100</sup> The California Supreme Court's decision in *Pruneyard* represents the state law arguably most amenable to a right of access claim.<sup>101</sup> Under that decision, California courts must recognize that "[t]o protect free speech and petitioning is a goal that surely matches . . . other societal goals that have been held to justify reasonable restrictions on private property rights."<sup>102</sup> Thus, a Californian advocacy group could initiate a coordinated strategy to establish a right of access under California law arguing that protection of its free speech is a goal justifying reasonable restriction of a forum provider's right to exclude its speech. Since one of the major bases of the computer industry is in California, one attempting to establish a right of

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97. Rishikof & Wohl, *supra* note 95, at 550.

98. See *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 445-46 (E.D. Pa. 1996) ("Cyber Promotions I") (finding the case before it more similar to *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A.2d 1331 (Pa. 1986) (plurality) (finding no right of access to privately owned shopping mall), than to *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981) (allowing right of access to privately owned college)).

99. See *id.*

100. Another strategy would be to create state law through the state legislature.

101. *Pruneyard*, 592 P.2d at 341.

102. *Id.* at 346. California courts have faithfully fulfilled their obligation. See, e.g., *Westside Sane/Freeze v. Hahn*, 274 Cal. Rptr. 51, 54 (1990) (affirming grant of injunction prohibiting shopping mall from barring "peaceful and orderly leafleting or speaking of noncommercial ideas" within any of mall owner's shopping centers).

access there might have little difficulty finding a willing plaintiff and a (presumably unwilling) popular bulletin board service or private cyber forum provider to serve as a defendant, both based within California.

Although California state courts may appear to provide relatively hospitable tribunals for those seeking access to private cyber forums, litigating access claims under state law should be preceded by an evaluation of possible shortcomings of such a strategy. Three potential weaknesses deserve immediate examination: the strength of the claim under state law; the potential confusion under choice-of-law rules; and the appropriateness of the Supreme Court's *Pruneyard* scheme to the context of cyberspace.

First, critics might argue that because they lack the familiar physical indicia of traditional forums, cyber forums are not sufficiently like traditional public forums or privately owned shopping malls to warrant the same protection those public spaces receive under state law.<sup>103</sup> Although it might be absurd to describe certain primitive bulletin boards as holding an equivalent role as malls in society's social fabric, other forums that provide extensive chat room capabilities, electronic messaging features, and group entertainment could provide a much greater outlet for free expression than many malls. As discussed above,<sup>104</sup> this author continues to believe that certain cyber forums should be treated as public forums under the federal constitution.<sup>105</sup> Therefore, even though state law differs from federal law, the growing importance of cyber forums as outlets of free expression suggests that state law should protect free expression in the on-line world in similar ways it protects it off-line.

The second potential critique of the state law tack is the potential uncertainty caused by choice-of-law questions. For example, if a litigant claiming a right of access to a California forum provider were a resident of Pennsylvania, he or she would probably have no right of access under Pennsylvania law, even if a court were willing to treat the cyber forum as tantamount to a shopping mall. The court considering this right of access claim would then be forced to make the difficult choice between

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103. See Berger, *supra* note 65, at 655 (articulating the common characteristics of marketplaces and public forums).

104. See *supra* notes 28-30 and accompanying text.

105. See Goldstone, *supra* note 28, at 383; see also, e.g., Steinglass, *supra* note 83, at 1159 (concluding that cable systems may be construed as public forums).

California and Pennsylvania law. While it would certainly be possible to resolve that choice-of-law question, and to resolve other claims on a case-by-case basis, those determinations would not necessarily be coherent or consistent.

This critique should not prove fatal, however, for the state law strategy. After all, courts have long addressed choice-of-law problems without revising settled precedent just because a claim is asserted by an out-of-state party. To the extent that choice-of-law concerns are exacerbated by the increasing number of interstate contacts that the growth of cyberspace facilitates, courts will be faced with choice-of-law questions arising out of cyberspace cases in a variety of contexts, not just public forums.<sup>106</sup> These cases, in turn, will provide an opportunity to develop a body of law addressing choice-of-law questions for cyberspace, which courts will be able to apply when deciding public forum questions. Rather than ignoring legal precedent that appears difficult to apply, state courts will likely endeavor to develop practices by which their decisions are in fact coherent and salutary, even if such a route is not immediately apparent. Even a California court that preferred to take a conservative route in declining to apply the California public access rules to an out-of-state party, nonetheless could apply those rules to in-state parties disputing access to a cyber forum without being handicapped by undue caution.

Third, critics might describe this strategy as an inappropriate usage of state authority under *Pruneyard*. Under this view, obtaining access to a cyber forum under state law would amount to exporting a legal theory the Supreme Court expressly delegated to the states for localized decision-making about local expression<sup>107</sup> to a medium uniquely ill-suited to localized analysis. Even though the Mall of America could conceivably grow large enough to cross a state boundary, the typical case under *Pruneyard* will be limited to single-state issues.

This criticism, however, is not reason enough to reject a state law approach. Instead, it should caution state courts to use wisely the authority delegated to them under *Pruneyard*. State courts should develop a nuanced application of their own state law that furthers the purposes behind *Pruneyard*, namely that

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106. See, e.g., Richard H. Acker, Comment, *Choice-of-Law Questions in Cyberfraud*, 1996 U. CHI. LEGAL F. 437 (1996).

107. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-83 (1980).

states should retain an important role in governing their state citizens and should provide their citizens with meaningful local outlets of expression—even in cyberspace activities. Even those skeptical of courts' ability to vindicate this value in the novel context of the Internet have no basis to deny state courts the opportunity to begin that inquiry. Should courts accept the invitation, skeptics should be reassured that overreaching legitimate state authority will still be subject to Supreme Court review.

Therefore, to the extent that cyber forums provide important venues for free expression, analogous to that which some courts have recognized shopping malls currently provide, particular state courts may be a preferable forum for pursuing a right of access. As a leader in protecting speech rights on private property, California courts may prove especially hospitable to such a claim. Moreover, with the nucleus of the computer industry based in California, an assertion of the importance of free expression in cyberspace by a state resident would have special resonance there. The most significant flaw in this strategy, if any, stems not from the state law nature of the claim but from the fact that the forum provider itself, more than a mall operator, could assert an independent First Amendment claim in defense. This countervailing interest, which would be common to both the federal and the state law analysis, is addressed in the next section.

### *C. First Amendment Constraints on Delineating Private Rights*

The discussion above highlights some of the difficulties in attributing public forum status to privately owned cyber forums. Under the First Amendment, private ownership is a barrier to protection. Under state law, where speech rights may have limited protection in private forums, cyber forums may not comport with traditional notions of arenas for debate, and may also invite unappealingly complex choice-of-law inquiries. In both contexts, cyberspace presents a more complex constitutional terrain because the forum owner can assert a more weighty countervailing speech right.

When applied against a government entity, the public forum analysis requires a balancing between the authority of the government to manage its property and the right of the citizen to

speak freely. In the case of a privately owned forum, the law places a different weight—in the form of a private property right—on the scale in favor of the property owner. Although this weight is normally substantial, it may be modified by state law without strict constitutional scrutiny, as was demonstrated in *Pruneyard* when the Court found no “taking” of private property for a public use by California’s imposition of access.<sup>108</sup> Yet owners of cyber forums can place a substantial and countervailing constitutional weight on the scale—a First Amendment claim of their own. Justice Breyer expressed the dilemmas that arise in balancing these interests in a recent case addressing government mediation of private speech rights, where he astutely observed that “[t]he First Amendment interests involved are therefore complex, and involve a balance between those interests served by the access requirements themselves . . . and the disadvantage to the First Amendment interests of” the forum owners.<sup>109</sup> Unlike the Court’s unanimous decision in *Pruneyard* which played down the forum owner’s asserted First Amendment rights—there a shopping mall owner’s rights<sup>110</sup>—a court reviewing a right of access to a cyberspace forum would be hard pressed to similarly minimize that forum owner’s interest in freedom of speech because cyber forums, as non-physical entities, consist largely of communication.

The difficulty in balancing these interests is evidenced in the recent Supreme Court decision *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.<sup>111</sup> The Court upheld a law that permits cable system operators to prohibit “patently offensive” programming transmitted over “leased channels.”<sup>112</sup> The plurality opinion specifically rejected the position that it “must ignore the expressive interests . . . altogether”

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108. *See id.*

109. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996). At oral argument, Justice Breyer described the case as “very difficult” in part because “there are First Amendment rights on both sides.” *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, Nos. 95-124, 95-227, 1996 WL 82192, at \*15 (U.S. Feb. 21, 1996) (oral argument). He later referred to the issues in the cases as “First Amendment rights versus First Amendment rights,” in contrast to the more common case of “First Amendment rights against something else.” *Id.* at \*17.

110. 447 U.S. at 85-87.

111. 116 S. Ct. 2374 (1996).

112. *See id.* “A ‘leased channel’ is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties.” *Id.* at 2381.

of the private forum providers.<sup>113</sup> A court cannot dismiss the expressive interest of the cyber forum operator when considering an assertion of public forum status.<sup>114</sup>

On the other hand, the plurality opinion did not hold that the forum provider's rights would be preeminent. To the contrary, the Court struck down an analogous law that applied to "public access channels" and would have permitted a cable operator to prevent transmission of "patently offensive" programming on those channels.<sup>115</sup> With a tip of the hat to public forum analysis, the plurality opinion likened the public access channels to the "reservation of a public easement, or a dedication of land for streets and parks," and concluded that, because cable operators had not historically exercised editorial control, their "counter-vailing First Amendment interest is nonexistent, or at least much diminished."<sup>116</sup>

This analysis accords with prior cases addressing access rights to privately owned forums. For example, the Court in *Pruneyard* rejected the shopping mall operator's claim of a First Amendment infringement for two reasons: first, because the use of the mall was not limited to the owner's personal use; and, second, because the views expressed by the public coming and going would not be identified with those of the owner.<sup>117</sup> Moreover, the Court noted that the state did not dictate a specific message for display on mall property.<sup>118</sup> Therefore, the historical lack of editorial control by the mall owner, combined with the content-neutral position taken by the state, mitigated the free

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113. *Id.* at 2388 (plurality opinion). One concurrence forcefully noted that "when there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion." *Id.* at 2421 (Thomas, J., concurring).

114. See Volokh, *supra* note 30, at 388-90.

115. See *Denver Area*, 116 S. Ct. at 2382. Public access channels were defined by the court as "channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way." *Id.* at 2381.

116. *Id.* at 2394 (plurality). One concurrence explicitly embraced the public forum analysis, particularly as applied to public access channels. See *id.* at 2409-10 (Kennedy, J., concurring) ("In providing public access channels under their franchise agreements, cable operators therefore are not exercising their own First Amendment rights. They serve as conduits for the speech of others." (citing *Pruneyard*, 447 U.S. at 87)).

