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ADVERTISING ON THE INTERNET: AN OPPORTUNITY FOR ABUSE?

SHIRLEY F. SARNA*

I am a bit reluctant to say anything, because I have a feeling I am one of the “guys” that give on-line service providers headaches. In addition to all the services on-line providers and the Internet offer, what I would like to invite you to think about today is yet another opportunity they provide—that is the opportunity of a marketplace.

It is unimportant from which of the on-line providers I received the following advertisements because they are available on all of them:

\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$

Either way you make money. Learn the method for generating \$50,000 or more cash any time you need it. No risk or any door to door selling ever. You can guarantee your cash flow.

This I assume is an ad for lawyers.

Learn how to work an 800 hour work week at \$10 an hour.

Actually they ask to call Mechanics of Wealth Hotline.

Make \$100,000 doing nothing.

It is nifty if you can get it. Here is another one.

If you are not serious or you are a skeptic, please don't waste yours and our time. We only want serious individuals . . . there's no big investment, no down payment, you can earn as much as you want with a success rate of 90% to 100%.

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I am calling that one immediately. These are marvelous to look at.

Remove all the negative credit information from your credit reports.

Regrettably, this is illegal. I would not recommend that you do it.

What I want to invite you to think about is the notion that really has developed over the last thirty years on how we regulate a marketplace,¹ and how we define the roles between buyer and seller.² While that does not have a two-hundred year history and does not go back to the founding fathers, it has a rich history of the last twenty-five or thirty years. Some of the change has been incremental and some of it has been in more concentrated periods, but, in any event, it takes into account the realities of the marketplace in the physical world.³ To the extent that telemarketing became a very important way in which we do business here in the United States and elsewhere, new laws were crafted to take into account that new mercantile relationship.⁴ (Incidentally, the FTC's new telemarketing rule applies to Internet transactions.⁵)

¹ See Steven R. Salbu, *Regulation of Insider Trading in a Global Marketplace: A Uniform Statutory Approach*, 66 TUL. L. REV. 837, 838 (1992) (illustrating that markets are best served by consistent substantive approaches and comparable infrastructures of enforcement); see also Kelley Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 935 (1994) (noting that currently regulation is primarily national in origin); Richard Raysman and Peter Brown, *Regulating Internet Advertising*, N.Y.L.J., May 14, 1996, at 3. The FTC regulates unfair competition in the marketplace, including unfair or deceptive acts or practices that injure customers. *Id.* The Federal Trade Commission Act, 15 U.S.C. § 45, grants the FTC the power to pursue a variety of civil and criminal actions with respect to proscribed advertising practices. *Id.*

² *Cf.*, e.g., Salbu, *supra* note 1, at 844 (noting that fiduciary duty between buyer and seller may be required for certain transactions).

³ See generally Jack E. Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 UNIV. OF RICHMOND L.R. 399 (1988) (discussing how FTC's advertising practice program monitors false and misleading advertising in developing areas of broadcast and print).

⁴ See Ray Choa, *FTC Regulations Target Telephone Marketing Scams*, 7 LOY. CONSUMER L. REP. 87, 87 (1995). Presently, federal law prohibits unfair and deceptive trade practices. *Id.* The rule will specifically address telemarketing abuses. *Id.*; see also George Pitcher, Note, *Moser v. Frohnmayer: Oregon's Dangerous Approach to Protecting Commercial Speech*, 31 WILLAMETTE L.R. 685, 687 (1995). Commercial speech issues have become more prevalent as legislatures attempt to regulate the growing telemarketing industry. *Id.* In response to the proliferation of telemarketing in the late 1980s and consumer complaints, Congress passed the Telephone Consumer Protection Act of 1991. *Id.* The Act was based on congressional findings that many consumers are outraged over the proliferation of intrusive nuisance calls into their homes from telemarketers. *Id.* However, the Act allows for a regulatory exception for "calls that are not made for a commercial purpose." *Id.*

⁵ Federal Trade Commission Act, 15 U.S.C. § 45; Telecommunications Act of 1996, 47 U.S.C. § 223(a)-(h); see William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 (1995) (dis-

I live in New York City. If I walk down the street and somebody comes over and says, "Hi, my name is Bob, what's yours?" I go to hold on to my purse. Yet, on-line, if somebody calls me and says the same thing, I hang up. If somebody writes, "Hi, my name is Bob, and I've got something to sell," I am likely to send back a note that says, "Hi, I'm Shirley, what is it?"