117. See *Pruneyard*, 447 U.S. at 87.

118. See *id.*

speech harm caused by the right of access. Justice Marshall also recognized in a subsequent case that the shopping center owner did not claim that his was a forum of "inherently limited scope" or that the imposition of unwanted expression hindered his own expression "in the slightest."<sup>119</sup>

On the other hand, the Court struck down a "right of reply" statute unanimously in *Miami Herald Publishing Co. v. Tornillo*.<sup>120</sup> *Tornillo* involved regulation of speech in newspapers, an industry that has inherited and cultivated a rich tradition of editorial control. The right of access there was heavily content-oriented: it was provided only for political candidates, only as a matter of reply, and only to "criticism" previously published in that newspaper. According to the *Pruneyard* court, the *Tornillo* decision to invalidate the right of reply statute "rests on the principle that the State cannot tell a newspaper what it must print."<sup>121</sup> This principle can be applied to other media services that exercise meaningful editorial control over content.<sup>122</sup>

To the extent that forum providers have declined to exercise editorial control over the discussion groups conducted on their computers, this analysis would hold some comfort for those seeking access, such as Cyber Promotions. There is no requirement that cyberspace forum operators reserve channel capacity for public, governmental, or educational channels either as part of the consideration for being awarded any kind of franchise or on any other basis. Nonetheless, many forum providers voluntarily set aside some space—for example chat rooms, Usenet, mailing

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119. See *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 24 (1986) (Marshall, J., concurring); see also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579-80 (1995) (distinguishing *Pruneyard* because the proprietors were (1) running a business establishment (2) open to the public where solicitations (3) would not likely be identified with the owner and (4) could be disavowed and where (5) the owner did not press his own expressive right).

120. 418 U.S. 241, 256-58 (1974).

121. 447 U.S. at 88.

122. *Accord* *Hurley*, 515 U.S. at 576 ("Parades and demonstrations . . . are not understood to be . . . neutrally programmed or selectively viewed."). The oft-criticized case of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), in which a right of reply was upheld for the broadcast medium, is not necessarily contrary to this view. At least, broadcast licensees, for all of the editorial discretion that they exercised, had always been subject to the requirement of operating in the "public interest." 47 U.S.C. § 307 (1994); cf. *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (upholding a requirement that those who wish to obtain radio or television licenses demonstrate that such would serve the "public interest" against a claim that the requirement restricts speech of those denied licenses).

list capabilities, or other forums—for open public discussion. Because they had not been exercising editorial control, these providers would have some difficulty arguing that their First Amendment rights had been transgressed. This challenge would be harder to overcome if the right of access, like the one upheld in *Pruneyard*, were not based on the content of speech. Moreover, the apparently unlimited scope of cyberspace may make it especially difficult to argue that a cyberspace forum is one “of inherently limited scope.”<sup>123</sup>

Evaluating the reasonableness of a right of public access consistent with the First Amendment rights of the forum provider will be inextricably fact-bound. Obviously, if the government had traditionally imposed a requirement of public access—for example, that the provider offer service to Usenet news groups in exchange for an Internet hookup, a domain name, or an Internet Protocol (“IP”) address<sup>124</sup>—an even better case might be made for public access. By contrast, where a forum provider exercises substantial editorial discretion, as does, for example, *CyberTimes* (the on-line presence of the *New York Times*), a right of access claim should be met with extreme skepticism.<sup>125</sup>

Cyberspace is not a single place. It cannot be treated for First Amendment purposes as a single place, or as subject to a single First Amendment doctrine. Just as with newspapers in the non-cyber part of the world, places in cyberspace subject to active editorial control should be accorded a substantial First

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123. See *Pacific Gas*, 475 U.S. at 23-24 (1986) (Marshall, J., concurring).

124. See *KROL*, *supra* note 69, at 23-34 (providing a simple explanation of how the Internet works, by reference to the United States Postal Service, and explaining that an “IP address” is necessary, like an address on an envelope, to ensure that messages over the Internet are properly delivered to the right computer host); see *also id.* at 373 (explaining that the InterNIC, which is an entity partially funded by the National Science Foundation, is responsible for assigning network addresses and top-level domain names).

125. This protection against a right of public access may be another side of the common-law coin from the imposition of defamation liability on editors for the words of those whom the forum provider purports to edit. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 26, 1995).

By statute, the “Good Samaritan Provision” of the Communications Decency Act has moderated the effect of *Stratton-Oakmont* by creating a limited safe haven from defamation liability for on-line services on account of editing activities “to restrict . . . availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” Telecommunications Act of 1996, 47 U.S.C.A. § 230(c)(2)(A) (West Supp.1997). The statute does not address the legal effect of exercising other kinds of editorial discretion.

Amendment defense against uninvited intrusions by members of the public. And as with malls, those who treat their forums as “a business establishment that is open to the public to come and go as they please” will not likely be identified with the views expressed by members of the public.<sup>126</sup> Either way, courts, legislators, litigators, and commentators should resist the temptation to treat this complex domain according to simpler signs.

#### *D. Finding Market Failures Related to Private Forums*

In truth, the Supreme Court has long been confronted with cases that it has recognized as implicating free speech rights in purely private disputes, where the government played merely a referee.<sup>127</sup> How the Court perceives its role varies with the medium of communication.<sup>128</sup> For example, a right of access to the private media was upheld in the broadcast context<sup>129</sup> and rejected in the newspaper context.<sup>130</sup> In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court overruled a state utility commission’s order granting a consumer activist organization access to a private utility’s billing envelopes.<sup>131</sup> Most recently, the Court rejected a right of access sought by a gay group to a privately organized parade.<sup>132</sup> Each of these cases was between private parties who asserted speech rights at the expense of other private parties, not of the government.

Speech in cyberspace is more open to public participation than speech in other mediums, like newspapers and television. Nevertheless, the increasing domination of commercial providers in servicing the Internet—coupled with the increasing role of commercial speech in furnishing Internet content—brings it closer to the commercial orientation present in those media. If the trend toward commercial domination of Internet forums

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126. *Pruneyard*, 447 U.S. at 87.

127. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (finding First Amendment constraint on libel action by public official).

128. *See* TRIBE, *supra* note 23, § 12-25, at 1003 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovaks v. Cooper*, 336 U.S. 77, 97 (1949) stating, “We deal here with the law of billboards.”)).

129. *See* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

130. *See* *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

131. 475 U.S. 1 (1986) (Powell, J., writing for the plurality).

132. *See* *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) (unanimous) (citing *Shelley v. Kramer*, 334 U.S. 1, 13 (1948), protection of First Amendment not a shield against “merely private conduct”).

continues, the perspectives of those forums would likely mirror the biases of other predominantly commercial media.

Commentators such as David Yassky have thoughtfully addressed the Court's role in overseeing the proper distribution of speech rights, particularly as they arise in commercially dominated speech markets, and have argued for a more active approach by the government in balancing the implicated interests.<sup>133</sup> For example, he agrees with Justice Marshall's characterization of the distinction between *Pacific Gas* and *Pruneyard*, mentioned above,<sup>134</sup> as whether the forum was one "of inherently limited scope."<sup>135</sup> However, he criticizes this view as treating market distributions as "'natural' or prepolitical," that is, analogous to the system created for contract rights under *Lochner*.<sup>136</sup> Yassky urges that "[i]n a political environment dominated by moneyed interests, genuinely pluralistic debate requires the government to go beyond laissez-faire."<sup>137</sup> To the extent that the "moneyed interests" are beginning to dominate cyberspace speech as much as they do politics, a laissez-faire approach may not be appropriate in cyberspace either. At least policy makers might focus their efforts on, and courts could give due consideration to, situations in which a laissez-faire approach is admittedly flawed—that is, cases of market imperfections.

An approach that addresses market imperfections, even in markets involving speech, is consistent with recent constitutional jurisprudence. In fact, in *Turner Broadcasting Systems v. FCC* ("Turner II"), the Court upheld the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992,<sup>138</sup> which require cable operators to carry the signals of a

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133. See Yassky, *supra* note 25. Yassky's primary project was applying Professor Bruce Ackerman's "dualist democracy" theory to the First Amendment. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

134. See *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 24 (1986) (Marshall, J., concurring); see also *supra* text accompanying note 119.

135. *Pacific Gas*, 475 U.S. 1, 23-24 (1986) (Marshall, J., concurring).

136. Yassky, *supra* note 25 at 1740-41 ("Just as *Lochner* did for property, *Pacific Gas* and *Pruneyard* enshrine private orderings of speech resources. These private orderings are assumed to be legitimate and beyond the reach of state intervention.").

137. *Id.* at 1752.

138. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C.).

specified number of local broadcast television stations.<sup>139</sup> Even though the government was, through the 1992 Act, overtly correcting the purportedly flawed marketplace of ideas as expressed in the cable television market, the Court limited its application of strict scrutiny review to content-based regulations.<sup>140</sup>

Because the speech regulations at issue in the earlier-decided *Turner I* were intended to correct market failures, and thus were not deliberately "related to the 'suppression of free expression,' or to the content of any speakers' messages," the Court applied an intermediate level of scrutiny.<sup>141</sup> The Court reaffirmed the propriety of a market-oriented approach when it noted approvingly in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* that "the government's interest in *Turner Broadcasting* was not the alteration of speech, but the survival of speakers."<sup>142</sup> The Court again reaffirmed that position recently in *Turner II*.<sup>143</sup> The government's position in *Turner I* went too far by suggesting that a "market dysfunction" should justify a rational basis review of cable television market regulation<sup>144</sup> as it did for the broadcast television market.<sup>145</sup> Still, the Court's repeated lesson is that overt correction of market flaws, even in markets for speech, can be constitutionally permissible if the regulation can pass intermediate review.

Because the Court will apply only intermediate-level review, governments will be permitted to enact affirmative measures reasonably tailored to correct or ameliorate structural problems which may cause specific speech markets to malfunction. In fact, the *Turner II* Court acknowledged its obligation to accord substantial deference to the predictive judgments of Congress, not only because it is far better equipped than a court to amass and evaluate data bearing upon legislative questions, but also because of its respect for Congress' authority to exercise the legislative

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139. *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997) ("Turner II").

140. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Turner I"). The three government interests asserted were "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Id.* at 662.

141. *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

142. 515 U.S. 557, 577 (1995).

143. 117 S. Ct. at 1186.

144. 512 U.S. at 630.

145. See *id.* at 638-39.

power.<sup>146</sup> The Court noted that this deference is due even in the realm of First Amendment questions.<sup>147</sup>

Structural problems in a variety of markets have given rise to a number of legal doctrines protective of speech—either incidentally or overtly. These doctrines include the essential facilities doctrine of antitrust law, the common carrier doctrine of communications law, and customary public policy concerns. Because cyberspace is as complex a terrain as the rest of the world, those structural problems (and others) are as salient in cyberspace's forums and markets as they are elsewhere. Therefore, these legal doctrines, which are intended to respond to and correct market dysfunctions generally, will likely have application in the context of cyberspace.

### 1. Antitrust Law: The Private Forum as an "Essential Facility"

For an argument arising out of a legal doctrine based purely on correcting market failures, Cyber Promotions first turned to the "bottleneck" or "essential facilities" doctrine of antitrust law.<sup>148</sup> This doctrine is only one of a spectrum of antitrust tools—and not necessarily the most valued tool in the workshop of the antitrust lawyer—all of which may be applied to particular cases.<sup>149</sup> Because the essential facilities doctrine was in fact raised by Cyber Promotions, this article will use the essential facilities doctrine as a prototype to illustrate the potential applicability of antitrust theories for cyber forums' antitrust arguments. Other particular applications of antitrust law in cyberspace will of necessity be fact-bound.<sup>150</sup>

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146. See 117 S. Ct. at 1189.

147. See *id.*

148. See *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 459 (E.D. Pa. 1996) ("Cyber Promotions II").

149. For one recent commentary critical of the "essential facilities" doctrine, see generally Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1, 35 ("[T]he essential facilities doctrine has no logical place in the spectrum of antitrust tools."). See also Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

150. For example, the Antitrust Division of the Justice Department on October 20, 1997, asked that Microsoft be held in contempt of court for tying its Internet Explorer, which provides access to the Internet, to its Windows operating system, allegedly in violation of a 1995 consent decree. Steve Hamm, *Going After Gates*, BUS.

The Court of Appeals for the Seventh Circuit has explained the basis for the essential facilities doctrine: because a monopolist's control of a bottleneck "can extend monopoly power from one stage of production to another, and from one market into another, . . . the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms."<sup>151</sup> That court articulated a standard four-prong test to establish liability: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."<sup>152</sup>

In *Cyber Promotions II*, the Philadelphia court decisively rejected the plaintiff's essential facilities claim under every prong of this test.<sup>153</sup> It even questioned the applicability of the doctrine on the basis that "AOL is not a business competitor of Cyber [Promotions]."<sup>154</sup>

Yet, in many respects, the court's conclusions against Cyber Promotions obscures the complexity of the essential facilities analysis. First, the essential facilities doctrine is not necessarily applied only to competitors, and, therefore, could be properly

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WK., Nov. 3, 1997, at 34. See also Susan B. Garland, *Justice vs. Microsoft: Why It Has a Case*, BUS. WK., Nov. 17, 1997, at 147 (quoting Assistant Attorney General Joel I. Klein that the "wonderful [thing] about antitrust is that it evolves"). The author has no involvement in this case.

151. *MCI Communications Corp. v. AT & T Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983).

152. *Id.* at 1132-33. The *Cyber Promotions II* court applied the same four-prong test. See *Cyber Promotions II*, 948 F. Supp. at 460-61 (quoting *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996)).

153. In reviewing the various contours of the essential facilities doctrine, the court held against Cyber Promotions on every count. It concluded that the antitrust test had not been satisfied because AOL as an on-line service was not a competitor with Cyber Promotions, an advertising agency; Cyber Promotions had not shown that AOL had monopoly power in the market of providing advertisements to AOL's customers; Cyber Promotions did not demonstrate that its advertising to AOL subscribers was any more "essential" than its advertising to others; Cyber Promotions did not demonstrate that it could not create its own commercial on-line Internet service; Cyber Promotions had not been denied access to those subscribers who requested access to "junk mail"; and because Cyber Promotions did not demonstrate access would be feasible. See *Cyber Promotions II*, 948 F. Supp. at 461-65.

The court also questioned whether the doctrine was even applicable since, as noted above, AOL did not actually block Cyber Promotions' messages except as directed by its subscribers through its software facility. See *id.* at 464. As discussed above, this decision by AOL will be treated here as tantamount to blocking.

154. *Id.* at 461.

applied against a party like AOL.<sup>155</sup> Second, the court criticizes Cyber Promotions' apparently unremarkable claim that AOL possesses monopoly power in the market for advertising to AOL subscribers by re-characterizing the market to include the market for "on-line users." The court does not acknowledge that there was a difference between these markets, which is borne out by the fact that the court could recommend merely that Cyber Promotions use alternative (non e-mail) advertising methods.<sup>156</sup> Third, the court's bald assertion that Cyber Promotions should "lure away AOL subscribers" to a competing commercial on-line service by "charging a competitive rate" ignores the possibility of any "lock-in" phenomenon.<sup>157</sup> If AOL subscribers were sufficiently locked-in, a competitively priced service may be unable to lure them away. Subscribers could be locked-in for a variety of reasons, including network externalities, sunk costs they have made in adapting to a particular system, or sunk costs they and others have invested in locating them at a particular address.

Fourth, and perhaps most intriguingly, the court provides an analogy to an advertising agency that attempts to insert advertisements into a newspaper for dissemination to that publication's subscribers without having to pay any fee to the publication. The court evaluates the likelihood of success of an antitrust claim brought in that context as "slim indeed."<sup>158</sup>

Yet, comparable cases have actually succeeded in the newspaper context, even at the Supreme Court.<sup>159</sup> The Supreme Court has even found refusals to deal in multiple competitor markets to violate the Sherman Act where one of the competitors had market power.<sup>160</sup> The *Cyber Promotions II* court dismissed this argument

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155. See Kezsbom & Goldman, *supra* note 149, at 14 (citing, *inter alia*, Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977) (requiring football stadium owner, which had exclusive use contract with one football team, to provide access to a second team even though stadium owner was not in competition with that team)).

156. See *Cyber Promotions II*, 948 F. Supp. at 461-62.

157. *Id.* at 463.

158. *Id.* at 462.

159. See *Lorain Journal Co. v. United States*, 342 U.S. 143, 156 (1951) ("The publisher may not accept or deny advertisements in an 'attempt to monopolize . . . any part of the trade or commerce among the several states.'" (quoting 15 U.S.C. § 2 (1994))); *Home Placement Serv. v. Providence Journal Co.*, 682 F.2d 274, 280-81 (1st Cir. 1982) (holding that within the city zone, the newspaper had a monopoly with respect to the sale of rental advertising and that the use of monopoly power to destroy a rental information advertiser was a violation of the Sherman Act).

160. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

too quickly. In fact, the Ninth Circuit recently reversed a summary judgment order for a newspaper that had refused to continue to carry the plaintiff's inserts advertising job fairs. In its decision, it noted that "[a] monopolist can refuse to deal with its competitors only if there are legitimate competitive reasons for the refusal."<sup>161</sup> Likewise, AOL's monopoly over its subscribers may oblige it to deal with Cyber Promotions unless it has legitimate competitive reasons for refusing to do so.

One important element of the Ninth Circuit's decision was the fact that the producer of the insert had "paid what it was asked to pay."<sup>162</sup> The *Cyber Promotions II* court, by way of contrast, repeatedly emphasized the fact that Cyber Promotions "of course, has never even offered to 'pay the freight' to advertise on AOL's system."<sup>163</sup> Nevertheless, it is significant that AOL does not charge any of the millions of Internet users who send mail to its subscribers. The *Cyber Promotions II* court did not mention this countervailing detail, perhaps because Cyber Promotions characterized itself as an advertiser rather than as a correspondent.<sup>164</sup> Once again, this self-characterization may have sealed Cyber Promotions' fate.<sup>165</sup>

None of this is to conclude, however, that AOL subscriber mail boxes should be treated as unavailable, yet essential, facilities. The Philadelphia court's decision in *Cyber Promotions II* was correct on the facts of the case, where the medium of communication was electronic mail sent directly to mailboxes of subscribers who could elect to receive mail from Cyber Promotions without undue burden.

Yet the court's analysis of the case under the essential facilities doctrine fails to capture a few of the nuances present in the relationships between subscribers, ISPs, advertisers, and other Internet speakers.<sup>166</sup> Cyber Promotions, like any entity that

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161. *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993).

162. *Id.* at 992.

163. 948 F. Supp. at 462 n.3.

164. *See, e.g., id.* at 462 ("In short, the federal antitrust laws simply do not forbid AOL from excluding from its system advertisers like Cyber Promotions who refuse to pay AOL any fee (as opposed to those advertisers who do pay a fee) for their advertising on AOL's system.")

165. The legitimacy of treating advertisers differently from other speakers will be discussed below. *See infra* Part III.

166. *See, e.g.,* David S. Evans & Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, 10 ANTITRUST 36, 36 (1996).

would like to reach a mass audience, was effectively required to try to utilize the forum provided by America Online because of its ubiquity. The more people who use AOL increases the value of access to its forums, even if AOL does not enhance its forums at all. That the accrued value to existing network users increases when additional users join the network is a recognized antitrust phenomenon described as a "network externality."<sup>167</sup>

To the extent that subscribers of large cyberspace services might be avoiding network externality costs they might bear on small services, the cyberspace service market may become distorted toward the large service providers with proprietary forums. In addition, the ability to switch to another service may not be a sufficient remedy for antitrust purposes if, for example, a subscriber is locked-in to a service for other reasons, such as its sunk costs associated with start-up or with being located by other network users.<sup>168</sup> For example, a business may spend substantial sums on advertisements that direct recipients to contact it at a particular e-mail address account. It might even automate the process by providing clients with software that automatically sends an e-mail to the business if the client needs company attention. This business would understandably be loathe to change the

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167. One commentator has explained the lock-in effect in the network externality context as follows:

In order to succeed, a new network would have to lure subscribers away from the old one. This may prove extremely difficult because of the network externality phenomenon.

The value of a network to a consumer depends on the total number of users and the identities of other specific users. The larger the network, the greater the number of consumers who will join it and conversely, the smaller the network, the fewer the number of consumers who will join it . . . . The entrant may face considerable difficulty [convincing consumers to switch] because consumers may have made significant nontransferable investments in learning to trust and use the incumbent network. The cost to a potential entrant of trying to provide utility comparable to the network externality of a well-established incumbent may present a formidable entry barrier.

John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571, 597-98 (1993) (citing, *inter alia*, WILLIAM W. SHARKEY, *THE THEORY OF NATURAL MONOPOLY* 126 (1982), and Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 AM. ECON. REV. 424, 425 (1985)). Stevens also reviewed cases recognizing that network externalities can create an effective barrier to competition. *Id.* at 599-602 & nn.113-31. For a contrary viewpoint, see S.J. Leibowitz & Stephen E. Margolis, *Should Technology Choice Be a Concern of Antitrust Policy?*, 9 HARV. J.L. & TECH. 283, 317-18 (1996).

168. See, e.g., Joseph Kattan, *Market Power in the Presence of an Installed Base*, 62 ANTITRUST L.J. 1, 6 (1993) ("The existence of network externalities can, in turn, create a lock-in effect because of the costs associated with abandoning a network.").

service provider if doing so would require it to relinquish the e-mail address, which it has developed into a critical asset. In recognition of these and other market dysfunctions, antitrust law or other legal doctrine may impose obligations on that provider to provide responsible and nondiscriminatory delivery of communications.

These dysfunctions are exacerbated by entities like Cyber Promotions, which create heavy burdens for delivering e-mail. That e-mail traffic highlights the conflicts between subscribers, who have an interest in receiving the e-mail, and the service provider, who has an interest in minimizing traffic. Effectively, the ISP can be prone to censor the high-volume e-mail from its locked-in subscribers. Concerns about this kind of ISP censorship may be more apparent if the speaker were sending political advertisements, religious tracts, or other material more sympathetic than Cyber Promotions' get-rich-quick ads.

These and other considerations may lead a court to conclude that under certain circumstances, certain Internet forums constitute "essential facilities" to which competitive access is required. As noted above, other antitrust tools may also be applicable to providing legal rights for individuals to access dominant proprietary forums. Thus, the rejection of Cyber Promotions' essential facilities claim in favor of AOL does not conclusively settle the validity of an antitrust claim throughout cyberspace.

## 2. Communications Law: Treating Forum Providers as Common Carriers

The venerable legal principles applicable to common carriers have long been applied in the communications context. As they have been applied to certain bus companies and telephone companies, they will likely be applied to particular cyberspace entities, including some forum providers.<sup>169</sup> Regulators and

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169. Many commentators have considered and rejected the imposition of common carrier status for forum providers in the context of defamation and intellectual property infringement, although these commentators have typically considered common carrier status primarily as a means for forum operators to avoid liability, and have considered only imposing that status to all cyber forums uniformly. See, e.g., Edward A. Cavazos, Note, *Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology*, 12 REV. LITIG. 231, 239 (1992) (doubting the common carrier model as a means of dealing with "the computer bulletin board defamation problem"); Andrea Sloan Pink,

courts should apply these established principles and doctrines with sensitivity to the new markets and forums the technological advances will induce.

a. *Defining "Common Carrier" in the Context of Cyberspace*

To the extent that ISPs such as America Online transport electronic mail to and from its subscribers indiscriminately, one might argue that such entities should be treated as common carriers. "Common carrier" is a general legal concept that has typically been defined thus:

Common carriers are those that hold themselves out or undertake to carry persons or goods of all persons indifferently, or of all who choose to employ it. Those whose occupation or business is transportation of persons or things for hire or reward. Common carriers of passengers are those that undertake to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusal.<sup>170</sup>

Courts could apply this traditional, albeit general, concept of common carriage to cyber forums, such as some mailing list services provided by ISPs. In fact, cyber forums could arguably be treated as common carriers by application of general principles under two separate theories: as a carrier of mail sent by its subscribers; or as a carrier of mail sent from the rest of cyberspace to its subscribers.