The question that I ask of you is: Should the consumer protection laws that were crafted to take care of the physical world be applicable in cyberspace?⁶ Should they be applicable with respect to the on-line providers?⁷ If they should be applicable, do they need re-thinking?⁸ Is there something about the relationship between two persons, buyer and seller, in the physical world that is different when we are talking about cyberspace.⁹

curring effect of new act in "non-physical universe"); see also Raysman, *supra* note 1, at 3. For the moment, the new on-line media are wide open to advertisers. *Id.* The FTC does not have jurisdiction over the Internet or commercial on-line services such as Prodigy, America Online, and CompuServe. *Id.* The issue so far is "unsettled." *Id.*

⁶ Cf. Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694, 698 (Sup. Ct. N.Y. Cty. 1995) (acknowledging that advertising in cyberspace is similar to print advertising for on-line service provider and thus subject to same rules as traditional advertising); see also Diana J. P. McKenzie, *Commerce on the Net: Surfing Through Cyberspace Without Getting Wet*, 14 J. MARSHALL J. COMPUTER & INFO. L. 247, 248 (1996) (discussing potential future legal developments in area of cyberspace).

⁷ Cf., e.g., E. Walter Van Valkenburg, Symposium: *The First Amendment in Cyberspace*, 75 OR. L. REV. 319, 324 (1995). Some commentators believe that Internet service providers should be subject to the same level of permissible regulation as is applicable to telecommunication utilities in general. *Id.* The extent to which government can constitutionally regulate Internet service providers is more complex, however, because service providers simply act as conduits for another's words and ideas. *Id.* Rules developed for the regulation of print media generally should apply to Internet providers, whereas regulation of service providers generally should correspond to regulations applicable to common carriers and cable television providers. *Id.*

⁸ See Bruce P. Keller, *Conducting the Intellectual Property Audit in Cyberspace*, in CONDUCTING INTELLECTUAL PROPERTY AUDITS 1996, at 483, 485 (PLI Pat., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G4-3956, 1996). The author details how new medium raises novel issues of liability for service providers concerning third parties' contributions to material posted by others. *Id.* The author further suggests that the key to reducing on-line service providers' risk of liability is to be clear in their business contracts and dealings as to who is liable for what activities; see also Jared Sandberg, *On-Line Regulators Try to Tame the Untamable On-Line World*, WALL ST. J., July 5, 1995, at B1. "When people look at the Internet and try to draw analogies to existing communications it doesn't work, because the Internet is a little of everything." *Id.* Therefore, it is appropriate to examine a number of different analogies to confront the variables on a novel cyber-issue. *Id.*

⁹ See Stern, 626 N.Y.S.2d at 701 (holding on-line service provider is analogous to news vendor or bookstore (citing Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991)); see also Pamela Samuelson, *The Quest for Enabling Metaphors for Law and Lawyering in the Information Age*, 94 MICH. L. REV. 2029, 2047 (1996) (illustrating how contract law has evolved to not only include the licensing of intangibles but new relationships between buyers, sellers, and agents in cyberspace). But see Church of Scientology v. Minnesota Med. Found., 264 N.W.2d 152, 163 (1978) (holding those who merely deliver or trans-

Now I am going to talk about the on-line service providers, because that is really our topic. Let me simplify this and take the very easy part first. The on-line providers are really schizophrenic. In the real world, they are service providers to the general public,¹⁰ just as the guy who is selling a refrigerator is the seller of a product and a guy who is selling warranty service for that refrigerator is the seller of a service. So in that regard, to the extent that there are representations that these folks make, it is important, and, under the consumer protection laws it is required, that what they deliver matches up to what they promise.¹¹ It is important that to the extent that they advertise,¹² their advertising is not false or deceptive. There is a clear body of law as to what that means.¹³

In New York, these laws are contained in the General Business Law, sections 349¹⁴ and 350.¹⁵ Each of the states and the District of Columbia has its own consumer protection laws.¹⁶ The Federal Trade Commission also has trade regulation laws¹⁷ that include

mit material previously published by another will be considered to have published material only if they new material was false and defamatory).

¹⁰ See, e.g., *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (discussing public expectations of service providers' advertisements).

¹¹ See *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996) (acknowledging that since most of these service providers do not charge users for search requests and are sustained primarily by advertising revenues, liability should be imposed); see also Amy Knoll, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275, 278 (1996) (discussing United States Telecommunication Act of 1996 as model for other countries).

¹² See, e.g., Steve Higgins, *How Two Lawyers are Pushing to Bring Advertising to the Internet*, INVESTOR'S BUS. DAILY, Nov. 23, 1994, at A4 (detailing how this interactive medium is perfect format for advertising).