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Comment, *Copyright Infringement Post Isoquantic Shift: Should Bulletin Board Services Be Liable?*, 43 UCLA L. REV. 587, 629-32 (1995) (concluding that "regulatory burdens of common carrier status would produce the same chilling effect on the bulletin board service industry that is cited as a reason to exclude bulletin board services from contributory copyright infringement liability"); see also Georgio Bovenzi, *Liabilities of System Operators on the Internet*, 11 BERKELEY TECH. L.J. 93, 130-32 (1996) (considering whether bulletin boards, networks, or on-line services are common carriers and whether they thus should be "protected" as such for their "transmission of data" and asserting that "[t]he common carrier analogy does not apply to public message areas").

170. BLACK'S LAW DICTIONARY 214 (6th ed. 1990) (part of entry for "carrier") (citation omitted); see also *id.* at 275 (entry for "common"). See, e.g., *Neubauer v. Disneyland, Inc.*, 875 F. Supp. 672 (C.D. Cal. 1995) (treating operator of amusement park as a "common carrier" under California's broad statutory definition including "[e]very one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages").

First, the forum could be deemed a common carrier of the mail its subscribers send. In response, the forum provider would probably argue that it is not a common carrier as to its subscribers, because it accepts subscriptions from and transports the e-mail of only those with whom it chooses to contract.<sup>171</sup> One claiming access, such as Cyber Promotions, would obviously be unable to assert this theory unless it were a subscriber.<sup>172</sup> This application of common carriage would thus depend upon the definition of "subscriber"; as new kinds of cyber forums present themselves to which people may "subscribe" in various ways and to various degrees, some subscribers will undoubtedly be more amenable to this analysis than others.

A second potential application of general common carriage principles to cyber forums is to the incoming mail that ISPs convey to their subscribers. This perspective captures the insight that, ordinarily, ISPs transmit mail indifferently. Yet this perspective also creates a legal model slightly askew from that applied to traditional common carriers. E-mail transmission is effectively done for hire, but the only hiring party who pays for cyber forums is the recipient (the subscriber) rather than the sender, who is the common carrier's usual customer. Yet this apparent incongruity is not insuperable. Many shipping companies charge the recipient. Likewise, subscribers might perceive themselves as "hiring" an incoming message stream by subscribing, even if they do not contract with, or even know, the senders of the messages.

The particular experiences of communications providers, such as telecommunications providers, with common carriage principles is instructive. The Communications Act of 1934,<sup>173</sup> as amended by the Telecommunications Act of 1996,<sup>174</sup> defines "common carrier" circularly as "any person engaged as a common

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171. See BLACK'S LAW DICTIONARY 214 (6th ed. 1990) (defining "private carrier").

172. Obviously, an entity seeking access, like Cyber Promotions, could obtain an inexpensive subscription to many popular cyber forums and then claim access as a subscriber. Analytically, though, it is valuable to separate the case in which it is not a subscriber from the one in which it is, particularly to the extent that a forum provider might be entitled to terminate that subscription.

173. Communications Act of 1934, 48 Stat. 1064 (1934) (codified as amended in 47 U.S.C. §§ 151-613 (1994) and 18 U.S.C. §§ 1304, 1464 (1994)).

174. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 15, 18, and 47 U.S.C.).

carrier for hire, in interstate or foreign communication by wire or radio, . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."<sup>175</sup> The courts—most notably the D.C. Circuit—have grappled with this unhelpful formulation and concluded that one “essential” element of the “quasi-public character implicit in the common carrier concept is that the carrier ‘undertakes to carry for all people indifferently.’”<sup>176</sup>

The D.C. Circuit soon revisited the definition of a common carrier. It held that a “second prerequisite to common carrier status . . . is the requirement formulated by the FCC and with peculiar applicability to the communications field, that the system be such that customers ‘transmit intelligence of their own design and choosing.’”<sup>177</sup> Other decisions have clarified a number of principles in applying the common carrier definitions: “lack of control over content does not by itself make one a common carrier”,<sup>178</sup> “earning a profit does not make one a common carrier”,<sup>179</sup> and “it is not essential that a carrier own facilities.”<sup>180</sup>

Under these particular communications law standards, cyber forums, particularly unmoderated ones, could be treated as a common carrier of those interested in submitting messages to the forum. The provider of an unmoderated forum would undertake

175. 47 U.S.C.A. § 153(10) (West Supp. 1997).

176. National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1975) (“NARUC I”) (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)), *cert. denied*, 425 U.S. 992 (1976); *see also* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (quoting *NARUC I*'s test approvingly). The court explained that:

One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

*NARUC I*, 525 F.2d at 641.

177. National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976) (“NARUC II”) (quoting *Industrial Radiolocation Serv.*, 5 F.C.C.2d 197, 202 (1966)).

178. Peter K. Pitsch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMM. L.J. 447, 458 (1996) (citing *World Communications, Inc. v. FCC*, 735 F.2d 1465, 1471 (D.C. Cir. 1984)).

179. *Id.* (citing *AT & T Co. v. FCC*, 572 F.2d 17, 25-27 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978)).

180. *Id.* at 459 (citing *AT & T Co. v. FCC*, 572 F.2d at 25).

to carry messages for all people indifferently. Such forums enable participants to transmit intelligence of their own design and choosing. Nevertheless, the argument that a non-subscriber who merely tries to contribute to such a forum (without paying for transmission of messages) should not be treated as a "customer" could provide a defense to the ISP or forum provider seeking to avoid such a categorization.<sup>181</sup> And, this definition would preclude such a forum from being a common carrier hired by the recipients, as suggested above, because the intelligence transmitted is not of the design of the recipients, except perhaps in the broadest of terms.

Judicial failure to consider creative applications of common carrier law is evident in part of the court's reasoning in *Cyber Promotions III*. The Ohio court recognized that "the public possesses a privilege to reasonably use the facilities of a public utility."<sup>182</sup> The court rejected a characterization of CompuServe as a "public utility" under its traditional doctrine because it held that Internet access and electronic mail services "are simply not essential to society" and because CompuServe did not occupy the requisite "monopolistic or oligopolistic position in the relevant marketplace" because Internet users—including Cyber Promotions—"can transfer from one service to another."<sup>183</sup>

The court's analysis that Cyber Promotions could appropriately be denied access because it could "transfer to" a different Internet service instead is predicated on an unexamined assumption: that Cyber Promotions was interested in access as a subscriber. Cyber Promotions did not seek access as a subscriber at all. Rather, it sought access as a sender of messages to CompuServe subscribers, and therefore, the option of transferring to another service would provide it no relief. Assuming CompuServe is a common carrier of messages sent to its subscribers, Cyber Promotions' claims should have been evaluated under this doctrine. Analyzed properly, Cyber Promotions' claim for access to CompuServe's forums on a common carrier theory should have been rejected on grounds that Cyber Promotions was unwilling to

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181. As shall be discussed below, this application of common carrier law offers little solace to a spammer like Cyber Promotions, because the forum could nonetheless simply refuse service on the grounds that its capacity is exhausted.

182. *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1025 (S.D. Ohio 1997) ("*Cyber Promotions III*").

183. *Id.*

pay for delivery of its messages and thus was not a "customer." Forum providers like CompuServe may not, however, have a comparable defense against a willing payer.

In short, common carriers in cyberspace may present themselves differently from common carriers in the rest of the world. The proper question for the courts is not whether a service provider, such as CompuServe, is a common carrier only for its subscribers, but whether a service provider rendered any of its services, such as delivery of messages sent by nonsubscribers, on a common carrier basis. Courts should be alert to permit the doctrine to evolve with the technology, and to recognize the common carriers of cyberspace wherever they may be found.

*b. Significance of "Common Carrier" Status for  
Cyber Forums*

As noted above, general common carriage principles require that "so long as there is room," a common carrier has "no legal excuse for refusal" to those who apply for passage.<sup>184</sup> This excuse may not provide much comfort to speakers such as Cyber Promotions, which sends millions of messages a day, because a forum operator should be able to refuse access on the basis that it does not have "room" to carry so many messages. Lower volume senders, however, would fare much better under common carriage principles.

Again, the experiences of other communications providers is helpful to review. In the communications context, common carriers have been regulated under Title II of the Communications Act.<sup>185</sup> Most notably, the statute declares that "[i]t shall be the duty of every common carrier . . . to furnish such communication service upon reasonable request therefor" and that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in . . . practices . . . or services."<sup>186</sup> These laws would suggest that, so long as an unmoderated forum is open to transmit messages as a common carrier, it may not refuse reasonable requests.<sup>187</sup> This analysis would hold no solace

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184. BLACK'S LAW DICTIONARY 214 (6th ed. 1990).

185. See 47 U.S.C. §§ 201-229 (1994).

186. 47 U.S.C. §§ 201, 202 (1994).

187. Cf. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2412 (1996) (Kennedy, J., and Ginsburg, J., dissenting):

for Cyber Promotions, whose requests were facially unreasonable, but taken literally would hold open an apparently well-defined possibility of a legal right of access for others.

Nonetheless, the FCC has eroded the meaningfulness of that possibility by declining to enforce these statutes literally. In a series of rulemakings, the FCC has decided to forbear from enforcing these restrictions for common carriers that did not possess market power or that offered so-called "enhanced services" rather than basic common-carrier transmission services.<sup>188</sup> Under the FCC's formulations, ISPs are treated as providing "enhanced services" because of the many "protocol conversions" involved in generating and transmitting on-line messages to subscribers.<sup>189</sup>

However, just because ISPs have been treated as providing enhanced services,<sup>190</sup> and effectively free of FCC oversight, does

Laws removing common-carriage protection from a single form of speech based on its content should be reviewed under the same standard as content-based restrictions on speech in a public forum. Making a cable operator a common carrier does not create a public forum in the sense of taking property from private control and dedicating it to public use; rather, regulations of a common carrier dictate the manner in which private control is exercised. A common-carriage mandate, nonetheless, serves the same function as a public forum.

188. Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1123 (1992) (citing Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 91 F.C.C.2d 59, 61-62 (1982) (second report and order), Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 95 F.C.C.2d 554, 557 (1983) (fourth report and order), and Amendment of Section 64.702 of Commission's Rules and Regulations, 77 F.C.C.2d 384, 498-99 (1980) (final decision) [hereinafter *Computer II Final Decision*], *modified on recon.*, 84 F.C.C.2d 50 (1980), *modified on further recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.*, *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

189. The FCC has defined "enhanced services" as: "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing *applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information*; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702 (1996) (emphasis added). By contrast, the FCC defined "basic service" as "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Final Decision*, 77 F.C.C.2d 384, 420 (1980).

190. There is also an interesting question of whether the information-telecommunications service distinction introduced by the 1996 Telecommunications Act changes the treatment of ISPs or on-line forums as enhanced services. Compare 47 U.S.C.A. § 153(43) (West Supp. 1997) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the

not mean all cyber forums should or will inevitably be treated as providing enhanced services. Certain forums, such as mailing lists, that merely retransmit messages to participants arguably render no enhanced services because they perform no protocol conversions. Even assuming the FCC were to deem mailing lists or other cyber forums that perform no protocol conversions as a basic service, it still might decline to regulate access to the forum unless it determines the forum has "market power." At this juncture, it is not apparent in which market a discussion forum might have power, and whether that market would be a purely economic one or one of ideas. As new kinds of markets and new kinds of forums develop in cyberspace, both regulators and courts should be attentive to resolving these questions in ways sensitive to both established common carriage principles and the nuances of the new technologies.

### 3. Responding to Market Failures

Although the foregoing discussion did not establish that economic-based legal doctrines would support an automatic right of access to a privately operated cyberspace forum, it used those doctrines to highlight market failures applicable to cyber forums. A full economic analysis of the cyberspace market is beyond the scope of this article. Nonetheless, a consideration of the market failures within cyberspace is an important element in the development of a rational body of law—either through legislatures or through courts—which is sensitive to the nuances of cyber forums. At least three features of cyber forums constitute market flaws: the externalities associated with the costs of sorting and storing e-mail; subscriber lock-in; and the implicit absence of information.

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user's choosing, without change in the form or content of the information as sent and received") *with* 47 U.S.C.A. § 153(20) (West Supp. 1997) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications . . ."). To the extent that an ISP, and especially an unmoderated discussion group, merely retransmits messages, it is arguably engaging in telecommunications only. However, the redirection of the message by the ISP, and especially by the discussion group, may not permit such activity to qualify as transmission "between or among points specified by the user." 47 U.S.C.A. § 153(43) (West Supp. 1997).

a. *Three Sets of Market Failures*

*Externalities Associated with the Costs of Sorting and Storing E-Mail.* First, particular features of the cyberspace communications market—most notably the e-mail communications medium—distort the costs of participating in the communications marketplace. E-mail must be sorted and stored by the recipient until it is retrieved, and then it is read. Both the sorting and the storage can be costly. Recipients cannot be presumed to have agreed to shoulder these costs for every piece of mail because a recipient receives it without any choice in the matter.<sup>191</sup> Even if an on-line service provider, such as America Online, does not charge directly for sorting and storage, the cost is imposed on subscribers indirectly, through higher subscription fees. Moreover, to the extent that the recipient might receive desirable mail at that address, he or she is burdened by the cost of sifting through the accumulated mail for the ones of interest. These costs of time and effort are also not the product of any freely negotiated transaction. This analysis suggests that the market, left to its own devices, tends to create an oversupply of e-mail, not an undersupply.

Another important aspect of the market for speech in cyberspace is that speech is relatively “cheap” in cyberspace. Commentators have noted that new information technologies, especially the “information superhighway,” will dramatically reduce the costs of distributing speech.<sup>192</sup> This fact is a technological development, not a market distortion. Nonetheless, the market dysfunction that enables senders to impose costs on unwilling recipients is exacerbated by the low barriers to entry to the medium.

Similar phenomena have justified, with judicial approval, severe regulations in analogous contexts, such as unwanted

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191. Arguably, the e-mail recipient has made the choice to disseminate the designation of his or her e-mail address. The author finds this view to be flawed, because an e-mail address is so important for communication that there is a compelling incentive to provide it to others, and once it is so provided it is (as is typical of informational goods) easily replicated. The author has found that any “public” activity, such as posting a message in a public discussion group, can expose the sender’s address to the world and thus make him or her subject to unwanted mail.

192. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806 (1995).

solicitations via phone calls and faxes.<sup>193</sup> Unwanted phone calls, of course, impose a burden of answering upon a recipient and unwanted faxes impose the burden of paper, ink, sorting time, and reading time upon a recipient. Under FCC regulations adopted pursuant to the Telephone Consumer Protection Act of 1991, telephone solicitations are permitted only between 8:00 A.M. and 9:00 P.M. local time for the called party and are subject to restrictions, such as a requirement of identifying the individual caller.<sup>194</sup>

In fact, the use of automated technologies, which impose a greater share of the communication costs on the recipient, has been prohibited altogether in similar contexts, again with judicial approval. Federal statute bars the use of artificial or prerecorded voices to deliver a message to a residential telephone line without prior express consent.<sup>195</sup> Likewise, individuals may not use fax machines to send an unsolicited advertisement.<sup>196</sup> By contrast, courts have been less receptive to regulations in contexts where costs are not as significantly shifted to the recipient from the speaker, such as face-to-face interactions.<sup>197</sup>

Market failures in cyberspace related to this kind of cost-shifting could justify a variety of governmental responses, which should be tailored to kinds of cyberspace communications. Bulk

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193. For a discussion of the reduced First Amendment protection received by commercial speech and the applicability of that reduced protection in both conventional and cyberspace forums, see *infra* Parts III and IV.

194. 47 C.F.R. § 64.1200(e) (1994); see also Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (to be codified as amended at 47 U.S.C. § 227). Cf. Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. REG. 99 (1986).

195. See 47 U.S.C. § 227(b)(1)(B) (1994); see also Moser v. FCC, 46 F.3d 970, 974-75 (9th Cir. 1995) (upholding the statute against a First Amendment challenge), *cert. denied*, 115 S. Ct. 2615 (1995).

196. See 47 U.S.C. § 227(b)(1)(C); see also Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 56 (9th Cir. 1995) (upholding the statute against a First Amendment challenge as reasonably tailored to Congress' goal of preventing the shifting of advertising costs).

197. See, e.g., Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (invalidating ordinance against knocking on doors to distribute circulars).

Unwanted "junk mail" which imposes costs on recipients but is hardly free to senders has also been subject to regulation. Consistent with its limited cost-shifting capability, it has not received unequivocal judicial treatment. Compare Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) (upholding a 30-day post-accident ban on targeted mail by attorneys), and Rowan v. United States Post Office Dept., 397 U.S. 728 (1970) (homeowner may be authorized to exclude unwanted mail), with Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60 (1983) (striking down a federal law that banned from the mails unsolicited advertisements for contraceptives).

e-mailers, for example, exemplify the ease with which senders can shift costs onto recipients in the medium of e-mail. Therefore, it might be reasonable to require bulk e-mailers to “tag,” or identify their messages as sent in bulk to restrict repeat mailings to individuals, and to design automated facilities by which individuals could easily “opt out” of receiving such mailings.<sup>198</sup> On the other hand, costs of participating in chat rooms would be more difficult to distort—because chat rooms are interactive and more analogous to face-to-face discussion—than costs of sending and receiving electronic mail. Broad distribution channels, such as news groups and mailing lists, are especially sensitive to the imposition of external costs by senders. The characteristics of that market would justify the most restrictive regulations.<sup>199</sup> At least, regulations requiring entities—particularly bulk e-mailers—to honor “cease and desist” notices, should be upheld, even if they limit some speech.<sup>200</sup>

*Subscriber “Lock-In.”* A second set of market flaws relevant to cyber forums can be broadly described as switching costs, which includes both the costs related to “network effects” and the costs of an “installed base.” The costs related to “network effects” are discussed above in the antitrust law section, which concludes that appropriate cases may induce a need for the law to provide access to proprietary cyber forums.<sup>201</sup> Another switching cost is the initial cost of subscribing, learning about, and configuring a particular service.

A third switching cost relates to the “installed base” of participants in cyberspace. An individual’s “installed base” is the set of people and entities who know an individual’s “username” and can, therefore, contact him or her by addressing communications to that username.<sup>202</sup> Participants in cyberspace

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198. A number of regulatory responses to unsolicited junk mail are considered in Michael W. Carroll, *Garbage In: Emerging Media and Regulation of Unsolicited Commercial Solicitations*, 11 BERKELEY TECH. L.J. 233, 276-80 (1996).

199. In fact, it was the posting of advertisements on news groups that first broadly demonstrated the potential problems caused by abuse of these means of dissemination. See Peter H. Lewis, *An Ad (Gasp!) in Cyberspace*, N.Y. TIMES, Apr. 19, 1994 at D1.

200. To the extent that the other courts follow the Ohio court’s decision in *Cyber Promotions III* that a sender must honor a “cease and desist” notice, additional government intervention may be unnecessary to provide this minimal level of protection for recipients of bulk e-mail. See 962 F. Supp. 1015 (S.D. Ohio 1997).

201. See *supra* Part III.D.1.

202. The “installed base” would also include mailing lists and similar

justifiably rely on these usernames as important conduits to receive information. If a subscriber of one ISP were to relocate the subscription to another service provider, he or she would likely lose the use of that personal username. This lock-in phenomena can prevent subscribers from migrating to the services that supply the most appropriate—or economical—forums for their needs. This phenomenon also imposes costs on implementing simple tactics, such as changing a username to avoid unwanted e-mail, like that sent by bulk e-mailers. Other strategies such as broadcasting notification of an address change or obtaining so-called “e-mail for life” from an independent third party have some practical value.<sup>203</sup> Nevertheless, to the extent that a people have (or will soon have) a large “installed base” in a proprietary username, the desirability of these strategies may be severely limited.<sup>204</sup>

Some might assume that competition in the ISP market would prevent inefficiently high switching costs related to this problem of an installed base. After all, if consumers want to retain their particular addresses indefinitely, they can contract with the ISP before subscribing to forward their mail upon

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mechanisms that a person has utilized to route contact information to his or her username.

203. “E-mail for life” services provide a username that is stable, and through which an individual’s e-mail may be routed to be forwarded to the addressee’s current service provider. This service can minimize the switching costs of changing service providers, because only the “forwarding address” to which the e-mail for life service provider forwards the mail need be changed. Nevertheless, the providers of e-mail for life services could themselves charge extortionate rates for continued service.

204. This problem is also present in other markets, including, most obviously, the housing market. Changing an address is one of the transaction costs of changing a home location. This problem is mitigated in the housing market by at least two factors. First, the other switching costs, such as moving, tend to dwarf the costs of changing addresses. Therefore, the significance of the address changing costs is obscured. Second, there is massive government intervention in the market for delivery of mail, *viz.*, the postal service itself. *See* U.S. CONST. art. I, § 8, cl. 7 (authorizing Congress to establish post offices). As part of its important governmental role, the postal service reduces the switching costs associated with an “installed base” of addresses by providing forwarding services at no cost. Government agencies are sensitive to reducing “installed base” costs in other communications contexts as well, such as changes in telephone numbers. *See, e.g.*, 47 U.S.C.A. § 251(b)(2) (West Supp. 1997) (imposing a duty on all local exchange carriers to provide number portability in accordance with the FCC’s requirements); *see also* Telephone Number Portability, 11 F.C.C.R. 8352, 8366-68 (1996) (explaining that requiring telephone number portability enhances competition).

termination of service.<sup>205</sup> This argument, however, ignores the likelihood that subscribers are ill-positioned to estimate their switching costs before they subscribe to a particular system. This problem is more acute among new users who may not even be aware of the significance their e-mail address will take on and may be unknowingly accruing “switching costs” during a “free” trial period.<sup>206</sup> Therefore, government regulation requiring e-mail providers to offer forwarding services to their subscribers at termination of service for a reasonable time period and at a reasonable or cost-based rate may be appropriate. Such regulation could substantially reduce the switching costs related to lock-in that might otherwise distort the market.