¹³ See, e.g., Van Valkenburg, *supra* note 7, at 328. The types of "commercial speech" that may occur in cyberspace are no different from the types that may occur in normal space. *Id.* There is no apparent reason why the rules governing commercial speech generally cannot be translated to the Internet. *Id.* Consumer protection laws, securities regulation, false advertising restrictions, and the various other levels of regulation that are applicable to commercial speech generally should apply equally to communications over the Internet. *Id.* But see, e.g., *National Basketball Assoc. v. Sports Team Analysis & Tracking Sys., Inc.*, 931 F. Supp. 1124, 1137 (S.D.N.Y. 1996) (declining to impose liability on on-line service provider for false advertising where evidence of knowledge of advertising content was not available).

¹⁴ N.Y. GEN. BUS. LAW § 349 (McKinney 1988 & Supp. 1989).

¹⁵ N.Y. GEN. BUS. LAW § 350 (McKinney 1988 & Supp. 1989).

¹⁶ See, e.g., Col. BUS. & Prof. Code §§ 57200, 17500-17577 (West 1987 & Supp. 1990); Conn. GEN. STAT. ANN. § 42-110g(a) (West 1987 & Supp. 1988); Ill Stat. ch. 121 1/2, p. 261 (Smith-Hurd Supp. 1989). See generally Kenneth A. Plevin & Miriam Siroky, ADVERTISING COMPLIANCE HANDBOOK 289-91.

¹⁷ Federal Trade Commission Act, § 5(a)(1)-(2) (1994) (declaring "unfair or deceptive acts or practices in or affecting commerce" to be unlawful and empowering Commissioner to prevent such acts or practices).

consumer protection elements; of course their scope is national. The state laws, while they differ slightly in remedies, address basically the same kinds of problems—false or deceptive advertising and market practices.¹⁸

When you take these concerns, they are easy to apply to the physical side of the on-line service provider's business.¹⁹ The more challenging part is the question of liability for the on-line provider with respect to the content of material available through their service²⁰ Each of the providers, for example, has classified ads. What is the paradigm by which we ought to analyze their liability with respect to those ads? There are no specific laws, there are no specific statutes, so we have to proceed by analogy. In those circumstances, is the on-line provider more like, for example, a newspaper with a classified ad section, or does it somehow have responsibility for what is contained in those classifieds?

Of course, making this more complicated is the culture of the Internet²¹ and this interactive medium²²—the culture of anonymity.²³ The possible confusion is thus heightened.

¹⁸ See *Cubby, Inc., v. CompuServe Inc.*, 776 F. Supp. 135, 143 (S.D.N.Y. 1991) (explaining why New York law regarding unfair competition is not applicable to on-line service provider with no opportunity to review context of publications); see also Anthony L. Clapes, *Wager of Sin: Pornography and Internet Providers*, 13 *COMPUTER LAW*, 1, 8 (1996) (explaining how Internet access providers offer world of information, of which advertising is only small part; industry participants have become agents and conduits for communication which potentially carries additional responsibilities).

¹⁹ See, e.g., *Comedy III Prod., Inc. v. Class Publications, Inc.*, 1996 WL 219636, at *1 (S.D.N.Y. 1996) (holding production company violated advertising regulation pursuant to common law unfair competition, false advertising under New York Business Law § 350, deceptive acts and practices under New York Business Law § 349, and trademark dilution under New York Business Law § 368-b in cyberspace arena).

²⁰ See *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (holding one who only delivers or transmits material published by third person subject to liability only if one knows of material's character); see also *Cubby*, 776 F. Supp. at 140 (holding on-line service provider's product was, "in essence, an electronic for-profit library," that carried vast number of publications, and that [CompuServe] had "little or no editorial control" over contents of publication). But see *Stratton*, 1995 WL 323710, at *4 (holding on-line service provider as "publisher" rather than "distributor" since it held itself out to public as controlling content of its computer bulletin boards).

²¹ See, e.g., William N. Hulsey, III, *Marketing in Cyberspace: What You Should Know*, AUSTIN BUS. J., July 1996. A potential Internet advertiser must realize that cyberspace has its own history, culture and attitude. *Id.* Over two million people utilize the Internet, with the number increasing at a tremendous pace. *Id.*

²² See Byassee, *supra* note 5, at 211 (stating that interactive nature allows users to gain access and download files, "without the intervention presence, or knowledge of the BBS operator"); see also Sandberg, *supra* note 8, at B1 (describing how on-line advertisement can be as simple as a display ad or as complex as a complete web site with multiple pages of text, graphics, video, and audio clips with interactive capabilities).