In fact, similar problems caused by installed bases have been recognized by law in other contexts. Most notably, the Supreme Court recently addressed an analogous argument by the Eastman Kodak Company relating not to the primary equipment market for items such as photocopiers—in which Kodak did not hold market power—but to the “derivative aftermarket” for Kodak parts and service.<sup>207</sup> The Court rejected Kodak’s argument that competition in its primary market precluded it from wielding monopoly power in the secondary market.<sup>208</sup> It held, instead, that “there is a question of fact whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another.”<sup>209</sup> Likewise, lawyers, courts, legislatures, and regulators should be alert to the possibility that switching costs and other costs may substantially undermine even a presumption of market virtue.

*Implicit Absence of Information.* Third, cyberspace forums are primarily markets for information, and thus may have the

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205. To the extent subscribers are “locked-in” to particular e-mail addresses, negotiating forwarding options at the time service is terminated would provide service providers the opportunity to charge extortionate prices.

206. Recognition of switching costs associated with the development of an installed base may motivate ISPs to give away as much as fifty hours of free service to new users who may be unfamiliar with the problem. See Robert H. Lande, *Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST L.J. 193, 200 (1993) (“Predatory pricing also becomes more plausible if we assume imperfect information.”).

207. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

208. See *id.* at 465-66.

209. *Id.* at 477.

inherent flaw of not providing perfect information.<sup>210</sup> Moreover, cyberspace forums are rapidly developing and will continue to develop rapidly for the foreseeable future. Therefore, it is doubtful that consumers have perfect information about cyber forums. The market for such forums cannot have a presumption of efficiency.<sup>211</sup>

*b. Review of Potential Responses*

The three market flaws discussed above at least confirm that the market for cyber forums is not perfectly efficient. Applying legal doctrines developed to address imperfections in other markets to cyberspace markets may be helpful, despite the fact that the courts correctly rejected the particular claims in the litigated *Cyber Promotions* cases on the facts before them.

The diversity among cyber forums and markets for cyber forums suggests that any government intervention should be reasonably tailored to the characteristics and the flaws of the particular market in which intervention is thought necessary. For example, failures in an information market would provide a basis for educational initiatives or for compelled disclosure regulations. Problems created by network effects could be corrected by limited mandated access. The switching costs and lock-in associated with the installed base of people who are familiar with a particular username could provide a basis for a regulation requiring e-mail providers to offer forwarding services to their subscribers at termination of service for a reasonable or cost-based rate.

The clearest market failure discussed here is the ability of bulk e-mail senders to impose substantial costs on recipients without their consent. Under *Turner I*<sup>212</sup> and *Turner II*,<sup>213</sup> reasonably tailored government regulations intended to correct such a flaw, for example, requiring entities to honor "cease and desist"

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210. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 37 (1996); Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393, 404 (1980).

211. See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-19 (1960) (discussing the importance of perfect information for an efficiently operating market).

212. 512 U.S. at 662.

213. 117 S. Ct. at 1186.

notices, should be upheld, even if they would have the effect of reducing some speech, as long as they are content-neutral.<sup>214</sup> Moreover, those costs would justify even more vigorous restrictions on senders of bulk e-mail than complying with cease and desist notices, like the restrictions that have been imposed on purveyors of phone solicitations and junk faxes under the Telephone Consumer Protection Act of 1991.<sup>215</sup>

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214. See *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) ("Cyber Promotions III"); see also Volokh, *supra* note 30, at 423-25 (arguing for enforcement of "cease and desist" notices to unwanted e-mailers and relying primarily on *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970)).

215. See 47 U.S.C.A. 227 (West Supp. 1997); Carroll, *supra* note 198, at 276-80.

*Something expensive,  
Something offensive,  
Something for everyone —  
A comedy tonight!*<sup>216</sup>

### III. THE ROLE OF COMMERCIAL SPEECH IN PUBLIC FORUMS

Cyber Promotions based its efforts to persuade courts to award public access to privately owned cyber forums not on traditional free speech vehicles, such as political speech or religious speech, but on advertisements. This tactic was not astute, and not merely because it turned out to be unsuccessful. It is unlikely that novel public forum claims will be recognized for commercial speech, because commercial speech—as it is understood through legal doctrine—does not serve the purposes for which public forums have been created.

It may be true that the *Cyber Promotions* courts never explicitly addressed whether (or how) the content of the speech before them played a role in their analyses. Rather, the courts' explicit analyses, like the analysis presented in Part II of this article, were strictly focused on characterizing the cyber forums (as, for example, public forums, state actors, or common carriers) while reviewing the legal theories that might support a right of access to those forums. Yet, the *Cyber Promotions* courts repeatedly characterized the speech at issue as "advertisements," implying that these initial characterizations were a critical part of their analyses.<sup>217</sup> Advertisements, of course, can represent a distinct category of speech under the First Amendment, described in First Amendment parlance as "commercial speech."<sup>218</sup>

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216. SONDEHEIM, *supra* note 17.

217. *See, e.g., Cyber Promotions III*, 962 F. Supp. at 1017; *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 437 (E.D. Pa. 1996) ("Cyber Promotions I").

218. Commercial speech is defined as "speech which does 'no more than propose a commercial transaction.'" *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). While not all advertisements are "commercial speech," many are. As the Supreme Court noted:

It is clear . . . that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976). Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money. *New York Times Co. v. Sullivan*, 376

Commercial speech receives less constitutional protection than speech generally.<sup>219</sup> It is also less sympathetic than political speech in unconventional speech claims.

This Part will investigate the role of commercial speech in public forums—first in conventional forums and then in cyberspace forums. The same justifications for greater restriction of commercial speech generally are particularly applicable in public forums and, if not more so, in cyberspace forums. Therefore, it would be surprising if innovative public forum claims were recognized for a purveyor of commercial speech. Novel speech claims should be made of sterner stuff.

### A. *Commercial Speech in Conventional Public Forums*

Commercial speech had not been accorded any First Amendment protection until 1976.<sup>220</sup> Even today, it is accorded only “a measure” of First Amendment protection and the Supreme Court claims that it is “careful to distinguish commercial speech from speech at the First Amendment’s core.”<sup>221</sup> In the Court’s view, “[c]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’”<sup>222</sup> That its protection is limited does not leave commercial speech without First Amendment protection; the Court recently reiterated that “in recent years this Court has not approved a blanket ban on commercial speech unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity.”<sup>223</sup>

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U.S. 254 (1964).

*Id.* at 761 (some citations omitted).

219. *See, e.g.,* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (noting that commercial speech occupies a “subordinate position in the scale of First Amendment values”); *see also* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 n.5 (1980) (describing commercial speech as of “less constitutional moment”).

220. *See, e.g.,* *Virginia State Bd. of Pharmacy*, 425 U.S. at 770 (recognizing constitutional protection for commercial speech).

221. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995).

222. *Went For It*, 115 S. Ct. at 2375 (citations omitted). *See also* *Central Hudson*, 447 U.S. at 563 n.5 (describing commercial speech as of “less constitutional moment”); *Ohralik*, 436 U.S. at 456 (noting that commercial speech occupies a “subordinate position in the scale of First Amendment values”).

223. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996) (plurality

### 1. A Paucity of Case Law

It is striking, then, that the Supreme Court has found no opportunity to discuss the role of commercial speech in the public forum context. Typical public forum cases involve union voting opportunities in public school mailing systems,<sup>224</sup> religious films in public schools,<sup>225</sup> theatrical events in public theaters,<sup>226</sup> and school board discussions.<sup>227</sup> Solicitation speech has arisen in the public forum context in the form of charitable solicitation cases.<sup>228</sup> Nevertheless, the speech in those cases, which was used to procure funding for nonprofit organizations, has been treated as “fully protected expression” outside of the public forum context.<sup>229</sup>

In truth, the Court has faced just two cases that have directly implicated commercial speech in a publicly owned forum. The first of these, *Board of Trustees v. Fox*, was decided in 1989.<sup>230</sup> *Fox* involved so-called “Tupperware parties” conducted by representatives of a housewares products company on the campus of a state university. The university’s regulations authorized the use of university campus facilities only for select categories of commercial enterprises.<sup>231</sup> During a demonstration of “housewares” products in a student’s dormitory room, campus police asked the company’s representative to leave and, upon her

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opinion of Stevens, J.) (quoting *Central Hudson*, 447 U.S. at 566 n.9).

224. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

225. See *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

226. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

227. See *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167 (1976).

228. See, e.g., *Lee v. International Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam); see also *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality opinion) (upholding postal service regulation prohibiting solicitation on postal premises, as applied to members of political advocacy group soliciting contributions, selling books and newspaper subscriptions, and distributing literature on sidewalk near post office entrance).

229. See *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 796 (1988).

230. 492 U.S. 469 (1989) (“*Fox II*”); cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising spaces on city-owned buses to be used for political advertising).

231. The university’s regulation stated: “No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.” *Fox II*, 492 U.S. at 471-72 (quoting Resolution 66-156 (1979)).

refusal, arrested her on a variety of grounds. The Supreme Court case arose out of an action by the students, who were first joined, and then deserted, by the housewares company. The district court found for the university because the dormitory did not constitute a public forum for the purpose of commercial activity and because the restrictions on speech were reasonable in light of the dormitory's purpose. The Court of Appeals reversed that decision and remanded the case for a strict scrutiny review.<sup>232</sup>

The students in *Fox* tried to argue that the Court should treat the Tupperware parties as non-commercial speech, as in the charitable solicitation cases. Despite the educational setting of the speech, the Court rejected this argument.<sup>233</sup> It concluded that the commercial speech at issue need not be subjected to the strict scrutiny applied by the Court of Appeals and remanded the case for analysis.<sup>234</sup> The Court specifically declined to address the state's public forum argument that the regulation "should be upheld even if the speech here was not commercial, because SUNY dormitories are not a public forum."<sup>235</sup> The Court refused to rule on this point purportedly because it found that the Court of Appeals did not address these legal and factual issues, even though the district court had addressed these legal and factual issues directly and in fact had held that student dormitory rooms were limited public forums for noncommercial activities.<sup>236</sup>

In only one other case has the Supreme Court squarely addressed commercial speech in traditional public forums. In *City of Cincinnati v. Discovery Network, Inc.*, the Court struck down a ban on the distribution of commercial material via news racks on city sidewalks.<sup>237</sup> The Court based its holding in *Discovery Network*, however, on the conclusion that excluding only commercial news racks from city sidewalks—purportedly on

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232. See *id.* at 472-73.

233. See *id.* at 474-75 ("Including these home economics elements no more converted AFS' presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.").

234. See *id.* at 474, 486.

235. *Id.* at 473 n.2.

236. Compare *id.*, with *Fox v. Board of Trustees of the State Univ. of N.Y.*, 649 F. Supp. 1393, 1401 (N.D.N.Y. 1986) (original trial court holding that "dormitories are limited public forums, at least with respect to the students, for the participation in social, cultural and educational activities. SUNY has not created a public forum for the commercial speech at issue here, however . . .") ("Fox I").

237. 507 U.S. 410 (1993).

safety and aesthetic concerns—was not rational when those news racks accounted for less than 4% of the city's newsstands.<sup>238</sup>

Therefore, on both of the occasions when it had the opportunity to address the distinctive protection, if any, that it should accord commercial speech in public forums, the Court declined to discuss the issue.<sup>239</sup> The silence on this intersection of legal doctrines is intriguing because it opens the possibility that the Court is uncomfortable addressing it. Moreover, this silence leaves lower courts, practitioners, and commentators without specific guidance as to the appropriate constitutional moment to accord such speech in public forums.<sup>240</sup>

Lower federal courts have provided no more instruction than the Supreme Court. Like the Supreme Court, they have expressed disfavor with commercial speech rights asserted in public forums. The vast majority of public forum cases, even those that involve locations where commercial speech is usually displayed, involve claims by those attempting to engage in noncommercial speech.<sup>241</sup> Where the proper characterization of the speech is debatable, lower courts too have viewed commercial speech as "inextricably intertwined" with noncommercial speech and thus treated the cases as relating to noncommercial speech.<sup>242</sup> And for

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238. *See id.* at 428.

239. The district court in *Fox* at least recognized explicitly that it was "confronted with an unusual situation: 'the intersection between government regulation of commercial speech and regulation of speech on government property.'" *Fox I*, 649 F. Supp. at 1398 (applying public forum analysis and quoting *American Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 862 (3d Cir. 1984) (applying commercial speech analysis).

240. One other case upheld commercial speech restrictions in the context of the broadcast spectrum, which some have suggested qualifies for designated public forum treatment. *See United States v. Edge Broad. Co.*, 509 U.S. 418 (1993). In another case, the Court struck down a federal law that banned from the mails unsolicited advertisements for contraceptives. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). The Court did not comment upon the public forum implications of either case. *Cf. Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (upholding speech right on private land used as commercial shopping mall because the land was not restricted to the owners "personal use").

241. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 69 F.3d 350 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996); *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995).

242. *See, e.g., Hays County Guardian v. Supple*, 969 F.2d 111, 120 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993); *Indiana Voluntary Firemen's Ass'n, Inc. v. Pearson*, 700 F. Supp. 421, 437 (S.D. Ind. 1988) ("Even if this court were to find that the information the Indiana Statute required professional solicitors to disclose was clearly commercial in nature, this court could not apply the lesser 'commercial speech' standards to that portion of the solicitation. . . .").

those few cases in which purely commercial speakers presented claims of access to public forums, the courts were not particularly receptive.<sup>243</sup>

## 2. Public Forums at Cross-Purposes with Commercial Speech: A Functional Analysis

A functional analysis does shed light on the judicial dislike, or at least apathy toward, the role of commercial speech in the public forum context. The two supposed characteristics of commercial speech that courts have used to justify this lower protection are a greater "objectivity" of commercial speech and its greater "hardiness."<sup>244</sup> The "objectivity" rationale is said to allow "the State more freedom to distinguish false commercial advertisements from true ones."<sup>245</sup> Professor Tribe has noted that "[t]he 'greater objectivity' with which falsity may be identified in most commercial contexts, and the correspondingly reduced danger of ideological censorship in the guise of consumer protection . . . support broader power to suppress false advertising than to censor false or misleading speech generally."<sup>246</sup> The "hardiness" quality of commercial speech arises from the manifest profit motive accompanying it.<sup>247</sup> As the Court noted in *Virginia State*

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243. See, e.g., *Friends of the Vietnam Veterans Mem'l v. Kennedy*, 116 F.3d 495, 497 (D.C. Cir. 1997) (upholding prohibition of sale of t-shirts by Vietnam Veterans group on the National Mall and holding that the National Park Service "may certainly take steps to limit the commercialization of the Mall"); *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1016 (9th Cir. 1996) (upholding prohibition of sale of merchandise on city streets against constitutional challenge as applied to bar non-profit organizations from selling message-bearing t-shirts); *Sciarrino v. City of Key West, Fla.*, 83 F.3d 364, 364 (11th Cir. 1996) (upholding ordinance "limiting location of off-premises solicitation, limiting number of off-premises canvassers, and establishing a permitting system for persons who seek to engage in off-premises soliciting on publicly owned land"), cert. denied, 117 S. Ct. 768 (1997). See also *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995) (upholding statute prohibiting use of fax machines to send an unsolicited advertisement against first amendment challenge). But cf. *Lueth v. St. Clair County Community College*, 732 F. Supp. 1410 (E.D. Mich. 1990) (addressing advertisement in school newspaper).

244. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1506 (1996) (plurality opinion of Stevens, J.) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976)).

245. *44 Liquormart*, 116 S. Ct. at 1506 (plurality opinion of Stevens, J.).

246. TRIBE, *supra* note 23, § 12-15, at 894-95 (footnotes omitted).

247. *44 Liquormart*, 116 S. Ct. at 1506 (plurality opinion of Stevens, J.).

*Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, “advertising is the *sine qua non* of commercial profits.”<sup>248</sup>

The justifications for protecting speech in public forums are exactly the converse of these points. First, in contrast to the “objectivity” rationale which militates for increased state authority, the justification for greater protection of speech in public forums is a concern about abuse of state authority. Speech in public forums is vulnerable to government control simply because the government by definition is exercising managerial authority over the forum itself.<sup>249</sup> Moreover, much activity in public forums is speech-oriented. Because regulating speech-related activities can be motivated by subjective opinions about the content of the speech, speech in public forums obtains protection from the formality of the public forum doctrine.<sup>250</sup>

Second, while commercial speech might be deemed to be particularly “hardy,” an important justification for protecting speech in public forums is that communication in these forums can be indispensable to people who lack access to more elaborate and more costly channels.<sup>251</sup> As Dean Farber has noted, public forums “are often the only place where less affluent groups and individuals can effectively express their message.”<sup>252</sup> Transferring protections afforded specifically for those whose speech is recognized as delicate to speakers whose speech has specifically been recognized as robust may seem inappropriate.

This functional analysis thus calls into question the appropriateness of according significant protections to commercial speech in public forums. Some may criticize this analysis as being overly instrumental. After all, the Court has repeatedly rejected the

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248. 425 U.S. at 772 n.24. Professor Tribe has also noted that:

Because the advertiser ordinarily “seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else,” there is little “danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression” and thus “little need to sanction ‘some falsehood in order to protect speech that matters.’”

TRIBE, *supra* note 23, § 12-15, at 894 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24 and *id.* at 777-78 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974))).

249. See Post, *supra* note 25, at 1782.

250. See Saphire, *supra* note 25, at 758.

251. See TRIBE, *supra* note 23, § 12-24, at 987 (citing *Martin v. Struthers*, 319 U.S. 141, 146 (1943)).

252. See Farber, *supra* note 25, at 574 n.86.

argument that commercial speech "is so removed from any exposition of ideas . . . that it lacks all protection."<sup>253</sup> It has often been remarked that free speech is protected not only for instrumental purposes, but also for intrinsic ones. Justice Brandeis's oft-cited concurrence in *Whitney* explains that the framers "valued liberty both as an end and as a means."<sup>254</sup>

While it is true that speech should not be valued merely as a means, the position that it has value as an end in itself is at its weakest with regard to commercial speech. Whereas the Court has recognized that some of the "most valued forms of fully protected speech" have been harmoniously "uttered for a profit," commercial speech, defined strictly as "speech that proposes a commercial transaction," is so clearly uttered for "means-oriented" purposes as to vitiate much of the "ends" justifications for protecting it.<sup>255</sup> Indeed, it is the state's power to regulate the sought-after commercial transactions that is said to justify the state's power to regulate commercial speech, for the reason that it is "'linked inextricably' to those transactions."<sup>256</sup>

Therefore, an instrumental analysis is appropriate in the commercial speech context. This analysis exposes cross-purposes between justifications for permitting restrictions on commercial speech and protecting speech in public forums. Obviously, commercial speech is not without First Amendment rights in public forums. In fact, the Court has demonstrated its willingness to strike down outright bans of commercial speech in public forums.<sup>257</sup> Nevertheless, the cross-purposes of the commercial speech doctrine and the public forum doctrine may explain why courts have avoided comment on the confluence of the two. That the first litigated public forum cases in cyberspace

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253. *Florida Bar v. Went For It, Inc.* 115 S. Ct. 2371, 2375 (1995) (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762) (quotation marks and citations omitted).

254. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also *TRIBE*, *supra* note 23, § 12-1, at 788 (noting that Justice Brandeis "did not make the mistake of reducing freedom of speech to its instrumental role in the political system").

255. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (emphasis omitted).

256. *44 Liquormart, Inc v. Rhode Island*, 116 S. Ct. 1495, 1506 (1996) (citing *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

257. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993).

do involve commercial speech, then, makes them more significant and deserving of study.

### B. *Commercial Speech in Cyberspace's Public Forums*

As discussed above, it is significant that the first public forum cases relating to cyberspace are ones in which the speech at issue is pure commercial speech.<sup>258</sup> The justifications for regulating commercial speech generally clarify why protecting it in public forums in cyberspace is as inappropriate there as in the rest of the world, if not more so.<sup>259</sup>

The *Cyber Promotions* cases once again provide a ready starting point.<sup>260</sup> As mentioned above, both courts repeatedly characterized the speech of Cyber Promotions as "advertisements." The Philadelphia court implicitly denigrated the advertised services when it noted that "[t]he Court has reviewed all of the examples and notes that many of the ads include get-rich-quick ads, weight loss ads, health aid promises, and even phone sex services."<sup>261</sup> The Ohio court, on a different tack, rejected the position that advertisements on the Internet are uncommon and noted that "[i]t is not surprising therefore that some companies, like defendant Cyber Promotions, Inc., have begun using the Internet to distribute advertisements by sending the same unsolicited commercial message to hundreds of thousands of Internet users at once."<sup>262</sup> The court also specifically recognized that "[i]n the vernacular of the Internet, unsolicited e-mail advertising is sometimes referred to pejoratively as 'spam.'"<sup>263</sup>

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258. See, e.g., *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1015 (S.D. Ohio 1997) ("Cyber Promotions III"); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 437 (E.D. Pa. 1996) ("Cyber Promotions I").

259. Cf. E. Walter Van Valkenburg, *The First Amendment in Cyberspace*, 75 OR. L. REV. 319, 328 (1996) ("The types of 'commercial speech' that may occur in Cyberspace are no different from the types that may occur in normal space. There is no apparent reason why the rules governing commercial speech generally cannot be translated to the Internet.").

260. Because the forums at issue in the *Cyber Promotions* cases were not owned or controlled by the government and thus were not First Amendment public forums, they provide only a starting point for studying the role of commercial speech in public forums in cyberspace. See *supra* Part I.B.

261. *Cyber Promotions I*, 948 F. Supp. at 439.

262. *Cyber Promotions III*, 962 F. Supp. at 1018.

263. *Id.*

One might fairly inquire why the courts would unnecessarily validate this content-based characterization of speech. A return to the functional analysis begun above suggests an answer.<sup>264</sup> The first rationale discussed above justifying the regulation of commercial speech is a belief that government regulation of it is more likely to be based on objective criteria and less likely to be arbitrary. By contrast, it was noted that the speech orientation inherent to public forum activities invites government managers to be more susceptible to arbitrariness, and thus more in need of a formal doctrine.

The concerns associated with this rationale are exacerbated in cyberspace. Public forum activities are likely to be at least as speech-oriented in cyberspace as they are in the rest of the world. In fact, because of the relative absence of physical indicia in cyberspace, speech will become even more of the focus of activity in cyberspace public forums, and authorities may be even more susceptible to capriciousness. Government regulation of commercial speech is no less likely to be based on objective criteria in cyberspace than it is in the rest of the world. Under this reasoning, commercial speech needs no greater protection in cyberspace public forums, although other speech does.