²³ See George P. Long, III, *Who Are You: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1178 (1994) (explaining that recently, through Internet access, users

The states of Minnesota and Pennsylvania and, perhaps one other, have brought actions against advertisers on the Internet.²⁴ In no case has an on-line service provider—you will be relieved to know—been held to be liable.²⁵ Each of those cases—all advertising cases—has taken the position that the deceptive practices are deceptive practices irrespective of the medium, and the cases been directed towards the individuals or the businesses who place those ads.²⁶

What we have discovered is that a nurturing environment exists for scam artists who are able to use the anonymity of the Net to take advantage of the rest of us.²⁷ Every one of these ads, had they appeared in the physical world, would be actionable and, I daresay, might have been stopped. Even if we recognize the on-line service providers as synonymous with newspapers containing classified ads, we must remember that there is a great deal of additional self regulation by broadcasters, and by newspapers as well, to screen out certain kinds of ads.²⁸ I invite on-line service providers to think about that. The challenge, of course, is enormous.

have been able to exchange information anonymously); *see also* Van Valkenburg, *supra* note 7, at 320 (detailing ubiquitous character of Internet since anyone with computer and modem can access Internet regardless of where he or she is located). *See generally* McKenzie, *supra* note 6, at 248-49 (illustrating difficulty with regulation as United States has approximately 92 million households, an estimated 25 million of which have computers).

²⁴ The Minnesota cases were all filed in the district court of Ramsey County: *Minnesota v. Excel Int'l Serv., Inc.*, No. 95-7219; *Minnesota v. Dean*, No. 95-7220; *Minnesota v. National Consumer Credit*, No. 95-7223; *Minnesota v. McClendon*, No. 95-7224; *Minnesota v. International Network*, No. 95-7225; and *Minnesota v. Granite Gate Resorts, Inc.*, No. 95-7227. *Cf., e.g.*, Christopher Wolf & Steven B. Fabrizio, *Online Providers Can Be Liable For User's Actions*, NAT'L L.J., Oct. 31, 1994, at C9 (citing comments of on-line service providers on Preliminary Draft of Report of Working Group of Intellectual Property Rights, Intellectual Property and National Information Infrastructure (Sept. 1994)).

²⁵ *See, e.g.*, *United States v. LaMacchia*, 871 F. Supp. 535, 548 (D.Mass. 1994) (proposing that assumption that on-line service providers be liable for all unauthorized uses of copyrighted works on their systems is not necessarily correct).

²⁶ *See, e.g., id.* at 550. An on-line service provider may not necessarily be directly liable in connection with materials relating to advertising. *Id.*

²⁷ *See* Anne W. Branscomb, Symposium, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1646 (1995) (discussing possibilities for consumer exploitation on Internet); *see also* Long, *supra* note 23, at 1187 (discussing same).

²⁸ *See* *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 942 (E.D. Wash. 1992). The court held consistent with the general rule that there is no "conduit liability" in absence of fault in broadcast medium. *Id.* Furthermore, a company's power to censor a broadcast is not enough since such a standard would force the creation of full time editorial boards at local stations throughout the country which possess insufficient knowledge, legal acumen, and access to experts to continually monitor incoming transmissions at every turn. *Id.*

On the other hand, this is a growing technology.²⁹ It is an opportunity that no longer is limited to the kind of “techies” who used it five years ago. Now every kid and his or her reluctant parents are learning to use this technology as well.

My concern is that this technology grow and that it not get burdened by practices that will taint it: number one, taint it from the point of view of the user, and then, number two, from the additional point of view of the general public; its dissatisfaction with the quality of what is available may result in a concomitant pressure to create laws to address the problems that are identified.³⁰ Without an enforceable set of rules to permit commercial predictability, certainty, and consumer confidence, the “global market” will never achieve its potential.

I recently attended a conference where an advertising agency executive was making a presentation about the use of the Internet in advertising. I sat there and kind of nodded my head in agreement about its potential. It was a really interesting presentation, when as an aside the executive sarcastically said, “and we want to be very careful about X, because we’re afraid we might wake up some bureaucrat someplace.” I continued nodding my head . . . until I realized she was talking about the likes of me! There is an element of reality in the speaker’s caution—although I might disagree with her characterizations. This is a good time for the industry to look at the market and undertake some self-regulatory steps. The alternative, should steps not be taken and abuses grow, is the increased likelihood of governmental regulation.

The questions are very, very challenging. The answers are still very, very scarce. What is clear, and I think the most useful avenue, is the need to work in conjunction with providers, with representatives of consumer groups, with government, and all the while to think through strategies and technologies that would encourage self policing in some meaningful way and to avoid these kinds of scam artists. Thank you.

²⁹ See, e.g., Salbu, *supra* note 1, at 840 (detailing difficulty of controlling ever changing cyberspace).

³⁰ See, e.g., *Cyber Promotions, Inc. v. America Online, Inc.*, Civil Action No. 96 CV-2456 (E.D. Pa. Mar. 26, 1996) (advertising company sued America Online in response to provider’s reaction to unsolicited mass mailing advertisement campaign).