The second rationale for regulating commercial speech, which also runs counter to the reasons for generally protecting speech in public forums, is the "hardiness" of commercial speech. Hardiness may be a particularly important concept in cyberspace because the reduced cost of speech will make the information marketplace "more accessible to comparatively poor speakers as well as rich ones."<sup>265</sup> Even though this characteristic is thought to both "democratize" and "diversify" the information marketplace,<sup>266</sup> it is not clear whether or how the new medium will similarly shift the balance between commercial and noncommercial speakers. In fact, businesses intent on selling a product may be the best positioned to systematically exploit the improved mechanisms of speech distribution. After all, it is businesses and advertising that have provided the incentive for improved "spamming" mechanisms and techniques. While it might be

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264. See generally *supra* Part III.A., for a functional analysis that relates the doctrine providing protection for commercial speech to the doctrine protecting speech in public forums.

265. Volokh, *supra* note 192, at 1833.

266. See *id.*

easier and cheaper to have advertising-free media within cyberspace,<sup>267</sup> it would be difficult to claim that taken as a whole, cyberspace is less susceptible to commercial speech than the rest of our world. Commercial speech is at least as hardy, if not more so, in cyberspace as it is in the conventional world. Therefore, purveyors of commercial speech have much weaker demands for those protections that courts have afforded noncommercial speakers in cyber and conventional public forums. Indeed, the Supreme Court specifically noted in striking down the Communications Decency Act that, *inter alia*, the statute before it was not limited to commercial speech or commercial entities.<sup>268</sup>

Nevertheless, commercial speech should not be without First Amendment rights in cyberspace forums. As the Supreme Court recognized in *United States v. Edge Broadcasting Co.*, restrictions on commercial speech are subjected to First Amendment scrutiny even if they seek to deter a long-disfavored activity (there, lottery and gambling) and even if the medium of expression (there, broadcasting) is accorded a lower level of First Amendment protection.<sup>269</sup> Moreover, the plurality opinion in *44 Liquormart, Inc. v. Rhode Island* held that an outright prohibition on the "dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process" should usually be subjected to rigorous First Amendment review.<sup>270</sup>

Likewise, an outright ban on commercial speech from a public forum in cyberspace should be subjected to strict scrutiny, particularly if more narrow regulation is possible "to protect consumers from misleading, deceptive, or aggressive sales practices" or that "require[ ] the disclosure of beneficial consumer information."<sup>271</sup> More reasonable regulations to deter aggressive sales practices in the particular context of the Internet might restrict the frequency with which a commercial speaker might utilize a particular cyberspace forum or set of forums.<sup>272</sup> Another regulation that

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267. *See id.* at 1841.

268. *ACLU v. Reno*, 117 S. Ct. 2329, 2341, 2347 (1997).

269. 509 U.S. 418, 426 (1993) (assessing restriction under the scrutiny for commercial speech as set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

270. 116 S. Ct. 1495, 1507 (1996) (plurality opinion of Stevens, J.).

271. *Id.*

272. *See Samantha Hardaway, Comment, Commercial Speech and the University Internet Account: Are Universities Selling Out the Spirit of the First*

would be more reasonable than an outright ban of commercial speech from a cyberspace public forum would be to require "tagging" of commercial speech, denoting it as such.<sup>273</sup> In light of the characteristics justifying regulation of commercial speech generally, a promulgator of commercial speech to a public forum in cyberspace would be hard pressed to try to avail himself of the special protections of the public forum doctrine.

Moreover, to the extent that many issues in cyberspace are likely to raise complex questions that courts may consider themselves unequipped to answer, providers of commercial speech would be wise not to press their claims in this medium too hard. Courts are likely to eschew broad pronouncements about the scope of the First Amendment in the new medium. As Justice Souter recently noted, "[i]n my own ignorance I have to accept the real possibility that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.'"<sup>274</sup> As no court has yet recognized any cyberspace forum as a public forum, it would be surprising if a court were sympathetic to affording the public forum protections, in the first instance, to a commercial speaker.

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*Amendment?*, 3 UCLA ENT. L. REV. 333, 372 (1996) (discussing allocation of "resource units"); cf. Policies and Rules Concerning Children's Television, 6 F.C.C.R. 2111 (1991) (imposing commercial limits on children's programming), and Policies and Rules Concerning Children's Television, 6 F.C.C.R. 5093 (1991) (upholding same).

273. See Hardaway, *supra* note 272, at 373-74 (discussing favorably a labeling requirement for commercial speech on the Internet).

274. *Denver Area*, 116 S. Ct. at 2402 (Souter, J., concurring) (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995)).

*What is the moral?  
Must be a moral.  
Here is the moral, wrong or right:  
Morals tomorrow!  
Comedy tonight!*<sup>275</sup>

#### IV. THE MORAL FOR COMMERCIAL SPEAKERS IN PRIVATE CYBER FORUMS: ROME'S FORUMS WERE NOT BUILT IN A DAY

Of the claims addressed in this article, the least attractive to a court would be that of the commercial speaker requesting access to a private forum. Unsympathetic as a court may be to the claim of a commercial speaker in a public forum,<sup>276</sup> it is likely to be even less sympathetic to the claim of a commercial speaker in a private forum. After all, the Supreme Court has struck down efforts by the government to exclude commercial speech when the content-based justifications appeared irrational.<sup>277</sup> Yet it is commonly accepted that, absent special circumstances, newspapers may refuse to carry any particular kind or type of advertising.<sup>278</sup> Moreover, slight as the claim of a speaker in a private forum may be,<sup>279</sup> it is even weaker if the content is purely commercial speech.<sup>280</sup>

Remarkably enough, it is precisely this weakest of claims that Cyber Promotions has asserted repeatedly.<sup>281</sup> The novelty of cyberspace, where judicial caution is predictably heightened, further reduced the viability of these claims. In short, Cyber Promotions' claims were virtually doomed from the start.

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275. SONDHEIM, *supra* note 17.

276. *See supra* Part III.

277. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983) (striking down content-based prohibition of contraceptive advertisements from the mails).

278. *See, e.g., Home Placement Serv., Inc. v. Providence Journal Co.*, 682 F.2d 274, 278 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

279. *See supra* Part II.

280. *Compare Lee v. International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (per curiam) (holding First Amendment supports a right to leaflet in nonpublic forum), *with International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) (upholding ban on solicitation in a nonpublic forum).

281. *See CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) ("Cyber Promotions III"); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 459 (E.D. Pa. 1996) ("Cyber Promotions II"); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) ("Cyber Promotions I").

Cyber Promotions' failure does not foreclose, however, other commercial speakers from asserting rights in private forums in cyberspace. After all, in appropriate cases outside of cyberspace, courts have recognized the speech rights of commercial speakers in private forums under conventional legal doctrines in short, matter-of-fact opinions that need not even address First Amendment issues.<sup>282</sup> Courts will also recognize speech rights in private forums provided by legislators or regulators if they represent content-neutral public policy reasonably tailored to a state interest.<sup>283</sup> Courts have long profitably capitalized on the rich body of judicial deliberation which assesses the significance of public-private distinctions in speech cases.<sup>284</sup> With proper deliberation, courts will be able to bring those resources to bear on cases set in cyberspace as well.

Cyberspace will continue to provide a legal terrain at least as difficult to traverse as the most difficult areas of constitutional and other legal landscapes in the rest of the world. Courts have already recognized that there are at least five kinds of communication in cyberspace, but have not yet addressed the extent to which the differences among them have legal significance.<sup>285</sup> Outside of cyberspace, Professor Tribe has noted that the Supreme Court has treated "each medium of communication as 'a law unto itself.'"<sup>286</sup> Courts should be equally sensitive to

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282. See, e.g., *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993). Of course, courts have also recognized speech rights in privately owned forums in self-conscious opinions; see also, e.g., *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 781 (N.J. 1994) (holding that shopping malls must permit "leafleting and associated speech in support of, or in opposition to, causes, candidates, and parties—political and societal speech").

283. See *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1181 (1997) ("Turner II").

284. See, e.g., *Lorain Journal Co. v. United States*, 342 U.S. 143, 154-56 (1951) (holding that the enjoining of an attempt by a newspaper to monopolize advertising and news channels does not violate any guaranteed freedom of the press); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.").

285. See, e.g., *ACLU v. Reno*, 929 F. Supp. 824, 834 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329, 2334 (1997) (surveying common methods of communication on the Internet, including e-mail, "listserv" mailing lists, news groups, chat rooms, and remote information retrieval).

286. TRIBE, *supra* note 23, § 12-25, at 1003 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) stating, "We deal here with the law of billboards.")).

differences among modes of communication in cyberspace. The body of rights available in cyberspace and the legal constructs developed to analyze them will eventually match or exceed those available in the rest of the world.<sup>287</sup>

Zealous commercial speakers who would assert rights in private forums in cyberspace should be more adroit than Cyber Promotions was. Some commercial speech rights will exist in private forums in cyberspace, but their precise contours will not be apparent until the boundaries and byways of cyberspace are better charted. Until then, the moral of the *Cyber Promotions* cases is that haphazardly asserting legal rights in convenient cyberspace forums is unlikely to develop supportive case law.<sup>288</sup> Cyber Promotions' own interests would have been better served if it had, at least, deferred its cases until it (or someone else) had clearly established separately the right to disseminate commercial speech in a cyber public forum and the right to disseminate some kind of speech—most likely political speech—in one of cyberspace's privately owned forums.

Rome's forums were not built in a day. Cyberspace's forums will not be either. Speech claims in cyber forums are more likely to be recognized if they are brought in appropriate cases than if they are brought in simply the most expedient ones.

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287. See, e.g., Mitchel L. Winick, et al., *Attorney Advertising on the Internet: From Arizona to Texas—Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH L. REV. 1487 (1996) (analyzing the constitutionality of applying the Texas Rules of Professional Conduct to attorney communication on the Internet).

288. In this vein, Professor Lawrence Lessig has made a thoughtful plea for utilizing the common law's case-by-case methodology on the basis that "if we had to decide today, say, just what the First Amendment should mean in cyberspace, my sense is that we would get it fundamentally wrong." Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995). While associations in cyberspace have links with older analogs—associations in public being a kind of electronic town meeting and associations in private being a form of private club—and also have the potential to be something quite different, Professor Lessig contends that "[h]ow different, how significant, we cannot yet quite see." *Id.* at 1747. Although his plea is directed primarily at the courts, this author shares his reluctance to unnecessarily accelerate the full resolution of conflicts over access to cyber forums until the nature of those conflicts is better mapped, better constructed, and better understood. See *id.* at 1752-53.

## V. CONCLUSION

The development of cyberspace requires a thoughtful re-assessment of legal doctrine relating to speech in forums. The *Cyber Promotions* cases provide examples of how litigants can exploit the novelty of the medium by trying to apply familiar doctrines in peculiar ways. Cyber Promotions asserted speech rights to distribute commercial speech in privately owned forums. These claims were so weak that their assertion militated against Cyber Promotions. The courts wisely rejected these claims and refused to impose access on the private forum providers.

These decisions mark the beginning of judicial forays into the cyberspace frontier. Rather than blithely providing or rejecting rights of access to cyberspace forums, courts and litigants should consider the particular characteristics of the forum at issue, the mode of communication utilized in that forum, and the speech itself. They should carefully examine a wide variety of implicated laws, including federal constitutional law, state law, antitrust law, and communications law. Furthermore, courts should be receptive to reasoned public policy measures, particularly in response to articulated market failures. Cyberspace will provide a terrain for speech at least as complex as the rest of the world, and sophisticated legal doctrines should develop in response.

For their part, speakers who would assert rights in cyberspace forums should be more strategic than Cyber Promotions. Careful litigation can assist in the development of reasoned and supportive case law. Rome's forums were not built in a day. Cyberspace's forums will not be either. While a variety of speech rights will legitimately exist in cyber forums, they are more likely to be recognized if they are brought in appropriate cases than if they are brought in simply the most expedient ones.